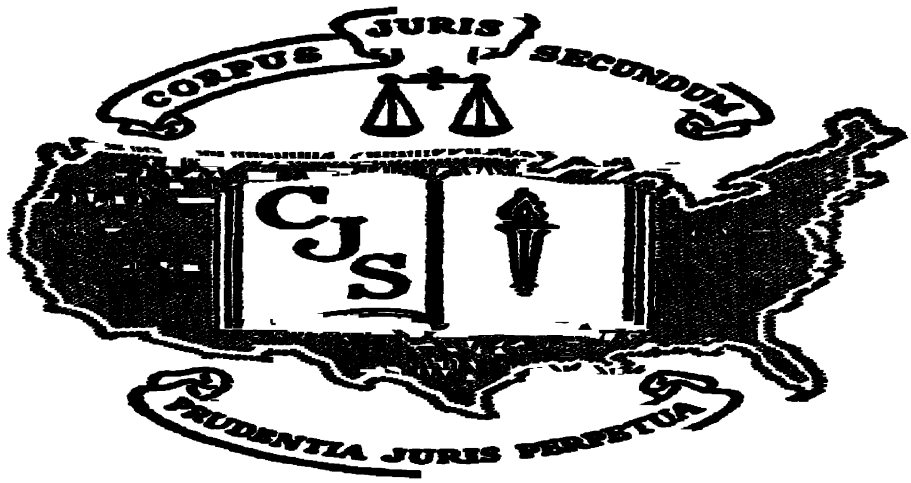
UNIVERSAL LIBRARY
103 511
UNIVERSAL LIBRARY



"The law is progressive and expansive, adapting itself to the new relations and interests which are constantly springing up in the progress of society. But this progress must be by analogy to what is already settled."

Chief Justice Greene, in 1 R.I. 356.

WILLIAM MACK

1865—1941

EDITOR IN CHIEF

OF

CORPUS JURIS SECUNDUM

CORPUS JURIS

CYCLOPEDIA OF LAW AND PROCEDURE

CORPUS JURIS SECUNDUM

A COMPLETE RESTATEMENT OF THE ENTIRE AMERICAN LAW

AS DEVELOPED BY

ALL REPORTED CASES

By
DONALD J. KISER, LL. D.
Editor in Chief

Assisted by
The Combined Editorial Staffs
of
The American Law Book Co. and West Publishing Co.

VOLUME XXXI

Kept to Date by Cumulative Annual Pocket Parts

88939

Hooley-Bundschu Library

Brooklyn, N. Y.
The American Law Book Co.

Copyright, 1942
By
The American Law Book Company

EXPLANATION

THE object in view in preparing *Corpus Juris Secundum* has been twofold: First, to provide a complete encyclopedic treatment of the whole body of the law, which means that it must be based upon all the reported cases; Second, to present each title of the law in form and content most suitable as a means of practical reference for the Bench and Bar.

Corpus Juris Secundum is therefor a complete restatement of the entire body of American Law. The clear-cut and exhaustive propositions comprising the text are supported by all the authorities from the earliest times to date. The supporting case citations, conspicuously set out in the notes, point to all decisions handed down since the publication of Corpus Juris. When the searcher may wish to consult earlier authorities, a specific reference to Corpus Juris makes available all cases back to 1658.

Each title is preceded by a complete section analysis, greatly simplified to facilitate research. Where the scope of any section is such as to require it, a more minute analysis is found thereunder in its appropriate place within the title (see Abatement and Revival, Section 112). The convenience of this method—an innovation in encyclopedic writing—must immediately commend itself.

A concise black-letter summary, indicative of its scope, precedes the full treatment or statement of the law under each section. These introductory summaries, concise and free from interlineation of authorities, have proven of great convenience and value in legal research.

An index is found in the back of each volume covering the titles contained therein, thus providing another convenient means of ready access to the text and notes.

Corpus Juris Secundum is kept to date by means of annual cumulative pocket parts for each volume. This feature of supplementation which has proved so successful in modern digests and statutes conveniently, and with certainty, keeps each title constantly to date through current cases and new precedents.

Corpus Juris Secundum represents the combined product of the highest editorial talent and manufacturing skill. Its many excellent editorial features are fittingly accompanied by corresponding innovations and improvements in mechanical arrangement, typography, and design, which the publisher believes will commend themselves to the profession as representing a new standard in legal publications.

THE PUBLISHERS

CITE BY TITLE AND SECTION

Thus

31 C.J.S. Estates § 36

TABLE OF ABBREVIATIONS

REPORTS AND TEXTBOOKS

A

A.	Atlantic Reporter
Abb.	Abbott (U.S.)
Abb.Adm.	Abbott's Admiralty (U.S.)
Abb.App.Dec.	Abbott's Appeals Decisions (N.Y.)
Abb.Dec.	Abbott's Decisions (N.Y.)
Abb.N.Cas.	Abbott's New Cases (N.Y.)
Abb.Pr.	Abbott's Practice (N.Y.)
Abb.Pr.N.S.	Abbott's Practice New Series (N.Y.)
A'Beck.Res. Judgm.	A'Beckett's Reserved Judgments (Vict.)
[1917]A.C.	[1917] Appeal Cases (Can.)
[1918]A.C.	Law Reports [1918] Appeal Cases (Eng.)
Acton	Acton (Eng.)
Adams	Adams Reports (N.H.)
Add.	Addison (Pa.)
Add.Eccl.	Addams' Ecclesiastical (Eng.)
A.&E.	Adolphus & Ellis (Eng.)
A.&E.Enc.L.	American & English Encyclopædia of Law
A.&E.Enc.L.&Pr.	American & English Encyclopædia of Law & Practice
Aik.	Aikens (Vt.)
A.K.Marsh.	A. K. Marshall (Ky.)
Ala.	Alabama
Ala.App.	Alabama Appellate Court
Alaska	Alaska
Alb.L.J.	Albany Law Journal
A.L.C.	American Leading Cases
Alc.&N.	Alcott & Napier (Eng.)
Alc.Reg.Cas.	Alcock's Registry Cases (Eng.)
Aleyn	Aleyn (Eng.)
Alison Pr.	Alison's Practice (Sc.)
Allen	Allen (Mass.)
Allen (N.B.)	Allen, New Brunswick
Alta.L.	Alberta Law
A.L.R.	American Law Reports
Am.Bankr.	American Bankruptcy (U.S.)
Ambl.	Ambler (Eng.)
A.M.C.	American Maritime Cases
Am.Corp.Cas.	American Corporation Cases
Am.Cr.	American Criminal
Am.D.	American Decisions
Am.&E.Corp.Cas.	American & English Corporation Cases
Am.&E.Corp.Cas. N.S.	American & English Corporation Cases New Series
Am.&Eng.Encyc. Law	American and English Encyclopedia of Law
Am.&E.Eq.D.	American & English Decisions in Equity
Am.&Eng.Pat. Cas.	American and English Patent Cases
Am.&Eng.R.R. Cas.	American and English Railroad Cases
Am.Electr.Cas.	American Electrical Cases
Am.&E.R.Cas.	American & English Railroad Cases
Am.&E.R.Cas.N.S.	American & English Railroad Cases New Series
Am.J.Int.L.	American Journal of International Law
Am.L.J.	American Law Journal (Pa.)
Am.L.J.N.S.	American Law Journal New Series (Pa.)
Am.L.Rec.	American Law Record (Ohio)
Am.L.Reg.	American Law Register
Am.L.Reg.N.S.	American Law Register New Series
Am.Law Reg.(O.S.)	American Law Register Old Series
Am.L.Rev.	American Law Review
Am.L.T.Bankr.	American Law Times Bankruptcy Reports
Am.Law Inst.	American Law Institute, Restatement of the Law
Am.Negl.Cas.	American Negligence Cases
Am.Negl.R.	American Negligence Reports
A.M.&O.	Armstrong, Macartney & Ogle (Ir.)
Am.Prob.	American Probate
Am.Prob.N.S.	American Probate New Series
Am.Pr.	American Practice
Am.R.	American Reports
Am.R.&Corp.	American Railroad & Corporation
Am.R.Rep.	American Railway Reports
Am.S.R.	American State Reports
Am.St.R.D.	American Street Railway Decisions
And.	Anderson (Eng.)
Andr.	Andrews (Eng.)
Ann.Cas.	American & English Annotated Cases
Ann.Cas.1912A	American Annotated Cases 1912A, et seq.
Anstr.	Anstruther (Eng.)
Anth.N.P.	Anthon's Nisi Prius (N.Y.)
App.D.C.	Appeal Cases (D.C.)
App.Cas.	Law Reports Appeal Cases (Eng.)
App.Div.	Appellate Division (N.Y.)
Ariz.	Arizona
Ark.	Arkansas
Ark.Just.	Arkley's Justiciary (Sc.)
Arn.	Arnold (Eng.)
Arn.&H.	Arnold & Hodges (Eng.)
Ashm.	Ashmead (Pa.)
Aspin.	Aspinall's Maritime Cases (Eng.)
Atk.	Atkyn (Eng.)
Austr.C.L.R.	Commonwealth Law Reports, Australia
Austr.Jur.	Australian Jurist
Austr.L.T.	Australian Law Times

B

Bacon Abr.	Bacon's Abridgment (Eng.)
Bail.Eq.	Bailey's Equity (S.C.)
Bailey	Bailey's Law (S.C.)
B.&Ad.	Barnewall & Adolphus (Eng.)
B.&Ald.	Barnewall & Alderson (Eng.)
Baldw.	Baldwin (U.S.)
Balf.Pr.	Balfour's Practice (Sc.)
Ball&B.	Ball & Beatty (Ir.)
Bank.&Ins.R.	Bankruptcy and Insolvency Reports (Eng.)
Bann.	Bannister (Eng.)
Bann.&A.	Banning & Arden (U.S.)
Barb.	Barbour (N.Y.)
Barb.Ch.	Barbour's Chancery (N.Y.)
B.&Arn.	Barron & Arnold (Eng.)
Barn.	Barnardiston King's Bench (Eng.)
Barn.Ch.	Barnardiston Chancery (Eng.)
Barnes	Barnes' Practice Cases (Eng.)
Barnes Notes	Barnes' Notes (Eng.)
Batty	Batty (Ir.)
B.&Aust.	Barron & Austin (Eng.)
Baxt.	Baxter (Tenn.)
Bay	Bay (S.C.)
B.&B.	Broderip & Bingham (Eng.)
B.C.	British Columbia

B.&C.	Barnewall & Cresswell (Eng.)
B.&Macn.	Browne & Macnamara (Eng.)
B.D.&O.	Blackham, Dundas & Osborne (Ir.)
Beatty	Beatty (Ir.)
Beav.	Beavan (Eng.)
Beav.&Wal.Ry. Cas.	Beavan & Walford's Railway and Canal Cases (Eng.)
Beav.R.&C.Cas.	English Railway and Canal Cases
Beaw.Lex.Mer.	Beawes Lex Mercatoria (Eng.)
Bee	Bee (U.S.)
Bell.	Bellewe (Eng.)
Bell App.Cas.	Bell's Appeal Cases (Sc.)
Bell Cas.	Bell's Cases (Sc.)
Bell C.C.	Bell's Crown Cases (Eng.)
Bell Comm.	Bell's Commentaries (Eng.)
Bell Sc.Cas.	Bell's Scotch Court of Session Cases
Ben.	Benedict (U.S.)
Benl.	Benloe (Eng.)
Benl.&D.	Benloe & Dallison (Eng.)
B.&H.Cr.Cas.	Bennett & Heard Leading Criminal Cases (Eng.)
Bibb	Bibb (Ky.)
Bing.	Bingham (Eng.)
Bing.N.Cas.	Bingham's New Cases (Eng.)
Binn.	Binney (Pa.)
Biss.	Bissell (U.S.)
Bitt.W.&P.	Bittleson, Wise & Parnell (Eng.)
Black	Black (U.S.)
Blackf.	Blackford (Ind.)
Blackstone Comm.	Blackstone Commentaries
Bla.H.	Henry Blackstone's English Common Pleas (Eng.)
Blair Co.	Blair County (Pa.)
Bland	Bland (Md.)
Bland's Ch.	Bland Chancery (Md.)
Blatchf.	Blatchford (U.S.)
Blatchf.&H.	Blatchford & Howland (U.S.)
Blatchf.PrizeCas.	Blatchford's Prize Cases (U.S.)
Bligh	Bligh (Eng.)
Bligh N.S.	Bligh New Series (Eng.)
B.Mon.	B. Monroe (Ky.)
Bond	Bond (U.S.)
Bouvier	Bouvier's Law Dictionary
Boyce	Boyce (Del.)
B.&P.	Bosanquet & Puller (Eng.)
B.&P.N.R.	Bosanquet & Puller's New Reports (Eng.)
Bract.	Bracton de Legibus et Consuetudinibus Angliæ
Bradf.Surr.	Bradford's Surrogate (N.Y.)
Brayt.	Brayton (Vt.)
B.R.C.	British Ruling Cases
Brev.	Brevard (S.C.)
Brewst.	Brewster (Pa.)
Brightly	Brightly (Pa.)
Brightly El.Cas.	Brightly's Election Cases (Pa.)
Bro.Ch.	Brown's Chancery (Eng.)
Brock.	Brockenbrough (U.S.)
Brock.Cas.	Brockenbrough's Virginia Cases
Brod.&B.	Broderip & Bingham (Eng.)
Brod.&Fr.	Broderick & Fremantle's Ecclesiastical Cases
Brodix Am.&E. Pat.Cas.	Brodix's American & English Patent Cases
Bro.Just.	Broun's Justiciary (Sc.)
Brook Abr.	Brook's Abridgments (Eng.)
Brook N.Cas.	Brook's New Cases (Eng.)
Brooke N.C.	Brooke's New Cases
Bro.P.C.	Brown's Parliament Cases (Eng.)
Brown Adm.	Brown's Admiralty (U.S.)
Brown, Ch.	Brown's Chancery Cases (Eng.)
Brown Ecc.	Brown Ecclesiastical (Eng.)
Brown N.P.	Brown's Michigan Nisi Prius
Brown,Parl.Cas.	Brown Parliamentary Cases (Eng.)
Browne	Browne (Pa.)
Brown.&L.	Browning & Lushington (Eng.)
Brownl.&G.	Brownlow & Goldesborough (Eng.)
Bruce	Bruce (Sc.)
Brunn.Coll.Cas.	Brunner's Collective Cases (U.S.)
B.&S.	Best & Smith (Eng.)
B.T.A.	Board of Tax Appeals (U.S.)
Buck	Buck (Eng.)
Buller N.P.	Buller's Nisi Prius (Eng.)
Bulstr.	Bulstrode (Eng.)
Bunb.	Bunbury (Eng.)
Burn.	Burnett (Wis.)
Burr.	Burrows (Eng.)
Burr.S.Cas.	Burrows' Settlement Cas. (Eng.)
Busb.	Busbee (N.C.)
Busb.Eq.	Busbee Equity (N.C.)
Bush	Bush (Ky.)
B.W.C.C.	Butterworth's Workmen's Compensation Cases (Eng.)

C

Cab.&E.	Cababe & Ellis (Eng.)
Cai.	Caines (N.Y.)
Cai.Cas.	Caines' Cases (N.Y.)
Cal.	California
Cal.(2d)	California Reports, Second Series
Cal.App.	California Appellate Court
Cal.App.(2d)	California Appellate Reports, Second Series
Cald.	Caldecott (Eng.)
Call	Call (Va.)
Calthr.	Calthrop (Eng.)
Cal.Unrep.Cas.	California Unreported Cases
Cam.Cas.	Cameron's Cases (Can.)
Campb.	Campbell (Eng.)
Canal Zone	Canal Zone Supreme Court
Can.App.Cas.	Canadian Appeal Cases
Can.Cr.Cas.	Canadian Criminal Cases
Can.Exch.	Canadian Exchequer
Can.L.J.	Canada Law Journal
Can.L.J.N.S.	Canada Law Journal New Series
Can.L.T.Occ. Notes	Canadian Law Times Occasional Notes
Can.R.Cas.	Canadian Railway Cases
Can.S.C.	Canada Supreme Court
Cane&L.	Cane & Leigh Crown Cases Reserved (Eng.)
Car.&K.	Carrington & Kirwan (Eng.)
Car.&M.	Carrington & Marshman (Eng.)
Car.&P.	Carrington & Payne (Eng.)
Car.H.&A.	Carrow, Hamerton & Allen (Eng.)
Carp.P.C.	Carpmael Patent Cases (Eng.)
Carter	Carter (Eng.)
Carth.	Carthew (Eng.)
Cartwr.Cas.	Cartwright's Cases (Can.)
Cary	Cary (Eng.)
Cas.	Casey (Pa.)
Cas.t.Hardw.	Cases temp. Hardwicke (Eng.)
Cas.t.Holt	Cases temp. Holt (Eng.)
Cas.t.King	Cases temp. King (Eng.)
Cas.t.Talb.	Cases temp. Talbot (Eng.)
C.B.	Common Bench (Manning, Granger & Scott) (Eng.)
C.B.N.S.	Common Bench New Series (Manning, Granger & Scott New Series) (Eng.)
C.C.A.	Circuit Court of Appeals (U.S.)
C.C.P.A.	Court of Customs and Patent Appeals
Centr.L.J.	Central Law Journal
[1891] Ch.	Law Reports [1891] Chancery (Eng.)
Chamb.Rep.	Chamber (Ont.)
Chandl.	Chandler (Wis.)
Charlt.R.M.	R. M. Charlton (Ga.)
Charlt.T.U.P.	T. U. P. Charlton (Ga.)
Chase	Chase (U.S.)
Ch.Cas.	Cases in Chancery (Eng.)
Ch.Chamb.	Chancery Chambers (U.C.)
Ch.Col.Op.	Chalmers' Colonial Opinions
Ch.D.	Law Reports Chancery Division (Eng.)
Chest.Co.	Chester County (Pa.)
Chev.	Cheves (S.C.)
Chit.	Chitty (Eng.)
Choyce Cas.Ch.	Choyce Cases in Chancery (Eng.)
Ch.Rep.	Chancery Reports (Eng.)
Ch.Sent.	Chancery Sentinel (N.Y.)
Cinc.L.Bul.	Weekly Law Bulletin (Oh.)
Cinc.Super.	Cincinnati Superior Court Reporter (Oh.)
City Ct.R.	City Court Reports (N.Y.)
City Hall Rec.	City Hall Recorder (N.Y.)

Civ.Proc.Rep.	Civil Procedure Reports (N.Y.)
C.J.	Corpus Juris
C.J.Ann.	Corpus Juris Annotations
C.J.S.	Corpus Juris Secundum
C.&K.	Carrington & Kirwan (Eng.)
C.&L.	Connor & Lawson (Ir.)
Cl.App.	Clark's Appeal Cases (Eng.)
Cl.Ch.	Clarke's Chancery (N.Y.)
Clark &F.	Clark & Finnelly (Eng.)
Clark &Fin.N.S.	Clark's House of Lords Cases (Eng.)
Clarke	Clarke's Chancery (N.Y.)
Clarke &S.Dr.Cas.	Clarke & Scully's Drainage Cases (Ont.)
Clarke Ch.	Clarke's Chancery (N.Y.)
Clayt.	Clayton's Reports, York Assizes (Eng.)
C.L.Chamb.	Chamber's Common Law (U.C.)
Clev.L.Rec.	Cleveland Law Record (Oh.)
Clev.L.Rep.	Cleveland Law Reporter (Oh.)
Cl.&F.	Clark & Finnelly (Eng.)
Clif.El.Cas.	Clifford's Southwick Election Cases
Cliff.	Clifford (U.S.)
C.L.R.	Common Law Reports (Eng.)
C.&M.	Carrington & Marshman (Eng.)
C.M.&R.	Crompton, Meeson & Roscoe (Eng.)
Cock.&Rowe	Cockburn & Rowe's Election Cases
Code Rep.	Code Reporter (N.Y.)
Code Rep.N.S.	Code Reports New Series (N.Y.)
Coff.Prob.	Coffey's Probate (Cal.)
Co.Inst.	Coke's Institutes
Coke	Coke (Eng.)
Col.Cas.	Coleman's Cases (N.Y.)
Col.&C.Cas.	Coleman & Caines' Cases (N.Y.)
Col.C.C.	Collyer's Chancery Cases (Eng.)
Coldw.	Coldwell (Tenn.)
Coll.	Collyer (Eng.)
Col.L.Rep.	Colorado Law Reporter
Col.Law Review	Columbia Law Review
Coll.&E.Bank.	Collier and Eaton's American Bankruptcy Reports
Colles	Colles' Cases in Parliament (Eng.)
Colo.	Colorado
Colo.App.	Colorado Appeals
Colq.	Colquit
Coltm.	Coltman (Eng.)
Comb.	Comberbach (Eng.)
Com.Cas.	Commercial Cases (Eng.)
Com.L.	Commercial Law (Can.)
Comptr.Treas. Dec.	Comptroller Treasury Decisions
Comst.	Comstock (N.Y.)
Comyns	Comyns (Eng.)
Comyns Dig.	Comyns Digest (Eng.)
Con.&Law.	Connor & Lawson (Ir.)
Conf.	Conference Reports (N.C.)
Conn.	Connecticut
Conn.Surr.	Connolly's Surrogate (N.Y.)
Const.	Constitutional Reports (N.C.)
Cooke	Cooke (Eng.)
Cooke	Cooke (Tenn.)
Cooke & A.	Cooke & Alcock (Ir.)
Cook Vice-Adm.	Cook's Vice-Admiralty (L.C.)
Coop.	Cooper's Chancery (Eng.)
Coop.Pr.Cas.	Cooper's Practice Cases (Eng.)
Coop.t.Brough.	Cooper's Cases temp. Brougham (Eng.)
Coop.t.Cott.	Cooper's Cases temp. Cottenham (Eng.)
Coop.t.Eld.	Cooper's Cases *tempore* Eldon (Eng.)
Co.P.C.	Coke's Reports (Eng.)
Corb.&D.	Corbett & Daniell's Election Cases (Eng.)
Court.&Macl.	Courtnay & Maclean (Sc.)
Cow.	Cowen (N.Y.)
Cow.Cr.Rep.	Cowen's Criminal (N.Y.)
Cowp.	Cowper (Eng.)
Cox Am.T.M.Cas.	Cox's American Trade-Mark Cases
Cox C.C.	Cox's Criminal Cases (Eng.)
Cox Ch.	Cox's Chancery (Eng.)
Cox &Atk.	Cox & Atkinson (Eng.)
C.&P.	Carrington & Payne (Eng.)
C.P.C.	C. P. Cooper's Chancery Practice Cases (Eng.)
C.P.D.	Law Reports Common Pleas Division (Eng.)
Crabbe	Crabbe (U.S.)
Cranch	Cranch (U.S.)
Cranch C.C.	Cranch's Circuit Court (U.S.)
Cranch Pat.Dec.	Cranch's Patent Decisions (U.S.)
Cr.App.	Criminal Appeals (Eng.)
Crawf.&D.	Crawford & Dix (Ir.)
Crawf.&D.Abr. Cas.	Crawford & Dix's Abridged Cases (Ir.)
Cripp's Ch.Cas.	Cripp's Church and Clergy Cases
Cr.L.Mag.	Criminal Law Magazine
Cr.&Ph.	Craig & Phillips (Eng.)
C.Rob.	Christopher Robinson's Admiralty (Eng.)
Cro.Car.	Croke Charles (Eng.)
Cro.Eliz.	Croke Elizabeth (Eng.)
Cro.Jac.	Croke's Reports tempore James (Jacobus) (Eng.)
Cromp.&J.	Crompton & Jervis (Eng.)
Cromp.&M.	Crompton & Meeson (Eng.)
Crosw.Pat.Cas.	Croswell's Collection of Patent Cases (U.S.)
Cr.&Ph.	Craig & Phillips (Eng.)
Ct.Cl.	Court of Claims (U.S.)
Ct.Cust.&Pat. App.	Court of Customs and Patent Appeals
Cunn.	Cunningham (Eng.)
Curt.	Curtis (U.S.)
Curt.Eccl.	Curteis Ecclesiastical (Eng.)
Cush.	Cushing (Mass.)
Cust.A.	United States Customs Appeals
Cyc.	Cyclopedia of Law & Procedure
Cyc.Ann.	Cyclopedia of Law & Procedure Annotations

D

Dak.	Dakota
Dal.C.P.	Dalison's Common Pleas (Eng.)
Dall.	Dallaman's Decisions (Tex.)
Dall.	Dallas (Pa.)
Dall.	Dallas (U.S.)
Dalr.Dec.	Dalrymple's Decisions (Sc.)
Daly	Daly (N.Y.)
Dan.	Daniell (Eng.)
Dana	Dana (Ky.)
Dane Abr.	Dane's Abridgment
Dans.&L.	Danson & Lloyd (Eng.)
D'Anv.Abr.	D'Anver's Abridgment (Eng.)
Dauph.Co.	Dauphin County (Pa.)
Dav.&M.	Davison & Merivale (Eng.)
Davys	Davys (Ir.)
Day	Day (Conn.)
D.B.&M.	Dunlop, Bell & Murray (Sc.)
D.C.	District of Columbia
D.Chipm.	D. Chipman (Vt.)
Deac.	Deacon (Eng.)
Deac.&C.	Deacon & Chitty (Eng.)
Deady	Deady (U.S.)
Dears.&B.	Dearsley & Bell (Eng.)
Dears.C.C.	Dearsley's Crown Cases (Eng.)
Deas & A.	Deas & Anderson (Eng.)
De Gex	De Gex (Eng.)
De G.F.&J.	De Gex, Fisher & Jones (Eng.)
De G.J.&S.	De Gex, Jones & Smith (Eng.)
De G.&J.	De Gex & Jones (Eng.)
De G.M.&G.	De Gex, MacNaghten & Gordon (Eng.)
De G.&Sm.	De Gex & Smale (Eng.)
Del.	Delaware
Del.Ch.	Delaware Chancery
Del.Co.	Delaware County (Pa.)
Dem.Surr.	Demarest's Surrogate (N.Y.)
Den.	Denio (N.Y.)
Den.C.C.	Denison's Crown Cases (Eng.)
Desaus.Eq.	Desaussure (S.C.)
Dev.Ct.Cl.	Devereux's Court of Claims (U.S.)
Dev.L.	Devereux (N.C.)
Dev.&Bat.	Devereux & Battle (N.C.)
Dick.	Dickens (Sc.)
Dill.	Dillon (U.S.)
Dirl.Dec.	Dirleton's Decisions (Sc.)
Disn.	Disney (Oh.)

K

Kames Dec.	Kames' Decisions (Sc.)
Kames Elucid.	Kames' Elucidation (Sc.)
Kames Rem.Dec.	Kames' Remarkable Decisions (Sc.)
Kames Sel.Dec.	Kames' Select Decisions (Sc.)
Kan.	Kansas
Kan.App.	Kansas Appeals
Kay	Kay (Eng.)
Kay&J.	Kay & Johnson (Eng.)
[1917]K.B.	Law Reports [1917] King's Bench (Eng.)
Keane &Gr.	Keane & Grant (Eng.)
Keb.	Keble (Eng.)
Keen	Keen (Eng.)
Keilw.	Keilway (Eng.)
Kel.C.C.	Kelyng's Crown Cases (Eng.)
Kelly	Kelly (Ga.)
Kelyng, J.	Kelyng's English Crown Cases
Kelynge, W.	Kelynge's Chancery (Eng.)
Keyes	Keyes (N.Y.)
Keyl.	Keilwey (Eng.)
K.&G.	Keane & Grant (Eng.)
Kilk.	Kilkerran's Decisions (Sc.)
Kirby	Kirby (Conn.)
Knapp	Knapp (Eng.)
Knapp&O.	Knapp & Ombler (Eng.)
Kn.&Moo.	Knapp & Moore (Eng.)
Knox	Knox (N.S.Wales)
Knox&F.	Knox & Fitzhardinge (N.S.Wales)
Kulp	Kulp (Pa.)
Ky.	Kentucky
Ky.Dec.	Kentucky Decisions
Ky.L.	Kentucky Law Reporter
Ky.Op.	Kentucky Opinions

L

La.	Louisiana
La.App.	Louisiana Court of Appeals
La.A.(Orleans)	Court of Appeal, Parish of Orleans
La.Ann.	Louisiana Annual
Lab.	Labatt's District Court (Cal.)
Lack.Jur.	Lackawanna Jurist (Pa.)
Lack.Leg.N.	Lackawanna Legal News (Pa.)
Lack.Leg.Rec.	Lackawanna Legal Record (Pa.)
Lalor	Lalor's Supplement to Hill & Denio (N.Y.)
Lanc.Bar	Lancaster Bar (Pa.)
Lanc.L.Rev.	Lancaster Law Review (Pa.)
Land Dec.	Land Decisions (U.S.)
Lane	Lane (Eng.)
Lans.	Lansing (N.Y.)
Lans.Ch.	Lansing's Chancery Decisions (N.Y.)
Latch	Latch (Eng.)
Law Rep.N.S.	Law Reports New Series (N.Y.)
L.C.	Lower Canada
L.&C.	Leigh & Cave (Eng.)
L.C.Jur.	Lower Canada Jurist
L.C.L.J.	Lower Canada Law Journal
L.C.Rep.S.Qu.	Lower Canada Reports Seignorial Questions
L.D.	Law Dictionary
Ld.Ken.	Lord Kenyon (Eng.)
Ld.Raym.	Lord Raymond (Eng.)
Lea	Lea (Tenn.)
Leach C.C.	Leach's Crown Cases (Eng.)
L.Ed.	Lawyers' Edition United States Supreme Court
Lee Eccl.	Lee's Ecclesiastical (Eng.)
Lee t.Hardw.	Lee temp. Hardwicke (Eng.)
Lef.Dec.	Lefevre's Parliamentary Decisions (Eng.)
Leg.Chron.	Legal Chronicle (Pa.)
Leg.Gaz.	Legal Gazette (Pa.)
Leg.&Ins.R.	Legal & Insurance Reporter (Pa.)
Leg.Int.	Legal Intelligencer (Pa.)
Leg.Op.	Legal Opinions (Pa.)
Leg.Rec.	Legal Record (Pa.)
Lehigh Co.L.J.	Lehigh County Law Journal (Pa.)
Lehigh Val.L.R.	Lehigh Valley Law Reporter (Pa.)
Leigh	Leigh (Va.)
Leigh &C.	Leigh & Cave's English Crown Cases
Leon.	Leonard (Eng.)
Lev.	Levinz (Eng.)
Lew.C.C.	Lewin's Crown Cases (Eng.)
Ley	Ley (Eng.)
L.G.	Law Glossary
Liberian L.	Liberian Law
Litt.	Littell (Ky.)
Litt.	Littleton (Eng.)
Litt.Sel.Cas.	Littell's Select Cases (Ky.)
L.J.Adm.	Law Journal Admiralty New Series (Eng.)
L.J.Bankr.	Law Journal Bankruptcy New Series (Eng.)
L.J.Ch.	Law Journal Chancery New Series (Eng.)
L.J.Ch.O.S.	Law Journal Chancery Old Series (Eng.)
L.J.C.P.	Law Journal Common Pleas New Series (Eng.)
L.J.C.P.O.S.	Law Journal Common Pleas Old Series (Eng.)
L.J.Eccl.	Law Journal Ecclesiastical New Series (Eng.)
L.J.Exch.	Law Journal Exchequer New Series (Eng.)
L.J.Exch.O.S.	Law Journal Exchequer Old Series (Eng.)
L.J.K.B.	Law Journal King's Bench New Series (Eng.)
L.J.K.B.O.S.	Law Journal King's Bench Old Series (Eng.)
L.J.M.C.	Law Journal Magistrate Cases New Series (Eng.)
L.J.M.C.O.S.	Law Journal Magistrate Cases Old Series (Eng.)
L.J.P.C.	Law Journal Privy Council New Series (Eng.)
L.J.P.D.&Adm.	Law Journal Probate Divorce & Admiralty New Series (Eng.)
L.J.P.&M.	Law Journal Probate & Matrimonial New Series (Eng.)
L.J.Q.B.	Law Journal Queen's Bench New Series (Eng.)
L.J.Rep.	Law Journal Reports (Eng.)
Ll.&G.t.Pl.	Lloyd & Goold temp. Plunket (Ir.)
Ll.&G.t.S.	Lloyd & Goold temp. Sugden (Ir.)
Ll.&W.	Lloyd & Welsby (Eng.)
L.&M.	Lowndes & Maxwell (Eng.)
L.M.&P.	Lowndes, Maxwell & Pollack (Eng.)
Loc.Gov.	Local Government (Eng.)
Lofft	Lofft (Eng.)
Longf.&T.	Longfield & Townsend (Ir.)
Low.Can.Seign.	Lower Canada Seignorial Reports
Lowell	Lowell (U.S.)
L.R.	Law Reports (U.S.)
L.R.A.	Lawyers' Reports Annotated
L.R.A.1915A.	Lawyers' Reports Annotated 1915A
L.R.App.Cas.	English Law Reports, Appeal Cases (Eng.)
L.R.A.&E.	Law Reports Admiralty & Ecclesiastical (Eng.)
L.R.A.N.S.	Lawyers' Reports Annotated New Series
L.R.C.C.	Law Reports Crown Cases (Eng.)
L.R.Ch.	Law Reports Chancery Appeal Cases (Eng.)
L.R.C.P.	Law Reports Common Pleas Cases (Eng.)
L.R.Eq.	Law Reports Equity Cases (Eng.)
L.R.Exch.	Law Reports Exchequer Cases (Eng.)
L.R.H.L.	Law Reports House of Lords (English & Irish Appeal Cases)
L.R.H.L.Sc.	Law Reports House of Lords (Scotch Appeal Cases)
L.R.Indian App.	Law Reports Indian Appeals (Eng.)
L.R.Ir.	Law Reports Irish
L.R.P.C.	Law Reports Privy Council (Eng.)
L.R.P.&D.	Law Reports Probate & Divorce (Eng.)
L.R.Q.B.	Law Reports Queen's Bench Cases (Eng.)
L.T.	Law Times (Pa.)
L.T.N.S.	Law Times New Series (Pa.)
L.T.O.S.	Law Times, Old Series (Eng.)

L.T.Rep.N.S.	Law Times Reports New Series (Eng.)
Lush.	Lushington's Admiralty (Eng.)
Lutw.	Lutwyche (Eng.)
Lutw.Reg.Cas.	Lutwyche's Registration Cases (Eng.)
Luz.Leg.Obs.	Luzerne Legal Observer (Pa.)
Luz.Leg.Reg.	Luzerne Legal Register (Pa.)
Lynd.Prov.	Lyndwood's Provinciales

M

MacA.Pat.Cas.	MacArthur's Patent Cases (D.C.)
MacArth.	MacArthur's District of Columbia Reports
MacAr.&M.	MacArthur & Mackey's District of Columbia Reports
Macc.	Macclesfield (Eng.)
MacFarl.	MacFarlane (Sc.)
Mackey	Mackey's Reports, District of Columbia
Macl.&R.	Maclean & Robinson (Eng.)
Macn.&G.	Macnaghten & Gordon (Eng.)
Macph.	Macpherson (Sc.)
Macph.S.&L.	Macpherson, Shirreff & Lee (Sc.)
Macq.	Macqueen's Scotch Appeal Cases
Madd.	Maddock (Eng.)
Madd.Ch.Pr.	Maddock's Chancery Practice (Eng.)
Malloy	Malloy (Ir.)
Man.	Manitoba Law
Man.El.Cas.	Manning's Election Cases (Eng.)
Man.Exch.Pr.	Manning's Exchequer Practice (Eng.)
Man.Gr.&S.	Manning, Granger, & Scott (Eng.)
Man.L.J.	Manitoba Law Journal
Man.&Ry.	Manning & Ryland (Eng.)
Man.&Ry.Mag. Cas.	Manning & Ryland's Magistrates' Cases (Eng.)
Man.&S.	Manning & Scott (Eng.)
Mann.Unrep.Cas.	Manning's Unreported Cases (La.)
Manson	Manson (Eng.)
Man.t.Wood	Manitoba temp. Wood
March	March (Eng.)
Mar.Prov.	Maritime Province Reports (Can.)
Mars.Adm.	Marsden's Admiralty (Eng.)
Marsh.	Marshall (Eng.)
Marsh.J.J.	J. J. Marshall (Ky.)
Mart.	Martin Old Series (La.)
Mart.(N.S.)	Martin, New Series (La.)
Mart.	Martin (N.C.)
Marv.	Marvel (Del.)
Mart.N.S.	Martin New Series (La.)
Mart.&Y.	Martin & Yerger (Tenn.)
Mason	Mason (U.S.)
Mass.	Massachusetts
Maule &S.	Maule & Selwyn (Eng.)
Mayn.	Maynard (Eng.)
McAll.	McAllister (U.S.)
McC.	McCahon (Kan.)
McClell.	McClelland (Eng.)
McClell.&Y.	McClelland & Younge (Eng.)
McCord.	McCord (S.C.)
McCrary	McCrary (U.S.)
McG.	McGloin (La.)
McLean	McLean (U.S.)
McMul.	McMullan (S.C.)
Md.	Maryland
Md.Ch.	Maryland Chancery
Me.	Maine
Mees.&Ros.	Meeson & Roscoe (Eng.)
Mees.&W.	Meeson & Welsby (Eng.)
Meg.	Megone (Eng.)
Meigs	Meigs (Tenn.)
Menzies Cape of Good Hope	Menzies Cape of Good Hope
Meriv.	Merivale (Eng.)
Metc.	Metcalf (Mass.)
Metc.	Metcalfe (Ky.)
M.&G.	Manning & Granger (Eng.)
M.&H.	Murphy & Hurlstone (Eng.)
Mich.	Michigan
Mich.N.P.	Michigan Nisi Prius
Mich.T.	Michaelmas Term (Eng.)
Miles	Miles (Pa.)
Mill.Const.	Mill's Constitutional (S.C.)
Mill.Dec.	Miller's Decisions (U.S.)
Mills	Mills (N.Y.)
Milw.	Milward (Ir.)
Minn.	Minnesota
Minor	Minor (Ala.)
Misc.	Miscellaneous (N.Y.)
Miss.	Mississippi
Miss.Dec.	Mississippi Decisions
Miss.St.Cas.	Mississippi State Cases
M.&M.	Moody & Malkin (Eng.)
Mo.	Missouri
Mo.App.	Missouri Appeals
Moak	Moak (Eng.)
Mo.A.R.	Missouri Appeals Reporter
Mod.	Modern (Eng.)
Mod.Cas.L.&Eq.	Modern Cases at Law and Equity (Eng.)
Molloy	Molloy (Ir.)
Mon.	Monaghan (Pa.)
Mont.	Montana
Mont.	Montagu (Eng.)
Mont.Bank.Rep.	Montagu's English Bankruptcy Reports
Mont.L.R.	Montreal Law Reports (Can.)
Mont.&A.	Montagu & Ayrton (Eng.)
Mont.&B.	Montagu & Bligh (Eng.)
Mont.&C.	Montagu & Chitty (Eng.)
Mont.D.&DeG.	Montagu, Deacon & De Gex (Eng.)
Montg.Co.	Montgomery County Law Reporter (Pa.)
Mont.&M.	Montagu & McArthur (Eng.)
Montr.Cond.Rep.	Montreal Condensed Reports
Montr.Leg.N.	Montreal Legal News
Montr.Q.B.	Montreal Law Reports Queen's Bench
Montr.Super.	Montreal Law Reports Superior Court
Moody C.C.	Moody's Crown Cases (Eng.)
Moore C.P.	Moore's Common Pleas (Eng.)
Moore Indian App.	Moore's Indian Appeals (Eng.)
Moore K.B.	Moore's King's Bench (Eng.)
Moore P.C.	Moore's Privy Council Old Series (Eng.)
Moore P.C.N.S.	Moore's Privy Council New Series (Eng.)
Moore&S.	Moore & Scott (Eng.)
Moore&W.	Moore & Walker (Tex.)
Mor.Min.Rep.	Morrison's Mining Reports
Morr.	Morris (Iowa)
Morr.Bankr.Cas.	Morrell's Bankruptcy Cases (Eng.)
Morr.St.Cas.	Morris' State Cases (Miss.)
Mosely	Mosely (Eng.)
M.&P.	Moore & Payne (Eng.)
M.&R.	Manning & Ryland (Eng.)
M.&Rob.	Moody & Robinson (Eng.)
M.&S.	Maule & Selwyn (Eng.)
Mun.Corp.Cas.	Municipal Corporation Cases
Munf.	Munford (Va.)
Murph.	Murphey (N.C.)
Murr.	Murray (Sc.)
M.&W.	Meeson & Welsby (Eng.)
Myl.&C.	Mylne & Craig (Eng.)
Myl.&K.	Mylne & Keen (Eng.)
Myr.Prob.	Myrick's Probate (Cal.)

N

Nat.Bankr.Reg.	National Bankruptcy Register (U.S.)
Nat.Corp.Rep.	National Corporation Reporter
Nat.L.Rep.	National Law Reporter
N.B.	New Brunswick
N.Benl.	New Benloe (Eng.)
N.B.Eq.	New Brunswick Equity
N.C.	North Carolina
N.Chipm.	N. Chipman (Vt.)
N.C.Conf.	North Carolina Conference
N.C.T.Rep.	North Carolina Term Reports
N.D.	North Dakota
N.E.	North Eastern Reporter
N.E.(2d)	North Eastern Reporter Second Series
Neb.	Nebraska
Neb.(Unoff.)	Nebraska Unofficial
Nels.	Nelson (Eng.)
Nels.Abr.	Nelson's Abridgment of the Common Law

Nev.	Nevada
Newb.Adm.	Newberry's Admiralty (U.S.)
Newfoundl.	Newfoundland
Newf Sel.Cas.	Newfoundland Select Cases
New Rep.	New Reports in all Courts (Eng.)
New Sess.Cas.	New Session Cases (Eng.)
New Zeal.L.	New Zealand Law
N.H.	New Hampshire
N.J.Eq.	New Jersey Equity
N.J.Law	New Jersey Law
N.J.L.J.	New Jersey Law Journal
N.J.Misc.	New Jersey Miscellaneous
N.M.	New Mexico
N.&M.	Nevile & Manning (Eng.)
N.&Macn.	Neville & Macnamara (Eng.)
Nolan	Nolan (Eng.)
North.	Northington (Eng.)
North.Co.	Northampton County Reporter (Pa.)
Northum.	Northumberland County Legal News (Pa.)
Northumb.Co.Leg. N.	Northumberland County Legal News (Pa.)
Notes of Cas	Notes of Cases (Eng.)
Nott & McC.	Nott & McCord (S.C.)
Noy	Noy (Eng.)
N.&P.	Nevile & Perry (Eng.)
N.S.	Nova Scotia
N.S.Dec.	Nova Scotia Decisions
N.S.Wales	New South Wales
N.S.Wales L.	New South Wales Law
N.S.Wales L.R.Eq.	New South Wales Law Reports Equity
N.W.	North Western Reporter
N.Y.	New York
N.Y.Ann.Cas.	New York Annotated Cases
N.Y.City Ct.	New York City Court
N.Y.City Ct.Suppl.	New York City Court Supplement
N.Y.Civ.Proc.	New York Civil Procedure
N.Y.Civ.Pr.Rep.	New York Civil Procedure Reports
N.Y.Code Reports, N.S.	New York Code Reports, New Series
N.Y.Cr.	New York Criminal
N.Y.Leg.Obs.	New York Legal Observer
N.Y.L.Rec.	New York Law Record
N.Y.Month.L.Bul.	New York Monthly Law Bulletin
N.Y.S.	New York Supplement
N.Y.St.	New York State Reporter
N.Y.Super.	New York Superior Court
N.Y.Wkly.Dig.	New York Weekly Digest

O

O.Ben.	Old Benloe (Eng.)
O.Bridgm.	Orlando Bridgman (Eng.)
Off.Gaz.	Official Gazette
Ohio	Ohio
Ohio App.	Ohio Court of Appeals
Ohio Cir.Ct.	Ohio Circuit Court
Ohio Cir.Ct.N.S.	Ohio Circuit Court New Series
Ohio Cir.Dec.	Ohio Circuit Decisions
Ohio Dec. (Reprint)	Ohio Decisions (Reprint)
Ohio F.Dec.	Ohio Federal Decisions
Ohio L.J.	Ohio Law Journal
Ohio N.P.	Ohio Nisi Prius
Ohio N.P.N.S.	Ohio Nisi Prius New Series
Ohio O.	Ohio Opinions
Ohio Prob.	Ohio Probate
Ohio S.&C.P.	Ohio Superior & Common Pleas Decisions
Ohio St.	Ohio State
Okl.	Oklahoma
Okl.Cr.	Oklahoma Criminal
Olcott	Olcott (U.S.)
Oliv.B.&L.	Oliver, Beavan & Lefroy (Eng.)
O'M.&H.	O'Malley & Hardcastle (Ir.)
Ont.	Ontario
Ont.A.	Ontario Appeals
Ont.El.Cas.	Ontario Election Cases
Ont.L.	Ontario Law
Ont.L.J.	Ontario Law Journal
Ont.L.J.N.S.	Ontario Law Journal New Series
Ont.Pr.	Ontario Practice
Ont.W.N.	Ontario Weekly Notes
Ont.W.R.	Ontario Weekly Reporter
Op.Atty.-Gen.	Opinions of Attorneys-General (U.S.)
Op.Sol.Dept. Labor	Opinions of the Solicitor for the Department of Labor dealing with Workmen's Compensation
Or.	Oregon
Orleans App.	Orleans Appeals (La.)
Overt.	Overton (Tenn.)
Owen	Owen (Eng.)

P

P.	Pacific Reporter
P.(2d)	Pacific Reporter Second Series
[1891]P.	Law Reports [1891] Probate (Eng.)
Pa.	Pennsylvania State
Pa.Cas.	Pennsylvania Supreme Court Cases (Sadler)
Pa.Co.	Pennsylvania County Court
Pa.C.Pl.	Common Pleas (Pa.)
Pa.Dist.	Pennsylvania District
Pa.Dist.&Co.	Pennsylvania District and County
Paige	Paige's Chancery (N.Y.)
Paine	Paine (U.S.)
Pa.L.J.	Pennsylvania Law Journal
Pa.L.Rec.	Pennsylvania Law Record
Pa.L.J.R.	Clark's Pennsylvania Law Journal Reports
Palm.	Palmer (Eng.)
Park.	Parker (Eng.)
Park.Cr.	Parker's Criminal (N.Y.)
Park Exch.	Parker's Exchequer (Eng.)
Park.Ins.	Parker's Insurance (Eng.)
Pars.Eq.Cas.	Parsons' Equity Cases (Pa.)
Pa.Super.	Pennsylvania Superior Court
Paton App.Cas.	Paton's Appeal Cases (Sc.)
Patrick El.Cas.	Patrick's Election Cases (Can.)
Patt.&H.	Patton & Heath (Va.)
P.D.	Law Reports Probate Division (Eng.)
P.&D.	Perry & Davison (Eng.)
Peake N.P.	Peake's Nisi Prius (Eng.)
Pearce C.C.	Pearce's Reports in Dearsly's (Eng.)
Pearson	Pearson (Pa.)
Peck	Peck (Tenn.)
Peck.El.Cas.	Peckwell's Election Cases (Eng.)
Pennew.	Pennewill (Del.)
Pennyp.	Pennypacker (Pa.)
Penr.&W.	Penrose & Watts (Pa.)
Perry & Kn.	Perry & Knapp Election Cases (Eng.)
Pet.	Peters (U.S.)
Pet.Adm.	Peters' Admiralty (U.S.)
Pet.C.C.	Peters' Circuit Court (U.S.)
Phil.	Phillips (Eng.)
Phil.	Phillip (N.C.)
Phila.	Philadelphia (Pa.)
Philippine	Philippine
Phillim.	Phillimore Ecclesiastical (Eng.)
Pick.	Pickering (Mass.)
Pig.&R.	Pigott & Rodwell (Eng.)
Pig.Rec.	Pigott's Recoveries (Eng.)
Pinn.	Pinney (Wis.)
Pittsb.	Pittsburgh (Pa.)
Pittsb.Leg.J.	Pittsburgh Legal Journal (Pa.)
Pittsb.Leg.J.N.S.	Pittsburgh Legal Journal New Series (Pa.)
P.&K.	Perry & Knapp (Eng.)
Plowd.	Plowden (Eng.)
Pollexf.	Pollexfen (Eng.)
Poph.	Popham (Eng.)
Port.	Porter (Ala.)
Posey	Posey's Unreported Cases (Tex.)
Puerto Rico	Puerto Rico
Puerto Rico Fed.	Puerto Rico Federal
Pow.Surr.	Powers' Surrogate (N.Y.)
P.R.&D.El.Cas.	Power, Rodwell & Dew's Election Cases (Eng.)
Prec.Ch.	Precedents in Chancery (Eng.)
Pr.Edw.Isl.	Prince Edward Island
Price	Price (Eng.)
Price Pr.Cas.	Price's Practice Cases (Eng.)
Prid.&C.	Prideaux & Cole (Eng.)
Prob.[1917]	Law Reports, Probate Division (Eng.)

Prob.Rep.	Probate Reports (Eng.)
Pr.Rep.	Practice Reports (Eng.)
P.Wms.	Peere-Williams (Eng.)
P.U.R.	Public Utilities Reports
Pyke	Pyke (Can.)

Q

Q.B.	Queen's Bench (Adolphus & Ellis New Series) (Eng.)
[1891]Q.B.	Law Reports [1891] Queen's Bench (Eng.)
Q.B.D.	Law Reports Queen's Bench Division (Eng.)
Queensl.J.P.	Queensland Justice of the Peace
Queensl.L.	Queensland Law
Queensl.L.J.	Queensland Law Journal
Que.L.	Quebec Law
Que.Pr.	Quebec Practice
Que.Q.B.	Quebec Official Reports Queen's Bench
Que.Rev.Jud.	Quebec Revised Judicial
Que.Super.	Quebec Official Reports Superior Court
Quincy	Quincy (Mass.)

R

Rand.	Randolph (Va.)
Rap.Jud.Q.C.S.	Rapport's Judiciaries de Quebec Cour Superieure
Rawle	Rawle (Pa.)
R.C.L.	Ruling Case Law
R.&Can.Cas.	Railway & Canal Cases (Eng.)
R.&Can.Tr.Cas.	Railway & Canal Traffic Cases (Eng.)
Redf.	Redfield's Surrogate (N.Y.)
Redf.&B.	Redfield & Bigelow's Leading Cases (Eng.)
Redf.R.Cas.	Redfield's Railway Cases (Eng.)
Redf.Surr.	Redfield's Surrogate (N.Y.)
Reeve Eng.L.	Reeve's English Law
Reports	Reports (Eng.)
Reprint	English Reprint
Rep.t.Finch	Cases temp. Finch (Eng.)
Rep.t Hard.	Lee's Reports *tempore* Hardwicke (Eng.)
Rep.t.Holt	Reports *tempore* Holt (English Cases of Settlement)
Res.&Eq.Judgm.	Reserved & Equity Judgments (N.S. Wales)
Rev.Crit.	Revue Critique (Can.)
Rev.de Jur.	Revue de Jurisprudence (Can.)
Rev.de Legis.	Revue de Legislation (Can.)
Rev.Leg.	Revue Legale (Can.)
Rev.Leg.N.S.	Revue Legale New Series (Can.)
Rev.Rep.	Revised Reports (Eng.)
R.I.	Rhode Island
Rice	Rice (S.C.)
Rich.	Richardson (S.C.)
Rich.C.P.	Richardson's Practice Common Pleas (Eng.)
Ridg.	Ridgeway's Reports *tempore* Hardwicke (Eng.)
Ridg.Ap.	Ridgeway's Appeal (Ir.)
Ridg.L.&S.	Ridgeway, Lapp & Schoale (Ir.)
Ridg.P.C.	Ridgeway's Parliament Cases (Ir.)
Ridg.t.Hardw.	Ridgeway temp. Hardwicke (Eng.)
Riley	Riley (S.C.)
R.&M.	Ryan & Moody (Eng.)
R.M.Charlt.	R. M. Charlton (Ga.)
Rob.	Robinson (La.)
Rob.	Robinson (Va.)
Robb Pat.Cas.	Robb's Patent Cases (U.S.)
Robert.App.Cas.	Robertson's Appeal Cases (Sc.)
Rob.Eccl.	Robertson's Ecclesiastical (Eng.)
Robin.App.Cas.	Robinson's Appeal Cases (Sc.)
Rob.Wm.Adm.	William Robinson's Admiralty (Eng.)
Rolle	Rolle (Eng.)
Rolle Abr.	Rolle's Abridgment (Eng.)
Rolls Ct.Rep.	Rolls' Court Reports
Rom.Cas.	Romilly's Notes of Cases (Eng.)
Root	Root (Conn.)
Rose	Rose (Eng.)
Ross Lead.Cas.	Ross' Leading Cases (Eng.)
R.&R.	Russell & Ryan Crown Cases (Eng.)
Russ.	Russell (Eng.)
Russ.&C.Eq.Cas.	Russell's & Chesley's Equity Cases (N.S.)
Russ.Eq.Cas.	Russell's Equity Cases (N.S.)
Russ.&Geld.	Russell & Geldert. Nova Scotia
Russ.&M.	Russell & Mylne (Eng.)
Ry.&M.	Ryan & Moody (Eng.)

S

Salk.	Salkeld (Eng.)
Sandf.	Sandford's Superior Court (N.Y.)
Sandf.Ch.	Sandford's Chancery (N.Y.)
Sask.L.	Saskatchewan Law
Saund.	Saunders (Eng.)
Saund.&C.	Saunders & Cole (Eng.)
Sau.&Sc.	Sausse & Scully (Ir.)
S.Austr.L.	South Australia Law
Sav.	Savile (Eng.)
Sawy.	Sawyer (U.S.)
Saxt.	Saxton (N.J.)
Say.	Sayer (Eng.)
S.C.	South Carolina
[1907]S.C.	Court of Session Cases (Sc.)
Scam.	Scammon (Ill.)
S.C.Eq.	South Carolina Equity
Sch.&Lef.	Schoales & Lefroy (Ir.)
[1907]S.C.(J.)	Court of Justiciary Cases (Sc.)
Sc.Jur.	Scottish Jurist
S.C.L.	South Carolina Law
Sc.L.Rep.	Scottish Law Reporter
Scot L.T.	Scot Law Times
Scott	Scott (Eng.)
Scott N.R.	Scott's New Reports (Eng.)
Scr.L.T.	Scranton Law Times (Pa.)
Sc.Sess.Cas.	Scotch Court of Session Cases
S.Ct.	Supreme Court Reporter (U.S.)
S.D.	South Dakota
S.E.	South Eastern Reporter
Searle & Sm.	Searle & Smith (Eng.)
Sel.Cas.Ch.	Select Cases in Chancery (Eng.)
Seld.	Selden's Notes (N.Y.)
Selden	Selden (N.Y.)
Selw.	Selwyn's Nisi Prius (Eng.)
Serg.&R.	Sergeant & Rawle (Pa.)
Sess.Cas.	Court of Session Cases (Eng.)
Shan.	Shannon (Tenn.)
Shaw	Shaw (Sc.)
Shaw&D.	Shaw & Dunlop (Sc.)
Shaw Dec.	Shaw's Digest of Decisions (Sc.)
Shaw, Dunl.&B.	Shaw, Dunlop & Bell (Sc.)
Shaw&M.	Shaw & MacLean (Sc.)
Sheld.	Sheldon (N.Y.)
Shep.Abr.	Sheppard's Abridgment
Sheph.Sel.Cas.	Shepherd's Select Cases (Ala.)
Show.	Shower (Eng.)
Show.P.C.	Shower's Parliament Cases (Eng.)
Sid.	Siderfin (Eng.)
Silv.A.	Silvernail's Appeals (N.Y.)
Silv.Sup.	Silvernail's Supreme (N.Y.)
Sim.	Simons (Eng.)
Sim.N.S.	Simons New Series (Eng.)
Sim.&St.	Simons & Stuart (Eng.)
Skin.	Skinner (Eng.)
Smale&G.	Smale & Giffard (Eng.)
Smith	Smith (Ind.)
Smith	Smith (N.H.)
Smith&B.	Smith & Batty (Ir.)
Smith K.B.	Smith's King's Bench (Eng.)
Smith Lead.Cas.	Smith's Leading Cases (Eng.)
Smith Reg.	Smith's Registration (Eng.)
Sm.&M.	Smedes & Marshall (Miss.)
Sm.&M.Ch.	Smedes & Marshall Chancery (Miss.)
Smythe	Smythe (Ir.)
Sneed	Sneed (Tenn.)
So.	Southern Reporter
Sol.J.	Solicitor's Journal (Eng.)
Sp.	Speers (S.C.)
Spinks	Spinks Admiralty (Eng.)
Spinks	Spinks' Ecclesiastical and Admiralty (Eng.)

Spinks, P.C.	Spinks' Prize Cases (Eng.)
Spottisw.	Spottiswoode (Sc.)
Spottisw.Eq.	Spottiswoode's Equity (Sc.)
Sprague	Sprague (U.S.)
Stair	Stair (Sc.)
Stark.	Starkie Nisi Prius (Eng.)
Stat. at L.	United States Statutes at Large
Stew.	Stewart (Ala.)
Stew.	Stewart's Reports (N.S.)
Stew.&P.	Stewart & Porter (Ala.)
Stockt.Vice-Adm.	Stockton's Vice-Admiralty (N.B.)
Story	Story (U.S.)
Str.	Strange (Eng.)
Strob.	Strobhart (S.C.)
Stuart Vice-Adm.	Stuart's Vice-Admiralty (L.C.)
Stu.M.&P.	Stuart, Milne & Peddie (Sc.)
Style	Style (Eng.)
Sumn	Sumner (U.S.)
Susq.Leg.Chron.	Susquehanna Legal Chronicle (Pa.)
S.W.	South Western Reporter
S.W.(2d)	South Western Reporter Second Series
Swab.	Swabey's Admiralty (Eng.)
Swab.&Tr.	Swabey & Tristram (Eng.)
Swan	Swan (Tenn.)
Swanst.	Swanston (Eng.)

T

Taml.	Tamlyn (Eng.)
Taney	Taney (U.S.)
Tapp.	Tappan (Oh.)
Taunt.	Taunton (Eng.)
Taylor	Taylor (N.C.)
T.B.Mon.	T. B. Monroe (Ky.)
Tenn.	Tennessee
Tenn.App.	Tennessee Appeals
Tenn.Cas.	Unreported Tennessee Cases
Tenn.Ch.	Tennessee Chancery
Tenn.Ch.A.	Tennessee Chancery Appeals
Tenn.Civ.A.	Tennessee Civil Appeals
Terr.L.	Territories Law (Northwest Territories)
Tex.	Texas
Tex.App.	Texas Court of Appeals
Tex.A.Civ.Cas.	White & Wilson's Civil Cases (Tex.)
Tex.Civ.App.	Texas Civil Appeals
Tex.Cr.	Texas Criminal
Tex.Suppl.	Texas Supplement
Tex.Unrep.Cas.	Posey's Unreported Cases (Tex.)
Thach.Cr.	Thacher's Criminal Cases (Mass.)
Thomps.&C.	Thompson & Cook (N.Y.)
Thomps.Cas.	Thompson's Cases (Tenn.)
Tinw.	Tinwald (Sc.)
T.Jones	Thomas Jones (Eng.)
T.L.R.	Times Law Reports (Eng.)
T.M.R.	Trade Mark Reports
T.&M.	Temple & Mew (Eng.)
Toth.	Tothill (Eng.)
T.R.	Term Reports (Durnford & East) (Eng.)
Transcr.A.	Transcript Appeals (N.Y.)
T.Raym.	Thomas Raymond (Eng.)
Tread Const.	Treadway Constitutional (S.C.)
Treas Dec.	Treasury Decisions (U.S.)
Tr.&H.Pr.	Troubat & Haly's Practice (Pa.)
Trint.T.	Trinity Term (Eng.)
Truem.Eq Cas.	Trueman's Equity Cases (N.B.)
Tuck Sel.Cas.	Tucker's Select Cases (Newfoundland)
Tuck.Surr.	Tucker's Surrogate (N.Y.)
T.U.P.Charlt.	T. U. P. Charlton (Ga.)
Turn.&R.	Turner & Russell (Eng.)
Tyler	Tyler (Vt.)
Tyrw.	Tyrwhitt (Eng.)
Tyrw.&G.	Tyrwhitt & Granger (Eng.)

U

U.C.	Upper Canada
U.C.Ch.	Upper Canada Chancery
U.C.Cham.	Upper Canada Chamber
U.C.C.P.	Upper Canada Common Pleas
U.C.E.&A.	Upper Canada Error and Appeal
U.C.K.B.	Upper Canada King's Bench Reports
U.C.Q.B.	Upper Canada Queen's Bench
U.C.Q.B.O.S.	Upper Canada Queen's Bench Old Series
U.S.	United States
U.S Aviation Rep.	Aviation Reports (U.S.)
U.S.C.A.	United States Code Annotated
Utah	Utah

V

Va.	Virginia
Va.Cas.	Virginia Cases
Va.Ch.Dec.	Chancery Decisions (Va.)
Va.Dec.	Virginia Decisions
Van Ness Prize Cas.	Van Ness Prize Cases (U.S.)
Vaugh.	Vaughan (Eng.)
Vaux	Vaux's Decisions (Pa.)
Vent.	Ventris (Eng.)
Vern.	Vernon's Cases (Eng.)
Vern.Ch.	Vernon's Chancery (Eng.)
Vern.&S.	Vernon & Scriven (Ir.)
Ves.	Vesey Senior (Eng.)
Ves.&B.	Vesey & Beames (Eng.)
Ves.Jr.	Vesey Junior (Eng.)
Ves.Jr Suppl.	Vesey Junior Supplement (Eng.)
Ves.Suppl.	Vesey Senior Supplement (Eng.)
Vict.	Victorian
Vict.L.	Victorian Law
Vict.L.T.	Victorian Law Times
Vict.Rep.	Victorian Reports
Vict.St.Tr.	Victorian State Trials
Vin.Abr.	Viner's Abridgment (Eng.)
Virgin Islands	Virgin Islands
Vt.	Vermont

W

Walk.	Walker (Pa.)
Walk.	Walker's Chancery (Mich.)
Wall.	Wallace (U.S.)
Wall.C.C.	Wallace (U.S.)
Wall Jr.	Wallace Junior (U.S.)
Wall.Sr.	Wallace Senior (U.S.)
Wallis	Wallis (Ir.)
Ware	Ware (U.S.)
Wash.	Washington
Wash.	Washington (Va.)
Wash St.	Washington State
Wash.C.C.	Washington Circuit Court (U.S.)
Wash.T.	Washington Territory
Watts	Watts (Pa.)
Watts&S.	Watts & Sergeant (Pa.)
W.Bl.	William Blackstone (Eng.)
W.C.C.	Minton-Senhouse's Workmen's Compensation Cases (Eng.)
Webb, A'B &W.I. P.&M.	Webb, A'Beckett, & Williams' Insolvency, Probate, and Matrimonial Reports (Victoria)
Web Pat.Cas.	Webster's Patent Cases (Eng.)
Welsh	Welsh Registry Cases (Ir.)
Wend.	Wendell (N.Y.)
West	West (Eng.)
West.L.J.	Western Law Journal (Oh.)
West.L.Month.	Western Law Monthly (Oh.)
West.L.R.	Western Law Reporter (Can.)
West.L.T.	Western Law Times (Can.)
West.R.	Western Reporter
West t.Hardw.	West temp. Hardwicke (Eng.)
West.Wkly.	Western Weekly (Can.)
[1917] West.Wkly.	[1917] Western Weekly (Can.)
Whart.	Wharton (Pa.)
Wheat.	Wheaton (U.S.)
Wheel.Cr.	Wheeler's Criminal (N.Y.)
White&T.Lead. Cas.Eq.	White & Tudor's Leading Cases in Equity (Eng.)
Whitm.Pat.Cas.	Whitman's Patent Cases (U.S.)
Wight.	Wightwicke (Eng.)
Wilcox	Wilcox (Pa.)
Willes	Willes (Eng.)
Wilm.	Wilmot's Notes (Eng.)
Wils.	Wilson (Ind.)

Wils.Ch.	Wilson's Chancery (Eng.)
Wils.C.P.	Wilson's Common Pleas (Eng.)
Wils.Exch.	Wilson's Exchequer (Eng.)
Wils.P.C.	Wilson's Privy Council (Eng.)
Wils.&S.	Wilson & Shaw (Sc.)
Winch	Winch (Eng.)
Winst.	Winston (N.C.)
Wis.	Wisconsin
W.Jones	William Jones (Eng.)
W.Kel.	William Kelynge (Eng.)
Wkly.L.Gaz.	Weekly Law Gazette (Oh.)
Wkly.N.C.	Weekly Notes of Cases (Pa.)
Wkly.Rep.	Weekly Reporter (Eng.)
Wms.Saund.	Williams Notes to Saunders' Reports
W.N.	Weekly Notes (Eng.)
Wolf.&B.	Wolferstan & Bristow's Election Cases (Eng.)
Wolf.&D.	Wolferstan & Dew's Election Cases (Eng.)
Woll.	Wollaston (Eng.)
Woodb.&M.	Woodbury & Minot (U.S.)
Woods	Woods (U.S.)
Woodw.	Woodward's Decisions (Pa.)
Woolw.	Woolworth (U.S.)
Words & Phrases	Words & Phrases
Wright	Wright (Oh.)
W.Rob.	William Robinson's Admiralty (Eng.)
Wr.Pa.	Wright (Pa.)
W.Va.	West Virginia
W.W.Harr.	W. W. Harrington
W.W.&D.	Willmore, Wollaston & Davidson (Eng.)
W.W.&H.	Willmore, Wollaston & Hodges (Eng.)
Wyo.	Wyoming
Wythe	Wythe's Chancery (Va.)
Wy.&W.	Wyatt & Webb (Vict.)
Wy.W.&A'Beck.	Wyatt, Webb & A'Beckett (Vict.)

Y

Yates Sel.Cas.	Yates Select Cases (N.Y.)
Y.B.	Year Book (Eng.)
Y.&C.Exch.	Younge & Collyer's Exchequer (Eng.)
Y.&Coll.	Younge & Collyer's Chancery (Eng.)
Yeates	Yeates (Pa.)
Yelv.	Yelverton (Eng.)
Yerg.	Yerger (Tenn.)
Y.&J.	Younge & Jervis (Eng.)
York Leg.Rec.	York Legal Record (Pa.)
Young Adm.	Young's Admiralty Decisions (N.S.)
Younge	Younge Exchequer (Eng.)

LAW REVIEWS AND LAW JOURNALS

A.B.A.Jour.	American Bar Association Journal
Am.J.Int.Law	American Journal of International Law
Am.Law S.Rev.	American Law School Review
B.U.L.Rev.	Boston University Law Review
Brooklyn L.Rev.	Brooklyn Law Review
Calif.L.Rev.	California Law Review
Camb.L.J.	Cambridge Law Journal
Chi-Kent Rev.	Chicago-Kent Review
Colum.L.Rev.	Columbia Law Review
Com.L.J.	Commercial Law Journal
Cornell L.Q.	Cornell Law Quarterly
Detroit L.Rev.	Detroit Law Review
Dick.L.Rev.	Dickinson Law Review
Fed.B.A.J.	Federal Bar Association Journal
Fla.L.J.	Florida Law Journal
Fordham L.Rev.	Fordham Law Review
Geo.Wash.L.Rev.	George Washington Law Review
Geo.L.J.	Georgetown Law Journal
Harv.L.Rev.	Harvard Law Review
Ia.L.Rev.	Iowa Law Review
Idaho L.J.	Idaho Law Journal
Ill.L.Rev.	Illinois Law Review
Ind.L.J.	Indiana Law Journal
J.Am.Jud.Soc.	Journal of the American Judicature Society
J.Comp.Leg.	Journal of the Society of Comparative Legislation
J.N.A.Referees Bank.	Journal of the National Association of Referees in Bankruptcy
J.Soc.Pub.Teach. Law	Journal of the Society of Pub. Teachers of Law
John Marshall L.Q.	The John Marshall Law Quarterly
Kan.City L.Rev.	Kansas City Law Review
Kan.St.L.J.	Kansas State Law Journal
Ky.L.J.	Kentucky Law Journal
L.J.	Law Journal
L.Lib.J.	Law Library Journal
Law Ser.Mo.Bull.	University of Missouri Bulletin, Law Series
Law Soc.J.	Law Society Journal
Lincoln L.Rev.	Lincoln Law Review
Marq.L.Rev.	Marquette Law Review
Mass.L.Q.	Massachusetts Law Quarterly
Mercer, Beasley L.Rev.	Mercer, Beasley Law Review
Mich.L.Rev.	Michigan Law Review
Minn.L.Rev.	Minnesota Law Review
Miss.L.J.	Mississippi Law Journal
Neb.L.B.	Nebraska Law Bulletin
N.J.L.J.	New Jersey Law Journal
N.J.L.Rev.	New Jersey Law Review
N.Y.U.L.Q.Rev.	New York University Law Quarterly Review
Notre Dame Law.	Notre Dame Lawyer
N.C.L.Rev.	North Carolina Law Review
Okla.S.B.J.	Oklahoma State Bar Journal
Oreg.L.Rev.	Oregon Law Review
Phil.L.J.	Philippine Law Journal
Rocky Mt.L.Rev.	Rocky Mountain Law Review
St. John's L.Rev.	St. John's Law Review
St. Louis L.Rev.	St. Louis Law Review (now Washington University Law Quarterly)
So.Calif.L.Rev.	Southern California Law Review
Temp.L.Q.	Temple Law Quarterly
Tenn.L.Rev.	Tennessee Law Review
Tex.L.Rev.	Texas Law Review
Tul.L.Rev.	Tulane Law Review
U.Chi.L.Rev.	University of Chicago Law Review
U.Cin.L.Rev.	University of Cincinnati Law Review
U.Detroit L.J.	University of Detroit Law Journal
U.Pa.L.Rev.	University of Pennsylvania Law Review
U. of Pitts.L.Rev.	University of Pittsburgh Law Review
U.Toronto L.J.	University of Toronto Law Journal
Va.L.Rev.	Virginia Law Review
Wash.L.Rev.	Washington Law Review
Wash.U.L.Q.	Washington University Law Quarterly
W.Va.L.Q.	West Virginia Law Quarterly and The Bar
Wis.L.Rev.	Wisconsin Law Review
Yale L.J.	Yale Law Journal

LIST OF TITLES

IN

CORPUS JURIS SECUNDUM

Abandonment
Abatement and Revival
Abduction
Abortion
Absentees
Abstracts of Title
Accession
Accord and Satisfaction
Account, Action on
Accounting
Account Stated
Acknowledgments
Actions
Adjoining Landowners
Admiralty
Adoption of Children
Adulteration
Adultery
Adverse Possession
Aerial Navigation
Affidavits
Affray
Agency
Agriculture
Aliens
Alteration of Instruments
Ambassadors and Consuls
Amicus Curiæ
Animals
Annuities
Appeal and Error
Appearances
Apprentices
Arbitration and Award
Architects
Army and Navy
Arrest
Arson
Assault and Battery
Assignments
Assignments for Benefit of Creditors
Assistance, Writ of
Associations
Assumpsit, Action of
Asylums
Attachment
Attorney and Client
Attorney General
Auctions and Auctioneers
Audita Querela
Bail
Bailments
Bankruptcy
Banks and Banking
Barratry
Bastards
Beneficial Associations
Bigamy
Bills and Notes
Blasphemy
Bonds
Boundaries
Bounties
Breach of Marriage Promise
Breach of the Peace
Bribery
Bridges
Brokers
Building and Loan Associations
Burglary
Business Trusts
Canals
Cancellation of Instruments
Carriers
Case, Action on
Cemeteries
Census
Certiorari
Champerty and Maintenance
Charities
Chattel Mortgages
Citizens
Civil Rights
Clerks of Courts
Clubs
Colleges and Universities
Collision
Commerce
Common Lands
Common Law
Common Scold
Compositions with Creditors
Compounding Offenses
Compromise and Settlement
Concealment of Birth or Death
Conflict of Laws
Confusion of Goods
Conspiracy
Constitutional Law
Contempt
Continuances
Contracts
Contratos
Contribution
Conversion
Convicts
Copyright and Literary Property
Coroners
Corporations
Costs
Counterfeiting
Counties
Court Commissioners
Courts
Covenant, Action of
Covenants
Creditors' Suits
Criminal Law
Crops
Culpa
Curtesy
Customs and Usages
Customs Duties
Damages
Dead Bodies
Death
Debt, Action of

Dedication
Deeds
Dependencies, Colonies, and British Possessions
Depositaries
Depositions
Deposits in Court
Descent and Distribution
Detectives
Detinue
Discovery
Dismissal and Nonsuit
Disorderly Conduct
Disorderly Houses
District and Prosecuting Attorneys
District of Columbia
Disturbance of Public Meetings
Divorce
Domicile
Dower
Drains
Druggists
Drunkards
Dueling
Easements
Ejectment
Election of Remedies
Elections
Electricity
Embezzlement
Embracery
Eminent Domain
Entry, Writ of
Equity
Escape
Escheat
Escrows
Estates
Estoppel
Evidence
Exchange of Property
Exchanges
Executions
Executors and Administrators
Exemptions
Explosives
Extortion
Extradition
Factors
False Imprisonment
False Personation
False Pretenses
Federal Courts
Fences
Ferries
Finding Lost Goods
Fines
Fires
Fish
Fixtures
Flags
Food
Forcible Entry and Detainer
Forfeitures
Forgery
Fornication
Franchises
Fraud
Frauds, Statute of
Fraudulent Conveyances
Game
Gaming
Garnishment
Gas
Gifts
Good Will
Grand Juries
Ground Rents
Guaranty
Guardian and Ward
Habeas Corpus
Hawkers and Peddlers
Health
Highways
Holidays
Homesteads
Homicide
Hospitals
Husband and Wife
Improvements
Incest
Indemnity
Indians
Indictments and Informations
Industrial Co-operative Societies
Infants
Injunctions
Innkeepers
Insane Persons
Insolvency
Inspection
Insurance
Insurrection and Sedition
Interest
Internal Revenue
International Law
Interpleader
Intoxicating Liquors
Joint Adventures
Joint Stock Companies
Joint Tenancy
Judges
Judgments
Judicial Sales
Juries
Justices of the Peace
Kidnapping
Landlord and Tenant
Larceny
Levees and Flood Control
Lewdness
Libel and Slander
Licenses
Liens
Limitations of Actions
Lis Pendens
Livery Stable Keepers
Logs and Logging
Lost Instruments
Lotteries
Malicious Mischief
Malicious Prosecution
Mandamus
Manufactures
Maritime Liens
Marriage
Marshaling Assets and Securities
Master and Servant
Masters' and Employers' Associations
Mayhem
Mechanics' Liens
Mercantile Agencies
Militia
Mills
Mines and Minerals
Miscegenation
Modern Civil Law
Money Lenders
Money Lent
Money Paid
Money Received
Monopolies
Mortgages
Motions and Orders
Motor Vehicles
Municipal Corporations
Names
Navigable Waters
Ne Exeat
Negligence
Neutrality Laws

Newspapers
New Trial
Notaries
Notice
Novation
Nuisances
Oaths and Affirmations
Obscenity
Obstructing Justice
Officers
Pardons
Parent and Child
Parliamentary Law
Parties
Partition
Partnership
Party Walls
Patents
Paupers
Pawnbrokers
Payment
Penalties
Pensions
Pent Roads
Peonage
Perjury
Perpetuities
Physicians and Surgeons
Pilots
Piracy
Pleading
Pledges
Poisons
Possessory Warrant
Post Office
Powers
Principal and Surety
Prisons
Private Roads
Prize Fighting
Process
Profanity
Prohibition
Property
Prostitution
Public Lands
Public Utilities
Quieting Title
Quo Warranto
Railroads
Rape
Real Actions
Receivers
Receiving Stolen Goods
Recognizances
Records
References
Reformation of Instruments
Reformatories
Registers of Deeds
Registration of Land Titles
Release
Religious Societies
Removal of Causes
Replevin
Reports
Rescue
Review
Rewards
Right of Privacy
Riot
Robbery
Sales
Salvage
Schools and School Districts
Scire Facias
Seals
Seamen
Searches and Seizures
Seduction
Sequestration
Set-Off and Counterclaim
Sheriffs and Constables
Shipping
Signatures
Slaves
Sodomy
Specific Performance
Spendthrifts
States
Statutes
Steam
Stenographers
Stipulations
Street Railroads
Submission of Controversy
Subrogation
Subscriptions
Suicide
Summary Proceedings
Sunday
Supersedeas
Taxation
Telegraphs and Telephones
Tenancy in Common
Tender
Territories
Theaters and Shows
Threats and Unlawful Communication
Time
Torts
Towage
Towns
Trade-Marks, Trade-Names, and Unfair Competition
Trade Unions
Trading Stamps and Coupons
Treason
Treaties
Trespass
Trespass to Try Title
Trial
Trover and Conversion
Trusts
Turnpikes and Toll Roads
Undertakings
United States
United States Commissioners
United States Marshals
Unlawful Assembly
Use and Occupation
Usury
Vagrancy
Vendor and Purchaser
Venue
War
Warehousemen and Safe Depositaries
Waste
Waters
Weapons
Weights and Measures
Wharves
Wills
Witnesses
Woods and Forests
Work and Labor
Workmen's Compensation

TITLES IN THIS VOLUME

	Page
Estates	4
Estoppel	186
Evidence §§ 1–402	478

†

CORPUS JURIS SECUNDUM

VOLUME THIRTY-ONE

ESTATE. For its general definition as property or an interest therein, as well as the classification of estates and the legal principles governing them, see generally the title Estates post.

What constitutes an "estate" so as to warrant appointment of administrator see the C.J.S. title Executors and Administrators §§ 17, 20, also 23 C.J. p 1008 note 33–p 1010 note 46, p 1014 notes 67–70; within estate or inheritance tax statutes see the C.J.S. titles Internal Revenue § 69, also 33 C.J. p 312 note 66–p 315 note 27, and Taxation § 1111, also 61 C.J. p 1590 note 2–p 1597 note 61; with reference to trusts see the C.J.S. title Trusts § 6, also 65 C.J. p 217 notes 83–88; and with reference to wills, see the C.J.S. title Wills §§ 802–973, also 69 C.J. p 429 note 38–p 657 note 99.

Phrases employing the word and considered in the cases cited are listed in the note;[8] and other

2. Phrases construed

(1) "Absolute estate:"

Construed as a full and complete estate.—Cooper v. Cooper, 38 A. 198, 200, 56 N.J.Eq. 48.

Defined as an estate in lands not subject to be defeated on any condition.—Black L.D. See also Absolute 1 C.J.S. p 374 note 70.

(2) "Contingent estate," defined as one which depends for its effect upon an event which may or may not happen, as, where an estate is limited to a person not yet born.—Black L.D. See also Estates §§ 70–75.

(3) "Conventional estate," defined as a freehold, not of inheritance or estate for life, which is created by the express acts of the parties, in contradistinction to those which are legal and arise from operation of law.—Black L.D.

(4) "Derivative estate," defined as a particular interest carved out of another estate of larger extent.—Black L.D. See also Deeds § 6.

(5) "Equitable estate," as meaning not an interest in the land itself, but a right which can be enforced in equity.

Ohio.—Avery v. Dufrees, 9 Ohio 145, 147.

R.I.—In re Qualifications of Electors, 35 A. 213, 19 R.I. 387.

(6) "Estate accounted for."—In re Pringle's Estate, 67 P.2d 204, 206 208, 51 Wyo. 352, 110 A.L.R. 987.

(7) "Estate ad remanentiam," defined as an estate in fee-simple.—Black L.D.

(8) "Estate and maintenance of the parties."—Phillips v. Phillips, 144 S.E. 875, 876, 106 W.Va. 105.

(9) "Estate assets."—In re Hechfeld's Estate, 13 N.Y.S.2d 685, 686, 171 Misc. 727.

(10) "Estate by purchase," as one acquired by sale or gift, or by any other method except only that of descent.—In re Field, 169 N.Y.S. 677, 681, 182 App.Div. 226.

(11) "Estate contingently vested."—In re Leonard's Will, 256 N.Y.S. 355, 359, 143 Misc. 172.

(12) "Estate excise taxes," as distinguished from "legacy or inheritance taxes."—Frick v. Lewellyn, D.C.Pa., 298 F. 803, 810.

(13) "Estate for widowhood" as including a grant of realty by a husband to his wife in contemplation of divorce, to terminate on her remarriage.—Berry v. Cooley, Okl., 109 P.2d 1081, 1085.

(14) "Estate in lieu of dower," as not being an apt term for the widow's elective right to take under the statute as heir.—Safe Deposit & Trust Co. of Baltimore v. Tait, D.C.Md., 3 F.Supp. 51, 57.

(15) "Estate in realty:"

As including an oil lease for an indefinite period.—McCracken v. Hummel, Cal.App., 110 P.2d 700, 701.

As not including widow's inchoate right of dower.—American Equitable Assur. Co. of New York v. Powderly Coal & Lumber Co., 128 So. 225, 226, 221 Ala. 280.

(16) "Estate of a decedent to be protected," as meaning any claim or right which a personal representative, as such, must protect or defend.—Richardson v. Shenk, 154 S.E. 542, 544, 155 Va. 240.

(17) "Estate of a testator or testatrix," as not relating to personal property which the decedent parted with during life, either by gift or sale.—Lambert v. Lambert, 104 A. 820, 117 Me. 471.

(18) "Estate of a ward," as not including the estate of infants in the hands of their guardians.—Powell's Adm'r v. Mercer County Board of Education, 281 S.W. 535, 536, 213 Ky. 556.

(19) "Estate of deceased person"

phrases in which the word occurs and which were involved in the various judicial decisions and interpretations cited and discussed elsewhere are set out in the note.[9]

—Elmer v. Holmes, Miss., 199 So. 84, 86.

(20) "Estate of the husband."—Hedeman v. Newnom, 211 S.W. 968, 970, 109 Tex. 472.

(21) "Estate of the insured."—In re Ryan's Estate, 222 N.Y.S. 253, 254, 129 Misc. 248.

(22) "Estate or assets."—Keefe v. Jacobo, 54 P.2d 270, 271, 47 Ariz. 162.

(23) "Estate or interest in real property":

As including a lease.—Tamarin v. Fitzpatrick, 211 N.Y.S. 616, 617, 125 Misc. 823.

As including an action brought for the purpose of setting aside a deed of trust, and obtaining a lien on the property superior and prior thereto.—Henrico Lumber Co. v. Dare Lumber Co., 103 S.E. 915, 916, 180 N.C. 12.

As not including a grantor's right to take advantage of a breach of the conditions subsequent.—Simms v. Folts Mission Institute, 276 N.Y.S. 145, 150, 154 Misc. 384.

(24) "'Estate' or interest therein."—Haggart v. Wheeler, 229 P. 357, 359, 116 Kan. 702—McCartney v. Robbins, 217 P. 311, 314, 114 Kan. 141.

(25) "Estate or interest vested." In re Hoagland's Estate, 211 N.Y.S. 629, 633, 125 Misc. 376.

(26) "Estate or right."—Newman v. Equitable Life Assur. Soc. of U. S., 160 So. 745, 749, 119 Fla. 641.

(27) "Estate or transfer tax," as distinguished from "succession tax."—Brady v. Ham, C.C.A.Me., 45 F.2d 454, 455.

(28) "Estate passing by will," as not including a widow's exemption from the direct inheritance tax.—In re Hidebrand's Estate, 104 A. 866, 262 Pa. 112.

(29) "Estates and funds."—Cronkleton v. Jones, D.C.Neb., 4 F.Supp. 690, 691.

(30) "Estates of the realm," defined as the lords spiritual, the lords temporal, and the commons of Great Britain; sometimes called the "three estates", but inasmuch as the lords spiritual have no separate assembly or negative in their political capacity, some authorities reduce the estates in Great Britain to two, the lords and commons.—Black L.D.

(31) "Estate subject to a conditional limitation," as distinguished from "Estate upon Condition Subsequent."—Johnson v. Lane, Ark., 135 S.W.2d 853, 856.

(32) "Estate, title, or interest in land," as not including a claim for compensation for improvements—Staub v. Phillips, 271 S.W. 365, 369, 307 Mo. 576.

(33) "Estate to be administered."—Hill v. Ouzts, 200 So. 254, 257, 190 Miss. 341.

(34) "Estate to commence in futuro," as including a reverter.—Skipper v. Davis, Tex.Civ.App., 59 S.W.2d 454, 458.

(35) "Estate undisposed of by her."—Hicks v. Connor, 276 S.W. 844, 845, 210 Ky. 773.

(36) "Executed estate," defined as an estate whereby a present interest passes to and resides in the tenant, not dependent on any subsequent circumstance or contingency, and more commonly called "estates in possession."—Black L.D., citing 2 Blackstone Comm. p 151. See also Estates § 14.

(37) "Executory estate," defined as an estate or interest in lands, the vesting or enjoyment of which depends on some future contingency.—Black L.D. See also Estates §§ 119–122.

(38) "Existing estates."—State v. Diveling, 66 Mo. 375, 378, 379.

(39) "Fast estate," as a term sometimes used in wills and applicable to real property.—Black L.D., citing Lewis v. Smith, 9 N.Y. 502, 510, 61 Am.D. 706.

(40) "Future and contingent estate in lands," as including both legal and equitable estates.—In re Vail, 133 A. 866, 867, 99 N.J.Eq. 598.

(41) "Interest or estate in realty," as not including a vendor's lien for the purchase money.—Perry Coal Co. v. Richmond, 4 N.E.2d 891, 893, 287 Ill.App. 298.

(42) "Landed estate or property," as meaning an interest in and pertaining to lands.—Black L.D., citing Police Jury of the Parish of St. Mary v. Harris, 10 La.Ann. 676, 677.

(43) "Legal estate:"

Defined as that kind of estate which is properly cognizable in the courts of common law, although noticed also in the courts of equity.—Black L.D.

Historically discussed.—Sayre v. Mohney, 47 P. 197, 198, 30 Or. 238.

(44) "Life, liberty, or estate," as not including a public office or trust.—Attorney General v. Pelletier, 131 N.E. 407, 414, 240 Mass. 264.

(45) "Original estate," defined as the first of several estates, bearing to each other the relation of a particular estate and a reversion.—Black L.D. See also Deeds § 5.

(46) "Owned by the estate of a deceased person."

Conn.—Gilpatric v. City of Hartford, 120 A. 317, 319, 98 Conn. 471.

Mont.—State v. District Court of Nineteenth Judicial Dist. in and for Toole County, 245 P. 529, 531, 76 Mont. 143.

(47) "Real estate," as meaning landed property, including all estates and interests in lands which are held for life or for some greater estate, and whether such lands be of freehold or copyhold tenure.—Black L.D.

(48) "Settled estate," defined in English law as one created or limited under a settlement; that is, one in which the powers of alienation, devising and transmission according to the ordinary rules of descent are restrained by the limitations of the settlement.—Black L.D., citing Micklethwait v. Micklethwait, 4 C.B.N.S. 858.

(49) "Vested estate," as meaning:

An estate as to which there is a person in being who would have an immediate right to the possession upon the ceasing of some intermediate or precedent estate—Tayloe v. Gould, 10 Barb., N.Y., 388, 396.

One in which there is an immediate right of present enjoyment or a present fixed right of future enjoyment.—Flanner v. Fellows, 68 N.E. 1057, 1058, 206 Ill. 136.

9. Phrases discussed elsewhere

(1) "Conditional estate" see Estates §§ 9–11, 20.

(2) "Copyhold estate" see Estates § 12.

(3) "Dominant estate" see Easements §§ 45, 46.

(4) "Estate at sufferance" and "estate at will" see the C.J.S. title Landlord and Tenant §§ 156–183, also 35 C.J. p 1119 note 73–p 1139 note 96.

(5) "Estate by elegit" see Estates § 20.

(6) "Estate by entireties" and "estate by the entirety" see the C.J.S. title Husband and Wife § 34, also 30 C.J. p 564 note 66–p 574 note 16.

(7) "Estate by statute merchant" and "estate by statute staple" see Estates § 20.

(8) "Estate by the curtesy" see Curtesy § 1.

(9) "Estate for life" see Estates §§ 30–67.

(10) "Estate for years" and "estate from year to year" see the C.J.S. title Landlord and Tenant §§ 26, 130, 131, also 35 C.J. p 970 note 70–p 971 note 82, p 1096 note 27–p 1097 note 35.

(11) "Estate in common" and "estate in coparcenary" see the C.J.S. title Tenancy in Common §§ 1, 3, also 62 C.J. p 408 notes 1, 2, 6—p 409 note 15.

(12) "Estate in dower" see Dower § 110.

(13) "Estate in expectancy," "estate in fee tail," and "estate in gage or pledge" see Estates §§ 15, 20, 21.

(14) "Estate in joint tenancy" see the C.J.S. title Joint Tenancy § 6, also 33 C.J. p 909 notes 33—36.

(15) "Estate in land" see Estates § 1.

(16) "Estate in possession," "estate in remainder," and "estate in reversion" see Estates §§ 14, 68, 105.

(17) "Estate in severalty" and "estate in vivo vadio" see Estates §§ 17, 20.

(18) "Estate less than freehold" see Estates § 12.

(19) "Estate of inheritance" see Descent and Distribution §§ 65—67, and Estates § 7.

(20) "Estate of purchase" see Descent and Distribution § 1.

(21) "Estate per autre vie" see the C.J.S. title Wills § 76, also 68 C. J. p 492 note 22.

(22) "Estate tail" see Estates § 21.

(23) "Estate upon condition expressed," "estate upon condition implied," "estate upon condition precedent," and "estate upon condition subsequent" see Estates § 20.

(24) "Fee simple estate," "freehold estate," and "future estate" see Estates §§ 7, 8, 15.

(25) "Servient estate" see Easements §§ 45, 46.

ESTATES

This Title includes nature and incidents of interests in real or personal property; estates in fee or absolute ownership; estates of inheritance limited to issue, general or special; estates not of inheritance which are limited to or may possibly last during the life of the tenant or the life or lives of another or others and are created by act of the parties; estates limited to take effect after the determination of preceding estates; ulterior estates remaining in grantors of particular estates; executory interests; merger of estates; rights, powers, and liabilities of tenants in tail, life tenants, remaindermen, and reversioners; abolition of estates tail, and barring entails; and remedies for protection of particular interests.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

Analysis

I. DEFINITION, NATURE, AND INCIDENTS IN GENERAL, §§ 1–4

II. CLASSIFICATION, §§ 5–20

III. ESTATES TAIL, §§ 21–29

IV. LIFE ESTATES, §§ 30–67

V. REMAINDERS, §§ 68–104

VI. REVERSIONS, §§ 105–118

VII. EXECUTORY INTERESTS, §§ 119–122

VIII. MERGER OF ESTATES, §§ 123–131

IX. ESTATES IN PERSONAL PROPERTY, §§ 132–144

Sub-Analysis

I. DEFINITION, NATURE, AND INCIDENTS IN GENERAL—p 8

§ 1. Definition—p 8
2. Nature and incidents in general—p 11
3. Statutory provisions—p 12
4. Rule in Shelley's Case—p 12

II. CLASSIFICATION—p 13

§ 5. General statement—p 13
6. With regard to quantity of interest—p 16
7. Estates of freehold—p 16
8. Fee simple—p 18
9. Limited or conditional fees in general—p 22
10. Base, qualified, or determinable fee—p 22
11. Fees conditional—p 25

II. CLASSIFICATION—Continued

§ 12. Estates less than freehold—p 27
13. With regard to time of enjoyment—p 27
14. Estates in possession—p 27
15. Estates in expectancy—p 28
16. With regard to number and connection of tenants p 29
17. Estates in severalty—p 29
18. Estates in plurality—p 29
19. With regard to qualifications of interest—p 30
20. Estates upon condition—p 30

III. ESTATES TAIL—p 35

§ 21. Definition and nature—p 35
22. Origin and status—p 36
23. Classification—p 36
24. Creation in general—p 36
25. What may be entailed—p 36
26. Incidents—p 36
27. Bar or defeat of estate—p 37
28. Estate tail after possibility of issue extinct—p 39
29. Statutory abolition or modification—p 39

IV. LIFE ESTATES p 39

§ 30. Definition, nature, and regulation—p 39
31. Classification—p 40
32. Creation—p 41
33. Incidents—p 42
34. Relation of life tenant to remainderman or reversioner—p 42
35. Acquisition of outstanding title or claim—p 44
36. Present value of life estate—p 45
37. Rights and liabilities of life tenants—p 46
38. Possession of estate—p 46
39. Estovers—p 46
40. Emblements—p 47
41. Income, profits, and accretions—p 47
42. Working mines, quarries, oil or gas wells—p 49
43. Liability for waste—p 51
44. Repairs—p 55
45. Improvements—p 56
46. Insurance—p 59
47. Taxes and assessments—p 59
48. Debts, charges, and encumbrances—p 63
49. Expenses, deterioration, and losses p 65
50. Sale or conveyance—p 66
51. By life tenant—p 66
52. By order of court—p 68
53. Division and disposition of proceeds—p 70
54. Lease—p 72
55. Mortgage—p 74
56. Contracts and agreements—p 75
57. Remedies for protection of remainder or reversion—p 76
58. Requirement of inventory—p 76
59. Requirement of security—p 76
60. Equitable relief in general—p 76

IV. LIFE ESTATES—Continued

§ 61. Injunction—p 77
62. Accounting—p 77
63. Sequestration and ne exeat—p 78
64. Receiver—p 78
65. Termination—p 78
66. Adverse possession—p 82
67. Actions by or against life tenants—p 85

V. REMAINDERS—p 88

§ 68. Definition, nature and incidents—p 88
69. Vested remainders—p 88
70. Contingent remainders—p 90
71. Definition—p 90
72. Characteristics—p 91
73. Remainders to class—p 92
74. Cross remainders—p 92
75. Double contingencies—p 93
76. Preceding particular estate—p 93
77. Necessity—p 93
78. Quantity—p 93
79. Simultaneous creation—p 94
80. Determination of preceding estate—p 94
81. Time of vesting of remainder in general—p 95
82. Acceleration of remainder—p 95
83. Construction—p 96
84. Statutory provisions—p 97
85. Rights of remaindermen—p 97
86. Liabilities of remaindermen—p 99
87. Sale or conveyance—p 100
88. By remaindermen—p 100
89. Judicial sale—p 104
90. Mortgage—p 107
91. Destruction of remainder—p 109
92. By act of tenant of particular estate—p 109
93. By merger—p 110
94. By nature of contingency—p 111
95. Statutory provisions—p 113
96. Protection; trust estates—p 113
97. Actions by or against remaindermen—p 114
98. Right of action—p 114
99. Limitation and laches—p 118
100. Parties—p 122
101. Pleadings—p 122
102. Evidence—p 123
103. Damages—p 124
104. Trial and judgment—p 124

VI. REVERSIONS—p 125

§ 105. Definitions and distinctions—p 125
106. Characteristics—p 126
107. Rights and liabilities of reversioner—p 127
108. Transfer—p 128
109. Extinction—p 128

VI. REVERSIONS Continued

§ 110. Merger—p 129
111. Actions—p 129
112. Limitations and laches—p 129
113. Form of remedy—p 129
114. Parties—p 130
115. Pleadings—p 130
116. Evidence—p 130
117. Trial and judgment—p 130
118. Damages—p 131

VII. EXECUTORY INTERESTS—p 131

§ 119. Origin and history—p 131
120. Definitions—p 132
121. Classes of executory limitations—p 133
122. Incidents and characteristics—p 136

VIII. MERGER OF ESTATES—p 141

§ 123. In general—p 141
124. Application of rule at law and in equity—p 143
125. Conditions essential to merger—p 146
126. Life estates—p 147
127. Estates for years—p 149
128. Equitable estates—p 149
129. Curtesy—p 150
130. Dower—p 150
131. Estates tail—p 150

IX. ESTATES IN PERSONAL PROPERTY—p 151

§ 132. In general—p 151
133. Life estates—p 151
134. Possession of property—p 152
135. Use of property—p 159
136. Income, profits, and accretions—p 161
137. Alienability—p 164
138. Executory or future interests—p 165
139. In analogy to remainders or executory devises—p 166
140. Reversionary interests—p 169
141. Rights and liabilities of owner—p 169
142. Transfer of interest—p 174
143. Merger—p 176
144. Actions—p 176

I. DEFINITION, NATURE, AND INCIDENTS IN GENERAL

§ 1. Definition

a. Estate
b. Interest
c. Tenant; tenancy

a. Estate

"Estate" is a term which in its ordinary usage may signify condition in life and may include property, rank, office, income, social position, or character. In legal usage it is of more restricted meaning, ordinarily as indicating the position in which a person stands with regard to the ownership, possession, and control of his property, or as meaning the property itself.

In a popular sense "estate" may signify condition in life, prosperity, or adversity, and may include not only property but also rank, office, income, social position, and even character.[1] In legal parlance its meaning is more restricted,[2] but is not always uniform.[3] In many cases its precise meaning can be ascertained only from the context, or the circumstances under which it is used;[4] but, unless there is a clear intention to convey a different meaning, it should be construed in its ordinary and accepted meaning,[5] and in a sense which will accomplish and not defeat the purpose of the instrument in which it is used.[6]

As originally used the term signifies the condition or circumstance in which the owner stands with regard to the ownership, possession, and control of his property;[7] but objectively it has been extended to indicate the property itself.[8] The terms "estate" and "property" are often used synonymously.[9]

As used in statutes, if not expressly defined,[10] the import of the term "estate" depends in a great degree on its association with other expressions,[11] and must be found from the context and purpose of the statute,[12] and the fixed absolute sense of the word in the abstract must give way to the connection in which it is used.[13] It may include personal, as well as real, property[14] of every kind.[15] It may, however, be limited either to personalty[16] or realty.[17] Generally, when legal enactments are intended to apply exclusively to one or the other of these different species of property, the statutes use the proper qualifying words, "personal" or "real" estate, as the case may require.[18]

An estate in land is the degree, quantity, nature, or extent of interest which a person has in it;[19] as

1. Mich.—In re Reynolds' Estate, 264 N.W. 399, 401, 274 Mich. 354.
21 C.J. p 912 note 1.

2. Wis.—Campbell v. Campbell, 37 Wis. 206.

3. Cal.—Higgins v. Higgins, 53 P. 1081, 121 Cal. 487, 66 Am.S.R. 57.
Wis.—Campbell v. Campbell, 37 Wis. 206.

4. Ark.—Beneux v. Brown, 87 S.W. 2d 28, 191 Ark. 579.
Ill.—Samuels v. Worst, 149 N.E. 228, 229, 318 Ill. 297.
Mich.—In re Reynolds' Estate, 264 N.W. 399, 401, 274 Mich. 354.
N.Y.—In re Billman's Estate, 24 N.Y.S.2d 43, 48, 175 Misc. 334.
Ohio.—Black v. Sylvania Producing Co., 137 N.E. 904, 905, 105 Ohio St. 346.
21 C.J. p 912 note 4.

5. Ind.—Department of Treasury of Indiana v. Dietzen's Estate, 21 N.E.2d 137, 215 Ind. 528.

6. Cal.—Higgins v. Higgins, 53 P. 1081, 121 Cal. 487, 66 Am.S.R. 57.

7. Ala.—Frazer v. First Nat. Bank of Mobile, 178 So. 441, 444, 235 Ala. 252.
Ky.—Fayette County Board of Education v. Bryan, 91 S.W.2d 990, 993, 263 Ky. 61—King v. Wurts, 13 S.W.2d 1043, 1044, 227 Ky. 705.
Mich.—In re Reynolds' Estate, 264 N.W. 399, 401, 274 Mich. 354.
Okl.—Taylor v. Johnson, 218 P. 1095, 1097, 92 Okl. 145.
Wash.—Boyd v. Sibold, 109 P.2d 535, 539, quoting **Corpus Juris.**
21 C.J. p 912 note 6.

"Estate" is derived from the Latin "status" and signifies the owner's position or standing with regard to his property.—Bradford v. Mogk, 8 N.Y.S. 709, 55 Hun 482—21 C.J. p 912 note 6 [a].

The primary signification of the word "estate" refers rather to the interest than the subject. Kutter v. Smith, 2 Wall. (U.S.) 491, 17 L.Ed. 830—21 C.J. p 912 note 6 [b].

8. Ind.—Department of Treasury of Indiana v. Dietzen's Estate, 21 N.E.2d 137, 215 Ind 528.
Ky.—King v. Wurts, 13 S.W.2d 1043, 1044, 227 Ky. 705.
N.Y.—In re Harris' Estate, 271 N.Y.S. 464, 467, 150 Misc. 758, citing **Corpus Juris.**
N.C.—In re Wright's Estate, 168 S.E. 664, 666, 204 N.C. 465.
Okl.—Taylor v. Johnson, 218 P. 1095, 1097, 92 Okl. 145.
Or.—Connertin v. Concannon, 259 P. 290, 292, 122 Or. 387, citing **Corpus Juris.**
21 C.J. p 913 note 7.

9. Ark.—McDaniel v. Herrn, 179 S.W. 337, 120 Ark. 288.
21 C.J. p 913 note 10 [c].

10. Mich.—In re Reynolds' Estate, 264 N.W. 399, 401, 274 Mich. 354, quoting **Corpus Juris.**
21 C.J. p 915 note 35.

11. Mich.—In re Reynolds' Estate, supra, quoting **Corpus Juris.**
N.Y.—In re Harris' Estate, 271 N.Y.S. 464, 150 Misc. 758.
21 C.J. p 915 note 36.

12. Kan.—Barker v. Lashbrook, 279 P. 12, 13, 128 Kan. 595.
N.J.—In re Vail, 133 A. 866, 867, 99 N.J.Eq 598.

13. Mich.—In re Reynolds' Estate, 264 N.W. 399, 402, 274 Mich. 354, quoting **Corpus Juris.**
S.D.—Minnehaha County v. Boyce, 138 N.W. 287, 30 S.D. 226.
Wis.—Campbell v. Campbell, 37 Wis. 206.

14. Ky.—Patton v. Walker, 118 S.W. 312.

15. Ill.—North v. Graham, 85 N.E. 267, 235 Ill. 178, 126 Am.S.R. 189, 18 L.R.A.,N.S., 624.
21 C.J. p 915 note 39.

16. Miss.—Harkleroad v. Maxwell, 25 So. 873, 77 Miss. 117.
21 C.J. p 915 note 40.

17. N.Y.—Fifth Ave. Bldg. Co. v. Kernochan, 117 N.E. 579, 221 N.Y. 370.
21 C.J. p 915 note 41.

18. Vt.—Read v. Jamaica, 40 Vt. 629.

19. Ky.—Howard v. Mitchell, 105 S.W.2d 128, 268 Ky. 429.
N.C.—Shoemaker v. Coats, 10 S.E.2d 810, 814, 218 N.C. 251.
Ohio.—Black v. Sylvania Producing

applied to land it does not necessarily import a fee or even a freehold,[20] but merely the quantity of interest a person has from absolute ownership to naked possession,[21] and is applied to rights in land, both in possession and expectancy, and to future estates either vested or contingent.[22] It has been held that it does not apply to the possession of lands without color of title,[23] and that neither a right of entry,[24] an exclusive right to acquire the title to certain lands,[25] nor the interest of a tenant under a lease to begin at a future date,[26] is an estate.

There is a very plain and marked distinction between an estate in lands and a title to lands, the former signifying the interest which a person has, and the latter the evidence of his right, or of the extent of his interest, or the means whereby he is enabled to assert or maintain his possession.[27] An estate in land is also distinguished from a lien on the land in that an estate is the right to possession and enjoyment of the land, whereas a lien on the land is the right to have it sold or otherwise applied in satisfaction of the debt.[28]

"Landed estate." In the ordinary meaning of the words, an interest in, and pertaining to, lands.[29] Landed estates are of three kinds: (1) Those which are not limited by precise bounds, but are described by quantity. (2) Those which have fixed artificial limits. (3) Those which have natural boundaries, such as rivers, mountains, or woods.[30]

"Settled estate." The meaning of the term, whether in legal or popular language, as contradistinguished from an estate in fee simple,[31] is understood to be one in which the powers of alienation, of devising, and of transmission according to ordinary rules of descent are restrained by the limitations of the settlement.[32]

An estate by purchase is one acquired by sale or gift, or by any other method except only that of descent.[33]

"Estate" and "equity" are not synonymous terms either in meaning or substance.[34]

"Estate" and "heirs" are not equivalent terms; the estate is the subject matter with which the gran-

Co., 137 N.E. 904, 905, 105 Ohio St. 346—Lape v. Lape, 22 Ohio N. P., N.S., 392, 394.
Okl.—Nicholson Corporation v. Ferguson, 243 P. 195, 200, 114 Okl. 10.
Or.—Connertin v. Concannon, 259 P. 290, 292, 122 Or. 387, citing Corpus Juris.
Tex.—Gibbs v. Lester, Com.App., 41 S.W.2d 28, 29, 80 A.L.R. 431.
21 C.J. p 915 note 43.

Similar definitions

(1) "An estate in lands, tenements, and hereditaments signifies such interest as the tenant has therein."—Shoemaker v. Coats, 10 S.E.2d 810, 814, 218 N.C. 251, quoting Black L. D.—21 C.J. p 915 note 43 [a].

(2) "Estate signifieth such inheritance, freehold, terme for yeares, tenancie by statute merchant, staple, elegit, or the like, as any man hath in lands or tenements."—Bailey v. Henry, 143 S.W. 1124, 1126, 125 Tenn. 390, quoting Coke Litt. 345a § 650—21 C.J. p 915 note 43 [b].

(3) Other similar definitions see 21 C.J. p 915 note 43 [c].

"Estate" is applied to land in two senses, first, to point out the land itself, and second, to signify the degree, quantity, nature, and extent of the interest therein.—Pearce v. Pearce, 74 So. 952, 199 Ala. 491—21 C.J. p 915 note 43 [d].
"Personal estate" see the C.J.S. title Property § 8, also 50 C.J. p 759, notes 7–10, and the C.J.S. definition "Personal Estate" 48 C.J. p 1046 notes 9–16.

20. Ohio.—Black v. Sylvania Producing Co., 137 N.E. 904, 905, 105 Ohio St. 346.
21 C.J. p 915 note 44.

21. Ga.—Providence Washington Ins. Co. v. Pass, for Use of Nalley, 12 S.E.2d 460, 461, 64 Ga.App. 221.
N.C.—Shoemaker v. Coats, 10 S.E.2d 810, 814, 218 N.C. 251.
Ohio.—Black v. Sylvania Producing Co., 137 N.E. 904, 905, 105 Ohio St. 346.
Okl.—Nicholson Corporation v. Ferguson, 243 P. 195, 200, 114 Okl. 10—Taylor v. Johnson, 218 P. 1095, 1097, 92 Okl. 145.
Or.—Connertin v. Concannon, 259 P. 290, 122 Or. 387.
21 C.J. p 915 note 45.

"An estate in land may vary in its duration. It may be forever; it may be for life, or for a term of years, or at will. Its duration has nothing to do with its character, it is an estate nevertheless."—Liberty Cent. Trust Co. of St. Louis, Mo., v. Gilliland Oil Co., D.C.Tex., 297 F. 494, 499.

22. Ohio.—Black v. Sylvania Producing Co., 137 N.E. 904, 905, 105 Ohio St. 346.
21 C.J. p 915 note 46.
Remainders see infra § 68.
Reversions see infra § 106.

23. Vt.—Austin v. Rutland R. Co., 45 Vt. 215.

24. N.Y.—New Edgewood Lake Corporation v. Kingston Trust Co., 285 N.Y.S. 130, 246 App.Div. 163—Huber v. Georg, 168 N.Y.S. 834, 181 App.Div. 369.
21 C.J. p 916 note 48.

Personal agreement to enter and perform labor

An agreement by which one enters on another's land and performs labor thereon in cultivating and harvesting crops is not an agreement by which an estate in the land is created.—Phillips v. Atwell, 80 So. 180, 76 Fla. 480.

25. N.Y.—Wordsworth v. Buffalo Hydraulic Assoc., 15 Barb. 83.

26. N.Y.—Evans v. Prince's Bay Oyster Co., 154 N.Y.S. 279.

27. Ind.—Robertson v. Vancleave, 26 N.E. 899, 29 N.E. 781, 129 Ind. 217, 232, 15 L.R.A. 68.
Ky.—Howard v. Mitchell, 105 S.W.2d 128, 133, 268 Ky. 429, quoting Corpus Juris.
S.D.—State v. Weide, 135 N.W. 696, 29 S.D. 109.

28. Ark.—Decatur State Bank v. Sanders, 170 S.W. 86, 114 Ark. 440, 447.
Pa.—Day v. Ostergard, Super., 21 A. 2d 586.

29. La.—St. Mary v. Harris, 10 La. Ann. 676, 677.
35 C.J. p 935 note 20.

30. Mo.—Smith v. St. Louis Public Schools, 30 Mo. 290.

31. Ga.—Phinizy v. Wallace, 71 S. E. 896, 899, 901, 136 Ga. 520.
57 C.J. p 530 note 12.

32. Ga.—Phinizy v. Wallace, supra.
57 C.J. p 530 note 13.

33. N.Y.—Matter of Field, 169 N.Y. S. 677, 182 App.Div. 226, 232.

34. N.J.—Tewksbury Tp. v. Readington Tp., 8 N.J.Law 319.

tor deals; the heirs are possible distributees.[35]

"Estate" and "succession" may be used as having the same meaning.[36]

Trade, business, or employment. It has been said that the word "estate" in its full sense may perhaps include trade or business,[37] and that the interest of a person in his continued employment, and his right to enjoy such employment free from malicious interference from an outsider, are included in the term "estate."[38]

b. Interest

"Interest," as applied to property, means the legal concern of a person in the property, or in the right to its benefits or uses. Its meaning, however, may be varied according to the context or connection in which it is used.

As applied to property, the chief use of the term "interest" seems to be to designate some right attached to property which either cannot, or need not, be defined with precision.[39] It means the legal concern of a person in the thing or property, or in the right to some of the benefits or uses from which the property is inseparable.[40]

The word "interest," when applied to property, has a variable meaning to be determined in any case by the context, intention, and circumstances.[41] It may be used as synonymous with "estate,"[42] or "title,"[43] or "property;"[44] or it may be distinguishable from "title,"[45] or "estate."[46] An interest in property may comprehend the entire title thereto,[47] as well as something less than the entire title.[48] It may be used to denote something less than an estate,[49] or ownership,[50] or title;[51] a merely beneficial property right.[52] When used in contradistinction to "title," it means any right in the nature of property, less than title;[53] it may not mean a greater estate than title.[54]

"Interest" may be used in a broader and more comprehensive sense than "title."[55] It may include both equitable and legal rights.[56] It may have even the same meaning as the phrase "right, title, and interest."[57] In its broadest signification it may include any right, title, or estate in, or lien on, real estate;[58] any right in or to the property dependent on a contingency.[59] In fact, the term "interest" seems to be one of extreme elasticity, which may be used to include nearly everything legally connecting claimant with the subject matter;[60] and in its plain and natural meaning it may include and compre-

35. Ill.—Downing v. Grigsby, 96 N. E. 513, 251 Ill. 568.
N.Y.—Abraham v. Abraham, 280 N. Y.S. 825, 827, 245 App.Div. 302, quoting **Corpus Juris.**
Tenn.—Martin v. Hale, 71 S.W.2d 211, 212, 167 Tenn. 433, quoting **Corpus Juris.**

36. La.—Thomas v. Blair, 35 So. 811, 111 La. 678.
21 C.J. p 914 note 21.
"Succession" defined see Descent and Distribution § 1 c.

37. Neb.—Gillespie v. Smith, 30 N. W. 526, 20 Neb. 455.

38. N.Y.—Scott v. Prudential Outfitting Co., 155 N.Y.S. 497, 92 Misc. 195.

39. Tex.—East Texas F. Ins. Co. v. Clarke, 15 S.W. 166, 79 Tex. 23, 25, 11 L.R.A. 293.
33 C.J. p 261 note 18.

40. Iowa.—McDonald v. Bayard Sav. Bank, 98 N.W. 1025, 123 Iowa 413, 416.

41. Kan.—Hillyard v. Banchor, 118 P. 67, 69, 85 Kan. 516.

42. U.S.—Ladd v. Ladd, D.C., 8 How. 10, 29, 12 L.Ed. 967.
Ga.—Providence Washington Ins. Co. v. Pass, for Use of Nalley, 12 S. E.2d 460, 64 Ga.App. 221.
21 C.J. p 914 note 20—33 C.J. p 262 note 25.

43. Kan.—Hillyard v. Banchor, 118 P. 67, 69, 85 Kan. 516.
33 C.J. p 262 note 26.

May include title
N.J.—Class v. Strack, 96 A. 405, 85 N.J.Eq. 319.

44. U.S.—Ladd v. Ladd, D.C., 8 How. 10, 29, 12 L.Ed. 967.

45. Ala.—Loventhal v. Home Ins. Co., 20 So. 419, 112 Ala. 108, 116, 57 Am.S.R. 17, 33 L.R.A. 258.
33 C.J. p 262 note 31.

46. Okl.—White v. Wester, 39 P.2d 22, 25, 170 Okl. 250.

47. U.S.—Salamandra Ins. Co. v. New York L. Ins. & Trust Co., D. C.N.Y., 254 F. 852, 862.
33 C.J. p 262 note 29.

48. U.S.—Salamandra Ins. Co. v. New York L. Ins. & Trust Co., supra.

49. Kan.—Hillyard v. Banchor, 118 P. 67, 69, 85 Kan. 516.

In the common law of real property it has been used to designate a right less than an estate.—Hillyard v Banchor, supra—Garner v. Milwaukee Mechanics' Ins. Co., 84 P. 717, 718, 73 Kan. 127, 117 Am.S.R. 460, 4 L.R.A.,N.S., 654, 9 Ann.Cas. 459.

50. Mass.—Copeland v. Eaton, 95 N. E. 291, 292, 209 Mass. 139, Ann. Cas.1912B 521.

51. N.J.—Class v. Strack, 96 A. 405, 85 N.J.Eq. 319.
33 C.J. p 262 note 34.

52. Fla.—Pasco v. Harley, 75 So. 30, 35, 73 Fla. 819.

53. Tex.—East Texas F. Ins. Co. v. Clarke, 15 S.W. 166, 79 Tex. 23, 25, 11 L.R.A. 293.
33 C.J. p 262 note 36.

54. Kan.—Hillyard v. Banchor, 118 P. 67, 69, 85 Kan. 516—Garner v Milwaukee Mechanics' Ins. Co., 84 P. 717, 718, 73 Kan. 127, 117 Am. S.R. 460, 4 L.R.A.,N.S., 654, 9 Ann. Cas. 459.

55. Ga.—Providence Washington Ins. Co. v. Pass, for Use of Nalley, 12 S.E.2d 460, 64 Ga.App. 221.
Iowa.—Ward v. Meredith, 173 N.W. 246, 251, 186 Iowa 1108.
21 C.J. p 914 note 20—33 C.J. p 262 notes 39, 40.

56. Minn.—Gibb v. Philadelphia F. Ins. Co., 61 N.W. 137, 59 Minn. 267, 273, 50 Am.S.R. 405.
33 C.J. p 262 notes 42, 43.

57. La.—Stenzel v. Pennsylvania F. Ins. Co., 35 So. 271, 110 La. 1012 1023, 98 Am.S.R. 481.

58. U.S.—Ormsby v. Ottman, Neb., 85 F. 492, 497, 29 C.C.A. 295.
Neb.—Johnson v. Samuelson, 117 N. W. 470, 471, 82 Neb. 201, 130 Am. S.R. 666.
33 C.J. p 262 note 45.

59. Iowa.—Ward v. Meredith, 173 N.W. 246, 251, 186 Iowa 1108.

60. N.C.—Henderson Methodist Protestant Church v. Young, 40 S. E. 691, 130 N.C. 8, 13.

d an attachment;[61] easement;[62] estate in fee, life, and for years;[63] a lien;[64] mortgage;[65] l every kind of claim to land which can form the is of a property right.[66]

c. Tenant; Tenancy

A tenant, broadly speaking, is one who holds and sesses property of another, the term being usually d with reference to real property, by any kind of . In a narrower sense it is one who has possession he premises of another in subordination to such oth- title. Tenancy is the relation of the tenant to the perty which he holds.

Jsed as a generic term,[67] in the broadest sense, a nant" is one who holds or possesses lands or ten- ents by any kind of right or title, either in fee, life, for years, at will, or on sufferance.[68] In a icter sense the term refers to one who has pos- sion of the premises of another in subordination that other's title and with his consent, express implied, as explained in the C.J.S. title Landlord l Tenant § 1, also 35 C.J. p 951 notes 1–3.

Land tenant. The person actually in possession land; otherwise styled the "terre-tenant."[69]

Tenant paravail. In the feudal system of land ure, the lowest tenant, in the process of subinfeu- ion, who cultivated the land and gathered the ps, performing his service to the next superior order.[70]

Terre-tenant. A person in actual possession or occupation of land;[71] a tenant, holder, or occupier of land;[72] also, but less frequently, the owner of the legal, as distinguished from the equitable, es- tate.[73] In a general sense, one who is seized or ac- tually possessed of lands as the owner thereof.[74]

Tenancy. Tenancy is the relation of a tenant to the land which he holds.[75] The term has two sig- nifications: (1) The estate of a tenant.[76] (2) The term or interest of a tenant,[77] although it does not necessarily imply a right to complete an exclusive possession.[78] Particular forms of tenancy are treat- ed in particular titles elsewhere in this work.

A general tenancy is one which is not fixed and made certain in point of duration by the agreement of the parties.[79]

§ 2. Nature and Incidents in General

In its primary and technical sense, "estate" refers only to an interest in land; but in its wider import it applies to all kinds of property, personal or real.

In its primary and technical sense the term "estate" refers only to an interest in land,[80] but it has acquired a much wider import and applica- tion,[81] being applied to all property of every de- scription, including personal property as well as realty,[82] and in its most extreme sense signifying ev-

Mass.—Union Trust Co. v. Reed, 9 N.E. 1093, 1094, 213 Mass. 199.
achment as creating vested inter- st see Attachment § 256.

Mass.—Union Trust Co. v. Reed, upra.
sement as interest in land see Easements § 1.

Mass.—Union Trust Co. v. Reed, upra.

Kan.—Hillyard v. Banchor, 118 . 67, 69, 35 Kan. 516.
ss.—Union Trust Co. v. Reed, 99 N.E. 1093, 1094, 213 Mass. 199.
ture of lien generally see the C. .S. title Liens § 1, also 37 C.J. p 10 note 82—p 311 note 99.

Mass.—Union Trust Co. v. Reed, upra.

Mass.—Union Trust Co. v. Reed, upra.

Mont.—Citizens' Nat. Bank v. Western Loan & Building Co., 208 . 803, 64 Mont. 40, 47.

Ark.—Chastain v. Hall, 33 S.W. d 45, 46, 182 Ark. 920.
nt.—Citizens' Nat. Bank v. West- rn Loan & Building Co., 208 P. 93, 894, 64 Mont. 40.
).—Minneapolis Iron Store Co. v. Branum, 162 N.W. 543, 36 N.D. 55, 367, L.R.A.1917E 298.
C.J. p 916 note 70.

Similar definitions
(1) "Everyone who holds land, whatever may be the nature or ex- tent of his interest."—Coles & Howe v. Marquand & Bateman, 2 Hill, N.Y., 447, 449—62 C.J. p 571 notes 12–13.

(2) Other similar definitions see 21 C.J. p 916 note 70 [a]—62 C.J. p 571 notes 5–11, 14, 15.

The word is derived from the Latin "teneo," to hold.—Stevens v. Enders, 13 N.J.Law 271.

"To be a tenant, a person must have some estate, be it ever so little, such as that of a tenant at will or on sufferance."—City of Waterville v. Kelleher, 141 A. 70, 72, 127 Me. 32—21 C.J. p 916 note 70 [c].

69. Black L.D.

70. N.Y.—Kavanaugh v. Cohoes Power & Light Corporation, 187 N. Y.S. 216, 231, 114 Misc. 590.
62 C.J. p 571 note 18.

71. Burrill L.D.
62 C.J. p 736 notes 29, 30.

72. Burrill L.D.

73. Abbott L.D.

74. Pa.—Handel & Hayden Building & Loan Ass'n v. Elleford, 101 A. 951, 258 Pa. 143, 146—Hulett v. Mutual L. Ins. Co., 6 A. 554, 114 Pa. 142, 146.

75. Black L.D.
62 C.J. p 318 note 91.

76. Cal.—Stone v. Los Angeles, 299 P. 838, 841, 114 Cal.App. 192.
62 C.J. p 318 note 92.

77. Or.—Klein v. City of Portland, 213 P. 147, 150, 106 Or. 686.
62 C.J. p 318 note 93.

78. Mich.—Morrill v. Mackmen, 24 Mich. 279, 284, 9 Am.R. 124.
62 C.J. p 318 note 94.

79. Ind.—Brown v. Bragg, 22 Ind. 122, 123.

80. Ohio.—Black v. Sylvania Producing Co., 137 N.E. 904, 905, 105 Ohio St. 346—Tapp v. Lape, 22 Ohio N.P., N.S., 392.
Okl.—Taylor v. Johnson, 218 P. 1095, 1097, 92 Okl. 145.
Wash.—Boyd v. Sibold, 109 P.2d 535, 539, quoting Corpus Juris.
21 C.J. p 913 note 8.

81. Ohio.—Black v. Sylvania Producing Co., 137 N.E. 904, 905, 105 Ohio St. 346.
Wash.—Boyd v. Sibold, 109 P.2d 535.
21 C.J. p 913 note 9.

82. Ala.—Frazer v. First Nat. Bank of Mobile, 178 So. 441, 444, 235 Ala. 252.
N.C.—Shoemaker v. Coats, 10 S.E.2d 810, 218 N.C. 251—In re Wright's Estate, 168 S.E. 664, 666, 204 N.C. 465.

erything of which riches or fortune may consist,[83] every species of property possessed by an individual or which comes into possession of his representatives after his death.[84] It has been said to denote a man's whole financial status or condition—the aggregate of his interests and concerns, so far as regards his situation with reference to wealth or its objects, including debts and obligations, as well as possessions and rights.[85] A man's estate is that which he can dispose of at his pleasure;[86] but it is not an essential element of an estate that it shall be alienable by, and subject to, the debts of the beneficial owner, in the sense that it is a logical impossibility for the estate to exist without these incidents.[87] The rules governing estates or interests in land, whether founded on statutes or on general principles of law, are, so far as practicable, applied to estates or interests of a like character in personal property.[88]

An annuity charged on an estate, properly a rent charge, is itself an estate.[89]

Choses in action are included under the term "estate," used in its broadest sense.[90] However, when used in a more restricted sense, the term has been held not to include choses in action.[91]

§ 3. Statutory Provisions

Estates in some states are regulated and controlled by statute.

In some states matters relating to estates are now regulated and controlled by statutes,[92] some of which abrogate or change the common law with respect to ownership or interests in real property,[93] and as to the alienation or conveyance of estates.[94] Only such estates as the law permits may be created in land,[95] and under some statutes there can be no other estate in lands than simple ownership of the soil and servitudes thereon, including usufruct,[96] and the owner cannot establish any other estate by will or contract.[97] The legislature may direct how contingent or vested interests coming into being in the future, may be created, divested, or sold.[98] The operation and effect of such statutory regulations, as applied to particular estates, will be treated in subsequent sections of this Title.

§ 4. Rule in Shelley's Case

Under the rule in Shelley's case, a limitation of an estate to an ancestor for life, with remainder to his heirs or the heirs of his body, gives the whole estate in fee to the ancestor.

The rule in Shelley's case, which is that where an estate is limited to an ancestor for life, with remainder either mediately or immediately to his heirs or the heirs of his body, the word "heirs" is a word of limitation and not of purchase, and the ancestor takes the whole estate in fee simple or fee tail, according to the terms of the limitation,[99] is firmly es-

Or.—Connertin v. Concannon, 259 P. 290, 292, 122 Or. 387, citing **Corpus Juris.**
Wash.—Boyd v. Sibold, 109 P.2d 535. 21 C.J. p 913 note 10.

The word "estate" is genus generalissimum, and includes all things real and personal including money.—Andrews v. Sanders, 197 S.E. 639, 641, 186 Ga. 269—21 C.J. p 913 note 10 [b].

83. Ohio.—Black v. Sylvania Producing Co., 137 N.E. 904, 905, 105 Ohio St. 346.
Wash.—Boyd v. Sibold, 109 P.2d 535. 21 C.J. p 914 note 11.

84. N.Y.—In re Harris' Estate, 271 N.Y.S. 464, 150 Misc. 758.

"An 'estate' is the property or a piece or aggregation of property in lands or tenements or both that a person possesses, often including, inexactly, property in personalty; fortune; possessions; also, the aggregate of property of all kinds which a person leaves to be divided at his death."—Department of Treasury of Indiana v. Dietzen's Estate, 21 N.E. 2d 137, 138, 215 Ind. 528, quoting Webster New Int.D.

85. Ark.—Beneux v. Brown Shoe Co., 87 S.W.2d 28, 29, 191 Ark. 579, citing **Corpus Juris.**
Mich.—In re Reynolds' Estate, 264 N.W. 399, 401, 274 Mich. 354—In re McRae, 146 N.W. 265, 268, 179 Mich. 595, quoting Black L.D.
N.J.—Smith v. Terry, 12 A. 204, 43 N.J.Eq. 659.
N.Y.—In re Harris' Estate, 271 N.Y.S. 464, 467, 150 Misc. 758, quoting **Corpus Juris.**

86. Ky.—Howard v. Mitchell, 105 S.W.2d 128, 268 Ky. 429.
N.Y.—In re Harris' Estate, 271 N.Y.S. 464, 467, 150 Misc. 758, quoting **Corpus Juris.**
Va.—Wilson v. Miller, 1 Patt. & H. 353, 399.
Wash.—Boyd v. Sibold, 109 P.2d 535, 541, quoting **Corpus Juris.**

87. Va.—Sheridan v. Krause, 172 S.E. 508, 161 Va. 873, 91 A.L.R. 1067.

88. N.Y.—In re Moehring, 48 N.E. 818, 154 N.Y. 423, 27 N.Y.Civ.Proc. 74.
21 C.J. p 913 note 10 [e].

89. Wis.—Campbell v. Campbell, 37 Wis. 206.
Definition and nature of annuities generally see Annuities § 1.

90. Conn.—Veeder Mfg. Co. v. Marshall-Sanders Co., 63 A. 641, 79 Conn. 15.
21 C.J. p 914 note 14.

91. Kan.—Perry v. St. Joseph & W. R. Co., 29 Kan. 420.
N.C.—Bond v. Hilton, 51 N.C. 180.
21 C.J. p 914 note 15.

92. Okl.—Knight v. Kimble, 225 P. 909, 99 Okl. 48.
Statutory provisions as to remainders see infra § 84.

93. Okl.—Knight v. Kimble, supra.
Statutory abolition or modification of estates tail see infra § 29.

94. Tex.—Glenn v. Holt, Civ.App., 229 S.W. 684.

95. U.S.—Zanes v. Lehigh Valley Transit Co., D.C.Pa., 41 F.2d 552, affirmed, C.C.A., Lehigh Valley Transit Co. v. Zanes, 46 F.2d 848, certiorari denied 52 S.Ct. 8, 284 U.S. 619, 76 L.Ed. 528.

96. La.—Wemple v. Nabors Oil & Gas Co., 97 So. 666, 154 La. 483—Iberville Land Co. v. Texas Co., 128 So. 304, 14 La.App. 221—Terrell v. Allen, 7 La.Ann. 46, 47—Harper v. Stanbrough, 2 La.Ann. 377.

97. La.—Wemple v. Nabors Oil & Gas Co., 97 So. 666, 154 La. 483.

98. N.Y.—Gedney v. Marlton Realty Co., 179 N.E. 766, 258 N.Y. 355, reversing 246 N.Y.S. 881, 231 App. Div. 812.

99. U.S.—Morsman v. Commissioner

tablished in some states as a rule of law or property.[1] In other states, it has been abrogated by statute,[2] but such abrogation has no retrospective effect.[3] This rule, in its application, where such an estate is created by deed, is considered in Deeds § 123, and in the C.J.S. title Trusts § 186, also 65 C.J. p 540 note 29–p 541 note 40, and in the C.J.S. title Wills §§ 870–879, also 69 C.J. p 505 note 89–p 526 note 34, where such is the mode of creation of the estate.

Where the rule exists, it applies only where an estate of freehold is limited to the ancestor,[4] and where the subsequent estate is limited to the heirs of the first taker, that is, to the "heirs" or "heirs of the body" as an entire class or denomination, and not merely to individuals embraced within such class;[5] it does not apply where the limitation is to "children," meaning the immediate offspring or a restricted class or number who take as purchasers.[6] As respects the application of this rule, the word "heirs" is primarily a word of limitation and not of purchase,[7] and whether it will be construed to mean "children," or whether the word "children" will be construed to mean "heirs," or "heirs of the body," depends on the particular circumstances.[8] The rule applies only where the estate in freehold and the estate in remainder are created by the same instrument,[9] and where the estates are both legal or both equitable.[10]

The rule in Shelley's case has been held to apply to realty only and not to personalty,[11] but there are decisions to the contrary.[12]

II. CLASSIFICATION

§ 5. General Statement

Estates are usually considered with regard to the quantity of the tenant's interest, the time of its enjoyment, the number and connections of the tenants, and the qualifications of the interest which may exist. Estates or interests are also classified as vested or contingent, and as legal or equitable.

Estates are usually considered: (1) With regard to the quantity of interest which the tenant has in the tenement. (2) With regard to the time at which that quantity is to be enjoyed. (3) With regard to the number and connections of the tenants.[13] They

of Internal Revenue, C.C.A., 90 F. 2d 18, 113 A.L.R. 441, certiorari denied Morsman v. Helvering, 58 S.Ct. 20, 302 U.S. 701, 82 L.Ed. 542.

N.C.—Rose v. Rose, 12 S.E.2d 688, 219 N.C. 20.

S.C.—Jarecky v. Jarecky, 9 S.E.2d 922, 194 S.C. 456—Sims v. Clayton, 7 S.E.2d 724, 193 S.C. 98—Hutto v. Ray, 6 S.E.2d 747, 192 S.C. 364—Clark v. Neves, 57 S.E. 614, 76 S.C. 484, 12 L.R.A.,N.S., 298—Williams v. Foster, 3 Hill 193.

Tex.—Davis v. First Nat. Bank of Waco, Civ.App., 145 S.W.2d 707.

Rule as applied to:
Deeds see Deeds § 123.
Wills see the C.J.S. title Wills § 871, also 69 C.J. p 505 notes 89–91.

The law will not treat as a "life estate" that which is essentially an estate of inheritance, nor permit any one to take in the character of heir unless he takes also in the quality of heir.

N.C.—Rose v. Rose, 12 S.E.2d 688, 219 N.C. 20.

Pa.—Steacy v. Rice, 27 Pa. 75, 67 Am.D. 447.

1. Ill.—Hegé v. Provident Mut. Life Ins. Co. of Philadelphia, 173 N.E. 610, 341 Ill. 559—Du Bois v. Judy, 126 N.E. 104, 291 Ill. 340.

N.C.—Blackledge v. Simmons, 105 S. E. 202, 180 N.C. 535.

Tex.—Davis v. First Nat. Bank of Waco, Civ.App., 145 S.W.2d 707, error granted.

Rule as applied to:
Deeds see Deeds § 123.
Wills see the C.J.S. title Wills § 872, also 69 C.J. p 509 notes 32, 33.

2. Iowa.—Friedmeyer v. Lynch, 284 N.W. 160, 226 Iowa 251.

Tenn.—Manhattan Sav. Bank & Trust Co. v. Bedford, 30 S.W.2d 227, 161 Tenn. 187.

26 C.J. p 419 note 50.

3. Iowa.—Friedmeyer v. Lynch, 284 N.W. 160, 226 Iowa 251—Hibler v. Hibler, 226 N.W. 8, 208 Iowa 586.

4. Ill.—Northern Trust Co. v. Thompson, 168 N.E. 116, 336 Ill. 137, reversing 245 Ill.App. 20.

Rule as applied to:
Deeds see Deeds § 123.
Wills see the C.J.S. title Wills § 876, also 69 C.J. p 515 notes 9–13.

5. S.C.—Hutto v. Ray, 6 S.E.2d 747, 192 S.C. 364—Duckett v. Butler, 45 S.E. 137, 67 S.C. 130.

Rule as applied to:
Deeds see Deeds § 123.
Wills see the C.J.S. title Wills § 870, also 69 C.J. p 517 notes 39–47, p 522 notes 87–89.

6. S.C.—Hutto v. Ray, 6 S.E.2d 747, 192 S.C. 364.

Rule as applied to:
Deeds see Deeds § 123.
Trusts see the C.J.S. title Trusts § 186, also 65 C.J. p 540 note 37.

7. N.C.—Whitley v. Arenson, 12 S. E.2d 906, 219 N.C. 121.

The word "heirs" is a technical word, and is always construed to be a word of limitation and not of purchase, unless there be other controlling words, clearly showing that a contrary meaning was intended by its use.—Hamby v. Northcut, Tenn. App., 149 S.W.2d 484.

8. S.C.—Hutto v. Ray, 6 S.E.2d 747, 192 S.C. 364.

Tenn.—Hamby v. Northcut, App., 149 S.W.2d 484.

9. Ill.—People v. Emery, 145 N.E. 349, 314 Ill. 220.

69 C.J. p 512 note 77.

10. Wash.—In re Johnson's Estate, 73 P.2d 755, 192 Wash. 439.

Rule as applied to:
Deeds see Deeds § 123.
Trusts see the C.J.S. title Trusts § 186, also 65 C.J. p 540 note 33.
Wills see the C.J.S. title Wills § 871, also 69 C.J. p 512 notes 86–92.

The rule does not apply where a legal interest is limited to a person for life and an equitable interest to his heirs, or where an equitable interest is limited to a person for life and a legal interest to his heirs.—In re Johnson's Estate, supra.

11. Pa.—In re Mitinger's Estate, 1 A.2d 572, 132 Pa.Super. 475.

69 C.J. p 512 notes 79, 80.

12. Md.—Hughes v. Nicklas, 17 A. 398, 70 Md. 484, 14 Am.S.R. 377.

69 C.J. p 512 note 82.

13. Ohio.—Lape v. Lape, 22 Ohio N. P., N.S., 392, 394.

Pa.—Rash's Est., 2 Pars.Eq.Cas. 160.

may also be considered with regard to the qualifications of interest which may exist with reference thereto, as discussed infra §§ 19, 20.

Vested or contingent estate. Estates are also either vested or contingent.[14] An estate is vested when there is an immediate right of present enjoyment or a present fixed right of future enjoyment;[15] an estate either present or future, the title to which has become established in some person or persons and is no longer subject to any contingency,[16] including all estates which are not contingent, whether in possession, reversion, or remainder.[17] The law generally favors vested estates in preference to contingent estates.[18] Vested estates are subdivided into estates vested in possession and estates vested in interest.[19] An estate is vested in possession when there is a right of present enjoyment.[20] An estate is vested in interest when there is a present fixed right of future enjoyment;[21] a present and imme-

Estates with regard to:
Number and connections of tenants see infra §§ 16–18.
Quantity of interest see infra §§ 6–12.
Time of enjoyment see infra §§ 13–15.

14. Ala.—Johnson v. Terry, 36 So. 775, 139 Ala. 164
Fla.—Story v. First Nat. Bank & Trust Co., in Orlando, 156 So. 101, 115 Fla. 436.
Ill.—Smith v. West, 103 Ill. 332.
21 C.J. p 916 note 74.
Vested or contingent future estates see infra § 15.

15. Cal.—Trippet v. State, 86 P. 1084, 1086, 149 Cal. 521, 8 L.R.A.,N.S., 1210
Colo.—Hignett v. Sherman, 224 P. 411, 415, 75 Colo. 64.
Ga.—Lumpkin v. Patterson, 152 S.E. 448, 170 Ga. 94—Wilbur v. McNulty, 75 Ga. 458, 463.
Ill.—People v. Strom's Estate, 2 N.E. 2d 94, 95, 363 Ill. 241—Armstrong v. Barber, 88 N.E. 246, 239 Ill. 389, 397—Flanner v. Fellows, 68 N.E. 1057, 1058, 206 Ill. 136—Strode v. McCormick, 41 N.E. 1091, 158 Ill. 142, 148—Scofield v. Olcott, 11 N.E. 351, 352, 120 Ill. 362—Smith v. West, 103 Ill. 332, 337.
Kan.—Caple v. Warburton, 264 P. 47, 48, 125 Kan. 290
Miss.—Clarke v. McCreary, 12 Sm. & M. 347, 353.
Mo.—Trautz v. Lemp, 46 S.W.2d 135, 142, 329 Mo. 580—Headington v. Woodward, 214 S.W. 963, 965—O'Day v. Meadows, 92 S.W. 639, 645, 194 Mo. 588, 112 Am.S.R. 542—Tindall v. Tindall, 66 S.W. 1092, 167 Mo. 218, 225.
N.Y.—Bennett v. Garlock, 10 Hun 328, 338, reversed on other grounds 79 N.Y. 302, 35 Am.R. 517—Hopkins v. Hopkins, 1 Hun 352, 354, 3 Thomps. & C. 527—In re Kelly's Estate, 4 N.Y.S.2d 675, 167 Misc. 751—Bettinger v. Montgomery, 210 N.Y.S. 320, 324, 124 Misc. 906—In re Trevor's Will, 197 N.Y.S. 719, 120 Misc. 22, modified on other grounds 202 N.Y.S. 862, 207 App. Div. 673, resettled on reargument 204 N.Y.S. 387, 209 App.Div. 1, modified on other grounds 145 N.E. 66, 239 N.Y. 6, reargument denied 147 N.E. 203, 239 N.Y. 579.
N.C.—Patrick v. Beatty, 163 S.E. 572, 575, 202 N.C. 454—Ziegler v. Love, 115 S.E. 887, 888, 185 N.C. 40—Pendleton v. Williams, 95 S.E. 500, 502, 175 N.C. 248.
Ohio.—Webb v. Biles, 161 N.E. 218, 219, 27 Ohio App. 197, affirmed 161 N.E. 49, 118 Ohio St. 346.
Pa.—In re Gerber's Estate, 46 A. 497, 196 Pa. 366—In re Johnston's Estate, 39 A. 879, 881, 185 Pa. 179, 64 Am.S.R. 621—Barton v. Thaw, 41 Pa.Co. 396, 405, 62 Pittsb.Leg.J. 17, affirmed 92 A. 312, 246 Pa. 348, Ann.Cas.1916D 570.
Wis.—In re Moran's Will, 96 N.W. 367, 118 Wis. 177.
Other definitions
"An interest clothed with a present, legal, and existing right of alienation."—Anderson v. Menefee, Tex.Civ.App., 174 S.W. 904, 908—Thornton v. Zea, 55 S.W. 798, 22 Tex.Civ. App. 509, 511.

16. Minn.—Snortum v. Snortum, 193 N.W. 304, 306, 155 Minn. 230.
Future estates in general see infra § 15 b.

17. Ky.—Crutcher v. Rodman, 81 S.W. 252, 253, 118 Ky. 506, 26 Ky.L. 294—Ward v. Edge, 39 S.W. 440, 100 Ky. 757, 771, 19 Ky.L. 59.

18. U.S.—Fink v. Northwestern Mut Life Ins. Co. of Milwaukee, Wis., D.C.Mich., 29 F.Supp. 972
Ill.—Pingrey v. Rulon, 92 N.E. 592, 246 Ill. 109.
Md.—Safe Deposit & Trust Co. of Baltimore v. Sheehan, 179 A. 536, 169 Md. 93.
Mich.—Union Mut. Aid Ass'n v. Montgomery, 38 N.W. 588, 70 Mich 587, 14 Am.S.R. 519.
N.Y.—In re O'Hanlon's Will, 27 N.Y.S.2d 889.
W.Va.—Burche v. Neal, 149 S.E. 611, 107 W.Va. 559.
"The policy of the law is to stabilize land titles and to favor vested estates."—Weller v. Dinwiddie, 248 S.W. 874, 875, 198 Ky. 360.

19. U.S.—Title Guarantee & Trust Co. v. Ward, C.C.N.Y., 164 F. 459, 468, affirmed 184 F. 447, 107 C.C.A. 41, certiorari denied 31 S.Ct. 723, 220 U.S. 620, 55 L.Ed. 613.
Ill.—Smith v. West, 103 Ill. 332.
N.Y.—In re Trevor's Will, 197 N.Y.S. 719, 726, 120 Misc. 22, modified on other grounds 202 N.Y.S. 862, 207 App.Div. 673, resettled on reargument 204 N.Y.S. 387, 209 App. Div. 1, modified on other grounds 145 N.E. 66, 239 N.Y. 6, reargument denied 147 N.E. 203, 239 N.Y. 579—Butler v. Sherwood, 186 N.Y.S. 712, 114 Misc. 483, affirmed 188 N.Y.S. 242, 196 App.Div. 603, and affirmed 135 N.E. 957, 233 N.Y 655.
N.C.—Ziegler v. Love, 115 S.E. 887, 185 N.C. 40.

20. Ill.—People v. Strom's Estate, 2 N.E 2d 94, 363 Ill. 241—Golladay v. Knock, 85 N.E. 649, 235 Ill. 412, 126 Am.S.R. 224—Smith v. West, 103 Ill. 332, 337.
Mich.—State v. Welch's Estate, 209 N.W. 930, 235 Mich. 555.
Mo.—Schee v. Boone, 243 S.W. 882, 295 Mo 212—Gates v. Seibert, 57 S.W. 1065, 157 Mo. 254, 268, 80 Am. S.R. 625.
N.J.—Carroll v. City of Newark, 158 A. 458, 461, 108 N.J.Law 323, 79 A.L.R. 509.
N.Y.—In re Cochrane's Estate, 190 N.Y.S. 895, 903, 117 Misc. 18, affirmed 194 N.Y.S. 924, 202 App.Div. 807—Butler v. Sherwood, 186 N.Y.S. 712, 714, 114 Misc. 483, affirmed 188 N.Y.S. 242, 196 App.Div. 603, affirmed 135 N.E. 957, 233 N.Y. 655.
N.C.—Ziegler v. Love, 115 S.E. 887, 185 N.C. 40.

21. Ill.—Gray v. Shinn, 127 N.E. 755, 758, 293 Ill. 573—Golladay v. Knock, 85 N.E. 649, 235 Ill. 412, 126 Am.S.R. 224—Strode v. McCormick, 41 N.E 1091, 158 Ill. 142—Smith v. West, 103 Ill. 332, 337.
Mich.—State v. Welch's Estate, 209 N.W. 930, 235 Mich. 555.
Mo.—Schee v. Boone, 243 S.W. 882, 295 Mo. 212—Gates v. Seibert, 57 S.W. 1065, 157 Mo. 254, 268, 80 Am. S.R. 625.
N.J.—Carroll v. City of Newark, 158 A. 458, 461, 108 N.J.Law 323, 79 A.L.R. 509.
N.Y.—Butler v. Sherwood, 186 N.Y.S. 712, 714, 114 Misc. 483, affirmed 188 N.Y.S. 242, 196 App. Div. 603, affirmed 135 N.E. 957, 233 N.Y. 655.
N.C.—Ziegler v. Love, 115 S.E. 887, 888, 185 N.C. 40.

diate interest, as distinguished from an interest the existence of which depends on a contingency,[22] as where there is a person in being who would have an immediate right to the estate on the ceasing of an intermediate or precedent estate or interest.[23]

The word "vested," even when used as descriptive of recognized legal estates, does not exclude defeasible estates.[24] It is used to denote the quality of a present estate, even though defeasible, as distinguished from that the very existence of which is contingent;[25] if there is a present right to a future possession, although that right may be defeated by some future event, contingent or certain, there is nevertheless a vested estate.[26]

An estate is contingent when a right of enjoyment is to accrue on an event which is dubious and uncertain,[27] that is, where either the person who is to enjoy it, or the event on which the estate is to arise, is uncertain.[28]

Vested, executory, or contingent interest. The term "interest," as applied to property, may be vested,[29] executory,[30] or contingent.[31] An interest is vested where there is an immediate fixed right of present or future enjoyment;[32] where there is a right to immediate possession on the determination of the preceding or particular estate;[33] a future interest not dependent on an uncertain period or event.[34] An equitable interest, as well as a legal in-

Ohio.—Cortland First Nat. Bank v. Logue, 106 N.E. 21, 89 Ohio St. 288, L.R.A.1915B 340.
Pa.—Johnston's Estate, 39 A. 879, 185 Pa. 179, 186, 64 Am.S.R. 621—Barton v. Thaw, 41 Pa.Co. 396, 405, 62 Pittsb.Leg.J. 17, affirmed 92 A. 312, 246 Pa. 348, Ann.Cas. 1916D 570.

"In relation to interests of a freehold quality," "by a vested estate . . . is to be understood an interest clothed, as to legal estates, with a legal seisin, or, as to equitable estates, with an equitable seisin, which enables the person to whom the interest is limited to exercise the right of present or future enjoyment immediately, in point of estate."—Anderson v. Menefee, Tex.Civ.App., 174 S.W. 904, 908, error refused—Thornton v. Zea, 55 S.W. 798, 799, 22 Tex.Civ.App. 509, error refused.

22. Pa.—In re McClellan's Estate, 70 A. 737, 221 Pa. 261, 264—Barton v. Thaw, 41 Pa.Co. 396, 405, 62 Pittsb.Leg.J. 17, affirmed 92 A. 312, 246 Pa. 348, Ann.Cas.1916D 570.
W.Va.—Post v. Bailey, 159 S.E. 524, 110 W.Va. 504.

23. Fla.—Story v. First Nat. Bank & Trust Co., in Orlando, 156 So. 101, 115 Fla. 436.
Ill.—Pingrey v. Rulon, 92 N.E. 592, 596, 246 Ill. 109.
Iowa.—Williamson v. Youngs, 203 N.W. 28, 30, 200 Iowa 672.
N.Y.—In re Gates' Estate, 254 N.Y.S. 614, 617, 142 Misc. 83, modified on other grounds 268 N.Y.S. 686, 239 App.Div. 666.

24. N.J.—Clias v. Strike, 96 A. 405, 85 N.J.Eq. 319.

May be absolutely or defeasibly vested

Mich.—L'Etourneau v. Henquenet, 50 N.W. 1077, 1079, 89 Mich. 428, 28 Am.S.R. 310.
N.C.—Pendleton v. Williams, 95 S.E. 500, 502, 175 N.C. 248.

25. N.J.—Clias v. Strike, 96 A. 405, 85 N.J.Eq. 319.

26. Pa.—In re Reed's Estate, 161 A. 729, 730, 307 Pa. 482—Wheaton Coal Co. v. Harris, 135 A. 637, 638, 288 Pa. 294—McCauley's Estate, 101 A. 827, 829, 257 Pa. 377—In re Neel's Estate, 97 A. 502, 505, 252 Pa. 394—In re Long's Estate, 77 A. 924, 926, 228 Pa. 591 Safe Deposit & Trust Co. v. Wood, 50 A. 920, 922, 201 Pa. 420—Manderson v. Lukens, 23 Pa. 31, 34, 62 Am.D. 312.
R.I.—Rhode Island Hospital Trust Co. v. Noyes, 58 A. 999, 1002, 26 R.I. 323.

27. U.S.—Title Guarantee & Trust Co. v. Ward, C.C.N.Y., 164 F. 459, 468, affirmed 184 F. 447, 107 C.C.A. 41, certiorari denied 31 S.Ct. 723, 220 U.S. 620, 55 L.Ed. 613.
Md.—Bishop v. Horney, 9 A.2d 597, 177 Md. 353.
Ohio.—Cortland First Nat. Bank v. Logue, 106 N.E. 21, 89 Ohio St. 288, L.R.A.1915B 340.
21 C.J. p 917 note 76.

Other definitions

A contingent estate is an estate which cannot become a present estate except by fulfillment of a condition precedent other than determination of preceding freehold estate.—Story v. First Nat. Bank & Trust Co., in Orlando, 156 So. 101, 115 Fla. 436.

28. Pa.—In re Gerber's Estate, 46 A. 497, 196 Pa. 366—In re Johnston's Estate, 39 A. 879, 881, 185 Pa. 179, 64 Am.S.R. 621—Barton v. Thaw, 41 Pa.Co. 396, 405, 62 Pittsb. Leg.J. 17, affirmed 92 A. 312, 246 Pa. 348, Ann.Cas.1916D 570.
21 C.J. p 917 note 76 [a].

29. Conn.—Mahoney v. Mahoney, 120 A. 342, 98 Conn. 525.
Minn.—Snortum v. Snortum, 193 N.W. 304, 155 Minn. 230.
N.C.—Henderson Methodist Protestant Church v. Young, 40 S.E. 691, 130 N.C. 8, 13.

30. N.C.—Henderson Methodist Protestant Church v. Young, supra.

31. N.C.—Henderson Methodist Protestant Church v. Young, supra. The word "interest" is usually so construed as to embrace a contingent interest.—Hartigan v. Hartigan, 64 S.E. 726, 65 W.Va. 471, 475, 131 Am.S.R. 973, 17 Ann.Cas. 728.

32. U.S.—Schneider v. Duffy, D.C.N.J., 43 F.2d 642—In re Whiting, D.C.N.C., 3 F.2d 440, 442.
Me.—McManus v. Peerless Casualty Co., 95 A. 510, 114 Me. 93.
N.H.—Stewart v. Harriman, 56 N.H. 25, 29, 22 Am.R. 408.
Ohio.—Alter v. Alter, 31 Ohio C.A. 113.
Pa.—Barton v. Thaw, 92 A. 312, 246 Pa. 348, 357, Ann.Cas.1916D 570.
Wash.—In re Galland's Estate, 173 P. 740, 742, 103 Wash. 106.

Actual physical possession not necessary

U.S.—Schneider v. Duffy, D.C.N.J., 43 F.2d 642, 645.

Contingent interest distinguished

"It is not the uncertainty of enjoyment in the future, but the uncertainty of the right of enjoyment, which makes the difference between a 'vested' and a 'contingent' interest."
Conn.—Mahoney v. Mahoney, 120 A. 342, 345, 98 Conn. 525.
N.H.—Wiggin v. Perkins, 5 A. 904, 64 N.H. 36, 39.

"Present or vested interest"

Ky.—Kalfus v. Davie, 110 S.W. 871, 873, 33 Ky.L. 663.

"Vested right" or "vested interest" may, with reasonable precision, be held to mean some right or interest in property that has become fixed or established.—Snortum v. Snortum, 193 N.W. 304, 306, 155 Minn. 230.
"Vested right" defined see Constitutional Law § 215.

33. N.J.—In re Clark's Estate, 178 A. 574, 13 N.J.Misc. 393.

34. U.S.—In re Whiting, D.C.N.C., 3 F.2d 440, 442.

Future right distinguished

A "vested interest" is a present

terest in property may be a vested one.[35]

"Executory interest" is a general term, comprising all future estates and interests in land or personalty, other than reversions or remainders.[36]

A contingent interest is one in which there is no present fixed right of either present or future enjoyment, but in which a fixed right will arise in the future under certain specified contingencies.[37]

Legal or equitable estate or interest. Estates or interests in property are also classified as legal or equitable.[38] An equitable estate or interest is an estate or interest acquired by operation of equity, or cognizable in a court of equity.[39] The term is applied to the collateral obligations of trust which were not known at law as interests in land.[40] It is not, however, strictly speaking, an interest in the land itself, but a right which can be enforced in equity;[41] that which can be sustained or made effective or available in a court of equity;[42] the interest which a man has in lands, tenements, or hereditaments which can be enforced only in a court of chancery.[43] An equitable estate is considered, to all intents and purposes, as a legal estate.[44]

A legal estate or interest is an estate or interest which can be enforced in a court of law;[45] an estate or interest vesting by operation of law on an event certain.[46] In contemplation of law there is and can be but one estate, which may properly be denominated the "legal estate,"[47] but owing to the introduction of uses and trusts there has grown up a double ownership of lands, and the interests which are cognizable as such only in a court of equity have taken the name "equitable" to distinguish them from "legal" estates.[48]

§ 6. With Regard to Quantity of Interest

With regard to quantity of interest, estates are of freehold or less than freehold.

With regard to the quantity of interest which the tenant has in the tenement, estates are classified as estates of freehold and estates less than freehold.[49]

§ 7. Estates of Freehold

An estate of freehold is an estate of indeterminate duration other than an estate at will or by sufferance. An estate of inheritance is an estate which may descend to heirs.

right or title to a thing, which carries with it an existing right of alienation, even though the right to possession or enjoyment may be postponed to some uncertain time in the future, as distinguished from a future right, which may never materialize or ripen into title.—Fidelity & Columbia Trust Co. v. Tiffany, 260 S.W. 357, 359, 202 Ky. 618.

Mere expectancy not sufficient

A "vested interest" is not one creating a mere expectancy.—McManus v. Peerless Casualty Co., 95 A. 510, 114 Me. 98.

35. Ohio.—Cortland First Nat. Bank v. Logue, 106 N.E. 21, 89 Ohio St. 288, 295, L.R.A.1915B 340.

36. Black L.D.
Executory interests discussed see infra §§ 119–122.

37. Pa.—Barton v. Thaw, 92 A. 312, 315, 246 Pa. 348, Ann.Cas.1916D 570.

An interest is "contingent" if, in order for it to come in possession, there is necessary the fulfillment of some condition precedent other than the determination of the preceding freehold estate.—In re Clark's Estate, 178 A. 574, 13 N.J.Misc. 393.
"Contingent interest" in general see 17 C.J.S. p 184.

38. N.J.—In re Vail, 133 A. 866, 867, 99 N.J.Eq. 598.

39. Ind.—Brown v. Freed, 43 Ind. 253, 256.
Or.—Sayre v. Mohney, 47 P. 197, 198, 30 Or. 238.
20 C.J. 1303 notes 73, 77.

Similar definition

An equitable interest is such an interest as a court of equity can pursue and appropriate to the discharge of debts.—Leathwhite v. Bennet, N.J.Ch., 11 A. 29, 30.

"Equitable title" distinguished

Ind.—Robertson v. Vancleave, 26 N.E. 899, 29 N.E. 781, 129 Ind. 217, 15 L.R.A. 68.

40. Mo.—McIlvaine v. Smith, 42 Mo. 45, 55, 56, 97 Am.D. 295.

"An equitable interest in land" is "such an interest only as might furnish a ground for equitable relief against the trustee to enforce the execution of the trust, or 'an equitable chose in action.'"—McIlvain v. Smith, supra.

41. R.I.—In re Qualifications of Electors, 35 A. 213, 19 R.I. 387.

An "equitable estate" or "interest" in land, generally speaking, is some definite right or interest in the property such as will furnish ground for equitable relief against a trustee or any person asserting a hostile right or interest.—Curtis v. Reilly, 177 N.W. 535, 188 Iowa 1217.

42. Pa.—Provident Life & Trust Co. v. McCaughn, 91 A. 672, 674, 245 Pa. 370.

43. Cal.—Austin v. American Surety Co. of New York, 4 P.2d 577, 578, 118 Cal.App. 68.
Ohio.—Avery v. Dufrees, 9 Ohio 145, 147.
20 C.J. p 1303 note 79.

44. N.J.—Zelley v. Zelley, 136 A. 738, 101 N.J.Eq. 37.

Equitable estates are in equity what legal estates are in law

The ownership of the equitable estate is regarded by equity as the real ownership, and the legal estate is, as has been said, no more than the shadow always following the equitable estate, which is the substance.
U.S.—Credit Finance Corporation v. Hale & Perry, C.C.A.Colo., 66 F.2d 357, 358.
Cal.—Title Ins. & Trust Co. v. Dufill, 218 P. 14, 191 Cal. 629.
Mont.—Town of Cascade v. Cascade County, 243 P. 806, 808, 75 Mont. 304.

45. Ohio.—Avery v. Dufrees, 9 Ohio 145, 147.

46. U.S.—Sandoval v. Priest, Tex., 210 F. 814, 816, 127 C.C.A. 364.

47. Or.—Sayre v. Mohney, 47 P. 197, 30 Or. 238.
R.I.—In re Qualifications of Electors, 35 A. 213, 19 R.I. 387.
21 C.J. p 916 note 62.

48. Or.—Sayre v. Mohney, 47 P. 197, 30 Or. 238, 242.

49. Ill.—Fowler v. Marion & Pittsburg Coal Co., 146 N.E. 318, 315 Ill. 312.
Ohio.—Ralston Steel Car Co. v. Ralston, 147 N.E. 513, 516, 112 Ohio St. 306, 39 A.L.R. 334—Lape v. Lape, 22 Ohio N.P., N.S., 392, 394.
21 C.J. p 917 note 82.

An estate of freehold has been defined to be an estate of indeterminate duration other than an estate at will or by sufferance, such as an estate in fee simple, an estate for life, an estate durante viduitate, or an estate during coverture.[50] Its meaning may depend on express statutory provisions[51] or it may be used in a statute in the same sense as at common law.[52] It has been said that at common law a freehold cannot be created to commence in futuro,[53] but in some states the rule is now otherwise.[54]

Estates of freehold are either estates of inheritance or estates not of inheritance,[55] all being estates of inheritance except estates for life.[56]

Freehold of inheritance. An estate of inheritance is an estate which may descend to heirs.[57] Estates of inheritance are generally divided into inheritances absolute or fee simple, and inheritances limited.[58]

Fee in abeyance. The fee simple inheritance of

50. U.S.—Magnolia Petroleum Co. v. Thompson, C.C.A.Mo., 106 F.2d 217, certiorari denied Thompson v. Magnolia Petroleum Co., 60 S.Ct. 180, 308 U.S. 613, 84 L.Ed. 180, 308 U.S. 613, 84 L.Ed. 513, rehearing granted 60 S.Ct. 261, 308 U.S. 630, 84 L.Ed. 525, reversed on other grounds 60 S.Ct. 628, 309 U.S. 478, 84 L.Ed. 876.

Ill.—Randolph v. Wilkinson, 128 N.E. 525, 294 Ill. 508.

Ky.—Payne v. Fiscal Court of Carlisle County, 252 S.W. 127, 129, 200 Ky. 41.

Ohio.—Ralston Steel Car Co. v. Ralston, 147 N.E. 513, 112 Ohio St. 306, 39 A.L.R. 334—Lape v. Lape, 22 Ohio N.P., N.S., 392, 394.

21 C.J. p 917 note 83.

Similar definitions

(1) "Any estate of inheritance or for life in either a corporeal or incorporeal hereditament existing or arising from real property of free tenure."

Colo.—Wyatt v. Larimer & Weld Irrigation Co., 33 P. 144, 147, 18 Colo. 298, 36 Am.S.R. 280.

Ill.—Fowler v. Marion & Pittsburg Coal Co., 146 N.E. 318, 319, 315 Ill. 312.

(2) "An interest as much as, or more than, a life estate in land either for the life of the holder or pur autre vie."—Payne v. Fiscal Court of Carlisle County, 252 S.W. 127, 129, 200 Ky. 41.

(3) "A right of title to land."—Cohn v. Litwin, 35 N.E.2d 410, 412, 311 Ill.App. 55.

(4) Other similar definitions see 21 C.J. p 917 notes 83 [a], [b].

A leasehold for ninety-nine years, renewable forever, is a freehold estate.—Ralston Steel Car Co. v. Ralston, 147 N.E. 513, 112 Ohio St. 306, 39 A.L.R. 334.

A water right may constitute a freehold estate.—Daum v. Conley, 59 P. 753, 755, 27 Colo. 56—21 C.J. p 917 note 84.

Easement as freehold estate see Easements § 1 b.

"Freeholder" see 27 C.J. p 896 notes 39–58.

Homestead as freehold estate see the C.J.S. title Homesteads § 3, also 29 C.J. p 784 note 35.

Life estate as freehold see infra § 30.

51. Ky.—Payne v. Fiscal Court of Carlisle County, 252 S.W. 127, 129, 200 Ky. 41, quoting Corpus Juris.

Mass.—Stark v. Mansfield, 59 N.E. 643, 178 Mass. 76.

S.D.—State v. Weide, 135 N.W. 696, 29 S.D. 109.

21 C.J. p 917 note 87.

In New York, by statute, estates of inheritance are denominated "estates of freehold."—Nellis v. Munson, 15 N.E. 739, 108 N.Y. 453.

52. Ill.—Streator Independent Tel. & Tel. Co. v. Interstate Independent Tel. & Tel. Co., 142 Ill.App. 183.

Ky.—Payne v. Fiscal Court of Carlisle County, 252 S.W. 127, 129, 200 Ky. 41.

53. Ky.—Payne v. Fiscal Court of Carlisle County, supra.

21 C.J. p 917 note 89.

54. Tex.—Glenn v. Holt, Civ.App., 229 S.W. 684.

Vt.—Blair v. Blair, 10 A.2d 188.

21 C.J. p 917 note 90.

Abrogating common-law rule

A statute providing that an estate of freehold or inheritance may be made to commence in futuro by deed or conveyance in like manner as by will, abrogates the common-law rule that a freehold to commence in futuro could not be conveyed, and has reference to estates in expectancy other than estates in reversion and remainder.—Glenn v. Holt, Tex.Civ.App., 229 S.W. 684.

55. Ill.—Randolph v. Wilkinson, 128 N.E. 525, 294 Ill. 508.

Ky.—Payne v. Fiscal Court of Carlisle County, 252 S.W. 127, 129, 200 Ky. 41, citing Corpus Juris.

Neb.—Crawl v. Harrington, 49 N.W. 1118, 33 Neb. 107, 112.

Or.—Beirl v. Columbia County, 144 P. 457, 73 Or. 107.

56. Ky.—Payne v. Fiscal Court of Carlisle County, 252 S.W. 127, 129, 200 Ky. 41, citing Corpus Juris.

21 C.J. p 917 note 92.

57. Tenn.—Administration & Trust Co. v. Catron, 102 S.W.2d 59, 60, 171 Tenn. 268, quoting Corpus Juris.

W.Va.—Couch v. Eastman, 73 S.E. 314, 315, 69 W.Va. 710, 39 L.R.A., N.S., 307.

21 C.J. p 917 note 93.

Similar definitions

(1) "One which descends or may descend to the heir upon the death of the ancestor."—Quinn v. Ladd, 59 P. 457, 37 Or. 261, 267—31 C.J. p 1199 note 87.

(2) "A perpetuity in lands to a man and his heirs."—Cummings v. Cummings, 75 A. 210, 76 N.J.Eq. 568, 570—31 C.J. p 1199 note 88.

(3) "A species of freehold estate in lands, otherwise called a fee, where the tenant is not only entitled to enjoy the land for his own life, but where, after his death, it is cast by the law upon the persons who successively represent him in perpetuum, in right of blood, according to a certain established order of descent."

Ark.—Roulston v. Hall, 50 S.W. 690, 692, 66 Ark. 305, 309, 74 Am.S.R. 97.

Ind.—Brown v. Freed, 43 Ind. 253, 256.

Ohio.—George v. George, 200 N.E. 142, 143, 51 Ohio App. 169.

(4) "A possession received by gift or without purchase."—In re White, 84 P. 831, 42 Wash. 360, 362.

"An estate acquired by inheritance is one that descends upon the heir and is cast upon him by the single operation of law."—Larrabee v. Tracy, 104 P.2d 61, 39 Cal.App.2d 593—21 C.J. p 917 note 93 [c].

An estate less than freehold is not an estate of inheritance at common law.—Crawl v. Harrington, 49 N.W. 1118, 33 Neb. 107.

A full equitable title to real estate and a beneficial interest therein, the holder of the legal title having no duty to perform except to convey to the holder of the equitable title, is an estate of inheritance.

Ohio.—George v. George, 200 N.E. 142, 143, 51 Ohio App. 169.

Wis.—Harley v. Harley, 122 N.W. 761, 140 Wis. 282.

58. Neb.—Crawl v. Harrington, 49 N.W. 1118, 33 Neb. 107, 112.

21 C.J. p 918 note 94.

lands and tenements is generally vested and resides in some person or other, although various inferior estates may be carved out of it.[59] However, it has been said that the fee may be in abeyance, that is, in expectation, remembrance, and contemplation in law, where there is no person in esse in whom it can vest and abide, although the law considers it as always potentially existing and ready to vest whenever a proper owner appears,[60] but this theory was never recognized unless in cases of extreme necessity.[61]

Freeholds not of inheritance are estates for life only.[62]

§ 8. Fee Simple

a. Definition and application of term
b. Nature and incidents

a. Definition and Application of Term

A fee simple estate is one by which a tenant holds lands, tenements, or hereditaments to himself and his heirs forever. The terms "fee," "fee simple," and "fee simple absolute" are substantially synonymous.

A tenant in fee simple is he that hath lands, tenements, or hereditaments, to hold to him and his heirs forever; generally, absolutely, and simply, without mentioning what heirs, but referring that to his own pleasure, or to the disposition of the law;[63] an estate of inheritance without condition, belonging to the owner, and alienable by him or transmissible to his heirs absolutely and simply;[64] an estate or interest in land of one holding absolute and exclusive control and dominion over it, no matter how acquired.[65] "Fee simple" and "fee" are generally used as convertible terms,[66] and it has been held that the several terms "fee," "fee simple," and "fee simple absolute" are substantially synonymous,[67] and that an absolute estate is a fee simple.[68] However, "fee simple" does not necessarily mean a "fee simple absolute,"[69] as the former term may be applied to a base or determinable fee[70] or to a fee condi-

59. "A fee-simple estate must either vest or not vest, and once vested it is indefeasible."—Farrar v. Bingham, 93 F.2d 252, 256, 68 App.D.C. 93.

60. U.S.—Illinois Cent. R. Co. v. Bosworth, La., 10 S.Ct. 231, 133 U.S. 92, 100, 33 L.Ed. 550, quoting 2 Blackstone Comm. p 107—West Tennessee Co. v. Townes, D.C. Miss., 52 F.2d 764, 767.
21 C.J. p 921 note 42.

"Fee always abides somewhere, either in possession or expectancy."—West Tennessee Co. v. Townes, supra.

61. Ind.—Alsman v. Walters, 106 N.E. 879, 111 N.E. 921, 184 Ind. 565.

62. Ohio.—Lape v. Lape, 22 Ohio N.P., N.S., 392, 394, quoting **Corpus Juris.**
Life estates see infra § 30.

63. Kan.—Coleman v. Shoemaker, 78 P.2d 905, 908, 147 Kan. 689, quoting **Corpus Juris.**
La.—Wilson v. Aetna Ins. Co., App., 161 So. 650, 652.
Mich.—Rathbun v. State, 280 N.W. 35, 40, 284 Mich. 521, quoting **Corpus Juris.**
21 C.J. p 918 note 95.

Similar definitions
(1) "Every estate which is not for life, for years, or at will."
N.Y.—Phoenix v. Emigration Com'rs., 12 How.Pr. 1, 10.
Or.—Chance v. Weston, 190 P. 155, 96 Or. 390.
(2) Other similar definitions see 21 C.J. p 918 note 95 [c].

"Lease" distinguished
Vt.—Powers v. Trustees of Caledonia County Grammar School, 106 A. 836, 93 Vt. 220.

64. Fla.—Reid v. Barry, 112 So. 846, 93 Fla. 849.
Ill.—Woods v. Seymour, 183 N.E. 458, 460, 350 Ill. 493.
Miss.—Boxley v. Jackson, 2 So.2d 160.
Or.—Chance v. Weston, 190 P. 155, 158, 96 Or. 390.
R.I.—Stanton v. Sullivan, 7 A.2d 696, 698.
Wash.—Bartlett v Bartlett, 48 P.2d 560, 183 Wash. 278.
21 C.J. p 918 note 95 [c] (2), (3), (5).

A "fee" signifies an estate of inheritance, and a "fee simple" is an absolute inheritance clear of any condition, limitation, or restriction to particular heirs.—Coleman v. Shoemaker, 78 P.2d 905, 147 Kan. 689.

In New York, under Real Prop. L. § 31, an estate of inheritance is a fee simple or fee, and when not defeasible or conditional is a fee simple absolute, or an absolute fee.—In re Bensel, 125 N.Y.S. 128, 140 App Div. 257, rehearing denied 126 N.Y.S. 1121, 140 App.Div. 944, affirmed 94 N.E. 1091, 201 N.Y. 531—In re New York, 77 N.Y.S. 737, 74 App.Div. 197, 206.

65. Md.—Trustees of Sheppard & Enoch Pratt Hospital v. Swift & Co., 13 A.2d 174, 178 Md. 200—Arnd v. Lerch, 159 A. 587, 162 Md. 318.

A permanent leasehold estate, renewable forever, is not a fee simple, although it has many of the incidents thereof, but the fee simple remains in the lessor, his heirs, devisees, or assigns.
Mass.—Fulgenitti v. Cariddi, 198 N.E. 258, 292 Mass. 321.
Ohio.—Rawson v. Brown, 136 N.E. 209, 104 Ohio St 537.

66. Or.—Chance v. Weston, 190 P. 155, 96 Or. 390.
21 C.J. p 919 note 96.

"The word 'fee' alone, without any qualifying words, serves to designate a fee simple estate, and is not infrequently used in that sense."—Stanton v. Sullivan, R.I., 7 A.2d 696, 698.

"Fee" in original sense, as signifying right of tenant to use of land held of a superior.—Cummings v. Cummings, 75 A. 210, 76 N.J.Eq. 568—21 C.J. p 918 note 95 [e].

67. Ill.—Boon v. Boon, 180 N.E. 792, 348 Ill. 120.
21 C.J. p 919 note 97.

68. Miss.—Boxley v. Jackson, 2 So. 2d 160.
Mo.—Middleton v. Dudding, 183 S.W. 443, 444.

"'Fee simple' and 'absolute property' are convertible and interchangeable or definitions each of the other."—Middleton v. Dudding, supra.

69. Ill.—Orr v. Yates, 70 N.E. 731, 209 Ill. 222.
Ky.—Payne v. Fiscal Court of Carlisle County, 252 S.W. 127, 200 Ky. 41.
Mass.—Richardson v. Noyes, 2 Mass. 56, 3 Am.D. 627.
21 C.J. p 919 note 99.

It may be encumbered and still be a fee-simple estate.—Hughes v. Millers' Mut. Fire Ins. Co., 246 S.W. 23, 147 Tenn. 164, 28 A.L.R. 797.

70. Ky.—Payne v. Fiscal Court of Carlisle County, 252 S.W. 127, 129, 200 Ky. 41.
21 C.J. p 919 note 1.

tional,[71] while the latter, "fee simple absolute," can be applied only to an estate which is limited absolutely to a man and his heirs and assigns forever without limitation or condition.[72] The material difference between a fee simple and other fees is that the former estate will, the latter may, continue forever.[73]

"Fee simple" is a common-law term corresponding to what in the civil law is a "perfect title;"[74] and the term "fee simple absolute" means a perfect title; the entire and absolute interest and property in the land, from which it follows that no one can have a greater estate.[75]

A fee-simple estate may be either legal or equitable,[76] as the term "fee simple" is not generally used to distinguish between legal and equitable estates, but is used to denote the quantity or duration of estates, whether the enjoyment is limited or unlimited in point of continuance or duration.[77]

Ordinarily the term "fee" or "fee simple" applies to an estate in land, but it may be applied to any kind of hereditament, corporeal or incorporeal.[78]

"Fee" and "power of disposition" distinguished. There is a wide distinction between a title in fee and a power to dispose of property, as under the latter the fee is not in the donee, but he has a dominion over the fee, which he may exercise at his option and on his failure to exercise it the fee never rests in him.[79] Under some statutes, however, where an absolute power of disposition, not accompanied by any trusts, is given to the owner of a particular estate for life or for years, such estate is changed into a fee absolute with respect to the rights of creditors and purchasers, but subject to any future estate limited thereon, in case the power is not executed.[80]

Lay fee. A fee held by ordinary feudal tenure, as distinguished from the ecclesiastical tenure of frankalmoign, by which an ecclesiastical corporation held of the donor.[81]

Quasi fee. An estate gained by wrong.[82]

b. Nature and Incidents

(1) In general
(2) Alienation

(1) In General

A fee-simple estate is the greatest estate a person can possess in landed property; an absolute estate in perpetuity.

An estate in fee simple is the greatest estate and most extensive interest which a person can possess in landed property,[83] being an absolute estate in

71. Mich.—Rathbun v. State, 200 N. W. 35, 40, 284 Mich. 521.
21 C.J. p 919 note 2.

72. Ill.—Doe v. Ballance, 7 Ill. 141.
A "fee simple absolute estate" is an estate not subject to a special limitation or a condition subsequent or an executory limitation.—Chidester v. City of Newark, D.C.N.J., 31 F.Supp. 892, reversed on other grounds, C.C.A., 117 F.2d 981.

73. N.Y.—Waldron v. Gignint, 6 Hill. 601.
Other distinction stated
"Fee simple" means an estate limited to a man and his heirs absolutely, as distinguished from a "fee-tail," which is limited to certain classes of heirs, a "determinable fee," a "qualified fee," and a "conditional fee," which includes one that is either to commence or determine on some condition.—Wilson v. Ætna Ins. Co., La. App., 161 So. 650, followed in Wilson v. Royal Ins. Co., 161 So. 653.
"Estate tail" distinguished
A "fee simple" estate is contrary to the inheritance of the heirs of the body of the life tenant and is different from an "entailed estate."—Boxley v. Jackson, Miss., 2 So.2d 160.

74. La.—Wilson v. Royal Ins. Co., App., 161 So. 653, followed in Wilson v. Ætna Ins. Co., 161 So. 650.
"Perfect ownership" gives the right to use, to enjoy, and to dispose of one's property in the most unlimited manner, and these rights, termed the "usus," "fructus," and "abusus," must be united in the same person to constitute "perfect ownership."—Wilson v. Ætna Ins. Co., La.App., 161 So. 650, followed in Wilson v. Royal Ins. Co., 161 So. 653.

75. Ill.—Frink v. Darst, 14 Ill. 304, 308, 58 Am.D. 575.
21 C.J. p 918 note 95 [f].

76. Tenn.—Hughes v. Millers' Mut. Fire Ins. Co., 246 S.W. 23, 147 Tenn. 164, 28 A.L.R. 797.
Tex.—Texas Creosoting Co. v. Hartburg Lumber Co., Com.App., 16 S.W.2d 255, denying rehearing 12 S.W.2d 169, which affirmed, Civ. App., 298 S.W. 645.

77. Mich.—Rathbun v. State, 280 N. W. 35, 40, 284 Mich. 521, quoting Corpus Juris.
21 C.J. p 919 note 5.

78. Ariz.—In re Forsstrom, 38 P.2d 378, 44 Ariz. 472.
Ill.—Oswald v. Wolf, 19 N.E. 28, 126 Ill. 542, 548.

79. N.Y.—Matter of Briggs, 167 N. Y.S. 632, 101 Misc. 191, modified on other grounds 168 N.Y.S. 597, 180 App.Div. 752.

80. Ala.—Alford v. Alford, 56 Ala. 350.
N.Y.—Deegan v. Wade, 39 N.E. 692, 144 N.Y. 573—Hume v. Randall, 36 N.E. 402, 141 N.Y. 499 Crooke v. Kings County, 97 N.Y. 421—Cutting v. Cutting, 86 N.Y. 522.
Wis.—Auer v. Brown, 98 N.W. 966, 121 Wis. 115—Larsen v. Johnson, 47 N.W. 615, 78 Wis. 300, 22 Am. S.R. 404.

81. Black L.D.

82. Bouvier L.D.

83. Ariz.—In re Forsstrom, 38 P.2d 378, 44 Ariz. 472.
Ga.—Regents of University System v. Trust Co. of Georgia, 198 S.E. 345, 186 Ga. 498, 121 A.L.R. 125.
Mich.—Rathbun v. State, 280 N.W. 35, 40, 284 Mich. 521, quoting Corpus Juris.
Or.—Chance v. Weston, 190 P. 155, 156, 96 Or. 390.
R.I.—Stanton v. Sullivan, 7 A.2d 696, 698.
Wash.—Bartlett v. Bartlett, 48 P.2d 560, 183 Wash. 278.
W.Va.—Ealy v. Shetler Ice Cream Co., 150 S.E. 531, 539, 108 W.Va. 128, 66 A.L.R. 518.
21 C.J. p 919 note 7.
"The grant of a fee in land conveys to the grantee complete ownership, immediately and forever, with the right of possession from bound-

perpetuity.[84] It embraces all of the estates that may be carved therefrom,[85] and there can be but one estate in fee simple to a particular described tract of land.[86] It is not subject to a special limitation or a condition subsequent or an executory limitation.[87]

A title in fee or fee simple is a full and absolute estate, beyond and outside of which there is no other interest or right;[88] a title to the whole of the thing absolutely;[89] it is an indefeasible title or estate, in which is blended the right of possession and the right of property.[90]

A fee simple estate is liable for the debts of the owner thereof,[91] and the tenant of the estate may devise it,[92] notwithstanding restraints on his power of alienation.[93]

Descent. One of the essential qualities of a fee simple estate is that it is one of inheritance, one which passes, on the death of the ancestor, to all the heirs generally, and not to a particular heir or set of heirs.[94]

(2) Alienation

The right of alienation is an inseparable incident to an estate in fee, and the imposition of any restraint thereon is generally repugnant to the estate and against the policy of the law.

Since the statute quia emptores, and similar statutes, the right of alienation has been considered an inseparable incident to an estate in fee, and it is repugnant to the estate conveyed and against the policy of the law to allow restraints to be imposed on the alienation of such an estate,[95] except to the

ary to boundary and from the center of the earth to the sky, together with all the lawful uses thereof."—Magnolia Petroleum Co. v. Thompson, C.C.A.Mo., 106 F.2d 217, 224, certiorari denied Thompson v. Magnolia Petroleum Co., 60 S.Ct. 180, 308 U.S. 613, 84 L.Ed. 180, rehearing granted 60 S.Ct. 261, 308 U.S. 630, 84 L.Ed. 525, reversed on other grounds 60 S.Ct. 628, 309 U.S. 478, 84 L.Ed. 876.

Fee-simple estate as subject to:
Curtesy see Curtesy § 11.
Dower see Dower § 17.
Forfeiture see the C.J.S. title Forfeitures § 3, also 25 C.J. p 1171 note 38.

84. Mich.—Rathbun v. State, 280 N.W. 35, 40, 284 Mich. 521.
Mo.—Middleton v. Dudding, 183 S.W. 443, 444.
R.I.—Stanton v. Sullivan, 7 A.2d 696.
Vt.—Powers v. Trustees of Caledonia County Grammar School, 106 A. 836, 841, 93 Vt. 220.
Wash.—Bartlett v. Bartlett, 48 P.2d 560, 183 Wash. 278.
W.Va.—Ealy v. Shetler Ice Cream Co., 150 S.E. 531, 539, 108 W.Va. 128, 66 A.L.R. 518.
21 C.J. p 919 note 8.

85. U.S.—Rothensies v. Fidelity-Philadelphia Trust Co., C.C.A.Pa., 112 F.2d 758.

86. Mich.—In re McBride's Estate, 235 N.W. 166, 253 Mich. 305.
Tex.—Humphreys-Mexia Co. v. Gammon, 254 S.W. 296, 113 Tex. 247, 29 A.L.R. 607, modifying Gammon v. Humphreys-Mexia Oil Co., Civ. App., 244 S.W. 162.

A fee cannot be limited after a fee.—Briggs v. Faulkner, 183 A. 712, 120 N.J.Eq. 1—Tooker v. Tooker, 64 A. 806, 71 N.J.Eq. 513.

87. U.S.—Chidester v. City of Newark, D.C.N.J., 31 F.Supp. 892, reversed on other grounds, C.C.A., 117 F.2d 981.
Kan.—Coleman v. Shoemaker, 78 P.2d 905, 147 Kan. 689.

An absolute estate is one which cannot be defeated or changed by any condition, restriction, or limitation.—Falconer v. Buffalo & J. R. Co., 69 N.Y. 491, affirmed 103 U.S. 821, 26 L.Ed. 471.

88. Pa.—Long for Use of Gordon v. Daylor, 46 Dauph.Co. 162.
Tenn.—Malone v. Peay, 7 S.W.2d 40, 157 Tenn. 429—Bailey v. Henry, 143 S.W. 1124, 125 Tenn. 390.
21 C.J. p 918 note 95 [c] (7).

Similar definition
An estate unlimited as to duration, disposition, and descendibility.—Slayden v. Hardin, 79 S.W.2d 11, 257 Ky. 685.

89. Ind.—Dumont v. Dufore, 27 Ind. 263.
21 C.J. p 918 note 95 [h].

To acquire fee-simple title to land, recipient must get estate that may last forever, having no termination, one recipient may dispose of as he chooses by will, deed, or otherwise, and one descendible, not to some of recipient's heirs, but to any and all heirs recipient may have.—Sumner v. Borders, 98 S.W.2d 918, 266 Ky. 401—Slayden v. Hardin, 79 S.W.2d 11, 257 Ky. 685.

90. Tenn.—Malone v. Peay, 7 S.W. 2d 40, 43, 157 Tenn. 429.

Includes complete dominion
Ky.—Bain v. Hardin, 4 S.W.2d 745, 223 Ky. 792.

"Ownership in fee simple implies something more than being the holder of the naked legal title to land. It implies an indefeasible legal title—the entire title and estate in land."—U. S. v. Hyde, D.C.Cal., 132 F. 545, 550, affirmed 25 S.Ct. 760, 199 U.S. 62, 50 L.Ed. 90.

91. Va.—Scott v. Patterson, 51 S.E. 848, 104 Va. 455—Hutchinson v. Maxwell, 40 S.E. 655, 100 Va. 169, 93 Am.S.R. 944, 57 L.R.A. 384.
21 C.J. p 921 note 37.

Exemption provision invalid
A provision in the deed or will creating such estate, exempting it from such liability, is void.—Lathrop v. Merrill, 92 N.E. 1019, 207 Mass. 6—21 C.J. p 921 note 38.

92. Conn.—Hemingway v. Hemingway, 22 Conn. 462.
Md.—Fairfax v. Brown, 60 Md. 50.
Wash.—Bartlett v. Bartlett, 48 P.2d 560, 183 Wash. 278.
What property may pass by will generally see the C.J.S. title Wills § 76, also 68 C.J. p 490 note 2—p 492 note 22.

93. Pa.—Reynolds v. Crispin, 11 A. 236, 8 Pa.Cas. 252.

94. Ky.—Slayden v. Hardin, 79 S.W. 2d 11, 257 Ky. 685.
21 C.J. p 921 note 31.
Property subject to descent generally see Descent and Distribution § 8.

95. Ky.—Ramey v. Ramey, 243 S.W. 934, 195 Ky. 673.
Mass.—Eastman Marble Co. v. Vermont Marble Co., 128 N.E. 177, 236 Mass. 138.
N.Y.—De Peyster v. Michael, 6 N.Y. 467, 57 Am.D. 470.
N.C.—Stokes v. Dixon, 108 S.E. 913, 182 N.C. 323—Smith v. Witter, 94 S.E. 402, 174 N.C. 616—Holloway v. Green, 83 S.E. 243, 167 N.C. 91—American Trust Co. v. Nicholson, 78 S.E. 152, 162 N.C. 257—Christmas v. Winston, 67 S.E. 58, 152 N.C. 48, 27 L.R.A.,N.S., 1084.
Tenn.—Scruggs v. Mayberry, 188 S.W. 207, 135 Tenn. 586.
Vt.—Powers v. Trustees of Caledonia County Grammar School, 106 A. 836, 93 Vt. 220.
Wash.—Gladstone Mountain Mining Co. v. Tweedell, 232 P. 306, 132 Wash. 441.

extent that they are necessary to accomplish some purpose which justifies a departure from such policy.[96]

A general restraint on alienation, whether by deed or will, is undoubtedly void.[97] The rule against such restraints, however, applies only where the grant in the first instance conveys an absolute fee-simple estate,[98] and not where the original grantor does not part with all the incidents of the fee,[99] as where he conveys only a base or qualified fee.[1]

Limited or partial restraint. The rule against restraint on alienation has been held not to apply with respect to a restraint which is limited or partial,[2] and not inconsistent with the reasonable enjoyment of the fee.[3] However, in order to make a partial or limited restriction on alienation good, there must be a provision for a reversion or limitation over on violation of the restricting clause.[4]

Reasonable restraint. The rule prevailing in some states is that a reasonable restraint may be imposed on alienation,[5] what is a reasonable restraint being a matter for determination on the particular circumstances of each case.[6]

Restraint for limited time. According to some decisions, a restraint on the alienation of such an estate, for a limited time, is void;[7] but there are decisions[8] and dicta[9] to the contrary.

Restraint to particular persons. It has also been held that a restraint against alienation to a particular person or class of persons is valid,[10] but there is authority to the contrary.[11] If the restriction allows alienation only to certain persons or classes of persons, it is invalid.[12]

Restraint to control of other person. A restriction which makes the right to alien a fee subject to the control of other persons is invalid.[13]

W.Va.—McCreery v. Johnston, 110 S.E. 464, 90 W.Va. 80.
21 C.J. p 920 note 11.

Grantee of a fee-simple estate "may use, convey, or devise at pleasure, without condition or limitation."—Antley v. Antley, 128 S.E. 31, 32, 132 S.C. 306.

"Prior to the statute quia emptores, a condition against alienation would in England have been good."—Mandlebaum v. McDonell, 29 Mich. 78, 94, 18 Am.R. 61—21 C.J. p 919 note 9 [a].

Creation of fee conditional distinguished
S.C.—Antley v. Antley, 128 S.E. 31, 32, 132 S.C. 306.

Limitation on alienation as a perpetuity within the rule against perpetuities see the C.J.S. title Perpetuities §§ 2–4, also 48 C.J. p 934 note 12–p 942 note 87.

Restraint on alienation in:
Deed:
As affecting grant of fee see Deeds § 134 b.
Validity of condition or restriction generally see Deeds § 145.
Will:
As affecting devise of fee see the C.J.S. title Wills § 829, also 69 C.J. p 462 note 17–p 463 note 26.
Validity of restriction generally see the C.J.S. title Wills § 980, also 69 C.J. p 661 note 61–p 664 note 5.

96. W.Va.—McCreery v. Johnston, 110 S.E. 464, 90 W.Va. 80.

97. Mo.—Elliott v. Delaney, 116 S.W. 494, 217 Mo. 14.
Tex.—Diamond v. Rotan, 124 S.W. 196, 58 Tex.Civ.App. 263, error refused.
21 C.J. p 920 notes 12, 13.

98. Pa.—Pennsylvania Horticultural Society v. Craig, 87 A. 678, 240 Pa. 137.

99. Pa.—Pennsylvania Horticultural Society v. Craig, supra.

1. Pa.—Pennsylvania Horticultural Society v. Craig, supra.

2. Iowa.—Porter v. Tracey, 162 N.W. 800, 179 Iowa 1295.
Pa.—Kaufman v. Burgert, 45 A. 725, 195 Pa. 274, 78 Am.S.R. 813.
21 C.J. p 920 note 14.

3. Iowa.—Porter v. Tracey, 162 N.W. 800, 179 Iowa 1295.
Pa.—McCullough v. Gilmore, 11 Pa. 370—McWilliams v. Nisly, 2 Serg. & R. 507, 7 Am.D. 654.

4. Mich.—Mandlebaum v. McDonell, 29 Mich. 78, 18 Am.R. 61.
21 C.J. p 920 note 16.

5. Ky.—Francis v. Big Sandy Co., 188 S.W. 345, 171 Ky. 209—Kentland Coal & Coke Co. v. Keen, 183 S.W. 247, 168 Ky. 836, L.R.A.1916D 924.
21 C.J. p 920 note 17.

6. Ky.—Chappell v. Frick, 179 S.W. 203, 166 Ky. 311.
Ohio.—Anderson v. Cary, 36 Ohio St. 506, 38 Am.R. 602.

During lifetime of grantor
A provision in a deed restraining alienation by the grantee during the life time of the grantor is not invalid under a statute declaring void a provision restraining alienation for a longer time than a life or lives in being at the creation of the estate.—Kentland Coal & Coke Co. v. Keen, 183 S.W. 247, 168 Ky. 836, L.R.A.1916D 924—Pond Creek Coal Co. v. Runyon, 170 S.W. 501, 161 Ky. 64.

7. Ill.—Noth v. Noth, 127 N.E. 113, 292 Ill. 536.
N.C.—Hess v. Hess, 143 S.E. 541, 195 N.C. 734—Christmas v. Winston, 67 S.E. 58, 152 N.C. 48, 27 L.R.A., N.S., 1084.
21 C.J. p 920 note 19.

8. Miss.—Bratton v. Graham, 111 So. 353, 146 Miss. 246.
Pa.—Yost v. Dwelling House Ins. Co., 36 A. 317, 179 Pa. 381, 57 Am. S.R. 604—McWilliams v. Nisly, 2 Serg. & R. 507, 7 Am.D. 654.

Limitation to life of grantee
Tex.—Berry v. Spivey, 97 S.W. 511, 44 Tex.Civ.App. 18.

Agreement not to sell during lifetime
An owner may agree, for a valuable consideration, not to sell his property during his lifetime, or that a certain person shall have the right to say whether or not he will take the property at the owner's death at a stipulated price.—Elliott v. Delaney, 116 S.W. 494, 217 Mo. 14.

9. Iowa.—Porter v. Tracey, 162 N.W. 800, 179 Iowa 1295.
21 C.J. p 921 note 21.

10. Ga.—Blevins v. Pittman, 7 S.E. 2d 662, 664, citing Corpus Juris.
21 C.J. p 921 note 22.

11. Del.—Barnard v. Bailey, 2 Del. 56.

12. Ky.—Chappell v. Frick Co., 179 S.W. 203, 166 Ky. 311.
Minn.—Morse v. Blood, 71 N.W. 682, 68 Minn. 442.
N.Y.—Schermerhorn v. Negus, 1 Den. 448.

13. N.C.—Schwren v. Falls, 87 S.E. 49, 170 N.C. 251, L.R.A.1916B 1235.
21 C.J. p 921 note 25.

Contract to take advice of other person as to time most advantageous for sale held not restraint on alienation.—Epstean v. Mintz, 198 N.W. 225, 226 Mich. 660.

Restraint as to repurchase. A stipulation in a deed prohibiting the purchaser from alienating the land without giving the vendor the privilege of repurchasing is void,[14] and so likewise is a condition in a deed that the grantee alienating shall pay part of the price received to the grantor.[15]

A prohibition against partition is not a restraint on alienation, as each tenant in common may convey his share at pleasure.[16] However, it has been held that if such a provision is treated as a restraint on alienation it is void.[17]

Restraint as to equitable fee. In some states equity follows the rule of law as to restraints on alienation,[18] but in other states, in case of the devise of an equitable fee in land, limitations against alienation are valid.[19]

§ 9. Limited or Conditional Fees in General

A limited fee is one which has some limitation or condition annexed to it whereby it is determinable. It is either a qualified or base fee, or a fee conditional.

A limited fee simple is such as has some collateral matter annexed to it whereby it is made by some means determinable, as by limitation or condition.[20] Limited or conditional fees are of two kinds: (1) Qualified or base fees. (2) Fees conditional, so called at the common law; and afterward fees tail, in consequence of the statute de donis.[21]

§ 10. Base, Qualified, or Determinable Fee

A base, qualified, or determinable fee is a fee which has a qualification subjoined thereto, and which must be determined when such qualification is at an end. Until its determination such a fee has all the incidents of a fee simple. On its determination the property reverts to the grantor without any claim or act on his part.

Although distinctions have been made or discussed by some authorities,[22] the terms "base fee," "qualified fee," and "determinable fee" are generally used interchangeably[23] to denote a fee which has a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end.[24] This estate is a fee, be-

14. N.C.—Hardy v. Galloway, 15 S.E. 890, 111 N.C. 519, 32 Am.S.R. 828.

15. N.Y.—De Peyster v. Michael, 6 N.Y. 467, 57 Am.D. 470.

16. Iowa—Porter v. Tracey, 162 N.W. 800, 179 Iowa 1295.
N.H.—Hunt v. Wright, 47 N.H. 396, 93 Am.D. 451.

Entire estate not passed
A deed conveying land to grantor's four grandchildren, and to defendant in trust with option to use the land himself by paying rental, not passing entire estate to beneficiaries, was valid as to the provision against partition.—Whiteley v. Babcock, Mo., 249 S.W. 930.

17. N.C.—American Trust Co. v. Nicholson, 78 S.E. 152, 162 N.C. 257.

Where land was granted in trust to one for life, remainder to his children, a provision that no partition should be made until the youngest child became twenty-one is invalid as a restraint on alienation, if considered as preventing the sale of the trust property for reinvestment.—American Trust Co. v. Nicholson, supra.

18. Gray, Restraints on the Alienation of Property § 105.
21 C.J. p 921 note 29.

19. Mass.—Lathrop v. Merrill, 92 N.E. 1019, 207 Mass. 6.
21 C.J. p 921 note 30.

An equitable estate in fee may be alienated, subject to the existing trusts, if the instrument creating it puts no restraint on the power of alienation—Gunn v. Brown, (Md.) 23 A. 462.

20. N.Y.—Lott v. Wyckoff, 1 Barb. 565, 575, affirmed 2 Comst. 355.

An estate in reversion or remainder is properly termed a "limited fee," rather than "fee simple."—Brackett v. Ridlon, 54 Me. 426, 434.

21. N.J.—United States Pipe-Line Co. v. Delaware, L. & W. R. Co., 41 A. 759, 763, 62 N.J.Law 254, 42 L.R.A. 572.
N.Y.—Paterson v. Ellis, 11 Wend. 259.
Or.—Stubbs v. Abel, 233 P. 852, 114 Or. 610.

22. N.C.—Hall v. Turner, 14 S.E. 791, 110 N.C. 292.
21 C.J. p 922 note 45.

23. Okl.—Union Missionary Baptist Church v. Fyke, 64 P.2d 1203, 179 Okl. 102.
Or.—Stubbs v. Abel, 233 P. 852, 859, 114 Or. 610.
21 C.J. p 922 note 46.
"The term 'determinable fee' is used often as synonymous with base fees or with fees upon condition, but at common law the distinction between these three classes of fees was very clear."—University of Vermont and State Agr. College v. Ward, 158 A. 773, 776, 104 Vt. 239.

24. Ala.—Montgomery v. Montgomery, 181 So. 92, 96, 236 Ala. 161—Reid v. Armistead, 151 So. 874, 877, 228 Ala. 75, citing **Corpus Juris.**
Ga.—Rumble v. Strange, 114 S.E. 881, 884, 154 Ga. 512.
Ill.—McIntyre v. Dietrich, 128 N.E. 321, 322, 294 Ill. 126—Rasmusson v. Unknown Wife of Hoge, 127 N.E. 356, 359, 293 Ill. 101.
Iowa.—Staack v. Detterding, 161 N.W. 44, 45, 182 Iowa 582, L.R.A. 1918C 856.
Mich.—Kirchen v. Remenga, 288 N.W. 344, 350, 291 Mich. 94.
Mo.—White v. Kentling, 134 S.W.2d 39, 44.
N.Y.—Lott v. Wyckoff, 1 Barb. 565, 575, affirmed 2 Comst. 355.
Or.—Stubbs v. Abel, 233 P. 852, 859, 114 Or. 610.
Tex.—Stephens County v. Mid-Kansas Oil & Gas Co., 254 S.W. 290, 295, 113 Tex. 295, 29 A.L.R. 566.
Va.—Burche v. Neal, 149 S.E. 611, 612, 107 W.Va. 559.
21 C.J. p 922 note 47.

Similar definitions
(1) "An estate in fee simple upon special limitation."—Yarborough v. Yarborough, 269 S.W. 36, 37, 151 Tenn. 221.

(2) "A fee simple estate to a person and his heirs, with a qualification annexed to it by which it is provided that it must terminate whenever the qualification is at an end."—Queen City Park Ass'n v. Gale, 3 A.2d 529, 531, 110 Vt. 110—University of Vermont and State Agr. College v. Ward, 158 A. 773, 776, 104 Vt. 239—21 C.J. p 922 note 47 [a] (7).

(3) "A fee which may be defeated by some condition independent of the estate granted or devised, on the happening of which the fee will come to and end and the estate be lost."—McIntyre v. Dietrich, 128 N.E. 321, 322, 294 Ill. 126.

(4) A fee "which may continue forever, but is liable to be deter-

cause by possibility it may endure forever in a man and his heirs; yet as that duration depends on the concurrence of collateral circumstances which qualify and debase the purity of the donation it is therefore a qualified or base fee.[25]

The qualification annexed to a base, qualified, or determinable fee may be either one of two kinds: (1) It may be a qualification which attaches itself to the use of the land, so that the estate is held to be granted for that use and purpose only, and on the cessation of the use the estate expires.[26] (2) It may be one which is concerned with the happening of a more strictly collateral event, in that case leaving the use of the estate free for any purpose, but limiting its existence only by the event contemplated, or to the continuance of the state of affairs contemplated at the time of the grant.[27] The mere expression of a purpose for which the land is to be used will not of itself debase a fee,[28] but where an estate is conveyed in fee for a specified purpose "and no other" the fee is a base fee determinable on cessation of the use of the property for that purpose.[29] This also results where the estate is to endure while, or so long as, the land is used for a specified purpose[30] and shall revert to the grantor,[31] or vest in other persons named,[32] when it shall cease to be used for this purpose. The qualification on which the estate is to determine must be found in the instrument creating the estate,[33] but no especial or technical words are required to establish it,[34] except that they must be words of limitation as distinguished from words of condition.[35]

Contingency impossible. If the happening of the event on which the estate is to be determined becomes impossible, it is converted into an estate in fee simple.[36]

Incidents. Until its determination a base, qualified, or determinable fee has all the incidents of a fee simple,[37] and while this estate continues, and

mined by some act or occurrence limiting its duration or extent."—Paul v. Willoughby, 169 S.E. 226, 228, 204 N.C. 595—Henderson v. Western Carolina Power Co., 157 S.E. 425, 427, 200 N.C. 443, 80 A.L.R. 497—West v. Murphy, 149 S.E. 731, 732, 197 N.C. 488.

(5) "An interest which may continue forever, but the estate is liable to be determined without the aid of a conveyance, by some act or event, circumscribing its continuance or extent."
N.C.—Paul v. Willoughby, supra.
W.Va.—Burche v. Neal, 149 S.E. 611, 612, 107 W.Va. 559.
21 C.J. p 922 note 47 [a] (6).

(6) Other similar definitions see 21 C.J. p 922 note 47 [a].

Perpetual lease on condition conveys determinable or base fee.—Piper v. Town of Meredith, 139 A. 294, 83 N.H. 107, 55 A.L.R. 148.
As created by deed see Deeds § 110.
Fee upon condition subsequent see infra § 20 b (3).

25. Ga.—Rumble v. Stanage, 114 S.E. 881, 154 Ga. 512.
Ill.—McIntyre v. Dietrich, 128 N.E. 321, 294 Ill. 126.
Iowa.—Staack v. Detterding, 161 N.W. 44, 45, 182 Iowa 582, L.R.A. 1918C 856.
N.C.—Paul v. Willoughby, 169 S.E. 226, 204 N.C. 595—Henderson v. Western Carolina Power Co., 157 S.E. 425, 200 N.C. 443, 80 A.L.R. 497—West v. Murphy, 149 S.E. 731, 197 N.C. 488.
Or.—Stubbs v. Abel, 233 P. 852, 859, 114 Or. 610.
Tenn.—Yarborough v. Yarborough, 269 S.W. 36, 37, 151 Tenn. 221.
Tex.—Davis v. Skipper, Com.App., 83 S.W.2d 318, 320—Stanolind Oil & Gas Co. v. Barnhill, Civ.App., 107 S.W.2d 746, 748.
21 C.J. p 923 note 48.

26. Ill.—Regular Predestinarian Baptist Church of Pleasant Grove v. Parker, 27 N.E.2d 522, 524, 373 Ill. 607, quoting Corpus Juris.
Okl.—Union Missionary Baptist Church v. Fyke, 64 P.2d 1203, 179 Okl. 102—Jordan v. Goldman, 34 P. 371, 1 Okl. 406.
Tex.—Stephens County v. Mid-Kansas Oil & Gas Co., 254 S.W. 290, 295, 113 Tex. 160, 29 A.L.R. 566, quoting Corpus Juris.

27. Ill.—Regular Predestinarian Baptist Church of Pleasant Grove v. Parker, 27 N.E.2d 522, 524, 373 Ill. 607, quoting Corpus Juris.
Okl.—Union Missionary Baptist Church v. Fyke, 64 P.2d 1203, 179 Okl. 102—Jordan v. Goldman, 34 P. 371, 1 Okl. 406.
Tex.—Lockett v. Wood, Civ.App., 84 S.W.2d 798, 802.

28. Pa.—Siegel v. Lauer, 23 A. 996, 148 Pa. 236, 15 L.R.A. 547.
21 C.J. p 923 note 51.

29. Ill.—Regular Predestinarian Baptist Church of Pleasant Grove v. Parker, 27 N.E.2d 522, 373 Ill. 607.
Pa.—Siegel v. Lauer, 23 A. 996, 148 Pa. 236, 15 L.R.A. 547—Scheetz v. Fitzwater, 5 Pa. 126.

30. Ill.—Wiggins Ferry Co. v. Ohio & M. R. Co., 94 Ill. 83.
21 C.J. p 923 note 53.

Mere nonuser cannot result in the extinguishment of such a fee unless a limitation annexed thereto provides for a continued user.—Hanks v. Magnolia Petroleum Co., Tex.Civ.App., 14 S.W.2d 348, affirmed, Com.App., 24 S.W.2d 5.

31. Ill.—North v. Graham, 85 N.E. 267, 235 Ill. 178, 126 Am.S.R. 189, 18 L.R.A.,N.S., 624.
21 C.J. p 923 note 54.

32. Mass.—North Adams First Universal Soc. v. Boland, 29 N.E. 524, 155 Mass. 171, 15 L.R.A. 231.

33. Tex.—Hanks v. Magnolia Petroleum Co., Civ.App., 14 S.W.2d 348, 351, quoting Corpus Juris, and affirmed, Com.App., 24 S.W.2d 5.
21 C.J. p 923 note 56.

It is incorporated into, and forms part of, limitation or grant.—Chouteau v. City of St. Louis, 55 S.W.2d 299, 331 Mo. 781.

34. Pa.—Siegel v. Lauer, 23 A. 996, 148 Pa. 236, 15 L.R.A. 547—Siegel v. Herbine, 10 Pa.Co. 347.
Tex.—Hanks v. Magnolia Petroleum Co., Civ.App., 14 S.W.2d 348, 351, quoting Corpus Juris, and affirmed, Com.App., 24 S.W.2d 5.

35. Tenn.—Yarbrough v. Yarbrough, 269 S.W. 36, 38, 151 Tenn. 221.
"Until," "during," "so long as," and the like, are proper words to be used in creating such an estate.—Chouteau v. City of St. Louis, 55 S.W.2d 299, 301, 331 Mo. 781.
Conditions and limitations distinguished see infra § 20.

36. Ind.—Watson v. Tracy, 133 N.E. 411, 413, 77 Ind.App. 163, citing Corpus Juris.
21 C.J. p 923 note 58.

37. Conn.—Whiting v. Whiting, 4 Conn. 179.
Ill.—Warrington v. Chester, 128 N.E. 549, 294 Ill. 524.
Iowa.—Staack v. Detterding, 161 N.W. 44, 45, 182 Iowa 582, L.R.A. 1918C 856.
Okl.—University Scholarship Corpo-

until the qualification on which it is limited is at an end, the grantee or proprietor has the same rights and privileges over his estate as though it were a fee simple.[38] He has an absolute right to the exclusive possession, use, and enjoyment of the land and as complete dominion over it for all purposes as though he held it in fee simple.[39] He is not, as a general rule, liable for waste,[40] but if such an estate consists of personalty, he would be liable if he should consume it or any part of it, and then his estate would be defeated by the occurrence of the condition imposed.[41]

A base, qualified, or determinable fee is an estate of inheritance, descendible to heirs,[42] and is subject to assignment,[43] devise,[44] or conveyance.[45] The owner of such a fee cannot, however, alone convey a perfect title in fee simple to the property,[46] and if he conveys in fee the determinable quality of the estate follows the transfer;[47] but an indefeasible title in fee simple may be conveyed if those who would take the estate on the contingency by which his estate would be defeated join with him in the conveyance.[48]

Right of grantor. On the determination of such a fee the property reverts to the grantor as explained infra § 105, without any claim or act on his part,[49] no reëntry being necessary.[50] In the meantime, as explained infra § 105, the whole estate is

ration v. Parduhn, 70 P.2d 84, 180 Okl. 446.
Tex.—Davis v. Skipper, Com.App., 83 S.W.2d 318, 320, quoting **Corpus Juris**—Hanks v. Magnolia Petroleum Co., Civ.App., 14 S.W.2d 348, 351, quoting **Corpus Juris**, and affirmed, Com.App., 24 S.W.2d 5.
"Such a fee has all the attributes of fee simple, except that the entire interest is subject to be defeated by the happening of the condition"—Warrington v. Chester, 128 N.E. 549, 551, 294 Ill. 524.
Determinable fees or estates as subject to:
Curtesy see Curtesy § 11.
Dower see Dower § 26.

38. Colo.—Union Colony Co. of Colorado v. Gallie, 88 P.2d 120, 104 Colo. 46.
Conn.—Connecticut Junior Republic Ass'n v. Town of Litchfield, 174 A. 304, 119 Conn. 106, 95 A.L.R. 56.
Okl.—University Scholarship Corporation v. Parduhn, 70 P.2d 84, 180 Okl. 446.
Tex.—Davis v. Skipper, Com.App., 83 S.W.2d 318, 320—Hanks v. Magnolia Petroleum Co., Civ.App., 14 S.W.2d 348, affirmed, Com.App., 24 S.W.2d 5.
Wyo.—Johnson Irr. Co. v. Ivory, 24 P.2d 1053, 1058, 46 Wyo. 221, citing **Corpus Juris.**
21 C.J. p 923 note 60.

39. Ill.—Warrington v. Chester, 128 N.E. 549, 551, 294 Ill. 524.
Ind.—Hillis v. Dils, 100 N.E. 1047, 53 Ind.App. 576, rehearing denied 102 N.E. 140, 53 Ind.App. 576.
Tex.—Davis v. Skipper, Com.App., 83 S.W.2d 318, 320—Hanks v. Magnolia Petroleum Co., Civ.App., 14 S.W.2d 348, affirmed, Com.App., 24 S.W.2d 5.
21 C.J. p 923 note 61.
Any attempt by the grantor to exercise any sort of possession over the land, or to use any part of it as a means of advantage or profit to himself, would be in plain derogation of his grant, and a clear violation of the grantee's rights.—New Jersey Zinc & Iron Co. v. Morris Canal & Banking Co., 15 A. 227, 44 N.J.Eq. 398, 1 L.R.A. 133, affirmed 22 A. 1076, 47 N.J.Eq. 598.

40. Ala.—Boshell v. Boshell, 118 So. 553, 555, 218 Ala. 320, citing **Corpus Juris.**
Tex.—Davis v. Skipper, Com.App., 83 S.W.2d 318, 320, quoting **Corpus Juris.**
W.Va.—Garrett v. Board of Education of Chapmansville Dist., 156 S.E. 115, 116, 109 W.Va. 714, citing **Corpus Juris.**
21 C.J. p 923 note 62.
Extent of waste permissible
The owner of a determinable fee in real estate has all the right of an owner in fee simple with regard to the use or disposal of the real estate; he may use it in any way, may cut and sell the trees growing on the land, strip the sod and clay from its surface, and take out the minerals from underneath.—Hillis v. Dils, 100 N.E. 1047, 102 N.E. 140, 53 Ind.App. 576.
Liability of holder of tenant of base or qualified fee for waste in general see the C.J.S. title Waste § 11, also 67 C.J. p 622 note 1—p 623 note 5.

41. Ky.—McKee v. McKee, 82 S.W. 451, 26 Ky.L. 736.

42. Ind.—Watson v. Tracy, 133 N.E. 411, 412, 77 Ind.App. 163, citing **Corpus Juris.**
21 C.J. p 924 note 64.
"The heirs of a person dying seized of such an estate take the same, however, burdened with the limitation fixing its character."—Watson v. Tracy, 133 N.E. 411, 77 Ind.App. 163.

43. Ky.—Riner v. Fallis, 195 S.W. 1102, 176 Ky. 575.
21 C.J. p 924 note 65.

44. Ill.—Aloe v. Lowe, 115 N.E. 862, 278 Ill. 233.
Ind.—Coquillard v. Coquillard, 113 N.E. 474, 62 Ind.App. 426.

45. Ill.—Warrington v. Chester, 128 N.E. 549, 551, 294 Ill. 524.
N.Y.—Dunkel v. Homindustries, 9 N.E.2d 949, 275 N.Y. 327, reversing 296 N.Y.S. 456, 250 App.Div. 829, reargument affirming order 291 N.Y.S. 959, 249 App.Div. 709, reversing 291 N.Y.S. 186, 248 App.Div. 942.
21 C.J. p 924 note 67.

46. Ill.—Warrington v. Chester, 128 N.E. 549, 294 Ill. 524.
Iowa.—Staack v. Detterding, 161 N.W. 44, 45, 182 Iowa 582, L.R.A.1918C 856.
N.C.—Vassar v. Vassar, 131 S.E. 647, 191 N.C. 332.
21 C.J. p 924 note 68.

47. Ill.—Lee v. Roberson, 130 N.E. 774, 297 Ill. 321.
Iowa.—Staack v. Detterding, 161 N.W. 44, 46, 182 Iowa 582, L.R.A. 1918C 856.
N.Y.—Dunkel v. Homindustries, 9 N.E.2d 949, 275 N.Y. 327, reversing 296 N.Y.S. 456, 250 App.Div. 829, reargument affirming order 291 N.Y.S. 959, 249 App.Div. 709, reversing 291 N.Y.S. 186, 248 App.Div. 942.
21 C.J. p 924 note 69.

48. Ky.—Goodman v. Carpenter, 224 S.W. 676, 189 Ky. 83.
N.Y.—In re New York, etc., R. Co., 11 N.E. 492, 105 N.Y. 89, 59 Am.S.R. 478.

49. Ark.—Johnson v. Lane, 135 S.W.2d 853, 856.
Mo.—White v. Kentling, 134 S.W.2d 39, 44.
N.Y.—Allen v. Trustees of Great Neck Free Church, 269 N.Y.S. 341, 240 App.Div. 206, affirmed 193 N.E. 324, 265 N.Y. 570.
21 C.J. p 924 note 74.

50. Ark.—Johnson v. Lane, 135 S.W.2d 853, 856.
Mo.—Chouteau v. City of St. Louis, 55 S.W.2d 299, 331 Mo. 781.
21 C.J. p 924 note 75.

vested in the grantee and all that remains to the grantor is the mere possibility of reverter which it has been decided is incapable of alienation or devise, although it may descend to his heirs.

Distinctions. A base or determinable fee is distinguished from a life estate in that the incidents are different,[51] as by the fact that, while the former may last forever, the latter terminates absolutely on the death of the life tenant.[52] A base or determinable fee is also distinguished from an estate for years by the fact that the latter terminates at the end of a fixed and definite period;[53] from a fee on condition subsequent in that an entry is necessary to terminate the latter, but not the former;[54] and from a conditional fee, in that the former is confined to a person as tenant of a particular place, whereas the latter is restrained to particular heirs.[55]

Present status. Base or qualified fees are still recognized[56] and were not done away with by the statute quia emptores.[57]

§ 11. Fees Conditional

A fee conditional restrains the fee to particular heirs. It is a fee simple on condition that the donee has issue, and in default thereof reverts to the donor, the entire estate being in the donee with a possibility of reverter in the donor. After birth of issue the estate becomes absolute, with the usual incidents, such as alienability and liability for debts.

A conditional fee is one which restrains the fee to some particular heirs, exclusive of others, as to the heirs of a man's body, or to the heirs male of his body.[58] This estate has been held to be a fee simple on condition that the donee has issue,[59] and with the further condition that in default of such issue it shall revert to the donor.[60]

Interest of donor, donee, and issue. Until the condition under which the fee is broken arises, in a fee conditional the entire estate is in the donee, the donor having a mere possibility of reverter[61] which he may release to the donee and thereby convert the estate into a fee simple absolute.[62] The issue is not regarded as having any interest whatever.[63]

Effect of birth of issue. As soon as any issue is born the estate is supposed to become absolute by the performance of the condition, at least for three purposes: (1) To enable the tenant to alien the

51. Ala.—Boshell v. Boshell, 118 So. 553, 218 Ala. 320.

52. Ill.—Ahlfield v. Curtis, 82 N.E. 276, 229 Ill. 139.

53. Miss.—Moss Point Lumber Co. v. Harrison County, 42 So. 290, 873, 89 Miss. 449.

54. Ark.—Johnson v. Lane, 135 S.W.2d 853.
Cal.—Hencke v. Lake Hemet Water Co., 69 P.2d 849, 9 Cal.App.2d 136.
Vt.—Queen City Park Ass'n v. Gale, 3 A.2d 529, 110 Vt. 110—University of Vermont and State Agr. College v. Ward, 158 A. 773, 104 Vt. 239.
21 C.J. p 924 note 75 [a].
Conditions and limitations distinguished see infra § 20.

55. N.Y.—Paterson v. Ellis, 11 Wend. 259, 277.

56. Mass.—Institution for Savings in Roxbury and Its Vicinity v. Roxbury Home for Aged Women, 139 N.E. 301, 244 Mass. 583.
21 C.J. p 924 note 83.

57. Mass.—Institution for Savings in Roxbury and Its Vicinity v. Roxbury Home for Aged Women, supra—North Adams First Universalist Soc. v. Boland, 29 N.E. 524, 155 Mass. 171, 15 L.R.A. 231.

58. Neb.—Yates v. Yates, 178 N.W. 262, 265, 104 Neb. 678.
N.Y.—Paterson v. Ellis, 11 Wend. 259, 277.
Or.—Lytle v. Hulen, 275 P. 45, 52, 128 Or. 483, 114 A.L.R. 587, quoting Corpus Juris.
S.C.—Lipscomb v. Hammett, 35 S.E. 194, 56 S.C. 549.
21 C.J. p 924 note 85.

Similar definitions

(1) "A conditional fee, at the common law, was a fee restrained to some particular heirs, exclusive of others . . . as to the heirs of a man's body, by which only his lineal descendants were admitted, in exclusion of collateral heirs; or to the heirs male of his body, in exclusion both of collaterals, and lineal females also."—Sagers v. Sagers, 138 N.W. 911, 158 Iowa 729, 732, 43 L.R.A.,N.S., 562, quoting 2 Blackstone Comm. p 110—21 C.J. p 924 note 85 [a].

(2) Other similar definitions see 21 C.J. p 924 note 85 [b].

Reason for name

It was called "conditional fee by reason of the condition that, should the grantee die without the particular heirs, the land would revert to the grantor."—Yates v. Yates, 178 N.W. 262, 265, 104 Neb. 678—21 C.J. p 924 note 85 [c].

Fee simple distinguished, as to the characteristics and incidents of the two estates.—Antley v. Antley, 128 S.E. 31, 32, 132 S.C. 306—21 C.J. p 924 note 85 [d].
Fees or estates on condition see infra § 20.

59. Iowa.—Sagers v. Sagers, 138 N.W. 911, 158 Iowa 729, 43 L.R.A.,N.S., 562.
21 C.J. p 925 note 86.

60. Neb.—Yates v. Yates, 178 N.W. 262, 265, 104 Neb. 678.
N.Y.—Paterson v. Ellis, 11 Wend. 259, 277.
Or.—Lytle v. Hulen, 275 P. 45, 128 Or. 483, 114 A.L.R. 587.
21 C.J. p 925 note 87.

61. Iowa.—Frazier v. Wood, 255 N.W. 647, 651, 219 Iowa 36, citing Corpus Juris, and supplemented 257 N.W. 768, 219 Iowa 36—Sagers v. Sagers, 138 N.W. 911, 158 Iowa 729, 43 L.R.A.,N.S., 562.
Or.—Lytle v. Hulen, 275 P. 45, 128 Or. 483, 114 A.L.R. 587.
S.C.—Adams v. Chaplin, 10 S.C.Eq. 265.

Life estate

It has been said that "until issue born after execution and delivery of the deed, the grantee takes only a life estate, with reversion to the grantor."—Antley v. Antley, 128 S.E. 31, 32, 132 S.C. 306.

62. Or.—Lytle v. Hulen, 275 P. 45, 52, 128 Or. 483, 114 A.L.R. 587.
S.C.—Pearse v. Killian, 16 S.C.Eq. 231.

63. Or.—Lytle v. Hulen, 275 P. 45, 52, 128 Or. 483, 114 A.L.R. 587.
S.C.—Gleaton v. Gleaton, 151 S.E. 276, 279, 154 S.C. 140—Pearse v. Killian, 16 S.C.Eq. 231, 238.

Named only as qualification

"The heirs of the body, in a grant of a fee conditional, are named, not for any benefit intended to them, but to qualify the estate of their ancestor and fix the course of descent, if he makes no disposition. As against him they have no rights."—Pearse v. Killian, supra.

land and thereby to bar, not only his own issue, but also the donor of his interest in the reversion. (2) To subject him to forfeit it for treason, which he could not do until issue was born, longer than for his own life, lest thereby the inheritance of the issue and reversion of the donor might have been defeated. (3) To empower him to charge the land with rents, commons, and certain other encumbrances, so as to bind his issue.[64]

Alienation before, as well as after, the birth of issue is sufficient to bar the rights of such issue,[65] but not the donor's right of reverter.[66] If the alienation is before the birth of issue and then the issue dies before the tenant in fee conditional, who has alienated, this does not prevent the reverter to the donor.[67] After the birth of issue alienation passes the entire estate and bars the donor's reverter,[68] even though the alienation does not take place until after the death of the issue.[69] Since the reverter to the donor was not barred in case there was no alienation after the birth of issue,[70] it became customary for the grantee, on the birth of issue, to alien and then repurchase, so that he might become vested with a fee simple absolute that would descend to his heirs generally.[71] To prevent this the statute de donis conditionalibus was passed which took away from the donee the power of alienation,[72] and left in him an estate called a fee tail.[73] If the fee conditional is not alienated during the life of the grantee after birth of issue, the estate descends, not to the heirs generally, but to the bodily issue of the grantee.[74]

Dower and curtesy. As an estate of inheritance, a fee conditional is subject to both dower[75] and curtesy.[76]

Devise. An estate in fee conditional cannot be devised.[77]

Liability for debts. A fee conditional estate is bound, after the birth of issue, by the lien of a judgment or decree against the tenant in fee in bar of all the rights of the issue[78] and, in the hands of the heirs of the body after the death of the first taker, constitutes assets for the payment of the debts of such first taker even though not reduced to judgment.[79]

In equity. A fee conditional estate may exist in equity as a trust or use as well as in law, and, when thus existing in equity, is subject to all the rules of descent and otherwise, and is accompanied by most of the incidents and attributes applicable to such estates at law.[80]

Status. In some states the existence of this estate, at the present time, is expressly recognized,[81]

64. Neb.—Yates v. Yates, 178 N.W 262, 265, 104 Neb. 678.
Or.—Lytle v. Hulen, 275 P. 45, 52, 128 Or. 483, 114 A.L.R. 587, quoting **Corpus Juris.**
S.C.—Antley v. Antley, 128 S E. 31, 32, 132 S.C. 306—McWhite v. Rosemon, 103 S.E. 586, 114 S C. 177—Crawford v. Masters, 82 S.E. 793, 98 S.C. 461.
21 C.J. p 925 note 91.
A woman owning fee conditional estate could convey property in fee simple after her marriage and birth of children to her.—Hewitt v. Hewitt, 196 S.E. 541, 187 S.C. 86.

65. Iowa.—Sagers v. Sagers, 138 N. W. 911, 158 Iowa 729, 43 L R.A., N.S., 562.
S.C.—Izard v. Middleton, 8 S.C.Eq. 228.

66. Iowa.—Sagers v. Sagers, 138 N. W. 911, 158 Iowa 729, 43 L.R.A., N.S., 562.
S C.—Barksdale v. Gamage, 24 S.C. Eq. 271.

67. S.C.—Holley v. Still, 74 S.E. 1065, 91 S.C. 487.
21 C.J. p 925 note 94.

68. Neb.—Yates v. Yates, 178 N.W. 262, 265, 104 Neb. 678.
S.C.—Antley v. Antley, 128 S.E. 31, 32, 132 S.C. 306.
21 C.J. p 925 note 95.

69. S C —Holley v. Still, 74 S.E. 1065, 91 S.C. 487.
21 C.J p 925 note 96.

70. Ill —Frazer v. Peoria County, 74 Ill. 282.
S.C —Barksdale v. Gamage, 24 S.C. Eq. 271.

71. Neb —Yates v. Yates, 178 N.W. 262, 265, 104 Neb. 678.
21 C.J. p 925 note 98.

72. Neb.—Yates v. Yates, supra.
21 C.J. p 925 note 1.
The statute provided that "an alienation of the estate by the tenant in tail would carry the life interest of such tenant only, and would not destroy the right of inheritance to lineal descendants nor prevent a reverter in case of the failure of issue."—Yates v. Yates, supra.

73. Ill.—Coogan v. Jones, 115 N.E. 877, 278 Ill. 279.
N.H.—Merrill v. American Baptist Missionary Union, 62 A. 647, 73 N.H. 414, 111 Am.S.R. 632, 3 L.R. A.,N.S., 1143, 6 Ann.Cas. 646.

74. S.C.—Antley v. Antley, 128 S.E. 31, 132 S C. 306.

75. S.C.—Wright v. Herron, 26 S C. Eq. 441.
Conditional estates as subject to dower generally see Dower § 26.

76. S.C.—Wright v. Herron, 26 S.C. Eq. 441.
Determinable fees as subject to curtesy generally see Curtesy § 11.

77. S.C.—Antley v. Antley, 128 S E 31, 32, 132 S C. 306.
21 C.J. p 925 note 5.
Reason for rule
"To allow such a power to a tenant in fee conditional would be to give him the power to disturb the course of descent fixed by the instrument creating the estate, and hence it cannot, consistently with the nature of the estate, be allowed."—Burnett v. Burnett, 17 S.C. 545, 551.

78. S.C.—Pearse v. Killian, 16 S.C. Eq. 231—Izard v. Middleton, 8 S.C. Eq. 228.

79. S C.—Antley v. Antley, 128 S E. 31, 132 S C. 306.
21 C.J. p 926 note 7.

80. S.C.—Withers v. Jenkins, 14 S. C. 597.

81. Iowa.—Sagers v. Sagers, 138 N W. 911, 158 Iowa 729, 43 L.R.A.,N. S., 562.
21 C J. p 926 note 9.
The statute de donis preventing alienation of estates, repudiated at common law, is contrary to the spirit of the institutions, and cannot be held a part of the laws of such states.—Yates v. Yates, 178 N.W. 262, 104 Neb. 678—21 C.J. p 926 note 9 [a].

while in others it has never been recognized,[82] and in others it has been converted by statute to an unqualified fee-simple estate.[83]

§ 12. Estates Less than Freehold

Estates less than freehold include estates for years, estates at will, and estates by sufferance, and are regarded as chattels real.

Estates less than freehold are, as the term signifies, estates or interests in land less than a freehold.[84] They are of three sorts: Estates for years, estates at will, and estates by sufferance.[85] An estate for years arises where one contracts for the possession of lands or tenements for some determinate period.[86] An estate at will arises where lands or tenements are let by one person to another without the limitation of any certain or determinate estate;[87] it is an estate at the will of either party.[88] An estate by sufferance arises where one comes into possession of land by lawful title, but keeps it afterward without any title at all.[89]

Such estates are regarded as chattel interests, that is, interests in incorporeal hereditaments, not amounting to freeholds, as distinguished from freehold interests;[90] and are regarded as "chattels real," that is estates or interests which are annexed to or concern real estate,[91] and include all estates and interests in real property less than estates of freehold.[92]

Copyhold estate. Copyhold estates were originally nothing better than mere estates at will, but successive lords of manors having permitted these estates to be enjoyed by the tenants and their heirs according to particular custom established in their respective districts, they became as properly tenants by the custom as tenants at will, the custom having arisen from a series of uniform wills.[93]

§ 13. With Regard to Time of Enjoyment

With regard to time of enjoyment, estates are either in possession or in expectancy.

Estates with regard to the time of their enjoyment are divided into estates in possession and estates in expectancy.[94]

§ 14. Estates in Possession

An estate in possession is one whereby a present interest passes to, and resides in, the tenant, independent of any subsequent circumstance or contingency.

Estates in possession are, as defined at common law, those whereby a present interest passes to and resides in the tenant, not depending on any subsequent circumstance or contingency.[95] Under some statutes an estate in possession is where the owner

82. Conn.—Rudkin v. Rand, 91 A. 198, 88 Conn. 292.

83. Md.—Baltimore & O. R. Co. v. Patterson, 13 A. 369, 68 Md. 606.
N.H.—Merrill v. American Baptist Missionary Union, 62 A. 647, 73 N. H. 414, 111 Am.S.R. 632, 3 L.R.A., N.S., 1143, 6 Ann.Cas. 646.

84. Ill.—Fowler v. Marion & Pittsburg Coal Co., 146 N.E. 318, 319, 315 Ill. 312.

85. Ill.—Fowler v. Marion & Pittsburg Coal Co., supra.
Ohio.—Ralston Steel Car Co. v. Ralston, 147 N.E. 513, 112 Ohio St. 306, 39 A.L.R. 334—Lape v. Lape, 22 Ohio N.P., N.S., 392.
21 C.J. p 926 note 13.

86. Ill.—McArthur v. Weidert, 30 N.E.2d 610, 375 Ill. 212.
Similar definition
"Every estate which must expire at a period certain and prefixed, by whatever words created, is an estate for years."—Ralston Steel Car Co. v. Ralston, 147 N.E. 513, 516, 112 Ohio St. 306, 39 A.L.R. 334.
Estate for life distinguished
"An estate for years in land is regarded as inferior to an estate for life, or an inheritance; an estate for life . . . is a freehold; but an estate for years . . . is only a chattel, and becomes part of the personal estate."—Wilgus v. Commonwealth, 3 Ky.Op. 448, 450.
Estate for years in general see the C.J.S. title Landlord and Tenant § 26, also 35 C.J. p 970 note 71—p 971 note 82.

87. N.C.—Sappenfield v. Goodman, 2 S.E.2d 13, 215 N.C. 417.
Tenancy at will in general see the C.J.S. title Landlord and Tenant § 156, also 35 C.J. p 1120 notes 84—95.
Tenancy from month to month as estate at will see the C.J.S. title Landlord and Tenant § 145, also 35 C.J. p 1105 note 38.

88. N.C.—Mhoon v. Drizzle, 14 N. C. 414, 416.
W.Va.—Angel v. Black Band Consol. Coal Co., 122 S.E. 274, 276, 96 W. Va. 47, 35 A.L.R. 568.

89. Ga.—Malone v. Floyd, 179 S.E. 176, 50 Ga.App. 701—Hill v. Kitchens, 148 S.E. 754, 755, 39 Ga.App. 789.
Tenancy at sufferance in general see the C.J.S. title Landlord and Tenant § 175, also 35 C.J. p 1134 note 28—p 1135 note 42.

90. Burrill L.D.

91. Idaho.—Intermountain Realty Co. v. Allen, 90 P.2d 704, 60 Idaho 228, 122 A.L.R. 647.
Ill.—McArthur v. Weidert, 30 N.E. 2d 610, 375 Ill. 212.
Ind.—Lincoln Nat. Bank & Trust Co. of Fort Wayne v. Nathan, 19 N.E.2d 243, 215 Ind. 178.
N.M.—State ex rel. Truitt v. District Court of Ninth Judicial Dist., Curry County, 96 P.2d 710, 44 N.M. 16.
N.Y.—Henderson v. Tomb, 8 N.Y.S. 2d 612, 169 Misc. 737.
Wash.—In re Barclay's Estate, 95 P. 2d 393, 1 Wash.2d 82.
11 C.J. p 885 note 13—p 886 note 18.
"Term 'chattels real' originated under the feudal system of the common law and was intended primarily to designate any and all interests in real estate of lesser dignity than a freehold estate."—Intermountain Realty Co. v. Allen, 90 P.2d 704, 705, 60 Idaho 228, 122 A.L.R. 647.

92. Mass.—Moulton v. Long, 137 N. E. 297, 243 Mass. 129.
50 C.J. p 763 note 26.

93. Tenn.—Choate v. Tighe, 10 Heisk. 621.
21 C.J. p 926 note 16.

94. Minn.—State v. Washington County Probate Ct., 113 N.W. 888, 102 Minn. 268.
21 C.J. p 926 note 17.

95. Blackstone Comm. p 163.

has an immediate right to the possession of the land.[96]

§ 15. Estates in Expectancy

a. In general
b. Future estates

a. In General

An estate in expectancy is where the right to possession or enjoyment is postponed to a future period. It is subject to descent, devise, or alienation.

An estate in expectancy is where the right to the possession or enjoyment is postponed to a future period,[97] although the estate or interest has a present legal existence.[98] Estates in expectancy are usually of two kinds; one created by the act of the parties, called a remainder; the other by act of law, and called a reversion.[99] To these a third, executory limitations, has sometimes been added, as discussed infra § 119.[1]

Descent, devise, and alienation. Under some statutes, expectant estates, including expectant estates in personalty,[2] are descendible, devisable, and alienable in the same manner as estates in possession.[3] All such estates, contingent as well as vested, are included,[4] so far as the nature of the contingency admits.[5] However, the mere possibility of a reverter which the grantor has after he has conveyed in fee on condition subsequent is not included.[6]

b. Future Estates

A future estate is one limited to commence in possession or enjoyment in the future. It is vested if there is a person in being who would have an immediate right to possession on the ceasing of the intermediate or precedent estate. It is contingent while the person to whom or the event on which it is limited to take effect remains uncertain.

Under some statutes, estates in expectancy are divided into future estates and reversions,[7] future estates including all remainders, whether vested or contingent.[8] Under such statutes a future estate is an estate limited to commence in possession or enjoyment at a future day, either without the intervention of a precedent estate, or on the determination by lapse of time or otherwise, of a precedent estate created at the same time.[9] When future estates are dependent on preceding estates they are termed remainders.[10] The same rules which regulate future estates in land are made applicable to the creation and limitation of future estates in personal property.[11]

96. Mich.—Eberts v. Fisher, 7 N.W. 211, 44 Mich. 551.
21 C.J. p 926 note 19.

Actual occupancy not necessary
Mich.—Eberts v. Fisher, 7 N.W. 211, 44 Mich. 551.

97. Wis.—Mathy v. Mathy, 291 N. W. 761.
21 C.J. p 926 note 20.

Estate conveyed to children of grantee by a deed conveying premises to grantee and his wife during the wife's lifetime and, after her death, to grantee's children is an "expectant estate" or an "estate in expectancy."—Mathy v. Mathy, supra.

98. Wis.—Mathy v. Mathy, supra.

99. Ill.—Ayers v. Chicago Title & Trust Co., 58 N.E. 318, 187 Ill. 42.
Minn.—State v. Washington County Probate Ct., 113 N.W. 888, 102 Minn. 268.
Remainders see infra §§ 68–104.
Reversions see infra §§ 105–118.

1. Executory interests generally see infra § 119.

2. N.Y.—West v. Burke, 113 N.E. 561, 219 N.Y. 7.
21 C.J. p 927 note 23 [b].

3. N.Y.—Schwartz v. Fulton Trust Co. of New York, 198 N.Y.S. 275, 119 Misc. 831.
21 C.J. p 927 note 23.

Word "alienable," as used in a statute making expectant estates alienable, is not used in a restricted sense so as to enable the owner of an expectant estate to convey merely his expectancy, but is used to enable the owner of such estate to deal with the same in all respects as he might if he were actually in possession of the property representing the estate.—New York Life Ins. & Trust Co. v. Cary, 83 N.E. 598, 191 N.Y. 33, reversing 105 N.Y.S. 125, 120 App. Div. 264—Clark v. Grosh, 142 N.Y. S. 966, 81 Misc. 407.

4. N.Y.—Clowe v. Seavey, 102 N.E. 521, 208 N.Y. 496, 47 L.R.A.,N.S., 284, affirming 135 N.Y.S. 1105, 151 App Div. 912.
21 C.J. p 927 note 24.

Mere possibility coupled with interest is capable of being conveyed or assigned at law.—Lawrence v. Bayard, 7 Paige, N.Y., 70.

Uncertainty as to persons or events
Such a statute makes no distinction between uncertainty of persons and uncertainty of events.—Clowe v. Seavey, 102 N.E. 521, 208 N.Y. 496, 47 L.R.A.,N.S., 284, affirming 135 N.Y.S. 1105, 151 App.Div. 912.

5. N.Y.—Clowe v. Seavey, supra.

6. N.Y.—Upington v. Corrigan, 45 N.E. 359, 151 N.Y. 143, 37 L.R.A. 794.

7. Minn.—Papke v. Pearson, 280 N. W. 183, 185, 203 Minn. 130.
21 C.J. p 927 note 28.
Reversions see infra § 105.

"Classification of estates under the statute is without respect to their nature, the mode of conveyance by which they are created and their relation to the estate of the grantor, or to other granted estates."—Papke v. Pearson, supra.

8. N.Y.—In re Pell, 63 N.E. 789, 171 N.Y. 48, 89 Am.S.R. 791, 57 L.R.A. 540, reversing 70 N.Y.S. 196, 60 App.Div. 286.
21 C.J. p 927 note 29.

"Included in the statutory definitions of future estates are all limitations which at common law were denominated remainders, vested or contingent, springing and shifting uses and executory devises."—Papke v. Pearson, 280 N.W. 183, 185, 203 Minn. 130.

9. N.Y.—In re McQueen's Will, 163 N.Y.S. 287, 99 Misc. 185.
21 C.J. p 927 note 30.

Future interests and present interests contrasted
U.S.—Welch v. Paine, C.C.A.Mass., 120 F.2d 141, reversing, D.C., Paine v. Welch, 33 F.Supp. 341.

Availability of interest for claims of creditors is not inconsistent with its being a "future interest".—Welch v. Paine, supra.

10. Mich.—L'Etourneau v. Henquenet, 50 N.W. 1077, 89 Mich. 428, 28 Am.S.R. 310.
21 C.J. p 927 note 31.
Remainders see infra § 68.

11. N.Y.—National Park Bank v. Billings, 129 N.Y.S. 846, 144 App. Div. 536, affirmed 96 N.E. 1122, 203

Future estates are either vested or contingent.[12] Such an estate is vested where there is a person in being who would have an immediate right to possession on the ceasing of the intermediate or precedent estate,[13] and if there is a person in being of whom it can be positively averred that, if the intermediate estate were now to cease, he would have an immediate right of possession, he has a vested estate notwithstanding the fact that subsequent events may defeat it.[14] Such an estate is contingent while the person to whom or the event on which it is limited to take effect remains uncertain.[15] If the person to take is not ascertained, a contingent estate is a mere possibility or expectancy, not coupled with an interest.[16]

§ 16. With Regard to Number and Connection of Tenants

With regard to the number and connection of the tenants, estates are in severalty or in plurality.

With reference to the number and connection of the tenants, estates are either estates in severalty or estates in plurality, as discussed in the following sections.[17]

§ 17. Estates in Severalty

An estate in severalty is one held by a person in his own right alone.

A tenant in severalty or sole tenant is one who holds real property in his own right alone, without any other person being joined or connected with him in point of interest during his estate therein.[18] This is the most common and usual way of holding an estate, and all estates are supposed to be of this sort unless they are expressly declared to be otherwise.[19]

Severalty, as applied to tenants, is a technical word meaning a sole, separate, and exclusive dominion.[20]

§ 18. Estates in Plurality

Estates in plurality are designated as estates in joint tenancy, tenancy in common, coparcenary, and estates by entirety.

Estates in plurality or coöwnership are designated as estates in joint tenancy, estates in tenancy in common, and estates in coparcenary, respectively.[21] To this enumeration is sometimes added tenancy by entirety, which is a species of joint tenancy and occurs at common law when a gift or conveyance which, if made to two strangers, would create a

N.Y. 556—Robinson v. New York Life Ins. & Trust Co., 133 N.Y.S. 257, 75 Misc. 361.

12. U.S.—Welch v. Paine, C.C.A. Mass., 120 F.2d 141, reversing, D. C., Paine v. Welch, 33 F.Supp. 341.
Minn.—Papke v. Pearson, 280 N.W. 183, 203 Minn. 130.
N.Y.—In re Perry, 96 N.Y.S. 879, 884, 48 Misc. 285.
21 C.J. p 927 note 33.
Vested and contingent estates in general see supra § 5.

13. Minn.—Papke v. Pearson, 280 N. W. 183, 185, 203 Minn. 130.
N.Y.—In re Berry's Will, 139 N.Y.S. 186, 187, 154 App.Div. 509, affirmed 102 N.E. 1099, 209 N.Y. 540—In re Hathaway's Estate, 171 N.Y.S. 190, 191, 103 Misc. 360—In re McQueen's Will, 163 N.Y.S. 287, 292, 99 Misc. 185—In re Perry, 96 N.Y.S. 879, 884, 48 Misc. 285.
Tex.—Thornton v. Zea, 55 S.W. 798, 799, 22 Tex.Civ.App. 509, error refused.
21 C.J. p 927 note 34.

Right to undisposed profits

The purpose of a statutory provision respecting rights to undisposed profits arising in connection with creation of certain estates is to allow him who is to take a future estate also to take the income in interim pending vesting in possession of his estate where such income is not given to another, it being presumed that donor of property may naturally be supposed to intend that income should go to the same person to whom he had given that out of which income arises.—In re O'Hanlon's Will, 27 N.Y.S.2d 889.

14. Iowa.—Williamson v. Youngs, 203 N.W. 28, 200 Iowa 672.
N.Y.—Moore v. Littel, 41 N.Y. 66, affirming 40 Barb. 488.
21 C.J. p 928 note 35.

15. Cal.—In re De Vries, 119 P. 109, 17 Cal.App. 184.
Minn.—Papke v. Pearson, 280 N.W. 183, 185, 203 Minn. 130, citing Corpus Juris.
N.Y.—In re Perry, 96 N.Y.S. 879, 884, 48 Misc. 285.
21 C.J. p 928 note 36.

16. Md.—Bishop v. Horney, 9 A.2d 597, 177 Md. 353.

"Expectancy" distinguished

A contingent interest is distinguished from an expectancy, which is defined as a bare hope of succession to the property of another such as may be entertained by an heir apparent. Such a hope is inchoate, it has no attribute of property, is without appreciable value, and the interest to which it relates is nonexistent, and may never exist. A contingent interest, on the other hand, is an actual creation whose existence may be cut off by few or many contingencies but whose very existence gives it a possible value.—In re Robbins, 49 A. 233, 199 Pa. 500.

"Expectancy" see 25 C.J. p 171 note 36.

17. **Different estates in same fee**

By the common law several sorts of estates or interests, joint or several, may exist in the same fee, so that one person may own ground or soil, another structures thereon, another minerals beneath the surface, and another the trees and wood growing thereon.—Walters v. Sherfield, 78 So. 539, 75 Fla. 505.

18. **Several tenancy** is a tenancy which is separate and not held jointly with another person.—Black L.D.

19. Blackstone Comm. p 179.
21 C.J. p 928 note 39.

20. Pa.—Funk v. Haldeman, 53 Pa. 229, 246.

21. Pa.—Madden v. Gosztonyi Savings & Trust Co., 200 A. 624, 331 Pa. 476, 117 A.L.R. 904.
21 C.J. p 928 note 40.
Coparcenary see the C.J.S. title Tenancy in Common § 3, also 62 C.J. p 408 note 3–p 409 note 15.
Joint tenancy see the C.J.S. title Joint Tenancy § 1, also 33 C.J. p 901 notes 1–9.
Tenancy in common see the C.J.S. title Tenancy in Common § 1, also 62 C.J. p 408 notes 1, 2.

joint tenancy is made to a husband and wife during the coverture.[22]

§ 19. With Regard to Qualifications of Interest

Viewed according to the qualifications of interest which may be had in real property, estates may be treated as uses; trusts; and conditions. A full discussion of the first and second of these estates will be found in the title Trusts, while estates on condition are discussed in the following section.

Examine Pocket Parts for later cases.

§ 20. Estates upon Condition

a. Definition and nature
b. Classification
c. Requisites of conditions
d. Conditions and limitations distinguished
e. Conditional limitations

a. Definition and Nature

An estate on condition is an estate whose existence depends on the happening or not happening of some uncertain event, whereby the estate may be either originally created, enlarged, or finally defeated.

Estates on condition are those whose existence depends on the happening or not happening of some uncertain event, whereby the estate may be either originally created, enlarged, or finally defeated.[23] Such conditions may be annexed to every species of estate or interest in real property,[24] including a fee,[25] and therefore are more properly qualifications of other estates than a distinct species of themselves.[26] An estate is an unconditional estate when the quality thereof is not limited or affected by any condition.[27]

A condition, as used in estates law, is a qualification, restriction, or limitation defeating, terminating, or enlarging an estate granted;[28] a qualification or restriction annexed to a deed or devise, by virtue of which an estate is made to vest, to be enlarged or defeated on the happening or not happening of a particular event, or the performance or nonperformance of a particular act.[29]

b. Classification

(1) In general
(2) Conditions precedent
(3) Conditions subsequent

(1) In General

Estates on condition are divided into estates on condition implied or in law, and estates on condition expressed or in deed, and are further divided into estates on condition precedent and estates on condition subsequent.

22. Pa.—Madden v. Gosztonyi Savings & Trust Co., supra.
Estate by entirety see the C.J.S. title Husband and Wife § 34, also 30 C.J. p 564 note 66–p 565 note 75.

23. N.J.—Board of Education of Borough of West Paterson v. Brophy, 106 A. 32, 34, 90 N.J.Eq. 57.
N.C.—Hall v. Quinn, 130 S.E. 18, 190 N.C. 326.
21 C.J. p 928 note 45.
Similar definitions
(1) "One which is made to vest, to be enlarged or defeated, upon the happening or not happening of some event."—Raley v. Umatilla County, 13 P. 890, 894, 15 Or. 172, 3 Am.S.R. 142.
(2) Other similar definitions see 21 C.J. p 928 note 45 [b].
Origin
Estates on condition are of feudal origin.—Adams v. Ore Knob Copper Co., C.C.N.C., 7 F. 634, 4 Hughes 589—21 C.J. p 928 note 45 [c].

24. U.S.—Vermont v. Society for Propagation of the Gospel, C.C.Vt., 28 F.Cas.No.16,920, 2 Paine 545.
Ill.—Talent v. Talent, 267 Ill.App. 334, 342, quoting **Corpus Juris.**
W.Va.—Stewart v. Workman, 102 S. E. 474, 85 W.Va. 695.
21 C.J. p 929 note 46.

25. N.C.—Paul v. Willoughby, 169 S.E. 226, 204 N.C. 595—Hall v. Quinn, 130 S.E. 18, 190 N.C. 326.
Vt.—Queen City Park Ass'n v. Gale, 3 A.2d 529, 110 Vt. 110.
W.Va.—Stewart v. Workman, 102 S. E. 474, 85 W.Va. 695.
Base, qualified, or determinable fees generally see supra § 10.
Fees conditional see supra § 11.

26. Ill.—Talent v. Talent, 267 Ill. App. 334, 342, quoting **Corpus Juris.**

27. Wis.—Miller v. Yorkshire Ins. Co., 297 N.W. 377, 237 Wis. 551, 133 A.L.R. 1341.

28. Cal.—In re Russell, 126 P. 875, 163 Cal. 668, 673, Ann.Cas.1914A 152.

29. Ala.—Metropolitan Life Ins. Co. v. Goodman, 65 So. 449, 10 Ala. App. 446.
Mich.—Detroit Union Railroad Depot & Station Co. v. Fort St. Union Depot Co., 87 N.W. 214, 128 Mich. 184.
Similar definitions
(1) "A qualification annexed to an estate by the grantor, upon the happening of which the estate granted is enlarged or defeated."—Moe v. Gier, 2 P.2d 852, 855, 116 Cal.App. 403—Joyce v. Krupp, 257 P. 124, 127, 83 Cal.App. 391.
(2) "A qualification annexed to an estate by the grantor, whereby it may be enlarged, defeated, or created upon an uncertain event."—Langley v. Ross, 20 N.W. 886, 887, 55 Mich. 163—12 C.J. p 400 note 10.
(3) "A qualification annexed to an estate, whereby it is to arise (in which case it is called a condition precedent, that is, precedent to the arising of the estate,) or is to be defeated (when it is styled a condition subsequent, that is, subsequent to the arising of the estate)."—Chavis v. Chavis, 35 S.E. 507, 508, 57 S.C. 173.
(4) A modus or quality annexed by him that hath an estate, or interest or right to the same, whereby an estate, etc., may either be defeated, enlarged, or created upon an uncertain event.—Black L.D.
(5) "A quality annexed to land whereby an estate may be defeated."—Littlejohn v. Egerton, 77 N.C. 379, 384.
"Condition is annexed to the estate; it doth always attend and wait upon the estate; it is knit to it."—Michigan State Bank v. Hastings, 1 Dougl., Mich., 225, 266, 41 Am.D. 549.

Estates on condition are divided into estates on condition implied or in law, and estates on condition expressed or in deed,[30] and are further divided into estates on condition precedent and estates on condition subsequent.[31]

Condition implied. Estates on condition implied in law are where the grant of an estate has a condition annexed to it inseparably, from its essence and constitution, although no condition be expressed in words,[32] the implied condition being one which the law implies either from its being always understood to be annexed to certain estates, or as annexed to estates held under certain circumstances.[33]

Condition expressed. An express condition, or, as otherwise termed, a condition in fact,[34] is one declared in terms in the deed or instrument by which the estate is created,[35] and an estate on condition expressed in the grant or devise itself is where the estate granted has a qualification annexed, whereby the estate shall commence, be enlarged, or defeated, on performance or breach of such qualification or condition.[36] Under estates on condition expressed or in deed may be included estates in vadio, gage, or pledge, estates by statute merchant or statute staple, and estates by elegit.[37]

Estates in vadio, gage, or pledge. Estates in gage or pledge are of two kinds, vivum vadium, or living pledge, and mortuum vadium, dead pledge or mortgage.[38] Vivum vadium, or living pledge, so called because neither the debt nor the estate is lost,[39] is a species of security by which a borrower of a sum of money makes over his estate to the lender until he has received that sum out of the issues and profits of his land;[40] the land survives the debt, and when the debt is discharged, the land by right of reverter returns to the original owner.[41]

(2) Conditions Precedent

A condition precedent, as distinguished from a condition subsequent, is a condition which must happen or be performed before the estate can vest or be enlarged.

Conditions precedent are such as must happen or be performed before the estate can vest or be enlarged.[42] The effect of the nonperformance of a condition precedent is to prevent the estate granted under such condition from ever vesting in the gran-

30. Ind.—Sheets v. Vandalia R. Co., 127 N.E. 609, 74 Ind.App. 597.
Wis.—Rogan v. Walker, 1 Wis. 527, 556.
21 C.J. p 929 note 48.
Simplest form of estate on condition in deed is where a grantor conveys the fee reserving a certain rent on condition that if it is not paid he or his heirs may reënter.—Sheets v. Vandalia R. Co., 127 N.E. 609, 74 Ind.App. 597.

31. Ala.—Metropolitan Life Ins. Co. v. Goodman, 65 So. 449, 451, 10 Ala.App. 446.
Wis.—Miller v. Yorkshire Ins. Co., 297 N.W. 377, 237 Wis. 551, 133 A.L.R. 1341.—Rogan v. Walker, 1 Wis. 527, 555.
21 C.J. p 929 note 50.
Condition precedent see infra subdivision b (2) of this section.
Condition subsequent see infra subdivision b (3) of this section.

32. Or.—Raley v. Umatilla County, 13 P. 890, 15 Or. 172, 3 Am.S.R. 142.

33. Or.—Raley v. Umatilla County, supra.

34. Ga.—Thornton v. Trammell, 39 Ga. 202, 207.
Payment of rent
A condition in fact is created where a feoffment is made of lands, reserving rent, payable on a certain day, on condition, that, if it be not paid on the day, the feoffer may reënter, etc.—Thornton v. Trammell, supra.

35. Or.—Raley v. Umatilla County, 13 P. 890, 15 Or. 172, 179, 3 Am.S.R. 142.

36. Ga.—Self v. Billings, 77 S.E. 562, 139 Ga. 400.
21 C.J. p 929 note 52.

37. Blackstone Comm. p 152.
Elegit generally see the C.J.S. title Executions § 12, also 23 C.J. p 307 note 55—p 308 note 58.
Estates by elegit see 21 C.J. p 929 notes 58, 59.
Estates by statute merchant or statute staple see 21 C.J. p 929 notes 56, 57.

38. N.Y.—Kortright v. Cady, 21 N.Y. 343, 344, 78 Am.D. 145.
Mortuum vadium see the C.J.S. title Mortgages § 1, also 41 C.J. p 273 note 2 [b].

39. N.Y.—Kortright v. Cady, supra.—O'Neill v. Gray, 39 Hun 566, 568.

40. Cal.—Spect v. Spect, 26 P. 203, 88 Cal. 437, 441, 22 Am.S.R. 314, 13 L.R.A. 137.
N.Y.—O'Neill v. Gray, 39 Hun 566, 568.

41. Cal.—Spect v. Spect, 26 P. 203, 88 Cal. 437, 441, 22 Am.S.R. 314, 13 L.R.A. 137.
"'Vivum vadium' consisted of a feoffment to the creditor and his heirs, until out of the rents and profits he had satisfied himself his debt. . . . When it was satisfied, the debtor might reënter and maintain ejectment."—Kortright v. Cady, 21 N.Y. 343, 344, 78 Am.D. 145.
In nature of Welsh mortgage
N.Y.—O'Neill v. Gray, 39 Hun 566, 568.
Welsh mortgage see the C.J.S. title Mortgages § 3, also 41 C.J. p 281 note 36—p 282 note 39.
Resembles estate held by statute merchant or statute staple
N.C.—Bradburn v. Roberts, 61 S.E. 617, 619, 148 N.C. 214.

42. Miss.—Clarke v. McCreary, 20 Miss. 347, 354.
N.C.—Brittain v. Taylor, 84 S.E. 280, 168 N.C. 271, 274.
Okl.—In re Assessment of Alleged Omitted Property of Kennedy for Taxation in Osage County for 1917, 58 P.2d 134, 136, 177 Okl. 74.
Wash.—Spencer v. Commercial Co., 71 P. 53, 30 Wash. 520.
Wis.—Miller v. Yorkshire Ins. Co., 297 N.W. 377, 237 Wis. 551, 133 A.L.R. 1341.
12 C.J. p 408 note 21—21 C.J. p 929 note 60.
Similar definitions
(1) "One that must happen or be performed before the estate dependent upon it can arise or be enlarged."—Frank v. Stratford-Handcock, 77 P. 134, 138, 13 Wyo. 37, 110 Am.S.R. 963, 67 L.R.A. 571.
(2) One that must happen before the estate dependent on it can arise or be enlarged.—Seitter v. Riverside Academy, Fla., 197 So. 764—12 C.J. p 407 note 20.
(3) Other similar definitions see 12 C.J. p 408 note 21 [a].

tee,[43] and the general rule is that, where an estate is to vest on the happening of an event it must be shown that the event has taken place, and if the event consists of several particulars it must be shown that every particular has been performed.[44]

Conditions precedent and subsequent compared and distinguished. The question as to whether conditions are precedent or subsequent is a matter of construction,[45] there being no technical words to distinguish between them.[46] The same words may be construed to operate, either as the one or the other, according to the evident sense in which they are used, as indicated by the instrument.[47] The true test therefore, it is said, is that of the intention of the parties to the instrument, creating the condition or estate.[48] This intention is to be gathered from the context of the instrument, read in those lights which are properly employed in the construction of writings.[49] It is not always easy to determine whether a condition is precedent or subsequent. One general rule will, however, solve most cases: If the thing conditioned is to exist or happen before the estate is to vest, the condition is precedent; if after, it is subsequent.[50] Whether the condition is precedent or subsequent may be determined from the nature of the acts to be done, and the order in which they must necessarily precede and follow each other in the progress of performance.[51]

(3) Conditions Subsequent

A condition subsequent is a condition by the failure or nonperformance of which an estate already vested may be defeated.

A condition subsequent is such by the failure or nonperformance of which an estate already vested may be defeated.[52] This rule applies to a condition subsequent to a fee simple title,[53] and the grantee may have an estate of freehold so long as the condition remains unbroken, provided the estate on which such condition is annexed is itself a freehold.[54] In case of a condition subsequent, the estate is given absolutely, without limitation, grantor having no estate left which he may either alienate or devise,[55] but the title is subject to be divested by

43. N.H.—Rollins v. Riley, 44 N.H. 9.
Tenn.—Fowlkes v. Wagoner, Ch., 46 S.W. 586.

44. Ill.—Becker v. Becker, 89 N.E. 737, 241 Ill. 423, 26 L.R.A.,N.S., 858.
N.C.—Brittain v. Taylor, 84 S.E. 280, 168 N.C. 271.

45. U.S.—Huggins v. Daley, W.Va., 99 F. 606, 609, 40 C.C.A. 12, 48 L.R.A. 320.
12 C.J. p 408 note 27.

46. U.S.—Huggins v. Daley, supra.
12 C.J. p 408 note 28.

47. U.S.—Finlay v. King, Va., 3 Pet. 346, 374, 7 L.Ed. 701.
Mich.—Scott v. Roethlesberger, 146 N.W. 307, 308, 178 Mich. 571—Markham v. Hufford, 82 N.W. 222, 225, 123 Mich. 505, 81 Am.S.R. 222, 48 L.R.A. 580.
S.C.—Schuman v. Heldman, 41 S.E. 510, 63 S.C. 474.
12 C.J. p 408 note 29.

48. U.S.—Finlay v. King, Va., 3 Pet. 346, 374, 7 L.Ed. 701.
Okl.—Wellsville Oil Co. v. Miller, 145 P. 344, 348, 44 Okl. 493.
12 C.J. p 408 notes 30, 31, p 409 notes 32, 33.

49. U.S.—Rannels v. Rowe, Ark., 145 F. 296, 300, 74 C.C.A. 376.
12 C.J. p 409 notes 34, 35.

50. U.S.—Finlay v. King, Va., 3 Pet. 346, 7 L.Ed. 701.
12 C.J. p 409 note 36.

51. U.S.—Huggins v. Daley, W.Va., 99 F. 606, 609, 40 C.C.A. 12, 48 L.R.A. 320.

52. Conn.—City Nat. Bank v. City of Bridgeport, 147 A. 181, 109 Conn. 529.
Fla.—Seitter v. Riverside Academy, 197 So. 764.
N.C.—Brittain v. Taylor, 84 S.E. 280, 168 N.C. 271.
Okl.—In re Assessment of Alleged Omitted Property of Kennedy for Taxation in Osage County for 1917, 58 P.2d 134, 136, 177 Okl. 74.
Wis.—Miller v. Yorkshire Ins. Co., 297 N.W. 377, 378, 237 Wis. 551, 133 A.L.R. 1341.
21 C.J. p 930 note 63.

Condition is condition subsequent, where the performance of it does not necessarily precede the vesting of the estate, but may accompany or follow it, and the act may as well be done after as before the vesting of the estate, or where from the nature of the act and the time required for its performance it is evident that the intention of the parties was that the estate should vest and the act be performed after the taking of possession by the grantee or devisee.
Colo.—Godding v. Hall, 140 P. 165, 56 Colo. 579.
N.M.—Torres v. Abeyta, 84 P.2d 592, 42 N.M. 665.

Estate for widowhood, as known to the common law and recognized and provided for by some statutes, is an estate defeasible by, and in the event of, the widow's remarriage.—Logan v. Hammond, 117 S.E. 428, 155 Ga. 514.

53. Ky.—Manning v. Street, 130 S.W.2d 735, 739, 279 Ky. 253.
La.—Wilson v. Ætna Ins. Co., App., 161 So. 650, 652.
N.Y.—Allen v. Trustees of Great Neck Free Church, 269 N.Y.S. 341, 350, 240 App.Div. 206.
Pa.—In re Gohn's Estate, 188 A. 144, 324 Pa. 177.
Vt.—University of Vermont and State Agr. College v. Ward, 158 A. 773, 104 Vt. 239.
Determinable fee distinguished see supra § 10.

Restatement of law
As stated in the American Law Institute Restatement of the Law of Property, Tentative Draft No. 2, § 65: "An estate in fee simple with a condition subsequent is an estate in fee simple which the creator thereof, or his successor in interest, has the privilege and power of terminating if and when an event specified in the creating conveyance occurs."—Allen v. Trustees of Great Neck Free Church, 269 N.Y.S. 341, 350, 240 App.Div. 206.

Lease for "as long as grass grows and water runs," if conveying fee, would convey "fee on condition subsequent."—University of Vermont and State Agr. College v. Ward, 158 A. 773, 777, 104 Vt. 239.

Statute Quia Emptores, which prevented subinfeudation, has been held not to affect the right of the owner of a fee simple to grant the fee on a condition, and to enter, on breach of the condition.—Van Rensselaer v. Dennison, 35 N.Y. 393—Van Rensselaer v. Ball, 19 N.Y. 100.

54. Colo.—Union Colony Co. of Colorado v. Gallie, 88 P.2d 120, 104 Colo. 46.

55. Colo.—Union Colony Co. of Colorado v. Gallie, supra.

the happening or not happening of the contingency,[56] and if the condition is expressed, the right of reëntry for a breach thereof follows without an express reservation or stipulation to that effect.[57]

The effect of the nonperformance or breach of a condition subsequent is not ipso facto to produce a reverter of title,[58] but to render the estate granted liable to forfeiture, at the option of the person entitled to take advantage of such breach.[59] To have any effect on the estate the condition, on breach thereof, must be taken advantage of, by reëntry or claim, by the grantor or his heirs or other person to whom the right so to do belongs;[60] and it may be stated as a general rule, that with the breach of a condition a stranger has nothing to do and a court will not examine at his request,[61] or in a collateral proceeding,[62] the question whether a condition has been broken and a forfeiture incurred.

Estates on condition subsequent have until defeated the same qualities and incidents as though no condition was annexed thereto,[63] but if conveyed or devised they pass subject to the condition.[64]

Conditions subsequent are not favored by the law and are construed strictly because they tend to destroy estates,[65] and therefore may be created only by apt and appropriate language, which establishes that only a conditional estate was conveyed.[66]

Conn.—City Nat. Bank v. City of Bridgeport, 147 A. 181, 109 Conn. 529—Warner v. Bennett, 31 Conn. 468, 475.

Me.—Whitmore v. Church of the Holy Cross, 117 A. 469, 121 Me. 391.

56. Conn.—City Nat. Bank v. City of Bridgeport, 147 A. 181, 109 Conn. 529—Warner v. Bennett, 31 Conn. 468.

Vt.—University of Vermont and State Agr. College v. Ward, 158 A. 773, 104 Vt. 239.

57. Me.—Whitmore v. Church of the Holy Cross, 117 A. 469, 121 Me. 391.

58. Wis.—Mash v. Bloom, 114 N.W. 457, 133 Wis. 646, 14 L.R.A.,N.S., 1187, 14 Ann.Cas. 1012.

59. U.S.—Stanley v. Colt, Conn., 5 Wall. 119, 18 L.Ed. 502.

Ill.—Union Trust Co. v First Trust & Savings Bank, 252 Ill.App. 337, 347, quoting **Corpus Juris**

N.J.—Board of Education of Borough of West Paterson v. Brophy, 106 A. 32, 90 N.J.Eq. 57.

Tenn.—Fowlkes v. Wagoner, Ch., 46 S.W. 586.

Va.—Neal v. State-Planters Bank & Trust Co., 184 S.E. 203, 206, 166 Va. 158, citing **Corpus Juris**

Wis.—Mash v. Bloom, 114 N.W. 457, 133 Wis. 646, 14 L.R.A.,N.S., 1187, 14 Ann.Cas. 1012.

60. Me.—Whitmore v. Church of the Holy Cross, 117 A. 469, 121 Me. 391.

N.Y.—Williams v. Jones, 60 N.E. 240, 166 N.Y. 522—Lyon v. Hersey, 8 N.E. 518, 103 N.Y. 264.

Tenn.—Yarbrough v. Yarbrough, 269 S.W. 36, 151 Tenn. 221.

Tex.—Community of Priests of St. Basil v. Byrne, Com.App., 255 S.W. 601, reversing, Civ.App., 236 S.W. 1016.

Vt.—Queen City Park Ass'n v. Gale, 3 A.2d 529, 110 Vt. 110.

Wis.—Mash v. Bloom, 114 N.W. 457, 133 Wis. 646, 14 L.R.A.,N.S., 1187, 14 Ann.Cas. 1012.

21 C.J. p 930 note 66.

Actual entry by grantor or his heirs is necessary to defeat the estate.—Whitmore v. Church of the Holy Cross, 117 A. 469, 121 Me. 391.

61. U.S.—Schulenberg v Harriman, Minn., 21 Wall. 44, 22 L.Ed. 551.

Ill.—Union Trust Co. v. First Trust & Savings Bank, 252 Ill.App. 337, 347.

21 C.J. p 930 note 66.

62. Tenn.—Fowlkes v. Wagoner, Ch., 46 S.W. 586.

63. Ill.—Union Trust Co. v. First Trust & Savings Bank, 252 Ill.App. 337, 347, quoting **Corpus Juris.**

Me.—Whitmore v. Church of the Holy Cross, 117 A. 469, 121 Me. 391.

N.C.—Paul v. Willoughby, 169 S.E. 226, 204 N.C. 595.

Wis.—Cobban v. Northern Wisconsin State Fair Ass'n, 248 N.W. 463, 465, 212 Wis. 235, citing **Corpus Juris**—Mash v. Bloom, 114 N.W. 457, 133 Wis. 646, 14 L.R.A.,N.S., 1187, 14 Ann.Cas. 1012.

21 C.J. p 930 note 68.

Fee on condition subsequent is a fee with all the incidents thereof, subject to be divested on the happening of the condition which does not cut down the fee to a life estate, even though the gift over is to the descendants of the first taker.—Paul v Willoughby, 169 S.E. 226, 204 N.C. 595.

Contingency not occurring

If the condition subsequent, or contingency, which would cause a vested estate to be divested if it occurred, does not occur, there is no divestiture, and the estate remains vested.—Bishop v. Horney, 9 A.2d 597, 177 Md. 353.

Right to convey

The holder of a fee on condition subsequent may convey it.—Guilford v. Gardner, 162 N.W. 261, 180 Iowa 1210.

Right to undisposed rents and profits

Where an estate is vested, subject to being divested on the happening of a contingency, the donee of estate is entitled as the next eventual taker of the undisposed rents and profits accruing therefrom.—In re O'Hanlon's Will, 27 N.Y.S.2d 889.

Qualified fee

A conveyance on condition subsequent vests a qualified fee in grantee, until the happening of the condition subsequent, divesting grantor of all right and interest in, and all title to, the land, and giving grantee the same right and privileges as though the estate were in fee simple.—Union Colony Co. of Colorado v Gallie, 88 P.2d 120, 104 Colo. 46.

Qualified fee generally see supra § 10.

64. Colo.—Brown v. State, 5 Colo. 496.

Miss.—Memphis & C. R. Co. v Neighbors, 51 Miss. 412.

65. Colo.—Union Colony Co. of Colorado v. Gallie, 88 P.2d 120, 104 Colo. 46—Godding v. Hall, 140 P. 165, 56 Colo. 579.

Me.—Whitmore v. Church of the Holy Cross, 117 A. 469, 121 Me. 391.

Minn.—Chute v. Washburn, 46 N.W. 555, 44 Minn. 312.

66. Me.—Whitmore v. Church of the Holy Cross, 117 A. 469, 121 Me. 391.

N.J.—Board of Education of West Paterson v. Brophy, 106 A. 32, 34, 90 N.J.Eq. 57.

As stated in Restatement of the Law of Property vol 1 § 45, "An estate in fee simple subject to a condition subsequent is created by any limitation which, in an otherwise effective conveyance of land, (a) creates an estate in fee simple; and (b) provides that upon the occurrence of a stated event the conveyor or his successor in interest shall have the power to terminate the estate so created."

Ky.—Manning v. Street, 130 S.W. 2d 735, 738, 279 Ky. 253.

Vt.—Queen City Park Ass'n v. Gale, 3 A.2d 529, 531, 110 Vt. 110.

c. Requisites of Conditions

A condition annexed to an estate must be legal and possible, and generally must be expressed in the instrument creating the estate.

The condition annexed to the estate must be legal and possible,[67] and generally must be expressed in the grant or devise creating the estate.[68] The condition is void, and its performance will be excused, if it is impossible at the time of its creation,[69] or afterward becomes so by the act of God,[70] or of the grantor,[71] or if it is contrary to law[72] or to public policy,[73] or repugnant to the nature of the estate.[74] In such cases if the condition is a condition subsequent the effect is to vest the estate in the grantee, discharged from the condition;[75] but if a condition precedent is void the estate dependent thereon is also void, and the grantee takes nothing by the grant.[76] If a condition precedent is impossible the estate will not vest.[77]

d. Conditions and Limitations Distinguished

A condition is distinguished from a limitation in that in case of a condition the estate continues beyond the breach of the condition until the grantor or his heirs take advantage of the breach, to avoid the estate, whereas, in case of a limitation, the estate determines as soon as the contingency happens, without any act on the part of the person next in expectancy.

The distinction between a condition and a limitation is technical, but clear.[78] The distinction is that in the case of a limitation the estate determines as soon as the contingency happens, without any act on the part of him who is next in expectancy, while in the case of a condition the estate continues beyond the happening of the contingency, unless grantor or his heirs take advantage of the breach of the condition and make an entry or claim in order to avoid the estate.[79] A condition terminates an estate; a limitation creates a new one.[80] Words of limitation mark the period which is to determine the estate; but words of condition render the estate liable to be defeated in the intermediate time, if the event expressed in the condition arises before the determination of the estate, or completion of the period prescribed by the limitation.[81] A condition sub-

67. Mass.—Brattle Square Church v. Grant, 3 Gray 142, 63 Am.D. 725.

68. Wis.—Miller v. Yorkshire Ins. Co., 297 N.W. 377, 237 Wis. 551, 133 A.L.R. 1341.
Conditions implied see supra § 20 b.

69. Ky.—Eastham v. Eastham, 231 S.W. 221, 222, 191 Ky. 617, quoting **Corpus Juris.**
N.M.—Torres v. Abeyta, 84 P.2d 592, 595, 42 N.M. 665, citing **Corpus Juris.**
N.Y.—Plumb v. Tubbs, 41 N.Y. 442

70. Ky.—Eastham v. Eastham, 231 S.W. 221, 222, 191 Ky. 617.
N.M.—Torres v. Abeyta, 84 P.2d 592, 595, 42 N.M. 665, citing **Corpus Juris.**
N.C.—Brittain v. Taylor, 84 S.E. 280, 168 N.C. 271.
21 C.J. p 930 note 72.

71. Ky.—Eastham v. Eastham, 231 S.W. 221, 222, 191 Ky. 617.
N.M.—Torres v. Abeyta, 84 P.2d 592, 42 N.M. 665.
N.C.—Brittain v. Taylor, 84 S.E. 280, 168 N.C. 271.
W.Va.—Jones v. Chesapeake & O. R. Co., 14 W.Va. 514.

72. Ky.—Eastham v. Eastham, 231 S.W. 221, 222, 191 Ky. 617.
21 C.J. p 930 note 74.

73. Ky.—Eastham v. Eastham, supra.
21 C.J. p 930 note 75.

74. Ky.—Easthan v. Easthan, supra.
Pa.—Jauretche v. Proctor, 48 Pa. 466.
21 C.J. p 930 note 76.

75. Ill.—Union Trust Co. v. First Trust & Savings Bank, 252 Ill.App. 337, 347.
Ky.—Eastham v. Eastham, 231 S.W. 221, 222, 191 Ky. 617.
N.M.—Torres v. Abeyta, 84 P.2d 592, 595, 42 N.M. 665, citing **Corpus Juris.**
N.C.—Brittain v. Taylor, 84 S.E. 280 168 N.C. 271, 274.
Tenn.—Fowlkes v. Wagoner, Ch., 46 S.W. 586.
21 C.J. p 930 note 77.

76. N.C.—Brittain v. Taylor, 84 S.E. 280, 168 N.C. 271.
Okl.—Wellsville Oil Co. v. Miller, 145 P. 344, 44 Okl. 493.

77. Cal.—Stockton v. Weber, 33 P. 332, 98 Cal. 433.

78. Ind.—Fall Creek School Tp. v. Shuman, 103 N.E. 677, 55 Ind.App. 232.

79. Cal.—Hencke v. Lake Hemet Water Co., 69 P.2d 849, 9 Cal.App. 2d 136.
Ill.—Pure Oil Co. v. Miller-McFarland Drilling Co., 34 N.E.2d 854, 858, 376 Ill. 486.
Ky.—Eastham v. Eastham, 231 S.W. 221, 222, 191 Ky. 617, quoting **Corpus Juris.**
Mass.—Markey v. Smith, 16 N.E.2d 20, 301 Mass. 64, 118 A.L.R. 274
Mo.—Chouteau v. City of St. Louis, 55 S.W.2d 299, 331 Mo. 781.
Tex.—Gulf Production Co. v. Continental Oil Co., 132 S.W.2d 553, modifying, Civ.App., 61 S.W.2d 185—Community of Priests of St. Basil v. Byrne, Com.App., 255 S.W. 601, reversing, Civ.App., 236 S.W. 1016—Diamond v. Rotan, 124 S.W. 196, 200, 58 Tex.Civ.App. 263.
Vt.—Bean v. Atkins, 89 A. 643, 648, 87 Vt. 376.
21 C.J. p 930 note 81.
"A limitation is imperative and is determined by the rules of law, while a condition is controlled by equity, if an inequitable use of it is attempted."—Bean v. Atkins, supra.

"Estate upon limitation is one which is made to determine absolutely upon the happening of some future event. . . . The technical words generally used to create a limitation are conjunctions relating to time, such as during, while, so long as, until, etc. But these words are not absolutely necessary; for where it is necessary, in order to carry out the intent of the grantor, to construe an estate to be a limitation, it will be done, even though words, ordinarily used in the creation of an estate upon condition, appear in their stead."—Diamond v. Rotan, 124 S.W. 196, 200, 58 Tex.Civ. App. 263.

80. N.Y.—Williams v. Jones, 60 N.E. 240, 166 N.Y. 522—Lyon v. Hersey, 8 N.E. 518, 103 N.Y. 264.

81. N.Y.—First Reformed Dutch Church of Gilboa, N. Y., v. Croswell, 206 N.Y.S. 132, 210 App.Div. 294, appeal dismissed 147 N.E. 222, 239 N.Y. 625.
21 C.J. p 931 note 85.
Other statement of distinction
"Where an estate is so expressly limited by the words of its creation that it cannot endure for any longer time than until the contingency happens upon which the estate is to fail, this is a limitation; but when an estate is expressly granted upon condition in deed, the law permits it to endure beyond the time of the contingency happening, unless the grantor takes advantage of the breach of condition, by making en-

sequent brings the estate back to the grantor or his heirs; a conditional limitation carries it over to a stranger.[82]

Special limitation is a qualification serving to mark out the bounds of an estate, so as to determine it ipso facto in a given event without action, entry, or claim, before it would, or might, otherwise expire by force of, or according to, the general limitation.[83]

e. Conditional Limitations

A conditional limitation is an estate limited to take effect after the determination of another estate, which, in the absence of a limitation over, would have been an estate on condition.

A conditional limitation is an estate limited to take effect after the determination of an estate, which, in the absence of a limitation over, would have been an estate on condition.[84] If a condition subsequent is followed by a limitation over on a noncompliance with or a breach of the condition, it is termed a conditional limitation.[85] The estate is of a mixed nature, partaking both of a condition and of a limitation;[86] of a condition, because it defeats the estate previously limited; and of a limitation, because on the happening of the contingency, the estate passes to the person having the next expectant interest without entry or claim.[87] Conditional limitations were not recognized by the common law and could only be created so as to become valid and effectual under the statutes of uses.[88]

III. ESTATES TAIL

§ 21. Definition and Nature

A "fee tail" or "estate tail" is an estate of inheritance which, instead of descending to heirs generally, goes only to heirs of the donee's body.

Estates tail are estates of inheritance which, instead of descending to heirs generally, go to the heirs of the donee's body, which means his lawful issue, his children, and through them to his grandchildren in a direct line, so long as his posterity endures in a regular order and course of descent, and on the extinction of such issue the estate determines.[89] The indefinite failure of issue which is an essential ingredient of a fee tail[90] means a failure of issue which may occur at any time rather than at

try."—Lonas v. Silver, 195 N.Y.S. 214, 215, 201 App.Div. 383.

82. Conn.—City Nat. Bank v. City of Bridgeport, 147 A. 181, 185, 109 Conn. 529, quoting Corpus Juris.
Ill.—Green v. Old People's Home of Chicago, 109 N.E. 701, 269 Ill. 134, reversing 190 Ill.App. 152.
N.J.—Board of Chosen Freeholders of Cumberland County v. Buck, 82 A. 418, 79 N.J.Eq. 472.
N.Y.—Williams v. Jones, 60 N.E. 240, 166 N.Y. 522, reversing 66 N.Y.S. 702, 54 App.Div. 349—Lyon v. Hersey, 8 N.E. 518, 103 N.Y. 264.
Tenn.—Fowlkes v. Wagoner, Ch., 46 S.W. 586, 592.
Conditional limitation vesting shifting or springing use in a third person is distinguishable from a condition subsequent creating a possibility of reverter in the grantor.—Village of Hinsdale v. Chicago City Missionary Soc., 30 N.E.2d 657, 375 Ill. 220.

83. Pa.—Henderson v. Hunter, 59 Pa. 335, 340.

84. Tex.—Diamond v. Rotan, 124 S.W. 196, 200, 58 Tex.Civ.App. 263.
21 C.J. p 931 note 86.
Similar definitions
(1) "A condition, followed by a limitation over to a third person in case the condition be not fulfilled, or there is a breach of it."—Brattle Square Church v. Grant, 3 Gray, Mass., 142, 146, 63 Am.D. 725.
(2) "One where the whole estate is given to the grantee absolutely, but upon the happening of a specified event it is to terminate absolutely . . . and the fee goes immediately to some one else."—Board of Education of Borough of West Paterson v. Brophy, 106 A. 32, 34, 90 N.J.Eq. 57.
(3) Other similar definitions see 21 C.J. p 931 note 86 [a].
Conditional limitations comprehend every limitation which is to vest an interest in a third person, on a condition, or on an event which may or may not happen.—Brattle Square Church v. Grant, 3 Gray, Mass., 142, 63 Am.D. 725.

85. Conn.—City Nat. Bank v. City of Bridgeport, 147 A. 181, 109 Conn. 529.
Vt.—Bean v. Atkins, 89 A. 643, 87 Vt. 376.
21 C.J. p 931 note 87.

86. Tenn.—Fowlkes v. Wagoner, Ch., 46 S.W. 586.
21 C.J. p 931 note 88.

87. Ill.—Village of Hinsdale v. Chicago City Missionary Soc., 30 N.E.2d 657, 665, 375 Ill. 220.
N.J.—Board of Education of Borough of West Paterson v. Brophy, 106 A. 32, 90 N.J.Eq. 57.
Tenn.—Yarbrough v. Yarbrough, 269 S.W. 36, 151 Tenn. 221.
21 C.J. p 931 note 89.

88. Ind.—Outland v. Bowen, 17 N.E. 281, 115 Ind. 150, 7 Am.S.R. 420.
21 C.J. p 931 note 90.

89. Kan.—Coleman v. Shoemaker, 78 P.2d 905, 906, 147 Kan. 689, quoting Corpus Juris—Burnworth v. Fellerman, 289 P. 433, 434, 131 Kan. 186, quoting Corpus Juris.
Miss.—Boxley v. Jackson, 2 So.2d 160.
Tenn.—Harwell v. Harwell, 271 S.W. 353, 355, 151 Tenn. 587, quoting Corpus Juris.
21 C.J. p 931 note 91.
Similar definitions
U.S.—Richman v. Hoppin, C.C.A.Ill., 45 F.2d 737.
Ill.—Nave v. Bailey, 160 N.E. 605, 329 Ill. 235.
Kan.—Jonas v. Jones, 109 P.2d 211, 153 Kan. 108—Gardner v. Anderson, 227 P. 743, 114 Kan. 778, 116 Kan. 431.
Ky.—Cox v. Fink, 254 S.W. 757, 200 Ky. 219.
Mo.—Inlow v. Herren, 267 S.W. 893, 306 Mo. 42.
21 C.J. p 931 note 91 [a].
Interference with ordinary devolution by implication
"Estate tail" involves interference with statutory rules pertaining to descent, and limitation of inheritance to issue of body.—Woodley v. Howse, 3 P.2d 475, 133 Kan. 639—Gardner v. Anderson, 227 P. 743, 114 Kan. 778, 116 Kan. 431.

90. Me.—Gould v. Leadbetter, 150 A. 375, 129 Me. 101.

any fixed time.[91] An estate tail like an estate in fee simple may depend for its continuance on the performance of a condition or may be defeated by the happening of a contingency.[92]

The donor is left with a reversionary interest in the fee; on the failure of issue, the estate reverts to the donor.[93]

§ 22. Origin and Status

Estates tail originated with the statute de donis. While adopted as a part of the English common law they are now recognized in but a few jurisdictions.

Estates tail had their origin in the statute de donis conditionalibus (3 Edw. I c 1) which abolished fees conditional and substituted therefor fees tail.[94]

Estates tail are not favored because of the delay in the vesting of title[95] and in some states have never been recognized,[96] but they were generally accepted with the other parts of English jurisprudence,[97] and in a few states still exist,[98] but as stated infra § 29, they have been abolished or materially modified by statute in most jurisdictions.

§ 23. Classification

Estates tail are classified as general or special.

Estates tail are either general or special, according to whether the limitation is to the heirs of the donee's body generally, or to certain specified heirs, coming within that description, to the exclusion of others;[99] but the specified heirs must be lineal heirs, as an estate tail can be created only by a gift to the donee and the heirs of his body begotten.[1] Estates in general and special tail may both of them be either in tail male or tail female.[2]

§ 24. Creation in General

Estates tail may be created by deed, see Deeds § 111, or by will, see the C.J.S. title Wills §§ 861–869, also 69 C.J. p 492 note 55–p 505 note 87.

§ 25. What May Be Entailed

Personalty cannot be entailed.

Mere personal chattels cannot be entailed;[3] and a limitation which would create an estate tail as to realty gives the first donee an absolute estate in personalty.[4]

§ 26. Incidents

Estates tail have progressively taken on more and more of the incidents of an estate in fee simple.

Originally an estate tail was not chargeable with the debts or obligations of the tenant after his death;[5] but by statute the estate was made liable for the debts of the tenant to the crown due by record or special contract, and still later they were made liable for all his debts in case of bankruptcy.[6] In some jurisdictions such an estate is by statute generally liable for the debts of the tenant.[7] In any event an estate tail may be sold under execution to raise funds to pay a charge imposed by the instrument creating the estate.[8] Until the rule was modified by statute, estates tail were not liable to forfeiture for treason or felony.[9] The tenant in tail was not liable for waste.[10]

An estate tail was subject to both curtesy, see Curtesy § 11e, and dower, see Dower § 26a.

Alienation. Originally a tenant in tail could not alienate the estate for a period longer than his life and he could not devise it.[11] He could of course lease it for a period within his own tenure.[12] However, as discussed infra § 27, the courts and the legislatures have created a number of ways whereby the tenant in tail can convey a fee simple. Moreover the right to bar the entail in one of these

91. Kan.—Burnworth v. Fellerman, 289 P. 433, 131 Kan. 186.

92. Pa.—Linn v. Alexander, 59 Pa. 43—Lammot v. Merciful Home, 26 Pa.Dist. 339.

93. Mo.—Williams v. Reid, 37 S.W. 2d 537, 539, citing **Corpus Juris.**
21 C.J. p 932 notes 97, 98.

94. N.J.—Den v. Spachius, 16 N.J. Law 172.
21 C.J. p 932 notes 93–96.

95. Ill.—Albers v. Donovan, 21 N.E. 2d 563, 371 Ill. 458.

96. Iowa—Pierson v. Lane, 14 N.W. 90, 60 Iowa 60.
21 C.J. p 932 note 2.

97. Wyo.—Jensen v. Jensen, 89 P.2d 1085, 54 Wyo. 224.
21 C.J. p 932 note 99.

98. Kan.—Ewing v. Nesbitt, 127 P. 1131, 88 Kan. 708, 716.
21 C.J. p 932 note 3.

99. N.J.—Tantum v. Campbell, 91 A. 120, 122, 83 N.J.Eq. 361.
21 C.J. p 932 notes 4–6, 9, 10.

1. Miss.—Jordan v. Roach, 32 Miss. 481, 603.

2. Conn.—Dart v. Dart, 7 Conn. 250.
21 C.J. p 932 note 8.

3. Ill.—Hempstead v. Hempstead, 120 N.E. 782, 285 Ill. 448.
21 C.J. p 933 note 18.

4. Conn.—Thames Bank & Trust Co. v. Adams, 7 A.2d 836, 838, 125 Conn. 656, citing **Corpus Juris.**
21 C.J. p 933 note 19.

5. Del.—Hazzard v. Hazzard, 97 A. 233, 29 Del. 91.
Pa.—Gause v. Wiley, 4 Serg. & R 509.
21 C.J. p 933 note 26.

6. U.S.—Croxall v. Shererd, N.J., 5 Wall. 268, 18 L.Ed. 572.

7. Mass.—Holland v. Cruft, 3 Gray 162.
21 C.J. p 933 note 29.

8. Pa.—Gause v. Wiley, 4 Serg & R. 509.

9. Pa.—Gause v. Wiley, supra.

10. Ohio.—Pollock v. Speidel, 17 Ohio St. 439.
21 C.J. p 933 note 22.

11. Del.—In re Reeves, 92 A. 246, 10 Del.Ch. 324, affirmed 94 A. 511, 10 Del.Ch. 483.
21 C.J. p 934 notes 37, 38.

12. Kan.—Davis v. Davis, 246 P. 982, 121 Kan. 312.

ways, by a common recovery, became an inseparable incident to estates tail, one which could not be restrained by condition, limitation, custom, recognizance, or covenant.[13] A tenant in tail cannot divest himself of the power of barring the entail by a covenant with the remainderman that he will not use such power.[14]

§ 27. Bar or Defeat of Estate

A variety of methods of barring an estate tail have been evolved by the courts and the legislatures, as means of a common recovery, lease, or fine and in more recent times by deed or mortgage.

Common recovery. The first relief against the evils incident to estates tail was procured through the courts in the decision of Taltarum's case (Y. B. 12 Edw. IV pp 14, 19)[15] in which it was decided that an estate tail might be barred by a fictitious proceeding called a common recovery which was introduced to elude the statute de donis,[16] and this decision having been generally acquiesced in, common recoveries became the regular mode of conveyance by which the tenant in tail might dispose of his land and tenements.[17] A common recovery duly executed passed an absolute estate defeating not only the rights of the tenant in tail but those in remainder and reversion.[18] It let in all the preceding encumbrances of the tenant, and rendered valid all the acts of ownership which he had exercised over the estate.[19] Common recoveries were introduced into this country and allowed as a means of barring estates tail,[20] but have now very generally been done away with under the statutory provisions relating to these estates.[21]

Lease. The next mode of barring estates tail was by virtue of a statute, where by certain leases made by tenants in tail, not prejudicial to the issue, were allowed to be good in law and bind the issue in tail.[22]

Fine. A later statute provided that a fine duly levied by the tenant in tail should be a complete bar to him and his heirs, and all persons claiming under the entail.[23] Fines as a means of barring estates tail were recognized in this country in a few of the states until they were abolished by statute.[24]

Appointment to charitable uses. A later statute, commonly called the statute of charitable uses, was so construed by the courts that an appointment by the tenant in tail of the land entailed to a charitable use was good without fine or recovery.[25] It has been held that this means of barring estates tail is not recognized in this country.[26]

Deed. At common law if a tenant in tail, by bargain and sale, lease and release, covenant to stand seized, or other conveyance operating by way of grant, conveyed to another and his heirs, the grantee had a base fee simple, determinable after the death of the tenant in tail by the entry of the issue in tail.[27] By virtue of statutory enactments or judicial decision the tenant in tail may now generally convey the estate by deed and thus bar the entail.[28] The

13. U.S.—Croxall v. Shererd, N.J., 5 Wall. 268, 18 L.Ed. 572.
21 C.J. p 934 notes 33–35.

14. Pa.—Doyle v. Mullady, 83 Pa. 264.

15. Evils of estates tail
Va.—Orndoff v. Turman, 2 Leigh, 200, 221, 29 Va. 200, 221, 21 Am.D. 608.
21 C.J. p 934 note 42.

16. Kan.—Ewing v. Nesbitt, 127 P. 1131, 88 Kan. 708.
21 C.J. p 934 note 44.

"Common recovery" defined
"A common recovery was in the nature and form of an action at law, carried regularly through, and ending in a recovery of the lands against the tenant of the freehold; which recovery, being a supposed adjudication of the right, bound all persons, and vested a free and absolute fee-simple in the recoverer."—Christy v. Burch, 2 So. 258, 25 Fla. 942, 965—12 C.J. p 206 notes 13–19.

Common vouchee
In common recoveries, the person who is vouched to warranty is called the "common vouchee."—Bouvier L. D.—12 C.J. p 210 note 27.

17. Kan.—Ewing v. Nesbitt, 127 P. 1131, 88 Kan. 708.
21 C.J. p 934 note 45.

18. U.S.—Croxall v. Shererd, N.J., 5 Wall. 268, 18 L.Ed. 572.
21 C.J. p 934 note 47.

19. Md.—Maslin v. Thomas, 8 Gill 18.

20. Mass.—Hall v. Thayer, 5 Gray 523.
21 C.J. p 934 note 49.

21. Md.—Maslin v. Thomas, 8 Gill 18.
21 C.J. p 934 note 50.

22. Kan.—Ewing v. Nesbitt, 127 P. 1131, 88 Kan. 708.
21 C.J. p 935 note 52.

23. U.S.—Croxall v. Shererd, N.J., 5 Wall. 268, 18 L.Ed. 572.
21 C.J. p 935 note 54.

24. Va.—Orndoff v. Turman, 2 Leigh 200, 29 Va. 200, 21 Am.D. 608.
21 C.J. p 935 note 55.

25. Kan.—Ewing v. Nesbitt, 127 P. 1131, 88 Kan. 708.

26. Pa.—Theological Seminary v. Wall, 44 Pa. 353.

27. Conn.—Whiting v. Whiting, 4 Conn. 179.
21 C.J. p 935 note 59.

28. Kan.—Somers v. O'Brien, 281 P. 888, 129 Kan. 24—Usman v. Marks, 267 P. 963, 126 Kan. 344—Wright v. Jenks, 261 P. 840, 124 Kan. 604.
21 C.J. p 935 notes 60–63.

Good faith conveyance
(1) The conveyance must be bona fide and for a good or valuable consideration.—Nightingale v. Burrow, 15 Pick., Mass., 104—Soule v. Soule, 5 Mass. 61—Wheelwright v. Wheelright, 2 Mass. 447, 3 Am.D. 66.

(2) It has been held that a deed properly executed and recorded is effectual to bar an estate tail, although executed merely for this purpose, for a nominal consideration, and on an express trust that the grantee shall immediately reconvey to the grantor.—Lawrence v. Lawrence, 105 Pa. 335.

A sale and conveyance by the trustee of a lunatic who is a tenant in tail, made by order of court, will pass a good title in fee simple.—In re Reeves, 94 A. 511, 10 Del.Ch. 483, affirming 92 A. 246, 10 Del.Ch. 324.

deed must be executed[29] and recorded[30] in the manner provided by statute, and have proper parties legally capable of contracting.[31] According to most authorities seizin by the tenant in tail which was essential to the earlier modes of barring the entail is also an essential requisite of this mode;[32] a deed will not be effectual to bar the entail if made by a tenant in tail in remainder[33] or by the heir in tail during his ancestor's lifetime.[34] It has been held, however, that the requirement of seizin is an absolute subtlety.[35] A tenant in tail instead of defeating the estate tail altogether may convey only a limited interest therein, and on the expiration of the particular interest will again take the estate tail as originally held.[36] The deed of the tenant in tail may convey to the grantee an absolute estate in fee simple,[37] and bar not only the estate tail but also all remainders and reversions,[38] contingent interests,[39] and executory devises over,[40] and does not, as in the case of a common recovery, let in prior encumbrances.[41] The sale and conveyance by a sheriff on execution of a judgment against a tenant in tail, of the land of the tenant in tail, does not bar the entail,[42] and after such a sale and conveyance the tenant in tail may himself execute a deed for the purpose of barring the entail.[43]

Mortgage. A tenant in tail can execute a mortgage valid for the duration of his tenure.[44] Under a statute authorizing an absolute conveyance by deed a mortgage deed does not of itself bar the entail, as the whole estate is not thereby conveyed,[45] and if the mortgage debt is paid it seems that the old estate is again revived;[46] but if it is not, a sale of the equity of redemption passes the entire remaining interest and bars the entail.[47]

Adverse possession. It has been usually held that adverse possession, for the statutory period, will bar both the tenant in tail and the issue in tail.[48] When the statute of limitations once begins to run against an heir in tail, no subsequent event can interrupt its progress;[49] and when it has run for the statutory period no formedon can afterward be maintained.[50]

Judicial authorization. In some jurisdictions, the court may authorize the alienation of a fee tail when satisfied that such sale will not substantially injure the heirs in tail.[51] In such proceeding, unborn issue are represented by living issue[52] or by the tenant.[53]

Provisions in instrument creating entail. The original grantor, in creating an entail, may in the same instrument provide the means by which it may be barred,[54] and, where a devise of an estate tail charges the estate with the payment of a legacy, a sale under an execution for the purpose of raising the legacy passes a fee simple to the purchaser and extinguishes the entail.[55]

29. Mass.—Perry v. Kline, 12 Cush. 118.
21 C.J. p 935 note 64.

30. Pa.—George v. Morgan, 16 Pa. 95.
21 C.J. p 935 note 65.

31. Pa.—Wood v. Bayard, 63 Pa. 320.
21 C.J. p 935 note 66.

32. Mass.—Whittaker v. Whittaker, 99 Mass. 364—Holland v. Cruft, 3 Gray 162.
21 C.J. p 936 note 68 [a].

33. Mass.—Allen v. Ashley School Fund, 102 Mass. 262.
21 C.J. p 939 note 69.

34. Md.—Hopkins v. Threlkeld, 3 Harr. & M. 443.
Mass.—Whittaker v. Whittaker, 99 Mass. 364.

35. Kan.—Wright v. Jenks, 261 P. 840, 124 Kan. 604.

36. Md.—Laidler v. Young, 2 Harr. & J. 69.

37. Me.—Fisk v. Keene, 35 Me. 349.
21 C.J. p 936 note 72.

38. Mass.—Lithgow v. Kavenagh, 9 Mass. 161.
21 C.J. p 936 note 73.

39. U.S.—Pearsol v. Maxwell, C.C. Pa., 68 F. 513, affirmed 76 F. 428, 22 C.C.A. 262.

40. Pa.—Ralston v. Truesdell, 35 A. 813, 178 Pa. 429.

41. Md.—Maslin v. Thomas, 8 Gill 18.
21 C.J. p 936 note 77.

42. Del.—Hazzard v. Hazzard, 97 A. 233, 29 Del. 91, 94 A. 905, 25 Del. 502.

43. Pa.—Waters v. Margerum, 60 Pa. 39.
21 C.J. p 936 note 79.

44. Ill.—Hosmer v. Carter, 68 Ill. 98.
21 C.J. p 936 note 82.

45. Md.—Laidler v. Young, 2 Harr. & J. 69.
Mass.—Cuffee v. Milk, 10 Metc. 366.

46. Md.—Laidler v. Young, 2 Harr. & J. 69.

47. Mass.—Cuffee v. Milk, 10 Metc. 366.

48. U.S.—Croxall v. Shererd, N.J., 5 Wall. 268, 18 L.Ed. 572.
21 C.J. p 936 note 88.

49. Mass.—Dow v. Warren, 6 Mass. 328.

50. Mass.—Dow v. Warren, supra.

51. Ohio.—Beard v. Prinz, 168 N.E. 383, 32 Ohio App. 497, affirmed Prinz v. Beard, 166 N.E. 905, 121 Ohio St. 36, following Schneider v. Wolf, 166 N.E. 679, 120 Ohio St. 524.

Wyo.—Jensen v. Jensen, 89 P.2d 1085, 54 Wyo. 224.

Unborn devisees held not required to be named as parties to action brought to disentail property.—Schneider v. Wolf, 166 N.E. 679, 120 Ohio St. 524, followed in Prinz v. Beard, 166 N.E. 905, 121 Ohio St. 36, affirming Beard v. Prinz, 168 N.E. 383, 32 Ohio App. 497.

52. Ohio.—Schneider v. Wolf, 166 N.E. 679, 120 Ohio St. 524, followed in Prinz v. Beard, 166 N.E. 905, 121 Ohio St. 36, affirming Beard v. Prinz, 168 N.E. 383, 32 Ohio App 497.

53. Ohio.—Beard v. Prinz, 168 N.E. 383, 32 Ohio App. 497, affirmed Prinz v. Beard, 166 N.E. 905, 121 Ohio St. 36, following Schneider v. Wolf, 166 N.E. 679, 120 Ohio St. 524.

54. Ohio.—Yoder v. Ford, 10 Ohio Dec. (Reprint) 675, 23 Cinc.L.Bul. 54.
21 C.J. p 936 note 91.

55. Pa.—Gause v. Wiley, 4 Serg. & R. 509.

Equitable estates tail. The rule in England that an equitable estate tail can be barred in equity precisely as a legal estate tail can be barred at law has never been followed in this country and authority must be found, if at all, in statutory enactment.[56]

The right to bar an estate tail is not property; it is an incident of the estate a privilege bestowed by the statute on a tenant in tail, which he may or may not assert.[57]

§ 28. Estate Tail after Possibility of Issue Extinct

An estate tail after possibility of issue extinct has incidents of both an estate tail and one for life.

An estate tail after possibility of issue extinct partakes partly of the nature of an estate for life and partly of the nature of an estate in fee tail.[58] The holder of such estate is not punishable for waste.[59]

§ 29. Statutory Abolition or Modification

Estates tail have been abolished by statute in most jurisdictions.

In most jurisdictions, as the result of statutory enactments, estates tail have been either entirely abolished or greatly modified.[60] In some jurisdictions they have been converted into estates in fee simple in the hands of the first taker;[61] while in others the first taker has only a life estate with remainder in fee simple, variously disposed of, as to his issue,[62] children,[63] or those to whom the estate would pass according to the common law on the death of the first taker.[64] In Connecticut the conditional fee of the common law was never recognized nor the statute de donis conditionalibus adopted but estates tail may be created by words appropriate to their creation at common law,[65] and the rule in that state, as confirmed by statute, is that such words vest a fee simple in the issue of the first donee in tail, such issue taking no interest in the land during the life of the donee, and the donee having no alienable interest beyond a life interest.[66] A statute, which operates to destroy an entail, supporting a remainder, necessarily destroys the remainder expectant thereon.[67] The two statutes which have been generally enacted in the several states respectively converting fees tail into fees simple, and abolishing the rule in Shelley's Case, are not inconsistent; the former applies where, by the terms of the instrument conferring the estate, it goes to the person mentioned, and the heirs of his body, while the latter applies where the terms of the instrument purport to create a life estate in the first taker, with remainder to his heirs, or to the heirs of his body.[68]

IV. LIFE ESTATES

§ 30. Definition, Nature, and Regulation

A life estate is a freehold interest in lands, the duration of which is confined to the life or lives of some particular person or persons or to the happening or not happening of some uncertain event.

A life estate is a freehold interest in lands, the duration of which is confined to the life or lives of some particular person or persons or to the happening or not happening of some uncertain event.[69] A life estate is not an estate of inheritance,[70] but

56. R.I.—Green v. Edwards, 77 A. 188, 31 R.I. 1, Ann.Cas.1912B 41.
21 C.J. p 936 notes 93, 94.

57. Del.—In re Reeves, 94 A. 511, 10 Del.Ch. 483.

58. Tex.—Swayne v. Lone Acre Oil Co., 86 S.W. 740, 98 Tex. 597, 69 L.R.A. 986, 8 Ann.Cas. 1117.
21 C.J. p 938 note 27, p 939 notes 28–35.

59. Tex.—Swayne v. Lone Acre Oil Co., supra.
21 C.J. p 939 note 30.

60. Or.—Hawkins & Roberts v. Jerman, 35 P.2d 248, 147 Or. 657—Lytle v. Hulen, 275 P. 45, 128 Or. 483, 114 A.L.R. 587.
21 C.J. p 937 note 95.

Statute may apply to estates existing at time statute is enacted.—Jensen v. Jensen, 89 P.2d 1085, 54 Wyo. 224—21 C.J. p 937 note 97 [a] (2).

61. Tenn.—Hill v. Maloney, 103 S.W.2d 791, 21 Tenn.App. 216.
Va.—Larew v. Larew, 135 S.E. 819, 146 Va. 134.
21 C.J. p 937 note 96.

62. Wyo.—Jensen v. Jensen, 89 P. 2d 1085, 54 Wyo. 224.

63. U.S.—Dickson v. Neal, C.C.A. Ark., 2 F.2d 533, certiorari denied 46 S.Ct. 19, 269 U.S. 556, 70 L.Ed. 409.
21 C.J. p 937 note 98.

64. U.S.—Hall v. Hankey, Ill., 174 F. 139, 98 C.C.A. 173.
21 C.J. p 937 note 99.

65. Conn.—Rudkin v. Rand, 91 A. 198, 88 Conn. 292.

66. Conn.—Thames Bank & Trust Co. v. Adams, 7 A.2d 836, 125 Conn. 656.
21 C.J. p 938 note 2.

67. Ill.—Kolmer v. Miles, 110 N.E. 407, 270 Ill. 20.

68. Mass.—Hayward v. Howe, 78 Mass. 49, 71 Am.D. 734.
21 C.J. p 938 note 4.

69. Ky.—Brandenburg v. Petroleum Exploration, 291 S.W. 757, 218 Ky. 557.
Ohio.—Lape v. Lape, 22 Ohio N.P., N.S., 392.
21 C.J. p 938 note 5.

Other definitions
Iowa.—Beeman v. Stilwell, 189 N.W. 969, 971, 194 Iowa 231.
N.Y.—In re Cochrane's Estate, 190 N.Y.S. 895, 117 Misc. 18, affirmed 194 N.Y.S. 924.
21 C.J. p 938 note 5 [a].

Duration
When an estate is "vested" for life or years, it is fixed for the described term.—Brewington v. Brewington, 109 S.W. 723, 727, 211 Mo. 48.

70. Tenn.—Harwell v. Harwell, 271

is a freehold,[71] whether for the tenant's own life or for that of another person.[72] Such an estate may be made to depend on a contingency, on the happening of which the estate may be entirely defeated before the death of the grantee,[73] for example, if an estate is given to a woman during widowhood,[74] or to a person so long as he shall dwell in a particular place[75] or shall use the granted premises for a specified purpose,[76] in which last case it has been held that the grant must be to a natural person and not to a corporation.[77] The indefinite duration of the estate and the fact that it may continue for life places it within the category of estates for life;[78] it matters not how contingent or uncertain the duration of the estate may be, or how probable is its termination in a limited number of years, if it is capable of enduring for the term of a life.[79]

A tenant for life is one to whom lands or tenements are granted or devised, or to which he derives title by operation of law for the term of his own life, or the life of another;[80] where a grant of an estate is made to a man for the term of his own life, or for that of another person, he is so called.[81] The life tenant possesses legal title.[82]

§ 31. Classification

a. In general
b. Legal life estates
c. Conventional life estates

a. In General

Life estates are either conventional or legal.

Estates for life are either conventional, which are created by the acts of the parties, or legal, which are created by operation of law.[83]

b. Legal Life Estates

Legal life estate are those created by operation of law.

Legal life estates are those made by operation of law.[84] Such estates are curtesy, discussed in the C.J.S. title Curtesy § 1, dower, considered as a life estate in the C.J.S. title Dower, §§ 1, 6, and, in some jurisdictions, homesteads, discussed in the C.J.S. title Homesteads § 3, also 29 C.J. p 784 note 36.

c. Conventional Life Estates

(1) In general
(2) Estates pur autre vie

(1) In General

Conventional life estates are those created by act, contract, or convention of the parties.

Conventional life estates are those made by act, contract, or convention of the parties.[85] They are naturally subdivided into: An estate to the tenant for his own life;[86] an estate to the tenant for the life of some other person called an estate pur autre vie;[87] and an estate for an uncertain period which is not inheritable nor at will and may last for life.[88]

(2) Estates pur Autre Vie

An estate pur autre vie is an estate for the life of some person other than the tenant himself. It is not an estate of inheritance.

An estate pur autre vie is an estate for the life of some person other than the tenant himself,[89] and the person on whose life the duration of the estate

S.W. 353, 356, 151 Tenn. 587, quoting **Corpus Juris.**
21 C.J. p 938 note 6.

71. N.Y.—In re McCarty's Estate, 285 N.Y.S. 641, 158 Misc. 287.
Ohio.—Ireton Brothers & Eckenberg v. Ft. Wayne, Van Wert & Lima Traction Co., 2 Ohio N.P., N.S., 317.
Tenn.—Harwell v. Harwell, 271 S. W. 353, 356, 151 Tenn. 587, quoting **Corpus Juris.**
21 C.J. p 938 note 7.

72. Tenn.—Harwell v. Harwell, supra, quoting **Corpus Juris.**
21 C.J. p 938 note 8.

73. Ill.—Tallent v. Tallent, 267 Ill. App. 334, 342, citing **Corpus Juris.**
21 C.J. p 938 note 9.

Rule of Restatement of the Law of Property
As stated in Restatement, Property § 18, an estate for life can be created subject to a special limitation, a condition subsequent, an executory limitation, or a combination of such restrictions.—Dormer v. Walker, 69 P.2d 1049, 101 Colo. 20.

74. Mo.—Greenleaf v. Greenleaf, 58 S.W.2d 448, 450, citing **Corpus Juris.**
N.Y.—In re Ball's Estate, 14 N.Y.S.2d 889, 172 Misc. 181.
21 C.J. p 938 note 11.

75. Minn.—Thompson v. Baxter, 119 N.W. 797, 107 Minn. 122, 21 L.R.A., N.S., 575.
21 C.J. p 938 note 12.

76. N.J.—Thomas v. Thomas, 17 N. J.Eq. 356.
21 C.J. p 938 note 13.

77. Pa.—Haly's Estate, 5 Pa.Dist. 533, 18 Pa.Co. 124.

78. R.I.—Disley v. Disley, 75 A. 481, 30 R.I. 366.

79. Ill.—Tallent v. Tallent, 267 Ill. App. 334, 342, citing **Corpus Juris.**
21 C.J. p 938 note 16.

80. N.Y.—In re Hyde, 41 Hun 72, 11 N.Y.Civ.Proc. 155.
62 C.J. p 571 note 16.

81. Minn.—Thompson v. Baxter, 119 N.W. 797, 107 Minn. 122, 21 L.R.A., N.S., 575.
62 C.J. p 571 note 17.

82. Ohio.—In re Wernet's Estate, 22 N.E.2d 490, 61 Ohio App. 304.

83. Ohio.—Lape v. Lape, 22 Ohio N.P., N.S., 392.
21 C.J. p 938 note 19.

84. Ala.—Garrett v. Snowden, 145 So. 493, 226 Ala. 30, citing **Corpus Juris.**
21 C.J. p 938 note 20.

85. R.I.—Disley v. Disley, 75 A. 481, 30 R.I. 366.
13 C.J. p 848 note 75.

86. R.I.—Disley v. Disley, supra.
21 C.J. p 939 note 37.

87. R.I.—Disley v. Disley, supra.
21 C.J. p 939 note 38.

88. R.I.—Disley v. Disley, supra.

89. R.I.—Disley v. Disley, supra.
21 C.J. p 939 note 41.

depends is called the cestui que vie.[90] An estate pur autre vie is not an estate of inheritance,[91] and before the statute of frauds was not devisable.[92]

Occupancy. At common law, if a tenant pur autre vie died in the lifetime of the cestui que vie, any person might enter upon the land and lawfully retain the possession thereof so long as the cestui que vie lived, by right of occupancy, and was called the general or common occupant.[93] In some jurisdictions it has been held that the wife and family or next of kin of a tenant pur autre vie who dies during the lifetime of the cestui que vie are entitled to continue in possession of the property during the remainder of the latter's life;[94] both in England and in the United States the disposition of the residue of an estate pur autre vie is generally regulated by statute.[95]

§ 32. Creation

Life estates may be created by express words or by implication.

Life estates, created by the acts of the parties, need not be by express words, but may be by implication or judicial construction.[96] The use of the term "life estate" is not necessary to create such an estate, but the intention to create a life estate may be expressed in any equivalent and appropriate language.[97] A life estate may be created not only by an express limitation to that effect but by a general grant without defining any specific interest or estate,[98] as where a grant is made to a man, or to a man and his assigns, without any limitation in point of time,[99] unless the grantor is only a tenant for life, in which case the grantee will take an estate for the life of the grantor.[1] It may also be created by a lease to the lessee, his executors, administrators, and assigns forever.[2] Where the grantor offers a life estate to a person and remainder to his heirs, the act of the life tenant in taking possession of the land is a sufficient acceptance of the offer to convey the life estate,[3] and the acceptance of the life tenant may be good as to the remaindermen.[4] An express life estate is not enlarged into a fee by being coupled with a power of conveyance or disposition,[5] or with a power to consume so much of the corpus of the estate as may be necessary for the

90. N.Y.—Clark v. Owens, 18 N.Y. 434.
21 C.J. p 939 note 42.

91. Ill.—Bullard v. Suedmeier, 126 N.E. 117, 291 Ill. 400.
Ind.—Graham v. Sinclair, 147 N.E. 634, 83 Ind.App. 58.
21 C.J. p 939 note 44.

Life estate in co[illegible]
In a deed by husband, owning three hundred and ninety-eight acres, and wife, owning one hundred and eighty acres, conveying the entire tract of five hundred and seventy-eight acres to their daughters, an exception of an estate for and during the grantors' lives did not convey to the wife of a life estate in her husband's lands, but such excepted estate remained in the husband, and at his death, his wife having survived him, the estate pur autre vie descended to his heirs.—Meador v. Ward, 260 S.W. 106, 303 Mo. 176.

92. N.J.—Folwell v. Folwell, 56 A. 117, 65 N.J.Eq. 526, affirmed 63 A. 1018, 67 N.J.Eq. 727.
21 C.J. p 939 note 45.

93. N.J.—Folwell v. Folwell, supra.
21 C.J. p 939 note 46.

94. Pa.—In re Walker's Estate, 24 Pa.Dist. & Co. 470.
21 C.J. p 939 note 48.

95. N.J.—Folwell v. Folwell, 56 A. 117, 65 N.J.Eq. 526, affirmed 63 A. 1018, 67 N.J.Eq. 727.
21 C.J. p 939 note 51.

96. Mo.—Cross v. Hoch, 50 S.W. 786, 149 Mo. 325.
21 C.J. p 940 note 55.

Use and control of property
One may be given use and control of property during his natural life without power to transfer absolute title thereto by sale or gift.—West Haven Bank & Trust Co. v. McCoy, 169 A. 49, 117 Conn. 489.

Life estate held created
Kan.—Kolterman v. Atkinson, 100 P.2d 729, 151 Kan. 623.
N.Y.—Duffy v. Wilson, 180 N.Y.S. 669, 110 Misc. 1.

Life estate held not created
Ind.—Gilmore v. Hamilton, 83 Ind. 196.
Mont.—F. H. Stoltze Land Co. v. Westberg, 206 P. 407, 63 Mont. 38.
Tenn.—Wilburn v. Kingsley, 3 Tenn. App. 88.

Vested estate
Under will granting to testator's adopted son a life estate in testator's property subject only to particular estate for life in his mother, such adopted son had "vested estate."—Bogenrief v. Law, 271 N.W. 229, 222 Iowa 1303.

Estate pur autre vie
An "estate per autre vie" is one that is in every instance created by deed or will, or brought into existence by reason of the provisions of a will or deed or other instrument under consideration, and the devise of a life estate to widow, which she renounces, does not create an "estate per autre vie."—Schaffenacker v. Bell, 150 N.E. 333, 336, 320 Ill. 31.

97. Mo.—Greenleaf v. Greenleaf, 58 S.W.2d 448, 332 Mo. 402—Cross v. Hoch, 50 S.W. 786, 149 Mo. 325.

98. Minn.—Thompson v. Baxter, 119 N.W. 797, 107 Minn. 122, 21 L.R.A., N.S., 575.

99. Minn.—Thompson v. Baxter, 119 N.W. 797, 107 Minn. 122, 21 L.R.A., N.S., 575.
21 C.J. p 940 note 57.

1. N.Y.—Jackson v. Van Hoesen, 4 Cow. 325.

2. N.Y.—Kavanaugh v. Cohoes Power & Light Corporation, 187 N.Y.S. 216, 114 Misc. 590.

3. Iowa.—Youngs v. Youngs, 196 N.W. 795, 197 Iowa 101.

4. Iowa.—Youngs v. Youngs, supra.

5. Ark.—U. S. v. Moore, 124 S.W.2d 807, 197 Ark. 664—City of Little Rock v. Lenon, 54 S.W.2d 287, 186 Ark. 460.
Colo.—Barnard v. Moore, 207 P. 332, 71 Colo. 401.
Ga.—Willie v. Hines-Yelton Lumber Co., 135 S.E. 505, 163 Ga. 64—Melton v. Camp, 49 S.E. 690, 121 Ga. 693.
N.Y.—In re Briggs' Will, 167 N.Y.S. 632, 101 Misc. 191, modified on other grounds 168 N.Y.S. 597, 180 App.Div. 752, modified on other grounds 119 N.E. 1032, 223 N.Y. 677.
Ohio.—Tax Commission v. Oswald, 141 N.E. 678, 109 Ohio St. 36.
Tex.—Arnold v. Southern Pine Lumber Co., 123 S.W. 1162, 58 Tex.Civ.App. 186, error dismissed.
21 C.J. p 940 note 60.

support of the life tenant;[6] nor by a warranty in fee or covenant for quiet enjoyment to the grantee and his heirs,[7] or his children forever,[8] nor by its being doubtful who will ultimately receive the remainder.[9] The rule generally stated is that life estate in land cannot be created by a verbal agreement, but only by a valid deed or will;[10] but it has been held that a life interest may be transferred by an oral transfer, coupled with a taking of possession and the performance of other acts in reliance upon the grant.[11]

Property in which life estates may be created. While, as stated supra § 1, the term "estate" in its technical sense refers only to an interest in land, and as stated supra § 30 a life estate is a freehold interest in land, as shown infra § 133 a life estate may be created in personal property although the common law originally did not permit such an estate in such property.

§ 33. Incidents

The incidents pertaining to life estates include the right to estovers and emblements, liability for waste, and the like. The life estate is, in a proper case, alienable; and in general the life estate is liable for the debts of the life tenant.

In general. In the absence of special agreements or covenants to the contrary, the incidents pertaining to life estates are right to estovers, considered infra § 39, right to emblements, considered infra § 40, liability for waste, discussed infra § 43, liability to forfeiture, discussed infra § 65, and liability of the under tenant for rent, considered infra § 41.

Alienability. A life estate is alienable,[12] and, although it has been said that the power of alienation is not a necessary incident to a life estate in real property,[13] general restraints against the alienation of such an estate are void;[14] but it seems that the power of alienation may be restrained to a limited extent, as to certain designated persons;[15] and a provision in the instrument creating such an estate, that in the event of an attempted alienation it shall go over to some third person, is valid.[16]

Liability for debts of life tenant. A life estate is liable for the debts of the life tenant,[17] and this liability cannot be avoided by a provision against such liability in the instrument creating the estate,[18] unless accompanied by a limitation over, in the event of the insolvency or bankruptcy of the life tenant or such estate being taken for his debts.[19] Since, as stated infra § 65, on the death of the tenant for his own life his life estate terminates, land in which he had a life interest is not subject to a lien for his debts,[20] nor is the corpus of the estate chargeable with his debts[21] and funeral expenses.[22]

A life tenant cannot jeopardize the interests of the remaindermen by subjecting the assets of the estate to the uncertainties and risks of business ventures without their assent.[23]

§ 34. Relation of Life Tenant to Remainderman or Reversioner

The relation of a life tenant to a remainderman or reversioner is frequently termed that of a trustee or quasi trustee. The life tenant is a trustee in the sense that he cannot injure or dispose of the property to the

6. Wis.—Post v. Campbell, 85 N.W. 1032, 110 Wis. 378.
7. N.C.—Roberts v. Forsythe, 14 N.C. 26.
21 C.J. p 940 note 62.
8. Ky.—Hall v. Wright, 87 S.W. 1129, 121 Ky. 16, 27 Ky.L. 1185.
9. Pa.—Waldhoeffer v. Falk, 3 Walk. 140.
10. Mont.—Hayes v. Moffatt, 271 P. 433, 438, 83 Mont. 214, citing **Corpus Juris.**
21 C.J. p 940 note 65.
11. Cal.—Hesheon v. Kelley, 124 P. 231, 162 Cal. 656.
12. Va.—Rowley v. American Trust Co., 132 S.E. 347, 350, 144 Va. 375, 45 A.L.R. 738, quoting **Corpus Juris.**
Sale or conveyance of:
Personalty see infra § 137.
Realty see infra §§ 50–53.
13. U.S.—Nichols v. Eaton, R.I., 91 U.S. 716, 23 L.Ed. 254.
21 C.J. p 940 note 76.
14. Iowa.—McCleary v. Ellis, 6 N.W. 571, 54 Iowa 311, 37 Am.R. 205.
21 C.J. p 940 note 77.
15. Va.—Camp v. Cleary, 76 Va. 140.
16. Va.—Camp v. Cleary, supra.
21 C.J. p 940 note 79.
17. Kan.—Alexander v. Goellert, 109 P.2d 146, 148, 153 Kan. 202, citing **Corpus Juris.**
21 C.J. p 941 note 80.
18. Iowa.—McCleary v. Ellis, 6 N.W. 571, 54 Iowa 311, 37 Am.R. 205.
21 C.J. p 941 note 81.
19. N.Y.—Bramhall v. Ferris, 14 N.Y. 41, 67 Am.D. 113.
21 C.J. p 941 note 82.
20. Ga.—Reece v. McCrary, 181 S.E. 697, 699, 51 Ga.App. 746, quoting **Corpus Juris.**
21 C.J. p 941 note 84.
Lien for services
Where contract to pay nurse for services rendered to life tenant of realty out of proceeds of sale of realty was not claimed to have been entered into until after life tenant had conveyed the realty, reserving to herself only a life estate therein, the nurse by virtue of such contract could acquire no lien on the real estate enforceable as against title of grantee after life tenant's death. —Cunningham v. Love, Ark., 150 S.W.2d 217.
21. Ga.—Reece v. McCrary, 181 S.E. 697, 699, 51 Ga.App. 746, quoting **Corpus Juris.**
Ill.—Tallent v. Tallent, 267 Ill.App. 334.
21 C.J. p 941 note 85.
Remainderman takes remainder free from life tenant's debts, even from possession of one holding under tax deed under sale for taxes assessed during life tenancy.—Superior Oil Corporation v. Alcorn, 47 S.W.2d 973, 242 Ky. 814.
22. Ga.—Reece v. McCrary, 181 S.E. 697, 699, 51 Ga.App. 746, quoting **Corpus Juris.**
21 C.J. p 941 note 86.
23. Md.—Weber v. Bien, 123 A. 52, 143 Md. 561.

injury of the rights of the remainderman but he differs from a pure trustee in that he may use the property for his exclusive benefit and take all the income and profits.

While an ordinary tenant for life is not a trustee,[24] nor subject to trust remedies for those in remainder,[25] the relation of a life tenant to the remainderman or reversioner is frequently termed that of a trustee,[26] or a quasi trustee.[27] He is a trustee in the sense that he cannot injure or dispose of the property to the injury of the rights of the remainderman,[28] or, as stated infra § 35, acquire an outstanding title for his own exclusive benefit, and must use reasonable precautions to preserve the property intact without injury or diminution;[29] but he differs from the trustee of a pure trust in that he may use the property for his exclusive benefit and take all of the income and profits.[30] In general a life tenant can do nothing during the continuance of his estate to impair the estate in remainder,[31] and, on the other hand, the remainderman cannot do any act which will affect the life estate.[32] There is no tenure[33] nor any privity[34] of contract[35] between a life tenant and a remainderman; nor is there such a fiduciary relation as will prevent the life tenant from purchasing from the remainderman his remainder interest.[36] While the remainderman ultimately succeeds to the possession of the life tenant, he does not succeed to his title, but gets his title from another and independ-

24. Conn.—Andrews v. New Britain Nat. Bank, 155 A. 838, 113 Conn. 467.
Ga.—Lazenby v. Ware, 173 S.E. 86, 178 Ga. 463.
Pa.—In re Powell's Estate, 17 A.2d 391, 340 Pa. 404.
21 C.J. p 941 note 87.

25. Pa.—In re Welsh, 86 A. 1091, 239 Pa. 616.

26. Me.—Mallett v. Hall, 150 A. 531, 534, 129 Me. 148, citing Corpus Juris—Nelson v. Meade, 149 A. 626, 129 Me. 61.
Mo.—Miller v. Bowen Coal & Mining Co., App., 40 S.W.2d 485.
21 C.J. p 941 note 89.

27. U.S.—Buder v. Binns, C.C.A. Mo., 27 F.2d 101.
Conn.—Andrews v. New Britain Nat. Bank, 155 A. 838, 113 Conn. 467.
Ga.—Crisp County Lumber Co. v. Bridges, 200 S.E. 777, 187 Ga. 484, 126 A.L.R. 333.
Ky.—Superior Oil Corporation v. Alcorn, 47 S.W.2d 973, 989, 242 Ky. 814, citing Corpus Juris.
Me.—Nelson v. Meade, 149 A. 626, 129 Me. 61.
21 C.J. p 941 note 90.

Life tenant with power of disposal
Life tenant's relation to remainderman is that of quasi trustee, although power of disposal is annexed to life estate.—Mallett v. Hall, 150 A. 531, 129 Me. 148.

28. Ala.—Durden v. Neighbors, 168 So. 887, 889, 232 Ala. 496, citing Corpus Juris—Amos v. Toolen, 168 So. 687, 691, 232 Ala. 587, citing Corpus Juris Small v. Hockinsmith, 48 So. 541, 158 Ala. 234.
Ky.—Superior Oil Corporation v. Alcorn, 47 S.W.2d 973, 989, 242 Ky. 814, citing Corpus Juris.
21 C.J. p 941 note 91.

29. Ark.—Love v. McDonald, 148 S.W.2d 170, 201 Ark. 882.
Ind.—Kepert v. Kepert, 134 N.E. 297, 79 Ind.App. 633.
Ky.—Mills v. Mills, 121 S.W.2d 962, 275 Ky. 431—Miracle v. Miracle, 86 S.W.2d 536, 260 Ky. 624, 102 A.L.R. 964—Salyer's Guardian v. Keeton, 283 S.W. 1015, 214 Ky. 643.
Me.—Mallett v. Hall, 150 A. 531, 129 Me. 148.
Mo.—Souders v. Kitchens, 137 S.W.2d 501, 345 Mo. 977—Duffley v. McCaskey, 134 S.W.2d 62, 345 Mo. 550, 126 A.L.R. 853.
N.Y.—In re Gaffers' Estate, 5 N.Y.S.2d 671, 254 App.Div. 448.

30. Ala.—Amos v. Toolen, 168 So. 687, 691, 232 Ala. 587, citing Corpus Juris.
Ky.—Superior Oil Corporation v. Alcorn, 47 S.W.2d 973, 989, 242 Ky. 814, citing Corpus Juris.
Tex.—Wagnon v. Wagnon, Civ.App., 16 S.W.2d 366, 370, error refused, quoting Corpus Juris.
21 C.J. p 941 note 93.

31. Kan.—Alexander v. Goellert, 109 P.2d 146, 153 Kan. 202.
Md.—Johnson v. Johnson, 179 A. 831, 835, 168 Md. 568, citing Corpus Juris.
Mich.—Lowry v. Lyle, 198 N.W. 245, 226 Mich. 676.
Minn.—Ashbaugh v. Wright, 188 N.W. 157, 152 Minn. 57.
Tex.—Daugherty v. Manning, Civ.App., 221 S.W. 983, dismissed on motion.
Va.—Graham v. Smith, 196 S.E. 600, 170 Va. 246.
21 C.J. p 941 note 94.

32. Ky.—Frey v. Clark, 197 S.W. 414, 176 Ky. 661.
N.Y.—Doe v. Thompson, 5 Cow. 371.
Entry by remainderman
Remainderman cannot enter during life tenancy, unless life tenant unequivocally repudiates life tenancy.—Superior Oil Corporation v. Alcorn, 47 S.W.2d 973, 242 Ky. 814.
Acquisition of title
As against the life tenant a remainderman cannot acquire and hold title based on his own default; and redemption from mechanic's lien foreclosure by sham mortgagee of remainderman annuls the foreclosure sale and reinstates estate for life and remainder.—Hall v. Hall, 216 N.W. 798, 173 Minn. 128.
Acquisition of title by life tenant see infra § 35.

33. N.Y.—Coakley v. Chamberlain, 38 How.Pr. 483.
21 C.J. p 941 note 96.

34. Ga.—Lazenby v. Ware, 173 S.E. 86, 178 Ga. 463.
Wis.—McLean v. McLean, 199 N.W. 459, 461, 184 Wis. 495, citing Corpus Juris.
21 C.J. p 941 note 97.
Child and parent
Child, as vested remainderman, is not in privity with parent as life tenant.—Farmers' Loan & Trust Co. v. Pierson, 222 N.Y.S. 532, 130 Misc. 110.
Remainderman not trustee for life tenant
One to whom his brother's will devised land at death of their mother, to whom it gave life estate therein, did not hold his interest in trust for mother, but their interests were separate and distinct, and hence was not precluded from recovering his share of balance due on vendor's lien note, given in payment for land by one to whom he and mother conveyed it, on ground that he merely carried out trust in joining with mother in execution of deed.—Elliott v. Elliott, Tex.Civ.App., 120 S.W.2d 631, error dismissed.

35. Wis.—McLean v. McLean, 199 N.W. 459, 461, 184 Wis. 495, citing Corpus Juris.
21 C.J. p 942 note 98.

36. U.S.—Warfield v. Bixby, C.C.A. Mo., 51 F.2d 210.
Ky.—Ware v. Bank, 38 S.W. 1061, 18 Ky.L. 1009.
Me.—Mallett v. Hall, 150 A. 531, 129 Me. 148.
Infant remainderman of trust estate
Infant remainderman of trust estate are wards of chancellor, who protects their interest from any error or possible bias, where life tenant purchases trust estate.—Headley v. Headley, 11 S.W.2d 123, 226 Ky. 483.

ent source.[37] The relationship of the life tenant and the remainderman as debtor and creditor is discussed infra § 141.

A tenant for life and remaindermen are not tenants in common.[38]

Ordinarily a life tenant holds his estate rent free.[39]

§ 35. Acquisition of Outstanding Title or Claim

As a general rule, neither the life tenant nor one claiming under him can acquire an outstanding title or claim for his own exclusive use. If an outstanding title or claim is purchased by the life tenant the purchase will be regarded as having been made for the benefit of the life tenant and the remainderman or reversioner.

An outstanding title or interest cannot be acquired by the life tenant for his own exclusive benefit;[40] but one who refuses to accept a life estate, which it is attempted to bestow on him, may purchase and deal with premises like any other stranger.[41] A life tenant may be a purchaser at a sale to satisfy an encumbrance;[42] but neither a life tenant nor one claiming under him,[43] who allows the property to be sold for taxes[44] or the satisfaction of an encumbrance,[45] or the interest thereon,[46] can acquire a title adverse to the remainderman or reversioner by purchasing at the sale himself, or through an intermediary,[47] or by obtaining a conveyance of the title acquired by another purchaser at such sale.[48] Such a transaction amounts simply to a payment or redemption.[49] The disability which attaches to a tenant to assert title against his re-

37. Ky.—Superior Oil Corporation v. Alcorn, 47 S.W.2d 973, 242 Ky. 814.

38. Ky.—Miracle v. Miracle, 86 S.W. 2d 336, 260 Ky. 624, 102 A.L.R. 964.
Wis.—McLean v. McLean, 199 N.W. 459, 461, 184 Wis. 495, citing **Corpus Juris.**
21 C.J. p 942 note 2.

39. Kan.—Kimberlin v. Hicks, 94 P. 2d 335, 150 Kan. 449.

40. Ky.—Superior Oil Corporation v. Alcorn, 47 S.W.2d 973, 986, 242 Ky. 814, citing **Corpus Juris.**
Minn.—Hall v. Hall, 216 N.W. 798, 173 Minn. 128.
21 C.J. p 942 note 3.

41. Mich.—Truitt v. City of Battle Creek, 175 N.W. 578, 208 Mich. 618, modifying 171 N.W. 338, 205 Mich. 180.

42. N.C.—Miller v. Marriner, 121 S. E. 770, 187 N.C. 449.
21 C.J. p 942 note 5.

43. Iowa.—Harris v. Evans, 195 N. W. 178, 196 N.W. 799.
Kan.—Colver v. Miller, 272 P. 106, 127 Kan. 72.
Mich.—Lowry v. Lyle, 198 N.W. 245, 226 Mich. 676.
N.C.—Creech v. Wilder, 193 S.E. 281, 284, 212 N.C. 162, quoting **Corpus Juris.**
21 C.J. p 942 note 7.

A judgment creditor who purchased a life estate at execution sale by purchasing tax certificates outstanding against the life estate was merely redeeming the taxes and could not acquire any interest adverse to the remaindermen.—Rich v. Allen, 286 N.W. 434, 226 Iowa 1304.

Purchaser not in privity with life tenant

In ejectment action by remaindermen against holder of voidable tax deeds, court properly held that holder of tax deeds was not estopped from taking tax title adverse to remaindermen on ground that he was in privity with life tenant, where his possession was acquired by virtue of his rights under the tax deeds.—Settle v. Glenn, 78 P.2d 57, 147 Kan. 503.

44. Ala.—Christopher v. Chadwick, 135 So. 454, 223 Ala. 260.
Ark.—Wells v. Henry, 45 S.W.2d 20, 184 Ark. 1114.
N.C.—Creech v. Wilder, 193 S.E. 281, 284, 212 N.C. 162, quoting **Corpus Juris.**
21 C.J. p 942 note 8.

45. Mo.—Souders v. Kitchens, 137 S.W.2d 501, 345 Mo. 977.
N.C.—Creech v. Wilder, 193 S.E. 281, 284, 212 N.C. 162, quoting **Corpus Juris.**
21 C.J. p 942 note 9.

46. Mo.—Peak v. Peak, 128 S.W. 981, 228 Mo. 536, 137 Am.S.R. 638.
21 C.J p 942 note 10.

47. Cal.—Newport v. Hatton, 231 P. 987, 991, 195 Cal. 132, citing **Corpus Juris.**
Iowa.—Koch v. Kiron State Bank of Kiron, 297 N.W. 450.
Ky.—Hager v. Connolly, 263 S.W. 723, 204 Ky. 147.
Mass.—Thayer v. Shorey, 191 N.E. 435, 287 Mass. 76, 94 A.L.R. 307.
Minn.—Kreuscher v. Roth, 188 N.W. 996, 152 Minn. 320.
Miss.—Federal Land Bank of New Orleans v. Newsom, 161 So. 864, 866, 175 Miss. 114, citing **Corpus Juris,** affirmed 166 So. 345, 348, 175 Miss. 114, quoting **Corpus Juris.**
Mo.—Souders v. Kitchens, 137 S.W. 2d 501, 345 Mo. 977.
N.C.—Creech v. Wilder, 193 S.E. 281, 284, 212 N.C. 162, quoting **Corpus Juris.**
21 C.J. p 942 note 11—61 C.J. p 1202 notes 39, 40.

Effect of collusion

One who entered into collusive agreement with life tenant to acquire tax title, in order to defeat the interests of the remaindermen, could not enforce a lien under the statute on the realty for the amount paid to acquire the title at the tax sale.—Turner v. Edwards, 292 N.W. 257, 207 Minn. 455.

Tax deed to life tenant's stepson and quitclaim deed without consideration from stepson to his mother, who was second wife of life tenant, would be set aside at suit of remaindermen without reimbursement or tender back of taxes or expenses of tax sale.—Westervelt v. Housner, 275 N.Y.S. 102, 153 Misc. 795.

Purchase by remainderman

As against other remaindermen, a remainderman, in possession under execution sale against life tenant, being chargeable with taxes as life tenant, was held not able to predicate adverse title on his own default by tax purchase.—Williams v. Williams, 202 N.W. 434, 200 Iowa 398, rehearing denied 204 N.W. 156.

Estoppel to invoke rule

Remaindermen having joined in life tenant's mortgage have been said to be estopped to assert latter through intermediary could not obtain adverse title through foreclosure sale.—Bartholomew v. Salvation Army, 235 N.W. 154, 253 Mich. 279.

48. Minn.—Turner v. Edwards, 292 N.W. 257, 207 Minn. 455.
21 C.J. p 942 note 12.

49. Mich.—Lowry v. Lyle, 198 N.W. 245, 247, 226 Mich. 676, citing **Corpus Juris.**
Minn.—Turner v. Edwards, 292 N.W. 257, 207 Minn. 455.
21 C.J. p 942 note 13.

Lessee of tenant

Evidence showed that purchase by life tenant's lessee at tax sales was merely redemption, inuring to owner's benefit.—Wells v. Henry, 45 S. W.2d 20, 184 Ark. 1114.

mainderman also attaches to his wife;[50] but the wife of the life tenant may, if she acts in good faith, purchase the property at a foreclosure sale.[51] Where the will which created the life estate made it primarily liable for the payment of a bequest, the life tenant could not acquire the fee by purchasing title acquired under a decree based on his default in payment of the bequest.[52] Where a life tenant procured the issuance of a tax deed to himself, and then conveyed the land by a warranty deed, the possession taken thereunder was held to be adverse to the remainderman, since the warranty deed was color of title.[53] If the life tenant purchases an outstanding title or encumbrance, or purchases the property at a sale to satisfy an encumbrance, he cannot hold such title, encumbrance, or property for his exclusive benefit, but will be deemed to have made the purchase for the benefit of himself and the remainderman or reversioner,[54] in case the latter will contribute his share of the sum paid by the life tenant,[55] and does so within a reasonable time.[56] If the life tenant pays more than his proportionate share, he simply becomes a creditor of the estate for that amount.[57] Where a widow is in possession of land after her husband's death, and before the assignment of dower to her, she is entitled to purchase the property at a tax sale.[58]

§ 36. Present Value of Life Estate

While in some instances the present value of a life estate is considered as one third of the value of the whole, the general rule is to calculate the value according to the probable duration of the life estate based on the tables of life expectancy and considering the habits, state of health of the life tenant, and other circumstances of the particular case.

In determining the present value of a life estate, the English rule was to consider an estate for life as equal in value to one third of the whole,[59] and this rule has been adopted in some of the cases in this country.[60] The general rule, however, is to calculate the value according to probable duration of the life estate, based on the tables of life expectancy, but taking into consideration the habits, physical appearance, constitution, and state of health of the life tenant and the other circumstances of the particular case;[61] and it has been held that the opinions of witnesses familiar with the apparent physical condition of a life tenant are, in determining the value of the life estate, a safer guide than mortality tables.[62] In addition to life expectancy, the present worth of money, in connection with the risks attending loaning it, the payment of taxes and the like are to be considered.[63] After ascertaining the life expectancy it is a mistake to calculate the value of the life estate at compound interest.[64] It has been held that in contemplation of law an estate for life is equal to seven years' purchase of the fee and that, to estimate the present value of an estate for life, interest must be computed on the value of the whole property for seven years, interest on the several sums of the annual interest, from the present time to the periods at which they would respectively fall due, being perhaps abated.[65] The value

50. Mich.—Lowry v. Lyle, 198 N.W. 245, 226 Mich. 676.
21 C.J. p 942 note 15.

51. Mass.—Porter v. Porter, 128 N.E. 795, 236 Mass. 422.

52. Mich.—Lowry v. Lyle, 198 N.W. 245, 226 Mich. 676.

53. Ill.—Lewis v. Pleasants, 30 N. E. 323, 32 N.E. 384, 143 Ill. 271.

54. Ala.—Rushton v. McLaughlin, 104 So. 824, 213 Ala. 380.
Ky.—Hager v. Connolly, 263 S.W. 723, 204 Ky. 147.
Mich.—Truitt v. City of Battle Creek, 171 N.W. 338, 205 Mich. 180, modified on other grounds 175 N.W. 578, 208 Mich. 618.
Mo.—Witcher v. Hanley, 253 S.W. 1002, 1003, 299 Mo. 696, citing Corpus Juris—Peterson v. Larson, 225 S.W. 704, 285 Mo. 119.
N.C.—Creech v. Wilder, 193 S.E. 281, 284, 212 N.C. 162, quoting Corpus Juris.
Okl.—Waldon v. Baker, 88 P.2d 352, 184 Okl. 492.
21 C.J. p 942 note 16.

55. Ala.—Rushton v. McLaughlin, 104 So. 824, 213 Ala. 380.
Ky.—Hager v. Connolly, 263 S.W. 723, 204 Ky. 147.
21 C.J. p 943 note 17—42 C.J. p 454 note 35.

Offer of reimbursement unnecessary
Where life tenant or person in possession as trustee for remainderman purchased land at sale to enforce lien, purchase money being paid by former husband's estate and another who acted in behalf of trustee's daughter, it was unnecessary for remainderman to plead willingness to reimburse trustee as condition precedent to recovery of property.—Hager v. Connolly, supra.

Contribution held not required
Where a life tenant purposely permitted land to be sold under a deed of trust and bought the property in to avoid administration of the estate of deceased in Tennessee, and at the sale she paid an amount greater than the amount of the deed of trust, it was held that although ordinarily the remaindermen would be required to contribute the amount paid above the encumbrance, yet in this instance the court would not require them to contribute.—Miller v. Gratz, 3 Tenn.App. 498.

56. Mich.—Stroh v. O'Hearn, 142 N.W. 865, 176 Mich. 164.
21 C.J. p 943 note 18.

57. N.C.—Creech v. Wilder, 193 S.E. 281, 284, 212 N.C. 162, quoting Corpus Juris.
21 C.J. p 943 note 19.

58. N.C.—Branson v. Yancy, 16 N.C. 77.

59. Pa.—McCommon v. Johnson, Super., 187 A. 445, 448, quoting Corpus Juris.
21 C.J. p 943 note 20.

60. Pa.—McCommon v. Johnson, supra, quoting Corpus Juris.
21 C.J. p 943 note 21.

61. Pa.—McCommon v. Johnson, supra quoting Corpus Juris.
21 C.J. p 943 note 22.

62. Ala.—Steiner v. Berney, 30 So. 570, 130 Ala. 289.

63. Tenn.—Holt v. Hamlin, 111 S.W. 241, 120 Tenn. 496.

64. Ill.—Marshall v. Marshall, 96 N.E. 907, 252 Ill. 563.

65. S.C.—Garland v. Crow, 18 S.C.L. 24.

of a life estate, subject to determination by an event happening prior to the death of the life tenant and dependent wholly on the volition of the latter, cannot be ascertained until the estate has terminated.[66] The present value of a life estate may be fixed by agreement between the life tenant and the remaindermen.[67] A statute providing for the determination of the value of a life estate does not empower a court to require the life tenant to take money instead of his estate except in the instances or under the circumstances provided for by statute.[68]

§ 37. Rights and Liabilities of Life Tenants

The rights and liabilities of a life tenant of real property are discussed in detail infra §§ 38-67. The rights and liabilities of life tenants of personal property are considered infra § 133 et seq. Examine Pocket Parts for later cases.

§ 38. Possession of Estate

As long as his estate therein continues, the life tenant is entitled to the possession and enjoyment of the real property.

As long as his estate therein continues, the life tenant of real property is entitled to its possession and enjoyment,[69] to the exclusion of the remainderman or reversioners[70] and those claiming through or under them,[71] unless the life tenant relinquishes or releases his right and permits such persons to take[72] or continue in[73] possession, and if the remainderman or reversioner obtains possession of the land before the determination of the life estate he will be required to restore the possession[74] and to account to the life tenant for all of the rents and profits received by him.[75] The life tenant's right of possession is not lost by sale of the property under deed of trust executed by the remainderman without the life tenant's knowledge, notwithstanding the remainderman had gone into possession with the life tenant's knowledge and had made improvements.[76] The life tenant is entitled to recover as damages the fair rental value of the property during the time it is unlawfully occupied, subject to any proper deductions.[77] A life tenant cannot be compelled to submit to a sale thereof or to accept a sum of money in lieu of the specific use of the property.[78] By will the management and control of the property may be placed in the executor.[79]

§ 39. Estovers

A life tenant is entitled as of common right to take reasonable estovers.

Every tenant for life is entitled of common right to take reasonable estovers, or botes, that is, wood from off the land for fuel, fences, agricultural erections, and other necessary improvements.[80] In taking wood for fuel he is entitled to take a reasonable quantity,[81] and to take good fuel and such as is conveniently situated.[82] The right includes a reasonable supply for servants living in the same or another house on the premises.[83] He may cut whatever timber is necessary for making repairs on the

66. N.Y.—In re Sloane, 47 N.E. 978, 154 N.Y. 109, affirming 46 N.Y.S. 264, 19 App.Div. 411.

67. Mich.—Ferris v. Poucher, 115 N.W. 1054, 152 Mich. 251.

68. Mo.—Carson v. Hecke, 222 S.W. 850, 282 Mo. 580.

69. Ga.—Crisp County Lumber Co. v. Bridges, 200 S.E. 777, 187 Ga. 484, 126 A.L.R. 333.
Ky.—Owens v. Owens' Ex'r, 32 S.W.2d 731, 236 Ky. 118.
Mo.—Mathis v. Melton, 238 S.W. 806, 293 Mo. 134.
Mont.—Thompson v. Flynn, 27 P.2d 505, 95 Mont. 484.
N.Y.—In re McCarty's Estate, 285 N.Y.S. 641, 158 Misc. 287.
N.C.—Burwell v. Raleigh Banking & Trust Co., 118 S.E. 881, 186 N.C. 117.
Pa.—See In re Pardee's Estate, 56 Montg.Co. 229.
21 C.J. p 943 note 31.
Resumption of possession
Ky.—May v. Chesapeake & O. Ry. Co., 212 S.W. 131, 184 Ky. 493.

70. N.Y.—In re McCarty's Estate, 285 N.Y.S. 641, 158 Misc. 287.
Tex.—Hensley v. Conway, Civ.App., 29 S.W.2d 416.
21 C.J. p 943 note 32.
Right of remainderman to possession see infra § 85.

71. N.C.—Jones v. Potter, 89 N.C. 220.
21 C.J. p 943 note 33.

72. Ga.—Smith v. Smith, 65 S.E. 414, 133 Ga. 170.

73. Iowa.—In re Doore's Estate, 163 N.W. 763, 183 Iowa 152.
21 C.J. p 943 note 35.

74. Ark.—Jones v. Freed, 42 Ark. 357.
Status of remainderman in possession
Remainderman's possession of land during existence of life estate cannot be referred to title as remainderman, but he holds under life tenant or as trespasser.—Hensley v. Conway, Tex.Civ.App., 29 S.W.2d 416.

75. Ark.—Jones v. Freed, 42 Ark. 357.
21 C.J. p 944 note 37.

76. Va.—Edmunds & Abernathy v. Pike, 118 S.E. 91, 136 Va. 270.

77. Conn.—Lewis v. Lewis, 57 A. 735, 76 Conn. 586.

78. Md.—Armiger v. Reitz, 46 A. 990, 91 Md. 334.
N.Y.—Hughes v. Hughes, 63 How. Pr. 408, affirmed 30 Hun 349.

79. Mich.—In re Miner's Estate, 166 N.W. 882, 201 Mich. 115.

80. Ga.—Higgins v. State, 199 S.E. 158, 58 Ga.App. 480, followed in 199 S.E. 160, 58 Ga.App. 483.
Va.—Fleenor v. Sproles, 139 S.E. 286, 148 Va. 503.
21 C.J. p 944 note 41.
Tenant for life without impeachment for waste may cut wood to same extent as owner of fee, provided tenant does not cut trees planted for ornament or shelter, or commit equitable waste, or cut willfully or maliciously.—In re Paine's Estate, 174 So. 430, 128 Fla. 151.

81. N.H.—Smith v. Jewett, 40 N.H. 530—Webster v. Webster, 33 N.H. 18, 66 Am.D. 705.

82. N.H.—Webster v. Webster, supra.
N.Y.—Rutherford v. Aiken, 2 Thomps. & C. 281.

83. N.H.—Smith v. Jewett, 40 N.H. 530.
21 C.J. p 944 note 44.

premises,[84] and if there are mines on the estate which he has a right to work he may take such timber as is necessary for mining operations.[85] As shown infra § 43, he has no right to sell any of the firewood or timber or to exchange it for materials for repairs, or to take more than is necessary.

§ 40. Emblements

As a general rule the life tenant, or one holding under him, has a right to emblements.

A tenant for life, or his legal representative, is entitled to emblements, that is, the crops planted by him prior to the termination of the life estate, in all cases where the life estate is terminated by the act of God, as by the death of the tenant,[86] and this rule applies notwithstanding the life tenant has and exercises a power of appointment by will to dispose of the fee.[87] The right ceases where the estate is terminated by the voluntary act of the tenant himself.[88] The right of emblements is not incident to a life estate created by a reservation in a deed in which the grantor divests himself of all existing and future rights in the property, except solely the right to retain the use and occupancy of the premises, and to take and receive the rents and profits during his lifetime.[89] A life tenant is not entitled to crops planted prior to the beginning of the life estate.[90] An undertenant or lessee of a tenant for life is entitled to crops planted by him prior to the death of the life tenant,[91] unless it is otherwise provided by statute;[92] and a tenant pur autre vie is entitled to crops planted by him prior to the death of the cestui que vie.[93] The husband of a life tenant is entitled to the crops planted by him prior to the death of the wife.[94] The right includes only such crops as are produced annually by the labor of the tenant,[95] and which are planted before the life estate determines,[96] and does not arise by reason merely of the preparation of the soil for planting.[97] The right to emblements carries with it a right of ingress and egress to preserve the crop and gather it and carry it away.[98]

§ 41. Income, Profits, and Accretions

a. In general
b. Rents

a. In General

In general a life tenant is entitled to everything in the nature of income or profits accruing during the continuance of the life estate.

In the absence of any limitation or restriction thereof,[99] everything in the nature of income or profits accruing during the continuance of the life estate belongs to the life tenant,[1] and at his death,

84. N.C.—Thomas v. Thomas, 82 S.E. 1032, 166 N.C. 627, L.R.A.1915B 219.
21 C.J. p 944 note 45.

85. Pa.—Neel v. Neel, 19 Pa. 323.
Va.—Findlay v. Smith, 6 Munf. 134, 20 Va. 134, 8 Am.D. 733.
21 C.J. p 944 note 46.

86. Ala.—Adams v. Adams, 140 So. 438, 439, 224 Ala. 346, citing Corpus Juris.
Cal.—Story v. Christin, 95 P.2d 925, 14 Cal.2d 592, 125 A.L.R. 1402, superseding 89 P.2d 144.
Neb.—In re Mischke's Estate, 287 N.W. 760, 761, 136 Neb. 875, citing Corpus Juris.
21 C.J. p 944 note 49.

87. Ill.—Kerns v. Blinn, 84 N.E. 628, 234 Ill. 121, 14 Ann.Cas. 37.

88. Tenn.—Hawkins v. Skeggs, 10 Humphr. 31.
21 C.J. p 944 note 52.

89. Cal.—Wilhoit v. Salmon, 80 P. 405, 146 Cal. 444.

90. S.C.—Glover v. Hearst, 31 S.C. Eq. 329.

91. Ala.—Scott v. Coulson, 47 So. 60, 156 Ala. 450.
Ill.—Roberts v. McAllister, 226 Ill. App. 356.
Ind.—Dorsett v. Gray, 98 Ind. 273.
N.C.—King v. Foscue, 91 N.C. 116.
S.D.—Strand v. Boll, 183 N.W. 284, 285, 44 S.D. 228, 15 A.L.R. 652, citing Corpus Juris.
21 C.J. p 945 note 55.

92. Ga.—Story v. Butt, 58 S.E. 388, 2 Ga.App. 119.
N.C.—Hayes v. Wrenn, 83 S.E. 356, 167 N.C. 229.
In Kentucky, under a statute providing that all the emblements of the lands of a person dying after the 1st day of March which shall be severed before the last day of December following shall be assets in the hands of his personal representative, and all the emblements growing on the lands the last day of December or at his death, if that shall happen after that date and before the 1st day of March shall pass with the land to the heir or remainderman, a lessee occupies the same relation toward the premises as the life tenant did, and is not entitled to crops as emblements, where although the life tenant died after March 1st of that year, the crop could not be severed from the land before the last day of December following.—Devers v. May, 99 S.W. 255, 124 Ky. 387, 30 Ky.L. 528.

93. Ga.—King v. Whittle, 73 Ga. 482.
Mo.—Dale v. Parker, 128 S.W. 510, 143 Mo.App. 492.

94. Ga.—King v. Whittle, 73 Ga. 482.

95. Pa.—Reiff v. Reiff, 64 Pa. 134.
21 C.J. p 945 note 60.

96. Conn.—Bradley v. Bailey, 15 A. 746, 56 Conn. 374, 7 Am.S.R. 316, 1 L.R.A. 427.
21 C.J. p 945 note 61.

97. Tenn.—Turner v. Turner, 179 S.W. 132, 132 Tenn. 592.
21 C.J. p 945 note 62.

98. Neb.—Edghill v. Mankey, 112 N.W. 507, 79 Neb. 347, 11 L.R.A.,N.S., 688.
21 C.J. p 945 note 63.

99. Iowa.—Whitehill v. Whitehill, 233 N.W. 748, 211 Iowa 475.
21 C.J. p 945 note 65.

1. Ala.—Amos v. Toolen, 168 So. 687, 232 Ala. 587—Edwards v. Williamson, 80 So. 867, 202 Ala. 483.
Ga.—Lane v. Tarver, 113 S.E. 452, 153 Ga. 570.
Iowa.—Whitehill v. Whitehill, 233 N.W. 748, 211 Iowa 475.
Ky.—Childers v. Collier, 290 S.W. 497, 217 Ky. 632.
Mich.—In re Chipman's Estate, 209 N.W. 67, 235 Mich. 130.
Mo.—Guthrie v. Crews, 229 S.W. 182, 286 Mo. 433.
N.Y.—In re Mullin's Estate, 202 N.Y.S. 758, 121 Misc. 867.
Pa.—In re Sternberger's Estate, 182 A. 723, 121 Pa.Super. 50—In re Hay's Estate, 30 Pa.Dist. 42, 68 Pittsb.Leg.J. 461, 1 Som.Leg.J. 84.

if not otherwise disposed of by him, passes to his representative;[2] but any appreciation in the principal of the estate belongs to the remainderman[3] unless it is otherwise provided by the grantor.[4] The capital of the estate cannot be broken into for the benefit of the remainderman so as to diminish the income of the life tenant without the latter's consent.[5] A sum forfeited to a testator's estate on nonperformance of a real estate contract should be treated as capital and credited as an addition of the principal of the estate, and not as income to which the life tenant would be entitled.[6]

b. Rents

A life tenant is entitled to rents accruing from the property during the continuance of his estate. In general, where a life tenant leases the property, and dies during the term of the lease, the rents may be apportioned between the life tenant's estate and the remaindermen.

The life tenant is entitled to all the rents accruing from the property during the continuance of his estate,[7] and to collect them himself without interference by the executor or remainderman.[8] On the other hand, the life tenant is not entitled to the rent for the premises after the determination of the life estate.[9] While the life tenant, in the absence of

Tenn.—Dooley v. Penland, 300 S.W. 9, 156 Tenn. 284.
Tex.—Wagnon v. Wagnon, Civ.App., 16 S.W.2d 366, 370, error refused, citing **Corpus Juris.**
Va.—Livesay v. Boyd, 180 S.E. 158, 159, 164 Va. 528, citing **Corpus Juris.**
21 C.J. p 945 note 66.

Property purchased with profits

(1) Land purchased with the profits from the life estate has been held to belong exclusively to the life tenant.—Gibony v. Hutcheson, 50 S.W. 648, 20 Tex.Civ.App. 581.

(2) However, it has been held that, where a will gives property to the widow for use during life, with remainder to the children, she has only a life estate in property purchased by her with the rents and profits of the devised property.—Esman v. Esman, 18 Ohio Cir.Ct. 603, 10 Ohio Cir.Dec. 257.

Moneys held not income

A life tenant is not entitled to unexpended proceeds of note executed by commissioner to borrow money to pay expenses of foreclosure sale and delinquent taxes on land acquired by foreclosure of mortgage owned by life tenant and remaindermen, but sum should be applied to reduce principal of note.—Livesay v. Boyd, 180 S.E. 158, 164 Va. 528.

2. N.Y.—In re Lamb, 169 N.Y.S. 614, 182 App.Div. 180, affirmed 120 N.E. 866, 224 N.Y. 577.
21 C.J. p 945 note 67.

Estates pur autre vie

On death of one holding estate pur autre vie, income held payable to his representatives until death of cestui que vie.—Morgan v. Williams, 66 How.Pr., N.Y., 139.

Estate limited to support and maintenance

Where will vests unconditional life estate with provision for remainder at death of life tenant, life tenant is entitled to all income from estate during life tenancy, and unexpended income at her death constitutes a part of her estate and does not pass to remaindermen under the will, but this rule does not apply where enjoyment of estate for life is specifically limited to necessary support and maintenance; and under will giving wife use of property for lifetime for her support and maintenance, if it became necessary for her to sell any part of the property or to exchange it for other property, or convert it into money to be loaned out or otherwise reinvested, she could only use such part of the income derived therefrom as was necessary and proper for her support and maintenance and at her death all that remainded would pass to the remaindermen.—Hair v. Farrell, 103 S.W.2d 918, 21 Tenn.App. 12.

Recovery from remainderman

Deceased's life tenant's administrator is entitled to require remainderman to account for income during existence of life estate and give information respecting investment.—Whitehill v. Whitehill, 233 N.W. 748, 211 Iowa 475.

3. Ga.—Wood v. Davis, 148 S.E. 330, 168 Ga. 504.
Mich.—Eldred v. Shaw, 70 N.W. 545, 112 Mich. 237.
N.Y.—Olcott v. Estate of Charles Frederick Hoffman, Inc., 216 N.Y.S. 267, 217 Misc. 399, affirmed 221 N.Y.S. 871, 220 App.Div. 713.
Pa.—Henderson v. Buck, 2 Pa.Co. 230.
21 C.J. p 946 note 68.

4. Colo.—Tuckerman v. Currier, 129 P. 210, 54 Colo. 25, Ann.Cas.1914C 599.

Testator's intent determines whether life tenant must return bequest to remaindermen in cash or otherwise.—Olcott v. Estate of Charles Frederick Hoffman, Inc., 216 N.Y.S. 267, 217 Misc. 399, affirmed 221 N.Y.S. 871, 220 App.Div. 713.

5. N.Y.—Matter of Ryder, 4 Edw. 338.

6. N.Y.—In re Victorin, 219 N.Y.S. 619, 128 Misc. 577.

7. Ark.—Galloway v. Sewell, 258 S.W. 655, 162 Ark. 627.
Ga.—Kinard v. Clay, 75 S.E. 636, 138 Ga. 544.
Ill.—Union Trust Co. v. First Trust & Savings Bank, 252 Ill.App. 337.
21 C.J. p 946 note 73.

After payment of note secured by deed of trust

Life tenant is not entitled to rents from realty acquired through foreclosure of mortgage in which funds derived from condemnation award for devised realty were invested, until after payment of principal of note payable in one year and secured by trust deed, which was executed to borrow money to pay expenses of foreclosure sale and delinquent taxes, where life tenant acquiesced in borrowing.—Livesay v. Boyd, 180 S.E. 158, 164 Va. 528.

8. Pa.—Boyle's Estate, 10 Pa.Dist 206.

9. Colo.—Haselwood v. Moore, 69 P.2d 248, 100 Colo. 556.
N.Y.—Marshall v. Moseley, 21 N.Y 280.
Pa.—See In re Myers' Trust, 35 Pa. Dist. & Co. 492.
21 C.J. p 946 note 75.

Necessity for termination

Remaindermen, claiming a violation of a condition subsequent by the life tenant in subleasing the premises, have no right to rents collected by the life tenant where they took no steps to terminate the life estate for the alleged breach, and, having knowledge that the life tenant was subleasing the premises, may be estopped from asserting any right to the rents.—Union Trust Co. v. First Trust & Savings Bank, 252 Ill.App. 337.

Crop shares

(1) On death of a life tenant before any share of a crop is due the rent goes to the remainderman.
Ill.—Grotefendt v. Schlaeppi-Siever, 213 Ill.App. 436.
Ind.—Jennings v. Hembree, 124 N.E. 876, 71 Ind.App. 370.
Kan.—Cooper v. Cyr, 40 P.2d 375, 141 Kan. 236.

(2) The estate of the life tenant is not entitled to any share, where he dies before the crop has matured.—Wyandt v. Merrill, 193 P. 366, 1087,

a valid conveyance of the rents and profits, is ordinarily entitled to recover them from the remainderman when both live together on the land,[10] this has been held not to apply between parents and child when they are living thereon, with the latter's family, for a long term of years, the child taking full charge and management of the lands and supporting them all therefrom.[11] A remainderman who leases a life tenant's interest for a stipulated annual rental is liable for the just proportion of the annual rent for the year in which the life tenant died.[12] Rents due to a life tenant at his death are collectable by his personal representative,[13] but where the life tenant takes his estate subject to an existing lease, and dies during the term of the lessee, before any rent becomes due, his personal representative cannot recover any part thereof, but the rent for the entire term becomes an incident to the reversion.[14] At common law there could be no apportionment of rent as to time where the tenant for life leased and died during the period for which rent was payable;[15] and the lessee was not bound to pay at all for so much of the time since the last rent day as had elapsed before the death of the tenant for life;[16] but it has been held that, where he conscientiously paid for the whole time, the person who took the estate in remainder could not recover from the executor or administrator of the life tenant, any of the rent so paid.[17] In England this was remedied by statute.[18] In this country the general rule allows an apportionment;[19] but in some jurisdictions the rule remains the same as at common law,[20] except that, if the lessee continues to occupy the premises after his lease has been determined by the death of the life tenant, the remainderman may recover the reasonable value of such use and occupation.[21]

§ 42. Working Mines, Quarries, Oil or Gas Wells

A life tenant cannot, as a general rule, open new mines or quarries or oil or gas wells, or authorize another to do so; but this may be done by agreement with the remaindermen. Mines, quarries, or oil or gas wells already opened may be worked by the life tenant, or he may authorize another to do so, and the life tenant is entitled to all proceeds resulting from such operation.

Although a life tenant may be authorized to open mines or drill wells after the inception of his estate,[22] and may be authorized to execute leases for such purpose,[23] as a general rule a life tenant who is impeachable for waste cannot open new mines or quarries or oil or gas wells,[24] or lease the land to others for this purpose,[25] and remaindermen in title may not make such a lease to permit immediate

107 Kan. 661, rehearing dened 194 P. 634, 108 Kan. 204, 15 A.L.R. 654.

(3) Where life tenant of farm land leased the land with rent payable in a share of the crop, and then died while the crop was growing, title to the share of the crop reserved as rent passed to the executor of the life tenant as assets of that estate, and not to the remaindermen. —In re Mischke's Estate, 287 N.W. 760, 136 Neb. 875, 125 A.L.R. 277.

Right to emblements see supra § 40.

10. N.C.—Townsend v. Rowland, 86 S.E. 711, 170 N.C. 31.

11. N.C.—Townsend v. Rowland, supra.
21 C.J. p 946 note 77.

12. Ala.—Saint v. Britnell, 91 So. 310, 206 Ala. 533.

13. Ind.—Frame's Estate v. Frame, 96 N.E. 35, 48 Ind.App. 481.
Ohio.—In re Submission of an Agreed Case, 8 Ohio N.P., N.S., 486.

14. Ind.—Watson v. Penn, 8 N.E. 636, 108 Ind. 21, 58 Am.R. 26.
21 C.J. p 946 note 79.

15. Or.—Peery v. Fletcher, 182 P. 143, 93 Or. 43.
21 C.J. p 946 note 80.

16. Ill.—Humphreys v. Orrey, 220 Ill.App. 523.
Or.—Peery v. Fletcher, 182 P. 143, 93 Or. 43.
21 C.J. p 946 note 81.

17. Ohio.—Van Hayes v. West, 3 Ohio Cir.Ct. 64, 2 Ohio Cir.Dec. 37.
Or.—Peery v. Fletcher, 182 P. 143, 93 Or. 43.

18. N.H.—Perry v. Aldrich, 13 N. H. 343, 38 Am.D. 493.
21 C.J. p 946 note 84.

19. Ala.—Baker v. First Nat. Bank, 178 So. 441, 235 Ala. 252—Graham v. Graham, 89 So. 25, 205 Ala. 644.
Ga.—Trust Co. of Georgia v. Kenny, 3 S.E.2d 553, 555, citing Corpus Juris.
Tenn.—Hawkins v. McCall, 7 Tenn. App. 13.
21 C.J. p 947 note 87.

Payment made for surrender of lease extending beyond life of life tenant is distributable as between life tenant's representative and remaindermen as rent under original lease.—Johnson v. Collamore, 171 N. E. 717, 271 Mass. 521.

20. Ohio.—Noble v. Tyler, 56 N.E. 191, 61 Ohio St. 432, 48 L.R.A. 735.
21 C.J. p 947 note 88.

21. Neb.—Guthmann v. Vallery, 71 N.W. 734, 51 Neb. 824, 66 Am.S.R. 475.

22. Tex.—Amarillo Oil Co. v. McBride, Civ.App., 67 S.W.2d 1098, error refused.

23. Tex.—Amarillo Oil Co. v. McBride, supra.

Statutory provisions authorizing execution of leases by life tenants have been held constitutional.—Love v. McDonald, 148 S.W.2d 170, 201 Ark. 882.

24. U.S.—Crabb v. Commissioner of Internal Revenue, C.C.A.Tex., 121 F.2d 1015, remanding 119 F.2d 772—Carter Oil Co. v. McQuigg, C.C.A. Ill., 112 F.2d 275, affirming, D.C., 27 F.Supp. 182—Texas Co. v. Marlin, C.C.A.Tex., 109 F.2d 305, reversing, D.C., Marlin v. Texas Co., 26 F.Supp. 611.
Ill.—Sewell v. Sewell, 1 N.E.2d 492, 363 Ill. 166.
Ky.—Smith v. Harris, 124 S.W.2d 786, 276 Ky. 529.
Mo.—Miller v. Bowen Coal & Mining Co., 40 S.W.2d 485.
Ohio.—Fourth & Central Trust Co. v. Woolley, 165 N.E. 742, 31 Ohio App. 259.
Pa.—Waldron v. Wahl, 133 A. 252, 286 Pa. 237—Guthrie v. Guthrie, 7 A.2d 137, 135 Pa.Super. 588.
Tex.—Amarillo Oil Co. v. McBride, Civ.App., 67 S.W.2d 1098, error refused—Whitaker v. Surtees, Civ. App., 248 S.W. 432.
21 C.J. p 947 note 92.

25. Kan.—Burden v. Gypsy Oil Co., 40 P.2d 463, 141 Kan. 147.
Ky.—Mills v. Mills, 121 S.W.2d 962, 275 Ky. 431—Meredith v. Meredith, 264 S.W. 1109, 204 Ky. 608—Russell v. Tipton, 235 S.W. 763, 193 Ky. 305.
Ohio.—Fourth & Central Trust Co. v.

exploration and production without the consent of the life tenant;[26] but the life tenant may join with the remainderman in such a lease,[27] and they may agree as to the division of the rents and royalties;[28] and in the absence of an agreement the life tenant is entitled to no part of the royalties,[29] but is entitled only to the income from the royalties[30] or to such a proportion of the royalties as will amount to the present value of an annuity for the life expectancy of the life tenant equal to the interest on the royalties at the legal rate.[31] Where remaindermen have executed an oil lease, the life tenant may deal on his own account and execute a lease.[32] Such leases cannot be considered as one lease by one ultimately acquiring both.[33] Where a lease has been obtained from remaindermen, and thereafter a lease is obtained from the life tenant, an assignee of the lease cannot assert that the lease of the life tenant is void.[34] The life tenant is not entitled to royalties coming due before the life estate vested,[35] and

Woolley, 165 N.E. 742, 31 Ohio App. 259.
21 C.J. p 947 note 93.

Effect of lease

Under Illinois law, life tenant could not grant lease for removal of oil from premises, nor could remainderman as against life tenant give lessee right to enter and remove oil, but an oil lease executed by life tenant conveyed a freehold and entitled assignee of lease to go upon the land, operate for oil and gas, lay pipe lines, and to build tanks to take care of oil from the premises, without interference by remaindermen, and the assignee was seized of a valid property interest which neither remaindermen, his lessee, or life tenant could, without assignee's consent, defeat, and right could not be defeated by life tenant by quitclaim deed delivered to lessee of remaindermen.—Carter Oil Co. v. McQuigg, D.C.Ill., 27 F.Supp. 182, affirmed, C.C.A., 112 F.2d 275.

Lease illegal

Life tenant of undeveloped coal land could not recover on lease of land for purpose of opening mines, such lease being illegal, and a provision in life tenant's illegal lease of undeveloped coal land for mining purposes, regarding payment of switch rental, is not enforceable as valid severable undertaking especially where injustice would result to lessee from its separate enforcement.—Miller v. Bowen Coal & Mining Co., Mo.App., 40 S.W.2d 485.

26. Kan.—Burden v. Gypsy Oil Co., 40 P.2d 463, 141 Kan. 147.

Implied consent

W.Va.—Ferrell v. Deverick, 100 S.E. 850, 85 W.Va. 1.

27. U.S.—Carter Oil Co. v. McQuigg, D.C.Ill., 27 F.Supp. 182, affirmed, C.C.A., 112 F.2d 275.
Ky.—Union Gas & Oil Co. v. Wiedemann Oil Co., 277 S.W. 323, 211 Ky. 361—Meredith v. Meredith, 235 S.W. 757, 193 Ky. 192.
21 C.J. p 947 note 94.

Joinder by guardian of remainderman

Mineral leases executed by life tenant without authority became lawful as to remainderman after his joinder therein by guardian pursuant to court order, and case stood as though remainderman had sunk the wells and life tenant was claiming participation.—Texas Co. v. Marlin, C.C.A.Tex., 109 F.2d 305, reversing, D.C., Marlin v. Texas Co., 26 F. Supp. 611.

Separate approval

Where remaindermen by separate document approved original oil and gas lease executed by life tenant to all intents and purposes as though they had executed original lease, effect was as though they had joined in lease in first instance, as regards right to royalty.—Burden v. Gypsy Oil Co., 40 P.2d 463, 141 Kan. 147.

Operation and effect of agreement

Ky.—Sparks v. Albin, 241 S.W. 321, 195 Ky. 52.

28. Kan.—Burden v. Gypsy Oil Co., 40 P.2d 463, 468, 141 Kan. 147, citing **Corpus Juris.**
21 C.J. p 947 note 95.

Consideration

Agreement between life tenant and two remaindermen as to division of royalties under oil lease executed by them was supported by sufficient consideration.—Meredith v. Meredith, 264 S.W. 1109, 204 Ky. 608.

29. Ky.—Brandenburg v. Petroleum Exploration, 291 S.W. 757, 218 Ky. 557.

30. Kan.—Burden v. Gypsy Oil Co., 40 P.2d 463, 468, 141 Kan. 147, citing **Corpus Juris.**
Ky.—Brandenburg v. Petroleum Exploration, 291 S.W. 757, 218 Ky. 557.
Tex.—Davis v. Bond, Civ.App., 141 S.W.2d 979, 983, error granted, citing **Corpus Juris.**
21 C.J. p 947 note 96.

Widow of owner of sixth interest in land, leased with her consent to parties taking and selling oil therefrom, is entitled only to income from third of such interest.—Fourth & Central Trust Co. v. Woolley, 165 N.E. 742, 31 Ohio App. 259.

Owners of undivided interest and life estate

Sons to whom parents conveyed an undivided one-fourth interest in land and a life interest in the remaining undivided three-fourths interest in the land were entitled to one fourth of royalties under oil and gas lease and to the income accruing from three fourths of the royalties under the oil and gas lease, and the corpus of such three fourths of the royalties was required to be preserved for the remainderman.—Mills v. Mills, 121 S.W.2d 962, 275 Ky. 431.

Liability of lessee to life tenant and remainderman

Where fee in minerals was in remainderman, life tenant was entitled to interest that could be earned on royalty payments during her life and lessee was not liable to remainderman for any interest during that time, but owed him interest on payments only from time of life tenant's death; and, where mineral leases executed by life tenant without authority were subsequently adopted by guardian for minor remainderman, pursuant to court order, remainderman was entitled to recover royalties for oil produced subsequent to adoption of the lease, but without interest during continuance of the life estate, and with interest at the legal rate thereafter, rather than at rate of ten per cent. on theory that lessee was a delinquent "trustee."—Texas Co. v. Marlin, C.C.A.Tex., 109 F.2d 305, reversing, D.C., Marlin v. Texas Co., 26 F.Supp. 611.

31. Okl.—Barnes v. Keys, 127 P. 261, 36 Okl. 6, 45 L.R.A.,N.S., 178, Ann. Cas.1915A 515.

32. Pa.—Orndoff v. Consumers' Fuel Co., 162 A. 431, 308 Pa. 165.

Rights of parties to lease

Assignee of oil lease, executed by life tenant, is bound by covenant to pay lessor stated royalty, but the life tenant, executing oil lease, requiring payment to him of one sixth of one eighth of oil, after remaindermen executed lease reserving one-eighth royalty, is not entitled to have proceeds of sale of one eighth of oil impounded and interest paid him during his life.—Orndoff v. Consumers' Fuel Co., supra.

33. Pa.—Orndoff v. Consumers' Fuel Co., supra.

34. Pa.—Orndoff v. Consumers' Fuel Co., supra.

35. Tex.—Frame v. Whitaker, Civ. App., 7 S.W.2d 140, reversed on

his right to royalties ceases on his death.[36] A bonus for a lease, which was a part of the consideration for the entire title to minerals, belongs to the remaindermen subject to the estate of the life tenant.[37] When not expressly precluded, however,[38] a life tenant may work a mine, quarry, or well, opened before the creation of his estate,[39] even to exhaustion;[40] and not only for his own use but for profit;[41] and is entitled to all proceeds derived from such operation[42] without being obliged to make provision for any fund to offset depletion.[43] Mining by the life tenant will be allowed if the former owner of the fee has impressed on it the character of mining land, by executing an enforceable lease for that purpose prior to the commencement of the life estate, although no mines have been opened thereunder until after the commencement of the life estate;[44] and if a lessee of an oil and gas lease enters after lessor's death and drills and produces oil and gas, the wells will be regarded as open at lessor's death, and the life tenant will be entitled to the rents and profits reserved to lessor, accruing therefrom, during the life tenancy.[45] If necessary the life tenant may sink new shafts and open new pits on veins of minerals already opened;[46] and he may pursue the veins opened to the limits of the tract but not into another distinct tract on which no opening was made.[47] In the case of mines in which work was discontinued prior to the creation of the life estate, a mere cessation of work for however long will not defeat the right of the life tenant to continue it,[48] but if the mine has been abandoned with an executed intention of devoting the land to some other use[49] the work cannot be continued by the life tenant. A life tenant who recognizes that production of oil from adjacent territory may diminish reserves which normally would come into the possession of the remainderman may execute leases in order to conserve the contingent estate.[50] Where the grantor in a deed reserves to himself and his wife life estates and mining rights, a mining company purchasing such rights from the wife after the death of the grantor and exercising them is not accountable to the remainderman.[51]

§ 43. Liability for Waste

a. In general
b. Cutting, selling, and removal of timber
c. Removal or destruction of buildings

a. In General

In general, a life tenant has no right to commit waste; that is, to do any act which does a permanent injury to the inheritance.

With the exception of tenants in tail after possibility of issue extinct, considered supra § 28, the tenants of legal life estates are impeachable for waste.[52] It has been said that originally tenants of conventional life estates were not impeachable for waste, unless expressly made so by the instrument

other grounds 36 S.W.2d 149, 120 Tex. 53.

36. Kan.—Burden v. Gypsy Oil Co., 40 P.2d 463, 141 Kan. 147.

37. Tex.—Andrews v. Brown, Civ. App., 283 S.W. 288, affirmed, Com. App., 10 S.W.2d 707.

In partitioning payment for title to oil in ground, heirs of life tenant are entitled to net value of use of payment during life of life tenant.—Andrews v. Brown, supra.

38. U.S.—Baze v. Scott, C.C.A.Okl., 106 F.2d 365.
21 C.J. p 947 note 97.

39. U.S.—Baze v. Scott, C.C.A.Okl., 106 F.2d 365.
Ark.—Butler v. Butler, 2 S.W.2d 63, 176 Ark. 126.
Ky.—Tomlinson v. Humpich, 248 S. W. 1016, 198 Ky. 474—Goosling v. Pinson, 248 S.W. 248, 198 Ky. 57.
21 C.J. p 947 note 98.

40. Ark.—Butler v. Butler, 2 S.W. 2d 63, 176 Ark. 126.
21 C.J. p 948 note 99.

41. Ind.—Cypress Creek Coal Co. v. Boonville Mining Co., 142 N.E. 645, 194 Ind. 187.
21 C.J. p 948 note 1.

Purchase and sale of lease
Life tenant could purchase outstanding lease as individual and release property beyond period of his life.—Waldron v. Wahl, 133 A. 252, 286 Pa. 237.

42. Pa.—In re Crozer's Estate, 9 A. 2d 535, 336 Pa. 266—In re Knox' Estate, 195 A. 28, 328 Pa. 177, 113 A.L.R. 1185.
Tex.—Barton v. Warner, Civ.App., 142 S.W.2d 303.
21 C.J. p 946 note 73 [a].

43. Pa.—In re Crozer's Estate, 9 A. 2d 535, 336 Pa. 266—In re Knox' Estate, 195 A. 28, 328 Pa. 177, 113 A.L.R. 1185.

44. Kan.—Benson v. Nyman, 16 P.2d 963, 136 Kan. 455.
21 C.J. p 948 note 2.

45. Ohio.—Breece v. Breece, 8 Ohio N.P., N.S., 421.
Tex.—Barton v. Warner, Civ.App., 142 S.W.2d 303.
21 C.J. p 948 note 3.

46. N.J.—Gaines v. Green Pond Iron Min. Co., 33 N.J.Eq. 603.
21 C.J. p 948 note 4.

47. Pa.—Westmoreland Coal Co.'s Appeal, 85 Pa. 344.

48. Ind.—Cypress Creek Coal Co. v. Boonville Mining Co., 142 N.E. 645, 194 Ind. 187.
Ky.—Tomlinson v. Humpich, 248 S. W. 1016, 198 Ky. 474.
21 C.J. p 948 note 7.

49. N.J.—Gaines v. Green Pond Iron Min. Co., 33 N.J.Eq. 603 reversing 32 N.J.Eq. 86.
21 C.J. p 948 note 9.

50. Ark.—Love v. McDonald, 148 S. W.2d 170, 201 Ark. 882.

51. Ind.—Ireland v. Francisco Mining Co., 151 N.E. 700, 85 Ind.App. 428, rehearing denied 154 N.E. 239, 85 Ind.App. 428.

52. Tex.—Swayne v. Lone Acre Oil Co., 86 S.W. 740, 98 Tex. 597, 69 L.R.A. 986, 8 Ann.Cas. 1117.
21 C.J. p 948 note 12.

Right of widow in homestead
Life tenants by virtue of operation of law, such as a widow, in the case of a homestead, cannot use the property for any purpose which would work an injury to the inheritance, except those purposes to which it had been devoted at the time the life estate came into existence.—Petrus v. Cage Bros., Tex.Civ.App., 128 S. W.2d 537, error refused.

creating the estate,[53] but the general rule is now that a life tenant has no right to commit waste,[54] either voluntary or permissive, according to the authorities in this country,[55] or to authorize another to commit waste,[56] and one holding under the life tenant may be held liable for waste.[57] The general rule that the life tenant is liable for waste committed by a stranger as well as for that committed by himself,[58] does not apply in the case of an injury caused by the negligent act of a stranger,[59] or of a destructive trespass of a stranger, which the life tenant neither licenses nor negligently suffers to be done,[60] nor where a mere incorporeal hereditament is transferred to the life tenant.[61] A stranger who commits waste is liable over to the life tenant for damages which the latter has been compelled to pay to the owner of the reversion.[62] Where, under existing statutes, only the tenant for life can be held responsible for waste, a life tenant who has assigned his entire interest and surrendered possession cannot be held liable for waste suffered subsequent to the surrender, he being no longer the life tenant.[63] No precise rule can be laid down that will apply in all cases as to what specific acts will constitute waste,[64] but in general any act which does a permanent injury to the inheritance is waste.[65] What is a permanent injury to the inheritance must often depend on the facts and circumstances of the particular case under consideration.[66] The life tenant may do whatever is required for the general use and enjoyment of the estate as received,[67] but he does not have the right to exercise acts of dominion or ownership over it;[68] and with reference to waste it has been said that the law intends that the life tenant shall enjoy his estate in such reasonable way, as that the land shall pass to the reversioner, as nearly as practicable, unimpaired as to its natural capacities and the improvements on it.[69] However, the fact that the inheritance is as valuable at the termination of the life estate as at its beginning[70] or that the life tenant has improved the estate[71] is no justification for acts of waste committed by the life tenant. The court is not concerned with the motives and purposes of the life tenant in determining whether his acts would constitute waste.[72] Owing to the difference in conditions, the common-law doctrine of waste has been greatly modified in this country, and many things may be done by a tenant for life here that in England would be waste.[73] Thus in England it is waste for a life tenant to convert arable land into meadow or pasture land or vice versa,[74] but in this country the rule is otherwise,[75] unless the change is detrimental to the inheritance and contrary to the ordinary course of good husbandry,[76] and it is not waste to permit arable or pasture land

53. Tex.—Swayne v. Lone Acre Oil Co., 86 S.W. 740, 98 Tex. 597, 69 L.R.A. 986, 8 Ann.Cas. 1117.
21 C.J. p 948 note 13.

54. U.S.—Buder v. Franz, C.C.A.Mo., 27 F.2d 101.
Ky.—Brandenburg v. Petroleum Exploration, 291 S.W. 757, 218 Ky. 557.
Mo.—Miller v. Bowen Coal & Mining Co., App., 40 S.W.2d 485.
N.J.—Camden Trust Co. v. Handle. 21 A.2d 354, 130 N.J.Eq. 125.
Tex.—Davis v. Bond, Civ.App., 141 S.W.2d 979, 983, citing **Corpus Juris.**
21 C.J. p 948 note 16.

55. N.H.—Hanley v. Wadleigh, 186 A. 505, 88 N.H. 174.
21 C.J. p 949 note 17.

56. Mich.—Stroh v. O'Hearn, 142 N. W. 865, 176 Mich. 164.
21 C.J. p 949 note 18.

57. Ky.—Burns v. Dillon, 9 S.W.2d 1095, 226 Ky. 82.

58. N.Y.—Baker v. Hart, 25 N.E. 948, 123 N.Y. 470, 26 Abb.N.Cas. 194, 12 L.R.A. 60, reversing 5 N.Y. S. 345, 52 Hun 363.
21 C.J. p 949 note 21.

59. N.Y.—Rogers v. Atlantic, G. & P. Co., 107 N.E. 661, 213 N.Y. 246, L.R.A.1916A 787, Ann.Cas.1916C 877.

60. Ga.—Kehr v. Floyd, 64 S.E. 673, 132 Ga. 626.

61. N.Y.—Baker v. Hart, 25 N.E. 948, 123 N.Y. 470, 26 Abb.N.Cas. 194, 12 L.R.A. 60, reversing 5 N. Y.S. 345, 52 Hun 363.

62. N.H.—Wood v. Griffin, 46 N.H. 230.

63. Ohio.—Howell v. Howell, 172 N. E. 528, 122 Ohio St. 543, 71 A.L.R. 1182.

64. Vt.—Keeler v. Eastman, 11 Vt. 293.

Working trees for turpentine is not waste by the life tenant where the testator prior to his death used the land and trees for such purpose. —Lee & Bradshaw v. Rogers, 108 S.E. 371, 151 Ga. 838.

65. Ark.—Kory v. Less, 22 S.W.2d 25, 180 Ark. 342.
N.H.—Hanley v. Wadleigh, 186 A. 505, 88 N.H. 174.
N.Y.—Brokaw v. Fairchild, 237 N.Y. S. 6, 135 Misc. 70, affirmed 245 N. Y.S. 402, 231 App.Div. 704, affirmed 177 N.E. 186, 256 N.Y. 670.
Or.—In re Stout's Estate, 50 P.2d 768, 151 Or. 411, 101 A.L.R. 672.
21 C.J. p 949 note 27.

66. Or.—In re Stout's Estate, 50 P. 2d 768, 151 Or. 411, 101 A.L.R. 672.
21 C.J. p 949 note 28.

67. N.Y.—Brokaw v. Fairchild, 237 N.Y.S 6, 135 Misc. 70, affirmed 245 N.Y.S. 402, 231 App. Div. 704, affirmed 177 N.E. 186, 256 N.Y. 670.

68. N.Y.—Brokaw v. Fairchild, supra.

69. N.Y.—Brokaw v. Fairchild, supra.
21 C.J. p 949 note 29.

70. Pa.—McCullough v. Irvine, 13 Pa. 438.

71. N.Y.—Brokaw v. Fairchild, 237 N.Y.S. 6, 135 Misc. 70, affirmed 245 N.Y.S. 402, 231 App.Div. 704, affirmed 177 N.E. 186, 256 N.Y. 670
21 C.J. p 949 note 31.

72. N.Y.—Brokaw v. Fairchild, supra.

73. Miss.—Learned v. Ogden, 32 So. 278, 80 Miss. 769, 92 Am.S.R. 621.
21 C.J. p 949 note 32.

74. Mass.—Pynchon v. Stearns, 11 Metc. 304, 45 Am.D. 207.
21 C.J. p 949 note 33

75. Mo.—Proffitt v. Henderson, 29 Mo. 325.
21 C.J. p 949 note 34.

76. Mass.—Pynchon v. Stearns, 11 Metc. 304, 45 Am.D. 207.
R.I.—Clemence v. Steere, 1 R.I. 272, 53 Am.D. 621.

to grow up in timber.[77] In this country the general rule has come to be that a life tenant may do whatever is required for the proper enjoyment of his estate, to the extent that his acts and management are sanctioned by good husbandry in the locality where the land is situated, having regard, also, to its condition, if he does not cause a substantial injury to the inheritance.[78] A life estate may be created "without impeachment of waste,"[79] in which case the tenant may do all reasonable acts consistent with the preservation of the estate which otherwise might in law be waste;[80] but he cannot commit malicious or, as it is called, equitable, waste so as to destroy the estate,[81] and can do no act to affect the inheritance in an unreasonable and unconscientious manner.[82]

b. Cutting, Selling, and Removal of Timber

In a proper case the life tenant may have the right of cutting, selling, or removing timber from the land, and whether in a particular instance such actions constitute waste depends on the circumstances of the particular case. In the absence of authorization by the creator of the life estate, the life tenant may cut, sell, or remove timber only when his acts are conformable to the rules of good husbandry and the inheritance is not damaged or diminished.

The common-law doctrine of waste has been modified in this country most particularly with regard to the cutting and removal of timber,[83] which in many cases would benefit rather than injure the inheritance,[84] but which must be decided as a question of fact on the particular circumstances of each case.[85] The life tenant may in this country usually remove timber so as to fit the land for pasture or cultivation, the rule being that such clearing is not waste if it does not damage or diminish the value of the inheritance and the acts of the tenant are conformable to the rules of good husbandry;[86] and in such cases the timber removed, it has been held, may be sold by the tenant or used off the premises.[87] The amount of clearing which may be done depends on the circumstances of the particular case;[88] and if it is in fact an injury to the inheritance,[89] or the real purpose is the sale of the timber,[90] its removal is waste. It is not waste to cut dead or decaying trees.[91] Unless the life tenant is authorized to do so by the creator in the instrument creating the life estate,[92] it is waste to sell or cut for sale either timber trees[93] or firewood,[94] or to exchange or sell timber for fuel,[95] or for materials for repairs,[96] or in making repairs to cut a greater amount of timber than is necessary,[97] and the life tenant is liable in tort to the remainderman.[98] It has been held, however, that the general rule that trees cut and sold are treated as principal and not as income and that a life tenant is guilty of waste in cutting trees for sale is not applicable to trees on wild land kept and held merely for the produce of salable timber,[99] and that where before the commencement of the life estate the land had been cultivated for the produce of salable timber, the life tenant may continue the cultivation for his own profit.[1] An exception to the rule against selling or exchanging

77. Mass.—Clark v. Holden, 7 Gray 8, 66 Am.D. 450.
N.C.—Shine v. Wilcox, 21 N.C. 631.

78. N.C.—Thomas v. Thomas, 82 S.E. 1032, 166 N.C. 627, L.R.A.1915B 219.

79. N.H.—Webster v. Webster, 33 N.H. 18, 21, 66 Am.D. 705.
21 C.J. p 950 note 40.

80. Ga.—Belt v. Simkins, 39 S.E. 430, 113 Ga. 894.
21 C.J. p 950 note 41.

81. Mich.—Derham v. Hovey, 161 N.W. 883, 195 Mich. 243.
21 C.J. p 950 note 42.

82. N.H.—Clement v. Wheeler, 25 N.H. 361.
N.Y.—Kane v. Vanderburgh, 1 Johns. Ch. 11.

83. Pa.—Sayers v. Hoskinson, 1 A. 308, 110 Pa. 473.

84. Ga.—Woodward v. Gates, 38 Ga. 205.
21 C.J. p 950 note 45.

85. N.Y.—McCay v. Wait, 51 Barb. 225.
21 C.J. p 950 note 46.

86. Ala.—Guest v. Guest, 176 So. 289, 234 Ala. 581.
Tex.—Anderson v. Anderson, Civ. App., 97 S.W.2d 513.
21 C.J. p 950 notes 47, 49.

87. Mich.—Poole v. Union Trust Co., 157 N.W. 430, 191 Mich. 162, Ann. Cas.1918D 145.
21 C.J. p 950 note 50.

88. Tex.—Anderson v. Anderson, Civ. App., 97 S.W.2d 513.
21 C.J. p 950 note 52.

89. Ala.—Guest v. Guest, 176 So. 289, 234 Ala. 581.
Tex.—Anderson v. Anderson, Civ. App., 97 S.W.2d 513.
21 C.J. p 950 note 53.

90. Mo.—Davis v. Clark, 40 Mo. App. 515.
N.C.—Davis v. Gilliam, 40 N.C. 308.

91. Pa.—Sayers v. Hoskinson, 1 A. 308, 110 Pa. 473.
Vt.—Keeler v. Eastman, 11 Vt. 293.

92. U.S.—Alwood v. Lewis, Ga., 254 F. 810, 166 C.C.A. 256.
Power of disposition
A devise of life estate with remainder over with power in life tenant of disposition of timber annexed gives life tenant proceeds of timber sold for own use.—Fletcher v. Bray, 161 S.E. 383, 201 N.C. 763.

93. Ala.—Guest v. Guest, 176 So. 289, 234 Ala. 581—Westmoreland v. Birmingham Trust & Savings Bank, 108 So. 536, 214 Ala. 593, 46 A.L.R. 1201—Jones v. Sandlin, 87 So. 850, 205 Ala. 67.
Ga.—Higgins v. State, 199 S.E. 158, 58 Ga.App. 480, followed in 199 S.E. 160, 58 Ga.App. 483.
Ky.—Smith v. Harris, 124 S.W.2d 786, 276 Ky. 529.
Pa.—See In re Grubb's Estate, 33 Berks Co.L.J. 53.
21 C.J. p 950 note 59.

94. R.I.—Clemence v. Steere, 1 R.I. 272, 53 Am.D. 621.
21 C.J. p 951 note 60.

95. Mass.—Padelford v. Padelford, 7 Pick. 152.

96. N.H.—Dennett v. Dennett, 43 N.H. 499.
21 C.J. p 951 note 62.

97. N.Y.—Sarles v. Sarles, 3 Sandf. Ch. 601.

98. Ga.—Upenby v. Ware, 173 S.E. 86, 178 Ga. 463.

99. Me.—Bartlett v. Pickering 92 A. 1008, 113 Me. 96.

1. Mich.—Poole v. Union Trust Co.,

timber to obtain funds or materials for repairs has been made when repairs are necessary and the means of making them cannot be otherwise obtained,[2] or where it appears that the sale of the timber and the purchase of materials with the proceeds is the most economical means of making the repairs;[3] but to justify this exception the sale of the timber must be made with the present view of making repairs, the proceeds must be honestly expended, and there must be no substantial injury to the inheritance.[4] It has been held that in an action for an accounting for a wrongful cutting of trees, the life tenant is not entitled to any allowance on account of the fact that he has procured firewood from other sources instead of cutting it from the estate,[5] but there is authority to the contrary.[6] The purchaser of timber with notice of the nature of the title is liable to the remainderman for the value thereof, as of the date and place of conversion.[7] Timber trees, except such as the life tenant is authorized to cut, it has been held, become the property of the remainderman or reversioner, whether cut by the life tenant,[8] or a third person,[9] or blown down on the land by storms;[10] and he may maintain replevin for their recovery,[11] or trespass for taking them away and converting them.[12] It has been held, however, that while the life tenant has no right to cut and sell timber, he nevertheless has the right to have it remain on the premises, and when it has been severed without his fault, he is entitled to an estate for life in the proceeds and to have the proceeds invested and the interest paid to him,[13] and that, although one entitled to the use of the whole estate both real and personal for life has no right to sell timber without the consent of the remainderman, yet having done so he is entitled to the use of the fund arising from the sale of the timber during his life;[14] but there is authority to the contrary.[15] The right to reduce land to cultivation by cutting and removing timber does not warrant the life tenant's retaining all of the proceeds from the sale of the timber.[16]

c. Removal or Destruction of Buildings

In general the removal or destruction of buildings on the premises by the life tenant is waste.

For a life tenant to tear down a house on the premises is waste,[17] even though the house is not tenantable,[18] or the object in removing it is to erect a better building in its place.[19] A building not affixed to the freehold may be removed by the life tenant,[20] but the removal of any building intended as a permanent part of the freehold is waste;[21] and this is true even where the tenant for life is "without impeachment of waste."[22] A life tenant may, however, remove an outbuilding which is in such a dilapidated condition as to be dangerous to stock, unless its condition resulted from his neglect.[23] Where life estates in adjoining parcels of property are devised separately, and are not in common own-

157 N.W. 430, 191 Mich. 162, Ann. Cas.1918E 622.
21 C.J. p 951 note 65.

2. Ky.—Morrow v. Morrow, 3 Ky.L. 620, 11 Ky.Op. 496.
21 C.J. p 951 note 66.

3. U.S.—Loomis v. Wilbur, C.C.R.I., 15 F.Cas.No.8,498, 5 Mason 13.
Ind.—Miller v. Shields, 55 Ind. 71.

4. N.C.—Fleming v. Sexton, 90 S.E. 247, 172 N.C. 250—Thomas v. Thomas, 82 S.E. 1032, 166 N.C. 627, L.R.A.1915B 219.

5. Mass.—Phillips v. Allen, 7 Allen 115.

6. N.Y.—Sarles v. Sarles, 3 Sandf. Ch. 601.

7. Ky.—Bergen & Meehan Co. v. Sears, 67 S.W. 1002, 24 Ky.L. 80.

8. Me.—Richardson v. York, 14 Me. 216.
R.I.—Lester v. Young, 14 R.I. 579.

9. N.H.—Lane v. Thompson, 43 N. H. 320.

10. Md.—Stonebreaker v. Zollickoffer, 52 Md. 154, 36 Am.R. 364.
21 C.J. p 951 note 75.

11. Me.—Richardson v. York, 14 Me. 216.

12. N.H.—Lane v. Thompson, 43 N. H. 320.

13. N.H.—Keniston v. Gorrell, 64 A. 1101, 74 N.H. 53.

14. Ky.—Cecil v. Cecil, 170 S.W. 973, 161 Ky. 419.

15. Ala.—Westmoreland v. Birmingham Trust & Savings Bank, 108 So. 536, 214 Ala. 593, 46 A.L.R. 1201.

16. Ala.—Guest v. Guest, 176 So. 289, 234 Ala. 581.
Life tenant and coöperating remaindermen were properly held accountable to other remaindermen for difference between reasonable market value of sale of timber from land cleared and reasonable market or contract price required and paid in fitting land for cultivation.—Guest v. Guest, supra.

17. N.Y.—Brokaw v. Fairchild, 237 N.Y.S. 6, 135 Misc. 70, affirmed 245 N.Y.S. 402, 231 App.Div. 704, affirmed 177 N.E. 186, 256 N.Y. 670.
21 C.J. p 951 note 80.

18. R.I.—Clemence v. Steere, 1 R.I. 272, 53 Am.D. 621.

19. N.Y.—In re Edgar's Will, 282 N.Y.S. 795, 157 Misc. 10.
Utah.—Dooly v. Stringham, 7 P. 405, 4 Utah 107.
21 C.J. p 951 note 82.
Life estate in residence
Life tenant, devised testator's residence, could use dwelling reasonably for own convenience or profit, but demolition of such dwelling and erection of apartment would be exercise of act of ownership by life tenant, since this would prevent delivery of inheritance to remaindermen, and the life tenant, although tendering bond, could not against will of remaindermen demolish such dwelling for purpose of erecting apartment, although maintenance was unprofitable as investment.—Brokaw v. Fairchild, 237 N.Y.S. 6, 135 Misc. 70, affirmed 245 N.Y.S. 402, 231 App.Div. 704, affirmed 177 N.E. 186, 256 N.Y. 670.

20. R.I.—Clemence v. Steere, 1 R.I. 272, 53 Am.D. 621.

21. Mich.—Stevens v. Rose, 37 N.W. 205, 69 Mich. 259.
N.J.—Kimble v. Newark, 102 A. 637, 91 N.J.Law 249, L.R.A.1918E 793.

22. Mich.—Stevens v. Rose, 37 N.W. 205, 69 Mich. 259.

23. R.I.—Clemence v. Steere, 1 R.I. 272, 53 Am.D. 621.

ership, the properties have no plottage value so that alleged impairment of such value could not prevent removal of a building by one of the life tenants.[24] Where destruction of a building results from an act of God and the life tenant salvages and sells materials from it, he is required to apply the money realized for the benefit of the remaindermen.[25] Where a life tenant tears down a building, a third person who purchases the materials is liable to the remainderman for the value thereof, since the life tenant had no right to sell and the buyer obtains no title.[26]

§ 44. Repairs

A life tenant must make all the ordinary repairs necessary to preserve the property and prevent its going to waste, but he need not make extraordinary repairs.

A tenant for life must make all the ordinary repairs necessary to preserve the property and prevent its going to waste,[27] to the extent at least of its rental value,[28] unless there is a provision to the contrary in the instrument creating the estate.[29] He is bound to keep the premises in as good repair as they were when he took them,[30] not excepting ordinary or natural wear and tear,[31] and this duty devolves on one holding under the life tenant.[32] Where, however, a life estate is created in premises occupied by a tenant under a lease for years, which does not expressly charge the landlord with the duty of repairs, the measure of the life tenant's liability for repairs is, at most, the cost of restoring the premises to the condition in which they were when the lease expired, as distinguished from the cost of restoring them to the condition in which they were at time of creation;[33] but he is not bound to

24. N.Y.—Brokaw v. Fairchild, 237 N.Y.S. 6, 135 Misc. 70, affirmed 245 N.Y.S. 402, 231 App.Div. 704, affirmed 177 N.E. 186, 256 N.Y. 670.

25. Ga.—Crisp County Lumber Co. v. Bridges, 200 S.E. 777, 187 Ga. 484, 126 A.L.R. 333.

26. Ky.—Hayden v. Boetler, 93 S.W. 2d 831, 263 Ky. 722.

27. U.S.—Lyon v. Commissioner of Internal Revenue, C.C.A., 69 F.2d 460, 461, citing Corpus Juris.
Ark.—Kory v. Less, 42 S.W.2d 764, 184 Ark. 473.
Ill.—Guhl v. Guhl, 33 N.E.2d 185, 376 Ill. 100.
Ky.—Thomas v. Thomas' Guardian, 51 S.W.2d 949, 244 Ky. 721 Sullivan v. Bland, 284 S.W. 410, 215 Ky. 57—Lindenberger v. Cornell, 229 S.W. 54, 190 Ky. 844—Shutt's Adm'r v. Shutt's Adm'r, 232 S.W. 405, 192 Ky. 98.
Minn.—Rendahl v. Hall, 200 N.W. 744, 160 Minn. 502, rehearing denied 200 N.W. 940, 160 Minn. 502.
Mo.—Weller v. Searcy, 128 S.W.2d 73, 343 Mo. 768, transferred, see 111 S.W.2d 206—Witcher v. Hanley, 253 S.W. 1002, 299 Mo. 696—Larsen v. Hansen, App., 12 S.W.2d 505.
N.H.—Ruel v. Hardy, 6 A.2d 753, 90 N.H. 240—Burke v. Millikin, 45 A. 401, 69 N.H. 501.
N.J.—Asmus v. Asmus, 194 A. 884, 122 N.J.Eq. 485.
N.Y.—In re Gaffers' Estate, 5 N.Y.S. 2d 671, 254 App.Div. 448—In re Rogers' Will, 296 N.Y.S. 872, 251 App.Div. 478—In re Cronise's Estate, 6 N.Y.S.2d 392, 167 Misc. 310—In re Edgar's Will, 282 N.Y.S. 795, 157 Misc. 10—In re Mills' Estate, 266 N.Y.S. 478, 148 Misc. 224—In re Williams' Estate, 266 N.Y.S. 422, 148 Misc. 14—In re Slater's Will, 242 N.Y.S. 733, 137 Misc. 54—In re Williams' Estate, 232 N.Y.S. 521, 133 Misc. 322—In re Victorin, 219 N.Y.S. 619, 128 Misc. 577—Gould v. Gould, 213 N.Y.S. 286, 126 Misc. 54—Peerless Candy Co. v. Kessler, 205 N.Y.S. 884, 123 Misc. 361—Peerless Candy Co. v. Kessler, 205 N.Y.S. 883, 123 Misc. 735—Sweeney v. Schoneberger, 186 N.Y.S. 707, 111 Misc. 718—In re Wells' Estate, 26 N.Y.S.2d 604.
Or.—In re Stout's Estate, 50 P.2d 768, 771, 151 Or. 411, quoting Corpus Juris.
Pa.—In re Farber's Estate, 70 Pa. Super. 81—In re Lawson's Estate, 2 Pa.Dist. & Co. 316, 19 Sch.Leg. Rec. 27, 36 York Leg.Rec. 159—In re Warfel's Estate, 22 Erie Co. 190.
S.C.—McDavid v. McDavid, 197 S.E. 204, 187 S.C. 127, 116 A.L.R. 1412.
Tenn.—Old Nat. Bank v. Swearingen, 72 S.W.2d 545, 167 Tenn. 529.
Tex.—Sargeant v. Sargeant, 15 S.W. 2d 589, 118 Tex. 343, answering certified questions, Civ.App., 19 S.W.2d 382.
Wis.—Nixon v. Nixon, 199 N.W. 50, 184 Wis. 200.
21 C.J. p 951 note 87.

Life tenant of income

A life tenant must make all ordinary, reasonable, and necessary repairs to preserve property, and ordinarily, as between a life tenant of income from property and remaindermen, remaindermen are entitled to have sufficient sum taken from current income to preserve physical integrity of corpus.—In re Matthews' Estate, 245 N.W. 122, 210 Wis. 109.

28. Or.—In re Stout's Estate, 50 P. 2d 768, 771, quoting Corpus Juris.
21 C.J. p 952 note 88.

29. N.Y.—In re Gaffers' Estate, 5 N.Y.S.2d 671, 254 App.Div. 448.
Or.—In re Stout's Estate, 50 P.2d 768, 771, 151 Or. 411, quoting Corpus Juris.
Pa.—In re Warfel's Estate, 22 Erie Co. 152.
21 C.J. p 952 note 89.

Reservation in deed

Repairing property is not required of life tenants becoming such by reservation in their deed in which grantee, as remaindermen, agrees to support them.—In re Ringle's Estate, 242 N.W. 908, 259 Mich. 262.

Unequivocal direction

For repairs to be chargeable against corpus of estate instead of income, directions in will to such effect must be unequivocal; but where testatrix devised to husband life estate in dwelling with remainder over to nephews, and provided repairs should be chargeable against her estate, life tenant is entitled to have such charges paid out of corpus rather than income.—In re Mills' Estate, 266 N.Y.S. 478, 148 Misc. 224.

Proportionate share

Surviving wife of testator, entitled to life estate in testator's realty, is liable for proportionate share of upkeep.—In re Hale's Estate, 18 P. 2d 808, 142 Or. 23.

30. N.Y.—Peerless Candy Co. v. Kessler, 205 N.Y.S. 884, 123 Misc. 361.
Or.—In re Stout's Estate, 50 P.2d 768, 771, 151 Or. 411, quoting Corpus Juris.
21 C.J. p 952 note 90.

31. Or.—In re Stout's Estate, supra.
21 C.J. p 952 note 91.

32. Neb.—Annable v. Ricedorff, 299 N.W. 373.
N.Y.—Peerless Candy Co. v. Kessler, 205 N.Y.S. 884, 123 Misc. 361.

33. Pa.—Davenport's Estate, 10 Pa. Dist. 121.

make extraordinary repairs,[34] which involve the substitution of new structures for old or parts thereof for old,[35] or to repair buildings which are in an untenantable condition at the time the life estate is created.[36] If the cost of repairs would exceed the value of the buildings, he is not bound to repair them but may leave them to their natural destruction.[37] A life tenant is not bound to restore a building destroyed by the act of God,[38] or by an accidental fire for which he was not to blame.[39] A failure to make necessary repairs is waste.[40] If repairs are necessary to preserve the estate, and the life tenant after due notice and request does not make them within a reasonable time,[41] the remainderman may, by appropriate proceedings, require him to make such repairs[42] or may have them made[43] and may recover the cost of such repairs from the life tenant,[44] or, as stated infra § 64, a receiver may be appointed to apply the rents and income to this purpose. Remaindermen cannot recover the cost of repairs made after the termination of the life tenancy which were not, in the usual course of such matters, necessitated during the occupancy of the life tenant.[45] In ascertaining the amount, if any, chargeable against the estate of a life tenant for repairs necessitated by marauders, the court should ascertain whether or not the acts of depredation were due to negligence of the life tenant.[46] Where the necessary repairs are also in the nature of permanent improvements which are of benefit to both the life tenant and the remainderman, and increase the value of the latter's estate as compared with its value at the time the life estate was created, the expense of such repairs may be apportioned according to the respective interests.[47] A life tenant of certain rooms in a house and the reversioner who occupies the rest of the house are in contemplation of law occupants of distinct dwellings, and neither can recover from the other on account of repairs made without request.[48] If the life estate is in the hands of a trustee, he may apply the rents and profits to making necessary repairs, but in the absence of a power of sale cannot sell any part of the property for this purpose.[49]

§ 45. Improvements

In general, if the life tenant makes permanent improvements on the property it is presumed that they were for his own benefit, and he cannot recover anything therefor from the remainderman or reversioner. Under certain circumstances the cost of improvements may be apportioned; and in some jurisdictions in a proper case the life tenant may be entitled to reimbursement.

A tenant for life is not bound to make any permanent improvements on the estate;[50] and when such improvements are made by an executor or trustee they are not chargeable against the life tenant except when made by his procurement,[51] although in some cases where the improvement was a distinct benefit to both interests it has been held that the cost should be apportioned.[52] The rule, as generally stated, is, that if the life tenant himself makes permanent improvements it will be presumed that they were for his own benefit, and he cannot recover anything therefor from the remainderman or reversioner,[53] especially, where knowing that his

34. Iowa.—Shelangowski v. Schrack, 143 N.W. 1081, 162 Iowa 176.
21 C.J. p 952 note 93.

35. Iowa.—Shelangowski v. Schrack, 143 N.W. 1081, 162 Iowa 176.
N.Y.—Suydam v. Jackson, 54 N.Y. 450.
Expense of modernization not chargeable to life tenant.—In re Stout's Estate, 50 P.2d 768, 151 Or. 411, 101 A.L.R. 672.

36. Mass.—Sohier v. Eldredge, 103 Mass. 345.
Pa.—Griffith's Estate, 2 Pa.Dist. 191, 12 Pa.Co. 616.

37. R.I.—Clemence v. Steere, 1 R.I. 272, 53 Am.D. 621.

38. Ind.—Miller v. Shields, 55 Ind. 71.

39. Minn.—Rendahl v. Hall, 200 N.W. 744, 160 Minn. 502, rehearing denied 200 N.W. 940, 160 Minn. 502.
21 C.J. p 952 note 98.

40. Mich.—In re Ringle's Estate, 242 N.W. 908, 259 Mich. 262.
N.H.—Hanley v. Wadleigh, 186 A. 505, 88 N.H. 174.
21 C.J. p 952 note 99.

41. Pa.—Baker v. Esbin, 1 Chest. Co. 293.

42. N.Y.—In re Gaffers' Estate, 5 N.Y.S.2d 671, 254 App.Div. 448.
21 C.J. p 952 note 2.

43. Ky.—Prescott v. Grimes, 136 S.W. 206, 143 Ky. 191, 33 L.R.A., N.S., 669.
Pa.—Baker v. Esbin, 1 Chest.Co. 293.

44. N.Y.—In re Gaffers' Estate, 5 N.Y.S.2d 671, 254 App.Div. 448—In re Slater's Will, 242 N.Y.S. 733, 137 Misc. 54—In re Williams' Estate, 232 N.Y.S. 521, 133 Misc. 322.
21 C.J. p 952 note 4.
Ascertainment of amount of recovery
Or.—In re Stout's Estate, 50 P.2d 768, 151 Or. 411, 101 A.L.R. 672.

45. Or.—In re Stout's Estate, supra.

46. Or.—In re Stout's Estate, supra.

47. N.Y.—Matter of Laytin, 20 N.Y.S. 72, 2 Connoly Surr. 106.
21 C.J. p 952 note 6.

48. N.H.—Wiggin v. Wiggin, 43 N.H. 561, 80 Am.D. 192.

49. R.I.—Thurston v. Thurston, 6 R.I. 296.

50. Ky.—Neel v. Noland, 179 S.W. 430, 166 Ky. 455, 463.
21 C.J. p 953 note 10.

51. N.Y.—Matter of Pollock, 3 Redf. Surr. 100.
21 C.J. p 953 note 11.

52. Or.—Moore v. Simonson, 39 P. 1105, 27 Or. 117.
21 C.J. p 953 note 12.

53. Ala.—Sumner v. Bingham, 98 So. 294, 210 Ala. 446, citing **Corpus Juris.**
Ark.—Smith & Shoptaw v. Stanton, 60 S.W.2d 183, 185, 187 Ark. 447, citing **Corpus Juris.**
Ga.—Crawford v. Moorman, 163 S.E. 179, 174 Ga. 629—Darnell v. Williams, 156 S.E. 584, 171 Ga. 651—Hamilton v. Kinnebrew, 131 S.E. 470, 161 Ga. 495.

interest is limited to a life estate, he makes improvements for the comfort and convenience of himself and family.[54] The life tenant does not acquire a lien enforceable against the remainderman.[55] This rule applies to one holding under a life tenant,[56] and one lending him money for making improvements cannot charge the remainderman.[57] This rule, however, is not absolutely without exception,[58] as in the case of a life tenant who completes improvements begun by the donor,[59] and it has been somewhat relaxed by some of the later decisions,[60] it being held that where improvements of a permanent character have been made to the estate, by compulsion,[61] as in the case of municipal improvements to be paid for by taxation,[62] or where buildings become untenantable without neglect on the part of the life tenant,[63] or where improvements are necessary by reason of changed conditions,[64] or in order to obtain a reasonable return from property which is unproductive,[65] and the expenditure for such improvements is for the best interests of the remaindermen, as well as the life tenant,[66] and does not contravene the terms of the instrument creating the life estate and the estate in remainder,[67] the cost of such improvements should be paid out of the corpus of the estate,[68] or apportioned between the life tenant and the remaindermen according to the benefit accruing to each.[69]

Ill.—Leininger v. Reichle, 148 N.E. 384, 317 Ill. 625.

Ky.—German v. Frey Planing Mill Co., 77 S.W.2d 414, 415, 257 Ky. 128, citing **Corpus Juris**—Superior Oil Corporation v. Alcorn, 47 S.W. 2d 973, 986, 242 Ky. 814, citing **Corpus Juris** Gueskind v. Michael Hardware Co., 15 S.W.2d 528, 228 Ky. 780—Leonard v. Williams, 295 S.W. 408, 220 Ky. 413—Pool v. Pool, 283 S.W. 111, 214 Ky. 267—Decker v. Decker, 265 S.W. 483, 205 Ky. 69.

Mass.—Gueklan v. Riley, 135 Mass. 71.

Mich.—Jones v. Harsha, 196 N.W. 624, 225 Mich. 416.

Minn.—Day v. Day, 230 N.W. 634, 656, 180 Minn. 151, citing **Corpus Juris**—Rendahl v. Hall, 200 N.W. 744, 160 Minn. 502, rehearing denied 200 N.W. 940, 160 Minn. 502.

Mo.—Schowe v. Kallmeyer, 20 S.W. 2d 26, 30, 323 Mo. 899, citing **Corpus Juris**—Gray v. Clement, 246 S.W. 940, 296 Mo. 497.

N.C.—Hall v. Hall, 15 S.E.2d 273, 219 N.C. 805—Smith v. Suitt, 153 S.E. 602, 199 N.C. 5.

S.C.—Guignard v. Corley, 144 S.E. 586, 147 S.C. 12, 62 A.L.R. 533—Cagle v. Schaefer, 104 S.E. 321, 115 S.C. 35.

Tex.—Phelps v. Thurber Brick Co., Civ.App., 62 S.W.2d 596, 598, citing **Corpus Juris**—Ely v. Moore, Civ.App., 297 S.W. 795, modified on other grounds, Com.App., 11 S.W.2d 294.

W.Va.—Ferrell v. Ferrell, 138 S.E. 399, 400, 103 W.Va. 704, citing **Corpus Juris.**

21 C.J. p 953 note 13.

In Louisiana a usufructuary has the right to make repairs at his own expense, and recover the outlay at the expiration of the usufruct, but the use for extraordinary repairs or improvements of proceeds of personalty subject to the usufruct give no right to reimbursement.—Le Goaster v. Lafon Asylum, 99 So. 22, 155 La. 158.

54. Ky.—Holmes v. Lane, 123 S.W. 318, 136 Ky. 21.

55. Ky.—Baker's Adm'x v. Combs, 284 S.W. 101, 215 Ky. 5—Hager v. Connolly, 263 S.W. 723, 204 Ky. 147—Wainscott v. McBroom, 262 S.W. 961, 203 Ky. 634.

R.I.—Tillinghast v. Harrop, 9 A.2d 28.

Wife of life tenant

Where husband had life estate, his wife is not entitled to lien for her improvements as against remaindermen.—Baker's Adm'x v. Combs, 284 S.W. 101, 215 Ky. 5.

56. Ga.—Crawford v. Moorman, 163 S.E. 179, 174 Ga. 629.

Ill.—Clark v. Leavitt, 166 N.E. 538, 335 Ill. 184.

Iowa.—Wiltse v. Hurley, 11 Iowa 473.

Ky.—Leonard v. Williams, 295 S.W. 408, 220 Ky. 413—Hager v. Connolly, 263 S.W. 723, 204 Ky. 147.

Me.—Maddocks v. Jellison, 11 Me. 482.

Neb.—Annable v. Ricedorff, 299 N.W. 373.

21 C.J. p 953 note 15.

Husband, making improvements on land in which wife had homestead life estate, was not entitled to charge corpus of estate therewith.—Schowe v. Kallmeyer, 20 S.W.2d 26, 323 Mo. 899.

57. Mo.—Missouri Cent. Bldg. & Loan Ass'n v. Eveler, 141 S.W. 877, 237 Mo. 679, Ann.Cas.1913A 486.

58. Ark.—Smith & Shoptaw v. Stanton, 60 S.W.2d 183, 185, 187 Ark. 447, citing **Corpus Juris.**

21 C.J. p 953 note 17.

59. N.Y.—Jacobs v. Steinbrink, 149 N.Y.S. 337, 164 App.Div. 715.

60. N.Y.—Matter of Whitney, 136 N.Y.S. 633, 75 Misc. 610.

21 C.J. p 953 note 21.

In surrogate's court

Surrogate's court is governed by principles of equity, as well as of law, and may do exact justice between remainderman and life beneficiary, who is also executor and trustee, and who in good faith has made permanent improvements to estate.—In re Schummers' Will, 206 N.Y.S. 113, 210 App.Div. 296, affirmed In re Schummers' Estate, 154 N.E 600, 243 N.Y. 548.

61. N.Y.—Matter of Whitney, 136 N.Y.S. 633, 75 Misc. 610.

21 C.J. p 953 note 22.

62. N.Y.—Matter of Whitney, 136 N. Y.S. 633, 75 Misc. 610.

63. N.Y.—Matter of Whitney, supra.

64. N.Y.—Matter of Whitney, supra.

65. N.Y.—Matter of Whitney, supra.

66. N.Y.—Matter of Ziegler, 143 N. Y.S. 682, 82 Misc. 10—Matter of Whitney, 136 N.Y.S. 633, 75 Misc. 610.

67. N.Y.—Matter of Whitney, supra.

68. N.Y.—Matter of Whitney, supra.

21 C.J. p 954 note 28.

69. Mo.—Estey v. Commerce Trust Co., 64 S.W.2d 608, 616, 333 Mo. 977, citing **Corpus Juris.**

21 C.J. p 954 note 30.

Improvements by executor who was life tenant

Where building destroyed by fire, in which estate had one half undivided interest, was rebuilt by executor, who was life beneficiary, and who, when land was subsequently appropriated by state, purchased building for small amount and moved it to another site, in which estate owned one half interest, and made alterations and improvements thereto, executor was entitled to charge estate for its share of expenses on his accounting, but charges against the remainderman should be limited to value of improvements at the time remainderman would, in ordinary course of events, finally come into enjoyment of them, by deducting proper allowance for depreciation, and the executor, who was also life tenant, was not entitled to credit on his accounting for expenditures which were not permanent improvements.—In re Schummers' Will, 206 N.Y.S. 113, 210 App.

According to some authorities the cost of permanent improvements should usually be borne by the remainderman,[70] especially where there are circumstances making this course equitable,[71] it being within the power of the court to apportion the expenses of improvements between the life tenant and the remainderman whenever it appears equitable to do so.[72] According to others the cost of permanent improvements,[73] which add to the value of both the life estate and remainder, should be equitably apportioned between the life tenant and the remainderman, taking into account the probable duration of the life estate and other relevant facts,[74] the life tenant paying the interest and the remainderman the principal,[75] and it has been held that in a proper case the cost of improvements, irrespective of whether they should be classed as permanent or as repairs, will be apportioned between the life tenant and the remainderman.[76] It has been held that a life tenant[77] or one claiming under him[78] cannot charge the remainder estate[79] or remainderman personally[80] with improvements on the land, although he makes them in good faith under the belief that he is the absolute owner; but there is authority to the contrary,[81] and it is sometimes otherwise provided by statute.[82] The life tenant's personal representative cannot recover from the remainderman the value of improvements, placed on land by lessees of the life tenant, at their own expense, and to the cost of which the life tenant did not contribute.[83] Where the life tenant is an infant and the income of the property is invested by order of the court in permanent improvements, the value of the improvements may be apportioned between the life tenant and the remainderman.[84] Where a tenant for life is also a tenant in common of the remainder he will be allowed, on partition with his cotenants, compensation for improvements made during the continuance of the life estate.[85] The liability of the life tenant and the remainderman for the cost of improvements may depend on an agreement made by them.[86] In the case of a sale under order of court of property on which the life tenant has made permanent improvements for the mutual accommodation of himself and the remainderman, he will be allowed to recover the value of such

Div. 296, affirmed In re Schummers' Estate, 154 N.E. 600, 243 N.Y. 548.

70. Conn.—Hooker v. Goodwin, 99 A. 1059, 91 Conn. 463, Ann.Cas.1918 D 1159.
21 C.J. p 954 note 31.

71. Pa.—Hoyt's Estate, 84 A. 835, 236 Pa. 433, affirming 48 Pa.Super 359.
21 C.J. p 954 note 32.

72. Pa.—In re Wright, 83 A. 427, 234 Pa. 580—Norris' Estate, 26 Pa.Dist. 775.

73. Hawaii.—In re Ena's Estate, 30 Hawaii 286.
21 C.J. p 954 note 34.

Improvements and repairs distinguished

Clearing land, construction of new buildings, and installing new roof are improvements, and not repairs. —O'Donnell v. Mathews, 284 S.W. 204, 221 Mo.App. 657.

74. Ind.—Lantz v. Caraway, 103 N.E. 335, 180 Ind. 484, 50 L.R.A.,N.S., 32—Kline v. Dowling, 96 N.E. 579, 176 Ind. 521.

75. Hawaii.—In re Ena's Estate, 30 Hawaii 286.

Time for payment

Remaindermen, reimbursing life tenants for permanent improvement, are not required to make entire payment at one time, in view of provisions of will under which parties held property.—In re Ena's Estate, supra.

76. Pa.—Uhl's Estate, 23 Pa.Dist 386—Davenport's Estate, 10 Pa. Dist. 121—Baker v. Esbin, 1 Chest Co. 293.

77. Ky.—Hager v. Connolly, 263 S.W. 723, 204 Ky. 147—Henry v Brown, 34 S.W. 710, 99 Ky. 13, 17 Ky L. 1329.
21 C.J. p 954 note 39.

78. Ky.—Hager v. Connolly, 263 S.W. 723, 204 Ky. 147.
21 C.J. p 954 note 40.

79. Minn.—Rendahl v. Hall, 200 N.W. 744, 160 Minn. 502, rehearing denied 200 N.W. 940, 160 Minn. 502.
21 C.J. p 954 note 41.

80. Ky.—Stovall v. Mayhew, 190 S.W. 675, 173 Ky. 212.
21 C.J. p 954 note 42.

81. Ala.—Chambers v. Hunton, 132 So. 713, 714, 222 Ala. 482, citing **Corpus Juris.**
Mo.—O'Donnell v. Mathews, 284 S.W. 204, 221 Mo.App. 657.
N.C.—Hall v. Hall, 15 S.E.2d 273, 219 N.C. 805—Harriett v. Harriett, 106 S.E. 221, 181 N.C. 75—Pritchard v. Williams, 106 S.E. 144, 181 N.C. 46.
21 C.J. p 954 note 43.

Determination by court

District court in Wyoming had power to decide right of life tenant to reimbursement for permanent improvements made.—Murrell v. Stock Growers' Nat. Bank of Cheyenne, C.C.A.Wyo., 74 F.2d 827.

On ejectment of life tenant

One making improvements on land believing himself to be owner in fee is entitled, when dispossessed in ejectment, to recover compensation, under Rev.St.1919, § 1834, for improvements put on such land, although only life tenant.—Staub v. Phillips, 271 S.W. 365, 307 Mo. 576.

82. **In Arkansas**

(1) Under a betterments statute, the holder of a life estate may be entitled to compensation for betterments, when he in good faith claims the entire interest under color of title thereto, and makes the improvements under the belief that he is the owner in fee.—Bloom v. Strauss, 69 S.W. 548, 72 S.W. 563, 70 Ark. 483.

(2) A life tenant who improved property was not entitled to a lien on the property or a right under the betterment statute to the extent that it was improved with his money, where he did not make the improvements under color of title or did not make them in good faith.—Graves v. Bean, 141 S.W.2d 50, 200 Ark. 863.

83. Md.—Wagner v. Ruhl, 105 A. 770, 133 Md. 521.

84. Ky.—Gray v. Gray, 139 S.W. 838, 144 Ky. 603.
21 C.J. p 954 note 46.

85. Tenn.—Broyles v. Waddel, 11 Heisk. 32.

86. Pa.—Meyer's Estate, 66 Pa.Super. 115.

Agreement by some of remaindermen

Notwithstanding the evidence sustained finding that a written agreement to pay for improvements during life tenancy was executed and delivered by three of four remaindermen, such agreement created merely a personal obligation on those who executed it, and did not create lien on property, and was no defense to an action in ejectment.—Day v. Day, 230 N.W. 634, 180 Minn. 151.

improvements out of the proceeds of the sale.[87] Under a warranty deed signed by the life tenant and the heirs in the remainder, all improvements by the life tenant go with the property conveyed.[88] Improvements made by the life tenant become part of the real estate and pass to the remainderman, and they may not be removed without the consent of the remaindermen.[89]

§ 46. Insurance

As a general rule, the life tenant is not bound to keep the premises insured for the benefit of the remainderman or reversioner.

It has been stated, as a general rule, that the life tenant is not bound to keep the premises insured for the benefit of the remainderman or reversioner,[90] unless there is an agreement that he shall do so,[91] or a provision to that effect in the instrument creating the estate;[92] but that either may insure for his own benefit,[93] the tenant for life and the remainderman paying insurance for their respective interests.[94] Ordinarily this is what is done,[95] and it has been held that neither the life tenant nor the remainderman will be benefited by the other's policy.[96] On the other hand, it has frequently been held that insurance is chargeable to the life tenant.[97] Thus, where the estate is subject to a mortgage executed by the donor of the life estate and containing a covenant that the buildings on the estate shall be kept insured, the premiums must be paid by the life tenant;[98] and it has been said that the true rule is that if the insurance benefits the life tenant solely, then he must pay the premium, if the remainderman only is benefited then he must pay it, if both the tenant and the remainderman are benefited it must be apportioned between them.[99]

§ 47. Taxes and Assessments

As a general rule, the life tenant in possession is required to pay all ordinary taxes on the property during the continuance of his estate. Assessments for public improvements not being ordinary taxes, the life tenant may or may not be obliged to pay, and it is generally held that if the improvements are permanent, the assessment should be apportioned between the tenant for life and the remainderman.

A life tenant,[1] in possession, enjoying the rents

87. Md.—Gambril v. Gambril, 3 Md. Ch. 259.

88. Ky.—Gaulbaugh v. Rouse, 104 S.W. 959, 31 Ky.L. 1195.

89. Minn.—Day v. Day, 230 N.W. 634, 180 Minn 151.

90. Cal.—Corder v. McDougall, 16 P. 2d 740, 216 Cal. 773.
Mo.—Underwood v. Fortune, App., 9 S.W.2d 845, 846, citing Corpus Juris.
21 C.J. p 954 note 52.

Clause of life tenant

Provision in deed from life tenant to daughter as remainderman whereby daughter agreed to care for mother and incompetent brother, who shared remainder interest, did not require daughter to insure for brother's benefit.—Bell v. Barefield, 122 So. 318, 219 Ala. 319.

91. Ga.—Payne v. Thebaut, 180 S.E. 725, 726, 180 Ga. 758, citing Corpus Juris.
Mo.—Underwood v. Fortune, App., 9 S.W.2d 845, 846, citing Corpus Juris.
21 C.J. p 954 note 53.

92. Mo.—Underwood v. Fortune, supra.
21 C.J. p 954 note 54.

93. Minn.—Rendahl v. Hall, 200 N. W. 744, 160 Minn. 502, rehearing denied 200 N.W. 940, 160 Minn. 502.
Pa.—In re Farber's Estate, 70 Pa. Super. 81.
21 C.J. p 955 note 55.

94. N.J.—Rogers v. Genung, Ch., 76 A. 233—Kearney v. Kearney, 17 N.J.Eq. 59, affirmed 17 N.J.Eq. 504.

95. Md.—Legge v. Canty, 4 A.2d 465.

96. Mass.—Harrison v. Pepper, 44 N.E. 222, 166 Mass. 288, 55 Am.S.R. 404, 33 L.R.A. 239.
21 C.J. p 955 note 60.

97. Ky.—Thomas v. Thomas' Guardian, 51 S.W.2d 949, 244 Ky. 724—Pool v. Pool, 283 S.W. 111, 214 Ky. 267.
Miss.—Grace v. Reed, 108 So. 799, 143 Miss 427, 47 A.L.R. 516.
N.Y.—In re Garibaldi's Will, 1 N.Y.S.2d 691, 253 App.Div. 843—In re Rogers' Will, 296 N.Y.S. 872, 251 App.Div. 478.
Pa.—In re Warfel's Estate, 22 Erie Co. 190.
However, it has been held that a life tenant is not required to insure testator's property for amount greater than necessary to protect her life interest.—In re Williams' Estate, 266 N.Y.S. 422, 148 Misc. 14.
21 C.J. p 955 note 57.

Determined by instrument creating estate

Generally, life tenant must pay insurance, but contrary intention will govern when manifested by testator, and directions in will to such effect must be unequivocal, but where testatrix provided insurance should be chargeable against her estate, life tenant is entitled to have such charges paid out of corpus rather than income.—In re Mills' Estate, 266 N.Y.S. 478, 148 Misc. 224.

98. Va.—Livesay v. Boyd, 180 S.E. 158, 164 Va. 528.
21 C.J. p 955 note 58.

99. N.Y.—In re Phelps' Estate, 295 N.Y.S. 840, 162 Misc. 703.
21 C.J. p 955 note 59.

1. U.S.—Lone Pine Lawn Corporation v Helvering, C.C.A., 121 F.2d 935.
Ala.—Christopher v. Chadwick, 135 So. 454, 223 Ala. 260.
Ark.—Wells v. Henry, 45 S.W.2d 20, 184 Ark. 1114.
Cal.—Newport v. Hatton, 231 P. 987, 195 Cal. 132.
Colo.—Dormer v. Walker, 69 P.2d 1049, 101 Colo. 20.
Del.—De Prisco v. Rykrocwski, 158 A. 144, 18 Del.Ch. 252.
Ill.—Guhl v. Guhl, 32 N.E.2d 185, 376 Ill. 100.
Iowa.—Rich v. Allen, 286 N.W. 434, 226 Iowa 1304—Hucke v. Dinkel, 275 N.W. 61—Reddish v. John, 179 N.W. 950, 190 Iowa 49—Harris v. Brown, 169 N.W. 664, 184 Iowa 1288.
Ky.—Atkins' Guardian v. McCoy, 120 S.W.2d 1019, 275 Ky. 117—Vaughn v. Metcalf, 113 S.W.2d 727, 274 Ky. 379—Thomas v. Thomas' Guardian, 51 S.W.2d 949, 244 Ky. 721 Superior Oil Corporation v. Alcorn, 47 S.W.2d 973, 986, 242 Ky. 814, citing Corpus Juris—Youngblood v. Dempewolf, 45 S.W.2d 1048, 242 Ky. 133—Pool v. Pool, 283 S.W. 111, 214 Ky. 267—Shutt's Adm'r v. Shutt's Adm'r, 232 S.W. 405, 192 Ky. 98.
Mass.—Thayer v. Shorey, 191 N.E. 435, 287 Mass. 76, 94 A.L.R. 307.
Mich.—In re Ringle's Estate, 242 N. W. 908, 259 Mich. 262—In re Thompson's Estate, 217 N.W. 889, 241 Mich. 583.

and profits,[2] or those succeeding to his estate,[3] must pay all the ordinary taxes on the property during the continuance of his estate, unless there is some agreement,[4] or some provision in the instru-

Minn.—Turner v. Edwards, 292 N. W 257, 207 Minn. 455—In re Roberts' Estate, 207 N.W. 629, 166 Minn. 315—Kreuscher v. Roth, 188 N.W. 996, 152 Minn 320

Miss.—Medford v. Mathis, 168 So. 607, 176 Miss. 188, citing **Corpus Juris**—Federal Land Bank of New Orleans v. Newsom, 166 So. 346. 175 Miss. 134, affirming 161 So 867.

Mo.—Duffley v. McCaskey, 134 S.W. 2d 62, 345 Mo. 550, 126 A.L.R. 853 —Weller v. Searcy, 123 S.W.2d 73, 343 Mo. 768, transferred, see, App. 111 S.W 2d 206—Estey v. Commerce Trust Co., 64 S.W.2d 608, 333 Mo. 977—Falvey v. Hicks, 286 S.W. 385, 315 Mo. 442—Mathis v Melton, 238 S.W. 806, 293 Mo. 134 —Mathews v. O'Donnell, 233 S.W. 451, 289 Mo. 235—Houchin v. Hobbs, App., 34 S W.2d 167—Larsen v. Hansen, App., 12 S.W.2d 505.

Mont —Anderson v. McClenathan, 205 P. 230, 62 Mont. 387.

Neb.—Annable v. Ricedorff, 299 N W. 373—Saffer v. Saffer, 274 N.W. 479, 480, 133 Neb. 528, citing **Corpus Juris.**

N.H.—Ruel v. Hardy, 6 A 2d 753, 90 N.H. 240—Reeves v. Ruckins, 117 A. 263, 80 N.H. 348.

N.J.—Asmus v. Asmus, 194 A. 884, 122 N.J.Eq. 485—Tichenor v. Mechanics & Metals Nat. Bank of City of New York, 125 A. 323, 96 N.J.Eq. 560.

N Y.—In re Gaffers' Estate, 5 N.Y.S. 2d 671, 254 App.Div. 448—In re Garibaldi's Will, 1 N.Y.S.2d 691, 253 App.Div. 843—In re Rogers' Will, 296 N.Y.S. 872, 251 App.Div. 478—In re Lott's Will, 296 N.Y.S. 43, 251 App.Div. 333—Wise v. Wedlake, 216 N.Y.S. 699, 217 App.Div. 210—In re Manning's Will, 300 N. Y.S. 906, 165 Misc. 467—In re Edgar's Will, 282 N.Y.S. 795, 157 Misc. 10—Westervelt v. Hausner, 275 N. Y.S. 102, 153 Misc. 795—In re Mills' Estate, 266 N.Y.S. 478, 148 Misc. 224—In re Slater's Will, 242 N.Y.S. 733, 137 Misc. 54—In re Williams' Estate, 232 N.Y.S. 521, 133 Misc. 322—In re Victorin, 219 N.Y.S. 619, 128 Misc. 577—In re Arnolt's Estate, 217 N.Y.S. 323, 127 Misc. 579 —Keeley v. Clark, 211 N.Y.S. 391, 125 Misc. 541—In re Fleet's Estate, 192 N.Y.S. 206, 117 Misc. 273 —Sweeney v. Schoneberger, 186 N. Y.S. 707, 111 Misc. 718—In re Wells' Will, 26 N.Y.S.2d 604.

N.C.—Meadows v. Meadows, 5 S E.2d 128, 216 N.C. 413—Jeffreys v. Hocutt, 142 S.E. 226, 195 N.C. 339.

N.D.—Roach v. McKee, 265 N.W. 264, 66 N.D. 304.

Okl —Riley v. Collier, 238 P. 491, 111 Okl. 130—Helm v. Belvin, 232 P. 382, 384, 107 Okl. 214, quoting **Corpus Juris at length.**

Or.—Milton Warehouse Co. v. Basche Sage Hardware Co., 34 P.2d 338, 147 Or. 563—In re Banfield's Estate, 3 P.2d 116, 137 Or. 256, denying rehearing 299 P. 323, 137 Or. 256—Skyles v. Kincaid, 264 P. 432, 124 Or. 443.

Pa.—McDannel v. Weddige, 79 Pa Super. 494—In re Warfel's Estate, 22 Erie Co. 190—In re Warfel's Estate, 22 Erie Co. 152. See In re Stern's Estate, 31 Pa.Dist. & Co 565, 19 Erie Co. 471, 8 Som.Leg.J. 405, 51 York Leg.Rec 170—Harrison v. Ramsey, 86 Pittsb.Leg J. 613, 20 Erie Co. 270, 52 York Leg. Rec. 121.

S C.—McDavid v. McDavid, 197 S.E. 204, 187 S C. 127, 116 A.L R. 1412 —Campbell v. Williams, 172 S.E. 142, 171 S.C. 279.

Tenn.—Old Nat. Bank v. Swearingen, 72 S W.2d 545, 167 Tenn. 529.

Tex.—Roberts v. Roberts, 150 S.W 2d 226, reversing, Civ.App., 140 S. W.2d 528—Sargeant v. Sargeant, 15 S W.2d 589, 118 Tex. 343, answering certified questions, Civ.App., 19 S.W.2d 382.

Utah.—Boland v. Nihlros, 293 P. 7, 77 Utah 205.

Va —Livesay v. Boyd, 180 S.E. 158, 164 Va. 528—Patterson v. Old Dominion Trust Co., 140 S.E. 810, 149 Va. 597, modified on other grounds 141 S.E. 759, 149 Va. 597.

Wis.—Nixon v. Nixon, 199 N.W. 50, 184 Wis. 200.

21 C.J. p 955 note 69.

Source of duty

Duty of life tenant to remainderman to pay ordinary taxes does not spring from privity of estate or by covenant, but it is an incident, of equitable origin, to the life estate.—In re Hone's Estate, 274 N.Y.S. 101, 152 Misc. 221.

Estate of life tenant

(1) Estate of deceased life beneficiary of testamentary trust in realty, occupied by her, instead of receiving net income therefrom, is liable to executor and trustee for taxes and fire insurance premium not paid by her, but a residuary devisee, living with life beneficiary of testamentary trust in house occupied by latter until her death, is not liable for taxes and fire insurance premium not paid by beneficiary.—In re Newton's Estate, 266 N.Y.S. 653, 148 Misc. 510.

(2) Estate of widow, life tenant, is not entitled to reimbursement from proceeds of sale for taxes paid by widow.—Spring v. Hollander, 158 N.E 791, 261 Mass. 373.

Payment of tax lien

Expenditures by life tenant in paying off liens against property for taxes, street improvements, and making permanent improvements on property, are not properly chargeable against the remainder interests. —Hamilton v. Kinnebrew, 131 S.E. 470, 161 Ga. 495.

Successive homestead rights

As a life tenant must pay ordinary annual taxes accruing during term a child with homestead right in land of deceased father was not liable for taxes accruing during continuance of mother's homestead life estate.—Schowe v. Kallmeyer, 20 S. W.2d 26, 323 Mo. 899.

Surviving wife of testator, entitled to life estate in testator's realty, to the extent of her dower interest, is liable for proportionate share of taxes.—In re Hale's Estate, 18 P.2d 803, 142 Or. 23.

2. Ark.—Ussery v. Sweet, 208 S.W. 600, 137 Ark. 140.

3. Iowa —Rich v. Allen, 286 N.W. 434, 226 Iowa 1304—Harris v. Evans, 195 N.W. 178, 196 Iowa 799 21 C.J. p 956 note 71.

Life tenant's lessee, who, having purchased property at tax sale, received rents and profits, is not entitled, as against redeeming remainderman, to retain rents, and at the same time recover the amount paid in taxes.—Wells v. Henry, 45 S.W 2d 20, 184 Ark. 1114.

Purchasers of property sold for taxes due by life tenant in possession of the realty had duty to list the property and pay the taxes after the date of the purchase, and were not entitled to receive from the remainderman the amount of taxes paid by the tax purchasers.—Vaughn v. Metcalf, 118 S.W.2d 727, 274 Ky 379.

Purchaser of tax lien and life interest

A tax lien covers entire premises, and is not impaired by coming into hands of one who subsequently secured life interest and part of remainder interest in property, there being an intent that these interests should not merge.—Peerless Candy Co. v. Kessler, 205 N.Y.S. 883, 123 Misc. 735.

4. Iowa.—Reddish v. John, 179 N. W. 951, 190 Iowa 49—Meier v. Meier, 178 N.W. 360.

21 C.J. p 956 note 72.

Agreement of remainderman

Paying taxes is not required of life tenants becoming such by reservation in deed in which grantee, as remainderman, agrees to support them.—In re Ringle's Estate, 242 N. W. 908, 259 Mich. 262.

ment creating the estate relieving him of this liability;[5] and, as stated infra § 64, in the case of failure of the life tenant to do so, a receiver may be appointed to collect the rents and income and apply them to this purpose, or the remainderman may by appropriate action require him to pay,[6] or may himself pay, the taxes and recover the amount from the life tenant,[7] and a lien may be declared on the interest of the life tenant in favor of the remainderman for the amount which the latter has had to pay.[8] It has been held that taxes do not constitute a lien on the fee where possession is in a life tenant;[9] but taxes on any part of the property devised to a life tenant constitute a lien on all his taxable property.[10] The life estate as such is not taxed but the land is taxed and the payment of the tax is left for the determination of the life tenant and the owner of the fee.[11] Taxes assessed before the testator's death, and which have become a liability against him, should be paid by his executor, and cannot be charged against the life tenant.[12] A life tenant during his tenancy being for all practical purposes the owner of the property, the rule that taxes due at the time of the owner's death must be paid out of his personal estate applies.[13] It has been decided that taxes which have become a lien on the land before the life tenant's death must be paid by his representative, although not payable until after such death;[14] but, on the other hand, it has been held that on the death of the life tenant taxes for the current year should be apportioned between him and the remainderman according to the respective periods of their enjoyment,[15] and that, if paid in advance by the life tenant, his estate may recover the amount due from such apportionment.[16] The life tenant has been held not liable for taxes assessed during his lifetime but not due and payable until after his death.[17] Where the life tenant dies before the day on which the taxes are assessed, there should be no apportionment of the taxes between the estate of the life tenant and the remaindermen, but the latter are required to bear the entire burden of the taxes.[18] To relieve real estate from the lien for taxes a remainderman will have to pay taxes assessed before the life tenant's death and unpaid by him.[19] A tax sale of a life tenant's estate does not affect the rights of the remainderman.[20] A remainderman voluntarily paying taxes cannot recover them from the representative of the life tenant.[21]

5. Mich.—Pike v. Gilbert, 198 N.W. 923, 227 Mich. 515.
Mo.—Cloves v. Cloves, 239 S.W. 145.
N.Y.—In re Gaffers' Estate, 5 N.Y.S.2d 671, 254 App.Div. 448—In re Mills' Estate, 266 N.Y.S. 478, 148 Misc. 224—In re Victorin, 219 N.Y.S. 619, 128 Misc. 577.
21 C.J. p 956 note 73.

6. N.Y.—In re Gaffers' Estate, 5 N.Y.S.2d 671, 254 App.Div. 448.

Remedies available

Where obligation to pay taxes or assessments devolves on owner of life estate either by instrument creating the estate or by operation of law and owner fails to do so, the remainderman's remedies are to bring action for damages or for mandatory injunction against the life tenant; or for the appointment of receiver to manage and operate the land and perform the duty; or to impress life estate with lien where remainderman has made payment of item which it was duty of life tenant to pay; or to compel the life tenant or his personal representatives to reimburse remainderman for sums expended for taxes and assessments.—Dormer v. Walker, 69 P.2d 1049, 101 Colo. 20.

7. N.Y.—In re Gaffers' Estate, 5 N.Y.S.2d 671, 254 App.Div. 448—In re Williams' Estate, 232 N.Y.S. 521, 133 Misc. 322.
21 C.J. p 956 note 75.

Set-off

Remaindermen have the right to off-set, against life tenant's judgment debt against them which has been declared a lien on the reversion, the amount of tax encumbrance imposed on the property because of life tenant's failure to pay taxes.—Meadows v. Meadows, 5 S.E.2d 128, 216 N.C. 413.

Purchase at tax sale

Alleged remainderman, who purchased land at delinquent tax sale, is entitled to recover taxes paid out of escrow deposit of purchaser of life estate covering possible liability of the life estate for the taxes, and the life estate is liable for the taxes, notwithstanding the money to pay the delinquent taxes was furnished by all, instead of one, of remaindermen.—Youngblood v. Dempewolf, 45 S.W.2d 1048, 242 Ky. 133.

8. Okl.—Helm v. Belvin, 232 P. 382, 384, 107 Okl. 214, quoting Corpus Juris.
21 C.J. p 956 note 76.

9. S.C.—McDavid v. McDavid, 197 S.E. 204, 187 S.C. 127, 116 A.L.R. 1412.

10. Ala.—Christopher v. Chadwick, 135 So. 454, 223 Ala. 260.

11. Iowa.—White v. Marion, 117 N.W. 254, 139 Iowa 479.

12. Va.—Kincheloe v. Gibson, 78 S.E. 603, 115 Va. 119.
21 C.J. p 956 note 78.

13. Ga.—Bristol Sav. Bank v. Nixon, 150 S.E. 148, 169 Ga. 282.
N.Y.—In re McCarty's Estate, 285 N.Y.S. 641, 158 Misc. 287.

14. Ind.—Lantz' Estate v. McDaniel 190 N.E. 130, 99 Ind.App. 233.
21 C.J. p 956 note 79.

15. Ga.—Trust Co. of Georgia v. Kenny, 3 S.E.2d 553, 188 Ga. 242
N.Y.—In re Hone's Estate, 274 N.Y.S. 101, 152 Misc. 221—In re Schulz's Estate, 231 N.Y.S. 677, 133 Misc. 168.
Ohio.—In re Submission of an Agreed Case, 8 Ohio N.P., N.S., 486.
21 C.J. p 957 note 80.

16. Pa.—Fest's Estate, 28 Wkly.N.C. 415.

17. Mo.—O'Donnell v. Mathews, 254 S.W. 204, 221 Mo.App. 657.

18. R.I.—Industrial Trust Co. v. Wilson, 192 A. 821, 58 R.I. 378.

19. Ky.—Joyes v. Louisville, 82 S.W. 432, 26 Ky.L. 713.

Remaindermen of life tenant in tail could have saved their interest in estate by paying delinquent realty taxes on entailed estate, and could have dispossessed the delinquent life tenant of his life estate.—Slaughter v. Fitzgerald, 31 N.E.2d 744, 66 Ohio App. 53.

20. S.C.—Crook v. Hartford Fire Ins. Co., 178 S.E. 254, 175 S.C. 42—Bolt v. Sullivan, 174 S.E. 491, 173 S.C. 24.

21. Mont.—Anderson v. McClenathen, 205 P. 230, 62 Mont. 387.

Unproductive realty. Where taxes are assessed against unproductive real estate, it has been held that they are not chargeable to the life tenant,[22] but there is authority to the contrary,[23] and it has also been held that, where the trust estate to whose income the life tenant is entitled consists in part of unimproved property producing no revenue, the life tenant is bound to pay the taxes on the unimproved property from the income derived by him from the revenue producing property, so far as such income extends.[24] Taxes paid by a life tenant, which should have been paid by the remainderman, may be recovered back from the latter.[25]

Limit of liability. The liability as a rule is limited to the income or rental value of the property,[26] but all of the rents and profits accruing during the continuance of the life estate are applicable to the discharge of the liability.[27]

Waste. To neglect his duty to pay taxes,[28] and to allow the estate to be sold for taxes is waste,[29] and the life tenant is liable to the remainderman for the injury sustained by him,[30] except in cases where the income or rental value of the property was insufficient to pay the taxes,[31] and it is for the remainderman to show that the income from the property was sufficient for this purpose.[32]

Illegal tax. If the life tenant deems the taxes illegal, notice of that should be given to the reversioner, and the latter indemnified against loss, if payment of the taxes is to be resisted.[33]

An assessment for a public improvement is not an ordinary tax,[34] and the question whether it must be borne by the life tenant or by the remainderman, or apportioned between the two, depends to a large extent on the circumstances of the particular case, and especially on the probable duration of the improvement as compared with the expectancy of life of the life tenant.[35] If the assessment is for something in the nature of a permanent improvement of the whole estate, it may be ratably and equitably divided between the tenant for life and the remainderman.[36] However, when improvement assessments are distributed over a period of years, a ratable and equitable distribution of the burden of paying the debt requires that the life tenant discharge the annual assessments during each year of his occupancy.[37] Where the improvement is of a temporary character, calculated to benefit only the life interest, the assessment must be paid entirely by the life tenant.[38] Where a part of the improvement is permanent and a part will have to be replaced within a short time, the life tenant is properly charged with the cost of that part of the improvement which is temporary and the remainderman with the bal-

22. Minn.—In re Moore's Will, 241 N.W. 63, 185 Minn. 342.
N.Y.—In re Hone's Estate, 274 N.Y.S. 101, 152 Misc 221—In re Arnolt's Estate, 217 N.Y.S. 323, 127 Misc. 579.
R.I.—Calcagni v. Cirino, 14 A.2d 803.
21 C J. p 957 note 83.

23. Mass.—Thayer v. Shorey, 191 N. E. 435, 287 Mass. 76, 94 A.L.R. 307 —Creed v. Connelly, 172 N.E. 106, 272 Mass. 241.

24. Or.—In re Banfield's Estate, 3 P. 2d 116, 117, 137 Or. 256, citing **Corpus Juris,** and denying rehearing 299 P. 323, 137 Or. 256.
Tex.—Richardson v. McCloskey, Com.App., 276 S.W. 680, reversing, Civ.App., 261 S.W. 801.
21 C.J. p 957 note 84.

25. Fla—Snow v. Arnold, 181 So. 7, 132 Fla. 435.

26. Or—In re Banfield's Estate, 3 P.2d 116, 117, 137 Or. 256, citing **Corpus Juris,** and denying rehearing 299 P. 323, 137 Or. 256.
21 C.J. p 957 note 85.

Action of waste will lie against life tenant who fails to pay taxes, notwithstanding that it did not affirmatively appear that income of property was sufficient to enable life tenant to pay taxes.—Thayer v. Shorey, 191 N.E. 435, 287 Mass. 76, 94 A.L.R. 307.

27. N.J.—Murch v. J. O. Smith Mfg. Co., 20 A. 213, 47 N.J.Eq. 193.

28. N.H.—Hanley v. Wadleigh, 186 A. 505, 88 N H. 174.

29. Minn.—St. Paul Trust Co. v. Mintzer, 67 N.W. 657, 65 Minn. 124, 60 Am.S.R. 444, 32 L.R.A. 756.
21 C.J. p 957 note 87.

30. Ark.—Magness v. Harris, 98 S.E. 362, 80 Ark. 583.
21 C.J. p 957 note 88.

31. Ind.—Clark v. Middlesworth, 82 Ind. 240.

32. Ind.—Clark v. Middlesworth, supra.

33. Me.—Stetson v. Day, 51 Me. 434.

34. Ark.—Hicks v. Norsworthy, 4 S. W.2d 897, 900, 176 Ark. 786, citing **Corpus Juris.**
21 C.J. p 957 note 93.

35. Ark.—Kory v. Less, 22 S.W.2d 25, 29, 180 Ark. 342, citing **Corpus Juris.**
21 C.J. p 957 note 94.

36. Ark.—Kory v. Less, 22 S.W.2d 25, 29, 180 Ark. 342, citing **Corpus Juris**—Hicks v. Norsworthy, 4 S. W.2d 897, 900, 176 Ark. 786, citing **Corpus Juris.**
Ill.—Warren v. Lower Salt Creek Drainage Dist. of Logan County, 147 N.E. 248, 316 Ill. 345.
Iowa.—Cooper v. Barton, 226 N.W. 70, 208 Iowa 447.
Mo.—Estey v. Commerce Trust Co., 64 S.W.2d 608, 616, 333 Mo. 977, citing **Corpus Juris.**
N.Y.—Baker v. Schleyer, 253 N.Y.S. 351, 233 App.Div. 584, affirmed 184 N.E. 140, 260 N.Y. 673—In re Bommer's Estate, 288 N.Y.S. 419, 159 Misc. 511—In re Hone's Estate, 274 N.Y S. 101, 152 Misc. 221.
N.C.—Middleton v. Rigsbee, 102 S. E. 780, 179 N.C. 437.
21 C.J. p 957 note 95.

Payments credited
Where decree apportioned street assessments between remaindermen and life tenants, amounts paid on assssments by lessees are properly credited to remaindermen and life tenants in proportion stipulated by decree.—In re Ena's Estate, 30 Hawaii 286.

37. Ark.—Crowell v. Seelbinder, 49 S.W.2d 389, 185 Ark. 769, 83 A. L.R. 788.

On accounting in ejectment, occupants for life of another are chargeable with annual improvement assessments during each year of occupancy.—Crowell v. Seelbinder, supra.

38. Ark.—Kory v. Less, 22 S.W.2d 25, 29, 180 Ark. 342, citing **Corpus Juris.**
21 C.J. p 957 note 96.

ance.[39] According to some authorities assessments for improvements of a permanent nature ought to be apportioned between the life tenant and remainderman in the proportion which the value of the life estate bears to the value of the whole estate,[40] while according to others, the principal of the expenditure for an assessment should be paid by the remainderman, and the life tenant should, during his term of enjoyment, pay the interest on such expenditure.[41] The recourse of a life tenant who pays the whole assessment is by way of equitable contribution or subrogation, and he is not entitled to a personal judgment against the remainderman.[42] Where the assessment is one which is to be borne ratably by the life tenant and the remainderman, the life tenant and the remainderman are entitled to share ratably in a refund for excessive assessments after the sale of the land for the taxes.[43]

§ 48. Debts, Charges, and Encumbrances

A life tenant of property subject to encumbrances must keep down the interest thereon accruing during the continuance of his estate. He is under no obligation to pay off the principal, and if he does so is entitled to contribution.

A life tenant of property subject to encumbrances must keep down the interest accruing on such encumbrances during the continuance of his estate,[44] at least to the extent of the income or rental value of the property,[45] unless other provision is made for its payment by grantor;[46] but this rule does not apply where there is a general charge of all the testator's debts on his real estate, in the event that the personal estate proves insufficient to pay them.[47] One who conveys land by deed, reserving to himself a life estate, is under no obligation to pay the interest of a mortgage placed on the land by grantee and not joined in by the life tenant;[48] and in case of a deed subject to an encumbrance and reserving a life estate, the grantor is not personally bound to pay the interest on the encumbrance or any part of the encumbrance, although he must bear all other burdens.[49] A grantor in a deed reserving a life estate for himself who pays off encumbrances on the land conveyed does not obtain any additional equitable interest in the land where it does not appear that grantee received any benefit from such payment or that he ever agreed to pay the encumbrance.[50] Where the general residue of the personal estate is given to one for life with remainder to another, the interest on debts of the testator accruing after his death should be charged against the income.[51] Where the encumbrance is created jointly by the life tenant and remainderman, after the creation of the life estate, the interest must be apportioned between them.[52] Where there is a life estate in expectancy and the encumbrance is not on the life estate in possession

39. Wash.—Stahl v. Schwartz, 142 P. 651, 81 Wash. 293.

40. R.I.—Sheffield v. Cooke, 98 A. 161, 39 R.I. 217, Ann.Cas.1918E 961—Rhode Island Hospital Trust Co. v. Babbitt, 46 A. 403, 22 R.I. 113—Chambers v. Chambers, 39 A. 243, 20 R.I. 370.

41. Ala. Swoope v. Darrow, 188 So. 879, 884, 237 Ala. 692, citing Corpus Juris.
Pa.—In re Farber's Estate, 70 Pa. Super. 81.
21 C.J. p 958 note 99.

42. Ala.—Troy v. Protestant Episcopal Church, 56 So. 982, 174 Ala. 380, Ann.Cas.1914B 815.

43. Iowa.—Cooper v. Barton, 226 N. W. 70, 208 Iowa 447.

44. U.S.—Penrose v. U. S., D.C.Pa., 18 F.Supp. 413.
Ala.—Garrett v. Snowden, 145 So. 493, 226 Ala. 30, 87 A.L.R. 216.
Del.—De Prisco v. Rykowski, 158 A. 144, 18 Del.Ch. 252.
Ky.—Superior Oil Corporation v. Alcorn, 47 S.W.2d 973, 986, 242 Ky. 814, citing Corpus Juris.
Mass.—Porter v. Porter, 128 N.E. 795, 236 Mass. 422.
Minn.—In re Lee, 213 N.W. 736, 171 Minn. 182—In re Roberts' Estate, 207 N.W. 629, 166 Minn. 315—Kreuscher v. Roth, 188 N.W. 996, 152 Minn. 320.
Mo.—Witcher v. Hanley, 253 S.W. 1002, 299 Mo. 696—Larsen v. Hansen, App., 12 S.W.2d 505.
N.H.—Reeves v. Huckins, 117 A. 263, 80 N.H. 348.
N.Y.—In re Edgar's Will, 282 N.Y.S. 795, 157 Misc. 10—In re Williams' Estate, 232 N.Y.S. 521, 133 Misc. 322—Sweeney v. Schoneberger, 186 N.Y.S. 707, 111 Misc. 718.
Pa.—Mendenhall v. Jackson, 110 A. 799, 268 Pa. 122 Stroud v. McDowell, 179 A. 772, 118 Pa.Super. 318.
Va.—Livesay v. Boyd, 180 S.E. 158, 164 Va. 528.
21 C.J. p 958 note 2.

Life tenant as mortgagee
A life tenant as mortgagee is not entitled to collect interest on the mortgage, but may foreclose it to recover the principal.—Pfaff v. Kehrer, 200 N.Y.S. 113.

Agreement by remainderman
Evidence showed that remainderman agreed with life tenant and bank holding encumbrance on real estate of testator that remainderman would pay interest on encumbrance if life tenant could not make it off the real estate, and that life tenant with reasonable management was unable to do so, so as to preclude remainderman from seeking appointment of receiver because of failure of life tenant to pay interest.—Johnston v. Dickerson, 127 S.W.2d 64, 233 Mo.App. 762.

45. Or.—Tyler v. Bier, 172 P. 112, 88 Or. 430.
21 C.J. p 958 note 3.

46. Pa. Stroud v. McDowell, 179 A. 772, 118 Pa.Super. 318.
21 C.J. p 958 note 4.

47. Mo.—Johnston v. Dickerson, 127 S.W.2d 64, 70, 233 Mo.App. 762, quoting Corpus Juris.
21 C.J. p 958 note 5.

48. Iowa.—Reddish v. John, 179 N. W. 951, 190 Iowa 49.

49. Mo.—Fuller v. Devolld, 128 S. W. 1011, 144 Mo.App. 93.

50. Mo.—Cloves v. Cloves, 239 S.W. 145.

51. Pa.—Neide's Estate, 22 Pa.Dist. 563, overruling Patterson's Estate, 3 Pa.Dist. 796, 15 Pa.Co. 520 and Anspach's Estate, 16 Pa.Dist. 176.

52. Md.—Weber v. Lauman, 45 A. 870, 91 Md. 90.
N.Y.—Fosdick v. Lyons, 56 N.Y.S. 942, 38 App.Div. 608.

but on the estates to follow, the life tenant in expectancy and the remainderman must each contribute to the payment of the interest according to the basis of the relative value of their estates.[53] If the encumbrance is paid off by the remainderman or reversioner during the continuance of the life estate, the life tenant must contribute as his proportionate share the interest on the amount during the continuance of his estate.[54] The remainderman or reversioner is not obliged to accept this interest in annual installments, but may require that it be estimated according to the probable duration of the life estate and paid in a gross sum;[55] but if no apportionment is made until the termination of the life estate it will be based on the period of its actual duration.[56] The life tenant is not obliged to pay off arrears of interest accumulated prior to the beginning of his estate,[57] although such interest will be counted as a part of the principal debt on which the subsequently accruing interest must be kept down.[58] A life tenant is under no obligation to pay off the principal of an encumbrance,[59] even to prevent a foreclosure sale;[60] but he may do so,[61] and if he does so he is entitled to call on the remainderman or reversioner for contribution,[62] and has a lien on the property for the amount due.[63] He becomes prima facie a creditor,[64] but may by his conduct be estopped from claiming as a creditor.[65] He cannot, however, claim the right for such payments when made voluntarily with no purpose to bind the remainderman.[66] The rule requiring the remaindermen to pay to the life tenant within a reasonable time their share of the purchase money at a foreclosure sale, to protect their interests, has no application when the foreclosure is due to the failure of the life tenant to pay his own obligation.[67] Payments made in ignorance of the real state of the facts are not voluntary.[68] The amount

53. Mich.—Damm v. Damm, 67 N. W. 984, 109 Mich. 619, 63 Am S R 601
54. N.H.—Reeves v. Huckins, 117 A. 263, 80 N.H. 348.
21 C.J. p 958 note 10—42 C.J. p 454 note 34.
55. U.S.—Bourne v. Maybin, C.C. Miss., 3 F.Cas No 1,700, 3 Woods 724.
21 C J. p 958 note 11.
Computation of amount due from life tenant
N H.—Reeves v. Huckins, 117 A. 263, 80 N.H. 348
56. U.S.—Foster v. Hilliard, C C Mass, 9 F.Cas.No.4 972, 1 Story 77.
Miss —Callicott v. Parks, 58 Miss. 528.
57. N.C.—Jones v. Sherrard, 22 N. C. 179.
21 C.J. p 958 note 13.
58. N.C.—Jones v. Sherrard, 22 N. C. 179.
59. Minn.—Faulkenburg v. Windorf, 259 N.W. 802, 194 Minn. 154.
Mo.—Gates v. Rice, 8 S.W.2d 614, 320 Mo. 580.
N.Y.—Collins v. McKenna, 189 N.Y.S. 433, 116 Misc. 72.
N C —Miller v. Marriner, 121 S E. 770, 187 N.C. 449.
Va.—Livesay v. Boyd, 180 S.E. 158, 159, 164 Va. 528, citing **Corpus Juris.**
21 C J. p 959 note 15.
Life tenant and remaindermen where debt secured
Under statute, life tenant and remaindermen were not required to pay indebtedness secured by trust deed according to their respective interests.—Gates v. Rice, 8 S.W.2d 614, 320 Mo. 580.
60. Or.—Tyler v. Bier, 172 P. 112, 88 Or. 430, 435.
Pa.—German-American Title & Trust Co. v. Fidelity Ins., Trust & Safe-Deposit Co., 18 A. 1090, 132 Pa. 36, affirming 6 Pa.Co. 241.
61. N C.—Brown v. Jennings, 124 S. E. 150, 188 N.C 155.
42 C.J. p 363 note 49.
62. Ala.—Garrett v. Snowden, 145 So. 493, 226 Ala. 30, 87 A.L.R. 216
Fla.—Snow v. Arnold, 181 So. 7, 132 Fla. 435.
Minn.—In re Lee, 213 N.W 736, 171 Minn. 182.
Va.—Livesay v. Boyd, 180 S E. 158, 164 Va. 528.
21 C J. p 959 note 17—42 C.J. p 454 note 33.
Tenant in dower who has redeemed property is entitled to contribution from the heirs, if they desire to enjoy the benefit of the redemption — Hiller v. Nelson, Ky., 118 S.W 292.
Reasonable time for contribution
Where life tenant purchased mortgage against property and then transferred it to third party, any right of remaindermen to rehabilitate their title by contributing their share of cost to life tenant of acquiring the mortgage was an equitable right required to be asserted within a reasonable time, which depended on the circumstances of each case, and where remaindermen had notice of superior mortgage against property and of its purchase by life tenant and subsequent transfer to third party who foreclosed, and first offer of remaindermen to make contribution of their share of cost to life tenant in acquiring the mortgage was in answer filed in suit to quiet title brought twenty-five years after mortgage was executed, sixteen years after life tenant died and after nineteen years of adverse possession by those claiming under the foreclosure sale, any right of remaindermen to rehabilitate their title was barred by "laches."—Ward v. Chambless, 189 So. 890, 238 Ala. 165.
Equities of life tenant and remainderman
Where a mortgagor devised land for life to his wife, who had joined in mortgage, and then to remaindermen, neither the life tenant nor the remaindermen had a superior equity in the land, and, on foreclosure, sale of interests of the remaindermen in exoneration of the interest of the life tenant, was properly enjoined, and, on the other hand, the equities of the life tenant and remaindermen being equal, it was error to enjoin sale of the interest of the remaindermen until after the sale of the life estate.—Brown v. Jennings, 124 S.E. 150, 188 N.C. 155.
63. Ala.—Ward v. Chambless, 189 So. 890, 238 Ala. 165.
Ky.—Lindenberger v. Cornell, 229 S. W. 54, 190 Ky. 844.
Minn.—Faulkenburg v. Windorf, 259 N.W. 802, 806, 194 Minn. 154, citing **Corpus Juris.**
Mo.—Gates v. Rice, 8 S.W.2d 614, 320 Mo. 580.
Neb.—Bartels v. Seefus, 273 N.W. 485, 132 Neb. 841.
21 C.J. p 959 note 18.
64. Pa.—In re Marshall's Estate, 122 A. 289, 278 Pa. 206.
65. Pa.—In re Marshall's Estate, supra.
66. Mich.—Detroit & Northern Mich Bldg. & Loan Assoc. v. Oram, 167 N.W. 50, 200 Mich. 485.
67. Mo.—Souders v. Kitchens, 124 S.W.2d 1137, 344 Mo. 18.
68. Mich.—Detroit & Northern Mich. Bldg. & Loan Assoc. v. Oram, 167 N W. 50, 200 Mich. 485.

for which the remainderman or reversioner is liable is the amount paid less the amount of the interest which would have been payable by the life tenant.[69] While a life tenant under a deed with power of sale of the remainder could convey his life estate to one person or persons and the remainder to another or others, he cannot rid himself of the liens of his judgment creditors on the life estate except by paying the judgment debts.[70] The remainderman may pay the interest and collect it from the life tenant where he neglects or refuses to make such payments.[71] The equitable interest of a life tenant in land cannot be subjected to payment of debts of one vested with the fee title thereto.[72] Where property is left to one for life, charged with a legacy the amount of which is left to the discretion of the life tenant, who pays certain amounts to the legatee but keeps no account thereof, the estimated amount of such payments cannot be charged against the estate by the life tenant at the expense of the remainderman.[73]

§ 49. Expenses, Deterioration, and Losses

The ordinary expenses of the care and management of the estate must be borne by the life tenant, in the absence of any direction to the contrary in the instrument creating the estate.

The ordinary expense of the care and management of a life estate must be paid by the life tenant,[74] unless there is an unmistakable direction to the contrary in the instrument creating the estate.[75] A life tenant who is also executor is, in the latter capacity, entitled to an allowance for collecting and disbursing funds sufficient to discharge the debts against the testator's estate, to the amount limited by the statute, if any.[76] One having a life estate in part of property is liable for a proportionate part of the expense.[77] No part of the expenses of administering on the estate of the life tenant can be deducted from the fund payable to the remainderman.[78] The costs of a life tenant incurred in litigation over his interest in a trust estate must be paid out of the income and not out of the body of the estate.[79] Where trustees have in the exercise of a sound discretion withheld from the market for the benefit of the remainderman unimproved property, and the appreciation in value of the property has justified their management, the expenses should be charged on the fund, and not on the income of the life tenant.[80] A life tenant is liable for such losses or injuries to the corpus of the estate as are the result of his default or neglect,[81] but he is not liable for any loss or deterioration occurring from natural causes or from accident and without any fault on his part.[82] Life tenants acting en autre droit are entitled to reimbursement for expenses necessarily incurred.[83] The sum of items properly

69. Minn.—Engel v. Swenson, 254 N. W. 2, 191 Minn. 324—In re Lee, 213 N.W. 736, 171 Minn. 182.
Neb.—Bartels v. Seefus, 273 N.W. 435, 132 Neb. 841.
21 C.J. p 959 note 21.

70. Ky.—Roby v. Arterburn, 108 S. W.2d 873, 269 Ky. 816.

71. N.Y.—In re Williams' Estate, 232 N.Y.S. 521, 133 Misc. 322.

72. Cal.—Knudson v. Adams, 30 P. 2d 603, 137 Cal.App. 261.

73. Ill.—Vanatta v. Carr, 82 N.E. 267, 229 Ill. 47.

74. Ky.—Shutt's Adm'r v. Shutt's Adm'r, 232 S.W. 405, 192 Ky. 98.
N.J.—Tichenor v. Mechanics & Metals Nat. Bank of City of New York, 125 A. 323, 96 N.J.Eq. 560.
N.Y.—In re Garibaldi's Will, 1 N.Y.S. 2d 691, 253 App.Div. 842—In re Lott's Will, 296 N.Y.S. 43, 251 App. Div. 333—In re Elly's Estate, 290 N.Y.S. 975, 249 App.Div. 8, reversing 285 N.Y.S. 100, 157 Misc. 578, affirmed In re Elly's Will, 10 N.E. 2d 520, 274 N.Y. 501—In re Chanal's Will, 280 N.Y.S. 811, 245 App. Div. 818, reversed on other grounds 199 N.E. 762, 269 N.Y. 464, 103 A.L.R. 1268, modifying In re Chanal's Estate, 292 N.Y.S. 663, 161 Misc. 67—In re Corrigan's Will, 21 N.Y.S.2d 550, 174 Misc. 570.
21 C.J. p 959 note 28.

Employment of assistant by life tenant

Life tenant, under will giving her full power to control and manage a large estate for life, is empowered to engage assistants and agents, but the expense of management is properly chargeable against income, and not against corpus, unless income was insufficient; and an agent so engaged is not liable as individual to account personally for acts as agent, in absence of personal advantage accruing to detriment of estate other than compensation for services rendered.—Rock Island Bank & Trust Co. v. Rhoads, 187 N. E. 139, 353 Ill. 131.

Expenses chargeable

Under will creating trust estate and naming trust company as executor and also as trustee, questions of what expenditures were chargeable against life tenant and what were chargeable against remaindermen were questions of general law; and generally, expenditures should be charged against person or estate benefited thereby, but, if both life tenants of income and remaindermen are benefited, expenditures may be apportioned.—Estey v. Commerce Trust Co., 64 S.W.2d 608, 333 Mo. 977.

75. N.Y.—Matter of Brooklyn Trust Co., 157 N.Y.S. 547, 92 Misc. 674.

76. Ky.—Shutt's Adm'r v. Shutt's Adm'r, 232 SW. 405, 192 Ky. 98.

77. Ky.—Smith v. Holtheide, 84 S. W. 346, 27 Ky.L. 51.

78. Pa.—Reiff's Estate, 16 A. 636, 124 Pa. 145.

79. Ky.—Bates v. Rider, 44 S.W. 666, 19 Ky.L. 1768.

80. N.Y.—Matter of Coombs, 116 N. Y.S. 1129, 62 Misc. 597.

81. La.—Mehle v. Bensel, 2 So. 201, 39 La.Ann. 680.

82. U.S.—Loftin v. Commissioner of Internal Revenue, C.C.A., 69 F.2d 460, followed in Dixon v. Commissioner of Internal Revenue, 69 F. 2d 461, certiorari denied 55 S.Ct. 72, 293 U.S. 560, 79 L.Ed. 661.
Or.—In re Stout's Estate, 50 P.2d 768, 151 Or. 411, 101 A.L.R. 672.
21 C.J. p 960 note 35.

83. N.Y.—In re Boulware's Will, 258 N.Y.S. 522, 144 Misc. 235—In re Roosevelt's Estate, 228 N.Y.S. 323, 131 Misc. 800.

Legal services

Legal services rendered surviving

chargeable against the life tenant is deductible from an amount advanced and loaned by the life tenant to the estate of the testator.[84]

§ 50. Sale or Conveyance

An assignment of a life estate is a transfer of the entire interest to some one other than the reversioner or remainderman.

An assignment of an estate for life is a transfer of the whole interest of the assignor to some one other than the reversioner or remainderman holding an estate which is larger than that of the assignor.[85]

A sale or conveyance by the life tenant, or by order of court, is discussed infra §§ 51–53, while the right of the life tenant and remainderman by their joint conveyance to grant a fee is considered infra § 88.

Sale of a life estate under execution is considered in the C.J.S. title Executions § 36, also 21 C.J. p 962 notes 77–81, and 23 C.J. p 336 note 65–p 337 note 68.

§ 51. By Life Tenant

A tenant for life of land ordinarily may alien his interest, and a conveyance purporting to pass the fee passes his life estate only, unless made under a power of sale or by consent of the remainderman.

In the absence of a valid restraint imposed by the instrument creating the estate,[86] a tenant for life of land may alien his life interest,[87] and his grantee is entitled to the same estate his grantor had, but to none greater.[88] The grantee takes an estate for the lifetime of the life tenant, or, in other words, an estate pur autre vie.[89]

An attempted conveyance in fee passes only the life estate;[90] it does not affect the estate in re-

executrix in compromise and collection of claims against deceased executor's estate was chargeable against principal, although executrix, having life interest in residue, reaped personal benefit.—In re Uzmann's Estate, 258 N.Y.S. 49, 143 Misc. 654.

84. N.Y.—In re Garibaldi's Will, 1 N.Y.S.2d 691, 253 App.Div. 843.

85. N.J.—Wilson v. Cornbrooks, 140 A. 292, 104 N.J.Law 418, reversing 137 A. 819, 5 N.J.Misc. 614.

86. Iowa.—Security Sav. Bank v. Williams, 176 N.W. 971, 188 Iowa 904.
Ohio.—Mithoff v. Fritter, 1 Ohio N.P., N.S., 433.
Or.—Hawkins & Roberts v. Jerman, 35 P.2d 248, 147 Or. 657.
Validity of restraints against alienation see supra § 33.

87. Md.—Reeside v. Annex Bldg. Ass'n of Baltimore City, 167 A. 72, 165 Md. 200, 91 A.L.R. 426.
Ohio.—Howell v. Howell, 172 N.E. 528, 122 Ohio St. 543, 71 A.L.R. 1182.
Or.—Hawkins & Roberts v. Jerman, 35 P.2d 248, 147 Or. 657.
Pa.—In re Dingee's Estate, 167 A. 369, 109 Pa.Super. 455.
Tex.—Calvery v. Calvery, 55 S.W.2d 527, 122 Tex. 204.
Va.—Rowley v. American Trust Co., 132 S.E. 347, 144 Va. 375, 45 A.L.R. 738.
21 C.J. p 940 note 74, p 960 note 39.
Alienability of life estates in personalty see infra § 137.

An equitable life estate, when clothed with its usual attributes, is alienable.—Gordon v. Tate, 284 S.W. 497, 314 Mo. 508.

Life estate limited to take effect after previous life estate is subject to transfer or alienation.—Bogenrief v. Law, 271 N.W. 229, 222 Iowa 1303.

88. Cal.—Thompson v. Pacific Electric Ry. Co., 265 P. 220, 203 Cal. 578.
Ga.—Mathis v. Solomon, 4 S.E.2d 24, 188 Ga. 311—Devane v. Young, 115 S.E. 661, 154 Ga. 832.
Ill.—Clark v. Leavitt, 166 N.E. 538, 335 Ill. 184—Allison v. White, 120 N.E. 809, 285 Ill. 311.
Ky.—Brittain v. Campbell, 122 S.W. 2d 740, 275 Ky. 783—Rittenhouse v. Porter, 128 S.W. 288.
Neb.—Moffitt v. Reed, 246 N.W. 853, 124 Neb. 410.
N.Y.—Jackson v. Van Hoesen, 4 Cow. 325.
Or.—Hawkins & Roberts v. Jerman, 35 P.2d 248, 147 Or. 657.
S.C.—Hutto v. Ray, 6 S.E.2d 747, 192 S.C. 364—Jones v. Rosaman, 116 S.E. 193, 123 S.C. 340.
Tex.—Gibbs v. Barkley, Com.App., 242 S.W. 462, reversing Barkley v. Gibbs, Civ.App., 233 S.W. 134—Rae v. Baker, Civ.App., 38 S.W.2d 366, error refused.
Va.—Grubb v. Shirley, 5 S.E.2d 475, 174 Va. 204.
21 C.J. p 960 note 45, p 961 note 47.

Right to support
A deed by one who has a life tenancy in an undivided half of land and a right to support charged against all the land does not pass the right to support, since such right is personal and cannot be conveyed.—Rhodes v. Black, 170 S.E. 158, 170 S.C. 193.

89. Ala.—McWhorter v. Cox, 96 So. 71, 209 Ala. 233.
Ky.—Adkins v. Hackworth, 130 S.W. 2d 774, 279 Ky. 352—Fox v. Faulkner, 1 S.W.2d 1079, 222 Ky. 584—Rittenhouse v. Porter, 128 S.W. 288.
Mo.—Schee v. Boone, 243 S.W. 882, 295 Mo. 212.
N.C.—Roe v. Journigan, 106 S.E. 680, 181 N.C. 180.
Ohio.—Howell v. Howell, 172 N.E. 528, 122 Ohio St. 543, 71 A.L.R. 1182.
Or.—Hawkins & Roberts v. Jerman, 35 P.2d 248, 147 Or. 657.

Conveyance by two life tenants
A deed whereby two life tenants convey all their interest in lands to one entitled to a succeeding life estate passes an estate for the life of the survivor of the two tenants who convey.—In re Dingee's Estate, 167 A. 369, 109 Pa.Super. 455.

Right of possession as against remainderman
The grantee is entitled to possession, as against the remainderman, until the death of the life tenant.—Daley v. Daley, Mass., 32 N.E.2d 286.

On the death of the life tenant his grantee becomes merely a tenant at sufferance or a trespasser.
Miss.—Thomasson v. Kinard, 121 So. 109, 153 Miss. 398.
N.Y.—New York, O. & W. Ry. Co. v. Livingston, 201 N.Y.S. 629, 206 App.Div. 589, affirming 198 N.Y.S. 683, 120 Misc. 146, and modified on other grounds 144 N.E. 589, 238 N.Y. 300, 34 A.L.R. 1078.

90. Ala.—Murphy v. Leatherwood, 127 So. 843, 221 Ala. 61.
Ga.—Mathis v. Solomon, 4 S.E.2d 24, 188 Ga. 311—Seaboard Air-Line Ry. Co. v. Holliday, 140 S.E. 507, 165 Ga. 200.
Ky.—Woods v. Cook, 58 S.W.2d 404, 248 Ky. 216—Crawford v. Hisle, 283 S.W. 1019, 214 Ky. 536—Clore v. Nichols, 251 S.W. 846, 199 Ky. 581.
Minn.—Ashbaugh v. Wright, 188 N.W. 157, 152 Minn. 57.

mainder,[91] unless it is made under a power of sale or conveyance[92] and in accordance with the provisions thereof,[93] or, as shown infra this section, unless the remainderman has ratified, or is estopped to attack, the sale. Application by the life tenant to the court for leave to sell the entire interest in the land, is unnecessary where the life tenant is authorized to sell by the instrument creating the various estates;[94] but such application is necessary where the instrument does not give him a power of sale.[95]

Where land is devised to one for life, his grantee and those claiming under such grantee are charged with knowledge that he can convey only the estate for his life.[96] Where the purchaser of land from a life tenant conveys it to another in fee, believing himself to be the owner in fee, the recourse of his grantee is on the warranty in his deeds, and he is not entitled to be subrogated to the rights of the life tenant.[97]

The deed of a life tenant conveys nothing where his estate has already terminated, as by a sale thereof under execution,[98] or by a previous conveyance,[99]

Mo.—Friesz v. Friesz, 127 S.W.2d 714, 344 Mo. 698.
N.J.—Content v. Dalton, 190 A. 328, 121 N.J.Eq. 391, affirmed 194 A. 286, 122 N.J.Eq. 425, 112 A.L.R. 1031.
Or.—Hawkins & Roberts v. Jerman, 85 P.2d 248, 147 Or. 657.
Tex.—Rae v. Baker, Civ.App., 38 S.W.2d 366, error refused.
Va.—Phillips v. Wells, 133 S.E. 581, 147 Va. 1030.
21 C.J. p 960 note 45.

91. Ky.—Woods v. Cook, 58 S.W.2d 404, 248 Ky. 216 Superior Oil Corporation v. Alcorn, 47 S.W.2d 973, 988, 242 Ky. 814, citing Corpus Juris.
Mo.—Witcher v. Hanley, 253 S.W. 1002, 299 Mo. 696.
Or.—Hawkins & Roberts v. Jerman, 85 P.2d 248, 147 Or. 657.
Tex.—Dial v. Martin, Civ.App., 37 S.W.2d 166, reversed on other grounds, Martin v. Dial, Com.App., 57 S.W.2d 75, 89 A.L.R. 571.
21 C.J. p 961 note 47.

Recorded conveyance as notice to remaindermen

Remaindermen are not charged with notice of conveyances made by life tenant and recorded subsequent to creation of estate in remainder.—Bolkenburg v. Windorf, 259 N.W. 802, 194 Minn. 154.

Effect of statute favoring bona fide purchasers

A statute enacted in favor of bona fide purchasers from "distributees, devisees, legatees, or heirs at law, holding, or apparently holding land or personal property by will or inheritance from a deceased person," cannot be extended beyond its terms so as to aid a bona fide purchaser from a life tenant as against remaindermen who do not join in conveyance.—Mathis v. Solomon, 4 S.E.2d 24, 188 Ga. 311.

Fraudulent acquisition of fee by life tenant

A deed by a life tenant, who had fraudulently obtained a decree setting the property over to her in fee, is void where made to persons having knowledge of the facts.—Ford v. Ford, 191 N.W. 457, 46 S.D. 182.

Life tenant's quitclaim to fee owner and wife does not modify the fee; it either merges the life estate in the fee or, at most, transfers the tenant's right of use and occupation for his life.—In re McBride's Estate, 235 N.W. 166, 253 Mich. 305.

92. U.S.—Carter Oil Co. v. McQuigg, D.C.Ill., 27 F.Supp. 182, affirmed, C.C.A., 112 F.2d 275.
N.J.—Ballinger v. Bartolett, 127 A. 671, 3 N.J.Misc. 80.
N.C.—Tillett v. Nixon, 104 S.E. 352, 180 N.C. 195.
21 C.J. p 961 notes 47, 49.
Nature and extent of testamentary power of sale see the C.J.S. title Wills § 1067, also 69 C.J. p 833 note 2-p 840 note 29.

Corpus Juris cited in holding that life tenant generally has no implied power to sell.—Owens v. Owens' Ex'r., 32 S.W.2d 731, 733, 236 Ky. 118.

Grant of easement

Life tenant with power of disposal could grant easement for right of way which would run with the land and be binding on residuary legatees and their successors in title.—Stanolind Pipe Line Co. v. Willis, 45 P.2d 846, 142 Kan. 102.

Power to consume as authorizing conveyance or gift

(1) The power to consume real estate has been held to include the right to convey.—Allen v. Hirlinger, 67 A. 907, 219 Pa. 56—Luckenbill v. Reho, 8 Pa.Dist. & Co. 459, 22 Sch.Leg.Rec. 355.

(2) A life tenant with power to use the principal or income can convey the realty in return for an agreement for support.
Ga.—Goze v. Steele, 122 S.E. 607, 158 Ga. 97.
N.Y.—In re Fitzpatrick's Will, 169 N.E. 110, 252 N.Y. 121, reversing 236 N.Y.S. 113, 227 App.Div. 638, which affirmed 234 N.Y.S. 234, 133 Misc. 772.

(3) However, a life tenant with power to consume for his own benefit cannot make a gift of the property and thereby defeat the rights of remaindermen to the unconsumed portion of the property.
Iowa.—Brown v. Brown, 240 N.W. 910, 213 Iowa 998.
Pa.—Degenkolv v. Daube, 18 A.2d 464, 143 Pa.Super. 579.

93. Mo.—Cook v. Higgins, 235 S.W. 807, 290 Mo. 402.
21 C.J. p 961 note 50.

Power dependent on contingency

If the life tenant's power of sale is dependent on a contingency, it can be exercised only on the happening of the contingency.—Ashbaugh v. Wright, 188 N.W. 157, 152 Minn. 57—21 C.J. p 961 note 50 [a].

Limited power of appointment

Life tenant, devised property with power to appoint amongst children, cannot convey fee to third person.—In re Hays' Estate, 134 A. 402, 286 Pa. 520.

94. Ky.—Louisville Baptist Orphans' Home v. Igleheart's Adm'rs, 4 S.W.2d 693, 223 Ky. 702.
21 C.J. p 961 note 64 [g].

Right of court to entertain application

Even though the power of sale is such that there is possibly no necessity for asking permission of the court to sell, the court should nevertheless entertain the application where, under the circumstances, buyers might hesitate unless such permission were obtained.—In re Ullrich's Estate, 179 N.W. 176, 189 Iowa 868.

95. Ky.—Louisville Baptist Orphans' Home v. Igleheart's Adm'rs, 4 S.W.2d 693, 223 Ky. 702—Kincaid v. Bell, 266 S.W. 44, 205 Ky. 437—Lindenberger v. Cornell, 229 S.W. 54, 190 Ky. 844.

96. N.Y.—Green v. Horn, 101 N.E. 430, 207 N.Y. 489.

97. Mich.—Stroh v. O'Hearn, 142 N.W. 865, 176 Mich. 164.

98. Tex.—Willis v. Fivoash, Civ.App., 297 S.W. 509, reversed on other grounds Fivoash v. Willis, Com.App., 1 S.W.2d 585.

99. Tex.—Willis v. Fivoash, supra.

or by foreclosure of a mortgage on the land.[1]

Ratification, estoppel, or acquiescence of remainderman. An unauthorized conveyance by the life tenant may be subsequently ratified or adopted by the remainderman,[2] and a remainderman who ratifies a wrongful sale of the entire property may recover his proportion of the proceeds.[3]

The remainderman will be estopped from contesting the title of the life tenant's grantee by accepting and retaining his share of the proceeds.[4] However, the silence of a remainderman after learning of a conveyance in trust for creditors by the owner of a preceding life estate does not estop him from asserting his title.[5]

To constitute an acquiescence in the sale on the part of the remainderman, the acts relied on must be such as would amount to a fraud on the purchaser.[6] The remainderman does not waive any right in the property by failing to object to the sale before his right to the possession of the property accrues.[7]

§ 52. By Order of Court

a. In general
b. Proceedings

a. In General

The entire interest in land may be ordered to be sold on application of the life tenant where a sale is authorized by statute or where it may be ordered under the court's general equity jurisdiction.

In the absence of statutory authority or equitable grounds, a life tenant of land may not ordinarily apply to the court for the sale of the entire interest merely for the purpose of reinvesting the proceeds,[8] and this rule obtains, although the income from the land is small[9] or is insufficient to provide for his support.[10] The court may not aid the life tenant in such a case at the expense of the remainderman's right to do as he chooses with his own estate in the land.[11]

However, pursuant to statutory authorization in some jurisdictions the courts may, on application by a life tenant of land, order a sale of the entire interest in the property,[12] including instances where the estate is subject to contingent remainders or executory limitations,[13] or where the lands are limited over to infants.[14] A sale is permissible under some statutes where it is desired to reinvest the proceeds,[15] or where a sale would be beneficial to the parties concerned,[16] or where it appears that a

1. Ark.—Hobbs v. Lenon, 87 S.W.2d 6, 191 Ark. 509.

2. Ga.—Hicks v. Webb, 56 S.E. 327, 127 Ga. 170.
21 C.J. p 961 note 51.

Ratification by infant
An infant remainderman who on reaching majority declines to ratify a sale made by the life tenant and other remaindermen may recover his share of the entire remainder.—Miracle v. Miracle, 86 S.W.2d 536, 260 Ky. 624, 102 A.L.R. 964.

3. N.C.—Hunter v. Yarborough, 92 N.C. 68—Haughton v. Benbury, 55 N.C. 337.

4. Wis.—Hovely v. Herrick, 139 N.W. 384, 152 Wis. 11.
21 C.J. p 961 note 51 [a].

5. Ala.—Inge v. Murphy, 10 Ala. 885.

6. Ga.—Parker v. Chambers, 24 Ga. 518.

7. Ga.—Parker v. Chambers, supra.

8. Or.—Soules v. Silver, 245 P. 1069, 118 Or. 96.
Tenn.—White v. Kelton, 232 S.W. 668, 144 Tenn. 327.
Sale on application of remainderman see infra § 89.

Policy of law
A proceeding by the life tenant to sell the land has been said to be against the policy of the law.—In re Frutchey, 183 N.Y.S. 786, 113 Misc. 45.

9. Iowa.—Traversy v. Bell, 193 N.W. 439, 195 Iowa 1243.

10. Or.—Soules v. Silver, 245 P. 1069, 118 Or. 96.

11. Minn.—Rekovsky v. Glisczinski, 221 N.W. 906, 175 Minn. 531.

Debts of tenant; support of remaindermen
Under a devise of property to one for life and then to her children, and if none, then to kindred of testator under statutes of distribution, the court cannot direct a sale to pay the debts of the life tenant; but the court can direct sale to support the children of life tenant.—Workman v. Workman, 178 S.E. 121, 174 S.C. 490.

12. U.S.—Murrell v. Stock Growers' Nat. Bank of Cheyenne, C.C.A. Wyo., 74 F.2d 827.
Wis.—In re Rees, 196 N.W. 239, 182 Wis. 239.

Statute held valid
Ohio.—Judy v. Trollinger, 144 N.E. 44, 110 Ohio St. 576.

Both legal and equitable estates may be sold under some statutes.—In re Vail, 133 A. 866, 99 N.J.Eq. 598.

In New York
(1) Under prior statutes a sale could be had only with the express consent of those remaindermen who were known and not under legal disability.—In re Frutchey, 183 N.Y.S. 786, 113 Misc. 45.

(2) These statutes were repealed; and later statutes permitting a sale have been held to operate retrospectively so as to be available to a life tenant under a will which became effective prior to their enactment.—In re Gaffers' Estate, 5 N.Y.S.2d 671, 254 App.Div. 448.

(3) The matters to be determined on an application under the later acts are whether the facts render a sale of the property expedient, whether the interests of petitioner are such as to authorize a sale, and the terms and conditions on which a sale shall be made.—In re Gaffers' Estate, supra.

13. D.C.—American Security, etc., Co. v. Muse, 4 App.D.C. 12.
21 C.J. p 962 note 65.

14. N.J.—In re Dowe, 64 A. 803, 68 N.J.Eq. 11.
21 C.J. p 962 note 66.

15. Ky.—Cox v. Corrigan-McKinney Steel Co., 58 S.W.2d 625, 248 Ky. 426.
N.C.—Smith v. Suitt, 153 S.E. 602, 199 N.C. 5—De Laney v. Clark, 145 S.E. 398, 196 N.C. 282—Midyette v. Lycoming Timber & Lumber Co., 117 S.E. 386, 185 N.C. 423—Poole & Blue v. Thompson, 112 S.E. 323, 183 N.C. 588.
21 C.J. p 961 note 64.

Sale for purpose of partition cannot be had under statutes authorizing sales for reinvestment.—Smith v. Suitt, 153 S.E. 602, 199 N.C. 5.

16. Md.—Gittings v. Morris, 144 A. 836, 927, 156 Md. 565.

sale is necessary to protect the rights of the parties in interest.[17] Further, it is within the general powers of a court of equity to order a sale where all of the parties interested are properly represented and action by the court is necessary to protect them;[18] a court of equity may order a sale, although there is no trust and the life tenant has no power of sale under the will which created his estate.[19] However, equitable jurisdiction should be exercised with caution[20] and only in urgent cases.[21] Notwithstanding a sale may contravene the instrument creating the life estate, it may nevertheless be ordered by the court pursuant to statutory authorization,[22] or by a court of equity where it is necessary to preserve the property for the life tenant and remaindermen.[23]

On an application by a life tenant to exchange the land for the reason that the present income is insufficient to pay taxes, the interest of the remaindermen, rather than the interest of the life tenant, is to be considered.[24] A court of equity has no jurisdiction to decree a sale of the fee simple title in order to pay taxes or assessments,[25] or to discharge a lien which the life tenant, to the extent of his interest, has fastened on the property.[26]

b. Proceedings

Proceedings to sell the interest in land on application of the life tenant are governed by controlling statutory regulations.

The jurisdiction of particular courts to order a sale of the interest in land on application of the life tenant depends on applicable statutory regulations.[27]

Under some statutes the sale must be public;[28] while under other statutes the court may authorize the life tenant to sell the property at private sale,[29] with the reservation that the court may reject the amount offered where a substantially higher offer is made.[30] However, a decree which accepts a bid for the property, and from which no appeal is taken, is final and should not be set aside merely because a higher bid is received thereafter.[31]

Irregularities in proceedings for the sale of the property, may be cured,[32] such as the failure to require a bond from the commissioner appointed to sell the property.[33]

Parties, notice, and appearance. A person who is given the use and occupancy of property for life may institute proceedings to sell the property under statutes authorizing proceedings by those having a possessory interest.[34] Under some statutes a life

Pa.—In re Hays' Estate, 134 A. 402, 286 Pa. 520.
21 C.J. p 962 note 67.

17. Mich.—Garrison v. Hecker, 87 N.W. 642, 128 Mich. 539.
Conclusiveness of finding of necessity
The decision of the circuit court on the question of necessity or expediency of a sale of realty in which infants and unborn remaindermen have interests is conclusive unless reversed or modified by the supreme court, and the decision may not be questioned collaterally; purchaser takes good title when sale is ordered by the court with all parties in esse properly before it.—Bettis v. Harrison, 195 S.E. 835, 186 S.C. 352.

18. Ga.—Ethridge v. Pitts, 108 S.E. 543, 152 Ga. 1.
Ind.—Coquillard v. Coquillard, 113 N. E. 481, 62 Ind.App. 489.
Iowa.—John Hancock Mut. Life Ins. Co. v. Dower, 271 N.W. 193, 222 Iowa 1377.
Miss.—Riley v. Norfleet, 148 So. 777, 167 Miss. 420.
N.C.—In re Wilds, 110 S.E. 57, 182 N.C. 705.
S.C.—Cagle v. Schaefer, 104 S.E. 321, 115 S.C. 35.

19. Ill.—Thompson v. Adams, 69 N. E. 1, 205 Ill. 552.

20. Ind.—Coquillard v. Coquillard, 113 N.E. 481, 62 Ind.App. 489.

21. Ill.—Gibbs v. Andrews, 132 N. E. 544, 299 Ill. 510.
Iowa.—Traversy v. Bell, 193 N.W. 439, 195 Iowa 1243.

22. N.J.—In re Vail, 133 A. 866, 99 N.J.Eq. 598.
N.Y.—In re Gaffers' Estate, 5 N.Y.S. 2d 671, 254 App.Div. 448.
21 C.J. p 961 note 64 [a].

23. Ill.—Thompson v. Adams, 69 N. E. 1, 205 Ill. 552.

24. Ala.—Christopher v. Chadwick, 135 So. 454, 223 Ala. 260.
21 C.J. p 962 note 73.

25. D.C.—Stansbury v. Inglehart, 20 D.C. 134.
Pa.—Van Dusen's Estate, 11 Pa.Co. 201, 1 Pa.Dist. 156.

26. Ala.—Culley v. Elford, 65 So. 381, 187 Ala. 165.

27. Md.—Powell v. Bailey, 113 A. 714, 138 Md. 169.
Court designated by will
It is not essential to obtain a decree of the circuit court where the will creating the estate expressly provides that the county court may appoint some one to sell.—Bayard v. Ashbrooks, 215 S.W. 312, 185 Ky. 770.
Superior court
The superior court was not without jurisdiction of proceeding by a life tenant and remaindermen for sale of land on the ground that the proceeding was erroneously begun before the clerk and went before the judge only for his approval of the order of sale and decree of clerk confirming it. C.S. §§ 637, 3234.—Perry v. Bassenger, 15 S.E.2d 365, 219 N.C. 838.

28. Ky.—Luttrell v. Wells, 30 S.W. 10, 97 Ky. 84, 16 Ky.L. 812.
21 C.J. p 961 note 64 [d].

29. Pa.—In re Hays' Estate, 134 A. 402, 286 Pa. 520.
Necessity for jury finding
A private sale for reinvestment may be permitted without a jury finding that the sale is to the best interest of all persons interested in the property, even though the parties themselves do not agree to a sale.—De Laney v. Clark, 145 S.E. 398, 196 N.C. 282.

30. Pa.—In re Hays' Estate, 134 A. 402, 286 Pa. 520.

31. Va.—Ash v. Wesley, 12 S.E.2d 817.
Failure to give notice to a higher bidder that the property was to be sold to another did not invalidate the sale where such bidder had previously submitted a lower bid, stating at the time that he would pay no more, and the property was sold for more than the previous bid. —Ash v. Wesley, supra.

32. N.C.—Perry v. Bassenger, 15 S. E.2d 365, 219 N.C. 838.

33. N.C.—Midyette v. Lycoming Timber & Lumber Co., 117 S.E. 386, 185 N.C. 423.

34. N.Y.—In re Gaffers' Estate, 5 N. Y.S.2d 671, 254 App.Div. 448.

tenant of unproductive land from which the income is insufficient to pay taxes and reasonable upkeep may maintain an action for the sale thereof without joining vested remaindermen as parties plaintiff.[35] Contingent remaindermen may join with the life tenant as plaintiffs; it is not necessary that they be sued as defendants.[36] One who bids for and purchases the property subject to the approval of the court becomes a quasi party to the suit.[37]

Notice of the proceedings must be given to all such persons as are entitled to notice under statutory regulations.[38] In the case of contingent remaindermen, notice must be given, under some statutes, to all those parties in interest and in being who would be entitled to the estate if the contingency on which they would take had occurred.[39] Where there are two sets of remaindermen, the second set being entitled to take only if there is none of the first set, according to some authorities living persons of the second or alternative set must be given notice;[40] but, according to other decisions, persons of the alternative set need not be joined if there are persons of the first set in existence.[41]

The court may appoint some one to represent minors and persons who are unascertained or not in being,[42] and the proceedings are void as to infant remaindermen who have filed no answer either by guardian ad litem or in any other manner.[43]

Irregularities in proceedings for the sale of property do not render the sale void as to remaindermen where the remaindermen in esse were parties to the proceedings and at least one member of each class of remaindermen was present to represent the class.[44]

Pleading; evidence. The necessary facts to justify a sale must be alleged and proved.[45]

Decree. A decree authorizing the sale of lands and the reinvestment of the proceeds in another tract of land sufficiently describes the latter tract if the description given can be made certain.[46]

Where the court has jurisdiction of the parties and of the subject matter, the decree is binding on all parties in esse before the court and also on unborn contingent remaindermen in the same class as such parties;[47] but a decree will not bind any one except the parties and those holding under them.[48]

§ 53. Division and Disposition of Proceeds

The proceeds of a sale are divided according to the interests of the parties at the time of sale, and in such manner as is agreed on by the parties or as is directed by statute or by the court.

After a sale of the entire estate in the property, the rights of the parties in the property are transferred to the proceeds of the sale,[49] and there must

Reason for rule
Such person has a life estate and not merely a right to occupy the property.—In re Gaffers' Estate, supra.

35. N.C.—Stepp v. Stepp, 156 S.E. 804, 200 N.C. 237, 76 A.L.R. 536.

36. Ky.—Wittaker v. Chenault, 232 S.W. 391, 192 Ky. 81.

37. Va.—Ash v. Wesley, 12 S.E.2d 817.

38. Md.—Snook v. Munday, 45 A. 1004, 90 Md. 701.
21 C.J. p 961 note 64 [h].

39. Md.—Gittings v. Morris, 144 A. 836, 927, 156 Md. 565.
21 C.J. p 961 note 64 [n].

40. N.Y.—In re Young, 151 N.E. 218, 242 N.Y. 237, reversing 213 N.Y.S. 941, 215 App.Div. 780.

41. Ky.—Ward v. Kemper's Adm'r, 43 S.W.2d 50, 240 Ky. 808—Willis v. Lapsley, 43 S.W.2d 47, 240 Ky. 829.
21 C.J. p 977 note 93 [a] (1).

42. Mass.—Pratt v. Bates, 37 N.E. 439, 161 Mass. 315.
21 C.J. p 962 note 65 [b].

43. W.Va.—Ferrell v. Ferrell, 138 S.E. 399, 103 W.Va. 704.

44. N.C.—Perry v. Bassenger, 15 S.E.2d 365, 219 N.C. 838—John L. Roper Lumber Co. v. Herrington, 110 S.E. 656, 183 N.C. 85.

45. Va.—Watkins v. Ford, 96 S.E. 193, 123 Va. 263—Schroeder v. Woodward, 82 S.E. 192, 116 Va. 506.

Allegations held sufficient
Ala.—Christopher v. Chadwick, 135 So. 454, 223 Ala. 260.
Ga.—Hamilton v. Kinnebrew, 131 S.E. 470, 161 Ga. 495.
Md.—Powell v. Bailey, 113 A. 714, 138 Md. 169.

Burden rests on petitioner to establish the necessity or expediency of an order of sale.—Brierley v. Brierley, 124 A. 311, 81 N.H. 133.

Evidence held sufficient
Mo.—Willhite v. Rathburn, 61 S.W. 2d 708, 332 Mo. 1208.

46. Tenn.—Johnson v. Covington, 251 S.W. 893, 148 Tenn. 47.

47. Ga.—Goldberg v. Moore, 119 S.E. 522, 156 Ga. 683—Cooney v. Walton, 106 S.E. 167, 151 Ga. 195.
Judgments concerning property as binding on persons holding contingent interests see the C.J.S. title Judgments § 776, also 34 C.J. p 1000 note 25–p 1002 note 32.

48. N.J.—Richman v. Standard Oil Co., 123 A. 608, 95 N.J.Eq. 745.

49. Cal.—Holman v. Holman, 77 P. 2d 515, 25 Cal.App.2d 445.
Ind.—Coquillard v. Coquillard, 113 N.E. 481, 62 Ind.App. 489.
Ky.—Lindenberger v. Cornell, 229 S.W. 54, 190 Ky. 844.
S.C.—Bettis v. Harrison, 195 S.E. 835, 186 S.C. 352.

Proceeds as substitute for land
Where a sale of land, in which there is a life estate, is made by the order of a court of equity for the protection of those interested, the funds received should be substituted for the land and administered as nearly as possible as the land would have been handled.—Coquillard v. Coquillard, 113 N.E. 481, 62 Ind.App. 489.

Realty exchanged for stock
Where realty was conveyed to corporation in exchange for stock distributed to life tenants, stock constituted corpus of trust and on life tenant's death reverted to remaindermen.—Olcott v. Estate of Charles Frederick Hoffman, Inc., 216 N.Y.S 267, 217 Misc. 399, affirmed 221 N.Y.S. 871, 220 App.Div. 713.

Vesting of life tenant's rights
Where property subject to a life estate is sold under a decree of court, that portion of the proceeds representing the relative value of the life estate vests absolutely in the life tenant and passes to his assignee or

be an apportionment of the proceeds between the life tenant and remainderman[50] based on the value of their respective interests at the time of the sale.[51] The court should protect the rights of remaindermen in the proceeds of such a sale,[52] although they may never come into existence.[53]

In the absence of statute or agreement between the parties the usual mode of apportioning, or disposing of, the proceeds is to award to the life tenant the interest on the fund for his life, and the principal after his death to the remainderman;[54] the life tenant is not entitled to have the value of his life estate paid to him in gross instead of the annual interest on the fund,[55] and the remainderman may not compel the life tenant to take the commuted value of the life estate.[56] However, it has been held that the court may, in its discretion, divide the proceeds between the parties according to the value of their respective interests and award to each absolutely his proportionate share.[57] Furthermore, by agreement the life tenant and remainderman may divide the proceeds, provide for a future division, or leave the life tenant in possession of the proceeds.[58]

Where statutes specifically prescribe how the proceeds of the sale of the life estate and remainder shall be disposed of, such statutes must be followed.[59] Distribution of the proceeds to the life tenant and remainderman cannot be ordered where it is expressly required by statute that the proceeds of the sale shall be invested.[60]

Where land subject to a remainder is sold under

personal representative.—Williams' Case, 3 Bland., Md., 186.

50. Cal.—Holman v. Holman, 77 P. 2d 515, 520, 25 Cal.App.2d 445, quoting Corpus Juris.
21 C.J. p 962 note 82.

51. Cal.—Holman v. Holman, 77 P. 2d 515, 25 Cal.App.2d 445.
21 C.J. p 963 note 83.

52. Fla.—Mosgrove v. March, 182 So. 786, 133 Fla. 459.
N.J.—Zelley v. Zelley, 136 A. 738, 101 N.J.Eq. 37.
S.C.—Gaines v. Sullivan, 109 S.E. 276, 117 S.C. 475.
Tex.—Johnston v. Johnston, Civ. App., 276 S.W. 776.

Power of sale as affecting remaindermen's interest

The fact that the life tenant had a power to sell does not of itself give him the right to dispose of the proceeds without regard to the rights of the remaindermen.—Frank v. Frank, 137 N.E. 151, 305 Ill. 181.

Delivery of proceeds to life tenant

(1) A decree, which fails to preserve the rights of the parties in the proceeds of the sale but which merely orders that the proceeds be delivered to the life tenant without any check on the disposition of the fund is void as to a remainderman born after the rendition of the decree.—Des Champs v. Mims, 145 S.E. 623, 148 S.C. 52.

(2) One having a life estate, with remainder to surviving children and to surviving brothers and sisters in default of such issue, who was beyond the age for bearing children, and who had acquired the interests of the brothers and sisters by deed, is entitled to her share of the proceeds of the entire property absolutely on furnishing a bond to assure repayment into court in the event of issue.—Frank v. Frank, 280 S.W. 1012, 153 Tenn. 215.

53. Ky.—Willis v. Lapsley, 43 S.W 2d 47, 240 Ky. 829.

54. Ky.—Miracle v. Miracle, 86 S. W.2d 536, 260 Ky. 624, 102 A.L.R. 964.
21 C.J. p 963 notes 84, 85.

Purchase-money mortgage

Where the proceeds of purchase-money mortgage on property sold by life tenant are paid after life tenant's death, they belong to remaindermen.—In re Eddy's Adm'r, 236 N. Y.S. 275, 134 Misc. 511.

Life estate in undivided part of land

Where the title of a life tenant is in an undivided fractional part rather than in the whole of land, and a sale is ordered for partition, his right in the proceeds extends to the interest for life on the same fractional part of the proceeds.—Lone Acre Oil Co. v. Swayne, Civ.App., 78 S.W. 380, affirmed 86 S.W. 740, 98 Tex. 597, 69 L.R.A. 986, 8 Ann.Cas. 1117.

55. Ky.—Moore v. Moore, 145 S.W. 2d 836, 284 Ky. 636—Miracle v. Miracle, 86 S.W.2d 536, 260 Ky. 624, 102 A.L.R. 964.
Mass.—Spring v. Hollander, 158 N. E. 791, 261 Mass. 373.
Mo.—Willhite v. Rathburn, 61 S.W. 2d 708, 332 Mo. 1208.
N.H.—Brierley v. Brierley, 124 A. 311, 81 N.H. 133.
N.C.—In re Rees, 104 S.E. 358, 180 N.C. 192.
Va.—Phlegar's Ex'r v. Smith, 108 S. E. 662, 131 Va. 208—American Nat. Bank v. Taylor, 70 S.E. 534, 112 Va. 1, Ann.Cas.1912D 40.

Effect of consent of some parties

(1) A life tenant and some of the remaindermen owning a fund arising from proceeds of sale of land may not have commutation and receive present values of their respective interests without consent of all remaindermen.—Bell v. Bell, 152 S. W.2d 263, 287 Ky. 7.

(2) In suit by life tenant to have realty sold and proceeds divided, consent of the parties is not binding on the court, save as to the rights of the parties consenting, and, to bar unborn remaindermen, the court itself must pass on the merits.—Bettis v. Harrison, 195 S.E. 835, 186 S. C. 352.

56. Ky.—Bell v. Bell, 152 S.W.2d 263, 287 Ky. 7—Miracle v. Miracle, 86 S.W.2d 536, 260 Ky. 624, 102 A. L.R. 964.

57. Pa.—Datesman's Appeal, 17 A. 1086, 127 Pa. 348.
21 C.J. p 963 note 88.

58. Cal.—Salles v. Loane, 266 P. 538, 204 Cal. 55.

Possession as abandonment by remaindermen

"The fact that the proceeds of the sale were turned over to the life tenant and retained by her with the consent of the remaindermen is not indicative of an abandonment of his right to share in such proceeds in the absence of an agreement to that effect."—Holman v. Holman, 77 P.2d 515, 25 Cal.App.2d 445.

59. Ky.—Willis v. Lapsley, 43 S.W. 2d 47, 240 Ky. 829.
N.C.—Brown v. Jennings, 124 S.E. 150, 188 N.C. 155.
21 C.J. p 963 note 94.

60. Ky.—Willis v. Lapsley, 43 S.W. 2d 47, 240 Ky. 829—Wallen v. Nicely, 2 S.W.2d 648, 222 Ky. 825.
N.Y.—Short's Estate, 2 N.Y.Civ. Proc. 272, 11 Abb.N.Cas. 225, 1 Dem.Surr. 444, affirmed 30 Hun 481, affirmed 94 N.Y. 605.
21 C.J. p 961 note 64 [2], p 963 note 94 [a].

Transfer as investment

Where statutes require reinvestment of the proceeds, an order directing a trustee of such proceeds to "pay out the fund accordingly" does not mean that the trustee must rid himself of the corpus; "accordingly" means in accordance with the will creating the estate and with governing statutes, and hence requires investment of the fund;

a void decree during the life estate, the proceeds being deposited in a bank, the remainderman on the death of the life tenant may receive the fund so deposited or decline to accept such fund and take the land in specie.[61] Where the life tenant and remainderman join in executing an oil lease, giving the lessee the right to remove all the oil in the place, it is in effect a sale of a portion of the land, and the proceeds must be apportioned.[62] The life tenant will be entitled to the interest on the royalty during the continuance of the life estate and then the residue, or corpus, of the royalty will be paid to the remainderman.[63]

A purchaser who pays his bid into court or to the parties authorized by decree is not ordinarily chargeable with the duty of looking after the proper disposition of the purchase money,[64] and his title is not impaired by the court's failure to provide for proper disposition.[65] A trustee to whom the net proceeds of the sale are delivered is accountable for the fund, and, pending investment, is responsible for its safe-keeping.[66]

Sale of life estate only. Where the life estate alone is sold, the proceeds belong absolutely to the life tenant.[67]

Allowances. The court may permit allowances, in connection with the sale, for brokers' commissions,[68] for services of a guardian,[69] and for attorney's fees.[70] A statute requiring the proceeds of the sale to be turned over to a trustee for the life tenant and remainderman has been construed to refer to net proceeds and hence to permit such allowances.[71]

§ 54. Lease

With some exceptions and qualifications, as a rule a lease by a life tenant expires at the time of his death.

A tenant for life may lease the premises for any term less than his own.[72] The lessee, during the continuance of the lease, is entitled to the same rights and privileges as the original tenant for life,[73] except that rights and privileges included in the grant of the life estate which were intended to be personal to the life tenant do not pass to his lessee.[74] However, unless the lease is made under a power,[75] a life tenant cannot generally create any term which will outlast his own estate,[76] in the absence of consent,[77] in the absence of ratifica-

transfer of the fund to another cause wherein the trustee is also committee of the life tenant, a lunatic, does not constitute such investment.—Fidelity & Deposit Co. of Maryland v. State, to use of Grah, 165 A. 176, 180, 164 Md. 304.

61. Va.—Turner v. Citizens' Bank, 68 S.E. 407, 111 Va. 184.

62. Pa.—Blakely v. Marshall, 34 A. 564, 174 Pa. 425.
W.Va.—Eakin v. Hawkins, 43 S.E. 211, 52 W.Va. 124.

63. W.Va.—Eakin v. Hawkins, supra—Wilson v. Youst, 28 S.E. 781, 43 W.Va. 826, 39 L.R.A. 292.

64. N.C.—Perry v. Bassenger, 15 S.E.2d 365, 219 N.C. 838—De Laney v. Clark, 145 S.E. 398, 196 N.C. 282.

65. Md.—Powell v. Bailey, 113 A. 714, 138 Md. 169.

66. Md.—Fidelity & Deposit Co. of Maryland v. State, to use of Grah, 165 A. 176, 164 Md. 304.

67. Mo.—State v. Culbertson, 50 Mo. 341.

68. N.Y.—In re Roosevelt's Estate, 228 N.Y.S. 323, 131 Misc. 800.

69. N.Y.—In re Roosevelt's Estate, supra.

70. N.Y.—In re Roosevelt's Estate, supra.

71. N.Y.—In re Roosevelt's Estate, supra.

72. Cal.—Arighi v. Rule & Sons, 107 P.2d 970, 973, 41 Cal.App.2d 852, citing **Corpus Juris.**
21 C.J. p 963 note 97.

Effect of executor's power of sale
That the executor of the will under which the life tenant holds is given a power of sale and is directed to take charge of the property does not deprive the life tenant of the power to lease.—Werkheiser v. Friedman, 29 Pa.Dist. 411, 17 North. Co. 113.

Lease inoperable against remainderman
A lease by a life tenant may be inoperable as against the remainderman and valid as against the grantor.—Carter Oil Co. v. McQuigg, D.C.Ill., 27 F.Supp. 182, affirmed, C.C.A., 112 F.2d 275.

73. N.H.—Miles v. Miles, 32 N.H. 147, 64 Am.D. 362.

74. Ind.—Gronendyke v. Cramer, 2 Ind. 382.

75. Ga.—Hines v. McCombs, 58 S.E. 1124, 2 Ga.App 675.
Mo.—Holland v. Bogardus-Hill Drug Co., 284 S.W. 121, 314 Mo. 214.

Power to consume
Lease by life tenant with power to consume is effectual after his death. O'Hara v. Peirano, 8 Ohio N.P., N.S., 581.

General power to lease
At common law it is the established doctrine that a tenant for life, with the general power to make leases, can make only leases in possession, and not leases in reversion or in futuro.—U. S. v. Noble, Okl., 35 S.Ct. 532, 237 U.S. 74, 59 L.Ed. 844.

76. N.Y.—Winegard v. Levy, 199 N.Y.S. 209, 120 Misc. 590.
21 C.J. p 963 note 98.

Life tenant acting in different capacity
(1) Life tenant who executed oil lease as guardian of remaindermen conferred on lessees full estate therein contemplated, and his rights as a life tenant were in royalties paid.—Surtees v. Hobson, Tex.Com.App., 13 S.W.2d 345, affirming, Civ.App., 4 S.W.2d 245.

(2) Where property devised to one for life had been previously leased by the testator, and the life tenant, as an individual rather than as a life tenant, thereafter secured the original lessee's rights as to a portion of the property, he could make an assignment of such rights to be effective after his death.—Waldron v. Wahl, 133 A. 252, 286 Pa. 237.

77. Mo.—Matlack v. Kline, 216 S.W. 323, 280 Mo. 139.
Pa.—Waldron v. Wahl, 133 A. 252, 286 Pa. 237.

Joinder of remainderman
Under the law of Hawaii, where contingent remainderman joins in lease by life tenant and lease contains guaranty of possession during its term, the lease is not terminated by life tenant's death.—Christian v. Waialua Agr. Co., C.C.A.Hawaii, 93 F.2d 603, rehearing denied 94 F.2d 806, certiorari granted 58 S.Ct. 949,

tion,[78] or in the absence of estoppel[79] of the remainderman or remaindermen, and thus, on the termination of the life estate, a lease made by the life tenant ordinarily terminates, although the stated term for which it was made has not expired.[80] The lessee's interest in the premises is then limited to the crops growing thereon at the time of the life tenant's death,[81] and if there are no growing crops the lessee has no further right of occupation.[82] The lessee of a life tenant is charged with notice of his lessor's title,[83] especially where it is a matter of record.[84]

In some jurisdictions, however, the courts may by statute authorize a lease of the property by the life tenant for a term of years,[85] and it has been held that a court of chancery can ratify such a lease on a showing that it is beneficial to the owner of the fee as well as to the life tenant;[86] further, in some jurisdictions a lessee of a life tenant who dies before the lease expires may, by statute, hold over to the end of the current year.[87]

A covenant for the renewal of the lease[88] or for quiet enjoyment[89] is not binding on the remainderman after the life tenant's death. On the other hand, the lessee may maintain an action against the personal representative of the life tenant for a breach of covenant of quiet enjoyment caused by the death of the life tenant,[90] at least if the lease contained an express covenant of this character,[91] or if the life tenant had a power of appointment by which he might have protected the lessee for the full period of the lease.[92]

Relation after life tenant's death. After the death of the life tenant, no tenure and no relation exists between the remainderman and the tenant of the life tenant,[93] except by a subsequent contract, either express or implied.[94] If the lessee holds over after the life tenant's death, he becomes a tenant by sufferance,[95] or in some jurisdictions, by statute, a tenant at will,[96] or a trespasser.[97] The lessee, by remaining in possession, becomes liable on an implied promise for the reasonable value of the use and occupation of the premises,[98] but not for the rent stipulated in the lease,[99] except as such rent

304 U.S. 553, 82 L.Ed. 1523, reversed on other grounds 59 S.Ct. 21, 305 U. S. 91, 83 L.Ed. 60, rehearing denied 59 S.Ct. 240, 305 U.S. 673, 83 L.Ed. 436—Waialua Agr. Co. v. Christian, C.C.A.Hawaii, 93 F.2d 603, rehearing denied 94 F.2d 806, certiorari granted 58 S.Ct. 949, 304 U.S. 553, 82 L.Ed. 1523, reversed on other grounds 59 S.Ct. 21, 305 U.S. 91, 83 L.Ed. 60, rehearing denied 59 S.Ct. 240, 305 U.S. 673, 83 L.Ed. 436.

78. Iowa.—Armstrong v. Rodemacher, 203 N.W. 23, 199 Iowa 928.
21 C.J. p 963 note 1.

79. Iowa.—Armstrong v. Rodemacher, supra.

80. Iowa.—Scurry v. Anderson, 183 N.W. 585, 191 Iowa 1058.
N.Y.—In re O'Donnell, 147 N.E. 541, 240 N.Y. 99, reversing In re O'Donnell's Estate, 203 N.Y.S. 882, 208 App.Div. 374, which reversed 201 N.Y.S. 463, 121 Misc. 496—Winegard v. Levy, 199 N.Y.S. 209, 120 Misc. 590—In re Hunt's Estate, 197 N.Y.S. 633, 120 Misc. 174.
21 C.J. p 963 note 6, p 972 note 26.
Apportionment of rents see supra § 41.

Lease as void
On the death of the life tenant the lease becomes void.—Sanders v. Sutlive, 174 N.W. 267, 187 Iowa 300—
21 C.J. p 964 note 8.

81. Iowa.—Scurry v. Anderson, 183 N.W. 585, 191 Iowa 1058.
21 C.J. p 964 note 27.
Undertenant's right to emblements see supra § 40.

82. Iowa.—Carman v. Mosier, 75 N. W. 323, 105 Iowa 367.

83. Mich.—Harrington v. Sheldon, 163 N.W. 64, 196 Mich. 388.
N.Y.—Nesbitt v. Thompson, 157 N. Y.S. 166, 93 Misc. 251.

Failure to disclose life tenancy as fraud
Whether a lessor's failure to disclose to his lessee that he is merely a life tenant is such a lack of good faith as to approximate fraud on the lessee is a question of fact depending on the evidence in the case.—In re O'Donnell's Estate, 203 N.Y.S. 882, 208 App.Div. 374, reversing 201 N.Y.S. 463, 121 Misc. 496, and reversed on other grounds In re O'Donnell, 147 N.E. 541, 240 N.Y. 99.

84. Mich.—Harrington v. Sheldon, 162 N.W. 64, 196 Mich. 388.

85. U.S.—Murrell v. Stock Growers' Nat. Bank of Cheyenne, C.C.A. Wyo., 74 F.2d 827.

86. Tenn.—Barrett v. Barrett, 2 Tenn.App. 499.

87. S.C.—May v. Thomas, 78 S.E. 85, 94 S.C. 158.
21 C.J. p 964 note 30, p 969 note 45 [a].

88. D.C.—Velati v. Dante, 39 App. D.C. 372.
Minn.—Bergengren v. Aldrich, 29 N. E. 667, 139 Minn. 259.

89. N.Y.—Coakley v. Chamberlain, 8 Abb.Pr.,N.S., 37, 38 How.Pr. 483.

90. N.Y.—In re O'Donnell, 147 N.E. 541, 240 N.Y. 99, reversing In re O'Donnell's Estate, 203 N.Y.S. 882, 208 App.Div. 374, which reversed 201 N.Y.S. 463, 121 Misc. 496.
21 C.J. p 964 note 21.

91. Ky.—Duker v. Kaelin, 90 S.W. 959, 28 Ky.L. 900.

92. Mo.—Hamilton v. Wright, 28 Mo. 199.

93. N.Y.—Coakley v. Chamberlain, 31 N.Y.Super. 676, 8 Abb.Pr.,N.S., 37, 38 How.Pr. 483.

94. Del.—Horsey's Lessee v. Horsey, 4 Del. 517.
21 C.J. p 964 note 11.

95. Mich.—Harrington v. Sheldon, 163 N.W. 64, 196 Mich. 388.
21 C.J. p 964 note 24.

96. Iowa.—Sanders v. Sutlive, 143 N.W. 492, 163 Iowa 172.

97. N.Y.—In re O'Donnell, 147 N.E. 541, 240 N.Y. 99, reversing In re O'Donnell's Estate, 203 N.Y.S. 882, 208 App.Div. 374, which reversed 201 N.Y.S. 463, 121 Misc. 496—Williams v. Alt, 133 N.E. 499, 226 N.Y. 283.

Licensee of life tenant as trespasser
An occupant under a mere license from a life tenant is, after the termination of the life estate, with respect to the remainderman, a trespasser.—Williams v. Caston, 32 S.C. L. 130.

98. Ill.—Humphreys v. Orrey, 220 Ill.App. 523.
Or.—Peery v. Fletcher, 182 P. 143, 93 Or. 43.
21 C.J. p 964 note 12.

99. Iowa.—Sanders v. Sutlive, 174 N.W. 267, 187 Iowa 300.

represents the reasonable value of the premises.[1]

However, a tenancy may result from the implied adoption of the lease terminated by the life tenant's death;[2] but a continuance of the original term may not be inferred from declarations or circumstances that are uncertain or equivocal.[3] The mere continued occupation by the lessee does not amount to an adoption of the lease by the remaindermen.[4] The acceptance of rent from the lessee by the remainderman subsequent to the death of the life tenant does not, of itself, constitute a ratification or adoption of the lease,[5] or an estoppel against the remainderman,[6] or an attornment by the lessee.[7] Nevertheless, acceptance of rent by the remainderman after the termination of a lease by the death of the life tenant may, in view of the surrounding circumstances, effect a new tenancy, or a continuance of the old tenancy,[8] and thereby entitle the lessee to retain possession.[9]

Distinctions. Whether an instrument is a letting or an assignment by the life tenant depends on the intention of the parties and on whether the life tenant parted with his entire interest for the term, reserving no reversionary right.[10]

§ 55. Mortgage

A life tenant can encumber his own interest, but, except under certain circumstances, he may not mortgage the remainder.

A tenant for life may mortgage or encumber his own interest.[11] However, unless the remaindermen consent,[12] the life tenant ordinarily cannot mortgage the entire estate so as to bind the interest in remainder, and a mortgage, by him purporting to cover the fee is effective as to the life estate only.[13]

On the other hand, the life tenant may mortgage the entire estate where the life estate is coupled with a power to sell the fee[14] or where the life estate is

1. Mo.—Matlack v. Kline, 216 S.W. 323, 280 Mo. 139.

Lease as evidence of value

The lease is competent evidence on the question of reasonable value as an admission by the lessee.—Humphreys v. Orrey, 220 Ill.App. 523.

2. Iowa.—Sanders v. Sutlive, 174 N.W. 267, 187 Iowa 300.

However, in an early case it was said that on the death of the life tenant "the term for years is so utterly void as not even to be capable of confirmation by the remainderman."—Bogle v. North Carolina R. Co., 51 N.C. 419, 420.

3. N.Y.—In re O'Donnell, 147 N.E. 541, 240 N.Y. 99, reversing In re O'Donnell's Estate, 203 N.Y.S. 882, 208 App.Div. 374, which reversed 201 N.Y.S. 463, 121 Misc. 496.

4. Iowa.—Sanders v. Sutlive, 174 N.W. 267, 187 Iowa 300.

5. N.Y.—Winegard v. Levy, 199 N.Y.S. 209, 120 Misc. 590.

Action for rent as ratification

The institution of an action for the collection of unpaid rent which became due after the death of the life tenant is not a ratification of the lease.—Winegard v. Levy, supra.

6. D.C.—Velati v. Dante, 39 App.D.C. 372, certiorari denied 33 S.Ct. 463, 227 U.S. 679, 57 L.Ed. 700.

7. N.Y.—In re O'Donnell, 147 N.E. 541, 240 N.Y. 99, reversing In re O'Donnell's Estate, 203 N.Y.S. 882, 208 App.Div. 374, which reversed, 201 N.Y.S. 463, 121 Misc. 496.

8. Va.—Holden v. Boring, 43 S.E. 86, 52 W.Va. 37.
21 C.J. p 964 note 16.

Acceptance over long period

It seems that accepting the rent according to the terms of the terminated lease without other arrangement is in the nature of a recognition of its binding force and if continued long enough may, in connection with other circumstances, warrant the inference that the parties have adopted the lease as expressing the understanding between them.—Sanders v. Sutlive, 174 N.W. 267, 187 Iowa 300—21 C.J. p 964 note 18.

9. Ind.—Lowrey v. Reef, 27 N.E. 626, 1 Ind.App. 244.

10. Ala.—Staples v. Pearson, 159 So. 488, 230 Ala. 62, 98 A.L.R. 852.

11. Ala.—Penny v. Weems, 35 So. 883, 139 Ala. 270.
Cal.—Arighi v. Rule & Sons, 107 P. 2d 970, 973, 41 Cal.App.2d 852, citing **Corpus Juris.**
Iowa.—Bogenrief v. Law, 271 N.W. 229, 222 Iowa 1303.
Kan.—Alexander v. Goellert, 109 P.2d 146, 153 Kan. 202.
Ky.—Simmons v. Reinhardt, 78 S.W. 890, 25 Ky.L. 1804.
Md.—Reeside v. Annex Bldg. Ass'n of Baltimore City, 167 A. 72, 165 Md. 200, 91 A.L.R. 426.
21 C.J. p 965 note 32.

Estate pur autre vie

A foreclosure sale under a deed of trust executed by one having an estate pur autre vie passes an estate for the life of the cestui que vie.—Leflore v. Flowers, 79 So. 60, 118 Miss. 75, reversing 78 So. 513, 117 Miss. 682.

Life tenant possessing lien on remainder

A mortgage of the life tenant's estate covers a lien which the life tenant obtained on the remainder by having redeemed from a prior mortgage on the whole estate.—Faulkenburg v. Windorf, 259 N.W. 802, 194 Minn. 154.

12. Mo.—Matlack v. Kline, App., 190 S.W. 408, transferred, see 216 S.W. 323, 280 Mo. 139.

Remaindermen as equally bound

Notwithstanding only one of two remaindermen assisted in the placing of a mortgage by the life tenant, who appeared of record to be the fee owner, the interests of both remaindermen were held equally bound by the lien of the mortgage.—Fullerton Savings Bank v Des Granges, 186 P. 1052, 44 Cal.App. 611.

13. Minn.—Ashbaugh v. Wright, 188 N.W. 157, 158, 152 Minn. 57, citing **Corpus Juris.**
Mo.—First Nat. Bank & Trust Co. of King City v. Bowman, 15 S.W.2d 342, 322 Mo. 654.
S.D.—Tscherne v. Crane-Johnson Co., 227 N.W. 479, 56 S.D. 101.
21 C.J. p 965 note 33.

14. Md.—Reeside v. Annex Bldg. Ass'n of Baltimore City, 167 A. 72, 165 Md. 209, 91 A.L.R. 426.
Pa.—In re Stannert's Estate, 15 A.2d 360, 339 Pa. 439.
21 C.J. p 965 note 36.

Power to sell for reinvestment

Although a life tenant is authorized to sell for the purpose of reinvestment only, yet, there being taxes due on the land and the life tenant having no resources with which to pay them, he can mortgage part of the land to obtain money to pay the taxes, so that the title obtained under the mortgage will be to the fee.—Whitfield v. Lyon, 46 So. 545, 93 Miss. 443.

Power to "manage"

A power given to life tenants to "manage" the property does not vest in them any authority to charge a portion of it with the payment of an annuity to a third person beyond the duration of their life interests

coupled with a power to mortgage the fee,[15] or coupled with a power to use the estate for his own benefit with a remainder over of only whatever may remain,[16] or where the mortgage is authorized by an order of court.[17]

The life tenant and the remainderman may join in a mortgage which will bind the entire estate.[18]

Jurisdiction of equity. A court of equity has inherent power to order a mortgage of real estate held by a life tenant with remainder over, if the exercise of such power is necessary to preserve the property and to prevent loss to the life tenant and remaindermen;[19] and this power exists although the grantor of the life estate and remainder interests intended that the property should be held intact.[20]

On an application for authority to mortgage the realty, proper notice of the proceedings must be given,[21] notwithstanding the court may have been in error in finding that an exigency existed requiring a mortgage of the fee to protect all those interested in the land, its decree authorizing the mortgage is binding where it had jurisdiction of the subject matter and of all parties interested in the estate.[22]

Authority granted by the court to execute a mortgage is not exhausted after a mortgage is once placed, where the court by its decree expressly retains jurisdiction to make further orders as to a mortgage of the premises; and under such retained jurisdiction new mortgages refunding the original debt are proper.[23]

§ 56. Contracts and Agreements

The life tenant can contract with respect to his own estate, but his contracts are not ordinarily binding on, or enforceable by, the remainderman.

A life tenant may contract with respect to his own estate.[24] However, a contract or agreement made by a life tenant will not bind the remainderman[25] unless it is ratified by him;[26] and, conversely, a remainderman cannot ordinarily sue on a con-

and in derogation of the interests in remainder.—Horwitz v. Safe Deposit & Trust Co. of Baltimore, 192 A. 281, 286, 172 Md. 437.

Jurisdiction to determine extent of power

District court in Wyoming had power to decide whether the power to authorize a sale and conveyance included the power to execute a mortgage or deed of trust.—Murrell v. Stock Growers' Nat. Bank of Cheyenne, C.C.A.Wyo., 74 F.2d 827.

15. Md.—Reeside v. Annex Bldg. Ass'n of Baltimore City, 167 A. 72, 165 Md. 209, 91 A.L.R. 426.

16. R.I.—Jenks' Petition, 43 A. 871, 21 R.I. 390.
21 C.J. p 965 note 37.

17. Pa.—Stevenson's Estate, 5 Pa. Dist. 5, 17 Pa.Co. 312.
21 C.J. p 965 note 38.

Necessity for consent of all competent persons

Under the statutes in some jurisdictions the court cannot grant an order permitting the life tenant to mortgage the fee unless the consent of all of the remaindermen or reversioners not under disability is obtained.—In re Brokaw's Will, 219 N.Y.S. 734, 219 App.Div. 337, affirmed In re Brokaw, 157 N.E. 880, 245 N.Y. 614.

Mortgage for taxes and repairs

A court will not grant a life tenant's petition to mortgage real estate for the purpose of paying taxes and repairs where one of the respondents holds a remainder contingent on the death of the petitioner without surviving issue, and another respondent is a mortgagee of the first respondent's contingent interest.—In re Donnelly's Estate, 32 Pa. Dist. & Co. 90.

18. Kan.—Brown v. Staab, 176 P. 113, 103 Kan. 611.

19. Iowa.—John Hancock Mut. Life Ins. Co. v. Dower, 271 N.W. 193, 222 Iowa 1377.

20. Iowa.—John Hancock Mut. Life Ins. Co. v. Dower, supra.

21. **Service on minors**

Service of notice on minors by reading notice to each of them and delivering to each minor a copy of notice with copy of petition attached and father's acceptance of service on behalf of minors is sufficient.—John Hancock Mut. Life Ins. Co. v. Dower, supra.

22. Iowa.—John Hancock Mut. Life Ins. Co. v. Dower, supra.

23. Iowa.—John Hancock Mut. Life Ins. Co. v. Dower, supra.

24. Or.—Riddle v. Isaacs, 192 P. 398, 97 Or. 404.

Management of estate

A life tenant, with power to manage the estate, may agree with a third person to occupy the estate for the purpose of management.—Riddle v. Isaacs, supra.

Execution of contract

A life tenant who permitted a third person to occupy the property and who contributed a stated sum toward the upkeep of the property has been held, under the particular circumstances, not to have thereby entered into a contract.—Binney v. Rhode Island Hospital Trust Co., 110 A. 615, 43 R.I. 222.

25. Va.—Grubb v. Shirley, 5 S.E.2d 475, 174 Va. 204.
21 C.J. p 965 note 41.

Charging estate with business debts

Where life tenant's use of principal of the estate was restricted to use for her comfortable maintenance, the estate could not be charged with debts incurred for benefit of business conducted by life tenant and her husband rather than for life tenant's maintenance and support.—In re Strunnert's Estate, 15 A.2d 360, 339 Pa. 439.

Covenants to run with land

A life tenant cannot create any covenants that will run with the land.—Grubb v. Shirley, 5 S.E.2d 475, 174 Va. 204.

Estate for another's life

Where one who acquired the interest of a life tenant aided a third person in obtaining a lease for a term of years from executors in charge of the property, and such third person agreed to give him a specified quantity of merchandise annually for the term of the lease, the beneficiary of the life estate is not entitled to the benefit of the contract, to the detriment of the succeeding estate, after his interest terminates.—Hamer v. David, 99 S.E. 816, 112 S.C. 211.

26. S.C.—Townes v. Augusta, 23 S.E. 984, 46 S.C. 15.
21 C.J. p 965 note 42.

Acceptance of benefit

Where a life tenant was given a note by a third person to make good a trustee's dissipation of the proceeds of the sale of realty, remaindermen seeking the benefit of such note must take it as the life tenant held it and at the interest rate specified therein.—Hartnett v. Langan, 222 S.W. 403, 282 Mo. 471.

tract made by a life tenant to which he was not a party.[27] An agreement between a coexecutor and a life tenant, entitled solely to the income of certain property, for the payment of certain claims against the estate out of such income is at most voidable, and so far as consummated cannot be repudiated by the heirs of the life tenant, at least without a showing that they were ignorant of their rights in the premises.[28]

Delay of the life tenant does not, of itself, annul a contract by which he has agreed to institute proceedings for a judicial sale of the land as soon as is practicable;[29] the prospective purchasers may ratify the contract and waive their right to rescind.[30]

§ 57. Remedies for Protection of Remainder or Reversion

Particular remedies against a life tenant by those holding future estates in land are considered infra §§ 58–64. Actions by remaindermen generally are considered infra §§ 97 et seq, and by reversioners infra §§ 111 et seq.

Examine Pocket Parts for later cases.

§ 58. Requirement of Inventory

The right of a remainderman to require a life tenant of personal property to file an inventory is considered infra § 134.

Examine Pocket Parts for later cases.

§ 59. Requirement of Security

Unless required by statute, ordinarily a life tenant need not give security to protect remaindermen.

Ordinarily the life tenant is not obliged to give security for the protection of the remaindermen,[31] particularly if he has a power to dispose of, or to consume, the property, and does not act in bad faith.[32]

Where the property is sold and the proceeds are turned over to the life tenant, security is not necessarily required,[33] at least where such tenant has an unlimited power of disposal.[34] However, security may be required from the life tenant on the sale of realty and delivery of the proceeds,[35] especially where security is required by statute.[36]

In the absence of a statutory requirement, the purchaser of a life estate in realty at a judicial sale is not required to give bond for delivery of the property.[37]

§ 60. Equitable Relief in General

The holders of future estates in land may have relief in equity to prevent threatened injury to the property in the hands of the life tenant.

Unless barred by laches,[38] those holding remainders or other rights in futuro, may come into equity, to protect their interest in property in the hands of a life tenant which is in danger of loss, deterioration, or injury,[39] as by a bill quia timet.[40]

27. N.C.—Bogle v. North Carolina R. Co., 51 N.C. 419.

28. Wash.—Stahl v. Schwartz, 142 P. 651, 81 Wash. 293.

29. Ky.—Reid v. Wilder, 264 S.W. 849, 204 Ky. 395.

30. Ky.—Reid v. Wilder, supra.

Abuse of discretion

Cancellation of such a contract for the alleged delay of the life tenant has been held to be an abuse of discretion under the circumstances.—Reid v. Wilder, supra.

31. Me.—McGuire v. Gallagher, 59 A. 445, 99 Me. 334.

Security by life tenant of personalty see infra § 134.

32. Mich.—Chamberlain v. Husel, 144 N.W. 549, 178 Mich. 1.

Pa.—In re Anderson's Estate, 28 Pa. Dist. 327, 67 Pittsb.Leg.J. 232, 33 York Leg.Rec. 24—In re Aurand's Estate, 25 Pa.Dist. 725—Teller's Estate, 15 Pa.Dist. 53, 32 Pa.Co. 177, affirmed 64 A. 525, 215 Pa. 263.

33. Mich.—Woolfitt v. Preston, 169 N.W. 838, 203 Mich. 502.

34. N.J.—Weaver v. Patterson, 111 A. 506, 92 N.J.Eq. 170.

35. Ky.—Lindenberger v. Cornell, 229 S.W. 54, 190 Ky. 844.

N.Y.—Matter of Blauvelt, 30 N.E. 194, 131 N.Y. 249, reversing 15 N.Y.S. 586, 60 Hun 394, affirming 20 N.Y.S. 119, 2 Conn.Surr. 458.

Ohio—Bierce v. Bierce, 41 Ohio St. 241.

Failure to require security as affecting decree

The failure to require security is not error affecting the validity or legality of the court's decree.—Bierce v. Bierce, supra.

Payment of premium

Where proceeds of sale of life estate in realty set up by will are paid to the life tenant on his furnishing security, the premium for the security is to be paid by the life tenant personally and not by the estate.—Mutchmore's Estate, 14 Pa. Dist. 251.

36. Pa.—Dewey's Estate, 33 Pa.Co. 307.

37. Ga.—George v. Clary, 178 S.E. 920, 180 Ga. 279.

38. U.S.—Buder v. Franz, C.C.A.Mo., 27 F.2d 101, 107, quoting **Corpus Juris.**

Ky.—Bowman v. Utley, 1 Ky.Op. 443.

39. Kan.—Robinson v. Barrett, 45 P.2d 587, 591, 142 Kan. 68, quoting **Corpus Juris.**

Or.—Calvary Baptist Church of Baker v. Saxton, 242 P. 616, 117 Or. 125.

S.D.—Tscherne v. Crane-Johnson Co., 227 N.W. 479, 481, 56 S.D. 101, citing **Corpus Juris.**

Tex.—Hamilton v. Hamilton, Civ. App., 42 S.W.2d 814, 817, quoting **Corpus Juris.**

21 C.J. p 967 note 77.

On foreclosure of mortgage of fee

On the foreclosure of a mortgage executed by a life tenant and purporting to mortgage the fee, remaindermen have right to object to issuance of deed which would injure their inheritance.—Tscherne v. Crane-Johnson Co., 227 N.W. 479, 56 S.D. 101.

Life tenant as executor with right to sell

The remainderman may have relief even where the life tenant is also executor of a will with the right to sell property for reinvestment.—Amos v. Toolen, 168 So. 687, 232 Ala. 587.

40. U.S.—Buder v. Franz, C.C.A. Mo., 27 F.2d 101.

Such equitable relief will be accorded either to a vested or a contingent remainderman.[41]

A remainderman may have relief in equity when the life tenant is claiming a right to the property adverse to that of the remainderman;[42] but a threat of making a lease, which might extend beyond the tenant's life, is not a ground for equitable relief.[43]

§ 61. Injunction

Injunction is a proper remedy to prevent threatened injury to the remainder.

In a proper case an injunction may issue to protect the estate in remainder.[44]

A remainderman may sue to enjoin a life tenant from committing waste[45] when the injury complained of is irreparable and an action for damages would not afford adequate relief.[46] The injunction may be awarded at the instance of a contingent remainderman[47] and may be granted against a purchaser from the life tenant.[48] The erection of a partition wall and disconnecting of drain pipes by a life tenant has been enjoined as an injury to the inheritance.[49]

§ 62. Accounting

An accounting by the life tenant may be required for the protection of the estate in remainder.

In a proper case an accounting by the life tenant may be required to protect the estate in remainder.[50] Equity will require an accounting where the life tenant has committed waste on the estate,[51] as by the wrongful cutting of timber[52] or the mingling of the property with his own property so that its identity is lost.[53] The wrongful disposal of real property, or of the proceeds of a sale thereof, will warrant an accounting.[54] In the case of a contingent remainderman, plaintiff is not entitled to indemnity but only to an account and an impounding of the damages and an investment of the proceeds for his benefit.[55]

A life tenant who has been given power to dispose of the property cannot be required to account as to property conveyed in accordance with the power.[56]

Ala.—Amos v. Toolen, 168 So. 687, 232 Ala. 587.
Cal.—Newport v. Hatton, 231 P. 987, 994, 195 Cal. 132, citing Corpus Juris.
21 C.J. p 131 note 41, p 967 note 77.

41. Ga.—Kollock v. Webb, 39 S.E. 339, 113 Ga. 762.
Tex.—Boone v. Stone, Civ.App., 142 S.W.2d 936, 943, citing Corpus Juris.

42. U.S.—Buder v. [illegible], C.C.A.Mo., 27 F.2d 101.
21 C.J. p 967 note 78.

Requiring deed by life tenant to remainderman

In action to restrain life tenant from asserting adverse title to land, it was improper to require defendant to convey fee simple to remainderman subject to the life estate; decree should merely enjoin defendant from asserting any estate adverse to remainder.—Gaskin v. Gaskin, 2 F.2d 931, 55 App.D.C. 129.

43. U.S.—Preston v. Smith, C.C.Mo., 23 F. 737.

44. U.S.—Buder v. [illegible], C.C.A.Mo., 27 F.2d 101, 107, citing Corpus Juris.
Ind.—Kepert v. Kepert, 134 N.E. 297, 79 Ind.App. 633.
N.Y.—Collins v. Collins, 32 Hun 156.

Injunction held too broad and indefinite

An injunction prohibiting a life tenant from "cutting or removing any timber from said land, and from removing the buildings thereon or any part thereof, or from otherwise injuring the same," has been held to be too broad and indefinite.—Greathouse v. Greathouse, 32 S.E. 994, 46 W.Va. 21, 22.

45. Mich.—Anstays v. Anderson, 160 N.W. 475, 194 Mich. 1.
21 C.J. p 968 note 93.

46. W.Va.—Greathouse v. Greathouse, 32 S.E. 994, 46 W.Va. 21.
21 C.J. p 968 note 95.

47. Ark.—Watson v. Wolff-Goldman Realty Co., 128 S.W. 581, 95 Ark. 18, Ann.Cas.1912A 540.

48. Ark.—Watson v. Wolff-Goldman Realty Co., supra.

49. Cal.—Taft v. Washington, 154 P. 1073, 29 Cal.App. 197.

50. U.S.—Buder v. [illegible], C.C.A.Mo., 27 F.2d 101, 107, citing Corpus Juris.

51. Ind.—Rupel v. Ohio Oil Co., 95 N.E. 225, 176 Ind. 4, Ann.Cas.1913E 836.
21 C.J. p 968 note 3.

52. Mass.—Phillips v. Allen, 89 Mass. 115.
21 C.J. p 968 note 4.

53. Ill.—Mann v. Martin, 69 Ill.App. 501.
N.Y.—Putnam v. Lincoln Safe Deposit Co., 104 N.Y.S. 4, 118 App.Div. 468.

54. Ga.—Kollock v. Webb, 39 S.E. 339, 113 Ga. 762.
Mich.—Anstays v. Anderson, 160 N.W. 475, 194 Mich. 1.
21 C.J. p 968 note 6.

Amount of recovery

Where a life tenant converts property of the estate into money and spends the money, the remainderman is entitled to recover the principal sum with simple interest from the date of the life tenant's death.—Anderson v. Northrop, 33 So. 419, 44 Fla. 472.

55. Ark.—Watson v. Wolff-Goldman Realty Co., 128 S.W. 581, 95 Ark. 18, Ann.Cas.1912A 540.

56. Mo.—Crews v. Crews, 240 S.W. 149.

Power to consume

(1) Where a life tenant with power to consume had funds of her own to use for living expenses, it will be presumed on an accounting by her executor that she expended the property in which she had the life estate before drawing on her own.—In re Richey's Estate, 96 A. 748, 251 Pa. 324.

(2) The trustee in bankruptcy of the remainderman is entitled to an accounting to the extent of requiring the life tenant to disclose the property received; but the life tenant need not account for the use and disposition of the property where he has been given a right to encroach on the principal and it is not claimed that he is disposing of the property in a manner other than is authorized.—Nelson v. Horsford, 208 N.W. 341, 201 Iowa 913, 45 A.L.R. 515.

§ 63. Sequestration and Ne Exeat

The issuance of the writs of sequestration and ne exeat against a life tenant of personal property at the instance of a remainderman is considered infra § 144.

Examine Pocket Parts for later cases.

§ 64. Receiver

A receiver may be appointed for the custody of property subject to a life estate whenever necessary to protect the future estates.

A receiver may be appointed for the custody of property subject to a life estate whenever necessary to protect the rights of the remainderman or reversioner,[57] as, for example, on the failure of a tenant to make necessary repairs,[58] or on the failure of a tenant to pay taxes[59] or other charges[60] on the property.

The cost of the receivership may be equally divided between the life tenant and remainderman.[61]

§ 65. Termination

a. Manner
b. Effect

a. Manner

(1) In general
(2) Death
(3) Limitation
(4) Surrender
(5) Forfeiture

(1) In General

A life estate may be terminated before death of the life tenant or the person by whose life the estate is measured, as by agreement of interested persons or by foreclosure of a prior mortgage on the property.

The life tenant and remaindermen may by agreement terminate the life estate.[62] Termination of a testamentary life estate may occur during the life tenancy if the will expressly or impliedly permits distribution of the estate prior to the death of the life tenant.[63]

In some jurisdictions by statute a life estate may be terminated by filing a petition similar to a petition in equity,[64] and giving notice to all persons interested in such life estate.[65]

Abandonment. It has been stated that abandonment is not usually mentioned as a method by which a life estate may be extinguished.[66]

Judicial sale. Where a life estate is created in property subject to a mortgage, a foreclosure sale of the property terminates the life estate.[67]

(2) Death

A life estate terminates on the death of the person on whose life the estate is limited, while an estate for the life of two persons terminates on the death of the survivor.

An estate for the tenant's own life terminates immediately on the death of the tenant.[68] An estate for the tenant's own life and for the life of another person does not terminate on the death of the tenant during the life of the other person but only on the death of the survivor of these two persons,[69] and an estate to two persons for and during their natural life continues during the life of each, and is terminated only at the death of the survivor.[70] An

57. U.S.—Buder v. Franz, C.C.A. Mo., 27 F.2d 101, 107, citing **Corpus Juris.**
21 C.J. p 968 note 25.

58. N.Y.—Sweeney v. Schoneberger, 186 N.Y.S. 707, 111 Misc. 718.
21 C.J. p 952 note 5.

59. N.Y.—Keeley v. Clark, 211 N.Y.S. 391, 125 Misc. 541.
Okl.—Helm v. Belvin, 232 P. 382, 384, 107 Okl. 214, quoting **Corpus Juris.**
Pa.—See Harrison v. Ramsey, 86 Pittsb.Leg.J. 613, 20 Erie Co. 270, 52 York Leg.Rec. 121.
21 C.J. p 956 note 74.

Failure to pay taxes, etc.
The appointment of a receiver is proper where the life tenant fails to pay taxes and amounts due under a property settlement, and permits the lands to become delinquent.—Kory v. Less, 22 S.W.2d 25, 180 Ark. 342.

Judgment and execution against tenant
Where a receiver has been appointed to secure payment of taxes, the remainderman, although entitled to a judgment for taxes paid by him, cannot have execution against the tenant as long as the receiver applies the income to payment of the judgment.—Keeley v. Clark, 211 N.Y.S. 391, 125 Misc. 541.

60. N.Y.—Sweeney v. Schoneberger, 186 N.Y.S. 707, 111 Misc. 718.

61. Ark.—Kory v. Less, 22 S.W.2d 25, 180 Ark. 342.

Items of expense
Part of the expenses incurred by the receiver for a survey, and for legal and clerical services, are properly charged against the life tenant. —Kory v. Less, 42 S.W.2d 764, 184 Ark. 473.

62. Cal.—Salles v. Loane, 266 P. 538, 204 Cal. 55.

63. N.J.—Breidenbach v. Breidenbach, 17 A.2d 596, 128 N.J.Eq. 558.

64. Cal.—In re Tracey, 69 P. 20, 136 Cal. 385.

65. Cal.—In re Tracey, supra.

Executor of life tenant
Cal.—In re Tracey, supra.

66. Kan.—Kimberlin v. Hicks, 94 P.2d 335, 339, 150 Kan. 449, citing **Corpus Juris.**

67. U.S.—Holmes v. Winler, C.C. Wash., 47 F. 257.
Pa.—German-American Title & Trust Co. v. Fidelity Ins., Trust & Safe-Deposit Co., 18 A. 1090, 132 Pa. 36, affirming 6 Pa.Co. 241.

68. Ga.—Battey v. Bayard, 123 S.E. 11, 158 Ga. 11.
Mo.—White v. Hoffman, 111 S.W.2d 100, 341 Mo. 1161.
21 C.J. p 969 note 44.
Right of life tenant's lessee to hold over see supra § 54.

Civil death
A life estate is not terminated by the civil death of a person sentenced to imprisonment.—Avery v. Everett, 36 Hun 6, affirmed 18 N.E. 148, 110 N.Y. 317, 6 Am.S.R. 368, 1 L.R.A. 264.

69. Me.—Flagg v. Badger, 58 Me. 258.

70. Me.—Kenney v. Wentworth, 77 Me. 203.

estate for a specified number of years or during the natural life of the tenant expires at the end of the specified number of years or, if the tenant dies during the term, on the death of the tenant.[71]

A usufruct is terminated by the death of the usufructuary,[72] but if given to two persons during their lives no part of the usufruct ceases until the death of both usufructuaries.[73]

Under the statutes in some jurisdictions, the court on the death of a life tenant may make a decree declaring the estate terminated;[74] but such statutes do not authorize the court to declare in whom the title is vested.[75]

Estate for life of another. An estate pur autre vie, that is, one limited on the life of some person other than the tenant to whom it is granted or devised, is terminated on the death of the cestui que vie.[76]

When search and inquiry for the lives on which a continuance of a life estate depends is required by the lease granting the estate, what is reasonable search and inquiry is a mixed question of law and fact, depending on the circumstances of the particular case.[77]

(3) Limitation

A life estate terminates on the happening of a contingency, or on the breach of a condition, specified in the instrument as limiting its continuance.

A life estate is terminated by the event of any contingency named in the instrument creating the estate as a limitation for its continuance.[78] For example, an estate to a widow for life or during widowhood is terminated by her subsequent marriage.[79]

A life estate is terminated by the breach of any covenant or condition which that instrument provides shall terminate the estate,[80] such as a valid covenant against alienation by the life tenant;[81] but a covenant that the grantee will not dispose of the premises under penalty of forfeiting the life estate is not broken by the conveyance of a term of years,[82] and a lease to a woman for life providing that it is only for herself to occupy for a residence and that the lease shall terminate on the violation of any of its covenants is not terminated by the woman marrying a man with children and taking them to live with her on the premises.[83] Further, it has been held that the failure of a life tenant, or his successor, to comply with provisions as to the occupancy and repair of the property, the payment of taxes, and maintenance of insurance does not terminate the life estate.[84]

(4) Surrender

A life estate may be terminated by surrender, which consists in yielding up the life estate to the owner of the next immediate estate in reversion or remainder.

A life estate may be terminated by a surrender,[85] which consists of a yielding up of the life estate to the person having the next immediate estate in reversion or remainder, the lesser estate thereby becoming merged in the greater by mutual agreement.[86] Thus a life estate may be surrendered

71. Ga.—Sutton v. Hiram Lodge, 10 S.E. 585, 88 Ga. 770, 6 L.R.A. 703.

72. La.—Declouet v. Borel, 15 La. Ann. 606.

73. La.—Arceneaux v. Bernard, 10 La. 246.

74. Cal.—In re Tracey, 69 P. 20, 136 Cal. 385.

75. Cal.—In re Tracey, supra.

76. Ga.—Coleman v. Thomasson, 127 S.E. 129, 160 Ga. 81.
Ky.—Brittain v. Campbell, 122 S.W.2d 740, 275 Ky. 783.
21 C.J. p 969 note 56.

Necessity for notice to quit

Notice to quit is not necessary where a tenant pur autre vie of realty holds over.—Livingston v. Tanner, 14 N.Y. 64; Sexton v. Davis, 1 Thomps. & C., N.Y., 97.

77. N.Y.—Clark v. Owens, 18 N.Y. 434—Clarke v. Cummings, 5 Barb. 339.

78. Mich.—Lariverre v. Rains, 70 N.W. 583, 585, 112 Mich. 276.
21 C.J. p 969 note 61.

Cessation of occupancy

An estate to one for life "providing he sees fit to use and occupy the same so long as a home and residence" is terminated by the tenant ceasing to so use and occupy the premises.—Lariverre v. Rains, supra.

Written notice as limitation

A grant reserving "a life lease from year to year" and providing that the right of the grantor to such possession and use must be requested in writing before a certain day in each year creates a life estate, and the condition is not a limitation for the determination of the estate but merely affects the right to possession during the year for which the notice is given.—Hurd v. Hurd, 20 N. W. 740, 64 Iowa 414, 416.

79. Ohio.—Burkhardt's Ex'x, 8 Ohio N.P., N.S., 526.
21 C.J. p 969 note 62.

80. Minn.—Barnes v. Gunter, 127 N. W. 398, 111 Minn. 383.
21 C.J. p 969 note 65.

81. Minn.—Barnes v. Gunter, supra.
N.Y.—Moore v. Pitts, 53 N.Y. 85.

82. N.Y.—Jackson v. Silvernail, 15 Johns. 278.

83. Conn.—Schroeder v. King, 38 Conn. 78.

84. N.Y.—In re Bingham's Estate, 17 N.Y.S.2d 981.

85. Ky.—Brooks v. Stuart, 37 S.W. 2d 56, 57, 238 Ky. 235, citing Corpus Juris.
21 C.J. p 970 note 70.

Release of income

A release by a life tenant of his right to the income from the property on payment to him of an annual sum for life does not convey his title, especially where the release is to become void if the payments are not made.—Mathewson v. Geer, 197 N.Y.S. 690, 120 Misc. 120, reversed on other grounds 205 N.Y.S. 451, 210 App.Div. 160.

86. Ark.—Rogers v. Ogburn, 172 S. W. 867, 116 Ark. 233.
Cal.—Triest & Co. v. Goldstone, 159 P. 715, 173 Cal. 240—Welcome v. Hess, 27 P. 369, 90 Cal. 507, 25 Am. S.R. 145.

by a lessee for life accepting a new lease or a grant in fee of the same premises,[87] or by an actual and continued change of possession by mutual consent of the parties.[88]

On the other hand, a life estate is not surrendered by an application for an order of sale of an estate in which the applicant has a life interest, for the purpose of investing the proceeds,[89] or by a life tenant conveying his interest to one of two remaindermen,[90] or by an agreement by the life tenant that the remainderman may enter on the land and build and make permanent improvements thereon.[91] Further, a life estate is not surrendered by the act of a life tenant in consenting to a distribution of a trust fund before his death,[92] or in renting a residence to strangers and living elsewhere, retaining only a furnished room for his own use.[93] In the case of a husband and wife who hold a life estate as tenants in common, the estate is not surrendered by the abandonment of the husband by the wife for a long period of time,[94] or by her remarriage.[95]

Necessity for writing. A statutory requirement that a surrender shall be in writing cannot be dispensed with by calling it a forfeiture and agreeing that it shall operate as such.[96]

(5) Forfeiture

At common law or under statutory regulations a life estate may be forfeited for alienation, for waste, for disclaimer or for nonpayment of taxes, although the mere breach of a covenant does not result in a forfeiture unless it is expressly so provided.

Mere breach of a covenant in the instrument which created the life estate will not work a forfeiture of the estate unless it is expressly so provided.[97] A forfeiture incurred by a life tenant may be waived by the person entitled to enforce it.[98]

The reversioner's right to enforce a forfeiture is merely an inchoate right until decreed by a court of competent jurisdiction.[99]

For alienation. A life tenant at common law forfeited his estate by making a conveyance in fee by way of feoffment, fine, or recovery,[1] or by suffering a common recovery,[2] but not by a conveyance by deed of bargain and sale, lease and release, or other conveyance under the statute of uses.[3]

At present an alienation in fee in most jurisdictions merely passes the estate of the grantor, see supra § 51, and does not work a forfeiture of the life estate,[4] particularly where it is so provided by statute.[5]

For waste. In the absence of a statutory provision authorizing the forfeiture of a life estate for waste, the tenant is liable, it has been held, only for the injury done to the estate, and the life estate is not forfeited.[6]

Ill.—Brewer v. National Union Bldg. Ass'n, 46 N.E. 752, 166 Ill. 221.
Ind.—Woodward v. Lindley, 43 Ind. 333.
Minn.—Dayton v. Craik, 1 N.W. 813, 36 Minn. 133.
Mo.—McCullough v. Carpenter, 225 S.W. 674—Churchill v. Lammers, 60 Mo App. 244.
N.J.—Heroy v. Reilly, 87 A. 112, 84 N.J.Law 671.
N.M.—Elliott v. Gentry, 60 P.2d 203, 40 N.M. 358.
N.Y.—Bedford v. Terhune, 30 N.Y. 453, 27 How.Pr. 422, 86 Am.D 394—Schieffelin v. Carpenter, 15 Wend. 400—Springstein v. Schermerhorn, 12 Johns. 357.
Tenn.—Fisher v. Edington, 12 Lea 189.
Utah.—Gappmayer v. Wilkenson, 177 P. 763, 53 Utah 236.
Va.—Scott v. Scott, 18 Gratt. 150, 59 Va. 150.
W.Va.—Parsons & Sweeney Oil Co. v. McCormick, 70 S.E. 371, 68 W.Va. 604.
Wis.—Bailey v. Wells, 8 Wis. 141, 76 Am.D. 233.

87. N.Y.—Livingston v. Potts, 16 Johns. 28.

88. Ill.—Curtis v. Hollenbeck, 92 Ill. App. 34.

89. Md.—Snook v. Munday, 45 A. 1004, 90 Md. 701.

90. Ark.—Rogers v. Ogburn, 172 S.W. 867, 116 Ark 233.
21 C.J. p 970 note 78.

91. S.C.—Hatcher v. Hatcher, 27 S.C.L. 429.

92. Tenn.—Ewin v. Lindsay, Ch., 58 S.W. 388.

93. N.Y.—Benham v. Boardman, 146 N.Y.S. 434.

94. Me.—Doherty v. Russell, 101 A. 305, 116 Me. 269.
21 C.J. p 970 note 79.

95. Me.—Doherty v. Russell, supra.

96. N.Y.—Allen v. Brown, 5 Lans. 280, 60 Barb. 39.

97. Mich.—Schuman v. Schuman, 185 N.W. 717, 217 Mich. 184.
21 C.J. p 970 note 69.

Subletting

A life estate is not subject to forfeiture for subletting, although the instrument creating the estate was in the form of a lease and prohibited subletting.—Hess v. Haas, 203 N.W. 471, 230 Mich. 646.

98. Ky.—Superior Oil Corporation v. Alcorn, 47 S.W.2d 973, 985, 242 Ky. 814, citing **Corpus Juris.**
21 C.J. p 970 note 88.

Consenting to act of waste

By consenting to an act of waste either before or after its commission a forfeiture may be waived.—Clemence v. Steere, 1 R.I. 272, 53 Am. D. 621.

99. N.Y.—In re Gaffers' Estate, 5 N.Y.S.2d 671, 679, 254 App.Div. 448, citing **Corpus Juris.**
Ohio.—Johnson v. Pettit, 1 Cinc.Super. 25.

1. Ala.—McMichael v. Craig, 16 So. 883, 105 Ala 382, 388.
21 C.J. p 970 note 90.

2. Pa.—Stump v. Findlay, 2 Rawle 168, 19 Am.D. 632.

3. Ala.—McMichael v. Craig, 16 So. 883, 105 Ala. 382.
21 C.J. p 970 note 92.

4. Ark.—Smith v. Maberry, 229 S.W. 718, 148 Ark. 216.
Neb.—Moffitt v. Reed, 246 N.W. 853, 124 Neb. 410.
21 C.J. p 970 note 94.

5. Ga.—Mathis v. Solomon, 4 S.E. 2d 24, 188 Ga. 311.
Ky.—Superior Oil Corporation v. Alcorn, 47 S.W.2d 973, 242 Ky. 814.
21 C.J. p 971 note 95.

6. Mich.—Schuman v. Schuman, 185 N.W. 717, 217 Mich. 184.
21 C.J. p 971 note 7.

However, under statutes in some of the states, a life tenant forfeits his estate by the commission of waste.[7] Such waste may, for example, consist in the cutting of timber,[8] particularly under a statute providing for a forfeiture if the damages exceed the value of the life estate,[9] or in the construction of a highway on agricultural land.[10] Statutes providing for forfeiture for waste have been construed to apply only to life estates which vested subsequent to the enactment of the statute;[11] further, they have been construed as applying only to voluntary waste,[12] the life tenant forfeiting only that portion of the estate on which the waste was committed.[13]

Equity will in some cases prevent a forfeiture where the injury is repaired by the life tenant before judgment of forfeiture is rendered.[14]

For disclaimer. The common-law rule that a life tenant forfeited his estate by any act in a court of record amounting to a disclaimer of the superior title, as by claiming in himself a larger estate or affirming the reversion to be in a stranger, has apparently never been adopted in this country.[15] At any rate, neither a parol disclaimer of rights of the reversioner or remainderman,[16] nor the claiming of a fee by the life tenant[17] in a court of equity,[18] nor the acceptance of a deed of the fee by a life tenant from a person whose title is hostile to that of the reversioner[19] constitutes a disclaimer within the operation of this rule.

For nonpayment of taxes. Under some statutes, where a life tenant permits the land to be sold for taxes and does not redeem the same within the period prescribed by statute, his estate may be forfeited.[20] However, the life estate is not forfeited under such statutes where a third person purchases the land at the tax sale for the life tenant,[21] or where the sale is invalid so that no valid deed can be made to the purchaser at the tax sale.[22]

A statute providing for the forfeiture of a life estate for permitting a sale for nonpayment of taxes by the life tenant does not apply to a sale for the nonpayment of a special assessment for a local improvement.[23]

b. Effect

On the termination of a life estate, rights claimed through the life tenant cease and the remainderman is entitled to possession.

On the determination of a life estate in any manner the remainderman has a right to immediate possession;[24] no interest passes to the life tenant's heirs[25] or to his personal representatives.[26] The termination of the life estate ordinarily brings to an end all rights under the life tenant's leases, see su-

7. Ga.—Grimm v. Grimm, 118 S.E. 91, 153 Ga. 655.
21 C.J. p 971 note 2.

In Louisiana, under the statutes, "the usufructuary who commits waste on the estate may be expelled with or without compensation according to the circumstances; and, if he wishes to prevent the re-entry of the owner, he must repair the waste without delay."—Winn v. Strickland, 91 So. 719, 151 La. 235.

In Ohio, prior to statutes providing for forfeiture for waste by life tenants generally, only life estates of dower and curtesy were subject to forfeiture for waste of a life tenant.—Kent v. Bentley, 10 Ohio Cir.Ct. 132, 6 Ohio Cir.Dec. 457.

8. N.Y.—McCartney v. Titsworth, 104 N.Y.S. 45, 119 App.Div. 547.

9. N.Y.—McCartney v. Titsworth, supra.
21 C.J. p 971 note 5–6.

10. Ga.—Chauncey v. Brown, 26 S.E. 763, 99 Ga. 766.

11. Ohio.—Kent v. Bentley, 10 Ohio Cir.Ct. 132, 6 Ohio Cir.Dec. 457.

12. Ky.—Smith v. Mattingly, 28 S.W. 503, 96 Ky. 228, 16 Ky.L. 418.

Act of God

Destruction of a building by act of God and through no fault of the life tenant is not a ground for forfeiture.—Crisp County Lumber Co. v. Bridges, 200 S.E. 777, 187 Ga. 484, 126 A.L.R. 333.

13. Ky.—Smith v. Mattingly, 28 S.W. 503, 96 Ky. 228, 16 Ky.L. 418.

14. Ohio.—Johnson v. Pettitt, 1 Cinc.Super. 25.

15. Ky.—Hart v. Soward, 14 B.Mon. 243.
21 C.J. p 971 note 19.

16. Ky.—Hart v. Soward, supra.
21 C.J. p 971 note 16.

17. Neb.—Bretschneider v. Farmers Nat. Bank of Madison, 268 N.W. 278, 131 Neb. 495.

18. Ky.—Robinson v. Miller, 2 B.Mon. 284, 292.
21 C.J. p 971 note 17.

19. Wis.—Rosseel v. Jarvis, 15 Wis. 571.

20. Ohio.—Leatherman v. Maytham, 33 N.E.2d 1022, 66 Ohio App. 344.
21 C.J. p 971 note 20.

Effect of redemption

A life tenant does not forfeit his life estate through failure to pay taxes, where redemptions were perfected before question was raised.—Hill v. Schultz, 27 S.W.2d 512, 181 Ark. 719.

In North Carolina—

(1) A remainderman's payment of taxes due by life tenant is not a condition antecedent to institution of his action for forfeiture.—Bryan v. Bryan, 174 S.E. 269, 206 N.C. 464.

(2) Forfeiture may occur notwithstanding tax sale certificate has not been foreclosed by court and land has not been sold by commissioner.—Sibley v. Townsend, 175 S.E. 107, 206 N.C. 648.

Corpus Juris cited in holding that no forfeiture resulted where there was no actual sale for taxes.—Crisp County Lumber Co. v. Bridges, 200 S.E. 777, 778, 187 Ga. 484, 126 A.L.R. 333.

21. Ark.—Mercantile Trust Co. v. Adams, 129 S.W. 1101, 95 Ark. 333.

22. Ark.—Kory v. Less, 22 S.W.2d 25, 180 Ark. 342—Champion v. Williams, 264 S.W. 972, 165 Ark. 328.
21 C.J. p 971 note 22.

23. U.S.—Anderson v. Messenger, Ohio, 158 F. 250, 85 C.C.A. 468.
21 C.J. p 971 note 24.

24. Ill.—Corney v. Corney, 257 Ill. App. 13.
21 C.J. p 972 note 28.

25. Ga.—Furr v. Burns, 53 S.E. 201, 124 Ga. 742.
21 C.J. p 972 note 29.

26. Ga.—Borum v. Gregory, 47 S.E. 192, 119 Ga. 766.

pra § 54, mortgages, see supra § 55, and conveyances, see supra § 51. The lien of a judgment against the life tenant is destroyed by the breach of a condition which forfeits the estate.[27]

§ 66. Adverse Possession

a. During life estate
b. After termination of life estate

a. During Life Estate

(1) In General
(2) Adverse possession by or against third persons

(1) In General

As a general rule the possession of a life tenant, or of persons claiming through him, is not adverse to the holders of the future estates, but the authorities are in some disagreement as to whether such possession may become adverse.

As a general rule, the possession of a life tenant or of one acquiring his interest is not adverse to the remainderman or reversioner.[28] Thus, except as the rule has been modified or abrogated by statute,[29] possession through or under a conveyance made by a tenant for life does not become adverse to the remainderman or reversioner until after the death of the life tenant, whether the conveyance purports to transfer only the life estate or the title in fee simple.[30] Further, where a person purchases the life estate of the life tenant and the interest of a cotenant in remainder, his possession during the life of the life tenant is not adverse to the other cotenants of the remainder.[31] The life tenant or his

27. N.Y.—Moore v. Pitts. 53 N.Y. 85.

28. Ala.—St. Clair Springs Hotel Co. v. Balcomb, 108 So. 858, 215 Ala. 12.
Cal.—Newport v. Hatton, 231 P. 987, 195 Cal. 132—Akley v. Bassett, 209 P. 576, 189 Cal. 625—In re Finley, 284 P. 941, 103 Cal.App. 694.
Ill.—Farmer v. Reed, 166 N.E. 498, 335 Ill. 156—Gibbs v. Gerdes, 126 N.E. 155, 291 Ill. 490.
Ky.—Superior Oil Corporation v. Alcorn, 47 S.W.2d 973, 983, 242 Ky. 814, citing **Corpus Juris**—Forman v. Gault, 32 S.W.2d 977, 236 Ky. 213—Kerr v. Watkins, 27 S.W.2d 679, 234 Ky. 104—Iseman v. Iseman, 10 S.W.2d 613, 226 Ky. 116—Fox v. Faulkner, 1 S.W.2d 1079, 222 Ky. 584.
Me.—Spencer v. Bouchard, 121 A. 164, 123 Me. 15.
Mich.—Lowry v. Lyle, 198 N.W. 245, 226 Mich. 676.
Mo.—Weller v. Searcy, 123 S.W.2d 73, 343 Mo. 768, transferred see 111 S.W.2d 206—Crismond v. Kendrick, 29 S.W.2d 1100, 325 Mo. 619—Wells v. Egger, 259 S.W. 437, 303 Mo. 26.
S.C.—Ellison v. Mattison, 98 S.E. 840, 112 S.C. 183.
Tenn.—Miller v. Gratz, 3 Tenn.App. 498.
Tex.—Wells v. Hilburn, 98 S.W.2d 177, 129 Tex. 11, reversing in part, Civ.App., Johns v. Hilburn, 64 S.W.2d 1009—Nussbaum v. Nussbaum, Com.App., 292 S.W. 189, reversing, Civ.App., 261 S.W. 512.
21 C.J. p 972 note 34, p 996 note 12.
Running of statute of limitations see infra § 99.

Character of estate in remainder
Until the death of the life tenant the possession of a life tenant or his grantee is not adverse as to the remainderman, whether the estate in remainder is vested or contingent, legal or equitable.—Lamar v. Pearre, 9 S.E. 1043, 82 Ga. 354, 14 Am.S.R. 168—Augusta v. Radcliffe, 66 Ga. 469.

Possession of life tenant as that of remaindermen
With respect to the question of adverse possession of a life tenant against the remaindermen, the possession of the life tenant is the possession of the remaindermen or their grantee.
Ill.—Cross v. Janes, 158 N.E. 694, 327 Ill. 538.
Ky.—Adkins v. Hackworth, 130 S.W. 2d 774, 279 Ky. 352.
Mo.—Falvey v. Hicks, 286 S.W. 385, 315 Mo. 442.
Wis.—Wanta v. Potrykus, 240 N.W. 183, 207 Wis. 282, modified on other grounds 241 N.W. 377, 207 Wis. 282.

One who is both administrator and life tenant holding under a decedent cannot assert possession as life tenant adverse to rights as administrator.—Thomas v. Couch, 156 S.E. 206, 171 Ga. 602.

Color of title
A sheriff's deed purporting to convey the fee to lands, as to part of which the judgment debtor owned a life estate only, did not constitute color of title, with respect to such part, as against remainderman.—Dunlavy v. Lowrie, 25 N.E.2d 67, 372 Ill. 622.

29. Iowa.—Nevelier v. Foster, 173 N.W. 879, 186 Iowa 1307.

30. U.S.—Interstate Realty & Investment Co. of Louisiana v. Bibb County, C.C.A.Ga., 293 F. 721.
Ala.—Montgomery v. Spears, 117 So. 753, 218 Ala. 160.
Ark.—Smith v. Maberry, 229 S.W. 718, 148 Ark. 216.
Ga.—Mathis v. Solomon, 4 S.E.2d 24, 188 Ga. 311—Pearson v. Fox, 145 S.E. 875, 167 Ga. 448—Seaboard Air-Line Ry. Co. v. Holliday, 140 S.E. 507, 165 Ga. 200.
Ky.—Lane v. Taylor, 152 S.W.2d 271, 287 Ky. 116—Stahr v. Mozley, 145 S.W.2d 40, 284 Ky. 552—Adkins v. Hackworth, 130 S.W.2d 774, 279 Ky. 352—Boggess v. Crail, 5 S.W.2d 906, 224 Ky. 97—Stevens v. Stevens, 297 S.W. 1104, 221 Ky. 123—Manning v. McGinnis, 279 S.W. 668, 212 Ky. 451.
Mich.—Felt v. Methodist Educational Advance, 232 N.W. 178, 251 Mich. 512.
Neb.—Maxwell v. Hamel, 292 N.W. 38.
N.J.—Content v. Dalton, 194 A. 286, 122 N.J.Eq. 425, affirming 190 A. 328, 121 N.J.Eq. 391.
N.Y.—Livingston v. New York, O. & W. Ry. Co., 184 N.Y.S. 665, 193 App.Div. 523.
N.C.—Howell v. Shaw, 112 S.E. 38, 183 N.C. 460.
Pa.—Ontelaunee Orchards v. Rothermel, 11 A.2d 543, 545, 139 Pa.Super. 44, quoting **Corpus Juris.**
S.C.—Floyd v. Page, 124 S.E. 1, 129 S.C. 301—Youmans v. Youmans, 105 S.E. 31, 115 S.C. 186.
Tenn.—Hall v. Gossum, 228 S.W. 1039, 144 Tenn. 1—Delk v. Williams, 10 Tenn.App. 246.
21 C.J. p 973 note 35.

Failure to establish remainder
The grantee of a life tenant may establish adverse possession as against an alleged remainderman where the latter fails to establish that he owned a remainder in fee.—Waddell v. Chapman, 238 S.W. 481, 292 Mo. 666.

31. Ky.—Murphy v. Boling, 117 S.W.2d 962, 273 Ky. 827, 117 A.L.R. 1373—Chapman v. Aldridge, 15 S.W.2d 454, 228 Ky. 538—Salyer's Guardian v. Keeton, 283 S.W. 1015, 214 Ky. 643.
21 C.J. p 974 note 36.

Acquisition of life estate by remainderman
Possession of one remainderman under execution sale against life tenant is not adverse to others, being

grantee is not presumed or deemed to hold adversely to the remainderman before the death of the life tenant;[32] on the contrary, the presumption is that the possession of the life tenant or one holding under or through him is not adverse.[33] These principles have their basis in the rule that, during the existence of the life estate, the remainderman or reversioner has no right to possession and consequently cannot bring an action to recover it.[34]

However, in some jurisdictions, statutes permit a remainderman to sue to quiet title during the existence of the life estate, and, according to some authorities, the effect of such statutes is to permit title by adverse possession to be acquired against a remainderman before the termination of the life estate;[35] but, according to other authorities, such statutes do not alter the general rule that adverse possession does not commence to run against a remainderman until the death of the life tenant.[36]

Change in character of possession. It is sometimes broadly stated that a life tenant cannot, by his declarations, acts, or claims of a greater or different estate, make it adverse so as to enable himself or those claiming under him to invoke the statute of limitations.[37] On the other hand, it has been asserted that the rule supposes an uninterrupted continuation of the relation of life tenant and remainderman, and that it does not apply where there has been an ouster and disseizin by the life tenant, or one claiming through him, under claim of right or color of title, followed by adverse possession for the statutory period.[38] Thus, according to some of the authorities, the possession of a life tenant may become hostile and adverse to that of the remainderman or reversioner when knowledge is clearly conveyed to him that the person in possession claims entire title in his own right, adverse and hostile to any claims or interest in the land by the remainderman or the reversioner or others claiming through either of them.[39]

In any event, the possession of one holding a life estate does not become adverse to the holder of the future estate unless the life estate is renounced,[40] and notice is clearly conveyed to the remaindermen that their property is being held or claimed adversely and not under the life tenancy.[41] The remain-

referable to life estate acquired under process.—Williams v. Williams, 202 N.W. 434, 200 Iowa 393, rehearing denied 204 N.W. 156.

32. Mo.—Souders v. Kitchens, 124 S.W.2d 1137, 344 Mo. 18.
Okl.—Lincoln v. Herndon, 285 P. 120, 141 Okl. 212.

33. Iowa.—Harris v. Brown, 169 N. W. 664, 184 Iowa 1288.
Wis.—Wanta v. Potrykus, 240 N.W. 183, 207 Wis. 282, modified on other grounds 241 N.W. 377, 207 Wis. 282.
21 C.J. p 975 note 45.

34. Ala.—Kyser v. McGlinn, 92 So. 13, 207 Ala. 82.
Cal.—Woman's Home & Foreign Missionary Soc. of Presbytery of Los Angeles v. Bank of America Nat. Trust & Savings Ass'n, 59 P.2d 1060, 15 Cal.App.2d 682.
Ga.—Mathis v. Solomon, 4 S.E.2d 24, 188 Ga. 311.
Ky.—Salyer's Guardian v. Keeton, 283 S.W. 1015, 214 Ky. 643.
Mass.—Isbell v. Greylock Mills, 120 N.E. 446, 231 Mass. 233.
Minn.—Ashbaugh v. Wright, 188 N. W. 157, 152 Minn. 57.
Mo.—Willis v. Robinson, 237 S.W. 1030, 291 Mo. 650—Case v. Sipes, 217 S.W. 306, 280 Mo. 110.
Ohio.—Stein v. White, 143 N.E. 124, 109 Ohio St. 578.
S.C.—Kirton v. Howard, 134 S.E. 859, 137 S.C. 11.
21 C.J. p 974 note 39.

35. Iowa.—Lane v. Travelers Ins. Co. of Hartford, Conn., 299 N.W. 553, 230 Iowa 973.

36. Neb.—Maxwell v. Hamel, 292 N.W. 38.

Duty of remainderman to bring action

Although a remainderman has the right under statute to bring an action to quiet title during the pendency of the life estate, he is not required to do so in order to protect his remainder.—Maxwell v. Hamel, Neb., 292 N.W. 38.

37. Cal.—Newport v. Hatton, 231 P. 937, 195 Cal. 132.
Ky.—Howard v. Mitchell, 105 S.W.2d 128, 268 Ky. 429—Superior Oil Corporation v. Alcorn, 47 S.W.2d 973, 242 Ky. 814.
Mo.—Crismond v. Kendrick, 29 S. W.2d 1100, 325 Mo. 619.
21 C.J. p 974 note 40, p 975 note 44, p 996 note 12.

Life tenant as original grantor

The fact that the life tenant was the original grantor does not enable him to make his possession adverse where he reserved no rights other than a life estate, and the statutes provide that no future interest can be defeated by act of the owner of the precedent interest.—Woman's Home & Foreign Missionary Soc. of Presbytery of Los Angeles v. Bank of America Nat. Trust & Savings Ass'n, 59 P.2d 1060, 15 Cal.App.2d 682.

38. Fla.—Commercial Bldg. Co. v. Parslow, 112 So. 378, 93 Fla. 143.
21 C.J. p 974 note 41.

39. Fla.—Fairlie v. Scott, 102 So. 247, 248, 88 Fla. 229, citing Corpus Juris.

S.C.—Bradley v. Calhoun, 117 S.E. 811, 125 S.C. 70.
Tex.—Crump v. Andress, Com.App., 278 S.W. 422, reversing, Civ.App., 265 S.W. 1074.
21 C.J. p 974 note 43.

40. Ky.—Forman v. Gault, 32 S.W. 2d 977, 236 Ky. 213.

What constitutes renunciation

(1) Renunciation of life estate, to enable life tenant to assert adverse claim, must be unequivocal act by him which destroys his claim as life tenant and which accelerates and matures the remainder.—Superior Oil Corporation v. Alcorn, 47 S.W.2d 973, 242 Ky. 814.

(2) Where one who devises land for life dies before acquiring the legal title and the life tenant afterward obtains such title, his possession thereunder is a renunciation of his holding as life tenant, and hence is adverse to the remainderman.—Commonwealth v. Clarke, 83 S.W. 100, 119 Ky. 85, 26 Ky.L. 993, 9 L.R.A.,N.S., 750.

41. Ky.—Lake v. Ford, 52 S.W.2d 724, 244 Ky. 803—Forman v. Gault, 32 S.W.2d 977, 236 Ky. 213—Russell v. Tipton, 235 S.W. 763, 193 Ky. 305.
Neb.—Bretschneider v. Farmers Nat. Bank of Madison, 268 N.W. 278, 131 Neb. 495.
N.J.—Content v. Dalton, 194 A. 286, 122 N.J.Eq. 425, affirming 190 A. 328, 121 N.J.Eq. 391.
Wis.—Wanta v. Potrykus, 240 N.W. 183, 207 Wis. 282, modified on oth-

derman is not charged with the duty of keeping his estate under constant observation;[42] he is not bound to notice a possession taken and continued by virtue of a conveyance from the life tenant.[43]

In order for a purchaser from a life tenant to convert his possession into an adverse holding against the remainderman, he must do much more than would be required to establish an adverse holding by a stranger;[44] such person cannot during the life of the life tenant claim adverse possession where no attempt is made to convey the remainder interest to him[45] or where he knew that he was receiving only a life estate.[46]

Adverse possession as between life tenants. One of several life tenants cannot ordinarily acquire title by limitation as against the others.[47]

(2) Adverse Possession by or against Third Persons

During the existence of the life estate, a stranger may establish adverse possession against the life tenant, but not, as a rule, against the remainderman. A life tenant can hold adversely as against third persons.

A stranger to the title may, during the life of the life tenant, establish an adverse possession as against the life tenant and acquire title thereby to the life estate.[48] Where the owner of a life estate has lost it by the adverse possession of another, the life estate vests in such other and is not defeated until the death of the life tenant; and the remainderman or reversioner has no right to recover the land from such disseizor until such time.[49] The life tenant cannot thereafter confer any greater right on the remainderman by any act on his part, such as a surrender or conveyance.[50]

Adverse possession against remaindermen or reversioners. As a general rule a stranger cannot during the existence of the life estate establish an adverse possession as against remaindermen or reversioners so as to bar their interest;[51] but it

er grounds 241 N.W. 377, 207 Wis. 282.
21 C.J. p 974 note 43 [b], [c].

Life tenant's secret intention is insufficient notice of adverse claim to remainderman.—Superior Oil Corporation v. Alcorn, 47 S.W.2d 973, 242 Ky. 814.

Positive act, etc., as essential
"Adverse possession does not run in favor of a life tenant against the remainderman without some clear positive overt act, or express notice."—Trimble v. Gordon, 109 S.W. 2d 1217, 1219, 270 Ky. 476.

Ordinary acts of ownership
The life tenant's holding is not adverse where he does nothing more than engage in ordinary acts of ownership and rights of possession, control, and management.—Trimble v. Gordon, supra.

Conveyance as notice
Life tenant's conveyance purporting to pass fee simple was not notice to remaindermen of grantee's adverse claim.—Rae v. Baker, Tex. Civ.App., 38 S.W.2d 366, error refused.

Disclosure of basis of claim
The life tenant must disclose to the remainderman the basis of his adverse claim.—Superior Oil Corporation v. Alcorn, 47 S.W.2d 973, 242 Ky. 814.

Notice as to part of land
Adverse possession by life tenant's grantee of part of the land will not inure to the benefit of a grantee of a different part so as to constitute notice that all the land is being held adversely to the remainderman.—Gibbs v. Barkley, Tex.Com.App., 242 S.W. 462, reversing Barkley v. Gibbs, Civ.App., 233 S.W. 134.

Purchase by life tenant after foreclosure
The purchase of the property by the life tenant from one who had purchased it at a mortgage foreclosure sale, and the continued occupancy of the premises, the recordation of the deed and the improvement of the property by the life tenant, are some evidence of notice to the remaindermen of the nature of his claim.—Miller v. Marriner, 121 S.E. 770, 187 N.C. 449.

42. Neb.—Anderson v. Miller, 172 N. W. 688, 103 Neb. 549.

43. Pa.—Ontelaunee Orchards v. Rothermel, 11 A.2d 543, 139 Pa. Super. 44.

44. Ky.—Bates v. Adams, 206 S.W. 163, 182 Ky. 100.

Special equity in favor of purchaser
The life estate may be considered terminated as though the life tenant had died where there is some special independent equity in favor of a purchaser from the life tenant.—Commercial Bldg. Co. v. Parslow, 112 So. 378, 93 Fla. 143.

45. Ky.—Boggess v. Crail, 5 S.W.2d 906, 224 Ky. 97.

Failure to convey vested remainder
The interest of a vested remainderman is not barred by adverse possession where the one asserting the adverse claim was a grantee only of the life estate and the interest of a contingent remainderman.—Boggess v. Crail, supra.

Color of title
A quitclaim deed from one obtaining a void decree quieting title against a remainderman is sufficient to give the grantee color of title even though the purchaser knew of the possibility of a future hostile claim.—Nevelier v. Foster, 173 N.W. 879, 186 Iowa 1307.

46. Iowa.—Sherbonday v. Surring, 188 N.W. 831, 194 Iowa 203.

47. Miss.—Ford v. Smith, 137 So. 482, 162 Miss. 138.
Adverse possession by tenants in common see the C.J.S. title Tenancy in Common §§ 37–42, also 62 C. J. p 434 note 8–p 445 note 82.

Nature of possession
Possession by one life tenant constitutes possession by all.—Ford v. Smith, 137 So. 482, 162 Miss. 138.

48. Mo.—Falvey v. Hicks, 286 S.W. 385, 389, 315 Mo. 442, quoting **Corpus Juris.**
21 C.J. p 975 note 49.

49. U.S.—Deguire v. St. Joseph Lead Co., C.C.Mo., 37 F. 663.
21 C.J. p 975 note 54.

50. N.Y.—Baker v. Oakwood, 25 N E. 312, 123 N.Y. 16, 10 L.R.A. 387.
Pa.—Moore v. Luce, 29 Pa. 260, 72 Am.D. 629.

51. Ga.—Seaboard Air-Line Ry. Co. v. Holliday, 140 S.E. 507, 165 Ga. 200.
Mass.—Daley v. Daley, 14 N.E.2d 113, 300 Mass. 17.
Mo.—Falvey v. Hicks, 286 S.W. 385, 389, 315 Mo. 442, quoting **Corpus Juris.**
N.C.—Nash v. Shute, 114 S.E. 470, 184 N.C. 383.
S.C.—Bolt v. Sullivan, 174 S.E. 491, 173 S.C. 24.
21 C.J. p 975 note 50.

Forfeiture by life tenant
If the life tenant incurs a forfeiture, the remainderman is not required to treat the life estate as merged in the remainder and enter immediately, but may wait until aft-

seems, according to some authorities, that a contingent remainder may be defeated by the adverse possession of a stranger during the existence of the life estate.[52] At any rate, the fact that possession is adverse to the life tenant does not per se make it adverse to the remainderman;[53] and asserting a claim by adverse possession to a life estate only cannot perfect title to a larger estate either in himself or in those claiming through him.[54]

Where an adverse holding has been established against the owner of the fee simple, the subsequent creation of a life estate does not prevent the disseizor from acquiring title by continued adverse possession during the life of the life tenant as against the remainderman or reversioner.[55]

Adverse possession against third persons. The possession of the life tenant may be adverse as against third persons so as to create a valid title by adverse possession in favor of the life tenant and the remainderman or reversioner.[56]

b. After Termination of Life Estate

After the death of the life tenant, his grantee and other persons may hold adversely against the remainderman or reversioner, although it has been held that some positive act of disclaimer is necessary on the part of the grantee.

After the determination of the life estate, the possession of a person who had disseized the life tenant, or of a grantee of the life tenant holding under a deed conveying the fee simple, is deemed adverse to the remainderman or reversioner,[57] and if after the termination of the life estate the remainderman or reversioner permits the heirs or representatives of the life tenant to retain possession under claim of title, such possession will be adverse so as to bar in time the title of the remainderman.[58] However, it has been held that the possession of grantees of a life tenant does not become hostile to the title of the remaindermen after the death of the life tenant until some positive act of disclaimer is conveyed to the remaindermen,[59] and that a hostile claim of adverse possession cannot be based simply on continued possession by such grantees.[60] The possession of a grantee of a life tenant does not become adverse on the death of the life tenant where the deed to him purports to convey only a life estate.[61]

§ 67. Actions by or against Life Tenants

A life tenant may sue for injuries to his own es-

er the death of the life tenant without being affected by any possession prior to the death of the life tenant.—Moore v. Luce, 29 Pa. 260, 72 Am.D. 629.

Lands in excess of life estate

Where a widow by failing to make timely claim had lost her right to a life estate in lands exceeding the homestead, third persons could hold such excess adversely to the remaindermen before the widow's death.—Falvey v. Hicks, 286 S.W. 385, 315 Mo. 442.

52. Ala.—Gindrat v. Western R. Co., 11 So. 372, 96 Ala. 162, 19 L.R.A. 839.
Pa.—Baldridge v. McFarland, 26 Pa. 338.

53. N.J.—Content v. Dalton, 194 A. 286, 122 N.J.Eq. 425, affirming 190 A. 328, 121 N.J.Eq. 391.
Wis.—Blodgett v. Davenport, 263 N.W. 629, 219 Wis. 596.

54. Tex.—Nussbaum v. Nussbaum, Com.App., 292 S.W. 189, reversing, Civ.App., 261 S.W. 512.

55. Mo.—Hubbard v. Swofford Bros. Dry Goods Co., 108 S.W. 15, 209 Mo. 495, 123 Am.S.R. 488.
S.C. Sutton v. Clark, 38 S.E. 150, 59 S.C. 440, 82 Am.S.R. 848.

56. U.S.—Combs v. Haley Coal Co., C.C.A.Ky., 276 F. 342.
Ala.—Ray v. Farrow, 100 So. 868, 211 Ala. 445.
21 C.J. p 975 note 48.

Recognition of remainderman's claim

Possession by one claiming a life estate, with the recognition of the claim of the remainderman and with his consent, may ripen into title by prescription as against all others.—Munro v. Whitlow, 201 P. 964, 54 Cal.App. 448.

57. Cal.—Akley v. Barrett, 209 P. 576, 189 Cal. 625—Akley v. Barrett, 228 P. 1057, 68 Cal.App. 270.
Pa.—Ontelaunee Orchards v. Rothermel, 11 A.2d 543, 545, 139 Pa.Super. 44, quoting Corpus Juris.
Tex.—Griffin v. Reynolds, Civ.App., 107 S.W.2d 634, 636, citing Corpus Juris.
21 C.J. p 975 note 57.

58. Ala.—Childs v. Floyd, 70 So. 121, 194 Ala. 651.
Pa.—Ontelaunee Orchards v. Rothermel, 11 A.2d 543, 139 Pa.Super. 44.
21 C.J. p 976 note 58.

59. Iowa.—Gates v. Colfax Northern R. Co., 159 N.W. 456, 177 Iowa 690.
N.Y.—Green v. Horn, 101 N.E. 430, 207 N.Y. 489.

Purchase of life estate and interest in fee

The purchasers of the interest of an individual who owned a life estate in all the land and the fee to a part thereof did not, on the life tenant's death, commence to hold adversely to the remainderman where they did not affirmatively apprise the remainderman that they claimed adversely; in such case on the death of the life tenant the purchasers became tenants in common with the remainderman and the presumption obtained that the possession of one was possession of all.—Dunlavy v. Lowrie, 25 N.E.2d 67, 372 Ill. 622.

Express or constructive notice

(1) Express notice has been held to be necessary.—Gates v. Colfax Northern R. Co., 159 N.W. 456, 177 Iowa 690—21 C.J. p 976 note 59 [a].

(2) On the other hand, it has been held that even if notice of an adverse holding is necessary, such notice may be constructive and will be presumed to have been brought home to remaindermen when adverse occupancy and claim of title are long continued, open, notorious, exclusive, and inconsistent with existence of title in others, except occupant.—Griffin v. Reynolds, Tex.Civ.App., 107 S.W.2d 634, error dismissed.

60. Miss.—Thompson v. Kinard, 121 So. 109, 153 Miss. 398.

61. Iowa.—Van Dusen v. Sharrar, 173 N.W. 97, 186 Iowa 1082.

Sufficiency of deed

A life tenant's deed to a school district, "its successors and assigns forever," is sufficient to support a claim of adverse possession commencing on the death of the life tenant.—Ontelaunee Orchards v.

tate, but generally he may not sue for injuries to the inheritance.

A life tenant may sue for any injury occasioned to his possession and right of enjoyment.[62] Thus he may sue for injuries occasioned by the construction[63] or operation[64] of a railroad on the land, or by the opening of a street through his premises without condemnation and compensation,[65] or by interference with an easement right to an alley,[66] or by the maintenance of a nuisance on adjoining land,[67] or by waste committed by an adverse claimant.[68] He may maintain an action of trespass quare clausum fregit and recover such actual damages as he sustains to his possession,[69] or an action of ejectment,[70] or, in a proper case, a suit for partition.[71] A life tenant may maintain an action for depreciation in rental value and time and money spent in repairs made necessary by the inadequacy of a city sewer.[72]

On the other hand, a life tenant cannot, as a general rule, maintain an action for any injury to the inheritance.[73] Thus it has been held that a life tenant may not maintain an action for damage caused by a defective street drain[74] or by a change in street grade,[75] nor may he maintain an action of trover,[76] or of trespass de bonis[77] for the cutting of timber on the land,[78] unless in such cases he has previously satisfied the remainderman or reversioner.[79] However, it has also been held that a life tenant may recover for injuries caused by the negligence of a stranger, including not only injuries to the life estate but also to the remainder.[80]

Where the land is in possession of the remainderman, who cultivates it as a tenant of the owner of the life estate, paying no rents except the payment of the taxes, the life tenant cannot maintain an action for injury to the crops.[81]

Separate rights of life tenant and remainderman. Although both a life tenant and remainderman can sue for damages where a tort on realty affects each estate, their rights are separate and independent.[82] The life tenant and remaindermen may recover in separate actions for their damages for injuries caused by the construction of a railway cut and grade through the premises and in front of the residence, the life tenant for loss to present enjoyment and the remaindermen for permanent injury to the property.[83]

Parties. A life tenant may maintain an action for an injury to his own estate without making the remaindermen parties,[84] and, indeed, if the injury complained of is one to the life estate only, it is not proper to join the remaindermen as parties plaintiff.[85] However, all persons whose rights or

Rothermel, 11 A.2d 543, 139 Pa.Super. 44.

62. W.Va.—Swick v. West Virginia Coal & Coke Co., 7 S.E.2d 697—Shaw v. Monongahela Ry. Co., 130 S.E. 461, 100 W.Va. 368.
21 C.J. p 976 note 60.

Diminution in value
Life tenant may sue stranger for diminution in value of life estate.—Cox v. Corrigan-McKinney Steel Co., 58 S.W.2d 625, 248 Ky. 426.

63. Ark.—Bentonville R. Co. v. Baker, 45 Ark. 252.
Ind.—Polk v. Haworth, 95 N.E. 332, 48 Ind.A. 32

64. N.Y.—Goggin v. Manhattan R. Co., 104 N.Y.S. 548, 54 Misc. 472, modified on other grounds 109 N.Y.S. 83, 124 App.Div. 644—Muller v. Manhattan R. Co., 102 N.Y.S. 454, 53 Misc. 133, affirmed 108 N.Y.S. 852, 124 App.Div. 295.

65. W.Va.—Jarvis v. Grafton, 30 S.E. 178, 44 W.Va. 453.

66. Ala.—Beard v. Hicks, 50 So. 232, 235, 163 Ala. 329—Walker v. Clifford, 29 So. 588, 128 Ala. 67, 86 Am.S.R. 74.

67. Neb.—Lowe v. Prospect Hill Cemetery Assoc., 78 N.W. 488, 494, 58 Neb. 94, 46 L.R.A. 237.

68. Mo.—Whitworth v. Barnes, 153 S.W. 538, 168 Mo.App. 269.

69. Ala.—C. W. Zimmerman Mfg. Co. v. Daffin, 42 So. 858, 862, 149 Ala. 380, 123 Am.S.R. 58, 9 L.R.A., N.S., 663.

Nominal damages
A life tenant may recover nominal damages for wrongful entry into the land although he suffers no substantial damage.—Lee v. Lee, 104 S.E. 76, 180 N.C. 86.

70. Ala.—Towns v. Towns, 25 So. 715, 121 Ala. 422.
21 C.J. p 976 note 68.

71. Tex.—Skaggs v Deskin, Civ. App., 66 S.W. 793, 795.

72. Ky.—Louisville v. Kramer, 151 S.W. 379, 151 Ky. 117, reversed on other grounds 152 S.W. 544, 151 Ky. 577.

73. W.Va.—Swick v. West Virginia Coal & Coke Co., 7 S.E.2d 697.
21 C.J. p 976 note 70.

74. Pa.—Witzel's Estate, 26 Pa.Co. 58.
W.Va.—Jordan v. Benwood, 26 S.E. 266, 42 W.Va. 312, 57 Am.S.R. 859, 36 L.R.A. 519.

75. Ky.—Alford v. Stanford, 13 Ky. L. 876.

76. Ala.—C. W. Zimmerman Mfg. Co. v. Daffin, 42 So. 858, 149 Ala. 380, 123 Am.S.R. 58, 9 L.R.A., N.S., 663.

77. Ala.—C. W. Zimmerman Mfg. Co. v. Daffin, supra.

78. Ala.—Daffin v. C. W. Zimmerman Mfg. Co., 48 So. 109, 158 Ala. 637—C. W. Zimmerman Mfg. Co. v. Daffin, 42 So. 858, 149 Ala. 380, 123 Am.S.R. 58, 9 L.R.A.,N.S., 663.

79. N.H.—Wood v. Griffin, 46 N.H. 230.

80. N.Y.—Rogers v. Atlantic, G. & P. Co., 107 N.E. 661, 213 N.Y. 246, 259, L.R.A.1916A 787, Ann.Cas. 1916C 877.
21 C.J. p 977 note 77.

Effect on rights of remainderman
The allowance of a suit at the instance of the life tenant bars a recovery by the remainderman whose rights in the amount so recovered will be protected by the court.—Rogers v. Atlantic, G. & P. Co., supra—21 C.J. p 977 note 79.

81. Ga.—Brown v. Woodliff, 15 S.E. 491, 89 Ga. 413.

82. W.Va.—Swick v. West Virginia Coal & Coke Co., 7 S.E.2d 697.
21 C.J. p 976 note 60.

83. Ind.—Polk v. Haworth, 95 N.E. 332, 48 Ind.App. 32.

84. W.Va.—Shaw v. Monongahela Ry. Co., 130 S.E. 461, 100 W.Va. 368.
21 C.J. p 977 note 87.

85. Ohio.—Neuhs v. Grasselli Chemical Co., 8 Ohio S. & C. P. 203, 5 Ohio N.P. 359.

interests are directly involved in an action by a life tenant must be joined as parties.[86]

As a general rule, the life tenant may join with the remainderman in an action to recover for the injury to the interests of both.[87] It has been held to be proper for both to join in an action of ejectment,[88] or a statutory action of trespass on the case on account of illegal mining,[89] or an action to recover for the destruction of property by negligence,[90] or an action for damages resulting from the construction of a railroad on the land.[91]

Where the action is to recover the proceeds of a sale of the entire estate, all of the persons interested in the fund must be made parties,[92] although as to remaindermen it is sufficient that the holder of the first vested estate of inheritance be included.[93]

A life tenant who seeks to compel the remainderman to pay a proportionate part of an assessment for a permanent improvement must make the city a party.[94] When an action is brought by the life tenant to recover his share of the fund assessed as damages for the taking of property by eminent domain, the remainderman is entitled as a matter of right to intervene.[95]

Pleadings; evidence. In proceedings by or against the holder of a life estate the pleadings[96] and evidence[97] must be sufficient to justify the relief sought.

A life tenant who seeks to compel a remainderman to pay a part of an assessment for a permanent public improvement by enforcing the lien against the remainderman by way of equitable contribution or subrogation must aver and prove that he has discharged the lien for the cost.[98]

Questions of law and fact. General rules relating to questions of law and fact ordinarily apply in actions by or against life tenants.[99]

86. Ky.—Walden v. Smith, 201 S.W. 302, 179 Ky. 829.
21 C.J. p 977 note 93.

87. N.C.—Boney v. Atlantic Coast Line R. Co., 95 S.E. 560, 175 N.C. 354.
21 C.J. p 977 note 88.
However, it has been held that where a tort on realty affects both the life estate and remainderman they cannot unite in an action to recover damages for the injury.—Shaw v. Monongahela Ry. Co., 130 S.E. 461, 100 W.Va. 368.

88. Wis.—Beck v. Ashland Cigar & Tobacco Co., 130 N.W. 464, 466, 146 Wis. 324, 329, Ann.Cas.1912C 239.

89. Pa.—McIntire v. Westmoreland Coal Co., 11 A. 808, 118 Pa. 108.
Va.—Shinn v. O'Gara Coal Min. Co., 78 S.E. 104, 105, 72 W.Va. 326.

90. Ill.—Bacon v. Peoria & E. R. Co., 162 Ill.App. 162.
N.C.—Boney v. Atlantic Coast Line R. Co., 95 S.E. 560, 175 N.C. 354.

91. Ark.—Bentonville R. Co. v. Baker, 45 Ark. 252.
21 C.J. p 977 note 91.

92. U.S.—Cuthbert v. U. S., 20 Ct.Cl. 172.
Testator's heirs
Where a will devised a remainder over on the death of the life tenant without issue, the testator's heirs are not necessary parties in an action by the life tenant to compel a purchaser of the land to accept a deed and to pay the purchase price.—Lancaster v. Lancaster, 184 S.E. 527, 209 N.C. 673.

93. D.C.—Morse v. U. S., 41 App.D.C. 374.
Representation by life tenant and vested remainderman
All interests in a suit to recover the proceeds of a sale of land may be represented by the life tenant and vested remainderman, even though the remainder may open and let in others, and may be devested by his death and the marriage of the life tenant.—Morse v. U. S., supra.
Mortgage foreclosure
Where the proceeds of the sale have been invested in a mortgage, and parties having the same interests as unborn heirs were before the court in the proceedings leading to the sale, the foreclosure of the mortgage is not prevented by the possible birth of new claimants.—Miller v. McLaughlin, 104 N.W. 777, 141 Mich. 425.

94. Ala.—Troy v. Protestant Episcopal Church, 56 So. 982, 174 Ala. 380, Ann.Cas.1914B 815.

95. N.C.—Jones v. Asheville, 21 S.E. 691, 116 N.C. 817.

96. **Bill for forfeiture of life estate**
Bill alleging that defendant, because of failure to comply with the conditions of the life estate, forfeited his interest, and praying that the conditional life estate be forfeited, is, in effect, a "bill for forfeiture."—Mickens v. Ebbo, 237 N.W. 377, 255 Mich. 139.
Complaint held insufficient to show defendant's participation in alleged fraudulent conduct of remainderman in inducing life tenant to convey her interest.—Belknap v. Caldwell, 33 Ind. 14.

97. **Evidence held sufficient**
(1) To entitle life tenant to possession of the property.—Campbell v. McFarlane, Tex.Civ.App., 233 S.W. 110, error refused.
(2) To support conclusion that life tenant knew of defect in her title at time she improved property.—Graves v. Bean, 141 S.W.2d 50, 200 Ark. 863.
(3) To sustain finding that life estate was not surrendered.—Chanoweth v. Bullitt, 6 S.W.2d 1061, 224 Ky. 698.
(4) To sustain findings that persons claiming reimbursement for improvements had no knowledge of remainderman's title.—O'Donnell v. Mathews, 284 S.W. 204, 221 Mo.App. 657.
(5) Other cases.—In re Strause's Estate, 75 Pa.Super.Ct. 276.
Evidence held insufficient
(1) To show that certain bank deposits represented money received by the life tenant as the proceeds of the sale of realty.—In re Eddy's Adm'r, 236 N.Y.S. 275, 134 Misc. 511.
(2) To sustain finding that defendant had use of life estate for specified period under a contract to pay an annual sum to the life tenant.—Truesdale v. Streight, 198 N.W. 620, 183 Wis. 638.
(3) Other cases.—Jukes v. Hull, 106 S.E. 96, 151 Ga. 156.

98. Ala.—Troy v. Protestant Episcopal Church, 56 So. 982, 174 Ala. 380, Ann.Cas.1914B 815.

99. **Questions held for jury**
(1) Payment of taxes by remainderman.—Houchin v. Hobbs, Mo.App., 34 S.W.2d 167.
(2) Ratification by remainderman of life tenant's contract.—Koons v. Harding, 3 Pa.Dist. & Co. 741, 26 Dauph.Co. 193.

Damages. A life tenant can recover damages only for the injury done to the life estate,[1] which, in an action of trespass, consists of the injury to the life tenant's possessory interests.[2] In the case of the destruction of a growing crop, the life tenant is entitled to recover the amount of the entire injury.[3] In every case the measure of damages is the amount necessary to make good the actual loss sustained by the life tenant.[4]

Where damages have been awarded or recovered as an entirety they may be apportioned equitably between the life tenant and the other parties in interest.[5] If a dispute arises between the parties, the money may be paid into court,[6] or may be paid out to the claimant on giving such security as is deemed necessary by the court.[7]

V. REMAINDERS

§ 68. Definition, Nature and Incidents

A remainder is a remnant of an estate in land, depending on a particular prior estate created at the same time and by the same instrument, and limited to arise immediately on the determination of the prior estate.

At common law, and under statute, a remainder is a remnant of an estate in land, depending on a particular prior estate,[8] created at the same time and by the same instrument and limited to arise immediately on the determination of the prior estate[9] and not in abridgment of it.[10]

A remainderman always takes by purchase, and never by descent;[11] and it is not essential to the validity of remainders that they be equally divided among the remaindermen.[12] Among the incidents of the ownership of real property pertinent to a consideration of remainders are: (1) The estate (the quantum of the right, title and interest) therein. (2) The enjoyment and possession thereof.[13]

In some jurisdictions estates in remainder are not recognized,[14] and, as is noticed in § 84 infra, common-law remainders have been abolished by statute in other jurisdictions.

§ 69. Vested Remainders

A vested remainder is one where a present interest passes to a certain and definite person, to be enjoyed in future; and it is distinguished from a contingent remainder in that it has a present capacity to take effect in possession immediately on the determination of the particular estate.

Unless otherwise defined by statute, a vested remainder is one where a present interest passes to a certain and definite person, to be enjoyed in futuro.[15] Vested remainders are also sometimes called

1. Vt.—Dernier v. Rutland Ry., Light & Power Co., 110 A. 4, 94 Vt. 187.
21 C.J. p 978 note 99.

Life estate in term for years

Where there is a life estate in a term for ninety-nine years, and the life tenant is also the owner of the reversion after the expiration of the term, he may in a single action of trespass by means of a per quod recover not only for the trespass but also the value of the property destroyed.—Burnett v. Thompson, 51 N.C. 210, 52 N.C. 407.

2. Md.—Zimmerman v. Shreeve, 59 Md. 357.

3. Ind.—Ohio & M. R. Co. v. Trapp, 30 N.E. 812, 4 Ind.App. 69.

4. Ky.—Louisville v. Kramer, 151 S.W. 379, 151 Ky. 117.
21 C.J. p 978 note 4.

5. Pa.—Pittsburgh, V. & C. R. Co. v. Bentley, 88 Pa. 178.
21 C.J. p 978 note 6.
Apportionment of award for property taken by eminent domain see Eminent Domain § 199.

6. Pa.—Crangle v. Harrisburg, 1 Pa. 132.

7. Pa.—Crangle v. Harrisburg, supra.

8. N.Y.—In re Mawhinney's Will, 261 N.Y.S. 234, 146 Misc. 30, affirmed In re Mawhinney, 264 N.Y.S. 984, 239 App.Div. 874.
21 C.J. p 995 note 73.
Remainders created by:
Deed see Deeds §§ 113, 114.
Will see the C.J.S. title Wills §§ 909–973, also 69 C.J. p 578, note 85–p 657 note 99.

9. Ark.—Wallace v. Wallace, 13 S.W.2d 810, 179 Ark. 30.
Fla.—Commercial Bldg. Co. v. Parslow, 112 So. 378, 93 Fla. 143.
N.C.—Carolina Power Co. v. Haywood, 119 S.E. 500, 186 N.C. 313.
Ohio.—Simpson v. Welsh, 184 N.E. 242, 44 Ohio App. 115.

10. Ill.—Raritan State Bank v. Huston, 161 N.E. 141, 329 Ill. 604—Morris v. Phillips, 122 N.E. 831, 287 Ill. 633.
N.J.—Byrne v. Byrne, 195 A. 848, 123 N.J.Eq. 6, affirmed 1 A.2d 464, 124 N.J.Eq. 273.
21 C.J. p 978 note 14.

Other definitions

Ky.—Weller v. Dinwiddie, 248 S.W. 874, 198 Ky. 360.
21 C.J. p 978 note 14.

Remainder is not estate in present possession but one which is to be reduced to possession in the future.
D.C.—Moore v. Boyd, 39 F.2d 502, 59 App.D.C. 252.
Ky.—Foster v. Foster, 225 S.W. 48, 189 Ky. 370.

"Remainder" is relative term, and implies a prior disposition of some part of the estate; but the particular estate and the remainder constitute one whole, are carved out of the same inheritance, and both may vest at the same time and subsist together.—Baley v. Strahan, 145 N.E. 359, 314 Ill. 213.

11. Colo.—Barnard v. Moore, 207 P. 332, 71 Colo. 401.
Or.—Hawkins & Roberts v. Jerman, 35 P.2d 248, 147 Or. 657.
Tex.—Glenn v. Holt, Civ.App., 229 S.W. 684.
21 C.J. p 979 note 16.

12. U.S.—Doe v. Considine, Ohio, 6 Wall. 458, 18 L.Ed. 869.
21 C.J. p 979 note 23.

13. Mo.—Norman v. Horton, 126 S.W.2d 187, 344 Mo. 290, 125 A.L.R. 531.

14. U.S.—Palmer v. Bender, D.C.La., 49 F.2d 316, affirmed, C.C.A., 57 F.2d 32, certiorari granted 53 S.Ct. 79, 287 U.S. 586, 77 L.Ed. 512, affirmed 53 S.Ct. 225, 287 U.S. 551, 77 L.Ed. 489.

15. Conn.—Gaffney v. Shepard, 143 A. 236, 108 Conn. 339.
D.C.—Vogt v. Vogt, 26 App.D.C. 46.

"executed remainders."[16] In the case of a vested remainder, the interest of the remainderman rises to the dignity of an estate in the land,[17] and the possession of the tenant of the particular estate is construed to be the possession of him in remainder, so that the remainderman is held to be seized of his remainder.[18]

Many attempts have been made to formulate a criterion by which a vested remainder may always be distinguished from a contingent remainder,[19]

appeal dismissed 27 S.Ct. 779, 203 U.S. 581, 51 L.Ed. 327.
Fla.—Commercial Bldg. Co. v. Parslow, 112 So. 378, 93 Fla. 143.
Kan.—Alexander v. Goellert, 109 P. 2d 146, 148, 153 Kan. 202, citing Corpus Juris—Buxton v. Noble, 73 P.2d 43, 46, 146 Kan. 671, quoting Corpus Juris—McLean v. Stanley, 5 P.2d 839, 842, 134 Kan. 234, quoting Corpus Juris.
Ky.—Craig's Adm'r v. Williams, 200 S.W. 481, 179 Ky. 329.
Minn.—Ashbaugh v. Wright, 188 N. W. 157, 152 Minn. 57.
Mo.—Norman v. Horton, 126 S.W.2d 187, 191, 344 Mo. 290, citing Corpus Juris.
S.C.—Home Bank of Lexington v. Fox, 102 S.E. 643, 113 S.C. 378.
21 C.J. p 979 note 33.

Blackstone's definition

Vested remainders, or remainders executed, whereby a present interest passes to the party, although to be enjoyed in futuro, are where the estate is invariably fixed, to remain to a determinate person, after the particular estate is spent.
Ark.—Wallace v. Wallace, 13 S.W.2d 810, 179 Ark. 30.
Ill.—Hoblit v. Howser, 170 N.E. 257, 338 Ill. 328, 71 A.L.R. 1046.
Ky.—Grubbs v. Grubbs, 227 S.W. 272, 190 Ky. 258.
Me.—Belding v. Coward, 133 A. 689, 125 Me. 305.
Mo.—Norman v. Horton, 126 S.W.2d 187, 344 Mo. 290, 125 A.L.R. 531.
N.C.—Scales v. Barringer, 133 S.E. 410, 192 N.C. 94—In re Collins' Estate, 133 A. 188, 99 N.J.Eq. 333—Ziegler v. Love, 115 S.E. 227, 185 N.C. 40—Richardson v. Richardson, 68 S.E. 217, 152 N.C. 705.
Okl.—Baldwin v. Chappell, 231 P. 496, 105 Okl. 38.
Pa.—In re Kountz's Estate, 62 A. 1103, 213 Pa. 390, 3 L.R.A.,N.S., 639, 5 Ann.Cas. 427.
21 C.J. p 979 note 33 [a].

Gray's definition

A remainder is vested when throughout its continuance remainderman and his heirs have the right to the immediate possession whenever and however the preceding estates may determine.
Ill.—Ryan v. Beshk, 170 N.E. 699, 339 Ill. 45—Baley v. Strehan, 145 N.E. 359, 314 Ill. 213—People v. Allen, 144 N.E. 800, 313 Ill. 156—Meldahl v. Wallace, 110 N.E. 354, 270 Ill. 220—Brown v. Brown, 93 N.E. 357, 247 Ill. 528.
R.I.—Storrs v. Burgess, 67 A. 731, 29 R.I. 269.
Tex.—Anderson v. Menefee, Civ.App., 174 S.W. 904, error refused.
21 C.J. p 979 note 33 [c].

Kent's definition

A vested remainder is a fixed interest, to take effect in possession after a particular estate is spent.—Lindenberger v. Cornell, 229 S.W. 54, 190 Ky. 844—Davie's Ex'r v. City of Louisville, 188 S.W. 911, 171 Ky. 663—21 C.J. p 979 note 33 [d].

Minor's definition

A remainder limited to a certain person, and on a certain event, so as to possess a present capacity to take effect in possession should the possession become vacant at any moment.—In re Conley, W.Va., 12 S.E. 2d 49—Patton v. Corley, 148 S.E. 120, 107 W.Va. 318—Bland v. Davisson, 88 S.E. 1021, 77 W.Va. 557, affirmed 94 S.E. 539, 77 W.Va. 557—21 C.J. p 979 note 33 [e].

Other definitions

(1) A remainder is vested where there is a present fixed right to future enjoyment.
Ind.—Kepert v. Kepert, 134 N.E. 297, 79 Ind App. 633.
N.J.—Den v. Hillman, 7 N.J.Law 180.
Ohio.—Tax Commission of Ohio v. Oswald, 141 N.E. 678, 109 Ohio St. 36—Simpson v. Welsh, 184 N.E. 242, 44 Ohio App. 115.
Or.—Soules v. Silver, 245 P. 1069, 118 Or. 96.
R.I.—Petition of Norris, 125 A. 84, 46 R.I. 57.

(2) A vested remainder is one limited to a certain person at a certain time, or on the happening of a necessary event.—Lumpkin v. Patterson, 152 S.E. 448, 170 Ga. 94—Fields v. Lewis, 45 S.E. 737, 118 Ga. 573.

(3) Vested remainder is estate which passes by conveyance, but possession and enjoyment are postponed until particular estate is determined, and which is invariably fixed to remain to certain determinate persons.—Dickerson v. Morse, 202 N.W. 603, 200 Iowa 115—21 C.J. p 979 note 33 [g] (4).

(4) Further definitions.
U.S.—Commissioner of Internal Revenue v. Kellogg, C.C.A., 119 F.2d 54.
Ga.—Olmstead v. Dunn, 72 Ga. 850, 859.
Ill.—Danz v. Danz, 26 N.E.2d 872, 373 Ill. 482—Heitzig v. Goetten, 180 N.E. 428, 347 Ill. 619—Raritan State Bank v. Huston, 161 N.E. 141, 329 Ill. 604.
Ind.—Miller v. Harland, 130 N.E. 134, 78 Ind.App. 56.
Md.—Bishop v. Horney, 9 A.2d 597, 177 Md. 353.
21 C.J. p 979 note 33.

"Reversion" and "vested remainder in fee simple" have been said to be convertible terms.—Stock v. Mann, 221 N.Y.S. 656, 660, 129 Misc. 201.

16. Ky.—Grubbs v. Grubbs, 227 S.W. 272, 190 Ky. 258.
21 C.J. p 980 note 34.

17. Kan.—McCartney v. Robbins, 217 P. 311, 114 Kan. 141.
Me.—Real Estate Title Ins. & Trust Co. of Philadelphia v. Dearborn, 109 A. 816, 119 Me. 168.
Minn.—Minnesota Debenture Co. v. Dean, 89 N.W. 848, 85 Minn. 473.
Mo.—Union Nat. Bank in Kansas City v. Bunker, 114 S.W.2d 193, 196, 232 Mo.App. 1062, quoting Corpus Juris.
N.C.—Mercer v. Downs, 131 S.E. 575, 191 N.C. 203.
Pa.—Riverside Trust Co. v. Twitchell, 20 A.2d 768.
Va.—Copenhaver v. Pendleton, 155 S.E. 802, 155 Va. 463, 77 A.L.R. 324.
21 C.J. p 980 note 35.

18. N.J.—Den v. Hillman, 7 N.J.Law 180.

19. Iowa.—In re Gordon's Estate, 236 N.W. 37, 213 Iowa 6—Lingo v. Smith, 156 N.W. 402, 174 Iowa 461.
Mo.—Brumbaugh v. Young, App., 144 S.W.2d 823.
S.C.—Home Bank of Lexington v. Fox, 102 S.E. 643, 113 S.C. 378.
21 C.J. p 984 note 73.

Power to convey fee simple

(1) It has been held that the distinction between a vested and a contingent remainder may be determined by inquiring whether the owner being sui juris can by uniting with the owner of the particular estate convey a fee simple title.—Faber v. Police, 10 S.C. 376.

(2) This test is inapplicable, however, to a remainder, which is vested subject to a divesting contingency, or which is given to a class some of whom are not in esse.—Walker v. Alverson, 68 S.E. 966, 87 S.C. 55, 30 L.R.A.,N.S., 115.
21 C.J. p 981 note 42 [a].

A remainder which is technically vested but liable to be defeated by the death of the remainderman before the death of the life tenant is not substantially different, as far as the value of the interest is concerned, from a vested interest in a

and, while there is confusion among the authorities on this question,[30] it is generally held that the distinguishing characteristic of a vested remainder is a present capacity to take effect in possession, if the possession were to become vacant.[21] This description, however, probably does not fully cover the distinction at common law;[22] and it has been said that the true criterion of a vested remainder is the existence (1) in an ascertained person (2) of a present fixed right (3) of future enjoyment of the estate limited in remainder (4) which right will take effect in possession immediately on the determination of the precedent estate, (5) irrespective of any collateral event, (6) provided the estate in remainder does not determine before the precedent estate.[23]

That an estate in remainder is vested does not imply a certainty that it will ever actually take effect in possession, because every remainder of a life estate or a fee tail is subject to uncertainty in this respect, consequent on the possibility that the precedent estate may outlast the estate in remainder by reason of the death of the remainderman, or his death without issue, before the determination of the precedent estate.[24] Neither does it imply any certainty as to the quantity and value of the remainderman's interest; since a remainder may be vested, although the amount of the estate remaining undisposed of at the expiration of the particular estate is uncertain, as where the first taker is given a power of appointment or disposition,[25] with remainder limited over in default of the exercise of such power.[26]

Divesting of remainder. A vested remainder may be limited or conditioned to divest on the happening of a named event;[27] and such a remainder is an estate subject to a condition subsequent.[28]

§ 70. Contingent Remainders

Contingent remainders are sometimes called executory remainders.

Contingent remainders are sometimes called executory remainders.[29]

§ 71. Definition

A contingent remainder is one where the estate in remainder is limited either to a dubious and uncertain person, or on the happening of a dubious and uncertain event.

Unless otherwise defined by statute, a contingent remainder is one where the estate in remainder is limited either to a dubious and uncertain person, or

contingent remainder.—Reilly v. Mackenzie, 134 A. 502, 151 Md. 216, 48 A.L.R. 778.

20. Wash.—In re Ivy's Estate, 101 P.2d 1074.

21. U.S.—Boal v. Metropolitan Museum of Art of City of New York, C.C.A.N.Y., 298 F. 894, reversing, D.C., 292 F. 303—Anderson v. Anderson, S.C., 221 F. 871, 137 C.C.A. 441.
Ark.—Tandy v. Smith, 293 S.W. 735, 173 Ark. 828.
Conn.—H. J. Lewis Oyster Co. v. West, 107 A. 138, 93 Conn. 518.
Ga.—Lumpkin v. Patterson, 152 S.E. 448, 170 Ga. 94—Schley v. Williamson, 111 S.E. 917, 153 Ga. 245.
Ill.—Hoblit v. Howser, 170 N.E. 257, 338 Ill. 328, 71 A.L.R. 1046—Raritan State Bank v. Huston, 161 N.E. 141, 329 Ill. 604.
Iowa.—Glenn v. Gross, 294 N.W. 297.
Ky.—Zinsmeister's Trustee v. Long, 61 S.W.2d 857, 250 Ky. 50—Carroll v. Carroll's Ex'r, 58 S.W.2d 670, 248 Ky. 386—Sherley v. Sherley, 232 S.W. 53, 192 Ky. 122.
Mo.—Union Nat. Bank in Kansas City v. Bunker, 114 S.W.2d 193, 196, 232 Mo.App. 193, quoting **Corpus Juris.**
N.H.—McAllister v. Elliot, 140 A. 708, 83 N.H. 225.
N.Y.—In re Watson's Will, 186 N.E. 787, 262 N.Y. 284, modifying 262 N.Y.S. 394, 237 App.Div. 625, which modified 258 N.Y.S. 755, 144 Misc. 213—In re Lansing's Estate, 74 N.E. 882, 182 N.Y. 238—Moore v. Littel, 41 N.Y. 66—Sheridan v. House, 4 Abb.Dec. 218, 4 Keyes 569—Tayloe v. Gould, 10 Barb. 388—In re Barnes' Estate, 279 N.Y.S. 117, 155 Misc. 320—Lawrence v. Bayard, 7 Paige 70.
N.C.—Williams v. Sasser, 132 S.E. 278, 191 N.C. 453—Ziegler v. Love, 115 S.E. 887, 185 N.C. 40.
R.I.—Petition of Hayden, 152 A. 254, 51 R.I. 117—Aldrich v. Aldrich, 110 A. 626, 43 R.I. 179.
Tex.—Caples v. Ward, 179 S.W. 856, 107 Tex. 341—Tipton v. Tipton, Civ.App., 1 S.W.2d 485, reversed on other grounds, Com.App., 12 S.W.2d 987.
Wis.—In re Moran's Will, 96 N.W. 367, 118 Wis. 177.
21 C.J. p 980 notes 37, 38, p 985 note 74, p 995 note 83, p 996 note 95.

22. Mo.—Union Nat. Bank in Kansas City v. Bunker, 114 S.W.2d 193, 232 Mo.App. 193,
Wis.—In re Moran's Will, 96 N.W. 367, 118 Wis. 177.
21 C.J. p 980 notes 39, 40 [a], p 985 notes 77–88, p 986 notes 89–92, p 996 note 95 [a].

23. Ill.—Ruddell v. Wren, 70 N.E. 751, 208 Ill. 508.
21 C.J. p 981 note 43.

24. Ark.—National Bank of Commerce of St. Louis v. Ritter, 26 S.W.2d 113, 181 Ark. 439.
Ill.—Hoblit v. Howser, 170 N.E. 257, 338 Ill. 328, 71 A.L.R. 1046—People v. Northern Trust Co., 161 N.E. 525, 330 Ill. 238—Baley v. Strahan, 145 N.E. 359, 314 Ill. 213.
Iowa.—Lingo v. Smith, 156 N.W. 402, 174 Iowa 461.
Kan.—Caple v. Warburton, 264 P. 47, 125 Kan. 290.
Ky.—Slote v. Reiss, 154 S.W. 405, 153 Ky. 30.
Md.—Bishop v. Horney, 9 A.2d 597, 177 Md. 353.
N.J.—Hopper v. Gurtman, 18 A.2d 245, 126 N.J.Law 263, 133 A.L.R. 621, affirming 8 A.2d 376, 17 N.J. Misc. 289.
Pa.—Riverside Trust Co. v. Twitchell, 20 A.2d 768.
21 C.J. p 981 note 44.

25. Minn.—Ashbaugh v. Wright, 188 N.W. 157, 152 Minn. 57.
Wash.—In re Ivy's Estate, 101 P.2d 1074.
21 C.J. p 981 note 47.

26. Ill.—Ducker v. Burnham, 34 N.E. 558, 146 Ill. 9, 37 Am.S.R. 135.

27. D.C.—Farrar v. Bingham, 93 F.2d 252, 68 App.D.C. 93.
Me.—Gould v. Leadbetter, 150 A. 375, 129 Me. 101.
N.Y.—In re Benton's Will, 278 N.Y.S. 267, 244 App.Div. 56, reversing In re Benton, 268 N.Y.S. 256, 149 Misc. 377, and affirmed 199 N.E. 680, 269 N.Y. 579—In re Barnes' Estate, 279 N.Y.S. 117, 155 Misc. 320.

28. Mo.—Rutherford v. Farrar, App., 118 S.W.2d 79, transferred see, Sup., 112 S.W.2d 847.

29. Conn.—Hudson v. Wadsworth, 8 Conn. 348.

on the happening of a dubious and uncertain event.[30] A remainder may be rendered contingent by reason of a condition subsequent as well as a condition precedent.[31]

Classes. Contingent remainders have been divided into four classes.[32]

The first class is that where the remainder depends entirely on a contingent determination of the particular estate itself, that is, where the particular estate is limited to determine on either of several events, one of which may never happen, and the remainder is to take effect only in case the particular estate is determined by the happening of such uncertain event.[33] Some forms of limitation, however, constitute apparent exceptions to this class of contingent remainders as, for example, after a life estate to the testator's wife, if she shall so long continue his widow, a life estate in remainder to another to take effect on the widow's remarriage.[34] Remainders of this first class differ from conditional limitations or executory devises after a life estate, to which they bear a superficial resemblance, in that a contingent remainder of the first class is limited to commence on the occurrence of one of several events by which the particular estate was originally limited, while a conditional limitation is limited to commence on a condition which is independent of the original measure or extent of the particular estate and which may terminate the particular estate before the time specified for its regular determination.[35]

The second class of contingent remainders is that where some uncertain event unconnected with, and collateral to, the determination of the preceding estate is by the nature of the limitation to precede the remainder.[36]

A contingent remainder of the third class is one limited to take effect on an event which, although it certainly must happen some time or other, yet may not happen until after the determination of the particular estate.[37]

The fourth class of contingent remainders is that where a remainder is limited to a person not ascertained or not in being at the time when such limitation is made.[38] Some forms of limitations, however, constitute apparent exceptions to this fourth class as, for example, a remainder limited to the heirs of the grantor; while such a limitation is designated as a remainder, it is not in reality a remainder, but is an estate which continues in the grantor as the reversion in fee.[39]

§ 72. Characteristics

A contingent remainder is not strictly an estate, but a mere chance of having one, if the contingency turn out favorably to the remainderman.

While a contingent remainder is an interest in land,[40] which is valuable,[41] and which will be protected by a court of equity,[42] it is not strictly an es-

30. U.S.—Suskin & Berry v. Rumley, C.C.A.N.C., 37 F.2d 304, 68 A.L.R. 768—Dickson v. Neal, C.C.A.Ark., 2 F.2d 533, certiorari denied 46 S. Ct. 19, 269 U.S. 556, 70 L.Ed. 409.
Ark.—Wallace v. Wallace, 13 S.W.2d 810, 179 Ark. 30.
Conn.—Gaffney v. Shepard, 143 A. 236, 108 Conn. 339.
Ga.—Lumpkin v. Patterson, 152 S.E. 448, 170 Ga. 94.
Ill.—Heitzig v. Goetten, 180 N.E. 428, 347 Ill. 619—Ryan v. Beshk, 170 N.E. 699, 339 Ill. 45—Hoblit v. Howser, 170 N.E. 257, 338 Ill. 328, 71 A.L.R. 1046—Nicol v. Morton, 164 N.E. 5, 332 Ill. 533—Raritan State Bank v. Huston, 161 N.E. 141, 329 Ill. 604—Department of Public Works and Buildings v. Porter, 158 N.E. 366, 327 Ill. 28—Wood v. Chase, 158 N.E. 470, 327 Ill. 91—Baley v. Stephen, 145 N.E. 359, 314 Ill. 213—Randolph v. Wilkinson, 128 N.E. 525, 294 Ill. 508—Jones v. Miller, 119 N.E. 324, 283 Ill. 348—Henderson v. Cadwalader, 202 Ill.App. 351.
Iowa.—Williamson v. Youngs, 203 N.W. 28, 200 Iowa 672.
Kan.—Buxton v. Noble, 73 P.2d 43, 46, 146 Kan. 671, quoting Corpus Juris—McLean v. Stanley, 5 P.2d 839, 842, 134 Kan. 234, quoting Corpus Juris—Walker v. Row, 296 P. 699, 132 Kan. 564.
Ky.—Craig's Adm'r v. Williams, 200 S.W. 481, 179 Ky. 329.
Me.—Belding v. Coward, 133 A. 689, 125 Me. 305.
Md.—Bishop v. Horney, 9 A.2d 597, 177 Md. 353.
Mo.—Norman v. Horton, 126 S.W.2d 187, 191, 344 Mo. 290, 125 A.L.R. 531, citing Corpus Juris.
N.H.—McAllister v. Elliot, 140 A. 708, 83 N.H. 225.
N.J.—In re Collins' Estate, 133 A. 188, 99 N.J.Eq. 333.
N.Y.—Purdy v. Hayt, 92 N.Y. 446—In re Barnes' Estate, 279 N.Y.S. 117, 155 Misc. 320.
N.C.—Scales v. Barringer, 133 S.E. 410, 192 N.C. 94.
Tenn.—Rinks v. Gordon, 24 S.W.2d 896, 160 Tenn. 345.
13 C.J. p 117 note 45—21 C.J. p 981 note 49, p 995 note 84.
"Determinable remainder in fee" is one that may ripen into a fee simple or it may be defeated by the happening of some contingency.—Miles v. Miles, 233 N.W. 249, 120 Neb. 436.

31. Iowa.—Jones v. Coon, 295 N.W. 162—Glenn v. Gross, 294 N.W. 297.
32. N.C.—Richardson v. Richardson, 68 S.E. 217, 152 N.C. 705.
33. N.C.—Richardson v. Richardson, supra.
21 C.J. p 982 note 51.
34. Tenn.—Tubb v. Fowler, 99 S.W. 988, 118 Tenn. 325.
21 C.J. p 983 notes 56–58.
35. Cal.—Taylor v. McCowen, 99 P. 351, 154 Cal. 798.
21 C.J. p 982 note 53.
36. N.C.—Richardson v. Richardson, 68 S.E. 217, 152 N.C. 705.
21 C.J. p 983 note 59.
37. N.C.—Richardson v. Richardson, supra.
21 C.J. p 983 notes 60–63.
38. N.C.—Richardson v. Richardson, supra.
21 C.J. p 984 note 64.
39. Ala.—Wilcoxen v. Owen, 185 So. 897, 901, 237 Ala. 169, quoting Corpus Juris.
21 C.J. p 984 notes 68–70.
40. Mo.—McFarland v. Bishop, 222 S.W. 143, 282 Mo. 534.
41. Ill.—Kohl v. Montgomery, 25 N.E.2d 826, 373 Ill. 200.
42. Iowa.—Lane v. Travelers Ins.

tate, but a mere chance of having one, if the contingency turn out favorably to the remainderman.[43] It may, however, be raised to the dignity of an estate by statute.[44]

A remainder subject to a power of appointment is not necessarily vested;[45] and the exercise by the tenant of the particular estate of a power of appointment granted him will prevent a contingent remainder from vesting.[46]

As is shown supra § 69, a contingent remainder is distinguished from a vested remainder in that it has a present incapacity to take effect in possession should the possession become vacant.

§ 73. Remainders to Class

A remainder limited to a class consisting of children or more remote relatives vests in such of the objects as are in esse and answer the description at the time the instrument creating the remainder takes effect, subject to open and let in any who may be afterward born before the determination of the particular estate.

A remainder limited to a class consisting of children or more remote relatives such as grandchildren, brothers, sisters, nephews, nieces, and cousins vests in such of the objects as are in esse and answer the description at the time the instrument creating the remainder takes effect,[47] subject to open and let in any who may be afterward born before the determination of the particular estate.[48] However, according to some authorities, in the absence of a contrary intent, the class is not ascertained until the death of the life tenant.[49] Where a contingent remainder is given to a class of persons by description and the contingency consists not merely in the uncertainty of the persons by whom the estate is to be taken but also in events disconnected with the persons to take, the estate vests in the persons answering the description when the contingency happens.[50]

As to unborn members of a class, the remainder is contingent until they come in esse, and then it immediately vests.[51] Vested remainders to members of a class open to let in adopted children[52] and illegitimate children who have been legitimatized by the subsequent marriage of their parents.[53]

Where the remainder is to a class of persons definitely described,[54] or to the survivors of a class,[55] only those persons answering the description who are in being when the contingency happens can take.

Statutory provisions. Under some statutes a remainder limited to a class of persons in existence, with words of present gift, and not words of futurity showing an intention to postpone vesting of gift until the determination of the particular estate, must be construed as a vested remainder,[56] although it cannot be ascertained until the determination of the particular estate which, if any, members of the class will ultimately take.[57]

§ 74. Cross Remainders

Cross remainders are remainders which are so limited after particular estates to two or more persons in several parcels of land, or in several undivided shares in the same parcel of land, that, on the determination of the particular estates in any of the several parcels or undivided shares, they remain over to the other grantees, and the reversioner or ulterior remainderman is not let in until the determination of all of the particular estates.

Cross remainders are remainders limited after particular estates to two or more persons, in several parcels of land, or in several undivided shares in the same parcel of land in such way that, on the determination of the particular estates in any of the several parcels or undivided shares, they remain over to the other grantees, and the reversioner or ulterior remainderman is not let in until the determination of all of the particular estates.[58] In the

Co. of Hartford, Conn., 299 N.W. 553, 230 Iowa 973.

43. Ill.—Kohl v. Montgomery, 25 N.E.2d 826, 373 Ill. 200—Du Bois v. Judy, 126 N.E. 104, 291 Ill. 340.
Kan.—McCartney v. Robbins, 217 P. 311, 114 Kan. 141.
N.C.—Mercer v. Downs, 131 S.E. 575, 191 N.C. 203.
Or.—Hawkins & Roberts v. Jerman, 35 P.2d 248, 147 Or. 657.
Pa.—Riverside Trust Co. v. Twitchell, 20 A.2d 768.
21 C.J. p 915 note 46 [b] (2), p 984 note 71.

44. Ga.—Phelps v. Palmer, 15 S.E.2d 503.
21 C.J. p 996 note 98.

45. N.J.—Central Hanover Bank & Trust Co. v. Helme, 190 A. 53, 121 N.J.Eq. 406.

46. Ill.—Scofield v. Olcott, 11 N.E. 351, 120 Ill. 362.
21 C.J. p 986 note 94.

47. Mass.—Minot v. Purrington, 77 N.E. 630, 190 Mass. 336.
21 C.J. p 986 note 95.

48. Iowa.—Archer v. Jacobs, 101 N.W. 195, 125 Iowa 467.
21 C.J. p 986 note 97.

49. Tenn.—Blackburn v. Blackburn, 73 S.W. 109, 109 Tenn. 674.
21 C.J. p 986 note 99.

50. N.J.—Micheau v. Crawford, 8 N.J.Law 90.

51. Ga.—Doe v. Newton, 156 S.E. 25, 29, 171 Ga. 418, citing **Corpus Juris.**
Ill.—Lewin v. Bell, 120 N.E. 633, 285 Ill. 227.
21 C.J. p 986 note 2.

52. N.Y.—Gilliam v. Guaranty Trust Co., 97 N.Y.S. 758, 111 App.Div. 656.

53. Mo.—Gates v. Seibert, 57 S.W. 1065, 157 Mo. 254, 80 Am.S.R. 625.

54. Md.—Demill v. Reid, 17 A. 1014, 71 Md. 175.
Tenn.—Ryan v. Monaghan, 42 S.W. 144, 99 Tenn. 338.

55. D.C.—Frosch v. Monday, 34 App. D.C. 338.
S.C.—Carson v. Kennerly, 29 S.C.Eq. 259.

56. Minn.—Minnesota Debenture Co. v. Dean, 89 N.W. 848, 85 Minn. 473.
21 C.J. p 996 note 91.

57. U.S.—In re Hoadley, D.C.N.Y., 101 F. 233.
21 C.J. p 996 note 93 [a].

58. Ill.—Whittaker v. Porter, 151 N.E. 905, 321 Ill. 368—Kramer v.

case of cross remainders, the estates usually have been granted originally to the several persons in common, but sometimes the particular estates are held in severalty.[59]

The rule of cross remainders does not operate in the case of joint tenancy;[60] and, where they are to be raised between more than two, the presumption is against them.[61]

§ 75. Double Contingencies

Two or more remainders in fee simple may be created as substitutes or alternatives the one for the other.

A remainder cannot, as shown infra § 78, be limited after a fee simple. This rule, however, forbids neither at common law nor under modern statutes, the creation of limitations variously called contingencies with a double aspect, or gifts on a double contingency, or gifts or devises on two alternative contingencies or alternative or substitutional remainders, whereby two or more remainders in fee simple are created as substitutes or alternatives the one for the other, that is, on such contingencies that only one of the remainders can possibly vest.[62]

As distinguished from successive remainders, each of such fees is a remainder in regard to the particular estate, but none is a remainder in regard to any other of them;[63] and as distinguished from a vested remainder subject to a condition subsequent with a limitation over, it is a true remainder, while the latter limitation over is not a remainder, but an executory interest.[64]

§ 76. Preceding Particular Estate

The preceding estate is called the particular estate because it is only a small part or portion of the whole estate.

With respect to remainders, the preceding estate is called the particular estate because it is only a small part or portion of the whole estate.[65]

§ 77. Necessity

Unless otherwise regulated by statute, as a general rule, in order that an estate in expectancy may constitute a remainder, it must be limited after a preceding particular estate.

In order that an estate in expectancy may technically constitute a remainder it must be limited after a preceding estate called the particular estate,[66] and any attempt to create a remainder is ineffectual if the particular estate cannot take effect.[67] Where there is a legal estate in trustees, however, there is no necessity for any preceding particular estate to support contingent limitations, since the outstanding legal estate is sufficient to sustain them.[68]

Statutory regulations. Under some statutes, a remainder will not fail for want of a particular estate;[69] and statutes now generally permit freehold estates to be created, by will or deed, to commence either with or without the intervention of a precedent estate.[70] Some statutes permit future estates, even fees, to be created to take effect in the alternative, so that if the first in order fails to vest the next in succession shall be substituted for it and take effect accordingly;[71] and it has been held, under statute, that a remainder cannot be limited on an estate for the life of any other person than the first grantee or devisee of such estate unless such remainder is in fee, nor on such an estate in a term of years unless it is for the whole residue of the term.[72]

§ 78. Quantity

A remainder may be limited after an estate tail, or after an estate for life or for years.

Sangamon Loan & Trust Co., 127 N.E. 878, 293 Ill. 553—Addicks v. Addicks, 107 N.E. 580, 266 Ill. 349, Ann.Cas.1916B 709.

59. Conn.—Houghton v. Brantingham, 86 A. 664, 86 Conn. 630.
21 C.J. p 987 note 15.

60. Mich.—Kemp v. Sutton, 206 N. W. 366, 233 Mich. 249.

61. Mass.—Hall v. Priest, 6 Gray, Mass. 18.
21 C.J. p 987 note 23.

62. U.S.—Boal v. Metropolitan Museum of Art of City of New York, C.C.A.N.Y., 298 F. 894, 905, reversing, D.C., 292 F. 803, quoting Corpus Juris.
Ky.—Willis v. Lapsley, 43 S.W.2d 47, 49, 240 Ky. 829, citing Corpus Juris.
Mo.—Norman v. Horton, 126 S.W.2d 187, 190, 344 Mo. 290, citing Corpus Juris.

21 C.J. p 988 notes 26–29, p 991 note 86.

63. U.S.—Boal v. Metropolitan Museum of Art of City of New York, C.C.A.N.Y., 298 F. 894, reversing, D.C., 292 F. 803.

64. U.S.—Boal v. Metropolitan Museum of Art of City of New York, C.C.A.N.Y., 298 F. 894, reversing, D.C., 292 F. 803.
N.Y.—Avery v. Everett, 18 N.E. 148, 110 N.Y. 317, 6 Am.S.R. 368, 1 L.R.A. 264.
21 C.J. p 988 note 32 [a].

65. Iowa.—Anderson v. Anderson, 286 N.W. 446, 227 Iowa 25.
Kan.—Bunting v. Speek, 21 P. 288, 41 Kan. 424, 3 L.R.A. 690.

66. Ark.—Wallace v. Wallace, 13 S. W.2d 810, 179 Ark. 30.
Conn.—Gaffney v. Shepard, 143 A. 236, 108 Conn. 339.
Ky.—Superior Oil Corporation v. Alcorn, 47 S.W.2d 973, 242 Ky. 814.
21 C.J. p 988 note 37.

67. N.Y.—Schettler v. Smith, 41 N. Y. 328.
21 C.J. p 988 note 38.

68. U.S.—Brigham v. Peter Bent Brigham Hospital, Mass., 134 F. 513, 67 C.C.A. 393.
21 C.J. p 989 note 44.

69. Ga.—Toombs v. Spratlin, 57 S.E. 59, 127 Ga. 766.

70. Kan.—Miller v. Miller, 136 P. 953, 91 Kan. 1, L.R.A.1915A 671, Ann.Cas.1917A 918.
21 C.J. p 989 note 46.

71. Mo.—Yocum v. Siler, 61 S.W. 208, 160 Mo. 281.
21 C.J. p 989 note 49.

72. N.Y.—Gilman v. Reddington, 24 N.Y. 9, modifying 1 Hilt. 492—Matter of Bogardus, 89 N.Y.S. 478, 43 Misc. 473.

The particular estate necessary to support a remainder must be of such quantity as would leave a reversion in the grantor, had the particular estate been the only interest conveyed.[73] Accordingly, a remainder cannot be limited on a fee simple, because that is the entire inheritance, and after a grant or devise of the fee nothing can be left to limit over;[74] and, although there is authority upholding a remainder after a determinable fee,[75] the general rule is that qualified, determinable, or conditional fees are so far regarded as the entire estate that remainders cannot be limited on them.[76]

A remainder may, however, be limited after an estate tail,[77] or after an estate for life,[78] measured by the life of the person to whom the particular estate is given or by the life of a third person.[79] Although the particular estate may be for a term of years,[80] the estate of freehold at common law is during the continuance of such a term, not "a remainder of freehold on a term of years," but rather "a freehold in possession subject to the term."[81]

Under some statutes the principles of the common law regarding the quantity of the particular estate necessary to support a remainder have been considerably modified.[82]

§ 79. Simultaneous Creation

A remainder must be created at the same time and by the same instrument as the particular estate.

Another characteristic of a remainder is that it must commence or pass out of the grantor at the time of the creation of the particular estate,[83] and by the same instrument.[84]

§ 80. Determination of Preceding Estate

As a general rule, a remainder cannot be so limited as to take effect in possession in derogation of the particular estate.

The use, possession, and enjoyment of the property by the vested remainderman commence on the determination of the preceding estate.[85] A remainder must await the determination of the preceding estate,[86] and it cannot be so limited as to take effect in possession in derogation or defeasance of it.[87] A subsequent estate limited to take effect on a condition which is to defeat the preceding particular estate is void at common law as a remainder,[88] unless limited on an event which destroys the particular estate by merging the particular estate with the

73. U.S.—Anderson v. Messinger, Ohio, 146 F. 929, 77 C.C.A. 179, 7 L.R.A.,N.S., 1094.
21 C.J. p 989 note 52.

74. Ohio.—Stophlet v. Stophlet, 153 N.E. 867, 22 Ohio App. 327—O'Malley v. O'Malley, 151 N.E. 795, 20 Ohio App. 279.
Or.—Imbrie v. Hartrampf, 198 P. 521, 100 Or. 589.
21 C.J. p 989 note 53, p 991 note 86.

75. Ga.—Tyler v. Theilig, 52 S.E. 606, 124 Ga. 204.
21 C.J. p 990 note 57 [a].

Under statute
N.Y.—Radley v. Kuhn, 97 N.Y. 26.

76. Or.—Imbrie v. Hartrampf, 198 P. 521, 100 Or. 589.
21 C.J. p 990 notes 56, 61.

77. Mass.—Dorr v. Johnson, 49 N.E. 919, 170 Mass. 540.
21 C.J. p 990 note 73.

Statutory conversion into fee simple
(1) Statutes which convert the estate tail into an estate in fee simple will prevent the limitation of a remainder on such an estate.—Carter v. Tyler, 1 Call 165, 5 Va. 165—21 C.J. p 990 note 78.

(2) Under the express provisions of some statutes, however, a remainder limited on what was formerly an estate tail has been held valid as a contingent remainder, to be vested in possession on the death of the first taker without issue living at the time of such death.—Nellis v. Nellis, 3 N.E. 59, 99 N.Y. 505.
21 C.J. p 990 note 85.

78. Conn.—Houghton v. Brantingham, 86 A. 664, 86 Conn. 630.
Iowa.—Anderson v. Anderson, 286 N.W. 446, 227 Iowa 25.
Kan.—Bunting v. Speek, 21 P. 288, 41 Kan. 424, 3 L.R.A. 690.

Joint life estate held sufficient to support a remainder.—Calloway v. Witt, 105 S.W.2d 123, 21 Tenn.App. 74.

Power to dispose of life estate
(1) A precedent particular estate in lands sufficient to support a remainder is created by the formation of a trust for the duration of the lives of certain designated beneficiaries who are to enjoy the net rents and profits thereof, and such precedent particular estate is not defeated because the beneficiaries are forbidden to alienate or encumber it during their period of enjoyment.—Aten v. Tobias, 220 P. 196, 114 Kan. 646.

(2) A remainder is valid, under statute, although limited on the estate of a life tenant who has a power of disposition.—Edwards v. Williamson, 80 So. 867, 202 Ala. 483.

79. R.I.—Kenyon's Petition, 20 A. 294, 17 R.I. 149.

80. Iowa.—Anderson v. Anderson, 286 N.W. 446, 227 Iowa 25—Shafer v. Tereso, 110 N.W. 846, 133 Iowa 342.
Kan.—Bunting v. Speek, 21 P. 288, 41 Kan. 424, 3 L.R.A. 690.
21 C.J. p 990 note 65.

81. Iowa.—Shafer v. Tereso, 110 N.W. 846, 133 Iowa 342.
21 C.J. p 990 note 66 [a].

82. Cal.—Jewell v. Pierce, 52 P. 132, 120 Cal. 79.

83. Fla.—Commercial Bldg. Co. v. Parslow, 112 So. 378, 93 Fla. 143.
N.C.—Carolina Power Co. v. Haywood, 119 S.E. 500, 186 N.C. 313.
Ohio.—Simpson v. Welsh, 184 N.E. 242, 44 Ohio App. 115.
21 C.J. p 991 note 95.

84. Fla.—Commercial Bldg. Co. v. Parslow, 112 So. 378, 93 Fla. 143.
N.C.—Carolina Power Co. v. Haywood, 119 S.E. 500, 186 N.C. 313.
Ohio.—Simpson v. Welsh, 184 N.E 242, 44 Ohio App. 115.
Tex.—Wells v. Houston, 57 S.W. 584, 23 Tex.Civ.App. 629, 654.

85. Minn.—Ashbaugh v. Wright, 188 N.W. 157, 152 Minn. 57.

86. Tex.—Rae v. Baker, Civ.App., 38 S.W.2d 366, error refused.
21 C.J. p 991 note 6.

87. Ill.—Cutler v. Garber, 124 N.E. 441, 289 Ill. 200.
N.J.—Byrne v. Byrne, 195 A. 848, 123 N.J.Eq. 6, affirmed 1 A.2d 464, 124 N.J.Eq. 273.
21 C.J. p 992 note 7.

88. Ark.—Myers v. Weiner, 63 S.W. 52, 69 Ark. 319.
21 C.J. p 992 notes 8, 9.

remainder.[89]

Under statute, however, the contingency on which a remainder is limited may operate to abridge the precedent estate.[90]

§ 81. Time of Vesting of Remainder in General

A remainder is ordinarily defeated unless it vests during the continuance of the particular estate, or eo instanti that the particular estate determines.

A remainder which does not vest during the continuance of the particular estate, or eo instanti that the particular estate determines, is defeated,[91] unless the legal estate is in trustees.[92] A contingent remainder is defeated when the particular estate is altered in quantity of interest, but not when the alteration is merely in quality.[93] A contingent remainder may fail as to one part and not as to another when the preceding estate is in several persons, in common or in severalty, since the particular tenant of one part may die before the contingency happens and the tenant of another part survive it.[94] Although it was formerly a disputed question, a remainder to a posthumous child is not defeated because the remainderman is not in esse at the determination of the particular estate.[95]

Under some statutes, a remainder is not affected, if valid in its creation, by the termination of the preceding estate before the happening of the contingency on which the remainder is limited to take effect.[96]

Some authorities hold that, where a contingent remainder of the inheritance is limited by a conveyance operating at common law, the estate in remainder immediately passes out of the grantor, is in abeyance, where it awaits the contingency, and, if that results favorably, vests in the remainderman, but, if the remainder fails to vest at or before the determination of the particular estate, the grantor or his heirs may reënter.[97] The logical and more reasonable theory, however, is that in such a case the inheritance remains in the grantor or his heirs or in the heirs of the testator, until the contingency happens to take it out of them.[98] Since, as shown supra § 7, the courts consider the theory of a fee in abeyance as odious and never recognize it except in case of urgent necessity, a contingent remainder of the measure of freehold is void ab initio unless supported by a previous vested estate of freehold capable, in its original limitation, of enduring until the vesting of the remainder;[99] but, if preceded by a life estate which is a freehold followed by a term of years, it will be upheld.[1]

A conveyance of a fee, reserving a life estate in the grantor, has been sustained as a remainder.[2]

§ 82. Acceleration of Remainder

A remainder is said to be accelerated where the time for its vesting in possession is shortened by the premature determination of the preceding estate, or where such estate is for some reason incapable of taking effect.

A vested remainder is said to be accelerated where

89. Ark.—Myers v. Weiner, supra.
21 C.J. p 992 note 10.

90. Ind.—McIlhinny v. McIlhinny, 37 N.E. 147, 137 Ind. 411, 45 Am.S.R. 186, 24 L.R.A. 489.

91. Ga.—Wells v. Ellis, 192 S.E. 380, 184 Ga. 645.
Mo.—Donaldson v. Donaldson, 278 S.W. 686, 311 Mo. 208—Brumbaugh v. Young, App., 144 S.W.2d 823.
N.C.—Carolina Power Co. v. Haywood, 119 S.E. 500, 186 N.C. 313.
21 C.J. p 992 notes 16, 21.

92. U.S.—Brigham v. Peter Bent Brigham Hospital, Mass., 134 F. 513, 67 C.C.A. 393.
21 C.J. p 992 note 17.

93. Pa.—Lyle v. Richards, 9 Serg. & R. 322.
21 C.J. p 993 note 24.

94. Ill.—Madison v. Larmon, 48 N.E. 556, 170 Ill. 65, 62 Am.S.R. 356.
21 C.J. p 993 notes 25, 26.

95. Md.—Crisfield v. Storr, 36 Md. 129, 11 Am.R. 480.
21 C.J. p 993 notes 29, 31, 32.

96. N.Y.—Hennessy v. Patterson, 85 N.Y. 91—Moore v. Littel, 41 N.Y. 66.
In Illinois
(1) Contingent remainders cannot, under statute, be defeated by determination of any precedent estate prior to happening of contingency on which future interest is limited to take effect.—Daubman v. Daubman, 186 N.E. 520, 353 Ill. 69.
(2) Prior to the enactment of the statute a remainder was defeated if it did not vest during the continuance of the particular estate, or eo instanti that the particular estate determined.—Gray v. Shinn, 127 N.E. 755, 293 Ill. 573—21 C.J. p 992 notes 16, 21.

97. U.S.—Illinois Cent. R. Co. v. Bosworth, La., 10 S.Ct. 231, 133 U.S. 92, 33 L.Ed. 550.
21 C.J. p 993 note 33.

98. U.S.—In re Youtsey, D.C.Ohio, 260 F. 423.
Fla.—Blocker v. Blocker, 137 So. 249, 103 Fla. 285—Arnold v. Wells, 131 So. 400, 100 Fla. 1470.
Ill.—Gray v. Shinn, 127 N.E. 755, 293 Ill. 573—Baker v. Baker, 120 N.E. 525, 284 Ill. 537.
Ind.—Waters v. Bishop, 24 N.E. 161, 122 Ind. 516.
Ky.—Bradshaw v. Waggener, 79 S.W.2d 193, 194, 257 Ky. 769, citing Corpus Juris—Slack v. Downing, 26 S.W.2d 497, 233 Ky. 554—Walker v. Irvine's Ex'r, 9 S.W.2d 1020, 225 Ky. 699.
Miss.—City Savings Bank & Trust Co. of Vicksburg v. Cortright, 84 So. 136, 122 Miss. 75.
N.Y.—Van Nostrand v. Marvin, 44 N.Y.S. 679, 16 App.Div. 28, appeal dismissed 57 N.E. 1127, 161 N.Y. 650.
Ohio.—Mills v. Mills, 20 Ohio N.P., N.S., 501—Chrisman v. Dixon, 13 Ohio App. 1.
S.C.—Monigault v. Bryan, 151 S.E. 199, 204, 154 S.C. 78, quoting Corpus Juris.
Tenn.—Harrell v. Sims, 141 S.W.2d 472, 474, 176 Tenn. 318, quoting Corpus Juris.
21 C.J. p 993 note 34.

99. D.C.—Green v. Gordon, 38 App.D.C. 443.
21 C.J. p 993 note 37.

1. Ill.—Hull v. Ensinger, 100 N.E. 513, 257 Ill. 160.

2. Me.—Watson v. Conney, 10 A. 59, 79 Me. 381.
21 C.J. p 994 note 45.

the time for its vesting in possession is shortened by the premature determination of the preceding estate, or where such estate is for some reason incapable of taking effect,[3] whether by reason of death,[4] incapacity,[5] remarriage,[6] renunciation,[7] or any other circumstance resulting in the termination of the whole particular estate, and not merely of the interest of one among several interested in it.[8] A vested remainder may be accelerated, although future contingent interests will thereby be cut off.[9] There is authority, however, that a conveyance or release of the life estate to the remainderman does not accelerate the remainder,[10] nor is the remainder accelerated by the civil death of the tenant of the particular estate.[11]

A remainder will not be accelerated if it is impossible to identify the remainderman, or if there is evidence of an intention to postpone the taking effect of the remainder;[12] but, where the contingencies are determined and the donees ascertained, the doctrine of acceleration applies as well to a contingent as to a vested remainder.[13] There is authority, however, that the doctrine of acceleration is never applicable to contingent remainders.[14] An instrument providing that the particular estate shall terminate on the happening of an event specified may provide for the acceleration and immediate vesting of what would otherwise be contingent remainders.[15]

§ 83. Construction

A remainder is not to be considered contingent in any case where it may fairly be construed to be vested.

The tendency of modern decisions on questions of contingent and vested remainders has been more and more to break away from the technical refinements of the old common-law learning,[16] and whether a remainder is vested or contingent depends on the language employed in the instrument creating it.[17]

However, a remainder is not to be considered contingent in any case where it may fairly be construed to be vested, since the law favors the vesting

3. Kan.—Ward v. Ward, 109 P.2d 68, 153 Kan. 222.
Ky.—Superior Oil Corporation v. Alcorn, 47 S.W.2d 973, 986, 242 Ky. 814, citing **Corpus Juris**—Brooks v. Stuart, 37 S.W.2d 56, 238 Ky. 235.
N.J.—Anthony v. Camden Safe Deposit & Trust Co., 149 A. 822, 823, 106 N.J.Eq. 41, citing **Corpus Juris.**
N.Y.—In re Cashman's Estate, 275 N.Y.S. 831, 153 Misc. 374.
21 C.J. p 994 notes 46, 48, 52, p 995 note 56.

Failure of life tenant to support grantor

A remainder to take effect on the death of the life tenant is not accelerated by a cancellation of the life estate for violation of the express obligation of the life tenant to support the grantor.—Browning v. Hall, 156 S.E. 190, 171 Ga. 560.

Grants by deed

The rule is rarely applicable to grants by deed.—Miller v. Miller, 136 P. 953, 91 Kan. 1, L.R.A.1915A 671, Ann.Cas.1917A 918.

4. N.Y.—Taylor v. Wendel, 4 Bradf. Surr. 324.
21 C.J. p 994 note 47.

5. S.C.—Key v. Weathersbee, 21 S.E. 324, 43 S.C. 414, 49 Am.S.R. 846.
21 C.J. p 994 note 49.

6. Ark.—Duncan v. Liddle, 184 S.W. 413, 123 Ark. 35.
21 C.J. p 994 note 50.

7. Ala.—Merchants' Nat. Bank of Mobile v. Hubbard, 133 So. 723, 222 Ala. 518, 74 A.L.R. 646.
Kan.—Ward v. Ward, 109 P.2d 68, 153 Kan. 222.
Ky.—Breckinridge v. Breckinridge's Ex'rs, 94 S.W.2d 283, 264 Ky. 82.
Va.—Christian v. Wilson's Ex'rs, 151 S.E. 300, 153 Va. 614, certiorari denied 51 S.Ct. 21, 282 U.S. 840, 75 L.Ed. 746.
21 C.J. p 994 note 51.

Renunciation or release must be unconditional

N.J.—Bennett v Fidelity Union Trust Co., 194 A. 449, 122 N.J.Eq. 455.

8. Ga.—Toombs v. Spratlin, 57 S.E. 59, 127 Ga. 766.

9. N.J.—Bennett v. Fidelity Union Trust Co., 196 A. 375, 123 N.J.Eq. 198.

10. Colo.—Barnard v. Moore, 207 P. 332, 71 Colo. 401.
N.J.—Bennett v. Fidelity Union Trust Co., 196 A. 375, 123 N.J.Eq. 198—Bennett v. Fidelity Union Trust Co., 194 A. 449, 122 N.J.Eq. 455—In re Nilsson, 164 A. 578, 112 N.J.Eq. 445, disregarding L'Hommedieu v. L'Hommedieu, 131 A. 302, 98 N.J.Eq. 554—Schmieder v. Meyer, 127 A. 162, 97 N.J.Eq. 335, reversing Schmeider v. Meyer, 125 A. 140, 96 N.J.Eq. 69.
21 C.J. p 994 note 54.

When remainders not accelerated

(1) Purchase of life estate by third party who had already purchased and mortgaged an undivided interest in the remainder does not accelerate the remainder so as to extend the security of the mortgage to include the life estate.—Watson v. Trimble, 87 S.W.2d 359, 261 Ky. 253.

(2) An attempt by the life tenant to convey a fee does not accelerate the remainder.—Superior Oil Corporation v. Alcorn, 47 S.W.2d 973, 242 Ky. 814.

11. N.Y.—Avery v. Everett, 18 N.E. 148, 110 N.Y. 317, 6 Am.S.R. 368, 1 L.R.A. 264, affirming 36 Hun 6.

12. Ill.—Schaffenacker v. Beil, 150 N.E. 333, 336, 320 Ill. 31, citing **Corpus Juris.**
Kan.—Miller v Miller, 136 P. 952, 91 Kan. 1, L.R.A.1915A 671, Ann. Cas.1917A 918.
Me.—Eastern Trust & Banking Co. v. Edmunds, 179 A. 716, 133 Me. 450.
Pa.—In re Bennett's Estate, 113 A. 685, 270 Pa. 397.
Va.—Christian v. Wilson's Ex'rs, 151 S.E. 300, 153 Va. 614, certiorari denied 51 S.Ct. 21, 282 U.S. 840, 75 L.Ed. 746.
21 C.J. p 995 note 57.

13. Me.—Eastern Trust & Banking Co. v. Edmunds, 179 A. 716, 133 Me. 450.
Va.—Christian v. Wilson's Ex'rs, 151 S.E. 300, 153 Va. 614, certiorari denied 51 S.Ct. 21, 282 U.S. 840, 75 L.Ed. 746.

14. N.Y.—City Bank Farmers' Trust Co. v. Whiteing, 241 N.Y.S. 398, 136 Misc. 416.

15. S.C.—Jones v. Bellinger, 73 S.E. 1049, 91 S.C. 1.

16. Mo.—Eckle v. Ryland, 165 S.W. 1035, 256 Mo. 424.

17. Ill.—Danz v. Danz, 26 N.E.2d 872, 373 Ill. 482—Heitzig v. Goetten, 180 N.E. 428, 347 Ill. 619.
Kan.—Faris v. Nickel, 107 P.2d 721, 152 Kan. 652—McCartney v. Robbins, 217 P. 311, 114 Kan. 141.
21 C.J. p 995 note 60.

of estates;[18] and it is a general rule of law, founded on public policy, that a contingent remainder shall be construed to vest when, and as soon as, it may.[19]

§ 84. Statutory Provisions

In the absence of contrary statutory provisions, the common-law principles governing remainders are presumed to prevail.

In the absence of express provisions to the contrary, the common-law principles governing remainders are presumed to prevail.[20] However, the common-law principles have been substantially changed by statute in some jurisdictions,[21] and the effects of such changes are treated supra §§ 68–82. As a result of statutory regulations in some jurisdictions there is no estate in real property known as a "remainder" at common law, but certain future estates in real property may be called a remainder, and may be created by that name.[22]

§ 85. Rights of Remaindermen

A remainderman is not entitled to possession of the property until the termination of the preceding particular estate. Apart from his remedies, at law and in equity, for the protection of his interests, he may be entitled to contribution from his fellow remaindermen, or to redeem the property from a mortgage.

Since, as appears in § 69 supra, a remainderman has only an estate to vest in possession in futuro, he is, as remainderman, entitled neither to actual nor to constructive possession of the property until the termination of the preceding particular estate,[23] so, his rights are ordinarily to be determined as of the time of the termination of the life estate.[24] He may, however, bring an action in equity during the lifetime of the life tenant to preserve the property, as appears in § 98 infra, and, without taking actual possession to complete his title,[25] he is entitled to all the remedies which may be necessary to protect and enforce his right at law,[26] but cannot maintain any action which depends on the right of pos-

18. Cal.—In re Shoemake, 295 P. 830, 211 Cal. 457.
Md.—Bishop v. Horney, 9 A.2d 597, 177 Md. 353.
N.Y.—In re Foster's Estate, 22 N.Y.S. 2d 252, 174 Misc. 933.

19. U.S.—Carver v. Astor, N.Y., 4 Pet. 1, 7 L.Ed. 761.

20. Iowa.—Fulton v. Fulton, 162 N. W. 253, 179 Iowa 948, L.R.A.1918E 1080.

21. Ga.—Toombs v. Spratlin, 57 S.E. 59, 127 Ga. 766.

22. Okl.—Knight v. Kimble, 225 P. 909, 99 Okl. 48.

23. U.S.—McCampbell v. Warrich Corporation, C.C.A.Ill., 109 F.2d 115, certiorari denied 60 S.Ct. 1077, 310 U.S. 631, 84 L.Ed. 1401, rehearing denied 61 S.Ct. 55—Buder v. Byrne, C.C.A.Mo., 27 F.2d 101, 107, quoting Corpus Juris.
Cal.—Newport v. Hatton, 231 P. 987, 195 Cal. 132.
Fla.—Scott v. Fairlie, 89 So. 128, 81 Fla. 433, 446.
Kan.—Selzer v. Selzer, 69 P.2d 708, 146 Kan. 273, 116 A.L.R. 1.
Ky.—Superior Oil Corporation v. Alcorn, 47 S.W.2d 973, 242 Ky. 814—Meredith v. Meredith, 264 S.W. 1109, 204 Ky. 608—Foster v. Foster, 225 S.W. 48, 189 Ky. 370.
Mich.—Lowry v. Lyle, 198 N.W. 245, 226 Mich. 676.
Minn.—Ashbaugh v. Wright, 188 N. W. 157, 152 Minn. 57.
Miss.—Belt v. Adams, 86 So. 584, 124 Miss. 194, suggestion of error dismissed 87 So. 666, 125 Miss. 387.
Mo.—Rhodus v. Geatley, 147 S.W. 2d 631—Carr v. Barr, 243 S.W. 98, 294 Mo. 673—Mathis v. Melton, 238 S.W. 806, 293 Mo. 134—Willis v. Robinson, 237 S.W. 1030, 291 Mo. 650—Welch v. Wagner, 232 S.W. 146.
Mont.—Thompson v. Flynn, 27 P.2d 505, 95 Mont. 484.
N.Y.—In re McCarty's Estate, 285 N.Y.S. 641, 158 Misc. 287.
N.C.—Corkey v. West, 186 S.E. 324, 210 N.C. 240—Blount v. Johnson, 80 S.E. 882, 165 N.C. 25.
Okl.—Lincoln v. Herndon, 285 P. 120, 141 Okl. 212.
Tenn.—Johnson v. Covington, 251 S. W. 893, 148 Tenn. 47—Templeton v. Twitty, 14 S.W. 435, 88 Tenn. 595.
Tex.—Rae v. Baker, Civ.App., 38 S. W.2d 366, error refused—Hensley v. Conway, Civ.App., 29 S.W.2d 416.
Wis.—Blodgett v. Davenport, 263 N. W. 629, 219 Wis. 596.
21 C.J. p 943 note 32, p 996 note 3.
Remedies for protection of remainder as against life tenant see supra §§ 57–64.
Termination of life estate see supra § 65.

Adverse possession

(1) Remainderman cannot make any claim of adverse possession until life tenant's death.—Clarke v. Johnson, 148 S.E. 190, 150 S.C. 351.

(2) The occupancy of land by a coremainderman during the life tenancy does not give rise to a presumption favorable to his claim of adverse possession as against the life tenant and the other coremaindermen, particularly where the relations of the parties preclude any idea of hostile possession.—Barnett v. Barnett, 142 S.W.2d 975, 283 Ky. 710.

"If a remainderman be found in possession during the existence of the life estate, the possession can in no way be referred to his title as remainderman."—Hensley v. Conway, Tex.Civ.App., 29 S.W.2d 416, 419.

Possession on request of life tenant

Where one having a remainder in fee went into possession, and made improvements, at the request of the tenant for life, a court of equity will restrain the latter from resuming the possession until he has paid for the betterments, despite the absence of a writing.—Baker v. Carson, 21 N.C. 381.

Removal of oil; right of lessee

(1) Under Illinois law, remainderman may not go on the property to drill for oil during life of life tenant against his will or consent, and life tenant can prevent remainderman from going on the premises during existence of his life estate. Carter Oil Co. v. McQuigg, C.C.A.Ill., 112 F.2d 275, affirming, D.C., 27 F.Supp. 182.

(2) Under Illinois law, remainderman could not, as against life tenant, give lessee right to enter and remove oil; but, if life tenant and remainderman join in leases to one lessee, the lessee has the rights of all parties and may remove oil. Carter Oil Co. v. McQuigg, D.C.Ill., 27 F.Supp. 182, affirmed, C.C.A., 112 F.2d 275.

24. Pa.—In re Shelley's Estate, 134 A. 468, 287 Pa. 105, modification refused 135 A. 740, 288 Pa. 11.

25. U.S.—Buder v. Byrne, C.C.A.Mo., 27 F.2d 101, 107, quoting Corpus Juris.
Ky.—Morrison v. Fletcher, 84 S.W. 548, 119 Ky. 488, 27 Ky.L. 124.

26. U.S.—Buder v. Byrne, C.C.A.Mo., 27 F.2d 101, 107, quoting Corpus Juris.
Remedies at law see infra § 98.

session, see infra § 98, since the estate of a remainderman is distinct from that of a tenant of a preceding particular estate, the remainderman taking his title by purchase and not by descent, see supra § 68, and holding with privity of estate, but without direct tenure.[27]

Since both life tenant and remainderman hold under the chief lord of the fee under the statute of quia emptores, Statute of Westminster III, 18 Edward I c 1, neither the possession of the life tenant, as appears in § 66, supra, nor that of a purchaser of the land at a sale for taxes assessed against the life tenant[28] can be adverse to that of the remainderman in fee during the lifetime of the life tenant, and, apart from the destruction of the remainder, see infra § 92, the remainderman's estate or rights cannot be, in any way, affected by any act of the particular tenant or his grantee,[29] even though the remainderman is the heir of the life tenant,[30] unless the remainderman represented that the particular estate was an estate in fee.[31] It has been held that a reconveyance of the remainderman's property wrongfully conveyed to a third person by the life tenant will not be decreed under circumstances where such a decree would be inequitable.[32]

A remainderman may purchase a tax title under a sale for delinquent taxes which the life tenant should have paid,[33] and may hold it for his exclusive benefit as against coremaindermen;[34] he need not permit the property to be sold for nonpayment of taxes, but may at any time protect his interest by paying taxes and such other obligations as are imposed on the preceding estate.[35] If a life tenant incurs a forfeiture of his estate,[36] or a devisee for life refuses to accept the estate devised,[37] the remainderman need not enter at once, since a new right of entry accrues on the death of the life tenant.

Where land is purchased with funds resulting from the sale of property subject to a remainder, the remaindermen do not have an equitable estate proportionate to the amount of the trust funds used, but merely a charge on the land, bearing interest from the life tenant's death.[38] A remainderman who effects a settlement of the amount due for life tenant's waste, while the other remaindermen fail to do so is not thereby forced to accept the settlement in full satisfaction of his interest as remainderman.[39]

Curtesy and dower in estates in expectancy are discussed in Curtesy § 11 d and Dower § 27, respectively, and the rights and liabilities of life tenants, with concomitant effects on the rights of remaindermen, in §§ 37–49 supra.

Contribution or accounting between remaindermen. A remainderman who incurs expenditures for the property may be entitled to contribution by the other remaindermen,[40] as where he pays inter-

27. N.Y.—Coakley v. Chamberlain, 8 Abb.Pr.,N.S., 37, 38 How.Pr. 483.

28. Ky.—Smith v. Young, 198 S.W. 1166, 178 Ky. 376.

29. Cal.—Williams v. Merced Irr. Dist., 48 P.2d 664, 4 Cal.2d 238.
Ky.—Whalin v. Whalin's Adm'r, 98 S.W.2d 501, 266 Ky. 209.
Mo.—Case v. Sipes, 217 S.W. 306, 280 Mo. 110.
Vt.—Blair v. Blair, 10 A.2d 188—Kennedy v. Rutter, 6 A.2d 17, 110 Vt. 332.
21 C.J. p 996 note 14.

Consent to entry on land

Right of remaindermen to damages for flooding of their land by irrigation district could not be affected or defeated by any act of life tenant in consenting to entry on the land by district. Williams v. Merced Irr. Dist., 48 P.2d 664, 4 Cal.2d 238.

Life tenant's debt to hospital

Where will vested widow with life estate with power to sell property for her support and devised remainder to testator's children, lien could not be imposed against land remaining on widow's death to secure payment of claim of hospital to which widow was committed on being adjudged insane.—Whalin v. Whalin's Adm'r, 98 S.W.2d 501, 266 Ky. 209.

30. N.Y.—Matter of Allison, 102 N. Y. S. 887, 53 Misc. 222, affirmed 107 N.Y.S. 1119, 122 App.Div. 898.

31. Tex.—Holder v. Melugin, Civ. App., 146 S.W 958.

32. Ky.—Mays v. Hannah, 4 Ky.L 50.
21 C J. p 997 note 17.

33. Kan.—Jinkiaway v. Ford, 145 P. 885, 93 Kan. 797, L.R.A.1915E 343, Ann.Cas.1916D 321.
Mo.—Duffley v. McCaskey, 134 S.W. 2d 62, 345 Mo. 550, 126 A.L.R. 853.

Purchase not merely payment of taxes

A life tenant whose neglect of duty to pay taxes on land brought about tax sale thereof to remainderman, is in no position to assert that remainderman's purchase of land was merely payment of taxes because of remainderman's duty to state and hence that life estate was preserved. —Duffley v. McCaskey, supra.

Redemption from tax sale

Respecting redemption by remainderman from tax sale, sums paid by life tenant's lessee to equip property was immaterial under lease, providing that improvements remain lessee's property, removable by him after expiration of lease.—Wells v. Henry, 45 S.W.2d 20, 184 Ark. 1114.

34. Iowa.—Crawford v. Meis, 99 N. W. 186, 123 Iowa 610, 101 Am.S.R. 337, 66 L.R.A. 154.
Kan.—Jinkiaway v Ford, 145 P. 885, 93 Kan 797, L.R.A.1915E 343, Ann. Cas.1916D 321.

35. N.Y.—In re McCarty's Estate, 285 N.Y.S. 641, 158 Misc. 287.

36. Mass.—Stevens v. Winship, 1 Pick. 318, 11 Am.D. 178.
S C.—Reese v. Holmes, 26 S.C.Eq. 531.

37. Ill.—Wakefield v. Wakefield, 100 N.E. 275, 256 Ill. 296, Ann.Cas.1913E 414.
Mass.—Wells v. Prince, 9 Mass. 508.

38. Mo.—Munro v. Collins, 7 S.W. 461, 95 Mo. 33.
N.J.—Bohle v. Hasselbrock, 48 A. 916, 61 N.J.Eq. 470, reversing 51 A. 508, 64 N.J.Eq. 334, 61 L.R.A. 323.

39. Ky.—Hunt v. Hardin, 189 S.W. 713, 172 Ky. 558.

40. Iowa.—Reddish v. John, 179 N. W. 951, 190 Iowa 49.
Okl.—Helm v. Belvin, 232 P. 382, 107 Okl. 214.

est on a mortgage[41] or taxes,[42] or pays for the painting of the property.[43] On an accounting between remaindermen, the propriety of particular items has been adjudicated.[44]

Liability of purchaser. A purchaser of real estate from a widow, having a life estate with knowledge of the limits of her title, who sold part of it to a bona fide purchaser renders himself liable to the remaindermen for the damages sustained.[45]

Redemption from mortgage. The owner of the estate in remainder has a right to redeem property from a mortgage.[46] The right of a remainderman to redeem his interest in the mortgage is not postponed until the termination of the preceding estate,[47] and he may disaffirm a voidable sale and redeem without waiting for the falling in of such estate.[48] However, a remainderman is not entitled to redeem from a mortgagee who is also a remainderman of an equal interest in the equity of redemption.[49]

As a general rule, redemption by a remainderman will not quicken his enjoyment of the postponed estate.[50]

Where the right of the life tenant to disaffirm a voidable foreclosure and to redeem has been lost by laches, and such right still remains in the remainderman, the latter may redeem subject to the mortgagee's right to retain possession during the life of the life tenant.[51] Where the mortgaged property has appreciated in value, the right of a remainderman of a tenant in common to redeem may be limited to the share owned by the devisor through whom he claims.[52]

§ 86. Liabilities of Remaindermen

The liability of remainders to levy under attachment or execution, or to the claims of trustees in bankruptcy, is considered in other titles of this work. The liability of the remainder or remainderman has been adjudicated, in particular circumstances, with respect to taxes, improvements, advances to the life tenant, and the discharge of liens.

A vested remainder may be subject to the claims of the remainderman's creditors, see infra § 89; may be levied on under an attachment, see Attachment § 78 d, or execution, see the C.J.S. title Executions § 36, also 23 C.J. p 335 note 54–p 336 note 56, against the remainderman; may pass to a trustee in bankruptcy, see Bankruptcy § 172 a; and may be sold subject to the rights of the owner of the precedent estate, see infra § 89. A contingent remainder is not subject to attachment, see Attachment § 78 d, but is varyingly held, or held not, subject to execution, see the C.J.S. title Executions § 36, also 23 C.J. p 336 notes 57–59, against the remainderman, although a contingent remainderman has such an interest as will entitle him to resist a levy by attachment on the land to pay a debt of a vested remainderman,[53] and a contingent remainder may be taken by a trustee in bankruptcy, see Bankruptcy § 172 a. The invalidity of a sale under execution may be attacked by a remainderman.[54] Where the court directs that improvements be made on the property and the cost thereof paid from the proceeds of mortgages on the property, it has been held that remaindermen cannot be held personally liable.[55]

The rights and liabilities of life tenants, with concomitant effects on the liabilities of remaindermen, are considered in §§ 37–49 supra.

The question of apportionment of the amount paid by a life tenant or remainderman to discharge liens is said to arise only when the liens were created by other persons;[56] and if a debt secured

41. Iowa.—Reddish v. John, 179 N.W. 951, 190 Iowa 49.

42. Okl.—Helm v. Belvin, 232 P. 382, 107 Okl. 214.

43. Iowa.—Reddish v. John, 179 N.W. 951, 190 Iowa 49.

44. **Item for sidewalk tax held allowable.**—Reddish v. John, 179 N.W. 951, 190 Iowa 49.

Improper rental charge

Amount on account of rental with which she was improperly charged held properly added to remainderman's recovery.—Reddish v. John, supra.

Item not pleaded

The trial court's refusal to allow an item not pleaded cannot be interfered with by the appellate court.—Reddish v. John, supra.

45. Ill.—Cassem v. Prindle, 101 N.E. 241, 258 Ill. 11.
21 C.J. p 997 note 38.

46. Minn.—Kreuscher v. Roth, 188 N.W. 996, 152 Minn. 320.
42 C.J. p 363 note 50.

Amount of redemption money

Where the wife of a life tenant of mortgaged real estate loans her husband money to pay a debt for money borrowed to make an interest payment on a mortgage, and afterward takes an assignment of the mortgage, such loan is not an element in the amount of redemption money necessary to be tendered her by the remaindermen in order to discharge the mortgage.—Fellows v. Fellows, 46 A. 474, 69 N.H. 339.

47. Ala.—Pitts v. American Freehold Land Mortg. Co., 47 So. 242, 157 Ala. 56.
Wis.—Zaegel v. Kuster, 7 N.W. 781, 51 Wis. 31.

48. Ala.—Pitts v. American Freehold Land Mortg. Co., 47 So. 242, 157 Ala. 56.

49. Md.—Snook v. Zentmyer, 46 A. 1008, 91 Md. 485.
21 C.J. p 997 note 37.

50. Ala.—Pitts v. American Freehold Land Mortg. Co., 47 So. 242, 157 Ala. 56.
Ill.—Bozarth v. Largent, 21 N.E. 218, 128 Ill. 95.

51. Ala.—Pitts v. American Freehold Land Mortg. Co., 47 So. 242, 157 Ala. 56.

52. Or.—Tualatin Academy v. Keene, 117 P. 424, 59 Or. 496.

53. Ga.—Watson v. Adams, 80 S.E. 577, 103 Ga. 733.

54. Ga.—Morehead v. Allen, 56 S.E. 745, 127 Ga. 510.

55. Ky.—Rudd v. Littell, 45 S.W. 451, 46 S.W. 3, 20 Ky.L. 158.

56. Mo.—Souders v. Kitchens, 124 S.W.2d 1137, 344 Mo. 18.

by a deed of trust is regarded as an encumbrance for which remaindermen, as well as a life tenant, are liable, the latter are subject to loss of their estate unless they make contribution within a reasonable time.[57] Advances by some of several remaindermen to the life tenant personally are not proper charges against the estate in remainder.[58]

Where realty was productive of practically no income during the life of the life tenant, remaindermen were held liable for taxes paid by the life tenant and his grantee during the former's life, less the small income received by the latter.[59]

§ 87. Sale or Conveyance

Contingent remainders and executory devises are governed by the same rule as to their alienation or transmission.

Contingent remainders and executory devises have been said to be governed by the same rule so far as their alienation or transmission is concerned.[60]

§ 88. By Remaindermen

a. In general
b. Vested remainders
c. Contingent remainders

a. In General

It is broadly held that a remainderman can sell his remainder interest. A life tenant and the holder or holders of the remainder may by their joint conveyance grant a fee, at least if the remainder is vested.

It has been broadly held that a remainderman can sell his remainder interest in land.[61] It is further held that a life tenant and the holder or holders of the remainder may by their joint conveyance grant a fee,[62] and that a remainderman in fee, by joining with the tenant of the preceding estate, may convey an absolute and indefeasible title in fee simple;[63] but under other authority this result follows only if the remainder is vested, and not if it is contingent,[64] although it has been held that a life tenant can convey a perfect title by joining all outstanding contingent remaindermen.[65]

b. Vested Remainders

A vested remainder may be alienated or conveyed by the remainderman, the purchaser taking subject to whatever restrictions and limitations there were on the remainder in the remainderman's hands.

A vested remainder is a present interest in the property, see supra § 69, which the remainderman, under or apart from statute so providing, may alienate or convey,[66] during the continuance of the

57. Mo.—Souders v. Kitchens, 137 S.W.2d 501, 345 Mo. 977.

58. Md.—Weber v. Bien, 123 A. 52, 143 Md. 561.

59. R.I.—Calcagni v. Cirino, 14 A. 2d 803.

60. Conn.—Bartram v. Powell, 89 A. 885, 88 Conn. 86.

61. Ga.—Aycock v. Williams, 196 S. E. 54, 185 Ga. 585—J. C. & W. C. Holman Mule Co. v. Bullard, 166 S.E. 825, 175 Ga. 900.
Ky.—Elkhorn Land & Improvement Co. v. Wallace, 24 S.W.2d 560, 232 Ky. 741.
"A mere . . . remainder of a defeasible estate may be assigned, and a regular conveyance thereof is valid and will be upheld, unless fraudulently procured."—Gottwald v. Warlick, Tex.Civ.App., 125 S.W.2d 1060, 1061.
Purchaser takes no greater interest than that owned by the remainderman, and is subject to whatever rights of others to which he was subject.
U.S.—Christian v. Waialua Agr. Co., C.C.A.Hawaii, 93 F.2d 603, rehearing denied 94 F.2d 806, certiorari granted 58 S.Ct. 949, 304 U.S. 553, 82 L.Ed. 1523, reversed on other grounds 59 S.Ct. 21, 305 U.S. 91, 83 L.Ed. 60, rehearing denied 59 S.Ct. 240, 305 U.S. 673, 83 L.Ed. 436—Waialua Agr. Co. v. Christian, C.C.A.Hawaii, 93 F.2d 603, rehearing denied 94 F.2d 806, certiorari granted 58 S.Ct. 949, 304 U.S. 553, 82 L.Ed. 1523, reversed on other grounds 59 S.Ct. 21, 305 U.S. 91, 83 L.Ed. 60, rehearing denied 59 S.Ct. 240, 305 U.S. 673, 83 L.Ed. 436.
Ky.—Caudil v. Wagoner, 212 S.W. 422, 184 Ky. 381.
Mo.—Schee v. Boone, 243 S.W. 882, 295 Mo. 212.
Share in resale price
Remainderman adequately compensated for the conveyance of the remainder interest held not entitled, on the ground of misrepresentation as to the nature of the transaction, to a share in the resale price.—Dusenberry v. Griffin, 135 A. 547, 100 N.J.Eq. 117, affirmed 138 A. 920, 101 N.J.Eq. 739.

62. Cal.—Holman v. Holman, 77 P. 2d 515, 25 Cal.App.2d 445.
Ill.—Greenfield v. Lauritson, 137 N. E. 818, 306 Ill. 279.
Ky.—Shaver v. Ellis, 11 S.W.2d 949, 226 Ky. 806—Wolford v. Smith, 142 S.W. 1055, 146 Ky. 341.
Rights of unborn children
However, under a will devising land to a man for life and on his death in equal parts to his children, it was held that the rights of unborn children could not be extinguished by a deed from the life tenant and the living children, and that such grantors cannot give a good, merchantable title.—Deem v. Miller, 135 N.E. 396, 302 Ill. 240, 25 A.L.R. 766.

63. Mich.—Kemp v. Sutton, 206 N. W. 366, 370, 233 Mich. 249, quoting **Corpus Juris.**
21 C.J. p 998 note 51.

64. N.C.—Thames v. Goode, 9 S.E. 2d 485, 217 N.C. 639—Woody v. Cates, 197 S.E. 561, 213 N.C. 792—Mercer v. Downs, 131 S.E. 575, 191 N.C. 203—Brown v. Guthery, 130 S.E. 836, 190 N.C. 822.
Wis.—Ruggles v. Tyson, 79 N.W. 766, 81 N.W. 367, 104 Wis. 500, 48 L.R.A. 809.

65. Mo.—Summet v. City Realty, etc., Co., 106 S.W. 614, 208 Mo. 501.

66. Ga.—De Vane v. Young, 115 S. E. 661, 154 Ga. 832.
Ill.—Boye v. Boye, 133 N.E. 382, 300 Ill. 508.
Ky.—Sherley v. Sherley, 232 S.W. 53, 192 Ky. 122—Lindenberger v. Cornell, 229 S.W. 54, 190 Ky. 844.
Me.—Real Estate Title Ins. & Trust Co. of Philadelphia v. Dearborn, 109 A. 816, 119 Me. 168
Mo.—Donaldson v. Donaldson, 278 S. W. 686, 311 Mo. 208—Schee v Boone, 243 S.W. 882, 295 Mo. 212.
N.Y.—In re Rohr's Estate, 260 N.Y. S. 181, 145 Misc. 382—In re Taylor's Will, 198 N.Y.S. 347, 119 Misc. 871.
Ohio.—Millison v. Drake, 174 N.E. 776, 123 Ohio St. 249, affirming 175 N.E. 34, 37 Ohio App. 559.

preceding life estate,[67] thereby giving the grantee all the rights that a remainderman could assert,[68] even though subject to be divested,[69] or subject to open to let in after-born children,[70] or although subject to a provision in the will that the property be kept together for the support of the life tenant,[71] or that the remainderman be prohibited from assigning his fee,[72] and however remote or contingent the right of enjoyment may be;[73] but the remainderman cannot convey any present interest or place his grantee in present possession of the land.[74] The purchaser of the remainder takes subject to the rights of the owner of the precedent estate[75] and of prior secured creditors or lienholders.[76] The remainderman may convey his interest to the life tenant,[77] a quitclaim deed being sufficient to accomplish this result.[78]

Only a remainderman or one claiming directly under him may assert fraud inducing the conveyance of the remainder, in order to avoid the conveyance,[79] and such fraud may be waived by inaction.[80] Mere inadequacy of the consideration paid for a vested remainder is not in itself sufficient to invalidate the sale in the absence of any evidence of fraud or of a fiduciary relationship,[81] although such inadequacy of consideration may be a circumstance tending to establish fraud.[82] Any fraudulent misrepresentation by the vendor of a remainder will invalidate the sale,[83] even in the absence of evidence of any trust relationship between the parties.[84]

A remainderman's agreement not to claim a share of the realty of an estate is not sufficient to divest him of his vested interest in land.[85] Remaindermen will not be allowed after the death of the life tenant to rescind on the ground of fraud an agreement for the release of their remainders to the life tenant, where such agreement seemed favorable to them during the lifetime of the life tenant and was not rescinded by them at that time.[86]

c. Contingent Remainders

Apart from statutes providing for the conveyance of contingent remainders, authorities differ as to their alienability; such a remainder is held alienable when the remainderman is ascertained and the uncertainty making it contingent is in the event on which it is limited to take effect. The grantor in a conveyance of a contingent remainder executed before the happening of the event on which it is contingent may, on such happening, be estopped from asserting title, at least if the conveyance contained covenants of warranty.

Under the common law, a contingent remainder, before the happening of the contingency, was inalienable,[87] being regarded as a possibility rather

Or.—Hawkins & Roberts v. Jerman, 35 P.2d 248, 147 Or. 657.
21 C.J. p 997 note 40.
Mortgage see infra § 90.
Sale under execution see the C.J.S. title Executions § 36, also 23 C.J. p 335 note 54—p 336 note 56.

At common law; livery of seisin

(1) "At common law vested remainders . . . being actual estates, could be aliened by any of the conveyances operating by force of the statute of uses."—Copenhaver v. Pendleton, 155 S.E. 802, 807, 155 Va. 463, 77 A.L.R. 324.

(2) "No estate in remainder could be aliened by common-law livery of seisin. To transfer land by that primitive and now obsolete method possession was indispensable, so that the seller could make 'livery'—i. e., delivery of a turf or twig to the buyer. With this exception vested estates in remainder are and always have been alienable (also inheritable and devisable) to the same extent as vested estates in possession."—Real Estate Title Ins. & Trust Co. of Philadelphia v. Dearborn, 109 A. 816, 817, 119 Me. 168.

Defeasance

"If there is no defeasance provided for in the conditions of a vested remainder, or if a defeasance is provided for but the condition does not happen which will create the defeasance, a sale and conveyance by the remaindermen transmits the title to the property, although the time is deferred at which the owner of the remainder can enjoy it."—Sherley v. Sherley, 232 S.W. 53, 55, 192 Ky. 122.

Particular instrument held a valid transfer of a vested remainder.—Schley v. Williamson, 111 S.E. 917, 153 Ga. 245.

67. Ga.—De Vane v. Young, 115 S.E. 661, 154 Ga. 832—Ragan v. Rogers, 92 S.E. 647, 146 Ga. 818.

68. Mich.—Hartz v. Hilsendegen, 148 N.W. 433, 182 Mich. 129.

69. N.Y.—Peterson v. De Baun, 55 N.Y.S. 249, 36 App.Div. 259.
21 C.J. p 998 note 43.

Effect on right of next taker

Where a testator intended that if one who took a vested remainder died before the life tenant, his share should go to his issue, and that his interest was not absolute but subject to being divested in favor of his issue, no conveyance or encumbrance of the property by him could affect the right of the issue.—Lansdale v. Linthicum, 115 A. 116, 139 Md. 155.

70. Mo.—Barkhoefer v. Barkhoefer, 204 S.W. 906.
21 C.J. p 998 note 44.

71. Ga.—Ragan v. Rogers, 92 S.E. 647, 146 Ga. 818.

72. Mass.—Hall v. Tufts, 18 Pick. 455.

73. Ky.—Patton v. Harrison, 1 Ky. Op. 304.

74. Ky.—Wolford v. Smith, 142 S.W. 1055, 146 Ky. 341.

75. Ky.—Caudil v. Wagoner, 212 S. W. 422, 184 Ky. 381.

76. Md.—Armiger v. Reitz, 46 A. 990, 91 Md. 334.

77. Ky.—Ware v. Frank, 38 S.W. 1061, 18 Ky.L. 1009.

78. Ill.—Ortmayer v. Elcock, 80 N. E. 339, 225 Ill. 342—Williams v. Esten, 53 N.E. 562, 179 Ill. 267.

79. Tex.—Hamilton v. Keller, Civ. App., 148 S.W.2d 1011.

80. Tex.—Hamilton v. Keller, supra.

81. Pa.—In re Phillips, 55 A. 212, 205 Pa. 511.
21 C.J. p 998 note 54.

82. Wis.—Moehlenpah v. Mayhew, 119 N.W. 826, 138 Wis. 531.

83. Wis.—Moehlenpah v. Mayhew, supra.
21 C.J. p 998 note 56.

84. Pa.—Obney v. Obney, 26 Pa. Super. 116.

85. Mich.—Broas v. Broas, 116 N.W. 1077, 153 Mich. 310.

86. Ky.—Almon v. Ellison, 81 S.W. 245, 26 Ky.L. 320.

87. U.S.—Dickson v. Neal, C.C.A. Ark., 2 F.2d 533, certiorari denied 46 S.Ct. 19, 269 U.S. 556, 70 L. Ed. 409.

than as an estate in the land;[88] the authorities are said to be in conflict as to whether such remainder is now alienable.[89] It has been broadly held that a contingent remainder, no matter on what the contingency depends,[90] is subject to conveyance[91] by deed,[92] or to transfer,[93] assignment,[94] or, when clothed with its usual attributes,[95] alienation;[96] but under other authority a contingent remainder cannot be the subject of sale,[97] and cannot be transferred or conveyed[98] by deed or common-law conveyance;[99] and it has been said that alienability is not a necessary attribute thereof.[1] More precisely, a contingent remainder is alienable when the remainderman is ascertained and the uncertainty which makes it contingent is in the event on which it is limited to take effect, because in such case the possibility is coupled with an interest,[2] but the interest transferred is subject to the same contingencies in the hands of the transferee as it would have been had it not been transferred.[3] On

Kan.—McCartney v. Robbins, 217 P. 311, 114 Kan. 141.
Ky.—Fulton v. Teager, 209 S.W. 535, 183 Ky. 381.
Mo.—Gordon v. Tate, 284 S.W. 497, 314 Mo. 508—Godman v. Simmons, 20 S.W. 972, 113 Mo. 122—Callison v. Wabash Ry. Co., 275 S.W. 965, 219 Mo.App. 271.
Or.—Hawkins & Roberts v. Jerman, 35 P.2d 248, 147 Or. 657.
Va.—Copenhaver v. Pendleton, 155 S.E. 802, 155 Va. 463, 77 A.L.R. 324.
W.Va.—Rouss v. Rouss, 111 S.E. 586, 90 W.Va. 646.
21 C.J. p 1000 note 79.

88. Or.—Hawkins & Roberts v. Jerman, 35 P.2d 248, 147 Or. 657.
Va.—Copenhaver v. Pendleton, 155 S.E. 802, 155 Va. 463, 77 A.L.R. 324.

89. Hawaii.—Crescent City Motors v. Nalaielua, 31 Hawaii 418.
Sale under execution see the C.J.S. title Executions § 36, also 23 C.J. p 336 notes 57–59.

90. Mo.—Vance v. Humphreys, 241 S.W. 91, 210 Mo.App. 498.

91. Hawaii.—Crescent City Motors v. Nalaielua, 31 Hawaii 418.
Iowa.—John Hancock Mut. Life Ins. Co. v. Dower, 271 N.W. 193, 222 Iowa 1377—Ward v. Meredith, 173 N.W. 246, 186 Iowa 1108.
Mo.—Donaldson v. Donaldson, 278 S.W. 686, 311 Mo. 208—Schee v. Boone, 243 S.W. 882, 295 Mo. 212.

"Bare contingency or possibility"
Under a deed conveying realty to grantor in trust for benefit of grantor's daughter during her natural lifetime with provision that at daughter's death the land should go to her surviving children, if any, in fee simple, and, if none, then to revert to grantor, the remainder interest of daughter's son under deed before daughter's death was not a "bare contingency or possibility" within statute providing that a bare contingency or possibility may not be the subject of sale.—Phelps v. Palmer, Ga., 15 S.E.2d 503.

Right to possession, rents, and profits will pass to the grantee of a contingent remainderman to whom the life tenant quitclaimed.—Donaldson v. Donaldson, 278 S.W. 686, 311 Mo. 208.

92. Iowa.—Lane v. Travelers Ins. Co. of Hartford, Conn., 299 N.W. 553, 230 Iowa 973—Noonan v. State Bank of Livermore, 233 N.W. 487, 211 Iowa 401.

93. Mo.—Bock v. Whelan, 30 S.W. 2d 607.

94. N.C.—Bodenhamer v. Welch, 89 N.C. 78.
Tenn.—Ankenbauer v. Ankenbauer, 6 Tenn.App. 221.

95. Mo.—Gordon v. Tate, 284 S.W. 497, 314 Mo. 508.

96. Hawaii.—Crescent City Motors v. Nalaielua, 31 Hawaii 418.
Kan.—McCartney v. Robbins, 217 P. 311, 114 Kan. 141
Ky.—Stevens v. Stevens, 297 S.W. 1104, 221 Ky 123.
Contra Kendrick v. Scott, 254 S.W. 422, 200 Ky. 202.
Me.—Gould v. Leadbetter, 150 A. 375, 129 Me. 101.
Mo.—Donaldson v. Donaldson, 278 S.W. 686, 311 Mo. 208.
N.Y.—In re Taylor's Will, 198 N.Y.S. 347, 119 Misc. 871.

97. Ill.—Raritan State Bank v. Huston, 161 N.E. 141, 329 Ill. 604—Du Bois v. Judy, 126 N.E. 104, 291 Ill. 340—Hill v. Hill, 106 N.E. 262, 264 Ill. 219.

98. Ark.—Love v. McDonald, 148 S.W.2d 170, 201 Ark. 882.
Direct transfer inter vivos held not possible.—Hawkins & Roberts v. Jerman, 35 P.2d 248, 147 Or. 657.

99. U.S.—In re Landis, C.C.A.Ill., 41 F.2d 700, certiorari denied Farmers' Bank of Mount Pulaski, Ill., v. Bickenbach, 51 S.Ct. 77, 282 U.S. 872, 75 L.Ed. 770.
Ill.—Kohl v. Montgomery, 25 N.E.2d 826, 373 Ill. 200—Raritan State Bank v. Huston, 161 N.E. 141, 329 Ill. 604—Du Bois v. Judy, 126 N.E. 104, 291 Ill. 340.
Ky.—Boggess v. Crail, 5 S.W.2d 906, 224 Ky. 97.
Ohio.—Pollock v. Brayton, 163 N.E. 573, 29 Ohio App. 296.
21 C.J. p 1000 note 79.

Exception as to release and estoppel
"Under the rule in this state a contingent remainder is not an estate that may be conveyed voluntarily by deed except by way of release or estoppel."—Biwer v. Martin, 128 N.E. 518, 523, 294 Ill. 488.

1. Mo.—Gordon v. Tate, 284 S.W. 497, 314 Mo. 508.

2. Ga.—Gormley v. Cleaveland, 200 S.E. 793, 187 Ga. 457—Todd v. Williford, 150 S.E. 912, 169 Ga. 543.
Hawaii.—Crescent City Motors v. Nalaielua, 31 Hawaii 418.
Ill.—Du Bois v. Judy, 126 N.E. 104, 291 Ill. 340.
Kan.—Berthoud v. McCune, 287 P. 904, 906, 130 Kan. 634, quoting **Corpus Juris.**
Ky.—Lindenberger v. Cornell, 229 S.W. 54, 190 Ky. 844—Goodman v. Carpenter, 224 S.W. 676, 189 Ky. 83.
Mich.—In re Coots' Estate, 234 N.W. 141, 143, 253 Mich. 208, citing **Corpus Juris.**
Miss.—Alexander v. Richardson, 64 So. 217, 106 Miss. 517.
N.J.—Gebhardt v. Elkin, 135 A. 509, 100 N.J.Eq. 254.
N.C.—Cheek v. Walker, 50 S.E. 863, 138 N.C. 446.
Or.—Hawkins & Roberts v. Jerman, 35 P.2d 248.
Tenn.—Frank v. Frank, 280 S.W. 1012, 153 Tenn. 215.
Vt.—Blair v. Blair, 10 A.2d 188, 190, citing **Corpus Juris**—Kennedy v. Rutter, 6 A.2d 17, 23, 110 Vt. 332, citing **Corpus Juris.**
21 C.J. p 998 note 61.
Mortgage see infra § 90.

Corpus Juris section cited in connection with the statement that "a contingent remainderman in being may . . . effectively assign his contingency in a manner to estop him from later asserting his title after the contingency transpires."—Waldon v. Baker, 88 P.2d 352, 354, 184 Okl. 492.

3. Hawaii.—Crescent City Motors v. Nalaielua, 31 Hawaii 418.
Kan.—Berthoud v. McCune, 287 P. 904, 906, 130 Kan. 634, quoting **Corpus Juris.**
Ky.—Cox v. Corrigan-McKinney Steel Co., 58 S.W.2d 625, 248 Ky. 426.
Mo.—Donaldson v. Donaldson, 278 S.W. 686, 311 Mo. 208—Schee v. Boone, 243 S.W. 882, 295 Mo. 212.
21 C.J. p 999 note 62.

the other hand, if the remainderman is not ascertained, there is not a possibility coupled with an interest but only a bare possibility[4] which is not subject to sale or transfer, according to some authorities,[5] although according to other decisions, contingent remainders are alienable whenever the remainderman is in being.[6]

Statutes in a number of jurisdictions provide for the conveyance or alienation of contingent remainders;[7] so, they are alienable under statutes authorizing the conveyance of "expectant estates,"[8] or "any estate or interest,"[9] or "any interest in or claim to" real property,[10] or "all the interest of the grantor unless a contrary intent can be reasonably inferred";[11] but under at least one statute, no person may dispose of a contingent estate where the contingencies are as to the person in whom the estate may vest.[12] Statutes providing that contingent remainders are devisable have been applied in several cases.[13]

A contingent remainder might at common law be released by the remainderman to the reversioner,[14] or to the tenant in possession,[15] or to any person possessed of an interest in the land, although not to a mere stranger.[16] A deed or assignment of a contingent remainder, even if inoperative as a grant or conveyance at common law, may be upheld as an executory agreement and enforced by a court of equity according to its intent, if supported by a valid consideration, whenever the grantor is in a condition to give it effect.[17] Likewise, on the happening of the event on which the remainder was contingent, the title inures to the benefit of the grantee named in a conveyance executed before that event,[18] such conveyance being as effective as

Contingency of survival

(1) "The purchaser will receive nothing unless the contingent remainderman survives until the event occurs upon which his estate vests."—Caperton v. Smith's Trustee, 104 S.W.2d 440, 444, 268 Ky. 223—Lindenberger v. Cornell, 229 S.W. 54, 59, 190 Ky. 344.

(2) Contingent remainder to person in existence, contingency being that he survive to named date, is alienable.—Crescent City Motors v. Nalaielua, 31 Hawaii 418.

(3) A conveyance made by a contingent remainderman during the life tenant's lifetime passes no title when the life tenant survives the remainderman.—Schee v. Boone, 243 S.W. 882, 295 Mo. 212—Commerce Trust Co. v. Foulds, App., 273 S.W. 229.

Where contingency is as to person, "all . . . [the contingent remainderman] could sell was the chance or prospective right he had, and if he died before such remainder vested, no title passed."—Callison v. Wabash Ry. Co., 275 S.W. 965, 967, 219 Mo. App. 271.

4. N.C.—Fortescue v. Satterthwaite, 23 N.C. 566.
21 C.J. p 999 note 65.

5. Ark.—Love v. McDonald, 148 S.W.2d 170, 201 Ark. 882.
Ill.—Du Bois v. Judy, 126 N.E. 104, 291 Ill. 340.
Or.—Hawkins & Roberts v. Jerman, 35 P.2d 248, 147 Or. 657.
21 C.J. p 999 note 66.

6. Hawaii.—Crescent City Motors v. Nalaielua, 31 Hawaii 418, 425, quoting Corpus Juris.
21 C.J. p 999 note 67.

7. Ky.—Cox v. Corrigan-McKinney Steel Co., 58 S.W.2d 625, 248 Ky. 426.
Mich.—In re Coots' Estate, 234 N.W. 141, 253 Mich. 208.
Mo.—Callison v. Wabash Ry. Co., 275 S.W. 965, 219 Mo.App. 271.
N.J.—Gebhart v. Wilkin, 135 A. 509, 100 N.J.Eq. 254.
N.C.—Poole & Blue v. Thompson, 112 S.E. 323, 183 N.C. 588.
Okl.—Knight v. Kimble, 225 P. 909, 99 Okl. 48.
21 C.J. p 1000 notes 70–71.

8. N.Y.—Weeks v. Guerin, 200 N.Y.S. 387, 121 Misc. 131.
21 C.J. p 1000 note 72.

9. Mo.—Kay v. Politte, 129 S.W.2d 863, 344 Mo. 805, 122 A.L.R. 1145.
Tenn.—Frank v. Frank, 280 S.W. 1012, 153 Tenn. 215.
21 C.J. p 1000 note 73.

10. Ky.—Caperton v. Smith's Trustee, 104 S.W.2d 440, 268 Ky. 223—Lindenberger v. Cornell, 229 S.W. 54, 190 Ky. 344—Fulton v. Teager, 209 S.W. 535, 183 Ky. 381—McAllister v. Ohio Val. Banking & Trust Co., 71 S.W. 509, 114 Ky. 540.
Va.—Copenhaver v. Pendleton, 155 S.E. 802, 155 Va. 463, 77 A.L.R. 324.
W.Va.—Rouss v. Rouss, 111 S.E. 586, 90 W.Va. 646.
21 C.J. p 1000 note 74.

11. Iowa.—McDonald v. Bayard Sav. Bank, 98 N.W. 1025, 123 Iowa 413.
21 C.J. p 1000 note 75.

12. N.J.—Tantum v. Campbell, 91 A. 120, 83 N.J.Eq. 361.

13. Mich.—In re Coots' Estate, 234 N.W. 141, 253 Mich. 208.
21 C.J. p 1000 notes 77–78.

14. Ill.—Kohl v. Montgomery, 25 N.E.2d 826, 373 Ill. 200—Du Bois v. Judy, 126 N.E. 104, 291 Ill. 340.
Va.—Copenhaver v. Pendleton, 155 S.E. 802, 155 Va. 463, 77 A.L.R. 324.
21 C.J. p 1000 note 80.

Divesting remainder

"Such release is valid to divest the contingent remainderman of his interest . . . and vest it in the life tenant."—Kohl v. Montgomery, 25 N.E.2d 826, 830, 373 Ill. 200.

15. Ill.—Kohl v. Montgomery, supra.
Or.—Hawkins & Roberts v. Jerman, 35 P.2d 248, 147 Or. 657.
21 C.J. p 1000 note 81.

Release by quitclaim deed

U.S.—Dickson v. Neal, C.C.A.Ark., 2 F.2d 533, certiorari denied 46 S.Ct. 19, 269 U.S. 556, 70 L.Ed. 409, stating Arkansas law.

16. Ill.—Kohl v. Montgomery, 25 N.E.2d 826, 373 Ill. 200.
21 C.J. p 1000 note 82.

17. U.S.—In re Landis, C.C.A.Ill., 41 F.2d 700, certiorari denied Farmers' Bank of Mount Pulaski, Ill., v. Bickenbach, 51 S.Ct. 77, 282 U.S. 872, 75 L.Ed. 770.
Ky.—Fulton v. Teager, 209 S.W. 535, 183 Ky. 381.
N.C.—Thames v. Goode, 9 S.E.2d 485, 217 N.C. 639—Woody v. Cates, 197 S.E. 561, 213 N.C. 792.
Or.—Hawkins & Roberts v. Jerman, 35 P.2d 248, 147 Or. 657.
Va.—Copenhaver v. Pendleton, 155 S.E. 802, 155 Va. 463, 77 A.L.R. 324.
21 C.J. p 1000 note 83.

18. U.S.—In re Landis, C.C.A.Ill., 41 F.2d 700, certiorari denied Farmers' Bank of Mount Pulaski, Ill., v. Bickenbach, 51 S.Ct. 77, 282 U.S. 872, 75 L.Ed. 770.
Ga.—Phelps v. Palmer, 15 S.E.2d 503.
Ill.—Kohl v. Montgomery, 25 N.E.2d 826, 373 Ill. 200.
Me.—Gould v. Leadbetter, 150 A. 375, 129 Me. 101.
Mo.—Donaldson v. Donaldson, 278 S.W. 686, 311 Mo. 208.
N.C.—Woody v. Cates, 197 S.E. 561, 213 N.C. 792.
Ohio.—Pollock v. Brayton, 163 N.E. 573, 29 Ohio App. 296.

if made after such event,[19] and the grantor, or those claiming under him, being estopped from asserting title;[20] but this result has been held to follow only where the conveyance was made by deed with general covenants of warranty or by bargain and sale deed,[21] and not in the case of a deed without covenants of warranty,[22] nor in the case of a mere release or quitclaim deed,[23] nor in the case of contingent remaindermen who are minors and whose interests are conveyed by a guardian,[24] unless such a mode of conveying contingent remainders is authorized by statute, as discussed earlier in this section.

The mode of conveyance usually employed at common law in the case of contingent remainders was a fine or common recovery,[25] operating by estoppel against the parties until the contingency should happen, and after the happening of the contingency operating on the estate as though it had been vested at the time the fine was levied, and for all practical purposes, vesting a complete legal title in the cognizee.[26]

§ 89. Judicial Sale

a. In general
b. Representation

a. In General

Subject to statutory and other restrictions, a court may have power to order the sale of property in which there are remainder interests, for the purpose of reinvestment, especially where, or provided that, such sale is advantageous to the interests of all parties or necessary to preserve such interests for those ultimately entitled thereto; and the court's order must provide for such an investment of the proceeds as will protect such interests.

The power of the courts to sell property in which there are remainder interests has been, in some jurisdictions, expressly provided for by statutes, which have been applied in several cases.[27] A court so authorized by statute, or a court of equity in the absence of such authorization, may have jurisdiction to order the sale of property in which there are remainder interests, including contingent remainders, for the purpose of reinvestment,[28] provided, as appears in § 89 b, infra, the persons in

Tenn.—Ankenbauer v. Ankenbauer, 6 Tenn.App. 221.
21 C.J. p 1000 note 84, p 1001 note 85.

19. Tenn.—Ankenbauer v. Ankenbauer, 6 Tenn.App. 221.

20. U.S.—In re Landis, C.C.A.Ill., 41 F.2d 700, certiorari denied Farmers' Bank of Mount Pulaski, Ill. v. Bickenbach, 51 S.Ct. 77, 282 U.S. 872, 75 L.Ed. 770.
Ill.—Kohl v. Montgomery, 25 N.E. 2d 826, 373 Ill. 200—Greenfield v. Lauritson, 137 N.E. 818, 306 Ill. 279—Du Bois v. Judy, 126 N.E. 104, 291 Ill 340.
Ky.—Fulton v. Teager, 209 S.W. 535, 183 Ky. 381.
Me.—Gould v. Leadbetter, 150 A. 375, 129 Me. 101.
N.C.—Thames v. Goode, 9 S.E.2d 485, 217 N.C. 639—Woody v. Cates, 197 S.E. 561, 213 N.C. 792.
Ohio.—Pollock v. Brayton, 163 N.E. 573, 29 Ohio App. 296.
Or.—Hawkins & Roberts v. Jerman, 35 P.2d 248, 147 Or. 657.
Tenn.—Ankenbauer v. Ankenbauer, 6 Tenn.App. 221.
21 C.J. p 1000 note 84, p 1001 note 85.
Estoppel to assert after-acquired title generally see the C.J.S. title Estoppel §§ 21–35, also 21 C.J. p 1074 note 57–p 1088 note 89.

21. U.S.—In re Landis, C.C.A.Ill., 41 F.2d 700, certiorari denied Farmers' Bank of Mount Pulaski, Ill., v. Bickenbach, 51 S.Ct. 77, 282 U.S. 872, 75 L.Ed. 770.
Ill.—Kohl v. Montgomery, 25 N.E.2d 826, 373 Ill. 200—Du Bois v. Judy, 126 N.E. 104, 291 Ill. 340.
Ky.—Fulton v. Teager, 209 S.W. 535, 183 Ky. 381.
Me.—Gould v. Leadbetter, 150 A. 375, 129 Me. 101.
Mo.—Vance v. Humphreys, 241 S.W. 91, 210 Mo.App. 498.
N.J.—Hannon v. Christopher, 34 N.J. Eq. 459.

22. Pa.—Stewart v. Neely, 20 A. 1002, 139 Pa. 309.
21 C.J. p 1001 note 87.
But it has been said, "While there is no express warranty in . . . [the contingent remainderman's] deed, yet his conveyance is of his entire interest in the land, and he therein empowers his grantees (trustees), upon foreclosure, to convey the land in fee simple, which was thereafter done."—Woody v. Cates, 197 S.E. 561, 562, 213 N.C. 792.

23. Ky.—Kendrick v. Scott, 254 S.W. 422, 200 Ky. 202.
Me.—Gould v. Leadbetter, 150 A. 375, 129 Me. 101.
N.H.—Hall v. Nute, 38 N.H. 422.

24. N.H.—Hayes v. Tabor, 41 N.H. 521.
21 C.J. p 1001 note 89.

25. Ky.—Fulton v. Teager, 209 S.W. 535, 183 Ky. 381.
Va.—Copenhaver v. Pendleton, 155 S.E. 802, 155 Va. 463, 77 A.L.R. 324.
21 C.J. p 1001 note 91.

26. Ky.—Fulton v. Teager, 209 S.W. 535, 183 Ky. 381.
21 C.J. p 1001 note 92.

27. Ky.—Vittitow v. Keene, 95 S.W. 2d 1083, 265 Ky. 66—Miracle v. Miracle, 86 S.W.2d 536, 260 Ky. 624, 102 A.L.R. 964—Cox v. Corrigan-McKinney Steel Co., 58 S.W.2d 625, 248 Ky. 426.
N.C.—Meyer v. Thompson, 112 S.E. 328, 183 N.C. 543.
21 C.J. p 1002 note 10, p 1009 notes 73–75.
Authorization where no remainderman in being see infra § 89 b.

"The purpose of this statute is not to destroy the interest of the more remote contingent remaindermen, but to enable the present owners to sell the property and make a good title to the same, to hold the proceeds as a fund subject to the claims of persons who may be ultimately entitled thereto."—Poole & Blue v. Thompson, 112 S.E. 323, 327, 183 N.C. 588.

One taking a life estate in trust by way of remainder can, in Kentucky, sue contingent remaindermen, for sale for reinvestment, only under Civ.Code Prac. § 491 a, and not under § 491, in view of their respective wordings, his estate not being in possession.—Osborne's Guardian v. Chatham, 226 S.W. 101, 189 Ky. 754.

28. Ga.—Rosenberg v. Phelps, 126 S.E. 788, 159 Ga. 607—Goldberg v. Moore, 119 S.E. 522, 156 Ga. 683—Ethridge v. Pitts, 108 S.E. 543, 152 Ga. 1.
Miss.—Riley v. Norfleet, 148 So. 777, 167 Miss. 420.
N.C.—In re Wilds, 110 S.E. 57, 182 N.C. 705—In re Rees, 104 S.E. 358, 180 N.C. 192—Waldroop v. Waldroop, 103 S.E. 381, 179 N.C. 674.
N.D.—Rasmusson v. Schmalenberger,

interest are properly represented before it, and especially where, or provided, such a sale is advantageous to the interests of all parties[29] or necessary to preserve such interests for those ultimately entitled thereto.[30] However, such a sale may be forbidden by statute;[31] and some statutes impose restrictions on the court's powers,[32] which the life tenant and the remaindermen cannot by their consent waive.[33] The will creating the estates may forbid such a sale by court order;[34] but a will providing that one of several life tenants shall not sell his interest, does not prevent a sale of the land by the court for the benefit of the other life tenants and the remaindermen;[35] nor will a testamentary prohibition prevent a sale by the court in cases where such a sale is necessary to preserve the remainder interests for those ultimately entitled thereto.[36] A court of equity, in the absence of statutory authority, may be held to be without power to sell where the remainderman is an infant,[37] since any other rule would defeat the clear intention of the testator.[38]

235 N.W. 496, 500, 60 N.D. 527, citing Corpus Juris.
Tex.—Wilder v. Cox, Civ.App., 104 S.W.2d 897, error dismissed—Johnston v. Johnston, Civ.App., 276 S.W. 776.
21 C.J. p 1001 notes 96, 98, p 1002 note 2.
Sale:
On application of life tenant see supra § 52.
Under attachment or execution see supra § 86.

After-born children

(1) Children afterward born will be bound by the decree, provided it has made proper provision for the investment and protection of their interests in the proceeds of the sale.—Reed v. Alabama & G. Iron Co., C.C.Ga., 107 F. 586.

(2) Where a trustee, representing a life estate, and the special guardian of infant remaindermen, then living, mortgaged real estate under Code Civ.Proc. § 2348, and the mortgage was foreclosed and the surplus moneys deposited with the trustee, the mortgage and foreclosure were binding on after-born children.—Nanreik Realty Co. v. Kiernan, 174 N.Y.S. 726, 106 Misc. 430.

Private sale

(1) Private sale or negotiation, subject to the approval of the court, is held proper.—Poole & Blue v. Thompson, 112 S.E. 323, 183 N.C. 588—McLean v. Caldwell, 100 S.E. 888, 178 N.C. 424.

(2) Private sale, as distinguished from decretal sale, is held improper, although approved by court.—Vittitow v. Keene, 95 S.W.2d 1083, 265 Ky. 66.

Compliance with Torrens system

Where, in suit under Revisal 1905 § 1590, to sell land freed and discharged of all contingent remainders, the suit complying in every particular with the requirements of the Torrens system, an attorney was appointed by the court to represent possible or contingent interests, the title deed by the commissioner cuts off the rights of any other person in being or hereafter to come into being.—Hayden v. Hayden, 100 S.E. 515, 178 N.C. 259.

Restrictions on unsold portion

Where restrictions placed on the unsold portion of land at the time of the sale of the rest, under court order, were the same as those on the portion sold, and were necessary to carry out the trustee's plan in selling the land, they are valid and bind remaindermen who were adults at the time of the sale, made no timely objections, and benefited from the restrictions; but an agreement by the life tenant trustee, subsequent to the sale, and changing or adding to the restrictions on the unsold land is not binding on the remainderman, although ratified by the court two years after the land was sold.—Gittings v. Morris, 144 A. 836, 927, 156 Md. 565.

Jurisdiction of particular courts

(1) An ordinary would not have jurisdiction, on a joint petition of a life tenant and the guardian of minor remaindermen in life to grant an order of sale which would convey a contingent remainder of unborn children.—Ethridge v. Pitts, 108 S.E. 543, 152 Ga. 1.

(2) The jurisdiction of the superior court in North Carolina in a proceeding of this character originating before the clerk is not derivative, since he is but a part of the same court; and the court is not without jurisdiction of such a proceeding erroneously begun before the clerk.—Perry v. Bassenger, 15 S.E.2d 365, 219 N.C. 838.

(3) Where the decree accepting the bid at a judicial sale retained the cause for further order, a separate proceeding cannot be maintained in a different county to recover from the purchaser the amount of his bid, and cannot be treated as a motion in the cause; a court of general jurisdiction ordering a sale of land can afford a complete remedy against one buying under its decree, and the title given by such sale is not affected by the fact that the proceedings should have been brought in the county where the land is situate, no objection having been made.—Crawford v. Allen, 104 S.E. 468, 180 N.C. 245.

Allowance of attorney's fee of five hundred dollars held proper.—Leavitt v. Arnott, 208 P. 546, 111 Kan. 717.

29. Md.—Forbes v. Littell, 114 A. 55, 138 Md. 211—Ball v. Safe-Deposit & Trust Co. of Baltimore City, 48 A. 155, 92 Md. 503, 52 L.R.A. 403.
N.C.—Poole & Blue v. Thompson, 112 S.E. 323, 183 N.C. 588.
Tenn.—Delk v. Williams, 10 Tenn. App. 246—Gaines v. Gaines, 10 Tenn.App. 145.
Tex.—Wilder v. Cox, Civ.App., 104 S.W.2d 897, error dismissed.
21 C.J. p 1001 note 99.

Sale of land for costs held void for want of jurisdiction as not to the interest of minor remainderman against whom costs had not been decreed.—Delk v. Williams, 10 Tenn.App. 246.

30. Kan.—Robinson v. Barrett, 45 P.2d 587, 142 Kan. 68.
N.D.—Rasmusson v. Schmalenberger, 235 N.W. 496, 500, 60 N.D. 527, citing Corpus Juris.
Tex.—Johnston v. Johnston, Civ.App., 276 S.W. 776.
21 C.J. p 1002 note 1.

31. Ill.—Kenwood Trust & Sav. Bank v. Palmer, 209 Ill.App. 370, affirmed 121 N.E. 186, 285 Ill. 552.
21 C.J. p 1002 note 3.

32. Ky.—Walton v. Cleneay, 153 S.W. 423, 152 Ky. 274.
21 C.J. p 1002 note 12.

33. Ky.—Morton v. Morton, 85 S.W. 1188, 120 Ky. 251, 27 Ky.L. 661.

34. Ky.—Lee v. Lee, 133 S.W. 154, 141 Ky. 63—Morton v. Morton, 85 S.W. 1188, 120 Ky. 251, 27 Ky.L. 661.

35. Ky.—Rousseau v. Page, 150 S.W. 983, 150 Ky. 812.

36. Ky.—Gillespie v. Winston, 186 S.W. 517, 170 Ky. 667.

37. Miss.—Hoskins v. Ames, 29 So. 828, 78 Miss. 986.
21 C.J. p 1002 note 7.

38. Miss.—Hoskins v. Ames, supra.

Sales of realty made improperly,[39] or even without authority,[40] may on sufficient showing be ratified and confirmed by the court, where all persons in interest are properly represented in the proceeding, as discussed in § 89 b infra, but not otherwise;[41] and irregularities may be cured.[42] In a sale by a court of equity under its power to order a sale for the purpose of changing the investment, there is no presumption that the court ordered a sale of the property free from the remainders;[43] and no bond need be executed before a judgment ordering a sale is entered.[44]

In New Jersey it has been said that a life estate may be involuntarily sold away from the life tenant only when it exists as an interest in lands the remainder of which is in others who are entitled to possession in some form, either with the life tenant or exclusive of him or in conjunction with him.[45]

Disposition of proceeds of sale. In all cases the order of the court must provide for such an investment of the proceeds as will protect the rights of all persons, including the unborn who have, or may subsequently acquire, an interest therein,[46] as by ordering the reinvestment of the proceeds in the same kind of property, to be held subject to the same conditions as the property sold,[47] or by substituting the funds received from the sale for the lands sold, and administering such funds as nearly as possible as the lands would have been handled had there been no conversion.[48] However, the court cannot order the actual reinvestment of the proceeds until the property has been sold and the net proceeds ascertained;[49] nor has it power to divide the proceeds between the life tenant and remainderman and reinvest only the remainderman's portion;[50] nor may it order a sale of the remainder for the purpose of paying a debt created by the life tenant[51] or to satisfy charges on the land under the will,[52] as there can be no separation of the interests of the life tenant from those in remainder. The purchaser is not charged with the duty of looking after the proper disposition of the purchase money,[53] and when he has paid his bid into court or to the parties authorized to receive it he is acquitted of further obligation concerning it.[54]

b. Representation

All parties in interest who are in being and within the court's jurisdiction must be made parties to a proceeding for the judicial sale of property in which there are remainder interests. Particular parties in interest may be represented by others, as where those of a class in being represent the others of that class.

All parties in interest who are in being and within the jurisdiction of the court must be made parties to a proceeding for the judicial sale of property in which there are remainder interests.[55] Although

39. Ark.—Bedford v. Bedford, 152 S.W. 129, 105 Ark. 587.
21 C.J. p 1002 note 14.

40. U.S.—Glover v. Bradley, S.C., 233 F. 731, 147 C.C.A. 487, Ann.Cas. 1917A 921.
N.C.—Meyer v. Thompson, 112 S.E. 328, 183 N.C. 543—Poole & Blue v. Thompson, 112 S.E. 323, 183 N.C. 588.

41. Ga.—Smith v. McWhorter, 51 S.E. 474, 123 Ga. 287, 107 Am.S.R. 85.
21 C.J. p 1002 note 17.

42. N.C.—Perry v. Bassenger, 15 S.E.2d 365, 219 N.C. 838.
Institution of proceeding before clerk of court held an irregularity which was cured by subsequent legislation.—John L. Roper Lumber Co. v. Herrington, 110 S.E. 656, 183 N.C. 85.
Proceeding held not void
N.C.—Perry v. Bassenger, 15 S.E.2d 365, 219 N.C. 838.

43. U.S.—Pineland Club v. Robert, S.C., 213 F. 545, 130 C.C.A. 125.

44. Ky.—Tierney Coal Co. v. Bailey, 189 S.W. 241, 172 Ky. 363—Ullman v. Harper, 12 Bush 164.

45. N.J.—Radley v. Radley, 78 A. 194, 78 N.J.Eq. 170.

46. N.C.—Crawford v. Allen, 104 S.E. 468, 180 N.C. 245—In re Rees, 104 S.E. 358, 180 N.C. 192.
N.D.—Rasmusson v. Schmalenberger, 235 N.W. 496, 500, 60 N.D. 527, citing **Corpus Juris.**
Tenn.—Gaines v. Gaines, 10 Tenn. App. 145.
Tex.—Wilder v. Cox, Civ.App., 104 S.W.2d 897, error dismissed.
21 C.J. p 1002 note 22.
Nature of remainderman's interest
"The remainderman had no interest in the fund except its preservation until the death of [one entitled to income for life]."—Fidelity & Deposit Co. of Maryland v. State, to use of Grah, 165 A. 176, 180, 164 Md. 304.
Investment in government bonds held proper, under governing statutes.—Osborne's Guardian v. Chatham, 226 S.W. 101, 189 Ky. 754.
Accumulation of income after payment to life tenant
Where land is sold by order of the court, and the value of the life estate is paid to the life tenant, the balance should be left to accumulate during the life of the life tenant so that the depletion of the corpus by the payment of the lump sum to him may be made good.—Pendergast v. Cutter, 191 N.Y.S. 43, 116 Misc. 632.

47. N.C.—In re Rees, 104 S.E. 358, 180 N.C. 192.
21 C.J. p 1003 note 23.

48. Ind.—Coquillard v. Coquillard, 113 N.E. 481, 62 Ind.App. 489.

49. N.C.—Smith v. Miller, 66 S.E. 671, 151 N.C. 620, 67 S.E. 746, 152 N.C. 314.

50. Ky.—Lilly v. Clay, 102 S.W. 278, 31 Ky.L. 317.
N.C.—In re Rees, 104 S.E. 358, 180 N.C. 192.

51. Ky.—Buckner v. Kelley, 152 S.W. 963, 151 Ky. 818.

52. Wis.—In re Kingston, 110 N.W. 417, 130 Wis. 560.

53. N.C.—Perry v. Bassenger, 15 S.E.2d 365, 219 N.C. 838—Crawford v. Allen, 104 S.E. 468, 180 N.C. 245—McLean v. Caldwell, 100 S.E. 888, 178 N.C. 424—Pendleton v. Williams, 95 S.E. 503, 175 N.C. 254.

54. N.C.—Crawford v. Allen, 104 S.E. 468, 180 N.C. 245—McLean v. Caldwell, 100 S.E. 888, 178 N.C. 424—Pendleton v. Williams, 95 S.E. 503, 175 N.C. 254.

55. Ga.—Goldberg v. Moore, 119 S.E. 522, 156 Ga. 683.
Ky.—Bell v. Bell, 152 S.W.2d 263, 287 Ky. 7—Wallen v. Nicely, 2 S.W.2d 648, 222 Ky. 825.

in some jurisdictions such a sale is authorized by statute,[56] where there are remaindermen who are not ascertained or not in being, a court of equity has been held not to possess the power to sell the property,[57] at least where they are not before the court in person or by representation.[58] A sale by the court has, however, been allowed where in the case of a remainder to a class those of the class who are in being represent the others;[59] or where in the case of successive classes the first class entitled to the remainder is represented;[60] or where a trustee represents contingent remaindermen not in being in cases in which both the life estate and the remainder are vested in the trustee,[61] although not in a case in which the life estate alone is vested in the trustee;[62] or where in the absence of fraud the life tenant virtually represents the contingent remaindermen not in esse;[63] or even where remaindermen in esse are held to represent all contingent remaindermen.[64] However, there can be no representation, and no sale can be ordered, if none of the class to which the remainder is limited is in being[65] or ascertained;[66] or where the remainder was to such children of the life tenant as might be surviving at his death, because until the event it could not be ascertained who would represent the class;[67] and it has apparently been held that contingent remaindermen not parties to the suit are not bound by a decree confirming a sale.[68]

§ 90. Mortgage

A vested remainder may be mortgaged during the continuance of the preceding estate, as may, to the extent to which it may be transferred, a contingent remainder. A mortgage of a remainder may be foreclosed prior to the happening of the contingency on which the remainder was to vest; and the foreclosure of a mortgage executed by a remainderman on his interest extinguishes his interest.

The owner of a vested remainder may mortgage his interest during the continuance of the preceding estate,[69] even though the will by which the remainder was limited operates to effect an equitable con-

Md.—Forbes v. Littell, 114 A. 55, 138 Md. 211—Ball v. Safe-Deposit & Trust Co. of Baltimore City, 48 A. 155, 92 Md. 503, 52 L.R.A. 403.
Miss.—Riley v. Norfleet, 148 So. 777, 167 Miss. 420.
N.C.—Crawford v. Allen, 104 S.E. 468, 180 N.C. 245—Waldroop v. Waldroop, 103 S.E. 381, 179 N.C. 674.
N.D.—Rasmusson v. Schmeelenberger, 235 N.W. 496, 500, 60 N.D. 527, citing Corpus Juris.
21 C.J. p 1003 note 31.
Holders of contingent and expectant interests in realty as represented in, and bound by, judgment see the C.J.S. title Judgments § 776, also 34 C.J. p 1000 note 25—p 1002 note 32.

"Living prospective contingent remaindermen must be made parties."—Cox v. Corrigan-McKinney Steel Co., 58 S.W.2d 625, 627, 248 Ky. 426.

Sale to satisfy claim

Where parties who, under a will, might eventually be devisees of the remainder interests were not parties to the action and may not have been in existence, the court was not authorized to adjudge a claim a lien on the property and order its sale in part satisfaction of such claim, when it could not be a debt against the remaindermen or a lien on their interest, although defendants in the action made no objection.—Lindenberger v. Cornell, 229 S.W. 54, 190 Ky. 844.

56. Ky.—Cox v. Corrigan-McKinney Steel Co., 58 S.W.2d 625, 248 Ky. 426.
21 C.J. p 1003 note 32.

Corpus Juris section cited in connection with the constitutionality of a similar statute regarding partition suits.—Mennie v. Howard, 240 N.W. 473, 213 Iowa 936.

57. Ill.—Hill v. Hill, 106 N.E. 262, 264 Ill. 219.
58. Miss.—Riley v. Norfleet, 148 So. 777, 167 Miss. 420.
59. Ga.—Goldberg v. Moore, 119 S.E. 522, 156 Ga. 683.
N.C.—Perry v. Ramsenger, 15 S.E. 2d 365, 219 N.C. 838—John L. Roper Lumber Co. v. Herrington, 110 S.E. 656, 183 N.C. 85.
Tex.—Wilder v. Cox, Civ.App., 104 S.W.2d 897, error dismissed.
21 C.J. p 1003 note 36.
Remainders to class generally see supra § 73.

After-born children

"The authorities are uniform in holding that the after-born children were represented by the living members of the class to which they would belong when born. Such holding is based on the sound reason that the interest in preserving this estate is just as strong on those who are living as it could be on those who may be after-born, and their interests are in law just as much protected through such representation as they would be were they actually in being and parties to the suit."—Johnston v. Johnston, Tex.Civ.App., 276 S.W. 776, 779.

60. N.C.—Springs v. Scott, 44 S.E. 116, 132 N.C. 548.
21 C.J. p 1003 note 37.
61. N.C.—Springs v. Scott, 44 S.E. 116, 132 N.C. 548—Overman v. Tate, 19 S.E. 706, 114 N.C. 571.
62. Ga.—Smith v. McWhorter, 51 S.E. 474, 123 Ga. 287, 107 Am.S.R. 85.
63. Tenn.—Ridley v. Halliday, 61 S.W. 1025, 106 Tenn. 607, 82 Am. S.R. 902, 53 L.R.A. 477.
64. U.S.—Glover v. Bradley, S.C., 233 F. 721, 147 C.C.A. 487, Ann. Cas.1917A 921.
21 C.J. p 1003 note 41.
65. N.C.—Watson v. Watson, 56 N. C. 400.
21 C.J. p 1003 note 42.

In West Virginia, in suit under Code 1913 c 71 §§ 24b I-24b XII, §§ 3766-3777, to sell or lease land subject to contingent remainders in persons yet unborn, the naming, as parties, of a trustee representing all interests, the life tenants whose unborn children are contingent remaindermen in fee, and an infant son of a life tenant who is of the same general class as unborn children, sufficiently protects the interest of unborn contingent remaindermen.—Geary v. Butts, 99 S.E. 492, 84 W.Va. 348.

66. Ill.—Hill v. Hill, 106 N.E. 262, 264 Ill. 219.
21 C.J. p 1003 note 43.
67. N.C.—Hodges v. Lipscomb, 38 S.E. 281, 128 N.C. 57.
21 C.J. p 1003 note 44.
68. Md.—Levering v. Gosnell, 80 A. 1078, 115 Md. 582.
69. Ill.—Springer v. Savage, 32 N. E. 520, 143 Ill. 301.
Iowa.—Bisby v. Walker, 169 N.W. 467, 185 Iowa 743, modified on other grounds 171 N.W. 152, 185 Iowa 743.
N.Y.—Grainger v. Engel, 269 N.Y.S. 134, 241 App.Div. 627, reversed on other grounds 191 N.E. 857, 265 N.Y. 118.
21 C.J. p 1003 note 48.

version of the realty into personalty.[70] A contingent remainder when, and to the extent that, it may be transferred, as discussed in § 88 supra, may be mortgaged,[71] but not otherwise,[72] although under an attempted mortgage, rights may arise which will be enforced in equity.[73] On a breach of the condition of the mortgage, the mortgagee or his assignee may proceed to foreclose it prior to the happening of the contingency on which the remainder is to vest,[74] or, of course, when by the death of the life tenant the contingent remaindermen acquire his interest.[75]

When a remainderman after having fraudulently terminated the life estate mortgaged the property to a mortgagee who was without notice of the facts, the mortgage lien as between the mortgagee and the life tenant covered the life estate,[76] but not so as between the life tenant and the remainderman.[77] The foreclosure of a mortgage executed by a remainderman on his remainder interest extinguishes his interest,[78] and his subsequent deed thereof after the life tenant's death passes no title;[79] but a sale on foreclosure of a mortgage given by a life tenant and vested remaindermen does not carry the interests of contingent remaindermen.[80] Where two remaindermen execute a deed of trust on the property in order to pay back taxes which the life tenant had permitted to accumulate, the entire property will be subjected to the payment of such indebtedness,[81] although a third remaindermen, let in as an after-born child, did not join in the deed of trust.[82] A mortgage executed by one to whom is left a conditional fee, before the happening of the contingency, does not create a lien on the interest of persons to whom the property, under the will, is to go on the nonhappening of the contingency.[83]

In a suit by remainderman to secure an order permitting the mortgaging of the realty, where there are living representatives before the court of every possible interest in the property, the court has jurisdiction to enter a binding order.[84] As appears in § 86 supra, where the court directs that improvements be made on the property and the cost thereof paid from the proceeds of mortgages on the property, it has been held that remaindermen cannot be held personally liable.

The right of a remainderman to redeem the property from a mortgage is considered in § 85 supra.

70. Pa.—Andress' Est., 14 Phila. 240, reversed on other grounds 99 Pa. 421.

71. U.S.—Ward v. Ward, C.C.N.Y., 131 F. 946, affirmed 145 F. 1023, 74 C.C.A. 146, motion denied 149 F. 204, 79 C.C.A. 162, certiorari denied 27 S.Ct. 796, 206 U.S. 564, 51 L.Ed. 1190, construing New York statute.
Iowa.—Lane v. Travelers Ins. Co. of Hartford, Conn., 299 N.W. 553, 230 Iowa 973—John Hancock Mut. Life Ins. Co. v. Dower, 271 N.W. 193, 222 Iowa 1377, citing **Corpus Juris**—Bisby v. Walker, 169 N.W. 467, 185 Iowa 743, modified on other grounds 171 N.W. 152, 185 Iowa 743.
Kan.—McCartney v. Robbins, 217 P. 311, 114 Kan. 141.
Ky.—Hurst v. Russell, 77 S.W.2d 355, 257 Ky. 78—Cox v. Corrigan-McKinney Steel Co., 58 S.W.2d 625, 248 Ky. 426.
N.Y.—Grainger v. Engel, 269 N.Y.S. 134, 241 App.Div. 627, reversed on other grounds 191 N.E. 857, 265 N.Y. 118.
Contra Jacobson v. Smith, 77 N.Y.S. 49, 73 App.Div. 412, appeal dismissed 65 N.E. 1118, 172 N.Y. 654.
S.C.—E. A. Beall Co. v. Weston, 65 S.E. 823, 83 S.C. 491.
21 C.J. p 1004 note 51.

Mortgage held not cloud on trustee's title
N.Y.—Grainger v. Engel, 269 N.Y.S. 134, 241 App.Div. 627, reversed on other grounds 191 N.E. 857, 265 N.Y. 118.

Benefit of remainderman
The statute providing for sale or mortgage of realty wherein there is a vested interest and a contingent remainder over to persons not in being, and authorizing sale of all or part of the property if interest of all parties requires or would be materially enhanced, did not warrant mortgage on interest of remaindermen to pay for improvements on land by life tenant, since mortgage would not materially enhance interest of remaindermen in view of fact that remaindermen were not liable for as much as fifty per cent of indebtedness arising out of such improvements; and a reduction in interest paid would not materially benefit remaindermen so as to warrant mortgaging of their interest to pay for portion of such improvements, where all savings in interest would inure to benefit of life tenant, and under the mortgage sought to be made remaindermen would be liable for interest on a larger sum than before.—Hall v. Hall, 15 S.E.2d 273, 219 N.C. 805.

72. Ark.—Love v. McDonald, 148 S.W.2d 170, 201 Ark. 882.
21 C.J. p 1004 note 52.
73. Md.—Bishop v. Horney, 9 A.2d 597, 599, 177 Md. 353.
21 C.J. p 1004 note 53.

Intention to convey remainder interest is shown by a recital in a mortgage, signed by remaindermen, that the mortgagors grant and convey "all their right, title, right and interest and estate, in fee simple."—Bishop v. Horney, supra.

74. Iowa.—John Hancock Mut. Life Ins. Co. v. Dower, 271 N.W. 193, 222 Iowa 1377.
21 C.J. p 1004 notes 54–56.

75. R.I.—Mudge v. Hammill, 43 A. 544, 21 R.I. 283, 79 Am.S.R. 802.

76. N.J.—Geyer v. Geyer, 78 A. 449, 75 N.J.Eq. 124.

77. N.J.—Geyer v. Geyer, supra.

78. Ky.—Rudd v. Travelers' Ins. Co., 73 S.W. 759, 24 Ky.L. 2141.
Mo.—Finley v. Babb, 73 S.W. 180, 173 Mo. 257.

79. Mo.—Finley v. Babb, supra.

80. Ky.—Rudd v. Travelers' Ins. Co., 73 S.W. 759, 24 Ky.L. 2141.

81. Mo.—Barkhoefer v. Barkhoefer, 204 S.W. 906.

82. Mo.—Barkhoefer v. Barkhoefer, supra.

83. Ind.—Sexton v. Cronkhite, 127 N.E. 829, 74 Ind.App. 245.

84. S.C.—McDavid v. McDavid, 197 S.E. 204, 187 S.C. 127, 116 A.L.R. 1412.

§ 91. Destruction of Remainder

A contingent remainder is destroyed by the destruction or regular determination of the particular estate on which it depends, before the happening of the contingency.

Unless, it has been held, the contingent remainder is preceded by a vested remainder,[85] a contingent remainder is destroyed by the destruction or regular determination of the particular estate on which it depends, before the happening of the contingency;[86] but where the devisee of the particular estate preceding a contingent remainder dies in the lifetime of the testator, the limitation over may be construed as an executory devise and the land until the contingency happens will descend to the heir at law,[87] although in states in which the freehold may be in abeyance without detriment to subsequent contingent remainders it is immaterial whether the precedent estate ever vested or not, the remainder passing in either case to the heirs at law until the happening of the contingency on which it is to vest.[88]

Where a deed conveys a life estate, with remainder to grantee's children, grantor and grantee cannot by subsequent agreement enlarge the grantee's estate, or divest the remaindermen of the interest acquired by them under the terms of the deed.[89]

Nonuser. A vested remainder to which there is no right of possession until the happening of a specified event is not forfeited by nonuser before such event takes place.[90]

Revival. It is held that a contingent remainder once destroyed cannot afterward be revived,[91] although if it is destroyed by the levy of a fine by the tenant of the particular estate, the annulment of the fine,[92] but not the reversal of the fine for error,[93] has been held to revive the remainder.

§ 92. By Act of Tenant of Particular Estate

Various acts of the tenant of the particular estate, such as the exercise of the power, conferred by will, to dispose of the entire estate, have been held to destroy contingent remainders; various other acts by such tenant, such as the invalid exercise of a power of appointment, have been held not to have such effect.

The contingent interests of remaindermen may be destroyed by the exercise of the power conferred, by will, on the tenant of the particular estate to dispose of the entire estate.[94]

It has been broadly held that whether an estate in remainder is vested or contingent, a conveyance by the life tenant passes only the life estate, and does not operate to destroy the estate in remainder.[95] Under other authority, unless the conveyance by the life tenant was obtained by fraud,[96] equity will not interfere to protect contingent remaindermen against the destruction of the remainder by the particular tenant, because, since he is not a trustee, his act is not a breach of trust, although it is a plain wrong.[97] Contingent remainders in the absence of a statutory prohibition, but never vested remainders,[98] or a conveyance of the fee with limitations over,[99] may be destroyed by a tortious alienation by the tenant of the particular estate, that is, a conveyance by such tenant of a greater estate than he has in the land,[1] and such is the effect of feoffment with livery of seizin,[2] of a fine by the particular tenant of the legal estate[3] or by a tenant in tail of a trust,[4] of a fine or re-

Joinder by life tenant in mortgage held essential.—McDavid v. McDavid, supra.

85. Eng.—Corbet v. Tichborn, 2 Salk. 576, 91 Reprint 485.

86. Fla.—Lewis v. City of Orlando, 199 So. 49—Tankersley v. Davis, 175 So. 501, 128 Fla. 507—Blocker v. Blocker, 137 So. 249, 103 Fla. 285.
Ill.—Martin v. Karr, 175 N.E. 376, 343 Ill. 296—Gray v. Shinn, 127 N.E. 755, 293 Ill. 573—Lewin v. Bell, 120 N.E. 633, 285 Ill. 227.
Ky.—Lawson v. Asberry, 141 S.W. 2d 564, 283 Ky. 390.
21 C.J. p 992 note 21, p. 1004 note 77.
Time of vesting of remainder see supra § 81.
Creation of trust
(1) "Where a trust is created even in real estate, a contingent remainder cannot be destroyed by a conveyance by the life tenant."—Scheuing v. May, 213 Ill.App. 143, 145.
(2) Protection: trust estates see infra § 96.

87. Ill.—Marvin v. Ledwith, 111 Ill. 144.
Executory interests see infra §§ 119–122.

88. Ind.—Dale v. Bartley, 58 Ind. 101.
Ky.—Augustus v. Seabolt, 3 Metc. 155.
Fee in abeyance see supra § 81.

89. Tex.—Henson v. Peterson, Civ. App., 218 S.W. 126.

90. Ohio.—Minor v. Shipley, 24 Ohio N.P.,N.S., 338, affirmed 21 Ohio App. 236, 23 Ohio L. 551.

91. Eng.—Purefoy v. Rogers, 2 Saund. 380, 85 Reprint 1181.

92. Eng.—Thompson v. Leach, 1 Ld. Raym. 313, 91 Reprint 1104.

93. Eng.—Cole v. Levingston, 3 Keb. 83, 84 Reprint 607.

94. Ill.—Talbot v. People, 171 N.E. 183, 339 Ill. 333.

95. Fla.—Scott v. Fairlie, 89 So. 128, 81 Fla. 438, 446.
Merger by act of particular tenant see infra § 93.

96. Eng.—Englefield v. Englefield, 1 Vern.Ch. 443, 23 Reprint 575.

97. Eng.—Mansell v. Mansell, 2 P. Wms. 678, 24 Reprint 913.

98. S.C.—Mims v. Hair, 61 S.E. 968, 80 S.C. 460.
21 C.J. p 1005 note 88.

99. Ill.—Cutler v. Garber, 124 N.E. 441, 289 Ill. 200—Stoller v. Doyle, 100 N.E. 959, 257 Ill. 369.

1. Fearne Rem. pp 315, 349.

2. Ill.—Bond v. Moore, 86 N.E. 386, 236 Ill. 576, 19 L.R.A.,N.S., 540.
21 C.J. p 1005 note 92.

3. N.Y.—Roseboom v. Van Vechten, 5 Den. 414.
21 C.J. p 1005 note 93.

4. Eng.—Boteler v. Allington, 1 Bro. Ch. 72, 28 Reprint 992.

covery,[5] or of a valid[6] surrender of any estate[7] other than of a copyhold,[8] or of a writing, such as a will, authorized, executed, and acknowledged as prescribed by statute.[9] However, a contingent remainder is not destroyed by a tortious alienation by the tenant of the particular estate by means of a conveyance derived from the statute of uses, which does not pass any greater estate than grantor may lawfully convey, such as a bargain and sale;[10] or by a lease and release;[11] or by a conveyance by a cestui que trust for life,[12] unless he has power of absolute disposition;[13] or by forfeiture,[14] attainder,[15] or the breach of a condition subsequent,[16] unless the particular estate continues to subsist and to support the contingent remainders dependent on it until an entry is made by the person entitled to take advantage of the forfeiture.[17] Furthermore, a contingent remainder is not destroyed by the disseizin of the tenant of the particular estate,[18] unless in the meantime the disseized tenant's right of entry has been tolled;[19] or by a mortgage by the life tenant and sale under foreclosure in his lifetime;[20] or by a conveyance from the life tenant without notice of the rights of the remainderman;[21] or by an invalid exercise of a power of appointment by the life tenant;[22] or by a failure of the remainderman to exercise his privilege to bring an action for damages for waste;[23] or by the renunciation by the life tenant of his estate;[24] and where a remainder is limited on two lives in being at the time of the grant, it will not be defeated by the failure of an intermediate trust estate.[25]

§ 93. By Merger

In the absence of statutes having a different effect, intermediate contingent remainders are destroyed where the preceding particular estate and the next vested estate of inheritance meet in the same person, whether or not by the act of the particular tenant. Merger involving remainder interests is not favored in equity.

The application of the common-law rule as to the destruction of contingent remainders by merger has been said necessarily to defeat the testator's intention.[26] Merger involving remainder interests is not favored in equity, being allowed only to promote the intention of the parties,[27] and where there is no fiduciary relationship between the life tenant and remainderman.[28] It has been said that equity does not permit a merger which destroys a vested interest in remainder;[29] but no fiduciary relation will be presumed between the life tenant and the remainderman,[30] or between a purchaser of the property at an administrator's sale and a remain-

5. Pa.—Waddell v. Rattew, 5 Rawle 231.
21 C.J. p 1005 note 95.

6. Eng.—Thompson v. Leach, 1 Ld. Raym. 313, 91 Reprint 1104, 3 Mod. 296, 301, 87 Reprint 196, 199, 2 Salk. 427, 576, 91 Reprint 327, 485.

7. Tenn.—Fisher v. Edington, 12 Lea 189.
21 C.J. p 1005 note 97.

8. Eng.—Pawsy v. Lowdall, Style 249, 273, 82 Reprint 685, 704.

9. R.I.—De Wolf v. Middleton, 26 A. 44, 31 A. 271, 18 R.I. 810, 31 L.R.A. 146.

10. N.H.—Dennett v. Dennett, 40 N. H. 498.
21 C.J. p 1005 note 1.
Merger see infra § 93.

11. Eng.—Smith v. Clyfford, 1 T.R. 738, 99 Reprint 1351.
Merger see infra § 93.

12. Eng.—Penhey v. Hurrell, 2 Freem. 213, 22 Reprint 1166.

13. Iowa.—Webb v. Webb, 104 N.W. 438, 130 Iowa 457.

14. Eng.—Palmer's Case, Moore K. B. 815, 72 Reprint 924.

15. Eng.—Palmer's Case, supra.

16. Ky.—Lowe v. Stepp, 116 S.W. 293, 132 Ky. 75.
21 C.J. p 1005 note 7.

17. R.I.—Williams v. Angell, 7 R.I. 145.
21 C.J. p 1005 note 8.

18. Eng.—Archer's case, 1 Coke 66b, 76 Reprint 146.

19. Eng.—Thompson v. Leach, 1 Ld. Raym. 313, 91 Reprint 1104, 12 Mod. 173, 88 Reprint 1243, 2 Salk. 576, 91 Reprint 485.

20. S.C.—Bentham v. Smith, 15 S.C. Eq. 33, 34 Am.D. 599.

21. Ill.—Willhite v. Berry, 83 N.E. 852, 232 Ill. 331.

22. U.S.—Highland Park Mfg. Co. v. Steele, S.C., 232 F. 10, 146 C.C.A. 202.

23. Wash.—McDowell v. Beckham, 130 P. 350, 72 Wash. 224.

24. Ill.—Wakefield v. Wakefield, 100 N.E. 275, 256 Ill. 296, Ann.Cas. 1913E 414.

25. N.Y.—King v. Whaley, 59 Barb. 71.

26. Ill.—Gray v. Shinn, 127 N.E. 755, 293 Ill. 573

27. Ill.—Biwer v. Martin, 128 N.E. 518, 521, 294 Ill. 488.
21 C.J. p 1006 note 28.
Merger of estates generally see infra §§ 123-131.
Merger of life estates see infra § 126.
"[Destruction of a contingent remainder by merger] is a rule of law that should never be applied unless its application is demanded by reason of the facts coming squarely within it. . . . It is only where the facts bring the case within the common-law rule and the application of that rule does not contravene other settled law that equity will apply that rule, where . . . its application works injustice."—Biwer v. Martin, supra.

Merger not allowed

(1) Where grantor of a life estate with contingent remainders is estopped by his covenants of warranty to destroy such remainders.—Biwer v. Martin, supra.

(2) Where under will property was to descend on life tenant's death to heirs of her body only, and life tenant conveyed her interest by deed, and her children and some of her grandchildren conveyed their interests, grantee was not entitled to quiet title to land as against life tenant's minor grandson who did not convey or consent to conveyance, since his interest was contingent and did not merge by conveyances.—Hawkins & Roberts v. Jerman, 35 P.2d 248, 147 Or. 657.

(3) Other instances see 21 C.J. p 1006 note 28 [a].

28. N.J.—Geyer v. Geyer, 78 A. 449, 75 N.J.Eq. 124.
21 C.J. p 1007 note 29.

29. R.I.—Gould v. Rhode Island Hospital Trust Co., 167 A. 119, 53 R.I. 422.

30. Ky.—Ware v. Frank, 38 S.W. 1061, 18 Ky.L. 1009.

derman.[31]

In the absence of statutes having a different effect, intermediate contingent remainders are destroyed where the preceding particular estate and the next vested estate of inheritance meet in the same person,[32] as where the particular estate and the immediate vested remainder or reversion become lodged in one person, such as the particular tenant himself,[33] or where the particular estate merges either by an act of the particular tenant,[34] such as the acceptance of the reversion in fee before the contingent remainder vests,[35] or a conveyance by deed,[36] and not merely a bond for a deed,[37] by the particular tenant to the immediate vested remainderman in tail or in fee, or to the reversioner,[38] or by the descent to the particular tenant of the inheritance after the particular estate has taken effect,[39] although not if the descent is immediate from the person by whom the particular estate and the contingent remainder were created,[40] unless after the descent the estates are conveyed to a third person.[41]

If the particular estate and the next vested estate of inheritance meet only as to a part of the inheritance, the remainder will be defeated pro tanto.[42] Where the particular estate, the contingent remainder, and the fee are all granted in the same instrument, the particular estate and the fee will not merge so as to defeat such remainder;[43] but it is otherwise where the fee is granted by a subsequent instrument.[44]

Statutes abolishing the destructibility of contingent remainders, as discussed generally in § 95 infra, may prevent the destruction of remainders by merger.[45] Such an act has been held not retroactive.[46]

§ 94. By Nature of Contingency

A contingent remainder may be void because of the nature of the contingency, as where the contingency involves the expectation of an illegal or impossible thing. It may be void for remoteness of the contingency, as involving a double possibility, such as an attempt to give a life estate to an unborn person with a remainder to a child of such person; but some authorities regard re-

31. Neb.—Holz v. Burling, 120 N.W. 954, 122 N.W. 681, 84 Neb. 211.

32. Fla.—Tankersley v. Davis, 175 So. 501, 505, 128 Fla. 507, citing Corpus Juris—Blocker v. Blocker, 137 So. 249, 103 Fla. 285.
Ill.—Jennings v. Capen, 151 N.E. 900, 321 Ill. 291—Danberg v. Langman, 149 N.E. 245, 318 Ill. 266—Drager v. McIntosh, 147 N.E. 433, 316 Ill. 460—Edmiston v. Donovan, 133 N.E. 237, 300 Ill. 521—Fuller v. Black, 131 N.E. 641, 298 Ill. 351—Biwer v. Martin, 128 N.E. 518, 294 Ill. 488.
21 C.J. p 1006 note 18.

Origin of rule
"[This] rule of law . . . has grown out of the theory that a contingent remainder must depend upon a particular estate of freehold for its existence."—Biwer v. Martin, supra.
In Hawaii courts have refused to recognize this doctrine.—Evans v. Bishop Trust Co., Ltd., 21 Hawaii 74—Godfrey v. Roland, 16 Hawaii 377.

33. Fla.—Tankersley v. Davis, 175 So. 501, 128 Fla. 507—Blocker v. Blocker, 137 So. 249, 103 Fla. 285.
Ill.—Danberg v. Langman, 149 N.E. 245, 318 Ill. 266—Drager v. McIntosh, 147 N.E. 433, 316 Ill. 460—Fuller v. Black, 131 N.E. 641, 298 Ill. 351—Parish v. Dewey, 131 N.E. 606, 298 Ill. 345—Calvert v. Calvert, 130 N.E. 347, 297 Ill. 22—Stevens v. Van Brocklin, 129 N.E. 68, 295 Ill. 434—Gray v. Shinn, 127 N.E. 755, 293 Ill. 573—Lewin v. Bell, 120 N.E. 633, 285 Ill. 227.
21 C.J. p 1006 note 24.

Well considered case
Ill.—Gray v. Shinn, 127 N.E. 755, 293 Ill. 573.

34. Fla.—Tankersley v. Davis, 175 So. 501, 128 Fla. 507—Blocker v. Blocker, 137 So. 249, 253, 103 Fla. 285, citing Corpus Juris.
21 C.J. p 1006 note 19.

35. Ky.—Coots v. Yewell, 25 S.W. 597, 26 S.W. 179, 95 Ky. 367, 16 Ky.L. 2.
21 C.J. p 1006 note 20.

36. Ill.—Ortmayer v. Elcock, 80 N.E. 339, 225 Ill. 342.
21 C.J. p 1006 note 21.

37. Ill.—Hill v. Hill, 106 N.E. 262, 264 Ill. 219.

38. S.C.—McCreary v. Coggeshall, 53 S.E. 978, 74 S.C. 42, 7 L.R.A.,N.S., 433, 7 Ann.Cas. 693.
21 C.J. p 1006 note 23.

39. Fla.—Tankersley v. Davis, 175 So. 501, 128 Fla. 507—Blocker v. Blocker, 137 So. 249, 253, 103 Fla. 285, citing Corpus Juris.
Ill.—Gray v. Shinn, 127 N.E. 755, 293 Ill. 573.
21 C.J. p 1006 note 25.

40. Ill.—Biwer v. Martin, 128 N.E. 518, 294 Ill. 488—Gray v. Shinn, 127 N.E. 755, 293 Ill. 573.
21 C.J. p 1006 note 26.

41. Pa.—Bennett v. Morris, 5 Rawle 9.

42. D.C.—Craig v. Warner, 16 D.C. 460, 60 Am.R. 381.

Complete or partial destruction
"Where the life tenant conveys the property to a third person, and all the reversioners convey the property to the same person, each expressly for the purpose of destroying the remainder, the person to whom the conveyances are made will take the fee in the entire property divested of the remainder; but where such conveyances are made by the life tenant, and only a part of the reversioners, the grantee in the deed will take the fee to only such proportional undivided part of the property wherein the person making the deed had a reversionary interest. Where there are two reversioners, each having an undivided half interest in the reversion, and the deed is made by the life tenant and one reversioner, the contingent remainder is thereupon destroyed in an undivided half of the property."—Fuller v. Fuller, 146 N.E. 174, 175, 315 Ill. 214.

43. Ill.—Biwer v. Martin, 128 N.E. 518, 294 Ill. 488.
21 C.J. p 1007 note 33.

44. Pa.—Jordan v. McClure, 85 Pa. 495.

45. Ill.—Hauser v. Power, 191 N.E. 64, 356 Ill. 521—Jennings v. Capen, 151 N.E. 900, 321 Ill. 291—Danberg v. Langman, 149 N.E. 245, 318 Ill. 266—Drager v. McIntosh, 147 N.E. 433, 316 Ill. 460—Edmiston v. Donovan, 133 N.E. 237, 300 Ill. 521.
Miss.—City Savings Bank & Trust Co. of Vicksburg v. Cortright, 84 So. 136, 122 Miss. 75.

46. Ill.—Hauser v. Power, 191 N.E. 64, 356 Ill. 521—Jennings v. Capen, 151 N.E. 900, 321 Ill. 291—Danberg v. Langman, 149 N.E. 245, 318 Ill. 266—Drager v. McIntosh, 147 N.E. 433, 316 Ill. 460—Edmiston v. Donovan, 133 N.E. 237, 300 Ill. 521.

moteness of contingent remainders as now governed by the rule against perpetuities.

A contingent remainder is void if the contingency involves the expectation of a thing which is against the law[47] or is repugnant to any rule of law,[48] or contrariant in itself,[49] or inconsistent with the quality or nature of the preceding estate,[50] or is impossible.[51]

Remoteness. A contingent remainder is likewise void, in the absence of a statutory provision protecting it, as discussed in § 95 infra, if the possibility of the happening of the event on which a contingent remainder depends is not a common possibility, or potentia propinqua, such as death, or death without issue, or the like.[52] According to one theory, a contingency is remote if it involves a "possibility on a possibility" or a "double possibility," that is, if the vesting of the remainder requires the concurrence of two several contingencies, not independent and collateral, but the one requiring the previous existence of the other, and yet not necessarily arising out of it,[53] such as an attempt to give a life estate to an unborn person with a remainder to a child of such unborn person,[54] or a remainder to a corporation not in esse,[55] although, as appears in Charities § 32, the rule is different in the case of a charitable corporation not in esse at the time of the testator's death, but to be formed thereafter, within a period not too remote, or a remainder to the right heirs of a person not in esse, as purchasers,[56] or a remainder to any unborn person described by a particular name,[57] although such a gift has been upheld on the ground that a living person may take that particular name as well as fulfill the description in the usual manner by obtaining it at birth.[58] According to the other theory, which holds that the rule as to a possibility on a possibility has become obsolete, the question of the remoteness of contingent remainders is now governed wholly by the rule against perpetuities.[59]

Successive contingent remainders. Where a remainder over is limited on a contingent determination of a preceding remainder and such preceding remainder never takes effect, the remainder over is not defeated thereby, but will take effect as if it has been originally limited on the particular estate;[60] where the preceding remainder takes effect, but the contingency does not happen, the remainder over will fail;[61] and the failure of a contingent interest preceding a remainder over will cause the remainder over to fail, if it is affected by the contingency;[62] but if the remainder over is not contingent, it is accelerated by the failure of the preceding contingent interest.[63] Where the freehold may be in abeyance without detriment to subsequent remainders, or where the freehold is in trustees and the interests are carved out of the equitable fee, if the contingent interest is void on its creation from any cause, or the contingency on which it depends afterward becomes impossible, or the donee dies before the testator, the next vested interest will be accelerated;[64] but if the contingent interest is valid in its creation, and the event on which it depends undetermined, the limitation over will not take effect until it is ascertained whether the contingent interest will vest, and in the meantime the property will devolve on the heirs or next of kin of the testator or settlor.[65] If the gift

47. D.C.—Landram v. Jordan, 25 App.D.C. 291, affirmed 27 S.Ct. 17, 203 U.S. 56, 51 L.Ed. 88.
21 C.J. p 1007 note 35.

48. D.C.—Landram v. Jordan, supra.
21 C.J. p 1007 note 36.

49. Eng.—Corbet's Case, 1 Coke 83b, 76 Reprint 187.

50. Va.—Camp v. Cleary, 76 Va. 140.

51. N.C.—Burleyson v. Whitley, 2 S.E. 450, 97 N.C. 295.

52. Pa.—Zeisweiss v. James, 63 Pa. 465, 3 Am.R. 558.

53. Pa.—Zeisweiss v. James, supra.

54. N.Y.—Jackson v. Brown, 13 Wend. 437.
Limits of rule
(1) A remainder to an unborn person, either for life, in tail, or in fee, will be good unless it is preceded by a gift for life or in tail to the unborn parent of that person.—Folk v. Hughes, 84 S.E. 713, 100 S.C. 220.
(2) If made in a will the prior limitation (whether it be executed or executory) may be construed as a limitation in tail provided that such a limitation would, if not barred, carry the estate by descent to the issue specified in the second limitation.—Jackson v. Brown, 13 Wend., N.Y., 437—21 C.J. p 1008 note 44 [a] (2).
(3) In the case of a will, this is done with a view to carrying out the general intent to benefit the issue of the unborn child, so far as the rules of law will permit.—Allyn v. Mather, 9 Conn. 114.

55. Pa.—Zeisweiss v. James, 63 Pa. 465, 3 Am.R. 558.

56. N.H.—Dennett v. Dennett, 40 N.H. 498.

57. Eng.—Cholmley's Case, 2 Coke 50a, 76 Reprint 527.

58. Eng.—In re Roberts, 19 Ch.D. 520.

59. Pa.—In re Kountz, 62 A. 1103, 213 Pa. 390, 3 L.R.A.,N.S., 639, 5 Ann.Cas. 427.
21 C.J. p 1008 note 50.

60. Eng.—Statham v. Bell, 1 Cowp. 40, 98 Reprint 956.

61. Eng.—Sheffield v. Orrery, 3 Atk. 282, 26 Reprint 965.

62. Ga.—Oetjen v. Diemmer, 42 S.E. 388, 115 Ga. 1005.

63. Eng.—Goodright v. Cornish, 1 Salk. 226, 91 Reprint 200.
Acceleration generally see supra § 82.

64. U.S.—Robison v. Portland Female Orphan Asylum, Me., 8 S.Ct. 327, 123 U.S. 702, 31 L.Ed. 293.
21 C.J. p 1009 note 60.
Fee in abeyance see supra § 81.
Protection: trust estates see infra § 96.

65. Eng.—Wade-Gery v. Handley, 1 Ch.D. 653, 3 Ch.D. 374.

over is limited to take effect on a particular event and the very opposite or alternative of that event actually happens, the subsequent gift fails altogether, although the prior gift is out of the way.[66]

§ 95. Statutory Provisions

The common-law rules governing the destruction of remainders have been considerably modified by statute, as by provisions for preventing the destruction of contingent remainders.

As will appear, the rules governing the destruction of remainders at common law, as discussed in §§ 91–94 supra, have been considerably modified by statute. In the United States, the purpose or effect of a number of statutes is to prevent the destruction of contingent remainders,[67] as by providing that no remainder, whether vested or contingent, may be defeated by any act of the particular tenant,[68] or that no estate in remainder shall be defeated by any deed of feoffment with livery of seizin,[69] or that no future estate shall be invalid on account of the improbability of the contingency on which it is to take effect.[70] Since these provisions do not prevent the destruction of the remainder by natural expiration of the particular estate,[71] it has been expressly provided in some jurisdictions that no future interest valid in its creation shall fail or be defeated by the termination of any precedent estate or estate before the happening of the event or contingency on which the future interest is limited to take effect, and such provisions have been applied in several cases.[72]

English statutes are considered in 21 C.J. p 1009 notes 65–67.

§ 96. Protection; Trust Estates

The legal subjection of contingent remainders to the power of the tenant of the preceding particular estate was overcome at common law by interposing between the particular estate and the contingent remainder a vested remainder of freehold to trustees.

The legal subjection of contingent remainders to the power of the tenant of the preceding particular estate of freehold, as discussed in § 92 supra, was overcome at common law by the device of trust estates to preserve contingent remainders,[73] which consisted of the testator's or grantor's interposing between the particular estate and the contingent remainder a vested remainder of freehold to trustees, so that, even should there be a forfeiture of the particular estate, there would still be a vested estate of freehold, preceding and supporting the contingent remainder;[74] and such limitations in trust to preserve contingent remainders were not executed by the statute of uses, the legal estate in such case remaining in the trustee.[75] A trust estate to preserve contingent remainders might be effected either by giving the trustee a vested remainder, in which case the trustee might, by joining with the preceding tenant, defeat the remainder,[76] which ordinarily would constitute a breach of trust,[77] or result in declaring the land subject to the original limitations in the hands of a purchaser with notice of the breach of trust,[78] although under the particular circumstances of some cases it was held not to be a breach of trust,[79] or by conveying the estate directly to the trustee and his heirs in trust for the tenant of the particular estate, and on the further trust to preserve the contingent remainder.[80] Under special circumstances

66. Pa.—In re Gunning, 83 A. 61, 234 Pa. 144.

67. Ill.—Danberg v. Langman, 149 N.E. 245, 318 Ill. 266—Drager v. McIntosh, 147 N.E. 433, 316 Ill. 460.
Miss.—City Savings Bank & Trust Co. of Vicksburg v. Cortright, 84 So. 136, 122 Miss. 75.
21 C.J. p 1009 notes 68, 71.
Statutory provisions as affecting merger see supra § 93.

68. Mich.—Lowry v. Lyle, 198 N.W. 245, 226 Mich. 676.
21 C.J. p 1009 note 69.

69. S.C.—McCreary v. Coggeshall, 53 S.E. 978, 74 S.C. 42, 7 L.R.A., N.S., 433, 7 Ann.Cas. 693.

70. Cal.—Los Angeles County v. Winans, 109 P. 640, 13 Cal.App. 234.
21 C.J. p 1009 note 76.

71. Miss.—Irvine v. Newlin, 63 Miss. 192.

72. Ill.—Hauser v. Power, 191 N.E. 64, 356 Ill. 521—Martin v. Karr, 175 N.E. 376, 343 Ill. 296—Danberg v. Langman, 149 N.E. 245, 318 Ill. 266—Drager v. McIntosh, 147 N.E. 433, 316 Ill. 460—Edmiston v. Donovan, 133 N.E. 237, 300 Ill. 521.
Statute held not retroactive
Ill.—Hauser v. Power, 191 N.E. 64, 356 Ill. 521—Martin v. Karr, 175 N.E. 376, 343 Ill. 296—Jennings v. Capen, 151 N.E. 900, 321 Ill. 291—Danberg v. Langman, 149 N.E. 245, 318 Ill. 266—Drager v. McIntosh, 147 N.E. 433, 316 Ill. 460—Edmiston v. Donovan, 133 N.E. 237, 300 Ill. 521.
Affirmative action to destroy the remainder must be taken before such a statute goes into effect; otherwise the right to abrogate is lost.—Jennings v. Capen, 151 N.E. 900, 321 Ill. 291.
"In Florida we have no statute, as have some of the states, that has the effect of dispensing with the necessity of a particular estate to support a contingent remainder."—Blocker v. Blocker, 137 So. 249, 253, 103 Fla. 285.

73. Ill.—Lewin v. Pell, 120 N.E. 633, 285 Ill. 227—Scheuing v. May, 213 Ill.App. 143.

74. N.Y.—Vanderheyden v. Crandall, 2 Den. 9, affirmed 1 N.Y. 491.
21 C.J. p 1009 note 83.

75. N.Y.—Vanderheyden v. Crandall, supra.

76. Eng.—Mansell v. Mansell, Cas. t.Talb. 252, 25 Reprint 763, 2 P. Wms. 678, 24 Reprint 913.

77. Pa.—Harris v. McElroy, 45 Pa. 216.

78. Eng.—Mansell v. Mansell, Cas. t.Talb. 252, 25 Reprint 763, 2 P. Wms. 678, 24 Reprint 913.

79. Eng.—Ellie v. Osborne, 2 Vern. Ch. 754, 23 Reprint 1093.

80. N.Y.—Vanderhyden v. Crandall, 2 Den. 9, affirmed 1 N.Y. 491.

equity may, in its discretion, direct the trustees to join in barring the contingent remainders;[81] but equity will never direct the trustees to join for the purpose of enabling any of the parties to sell the estate and disturb the original intention of the settlor or devisor.[82]

Remedies for the protection of the remainder as against the life tenant are considered generally in §§ 57–64 supra.

§ 97. Actions by or against Remaindermen

One who seeks to recover remainders wrongfully transferred by executors need not resort to the courts of the state where the testator died and the will was probated.

In an action to recover remainders alleged to have been wrongfully transferred by the executors of the will, probated in another state, of one who died there, the law of the latter state will be resorted to as the measure of plaintiff's substantive rights, but plaintiff is not required to resort to the courts of that state.[83]

§ 98. Right of Action

Various types of action, in law and equity, are or are not available to remaindermen for the protection of their interests, according to the nature of those interests at the time it is sought to bring the particular action; thus, a remainderman cannot, during the continuance of the preceding estate, maintain any action which depends on the right to possession, but may do so after the termination of that estate.

A vested remainderman may, during the continuance of the preceding estate, maintain an action for damages for an injury to his remainder interest;[84] but he may not, during such continuance, sue for an injury to the estate which is not of a permanent character,[85] or obtain partition of undivided interests in remainder either at law or in equity,[86] or sue for trespass,[87] or, even after the termination of the life estate, maintain an action of trover for a conversion during the continuance of that estate;[88] nor may he recover damages for injury done both to the particular estate and to the remainder,[89] unless the bringing of such actions are authorized by statute.[90] Contingent remaindermen are entitled to sue grantee of the life tenant, who permitted the land to be sold for taxes, to set aside the tax title acquired by him.[91] After the death of a life tenant who has allowed the property to be sold through failure to pay the interest on an encumbrance, the remainderman may sue the estate of the life tenant for the damages sustained even though during the lifetime of the life tenant he might have had a sequestrator appointed to apply the rents and income for this purpose.[92]

The remainderman may sue for a tort affecting his estate, although it also affects the estate of the tenant in possession.[93] He may sue for compensation where real estate limited in remainder is taken, either wholly or in part, for a public use, as appears in § 199 of the title Eminent Domain, even during the lifetime of the tenant of the particular estate,[94] since the value of the life estate may be definitely ascertained by life tables;[95] and he may bring suit for waste or destruction against the

81. Ky.—Whallen v. Kellner, 104 S.W. 1018, 31 Ky.L. 1285.

82. Eng.—Barnard v. Large, Ambl. 774, 27 Reprint 496, 1 Bro.Ch. 534, 28 Reprint 1283, 2 P.Wms. 684 note, 24 Reprint 916.

83. N.Y.—Squier v. Houghton, 226 N.Y.S. 162, 131 Misc. 129.

84. Ky.—Warfield Natural Gas Co. v. Ward, 72 S.W.2d 464, 254 Ky. 754—Cox v. Corrigan-McKinney Steel Co., 58 S.W.2d 625, 248 Ky. 426.
N.C.—Nash v. Shute, 114 S.E. 470, 184 N.C. 383.
Tex.—Hamilton v. Hamilton, Civ. App., 42 S.W.2d 814, 817, quoting **Corpus Juris.**
W.Va.—Swick v. West Virginia Coal & Coke Co., 7 S.E.2d 697.
21 C.J. p 1010 note 92.

Remaindermen held not estopped to claim damages for construction of pipe line on land in which they owned undivided half interest, because they did not object to construction of pipe line.—Warfield Natural Gas Co. v. Ward, 72 S.W.2d 464, 254 Ky. 754.

85. Ky.—Warfield Natural Gas Co. v. Ward, supra.
N.C.—Nash v. Shute, 114 S.E. 470, 184 N.C. 383.
Tex.—Hamilton v. Hamilton, Civ. App., 42 S.W.2d 814, 817, quoting **Corpus Juris.**
W.Va.—Swick v. West Virginia Coal & Coke Co., 7 S.E.2d 697.
21 C.J. p 1010 note 93.

Presumption of permanence
As respects right of remaindermen to sue for damages caused by construction of pipe line on land on which their father had life estate, since land itself has been taken, presumption is that taking is permanent.—Warfield Natural Gas Co. v. Ward, 72 S.W.2d 464, 254 Ky. 754.

86. Tex.—Hamilton v. Hamilton, Civ.App., 42 S.W.2d 814, 817, quoting **Corpus Juris.**
21 C.J. p 1010 note 94.

87. Iowa.—Bottorff v. Lewis, 95 N.W. 262, 121 Iowa 27.
Tex.—Hamilton v. Hamilton, Civ. App., 42 S.W.2d 814, 817, quoting **Corpus Juris.**

88. Ala.—Nations v. Hawkins, 11 Ala. 859.
21 C.J. p 1010 note 96.

89. W.Va.—Jordan v. Benwood, 26 S.E. 266, 42 W.Va. 312, 57 Am.S.R. 859, 36 L.R.A. 519.

90. N.Y.—Muller v. Manhattan R. Co., 88 N.E. 1126, 195 N.Y. 539, affirming 108 N.Y.S. 852, 124 App. Div. 295, affirming 102 N.Y.S. 454, 53 Misc. 133.

91. Ky.—Cox v. Corrigan-McKinney Steel Co., 58 S.W.2d 625, 245 Ky. 426.
Tenn.—Ford v. Hurt, 155 S.W. 927, 127 Tenn. 557.

92. Pa.—Rowe v. Thomas, 8 Kulp 449.

93. Ky.—Adams v. Bates, 231 S.W. 238, 191 Ky. 710.
21 C.J. p 1011 note 2.

94. Mo.—Rivard v. Missouri Pac. R. Co., 165 S.W. 763, 257 Mo. 135.

95. Mo.—Rivard v. Missouri Pac. R. Co, supra.

holder of the particular estate,[96] or his grantee,[97] although a contingent remainderman pending the contingency has no standing in a court of law to recover damages for waste,[98] being limited to his remedy in equity, as will appear in this section. In an action to recover taxes paid by a remainderman for the owner of the life estate, the former was not entitled to a judgment decreeing a lien on the property, and that it be sold to satisfy the judgment, as the action was merely at law for money paid for defendant's benefit.[99]

On the other hand, after the termination of the preceding particular estate, a remainderman may bring partition,[1] and may, under most authorities, maintain an action to recover all rents and profits which accrued after the termination of the life estate,[2] although there is authority to the contrary,[3] but not rents which accrued during continuance of the life estate,[4] even though the remainderman received a release from the life tenant at the time the action was commenced;[5] and a cause of action for injury to the property accrues to a contingent remainderman on the death of the life tenant, although he could not sue before.[6]

Suit may be maintained by the holder of the legal title against contingent remaindermen, whose remainder is a mere expectancy.[7]

Possessory actions. Since, as appears in § 85 supra, a remainderman has no present right to possession, he cannot, during the continuance of the preceding estate, maintain any action which depends on the right to possession.[8] So, he cannot, during that period, maintain an action to recover the possession of the realty;[9] he cannot maintain ejectment,[10] even if he takes a deed from the life tenant after the tenant's seizin is barred by limita-

96. Ky.—Superior Oil Corporation v. Alcorn, 47 S.W.2d 973, 242 Ky. 814.
Mass.—Thayer v. Shorey, 191 N.E. 435, 287 Mass. 76, 94 A.L.R. 307.
N.C.—Hass v. Hass, 143 S.E. 541, 195 N.C. 734.
Va.—Fleenor v. Sproles, 139 S.E. 286, 148 Va. 503.
21 C.J. p 1011 note 6.
Persons entitled to sue for waste generally see the C.J.S. title Waste § 12, also 67 C.J. p 631 note 60–p 632 note 75.

Good title required

"In an action for the recovery of damages for waste, committed by a life tenant, the plaintiff must establish a good and not a doubtful, title to the remainder."—Batten v. Corporation Commission of North Carolina, 154 S.E. 748, 749, 199 N.C. 460.

Nature of action

(1) A remainderman, to recover for the cutting of timber from land in the life tenant's possession, is not required to bring an action on the case, but may recover in trover, or may waive the tort and sue in assumpsit, or recover under the common count for money had and received.—Jones v. Sandlin, 87 So. 850, 205 Ala. 67.

(2) Statutory action of waste by remainderman as person having next immediate estate of inheritance to recover place wasted and damages is mixed action and not real action.—Thayer v. Shorey, 191 N.E. 435, 287 Mass. 76, 94 A.L.R. 307.

97. Ky.—Adams v. Bates, 231 S.W. 238, 191 Ky. 710.

98. Ky.—Cox v. Corrigan-McKinney Steel Co., 58 S.W.2d 625, 248 Ky. 426.
N.C.—Gordon v. Lowther, 75 N.C. 193.
Va.—Ivey v. Lewis, 112 S.E. 712, 133 Va. 122.
21 C.J. p 1011 note 8—67 C.J. p 632 note 64.

However, it has been held that a contingent remainderman could maintain action at law for recovery of value of standing timber which was removed from the land by one other than the life tenant, and the trial court in exercise of its equity jurisdiction would have duty to make appropriate orders in relation to the life tenant's interest, and secure or conserve the amount recovered for ultimate owners.—Louisville Cooperage Co. v. Rudd, 124 S.W.2d 1063, 276 Ky. 721.

99. Cal.—Huddleston v. Washington, 69 P. 146, 136 Cal. 514.

1. Ill.—Bechdoldt v. Bechdoldt, 75 N.E. 557, 217 Ill. 537.
21 C.J. p 1011 note 12.

2. Ohio.—Noble v. Tyler, 56 N.E. 191, 61 Ohio St. 432, 48 L.R.A. 735.
21 C.J. p 1011 note 13.

3. Ky.—Robison v. Gray, 97 S.W. 347, 29 Ky.L. 1296.

4. Ky.—Hellier v. Syck, 145 S.W. 1110, 147 Ky. 762.

5. Ky.—Mullings v. Conger, 22 S.W. 546, 15 Ky.L. 171.

6. Cal.—Rhoda v. Alameda County, 26 P.2d 691, 134 Cal.App. 726.

7. Cal.—Los Angeles County v. Winans, 109 P. 650, 13 Cal.App. 257.

8. Minn.—Ashbaugh v. Wright, 188 N.W. 157, 152 Minn. 57.
Mo.—Jones v. Himmelberger-Harrison Lumber Co., 223 S.W. 63.
Wis.—Blodgett v. Davenport, 263 N.W. 629, 219 Wis. 596.

9. U.S.—Interstate Realty & Investment Co. of Louisiana v. Bibb County, C.C.A.Ga., 293 F. 721.
Ala.—Lewis v. Belk, 122 So. 413, 219 Ala. 343—St. Clair Springs Hotel Co. v. Balcomb, 108 So. 858, 215 Ala. 12—Kyser v. McGlinn, 92 So. 13, 207 Ala. 82.
Ark.—Hamilton v. Farmer, 292 S.W. 683, 173 Ark. 341—Kennedy v. Burns, 215 S.W. 618, 140 Ark. 367.
Ill.—Cross v. Janes, 158 N.E. 694, 327 Ill. 533—Brown v. Ray, 145 N.E. 676, 314 Ill. 570—Allison v. White, 120 N.E. 809, 285 Ill. 311.
Iowa.—Ward v. Meredith, 173 N.W. 246, 186 Iowa 1108.
Ky.—Superior Oil Corporation v. Alcorn, 47 S.W.2d 973, 242 Ky. 814—Wells v. Cornish, 35 S.W.2d 308, 237 Ky. 236.
Mich.—Lowry v. Lyle, 198 N.W. 245, 226 Mich. 676.
Miss.—Belt v. Adams, 86 So. 584, 124 Miss. 194, suggestion of error dismissed 87 So. 666, 125 Miss. 387.
Mo.—Wells v. Egger, 259 S.W. 437, 303 Mo. 26—Mathews v. O'Donnell, 233 S.W. 451, 289 Mo. 235—Welch v. Wagner, 232 S.W. 146—Jones v. Himmelberger-Harrison Lumber Co., 223 S.W. 62—Settles v. Scott, 211 S.W. 35—Eighme v. Indiana, B. & W. R. Co., 249 S.W. 717, 213 Mo. App. 342.
S.C.—Clarke v. Johnson, 148 S.E. 190, 150 S.C. 351.

10. U.S.—McCampbell v. Warrich Corporation, C.C.A.Ill., 109 F.2d 115, certiorari denied 60 S.Ct. 1077, 310 U.S. 631, 84 L.Ed. 1401, rehearing denied 61 S.Ct. 55, 311 U.S. 612, 85 L.Ed. 388.
Ky.—Parkey v. Arthur, 53 S.W.2d 921, 245 Ky. 525.
Mo.—Owen v. Trail, 258 S.W. 699, 302 Mo. 292—Case v. Sipes, 217 S.W. 306, 280 Mo. 110—Settles v. Scott, 211 S.W. 35.
N.C.—Nash v. Shute, 114 S.E. 470, 184 N.C. 383.

tions;[11] nor can he, except against persons who are in possession, not under, but in hostility to, the life estate,[12] maintain an action of trespass to try title,[13] nor obtain a writ of entry against one rightfully in possession under the life tenant.[14] However, immediately on the determination of the particular estate the remainderman's right of entry is complete and he may maintain an action to recover the property by ejectment[15] or by a formedon in remainder or a writ of entry.[16]

In equity generally. Both vested or contingent remaindermen are entitled to equitable relief whenever necessary to protect their interest against loss or injury,[17] if defendant or the property is within the jurisdiction of the court,[18] whether the remainderman's interest is in the hands of the preceding tenant for life, as appears in § 60 supra, or some other person,[19] and even during the life of the life tenant;[20] but when such necessity does not exist the remainderman is not entitled to equitable relief.[21] In general, before expiration of the preceding estate, remaindermen may sue to have their rights adjudicated where adverse claims are being asserted against them.[22] A trespass on the rights of the life tenant gives the remainderman no right to equitable relief,[23] unless the trespass in some way endangers the remainder interest.[24]

Particular equitable remedies. A remainderman may, during the continuance of the preceding estate, protect his interests by relief by injunction;[25] he may, even within that period, maintain a suit to enjoin a sale under a mortgage executed by the life tenant;[26] to restrain the maintenance and operation of an elevated railroad in front of the premises;[27] to quiet, or remove a cloud from, his title,[28] except in certain cases where the remain-

Ohio.—Webster v. Pittsburg, C. & T. R. Co., 84 N.E. 592, 78 Ohio St 87, 15 L.R.A.,N.S., 1154.
Okl.—Lincoln v. Herndon, 285 P. 120, 141 Okl. 212.
Pa.—Dice v. Reese, 21 A.2d 89.
21 C.J. p 1011 note 18.

11. W.Va.—Adkins v. Spurlock, 33 S.E. 121, 46 W.Va. 139.

12. U.S.—Howth v. Farrar, C.C.A. Tex., 94 F.2d 654, rehearing denied 95 F.2d 1005, certiorari denied 59 S.Ct. 75, 305 U.S. 599, 83 L.Ed. 380.

13. Tex.—Hensley v. Conway, Civ. App., 29 S.W.2d 416.
21 C.J. p 1011 note 20.

14. Me.—Sylvester v. Sylvester, 21 A. 783, 83 Me 46.
21 C.J. p 1011 note 21.

15. Ga.—Mathis v. Solomon, 4 S.E. 2d 24, 188 Ga. 311—Harper v. Durden, 170 S.E. 45, 177 Ga. 216, 89 A.L.R. 625.
Pa.—Chesnut v. Chesnut, 151 A. 339, 300 Pa. 146, 75 A.L.R. 66.
21 C.J. p 1011 note 22.

Set-off of improvements

In remaindermen's ejectment suit, defendant, although he had improved land while holding adversely to life tenant, could set off value of permanent improvements.—Harper v. Durden, 170 S.E. 45, 177 Ga. 216, 89 A.L.R. 625.

Payment for redemption of mortgage

The court cannot attach to remaindermen's right to recover in ejectment a condition that they pay defendants the amount paid by the latter's grantor in redeeming a mortgage given by the life tenant to satisfy a bequest which was made a lien on the land in case of the life tenant's default in paying it.—Lowry v. Lyle, 198 N.W. 245, 226 Mich. 676.

16. Mass.—Wells v. Prince, 4 Mass. 64.

17. U.S.—Buder v. Franz, C.C.A.Mo., 27 F.2d 101, 107, quoting **Corpus Juris**—Grodsky v. Sipe, D.C.Ill., 30 F.Supp. 656, 662, citing **Corpus Juris.**
Or.—Calvary Baptist Church of Baker v. Saxton, 242 P. 616, 620, 117 Or. 125, citing **Corpus Juris.**
Tex.—Hamilton v. Hamilton, Civ. App., 42 S.W.2d 814, 817, quoting **Corpus Juris.**
21 C.J. p 131 note 41, p 1012 note 25.

18. Md.—Foley v. Syer, 88 A. 38, 121 Md. 79.
21 C.J. p 1012 note 25.

19. Or.—Calvary Baptist Church of Baker v. Saxton, 242 P. 616, 620, 117 Or. 125, citing **Corpus Juris.**
Tex.—Hamilton v. Hamilton, Civ. App., 42 S.W.2d 814, 817, quoting **Corpus Juris.**
21 C.J. p 1012 note 28.

20. Ala.—Washington v. Young, 139 So. 92, 224 Ala. 232—Nabors v. Woolsey, 56 So. 533, 174 Ala. 289.
Tex.—Hamilton v. Hamilton, Civ. App., 42 S.W.2d 814, 817, quoting **Corpus Juris.**

21. U.S.—Williams v. Provident Life & Trust Co of Philadelphia, W.Va., 242 F. 417, 155 C.C.A. 193.
Tex.—Hamilton v. Hamilton, Civ. App., 42 S.W.2d 814, 817, quoting **Corpus Juris.**
21 C.J. p 1012 note 30.

Cancellation or foreclosure of deeds

Remainderman who had only equitable contingent remainder under deed of trust held not entitled during existence of precedent life estate to maintain suit to cancel security deeds executed by life tenant and trustees purporting to convey entire trust estate; and where it was not shown that trustees vested with legal title under deed of trust had refused to act or would fail to protect interest of remainderman, latter could not maintain suit to enjoin theatened foreclosure of security deeds.—Stout v. Massachusetts Mut. Life Ins. Co., 189 S.E. 248, 183 Ga. 649.

22. Ky.—Cox v. Corrigan-McKinney Steel Co., 58 S.W.2d 625, 248 Ky. 426.

23. Ala.—Land v. Cowan, 19 Ala. 297.
Tex.—Hamilton v. Hamilton, Civ. App., 42 S.W.2d 814, 817, quoting **Corpus Juris.**

24. Ala.—Land v. Cowan, 19 Ala. 297.
Tex.—Hamilton v. Hamilton, Civ. App., 42 S.W.2d 814, 817, quoting **Corpus Juris.**

25. U.S.—Grodsky v. Sipe, D.C.Ill., 30 F.Supp. 656.
Ky.—Superior Oil Corporation v. Alcorn, 47 S.W.2d 973, 242 Ky. 814.

26. Ga.—New South Bldg. & Loan Ass'n v. Gann, 24 S.E. 448, 97 Ga. 367.

27. N.Y.—Goggin v. Manhattan R. Co., 104 N.Y.S. 548, 54 Misc. 472, modified on other grounds 109 N.Y.S. 83, 124 App.Div. 644.

28. Ala.—Ward v. Chambless, 189 So. 890, 238 Ala. 165—Teal v. Mixon, 169 So. 477, 233 Ala. 23—St. Clair Springs Hotel Co. v. Balcomb, 108 So. 858, 215 Ala. 12.
Fla.—Commercial Bldg. Co. v. Parslow, 112 So. 378, 93 Fla. 143.
Ky.—Superior Oil Corporation v. Alcorn, 47 S.W.2d 973, 242 Ky. 814—Wells v. Cornish, 35 S.W.2d 308, 237 Ky. 236.
Neb.—Davis v. Davis, 185 N.W. 442, 107 Neb. 70.
N.C.—Johnston v. Johnston, 12 S.E.2d 248, 218 N.C. 706.
Or.—Calvary Baptist Church of Bak-

derman's estate is subject to divestiture,[29] although where a purchaser of a life estate at a tax sale sues to quiet title, the remaindermen are not entitled to counter-relief during the life of the life tenant;[30] to reform[31] or set aside[32] a deed to the property; to charge a life tenant's estate for failure to repair;[33] to have a receiver appointed to collect the rents and profits of the land with which to discharge the taxes, and thereby preserve his title in case the life tenant shall fail to pay them for such a time as is liable to forfeit the entire estate;[34] to compel a life tenant with power of sale for benefit of remaindermen to invest proceeds of sale for the remainderman's benefit;[35] and to restrain or enjoin waste[36] pending the contingency.[37] Where timber or other part of the realty is going to loss and imperative need calls for it, equity may cause it to be cut or otherwise secured for the remainderman or reversioner,[38] if it does no harm to the life tenant,[39] or he is compensated.[40] A contingent remainderman born subsequent to the execution of a mortgage may seek relief against the foreclosure of the equity of redemption.[41] Where the property is in the hands of a trustee, any breach of trust or improper conduct on the part of the trustee is a ground for equitable relief,[42] and where a trust deed has been set aside under a decree fraudulently obtained, the remainderman may maintain a bill to have the property restored to the original trust.[43] If the trustee is already under a valid and sufficient bond to protect the remainder interest, the remainderman is not entitled to any other relief;[44] and the remainderman cannot, during the continuance of the life estate, sue on the trustee's bond to recover any part of the amount wasted, although he could proceed in equity to compel the trustee to bring the money into court to be invested.[45] The remainderman may maintain a suit for the appointment of a new trustee and for an accounting.[46]

Suit to quiet title may be maintained by the holder of the legal title against contingent remaindermen whose remainder is a mere expectancy.[47]

Statutory provisions. Statutes authorizing a remainderman, either vested or contingent, to maintain an action against any person claiming any interest in the property, to determine the interests of the parties therein, have been construed and applied,[48] as has a statute to the effect that a remainderman, notwithstanding the intervening estate,

er v. Saxton, 242 P. 616, 620, 117 Or. 125, citing Corpus Juris.
21 C.J. p 1012 note 33.

There is no duty on the remainderman to bring such suit, apart from circumstances requiring action to escape the charge of laches.—Ward v. Chambless, 189 So. 890, 238 Ala. 165—Teal v. Mixon, 169 So. 477, 233 Ala. 23.

Contingent remainder

(1) Although the right of future enjoyment of remaindermen may be contingent on their surviving life tenant, such right may be adjudicated in a suit to quiet title.—Audsley v. Hale, 261 S.W. 117, 303 Mo. 451.

(2) Contingent remainderman is held entitled to have title quieted in him as against the claim of another contingent remainderman, notwithstanding the intervening life estate still continued.—Boggess v. Crail, 5 S.W.2d 906, 224 Ky. 97.

(3) An action may be maintained by a remainderman for the protection of a contingent remainder, as against one who claims an estate or interest in the property adverse to such remainderman.—Wilson v. Linder, 110 P. 274, 18 Idaho 438, 138 Am.S.R. 213.

(4) However, grantees of contingent remainder subject to life estate may not maintain action to quiet title subject to life estate, but decree may only declare them contingent remaindermen.—Elvers-

meyer v. McCollum, 283 S.W. 379, 171 Ark. 117.

29. Ga.—LaPierre v. Martin, 89 S.E. 1074, 145 Ga. 851.
21 C.J. p 1012 note 34.

30. Mo.—Bradley v. Goff, 147 S.W. 1012, 243 Mo. 95.

31. Ala.—Lewis v. Belk, 122 So. 413, 219 Ala. 343.

32. Ala.—Washington v. Young, 139 So. 92, 224 Ala. 232.

33. Ky.—Prescott v. Grimes, 136 S.W. 296, 143 Ky. 191, 33 L.R.A.,N.S., 669.
Pa.—Rowe v. Thomas, 8 Kulp 449.

34. Kan.—Goodman v. Malcolm, 48 P. 439, 5 Kan.App. 285.
N.Y.—In re McCarty's Estate, 285 N.Y.S. 641, 158 Misc. 287.

35. Iowa.—Dickey v. Barnstable, 98 N.W. 368, 122 Iowa 572.

36. Ky.—Smith v. Harris, 124 S.W. 2d 786, 276 Ky. 529—Russell v. Tipton, 235 S.W. 763, 193 Ky. 305.

37. Ky.—Cox v. Corrigan-McKinney Steel Co., 58 S.W.2d 625, 248 Ky. 426.
Va.—Ivey v. Lewis, 112 S.E. 712, 133 Va. 122.
21 C.J. p 1013 note 41—67 C.J. p 632 note 69.

38. W.Va.—Williamson v. Jones, 27 S.E. 411, 43 W.Va. 562, 64 Am.S.R. 891, 38 L.R.A. 694.

39. W.Va.—Williamson v. Jones, supra.

40. W.Va.—Williamson v. Jones, supra.

41. N.J.—Tantum v. Campbell, 91 A. 120, 83 N.J.Eq. 361.

42. U.S.—Buder v. Franz, C.C.A.Mo., 27 F.2d 101, 107, quoting Corpus Juris.
21 C.J. p 1013 note 47.

43. U.S.—Buder v. Franz, supra.
N.Y.—Wright v. Miller, 1 Sandf.Ch. 103, reversed 4 Barb. 600, reversed 8 N.Y. 9, 59 Am.D. 438.

44. U.S.—Buder v. Franz, C.C.A.Mo., 27 F.2d 101, 107, quoting Corpus Juris.
Conn.—Terry v. Allen, 23 A. 150, 60 Conn. 530.

45. U.S.—Buder v. Franz, C.C.A.Mo., 27 F.2d 101, 107, quoting Corpus Juris.
Md.—State v. Brown, 1 A. 410, 64 Md. 97.

46. U.S.—Buder v. Franz, C.C.A.Mo., 27 F.2d 101, 107, quoting Corpus Juris.
Mo.—Haydel v. Hurck, 5 Mo.App. 267.

47. Cal.—Los Angeles County v. Wipens, 109 P. 650, 13 Cal.App. 257.

48. Mo.—Fountain v. Starbuck, 209, S.W. 900.
21 C.J. p 1013 note 52.

Corpus Juris cited in connection with the statement that "a remainderman, whether vested or contingent, may protect his interests by relief by injunction."—Grodsky v. Sipe, D.C.Ill., 30 F.Supp. 656, 662.

may maintain an action for injury to the inheritance.[49] A statute authorizing a proceeding by tenants having undivided interests in the remainder may impose conditions, such as one that the consent of the life tenant is essential for such an action.[50]

§ 99. Limitation and Laches

a. General rules; extinguishment of particular estate
b. Laches

a. General Rules; Extinguishment of Particular Estate

The general rule is that the statute of limitations does not begin to run against a remainderman until the termination of the preceding particular estate, as by the death of the life tenant, since he is not entitled to the possession until such termination; but the rule does not apply to actions which are available to him during the continuance of the preceding estate, as where his possession is not involved, and in such cases the statute begins to run immediately on the accrual of the cause of action, even though the preceding estate has not terminated.

With respect to actions by a remainderman arising out of, and by virtue of, his estate in remainder, the general rule is that, since, as appears in § 85 supra, a remainderman is not entitled to the possession of the premises during the continuance of the preceding particular estate, the statute of limitations does not start to run against him until that estate has terminated, as by the death of the life tenant;[51] and as appears in § 66 supra, posses-

49. Cal.—Thompson v. Pacific Electric Ry. Co., 265 P. 220, 203 Cal. 578.

Assertion of right of action held permissive only, and not compulsory.—Thompson v. Pacific Electric Ry. Co., supra.

50. N.Y.—Mersereau v. Camp, 86 N.Y.S. 568, 42 Misc. 253.

51. U.S.—Howth v. Farrar, C.C.A. Tex., 94 F.2d 654, rehearing denied 95 F.2d 1005, certiorari denied 59 S.Ct. 75, 305 U.S. 599, 83 L.Ed. 380.
Ala.—Herren v. Beck, 164 So. 904, 231 Ala. 328—Lewis v. Belk, 122 So. 413, 219 Ala. 343—St. Clair Springs Hotel Co. v. Balcomb, 108 So. 858, 215 Ala. 12—Huey v. Brock, 92 So. 904, 207 Ala. 175, certiorari denied 42 S.Ct. 585, 259 U.S. 581, 66 L.Ed. 1074, and error dismissed 43 S.Ct. 433, 261 U.S. 609, 67 L.Ed. 825—Kyser v. McGlinn, 92 So. 13, 207 Ala. 82.
Ark.—Hamilton v. Farmer, 292 S.W. 683, 173 Ark. 341—Jones v. Fowler, 285 S.W. 363, 171 Ark. 594—McGraw v. Berry, 238 S.W. 618, 152 Ark. 452.
Cal.—Thompson v. Pacific Electric Ry. Co., 265 P. 220, 203 Cal. 578—Newport v. Hatton, 231 P. 987, 195 Cal. 132—Akley v. Bassett, 209 P. 576, 189 Cal. 625—Holman v. Holman, 77 P.2d 515, 25 Cal.App. 2d 445.
Fla.—Mullan v. Bank of Pasco County, 133 So. 323, 101 Fla. 1097—Commercial Bldg. Co. v. Parslow, 112 So. 378, 93 Fla. 143—Fairlie v. Scott, 102 So. 247, 88 Fla. 229—Scott v. Fairlie, 89 So. 128, 81 Fla. 438, 446.
Ill.—Dunlavy v. Lowrie, 25 N.E.2d 67, 372 Ill. 622—Clark v. Leavitt, 166 N.E. 538, 335 Ill. 184—Farmer v. Reed, 166 N.E. 498, 335 Ill. 156—Cross v. Janes, 158 N.E. 694, 327 Ill. 538—Leininger v. Reichle, 148 N.E. 384, 317 Ill. 625—Brown v. Ray, 145 N.E. 676, 314 Ill. 570—Gibbs v. Gerdes, 126 N.E. 155, 291 Ill. 490.
Kan.—Selzer v. Selzer, 69 P.2d 708, 711, 146 Kan. 273, 116 A.L.R. 1, citing **Corpus Juris.**
Ky.—Lane v. Taylor, 152 S.W.2d 271, 287 Ky. 116—Adkins v. Hackworth, 130 S.W.2d 774, 279 Ky. 352—Murphy v. Boling, 117 S.W.2d 962, 273 Ky. 827, 117 A.L.R. 1373—Superior Oil Corporation v. Alcorn, 47 S.W. 2d 973, 983, 242 Ky. 814, citing **Corpus Juris**—Hargis v. Flesher Petroleum Co., 21 S.W.2d 818, 231 Ky. 442—Burns v. Dillon, 9 S.W.2d 1095, 226 Ky. 82—Chenoweth v. Bullitt, 6 S.W.2d 1061, 224 Ky. 698—Boggess v. Crail, 5 S.W.2d 906, 224 Ky. 97—Fox v. Faulkner, 1 S.W.2d 1079, 222 Ky. 584—Bidwell v. Bishop, 255 S.W. 828, 200 Ky. 817—Baker v. Campbell, 248 S.W. 1028, 198 Ky. 424—Russell v. Tipton, 235 S.W. 763, 193 Ky. 305—Shutt's Adm'r v. Shutt's Adm'r, 232 S.W. 405, 192 Ky. 98.
Minn.—Ashbaugh v. Wright, 188 N.W. 157, 152 Minn. 57.
Miss.—Belt v. Adams, 86 So. 584, 124 Miss. 194, suggestion of error dismissed 87 So. 666, 125 Miss. 387.
Mo.—Souders v. Kitchens, 124 S.W. 2d 1137, 344 Mo. 18—Williams v. Reid, 37 S.W.2d 537—Rayl v. Golfinopulos, 264 S.W. 911—Wells v. Egger, 259 S.W. 437, 303 Mo. 26—Owen v. Trail, 258 S.W. 699, 302 Mo. 292—Wicoff v. Moore, 257 S.W. 474—Carr v. Barr, 243 S.W. 98, 294 Mo. 673—Hunicke v. Flynn, 242 S.W. 941—Mathis v. Melton, 238 S.W. 806, 293 Mo. 134—Willis v. Robinson, 237 S.W. 1030, 291 Mo. 650—Mathews v. O'Donnell, 233 S.W. 451, 289 Mo. 235—Welch v. Wagner, 232 S.W. 146—Callison v. Wabash Ry. Co., 275 S.W. 965, 219 Mo.App. 271—Eighme v. Indiana, B. & W. R. Co., 249 S.W. 717, 213 Mo.App. 342.
N.J.—Content v. Dalton, 190 A. 328, 121 N.J.Eq. 391, affirmed 194 A. 286, 122 N.J.Eq. 425, 112 A.L.R. 1031.
N.Y.—Squier v. Houghton, 226 N.Y.S. 162, 131 Misc. 129.
Ohio.—Stein v. White, 143 N.E. 124, 109 Ohio St. 578—Lanham v. Bowman, 26 Ohio Cir.Ct., N.S., 22—McNeely v. City of Cincinnati, 7 Ohio N.P., N.S., 441.
Okl.—Patterson v. Joines, 244 P. 585, 114 Okl. 9, certiorari granted Joines v. Patterson, 46 S.Ct. 353, 270 U.S. 639, 70 L.Ed. 774, and reversed on other grounds 47 S.Ct. 706, 274 U.S. 544, 71 L.Ed. 1194.
Pa.—Ontelaunee Orchards v. Rothermel, 11 A.2d 543, 139 Pa.Super. 44.
S.C.—Bolt v. Sullivan, 174 S.E. 491, 173 S.C. 24—Floyd v. Page, 124 S.E. 1, 129 S.C. 301—Youmans v. Youmans, 105 S.E. 31, 115 S.C. 186—Jeffcoat v. Wingard, 96 S.E. 908, 110 S.C. 482.
Tenn.—Guy v. Culberson, 51 S.W.2d 500, 164 Tenn. 509—Johnson v. Covington, 251 S.W. 893, 148 Tenn. 47—Hall v. Gossum, 228 S.W. 1039, 144 Tenn. 1—Templeton v. Twitty, 14 S.W. 435, 88 Tenn. 595—Delk v. Williams, 10 Tenn.App. 246—Miller v. Gratz, 3 Tenn.App. 498.
Tex.—Gibbs v. Barkley, Com.App., 242 S.W. 462, reversing Barkley v. Gibbs, Civ.App., 233 S.W. 134—Olsen v. Grelle, Com.App., 228 S.W. 927, reversing Olsen v. Greele, Civ. App., 190 S.W. 240—Cleaver v. Knighton, Civ.App., 127 S.W.2d 958—Griffin v. Reynolds, Civ.App., 107 S.W.2d 634, error dismissed—Rae v. Baker, Civ.App., 38 S.W.2d 366, error refused—Hensley v. Conway, Civ.App., 29 S.W.2d 416—Willis v. Fiveash, Civ.App., 297 S.W. 509, reversed on other grounds Fiveash v. Willis, Com.App., 1 S.W.2d 585.
W.Va.—Koen v. Koen, 105 S.E. 322, 86 W.Va. 503.
21 C.J. p 975 note 50, p 1013 note 59, p 1014 note 60.

"Such conclusion rests on the theory that, until a cause of action

sion does not ordinarily become adverse as against the remainderman until such termination. It has been held that limitation will not run against a remainderman in favor of the life tenant.[52]

The general rule above stated does not apply where some special equity intervenes to put the onus of action on the remainderman.[53] Actions which are available to a remainderman during the continuance of the precedent estate, whether by statute or otherwise, are not within the general rule above stated, and the statute begins to run in such cases immediately on the accrual of the cause of action, even though the preceding particular estate has not terminated;[54] and the same exception applies where the life tenant has abandoned the claim of life tenancy and is claiming under a different title, with the remainderman's knowledge,[55] and where the claim could have been asserted by another in the remainderman's behalf,[56] and it applies to remaindermen who are entitled to possession before dower is assigned,[57] to actions which do not affect the remainderman's possession, but affect his title,[58] and to possessory actions

accrues which is capable of legal assertion, . . . [the remainderman's] rights are unaffected."—In re Shelley's Estate, 134 A. 468, 471, 287 Pa. 105, modification refused 135 A. 740, 288 Pa. 11.

Basis and limitation of rule

"The general rule is that laches, estoppel, nor the statute of limitations will run against a remainderman prior to the termination of the life tenancy. This rule is, however, predicated on an uninterrupted continuation of the conduct of the life tenant consistent with his duty as such to the remaindermen. The rule may not apply where it is shown that the remainderman had actual knowledge of the repudiation or abandonment by the life tenant of his status as such, and of the holding by him of the property under a different and adverse right, or where the life tenant, in good faith and to the knowledge of the remainderman, claims title, not as a life tenant, but through some other source, or where there has been ouster and disseisin of the life tenant or by one claiming by, through or under him, and this under claim of right or color of title followed by adverse possession for the statutory period, or when there is some special independent equity in favor of the purchaser who claims under a conveyance from the life tenant."—Mullan v. Bank of Pasco County, 133 So. 823, 829, 101 Fla. 1097—Commercial Bldg. Co. v. Parslow, 112 So. 378, 381, 93 Fla. 143.

Right of action in life tenant or tenant in common does not set limitation in motion against a remainderman during the term of the life estate.—Hensley v. Conway, Tex.Civ. App., 29 S.W.2d 416.

Effect of conveyance by life tenant

"A remainderman [will not] be relieved of his disability because the life tenant has attempted to convey and his grantee claims the fee under this transfer."—Willis v. Robinson, 237 S.W. 1030, 1034, 1035, 291 Mo. 650.

Death of second life tenant

"The interest of the life tenants being undivided and severable only by judicial action, which did not occur, the statute did not begin to run against the remaindermen until the death of [the second life tenant]."—Willis v. Robinson, supra.

Tax deed

(1) Recording of a tax deed does not start the statute of limitations against the remainderman while the life tenant is in possession.—Wicoff v. Moore, Mo., 257 S.W. 474.

(2) One entering under a void tax sale is a mere trespasser, so that the statute of limitations cannot be put in operation against remaindermen before the expiration of the life estate merely because of entry under the tax deed; and no forfeiture of a life estate results from a void sale for taxes so as to set the statute in motion against remaindermen before such expiration.—Champion v. Williams, 264 S.W. 972, 165 Ark. 328.

Action for appropriation of proceeds of sale

Since remaindermen had no interest in proceeds of sale of property except its preservation until death of one entitled to income for life, they were not obliged to take any action, where trustee appropriated funds, until within period of limitations reckoning from such death, and nothing could be presumed against them because they did not take any action against such trustee before such death.—Fidelity & Deposit Co. of Maryland v. State, to use of Grah, 165 A. 176, 164 Md. 304.

52. U.S.—Fisher v. Jordan, D.C.Tex., 32 F.Supp. 608, reversed on other grounds, C.C.A., 116 F.2d 183.

53. Ala.—St. Clair Springs Hotel Co. v. Balcomb, 108 So. 858, 215 Ala. 12—Kyser v. McGlinn, 92 So. 13, 207 Ala. 82.

54. U.S.—Howth v. Farrar, C.C.A. Tex., 94 F.2d 654, rehearing denied 95 F.2d 1005, certiorari denied 59 S.Ct. 75, 305 U.S. 599, 83 L.Ed. 380—Stubbs v. U. S., D.C.N.C., 21 F. Supp. 1007.
Iowa.—Skelton v. Cross, 268 N.W. 499, 222 Iowa 262, 109 A.L.R. 129.
Ky.—Hargis v. Flesher Petroleum Co., 21 S.W.2d 818, 231 Ky. 442.
Tex.—Williams v. Pure Oil Co., Civ. App., 49 S.W.2d 846, affirmed 78 S.W.2d 929, 124 Tex. 341.
21 C.J. p 1014 note 64.
Right of action during pendency of precedent estate see supra § 98.
Action against life tenant's grantee for waste
Ky.—Adams v. Bates, 231 S.W. 238, 191 Ky. 710.

55. Fla.—Fairlie v. Scott, 102 So. 247, 88 Fla. 229.
Ky.—Superior Oil Corporation v. Alcorn, 47 S.W.2d 973, 981, 242 Ky. 814—Webb v. Webb, 255 S.W. 137, 200 Ky. 488.
"If . . . the apparent life tenant acquires some color of title incompatible with the existence of a life estate and a remainder estate, even though by a void act or instrument, and takes and holds possession thereunder and not as life tenant, and the remainderman knows of such entry holding and possession and of the nature thereof, a cause of action then accrues to the remainderman, and if he takes no steps then, or within the statutory period, he must suffer the consequences. The reason underlying this is the apparent life tenant has relinquished and repudiated that claim, the remainderman then has a cause of action to obtain possession, the life estate is no more, and if the remainderman does not act he may lose his estate by an adverse possession."—Superior Oil Corporation v. Alcorn, supra.
Life tenant claiming entire estate
"The statute of limitations does not begin to run in favor of a life tenant who claims the entire estate in his own right as against the remaindermen until such claim of the life tenant is clearly brought home to the remainderman."—Anderson v. Miller, 172 N.W. 688, 103 Neb. 549.

56. Pa.—In re Shelley's Estate, 134 A. 468, 287 Pa. 105, modification refused 135 A. 740, 288 Pa. 11.

57. Ark.—Hayden v. Hill, 194 S.W. 19, 128 Ark. 342.

58. U.S.—Howth v. Farrar, C.C.A.

where the entire estate is granted to a trustee who holds the legal title in fee for the benefit of both the particular estate and the estate in remainder, where if the trustee's right of action is barred the cestuis qui trust in remainder are barred also.[59] To prevent the running of the statute until the life tenant's death, the remainderman has been required to establish that he owned the remainder in fee.[60] The failure of a remainderman to enter or otherwise enforce a forfeiture incurred by a preceding life tenant until the right to do so is barred merely confirms the existing life estate and does not affect his subsequently accruing right on the death of the life tenant;[61] and the same rule applies in cases where the life tenant refuses to accept his devise.[62]

Some courts have not applied the general rule where the possessor is a stranger to the title of both the life tenant and the remainderman;[63] but the correctness of this view has been questioned.[64]

Where there is a merger of the particular estate and the remainder, as discussed in § 93 supra, the right of action of the remainderman accrues at once and the statute of limitations begins to run against the one in possession,[65] even though the deed from the life tenant to the remainderman is fraudulent as to a creditor of the life tenant.[66] A conveyance by the life tenant to one remainderman who conveys to a third person does not extinguish the life estate so as to start the running of limitations against the other remainderman.[67] Where land is partitioned among several life tenants who thereafter occupy the different parts in severalty, the statute of limitations as to each tract begins to run from the death of the life tenant to whom the particular tract was allotted, and is not postponed until the death of the last surviving life tenant.[68] A remainderman who was not a party to an action of ejectment brought by a landlord against the life tenant to recover possession of property for the nonpayment of rent is not within the provision of the statute limiting the tenant's right to redeem by paying the rent in arrears to six months after the landlord has been placed in possession.[69] Where a person acquires possession under contracts with the remaindermen and claims adversely to all the world, the statute begins to run against the right of the remaindermen to recover the land from the date of their respective contracts.[70]

When the remainder estate is conveyed, even by a void instrument, the statute of limitation based on the grantee's adverse possession is immediately put in operation.[71]

When the remainderman's interest is adversely held, he must sue within the time allowed by the statute of limitations to vindicate his right and establish the character of his interest;[72] and the statute does not begin to run against him until knowledge is clearly brought home to him that another is claiming his title adversely.[73]

Tex., 94 F.2d 654, rehearing denied 95 F.2d 1005, certiorari denied 59 S.Ct. 75, 305 U.S. 599, 83 L.Ed. 380.

Ala.—Herren v. Beck, 164 So. 904, 231 Ala. 328.

Ky.—Hargis v. Flesher Petroleum Co., 21 S.W.2d 818, 231 Ky. 442.

Action by remaindermen to vacate deed made by them held barred by the running of the prescriptive period, unaffected by the period of the life estate.—Herren v. Beck, 164 So. 904, 231 Ala. 328.

59. Ala.—Cruse v. Kidd, 70 So. 166, 195 Ala. 22, 2 A.L.R. 36.
21 C.J. p 1014 note 66.

60. Mo.—Waddell v. Chapman, 238 S.W. 481, 292 Mo. 666.

61. Mass.—Stevens v. Winship, 1 Pick. 318, 11 Am.D. 178.
21 C.J. p 1014 note 67.

62. Mass.—Wells v. Prince, 9 Mass. 508.

63. U.S.—Howth v. Farrar, C.C.A. Tex., 94 F.2d 654, rehearing denied 95 F.2d 1005, certiorari denied 59 S.Ct. 75, 305 U.S. 599, 83 L.Ed. 380.
Tex.—Olsen v. Grelle, Com.App., 228 S.W. 927, reversing Olsen v. Greele, Civ.App., 190 S.W. 240.
21 C.J. p 1014 note 69.

Possessors held not strangers
Tex.—Cleaver v. Knighton, Civ.App., 127 S.W.2d 958—Hensley v. Conway, Civ.App., 29 S.W.2d 416.
In Illinois, under a statute providing that "every person in the actual possession of lands or tenements under claim and color of title made in good faith, and who shall for seven successive years continue in such possession, and shall also, during said time pay, all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner," a title can be acquired as against a remainderman by such possession and payment of taxes during the lifetime of the life tenant.—Dunlavy v. Lowrie, 25 N.E. 2d 67, 372 Ill. 622—21 C.J. p 1014 note 69 [b] (1).

64. Tex.—Hensley v. Conway, Civ. App., 29 S.W.2d 416.

65. Pa.—Moore v. Luce, 29 Pa. 260, 72 Am.D. 620.
S.C.—Mangum v. Piester, 16 S.C. 316.

66. Mo.—Whitaker v. Whitaker, 74 S.W. 1029, 175 Mo. 1.

67. Ark.—Rogers v. Ogburn, 172 S. W. 867, 116 Ark. 233.

68. Ill.—Peterson v. Jackson, 63 N. E. 643, 196 Ill. 40.

69. N.Y.—Sand v. Church, 46 N.E. 609, 152 N.Y. 174.

70. Ky.—Tucker v. Price, 29 S.W. 857, 17 Ky.L. 11.

71. Ky.—Hargis v. Flesher Petroleum Co., 21 S.W.2d 818, 231 Ky. 442.

72. U.S.—Howth v. Farrar, C.C.A. Tex., 94 F.2d 654, rehearing denied 95 F.2d 1005, certiorari denied 59 S.Ct. 75, 305 U.S. 599, 83 L.Ed. 380.
Ky.—Hargis v. Flesher Petroleum Co., 21 S.W.2d 818, 231 Ky. 442.
Fifteen-year limitation statute held applicable to adverse holding by grantee of life tenant and his assignees.—Lincoln v. Herndon, 285 P. 120, 141 Okl. 212.

73. U.S.—Howth v. Farrar, C.C.A. Tex., 94 F.2d 654, rehearing denied 95 F.2d 1005, certiorari denied 59 S.Ct. 75, 305 U.S. 599, 83 L.Ed. 380.
Ky.—Hargis v. Flesher Petroleum Co., 21 S.W.2d 818, 231 Ky. 442.
21 C.J. p 1013 note 57 [a].

In an action against a remainderman based on a cause arising on the termination of the preceding estate, the statute of limitations does not begin to run until such termination.[74]

Accounting. In an action by a remainderman against a life tenant for a general accounting, it was held that there was no applicable statute of limitations.[75]

b. Laches

While there are circumstances in which a remainderman may be guilty of laches, he is not guilty thereof in failing to assert his claim before his right to the possession accrues by the termination of the preceding estate, except as to actions available to him before such termination.

While it has been broadly stated that there are circumstances requiring a remainderman to act pending the particular estate in order to escape the charge of laches,[76] the general rule is that, except as to actions available to him before the termination of the preceding estate,[77] a remainderman is not guilty of laches in failing to assert his claim before his right to the possession of the property accrues by the termination of the preceding estate;[78] nor is there laches in his failure to assert it until any disability from which he may be suffering is removed.[79] A remainderman who commences suit within the period allowed by law is not guilty of laches even though he might have commenced it at once on the termination of the preceding estate.[80]

Where the remainderman has a present beneficial interest in addition to his interest in remainder, a bill to set aside a deed executed by a trustee of the estate will be barred where there has been an unreasonable delay on the part of the remainderman in asserting his claim to the property.[81] Where a life tenant wrongfully conveys land in fee, the remainderman's rights are not barred by failure to bring action to quiet title within the statutory time;[82] but a remainderman may be estopped by long delay to repudiate a sale by the life tenant,[83] or to set aside a conveyance divesting his interest,[84] or to repudiate a transaction whereby, through

74. Mo.—Powers v. Grand Lodge of Ancient Free and Accepted Masons of State of Missouri, App., 146 S.W.2d 895.

Remainder subject to charges

Where a will devised land in trust for the testator's son for life and thereafter to certain defendants, subject to charges for the benefit of plaintiffs, in a suit to recover a judgment therefor and to establish a trust in the land until payment thereof, limitation statutes did not begin to run prior to the life tenant's death.—Powers v. Grand Lodge of Ancient, Free and Accepted Masons of State of Missouri, supra.

75. N.Y.—Young v. Young, 21 N.Y.S. 1008, 2 Misc. 381.
21 C.J. p 968 note 15.

76. Ala.—Ward v. Chambless, 189 So. 890, 238 Ala. 165.

Collateral matter showing fee not passed

Where records and chain of title when taken alone, in fact pass entire fee and the only matter which will create a different result is collateral, as distinguished from situation where chain of title shows that life tenant undertaking to convey the remainder has only a life estate, persons claiming remainder must immediately assert their rights or they will be guilty of laches.—Ussery v. Darrow, 188 So. 885, 238 Ala. 67.

Forty-two years delay, during which the property was improved and enhanced in value, held to preclude remaindermen from asserting any claim thereto.—Souders v. Kitchens, 137 S.W.2d 501, 345 Mo. 977.

Suit to set aside deed

Remainderman, waiting until life tenant's death, over three years after remainderman gained full knowledge of the life tenant's sale of property for alleged inadequate price, before filing bill to set aside deed or compel reconveyance, was guilty of laches.—Ballinger v. Bartolett, 127 A. 671, 3 N.J.Misc. 80.

77. Ala.—Washington v. Young, 139 So. 92, 224 Ala. 232—Lewis v. Belk, 122 So. 413, 219 Ala. 343—Robinson v. Pierce, 24 So. 984, 118 Ala. 273, 72 Am.S.R. 160, 45 L.R.A. 66.
Fla.—Commercial Bldg. Co. v. Parslow, 112 So. 378, 93 Fla. 143—Fairlie v. Scott, 102 So. 247, 88 Fla. 229.

78. U.S.—Grodsky v. Sipe, D.C.Ill., 30 F.Supp. 656, 662, citing Corpus Juris.
Ark.—McGraw v. Berry, 238 S.W. 618, 152 Ark. 452.
Fla.—Mullan v. Bank of Pasco County, 133 So. 323, 101 Fla. 1097—Commercial Bldg. Co. v. Parslow, 112 So. 378, 93 Fla. 143.
Ill.—Cross v. Janes, 158 N.E. 694, 327 Ill. 538.
Ky.—Lane v. Taylor, 152 S.W.2d 271, 287 Ky. 116—Russell v. Tipton, 235 S.W. 763, 193 Ky. 305.
Mo.—Rhodus v. Geatley, 147 S.W.2d 631—Jones v. Himmelberger-Harrison Lumber Co., 223 S.W. 63.
Va.—Ivey v. Lewis, 112 S.E. 712, 133 Va. 122.
W.Va.—Koen v. Koen, 103 S.E. 322, 86 W.Va. 503.
21 C.J. p 238 note 17 [d], p 1015 note 78.

Basis and limitation of rule see supra § 99 a.

Thirteen months after life tenant's death held seasonable for action.—Williams v. Reid, Mo., 37 S.W.2d 537.

Laches held not applicable to vested remaindermen as regards right to bring action for recovery of realty.—Superior Oil Corporation v. Alcorn, 47 S.W.2d 973, 242 Ky. 814.

79. Ky.—Adkins v. Hackworth, 130 S.W.2d 774, 279 Ky. 352.
Neb.—Hobson v. Huxtable, 116 N.W. 278, 79 Neb. 340, 112 N.W. 658, 79 Neb. 334.

80. Mich.—Lowry v. Lyle, 198 N.W. 245, 226 Mich. 676.

Action by trustee suing for benefit of remaindermen on bond of former surety misappropriating proceeds of sale of property, brought four years after death of the person entitled to income for life, was not barred by laches where statute of limitations was twelve years.—Fidelity & Deposit Co. of Maryland v. State, to use of Grah, 165 A. 176, 164 Md. 304.

81. Md.—McCoy v. Poor, 56 Md. 197.

82. Mo.—Armor v. Frey, 161 S.W. 829, 253 Mo. 447.

83. Neb.—Bohrer v. Davis, 143 N.W. 209, 94 Neb. 367, L.R.A.1918D 430, Ann.Cas.1915A 992.
21 C.J. p 1015 note 82.

84. Ala.—Washington v. Young, 139 So. 92, 224 Ala. 232—Robinson v. Pierce, 24 So. 984, 118 Ala. 273, 72 Am.S.R. 160, 45 L.R.A. 66.
Fla.—Commercial Bldg. Co. v. Parslow, 112 So. 378, 93 Fla. 143.

fraud or deceit, he is induced to part with his remainder pending the life estate.[85]

§ 100. Parties

The propriety and necessity of joining particular persons, such as remaindermen and life tenants, as parties in actions involving remainder interests have been variously determined.

The life tenant is a necessary party to a suit by remaindermen to forfeit the life estate for waste,[86] and to a contingent remainderman's action to recover the value of timber removed from the land;[87] but he need not be made a party to an action by remaindermen for permanent damage to the inheritance,[88] and life tenants who convey their estates back to a decedent before his death are not necessary parties to an action to divest the title of infant heirs, since they have no interest in the land.[89] In an action by a remainderman, after the termination of the preceding estate, to recover his remainder interest in the hands of an adverse claimant, neither the personal representative of the testator or grantor of the remainder,[90] nor the personal representative of the tenant of the particular estate,[91] nor an attorney to whom a remainderman has quitclaimed a half interest in the land to secure fees in prosecuting an ejectment suit,[92] is a necessary party. To a remainderman's bill to avoid the sale of lands, and reclaim them, the original and intermediate grantees in warranty deeds are proper, but not necessary, parties.[93]

Although it has been held that the holder of a particular estate is to be treated as the representative of the contingent remaindermen in a proceeding to charge an expense on the corpus of an estate,[94] it is the general rule that the right of contingent remaindermen constitutes an estate in land of which they cannot be divested during the existence of the life estate except by appropriate legal proceedings to which they are made parties;[95] and in particular circumstances it has been held that contingent remaindermen should be made parties to an action for permanent injuries to the land,[96] or to recover the value of timber removed therefrom.[97] Where contingent remaindermen are necessary parties to a proceeding to sell land for reinvestment, they may join as plaintiffs,[98] and when they do so it is not necessary to make them defendants.[99] Contingent remaindermen suing for permanent injury to the property represent, under the doctrine of virtual representation, those who will ultimately come into the entire estate, such undetermined parties being in privity with them;[1] and children of vested remaindermen who died during the life estate cannot attack a sale of property for purpose of reinvestment, although they were not made parties.[2]

A life tenant not in possession of property covered by a void deed cannot be joined as a coplaintiff with the remaindermen in a bill against the grantee in possession to declare the deed void;[3] and it has been held that where a tort on realty affects both the life tenant's and the remainderman's estates, each may sue separately, but they cannot unite in an action to recover damages for the injury,[4] although other authority is to the contrary.[5] Several remaindermen may maintain a joint action against a personal representative of a preceding life tenant to recover rents collected by him which accrued after the termination of the life estate.[6]

§ 101. Pleadings

Requirements for pleadings in several types of action involving remainder interests have been stated, and the sufficiency of particular pleadings determined.

In an action to recover a remainder interest although it may be necessary to show the death of the precedent life tenant,[7] it is not necessary to aver a grant of administration on the estate of the testa-

85. Fla.—Commercial Bldg. Co. v. Parslow, supra.

86. Ga.—Kehr v. Floyd, 64 S.E. 673, 132 Ga. 626.

87. Ky.—Louisville Cooperage Co. v. Rudd, 124 S.W.2d 1063, 276 Ky. 721.

88. N.C.—Loven v. Roper, 101 S.E. 263, 178 N.C. 581—Balcum v. Johnson, 98 S.E. 532, 177 N.C. 213.

89. Ky.—Clore v. Nichols, 251 S.W. 846, 199 Ky. 581.

90. Wash.—Hayes v. Gaston, 119 P. 818, 66 Wash. 300.
21 C.J. p 1015 note 88.

91. Cal.—Hardy v. Mayhew, 110 P. 113, 158 Cal. 95, 139 Am.S.R. 73.
N.C.—Sanderford v. Moore, 54 N.C. 206.

92. Neb.—Currier v. Teske, 139 N.W. 622, 93 Neb. 7.

93. Tenn.—Aiken v. Suttle, 4 Lea 103.

94. Tenn.—Vaughn v. Tealey, Ch., 58 S.W. 487.

95. N.Y.—Wilson v. White, 15 N.E. 744, 109 N.Y. 59, 4 Am.S.R. 420, 28 Wkly.Dig. 333.

96. S.C.—Sparks v. Union Mfg. & Power Co., 114 S.E. 322, 121 S.C. 220.

97. Ky.—Louisville Cooperage Co. v. Rudd, 124 S.W.2d 1063, 276 Ky. 721.

98. Ky.—Cox v. Corrigan-McKinney Steel Co., 58 S.W.2d 625, 248 Ky. 426.

99. Ky.—Wittaker v. Chenault, 232 S.W. 391, 192 Ky. 81—Goff v. Renick, 161 S.W. 983, 156 Ky. 588.

1. Ky.—Cox v. Corrigan-McKinney Steel Co., 58 S.W.2d 625, 248 Ky. 426.

2. Ky.—Johnson v. Whitcomb, 179 S.W. 821, 166 Ky. 673.

3. Ala.—Lewis v. Alston, 58 So. 278, 176 Ala. 271.

4. W.Va.—Shaw v. Monongahela Ry. Co., 130 S.E. 461, 100 W.Va. 368.

5. Ky.—Cox v. Corrigan-McKinney Steel Co., 58 S.W.2d 625, 248 Ky. 426.

6. N.Y.—Marshall v. Moseley, 21 N. Y. 280.

7. Ind.—Owen v. Cooper, 46 Ind. 524.

tor.[8] In a suit in equity to protect the remainder from loss or injury, every fact essential to the relief which plaintiff seeks must be averred in the bill, and no relief can be granted for matters not alleged, although they may appear from other parts of the pleadings and evidence.[9] In an action to sell land for the purpose of defeating contingent remainders, the petition must show an explanation of the title and the intent to defeat such remainders.[10] A complaint alleging wrongful entry and the removal of trees sufficiently charges defendants with conversion as trespassers, excluding any inference that defendants with consent of life tenant cut only so much timber as he was entitled to use for fuel and repairs to fences and buildings.[11] In particular cases, a petition by a remainderman to recover land and compel the purchasers at a foreclosure sale against the life tenant to account for rents was held to set out a cause of action,[12] as were a petition in an action to recover damages for voluntary waste[13] and a petition by remaindermen to enjoin the taking of coal for commercial purposes by life tenants and their grantees;[14] a bill by coremaindermen for partition and to cancel clouds on title was held not demurrable as showing affirmatively that adverse possession began within a few days after the life tenant's death;[15] a petition by one who had a contingent remainder or no interest was held not to allege such title as would authorize an action to forfeit the property on the ground of waste;[16] and the object of a bill by contingent remaindermen was held to be the preservation of the principal of the estate.[17]

Misnomer. In an action by a remainderman for an injury to his estate, the fact that it is misnamed as a reversion instead of a remainder is immaterial.[18]

§ 102. Evidence

A remainderman, in an action to protect his interests or enforce his rights, has the burden of proving the essential elements of his cause of action. The admissibility and sufficiency of evidence has been adjudged in several cases involving remaindermen.

A remainderman seeking to set aside a deed by the life tenant, or to compel a reconveyance, has the burden of proving the fraud alleged,[19] as he has where he alleges fraud and conspiracy between the life tenant and one purchasing the tax title to have the property sold for taxes.[20]

On a writ of entry by a remainderman, the entry of the remainderman or some person for him or holding under him must be proved;[21] and in an action of ejectment the burden of proof rests on plaintiffs to show that the preceding life tenant was dead at the time the action was commenced.[22] Where the wife of a life tenant secured a tax deed to the premises on the life tenant's failure to pay the taxes, the burden, in an action by the remaindermen to set aside the tax proceeding, is on those claiming through the tax title to establish that it was acquired by the wife in good faith.[23] In an action to charge land purchased by a life tenant in favor of the remaindermen, the evidence must show that funds of the estate were used in the purchase.[24] A grantee, suing as remainderman to declare and foreclose a lien, for taxes paid by him, on the alleged life tenant's interest must prove that defendant is a life tenant.[25]

On the other hand, on an accounting between remaindermen, no burden rests on one claiming for taxes paid by him to show that payments were not made out of a common family purse.[26]

In an action of trover against a purchaser from the life tenant, proof of a demand and refusal is not only evidence of a conversion at the time of the demand, but it authorizes a jury to presume a conversion from the time the remainderman's right to possession accrued.[27] Since an action by a remainderman to redeem his interest after a life tenant has by default in a suit for nonpayment of rent for-

8. Tex.—Bufford v. Holliman, 10 Tex. 560, 60 Am.D. 223.
9. Ala.—Land v. Cowan, 19 Ala. 297. Ga.—Kehr v. Floyd, 64 S.E. 673, 132 Ga. 626.
10. Pa.—Swift v. Harbison-Walker Refractories Co., 77 A. 916, 228 Pa. 584.
11. Ind.—Stevens v. Howerton, 96 N.E. 968, 49 Ind.App. 151.
12. Ga.—Bristol Sav. Bank v. Nixon, 150 S.E. 148, 169 Ga. 282.
13. Ky.—Adams v. Bates, 231 S.W. 238, 191 Ky. 710.
14. Ky.—Smith v. Harris, 124 S.W. 2d 786, 276 Ky. 529.
15. Ala.—Sandlin v. Anders, 98 So. 299, 210 Ala. 396.
16. Ga.—Mathews v. Goddick, 123 S.E. 299, 158 Ga. 264.
17. Va.—Ivey v. Lewis, 112 S.E. 712, 133 Va. 122.
18. W.Va.—Jordan v. Benwood, 26 S.E. 266, 42 W.Va. 312, 57 Am.S.R. 859, 36 L.R.A. 519. 21 C.J. p 1016 note 5–6.
19. N.J.—Ballinger v. Bartolett, 127 A. 671, 3 N.J.Misc. 80.
20. Iowa.—Harris v. Evans, 195 N.W. 178, 196 Iowa 799.
21. Mass.—Wells v. Prince, 4 Mass. 64.
22. Ala.—Laster v. Blackwell, 32 So. 166, 133 Ala. 337. 21 C.J. p 1016 note 10.
23. Wis.—Boon v. Root, 119 N.W. 121, 137 Wis. 451.
24. N.J.—Bohle v. Hengelbrock, 48 A. 916, 61 N.J.Eq. 470, reversed on other grounds 51 A. 508, 64 N.J. Eq. 334, 61 L.R.A. 323.
25. Mich.—Pike v. Gilbert, 198 N.W. 923, 227 Mich. 515.
26. Iowa.—Reddish v. John, 179 N.W. 951, 190 Iowa 49.
27. S.C.—Talbird v. Baynard, 20 S.C.L. 597.

feited it to the landlord is one for equitable relief and does not sound in tort, recovery can be sustained therein without any proof of fraud.[28]

The admissibility[29] and sufficiency[30] of evidence has been adjudged in several cases involving remaindermen.

§ 103. Damages

Damage to a remainder is ascertained by apportioning the damage to the fee between the life tenant and the remainderman, according to the annuity tables.

The remainderman can recover only for the injury done to the estate in remainder and not for any injury to the preceding estate;[31] and the damage to the remainder is ascertained by taking the damage to the fee and apportioning it between the life tenant and the remainderman, according to the annuity tables.[32] In ejectment by remaindermen against one claiming under the life tenant, the jury cannot assess damages beyond the date of the death of the life tenant.[33]

§ 104. Trial and Judgment

In a remainderman's action, no relief will be granted on an allegation to support which no evidence was offered; and a decree of sale of a remainder is beyond the court's jurisdiction in an action where the pleadings do not involve the remaindermen's interest. The propriety of particular instructions, and of costs, has been adjudicated in actions involving remainder interests.

Instruction. In an action by remaindermen to declare a trust in land acquired by the life tenant from the purchaser at a sale under a mortgage given by the life tenant, a particular instruction given as to the purchaser's bidding in the property in behalf of the life tenant, and the refusal of a requested instruction, were held proper.[34]

Relief. In a remainderman's action against a life tenant, no relief will be granted on an allegation in support of which no evidence was offered.[35]

Decree. Where the scope of the pleadings in an action does not involve the interest of remaindermen, a decree of sale of the remainder is beyond the jurisdiction of the court, and a nullity.[36] A contingent remainderman who, while not obligated to do so, brings suit, before his estate vests, for the protection of the principal of the estate is bound, after his estate becomes vested, by the decree therein rendered.[37]

28. N.Y.—Sand v. Church, 46 N.E 609, 152 N.Y. 174.

29. **Evidence held erroneously excluded**

In suit to establish grandchildren's interests under deed granting deceased grandmother life estate, with remainder over to her children, ruling out as a whole evidence that plaintiffs were only lineal heirs of their father, grandmother's son, and as to date of father's death, and that plaintiffs never received any part of grandmother's estate, was error.—Ward v. Ward, 169 S.E. 120, 176 Ga. 849.

Evidence held inadmissible

In remaindermen's action for damages to land caused by construction of gas pipe line, defendant's agent was properly not allowed to testify that life tenant authorizing construction advised agent that life tenant was owner, since one cannot acquire interest in land of another by contract with one who represents himself to be true owner but who in fact is not owner.—Warfield Natural Gas Co. v. Ward, 72 S.W.2d 464, 254 Ky. 754.

30. **Evidence held sufficient**

(1) In suit by a remainderman to set aside a deed by the life tenant, or to compel a reconveyance, evidence showed that the dwelling conveyed was sold for about as much as it was possible to get for it at the time.—Ballinger v. Bartolett, 127 A. 671, 3 N.J.Misc. 80.

(2) In action to recover minor remaindermen's portion of land from life tenant's grantees, evidence was sufficient to sustain a finding for plaintiffs.—Abernathy v. McCoy, 154 N.E. 682, 91 Ind.App. 574.

(3) In an action in ejectment by the husband of a deceased remainderman, a finding that the life tenant did not intend to give up permanently possession to the remainderman, so as to merge the life estate in the remainder, was warranted under the evidence.—McCullough v. Carpenter, Mo., 225 S.W. 674.

(4) Evidence in quiet title action sustained finding that conditions imposed on grantee by her mother's will were fulfilled with money borrowed on deed of trust, which debt was a primary obligation on the land and not in effect a personal debt of grantee's husband who purchased property on foreclosure, and deed of trust became outstanding encumbrance for which grantee's children as remaindermen were proportionately liable.—Souders v. Kitchens, 137 S.W.2d 501, 345 Mo. 977.

(5) In action of ejectment by purchaser of remainder, evidence that school district built thereon a building which, with surrounding ground, was used only as public school until district sold lot to defendants, was sufficient to support jury's finding that district's possession of lot was adverse and its claim of ownership thereof, supported by face of its record title and character of its occupancy for statutory period, warranted verdict for defendants.—Ontelaunee Orchards v. Rothermel, 11 A. 2d 543, 139 Pa.Super. 44.

Evidence held insufficient

(1) To establish conspiracy, intentional fraud, or undue influence, in a remainderman's suit to set aside a deed by a life tenant, or to compel a reconveyance.—Ballinger v. Bartolett, 127 A. 671, 3 N.J.Misc. 80.

(2) To establish fraudulent conspiracy between the life tenant and the purchaser of the land at a tax sale, in a remainderman's suit to recover an interest in land sold for taxes.—Harris v. Evans, 195 N.W. 178, 196 Iowa 799.

31. Ill.—Staudt v. Murphysboro Electric R., Light, Heat & Power Co., 169 Ill.App. 276.
W.Va.—Jordan v. Benwood, 26 S.E. 266, 42 W.Va. 312, 57 Am.S.R. 859, 36 L.R.A. 519.

32. N.Y.—Thompson v. Manhattan R. Co., 8 N.Y.S. 641, 16 Daly 64, affirmed 29 N.E. 264, 130 N.Y. 360.

33. Ala.—Scott v. Colson, 47 So. 60, 156 Ala. 450.

34. N.C.—Miller v. Marriner, 121 S.E. 770, 187 N.C. 449.

35. Ill.—Guhl v. Guhl, 33 N.E.2d 185, 376 Ill. 100.

36. Va.—Turner v. Barraud, 46 S.E. 318, 102 Va. 324.

37. Va.—Ivey v. Lewis, 112 S.E. 712, 133 Va. 122.

Costs. On the dismissal of a remainderman's bill to set aside the life tenant's deed for inadequacy of price, costs have been denied because of defendant grantee's lack of frankness in testifying.[38]

VI. REVERSIONS

§ 105. Definitions and Distinctions

a. In general
b. Possibility of reverter

a. In General

An estate in reversion is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him.

An estate in reversion is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him.[39] The term "reversion" has two meanings: First, as designating the estate left in the grantor during the continuance of a particular estate. Second, the returning of the land to the grantor or his heirs after the grant is over.[40] The word "reverter" is sometimes loosely used to denote what is properly styled "possibility of reverter" which is considered infra subdivision b of this section. In deeds or wills the term "revert" or "reversion" is sometimes loosely used to describe an interest differing from a technical reversion.[41] A reversion does not become a remainder because it is so called in the instrument creating it.[42]

b. Possibility of Reverter

A possibility of reverter, as distinguished from a reversion, arises on a grant so limited that it may last forever or may terminate on a contingency; it is the possibility of having the fee again which exists in a grantor after the grant of a determinable or qualified fee.

A reversion should be distinguished from a possibility of reverter which, according to modern technical notions, arises on a grant so limited that it may last forever or may terminate on a contingency; it is the possibility of having the fee again which exists in a grantor after the grant of a determinable or qualified fee,[43] and determinable fees

38. N.J.—Ballinger v. Bartolett, 127 A. 671, 3 N.J.Misc. 80.

39. Fla.—Sorrels v. McNally, 105 So. 106, 89 Fla. 457.
Ill.—Keogh v. Peck, 147 N.E. 266, 316 Ill. 313, 38 A.L.R. 1151.
Iowa.—Ransom v. Mellor, 297 N.W. 861, 863, citing Corpus Juris.
Mo.—Norman v. Horton, 126 S.W. 2d 187, 189, 344 Mo. 290, 125 A.L.R. 531, citing Corpus Juris.
Tenn.—Manhattan Sav. Bank & Trust Co. v. Bedford, 30 S.W.2d 227, 230, 161 Tenn. 187, quoting Corpus Juris.
Tex.—Staley-Wynne Oil Corporation v. International Shoe Co., Civ.App., 91 S.W.2d 877, 882, citing Corpus Juris, error dismissed.
21 C.J. p 1016 note 19.

Other definitions
U.S.—Helvering v. Wood, 60 S.Ct. 551, 309 U.S. 344, 84 L.Ed. 796, affirming Commissioner of Internal Revenue v. Wood, 104 F.2d 1013, certiorari granted Helvering v. Wood, 60 S.Ct. 189, 308 U.S. 543, 84 L.Ed. 457.
Ill.—Williams v. Swango, 7 N.E.2d 306, 365 Ill. 549—Carter v. Lewis, 4 N.E.2d 853, 364 Ill. 434, 108 A.L.R. 458.
Me.—Johnson v. Palmer, 107 A. 291, 118 Me. 226.
N.Y.—Duff v. Rodenkirchen, 182 N.Y.S. 35, 110 Misc. 575, affirmed Duff v. Fox, 183 N.Y.S. 947, 193 App. Div. 898.
21 C.J. p 1016 note 19 [a].

Contingent remainder limited by devise
If a contingent remainder in fee be limited by devise, there remains a reversion in the heirs of the devisor until the contingency happens. —Osgood v. Thomas, 121 A. 122, 45 R.I. 189.

Right of re-entry
A right of reëntry for nonpayment of rent or nonperformance of any other condition is not a reversion or possibility of reversion. It is not an estate in the land, but a right of action, and if enforced the person entering would be in by a forfeiture of condition, and not by a reverter. Where lands are leased in fee, therefore, whatever conditions the lease may contain, the lessor has no reversion or possibility of reversion which can entitle him to impose restraints on the power of alienation of the lessee.—De Peyster v. Michael, 6 N. Y. 467, 57 Am.D. 470—21 C.J. p 938 note 27 b (2).

In Louisiana
Estates in reversion are unknown to Louisiana law.—Palmer v. Bender, D.C.La., 49 F.2d 316, affirmed C. C.A., 57 F.2d 32, certiorari granted 53 S.Ct. 79, 287 U.S. 586, 77 L.Ed. 512, affirmed 53 S.Ct. 225, 287 U.S. 551, 77 L.Ed. 489.

40. Or.—Powell v. Dayton, S. & G. R. R. Co., 16 P. 863, 16 Or. 33, 8 Am.S.R. 251.
21 C.J. p 1017 note 20.

"Revert" means to return or turn back, and its legal or technical signification is for property to return or go back to a person who formerly owned it, but who parted with the possession or title to it by creating an estate in another; it applies to personal as well as to real property. —Bynum v. McDowell, 3 Tenn.App. 340.

Reversion on non-compliance of condition of fee conditional
S.C.—Corley v. Hoyt, 107 S.E. 34, 116 S.C. 110.

41. Iowa.—Lewis v. Lewis, 87 N. W. 280, 114 Iowa 399.
21 C.J. p 1017 note 23.

42. Tenn.—Robinson v. Blankenship, 92 S.W. 854, 116 Tenn. 394.

43. Conn.—Connecticut Junior Republic Ass'n v. Town of Litchfield, 174 A. 304, 119 Conn. 106, 95 A.L.R. 56—Battistone v. Banulski, 147 A. 820, 110 Conn. 267.
Fla.—Sorrels v. McNally, 105 So. 106, 89 Fla. 457.
Ky.—Walker v. Irvine's Ex'r, 9 S. W.2d 1020, 225 Ky. 699.
Miss.—Ricks v. Merchants Nat. Bank & Trust Co. of Vicksburg, 2 So.2d 344, 345, citing Corpus Juris.
N.C.—Brown v. Guthery, 130 S.E. 836, 837, 190 N.C. 822, citing Corpus Juris.
Va.—Copenhaver v. Pendleton, 155 S. E. 802, 155 Va. 463, 77 A.L.R. 324.
21 C.J. p 1017 note 26.

A condition subsequent reserved by grantor in deed, creating a possibility of reëntry on breach by sale of liquors on the premises, is not an "estate" in grantor, but merely

and consequently possibilities of reverter have been frequently recognized in the United States.[44] A possibility of reverter is, at common law, not an estate;[45] it is inalienable,[46] not assignable, see Assignments § 13, nor devisable, see the C.J.S. title Wills § 85, also 68 C.J. p 499 note 1, although it may be made so by statute;[47] but, as stated in Descent and Distribution § 18, it is descendible, and may be released to him in possession,[48] and has been held capable of transmission by the grantor to his grantee and will pass to the latter under a conveyance of the reversion.[49] Until the contingency happens the whole title is in the grantee.[50] It has been held that this possibility is not subject to merger by the union of the possibility of reverter with the fee conditional in the heir at law.[51] A sale of the grantee's interest in property in which he has a qualified fee does not affect the grantor's right to have the property under his possibility of reverter when the fee has terminated.[52] The holder of a bare possibility of reverter cannot maintain an action for an injury to the property.[53]

§ 106. Characteristics

A reversion is a present vested interest or estate, and it arises by construction and operation of law whenever a grantor has conveyed less than his whole interest or estate, the undisposed portion being his when the grant is terminated. It is not within the rule against perpetuities.

Although at common law, as the necessary sequence of feudal tenures, the freehold could not be in abeyance, the doctrine of nonabeyance did not apply to reversions, for the reason that they were consistent with the fee, always being vested, or an intermediate estate of freehold being in some third person against whom an action might be brought for recovery of the property.[54] The grant by a tenant in fee of a term for years in no way affects the seizin of the grantor, whose interest is then freehold in possession subject to the term.[55] When, however, the particular estate is an estate of freehold the particular tenant and not the reversioner has the seizin, and the reversioner has a reversion of freehold expectant on the estate granted, and with less propriety he is said to be "seized of a reversion on a freehold estate."[56] A reversion is a present vested interest or estate, inasmuch as the person entitled to it has a fixed right of possession and profit in futuro,[57] and necessarily assumes that

a possibility of the grantor's coming into an estate in the future.—Union Colony Co. of Colorado v. Gallie, 88 P.2d 120, 104 Colo. 46.

Devise held creating reversion, not possibility of reverter

Remainder, in accordance with devise to trustee for use of testator's daughter for life in case of death without children, was reversion, rather than possibility of reverter.—Copenhaver v. Pendleton, 155 S.E. 802, 155 Va. 463, 77 A.L.R. 324.

44. Md.—Conner v. Waring, 52 Md. 724.
N.Y.—Lougheed v. Dykeman Baptist Church & Soc., 40 N.Y.S. 586.
21 C.J. p 924 note 79, p 1018 note 29.

45. Colo.—Union Colony Co. of Colorado v. Gallie, 88 P.2d 120, 104 Colo. 46.
Del.—Cookman v. Silliman, Ch., 2 A.2d 166, 167, citing **Corpus Juris.**
Fla.—Sorrels v. McNally, 105 So. 106, 89 Fla. 457.
Ga.—Shockley v. Storey, 196 S.E. 702, 704, 185 Ga. 790, quoting **Corpus Juris.**
Miss.—Ricks v. Merchants Nat. Bank & Trust Co. of Vicksburg, 2 So.2d 344, 345, citing **Corpus Juris.**
Mo.—University City v. Chicago, R. I. & P. R. Co., 149 S.W.2d 321, 324, citing **Corpus Juris.**
N.Y.—Upington v. Corrigan, 45 N.E. 359, 151 N.Y. 143, 37 L.R.A. 794—Southwick v. New York Christian Missionary Society, 135 N.Y.S. 392, 395, 151 App.Div. 116, motion to dismiss appeal conditionally denied 103 N.E. 1133, 209 N.Y. 566, and affirmed 105 N.E. 204, 211 N.Y. 515, rehearing denied 106 N.E. 1043, 212 N.Y. 564.
Vt.—University of Vermont and State Agricultural College v. Ward, 158 A. 773, 104 Vt. 239.
Va.—Copenhaver v. Pendleton, 155 S.E. 802, 155 Va. 463, 77 A.L.R. 324.
21 C.J. p 916 note 49, p 1018 note 30.

46. Colo.—Union Colony Co. of Colorado v. Gallie, 88 P.2d 120, 104 Colo. 46.
Del.—Cookman v. Silliman, Ch., 2 A.2d 166, 167, citing **Corpus Juris.**
Ky.—Walker v. Irvine's Ex'r, 9 S.W. 2d 1020, 225 Ky. 699.
Miss.—Ricks v. Merchants Nat. Bank & Trust Co. of Vicksburg, 2 So.2d 344, 345, citing **Corpus Juris.**
Vt.—University of Vermont and State Agricultural College v. Ward, 158 A. 773, 104 Vt. 239.
21 C.J. p 1018 note 31.

47. Conn.—Baltistone v. Banulski, 147 A. 820, 110 Conn. 267.
Del.—Cookman v. Silliman, Ch., 2 A. 2d 166, 167, citing **Corpus Juris.**
Ga.—Cooper v. Davis, 163 S.E. 736, 174 Ga. 670.
Miss.—Ricks v. Merchants Nat. Bank & Trust Co. of Vicksburg, 2 So.2d 344.
Tex.—Myrick v. Leddy, Civ.App., 37 S.W.2d 308, 309, citing **Corpus Juris.**
21 C.J. p 1018 note 34.

Prohibition against sale of bare contingency or possibility not applicable

The statutory provision that a bare contingency or possibility may not be subject of sale, unless person selling has a present right to a future benefit, does not mean that a possibility of reverter is inalienable.—Shockley v. Storey, 196 S.E. 702, 185 Ga. 790.

48. S.C.—Adams v. Chaplin, 10 S.C. Eq. 265.

49. Pa.—Slegel v. Lauer, 23 A. 996, 148 P. 236, 15 L.R.A. 547.
21 C.J. p 924 note 80.

50. N.Y.—Vail v. Long Island R. Co., 12 N.E. 607, 106 N.Y. 283, 60 Am.R. 449, 27 N.Y.Wkly.Dig. 65.
N.C.—Henderson M. P. Church v. Young, 40 S.E. 691, 130 N.C. 8.

51. S.C.—Adams v. Chaplin, 10 S.C. Eq. 265.

52. Ark.—Pettit v. Stuttgart Normal Inst., 55 S.W. 485, 67 Ark. 430.

53. Cal.—Hopper v. Barnes, 45 P. 874, 113 Cal. 636.

54. Ind.—Beatson v. Bowers, 91 N. E. 922, 174 Ind. 601, affirming, App., 88 N.E. 966.

55. Tenn.—Robinson v. Blankenship, 92 S.W. 854, 116 Tenn. 394.

56. U.S.—Burton v. Smith, Va., 13 Pet. 464, 10 L.Ed. 248.
21 C.J. p 1018 note 46.

57. Ill.—Fisher v. Easton, 132 N.E 442, 299 Ill. 293.

the original owner has not parted with his whole estate or interest in the land.[58] A reversion, being a vested right, is not, as stated in the C.J.S. title Perpetuities § 12, also 48 C.J. p 955 note 18, within the rule against perpetuities. It has been said that a reversion is never created like a remainder by deed or writing or other act of the grantor who creates it at the very time when the particular estate is created, but arises by construction and operation of law wherever a grantor has conveyed less than his whole interest or estate, the undisposed portion being his when the grant is terminated.[59] The particular estate which precedes a reversion may be a lease for years created by a life tenant.[60] At common law, if a remainder was limited to the heirs of the grantor, it took effect as a reversion.[61] By reason of the radical change in the law of descent and statutes rendering all of a decedent's real estate subject to sale for his debts, the heir is in the same position whether he takes by descent as the heir of the reversioner or under his will as a remainderman.[62]

§ 107. Rights and Liabilities of Reversioner

A reversioner has no right of possession during the continuance of the preceding estate, but is entitled to immediate possession of the premises on termination of such estate. He has the right to redeem from a mortgage. The right of the reversioner to rents depends on the terms of the grant.

A reversioner has no right of possession during the continuance of the preceding estate[63] and is liable for trespass on the land in the same manner as any other person;[64] but where there is a suit pending between the reversioner and another concerning a question of waste or improvements he has a right to go upon the premises in a peaceable manner, with his witnesses, for the purpose of examining the same.[65] On the termination of the particular estate the reversioner is entitled to the immediate possession of the premises, notwithstanding any lease previously executed by the preceding tenant.[66] If the owner of a precedent life estate is disseized, the reversioner is not obliged to enter at once, but has a new right of entry on the death of the life tenant.[67] A reversioner cannot, during the continuance of a life estate, authorize the cutting of timber on the estate.[68] A reversioner is entitled to the benefit of any increase in value in the property before the termination of the preceding estate.[69] A grantor of a right of way at a bridge, with a reservation that when the right of way be no longer used as a road it revert to him, is not entitled to take charge of the bridge when use as a right of way is discontinued.[70]

A reversioner has the right to redeem from a mortgage;[71] and it has been held that reversioner redeeming from a mortgage may oust the life tenant unless the life tenant redeems him.[72]

Rent is a separable incident of the reversion, since it may be severed from the reversion.[73] The rent may be granted away, reserving the reversion,[74] or the reversion may be granted away reserving the rent by special words.[75] By a general grant of the reversion the rent will pass with it as an incident to it,[76] and the rule is the same where

Iowa.—Ransom v. Mellor, 297 N.W. 861, 863, citing Corpus Juris.
Mo.—Norman v. Horton, 126 S.W.2d 187, 189, 344 Mo. 290, 125 A.L.R. 531, citing Corpus Juris.
N.H.—McAllister v. Elliot, 140 A. 708, 83 N.H. 225.
Va.—Copenhaver v. Pendleton, 155 S.E. 802, 155 Va. 463, 77 A.L.R. 324.
21 C.J. p 1018 note 47.

Time of vesting

Ky.—Clay v. Clay, 203 S.W. 1080, 181 Ky. 181.

A reversion may pass under the term "estate," if not restrained or qualified.—Hooper v. Hooper, 9 Cush., Mass., 122.

58. N.Y.—Wood v. Taylor, 30 N.Y.S. 433, 9 Misc. 640—Payn v. Beal, 4 Den. 405.

59. Mo.—Norman v. Horton, 126 S.W.2d 187, 189, 344 Mo. 290, 125 A.L.R. 531, citing Corpus Juris.
N.Y. Second Reformed Protestant (Dutch) Church in Town of Flatbush v. Trustees of Reformed Protestant Dutch Church of Town of Flatbush, 216 N.Y.S. 616, 618, 127 Misc. 498, citing Corpus Juris.
Tex.—Glenn v. Holt, Civ.App., 229 S.W. 684.
21 C.J. p 1018 note 51.

60. Vt.—Stockwell v. Sargent, 37 Vt. 16.

61. Ky.—Whayne v. Davis, 66 S.W. 827, 23 Ky.L. 2174.
21 C.J. p 1019 note 61.

62. Ky.—Mayes v. Kuykendall, 112 S.W. 673.
21 C.J. p 1019 note 63.

63. Ill.—Williams v. Bwango, 7 N.E. 2d 306, 365 Ill. 549.
21 C.J. p 1019 note 65.

64. N.H.—Lane v. Thompson, 43 N.H. 320—Anderson v. Nesmith, 7 N.H. 167.

65. Ind.—Conwell v. State, 3 Ind. 337, 56 Am.D. 512.

66. Neb.—Guthmann v. Vallery, 71 N.W. 734, 51 Neb. 824, 66 Am.S.R. 475.

67. Mass.—Tilson v. Thompson, 10 Pick. 359.
21 C.J. p 1019 note 69.

68. Me.—Simpson v. Bowden, 33 Me. 549.

69. N.J.—Haulenbeck v. Cronkright, 23 N.J.Eq. 407, affirmed 25 N.J. Eq. 513.

70. Mo.—Special Road Dist. No. 4 v. Stepp, 4 S.W.2d 480, 222 Mo.App. 1216.

71. Wis.—Zaegel v. Kuster, 7 N.W. 781, 51 Wis. 31.
42 C.J. p 363 note 51.

72. Me.—Wilkins v. French, 20 Me. 111.

73. Mass.—Winnisimmet Trust v. Libby, 122 N.E. 575, 232 Mass. 491.
21 C.J. p 1019 note 76.

74. Mass.—Winnisimmet Trust Co. v. Libby, supra.
21 C.J. p 1019 note 77.

75. Mass.—Winnisimmet Trust Co. v. Libby, supra.
21 C.J. p 1019 note 78.

76. Mass.—Winnisimmet Trust Co. v. Libby, supra.
21 C.J. p 1019 note 79.

the assignment of the reversion is by mortgage instead of by an absolute conveyance;[77] but a general grant of the rent will not pass the reversion.[78] It is not necessary that the rent should be payable in money for it to be incident to the reversion.[79] The devisee of a reversionary interest is entitled to the rents as an incident thereto.[80] Rent which is due and in arrears at the time of the assignment of the reversion does not pass as an incident thereto.[81] Where land is granted to a railroad for a right of way for the term of years of its incorporation, and the road or its successor elects to continue its use after the expiration of the time limited by the grant, the owner of the estate in reversion is entitled to compensation at such time.[82]

§ 108. Transfer

A reversion is devisable, descendible, and alienable inter vivos. A grant of the reversion passes all the rights of the grantor.

A reversion is devisable, see the C.J.S. title Wills § 85, also 68 C.J. p 498 note 86, descendible, see Descent and Distribution § 18, and alienable inter vivos,[83] whether the reversion is subject to a mere term of years, or is expectant on a freehold estate.[84] A grant of the reversion passes all rights reserved to the grantor in the grant of the preceding particular estate,[85] including the right of reentry.[86] A reversioner entitled to reënter on breach of a condition subsequent cannot reënter after conveyance of his reversionary interest,[87] and, where the grantee of a reversion expectant on breach of a condition subsequent has the same right of entry as the original reversioner, the grantee of a reversion has no right of entry for a breach of condition occurring prior to the conveyance of the reversion.[88] As stated supra § 107, in the case of a reversion subject to a term a grant of the reversion carries to the grantee the rent to accrue on the lease. The attornment of the tenant of the particular estate was formerly necessary to perfect such a conveyance by grant, whether the particular estate was in tail, for life, or for years, but this necessity has been abolished by statute.[89] A conveyance by a reversioner immediately after becoming of age will not be set aside for mere inadequacy of price, where no fraud or imposition on the part of the purchaser is shown and there is no confidential relation between the parties.[90] One holding real estate in trust for others during their life, with a reversion to himself after their death, and procuring insurance thereon in his name as trustee to an amount not shown to exceed the value of the life interest, may hold the money received by him on such insurance, after a loss by fire, as trustee, since he is not liable to be attached by his private creditors.[91] As stated supra § 106, at common law if a remainder was limited to the heirs of the grantor it took effect as a reversion and it would be competent for the grantor as being himself the reversioner after making such a limitation to grant away the reversion.[92] Where a lease in fact creates a life tenancy, a purchaser of the land incorrectly informed by the tenant as to the nature of his tenancy is a purchaser in good faith without notice of the claim of a life tenancy.[93]

§ 109. Extinction

The right to a reversion may be extinguished by adverse possession or limitations.

Ordinarily possession is not adverse to the reversioner during the continuance of the particular estate.[94] Although a disseizin of the life tenant of the particular estate gives the reversioner an immediate right of entry if he chooses, it does not affect the rule regarding the extinction of a reversion by

77. Mass.—Burden v. Thayer, 3 Metc. 76, 37 Am.D. 117.
21 C.J. p 1019 note 80.

78. Mass.—Winnisimmet Trust v. Libby, 122 N.E. 575, 232 Mass. 491.
21 C.J. p 1019 note 81.

79. Pa.—Johnston v. Smith, 3 Penr. & W. 496, 24 Am.D. 389.

80. N.C.—Lewis v. Wilkins, 62 N.C. 303.

81. Ohio.—Hughes v. Forsythe, 26 Ohio Cir.Ct., N.S., 13.
21 C.J. p 1020 note 84.

82. Cal.—East San Mateo Land Co. v. Southern Pac. R. Co., 157 P. 634, 30 Cal.App. 223.

83. Ga.—Irby v. Smith, 93 S.E. 877, 147 Ga. 329.
Tex.—Gottwald v. Warlick, Civ.App., 125 S.W.2d 1060.
21 C.J. p 1020 note 89.

Sale of shares of tenants in common

A reversion in lands set off to a widow for life as her dower interest belonged to the children of her deceased husband as tenants in common, and their respective shares could be disposed of and title transferred by deed in proper form — Nickerson v. Nickerson, 126 N.E. 834, 235 Mass. 348.

84. Ind.—Vaughn v. Stuzaker, 16 Ind. 338.
Mass.—Baker v. Baker, 46 N.E. 391, 167 Mass. 575.
21 C.J. p 1020 note 91.

85. Pa.—Burnside v. Weightman, 9 Watts 46.

86. Conn.—Lewis v. Lewis, 57 A. 735, 76 Conn. 586.

87. Conn.—Lewis v. Lewis, supra.

88. Conn.—Lewis v. Lewis, supra.

89. Mass.—Burden v. Thayer, 3 Metc. 76, 37 Am.D. 117.
21 C.J. p 1020 note 3.

90. D.C.—Hayes v. Huddleson, 40 App.D.C. 183, Ann Cas.1914B 1037.
Va.—Cribbins v. Markwood, 13 Gratt. 495, 54 Va. 495, 67 Am.D. 775.

91. Mass.—Lerow v. Wilmarth, 9 Allen 382.

92. Ill.—Akers v. Clark, 56 N.E. 296, 184 Ill. 136, 137, 75 Am.S.R. 152.
21 C.J. p 1020 note 10.

93. Mont.—F. H. Stoltze Land Co. v. Westberg, 206 P. 407, 63 Mont. 38.

94. Conn.—Lewis v. Lewis, 57 A. 735, 76 Conn. 586.
21 C.J. p 1020 note 13.

adverse possession and the running of the statute of limitations.[95] If the person in possession does not claim under the tenant of the particular estate, but under contracts with the reversioners, the statute of limitation begins to run against the right of the reversioners to recover the land from the date of their respective contracts, and is not postponed until the death of the life tenant.[96]

§ 110. Merger

A reversion may be extinguished by merger.

A reversion may by act of law cease to exist as a separate estate by merger, which takes place where the particular estate and the immediate reversion meet in the same person and in the same right.[97] What constitutes a merger is considered infra §§ 123–131.

§ 111. Actions

A reversioner may, during the continuance of the preceding estate, maintain an action at law for injury done to the inheritance. He may sue in equity to prevent a threatened injury to his rights, or to establish his claim.

A reversioner may, during the continuance of the preceding estate, maintain an action for any injury done to the inheritance,[98] but not for an injury which affects only the preceding estate and not the reversionary interest.[99] Where an injury is done to the estate both of the life tenant and the reversioner the latter can recover for the injury done to his estate but not for the entire injury to both estates.[1] That the injury is also an injury to the tenant of the preceding estate does not affect the reversioner's right of action;[2] nor does the fact that there is an intermediate life estate prevent the reversioner from maintaining an action against the tenant in possession for an injury to the inheritance.[3] A possibility that the cause of the injury may be removed before the termination of the particular estate does not affect the reversioner's right of action,[4] and the fact that it is the duty of the life tenant to protect the inheritance and that he might sue for an act of waste committed by a third person does not affect the reversioner's right of action for such injury.[5]

In equity. A reversioner may maintain a suit in equity to prevent a threatened injury to his rights,[6] or to establish his claim, and to be placed in a condition to make it available whenever he shall become entitled to the possession of the estate,[7] but a bill in equity is not necessary to reach a reversion of land in which another person has held a life estate which has run out.[8]

§ 112. Limitations and Laches

In general a reversioner's right of entry must have accrued before the statute of limitations will begin to run against him, or before laches may be imputed to him.

The statute does not begin to run until the termination of the estate on which the reversion is expectant, which gives the reversioner a right of entry;[9] nor, generally, can any laches in asserting his claim to the property be imputed to him until after his right of entry accrues.[10] However, in a proper case a reversioner's title may be destroyed by laches during the lifetime of the owner of the particular estate.[11]

§ 113. Form of Remedy

The rights of a reversioner may be enforced by any appropriate remedy. Case is a proper form of proceeding for an injury to an interest in reversion.

95. Mass.—Mixter v. Woodcock, 23 N.E. 907, 154 Mass. 535.
21 C.J. p 1020 note 15.

96. Ky.—Tucker v. Price, 29 S.W. 857, 17 Ky.L. 11.

97. Ga.—Bowen v. Driggers, 75 S.E. 318, 138 Ga. 398.

98. W.Va.—Swick v. West Virginia Coal & Coke Co., 7 S.E.2d 697.
21 C.J. p 1021 note 20.

99. N.J.—Beavers v. Trimmer, 25 N.J.Law 97.
21 C.J. p 1021 note 21.

1. W.Va.—Jordan v. Benwood, 26 S.E. 266, 42 W.Va. 312, 57 Am.S.R. 859, 36 L.R.A. 519.

2. N.J.—Tinsman v. Belvidere Delaware R. Co., 25 N.J.Law 255, 64 Am.D. 415.

3. Del.—Short v. Piper, 4 Del. 181.
N.Y.—Van Deusen v. Young, 29 N.Y. 9.

4. N.J.—Tinsman v. Belvidere Delaware R. Co., 25 N.J.Law 255, 64 Am.D. 415.
21 C.J. p 1021 note 27.

5. Miss.—Learned v. Ogden, 32 So. 278, 80 Miss. 769, 92 Am.S.R. 621.

6. Wis.—Phelan v. Boylan, 25 Wis. 679.

7. Ala.—St. Clair Springs Hotel Co. v. Balcomb, 108 So. 858, 215 Ala. 12.
21 C.J. p 1021 note 30.

8. Mich.—Eveland v. Stephenson, 8 N.W. 62, 45 Mich. 394.

9. S.C.—Floyd v. Page, 124 S.E. 1, 129 S.C. 301.
W.Va.—Koen v. Koen, 103 S.E. 322, 86 W.Va. 503.
21 C.J. p 1021 note 32.
Where a life tenant is disseized, rights of reversioner are not thereby affected, and reversioner may enter or sue to recover possession within period of limitations after death of life tenant, without regard to lapse of time during which disseizor may have held the premises.—Souders v. Kitchens, 124 S.W.2d 1137, 344 Mo. 18.
Statute of limitations against ejectment action by reversioners against railroad claiming under life tenant began to run at death of life tenant.—Thompson v. Pacific Electric Ry. Co., 265 P. 220, 203 Cal. 578.

10. Ala.—Winters v. Lowell, 61 So. 96, 180 Ala. 425.
21 C.J. p 1021 note 33.

11. Ala.—Huey v. Brock, 92 So. 904, 207 Ala. 175, certiorari denied 42 S.Ct. 585, 259 U.S. 581, 66 L.Ed. 1074, and error dismissed 43 S.Ct. 433, 261 U.S. 609, 67 L.Ed. 825.

On the termination of the particular estate, the reversioner or his legal representatives may enforce his rights by any appropriate available action or suit.[12] An action of case is the proper form of proceeding for an injury to an interest in reversion.[13] An action of trespass cannot be maintained by a reversioner who is not in possession of the premises,[14] unless authorized by statute.[15] A statute authorizing an action of trespass by a reversioner against a stranger does not authorize such an action where the act complained of was done under the authority, or by the permission, of the tenant in possession.[16] A third person cannot complain of the methods used by the reversioner in enforcing a forfeiture of the particular estate and in making reentry.[17] As stated in the C.J.S. title Partition § 58, also 47 C.J. p 341 note 23 et seq, where there are several reversioners they will be entitled to partition, and in some jurisdictions partition may be had during the continuance of the particular estate.

§ 114. Parties

The rules applicable to parties generally apply in actions or suits by reversioners.

In an action by a reversioner for an injury done to the inheritance it is not necessary for the owner of the preceding particular estate to be made a party.[18] One of two reversioners may maintain an action for an injury to the inheritance without joining the other, unless the nonjoinder is pleaded in abatement; and, under the general issue, evidence of such nonjoinder will not defeat the action, but will merely restrict plaintiff to the recovery of a moiety of the damage.[19] The heirs of a devisee of an estate in fee on condition restraining alienation for a certain period cannot recover the estate from the purchaser in breach of such condition, since the proper parties are the heirs of testator to whom the estate reverts.[20] Since, as stated supra § 105 b, the holder of a bare possibility of reverter cannot maintain an action for an injury to the property, he may not join as a party plaintiff in such an action.

§ 115. Pleadings

In actions or suits by reversioners the declaration, petition or complaint must state all matters necessary to support the cause of action.

The declaration must either state an injury of such a permanent nature as to be necessarily injurious to the reversion, or must explicitly allege that it was done to the injury of the reversion.[21] The declaration should not be argumentative nor should it contain a statement of the proof.[22] It is sufficient if it sets up an injury of such a permanent nature as to be necessarily injurious to the reversion,[23] but a mere allegation of injury to the reversion, without facts showing an injury of this character, is insufficient.[24]

§ 116. Evidence

The burden is on the reversioner to establish his case by proper evidence of matters material to his right of recovery.

Since in general the reversioner may sue only for an injury to the inheritance, the evidence must be confined strictly to the damage done to the inheritance,[25] and the proof must establish that the injury complained of is prejudicial to the reversionary interest and not merely to the estate in possession.[26] The burden of proof is on the reversioner to show the date of the death of a life tenant, on which event his right to rents accrued;[27] and this burden not being met there can be no decree in his favor for the rents.[28]

§ 117. Trial and Judgment

Actions by reversioners are governed by the general rules applicable in civil actions as to trial, discussed in the C.J.S. title Trial § 1 et seq, also 64 C.J. p 31 note 2 et seq, and judgments, considered in the C.J.S. title Judgments § 1 et seq, also 33 C.J. p 1047 note 1 et seq. Examine Pocket Parts for later cases.

12. Ga.—Edwards v. Edwards, 92 S. E. 540, 147 Ga. 12.
21 C.J. p 1022 note 39.

13. Ark.—Crowder v. Fordyce Lumber Co., 125 S.W. 417, 93 Ark. 392.
21 C.J. p 1021 note 34.

14. Mass.—Shattuck v. Gragg, 23 Pick. 88.
N.H.—Lane v. Thompson, 43 N.H. 320.
21 C.J. p 1021 note 35.

15. N.Y.—Van Deusen v. Young, 29 N.Y. 9.
21 C.J. p 1021 note 36.

16. N.Y.—Livingston v. Mott, 2 Wend. 605.

17. Colo.—Mosca Town Co. v. Wellington, 89 P. 783, 39 Colo. 326, 121 Am.S.R. 175.

18. N.C.—Loven v. Roper, 101 S.E. 263.
21 C.J. p 1022 note 44.

19. Mass.—Putney v. Lapham, 10 Cush. 232.

20. Tenn.—Fowlkes v. Wagoner, Ch. A., 46 S.W. 586.

21. N.J.—Tinsman v. Belvidere Delaware R. Co., 25 N.J.Law 255, 64 Am D. 415.
21 C.J. p 1022 note 50.

22. Mo.—Van Hoozer v. Van Hoozer, 18 Mo.App. 19.

23. Ill.—Chicago v. McDonough, 112 Ill. 85.
Mo.—Proffitt v. Henderson, 29 Mo. 325.

24. N.J.—Beavers v. Trimmer, 25 N. J.Law 97.

25. N.Y.—Van Deusen v. Young, 29 N.Y. 9, reversing 29 Barb. 9.

26. N.J.—Tinsman v. Belvidere Delaware R. Co., 25 N.J.Law 255, 64 Am.D. 415.

27. Tenn.—McKee v. Dail, 1 Tenn. Ch.A. 689.

28. Tenn.—McKee v. Dail, supra.

§ 118. Damages

The reversioner is limited to recovery of damages to the inheritance only.

The reversioner can recover damages only for the injury done to the inheritance and not for any injury to the preceding estate.[29] He is not entitled to recover damages for a diminution in the value of property where he has been allowed damages for making repairs and for loss of rentals.[30] In an action for wrongfully mining and removing coal from the land he may recover, not only the value of the coal taken, but also compensation for any damage done to the land or to the coal left in the mine.[31] The measure of damages as to the coal removed is the value of the coal when first severed from its native bed, without deducting the expense of severing it.[32]

VII. EXECUTORY INTERESTS

§ 119. Origin and History

Under the rules of the common law a legal estate could not be limited after a fee, or conveyed in futuro, or suspended. Under the system of uses, however, chancery enforced such estates, until the statute of uses transmuted the use into a legal estate, and, with the enactment of the statute of wills, legal estates could thereafter be conveyed or devised without the narrow limitations the common law technicalities required in the creation of remainders. Thus arose that class of estates known as executory interests.

As appears supra § 20, conditional limitations or executory interests had no existence at common law, and arose only out of conveyances or devises having operation under the statute of uses. A remainder or other legal estate could not be limited after a fee,[33] nor could a freehold be conveyed in futuro by a common-law conveyance;[34] and title to property could not be suspended, but was required to be vested in someone,[35] although it could be cut off or defeated.[36] Whatever the origin of uses, whether derived by the ecclesiastical chancellors from the Roman fidei commissum, or a native English growth, the system of uses was firmly established in England in the fifteenth century, see the C.J.S. title Trusts § 8, also 65 C.J. p 219 notes 13–18. However, as is shown in 21 Corpus Juris, page 1022 note 70–p 1024 note 74, uses were not enforced in the courts of law, and a feoffment to one to the use of another was enforceable in chancery alone. In the courts of law the feoffee to uses was considered as the legal owner and the cestui que use was recognized, if at all, as a mere tenant at sufferance. In chancery the cestui que use was recognized as the real owner, and by the writ of subpoena the feoffee to uses could be compelled to deal with the estate as the cestui que use should direct. This equitable estate of the cestui que use was free from the technical rules governing the transfer of estates at common law. After a feoffment to uses, the use of a freehold estate might be transferred without livery of seizin, and a feoffment of land to one to such uses as the feoffer might declare by his will was enforceable.[37] Thus the liberty to devise lands which theretofore did not exist came into being under the system of uses. The abuses of the system led parliament, in 1535, to attempt to abolish all uses, and by the statute of uses, 27 Henry VIII chapter 10, it was declared that the estate of the cestui que use was transferred into a legal estate, so that its owner became complete owner in law as well as in equity.[38] After this statute, under which the use was transmuted into a legal estate, the courts of law assumed jurisdiction of uses;[39] and it was held that an estate created by a deed operating under the statute might be made to commence in futuro without any immediate transmutation of possession, as by a bargain and sale, or a covenant to stand seized to uses,[40] and consequently, by such conveyances, inheritances might be made to shift from one to another on a supervening contingency.[41] Thence arose the doctrine of springing and shifting uses, or conditional limitations.[42] This statute also put a stop to wills of uses, but in 1540, by the Statute of Wills, 32 Henry VIII chapter 1, a general liberty to devise real estate was established. The transfer of lands under these statutes retained many of the doctrines established in the courts of equity before

29. W.Va.—Jordan v. Benwood, 26 S.E. 266, 42 W.Va. 312, 57 Am.S.R. 859, 36 L.R.A. 519.
21 C.J. p 1022 note 62.

30. N.Y.—Stevens v. State, 121 N.Y.S. 402, 65 Misc. 249.

31. Md.—Franklin Coal Co. v. McMillan, 49 Md. 549, 33 Am.R. 280.

32. Md.—Franklin Coal Co. v. McMillan, supra.

33. Ky.—McWilliams v. Havely, 283 S.W. 103, 214 Ky. 320.

34. Mass.—Wallis v. Wallis, 4 Mass. 135, 3 Am.D. 210.

35. Fla.—Sorrels v. McNally, 105 So. 106, 89 Fla. 457.

36. Fla.—Sorrels v. McNally, supra.

37. N.Y.—Wright v. Methodist Episcopal Church, Hoffm. 201, 253.

Use could be devised
The feoffer being considered as seized of the use, not of the land, could devise it.—Wright v. Methodist Episcopal Church, supra.

38. Md.—Ware v. Richardson, 3 Md. 505, 56 Am.D. 762.
21 C.J. p 1023 note 77—65 C.J. p 516 note 22.

39. N.C.—Smith v. Brisson, 90 N.C. 284.

40. Mass.—Wallis v. Wallis, 4 Mass. 135, 3 Am.D. 210.
N.C.—Smith v. Brisson, 90 N.C. 284.

41. N.C. Smith v. Brisson, supra.

42. N.C.—Smith v. Brisson, supra.

the statutes, and hence arose those "executory limitations" by which future estates in lands may be created without the satisfaction of the technicalities required in the creation of remainders, see supra §§ 68–104; a fee may be limited after, or in derogation of, a prior fee, and an estate may be limited to begin in futuro without the interposition of a precedent estate.[43] Further it is possible to limit a quasi remainder in a chattel real or personalty after a prior life estate therein, see infra §§ 138–139

Construction and effect of statute of uses. Three points established by the courts in the construction of the statute of uses are of the utmost consequence in the doctrine of executory trusts. First the statute executes only one use, see the C.J.S. title Trusts § 176, also 65 C.J. p 519 note 30, so that when a use is limited on a use the second use is void in law,[44] but in process of time the second use was supported in equity as a trust.[45] Second, as the statute requires a person "seized" of the land in order to transfer the legal estate to the cestui que use, the statute does not apply to terms for years[46] or to interests in chattels of which the owner is merely possessed, see the C.J.S. title Trusts § 176, also 65 C.J. p 519 note 31. Third, as appears in the C.J.S. title Trusts § 176, also 65 C.J. p 518 note 24, an active trust is not executed by the statute.

§ 120. Definitions

a. Executory limitations and executory interests
b. Conditional limitations
c. Springing use
d. Shifting use
e. Executory devise
f. Contingent use
g. Collateral limitation

a. Executory Limitations and Executory Interests

An executory interest is an ulterior limitation created by either deed or will and which could not be created under the technical rules of the old common law since it may abruptly break off and determine the preceding estate or commence at a period in the future after the precedent estate has determined.

Executory interests are such future estates or interests in realty as could not be created directly by a conveyance at common law, but only by executory devises in wills or by conveyances to uses in deeds.[47] When such interests are created by will they are known as executory devises,[48] and when created by deed they have been designated as conditional limitations,[49] and in either event such an interest is given effect as a shifting or springing use.[50] When the event which gives birth to the ulterior limitation abruptly determines and breaks off the preceding estate, the limitation is executory, inasmuch as it is essential to the constitution of a remainder that it wait for the regular expiration of such estate.[51] Executory devises, see infra § 120 e, shifting uses, see infra § 120 d, and conditional limitations, see infra § 120 b, are essentially the same.[52]

b. Conditional Limitations

A conditional limitation is an estate created by a limitation over to a third person on breach of a condition subsequent, and the term has been considered as a general one which may comprehend executory devises and shifting and springing uses.

If a condition subsequent is followed by a limitation over on a breach of the condition, it is termed a conditional limitation.[53] As appears supra § 20, it is properly a limitation cutting short an estate already granted and substituting another to a third person in its stead, in case a condition be not fulfilled or breached. The term in its broader sense, includes shifting uses and executory devises, and is a phrase limiting an estate previously created and substituting another in its place,[54] and has been considered as a general head or division comprehending every limitation which may vest an interest in a third person, on condition, or on an event which may or may not happen, and to include certain estates in remainder, as well as gifts and grants, which, when made by will, are termed executory

43. U.S.—Doe v. Considine, Ohio, 6 Wall. 458, 475, 18 L.Ed. 869.

44. Me.—Emery v. Chase, 5 Me. 232.
Mo.—Guest v. Farley, 19 Mo. 147.
S.C.—Ramsay v. Marsh, 13 S.C.L. 252, 13 Am.D. 717.

45. U.S.—Croxall v. Shererd, N.J., 5 Wall. 268, 18 L.Ed. 572.
Me.—Emery v. Chase, 5 Me. 232.
Mo.—Guest v. Farley, 19 Mo. 147.
S.C.—Ramsay v. Marsh, 13 S.C.L. 252, 13 Am.D. 717.
W.Va.—Ocheltree v. McClung, 7 W. Va. 232.

46. S.C.—Ramsay v. Marsh, 13 S.C. L. 252, 13 Am.D. 717.

47. Ky.—McWilliams v. Havely, 283 S.W. 103, 214 Ky. 320.

48. Ky.—McWilliams v. Havely, supra.

49. Ky.—McWilliams v. Havely, supra.

50. Ky.—McWilliams v. Havely, supra.

51. Vt.—Bean v. Atkins, 89 A. 643, 87 Vt. 376.

52. Vt.—Bean v. Atkins, supra.

53. Vt.—Bean v. Atkins, 89 A. 643, 87 Vt. 376.

Necessity for delay as distinguishing feature

An estate on condition and a conditional limitation are not the same, although the estate is a conditional one in either case. In the case of a conditional limitation, the estate is determined by the mere happening of the event by which its limitation is measured. An estate on condition, although liable to be defeated, is not in fact determined until he who has the right to avail himself of the condition enters and determines it.—Bean v. Atkins, supra.

54. N.Y.—Williams v. Jones, 60 N. E. 240, 166 N.Y. 522.

devises, and when contained in conveyances to uses, assume the name of springing or shifting uses.[55]

c. Springing Use

A springing use is a use which arises in futuro, either on a contingency or at a certain time, and is independent of, and does not take effect in derogation of, any preceding interest.

As is stated in 21 Corpus Juris page 1023 note 93, a springing use is a use limited to arise in futuro, either on a contingency or at a time certain, which is independent of, and does not take effect in derogation of, any preceding interest. It is a use which arises from the seizin of the grantor, and where there is no estate going before it.[56]

d. Shifting Use

A shifting use is a limitation which takes effect in derogation of some preceding estate previously limited by the same instrument.

A shifting use is a use limited to take effect in derogation of some preceding estate previously limited by the same instrument. Such a use is also called a secondary use.[57]

e. Executory Devise

An executory devise is an executory interest created by will.

An executory devise, as appears in the C.J.S. title Wills § 916, also 69 C.J. p 584 note 50, is such a limitation of a future estate or interest in lands or chattels as the law admits in the case of a will, although contrary to the rules of limitation in conveyances at common law. Every devise of a future interest which is not preceded by an estate of freehold created by the same will, or which, being so preceded, is limited to take effect before or after, and not at, the expiration of such prior estate of freehold, is an executory devise.[58] Every devise to a person in derogation of, or substitution for, a preceding estate in fee simple is an executory devise.[59] Although the term "executory devise" is used to include as well interests in chattels as in lands, a limitation of a future interest in chattels, which takes effect by the application of a doctrine similar to that of executory devises of lands, is sometimes called with greater exactness an "executory bequest."[60] Executory devises are not ordinarily designated as springing and shifting devises, although these terms are sometimes used as denoting executory devises which take effect in the same manner respectively as springing and shifting uses.

f. Contingent Use

A contingent use is a use such as may by possibility happen in possession, reversion, or remainder.

A contingent use is such a use as may by possibility happen in possession, reversion, or remainder, although there is some authority which states that it is limited to take effect as a remainder.[61]

g. Collateral Limitation

A collateral limitation is a limitation giving an interest for a specified period, but making the right depend on some collateral event.

A collateral limitation is a limitation in the conveyance of an estate, giving an interest for a specified period, but making the right of enjoyment depend on some collateral event.[62] It marks an event which may happen within the time described in the direct limitation, the happening of which puts an end to the estate.[63] It has been distinguished from conditional limitation.[64]

§ 121. Classes of Executory Limitations

a. General classification
b. Real property

a. General Classification

Executory limitations are ordinarily classified into three classes.

Executory limitations are ordinarily classified into three classes:[65] (1) Where the devisor or set-

55. Mass.—Proprietors of the Church in Brattle Square v. Grant, 3 Gray 142, 63 Am.D. 725.
N.C.—Smith v. Brisson, 90 N.C. 284.
Vt.—Bean v. Atkins, 89 A. 643, 87 Vt. 376.

56. N.C.—Smith v. Brisson, 90 N.C. 284.

57. N.C.—Smith v. Brisson, 90 N.C. 284.
21 C.J. p 1023 notes 94–96.

58. Vt.—Bean v. Atkins, 89 A. 643, 87 Vt. 376.

59. Mass.—Proprietors of the Church in Brattle Square v. Grant, 3 Gray 142, 63 Am.D. 725.

60. N.Y.—Van Horne v. Campbell, 3 N.E. 316, 771, 100 N.Y. 287, 53 Am.R. 166.

61. N.Y.—Jemison v. Blowers, 5 Barb. 686.

62. Tex.—Templeman v. Gibbs, 24 S.W. 792, 86 Tex. 358.

63. Va.—Millan v. Kephart, 18 Gratt. 1, 59 Va. 1.
Not a collateral limitation
Va.—Neal v. State-Planters Bank & Trust Co., 184 S.E. 203, 166 Va. 158.

64. Tex.—Templeman v. Gibbs, 24 S.W. 792, 793, 86 Tex. 358.
"Conditional" limitation distinguished
"Words in a deed restricting duration of an estate created by it are said to impose a 'limitation,' which may be conditional or collateral. If the conveyance gives an interest for a prescribed period, but makes the right to possess or enjoy the thing conveyed to depend upon some collateral event, then the limitation is said to be collateral; but if the estate is expressly so restricted by the instrument creating it that it can not endure after the happening of the contingency upon which the estate or interest, by the terms of the instrument, is to cease, then the limitation is said to be conditional."—Templeman v. Gibbs, supra.

65. Executory devise
There are two kinds of executory

tlor parts with his whole fee simple, but upon some contingency qualifies that disposition and limits an estate on that contingency, considered infra subdivision b (1) of this section. (2) Where the devisor or settlor, without parting with the immediate fee, gives a future estate to rise either on a contingency or at a period certain, unpreceded by, or not having the requisite connection with, any immediate freehold to give it effect as a remainder, considered infra subdivision b (3) of this section. (3) Executory limitations of chattels real and personal, considered infra §§ 138–144.

b. Real Property

(1) After fee
(2) In derogation of life estate
(3) Estates in futuro

(1) After Fee

(a) In general
(b) On failure of issue
(c) Alternative limitations

(a) In General

A limitation after a fee must take effect as an executory limitation. Such a limitation is invalid after an absolute fee simple, but is good after a defeasible fee, at least if created by will, although in some jurisdictions it is invalid if created by deed. The authorities are not agreed as to whether a limitation over in partial derogation of a fee destroys completely the precedent estate.

A limitation after a fee simple must take effect, if at all, as an executory limitation,[66] since, as appears supra § 78, such a limitation cannot take effect at common law as a remainder. There can be no limitation over after an absolute fee simple,[67] but there can be a limitation over of a fee after a defeasible fee simple, on the happening of the event which defeats the first fee.[68] At least a limitation of a fee after a defeasible fee is good by way of executory devise;[69] but there is authority which holds that such a limitation by deed is void,[70] except where authorized by statute.[71] One kind of executory devise exists where an estate is devised to one, but on some future event that estate is determined, and the estate thereupon is to go to another.[72]

Partial derogation of fee. When an executory interest is limited on a contingency in derogation of a preceding fee, it has been held that the fee will be completely destroyed by the vesting of such executory interest, although it is but a life estate;[73] but there is other authority which holds that the fee is divested only so far as is necessary to give effect to such executory interest, and subject thereto remains in the heirs of the prior devisee in fee.[74]

(b) On Failure of Issue

In general a limitation over of an executory interest on a failure of issue is valid unless the period within which the estate may vest violates the rule against perpetuities.

In general a limitation over of an executory interest after an indefinite failure of issue, either in a deed[75] or by way of executory devise in a will,[76] is void; but such a limitation over after a definite failure of issue, if made by way of executory devise in a will, is valid,[77] and in some jurisdictions is valid if made by deed.[78] As appears in the C.J.S. title Wills §§ 852, 917, also 69 C.J. p 476 note 92–p 480 note 6, p 587 note 2–p 588 note 8, a devise after a failure of issue, where the preceding limitation is held to create a fee simple, creates a defeasible fee with an executory devise over, and will take effect or not according as the failure is to happen on a contingency within the period allowed by the rule against perpetuities or is on an indefinite failure of issue. In general an executory devise

devise; one, where an estate is devised to one, but on some future event that estate is determined, and the estate thereupon is to go to another; the other, when the estate is limited to commence in futuro, contrary to the rules of the common law. In the latter case, the fee in the mean time remains in the heir of the devisor.—Nightingale v. Burrell, 15 Pick., Mass., 104.

66. Mo.—Chew v. Keller, 13 S.W. 395, 100 Mo. 362.
21 C.J. p 1024 note 17.

67. N.H.—Eaton v. Straw, 18 N.H. 320.
Reason for rule
If the whole estate has passed unconditionally there is nothing left to limit over.—Eaton v. Straw, supra.

68. Mo.—Humphreys v. Welling, 111 S.W.2d 123, 341 Mo. 1198.
N.H.—Eaton v. Straw, 18 N.H. 320.

69. Ala.—McRee's Adm'rs v. Means, 34 Ala. 349.
Ill.—Johnson v. Buck, 77 N.E. 163, 220 Ill. 226.
Mo.—Humphreys v. Welling, 111 S.W.2d 123, 341 Mo. 1198.
21 C.J. p 1024 note 20 [b].
After conditional fee
After a conditional fee an executory devise may be valid.—Smith v. Hunter, 23 Ind. 580—21 C.J. p 1024 note 19.

70. Ill.—Johnson v. Buck, 77 N.E. 163, 220 Ill. 226.
21 C.J. p 1024 note 20 [b] (1).

71. Ga.—Shealy v. Wammock, 42 S.E. 239, 115 Ga. 913.

72. Mass.—Nightingale v. Burrell, 15 Pick. 104.

73. Del.—Doe v. Roe, 6 Del. 398.

74. Ohio.—Hopkins v. Pease, 8 Ohio Cir.Ct. 246, 4 Ohio Cir.Dec. 435.

75. Ga.—Shealy v. Wammock, 42 S.E. 239, 115 Ga. 913.

76. N.H.—Bell v. Scammon, 15 N.H. 381, 41 Am.D. 706—Hall v. Chaffee, 14 N.H. 215.

77. N.H.—Bell v. Scammon, 15 N.H. 381, 41 Am.D. 706—Hall v. Chaffee, 14 N.H. 215.

78. Ga.—Shealy v. Wammock, 42 S.E. 239, 115 Ga. 913.
Marriage settlement
A disposition of this type may be made by marriage settlement operating under the statute of uses.—Carver v. Astor, N.Y., 4 Pet., U.S., 1, 7 L.Ed. 761.

may be limited after an estate tail.[79] If the devise on failure of issue creates an estate tail by implication, considered supra § 24, it has been held that the limitation over will be good where the common law still prevails without regard to whether the failure of issue is definite or indefinite and without regard to the distinction between remainders and executory devises,[80] although there are authorities which are not in harmony with this rule;[81] and there is authority which holds that a devise over, not to take effect until after a general failure of issue, cannot take effect as an executory devise both because it can be supported and have effect as a remainder, expectant on the determination of the estate tail, and also because if an executory devise could be so limited upon an estate tail it might not vest within the time allowed for the vesting of the estate under an executory devise.[82] It has been held that a devise over after an estate tail on a definite failure of issue is not an executory devise, but a remainder.[83] Under statutes which have abolished estates tail, see supra § 29, the validity of such limitations if construed as executory devises will in general depend on whether the limitation is on a definite or indefinite failure of issue.[84] In general a devise which, prior to the time estates tail were abolished, would have created either an express estate tail or an estate tail by implication, with a limitation over, in either case the limitation over being on an indefinite failure of issue, the limitation over on the failure of such issue is an executory devise,[85] which, as appears in the C.J.S. title Perpetuities § 15, also 48 C.J. p 963 note 7–p 964 note 12, is void for remoteness; but if the devise is of an estate of freehold with a limitation over on a definite failure of issue it gives the first taker a defeasible or determinable fee, and the limitation over, if construed as an executory devise, is valid.[86]

(c) Alternative Limitations

A future interest may be limited in the alternative so as to take effect either as an executory limitation or as a contingent remainder.

A future interest may be limited in the alternative so as to take effect either after a fee which is to arise in a certain contingency and which is then to be determinable on a contingency, when the subsequent gift operates as an executory devise; or, in case the fee so limited never vests, the future interest may take effect immediately after the termination of the first estate as a contingent remainder.[87]

(2) In Derogation of Life Estate

A gift to take effect in derogation of a preceding life estate is an executory devise or shifting use.

A gift to take effect in derogation of a preceding life estate is an executory devise or shifting use.[88] If made by deed the gift over is a conditional limitation or a shifting use.[89]

(3) Estates in Futuro

(a) In general
(b) To persons not in esse
(c) Covenant to stand seized and deed of bargain and sale

(a) In General

A freehold to commence in futuro may be made by executory limitation, and includes freeholds limited to arise without any precedent estate, or estates limited after a freehold estate and a further interval of time, or a contingent estate limited after a term for years.

As appears in 21 Corpus Juris page 1025 note 31, at common law a freehold in futuro arises whenever a freehold estate is limited to begin after the expiration of a definite interval of time, or on the happening of a specified event or contingency, other than the natural expiration of a precedent estate of freehold. In consequence of the abeyance of the freehold which would result if an estate so limited were allowed to take effect, a freehold in futuro is void at common law, as appears supra § 77. However, by operation of the statute of uses or statutes authorizing testamentary dispositions a freehold to commence in futuro may be made by executory devise,[90] or by a conveyance of the kind which came into use after the enactment of the statute of uses.[91] These include future freeholds limited to

79. N.J.—Kent v. Armstrong, 6 N.J. Eq. 637.

80. Pa.—Taylor v. Taylor, 63 Pa. 481, 3 Am.R. 565.

81. N.H.—Hall v. Chaffee, 14 N.H. 215.
Va.—Bells v. Gillespie, 5 Rand. 273, 26 Va. 273.

82. Mass.—Nightingale v. Burrell, 15 Pick. 104.

83. Pa.—Taylor v. Taylor, 63 Pa. 481, 3 Am.R. 565.

Reason for rule
It takes effect, not in derogation or abridgment of the preceding estate, but on its regular determination, although only in the event of the determination of the estate on the death of the tenant.—Taylor v. Taylor, supra.

84. Ga.—Hertz v. Abrahams, 86 S.E. 409, 110 Ga. 707, 50 L.R.A. 361.
21 C.J. p 1025 note 25.

85. Ga.—Hertz v. Abrahams, supra.

86. Ga.—Hertz v. Abrahams, supra.

87. N.Y.—Green v. Head, 104 N.Y. S. 383, 54 Misc. 454.

88. Mo.—Hoselton v. Hoselton, 65 S.W. 1005, 166 Mo. 182.
21 C.J. p 1025 note 29.

89. Va.—Camp v. Cleary, 76 Va. 140.

90. Mass.—Nightingale v. Burrell, 15 Pick. 104.

91. Mass.—Wallis v. Wallis, 4 Mass. 135, 3 Am.D. 210.
N.H.—Bell v. Scammon, 15 N.H. 381, 41 Am.D. 706.

arise either without any precedent estate,[92] or an estate limited after a freehold estate and a further interval of time,[93] or, as is shown in 21 Corpus Juris page 1026 note 42, a contingent estate limited after a term for years.

Under some statutes future estates are classified without respect to their nature, the mode of conveyance by which they are created, and their relation to the estate of the grantor or to other granted estates, and include under that simple classification limitations which at common law were denominated springing and shifting uses and executory devises.[94]

(b) To Persons Not in Esse

An executory interest may be limited to a person not in esse.

A limitation of realty to a person not in esse may be effected by executory devise or by springing use.[95] It seems that even where a devise is so worded as to appear to be an immediate present devise, it will be effectuated if there exists the least circumstance from which to collect the testator's intention that the gift is anything else than an immediate devise to take effect in præsenti.[96]

(c) Covenant to Stand Seized and Deed of Bargain and Sale

A freehold to commence in futuro may be created by a covenant to stand seized or by a deed of bargain and sale.

Under the Statute of Uses, *27* Henry VIII chapter 10, freeholds to begin in futuro may be created by covenant to stand seized,[97] or by deed of bargain and sale,[98] according as the consideration is a consideration of blood or marriage or a valuable consideration.

§ 122. Incidents and Characteristics

a. In general
b. Validity of executory limitations
c. Effect of action of first taker
d. Effect of merger
e. Effect of failure of prior gift on gift over
f. Effect of failure of gift over on prior gift
g. Taking effect of prior executory interest
h. Devolution and alienation

a. In General

Executory interests are not mere possibilities but are certain interests and estates. They are not destructible as a result of casualties to the precedent estate. A conditional limitation may depend on a condition precedent or a condition subsequent. The owner of an executory interest cannot maintain a suit to prevent waste by the owner of a precedent estate in fee.

Executory interests are not mere possibilities but are certain interests and estates,[99] or, as it has otherwise been stated, they are possibilities coupled with an interest.[1] Such estates arise, when their time comes, of their own inherent strength,[2] and differ from remainders, see supra §§ 76–79, in that they are not required to be supported by a preceding estate,[3] and so are not destructible on account of casualties to the precedent estate.[4]

A conditional limitation may depend on a condition precedent or a condition subsequent.[5]

Protection against waste. It has been held that the holder of a defeasible fee in realty is not subject to a suit to restrain waste by the owner of a subsequent executory interest.[6]

b. Validity of Executory Limitations

(1) Effect of power in first taker to defeat executory limitation
(2) Limitation on repugnant contingency
(3) Remoteness; rule against perpetuities

(1) Effect of Power in First Taker to Defeat Executory Limitation

As appears supra subdivision a of this section, executory limitations differ from contingent remain-

92. Mass.—Wallis v. Wallis, 4 Mass. 135, 3 Am.D. 210.
21 C.J. p 1025 note 37.

93. Pa.—Rupp v. Eberly, 79 Pa. 141.

94. Minn.—Papke v. Pearson, 280 N.W. 183, 203 Minn. 130.

95. W.Va.—Ocheltree v. McClung, 7 W.Va. 232.
21 C.J. p 1026 note 40.

96. U.S.—Inglis v. New York Sailor's Snug Harbor, N.Y., 3 Pet. 99, 144, 7 L.Ed. 617.
21 C.J. p 1026 note 41.

97. N.Y.—Bank of United States v. Housman, 6 Paige 526.
21 C.J. p 1026 note 44.

98. W.Va.—Ocheltree v. McClung, 7 W.Va. 232.
21 C.J. p 1026 note 45.

99. Kan.—Platt v. Woodland, 246 P. 1017, 121 Kan. 291.
N.C.—Beacom v. Amos, 77 S.E. 407, 161 N.C. 357—Fortescue v. Satterthwaite, 23 N.C. 566.
Va.—Medley v. Medley, 81 Va. 265.

1. Miss.—Alexander v. Richardson, 64 So. 217, 106 Miss. 517.
N.C.—Watson v. Smith, 14 S.E. 640, 110 N.C. 6, 28 Am.S.R. 665.

2. Ind.—Outland v. Bowen, 17 N.E. 281, 115 Ind. 150, 7 Am.S.R. 420.
Ky.—McWilliams v. Havely, 283 S.W. 103, 214 Ky. 320.

3. Ind.—Outland v. Bowen, 17 N.E. 281, 115 Ind. 150, 7 Am.S.R. 420.
Ky.—McWilliams v. Havely, 283 S.W. 103, 214 Ky. 320.

4. Kan.—Platt v. Woodland, 246 P. 1017, 121 Kan. 291.

5. N.J.—Den v. Hance, 11 N.J.Law 244.

6. Ga.—Matthews v. Hudson, 7 S.E. 286, 81 Ga. 120, 12 Am.S.R. 305.

ders in that contingent remainders are defeasible on the destruction of the particular estate, while executory limitations are independent of the particular estate, and, as appears infra subdivision c of this section, no act which the first taker may do can defeat the legal consequence of the contingency happening, that is, can defeat the vesting of the estate if the contingency happens. Hence it has been reasoned, see infra subdivision b (2) (c), of this section that where the gift to the first taker is accompanied with the absolute power of disposal, the gift over fails. However, the rule as stated is not universal in its application, for, as appears infra subdivision c, it has been decided that an executory limitation after an estate tail may always be barred by the tenant in tail.

(2) Limitation on Repugnant Contingency
- (a) In general
- (b) Contingency involving restraint on alienation or intestacy
- (c) Limitation after gift with absolute power of disposal
- (d) Limitation after life estate with power of disposal

(a) In General

An executory limitation repugnant to the prior estate, as where the prior estate is a fee simple absolute, is void; but where the prior estate is a fee simple defeasible, or lesser estate, the limitation over is valid.

A condition repugnant to the nature of the estate to which it is annexed is void, see supra § 20, and therefore, as appears in 21 Corpus Juris page 1027 note 51, a gift limited over on such a repugnant contingency fails. So any limitation over after a gift of the fee simple absolute is void, such a limitation being in its very nature repugnant to the prior absolute gift, and this principle has occasionally been made the ground of decision in adjudicated cases.[7] However, an executory limitation over after a gift of a fee simple defeasible is valid.[8] In such cases the question is generally one of intent, whether or not on the whole instrument the intent is clear that the property should go over on a contingency.[9]

(b) Contingency Involving Restraint on Alienation or Intestacy

An executory limitation over after a fee on alienation or attempt at alienation of the fee by the first taker, or of such interest as the first taker does not dispose of or as to which he dies intestate, is void.

A general restraint on alienation of an estate in fee is void, see supra § 8. Thus a limitation over after a fee on alienation or attempt at alienation is void.[10] So too a gift over after a gift of an absolute interest in property real or personal, if the first taker does not dispose of his interest or dies intestate, or a gift over of what remains at his death, is void.[11]

(c) Limitation after Gift with Absolute Power of Disposal

An executory limitation after a gift of a fee simple with an absolute power of disposal is void; but if the power of disposal is limited or conditional, as where the first taker has a fee simple defeasible, the limitation over is valid.

It is generally held, although there is authority to the contrary,[12] that an executory limitation is void after a gift with an absolute power of disposal, either express or implied, in the first taker,[13] regardless of whether the right of disposition is limited to any particular method of conveyance;[14] but the power of disposal must be absolute, and if the first taker's power of disposal is limited or conditional it will not defeat a disposition over.[15] However, this principle does not assert that if an estate in fee is given there cannot be a subsequent limitation over by way of executory limitation, notwithstanding the right of alienation and disposal is incident to every fee.[16] If such were its effect, it would destroy altogether that class of executory limitations which take effect in defeasance or abridgment of the prior estate.[17] A fee may be limited after a fee by executory limitation, as appears supra § 121 b (1), and a limitation may take effect in qualification, abridgment, or defeasance of the preceding estate.[18] The absolute power of disposition in the first taker, to which a limitation over is repugnant, is a power to dispose of the entire estate, including the limitation, and in destruc-

7. Ala.—McRee v. Means, 34 Ala. 349.
Pa.—Fisher v. Wister, 25 A. 1009, 154 Pa. 65.

8. N.Y.—Norris v. Beyea, 13 N.Y. 273.
21 C.J. p 1027 note 54.

9. Mich.—Robinson v. Finch, 74 N.W. 472, 116 Mich. 180.
21 C.J. p 1027 note 55.

10. U.S.—Potter v. Couch, Ill., 11 S.Ct. 1005, 141 U.S. 296, 35 L.Ed. 721.

11. Mass.—Foster v. Smith, 31 N.E. 291, 156 Mass. 379.

12. Tex.—Lockridge v. McCommon, 38 S.W. 33, 90 Tex. 234.
21 C.J. p 1028 note 64.

13. Ill.—Wolfer v. Hemmer, 33 N.E. 751, 144 Ill. 554.
21 C.J. p 1026 note 48, p 1027 note 63.

14. Pa.—Fisher v. Wister, 25 A. 1009, 154 Pa. 65.

15. Mo.—O'Day v. O'Day, 91 S.W. 921, 193 Mo. 62, 4 L.R.A.,N.S., 922.
21 C.J. p 1028 note 66.

16. Ala.—McRee's Adm'rs v. Means, 34 Ala. 349.

17. Ala.—McRee's Adm'rs v. Means, supra.

18. Ala.—McRee's Adm'rs v. Means, supra.

tion of the limitation.[19] It is in contradistinction to the power of disposition of a defeasible fee vested in the first taker.[20] So even where the first estate cannot be reduced to one for life, the remainder over may be good, provided the intention to make the first taker's estate a conditional fee is clear.[21] The rule of construction by which such seemingly contradictory clauses are to be tried is the familiar one that a clear gift will not be cut down or altered by any subsequent words, unless they show an equally clear intent.[22]

(d) Limitation after Life Estate with Power of Disposal

As a general rule a limitation over after a life estate with a power of disposal in the life tenant is valid.

A limitation after a life estate contingent on alienation by the life tenant is valid,[23] and a life estate may be given with the power of disposal or appointment superadded, and an executory limitation in default thereof will be good.[24] However, while the principle here announced is theoretically distinct from that which operates where the whole estate is given to the first taker, the cases turn on the wording of the particular will, and no clear distinction between the two classes seems deducible.[25] Where the first estate is for life in express terms it is held, as a general rule, that a general or absolute power of disposition will not enlarge it into a fee, and a limitation over is effective, although it is only of what remains undisposed of, and this applies to both real and personal property;[26] and where after a life estate there is a limitation over in remainder of the property, "if any there be," these words will not enlarge the life estate if, construing the whole will, any other meaning can be given to them.[27] However, in some jurisdictions it is held that an absolute power of disposal will enlarge the estate of the first taker to a fee, even though it is stated in express terms to be a life estate, and that a limitation over of what remains undisposed of at the death of the first taker is void.[28] The life estate may be implied, where such an intent may be gathered from the whole instrument, and the limitation over will take effect.[29]

(3) Remoteness; Rule against Perpetuities

The rule against perpetuities applies with full force to executory limitations, see the C.J.S. title Perpetuities §§ 13, 15, also 48 C.J. p 956 note 47–p 957 note 57, p 959 note 78–p 960 note 85, p 964 notes 11–12, with the exception of certain executory interests not within the evil against which the rule is directed, as limitations to charities, considered in the C.J.S. title Perpetuities § 20, also 48 C.J. p 973 note 11–p 974 note 16. Also the rule is inapplicable to a limitation over after an estate tail where such limitation is construed as a remainder, see the C.J.S. title Perpetuities § 15, also 48 C.J. p 963 note 10.

Examine Pocket Parts for later cases.

c. Effect of Action of First Taker

In general an executory interest is indestructible. Subject to an exception in the case of executory limitations after an estate tail, the first taker can do nothing to prevent the executory limitation from taking effect on the happening of the contingency, although he may be empowered, under the terms of the particular devise or conveyance, to determine whether the contingency itself will or will not happen.

In general an executory interest is indestructible,[30] exempt from the power of the first taker.[31] Subject to an exception in the case of executory limitations after an estate tail,[32] no act on the part of the person after whose estate an executory in-

19. Ala.—McRee's Adm'rs v. Means, supra.

20. Ala.—McRee's Adm'rs v. Means, supra.

Power to alien defeasible fee not inconsistent

The power of alienation, incident to the vesting of a fee in the first taker, is not inconsistent with the limitation over, for, as the limitation over may take effect in defeasance of the fee, so it may of an estate conveyed under his power of alienation. It may operate not only against the first taker himself, but also against an alienee.—McRee's Adm'rs v. Means, supra.

21. Va.—Randolph v. Wright, 81 Va. 608.
21 C.J. p 1028 note 65.

22. N.Y.—Washbon v. Cope, 39 N.E. 388, 144 N.Y. 287.
21 C.J. p 1029 note 67.

23. Mo.—Grace v. Perry, 95 S.W. 875, 197 Mo. 550, 7 Ann.Cas. 948.

24. Mo.—Grace v. Perry, supra.
21 C.J. p 1029 note 69.

25. Mass.—Kelley v. Meins, 135 Mass. 231.

26. Mo.—Evans v. Folks, 37 S.W. 126, 135 Mo. 397.
21 C.J. p 1029 note 71.

27. N.Y.—Owens v. Owens, 71 N.Y. S. 1108, 64 App.Div. 212.

28. Va.—Davis v. Heppert, 32 S.E. 467, 96 Va. 775.
21 C.J. p 1029 note 73.

29. Mo.—Walton v. Dumtra, 54 S.W. 233, 152 Mo. 489, overruling Cornwell v. Wulff, 50 S.W. 439, 148 Mo. 542, 45 L.R.A. 53.
21 C.J. p 1029 note 74.

30. N.J.—Kent v. Armstrong, 6 N.J. Eq. 637, 647.

Rule construed

"This rule only means that the first taker, as a general rule, cannot create a greater estate than he has; having a defeasible estate he cannot create an indefeasible one; he can do no act to prevent the vesting of the devise on the happening of the contingency, but he may prevent the occurrence."—Kent v. Armstrong, supra.

31. Ala.—McRee's Adm'rs v. Means, 34 Ala. 349.

32. Pa.—Seibert v. Wise, 70 Pa. 147.
21 C.J. p 1029 note 77.

terest is limited on a contingency can so change the nature of the estate as to prevent the executory limitation taking effect on the happening of the contingency;[33] the first taker cannot defeat a limitation over by any species of alienation;[34] nor can he obtain absolute title by adverse possession so as to defeat an executory limitation over.[35] However, this rule should be distinguished from cases where the estate is so limited that it is in the power of the first taker to prevent the contingency happening and thus, in a sense, to defeat the gift over.[36]

d. Effect of Merger

The doctrine of merger or surrender will not operate to extinguish an executory interest.

An executory interest cannot be destroyed by merger[37] or surrender.[38] A fee defeasible and and an executory fee are successive and not concurrent.[39] Where an executory fee descends to the person to whom a prior defeasible fee is limited, the former estate is not merged so as to extinguish the executory interest.[40] However, where a defeasible fee and successive executory limitations, which together constitute the fee simple absolute, are united in one person the various interests merge in such person so as to constitute a fee simple absolute.[41]

e. Effect of Failure of Prior Gift on Gift Over

In general an executory interest limited over after a prior estate will not fail because of failure of the prior estate, unless the conditions which cause the first estate to fail are such as to create the situation under which the subsequent limitation was not to take effect.

In general an executory interest limited over after a prior estate will not fail because of the failure of the prior estate, either ab initio or at any time before it becomes indefeasible in the donee;[42] if the precedent estate never arises or takes effect,[43] whether it be by the death of the first tenant before the estate vests in him or his nonexistence,[44] the subsequent limitation becomes effective, the first estate being considered only as a preceding limitation, and not as a preceding condition to give effect to a subsequent limitation.[45] However, the ulterior limitation will fail on the failure of the precedent estate ab initio if it is so connected with, and dependent on, the primary one that it cannot, consistently with the provisions of the instrument, have effect if the primary one fails ab initio.[46] So if the precedent estate fails under circumstances which, if they had happened after the first interest became effective, would have defeated the subsequent interest,[47] or, if all the events have happened on which the first taker's estate is contingent, so that his estate is absolute and indefeasible, and arises even though he dies in the testator's lifetime,[48] the limitation over fails. Where a limitation over is given for the accomplishment of certain objects in connection with the precedent estate, the failure of the precedent estate under conditions which make impossible the accomplishment of the objects intended will cause the limitation over to fail if it was the consideration and inducement for the accomplishment of the objects intended in connection with the precedent estate.[49]

Failure by death of first taker when gift over void for repugnancy. Where the gift over would be void because a limitation after an absolute gift

33. N.J.—Kent v. Armstrong, 6 N.J.Eq. 637.
34. Ind.—Abernathy v. McCoy, 154 N.E. 682, 91 Ind.App. 574.
Mass.—Nightingale v. Burrell, 15 Pick. 104.
21 C.J. p 1030 note 79.
35. Mo.—First Presbyterian Church of Louisiana v. Lynott, 78 S.W.2d 396.
36. N.J.—Jackson v. Robins, 16 Johns. 537.
21 C.J. p 1027 note 50.
37. Ill.—Fuller v. Black, 131 N.E. 641, 298 Ill. 351.
Ind.—Abernathy v. McCoy, 154 N.E. 682, 91 Ind.App. 574.
38. Ind.—Abernathy v. McCoy, supra.
39. S.C.—Cayce Land Co. v. Guignard, 117 S.E. 644, 124 S.C. 443.
40. S.C.—Cayce Land Co. v. Guignard, 117 S.E. 644, 646, 124 S.C. 443, quoting Cooley Jud—
21 C.J. p 1030 note 81.
41. Ky.—Thurman v. Northwestern Mut. Life Ins. Co., 53 S.W.2d 568, 245 Ky. 281.
By conveyance
Deeds by each of two executory devisees of undivided half interest in land to the other vests absolute ownership of half in each.—McWilliams v. Havely, 283 S.W. 103, 214 Ky. 320.
42. Ill.—Glover v. Condell, 45 N.E. 173, 163 Ill. 566, 35 L.R.A. 360.
N.Y.—In re Miller's Will, 55 N.E. 385, 161 N.Y. 71—McLean v. Freeman, 70 N.Y. 81, affirming 9 Hun 246.
Where an intermediate gift fails by lapse, gifts over take effect.—Glover v. Condell, 45 N.E. 173, 163 Ill. 566, 35 L.R.A. 360.
43. N.J.—Den v. Hance, 11 N.J.Law 244.
N.Y.—In re Miller's Will, 55 N.E. 385, 161 N.Y. 71.
44. Md.—Pennington v. Pennington, 17 A. 329, 70 Md. 418, 3 L.R.A. 816.
S.C.—Mathis v. Hammond, 27 S.C. Eq. 121.
45. N.Y.—Williams v. Jones, 60 N.E. 240, 166 N.Y. 522.
21 C.J. p 1031 note 90.
46. N.Y.—Williams v. Jones, supra.
47. S.C.—Mathis v. Hammond, 27 S.C.Eq. 121.
48. S.C.—Mathis v. Hammond, supra.
49. N.C.—Burleyson v. Whitley, 2 S.E. 450, 97 N.C. 295.
Support of holder of precedent estate
A limitation over as the consideration and inducement for services in making the precedent estate productive during the life of the holder so as to insure the providing of a comfortable income for such holder will fail where the precedent estate fails before its vesting due to the death of the holder.—Burleyson v. Whitley, supra.

on not making a particular disposition of the property, if the first taker dies in testator's lifetime, it has been held that the gift over takes effect.[50]

Alternative limitation. If an estate, legal or equitable, is given by deed or will to a person in the first instance and then over to another person on alternative contingencies, either one of which, if it occurs, will, under the terms of the instrument, exclude the existence of the other, and is not merely a limitation over on one double contingency or on the happening of two events which the testator or grantor has not separated, the validity of the limitation over depends on the event, if under one contingency it will be void for remoteness and under the other it will not; or, in other words, if the limitation over is on one contingency which must happen, if at all, within the limit of the rule against perpetuities, and that contingency does happen, the limitation over is valid, even though on a different contingency it would have been void for remoteness.[51]

Acceleration. Where the preceding estate fails, if the instrument creating the estate designates some future time for the vesting of the limitation over such direction will be followed.[52]

f. Effect of Failure of Gift Over on Prior Gift

The failure of a limitation over because the contingency on which it is to arise is illegal or impossible will ordinarily cause the precedent defeasible fee to become absolute.

Where a fee or absolute interest is liable to be defeated on a contingency on which a gift over is to take effect, the general rule is that if the contingency is illegal or becomes impossible, so that the gift over can never arise, the prior interest becomes absolute and indefeasible, the intent being that the prior interest is to be defeated only for the benefit of the ulterior interest.[53]

Where the gift over is void for remoteness the prior estate is absolute.[54]

g. Taking Effect of Prior Executory Interest

In a series of limitations all limitations subsequent to an executory limitation are executory, and when an executory limitation vests in possession all consecutive limitations capable of taking effect as remainders are changed into remainders; but a limitation which cannot be supported as a remainder and all those following it continue as executory limitations.

Where, in a series of limitations, one is an executory limitation, all subsequent limitations are likewise executory, and when the first limitation vests in possession the whole series of subsequent limitations are changed into remainders provided they are capable of taking effect as remainders.[55] However, if the limitation immediately after the executory limitation which has vested is not so connected with it as to be supported by it as a remainder, but can be valid as an executory devise, its nature and that of the limitation following it are not changed.[56]

h. Devolution and Alienation

In general, sometimes by force of statute, executory interests are alienable, devisable, and inheritable. The holder of the precedent estate may alienate his interest.

Executory interests, so far as concerns their alienation or transmission, are governed by the same rules as contingent remainders.[57] In equity such interests are assignable.[58] At law such interests were at first considered to be nothing more than possibilities and therefore not assignable,[59] but under the view, which soon came to be held, that they constitute possibilities coupled with an interest, see supra § 122 a, it is held that such an interest is alienable,[60] and as such assignable,[61] capable of conveyance by deed, see Deeds § 15 b, may be the subject of a mortgage, see the C.J.S. title Mortgages § 75, also 41 Corpus Juris p 374 notes 63–64, and may be released,[62] or the person entitled estopped by his warranty deed.[63] It is likewise held that such interests are devisable, see the C.J.S. title Wills § 85, also 68 C.J. p 498 note 89–p 499 note 97, and transmissible by descent, see Descent and Distribu-

50. Mass.—Burbank v. Whitney, 24 Pick. 146, 35 Am.D. 312.
N.H.—Eaton v. Straw, 18 N.H. 320.
51. Mass.—Jackson v. Phillips, 14 Allen 539.
21 C.J. p 1031 note 98.
52. Ill.—Blatchford v. Newberry, 99 Ill. 11.
53. Or.—Shadden v. Hembree, 18 P. 572, 17 Or. 14.
21 C.J. p 1032 note 2.
54. Ill.—Post v. Rohrback, 32 N.E. 687, 142 Ill. 600.
21 C.J. p 1032 note 5.
55. N.Y.—Lion v. Burtiss, 20 Johns. 483.
56. N.Y.—Vedder v. Evertson, 3 Paige 281.
57. Conn.—Bartram v. Powell, 89 A. 885, 88 Conn. 86.
Va.—Medley v. Medley, 81 Va. 265.
58. N.Y.—Nicoll v. New York & E. R. Co., 12 N.Y. 121.
N.C.—Watson v. Smith, 14 S.E. 640, 110 N.C. 6, 28 Am.S.R. 665.
21 C.J. p 1032 note 11.
59. N.C.—Watson v. Smith, supra.
60. Ky.—McWilliams v. Havely, 283 S.W. 103, 214 Ky. 320.
Miss.—Alexander v. Richardson, 64 So. 217, 106 Miss. 517.
Va.—Medley v. Medley, 81 Va. 265.
Transferability of executory devises see the C.J.S. title Wills § 1117, also 69 C.J. p 1283 note 67–p 1284 note 73.
61. N.Y.—Stover v. Eycleshimer, 46 Barb. 84.
5 C.J. p 854 note 48.
62. N.C.—Cheek v. Walker, 50 S.E. 863, 138 N.C. 446.
Vt.—Bean v. Atkins, 89 A. 643, 87 Vt. 376.
21 C.J. p 1032 note 16.
63. N.C.—Wright v. Brown, 22 S.E. 313, 116 N.C. 26.
21 C.J. p 1033 note 17.

tion § 18. In a number of jurisdictions by force of express statutory provisions such interests are alienable, devisable, and inheritable.[64] The preceding principles do not apply, however, where the object of the limitation over is not ascertained nor ascertainable until the contingency happens, for then the executory devise is a possibility not coupled with an interest, and it cannot be either devised or aliened.[65] Executory limitations which are so worded as to convey no interest unless the executory devisee survives the happening of the contingency have been held to carry no interest either devisable, descendible, or alienable, prior to the contingency happening.[66]

Judicial sale. Where any members of a class to which an executory devise is limited are in esse, the court may, on a proper case being made, order a sale of the land devised; the rule is otherwise where no such members are in esse.[67] A partition sale will not be decreed where it appears that the title to the land is subject to be divested out of petitioners by the terms of an executory devise.[68]

Precedent estate. The holder of a defeasible fee which is subject to an executory limitation over on the happening of a condition subsequent may alienate his interest, which is, of course, subject to a defeasance on the happening of the event on which the executory interest is limited.[69]

VIII. MERGER OF ESTATES

§ 123. In General

a. In general
b. Statement of doctrine

a. In General

The doctrine of merger originated from the principles of feudal tenures, and relates only to estates in land.

In strict technical meaning, the doctrine of merger of estates appears to have been derived from the principles applicable to feudal tenures, and hence to have relation only to estates in land.[70] So it is said that the doctrine applies to estates in land into which the original estate in fee simple may have been divided, and not to different divisions of a tract of land, whether these divisions are horizontal or vertical.[71] The doctrine is founded on the maxim, Nemo potest esse tenens et dominus,[72] although it has been said to be an application of the equity maxim that equity, in viewing the transaction of men, and in determining the rights and liabilities arising therefrom, looks to the real intent of the parties as constituting the essential substance, and not at the mere external form.[73]

b. Statement of Doctrine

The doctrine of merger of estates is that whenever a greater and a less estate meet in the same person without an intermediate estate the less is immediately annihilated.

The Corpus Juris statement of the doctrine of merger of estates, which has been quoted by the courts, is that whenever a greater and a less estate coincide and meet in one and the same person, without any intermediate estate, the less is immediately annihilated; or in the law phrase it is said to be merged, that is, sunk or drowned in the greater.[74] The merger is produced either from the

64. Ky.—Thurman v. Northwestern Mut. Life Ins. Co., 53 S.W.2d 568, 245 Ky. 281—McWilliams v. Havely, 283 S.W. 103, 214 Ky. 320.
N.Y.—Nicoll v. New York & E. R. Co., 12 N.Y. 121.
21 C.J. p 1033 note 20.

65. N.Y.—Stover v. Eycleshimer, 46 Barb. 84.

66. Conn.—Bristol v. Atwater, 50 Conn. 402.
21 C.J. p 1033 note 19.

67. N.C.—In re Dodd, 62 N.C. 97—Houston v. Houston, 62 N.C. 95.

68. N.C.—McKay v. McNeill, 59 N.C. 258.

69. N.Y.—In re Vosburgh's Estate, 255 N.Y.S. 393, 142 Misc. 676.

70. Md.—Johnson v. Hines, 61 Md. 122.
Applicability to personalty see infra § 143.

71. Tex.—Humphreys-Mexia Co. v. Gammon, 254 S.W. 296, 113 Tex. 247, 29 A.L.R. 607, modifying Gammon v. Humphreys-Mexia Oil Co., Civ.App., 244 S.W. 162.

72. Md.—Johnson v. Hines, 61 Md. 122.

73. Tenn.—Browning v. Browning, 132 S.W.2d 359, 23 Tenn.App. 333.
21 C.J. p 1034 note 36 [a].
Doctrine of equitable nature
Ill.—Kessler v. Aller, 5 N.E.2d 761, 287 Ill.App. 606.

74. U.S.—Toston v. Utah Mortg. Loan Corporation, C.C.A.Idaho, 115 F.2d 560, 562, quoting Corpus Juris.
Fla.—Alderman v. Whidden, 195 So. 605, 142 Fla. 647—Walter J. Dolan Properties v. Vonnegut, 184 So. 757, 133 Fla. 854—Tankersley v. Davis, 175 So. 501, 128 Fla. 507—Blocker v. Blocker, 137 So. 249, 103 Fla. 285.
Ga.—Seaboard Air-Line Ry. Co. v. Holliday, 140 S.E. 507, 509, 165 Ga. 200, citing Corpus Juris.
Ill.—Hooper v. Goldstein, 168 N.E. 1, 336 Ill. 125, certiorari denied 50 S.Ct. 239, 281 U.S. 724, 74 L.Ed. 1141—Forthman v. Deters, 69 N.E. 97, 206 Ill. 159, 99 Am.S.R. 145.
Ind.—Mugg v. Fenn, 153 N.E. 776, 198 Ind. 372—Abernathy v. McCoy, 154 N.E. 682, 91 Ind.App. 574.
Iowa.—Strong v. Garrett, 57 N.W. 715, 90 Iowa 100.
Kan.—Rand v. Ft. Scott, W. & W. R. Co., 31 P. 683, 50 Kan. 114.
Ky.—Fox v. Long, 8 Bush 551.
Md.—Wehrhane v. Safe Deposit & Trust Co., 42 A. 930, 89 Md. 179—Johnson v. Hines, 61 Md. 122.
Minn.—Bagley v. McCarthy Bros. Co., 104 N.W. 7, 95 Minn. 286.
Miss.—Hamilton v. City of Jackson, 127 So. 302, 157 Miss. 284.
Mo.—Willis v. Robinson, 237 S.W. 1030, 291 Mo. 650—Hayden v. Brock, 57 S.W. 723, 157 Mo. 88—

meeting of an estate of higher degree with an estate of inferior degree, or from the meeting of the particular estate and the immediate reversion in the same person.[75] A greater estate can never be merged into a smaller, and if either perishes by the merger it must be the smaller estate.[76] A portion of a particular estate may be merged without the residue, the merger being co-extensive with the interest merged and extending only to the part in which the owner has two several estates.[77] The estate in which the merger takes place is not enlarged by the accession of the preceding estate; it continues precisely of the same quantity and extent of ownership as before, and the lesser estate is extin-

Reed v. Inness, App., 102 S.W.2d 711—Henry G Taussig Co. v. Poindexter, 30 S.W.2d 635, 224 Mo.App. 580—Rowse v. Johnson, 66 Mo App. 57.

Mont.—Dilts v. Brooks, 213 P. 600, 66 Mont. 346.

Neb.—Anderson v. Lincoln Joint Stock Land Bank, 267 N.W. 355, 131 Neb. 150—American Savings & Loan Ass'n v. Barry, 243 N.W. 628, 630, 123 Neb. 523, quoting **Corpus Juris**—Edney v. Jensen, 216 N.W. 812, 116 Neb. 242—Citizens' State Bank of Ralston v. Petersen, 210 N.W. 278, 279, 114 Neb. 809, citing **Corpus Juris**—McLaughlin v. Nelson, 202 N.W. 871, 113 Neb. 308—Mathews v. Jones, 66 N.W. 622, 47 Neb. 616—Miller v. Finn, 1 Neb. 254.

N.J.—Pedrick v. Guarantee Trust Co., 197 A. 909, 123 N.J.Eq. 395.

N.Y.—Clark v. Rowell, 298 N.Y.S. 232, 163 Misc. 777—Delaware Nat. Bank of Delhi, N. Y. v. Wiss, 284 N.Y.S. 615, 158 Misc. 276—Wilkinson v. Medbury, 228 N.Y.S. 666, 132 Misc. 58—Dudley v. People's Trust Co., 107 N.Y.S. 930, 57 Misc. 230—Citizens' Permanent Savings & Loan Ass'n v. Rampe, 116 N.Y.S. 597, affirmed 123 N.Y.S. 1110, 139 App.Div. 927.

N.C.—Citizens Bank & Trust Co. v. Watkins, 1 S.E.2d 853, 215 N.C. 292.

N.D.—Rouse v. Zimmerman, 212 N. W. 515, 55 N.D. 94.

Ohio.—Conklin v. Tyler, 13 Ohio N. P., N.S., 441, modified on other grounds 20 Ohio Cir.Ct., N.S., 133, 31 Ohio Cir.Dec. 167.

Okl.—Coline Oil Co. v. Cannon, 289 P. 763, 144 Okl. 133.

Or.—Watson v. Dundee Mortg. & Trust Co., 8 P. 548, 12 Or. 474.

Pa.—H. C. Frick Coal Co. v. Laughead, 52 A. 172, 203 Pa. 168.

S.C.—Mangum v. Piester, 16 S.C. 316.

Tex.—Hampton v. King, Civ.App., 87 S.W.2d 319, reversed on other grounds King v. Hampton, 113 S. W.2d 173, 131 Tex. 85—Cole v. Grigsby, Civ.App., 35 S.W. 680, affirmed 35 S.W. 792, 89 Tex. 223—Henningsmeyer v. First State Bank of Conroe, Civ.App., 192 S. W. 286, petition granted 195 S.W. 1137, rehearing denied 201 S.W. 652, 109 Tex. 116—Kilgore v. Graves' Heirs, Tex.A.Civ.Cas. § 409.

Va.—Garland v. Pamplin, 32 Gratt. 305, 73 Va. 305.

Wash.—Tolsma v. Adair, 73 P. 347, 32 Wash. 383.

W.Va.—Buskirk v. Musick, 130 S.E. 435, 100 W.Va. 247.

Wis.—Carisch v. Lund, 218 N.W. 826, 195 Wis. 488.

21 C.J. p 1033 note 24.

Other statements

(1) The absorption of one estate in another, resulting when greater estate and less meet at same time in same person, without intervening estate.

N.C.—Citizens Bank & Trust Co. v. Watkins, 1 S.E.2d 853, 857, 215 N. C. 292.

Tex.—McCanless v. Davenport, Civ. App., 40 S.W.2d 903, 907.

(2) When two estates, either related inter se as derivative and original, or else being both derived out of the same original, and both being held in the same right, meet together in the same person; the posterior estate, first, being greater, or, at least, not less, in quantum than the prior estate, and second, following immediately after it in the order of succession, without the intervention of any intermediate vested estate.—City Savings Bank & Trust Co. of Vicksburg v. Cortright, 84 So. 136, 138, 122 Miss. 75, quoting Challis Real Prop. 3d ed p 86.

(3) Further statements see 21 C.J. p 1033 note 24 [a].

Statutory statement

"If two estates in the same property unite in the same person in his individual capacity, the less estate [being] merged in the greater."—Landrum v. Carey, 194 S.E. 362, 363, 185 Ga. 76—Seaboard Air-Line Ry. Co. v. Holliday, 140 S.E. 507, 509, 165 Ga. 200—Pitts Banking Co. v. Fenn, 129 S.E. 105, 106, 160 Ga. 854—Luquire v. Lee, 49 S.E. 834, 838, 121 Ga. 624—Edmonds v. Beatie, 8 S.E.2d 559, 560, 62 Ga.App. 246.

Merger of:

- Estate jure uxoris see Curtesy § 1 b.
- Executory interests see supra § 122.
- Ground rent see the C.J.S. title Ground Rents § 9, also 28 C.J. p 853 note 91—p 854 note 9.
- Homestead estate see the C.J.S. title Homesteads § 277, also 29 C.J. p 1028 notes 11, 12.
- Legal and equitable estates in cestui que trust under statute of uses and similar statutes see the C.J.S. title Trusts § 176, also 65 C.J. p 519 notes 34–38.
- Mortgages:
  - Assignment or transfer of mortgage or debt see the C.J.S. title Mortgages § 367, also 41 C.J. p 688 note 42—p 689 note 56.
  - Registered lands see the C.J.S. title Registration of Land Titles § 40, also 53 C.J. p 1147 note 47.
  - Sale or conveyance of equity of redemption to mortgagee see the C.J.S. title Mortgages §§ 437–442, also 41 C.J. p 775 note 79—p 783 note 86.
- Negotiations for lease and agreements see the C.J.S. title Landlord & Tenant § 232, also 35 C.J. p 1183 notes 28–32.
- Oral agreement for renewal of lease see the C.J.S. title Landlord & Tenant § 68, also 35 C.J. p 1025 note 9.
- Tax sale title see the C.J.S. title Taxation § 905, also 61 C.J. p 1303 note 88 [i].

Termination of:

- Annuity see Annuities § 3 c.
- Easement see Easements § 57.
- Estate for years see the C.J.S. title Landlord & Tenant § 94, also 35 C.J. p 1056 note 59—p 1057 note 74.
- Remainder:
  - In general see supra § 93.
  - Remainders created by will see the C.J.S. title Wills § 945, also 69 C.J. p 656 note 74—p 657 note 79.
- Reversion see supra § 110.
- Trust estate see the C.J.S. title Trusts § 203, also 65 C.J. p 567 note 58—p 569 note 79.

75. Tex.—West v. McCelvey Loan & Investment Co., Civ.App., 229 S.W. 913, error refused.
21 C.J. p 1033 note 25.

76. Ark.—Commonwealth Building & Loan Ass'n v. Martin, 49 S.W.2d 1046, 185 Ark. 858.
Iowa.—Strong v. Garrett, 57 N.W. 715, 90 Iowa 100.
21 C.J. p 1033 note 26.

77. N.H.—Clark v. Parsons, 39 A. 898, 69 N.H. 147, 76 Am.S.R. 157.
21 C.J. p 1034 note 27.

guished.[78] A merger will not be allowed where several interests are limited by the same instrument, or take effect in the same instance of time, and, in some degree, by the same act, and some other person is concerned in the consequence of the merger, and the merger, if taking place, would either alter the quality of one of two estates in the same person, or destroy a remainder intended for another person.[79]

§ 124. Application of Rule at Law and in Equity

While merger of estates is not favored at law or in equity, the doctrine is inflexible at law, but in equity its application rests on principles of justice and the intention of the parties. The controlling principle is the intention of the persons in whom the estates unite.

It is often stated that merger of estates is not favored either in courts of law[80] or in courts of equity.[81] Indeed, in some jurisdictions the doctrine has been expressly abolished.[82] At law, the rule that whenever a greater estate and a less coincide in the same person without any intermediate estate the lesser is merged is invariable and inflexible,[83] and takes effect in some instances, at least, without regard to the question of intention; but this has been questioned,[84] and the tendency of at least some of the courts is to admit and apply the same

78. Ind.—Abernathy v. McCoy, 154 N.E. 682, 91 Ind.App. 574.
Md.—Johnson v. Hines, 61 Md. 122.

79. Ind.—Abernathy v. McCoy, 154 N.E. 682, 91 Ind.App. 574.

80. Ark.—Bemis v. First Nat. Bank, 40 S.W. 127, 63 Ark. 625.
Iowa.—Williams v. Williams, 202 N.W. 434, 200 Iowa 398, rehearing denied and opinion amended on other ground 204 N.W. 156.
Kan.—Rand v. Ft. Scott, W. & W. R. Co., 31 P. 683, 50 Kan. 114.
Me.—Simonton v. Gray, 34 Me. 50.
Mo.—Bassett v. O'Brien, 51 S.W. 107, 149 Mo. 381—Morgan v. York, App., 91 S.W.2d 244.
Neb.—Mathews v. Jones, 66 N.W. 622, 47 Neb. 616—Miller v. Finn, 1 Neb. 254.
N.M.—Citizens' Nat. Bank of Albuquerque v. First Nat. Bank, 222 P. 935, 29 N.M. 273.
N.Y.—James v. Morey, 2 Cow. 246, 14 Am.D. 475.
S.C.—McCreary v. Coggeshall, 53 S.E. 978, 74 S.C. 42, 7 L.R.A.,N.S., 433, 7 Ann.Cas. 693.

81. Ark.—Bemis v. First Nat. Bank, 40 S.W. 127, 63 Ark. 625.
Ill.—Winters v. Polin, 33 N.E.2d 497, 309 Ill.App. 458.
Iowa.—O'Brien v. Gerbracht, 195 N.W. 731, 196 Iowa 990.
Kan.—Rand v. Ft. Scott, W. & W. R. Co., 31 P. 683, 50 Kan. 114.
Me.—Simonton v. Gray, 34 Me. 50.
Mo.—Bassett v. O'Brien, 51 S.W. 107, 149 Mo. 381—Peters v. Kirkwood Federal Savings & Loan Ass'n, App., 136 S.W.2d 369, transferred, see 130 S.W.2d 507, 344 Mo. 1067—Morgan v. York, App., 91 S.W.2d 244.
Neb.—American Savings & Loan Ass'n v. Barry, 243 N.W. 628, 630, 123 Neb. 523, quoting Corpus Juris—Mathews v. Jones, 66 N.W. 622, 47 Neb. 616—Miller v. Finn, 1 Neb. 254.
N.M.—Citizens' Nat. Bank of Albuquerque v. First Nat. Bank, 222 P. 935, 29 N.M. 273.
N.Y.—Dunkum v. Maceck Bldg. Corporation, 176 N.E. 392, 256 N.Y. 275, affirming 237 N.Y.S. 180, 227 App.Div. 230—Thorburn v. Wende, 257 N.Y.S. 186, 235 App.Div. 424, modifying 255 N.Y.S. 979, 235 App. Div. 757, affirming Wende v. Wende, 251 N.Y.S. 773, 141 Misc. 52—In re Grieco's Estate, 15 N.Y.S.2d 962, 172 Misc. 723—Clark v. Rowell, 298 N.Y.S. 232, 163 Misc. 777—Delaware Nat. Bank of Delhi, N. Y., v. Wiss, 284 N.Y.S. 615, 158 Misc. 276—James v. Morey, 2 Cow. 246, 14 Am.D. 475.
N.D.—Rouse v. Zimmerman, 212 N. W. 515, 55 N.D. 94.
S.C.—McCreary v. Coggeshall, 53 S. E. 978, 74 S.C. 42, 7 L.R.A.,N.S., 433, 7 Ann.Cas. 693.
Tenn.—Browning v. Browning, 132 S. W.2d 359, 361, 23 Tenn.App. 338, quoting Corpus Juris.
Tex.—Caprito v. Grigham-Hunter Corporation, Civ.App., 128 S.W.2d 149, error dismissed, judgment correct—Huselby v. Allison, Civ.App., 25 S.W.2d 1108—Ferguson v. Ragland, Civ.App., 243 S.W. 721—Henningsmeyer v. First State Bank of Conroe, Civ.App., 192 S.W. 286, petition granted 195 S.W. 1137, 109 Tex. 116, rehearing denied 201 S. W. 652, 109 Tex. 116—Cole v. Grigsby, Civ.App., 35 S.W. 680, affirmed 35 S.W. 792, 89 Tex. 223—Kilgore v. Graves' Heirs, Tex.A. Civ.Cas. § 409.
Va.—Garland v. Pamplin, 32 Gratt. 305, 73 Va. 305.
21 C.J. p 1034 note 35.

Mergers are odious in equity.—Gibson v. Crehore, 3 Pick., Mass., 475.

Unless for special reasons and to promote the intention of the parties, merger in equity is never allowed.
Md.—Wehrhane v. Safe Deposit & Trust Co., 42 A. 930, 89 Md. 179.
Mo.—Peters v. Kirkwood Federal Savings & Loan Ass'n, App., 136 S.W.2d 369, transferred, see 130 S. W.2d 507, 344 Mo. 1067.
Neb.—Mathews v. Jones, 66 N.W. 622, 47 Neb. 616.
Va.—Garland v. Pamplin, 32 Gratt. 305, 73 Va. 305.
21 C.J. p 1034 note 35 [a].

82. Iowa.—Williams v. Williams, 202 N.W. 434, 200 Iowa 398, rehearing denied and opinion amended on other grounds 204 N.W. 156.

83. Cal.—Jensen v. Burton, 3 P.2d 324, 117 Cal.App. 66.
Colo.—Goldblatt v. Cannon, 37 P.2d 524, 95 Colo. 419.
Mass.—Eaton v. Simonds, 14 Pick. 98.
Minn.—Bagley v. McCarthy Bros. Co., 104 N.W. 7, 95 Minn. 286.
Mo.—Curry v. Lafon, 113 S.W. 246, 133 Mo.App. 163.
Mont.—Dilts v. Brooks, 213 P. 600, 66 Mont. 346.
Neb.—McLaughlin v. Nelson, 202 N. W. 871, 113 Neb. 303—Henry & Coatsworth Co. v. Bond, 55 N.W. 643, 37 Neb. 207.
N.Y.—Dunkum v. Maceck Bldg. Corporation, 176 N.E. 392, 256 N.Y. 275, affirming 237 N.Y.S. 180, 227 App.Div. 230—Thorburn v. Wende, 257 N.Y.S. 186, 235 App.Div. 424, modifying 255 N.Y.S. 979, 235 App. Div. 757, affirming Wende v. Wende, 251 N.Y.S. 773, 141 Misc. 52.
Or.—Hawkins & Roberts v. Jerman, 35 P.2d 248, 147 Or. 657.
Tex.—York v. Robbins, Civ.App., 240 S.W. 603, reversed on other grounds, Com.App., 255 S.W. 720.
Utah.—Chausse v. Bank of Garland, 268 P. 781, 783, 71 Utah 586, citing Corpus Juris.
21 C.J. p 1034 note 30.

Charge merged
At law, a man cannot be his own creditor or debtor; hence, when he acquires an estate subject to a charge in his own favor, the charge will, in law, merge in the estate.—Hurst v. Spotts, 144 A. 91, 204 Pa. 221—Van Orner's Est., 25 Pa.Super. 234.

84. S.C.—McCreary v. Coggeshall, 53 S.E. 978, 74 S.C. 42, 7 L.R.A., N.S., 433, 7 Ann.Cas. 693.

principle in both law and equity.[85] However, generally in equity the rules of law as to merger are not followed.[86] Equity will prevent or permit a merger as will best subserve the purposes of justice and the actual and just intent of the parties,[87] whether expressed or implied.[88] The doctrine of merger has its foundation in the convenience of the parties interested, and therefore whenever the rights of strangers, not parties to the act, that would otherwise work an extinguishment of the particular estate, require it, the two estates will still be considered as having a separate continuance.[89] Wherever a merger would operate inequitably it will be prevented.[90]

85. S.C.—McCreary v. Coggeshall, supra.
21 C.J. p 1034 note 33.

86. Cal.—Jensen v. Burton, 3 P.2d 324, 117 Cal App. 66.
Mass.—Eaton v. Simonds, 14 Pick. 98.
Neb.—American Savings & Loan Ass'n v. Barry, 243 N.W. 628, 630, 123 Neb. 523, quoting **Corpus Juris**—Citizens' State Bank of Ralston v. Petersen, 210 N.W. 278, 279, 114 Neb. 809, citing **Corpus Juris**—Henry & Coatsworth Co. v. Bond, 55 N.W. 643, 37 Neb. 207.
N.Y.—Thorburn v. Wende, 257 N.Y.S. 186, 235 App.Div 424, modifying 255 N.Y.S. 979, 235 App.Div. 757, affirming Wende v. Wende, 251 N.Y.S 773, 141 Misc. 52—Clark v. Rowell, 298 N.Y.S. 232, 163 Misc. 777—Delaware Nat. Bank of Delhi, N. Y. v. Wiss, 284 N.Y.S. 615, 158 Misc. 276.
Tenn.—Browning v. Browning, 132 S.W.2d 359, 361, 23 Tenn.App. 338, quoting **Corpus Juris.**
Tex.—York v. Robbins, Civ.App., 240 S.W. 603, reversed on other grounds, Com.App., 255 S.W. 720.
21 C.J. p 1034 note 34.

"Notwithstanding the tendency of the courts to apply the same rule at law as in equity, and of law-making bodies to abolish the common-law distinction by statute, a merger will be held to have resulted at law when it would not be given that effect in equity."—O'Brien v. Gerbracht, 195 N.W. 731, 732, 196 Iowa 990.

87. U.S.—Fidelity-Philadelphia Trust Co. v. Hale & Kilburn Corporation, D.C.Pa., 24 F.Supp. 3—In re May, D.C.Ky., 10 F.Supp. 829.
Ark.—Commonwealth Building & Loan Ass'n v. Martin, 49 S.W.2d 1046, 185 Ark. 858.
Ill.—Winters v. Polin, 33 N.E.2d 497, 309 Ill.App. 458.
Iowa.—Freier v. Longnecker, Penn Mut. Life Ins. Co., Intervenor, 288 N.W. 444, 227 Iowa 366—Hanby v. Snyder, 237 N.W. 339, 212 Iowa 845.
Kan.—Rand v. Ft. Scott, W. & W. R. Co., 31 P. 683, 50 Kan. 114.
Mass.—Eaton v. Simonds, 14 Pick. 98.
Minn.—Bagley v. McCarthy Bros. Co., 104 N.W. 7, 95 Minn. 286.
Mo.—Phillips v. Jackson, 144 S.W. 112, 240 Mo. 310.
Mont.—Dilts v. Brooks, 213 P. 600, 66 Mont. 346.
Neb.—Anderson v. Lincoln Joint Stock Land Bank, 267 N.W. 355, 131 Neb. 150—American Savings & Loan Ass'n v. Barry, 243 N.W. 628, 630, 123 Neb. 523, quoting **Corpus Juris**—Henry & Coatsworth Co. v. Bond, 55 N.W. 643, 37 Neb. 207.
N.Y.—Dunkum v. Maceck Bldg. Corporation, 176 N.E. 392, 256 N.Y. 275, affirming 237 N.Y.S. 180, 227 App.Div. 230—In re 43d Avenue, Borough of Queens, City of New York, 10 N.Y.S.2d 351, 256 App. Div. 982, reargument denied 12 N. Y S.2d 356, 256 App.Div. 1100, affirmed 24 N.E.2d 841, 282 N.Y. 42—Thorburn v. Wende, 257 N.Y.S. 186, 235 App.Div. 424, modifying 255 N.Y.S. 979, 235 App.Div. 757, affirming Wende v. Wende, 251 N. Y.S. 773, 141 Misc. 52—In re Grieco's Estate, 15 N.Y.S 2d 962, 172 Misc. 723—Clark v. Rowell, 298 N. Y.S. 232, 163 Misc. 777—Delaware Nat. Bank of Delhi, N. Y. v. Wiss, 284 N.Y.S. 615, 158 Misc. 276.
N.D.—Ingstad v. Farmers' State Bank of Mandan, 237 N.W. 704, 61 N.D. 194—Rouse v. Zimmerman, 212 N.W. 515, 55 N.D. 94.
Okl.—Coline Oil Co. v. Cannon, 289 P. 763, 144 Okl. 133.
Pa.—Banks v. Jackson, 51 Dauph. Co. 176.
Tenn.—Browning v. Browning, 132 S.W.2d 359, 361, 23 Tenn.App. 338, quoting **Corpus Juris.**
Tex.—Baylor University v. Chester Sav.Bank, Civ.App., 82 S.W.2d 738, error refused—Ferguson v. Ragland, Civ.App., 243 S.W. 721—West v. McCelvey Loan & Investment Co., Civ.App., 229 S.W. 913, error refused—Henningsmeyer v. First State Bank of Conroe, Civ.App., 192 S.W. 286, petition granted 195 S.W. 1137, 109 Tex. 116, rehearing denied 201 S.W. 652, 109 Tex. 116—Kilgore v. Graves' Heirs, Tex. A.Civ.Cas. § 409.
Wis.—Milwaukee Loan & Finance Co. v. Grundt, 242 N.W. 131, 207 Wis. 506.
21 C.J. p 1034 note 36.

Equity will intervene to prevent merger of separate estates held in single ownership, only where some right or just advantage would be lost to owner of two estates if lesser were merged in greater estate.—Wilson v. McLaughlin, 67 P.2d 710, 20 Cal App.2d 608.

Charge

(1) Equity will prevent merger, where owner of fee becomes owner of charge, when necessary to carry out parties' intention.—Hurst v. Spotts, 144 A. 91, 294 Pa. 221.

(2) Court of equity may hold charge against estate for owner's benefit extinguished, although subsisting at law, or preserve it when merged at law.—Waldron v. Wahl, 133 A. 252, 286 Pa. 237.

88. Fla.—Polk Bond & Mortgage Co. v. Dwiggins, 147 So. 855, 109 Fla. 443.
Mont.—Dilts v. Brooks, 213 P. 600, 66 Mont. 346.
Neb.—American Savings & Loan Ass'n v. Barry, 243 N.W. 628, 630, 123 Neb. 523, quoting **Corpus Juris.**
N.D.—Rouse v. Zimmerman, 212 N. W. 515, 55 N.D. 94.
Tenn.—Browning v. Browning, 132 S.W.2d 359, 361, 23 Tenn.App. 338, quoting **Corpus Juris.**
21 C.J. p 1034 note 37.

89. Ky.—Watson v. Trimble, 87 S. W.2d 359, 261 Ky. 253.
Mo.—Evans v. Rankin, 44 S.W.2d 644, 649, 329 Mo. 411, citing **Corpus Juris.**
N.Y.—Clark v. Rowell, 298 N.Y.S. 232, 163 Misc. 777—Delaware Nat. Bank of Delhi, N. Y. v. Wiss, 284 N.Y.S. 615, 158 Misc. 276.
Tenn.—Browning v. Browning, 132 S.W.2d 359, 361, 23 Tenn.App. 338, quoting **Corpus Juris.**
21 C.J. p 1035 note 38.

90. Miss.—City Savings Bank & Trust Co. of Vicksburg v. Cortright, 84 So. 136, 122 Miss. 75.
N.Y.—Dunkum v. Maceck Bldg. Corporation, 176 N.E. 392, 256 N.Y. 275, affirming 237 N.Y.S. 180, 227 App.Div. 230—In re 43d Avenue, Borough of Queens, City of New York, 10 N.Y.S.2d 351, 256 App.Div. 982, reargument denied 12 N.Y.S. 2d 356, 256 App.Div. 1100, affirmed 24 N.E.2d 841, 282 N.Y. 42.
Pa.—Waldron v. Wahl, 133 A. 252, 255, 286 Pa. 237, citing **Corpus Juris.**
Tenn.—Browning v. Browning, 132 S.W.2d 359, 361, 23 Tenn.App. 338 quoting **Corpus Juris.**
Wis.—Nixon v. Nixon, 199 N.W. 50, 184 Wis. 200.
21 C.J. p 1035 note 39.

Merger does not always follow the union of a greater and lesser estate in the same ownership.[91] The controlling consideration is the intention, expressed or implied, of the person in whom the estates unite,[92] provided the intention is just and fair,[93] and a merger will not be permitted contrary to such intent.[94] Where there is no expression of intention, it will be sought for in all the circumstances.

91. Cal.—Ito v. Schiller, 3 P.2d 1, 213 Cal. 632.
Fla.—Walter J. Dolan Properties v. Vonnegut, 184 So. 757, 133 Fla. 854.
Ill.—Hooper v. Goldstein, 168 N.E. 1, 336 Ill. 125, certiorari denied 50 S.Ct. 239, 281 U.S. 724, 74 L.Ed. 1141.
Neb.—Anderson v. Lincoln Joint Stock Land Bank, 267 N.W. 355, 131 Neb. 150.

92. Cal.—Ito v. Schiller, 3 P.2d 1, 213 Cal. 632—Jensen v. Burton, 3 P.2d 324, 117 Cal.App. 66.
Colo.—Goldblatt v. Gannon, 37 P.2d 524, 95 Colo. 419.
Fla.—Walter J. Dolan Properties v. Vonnegut, 184 So. 757, 133 Fla. 854.
Ga.—Knowles v. Lawton, 18 Ga. 476, 63 Am.D. 290.
Ill.—Hooper v. Goldstein, 168 N.E. 1, 336 Ill. 125, certiorari denied 50 S.Ct. 239, 281 U.S. 724, 74 L.Ed. 1141—Forthman v. Deters, 69 N.E. 97, 206 Ill. 159, 99 Am.S.R. 145—Chicago Title & Trust Co. v. Kesner, 16 N.E.2d 175, 296 Ill.App. 187.
Iowa.—Schick v. Davenport Realty Co., 205 N.W. 782, 200 Iowa 997.
Kan.—Zuege v. Nebraska Mortgage Co., 140 P. 855, 92 Kan. 272, 52 L.R.A.,N.S., 877, Ann.Cas.1916B 865—Rand v. Ft. Scott, W. & W. R. Co., 31 P. 683, 50 Kan. 114.
Md.—Johnson v. Hines, 61 Md. 122.
Mich.—Shedd v. Krushinski, 298 N.W. 490, 298 Mich. 160.
Neb.—Citizens' State Bank of Ralston v. Petersen, 210 N.W. 278, 279, 114 Neb. 809, citing Corpus Juris—Sandford v. Scott, 181 N.W. 148, 105 Neb. 479—Longfellow v. Barnard, 79 N.W. 255, 58 Neb. 612, 76 Am.S.R. 117, affirmed 81 N.W. 307, 59 Neb. 455.
N.J.—Shreve v. Harvey, 70 A. 671, 74 N.J.Eq. 336.
N.M.—Citizens' Nat. Bank of Albuquerque v. First Nat. Bank, 222 P. 935, 29 N.M. 273.
N.Y.—Dunkum v. Maceck Bldg. Corporation, 176 N.E. 392, 256 N.Y. 275, affirming 227 N.Y.S. 180, 227 App.Div. 230—William P. Rae Co. v. Courtney, 165 N.E. 289, 250 N.Y. 271, reversing 230 N.Y.S. 292, 224 App.Div. 767—Thorburn v. Wende, 257 N.Y.S. 186, 235 App.Div. 424, modifying 255 N.Y.S. 979, 235 App. Div. 757, affirming Wende v. Wende, 251 N.Y.S. 773, 141 Misc. 52.
Pa.—Hurst v. Spotts, 144 A. 91, 294 Pa. 221—Waldron v. Wahl, 133 A. 252, 286 Pa. 287—Miller v. Griffith, 112 A. 52, 268 Pa. 409—Appeal of Fink, 18 A. 621, 130 Pa. 256—Rapp v. Schlichtman, 54 Montg.Co. 13.
Tex.—Beeler v. Harbour, Civ.App., 116 S.W.2d 927, error refused—Coleman v. Looney, Civ.App., 83 S.W.2d 1061, error dismissed—Baylor University v. Chester Sav. Bank, Civ.App., 82 S.W.2d 738, error refused—Huselby v. Allison, Civ.App., 25 S.W.2d 1108—Beeler v. Terrell, Civ.App., 245 S.W. 459—York v. Robbins, Civ.App., 240 S.W. 603, reversed on other grounds, Com.App., 255 S.W. 720—Cole v. Grigsby, Civ.App., 35 S.W. 680, affirmed 35 S.W. 792, 89 Tex. 223.
Utah.—Chausse v. Bank of Garland, 268 P. 781, 783, 71 Utah 586, citing Corpus Juris.
21 C.J. p 1035 note 40.

Question of fact

As respects whether merger of estates takes place, actual or presumed intention of person in whom interests are united is question of fact to be tried and determined in the same manner as are other issues.—Goldblatt v. Gannon, 37 P.2d 524, 95 Colo. 419.

Time of intention

(1) In determining whether merger occurs, test ordinarily applied is parties' intention at time two estates meet in same person, and not some subsequent purpose.—Thorburn v. Wende, 257 N.Y.S. 186, 235 App.Div. 424, modifying 255 N.Y.S. 979, 235 App.Div. 757, affirming Wende v. Wende, 251 N.Y.S. 773, 141 Misc. 52.

(2) When title to fee vests in owner of other estate by inheritance or by devise or bequest, owner has reasonable time to determine whether merger shall result, if rights of third parties do not intervene.—Delaware Nat. Bank of Delhi, N. Y., v. Wiss, 284 N.Y.S. 615, 158 Misc. 276.

93. N.Y.—Clift v. White, 12 N.Y. 519, reversing 15 Barb. 70.
21 C.J. p 1035 note 41.

Merger aiding fraud

(1) Where it would work an injury or wrong, or aid in effecting a fraud, a merger of legal and equitable estates will not take place, and any extraordinary circumstances which would indicate that the prevention of the merger would have such an evil effect can be established as a defense against the interference of equity.—Swatts v. Bowen, 40 N.E. 1057, 141 Ind. 322.

(2) Equity will never allow a merger to be prevented and a mortgage or other security to be kept alive when this result would aid in carrying a fraud or other unconscientious wrong into effect under cover of legal forms, but only interposes to prevent a merger so as thereby to work substantial justice.—Dilts v. Brooks, 213 P. 600, 66 Mont. 346.

94. U.S.—In re May D.C.Ky., 10 F. Supp. 829.
Colo.—Goldblatt v. Gannon, 37 P.2d 524, 95 Colo. 419.
Ga.—Landrum v. Carey, 194 S.E. 362, 185 Ga. 76—Edmonds v. Beatie, 8 S.E.2d 559, 62 Ga.App. 246.
Ky.—Watson v. Trimble, 87 S.W.2d 359, 261 Ky. 253.
Mo.—Evans v. Rankin, 44 S.W.2d 644, 649, 329 Mo. 411, citing Corpus Juris—Henry G. Taussig Co. v. Poindexter, 30 S.W.2d 635, 224 Mo. App. 580.
Neb.—Edney v. Jensen, 216 N.W. 812, 814, 116 Neb. 242—Mathews v. Jones, 66 N.W. 622, 623, 47 Neb. 616—Miller v. Finn, 1 Neb. 254.
N.J.—Hartford v. Martin, 4 A.2d 31, 122 N.J.Law 283, 121 A.L.R. 354, affirming 1 A.2d 13, 120 N.J.Law 564, dismissing certiorari In re Hartford's Estate, 194 A. 800, 122 N.J.Eq. 489—Shreve v. Harvey, 70 A. 671, 74 N.J.Eq. 336.
N.Y.—Thorburn v. Wende, 257 N.Y.S. 186, 235 App.Div. 424, modifying 255 N.Y.S. 979, 235 App.Div. 757, affirming Wende v. Wende, 251 N.Y.S. 773, 141 Misc. 52.
N.D.—Rouse v. Zimmerman, 212 N.W. 515, 55 N.D. 94.
Pa.—Hurst v. Spotts, 144 A. 91, 294 Pa. 221—Miller v. Griffith, 112 A. 52, 268 Pa. 409—Appeal of Fink, 18 A. 621, 130 Pa. 256.
S.C.—McCreery v. Coggeshall, 53 S.E. 978, 74 S.C. 42, 7 L.R.A.,N.S., 433, 7 Ann.Cas. 693.
Tenn.—Browning v. Browning, 132 S.W.2d 359, 23 Tenn.App. 338.
Tex.—Humphreys-Mexia Co. v. Gammon, 254 S.W. 296, 113 Tex. 247, 29 A.L.R. 607, modifying Gammon v. Humphreys-Mexia Oil Co., Civ.App., 244 S.W. 162—Caprito v. Grisham-Hunter Corporation, Civ.App., 128 S.W.2d 149, error dismissed, judgment correct—Coleman v. Looney, Civ.App., 83 S.W.2d 1061, error dismissed—Baylor University v. Chester Sav. Bank, Civ.App., 82 S.W.2d 738, error refused.
Wis.—Brown v. Loewenbach, 253 N.W. 379, 217 Wis. 379—Carlsch v. Lund, 218 N.W. 826, 195 Wis. 488.
21 C.J. p 1035 note 42.

Contrary to party's will

The doctrine of merger of estates is designed primarily for the benefit of one who acquires an interest in

stances of the transaction,[95] and may be gathered not only from the acts and declarations of the owner of the several and independent rights[96] but from a view of the situation as affecting his interests,[97] at least prior to the presence of some right in a third person.[98] Equity will presume such an intent as is consistent with the best interests of the party;[99] and the same presumption is indulged where the party is an infant[1] or person of unsound mind.[2] The intent of the party does not become fixed and unchangeable until some one acquires an interest in the property, and thereby a right to draw such intent in question.[3]

§ 125. Conditions Essential to Merger

The essentials for a merger of estates are: Two or more distinct estates of greater and lesser rank; a valid greater estate; a meeting of the estates in one person or class of persons; coincidence in time of meeting; absence of intervening estates; and a holding of the estates in the same right.

The doctrine of merger of estates rests on actualities, not on mere possibilities, so that coincidence of two independent estates presently held by one and the same person or class of persons is a necessary prerequisite.[4] In order that there may be a merger it is essential that there should be at least two distinct estates,[5] a greater and a

property greater than he possessed in the first instance, and will not be held to apply against his will, to his disadvantage.—Landrum v. Carey, 194 S.E. 362, 185 Ga. 76—Seaboard Air-Line Ry. Co. v. Holliday, 140 S.E. 507, 165 Ga. 200—Luquire v. Lee, 49 S.E. 834, 121 Ga. 624.

95. Md.—Johnson v. Hines, 61 Md. 122.
Neb.—American Savings & Loan Ass'n v. Barry, 243 N.W. 628, 123 Neb. 523—Citizens' State Bank of Ralston v. Petersen, 210 N.W. 278, 279, 114 Neb. 809, citing **Corpus Juris.**
N.Y.—William P Rae Co. v. Courtney, 165 N.E. 289, 250 N.Y. 271, reversing 230 N.Y.S. 292, 224 App. Div. 767.
Tex.—York v. Robbins, Civ.App., 240 S.W. 603, reversed on other grounds, Com.App., 255 S.W. 720.
21 C.J. p 1035 note 43.

Burden of proof

When the circumstances under which merger ordinarily takes place are shown, the burden rests on him who alleges that there was no merger to prove a contrary intention, or to prove facts and circumstances from which such an intention may be presumed.
Ark.—Bemis v. First Nat. Bank, 40 S.W. 127, 63 Ark. 625.
Ga.—Landrum v. Carey, 194 S.E. 362, 185 Ga. 76—Pitts Banking Co. v. Fenn, 129 S.E. 105, 160 Ga. 854.
Neb.—McLaughlin v. Nelson, 202 N. W. 871, 113 Neb. 308.
Tex.—Caprito v. Grisham-Hunter Corporation, Civ.App., 128 S.W.2d 149. Error dismissed, judgment correct.
Wis.—Brown v. Loewenbach, 258 N. W. 379, 217 Wis. 379.

96. N.Y.—Thorburn v. Wende, 257 N.Y.S. 186, 235 App.Div. 424, modifying 255 N.Y.S. 979, 235 App.Div. 757, affirming Wende v. Wende, 251 N.Y.S. 773, 141 Misc. 52—In re Grieco's Estate, 15 N.Y.S.2d 962, 172 Misc. 723—Clark v. Rowell, 298 N.Y.S. 232, 163 Misc. 777—Delaware Nat. Bank of Delhi, N. Y., v. Wiss, 284 N.Y.S. 615, 158 Misc. 276.
21 C.J. p 1035 note 44.

97. Iowa.—Hanby v. Snyder, 237 N. W. 339, 212 Iowa 845.
N.Y.—Dunkum v. Maceck Bldg. Corporation, 176 N.E. 392, 256 N.Y. 275, affirming 237 N.Y.S. 180, 227 App.Div. 230—William P. Rae Co. v. Courtney, 165 N.E. 289, 250 N. Y. 271, reversing 230 N Y S. 292, 224 App.Div. 767—Thorburn v. Wende, 257 N.Y.S. 186, 235 App. Div. 424, modifying 255 N.Y.S. 979, 235 App.Div. 757, affirming Wende v. Wende, 251 N.Y.S. 773, 141 Misc. 52—In re Grieco's Estate, 15 N.Y. S.2d 962, 172 Misc. 723—Clark v. Rowell, 298 N.Y.S. 232, 163 Misc. 777—Delaware Nat. Bank of Delhi, N. Y. v. Wiss, 284 N.Y.S. 615, 158 Misc. 276.
N.D.—Rouse v. Zimmerman, 212 N. W. 515, 55 N.D. 94.
Tex.—York v. Robbins, Civ.App., 240 S.W. 603, reversed on other grounds, Com.App., 255 S.W. 720.
21 C.J. p 1035 note 45.

98. N.Y.—Smith v. Roberts, 91 N. Y. 470, affirming 52 How.Pr. 196—Thorburn v. Wende, 257 N.Y.S. 186, 235 App.Div. 424, modifying 255 N.Y.S. 979, 235 App.Div. 757, affirming Wende v. Wende, 251 N.Y. S. 773, 141 Misc. 52—Clark v. Rowell, 298 N.Y.S. 232, 163 Misc. 777—Delaware Nat. Bank of Delhi, N. Y. v. Wiss, 284 N.Y.S. 615, 158 Misc. 276.

99. Ga.—Knowles v. Lawton, 18 Ga. 476, 63 Am.D. 290.
Kan.—Zuege v. Nebraska Mortgage Co., 140 P. 855, 92 Kan 272, 52 L. R.A.,N.S., 877, Ann.Cas.1916B 865—Rand v. Ft. Scott, W. & W. R. Co., 31 P. 683, 50 Kan. 144.
Pa.—Appeal of Fink, 18 A. 621, 130 Pa. 256.
Tex.—Ferguson v. Ragland, Civ.App., 243 S.W. 721.
21 C.J. p 1035 note 47.

Particular presumptions

(1) If no intention is expressed, equity will examine the circumstances and presume an intention in accordance with the advantage to the acquirer of the two estates.—Peters v. Kirkwood Federal Savings & Loan Ass'n, App., 136 S W.2d 369, transferred, see 130 S.W.2d 507, 344 Mo. 1067.

(2) Where it is against the interest of the person holding the respective titles, the law will not presume the intent to merge.
N.D.—Ingstad v. Farmers' State Bank of Mandan, 237 N.W. 704, 61 N.D. 194.
Pa.—Griffith v. McKeever, 103 A. 335, 259 Pa. 605.

(3) Intention that merger should not result will be presumed, where merger would result disastrously to party holding both estates.
N.Y.—William P. Rae Co. v. Courtney, 165 N.E. 289, 250 N.Y. 271, reversing 230 N.Y.S. 292, 224 App. Div. 767.
N.D.—Rouse v. Zimmerman, 212 N.W. 515, 55 N.D. 94.
Tex.—Baylor University v. Chester Sav. Bank, Civ.App., 82 S.W.2d 738, error refused—Huselby v. Allison, Civ.App., 25 S.W.2d 1108.

(4) A merger will not be prevented in equity when fraud or wrong will result from operation of rule raising presumption against merger where it is against interest of party holding legal and equitable titles.—Connecticut General Life Ins. Co. v. Planters Trust & Savings Bank, 181 So. 724, 182 Miss. 463.

1. N.Y.—James v. Morey, 2 Cow. 246, 14 Am.D. 475.
21 C J. p 1035 note 48.

2. N.Y.—James v. Morey, supra.

3. N.M.—Citizens' Nat. Bank of Albuquerque v. First Nat. Bank, 222 P. 935, 29 N.M. 273.
N.Y.—Smith v. Roberts, 91 N.Y. 470, affirming 62 How.Pr. 196.

4. Ga.—Luquire v. Lee, 49 S.E 834, 121 Ga. 624.

5. Ga.—Seaboard Air-Line Ry. Co. v. Holliday, 140 S.E. 507, 165 Ga. 200.
N.Y.—Wilkinson v Medbury, 228 N. Y.S. 666, 132 Misc. 58.

lesser,[6] meeting in the same person[7] or class of persons,[8] at the same time[9] and without any intervening estate.[10] The estates must also generally be held in the same right,[11] but, while this is true where one estate is an accession to the other merely by operation of law, there may be a merger of two estates held in different rights which meet in the same person by act of the parties.[12]

Greater estate avoided. In order that the lesser estate merge in the greater, the greater estate must be assumed as valid and continuing; there can be no merger when the estates are successive and not concurrent, nor when the greater estate is void and has been avoided.[13]

§ 126. Life Estates

When the essentials of a merger of estates are present, a life estate will merge in the next vested estate in remainder or reversion expectant thereon, either completely or pro tanto. However, such merger will be prevented in equity when necessary to protect the rights of innocent third parties or the rights of the person in whom the estates meet, and where contrary to the intention of such person.

Whenever a particular estate for life and the next vested estate in remainder or reversion expectant thereon meet in the same person the former estate is merged,[14] provided the estate in remain-

Tex.—Huselby v. Allison, Civ.App., 25 S.W.2d 1108.
21 C.J. p 1036 note 51.

Estates in fee simple

(1) There can never be a merger of two estates in fee simple to the same land.—Humphreys-Mexia Co. v. Gammon, 254 S.W. 296, 113 Tex. 247, 29 A.L.R. 607, modifying Gammon v. Humphreys-Mexia Oil Co., Civ.App., 244 S.W. 162.

(2) The reason is that, as stated in supra § 8, there can be but one estate in fee simple to a particular described tract of land.—Humphreys-Mexia Co. v. Gammon, supra.

6. N.Y.—Wilkinson v. Medbury, 228 N.Y.S. 666, 132 Misc. 58—Dudley v. People's Trust Co., 107 N.Y.S. 930, 57 Misc. 230—Citizens' Permanent Savings & Loan Ass'n v. Rome, 116 N.Y.S. 597, affirmed 123 N.Y.S. 1110, 139 App.Div. 927.
Tex.—Humphreys-Mexia Co. v. Gammon, 254 S.W. 296, 302, 113 Tex. 247, 29 A.L.R. 607, citing Corpus Juris, and modifying Gammon v. Humphreys-Mexia Oil Co., Civ. App., 244 S.W. 162.
Wash.—Fidelity Securities Co. v. Martin, 201 P. 301, 117 Wash. 323.
21 C.J. p 1036 note 52.

7. Fla.—Walter J. Dolan Properties v. Vonnegut, 184 So. 757, 133 Fla. 854—Polk Bond & Mortgage Co. v. Dwiggins, 147 So. 855, 109 Fla. 443—Seaboard Air Line Ry. Co. v. Board of Bond Trustees of Special Road and Bridge Dist. No. 1 of Alachua County, 108 So. 689, 91 Fla. 612, 46 A.L.R. 870.
Ga.—Seaboard Air-Line Ry. Co. v. Holliday, 140 S.E. 507, 165 Ga. 200.
N.C.—Citizens Bank & Trust Co. v. Watkins, 1 S.E.2d 853, 215 N.C. 292.
N.D.—Ingstad v. Farmers' State Bank of Mandan, 237 N.W. 704, 61 N.D. 194.
S.C.—Mangum v. Piester, 16 S.C. 316.
Tex.—Huselby v. Allison, Civ.App., 25 S.W.2d 1108.
Wash.—Fidelity Securities Co. v. Martin, 201 P. 301, 117 Wash. 323.
Wis.—Rainbridge v. Rainbridge, 284 N.W. 536, 539, 230 Wis. 610, citing Corpus Juris—Brown v. Loewenbach, 258 N.W. 379, 217 Wis. 379.
21 C.J. p 1036 note 53.

8. Ga.—Seaboard Air-Line Ry. Co. v. Holliday, 140 S.E. 507, 165 Ga. 200—Luquire v. Lee, 49 S.E. 834, 121 Ga. 624.

9. Fla.—Walter J. Dolan Properties v. Vonnegut, 184 So. 757, 133 Fla. 854—Polk Bond & Mortgage Co. v. Dwiggins, 147 So. 855, 109 Fla. 443—Seaboard Air Line Ry. Co. v. Board of Bond Trustees of Special Road and Bridge Dist. No. 1 of Alachua County, 108 So. 689, 91 Fla. 612, 46 A.L.R. 870.
Ga.—Seaboard Air-Line Ry. Co. v. Holliday, 140 S.E. 507, 165 Ga. 200.
N.C.—Citizens Bank & Trust Co. v. Watkins, 1 S.E.2d 853, 215 N.C. 292.
Wis.—Rainbridge v. Rainbridge, 284 N.W. 536, 539, 230 Wis. 610, citing Corpus Juris—Brown v. Loewenbach, 258 N.W. 379, 217 Wis. 379.
21 C.J. p 1036 note 55.

10. Mo.—Evans v. Rankin, 44 S.W. 2d 644, 329 Mo. 411.
N.Y.—Wilkinson v. Medbury, 228 N.Y.S. 666, 132 Misc. 58—Dudley v. People's Trust Co., 107 N.Y.S. 930, 57 Misc. 230.
N.D.—Ingstad v. Farmers' State Bank of Mandan, 237 N.W. 704, 61 N.D. 194.
Ohio.—Conklin v. Tyler, 13 Ohio N. P., N.S., 441, modified on other grounds 20 Ohio Cir.Ct.,N.S., 133, 31 Ohio Cir.Dec. 167.
Tex.—Humphreys-Mexia Co. v. Gammon, 254 S.W. 296, 113 Tex. 247, 29 A.L.R. 607, citing Corpus Juris, and modifying Gammon v. Humphreys-Mexia Oil Co., Civ.App., 244 S.W. 162.
Wash.—Fidelity Securities Co. v. Martin, 201 P. 301, 117 Wash. 323—Tolman v. Adair, 73 P. 347, 32 Wash. 383.
Wis.—Brown v. Loewenbach, 258 N. W. 379, 217 Wis. 379.
21 C.J. p 1036 note 56.

Estates not merged

Interest claimed under vendor's lien note No. 4 and judgment obtained in foreclosure of prior trust deed are not merged, where interest of holder of Nos. 2 and 3 intervened.—Huselby v. Allison, Tex.Civ.App., 25 S.W.2d 1108.

11. Fla.—Walter J. Dolan Properties v. Vonnegut, 184 So. 757, 133 Fla. 854—Polk Bond & Mortgage Co. v. Dwiggins, 147 So. 855, 109 Fla. 443—Seaboard Air Line Ry. Co. v. Board of Bond Trustees of Special Road and Bridge Dist. No. 1 of Alachua County, 108 So. 689, 91 Fla. 612, 46 A.L.R. 870.
Ga.—Seaboard Air-Line Ry. Co. v. Holliday, 140 S.E. 507, 165 Ga. 200.
Ind.—Mugg v. Fenn, 153 N.E. 776, 198 Ind. 372.
Iowa.—Strong v. Garrett, 57 N.W. 715, 90 Iowa 100.
N.C.—Citizens Bank & Trust Co. v. Watkins, 1 S.E.2d 853, 215 N.C. 292.
N.D.—Ingstad v. Farmers' State Bank of Mandan, 237 N.W. 704, 61 N.D. 194.
Pa.—Waldron v. Wahl, 133 A. 252, 286 Pa. 237.
S.C.—Mangum v. Piester, 16 S.C. 316.
Tex.—Humphreys-Mexia Co. v. Gammon, 254 S.W. 296, 302, 113 Tex. 247, 29 A.L.R. 607, citing Corpus Juris, and modifying Gammon v. Humphreys-Mexia Oil Co., Civ. App., 244 S.W. 162—Huselby v. Allison, Civ.App., 25 S.W.2d 1108.
Wis.—Rainbridge v. Rainbridge, 284 N.W. 536, 539, 230 Wis. 610, citing Corpus Juris—Brown v. Loewenbach, 258 N.W. 379, 217 Wis. 379.
21 C.J. p 1036 note 57.

12. N.Y.—Clift v. White, 12 N.Y. 519, reversing 15 Barb. 70.

13. Hawaii.—Christian v. Waialua Agricultural Co., 31 Hawaii 817.
Tex.—Huselby v. Allison, Civ.App., 25 S.W.2d 1108.
21 C.J. p 1036 note 60.

14. Conn.—Comstock v. Bridgeport Trust Co., 138 A. 440, 106 Conn. 514.
Ga.—McCoy v. Olive, 148 S.E. 327, 168 Ga. 492—Seaboard Air-Line Ry. Co. v. Holliday, 140 S.E. 507,

der or reversion is as large as the preceding estate,[15] the estates are held in the same right,[16] there is no intervening estate,[17] and provided the remainder has vested.[18] However, this rule relates to a conveyance by the life tenant and the reversioner to a third person of both the life estate and the reversion,[19] and does not apply where a person takes a life estate under a will and, on the testator's death, becomes invested with the reversion in fee by descent pending the taking effect of the contingent remainder.[20] If the owner of a life estate acquires the fee to only a portion of the remainder there will be a merger pro tanto,[21] but the life estate in the remainder of the property will not be affected.[22] So where the holder of the life estate conveys a share of such estate to one of the remaindermen, a merger pro tanto results.[23] However, a conveyance by one of several life tenants of the life estate to the remainderman does not work a merger.[24] Merger pro tanto also results where the owner of the fee simple in remainder in the whole property acquires a life estate in a portion of the property[25] as well as in the remainder or reversion in fee.[26] An estate pur autre vie may

509, 165 Ga. 200, citing **Corpus Juris.**

Ill.—Dell v. Herman, 6 N.E.2d 159, 365 Ill. 261—Danberg v. Langman, 149 N.E. 245, 318 Ill. 266—Depler v. Dyer, 144 N.E. 212, 312 Ill. 537—Fisher v. Easton, 132 N.E. 442, 299 Ill. 293—Brinkerhoff v. Butler, 129 N.E. 742, 296 Ill. 368—Biwer v. Martin, 128 N.E. 518, 294 Ill. 488—Gray v. Shinn, 127 N.E. 755, 293 Ill. 573—Forthman v. Deters, 69 N.E. 97, 206 Ill. 159, 99 Am.S.R. 145, and note.

Ind.—Dibble v. Lloyd, 127 N.E. 453, 73 Ind.App. 320.

Ky.—Mountjoy v. Kasselman, 7 S.W.2d 512, 225 Ky. 55.

Md.—Goldberg v. Erich, 121 A. 365, 142 Md. 544—Crisfield v. Storr, 36 Md. 129, 11 Am.R. 480.

Miss.—Brown v. Long Bell Co., 103 So. 353, 128 Miss. 548.

Mo.—Bramhall v. Bramhall, 216 S.W. 766.

N.J.—Pedrajas v. Bloomfield Trust Co., 137 A. 86, 88, 101 N.J.Eq. 150, quoting **Corpus Juris.**

N.Y.—Ackerman v. Ackerman, 226 N.Y.S. 104, 222 App.Div. 229, affirmed 168 N.E. 416, 251 N.Y. 533, reargument denied 168 N.E. 440, 251 N.Y. 593.

N.C.—Citizens Bank & Trust Co. v. Watkins, 1 S.E.2d 853, 215 N.C. 292—Sanderson v. Sanderson, 171 S.E. 60, 61, 205 N.C. 260, citing **Corpus Juris**—North Carolina Joint Stock Land Bank of Durham v. Whitehurst, 162 S.E. 768, 202 N.C. 363—W. R. Grace & Co. v. Johnson, 135 S.E. 849, 192 N.C. 734.

S.C.—Murchison Nat. Bank v. McInnis, 150 S.E. 895, 153 S.C. 382—McCreary v. Coggeshall, 53 S.E. 978, 74 S.C. 42, 7 L.R.A.,N.S., 433, 7 Ann.Cas. 693—Mangum v. Piester, 16 S.C. 316.

Pa.—Waldron v. Wahl, 133 A. 252, 286 Pa. 237.

21 C.J. p 1036 note 61.

Defeasible fee

Where a will devises property in trust for life to testatrix's children, and on their death, without issue, before distribution, to certain reversionaries, after a final distribution, a defeasible fee is conveyed.—Owen v. Burks, 151 S.W. 369, 151 Ky. 162.

Execution sale

Acquisition of a life estate by a remainderman by execution sale does not call for a merger of the estates.—Williams v. Williams, 202 N.W. 434, 200 Iowa 398, rehearing denied and amended on other ground 204 N.W. 156.

Rent of life estate

(1) If a remainderman rents an estate for life, for and during the life of the person entitled to it, the life estate is merged in the remainder.—McCullough v. Carpenter, Mo., 225 S.W. 674.

(2) However, this rule does not apply to a lease of farm land under an oral contract in which a yearly rent is reserved.—McCullough v. Carpenter, supra.

(3) Likewise, the rule is inapplicable where the lease is to a husband whose wife is the remainderman.—McCullough v. Carpenter, supra.

Revocation of reservation of life estate

Where a grantor who has conveyed the fee but has reserved a life estate subsequently executes a deed not containing such reservation for the express purpose of revoking the first, the doctrine of merger is inapplicable.—Butler v. Bell, 106 S.E. 217, 181 N.C. 85.

15. N.J.—Pedrajas v. Bloomfield Trust Co., 137 A. 86, 88, 101 N.J.Eq. 150, quoting **Corpus Juris.**
21 C.J. p 1037 note 62.

16. N.C.—Citizens Bank & Trust Co. v. Watkins, 1 S.E.2d 853, 215 N.C. 292.
Pa.—Waldron v. Wahl, 133 A. 252, 286 Pa. 237.

"Same right" refers not to the method of acquisition but means that the person claims both estates as his own and holds neither for another as trustee or otherwise.—Citizens Bank & Trust Co. v. Watkins, 1 S.E.2d 853, 215 N.C. 292.

17. Fla.—Tankersley v. Davis, 175 So. 501, 128 Fla. 507.
Ky.—Watson v. Trimble, 87 S.W.2d 359, 261 Ky. 253.
Miss.—City Savings Bank & Trust Co. of Vicksburg v. Cortright, 84 So. 136, 122 Miss. 75.

18. Ind.—Abernathy v. McCoy, 154 N.E. 682, 91 Ind.App. 574.

Extent of vesting

(1) Remainder must be vested in quantity and quality to effect merger.—Abernathy v. McCoy, supra.

(2) Deed by life tenant and remainderman holding as representative of class does not affect merger.—Abernathy v. McCoy, supra.

(3) Vested remainder of life tenant's after-born children is not merged by deeds executed by latter.—Abernathy v. McCoy, supra.

Destruction of contingent remainder following a life estate does not affect the precedent life estate, unless there has been a merger.—City Savings Bank & Trust Co. of Vicksburg v. Cortright, 84 So. 136, 122 Miss. 75.

19. Cal.—Holman v. Holman, 77 P.2d 515, 25 Cal.App.2d 445.
Ill.—Jennings v. Capen, 151 N.E. 960, 321 Ill. 291.
Or.—Hawkins & Roberts v. Jerman, 35 P.2d 248, 147 Or. 657.
Tex.—Holden v. Murphy, Civ.App., 62 S.W.2d 189, error refused.

20. Ill.—Jennings v. Capen, 151 N.E. 960, 321 Ill. 291.
Or.—Hawkins & Roberts v. Jerman, 35 P.2d 248, 147 Or. 657.

21. Md.—Bosley v. Burk, 139 A. 543, 154 Md. 27.
21 C.J. p 1037 note 63.

22. Ky.—Larmon v. Larmon, 191 S.W. 110, 173 Ky. 477.
N.H.—Clark v. Parsons, 39 A. 898, 69 N.H. 147, 76 Am.S.R. 157.

23. Pa.—In re Arnold's Estate, 4 Pa. Dist. & Co. 33, 72 Pittsb.Leg.J. 303, citing **Corpus Juris.**

24. Mo.—Willis v. Allen, 237 S.W. 1030, 291 Mo. 650.

25. R.I.—Gaddes v. Pawtucket Sav. Inst., 80 A. 415, 33 R.I. 177, Ann.Cas.1912B 407.

26. S.C.—Mangum v. Piester, 16 S.C. 316.

merge in an estate for the tenant's own life.[27] In equity the merger will be prevented whenever necessary to protect the rights of an innocent third person,[28] or of the person in whom the estates meet,[29] or when a merger would be contrary to the intention of such person.[30]

Even if a life estate in income of realty devised in fee be deemed valid, such life estate becomes merged in the fee.[31]

§ 127. Estates for Years

An estate for years may merge with the remainder or reversion, unless the one is legal and the other equitable. However, equity will prevent the merger when necessary to protect the interests of the person in whom the estates meet.

An estate for years may merge in the remainder or reversion in fee.[32] A legal title for a term of years cannot be merged where the title to the reversion is merely equitable.[33] The estates must be held in the same right.[34] Equity will prevent the merger of an estate for years, if necessary to protect the interests of the person in whom the estates meet.[35]

§ 128. Equitable Estates

Except when contrary to the intention of the parties or essential to justice, the general but not unanimous rule is that when legal and equitable estates meet in the same person the equitable is merged with the legal. On the other hand, legal estates do not merge with the equitable.

One may have as many equitable claims on a piece of land as he can obtain, and they will all subsist without merger, for it may take them all to make a complete equitable title;[36] but it is generally held, although there is authority to the contrary,[37] that whenever the legal and equitable estates in the same land become united in the same person the equitable is merged in the legal estate,[38] unless there is an intervening estate,[39] or the intention of the party in whom they unite is to the contrary,[40] or it is manifestly to his interest,[41] or essential to the ends of justice,[42] or necessary to

27. S.C.—Boykin v. Ancrum, 6 S.E. 305, 28 S.C. 486, 13 Am.S.R. 698.

28. Kan.—Bullock v. Wiltberger, 142 P. 950, 92 Kan. 900.
21 C.J. p 1037 note 68.

29. Wis.—Nixon v. Nixon, 199 N.W. 50, 184 Wis. 200.
21 C.J. p 1037 note 69.

30. Ky.—Watson v. Trimble, 87 S.W. 2d 359, 261 Ky. 253.
21 C.J. p 1037 note 70.

31. Colo.—Walton v. Wormington, 2 P.2d 1088, 1089, 89 Colo. 355, citing Corpus Juris.

32. Md.—Arnd v. Lerch, 159 A. 587, 162 Md. 318.
Pa.—Waldron v. Wahl, 133 A. 252, 286 Pa. 237.
21 C.J. p 1037 note 71.

33. U.S.—Litle v. Ott, C.C.D.C., 15 F.Cas.No.8,389, 3 Cranch C.C. 416.

34. Pa.—Waldron v. Wahl, 133 A. 252, 286 Pa. 237.

35. Cal.—Jameson v. Hayward, 39 P. 1078, 106 Cal. 682, 46 Am.S.R. 268.

36. Ind.—Chase v. Van Meter, 39 N. E. 455, 140 Ind. 321.

37. Pa.—In re Price, 103 A. 893, 260 Pa. 376—Moore's Estate, 9 Pa.Dist. 675.

38. D.C.—Walters v. Baer, 50 F.2d 995, 996, 60 App.D.C. 230, citing Corpus Juris.
Iowa.—Bennett v. Primer, 184 N.W. 392, 394, 191 Iowa 1233, quoting Corpus Juris.
Mass.—Eaton v. Simonds, 14 Pick. 98.
Mich.—Nott v. Gundick, 180 N.W. 376, 212 Mich. 223.
Mo.—Evans v. Rankin, 44 S.W.2d 644, 329 Mo. 411—Sorrell v. Bradshaw, 222 S.W. 1024—Bassett v. O'Brien, 51 S.W. 107, 149 Mo. 381.
N.J.—McLaughlin v. Whaland, 13 A. 2d 573, 127 N.J.Eq. 393.
N.Y.—Mickles v. Townsend, 18 N.Y. 575—Gardner v. Astor, 3 Johns.Ch. 53, 8 Am.D. 465.
Okl.—Dowling v. Springer, 100 P.2d 278, 279, 186 Okl. 656, citing Corpus Juris.
Va.—Garland v. Pamplin, 32 Gratt. 305.
Wis.—Bahrs v. Bastian, 212 N.W. 292, 192 Wis. 642.
21 C.J. p 1037 note 82.

Reason for rule
The doctrine of merger springs from the fact that when the entire equitable and legal estates are united in the same person, there can be no occasion to keep them distinct, for ordinarily it would be of no use to the owner to keep up a charge on the estate of which he was seized in fee simple, but if there is an outstanding, intervening title, the foundation for the merger does not exist, and as a matter of law, it is so declared.
D.C.—Walters v. Baer, 50 F.2d 995, 60 App.D.C. 230.
Mo.—Curly v. Lafon, 113 S.W. 246, 133 Mo.App. 163.

Whole title, legal as well as equitable, must unite in the same person.
Cal.—Boye v. Boerner, 54 P.2d 1116, 12 Cal.App.2d 186.
Ill.—Winters v. Polin, 33 N.E.2d 497, 309 Ill.App. 458.

Right to possession
One acquiring entire interest in land by consolidating legal and equitable titles becomes owner thereof and entitled to possession.—Swinson v. Shurling, 134 S.E. 613, 162 Ga. 604.

39. Mo.—Evans v. Rankin, 44 S.W. 2d 644, 329 Mo. 411.
Wis.—Bahrs v. Bastian, 212 N.W. 292, 192 Wis. 642.

Merger not presumed
Where equitable and legal titles reach same person after intervening interest has attached to equitable estate, merger is not presumed.—Milwaukee Loan & Finance Co. v. Grundt, 242 N.W. 131, 207 Wis. 506.

40. Iowa.—Bennett v. Primer, 184 N.W. 392, 394, 191 Iowa 1233, quoting Corpus Juris.
Okl.—Dowling v. Springer, 100 P.2d 278, 279, 186 Okl. 656, citing Corpus Juris.
Va.—Garland v. Pamplin, 32 Gratt. 305.
Wash.—Hulmes v. Moon, 11 P.2d 253, 168 Wash. 222, 93 A.L.R. 1.
21 C.J. p 1037 note 83.

Evidence of circumstances is admissible in equity to determine intention respecting whether legal and equitable estates are merged.—Walters v. Baer, 50 F.2d 995, 60 App.D.C. 230.

41. Iowa.—Bennett v. Primer, 184 N.W. 392, 394, 191 Iowa 1233, quoting Corpus Juris.
Ky.—Evansville Coffin Co. v. Sumner, 226 S.W. 863, 864, 189 Ky. 839, citing Corpus Juris.
Wis.—Bahrs v. Bastian, 212 N.W. 292, 192 Wis. 642.
21 C.J. p 1038 note 84.

42. Iowa.—Bennett v. Primer, 184

protect the rights of an innocent third person,[43] or necessary to carry out the purposes and intentions of the donors,[44] that the estates should be kept separate. However, there can be no merger of a legal in an equitable estate so as to extinguish the legal title.[45] It is essential that there be both a legal and an equitable estate uniting in the same person,[46] and that the two estates should be coextensive and commensurate,[47] or more accurately, the legal estate must be equally extensive with or more extensive than the equitable estate, for the equitable fee will not merge in a particular or partial interest.[48]

§ 129. Curtesy

When a husband acquires the fee, his right of curtesy becomes merged in the fee.

Where a husband becomes the owner in fee of land in which he has a curtesy right, the curtesy right is merged in the fee.[49] However, where the husband conveys his interest to one of several children and such child's wife, reserving his curtesy rights, and subsequently receives a conveyance of such grantees' interests, his right of curtesy is not merged in the fee.[50]

§ 130. Dower

Subject to the interests of the widow and those of creditors, unless contrary to the intention of the parties dower will merge with an estate in fee or a life estate acquired by the widow. The doctrine of merger has been applied as well to the inchoate right of dower, although there is contrary authority.

Where a widow becomes the owner in fee of land in which she has a dower right, the dower right is merged in the fee,[51] except where it is manifestly to her interest that the two titles should be kept distinct.[52] The doctrine has been applied to the inchoate right of dower,[53] notwithstanding this right is not an estate so that technically the doctrine of merger would not apply,[54] but this has been denied.[55] Where the widow is in possession as life tenant, the dower right merges with such interest.[56] However, merger will not occur where one estate is acquired by purchase and the other by dower,[57] nor is the right of dower merged in a superior estate by deed between the widow and heirs, in which the widow's dower interest is merely recognized and the interest of the several parties conveyed inter se.[58] Likewise, where there are two classes of creditors involved, if the merger of the dower interest in the fee will adversely affect one class it will not be allowed.[59] If the dower becomes a charge on the land and the owner of the fee becomes the owner of such charge, the charge of dower will not be merged in the fee when contrary to the intention of the parties.[60]

§ 131. Estates Tail

The doctrine of merger of estates does not apply to estates tail.

An estate tail is an exception to the rule of merger, and a man may have in his own right both an estate tail and a reversion in fee.[61]

N.W. 392, 394, 191 Iowa 1233, quoting **Corpus Juris.**
Mass.—Tifft v. Ireland, 172 N.E. 865, 273 Mass. 56.
21 C.J. p 1038 note 85.

43. Iowa.—Bennett v. Primer, 184 N.W. 392, 394, 191 Iowa 1233, quoting **Corpus Juris**—Sherlock v. Thompson, 148 N.W. 1035, 167 Iowa 1, Ann.Cas.1917A 1216.

44. Iowa.—Bennett v. Primer, 184 N.W. 392, 394, 191 Iowa 1233, quoting **Corpus Juris**—Curtis & Barker v. Central Univ., 176 N.W. 330, 188 Iowa 300.
Mass.—Tifft v. Ireland, 172 N.E. 865, 273 Mass. 56.
Tenn.—Magevney v. Karsch, 65 S.W. 2d 562, 573, 167 Tenn. 32, citing **Corpus Juris.**

45. Mo.—Bassett v. O'Brien, 51 S.W. 107, 149 Mo. 381.
21 C.J. p 1038 note 88.

46. N.M.—Citizens' Nat. Bank of Albuquerque v. First Nat. Bank, 222 P. 935, 29 N.M. 273.

47. Ga.—Seaboard Air-Line Ry. Co. v. Holliday, 140 S.E. 507, 165 Ga. 200.
N.Y.—In re Grieco's Estate, 15 N.Y.S.2d 962, 172 Misc. 723.
R.I.—Gould v. Rhode Island Hospital Trust Co., 167 A. 119, 120, 53 R.I. 422, citing **Corpus Juris.**
Wash.—Hilmes v. Moon, 11 P.2d 253, 168 Wash. 222, 93 A.L.R. 1.
21 C.J. p 1038 note 89.

48. Ind.—Murray v. Murray, 112 N.E. 835, 62 Ind.App. 132.

49. N.Y.—Berger v. Waldbaum, 93 N.Y.S. 352, 46 Misc. 4, affirmed 96 N.Y.S. 1114, 110 App.Div. 915.

50. N.Y.—Hamel v. D'Andrea, 251 N.Y.S. 39, 233 App.Div. 22.

51. Pa.—Miller v. Griffith, 112 A. 52, 268 Pa. 409.
21 C.J. p 1038 note 92.

52. Mich.—Wettlaufer v. Ames, 94 N.W. 950, 133 Mich. 201.
21 C.J. p 1038 note 93.

53. Mich.—Weaver v. Michello, 160 N.W. 612, 193 Mich. 572.
21 C.J. p 1038 note 94.

54. S.C.—Davis v. Townsend, 10 S.E. 837, 32 S.C. 112.

55. N.Y.—Huff v. Wheeler, 59 N.Y.S. 716, 27 Misc. 763.

56. N.J.—Asmus v. Asmus, 194 A. 884, 122 N.J.Eq. 485.
N.Y.—In re Cipolla, 1 N.Y.S.2d 8, 165 Misc. 493.

57. Ark.—Bingham v. Rhea, 143 S.W.2d 1087, 201 Ark. 200.

Reason for rule
The estates are not held in the same right.—Bingham v. Rhea, supra.

Purchase from heir
There was no "merger" of widow's dower interest in her deceased husband's lands because of her purchase of another heir's interest therein.—Bingham v. Rhea, supra.

58. N.Y.—Howells v. McGraw, 90 N.Y.S. 1, 97 App.Div. 460.

59. U.S.—In re Tietje, D.C.N.Y., 263 F. 917.

60. Pa.—Hurst v. Spotts, 144 A. 91, 204 Pa. 221.

61. N.J.—Holcomb v. Lake, 24 N.J. Law 686, affirmed 25 N.J.Law 605.

IX. ESTATES IN PERSONAL PROPERTY

§ 132. In General

There may be estates or interests in personal property which are less than the absolute title or interest, and such estates or interests are governed, in the main, by the general principles that govern similar estates or interests in real property.

Subject to certain limitations, an estate or interest for life, considered infra §§ 133–137, or an estate or interest for a term of years,[62] in one person, with remainder over to another, considered infra § 139, may be created in personal property, and, by analogy, such estates or interests are governed, in the main, by the same general principles that govern in the case of similar estates in real property.[63]

§ 133. Life Estates

It is permissible to create a life estate in personal property, and the life tenant may enforce or protect his rights by an appropriate suit or action.

While the common law originally did not admit of the creation of a life estate in personal property with a reversion or a remainder over,[64] and a gift for life carried the absolute title or interest,[65] yet it is now well settled that life estates may be created in personal property,[66] including money,[67] and personal property of a durable nature,[68] with a remainder over to others, considered infra § 139.

By analogy, such estates are governed, in the main, by the principles which govern in the case of similar estates in real property.[69] It has been stated broadly, however, that life estates in personal property are not favored.[70] As to gifts of property

62. Ky.—Sherley v. Sherley, 232 S.W. 53, 192 Ky. 122.

Transfer of corporate stock by a husband to his wife, pursuant to a family understanding that she should transfer it to their son when the latter should take over the management of the corporate business vested an absolute estate for a term in the wife, with a remainder in the son contingent on his taking over the management of the corporate business.—Clarke v. U. S., D.C.Pa., 5 F.Supp. 292, affirmed, C.C.A., U. S. v. Clarke, 69 F.2d 748, 94 A.L.R. 975, certiorari denied 55 S.Ct. 75, 293 U.S. 564, 79 L.Ed. 664.

63. Ky.—Sherley v. Sherley, 232 S.W. 53, 192 Ky. 122.

Rules governing estates in real property generally see supra §§ 5–131.

64. U.S.—Warfield v. Bixby, C.C.A. Mo., 51 F.2d 210.

Ala.—Schowalter v. Schowalter, 116 So. 116, 217 Ala. 418.

Neb.—In re Wecker's Estate, 243 N.W. 642, 646, 123 Neb. 504, citing Corpus Juris.

21 C.J. p 1038 note 2.

65. Neb.—In re Wecker's Estate, supra.

21 C.J. p 1038 note 3.

66. U.S.—Warfield v. Bixby, C.C.A. Mo., 51 F.2d 210.

Ala.—Schowalter v. Schowalter, 116 So. 116, 217 Ala. 418.

Cal.—Skellenger v. England, 253 P. 191, 81 Cal.App. 176.

Ky.—Sherley v. Sherley, 232 S.W. 53, 192 Ky. 122—Keen v. Macey, 3 Bibb 39.

Mo.—Landers Inv. Co. v. Brown, 254 S.W. 14, 300 Mo. 348, 30 A.L.R. 908.

Neb.—In re Wecker's Estate, 243 N.W. 642, 646, 123 Neb. 504, citing Corpus Juris.

Or.—Allen v. Hendrick, 206 P. 733, 740, 104 Or. 202, citing Corpus Juris.

S.C.—Evans v. Adams, 185 S.E. 57, 59, 180 S.C. 214, citing Corpus Juris—Tucker v. Stevens' Ex'rs, 4 S.C.Eq. 532.

Tenn.—Bynum v. McDowell, 2 Tenn. App. 340.

21 C.J. p 1039 note 6.

Gift of income

According to some cases the gift of the income of personal property for life is a gift of a life estate in such property.—Bradbury v. Jackson, 54 A. 1068, 1072, 97 Me. 449—Sampson v. Randall, 72 Me. 109.

Statutory regulation

Under statute prohibiting creation of life estates in property "such as is destroyed in the use," the quoted phrase does not refer to property of a substantial nature which depreciates from use over a substantial period of time, such as barber shop equipment.—First Nat. Bank v. Geiger, 7 S.E.2d 756, 61 Ga.App. 865.

Forfeiture

In respect of the ancient law that a tenant for life might forfeit his estate by claiming the fee in a court of record, it was said that "there does not seem to be any good reason for its application in reference to slaves, except in the case provided for by the statute, of the removal of them out of the state by the tenant for life, without the consent of the person in reversion of remainder. A claim of absolute property in slaves by a tenant for life might justify the person in reversion or remainder to bring an equitable action to establish his right, and to restrain the tenant for life from the commission of any act inconsistent with that right"—Hart v. Soward, 14 B.Mon., Ky., 243, 246.

67. U.S.—Warfield v. Bixby, C.C.A. Mo., 51 F.2d 210.

Ky.—Hall's Adm'r v. Hall's Adm'r, 97 S.W.2d 23, 265 Ky. 528.

S.C.—Evans v. Adams, 185 S.E. 57, 59, 180 S.C. 214, citing Corpus Juris.

21 C.J. p 1039 note 5.

Interest only given

(1) A gift of the use of money to a life tenant is a gift of interest and not of the corpus.

Ill.—Quigley v. Quigley, 18 N.E.2d 186, 370 Ill. 151.

Mass.—Field v. Hitchcock, 17 Pick. 182, 28 Am.D. 288.

(2) Gift of money for life, with remainder over to another, is a gift of the interest derivable from the money.—Rife v. Rife, 122 So. 739, 154 Miss. 529—Martin v. Martin, 13 So. 267, 69 Miss. 315.

Rentals due under lease

A lease agreement for ninety-nine years which provided that rent should be paid to the lessor during her life and thereafter to her daughter during the latter's life, and, after the death of the daughter, to the heirs of the lessor created successive life estates in praesenti in the lessor and her daughter.—Landers Inv. Co. v. Brown, 254 S.W. 14, 300 Mo. 348, 30 A.L.R. 908.

68. Ark.—King v. Stevens, 225 S.W. 656, 146 Ark. 443.

Ill.—Dickinson v. Griggsville Nat. Bank, 70 N.E. 593, 209 Ill. 350—Kadyk v. Abbott, 266 Ill.App. 537.

21 C.J. p 1039 note 7.

Property of a permanent nature

Modern common law recognizes life interests in personal property of a more or less permanent nature.—Knight v. Knight, 200 A. 431, 61 R.I. 187.

69. Ky.—Sherley v. Sherley, 232 S.W. 53, 192 Ky. 122.

70. Tex.—McNabb v. Cruze, 125 S.

the use of which consists in its consumption see infra § 135.

A life estate in personal property may be created without the intervention of a trustee.[71]

Actions by life tenant. The owner of a life estate in personal property may maintain an action of trover for the conversion of the property,[72] and, in an action of trover to recover damages for the conversion of personal property subject to a life estate, consists of the damages to such life interest and not of the value of the property.[73]

In an action by one entitled to the dividends on shares of corporate stock for life for an accounting and declaration of dividends, based on the theory that a surplus was accumulated over a long period of years in order to increase the value of defendant directors' remainder interest in such shares, the action was not barred by the statute of limitations.[74]

§ 134. Possession of Property

a. General considerations

b. Requirement of inventory

c. Requirement of security; alternative appointment of trustee

a. General Considerations

Whether or not the life tenant is entitled to possession is determined by the provisions of the instrument creating the life estate, and usually he is entitled to possession where specific chattels are bequeathed but not where personal property is included in a general residuary clause.

It has been stated broadly that, in the case of a direct bequest of personal property with remainder over, the general rule is that the life tenant is entitled to possession and control if the will does not show a contrary intention,[75] but the test sometimes applied in determining whether the life tenant or beneficiary is entitled to possession or custody is whether the will makes a specific bequest with right of enjoyment in specie, so that the general rule for conversion is not applicable.[76] Where specific chattels are bequeathed for life, the life-tenant is entitled to the actual possession of the property,[77] and cannot be compelled to submit to a sale or a commutation of his interest;[78] but where

W.2d 288, 132 Tex. 476, affirming, Civ.App., 101 S.W.2d 902.

71. Miss.—McDaniel v. Johns, 45 Miss. 632.
Tenn.—Cook v. Collier, Ch., 62 S.W. 658—Robertson v. Brown, 13 Tenn. App. 211.
Creation of life estate:
By deed generally see Deeds § 112.
In personal property by will see the C.J.S. title Wills § 894, also 69 C.J. p 547 note 53—p 548 note 65.

72. Tenn.—Logan v. Hartford City & Syracuse Coal Co., 9 Heisk. 689.

73. Ala.—Strong v. Strong, 6 Ala. 345.

74. N.Y.—Ochs v. David Maydole Hammer Co., 246 N.Y.S. 539, 138 Misc. 665.
Evidence held not to sustain recovery.—Ochs v. David Maydole Hammer Co., supra.

75. N.C.—Ernul v. Ernul, 132 S.E. 2, 191 N.C. 347—Burwell v. Raleigh Banking & Trust Co., 118 S.E. 881, 186 N.C. 117.
For other statement see Bynum v. McDowell, 3 Tenn.App. 340.
Property of durable nature
In respect of property of a durable nature, it has been stated broadly that possession is in the life tenant during the life estate.—Kadyk v. Abbott, 266 Ill.App. 537.
Partnership assets
Where, by will, a member of a partnership gave his wife a life estate in his personal property, it was stated broadly that, after the settlement of the partnership affairs and the debts of the testator, the widow, as life tenant, was entitled to possession of the remaining personal property which was subject to the life estate, in the absence of an agreement that the business should be continued as theretofore.—Thompson v. Flynn, 27 P.2d 505, 95 Mont. 484.
In Maine the rule is to allow the tenant for life to have the actual possession of the property unless the will provides otherwise.—Sampson v. Randall, 72 Me. 109—Starr v. McEwan, 69 Me. 334.
Rights of remainderman see infra § 141.

76. N.J.—In re Kellogg's Estate, 129 A. 742, 3 N.J.Misc. 694.

77. Me.—Fuller v. Fuller, 24 A. 946, 84 Me. 475—Whittemore v. Russell, 14 A. 197, 80 Me. 297, 6 Am.S.R. 200.
Miss.—Minor v. Stewart, 3 Miss. 912.
N.H.—Healey v. Toppan, 45 N.H. 243, 86 Am.D. 159.
N.J.—Corle v. Monkhouse, 20 A. 367, 47 N.J.Eq. 73—Jones' Ex'rs v. States, 19 N.J.Eq. 324—Kearney v. Kearney, 17 N.J.Eq. 504.
N.Y.—Hill v. Hill, 2 Lans. 43—Spear v. Tinkham, 2 Barb.Ch. 211.
N.C.—Simmons v. Fleruing, 72 S.E. 1082, 157 N.C. 389—Britt v. Smith, 86 N.C. 305—Easton v. Easton, 42 N.C. 98.
Pa.—In re Robinson's Estate, 24 Pa. Co. 588.
S.C.—Brooks v. Brooks, 12 S.C. 422.
Tenn.—Forsey v. Luton, 2 Head 183.
Wis.—Golder v. Littlejohn, 30 Wis. 344.
21 C.J. p 1039 note 12.
Bequest of corporate stock, bonds, and the like
Under a testamentary provision that the stocks, bonds, mortgages, or other investments owned by testatrix at the time of her death are to be divided among specified persons during the terms of their natural lives, the life tenants were entitled to the custody of the property bequeathed, subject to furnishing security to protect the estate of the remainderman, notwithstanding another provision for the application of income to payment of debts of testatrix.—Owens v. Owens' Ex'r, 32 S.W. 2d 731, 236 Ky. 118.
Right to use of property
Where testator obviously intended that articles should not be sold, and that a life beneficiary should have use of them, articles to be turned over to remainderman in specie on termination of trust, it was held that such beneficiary was entitled to possession of such articles during her lifetime; the question as to whether security could be dispensed with was not passed on as the life beneficiary did not claim the right to possession without security.—In re Rohr's Estate, 175 N.Y.S. 593.

78. Ala.—Underwood v. Underwood, 50 So. 305, 162 Ala. 553, 136 Am. S.R. 61.

personal property is included in a general residuary bequest for life,[79] where there is a general bequest of all of testator's personal estate for life,[80] or, as more broadly stated, where there is a general bequest for life,[81] usually the property should be held, or should be sold and the proceeds held or invested, by the executor or trustee and the interest or income paid to the life tenant or beneficiary, the principal being kept for the remainderman, unless the will shows a contrary intention on the part of testator.[82]

While the view has been taken that, in the case of a direct bequest of money with remainder over, the general rule is that the life beneficiary is entitled to possession if the will does not show a contrary intention,[83] it has been held or recognized that an executor or trustee should hold and invest a bequest of money for life,[84] and should sell and invest the proceeds of property, the use of which is

Md.—Armiger v. Reitz, 46 A. 990, 91 Md. 334.

79. Iowa.—Scott v. Scott, 114 N.W. 881, 137 Iowa 239, 126 Am.S.R. 277, 23 L.R.A. 716.
Ind.—Brannock v. Stocker, 76 Ind. 553—Eddy v. Cross, 60 N.E. 470, 26 Ind.App. 643.
N.H.—Healey v. Toppan, 45 N.H. 243, 86 Am.D. 159.
N.J.—Jones' Ex'rs v. Stites, 19 N.J. Eq. 324.
N.Y.—Spear v. Tinkham, 2 Barb.Ch. 211—Cairns v. Chaubert, 9 Paige 160—Clark v. Clark, 8 Paige 153, 35 Am.D. 676.
N.C.—Ernul v. Ernul, 132 S.E. 2, 191 N.C. 347—Burwell v. Raleigh Banking & Trust Co., 118 S.E. 881, 186 N.C. 117—Ritch v. Morris, 78 N.C. 377—Cross v. Camp, 42 N.C. 193.
S.C.—Robertson v. Collier, 10 S.C.Eq. 370.
21 C.J. p 1039 note 14.

Perishable property, or property consumed in use
N.H.—Healey v. Toppan, 45 N.H. 243, 86 Am.D. 159.
N.Y.—Cairns v. Chaubert, 9 Paige 160.
N.C.—Simmons v. Fleming, 72 S.E. 1032, 157 N.C. 389—Saunders v. Haughton, 43 N.C. 217, 57 Am.D. 581—Smith v. Barham, 17 N.C. 420, 25 Am.D. 721.
21 C.J. p 1041 note 38.

80. N.Y.—Spear v. Tinkham, 2 Barb. Ch. 211—Collins v. Collins, 1 Redf.Surr. 337.

81. Ind.—Eddy v. Cross, 60 N.E. 470, 26 Ind.App. 643.
N.J.—Jones v. Stites, 19 N.J.Eq. 324—Howard v. Howard, 16 N.J.Eq. 486—Ackerman's Adm'r v. Vreeland's Ex'r, 14 N.J.Eq. 23.
N.C.—Ritch v. Morris, 78 N.C. 377.
21 C.J. p 1039 note 14.

82. Ala.—Underwood v. Underwood, 50 So. 305, 162 Ala. 553, 136 Am.S.R. 61.
Ind.—Hutchinson's Estate, 1 N.E.2d 585, 210 Ind. 509, 108 A.L.R. 530, rehearing denied 4 N.E.2d 202, 210 Ind. 509, 108 A.L.R. 530.
Iowa.—Scott v. Scott, 114 N.W. 881, 137 Iowa 239, 126 Am.S.R. 277, 23 L.R.A. 716.
Mo.—Phipps v. Doak, App., 145 S.W. 2d 167.
N.H.—Healey v. Toppan, 45 N.H. 243, 86 Am.D. 159.
N.J.—Howard v. Howard, 16 N.J.Eq. 486—Ackerman's Adm'rs v. Vreeland's Ex'r, 14 N.J.Eq. 23.
N.Y.—In re Von Kleist's Will, 193 N.E. 256, 265 N.Y. 422, reversing 270 N.Y.S. 435, 240 App.Div. 436, modifying 263 N.Y.S. 883, 147 Misc. 416—Matter of Yates, 1 N.E. 248, 99 N.Y. 94—In re Watson's Estate, 5 N.Y.S.2d 416, 168 Misc. 135—Spear v. Tinkham, 2 Barb.Ch. 211.
21 C.J. p 1039 note 15.

Residuary beneficiary entitled to hold securities and cash
Terms of will conclusively showed that widow of testator, as residuary beneficiary for life, was entitled to hold securities and cash bequeathed to her.—Foley v. Syer, 88 A. 38, 121 Md. 79.

Will bequeathing "use" of property
Executors had the right to permit the life beneficiary to take possession of the property where will bequeathed the "use" of such property to him.—Jones v. Jones, 59 N.Y.S. 974, 28 Misc. 421.

83. Me.—Gregg v. Bailey, 113 A. 397, 120 Me. 263.
21 C.J. p 966 note 64 [a].

In North Carolina
(1) The rule stated in the text has been recognized.—Ernul v. Ernul, 132 S.E. 2, 191 N.C. 347—Hodge v. Hodge, 72 N.C. 616.

(2) In an earlier case, however, the view was taken that, in the case of pecuniary bequests, the legatee for life was entitled to the interest only and was not entitled to possession.—Bateman v. Knight, 37 N.C. 72.

84. Ga.—Chisholm v. Lee, 53 Ga. 611.
Iowa.—Scott v. Scott, 114 N.W. 881, 137 Iowa 239, 126 Am.S.R. 277, 23 L.R.A. 716.
Mass.—Lewis v. Shattuck, 53 N.E. 912, 173 Mass. 486—White v. Massachusetts Inst. of Technology, 50 N.E. 512, 171 Mass. 84—White v. Sawyer, 13 Metc. 546.
Miss.—Howell v. Howell, 127 So. 566, 157 Miss. 15.
21 C.J. p 1039 note 16.

Proceeds of mortgage
Where a mortgage held by the testator was bequeathed to a life beneficiary, the executor, on foreclosure of the mortgage and sale of the property, should have applied to the appropriate court for authority to invest the proceeds.—Miller v. Williamson, 5 Md. 219.

In Illinois
(1) The rule has been announced that where a testator gives to one for life a certain sum of money, with a limitation over to another, the former has no right to possession of the money so bequeathed.—Welsch v. Belleville Sav. Bank, 94 Ill. 191.

(2) In a case in which a deposit in bank was included in the bequest for life, it was stated broadly that a life tenant may obtain the possession of the property under such reasonable restrictions as the courts may impose.—Quigley v. Quigley, 18 N.E.2d 186, 370 Ill. 151.

In New Jersey
(1) Under bequest to legatee of use of a fund during his life and at his death fund to go to others, executors were required to retain fund as trustees and to invest it and pay income thereof to legatee during his lifetime, and at his death to distribute such part as remained to residuary legatees, where will, fairly construed, did not indicate an intention that legacy was specifically bequeathed and to be enjoyed in specie as to make general rule for conversion inapplicable.—In re Kellogg's Estate, 129 A. 742, 3 N.J.Misc. 694.

(2) In the absence of a provision of the will showing a contrary intention, the executor is entitled to hold the fund in the case of a bequest of the income of a specified sum for life.—Smith v. Field, 131 A. 521, 98 N.J.Eq. 532.

(3) Where a specified sum was bequeathed for the life of the legatee, the latter was not entitled to possession in the absence of anything in the will indicating a contrary intention.—In re Van Wagoner, Prerog. 97 A. 893.

(4) But in an earlier case the view was expressed that, where a specific sum of money is given for life, the money must be paid to the legatee.—Jones' Ex'rs v. Stites, 19 N.J.Eq. 324.

its conversion into money,[85] or the possession of which is not essential to its beneficial enjoyment,[86] or, according to some cases, which is of a perishable character,[87] unless the will shows an intention that the possession of the fund or property should be intrusted to the life tenant.[88]

A person bequeathing a life estate in money with a remainder over may confide the money to the life tenant, trusting to such life tenant to preserve the fund for the benefit of the remainderman,[89] but the court will not intrust to the tenant of the particular estate the corpus of the personalty, unless it can from the language of the will infer that such was the intention of testator.[90]

Effect of right to encroach on principal. In general the life tenant or beneficiary who is authorized by the will to encroach on the principal for his own use or purposes is entitled to the possession and management of the property,[91] but, in the case of a residuary bequest of personal property with right of the life beneficiary to use the income and to consume such portion of the principal as he shall need, it has been held that the executor is entitled to hold the fund,[92] and the general rule will not necessarily govern where the circumstances disclose that the rights of the remainderman would be menaced by delivering the property to the life tenant.[93]

Adverse possession. The right to possession extends to the proceeds of property which the life tenant, in possession under the instrument creating the life estate, has sold pursuant to authority conferred by such instrument.[94]

As a general rule the possession of personal property by a life tenant is in harmony with rights of remainderman and cannot in law become adverse to such rights[95] or, as otherwise stated, the life tenant's holding is not adverse to the remainderman, but is amicable to the latter, the possession of the life tenant being the possession of the remainderman.[96] The view has been taken, however, that, while the possession of a tenant for life is not adverse to the remainderman because it is entirely consistent with the latter's right and does not deprive him of anything to which he is entitled,[97] so far as a life estate only is claimed, the possession of one claiming the tenancy for life is adverse to the remaindermen and all others, and possession for the statutory period gives him a right to the extent of the interest claimed.[98]

b. Requirement of Inventory

Usually the life tenant may be required to furnish an inventory on taking possession of personal property which is subject to the life estate.

Where a life estate is given in personal property the tenant on taking possession may be required to file an inventory thereof,[99] with acknowledgement that it is held for life only, with title in the remainderman;[1] but, in the absence of a showing of danger of loss or injury, this is the only pro-

85. Md.—Miller v. Williamson, 5 Md. 219—Evans v. Iglehart, 6 Gill & J. 171—Wootten v. Burch, 2 Md.Ch. 190.

86. N.Y.—In re McDougall, 35 N.E. 961, 141 N.Y. 21.
Va.—Hawthorne v. Beckwith, 17 S.E. 241, 89 Va. 786.

87. **In Tennessee**
(1) The rule stated in the text has been announced in the form of a general rule.—Woods v. Sullivan, 1 Swan 507.
(2) As to gift of consumable property for life generally see infra § 135.

88. Iowa.—Scott v. Scott, 114 N.W. 881, 137 Iowa 239, 126 Am.S.R. 277, 23 L.R.A. 716.
Miss.—Howell v. Howell, 127 So. 566, 157 Miss. 15.
N.H.—Healey v. Toppan, 45 N.H. 243, 86 Am.D. 159.
21 C.J. p 1040 note 20.

89. N.Y.—Smith v. Van Ostrand, 64 N.Y. 278, reversing 3 Hun 450, 5 Thomps. & C. 664.
21 C.J. p 1040 note 21.

90. N.Y.—In re McDougall, 35 N.E. 961, 141 N.Y. 21—Matter of Ungrich, 62 N.Y.S. 975, 48 App.Div. 594.

91. N.Y.—In re Victorin, 219 N.Y.S. 619, 128 Misc. 577—In re Niles' Will, 202 N.Y.S. 475, 122 Misc. 17, affirmed 206 N.Y.S. 940, 211 App. Div. 826.
Vt.—In re Curtis' Estate, 192 A. 13, 109 Vt. 44—Parks' Adm'r v. American Home Missionary Soc., 20 A. 107, 62 Vt. 19.
21 C.J. p 1040 note 21 [a] (3)–(5).

Bequest of specified sum
In the case of a bequest of a specified sum of money for use during the life of the beneficiary with provision that, at her death the sum, or such parts as shall not be used by the beneficiary, shall go to others, it has been held that the beneficiary is entitled to possession of the fund. —In re Kellogg's Estate, 129 A. 742, 3 N.J.Misc. 694.

92. N.J.—Smith v. Field, 131 A. 521, 98 N.J.Eq. 532.

93. N.Y.—In re Frost, 165 N.Y.S. 980, 179 App Div. 431.

94. Ky.—Shutt's Adm'r v. Shutt's Adm'r, 232 S.W. 405, 192 Ky. 98.

95. Tenn.—Woodson v. Smith, 1 Head 276—O'Brien v. Waggoner, 96 S.W.2d 170, 20 Tenn.App. 145.

96. Ky.—Shutt's Adm'r v. Shutt's Adm'r, 232 S.W. 405, 192 Ky. 98.

97. Ky.—Burns v. Ray, 18 B.Mon. 392.

98. Ky.—Burns v. Ray, supra.

99. S.C.—Long v. Lea, 181 S.E. 6, 9, 177 S.C. 231, 101 A.L.R. 266, quoting **Corpus Juris.**
21 C.J. p 965 notes 46, 48, p 966 note 64 [a], p 1047 note 48.

Power to encroach on principal
Trustee in bankruptcy of remainderman was entitled to an accounting by the life tenant who had power to encroach on the principal, in the sense that such trustee was entitled to a full disclosure of the property of the life estate received by the life tenant.—Nelson v. Horsford, 208 N.W. 341, 201 Iowa 918, 45 A.L.R. 515.

1. Iowa.—Scott v. Scott, 114 N.W. 881, 137 Iowa 239, 126 Am.S.R. 277, 23 L.R.A.,N.S., 716.
S.C.—Long v. Lea, 181 S.E. 6, 9, 177 S.C. 231, 101 A.L.R. 266, quoting **Corpus Juris.**

tection to which the remainderman is entitled,[2] at least where specific chattels are given for the life of the donee.[3]

c. Requirement of Security; Alternative Appointment of Trustee

Security for the forthcoming of the property at the termination of the life estate is not necessarily required in order to entitle the life tenant to possession, but, if there is danger of loss or injury, it is usually within the discretion of the proper court to require security, or, in some jurisdictions at least, to appoint a trustee if security is not furnished.

A tenant for life of personal property, in order to be entitled to possession, is not necessarily obliged to give security for the forth coming of the property at the termination of the life estate;[4] usually, if he is otherwise entitled to possession, security is required only where there is a showing of actual danger of loss or injury,[5] and it cannot be demanded as a matter of absolute right,[6] unless it is so provided by statute.[7] It is, however, within the discretion of the court to require security,[8] and, under certain circumstances, it should be re-

2. Mont.—Thompson v. Flynn, 27 P.2d 505, 95 Mont. 484.
S.C.—Long v. Lea, 181 S.E. 6, 9, 177 S.C. 231, 101 A.L.R. 266, quoting Corpus Juris—Joyce v. Gunnels, 19 S.C.Eq. 259.
21 C.J. p 965 notes 46–48, p 1047 note 48.

3. Iowa.—Scott v. Scott, 114 N.W. 881, 137 Iowa 239, 126 Am.S.R. 277, 28 L.R.A.,N.S., 716.
Me.—Fuller v. Fuller, 24 A. 946, 84 Me. 475.
21 C.J. p 965 note 48, p 1047 note 48.

4. Del.—Equitable Trust Co. v. Pennetto, 142 A. 827, 16 Del.Ch. 218—Dougherty v. Conly, 123 A. 401, 14 Del.Ch. 176.
Mass.—Lynde v. Estabrook, 7 Allen 68.
Miss.—Howell v. Howell, 127 So. 566, 157 Miss. 15.
N.Y.—In re Smith's Will, 11 N.Y.S.2d 945, 170 Misc. 556.
N.C.—Hodge v. Hodge, 72 N.C. 616.
S.C.—Long v. Lea, 181 S.E. 6, 9, 177 S.C. 231, 101 A.L.R. 266, quoting Corpus Juris.
21 C.J. p 965 notes 48, 49, p 1047 note 48.

Life tenant in possession under terms of will

Usually security is not required where a life tenant is in possession by reason of the terms of the will.—In re Smith's Will, 11 N.Y.S.2d 945, 170 Misc. 556.

Undue burden on life tenant

It has been held or recognized that the requirement of security should not impose on life tenant a burden which he could not discharge, so as to defeat intention of testator to allow life tenant possession of funds.
Ala.—Underwood v. Underwood, 50 So. 305, 162 Ala. 553, 136 Am.S.R. 61.
S.C.—Evans v. Adams, 185 S.E. 57, 180 S.C. 214—Long v. Lea, 181 S.E. 6, 177 S.C. 231, 101 A.L.R. 266.

Property not in possession or under control of life beneficiary

Widow of testator was not required to give bond because of life interest in part of residue placed in trust and over which she had no control.—In re Grossman's Will, 227 N.Y.S. 470, 131 Misc. 526.

5. Cal.—Colburn v. Burlingame, 214 P. 226, 190 Cal. 697, 27 A.L.R. 1374.
N.Y.—In re Camp, 27 N.E. 799, 126 N.Y. 377—In re Ungrich, 62 N.Y.S. 975, 48 App.Div. 594—Graham v. New York Life Ins. & Trust Co., 46 Hun 261—In re Potter's Estate, 231 N.Y.S. 355, 133 Misc. 17.
S.C.—Long v. Lea, 181 S.E. 6, 9, 177 S.C. 231, 101 A.L.R. 266, quoting Corpus Juris.
W.Va.—Wise v. Hinegardner, 125 S.E. 579, 97 W.Va. 587.
21 C.J. p 966 notes 50–53, p 1047 note 48.

Grounds for requiring security not shown

N.Y.—In re Smith's Will, 11 N.Y.S.2d 945, 170 Misc. 556.
S.C.—Long v. Lea, 181 S.E. 6, 177 S.C. 231, 101 A.L.R. 266.

Judicial expressions indicating greater obligation

(1) "Ordinarily, where a legal life estate is created, the life tenant is required to furnish a bond. . . . Having in mind the possibility of waste, extravagance, loss of securities, or other dissipation of assets by a life tenant, the courts have uniformly imposed this salutary rule as a protection to the remainderman, except in cases where an express direction dispensing with a bond is found in the will, or is clearly inferred from its provisions."—In re Taylor's Estate, 268 N.Y.S. 70, 73, 149 Misc. 705, affirmed In re Taylor's Will, 271 N.Y.S. 1057, 242 App.Div. 608.

(2) "A life tenant, if she wishes to take the funds of the estate into her possession, is required to give a bond for the protection of the remainderman, unless she has a right to invade the principal, or it clearly appears that the decedent desired her to have such possession without the giving of security."—In re Richardson's Estate, 238 N.Y.S. 271, 272, 135 Misc. 726, affirmed 243 N.Y.S. 845, 229 App.Div. 271.

6. N.Y.—In re Ungrich, 62 N.Y.S. 975, 48 App.Div. 594—In re Potter's Estate, 231 N.Y.S. 355, 133 Misc. 17.
S.C.—Long v. Lea, 181 S.E. 6, 9, 177 S.C. 231, 101 A.L.R. 266, quoting Corpus Juris.
21 C.J. p 966 note 51.

7. Pa.—In re Kirkpatrick's Estate, 124 A. 474, 280 Pa. 306—In re Hess's Estate, 17 Pa.Dist. & Co. 793, 43 Lanc.L.Rev. 86—In re Young's Estate, 17 Pa.Dist. & Co. 745.
21 C.J. p 966 note 52.

Life tenant seeking possession

Under some statutes a legatee for life under a will by which a remainder to another is given and in which no trustee is named, in order to obtain possession, must apply to a designated court and give bond for the safe-keeping of the property, unless the testator has directed that possession shall be given to such legatee without requiring a bond or unless the remainderman consents to delivery to such legatee without such requirement.—Sanford v. Gilman, 44 Conn. 461.

Bond of life tenant

(1) Under some circumstances the bond of a life tenant under a will has been regarded as a sufficient compliance with the applicable statute.—Zehender's Estate, 8 Pa.Dist. 439.

(2) In a case in which the will gave the daughter of the testatrix the right to use certain jewelry for life, it was held that a bond of the daughter, joined in by her husband, without other surety, was sufficient, especially in view of the acquiescence of all the persons who were interested.—Graham's Estate, 26 Pa.Dist. 417.

In Louisiana a usufructuary must give bond unless it is dispensed with by the instrument creating the usufruct or the requirement is waived by the owner of the property.—Maguire v. Maguire, 34 So. 443, 110 La. 279—Weller's Succession, 31 So. 883, 107 La. 466.

8. Ill.—Quigley v. Quigley, 18 N.E. 2d 186, 370 Ill. 151—Gahan v. Golden, 162 N.E. 164, 330 Ill. 624.
Kan.—Diller v. Kilgore, 9 P.2d 643, 135 Kan. 200.

quired,[9] unless it appears from the proper construction of the instrument creating the estate that it was the intention of the grantor that the life tenant should be put into possession without security.[10] Even where the will shows an intention that the possession of the property should be intrusted to the life tenant the court may require security if it appears necessary for the protection of the rights of the remainderman.[11]

Particular circumstances affecting requirement. Usually security should be required whenever it is shown that the property is in actual danger of loss or injury,[12] or where it has been removed from the state,[13] or there is actual danger of its being removed;[14] or where the life tenant is a nonresident,[15] or insolvent.[16]

Where the articles left are perishable, the use of which consists in their consumption, usually no security is required of the legatee.[17] Where, however, a will shows an intention that they should not

Ky.—Owens v. Owens' Ex'r, 32 S.W. 2d 731, 236 Ky. 118.
Miss.—Rife v. Rife, 122 So. 739, 154 Miss. 529.
Neb.—Abbott v. Wagner, 188 N.W. 113, 108 Neb. 359.
N.Y.—In re Camp, 27 N.E. 799, 126 N.Y. 377—Hodgman v. Cobb, 195 N.Y.S. 428, 202 App.Div. 259—In re Smith's Will, 11 N.Y.S.2d 945, 170 Misc. 556—In re Victorin, 219 N.Y. S. 619, 128 Misc. 577—Matter of Lowery, 43 N.Y.S. 972, 19 Misc. 84.
S.C.—Evans v. Adams, 185 S.E. 57, 180 S.C. 214—Long v. Lea, 181 S.E. 6, 9, 177 S.C. 231, 101 A.L.R. 266, quoting **Corpus Juris.**
21 C.J. p 966 note 53.

Increasing bond

The amount of the bond may be increased on application, where it is shown that the interest of the remainderman has increased in value. —McCutchin v. Price, 3 Hayw., Tenn., 211.

Security required

Ga.—Barmore v. Gilbert, 106 S.E. 269, 151 Ga. 260, 14 A.L.R. 1060.
Kan.—In re Blakely's Estate, 224 P. 65, 115 Kan. 644.
N.Y.—In re Bacharach's Estate, 245 N.Y.S. 647, 138 Misc. 367.

9. Mo.—Phipps v. Doak, App., 145 S.W.2d 167.

Election to take statutory life interest

Where the widow of testator elected to take her statutory life interest in one third of testator's estate, in lieu of testamentary provision, the interest of the remainderman would be amply protected by the bond required of the widow as life tenant. —Farmers' Loan & Trust Co. v. McCarty, 124 A. 40, 100 Conn. 367.

10. Ky.—Thomas' Adm'r v. Thomas, 294 S.W. 776, 220 Ky. 101.
Mich.—Chamberlain v. Husel, 144 N. W. 549, 178 Mich. 1.
Miss.—Howell v. Howell, 127 So. 566, 157 Miss. 15—Martin v. Martin, 13 So. 267, 69 Miss. 315.
N.Y.—In re Richardson's Estate, 238 N.Y.S. 271, 135 Misc. 726, affirmed 243 N.Y.S. 845, 229 App.Div. 271.
S.C.—Long v. Lea, 181 S.E. 6, 9, 177 S.C. 231, 101 A.L.R. 266, quoting **Corpus Juris.**
21 C.J. p 966 note 54.

Direction for equal division

Where will provided for equal division of personal property and money among children of testator, to be retained by them for and during their natural lives, failure to require security from them for the benefit of the remaindermen was not erroneous, since direction for equal division indicated intention that delivery should be made to life tenants without requiring security.—Rife v. Rife, 122 So. 739, 154 Miss. 529.

Exoneration from giving bond as executor or trustee

(1) Mere fact that testator has indicated his desire that the life tenant, in his capacity as executor, shall not be required to give a bond does not necessarily show that the testator intended that security should not be required when the life tenant, as such, takes possession of the property.
Ill.—Gahan v. Golden, 162 N.E. 164, 330 Ill. 624.
Iowa.—Scott v. Scott, 114 N.W. 881, 137 Iowa 239, 126 Am.S.R. 277, 23 L.R.A.,N.S., 716.
N.Y.—In re Taylor's Estate, 268 N.Y. S. 70, 149 Misc. 705, affirmed In re Taylor's Will, 271 N.Y.S. 1057, 242 App.Div. 608.

(2) In a case in which security was required, the view was expressed that the fact that, while testator expressly relieved the executors and trustees from giving a bond, he made no provision in that regard as to the life tenant was significant, notwithstanding the life tenant was one of the executors and trustees.—In re Bachrach's Estate, 245 N.Y.S. 647, 138 Misc. 367.

(3) In a case in which it was held that a trust was not created because a person cannot legally be a sole trustee and sole beneficiary and, therefore, that the named beneficiary took a life estate, it was held that, while the testator's declaration that he did not wish his widow to give a bond as executrix and trustee might indicate that he did not desire her to give security under any circumstances, it did not conclusively show an intention not to require security if the widow should take possession as life tenant.—In re Richardson's Estate, 238 N.Y.S. 271, 135 Misc. 726, affirmed 243 N.Y.S. 845, 229 App.Div. 271.

(4) But, where will gave life estate in residuary to widow of testator with vested remainders to testator's children and directed that widow should not be required to give bond or undertaking as executrix or as trustee, but did not create a trust, the widow, as life tenant, was not required to give security before payment or delivery to her of corpus of residuary estate.—In re Beard's Will, 8 N.Y.S.2d 91, 169 Misc. 474.

Bequest in lieu of dower

Fact that bequest for life to widow of testator was in lieu of dower did not authorize delivery to her without exacting security.—Matter of McDougall, 35 N.E. 961, 141 N.Y. 21, reversing 21 N.Y.S. 479, 65 Hun 624.

11. N.Y.—Matter of Lowery, 43 N. Y S. 972, 19 Misc. 83.
S.C.—Long v. Lea, 181 S E. 6, 9, 177 S C. 231, 101 A.L.R. 266, quoting **Corpus Juris.**

12. N.Y.—In re Smith's Will, 11 N Y.S.2d 945, 170 Misc. 556.
S.C.—Long v. Lea, 181 S.E. 6, 9, 177 S.C. 231, 101 A.L R. 266, quoting **Corpus Juris.**
21 C.J. p 966 notes 50, 53, p 1047 note 48.

13. Ga.—Riddle v. Kellum, 8 Ga. 374.
S.C.—Long v. Lea, 181 S.E. 6, 9, 177 S.C. 231, 101 A.L.R. 266, quoting **Corpus Juris**—Moon v. Moon, 21 S.C.Eq. 327.

14. Conn.—Clarke v. Terry, 34 Conn. 176—Hudson v. Wadsworth, 8 Conn. 348.
S.C.—Long v. Lea, 181 S.E. 6, 9, 177 S.C. 231, 101 A.L.R. 266, quoting **Corpus Juris.**
21 C.J. p 966 note 58.

15. S.C.—Long v. Lea, supra.
21 C.J. p 966 note 59.

16. N.Y.—In re McDougall, 35 N.E. 961, 141 N.Y. 21—In re Smith's Will, 11 N.Y.S.2d 945, 170 Misc. 556.
S.C.—Long v. Lea, 181 S.E. 6, 9, 177 S.C. 231, 101 A.L.R. 266, quoting **Corpus Juris.**

17. Ky.—McKee v. McKee, 82 S. W. 451, 26 Ky.L. 736.

be consumed but go to the party in remainder, equity will in cases of danger require the life tenant to give security.[18] Where the articles left may depreciate by using them but will not be consumed or worn out in that way, the life legatee, under ordinary circumstances and risks, is allowed to retain possession of the articles without giving security for their preservation.[19] Where, however, the subject matter of the life estate is money or its equivalent or is such property as must be converted into money, usually security should be required;[20] but where the beneficiary is something more than life tenant and has the power to use in his discretion some portion of the principal for his support or otherwise, he is as a general rule entitled to the custody of the fund without security.[21]

The possession of the property by a wrongdoer who claims the entire title as his own is sufficient ground for requiring security.[22]

The fact that the remainderman is indebted to the life tenant for an amount loaned from the fund which is subject to the life estate will not affect the right to demand security but may be considered by the court in determining the amount.[23]

Where the life tenant purchases real property with the funds received by him as life tenant, or with the proceeds of the sale by him of personal property which was subject to the life estate and the remainderman does not question such purchase, it has been held that title to the real property should be placed in the life tenant for life, with remainder to the person entitled thereto, as shown infra § 141, but a trustee should not be appointed or security required of the life tenant.[24]

Security from third person. Security may be required from one who purchases the life estate from the life tenant[25] or at a sale under execution.[26] It has been held, however, that a purchaser for a valuable consideration without notice of the rights of the remainderman should not be required to give security where he has himself sold the property before receiving notice.[27]

Me.—Whittemore v. Russell, 14 A. 197, 80 Me. 297, 6 Am.S.R. 200.
Mass.—Lynde v. Estabrook, 7 Allen 68.
Pa.—Dewey's Estate, 32 Pa.Co. 307.

18. Md.—Miller v. Williamson, 5 Md. 219.

19. Ala.—Underwood v. Underwood, 59 So. 305, 162 Ala. 553, 136 Am.S.R. 61.
Me.—Fuller v. Fuller, 24 A. 946, 84 Me. 475—Whittemore v. Russell, 14 A. 197, 80 Me. 297, 6 Am.S.R. 200.

20. Ga.—Barmore v. Gilbert, 106 S.E. 269, 272, 151 Ga. 260, 14 A.L.R. 1060, citing Corpus Juris.
Ky.—Thomas' Adm'r v. Thomas, 294 S.W. 776, 220 Ky. 101.
Mo.—Phipps v. Doak, App., 145 S.W. 2d 167.
N.Y.—In re Talmage, 52 N.Y.S. 710, 32 App.Div. 10—In re Recke's Estate, 184 N.Y.S. 278, 112 Misc. 673.
21 C.J. p 966 note 64.

Legatee responsible and no showing of danger of waste

Where a life legacy consists of money and the will provides that it shall be paid to the life legatee, the practice prevails in courts of chancery to require security from the life legatee, notwithstanding he may be perfectly responsible and even though there is no showing that there is danger of waste.—Tripp v. Krauth, 171 N.E. 919, 340 Ill. 11—Pratt v. Skiff, 124 N.E. 534, 289 Ill. 268—21 C.J. p 966 note 64.

In North Carolina the rule is that when the bequest is specific and is not of the residuum, the executor should deliver the property to the one to whom it is given for life, taking an inventory and receipt for the benefit of the remainderman, and this rule applies to money as well as to other personal property.—Simmons v. Fleming, 72 S.E. 1082, 157 N.C. 389—Hodge v. Hodge, 72 N.C. 616—Williams v. Cotten, 56 N.C. 395.

21. Cal.—Colburn v. Burlingame, 214 P. 226, 190 Cal. 697, 27 A.L.R. 1374.
Me.—McGuire v. Gallagher, 59 A. 445, 99 Me. 334.
N.Y.—Matter of Frost, 165 N.Y.S. 930, 179 App.Div. 431—In re Richardson's Estate, 238 N.Y.S. 271, 135 Misc. 726, affirmed 243 N.Y.S. 845, 229 App.Div. 271—In re Potter's Estate, 231 N.Y.S. 355, 133 Misc. 7—In re Victorin, 219 N.Y.S. 619, 128 Misc. 577—Matter of Haskell, 43 N.Y.S. 1144, 19 Misc. 206.
Pa.—Appeal of Hippenstall, 22 A. 860, 144 Pa. 259—Hambright's Appeal, 2 Grant 320—Tibben's Estate, 8 Pa.Dist. 234—Dewey's Estate, 32 Pa.Co. 307.

Statute not applicable

(1) Some statutes requiring a life tenant to give bond to secure remaindermen's interests on taking over property devised do not apply to a life tenant having power of consumption of principal.—In re Powell's Estate, 17 A.2d 391, 340 Pa. 404.

(2) The view has been expressed that, where there is an enlargement or amplification of a gift of a life estate by the use of additional words and phrases contained in the will, the court in its discretion may accept the bond of the life tenant without security.—Hess's Estate, 17 Pa.Dist. & Co. 793, 43 Lanc.L.Rev. 86.

Bond as testamentary trustee

In a case in which the will gave the life tenant control of the property and the right to use the principal, if necessary, for his support and maintenance, no bond was required; in respect of the suggestion that, since the life tenant became a trustee for the remainderman, a bond should be required of him as testamentary trustee, it was pointed out that the will was executed before Sept. 1, 1914, and that Surrogate's Court Act § 169 does not require a bond where a will was so executed.—In re Niles' Will, 202 N.Y.S. 475, 122 Misc. 17, affirmed 206 N.Y.S. 940, 211 App.Div. 826.

22. Ala.—Ramey v. Green, 18 Ala. 771.

23. Ala.—Bethea v. Bethea, 22 So. 561, 116 Ala. 265.

24. Ill.—Vanatta v. Carr, 82 N.E. 267, 229 Ill. 47—Vanatta v. Carr 79 N.E. 86, 223 Ill. 160.

25. Ala.—Lyde v. Taylor, 17 Ala. 270.
21 C.J. p 967 note 69.

26. S.C.—Cordes v. Ardrian, 10 S.C. Eq. 154.
21 C.J. p 967 note 70.

Where the execution purchaser claims the entire interest under a sale where the life estate only was liable he will be required to give security.—McDougal v. Armstrong, 6 Humphr., Tenn., 428.

27. Va.—Chisholm v. Starke, 3 Call, 25, 7 Va. 25.

Right of life tenant to take possession on giving security. Even in cases in which the life tenant is entitled only to the income for life, it has been held or recognized that he may be entitled to obtain possession of the corpus or principal on giving adequate security,[28] and that, even though the life tenant is not entitled to possession as a matter of right, the court may require delivery of possession to him on his furnishing adequate security.[29] So one to whom the net estate of a decedent has been bequeathed for life may be entitled to the possession and control and management of the estate, consisting of money, on giving proper and adequate security.[30]

Authority and duty of executor. In cases in which the life tenant is not entitled to possession as of right without giving security, it has been held or recognized that the executor may exact security before giving possession,[31] and that, on obtaining security, he has authority to deliver the property to the life tenant.[32] Under some circumstances, it is the duty of the executor to require security before delivering the property to the life tenant.[33] The executor's duty to demand security exists, however, only where the testator has not manifested an intention that the property should be delivered to the life tenant;[34] and, where discretion is conferred on the executor or trustee to require security for the benefit of the remainderman, when he has acted and has transferred the possession to the life tenant without requiring security, he should not be surcharged because of the mere fact that in the exercise of his discretion he did not demand such security.[35]

Waiver; consent of remainderman. In general the remainderman may waive the giving of security by the life tenant[36] since the giving of security is for the purpose of preserving the estate in remainder and the life tenant and remainderman may, by united action, transfer absolute title.[37] There may be a waiver notwithstanding a statute provides for giving security.[38] So the testator who by will creates the life estate may waive security by testamentary direction that security shall not be required even though there is a statutory provision for security.[39] It seems, however, that it is not permissible to award the property to the life tenant without requiring adequate security merely because those apparently entitled to claim the remainder consent to such award, where the remainder is contingent so that other persons may ultimately be entitled to claim, or share in, the remainder.[40]

Effect of failure to give or require security. The fact that no bond has been given does not alter the rights of life tenant and remainderman,[41] as, for example, where the will creating the life estate directs that security shall not be required.[42] So the rights of the life tenant are not enlarged with regard to the use and management of the estate by the fact that no bond is required.[43]

Alternative appointment of trustee. In a case in which security is properly required, in some jurisdictions at least the court may and should appoint a trustee to hold the property and pay the income to the life tenant, if the latter is unable or refuses to give security,[44] and, under some statutes, the

28. N.Y.—Livingston v. Murray, 68 N.Y. 485, modifying 4 Hun 619, 67 Barb. 214—In re Recke's Estate, 184 N.Y.S. 278, 112 Misc. 673.
21 C.J. p 1040 note 24.

29. N.Y.—Scott v. Scott, 27 N.Y.S. 152, 6 Misc. 174.

30. N.Y.—In re Colwell, 168 N.Y.S. 812, 181 App.Div. 408.

31. N.H—Healey v. Toppan, 45 N. H. 243, 86 Am.D. 159.
N.Y.—Matter of McDougall, 35 N.E. 961, 141 N.Y. 21, reversing 21 N.Y.S. 479, 65 Hun 624—Clark v. Clark, 8 Paige 152, 35 Am.D. 676.
21 C.J. p 1040 note 24.

32. N.Y.—Hodgman v. Cobb, 195 N. Y.S. 428, 202 App.Div. 259.
21 C.J. p 1040 note 24.

33. N.Y.—Fernbacher's Estate, 17 Abb.N.C. 339, 8 N.Y.Civ.Proc. 227, 3 HowPr., N.S., 93, 4 Dem.Surr. 244.
21 C.J. p 967 note 73, p 1040 note 24.

34. N.Y.—In re Von Kleist's Will, 193 N.E. 256, 265 N.Y. 422, reversing 270 N.Y.S. 435, 240 App.Div. 436, modifying 263 N.Y.S. 888, 147 Misc. 416.

35. N.Y.—Matter of Hamlin, 126 N. Y.S. 396, 141 App.Div. 318.

36. Ky.—Owens v. Owens' Ex'r, 32 S.W.2d 731, 236 Ky. 118.
Pa.—In re Gillett's Estate, 197 A. 517, 130 Pa.Super. 309.

37. Ky—Owens v. Owens' Ex'r, 32 S.W.2d 731, 236 Ky. 118.

38. Pa.—In re Kirkpatrick's Estate, 131 A. 361, 284 Pa. 583.

39. Pa.—In re Kirkpatrick's Estate, supra—In re Gillett's Estate, 197 A. 517, 130 Pa.Super 309.

40. Pa.—In re Young's Estate, 17 Pa.Dist. & Co. 745.

41. Pa.—In re Powell's Estate, 17 A. 2d 391, 340 Pa. 404—In re Gillett's Estate, 197 A. 517, 130 Pa.Super. 309.

42. Pa.—In re Kirkpatrick's Estate, 131 A. 361, 284 Pa. 583—In re Strawbridge's Estate, 14 Pa.Dist. & Co. 703.

43. Tenn.—Cook v. Collier, Ch.A., 62 S.W. 658.

44. Ky.—Thomas' Adm'r v. Thomas, 294 S.W. 776, 220 Ky. 101—Wilkenson v. Rosser's Ex'r, 104 S.W. 1019, 31 Ky.L. 1262.

Affording opportunity to give security

(1) Where the will provides for payment of money to the life tenant and contains no provision for a trustee, the court should not decree absolutely that the money should be held in trust for the life tenant, but should make the appointment of a trustee contingent on the life tenant's inability and failure to give security.—Tripp v. Krauth, 171 N.E. 919, 340 Ill. 11.

(2) In a case in which the life tenant was a nonresident of the state and a wanderer, the propriety of the appointment of a trustee was

life tenant may either give a bond or have a trustee appointed.[45]

§ 135. Use of Property

The power of a life tenant in possession to invest and reinvest has been recognized. Subject to certain limitations as to consumable property, the life tenant may not encroach on the principal or corpus unless authority to do so is conferred by the instrument creating the estate.

While it has been said that personal property which is subject to a legal life estate cannot be reinvested by the person entitled to possession,[46] there is authority for the view that, where there is a life estate in personal property, there must always be a power to make it available according to the circumstances,[47] and the life tenant may, under proper restrictions, invest or reinvest money or its equivalent in order that his bequest may be more remunerative,[48] or, as stated in somewhat greater detail, he may convert one kind of property into another or change the character of the investments,[49] provided such acts are in accordance with prudent management and the value of the property as a whole is not diminished.[50] By the terms of the instrument creating the life estate it may become the duty of the life tenant to reinvest the proceeds of property sold pursuant to the terms of such instrument,[51] and the rule has been announced that, if the life tenant collects notes, debts, or the like, he should reinvest the proceeds.[52] The life tenant may have discretionary powers in determining the type of investment in the absence of restrictions or limitations imposed by the instrument creating the life estate.[53] Life tenant as trustee for remainderman see infra § 141.

Consumption and encroachment on corpus. Whether a person who has a life estate in personal property may convert such property to his own use depends to some extent on the kind and character of the property and the use to which it may be put as shown by the evidence in the particular case.[54] Ordinarily the life tenant is entitled to appropriate only the income and profits, and cannot encroach on the corpus of the estate,[55] at

recognized.—Emmitt v. Clark, 193 Ill. App. 561.

45. Pa.—Griffith's Estate, 26 Pa. Dist. & Co. 75—In re Ertel's Estate, 19 Pa.Dist. & Co. 95—Printzenhoff's Estate, 10 Pa.Dist. & Co. 335. See In re Strock's Estate, 18 Lehigh Co.L.J. 46.

46. U.S.—Backer v. Levy, C.C.A. N.Y., 82 F.2d 270.

47. Ala.—Underwood v. Underwood, 50 So. 305, 162 Ala. 553, 136 Am.S.R. 61.
Mich.—Sutphen v. Ellis, 35 Mich. 446.

48. Ill.—Quigley v. Quigley, 18 N.E. 2d 186, 370 Ill. 151.
21 C.J. p 1040 note 31, p 1041 note 46.

49. Me.—Warren v. Webb, 68 Me. 133.
Mich.—Sutphen v. Ellis, 35 Mich. 446, 450.
S.C. Calhoun v. Furgeson, 24 S.C. Eq. 160.
21 C.J. p 1040 note 31.

50. Mich.—Sutphen v. Ellis, 35 Mich. 446.
21 C.J. p 1040 note 31.

Other statement

Life tenant must prudently manage personalty and invest proceeds of sale thereof so as not to diminish its value as a whole.—Wagnon v. Wagnon, Tex.Civ.App., 16 S.W.2d 366, 370, citing Corpus Juris and error refused.

51. Ky.—Shutt's Adm'r v. Shutt's Adm'r, 232 S.W. 405, 192 Ky. 98.

52. Tex.—Wagnon v. Wagnon, Civ. App., 16 S.W.2d 366, error refused.

53. Power to encroach on principal and exoneration from accounting

(1) Life tenant, who, under the will creating the life estate, had the possession and management of the property, with right to dispose of it for her comfort, maintenance, and support, free from any obligation to account to any one for what she might desire to use of either principal or income, was not subject to statutory limitations as to investment of trust funds.—In re Raplee's Will, 290 N.Y.S. 517, 160 Misc. 615.

(2) In such case the life tenant may exercise discretion in the selection of securities.—In re Raplee's Will, supra.

(3) In such case, however, the life tenant owed to the remainderman the duty, in respect of investments, to manage the unused principal prudently, and the test of the fidelity of the life tenant was not whether he invested in any particular class of securities, but rather whether he exercised the care and judgment which a prudent investor would have exercised in his own affairs.—In re Raplee's Will, supra.

(4) In such case the prudence required must be determined by conditions as they existed at time of investment, and fact that the judgment turned out to be wrong is not a showing that life tenant failed to exercise sound discretion.—In re Raplee's Will, supra.

Retention of securities

A will giving residue of testatrix' property to her daughter for life with provision for distribution thereof on death of daughter manifested intent of testatrix that corpus was to be delivered to daughter in kind without requiring daughter, as life tenant, to sell or convert corpus of the estate into securities legal for trust fund investment.—In re Watson's Estate, 5 N.Y.S.2d 416, 168 Misc. 135.

In Pennsylvania, in view of the general rule obtaining in Pennsylvania that personal property taken over by a life tenant under a bequest becomes, in effect, his individual estate and that he becomes a debtor to the remainder to the extent of the value of the property when taken over, set forth infra § 141, the property may be used or invested in the purchase of realty, mercantile adventures, or stock speculations.—Reiff's Appeal, 16 A. 636, 124 Pa. 145—In re Gillett's Estate, 197 A. 517, 130 Pa.Super. 309.

54. Ark.—Dillen v. Fancher, 102 S.W.2d 87, 193 Ark. 715.
21 C.J. p 1041 note 34.

55. Kan.—Diller v. Kilgore, 9 P.2d 643, 135 Kan. 200.
Ky.—Shutt's Adm'r v. Shutt's Adm'r, 232 S.W. 405, 192 Ky. 98.
Neb.—In re Wecker's Estate, 243 N.W. 642, 647, 123 Neb. 504, citing Corpus Juris.
N.Y.—In re Victorin, 219 N.Y.S. 619, 128 Misc. 517—In re Recke's Estate, 184 N.Y.S. 278, 112 Misc. 673.
Tex.—Wagnon v. Wagnon, Civ.App., 16 S.W.2d 366, 370, citing Corpus Juris, and error refused.
21 C.J. 1040 note 32.

Gift of use of money

A gift of the use of money to a

least where the property is not consumed or worn out by use,[56] unless authorized to do so by the instrument or agreement creating the life estate.[57] Where the life tenant in possession is regarded as a debtor of the remainderman under rules stated infra § 141, according to some cases the life tenant may use the principal for his living and family expenses, without, however, affecting the right of remaindermen to receive the full amount of the principal on the death of the life tenant.[58]

Unless the instrument creating the estate manifests a contrary intention,[59] the donee or transferee of what purports to be a life estate in personal property of such a nature that its use necessarily results in its consumption may, under some circumstances, take absolute title,[60] and he may use such property without any accountability to the remainderman.[61] According to some cases, when such property is included in a general gift of personal property, to be specifically enjoyed, the rights of the remainderman are defeated as to all of such property which is consumed in the use intended to be made of it.[62] As sometimes expressed in the form of a general rule, a life estate in personal property gives the donee a right to consume such articles as cannot be enjoyed without consuming them,[63] and to wear out by use such as cannot be used without wearing out.[64] Under some circumstances, however, where the instrument creating the estate shows that the first taker is entitled only to a life interest notwithstanding the property is consumable, a sale may be directed and provision made for payment to the life tenant of the income from the proceeds and for securing the principal to the remainderman.[65]

The life tenant does not take an absolute estate in property which deteriorates in use, but which is not consumed or destroyed thereby.[66]

Where the property subject to the life estate is to be enjoyed in specie, a liability arises where the life tenant has converted chattels to unauthorized uses.[67] Where personal property which should properly be sold and the proceeds invested is left in the custody of the life tenant, he must account for all of the property received by him over and above the proportion to which he is entitled.[68]

As to creation of life estate in consumable property by will see the C.J.S. title Wills § 894, also 21

life tenant is a gift of interest and not of the corpus.—Quigley v. Quigley, 18 N.E.2d 136, 370 Ill. 151.

Exception with regard to support of children

Where the life tenant is the widow of testator and the remaindermen his children, and their means and those of the mother are insufficient to support and educate them in a proper manner, the widow may use a portion of the corpus of the estate for this purpose.—Wooten v. House, Tenn.Ch.A., 36 S.W. 932.

56. Ark.—Dillen v. Fancher, 102 S.W.2d 87, 193 Ark. 715.
Ky.—Ward v. Wright, 246 S.W. 123, 197 Ky. 148.
Tex.—Wagnon v. Wagnon, Civ.App., 16 S.W.2d 366.

Money or its equivalent

(1) Where money or its equivalent is bequeathed for life, only interest or income can be consumed, unless there are words in will authorizing greater latitude of use.—Chambers v. Williams, 132 S.W.2d 654, 199 Ark. 40—Dillen v. Fancher, 102 S.W. 2d 87, 193 Ark. 715—Galloway v. Sewell, 258 S.W. 655, 162 Ark. 627.

(2) Notes and accounts come within the rule.—Dillen v. Fancher, supra.

57. Ark.—Chambers v. Williams, 132 S.W 2d 654, 199 Ark. 40.
Cal.—Skellenger v. England, 253 P. 191, 81 Cal.App. 176.
Ky.—Ward v. Wright, 246 S.W. 123, 197 Ky. 148.
Minn.—Julian v. Northwestern Trust Co., 255 N.W. 622, 192 Minn. 136.
Neb.—In re Wecker's Estate, 243 N. W. 642, 647, 123 Neb. 504, citing Corpus Juris—Abbott v. Wagner, 188 N.W. 113, 108 Neb. 359.
N.Y.—Hasbrouck v. Knobauch, 114 N. Y.S. 949, 130 App.Div. 378—In re Eddy's Adm'r, 236 N.Y.S. 275, 134 Misc. 511—In re Victorin, 219 N.Y. S. 619, 128 Misc. 577.
21 C.J. p 1040 note 33.
Gift by life tenant see infra § 137.

58. Pa.—Reiff's Appeal, 16 A. 636, 124 Pa. 145—In re Gillett's Estate, 197 A. 517, 130 Pa.Super. 309.

59. Ala.—Harrison v. Foster, 9 Ala. 955.
Md.—Miller v. Williamson, 5 Md. 219.
21 C.J. p 1041 notes 38–40.

60. Ala.—Schowalter v. Schowalter, 116 So. 116, 217 Ala. 418.
Ky.—Hall's Adm'r v. Hall's Ex'r, 97 S.W.2d 23, 265 Ky. 528.
S.C.—Robertson v. Collier, 10 S.C. Eq. 370.
21 C.J. p 1041 note 34.

61. Ill.—Walker v. Pritchard, 12 N.E. 336, 121 Ill. 221, affirming Pritchard v. Walker, 22 Ill.App. 286.
Ky.—Ward v. Wright, 246 S.W. 123, 197 Ky. 148.
S.C.—Calhoun v. Furgeson, 24 S.C. Eq. 160.
21 C.J. p 1041 note 34.

"Consume", as used in references to the right of one having a life interest in personal property, has a well-defined meaning; it refers to such property as would naturally wear out or be destroyed or consumed in the use of it.—Ward v. Wright, 246 S.W. 123, 197 Ky. 148.

62. Tenn.—Ballentine v. Spear, 2 Baxt. 269—Vancil v. Evans, 4 Coldw. 340—Forsey v. Luton, 2 Head 183.

63. Ala.—Harrison v. Foster, 9 Ala. 955.
Ill.—Walker v. Pritchard, 12 N.E. 336, 121 Ill. 221, affirming Pritchard v. Walker, 22 Ill.App. 286.
Pa.—German v. German, 27 Pa. 116, 67 Am.D. 451.
21 C.J. p 1041 note 34.

64. Ill.—Walker v. Pritchard, 12 N. E. 336, 121 Ill. 221, affirming Pritchard v. Walker, 22 Ill.App. 286.
Pa.—German v. German, 27 Pa. 116, 67 Am D. 451.
21 C.J. p 1041 note 34.

65. Ill.—Dickinson v. Griggsville Nat. Bank, 70 N.E. 593, 209 Ill. 350.
S.C.—Robertson v. Collier, 10 S.C. Eq. 370.
21 C.J. p 1041 note 38.

66. Me.—Whittemore v. Russell, 14 A. 197, 80 Me. 297, 6 Am.S.R. 200.
21 C.J. p 1041 note 44.

67. Tenn.—Vancil v. Evans, 4 Coldw. 340—Forsey v. Luton, 2 Head 183.

68. N.C.—Jones v. Simmons, 42 N.C. 178.

C.J. p 1041 notes 34, 35, 38, 40, 44, and 69 C.J. p 548 notes 61–65.

Reproductive property. Where the property is consumable but also reproductive, such as flocks and herds, the life tenant is entitled to the increase, as shown infra § 136, but, according to some cases, must keep up the original stock,[69] although, under some statutes, the life tenant does not have this obligation.[70]

Land and personalty. According to some cases, where the gift is of an estate consisting partly of real property and partly of personal property some of which is perishable, the perishable property does not belong absolutely to the life tenant, nor can it be sold.[71] Also it has been held that where land together with personal property which may be used in connection with the land is given to a person for life with remainder over, the tenant for life must preserve the estate with all its appurtenances in the same situation in which he received it, and he must keep the stock of cattle, provisions, and instruments of husbandry in the condition in which he received them.[72]

§ 136. Income, Profits, and Accretions

Income from the property subject to the life estate usually belongs to the life tenant, and he may also be entitled to profits and increase, although in some jurisdictions the general rule appears to favor the remainderman in regard to an increase in the value of the principal or corpus.

Unless a contrary restriction or limitation is duly imposed,[73] usually the life tenant is entitled to everything in the nature of income accruing during the existence of the life estate,[74] and any accumulation of income,[75] provided, according to some cases, the intact value of the corpus of the estate is not reduced.[76]

According to some cases, the profits[77] or in-

69. Tex.—Wagnon v. Wagnon, Civ. App., 16 S.W.2d 366, 370, citing Corpus Juris, and error refused.
21 C.J. p 1041 note 43.

70. Ga.—Leonard v. Owen, 20 S.E. 65, 93 Ga. 678.

71. S.C.—Patterson v. Devlin, 16 S.C. Eq. 459—Robertson v. Collier, 10 S.C.Eq. 370.

72. S.C.—Patterson v. Devlin, 16 S. C.Eq. 459—Robertson v. Collier, 10 S.C.Eq. 370.

73. Mo.—Bramell v. Cole, 37 S.W. 924, 136 Mo. 201, 58 Am.S.R. 619.
Tex.—Wagnon v. Wagnon, Civ.App., 16 S.W.2d 366.
21 C.J. p 945 notes 65, 66.

Accumulation of income

The accumulation of income did not pass to the heirs or distributees of the life tenant in view of a contrary intention of the testator shown by the will creating the life estate.—Bramell v. Cole, 37 S.W. 924, 136 Mo. 201, 58 Am.S.R. 619.

74. Ky.—Shutt's Adm'r v. Shutt's Adm'r, 232 S.W. 405, 192 Ky. 98.
Md.—Evans v. Iglehart, 6 Gill & J. 171.
Mont.—Thompson v. Flynn, 27 P.2d 505, 95 Mont. 484.
N.Y.—In re Eddy's Adm'r, 236 N.Y. S. 275, 134 Misc. 511—Jones v. Jones, 59 N.Y.S. 974, 28 Misc. 421.
Pa.—In re Powell's Estate, 17 A.2d 391, 340 Pa. 404—In re Sternberger's Estate, 182 A. 723, 121 Pa. Super. 50.
Tex.—Wagnon v. Wagnon, Civ.App., 16 S.W.2d 366, error refused.
21 C.J. p 945 note 66, p 1040 note 32.

From date of death of testator

Generally life tenant or beneficiary under will is entitled to income earned from the date of testator's death.
Conn.—In re Cannon's Estate, 151 A. 166, 111 Conn. 589—Stanley v. Stanley, 142 A. 851, 108 Conn. 100.
Md.—York v. Maryland Trust Co., 133 A. 128, 150 Md. 354, 46 A.L.R. 231.
N.Y.—In re De Polo's Estate, 262 N. Y.S. 866, 146 Misc. 744.

Basis of computation

(1) In the absence of a contrary intention expressed in the will creating the life estate, the life tenant is entitled only to income from residue of principal after the payment of debts, expenses, and specific legacies; accordingly, the life tenant was not prejudiced, where executor paid income from entire estate, and then charged against income interest paid to carry securities pending liquidation of testator's debt.—York v. Maryland Trust Co., 133 A. 128, 150 Md. 354, 46 A.L.R. 231.

(2) But under will giving widow "life use in one-third of all my property" after paying "just debts and funeral expenses," ascertaining property subject to life use before deducting legacies was proper.—In re Cannon's Estate, 151 A. 166, 111 Conn. 589.

75. Iowa.—Milner v. Brokhausen, 133 N.W. 1068, 153 Iowa 560.
Pa.—In re Sternberger's Estate, 182 A. 723, 121 Pa.Super. 50.

76. Pa.—In re Sternberger's Estate, supra.
Tenn.—Cook v. Collier, Ch.A., 62 S.W. 658.

In New York

(1) In a well considered case, in which, however, a testamentary trust was actually involved, the rule has been announced that, where will makes specific gift of property to life beneficiary direct, he is entitled to receive entire income, notwithstanding impairment of value of principal as it existed at date of death of testator may thereby result, whether such impairment is great or small.—In re Hilliard's Will, 299 N.Y.S. 788, 164 Misc. 677, affirmed In re Myers, 5 N.Y.S.2d 92, 254 App.Div. 879, reargument denied In re Hilliard's Estate, 7 N.Y.S.2d 111, 255 App.Div. 781.

(2) Rule applies where gift is of specified securities.—In re Hilliard's Will, supra.

(3) Where, however, subject matter of legal life estate was not given directly by terms of will, and award of current income to life beneficiary would result in impairment of principal, amortization fund must be set up from income to keep principal intact, unless testator has clearly expressed contrary intent.—In re Hilliard's Will, supra.

Retention of income to maintain intact value of principal or corpus of trust see the C.J.S. titles Trusts §§ 337, 346, also 21 C.J. p 1042 note 59, and Wills § 1036, also 65 C.J. p 823 note 43—p 824 note 54, p 840 note 3—p 841 note 11, 69 C.J. p 786 notes 62–65.

Who chargeable with losses or depreciation in general see infra § 141.

77. Mont.—Thompson v. Flynn, 27 P.2d 505, 95 Mont. 484.
Tex.—Wagnon v. Wagnon, Civ.App., 16 S.W.2d 366.
21 C.J. p 945 note 66, p 1040 note 32.

Profits accumulated through use of property

The estate of the life tenant is en-

crease[78] accruing during the life tenancy belongs to the life tenant, unless a contrary restriction or limitation is duly imposed.[79] As otherwise stated, if a fund is handed over to the life tenant, instead of paying him the income therefrom he may invest the fund, and the profits from such investment become his exclusive property, the remainderman being entitled only to a return of the original sum;[80] he may use the fund, and make all the profit on it he can, with due regard to its safety and protection.[81] According to some cases, however, an increase in the value of the principal or corpus during the life tenancy usually belongs to the remainderman,[82] and, under some circumstances, where, on failure of the life tenant to give the required security, the court appoints a trustee to take charge of the property, the enhanced value of the property belongs to the remainderman.[83] As to whether the enhanced value of personal property held in trust is income or capital as between life beneficiary and remainderman generally see the C.J.S. titles Trusts § 355, and Wills § 1031, also 21 C.J. p 1041 note 49, 65 C.J. p 857 note 28–p 860 note 58, 69 C.J. p 774 notes 31, 34.

When the income of a fund is given for life, as a general rule, the life tenant is not entitled to have the value of his life estate commuted and paid to him in gross, instead of the annual interest of the fund,[84] nor can he be compelled to take a gross sum in lieu thereof,[85] but if he elects to do so it may sometimes be permitted by the court,[86] and provision for this is sometimes made by statute.[87]

Where, under a will, one is entitled to a part of the net income of the estate during his life, he is entitled to have the estate kept intact for the purpose of receiving such part; and the executor of the estate cannot, at the instance of a remainderman, be compelled to sell the estate on the giving to the life tenant of "satisfactory assurance" of the payment to him of his portion of the income.[88]

titled to profits accumulated through the use of the personal property in the life estate, in the absence of the testator's expression of a contrary intention in the will creating the life estate, and such profits pass to the heirs or devisees of the life tenant.—In re Wecker's Estate, 243 N.W. 642, 123 Neb. 504.

Partnership interest

(1) Life tenant was entitled to share of accumulated net profits in partnership as against remainderman, with interest on each year's accumulated undistributed net earnings.—Smith v. Sweetser, C.C.A.Ind., 19 F. 2d 974.

(2) In such case life tenant was entitled only to payment of share of undivided partnership profits rather than proportionate share of stock issued in lieu thereof and of deceased partner's interest in partnership.—Smith v. Sweetser, supra.

78. Md.—Evans v. Inglehart, 6 Gill & J. 171.
N.Y.—Jones v. Jones, 59 N.Y.S. 974, 28 Misc. 421.

Life tenant as debtor

Where the life tenant in possession is regarded as a debtor to the remainderman to the extent of the value of the property when received by, or when distributed to, the life tenant under rules stated infra § 141, any increase in the value of the property during the life tenancy belongs to the life tenant.—In re Powell's Estate, 17 A.2d 391, 340 Pa. 404—Kirkpatrick's Estate, 131 A. 361, 284 Pa. 583—In re Strawbridge's Estate, 14 Pa.Dist. & Co. 703—21 C.J. p 1041 note 46.

79. Md.—Evans v. Iglehart, 6 Gill & J. 171.
Mo.—Bramell v. Cole, 37 S.W. 924, 136 Mo. 201, 58 Am.S.R. 619.

80. Tenn.—Cook v. Collier, Ch.A., 62 S.W. 658.
21 C.J. p 1041 note 46.

81. Tenn.—King v. Sharp, 6 Humphr. 55.

82. Ky.—Hornsby v. Hornsby, 216 S.W. 88, 185 Ky. 847.
21 C.J. p 946 note 98.

Increase from natural causes

The rule has been announced that any increase in the intrinsic value of property which occurs during the life estate as the result of natural causes belongs to the remainderman.—In re Densen's Estate, 296 N.Y.S. 567, 163 Misc. 232.

83. **In Pennsylvania**

(1) The rule stated in the text has been applied where certain property came to the trustee in kind directly from the testator and remained in the trust unconverted at the date of the death of the life beneficiary, and where the appointment of the trustee was made at the request of all parties in interest.—In re Loewer's Estate, 106 A. 789, 263 Pa. 517.

(2) In a case in which a trustee was appointed pursuant to the Fiduciaries Act of 1917 § 23, 20 St. § 635, on refusal of the life tenant to give security, gains realized on the sale of principal assets were awarded to the remainderman.—In re Printzenhoff's Estate, 10 Pa.Dist. & Co. 335.

(3) In a case, however, in which reference was made to such statute, it was held that where the property received by the trustee consisted of tangible assets which were sold in continuing the business which had been carried on by the testator, profits earned in the business during the lifetime of the life beneficiary and undistributed at the time of his death belonged to his estate.—In re Chalfant's Estate, 144 A. 134, 294 Pa. 331.

(4) Where in such case the remainderman was a party to an agreement by virtue of which the court appointed a trustee and directed him to pay the net income to the life tenant during his life and, on his death, to pay the balance of the corpus to the remainderman, it was stated that the only effect of the agreement and the order was to waive the giving of security by the life tenant to protect the interest in remainder.—In re Chalfant's Estate, supra.

84. Conn.—Beach v. Beers, 68 A. 990, 80 Conn. 459.
N.C.—Ex parte Williams, 74 N.C. 68.
Va.—Washington, D. C. American Nat. Bank v. Taylor, 70 S.E. 534, 112 Va. 1, Ann.Cas.1912D 40.

85. Md.—State v. Brown, 1 A. 410, 64 Md. 97.
N.Y.—In re Camp, 27 N.E. 799, 126 N. Y. 377—Luce v. Burchard, 29 N.Y. S. 215, 78 Hun 537.

86. N.Y.—Jermain v. Sharpe, 61 N Y.S. 700, 29 Misc. 258.
21 C.J. p 1042 note 52.

87. Mo.—Millard v. Beaumont, 185 S.W. 547, 194 Mo.App. 69.
21 C.J. p 1042 note 53.

88. D.C.—Marfield v. McMurdy, 25 App.D.C. 342, 355.
N.Y.—Matter of Shadbolt, 131 N.Y.S. 989, 72 Misc. 591.
21 C.J. p 1042 note 54.

Interest. The interest on money,[89] and on bonds, notes, and other securities,[90] forming a part of the estate, belongs to the life tenant, but the right to such interest may be waived by him.[91]

The interest on a life estate in a residuary fund, where no time is prescribed for the commencement of the interest or enjoyment of such residue, should be estimated from the time of the death of the testator, on the amount of the residue as afterward ascertained.[92]

On the death of the life tenant interest is apportionable;[93] and this rule applies to the interest on municipal bonds and the bonds of private corporations.[94]

Increase of live stock. A person having a life estate in live stock is entitled to the natural increase produced during the continuance of his estate,[95] unless a contrary intention is shown by the instrument creating the life estate.[96]

Children of slaves. In most states the increase of slaves went with the mother to the owner of the remainder, and not to the person having the life estate,[97] unless a contrary intention appeared from the instrument creating the estate;[98] but in a few states such children were held to be the property of the life tenant.[99]

Increase in value of corporate stock. While the total proceeds of corporate shares of stock sold by the life tenant to the corporation which issued them have been regarded as corpus belonging to the remainderman, where the life tenant was entitled only to income,[1] and the rule has been announced that gains resulting from sales of corporate stock during the life tenancy are part of the estate in remainder,[2] in respect of corporate stock subject to a life estate which is called and redeemed by the corporation during the lifetime of the life tenant, it has been held that the life tenant is entitled to the difference between the value of the stock when the life tenancy began and the price at which the stock was redeemed, as earnings distributed to the life tenant,[3] but the interest in undistributed earnings held by the corporation as part of the corporate property, represented by each share, has been regarded as capital and not income, as between the life tenant and the remainderman.[4] Where the life tenant in possession is regarded as a debtor of the

89. Tex.—Wagnon v. Wagnon, Civ. App., 16 S.W.2d 366, 370, citing Corpus Juris and error refused.
21 C.J. p 1042 note 56.

Savings bank account

Under will giving life estate to beneficiary, with power to encroach on principal, interest credited by savings bank on bank account during life tenancy should be treated as income belonging to life tenant.—In re Eddy's Adm'r, 236 N.Y.S. 275, 134 Misc. 511.

90. Kan.—Diller v. Kilgore, 9 P.2d 643, 135 Kan. 200.
Pa.—In re Davidson's Estate, 135 A. 130, 287 Pa. 354.

Interest collected after death of life tenant

Interest on note which had accrued before, but which was not collected until after, the death of the life tenant belonged to the estate of the latter.—In re Davidson's Estate, supra.

Assignee of life tenant

The person to whom the life tenant had assigned a bond and mortgage in which the funds of the life estate were invested was entitled to interest thereon which was due at the date of the death of the life tenant.—Ex parte Richardson, 44 S.E. 964, 66 S.C. 413.

91. Pa.—Wentz's Estate, 24 Pa.Dist. 298.

92. Pa.—In re Reiff, 16 A. 636, 124 Pa. 145.
21 C.J. p 1042 note 58.

Interest pending investment in land

Under will requiring executor to invest amount bequeathed to life beneficiary in land, beneficiary was entitled to interest earned by fund while awaiting permanent investment.—Patterson's Ex'r v. Dean, 44 S.W.2d 565, 241 Ky. 671.

93. Pa.—Blick v. Cookins, 97 A. 125, 252 Pa. 56—Wilson's Appeal, 108 Pa. 344, 56 Am.R. 214.

94. Pa.—Wilson's Appeal, 108 Pa. 344, 56 Am.R. 214, overruling Earp's Will, 1 Pars.Eq.Cas. 453.

95. Ky.—Major v. Herndon, 78 Ky. 123.
Mont.—Thompson v. Flynn, 27 P.2d 505, 95 Mont. 484.
Tex.—Wagnon v. Wagnon, Civ.App., 16 S.W.2d 366, 370, citing Corpus Juris, and error refused.
21 C.J. p 1041 note 43, p 1042 note 62.

However, where property in the hands of the administrator of deceased life tenant was claimed by remaindermen named in the will creating the life estate, it was said that it made no difference that certain live stock appeared in the inventory of the administrator, "for they are not shown to be the domestic animals that were given for life, or the increase from them."—Pritchard v. Walker, 22 Ill.App. 286, 292, affirmed Walker v. Pritchard, 12 N.E. 336, 121 Ill. 221.

Gift of real and personal property as unit

According to some cases where lands are given to one for life together with personal property which is appropriate for use in connection with the land, the life tenant is entitled to the increase of stock included and to the rents and profits of the land.—Patterson v. Devlin, 16 S.C.Eq. 459—Robertson v. Collier, 10 S.C.Eq. 370.

96. Ky.—Major v. Herndon, 78 Ky. 123.
N.C.—Patterson v. High, 43 N.C. 52.
21 C.J. p 1042 note 63.

98. Ky.—Johnson v. Johnson, 8 B. Mon. 470.
S.C.—Withespoon v. McKee, 4 S.C. Eq. 14.
21 C.J. p 1042 note 64.

99. Del.—Smith v. Milburn, 2 Del. 497.
21 C.J. p 1042 note 65.

1. Ky.—Shutt's Adm'r v. Shutt's Adm'r, 232 S.W. 405, 192 Ky. 98.

2. N.Y.—Matter of Cutler, 52 N.Y.S. 842, 23 Misc. 508.

3. S.C.—Gist v. Craig, 141 S.E. 26, 142 S.C. 407.

4. Mass.—Rand v. Hubbell, 115 Mass. 461, 15 Am.R. 121.

Increased value at date of death of life tenant

The increase in value of stock at the date of the death of the life tenant over the value at the date of testator's death, resulting from profits which have never been divided, distributed, or declared, belongs to

remainderman to the extent of the value of the property when received by, or distributed to, the life tenant under the rules stated infra § 141, the increase in the value of shares of corporate stock which are subject to the life estate belongs to the life tenant who is not liable for the amount of such increase to the remainderman,[5] but, where, on the application of all interested persons, a trustee is appointed to hold the property on the life tenant's refusal to give security, the increase, during the life tenancy, in the value of corporate shares, which came to the trustee from the estate of the testator by whose will the life estate was created, belongs to the remainderman and not to the estate of the life tenant.[6] As to whether enhanced value of stock held in trust is income or capital as between life tenant and remainderman see C.J.S. titles Trusts § 355 and Wills § 1031, also 21 C.J. p 1041 note 49, 65 C.J. p 858 note 33, 69 C.J. p 774 note 31. As to the right, as between life tenant and remainderman, to exercise the right to subscribe for new stock, see Corporations § 201 e (2), and to receive dividends, see Corporations § 471.

§ 137. Alienability

Usually a life estate in personal property is alienable and may be disposed of by the life tenant, but not in such a way as to defeat the rights of the remainderman.

While it has been stated broadly that ordinarily personal property which is subject to a legal life estate with remainder over cannot be sold by the person entitled to possession,[7] as a general rule a life estate or interest in personal property is alienable and may be disposed of by the life tenant,[8] as in the case of similar estates in real property, considered supra §§ 33, 51, but not in a manner which will defeat the rights of the remainderman.[9] So usually the sale or assignment by the life tenant passes only his interest or estate,[10] notwithstanding the sale purports to pass the entire interest in the property,[11] and, according to some cases, a purchaser without notice from the life tenant takes subject

the remainderman and not to the estate of the life tenant, in the absence of any provision showing a contrary intention in the will creating the life estate.
Ky.—Bains v. Globe Bank, etc., Co., 124 S.W. 343, 136 Ky. 332, 136 Am.S.R. 263.
S.C.—Gist v. Craig, 141 S.E. 26, 142 S.C. 407.

5. Pa.—In re Powell's Estate, 17 A. 2d 391, 340 Pa. 404.

In Nebraska
It has been said that the increase in the value of bank stock, due to increase in the book value, passes to the heirs of the life tenant and not to the remainderman.—In re Wecker's Estate, 243 N.W. 642, 123 Neb. 504.

6. Pa.—In re Loewer's Estate, 106 A. 789, 263 Pa. 517.

7. U.S.—Backer v. Levy, C.C.A.N.Y., 82 F.2d 270.

8. U.S.—Seymour v. National Biscuit Co., C.C.A.N.J., 107 F.2d 58, 126 A.L.R. 1288, certiorari denied 60 S.Ct. 590, 309 U.S. 665, 84 L.Ed. 1012.
Ala.—Jones' Ex'rs v. Hoskins, 18 Ala. 489—Lyde v. Taylor, 17 Ala. 270.
Fla.—Haydon v. Weltmer, 187 So. 772, 137 Fla. 130.
Neb.—Abbott v. Wagner, 188 N.W. 113, 108 Neb. 359.
R.I.—Peck v. Smith, 15 A. 312, 16 R.I. 260.
21 C.J. p 1042 note 65½.

9. Ill.—Scheuing v. May, 213 Ill. App. 143.
Neb.—Abbott v. Wagner, 188 N.W. 113, 108 Neb. 359.
S.C.—Ex parte Richardson, 44 S.E. 964, 66 S.C. 413.
21 C.J. p 960 note 44, p 961 notes 46, 47, p 1042 note 65¼.

Shares of stock
(1) Under law of California holder of life estate in shares of corporate stock had no power to sell as trustee for remainderman.—Seymour v. National Biscuit Co., C.C.A.N.J., 107 F.2d 58, 126 A.L.R. 1288, certiorari denied National Biscuit Co. v. Seymour, 60 S.Ct. 590, 309 U.S. 665, 84 L.Ed. 1012.

(2) Under California law, that a beneficiary of a bequest of stock received a life estate by way of a residue, rather than by way of specific bequest, did not enlarge beneficiary's powers of sale, disposition, or consumption of stock, as respects beneficiary's right to deprive remaindermen of their rights in stock by its sale.—Seymour v. National Biscuit Co., supra.

(3) Where stock certificates represented a life interest only, full title to the stock could not be passed by the indorsement and delivery of such certificates by person who had only life interest therein.—Seymour v. National Biscuit Co., supra.

Remedies
(1) The remainderman may either assert his claim to the property in the hands of the purchaser or hold the life tenant responsible for its value, in case of a wrongful sale purporting to pass the entire interest.—Tabb v. Cabell, 17 Gratt. 160, 58 Va. 160.

(2) Where the life tenant wrongfully disposes of the property, he or his estate may be liable to the remainderman for the value of the property or of the estate in remainder.
Ky.—Coffey v. Wilkerson, 1 Metc. 101.
N.C.—Lewis v. Kemp, 38 N.C. 233.
21 C.J. p 960 note 44 [b] (1).

(3) A like rule has been recognized in respect of the liability of one who had purchased the life estate from the life tenant.—Coffey v. Wilkerson, 1 Metc., Ky., 101.

(4) Equity, however, it has been held, will validate a sale of part of personal property, the use of which is devised to a widow for life, where the sale was deemed necessary for the life support of her family.—Jones v. Jones, 3 N.C. 128.

10. S.C.—Ex parte Richardson, 44 S.E. 964, 66 S.C. 413.
Tenn.—Woodson v. Smith, 1 Head 276.
21 C.J. p 961 note 46, p 1042 notes 65½, 65¼, p 1047 note 50.

Effect of bill of sale
(1) In absence of power to convey a greater estate, a life tenant's bill of sale of personalty conveys merely his life estate therein.—Haydon v. Weltmer, 187 So. 772, 137 Fla. 130.

(2) Thus under a will giving some of property of testatrix to a specified person "for and during his natural life," and after his death to another "in fee simple," the life tenant had no power to dispose of any estate in personalty, and his bill of sale to third person conveyed only use of the property during his life.—Haydon v. Weltmer, supra.

11. Md.—Lark v. Linstead, 2 Md. 420.

to the rights of the remainderman,[12] although there is authority for the view that a purchaser in good faith for value acquires title, the life tenant holding the proceeds subject to the same limitations as applied to the holding of the property which was sold.[13] Even where the life tenant has the right to encroach on the principal for his personal use or for his personal support and maintenance, he may not make a gift to others of the property which is subject to the life estate, so as to defeat the rights of the remainderman.[14]

A sale by the life tenant which purports to pass the entire title does not terminate, or effect a forfeiture of, the life estate in the absence of statutory provision to the contrary.[15]

Where a life tenant wrongfully exchanges certain articles of personal property for property of a different kind, the executor who has continuing duties in regard to the estate may waive the tort and ratify the exchange if he considers it beneficial to the estate.[16]

§ 138. Executory or Future Interests

The common law now recognizes future and executory interests and executory limitations in respect of personal property.

It has been said that all future interests in personalty, whether vested or contingent, and whether preceded by a prior interest or not, are in their nature executory,[17] and fall under the rules by which that species of limitation is regulated,[18] and the common law now recognizes future and executory interests and executory limitations in respect of personal property.[19] A future interest in chattels real or personal may take effect in analogy to a re-

S.C.—Ex parte Richardson, 44 S.E. 964, 66 S.C. 418.
21 C.J. p 961 note 46.

12. Ga.—Russell v. Kearney, 27 Ga. 96.
21 C.J. p 1047 note 50.

In Alabama

(1) Some cases are in accord with the rule stated in the text.—Lyde v. Taylor, 17 Ala. 270—21 C.J. p 1047 note 50 [a] (1).

(2) According to some cases, however, the purchaser from the life tenant under a sale which purports to convey the entire property holds adversely to the remainderman, the latter's vested remainder being changed to a mere chose in action by such sale.—Broome v. King, 10 Ala. 819.
21 C.J. p 1047 note 50 [a] (2).

13. Neb.—Abbott v. Wagner, 188 N. W. 113, 108 Neb. 359.

14. Cal.—Hardy v. Mayhew, 110 P. 113, 158 Cal. 95, 139 Am.S.R. 78.
Conn.—Bishop v. Groton Sav. Bank, 114 A. 88, 96 Conn. 325.
Neb.—Abbott v. Wagner, 188 N.W. 113, 108 Neb. 359.

Restitution by donees

(1) The donees of the life tenant were bound, after the death of the life tenant, to make restitution of the property given to them, for the benefit of the persons entitled to the remainder.
Cal.—Hardy v. Mayhew, 110 P. 113, 158 Cal. 95, 139 Am.S.R. 78.
N.Y.—In re Thompson's Estate, 258 N.Y.S. 847, 144 Misc. 790.

(2) The righting of the wrong in such case should not be defeated on technical grounds.—In re Thompson's Estate, supra.

15. Ala.—Jones v. Hosking, 18 Ala. 489.
Ohio.—West v. American Telephone & Telegraph Co., 7 N.E.2d 805, 54 Ohio App. 369.

In Kentucky, in an early case involving the effect of a sale of a slave by the life tenant, it was held that, while the sale did constitute a conversion of the remainder interest, the transaction was not such a violation of the provisions of an existing statute as would operate to forfeit to the remaindermen the whole amount received, in view of the surrounding circumstances.—McGehee v. Ditto, 2 Ky.Op. 614.

Transfer of corporate stock

The rule stated in the text was applied where there was a transfer of shares of corporate stock by the life tenant; and the court pointed out that, if the case was governed by the law of Massachusetts, there would be no forfeiture in view of an applicable statute, and, in any event, a prior decision, involving the same facts, by the Ohio court of appeals was controlling.—West v. American Tel. & Tel. Co., C.C.A. Ohio, 121 F.2d 142, conforming to mandate 61 S.Ct. 179, 311 U.S. 223, 85 L.Ed. 139, 132 A.L.R. 956, reversing, C.C.A., 108 F.2d 347, two cases, certiorari granted 60 S.Ct. 979, 310 U.S. 618, 84 L.Ed. 1392.

16. Ga.—Leonard v. Owen, 20 S.E. 65, 93 Ga. 678.

17. Ill.—Glover v. Condell, 45 N.E. 173, 163 Ill. 566, 35 L.R.A. 360.

18. Ill.—Glover v. Condell, supra—Waldo v. Cummings, 45 Ill. 421.
21 C.J. p 1043 note 67.
Application of rule against perpetuities to future or executory interests in personalty see the C.J.S. title Perpetuities §§ 9–13, also 48 C.J. p 949 note 38–p 961 note 97.
Wills creating executory devises or bequests of personal property in general see C.J.S. title Wills § 920, also 69 C.J. p 589 note 23–p 590 note 32.

19. Mo.—Landers Inv. Co. v. Brown, 254 S.W. 14, 300 Mo. 348, 30 A.L.R. 908—Woolery v. Todd, App., 139 S.W.2d 1005.
R.I.—Knight v. Knight, 200 A. 431, 61 R.I. 187.
Tenn.—Bynum v. McDowell, 3 Tenn. App. 340.
21 C.J. p 1043 notes 69–71, 88.

Courts of law and of equity recognize such interests in personal property.
Miss.—Harris v. McLaran, 30 Miss. 533.
Va.—Poindexter v. Davis, 6 Gratt. 481, 47 Va. 481.

Transaction inter vivos

(1) As a general rule a future interest after an interest for life in personal property may be created by a transaction inter vivos.
Ala.—Williamson v. Mason, 28 Ala. 488—Jones' Ex'rs v. Hosking, 18 Ala. 489—Lyde v. Taylor, 17 Ala. 270—Price v. Price, 5 Ala. 578.
Ark.—Gullett v. Lamberton, 6 Ark. 109.
Cal.—Skellenger v. England, 253 P. 191, 81 Cal.App. 176.
Fla.—Horn v. Gartman, 1 Fla. 63.
Ga.—Sharman v. Jackson, 30 Ga. 224—Kirkpatrick v. Davidson, 2 Ga. 297.
Ill.—McCall v. Lee, 11 N.E. 522, 120 Ill. 261.
Ind.—Owen v. Cooper, 46 Ind. 524.
Ky.—Keen v. Macey, 3 Bibb 39.
Miss.—Harris v. McLaran, 30 Miss. 533.
Tenn.—Aiken v. Smith, 1 Sneed 304.
Va.—Bradley v. Mosby, 3 Call 50, 7 Va. 50.

(2) In North Carolina, however, the general rule appears to be to the contrary at least as to certain instru-

mainder after a life estate limited therein and is then called a quasi remainder or simply a remainder, as shown infra § 139; it may take effect in defeasance of a complete disposition of the property, or it may take effect on the happening of some future contingency.[20]

The law favors the vesting of estates in personalty,[21] and the fact that there is, by the terms of the will creating the estate, an equitable conversion of the real estate into personalty does not affect the operation of the rule,[22] although the clear intent of the testator is controlling.[23]

§ 139. In Analogy to Remainders or Executory Devises

While originally the common law did not permit the creation of remainders or future interests in personal property, interests or estates of this nature may now be created, and, in the main, are governed by the principles applicable to similar estates in real property.

Although originally at common law there could be no interest by way of remainder created in personal property,[24] and a gift for life passed the entire interest, as shown supra § 133, it is now settled that future interests or quasi remainders operating in analogy to remainders or executory devises may be created,[25] according to the decisions

actions inter vivos, in the absence of statutory modification.—Dowd v. Montgomery, 4 N.C. 198—Gilbert v. Murdock, 3 N.C. 182.

(3) So it has been held or recognized in that state that an attempted conveyance of chattels, with a reservation of a life estate to the grantor, is void as to the remainder, and has the effect of a reservation of the whole estate to the grantor.—Outlaw v. Taylor, 84 S.E. 811, 168 N.C. 511—Dail v. Jones, 85 N.C. 221—Morrow v. Williams, 14 N.C. 263.

(4) In an early case in Delaware the view apparently was taken that a gift of a chattel for life was an absolute gift except where the gift was in the form of an executory devise made at the time of the bequest of the life estate.—State v. Savin, 4 Del. 56, note.

(5) Creation of remainders in personal property by deed see Deeds § 113.

(6) Remainders and executory devises of personal property created by will see the C.J.S. title Wills §§ 914, 920, also 69 C.J. p 583 note 38–p 584 note 48, p 589 note 23–p 590 note 32.

20. Mass.—Hooper v. Bradbury, 133 Mass. 303.
21 C.J. p 1043 notes 70, 71.

21. N.Y.—Carr v. Smith, 49 N.Y.S. 351, 25 App.Div. 214.
Pa.—In re Carstensen, 46 A. 495, 196 Pa. 325.
Va.—Seller v. Reed, 13 S.E. 754, 88 Va. 377.

22. Conn.—Bates v. Spooner, 54 A. 305, 75 Conn. 501.
21 C.J. p 1043 note 78.

23. N.Y.—Teed v. Morton, 60 N.Y. 502.
Construction favoring vesting under will generally see the C.J.S. title Wills § 932, also 69 C.J. p 597 note 13–p 602 note 27.

24. U.S.—Boal v. Metropolitan Museum of Art of City of New York, C.C.A.N.Y., 298 F. 894, reversing, D.C., 292 F. 303.
Miss.—Harris v. McLaran, 30 Miss 533.
21 C.J. p 1043 note 82.

In North Carolina the rule has been announced that in determining the validity of a remainder created in another state by deed, the court will presume that the common-law rule against the creation of remainders in personal property prevails in that state, unless there is an allegation to the contrary.—Brown v. Pratt, 56 N.C. 202.
Gift of consumable property for life generally see supra § 135.

25. U.S.—Warfield v. Bixby, C.C.A. Mo., 51 F.2d 210.
Ind.—Owen v. Cooper, 46 Ind 524.
Tenn.—Bynum v. McDowell, 3 Tenn. App. 340.
21 C.J. p 1039 notes 5–7, p 1043 note 88.

Remainder after life estate

Personal property may be limited over by way of remainder after life estate.
U.S.—Warfield v. Bixby, C.C.A.Mo., 51 F.2d 210—Boal v. Metropolitan Museum of Art of City of New York, C.C.A.N.Y., 298 F. 894, reversing, D.C., 292 F. 303.
Cal.—Skellenger v. England, 253 P. 191, 81 Cal.App. 176.
Ga.—Sharman v. Jackson, 30 Ga. 224.
Ky.—Sherley v. Sherley, 232 S.W. 53, 192 Ky. 122—Betty v. Moore, 1 Dana 235.
Me.—Fuller v. Fuller, 24 A. 946, 84 Me. 475—Sampson v. Randall, 72 Me. 109.
Mass.—Hooper v. Bradbury, 133 Mass. 303.
Neb.—In re Wecker's Estate, 243 N.W. 642, 123 Neb. 504.
N.Y.—Westcott v. Cady, 5 Johns.Ch. 334, 9 Am.D. 306.
Or.—Allen v. Hendrick, 206 P. 733, 740, 104 Or. 202, citing **Corpus Juris.**
21 C.J. p 1043 note 88.

Remainder after term

(1) A remainder over after an estate for years may be created.—Sherley v. Sherley, 232 S.W. 53, 192 Ky. 122.

(2) In the case of a transfer of shares of corporate stock by a man to his wife pursuant to a family arrangement that she would transfer such shares to their son when the latter should take over the management of the corporate business, the son had a remainder interest after an absolute estate for a term in the wife, contingent on the son's taking over such management; her estate terminated on the happening of such contingency, and her transfer of the shares to the son constituted performance of the family arrangement.—Clarke v. U.S., D.C.Pa., 5 F.Supp. 292, affirmed, C.C.A., U.S. v. Clarke, 69 F.2d 748, 94 A.L.R. 975, certiorari denied 55 S.Ct. 75, 295 U.S. 564, 79 L.Ed. 664.

No right of possession, control, and disposal

A gift of a right of property generally, unaccompanied with any right of possession control, and disposal, is not inconsistent with a limitation over on the happening of a future contingency.—Hooper v. Bradbury, 133 Mass. 303.

Life interest and remainder interest in same person

One having an interest as life beneficiary under a trust may also have a vested remainder in the corpus or principal of the trust.—In re Roth's Will, 255 N.Y.S. 307, 234 App.Div. 474—In re Meyer's Estate, 294 N.Y.S. 743, 162 Misc. 426—In re Foster's Will, 231 N.Y.S. 613, 133 Misc. 222, affirmed 235 N.Y.S. 803, 227 App.Div. 668.

Validity

The view has been taken that, where the provision of a trust agreement for the benefit of a life beneficiary was void, the remainders provided for in the agreement were also invalid, on the theory that there was no one in whom legal title could vest because under the law which the court regarded as applicable the trustee did not take legal title and the identity of the remaindermen could not be ascertained until the death of the person named as life

in the cases listed below, in money[26] and other personalty.[27] In respect of a gift of personalty which, although impaired and worn out in the course of being used, is not useful merely as it is consumed, a quasi remainder may be operative,[28] and if the first taker dies leaving such property partly unconsumed the remainder over will take effect to the exclusion of the first taker's representatives.[29] In the case of a bequest creating a remainder after a life estate, the remainderman takes from the testator through the executor and after the life tenant, and does not take either from or through the life tenant.[30]

Language which would create a life estate and a reversion or remainder in lands may be sufficient to sever the title to personal property, giving it for life to one person, with remainder to others, on the same contingencies as land is granted.[31] By analogy, estates in remainder after a preceding estate are governed, in the main, by the principles which govern similar estates in real property.[32]

Under some circumstances, where a provision disposing of a remainder after a life estate is invalid, the property vests absolutely in the life tenant.[33] The destruction of the subject matter of a contingent remainder in personal property before the happening of the contingency defeats the remainder, and the fact that the property has been sold by the preceding tenant gives the remainderman no right to assert a claim against the purchaser where the destruction of the property was not the result of the sale.[34]

Vested or contingent. Whether a remainder in personal property is vested or contingent depends largely on the terms of the instrument creating the remainder when duly construed.[35] The possibility

beneficiary.—Ross v. Ross, 243 N.Y.S. 418, 137 Misc. 795, reversed on other grounds in first action 253 N.Y.S. 871, 233 App.Div. 626, and affirmed in second action Hutchison v. Ross, 253 N.Y.S. 889, 233 App.Div. 516, affirmed 187 N.E. 65, 262 N.Y. 381, reargument denied 188 N.E. 102, 262 N.Y. 643, 89 A.L.R. 1023.

Courts of law and of equity recognize remainder interests in personal property.

Miss.—Harris v. McTaran, 30 Miss. 533.

Va.—Poindexter v. Davis, 6 Gratt. 481, 47 Va. 481.

Creation by will see the C.J.S. title Wills §§ 914, 920, also 69 C.J. p 533 note 38–p 584 note 48, p 589 note 23–p 590 note 32.

In Missouri

(1) The rule has been announced that future interests or quasi remainders, operating in analogy to remainders or executory devises, may be created either by deed or by will, without the intervention of a trustee. —Landers Inv. Co. v. Brown, 254 S.W. 14, 300 Mo. 348, 30 A.L.R. 908—21 C.J. p 1043 note 88.

(2) In an early case, however, it was held that there could be no limitation over, by a common-law conveyance, on the death of the first taker without heirs where the first taker had first been given an absolute interest in personal property. —Wilson v. Cockrill, 8 Mo. 1.

(3) A lease agreement for ninety-nine years which provided that rent should be paid to the lessor during her lifetime and thereafter to her daughter for the latter's lifetime, and then, after the deaths of the lessor and of her daughter, to the heirs of the lessor, created a remainder interest in the lessor's heirs; such heirs were those who would have been the heirs of the lessor if the daughter had predeceased the lessor.—Landers Inv. Co. v. Brown, supra.

26. U.S.—Warfield v. Bixby, C.C.A. Mo., 51 F.2d 210.
Mo.—Landers Inv. Co. v. Brown, 254 S.W. 14, 300 Mo. 348, 30 A.L.R. 908.
Tenn.—Bynum v. McDowell, 3 Tenn. App. 340.
21 C.J. p 1044 note 89.

27. U.S.—Warfield v. Bixby, C.C.A. Mo., 51 F.2d 210.
Mo.—Landers Inv. Co. v. Brown, 254 S.W. 14, 300 Mo. 348, 30 A.L.R. 908—Woolery v. Todd, App., 139 S.W.2d 1005.
Tenn.—Bynum v. McDowell, 3 Tenn. App. 340.
21 C.J. p 1044 note 90.

Property not consumable in use
Remainders may be created in personal property which is not consumable in use.—First Nat. Bank v. Pointer, 126 S.W.2d 335, 174 Tenn. 472.

Property of a durable nature
Ark.—King v. Stevens, 225 S.W. 656, 146 Ark. 443.
Ill.—Kadyk v. Abbott, 266 Ill.App. 537.

Chattel real
(1) The earlier distinction affecting terms for years in real property, pursuant to which it was recognized that a remainder might be limited for the residue of the years, but not for the residue of the term, subsequently lost force, so that a remainder could be limited regardless of such distinction.—Keen v. Macey, 3 Bibb (Ky.) 39.

(2) The validity of the transfer of the unexpired term of a leasehold estate for ninety-nine years, renewable forever, has been recognized, whether the transfer is for life with remainder over or whether the property is transferred and a mere use for the benefit of the transferor during life is reserved.—Culbreth v. Smith, 16 A. 112, 69 Md. 450, 1 L.R.A. 538.

28. Me.—Fuller v. Fuller, 24 A. 946, 84 Me. 475.
21 C.J. p 1044 note 99.

29. R.I.—Sarle v. Scituate, 7 R.I. 270.
21 C.J. p 1044 note 99.

30. Ky.—Hall's Adm'r v. Hall's Ex'r, 97 S.W.2d 23, 265 Ky. 528.

31. Ky.—Stallcup v. Cronley, 78 S.W. 441, 117 Ky. 547, 25 Ky.L. 1675.
Mo.—State v. Welch, 162 S.W. 637, 175 Mo.App. 303.
Applicability of rule against perpetuities to personal property in general see the C.J.S. title Perpetuities § 10, also 48 C.J. p 950 note 49.

32. Ky.—Sherley v. Sherley, 232 S.W. 53, 192 Ky. 122.

33. Miss.—Harris v. McTaran, 30 Miss. 533.

34. N.C.—Herndon v. Pratt, 59 N.C. 327.

35. **Vested remainders**
(1) Remainders in chattels are frequently treated as vested remainders subject to a precedent life estate.
U.S.—Smith v. Bell, Tenn., 6 Pet. 68, 8 L.Ed. 322.
Cal.—Skellenger v. England, 253 P. 191, 81 Cal.App. 176.
Ill.—Kadyk v. Abbott, 266 Ill.App. 537.
21 C.J. p 1043 note 72 [c].

(2) A remainder over after life estate with right to invade principal is "vested remainder," not "contingent remainder."—In re Ivy's Estate, Wash., 101 P.2d 1074.

of a defeasance does not transform into a contingent remainder what would otherwise be a vested remainder.[36] A contingent remainder is an actual estate and has a possible, if not readily determinable, value; it is not a mere expectancy.[37]

The fact that the instrument creating the estate permits encroachment on the principal by the life tenant does not necessarily show that the remainderman has no equitable interest but merely creates a contingency with respect to an event and does not show lack of a present interest on the part of the remainderman.[38]

As to vested or contingent remainders in real property generally see supra §§ 69–75; and as to vested or contingent remainder created by deed see the C.J.S. title Deeds § 114, by will see the C.J.S. title Wills §§ 946–973, also 69 C.J. p 619 note 28–p 657 note 83–99.

After limitation to heirs or on failure of issue. Words which, if used concerning real estate, would create an estate tail, if used concerning chattels give an absolute interest, as shown supra § 25, and in general a remainder over is void and ineffective;[39] but remainders of chattel interests may be limited over on failure of issue at the death of the first taker,[40] the remainder sometimes being regarded as one after a life estate only.[41] A limitation over may take effect within the period allowed by the rule against perpetuities, the courts, where possible, giving this construction to the words used in the instrument involved.[42]

How created. In most jurisdictions quasi remainders in personal property may be created by deed, as shown in Deeds § 113, or by will, as shown in the C.J.S. title Wills § 914, also 69 C.J. p 583 note 39, or even by a bill of sale,[43] or, stated in more general terms, by written instrument,[44] but not by parol.[45]

While future interests or quasi remainders in personal property may be created without the intervention of a trustee,[46] there may be trusts in personal property, which may be created by parol in the absence of statutory provision to the contrary, as shown in the C.J.S. title Trusts §§ 24, 35, also 21 C.J. p 1045 note 10, 69 C.J. p 235 note 38 et seq, p 254 note 51–p 256 note 66, and it has been held that a trust in remainder by parol may be proved or manifested in writing and will then be good.[47]

The rule as to acceleration applies to remainders in personal property as well as realty,[48] although the view has been expressed that the doctrine of the acceleration of contingent remainders has no application to estates wholly personal,[49] and in any event such doctrine cannot prevail over a provision of the will creating the remainder which shows a contrary intention.[50] It has been held that the transfer by the life tenant of what purports to constitute a greater estate than he possesses does not effect a forfeiture of the life estate, as shown supra § 137, and does not effect an acceleration of the estate in remainder.[51]

(3) Remainders in designated children of beneficiary after a trust for the life of the latter, established by the terms of a decree of court were vested, even though the trustee was authorized to use some of the principal for the support of the life beneficiary.—Pollack v. Pollack, 251 S. W. 715, 212 Mo.App. 233.

(4) A vested remainder is an interest in property.—In re Laidlaw's Estate, 3 N.Y.S.2d 725, 167 Misc. 172.

Contingent remainder

Pa.—In re Young's Estate, 17 Pa. Dist. & Co. 745.

36. Ky.—Zinsmeister's Trustee v. Long, 61 S.W.2d 887, 250 Ky. 50.

37. Pa.—In re Hirsh's Estate, 5 A. 2d 160, 334 Pa. 172.

38. Ga.—Gormley v. Cleaveland, 200 S.E. 793, 187 Ga. 457.

Conn.—Hudson v. Wadsworth, 8 Conn. 348.

39. Mass.—Albee v. Carpenter, 12 Cush. 382.

21 C.J. p 1045 note 25, p 1046 note 26.

40. N.Y.—Moffat v. Strong, 10 Johns. 12.

21 C.J. p 1046 notes 26, 28.

41. Ala.—Powell v. Glenn, 21 Ala. 458.

21 C.J. p 1046 note 26.

42. Md.—Edelen v. Middleton, 9 Gill 161.

21 C.J. p 1046 notes 27, 28.

43. Ky.—Keen v. Macy, 3 Bibb 39.

44. Minn.—Mowry v. Thompson, 250 N.W. 52, 189 Minn. 479.

Writing not under seal

S.C.—Brummet v. Barber, 20 S.C.L. 543.

45. Minn.—Mowry v. Thompson, 250 N.W. 52, 54, 189 Minn. 479, citing **Corpus Juris.**

Tenn.—Williams v. Thornton, 22 S. W.2d 1041, 160 Tenn. 229.

21 C.J. p 1044 note 5.

In the absence of statute authorizing the creation of remainders by parol, the common-law rule stated in the text governs.—Mowry v. Thompson, 250 N.W. 52, 189 Minn. 479.

Attempt to create remainder by parol not shown

Ga.—Booth v. Terrell, 18 Ga. 570—Booth v. Terrell, 16 Ga. 20.

46. Mo.—Landers Inv. Co. v. Brown, 254 S.W. 14, 300 Mo. 348, 30 A.L.R. 908.

Tenn.—Bynum v. McDowell, 3 Tenn App. 340.

47. Ga.—Gordon v. Green, 10 Ga. 534.

48. Me.—Fox v. Rumery, 68 Me 121.

N.J.—Bennett v. Fidelity Union Trust Co., 196 A. 375, 123 N.J.Eq 198—Bennett v. Fidelity Union Trust Co., 194 A. 449, 122 N.J.Eq. 455.

21 C.J. p 1045 notes 13, 14.

Renunciation of benefits by prior legatee

Ky.—Timberlake v. Parish, 5 Dana 345.

49. Ill.—Scheuing v. May, 213 Ill. App. 143.

50. Ill.—Blatchford v. Newberry, 99 Ill. 11.

51. **Transfer of corporate stock**

The rule stated in the text was applied where the life tenant had transferred shares of corporate stock; the court pointed out that, if the case were governed by the law of Massachusetts, as claimed, there would be no forfeiture in view of an

§ 140. Reversionary Interests

There may be reversionary interests or quasi reversions in personal property analogous to like estates in real property.

Future interests in personal property, which are analogous to reversions or remainders in real property, considered supra §§ 68–118, are sometimes called "reversionary interests"[52] or "quasi reversions,"[53] and may take effect in analogy to such interests in realty.[54] So, where there is a valid gift or transfer of personal property for life, there may be a reversionary interest in the donor or grantor or in persons entitled to claim under him after his death.[55] There may be an interest in reversion where there has been an ineffectual attempt to create a remainder by parol.[56] A valid future reversionary interest of this character cannot be created where the donor does not in fact part with the title.[57]

In case of a gift to a specified person, to have and to hold to her and to her issue forever, with provision that, in case of death of the donee without issue, the property should return to the surviving heirs of the donor, it was held that, on the death of the first taker during the lifetime of the donor, there could be no reverter since there was no one capable of taking under the description of the donor's surviving heirs.[58]

§ 141. Rights and Liabilities of Owner

While a life tenant in possession of personal property is not a trustee in the usual sense and in some jurisdictions is regarded as a debtor of the remainderman, the status of the life tenant is frequently termed that of trustee or quasi trustee. While not entitled to possession of the property during the existence of the life estate, the remainderman is entitled to receive the principal or corpus on the death of the life tenant.

As in the case of a life estate in real property, considered supra § 34, while a tenant for life of personal property is not a trustee in the ordinary sense,[59] the status of a life tenant in relation to the remainderman or reversioner has frequently been termed that of a trustee,[60] or such status has fre-

applicable statute, and that, in any event, a prior decision of the Ohio court of appeals, involving the same facts, was controlling.—West v. American Tel. & Tel. Co., C.C.A.Ohio, 121 F.2d 142, conforming to mandate 61 S.Ct. 179, 311 U.S. 223, 85 L.Ed. 139, 132 A.L.R. 956, reversing, C.C.A., 108 F.2d 347, certiorari granted 60 S.Ct. 979, two cases, 310 U.S. 618, 84 L.Ed. 1392.

52. Miss.—Harris v. McLaran, 30 Miss. 533.
21 C.J. p 1046 note 33.

"An estate in remainder or reversionary interest is the residue of an estate left by operation of law in the grantor or devisor or his successors, commencing in possession on the determination of a particular estate granted or devised. It remains vested in the sense of a present fixed right of enjoyment in the future."—Ransom v. Mellor, 297 N.W. 861, 863, 230 Iowa 451, citing Corpus Juris.

53. Miss.—Harris v. McLaran, 30 Miss. 533.

54. Va.—Higgenbotham v. Rucker, 2 Call 313, 6 Va. 313.
21 C.J. p 1046 notes 31, 32.

Courts of law and of equity recognize reversionary interests in personal property.
Miss.—Harris v. McLaran, 30 Miss. 533.
Va.—Poindexter v. Davis, 6 Gratt. 481, 47 Va. 481.

55. Miss.—Andrews v. Brumfield, 32 Miss. 107—Harris v. McLaran, 30 Miss. 533.
N.Y.—Hoes v. Van Hosen, 1 N.Y. 120.
21 C.J. p 1046 note 33.

56. Minn.—Mowry v. Thompson, 250 N.W. 52, 189 Minn. 479.

On failure of a remainder after a life estate in personal property, because it was attempted to create the remainder by parol, the property reverts to the donor or grantor.—Mowry v. Thompson, supra.

57. Ga.—Booth v. Terrell, 16 Ga. 20.

Loan of property
A loan of personal property for life, with a stipulation that, on the death of the borrower, it shall return to the lender or his heirs, does not create a reversion, since no estate presently passes to the grantee, which is to return to the grantor.—Booth v. Terrell, supra.
Title of bailor of property in general see Bailments § 20.

58. S.C.—Powell v. Brown, 17 S.C.L. 100.

59. U.S.—Seymour v. National Biscuit Co., C.C.A.N.J., 107 F.2d 58, 126 A.L.R. 1288, certiorari denied National Biscuit Co. v. Seymour, 60 S.Ct. 590, 309 U.S. 665, 84 L.Ed. 1012, law of California.

In Pennsylvania
(1) The rule stated in the text has been recognized in respect of a life tenant in possession.—In re Welsh, 86 A. 1091, 239 Pa. 616.

(2) Rule applies where the life tenant has the right to consume or encroach on principal.—In re Welsh, supra.

(3) A life tenant who takes possession, as such, on giving a bond to protect the remainderman in accordance with the applicable statute, is not a trustee for the remainderman.—In re Letterle, 93 A. 935, 248 Pa. 95—Appeal of Reiff, 16 A. 636, 124 Pa. 145—Griffith's Estate, 26 Pa.Dist. & Co. 75.

(4) A life tenant who takes possession without giving bond is not a trustee for the remainderman.—In re Powell's Estate, 17 A.2d 391, 340 Pa. 404—In re Gillett's Estate, 197 A. 517, 130 Pa.Super. 309.

(5) The rule has been recognized where the testator, in the will which created the life estate, directed that the life tenant should not be required to give security.—In re Kirkpatrick's Estate, 131 A. 361, 284 Pa. 583—In re Strawbridge's Estate, 14 Pa.Dist. & Co. 703.

(6) Ordinary tenant for life is not subject to trust remedies for those in remainder.—In re Welsh, 86 A. 1091, 239 Pa. 616.

Right of life tenant to consume principal
The view has been taken that a life tenant, with right to consume principal is not "trustee," in ordinary sense.—Hardy v. Mayhew, 110 P. 113, 158 Cal. 95, 139 Am.S.R. 73—Skellenger v. England, 253 P. 191, 81 Cal.App. 176.

60. Kan.—Diller v. Kilgore, 9 P.2d 643, 135 Kan. 200.
Me.—Nelson v. Meade, 149 A. 626, 129 Me. 61.
N.J.—Trafton v. Rainbridge, 9 A.2d 306, 126 N.J.Eq. 448.
S.C.—Evans v. Adams, 185 S.E. 57, 180 S.C. 214.
Tenn.—Bynum v. McDowell, 3 Tenn. App. 340.
21 C.J. p 941 note 89.

In New York
(1) The life tenant has frequently been referred to as a trustee.—Leg-

quently been termed that of a quasi trustee.[61] He is a trustee in the sense that he must exercise reasonable precautions to preserve the property intact for transmission to the remainderman at the termination of the life estate,[62] and may not injure, or dispose of, the property to the detriment of the remainderman,[63] or do anything to impair the corpus of the estate,[64] or, as sometimes stated, only in the sense that he must have due regard for the rights of the remainderman;[65] but he differs from the trustee of a pure trust in that he may use the property for his exclusive benefit and take all the income and profits.[66] There is no such fiduciary relation between the life tenant and the remainderman as will prevent the former from acquiring from the remainderman the remainder interest.[67] It has been stated broadly that the trust obligation of a life tenant respecting realty is exactly the same as that of a life tenant respecting personalty,[68] and a life tenant in possession is under the duty not to waste the estate.[69] The intent of the testator as gathered from a will creating a life estate is to be given effect in determining the liability of the life tenant as custodian of the property and as trustee for the remainderman.[70] Notwithstanding the life tenant is given by the will broad powers as to the management of the property and has the right to encroach on principal, he owes a duty to the remainderman to manage prudently the unused principal.[71] A tenant for life of personal property may surrender the possession of such property to the remainderman and will not thereafter be liable for its safe-keeping.[72] Rights and duties of life tenant as to investments and reinvestments and as to income and profits are considered supra §§ 135, 136.

A life tenant who sells some of the personalty and invests the proceeds in other personalty holds such newly acquired personalty subject to the remainderman's interest;[73] but it has been held that, when an

gett v. Stevens, 77 N.E. 874, 185 N. Y. 70—In re Ungrich, 62 N.Y.S. 975, 48 App.Div. 594—In re Smith's Will, 11 N.Y.S.2d 945, 170 Misc. 556—In re Beard's Will, 8 N.Y.S.2d 91, 169 Misc. 91—In re Niles' Will, 202 N.Y. S. 475, 122 Misc. 17, affirmed 206 N. Y.S. 940, 211 App.Div. 826—21 C.J. p 941 note 89.

(2) Where testator's personal property was turned over to widow and life tenant without security, widow became constructive trustee for benefit of remaindermen.—In re Read's Estate, 253 N.Y.S. 648, 141 Misc. 716.

(3) A life tenant with the right to encroach on principal has been regarded as a trustee.—In re Smith's Will, supra.

(4) But, in considering the status of such a life tenant, it has been said that he is not a trustee.—In re Victorin, 219 N.Y.S. 619, 128 Misc. 577.

Power of disposal or to encroach on principal

(1) Life tenant with power to encroach on principal held the property on an implied trust for the remainderman.—In re Curtis' Estate, 192 A. 13, 109 Vt. 44.

(2) A life tenant, with the power of disposal, is a trustee for the benefit of remaindermen, and, where husband was executor of the will of his wife and held a life interest in her estate, with power to use the whole or any portion thereof, the husband was, in effect, a trustee for the beneficiaries in remainder under the wife's will for such portion of the estate of the wife as the husband did not use or appropriate.—Trafton v. Bainbridge, 9 A.2d 306, 126 N.J.Eq. 448.

Resulting trust

Where the personal assets of an estate were taken possession of by the life tenant as such and invested in realty, this created a resulting, not a constructive, trust in the realty so purchased, in favor of the remaindermen. The life tenant was powerless to destroy, by any act of hers, the rights of the cestuis que trust to the corpus, not consumed in the using, of the trust estate, and the investment of it in realty clothed the remaindermen with the right to elect to take the realty, whether enhanced in value or not since the purchase, in lieu of the funds so invested, provided the rights of innocent purchasers for value and without notice have not intervened.—Small v. Hockinsmith, 48 So. 541, 158 Ala. 234.

Uniform Fiduciaries Act

A person who had a life estate in stock bequeathed under a will was a "fiduciary," within meaning of provision of uniform fiduciaries law defining quoted term, as respects relationship of such person to remaindermen.—Seymour v. National Biscuit Co., C.C.A.N.J., 107 F.2d 58, 126 A.L.R. 1288, certiorari denied National Biscuit Co. v. Seymour, 60 S.Ct. 590, 309 U.S. 665, 84 L.Ed. 1012.

61. U.S.—Warfield v. Bixby, C.C.A. Mo., 51 F.2d 210.
Cal.—Hardy v. Mayhew, 110 P. 113, 158 Cal. 95, 139 Am.S.R. 73.
Me.—Mallett v. Hall, 150 A. 531, 129 Me. 148—Nelson v. Meade, 149 A. 626, 129 Me. 61.
Ohio.—Hobson v. Lower, 10 Ohio Cir. Ct., N.S., 323.
Tenn.—Cook v. Collier, Ch.App., 62 S. W.2d 658.
21 C.J. p 941 note 90.

62. Me.—Mallett v. Hall, 150 A. 531, 129 Me. 148.

63. U.S.—Warfield v. Bixby, C.C.A. Mo., 51 F.2d 210.
Me.—Mallett v. Hall, 150 A. 531, 129 Me. 148.
Tenn.—Vaden v. Vaden, 1 Head 444.
21 C.J. p 941 note 91.

64. U.S.—Warfield v. Bixby, C.C.A. Mo., 51 F.2d 210.

65. Cal.—Hardy v. Mayhew, 110 P. 113, 158 Cal. 95, 139 Am.S.R. 73.
Me.—Mallett v. Hall, 150 A. 531, 129 Me. 148.

66. Me.—Nelson v. Meade, 149 A. 626, 129 Me. 61.
21 C.J. p 941 note 93.

67. U.S.—Warfield v. Bixby, C.C.A. Mo., 51 F.2d 210.
Me.—Mallett v. Hall, 150 A. 531, 129 Me. 148.
Ky.—Ware v. Frank, 38 S.W. 1061, 18 Ky.L. 1009.

68. N.Y.—Olcott v. Estate of Charles Frederick Hoffman, Inc., 216 N.Y.S. 267, 217 Misc. 399, affirmed 221 N.Y.S. 871, 220 App. Div. 713.

69. Ohio.—Hobson v. Lower, 10 Ohio Cir.Ct.,N.S. 323.
S.C.—Evans v. Adams, 185 S.E. 57, 180 S.C. 214.
Tenn.—Vancil v. Evans, 4 Coldw 340.
Liability for conversion of property to unauthorized use see supra § 135.

70. N.Y.—In re Watson's Estate, 5 N.Y.S.2d 416, 168 Misc. 135.

71. N.Y.—In re Raplee's Will, 290 N.Y.S. 517, 160 Misc. 615.

72. Ky.—Bowling v. Bowling, 6 B. Mon. 31.

73. Va.—Tabb v. Cabell, 17 Gratt. 160, 58 Va. 160.

executor sells personalty subject to a remainder and advances money from the proceeds to the life tenant, who buys land therewith, such life tenant may hold the land absolutely unaffected by the rights of remainderman.[74] When a life tenant converts personalty, the remainderman may impress a trust on it if otherwise it is likely to be lost.[75] Where the life tenant purchases real property with the funds received by him as life tenant, or with the proceeds of the sale by him of personal property which was subject to the life estate, and the remainderman does not question such purchase, it has been held that title to the real property should be placed in the life tenant for life with remainder to the person entitled thereto.[76] In the case of a gift over if the first taker should die before reaching a certain age, it has been held that, before reaching such age, the first taker may not remove the property beyond the state, against the wishes of the remainderman.[77]

The assent of a life tenant to an improper investment, by the executor of the will creating the life estate, of funds which are subject to the life estate is not binding on the remainderman.[78]

Usually at least it is not permissible to compute the value of the interest of a life tenant in a fund and deduct the gross sum arrived at from the amount of the fund for the purpose of making payment to the remainderman, without the life tenant's consent.[79]

In general the remainderman is not entitled to possession during the existence of the life estate,[80] and he cannot claim payment to himself of a fund in which another has a life estate, on his giving security to the tenant for life that he will be paid the interest on the fund as long as he lives.[81]

Where funds subject to a life estate are invested in real property and title is taken in the name of the remainderman, he may release and extinguish his interest in such funds as remainderman by a conveyance by deed absolute in form of such real estate to the life tenant.[82]

In an action by a remainderman, the holder of the fund is entitled to credit for sums paid by him to or for the remainderman after remainderman arrived at age, where such sums must have been paid in anticipation of the remainder.[83]

The life tenant may, by his laches, bar himself from asserting against the remainderman claims which would reduce the share of the remainderman.[84]

The right of one having only a contingent future interest, dependent on the divestiture of the right of the first taker to the entire interest by the latter's death without issue surviving, to a decree requiring an inventory has been denied.[85] As to requiring life tenant to furnish inventory or security for protection of remainderman, see supra § 134.

Life tenant as debtor in general. While it has been held that a life tenant in possession with the right to encroach on principal is not a debtor of the remainderman,[86] according to the view taken in some jurisdictions personal property received by the life tenant becomes, in effect, a part of his individual estate, and the relationship between him and the remainderman is that of debtor and creditor.[87]

Effect of termination of preceding estate in gen-

74. Ga.—Eton Bank v. Owens, 91 S.E. 476, 146 Ga. 464.

75. Neb.—Withnell v. Withnell, 96 S.W. 221, 69 Neb. 605.
N.C.—Cheshire v. Cheshire, 37 N.C. 569.

76. Ill.—Vanatta v. Carr, 82 N.E. 267, 229 Ill. 47—Vanatta v. Carr, 79 N.E. 86, 223 Ill. 160—Dee v. Dee, 72 N.E. 429, 212 Ill. 338.

77. N.C.—Boswell v. Morehead, 45 N.C. 26, 57 Am.D. 586.

78. N.Y.—In re Talmage, 52 N.Y.S. 710, 32 App.Div. 10, affirmed 57 N.E. 1125, 160 N.Y. 704.

79. N.Y.—Matter of Camp, 27 N.E. 799, 126 N.Y. 377, reversing 10 N.Y.S. 141—Matter of Gilroy, 112 N.Y.S. 111, 60 Misc. 125.

80. Conn.—Harrison v. Belden, 26 Conn. 67.

81. N.Y.—Matter of Camp, 27 N.E. 799, 126 N.Y. 377, reversing 10 N.Y.S. 141.

82. D.C.—Britton v. Garlock, 48 App.D.C. 316.

83. Ky.—Brown v. Small, 10 Ky.L. 361.

84. Ill.—Vanatta v. Carr, 82 N.E. 267, 229 Ill. 47.
Particular claims
(1) The rule stated in the text has been applied where the life tenant sought to have deducted from the amount for which he must account to the remainderman the amount of certain payments made to a beneficiary named in the will creating the life estate.—Vanatta v. Carr, supra.
(2) The rule has also been applied where the life tenant sought to claim a certain amount as her own funds, where the amount claimed had been mingled with those of her husband for many years before his death leaving a will by which the life estate was created.
Ill.—Vanatta v. Carr, supra.

85. N.Y.—Simmons v. Cairns, 3 Barb. 243, reversing 2 Sandf.Ch. 369.

86. Ohio.—Moore v. Idlor, 26 Ohio Cir.Ct. 502.

87. Pa.—Reiff's Appeal, 16 A. 636, 124 Pa. 145—In re Gillett's Estate, 197 A. 517, 130 Pa.Super. 309—In re Ertel's Estate, 19 Pa.Dist. & Co. 95—Young's Estate, 17 Pa.Dist. & Co. 745—In re Strawbridge's Estate, 14 Pa.Dist. & Co. 703.
In Nebraska the rule has been announced that personal property given, without restriction in a will, to a life tenant for his free use, becomes his own property to all intents and purposes, except that he is held to exercise reasonable precautions to preserve the full value of the property received by him for transmission to the remainderman at

Ky.—Shutt's Adm'r v. Shutt's Adm'r, 232 S.W. 405, 192 Ky. 98.

eral. On the death of the life tenant the remainderman is, as a general rule, entitled to receive the principal or corpus,[88] or the balance thereof in cases in which the life tenant was authorized to encroach on principal.[89] In respect of property which may or may not be consumed in use, such as work

his death.—In re Wecker's Estate, 243 N.W. 642, 123 Neb. 504.

Taking possession without security

(1) A life tenant who takes possession without giving a bond is a debtor of the remainderman in the same manner as though a bond had been given.—In re Powell's Estate, 17 A.2d 391, 340 Pa. 404.

(2) The rule has been recognized where the testator, in the will creating the life estate, directed that the life tenant should not be required to give security.—In re Kirkpatrick's Estate, 131 A. 361, 284 Pa. 583.

Life tenant who gives security

A life tenant who takes possession, as such, on giving a bond to protect the remainderman in accordance with an applicable statute, is a debtor of the remainderman.—In re Litterle, 93 A. 935, 248 Pa. 95, affirming 23 Pa Dist. 471—Griffith's Estate, 26 Pa.Dist. & Co. 75—In re Strawbridge's Estate, 14 Pa.Dist. & Co. 703.

Extent of liability of life tenant

(1) A life tenant is responsible to remaindermen only for value of estate at date of distribution thereof to the life tenant as such.—In re Powell's Estate, 17 A.2d 391, 340 Pa. 404.

(2) Where life tenant was authorized to encroach on principal and the remaindermen were entitled to take what may "remain" at the time of the death of the life tenant, the life tenant was not obliged to account to remaindermen in respect of any particular shares of stock or other asset, the remainderman having an interest only in what might remain at the death of the life tenant of the amount at which the property subject to the life estate was valued when distributed to the life tenant.—In re Powell's Estate, supra.

Necessity for formal transfer

Where, when final account of executrix who was also a life tenant under will, was audited, balance was ordered distributed, whether in fact balance was distributed was immaterial as regards remaindermen's rights, and fact that life tenant did not have stock transferred on books of the company to her could not alter rights of the parties.—In re Powell's Estate, supra.

Alternative appointment of trustee

(1) In respect of cases governed by the law as it stood prior to the enactment of the Fiduciaries Act of 1917 § 23, 20 St. § 635, it was held that where, on the life tenant's declining to give security, as life tenant, the court, at the request of the life tenant, appointed a trustee, the latter stood in the same relation to the remainderman as the life tenant would have stood if the latter had given security and taken possession of the property, and the trustee so appointed was an insurer of the fund.—In re Weir's Estate, 96 A. 1086, 251 Pa. 499—In re Ertel's Estate, 19 Pa.Dist. & Co. 95.

(2) A distinction was recognized, however, in determining the status of the trustee, dependent on the question as to who sought the appointment of the trustee.—In re Kirkpatrick's Estate, 131 A. 361, 284 Pa. 583—Griffith's Estate, 26 Pa.Dist. & Co. 75—In re Ertel's Estate, supra.

(3) Where the appointment was made at the request both of the life tenant and remainderman, the trustee was not an insurer of the fund and could discharge his liability by turning over investments.—In re Ertel's Estate, supra.

(4) The appearance of remaindermen at an audit of executor's account and their acquiescence in the adjudication was a substantial joinder in the request of the life tenant for the appointment of a trustee within the meaning of the foregoing rule.—In re Ertel's Estate, supra.

(5) In cases to which the Fiduciaries Act of 1917 § 23 is applicable, the view has been taken that the responsibility of the trustee is only that of any general trustee regardless of what person sought the appointment of the trustee.—Griffith's Estate, supra—In re Printzenhoff's Estate, 10 Pa.Dist. & Co. 335.

(6) Trustee appointed under such statute is not an insurer of the trust fund and is liable only for due care as in the case of other trustees.—In re Printzenhoff's Estate, supra.

88. Ill.—Blinn v. Gillett, 70 N.E. 704, 208 Ill. 473, 100 Am.S.R. 234, affirming Gillett v. Gillett, 109 Ill. App. 75.
Ky.—Shutt's Adm'r v. Shutt's Adm'r, 232 S.W. 405, 192 Ky. 98.
Mont.—Thompson v. Flynn, 27 P.2d 505, 95 Mont. 484.
N.J.—Jones' Ex'rs v. Stites, 19 N.J. Eq. 324.
Pa.—In re Letterle, 93 A. 935, 248 Pa. 95—In re Gillett's Estate, 197 A. 517, 130 Pa.Super. 309.

Other statement

The broad generalization has been made that a remainderman is entitled to receive only the thing originally given at the time appointed for the effectuation of the gift to him, plus such increase in value as may have occurred from natural causes during the postponement of the gift to him; this is the maximum of his valid demand, and he may receive less.—In re Densen's Estate, 296 N.Y.S. 567, 163 Misc. 232.

Title and right of possession

(1) On termination of life estate, the title and right of possession vest absolutely in the remainderman.
Ill.—Corney v. Corney, 257 Ill.App. 13—Miller v. Miller, 232 Ill.App. 86.
Md.—Crean v. McMahon, 68 A. 265, 106 Md. 507, 14 L.R.A.,N.S., 798.

(2) The view has been taken that, title being so vested, it is not necessary for the remainderman to bring a suit against the administrator of the life tenant, as such, to recover the fund.—Corney v. Corney, supra.

Fund invested in mortgage

Where trust funds had been invested in mortgage, remaindermen, after death of life beneficiary, were entitled to recover principal of fund with interest from life beneficiary's death and could enforce lien on land therefor.—Head v. Oldham Bank & Trust Co., 60 S.W.2d 621, 249 Ky. 292.

Replacement of household equipment

Where life tenant under will used corpus of estate to maintain and replace household equipment which was property of testator at time of his death, expenditures for such replacements should be treated as having been made in maintaining household equipment as a whole, and, after death of life tenant, all household equipment should be treated as part of corpus of estate of deceased.—Hutchinson's Estate v. Arnt, 4 N.E.2d 202, 210 Ind. 509, 108 A.L.R. 530, denying rehearing 1 N.E.2d 585, 210 Ind. 509, 108 A.L.R. 530.

Property of life tenant's separate estate

Note in separate estate of widow who had life interest in husband's estate, under his will, would be treated as part of residue of husband's estate where widow might have disposed of and used note for her own support instead of spending an equal amount out of corpus of husband's estate.—Hutchinson's Estate v. Arnt, supra.

89. Cal.—Luscomb v. Fintzelberg, 123 P. 247, 162 Cal. 433—Hardy v. Mayhew, 110 P. 113, 158 Cal. 95, 139 Am.S.R. 73.
Conn.—Bishop v. Groton Sav. Bank, 114 A. 88, 96 Conn. 325.
Minn.—Julian v. Northwestern Trust Co., 255 N.W. 622, 192 Minn. 136.

stock, farming implements, and the like, if only an estate for life or other limited term is given and there is a gift over, the ulterior donee is entitled to such of the property as may remain at the termination of the preceding estate, in the condition in which it then is.[90]

Where personal property received by the life tenant is regarded, in effect, as part of his individual estate and he is treated as a debtor, the claim of the remainderman is payable out of the estate of the deceased life tenant,[91] but, where the relationship is not that of debtor and creditor, the remainderman is not required to present a claim as a creditor.[92]

A remainderman of personalty, where the property consists of a fund of money, or the equivalent, is entitled to interest on the amount of the fund from the date of the life tenant's death.[93] Usually, however, the remainderman is not entitled to interest which accrued prior to the death of the life tenant,[94] although he is entitled to accumulated income which has not been taken by the life tenant, where the instrument creating the life estate so provides.[95]

Depreciation, losses, expenses, and the like. It has been stated broadly that all to which a remainderman is entitled is the thing given in the state in which it is at the time when delivery to him was directed, without diminution in value because of the acts or neglects of the person to whom the intermediate use was given.[96] Generally the ordinary expense of the care and management of the fund during the existence of the life estate is payable by the life tenant.[97] Usually, however, the life tenant or his estate is not necessarily chargeable with losses to, or depreciation in the value of, the corpus or principal, occurring during the life tenancy,[98] and there is no liability for any loss or deterioration occurring from natural causes or without fault of the life tenant.[99] Where, however, property subject to the life estate which is received by the life

Corporate stock and balance of bank accounts

Corporate stock and unused principal in banks, remaining after death of life beneficiary, belonged to remaindermen.—In re Eddy's Adm'r, 236 N.Y.S. 275, 134 Misc. 511.

Remaindermen preceding testator

Heirs of testator were entitled to balance where the remainderman named in the will creating the life estate predeceased the testator.—In re Thompson's Estate, 258 N.Y.S. 847, 144 Misc. 700.

90. Ky.—Major v. Herndon, 78 Ky. 123.

91. Pa.—Reiff's Appeal, 16 A. 636, 124 Pa. 145—In re Gillett's Estate, 197 A. 517, 130 Pa.Super. 309.

In Nebraska, the estate of the life tenant has been regarded as a debtor to the remainderman to the extent of the value of the property when received by the life tenant, in a case in which the value of the assets had increased as a result of the business ability of the life tenant.—In re Wecker's Estate, 243 N.W. 642, 123 Neb. 504.

Limitation on assertion of claim

In the case of a legal life estate, on the death of the life tenant, the remainderman must look alone to the estate of the life tenant or to his surety.—In re Young's Estate, 17 Pa. Dist. & Co. 745.

Failure to give security

Fact that life tenant failed to give a bond on taking over the property did not relieve her estate from liability to remainderman for value of property which the life tenant received, as such.—In re Gillett's Estate, 197 A. 517, 130 Pa.Super. 309.

Debt to remaindermen not to testator's estate

A decree that estate of deceased life tenant under will was indebted to testator's estate for value of property taken over by life tenant was erroneous, latter's estate being indebted to remaindermen under will.—In re Gillett's Estate, supra.

92. Fla. Haydon v. Weltmer, 187 So. 772, 137 Fla. 130.
Ill.—Corney v. Corney, 257 Ill.App. 13.
Ohio.—Moore v. Idlor, 26 Ohio Cir. Ct. 502.
Tenn.—Bynum v. McDowell, 3 Tenn. App. 340.

93. Ky.—Head v. Oldham Bank & Trust Co., 60 S.W.2d 621, 249 Ky. 292.
Pa.—In re Gillett's Estate, 197 A. 517, 130 Pa.Super. 309.
21 C.J. p 1046 note 46.

94. Ga.—McCook v. Harp, 7 S.E. 174, 81 Ga. 229.
Ky.—Brown v. Small, 10 Ky.L. 361.
Right of life tenant to income, including interest, see supra § 136.

95. Minn.—Julian v. Northwestern Trust Co., 255 N.W. 622, 192 Minn. 136.

96. N.Y.—In re Densen's Estate, 296 N.Y.S. 567, 163 Misc. 232.

97. N.H.—Pierce v. Burroughs, 58 N.H. 302.
21 C.J. p 959 note 28.

98. N.Y.—In re Watson's Estate, 5 N.Y.S.2d 416, 168 Misc. 135.

Retention of securities

(1) A life tenant with power to consume principal was not chargeable with any loss resulting from the depreciation in the value of shares of corporate stock retained by her as life tenant.—In re Victorin, 219 N.Y.S. 619, 128 Misc. 577.

(2) A testator has the right to absolve the life tenant from responsibility incurred by reason of depreciation or loss in the retention of securities received by the life tenant as a part of the corpus of the life estate when such loss is not due to willful negligence, neglect, or conversion.—In re Watson's Estate, 5 N.Y.S.2d 416, 168 Misc. 135.

(3) Whether life tenant who was also executrix under will was liable to surcharge for depreciation in securities received from estate was governed by whether life tenant had acted in good faith and exercised that degree of care and diligence in the management of the estate as would a reasonably careful and prudent person of ordinary intelligence, circumstanced as was the life tenant.—In re Watson's Estate, supra.

(4) Under will giving residue of estate to daughter of testatrix for life, disposal of speculative securities received by life tenant as part of corpus of estate was within discretion of life tenant, and hence life tenant was not subject to surcharge because of error of judgment in retaining securities in absence of bad faith or negligence on her part.—In re Watson's Estate, supra.

99. Ky.—Mimms v. Lawrence, 91 S.W. 715, 28 Ky.L. 1317.
S.C.—Calhoun v. Furgeson, 24 S.C. Eq. 160.
21 C.J. p 960 note 35.

Question as to deterioration is determined, not by whether each article that went to make up the estate as a whole is in the same con-

tenant is regarded, in effect, as part of his individual estate, and he is regarded as a debtor of the remainderman to the extent of the value of the property when received by the life tenant, the latter, or his estate, is chargeable with losses to the corpus or principal occurring during the life tenancy,[1] and is not entitled to reimbursement for his expenses in caring for the property,[2] or for the expenses of settling the estate of deceased life tenant.[3]

It has been held that an income tax is chargeable against principal in so far as it is imposed on profits made by the estate which are not distributed or distributable to the life beneficiary as income,[4] but a tax on personal property due during the life tenancy is usually payable by the life tenant,[5] although the rule is otherwise if the instrument creating the life estate shows a contrary intention.[6]

A remainderman of personalty who relieves the personalty from execution, takes it into possession, and is compelled by the court to relinquish it, may be allowed interest and expenses.[7]

As to expenses, deterioration, and losses in the case of life estate in real property, see supra § 49. As to loss or depreciation affecting investments of trust funds see the C.J.S. titles Trusts §§ 334–337, also 65 C.J. p 819 note 85–p 824 note 54, Wills § 1037, also 69 C.J. p 792 notes 35–37.

§ 142. Transfer of Interest

Usually a remainder in personal property may be disposed of by the remainderman, although in the case of a contingent remainder it may be necessary to resort to equity to enforce an assignment.

A vested remainder in personal property may, as a general rule, be disposed of by the person entitled thereto during the continuance of the preceding estate.[8] A vested interest in remainder, which is also defeasible, cannot be disposed of or transferred,

dition as to preservation, value, and productiveness as at the death of the testator, but whether the estate as a whole is in such condition.—Brooks v. Brooks, 12 S.C. 422.

1. In Pennsylvania

(1) Loss due to depreciation of assets must be borne by the estate of the life tenant and may not be deducted from the original value of the property in determining the amount due to the remainderman.—In re Weir's Estate, 96 A. 1086, 251 Pa. 499—In re Strawbridge's Estate, 14 Pa.Dist. & Co. 703.

(2) In a case arising prior to the enactment of Fiduciaries Act of 1917 § 23, 20 St. § 635, it was held that, where a trustee was appointed at the request of the life tenant on the latter's declining to give security, the trustee, on the death of the life tenant, was bound to account to the remainderman for the corpus at its original value, without taking credit for the amount invested by him in a bond and mortgage which had depreciated in value.—In re Weir's Estate, supra.

(3) It was held that in such case the only credit to which the trustee was entitled was for expenses necessarily incident to the filing of his account.—In re Weir's Estate, supra.

(4) In this regard, the view was taken that in such case the trustee was in the same position that the life tenant or the estate of the latter would have been if the life tenant had taken possession.—In re Weir's Estate, supra.

(5) But in the case of a trustee appointed under such act, on refusal of the trustee to give security, such charges as usually are made against principal in the administration and distribution of a trust are deductible.—In re Printzenhoff's Estate, 10 Pa.Dist. & Co. 335.

2. Pa.—In re Weir's Estate, 96 A. 1086, 251 Pa. 499—Reiff's Appeal, 16 A. 636, 124 Pa. 145—In re Gillett's Estate, 197 A. 517, 130 Pa. Super. 309.

Alternative appointment of trustee

(1) In a case arising prior to the enactment of the Fiduciaries Act of 1917 § 23, 20 St. § 635, it was held that, where a trustee was appointed at the request of the life tenant on the latter's declining to give security, the trustee, on the death of the life tenant, was not entitled to a credit for the expense of caring for the fund, since the trustee was in the same position as the life tenant or the latter's estate would have been if the life tenant had taken possession of the property.—In re Weir's Estate, 96 A. 1086, 251 Pa. 499.

(2) Where, however, a trustee is appointed under such statute on the life tenant's refusal to give security, the fund is liable for expenses of administration.—Printzenhoff's Estate, 10 Pa.Dist. & Co. 335.

3. Pa.—Reiff's Appeal, 16 A. 636, 124 Pa. 145—In re Gillett's Estate, 197 A. 517, 130 Pa.Super. 309.

4. N.Y.—In re King's Estate, 224 N.Y.S. 283, 130 Misc. 296.

5. Ky.—Shutt's Adm'r v. Shutt's Adm'r, 232 S.W. 405, 192 Ky. 98. Pa.—In re Stern's Estate, 31 Pa.Dist & Co. 565, 19 Erie Co. 471, 8 Som. Leg.J. 405, 51 York Leg.Rec. 170. Vt.—Webb v. Burlington, 28 Vt. 188. 21 C.J. p 955 note 69.

Apportionment

(1) The income of the life tenant was chargeable with the whole tax for the tax year in which he died notwithstanding he died less than a month after the tax was assessed, where liability for the tax was determined by conditions existing on the date of assessment.—Holmes v Taber, 9 Allen, Mass., 246.

(2) But an apportionment has been allowed in respect of a state tax on investments.—Fest's Estate, 28 Wkly.N.C., Pa., 415.

6. N.C.—Crater v. Ryan, 41 S.E. 800, 130 N.C. 618.
21 C.J. p 956 note 73 [a] (1).

7. Va.—Upshaw v. Upshaw, 2 Hen. & M. 381, 12 Va. 381, 3 Am.D. 632.

8. Del.—Fisher v. Barcus, 127 A. 53, 14 Del.Ch. 324.
N.Y.—In re Weaver's Estate, 1 N.Y.S.2d 167, 253 App.Div. 24, affirmed McNary v. McNary, 16 N.E.2d 121, 278 N.Y. 605—In re Laidlaw's Estate, 3 N.Y.S.2d 725, 167 Misc. 172.
21 C.J. p 1047 notes 51, 61.

Vested interest in nature of equitable remainder

(1) One who has a vested interest in personal property in the nature of an equitable remainder subject to a life estate or interest may transfer and assign the same.—Swett v. Thompson, 21 N.E. 382, 149 Mass. 302.

(2) A mortgage of such vested interest containing the usual covenants operates as an equitable assignment which the mortgagee may enforce after the life tenant's death. Ind.—Thurston v. Buxton, 34 N.E. 2d 549.
Mass.—Swett v. Thompson, supra.

Property not included

(1) Assignment by testator's aunts, as remaindermen under insured's will, of their interest in insured's estate, did not include com-

however, so as to pass an absolute title,[9] but the title of the transferee is taken subject to the defeasance,[10] and such title is defeated where the remainderman dies before the happening of the event on which his enjoyment of the property and the vesting of absolute title depends.[11]

While a contingent remainder is, under some statutes, alienable,[12] and may be mortgaged by the remainderman before the death of the life tenant,[13] in accordance with general rules stated in Assignments §§ 11, 12, such an interest was not assignable or alienable at common law,[14] and, it has been held, is not rendered alienable by a statute subjecting all interests in land to conveyance.[15] In accordance with rules stated in Assignments §§ 11, 12, contingent interests in personal property are assignable in equity,[16] and in jurisdictions in which the courts do not recognize a mortgage of a contingent remainder in personalty, it may be upheld by equity as a valid assignment of such interest.[17] The death of the remainderman before the happening of the contingency on which the vesting of his interest depended defeats the rights of one to whom the remainderman had pledged his interest.[18]

While it has been held that the inadequacy of the price paid for a remainder interest in personal property is not in itself sufficient to invalidate the assignee's title,[19] according to some cases, a sale of a remainder will be viewed with suspicion in a court of equity, and relieved against if advantage is taken of the vendor's necessities by buying at a great undervalue,[20] and the assignment of a contingent remainder or interest will not be enforced in equity against the will of the assignor, unless supported by a valuable, as distinguished from a good, consideration.[21]

A contract for the sale of a remainder may contemplate valuation of the interest at the date of final distribution of the estate, although made during the life of the life tenant.[22]

The fact that the instrument creating the estate permits encroachment on the principal by the life tenant does not necessarily show that the remainderman has no assignable interest.[23]

Remainders in personalty may be sold at a sheriff's sale,[24] and a sale of personal property may be made by the court where the remainder interest is represented by the executor of the creator of the remainder.[25]

Sale, conveyance, or mortgage of remainder in real property in general is considered supra §§ 87–90; descent or distribution of reversions or remainders, in Descent and Distribution § 18; whether future or contingent estates, interests, or possibilities may be bequeathed or devised, in the C.J.S. title Wills § 85, also 68 C.J. p 498 note 86–p 500 note 6; and whether expectant or future interests

muted value of war risk insurance payable to estate on death of life beneficiary.—In re Fisher's Estate, 153 A. 736, 302 Pa. 516.

(2) Assignment of interest in insured's estate, "payable now or . . hereafter," where made to enable assignee to settle another estate, did not include interest of assignors as remaindermen under will of insured in commuted value of war risk insurance.—In re Fisher's Estate, supra.

Statutory regulation

Vested remainders in personal property may be transferred even if by statute the beneficiary to receive the income of personal property held in trust is not permitted to transfer it.—Bergmann v. Lord, 86 N.E. 828, 194 N.Y. 70, affirming 107 N.Y.S. 1121, 122 App.Div. 921.

9. Ky.—Roy v. West, 238 S.W. 167, 194 Ky. 96.

10. Ky.—Roy v. West, supra.

Pledge by remainderman

Ky.—Roy v. West, supra.

11. Ky.—Roy v. West, supra.

12. U.S.—Ward v. Ward, C.C.N.Y., 131 F. 946, affirmed 145 F. 1023, 74 C.C.A. 146.

Mo.—Landers Inv. Co. v. Brown, 254 S.W. 14, 16, 300 Mo. 348, 30 A.L.R. 908, citing Corpus Juris.

21 C.J. p 1047 notes 51, 61.

13. U.S.—Ward v. Ward, C.C.N.Y., 131 F. 946, affirmed 145 F. 1023, 74 C.C.A. 1461.

21 C.J. p 1047 note 52.

14. Ky.—Stallcup v. Cronley, 78 S. W. 441, 117 Ky. 547, 25 Ky.L. 1675.

15. Ky.—Stallcup v. Cronley, supra.

16. Ky.—Stallcup v. Cronley, supra.

17. S.C.—Earle v. Maxwell, 67 S.E. 962, 86 S.C. 1, 138 Am.S.R. 1012.

21 C.J. p 1047 note 52, p 1004 note 53 [b].

Rights under will

(1) Purported mortgage of remainderman's contingent interest in testator's estate after termination of life estate in trust was sufficient to transfer defeasible title to such interest to mortgagee and his assignee as security for mortgagor's indebtedness to them and operative as defeasible assignment, enforceable in equity to extent of such indebtedness in distribution of mortgagor's share of trust estate, subject to paramount equities.—Miller v. Hirschmann, 183 A. 259, 170 Md. 145.

(2) Petition to annul, for fraud, mortgage of remainderman's contingent interest in testator's estate after life tenant's death was properly dismissed as to original mortgagee, who agreed to loan mortgagor stated sum on such security, paid residue of loan after satisfaction of judgment against mortgagor from proceeds thereof to mortgagor or his attorney, was made party to equity cause, in which trust estate was being administered, with mortgagor's consent, and assigned his claim and security to another before life tenant's death, no fraud by such mortgagee being established.—Miller v. Hirschmann, supra.

18. Ky.—Roy v. West, 238 S.W. 167, 194 Ky. 96.

19. N.J.—Dixon v. Bentley, 59 A. 1036, 68 N.J.Eq. 108.

20. N.C.—Franklin v. Roberts, 37 N.C. 560.

21. Ky.—Stallcup v. Cronley, 78 S. W. 441, 117 Ky. 545, 25 Ky.L. 1675.

22. Utah.—Weight v. Bailey, 147 P. 899, 45 Utah 584.

23. Ga.—Gormley v. Cleaveland, 200 S.E. 793, 187 Ga. 457.

24. Pa.—Palm's Estate, 13 Pa.Super. 296.

25. Md.—Drovers' & Mechanics' Nat. Bank v. Hughes, 34 A. 1012, 83 Md. 355.

under will or by succession pass to a trustee in bankruptcy, in Bankruptcy § 180.

Mode of transfer. Remainders in personal property may be transferred or assigned by a writing,[26] but since delivery cannot be made during the continuance of the preceding estate such disposition cannot be made by parol.[27]

In the transfer of shares of corporate stock from the remainderman to the life tenant for a consideration, no delivery is necessary,[28] and, in view of statutory provisions abolishing the use of seals on private contracts, a seal is not required on an instrument making such transfer.[29]

§ 143. Merger

It has been laid down broadly that the doctrine of merger primarily has no application to personal property, although it has been said that the term "merger" is applicable to rights other than rights in land.

While it has been said that with respect to personalty the doctrine of merger, considered supra §§ 123–131, with regard to real property, primarily has no application,[30] it has been stated broadly that the term "merger" is applicable to rights other than such as exist in land.[31]

§ 144. Actions

a. Right to relief, and form of remedy, at law
b. Right to relief, and form of remedy, in equity
c. Time to sue and limitations
d. Parties
e. Pleading
f. Evidence
g. Trial or hearing and relief

a. Right to Relief, and Form of Remedy, at Law

One who has a remainder interest in personal property is entitled to avail himself of legal remedies, if otherwise applicable, to enforce his rights.

The nature of the quasi remainderman's right as a legal vested right has frequently been recognized, and he is entitled to legal remedies.[32] A remainder interest in personal property may be recovered either in an action on the case,[33] or in an action of account.[34]

In case of a sale of a chattel by the life tenant, it has been stated broadly that the remainderman may maintain an action for damages against any person who has the chattels in possession, or who has had them in possession since the death of the life tenant, or has done any act injurious to the estate in remainder during the continuance of the life estate.[35] So, where personal property has been wrongfully sold by the life tenant, the remainderman may, after the life tenant's death, elect to proceed for the recovery of the property itself or for its value.[36]

As to actions by life tenant generally see supra § 133.

b. Right to Relief, and Form of Remedy, in Equity

Courts of equity will intervene in a proper case to protect or preserve remainder or future interests in personal property, the propriety of a particular remedy depending on the facts of the case presented.

A court of equity has jurisdiction to entertain a bill to protect the rights of one who has a remainder interest,[37] or who has some contingent fu-

26. N.J.—Dixon v. Bentley, 59 A. 1036, 68 N.J.Eq. 108.
21 C.J. p 1047 note 61.

27. Tenn.—Hill v. McDonald, 1 Head 383.

28. Mo.—In re Franz' Estate, 127 S.W.2d 401, 344 Mo. 510.

Transaction not constituting transfer

(1) Where life tenant placed shares of stock in trust providing for payment of income to life tenant and remaindermen, supplemental agreement signed by remaindermen increasing amounts payable to them and signed solely to protect trustees did not effect a transfer of remaindermen's interest to life tenant.—In re Franz' Estate, supra.

(2) Where life tenant placed securities in trust providing for payment of income to remaindermen and life tenant and by subsequent agreement authorized trustees to lend remaindermen an advancement deductible from their respective interests in life tenant's estate, remaindermen's acceptance of advancement would not operate to transfer remaindermen's interest in securities to life tenant.—In re Franz' Estate, supra.

(3) Other matters not constituting transfer.—In re Franz' Estate, supra.

29. Mo.—In re Franz' Estate, supra.

30. Ind.—Merrell v. Garver, 101 N.E. 152, 54 Ind.App. 514.

Application questioned

"The merger here claimed is of interests in personal property, and, if the doctrine of merger may apply in such case, which is certainly unusual, the same principles would apply as in cases of real estate, we should think."—In re Washburn, 106 P. 415, 420, 11 Cal.App. 735.

31. N.Y.—Clift v. White, 12 N.Y. 519, reversing 15 Barb. 70.
Discharge or termination of chattel mortgage by merger see C.J.S. title Chattel Mortgages §§ 343, 344.

32. Ga.—Philips v. Crews, 65 Ga. 274.
Kan.—Chase v. Howie, 67 P. 822, 64 Kan. 320.
21 C.J. p 1047 note 69.

33. Conn.—Taber v. Packwood, 2 Day 52.

34. Conn.—Griggs v. Dodge, 2 Day 28, 2 Am.D. 82.
1 C.J. p 607 note 64.

35. Ky.—Coffey v. Wilkerson, 1 Metc. 101.

36. Va.—Cross v. Cross, 4 Gratt. 257, 45 Va. 257.
21 C.J. p 1048 note 72.

37. Ala.—Ramey v. Green, 18 Ala. 771.
Conn.—Terry v. Allen, 23 A. 150, 60 Conn. 530—Clarke v. Terry, 13 Conn. 42.

ture interest,[38] when the equities are in his favor.[39] According to some cases, the fact that the life tenant or other first taker is regarded as a trustee for the person entitled to the remainder or executory interest is the ground for jurisdiction of courts of equity of suits by such persons.[40]

A person who has a vested remainder is entitled to resort to equity by a bill quia timet, or other appropriate proceeding, for the protection of his interest when the property in the hands of a life tenant is in danger of loss, deterioration, or injury,[41] or when the life tenant is claiming a right to the property adverse to that of the remainderman.[42]

The sale of personal property by a life tenant to a person outside of the state, where it is not shown that the sale was of more than the life interest or was fraudulently made or that any injury to the remainderman has resulted therefrom, is not of itself ground for equitable relief.[43] It has been held that equitable relief for the protection of the remainderman's interest cannot be accorded where the life tenant is a nonresident and the property is not within the jurisdiction of the court.[44] If the property has already been removed beyond the state, equity will not usually interfere to redress the wrong until the remainderman's right to possession has accrued.[45] The right of one entitled to a contingent remainder or interest to resort to equity for the preservation of the property before his rights have become vested is affected by the degree of probability as to the vesting of the contingent interest.[46]

Where the delivery of specific chattels is desired and the circumstances are such that the legal remedy by an action for damages would be inadequate, equity may decree specific delivery.[47]

In respect of a sale made by a life tenant where the property was removed from the state, it has been held that the estate of the life tenant is primarily liable in a suit brought after the death of the life tenant to enforce the rights of the remainderman.[48]

As to actions by life tenant generally see supra § 133.

Injunction. An injunction may be granted in a proper case to protect an estate in remainder.[49] Thus equity may enjoin a life tenant of personal property from removing it out of the state,[50] but not unless good grounds are shown for believing that it is his intention to do so.[51]

Accounting. A life tenant in possession,[52] or, after his death, his legal representative,[53] may be

Ky.—Whitesides v. Dorris, 7 Dana 101.
Neb.—Abbott v. Wagner, 188 N.W. 113, 108 Neb. 359.
21 C.J. p 131 note 41, p 967 note 77, p 1048 note 78.

Otherwise stated

Persons who have an interest in personal property in the nature of a remainder may maintain a suit to protect and preserve their interests against life tenant, or against one to whom property has been transferred by gift, or who has received it under circumstances amounting to fraud on the rights of remaindermen, where transferee is not a bona fide purchaser.—Abbott v. Wagner, supra.

Contingent remainder

Fact that remainder is contingent does not prevent a court of equity from giving relief.—Security Co. v. Hardenburgh, 2 A. 391, 53 Conn. 169.

Encroachment on principal

Where the principal of a fund held by the life tenant was broken into for his benefit, it was held that the life interest might be held to make good the deficit not only against the life tenant himself, but also against his assignee in bankruptcy or insolvency.—Peck v. Smith, 15 A. 312, 16 R.I. 260.

38. Ala.—James v. Scott, 9 Ala. 579.
21 C.J. p 131 note 41.

39. Ala.—Land v. Cowan, 19 Ala. 297.
21 C.J. p 1048 note 79.

40. N.C.—Clapp v. Fogleman, 21 N.C. 466.
S.C.—Horry v. Glover, 11 S.C.Eq. 515.
21 C.J. p 1048 notes 75, 76.
Life tenant as trustee for remainderman generally see supra § 141.

41. U.S.—Buder v. Franz, C.C.A.Mo., 27 F.2d 101.
Ala.—Amos v. Toolen, 168 So. 687, 232 Ala. 587.
Cal.—Newport v. Hatton, 231 P. 987, 195 Cal. 132.
21 C.J. p 131 note 41, p 967 note 77.

42. U.S.—Buder v. Franz, C.C.A.Mo., 27 F.2d 101.
21 C.J. p 967 note 78.

43. N.C.—Lee v. McBride, 41 N.C. 533.

44. Md.—Foley v. Syer, 88 A. 38, 121 Md. 79.

45. Ky.—Bowling v. Bowling, 6 B. Mon. 31.

46. S.C.—Carson v. Kennerly, 29 S.C.Eq. 259.

47. Fla.—Haydon v. Weltmer, 187 So. 772, 137 Fla. 130.
21 C.J. p 1048 note 80.

Property having sentimental value

In suit by testamentary remainderman against holder of bill of sale from life tenant, to recover personalty bequeathed, chancellor was warranted in assuming jurisdiction on showing that some of the articles had a sentimental value to remainderman far exceeding their actual value.—Haydon v. Weltmer, 187 So. 772, 137 Fla. 130.

48. S.C.—Rippy v. Gilmore, 30 S.C. Eq. 365.
21 C.J. p 960 note 44 [b] (2).

49. U.S.—Buder v. Franz, C.C.A.Mo., 27 F.2d 101.

50. N.C.—Cross v. Camp, 42 N.C. 193.
21 C.J. p 967 note 86.

51. N.C.—Mercer v. Byrd, 57 N.C. 358—Clagon v. Veasey, 42 N.C. 173.
S.C.—Joyce v. Gunnels, 19 S.C.Eq. 259.

52. U.S.—Buder v. Franz, C.C.A.Mo., 27 F.2d 101.

Surrogate's court

Under its jurisdiction to direct, control, conduct, and settle accounts of testamentary trustees, the surrogate's court has required a life tenant in possession of property under will to account on application of infant remainderman's general guardian, on the theory that life tenant was a "trustee" during continuance of life estate, in view of Surrogate's Court Act § 314 subd 6.—In re Smith's Will, 11 N.Y.S.2d 945, 170 Misc. 556.

53. S.C.—Horry v. Glover, 11 S.C. Eq. 515.

under the duty to account to the remainderman under certain circumstances, and, in the case of a wrongful disposal of personal property, both a grantee of the life tenant who took with knowledge[54] and the personal representative of the life tenant[55] may be required to account.

It has been held that a life tenant with power to encroach on principal cannot be required to account to one entitled to the remainder, in the absence of allegation of waste, improvidence, fraud, or unauthorized use or disposal.[56] If the life tenant had the power to encroach on, or dispose of, principal, the duty, if any, of his personal representative to account does not extend beyond the principal unused when the life tenant died.[57] As to right to income, profits, and accretions as between life tenant and remainderman see supra § 136, and as to whether losses, depreciation, or expenses are chargeable to life tenant or remainderman see supra § 141.

Sequestration and ne exeat. In some jurisdictions a writ of sequestration may be issued at the instance of a remainderman or reversioner to prevent a life tenant of personal property from removing it from the state,[58] provided the writ states sufficient facts to enable the court to see that the fear of such removal is well founded,[59] although in certain other jurisdictions the writ will not be issued in the absence of a statute authorizing its issue.[60] When personal property has already been removed, the court will not order the sequestration of other property of the life tenant.[61]

If the property subject to a life estate has already been removed the tenant himself may in some jurisdictions be arrested under a writ of ne exeat and required to give bond not to leave the state and to abide the judgment of the court,[62] and in other jurisdictions relief will be granted by a bill quia timet only.[63]

Receiver. A receiver may be appointed in a proper case to take custody of personal property subject to a life estate in order to protect the rights of the remainderman or reversioner,[64] as, for example, on the conversion by a life tenant of personal property into money with danger that the fund may be lost,[65] or when a life tenant threatens to remove personal property from the state or to sell it to another with a view to its removal.[66]

c. Time to Sue and Limitations

Generally a statute of limitations does not begin to run against the right to recover a remainder interest until the termination of a life estate, but certain actions to protect rights of, or to redress injuries to, the remainderman may be brought during the lifetime of the life tenant.

In the case of a bequest subject to a life estate the statute of limitations does not begin to run against the right of a legatee to recover his remainder interest,[67] or against the right of his as-

54. Iowa.—Benham v. Turkle, 153 N. W. 1017, 173 Iowa 598.

55. Iowa.—Benham v. Turkle, supra.
W.Va.—Roush v. Hyre, 57 S.E. 368, 62 W.Va. 120.
21 C.J. p 968 note 14.

56. Iowa.—Nelson v. Horsford, 208 N.W. 341, 201 Iowa 918, 45 A.L.R. 515.

Trustee in bankruptcy

The rule stated in the text was applied in a case in which an accounting was sought by the trustee in bankruptcy of the remainderman, to whom the remainderman's interest had passed.—Nelson v. Horsford, supra.

57. N.Y.—Seaward v. Davis, 91 N.E. 1107, 198 N.Y. 415, modifying 117 N.Y.S. 468, 133 App.Div. 191.
Pa.—In re Welsh, 86 A. 1091, 239 Pa. 616.
21 C.J. p 968 note 11.

58. N.C.—McNeill v. Bradley, 59 N. C. 41—Brantley v. Kee, 58 N.C. 332—Douthett v. Bodenhamer, 57 N.C. 444.
Writ of sequestration as conservatory process in general see C.J.S. title Sequestration §§ 2, 5, also 57 C.J. p 184 note 51—p 185 note 85, p 190 notes 12–39.

59. N.C.—Mercer v. Byrd, 57 N.C. 358—Lehman v. Logan, 42 N.C. 296.

60. Ga.—Crewes v. Davie, 1 Ga.Dec. 66.

61. N.C.—Williams v. Smith, 57 N. C. 254.

62. N.C.—Wade v. Parks, 10 N.C. 202—Coleman v. Coleman, 10 N.C. 200.
S.C.—Moon v. Moon, 21 S.C.Eq 327.
Nature and purpose of, and nature of demand supporting, writ of ne exeat in general see the C.J.S. title Ne Exeat §§ 3, 4, also 45 C.J. p 589 note 4—p 593 note 62.

63. Ga.—Riddle v. Kellum, 8 Ga. 374.

64. N.C.—Cross v. Camp, 42 N.C. 193.
21 C.J. p 968 note 25.
Appointment of trustee as alternative to security furnished by life tenant see supra § 134.

65. Mo.—Lewey v. Lewey, 34 Mo. 367.

66. N.C.—Cross v. Camp, 42 N.C. 193.

67. N.Y.—Gilbert v. Taylor, 42 N.E. 713, 148 N.Y. 298, modifying 27 N. Y.S. 828, 76 Hun 92.

Suit against surviving partner

Action by the administrators with will annexed of testator by whose will the life estate was created was not barred by any statute of limitation, where the relief sought was an accounting by the surviving member of a partnership of which the testator was a member and of another partnership of which the life tenant was a member, and where plaintiffs had procured their appointment as administrators and had brought the action within a reasonable time after the death of the life tenant.—Thompson v. Flynn, 27 P.-2d 505, 95 Mont. 484.

Property sold by life tenant

Where property was sold by the life tenant pursuant to authority conferred by the will creating the life estate, the statute of limitation did not commence to run against the claim of the remainderman to recover the proceeds before the death of the life tenant, notwithstanding the latter had not reinvested such proceeds pursuant to direction in the will and had not charged herself with the proceeds in any of the several settlements made by her.—Shutt's Adm'r v. Shutt's Adm'r, 232 S.W. 405, 192 Ky. 98.

signee[68] until the termination of the life estate. So it has been held that the remainderman is not required to bring a suit in equity to compel a delivery to him of the property by a purchaser from the life tenant until the accrual of the cause of action by the termination of the life estate,[69] but, according to some cases, in the case of a sale of personal property by a life tenant, the statute of limitations begins to run against the remainderman from the date of sale.[70] It has also been held, in a suit to establish the rights of persons who were given a vested remainder after a trust for life, based on an alleged conspiracy to defraud and cheat the remaindermen by defeating the trust during the lifetime of the remaindermen, that the running of the applicable statute was not postponed until the death of the life beneficiary.[71]

A statute of limitations applicable to actions by creditors of deceased persons to recover on accounts, debts, or claims does not apply to a suit by the remainderman to establish his rights under the will creating the life estate and remainder, brought after the death of the life tenant,[72] nor does a statute of limitations applicable to actions against the personal representative of deceased person apply to such action by the remainderman, where no judgment or decree against the representative of deceased life tenant is sought.[73] It seems that in some jurisdictions there is no statute of limitations applicable to an action by the remainderman against the life tenant for a general accounting.[74]

What constitutes laches in suits to enforce the rights of remaindermen brought after the death of the life tenant depends on the facts of the particular case.[75]

A suit to protect the rights of the remainderman is not necessarily premature because brought in the lifetime of the life tenant,[76] and it has been held that the owner of a reversionary interest in personal property may, during the continuance of the preceding estate, maintain an action for the destruction of, or serious injury to, such interest.[77] On the other hand, during the continuance of the life estate, a remainderman cannot, although in possession, maintain an action of trover against a wrongdoer for the conversion of personal property.[78] Where a tenant pur autre vie of personal property hires it out for a certain period and the life estate terminates during this period, the remainderman may bring detinue against the person in actual possession or wait until the hiring expires and the property is returned to its former possessor,[79] but, prior to the expiration of the period of hiring, he may not bring the action against the tenant pur autre vie who is not in possession, in the absence of any showing that the latter had parted with the property wrongfully or fraudulently.[80] As to actions against life tenant in general see supra subdivisions a and b of this section.

d. Parties

Who are necessary or proper parties to actions to protect or enforce rights or claims of remaindermen depends on the nature of the action and the nature and extent of the rights asserted or invaded.

68. N.Y.—Matson v. Abbey, 86 N. E. 11, 141 N.Y. 179, modifying 24 N.Y.S. 284, 70 Hun 475.

69. Fla.—Haydon v. Weltmer, 187 So. 772, 137 Fla. 130.

70. Ky.—Coffey v. Wilkerson, 1 Metc. 101.
Va.—Philips v. Martiney, 10 Gratt. 333, 51 Va. 333.

71. Cal.—Westphal v. Westphal, App., 112 P.2d 919.

72. Tenn.—Bynum v. McDowell, 3 Tenn.App. 340.

73. Tenn.—Bynum v. McDowell, supra.

74. N.Y.—Young v. Young, 21 N.Y. S. 1008, 2 Misc. 381.

75. Laches not shown
(1) Where less than a year elapsed between the date when remainderman's right arose or became vested and date when he brought accounting action against deceased life tenant's executor and beneficiary, he was not guilty of laches.—Trafton v. Bainbridge, 9 A.2d 806, 126 N.J.Eq. 448.

(2) In the case of a life estate created by will, a suit by the administrators with will annexed against a surviving partner of the testator for an accounting was not barred by laches, notwithstanding it was not brought until after the death of the life tenant who survived the testator for twenty-six years.—Thompson v. Flynn, 27 P.2d 505, 95 Mont. 484.

Laches of life tenant in income of trust fund in claiming allowance from corpus of estate for delay in establishing trust fund may be imputable to personal representative and heirs.—City Trust & Savings Bank of Kankakee v. Knight, 249 Ill. App. 617.

76. U.S.—Buder v. Franz, C.C.A.Mo., 27 F.2d 101.

Suit not affecting possession or other rights of life tenant
Where the life tenant had created a trust for her life by transferring to trustees the property which was subject to the life estate, and the life tenant and several of the remaindermen denied the right of one of the remaindermen to any property in the possession of the trustee, a suit by the remainderman whose rights were so denied was not premature, although it was brought during the lifetime of the life tenant, where the suit did not involve nor seek to affect, enjoyment of possession or other rights of the life tenant, but merely sought to protect the property from spoliation and loss by requiring an accounting and other relief.—Buder v. Franz, supra.

77. Ala.—Williams v. Brassell, 51 Ala. 397.
Va.—Harvey v. Skinwith, 16 Gratt. 393, 57 Va. 393.
21 C.J. p 1048 note 74.

78. Ala.—Nations v. Hawkins, 11 Ala. 859.
N.C.—Barwick v. Barwick, 33 N.C. 80.
21 C.J. p 1048 note 73.

79. Ala.—Walker v. Fenner, 20 Ala. 192.

80. Ala.—Walker v. Fenner, supra.

Where in a suit by a remainderman to establish his rights a sale of the property is prayed for, all remaindermen should be made parties.[81] So, also, where personal property has been wrongfully disposed of by the preceding tenant and a remainderman sues to recover his interest in the proceeds, all of the remaindermen interested in the fund must be made parties,[82] but any remaindermen who joined in the sale, and thereby divested themselves of their interest in the property, need not be joined.[83] A bill for the sequestration of personal property to prevent its removal from the state, which does not seek a final adjudication of the rights of the parties, but only to have the property secured, may be maintained by one remainderman without making another, who is tenant in common with him, a party.[84] Where plaintiffs are asserting in equity a common right of remaindermen to have their interest declared in described property and to have the property protected against waste, it has been held that life tenant, representatives of deceased life tenants, and persons in possession of the property were proper parties defendant.[85]

The remainderman and not the personal representative of the life tenant is the proper party to sue for money loaned from the estate to a third person by the life tenant.[86]

It had been held that the life tenant is not a necessary party to a suit by persons holding a remainder interest against a transferee of the life tenant to establish rights of remainderman, based on a wrongful transfer by the life tenant in violation of plaintiffs' rights.[87]

e. Pleading

In an action to enforce rights of a remainderman, plaintiff's pleading must allege such facts, and only such facts, as are necessary to show the existence of a cause of action.

In an action to recover a remainder interest in personal property after the death of the life tenant every article sought to be recovered need not be specifically described in plaintiff's pleading.[88] Under a statute providing that personal property shall be forfeited to the reversioner on its removal out of the state by a tenant in dower without the reversioner's consent, the declaration must allege that the removal was without his consent.[89]

f. Evidence

Parties asserting claims of remaindermen against a life tenant or the latter's estate have the burden of proving facts essential to the existence of liability. The admissibility and sufficiency of evidence depends on the application of general rules and on the facts of the case in controversy.

Where a certain amount under a will is paid a life tenant in personal property and not in money, the remaindermen have the burden of proof that the life tenant's estate is liable therefor.[90] In cases in which the life tenant had power to encroach on, or dispose of, principal, if no part of the principal can be found after his death, there is a presumption that he used the whole principal,[91] and the burden of proof is on those who allege the contrary.[92] So persons who seek to impose surcharges against the estate of the life tenant in respect of depreciation in the value of investments made by the life tenant have the burden of proving facts which would authorize such surcharges,[93] and the remainderman has the burden of proving deterioration for which the life tenant might be responsible.[94]

Where a widow mingled the funds in which there was a remainder interest with her own property, a contract made by the widow with the remainder-

81. Ala.—Ramey v. Green, 18 Ala. 771.

82. N.C.—Hunter v. Yarborough, 92 N.C. 68.

83. Miss.—Stuart v. Swanzy, 20 Miss. 684.

84. N.C.—Brantly v. Kee, 78 N.C. 332.

85. Ga.—McHenry v. McHenry, 108 S.E. 522, 152 Ga. 105.

86. Ky.—Brown v. Small, 10 Ky.L. 361.

87. Neb.—Abbott v. Wagner, 188 N. W. 113, 108 Neb. 359.

88. Conn.—Taber v. Packwood, 2 Day 52.

89. La.—Hicks v. Calvitt, 5 Mart. 691.

90. Ky.—Mimms v. Lawrence, 91 S. W. 715, 28 Ky.L. 1317.

91. Pa.—In re Welsh, 86 A. 1091, 239 Pa. 616.

92. Pa.—In re Welsh, supra.

No property found by life tenant's representative

Burden was on plaintiff, who sought to charge the executor of the life tenant in an action in which it was alleged in the complaint that the life tenant did not consume, or dispose of, any of the property, to show that some part of the property passed to defendant executor or was in his possession, where the executor alleged that he could not find any part of the property.—Seaward v. Davis, 91 N.E. 1107, 198 N.Y. 415, modifying 117 N.Y.S. 468, 133 App. Div. 191.

93. **Life tenant having broad powers as to management and disposal**

(1) Persons who seek to impose surcharges against estate of life tenant, in respect of the depreciation in the value of investments made by the life tenant who, under the will creating the life tenancy, had broad powers as to the management and disposal of the property, had the burden to sustain their contention and to prove by fair preponderance of evidence that each investment which they criticized was not such as a prudent person would purchase.—In re Raplee's Will, 290 N.Y.S. 517, 160 Misc. 615.

(2) In such cases surcharges could not properly be imposed where no proof was given that any investment was hazardous, speculative or unsound, which a prudent person would have avoided.—In re Raplee's Will, supra.

94. S.C.—Brooks v. Brooks, 12 S.C. 422.

men, in which she admitted that she had received a certain sum of money as legatee for life under her husband's will, has been held to be admissible in evidence.[95]

Whether evidence is sufficient to establish particular facts or matters depends on the facts of the particular case.[96]

g. Trial or Hearing and Relief

In a suit in equity to protect the rights of a remainderman, the court may make such orders as are necessary and appropriate to safeguard his interests.

In a suit in equity to protect the rights of a remainderman, the court has power to make such orders and to require such security as may be necessary to protect and safeguard the interests of the remainderman.[97] It has been held that, when the specific property bequeathed has been disposed of by the life tenant in exchange for other property, equity will not require security for the delivery of property, received on the exchange, to the remainderman at the expiration of the life estate.[98]

A decree in a suit in equity to protect the rights of the remainderman against a third person, for the full value of the property vests a good title in such person and prevents or estops the remainderman from suing for, or recovering, the property.[99]

ESTATUTO. In Spanish law, this word is used in a sense broader than that of the English "statute" and includes "leyes" statutes, "ordenanzas," ordinances, and "reglamentos," regulations.[1]

EST AUTEM VIS LEGEM SIMULANS.[2]

EST BONI JUDICIS AMPLIARE JURISDICTIONEM.[3]

EST BONI JUDICIS AMPLIARE JUSTICIAM, NON JURISDICTIONEM.[4]

ESTELIONATO. In Spanish law, every species of deceit or fraud in contracts or other transaction which is not included under some other name or class.[5]

ESTENDARD, ESTENDART, or STANDARD. An ensign for horsemen in war.[6]

EST ENIM ALIQUID QUOD NON OPORTEAT, ETIAM SI LICET. QUIDQUID VERO NON LICET, CERTE NON OPORTET.[7]

EST ENIM JURIS CIVILIS SPECIES CONSUETUDO; ENIM VERO, DIUTURNA CONSUETUDO PRO JURE ET LEGE, IN HIS, QUÆ NON EX SCRIPTO DESCENDUNT OBSERVARI, SOLET. MAXIME AUTEM PROBATUR CONSUETUDO EX REBUS JUDICATIS.[8]

EST ENIM JUS QUOD LEX CONSTITUIT.[9]

EST ENIM OBLIGATIO QUASI CONTRACTUS GATIO.[10]

95. Mo.—Peters v. Clendennin, 6 Mo.App. 579.

96. **Conspiracy to convert property**
In a suit to establish the rights of remaindermen or reversioners, after the death of the life tenant, the evidence supported finding that life tenant, with power of disposition inter vivos, conspired with defendant third person to convert bonds and that such person did so.—Wintuska v. Peart, 36 S.W.2d 50, 237 Ky. 666.

Depreciation in value of securities
(1) Under will giving residue of estate to daughter of testatrix for life, proof of depreciation of speculative securities received by life tenant would not, standing alone, establish a prima facie case of negligence for which life tenant would be subject to surcharge for benefit of remaindermen, to justify surcharge, there must be some evidence of failure of life tenant to exercise that degree of care and diligence that a reasonably careful and prudent person of ordinary intelligence would have exercised in a like situation in the conduct of his own affairs.—In re Watson's Estate, 5 N.Y.S.2d 416, 168 Misc. 135.

97. Neb.—Abbott v. Wagner, 188 N. W. 113, 108 Neb. 359.

98. Tenn.—Bonner v. Bonner, 7 Humphr. 436.

99. Ky.—Whitesides v. Dorris, 7 Dana 101.
21 C.J. p 960 note 44 [b] (3).

1. Escriche Diccionario.

2. A maxim meaning "Violence may also put on the mask of law."—Black L.D.

3. A maxim meaning "It is the part of a good judge to extend the jurisdiction."—Adams Gloss.
Applied in Edmiston v. Edmiston, 2 Ohio 251, 252—21 C.J. p 1049 note 5 [a].

4. A maxim meaning "It is the duty of a good judge to amplify, extend justice, not jurisdiction or authority."—Adams Gloss.
Applied in People v. Judges of Dutchess Oyer and Terminer, 2 Barb., N.Y., 282, 287.

5. Escriche Diccionario.

6. Black L.D.

7. A maxim meaning "There are, indeed, some things which are not expedient, even if they are lawful. But whatever is not lawful is most certainly not expedient."—Adams Gloss.

8. A maxim meaning "Custom is really a species of Civil Law; for truly a long custom is wont to be observed as right and law in those matters which come down to us not in writing. Custom, indeed, is proved in the highest degree out of or by cases adjudicated [questions judicially determined]."—Adams Gloss.

9. A maxim meaning "That certainly is right [or binding] which the law ordains."—Adams Gloss.

10. A maxim meaning "An obligation is indeed the same as a counterbinding."—Adams Gloss.

ESTER. A compound ether derived from an oxygenated acid.[11]

ESTERILIDAD. In Spanish law, sterility, barrenness.[12]

ESTER IN JUDGMENT. Law French, to appear before a tribunal either as plaintiff or defendant.[13]

ESTERO. In Spanish, an insignificant estuary which takes its water from a river and is affected by the tide.[14]

EST ETIAM, UBI PROFECTO DAMNUM PRÆSTET FACERE, QUAM LUCRUM.[15]

ESTHETIC or ÆSTHETIC EDUCATION. See 28 C.J.S. p 833 note 80.

ESTILICIDIO. In Spanish law, a species of urban servitude or easement which consists in the right to divert to a neighbor's property the rain water which falls upon one's own roof, or to prevent one's neighbor from doing the same, or to oblige him not to divert such water but to let it run.[16]

ESTILO. Literally "Style;" in Spanish law, the formula or phraseology of judicial procedure, including composition of contracts or other legal documents.[17]

ESTIMACIÓN. In Spanish law, appraisement such as that made by experts in judicial proceedings, witnesses, etc.[18]

ESTIMATE.

In General

The sense in which this word is used, and the particular idea intended to be expressed by its use, must be determined by the subject matter under consideration, together with the context of the instrument.[19] When properly and correctly used, in oral communications or written instruments, it is a word selected to express the mind or judgment of the speaker or writer on the particular subject under consideration.[20] Either as a noun or a verb, the word implies computation or calculation,[21] reasonable approximation,[22] something more than a mere guess or conjecture;[23] but does not pretend to be based on absolute calculations,[24] for it is merely an exercise of judgment in determining the amount, importance, or magnitude of things with their other exterior relations,[25] and, in fact, precludes the idea of accuracy.[26] It has no more certainty than the terms "about" or "more or less,"[27] and, under particular circumstances, may be advisory only.[28] As used in some statutes, the term implies the performance of certain statutory requirements, and is to be distinguished from the tentative and preliminary estimates on which the statutory estimate is based.[29]

11. U.S.—E. I. Du Pont De Nemours & Co. v. Byrnes, D.C.N.Y., 1 F.R.D. 34, 36.

12. Escriche Diccionario.

13. Black L.D.

14. **It is not a stream,** for there is no current in it and at times it may be completely dry.—Palma v. Fernandez, 7 Philippine 154, 155.

15. A maxim meaning "There are occasions when it is undoubtedly better to incur loss than to make gain."—Adams Gloss.

16. Escriche Diccionario.
See also Easements § 32 note 95, and Eavesdrip 28 C.J.S. p 826 note 31.

17. Escriche Diccionario.

18. Escriche Diccionario.

19. N.Y.—People v. Clark, 37 Hun 201, 203.

20. La.—New Orleans Terminal Co. v. Dixie Rendering, Inc., App., 179 So. 98, 100.
N.Y.—People v. Clark, 37 Hun 201, 203.

21. La.—New Orleans Terminal Co. v. Dixie Rendering, Inc., App., 179 So. 98, 100.
Mo.—Miller, Franklin & Co. v. Gentry, 79 S.W.2d 470, 474, 230 Mo.App. 892—Wood v. Saylor Tie & Timber Co., App., 67 S.W.2d 826, 829.
N.Y.—People v. Clark, 37 Hun 201, 203.

22. Mo.—Wood v. Saylor Tie & Timber Co., App., 67 S.W.2d 826, 829.

23. Mo.—Miller, Franklin & Co. v. Gentry, 79 S.W.2d 470, 474, 230 Mo. App. 892.

24. Mo.—Gratz v. Kirkwood, 145 S. W. 870, 874, 165 Mo.App. 196.
Utah.—Bair v. Montrose, 199 P. 667, 669, 58 Utah 398.
Wash.—Board of Directors of Horse Heaven Irr. Dist. v. Mineah, 192 P. 997, 998, 112 Wash. 325.

25. N.Y.—O'Hehir v. Central New England R. Co., 137 N.Y.S. 627, 633, 152 App.Div. 677.

26. Ky.—State Highway Commission of Kentucky v. Board of Councilmen of City of Frankfort, 54 S. W.2d 315, 319, 245 Ky. 799.
La.—New Orleans Terminal Co. v. Dixie Rendering, Inc., App., 179 So. 98, 101.
Miss.—United States Fidelity & Guaranty Co. v. Attala County Drainage Dist. No. 2, 146 So. 460, 461, 166 Miss. 817.
Utah.—Bair v. Montrose, 199 P. 667, 669, 58 Utah 398.
21 C.J. p 1049 note 24.

27. Ky.—State Highway Commission of Kentucky v. Board of Councilmen of City of Frankfort, 54 S.W.2d 315, 319, 245 Ky. 799.
La.—New Orleans Terminal Co. v. Dixie Rendering, Inc., App., 179 So. 98, 100, 101.
21 C.J. p 1059 note 50 [a] (2).

28. Utah.—Bair v. Montrose, 199 P. 667, 669, 58 Utah 398.

29. Or.—Shainwald v. City of Portland, 55 P.2d 1151, 1156, 153 Or. 167, citing **Corpus Juris.**

As part of statutory procedure

"Prior to the making of the construction contracts, opinions expressed by engineers or officials may be estimates in one sense; but they are tentative and preliminary, and cannot be regarded as constituting the required statutory estimate, though contributing to the basic facts upon which it is made."—Yuma County Water Users' Ass'n v. Schlecht, 43 S.Ct. 498, 500, 262 U.S. 138, 67 L.Ed. 909.

As a Noun

An appraisement, or an approximation;[30] an approximate judgment or opinion as to weight, magnitude, cost, and the like;[31] a measure;[32] an opinion;[33] a rough or approximate calculation;[34] the fixing of the worth or value roughly or in a general way, sometimes from imperfect data;[35] something existing in the mind of a person, of which certainty cannot assuredly be predicated;[36] a valuing or rating, especially from incomplete data,[37] or without actually measuring, weighing, or the like.[38] In a somewhat different application, the word may also be used in the sense of a bid or offer.[39]

The noun has been held equivalent to, or synonymous with, "budget" see 12 C.J.S. p 375 note 77, "designation" see 26 C.J.S. p 1240 note 65, "judgment,"[40] and "opinion."[41] It has been compared with, or distinguished from, "actual cost,"[42] "allotment" see 3 C.J.S. p 888 note 48, "census,"[43] "compilation" see Compilation 15 C.J.S. in Pocket Parts, "correct and accurate statement,"[44] "designation" see 26 C.J.S. p 1240 note 65, "exact schedule,"[45] "expectation,"[46] "invoice,"[47] and "measure."[48]

Phrases employing the word are set out in the note.[49]

As a Verb

Present Tense. To ascertain or compute;[50] to

30. La.—New Orleans Terminal Co. v. Dixie Rendering, Inc., App., 179 So. 98, 100—New Orleans Terminal Co. v. Dixie Rendering, Inc., 140 So. 272, 273, 19 La.App. 611.
21 C.J. p 1050 notes 35, 36.

Similarly expressed

(1) An estimate is a mere approximation.—P. M. Hennessy Const. Co. v. Hart, 170 N.W. 579, 598, 141 Minn. 449.

(2) An estimation.—London Bd. of Education v. London, 1 Ont.L. 284, 289, 21 Can.L.T.Occ.Notes 210.

31. Okl.—City of Tulsa v. Weston, 229 P. 108, 122, 102 Okl. 222.
21 C.J. p 1050 note 31.

32. Wis.—Galloway v. Week, 12 N. W. 10, 11, 54 Wis. 604.

33. Cal.—Wheaton v. North British & Mercantile Ins. Co., 18 P. 758, 761, 76 Cal. 415, 9 Am.S.R. 216.

34. Cal.—State Highway Commission of Kentucky v. Board of Councilmen of City of Frankfort, 54 S.W.2d 315, 319, 245 Ky. 799.
Miss.—United States Fidelity & Guaranty Co. v. Attala County Drainage Dist. No. 2, 146 So. 460, 461, 166 Miss. 817, citing Corpus Juris.
Ohio.—McDonald v. Hornberger, 21 Ohio N.P., N.S., 209, 213.
Okl.—City of Tulsa v. Weston, 229 P. 108, 122, 102 Okl. 222.
Utah.—Bair v. Montrose, 199 P. 667, 669, 58 Utah 398.
21 C.J. p 1050 note 29.

Similarly expressed

(1) "A calculation not professedly exact."—Brown v. Cornwell, 60 S.E. 623, 625, 108 Va. 129.

(2) "A calculation without measuring or weighing."—Branting v. Salt Lake City, 153 P. 995, 1000, 47 Utah 296.

(3) "An approximate calculation."—State ex rel. Beach v. Beach, 28 S.W.2d 105, 106, 325 Mo. 175.

(4) "An approximate calculation, not a precise result obtained by actual measuring and weighing."—Tully v. Felton, 17 Pa.Co. 385, 386.

(5) "A rough valuation."—New Orleans Terminal Co. v. Dixie Rendering, Inc., La.App., 179 So. 98, 100.

35. Mo.—Boonville v. Stephens, 141 S.W. 1111, 1116, 238 Mo. 339.

36. Cal.—Ham v. Santa Rosa Bank, 62 Cal. 125, 136, 45 Am.R. 654.

37. Ky.—State Highway Commission of Kentucky v. Board of Councilmen of City of Frankfort, 54 S.W.2d 315, 319, 245 Ky. 799.
Miss.—United States Fidelity & Guaranty Co. v. Attala County Drainage Dist. No. 2, 146 So. 460, 461, 166 Miss. 817, citing Corpus Juris.
Ohio.—McDonald v. Hornberger, 21 Ohio N.P., N.S., 209, 213.
Utah.—Bair v. Montrose, 199 P. 667, 669, 58 Utah 398.

Similarly expressed

"A valuation based on opinion or roughly made from imperfect or incomplete data."—Brown v. Cornwell, 60 S.E. 623, 625, 108 Va. 129.

38. Okl.—City of Tulsa v. Weston, 229 P. 108, 122, 102 Okl. 222.
21 C.J. p 1049 note 26.

39. La.—New Orleans Terminal Co. v. Dixie Rendering, Inc., App., 179 So. 98, 100—New Orleans Terminal Co. v. Dixie Rendering, Inc., 140 So. 272, 273, 19 La.App. 611.

40. Tex.—McClung Const. Co. v. Muncy, Civ.App., 65 S.W.2d 786, 790.

41. Tenn.—Wray v. Knoxville, L. F. & J. R. Co., 82 S.W. 471, 474, 113 Tenn. 544.
Tex.—McClung Const. Co. v. Muncy, Civ.App., 65 S.W.2d 786, 790.

42. Cal.—O'Connell v. Behan, 124 P. 1038, 1042, 19 Cal.App. 111, 122.

43. Mo.—State v. Jost, 175 S.W. 591, 597, 265 Mo. 51.

44. Utah.—Branting v. Salt Lake City, 153 P. 995, 1000, 47 Utah 296.
21 C.J. p 1049 note 26 [c].

45. Ohio.—Mills-Carleton Co. v. Huberty, 95 N.E. 383, 385, 84 Ohio St. 81.

46. Ala.—Kenan, McKay & Spier v. Home Fertilizer & Cotton Oil Co., 79 So. 367, 369, 202 Ala. 29.

47. U.S.—Hall v. Union Indemnity Co., C.C.A.Mo., 61 F.2d 85, 87.

48. Eng.—Winch v. Winchester, 1 Ves. & B. 375, 377, 35 Reprint 146.

49. Phrases discussed or interpreted

(1) "Approximate estimate" see 6 C.J.S. p 132 note 98.

(2) "Conclusive estimate."—Herrick v. Belknap, 27 Vt. 673, 688.

(3) "Detailed estimate of the cost."—New Orleans Terminal Co. v. Dixie Rendering, Inc., 140 So. 272, 19 La.App. 611.

(4) "Estimate in detail," as not including a general estimate for "school purposes."—Randall v. School Dist. No. 44 of Grays Harbor County, 205 P. 748, 749, 119 Wash. 222.

(5) "Estimate of the cost," as meaning an estimate of the total actual cost of the work.—Pope v. Rich, 293 S.W. 373, 374, 316 Mo. 1206—Williams v. Hybskmann, Mo. App., 247 S.W. 203, 208—City of Washington ex rel. Bihr v. Mueller, 287 S.W. 856, 859, 220 Mo.App. 564.

(6) "Estimate of the damage to the owner."—Monterey County v. Cushing, 23 P. 700, 703, 83 Cal. 507.

(7) "Estimate of value," as an opinion of the value of property.—Wheaton v. North British & Mercantile Ins. Co., 18 P. 758, 761, 76 Cal. 415, 9 Am.S.R. 216.

(8) "Final estimate."—U. S. v. Venable Construction Co., C.C.Ga., 124 F. 267, 272.

(9) "Monthly estimates."—Gratz v. Kirkwood, 145 S.W. 870, 873, 165 Mo. App. 196.
21 C.J. p 1049 note 28 [a].

50. N.M.—Lougee v. New Mexico Bureau of Revenue Commissioner, 76 P.2d 6, 17, 41 N.M. 115.

assess;[51] to calculate roughly, or to form an opinion of, as to amount, number, etc., from imperfect data, comparison, or experience;[52] to fix the worth, value, size, extent, etc., of, especially roughly or in a general way;[53] to make an estimate of, or to rate.[54]

The verb has been held equivalent to, or synonymous with, "assess" see 6 C.J.S. p 1022 note 37, "compute" see 15 C.J.S. p 791 note 32, and "measure."[55] It has been compared with, or distinguished from, "appreciate" see 6 C.J.S. p 93 note 1, "classify" see 14 C.J.S. p 1195 note 49, and "guess."[56]

Phrases employing the word are set out in the note.[57]

Estimated. The past tense or past participle, meaning computed.[58] The general rule is that the word, following a description of the subject indicates that the statement of quantity is a matter of description, not of warranty, implying merely the good faith of the party making it,[59] and meaning the specific number or quantity named with slight or immaterial deviation.[60]

The term has been held equivalent to, or synonymous with, "about" or "approximately,"[61] "computed" see 15 C.J.S. p 791 note 34, "determined" see 26 C.J.S. p 1260 note 19, "fixed,"[62] "more or less,"[63] and "say."[64] It has been compared with, or distinguished from, "actual" see 1 C.J.S. p 1433 note 55, and "measured."[65]

Phrases employing the word are set out in the note.[66] Other phrases for which recent adjudica-

51. Ala.—Roddy v. McGetrick, 49 Ala 159, 162

52. Ky.—State Highway Commission of Kentucky v. Board of Councilmen of City of Frankfort, 54 S.W.2d 315, 319, 245 Ky. 799.
La.—New Orleans Terminal Co. v. Dixie Rendering, Inc., App., 179 So. 98, 101.
21 C.J. p 1050 notes 40, 44.

Similarly expressed

To calculate, compute, or reckon, to form an opinion of, to gauge, judge, or calculate approximately.—Miller, Franklin & Co. v. Gentry, 79 S.W.2d 470, 474, 230 Mo.App. 892—Wood v. Saylor Tie & Timber Co., Mo App., 67 S.W.2d 826, 829.

53. U.S.—V. Mueller & Co. v. United States, Cust. & Pat.App., 115 F. 2d 354, 362.
Mo.—Gratz v. Kirkwood, 145 S.W. 870, 874, 165 Mo.App. 196.

Similarly expressed

(1) To fix the amount of the damages, or the value of the thing to be ascertained.
Ala.—Roddy v. McGetrick, 49 Ala. 159, 162.
La.—New Orleans Terminal Co. v. Dixie Rendering, Inc., App., 179 So. 98, 100.

(2) "To fix the worth of roughly or in a general way."—National Mut. F. Ins. Co. v. Duncan, 98 P. 634, 637, 44 Colo. 472, 20 L.R.A.,N.S., 340—21 C.J. p 1050 note 43.

54. Neb.—McCormick v. State, 61 N.W. 99, 100, 42 Neb. 866.
N.Y.—O'Hehir v. Central New England R. Co., 137 N.Y.S. 627, 633, 152 App.Div. 677.

55. Wis.—Galloway v. Week, 12 N. W. 10, 11, 54 Wis. 604.
21 C.J. p 1050 note 39 [a].

56. Mo.—Wood v. Saylor Tie & Timber Co., App., 67 S.W.2d 826, 829.

57. **Phrases construed**

(1) "Estimate and determine the amount of money to be raised."—Board of Directors of Horse Heaven Irr. Dist. v. Mineah, 192 P. 997, 998, 112 Wash. 325.

(2) "Estimating according to cost," as meaning issuing estimates to the contractor calculated on the basis of cost.—Johnston v. Cincinnati, N. O. & T. P. R. Co., 240 S.W. 429, 435, 146 Tenn. 135.

58. Pa.—Tully v. Felton, 36 A. 285, 286, 177 Pa. 344.

59. Cal.—Biglione v. Bronge, 219 P. 69, 70, 192 Cal. 167.

60. Ill.—V. H. Parke & Son Co. v. Thompson, 159 Ill.App. 187, 193.
Ohio.—Ketchum v. Stout, 20 Ohio 453, 463.

61. Ill—V. H. Parke & Son Co. v. Thompson, 159 Ill.App. 187, 193.
"Approximately" in the sense of estimate see 6 C.J.S. p 132 note 7.
As to use of 'about" in estimates see 1 C.J.S. p 343 note 36—p 348 note 74.

62. Minn—Unton v. Liverpool, London & Globe Ins. Co., 207 N.W. 625, 626, 166 Minn. 273.

63. Ill.—Finch v. Zenith Furnace Co., 146 Ill.App. 257, 277.
Tex.—Robbins v. Hill, Civ.App., 259 S.W. 1112, 1115.

64. **"It is much the same in effect** as the word 'say' when used before a statement of quantity in business correspondence."—Finch v. Zenith Furnace Co., 146 Ill.App. 257, 277.

65. Eng.—Winch v. Winchester, 1 Ves. & B. 375, 377, 35 Reprint 146.

66. **Phrases construed**

(1) "Estimated about 10,000 bales capacity" see About 1 C.J.S. p 346 note 21.

(2) "Estimated approximately at."—Mathieson Alkali Works v. Virginia Banner Coal Corporation, 136 S.E. 673, 679, 147 Va. 125.

(3) "Estimated at."
Minn.—Unton v. Liverpool, London & Globe Ins. Co., 207 N.W. 625, 626, 166 Minn. 273.
Mo—Wood v. Saylor Tie & Timber Co., App., 67 S.W.2d 826, 829.

(4) "Estimated cost" see Cost 20 C.J.S. p 243 note 2, and as distinguished from "actual cost" see Actual 1 C.J.S. p 1440 note 1.

(5) "'Estimated cost' of the improvement."
As meaning the whole cost including the overhead charges.—Morris v. Drainage Dist. No. 24 of Craighead County, 234 S.W. 980, 982, 150 Ark. 525.
As not contemplating or having reference to a mere fancied, haphazard, or speculative estimate, but as having reference to a reasonable bona fide estimate predicated on the plans and specifications on file.—City of Ft. Myers v. State, 117 So. 97, 103, 95 Fla. 704.

(6) "Estimated cost . . . of the project," as not meaning the actual exact final sums paid for construction, but rather such sums as it is believed after careful computations will cover the expenses and outlay directly and fairly connected with the construction of the project.—Yuma County Water Users' Ass'n v. Schlecht, C.C.A.Ariz., 275 F. 885, 888.

(7) "Estimated cost of the work."—Meyer v. Ring, 257 S.W. 388, 389, 162 Ark. 9.

(8) "Estimated costs" see Drains § 25.

(9) "Estimated damages" see Damages § 2.

(10) "Estimated duties" see Customs Duties § 220.

(11) "Estimated in money."—Whitman v. Casualty Underwriters, Tex. Civ.App., 116 S.W.2d 908, 910, 911.

(12) "Estimated to contain," as meaning "more or less" or "thereabouts."—Jones v. Hackensack Auto Wreckers, 11 A.2d 595, 597, 124 N. J.Law 289.

tions have not been found see 21 C.J. p 1051 notes 52–62.

ESTIMATION. The act of estimating, or of judging something with respect to value, degree, quantity, etc.; calculation, computation, or estimate.[67] In a particular connection, it has been described as a fair representation of belief or probability, negativing all pretense of any positive assertion of fact in the nature of a declaration of knowledge or of warranty;[68] and as used in the phrase: "by estimation" see 12 C.J.S. p 872 notes 46, 47.

ESTIPENDARIO. In Spanish law, a stipendiary, one who receives an allowance or remuneration from another.[69]

EST IPSORUM LEGISLATORUM TANQUAM VIVA VOX; PERUS ET NON VERBA LEGEM IMPONIMUS.[70]

ESTIPULACIÓN. Stipulation.[71]

ESTIRPE. The root and branch of a family, hence lineage or stock.[72]

EST JUS PUBLICUM QUOD AD STATUM REI-PUBLICÆ PERTINET.[73]

EST NIHIL, ALIUD PRÆSUMPTIO QUAM OPINIO EX PROBABILI RATIOCINATIONE CONCEPTA.[74]

ESTOP. Generally to bar, debar, or stop; and specifically, in law, to bar, prevent, or preclude, usually by one's own act;[75] to preclude from averring in an action what is contrary to prior acts or admissions.[76]

"Estop" has been held synonymous with "preclude,"[77] and "estopped" with "precluded."[78]

(13) "Upon the basis of said estimated amount."—Lougee v. New Mexico Bureau of Revenue Commissioner, 76 P.2d 6, 17, 41 N.M. 115.

67. Century D.

68. U.S.—Stebbins v. Eddy, C.C.R.I., 22 F.Cas. No 13,342, 4 Mason 414.

69. Escriche Diccionario.

70. A maxim meaning "The voice of the legislators themselves is like the living voice; that is, the language of a statute is to be understood and interpreted like ordinary spoken language."—Black L.D.

Otherwise rendered

"[The voice, utterance or declaration] of legislators themselves is like the living voice [i. e., the spoken word of an individual]; we impose laws upon things, not upon words."—Adams Gloss

71. Escriche Diccionario.

See generally the C.J.S. title Stipulations § 1, also 60 C.J. p 39 notes 1–14.

72. Escriche Diccionario.

73. A maxim meaning "The public law is that which pertains to the state or condition of the republic."—Adams Gloss.

74. A maxim meaning "A presumption is nothing else than an opinion of a probable case conceived through an exercise of the reasoning powers."—Adams Gloss.

75. Century D.

76. N.D.—Olsgard v. Lemke, 156 N. W. 102, 103, 104, 32 N.D. 551.

77. N.D.—Olsgard v. Lemke, supra. 49 C.J. p 1320 note 80 [b].

78. Ga.—Anderson v. Mechanics Loan & Savings Co., 198 S.E. 87, 89, 58 Ga.App. 147.
Ky.—Embry v. Long, 75 S.W.2d 1036, 1037, 256 Ky. 266.
Pa.—First Nat. Bank v. Albright, 170 A. 370, 373, 111 Pa.Super. 392.

ESTOPPEL

This Title includes preclusion of persons from asserting or denying matters of fact, rights, or claims contrary to or inconsistent with previous allegations, admissions, denials, acts, or conduct of the same persons or those under whom they claim; nature and grounds of such preclusion; operation and effect of estoppel as to rights and titles subsequently acquired as well as those previously existing; pleading estoppel; and evidence relating thereto.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

Analysis

I. IN GENERAL, §§ 1–3

II. ESTOPPEL BY RECORD, §§ 4–9

III. ESTOPPEL BY DEED, §§ 10–54
- A. In General, §§ 10–12
- B. Particular Instruments and Parties Thereto, §§ 13–20
- C. Estoppel to Assert After-Acquired Title, §§ 21–35
- D. Estoppel to Deny Truth of Recitals, §§ 36–40
- E. Requisites, Validity, and Construction of Deed, §§ 41–45
- F. Persons for and Against Whom Estoppel Arises, §§ 46–54

IV. ESTOPPEL BY SIMPLE CONTRACT, §§ 55–58

V. EQUITABLE ESTOPPEL; ESTOPPEL BY MISREPRESENTATION, §§ 59–106
- A. General Nature and Essentials, §§ 59–77
  1. *In General,* §§ 59–66
  2. *Essential Elements,* §§ 67–77
- B. Grounds, §§ 78–106
  1. *Express Misrepresentations,* §§ 78–86
  2. *Implied Misrepresentations,* §§ 87–101
  3. *Negligence,* §§ 102–106

VI. EQUITABLE ESTOPPEL; QUASI ESTOPPEL, §§ 107–129

VII. OPERATION AND EFFECT OF EQUITABLE ESTOPPEL, §§ 130–152
- A. Persons Affected, §§ 130–147
- B. Matters Precluded, §§ 148–152

VIII. PROCEDURE, §§ 153–165
- A. Pleading, §§ 153–159
- B. Evidence, §§ 160–162
- C. Trial, §§ 163–165

Sub-Analysis

I. IN GENERAL—p 191

§ 1. Terminology—p 191
2. Classification—p 193
3. Odiousness of estoppels—p 193

II. ESTOPPEL BY RECORD—p 193
§ 4. Definition—p 193
5. Judicial records in general—p 193
6. Judgments—p 194
7. Pleadings and other judicial admissions—p 194
8. For or against whom estoppel operates—p 195
9. Matters precluded—p 195

III. ESTOPPEL BY DEED—p 195
A. In General—p 195
§ 10. Definition, nature, and essentials—p 195
11. Mutuality—p 196
12. Estoppel against estoppel—p 196
B. Particular Instruments and Parties Thereto—p 196
§ 13. Estoppel against grantor—p 196
14. Estoppel against mortgagor—p 198
15. Estoppel against grantee p 199
16. Estoppel against mortgagee p 201
17. Instruments founding estoppel—p 202
18. Deeds—p 202
19. Mortgages—p 202
20. Other instruments p 202
C. Estoppel to Assert After-Acquired Title—p 203
§ 21. To real estate—p 203
22. Deeds—p 205
23. Mortgage—p 206
24. Personal property—p 206
25. Instruments founding estoppel—p 207
26. Necessity for covenants p 207
27. Nature of covenant—p 208
28. Inoperative covenants—p 208
29. Instruments giving momentary seizin only—p 208
30. Estates or rights affected—p 209
31. Title acquired by patent from sovereignty—p 210
32. Title acquired in name of third person—p 210
33. Title acquired for third person—p 211
34. Title acquired from or adversely to grantee p 211
35. Operation of law in vesting title in grantee p 211
D. Estoppel to Deny Truth of Recitals p 213
§ 36. In general—p 213
37. In deeds p 213
38. Recital of particular facts—p 215
39. In mortgages—p 219
40. In bonds—p 220
E. Requisites, Validity, and Construction of Deed—p 222
§ 41. Execution—p 222
42. Delivery and acceptance p 223
43. Validity—p 223
44. Construction—p 224
45. Extent of estoppel—p 225

III. ESTOPPEL BY DEED—Continued

F. PERSONS FOR AND AGAINST WHOM ESTOPPEL ARISES—p 226

§ 46. General rule—p 226
47. Parties—p 227
48. Parties acting in different rights or capacities—p 227
49. States or municipalities—p 228
50. Privies—p 228
51. What constitutes privity—p 229
52. Who are privies generally—p 229
53. Heirs and devisees—p 229
54. Persons claiming through grantee—p 230

IV. ESTOPPEL BY SIMPLE CONTRACT—p 231

§ 55. In general—p 231
56. Necessity of seal—p 234
57. Validity of contract—p 234
58. Recitals in contract—p 235

V. EQUITABLE ESTOPPEL; ESTOPPEL BY MISREPRESENTATION—p 236

A. GENERAL NATURE AND ESSENTIALS—p 236

1. *In General*—p 236

§ 59. What constitutes—p 236
60. Distinguished from ratification and adoption—p 242
61. Distinguished from waiver—p 242
62. Distinguished from legal estoppel—p 248
63. Object and purpose of doctrine—p 248
64. Availability at law—p 252
65. Estoppel against estoppel—p 253
66. Laches or delay in asserting estoppel—p 254

2. *Essential Elements*—p 254

§ 67. In general—p 254
68. Materiality of representation—p 260
69. Intent—p 260
70. Knowledge of facts—p 264
71. Reliance on representation—p 267
72. Acts done or omitted and change of position—p 273
73. Benefit to person against whom estoppel asserted—p 276
74. Prejudice to person setting up estoppel—p 276
75. Default or wrongful act of person setting up estoppel—p 281
76. Mutuality—p 282
77. Certainty—p 282

B. GROUNDS—p 283

1. *Express Misrepresentations*—p 283

§ 78. Representations—p 283
79. Matters of fact or of opinion—p 288
80. As to future events—p 289
81. As to validity of bills, notes, bonds, stock, etc.—p 292
82. As to mortgages and judgments—p 294
83. Admissions and receipts—p 295
84. Admissions—p 295

V. EQUITABLE ESTOPPEL; ESTOPPEL BY MISREPRESENTATION—Continued

B. GROUNDS—Continued

1. *Express Misrepresentations*—Continued

§ 85. Receipts—p 298
86. Renunciation, disavowal, or disclaimer of title or right—p 298

2. *Implied Misrepresentations*—p 301

§ 87. Silence in general—p 301
88. Failure to assert title or right in general—p 306
89. Permitting sale or mortgage of property—p 308
90. Real property—p 308
91. Personal property—p 310
92. Public or judicial sale—p 311
93. Witnessing or taking acknowledgment—p 313
94. Permitting improvements or expenditures—p 314
95. Construction of railroad—p 317
96. Improvements and expenditures by purchasers—p 318
97. Improvements on near-by property—p 319
98. Failure to assert claim—p 320
99. Failure to assert lien—p 321
100. Concealment of facts—p 322
101. Surrender of possession of property—p 322

3. *Negligence*—p 323

§ 102. Negligence in general—p 323
103. Acts causing injury to one of two innocent parties—p 325
104. Clothing another with apparent title or authority—p 331
105. Real property—p 332
106. Personal property—p 334

VI. EQUITABLE ESTOPPEL; QUASI ESTOPPEL—p 341

§ 107. In general—p 341
108. Prior acts, claims, or conduct inconsistent with right asserted in general—p 341
109. Acceptance of benefits—p 347
110. Specific applications—p 350
111. Municipal and quasi municipal corporations—p 358
112. Parties dealing with municipal corporations—p 361
113. Acquiescence—p 362
114. In acts of others—p 362
115. In judicial proceedings—p 368
116. Inconsistency in positions before and after commencement of litigation—p 370
117. Prior claim or position in judicial proceedings—p 372
118. In same proceeding—p 379
119. In former proceedings—p 381
120. Stipulations and consents—p 384
121. Allegations or admissions in pleadings in former proceedings—p 386
122. Testimony in former proceedings—p 391
123. Prior recognition or assertion of authority, capacity, character, or status—p 393
124. Official certificates and acts—p 393
125. Prior assertion or recognition of right or title—p 393
126. By possession or acts of ownership under claim of title—p 395
127. By possession in subordination to another's title—p 395

VI. EQUITABLE ESTOPPEL; QUASI ESTOPPEL—Continued

§ 128. Claim under written instrument—p 396
129. Requests—p 396

VII. OPERATION AND EFFECT OF EQUITABLE ESTOPPEL—p 397

A. PERSONS AFFECTED—p 397

§ 130. To whom available—p 397
131. Against whom available generally—p 399
132. Heirs and personal representatives—p 399
133. Grantees, mortgagees, and their assignees—p 401
134. Persons acting in representative capacity—p 402
135. Cestuis que trust—p 403
136. Strangers—p 403
137. Creditors—p 403
138. Estoppel against public government, and public officers—p 403
139. General rule stated—p 411
140. Federal and state governments—p 411
141. Municipal and quasi-municipal corporations in general—p 413
142. Acts of officers and agents—p 417
143. Ultra vires acts—p 427
144. Irregular or unauthorized method of exercising power—p 428
145. Grants or licenses to use streets—p 430
146. Acquiescence in improvements—p 431
147. Collection of taxes and assessments—p 433

B. MATTERS PRECLUDED—p 436

§ 148. Extent of estoppel generally—p 436
149. Personal status or right—p 437
150. Title or claim to property—p 438
151. Rights and liabilities under contract—p 439
152. Remedies—p 440

VIII. PROCEDURE—p 440

A. PLEADING—p 440

§ 153. Necessity for pleading—p 440
154. Demurrer raising defense—p 448
155. Nature and form of plea—p 448
156. Requisites and sufficiency of allegations—p 449
157. Reply or demurrer to pleading setting up estoppel—p 452
158. Effect of pleading unsuccessfully—p 453
159. Issues, proof, and variance—p 453

B. EVIDENCE—p 454

§ 160. Presumptions and burden of proof—p 454
161. Admissibility—p 456
162. Weight and sufficiency—p 457

C. TRIAL—p 461

§ 163. Questions of law and fact—p 461
164. Instructions—p 464
165. Verdict, findings, and judgment—p 465

I. IN GENERAL

§ 1. Terminology

a. "Estoppel"
b. Other terms

a. "Estoppel"

An "estoppel" is a bar which precludes a person from denying the truth of a fact which has become settled in contemplation of law.

In the broad sense of the term, "estoppel" is a bar which precludes a person from denying the truth of a fact which has in contemplation of law become settled by the acts and proceedings of judicial or legislative officers, or by the act of the party himself, either by conventional writing or by representations, express or implied, in pais.[1] To use

1. U.S.—James v. Nelson, C.C.A. Alaska, 90 F.2d 910, 918, citing **Corpus Juris.**
Ky.—Horn v. Wells, 69 S.W.2d 1011, 1012, 253 Ky. 494, citing **Corpus Juris.**
La.—Lewis v. King, 103 So. 19, 22, 157 La. 718, quoting **Corpus Juris**—Sandifer v. Sandifer's Heirs, App., 195 So. 118.
Mont.—Hoppin v. Lang, 241 P. 636, 646, 74 Mont. 558, quoting **Corpus Juris.**
R.I.—Chernick v. National Surety Co., 148 A. 418, 419, 50 R.I. 419, citing **Corpus Juris.**
S.C.—Southern Ry. Co. v. Day, 138 S.E. 870, 873, 140 S.C. 388, quoting **Corpus Juris.**
Tex.—Masterson v. Boulding, Civ.App., 151 S.W.2d 301, error refused, quoting **Corpus Juris**—McLendon v. Federal Mortgage Co., Civ.App., 60 S.W.2d 324, 326, citing **Corpus Juris**—Sugg v. Johnson, Civ.App., 284 S.W. 705, 712, quoting **Corpus Juris**, and reversed on other grounds Johnson v. Sugg, Com.App., 291 S.W. 857.
21 C.J. p 1059 note 1.

Other definitions

(1) Preclusion in law which prevents one from alleging or denying a fact in consequence of his own previous act, allegation, or denial of contrary tenor.—State ex inf. Shartel, ex rel. City of Sikeston v. Missouri Utilities Co., 53 S.W.2d 394, 331 Mo. 337, 89 A.L.R. 607—Hodde v. Hahn, 222 S.W. 799, 283 Mo. 320—21 C.J. p 1059 note 1 [a] (1).

(2) Preclusion in law, resulting from previous act or conduct, and based on the conduct of one, or of another through whom the one claims.—Brown v. Fidelity Union Trust Co., 9 A.2d 311, 126 N.J.Eq. 406—21 C.J. p 1059 note 1 [a] (4).

(3) Preclusion of a person from asserting a fact, by previous conduct inconsistent therewith, on his own part or the part of those under whom he claims, or by an adjudication on his rights which he cannot be allowed to call in question.
Ala.—Cooper v. Lindsey, 19 So. 379, 109 Ala. 338.
Neb.—State v. Smith, 281 N.W. 851, 135 Neb. 423—Graham Ice Cream Co. v. Petros, 254 N.W. 869, 127 Neb. 172.

(4) Preclusion by act or conduct from asserting right which might otherwise have existed, to detriment and prejudice of another who, in reliance on such act or conduct, has acted thereon.—Reynolds v. Travelers' Ins. Co., 28 P.2d 310, 176 Wash. 36.

(5) A rule of evidence by which a man is precluded from alleging or denying a fact in consequence of his own previous action, inaction, allegation, or denial, which has led another so to conduct himself that, if the truth were established, such other would be damaged.
U.S.—U. S. to Use of Noland Co. v. Maryland Casualty Co., D.C.Md., 38 F.Supp. 479.
Cal.—Spear v. Farwell, 42 P.2d 391, 5 Cal.App.2d 111—Lake v. O'Brien, 202 P. 158, 54 Cal.App. 543.

(6) An impediment or bar to the assertion of a right of action arising by means of one's own act, or where he is forbidden to speak against his own act.—Greer v. Carter Oil Co., 25 N.E.2d 805, 373 Ill. 168.

(7) The term "estoppel" implies that one who by his deed or conduct has induced another to act in a particular manner will not be permitted to adopt an inconsistent attitude or course of conduct and thereby cause loss or injury to such other.—Pennington v. Pennington, Tex.Civ.App., 145 S.W.2d 688.

(8) Estoppel results from something which the law treats as so conclusive an admission that it cannot be controverted by the party making it.—Columbia Ins. Co. of New Jersey v. Mart Waterman Co., C.C.A. N.Y., 11 F.2d 216, certiorari denied 46 S.Ct. 486, 271 U.S. 672, 70 L.Ed. 1144.

(9) Further definitions and explanations.
U.S.—U. S., for Use and Benefit of Johnson v. Morley Const. Co., D.C. N.Y., 17 F.Supp. 378, modified on other grounds, C.C.A., U. S. ex rel. Johnson v. Morley Const. Co., 93 F.2d 781, certiorari denied Maryland Casualty Co. v. U. S. for Use and Benefit of Harrington, 59 S.Ct. 244, 305 U.S. 651, 83 L.Ed. 421—Oertel Co. v. Glenn, D.C.Ky., 13 F. Supp. 651, affirmed, C.C.A., Glenn v. Oertel Co., 97 F.2d 495.
Mo.—Johnson v. Ferguson, 44 S.W.2d 650, 329 Mo. 363—Hodde v. Hahn, 222 S.W. 799, 283 Mo. 320.
N.Y.—Volk v. City of New York, 19 N.Y.S.2d 53, 259 App.Div. 247, reversed on other grounds 30 N.E. 2d 596, 284 N.Y. 279—Winston v. Saugerties Farms, 21 N.Y.S.2d 841.
Ohio.—Carter v. Grossnickle, 11 Ohio N.P.,N.S., 465.
Tenn.—Foutch v. Alexandria Bank & Trust Co., 149 S.W.2d 76, 80.
Tex.—Harris v. Prince, Civ.App., 98 S.W.2d 1022, reversed on other grounds 121 S.W.2d 983, 132 Tex. 231.
21 C.J. p 1059 note 1 [a] (2), (3), (5)–(7).

"The generally accepted definition of estoppel is the commission of an act or the concealment of facts to one who is ignorant of the matter with the intent to induce and cause the other party to act upon it or change his position to his detriment or disadvantage."—Olbert v. Key, Mo. App., 93 S.W.2d 1048, 1051.

When estoppel arises

(1) An "estoppel" arises where a man is concluded and forbidden by law to speak against his own act or deed; yea, even though it is to say the truth.—Termes de la Ley, quoted in New Jersey Suburban Water Co. v. Town of Harrison, 3 A.2d 623, 122 N.J.Law 189, reversing 1 A.2d 61, 120 N.J.Law 546—21 C.J. p 1059 note 1 [b] (3).

(2) Estoppel arises when one executes a deed.
Pa.—General Contract Purchase Corporation v. Bitomski, 156 A. 727, 102 Pa.Super. 266.
S.C.—Southern Ry. Co. v. Day, 138 S.E. 870, 873, 140 S.C. 388, quoting **Corpus Juris.**
21 C.J. p 1059 note 1 [b].

Estoppel as to rules of law

Estoppels preclude the assertion of facts, not law.
La.—Straus v. City of New Orleans, 118 So. 125, 166 La. 1035—Lewis v. King, 103 So. 19, 157 La. 718.
Miss.—Mississippi Power & Light Co. v. Pitts, 179 So. 363, 181 Miss. 344.
N.C.—Moore v. Willis, 9 N.C. 555.

the quaint language of Lord Coke, it is so called "because a man's owne act or acceptance stoppeth or closeth up his mouth to alleage or plead the truth."[2] However, this statement does not mean that the person is precluded from alleging the truth, as truth, but because what he now assumes to be true is something inconsistent with his former position.[3]

The purpose of estoppels is to prevent inconsistency and fraud resulting in injustice.[4]

Distinctions. The principle of estoppel is sometimes spoken of as a rule of evidence.[5] However, it is not such;[6] estoppels differ from evidence in that estoppels are received as conclusive and preclude all inquiry into the merits of the title, while evidence is merely the medium of establishing facts which do exist or have existed.[7]

The distinction between laches and estoppel is treated in Equity § 112. Abandonment distinguished see Abandonment § 2 b (8).

b. Other Terms

Various other terms have been employed in connection with estoppel such as "estoppel at common law," "estoppel by laches," "technical estoppel," and "title by estoppel."

In connection with estoppel certain terms have been employed, such as "estoppel by contract" see infra §§ 55–58, "estoppel by deed" see infra §§ 10–54, "estoppel by misrepresentation" see §§ 59–106 infra, "estoppel by record" see infra §§ 4–9, and various other terms.[8]

"Estoppel by laches." A neglect to do something which one should do or to seek to enforce a right at a proper time has been termed "estoppel by laches."[9]

"Technical estoppel." "Technical estoppels" are those which arise from matter of record or the deed of the party estopped,[10] and sometimes conclude the party without any reference to the moral qualities of his conduct.[11]

"Title by estoppel." Where a person without title, having conveyed with warranty, subsequently acquires the title, it inures to the benefit of the grantee, who is said to acquire the title by estoppel.[12]

Estoppel as conclusion of law
Estoppel is conclusion of law which must be based on facts found. —Skeen v. Van Sickle, 15 P.2d 344, 80 Utah 419.

2. U.S.—The Robin Gray, D.C.N.Y., 53 F.2d 1037, 1040, citing **Corpus Juris,** and reversed in part on other grounds, C.C.A., 65 F.2d 375, modified on other grounds 65 F.2d 376, certiorari denied Seas Shipping Co. v. Approximately 3,251,000 Feet Board Measure of Lumber 54 S.Ct. 70, 290 U.S. 653, 78 L.Ed. 566.
Ala.—Houston Nat. Bank of Dothan v. Eldridge, 84 So. 430, 17 Ala.App. 235.
Del.—Colvoccoresses v. W. S. Wasserman Co., 190 A. 607, 613, 8 W.W. Harr. 253, citing **Corpus Juris.**
Pa.—Bowhall v. Wooleyhan Transport Co., 29 Del.Co. 314.
21 C.J. p 1059 note 2.

3. N.H.—Haynes v. Stevens, 11 N. H. 28.

4. U.S.—Joy v. Godchaux, C.C.A.Mo., 35 F.2d 649, certiorari denied Goudchaux v. Joy, 50 S.Ct. 239, 281 U.S. 723, 74 L.Ed. 1141.
Cal.—Pacific Finance Corporation v. Hendley, 7 P.2d 391, 119 Cal.App. 697.
Ill.—Trustees of Schools v. Village of Cahokia, 192 N.E. 565, 357 Ill. 538—Melin v. Community Consolidated School District No. 76, 144 N.E. 13, 312 Ill. 376.
N.Y.—Angerosa v. White Co., 290 N.Y.S. 204, 248 App.Div. 425, affirmed 11 N.E.2d 325, 275 N.Y. 524—Mount Vernon Trust Co. v. City of Mount Vernon, 12 N.Y.S.2d 120.
R.I.—Chernick v. National Surety Co., 148 A. 418, 419, 50 R.I. 419, citing **Corpus Juris.**
Tex.—Bell v. Moody, Civ.App., 147 S.W.2d 852, 854—Greer v. Franklin Life Ins. Co., Civ.App., 109 S.W.2d 305, error dismissed—The Royal Tailors v. Joseph, Civ.App., 239 S.W. 639.
21 C.J. p 1060 note 4.
Object and purpose of estoppel in pais see infra § 63.

5. Alaska—Fairhaven Gold Dredging Co. v. Golden Center Mines, 7 Alaska 669.
Cal.—Spear v. Farwell, 42 P.2d 391, 5 Cal.App.2d 111—Lake v. O'Brien, 202 P. 158, 54 Cal.App. 543.
21 C.J. p 1060 note 5.
Estoppel in pais as rule of evidence see infra § 63.

6. U.S.—The Carso, C.C.A.N.Y., 53 F.2d 374, modifying, D.C., 43 F.2d 736, certiorari denied Navigazione Libera Triestina v. Molinelli, Giannusa & Rao, Inc., 52 S.Ct. 140, 284 U.S. 679, 76 L.Ed. 574.
N.Y.—Mutual Life Ins. Co. v. Corey, 31 N.E. 1095, 135 N.Y. 326.

7. U.S.—The Carso, C.C.A.N.Y., 53 F.2d 374, modifying, D.C., 43 F.2d 736, certiorari denied Navigazione Libera Triestina v. Molinelli, Giannusa & Rao, Inc., 52 S.Ct. 140, 284 U.S. 679, 76 L.Ed. 574.
21 C.J. p 1060 note 7.

8. **"Estoppel at common law"** includes estoppel by record, estoppel by deed, and certain cases of estoppel in pais which are recognized in courts of law.—Thomas v. Conyers, 151 S.E. 270, 198 N.C. 229.
Equitable estoppel see infra § 59 et seq.
Estoppel by:
Conduct see infra § 59.
Negligence see infra §§ 102–106.
Silence see infra § 87 et seq.
Verdict or judgment see the C.J.S. title Judgments § 593, also 34 C.J. p 745 note 83 et seq.
Warranty see infra §§ 10–54.
Estoppel in pais see infra § 59 et seq.
Quasi estoppel see infra §§ 107–129.
Waiver see infra § 59 et seq.

9. Ky.—Jett v. Jett, 188 S.W. 669, 171 Ky. 548.
La.—Vosburg v. Federal Land Bank of New Orleans, App., 172 So. 567, 571, quoting **Corpus Juris.**
R.I.—Hunt v. Reilly, 50 A. 833, 23 R.I. 471.
Estoppel and laches distinguished see Equity § 112.

10. Iowa.—Hainer v. Iowa Legion of Honor, 43 N.W. 185, 78 Iowa 245.
21 C.J. p 1061 note 21 [d], p 1062 note 30.
Estoppel by:
Deed see infra §§ 10–54.
Record see infra §§ 4–9.
Legal and equitable estoppel distinguished see infra § 62.

11. N.Y.—Dezell v. Odell, 3 Hill 215, 221, 38 Am.D. 628.

12. N.Y.—Mutual Life Ins. Co. v. Corey, 31 N.E. 1095, 135 N.Y. 326.

§ 2. Classification

Estoppel is by matter of record, by matter in writing, and by matter in pais.

It is commonly stated that there are three kinds of estoppel, namely, by matter of record, by matter in writing, and by matter in pais.[13] However, as is shown infra §§ 107–129, there are also certain legal bars which have the same effect as an estoppel and yet are not strictly such, which have been termed quasi estoppels.

§ 3. Odiousness of Estoppels

While estoppels have not been viewed with favor, nevertheless the wisdom and justice of the principle of estoppel are generally recognized.

It is commonly stated in many decisions that estoppels are odious and are not favored in law because they exclude the truth.[14] Nevertheless, the wisdom and justice of the principle of estoppel, especially estoppel in pais, see infra § 63, are generally recognized,[15] the view being founded on principles of equity, morality, and justice,[16] and in accord with good conscience, honesty, and reason;[17] and, as such, the doctrine subserves its true purpose as a plain, practical, fair, and necessary rule of law.[18]

II. ESTOPPEL BY RECORD

§ 4. Definition

Estoppel by record is the preclusion to deny the truth of matter set forth in a judicial or legislative record, and to deny the facts adjudicated by a court of competent jurisdiction.

An estoppel by matter of record is such as arises from, or is founded on, the adjudication of a competent court;[19] more broadly, estoppel by record is the preclusion to deny the truth of matter set forth in a record, whether judicial or legislative, and also to deny the facts adjudicated by a court of competent jurisdiction.[20]

§ 5. Judicial Records in General

No one may impeach the records of a court of justice in a collateral proceeding.

Estoppel to assert after acquired title see infra §§ 21–35.

13. U.S.—Westinghouse Electric & Mfg. Co. v. Formica Insulation Co., C.C.A.Ohio, 288 F. 330, certiorari granted 44 S.Ct. 6, 263 U.S. 692, 68 L.Ed. 509 and affirmed 45 S.Ct. 117, 266 U.S. 342, 69 L.Ed. 316.
Mont.—Hoppin v. Lang, 241 P. 636, 74 Mont. 558.
21 C.J. p 1062 note 34.
Estoppel by:
Contract see infra §§ 55–58.
Deed see infra §§ 10–54.
Matter in pais see infra § 59 et seq.
Record see infra §§ 4–9.

14. U.S.—Fuchs v. Wadsworth, Cust. & Pat.App., 48 F.2d 928—Miller v. Hayman, Cust. & Pat.App., 46 F.2d 188—Sanford & Brooks Co. v. Commissioner of Internal Revenue, C.C.A., 35 F.2d 312, certiorari granted Lucas v. Sanford & Brooks Co., 50 S.Ct. 240, 281 U.S. 707, 74 L.Ed. 1130, reversed on other grounds Burnet v. Sanford & Brooks Co., 51 S.Ct. 150, 282 U.S. 359, 75 L.Ed. 383—Carter v. Business Men's Assur. Co. of America, D.C.Ky., 19 F.Supp. 599.
Cal.—Hammond Lumber Co. v. Weeks, 287 P. 573, 105 Cal.App. 315—Lorenz v. Rousseau, 258 P. 690, 85 Cal.App. 1.
Colo.—Langley v. Young, 211 P. 640, 72 Colo. 466.
Conn.—Peck v. Damutz, 135 A. 453, 105 Conn. 378.
Iowa.—Stookesberry v. Burgher, 262 N.W. 820, 220 Iowa 916—McIntosh v. McIntosh, 234 N.W. 234, 211 Iowa 750—City Bank of Mitchellville v. Alcorn, 176 N.W. 628, 188 Iowa 592.
La.—Succession of Butterworth, 196 So. 39, 195 La. 115—Gibson v. Pickens, 175 So. 600, 187 La. 860—McDonald v. Shreveport Mut. Bldg. Ass'n, 152 So. 318, 178 La. 645—Lawrence v. Sunrise Petroleum Co., App., 163 So. 742—American Fire & Marine Ins. Co. v. Seymour, App., 144 So. 775—International Projector Corporation v. Maricella, App., 144 So. 278—Whittington v. Town of Glenmora, 1 La. App. 568.
Mass.—Abbott v. Bean, 3 N.E.2d 762, 295 Mass. 268.
Mo.—Foster v. Modern Woodmen of America, App., 138 S.W.2d 18—National Match Co. v. Empire Storage & Ice Co., 58 S.W.2d 797, 227 Mo.App. 1115, certiorari denied Empire Storage & Ice Co. v. National Match Co., 54 S.Ct. 88, 290 U.S. 668, 78 L.Ed. 577.
Or.—Commercial Securities v. Hall, 15 P.2d 483, 140 Or. 644.
Tenn.—Rogers v. Colville, 238 S.W. 80, 145 Tenn. 650.
21 C.J. p 1062 note 40.

Estoppel applied with caution
U.S.—Kentucky Rock Asphalt Co. v. Helburn, D.C.Ky., 20 F.Supp. 364, affirmed, C.C.A., 108 F.2d 779.

Technical estoppels
Estoppels forbid one to speak the truth, and hence technical estoppels are not favored.—Westinghouse Electric & Mfg. Co. v. Formica Insulation Co., C.C.A.Ohio, 288 F. 330, certiorari granted 44 S.Ct. 6, 263 U.S. 692, 68 L.Ed. 509, and affirmed 45 S.Ct. 117, 266 U.S. 342, 69 L.Ed. 316.

When interposed against statutory rights
Estoppels and nonstatutory bars, when interposed against statutory rights, are not favored, and should be applied only where facts are clear and definite.—In re Long, Cust. & Pat.App., 83 F.2d 458.

15. La.—State ex rel. Shell Oil Co. v. Register of State Land Office, 192 So. 519, 193 La. 883.
21 C.J. p 1062 notes 42–44.

16. La.—State ex rel. Shell Oil Co. v. Register of State Land Office, supra.
21 C.J. p 1063 note 45.

17. La.—State ex rel. Shell Oil Co. v. Register of State Land Office, supra.
21 C.J. p 1063 note 46.

18. Wis.—Union Bank v. Commercial Securities Co., 157 N.W. 510, 163 Wis. 470.
21 C.J. p 1063 note 47.

19. Fla.—Smith v. Urquhart, 176 So. 787, 129 Fla. 742—Coral Realty Co. v. Peacock Holding Co., 138 So. 622, 103 Fla. 916—Gray v. Gray, 107 So. 261, 91 Fla. 103.
Pleading estoppel by record see infra § 156.

20. Okl.—Swofford Bros. Dry Goods Co. v. Owen, 133 P. 193, 37 Okl. 616, L.R.A.1916C 189.
21 C.J. p 1063 note 49.
Parol or extrinsic evidence affecting public or official records see the C.J.S. title Evidence §§ 865–891, also 22 C.J. p 1077 note 63–p 1083 note 19.

It is a well established rule, as appears in the C.J.S. title Evidence § 765, also 22 C.J. p 968 note 89, that the records of a court of justice, including the record of a judgment, import absolute verity; and no one, whether or not a party to the proceeding in which they were made, may in a collateral proceeding impeach them by adducing evidence in denial of the facts of which they purport to be a memorial.[21] An estoppel will not be predicated on a portion of the record and of the facts, but on the whole thereof.[22]

§ 6. Judgments

The record of a judgment, considered as a judgment, precludes a reëxamination into the truth of the matters decided, the matters adjudicated being termed res judicata.

The estoppel arising from the record of a judgment considered as a memorial or entry thereof is considered in § 5 supra. As a judgment, the record has the further effect of precluding a reëxamination into the truth of the matters decided;[23] this further effect of the record considered as a judgment is otherwise known as estoppel by judgment, the matters adjudicated being termed res judicata.[24]

§ 7. Pleadings and Other Judicial Admissions

The general rule, which has not been followed in all cases, is that allegations or recitals made in a prior case or proceeding, in pleadings or otherwise, do not operate, in a subsequent case, proceeding, or transaction, as a technical estoppel by record against the party making them.

Although statements in pleadings constitute solemn judicial admissions of fact requiring evidence to contradict them,[25] independent of the estoppel raised by the judgment in the case,[26] allegations or recitals made in a prior case or proceeding, in pleadings or otherwise, do not, as a rule, operate, in a subsequent case, proceeding, or transaction, as a technical estoppel by record against the party making them.[27] This rule is especially applicable where the allegations or recitals are not inconsistent with the position subsequently assumed by the pleader,[28] or where the other party did not accept or rely on the statements or recitals.[29] Nevertheless, in some cases so-called estoppels by record have been invoked with respect to material allegations or recitals made in former proceedings;[30] but an examination of these authorities will usually disclose the presence of facts or circumstances under which the pleader might have been estopped or concluded other than by a technical estoppel by record.[31] In any case, there can be no estoppel by record where the allegations were immaterial,[32] or where they were made through inadvertence or by mistake.[33] Likewise, there cannot be such an estoppel where the allegations or recitals did not conclude the pleader in the prior proceeding,[34] as where the action was discontinued or dismissed

21. Ala.—Westmoreland v. Birmingham Trust & Savings Bank, 108 So. 536, 214 Ala. 593, 46 A.L.R. 1201.
Tex.—Hartman v. Chumley, Civ.App., 266 S.W. 444, 445, citing **Corpus Juris.**
21 C.J. p 1063 note 50, p 1064 notes 51, 53.

22. Alaska.—Decker v. Berner's Bay Min. Co., 3 Alaska 280.

23. Tex.—Citizens' State Bank of Lindale v. Jeffries, Civ.App., 2 S.W.2d 317, error refused.

24. Ala.—Tallapoosa County Bank v. Salmon, 68 So. 542, 12 Ala.App. 589, 593.
Estoppel by judgment see the C.J.S. title Judgments §§ 592–848, also 34 C.J. p 742 note 69–p 1080 note 97.

25. Mo.—Rhoads v. Rhoads, 119 S.W.2d 247, 342 Mo. 934.
21 C.J. p 1064 note 60.
Conclusiveness of allegations or admissions as against pleader see the C.J.S. title Pleading §§ 59–62, also 49 C.J. p 122 note 53–p 128 note 28.
Judicial admissions generally see the C.J.S. title Evidence §§ 299–313, also 22 C.J. p 329 note 52–p 345 note 1.

26. Mo.—Rhoads v. Rhoads, 119 S.W.2d 247, 342 Mo. 934.
21 C.J. p 1064 note 61.

27. Mo.—Rhoads v. Rhoads, 119 S.W.2d 247, 251, 342 Mo. 934, quoting **Corpus Juris.**
Mont.—Hoppin v. Lang, 241 P. 636, 74 Mont. 558.
Tenn.—Houk v. Memphis Const. Co., 15 S.W.2d 742, 743, 159 Tenn. 103, quoting **Corpus Juris.**
21 C.J. p 1064 note 62, p 1066 notes 74, 76, 77 [b], 78 [b].
Equitable or quasi estoppel by:
Allegations or admissions in pleadings in former proceedings see infra § 121.
Prior claim or position in judicial proceedings see infra §§ 117–120.
Prayer for relief
U.S.—Current News Features, Inc. v. Pulitzer Pub. Co., C.C.A.Mo., 81 F.2d 288, 292, citing **Corpus Juris.**

28. U.S.—Block v. St. Louis, etc., R. Co., La., 230 F. 113, 144 C.C.A. 411.
21 C.J. p 1065 note 63.

29. La.—Lachman v. Block, 17 So. 153, 47 La.Ann. 505, 28 L.R.A. 255.
21 C.J. p 1065 note 64.

30. Mo.—City of St. Louis v. United R. Co., 174 S.W. 78, 263 Mo. 387, error dismissed 36 S.Ct. 550, 241 U.S. 647, 60 L.Ed. 1220, followed in City of St. Louis v. St. Louis, & S. R. Co., 174 S.W. 109, 263 Mo. 508, error dismissed 36 S.Ct. 550, 241 U.S. 647, 60 L.Ed. 1220, and City of St. Louis v. United R. Co., 174 S.W. 109, 263 Mo. 507, error dismissed 36 S.Ct. 550, 241 U.S. 647, 60 L.Ed. 1220.
N.Y.—Van Orman v. Phelps, 9 Barb. 500.
Wis.—Kuchenreuther v. Chicago, M., St. P. & P. R. Co., 275 N.W. 457, 225 Wis. 613.
21 C.J. p 1065 note 68, p 1066 notes 73, 75, 77 [a], 78 [a].

31. Tenn.—Houk v. Memphis Const. Co., 15 S.W.2d 742, 743, 159 Tenn. 103, quoting **Corpus Juris.**
21 C.J. p 1066 notes 70–72.

32. Ill.—Hoffman v. Hoffman, 161 N.E. 723, 330 Ill. 413, reversing 246 Ill.App. 60.

33. Mo.—Rhoads v. Rhoads, 119 S.W.2d 247, 251, 342 Mo. 934, quoting **Corpus Juris.**
21 C.J. p 1065 note 67.

34. Mo.—Rhoads v. Rhoads, supra—Kirk v. Metropolitan Life Ins. Co.,

without a decision on the merits.[35] In order to apply the doctrine of estoppel as to such matters, statements in favor of the pleader or declarant as well as those against his interest must be taken into consideration.[36]

§ 8. For or against Whom Estoppel Operates

Estoppels by record exist only as between the same parties or those in legal privity with them, and cannot be insisted on by one who is not himself bound thereby.

Estoppels by record, to the extent that they bind parties, will also bind their privies;[37] but they can exist only as between the same parties or those in legal privity with them,[38] and can be used neither by[39] nor against[40] strangers. Estoppels by record are mutual, and cannot be insisted on by one who is himself not bound thereby.[41]

The United States, when it once gets into court, may be estopped of record by its attorneys and officers, therein acting for it and representing it.[42]

§ 9. Matters Precluded

The rule of estoppel by record bars a second action between the same parties on an issue necessarily raised and decided in the first action.

The rule of estoppel by record bars a second action between the same parties on an issue necessarily raised and decided in the first action;[43] so, an issue of ownership of property and its incidents thus adjudicated cannot be relitigated in a second action between the same parties.[44] It has been held that the rule prevents a party not only from litigating again what was actually litigated in the former case, but also from litigating what might have been litigated therein.[45]

A party is not estopped from denying any fact which may be recited in a legislative act.[46]

III. ESTOPPEL BY DEED

A. IN GENERAL

§ 10. Definition, Nature, and Essentials

Estoppel by deed is a bar which precludes a party from denying the truth of his deed. It may be invoked only in a suit on the deed or concerning a right arising out of it.

Estoppel by deed is a bar which precludes a party to a deed and his privies from asserting as against the other and his privies any right or title in derogation of the deed, or from denying the truth of any material fact asserted in it.[47] In order that a deed may give rise to an estoppel, it must contain representations or covenants;[48] and an estoppel by deed may be invoked only in a suit on the deed or concerning a right arising out of the deed.[49] The doctrine of estoppel by deed is applied in order to avoid circuity of action,[50] and to compel the parties

App., 38 S.W.2d 519, 522, citing Corpus Juris
21 C.J. p 1065 note 65.

35. Colo.—Barlow v. Hoffman 86 P. 2d 239, 103 Colo. 286, 120 A.L.R. 552.
21 C.J. p 1065 note 66.

36. Colo.—Central Trust Co. v. Culver, 129 P. 253, 23 Colo.App. 317, affirmed 145 P. 684, 58 Colo. 334.

37. N.C.—Gillam v. Edmonson, 69 S.E. 924, 154 N.C. 127.

38. N.Y.—Smith v. Mrine, 260 N.Y. S. 425, 145 Misc. 521—Liberty Bank of Buffalo v. High Park Development Co., 236 N.Y.S. 194, 134 Misc. 733, affirmed 234 N.Y.S. 832, 227 App.Div. 647.
N.C.—Gillam v. Edmonson, 69 S.E. 924, 154 N.C. 127.
Pa.—Puharic v. Novy, 176 A. 233, 317 Pa. 199.
Tex.—Mitchell, Gartner & Thompson v. Young, Civ.App., 135 S.W.2d 308, 312, error refused, quoting Corpus Juris.

39. N.Y.—Liberty Bank of Buffalo v. High Park Development Co., 236 N.Y.S. 194, 134 Misc. 733, affirmed 234 N.Y.S. 832, 227 App.Div. 647.
Or.—Routledge v. Githens, 245 P. 1072, 1073, 45 A.L.R. 922, 118 Or. 70, quoting Corpus Juris.
Tex.—Mitchell, Gartner & Thompson, v. Young, Civ.App., 135 S.W.2d 308, 312, error refused, quoting Corpus Juris—American Surety Co. v. Martinez, Civ.App., 73 S.W.2d 109, 113, citing Corpus Juris.
21 C.J. p 1067 note 83.

40. N.Y.—Liberty Bank of Buffalo v. High Park Development Co., 236 N.Y.S. 194, 134 Misc. 733, affirmed 234 N.Y.S. 832, 227 App.Div. 647.
Or.—Routledge v. Githens, 245 P. 1072, 118 Or. 70, 45 A.L.R. 922.
Tex.—Mitchell, Gartner & Thompson v. Young, Civ.App., 135 S.W.2d 308, 312, error refused, quoting Corpus Juris.
21 C.J. p 1067 note 84.

41. N.Y.—Meltzer v. Doll, 91 N.Y. 365.
Or.—Routledge v. Githens, 245 P. 1072, 118 Or. 70, 45 A.L.R. 922.
21 C.J. p 1067 note 85.

42. U.S.—First Nat. Bank v. U. S., D.C.Mo., 2 F.Supp. 107.

43. Kan.—Woods v. Duval, 99 P.2d 804, 151 Kan 472.

44. Kan.—Woods v. Duval, supra.

45. Wis.—Kuchenreuther v. Chicago, M., St. P. & P. R. Co., 275 N.W. 457, 225 Wis. 613.

46. Ga.—Thornton v. Lane, 11 Ga. 459.

47. Mont.—Hart v. Anaconda Copper Mining Co., 222 P. 419, 69 Mont. 354.
Tex. Surtees v. Hobson, Civ.App., 4 S.W.2d 245, 246, affirmed, Com. App., 13 S.W.2d 345, citing Corpus Juris.
21 C.J. p 1067 note 87.
Title cannot be created by estoppel
La.—Gibson v. Pickens, 175 So. 600, 187 La. 860.

48. N.Y.—Petition of Testan, 281 N. Y.S. 96, 156 Misc. 449.

49. Mass.—Robert v. O'Connell, 169 N.E. 487, 269 Mass. 532.

50. N.Y.—Petition of Testan, 281 N. Y.S. 96, 156 Misc. 449.
21 C.J. p 1067 note 88.

to fulfill their contracts.[51]

Change of position necessary. It has been held that an estoppel by deed is not created or enforceable unless there has been a change in the situation of one of the parties, in reliance on the deed.[52]

Estoppel in pais distinguished. Estoppel by deed is distinguishable from estoppel in pais,[53] in that it appears from the face of the deed,[54] and it does not require all of the elements of an estoppel in pais.[55]

Unlike estoppels in pais, a technical estoppel by deed may conclude a party without reference to the moral qualities of his conduct.[56]

"Estoppel by warranty" is an estoppel based on the principle of giving effect to the manifest intention of the grantor appearing on the deed, as to the lands or estate to be conveyed, and of preventing the grantor from derogating from or destroying his own grant by any subsequent act.[57]

§ 11. Mutuality

It is usually said that an estoppel by deed must be mutual, binding both parties.

It is usual to say that an estoppel by deed must be mutual, else it will not operate as a bar, and that unless both parties are bound neither will be concluded;[58] but exceptions and limitations to this statement will appear in succeeding sections.

§ 12. Estoppel against Estoppel

An estoppel against an estoppel sets the matter at large; so, the setting up of an estoppel by deed may be prevented or offset by another such estoppel, or a different form of estoppel, against the party seeking to set it up.

An estoppel against an estoppel sets the matter at large,[59] the two estoppels destroying or neutralizing each other.[60] Thus no one can set up an estoppel by deed against the estoppel arising from his own grant;[61] and if both parties claim under the same person and one is estopped by one deed and the other is estopped by another deed, both made by that person, one estoppel offsets the other, and the rights of the parties are to be adjusted without regard to any estoppel.[62] So the setting up of an estoppel by deed may be prevented by an estoppel in pais as against the grantee;[63] and an estoppel by the covenants of a deed is overcome by the estoppel created by the subsequent judgment of a competent tribunal.[64] A person who secures a patent from the commonwealth on an application which either mistakenly or falsely alleges that the land is vacant cannot claim that the commonwealth is estopped by reason of its patent from setting up a prior paramount title in itself, as there is an estoppel against an estoppel.[65]

B. PARTICULAR INSTRUMENTS AND PARTIES THERETO

§ 13. Estoppel against Grantor

A grantor is estopped to assert anything in derogation of his deed.

A person who assumes to convey an estate by deed, or his successor, is estopped, as against the grantee, or those in privity with him, to assert any-

51. Md.—Potomac Dredging Co. v. Smoot, 69 A. 507, 510, 108 Md. 54—Casey v. Inloes, 1 Gill 430, 39 Am.D. 658.

52. Okl.—Nickel v. Janda, 242 P. 264, 115 Okl. 207.
21 C.J. p 1067 note 91.

53. Tex.—Rutherford v. McGee, Civ. App., 241 S.W. 629.
"Estoppel in pais" defined see infra § 59.

54. Tex.—Rutherford v. McGee, supra.

55. U.S.—In re Solomon, D.C.Pa., 40 F.Supp. 62.

56. Ind.—McAdams v. Bailey, 82 N. E. 1057, 169 Ind. 518, 124 Am.S.R. 240, 13 L.R.A.,N.S., 1003.

57. La.—Gaines v. Crichton, 174 So. 666, 187 La. 345—Lewis v. King, 103 So. 19, 157 La. 718—Sandifer v. Sandifer's Heirs, App., 195 So. 118.
N.J.—Condit v. Bigalow, 54 A. 160, 64 N.J.Eq. 504, 513.
Tex.—Lowry v. Carter, 102 S.W. 930, 46 Tex.Civ.App. 488.
Term "warranty," as applied to deed of conveyance, designates vendor's contract which operates to pass to vendee a title outstanding against property at time of conveyance whenever same is acquired.—Miller v. Miller, Tex.Civ.App., 283 S.W. 1085.

58. Ga.—Cook v. Flanders, 138 S.E. 218, 164 Ga. 279.
Neb.—Department of Banking v. McMullen, 278 N.W. 551, 555, 134 Neb. 338, citing **Corpus Juris.**
N.Y.—Liberty Bank of Buffalo v. High Park Development Co., 236 N.Y.S. 194, 134 Misc. 733, affirmed 234 N.Y.S. 832, 227 App.Div. 647.
Vt.—Smith v. Vermont Marble Co., 133 A. 355, 99 Vt. 384.
21 C.J. p 1107 notes 89–91.
Persons for and against whom estoppel arises see infra §§ 46–54.

59. W.Va.—Rust v. Commercial Coal & Coke Co., 115 S.E. 406, 414, 92 W.Va. 457, citing **Corpus Juris.**
21 C.J. p 1110 note 20.

60. Mich.—Shean v. U. S. Fidelity & Guaranty Co., 248 N.W. 892, 263 Mich. 535.
Miss.—Hopkins v. Hopkins, 165 So. 414, 415, 278 Miss. 643, citing **Corpus Juris.**

61. U.S.—Hoboken v. Pennsylvania R. Co., N.J., 8 S.Ct. 643, 124 U.S. 656, 31 L.Ed. 543.
21 C.J. p 1110 note 21.

62. N.H.—Carpenter v. Thompson, 3 N.H. 204, 14 Am.D. 348.
Wash.—Schmidt v. Olympia Light & Power Co., 90 P. 212, 46 Wash. 360.

63. La.—Gaines v. Tidwell, 2 La. App. 12.
Pa.—Grange Trust Co. v. Shade, 156 A. 620, 102 Pa.Super. 122.
21 C.J. p 1110 note 23.

64. U.S.—Boynton v. Haggart, Ark., 120 F. 819, 57 C.C.A. 301, certiorari denied 24 S.Ct. 845, 191 U.S. 573, 48 L.Ed. 307.

65. Pa.—Commonwealth v. Bierly, 37 Pa.Super. 496.

thing in derogation of the deed; he will not be heard, for the purpose of defeating the title of the grantee, to say that at the time of the conveyance he had no title, or that none passed by the deed, nor can he deny to the deed its full operation and effect as a conveyance.[66] So a grantor is estopped

66. U.S.—Logan v. Union Sulphur Co., D.C.La., 29 F.Supp. 33.
Ark.—Jernigan v. Daughtry, 109 S.W.2d 126, 194 Ark. 623.
Cal.—Widney v. Southern Pac. Co., 7 P.2d 1046, 120 Cal.App. 291.
Fla.—Reid v. Barry, 112 So. 846, 857, 93 Fla. 849, quoting Corpus Juris.
Ga.—Smith v. Wood, 7 S.E.2d 255, 189 Ga. 695—Martin v. Citizens' Bank of Marshallville, 171 S.E. 711, 177 Ga. 871—Todd v. Williford, 150 S.E. 912, 169 Ga. 543.
Ill.—Biwer v. Martin, 128 N.E. 518, 294 Ill. 488.
Ky.—Van Hoose v. Fitzpatrick, 58 S.W.2d 587, 248 Ky. 335—Wabash Drilling Co. v. Ellis, 20 S.W.2d 1002, 230 Ky. 769 Shaver v. Ellis, 11 S.W.2d 949, 226 Ky. 806—Turner v. Turner, 262 S.W. 257, 203 Ky. 327—Middleton v. Commonwealth, 254 S.W. 754, 200 Ky. 237.
La.—Superior Oil Producing Co. v. Leckelt, 181 So. 462, 189 La. 972—Gaines v. Crichton, 174 So. 666, 187 La. 345—Lewis v. King, 103 So. 19, 157 La. 718 Succession of Griffin, App., 165 So. 745.
Mo.—Coates & Honking Realty Co. v. Kansas City Terminal Ry. Co., 43 S.W.2d 817, 328 Mo. 1118—Jones v. Park, 271 S.W. 370, 307 Mo. 462—White v. Hughes, App., 88 S.W.2d 268—Chilton v. Chilton, App., 297 S.W. 457.
N.M.—Rocky Cliff Coal Mining Co. v. Kitchen, 222 P. 658, 29 N.M. 395.
N.C.—Thamer v. Goode, 9 S.E.2d 485, 217 N.C. 639—North Carolina Joint Stock Land Bank of Durham v. Moss, 2 S.E.2d 378, 215 N.C. 445—Goldstein v. Baer, 199 S.E. 379, 214 N.C. 832—Willis v. Willis, 166 S.E. 398, 203 N.C. 517—Bechtel v. Bohannon, 153 S.E. 316, 198 N.C. 730—Crawley v. Stearns, 138 S.E. 403, 194 N.C. 15.
Ohio.—Licking County Agr. Soc. v. Board of Com'rs of Licking County, 194 N.E. 606, 48 Ohio App. 528.
Okl.—Kennedy v. Uhrich, 62 P.2d 994, 178 Okl. 366—Barnes v. Morris, 231 P. 466, 105 Okl. 17.
Tenn.—Johnson v. Ford, 245 S.W. 531, 541, 147 Tenn. 63, quoting Corpus Juris—Tennessee Barium Corporation v. Williams, 133 S.W.2d 1015, 1020, 23 Tenn.App. 398, quoting Corpus Juris—Sawtelle v. Astor, 126 S.W.2d 367, 23 Tenn.App. 33.
Tex.—Duhig v. Peavy-Moore Lumber Co., 144 S.W.2d 878, affirming Peavy-Moore Lumber Co. v. Duhig, Civ.App., 119 S.W.2d 688 Simonds v. Stanolind Oil & Gas Co., 114 S.W.2d 226, 235, 134 Tex. 332, citing Corpus Juris, motions overruled 136 S.W.2d 207, 134 Tex. 332—Greene v. Smith, Civ.App., 148 S.W.2d 909—Neilon v. Texas Trust & Security Co., Civ.App., 147 S.W.2d 321, error dismissed, judgment correct—Blackman v. Blackman, Civ.App., 128 S.W.2d 433, 443, citing Corpus Juris—Kelley v. Neal, Civ.App., 111 S.W.2d 1122, error dismissed—C. D. Shamburger Lumber Co. v. Bredthauer, Civ.App., 62 S.W.2d 603, 605, error dismissed, quoting Corpus Juris—Simmons v. Brunson, Civ.App., 25 S.W.2d 685, 688, citing Corpus Juris.
Va.—School Board of Sand Lick Dist. v. Smith, 113 S.E. 868, 869, 134 Va. 98, citing Corpus Juris.
Wash.—Weldfelt v. Hart, 217 P. 723, 725, 126 Wash. 100, citing Corpus Juris.
21 C.J. p 1067 note 93.

"Ordinarily, no one can successfully contradict or traverse the terms of his solemn written acts or obligations, and especially is this true where real estate or real rights are involved and third persons have acted upon the faith of such instruments when registered."—United Gas Public Service Co. v. Roy, La.App., 147 So. 705, 708.

Grantor as witness

(1) A grantor's estoppel by his deed does not render inadmissible testimony by him derogatory to his title in an action between his grantee and another.
Ky.—Spicer v. Terry, 291 S.W. 727, 218 Ky. 448.
Tex.—Simmons v. Brunson, Civ.App., 25 S.W.2d 685, error refused.

(2) Grantor who conveyed property by warranty deed could not impeach his own deed in proceedings involving validity of title of grantor's successors by testimony that deed to grantor was delivered to him more than ninety days before its recordation.—Wolford v. Rimbey, 178 A. 498, 318 Pa. 353.

(3) The testimony of grantor in mineral deed, that title had been conveyed to grantor's deceased husband by lost deed executed prior to deed secured by grantor after husband's death, was not competent to impeach mineral deed.—Henry v. Texas Co., Ark., 147 S.W.2d 742.

A grantor who holds a prior mortgage on the premises can assert no rights as mortgagee against his grantee.—Tripp v. Langston, 10 S.E.2d 916, 218 N.C. 295.

Absence of signature of one party

Participation in making and signing partition agreement estopped signer from asserting agreement was invalid because not signed by infant owners of some of land partitioned.—Van Hoose v. Fitzpatrick, 58 S.W.2d 587, 248 Ky. 335.

Deed to purchaser's assignee

Even if the vendor of land could assert against an assignee of a purchaser any equities which he could have urged against the original purchaser, notwithstanding the innocence of the assignee, he waived his right to rely on such equities by making the conveyance directly to the assignee, without informing him of the equities, by a deed containing full covenants of warranty, after which the assignee was an innocent purchaser under his deed, regardless of his standing under the assignment of the contract.—Bilbo v. Bell, 188 N.W. 753, 194 Iowa 875.

Partition deed

(1) One who joins in a deed of partition, and his privies, are estopped thereby to deny his ownership, interest, and title in the premises partitioned at the time of the execution of the deed, or to claim that he was holding possession of what he conveyed and released by a title paramount to that which he conveyed.—Tewksbury v. Provines, 12 Cal. 20—47 C.J. p 27 note 15.

(2) Partition deeds operate as an estoppel only so far as they establish the extent of the interest of each tenant in common as such.—Edwards v. Worthington, Tex.Civ.App., 118 S.W.2d 328—47 C.J. p 279 note 28.

(3) Where there is no conveying clause in a partition deed, a party is not estopped to assert that the other parties have no interest in the land.—Townsend v. Outten, 28 S.E. 958, 95 Va. 536.

(4) Since partition deeds do not confer title but simply segregate it among existing owners, where owner of land executed grazing lease to his son and died, and owner's children and devisees, before expiration of lease, executed partition deed in ordinary form, giving owner's daughters land leased, partition deed did not convey or extinguish son's leasehold interest under theory of warranty, theory of estoppel, or any other theory.—Edwards v. Worthington, supra.

(5) A donee, who formally accepted act of donation made to him, his brothers and niece, took part in partitioning of property, signed deed of partition which expressed mutual warranty of title to tracts set aside for each donee, and took an active part by representatives of his own choosing in appraising the different tracts as set out in partition deed, was estopped from questioning fact

by his deed to question the capacity of his grantee to take the estate conveyed.[67] A warrantor of title may not question the validity of the title warranted, nor may he assert an outstanding hostile title.[68] One who creates estates by deed is estopped to utilize the doctrine of merger to destroy or alter rights so created.[69]

A lessor is estopped to deny that he had title.[70]

Conveyance by a third person as estoppel against owner. Where a person has, without authority, undertaken to sell and convey the land of another person, the real owner of the land should not be precluded by this wrongful act from asserting his title to the land.[71]

Personal property. The general rule that a grantor is estopped to assert anything in derogation of his deed has been said to apply to a conveyance of personal property.[72] So it has been held that, where a chattel or chose in action is assigned by deed, the grantor is estopped to deny that possession of the thing granted has not been transferred;[73] but the seller in a bill of sale has been held not estopped from testifying that he had no title.[74]

§ 14. Estoppel against Mortgagor

A mortgagor is estopped to assert anything in derogation of the rights which the mortgage purports to convey.

A mortgagor is estopped to assert anything in derogation of the rights which the mortgage purports to convey,[75] as that he had no title at the

that land had been partitioned amicably and legally.—Sandifer v. Sandifer's Heirs, La.App., 195 So. 118.

Grantee's knowledge of grantor's outstanding claim

Grantee having executed mortgage on property and thereafter conveyed to mortgagee in trust for himself subject to mortgage, a subsequent deed by the mortgagee as trustee to the grantee which did not mention the mortgage, did not preclude mortgagee from asserting rights under mortgage, in view of fact that grantee had himself executed the mortgage and that mortgage was already on the property when mortgagee acquired title as trustee.—Security Trust Co. of Pottstown v. Feist, 5 A.2d 119, 333 Pa. 536.

Nature of prior grant by grantor

Where a son, with other members of the family, took possession of lands and, before the expiration of the ten-year limitation period, moved away, giving whatever interest he had in the claim to his mother, who thereafter, without the son's participation, had a survey made of a specific one hundred sixty acres, including the improvements, and who subsequently matured title, the son was not estopped from testifying that his claim in entering on the lands was to an undesignated one hundred sixty acres, notwithstanding more than twenty years after moving away he executed a special warranty deed to a third person purporting to convey, not a limitation title, but a designated one hundred sixty acres.—W. T. Carter & Bro. v. Wells, 106 S.W.2d 1050, 130 Tex. 189, 115 A.L.R. 1293, affirming Wells v. W. T. Carter & Bro., Civ.App., 78 S.W.2d 678.

Admissions by adverse party

In an action to have declared simulated deeds to property standing in name of defendant, half brother of plaintiffs, and to have it decreed to belong to succession of their deceased mother, one of plaintiffs as record vendor of such defendant was not estopped to attack or deny the import of the conveyance where defendant, required by statute to confess, deny, or state other facts tending to his defense, or closely linked to the fact on which he was questioned by interrogatories, admitted that the deed from their mother to such plaintiff vendor was simulated.—Phelps v. Mulhaupt, 84 So. 362, 146 La. 1078.

67. Neb.—National Bank of Commerce of Kansas City v. Lefferdink, 193 N.W. 916, 110 Neb. 275—Carr v. Miller, 181 N.W. 557, 105 Neb. 623.

68. U.S.—Texas Co. v. McMillan, D.C.Tex., 13 F.Supp. 407.
Ill.—Kronan Building & Loan Ass'n v. Medeck, 13 N.E.2d 66, 368 Ill. 118—Bittner v. Field, 188 N.E. 342, 354 Ill. 215, affirming Field v. Bittner, 267 Ill.App. 346.

69. Ill.—Biwer v. Martin, 128 N.E. 518, 294 Ill. 488.
N.C.—Sanderson v. Sanderson, 171 S.E. 60, 205 N.C. 260.

Estoppel to effectuate merger

Conveyance of life estate with statutory warranties to one person, with contingent remainders in fee to others, by grantor retaining reversion, was held to estop grantor and those claiming under him from destroying contingent remaindermen's interests by a conveyance uniting the present interest and the reversion.—Marvin v. Donaldson, 160 N.E. 179, 329 Ill. 30.

70. Tenn.—Tennessee Barium Corporation v. Williams, 133 S.W.2d 1015, 23 Tenn.App. 398.

71. Ky.—War Fork Land Co. v. Carr, 33 S.W.2d 308, 236 Ky. 456—War Fork Land Co. v. Marcum, 202 S.W. 668, 180 Ky. 352.

72. S.C.—Wood v. Wood, 128 S.E. 837, 132 S.C. 120.

73. N.J.—Tarbox v. Grant, 39 A. 378, 56 N.J.Eq. 199.
R.I.—Harvey v. Harvey, 13 R.I. 598.

74. Ga.—Geise v. Blumenthal, 14 S.E. 479, 88 Ga. 285.
21 C.J. p 1068 note 95.

75. U.S.—Willison v. Watkins, S.C., 3 Pet. 43, 7 L.Ed. 596.
Ala.—Hinds v. Federal Land Bank of New Orleans, 186 So. 153, 237 Ala. 218—Wilson v. Alston, 25 So. 225, 122 Ala. 630—Chapman v. Abrahams, 61 Ala. 108.
Ark.—Moberly v. Blackshare, 149 S.W.2d 557—Ellsworth v. Ellsworth, 82 S.W.2d 531, 190 Ark. 982.
Cal.—Trope v. Kerns, 23 P. 691, 83 Cal. 553, affirming 20 P. 82, 3 Cal.Unrep.Cas. 47—Simson v. Eckstein, 22 Cal. 580—Clark v. Baker, 14 Cal. 612, 76 Am.D. 449.
Conn.—King v. Kilbride, 19 A. 519, 58 Conn. 109.
Fla.—Edwards v. Meyer, 130 So. 57, 100 Fla. 235.
Ga.—Phelps v. Palmer, 15 S.E.2d 503—Atlas Tack Co. v. Exchange Bank, 36 S.E. 939, 111 Ga. 703—Usina v. Wilder, 58 Ga. 178.
Ill.—Kronan Building & Loan Ass'n v. Medeck, 13 N.E.2d 66, 68, 368 Ill. 118, citing **Corpus Juris**—Northern Trust Co. v. McEldowney, 9 N.E.2d 480, 291 Ill.App. 352.
Ind.—Scobey v. Kinningham, 31 N.E. 355, 131 Ind. 552—Boone v. Armstrong, 87 Ind. 168—Pancoast v. Travelers' Ins. Co., 79 Ind. 172—French v. Blanchard, 16 Ind. 143.
Iowa.—John Hancock Mut. Life Ins. Co. v. Dower, 271 N.W. 193, 222 Iowa 1377—Templeton v. Stephens, 233 N.W. 704, 212 Iowa 1064.
Kan.—State Bank of Sharon Springs v. Marty, 250 P. 321, 121 Kan. 753.
Ky.—Preston v. Second Nat. Bank, 63 S.W.2d 774, 250 Ky. 673.
La.—Robinson v. Atkins, 30 So. 231, 105 La. 790.
Md.—Warburton v. Perkins, 133 A. 141, 150 Md. 304.
Mass.—Bridge v. Wellington, 1 Mass. 219.
Mich.—Dodge v. Kennedy, 53 N.W.

time of executing it,[76] that there is an outstanding title in a third person,[77] that the estate mortgaged was other or less than an estate in fee simple,[78] that the instrument was not executed as appears on its face,[79] or that the instrument, although running to the mortgagee, was in fact the property of a firm to which the mortgagee belonged.[80]

A limitation of the general rule has been recognized to the effect that, where a mortgage is given solely to secure a debt that has long existed, the mortgagor is not the recipient of such benefits under the mortgage that he will be estopped to deny its validity.[81] Further, the covenants in a mortgage given to secure purchase money will not estop the mortgagor, where the deed and mortgage are one and the same transaction, from suing on the covenants of the deed.[82]

A mortgagor of chattels is estopped to deny his ownership thereof, or the title of the mortgagee.[83]

§ 15. Estoppel against Grantee

Generally, a grantee, by accepting a deed, is not estopped to deny his grantor's title, except where he relies on such grantor's conveyance to establish his own claim.

While no one can impugn the title under which he holds,[84] it is generally held that, by accepting a deed, a grantee is not estopped to deny the grantor's title or seizin, except where the grantee relies on the grantor's conveyance to establish his own

795, 93 Mich. 547—Smith v. Graham, 34 Mich. 302.
Minn.—Peterson v. Weberg, 203 N.W. 209, 162 Minn. 410.
Mo.—Taylor v. Saugrain, 1 Mo.App. 312.
N.H.—Fletcher v. Chamberlin, 61 N. H. 438—Gotham v. Gotham, 55 N. H. 440.
Or.—Allen v. Baker, 80 P.2d 709, 712, 159 Or. 398, citing Corpus Juris.
N.Y.—Union Dime Sav. Inst. v. Wilmot, 94 N.Y. 221, 46 Am.R. 137—Parkinson v. Sherman, 74 N.Y. 88, 30 Am.R. 268—Freeman v. Auld, 44 N.Y. 50—Wilson v. Wilson, 32 Barb. 328—Barber v. Harris, 15 Wend. 615.
Pa.—Becker v. Rittenhouse, 147 A. 51, 297 Pa. 317.
Tenn.—Tennessee Barium Corporation v. Williams, 133 S.W.2d 1015, 1020, 23 Tenn.App. 398, quoting Corpus Juris.
Tex.—C. D. Shamburger Lumber Co. v. Bredthauer, Civ.App., 62 S.W. 2d 603, 605, error dismissed, quoting Corpus Juris.
W.Va.—Keller v. Norfolk & W. Ry. Co., 167 S.E. 448, 451, 113 W.Va. 286, citing Corpus Juris.
21 C.J. p 1068 note 98.

Defective description

As between mortgagor and mortgagee, former cannot take advantage of defective description of property contained in trust deed.—Battle v. Wolfe, Tex.Civ.App., 283 S.W. 1073, error refused.

Mortgagee's knowledge of limitation

Mortgagor taking premises under will limiting power to encumber and convey was held not estopped in mortgage foreclosure from setting up such limitations as grounds for rendering mortgage unenforceable as to her where mortgagee took with knowledge of limitation.—Minter v. People's Nat. Bank & Trust Co. of Sullivan, 182 N.E. 87, 95 Ind.App. 204.

Estoppel to claim merger

The owner of lands who treats a mortgage on the lands which has been assigned to him as a valid instrument, and transfers it as such, is estopped from insisting as against the assignee or anyone claiming under him that in his hands it had merged and disappeared in the fee, and the same estoppel controls his grantee who accepts a conveyance of the premises with actual constructive notice of the existence of the mortgage.
Mich.—Powell v. Smith, 30 Mich. 451.
N.Y.—Kellogg v. Ames, 41 N.Y. 259.

Mortgagor as witness

"While the mortgagor may be estopped by his covenants from claiming an issue against his mortgagee disputing the latter's title, nevertheless he may testify in an issue between the mortgagee and others to facts which might support a finding hostile to the title of the mortgagee."—Merchants' & Farmers' State Bank of Grove City v. Olson, 250 N.W. 366, 367, 189 Minn. 528, 89 A.L.R. 1289.

76. Cal.—Gambrill v. Dworack, 208 P. 995, 997, 58 Cal.App. 524, citing Corpus Juris.
Fla.—Edwards v. Meyer, 130 So. 57, 100 Fla. 235.
Idaho.—Forbush v. San Diego Fruit & Produce Co., 266 P. 659, 46 Idaho 231.
Ill.—Kronan Building & Loan Ass'n v. Medeck, 13 N.E.2d 66, 68, 368 Ill. 118, citing Corpus Juris.
Iowa.—Templeton v. Stevens, 233 N. W. 704, 212 Iowa 1064—Colby v. Forbes, 216 N.W. 722, 207 Iowa 9.
N.D.—Bingenheimer Mercantile Co. v. Seck, 195 N.W. 969, 971, 50 N.D. 381, citing Corpus Juris.
Or.—Allen v. Baker, 80 P.2d 709, 159 Or. 398.
21 C.J. p 1069 notes 99, 5.

Mortgagor is estopped to testify in derogation of his title, whether or not he is a party to the litigation.—Kronan Building & Loan Ass'n v. Medeck, 13 N.E.2d 66, 368 Ill. 118.

Mutual mistake

Mortgagor cannot plead his own want of title to mortgaged premises in foreclosure suit, except on ground of mutual mistake in substituting one lot for another.—Edwards v. Meyer, 130 So. 57, 100 Fla. 235.

Where both parties are trustees, and the trust may be impaired, the rule that the mortgagor is estopped to deny his own title is inapplicable.—Harris v. Kyle, 81 So. 826, 203 Ala. 36.

77. Cal.—Gambrill v. Dworack, 208 P. 995, 997, 58 Cal.App. 524, citing Corpus Juris.
Fla.—Taylor v. Federal Farm Mortg. Corporation, 193 So. 758, 141 Fla. 703.
Ill.—Kronan Building & Loan Ass'n v. Medeck, 13 N.E.2d 66, 68, 368 Ill. 118, citing Corpus Juris.
21 C.J. p 1069 notes 1, 5.

78. Cal.—Vallejo Land Ass'n v. Viera, 48 Cal. 572.
Neb.—Nielson v. Central Nebraska Land & Inv. Co., 127 N.W. 897, 87 Neb. 518.

79. Fla.—First Nat. Bank v. Ashmead, 14 So. 886, 33 Fla. 416.
21 C.J. p 1069 note 3.

80. Ind.—French v. Blanchard, 16 Ind. 143.

81. Ill.—State Nat. Bank v. John Moran Packing Co., 68 Ill.App. 25, affirmed 48 N.E. 82, 168 Ill. 519.

82. Mo.—Connor v. Eddy, 25 Mo. 72—Geyer v. Girard, 22 Mo. 159.
21 C.J. p 1069 note 7.

83. Ala.—Sims v. United Auto Supply Co., 129 So. 53, 221 Ala. 383.
Mo.—C. I. T. Corporation v. Byrnes, App., 38 S.W.2d 750.
N.D.—Bingenheimer Mercantile Co. v. Seck, 195 N.W. 969, 50 N.D. 381.
Okl.—Morgan v. Moxley, 222 P. 515, 101 Okl. 21.
21 C.J. p 1069 note 10.

84. La.—Reliance Homestead Ass'n v. Brink, 137 So. 52, 173 La. 331.

claim.[85] One having or claiming title to land may for greater security or to buy his peace purchase or procure an outstanding or adverse claim or title without estopping himself to deny its validity,[86] unless he abandons his claim under the title by virtue of which he entered into possession.[87] So a grantee may buy up a title antagonistic to that of his grantor, and set up the title so bought to defeat that of his grantor or of his grantor's representatives,[88] except, according to some authorities, where the grantee obtained possession of the land by the grantor's deed.[89] It has also been held that one of two grantees of the same grantor may connect himself with, and assert against the other, a title paramount to that of the common grantor.[90]

If the grantee, or one claiming under him, asserts no other right or title than that conveyed by the grantor's deed, he is estopped to deny that the grantor had title when he conveyed.[91] So, where

85. Iowa.—Hess v. Masters, 186 N. W. 6, 192 Iowa 1063.
Ky.—Cavin v. Little, 281 S.W. 480, 484, 213 Ky. 482, quoting **Corpus Juris.**
Me.—Webber v. Austin, 121 A. 673, 675, 123 Me. 95, quoting **Corpus Juris.**
Mont.—Hart v. Anaconda Copper Mining Co., 222 P. 419, 421, 69 Mont. 354, quoting **Corpus Juris.**
Tex.—Willis v. Martin, Civ.App., 4 S.W.2d 572, 573, citing **Corpus Juris.**
21 C.J. p 1069 note 11, p. 1070 note 12.

Reason for rule; no privity

"As a general proposition of law, the grantee named in a deed of conveyance does not hold in privity with his grantor, but rather holds adversely to the grantor, and is not estopped to deny the title of his grantor."—Oregon Short Line R. Co. v. Quigley, 80 P. 401, 10 Idaho 770, 784.

Second deed from same grantor

(1) Acceptance of new grant is admission that title to property granted is in grantor.—People v. Tompkins-Kiel Marble Co., 199 N.E. 10, 269 N.Y. 77, reversing 270 N.Y.S. 940, 241 App.Div. 695, affirming 265 N.Y.S. 243, 148 Misc. 559.

(2) A grantee who accepts from his grantor a new deed as a substitute for the original is estopped to claim title to land described in the original deed which is not included in the substitute.—People v. Tompkins-Kiel Marble Co., supra—21 C.J. p. 1072 note 25.

(3) Grantees under joint deed, who treated deed as mere bond for title, and who thereafter procured separate deeds for separate tracts to themselves or assignee, were held estopped to set up any claim under original joint deed.—Vanover v Meadors, 280 S.W. 1095, 213 Ky. 363.

(4) Railroad's acceptance of second deed of certain lands was held not to estop railroad from asserting greater estate in lands than was created by second deed, where first deed of lands was complete in its terms and effectually passed to railroad all the title which grantor had in lands, which, presumptively, was the whole title.—Nesral Production Co. v. St. Louis, B. & M. Ry. Co., Tex. Civ.App., 84 S.W.2d 805, error dismissed.

(5) Where a grantee surrenders the deed to the grantor and takes a new deed conveying the same and additional property, with no intention of revesting title in the grantor, he is not estopped to assert that he had title under the original deed.—St. Joseph v. Baker, 86 Mo.App. 310.

Conveyances from mortgagor and mortgagee

"When a man receives from both mortgagor and mortgagee unqualified conveyances with no covenant, conditions, or duties on his part, he is, of course, in the same situation as if he had received a similar conveyance of unmortgaged land from one grantor. A grantee so circumstanced is not estopped to dispute his grantor's title."—Webber v. Austin, 121 A. 673, 676, 123 Me. 95.

Where a deed was not accepted by the grantee, and, although filed in the county clerk's office, was not filed by him, and he did not authorize anyone to file it, he was not estopped, as against persons who saw such deed on file, to deny that he was holding under such deed; he is not charged with constructive knowledge of the unauthorized filing of the deed by some one else.—Fidelity Lumber Co. v. Adams, Tex. Civ.App. 230 S.W. 177, error dismissed.

86. Ga.—Calhoun v. Thompson, 155 S.E. 183, 171 Ga. 286—Harris v. McDonald, 108 S.E. 448, 152 Ga. 18—Yaughn v. Harper, 106 S.E. 100, 151 Ga. 187.
Ill.—Waterman v. Hall, 270 Ill.App. 558.
Ky.—Warfield Natural Gas Co. v. Ward, 149 S.W.2d 705, 286 Ky. 73—Dils v. Kentland Coal & Coke Co., 14 S.W.2d 395, 228 Ky. 161—Cavin v. Little, 281 S.W. 480, 484, 213 Ky. 482, quoting **Corpus Juris.**
La.—Walker v. Baer Thayer Hardwood Co., 129 So. 218, 14 La.App. 381, modifying 126 So. 541, 14 La. App. 381.
Mont.—Hart v. Anaconda Copper Mining Co., 222 P. 419, 69 Mont. 354.
Tex.—White v. Greene, Civ.App., 129 S.W.2d 801, reversed on other grounds Greene v. White, Sup., 153 S.W.2d 575.
W.Va.—State v. Scott, 113 S.E. 907, 911, 91 W.Va. 513, citing **Corpus Juris.**
21 C.J. p 1070 note 14.

Purchase of fixtures

A purchase by lessor at receiver's sale of paneling installed by bankrupt lessee, stated to be without prejudice and merely to prevent its removal by irresponsible third parties, was held not to estop lessor from claiming the paneling as fixtures, as against the claim of the bankrupt estate.—In re Lexington Motors Co. of New York, C.C.A.N.Y., 294 F. 233.

87. Ky.—Ray v. Banker, 1 B.Mon. 364—Field v. Klete, 10 Ky.Op. 360.

88. U.S.—Southern Pac. R. Co. v. Ambler Grain & Milling Co., D.C Cal., 57 F.2d 536, affirmed, C.C.A., 66 F.2d 670, certiorari denied 54 S.Ct. 207, 290 U.S. 697, 78 L.Ed. 600.
Neb.—Hollman v. J. S. Pattison & Co., 181 N.W. 130, 104 Neb. 846.
21 C.J. p 1070 note 16.

89. Ga.—Cook v. Powell, 129 S.E. 546, 160 Ga. 831.
W.Va.—State v. Scott, 113 S.E. 907, 911, 91 W.Va. 513, citing **Corpus Juris.**

90. N.H.—Cate v. Cate, 112 A. 826, 80 N.H. 16.
21 C.J. p 1070 note 17.

91. Ala.—St. Clair Springs Hotel Co. v. Balcomb, 108 So. 858, 215 Ala. 12.
Ga.—Ramsey v. Kitchen, 15 S.E.2d 877—National City Bank of Rome v. Moss, 119 S.E. 704, 156 Ga. 669.
Iowa.—Witmer v. Shreves, 120 N.W. 86, 141 Iowa 496.
La.—Consolidated-Progressive Oil Corporation v. Standard Oil Co. of Louisiana, 105 So. 36, 158 La. 982—Zuchowski v. Hingle, App., 149 So. 142.
N.J.—Lidgerwood Estates v. Public Service Electric & Gas Co., 167 A. 197, 198, 113 N.J.Eq. 403, citing **Corpus Juris.**
N.C.—North Carolina Joint Stock

adverse claimants to land trace their chain of title through a common source, each is estopped, as against the other, to deny that such grantor had title.[92]

One who has accepted a deed with covenants of seizin is estopped to allege that the covenants were broken because he was himself seized of the premises at the time the deed was executed.[93]

One who dismisses an action to cancel a deed he has given and in return receives a deed from his grantee is estopped to deny that the deed he gave was valid or that his grantee had title.[94]

§ 16. Estoppel against Mortgagee

One who accepts a mortgage is generally estopped to deny the mortgagor's title.

A party who accepts a mortgage is generally estopped to deny the mortgagor's title,[95] as are his successors;[96] however, if the mortgagor executes a second mortgage of the premises, the first mortgage is not estopped to deny that at the time of executing the second mortgage the mortgagor did not own the legal title.[97] Where the mortgagee assigns the mortgage, he is estopped to assert that his mortgagor had no existence,[98] or to deny his assignee's title,[99] as by setting up as against his assignee a prior conflicting title in himself.[1] Where a mortgagee records his instrument as a real estate mortgage on a house and lot, and files a bill to foreclose it as such, he is estopped to treat his mortgage at and after foreclosure as a chattel mortgage on the house which was not attached to the lot.[2]

Land Bank of Durham v. Moss, 2 S.E.2d 378, 215 N.C. 445.

21 C.J. p 1070 note 19.

Estoppel of purchaser to deny grantor's title in action for purchase price see the C.J.S. title Vendor and Purchaser § 215, also 21 C.J. p 1071 note 22–p 1072 note 23 and 66 C.J. p 948 notes 46–50.

Deed in individual and representative capacities

A party claiming under a deed by an executor who conveyed under a power in a will and also as heir at law of the testator may show that the grantor inherited the land.—Deery v. Cray, Md., 5 Wall. 795, 18 L.Ed. 653.

92. U.S.—Missouri Pac. R. Co. v. Bartlett, C.C.A.Ark., 79 F.2d 275, certiorari denied 56 S.Ct. 142, 296 U.S. 620, 80 L.Ed. 440.

Conn.—Borden v. Town of Westport, 151 A. 512, 112 Conn. 152.

Ga.—Crawford v. Moorman, 163 S.E. 179, 174 Ga. 629.

Ky.—Warfield Natural Gas Co. v. Ward, 149 S.W.2d 705, 286 Ky. 73—Sewell v. Dykes, 26 S.W.2d 502, 233 Ky. 573—Continental Realty Co. v. Bolen, 242 S.W. 6, 195 Ky. 219.

La.—Texas v. Gourgott, 125 So. 623, 169 La. 577—Consolidated-Progressive Oil Corporation v. Standard Oil Co. of Louisiana, 105 So. 36, 158 La. 982—Martin v. Louisiana Central Lumber Co., 90 So. 553, 150 La. 157.

Mo.—Hoffman v. Bigham, 24 S.W.2d 125, 324 Mo. 516.

N.Y.—Mayo v. New York Cent. R. Co., 189 N.E. 217, 263 N.Y. 277, reversing in part and affirming in part 261 N.Y.S. 378, 237 App.Div. 280, and reargument denied 191 N.E. 514, 264 N.Y. 460.

N.C.—Vance v. Pritchard, 197 S.E. 182, 213 N.C. 552—Johnson v. Fry, 143 S.E. 857, 195 N.C. 832—Mills v. Tabor, 109 S.E. 850, 182 N.C. 722.

Tenn.—Rhea v. Redus, 7 Tenn.App. 478.

21 C.J. p 1071 notes 20, 21.

Other interest created by same grant

(1) Grantees under deed, resting their title on validity of grant, cannot attack reversionary interest created by same grant.—City Nat. Bank v. City of Bridgeport, 147 A. 181, 109 Conn. 529.

(2) Grantee of life estate by warranty deed was held estopped to claim destruction of contingent remainders conveyed to others by same deed.—Marvin v. Donaldson, 160 N.E. 179, 329 Ill. 30—Biwer v. Martin, 128 N.E. 518, 294 Ill. 488.

(3) Life tenants of corporate stock accepting under a deed were held estopped from denying that the instrument referred to was effective to convey an interest to remaindermen.—McHenry v. McHenry, 108 S.E. 522, 152 Ga. 105.

(4) In action to establish title to mineral rights in land, where plaintiff attempted to show a common source of title and a deed from the common source to defendants' predecessors wherein the mineral rights were excepted and reserved in favor of plaintiff's predecessor, but subsequent deeds in defendants' chain of title omitted the exception or reservation and defendants claimed title to the mineral rights by adverse possession both under color of such deeds and without color of title, defendants were not estopped from denying plaintiff's title to the mineral rights under the "common source" rule.—Vance v. Pritchard, 197 S.E. 182, 213 N.C. 552.

93. Ga.—Cook v. Powell, 129 S.E. 546, 160 Ga. 831.

21 C.J. p 1072 note 24.

94. Tex.—Van Cleave v. Bell Oil & Gas Co., Civ.App., 102 S.W.2d 1103, error dismissed.

95. Ind.—Fleming v. Reed, 49 N.E. 1087, 20 Ind.App. 462.

Mass.—Johnson v. Thompson, 129 Mass. 398.

N.J.—Wills v. Windish, 151 A. 212, 214, 106 N.J.Eq. 449, citing Corpus Juris.

21 C.J. p 1072 note 27.

Acquisition of outstanding title by mortgagee see the C.J.S. title Mortgages § 200, also 41 C.J. p 494 note 88–p 495 note 8.

Mortgagee's possession as adverse to mortgagor see the C.J.S. title Mortgages § 199, also 41 C.J. p 491 note 46–p 492 note 56.

Chattel mortgage

U.S.—In re Redding, D.C.Fla., 285 F. 575.

Mass.—Sprague v. Branch, 3 Cush. 575.

Mortgagee as assignee of mortgagor

The fact that mortgagee, after purchasing at foreclosure, became assignee of mortgagor's rights was held not to estop mortgagee from asserting she owned property when she accepted assignment.—Wisong v. Van Anken, Tex.Civ.App., 29 S.W.2d 930, error dismissed.

96. Ala.—Lenoir v. Burns, 134 So. 485, 486, 223 Ala. 101, citing Corpus Juris.

97. Ky.—Hume v. Breck, 4 Litt. 284.

98. Iowa.—Salem Farmers' Nat. Bank v. Fletcher, 44 Iowa 252.

99. Me.—Pierce v. Odlin, 27 Me. 341.

1. N.Y.—Whitney v. McKinney, 7 Johns.Ch. 144.

21 C.J. p 1072 note 30.

2. Mich.—Miles v. McNaughton, 69 N.W. 481, 111 Mich. 350.

§ 17. Instruments Founding Estoppel

Any invalid instrument affirming that the grantor has a particular estate and purporting to convey it will found an estoppel against him.

Whatever the form or nature of the instrument, if it affirms, either by implication or express terms, that the grantor is seized or possessed of a particular estate which the instrument purports to convey, it will found an estoppel against the grantor.[3] The instrument need contain no technical covenants for title; if it bears on its face evidence that the grantor intended to convey and the grantee expected to become invested with an estate of a particular description or quality, and that the bargain had proceeded on that footing, it creates an estoppel against the grantor in respect of the estate thus described, although no technical covenants are inserted.[4] However, as appears infra § 43, an invalid instrument will not serve as the basis for an estoppel by deed.

§ 18. Deeds

It is generally held that a quitclaim deed will not support an estoppel and that the estoppel arising from a deed poll binds only the grantor and not the grantee; but there are exceptions to both of these rules.

Quitclaim deed. It is broadly stated that no estoppel arises from making or accepting a quitclaim deed.[5] A deed of this character does not estop the grantee to dispute the grantor's title or seizin,[6] or the quality of the title,[7] or to deny that anything passed by the instrument.[8] However, the grantor is estopped by a quitclaim deed from asserting any previously acquired interest in the property;[9] and a distinct recital in a quitclaim deed showing that the parties proceeded on the theory that a particular interest was thereby conveyed may be as effectual to create an estoppel as a warranty.[10]

Deed poll. According to the weight of authority, the estoppel arising from a deed poll ordinarily applies only to the grantor and does not operate against the grantee, who may accordingly deny that his grantor had such an estate as he undertook to convey;[11] the acceptance of a deed poll will not estop the grantee to deny the grantor's title or to acquire a superior title.[12] However, there are a number of decisions in which this rule is repudiated in toto[13] or materially limited.[14] In any event, it is generally held that, where the deed contains agreements or covenants to be performed by the grantee, his acceptance of the deed estops him to deny them.[15] It has been said that a grantee who has accepted a deed with seizin cannot allege that the grantor's covenants are broken by reason of the fact that the grantee himself, at the time he accepted the deed, was seized of the premises.[16]

§ 19. Mortgages

A chattel mortgage may found an estoppel by deed.

A deed in the form of a chattel mortgage may ordinarily found an estoppel the same as any other.[17]

§ 20. Other Instruments

The doctrine of estoppel by deed has been held to apply to a legislative grant of land, an antenuptial agreement, and a mechanic's lien, but not to an assignment of invention.

3. Ill.—Weegens v. Karels, 29 N.E. 2d 248, 374 Ill. 273—Thornton v. Louch, 130 N.E. 467, 297 Ill. 204.
Mont.—Midland Realty Co. of Minnesota v. Halverson, 52 P.2d 159, 101 Mont. 49.
Okl.—Weaver v. Drake, 193 P. 45, 79 Okl. 277.
21 C.J. p 1072 note 35, p 1073 note 37.
After-acquired title see infra §§ 25–29.

From an instrument conveying an estate in expectancy no estoppel arises.—King v. Burkhart, 180 S.W. 534, 167 Ky. 424.

4. Ga.—Thomas v. Hudson, 10 S.E. 2d 396, 190 Ga. 622.
N.C.—Thames v. Goode, 9 S.E.2d 485, 217 N.C. 639—Williams v. Norfolk-Southern R. Co., 158 S.E. 473, 200 N.C. 771.
21 C.J. p 1073 note 39.

5. Ind.—Murray v. Murray, 112 N. E. 835, 62 Ind.App. 132.
21 C.J. p 1073 note 40.

6. Mich.—Olmstead v. Tracy, 108 N.W. 649, 145 Mich. 299, 116 Am. S.R. 299.
21 C.J. p 1073 note 42.

7. Mich.—Olmstead v. Tracy, 108 N. W. 649, 145 Mich. 299, 116 Am.S.R. 299.
Or.—Farnum v. Loomis, 2 Or. 29.

8. N C.—Bryan v. Eason, 61 S.E. 71, 147 N.C. 284.
21 C.J p 1073 note 44.

9. Ga.—McDonald v. Dabney, 132 S. E. 547, 161 Ga. 711.
W.Va.—Roberts v. Huntington Development & Gas Co., 109 S.E. 348, 89 W.Va. 384.

Grandchildren of vendor cannot attack deed, after giving quitclaim deed to purchaser.—Glover v. Abney, 106 So. 735, 160 La. 175.

10. N.J.—Wills v. Windish, 151 A. 212, 214, 106 N.J.Eq. 449, citing **Corpus Juris.**
21 C.J. p 1073 note 45—47 C.J. p 278 note 15 [a].

11. Or.—Langley v. Kesler, 110 P. 401, 111 P. 246, 57 Or. 281.
21 C.J. p 1073 note 47.

12. U S.—Robertson v. Pickrell, D. C., 3 S.Ct. 407, 109 U.S. 608, 27 L. Ed. 1049.
21 C J. p 1073 note 49.

13. Wis.—Chloupek v. Perotka, 62 N.W. 537, 89 Wis. 551, 46 Am.S.R. 858.
21 C.J. p 1073 note 50.

14. Vt.—Blake v. Tucker, 12 Vt. 39.
21 C.J p 1073 note 51.

15. N.Y.—Futherer v. Agnew, 24 N. Y.S.2d 273, affirmed Futherer v. Angendis, 25 N Y.S.2d 207, 261 App. Div. 876, reargument denied 27 N. Y.S.2d 476, 261 App.Div. 1044, appeal dismissed 34 N.E.2d 916.
21 C.J. p 1073 note 53.

16. Or.—Langley v. Kesler, 110 P. 401, 111 P. 246, 57 Or. 281.

17. Mo.—C. I. T. Corporation v. Byrnes, App., 38 S.W.2d 750.
Okl.—Morgan v Mozley, 222 P. 515, 101 Okl. 21.
21 C.J. p 1074 note 55.

A legislative grant of land will found an estoppel;[18] and grantees of a land patent are estopped from asserting a claim not included in their patent.[19]

Antenuptial agreement. An antenuptial agreement, reciting that the prospective husband agreed and did thereby convey to the prospective wife certain lands to be hers absolutely, was in the nature of a present conveyance which estopped the husband from thereafter denying the title of the wife.[20]

Mechanic's lien. One who executed a mechanic's lien with warranty of title is estopped to deny the lienor's title.[21]

Assignment of invention. The doctrine of estoppel by deed has been held not to apply to an assignment of invention made on filing an application for a patent.[22]

A conditional vendee may set up against his vendor an outstanding title acquired by him.[23]

C. ESTOPPEL TO ASSERT AFTER-ACQUIRED TITLE

§ 21. To Real Estate

With some qualifications, the general rule is that a grantor who acquires a title or estate which he has previously purported to convey is estopped to deny that such after-acquired title passed by the conveyance.

With qualifications which will appear, the general rule is that, if a grantor of real estate having no title, a defective title, or an estate less than that which he assumed to grant, subsequently acquires the title or estate which he purported to convey, or perfects his title, such after-acquired or perfected title will inure to the grantee or to his benefit, or to his successors, by way of estoppel of the grantor or those claiming under him, particularly where the conveyance was with covenants of warranty.[24]

18. La.—Ellerbe v. Grace, 111 So. 185, 162 La. 846.

19. Tex.—Turner v. Smith, 61 S.W. 2d 792, 122 Tex. 338, reversing Smith v. Turner, Civ.App., 13 S.W. 2d 152, followed in Douglas Oil Co. v. State, 61 S.W.2d 804, 122 Tex. 369.

20. Ky.—Smith v. Johns, 157 S.W. 21, 154 Ky. 274.

21. Tex.—C. D. Shamburger Lumber Co. v. Bredthauer, Civ.App., 62 S.W.2d 603, error dismissed.

22. U.S.—Westinghouse Electric & Mfg. Co. v. Formica Insulation Co., C.C.A.Ohio, 288 F. 330, certiorari granted 44 S.Ct. 6, 263 U.S. 692, 68 L.Ed. 509, and affirmed 45 S.Ct. 117, 266 U.S. 342, 69 L.Ed. 316.

23. Del.—Maryland Credit Finance Corporation v. Campbell, 195 A. 277, 8 W.W.Harr. 575.

24. U.S.—Scott v. Cohen, C.C.A.Tex., 115 F.2d 704, affirming, D.C., Cone v. Parish, 32 F.Supp. 412, and certiorari denied Scott v. Cohen, 61 S. Ct. 806—Brown v. Harvey Coal Corporation, D.C.Ky., 49 F.2d 434, affirmed, C.C.A., 61 F.2d 624—Dickson v. Neal, C.C.A.Ark., 2 F.2d 533, certiorari denied 46 S.Ct. 19, 269 U.S. 556, 70 L.Ed. 409—Crawford v. Cotton, D.C.Fla., 281 F. 189—Wall v. Utah Copper Co., C.C.A.Utah, 277 F. 55.

Ala.—Lost Creek Coal & Mineral Land Co. v. Hendon, 110 So. 308, 215 Ala. 212—May v. Lowery, 107 So. 67, 214 Ala. 230—Cobbs v. Union Naval Stores Co., 80 So. 415, 202 Ala. 333.

Ark.—Sheppard v. Zeppa, 133 S.W.2d 860, 199 Ark. 1—Myers v. Hobbs, 115 S.W.2d 880, 195 Ark. 1026—Farmers' & Merchants' Bank v. Hammond, 291 S.W. 823, 172 Ark. 1065.

Cal.—Palm Springs-La Quinta Development Co. v. Palm Springs Land & Irrigation Co., 98 P.2d 530, 36 Cal.App.2d 730.

Colo.—Colorado Trout Fisheries v. Welfenberg, 273 P. 17, 84 Colo. 592.

Ga.—Federal Land Bank of Columbia v. Bank of Lenox, 16 S.E.2d 9—Perkins v. Rhodes, 15 S.E.2d 426—Shockley v. Storey, 196 S.E. 702, 185 Ga. 790—Morris v. Butler, 193 S.E. 883, 184 Ga. 845—Donalson v. Yeates, 159 S.E. 856, 173 Ga. 30, followed in Shingler v. Yeates, 159 S.E. 859 (first case), 173 Ga. 34, and 159 S.E. 859 (second case), 173 Ga. 35—Todd v. Williford, 150 S.E. 912, 169 Ga. 543.

Ill.—Weegens v. Karels, 29 N.E.2d 248, 374 Ill. 273—Biwer v. Martin, 128 N.E. 518, 294 Ill. 488—Tri-City Artificial Ice Co. v. Day, 127 N.E. 106, 292 Ill. 545.

Ind.—Sabinske v. Patterson, 196 N. E. 539, 100 Ind.App. 657—Dibble v. Lloyd, 127 N.E. 453, 73 Ind. App. 320.

Iowa.—Schultz v. Ferguson, 231 N.W. 858, 210 Iowa 677.

Ky.—Williams v. Thomas, 149 S.W.2d 525, 285 Ky. 776—Van Hoose v. Fitzpatrick, 58 S.W.2d 587, 248 Ky. 335—Ratcliff's Guardian v. Ratcliff, 46 S.W.2d 504, 242 Ky. 419—Elk Horn Coal Corporation v. Jacks Creek Coal Co., 43 S.W.2d 13, 240 Ky. 769—Franklin Fluorspar Co. v. Hosick, 39 S.W.2d 665, 667, 239 Ky. 454, citing Corpus Juris—War Fork Land Co. v. Carr, 33 S. W.2d 303, 236 Ky. 453—Kentucky River Coal Corporation v. Williams, 10 S.W.2d 617, 226 Ky. 93—Salyer's Guardian v. Keeton, 283 S.W. 1015, 214 Ky. 643—Crider v. Kentenia-Catron Corporation, 283 S.W. 117, 214 Ky. 353—Continental Realty Co. v. Bolen, 242 S.W. 6, 195 Ky. 219.

La.—Standard Oil Co. of Louisiana v. Allison, 200 So. 273, 196 La. 838—Jackson v. United Gas Public Service Co., 198 So. 633, 196 La. 1—Guice v. Mason, 100 So. 397, 156 La. 201—Brewer v. New Orleans Land Co., 97 So. 605, 154 La. 446—Burns v. Jolley, 95 So. 648, 153 La. 212.

Me.—Stearns v. Thompson, 186 A. 800, 134 Me. 352, 107 A.L.R. 305—Lapitre v. Breton, 186 A. 796, 134 Me. 300—Pelletier v. Langlois, 157 A. 577, 130 Me. 486.

Mass.—Horowitz v. People's Sav. Bank, 29 N.E.2d 770—Supraner v. Citizens Sav. Bank, 22 N.E.2d 38, 303 Mass. 460—Mt. Washington Co-op. Bank v. Benard, 194 N.E. 839, 289 Mass. 498.

Miss.—Fitzgerald v. Allen, 89 So. 146, 126 Miss. 678.

Mo.—Clark v. Ferguson, 144 S.W.2d 116—Keller v. Keller, 92 S.W.2d 157, 338 Mo. 731—Sorrell v. Bradshaw, 222 S.W. 1024.

N.J.—Armour Realty Co. v. Carboy, 11 A.2d 243, 124 N.J.Law 205—Beach Realty Co. v. City of Wildwood, 144 A. 720, 105 N.J.Law 317, 64 A.L.R. 304.

N.Y.—Moenig v. New York Cent. R. Co., 175 N.Y.S. 665, 187 App.Div. 323, followed in Baldicini v. New York Cent. R. Co., 175 N.Y.S. 893, 188 App.Div. 898 and Bushel v. New York Cent. R. Co., 175 N.Y.S. 896, 188 App.Div. 899, and affirmed 132 N.E. 902, 231 N.Y.S. 596—Northern Terminal Corporation of

However, one who relies on estoppel for an after-acquired title can have no greater right than has the grantor against whom the estoppel is claimed.[25]

Reason for rule. It has been held that the rule rests on the ground that it would be iniquitous to permit one, after he has asserted ownership of land and made a deed conveying it to another, on a valuable consideration, to obtain by deed an outstanding title and hold it against his purchaser in spite of the deed he has made to him.[26] However, the reason usually assigned is that the rule was adopted to avoid circuity of action.[27]

New York v. Butterly, 241 N.Y.S. 552, 137 Misc. 165, affirmed 252 N.Y.S. 950, 234 App.Div. 680.

N.C.—Woody v. Cates, 197 S.E. 561, 213 N.C. 792—Crawley v. Stearns, 138 S.E. 403, 404, 194 N.C. 15, quoting **Corpus Juris**—James v. Griffin, 134 S.E. 849, 192 N.C. 285—Matthews v. Griffin, 122 S.E. 465, 187 N.C. 599.

Ohio.—Pollock v. Brayton, 163 N.E. 573, 29 Ohio App. 296.

Okl.—Yamie v. Willmott, 88 P.2d 325, 327, 184 Okl. 382, citing **Corpus Juris**—Carter v. Luster, 275 P. 1050, 134 Okl. 274, certiorari denied 49 S.Ct. 352, 279 U.S. 857, 73 L.Ed. 998—Hooks v. Canadian Holding Co., 272 P. 366, 133 Okl. 275, certiorari denied 49 S.Ct. 347, 279 U.S. 850, 73 L.Ed. 993—Holleman v. Cushing, 202 P. 1029, 1031, 84 Okl. 156, citing **Corpus Juris.**

S.C.—Hungerpiller v. Keller, 6 S.E. 2d 741, 192 S.C. 329—Yawkey v. Lowndes, 148 S.E. 554, 150 S.C. 493—Owings v. Graham, 113 S.E. 279, 120 S.C. 408.

Tenn.—Jenkins v. Harris, 83 S.W.2d 562, 19 Tenn.App. 113—Barksdale v. Keisling, 13 Tenn.App. 699, 704, quoting **Corpus Juris**—Wilburn v. Kingsley, 3 Tenn.App. 88.

Tex.—Duhig v. Peavy-Moore Lumber Co., 144 S.W.2d 878, affirming Peavy-Moore Lumber Co. v. Duhig, Civ.App., 119 S.W.2d 688—Robinson v. Jacobs, 254 S.W. 309, 113 Tex. 231, affirming Jacobs v. Robinson, Civ.App., 241 S.W. 241—Barker v. Temple Lumber Co., Com.App., 12 S.W.2d 175, reversing Temple Lumber Co. v. Barker, Civ.App., 298 S.W. 477, and reversed on other grounds Barker v. Temple Lumber Co., 37 S.W.2d 721, 120 Tex. 244—Houston Oil Co. of Texas v. Village Mills Co., Com.App., 241 S.W. 122, reversing, Village Mills Co. v. Houston Oil Co. of Texas, Civ.App., 186 S.W. 785—Faddell v. Taylor, 239 S.W. 931, Com.App., reversing, Faddell v. Taylor, Civ.App., 229 S.W. 965—Clarke v. Gauntt, Civ.App., 149 S.W.2d 193, error granted—Farmers Royalty Holding Co. v. Cherry, Civ.App., 142 S.W.2d 255, error granted—Chandler v. Kountze, Civ.App., 130 S.W.2d 327, error refused—Jackson v. Jackson, Civ.App., 114 S.W.2d 644, error dismissed—Miller-Vidor Lumber Co. v. Schreiber, Civ.App., 298 S.W. 154—Martin v. Barnum, Civ.App., 286 S.W. 550—Wilson v. Beck, Civ.App., 286 S.W. 315—Townsend v. Seber, Civ.App., 264 S.W. 211—Texas Pacific Coal & Oil Co. v. Fox, Civ.App., 228 S.W. 1021—Green v. West Texas Coal Mining & Developing Co., Civ.App., 225 S.W. 548, error refused—Hopkins v. Walters, Civ.App., 224 S.W. 516.

Va.—Wilkerson v. Wilkerson, 144 S.E. 497, 151 Va. 322—Rose v. Agee, 104 S.E. 827, 128 Va. 502.

W.Va.—Egnor v. Roberts, 191 S.E. 532, 118 W.Va. 671.

Wis.—Federal Farm Mortgage Corporation v. Larson, 278 N.W. 421, 227 Wis. 221.

21 C.J. p 1074 note 57, p 1076 note 58, p 1077 note 78, p 1083 note 34.

Persons for and against whom estoppel arises see infra §§ 46–54.

Rule limited

Rule that covenant of warranty passes subsequently acquired title is limited by rule that searcher of records need not go beyond origin of title claimed in record—Williams v. Cook, Tex.Com.App., 282 S.W. 574, affirming, Civ.App., 272 S.W. 809.

Conveyance without grantor's authority is not within text rule.—War Fork Land Co. v. Carr, 33 S.W.2d 308, 236 Ky. 453.

Relation back

When necessary in furtherance of justice transfer of title resulting from several transactions takes effect by relation from first substantive act.—Tendolle v. Eureka Oil Syndicate, 268 P. 185, 38 Wyo. 442, rehearing denied 270 P. 542, 38 Wyo. 442.

Partition deed

(1) Warranty in partition deed cannot be made to operate as conveyance by estoppel of after-acquired title.—Walling v. Harendt, Tex.Civ.App., 37 S.W.2d 280, error dismissed.

(2) A partition deed has, however, been held to bind an after-acquired title as between parties and privies. Neb.—Hagensick v. Castor, 73 N.W. 932, 53 Neb. 495.

N.Y.—Jackson v. Hasbrouck, 3 Johns. 331.

(3) Where intestate's son and daughter inherited realty, subject to dower, intestate's son and widow mortgaged realty, and son, daughter, and widow executed partition deed to allocate one half of realty to each of son and daughter, subject to dower, daughter's purchase on foreclosure of mortgage was not an after-acquired title which redounded to son's benefit because of partition deed.—Wofford v. Jackson, 111 S.W. 2d 542, 194 Ark. 1049.

(4) Where one of two tenants in common, with knowledge of outstanding mortgage debt for which both cotenants were liable, conveyed to other cotenant under warranty to defend title against all lawful claims, trust relationship arose which estopped grantor's executor from claiming title through purchase at foreclosure sale, and purchase would be held to have been made for benefit of grantee's heirs; rule that actual partition merely designates share of cotenant and allots land to him in severalty and does not create title was held inapplicable.—Kelly v. Davis, 188 S.E. 853, 211 N.C. 1.

Reducing an existing claim to judgment does not make it an after-acquired claim.—Phipps v. Sappenfield, 102 N.E. 841, 54 Ind.App. 139.

When a sale, lease, mortgage or lien is granted at a time when the vendor is not the owner of property, after-acquired ownership inures to the benefit of such vendee, lessee, mortgagee or lienee.—Angichiodo v. Cerami, D.C.La., 35 F.Supp. 359.

25. Mo.—Hodges v. Hodges, 292 S.W. 12.
21 C.J. p 1076 note 59.

Title fraudulently acquired by grantor

Grantee in deed of trust was held not to have acquired any rights by grantor's fraudulently inducing owner to execute deed vesting no title in him.—Hodges v. Hodges, supra

Purchase money mortgage executed by grantor on subsequent acquisition of title

Where a grantor of land, having no title, subsequently acquired title from a third person to whom he gave a purchase-money mortgage on the land conveyed, the rights of the latter were not affected by the prior conveyance.—Morgan v. Graham, 35 Iowa 213.

26. Tex.—Texas Pacific Coal & Oil Co. v. Fox, Civ.App., 228 S.W. 1021.
21 C.J. p 1076 note 60.

27. N.J.—Turick v. Erdmann, 164 A. 40, 112 N.J.Eq. 261.
Tex.—Duhig v. Peavy-Moore Lumber Co., 144 S.W.2d 878, affirming

Consideration. In order that an after-acquired title shall pass to a grantee under a warranty of title, it is not necessary that the conveyance should have been on a valuable consideration.[28]

Fraud or mistake. The rule applies equally whether the party assuming to convey title acted under an honest mistake[29] or committed a fraud.[30] According to several authorities, the fact that the conveyance was made to defraud creditors does not affect the operation of the rule, since it is good as between the parties;[31] but there is authority to the contrary.[32]

Champertous conveyances have been held to pass after-acquired title,[33] but other authorities hold that such conveyances are void and do not estop the grantor to assert a subsequently acquired title.[34]

Grantee's knowledge. It has been held that a subsequently acquired title will not pass where the grantee knew of the deficiencies in the grantor's title,[35] as where the deficiencies appeared in the deed.[36] On the other hand, it has been held that, where the grantor's knowledge was as great as, or greater than, the grantee's, he cannot rely on the grantee's knowledge to avoid being estopped by his deed.[37]

Enlarging estate granted. The warranty contained in the deed cannot operate to enlarge the estate granted.[38]

Mechanic's lien. The rule that the grantor is estopped to assert an after-acquired title applies to the grant of a mechanic's lien.[39]

Lease. A lessor is estopped to set up an after-acquired title as against his lessee.[40] Similarly, the after-acquired title of a lessee inures to the benefit of his assignee.[41]

§ 22. Deeds

A conveyance which purports to convey only the grantor's present interest will not estop him to assert an after-acquired title; and this is the general rule as to quitclaim deeds.

A conveyance which does not purport to convey any estate or which conveys only a present estate, or the right, title, and interest of the grantor passes only such a title as the grantor has at the time of its execution and delivery, and will not operate to confer on the grantee a new and independent title subsequently acquired by the grantor, estoppel being coextensive with the estate, right, or interest which the conveyance purports to pass.[42] A fortiori, an instrument which expressly excludes after-acquired property from its operation will not estop the grantor from asserting a subsequently acquired title.[43]

Quitclaim deeds. Since, as stated in the title Deeds, § 8, a quitclaim deed is one which purports to convey only the grantor's present interest or estate, if any, the general rule is that a quitclaim deed will not estop the grantor from setting up a title subsequently acquired by him.[44] However, it has been

Peavy-Moore Lumber Co. v. Duhie, Civ.App., 119 S.W.2d 688.
21 C.J. p 1076 note 61.

28. Ark.—McCullough v. Polk, 262 S.W. 670, 165 Ark. 613.
21 C.J. p 1077 note 82.

29. Tex.—Breen v. Morehead, Civ. App., 126 S.W. 650.

30. Tex.—Breen v. Morehead, supra.

31. Mass.—Gibbs v. Thayer, 6 Cush. 30.
21 C.J. p 1077 note 85.

32. Tex.—Barfield v. W. C. Belcher Land Mortgage Co., Com.App., 257 S.W. 1095, reversing, Civ.App., W. C. Belcher Land Mortgage Co. v. Barfield, Civ.App., 244 S.W. 395.
21 C.J. p 1077 note 86.

33. Tenn.—Nance v. Thompson, 1 Sneed 321.
21 C.J. p 1077 note 87 [b].
Validity of deed to support estoppel see infra § 43.

34. Ky.—War Fork Land Co. v. Carr, 33 S.W.2d 308, 236 Ky. 453—Colson's Adm'r v. Johnson, 271 S.W. 1033, 208 Ky. 684—Riggsby v. Montgomery, 271 S.W. 564, 208 Ky. 524.
21 C.J. p 1077 note 87 [a].

35. Iowa.—Schiltz v. Ferguson, 231 N.W. 358, 210 Iowa 677.
Ky.—Flowers v. Crumbaugh, 221 S.W. 1074, 188 Ky. 336.
Tex.—Byrnes v. Cobb, Civ.App., 71 S.W.2d 925, error dismissed.
21 C.J. p 1077 note 91.

36. Mont.—Midland Realty Co. of Minnesota v. Halverson, 52 P.2d 159, 101 Mont. 49.
21 C.J. p 1078 note 94.

37. N.Y.—Northern Terminal Corporation of New York v. Butterly, 241 N.Y.S. 552, 137 Misc. 165, affirmed 252 N.Y.S. 950, 234 App.Div. 680.

38. N.J.—Turick v. Erdmann, 164 A. 40, 41, 112 N.J.Eq. 261, citing Corpus Juris.
21 C.J. p 1078 note 97.

39. Tex.—Land Title Bank & Trust Co. v. Witherspoon, Civ.App., 126 S.W.2d 71.

40. Ala.—Burford v. Tucker, 175 So. 548, 234 Ala. 503.
Ind.—Burnett Coal Mining Co. v. Schrepferman, 188 N.E. 34, 77 Ind. App. 45.
Tex.—Stone v. Broadway, Civ.App., 6 S.W.2d 197, modified on other grounds Broadway v. Stone, Com. App., 15 S.W.2d 230, rehearing denied 17 S.W.2d 36—Texas Pacific Coal & Oil Co. v. Fox, Civ.App., 228 S.W. 1021.

41. Mont.—Johannes v. Dwire, 23 P. 2d 971, 94 Mont. 590.

42. Cal.—Wilson v. Nichols, 103 P. 2d 1007, 39 Cal.App.2d 527.
Hawaii.—Jellings v. Baldwin, 29 Hawaii 494.
Ky.—War Fork Land Co. v. Carr, 33 S.W.2d 308, 236 Ky. 453—Kendrick v. Scott, 254 S.W. 422, 200 Ky. 202.
Me.—Gould v. Leadbetter, 150 A. 375, 129 Me. 101.
N.J.—Turick v. Erdmann, 164 A. 40, 112 N.J.Eq. 261.
Or.—U. S. National Bank of La Grande v. Miller, 258 P. 205, 122 Or. 285, 58 A.L.R. 339.
Tex.—Wilson v. Wilson, Civ.App., 118 S.W.2d 403.
21 C.J. p 1081 notes 27, 28, p 1084 note 49.

43. Pa.—In re Mitinger's Estate, 1 A.2d 572, 132 Pa.Super. 475.

44. U.S.—Brown v. Harvey Coal Corporation, D.C.Ky., 49 F.2d 434, affirmed, C.C.A., 61 F.2d 624.
Ark.—Union Trust Co. of Concord,

held that this rule applies only to a quitclaim deed in the strict and proper sense of that species of conveyance, and that, if the deed bears on its face evidence that the grantor intended to convey, and the grantee expected to become invested with, an estate of a particular description of quality, and that the bargain had proceeded on such footing between the parties, it will estop the grantor to assert an after-acquired title which is within the estate purported to be conveyed;[45] and, under a statute so providing, a quitclaim deed will pass an after-acquired title.[46]

§ 23. Mortgage

The estoppel of a mortgagor to assert as against his mortgagee a title or interest acquired subsequent to the execution of the mortgage is treated in the C.J.S. title Mortgages § 185, also 21 C.J. p 1078 note 98–p 1079 note 9 and 41 C.J. p 478 note 77–p 481 note 3.

§ 24. Personal Property

After-acquired title of a seller of personalty inures to the benefit of the buyer, at least where there is a warranty of title.

Where personal property is sold with an express warranty of title by the seller, who at the time has no title, his subsequent acquisition of title inures to the benefit of the buyer by estoppel.[47] Moreover, there is authority for the view that, in sales of personalty, even without any express covenant of warranty, the title afterward acquired by a vendor in property which he has sold passes to the grantee;[48]

N. H., v. Watts, 148 S.W.2d 318—Adamson v. Wolfe, 139 S.W.2d 674, 200 Ark. 360—Holmes v. Countiss, 115 S.W.2d 553, 195 Ark. 1014.
Cal.—In re Wilson's Estate, App., 104 P.2d 716.
Ga.—Shockley v. Storey, 196 S.E. 702, 185 Ga. 790—Citizens' & Southern Nat. Bank v. Ellis, 156 S.E. 603, 171 Ga. 717—McDonald v. Dabney, 132 S.E. 547, 161 Ga. 711.
Ill.—Du Bois v. Judy, 126 N.E. 104, 291 Ill. 340.
Ind.—Crawfordsville Trust Co. v. Elston Bank & Trust Co., 25 N.E. 2d 626.
Ky.—War Fork Land Co. v. Carr, 33 S.W.2d 308, 236 Ky. 453.
Me.—Crockett v. Borgerson, 152 A. 407, 129 Me. 395.
Mo.—Williams v. Reid, 37 S.W.2d 537—Douglass v. Hammel, 285 S.W. 433, 313 Mo. 514—Inlow v. Herren, 267 S.W. 893, 306 Mo. 42.
Contra Barada-Ghio Real Estate Co. v. Keleher, 214 S.W. 961.
Ohio.—Gaston v. Moore, 176 N.E. 483, 38 Ohio App. 403—Newton v. Harris, 21 Ohio N.P., N.S., 329—Carter v. Grossnickle, 11 Ohio N.P., N.S., 465.
Okl.—Selsor-Badley v. Reed, 223 P. 651, 97 Okl. 204.
Tex.—Barfield v. W. C. Belcher Land Mortgage Co., Com.App., 257 S.W. 1095, reversing W. C. Belcher Land Mortgage Co. v. Barfield, Civ.App., 244 S.W. 395—Bell v. Gaines, Civ.App., 237 S.W. 346.
21 C.J. p 1082 note 30.

The fact that the words "bargain, sell and convey" are used in a conveyance of all right, title, or interest in the land described does not affect the operation of the rule, although a statute provides that in conveyances in fee the words "grant, bargain, sell," or any of them, must be construed as an express covenant, unless the contrary clearly appears from the conveyance.—Vary v. Smith, 50 So. 187, 162 Ala. 457.

Where quitclaimer had equitable title, subsequently acquired legal title passed to grantee as incident of equitable title.—Johnson v. Johnson, 191 S.W. 672, 173 Ky. 701—21 C.J. p 1082 note 29 [a].

45. Ill.—Thornton v. Louch, 130 N.E. 467, 297 Ill. 204.
Ohio.—Carter v. Grossnickle, 11 Ohio N.P., N.S., 465.
Tex.—Hamilton v. Keller, Civ.App., 148 S.W.2d 1011.
21 C.J. p 1082 note 29 [c], p 1083 note 33.

If there are recitals or covenants in a deed showing an intention not to limit the interest conveyed to that merely which the grantor then had, or expressly or impliedly affirming existence of a particular estate which the parties intended should pass by conveyance, grantor may be estopped from asserting an after-acquired title or interest in contradiction of terms or implications of deed, even though granting clause is in form of a quitclaim.—In re Wilson's Estate, Cal.App., 104 P.2d 716.

"Remise, release and . . . quitclaim"

Deed reciting that grantors "remise, release and forever quitclaim" did not evidence intention to convey land itself, and hence any after-acquired interest necessary to round out fee-simple title.—Williams v. Reid, Mo., 37 S.W.2d 537.

Quitclaim deed as part of larger transaction

Where, in order to transfer title of realty from husband to himself and wife as joint tenants, wife's attorney had his stenographer execute a quitclaim deed to the husband and wife, and attorney held that deed until the husband and wife subsequently executed a deed to the stenographer, and thereafter the attorney sent both deeds to the wife, stenographer's deed was effectual to convey title to the husband and wife, since both deeds were part of one transaction.—Baar v. Baar, Minn., 298 N.W. 455.

46. Miss.—Bramlett v. Roberts, 10 So. 56, 68 Miss. 325.
21 C.J. p 1082 note 29 [b].

47. U.S.—Merchants' Bank v. People's Savings & Loan Ass'n, C.C.A. Okl., 70 F.2d 169, 93 A.L.R. 226.
Cal.—Callahan v. General Oil Well Supply Co., 19 P.2d 508, 130 Cal. App. 32.
21 C.J. p 1079 note 11.

A chattel mortgage executed on property at the time not in existence may become operative if the property covered subsequently comes into the possession of the mortgagor.—Ivy v. Pugh, Tex.Civ.App., 161 S.W. 939—21 C.J. p 1079 note 4.

No buyer-seller relationship

Where holder of part of series of notes secured by same mortgage instituted foreclosure proceeding and purchased property at public sale as representative of another, the "equitable estoppel" doctrine could not be invoked by another holder of some of the notes who was not a party to the foreclosure proceeding, for purpose of contending that mortgage creditor who foreclosed purchased property for benefit of all the mortgage noteholders, where there was neither express nor implied warranty by the mortgage creditor who foreclosed in favor of the other noteholder because the other noteholder acquired the note from someone else.—Stahl v. Caron, 200 So. 811, 197 La. 31.

48. Or.—Commercial Credit Co. v. Click, 271 P. 36, 127 Or. 130.
Tex.—Brinkman v. Rick, Civ.App., 19 S.W.2d 808, 811, error refused, citing **Corpus Juris**—Texas Pacific Coal & Oil Co. v. Fox, Civ.App., 223 S.W. 1021.
21 C.J. p 1079 note 12.

but it has been held that a sale estops the seller as to an after-acquired title only when it is with express or implied warranty of title.[49]

§ 25. Instruments Founding Estoppel

To give rise to an estoppel to assert an after-acquired title, there must be an instrument purporting to convey an estate.

To give rise to an estoppel to assert an after-acquired title, there must be an instrument purporting to convey an estate.[50] According to the weight of authority, an execution sale of property not belonging to the debtor does not estop him from asserting against the purchaser title subsequently acquired,[51] although there is some authority apparently to the contrary.[52]

§ 26. Necessity for Covenants

The authorities disagree as to whether an instrument not containing covenants can found an estoppel to assert an after-acquired title.

According to some authorities, a deed must contain a covenant of warranty in order to preclude the grantor from asserting an after-acquired title and cause such title to inure to the grantee.[53] However, it is frequently held that other covenants may give rise to the estoppel, as appears infra § 27, and that, if a deed either expressly or by necessary implication shows that the grantor intended to convey, and that the grantee expected to become vested with, an estate of a particular kind, the deed may found an estoppel, although it contains no technical covenants.[54] Moreover, statutes in a number of juris-

49. U.S.—Merchants' Bank v. People's Savings & Loan Ass'n, C.C.A.Okl., 70 F.2d 169, 93 A.L.R. 226.

50. N.Y.—Oliphant v. Burns, 40 N.E. 980, 146 N.Y. 218.
21 C.J. p 1080 note 15.
Instruments founding estoppel generally see supra §§ 17–20.

Oral partnership agreement
Partnership erecting building and conducting business on lot for years, under partner's agreement that premises should belong to partnership, becames equitable owner on partner's acquiring legal title he did not have.—Kurowski v. Retail Hardware Mut. Fire Ins. Co. of Minnesota, 234 N.W. 900, 203 Wis. 644.

51. Cal.—Emerson v. Sansome, 41 Cal. 552.
21 C.J. p 1080 note 17.

52. Mass.—Cressey v. Cressey, 102 N.E. 314, 215 Mass. 65.
21 C.J. p 1080 note 18.

53. U.S.—Childs v. U. S., C.C.A.La., 5 F.2d 816.
Ark.—Holmes v. Countiss, 115 SW. 2d 553, 195 Ark. 1014.
Hawaii.—Jellings v. Baldwin, 29 Hawaii 494.
Ind.—Crawfordsville Trust Co. v. Elston Bank & Trust Co., 25 N.E. 2d 626.
Ky.—Inter-Mountain Coal & Lumber Co. v. Boggs, 56 S.W.2d 705, 247 Ky. 123—War Fork Land Co. v. Carr, 33 S.W.2d 308, 236 Ky. 453.
Me.—Gould v. Leadbetter, 150 A. 375, 129 Me. 101.
Tenn.—Beaty v. Owens, 6 Tenn.App. 154.
W.Va.—Egnor v. Roberts, 191 S.E. 532, 118 W.Va. 671.
21 C.J. p 1080 note 19.
So at common law
N.C.—Crawley v. Stearns, 188 S.E. 403, 404, 194 N.C. 15, citing Corpus Juris.
21 C.J. p 1080 note 19.

Deed of relocation construed as transaction under covenants of warranty.—Childs v. U. S., C.C.A.La., 5 F.2d 816.

Where a deed is indefinite as to the interest conveyed, it will not estop the grantor as to an after-acquired title, in the absence of covenants.—Egnor v. Roberts, 191 S.E. 532, 118 W.Va. 671.

Waiver of implied warranty
Where oil lease contained waiver of implied warranty of title as to outstanding interests, lessor's after-acquired interest was held not to inure to lessee's benefit.—United Fuel Gas Co. v. Koontz, 169 S.E. 328, 113 W.Va. 611.

Mortgage
(1) Where there is no warranty in a mortgage, the mortgagor is not estopped to set up an after-acquired title.
Ala.—Jones v. Wilson, 57 Ala. 122.
Mass.—Weed Sewing Mach. Co. v. Emerson, 115 Mass. 554.

(2) Mortgage on land to which mortgagor had no title, containing no covenants of warranty, is insufficient to pass title to mortgagee on mortgagor's subsequent acquisition of title.—Robinson Mercantile Co. v. Davis, 187 P. 931, 26 Wyo. 484.

54. Cal.—Flores v. Flores, 204 P. 54, 55 Cal.App. 595.
Conn.—Zandri v. Tendler, 193 A. 598, 123 Conn. 117, 111 A.L.R. 1280.
N.C.—Woody v. Cates, 197 S.E. 561, 213 N.C. 792—Crawley v. Stearns, 188 S.E. 403, 404, 194 N.C. 15, citing Corpus Juris—Bourne v. Farrar, 104 S.E. 170, 180 N.C. 135.
Ohio.—Ward v. Ward, 11 Ohio Cir.Ct., N.S., 396.
Okl.—Weaver v. Drake, 193 P. 45, 79 Okl. 277.
Tex.—Wilson v. Beck, Civ.App., 286 S.W. 315—Texas Pacific Coal & Oil Co. v. Fox, Civ.App., 228 S.W. 1021.
21 C.J. p 1080 note 21, p 1083 note 34 [a].

Basis of rule
(1) These cases abandon the technical ground taken in the earlier decisions that estoppel grows out of warranty and rests on the broader basis of giving effect to the intention of the parties as expressed in the deed.—Taggart v. Risley, 4 Or. 235.

(2) The rule accords with honesty and fair dealing.
Okl.—Weaver v. Drake, 193 P. 45, 79 Okl. 277.
Tex.—Texas Pacific Coal & Oil Co. v. Fox, Civ.App., 228 S.W. 1021.
Va.—Hurley v. Charles, 72 S.E. 689, 112 Va. 706.

Rule as equitable doctrine
While the doctrine of estoppel has been enlarged to include deeds without covenant or warranties to the extent of protecting bona fide purchasers, it is still an equitable doctrine, and not an inflexible rule, a shield of the innocent, and not a sword for destruction.—Jackson v. Mills, 115 S.E. 881, 185 N.C. 53.

Implied covenants
The doctrine of after-acquired title, whether by statutory provision or by contract lien, may be invoked in the absence of express warranty, based on implied covenants in the grant or by express covenants by contract to the effect that previous to the execution of the conveyance the grantor had not conveyed the same estate nor any right, title or interest therein to any person other than the grantee.—Person v. Levenson, Tex.Civ.App., 143 S.W.2d 419.

In Pennsylvania the rule is laid down, without regard to whether the instrument contains covenants, that, when a vendor or mortgagor sells or mortgages land which he does not own, and afterward obtains title thereto, he will not be permitted to set up this after-acquired title to defeat his previous grant or mortgage, for this would be to permit him to perpetrate fraud on his grantee or creditor.—Rushton v. Lippincott, 12 A. 761, 119 Pa. 12—21 C.J. p 1081 note 25.

dictions have been construed as providing that conveyances purporting to convey the fee, or to convey a greater interest than the grantee has, or containing prescribed words of grant, are deemed to have the same legal effect as deeds which by the terms of the grant or covenants therein would estop the grantor to claim an after-acquired title or estate.[55]

§ 27. Nature of Covenant

Various covenants other than a covenant of warranty have been held, or held not, to estop a grantor from asserting an after-acquired title.

The requirement of a covenant of warranty to bring about an estoppel to assert after-acquired title is considered supra §§ 21 and 26.

Covenant for quiet enjoyment or possession. An ordinary deed of bargain and sale with covenant for quiet enjoyment gives the grantee the benefit of a title subsequently acquired by the grantor.[56] Such also is the effect of a conveyance with covenants of special warranty and quiet possession.[57]

Covenant of seizin and right to convey. In some jurisdictions title by estoppel may be founded on a covenant of seizin and right to convey;[58] in others the contrary rule has been maintained.[59]

A covenant against encumbrances will estop the grantor to assert a subsequent title acquired through the enforcement of a lien existing at the time of the conveyance,[60] but not a title otherwise acquired.[61]

Covenant of nonclaim. According to some decisions, a covenant of nonclaim in a deed amounts to the ordinary covenant of warranty and operates as an estoppel on an after-acquired title,[62] being confined, however, to the estate granted by the deed.[63] However, other decisions hold that a covenant of nonclaim will not operate as an estoppel against the grantor as to an after-acquired title,[64] even where it is joined with a covenant against encumbrances.[65]

Covenant for further assurance. A subsequent title inures under a covenant for further assurance as well as under a covenant of warranty;[66] and under at least one statute, if a quitclaim deed contains a covenant for further assurance, a title subsequently acquired by the grantor will inure to the benefit of his grantee, the same as if the deed had contained a covenant of warranty.[67]

Special covenants. A conveyance with special covenants as to acts of the grantor or those in privity with him, or against a particular title, will not preclude the grantor to acquire or assert an after-acquired title,[68] unless such acquisition is against the terms of the covenants therein.[69]

§ 28. Inoperative Covenants

By the weight of authority, a grantor is not estopped to assert an after-acquired estate if there is no liability on his covenants.

Although it has been held that the general rule as to title by estoppel is not changed by the fact that a right of action on the covenant on which the estoppel is based is barred by limitation,[70] the weight of authority is to the effect that a grantor is not estopped to assert an after-acquired estate, if there is no liability on his covenants because of their being inoperative or having been extinguished.[71]

§ 29. Instruments Giving Momentary Seizin Only

An estate of which a grantor is given only momentary seizin will not inure to his grantee.

55. Ark.—Patillo v. Mays, 9 S.W.2d 83, 177 Ark. 1194.
Cal.—Maxwell v. Carlon, 86 P.2d 666, 30 Cal.App.2d 356—Duncan v. Wolfer, 212 P. 390, 60 Cal.App. 120.
21 C.J. p 1081 note 24.

56. Mich.—Smith v. Williams, 6 N.W. 662, 44 Mich. 240.
21 C.J. p 1083 note 35.

57. Va.—Hurley v. Charles, 72 S.E. 689, 112 Va. 706.

58. U.S.—Van Rensselaer v. Kearney, N.Y., 11 How. 297, 13 L.Ed. 703.
21 C.J. p 1083 note 37.

59. Me.—Allen v. Sayward, 5 Me. 227, 17 Am.D. 221.
Mass.—Doane v. Willcutt, 5 Gray 328, 66 Am.D. 369.

60. N.J.—Brundred v. Walker, 12 N.J.Eq. 140.
N.Y.—Coleman v. Bresnahan, 8 N.Y.S. 158.

61. Ill.—Look v. Bruninga, 180 N.E. 816, 348 Ill. 183.
21 C.J. p 1083 note 40.

62. U.S.—Bell v. Gaines, Civ.App., 237 S.W. 346.
21 C.J. p 1083 note 41.

63. Cal.—Morrison v. Wilson, 30 Cal. 344.
21 C.J. p 1083 note 42.

64. Mo.—Williams v. Reid, 37 S.W. 2d 537.
21 C.J. p 1083 note 43.

65. Me.—Partridge v. Patten, 33 Me. 483, 54 Am.D. 633—Sweetser v. Lowell, 33 Me. 446.

66. U.S.—State of New Jersey v. State of Delaware, 54 S.Ct. 407, 291 U.S. 361, 78 L.Ed. 847.
D.C.—Atlas Portland Cement Co. v. Fox, 265 F. 444, 49 App.D.C. 292, dissenting opinion 266 F. 1021.
Okl.—Selsor-Badley v. Reed, 223 P. 651, 97 Okl. 204.
21 C.J. p 1083 note 45.

67. Ill.—Bennett v. Waller, 23 Ill. 97.

68. Me.—Bennett v. Davis, 38 A. 372, 90 Me. 457.
21 C.J. p 1083 note 47.

69. Tenn.—Coal Creek Min. & Mfg. Co. v. Ross, 12 Lea 1.
21 C.J. p 1084 note 48.

70. Mass.—Cole v. Raymond, 9 Gray 217.
21 C.J. p 1084 note 50.

71. Ill.—Smiley v. Fries, 104 Ill 416.
21 C.J. p 1084 note 51.

Where a grantor conveys without consideration, and the grantee without consideration and as a part of the same transaction reconveys to the grantor, a momentary seizin only, not beneficial even for a moment, vests in the first grantee, and he is not invested with any title inuring to the benefit of one to whom he has previously conveyed the same land by mortgage deed of warranty.[72]

§ 30. Estates or Rights Affected

The doctrine of estoppel to assert an after-acquired title applies to any estate or interest that the deed purports to convey, provided the conveyance of such interest is not void or against public policy; and the doctrine has been applied to the conveyance of various types of estates or interests.

The estoppel to assert an after-acquired title will not operate as to land or an interest therein other than that which is specifically conveyed or called for by the plain import of the conveyance, and to which the covenants for title are confined.[73] A fortiori is this so in respect of land which is expressly reserved or excepted from the operation of the conveyance.[74] The doctrine of estoppel of a grantor to assert a title acquired after conveyance has been said to apply without regard to the method whereby such title is acquired,[75] or to whether the title subsequently acquired is legal or equitable.[76] The doctrine has been applied to conveyances by parties having merely an equitable title or interest therein who subsequently acquired the legal title;[77] to a conveyance by an heir of a particular tract of land, part of his ancestor's estate, which he expects will be allotted to him on partition;[78] to an attempted conveyance by an heir before the death of the ancestor, where the heir survived the ancestor,[79] unless the conveyance of such an interest is held to be invalid, void, or against public policy;[80] to a conveyance by one having only a limited estate, on his subsequently acquiring a greater estate by inheritance;[81] to a conveyance of an entire tract where the grantor subsequently acquires by descent or otherwise a title to a further undivided part of the tract;[82] to a conveyance of an estate which by reason of a contingency was not transmissible at the time the conveyance was executed, where the estate subsequently passed to the grantor on the happening of the contingency;[83] to a conveyance by a child of one who holds a life estate in land,

72. Me.—Haslam v. Jordan, 70 A. 1066, 104 Me. 49.
21 C.J. p 1084 note 52.

73. Ala.—Henderson v. Noland, 189 So. 732, 238 Ala. 213, 123 A.L.R. 483—Lindsey Lumber & Export Co. v. Deas, 161 So. 473, 230 Ala. 447.
Ark.—Henry v. Gulf Refining Co., 2 S.W.2d 687, 176 Ark. 133.
Fla.—Reid v. Barry, 112 So. 846, 93 Fla. 849.
Ky.—War Fork Land Co. v. Carr, 33 S.W.2d 308, 236 Ky. 453—Burns v. Dillon, 9 S.W.2d 1095, 226 Ky. 82.
Mont.—Midland Realty Co. of Minnesota v. Halverson, 52 P.2d 159, 101 Mont. 49.
21 C.J. p 1084 note 54.

Bond for title

Where the holder of a bond for title acquired his bond from transferee of the original holder, the acquiring of title by transferee would not inure to the benefit of the holder in such a way as to ipso facto vest the title in him.—Faddell v. Taylor, Tex.Com.App., 239 S.W. 931, reversing Faddell v. Taylor, Civ.App., 229 S.W. 965.

74. Ill.—Gill v. Grand Tower Min., Mfg. & Transp. Co., 92 Ill. 249.
Okl.—Voss v. Thompson, 232 P. 392, 105 Okl. 238.
21 C.J. p 1084 note 55.

75. Miss.—Garner v. Garner, 78 So. 623, 117 Miss. 694.
21 C.J. p 1077 note 80.

Delivery of deed, without delivery of possession of land, is sufficient to pass title inuring to the benefit of grantee's prior grantee.—McCullough v. Polk, 262 S.W. 670, 165 Ark. 613.

Covenant of warranty; restriction on exemption

(1) A conveyance by a city, without covenants of seizin or warranty, of all the right, title and interest of the city in tidelands, to which it then had no title and never acquired title, was not sufficient to support a suit to quiet title against the city on account of its subsequent occupation and improvement of the land in aid of navigation under authority of a state statute, which forbade alienation by the city.—Dean v. City of San Diego, C.C.A.Cal., 284 F. 970, affirming, D.C., 275 F. 228.

(2) Where levee district conveyed to individuals, with warranty of fee-simple title, lands transferred to levee district by state, but formal conveyances from state to levy district were not executed until after adoption of constitutional provision prohibiting alienation of mineral interests by state, transferees of the lands obtained the mineral interests by virtue of "estoppel" against board of commissioners of the levee district.—Standard Oil Co. of Louisiana v. Allison, 200 So. 278, 196 La. 838.

76. Va.—Rose v. Agee, 104 S.E. 827, 128 Va. 502.

77. N.Y.—Doyle v. Peerless Petroleum Co., 44 Barb. 239.
78. Tex.—Ackerman v. Smiley, 37 Tex. 211.
79. N.J.—Cain v. Belden, 117 A. 39, 93 N.J.Eq. 576.
S.C.—Wallace v. Quick, 153 S.E. 168, 156 S.C. 248.
Tex.—Donnell v. Otts, Civ.App., 230 S.W. 864.
5 C.J. p 859 note 81—21 C.J. p 1076 note 64.

80. Ky.—Harkins v. Hatfield, 297 S. W. 1109, 221 Ky. 91—Howard's Adm'x v. Asher Coal Mining Co., 284 S.W. 419, 215 Ky. 38—Hunt v. Smith, 230 S.W. 936, 191 Ky. 443. 17 A.L.R. 588.
Ohio.—Ferenbaugh v. Ferenbaugh. 136 N.E. 213, 104 Ohio St. 556.
21 C.J. p 1076 note 65.

81. Ohio.—Millison v. Drake, 175 N. E. 34, 37 Ohio App. 559, affirmed 174 N.E. 776, 123 Ohio St. 249.
21 C.J. p 1076 notes 66–67.

82. Ariz.—Molina v. Ramirez, 138 P. 17, 15 Ariz. 249.
21 C.J. p 1076 note 68.

83. Me.—Gould v. Leadbetter, 150 A. 375, 129 Me. 101.
N.J.—Gebhardt v. Elkin, 135 A. 509, 100 N.J.Eq. 254.
N.C.—Croom v. Cornelius, 14 S.E.2d 799, 219 N.C. 761—Woody v. Cates, 197 S.E. 561, 213 N.C. 792.
Ohio.—Pollock v. Brayton, 163 N.E. 573, 29 Ohio App. 296.
21 C.J. p 1000 note 83–p 1001 note 92, p 1076 note 69.

with remainder to his heirs, where the grantor survives the life tenant;[84] to a conveyance by one who subsequently acquires a tax title to the land which he attempted to convey;[85] to a conveyance by a wife of land in which she had only an estate by the entirety, where her husband afterward devised her all of his rights;[86] to a conveyance of land by a coal land entryman who conveyed it after filing his declaratory statement but before completing his entry, where he subsequently obtains a patent for the land;[87] and to a conveyance by one in whom title is to vest by conveyance and devise on the death of the father, where he survives the father.[88] So, also, a purchaser from a member of a class, in which a remainder expectant on the death of the life tenant is vested, takes title against his vendor by estoppel on the death of the life tenant.[89]

A conveyance of all property that the grantor may thereafter in any manner acquire has been held void and not to estop the grantor from asserting an after-acquired title.[90]

Although a possibility of reverter or a right of reëntry for breach of condition subsequent is not regarded as an alienable interest, a conveyance of such right will operate by way of estoppel against the grantor when the property is acquired by him by reason of such right.[91]

Easements are property within the rule of estoppel as to after-acquired property.[92]

§ 31. Title Acquired by Patent from Sovereignty

A title acquired through a patent of land after a purported conveyance of the land will inure to the grantee, unless the grantor's want of a present vested estate appeared on the deed.

When one entitled to a grant or patent of land from the state or general government purports to convey the land, the legal title when acquired by him through the issuance of the patent will vest in his grantee or inure to the latter's benefit.[93] So, where the patent was issued to others under an assignment of the land warrant to them by the grantor to perfect title to other land given them, the assignees took title under the land warrant, subject to such grantee's prior title;[94] and it has been held that, although a quitclaim deed does not operate to convey a subsequently acquired patent title not actually owned in equity when the deed was given,[95] it will nevertheless convey land thereafter patented if the grantor at the time of the conveyance is entitled to a patent by reason of performance of conditions prerequisite to its issuance,[96] or if the quitclaim expressly includes after-acquired title.[97]

However, it is essential to the success of such an estoppel that the grantor's want of a present vested estate should not appear on the deed itself, which would otherwise contain internal evidence of its invalidity.[98] The fact that the vendor after acquiring title from the government conveys his land with full covenants of warranty to a third person does not affect the operation of the rule where the latter recognizes the title of the first purchaser by accepting and acting under a power of attorney from him, and does not occupy the land.[99]

§ 32. Title Acquired in Name of Third Person

A grantor, by taking title to after-acquired property in a third person's name, will not defeat the estoppel to assert such title.

A grantor cannot defeat the estoppel to assert title to after-acquired property by procuring title to such property to be taken in the name of a third person.[1] However, the acquisition of an adverse ti-

Alienation of contingent remainders see Estates § 88.

84. N.Y.—Moore v. Littel, 41 N.Y. 66, affirming 40 Barb. 488.

85. Ark.—Fox v. Three States Lumber Co., 108 S.W. 1137, 85 Ark. 497.
Quitclaim of interest thereafter acquired by purchase or descent did not estop grantor having no interest except an expectancy from asserting a title subsequently acquired through tax sale proceedings.—Kelly v. Southworth, 267 P. 691, 38 Wyo. 414.

86. Mich.—Demerse v. Mitchell, 164 N.W. 97, 187 Mich. 683.

87. U.S.—Ketchum v. Pleasant Valley Coal Co., C.C.A.Utah, 257 F. 274.

88. Iowa.—Stephens v. Boyd, 138 N.W. 389, 157 Iowa 570.

89. Tenn.—Nichols v. Guthrie, 73 S.W 107, 109 Tenn 535.

90. Ga.—Shockley v. Storey, 196 S.E. 702, 185 Ga. 790.

91. Ill.—Pure Oil Co. v. Miller-McFarland Drilling Co., 34 N.E.2d 854, 376 Ill. 486.
Ind.—Hughes v. Fifer, 31 N.E.2d 634.

92. Mass.—Supraner v. Citizens Sav. Bank, 22 N.E.2d 38, 303 Mass. 460.
21 C.J. p 1077 note 81.

93. Ala.—Reichert v. Jerome H. Sheip, Inc., 131 So. 229, 222 Ala. 133.
Cal.—Whitten v. Young, 58 P.2d 167, 14 Cal.App.2d 299.
La.—Cherami v. Cantrelle, 142 So. 150, 174 La. 995.
21 C.J. p 1084 notes 56–58.

94. Ky.—Martin v. Bentley, 124 S.W. 873.

95. Mich.—Frost v. Missionary Soc., 22 N.W. 189, 56 Mich. 62.
S.D.—Hohn v. Bidwell, 130 N.W. 837, 27 S.D. 249.

96. Mich.—Frost v. Missionary Soc., 22 N.W. 189, 56 Mich. 62.

97. U.S.—Ogden v. Police Jury of Concordia Parish, D.C.La., 28 F. Supp. 402.

98. U.S.—Gilmer v. Poindexter, La., 10 How. 257, 13 L.Ed. 411.
21 C.J. p 1085 note 64.

99. Mich.—Chapman v. Sault Ste. Marie, 109 N.W. 53, 146 Mich. 23.

1. Cal.—Quivey v. Baker, 37 Cal. 465.
N.Y.—Collins v. Buffalo, L. & R. R. Co., 129 N.Y.S. 139, 145 App.Div. 148.
21 C.J. p 1085 note 65.

tle by a wife will not inure to the benefit of a grantee to whom the husband has conveyed with warranty.[2]

§ 33. Title Acquired for Third Person

Title acquired by a grantor for a third party will not inure to the grantee.

The doctrine of estoppel to assert an after-acquired title does not apply where such a title passes to the grantor subject to a resulting trust in favor of a third party who is the actual purchaser, or the conveyance is made to him as a conduit and for the purpose of vesting the title in a third person.[3] It has been held, however, that where a person holding a bond for title conveyed the property, and afterward the vendor conveyed to him, and at the same time a third person advanced the money to pay the vendor, and thereupon took a mortgage on the land from the purchaser, the purchaser was not a mere instrument of conveyance or a trustee of the mortgagee so as to vest title in the mortgagee to the exclusion of the first grantee.[4]

§ 34. Title Acquired from or Adversely to Grantee

Where a title defeating the grantee's title is acquired by the grantor from the grantee or through the latter's act or failure to act, such title will not inure to the grantee's benefit.

A title subsequently acquired by a grantor by purchase from the grantee or those claiming under him will not inure to the benefit of him or them.[5]

Judicial sale. If the property is sold as the grantee's at an execution or judicial sale, the grantor is not estopped by his covenant from purchasing at the sale and asserting the title thus acquired against the grantee;[6] a grantor is not estopped to acquire a title based on the enforcement of an obligation against the property created by the grantee.[7] However, where a grantee is divested of title by the foreclosure of a mortgage which existed at the time of the grant, a title acquired by the grantor at the sale,[8] or from the purchaser at the sale,[9] has been held to inure to the grantee's benefit, although under other authority a title acquired through the purchaser at the foreclosure sale is an independent title which will not inure to the grantee's benefit.[10] Where the conveyance was subject to the mortgage, a title acquired by the grantor through the foreclosure of such mortgage will not pass to the grantee.[11]

The grantor may acquire title through a sale for taxes which have accrued since the conveyance,[12] but not where the taxes were a lien at the time of the conveyance, or the sale was the result of the grantor's delinquency.[13]

An after-acquired title based on the vendor's lien of the true owner may be enforced by the grantor.[14]

Adverse possession. A subsequent possession by the grantor of the premises conveyed for the period prescribed by the statute of limitations will inure to his benefit and not to the benefit of the grantee;[15] and, similarly, the grantor may by prescription obtain an easement over the land granted.[16] However, if such possession is held in subserviency to the title of the grantee, the possession thereof will inure to the grantee's benefit.[17]

Deed rendered nugatory. After the deed on which the estoppel is based is rendered nugatory by judicial decree or the operation of law, the grantor is not estopped to set up a title subsequently acquired by him.[18]

§ 35. Operation of Law in Vesting Title in Grantee

The estoppel against a grantor to assert an after-acquired title is generally held to vest such title in the grantee by operation of law and to be effective against a bona fide purchaser of such title.

2. Miss.—Carter v. Bustamente, 59 Miss. 559—Cameron v. Lewis, 59 Miss. 134.

3. Tex.—Newton v. Easterwood, Civ.App., 154 S.W. 646.
21 C.J. p 1085 note 67.

4. N.H.—Wark v. Willard, 13 N.H. 389.

5. N.J.—Turick v. Erdmann, 164 A. 40, 41, 112 N.J.Eq. 261, citing Corpus Juris.
21 C.J. p 1085 note 69.

6. Cal.—McCune v. McCune, 72 P.2d 883, 884, 23 Cal.App.2d 295, quoting Corpus Juris.
21 C.J. p 1086 note 70.

7. Cal.—McCune v. McCune, supra.

8. Wyo.—Arnold v. Nichols, 172 P. 335, 25 Wyo. 458.
21 C.J. p 1076 note 72.

9. Pa.—Minick v. Marshall, 48 Pa. Super. 43.

10. Kan.—Schultz v. Cities Service Oil Co., 86 P.2d 533, 149 Kan. 148.

11. Cal.—Duncan v. Wolfer, 212 P. 390, 60 Cal.App. 120.

12. La.—Lear v. John, 6 La.App. 197.
21 C.J. p 1086 note 71.

13. Ga.—Rosborough v. Wrigley, 150 S.E. 156, 169 Ga. 298.
21 C.J. p 1086 note 72.

14. Tex.—Pierce v. Camp, Civ.App., 30 S.W.2d 807, error refused.

15. Ala.—Henderson v. Noland, 189 So. 732, 238 Ala. 213, 123 A.L.R. 483.
Tex.—Griffith v. Wynne, Civ.App., 236 S.W. 171.
21 C.J. p 1086 note 73.

16. Ga.—Carlton v. Seaboard Air Line R. Co., 85 S.E. 863, 143 Ga. 516, 519, Ann.Cas.1917A 497.
Ohio.—Kimball v. Anderson, 181 N.E. 17, 125 Ohio St. 241.

17. Or.—Gardner v. Wright, 91 P. 286, 49 Or. 609.

18. Kan.—Schultz v. Cities Service Oil Co., 86 P.2d 533, 149 Kan. 148.

By the common law only two classes of conveyances were held to operate an actual transfer of an after-acquired estate; such an operation was given to conveyances by feoffment, fine, or common recovery on account of their solemnity and publicity, and to those by indenture of lease from the implied covenants arising from such indenture.[19] According to some authorities, if a person conveys land with general warranty and does not own it at the time, the grantee has the right to have a subsequently acquired title transferred to him, but such acquisition does not operate actually to transfer the estate subsequently acquired;[20] but the generally prevailing rule is that the estoppel has the effect of vesting the after-acquired title in the grantee by operation of law,[21] without the intervention of any court.[22] The latter rule will not be applied so as to defeat the grantee's cause of action against the grantor where he was wholly evicted from the premises by a title paramount,[23] or instituted an action for rescission,[24] before the grantor acquired title.

Right as against subsequent grantee. The weight of authority is that the grantee may urge the estoppel against a bona fide purchaser of the grantor's after-acquired title, even under the recording acts;[25] it has been said that however much this doctrine may be at variance with the spirit of the recording acts it does not violate the letter thereof.[26] Some authorities limit this rule to such after-acquired title as had its origin prior to the instrument creating the estoppel.[27]

On the other hand, there is a view that the grantee cannot urge the estoppel against a bona fide purchaser of the after-acquired title where the deed to the grantee was made at a time when the grantor had no estate in the land.[28]

Subsequent judgment creditors. If between the date of the conveyance and the acquisition of the perfect title a judgment is rendered against the grantor, the title of the grantee is prior to the lien of the judgment.[29]

19. Kan.—Schultz v. Cities Service Oil Co., 86 P.2d 533, 535, 149 Kan. 148, citing **Corpus Juris.**
21 C.J. p 1086 notes 76, 77.

20. Va.—Burtners v. Keran, 24 Gratt. 42, 66, 65 Va. 42, 66.
21 C.J. p 1086 notes 78, 79.

21. U.S.—Scott v. Cohen, C.C.A.Tex., 115 F.2d 704, affirming, D.C., Cone v. Parish, 32 F.Supp. 412, and certiorari denied Scott v. Cohen, 61 S.Ct. 806—Texas Co. v. McMillan, D.C.Tex., 13 F.Supp. 407.
Ill.—Weegens v. Karels, 29 N.E.2d 248, 374 Ill. 273.
Ky.—Crider v. Kentenia-Catron Corporation, 283 S.W. 117, 214 Ky. 353.
La.—St. Landry Oil & Gas Co. v. Neal, 118 So. 24, 166 La. 799.
Mo.—Sorrell v. Bradshaw, 222 S.W. 1024.
N.J.—Armour Realty Co. v. Carboy, 11 A.2d 243, 124 N.J.Law 205.
Tex.—Caswell v. Llano Oil Co., 36 S.W.2d 208, 120 Tex. 139—Robinson v. Jacobs, 254 S.W. 309, 113 Tex. 231, affirming, Civ.App., Jacobs v. Robinson, 241 S.W. 241—Clarke v. Gauntt, Civ.App., 149 S.W.2d 193, error granted—Farmers Royalty Holding Co. v. Cherry, Civ.App., 142 S.W.2d 255, error granted—Jackson v. Jackson, Civ.App., 114 S.W.2d 644, error dismissed—Edwards v. Riverside Royalties Corporation, Civ.App., 99 S.W.2d 418, error dismissed—Wilson v. Beck, Civ.App., 286 S.W. 315—Texas Pacific Coal & Oil Co. v. Fox, Civ.App., 228 S.W. 1021.
21 C.J. p 1087 note 80.

22. Mich.—Donohue v. Vosper, 155 N.W. 407, 189 Mich. 78.

23. La.—St. Landry Oil & Gas Co. v. Neal, 118 So. 24, 166 La. 799.
21 C.J. p 1087 note 83.

Acquisition of title by grantor before eviction

Only nominal damages, if any, may be recovered for breach of the covenants where the grantor acquired title before the grantee was evicted or suffered any actual injury from the breach of covenants.—King v. Gilson, 32 Ill. 348, 83 Am.D. 269—21 C.J. p 1087 note 84, p 1088 note 85.

24. La.—St. Landry Oil & Gas Co. v. Neal, 118 So. 24, 166 La. 799.

25. U.S.—Scott v. Cohen, C.C.A.Tex., 115 F.2d 704, affirming, D.C., Cone v. Parish, 32 F.Supp. 412, and certiorari denied Scott v. Cohen, 61 S.Ct. 806.
Ga.—Todd v. Williford, 150 S.E. 912, 169 Ga. 543.
Ky.—Piney Oil & Gas Co. v. Scott, 79 S.W.2d 394, 258 Ky. 51.
Tex.—Caswell v. Llano Oil Co., 36 S.W.2d 208, 120 Tex. 139.
Va.—Rose v. Agee, 104 S.E. 827, 128 Va. 502.
21 C.J. p 1088 note 86.
Persons bound by estoppel by deed generally see infra §§ 46–54.

Notice to purchaser

(1) A subsequent purchaser with notice of grantor's prior deed is estopped to claim title.—Rose v. Agee, 104 S.E. 827, 128 Va. 502—21 C.J. p 1088 note 86 [b].

(2) Recording the deed is regarded as notice to the subsequent grantee.—Maxwell v. Carlon, 86 P.2d 666, 30 Cal.App.2d 356.

Purchase for value

The purchaser is estopped also if he does not show that he bought for value.
Tex.—Lindsay v. Freeman, 18 S.W. 727, 83 Tex. 259.
Wash.—Mann v. Young, 1 Wash.T. 454.

26. R.I.—McCusker v. McEvey, 9 R.I. 528, 11 Am.R. 295.

27. Tex.—Caswell v. Llano Oil Co., 36 S.W.2d 208, 120 Tex. 139—Williams v. Cook, Com.App., 282 S.W. 574—Farmers Royalty Holding Co. v. Cherry, Civ.App., 142 S.W.2d 255, error granted.

28. N.J.—Wack v. Collingswood Extension Realty Co., 168 A. 639, 114 N.J.Eq. 253.
N.C.—Federal Land Bank of Columbia v. Johnson, 170 S.E. 658, 205 N.C. 180—Builders' Sash & Door Co. v. Joyner, 109 S.E. 259, 182 N.C. 518.
21 C.J. p 1088 notes 88, 89.

29. Ark.—Ellsworth v. Ellsworth, 82 S.W.2d 531, 533, 190 Ark. 982, citing **Corpus Juris.**
21 C.J. p 1077 note 89.

D. ESTOPPEL TO DENY TRUTH OF RECITALS

§ 36. In General

Ordinarily the parties to an instrument are estopped to deny recitals therein intended as admissions of fact.

As a general rule the parties to an instrument are estopped to deny recitals therein intended by them as admissions of fact.[30]

§ 37. In Deeds

a. In general
b. General and particular recitals
c. Materiality
d. Extent of estoppel

a. In General

As a general rule all parties to a deed, and those claiming through them, are bound by the recitals in it legitimately appertaining to its subject matter.

As a general rule, all parties to a deed, and those claiming through them, are bound by the recitals in it legitimately appertaining to the subject matter of it.[31]

Recitals of matter of fact in a deed are ordinarily binding on the grantor;[32] and, in addition, they are binding on the grantee and his successors in estate

30. N.C.—Meyer v. Reaves, 186 S.E. 561, 193 N.C. 172.

Estoppel against county by recitals in particular instruments:
Bills and notes, see Counties § 257.
Bonds, see Counties § 270.
Warrants, see Counties § 249.

Estoppel against municipality by recitals in bonds see the C.J.S. title Municipal Corporations § 1968, also 44 C.J. p 1248 note 61-p 1254 note 35.

Estoppel against school district by recitals in bonds see the C.J.S. title Schools and School Districts § 372, also 56 C.J. p 629 note 24-p 630 note 27.

Estoppel by recitals in simple contracts see infra § 58.

Reason for rule

The legal rule which makes the statements of a sealed instrument incontestible by the party to it grows out of the circumstance that such statements are the deliberate utterances of such party.—Singer Mfg. Co. v. Elizabeth, 42 N.J.Law 249.

Recitals in lease

Where lessee of fleet of towboats, barges, and other appliances by terms of lease acknowledged title to be in the government, he was estopped from contending to the contrary.—Weeks v. Goltra, C.C.A.Mo., 7 F.2d 838, certiorari granted Goltra v. Weeks, 46 S.Ct. 102, 269 U.S. 545, 70 L.Ed. 404, affirmed 46 S.Ct. 613, 271 U.S. 536, 70 L.Ed. 1074.

Recitals held not to create estoppel:

(1) In favor of a party who had totally ignored the instrument containing the recitals.—Clark v. Reynolds, 100 S.E. 468, 125 Va. 626.

(2) To show true nature of instrument.—McLeod Nash Motors v. Commercial Credit Trust, 246 N.W. 17, 187 Minn. 452, 87 A.L.R. 296.

31. Ark.—Henry v. Texas Co., 147 S.W.2d 742.

Ga.—Mitchell v. Hunt, 196 S.E. 711, 185 Ga. 835—Doe v. Newton, 156 S.E. 25, 171 Ga. 418—Wyley Loose Leaf Co. v. Bird, 135 S.E. 496, 159 Ga. 246.

Ky.—Wabash Drilling Co. v. Ellis, 20 S.W.2d 1002, 230 Ky. 769—Virginia Iron, Coal & Coke Co. v. Combs, 216 S.W. 346, 186 Ky. 261.

La.—Gaines v. Crichton, 174 So. 666, 187 La. 345—Lewis v. King, 103 So. 19, 157 La. 718—Sandifer v. Sandifer's Heirs, App., 195 So. 118.

N.Y.—In re Marsh, 272 N.Y.S. 807, 152 Misc. 454.

N.C.—In re Freeman's Heirs at Law, 128 S.E. 404, 189 N.C. 790.

Or.—Lange v. Allen, 251 P. 715, 120 Or. 96.

Tex.—Henderson v. Book, Civ.App., 128 S.W.2d 117, error refused—Snyder v. Magnolia Petroleum Co., Civ.App., 107 S.W.2d 603, error dismissed—Halsey v. Humble Oil & Refining Co., Civ.App., 66 S.W.2d 1082, error dismissed—Havard v. Smith, Civ.App., 13 S.W.2d 743—Ludtke v. Houston Lumber & Building Co., Civ.App., 5 S.W.2d 802, error refused—Surtees v. Hobson, Civ.App., 4 S.W.2d 245, affirmed, Com.App., 13 S.W.2d 345—Wilson v. Beck, Civ.App., 286 S.W. 315—Royall v. Webster, Civ.App., 279 S.W. 895, 896, citing Corpus Juris.

21 C.J. p 1088 note 91—47 C.J. p 278 note 21, p 279 note 22.

Fixation of facts

When the recital shows that the object of the parties to the deed was to make the matter recited a fixed fact, such recital binds all the parties, and as to them and their privies the matter recited becomes a fixed fact.—Williams v. Johns-Carroll Lumber Co., 192 So. 278, 238 Ala. 536—Youngerman-Reynolds Hardwood Co. v. Hicks, 181 So. 111, 236 Ala. 138—Pendrey v. Godwin, 66 So. 43, 188 Ala. 565.

Reliance on representations

(1) In order to invoke the estoppel, it has been held that one claiming the benefit thereof must show that he was misled to his injury by reason of his reliance on the recitals in the deed and that he had no notice of facts contrary to those recited.—Kuykendall v. Spiller, Tex.Civ.App., 299 S.W. 522.

(2) A recital in a deed is not necessarily binding on the grantor where it is inserted without his knowledge and no one is misled thereby.—Cartwright v. Jones, 1 S.E.2d 559, 215 N.C. 108.

32. Idaho.—Allen v. Laudahn, 81 P. 2d 734, 59 Idaho 207.

Ill.—Vallette v. Bennett, 69 Ill. 632.

Ky.—Fordson Coal Co. v. Potter's Ex'rs, 35 S.W.2d 298, 237 Ky. 311.

Mich.—Greenberg v. Mosley's Estate, 279 N.W. 904, 284 Mich. 683.

Mo.—White v. Hughes, App., 88 S.W.2d 268.

Tenn.—Cooper v. Cooper, 124 S.W.2d 264, 22 Tenn.App. 473.

Tex.—Wilson v. Alexander, Civ.App., 50 S.W.2d 440, 441, citing Corpus Juris.

21 C.J. p 1089 note 92.

Recital as to payment of purchase money

Under a statute defining estoppels, recitals in deeds, except payment of purchase money, generally work an estoppel as against the grantor and his privies.—Sikes v. Sikes, 133 S.E. 239, 162 Ga. 302—Gammage v. Perry, 116 S.E. 126, 29 Ga.App. 427.

Recital as to obligation of grantees

Where deed to two life tenants recited that both grantees were to keep buildings insured and in repair, and one of grantees reconveyed interest to grantors, grantors were estopped from denying, as against remaining grantee, that both grantees were to carry out obligations assumed in deed.—Sanderson v. Sanderson, 171 S.E. 60, 205 N.C. 260.

if they claim under the deed,[33] but not otherwise.[34] Such recitals do not bind mere strangers or those who claim by title paramount to the reciting deed.[35]

Intent of parties. The estoppel is limited by the intention of the parties and whether one party or the other or both are estopped by a recital depends on their intent as manifested by the deed.[36]

Consideration of entire instrument. In determining the effect of recitals, the entire instrument must be considered, and a recital will not work an estoppel if it is shown to be untrue by taking into consideration other parts of the instrument.[37]

b. General and Particular Recitals

To found an estoppel the recital must be certain, and accordingly only particular recitals will work an estoppel.

To found an estoppel the recital must be certain.[38] With this idea in mind, recitals have been classified as being either general or particular; general recitals are such as do not definitely affirm or deny the existence of some fact, or either expressly or impliedly show a clear intention of the parties that either one or the other or both of them shall be concluded from disputing the fact recited, and such recitals do not work an estoppel as to the fact in question.[39]

Particular recitals, on the other hand, are such as definitely affirm or deny the existence of some fact and either expressly or impliedly show a clear intention of the parties that either one or the other or both shall be precluded from asserting anything to the contrary; these recitals are binding.[40]

c. Materiality

Recitals in a deed are estoppels only when they are of the essence of the contract.

Recitals in a deed are estoppels when they are the

33. Ga.—Doe v. Newton, 156 S.E. 25, 171 Ga. 418.
Ky.—Virginia Iron, Coal & Coke Co. v. Combs, 216 S.W. 846, 186 Ky. 261.
Mass.—Walker v. E. William & Merrill C. Nutting, 20 N.E.2d 441, 302 Mass. 535.
Tex.—Greene v. White, 153 S.W.2d 575, reversing White v. Greene, Civ. App., 129 S.W.2d 801.
Vt.—Holton v. Hassam, 111 A. 389, 94 Vt. 324.
21 C.J. p 1089 note 93.

Reason for rule
The doctrine that one asserting title under a conveyance is estopped to deny the truth of its recitals is based on the common-sense rule that he is not at liberty to claim under it and deny it at the same time.—Ramsey v. Kitchen, Ga., 15 S.E.2d 877.

Party is estopped to dispute title which is recognized in a deed under which he claims.—Pendergrass v. Swiss Oil Corporation, 290 S.W. 713, 217 Ky. 789.
21 C.J. p 1089 note 93 [c].

Deed recognizing certain land as public
Owner of land, whose title papers refer to and recognize certain land as a public road, in suit between himself and county court involving existence of such highway, is estopped to deny public character of such land.—Monroe County Court v. Hamlett, 133 S.E. 363, 101 W.Va. 673.

Matters appearing in chain of title
Grantee by accepting deed is bound by provisions thereof and of all matters appearing in his chain of title.—Dodge & Bliss Co. v. Jersey City, 144 A. 14, 103 N.J.Eq. 552, reversed on other grounds 148 A. 783, 105 N.J. Eq. 545.

Deed from life tenant to remainderman
Acceptance by remainderman of fee-simple deed from life tenant conveying property in trust with provision that remainderman might acquire ownership, constitutes an element of estoppel against subsequent claim as remainderman.—Boyle v. Maryland State Fair, 134 A. 124, 150 Md. 333.

34. Ind.—Donner v. Griffith, 122 N.E. 23, 71 Ind.App. 693.
21 C.J. p 1089 note 93.

35. Ga.—Campbell v. Sims, 131 S.E. 483, 161 Ga. 517.
La.—Johnston v. Cole, 113 So. 135, 163 La. 885.
21 C.J. p 1090 note 95.
Persons against whom estoppel arises see infra §§ 46–54.

Recitals as evidence
Where a stranger to a deed relies on admissions of the grantor recited therein, such recitals are only evidence, and no estoppel in his favor, and hence he is not precluded from denying other recitals in the instrument that operate against him.—Stoever v. Whitman, 6 Binn., Pa. 416.

36. La.—Laurent v. Laurent, 84 So. 212, 146 La. 939.
N.C.—In re Freeman's Heirs at Law, 128 S.E. 404, 189 N.C. 790.
Okl.—Schuman v. Campbell, 83 P.2d 549, 183 Okl. 553.
21 C.J. p 1090 note 96.

Deed recital that grantee should help grantor during grantor's life did not estop grantee from claiming compensation for services.—Moody v. Keith, 155 S.E. 916, 109 W.Va. 645.

37. Tex.—Atkins v. Schmid, Civ. App., 129 S.W.2d 412.
21 C.J. p 1091 note 7.

38. Ga.—Doe v. Newton, 156 S.E. 25, 171 Ga. 418.
Md.—Mullan v. Hochman, 145 A. 554, 157 Md. 213.
Miss.—Mixon v. Green, 193 So. 8, 9, 187 Miss. 343, citing **Corpus Juris.**
Okl.—Schuman v. Campbell, 83 P.2d 549, 551, 183 Okl. 553, quoting **Corpus Juris.**
21 C.J. p 1090 note 98.

Rule otherwise stated
"To work an estoppel, a recital must clearly, with particularity, beyond doubt and without ambiguity, affirm or deny some present or past fact or admit some liability definitely stated. It must be certain to every intent and cannot be taken by argument or inference."—City of Chicago v. Joseph, C.C.A.Ill., 95 F.2d 444, 446, certiorari denied 58 S.Ct. 1049, 304 U.S. 578, 82 L.Ed. 1542.

39. U.S.—City of Chicago v. Joseph, C.C.A.Ill., 95 F.2d 444, 447, certiorari denied 58 S.Ct. 1049, 304 U.S. 578, 82 L.Ed. 1542, citing **Corpus Juris.**
Fla.—Haines City Citrus Growers' Ass'n v. Petteway, 145 So. 183, 107 Fla. 344.
Ind.—Cleveland, C., C. & St. L. Ry. Co. v. Beck, 139 N.E. 705, 84 Ind. App. 380.
N.Y.—Mayo v. New York Cent. R. Co., 189 N.E. 217, 263 N.Y. 277, reversing in part and affirming in part 261 N.Y.S. 378, 237 App.Div. 280, and reargument denied 191 N.E. 514, 264 N.Y. 460.
Okl.—Thompson v. Taylor, 100 P.2d 860—Schuman v. Campbell, 83 P.2d 549, 183 Okl. 553.
21 C.J. p 1090 note 1.

40. U.S.—City of Chicago v. Joseph, C.C.A.Ill., 95 F.2d 444, certiorari denied 58 S.Ct. 1049, 304 U.S. 578, 82 L.Ed. 1542.
21 C.J. p 1090 note 3, p 1091 note 4.

essence of the contract, that is, where, unless the facts recited exist, the contract, it is presumed, would not have been made.[41] The doctrine of estoppel does not extend to mere descriptive matter or statements or recitals which are immaterial and not contractual or essential to the purposes of the instrument.[42]

d. Extent of Estoppel

A recital will not operate as an estoppel to deny a fact not necessarily inconsistent therewith, and it does not work an estoppel in a collateral action.

A recital will not operate as an estoppel to deny a fact not necessarily inconsistent with the recital,[43] and, consequently, it may be an estoppel for some purposes and not for others.[44]

A recital may be limited in its operation to the land conveyed.[45]

In collateral actions. A recital works an estoppel only in an action founded on the deed or brought to enforce rights arising under it; and while in a collateral action it may constitute evidence against the one party or the other, it is not conclusive.[46]

§ 38. Recital of Particular Facts

a. In general
b. Title
c. Power to convey
d. Consideration
e. Description
f. Exceptions or reservations

a. In General

The rule estopping parties to a deed from denying the material recitals therein has been applied to various recitals of particular facts.

The general rule stated in § 37 a supra that all parties to a deed and their privies are estopped to deny the material recitals contained in the instrument has been applied to various recitals of particular facts,[47] such as to the grantor's status,[48] the nature and identity of the grantee,[49] the quality[50] and extent[51] of the estate conveyed, the date of the instrument,[52] the existence of prior agree-

41. Ky.—Fordson Coal Co. v. Potter's Ex'rs, 35 S.W.2d 298, 300, 237 Ky. 311, quoting Corpus Juris.
N.C.—North Carolina Joint Stock Land Bank of Durham v. Moss, 2 S.E.2d 378, 215 N.C. 445—In re Freeman's Heirs at Law, 128 S.E. 404, 189 N.C. 790.
21 C.J. p 1091 note 5.

42. Ky.—Fordson Coal Co. v. Potter's Ex'rs, 35 S.W.2d 298, 237 Ky. 311.
S.C.—Rogers v. Rogers, 11 S.E.2d 521, 195 S.C. 381.
Tex.—Turner v. Germany, Civ.App., 94 S.W.2d 1177, reversed on other grounds Germany v. Turner, 123 S.W.2d 874, 132 Tex. 491.
21 C.J. p 1091 note 6.

Recital as to origin of title
A recital in a deed that the grantor granted title inherited from her daughter, when in fact her title rested on adverse possession, is not an estoppel of those claiming under such deed to assert that the title conveyed was by adverse possession.—Harris v. Mayfield, Civ.App., 244 S.W. 857, reversed on other grounds, Com.App., 260 S.W. 835.

43. U.S.—City of Chicago v. Joseph, C.C.A.Ill., 95 F.2d 444, 447, certiorari denied 58 S.Ct. 1049, 304 U.S. 578, 82 L.Ed. 1542, citing Corpus Juris.
21 C.J. p 1091 note 12.
Extent of estoppel generally see infra § 45.

Extension beyond specific facts
A recital will not be extended beyond the specific facts contained therein.—Doe v. Newton, 156 S.E. 25, 171 Ga. 418.

44. La.—Barnes v. Thompson, 98 So. 657, 154 La. 1036.
21 C.J. p 1091 note 13.

45. **Recitals as denying recovery of other land**
The principle of estoppel by recitations in deeds does not operate so as to deny the recovery of land lying outside of the boundaries of the land conveyed by the deed in which the recitals occur. Snyder v. Magnolia Petroleum Co., Tex.Civ.App., 107 S.W.2d 603, error dismissed.

46. N.D.—Farmers' State Bank of Knox v. Bowles, 203 N.W. 903, 52 N.D. 553, 40 A.L.R. 377.
Or.—Strong & MacNaughton Trust Co. v. Bodley, 15 P.2d 470, 471, 141 Or. 36, citing Corpus Juris.
Tex.—Moseley v. Fikes, Civ.App., 126 S.W.2d 589, error granted—Robert Oil Corporation v. Jones, Civ.App., 23 S.W.2d 472, error dismissed.
21 C.J. p 1091 note 15.

47. Tex.—Holland v. Blanchard, Civ.App., 262 S.W. 97.

48. **Recitals of heirship**
(1) Recital in deed that former owner died intestate leaving him surviving no other heir than grantor would be binding on parties to deed on theory of estoppel.—In re Marsh, 272 N.Y.S. 807, 152 Misc. 454.
(2) Where heirs did not merely transfer their right to accept the successions of their ancestors as irregular heirs, but transferred their interest in land by warranty deeds, the deeds amounted in effect to a warranty that they were legal heirs.—Jackson v. United Gas Public Service Co., 198 So. 633, 196 La. 1.

49. **Description of grantee**
Parties claiming under deed are bound by its recitals as to name and residence of grantee.—Holland v. Blanchard, Tex.Civ.App., 262 S.W. 97.

50. **Estate in fee simple**
The grantor of an estate in fee simple may thereafter be estopped from denying that he conveyed such an estate, on the principle that, when one has by his deed affirmed or covenanted, or by his act admitted, that a fact is true, he cannot thereafter deny or contradict it.—Weaver v. Drake, 198 P. 45, 79 Okl. 277.

51. **Conveyance of entire interest**
A mortgagee, executing and delivering foreclosure deed to one of two mortgagors for entire interest in mortgaged realty, is estopped to assert title to one-third undivided interest, conveyed to mortgagee by such mortgagor on date of execution of mortgage.—North Carolina Joint Stock Land Bank of Durham v. Moss, 2 S.E.2d 378, 215 N.C. 445.

52. **Materiality of recital**
(1) Where the date of an instrument is immaterial, as is frequently the case, a party is not concluded by his signature to show that the date thereof is not the true one.—Jackson v. Bard, 4 Johns., N.Y., 230, 4 Am.D. 267—21 C.J. p 1094 note 38.
(2) On the other hand, if the date is material and injustice would result from a denial of the date as recited in the instrument, the party will be estopped to deny the date.—White v. Hughes, Mo.App., 88 S.W.2d 268.
21 C.J. p 1094 note 39.

ments,[53] and to other matters considered in the succeeding subdivisions of this section.

b. Title

(1) In general

(2) References to prior instruments in general

(3) Recital making deed subject to outstanding interest

(1) In General

The grantor and grantee may be estopped to deny recitals as to title contained in the deed.

As a general rule, a grantor is estopped to deny recitals as to title contained in his deed.[54] Accordingly, a grantor cannot, as against his grantee, set up a title in a third person contrary to a recital in his own deed.[55]

The grantee may be estopped by a recital of the grantor's title,[56] provided he claims under the deed and not by title paramount.[57] Indeed, it has been stated that a recital declaring the reversion to be in the grantor will estop the grantee from setting up a paramount title.[58]

(2) References to Prior Instruments in General

A deed referring to a will or conveyance as the source of title will estop one claiming thereunder from denying the validity of the will or conveyance; and a recital of one deed in another binds the parties and their privies by matters subsequent.

A deed which refers to a will or conveyance as the source of title will estop one claiming thereunder from denying the genuineness and validity of the will or conveyance.[59]

As a general rule, a recital of one deed in another binds the parties and those who claim under them[60] by matters subsequent.[61] Such a recital may take the place of a deed and thus form a muniment of the title.[62]

(3) Recital Making Deed Subject to Outstanding Interest

A grantee is estopped to deny the validity of any outstanding interest to which his deed recites that the conveyance is subject.

As a general rule, a grantee is estopped to deny the validity of any outstanding interest, to which his deed recites that the conveyance to him is subject.[63] Thus where the deed so recites, the grantee is estopped to deny the validity of an easement,[64] lease,[65] or lien.[66]

53. Estoppel to deny existence of agreement

A recital in a deed that a certain agreement had been previously made between the parties is equivalent to making the agreement anew and will estop the parties from saying that there was no agreement.—Ball v. Hancock, 82 Ky. 107—21 C.J. p 1095 note 53.

54. Ky.—Walton's Adm'r v. Rogers, 221 S.W. 876, 188 Ky. 353.
Tex.—Mid-Texas Petroleum Co. v. Colcord, Civ.App., 235 S.W. 710.

Quantity of grantor's estate

Recitations in deed to cotenant's widow as to grantor's estate being undivided one-half interest estopped grantor from afterward asserting title to whole.—Redmond v. Gillis, 178 N.E. 504, 346 Ill. 223.

Disclaiming title

Where grantors' deed recited grantors made deed to grantee to whom land justly belonged because grantors never had interest therein, such deed, coupled with grantors' acceptance back of deed, granting life estate, estopped them or any one claiming through them from claiming title.—Cooper v. Cooper, 279 S.W. 615, 212 Ky. 454.

55. Ark.—Henry v. Texas Co., 147 S.W.2d 742.
Tenn.—Tennessee Barium Corporation v. Williams, 133 S.W.2d 1015, 23 Tenn.App. 398.
21 C.J. p 1092 note 16.

56. Del.—Simmons v. Hendrickson, 3 Del. 103.
21 C.J. p 1092 note 17.

Grantee in deed of partition

Del.—Simmons v. Hendrickson, supra—Simmons v. Logan, 1 Del. 110.
21 C.J. p 1092 note 17 [a].

57. Mo.—Joeckel v. Easton, 11 Mo. 118, 47 Am.D. 142.
Pa.—Poyntell v. Spencer, 6 Pa. 254.

58. U.S.—Robertson v. Pickrell, D. C., 3 S.Ct. 407, 109 U.S. 608, 27 L.Ed. 1049.

59. Ga.—McCleskey v. Leadbetter, 1 Ga. 551.
21 C.J. p 1092 note 20.

Estoppel of grantor

Grantor, having set out in deed that its title was acquired from certain person by certain act of sale, cannot subsequently urge that such person had no title to convey.—Reliance Homestead Ass'n v. Brink, 137 So. 52, 173 La. 331.

60. Ky.—Virginia Iron, Coal & Coke Co. v. Combs, 216 S.W. 846, 186 Ky. 261.
Tex.—Greene v. White, 153 S.W.2d 575, reversing White v. Greene, Civ.App., 129 S.W.2d 801—Pinchback v. Hockless, Civ.App., 137 S.W.2d 864, error dismissed, judgment correct.
21 C.J. p 1092 note 21.

Mere reference to instrument has been held not to preclude a party to the deed from disputing the existence of the writing referred to.—Parker v. Parker, 17 Mass. 370.

61. Tex.—Simonds v. Stanolind Oil & Gas Co., 114 S.W.2d 226, 134 Tex. 332, reversing, Civ.App., 103 S.W.2d 784, rehearing denied 136 S.W.2d 207, 134 Tex. 332.
21 C.J. p 1092 note 21.

62. Tex.—Greene v. White, 153 S.W.2d 575, reversing White v. Greene, Civ.App., 129 S.W.2d 801—Pinchback v. Hockless, Civ.App., 137 S.W.2d 864, error dismissed, judgment correct.
21 C.J. p 1092 notes 20 [a], 21.

63. U.S.—Carter Oil Co. v. Delworth, C.C.A.Ill., 120 F.2d 589.

64. N.C.—Meyer v. Reaves, 136 S.E. 561, 193 N.C. 172.

65. Ill.—Luly Stores Co. v. Hartman, 235 Ill.App. 319.
Okl.—Schuman v. Campbell, 83 P.2d 549, 183 Okl. 553.

Where deed did not convey land subject to lease, or in terms create any rights in favor of lessee, but merely recited, as an exception to the operation of a covenant in the deed, that the premises were free from encumbrances, except the lease, etc., grantee was not estopped as against lessee from claiming that she was not bound by the lease.—Hixon v. Starr, 136 N.E. 186, 242 Mass. 371.

66. U.S.—Mathis v. Hemingway, C.C.A.Ark., 24 F.2d 951.

However, the acceptance of a deed, which merely recites that it is subject to any rights which may have been acquired by a third person does not admit that any rights have been acquired by such person.[67]

c. Power to Convey

One executing a conveyance reciting that he is empowered to convey is estopped to deny such recital, but a principal is not estopped to deny the authority of an agent as recited in the deed.

One who executes a conveyance of land which recites that he is empowered to convey is estopped to deny such recital[68] as effectually as if it had been an express covenant.[69]

On the other hand, where one executes a deed for another as attorney in fact, the person for whom he assumes to act is not estopped to deny his authority as recited in the deed.[70] Claimants under a deed executed under a power of attorney are not estopped by the recitals of the power of attorney to show a title in the attorney different from that which the power represents him to have.[71]

d. Consideration

A recital of consideration in a deed is conclusive for some, but not for all, purposes.

According to a few early cases the recital of consideration in a deed is conclusive.[72] The true rule, however, would appear to be that the recital is binding for the purpose of giving effect to the operative words of the deed, and that the grantor may not question the reality or adequacy of the consideration for the purpose of defeating the conveyance;[73] but that for any other purpose it may be shown that the consideration was not paid in whole or in part, or that it was not paid as expressed in the deed but in some other manner.[74]

e. Description

Recitals simply by way of description of the land intended to be conveyed operate as admissions as to the identity of the land, but do not raise an estoppel as to the title.

Recitals simply by way of description of the land intended to be conveyed, while admissions as to the identity of the land,[75] do not raise an estoppel as to the title thereto.[76]

Tex.—Belote v. Enochs, Civ.App., 131 S.W.2d 691, error granted.

Estoppel of grantee accepting deed subject to mortgage see the C.J.S. title Mortgages § 424, also 41 C.J. p 757 note 97–p 758 note 6.

67. Mass.—Inhabitants of Town of Holliston v. Holliston Water Co., 27 N.E.2d 194.

Conveyance subject to option holder's rights

Where realty was conveyed to defendant subject "to such rights as the person holding the option may have," defendant could inquire into the validity of, or consideration for, plaintiff's option to buy to establish, if it could, that plaintiff had acquired no rights thereunder.—Mandel v. National Ass'n Bldg. Corporation, 187 N.Y.S. 4, 195 App.Div. 576.

Deed "subject to all liens and taxes thereon"

Acceptance of a deed which merely recites that it is "subject nevertheless to all liens of mortgages and taxes thereon" does not admit that there were any such liens.—Purdy v. Coar, 17 N.E. 352, 109 N.Y. 448, 453, 4 Am.S.R. 491—21 C.J. p 1092 note 26.

68. Tex.—Corzine v. Williams, 22 S.W. 399, 85 Tex. 499.
21 C.J. p 1093 note 29.

Recital of compliance with terms of power of sale

It has been held that recitals in a deed made in the execution of a power of sale that it is made in pursuance of the sale under such power of attorney and that all the terms of the power have been complied with, such as advertisement, public sale, etc., does not estop the maker and those claiming under him from showing the contrary.—Pennington v. Palmer, 176 S.E. 697, 49 Ga.App. 540, conforming to Palmer v. Pennington, 175 S.E. 380, 179 Ga. 76.

69. S.C.—Stoney v. Shultz, 10 S.C. Eq. 465, 27 Am.D. 429.

70. N.J.—Earle v. Earle, 20 N.J.Law 347.

71. Ky.—Poage v. Chinn, 4 Dana 50.

72. N.C.—Spiers v. Clay, 11 N.C. 22.
21 C.J. p 1093 note 34.

73. Fla.—Maxwell v. Sullivan, 166 So. 575, 123 Fla. 263.
Mo.—Johnston v. Bank of Poplar Bluff, 294 S.W. 111, 221 Mo.App. 127.
Tex.—Fillmon v. Graves, Civ.App., 134 S.W.2d 436.
Wash.—Gardner v. Herbert, 5 P.2d 782, 165 Wash. 429.
21 C.J. p 1093 note 35.

74. La.—McConnell v. Harris Chevrolet Co., 147 So. 827, 829, quoting the entire section from Corpus Juris.
21 C.J. p 1093 note 36.

Recital as mere receipt

"A receipt is always open to explanation, and this acknowledgment, although under seal, is nothing more than a receipt, for the seal gives it no additional solemnity."—Wilkinson v. Scott, 17 Miss. 249, 256.

Showing true consideration

A recital in a conveyance of a consideration of less than one hundred dollars, allegedly made for the purpose of avoiding payment of the federal stamp tax, does not estop the parties to the conveyance from proving the true consideration which was much larger than that recited.—Home Financiers' Building & Loan Ass'n v. Michael, 177 A. 503, 117 Pa.Super. 391.

Deed as gift

Or.L. § 798, providing that there shall be a conclusive presumption of the truth of facts recited in a written instrument as between the parties thereto, but that the statute shall not apply to recitals of consideration does not preclude a grantee from showing that the deed, although reciting a consideration of two thousand dollars, was in fact a voluntary deed intended as a gift or advancement.—Fletcher v. Yates, 211 P. 179, 105 Or. 630.

75. Okl.—Rochelle v. Anderson, 243 P. 528, 113 Okl. 137.
Pa.—Golden v. Ross, 186 A. 249, 122 Pa.Super. 234.
21 C.J. p 1094 note 41.

One who conveys land by certain metes and bounds is estopped to say against his deed that the land conveyed is not the land specifically defined by those metes and bounds.—Marshall v. Jameson, 134 S.E. 573, 145 Va. 605.

76. Ill.—Blair v. Carr, 44 N.E. 720, 162 Ill. 362.
21 C.J. p 1094 note 43.

Title of adjacent owner

The mere mention of an adjoining tract of land, such as the H tract, in describing the location of the

A grantee is ordinarily bound by the description contained in his deed and is estopped to claim more land than is therein described.[77] However, to operate as an estoppel the description, according to the rule governing recitals generally, see § 37 b supra, must be definite and certain.[78]

Reference to map. A map referred to in a deed may serve as evidence of the location and surroundings of the property to be conveyed, without operating as an estoppel.[79] On the other hand, it may, when referred to in a deed as containing a correct description of property to be conveyed, become such a part of the deed as to estop the parties thereto from denying the correctness of such part of the contents of the map as is essential to the description of the property.[80]

f. Exceptions or Reservations

Ordinarily a grantee in a deed will be concluded by recitals therein making exceptions or reservations in favor of the grantor or a third person unless he claims the reserved interest under an independent title.

The grantee in a deed will be concluded by recitals therein limiting the quantity or extent of the interest conveyed and making reservations in favor of the grantor or third person.[81] However, the grantee will not be estopped by such reservation or exception from setting up his claim to the reserved interest under an independent title.[82]

land conveyed is not a recognition of title to the adjoining land in the person named.
N.H.—Great Falls Co. v. Worster, 15 N.H. 412.
Tex.—Halsey v. Humble Oil & Refining Co., Civ.App., 66 S.W.2d 1082, error dismissed.

77. Ky.—Hazard Coal Corporation v. Getaz, 29 S.W.2d 573, 234 Ky. 817.
21 C.J. p 1095 note 44.

78. Ga.—Hill v. Neely, 106 S.E. 729, 151 Ga. 276.
Iowa.—Kitteridge v. Ritter, 151 N.W. 1097, 172 Iowa 55.
Acreage as stated in patents and various deeds, being only an estimate, held not to estop owner from claiming greater acreage.—Board of Levee Com'rs of Orleans Levee Dist. v. Orangedale Colony Co., 113 So. 772, 164 La. 77.

79. U.S.—Beach Front Hotel Co. v. Sooy, N.J., 197 F. 881, 118 C.C.A. 579.
Mo.—Johnson v. Ferguson, 44 S.W.2d 650, 655, 329 Mo. 363, quoting **Corpus Juris.**

80. U.S.—Beach Front Hotel Co. v. Sooy, N.J., 197 F. 881, 118 C.C.A. 579.
21 C.J. p 1095 note 44 [a] (3).
Where owner of land platted lots with reference to a street as it actually existed, showing therein that the lots abutted on an existing street, he estopped himself from afterward asserting ownership to the strip between the street and lots to the detriment of the purchasers of the lots and their successors in title.—In re Phinney Ave. in City of Seattle, 194 P. 977, 114 Wash. 262.

81. Kan.—Brown v. Ulmer, 204 P. 1007, 110 Kan. 504.
N.Y.—Sherover Const. Corporation v. City of New York, 295 N.Y.S. 925, 162 Misc. 893.
Tex.—Greene v. White, 153 S.W.2d 575, 583, citing **Corpus Juris,** and reversing White v. Greene, Civ. App., 129 S.W.2d 801.
Va.—Johnson v. Powhatan Mining Co., 103 S.E. 703, 127 Va. 352.
21 C.J. p 1095 note 49.
However, it has been held that a grantee under a deed containing a reservation or exception in favor of a stranger to the conveyance is not estopped to deny its efficacy.—Beardslee v. New Berlin Light & Power Co., 100 N.E. 434, 207 N.Y. 34, Ann.Cas.1914B 1287—21 C.J. p 1095 note 52 [a].
Reservation of timber rights
(1) Under a statute providing that when a grantee accepts a deed and enters thereunder, he will be bound by the covenants contained therein, a grantee accepting a deed becomes bound by the recitals therein reserving the timber on all the lots conveyed.—Field v. Hargis, 151 S.E. 379, 169 Ga. 670.
(2) Where a father deeded lands to his children reserving the timber for himself, and the children accepted the deed, and divided the property executing mutual deeds to each other, one claiming through a child was estopped from claiming the timber because the acceptance by the child of the deed reserving the timber was an express recognition of the father's right to the timber.—Continental Realty Co. v. Bolen, 242 S.W. 6, 195 Ky. 219.
Reservation of condemnation award
Where grantee took deed subject to an exception of any awards that might be made to premises conveyed for widening of street and subsequently executed a conveyance of same property to another purchaser with clause expressly reserving to original grantor the amount of any future award, deed executed by grantee was indication of her knowledge of grantor's claim, and grantee was estopped from asserting to contrary, on property being reconveyed to her by deed which did not contain reservation of award to grantor.—Application of Mazzone, 22 N.E.2d 315, 281 N.Y. 129, 123 A.L.R. 1467, reversing 4 N.Y.S.2d 1, 254 App.Div. 104, motion granted 16 N.E.2d 853, 278 N.Y. 707, reargument denied Mazzone v. Hjorth, 22 N.E.2d 868, 281 N.Y. 671.
Reservation of easement
R.I.—Chenevert v. Larame, 108 A. 589, 42 R.I. 426.
Tex.—El Paso Land Improvement Co. v. Crawford, Com.App., 292 S.W. 518, reversing, Civ.App., 280 S.W. 914.
Absence of title in grantor
To make a reservation in favor of the grantor effective against the grantee, it is not necessary that good title to the land be shown in the grantor at the time the deed was executed.—Greene v. White, Tex., 153 S.W.2d 575, reversing White v. Greene, Com.App., 129 S.W.2d 801.
Persons ratifying deed
Recitals in deed reserving mineral rights in favor of grantor are binding on wife of grantee and her grantees where they ratified the deed containing the reservation.—Greene v. White, supra.

82. **Previously acquired title**
(1) A deed cannot by reservation alone estop the grantee from claiming any interest he already had in the land.—Eastern Gulf Oil Co. v. Lovelace, 221 S.W. 544, 188 Ky 238.
(2) The fact that mortgagees received from their mortgagor a warranty deed of a township, excepting therefrom a tract including the disputed land, does not estop the mortgagee from thereafter claiming the disputed land under the mortgage.—Webber v. Austin, 121 A. 673, 123 Me. 95.
Subsequently acquired title
The grantee will not be estopped from setting up title to the reserved interest afterward acquired through a source hostile to the title of the grantor.—Champlain & St. Lawrence R. Co. v. Valentine, 19 Barb., N.Y., 484—21 C.J. p 1095 note 50.
Title by prescription
Acceptance of deed reciting premises to be subjected to alleyway re-

The recitals of a deed, excepting out of the conveyance lands embraced therein, must, to work an estoppel, be as definite and descriptive as are required by law in a deed of conveyance, either by their presence in the deed relied on as an estoppel, or by reference to another in which they are sufficiently set out.[83]

§ 39. In Mortgages

As a general rule, the parties to a mortgage are estopped to deny the material recitals therein unless the mortgage presents a case for reformation.

Unless a mortgage presents a case for reformation,[84] as a general rule the parties thereto are estopped to deny the material recitals which the instrument contains,[85] such as recitals as to the consideration,[86] the indebtedness,[87] the existence,[88] description,[89] and nature[90] of the property mortgaged, the title[91] or interest and estate mortgaged,[92] the nature and identity of the mortgagor,[93] and prior encumbrances.[94]

However, as in the case of deeds, see § 37 supra, the rule does not extend to mere descriptive matter, statements, or recitals which are immaterial or merely evidentiary and not contradictory or essential to the purposes of the instrument.[95]

strictions does not preclude grantee from showing destruction of restrictions by prescription, including his own adverse user.—Robert v. O'Connell, 169 N.E. 487, 269 Mass. 532.

83. Minn.—Ambs v. Chicago, St. P., M. & O. R. Co., 46 N.W. 321, 44 Minn. 266.
21 C.J. p 1095 note 51.

84. Tenn.—Sawtelle v. Astor, 126 S.W.2d 367, 23 Tenn.App. 33.
Effect of fraud or mistake see infra § 43.

85. N.Y.—Goodman v. Rhoades, 203 N.Y.S. 548, 122 Misc. 567.
Tenn.—Sawtelle v. Astor, 126 S.W.2d 367, 23 Tenn.App. 33.
21 C.J. p 1095 note 55.

86. Ky.—Norris v. Norris, 9 Dana 317, 35 Am.D. 138.
21 C.J. p 1096 note 56.

87. Ill.—Brokaw v. Field, 33 Ill. App. 138, affirmed 37 N.E. 80, 148 Ill. 654.
Mortgagor held not estopped from claiming that there was no indebtedness due.—Ravesies v. Martin, Miss., 199 So. 282.

88. Chattels
(1) Where a mortgagor by his mortgage sets forth a certain stock of goods, locating them at a certain house, he is estopped in a suit to foreclose the mortgage from denying the truth of the same, or claiming that the mortgage is illegal because there were no such goods.—Marable v. Mayer, 78 Ga. 60.

(2) However, in an action by a chattel mortgagee against the mortgagor for conversion of the mortgaged property the mortgagor is not estopped by covenants of ownership and warranty in the mortgage from showing that the property in question never existed and could not have been converted.—Farmers' State Bank of Knox v. Bowles, 203 N.W. 903, 52 N.D. 553, 40 A.L.R. 377.

89. Those executing security trust deed are bound by the description of the property contained in the deed.—Sawtelle v. Astor, 126 S.W.2d 367, 23 Tenn.App. 33.

90. Ill.—Ballou v. Jones, 37 Ill. 95.
21 C.J. p 1096 note 59.

91. Tenn.—Sanders v. Daniel, 8 Tenn.App. 195.
21 C.J. p 1096 note 60.

Estoppel against mortgagor
Mortgagor is estopped to deny his title as recited in the mortgage.—Thomas v. Hudson, 10 S.E.2d 396, 190 Ga. 622—21 C.J. p 1096 note 60 [a].

Estoppel against mortgagee
(1) A recital in a chattel mortgage that party allegedly signing as surety was owner and mortgagor does not estop mortgagee to deny such party's title, where mortgagee relied solely on mortgagors' title.—Perkins v. First Nat. Bank, 56 P.2d 639, 47 Ariz. 376, certiorari denied Perkins v. Honorable Supreme Court of State of Arizona, 57 S.Ct. 20, 299 U.S. 540, 81 L.Ed. 397.

(2) Other cases see De Witt County School v. Wilson, 74 N.E. 375, 215 Ill. 352, 354—21 C.J. p 1096 note 60 [b].

92. Iowa.—Bisby v. Walker, 169 N.W. 467, 185 Iowa 743, modified on other grounds 171 N.W. 152, 185 Iowa 743.
21 C.J. p 1096 note 61.

93. Tex.—Willis v. Lockett, Civ. App., 26 S.W. 419.
21 C.J. p 1096 note 62.

Residence of mortgagor
Where a chattel mortgage recites that mortgagor resides in a certain parish, mortgagee is estopped to assert the contrary as against an innocent purchaser of the mortgaged property.—General Finance Co. of Louisiana v. Evans, La.App., 196 So. 581.

94. Estoppel against mortgagor
A mortgage covenant that the premises were unencumbered will not estop the mortgagor from asserting the existence of a prior mortgage where the mortgagee had actual knowledge of its existence when his mortgage was executed.—Danielson v. Tessum, 227 N.W. 852, 178 Minn. 514.

Estoppel against mortgagee
(1) Ordinarily, a mortgagee who accepts a mortgage which recites that it is subject to another mortgage on the same property is estopped thereby, and he may not defeat or impair such other mortgage by denying its priority or validity at the time he took it to the amount of it as recited in his own mortgage.—Moffatt v. Fouts, 160 P. 1137, 99 Kan. 118—21 C.J. p 1089 note 93 [d] (1), p 1096 note 63 [a].

(2) Accordingly, junior mortgagee, whose mortgage is made expressly subject to prior mortgages, is estopped from thereafter attacking such prior mortgages on the ground that they were given, without consideration, with the mutual intent to defraud creditors of mortgagor.—Nichols v. Jackson County Bank, 298 P. 908, 911, 136 Or. 302, citing Corpus Juris—21 C.J. p 1072 note 31.

(3) Such junior mortgagee is also estopped from asserting that prior mortgage was in effect an assignment for the benefit of creditors.—Smith-McCord Dry Goods Co. v John B. Farwell Co., 50 P. 149, 6 Okl. 318.

(4) Where a second security deed recited existence of original security deed and lien, grantee in second deed could not obtain reformation of original deed on denying truth of recital by showing that it was not intended that disputed land should be covered by original deed.—Rawson v. Brosnan, 1 S.E.2d 423, 187 Ga. 624.

(5) Mortgagee who accepts a mortgage which recites that it is subject to another mortgage on the same property given to a foreign corporation, however, is not estopped thereby from showing that the foreign corporation's mortgage is void because made while the corporation was doing business in the state without having complied with certain statutory conditions, since otherwise the purpose of the statute would be defeated.—Dunn v. Utah Serum Co., 238 P. 245, 65 Utah 527.

95. Colo.—International Trust Co. v.

§ 40. In Bonds

a. In general
b. Circumstances under which estoppel not operative

a. In General

As a general rule parties who execute a bond are estopped to deny the material recitals therein.

The holder of a bond is entitled to rely on the facts recited therein,[96] and, as a general rule, subject to certain limitations which appear infra in subdivision b of this section, the principal[97] and sureties[98] in a bond are estopped to deny the material recitals therein, irrespective of the obligee's knowledge as to their truth.[99]

Applications of rule. This rule has been applied to various classes of bonds.[1] Thus the rule has been applied to bonds for release of attachment;[2] bonds of executors and administrators,[3] of guardians,[4] of public officers;[5] bonds to indemnify obligee for giving security for costs for obligor;[6] bonds to procure discharge of garnishee;[7] contractors' bonds.[8] Further, the rule has been applied

Palisade Light, Heat & Power Co., 153 P. 1002, 60 Colo. 397.
21 C.J. p 1096 note 65.

Estoppel of husband to assert title
Where wife conveyed certain property to her husband by a deed which he did not record, and thereafter a deed of trust was executed by both to secure a loan, which recited that, if the loan was paid, the trustee should reconvey the land to the wife, her heirs, and assigns, at her request and cost, such deed of trust did not estop the husband from denying that she was the owner of the property.—Tyler v. Currier, 81 P. 319, 147 Cal. 31—21 C.J. p 1069 note 8.

96. U.S.—Bloomfield Village Drain Dist. v. Keefe, C.C.A.Mich., 119 F. 2d 157.

97. U.S.—U. S. v. Massachusetts Bonding & Insurance Co., D.C.N.Y., 60 F.2d 541.
Ill.—Bryson v. Fischer, 258 Ill.App. 502.
Okl.—Burnham v. Edwards, 257 P. 788, 125 Okl. 272, 53 A.L.R. 800.
Or.—State v. Francis, 54 P.2d 297, 152 Or. 448.
21 C.J. p 1096 note 68.

98. U.S.—U. S. v. Massachusetts Bonding & Insurance Co., D.C.N.Y., 60 F.2d 541—Ætna Casualty & Surety Co. v. National Bank of Tacoma, C.C.A.Wash., 59 F.2d 493, 495, citing **Corpus Juris.**
Ill.—Bryson v. Fischer, 258 Ill.App. 502.
Mich.—Shean v. U. S. Fidelity & Guaranty Co., 248 N.W. 892, 263 Mich. 535.
Minn.—Board of Com'rs of St. Louis County v. American Loan & Trust Co., 78 N.W. 113, 75 Minn. 489.
Okl.—Burnham v. Edwards, 257 P. 788, 125 Okl. 272, 53 A.L.R. 800—Massachusetts Bonding & Ins. Co. v. Lewis, 195 P. 494, 80 Okl. 187.
Or.—State v. Francis, 54 P.2d 297, 152 Or. 448.
Pa.—Mechanics' Trust Co. v. Fidelity & Casualty Co. of New York, 156 A. 146, 304 Pa. 526—Sokoloff v. Fidelity & Casualty Co. of New York, 135 A. 746, 288 Pa. 211.
W.Va.—Potts v. Longest & Tessier Co., 103 S.E. 279, 86 W.Va. 157.
21 C.J. p 1097 note 69.

99. U.S.—City of Chicago v. Joseph, C.C.A.Ill., 95 F.2d 444, 446, certiorari denied 58 S.Ct. 1049, 304 U.S. 578, 82 L.Ed. 1542.

1. Mo.—Minor v. Woodward, 166 S. W. 855, 179 Mo.App. 333.
21 C.J. p 1098 note 73.

Various classes of bonds
(1) Auctioneer's bonds.—Duchamp v. Nicholson, 2 Mart.N.S., La., 672.

(2) Bail bonds.—Commonwealth v. Rasner, 193 S.W. 1011, 175 Ky. 133—21 C.J. p 1098 note 77.

(3) Bonds of cashiers or treasurers.—Lionberger v. Krieger, 88 Mo. 160, affirming 13 Mo.App. 313—21 C.J. p 1098 note 79.

(4) Bonds of trustees to sell real estate—U. S. v. Morse, D.C., 31 S. Ct. 37, 218 U.S. 493, 54 L.Ed. 1123, 21 Ann.Cas. 782.

(5) Liquor bonds.—Brockway v. Petted, 45 N.W. 61, 79 Mich. 620, 7 L.R.A. 740.

(6) Prison-bounds bonds.—Allen v. Magruder, C.C.D.C., 1 F.Cas.No.230, 3 Cranch C.C. 6.
21 C.J. p 1098 note 92.

Penal bonds
U.S.—U. S. v. Pan American Airways, D.C. Fla., 39 F.Supp. 297.
21 C.J. p 1098 note 73 [b].

2. Cal.—Ward v. Massachusetts Bonding & Insurance Co., 228 P. 363, 67 Cal.App. 792—Torney v. McIntosh, 184 P. 1012, 43 Cal.App. 411.
Conn.—Safford v. McNeil, 129 A. 721, 102 Conn. 684—Birdsall v. Wheeler, 20 A. 607, 58 Conn. 429.
21 C.J. p 1098 note 78.

3. Conn.—State v. U. S. Fidelity & Guaranty Co., 135 A. 44, 105 Conn. 230.
21 C.J. p 1098 note 80.

4. N.C.—Cheshire v. Howard, 178 S.E. 348, 207 N.C. 566.
21 C.J. p 1098 note 81.

Validity of appointment
(1) Sureties on a guardian's bond reciting that the guardian has been duly appointed are estopped to deny the validity of his appointment.
N.C.—Cheshire v. Howard, 178 S.E. 348, 207 N.C. 566.
Va.—Fidelity & Deposit Co. of Maryland v. Anderson, 150 S.E. 413, 155 Va. 535, affirmed 155 S.E. 828, 155 Va. 535.
21 C.J. p 1098 note 81 [a].

(2) The principal is likewise estopped in this respect.—Fidelity & Deposit Co. of Maryland v. Anderson, 150 S.E. 413, 155 Va. 535, affirmed 155 S.E. 828, 155 Va. 535.

5. N.C.—State v. Martin, 118 S.E. 914, 186 N.C. 127, modified on other grounds Lee v. Martin, 123 S.E. 631, 188 N.C. 119.
21 C.J. p 1098 note 82.

6. Va.—Cordle v. Burch, 10 Gratt. 480, 51 Va. 480.

7. Minn.—Wilcox v. Conley, 210 N. W. 887, 169 Minn. 179—Greengard v. Fretz, 35 N.W. 949, 64 Minn. 10.

8. Minn.—Red Wing Sewer Pipe Co. v. Donnelly, 113 N.W. 1, 102 Minn. 192, 120 Am.S.R. 619.
21 C.J. p 1098 note 86.

Validity of contract
(1) It has been held that sureties on a contractor's bond are precluded from asserting the invalidity of the contract for defects in its execution where the bond recites the existence of the contract.—City of Minneapolis v. Republic Creosoting Co., 201 N.W. 414, 161 Minn. 178—Bell v. Keyland, 113 N.W. 271, 102 Minn. 213, 120 Am.S.R. 621, 13 L.R.A.,N.S., 793.

(2) The obligors on a contractor's bond are estopped to deny a recital in the bond that the agents making the contract were authorized so to do.—Potts v. Longest & Tessier Co., 103 S.E. 279, 86 W.Va. 157.

(3) However there is also authority for the view that a surety is not estopped by recitals in the bond to assert the invalidity of the contract.—State v. Kuhner, 140 N.E. 344, 107 Ohio St. 406—Southern Surety Co. v. Moores-Coney Co., 163 N.E. 575, 29 Ohio App. 310.

by the courts to employees' indemnity bonds;[9] fidelity bonds;[10] injunction bonds;[11] replevin,[12] forthcoming, or delivery bonds;[13] taxpayers' bonds;[14] traverse bonds;[15] and underwriting bonds.[16]

Appeal or supersedeas bonds. The general rule, that parties who execute a bond are estopped to deny the material recitals therein, is applicable to an appeal or supersedeas bond.[17] Accordingly, by the recital of a judgment in an appeal or supersedeas bond, the obligors are estopped to deny the fact of its existence,[18] validity,[19] or amount[20] as recited in the bond.

Construction. In determining whether recitals in a bond create an estoppel, the recitals must be construed in connection with the circumstances under which the bond was executed.[21]

b. Circumstances under Which Estoppel Not Operative

Under certain circumstances a recital in a bond will not work an estoppel, as where it is without consideration, relates to immaterial matters, or is indefinite, etc.

Under certain circumstances recitals in a bond do not operate as an estoppel.[22]

Such recitals work no estoppel where they are without consideration;[23] where they consist of matter immaterial to the object of the instrument,[24] or relate to past transactions, which form no part of the consideration for the execution of the bond;[25] where the instrument in which the recitals relied on occur has fully performed its office and in

Performance of contract

Recitals of a second bond signed by a contractor with an irrigation district and his surety that certain parts of the work were unsatisfactory to the directors and engineer of the district are conclusive, or at least very strong, evidence that when it was executed the contractor had not performed.—Oakdale Irr. Dist. v. Beard, 190 P. 224, 47 Cal.App. 66.

9. Ala.—Craft v. Standard Acc. Ins. Co., 123 So. 271, 220 Ala. 6, granting certiorari 123 So. 265, 23 Ala. App. 246.
21 C.J. p 1098 note 87.

10. Kan.—Vilm Milling Co. v. Kansas Casualty & Surety Co., 180 P. 782, 104 Kan. 790.

11. W.Va.—Virginia Northwestern Bank v. Fleshmen, 22 W.Va. 317.
21 C.J. p 1098 note 89.

12. Minn.—Somers v. Kane, 202 N. W. 27, 162 Minn. 40.
21 C.J. p 1098 note 93.

Value

Where the bond under which plaintiff obtained possession in replevin alleged the value of such property to be a certain amount, plaintiff was estopped from asserting in amended complaint that the property was of a value less than that originally alleged.—Somers v. Kane, supra.

13. Ill.—Cermak v. Schaaf, 224 Ill. App. 351, affirmed 139 N.E. 39, 308 Ill. 61, 37 A.L.R. 1398.
Miss.—Schneider v. Berry, 157 So. 91, 171 Miss. 89—Furst v. Pease, 52 So. 257, 97 Miss. 468.
21 C.J. p 1098 note 94.

14. Recital as to filing of claim

Surety on taxpayer's bond, accepted by government, which postponed collection of tax in reliance thereon, is estopped to deny that principal filed claim in abatement before execution of bond, as recited therein.—U. S. v. Massachusetts Bonding & Insurance Co., D.C.N.Y., 60 F.2d 541.

15. Ky.—Wayman v. Taylor, 1 Dana 527.

16. U.S.—Brown & Haywood Co. v. Ligon, C.C.Mo., 92 F. 851.

17. Ill.—McGinnis v. McGinnis, 225 Ill.App. 340—Barrett v. Ablin, 215 Ill.App. 113—Gilmore v. Lewinsohn, 189 Ill.App. 546. See L. W. Hubbell Fertilizer Co. v. Jacobellis, 199 Ill.App. 379.
Ind.—Pierson v. Republic Casualty Co., 160 N.E. 43, 200 Ind. 359—Sluss v. Thermoid Rubber Co., 179 N.E. 732, 95 Ind.App. 306.
Okl.—Haffner v. Commerce Trust Co., 86 P.2d 331, 184 Okl. 212—Gibson Oil Co. v. Hayes Equipment Mfg. Co., 67 P.2d 8, 180 Okl. 37—Williams v. Edwards, 22 P.2d 1026, 163 Okl. 246.
4 C.J. p 1269 note 29, p 1299 note 60—21 C.J. p 1098 note 75.

Estoppel to deny particular recitals

(1) Recitals as to obligee's representative capacity.—Barrett v. Ablin, 215 Ill.App. 113.

(2) Recital that a writ of supersedeas had been allowed.—Baltimore & O. R. Co. v. Vanderwarker, 19 W. Va. 265.

(3) Recital that an appeal was obtained.—McGinnis v. McGinnis, 225 Ill.App. 340.
4 C.J. p 1270 note 36, p 1299 note 63.

18. U.S.—Pacific Coast Casualty Co. v. Harvey, Cal., 250 F. 952, 163 C.C.A. 202.
Ind.—Sluss v. Thermoid Rubber Co., 179 N.E. 732, 734, 95 Ind.App. 306, citing Corpus Juris.
Okl.—Gibson Oil Co. v. Hayes Equipment Mfg. Co., 67 P.2d 8, 180 Okl. 37—Williams v. Edwards, 22 P.2d 1026, 163 Okl. 246—Burnham v. Edwards, 257 P. 788, 125 Okl. 272, 53 A.L.R. 800.
4 C.J. p 1270 note 42, p 1299 note 61.

19. Ill.—Truly Warner Co. v. Royal Indemnity Co., 259 Ill.App. 485.
Ind.—Sluss v. Thermoid Rubber Co., 179 N.E. 732, 734, 95 Ind.App. 306, citing Corpus Juris.
4 C.J. p 1270 note 43, p 1299 note 62.

Fine for contempt

An appeal bond given by a judgment debtor in supplementary proceedings, conditioned to pay a fine imposed for contempt if the order appealed from was affirmed, estopped him, after affirmance, to question the legality of the fine.—Soule v. Lookstein, 151 N.Y.S. 67.

20. Ind.—Sluss v. Thermoid Rubber Co., 179 N.E. 732, 734, 95 Ind.App. 306, citing Corpus Juris.
4 C.J. p 1271 note 44.

Amount of recovery

Where supersedeas bond states that money judgment for certain amount was rendered, obligors are estopped to deny amount of judgment, but obligees are limited in recovery on bond to amount recoverable, had bond been properly conditioned.—Gibson Oil Co. v. Hayes Equipment Mfg. Co., 67 P.2d 8, 180 Okl. 37—Williams v. Edwards, 22 P. 2d 1026, 163 Okl. 246.

21. Va.—Moore v. Aetna Casualty & Surety Co., 155 S.E. 707, 155 Va. 556.
Construction generally see infra § 44.

22. Descriptive recitals

Recitals in a bond work no estoppel where they are merely descriptive.—Stillman v. Barney, 4 Vt. 187.

23. Or. State v. Francis, 54 P.2d 297, 152 Or. 448.

24. Or.—State v. Francis, 54 P.2d 297, 300, 152 Or. 448, citing Corpus Juris.
21 C.J. p 1099 note 97.

25. Neb.—Hafka v. Coffin, 130 N.W. 1045, 89 Neb. 134.

legal contemplation does not exist at all;[26] where the recitals are a nullity having been inadvertently inserted by the clerk of the court in which the bond was given;[27] where the recitals are contradicted by the record of the proceedings in which the bond was given,[28] or by other recitals in the instrument itself;[29] where the recitals were inserted in the bond through mistake,[30] or where the bond was procured by fraud,[31] which reached the substance of the consideration.[32]

In addition, there is no estoppel where the recitals are not definite and certain,[33] where the action is not founded on the bond but wholly collateral to it,[34] or where the bond is void.[35] A recital of a "generality to be done," such as the condition of payment in the bond, will not operate as an estoppel.[36]

It has also been held that one cannot invoke the estoppel unless he has accepted and relied on the recitals in the bond, in genuine innocence and sincerity, to his actual prejudice.[37]

Recitals in an additional and cumulative bond which show no agreement that the sureties thereon shall be primarily liable will not operate as an estoppel in favor of the sureties on the original obligation.[38] However, the obligors in a underwriting bond are estopped by its recitals to set up the invalidity of the original bond by reason of formal defects.[39]

Death of obligee. A bond reciting that the obligor was a prisoner at the suit of a nominal plaintiff will not estop the sureties to show that the latter died before the bond was executed.[40]

E. REQUISITES, VALIDITY, AND CONSTRUCTION OF DEED

§ 41. Execution

To work an estoppel by deed, the instrument must have been executed and must have been the voluntary act of the grantor, although the necessity for sealing, acknowledging, and recording the instrument may depend on statutory requirements.

A grantor is not estopped by a deed which he has not executed.[41]

The principle governing the doctrine of estoppel by recitals in sealed instruments is applicable only where the existence of the instrument as the act of the party is admitted or proved.[42]

Furthermore, the execution of the instrument must be the voluntary act of the grantor.[43] A party will not be prejudiced by the recitals in a deed executed under judicial compulsion;[44] a fortiori is this so where the deed describes premises other than those described in the complaint and in the decree of sale.[45]

26. Ark.—Norris v. Norton, 19 Ark. 319.
21 C.J. p 1099 note 1.

27. Me.—Thomas v. Spofford, 46 Me. 408.

28. Vt.—Probate Ct. v. Matthews, 6 Vt. 269.

29. S.C.—Tinsley v. Kirby, 17 S.C. 1.

30. Minn.—Pleason Realty & Investment Co. v. Kleinman, 206 N.W. 645, 165 Minn. 342.
Neb.—Union Life & Accident Ins. Co. of Lincoln, Neb. v. American Surety Co. of New York, 203 N.W. 172, 113 Neb. 300.
21 C.J. p 1099 note 5.

31. Me.—Goodwin v. Fall, 66 A. 727, 102 Me. 353.
Neb.—Union Life & Accident Ins. Co. of Lincoln, Neb. v. American Surety Co. of New York, 203 N.W. 172, 113 Neb. 300.

32. R.I.—Phillips v. Potter, 7 R.I. 289, 82 Am.D. 598.

33. U.S.—City of Chicago v. Joseph, C.C.A.Ill., 95 F.2d 444, 447, citing **Corpus Juris,** and certiorari denied 58 S.Ct. 1049, 304 U.S. 578, 82 L. Ed. 1542.
21 C.J. p 1099 note 8.

34. Ill.—Brown v. Hamsmith, 247 Ill.App. 358.
Minn.—Pleason Realty & Investment Co. v. Kleinman, 206 N.W. 645, 165 Minn. 342.
21 C.J. p 1099 note 9.
Separate and independent suit
Where plaintiff in bail trover replevied property, and thereafter dismissed action without restitution, and defendant thereafter brought separate and independent suit against former plaintiff for breach of bond, recital in bond that property was of certain value stated would not estop defendant in second suit from asserting that property was worthless. —Dixon v. Cassels Co., 130 S.E. 75, 34 Ga.App. 478.

35. D.C.—Morse v. U. S., 29 App. D.C. 433.
21 C.J. p 1099 note 10.
Void deed as basis of estoppel see infra § 43.

36. Okl.—Burnham v. Edwards, 257 P. 788, 125 Okl. 272, 53 A.L.R. 800.

37. Kan.—McKie v. Curtis, 210 P. 483, 112 Kan. 223—Woods-Egon Live Stock Commission Co. v. Hicks, 142 P. 276, 92 Kan. 922, L.R. A.1915A 1132.

38. Wis.—Rudolf v. Malone, 80 N. W. 743, 104 Wis. 470.

39. U.S.—Brown & Haywood Co. v. Ligon, C.C.Mo., 92 F. 851.

40. Ala.—Tait v. Frow, 8 Ala. 543

41. **Estoppel to deny execution**
A grantor is not estopped from denying the bona fide execution of the conveyance.—Neal v. Harber, 134 S.E. 349, 35 Ga.App. 631.

42. U.S.—Chisholm v. Montgomery, C.C.Ala., 5 F.Cas.No.2,686, 2 Woods 584.
Ill.—See Leipold v. Epler, 198 Ill. App. 618.
21 C.J. p 1099 note 14.
Instrument altered after delivery
Donors are not estopped as against donee by donee's insertion in deed after delivery, without donors' knowledge, of false statement that certain price was paid for property.—Gabert v. St. Tammany Yacht Club, 116 So. 667, 166 La. 57.

43. Ga.—McDougald v. Dougherty, 11 Ga. 570.
N.D.—Jessen v. Pingel, 257 N.W. 2, 65 N.D. 209.

44. Ga.—McDougald v. Dougherty, 11 Ga. 570.

45. N.Y.—Heller v. Cohen, 48 N.E. 527, 154 N.Y. 299.

Seal. To create an estoppel by deed the instrument must be under seal,[46] unless an unsealed instrument is by statute placed on the same footing as a sealed instrument.[47]

Acknowledgment and recordation. In the absence of a statutory requirement, a deed need not be acknowledged[48] or recorded[49] in order to operate as an estoppel.

§ 42. Delivery and Acceptance

To work an estoppel by deed the instrument must have been delivered and accepted.

An estoppel by deed cannot arise against the grantor until the instrument which is claimed to create the estoppel has become effective by delivery;[50] but one holding a deed to himself and others and claiming the land under it cannot deny its validity as a conveyance to the other grantees for want of delivery.[51]

A grantee is not estopped by a deed which he has never accepted or authorized to be accepted.[52] However, ratification of acceptance by the attorney in fact of the grantee estops the grantee to dispute the validity of the deed.[53]

§ 43. Validity

a. In general
b. Fraud and mistake
c. Estoppel by covenants in invalid deed

a. In General

An invalid deed ordinarily does not operate as an estoppel; and to work an estoppel, the parties must be competent to make the deed effectual as a contract.

A deed having no validity cannot be made the basis of an estoppel;[54] and a void instrument will not operate by way of estoppel so as to vest a subsequently acquired estate in the grantee.[55] Neither does a void instrument inure by way of estoppel to the benefit of a person in adverse possession of the land at the time it was conveyed.[56]

Nevertheless, a deed which is valid as between the parties to it, although invalid as to third persons, may operate as an estoppel against the grantor and those in privity with him;[57] and where a deed is valid as to one of several grantors, he may be estopped, although it is void as to the others.[58]

An inoperative conveyance by one tenant in common which is rendered effectual by a release from the other tenants in common will operate as an estoppel;[59] and one who, owning land, undertakes

46. Mass.—Massachusetts Gasoline & Oil Co. v. Go-Gas Co., 156 N.E. 871, 259 Mass. 585.
21 C.J. p 1099 note 18.

47. Ala.—Jones v. Morris, 61 Ala. 518.
21 C.J. p 1099 note 19.

48. U.S.—James v. Nelson, C.C.A. Alaska, 90 F.2d 910, certiorari denied 58 S.Ct. 41, 302 U.S. 721, 82 L.Ed. 556.
Operation of unacknowledged instrument of married woman as estoppel see Acknowledgments § 14 a (1) (f).

49. U.S.—James v. Nelson, supra.

50. Ark.—Rogers v. Snow Bros. Hardware Co., 52 S.W.2d 969, 186 Ark. 183.
Ga.—Cook v. Flanders, 138 S.E. 218, 164 Ga. 279.
21 C.J. p 1099 note 20.

51. Tex.—Glover v. Thomas, 12 S.W. 684, 75 Tex. 506.

52. Ill.—St. Louis, A. & T. H. R. Co. v. Belleville, 12 N.E. 680, 122 Ill. 376.
21 C.J. p 1099 note 22.

53. Ill.—Meldahl v. Wallace, 110 N.E. 854, 270 Ill. 220.

54. U.S.—Maury v. Jones, C.C.A. Mont., 25 F.2d 412.
Ala.—Sims v. United Auto Supply Co., 129 So. 53, 221 Ala. 383.
Fla.—Phillips v. Lowenstein, 107 So. 350, 352, 91 Fla. 89, citing Corpus Juris.
Ga.—Cook v. Flanders, 138 S.E. 218, 164 Ga. 279—McDougall v. National Bank of Columbus, 104 S.E. 630, 150 Ga. 579.
Ky.—Edge v. City of Lexington, 127 S.W.2d 393, 395, 277 Ky. 750, citing Corpus Juris.
La.—Horne v. Beattie, 120 So. 38, 167 La. 647—Erskine Heirs v. Gardiner, 118 So. 453, 166 La. 1098.
Mass.—Daly v. Donovan, 154 N.E. 579, 258 Mass. 226.
N.D.—Acklin v. First Nat. Bank, 254 N.W. 769, 775, 64 N.D. 577, citing Corpus Juris.
Okl.—Coats v. Riley, 7 P.2d 644, 652, 154 Okl. 291, citing Corpus Juris.
Tex.—Higgins v. Bankers' Mortg. Co., Com.App., 13 S.W.2d 683, reversing Bankers' Mortg. Co. v. Higgins, Civ.App., 4 S.W.2d 102.
W.Va.—Carleton Mining & Power Co. v. West Virginia Northern R. Co., 145 S.E. 42, 45, 106 W.Va. 126, citing Corpus Juris.
21 C.J. p 1100 note 24.
Void bond as basis of estoppel see supra § 40.

A deed conveying an expectancy, being absolutely void, cannot operate as an estoppel.—Consolidation Coal Co. v. Riddle, 248 S.W. 530, 198 Ky. 256—Flatt v. Flatt, 225 S.W. 1067, 189 Ky. 801—King v. Burkhart, 180 S.W. 534, 167 Ky. 424.

Forged deed
(1) A forged deed, being void ab initio, affords no ground for estoppel.—Neal v. Pickett, Tex.Com.App., 280 S.W. 748, reversing, Civ.App., 269 S.W. 160.
(2) Other cases see Vesy v. Solberg, 132 N.W. 254, 27 S.D. 618—21 C.J. p 1101 note 32 [c].

A voidable deed may operate as an estoppel.—Ferguson v. Rieke, 2 S.W.2d 405, 223 Ky. 321.

Conveyance deed to deceased grantee, even though not passing legal title to heirs or grantee of deceased grantee, would be sufficient to estop grantor and her heirs from claiming title to land intended originally to be conveyed.—Lott v. Dashiell, Tex.Civ.App., 233 S.W. 1103, modified on other grounds Dashiel v. Lott, Com.App., 243 S.W. 1072.

55. Ala.—Crosby v. Turner, 75 So. 937, 200 Ala. 189.
21 C.J. p 1100 note 25.

56. N.Y.—Jackson v. Brinkerhoff, 3 Johns.Cas. 101.

57. Ill.—Frank v. Frank, 137 N.E. 151, 305 Ill. 181.
21 C.J. p 1100 note 27.

58. N.C.—Doe v. Finley, 52 N.C. 238.
21 C.J. p 1100 note 28.

59. Conn.—Hartford & Salisbury Ore Co. v. Miller, 41 Conn. 112.

without authority to convey such land as the attorney in fact to one who has no interest whatever in the land is estopped from asserting title as against one who claims under the deed so executed.[60]

Incompetency of parties. In order to work an estoppel the parties to a deed must be sui juris, competent to make it effectual as a contract.[61] Specific applications of this doctrine will be found treated under other titles in this work.

b. Fraud and Mistake

A party is not estopped to question his own deed where it has been procured by fraud; and a recital inserted in a deed through mistake ordinarily will not operate as an estoppel.

The general rule that a party will be estopped to question his own deed does not apply where the deed has been procured by fraud,[62] although there has been some conflict of authority as to whether relief can be granted in an action at law.[63]

Mistake. While there is some authority to the contrary,[64] it is generally held that a recital inserted in a deed through mistake will not in equity be permitted to operate as an estoppel, so as to exclude the truth.[65] However, it has been held that, where a tract of land is granted in clear and unmistakable terms, the grantor and those claiming under him are estopped to say in a court of law that the land thus described in the deed was inserted by mistake, and that another piece was intended,[66] although there are decisions which hold that the mistake may be shown by the grantor for the purpose of reducing the damages for covenants broken.[67]

c. Estoppel by Covenants in Invalid Deed

The mere fact that an invalid deed contains covenants of warranty ordinarily will not make the deed operative by way of estoppel.

As a general rule, where the deed is invalid, the mere fact that it contains covenants of warranty will not make it operative by way of estoppel, for to make a warranty binding, there must be some estate conveyed to which the warranty may be annexed.[68] In order for a covenant to work an estoppel, it must be in a deed good and valid in law as well as in equity.[69]

However, there are decisions holding that a deed which is void as a conveyance for want of words of inheritance[70] or grant,[71] but which contains a covenant of warranty, may operate by way of estoppel to prevent circuity of action.

§ 44. Construction

a. In general
b. Truth apparent from whole instrument

a. In General

In determining whether a deed creates an estoppel, the instrument should be construed in its entirety; the instrument must be precise and certain and the intention clear and unambiguous.

In determining whether a deed creates an estoppel, every part of it should be given effect, if this can be done, and if the deed evidences conflicting intentions on its face, the object of the grant being considered, effect should be given to what may appear to be the controlling intention of the grantor.[72]

60. Minn.—North Star Land Co. v. Taylor, 152 N.W. 837, 129 Minn. 438.

61. Tex.—Dallas Building & Loan Ass'n v. Henry, Civ.App., 98 S.W.2d 1030, 1035, quoting **Corpus Juris.**
21 C.J. p 1101 note 41.

62. Okl.—Rochelle v. Anderson, 243 P. 528, 113 Okl. 137.
Tenn.—Sawtelle v. Astor, 126 S.W. 2d 367, 23 Tenn.App. 33.
21 C.J. p 1101 note 32.

As against subsequent grantee
The rule of the text has no application as against a purchaser from the fraudulent grantee where the deed procured by fraud was duly recorded, and there was nothing to charge the subsequent grantee with notice that the deed to his grantor had been procured by fraud.—Collett v. Houston & T. C. R. Co., Tex. Civ.App., 186 S.W. 232.

Loss of right to set up fraud
It has been held that a party may by his own negligence lose his right to set up the fraud.
Kan.—McNeil v. Jordan, 28 Kan. 7.
S.C.—Charleston v. Ryan, 22 S.C. 339, 53 Am.R. 713.
Negligence as ground of estoppel see infra §§ 102–106.

63. **Relief granted**
Me.—Goodwin v. Fall, 66 A. 727, 102 Me. 353, 359.
21 C.J. p 1101 note 33 [a].

Relief denied
Tenn.—Furguson v. Coleman, 5 Heisk. 378.

64. Ky.—Jones v. Prewit, 3 A.K. Marsh. 302.

65. Okl.—Rochelle v. Anderson, 243 P. 528, 113 Okl. 137.
Tenn.—Sawtelle v. Astor, 126 S.W. 2d 367, 23 Tenn.App. 33—First Nat. Bank of Fayetteville v. Ashby, 2 Tenn.App. 666.
Tex.—Kuykendall v. Spiller, Civ.App., 299 S.W. 522, 527, citing **Corpus Juris.**
21 C.J. p 1101 note 38.

66. N.H.—Bell v. Morse, 6 N.H. 205.
21 C.J. p 1101 note 39.

67. Mass.—Leland v. Stone, 10 Mass. 459.
N.H.—Barns v. Learned, 5 N.H. 264.

68. Ky.—Consolidation Coal Co. v. Riddle, 248 S.W. 530, 198 Ky. 256—Flatt v. Flatt, 225 S.W. 1067, 189 Ky. 801.
21 C.J. p 1101 note 43.

69. Tex.—Breen v. Moorehead, Civ. App., 126 S.W. 650.

70. Pa.—Shaw v. Galbraith, 7 Pa. 111.

71. N.H.—Brown v. Manter, 21 N.H. 528, 53 Am.D. 223.

72. Tex.—Germany v. Turner, 123 S.W.2d 874, 132 Tex. 491, reversing Turner v. Germany, Civ.App., 94 S.W.2d 1177.
21 C.J. p 1102 note 47.
Construction of recitals in bonds see supra § 40.

The phrase, "containing 80 acres, more or less," following description of half quarter section of land in warranty deed thereof, was merely a limitation on warranty as to quan-

The estoppel will be limited by the intention of the parties.[73]

Certainty. In order to create an estoppel the instrument by which the estoppel is claimed must be precise and certain and the intention clear and unambiguous.[74]

b. Truth Apparent from Whole Instrument

Where the truth is apparent on an instrument which otherwise works an estoppel, ordinarily the parties will not be estopped from taking advantage of it.

Where the truth is apparent on a deed or instrument which otherwise works an estoppel, the parties will not be estopped from taking advantage of it,[75] as, for instance, that the grantor had no title,[76] or only a naked possibility.[77] However, the rule does not apply to a distinct undertaking for the transfer of after-acquired property since, in such an undertaking, an estoppel exists because of the covenant of warranty.[78]

§ 45. Extent of Estoppel

An estoppel cannot be extended beyond the exact terms of the admission.

An estoppel cannot be extended beyond the exact terms of the admission so as to preclude a party from establishing facts not inconsistent therewith.[79]

While the estoppel is in all cases coextensive with the estate or interest which the grantor attempts to convey and warrant,[80] it is confined to the subject matter of the conveyance,[81] and will not extend to objects that the parties cannot reasonably be supposed to have had in view,[82] or be

tity of ground in land described, not reservation or exception of any part of such land, on the issue of effect of after acquired title.—Hughes v. Fifer, Ind., 31 N.E.2d 634.

73. Cal.—Rispaud v. Rispaud, 287 P. 466, 209 Cal. 375.
Or. Security Savings & Trust Co. v. Portland Flour Mills Co., 261 P. 432, 124 Or. 276.
Pa.—Security Trust Co. of Pottstown v. Feist, 5 A.2d 119, 333 Pa. 536.
21 C.J. p 1102 note 48.
Intention as governing recitals in deeds see supra § 37.

Deed subject to mortgage
Where the parties intend a warranty deed to be subject to a prior mortgage held by the grantor, the grantor is not estopped by his deed from enforcing the mortgage as against the grantee and subsequent purchasers with notice.—Walters v. Baer, 50 F.2d 995, 60 App.D.C. 230.

74. U.S.—City of Chicago v. Joseph, C.C.A.Ill., 95 F.2d 444, certiorari denied 58 S.Ct. 1049, 304 U.S. 578, 82 L.Ed. 1542.
Miss.—Mixon v. Green, 193 So. 8, 9, 187 Miss. 343, citing Corpus Juris.
Tex.—Kuykendall v. Spiller, Civ.App., 299 S.W. 522.
21 C.J. p 1102 note 56.
Certainty of recitals in:
Bonds see supra § 40.
Deeds see supra § 37.

Deed containing self-contradictory description will not support estoppel.
Pa.—Frick v. Fiscus, 30 A. 515, 164 Pa. 623.
Tex.—Kuykendall v. Spiller, Civ.App., 299 S.W. 522.

Deed held sufficiently certain to serve as a conveyance of an after-acquired title.—Scott v. Cohen, C.C.A. Tex., 115 F.2d 704, affirming, D.C., Cone v. Parish, 32 F.Supp. 412, and certiorari denied Scott v. Cohen, 61 S.Ct. 806.

75. Ind.—McAdams v. Bailey, 82 N.E. 1057, 169 Ind. 518, 124 Am.S.R. 240, 13 L.R.A.,N.S., 1003.
21 C.J. p 1102 note 49.

76. Or.—Langley v. Kesler, 110 P. 401, 111 P. 246, 57 Or. 281.
21 C.J. p 1102 note 50.

77. N.Y.—Pelletreau v. Jackson, 11 Wend. 110, affirmed 13 Wend. 178.

78. Ind.—McAdams v. Bailey, 82 N.E. 1057, 169 Ind. 518, 124 Am.S.R. 240, 13 L.R.A.,N.S., 1003.

79. Cal.—Farmers' & Merchants' Nat. Bank of Los Angeles v. Stowell, 44 P.2d 392, 6 Cal.App.2d 373.
Ga.—Neal v. Harber, 134 S.E. 349, 35 Ga.App. 631.
Ky.—Illinois Cent. R. Co. v. Ward, 35 S.W.2d 863, 237 Ky. 478.
21 C.J. p 1102 note 59.
Extent of estoppel to deny truth of recitals in deeds see supra § 37.

Extent of particular estoppels
(1) That plaintiff's lease was expressly subject to terms of third party's lease estopped plaintiff from denying the validity of such third party's lease, but not from claiming exclusive right to drill for oil in creek bed where third party's lease did not purport to convey creek bed.—Carter Oil Co. v. Delworth, C.C.A. Ill., 120 F.2d 589.

(2) Where defendants gave note and mortgage to married woman and thereafter conveyed the mortgaged land to her husband, and thereafter she and her husband conveyed the land to defendants by deed containing full covenants including a warranty that the land was free from all encumbrances, her joinder in the deed released her interest as mortgagee, and administrator of her estate was "estopped" from asserting any interest in the land but was not "estopped" from proceeding against defendants on the note as an unsecured claim.—Tripp v. Longston, 10 S.E.2d 916, 218 N.C. 295.

(3) While the fact that defendant holds a deed to a part of the property in controversy from one who was a common source of title for both plaintiff and defendant estops defendant from claiming that the common source did not have title, it does not estop him from claiming that the common source did not, by valid deed, convey his title to plaintiff.—Webber v. Austin, 121 A. 673, 123 Me. 95.

80. Miss.—Garner v. Garner, 78 So. 623, 117 Miss. 694.

81. Mont.—Cavanaugh v. Corbin Copper Co., 174 P. 184, 55 Mont. 173.
21 C.J. p 1103 note 61.

Restriction to estate conveyed
A covenant of warranty cannot pass by estoppel a greater estate than that expressly conveyed.
Fla.—Reid v. Barry, 112 So. 846, 93 Fla. 849.
Tex.—Edwards v. Worthington, Civ. App., 118 S.W.2d 328.
21 C.J. p 1103 note 61 [a].

Restriction to corpus conveyed
(1) Estoppel of grantor to deny grantees' title arising from warranty in deed goes no further than land actually described by such deed.
La.—Lewis v. King, 103 So. 19, 157 La. 718—Sandifer v. Sandifer's Heirs, App., 195 So. 118.
Tex.—Outlaw v. Gulf Oil Corporation, Civ.App., 137 S.W.2d 787, reversed on other grounds Gulf Oil Corporation v. Outlaw, Com.App., 150 S.W. 2d 777.

(2) The same rule obtains as to the estoppel of a grantee to deny his grantor's title.—Webber v. Austin, 121 A. 673, 123 Me. 95.
21 C.J. p 1103 note 61 [a].

82. Pa.—Safe Deposit & Title Guar-

extended to render effective a conveyance contrary to public policy.[83] However, the rule that a grantor is estopped to deny that his deed actually conveyed what it purports to convey will not estop him to deny that it did purport to convey the interest alleged by the grantee.[84]

F. PERSONS FOR AND AGAINST WHOM ESTOPPEL ARISES

§ 46. General Rule

Estoppel by deed is operative only between the parties to the deed and their privies.

Estoppel by deed is operative only between parties to the deed and their privies; strangers to the deed are not bound by, nor can they invoke, the estoppel.[85] The rule is the same as to an estoppel to assert an after-acquired title; the parties and their privies are estopped, but strangers are not bound by,[86] nor can they invoke,[87] the estoppel. However, it has been held that the estoppel becomes operative against strangers who come in after it has become effective.[88]

Grantor's donees. Under some statutes donees of the grantor are bound by an estoppel against the grantor to the extent of the value of the estate

anty Co. v. Linton, 100 A. 831, 256 Pa. 274.
21 C.J. p 1103 note 62.

Estoppel to assert nuisance
The conveyance of a tract of land does not estop the grantor from complaining of the grantee's use of the land in a manner constituting a nuisance.—Off v. Exposition Coaster, 167 N.E. 782, 336 Ill. 100.

83. Conveyance of burial lots
Party who joined in conveyance without reservation of land burdened with use of part as private burial ground was not estopped to have enjoined desecration of burial ground in which her ancestors were buried by parties claiming under grantee, as it is always presumed that burial lots are not included in the sale of property surrounding them.—White v. Williams, Tex.Civ.App., 57 S.W.2d 385.

Conveyance contrary to public statute
Ind.—State v. State Bank, 5 Ind. 353.

84. D.C.—Walbridge v. Hammack, 18 D.C. 154.

85. U.S.—Gill v. Colton, C.C.A.W.Va., 12 F.2d 531.
Cal.—Johnstone v. Gloster, 194 P. 504, 49 Cal.App. 750.
Ga.—Campbell v. Sims, 131 S.E. 483, 161 Ga. 517.
Ill.—Thornton v. Louch, 130 N.E. 467, 297 Ill. 204.
La.—Herold v. Jefferson, 134 So. 104, 172 La. 315—Gentilly Development Co. v. Carbajal, 118 So. 78, 80, 166 La. 905, quoting **Corpus Juris**—Broussard v. Succession of Broussard, 114 So. 834, 836, 164 La. 913, quoting **Corpus Juris**—Johnston v. Cole, 113 So. 135, 163 La. 885—Moore v. Fitzgerald, 138 So. 705, 18 La.App. 412—Wagster v. Nabors Oil Corporation, 118 So. 857, 9 La.App. 14.
Md.—Boyd v. Busch, 147 A. 718, 158 Md. 1.
Mass.—Makepeace Bros. v. Town of Barnstable, 198 N.E. 922, 292 Mass. 518—Robert v. O'Connell, 169 N.E. 487, 269 Mass. 532—Brady v. Brady, 130 N.E. 677, 238 Mass. 302.
N.J.—In re Receivership of Adjavant Roofing Mfg. Co., 134 A. 910, 4 N.J. Misc. 896.
N.Y.—Liberty Bank of Buffalo v. High Park Development Co., 236 N.Y.S. 194, 201, 134 Misc. 733, citing **Corpus Juris**, and affirmed 234 N.Y.S. 832, 227 App.Div. 647.
Ohio.—Ward v. Sark, 19 Ohio N.P., N.S., 401.
Or.—Magness v. Kerr, 254 P. 1012, 121 Or. 373, 51 A.L.R. 1466—Blake v. Kimble, 253 P. 522, 120 Or. 626.
R.I.—Tefft v. Reynolds, 113 A. 787, 43 R.I. 538.
Tex.—Harris v. Mayfield, Com.App., 260 S.W. 835, reversing, Civ.App., 244 S.W. 857—Moseley v. Fikes, Civ.App., 126 S.W.2d 589, error granted—Jones-O'Brien, Inc., v. Loyd, Civ.App., 125 S.W.2d 684, error granted—Purdy v. Pruitt, Civ. App., 112 S.W.2d 808, error dismissed—Turner v. Germany, Civ. App., 94 S.W.2d 1177, 1180, citing **Corpus Juris**, and error reversed on other grounds Germany v. Turner, 123 S.W.2d 874, 132 Tex. 491—Fowler v. Texas Exploration Co., Civ. App., 290 S.W. 818—Rovall v. Webster, Civ.App., 279 S.W. 895.
21 C.J. p 1103 note 65.
Estoppel by grantee against bona fide purchaser of grantor's after-acquired title see § 35 supra.

Admission of stranger's title
Stranger to deed cannot avail himself of estoppel by admission therein that he is owner of land to which grantee is claiming by adverse possession.—Smith v. Vermont Marble Co., 133 A. 355, 99 Vt. 384.

Provision in chattel mortgage that mortgagor would furnish waiver of lessor's lien will not estop lessor to claim priority, where lessor was not party to instrument.—Thigpen v. Wall Printing Corporation, La.App., 145 So. 714.

Easements
Clause in a deed, "There is also excepted a passway where it now is for the use and benefit of A. and J. during their natural life," did not estop them to claim a prescriptive right to use passway, they not being parties to deed.—Barry v. Messmer, 262 S.W. 1109, 203 Ky. 702.

Grantees in a tax deed are not concluded by a recital in a quitclaim deed executed by the record owner after the sale that a lost, unrecorded deed had been executed and delivered by him to grantee before the tax suit.—Dent v. Investors' Sec. Ass'n, 254 S.W. 1080, 300 Mo. 552.

Instrument executed by stranger
Plea of estoppel against defendants in petitory action based on instrument signed by person not owning lot involved when instrument was filed is properly overruled.—Pringle v. Price, 127 So. 745, 170 La. 343.

86. Pa.—Ruston v. Lippincott, 12 A. 761, 119 Pa. 12.
21 C.J. p 1104 note 66.

Persons estopped by after-acquired property clause
The estoppel raised by an after-acquired property clause in a mortgage to assert that the mortgage does not cover all the property and rights which it purports to cover operates against the mortgagor corporation and persons claiming under and in privity with it, but does not operate against others not so related, who desire to contest the lien on the ground that the property in question was acquired by another in its own right.—Susquehanna Trust & Safe Deposit Co. v. United Telephone & Telegraph Co., C.C.A. Pa., 6 F.2d 179.

87. Persons adjudged interest in land
Grantor's after-acquired title will not inure to persons to whom grantee did not convey the land, but who were adjudged an interest in the land in an action to quiet title against the grantee.—Pullen v. Hart, 238 S.W. 437, 293 Mo. 61.

88. Mass.—Somes v. Skinner, 3 Pick. 52.

received as a gift.[89]

§ 47. Parties

Estoppel by deed is operative only between the real parties to the deed.

The doctrine of estoppel by deed is operative only between the real, as distinguished from the apparent, parties to the deed.[90]

§ 48. Parties Acting in Different Rights or Capacities

A deed made by a person individually does not estop him in a representative capacity, and a deed accepted in a representative capacity does not estop the grantee individually; but the authorities disagree as to whether a deed made in a representative capacity estops the grantor individually.

A deed made by a person individually does not estop him in a representative capacity from asserting title in those whom he represents.[91] As to whether a deed made in a representative capacity estops the grantor individually the cases are not in accord, for, while some of the courts have held that the grantor is not estopped to assert an individual right or title in derogation of the deed,[92] the general rule is to the contrary, at least where there are general covenants,[93] unless the deed expressly excepts or recognizes an interest in the grantor individually.[94] A deed accepted in a representative capacity, however, does not estop the grantee in-

89. In Kentucky, under a statute so providing, whenever a vendor conveys by general warranty deed a greater estate than he has, and afterward there is a claimant of the estate so conveyed who has received estate, real or personal, by gift or advancement from the vendor, such claimant is barred of recovery to the extent of the value of the estate so received.—Blankenship v. Haldeman, 10 S.W.2d 469, 226 Ky. 57.

90. Community property
A purchaser of property standing of record in the name of the wife, who is apparently the seller, may show as against the wife that the property was in fact community property notwithstanding the principle that a party cannot controvert the title of one under whom he claims as the title is in reality from the community and not from the wife.—Garlick v. Dalbey, 84 So. 441, 147 La. 18.
Estoppel against:
Grantor see supra § 13.
Mortgagor see supra § 14.
Grantee see supra § 15.
Mortgagee see supra § 16.

91. Fla.—Dewhurst v. Wright, 10 So. 682, 29 Fla. 223.
21 C.J. p 1104 note 71.

92. Minn.—Kern v. Chalfant, 7 Minn. 487.
21 C.J. p 1104 note 72.
In Alabama
(1) The text rule prevails.—Jacksonville Public Service Corporation v. Calhoun Water Co., 123 So. 79, 219 Ala. 616, 64 A.L.R. 1550.
(2) Formerly, however, it had been held that a conveyance by an executrix and life tenant, executed by an attorney in fact in her name, adding the word "executrix," and in his name as agent, will estop her as to her life estate.—Phillips v. Hornsby, 70 Ala. 414.

93. Tex.—Surtees v. Hobson, Com.App., 13 S.W.2d 245, affirming, Civ.App., 4 S.W.2d 245.
21 C.J. p 1104 note 73.
One not a purchaser for value cannot invoke the principle that a grantor conveying property in a representative capacity is estopped to assert an individual title in derogation of the deed.—Security Trust Co. of Pottstown v. Feist, 5 A.2d 119, 333 Pa. 536.
Conveyance by agent
(1) One executing mortgage as agent for mortgagor is estopped from denying validity of mortgage on ground that agent herself owned land involved.—Hoover v. Pennington, 141 So. 517, 19 La.App. 779.
(2) Attorneys in fact, who executed an assignment of an oil and gas lease for their principal and "in their own right," and who were afterward made sole devisees of their principal under his will, would be estopped to question the validity of the assignment.—Kentucky Coke Co. v. Keystone Gas Co., C.C.A.Ky., 296 F. 320, certiorari denied 45 S.Ct. 92, 266 U.S. 605, 69 L.Ed. 464.
(3) Other cases see Edwards v. Sarasota Venice Co., Fla., 246 F. 773, 776, 159 C.C.A. 75—21 C.J. p 1104 note 73 [a].
Conveyance by executor
(1) One who, as executor, conveyed land by warranty deed was estopped to claim, as against grantee, that strip included was public road because of alleged dedication.—Clokey v. Wabash Ry. Co., 187 N.E. 475, 353 Ill. 349.
(2) Other cases see Carbee v. Hopkins, 41 Vt. 250—21 C.J. p 1104 note 73 [b].
Conveyance by guardian
(1) Where a guardian makes an absolute conveyance of land to a purchaser at guardian's sale, he is thereby estopped from claiming, in his individual capacity, against the purchaser, an interest in the land conveyed.—Simpson-Fell Oil Co. v. Stanolind Oil & Gas Co., Tex., 125 S.W.2d 263, affirming Stanolind Oil & Gas Co. v. Simpson-Fell Oil Co., Civ.App., 85 S.W.2d 325, and reversed on other grounds Simpson-Fell Oil Co. v. Stanolind Oil & Gas Co., Sup., 146 S.W.2d 723—Rutherford v. McGee, Civ.App., 241 S.W. 629.
(2) This rule obtains without regard to a covenant of warranty contained in the deed.—Surtees v. Hobson, Tex.Civ.App., 4 S.W.2d 245, affirmed, Com.App., 13 S.W.2d 245.
(3) A general warranty of title in a guardian's deed, however, is binding on the guardian, and prevents him from claiming in his individual capacity an interest in the land conveyed.—Rutherford v. McGee, supra.
(4) The fact that the purchaser at a guardian's sale had the title examined by his attorney, who gave the opinion that the guardian's sale conveyed the title, does not prevent the deed from operating as an estoppel against the claim by the guardian in his individual capacity of an interest in the land.—Rutherford v. McGee, supra.
(5) Other cases see Morris v. Wheat, 8 App.D.C. 379—21 C.J. p 1104 note 73 [c].
Conveyance by trustee
Cal.—Widney v. Southern Pac. Co., 7 P.2d 1046, 120 Cal.App. 291.
Tex.—Grange v. Kayser, Civ.App., 80 S.W.2d 1007.
21 C.J. p 1104 note 73 [d].
Corporate officers
(1) A corporation's secretary, by signing its chattel mortgage, is estopped to deny any statement of fact contained therein.—Howry v. Sigel-Campion Live Stock Commission Co., 249 P. 658, 80 Colo. 143.
(2) President of corporate mortgagor, who signed bond and mortgage and personal guaranty of deficiency, and was present when descriptions in mortgage were read, was estopped to claim that mortgage was not lien on two of his own lots included therein.—Bankers' Trust Co. v. Marson, 134 A. 875, 100 N.J.Eq. 1.

94. Tex.—Carothers v. Alexander, 12 S.W. 4, 74 Tex. 309.
21 C.J. p 1105 note 74.

dividually;[95] and as a rule, the doctrine of title by estoppel does not apply, in the absence of personal covenants, to a title subsequently acquired in a different right.[96]

A deed executed by one as agent for another, particularly where it recites that he has authority to convey, estops him and his subsequent grantees from denying such authority.[97] One who conveys land as executor is estopped to deny that he was executor and had received letters testamentary from the probate court;[98] and the principle also applies to administrators.[99] Furthermore an executor is estopped to deny that his exercise of his discretionary power as executor to sell testator's real estate was for the best interest of the estate after receiving full consideration for the land sold.[1]

It is ordinarily held that the execution of conveyances by public officers in their capacity as such will not estop them from attacking the title thus conveyed,[2] but there is some authority to the contrary.[3]

§ 49. States or Municipalities

The doctrine of estoppel by deed generally applies against the state and municipal corporations.

While there are some decisions which hold that on principles of public policy the sovereign cannot be estopped,[4] it is generally held that the doctrine of estoppel by deed applies against the state, and it will not be allowed to assert anything in derogation of its grant.[5]

However, the deed of a state officer to land sold for taxes which contains no covenants and does not purport to convey any right, title, or interest of the state other than its lien for the taxes assessed will not preclude it from asserting a claim to the land in question.[6] Further, the state is not estopped by the unauthorized deeds of its officers or agents.[7]

Municipal corporation. A municipal corporation is estopped by its grants the same as the state.[8] However, a grant of land by a municipal corporation will not estop it from passing laws in the exercise of the police power, by which the land will be rendered useless for the purposes of the grant.[9]

§ 50. Privies

The privies of a grantor or grantee are estopped to the same extent as the original parties to the deed and may, in like manner, take advantage of the estoppel.

The privies of a grantor[10] and the privies of a

95. Ala.—Seabury v. Doe, 22 Ala. 207, 58 Am.D. 254.

96. Colo.—Consolidated Republican Mountain Min. Co. v. Lebanon Min. Co., 12 P. 212, 9 Colo. 343.
21 C.J. p 1106 note 76.

Acquisition of title in representative capacity

(1) A grantor's subsequent acquisition of title, not individually but as trustee for others, cannot inure to the benefit of his grantee.—Brown v. Harvey Coal Corporation, D.C.Ky., 49 F.2d 434, affirmed, C.C.A., 61 F. 2d 624.

(2) A title acquired in a different representative capacity from that in which the prior title was held and conveyed will not inure to the grantee's benefit.—Lauve v. Wilson, 38 So. 522, 114 La. 699.

97. Colo.—Byers v. Gilmore, 50 P. 370, 10 Colo.App. 79.
21 C.J. p 1106 note 77.
Recitals as to power to convey see supra § 38 c.

98. Cal.—Larco v. Casaneuava, 30 Cal. 560.

99. Tex.—Corzine v. Williams, 22 S. W. 399, 85 Tex. 499.

1. Pa.—Eisenbrown v. Burns, 30 Pa. Super. 46.

2. Ga.—Johnson v. Thomason, 48 S. E. 137, 120 Ga. 531.
21 C.J. p 1106 note 81.

3. Minn.—Morris v. Watson, 15 Minn. 212.
21 C.J. p 1106 note 82.

4. N.C.—Wallace v. Maxwell, 32 N. C. 110, 51 Am.D. 380.
21 C.J. p 1106 note 83.
Estoppel against:
County by recitals in particular instruments:
Bills and notes see Counties § 257.
Bonds see Counties § 270.
Warrants see Counties § 249.
Municipality by recitals in municipal bonds see the C.J.S. title Municipal Corporations § 1968, also 44 C.J. p 1248 note 61–p 1254 note 35.
School district by recitals in bonds see the C.J.S. title Schools and School Districts § 372, also 56 C. J. p 629 note 24–p 630 note 27.

5. N.Y.—People v. Wainwright, 200 N.Y.S. 200, 205 App.Div. 505, modifying 195 N.Y.S. 777, 119 Misc. 71.
21 C.J. p 1106 note 84.

Corpus Juris cited in connection with a holding that the doctrine of estoppel applies to the state under certain circumstances.—City of Winter Haven v. State, 170 So. 100, 108, 125 Fla. 392.

6. Ind.—Reid v. State, 74 Ind. 252.
Mich.—Crane v. Reeder, 25 Mich. 303.

7. Tex.—Childress County Land & Cattle Co. v. Baker, 56 S.W. 756, 23 Tex.Civ.App. 451.
21 C.J. p 1106 note 86.

8. Ohio.—State v. Turner, 113 N.E 327, 93 Ohio St. 379.
21 C.J. p 1106 note 87.

Where a municipality receives no benefit from a transaction which has prompted the issuance of its nonnegotiable warrants, the municipality cannot be estopped to assert failure of consideration or fraud or invalidity of the warrants, since one of the indispensable elements of estoppel by recital, as applied to nonnegotiable instruments is benefits received by the city or county issuing the same.—City of Del Rio v. Lowe Civ.App., 111 S.W.2d 1208, reversed on other grounds Lowe v. City of Del Rio, 122 S.W.2d 191, 132 Tex. 111.

9. N.Y.—In re Opening of Albany St., 6 Abb.Pr. 273.
21 C.J. p 1107 note 88.

10. Cal.—Midstate Oil Co. v. Ocean Shore R. Co., 270 P. 216, 93 Cal App. 704.
Ga.—Mitchell v. Hunt, 196 S.E. 711, 185 Ga. 835—Cook v. Flanders, 138 S.E. 218, 164 Ga. 279—Wyley Loose Leaf Co. v. Bird, 125 S.E. 496, 159 Ga. 246.
Ill.—Clokey v. Wabash Ry. Co., 187 N.E. 475, 353 Ill. 349—Scott v. Scott, 139 N.E. 70, 307 Ill. 586.
Ky.—Gray-Mellon Oil Co. v. Fairchild, 292 S.W. 743, 219 Ky. 143.

grantee[11] are estopped to the same extent as the original parties to the deed, and may in like manner take advantage of the estoppel. The estoppel of a grantor as to an after-acquired title applies against those in privity with him the same as in other cases of estoppel.[12]

§ 51. What Constitutes Privity

Privity means the mere succession of rights or the derivation of rights by one person from another and the holding in subordination to the latter.

In the law of estoppel by deed, privity means: (1) Mere succession of rights, that is, the devolution, in whole or in part, of the rights and duties of one person upon another. (2) The derivation of rights by one person from another and the holding in subordination to the latter.[13]

§ 52. Who Are Privies Generally

A person is not bound as a privy by an estoppel against another, nor may he urge it, unless he succeeds to that other's possession or holds in subordination to it.

A privy to a deed is a party to the deed or a legal representative of, or successor in title to, a party,[14] or one who has succeeded to some right or obligation which one of the parties to the act derived through the act or incurred under it.[15]

A person is not bound as a privy by an estoppel against another, nor may he urge it, unless he succeeds to that other's possession or holds in subordination to it; persons claiming under an independent title are not estopped.[16] If, on the other hand, a person does so succeed or does so hold, he is bound by the estoppel and may urge it the same as the original party to the deed.[17] A creditor levying on land may not take advantage of an estoppel created by a deed thereof to the debtor, unless he buys in the property;[18] but a levying creditor is bound by an estoppel against the debtor as grantor.[19] A purchaser at execution sale may take advantage of an estoppel arising from the deed by which the debtor acquired title,[20] and he is estopped by a deed made by the debtor before the sale.[21] A purchaser under an attachment levied on property is bound by a conveyance of the property executed before levy of the attachment.[22]

§ 53. Heirs and Devisees

An heir or devisee is in privity with the ancestor or testator and may urge an estoppel arising in his favor, and he is bound by an estoppel against the ancestor or testator, unless, in some jurisdictions, he claims under an independent title.

Mo.—Ba[illegible]-Ghio Real Estate Co. v. Keleher, 214 S.W. 961.
Neb.—National Bank of Commerce of Kansas City v. Lefferdink, 193 N.W. 916, 110 Neb. 275.
N.C.—Thames v. Goode, 9 S.E.2d 485, 217 N.C. 639—Williams v. Norfolk-Southern R. Co., 158 S.E. 473, 200 N.C. 771.
Okl.—Weaver v. Drake, 193 P. 45, 79 Okl. 277.
Va.—Rose v. Agee, 104 S.E. 827, 128 Va. 502.
W.Va.—Roberts v. Huntington Development & Gas Co., 109 S.E. 348, 89 W.Va. 384.
21 C.J. p 1107 note 92—47 C.J. p 278 note 15.

Persons claiming under a mortgagor, except purchasers or lienholders without actual or constructive notice, are precluded, as against the mortgagee, acting in good faith, or his assignees from denying the mortgagor's title as asserted in the mortgage.—Thomas v. Hudson, 10 S.E.2d 396, 190 Ga. 622.

11. Ga.—Mitchell v. Hunt, 196 S.E. 711, 185 Ga. 835—Cook v. Flanders, 138 S.E. 218, 164 Ga. 279—Wyley Loose Leaf Co. v. Bird, 125 S.E. 496, 159 Ga. 246.
Ky.—Continental Realty Co. v. Bolen, 242 S.W. 6, 195 Ky. 219.
Mass.—Cheffee v. Geageah, 149 N.E. 620, 253 Mass. 586.
Va.—Johnson v. Powhatan Mining Co., 103 S.E. 703, 127 Va. 352.
21 C.J. p 1107 note 93.

Effect of knowledge
Complainant's knowledge that his grantor's prior deed to defendant's ancestor was to secure loan and that reconveyance by warranty deed was to restore title could not prevent complainant from asserting estoppel against defendant.—Wills v. Windish, 151 A. 212, 106 N.J.Eq. 449.

12. Ill.—Weegens v. Karels, 29 N.E. 2d 248, 374 Ill. 273—Thornton v. Louch, 130 N.E. 467, 297 Ill. 204.
Ky.—Ratcliff's Guardian v. Ratcliff, 46 S.W.2d 504, 242 Ky. 419.
Mass.—Supraner v. Citizens Sav. Bank, 22 N.E.2d 38, 303 Mass. 460.
Mich.—Jacobsen v. Nieboer, 299 N.W. 830, 299 Mich. 116.
21 C.J. p 1107 note 94.

13. Ga.—Murrelle v. Broughton, 82 S.E. 456, 142 Ga. 41.
21 C.J. p 1108 note 95.

14. La.—Gipson v. Gipson, 192 So. 355, 356, 193 La. 807—Farley v. Frost-Johnson Lumber Co., 63 So. 122, 124, 133 La. 497, L.R.A.1915A 200, Ann.Cas.1915C 717.
What constitutes privity see supra § 51.

15. La.—Gipson v. Gipson, 192 So. 355, 193 La. 807—Commercial Germanic Trust & Savings Bank v. White, 81 So. 753, 145 La. 54.

16. Ark.—Moberly v. Ricketshare, 149 S.W.2d 557.
Hawaii.—Damon v. Tsutsui, 31 Hawaii 673.
S.C.—Cayce Land Co. v. Guignard, 117 S.E. 644, 124 S.C. 443.
Tex.—Greene v. White, 153 S.W.2d 575, reversing White v. Greene, Civ.App., 129 S.W.2d 801.
21 C.J. p 1108 note 96.

17. Tex.—Henderson v. Book, Civ. App., 128 S.W.2d 117, error refused.
21 C.J. p 1108 note 97.

An executor or administrator can maintain only such claim as the testator or intestate might successfully have adopted while living.
Ill.—Bittner v. Field, 188 N.E. 342, 354 Ill. 215, affirming Field v. Bittner, 267 Ill.App. 346.
N.Y.—Dennison v. Ely, 1 Barb. 610.
N.C.—Tripp v. Longston, 10 S.E.2d 916, 218 N.C. 295.

18. Pa.—Waters' Appeal, 35 Pa. 523, 78 Am.D. 354.

19. N.H.—Kimball v. Bridgell, 5 N.H. 533, 22 Am.D. 476.

20. Cal.—Dodge v. Walley, 22 Cal. 224, 83 Am.D. 61.
21 C.J. p 1108 note 1.

21. N.C.—Den v. Bird, 30 N.C. 280, 49 Am.D. 379.
21 C.J. p 1108 note 2.

22. S.D.—Bliss v. Tidrick, 127 N.W. 852, 25 S.D. 533, 32 L.R.A.,N.S., 854, Ann.Cas.1912C 671.

Heirs and devisees are in privity with the ancestor or testator and may urge an estoppel arising in his favor.[23] For the same reason they are bound by an estoppel against the ancestor or testator;[24] and this is so whether the ancestor had title at the time of the conveyance or subsequently acquired it.[25] However, a warranty deed binds the grantor's heirs only to the extent of the property received by them from the grantor's estate;[26] and no estoppel arises against the heirs as to an after-acquired title by the ancestors by reason of a conveyance by the ancestor which conveys only the interest the grantor had in the land and not the land itself.[27]

As a general rule the heirs or devisees are estopped only where they claim through the ancestor or testator; ordinarily an heir or devisee claiming an independent title in himself is not estopped.[28] Nevertheless important limitations of the proposition are recognized in some jurisdictions, where, if heirs or devisees have received property from the estate equal in value to the land conveyed, they are estopped to claim by an independent title the land conveyed,[29] and if the property received from the estate is less in value than the estate conveyed they will be barred of a recovery to the extent of the value of the property received;[30] but this is the extent of the limitation, and heirs or devisees of the grantor are bound only to the extent of the property received by them from the estate.[31] In some states the rule has been modified so as not to estop the heir in such case, even though he has received assets, unless administration has been taken out and a breach occurs after the estate has been settled.[32] The rule has been denied altogether in other jurisdictions where, by statute, lineal and collateral warranties with all their incidents are abolished.[33]

§ 54. Persons Claiming through Grantee

An estoppel arising against a grantor may be urged by persons claiming under the grantee.

An estoppel arising against a grantor may be urged by persons claiming under the grantee.[34]

23. La.—Guice v. Mason, 100 So. 397, 156 La. 201.
21 C.J. p 1108 note 4.

24. U.S.—Dodge v. Dodge, C.C.A. Mass., 102 F.2d 703, certiorari denied 60 S.Ct. 85, 308 U.S. 550, 84 L.Ed. 463—Childs v. U. S., C.C.A. La., 5 F.2d 816.
Ill.—Marvin v. Donaldson, 160 N.E. 179, 329 Ill. 30—Northern Trust Co. v. McEldowney, 9 N.E.2d 480, 291 Ill.App. 352—Field v. Bittner, 267 Ill.App. 346, affirmed Bittner v. Field, 188 N.E. 342, 354 Ill. 215.
Ky.—Hargis v. Flesher Petroleum Co., 21 S.W.2d 818, 231 Ky. 442—Reid v. Reid, 20 S.W.2d 1015, 230 Ky. 835.
La.—Soule v. West, 170 So. 26, 185 La. 655—Cherami v. Cantrelle, 142 So. 150, 174 La. 995—Kuhn v. Breard, 92 So. 52, 151 La. 546.
Miss.—Hamilton v. City of Jackson, 127 So. 302, 157 Miss. 284.
N.J.—Wills v. Windish, 151 A. 212, 106 N.J.Eq. 449.
N.C.—Thames v. Goode, 9 S.E.2d 485, 217 N.C. 639—West v. Murphy, 149 S.E. 731, 197 N.C. 488—Williams v. Biggs, 96 S.E. 643, 176 N.C. 48.
Pa.—Roper v. Scevcnik, 194 A. 333, 128 Pa.Super. 453.
Tex.—Havard v. Smith, Civ.App., 13 S.W.2d 743—Tinsley v. Mays, Civ. App., 251 S.W. 577.
Va.—Wilkerson v. Wilkerson, 144 S.E. 497, 151 Va. 322.
21 C.J. p 1108 note 5.

Grantors' heirs are estopped by grantors' second deed from claiming interest, where contingent ultimate reversion under first deed was in grantors and heirs took no estate by purchase.—West Tennessee Co. v. Townes, D.C.Miss., 52 F.2d 764.

Heirs accepting ancestor's succession unconditionally are bound by an estoppel against the ancestor.—Cook v. Martin, 178 So. 881, 188 La. 1063.

Estoppel inoperative as to ancestor
An heir is not estopped where the estoppel is not operative as to his ancestor.—Castleman v. Smith, 86 So. 778, 148 La. 233.

25. U.S.—Scott v. Cohen, C.C.A.Tex., 115 F.2d 704, affirming, D.C., Cone v. Parish, 32 F.Supp. 412, and certiorari denied Scott v. Cohen, 61 S.Ct. 806.
Ky.—Kentucky River Coal Corporation v. Williams, 10 S.W.2d 617, 226 Ky. 93.
La.—Jackson v. United Gas Public Service Co., 198 So. 633, 196 La. 1.
Mass.—Horowitz v. People's Sav. Bank, 29 N.E.2d 770—Supraner v. Citizens Sav. Bank, 22 N.E.2d 38, 303 Mass. 460.
21 C.J. p 1108 note 6.

26. Tex.—Cleveland v. Smith, Civ. App., 113 S.W. 547.

27. Mo.—Stoeper v. Silberberg, 119 S.W. 418, 220 Mo. 258.
21 C.J. p 1108 note 8.

28. La.—Little v. Barbe, 198 So. 368, 195 La. 1071.
Ohio.—Wheeler v. Wannamaker, 24 Ohio N.P.,N.S., 101.
21 C.J. p 1109 note 10.

Heirs or devisees of grandparent
Heirs who do not take through the parent but who take as heirs or devisees of a grandparent are not estopped by the parent's deed.—Hutchinson v. Lucas, 106 S.E. 150, 181 N.C. 53—Benson v. Benson, 104 S.E. 68, 180 N.C. 106.

Persons claiming not as heirs of decedent's widow but as heirs of decedent are not estopped by widow's deed.—Johnson v. Adams, Mo., 7 S.W. 2d 1010.

Remainderman
Son, having remainder by implication after life estate in mother, may assert title against purchaser from mother.—West v. Murphy, 149 S.E. 731, 197 N.C. 488.

29. Pa.—Carson v. New Bellevue Cemetery Co., 104 Pa. 575.
21 C.J. p 1109 note 11.

Cotenants
Where value of deceased cotenant's interest exceeded damage done under easement conveyed by him, other cotenants, inheriting his interest, could not sue for damages.—U.S.—Burdine v. Southern Public Utilities Co., C.C.A.S.C., 11 F.2d 29.
S.C.—Charleston, C. & C. R. R. Co. v. Leech, 17 S.E. 994, 39 S.C. 446.

30. Ky.—Ball v. Wasioto & B. M. R. Co., 162 S.W. 810, 157 Ky. 166.
21 C.J. p 1109 note 12.

31. Tex.—Chace v. Gregg, 32 S.W. 520, 88 Tex. 552.
21 C.J. p 1109 note 13.

32. Mass.—Russ v. Alpaugh, 118 Mass. 369, 19 Am.R. 464.
21 C.J. p 1109 note 14.

33. N.Y.—Trolan v. Rogers, 34 N.Y.S. 836, 88 Hun 422.

34. Mo.—Barada-Ghio Real Estate Co. v. Keleher, 214 S.W. 961.

The right of a grantee to assert an estoppel as to after-acquired property inures to those claiming under him.[35] This is allowed, however, not because of privity between the grantee and the sub-grantee, but because the covenant of warranty in the original deed runs with the land.[36]

IV. ESTOPPEL BY SIMPLE CONTRACT

§ 55. In General

a. In general
b. Estoppel to deny facts settled by contract

a. In General

Two kinds of estoppel by contract are recognized: Estoppel to deny facts settled by contract; and estoppel arising from acts done under, or in performance of, the contract.

While it has been stated that "estoppel by contract" is a term intended to embrace all cases in which there is an actual or virtual undertaking to treat a fact as settled,[37] it is well agreed that, as stated in Corpus Juris, which has been quoted by the courts, there are two sorts of what has been termed "estoppel by contract," namely, estoppel to deny the truth of facts agreed on and settled by force of entering into the contract, and estoppel arising from acts done under, or in performance of, the contract.[38]

The first form of estoppel, if the contract is in writing, is analogous to certain phases of estoppel by deed, and is not in strict propriety a species of estoppel in pais, since it is wholly based on a written instrument.[39]

The second sort of estoppel by contract seems to be limited to cases where one party goes into possession of another's property in recognition of the latter's title, and it precludes the possessor from denying that title.[40] It rests, whether or not the contract is in writing, on matters in pais.[41] It does not, however, seem to fall within the scope of estoppel in pais, in the strict sense of that term, although it bears a close resemblance thereto and its practi-

Va.—Marshall v. Jameson, 134 S.E. 573, 145 Va. 605.
21 C.J. p 1109 note 16.

Assignee of lessee
Where children of deceased husband executed quitclaim deed to interest in certain land to wife and son of deceased husband who were record owners and who granted oil and gas lease to lessee who assigned the lease, assignee was a successor in title in so far as oil and gas lease was concerned and therefore a "privy" in title and entitled to assert estoppel by deed against the children.—Gipson v Gipson, 192 So. 355, 193 La. 807.

35. Ark.—Myers v. Hobbs, 115 S.W. 2d 880, 195 Ark. 1026.
Ga.—Fite v. Walker, 187 S.E. 95, 183 Ga. 46.
Ky.—Elkhorn Coal Corporation v. Hackett, 88 S.W.2d 943, 261 Ky. 795—Salyer's Guardian v. Keeton, 283 S.W. 1015, 214 Ky. 643.
La.—Guice v. Mason, 100 So. 397, 156 La. 201.
Mass.—Horowitz v. People's Sav. Bank, 29 N.E.2d 770—Supraner v. Citizens Sav. Bank, 22 N.E.2d 38, 303 Mass. 460.
Mich.—Jacobson v. Nieboer, 299 N. W. 830, 299 Mich. 116.
Mo.—Baldridge Ohio Real Estate Co. v. Keleher, 214 S.W. 961.
21 C.J. p 1110 note 17.

A lessor's after-acquired title inures to the benefit of the lessee's assignees.—Stone v. Broadway, Tex. Civ.App., 6 S.W.2d 197, modified on other grounds Broadway v. Stone, Com.App., 15 S.W.2d 230, rehearing denied 17 S.W.2d 36.

Redelivery of deed to grantor
The grantor's after-acquired title inures to the benefit of those claiming under the grantee by deed although after the conveyance to them the grantee redelivers his deed to the original grantor.—Galer Oil Co. v. Pryor, 47 P.2d 97, 172 Okl. 302.

Waiver
Right of persons claiming under grantee to assert an estoppel as to after-acquired title held not waived. —Wall v. United Gas Public Service Co., La.App., 181 So. 562.

36. Ohio.—Boyd v. Longworth, 11 Ohio 235.

37. La.—Robbins v. Martin, 138 So. 132, 18 La.App. 223.
Mo.—Bricker v. Stroud, 56 Mo.App. 183.

Other statement
"The phrase 'estoppel by contract' . . . means no more than that a party is bound by the terms of his own contract until set aside or annulled for fraud, accident, or mistake."—United Fidelity Life Ins. Co. v. Fowler, Tex.Civ.App., 38 S.W.2d 128, 131, error dismissed.

38. Ala.—Stocks v. Inzer, 168 So. 877, 878, 232 Ala. 482, citing Corpus Juris.
Colo.—In re Schofield's Estate, 73 P. 2d 1381, 1382, 101 Colo. 443, quoting Corpus Juris.
Ky.—Goodin v. Turner, 300 S.W. 327, 222 Ky. 132.
La.—Robbins v. Martin, 138 So. 132, 135, 18 La.App. 223, quoting Corpus Juris.
Okl.—Finch v. Smith, 58 P.2d 850, 851, 177 Okl. 307, quoting Corpus Juris.
Tex.—Dallas Lumber Co. v. Golde, Com.App., 12 S.W.2d 187, reversing, Civ.App., 1 S.W.2d 455—Masterson v. Bouldin, Civ.App., 151 S. W.2d 301, 307, error refused, quoting Corpus Juris.
Vt.—Barton Sav. Bank & Trust Co. v. Bickford, 122 A. 582, 97 Vt. 166.
W.Va.—Roberts v. Huntington Development & Gas Co., 109 S.E. 348, 352, 89 W.Va. 384, citing Corpus Juris.
21 C.J. p 1110 note 26.

39. U.S. Stevens v. U. S., C.C.A. Minn., 29 F.2d 904.
Colo.—In re Schofield's Estate, 73 P. 2d 1381, 1383, 101 Colo. 443, quoting Corpus Juris.
La.—Robbins v. Martin, 138 So. 132, 135, 18 La.App. 223, quoting Corpus Juris.
Okl.—Finch v. Smith, 58 P.2d 850, 851, 177 Okl. 307, quoting Corpus Juris.
Tex.—Masterson v. Bouldin, Civ. App., 151 S.W.2d 301, 307, error refused, quoting Corpus Juris.
21 C.J. p 1110 note 26.

40. Okl.—Finch v. Smith, 58 P.2d 850, 177 Okl. 307.

41. Tex.—Dallas Lumber Co. v. Golde, Com.App., 12 S.W.2d 187, reversing, Civ.App., 1 S.W.2d 455.

cal operation is the same.[42] Elements essential to an estoppel in pais are found wanting in this sort of so-called estoppel by contract, and it seems to rest on the broad principle which precludes a party from taking inconsistent positions to another's prejudice.[43] It is therefore treated in §§ 107–129 infra, as a form of quasi estoppel.

Unlike the case of estoppel by conduct, as discussed in § 70 infra, it can seldom be an answer to estoppel by contract that the party against whom the estoppel is claimed acted in ignorance of the facts and under mistake.[44] The office of estoppel by simple contract is, it has been stated, to preclude a party from taking inconsistent positions to another's prejudice.[45] A seller who, with full knowledge of the facts, enters into an agreement relating to a refund of the price is estopped to claim that the agreement was merely colorable and made solely because the other party had obtained an unjust advantage.[46]

b. Estoppel to Deny Facts Settled by Contract

In the absence of fraud, accident, or mistake, parties to a contract and their privies are estopped to deny facts agreed on or assumed in the making of the contract.

As stated in Corpus Juris, which has been quoted and cited by the courts, if, in making a contract, the parties agree on or assume the existence of a particular fact as the basis of their negotiations, they are estopped to deny the fact so long as the contract stands,[47] in the absence of fraud, accident,

42. Tex.—Mauritz v. Schwind, Civ. App., 101 S.W.2d 1085, error dismissed—United Fidelity Life Ins. Co. v. Fowler, Civ.App., 38 S.W.2d 128, 131, error dismissed, citing **Corpus Juris.**

43. Tex.—Maurrtz v. Schwind, Civ. App., 101 S.W.2d 1085, error dismissed—United Fidelity Life Ins. Co. v. Fowler, Civ.App., 38 S.W.2d 128, error dismissed.

44. U.S.—Stevens v. U. S., C.C.A. Minn., 29 F.2d 904.
Mo.—McFarland v. McFarland, 211 S. W. 23, 278 Mo. 1.
Tex.—Allen v. Berkmier, Civ.App., 216 S.W. 647, error refused.

45. Tex.—Marshburn v. Stewart, Civ.App., 295 S.W. 679—Magnolia Petroleum Co. v. Caswell, Civ.App., 295 S.W. 653.

46. Ala.—E. T. Gray & Sons v. Satuloff Bros., 105 So. 666, 213 Ala. 526.

47. U.S.—McLean v. Texas Co., C.C. A. Tex., 103 F.2d 989, certiorari denied 60 S.Ct. 98, 308 U.S. 579, 84 L.Ed. 485—Wheelock v. Commissioner of Internal Revenue, C.C.A. Tex., 77 F.2d 474—Stevens v. U. S., D.C.Minn., 60 F.2d 159, 161, quoting **Corpus Juris,** and reversed on other grounds U. S. v. Stevens, C.C.A.Minn., 64 F.2d 853—Stevens v. U. S., C.C.A.Minn., 29 F.2d 904, 905, quoting **Corpus Juris**—Mohawk Oil Corporation v. Simpson, C.C.A.Tex., 285 F. 149.
Ala.—Russell v. Soper, 167 So. 261, 232 Ala. 194.
Cal.—Palvutzian v. Terkanian, 190 P. 503, 47 Cal.App. 47.
Colo.—In re Schofield's Estate, 73 P. 2d 1381, 1383, 101 Colo. 443, quoting **Corpus Juris.**
Fla.—Warren v. Tampa Mortg. Investors' Co., 150 So. 738, 112 Fla. 555.
Ga.—Fidelity & Deposit Co. of Maryland v. Fine, 194 S.E. 58, 62, 56 Ga. App. 729, quoting **Corpus Juris.**
Ind.—Lebo v. Bowlin, 189 N.E. 397, 399, 100 Ind.App. 75, quoting **Corpus Juris.**
Kan.—Hoxie State Bank v. Brewer, 224 P. 896, 897, 115 Kan. 756, citing **Corpus Juris.**
La.—Robbins v. Martin, 138 So. 132, 135, 18 La.App. 223, quoting **Corpus Juris.**
Mich.—Paul v. University Motor Sales Co., 278 N.W. 714, 721, 283 Mich. 587, quoting **Corpus Juris**—Amos v. Walter N. Kelley Co., 215 N.W. 397, 240 Mich. 257.
Mo.—Bentrup v. Johnson, 14 S.W.2d 537, 223 Mo.App. 299.
Mont.—Scott v. Tuggle, 241 P. 229, 74 Mont. 476.
N.M.—Montoya v. Hubbell, 210 P. 227, 28 N.M. 250.
N.Y.—McGovern v. City of New York, 138 N.E. 26, 234 N.Y. 377, 25 A.L.R. 1442, modifying 196 N.Y.S. 162, 202 App.Div. 361, remittitur amended and reargument denied 142 N.E. 262, 236 N.Y. 508.
S.C.—Rogers v. Aetna Life Ins. Co., 173 S.E. 306, 307, 172 S.C. 139, citing **Corpus Juris.**
Tenn.—Matthews v. Matthews, App., 148 S.W.2d 3—Bettis Electric Shop v. Chapman Drug Co., 11 Tenn.App. 574.
Tex.—Johnson v. Tunstall, Com.App., 25 S.W.2d 828, reversing Tunstall v. Johnson, Civ.App., 13 S.W.2d 240—El Paso Land Improvement Co. v. Crawford, Com.App., 292 S.W. 518, reversing, Civ.App., 280 S.W. 914—H. C. Denny & Co. v. Lee, Com.App., 221 S.W. 947, affirming, Civ.App., 188 S.W. 294—Masterson v. Bouldin, Civ.App., 151 S.W.2d 301, 307, error refused, quoting **Corpus Juris**—Ward v. Priddy, Civ. App., 57 S.W.2d 586, error refused—United Fidelity Life Ins. Co. v. Fowler, Civ.App., 38 S.W.2d 128, 131, error dismissed, quoting **Corpus Juris**—Marshburn v. Stewart, Civ.App., 295 S.W. 679, 694, quoting **Corpus Juris**—Magnolia Petroleum Co. v Caswell, Civ.App., 295 S.W. 653, 659, quoting **Corpus Juris**—Allen v. Berkmier, Civ.App., 216 S.W. 647, error refused.
Vt.—Barton Sav. Bank & Trust Co. v. Bickford, 122 A. 582, 585, 97 Vt. 166, quoting **Corpus Juris.**
Va.—Hobbs v. Virginia Nat. Bank of Petersburg, 133 S.E 595, 147 Va. 892, reversing 128 S.E. 46, 147 Va. 892.
Wash.—Goebel v. Elliott, 35 P.2d 44, 178 Wash. 444—Halverstadt v. Estus, 295 P. 175, 160 Wash. 390.
W.Va.—Guffey Oil & Gas Royalties v. Marshall, 153 S.E. 291, 293, 109 W.Va. 180, quoting **Corpus Juris.**
21 C.J. p 1111 note 30.
Estoppel by contract as to:
Bills of sale see the C.J.S. title Sales § 129, also 55 C.J. p 303 note 99.
Trade-marks and trade-names see the C.J.S. title Trade-Marks, Trade-Names and Unfair Competition § 173, also 63 C.J. p 519 notes 53–55.

Election of remedies
Under trust agreement, empowering trustee to sell collateral pledged to secure corporate note issue on corporation's default and to proceed at law or equity to protect rights of holders of notes, the corporation was estopped from objecting that the remedy by enforcement of collection of the collateral notes was inconsistent with remedy of execution sale of the collateral, especially where such judgment inured to the benefit of corporation.—Anglo-California Trust Co. v. Oakland Rys., 225 P. 452, 193 Cal. 451.

Estoppel to attack encumbrance
Purchaser at receiver's sale subject to chattel mortgages could not thereafter attack validity of mortgages.—Bergenfield Printing Co. v. Intertype Corporation, 144 A. 730, 104 N.J.Eq. 212.

Estoppel to deny contract superseded prior arrangements
Even if a party to a contract had objections to it, after he has exe-

or mistake.[48]

There can be no estoppel as to matters not included in the contract,[49] nor is the doctrine applicable as against persons other than parties to the contract and their privies.[50] To form the basis of an estoppel by contract, except in equity, the con-

cuted it his mouth is closed against any denial that it superseded all previous arrangements.
U.S.—Parish v. U. S., Ct.Cl., 8 Wall. 489, 19 L.Ed. 472, 7 Ct.Cl. 116.
Mich.—Paul v. University Motor Sales Co., 278 N.W. 714, 283 Mich. 587.

Estoppel to deny discharge of claims

Where two individuals purchased the entire stock of a corporation from original sole owners who consented to terms and executed the contract based on statement of assets and liabilities in which they approved the omission of their claims for loans and past-due salary, the original stockholders were estopped, in an action against corporation for amount of loans and past-due salary accounts, from setting up that there was no discharge of their claims.—Paul v. University Motor Sales Co., supra.

Estoppel to deny liability

(1) Where one who purchases stock and obligations of a corporation from a creditor of the company assumes payment of certain of the company's bonds secured by its mortgage, he is estopped, on foreclosure of the mortgage, to deny the company's liability on the bonds.—Old Colony Trust Co. v. Allentown & B. Rapid-Transit Co., 44 A. 319, 192 Pa. 596.

(2) Under a contract clearly showing plaintiff was indebted to defendant in some amount, plaintiff is estopped to deny he was indebted to defendant on contract date.—United Fidelity Life Ins. Co. v. Fowler, Tex.Civ.App., 38 S.W.2d 128, error dismissed.

Marshaling assets

Where a vendor who had sold on installments one of two quarter sections, each of which was subject to mortgages covering the whole, thereafter assigned the contract and notes representing the unpaid purchase money, the assignee was not estopped as against one who recovered judgment against the vendor before recordation of the assignment of the contract, etc., from insisting that the original mortgagee first exhaust the security of the quarter section not sold on installments, because, when the assignee bought the notes of the purchaser, it also took a deed to the quarter section, etc., and agreed to pay the encumbrances on both, for the agreement was made on condition that there was then owing a fixed sum on the notes of the purchaser, and that the assignee should have those notes paid to it, and the judgment creditor could assert no greater rights than the vendor, the assignor being estopped to deny the assignee's right to such notes.—Frank Lynch Co. v. National City Bank of Chicago, C.C.A.N.D., 261 F. 480.

Power of attorney

Assignee of proceeds of policies taking power of attorney to sue was estopped to assert assignor was not real party in interest, where assignee's right to sue was barred.—Keeley v. Indemnity Co. of America, 7 S.W.2d 434, 222 Mo.App. 439.

Receipts for sums due as their mother's heirs, under a charge of five hundred dollars for her benefit against land devised by their grandmother to an uncle, and releasing legacies under his will, estopped heirs who were sui juris by contract from asserting that deceased uncle's land was a trust investment of the five hundred dollars.—Winstead v. Farmer, 137 S.E. 179, 193 N.C. 405.

48. U.S.—Stevens v. U. S., D.C.Minn., 60 F.2d 159, reversed on other grounds U. S. v. Stevens, C.C.A.Minn., 64 F.2d 853—U. S. v. Golden, C.C.A.N.M., 34 F.2d 367, 373, quoting Corpus Juris—Stevens v. U. S., C.C.A.Minn., 29 F.2d 904.
Colo.—In re Schofield's Estate, 73 P.2d 1381, 1383, 101 Colo. 443, quoting Corpus Juris.
Ga.—Fidelity & Deposit Co. of Maryland v. Fine, 194 S.E. 58, 62, 56 Ga.App. 729, quoting Corpus Juris.
Idaho.—Intermountain Ass'n of Credit Men v. Pierce, 251 P. 615, 43 Idaho 279.
Ind.—Lebo v. Bowlin, 189 N.E. 397, 399, 100 Ind.App. 75, quoting Corpus Juris.
Iowa.—Bettendorf v. Bettendorf, 179 N.W. 444, 945, 190 Iowa 83.
La.—Robbins v. Martin, 138 So. 132, 135, 18 La.App. 223, quoting Corpus Juris.
Mich.—Paul v. University Motor Sales Co., 278 N.W. 714, 721, 283 Mich. 587, quoting Corpus Juris.
Neb.—Union Life & Accident Ins. Co. of Lincoln, Neb., v. American Surety Co. of New York, 203 N.W. 172, 113 Neb. 300.
Tenn.—Matthews v. Matthews, App., 148 S.W.2d 3.
Tex.—Masterson v. Bouldin, Civ.App., 151 S.W.2d 301, 307, error refused, quoting Corpus Juris—Larson v. Sterling Mut. Life Ins. Co., Civ.App., 134 S.W.2d 717—United Fidelity Life Ins. Co. v. Fowler, Civ.App., 38 S.W.2d 128, 131, error dismissed, quoting Corpus Juris—Marshburn v. Stewart, Civ.App., 295 S.W. 679, 694, quoting Corpus Juris—Magnolia Petroleum Co. v. Caswell, Civ.App., 295 S.W. 653, 659, quoting Corpus Juris.
Vt.—Dunnett v. Shields, 123 A. 626, 97 Vt. 419—Barton Sav. Bank & Trust Co. v. Bickford, 122 A. 582, 585, 97 Vt. 166, quoting Corpus Juris.
W.Va.—Guffey Oil & Gas Royalties v. Marshall, 153 S.E. 291, 293, 109 W.Va. 180, quoting Corpus Juris.
21 C.J. p 1111 note 31.

49. Cal.—Woody v. Security Trust & Savings Bank, 29 P.2d 898, 137 Cal.App. 29.
Colo.—Colorado & S. Ry. Co. v. Western Light & Power Co., 214 P. 30, 73 Colo. 107.
Ill.—Barnes v. Gulliford, 124 N.E. 525, 289 Ill. 538.
La.—Delta Drilling Co. v. Oil Finance Corporation, 196 So. 914, 195 La. 407—McEachern v. Lawhon, 90 So. 674, 150 La. 349.
Md.—Marshall v. Security Storage & Trust Co., 142 A. 186, 155 Md. 649.
Mass.—Musto v. Tutella, 142 N.E. 109, 247 Mass. 303.
Mo.—In re Franz' Estate, 127 S.W. 2d 401, 344 Mo. 510—Orchard v. Wright-Dalton-Bell-Anchor Store Co., 197 S.W. 42.
Mont.—Scott v. Tuggle, 241 P. 229, 74 Mont. 476.
Pa.—Cobbett v. Gallagher, 13 A.2d 403, 339 Pa. 231—Tackawanna Mills v. Scranton Gas & Water Co., 150 A. 633, 300 Pa. 303.
R.I.—Inman v. Inman, 121 A. 113, 45 R.I. 206.
Tex.—Woods v. Selby Oil & Gas Co., Civ.App., 2 S.W.2d 895, affirmed, Com.App., 12 S.W.2d 994—Magnolia Petroleum Co. v. Caswell, Civ.App., 295 S.W. 653, 659, quoting Corpus Juris—Liverpool & London & Globe Ins. Co. v. Currie, Civ.App., 234 S.W. 232, error refused.

Particular matters

(1) Remaindermen are not estopped to claim interest in property and securities held by life tenant's trustees, by agreement for exercise of rights to purchase additional stock, which rights belong to them.—Buder v. Franz, C.C.A.Mo., 27 F.2d 101.

(2) Remaindermen are not estopped to assert interest in securities by a subsequent agreement of life tenant, or by assumption of life tenant's trustees, relative to exercise of rights to take additional stock.—Buder v. Franz, supra.

50. Ky.—Axton v. Vance, 269 S.W. 534, 207 Ky. 580.

tract in all its terms must be invoked by one party against the other.[51]

§ 56. Necessity of Seal

The authorities do not agree as to whether a written instrument not under seal may create an estoppel.

Since a deed is a writing under seal, it is self-evident that an unsealed writing cannot give rise to an estoppel by deed; and, as shown supra § 41, cases may be found in which it has been stated that a writing not made under seal cannot found an estoppel as by deed. Other decisions hold that no instrument not under seal will operate as an estoppel,[52] but it does not follow that a simple written contract cannot create an estoppel analogous to estoppel by deed and of the same force and effect, in so far as it is sufficient in law to effectuate the purpose for which it was made, and indeed there is authority that it may.[53]

§ 57. Validity of Contract

Unless the contract has been fully executed, an invalid contract cannot give rise to estoppel by simple contract, although an estoppel may arise from a contract merely invalid, as distinguished from illegal or unlawful.

An estoppel by simple contract cannot be predicated on an invalid contract,[54] unless it has been fully executed.[55] However, it has been held that a party to an invalid contract which is not illegal and unlawful may be equitably estopped to dispute the validity of the contract.[56]

An estoppel cannot be based on a contract which has been abrogated.[57]

La.—Walker v. Baer Thayer Hardwood Lumber Co., 129 So. 218, 14 La.App. 381, modifying 126 So. 541, 14 La.App. 381.

51. Tex.—Marshburn v. Stewart, Civ.App., 295 S.W. 679.

52. Conn.—Shelton v. Alcox, 11 Conn. 240.
N.Y.—Davis v. Tyler, 18 Johns. 490.

53. Tex.—Miller v. Miller, Civ.App., 283 S.W. 1085, 1092, citing **Corpus Juris.**

54. U.S.—U. S. v. Golden, C.C.A.N.M., 34 F.2d 367, 373, quoting **Corpus Juris.**
Ala.—Donald-Richard Co. v. Keel, 89 So. 102, 18 Ala.App. 150.
Cal.—Wood v. Imperial Irr. Dist., 17 P.2d 128, 216 Cal. 748—Butterfield Const. Co. v. Federal Land Value Ins. Co., 41 P.2d 958, 5 Cal.App.2d 16.
Colo.—Index Shale Oil Co. v. Wheeler, 255 P. 582, 81 Colo. 402—Walpole v. State Board, 163 P. 848, 62 Colo. 554.
Ky.—Edge v. City of Lexington, 127 S.W.2d 393, 395, 277 Ky. 750, citing **Corpus Juris**—Looney v. Elkhorn Land & Improvement Co., 242 S.W. 27, 28, 195 Ky. 198, citing **Corpus Juris.**
La.—Boyce Cottonseed Oil Mfg. Co. v. Board of Com'rs of Red River, Atchafalaya and Bayou Boeuf Levee Dist., 107 So. 506, 160 La. 727.
N.Y.—City of New York v. Yellow Taxi Corporation, 284 N.Y.S. 544, 157 Misc. 723.
Tex.—Drake v. Yawn, Civ.App., 248 S.W. 726—Workman's Mut. Aid Ass'n v. Monroe, Civ.App., 53 S.W. 1029.
21 C.J. p 1111 note 36.
Estoppel as validating illegal contract see Contracts § 279 c.

Lack of consideration

(1) Declarations without consideration regarding estate received under will did not constitute contract nor basis of estoppel.—Adkison v. Blomquist, 274 P. 312, 128 Or. 211.

(2) Where a promise to return funds in his hands belonging to another is without consideration, the promisor is not estopped to deny possession of funds, even though the owner sues in reliance thereon.—Story v. Palmer, Tex.Civ.App., 284 S.W. 331.

(3) Patentee was not estopped from asserting infringement of claims by his alleged promise not to enforce his patent against defendant, such promise, even if established, being void for lack of consideration.—Leake v. New York Cent. R. R., D.C.N.Y., 28 F.Supp. 565.

Lack of mutuality

That plaintiff, suing to enjoin violation of building line restriction, had consented on unfulfilled condition to abrogation of restriction, which lacked mutuality, does not bar his right to relief.—Avignone v. Roumel, 13 F.2d 292, 56 App.D.C. 320.

Contracts against public policy

Cal.—Woody v. Security Trust & Savings Bank, 29 P.2d 898, 137 Cal.App. 29.
Ky.—Milliken v. Haner, 212 S.W. 605, 184 Ky. 694.
Minn.—City of St. Paul v. Minnesota Transfer Ry Co., 193 N.W. 175, 155 Minn. 237.

Contracts contravening statutes or constitutions

Cal.—American Nat. Bank of San Francisco v. A. G. Sommerville, Inc., 216 P. 376, 191 Cal. 364.
Idaho.—Deer Creek Highway Dist. v. Doumecq Highway Dist., 218 P. 371, 37 Idaho 601—Twin Falls County School Dist. No. 8 v. Twin Falls County Mut. F. Ins. Co., 164 P. 1174, 30 Idaho 400.

55. Kan.—City of Eureka v. Kansas Electric Power Co., 299 P. 938, 941, 133 Kan. 238, citing **Corpus Juris,** and rehearing denied 3 P.2d 484, 133 Kan. 708.
21 C.J. p 1112 note 37.

56. U.S.—U. S. for Use of Baltimore Cooperage Co. v. McCay, D.C.Md., 28 F.2d 777.
Kan.—City of Eureka v. Kansas Electric Power Co., 299 P. 938, 941, 133 Kan. 238, citing **Corpus Juris,** and rehearing denied 3 P.2d 484, 133 Kan. 708.
Mo.—Bunch v. Phillips, App., 79 S.W. 2d 785.
N.Y.—Queen v. Benesch, 180 N.Y.S. 856, 191 App.Div. 83.
21 C.J. p 1112 note 38.

Elements of estoppel

"Estoppel" applies where one has performed his part of contract in reliance on conduct and assertions of other amounting to representation that contract would be performed.—City of Eureka v. Kansas Electric Power Co., 299 P. 938, 133 Kan. 238, rehearing denied 3 P.2d 484, 133 Kan. 708.

Provision for counsel fees

Member of cooperative association is estopped to assert illegality of provision in contract for solicitor's fee.—Milk Producers' Marketing Co. v. Bell, 234 Ill.App. 222.
Equitable estoppel see infra § 59 et seq.

57. U.S.—U. S. v. Stevens, C.C.A. Minn., 64 F.2d 853, 856, citing **Corpus Juris,** and reversing Stevens v. U. S., D.C.Minn., 60 F.2d 159.
Tex.—Lee v. Durham, Civ.App., 204 S.W. 1171.

After-acquired title

The purchaser under a contract for deed which was duly canceled was not entitled to invoke "estoppel" against the grantee of his vendor as to subsequently-acquired title because of lack of any right against

§ 58. Recitals in Contract

a. In general
b. Acknowledgment of consideration

a. In General

Persons contracting may be estopped to deny the truth of recitals in a written contract which are consistent and certain in their terms, relevant to the subject matter of the contract, and with reference to which the contract was made.

A party to a written contract may be estopped to deny the truth of recitals therein,[58] where such recitals are consistent and certain in their terms, relevant to the subject matter of the contract, and with reference to which the contract was made.[59]

However, a recital that does not amount to a precise affirmation of a fact will not estop the party to deny the fact.[60] An estoppel does not arise from a recital unless it is of the essence of the agreement,[61] or unless it constitutes a representation or warranty inducing the contract,[62] or in favor of one suing as assignor of the contract in which the recitals occur where he gave no consideration for the assignment,[63] or, unless having been accepted and acted on in good faith, it results in consequences which it would be inequitable or unjust to disturb.[64] A recital is not binding in an action not founded on the contract.[65] Recitals that the parties have inspected the property and do

him under the contract.—Ferch v. Hiller, Minn., 297 N.W. 102.

58. U.S.—In re The Westover, Inc., C.C.A.N.Y., 82 F.2d 177—Harris v. Twentieth Century-Fox Film Corporation, D.C.N.Y., 35 F.Supp. 153—Adams-McGill Co. v. Hendrix, D.C.Nev., 22 F.Supp. 789, 791, citing Corpus Juris.
Cal.—Texas Co. v. Wieczorek, 98 P.2d 547, 36 Cal.App.2d 560—Borland v. Borland, 206 P. 478, 56 Cal.App. 638.
Del.—Manhattan Shirt Co. v. Sarnoff-Irving Hat Stores, 164 A. 246, 19 Del.Ch. 151, rehearing denied 165 A. 570, 19 Del.Ch. 242, affirmed 180 A. 928, 20 Del.Ch. 455.
Ill.—National Bank of Republic of Chicago v. Wells-Jackson Corporation, 193 N.E. 215, 358 Ill. 356, 98 A.L.R. 618, reversing 272 Ill.App. 561.
Iowa.—Carr v. McCauley, 245 N.W. 290, 295, 215 Iowa 298, citing Corpus Juris.
La.—Fox v. Merks, 88 So. 784, 149 La. 178.
Md.—C. I. T. Corporation v. Powell, 170 A. 740, 166 Md. 208.
Mass.—Cass v. Lord, 128 N.E. 716, 236 Mass. 430.
Minn.—Dr. Ward's Medical Co. v. Wolleat, 199 N.W. 738, 160 Minn. 21.
N.M.—Cox v. Sims, 7 P.2d 617, 36 N.M. 31.
N.Y.—Neubeck v. Doscher, 199 N.Y.S. 203, 204 App.Div. 617—In re Brooklyn Trust Co., 295 N.Y.S. 1007, 163 Misc. 117—Goldsmith v. Outdoor Advertising Co., 264 N.Y.S. 189, 147 Misc. 536.
Okl.—Universal Credit Co. v. Cushing Motor Co., 79 P.2d 1014, 183 Okl. 63—Finch v. Smith, 58 P.2d 850, 177 Okl. 307.
R.I.—D. W. Flint Motor Sales Co. v. Crofton, 171 A. 236, 54 R.I. 160.
Tex.—Bryan v. Dallas Nat. Bank, Civ.App., 135 S.W.2d 249, error dismissed, judgment correct—Rio Grande Nat. Life Ins. Co. v. Bandy, Civ.App., 110 S.W.2d 122—Spillman v. Hibler, Civ.App., 60 S.W.2d 1103—Gardner v. Wesner, Civ.App., 55 S.W.2d 1104, error refused—Lawson v. Phipps, Civ.App., 269 S.W. 458, followed in Robinson v. Phipps, Civ.App., 269 S.W. 459.
Wis.—Women's Catholic Order of Foresters v. Krivetz, 180 N.W. 819, 173 Wis. 247.
21 C.J. p 1112 note 40.

Compromise agreement
(1) Where daughter's suit for appointment of guardian for mother as alleged insane person was compromised by agreement providing that daughter should not thereafter sue to set aside voluntary trust deed executed by mother, daughter was estopped from suing to set aside trust deed until contract was set aside.—Lebo v. Bowlin, 189 N.E. 397, 100 Ind.App. 75.

(2) Such estoppel extends as well to the administrator of mother's estate, since he, as administrator, was trustee for daughter who was mother's sole heir.—Lebo v. Bowlin, supra.

Estate of decedent, who agreed that bank might apply collateral, pledged as security for note indorsed by him, on any obligation of maker to bank, cannot be heard to complain of bank's application of proceeds of such collateral on other obligations than note, in bank receiver's proceeding for allowance of claim against estate on note.—In re Dosker, 280 N.W. 61, 284 Mich. 597.

Note given to satisfy judgment
Where a note, given to satisfy a judgment, contains a recital that it is given as collateral to a judgment, the judgment debtor is estopped to claim that entry of satisfaction of the judgment canceled the note.—Richardson v. Marshall, 258 P. 47, 201 Cal. 584.

Party signing as principal is precluded from asserting that he is a surety.
Ind.—Menaugh v. Chandler, 89 Ind. 94.
Tex.—U. S. Fidelity & Guaranty Co. v. Cicero Smith Lumber Co., Civ.App., 290 S.W. 807.

59. Minn.—Dr. Ward's Medical Co. v. Wolleat, 199 N.W. 738, 160 Minn. 21—Minneapolis v. Minneapolis St. R. Co., 133 N.W. 80, 115 Minn. 514.

60. Fla.—Haines City Citrus Growers' Ass'n v. Petteway, 145 So. 183, 185, 107 Fla. 344, citing Corpus Juris.
S.C.—Atlantic Life Ins. Co. v. Barringer, 178 S.E. 505, 175 S.C. 145.
Tex.—Luker v. Anderson, Civ.App., 10 S.W.2d 143.
21 C.J. p 1112 note 42.

General recital in a contract is not an estoppel, although the recital of a particular fact is.—Dr. Ward's Medical Co. v. Wolleat, 199 N.W. 738, 160 Minn. 21.

Designating sale contract a lease does not estop either party from contending it was actually a sale.—Grapico Bottling Works v. Liquid Carbonic Co., 113 So. 454, 163 La. 1057.

61. U.S.—Kraus v. General Motors Corporation, C.C.A.N.Y., 120 F.2d 109.
Minn.—Dr. Ward's Medical Co. v. Wolleat, 199 N.W. 738, 741, 160 Minn. 21, citing Corpus Juris.
21 C.J. p 1112 note 43.

Where agreement is intended only as evidence, claimant of title is not estopped thereby.—Marshburn v. Stewart, Tex.Civ.App., 295 S.W. 679.

62. Kan.—Moon v. Moon, 173 P. 9, 102 Kan. 737, 103 Kan. 179.
Minn.—Dr. Ward's Medical Co. v. Wolleat, 199 N.W. 738, 741, 160 Minn. 21, citing Corpus Juris.

63. Mich.—Ferguson v. Milliken, 4 N.W. 185, 42 Mich. 441, 443.
21 C.J. p 1112 note 45.

64. Minn.—Dr. Ward's Medical Co. v. Wolleat, 199 N.W. 738, 160 Minn. 21.

65. N.Y.—Eppenbach v. Eppenbach, 215 N.Y.S. 755, 217 App.Div. 26.
21 C.J. p 1113 note 46.

not rely on any representations made to them,[66] that the seller is not responsible for any representations not set forth in the contract,[67] or that the seller has made no representations to the buyer,[68] do not constitute an estoppel to assert fraudulent inducement to contract.

In determining the effect of a recital, it must be construed in connection with the whole contract.[69]

b. Acknowledgment of Consideration

A recital in a contract of receipt of consideration may not be contradicted so as to defeat the operation of the contract, but it may be contradicted for collateral purposes, and may give rise to an equitable estoppel in connection with extraneous circumstances.

While an acknowledgment of receipt of consideration as part of the contract in which it occurs may not be contradicted for the purpose of defeating the operation of the contract,[70] yet it may as a simple receipt be contradicted for collateral purposes.[71] The party making the acknowledgment may, however, be equitably estopped by extraneous circumstances to deny the receipt as against third persons who have acted on it to their detriment,[72] and even as against the other party to the contract.[73]

V. EQUITABLE ESTOPPEL; ESTOPPEL BY MISREPRESENTATION

A. GENERAL NATURE AND ESSENTIALS

1. In General

§ 59. What Constitutes

a. In general
b. Estoppel by conduct
c. Comparison of terms and principles

a. In General

Equitable estoppel or estoppel by misrepresentation is the effect of the voluntary conduct of a person whereby he is precluded, both at law and in equity, from asserting rights against another person relying on such conduct; and it arises where a person, by his acts, representations, or admissions, or even by his silence when it is his duty to speak, intentionally or through culpable negligence induces another to believe that certain facts exist, and the other person rightfully relies and acts on such belief, and will be prejudiced if the former is permitted to deny the existence of such facts.

Equitable estoppel is defined as the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who in good faith relied on such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of contract or of remedy; and the same definition is given estoppel in pais and estoppel by misrepresentation,[74] these terms, as shown infra in sub-

66. Cal.—Sherratt v. Hellman Commercial Trust & Savings Bank, 297 P. 582, 112 Cal.App. 542.
Neb.—Moller v. Mallory, 193 N.W. 913, 110 Neb. 269.

67. Cal.—Palladine v. Imperial Valley Farm Lands Ass'n, 225 P. 291, 65 Cal.App. 727.

68. N.Y.—Bridger v. Goldsmith, 23 N.Y.S. 9, 3 Misc. 535, affirmed 38 N.E. 458, 143 N.Y. 424.

69. Cal.—McLear v. Hapgood, 24 P. 788, 85 Cal. 555, 557.
Tex.—Marshburn v. Stewart, Civ.App., 295 S.W. 679.

70. Conn.—Redfield v. Haight, 27 Conn. 31.
21 C.J. p 1113 note 48 [a].

71. Cal.—American Nat. Bank of San Francisco v. A. G. Somerville, Inc., 216 P. 376, 191 Cal. 364—Parker v. Funk, 197 P. 83, 185 Cal. 347.
21 C.J. p 1113 note 49 [a].

72. Ind.—Dill v. Fraze, 79 N.E. 971, 169 Ind. 53.
21 C.J. p 1113 note 50.

73. Cal.—Dresbach v. Minnis, 45 Cal. 223.
21 C.J. p 1113 note 51.

74. Ariz.—City of Glendale v. Coquat, 52 P.2d 1178, 46 Ariz. 478, 102 A.L.R. 837.
Ill.—Laughlin v. Irwin, 262 Ill.App. 40.
Ky.—Haggard v. Green, 6 S.W.2d 487, 224 Ky. 441.
Md.—Parks & Hull Appliance Corporation v. Reimsnyder, 9 A.2d 648, 177 Md. 280—Pearre v. Grossnickle, 114 A. 725, 139 Md. 1.
Minn.—In re Beier's Estate, 284 N.W. 833, 205 Minn. 43—Clover v. Peterson, 231 N.W. 275, 203 Minn. 337.
Mo.—Grafeman Dairy Co. v. Northwestern Bank, 288 S.W. 359, 364, 315 Mo. 849, quoting **Corpus Juris.**
Mont.—Lindblom v. Employers' Liability Assur. Corporation, 295 P. 1007, 1008, 88 Mont. 488, quoting **Corpus Juris.**
N.J.—City of Bayonne v. Passaic Consol. Water Co., 130 A. 530, 98 N.J.Eq. 174.
N.Y.—Oswego Falls Corporation v. City of Fulton, 265 N.Y.S. 436, 148 Misc. 170, affirmed 268 N.Y.S. 978, 241 App.Div 560—Smith v. Vara, 241 N.Y.S. 202, 136 Misc. 500—New York Central & H. R. R. Co. v. City of Buffalo, 147 N.Y.S. 209, 85 Misc. 78.
N.C.—Scott v. Bryan, 187 S.E. 756, 210 N.C. 478—American Exchange Nat. Bank v. Winder, 150 S.E. 489, 491, 198 N.C. 18, quoting **Corpus Juris.**
N.D.—Baird v. Stephan, 204 N.W. 188, 52 N.D. 568.
Ohio.—Fleming v. City of Steubenville, 184 N.E. 701, 702, 44 Ohio App. 121, quoting **Corpus Juris.**
Tex.—Malone v. Republic Nat. Bank & Trust Co., Civ.App., 70 S.W.2d 809, error dismissed—Keene v. Gold, Civ.App., 27 S.W.2d 631, error refused Gold v. Keene, 31 S.W.2d 1071, 119 Tex. 448—Lockhart State Bank v. Baker, Civ.App., 264 S.W. 566.
21 C.J. p 1113 note 52.

Other statements
(1) Estoppel means that a party is

division c of this section, being used interchangeably with the term "equitable estoppel." This estoppel arises when one by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts.[75] In this situation, the person inducing the

precluded by his own acts from asserting a right to the detriment of another, who, entitled to rely on such conduct, has acted thereon.—Sovereign Camp, W.O.W. v. Heflin, 200 S. E. 489, 59 Ga.App. 299, affirmed 3 S.E.2d 559, 188 Ga. 234.

(2) Doctrine of equitable estoppel or estoppel in pais is that person may be precluded by his acts and conduct from asserting right to detriment or prejudice of another who was entitled to rely on such conduct and acted thereon.

Ill.—Lincoln Park Arms Bldg. Corporation, for Use of Schroeder, v. U. S. Fidelity & Guaranty Co., 5 N.E.2d 773, 287 Ill.App. 520.

N.Y.—Kennilwood Owners' Ass'n v. Kennilwood, Inc., 28 N.Y.S.2d 239, affirmed 28 N.Y.S.2d 154, 262 App. Div. 750—In re Knapp's Estate, 253 N.Y.S. 409, 141 Misc. 540.

(3) Estoppel is the inhibition to assert a right which the law places on one as a consequence of his conduct which has resulted in injury or detriment to another.—Fipps v. Stidham, 50 P.2d 680, 174 Okl. 473.

(4) In ordinary instance of equitable estoppel, a party is barred from setting up claim because he has, by word or deed or by silence when honesty and fair dealing required him to speak, made a representation, actual or constructive, to adverse party, which the adverse party has believed and, so believing, has changed his legal position for the worse.—Rhodus v. Geatley, Mo., 147 S.W.2d 631.

(5) A party who by his acts, declarations, or admissions either deliberately or with willful disregard of the interests of another induces him to conduct or dealings which he would not otherwise have entered on is estopped to assert his rights afterwards to the injury of the party so misled.—Lacey v. Humphres, 116 S.W.2d 345, 196 Ark. 72—Thomas v. Spires, 22 S.W.2d 553, 180 Ark. 671.

(6) One who by his language or conduct induces another to do or omit that which he would not otherwise have done or omitted to do is estopped from asserting any claim or maintaining any action against him who is so misled.—Berarducci v. Diano, 198 A. 351, 60 R.I. 305.

75. U.S.—Lee Blakemore, Inc., v. Lewelling, C.C.A.Ark., 281 F. 952.
Cal.—Johnson v. Schimmf, 239 P. 401, 197 Cal. 43.
Ky.—Jones v. Kentucky Glycerine, 11 S.W.2d 713, 716, 226 Ky. 676, quoting Corpus Juris.
La.—E. C. Taylor Co. v. New York & Cuba Mail S. S. Co., 105 So. 379, 159 La. 381, annulling and setting aside 1 La.App. 738.
Mich.—Postal v. Home State Bank for Savings, 279 N.W. 488, 284 Mich. 220—Engel v. State Mut. Rodded Fire Ins. Co., 275 N.W. 231, 281 Mich. 520—Schudlich v. Yankee, 262 N.W. 395, 272 Mich. 482—Hetchler v. American Life Ins. Co., 254 N.W. 231, 266 Mich. 608.
Minn.—Clover v. Peterson, 281 N.W. 275, 203 Minn. 337.
Mo.—Randolph v. Moberly Hunting & Fishing Club, 15 S.W.2d 834, 321 Mo. 995—Grafeman Dairy Co. v. Northwestern Bank, 288 S.W. 359, 364, 315 Mo. 849, quoting Corpus Juris.
Mont.—Arnold v. Genzberger, 31 P. 2d 296, 308, 96 Mont. 358, quoting Corpus Juris—Lindblom v. Employers' Liability Assur. Corporation, 295 P. 1007, 1008, 88 Mont. 48, quoting Corpus Juris.
N.Y.—Smith v. Vara, 241 N.Y.S. 202, 136 Misc. 500.
N.C.—Thomas v. Conyers, 151 S.E. 270, 198 N.C. 229—American Exchange Nat. Bank v. Winder, 150 S.E. 489, 491, 198 N.C. 18, quoting Corpus Juris—Boddie v. Bond, 70 S.E. 824, 154 N.C. 359.
N.D.—Peterson v. Baird, 249 N.W. 690, 693, 63 N.D. 604, quoting Corpus Juris.
Ohio.—Fleming v. City of Steubenville, 184 N.E. 701, 702, 44 Ohio App. 121, quoting Corpus Juris.
Pa.—Howe v. Mimm, 161 A. 603, 605, 105 Pa.Super. 474, quoting Corpus Juris.
Tex.—Noxon v. Cockburn, Civ.App., 147 S.W.2d 872, 875, error refused, quoting Corpus Juris—Sovereign Camp, W. O. W. v. Moraida, Civ. App., 85 S.W.2d 364, 374, quoting Corpus Juris—Sovereign Camp, W. O. W. v. Johnson, Civ.App., 64 S. W.2d 1084, 1087, quoting Corpus Juris.
Utah.—Kelly v. Richards, 83 P.2d 731, 734, 95 Utah 560, quoting Corpus Juris.
Va.—American Mut. Liability Ins. Co. v. Hamilton, 185 S.E. 21, 145 Va. 391.
21 C.J. p 1114 note 53.

Corpus Juris is cited as showing that the equitable rule of estoppel clearly applies to the facts of the case.—Citizens Savings & Loan Ass'n v. Warson, 94 P.2d 311, 314, 150 Kan. 432.

Other expressions of principle

(1) Various other statements to the same effect as the one contained in the text, but couched in different, fuller, or more abbreviated language, have been made.

Conn.—Lengyel v. Peregrin, 132 A. 459, 104 Conn. 285.
Fla.—Steen v. Scott, 198 So. 489—New York Life Ins. Co. v. Oates, 166 So. 269, 122 Fla. 540.

(2) An estoppel, equitable estoppel, or estoppel in pais arises and exists where one person, by his acts, words, conduct, silence amounting to a representation, or concealment of material facts, induces another to change his position, or to act or refrain from acting, to his hurt, injury, prejudice, or detriment.

U.S.—Fosgate v. Nocatee Fruit Co., D.C.Fla., 299 F. 963, affirmed, C.C. A., Nocatee Fruit Co. v. Fosgate. 12 F.2d 250.
Cal.—Laraway v. First Nat. Bank of La Verne, 104 P.2d 95, 39 Cal.App. 2d 718—Miles v. Bank of America Nat. Trust & Savings Ass'n, 62 P. 2d 177, 17 Cal.App.2d 389—Calistoga Nat. Bank v. Calistoga Vineyard Co., 46 P.2d 246, 7 Cal.App.2d 65.
Ill.—Catherwood v. Morris, 196 N.E. 519, 360 Ill. 472—Springfield Marine Bank v. Marbold, 264 Ill.App. 446 Chapera v. Fargo, 240 Ill.App. 145.
Ky.—Rice v. Rice, 50 S.W.2d 26, 243 Ky. 837.
Me.—Blaisdell Automobile Co. v. Nelson, 154 A. 184, 130 Me. 167.
Mass.—Calkins v. Wire Hardware Co., 165 N.E. 889, 267 Mass. 52.
Mont.—Mundt v. Mallon, 76 P.2d 326, 106 Mont. 242.
N.J.—Wysokowski v. Polish-American Building & Loan Ass'n of City of Newark, 113 A. 246, 95 N.J.Law 352, affirmed Wysakowska v. Polish-American Building & Loan Ass'n of City of Newark, 115 A. 438, 96 N.J.Law 447.
N.Y.—Vandeweghe v. City of New York, 270 N.Y.S. 570, 150 Misc. 815, affirmed 275 N.Y.S. 218, 242 App.Div. 762—Brady v. Metropolitan Life Ins. Co., 14 N.Y.S.2d 581, affirmed In re Masterson's Estate, 20 N.Y.S.2d 988.
S.C.—Fallaw v. Oswald, 9 S.E.2d 793, 194 S.C. 387—Georgia Veneer & Package Co. v. S. H. & E. H. Frost, Inc., 167 S.E. 500, 168 S.C. 285—Haselden v. Schein, 166 S.E. 634, 167 S.C. 534—Thompson v.

belief in the existence of a certain state of facts is estopped to deny that the state of facts does in truth exist,[76] aver a different or contrary state of facts as existing at the same time,[77] or deny or repudiate his acts, conduct, or statements.[78] The estoppel consists in holding for truth a representation acted on, when the person who made it, or his privies, seek to deny its truth, and to deprive the party who has acted upon it of the benefit obtained;[79] and it holds a person to a representation

Hudgens, 159 S.E. 807, 161 S.C. 450.
S.D.—Hood v. Sioux Steel Co., 287 N.W. 636—Ziegler v. Ryan, 285 N.W. 875, 66 S.D. 491.
Tex.—Wirtz v. Sovereign Camp, W. O. W., 268 S.W. 438, 114 Tex. 471, affirming Sovereign Camp, W. O. W. v. Wirtz, Civ.App., 254 S.W. 637—The Prætorians v. Strickland, Com.App., 66 S.W.2d 686, reversing, Civ.App., 48 S.W.2d 690.

(3) Estoppel generally arises against a person making a representation or assuming a position which, if not maintained would result in injustice to another who, having a right to rely on the representation or position assumed, has done so to his injury.—Harvey v. J. P. Morgan & Co., 2 N.Y.S.2d 520, 166 Misc. 455

(4) Estoppel arises from circumstances under control of one party making it unconscionable for him to assert right against another.—Salley v. McCoy, 189 S.E. 196, 182 S.C. 249.

(5) Estoppel arises where party estopped was apprised of facts and intended that his conduct should be acted on and acted so that party asserting estoppel had right to believe it was so intended, and where such party was ignorant of true facts and relied to his injury upon conduct of party estopped.—Lusitanian-American Development Co. v. Seaboard Dairy Credit Corporation, 34 P.2d 139, 1 Cal.2d 121.

(6) An estoppel arises where a person does some act which will prevent him from averring anything to the contrary.—People v. Fullenwider, 160 N.E. 175, 329 Ill. 65.

(7) An estoppel in pais arises where one party to a contract has done some act which the policy of the law will not permit him to gainsay or deny.—Lockhart State Bank v. Baker, Tex.Civ.App., 264 S.W. 566.

(8) Further expressions of principle see 21 C.J. p 1114 note 53 [a].

76. U.S.—Searchlight Horn Co. v. Victor Talking Mach. Co., D.C.N.J., 261 F. 395.
Ala.—Gable v. Kinney, 121 So. 511, 219 Ala. 150.
Ga.—Rieves v. Smith, 192 S.E. 372, 184 Ga. 657, 112 A.L.R. 368.
Ill.—Litchfield Nat. Bank v. McBride, 7 N.E.2d 348, 289 Ill.App. 420.
Me.—Goodwin v. Boutin, 155 A. 738, 130 Me. 322.
Md.—Benson v. Borden, 198 A. 419, 174 Md. 202.
Mo.—Large v. Frick Co., 256 S.W. 90, 215 Mo.App. 232.
Okl.—Mason v. Nibel, 263 P. 121, 129 Okl. 7—Underwood v. Purcell Wholesale Grocery Co., 209 P. 736, 87 Okl. 94.
Utah.—Tanner v. Provo Reservoir Co., 289 P. 151, 76 Utah 335.
W.Va.—Harris v. Coliver, 141 S.E. 791, 105 W.Va. 174.
Wyo.—Seaman v. Big Horn Canal Ass'n, 213 P. 938, 29 Wyo. 391.

Estoppel to deny reality

Persons are estopped to deny the reality of a state of things which they have made appear to exist and on which others have been made to rely.
U.S.—Mann v. Anderson, D.C.N.Y., 20 F.Supp. 643.
Tex.—Texas Employers' Ins. Ass'n v. Newton, Com.App., 25 S.W.2d 608, reversing Newton v. Texas Employers' Ins. Ass'n, Civ.App., 15 S.W.2d 709.

Bar to denial

Equitable estoppel is a bar which prevents the party against whom it is pleaded from denying the truth of a fact because the party asserting estoppel has changed his position and has parted with some right by reason of the representation or conduct constituting the estoppel.
Ark.—Reynolds v. Cowan Bros. & Hardin, 232 S.W. 941, 148 Ark. 655.
Tex.—San Antonio Nat. Bank v. Conn, Civ.App., 237 S.W. 353, reversed on other grounds, Com.App., 249 S.W. 1045—Lomax v. Trull, Civ.App., 232 S.W. 861 dismissed for want of jurisdiction.

Indisputable admission

(1) Estoppel is a conclusive admission, which cannot be denied.—Hopwood Plays v. Kemper, 189 N.E. 461, 263 N.Y. 380, reversing 264 N.Y.S. 924, 239 App.Div. 820.

(2) Estoppel by matters in pais is an indisputable admission arising from circumstances that party claiming benefit of it has in good faith been induced to change his position to his substantial prejudice by voluntary intelligent action by party against whom it is alleged.—First Lutheran Church of Pontiac v. Rooks Creek Evangelical Lutheran Church, 147 N.E. 53, 316 Ill. 196.
21 C.J. p 1113 note 52 [a] (3).

77. Ill.—Scott v. Hatch, 280 Ill.App. 269.
La.—First Nat. Bank v. Andrus, App., 195 So. 854—Federal Land Bank of New Orleans v. Sanders, App., 167 So. 140.
Neb.—Merchants'-Mechanics' First Nat. Bank v. Cavers Elevator Co., 180 N.W. 588, 105 Neb. 321.
Or.—State v. Claypool, 28 P.2d 882, 145 Or. 615.
Pa.—Ervin v. City of Pittsburgh, 14 A.2d 297, 339 Pa. 241—Gehringer v. Real Estate-Land Title & Trust Co., 184 A. 100, 321 Pa. 401—Fedas v. Insurance Co. of State of Pennsylvania, 151 A. 285, 300 Pa. 555—Bell v. Scranton Trust Co., 128 A. 494, 282 Pa. 562—Thompson v. Parke, 198 A. 819, 131 Pa. Super. 81.
Va.—Heath v. Valentine, 15 S.E.2d 98—Thomasson v. Walker, 190 S.E. 309, 168 Va. 247, 110 A.L.R. 593

Important fact

Term "equitable estoppel" or "estoppel in pais" applies where party is denied right to plead or prove otherwise important fact because of something he did or omitted to do.—Hartford Accident & Indemnity Co. v. Oles, 274 N.Y.S. 349, 152 Misc. 876—First Nat. Bank of Fleischmanns v. Creamery Package Mfg. Co., 21 N.Y.S.2d 976.

78. Ark.—First Nat. Bank v. Godbey & Sons, 29 S.W.2d 272, 181 Ark 1004—Baker-Matthews Lumber Co. v. Bank of Lepanto, 282 S.W. 995, 170 Ark. 1146.
Ill.—Bondy v. Samuels, 165 N.E. 181, 333 Ill. 535—McNeill v. Harrison & Sons, 2 N.E.2d 959, 286 Ill.App. 120.
La.—Reynolds v. St. John's Grand Lodge, A. F. & A. M., 131 So. 186, 171 La. 395.

79. Mo.—Grafeman Dairy Co. v. Northwestern Bank, 288 S.W. 359, 364, 315 Mo. 849, quoting **Corpus Juris.**
Mont.—Lindblom v. Employers' Liability Assur. Corporation, 295 P. 1007, 1008, 88 Mont. 488, quoting **Corpus Juris.**
N.C.—Boddie v. Bond, 70 S.E. 824, 154 N.C. 359.
Utah.—Kelly v. Richards, 83 P.2d 731, 734, 95 Utah 560, quoting **Corpus Juris.**
21 C.J. p 1115 note 54.

Truth between parties

What one induces another to regard as true is to be treated as the truth between them if the party who acts has been misled to his damage by the conduct or statements of the other.
Ga.—Anderson v. Mechanics Loan & Savings Co., 198 S.E. 87, 58 Ga.

made or a position assumed where otherwise inequitable consequences would result to another who, having a right to do so under the circumstances has, in good faith, relied thereon.[80] When a party unjustly contrives to put another in a dilemma and to subject him to necessity and distress and he acts one way, it is not for the wrongdoer to insist that he should have acted another way.[81]

Whether or not the doctrine of equitable estoppel is applicable depends on the particular facts and circumstances of each case.[82]

A statute providing that whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing to be true, and to act on such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it is but a crystallization into statutory form of rules otherwise existing.[83]

As affecting land titles, equitable estoppel is a doctrine by which a party is prevented from setting up his legal title because he has through his acts, words, or silence led another to take a position in which the assertion of the legal title would be contrary to equity and good conscience.[84]

b. Estoppel by Conduct

Estoppel by conduct is the estoppel to deny that a particular state of facts exists which arises from the conduct of a person which induces another to believe in the existence of such state of facts and to act thereon to his prejudice.

Estoppel by conduct is such conduct by the one sought to be estopped as thereafter precludes him from asserting a cause of action or relying on a defense, although such cause of action, or defense may be based on truth, against one who has changed

App. 147—Hood v. Duren, 125 S.E. 787, 33 Ga.App. 203.

Okl.—Morris v. Prickard Dallas Co., 36 P.2d 779, 184 Okl. 277.

80. U.S.—Ralston Purina Co. v. U. S., 58 F.2d 1065, certiorari denied 53 S.Ct. 594, 289 U.S. 732, 77 L.Ed. 1481.

Ariz.—Munger v. Boardman, 88 P.2d 536, 53 Ariz. 271—Young Mines Co. v. Citizens' State Bank, 296 P. 247, 37 Ariz. 521.

Mo.—Central States Life Ins. Co. v. Bloom, 137 S.W.2d 517—Biggs v. Modern Woodmen of America, 82 S.W.2d 898, 336 Mo. 479, reversing, App., 71 S.W.2d 782—State ex rel. Consolidated School Dist. No. 2 of Pike County v. Haid, 41 S.W.2d 806, 328 Mo. 729, quashing certiorari Consolidated School Dist. No. 2 of Pike County v. Cooper, App., 28 S.W.2d 384.

Pa.—Antone v. New Amsterdam Casualty Co., 6 A.2d 566, 335 Pa. 134.

Change of position or attitude

(1) Where a person has said or done something with an intent to influence another to act, and the other has acted on the faith of the former's act or statement, the former will not be permitted to change his position to the injury of the latter.

U.S.—U. S. for Use and Benefit of Noland Co. v. Wood, C.C.A.Va., 99 F.2d 80.

Iowa.—Seymour v. City of Ames, 255 N.W. 874, 218 Iowa 615.

La.—State ex rel. Porterie v. Gulf, Mobile & Northern R. Co., 184 So. 711, 191 La. 163—U. S. Fidelity & Guaranty Co. v. Putfark, 158 So. 9, 180 La. 893—Bradford-Kennedy Co. v. Brown, 92 So. 723, 152 La. 29.

N.J.—New Jersey Suburban Water Co. v. Town of Harrison, 3 A.2d 623, 122 N.J.Law 189, reversing 1 A.2d 61, 120 N.J.Law 546.

(2) Where person is induced by another's conduct to take action or refrain from acting, other, under doctrine of equitable estoppel, may not suddenly change his attitude to former's injury.—Newmyer Steam Cotton Co. v. U. S., Ct.Cl., 2 F.Supp. 126, certiorari denied 53 S.Ct. 694, 289 U.S. 749, 77 L.Ed. 1495.

(3) Idea or notion which inheres in word "estoppel" is that one who by his speech or conduct has induced another to act in a particular manner ought not to be permitted to adopt an inconsistent position, attitude, or course of conduct, and thereby cause loss or injury to such other.—Brand v. Farmers Mut. Protective Ass'n of Texas, Tex.Civ.App., 95 S.W.2d 994.

81. Mo.—Grafeman Dairy Co. v. Northwestern Bank, 288 S.W. 359, 364, 315 Mo. 849, quoting Corpus Juris.

Mont.—Lindblom v. Employers' Liability Assur. Corporation, 295 P. 1007, 1008, 88 Mont. 488, quoting Corpus Juris.

N.D.—Bovey-Shute Lumber Co. v. Leeds Farmers' & Merchants' Bank, 173 N.W. 455, 43 N.D. 66.

Impeachment of transaction

"Rule of equitable estoppel" is that where one by his acts, declarations, or silence where it is his duty to speak, has induced another in reliance thereon to enter into a transaction, he shall not impeach transaction to the prejudice of person misled.

Ky.—Scottsville Oil Co. v. Dye Bros., 262 S.W. 615, 203 Ky. 496.

Tenn.—Cline v. Plyly, 3 Tenn.App. 292.

82. U.S.—Globe Indemnity Co. v. Cohen, C.C.A.Pa., 106 F.2d 687—U. S. v. Canal Bank & Trust Co., D.C.La., 29 F.Supp. 605.

Ala.—Hinds v. Federal Land Bank of New Orleans, 186 So. 153, 237 Ala. 218—Madison County v. Williams, 183 So. 452, 236 Ala. 470.

Ariz.—Munger v. Boardman, 88 P.2d 536, 53 Ariz. 271.

Fla.—City of South Miami v. State ex rel. Landis, 192 So. 624, 140 Fla. 740.

Kan.—Gas Service Co. v. Consolidated Gas Utilities Corporation, 65 P.2d 584, 145 Kan. 423.

Md.—Pearre v. Grossnickle, 114 A. 725, 139 Md. 1.

Mich.—Colonial Theatrical Enterprises v. Sage, 237 N.W. 529, 255 Mich. 160.

Mo.—Haggerty v. St. Louis Police Relief Ass'n, App., 141 S.W.2d 174—Swinney v. Modern Woodmen of America, 95 S.W.2d 655, 231 Mo. App. 83.

Mont.—Lindblom v. Employers' Liability Assur. Corporation, 295 P. 1007, 88 Mont. 488.

Neb.—State v. Smith, 281 N.W. 851, 135 Neb. 423.

N.Y.—Harvey v. J. P. Morgan & Co., 2 N.Y.S.2d 520, 166 Misc. 455—Mount Vernon Trust Co. v. City of Mount Vernon, 12 N.Y.S.2d 120.

Okl.—Nickel v. Jarvis, 242 P. 264, 115 Okl. 207.

Pa.—Irwin v. City of Pittsburgh, 14 A.2d 297, 339 Pa. 241.

Tex.—Houston & T. C. R. Co. v. Paris Milling Co., Civ.App., 240 S.W. 638.

Wyo.—Vogel v. Shaw, 294 P. 687, 42 Wyo. 333, 75 A.L.R. 639.

83. Mont.—Lindblom v. Employers' Liability Assur. Corporation, 295 P. 1007, 88 Mont. 488.

84. Fla.—Florida Land Inv. Co. v. Williams, 116 So. 642, 98 Fla. 1258.

his position for the worse in reliance on such conduct.[85] It arises where a person, against whom it is pleaded, by his conduct induces another person relying on such conduct to believe in the existence of a particular state of facts and to act thereon to his prejudice,[86] it being a well recognized rule that if a person by his conduct induces another to believe in the existence of a particular state of facts, and the other acts thereon to his prejudice, the former is estopped, as against the latter, to deny that that state of facts does in truth exist.[87] Other statements, sometimes made, are that estoppel by conduct exists or arises: Where a party has been induced by the conduct of another to do, or forbear doing, something he would not have, or would have, done but for such conduct;[88] where the conduct of a party has resulted in disadvantage to the opposite party or advantage to himself;[89] or from an act or declaration of a person intended or calculated to mislead another on which such other person has relied, and has so acted, or refrained from acting, that injury will befall him if the truth of the act or declaration be denied.[90] In so far as conduct amounts to, and is considered as, a representation, it is dealt with in this chapter together with other matters constituting representations; but in so far as conduct inconsistent with a right subsequently asserted is viewed as a form of quasi estoppel, it is dealt with in the chapter on quasi estoppel, the general rule pertaining thereto being stated in § 108, and particular matters being discussed in subsequent sections, such as acquiescence in §§ 113–115, and acceptance of benefits in §§ 109–112.

c. Comparison of Terms and Principles

Although other terms and principles have been distinguished from equitable estoppel or estoppel in pais, equitable estoppel and estoppel in pais are frequently, and equitable estoppel and estoppel by representation are occasionally, used interchangeably without recognition of any difference between them.

By the earlier usage matter in pais commonly meant matter of fact as distinguished from matter of record.[91] In the law of estoppel, however, it meant, and still means, matter of fact as distinguished from matter of record or conventional writing.[92] Estoppel in pais, therefore, includes all forms of estoppel not arising from a record, from a deed, or from a written contract.[93]

Equitable estoppel is so denominated because the term was borrowed originally from equity,[94] and because it arises on facts which render its application in the protection of rights equitable and just,[95] but not because its recognition is peculiar to equitable tribunals.[96] Like an estoppel generally, see supra § 1, it is called estoppel because a man's own act or acceptance prevents him from alleging or proving the truth.[97] Equitable estoppel signifies estoppel by misrepresentation;[98] and the two terms are sometimes used interchangeably.[99] So also, equitable estoppel is estoppel in pais,[1] and estoppel in pais is equitable estoppel;[2] in modern usage the

85. Ky.—Montgomery Coal Corporation v. Riddle, 276 S.W. 975, 211 Ky. 26.

86. Ky.—Graves County v. Sullivan, 140 S.W.2d 636, 283 Ky. 130.

87. U.S.—Burlington Sav. Bank of Burlington, Vt. v. Rockwell, C.C.A. Idaho, 31 F.2d 27, 29, citing **Corpus Juris.**
Ala.—Franklin Life Ins. Co. v. Brantley, 165 So. 834, 836, 231 Ala. 554, citing **Corpus Juris.**
Cal.—Irrigated Valleys Land Co. of California v. Altman, 207 P. 401, 57 Cal.App. 413.
Del.—Colvocoresses v. W. S. Wasserman Co., 190 A. 607, 8 W.W.Harr. 253.
La.—Shreveport Packing Co. v. Marrs, App., 180 So. 220, 224, quoting **Corpus Juris**—Maloney Motor Car Co. v. Perrin, App., 155 So. 289, 290, quoting **Corpus Juris.**
Mo.—Foster v. Modern Woodmen of America, App., 138 S.W.2d 18, 25, citing **Corpus Juris.**
N.Y.—Hammond v. Antwerp Light & Power Co., 230 N.Y.S. 621, 132 Misc. 786.
Or.—Brady v. Selberg, 60 P.2d 1104, 1105, 154 Or. 477, citing **Corpus Juris**—Platt v. Jones, 38 P.2d 703, 710, 149 Or. 246, citing **Corpus Juris,** and modified on other grounds 39 P.2d 955, 149 Or. 246.
R.I.—Thornley Supply Co. v. Madigan, 154 A. 277, 278, citing **Corpus Juris.**
S.C.—County Board of Com'rs v. Holladay, 189 S.E. 885, 888, 182 S.C. 510, citing **Corpus Juris.**
21 C.J. p 1060 note 8.

88. Va.—Big Vein Pocahontas Co. v. Browning, 120 S.E. 247, 137 Va. 34.

89. Wis.—In re Acme Brass & Metal Works, 272 N.W. 356, 225 Wis. 74.

90. Miss.—Barron v. Federal Land Bank of New Orleans, 180 So. 74, 182 Miss. 50—Izard v. Mikell, 163 So. 498, 173 Miss. 770—Plant Flour Mills Co. v. Sanders & Ellis, 157 So. 713, 172 Miss. 539.

91. Kan.—Wilson v. Stephenson, 53 P.2d 874, 876, 143 Kan. 91, quoting **Corpus Juris.**

92. Kan.—Wilson v. Stephenson, supra.
21 C.J. p 1061 note 20.

93. Kan.—Wilson v. Stephenson, supra.
Okl.—Oklahoma City v. Wells, 91 P.2d 1077, 1084, 185 Okl. 369, quoting **Corpus Juris.**
21 C.J. p 1061 note 21.

94. Me.—Hallowell Nat. Bank v. Marston, 27 A. 529, 85 Me. 488.

95. Ark.—Lacey v. Humphres, 116 S.W.2d 345, 196 Ark. 72—Thomas v. Spires, 22 S.W.2d 553, 180 Ark. 671.
21 C.J. p 1061 note 26.

96. Ky.—Fitzpatrick v. Baker, 159 S.W. 675, 155 Ky. 175.
21 C.J. p 1061 note 26.

97. Miss.—Eagle Lumber & Supply Co. v. De Weese, 135 So. 490, 163 Miss. 602.

98. Tenn.—Frumin v. Chazen, 282 S.W. 199, 201, 153 Tenn. 1, citing **Corpus Juris.**
21 C.J. p 1061 note 23.

99. N.C.—Scott v. Bryan, 187 S.E. 756, 210 N.C. 478.

1. Va.—Thomasson v. Walker, 190 S.E. 309, 168 Va. 247, 110 A.L.R. 593.
21 C.J. p 1061 note 22.

2. Ark.—Lacey v. Humphres, 116 S.W.2d 345, 196 Ark. 72—Thomas v.

two terms are convertible[3] and, as judicially noted,[4] are often commingled and used interchangeably without statement or recognition of any difference between them.[5] Indeed, the two terms are sometimes combined into one, such as equitable estoppel in pais.[6] Although some cases recognize a distinction between an estoppel in pais and an equitable estoppel when the latter term is employed to designate a quasi estoppel, that is, one in which there is a situation which is analogous to, and has the same effect as, an estoppel in pais, but to which not all of the rules governing an estoppel in pais are applicable,[7] other cases do not do so and instead assert that both equitable estoppel and estoppel in pais embrace quasi estoppel[8] and estoppel by conduct.[9] Promissory estoppel, which is considered below in § 80, differs from equitable estoppel in that it rests on a promise to do something in the future, while the latter rests on a statement of present fact.[10]

Abandonment. The distinction between abandonment and estoppel in pais is stated in Abandonment § 2 b (8).

Acquiescence. Although acquiesence may constitute the basis of an equitable estoppel, or at least a quasi estoppel, as to which see infra § 114, and although acquiesence and estoppel belong to the same family in the law,[11] they are not strictly synonymous.[12] An estoppel goes deeper than the principle of acquiesence.[13]

Fraud. Fraud and estoppel in pais have some elements which are similar and they are alike in that each is dependent on a representation, but they differ in the following respects: In fraud the representation is the foundation of the cause of action or defense, while in estoppel the representation is the means by which there has been made known the position of a party with regard to a material fact, from which position he would like to retreat and to which the representee desires to hold him; in fraud the representee endeavors to establish a discrepancy between the representation and the truth, while in estoppel he endeavors to show that it would be inequitable to permit the truth to be known; estoppel stops short of embracing all the elements of fraud; and a cause of action exists where all the elements of fraud are present, but not necessarily where all the elements of estoppel are present.[14]

As stated infra § 69 a, fraud is an element of estoppel only in the sense that a fraudulent result would follow a denial of the truth of the representation, and not in the sense that the representation must have been made with an intent to deceive.

Laches. The distinction between laches and estoppel is stated in Equity § 112.

Presumption of ouster. The doctrine of equitable estoppel is entirely distinct from the presumption of ouster created by continuous possession for twenty years.[15]

Principle that person may not rely on his own wrong. Although it is sometimes denominated an estoppel or equitable estoppel,[16] the principle that equity will not permit one to rely on his own wrongful act, as against those affected by it but who

Spires, 22 S.W.2d 553, 180 Ark. 671.
Ky.—Montgomery Coal Corporation v. Riddle, 276 S.W. 975, 211 Ky. 26.
N.C.—American Exchange Nat. Bank v. Winder, 150 S.E. 489, 198 N.C. 18.

3. N.J.—New Jersey Suburban Water Co. v. Town of Harrison, 3 A.2d 623, 122 N.J.Law 189, reversing 1 A.2d 61, 120 N.J.Law 546.

4. Ohio.—Fleming v. City of Steubenville, 184 N.E. 701, 44 Ohio App. 121.

5. Del.—Graham v. National Bank of Smyrna, 122 A. 85, 2 W.W.Harr. 264.
Ga.—Hood v. Duren, 125 S.E. 787, 33 Ga.App. 203.
Ill.—Lincoln Park Arms Bldg. Corporation, for Use of Schroeder v. U. S. Fidelity & Guaranty Co., 5 N.E.2d 773, 287 Ill.App. 520.
Mont.—Hoppin v. Lang, 241 P. 636, 74 Mont. 558.
N.Y.—In re Knapp's Estate, 253 N.Y. S. 409, 141 Misc. 540—Smith v. Vara, 241 N.Y.S. 202, 136 Misc. 500—Kennilwood Owners' Ass'n v. Kennilwood, Inc., 28 N.Y.S.2d 239, affirmed 38 N.Y.S.2d 154, 262 App. Div. 750.
Tex.—Lockhart State Bank v. Baker, Civ.App., 264 S.W. 566.
Utah.—I. X. L. Stores Co. v. Success Markets, 97 P.2d 577, 98 Utah 577.
Va.—Heath v. Valentine, 15 S.E.2d 98.
Wis.—Sparks v. Kuss, 216 N.W. 929, 195 Wis. 378, modified on other grounds 218 N.W. 208, 195 Wis. 378.

6. N.Y.—New York Cent. & H. R. R. Co. v. City of Buffalo, 147 N.Y.S. 209, 85 Misc. 78.
N.C.—Thomas v. Conyers, 151 S.E. 270, 198 N.C. 229.

7. U.S.—Mahoning Inv. Co. v. U. S., 3 F.Supp. 622, certiorari denied 54 S.Ct. 526, 291 U.S. 675, 78 L.Ed. 1064 and Rochester & Pittsburgh Coal & Iron Co. v. U. S., 54 S.Ct. 527, 291 U.S. 675, 78 L.Ed. 1064.

8. N.J.—New Jersey Suburban Water Co. v. Town of Harrison, 3 A.2d 623, 122 N.J.Law 189, reversing 1 A.2d 61, 120 N.J.Law 546.

9. Ky.—Montgomery Coal Corporation v. Riddle, 276 S.W. 975, 211 Ky. 26.

10. Pa.—Langer v. Superior Steel Corporation, 161 A. 571, 105 Pa.Super. 579.

11. Mich.—Seymen v. Ironwood Amusement Corporation, 278 N.W. 51, 283 Mich. 220.

12. Iowa.—Marion Sav. Bank v. Leahy, 204 N.W. 456, 200 Iowa 220.

13. N.D.—Bichler v. Ternes, 248 N.W. 185, 63 N.D. 295.

14. Or.—Bramwell v. Rowland, 261 P. 57, 123 Or. 33.

15. N.C.—Thomas v. Conyers, 151 S.E. 270, 198 N.C. 229.

16. U.S.—Atlas Pipeline Corporation v. Federal Tender Board No. 1, C.C.A.Tex., 86 F.2d 802.

have not participated in it, to support his own asserted legal title or to defeat a remedy which, except for his misconduct, would not be available, is not an estoppel in a strict and technical sense.[17]

§ 60. Distinguished from Ratification and Adoption

The reason for holding a person bound by ratification differs from the reason for holding him bound by estoppel; but the distinction between the terms is sometimes ignored or is regarded as only of abstract, and not concrete, significance in the case at hand.

The distinction between a contract intentionally assented to, or ratified in fact, and an estoppel to deny the validity of the contract, is very wide. In the former case the party is bound because he intended to be; in the latter, he is bound notwithstanding there was no such intention, because the other party will be prejudiced and defrauded by his conduct unless the law treats him as legally bound.[18] However, notwithstanding their capability of being distinguished, ratification and estoppel are closely allied;[19] the legal effect thereof is the same;[20] the abstract difference between them may not render it improper to consolidate them, or to include one in the other, in the concrete consideration of the facts of a particular case;[21] and the terms "ratification" and "estoppel in pais" are sometimes used in a way which seems to ignore any distinction between them.[22] The distinction between estoppel in pais and ratification in the law of agency is stated and discussed in Agency § 34 b.

§ 61. Distinguished from Waiver

a. What constitutes waiver
b. Differentiating features

a. What Constitutes Waiver

A waiver is commonly defined as the intentional relinquishment of a known right; and it is comprehensively defined as a voluntary and intentional relinquishment or abandonment of a known existing legal right, advantage, benefit, claim, or privilege, which except for such waiver the party would have enjoyed.

A waiver is comprehensively defined as a voluntary and intentional relinquishment or abandonment of a known existing legal right, advantage, benefit, claim, or privilege, which except for such waiver the party would have enjoyed.[23] However, there are various other definitions of the term,[24] including those which are similar to, but are not as full and comprehensive as, the one just stated.[25] One

17. U.S.—Deitrick v. Greaney, Mass., 60 S.Ct. 480, 309 U.S. 190, 84 L.Ed. 694, reversing, C.C.A., 103 F.2d 83, modifying, D.C., Deitrick v. Greaney, 23 F.Supp. 758, certiorari granted 60 S.Ct. 104, 308 U.S. 535, 84 L.Ed. 451, certiorari denied Greaney v. Deitrick, 60 S.Ct. 104, 308 U.S. 582, 84 L.Ed. 488, rehearing denied Deitrick v. Greaney, 60 S.Ct. 611, 309 U.S. 697, 84 L.Ed. 1036.

18. Iowa.—Marion Sav. Bank v. Leahy, 204 N.W. 456, 200 Iowa 220.
Mont.—Arnold v. Genzberger, 31 P.2d 296, 308, 96 Mont. 358, quoting **Corpus Juris.**
Okl.—B. F. C. Morris Co. v. Mason, 39 P.2d 1, 3, 171 Okl. 589, citing **Corpus Juris,** and rehearing denied 43 P.2d 401, 171 Okl. 589.
Tex.—Carlile v. Harris, Civ.App., 38 S.W.2d 622, 624, quoting **Corpus Juris.**
21 C.J. p 1115 note 57.
Prejudice is necessary element of estoppel, but ratification requires no change of position or prejudice.—Texas & Pacific Coal & Oil Co. v. Kirtley, Tex.Civ.App., 288 S.W. 619.

19. Ohio.—Gross v. Wiener, 23 Ohio Cir.Ct.,N.S., 518, 528, affirmed 110 N.E. 1071, 91 Ohio St. 390, 59 Cinc. L.Bul. 461, 12 Ohio Law R. 297.

20. Cal.—Zenos v. Britten-Cook Land & Live Stock Co., 242 P. 914, 75 Cal.App. 299.

21. Tex.—Carlile v. Harris, Civ.App., 38 S.W.2d 622.

22. Mont.—Arnold v. Genzberger, 31 P.2d 296, 96 Mont. 358.
21 C.J. p 1115 note 56.

23. N.J.—McCue v Silcox, 3 A.2d 437, 122 N.J.Law 12, quoting **Corpus Juris.**
N.Y.—Davison v. Klaess, 20 N.E.2d 744, 280 N.Y. 252, reversing 5 N.Y.S.2d 623, 254 App.Div. 897—In re Hayden's Estate, 16 N.Y.S.2d 126, 172 Misc. 669.
67 C.J. p 289 note 91, p 291 notes 92–94.

24. **Other definitions**
(1) The voluntary abandonment or surrender, by a capable person, of a right known by him to exist, with the intent that such right shall be surrendered and such person forever deprived of its benefits.—McCue v. Silcox, 3 A.2d 437, 122 N.J.Law 12, quoting **Corpus Juris**—67 C.J. p 291 note 95.

(2) The relinquishment of some right by word or conduct.—Sovereign Camp, W. O. W. v. Nigh, Tex.Civ. App., 223 S.W. 291.

(3) An election to dispense with something of value or forego advantage.—Fox v. City of Monroe, 131 So. 483, 15 La.App. 192—67 C.J. p 293 notes 17, 18.

(4) An election not to take advantage of technical defense in nature of forfeiture.—Trice v. Georgia Home Ins. Co., Tex.Civ.App., 81 S.W.2d 1055.

(5) An implied consent by failure to object.—Welch v. New York Life Ins. Co., 189 S.E. 809, 814, 183 S.C. 9, quoting **Corpus Juris**—67 C.J. p 293 note 20.

(6) A neglect or omission to insist on a matter of which a party may take advantage at the time when it ought to be done, so that it must operate as a trap to the other party to insist upon it afterwards.—Collins v. Benson, 120 A. 724, 81 N.H. 10.
67 C.J. p 293 notes 16, 19.

25. U.S.—Johnson v. Zerbst, Ga., 58 S.Ct. 1019, 304 U.S. 458, 82 L.Ed. 1461, reversing, C.C.A., 92 F.2d 748, affirming, D.C., Bridwell v. Aderhold, 13 F.Supp. 253, certiorari granted Johnson v. Zerbst, 58 S.Ct. 610, 303 U.S. 629, 82 L.Ed. 1089, set aside, C.C.A., Bridwell v. Zerbst, 97 F.2d 992, reversing, D.C., Bridwell v. Aderhold, 13 F.Supp. 253—Bruun v. Hanson, C.C.A.Idaho, 103 F.2d 685, certiorari denied Hanson v. Bruun, 60 S.Ct. 86, 308 U.S. 571, 84 L.Ed. 479, mandate conformed to, D.C., Bruun v. Hanson, 30 F.Supp. 602—Oregon Mortg. Co. v. Renner, C.C.A.Idaho, 96 F.2d 429, affirming, D.C., 17 F.Supp. 727—Western Casualty & Surety Co. v. Beverforden, C.C.A.Mo., 93 F.2d 166, reversing, D.C., 17 F.Supp. 928—Dunkel Oil Corporation v. Independent Oil & Gas Co., C.C.A.Ill., 70 F.2d 967—Manufacturers Cas-

of the similar, but shorter, definitions which has been stated repeatedly by the courts is that waiver is the intentional relinquishment of a known right;[26] another is that waiver is the voluntary relinquish-

uality Ins. Co. v. Roach, D.C.Md., 25 F.Supp. 852.
Ark.—First Nat. Bank v. Hayes-McKoon Hardware Co., 10 S.W.2d 866, 178 Ark. 429.
Cal.—Kadow v. City of Los Angeles, 87 P.2d 906, 31 Cal.App.2d 324—Conner v. Union Automobile Ins. Co., 9 P.2d 863, 122 Cal.App. 105.
Ga.—Bryant v. Continental Casualty Co., 199 S.E. 343, 58 Ga.App. 518.
Ill.—McMahel v. Smith, 277 Ill.App. 29—Ely v. Prudential Ins. Co. of America, 247 Ill.App. 345.
Ind.—Rushville Nat. Bank of Rushville v. State Life Ins. Co., 1 N.E.2d 445, 210 Ind. 492—Farmers' Ins. Ass'n of Hamilton County v. Males, 145 N.E. 446, 82 Ind.App. 172.
Iowa.—Jones v. City of Des Moines, 283 N.W. 924, 225 Iowa 1342—Eclipse Lumber Co. v. Bitler, 241 N.W. 696, 213 Iowa 1313—In re McFarland's Guardianship, 239 N.W. 702, 214 Iowa 417—Andrew v. Rivers, 223 N.W. 102, 207 Iowa 343—In re Sarvey's Estate, 219 N.W. 318, 206 Iowa 527—Chicago & N. W. Ry. Co. v. Sedgwick, 213 N.W. 435, 203 Iowa 726.
La.—Ratcliffe v. Acacia Mut. Life Ins. Co., App., 187 So. 329.
Me.—Colbath v. H. B. Stebbins Lumber Co., 144 A. 1, 127 Me. 406.
Md.—Benson v. Borden, 198 A. 419, 174 Md. 202.
Mich.—Weller v. Manufacturers' Life Ins. Co., 240 N.W. 34, 256 Mich. 532.
Minn.—Nygaard v. Mosser Fur Farms, 237 N.W. 7, 183 Minn. 388—Farnum v. Peterson-Riddick Co., 234 N.W. 646, 182 Minn. 338.
Mo.—Wall Inv. Co. v. Schumacher, 125 S.W.2d 838, 344 Mo. 225—State ex rel. Metropolitan Life Ins. Co. v. Shain, 66 S.W.2d 871, 334 Mo. 385—Miller v. Rosebud Bank, 116 S.W.2d 267, 234 Mo.App. 647—Wilson v. Illinois Life Ins. Co., 300 S.W. 550, 221 Mo.App. 1007—Howe Scale Co. of Illinois v. Geller, Ward & Hegner Hardware Co., App., 285 S.W. 141.
Mont.—State v. District Court of Fourteenth Judicial Dist. in and for Meagher County, 257 P. 1014, 80 Mont. 97.
N.J.—Smith v. National Commercial Title & Mortgage Co., 198 A. 407, 120 N.J.Law 75—Lincoln Furniture Co. v. Bornstein, 135 A. 83, 100 N.J.Eq. 78, affirmed 138 A. 921, 101 N.J.Eq. 774—Tumen v. Monmouth, 199 A. 78, 16 N.J.Misc. 294.
N.Y.—Redfield v. Critchley, 300 N.Y.S. 305, 252 App.Div. 568, affirmed 14 N.E.2d 377, 277 N.Y. 336, reargument denied 15 N.E.2d 73, 278 N.Y. 483—N. Wagoun & Co. v. Schafer Motor Freight Service, 4 N.Y.S.2d 526, 167 Misc. 681—Parsons v. Lipe, 286 N.Y.S. 60, 158 Misc. 32, affirmed Parsons v. First Trust & Deposit Co., 277 N.Y.S. 426, 243 App.Div. 681, and 277 N.Y.S. 428, 243 App.Div. 681, affirmed 200 N.E. 31, 269 N.Y. 630—In re Turner's Will, 281 N.Y.S. 452, 156 Misc. 68, affirmed 285 N.Y.S. 393, 246 App.Div. 741—People v. George, 280 N.Y.S. 332, 155 Misc. 386—In re Knapp's Estate, 253 N.Y.S. 409, 141 Misc. 540—Fisher v. U. S. Casualty Co., 245 N.Y.S. 406, 138 Misc. 307.
N.C.—Brady v. Funeral Benefit Ass'n of State Camp Patriotic Order Sons of America of North Carolina, 169 S.E. 823, 205 N.C. 5.
Ohio.—Michigan Automobile Ins. Co. v. Van Buskirk, 155 N.E. 186, 115 Ohio St. 598—Motz v. Root, 4 N.E.2d 990, 53 Ohio App. 375.
Okl.—Farris v. Commercial Union Fire Ins. Co. of New York, 55 P.2d 432, 176 Okl. 331—Fipps v. Stidham, 50 P.2d 680, 174 Okl. 473—Ketcham v. Oil Field Supply Co., 226 P. 93, 99 Okl. 201—Ex parte Stinnett, Cr., 110 P.2d 310—Ex parte Barnett, 94 P.2d 18, 67 Okl.Cr. 300.
Or.—Morford v. California Western States Life Ins. Co., 113 P.2d 629—Morford v. California-Western States Life Ins. Co., 88 P.2d 303, 161 Or. 113—Johnson v. Fuchsen, 31 P.2d 667, 146 Or. 657, 107 A.L.R. 340—Boyce v. Toke Point Oyster Co., Consol., 25 P.2d 930, 145 Or. 114.
Pa.—In re Bell's Estate, 10 A.2d 835, 139 Pa.Super. 11—City of Harrisburg v. Morrett, 49 Dauph.Co. 156—General Electric Co. v. N. K. Ovalle, Inc., 45 Dauph.Co. 376.
S.C.—Bank of Swansea v. Williams, 142 S.E. 234, 144 S.C. 130—McKee v. McGhee, 103 S.E. 508, 114 S.C. 183.
S.D.—Hood v. Sioux Steel Co., 287 N.W. 636.
Tex.—De Witt v. Kent County, Civ.App., 148 S.W.2d 213, error dismissed, judgment correct—Hodges v. Cole, Civ.App., 117 S.W.2d 822—Trice v. Georgia Home Ins. Co., Civ.App., 81 S.W.2d 1055—Metzler Bros. v. Johnson, Civ.App., 45 S.W.2d 263, error refused—Missouri State Life Ins. Co. v. Le Fevre, Civ.App., 10 S.W.2d 267, error dismissed.
Wash.—Knutzen v. Truck Ins. Exchange, 90 P.2d 282, 199 Wash. 1—Fickle v. Hayes, 55 P.2d 1072, 185 Wash. 520—Bunge v. Brotherhood of Maintenance of Way Employees, 33 P.2d 383, 178 Wash. 33.
Wis.—Wisconsin Club v. John, 233 N. W. 79, 202 Wis. 476—Wisconsin Electric Sales Co. v. Fidelity & Deposit Co. of Maryland, 211 N.W. 670, 191 Wis. 645—Fanborn v. Miski, 209 N.W. 759, 190 Wis. 513.
Wyo.—Howsley v. Star Ins. Co. of America, 28 P.2d 477, 46 Wyo. 409.
67 C.J. p 292 notes 2–10, p 293 notes 11–15.

26. U.S.—Globe Indemnity Co. v. Cohen, C.C.A.Pa., 106 F.2d 687—Stanolind Oil & Gas Co. v. Guertzgen, C.C.A.Mont., 100 F.2d 299—Bertelsen & Petersen Engineering Co. v. U. S., C.C.A.Mass., 60 F.2d 745, vacating, D.C., 49 F.2d 395—Panther Rubber Mfg. Co. v. Commissioner of Internal Revenue, C. C.A., 45 F.2d 314—Olivier Produce Corporation v. U. S., D.C.Wash., 20 F.2d 214—Oelbermann v. Toyo Kisen Kabushiki Kaisha, C.C.A.Cal., 3 F.2d 5, certiorari denied Toyo Kisen Kabushiki Kaisha v. Oelbermann, 45 S.Ct. 511, 268 U.S. 693, 69 L.Ed. 1161—Forbriger v. Metropolitan Life Ins. Co., D.C.Mo., 9 F.Supp. 94.
Ariz.—Home Owners' Loan Corporation v. Bank of Arizona, 94 P.2d 437, 54 Ariz. 146—Ætna Ins. Co. v. Itule, 218 P. 990, 25 Ariz. 446.
Colo.—French v. Patriotic Ins. Co. of America, 111 P.2d 893.
Conn.—State v. Bloomfield Const. Co., 11 A.2d 382, 126 Conn. 349—National Transp. Co. v. Toquet, 196 A. 344, 123 Conn. 468—Di Francesco v. Zurich General Accident & Liability Ins. Co., 134 A. 739, 105 Conn. 162.
Del.—McCabe v. Baltimore Trust Co., 180 A. 780, 7 W.W.Harr. 116—Brooks Transp. Co. v. Merchants' Mut. Casualty Co., 171 A. 207, 6 W.W.Harr. 40.
Fla.—Masser v. London Operating Co., 145 So. 79, 106 Fla. 474.
Ga.—Sovereign Camp, W. O. W. v. Heflin, 200 S.E. 489, 59 Ga.App. 299, affirmed 3 S.E.2d 559, 188 Ga. 234.
Idaho.—Hopkins v. Hemsley, 22 P.2d 188, 53 Idaho 120.
Ill.—First Lutheran Church of Pontiac v. Rooks Creek Evangelical Lutheran Church, 147 N.E. 53, 316 Ill. 196—Tatro v. Modern Woodmen of America, 2 N.E.2d 107, 284 Ill. App. 423—Willis Coal & Mining Co. v. Missouri & Illinois Coal Co., 206 Ill.App. 192.
Ind.—Barnard v. Megorden, 178 N.E. 868, 94 Ind.App. 391.
Iowa.—Bankers Trust Co. v. Economy Coal Co., 276 N.W. 16, 224 Iowa 36—Randolph State Bank v. Osborn, 223 N.W. 492, 207 Iowa 729—North American Ginseng Co. v. Gilbertson, 206 N.W. 610, 200 Iowa 1349.
Ky.—Western & Southern Life Ins. Co. v. Van Hoose's Adm'x, 142 S.

ment of a known right;[27] and still another is that waiver is the intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right.[28] A waiver occurs, takes place, or exists when one dispenses with the performance of something he is entitled to exact[29] or when one in possession of any right, whether conferred by law or by contract, with full knowledge of the material facts, does or forbears to do something the doing of which or the failure or forbearance to do which is inconsistent with the right or his intention to rely upon it;[30] and when

W.2d 145, 283 Ky. 577—Harris v. Sparks, 1 S.W.2d 772, 222 Ky. 472.
Me.—Houlton Trust Co. v. Lumbert, 5 A.2d 921, 136 Me. 184.
Mass.—Forman v. Hamilburg, 14 N.E.2d 137, 300 Mass. 138—Whelan v. McNally, 178 N.E. 741, 277 Mass. 391—Anti v. Boston Elevated Ry. Co., 141 N.E. 598, 247 Mass. 1—Moss v. Old Colony Trust Co., 140 N.E. 803, 246 Mass. 139—Samuel v. Page-Storms Drop Forge Co., 137 N.E. 169, 243 Mass. 133—Suburban Land Co. v. Brown, 129 N.E. 291, 237 Mass. 166.
Mich.—Couper v. Metropolitan Life Ins. Co., 230 N.W. 929, 250 Mich 540—Bailey v. Jones, 219 N.W. 629, 243 Mich. 159.
Mo.—Drannek Realty Co. v. Nathan Frank, Inc., 139 S.W.2d 926—State ex rel. Continental Ins. Co. of City of New York v. Becker, 77 S.W.2d 100, 336 Mo. 59, quashing Weiss v. Continental Ins. Co., App., 61 S.W.2d 392—Schwab v. Brotherhood of American Yeomen, 264 S.W. 690, 305 Mo. 148—Reis-Moran Lumber Co. v. Putney Roofing Co., App., 147 S.W.2d 172—Brandtjen & Kluge v. Hunter, App., 145 S.W.2d 1009—Springfield Sec. Co. v. Boren, App., 275 S.W. 566—Carpenter v. St. Joseph Life Ins. Co., 246 S.W. 623, 212 Mo.App. 336.
Mont.—Mundt v. Mallon, 76 P.2d 326, 106 Mont. 242—Swords v. Occident Elevator Co., 232 P. 189, 72 Mont. 189—Osborne v. Supreme Lodge, Knights of Pythias, Insurance Department, 222 P. 456, 69 Mont. 361.
Neb.—Klanecky v. Woodmen of the World, 254 N.W. 577, 126 Neb. 809.
Nev.—Santino v. Great American Ins. Co. of New York, 9 P.2d 1000, 54 Nev. 127, rehearing denied Santino v. Glens Falls Ins. Co., 24 P.2d 1119, 54 Nev. 466.
N.Y.—Stevens v. Stevens, 288 N.Y.S. 785, 248 App.Div. 344, affirmed 7 N.E.2d 26, 273 N.Y. 157, 109 A.L.R. 1016—A. Z. A. Realty Corporation v. Harrigan's Café, 185 N.Y.S. 312, 113 Misc. 141.
N.C.—Peanut Growers' Exch. v. Bobbitt, 124 S.E. 625, 188 N.C. 335.
Okl.—Smith v. Minneapolis Threshing Mach. Co., 214 P. 178, 89 Okl. 156.
Or.—Title & Trust Co. v. Durkheimer Inv. Co., 63 P.2d 909, 155 Or. 427.
Tex.—Hines v. Jordan, Civ.App., 228 S.W. 633, error refused.
Vt.—West River Power Co. v. Bussino, 11 A.2d 263—Beatty v. Employers' Liability Assur. Corporation, 168 A. 919, 106 Vt. 25.
Wis.—Nelson v. Caddo Texas Oil Lands Co., 186 N.W. 155, 176 Wis. 327.

27. U.S.—Women's Catholic Order of Foresters v. City of Ennis, C.C.A. Tex., 116 F.2d 270, certiorari denied Women's Catholic Order of Foresters v. City of Ennis, Tex., 61 S.Ct. 1112—Kansas City Life Ins. Co. v. Davis, C.C.A.Cal., 95 F.2d 952—Western Casualty & Surety Co. v. Beverforden, C.C.A.Mo., 93 F.2d 166, reversing, D.C., 17 F. Supp. 928—Dunkel Oil Corporation v. Independent Oil & Gas Co., C.C.A.Ill., 70 F.2d 967—Houlton Sav. Bank v. American Laundry Machinery Co., D.C.Me., 7 F.Supp. 858.
Ala.—Bellingrath v. Samuel, 122 So. 27, 219 Ala. 263.
Cal.—Coolidge v. Standard Accident Ins. Co., 300 P. 885, 114 Cal.App. 716.
Conn.—Hendsey v. Southern New England Telephone Co., 20 A.2d 722, 128 Conn. 132—Temple v. City of New Britain, 15 A.2d 318, 127 Conn. 170—Halloran v. Fischer, 9 A.2d 290, 126 Conn. 44—Flaxman v. Capitol City Press, 185 A. 417, 121 Conn. 423—Dexter Yarn Co. v. American Fabrics Co., 129 A. 527, 102 Conn. 529.
Fla.—Rader v. Prather, 130 So. 15, 100 Fla. 591.
Iowa.—Glade v. General Mut. Ins. Ass'n of Des Moines, 246 N.W. 794, 216 Iowa 622.
Me.—Bryson v. American Eagle Fire Ins. Co., 168 A. 719, 132 Me. 172—Handley v. Metropolitan Ins. Co., 143 A. 465, 127 Me. 361.
Minn.—State v. Tupa, 260 N.W. 875, 194 Minn. 488, 99 A.L.R. 147.
N.J.—Aron v. Rialto Realty Co., 136 A. 339, 100 N.J.Eq. 513, affirmed 140 A. 918, 102 N.J.Eq. 331.
N.Y.—Ausorge v. Belfer, 161 N.E. 450, 248 N.Y. 145, reversing 221 N.Y.S. 786, 220 App.Div. 731—Lord Const. Co. v. Edison Portland Cement Co., 138 N.E. 39, 234 N.Y. 411, reversing 190 N.Y.S. 669, 198 App.Div. 584.
N.C.—In re Yelverton's Will, 153 S.E. 319, 198 N.C. 746—Aldridge v. Greensboro Fire Ins. Co., 140 S.E. 706, 194 N.C. 683.
Ohio.—State ex rel. Hess v. City of Akron, 7 N.E.2d 411, 132 Ohio St. 305, affirming 10 N.E.2d 1, 56 Ohio App. 28.
Or.—Paine v. Meier & Frank Co., 27 P.2d 315, 146 Or. 40, rehearing denied 29 P.2d 531, 146 Or. 40.
S.C.—Duncan v. McCormick County, 6 S.E.2d 265, 192 S.C. 216—Salley v. McCoy, 189 S.E. 196, 182 S.C. 249—Farmers' & Merchants' Bank v. People's First Nat. Bank, 159 S.E. 617, 161 S.C. 286.
Vt.—Dunbar v. Farnum, 196 A. 237, 109 Vt. 313, 114 A.L.R. 996.
Wash.—Constantino v. Moreschi, 115 P.2d 955—Reynolds v. Travelers' Ins. Co., 28 P.2d 310, 176 Wash 36.
Wis.—In re Oeflein's Estate, 245 N.W. 109, 209 Wis. 386—Eau Claire Dells Improvement Co. v. City of Eau Claire, 179 N.W. 2, 172 Wis. 240.
Wyo.—Barber v. Sheridan Trust & Savings Bank, 78 P.2d 1101, 53 Wyo. 65.

28. Ariz.—Meason v. Ralston Purina Co., 107 P.2d 224.
Del.—Hanson v. Fidelity Mut. Ben Corporation, Super., 13 A.2d 456—Frank v. Wilson & Co., Ch., 9 A.2d 82—Keil Motor Co. v. Royal Ins. Co., Limited, of Liverpool, England, 171 A. 201, 6 W.W.Harr. 24.
Ill.—A-1 Cleaners & Dyers v. American Mut. Liability Ins. Co. of Boston, 30 N.E.2d 87, 307 Ill.App. 64
Iowa.—Sioux Falls Broadcasting Ass'n v. Henry Field Co., 277 N.W. 284, 224 Iowa 655—McPherrin v. Sun Life Assur. Co. of Canada, 257 N.W. 316, 219 Iowa 159.
N.J.—McCue v. Silcox, 3 A.2d 437, 122 N.J.Law 12, quoting **Corpus Juris.**
Tex.—The Prætorians v. Strickland, Com.App., 66 S.W.2d 686, reversing, Civ.App., 48 S.W.2d 690.
67 C.J. p 291 note 96.

29. N.J.—McCue v. Silcox, 3 A.2d 437, 122 N.J.Law 12, quoting **Corpus Juris.**
67 C.J. p 291 note 99.

30. Mo.—Swihart v. Missouri Farmers Mut. Tornado, Cyclone & Windstorm Ins. Co., App., 138 S.W.2d 9.
N.J.—McCue v. Silcox, 3 A.2d 437, 122 N.J.Law 12, quoting **Corpus Juris.**
67 C.J. p 291 note 98.

Relinquishment with knowledge
Waiver is the intentional relinquishment of a known right after knowledge of the facts.
Cal.—Newark Trust Co. v. Kriebel, 193 P. 962, 49 Cal.App. 614.
N.M.—Smith v. New York Life Ins. Co., 193 P. 67, 26 N.M. 408.

once made it cannot be recalled, expunged, or revoked,[31] nor can the right waived be reclaimed[32] or regained by revoking the waiver.[33] The word "waiver" carries certain implications, such as the relinquishment of a legal position[34] and, as shown infra § 72 a, an election to forego or dispense with some right or advantage; but the definitions of waiver are not to be understood as implying that any voluntary or intentional relinquishment of a known right is necessarily effective.[35] Although the word is flexible and not always definite,[36] it is capable of taking on a very definite meaning from its context.[37] The doctrine of waiver is often difficult of application;[38] and the question of whether waiver is present in any particular case must be decided on the facts peculiar to that case.[39]

b. Differentiating Features

The ground of distinction between the doctrines of waiver and estoppel most frequently adverted to is that waiver rests on intention of the party while estoppel rests on a detrimental change of position induced by his acts or conduct. The distinction is close in cases of implied waiver and the terms are frequently used as interchangeable.

Waiver and estoppel or estoppel in pais are closely related;[40] the line of demarcation between them is said to be very slight, since both partake of somewhat the same elements and ask essentially the same relief;[41] and the terms are frequently and loosely used as convertible,[42] especially where waivers implied, and estoppels arising, from conduct are involved, the dividing line being very shadowy in such cases[43] and it being often a difficult question to determine just where the doctrine of implied waiver ends and that of estoppel begins.[44] Where the waiver relied on is constructive, or merely implied from the conduct of a party, irrespective of what his actual intention may have been, it is at least questionable if there are not present some of the elements of estoppel.[45] It has been declared on the one hand, that estoppel is a species of waiver[46] and, on the other hand, that waiver belongs to the family,[47] and, according to the judicial de-

Inconsistency with claim of right

A waiver is the voluntary surrender or relinquishment of a known legal right or the intentional doing of an act inconsistent with claiming it.—Hackett v. Kripke, 23 N.E.2d 438, 62 Ohio App. 89—67 C.J. p 291 note 97.

Acquiescence is a species of waiver.

Del.—Frank v. Wilson & Co., Ch., 9 A.2d 82.

Md.—Dague v. Grand Lodge Brotherhood of Railroad Trainmen, 73 A. 735, 111 Md. 95.

31. Ala.—Penney v. Burns, 146 So. 611, 226 Ala. 273.
Ky.—U. S. Fidelity & Guaranty Co. v. Miller, 34 S.W.2d 938, 237 Ky. 43.
Mo.—Mackey v. Home Ins. Co. of New York, App., 284 S.W. 161.
N.Y.—Sullivan v. Taylor, 4 N.Y.S.2d 674, 254 App.Div. 766, reversed on other grounds, 18 N.E.2d 531, 279 N.Y. 864.

32. Vt.—Johnson v. Tuttle, 187 A. 515, 108 Vt. 291, 106 A.L.R. 1391.

33. Conn.—Hendsey v. Southern New England Telephone Co., 20 A. 2d 722, 128 Conn. 132.

34. N.D.—State Bank of Ardock v. Burke, 208 N.W. 115, 53 N.D. 777.
67 C.J. p 293 notes 22–44.

35. Me.—Colbath v. H. B. Stebbins Lumber Co., 144 A. 1, 127 Me. 406.
67 C.J. p 292 note 1.

36. Wyo.—Barber v. Sheridan Trust & Savings Bank, 78 P.2d 1101, 53 Wyo. 65.
67 C.J. p 289 notes 87–89.

37. Conn.—Townsend v. Barlow, 124 A. 832, 101 Conn. 86.

38. Okl.—Seidenbach's v. Underwood, 63 P.2d 950, 178 Okl. 624.
67 C.J. p 293 note 27.

39. U.S.—Globe Indemnity Co. v. Cohen, C.C.A.Pa., 106 F.2d 687.
Ill.—Haggerty v. St. Louis Police Relief Ass'n, App., 141 S.W.2d 174.
Okl.—Seidenbach's v. Underwood, 63 P.2d 950, 178 Okl. 624.
Wis.—Zwietusch v. Luehring, 144 N. W. 257, 156 Wis. 96.

40. U.S.—Globe Indemnity Co. v. Cohen, C.C.A.Pa., 106 F.2d 687.
Del.—Hanson v. Fidelity Mut. Ben. Corporation, Super., 13 A.2d 456.
Md.—Benson v. Borden, 198 A. 419, 174 Md. 202.
Mo.—Swihart v. Missouri Farmers Mut. Tornado, Cyclone & Windstorm Ins. Co., App., 138 S.W.2d 9.
Neb.—First Nat. Bank of Hastings v. Davis, 242 N.W. 655, 123 Neb. 304.
N.J.—McSweeney v. Equitable Trust Co., 198 A. 529, 16 N.J.Misc. 193.
S.D.—Labidee v. City of Pierre, 177 N.W. 499, 43 S.D. 31.

41. Ind.—Menzenberger v. American State Bank, 198 N.E. 819, 101 Ind. App. 600.

Both require knowledge of the facts by the person against whom they are asserted.—First Nat. Bank of Hastings v. Davis, 242 N.W. 655, 123 Neb. 304.

42. Cal.—McDaniels v. General Ins. Co. of America, 36 P.2d 329, 1 Cal. App. 454.
Md.—Benson v. Borden, 198 A. 419, 174 Md. 202.
N.J.—Aron v. Rialto Realty Co., 136 A. 339, 100 N.J.Eq. 513, affirmed 140 A. 918, 102 N.J.Eq. 331.
N.Y.—Brady v. Metropolitan Life Ins. Co., 14 N.Y.S.2d 581, affirmed In re Masterson's Estate, 20 N.Y.S. 2d 988.
Tex.—Goodwin v. Abilene State Bank, Civ.App., 20 S.W.2d 1090, error dismissed.
21 C.J. p 1115 note 59—67 C.J. p 294 note 53.

Presence of all elements

Where all of the elements of an estoppel are present in a waiver, the terms may be used interchangeably. —Adam v. Columbian Nat. Life Ins. Co., 218 Ill.App. 54.

43. Ga.—Sentinel Fire Ins. Co. v. McRoberts, 179 S.E. 256, 50 Ga. App. 732.

44. Wash.—Reynolds v. Travelers' Ins. Co., 28 P.2d 310, 176 Wash. 36.

45. U.S.—Stanolind Oil & Gas Co. v. Guertzgen, C.C.A.Mont., 100 F.2d 299.
N.Y.—Redfield v. Critchley, 300 N. Y.S. 305, 252 App.Div. 568, affirmed 14 N.E.2d 377, 277 N.Y. 336, reargument denied 15 N.E.2d 73, 278 N.Y. 483.
21 C.J. p 1116 note 75—67 C.J. p 295 note 61.

46. Cal.—Kline v. San Francisco Unified School Dist., App., 104 P.2d 661, hearing denied 105 P.2d 362.

47. U.S.—Eagle Oil Co. v. Sinclair Prairie Oil Co., D.C.Okl., 24 F.Supp. 612, affirmed, C.C.A., 105 F.2d 710.
Ga.—Sentinel Fire Ins. Co. v. McRoberts, 179 S.E. 256, 260, 50 Ga. App. 732, citing 8 Corpus Juris.
Md.—Benson v. Borden, 198 A. 419, 174 Md. 202.
Mich.—Seaman v. Ironwood Amuse-

cisions on the subject, is in the nature,[48] of estoppel. Also it has been held or stated that estoppel is the basis[49] and an indispensable element[50] of waiver, it being the essence of waiver and there being no waiver where there is no estoppel.[51] Estoppel as an alternative element of waiver is considered below in connection with the necessity of intent, see infra § 69 b, and consideration, see infra § 67 c.

At any rate, the same conduct may constitute both an implied waiver and an estoppel.[52] A waiver may be based on, or arise from, an estoppel;[53] it may have the elements of an equitable estoppel;[54] and, provided the elements of estoppel, as well as of waiver, are present,[55] a waiver, when established, may amount to, or operate as, an estoppel, or, in other words there may be an estoppel by waiver,[56] it being well settled that, where a party to a transaction induces another to act on the reasonable belief that he has waived or will waive certain rights, remedies, or objections which he is entitled to assert, he will be estopped to insist on such rights, remedies, or objections to the prejudice of the one misled.[57] The doctrine of estoppel by waiver, it has been said, applies in any case to determine the rights of the parties from the time when a mistake of law or of fact becomes known to the parties whose rights are affected.[58]

However, strictly and accurately speaking, waiver and estoppel or estoppel in pais are distinguishable, rather than synonymous or convertible, terms;[59] the same set of facts may establish one, but not the other;[60] waiver is not in the proper sense of the term a species of estoppel[61] and does not necessarily amount to an estoppel;[62] the doctrine of waiver does not necessarily depend on estoppel[63] or misrepresentation;[64] a waiver may be created by acts, conduct, or declarations insufficient to create a technical estoppel;[65] it may be estab-

ment Corporation, 278 N.W. 51, 283 Mich. 220.
27 C.J. p 1115 note 58—67 C.J. p 294 note 49.

48. Ala.—Sovereign Camp, W. O. W. v. Allen, 89 So. 58, 206 Ala. 41.
Implied waiver
Iowa.—Guenther v. City of Des Moines, 197 N.W. 326, 197 Iowa 414.
67 C.J. p 295 note 61 [a].
Waiver of forfeiture
U.S.—New York Life Ins. Co. v. Dumler, C.C.A.Miss., 282 F. 969.
Ark.—American Life Ass'n v. Vaden, 261 S.W. 320, 164 Ark. 75.
N.C.—Bullard v. Pilot Fire Ins. Co., 126 S.E. 179, 189 N.C. 34.

49. U.S.—Exchange Trust Co. v. Capitol Life Ins. Co. of Colorado D.C.Okl., 40 F.2d 687, affirmed, C.C.A., 49 F.2d 133.
S.D.—Labidee v. City of Pierre, 177 N.W. 499, 43 S.D. 31.
67 C.J. p 294 note 51.
Waiver rests fundamentally on the doctrine of estoppel.—General Electric Co. v. N. K. Ovalle, Inc., 45 Dauph.Co., Pa., 376.

50. U.S.—Coursey v. International Harvester Co., C.C.A.Kan., 109 F. 2d 774.

51. U.S.—G. Amsinck & Co. v. Springfield Grocer Co., C.C.A.Mo., 7 F.2d 855.
67 C.J. p 294 note 52.

52. Ga.—Sentinel Fire Ins. Co. v. McRoberts, 179 S.E. 256, 50 Ga. App. 732.

53. Ohio.—Motz v. Root, 4 N.E.2d 990, 53 Ohio App. 375.
Or.—Kaller v. Spady, 24 P.2d 351, 144 Or. 206.

54. Me.—Colbath v. H. B. Stebbins Lumber Co., 144 A. 1, 127 Me. 406.
67 C.J. p 296 note 73.

55. Va.—Richmond Trust Co. v. Christian, 142 S.E. 528, 150 Va. 244.

56. Cal.—People v. Ventura Refining Co., 268 P. 347, 204 Cal. 286, rehearing denied 283 P. 60, 204 Cal. 286, and followed in People v. Richfield Oil Co., 268 P. 355, 204 Cal. 699.
Md.—Benson v. Borden, 198 A. 419, 174 Md. 202.
Mich.—August v. Collins, 214 N.W. 951, 240 Mich. 23.
N.Y.—Lord Const. Co. v. Edison Portland Cement Co., 138 N.E. 39, 234 N.Y. 411, reversing 190 N.Y.S. 669, 198 App.Div. 584.
Or.—Johnson v. Feskens, 31 P.2d 667, 146 Or. 657.
Utah.—Sullivan v. Beneficial Life Ins. Co., 64 P.2d 351, 91 Utah 405.

57. U.S.—U. S., for Use and Benefit of Noland Co. v. Wood, C.C.A.Va., 99 F.2d 80.
Mich.—Mettetal v. Hall, 284 N.W. 698, 701, 288 Mich. 200, citing **Corpus Juris.**
Va.—Big Vein Pocahontas Co. v. Browning, 120 S.E. 247, 256, 137 Va. 34, citing **Corpus Juris.**
Wyo.—Snowball v. Maney Bros. & Co., 270 P. 167, 39 Wyo. 84, 61 A.L.R. 199, rehearing denied 271 P. 875, 39 Wyo. 84, 61 A.L.R. 199.
21 C.J. p 1241 note 86.

58. S.D.—Kenny v. McKenzie, 127 N.W. 597, 25 S.D. 485, 49 L.R.A., N.S., 782.

59. Ga.—Sentinel Fire Ins. Co. v. McRoberts, 179 S.E. 256, 260, 50 Ga.App. 732, citing **Corpus Juris.**
Iowa.—In re Caylor's Estate, 227 N. W. 103, 208 Iowa 208.
Md.—Benson v. Borden, 198 A. 419, 174 Md. 202.
Mont.—Williams v. Anaconda Copper Mining Co., 29 P.2d 649, 96 Mont. 204.
N.J.—Aron v. Rialto Realty Co., 136 A. 339, 100 N.J.Eq. 513, affirmed 140 A. 918, 102 N.J.Eq. 331.
Or.—Johnson v. Feskens, 31 P.2d 667, 146 Or. 657.
Tex.—Goodwin v. Abilene State Bank, Civ.App., 20 S.W.2d 1090, error dismissed—Sovereign Camp. W. O. W., v. Nigh, Civ.App., 223 S.W. 291.
21 C.J. p 1115 note 60—67 C.J. p 295 notes 54, 55.

60. Md.—Benson v. Borden, 198 A 419, 174 Md. 202.

61. Wis.—Oconto Electric Co. v. Oconto Service Co., 169 N.W. 293, 168 Wis. 165.
21 C.J. p 1240 note 85.

62. Or.—Johnson v. Feskens, 31 P. 2d 667, 146 Or. 657.

63. Mo.—Roberts v. American Nat. Assur. Co., 220 S.W. 996.
67 C.J. p 295 note 56.

64. R.I.—Inventasch v. Superior Fire Ins. Co., 138 A. 39, 48 R.I. 321.

65. U.S.—New York Life Ins. Co. v. Dumler, C.C.A.Miss., 282 F. 969—Eagle Oil Co. v. Sinclair Prairie Oil Co., 24 F.Supp. 612, affirmed, C.C.A., 105 F.2d 710.
Ga.—Sentinel Fire Ins. Co. v. McRoberts, 179 S.E. 256, 261, 50 Ga. App. 732, citing **Corpus Juris**—Sovereign Camp, W. O. W., v. Bowman, 150 S.E. 436, 40 Ga.App. 536.
Md.—Benson v. Borden, 198 A. 419, 174 Md. 202.
Mo.—Swihart v. Missouri Farmers Mut. Tornado, Cyclone & Windstorm Ins. Co., App., 138 S.W.2d 9.
N.C.—Bullard v. Pilot Fire Ins. Co., 126 S.E. 179, 189 N.C. 34.
Tex.—John Hancock Mut. Life Ins.

lished without proving all[66] the elements of an estoppel;[67] and it has been said that waiver does not require any element of estoppel at all.[68] There are several essential differences between the two doctrines.[69] According to all the accepted definitions of the term "waiver," it is of the essence of the waiver that there should be an intentional relinquishment of a known right,[70] and necessarily therefore it assumes the existence of an opportunity for choice between the relinquishment and the enforcement of the right,[71] while in estoppel the intention to relinquish a right is not necessarily present.[72] Also waiver depends on what one himself intends to do, while estoppel depends rather on what the adversary party is induced to do;[73] and waiver involves the acts and conduct of only one of the parties, regardless of the attitude assumed by the other party, whereas estoppel, on the other hand, involves the conduct of both parties.[74] A waiver does not necessarily imply that one has been misled to his prejudice or into an altered position; an estoppel always involves this element.[75] Estoppel results from an act which may operate to the injury of the other party; waiver may affect the opposite party beneficially.[76] Also estoppel may carry the implication of fraud; waiver does not.[77] Furthermore, estoppel may arise as between consistent remedies; for waiver by election to operate

Co. v. Harrison, Civ.App., 82 S.W. 2d 1075, error dismissed.
21 C.J. p 1116 note 74—67 C.J. p 295 note 59.

66. Utah.—Sullivan v. Beneficial Life Ins. Co., 64 P.2d 351, 91 Utah 405.

67. Ill.—Adam v. Columbian Nat. Life Ins. Co., 218 Ill.App. 54.

68. Wis.—Somers v. Germania Nat. Bank, 138 N.W. 713, 152 Wis. 210 —Cowie v. Strohmeyer, 136 N.W. 956, 137 N.W. 778, 150 Wis. 401.
67 C.J. p 303 note 61.
Corpus Juris is cited in a case where, after holding untenable various objections to the application of the doctrine of equitable estoppel, the court said that, moreover, the evidence conclusively showed a waiver.—New Jersey Suburban Water Co. v. Town of Harrison, 3 A.2d 623, 627, 122 N.J.Law 189, reversing 1 A.2d 61, 120 N.J.Law 546.

69. Ariz.—City of Glendale v. Coquat, 52 P.2d 1178, 46 Ariz. 478, 102 A.L.R. 837.
Del.—Henson v. Fidelity Mut. Ben. Corporation, Super., 13 A.2d 456.
N.J.—McSweeney v. Equitable Trust Co., 198 A. 529, 16 N.J.Misc. 193.
S.D.—Labidee v. City of Pierre, 177 N.W. 499, 43 S.D. 31.
21 C.J. p 1115 note 62.
Waiver and estoppel are rooted in different conceptions
N.Y.—Brady v. Metropolitan Life Ins. Co., 14 N.Y.S.2d 581, affirmed In re Masterson's Estate, 20 N.Y.S.2d 988.
Grounds
As compared to estoppel, waiver is broad on relatively tenuous grounds.—First Nat. Bank v. Witherspoon Livestock Com'n Co., 90 S.W. 2d 453, 230 Mo.App. 285.

70. Ariz.—City of Glendale v. Coquat, 52 P.2d 1178, 46 Ariz. 478, 102 A.L.R. 837.
Mo.—First Nat. Bank v. Witherspoon Livestock Com'n Co., 90 S.W.2d 453, 463, 230 Mo.App. 285, citing Corpus Juris.
Nev.—Santino v. Great American Ins. Co. of New York, 9 P.2d 1000, 1004, 54 Nev. 127, citing Corpus Juris, and rehearing denied 24 P.2d 1119, 54 Nev. 466.
N.Y.—American Bridge Co. v. State, 283 N.Y.S. 577, 245 App.Div. 535.
21 C.J. p 1116 note 68.

71. Ariz.—City of Glendale v. Coquat, 52 P.2d 1178, 46 Ariz. 478, 102 A.L.R. 837.
Ky.—Harris v. Sparks, 1 S.W.2d 772, 773, 222 Ky. 472, quoting Corpus Juris.
Okl.—Seigle v. Hamilton-Carhartt Cotton Mills, 213 P. 305, 89 Okl. 68.
21 C.J. p 1116 note 64.

72. Ariz.—City of Glendale v. Coquat, 52 P.2d 1178, 46 Ariz. 478, 102 A.L.R. 837—Equitable Life Assur. of U. S. v. Pettid, 11 P.2d 833, 40 Ariz. 239.
Colo.—Davis v. Brinkhouse Hotel Co., 219 P. 1074, 74 Colo. 199.
Ga.—Sentinel Fire Ins. Co. v. McRoberts, 179 S.E. 256, 260, 50 Ga. App. 732, citing Corpus Juris.
N.Y.—Brady v. Metropolitan Life Ins. Co., 14 N.Y.S.2d 581, affirmed In re Masterson's Estate, 20 N.Y.S. 2d 988.
Or.—Boyce v. Toke Point Oyster Co., Consol., 25 P.2d 930, 145 Or. 114.
Tex.—Goodwin v. Abilene State Bank, Civ.App., 20 S.W.2d 1090, error dismissed.
21 C.J. p 1116 note 65.

73. U.S.—Myers v. Ross, D.C.Fla., 10 F.Supp. 409.
Ariz.—City of Glendale v. Coquat, 52 P.2d 1178, 46 Ariz. 478, 102 A.L.R. 837—Southwest Cotton Co. v. Valley Bank, 227 P. 986, 26 Ariz. 559, rehearing denied 229 P. 98, 27 Ariz. 7.
Ga.—Sentinel Fire Ins. Co. v. McRoberts, 179 S.E. 256, 260, 50 Ga. App. 732, citing Corpus Juris.
Ill.—Adam v. Columbian Nat. Life Ins. Co., 218 Ill.App. 54.
Md.—Benson v. Borden, 198 A. 419, 174 Md. 202.
S.D.—Labidee v. City of Pierre, 177 N.W. 499, 43 S.D. 31.
21 C.J. p 1116 notes 66, 69.

74. Ariz.—City of Glendale v. Coquat, 52 P.2d 1178, 46 Ariz. 478, 102 A.L.R. 837.
Cal.—McDaniels v. General Ins. Co. of America, 36 P.2d 829, 1 Cal. App.2d 454.
Md.—Benson v. Borden, 198 A. 419, 174 Md. 202.
N.J.—Smith v. National Commercial Title & Mortgage Guaranty Co., 198 A. 407, 120 N.J.Law 75—Tumen v. Monmouth County, 199 A. 78, 16 N.J.Misc. 294.
S.D.—Labidee v. City of Pierre, 177 N.W. 499, 43 S.D. 31.
21 C.J. p 1116 notes 67, 68.

75. Ariz.—City of Glendale v. Coquat, 52 P.2d 1178, 46 Ariz. 478, 102 A.L.R. 837—Southwest Cotton Co. v. Valley Bank, 227 P. 986, 26 Ariz. 559, rehearing denied 229 P. 98, 27 Ariz. 7.
Ill.—A-1 Cleaners & Dyers v. American Mut. Liability Ins. Co. of Boston, 30 N.E.2d 87, 307 Ill.App. 64.
Md.—Benson v. Borden, 198 A. 419, 174 Md. 202.
Mo.—Biggs v. Modern Woodmen of America, 82 S.W.2d 898, 336 Mo. 879, reversing, App., 71 S.W.2d 783—Thomas v. Modern Woodmen of America, 260 S.W. 552, 218 Mo. App. 10.
Vt.—Beatty v. Employers' Liability Assur. Corporation, 168 A. 919, 106 Vt. 25.
21 C.J. p 1116 note 70—67 C.J. p 295 note 58.

76. Ariz.—City of Glendale v. Coquat, 52 P.2d 1178, 46 Ariz. 478, 102 A.L.R. 837.
Ga.—Sentinel Fire Ins. Co. v. McRoberts, 179 S.E. 256, 260, 50 Ga. App. 732, citing Corpus Juris.
21 C.J. p 1116 note 71.

77. Ariz.—City of Glendale v. Coquat, 52 P.2d 1178, 46 Ariz. 478, 102 A.L.R. 837.
Md.—Benson v. Borden, 198 A. 419, 174 Md. 202.
21 C.J. p 1116 note 72.

as a bar, the remedies must be inconsistent.[78] Estoppel and waiver have been distinguished on the ground that a consideration is necessary for the former, but not the latter.[79] However the basis for this distinction does not find support in the weight of authority. As shown infra § 67 c, it is generally considered that an estoppel need not be supported by a consideration and the view is taken by a number of authorities that a waiver must be so supported in some situations, as where there is no estoppel.

In insurance cases. The distinction between waiver and estoppel is frequently noted in insurance cases and, in so far as it bears on insurance law, is discussed at length in the C.J.S. title Insurance § 673, also 26 C.J. p 279 note 28–p 281 note 46, and 32 C.J. p 1315 note 60–p 1316 note 67.

§ 62. Distinguished from Legal Estoppel

Legal and equitable estoppels differ in basis and object.

There is quite a distinction between the two classes of estoppel, legal and equitable.[80] Legal estoppel, which is founded on deeds and judicial records,[81] excludes evidence of the truth and the equity of the particular case to support a strict rule of law on grounds of public policy.[82] Equitable estoppel, which is in pais, see supra § 59 c, is admitted on exactly the opposite ground of promoting the equity and justice of the individual case by preventing a party from asserting his rights under a general technical rule of law, when he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth.[83]

An estoppel by misrepresentation differs from estoppel by record, by deed, and by contract, in that it is not based on an agreement of the parties or on a finding of fact which may not be disputed.[84] Another ground of distinction is said to be that it is not mutual, but applies to only one party.[85] According to the weight of authority, however, an estoppel in pais must be mutual, as stated infra § 76.

§ 63. Object and Purpose of Doctrine

The doctrine of estoppel in pais is based on grounds of public policy and good faith, it being intended to af-

78. Ga.—Kennedy v. Manry, 66 S.E. 29, 6 Ga.App. 816.

79. U.S.—Globe Indemnity Co. v. Cohen, C.C.A.Pa., 106 F.2d 687.

80. Ala.—First Nat. Bank of Opp v. Boles, 165 So. 582, 231 Ala. 503.
N.C.—American Exchange Nat. Bank v. Winder, 150 S.E. 489, 198 N.C. 18.

Estoppel at common law
There is a distinction between equitable estoppel and estoppels at common law.—Thomas v. Conyers, 151 S.E. 270, 198 N.C. 229.

81. Wash.—Carruthers v. Whitney, 105 P. 831, 56 Wash. 327, 134 Am. S.R. 1114.

82. Ala.—First Nat. Bank of Opp v. Boles, 165 So. 582, 592, 231 Ala. 503, quoting **Corpus Juris.**
N.C.—American Exchange Nat. Bank v. Winder, 150 S.E. 489, 198 N.C. 18.
Tex.—Lockhart State Bank v. Baker, Civ.App., 264 S.W. 566.
21 C.J. p 1116 note 77.

83. U.S.—Grand Central Public Market v. U. S., D.C.Cal., 22 F. Supp. 119, appeal dismissed, C.C.A., U. S. v. Grand Central Public Market, 98 F.2d 1023—Maryland Casualty Co. v. Gates, C.C.A.Md., 290 F. 65, certiorari denied Gates v. Maryland Casualty Co., 44 S.Ct. 36, 263 U.S. 708, 68 L.Ed. 517.
Ala.—First Nat. Bank of Opp v. Boles, 165 So. 582, 592, 231 Ala. 503, quoting **Corpus Juris.**
Cal.—Smith v. Anglo-California Trust Co., 271 P. 898, 205 Cal. 496.
Del.—Graham v. National Bank of Smyrna, 122 A. 85, 2 W.W Harr. 264.
Ga.—Parham v. Kennedy, 2 S.E.2d 765, 768, 60 Ga.App. 52, citing **Corpus Juris**—Bragan v. Lumbermen's Mut. Casualty Co., 2 S.E.2d 189, 190, 59 Ga.App. 862, quoting **Corpus Juris.**
Ill.—Union Cent. Life Ins. Co. of Cincinnati, Ohio, v. Anderson, 10 N.E.2d 46, 291 Ill.App. 423.
Nev.—Noble Gold Mines Co. v. Olsen, 66 P.2d 1005, 57 Nev. 448.
N.C.—American Exchange Nat. Bank v. Winder, 150 S.E. 489, 198 N.C. 18.
S.C.—Smith v. Williams, 139 S.E. 625, 141 S.C. 265, 54 A.L.R. 964.
Tenn.—Mason v. Hamilton Nat. Bank, 1 Tenn.App. 232.
Tex.—Lockhart State Bank v. Baker, Civ.App., 264 S.W. 566.
Wis.—Sparks v. Kuss, 216 N.W. 929, 195 Wis. 378, modified on other grounds 218 N.W. 208, 195 Wis. 378.
21 C.J. p 1117 note 79.

Promotion of justice
The remedy of equitable estoppel has for its purpose promotion of the ends of justice.
U.S.—Roedel v. U. S., 82 Ct.Cl. 655.
Ill.—Elowe v. Superior Fire Ins. Co., 30 N.E. 953, 307 Ill.App. 569.
N.J.—Muller v. Thomann, 145 A. 480, 104 N.J.Eq. 289.

Doctrine is grounded on equity and good conscience
Ind.—Rushville Nat. Bank of Rushville v. State Life Ins. Co., 1 N.E. 2d 445, 210 Ind. 492.
N.C.—Martin v. Bundy, 193 S.E. 831, 212 N.C. 437.

Irrespective of legal rights, estoppel shows what equity and good conscience require.—Basak v. Damutz, 135 A. 453, 105 Conn. 378.

Application of golden rule
The doctrine of equitable estoppel is based on an application of the golden rule to the everyday affairs of men. It requires that one should do unto others as, in equity and good conscience, he would have them do unto him, if their positions were reversed.—McNeely v. Walters, 189 S.E. 114, 211 N.C. 112.

Departure from common law rule
It having been found that the common-law rule recognizing only legal estoppels was too narrow and inadequate for the attainment of justice under the multiplied transactions of modern times, the equitable estoppel of the present day was recognized and applied.—Carruthers v. Whitney, 105 P. 831, 56 Wash. 327, 134 Am.S.R. 1114.

84. N.C.—Bank of Canton & Trust Co. v. Clark, 151 S.E. 102, 198 N. C. 169.

85. N.C.—Bank of Canton & Trust Co. v. Clark, supra.

ford protection against injustice and fraud by denying to a person the right to repudiate his acts, admissions, or representations which have been relied on by the person to whom they were directed and whose conduct they were intended to, and did, influence. It is more than a rule of evidence, but nevertheless is merely a protective weapon and should never be given inequitable application.

The doctrine of estoppel in pais, although it has been characterized as odious,[86] a harsh doctrine,[87] and not to be favored,[88] on the ground that it tends to exclude the truth,[89] is not so regarded in some cases,[90] it being said that it does not so much shut out the truth as let in the truth, and the whole truth.[91] Estoppel is sometimes regarded as being a branch of the law of evidence[92] and governed by the laws of the forum.[93] The doctrine is, however, much more than a rule of evidence;[94] it is said to establish rights[95] and to determine remedies;[96] but, nevertheless, its operation and effect, which are fully discussed in §§ 148–152, are limited; and in a number of cases its purpose is declared to be the preservation of rights already acquired and not the creation of new ones.[97] It is based on the grounds of public policy and good faith,[98] and is interposed to prevent injury, fraud, injustice, and inequitable consequences by denying to a person the right to repudiate his acts, admissions, or representations, when they have been relied on by persons to whom they were directed and whose conduct they were intended to and did influence.[99]

86. U.S.—Stubnitz-Greene Spring Corporation v. Fort Pitt Bedding Co., C.C.A.Mich., 110 F.2d 192.
N.Y.—Hartford Accident & Indemnity Co. v. Oles, 274 N.Y.S. 349, 152 Misc. 876.
21 C.J. p 1117 note 80.

87. Cal.—Franklin v. Merida, 35 Cal. 558, 95 Am.D. 129.
N.Y.—Hartford Accident & Indemnity Co. v. Oles, 274 N.Y.S. 349, 152 Misc. 876.

88. U.S.—Stubnitz-Greene Spring Corporation v. Fort Pitt Bedding Co., C.C.A.Mich., 110 F.2d 192—Jenks v. Knight, Cust. & Pat.App., 90 F.2d 654.
Ga.—Cook v. Flanders, 138 S.E. 218, 164 Ga. 279.
La.—Federal Land Bank of New Orleans v. Mulhern, 157 So. 370, 180 La. 627, 95 A.L.R. 948—In re Clover Ridge Planting & Mfg. Co., 151 So. 212, 178 La. 302.
N.Y.—McKeefry v. O'Hara, 184 N.Y.S. 700, 113 Misc. 159.
Tenn.—Allred v. Allred, 5 Tenn.App. 200.
21 C.J. p 1117 note 82.

89. U.S.—Stubnitz-Greene Spring Corporation v. Fort Pitt Bedding Co., C.C.A.Mich., 110 F.2d 192—Jenks v. Knight, Cust. & Pat.App., 90 F.2d 654.
21 C.J. p 1117 note 83.

90. La.—State ex rel. Shell Oil Co. v. Register of State Land Office, 192 So. 519, 198 La. 883.
Okl.—Moroney v. Tannehill, 215 P. 938, 90 Okl. 224.
21 C.J. p 1117 note 84.

91. Ala.—First Nat. Bank of Opp v. Boles, 165 So. 582, 592, 231 Ala. 503, quoting Corpus Juris.
21 C.J. p 1117 note 85.
Truth of thing asserted is not denied by equitable estoppel to make assertion.—Phillips v. Citizens' Nat. Bank, Tex.Com.App., 15 S.W.2d 550, reversing Wilson v. Shaer Co., Civ.App., 3 S.W.2d 849.

92. Tenn.—Rogers v. Colville, 233 S.W. 80, 145 Tenn. 650.

93. U.S.—Sunshine Mining Co. v. Treinies, D.C.Idaho, 19 F.Supp. 587, affirmed, C.C.A., Treinies v. Sunshine Mining Co., 99 F.2d 651, certiorari granted 59 S.Ct. 489, 306 U.S. 624, 83 L.Ed. 1029, affirmed 60 S.Ct. 44, 308 U.S. 66, 84 L.Ed. 85, rehearing denied 60 S.Ct. 464, 309 U.S. 693, 84 L.Ed. 1034.

94. U.S.—Wright v. Farmers' Nat. Grain Corporation, C.C.A.Ill., 74 F. 2d 425, 428, citing Corpus Juris.
Ala.—First Nat. Bank of Opp v. Boles, 165 So. 582, 592, 231 Ala. 503, quoting Corpus Juris.
21 C.J. p 1117 note 87.

95. U.S.—Wright v. Farmers' Nat. Grain Corporation, C.C.A.Ill., 74 F.2d 425, 428, citing Corpus Juris—Commodores Point Terminal Co. v. Hudnall, D.C.Fla., 283 F. 150.
Ala.—First Nat. Bank of Opp v. Boles, 165 So. 582, 592, 231 Ala. 503, quoting Corpus Juris.

96. Ala.—First Nat. Bank of Opp v. Boles, supra.

97. Mo.—State ex rel. City of Sikeston v. Public Service Commission of Missouri, 82 S.W.2d 105, 336 Mo. 985 State ex inf. Shartel ex rel. City of Sikeston v. Missouri Utilities Co., 53 S.W.2d 394, 331 Mo. 337, 89 A.L.R. 607—McKain v. Mercantile Trust Co., 237 S.W. 506—Taverno v. American Auto Ins. Co., 112 S.W.2d 941, 232 Mo.App. 820—Shick v. Rehkop, App., 237 S.W. 209—Berry v. Massachusetts Bonding & Ins. Co., 221 S.W. 748, 203 Mo.App. 459.
Neb.—Furstenberg v. Omaha & Council Bluffs St. Ry. Co., 272 N. W. 756, 132 Neb. 562.
Estoppel may be urged to protect, but not to create, right.—Henry County v. Standard Oil Co., 71 S.W. 2d 683, 167 Tenn. 485, 93 A.L.R. 1483.
Estoppel merely forbids denial of right claimed to have arisen otherwise, and does not originate a right.—Morrill Realty Corporation v. Rayon Holding Corporation, 172 N.E. 494, 254 N.Y. 268, affirming 241 N.Y.S. 918, 229 App.Div. 760, which affirmed 240 N.Y.S. 38, 135 Misc. 845.

98. U.S.—Wright v. Farmers' Nat. Grain Corporation, C.C.A.Ill., 74 F. 2d 425, 428, citing Corpus Juris.
Ala.—First Nat. Bank of Opp v. Boles, 165 So. 582, 592, 231 Ala. 503, quoting Corpus Juris.
La.—State ex rel. Shell Oil Co. v. Register Land Office, 192 So. 519, 193 La. 883.
Pa.—Ervin v. City of Pittsburgh, 14 A.2d 297, 339 Pa. 241.
21 C.J. p 1117 note 90.
Morality
(1) The doctrine of equitable estoppel or estoppel in pais is founded on the highest principles of morality.—Stubnitz-Greene Spring Corporation v. Fort Pitt Bedding Co., C.C.A.Mich., 110 F.2d 192—Robinson v. Commissioner of Internal Revenue, C.C.A., 100 F.2d 847, certiorari denied 60 S. Ct. 81, 308 U.S. 567, 84 L.Ed. 476.
(2) It is a rule of good morals and consequently is enforced as a rule of policy.—4-One Box Machine Makers v. Wirebounds Patents Co., 159 A. 496, 131 Me. 70.

99. U.S.—Robinson v. Commissioner of Internal Revenue, C.C.A., 100 F.2d 847, certiorari denied 60 S. Ct. 81, 308 U.S. 567, 84 L.Ed. 476—Wright v. Farmers' Nat. Grain Corporation, C.C.A.Ill., 74 F.2d 425, 428, citing Corpus Juris.
Ala.—First Nat. Bank of Opp v. Boles, 165 So. 582, 592, 231 Ala. 503, quoting Corpus Juris.
Ariz.—Munger v. Boardman, 88 P.2d 536, 53 Ariz. 271.
Cal.—Burgess v. California Mut. Building & Loan Ass'n, 290 P. 1029, 210 Cal. 180—City of San Diego v. Cuyamaca Water Co., 287 P. 475, 209 Cal. 105—Bank of America Nat. Trust & Savings Ass'n v. National Funding Corporation, App., 114 P. 2d 49—Fleishbein v. Western Auto Supply Agency, 65 P.2d 928, 19 Cal. App.2d 424—Litchner v. Staples, 273 P. 585, 95 Cal.App. 685.

The doctrine of estoppel is far reaching in its effect, extending to real as well as personal estate, and embracing almost every enterprise in which men may be engaged.[1] Nevertheless, it is not of unlimited application.[2] As the doctrine, when applied, contravenes the technical, legal rights of the person estopped,[3] stays the operation of the usual machinery employed to adjust the rights of men, and halts proceedings to make certain of justice,[4] and hence is somewhat of a superlaw,[5] arbitrary[6] and penal[7] in nature and character, it should be applied with great care and caution in each case;[8] otherwise there would be great danger that estoppels of this character would justly be regarded as "odious."[9] It is applied in, and only in, exceptional cases[10] wherein there is manifest inequity,[11] and

Fla.—Therrell v. Reilly, 151 So. 305, 111 Fla. 805.

Ga.—Garmon v. Davis, 12 S.E.2d 209, 63 Ga.App. 815—Peoples Credit Clothing Co. v. Stottish Union & National Ins. Co., 196 S.E. 99, 101, 57 Ga.App. 747, citing **Corpus Juris.**

Ill.—Scott v. Hatch, 280 Ill.App. 269.

Ky.—Colyer v. James, 30 S.W.2d 882, 235 Ky. 197—Wabash Drilling Co. v. Ellis, 20 S.W.2d 1002, 230 Ky. 769—Goodin v. Turner, 300 S.W. 327, 222 Ky. 132.

Mich.—Shean v. U. S. Fidelity & Guaranty Co., 248 N.W. 892, 263 Mich. 535.

Miss.—Izard v. Mikell, 163 So. 498, 173 Miss. 770.

N.J.—New Jersey Suburban Water Co. v. Town of Harrison, 3 A.2d 623, 122 N.J.Law 189, reversing 1 A.2d 61, 120 N.J.Law 546.

N.Y.—Morris v. Morris, 247 N.Y.S. 28, 138 Misc. 682, affirmed 254 N.Y.S. 429, 234 App.Div. 187, affirmed 184 N.E. 131, 260 N.Y. 650.

N.C.—Scott v. Bryan, 187 S.E. 756, 210 N.C. 478.

Tex.—Brooks v. Kennedy, Civ.App., 28 S.W.2d 214, error dismissed.

Wis.—Spohn v. Johnson, 209 N.W. 725, 190 Wis. 446.

21 C.J. p 1117 note 91.

Loss or injury from disappointment of expectations

The vital principle of equitable estoppel is that a person who by his language or conduct leads another to do what he would not otherwise have done may not subject such person to loss or injury by disappointing the expectations on which he acted.

U.S.—Mann v. Anderson, D.C.N.Y., 20 F.Supp. 643.

Cal.—Bank of America Nat. Trust & Savings Ass'n v. National Funding Corporation, App., 114 P.2d 49—Struckman v. Board of Trustees of Tracy Union High School, 101 P.2d 151, 38 Cal.App.2d 373.

Ind.—International Harvester Co. of America v. Holley, 18 N.E.2d 484, 106 Ind.App. 329.

Tex.—Glasscock v. Bradley, Civ.App., 152 S.W.2d 439—Union Cent. Life Ins. Co. v. Austin, Civ.App., 52 S.W.2d 536, error refused—Booty v. O'Connor, Civ.App., 287 S.W. 282.

Utah.—I. X. L. Stores Co. v. Success Markets, 97 P.2d 577, 98 Utah 160.

21 C.J. p 1117 note 91 [c] (1).

1. Ala.—First Nat. Bank of Opp v. Boles, 165 So. 582, 592, 231 Ala. 503, quoting **Corpus Juris.**

Ky.—Trimble v. King, 114 S.W. 317, 131 Ky. 1, 22 L.R.A.,N.S., 880.

Doctrine extends to real estate, as well as to personalty.—Louisville Joint Stock Land Bank v. McMurry, 128 S.W.2d 596, 278 Ky. 238—Young v. Venters, 18 S.W.2d 277, 229 Ky. 806—Stark v. Petty Bros., 243 S.W. 50, 195 Ky. 445.

Both sexes

Estoppel in pais operates alike, whether against conduct of woman or of man.—Bragg v. Hatfield, 130 A. 233, 124 Me. 391.

All transactions

Equitable estoppel imposes its obligation on all transactions.—Robinson v. Commissioner of Internal Revenue, C.C.A., 100 F.2d 847, certiorari denied 60 S.Ct. 81, 308 U.S. 567, 84 L.Ed. 476.

2. N.Y.—Buxbaum v. Assicurazioni Generali, 25 N.Y.S.2d 357, 175 Misc. 785.

Legislative or administrative proceedings

Doctrine of estoppel has application in adversary judicative controversies at law or in equity where one party is prevented from making a claim by reason of his previous conduct to damage of his opponent, but doctrine is not ordinarily applicable in unilateral legislative or administrative proceedings.—Furstenberg v. Omaha & Council Bluffs St. Ry. Co., 272 N.W. 756, 132 Neb. 562.

3. W.Va.—Spradling v. Spradling, 190 S.E. 537, 118 W.Va. 308.

4. Cal.—Pacific Finance Corporation v. Hendley, 7 P.2d 391, 119 Cal.App. 697.

5. Cal.—Pacific Finance Corporation v. Hendley, supra.

6. W.Va.—Spradling v. Spradling, 190 S.E. 537, 118 W.Va. 308.

7. N.H.—Odlin v. Gove, 41 N.H. 465, 77 Am.D. 773.

N.Y.—Smith v. Vara, 241 N.Y.S. 202, 136 Misc. 500.

Application in criminal cases

(1) The doctrine of estoppel may be applied in a criminal case to the extent of holding that accused is estopped to assert a certain fact.—People v. Blackmore, 261 P. 1053, 87 Cal.App. 222.

(2) Also, the government may be estopped from prosecuting under circumstances ordinarily considered under the heading of entrapment, see Criminal Law § 45 a.

(3) However, as stated in Criminal Law § 42, equitable estoppel of the person injured by an offense is not a defense in a criminal prosecution.

Punishment

In some cases it has been stated that estoppel is never employed to inflict punishment for a wrongful or unlawful act, but in those cases some element of estoppel was lacking. In other words, estoppel does not arise from a wrongful act alone, even though such act is made a crime by statute.

U.S.—In re Trustees System Co. of Louisville, D.C.Ky., 30 F.Supp. 361.

Tex.—Worsham Buick Co. v. Isaacs, 51 S.W.2d 277, 121 Tex. 587, 86 A.L.R. 232, answers conformed to Worsham-Buick Co. v. Isaacs, Civ.App., 56 S.W.2d 288, reversed on other grounds, 87 S.W.2d 252, 126 Tex. 546.

8. Nev.—Noble Gold Mines Co. v. Olsen, 66 P.2d 1005, 57 Nev. 448.

W.Va.—Spradling v. Spradling, 190 S.E. 537, 118 W.Va. 308.

21 C.J. p 1118 note 95.

Doctrine must be strictly applied

Ohio.—Allenbaugh v. City of Canton, 28 N.E.2d 354, 137 Ohio St. 128.

9. N.H.—Odlin v. Gove, 41 N.H. 465, 77 Am.D. 773.

10. Cal.—McGushin v. Arnold, 68 P.2d 733, 21 Cal.App.2d 271.

Or.—Killam v. Multnomah County, 4 P.2d 323, 137 Or. 562.

11. Mass.—Augello v. Hanover Trust Co., 148 N.E. 138, 253 Mass. 160.

Miss.—Izard v. Mikell, 163 So. 498, 173 Miss. 770.

21 C.J. p 1118 note 97.

Strong equity

When party is to be deprived of his property or his right to maintain action by estoppel, equity ought to be strong.—Hooper v. Bail, 179 A. 404, 133 Me. 412.

its application is necessary to effectuate justice or prevent injustice.[12] It will never be allowed or applied where it would be an instrument of, or operate as, a fraud,[13] be against good conscience,[14] work injustice,[15] accomplish a wrong,[16] or enforce an act which is against the law;[17] and, where specific performance cannot be decreed, the same result cannot be accomplished under the doctrine of equitable estoppel.[18] The estoppel is a protective, and not an offensive, weapon; its office is limited to saving harmless or making whole the person in whose favor it arises; and it is not intended as an instrument of gain or profit.[19] It is not a cause of action[20] and does not give or create one,[21] its purpose being to preserve one already acquired.[22]

Enforcement of fair dealing. The promotion

12. U.S.—Starrett Corporation v. Fifth Ave. & Twenty-Ninth St. Corporation, D.C.N.Y., 1 F.Supp. 868.
Ill.—Molloy v. City of Chicago, 15 N.E.2d 861, 369 Ill. 97.
Ky.—Capital Amusement Co. v. Board of Common Council of City of Frankfort, 276 S.W. 528, 531, 210 Ky. 622, quoting Corpus Juris.
Mass.—Ford v. Rogovin, 194 N.E. 719, 289 Mass. 549—Looney v. Trimount Theatre, 184 N.E. 683, 282 Mass. 275.
Mo.—Waugh v. Williams, 119 S.W.2d 223, 342 Mo. 903.
Nev.—Noble Gold Mines Co. v. Olsen, 66 P.2d 1005, 57 Nev. 448.
Okl.—Fipps v. Stidham, 50 P.2d 680, 174 Okl. 473—Slyman v. Alexander, 259 P. 224, 126 Okl. 232.
21 C.J. p 1118 note 98, p 1138 note 88.

13. Cal.—Cohen v. Metropolitan Life Ins. Co., 89 P.2d 732, 32 Cal.App.2d 337.
Del.—Coyne v. Jones, 114 A. 162, 12 Del.Ch. 291.
Ind.—Rushville Nat. Bank of Rushville v. State Life Ins. Co., 1 N.E.2d 445, 210 Ind. 492.
Ky.—Capital Amusement Co. v. Board of Common Council of City of Frankfort, 276 S.W. 528, 531, 210 Ky. 622, quoting Corpus Juris.
Okl.—Fipps v. Stidham, 50 P.2d 680, 174 Okl. 473—Slyman v. Alexander, 259 P. 224, 126 Okl. 232.
Wis.—Welfare Building & Loan Ass'n v. Breuer, 250 N.W. 846, 849, 213 Wis. 97, citing Corpus Juris, and followed in West Side Building & Loan Ass'n v. Anderson, 250 N.W. 849, 213 Wis. 104, East Side Mut. Building & Loan Ass'n v. Lock, 250 N.W. 849, 213 Wis. 105, Mortgage Discount Co. v. Continental Discount Corporation, 250 N.W. 849, 213 Wis. 106, West Side Building & Loan Ass'n v. Breuer, 250 N.W. 850, 213 Wis. 107, West Side Building & Loan Ass'n v. Continental Discount Corporation, 250 N.W. 850, 213 Wis. 108 and East Side Mut. Building & Loan Ass'n v. Thoreson, 250 N.W. 850, 213 Wis. 109.
21 C.J. p 1118 note 99, p 1138 note 88.

14. La.—Gonsoulin v. Equitable Life Assurance Society of U. S., 94 So. 424, 152 La. 865.

15. Wis.—Sparks v. Kuss, 216 N.W. 929, 195 Wis. 378, modified on other grounds 218 N.W. 208, 195 Wis. 378.
21 C.J. p 1118 note 99.

16. N.Y.—Troy Union R. Co. v. City of Troy, 238 N.Y.S. 577, 227 App. Div. 351, affirming 230 N.Y.S. 653, 132 Misc. 534, and affirmed 171 N.E. 798, 253 N.Y. 597—Winston v. Saugerties Farms, 21 N.Y.S.2d 841.
Wis.—Sparks v. Kuss, 216 N.W. 929, 195 Wis. 378, modified on other grounds, 218 N.W. 208, 195 Wis. 378.

17. N.Y.—Winston v. Saugerties Farms, 21 N.Y.S.2d 841.
21 C.J. p 1118 note 1.

Estoppel cannot legalize or validate that which law declares unlawful and void.
U.S.—Joy v. Godchaux, C.C.A.Mo., 35 F.2d 649, certiorari denied Goudchaux v. Joy, 50 S.Ct. 239, 281 U.S. 723, 74 L.Ed. 1141.
Ga.—Flournoy v. Highlands Hotel Co., 153 S.E. 26, 170 Ga. 467, answers to certified questions conformed to 153 S.E. 447, 41 Ga.App. 514.

Statute or public policy
The doctrine of estoppel does not, in general, apply in transactions that are forbidden by statute or that are contrary to public policy.—Montsdoca v. Highlands Bank & Trust Co., 95 So. 666, 85 Fla. 158.

18. Mich.—Beaverton Power Co. v. Wolverine Power Co., 222 N.W. 703, 245 Mich. 541.

19. U.S.—Murphy v. Paine, D.C.N.Y., 15 F.2d 570—G. S. Johnson Co. v. Nevada Packard Mines Co., D.C.Nev., 272 F. 291.
Ala.—Stuart v. Strickland, 83 So. 600, 203 Ala. 502.
Cal.—Conner v. Pacific Ready Cut Homes, 1 P.2d 1027, 115 Cal.App. 553—Ramsey v. Chilson, 208 P. 319, 57 Cal.App. 785.
Conn.—Stanio v. Berner Lahne Co., 17 A.2d 502, 127 Conn. 431—Du Cotey v. Wilkenda Land Co., 123 A. 265, 100 Conn. 255.
Kan.—Lawson v. Marland Production Co., 299 P. 947, 133 Kan. 313—Midwest Lumber Co. v. Brinkmeyer, 264 P. 17, 125 Kan. 299.
Mo.—State ex rel. Ben Hur Life Ass'n v. Shain, 119 S.W.2d 236, 342 Mo. 928, quashing certiorari Helm v. Ben Hur Life Ass'n, 107 S.W.2d 844, 233 Mo.App. 138—Waugh v. Williams, 119 S.W.2d 223, 342 Mo. 903.
Okl.—Cuneo v. Champlin Refining Co., 62 P.2d 82, 178 Okl. 198—Williams v. Edwards, 22 P.2d 1026, 163 Okl. 246—Noble v. Johnson, 291 P. 26, 145 Okl. 46—Haubert v. Navajo Refining Co., 264 P. 151, 129 Okl. 195.
Tex.—Texas Life Ins. Co. v. Mansel, Civ.App., 105 S.W.2d 899—Malone v. Republic Nat. Bank & Trust Co., Civ.App., 70 S.W.2d 809, error dismissed.
Wis.—Welfare Building & Loan Ass'n v. Breuer, 250 N.W. 846, 849, 213 Wis. 97, citing Corpus Juris, and followed in West Side Building & Loan Ass'n v. Anderson, 250 N.W. 849, 213 Wis. 104, East Side Mut. Building & Loan Ass'n v. Lock, 250 N.W. 849, 213 Wis. 105, Mortgage Discount Co. v. Continental Discount Corporation, 250 N.W. 849, 213 Wis. 106, West Side Building & Loan Ass'n v. Breuer, 250 N.W. 850, 213 Wis. 107, West Side Building & Loan Ass'n v. Continental Discount Corporation, 250 N.W. 850, 213 Wis. 108 and East Side Mut. Building & Loan Ass'n v. Thoreson, 250 N.W. 850, 213 Wis. 109.
21 C.J. p 1118 note 2.

20. Or.—Bramwell v. Rowland, 261 P. 57, 123 Or. 33.

Estoppel is not made basis of relief sought where the relief sought is based only on the terms of a contract and the estoppel is asserted only as against a defense pleaded by the adverse party.—The Tampico, C.C.A.Cal., 270 F. 537.

21. Mo.—State ex inf. Shartel, ex rel. City of Sikeston v. Missouri Utilities Co., 53 S.W.2d 394, 331 Mo. 337, 89 A.L.R. 607—McClain v. Mercantile Trust Co., 237 S.W. 506—National Fire Ins. Co. of Hartford, Conn. v. Munger, App., 106 S.W.2d 10—Schick v. Rehkop, App., 237 S.W. 209—Berry v. Massachusetts Bonding & Ins. Co., 221 S.W. 748, 203 Mo.App. 459.
Neb.—Furstenberg v. Omaha & Council Bluffs St. Ry. Co., 272 N.W. 756, 132 Neb. 562.
Pa.—City of Pittsburgh v. Commercial Casualty Ins. Co., 161 A. 630, 106 Pa.Super. 254.

22. Mo.—National Fire Ins. Co. of Hartford, Conn., v. Munger, App., 106 S.W.2d 10.

and enforcement of fair dealing, and the prevention of results contrary to good conscience and fair dealing, are involved in equitable estoppel and the application thereof.[23] The doctrine can be invoked only to promote fair dealing.[24]

Undue advantage. One of the purposes of estoppel is to prevent one person, by throwing another off his guard, from obtaining an unfair advantage or from acting inconsistently to another's disadvantage.[25] It may not be properly invoked to permit the party asserting it to secure an undue advantage.[26]

§ 64. Availability at Law

With some exceptions, an estoppel in pais is cognizable in an action at law and it is not necessary, or even proper, to resort to equity for the sole purpose of presenting it.

While an estoppel in pais is equitable in nature,[27] the doctrine pertaining thereto having originated in equity[28] and being governed by equitable principles,[29] it nevertheless, as a general rule, may be set up in actions at law, as well as in suits in equity,[30] and it is not necessary to proceed by a suit

23. U.S.—Robbins v. U. S., 21 F. Supp. 403.
Ill.—Union Cent. Life Ins. Co. of Cincinnati, Ohio, v. Anderson, 10 N.E.2d 46, 291 Ill.App. 423.
Mass.—McLearn v. Hill, 177 N.E. 617, 276 Mass. 519, 77 A.L.R. 1039.
Neb.—Idlewild Farm Co. v. Ekhorn River Drainage Dist., 206 N.W. 741, 114 Neb. 134.
N.Y.—Rothschild v. Title Guarantee & Trust Co., 97 N.E. 879, 204 N.Y. 458, 41 L.R.A.,N.S., 470.
Tenn.—Mason v. Hamilton Nat. Bank, 1 Tenn.App. 232.

Foundation

The principle of "estoppel" in equity stands on the very foundations of right and fair dealing. It considers and weighs the conduct of men in their dealings with each other, and gives that effect and meaning to their actions which common sense and justice dictate.
S.C.—Palmer v. Sovereign Camp, W. O. W., 15 S.E.2d 655.
Tex.—Wichita Home Ins. Co. v. Montgomery, Civ.App., 4 S.W.2d 1041, error dismissed—Southern Surety Co. v. Beaird, Civ.App., 235 S.W. 240, dismissed for want of jurisdiction.

Fair play

The compulsion of the doctrine of equitable estoppel is one of fair play.—McNeeley v. Walters, 189 S.E. 114, 211 N.C. 112.

24. Ind.—Minas Furniture Co. v. Edward C. Minas Co., 165 N.E. 84, 96 Ind.App. 520.

25. Iowa.—Blackman v. Carey, 185 N.W. 87, 192 Iowa 548.
Pa.—Titus v. Mapel-Sterling Coal Co., 167 A. 229, 311 Pa. 529.

26. N.Y.—Troy Union R. Co. v. City of Troy, 238 N.Y.S. 577, 227 App. Div. 351, affirming 230 N.Y.S. 653, 132 Misc. 534, and affirmed 171 N. E. 798, 253 N.Y. 597.

Advantage of one creditor over others

Estoppel doctrine may not be invoked to give one creditor of insolvent estate advantage over others.—Thompson v. Hudgens, 159 S.E. 807, 161 S.C. 450.

27. U.S.—Commodores Point Terminal Co. v. Hudnall, D.C.Fla., 283 F. 150.
N.Y.—Troy Union R. Co. v. City of Troy, 238 N.Y.S. 577, 227 App.Div. 351, affirming 230 N.Y.S. 653, 132 Misc. 534, and affirmed 171 N.E. 798, 253 N.Y. 597.

Equitable doctrine

(1) Estoppel is an equitable doctrine.
U.S.—Turk v. Newark Fire Ins. Co., D.C.Pa., 4 F.2d 142, affirmed, C.C.A., Newark Fire Ins. Co. v. Turk, 6 F.2d 533, 43 A.L.R. 496.
Ill.—Elowe v. Superior Fire Ins. Co., 30 N.E.2d 953, 307 Ill.App. 569.
Mo.—Horwitz v. Schaper, App., 119 S.W.2d 474.
N.Y.—Mount Vernon Trust Co. v. City of Mount Vernon, 12 N.Y.S.2d 120.
Okl.—Jackson v. Twin State Oil Co., 218 P. 324, 95 Okl. 96.
Wis.—Sparks v. Kuss, 216 N.W. 929, 195 Wis. 378, modified on other grounds 218 N.W. 208, 195 Wis. 378.

(2) So, also, waiver is an equitable doctrine.—Turk v. Newark Fire Ins. Co., D.C.Pa., 4 F.2d 142, affirmed, C.C.A., Newark Fire Ins. Co. v. Turk, 6 F.2d 533, 43 A.L.R. 496.

(3) Implied waiver is a purely equitable doctrine.—In re Miller's Will, 295 N.Y.S. 943, 162 Misc. 563, affirmed 300 N.Y.S. 798, 252 App.Div. 872.

Estoppel is equitable remedy

La.—Glover v. Southern Cities Distributing Co., App., 142 So. 289.

Estoppel is equitable defense

U.S.—Barker v. U. S., D.C.Ala., 3 F. Supp. 545, reversed on other grounds, C.C.A., U. S. v. Barker, 70 F.2d 1002.
Ill.—First Lutheran Church of Pontiac v. Rooks Creek Evangelical Lutheran Church, 147 N.E. 53, 316 Ill. 196.
Mich.—Beloskursky v. Jozwiak, 191 N.W. 16, 221 Mich. 316.
Mo.—Gill v. Buchanan County, 142 S.W.2d 665.
Tex.—Hunt v. W. O. W. Life Ins. Soc., Civ.App., 153 S.W.2d 857.

28. Ala.—First Nat. Bank of Opp v. Boles, 165 So. 582, 592, 231 Ala. 503, quoting **Corpus Juris.**
N.J.—New Jersey Suburban Water Co. v. Town of Harrison, 3 A.2d 623, 122 N.J.Law 189, reversing 1 A.2d 61, 120 N.J.Law 546—Muller v. Thomann, 145 A. 480, 104 N.J.Eq. 289.
N.Y.—Brady v. Metropolitan Life Ins. Co., 14 N.Y.S.2d 581, affirmed In re Masterson's Estate, 20 N.Y.S.2d 988.
Tenn.—Whitlow v. Hardin County, Tenn., 13 Tenn.App. 347, 356, quoting **Corpus Juris.**
Wis.—Wussow v. Badger State Bank of Milwaukee, 234 N.W. 720, 204 Wis. 467, rehearing denied 236 N.W. 687, 204 Wis. 467.
21 C.J. p 1062 note 28, p 1117 note 86

29. Fla.—Gray v. Gray, 107 So. 261, 91 Fla. 103.
N.J.—New Jersey Suburban Water Co. v. Town of Harrison, 3 A.2d 623, 122 N.J.Law 189, reversing 1 A.2d 61, 120 N.J.Law 546.
Wis.—Wussow v. Badger State Bank of Milwaukee, 234 N.W. 720, 204 Wis. 467, rehearing denied 236 N.W. 687, 204 Wis. 467.

30. U.S.—Smith v. Royal Ins. Co., C.C.A.Cal., 93 F.2d 143, certiorari denied Royal Ins. Co. v. Smith, 58 S.Ct. 759, 303 U.S. 656, 82 L.Ed. 1115—Home Ins. Co. v. Campbell Mfg. Co., C.C.A.N.C., 79 F.2d 588, 592, citing **Corpus Juris**—Wright v. Farmers' Nat. Grain Corporation, C.C.A.Ill., 74 F.2d 425, 428, citing **Corpus Juris**—Joy v. Godchaux, C.C.A.Mo., 35 F.2d 649, certiorari denied Goudchaux v. Joy, 50 S.Ct. 239, 281 U.S. 723, 74 L.Ed. 1141—Commodores Point Terminal Co. v. Hudnall, D.C.Fla., 283 F. 150.
Ala.—Mercantile Finance Corporation of Alabama v. Scruggs, 151 So. 353, 227 Ala. 585—State ex rel. Martin v. City of Gadsden, 113 So. 6, 216 Ala. 243.
Ark.—Lacey v. Humphres, 116 S.W. 2d 345, 196 Ark. 72—Thomas v. Spires, 22 S.W.2d 553, 180 Ark. 671.
Ga.—Hood v. Duren, 125 S.E. 787, 33 Ga.App. 203.

in equity in order to obtain the benefit thereof.[31] Consequently, in order to justify a resort to a court of equity, it is necessary to show some ground of equity other than the estoppel itself, whereby the party entitled to the benefit of it is prevented from making it available in a court of law.[32]

Exceptions to rule. It does not follow, because equitable estoppels may originate legal as distinguished from equitable rights, that it may not be necessary in particular cases to resort to a court of equity in order to make them available;[33] and equitable estoppel is not cognizable in an action at law on the bond of an administrator;[34] and, while there is some authority to the contrary,[35] it is generally held that, where the estoppel sought to be set up involves the title to land, or an interest therein which can only be transferred by deed, it cannot be taken advantage of in an action at law, but only by resort to a court of equity,[36] and that a judgment which assumes to affect the legal title to a freehold in a common-law proceeding is erroneous.[37] Whether an equitable estoppel is a defense in an action of ejectment is considered in Ejectment § 45. It has been held that the only estoppels which are available in equity and not in law are such as depend on titles and relations which are not cognizable at law.[38]

§ 65. Estoppel against Estoppel

A party may be precluded by counter estoppel from asserting an estoppel; and where he is so precluded, the matter in issue is to be determined and disposed of otherwise than by application of the doctrine of estoppel.

A party may assert a counter estoppel against an estoppel offered by the adverse party.[39] Where an estoppel exists against an estoppel, the matter is set at large,[40] or is left as if neither estoppel had

Iowa.—State v. Kinkade, 186 N.W. 662, 192 Iowa 1362.
Md.—Bitting v. Home Ins. Co. of New York, 155 A. 329, 161 Md. 56.
Mich.—Stone Road Dairy Co. v. Humes, 189 N.W. 883, 220 Mich. 57.
N.J.—New Jersey Suburban Water Co. v. Town of Harrison, 3 A.2d 623, 122 N.J.Law 189, reversing 1 A.2d 61, 120 N.J.Law 546—Fidelity Union Trust Co. v. Chausmer, 198 A. 828, 120 N.J.Law 208—Basen v. Clinton Trust Co., 181 A. 67, 115 N.J.Law 546, reversing 177 A. 675, 13 N.J.Misc. 252—Wysckowski v. Polish-American Building & Loan Ass'n of City of Newark, 113 A. 246, 95 N.J.Law 352, affirmed Wysakowska v. Polish-American Building & Loan Ass'n of City of Newark, 115 A. 438, 96 N.J.Law 447.
N.Y.—Witherell v. Kelly, 187 N.Y.S. 43, 195 App.Div. 227—Labianca v. Digianna, 244 N.Y.S. 437, 137 Misc. 725.
N.D.—Bichler v. Ternes, 248 N.W. 185, 63 N.D. 295.
Or.—State v. Claypool, 28 P.2d 882, 145 Or. 615.
Tenn.—Tuck v. Payne, 17 S.W.2d 8, 159 Tenn. 192—Whitlow v. Hardin County, Tenn., 13 Tenn.App. 347, 356, quoting Corpus Juris.
Vt.—Mathews v. Drew, 172 A. 638, 106 Vt. 245.
Va.—Massachusetts Bonding & Insurance Co. v. Piedmont Service Station, 181 S.E. 397, 401, 165 Va. 167, citing Corpus Juris—Camp Mfg. Co. v. Green, 106 S.E. 894, 129 Va. 360.
W.Va.—Union Bank & Trust Co. v. Dowman, 155 S.E. 465, 466, 109 W.Va. 493, citing Corpus Juris—Harris v. Coliver, 141 S.E. 791, 105 W.Va. 174—Tuggle v. Sutherland, 127 S.E. 384, 98 W.Va. 540.
21 C.J. p 1061 note 27, p 1118 note 3.

Adaptation to legal proceedings

The doctrine of estoppel in pais was taken over at quite an early day by courts of law and made adaptable to, and applied in, legal proceedings to prevent circuity of action, or to obviate the necessity of bringing another proceeding to enforce rights growing out of the same transaction, and to award relief by specific reparation, where specific reparation could equitably be had, and, where it could not, to award restitution in money equivalent to the damages sustained and all for the promotion of justice and equity.
N.H.—Conway Nat. Bank v. Pease, 82 A. 1068, 76 N.H. 319.
Tenn.—Whitlow v. Hardin County, Tenn., 13 Tenn.App. 347, 356, quoting Corpus Juris.

Part of common law

The doctrine of estoppel was administered by the courts at common law; it is part of the common law in force in a state; and its proper application is not violative of, but is consistent with, the constitution and statutes of the state.—Steen v. Scott, Fla., 198 So. 489—New York Life Ins. Co. v. Oates, 192 So. 637, 141 Fla. 164—New York Life Ins. Co. v. Oates, 166 So. 269, 122 Fla. 540—State v. Greer, 102 So. 739, 88 Fla. 249, 37 A.L.R. 1298.

Action resting on forgery

Estoppel is a valid defense to an action resting on a forgery.—Slattery & Co. v. National City Bank of New York, 186 N.Y.S. 679, 114 Misc. 48.

In quo warranto proceeding see the C.J.S. title Quo Warranto § 23, also 51 C.J. p 330 notes 88, 90, 98.

31. Va.—Massachusetts Bonding & Insurance Co. v. Piedmont Service Station, 181 S.E. 397, 165 Va. 167.
32. Tenn.—Whitlow v. Hardin County, Tenn., 13 Tenn.App. 347, 357, quoting Corpus Juris.
Vt.—Mathews v. Drew, 172 A. 638, 106 Vt. 245.
21 C.J. p 1119 note 6.

Where equity can give more adequate relief, the estoppel may be enforced in equity, which in such cases will exercise its ancient jurisdiction over estoppel.—Commodores Point Terminal Co. v. Hudnall, D.C. Fla., 283 F. 150.

33. U.S.—Drexel v. Berney, N.Y., 7 S.Ct. 1200, 122 U.S. 241, 30 L.Ed. 1219.
34. N.J.—Webb v. Updike-Kennedy Co., 173 A. 916, 116 N.J.Eq. 340.
35. Ga.—Norman v. McMillen, 107 S.E. 325, 151 Ga. 363.
21 C.J. p 1119 note 8.
36. Ala.—Henderson v. Noland, 189 So. 732, 238 Ala. 213, 123 A.L.R. 483.
Ill.—First Lutheran Church of Pontiac v. Rooks Creek Evangelical Lutheran Church, 147 N.E. 53, 316 Ill. 196.
Mo.—McQuitty v. McQuitty, 61 S.W. 2d 342, 343, 332 Mo. 1057, citing Corpus Juris.
19 C.J. p 1087 note 23—21 C.J. p 1119 note 9.

Case considered as one in equity

Mo.—Schneider v. Schneider, 224 S. W. 1, 284 Mo. 314.

37. Ill.—Matoon v. Elliott, 102 N.E. 251, 259 Ill. 72.
38. Ala.—Wefel v. Stillman, 44 So. 203, 151 Ala. 249.
39. Fla.—Florida Land Inv. Co. v. Williams, 116 So. 642, 98 Fla. 1258.
40. Iowa.—Redding v. Redding, 234 N.W. 167, 226 Iowa 327.
Mich.—Shean v. U. S. Fidelity &

been offered;[41] the two estoppels destroy each other[42] and the interest of justice requires that both parties be liberated therefrom.[43] Somewhat related propositions concerning the mutuality of an estoppel are considered infra § 76. Also, the question of whether a party who is himself guilty of bad faith may claim an estoppel is treated below in § 75.

§ 66. Laches or Delay in Asserting Estoppel

A claim of estoppel may be affected by laches or negligence, but not by mere delay, in asserting it.

An equitable estoppel is not lost by delay in asserting it as would be the corresponding action for deceit growing out of the transaction;[44] but, in order to justify a person setting up an estoppel against the legal owner of land, he must be free from the imputation of laches in acting on the belief of ownership by one who has no right.[45] The negligence of the holder of an equity arising out of an estoppel by misrepresentation may change the order of priority and postpone his equity to that of a junior holder of an equity in the same property.[46]

2. Essential Elements

§ 67. In General

a. Enumeration of elements
b. Existence and nature of right
c. Contract or consideration

a. Enumeration of Elements

(1) Of equitable estoppel
(2) Of waiver

(1) Of Equitable Estoppel

To create an equitable estoppel, a false representation or concealment of material facts must be made, by a person with knowledge, actual or constructive, of the real facts, to a person without such knowledge, with the intention that it shall be acted on by the latter person, and he must so rely and act thereon that he will suffer injury or prejudice by the repudiation or contradiction thereof or the assertion of a claim inconsistent therewith.

In order to constitute an equitable estoppel or estoppel in pais there must exist a false representation or concealment of material facts; it must have been made with knowledge, actual or constructive, of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted on; and the party to whom it was made must have relied on or acted on it to his prejudice.[47] Various

Guaranty Co., 248 N.W. 892, 263 Mich. 535.
21 C.J. p 1139 note 1.

Entering into new arrangement, instead of asserting an estoppel, may preclude a party from subsequently asserting the estoppel.—John O'Brien Boiler Works Co. v. Third Nat. Bank, App., 231 S.W. 1053, retransferred, see 222 S.W. 788, 282 Mo. 670.

Admission

Estoppel to deny contract cannot be claimed by one who admits that no such contract was ever made.—Miller v. Babb, Tex.Com.App., 263 S.W. 253, reversing Babb v. Miller, Civ.App., 259 S.W. 177.

41. Fla.—Florida Land Inv. Co. v. Williams, 116 So. 642, 98 Fla. 1258.

42. La.—Chretien v. Giron, 38 So. 881, 115 La. 24, 5 Ann.Cas. 845.
Mich.—Shean v. U. S. Fidelity & Guaranty Co., 248 N.W. 892, 263 Mich. 535.
Miss.—Hopkins v. Hopkins, 165 So. 414, 174 Miss. 643.

43. La.—Ackerman v. Larner, 40 So. 581, 116 La. 101.

44. Cal.—San Francisco Mercantile Co. v. Sunset Road Oil Co., 168 P. 1033, 176 Cal. 451.
21 C.J. p 1140 note 3.

45. N.Y.—Trenton Banking Co. v. Duncan, 86 N.Y. 221.
Or.—Urquhart v. Bellom, 111 P. 692, 57 Or. 314.
21 C.J. p 1140 note 4.

46. N.M.—Smith v. Hill, 134 P. 243, 17 N.M. 415.

47. U.S.—Current News Features v. Pulitzer Pub. Co., C.C.A.Mo., 81 F.2d 288, 291, quoting **Corpus Juris**—Grouf v. State Nat. Bank of St. Louis, C.C.A.Mo., 40 F.2d 2, 7, quoting **Corpus Juris**—Gruber v. Savannah River Lumber Co., C.C.A. S.C., 2 F.2d 418, 425, quoting **Corpus Juris.**
Ala.—Jacksonville Public Service Corporation v. Calhoun Water Co., 123 So. 79, 219 Ala. 616, 64 A.L.R. 1550.
Ariz.—Lillywhite v. Coleman, 52 P. 2d 1157, 1160, 46 Ariz. 523, citing **Corpus Juris.**
Idaho.—Little v. Bergdahl Oil Co., 95 P.2d 833, 60 Idaho 662—Sullivan v. Mabey, 264 P. 233, 235, 45 Idaho 595, quoting **Corpus Juris.**
Ill.—Lowenberg v. Booth, 162 N.E. 191, 330 Ill. 548.
Ind.—General Realty Co. v. Silcox, 146 N.E. 408, 84 Ind.App. 451.
Iowa.—Stookesberry v. Burgher, 262 N.W. 820, 220 Iowa 916.
Kan.—Cox v. Watkins, 87 P.2d 243, 246, 149 Kan. 209, citing **Corpus Juris**—Peterson v. City of Parsons, 33 P.2d 715, 720, 139 Kan. 676, quoting **Corpus Juris.**
Ky.—Jones' Adm'x v. Black Mountain Corporation, 61 S.W.2d 1050, 1051, 250 Ky. 163, quoting **Corpus Juris.**
La.—Swain v. Louisiana Light & Power Co., 128 So. 538, 13 La.App. 515.
Minn.—Weidmann v. Brown, 250 N. W. 724, 726, 190 Minn. 33, citing **Corpus Juris.**
Miss.—Day v. McCandless, 142 So. 486, 167 Miss. 832.
Mo.—Taylor v. Farmers Bank of Chariton County, App., 135 S.W. 2d 1108—Montbriand v. Scruggs, 46 S.W.2d 211, 214, 226 Mo.App. 743, quoting **Corpus Juris.**
Mont.—Mundt v. Mallon, 76 P.2d 326, 106 Mont. 242—Lindblom v. Employers' Liability Assur. Corporation, 295 P. 1007, 88 Mont. 488.
Neb.—State ex rel. Truax v. Burrows, 287 N.W. 178, 136 Neb. 691—Peters Trust Co. v. Cranmore, 208 N.W. 635, 114 Neb. 491.
N.J.—Briscoe v. O'Connor, 182 A. 855, 119 N.J.Eq. 378, reversing 179 A. 253, 118 N.J.Eq. 322.
Ohio.—Fleming v. City of Steubenville, 184 N.E. 701, 702, 44 Ohio App. 121, quoting **Corpus Juris.**
Okl.—Oklahoma City v. Wells, 91 P. 2d 1077, 1084, 185 Okl. 369, quoting **Corpus Juris**—Consolidated Cut Stone Co. v. Seidenbach, 75 P.2d 442, 181 Okl. 578—Antrim Lumber

other general and comprehensive statements of the essentials of this kind of estoppel have been made;[48] but, although they are couched in different language, and some are more elaborate or state some

Co. v. Wagner, 54 P.2d 173, 175 Okl. 564—Fipps v. Stidham, 50 P.2d 680, 174 Okl. 473—Rosser v. Texas Co., 48 P.2d 327, 173 Okl. 309—Equitable Life Assur. Soc. of U. S. v. Case, 28 P.2d 571, 167 Okl. 119—Gypsy Oil Co. v. Marsh, 248 P. 329, 121 Okl. 135, 48 A.L.R. 876—Texas Co. v. Petit, 231 P. 463, 107 Okl. 243—Texas Co. v. Pettit, 220 P. 956, 107 Okl. 243.

S.C.—W. S. Gray Cotton Mills v. Spartanburg County Mills, 137 S.E. 684, 139 S.C. 223.

Tex.—Herbert v. Denman, Civ.App., 44 S.W.2d 441, error refused—Irvin v. Irvin, Civ.App., 7 S.W.2d 1103.

Utah.—Kelly v. Richards, Utah, 83 P.2d 731, 734, 95 Utah 560, quoting Corpus Juris.

Va.—Heath v. Valentine, 15 S.E.2d 98.

Wash.—Elmonte Inv. Co. v. Schafer Bros. Logging Co., 72 P.2d 311, 324, 192 Wash. 1, quoting Corpus Juris.

W.Va.—Spradling v. Spradling, 190 S.E. 537, 118 W.Va. 308.

21 C.J. p 1119 note 12.

48. U.S.—Coen v. American Surety Co. of New York, C.C.A.Mo., 120 F.2d 393—U.S. v. Dickinson, C.C.A. Mont., 95 F.2d 65, affirming, D.C., Cushing v. U. S., 18 F.Supp. 83—Van Antwerp v. U. S., C.C.A.Cal., 92 F.2d 871, reversing, D.C., 17 F. Supp. 229—James v. Nelson, C.C.A. Alaska, 90 F.2d 910, certiorari denied 58 S.Ct. 41, 302 U.S. 721, 82 L. Ed. 556—California Prune & Apricot Growers v. El Reno Wholesale Grocery Co., C.C.A.Okl., 15 F.2d 839, certiorari denied El Reno Wholesale Grocery Co. v. California Prune & Apricot Growers, 47 S.Ct. 570, 273 U.S. 765, 71 L.Ed. 881—Oklahoma State Bank v. Galion Iron Works & Mfg. Co., C.C.A.Okl., 4 F.2d 337, corrected on rehearing 11 F.2d 370.

Cal.—Rice v. California-Western States Life Ins. Co., 70 P.2d 516, 21 Cal.App.2d 660—Bank of America of California v. Pacific Ready-Cut Homes, 10 P.2d 478, 122 Cal. App. 554—Lynch v. Wells Fargo Bank & Union Trust Co., 300 P. 74, 114 Cal.App. 565—Faulkner v. Bank of Italy, 231 P. 380, 69 Cal.App. 370—California Pear Growers' Ass'n v. Herspring, 213 P. 513, 60 Cal. App. 503.

Conn.—Tradesmens Nat. Bank of New Haven v. Minor, 190 A. 270, 122 Conn. 419.

Ill.—Fitzpatrick v. Pitcairn, 20 N.E. 2d 280, 371 Ill. 203, affirming Fitzpatrick v. Wabash Ry. Co., 16 N. E.2d 764, 296 Ill.App. 531—Mulloy v. City of Chicago, 15 N.E.2d 861, 369 Ill. 97—Wollenberger v. Hoover, 179 N.E. 42, 346 Ill. 511.

Ind.—Kerestury v. Elkhart Packing Co., App., 27 N.E.2d 383.

Ky.—Saylor v. Kentucky-Cardinal Coal Corporation, 266 S.W. 388, 205 Ky. 724, 50 A.L.R. 666.

La.—State ex rel. Porterie v. Gulf, Mobile & Northern R. Co., 184 So. 711, 191 La. 163.

Mass.—Industrial Bankers of Massachusetts v. Reid, Murdoch & Co., 8 N.E.2d 19, 297 Mass. 119—Cleaveland v. Malden Sav. Bank, 197 N.E. 14, 291 Mass. 295.

Minn.—Crane Co. of Minnesota v. Advance Plumbing & Heating Co., 224 N.W. 847, 177 Minn. 132.

Mo.—Delta Realty Co. v. Hunter, 152 S.W.2d 45—Board of Education of City of St. Louis v. St. Louis County, 149 S.W.2d 878—Rhoads v. Rhoads, 119 S.W.2d 247, 342 Mo. 934—Haggerty v. St. Louis Police Relief Ass'n, App., 141 S.W.2d 174.

Mont.—Waddell v. School Dist. No. 2 of Yellowstone County, 238 P. 884, 74 Mont. 91.

N.J.—Callised Floors v. Glens Falls Indemnity Co. of New York, 156 A. 845, 9 N.J.Misc. 1111.

N.Y.—New York State Guernsey Breeders' Co-op. v. Noyes, 22 N.Y. S.2d 132, 260 App.Div. 240, modified on other grounds 30 N.E.2d 471, 284 N.Y. 197.

N.C.—North Carolina Self Help Corporation v. Brinkley, 2 S.E.2d 889, 215 N.C. 615—L. J. Upton & Co. v. Ferebee, 100 S.E. 310, 178 N.C. 194.

S.C.—Hubbard v. Beverly, 15 S.E.2d 740, 197 S.C. 476.

Tex.—Noxon v. Cockburn, Civ.App., 147 S.W.2d 872, error refused—Hale v. Realty Acceptance Corporation, Civ.App., 122 S.W.2d 334—Greer v. Franklin Life Ins. Co., Civ.App., 109 S.W.2d 305, error dismissed—Smith v. Roberts, Civ.App., 218 S.W. 27.

The indispensable elements of an estoppel are ignorance on the part of the party invoking the estoppel, a misrepresentation by the party estopped which misleads, and an innocent and detrimental or deleterious change of position in reliance on the representation.

U.S.—Nakdimen v. Baker, C.C.A.Ark., 111 F.2d 778, certiorari denied 61 S.Ct. 22, rehearing denied 61 S.Ct. 180—Coursey v. International Harvester Co., C.C.A.Kan., 109 F.2d 774—G. Amsinck & Co. v. Springfield Grocer Co., C.C.A.Mo., 7 F.2d 855—News Projection Corporation v. Western Union Tel. Co., D.C.N.Y., 38 F.Supp. 854.

N.Y.—Harvey v. J. P. Morgan & Co., 2 N.Y.S.2d 520, 166 Misc. 455—Parsons v. Lipe, 286 N.Y.S. 60, 158 Misc. 32, affirmed Parsons v. First Trust & Deposit Co., 277 N.Y.S. 426, 243 App.Div. 681, and 277 N. Y.S. 428, 243 App.Div. 681, affirmed 200 N.E. 31, 269 N.Y. 630.

Estoppel by conduct

(1) Estoppel by conduct cannot be effected unless there is misrepresentation of facts or willful concealment thereof, made with knowledge of the facts to one ignorant of them, with intent of having the other party act thereon, and such other party must be induced thereby to act.

U.S.—Hartford Accident & Indemnity Co. v. Feilbach Co., D.C.Ohio, 39 F. Supp. 740.

Mo.—Hamilton v. Northeast Mut. Ins. Ass'n. App., 116 S.W.2d 159—Roth v. Hoffman, App., 111 S.W.2d 988.

Ohio.—Lubric Oil Co. v. Drawe, 160 N.E. 93, 26 Ohio App. 478.

Tex.—Hartman v. Chumley, Civ.App., 266 S.W. 441 Smith v. Roberts, Civ.App., 218 S.W. 27.

(2) A similar statement has been made with the additional requirement that the party must have been induced to act differently than he otherwise would.—Hartlep v. Murphy, 150 N.E. 312, 197 Ind. 222.

(3) Generally, to constitute an estoppel by conduct, there must be false representation or wrongful, misleading silence, the error must originate in a statement of fact and not in an opinion or statement of law, the person claiming benefit of estoppel must be ignorant of true facts, and such person must be adversely affected by the acts of the person against whom estoppel is claimed.—Uhlmann Grain Co. v. Fidelity & Deposit Co. of Maryland, C.C.A.Ill., 116 F.2d 105.

Equitable estoppel to assert title

(1) Requisites of equitable estoppel to assert title are claimant's knowledge of title, other party's ignorance thereof, and latter's deception in reliance on former's representations or silence.—American Exchange Nat. Bank v. Winder, 150 S. E. 489, 198 N.C. 18.

(2) In order to be equitably estopped to assert title, party must have made admissions or declarations or done acts with intention of deceiving or with such carelessness or culpable negligence as to amount to constructive fraud, with knowledge of true state of his own title, and other party must have had no knowledge of title or convenient means of acquiring such knowledge.—Gioscio v. Lautenschlager, 73 P.2d 1230, 23 Cal.App.2d 616.

particular element in greater detail, while others are more compact or, without denying the necessity thereof, fail to mention some particular element, all are to the same effect as the foregoing enumeration. One frequently repeated statement is that to constitute "estoppel in pais" there must concur an admission, statement, or act inconsistent with the claim afterward asserted, action by the other party on the faith of such admission, statement, or act, and injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act.[49] There can be no estoppel if any of the requisite elements thereof are wanting.[50] They are each of equal importance.[51]

In states where the doctrine of estoppel has been

49. U.S.—Gruber v. Savannah River Lumber Co., C.C.A.S.C., 2 F.2d 418, 425, quoting **Corpus Juris.**

Ariz.—Valley Products v. Kubelsky, 68 P.2d 69, 49 Ariz. 500.

Conn.—Myers v. Burke, 179 A. 88, 90, 120 Conn. 69, citing **Corpus Juris.**

Idaho.—Sullivan v. Mabey, 264 P. 233, 235, 45 Idaho 595, quoting **Corpus Juris.**

Kan.—Peterson v. City of Parsons, 33 P.2d 715, 720, 139 Kan. 676, quoting **Corpus Juris.**

La.—Peyrefitte v. Union Homestead Ass'n, 185 So. 693, 697, quoting **Corpus Juris.**

Mo.—Delta Realty Co. v. Hunter, 152 S.W.2d 45—Brown v. Brown, 146 S.W.2d 553—In re Franz' Estate, 127 S.W.2d 401, 344 Mo. 510—Waugh v. Williams, 119 S.W.2d 223, 342 Mo. 903—State ex inf. Shartel, ex rel. City of Sikeston v. Missouri Utilities Co., 53 S.W.2d 394, 331 Mo. 337, 89 A.L.R. 607—State ex rel. Consolidated School Dist. No. 2 of Pike County v. Haid, 41 S.W.2d 806, 808, 328 Mo. 729, quoting **Corpus Juris,** and quashing certiorari Consolidated School Dist. No. 2 of Pike County v. Cooper, App., 28 S.W.2d 384—Vette v. Hackman, 237 S.W. 802, 292 Mo. 138—McClain v. Mercantile Trust Co., 237 S.W. 506, 292 Mo. 114—Grafeman Dairy Co. v. Northwestern Bank, 235 S.W. 435, 290 Mo. 311—Pollard v. Ward, 233 S.W. 14, 289 Mo. 275, 20 A.L.R. 936—Commerce Trust Co. v. Keck, 223 S.W. 1057, 283 Mo. 209—National Match Co. v. Empire Storage & Ice Co., 58 S.W.2d 797, 227 Mo.App. 1115, certiorari denied Empire Storage & Ice Co. v. National Match Co., 54 S.Ct. 88, 290 U.S. 668, 78 L.Ed. 577—Montbriand v. Scruggs, 46 S.W.2d 211, 214, 226 Mo.App. 743, quoting **Corpus Juris.**

Okl.—Oklahoma City v. Wells, 91 P.2d 1077, 1084, 185 Okl. 369, quoting **Corpus Juris.**

Utah.—Kelly v. Richards, 83 P.2d 731, 734, 95 Utah 560, quoting **Corpus Juris.**

Wash.—Elmonte Inv. Co. v. Schafer Bros. Logging Co., 72 P.2d 311, 324, 192 Wash. 1, quoting **Corpus Juris.**

21 C.J. p. 1119 note 13.

Similar statements

(1) Essential elements of estoppel are that party with knowledge of facts must have asserted particular right, inconsistent with that now asserted, to prejudice of another who relied on party's original conduct.

Ariz.—City of Glendale v. Coquat, 52 P.2d 1178, 46 Ariz. 478, 102 A.L.R. 837—Insurance Co. of North America v. Williams, 26 P.2d 117, 42 Ariz. 331—Peterson v. Hudson Ins. Co., 15 P.2d 249, 41 Ariz. 31.

Ark.—Merchants' & Planters' Bank v. Citizens' Bank of Grady, 299 S.W. 753, 175 Ark. 417.

La.—French Market Ice Mfg. Co. of New Orleans v. Dalton, 130 So. 122, 15 La.App. 115.

(2) To constitute estoppel, person sought to be estopped must do some act or make some admission intending to influence conduct of another, which act or admission is inconsistent with claim subsequently made, and other party must have acted thereon.—Crocker v. Page, 206 N.Y.S. 481, 210 App.Div. 735, affirmed 148 N.E. 738, 240 N.Y. 638.

50. U.S.—Sinclair Refining Co. v. Jenkins Petroleum Process Co., C.C.A.Me., 99 F.2d 9, certiorari denied Jenkins Petroleum Process Co. v. Sinclair Refining Co., 59 S.Ct. 362, 305 U.S. 659, 83 L.Ed. 427, rehearing denied 59 S.Ct. 484, 306 U.S. 667, 83 L.Ed. 1062, second rehearing denied 59 S.Ct. 1035, 307 U.S. 651, 83 L.Ed. 1530—City of Del Rio v. Ulen Contracting Corporation, C.C.A.Tex., 94 F.2d 701, 704, citing **Corpus Juris**—Gruber v. Savannah River Lumber Co., C.C.A.S.C., 2 F.2d 418, 425, quoting **Corpus Juris.**

Ariz.—Lillywhite v. Coleman, 52 P.2d 1157, 1160, 46 Ariz. 523, citing **Corpus Juris.**

Cal.—Riley v. Brown, 237 P. 833, 72 Cal.App. 468.

Colo.—Langley v. Young, 211 P. 640, 72 Colo. 466

Idaho.—Sullivan v. Mabey, 264 P. 233, 235, 45 Idaho 595, quoting **Corpus Juris.**

Ind.—Gamble v. Rooney, 134 N.E. 199, 192 Ind. 454.

Kan.—Peterson v. City of Parsons, 33 P.2d 715, 720, 139 Kan. 676, quoting **Corpus Juris.**

La.—Peyrefitte v. Union Homestead Ass'n, App., 185 So. 693, 697, quoting **Corpus Juris.**

Mich.—Fontana v. Ford Motor Co., 270 N.W. 266, 278 Mich. 199—August v. Collins, 214 N.W. 951, 240 Mich. 23.

Mo.—Church v. Combs, 58 S.W.2d 467, 332 Mo. 334—Fidelity Nat. Bank & Trust Co. v. Kinsfather, 46 S.W.2d 238, 241, 226 Mo.App. 462, citing **Corpus Juris.**

Okl.—Oklahoma City v. Wells, 91 P.2d 1077, 1084, 185 Okl. 369, quoting **Corpus Juris.**

Or.—American Bank v. Port Orford Cedar Products Co., 12 P.2d 1014, 140 Or. 138.

S.C.—American Surety Co. v. Hamrick Mills, 4 S.E.2d 308, 191 S.C. 362, 124 A.L.R. 1147.

Tex.—Colquitt v. Eureka Producing Co., Com.App., 63 S.W.2d 1018, reversing Eureka Producing Co. v. Colquitt, Civ.App., 45 S.W.2d 254, and rehearing denied Colquitt v. Eureka Producing Co., Com.App., 67 S.W.2d 224—Mitchell, Gartner & Thompson v. Young, Civ.App., 135 S.W.2d 308, error refused—Quick v. Pevehouse, Civ.App., 41 S.W.2d 635.

Utah.—Kelly v. Richards, 83 P.2d 731, 734, 95 Utah 560, quoting **Corpus Juris.**

Wash.—Elmonte Inv. Co. v. Schafer Bros. Logging Co., 72 P.2d 311, 324, 192 Wash. 1, quoting **Corpus Juris**—Henson v. First Security & Loan Co., 2 P.2d 85.

21 C.J. p 1120 note 14.

All the usual elements must be found to exist; otherwise estoppel does not arise.—Gerard v. Sanner, Mont., 103 P.2d 314.

51. U.S.—Gruber v. Savannah River Lumber Co., C.C.A.S.C., 2 F.2d 418, 426, quoting **Corpus Juris.**

Idaho.—Sullivan v. Mabey, 264 P. 233, 235, 45 Idaho 595, quoting **Corpus Juris.**

La.—Peyrefitte v. Union Homestead Ass'n, App., 185 So. 693, 697, quoting **Corpus Juris.**

Okl.—Oklahoma City v. Wells, 91 P.2d 1077, 1084, 185 Okl. 369, quoting **Corpus Juris.**

S.D.—Street v. Elkton Farmers' El. Co., 146 N.W. 1077, 33 S.D. 601.

Utah.—Kelly v. Richards, 83 P.2d 731, 734, 95 Utah 560, quoting **Corpus Juris.**

Wash.—Elmonte Inv. Co. v. Schafer Bros. Logging Co., 72 P.2d 311, 324, 192 Wash. 1, quoting **Corpus Juris.**

crystallized into statutory form, the pertinent statutes have been construed to require all of the necessary elements of estoppel at common law.[52]

An equitable estoppel or estoppel in pais presupposes, is based on, and does not arise without, fault on the part of the person against whom it is asserted;[53] the doctrine is inapplicable where both parties to the transaction are in the right.[54] Also, estoppel presupposes two adverse parties[55] and a situation where one has changed his position in reliance on representations or conduct of the other and will be injured by the other's repudiation of his representations or conduct.[56] Furthermore, the doctrine of estoppel by conduct rests on the assumption that the person to be estopped is capable of binding himself by admissions or conduct;[57] a party cannot be estopped in pais when he is unable to bind himself by contract[58] or where the circumstances are such that a contract, if made, would not be sustained.[59]

(2) Of Waiver

The essential elements of a waiver are an existing right, benefit, or advantage; knowledge, actual or constructive, of the existence of such right, benefit, or advantage; and an actual intention to relinquish it or an adequate substitute for such intention.

To constitute a waiver, there must be an existing right, benefit, or advantage, knowledge, actual or constructive, of the existence of such right, benefit, or advantage, and an actual intention to relinquish it,[60] or such conduct as warrants an inference of relinquishment.[61] There must be an existing right and an intention to relinquish it;[62] and there must be both knowledge of the existence of a right and an intention to relinquish it.[63] A waiver exists only where one, with full knowledge of material facts, does or forbears to do something inconsistent with the existence of the right in ques-

52. Mont.—Gerard v. Sonner, 103 P. 2d 314.

Statutory rule is similar to that stated independently of statute.—Bank of America of California v. Pacific Ready-Cut Homes, 10 P.2d 478, 122 Cal.App. 554.

53. Minn.—Conner v. Caldwell, 294 N.W. 650—Farmers' & Merchants' State Bank of Morgan v. Huschke, 205 N.W. 637, 165 Minn. 71—St. Denis v. Mullen, 196 N.W. 258, 157 Minn. 266.

Tex.—Law Union & Rock Ins. Co., Limited, of London, v. Scott, Civ. App., 1 S.W.2d 712, reversed on other grounds Scott v. Law Union & Rock Ins. Co. of London, Com. App., 12 S.W.2d 147.

Error on one side and fault on the other

N.J.—Todd v. Exeter Land Co., 146 A. 303, 104 N.J.Eq. 431, reversing 143 A. 428, 103 N.J.Eq. 268.

N.C.—Davis v. Montgomery, 190 S.E. 489, 211 N.C. 322.

Estoppel presupposes a wrong

Del.—Henderson v. Plymouth Oil Co., 136 A. 140, 15 Del.Ch. 231, affirmed 141 A. 197, 16 Del.Ch. 347.

Estoppel is based on a wrong

U.S.—In re Steiners Improved Dye Works, C.C.A.Ill., 44 F.2d 557.

Some degree of culpable conduct in conduct of party to be estopped is necessary.—Holzer v. Read, 13 P.2d 697, 216 Cal. 119.

Fraud see infra § 69 a.

Negligence see infra § 102.

54. N.C.—Davis v. Montgomery, 190 S.E. 489, 211 N.C. 322.

55. Mo.—Hamilton v. Northeast Mut. Ins. Ass'n, App., 116 S.W.2d 159—Frankford Exchange Bank v. McCune, App., 72 S.W.2d 155.

56. Mo.—Hamilton v. Northeast Mut. Ins. Ass'n, App., 116 S.W.2d 159—Frankford Exchange Bank v. McCune, App., 72 S.W.2d 155.

Necessity of:

Change of position see infra § 72.

Injury or prejudice see infra § 74.

57. N.Y.—Agoodash Achim of Ithaca v. Temple Beth-El, 263 N.Y.S. 81, 147 Misc. 405.

58. Ala.—Merchants' Nat. Bank of Mobile v. Hubbard, 133 So. 723, 222 Ala. 518, 74 A.L.R. 646.

59. Ala.—Merchants' Nat. Bank of Mobile v. Hubbard, supra.

60. U.S.—Garvy v. Blatchford Calf Meal Co., C.C.A.Ill., 119 F.2d 973.

Cal.—Cohen v. Metropolitan Life Ins. Co., 89 P.2d 732, 32 Cal.App.2d 337.

Additional element

(1) It is said that, to constitute waiver, there must be an existing right, benefit, or advantage waived, with full knowledge of its existence, with an intention to relinquish such right for a valuable consideration.—Payne v. Beaumont, Tex.Civ.App., 245 S.W. 94.

(2) However, as shown infra § 67 c, the authorities are not entirely in accord as to the necessity of a consideration for a waiver and many deem it necessary only as an alternative to an estoppel.

61. Cal.—Lincoln Holding Corporation v. Union Indemnity Co., 18 P. 2d 744, 129 Cal.App. 399—Johnson v. De Waard, 298 P. 92, 113 Cal. App. 417.

Tex.—Cliett v. Williams, Civ.App., 97 S.W.2d 272.

Wash.—Constantino v. Moreschi, 115 P.2d 955.

Estoppel as substitute for intention see infra § 69 b.

62. Wash.—Shafer Bros. Land Co. v. Universal Pictures Corporation, 61 P.2d 593, 188 Wash. 33.

63. Cal.—Stiles v. Bodkin, 111 P.2d 675, 43 Cal.App.2d 839.

Ill.—First Lutheran Church of Pontiac v. Rooks Creek Evangelical Lutheran Church, 147 N.E. 53, 316 Ill. 196—Tatro v. Modern Woodmen of America, 2 N.E.2d 107, 284 Ill.App. 423—McMahel v. Smith, 277 Ill.App. 29—Willis Coal & Mining Co. v. Missouri & Illinois Coal Co., 206 Ill.App. 192.

Mo.—Springfield Sec. Co. v. Boren, App., 275 S.W. 566.

Neb.—Klanecky v. Woodmen of the World, 254 N.W. 577, 126 Neb. 809.

Or. Smith v. Hyett, 281 P. 826, 131 Or. 1—In re Iltz's Estate, 202 P. 409, 104 Or. 59, affirmed 206 P. 550, 104 Or. 59.

Tex.—Magnolia Petroleum Co. v. Butler, Civ.App., 86 S.W.2d 258, error dismissed.

Wash.—Associated Indemnity Corporation v. Wachsmith, 99 P.2d 420, 2 Wash.2d 679, 127 A.L.R. 531.

All attendant facts, taken together, must amount to intentional relinquishment of known right in order that waiver may exist.—Blue v. Hazel-Atlas Glass Co., 147 S.E. 22, 106 W.Va. 642.

To work estoppel

(1) In order that a waiver may work or operate as an estoppel, it must appear that the party against whom the doctrines of waiver and estoppel are invoked knew his rights and intentionally relinquished or surrendered them.—Empire Buggy Co. v. Moss, 151 S.E. 788, 154 S.C. 424.

(2) In addition to the elements of knowledge and intention, the party against whom the estoppel is sought must by his conduct have caused the

tion or of his intention to rely on that right.[64] It cannot be made to depend on terminology alone.[65]

Parties. A waiver requires two parties, one waiving a right and another receiving the benefit of the waiver.[66]

Assent or consent. Waiver is said to be a matter of consent,[67] or to involve the idea of assent,[68] or to require assent[69] or consent.[70]

b. Existence and Nature of Right

Both waiver and estoppel imply that the subject matter thereof is some legal right possessed at the time thereof by the person against whom it is asserted. Only a private right or privilege may be waived.

The doctrine of estoppel implies the existence of some legal right which the party against whom it is asserted would, but for his conduct, fraud, or acquiescence, have been entitled to enforce.[71] So, also, a waiver implies and requires the existence of the right in question at the time of the alleged waiver;[72] there can be no waiver of a right before it exists[73] or after it has been lost.[74]

Provided the waiver will not infringe on the rights of others,[75] nor be against public policy,[76] and the right or privilege waived is exclusively private and is intended for the benefit of the person waiving it,[77] a person may waive any right or privilege to which he is legally entitled,[78] whether such right or privilege is conferred, secured, or

party who invokes the estoppel to have acted to his prejudice.—Cary v. Northwestern Mut. Life Ins. Co., 103 S.E. 580, 127 Va. 236.

64. Tex.—Texas Life Ins. Co. v. Mansel, Civ.App., 105 S.W.2d 899—Sovereign Camp, W. O. W., v. Bailey, Civ.App., 277 S.W. 732, reversed on other grounds Bailey v. Sovereign Camp, W. O. W., 286 S. W. 456, 116 Tex. 160, 47 A.L.R. 876, rehearing denied 288 S.W. 115, 116 Tex. 160, 47 A.L.R. 876—Bering Mfg. Co. v. W. T. Carter & Bro., Civ.App., 255 S.W. 243, affirmed, Com.App., 272 S.W. 1105.
Wyo.—New Hampshire Fire Ins. Co. of Manchester v. Boler, 102 P.2d 39, 55 Wyo. 530.

65. U.S.—In re Schulte Retail Stores Corporation, D.C.N.Y., 22 F. Supp. 612.

66. Mont.—Gerard v. Sanner, 103 P. 2d 314.

67. La.—Edenborn v. Kirkland, 68 So. 111, 136 La. 1020.
Whether waiver is, or requires, contract or agreement see infra § 67 c.

68. Conn.—Hendsey v. Southern New England Telephone Co., 20 A. 2d 722, 128 Conn. 132—Temple v. City of New Britain, 15 A.2d 318, 127 Conn. 170—Halloran v. Fischer, 9 A.2d 290, 126 Conn. 44.
67 C.J. p 296 note 68.

69. Or.—Smith v. Martin, 185 P. 236, 94 Or. 132.

70. S.C.—Salley v. McCoy, 189 S.E. 196, 182 S.C. 249.

71. Tex.—F. O. Ketcham Mortg. Co. v. Walker, Civ.App., 94 S.W.2d 806, error refused.

72. Mont.—Swords v. Occident Elevator Co., 232 P. 189, 72 Mont. 189.
67 C.J. p 299 notes 12–18.

73. Cal.—Maltby v. Conklin, 195 P. 280, 50 Cal.App. 201.

74. Cal.—Bourdieu v. Baker, 44 P. 2d 587, 6 Cal.App.2d 150.
67 C.J. p 299 note 19.

75. Ga.—Haygood v. Haygood, 9 S. E.2d 834, 190 Ga. 445, 130 A.L.R. 87.
N.M.—Hittson v. Chicago, R. I. & P. Ry. Co., 86 P.2d 1037, 43 N.M. 122.
Or.—Guardian Building & Loan Ass'n v. McCallister, 270 P. 478, 127 Or. 440.
Tenn.—Black Diamond Coal Mining Co. v. Rankin, 98 S.W.2d 311, 170 Tenn. 651.

76. Ala.—City of Birmingham v. Smyer, 177 So. 630, 235 Ala. 116.
Ga.—Sovereign Camp, W. O. W., v. Heflin, 3 S.E.2d 559, 188 Ga. 234, affirming 200 S.E. 489, 59 Ga.App. 299.
Iowa.—Osgood v. Names, 184 N.W 331, 191 Iowa 1227.
Mich.—Lee v. Macomb County, 284 N.W. 892, 288 Mich. 233.
N.J.—Magna Mfg. Co. v. Aetna Casualty & Surety Co., 18 A.2d 565, 129 N.J.Eq. 142.
N.M.—Hittson v. Chicago, R. I. & P. Ry. Co., 86 P.2d 1037, 43 N.M. 122.
N.Y.—In re Moore's Estate, 1 N.Y. S.2d 281, 165 Misc. 683—People v. Frost, 241 N.Y.S. 749, 136 Misc. 40—People v. Mantei, 236 N.Y.S. 122, 134 Misc. 529.
Ohio.—State ex rel. Hess v. City of Akron, 7 N.E.2d 411, 132 Ohio St. 305, affirming 10 N.E.2d 1, 56 Ohio App. 28.
Or.—School Dist. No. 1, Multnomah County, v. Teachers' Retirement Fund Ass'n of School Dist. No. 1, Multnomah County, 95 P.2d 720, 125 A.L.R. 720, concurring opinion 96 P.2d 419, 125 A.L.R. 727.
Tenn.—Black Diamond Coal Mining Co. v. Rankin, 98 S.W.2d 311, 170 Tenn. 651.
67 C.J. p 308 notes 26–28.

There can be no estoppel where a waiver would be against public policy.—Gibbs v. Bergh, 214 N.W. 538, 51 S.D. 432.

77. Ala.—City of Birmingham v. Smyer, 177 So. 630, 235 Ala. 116.
Conn.—Hatch v. Merigold, 176 A. 266, 119 Conn. 339, 96 A.L.R. 1114.
Del.—State v. Guessford, 192 A. 612, 8 W.W Harr. 357.
N.M.—Hittson v. Chicago, R. I. & P. Ry. Co., 86 P.2d 1037, 43 N.M. 122.
N.Y.—People v. Frost, 241 N.Y.S. 749, 136 Misc. 40.
Tex.—Evans v. Whicker, Civ.App., 59 S.W.2d 420, reversed on other grounds 90 S.W.2d 554, 126 Tex. 621.

Tax law
Municipal authorities cannot waive jurisdictional requirements of tax law.—Oswego Falls Corporation v. City of Fulton, 265 N.Y.S. 436, 148 Misc. 170, affirmed 268 N.Y.S. 978, 241 App.Div. 560.

78. Cal.—Michaels v. Pacific Soft Water Laundry, 286 P. 165, 104 Cal.App. 349, rehearing denied 286 P. 1071, 104 Cal.App. 349.
Del.—State v. Guessford, 192 A. 612, 8 W.W Harr. 357—Hirzel v. Silker, 156 A. 360, 4 W.W.Harr. 588.
Ga.—U. S. Casualty Co. v. Smith, 129 S.E. 880, 34 Ga.App. 363, affirmed 133 S.E. 851, 162 Ga. 130.
N.M.—Hittson v. Chicago, R. I. & P. Ry. Co., 86 P.2d 1037, 43 N.M. 122.
Ohio.—State ex rel. Hess v. City of Akron, 7 N.E.2d 411, 132 Ohio St 305, affirming 10 N.E.2d 1, 56 Ohio App. 28.
Okl.—Smith v. Minneapolis Threshing Mach. Co., 214 P. 178, 89 Okl. 156.
Tex.—Zurich General Accident & Liability Ins. Co. v. Fort Worth Laundry Co., Civ.App., 63 S.W.2d 236, denying rehearing 58 S.W.2d 1058.

Simple irregularities affecting rights
Parties to law suit may waive simple irregularities affecting their rights.—Hall v. Wilbarger County, Tex.Civ.App., 37 S.W.2d 1041, affirmed Wilbarger County v. Hall, Com.App., 55 S.W.2d 797.

guaranteed by a rule of law,[79] a statute,[80] a constitutional provision, see the C.J.S. title Constitutional Law §§ 89–91, or a contract.[81] The waiver of various particular matters connected with contracts is fully considered in Contracts, such as waiver of performance generally, see §§ 491–493, full or strict performance, see § 514, time for performance, see § 506, the right to rescind, see §§ 443 448, defenses generally to an action for breach of contract, see § 530, and the defense of illegality, see § 279 b. Estoppel to question the constitutionality of a statute infringing a constitutional right is treated in the Constitutional Law §§ 89–91. As stated in Courts §§ 108–111, there can be no waiver of, or estoppel to assert, absolute want of jurisdiction of the subject matter.

c. Contract or Consideration

Neither a contract nor a consideration is necessary to support an estoppel; but the authorities do not agree as to the necessity of an agreement founded on a valuable consideration to support a waiver, although many consider such agreement and consideration necessary in the absence of acts or conduct constituting an estoppel.

While there may be a consideration in a case where there is an estoppel,[82] equitable estoppel is not grounded in principles of contract,[83] and it is not essential that it should rest on a consideration or agreement or legal obligation.[84] Also, according

79. Ala.—City of Birmingham v. Smyer, 177 So. 630, 235 Ala. 116.
Ga.—Sovereign Camp, W. O. W. v. Heflin, 3 S.E.2d 559, 188 Ga. 234, affirming 200 S.E. 489, 59 Ga.App. 299.
N.Y.—Stevens v. Stevens, 288 N.Y.S. 785, 248 App.Div. 344, affirmed 7 N.E.2d 26, 273 N.Y. 157, 109 A.L.R. 1016.

80. U.S.—Globe Grain & Milling Co. v. De Tweede Northwestern & Pacific Hypotheekbank, C.C.A.Idaho, 69 F.2d 418—Roos v. U. S., Ct.Cl., 31 F.Supp. 144—Lehigh Portland Cement Co. v. U. S., Ct.Cl., 30 F. Supp. 217.
Ala.—City of Birmingham v. Smyer, 177 So. 630, 235 Ala. 116.
Cal.—People v. Ventura Refining Co., 268 P. 347, 204 Cal. 286, rehearing denied 283 P. 60, 204 Cal. 286, and followed in People v. Richfield Oil Co., 268 P. 355, 204 Cal. 699—Landreth v. South Coast Rock Co., 29 P.2d 225, 136 Cal.App. 457.
Conn.—Hatch v. Merigold, 176 A. 266, 119 Conn. 339, 96 A.L.R. 1114.
Del.—State v. Guessford, 192 A. 612, 8 W.W.Harr. 357—Hirzel v. Silker, 156 A. 360, 4 W.W.Harr. 588.
Fla.—Abell v. Town of Boynton, 117 So. 507, 95 Fla. 984.
Ga.—Sovereign Camp, W. O. W. v. Heflin, 3 S.E.2d 559, 188 Ga. 234, affirming 200 S.E. 489, 59 Ga.App. 299.
Ill.—Howard v. Mueller, 252 Ill.App. 10.
Iowa.—Black v. Consolidated Independent School Dist. of Thayer, 222 N.W. 350, 206 Iowa 1336—Osgood v. Names, 184 N.W. 331, 191 Iowa 1227.
La.—State v. Williams, 146 So. 29, 176 La. 481.
N.J.—Magna Mfg. Co. v. Aetna Casualty & Surety Co., 18 A.2d 565, 129 N.J.Eq. 142.
N.M.—Hittson v. Chicago, R. I. & P. Ry. Co., 86 P.2d 1037, 43 N.M. 122.
N.Y.—In re Piesco, 300 N.Y.S. 2, 252 App.Div. 887—City of Oswego v. Montcalm Dock Co., 283 N.Y.S. 121, 245 App.Div. 555—People ex rel. Jannicky v. Warden of City Prison, Raymond St., Brooklyn, 246 N.Y.S. 194, 231 App.Div. 131, affirmed 175 N.E. 340, 255 N.Y. 623—Harris v. Hulbert, 207 N.Y.S. 485, 211 App. Div. 301—In re Moore's Estate, 1 N.Y.S.2d 281, 165 Misc. 683—People v. Frost, 241 N.Y.S. 749, 136 Misc. 40.
N.C.—In re West, 193 S.E. 134, 212 N.C. 189.
Ohio.—State ex rel. Hess v. City of Akron, 7 N.E.2d 411, 132 Ohio St. 305, affirming 10 N.E.2d 1, 56 Ohio App. 28.
Tenn.—Black Diamond Coal Mining Co. v. Rankin, 98 S.W.2d 311, 170 Tenn. 651.
Tex.—Zurich General Accident & Liability Ins. Co. v. Fort Worth Laundry Co., Civ.App., 63 S.W.2d 236, denying rehearing 58 S.W.2d 1058—Evans v. Whicker, Civ.App., 59 S.W.2d 420, reversed on other grounds 90 S.W.2d 554, 126 Tex. 621.
67 C.J. p 307 note 22.

Waiver not favored

A waiver in derogation of a statutory right is not favored, and will not be inferred from doubtful acts. —Dunbar v. Farnum, 196 A. 237, 109 Vt. 313, 114 A.L.R. 996.

Caution in application of rule

A large degree of caution must be exercised in the extent to which the courts shall go in applying the theory that one to whom the benefit of a police regulation inures is necessarily its beneficiary, in any such exclusive sense as to entitle him to waive its provisions.—Lewis v. Ferrari, 90 P.2d 384, 34 Cal.App.2d 767.

81. U.S.—Globe Grain & Milling Co. v. De Tweede Northwestern & Pacific Hypotheekbank, C.C.A.Idaho, 69 F.2d 418—In re Zimmerman, D. C.Pa., 35 F.Supp. 13.
Cal.—Landreth v. South Coast Rock Co., 29 P.2d 225, 136 Cal.App. 457—Michaels v. Pacific Soft Water Laundry, 286 P. 165, 104 Cal.App. 349, rehearing denied 286 P. 1071, 104 Cal.App. 349.
Del.—State v. Guessford, 192 A. 612, 8 W.W.Harr. 357—Hirzel v. Silker, 156 A. 360, 4 W.W.Harr. 588.
Ga.—Sovereign Camp, W. O. W. v. Heflin, 3 S.E.2d 559, 188 Ga. 234, affirming 200 S.E. 489, 59 Ga.App. 299.
N.M.—Hittson v. Chicago, R. I. & P. Ry. Co., 86 P.2d 1037, 43 N.M. 122.
N.Y.—Harris v. Hulbert, 207 N.Y.S. 485, 211 App.Div. 301—In re Moore's Estate, 1 N.Y.S.2d 281, 165 Misc. 683.
Ohio.—State ex rel. Hess v. City of Akron, 7 N.E.2d 411, 132 Ohio St. 305, affirming 10 N.E.2d 1, 56 Ohio App. 28.
Okl.—Smith v. Minneapolis Threshing Mach. Co., 214 P. 178, 89 Okl. 156.
Tex.—Zurich General Accident & Liability Ins. Co. v. Fort Worth Laundry Co., Civ.App., 63 S.W.2d 236, denying rehearing 58 S.W.2d 1058.
Va.—Richmond Leather Mfg. Co. v. Fawcett, 107 S.E. 800, 130 Va. 484.
Wash.—Coluccio v. Hansen & Rowland, 85 P.2d 1078, 197 Wash. 417.
67 C.J. p 307 note 22.

82. La.—Pharr v. Coudroy, 43 So. 76, 118 La. 499.

83. N.J.—New Jersey Suburban Water Co. v. Town of Harrison, 3 A.2d 623, 122 N.J.Law 189, reversing 1 A.2d 61, 120 N.J.Law 546.

84. N.Y.—Rothschild v. Title Guarantee & Trust Co., 97 N.E. 879, 204 N.Y. 458, 41 L.R.A.,N.S., 740—Witherell v. Kelly, 187 N.Y.S. 48, 195 App.Div. 227—Morris v. Morris, 247 N.Y.S. 28, 138 Misc. 682, affirmed 254 N.Y.S. 429, 234 App. Div. 187, affirmed 184 N.E. 131, 260 N.Y. 650.
Okl.—Oklahoma City v. Wells, 91 P. 2d 1077, 1084, 185 Okl. 369, quoting Corpus Juris.

Agreement or contract is not essential.

Miss.—Aetna Ins. Co. v. Lester, 154 So. 706, 170 Miss. 353.
Nev.—Noble Gold Mines Co. v. Ol-

to some authorities, a waiver is not a contract[85] and need not be supported by a consideration,[86] or at least it need not be so supported in some cases,[87] as where the conduct of a party estops him from insisting on the right in question.[88] Indeed, some authorities lay down the rule that neither estoppel nor a new consideration is necessary to support a waiver.[89] Other authorities, however, hold or state that a waiver is contractual in nature[90] and requires a consideration,[91] or that, in the absence of acts or conduct constituting an estoppel, it must be supported by an agreement founded on a valuable consideration.[92] At any rate, a waiver may be supported by a consideration,[93] and it may arise by agreement.[94]

§ 68. Materiality of Representation

The false representation must be of a material fact.

It is essential to an equitable estoppel that the false representation, howsoever it may rise, whether by declarations, acts, or conduct, shall be of a material fact.[95]

§ 69. Intent

a. As element of equitable estoppel
b. As element of waiver

a. As Element of Equitable Estoppel

It is essential to equitable estoppel that the matters claimed to create it were intended to lead the other party to act thereon or that there were reasonable grounds to anticipate that he would so act; but an actual intent to deceive or defraud is not essential, provided the conduct and circumstances are such that it would be fraudulent or unconscionable for a party to deny what he has induced another to believe and act on.

Although it has been stated generally that intent is an essential element of estoppel,[96] and it has also been declared that the doctrine of estoppel imposes a result regardless of intent and sometimes in defiance of it,[97] the generally prevailing rule is

sen, 66 P.2d 1005, 1012, 57 Nev. 448, citing **Corpus Juris.**

Neither consideration nor legal obligation is required to support equitable estoppel.—Robinson v. Commissioner of Internal Revenue, C.C.A., 100 F.2d 847, certiorari denied 60 S.Ct. 81, 308 U.S. 567, 84 L.Ed. 476.

Consideration is not necessary

Ala.—Life & Casualty Ins. Co. of Tennessee v. Powell, 180 So. 559, 235 Ala. 537.

Minn.—Thom v. Thom, 294 N.W. 461, 208 Minn. 461.

N.J.—New Jersey Suburban Water Co. v. Town of Harrison, 3 A.2d 623, 122 N.J.Law 189, reversing 1 A.2d 61, 120 N.J.Law 546.

Okl.—Lacy v. Wozencraft, 105 P.2d 781, 188 Okl. 19.

Tex.—Lohmann v. Hooper, Civ.App., 87 S.W.2d 803—Ross v. Isaacs, Civ. App., 54 S.W.2d 182, error dismissed.

Contra Globe Indemnity Co. v. Cohen, C.C.A.Pa., 106 F.2d 687.

85. U.S.—Bertelsen & Petersen Engineering Co. v. U. S., C.C.A.Mass., 60 F.2d 745, vacating, D.C., 49 F. 2d 395.
67 C.J. p 296 note 71.

Law of waiver is not dependent on contract.

Miss.—Ætna Ins. Co. v. Lester, 154 So. 706, 170 Miss. 353.

86. Mo.—Swihart v. Missouri Farmers Mut. Tornado, Cyclone & Windstorm Ins. Co., App., 138 S.W.2d 9.
67 C.J. p 296 note 72.

Actual waiver is a completed performance, the doing of what one wills with his own, so that there is no question of consideration involved.—Richmond Leather Mfg. Co. v. Fawcett, 107 S.E. 800, 130 Va. 484.

87. Cal.—Haserot v. Keller, 228 P. 383, 67 Cal.App. 659.

Mo.—Maier v. Wallace, 244 S.W. 945, 211 Mo.App. 454.

S.C.—Salley v. McCoy, 189 S.E. 196, 182 S.C. 249.

88. Fla.—Masser v. London Operating Co., 145 So. 79, 106 Fla. 474.

N.Y.—Kuhn v. Simons, 255 N.Y.S. 633, 143 Misc. 21.
67 C.J. p 297 note 84.

89. Mo.—Brandtjen & Kluge v. Hunter, App., 145 S.W.2d 1009.

N.Y.—Kraut v. Nordlinger, 215 N.Y. S. 496, 216 App.Div. 409, affirmed 154 N.E. 642, 243 N.Y. 649.
67 C.J. p 297 note 83.

90. Mich.—Lee v. Macomb County, 284 N.W. 892, 288 Mich. 233.

S.C.—Salley v. McCoy, 189 S.E. 196, 182 S.C. 249.
67 C.J. p 296 notes 62, 63.

91. Ariz.—Davis v. Standard Acc. Ins. Co., 278 P. 384, 35 Ariz. 392.
67 C.J. p 296 notes 64, 65, p 297 note 86.

Waiver consisting of voluntary surrender or relinquishment of a known legal right, as distinguished from a waiver consisting of intentionally doing an act inconsistent with claiming the right, amounts to an agreement and must be supported by a consideration.—Marfield v. Cincinnati, etc., Traction Co., 144 N. E. 689, 111 Ohio St. 139, 40 A.L.R. 357—Hackett v. Kripke, 23 N.E.2d 438, 62 Ohio App. 89.

92. U.S.—Hunter Milling Co. v. Koch, C.C.A.Kan., 82 F.2d 735—Moss v. Ætna Life Ins. Co., C.C. A.Tenn., 73 F.2d 339—Reynolds v. Detroit Fidelity & Surety Co., C.C. A.Ohio, 19 F.2d 110.

Ala.—Life & Casualty Ins. Co. of Tennessee v. Powell, 180 So. 559, 235 Ala. 537.

Fla.—Masser v. London Operating Co., 145 So. 79, 106 Fla. 474.

Mont.—Gerard v. Sanner, 103 P.2d 314, 110 Mont 71.

N.Y.—Parsons v. Lipe, 286 N.Y.S. 60, 158 Misc. 32, affirmed Parsons v. First Trust & Deposit Co., 277 N.Y.S. 426, 243 App.Div. 681 and 277 N.Y.S. 428, 243 App.Div. 681, affirmed 200 N.E. 31, 269 N.Y. 630.

Pa.—Dougherty v. Thomas, 169 A. 219, 313 Pa. 287.

Vt.—Noyes v. Pierce, 122 A. 896, 97 Vt. 188.
67 C.J. p 297 notes 75, 77, 80.

Agreement or estoppel

Waiver must be supported either by a sufficient agreement or acts constituting an estoppel.—Peal v. Gulf Red Cedar Co. of California, 59 P.2d 183, 15 Cal.App.2d 196.

93. Me.—Colbath v. H. B. Stebbins Lumber Co., 144 A. 1, 127 Me. 406

Utah.—Schwab Safe & Lock Co. v. Snow, 152 P. 171, 47 Utah 199.

94. Mont.—Northwestern Fire & Marine Ins. Co. v. Pollard, 238 P 594, 74 Mont. 142.
67 C.J. p 304 note 73, p 305 note 75.

95. Iowa.—McIntosh v. McIntosh, 234 N.W. 234, 238, 211 Iowa 750, citing **Corpus Juris.**

Utah.—Kelly v. Richards, 83 P.2d 731, 95 Utah 560.
21 C.J. p 1120 note 18.

96. Cal.—Mercer Casualty Co. v. Lewis, 108 P.2d 65, 41 Cal.App.2d 918.

Estoppel is mostly question of intent

U.S.—Gates v. Megargel, C.C.A.N.Y., 266 F. 811, certiorari denied Megargel v. Gates, 41 S.Ct. 13, 254 U. S. 639, 65 L.Ed. 452.

97. N.Y.—Brady v. Metropolitan

that it is an essential element of an equitable estoppel that the acts, representations, or silence relied on to create the estoppel must have been willfully intended to lead the party setting up the estoppel to act on them,[98] or there must have been reasonable grounds to anticipate that he would change his position or in some way act on the faith of the conduct to his detriment.[99] The word "willfully" as used in this connection is not, however, to be taken in the limited sense of the term "maliciously" or "fraudulently";[1] it is sufficient if the acts, representations, or silence relied on are of such a character as to induce a reasonable and prudent man to believe that they were meant to be acted on;[2] and it is also sufficient that the conduct of a party occurred under such circumstances that he should have known that it was both natural and probable that it would be acted on.[3] As shown infra § 102, negligence may supply the place of intent and operate as an estoppel. On the other hand, ordinary, casual declarations or admissions, not made for the purpose of inducing any specific action, and on the faith of which no one has been misled, are not conclusive in their character and are entitled to have only such weight attached to them as under all the circumstances they may fairly deserve;[4] and in the absence of expressly proved fraud, there can be no estoppel based on the acts or conduct of the party sought to be estopped, where they are as consistent with honest purpose and with absence of negligence as with their opposites.[5]

Estoppel cannot be based on statements to third parties which were not intended to be communicated to the party claiming the benefit thereof.[6] Also, estoppel arises from words or acts, and not from intention alone, and the fact that defendant,

Life Ins. Co., 14 N.Y.S.2d 581, affirmed In re Masterson's Estate, 20 N.Y.S.2d 988.

S.C.—Salley v. McCoy, 189 S.E. 196, 182 S.C. 249.

Tex.—Law v. Texas State Mut. Fire Ins. Co., Com.App., 12 S.W.2d 539, reversing Texas State Mut. Fire Ins. Co. v. Law, Civ.App., 3 S.W.2d 505, and rehearing denied Law v. Texas State Mut. Fire Ins. Co., Com.App., 16 S.W.2d 277.

98. Cal.—Killian v. Conselho Supremo Da Uniao Portugueza Do Estado Da California, 88 P.2d 214, 31 Cal.App.2d 497.

Iowa.—McIntosh v. McIntosh, 234 N.W. 234, 238, 211 Iowa 750, citing **Corpus Juris**—Hess v. Masters, 186 N.W. 6, 192 Iowa 1063.

N.J.—Minton v. Sutton, 135 A. 693, 100 N.J.Eq. 403, affirmed 139 A. 600, 102 N.J.Eq. 61.

N.Y.—Eppenbach v. Eppenbach, 215 N.Y.S. 785, 217 App.Div. 26—Hartford Accident & Indemnity Co. v. Oles, 274 N.Y.S. 349, 152 Misc. 876—First Nat. Bank of Fleischmanns v. Creamery Package Mfg. Co., 21 N.Y.S.2d 976.

N.C.—Wilmington Furniture Co. v. Cole, 178 S.E. 579, 207 N.C. 840, 847.

Okl.—Lacy v. Wozencraft, 105 P.2d 781, 188 Okl. 19—St. Louis & S. F. R. Co. v. Mann, 192 P. 231, 79 Okl. 160.

Tex.—Lohmann v. Hooper, Civ.App., 87 S.W.2d 803, 807, quoting **Corpus Juris.**

Utah.—I. X. L. Stores Co. v. Success Markets, 97 P.2d 577, 581, 98 Utah 48, per Wolfe J., concurring, citing **Corpus Juris**—Kelly v. Richards, 83 P.2d 731, 95 Utah 560, 129 A.L.R. 164.

Wash.—Elmonte Inv. Co. v. Schafer Bros. Logging Co., 72 P.2d 311, 324, 192 Wash. 1, quoting **Corpus Juris.**

W.Va.—Bank of Sutton v. Skidmore, 167 S.E. 144, 113 W.Va. 25.

Wis.—Welfare Building & Loan Ass'n v. Breuer, 250 N.W. 846, 849, 213 Wis. 97, citing **Corpus Juris,** and followed in West Side Building & Loan Ass'n v. Anderson, 250 N.W. 849, 213 Wis. 104, East Side Mut. Building & Loan Ass'n v. Lock, 250 N.W. 849, 213 Wis. 105, Mortgage Discount Co. v. Continental Discount Corporation, 250 N.W. 849, 213 Wis. 106, West Side Building & Loan Ass'n v. Breuer, 250 N.W. 850, 213 Wis. 107, West Side Building & Loan Ass'n v. Continental Discount Corporation, 250 N.W. 850, 213 Wis. 108, and East Side Mut. Building & Loan Ass'n v. Thoreson, 250 N.W. 850, 213 Wis. 109.

21 C.J. p 1120 note 19.

Intention and other elements

Where a person says or does something, or remains silent when he should speak, with intention of influencing another to act to his hurt, and the other is injured thereby, the person will be held estopped to change his position when other seeks to enforce his rights.—State ex rel. Porterie v. Gulf, Mobile & Northern R. Co., 184 So. 711, 191 La. 163.

99. Iowa.—McIntosh v. McIntosh, 234 N.W. 234, 238, 211 Iowa 750, citing **Corpus Juris.**

N.Y.—Eppenbach v. Eppenbach, 215 N.Y.S. 785, 217 App.Div. 26.

N.C.—American Exchange Nat. Bank v. Winder, 150 S.E. 489, 198 N.C. 18.

Tex.—Lohmann v. Hooper, Civ.App., 87 S.W.2d 803, 807, quoting **Corpus Juris.**

Utah.—Kelly v. Richards, 83 P.2d 731, 95 Utah 560, 129 A.L.R. 164.

Wash.—Elmonte Inv. Co. v. Schafer Bros. Logging Co., 72 P.2d 311, 324, 192 Wash. 1, quoting **Corpus Juris.**

W.Va.—Bank of Sutton v. Skidmore, 167 S.E. 144, 113 W.Va. 25.

21 C.J. p 1121 note 20.

1. W.Va.—Shelton v. Johnston, 95 S.E. 958, 82 W.Va. 319.

21 C.J. p 1121 note 21.

2. U.S.—The Tampico, C.C.A.Cal., 270 P. 537, 541, quoting **Corpus Juris.**

Wash.—Elmonte Inv. Co. v. Schafer Bros. Logging Co., 72 P.2d 311, 324, 192 Wash. 1, quoting **Corpus Juris.**

21 C.J. p 1121 note 23.

3. Minn.—Froslee v. Sonju, 297 N.W. 1—Macomber v. Kinney, 128 N.W. 1001, 130 N.W. 851, 114 Minn. 146.

4. Iowa.—Near v. Green, 85 N.W. 799, 113 Iowa 647.

21 C.J. p 1122 note 25.

Necessity of person being actually misled see infra § 71 a.

5. U.S.—Standard Sanitary Mfg. Co. v. Arrott, Pa., 135 F. 750, 68 C.C.A. 388, affirming 131 F. 457.

Ga.—Bragan v. Lumbermens' Mut. Casualty Co., App., 2 S.E.2d 189, 190, 189 Ga.App. 862, quoting **Corpus Juris.**

N.Y.—Hartford Accident & Indemnity Co. v. Oles, 274 N.Y.S. 349, 152 Misc. 876—Smith v. Vara, 241 N.Y.S. 202, 136 Misc. 500.

6. Ga.—Parker v. Crosby, 102 S.E. 446, 150 Ga. 1.

21 C.J. p 1122 note 26.

who conveyed property to another, who in turn conveyed to defendant's wife, intended the deed to his wife to state that it should be her separate property would not estop him from afterward claiming that he did not intend to give her the property, but merely conveyed it to her to avoid claims of creditors.[7]

The intention that a representation or concealment be acted on may be inferred from circumstances;[8] and it is held that either the intention or a presumption thereof is essential.[9]

Fraud or deceit. In order to constitute an estoppel which affects the title to real estate, there must be an express intention to deceive or such careless and culpable negligence as amounts to constructive fraud. Except in this case, however,[10] general statements as to the necessity of fraud, such as statements that estoppel in pais is always bottomed on fraud, actual or constructive, or that there can be no estoppel without fraud,[11] do not mean that there should be fraud in the strict legal sense of the term,[12] or an actual overt act of fraud,[13] or an actual intent or design to mislead, deceive, or defraud on the part of the party sought to be estopped,[14] but only that the case should be one in which the circumstances and conduct would render it a fraud or unfair advantage for a party to deny what he had previously induced or suffered another to believe and take action on;[15] it is sufficient if

7. Tex.—Du Perier v. Du Perier, 126 S.W. 10, 59 Tex.Civ.App. 224.

8. Okl.—Lacy v. Wozencraft, 105 P. 2d 781, 188 Okl. 19—Gypsy Oil Co. v. Marsh, 248 P. 329, 121 Okl. 135, 48 A.L.R. 876—Flesner v. Cooper, 162 P. 1112, 62 Okl. 263.
Wash.—Elmonte Inv. Co. v. Schafer Bros. Logging Co., 72 P.2d 311, 324, 192 Wash. 1, quoting **Corpus Juris.**

9. N.Y.—Hartford Accident & Indemnity Co. v. Oles, 274 N.Y.S. 349, 152 Misc. 876.

10. Cal.—Gioscio v. Lautenschlager, 73 P.2d 1230, 23 Cal.App.2d 616.
Va.—Heath v. Valentine, 15 S.E.2d 98.
21 C.J. p 1122 note 30.

11. U.S.—Grand Trunk Western R Co. v. H. W. Nelson Co., C.C.A. Mich., 116 F.2d 823, rehearing denied 118 F.2d 252—Lamborn & Co. v. Palmetto Grocery Co., C.C.A.S.C., 284 F. 427.
Ark.—Thomas v. Spires, 22 S.W.2d 553, 180 Ark. 671.
Ind.—International Harvester Co. of America v. Holley, 18 N.E.2d 484, 106 Ind.App. 329—City Dairy Co. v. Uservo, Inc., 199 N.E. 457, 101 Ind. App. 375.
Iowa.—McCloud v. Bates, 261 N.W. 766, 220 Iowa 252.
Md.—Cityco Realty Co. v. Slaysman, 153 A. 278, 281, 160 Md. 357, 76 A.L.R. 296, citing **Corpus Juris.**
Mass.—Looney v. Trimount Theatres, 184 N.E. 683, 282 Mass. 275.
Mich.—McCurdy v. Van Os, 287 N.W. 890, 290 Mich. 492, 125 A.L.R. 966—Colonial Theatrical Enterprises v. Sage, 237 N.W. 529, 255 Mich. 160.
Mont.—Scott v. Jardine Gold Min. & Mill. Co., 257 P. 406, 79 Mont. 485.
N.J.—Howard v. West Jersey & S. S. R. Co., 141 A. 755, 102 N.J.Eq. 517, affirmed 144 A. 919, 104 N.J.Eq. 201.
Tex.—Benskin v. Barksdale, Com. App., 246 S.W. 360, reversing Barksdale v. Benskin, Civ.App., 194 S.W. 402—Smith v. Roberts, Civ. App., 218 S.W. 27.
W.Va.—Spradling v. Spradling, 190 S. E. 537, 118 W.Va. 308.
21 C.J. p 1122 note 31, p 1123 note 33 [a].

Fraudulent purpose and result
The doctrine of estoppel in pais is based on a fraudulent purpose and a fraudulent result.—People v. Chicago, B. & I. R. Co., 125 N.E. 310, 290 Ill. 327.

12. Mass.—Looney v. Trimount Theatres, 184 N.E. 683, 282 Mass. 275—McLearn v. Hill, 177 N.E. 617, 276 Mass. 519, 77 A.L.R. 1039.
N.J.—Howard v. West Jersey & S. S. R. Co., 141 A. 755, 102 N.J.Eq. 517, affirmed 144 A. 919, 104 N.J.Eq. 201.

13. Okl.—Lacy v. Wozencraft, 105 P.2d 781, 188 Okl. 19.

14. U.S.—U. S. for Use and Benefit of Noland Co. v. Wood, C.C.A.Va., 99 F.2d 80—Mahoning Inv. Co. v. U. S., Ct.Cl., 3 F.Supp. 622, certiorari denied 54 S.Ct. 526, 291 U.S. 675, 78 L.Ed. 1064 and Rochester & Pittsburgh Coal & Iron Co. v. U. S., 54 S.Ct. 527, 291 U.S. 675, 78 L.Ed. 1064.
Cal.—Notten v. Mensing, 45 P.2d 198, 3 Cal.2d 469—Laraway v. First Nat. Bank of La Verne, 104 P.2d 95, 39 Cal.App.2d 718.
Colo.—Schraeder v. Mitchell, 215 P. 147, 73 Colo. 320.
Ill.—Richardson Lubricating Co. v. Kinney, 168 N.E. 886, 337 Ill. 122.
Mass.—Looney v. Trimount Theatres, 184 N.E. 683, 282 Mass. 275.
Minn.—Froslee v. Sonju, 297 N.W. 1.
Mont.—Lindblom v. Employers' Liability Assur. Corporation, 295 P. 1007, 88 Mont. 488.
Nev.—Noble Gold Mines Co. v. Olsen, 66 P.2d 1005, 57 Nev. 448.
N.J.—New Jersey Suburban Water Co. v. Town of Harrison, 3 A.2d 623, 122 N.J.Law 189, reversing 1 A.2d 61, 120 N.J.Law 546—Howard v. West Jersey & S. S. R. Co., 141 A. 755, 102 N.J.Eq. 517, affirmed 144 A. 919, 104 N.J.Eq. 201.
N.Y.—Witherell v. Kelly, 187 N.Y. S. 43, 195 App.Div. 227—Kelly-Springfield Tire Co. v. Stein, 297 N.Y.S. 22, 163 Misc. 393.
Tex.—Glaser v. Henderson, Civ.App., 2 S.W.2d 987.
Utah.—Kelly v. Richards, 83 P.2d 731, 95 Utah 560, 129 A.L.R. 164—Tanner v. Provo Reservoir Co., 289 P. 151, 76 Utah 335.
21 C.J. p 1122 note 32.

Bad faith is not always necessary to estoppel.—Ellis v. Metropolitan Casualty Ins. Co. of New York, 197 S.E. 510, 187 S.C. 162.

Actual malice need not motivate representations or conduct acted on to work an estoppel.—Holterman v. Poynter, 198 N.E. 723, 361 Ill. 617, 101 A.L.R. 842.

Corrupt motive or evil design is not necessary.
Cal.—Corporation of America v. Harris, 43 P.2d 307, 5 Cal.App.2d 452.
Ind.—Anderson v. Hubble, 93 Ind. 570, 47 Am.R. 394.

15. Cal.—Notten v. Mensing, 45 P. 2d 198, 3 Cal.2d 469—Parke v. Franciscus, 228 P. 435, 194 Cal. 284—American Nat. Bank of San Francisco v. A. G. Sommerville, Inc., 216 P. 376, 191 Cal. 364—Parker v. Funk, 197 P. 83, 185 Cal. 347—Fleishbein v. Western Auto Supply Agency, 65 P.2d 928, 19 Cal. App.2d 424.
Ill.—Richardson Lubricating Co. v. Kinney, 168 N.E. 886, 337 Ill. 122.
Neb.—Furstenberg v. Omaha & Council Bluffs St. Ry. Co., 272 N.W. 756, 132 Neb. 562.
Tenn.—Rogers v. Colville, 238 S.W. 80, 83, 145 Tenn. 650, quoting **Corpus Juris.**
Utah.—Kelly v. Richards, 83 P.2d 731, 95 Utah 560, 129 A.L.R. 164.
21 C.J. p 1122 note 32.

Test is whether conscience and duty of honest dealing should deny one right to repudiate consequences of his representations or conduct.
Mass.—Looney v. Trimount Theatres, 184 N.E. 683, 282 Mass. 275.
N.J.—Howard v. West Jersey & S. S. R. Co., 141 A. 755, 102 N.J.Eq.

acts or declarations, although not made with intent to mislead, were calculated to, and did, mislead.[16] However, either actual fraudulent intent or conduct of the character under consideration is essential to create an estoppel,[17] and it has been said that fraud or bad faith is a necessary ingredient of misrepresentation by passivity,[18] although there is authority apparently to the contrary.[19]

b. As Element of Waiver

An intention to relinquish a right is an essential element of waiver, or at least it is so in the absence of conduct estopping a party to deny that he consented to or intended a waiver. This intention may be expressed directly or implied from acts or declarations; but it must be manifested and not kept secret.

Intent is one of the primary, essential elements of waiver.[20] Its importance in the law of waiver is indicated by judicial statements that waiver is a matter or question of intention, or is largely, mainly, or essentially so, as well as by various other statements demonstrating the dependence of waiver on the intention of the party sought to be charged therewith.[21] The requisite intention is one to waive, abandon, relinquish, forego, or surrender a right[22] which, as shown supra § 67 b must exist, and, as stated infra § 70, must be known; and, as noted supra § 61, this intention, which is not necessarily present in estoppel, is one of the grounds of distinction between waiver and estoppel. This intention must be clear;[23] and while it may either be expressed directly or be implied or inferred from conduct or declarations,[24] a mere

517, affirmed 144 A. 919, 104 N.J. Eq. 201.

Something of fraudulent or misleading conduct is needed to make an estoppel.—First & American Nat. Bank of Duluth v. Whiteside, 292 N. W. 770, 207 Minn. 537.

16. U.S.—Mahoning Inv. Co. v. U. S., Ct.Cl., 3 F.Supp. 622, certiorari denied 54 S.Ct. 526, 291 U.S. 675, 78 L.Ed. 1064, and Rochester & Pittsburgh Coal & Iron Co. v. U. S., 54 S.Ct. 527, 291 U.S. 675, 78 L. Ed. 1064.
Ala.—Irvin v. Irvin, 93 So. 517, 207 Ala. 493.

17. Wash.—Elmonte Inv. Co. v. Schafer Bros. Logging Co., 72 P. 2d 311, 324, 192 Wash. 1, quoting entire section from **Corpus Juris.**
21 C.J. p 1123 note 33.

18. Ky.—Wisdom's Adm'r v. Sims, 144 S.W.2d 232, 284 Ky. 258.
21 C.J. p 1123 note 34.

19. N.Y.—Rothschild v. Title Guarantee & Trust Co., 97 N.E. 879, 204 N.Y. 458, 41 L.R.A.,N.S., 740.
21 C.J. p 1123 note 35.

20. Ariz.—Southwest Cotton Co. v. Valley Bank, 227 P. 986, 26 Ariz. 559, rehearing denied 229 P. 98, 27 Ariz. 7.
Cal.—In re DeNeef, App., 109 P.2d 741—Killian v. Conselho Supremo Da Uniao Portugueza Do Estado Da California, 88 P.2d 214, 31 Cal. App.2d 497.
Colo.—Hale v. Burford, 214 P. 543, 73 Colo. 197.
Conn.—Rosenthal v. State Bar Examining Committee, 165 A. 211, 116 Conn. 409, 87 A.L.R. 991.
Mont.—Gerard v. Sanner, 103 P.2d 314, 110 Mont. 71—Williams v. Anaconda Copper Mining Co., 29 P. 2d 649, 96 Mont. 204.
Pa.—Spector v. Grossman, 175 A. 890, 115 Pa.Super. 372.
Wash.—Pacific Commercial Co. v. Northwestern Fisheries Co., 197 P. 930, 115 Wash. 608.
67 C.J. p 302 notes 43, 44.

Character of waiver
A waiver, whether express or implied, must be intentional.—Davison v. Klaess, 20 N.E.2d 744, 280 N.Y. 252, reversing 5 N.Y.S.2d 623, 254 App.Div. 897.

21. U.S.—Dunkel Oil Corporation v. Independent Oil & Gas Co., C.C.A. Ill., 70 F.2d 967—Masden v. Travelers' Ins. Co., C.C.A.Mo., 52 F.2d 75, 79 A.L.R. 469.
Ala.—Bellingrath v. Samuel, 122 So. 27, 219 Ala. 263—Chemical Nat. Bank of New York v. Jackson, 108 So. 53, 214 Ala. 458.
Cal.—Chester R. Pyle Co. v. Fossler, 252 P. 599, 200 Cal. 204—Peal v. Gulf Red Cedar Co. of California, 59 P.2d 183, 15 Cal.App.2d 196.
Colo.—Davis v. Brinkhouse Hotel Co., 219 P. 1074, 74 Colo. 199.
Conn.—Barnes v. Church, 173 A. 226, 118 Conn. 521.
Ga.—Bryant v. Continental Casualty Co., 199 S.E. 343, 58 Ga.App. 518.
Me.—Dube v. Simard, 129 A. 488, 124 Me. 369.
Mo.—Swihart v. Missouri Farmers Mut. Tornado, Cyclone & Windstorm Ins. Co., App., 138 S.W.2d 9—Concrete Engineering Co. v. Grande Bldg. Co., 86 S.W.2d 595, 230 Mo.App. 443—Waters v. Gallemore, App., 41 S.W.2d 870—Springfield Gas & Electric Co. v. Southern Surety Co. of Oklahoma, App., 250 S.W. 78.
Mont.—Williams v. Anaconda Copper Mining Co., 29 P.2d 649, 96 Mont. 204.
Wash.—Cohen v. Robinson, 205 P. 838, 119 Wash. 392.
67 C.J. p 302 notes 45–47, p 303 notes 50–55.

22. U.S.—Garvy v. Blatchford Calf Meal Co., C.C.A.Ill., 119 F.2d 973.
Cal.—In re De Neef, 109 P.2d 741, 42 Cal.App.2d 691.
Conn.—Hendsey v. Southern New England Telephone Co., 20 A.2d 722, 128 Conn. 132—Temple v. City of New Britain, 15 A.2d 318.
D.C.—C. I. T. Corporation v. Carl, 85 F.2d 809, 66 App.D.C. 232.
Mass.—Sheehan v. Commercial Travelers' Mut. Accident Ass'n, 186 N.E. 627, 283 Mass. 543, 88 A.L.R. 975.
Minn.—Hayfield v. Farmers Elevator & Mercantile Co. v. New Amsterdam Casualty Co., 282 N.W. 265, 203 Minn. 522.
Mo.—Miller v. Rosebud Bank, App., 116 S.W.2d 267.
Nev.—State v. Second Judicial Dist. Court in and for Washoe County, 15 P.2d 682, 54 Nev. 328.
N.H.—Malloy v. Head, 4 A.2d 875, 90 N.H. 58, 123 A.L.R. 941.
N.D.—Jacobson v. Mutual Ben. Health & Accident Ass'n, 296 N.W. 545, 70 N.D. 566.
Vt.—Dunbar v. Farnum, 196 A. 237, 109 Vt. 313, 114 A.L.R. 996.
67 C.J. p 302 note 48, p 303 note 49.

Deliberate abandonment of right
The doctrine of implied waiver is a purely equitable doctrine which will be applied only on demonstration of deliberate abandonment of rights.—In re Feldhus' Will, 300 N.Y.S. 799, 165 Misc. 122, affirmed In re Feldhus' Estate, 6 N.Y.S.2d 508, 254 App.Div. 902, reargument denied 7 N.Y.S.2d 109, 255 App.Div. 780, affirmed In re Feldhus' Will, 20 N.E.2d 17, 280 N.Y. 568—In re Heubach's Will, 300 N.Y.S. 802, 165 Misc. 196.

23. U.S.—Public Warehouses of Matanzas v. Fidelity & Deposit Co. of Maryland, C.C.A.N.Y., 77 F.2d 831, certiorari denied 56 S.Ct. 156, 296 U.S. 633, 80 L.Ed. 450—Anderson v. Missouri State Life Ins. Co., C.C.A. Ky., 69 F.2d 794—Howard v. Dowd, D.C.Ind., 25 F.Supp. 844.

24. Cal.—Stiles v. Bodkin, 111 P.2d 675, 43 Cal.App.2d 839—Cohen v. Metropolitan Life Ins. Co., 89 P.2d 732, 32 Cal.App.2d 337—Linnard v.

secret understanding or intention is not sufficient;[25] the intention must be indicated or manifested by some language, act, conduct, or omission related to the matter involved.[26]

It has been said that there can be no waiver without an intention to waive.[27] However, there is authority for the proposition that, notwithstanding the absence of an intention to waive, waiver may result or be presumed from conduct which prejudicially misleads the other party to believe that a waiver is intended.[28] Conversely, it is said that there can be no waiver unless it was so intended by one party and understood by the other or one party has so acted as to mislead the other and is estopped thereby;[29] and it has also been said that a waiver will not be presumed or implied contrary to the intention of a party whose rights would be injuriously affected thereby unless, by such party's conduct, the opposite party has been misled to his prejudice into an honest belief that a waiver was consented to or intended.[30]

§ 70. Knowledge of Facts

a. As element of equitable estoppel
b. As element of waiver

a. As Element of Equitable Estoppel

Unless knowledge is necessarily imputable to the person claimed to be estopped or he was culpably negligent in not knowing the facts, actual, full knowledge, on his part, of the real facts, at the time of his representation, concealment, or other conduct relating thereto and alleged to constitute the basis of the estoppel, is an indispensable element of an equitable estoppel.

It is generally indispensable to the application of the doctrine of equitable estoppel that the person claimed to be estopped shall have had full knowledge of the real facts at the time of his representation, concealment, or other conduct relating thereto and alleged to constitute the basis of the estoppel.[31] Equitable estoppel cannot be successful-

Sonnenschein, 272 P. 315, 94 Cal. App. 729.
Colo.—Davis v. Brinkhouse Hotel Co., 219 P. 1074, 74 Colo. 199.
Minn.—Hayfield Farmers Elevator & Mercantile Co. v. New Amsterdam Casualty Co., 282 N.W. 265, 203 Minn. 522.
N.H.—Malloy v. Head, 4 A.2d 875, 90 N.H. 58, 123 A.L.R. 941.
67 C.J. p 303 notes 56–60.

Implied waiver

The intention, where waiver is implied, is a matter of inference to be drawn from the facts and circumstances relied on to constitute it.—Bankers Trust Co. v. Economy Coal Co., 276 N.W. 16, 224 Iowa 36—North American Ginseng Co. v. Gilbertson, 206 N.W. 610, 200 Iowa 1349.

25. Mo.—Swihart v. Missouri Farmers Mut. Tornado, Cyclone & Windstorm Ins. Co., App., 138 S.W.2d 9.
67 C.J. p 304 note 69.

26. Ill.—Muller v. Equitable Life Assur. Soc. of U. S., 13 N.E.2d 96, 293 Ill.App. 555.
Mo.—Swihart v. Missouri Farmers Mut. Tornado, Cyclone & Windstorm Ins. Co., App., 138 S.W.2d 9.
Vt.—Dunbar v. Farnum, 196 A. 237, 109 Vt. 313, 114 A.L.R. 996.

27. U.S.—Orr v. Mutual Life Ins. Co. of New York, C.C.A.Mo., 64 F.2d 561, affirming, D.C., 57 F.2d 901.
Tex.—Goodwin v. Abilene State Bank, Civ.App., 20 S.W.2d 1090, error dismissed.

28. Cal.—Linnard v. Sonnenschein, 272 P. 315, 94 Cal.App. 729.
67 C.J. p 303 notes 63–66.

29. U.S.—Moss v. Ætna Life Ins Co., C.C.A.Tenn., 73 F.2d 339—Burlew v. Fidelity & Casualty Co. of New York, C.C.A.Ky., 64 F.2d 976, certiorari denied 54 S.Ct. 122, 290 U.S. 686, 78 L.Ed. 591—Reynolds v. Detroit Fidelity & Surety Co., C.C.A.Ohio, 19 F.2d 110.
Minn.—State v. Tupa, 260 N.W. 875, 194 Minn. 488, 99 A.L.R. 147.
Or.—Title & Trust Co. v. Durkheimer Inv. Co., 63 P.2d 909, 155 Or. 427
Pa.—Kahn v. Bancamerica-Blair Corporation, 193 A. 905, 327 Pa. 209—Spector v. Grossman, 175 A. 890, 115 Pa.Super. 372.
67 C.J. p 303 note 67, p 304 note 68.

Acts showing purpose or amounting to estoppel

To create a waiver or an implied waiver, there must be a clear, unequivocal, and decisive act of a party showing his purpose or intention to waive a right or acts amounting to an estoppel on his part.
U.S.—Victor Products Corporation v. Yates-American Mach. Co., C.C.A.Va., 54 F.2d 1062—In re Zimmerman, D.C.Pa., 35 F.Supp. 13.
Kan.—Cure v. Midland Life Ins. Co., 198 P. 940, 109 Kan. 259.
Mo.—Wall Inv. Co. v. Schumacher, 125 S.W.2d 838, 344 Mo. 225—State ex rel. Continental Ins. Co. of City of New York v. Becker, 77 S.W.2d 100, 336 Mo. 59, quashing Weiss v. Continental Ins. Co., App., 61 S.W.2d 392—Schwab v. Brotherhood of American Yeomen, 264 S.W. 690, 305 Mo. 148—Fitzgerald v. Metropolitan Life Ins. Co., App., 149 S.W.2d 389—Roth v. Hoffman, App., 111 S.W.2d 988.
Ohio.—White Co. v. Canton Transp. Co., 2 N.E.2d 501, 131 Ohio St. 190.
Okl.—In re Drumright State Bank, 40 P.2d 1059, 170 Okl. 480.
Pa.—Dougherty v. Thomas, 169 A. 219, 313 Pa. 287.

Intent or inequity

To constitute a waiver, there must have been an intent to waive or forego the right involved, or some act or agreement of the person entitled to a right which renders it inequitable for him to assert his right.—Pray & Thomas v. Donald, 193 N.W. 7, 195 Iowa 745.

30. U.S.—Universal Gas Co. v. Central Illinois Public Service Co., C.C.A.Ill., 102 F.2d 164.
Cal.—Kadow v. City of Los Angeles, 87 P.2d 906, 31 Cal.App.2d 324—McDanels v. General Ins. Co. of America, 36 P.2d 829, 1 Cal.App.2d 454.
Pa.—Dougherty v. Thomas, 169 A. 219, 313 Pa. 287.
Tex.—Bounds v. Home Mut. Life & Accident Ass'n No. 1, Civ.App., 290 S.W. 552—Miller v. Deahl, Civ.App., 239 S.W. 679, error refused.

31. Ark.—American Nat. Ins. Co. v. Lacey, 34 S.W.2d 757, 182 Ark. 1158.
Cal.—Battle v. Niece, App., 111 P.2d 455—Mercer Casualty Co. v. Lewis, 108 P.2d 65, 41 Cal.App.2d 918—Hacker Pipe & Supply Co. v. Chapman Valve Mfg. Co., 61 P.2d 944, 17 Cal.App.2d 265—Weinberg v. John A. Vaughan Corporation, 29 P.2d 862, 137 Cal.App. 55—Weintraub v. Weingart, 277 P. 752, 98 Cal.App. 690—Rice v. McCarthy, 239 P. 56, 73 Cal.App. 655—Bisconer v. Billing, 236 P. 329, 71 Cal. App. 779—Norton v. Overholtzer, 218 P. 637, 63 Cal.App. 388.
Conn.—Davis v. Maislen, 165 A. 451, 116 Conn. 375.
Idaho.—Kennison v. McMillan Sheep Co., 270 P. 1062, 46 Idaho 754.
Ill.—Sherman State Bank v. Smith, 161 N.E. 483, 330 Ill. 373, affirming

ly asserted against a person who was ignorant of the facts and the true state of affairs,[32] or who acted under a mistake of fact,[33] unless his ignorance or mistake was the result of gross[34] or culpable[35] negligence,[36] or otherwise involves gross culpability,[37] as where he was consciously ignorant of the facts at the very time of professing full knowledge of them.[38] No estoppel arises where the representation or conduct of the party sought to be estopped is due to ignorance founded on an innocent mistake;[39] and while there is authority to the contrary,[40] the weight of authority is that the

244 Ill.App. 171—Elowe v. Superior Fire Ins. Co., 30 N.E.2d 953, 307 Ill.App. 569.
Ind.—Smith v. Yost, 125 N.E. 73, 72 Ind.App. 628.
Ky.—Kinnett v. Abrell, 121 S.W.2d 699, 275 Ky. 276—Dees' Adm'r v. Dees' Ex'r, 61 S.W.2d 301, 249 Ky. 650—Rice v. Rice, 50 S.W.2d 26, 243 Ky. 837—Farmers' Nat. Bank of Somerset v. Dodson, 28 S.W.2d 777, 234 Ky. 518—Burns v. Dillon, 9 S.W.2d 1095, 226 Ky. 82.
La.—Little v. Barbe, 198 So. 368, 195 La. 1071—State v. Register of State Land Office, 192 So. 519, 522, 193 La. 883, quoting **Corpus Juris**—Nelson, Curtis & Nelson v. Bridgeman, 92 So. 855, 152 La. 190—International Projector Corporation v. Maricella, App., 144 So. 278—Blunson v. Knighton, App., 140 So. 302—George T. Bishop, Inc., v. Jones, 136 So. 101, 17 La.App. 410—O'Toole v. Exchange Nat. Bank, 4 La.App. 342.
Md.—Seymour v. Finance & Guaranty Co., 142 A. 710, 155 Md. 514.
Mich.—E. Clemens Horst Co. v. Grand Rapids Brewing Co., 273 N.W. 388, 280 Mich. 49—Edmore Marketing Ass'n v. Skinner, 227 N.W. 681, 248 Mich. 695.
Minn.—Froslee v. Sonju, 297 N.W. 1—Johnson v. Christlieb, 225 N.W. 927, 178 Minn. 9.
Mo.—Grafeman Dairy Co. v. Northwestern Bank, 288 S.W. 359, 315 Mo. 849—Missouri Pac. R. Co. v. Askew Saddlery Co., 256 S.W. 566, 215 Mo.App. 277.
Neb.—Wiltse v. Bolton, 272 N.W. 197, 132 Neb. 354—First Nat. Bank of Hastings v. Davis, 242 N.W. 655, 123 Neb. 304.
N.J.—Traurig v. Levin, 142 A. 48, 102 N.J.Eq. 582.
Ohio.—Bear v. Colonial Finance Co., 182 N.E. 521, 42 Ohio App. 482—Westwater v. Guitner, 18 Ohio N.P., N.S., 209.
Okl.—Maynard v. Hustead, 90 P.2d 30, 185 Okl. 20.
Tex.—Hunt v. W. O. W. Life Ins. Soc., Civ.App., 153 S.W.2d 857—Williams v. Texas Employers Ins. Ass'n, Civ.App., 135 S.W.2d 262, error refused—McLendon Hardware Co. v. Black, Civ.App., 264 S.W. 1011—Moore v. Carey Bros. Oil Co., Civ.App., 246 S.W. 1083, overruled conditionally 248 S.W. 470, and affirmed, Com.App., 269 S.W. 75, 39 A.L.R. 1247.
Vt.—Pellon v. Connecticut General Life Ins. Co., 178 A. 902, 107 Vt. 129.
Va.—American Nat. Bank of Portsmouth v. Ames, 194 S.E. 784, 169 Va. 711, certiorari denied 58 S.Ct. 1046, 304 U.S. 577, 82 L.Ed. 1540—School Board of Carroll County v. First Nat. Bank, 170 S.E. 625, 161 Va. 127.
Wis.—Caveney v. Caveney, 291 N.W. 818, 234 Wis. 637.
21 C.J. p 1123 note 36.

Extent of knowledge

(1) Where the material facts are false representations, a person has sufficient knowledge of those facts to supply this element of estoppel where he has knowledge of the falsity of the representations, even though he does not know the exact extent of the falsity or have possession of all the proof thereof.—Caprito v. Grisham-Hunter Corporation, Tex.Civ.App., 128 S.W.2d 149, error dismissed, judgment correct.

(2) In order that a person may be estopped by his declarations in response to an inquiry, he must have knowledge of the purpose of the inquiry and of the interest of the person claiming the estoppel.—Hydro-Centrifugals v. Crawford Laundry Co., 147 A. 31, 110 Conn. 49.
21 C.J. p 1125 note 44.

32. Ind.—International Harvester Co. of America v. Holley, 18 N.E.2d 484, 106 Ind.App. 329.
La.—Jones v. Alford, App., 172 So. 213.
Minn.—Scheele v. Union Loan & Finance Co., 274 N.W. 673, 200 Minn. 554.
N.Y.—Agoodash Achim of Ithaca v. Temple Beth-El, 263 N.Y.S. 81, 147 Misc. 405.
Okl.—St. Louis & S. F. R. Co. v. Mann, 192 P. 231, 79 Okl. 160.
Pa.—Bittner v. Quemahoning Coal Co., 116 A. 42, 271 Pa. 579—McCully v. Flanagan, 99 Pa.Super. 566.

33. U.S.—Leathem Smith-Putnam Nav. Co. v. National Union Fire Ins. Co., C.C.A.Wis., 96 F.2d 923.
Okl.—St. Louis & S. F. R. Co. v. Mann, 192 P. 231, 79 Okl. 160.

Mutual error regarding a particular fact affords no ground for a plea of estoppel.—New York Life Ins. Co. v. Talley, C.C.A.Iowa, 72 F.2d 715, 718, citing **Corpus Juris**—Rockwood v. U. S., Ct.Cl., 39 F.2d 984—21 C.J. p 1125 note 45 [b].

34. Va.—School Board of Carroll County v. First Nat. Bank, 170 S.E. 625, 161 Va. 127.
21 C.J. p 1124 note 37.

35. Minn.—Froslee v. Sonju, 297 N.W. 1—Schaefer v. Nylin, 202 N.W. 439, 162 Minn. 170, citing **Corpus Juris.**
Tex.—McLendon Hardware Co. v. Black, Civ.App., 264 S.W. 1011.
21 C.J. p 1126 note 49.

36. Tex.—Holland v. Blanchard, Civ.App., 262 S.W. 97.

Negligence in fiduciary capacity

While an estoppel may not usually arise against a person who is ignorant of his rights, yet the rule does not go so far as to hold that ignorance which is the result of negligence in a fiduciary capacity bars the application of the equitable doctrine of estoppel.—Seaman v. Leonardi, 181 N.Y.S. 868, 110 Misc. 532.

37. U.S.—U. S. v. Lee Wilson, D.C.Ark., 214 F. 630, affirmed, C.C.A., 227 F. 827.
Va.—School Board of Carroll County v. First Nat. Bank, 170 S.E. 625, 161 Va. 127.

38. Vt.—Twitchell v. Bridge, 42 Vt. 68.
21 C.J. p 1124 note 39.

Duty to know correctness of statement

He who speaks to induce another to act thereon is bound to know correctness or truth of his statements, and will not be heard to say contrary against those relying thereon, although in truth he did not know.—Bass & Co. v. Trustees of Madisonville Christian Church, 61 S.W.2d 1074, 250 Ky. 36.

39. U.S.—Quirk v. United States, D.C.Pa., 45 F.2d 631, 637, quoting **Corpus Juris**—Roedel v. U. S., 82 Ct.Cl. 655.
Minn.—Froslee v. Sonju, 297 N.W. 1—Schaefer v. Nylin, 202 N.W. 439, 162 Minn. 170, citing **Corpus Juris.**
Ohio.—Fleming v. City of Steubenville, 184 N.E. 701, 702, 44 Ohio App. 121, quoting **Corpus Juris.**
Or.—In re Kulka's Estate, 18 P.2d 1036, 142 Or. 104.
21 C.J. p 1125 note 45.

40. N.M.—La Luz Community Ditch Co. v. Town of Alamogordo, 279 P. 72, 34 N.M. 127.
Wash.—Harvey v. Chas. R. McCormick Lumber Co. of Delaware, 271 P. 65, 149 Wash. 368.
21 C.J. p 1125 note 46.

acts and declarations of a party based on ignorance of, or an innocent mistake as to, his legal rights will not estop him to assert the same,[41] especially where the parties stand on equal terms in respect of actual or imputed knowledge of the facts.[42]

Knowledge or lack of knowledge on the part of the person asserting the estoppel is considered in connection with the necessity of his reliance on the representations, see infra § 71.

Actual knowledge or substitute therefor. Ordinarily, actual or imputed knowledge of the material facts by the person claimed to be estopped, at the time of his acts, declarations, or conduct relied on as giving rise to the estoppel, is essential to an equitable estoppel.[43] It is sometimes said that actual knowledge of the facts is necessary;[44] but generally it is not considered indispensable that the knowledge should be actual if the circumstances are such that a knowledge of the truth is necessarily imputed to the party sought to be estopped,[45] or if he has actively and recklessly interfered to the prejudice of another;[46] and it is recognized that culpable[47] or inexcusable[48] negligence in not knowing the facts may be the equivalent of actual knowledge for the purpose of an estoppel.

Avoidance of rule by contract. Parties may contract with reference to the rule of law relating to knowledge, so as to prevent lack of knowledge of a fact from avoiding an estoppel.[49]

b. As Element of Waiver

Full knowledge of the right waived and the facts on which the waiver is based is an essential element of waiver.

Knowledge is an essential element of waiver; there can be no waiver without it,[50] unless the parties contract with respect to the rule, as they may, so as to prevent lack of knowledge of a fact from avoiding a waiver,[51] or unless the party who is alleged to have waived a right has, by his representations or conduct, misled the other party and caused him to act, or to omit to act, to his injury, and has thereby become estopped.[52] There

41. Ala.—Cameron v. Cameron, 10 So. 506, 95 Ala. 344.
21 C.J. p 1126 note 47.

42. U.S.—Idaho Farms Co. v. North Side Canal Co., D.C.Idaho, 24 F. Supp. 189, reversed on other grounds, C.C.A., North Side Canal Co. v. Idaho Farms Co., 107 F.2d 481, rehearing denied 109 F.2d 354.
Ill.—People v. Chicago, B. & Q. R. Co., 125 N.E 310, 290 Ill. 327.
Miss.—Mississippi Power & Light Co. v. Pitts, 179 So. 363, 181 Miss. 344.
Okl.—Champlin Refining Co. v Magnolia Petroleum Co., 62 P.2d 249, 178 Okl. 203—National Surety Co. v. Craig, 220 P. 943, 94 Okl. 63.
Pa.—In re Eaby's Estate, 173 A. 174, 315 Pa. 161.
21 C.J. p 1126 note 48.

43. Mo.—Delta Realty Co. v. Hunter, 152 S.W.2d 45.
Tex.—Gaines v. Traders & General Ins. Co., Civ.App., 99 S.W.2d 984, error dismissed.
W.Va.—First Nat. Bank v. Croy, 150 S.E. 904, 108 W.Va. 342.

Actual or constructive knowledge
Ga.—Sovereign Camp, W. O. W. v. Heflin, 3 S.E.2d 559, 188 Ga. 234, affirming 200 S.E. 489, 59 Ga.App. 299.

Information or certain position
To create an equitable estoppel, the party acting must have information of the true state of affairs, or be in a position to have become aware of them.—Bittner v. Quemahoning Coal Co., 116 A. 42, 271 Pa. 579—Sundheim v. Beaver County Building & Loan Ass'n, 14 A.2d 349, 140 Pa. Super. 529.

Person without knowledge or notice is not estopped.
U.S.—Thomas v. Sullivan, C.C.A.Okl., 28 F.2d 255.
R.I.—Tillinghast v. Harrop, 9 A.2d 28.
Wis.—Gulbrandsen v. Chaseburg State Bank, 295 N.W. 729, 236 Wis. 391.

Person having both actual knowledge and constructive notice may be estopped.—Wabash Drilling Co. v. Ellis, 20 S.W.2d 1002, 230 Ky. 769.

44. Neb.—First Nat. Bank of Hastings v. Davis, 242 N.W. 655, 123 Neb. 304.

45. Ind.—Seymour Improvement Co. v. Viking Sprinkler Co., 161 N.E. 389, 87 Ind.App. 179.
La.—State v. Register of State Land Office, 192 So. 519, 522, 193 La. 883, quoting **Corpus Juris.**
Minn.—Froslee v. Sonju, 297 N.W. 1—Johnson v. Christlieb, 225 N.W. 927, 178 Minn. 9.
Okl.—Fipps v. Stidham, 50 P.2d 680, 174 Okl. 473.
Tenn.—Cole v. Atlanta Life Ins. Co., 134 S.W.2d 912, 23 Tenn.App. 525.
21 C.J. p 1125 note 40.

Suitable means of ascertaining facts
Generally, one with full knowledge of true facts, or with suitable means of ascertaining facts, is held to his representations or to position assumed, if inequitable consequences result to another.—Stone v. C. I. T. Corporation, 184 A. 674, 122 Pa. Super. 71.

46. Conn.—Preston v. Mann, 25 Conn. 118.
21 C.J. p 1125 note 41.

47. Minn.—Johnson v. Christlieb, 225 N.W. 927, 178 Minn. 9.

48. Ind.—Seymour Improvement Co. v. Viking Sprinkler Co., 161 N.E. 389, 87 Ind.App. 179.

49. Ga.—Sovereign Camp, W. O. W. v. Heflin, 3 S.E.2d 559, 188 Ga. 234, affirming 200 S.E. 489, 59 Ga.App. 299.

50. Cal.—In re De Neef, App., 109 P.2d 741.
Me.—Pokroisky v. Potter, 149 A. 806, 129 Me. 70.
Nev.—Santino v. Great American Ins. Co. of New York, 9 P.2d 1000, 54 Nev. 127, rehearing denied Santino v. Glens Falls Ins. Co., 24 P.2d 1119, 54 Nev. 466.
Pa.—Burke v. Bryant, 128 A. 821, 283 Pa. 114.
Tex.—Carolina Ins. Co. v. Christopher, 106 S.W.2d 138, 130 Tex. 345, affirming, Civ.App., 80 S.W.2d 774, rehearing denied 109 S.W.2d 467, 130 Tex. 245.
67 C.J. p 299 note 21, p 300 note 22, p 301 notes 28, 30, 32, 35.

Waiver is predicated on knowledge
Cal.—Chester R. Pyle Co. v. Fossler, 252 P. 599, 200 Cal. 204.
Mo.—Haggerty v. St. Louis Police Relief Ass'n, App., 141 S.W.2d 174—Woodson v. John Hancock Mut. Life Ins. Co., App., 84 S.W.2d 390.

51. Ga.—Sovereign Camp, W. O. W., v. Heflin, 3 S.E.2d 559, 188 Ga. 234, affirming 200 S.E. 489, 59 Ga.App. 299.

52. Ga.—Kaufman v. Young, 122 S. E. 822, 32 Ga.App. 135.

must be knowledge of the right[53] or matter[54] waived and of all[55] material or essential[56] facts[57] on which the waiver is based.[58] Furthermore, there can be no waiver without full knowledge[59] of the right waived[60] and of all[61] material[62] facts.[63] A milder statement, sometimes made, is that there must be reasonable knowledge of all the facts and of the rights intended to be waived.[64] It has been asserted that actual knowledge is necessary;[65] but more frequently it is held or stated that actual or constructive knowledge is necessary and sufficient.[66]

§ 71. Reliance on Representation

a. In general
b. Knowledge or lack thereof by person claiming estoppel

a. In General

The doctrine of equitable estoppel is not applicable unless the person invoking it relied, and had a right to rely, on the representation or conduct of the person sought to be estopped.

It is an essential element of equitable estoppel that the person invoking it has been influenced by,

53. U.S.—Garvy v. Blatchford Calf Meal Co., C.C.A.Ill., 119 F.2d 973—J. P. Stevens Engraving Co. v. U. S., D.C.Ga., 48 F.2d 899, affirmed, C.C.A., 53 F.2d 1, certiorari denied 52 S.Ct. 209, 284 U.S. 687, 76 L.Ed. 580.
Cal.—In re De Neef, App., 109 P.2d 741.
Conn.—Hendsey v. Southern New England Telephone Co., 20 A.2d 722, 128 Conn. 132—Kimberly v. Town of Madison, 17 A.2d 504, 127 Conn. 409—Stempel v. Middletown Trust Co., 15 A.2d 305, 127 Conn. 206—Halloran v. Fischer, 9 A.2d 290, 126 Conn. 44—National Transp. Co. v. Toquet, 196 A. 344, 123 Conn. 468.
D.C.—C. I. T. Corporation v. Carl, 85 F.2d 809, 66 App.D.C. 232.
Me.—Bryson v. American Eagle Fire Ins. Co., 168 A. 719, 132 Me. 172.
Mass.—Wedgwood v. Eastern Commercial Travelers Accident Ass'n, 32 N.E.2d 687, 308 Mass. 463.
N.Y.—In re Heubach's Will, 300 N. Y.S. 802, 165 Misc. 196—In re Feldhus' Will, 300 N.Y.S. 799, 165 Misc. 122, affirmed In re Feldhus' Estate, 6 N.Y.S.2d 508, 254 App. Div. 902, reargument denied 7 N.Y. S.2d 109, 255 App.Div. 780, affirmed In re Feldhus' Will, 20 N.E. 2d 17, 280 N.Y. 568.
Tex.—Hunt v. W. O. W. Life Ins. Soc., Civ.App., 153 S.W.2d 857.
67 C.J. p 300 note 24, p 301 notes 27, 31.

54. Ala.—Baker Sand & Gravel Co. v. Rogers Plumbing & Heating Co., 154 So. 591, 228 Ala. 612, 102 A.L.R. 346—Gulf Trading Co. v. Radcliff, 114 So. 308, 216 Ala. 645.

Condition

There can be no waiver of a condition unknown.—City of Osceola v. Gjellefald Const. Co., 279 N.W. 590, 225 Iowa 215.

55. U.S.—Combs v. Equitable Life Ins. Co. of Iowa, C.C.A.Va., 120 F. 2d 432, affirming, D.C., 34 F.Supp. 1002.
Tex.—Hunt v. W. O. W. Life Ins. Soc., Civ.App., 153 S.W.2d 857.

56. U.S.—Leathem Smith-Putnam Nav. Co. v. National Union Fire Ins. Co., C.C.A.Wis., 96 F.2d 923.
Ill.—Lake Shore Country Club v. Brand, 171 N.E. 494, 339 Ill. 504.
Vt.—Pellon v. Connecticut General Life Ins. Co., 178 A. 902, 107 Vt. 129.

57. Cal.—Killian v. Conselho Supremo De Uniao Portugueza Do Estado Da California, 88 P.2d 214, 31 Cal.App.2d 497.
Ill.—Hensel v. Capital Live Stock Ins. Co., 219 Ill.App. 77
Iowa.—Smith v. Bagmen Emergency Fund Ass'n of Zeus Guild Ancient Mystic Order of Bagmen of Bagdad, 270 N.W. 13, 222 Iowa 958.
Mich.—Edmore Marketing Ass'n v. Skinner, 227 N.W. 681, 248 Mich. 695.
Mo.—Hanna v. Ætna Life Ins. Co., 263 S.W. 526, 217 Mo.App. 261.
67 C.J. p 300 notes 23, 26, p 301 notes 33, 34.

58. Cal.—Stiles v. Bodkin, App., 111 P.2d 675—Jewett v. Albin, 266 P. 329, 90 Cal.App. 535.
Ohio.—Michigan Automobile Ins. Co. v. Van Buskirk, 155 N.E. 186, 115 Ohio St. 598.
67 C.J. p 300 note 25.

59. Colo.—Obodov v. Foster, 97 P.2d 426.
Tex.—Szanto v. Pagel, Civ.App., 47 S.W.2d 632, error dismissed.

60. U.S.—Universal Gas Co. v. Central Illinois Public Service Co., C.C.A.Ill., 102 F.2d 164—Howard v. Dowd, D.C.Ind., 25 F.Supp. 844.
Mo.—State ex rel. Continental Ins. Co. of City of New York v. Becker, 77 S.W.2d 100, 336 Mo. 59, quashing Weiss v. Continental Ins. Co., App., 61 S.W.2d 392—Miller v. Rosebud Bank, App., 116 S.W.2d 267—Andrews v. Washington Nat. Ins. Co. of Illinois, App., 93 S.W. 2d 1045—Howe Scale Co. of Illinois v. Geller, Ward & Hasner Hardware Co., App., 285 S.W. 141—Springfield Sec. Co. v. Boren, App., 275 S.W. 566.
S.D.—Gibbs v. Bergh, 214 N.W. 838, 51 S.D. 432.
Tex.—Wirtz v. Sovereign Camp, W. O. W., 268 S.W. 438, 114 Tex. 471, affirming, Civ.App., Sovereign Camp, W. O. W. v. Wirtz, 254 S.W. 637.
Va.—Parker v. Inge, 161 S.E. 884, 157 Va. 592.

61. Ind.—State Farm Mut. Automobile Ins. Co. v. Phillips, 2 N.E.2d 989, 210 Ind. 561.
N.Y.—S. & E. Motor Hire Corporation v. New York Indemnity Co., 174 N.E. 65, 255 N.Y. 69, 81 A.L.R. 1318, reversing 241 N.Y.S. 417, 229 App.Div. 232, reversing 235 N.Y.S. 626, 134 Misc. 514.

62. Ga.—Bryant v. Continental Casualty Co., 199 S.E. 343, 58 Ga.App. 518.

63. Cal.—Hacker Pipe & Supply Co. v. Chapman Valve Mfg. Co., 61 P. 2d 944, 17 Cal.App.2d 265.
Ill.—Muller v. Equitable Life Assur. Soc. of U. S., 13 N.E.2d 96, 293 Ill.App. 555.

64. D.C.—Helvering v. Ethel D. Co., 70 F.2d 761, 63 App.D.C. 157.

65. Cal.—Schick v. Equitable Life Assur. Soc. of U. S., 59 P.2d 163, 15 Cal.App.2d 28.
Neb.—First Nat. Bank of Hastings v. Davis, 242 N.W. 655, 123 Neb. 304.

66. Cal.—Cohen v. Metropolitan Life Ins. Co., 89 P.2d 732, 32 Cal.App.2d 337.
Tex.—White v. Cooper, Civ.App., 145 S.W.2d 298, error dismissed, judgment correct.
67 C.J. p 301 note 36, p 302 notes 37–40.

Actual or imputed knowledge

Mont.—Osborne v. Supreme Lodge, Knights of Pythias, Insurance Department, 222 P. 456, 69 Mont. 361.

Knowledge or means of knowledge of all material facts is necessary for a waiver.—American Nat. Bank & Trust Co. v. Powell, 178 So. 21, 235 Ala. 236.

Knowledge or duty to know

To constitute waiver, facts or circumstances on which waiver is predicated must have transpired after party against whom waiver is urged knew or should have known of right.—Nygaard v. Maeser Fur Farms, 237 N.W. 7, 183 Minn. 388—67 C.J. p 301 note 29.

and has relied on, the representation or conduct of the person sought to be estopped;[67] and this rule applies with equal force and effect as well where the conduct of the party sought to be estopped consists of silence[68] as where it consists of positive acts.[69] The person asserting the estoppel must have been actually misled[70] to his injury, see infra § 74, by the acts, conduct, words, or silence of the

67. U.S.—State of Oklahoma v. State of Texas, 45 S.Ct. 497, 268 U.S. 252, 69 L.Ed. 937—Helvering v. Schine Chain Theatres, C.C.A., 121 F.2d 948—Aetna Life Ins. Co. v. Kepler, C.C.A.Neb., 116 F.2d 1—Quirk v. U. S., D.C.Pa., 45 F.2d 631, 637, quoting **Corpus Juris**—Myers v. Ross, D.C.Fla., 10 F.Supp. 409—Rader v. Star Mill & Elevator Co., Okl., 258 F. 599, 169 C.C.A. 541.

Ala.—Standard Oil Co. v. Gentry, 1 So.2d 29.

Ark.—Union Indemnity Co. v. Benton County Lumber Co., 18 S.W.2d 327, 179 Ark. 752.

Cal.—Gajanich v. Gregory, 3 P.2d 389, 116 Cal.App. 622—California Canning Peach Growers v. Downey, 243 P. 679, 685, 76 Cal.App. 1, quoting **Corpus Juris.**

D.C.—Washington Loan & Trust Co. v. Convention of Protestant Episcopal Church of the Diocese of Washington, 293 F. 833, 54 App.D.C. 14.

Ill.—Chicagoland Agencies v. Palmer, 2 N.E.2d 910, 364 Ill. 13—Alton Banking & Trust Co. v. Alton Building & Loan Ass'n, 6 N.E.2d 921, 289 Ill.App 177—Adam v. Columbian Nat. Life Ins. Co., 218 Ill. App. 54.

Ind.—International Harvester Co. of America v. Holley, 18 N.E.2d 484, 106 Ind.App. 329.

Iowa.—King v. Knudson, 229 N.W. 839, 209 Iowa 1214—McKeon v. City of Council Bluffs, 221 N.W. 351, 206 Iowa 556, 62 A.L.R. 1006—People's Sav. Bank v. McCarthy, 217 N.W. 453, 206 Iowa 28—Rhodes v. Uhl, 178 N.W. 394, 189 Iowa 408.

Kan.—Johnson v. People's Nat Bank of Kansas City, 286 P. 214, 130 Kan. 379.

Ky.—Wisdom's Adm'r v. Sims, 144 S.W.2d 232, 284 Ky. 258—Clark v. Fergerson, 20 S.W.2d 1013, 231 Ky. 36—City of Covington v. Patterson, 230 S.W. 542, 191 Ky. 370.

La.—Electron Engineering Co. v. B. B. T. Corporation of America, 155 So. 295.

Me.—Ouellette v. City of New York Ins. Co., 174 A. 462, 133 Me. 149.

Mich.—Kennedy v. Lynch Timber Co., 198 N.W. 985, 227 Mich. 269.

Minn.—Froslee v. Sonju, 297 N.W. 1—First & American Nat. Bank of Duluth v. Whiteside, 292 N.W. 770, 207 Minn. 537.

Mo.—Hamilton v. Northeast Mut. Ins. Ass'n, App., 116 S.W.2d 159—First Nat. Bank v. Witherspoon Livestock Commission Co., 90 S.W.2d 453, 230 Mo.App. 285—Fisher v. Ely & Walker Dry Goods Co., App., 46 S.W.2d 902.

Mont.—O'Neill v. Wall, 62 P.2d 672, 103 Mont. 388—Mitchell v. Banking Corporation of Montana, 24 P.2d 124, 95 Mont. 23—In re McGovern's Estate, 250 P. 812, 77 Mont. 182.

Neb.—Wiltse v. Bolton, 272 N.W. 197, 132 Neb. 354—Rea v. Pierson, 206 N.W. 760, 114 Neb. 173.

Nev.—Beck v. Curti, 45 P.2d 601, 56 Nev. 72—Ford v. Brown, 200 P. 522, 45 Nev. 202.

N.J.—Smith v. National Commercial Title & Mortgage Guaranty Co., 198 A. 407, 120 N.J.Law 75—Tumen v. Monmouth County, 199 A. 78, 16 N.J.Misc. 294.

N.Y.—Byrne v. Barrett, 197 N.E. 217, 268 N.Y. 199, 100 A.L.R. 680, reversing 276 N.Y.S. 1, 242 App.Div. 583, and reargument denied 198 N.E. 528, 268 N.Y. 630—Trimble v. New York Life Ins. Co., 255 N.Y.S. 292, 234 App.Div. 427—MacDonald v. Western Union Telegraph Co., 27 N.Y.S.2d 666, 176 Misc. 422—Smith v. Maine, 260 N.Y.S. 425, 145 Misc. 521—First Nat. Bank of Fleischmanns v. Creamery Package Mfg. Co., 21 N.Y.S.2d 976—Mount Vernon Trust Co. v. City of Mount Vernon, 12 N.Y.S.2d 120.

N.C.—Central Bank & Trust Co. v. Wyatt, 131 S.E. 311, 191 N.C. 133.

Ohio.—Potter v. Potter, 20 Ohio Cir. Ct.,N.S., 58—Trustees of Cincinnati Southern Ry. v. Porter, 21 Ohio N.P., N.S., 441.

Or.—Strong & MacNaughton Trust Co. v. Bodley, 15 P.2d 470, 141 Or. 36.

Pa.—Gianni v. Union Bank & Trust Co., 166 A. 553, 311 Pa. 121, quoting **Corpus Juris**—Howe, to Use of Commercial Loan & Finance Corporation v. Mimm, Super., 161 A. 603—General Electric Co. v. N. K. Ovalle, Inc., 45 Dauph.Co. 376.

R.I.—Anderson v. Polleys, 173 A. 114, 116, 54 R.I. 296, citing **Corpus Juris.**

S.C.—American Surety Co. v. Hamrick Mills, 4 S.E.2d 308, 191 S.C. 362, 124 A.L.R. 1147.

Tenn.—Dunlap v. P'Pool, 6 Tenn. App. 91—Wallace v. P'Pool, 4 Tenn.App. 30.

Tex.—Hill v. Engel, Civ.App., 89 S.W.2d 219, 221, citing **Corpus Juris**—Holland v. Blanchard, Civ. App., 262 S.W. 97—Hitson v. Gilman, Civ.App., 220 S.W. 140.

Utah.—Kelly v. Richards, 83 P.2d 731, 95 Utah 560—Cache Valley General Hospital v. Cache County, 67 P.2d 639, 92 Utah 279—Mullner v. McCornick & Co., Bankers, 257 P. 658, 668, 69 Utah 557, quoting **Corpus Juris.**

Va.—School Board of Carroll County v. First Nat. Bank, 170 S.E. 625, 161 Va. 127—Parker v. Murphy, 146 S.E. 254, 152 Va. 173.

Wash.—State ex rel. Booth v. Tatro, 92 P.2d 206, 199 Wash. 421—Elmonte Inv. Co. v. Schafer Bros Logging Co., 72 P.2d 311, 324, 192 Wash. 1, quoting **Corpus Juris**—Elkenbary v. Calispel Light & Power Co., 231 P. 946, 132 Wash 255.

Wis.—In re Smith's Estate, 277 N.W. 141, 226 Wis. 556.

21 C.J. p 1126 note 51.

68. Cal.—California Canning Peach Growers v. Downey, 243 P. 679, 685, 76 Cal.App. 1, quoting **Corpus Juris.**

Tex.—Nelson v. Wilson, Civ.App., 97 S.W.2d 287, error refused.

Wash.—Elmonte Inv. Co. v. Schafer Bros. Logging Co., 72 P.2d 311, 324, 192 Wash. 1, quoting **Corpus Juris.**

21 C.J. p 1129 note 52.

69. Cal.—California Canning Peach Growers v. Downey, 243 P. 679, 685, 76 Cal.App. 1, quoting **Corpus Juris.**

Wash.—Elmonte Inv. Co. v. Schafer Bros. Logging Co., 72 P.2d 311, 324, 192 Wash. 1, quoting **Corpus Juris.**

70. U.S.—Fifth Ave. Uniform Co v. Commissioner of Internal Revenue, C.C.A., 70 F.2d 677.

Ala.—Hattemer v. Davis, 91 So. 321 206 Ala. 613.

Ark.—Yaffe Iron & Metal Co. v Pulaski County, 67 S.W.2d 1017, 188 Ark. 808.

Cal.—Anchester v. Keck, 4 P.2d 934, 214 Cal. 207.

Del.—Graham v. National Bank of Smyrna, 122 A. 85, 2 W.W.Harr. 264.

Ill.—McGee v. Vandeventer, 158 N.E. 127, 326 Ill. 425—Trustees of Schools of Township, 36 North, Range 10 East of Third P. M., Will County, v. American Surety Co. of New York, 30 N.E.2d 513, 307 Ill.App. 398.

Ind.—Russell v. Trustees of Purdue University, 178 N.E. 180, 93 Ind. App. 242.

Iowa.—Fischer v. Johnson, 76 N.W. 658, 106 Iowa 181.

Ky.—Fordson Coal Co. v. Garrard, 125 S.W.2d 977, 277 Ky. 218, 121 A.L.R. 841—Nussbaum v. General Accident, Fire & Life Assur. Corporation, Limited, of Perth, Scotland, 38 S.W.2d 1, 238 Ky. 348.

La.—Blunson v. Knighton, App., 140 So. 302.

person claimed to be estopped. There can be no equitable estoppel where the complainant's act appears to be rather the result of his own will or judgment than the product of what defendant did or represented.[71] The act must be induced by,[72] and be the immediate or proximate result of,[73] the conduct or representation, which must be such as the party claiming the estoppel had a right to rely on.[74] The representation or conduct must of itself have been sufficient to warrant the action of the party claiming the estoppel.[75] If notwithstanding such representation or conduct he was still obliged to inquire for the existence of other facts and to rely on them also to sustain the course of action adopt-

Mich.—Shean v. U. S. Fidelity & Guaranty Co., 248 N.W. 892, 263 Mich 535.
Minn.—Darelius v. Commonwealth Mortg. Co., 188 N.W. 208, 152 Minn. 128.
Mo.—Park Transp. Co. v. Missouri State Highway Commission, 60 S. W.2d 388, 332 Mo. 592.
Mont.—Scott v. Jardine Gold Min. & Mill Co., 257 P. 406, 79 Mont. 485.
N.Y.—Pagel, Horton & Co. v. Harmon Paper Co., 258 N.Y.S 168, 236 App.Div. 47—Agoodash Achim of Ithaca v. Temple Beth-El, 263 N. Y S. 81, 147 Misc. 405.
Or.—Security Savings & Trust Co. v. Portland Flour Mills Co., 261 P. 432, 124 Or. 276.
Tenn —Newburger v. Newburger, 14 Tenn App. 229—Arnold v. May, 10 Tenn.App. 315—Samples v. Samples, 8 Tenn.App. 211—Allred v. Allred, 5 Tenn.App. 200.
Tex —Logan v. Aiken, Civ.App., 123 S W.2d 401, error dismissed, judgment correct—Robertson v. Vernon, Civ.App., 3 S W.2d 573, affirmed, Com.App., 12 S W.2d 991.
Utah.—Tripp v. Bagley, 276 P. 912, 74 Utah 57, 69 A.L.R. 1417.
Vt.—West River Power Co. v. Bussino, 11 A.2d 263.
Wash.—Spokane Valley State Bank v. Murphy, 274 P. 702, 150 Wash. 640.
Wyo.—Willis v. Willis, 49 P.2d 670, 48 Wyo. 403, rehearing denied 54 P.2d 814, 49 Wyo. 296.

Deception is necessary.

Ky.—Federal Surety Co. v. Guerrant, 38 S.W.2d 425, 238 Ky. 562.
La —Joseph v. Sliman, 6 La.App. 552.
Tex —Shear Co. v. Wilson, Com.App., 294 S.W. 843, overruling motion 292 S.W. 531, which affirmed in part and reversed in part Wilson v. Shear Co., Civ.App., 284 S.W. 654.

71. Cal.—California Canning Peach Growers v. Downey, 243 P. 679, 685, 76 Cal.App. 1, quoting **Corpus Juris.**
Ill.—People v. Chicago, B. & Q. R. Co., 125 N.E. 310, 290 Ill. 327.
Mich.—Shean v. U. S. Fidelity & Guaranty Co., 248 N.W. 892, 263 Mich. 535.
Utah.—Kelly v. Richards, 83 P.2d 731, 95 Utah 560.
Wash.—Elmonte Inv. Co. v. Schafer Bros. Logging Co., 72 P.2d 311, 324, 192 Wash. 1, quoting **Corpus Juris.**
21 C.J. p 1129 note 54.

Errors of judgment

Estoppel cannot be predicated on errors of judgment by person asking its benefit.—Grand Central Public Market v. U. S., D.C.Cal., 22 F.Supp. 119, appeal dismissed, C.C.A., U. S. v. Grand Central Public Market, 98 F.2d 1023.

72. U.S.—Standard Oil Co. of California v. U. S, C.C.A Cal., 107 F. 2d 402, affirming, D.C, U. S. v. Standard Oil Co. of California, 21 F Supp. 645, certiorari denied Standard Oil Co. of California v U. S., 60 S Ct. 469, 309 U S. 654, 84 L Ed. 1003, motion granted 60 S. Ct. 581, rehearing denied 60 S Ct. 708, 309 U.S. 697, 84 L.Ed. 1036, certiorari denied U. S. v. Standard Oil Co. of California, 60 S.Ct. 715, 309 U.S 673, 84 L.Ed. 1019—Empire Voting Mach. Co v. City of Chicago, C.C.A.Ill , 267 F. 162, certiorari denied 41 S.Ct 14, 254 U S. 642, 65 L.Ed 453.
Cal.—Fleishbein v Western Auto Supply Agency, 65 P.2d 928, 19 Cal.App 2d 424.
Ill.—People v. Federal Surety Co., 168 N.E 401, 336 Ill. 472—People v Chicago, B. & Q. R Co., 125 N. E. 310, 290 Ill. 327—Trustees of Schools of Township 36 North, Range 10 East of Third P. M., Will County, v. American Surety Co. of New York, 30 N.E 2d 513, 307 Ill.App 398—City of Sullivan v. Central Illinois Public Service Co., 221 Ill.App. 561.
Pa.—In re Jeffries' Estate, 19 Wash. Co. 57.
Tex.—Hitson v. Gilman, Civ.App., 220 S.W. 140

73. Cal.—California Canning Peach Growers v. Downey, 243 P. 679, 685, 76 Cal.App. 1, quoting **Corpus Juris.**
21 C.J. p 1129 note 55.

74. Ala.—Whitfield v. Hatch, 177 So. 149, 235 Ala. 38.
Cal —California Canning Peach Growers v. Downey, 243 P. 679, 685, 76 Cal.App. 1, quoting **Corpus Juris.**
Ill.—Wollenberger v. Hoover, 179 N. E. 42, 346 Ill. 511.
Iowa.—King v. Knudson, 229 N W. 839, 209 Iowa 1214.
N.J.—Ginsberg v. Eastern Life Ins Co. of New York, 178 A. 378, 118 N.J Eq. 223, affirmed 184 A. 348, 120 N.J.Eq. 110.
N Y.—Rifkin v. Stuyvesant Ins. Co. of New York, 270 N.Y.S. 630, 240 App.Div. 540—In re Cooke's Estate, 264 N.Y.S. 336, 147 Misc. 528.
Pa.—General Electric Co. v. N. K. Ovalle, Inc., 45 Dauph.Co. 376.
Tex.—Ellison v. Humble Oil & Refining Co., Civ.App , 106 S.W 2d 1083, reversed on other grounds Humble Oil & Refining Co v. Ellison, 132 S.W.2d 395, 134 Tex. 140.
21 C J. p 1129 note 56.

Corpus Juris is cited as not containing anything that militates against the conclusion that the possession by a mortgagor of a note and mortgage marked "Paid" constitutes a prima facie case of payment on which the purchaser of another mortgage has a right to rely. —Bank of Oakman v. Thompson, 163 So. 614, 615, 231 Ala. 73.

Reasonableness of reliance

The words, conduct, or appearance must be such that others may be reasonably expected to act thereon or such that a reasonable man or man of ordinary prudence would rely thereon and which would tend to mislead such a man.
U.S.—Commissioner of Internal Revenue v. Bryson, C.C.A., 79 F.2d 397—Traitel Marble Co. v. U. T. Hungerford Brass & Copper Co., D.C.N.Y., 34 F.2d 670
Cal —Pacific Finance Corporation v. Hendley, 7 P.2d 391, 119 Cal.App. 697.
Mass.—Ford v. Rogovin, 194 N.E. 719, 289 Mass. 549.

Representations by agent

In ejectment, that plaintiff's predecessor's attorney, who examined title to property in controversy for defendant's predecessor, stated to defendant's predecessor that plaintiff's predecessor claimed none of property in controversy would not estop plaintiff from asserting title where defendant's predecessor must have known that it was not within the scope of the agency of the attorney to locate the land claimed by plaintiff's predecessor.—Fordson Coal Co. v. Wells, 53 S.W.2d 564, 245 Ky. 291.

75. Cal.—California Canning Peach Growers v. Downey, 243 P. 679, 685, 76 Cal.App. 1, quoting **Corpus** Juris.
Utah.—Kelly v. Richards, 83 P.2d 731, 95 Utah 560.
21 C.J. p 1129 note 57.

ed, he cannot claim that the conduct of the other party was the cause of his action and no estoppel will arise.[76]

Subsequent acts. Acts done subsequent to the transaction out of which the estoppel is claimed to arise can have no bearing on the question.[77] The representations or conduct relied on to raise the estoppel must have been concurrent with or anterior to the action which they are alleged to have influenced.[78] If, however, a party having an interest to prevent an act being done has full notice of its having been done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous license;[79] and it has been held that, although a contract had been entered into before a representation was made, an estoppel arises if the performance of the contract was induced by such representation.[80]

b. Knowledge or Lack Thereof by Person Claiming Estoppel

There is no compliance with the rule requiring reliance on representations, express or implied, as an element of equitable estoppel where the person setting up the estoppel had no knowledge of the acts, conduct, or statements by which the representations were made or where he had actual knowledge, or ready or convenient means of acquiring knowledge, of the real facts concerning which the representations were made.

Obviously a party did not rely on,[81] and could not have been misled by,[82] acts, statements, or transactions which were unknown to him at the time. Also, where the real facts were known to a person or were open for his convenient ascertainment, he was not justified in relying on representations pertaining thereto[83] and he cannot effectively say that he was misled or deceived by such representations.[84] Hence, as a corollary to the proposition that the party setting up an estoppel must have acted in reliance on the conduct or representations of the party sought to be estopped, the former must have had knowledge of the conduct or representations[85] and must not only have been destitute of knowledge of the real facts as to the matter in controversy, but must have also been without convenient or ready means of acquiring such knowledge.[86] One relying on an estoppel must have exercised such reasonable diligence to acquire knowl-

76. Cal.—California Canning Peach Growers v. Downey, 243 P. 679, 685, 76 Cal.App. 1, quoting **Corpus Juris.**
21 C.J. p 1129 note 58.

77. N.Y.—Smith v. Vara, 241 N.Y.S. 202, 136 Misc. 500.
Wash.—Elmonte Inv. Co. v. Schafer Bros. Logging Co., 72 P.2d 311, 325, 192 Wash. 1, quoting **Corpus Juris**—Lloyd v. Schwaegler, 216 P. 884, 885, 126 Wash. 67, quoting **Corpus Juris.**

78. Ark.—Berg v. Owens, 300 S.W. 417, 175 Ark. 1169.
N.Y.—Hartford Accident & Indemnity Co. v. Oles, 274 N.Y.S. 349, 152 Misc. 876—Smith v. Vara, 241 N.Y.S. 202, 136 Misc. 500.
Pa.—Howe, to Use of Commercial Loan & Finance Corporation v. Mimm, Super., 161 A. 603.
Wash.—Elmonte Inv. Co. v. Schafer Bros. Logging Co., 72 P.2d 311, 325, 192 Wash. 1, quoting **Corpus Juris**—Lloyd v. Schwaegler, 216 P. 884, 885, 126 Wash. 67, quoting **Corpus Juris.**
21 C.J. p 1132 note 73.

79. U.S.—Leather Manufacturers' Nat. Bank v. Morgan, N.Y., 6 S.Ct. 657, 117 U.S. 96, 29 L.Ed. 811.

80. Ill.—Goeing v. Outhouse, 95 Ill. 346.

81. Cal.—King v. Harford, 191 P. 998, 48 Cal.App. 405.
S.C.—Federal Land Bank of Columbia v. Ledford, 9 S.E.2d 804, 194 S.C. 347.

82. Pa.—Peoples Nat. Bank of Ellwood City v. Bartel, 193 A. 59, 128 Pa.Super. 128.

83. Or.—State by Hagglund ex rel. Security Savings & Trust Co. v. School Dist. No. 9 of Tillamook County, 36 P.2d 179, 148 Or. 273.

84. Mass.—Schiller v. Metropolitan Life Ins. Co., 3 N.E.2d 384, 295 Mass. 169.
Nev.—Beck v. Curtis, 45 P.2d 601, 56 Nev. 72.
N.D.—Thompson v. North Dakota Workmen's Compensation Bureau, 268 N.W. 710, 66 N.D. 756.
Tex.—Logan v. Aiken, Civ.App., 123 S.W.2d 401, error dismissed, judgment correct—Crim v. Lukenbill, Civ.App., 21 S.W.2d 83.

85. Ala.—Bank of Eclectic v. Sturdivant Bank, 83 So. 321, 203 Ala. 458.
Ill.—De Proft v. Heydecker, 131 N.E. 114, 297 Ill. 541.
Mich.—R. C. Mahon Co. v. R. S. Knapp Co., 255 N.W. 453, 268 Mich. 67.
Pa.—Peoples Nat. Bank of Ellwood City v. Bartel, 193 A. 59, 128 Pa. Super. 128.
Vt.—Dunbar v. Farnum, 196 A. 237, 109 Vt. 313, 114 A.L.R. 996.
Wis.—Williams v. Jensen, 231 N.W. 276, 202 Wis. 19.

86. U.S.—In re Euclid Doan Co., C.C.A.Ohio, 104 F.2d 712, certiorari denied National City Bank of Cleveland v. Euclid-Doan Co., 60 S.Ct. 291, 308 U.S. 619, 84 L.Ed. 517—Idaho Farms Co. v. North Side Canal Co., D.C.Idaho, 24 F. Supp. 189, reversed on other grounds, C.C.A., North Side Canal Co. v. Idaho Farms Co., 107 F.2d 481, rehearing denied 109 F.2d 354—Myers v. Ross, D.C.Fla., 10 F. Supp. 409, 411, citing **Corpus Juris.**
Cal.—California Canning Peach Growers v. Downey, 243 P. 679, 685, 76 Cal.App. 1, quoting **Corpus Juris.**
Conn.—Myers v. Burke, 179 A. 88, 120 Conn. 69—Graham v. Southington Bank & Trust Co., 121 A. 812, 817, 99 Conn. 494, quoting **Corpus Juris.**
Ga.—Nowell v. Mayor and Council of Monroe, 171 S.E. 136, 141, 177 Ga. 648, quoting **Corpus Juris**—Cook v. Flanders, 138 S.E. 218, 164 Ga. 279.
Ill.—Alton Banking & Trust Co. v. Alton Building & Loan Ass'n, 6 N.E.2d 921, 289 Ill.App. 177—Payne v. Hutson, 264 Ill.App. 508.
La.—Robbins v. Martin, 138 So. 132, 135, 18 La.App. 223, quoting **Corpus Juris.**
Mich.—American Trust Co. v. Bergstein, 224 N.W. 327, 246 Mich. 527.
Mont.—Stanton Trust & Savings Bank v. Johnson, Mont., 85 P.2d

edge of the real facts as the circumstances of the case require.[87] If he conducts himself with a careless indifference to means of information reasonably at hand or ignores highly suspicious circumstances which should warn him of danger or loss he cannot invoke the doctrine of estoppel.[88]

336, 339, 107 Mont. 348, citing **Corpus Juris**—O'Neill v. Wall, 62 P.2d 672, 103 Mont. 388.

N.J.—Trenton Banking Co. v. Howard, 187 A. 569, affirmed 187 A. 575, 121 N.J.Eq. 85.

Or.—American Bank v. Port Orford Cedar Products Co., 12 P.2d 1014, 1016, 140 Or. 138, quoting **Corpus Juris.**

Pa.—Gsell v. Helman, 164 A. 853, 108 Pa.Super. 258.

S.C.—Hubbard v. Beverly, 15 S.E.2d 740, 197 S.C. 476—American Surety Co. v. Hamrick Mills, 4 S.E.2d 308, 191 S.C. 362, 124 A.L.R. 1147.

Tex.—Washington v. City of Houston, Civ.App., 60 S.W.2d 519, 522, citing **Corpus Juris**—Holland v. Blanchard, Civ.App., 262 S.W. 97—Jones v. El Paso Bitulithic Co., Civ. App., 246 S.W. 749.

Wash.—Elmonte Inv. Co. v. Schafer Bros. Logging Co., 72 P.2d 311, 324, 192 Wash. 1, quoting **Corpus Juris.**

21 C.J. p 1129 note 59.

Knowledge

One cognizant of all the material facts can claim nothing by estoppel.

Ga.—Bank of Lenox v. Webb Naval Stores Co., 156 S.E. 30, 171 Ga. 464.

Mich.—Cudahy Bros. Co. v. West Michigan Dock & Market Corporation, 280 N.W. 93, 285 Mich. 18.

Tex.—Panhandle Refining Co. v. Bennett, Civ.App., 13 S.W.2d 923.

Va.—Springer v. Gaddy, 2 S.E.2d 355, 172 Va. 533.

Knowledge or notice

There can be no estoppel where party claiming estoppel had notice or knowledge of the facts.—Ingram v. Smith, 195 S.E. 882, 57 Ga.App. 438.

Knowledge of facts putting person on inquiry

(1) Estoppel by representation cannot be claimed by one acting thereon, if he knows, or is put on inquiry as to, falsity of representation.—W. E Richmond & Co. v. Security Nat. Bank, 64 S.W.2d 863, 16 Tenn. App. 414.

(2) Even in a state where a person is not held, as a matter of law, to have knowledge of all facts which a reasonable inquiry on his part would develop, yet where he has knowledge of facts that would put a reasonably prudent person on inquiry the jury may, from those facts alone, infer that he had knowledge of all facts which such an inquiry would have developed.—Stottlemyre v. Swearingen, Mo.App., 297 S.W. 1003.

Party knowing facts, or in position to know them, cannot claim benefit of estoppel.—Hull v. Commissioner of Internal Revenue, C.C.A., 87 F.2d 260.

Knowledge or negligence

Estoppel cannot be invoked by one who knew the facts or was negligent in not knowing them.—Froslee v. Sonju, Minn., 297 N.W. 1.

Ignorance or lack of knowledge

(1) A party pleading or claiming an estoppel must have been ignorant, or without knowledge, of the true state of facts.

U.S.—Sinclair Refining Co. v. Jenkins Petroleum Process Co., C.C.A. Me., 99 F.2d 9, certiorari denied Jenkins Petroleum Process Co. v. Sinclair Refining Co., 59 S.Ct. 362, 305 U.S. 659, 83 L.Ed. 427, rehearing denied 59 S.Ct. 484, 306 U. S. 667, 83 L.Ed. 1062, second rehearing denied 59 S.Ct. 1035, 307 U. S. 651, 83 L.Ed. 1530—Commissioner of Internal Revenue v. Union Pac. R. Co., C.C.A., 86 F.2d 637—U. S. v. S. F. Scott & Sons, C.C. A.Mass., 69 F.2d 728—Andrew Jergens Co. v. Woodbury, Inc., D.C. Del., 273 F. 952, affirmed, C.C.A., 279 F. 1016, certiorari denied 43 S.Ct. 92, 260 U.S. 728, 67 L.Ed. 484.

Cal.—Moss v. Underwriters' Report, 83 P.2d 503, 12 Cal.2d 266—In re Davis' Estate, 101 P.2d 761, 38 Cal.App.2d 579, rehearing denied 102 P.2d 545, 38 Cal.App.2d 579—Killian v. Conselho Supremo Da Uniao Portugueza Do Estado Da California, 88 P.2d 214, 31 Cal.App. 2d 497—Maggini v. West Coast Life Ins. Co., 29 P.2d 263, 136 Cal. App. 472—Toms v. Hellman, 1 P. 2d 31, 115 Cal.App. 74.

Idaho.—Page v. Savage, 246 P. 304, 42 Idaho 458.

Ind.—Menzenberger v. American State Bank, 198 N.E. 819, 101 Ind. App. 600—Franklin Bank of St. Louis, Mo., v. Boeckeler Lumber Co., 147 N.E. 722, 83 Ind.App. 94—Smith v. Yost, 125 N.E. 73, 72 Ind. App. 628.

Ky.—Fordson Coal Co. v. Garrard, 125 S.W.2d 977, 277 Ky. 218, 121 A.L.R. 841—Rice v. Rice, 50 S.W. 2d 26, 243 Ky. 837.

Minn.—Conner v. Caldwell, 294 N.W. 650—Wiedemann v. Brown, 250 N. W. 724, 190 Minn. 33.

Mo.—Charter Oak Inv. Co. v. Felker, 60 S.W.2d 655—Thomas v. Modern Woodmen of America, 260 S.W. 552, 218 Mo.App. 10.

Neb.—Wiltse v. Bolton, 272 N.W. 197, 132 Neb. 354.

Pa.—In re Eaby's Estate, 173 A. 174, 315 Pa. 161—Klerlein v. Fred Werner Co., 98 Pa.Super. 440.

Tex.—Hunt v. W. O. W. Life Ins. Soc., Civ.App., 153 S.W.2d 857.

Utah—Tripp v. Bagley, 276 P. 912, 74 Utah 57, 69 A.L.R. 1417.

(2) He must have been ignorant of true facts at time representation was made to him and at time he acted thereon.

Ala.—O'Neal v. Turner, 158 So. 801, 230 Ala. 24.

N.C.—North Carolina Self Help Corporation v. Brinkley, 2 S.E.2d 889, 215 N.C. 615.

(3) His ignorance of the truth of the matter must have been actual and permissible.—General Motors Acceptance Corporation v. Gandy, 253 P. 137, 200 Cal. 284.

87. Cal.—California Canning Peach Growers v. Downey, 243 P. 679, 685, 76 Cal.App. 1, quoting **Corpus Juris.**

Conn.—Second Nat. Bank v. Dyer, 9 A.2d 503, 126 Conn. 101—Myers v. Burke, 179 A. 88, 120 Conn. 69—Graham v. Southington Bank & Trust Co., 121 A. 812, 817, 99 Conn. 494, quoting **Corpus Juris.**

Ga.—Nowell v. Mayor and Council of Monroe, 171 S.E. 136, 141, 177 Ga. 648, quoting **Corpus Juris.**

Iowa.—Branch v. Freking, 258 N.W. 892, 895, 219 Iowa 556, quoting **Corpus Juris.**

Mo.—Biggs v. Modern Woodmen of America, 82 S.W.2d 898, 908, 336 Mo. 879, citing **Corpus Juris.**

Okl.—Rosser v. Texas Co., 48 P.2d 327, 173 Okl. 309.

Tenn.—W. E. Richmond & Co. v. Security Nat. Bank, 64 S.W.2d 863, 16 Tenn.App. 414.

Wash.—Elmonte Inv. Co. v. Schafer Bros. Logging Co., 72 P.2d 311, 325, 192 Wash. 1, quoting **Corpus Juris.**

W.Va.—Clark v. County Court of Raleigh County, 185 S.E. 855, 117 W. Va. 467.

21 C.J. p 1130 note 60.

88. Conn.—Second Nat. Bank v. Dyer, 9 A.2d 503, 126 Conn. 101—Graham v. Southington Bank & Trust Co., 121 A. 812, 817, 99 Conn. 494, quoting **Corpus Juris.**

Ga.—Nowell v. Mayor and Council of Monroe, 171 S.E. 136, 141, 177 Ga. 648, quoting **Corpus Juris.**

Iowa.—Branch v. Freking, 258 N.W. 892, 895, 219 Iowa 556, quoting **Corpus Juris.**

Mo.—Swinney v. Modern Woodmen of America, 95 S.W.2d 655, 658, 231 Mo.App. 83, citing **Corpus Juris.**

Okl.—Rosser v. Texas County, 48 P. 2d 327, 173 Okl. 327.

Tenn.—Fourth Nat. Bank of Nashville v. Nashville, C. & St. L. R. Co., 161 S.W. 1144, 128 Tenn. 530.

Knowledge implied from occupancy of land. A person in the actual occupancy of his land gives thereby all the information of his claim which is required, unless specially interrogated, and his mere failure to assert title under such circumstances cannot operate as an estoppel.[89]

Record of notice of title. A public record is an available means of information as to questions of title, and one who does not take advantage of it cannot claim an estoppel against one who merely fails to furnish such information.[90] It has been held that he will not be estopped by his silence, although he may know or be informed that others are negotiating for rights and interests in property bound by his title of record, as he is under no obligation to warn or apprise them of that which the record discloses,[91] but there is authority to the contrary.[92]

Active misrepresentation of facts. There are, however, cases in which the representation, by actively misleading the person setting up the estoppel and preventing him from having recourse to available means of information, has been held to excuse his failure to inform himself of the facts,[93] even in the case of constructive notice by matter of record.[94]

Duty to inform party against whom estoppel arises. No estoppel arises where the party setting it up is under as great obligation to inform the person sought to be estopped of the real facts as the latter is to inform himself.[95]

Equality of knowledge or notice with adverse party. In the absence of a fiduciary relationship between the parties,[96] there can be no equitable estoppel short of one arising from actual contract[97] where the truth is known to both parties or where they both have equal means of knowledge.[98] For obvious equitable reasons, the law of equitable es-

Wash.—Elmonte Inv. Co. v. Schafer Bros. Logging Co., 72 P.2d 311, 325, 192 Wash. 1, quoting **Corpus Juris.**

W.Va.—Clark v. County Court of Raleigh County, 185 S.E. 855, 117 W. Va. 467.

Negligence

One cannot avail himself of estoppel if his own negligence to avail himself of information within reach brought about situation complained of.—Haselden v. Schein, 166 S.E. 634, 167 S.C. 534.

89. Ark.—Jowers v. Phelps, 33 Ark. 465.
21 C.J. p 1130 note 62.

Where land is occupied by a tenant, his possession is that of the landlord, and is constructive notice to the world of the legal or equitable rights of the landlord under whom he holds, and to whom he pays rents, even though the record title stand in the name of another.—Payne v. Hutson, 264 Ill.App. 508.

90. Ill.—Perry Coal Co. v. Richmond, 4 N.E.2d 891, 287 Ill.App. 298, transferred, see 200 N.E. 329, 362 Ill. 487.
La.—Parker v. Ohio Oil Co., 186 So. 604, 191 La. 896—Robbins v. Martin, 138 So. 132, 135, 18 La.App. 223, quoting **Corpus Juris**—Brown v. Parish, 1 La.App. 246.
N.Y.—Smith v. Vara, 241 N.Y.S. 202, 136 Misc. 500.
N.C.—Ricks v. Futrell, 100 S.E. 330, 178 N.C. 154.
Wash.—Elmonte Inv. Co. v. Schafer Bros. Logging Co., 72 P.2d 311, 325, 192 Wash. 1, quoting **Corpus Juris.**
W.Va.—Clark v. County Court of Raleigh County, 185 S.E. 855, 856, 117 W.Va. 467, quoting **Corpus Juris.**
21 C.J. p 1130 note 63.

91. Wash.—Elmonte Inv. Co. v. Schafer Bros Logging Co., 72 P. 2d 311, 323, 325, 192 Wash. 1, quoting **Corpus Juris.**
W.Va.—Clark v. County Court of Raleigh County, 185 S.E. 855, 117 W. Va. 467.
21 C.J. p 1131 note 64.

92. N.J.—Sumner v. Seaton, 19 A. 884, 47 N.J.Eq. 103.
Wis.—Kingman v. Graham, 8 N.W. 181, 51 Wis. 232.
21 C.J. p 1131 note 65.

93. La.—Robbins v. Martin, 138 So. 132, 135, 18 La.App. 223, quoting **Corpus Juris.**
Md.—Machovec v. Shipley, 189 A. 223, 171 Md. 339.
21 C.J. p 1131 note 66.

Very representations relied on may have caused party to desist from inquiry and neglect his means of information, and it does not rest with him who made them to say that their falsity might have been ascertained, and it was wrong to credit them.
U.S.—Robinson v. Commissioner of Internal Revenue, C.C.A., 100 F.2d 847, certiorari denied 60 S.Ct. 81, 308 U.S. 567, 84 L.Ed. 476.
Ark.—Graham v. Thompson, 18 S.W. 58, 55 Ark. 296, 29 Am.S.R. 40.

94. Idaho.—Marshall-Wells Co. v. Kramlich, 267 P. 611, 46 Idaho 355.
Ind.—Duncan v. Kimbrel, 176 N.E. 25, 93 Ind.App. 454.
La.—Robbins v. Martin, 138 So. 132, 135, 18 La.App. 223, quoting **Corpus Juris.**
Me.—Stearns v. Thompson, 186 A. 800, 134 Me. 352, 107 A.L.R. 305.
Md.—Machovec v. Shipley, 189 A. 223, 226, 171 Md. 339, citing **Corpus Juris.**
21 C.J. p 1131 note 67.

95. Okl.—Rosser v. Texas Co., 48 P.2d 327, 173 Okl. 309.
Wash.—Elmonte Inv. Co. v. Schafer Bros. Logging Co., 72 P.2d 311, 325, 192 Wash. 1, quoting **Corpus Juris.**
21 C.J. p 1131 note 68.

96. U.S.—Commercial Inv. Trust v. Bay City Bank, C.C.A.Mich., 62 F. 2d 735.

97. N.D.—Loff v. Gibbert, 166 N.W. 810, 39 N.D. 181.
21 C.J. p 1131 note 70.

98. U.S.—Uhlmann Grain Co. v. Fidelity & Deposit Co. of Maryland, C.C.A.Ill., 116 F.2d 105—Hirning v. Federal Reserve Bank of Minneapolis Minn., C.C.A.Minn., 52 F.2d 382, 388, 82 A.L.R. 297, reversing, D.C., 42 F.2d 925, citing **Corpus Juris**—Guaranty Trust Co. of New York v. Minneapolis & St. L. R. Co., C.C.A.Minn., 36 F.2d 747, modifying, D.C., 33 F.2d 512, and certiorari denied 50 S.Ct. 407, 281 U.S. 756, 74 L.Ed. 1166—Murphy v. Paine, D.C.N.Y., 15 F.2d 570—Idaho Farms Co. v. North Side Canal Co., D.C.Idaho, 24 F.Supp. 189, reversed on other grounds, C.C.A., North Side Canal Co. v. Idaho Farms Co., 107 F.2d 481, rehearing denied 109 F.2d 354—Coos County v. Berlin Nat. Bank, D.C.N.H., 21 F.Supp. 523—U. S. v. Standard Oil Co. of California, D.C.Cal., 20 F. Supp. 427.
Cal.—California Canning Peach Growers v. Harkey, App., 69 P.2d 915, 920, citing **Corpus Juris,** and rehearing denied, App., 70 P.2d 651.
Colo.—Farmers' Life Ins. Co. v. Hetherington, 274 P. 926, 85 Colo. 255.
D.C.—Thompson v. Park Sav. Bank, 96 F.2d 544, 68 App.D.C. 272, certiorari denied 59 S.Ct. 82, 305 U.S.

toppel by conduct based on imputed knowledge is not accompanied by refinements in the nature of a last clear chance doctrine.[99]

§ 72. Acts Done or Omitted and Change of Position

a. By person against whom waiver or estoppel is claimed

b. By person claiming estoppel

a. By Person against Whom Waiver or Estoppel Is Claimed

Equitable estoppel requires a false representation or concealment of facts by words, acts, conduct, or silence or omission to act when there is a duty to speak or act. Waiver may be express or implied; it may arise from words, oral or written, or it may be implied from acts or conduct or a course thereof. Acts or other matters giving rise to either waiver or estoppel must be voluntary.

A waiver is a voluntary act[1] implying an election to forego, or dispense with, some right or advantage;[2] but the voluntary character of an act re-

606, 83 L.Ed. 385, and Cox v. Thompson, 59 S.Ct. 66, 305 U.S. 606, 83 L.Ed. 385.

Ga.—Bank of Lenox v. Webb Naval Stores Co., 156 S.E. 30, 171 Ga. 464—Cook v. Flanders, 138 S.E. 218, 164 Ga. 279—Ingram v. Smith, 195 S.E. 882, 57 Ga.App. 438.

Ill.—Perry Coal Co. v. Richmond, 4 N.E.2d 891, 893, 287 Ill.App. 298, citing **Corpus Juris,** and transferred, see 200 N.E. 329, 362 Ill. 487.

Ind.—Kentucky Central Life & Accident Ins. Co. v. White, 19 N.E.2d 872, 106 Ind.App. 530—International Harvester Co. of America v. Holley, 18 N.E.2d 484, 106 Ind.App. 329—Canen v. Uservo, Inc., 15 N.E. 2d 114, 105 Ind.App. 461—City Dairy Co. v. Uservo, Inc., 199 N.E. 457, 101 Ind.App. 375.

Iowa—Anthon State Bank v. Bernard, 201 N.W. 59, 198 Iowa 1345.

Ky.—Hensley v. Lewis, 128 S.W.2d 917, 278 Ky. 510, 123 A.L.R. 537—Dees' Adm'r v. Dees' Ex'r, 61 S.W.2d 301, 249 Ky. 650.

Mich.—Shean v. U. S. Fidelity & Guaranty Co., 248 N.W. 892, 263 Mich. 535.

Minn.—Froslee v. Sonju, 297 N.W. 1—Leighton v. Bancamerica-Blair Corporation, 255 N.W. 848, 192 Minn. 223—Makiesky v. National Guardian Life Ins. Co., 219 N.W. 864, 174 Minn. 554—Darelius v. Commonwealth Mortg. Co., 188 N.W. 208, 152 Minn. 128.

Mo.—Rhoads v. Rhoads, 119 S.W.2d 247, 342 Mo. 934—State ex rel. and to Use of Abeille Fire Ins. Co. v. Sevier, 73 S.W.2d 361, 335 Mo. 269, certiorari denied State of Missouri ex rel. and to Use of Abeille Fire Ins. Co. of Paris v. Sevier, 55 S. Ct. 99, 293 U.S. 585, 79 L.Ed. 680—Wilkinson v. Lieberman, 37 S.W. 2d 533, 327 Mo. 420—Laughlin v. Wells, 283 S.W. 990, 314 Mo. 474—Grafeman Dairy Co. v. Northwestern Bank, 235 S.W. 435, 290 Mo. 311—Taylor v. Farmers Bank of Chariton County, App., 135 S.W. 2d 1108—Roth v. Hoffman, App., 111 S.W.2d 988—Charter Oak Inv. Co. v. Felker, App., 60 S.W.2d 655—Wood v. White Eagle Oil & Refining Co., 274 S.W. 894, 900, 220 Mo.App. 1004, citing **Corpus Juris.**

N.Y.—Troy Union R. Co. v. City of Troy, 230 N.Y.S. 653, 132 Misc. 534, affirmed 238 N.Y.S. 577, 227 App. Div. 351, affirmed 171 N.E. 798, 253 N.Y. 597.

Okl.—Chicago, R. I. & P. Ry. Co. v. Sawyer, 56 P.2d 418, 176 Okl. 446—Rosser v. Texas Co., 48 P.2d 327, 173 Okl. 309.

Pa.—Culbertson v. Cook, 162 A. 803, 308 Pa. 557—Groner v. Keith, 21 Pa.Dist. & Co. 347, 24 North.Co. 246.

Tex.—Robertson v. Vernon, Civ.App., 3 S.W.2d 573, 575, affirmed, Com. App., 12 S.W.2d 991, citing **Corpus Juris.**

Va.—Blanford v. Trust Co. of Norfolk, 128 S.E. 640, 142 Va. 73.

Wash.—Elmonte Inv. Co. v. Schafer Bros. Logging Co., 72 P.2d 311, 325, 192 Wash. 1, quoting **Corpus Juris.**

W.Va.—Clark v. County Court of Raleigh County, 185 S.E. 855, 117 W.Va. 467.

Wyo.—Willis v. Willis, 49 P.2d 670, 48 Wyo. 403, rehearing denied 54 P.2d 814, 49 Wyo. 296.

21 C.J. p 1131 note 71.

Opportunity to know law

(1) An estoppel cannot arise out of a lack of knowledge of the law, since all have an opportunity to know the law, and are presumed to know it.—Iterman v. Baker, 15 N.E. 2d 365, 214 Ind. 308.

(2) Ignorance of the fact that final interpretation of the constitution belongs to the judicial department of the government is no basis for a right to claim estoppel.—Trustees of Phillips Exeter Academy v. Exeter, 11 A.2d 569, 90 N.H. 472.

Lack of equal means or opportunity

(1) An estoppel can arise only where party claiming it has acted to his injury without full knowledge of the facts and without an equal opportunity to know the facts.—Iterman v. Baker, 15 N.E.2d 365, 214 Ind. 308.

(2) Constructive notice of facts does not prevent a person from rightfully relying on a misleading statement of facts where he does not have equal means with the other party of knowing the truth or untruth of the statement made by the latter, as where the party asserting the estoppel is a public administrative official and his administration of the laws would be greatly delayed and burdened if he and his agents were required to search court records diligently.—Robinson v. Commissioner of Internal Revenue, C.C.A. 6, 100 F.2d 847, certiorari denied 60 S.Ct. 81, 308 U.S. 567, 84 L.Ed. 476.

99. Conn.—Graham v. Southington Bank & Trust Co., 121 A. 812, 99 Conn. 494.

1. Colo.—French v. Patriotic Ins. Co. of America, 111 P.2d 893.

Idaho.—Independent Gas & Oil Co. v. T. B. Smith Co., 10 P.2d 317, 51 Idaho 710.

Ky.—Western & Southern Life Ins. Co. v. Van Hoose's Adm'x, 142 S.W.2d 145, 283 Ky. 577.

Minn.—Hayfield Farmers Elevator & Mercantile Co. v. New Amsterdam Casualty Co., 282 N.W. 265, 203 Minn. 522.

Tex.—De Witt v. Kent County, Civ. App., 148 S.W.2d 213, error dismissed, judgment correct—Hodges v. Cole, Civ.App., 117 S.W.2d 822.

67 C.J. p 298 notes 96, 99–2.

Waiver requires voluntary relinquishment or surrender of right.—Masden v. Travelers' Ins. Co., C.C.A. Mo., 52 F.2d 75, 79 A.L.R. 469—67 C.J. p 298 note 98.

Waiver implies willingness to refrain from enforcing rights.—Maxwell v. Dirigo Mut. Fire Ins. Co., 104 A. 812, 117 Me. 431.

Facts held not to show duress

S.C.—Farmers' & Merchants' Bank v. People's First Nat. Bank, 159 S.E. 617, 161 S.C. 286.

2. Idaho.—Independent Gas & Oil Co. v. T. B. Smith Co., 10 P.2d 317, 51 Idaho 710.

Ky.—Western & Southern Life Ins. Co. v. Van Hoose's Adm'x, 142 S.W.2d 145, 283 Ky. 577.

Mich.—Couper v. Metropolitan Life Ins. Co., 230 N.W. 929, 250 Mich. 540.

N.Y.—In re Hayden's Estate, 16 N.Y.S.2d 126, 172 Misc. 669.

N.C.—In re Yelverton's Will, 153 S.E. 319, 198 N.C. 746—Aldridge v. Greensboro Fire Ins. Co., 140 S.E. 706, 194 N.C. 683.

Tex.—De Witt v. Kent County, Civ.

lied on to show a waiver does not depend on the reasons prompting the act.[3] So it has been held that the doctrine of estoppel applies only to voluntary representations, admissions and acts, and not to declarations exacted by statute.[4]

Equitable estoppel arises from the conduct of a party, including his spoken words, his positive acts, and his silence or omission to act when there is a duty to speak or act.[5] There must be a false representation or concealment of facts;[6] there must be some word spoken, act done, or failure to speak or act when there is a duty to do so;[7] and, in cases where silence or omission is not claimed to create an estoppel or would not be sufficient for that purpose under the circumstances, there must be affirmative or overt[8] acts, conduct, or declarations.[9] In the broadest phase of equitable estoppel, the person estopped must have done something he should not have done or failed to do something he should have done;[10] but an estoppel cannot be founded on an illegal or invalid act.[11] Under the general headings of express misrepresentations, see infra §§ 78–86, implied representations, see infra §§ 87–101, negligence, see infra §§ 102–106, and equitable or quasi estoppel, see infra §§ 107–129, there is given below a detailed consideration of estoppels arising, or claimed to arise, from various acts, statements, omissions, and conduct inconsistent with a right subsequently asserted.

A waiver may be express or implied.[12] It may be created by acts, conduct or words, oral or written;[13] but, while it may be implied from acts or conduct, or a course thereof,[14] warranting an in-

App., 148 S.W.2d 213, error dismissed, judgment correct.

3. S.C.—Farmers' & Merchants' Bank v. People's First Nat. Bank, 159 S.E. 617, 161 S.C. 286.

4. N.Y.—Almy v. Thurber, 65 How. Pr. 481, affirmed 2 N.E. 49, 99 N. Y. 407.
Okl.—Oklahoma City v. Wells, 91 P. 2d 1077, 1084, 185 Okl. 369, quoting **Corpus Juris.**
Conduct, to create estoppel, must be voluntary.—Muller v. Thomann, 145 A. 480, 104 N.J.Eq. 289.

5. U.S.—Mahoning Inv. Co. v. U. S., Ct.Cl., 3 F.Supp. 622, certiorari denied 54 S.Ct. 526, 291 U.S. 675, 78 L.Ed. 1064 and Rochester & Pittsburgh Coal & Iron Co. v. U. S., 54 S.Ct. 527, 291 U.S. 675, 78 L. Ed. 1064.
Ark.—Rone v. Sawrey, 123 S.W.2d 524, 197 Ark. 472.
Ind.—Johnson v. Western Indiana Mining Co., 140 N.E. 559, 81 Ind. App. 79.
Neb.—In re Lee's Estate, 290 N.W. 437, 137 Neb. 567.
Nev.—Noble Gold Mines Co. v. Olsen, 66 P.2d 1005, 57 Nev. 448.
N.D.—Bichler v. Ternes, 248 N.W. 185, 63 N.D. 295.
S.C.—Smith v. Williams, 139 S.E. 625, 141 S.C. 265, 54 A.L.R. 964.
Refusal to accept performance
If all payments and charges have been tendered by bailee under an agreement whereby he was entitled to conveyance after payment of certain rents and charges, and bailor fails or refuses to accept and formally convey, he will be estopped from asserting as a breach the bailee's refusal to perform what the bailor through his own fault has refused to accept performance of, since his own wrongdoing cannot inure to his own benefit.—White Co. v. Union Transfer Co., 113 A. 432, 270 Pa. 514.

6. U.S.—Current News Features v. Pulitzer Pub. Co., C.C.A.Mo., 81 F. 2d 288.
Ark.—Rone v. Sawrey, 123 S.W.2d 524, 197 Ark. 472.
Okl.—Lacy v. Wozencraft, 105 P.2d 781.
Absence of representation negatives estoppel.
Ill.—Silverthorne v. Chapman, 259 Ill.App. 289.
N.C.—Orchard Scenic Development Co. v. Bon Marche, 189 S.E. 781, 211 N.C. 272.
Express or implied representation is necessary.—Biossat v. Trainor, 225 Ill.App. 271.
Direct or indirect misrepresentation is essential.—Rispaud v. Rispaud, 287 P. 466, 209 Cal. 375.

7. Miss.—Canal-Commercial Trust & Savings Bank v. Brewer, 108 So. 424, 143 Miss. 146, 47 A.L.R. 45, motion dismissed 109 So. 8, 143 Miss. 184, and error dismissed 47 S.Ct. 96, 273 U.S. 638, 71 L.Ed. 816.

8. U.S.—Holbrook Irr. Dist. v. Arkansas Valley Sugar Beet & Irrigated Land Co., D.C.Colo., 42 F.2d 541—George W. Armbruster, Jr., Inc., v. City of Wildwood, D.C.N.J., 41 F.2d 823.
R.I.—Personal Finance Co. of Providence v. Henley-Kimball Co., 1 A.2d 121, 61 R.I. 402, 117 A.L.R. 1476.
Utah.—Mary Jane Stevens Co. v. First Nat. Bldg. Co., 57 P.2d 1099, 89 Utah 456.

9. Tenn.—Donaldson Bros. & Co. v. Thornburg, 265 S.W. 684, 150 Tenn. 464.
Misrepresentation by acts, words, or conduct is necessary.
U.S.—Ætna Life Ins. Co. v. Kepler, C.C.A.Neb., 116 F.2d 1.
Me.—Ouellette v. City of New York Ins. Co., 174 A. 462, 133 Me. 149.

10. U.S.—Brown-Crummer Inv. Co. v. Paulter, C.C.A.Okl., 70 F.2d 184.

11. Ky.—Edge v. City of Lexington, 127 S.W.2d 393, 277 Ky. 750.
Tenn.—Louisville & N. R. Co. v. Hardiman, 5 Tenn.App. 289.

12. U.S.—Universal Gas Co. v. Central Illinois Public Service Co., C.C.A.Ill., 102 F.2d 164—Kansas City Life Ins. Co. v. Davis, C.C.A.Cal., 95 F.2d 952—Dunkel Oil Corporation v. Independent Oil & Gas Co., C.C.A.Ill., 70 F.2d 967—Manufacturers Casualty Ins. Co. v. Roach, D.C.Md., 25 F.Supp. 852.
Ala.—Bellingrath v. Samuel, 122 So. 27, 219 Ala. 263.
Cal.—Johnson v. Kaeser, 239 P. 324, 196 Cal. 686.
Conn.—Hendsey v. Southern New England Telephone Co., 20 A.2d 722, 128 Conn. 132.
La.—Palmer v. Oscar Dowling Food Products, 142 So. 127, 174 La. 923.
Or.—Paine v. Meier & Frank Co., 27 P.2d 315, 146 Or. 40, rehearing denied 29 P.2d 531, 146 Or. 40.
Pa.—Dougherty v. Thomas, 169 A. 219, 313 Pa. 287.
S.C.—Welch v. New York Life Ins. Co., 189 S.E. 809, 183 S.C. 9.
Tex.—Miller v. Deahl, Civ.App., 239 S.W. 679, error refused.
Vt.—Dunbar v. Farnum, 196 A. 237, 109 Vt. 313, 114 A.L.R. 996.
Wash.—Reynolds v. Travelers' Ins. Co., 28 P.2d 310, 176 Wash. 36.
67 C.J. p 304 notes 71, 74, p 305 note 76.

13. U.S.—Dunkel Oil Corporation v. Independent Oil & Gas Co., C.C.A. Ill., 70 F.2d 967.
Cal.—In re Heim's Estate, 90 P.2d 100, 32 Cal.App.2d 438.
S.C.—Welch v. New York Life Ins. Co., 189 S.E. 809, 183 S.C. 9.
Tex.—Bankers Life & Loan Ass'n of Dallas v. Ashford, Civ.App., 139 S. W.2d 858.
67 C.J. p 304 notes 72, 73.

14. U.S.—Universal Gas Co. v. Central Illinois Public Service Co., C.

ference of relinquishment of a right,[15] a person does not waive his rights where he continues to demand them, or is led by promises of settlement or adjustment to continue his dealings with the other party, even though his acts are apparently inconsistent with the assertion of such rights.[16]

b. By Person Claiming Estoppel

One element of equitable estoppel is that the party asserting it shall have done or omitted some act or changed his position in reliance on the representations or conduct of the other party.

It is essential to an equitable estoppel that the person asserting the estoppel shall have done or omitted some act or changed his position in reliance upon the representations or conduct of the person sought to be estopped.[17] A change of position which will fulfill this element of estoppel must be actual,[18] substantial,[19] and justified.[20]

The bringing of suit, or the commencement of an action, is not a change of position within the meaning of the law of estoppel.[21] Also, in order that this element of an estoppel may be fulfilled by an

C.A.Ill., 102 F.2d 164—Dunkel Oil Corporation v. Independent Oil & Gas Co., C C.A.Ill., 70 F.2d 967.
Conn.—Hendsey v. Southern New England Telephone Co., 20 A.2d 722, 128 Conn. 132.
Fla.—Rader v. Prather, 130 So. 15, 100 Fla. 591.
Me.—Holton Trust Co. v. Lumbert, 5 A.2d 921, 136 Me. 184.
Tex.—Kennedy v. McMullen, Civ. App., 39 S.W.2d 168, error refused.
Wash.—Reynolds v. Travelers' Ins. Co., 28 P.2d 310, 176 Wash. 36.
67 C.J. p 305 notes 77–80.

15. Tex.—De Witt v. Kent County, Civ.App., 148 S.W.2d 213, error dismissed, judgment correct.

16. S.C.—Empire Buggy Co. v. Moss, 151 S.E. 788, 154 S.C. 424.

17. U.S.—Helvering v. Schine Chain Theatres, C.C.A., 121 F.2d 948—New York Life Ins. Co. v. Talley, C.C.A.Iowa, 72 F.2d 715—George W. Armbruster, Jr., Inc. v. City of Wildwood, D.C.N.J., 41 F.2d 823—Unterweser Reederei Aktiengesellschaft v. Potash Importing Corporation of America, C.C.A.Ga., 36 F.2d 869.
Ark.—Union Indemnity Co. v. Benton County Lumber Co., 18 S.W.2d 327, 179 Ark. 752.
Cal.—Lusitanian-American Development Co. v. Seaboard Dairy Credit Corporation, 34 P.2d 139, 142, 1 Cal.2d 121, quoting **Corpus Juris**—Fleishbein v. Western Auto Supply Agency, 65 P.2d 928, 19 Cal.App. 2d 424.
Ill.—Dodd v. Rotterman, 161 N.E. 756, 330 Ill. 362—Spadoni v. Frigo, 138 N.E. 226, 307 Ill. 32—De Proft v. Heydecker, 131 N.E. 114, 297 Ill. 541—Trustees of Schools of Township 36 North, Range 10 East of Third P. M., Will County, v. American Surety Co. of New York, 30 N.E.2d 513, 307 Ill.App. 398.
Iowa.—Fitch v. Stephenson, 252 N. W. 130, 217 Iowa 458.
Ky.—Capital Amusement Co. v. Board of Common Council of City of Frankfort, 276 S.W. 528, 210 Ky. 622.
La.—Wilkinson v. Macheca, 103 So 733, 158 La. 183.
Me.—Augusta Trust Co. v. Augusta, H. & G. R. Co., 187 A. 1, 134 Me. 314.
Mich.—Cudahy Bros. Co. v. West Michigan Dock & Market Corporation, 280 N.W. 93, 285 Mich. 18—Kennedy v. Lynch Timber Co., 198 N.W. 985, 227 Mich. 269.
Mo.—Waugh v. Williams, 119 S.W. 2d 223, 342 Mo. 903—Wilkinson v. Lieberman, 37 S.W.2d 533, 327 Mo. 420—Foster v. Modern Woodmen of America, App., 138 S.W.2d 18.
N.J.—Ginsberg v. Eastern Life Ins. Co. of New York, 178 A. 378, 118 N.J.Eq. 223, affirmed 184 A. 348, 120 N.J.Eq. 110.
N.M.—American Ry. Express Co. v. Gallup State Bank, 264 P. 947, 33 N.M. 251.
N.Y.—Byrne v. Barrett, 197 N.E. 217, 268 N.Y. 199, 100 A.L.R. 680, reversing 276 N.Y.S. 1, 242 App.Div. 583, and reargument denied 198 N. E. 528, 268 N.Y. 630—Wills v. Investors' Bankstocks Corporation, 178 N.E. 755, 257 N.Y. 451, 78 A.L. R. 1013, reversing 249 N.Y.S. 705, 232 App.Div. 197, and reargument denied 180 N.E. 340, 258 N.Y. 578—Wiedersum v. Atlantic Cement Products, 25 N.Y.S.2d 496, 261 App. Div. 305—People ex rel. Schick v. Marvin, 292 N.Y.S. 93, 249 App. Div. 293, remitted 2 N.E.2d 634, 271 N.Y. 219, reversing 283 N.Y.S. 203, 246 App.Div. 71, motion denied 8 N.E.2d 618, 274 N Y. 491, affirmed 11 N.E.2d 767, 275 N.Y. 587—Chalmers v. Weed, 25 N.Y.S.2d 195, 175 Misc. 740—In re Heubach's Will, 300 N.Y.S. 802, 165 Misc. 196—In re Feldhus' Will, 300 N.Y.S. 799, 165 Misc. 122, affirmed 6 N.Y.S.2d 508, 254 App.Div. 902, reargument denied 7 N.Y.S.2d 109, 255 App.Div. 780, affirmed In re Feldhus' Will, 20 N.E.2d 17, 280 N.Y. 568—Ridgway v. Cockburn, 296 N.Y.S. 936, 163 Misc. 511—Oswego Falls Corporation v. City of Fulton, 265 N.Y. S. 436, 148 Misc. 170, affirmed 268 N.Y.S. 978, 241 App.Div. 560.
N.C.—Central Bank & Trust Co. v. Wyatt, 131 S.E. 311, 191 N.C. 133.
Okl.—Hawkins v. Mattes, 41 P.2d 880, 171 Okl. 186.
Or.—State v. Claypool, 28 P.2d 882, 145 Or. 615—Security Savings & Trust Co. v. Portland Flour Mills Co., 261 P. 432, 437, 124 Or. 276, citing **Corpus Juris.**
S.D.—Iowa Guarantee Mortg. Corporation v. General Motors Acceptance Corporation, 250 N.W. 669, 62 S.D. 18.
Tex.—Holland v. Blanchard, Civ.App., 262 S.W. 97.
Wash.—Elmonte Inv. Co. v. Schafer Bros. Logging Co., 72 P.2d 311, 325, 192 Wash. 1, quoting **Corpus Juris.**
Wis.—Williams v. Jensen, 231 N.W. 276, 202 Wis. 19.
Wyo.—Willis v. Willis, 49 P.2d 670, 48 Wyo. 403, rehearing denied 54 P.2d 814, 49 Wyo. 296.
21 C.J. p 1133 note 76.

Sufficiency of nonaction

(1) It is not necessary that affirmative action be taken in reliance on representations made, but nonaction in reliance thereon resulting in injury is sufficient.—Hetchler v. American Life Ins. Co., 254 N.W. 221, 266 Mich. 608.

(2) It is sufficient if the party has been induced to refrain from using such means or taking such action as lay in his power by which he might have protected his rights or retrieved his position and saved himself from loss.
Cal.—Laraway v. First Nat. Bank of La Verne, 104 P.2d 95, 39 Cal.App. 2d 718.
N.D.—Northwestern Mut. Savings & Loan Ass'n v. Kessler, 268 N.W. 692, 66 N.D. 737.
Changing position for worse see infra § 74.

18. Mo.—State ex inf. McKittrick ex rel. City of California v. Missouri Utilities Co., 96 S.W.2d 607, 339 Mo. 385, 106 A.L.R. 1169.

19. Ky.—Embry v. Long, 75 S.W.2d 1036, 256 Ky. 266.

20. Cal.—Imes v. MacDonald, 298 P. 173, 113 Cal.App. 427.

21. Mont.—Stanton Trust & Savings Bank v. Johnson, 85 P.2d 336, 338, 107 Mont. 348, quoting **Corpus Juris.**
21 C.J. p 1135 note 77.

act, a party must do something which he would not do except for the conduct or representation of the other party.[22] The doctrine of estoppel has no application in cases where the representations or conduct which are claimed to give rise to it tend only to induce the party to do some act which he is already legally bound to do.[23]

§ 73. Benefit to Person against Whom Estoppel Asserted

A benefit to the person sought to be estopped is not essential to an estoppel where there is injury or detriment to the other party; but there is no estoppel where there is neither injury to one party nor advantage to the other.

It has been said in some decisions that the doctrine of estoppel does not obtain unless there is injury to one party or advantage to the other, resulting from the acts or declarations of the person to be estopped.[24] It is not necessary that a special benefit should be shown to have accrued to the party sought to be estopped;[25] it is sufficient to raise the estoppel if the other party has been induced to take upon himself burdens which he would not otherwise have taken;[26] and, a fortiori, a party is estopped whenever he has gained an undue advantage and has caused his adversary a loss or injury.[27] The creation of an estoppel by the acceptance of benefits is considered at length infra §§ 109–112. Whether a consideration is necessary to support a waiver or estoppel is treated supra § 67 c.

§ 74. Prejudice to Person Setting Up Estoppel

Injury, prejudice, or detriment to the party claiming it is essential to an estoppel, but not to a waiver, except where the waiver must necessarily rest on an estoppel.

In order to create an estoppel in pais the party pleading it must have been misled to his injury,[28]

22. Ariz.—Maricopa Laundry Co. v. Levandoski, 9 P.2d 1014, 40 Ariz. 91.
Cal.—Rice v. McCarthy, 239 P. 56, 73 Cal.App. 655.
Conn.—Boucher v. Godfrey, 178 A. 655, 119 Conn. 622.
Ill.—American Type Founders Co. v. Metropolitan Credit & Discount Corporation, 271 Ill.App. 380.
La.—Aronson v. Pailet, App., 173 So. 545—Jones v. Alford, App., 172 So. 213.
Mass.—Tourles v. Grogan, 29 N.E.2d 691—Cleaveland v. Malden Sav. Bank, 197 N.E. 14, 291 Mass. 295—Looney v. Trimount Theatres, 184 N.E. 683, 282 Mass. 275—Augello v. Hanover Trust Co, 148 N.E. 138, 253 Mass. 160—Rockport Granite Co. v. Plum Island Beach Co., 142 N.E. 834, 248 Mass. 290—Nelson v. Wentworth, 137 N.E. 646, 243 Mass. 377.
S.D.—Farmers' Shipping Ass'n of Sinai v. Nordgren, 227 N.W. 576, 56 S.D. 152, followed in Farmers' Shipping Ass'n of Sinai v. Nordgren, 227 N.W. 578, 56 S.D. 156.
Tenn.—Morristown Furniture Co. v. People's Nat. Fire Ins. Co., 259 S.W. 539, 149 Tenn. 214.

23. N.Y.—Organ v. Stewart, 60 N.Y. 413
21 C.J. p 1135 note 78.

24. U.S.—Grodsky v. Sipe, D.C.Ill., 30 F.Supp. 656, 662, citing **Corpus Juris.**
Ala.—McFry v. Stewart, 121 So. 517, 219 Ala. 216.
Idaho.—United States Building & Loan Ass'n v. France, 70 P.2d 374, 376, 58 Idaho 95, citing **Corpus Juris.**
La.—Tyler v. Walt, 167 So. 182, 184 La. 659.
Mo.—Park Transp. Co. v. Missouri State Highway Commission, 60 S.W.2d 388, 332 Mo. 592.
N.J.—Briscoe v O'Connor, 179 A. 253, 257, 18 N.J.Eq. 322, citing **Corpus Juris,** and reversed on other grounds 182 A. 855, 119 N.J.Eq. 378—Briscoe v. O'Connor, 170 A. 884, 886, 115 N.J.Eq. 360, citing **Corpus Juris.**
21 C.J. p 1135 note 80.

25. Okl.—Lacy v. Wozencraft, 105 P. 2d 781.

26. Tex.—McLemore v. Bickerstaff, Civ.App., 179 S.W. 536.
21 C.J. p 1135 note 82.

27. Tex.—Johnson v. Byler, 38 Tex. 606—Goodrich v. First Nat. Bank, Civ.App., 70 S.W.2d 609, error refused—Glaser v. Henderson, Civ. App., 2 S.W.2d 987.

28. U.S.—In re Euclid Doan Co., C.C.A.Ohio, 104 F.2d 712, certiorari denied National City Bank of Cleveland v. Euclid-Doan Co., 60 S.Ct. 291, 308 U.S. 619, 84 L.Ed. 517—Foshay Trust & Savings Bank v. Public Utilities Consol. Corporation, C.C.A.Minn., 64 F.2d 665, certiorari denied 54 S.Ct. 69, 290 U.S 653, 78 L.Ed. 566—New York Life Ins. Co. v. Silverstein, C.C.A.Mo., 53 F.2d 986—U. S. v. Interstate R. Co., D.C.Va., 14 F.2d 328—Coos County v. Berlin Nat. Bank, D.C.N.H., 21 F.Supp. 523.
Ala.—Dowling v. Sollie & Sollie, 176 So. 340, 343, 234 Ala. 630, citing **Corpus Juris**—Brown v. Alabama Great Southern Ry. Co., 121 So. 91, 219 Ala. 87.
Ark.—Union Indemnity Co. v. Benton County Lumber Co., 18 S.W 2d 327, 179 Ark. 752.
Cal.—Moss v. Underwriters' Report, 83 P.2d 503, 12 Cal.2d 266—In re Bloom's Estate, 2 P.2d 753, 213 Cal. 575—Killian v. Conselho Supremo Da Uniao Portugueza Do Estado Da California, 88 P.2d 214, 31 Cal. App.2d 497—In re Hurley's Estate, 83 P.2d 61, 28 Cal.App.2d 584—Moriarty v. California Western States Life Ins. Co, App., 69 P.2d 434, 438, citing **Corpus Juris**—Maggini v. West Coast Life Ins. Co., 29 P. 2d 263, 136 Cal App. 472—Lathrop v. Title Insurance & Trust Co., 238 P. 748, 73 Cal.App 147.
Colo.—Commercial Inv. Co. v. Newhagen, 266 P. 713, 83 Colo. 533—Davis v. Fruita Mercantile Co., 220 P. 983, 74 Colo. 247.
Ga.—W. T. Rawleigh Co. v. Burkhalter, 1 S.E.2d 609, 59 Ga.App. 514—Gulf Refining Co. v. Harris, 117 S.E. 274, 30 Ga.App. 240, affirmed 121 S.E. 242, 157 Ga. 411.
Kan.—Challis v. Hartloff, 18 P.2d 199, 203, 136 Kan. 823, quoting **Corpus Juris**—Jacquart v. Jennings, 235 P. 101, 118 Kan. 224.
La.—Succession of Butterworth, 196 So. 39, 195 La. 115—Louisiana Oil Refining Corporation v. Williams, 127 So. 606, 170 La. 218—Brownfield v. Southern Amusement Co., App., 198 So. 670, 676, citing **Corpus Juris.**
Me.—Inhabitants of Town of Milo v. Milo Water Co., 163 A. 163, 131 Me. 372.
Mass.—Childs, Jeffries & Co. v. Bright, 186 N.E. 571, 283 Mass. 283—Di Lorenzo v. Atlantic Nat. Bank of Boston, 180 N.E. 148, 278 Mass. 321.
Minn.—Riethmuller v. Burton, 222 N. W. 929, 176 Minn. 227.
Mo.—Foster v. Modern Woodmen of America, App., 138 S.W.2d 18—Hamilton v. Northeast Mut. Ins. Ass'n, App., 116 S.W.2d 159—National Match Co. v. Empire Storage & Ice Co., App., 58 S.W.2d 797,

or the party pleading it must have been misled to his hurt[29] or prejudice,[30] or the party pleading it,

799, quoting **Corpus Juris**—Kirk v Metropolitan Life Ins. Co., 38 S W.2d 519, 522, 225 Mo.App. 756, citing **Corpus Juris.**

Neb.—State ex rel. Truax v. Burrows, 287 N.W. 178, 136 Neb. 691—Shelby v. Platte Valley Public Power & Irrigation Dist., 278 N.W. 568, 134 Neb. 354—Haschenberger v. Dennis, 225 N.W. 25, 26, 118 Neb. 411, 63 A L R. 493, quoting **Corpus Juris**—Rea v. Pierson, 206 N.W. 760, 114 Neb. 173.

Nev.—Beck v. Curti, 45 P.2d 601, 56 Nev. 72.

N Y.—In re Meyer's Will, 24 N.Y S 2d 184—In re Cooke's Estate, 264 N. Y S. 336, 147 Misc. 528.

Okl.—Oklahoma City v. Pratt, 95 P 2d 596, 185 Okl. 637—Frost v. Davis, 79 P.2d 600, 182 Okl. 593—Downing v. Young Men's Christian Ass'n of University of Oklahoma, 61 P.2d 859, 178 Okl. 292—Fipps v. Stidham, 50 P.2d 680, 174 Okl 473—In re Drumright State Bank, 40 P.2d 1059, 170 Okl. 480—Coats v. Riley, 7 P.2d 644, 154 Okl. 291—Guy Harris Buick Co. v. Bryant, 233 P. 752, 108 Okl. 117—Hughes v. Sparks, 224 P. 957, 958, 98 Okl. 208, quoting **Corpus Juris**—Fay State Bank v. Boster, 224 P. 513, 98 Okl. 151—Producers' Supply Co. v. Render, 218 P. 304, 95 Okl. 212—Tidal Oil Co. v. Flanagan, 209 P. 729, 87 Okl. 231, error dismissed 44 S.Ct. 197, 263 U.S. 444, 68 L.Ed. 382.

Or.—American Bank v. Port Orford Cedar Products Co., 12 P.2d 1014, 1016, 140 Or. 138, citing **Corpus Juris.**

Pa.—Rigby v. Great Atlantic & Pacific Tea Co., 13 A.2d 89, 139 Pa. Super. 543.

S.C.—Haselden v. Schein, 166 S.E. 634, 167 S.C. 534—Grady v. City of Greenville, 123 S.E. 494, 129 S. C. 89.

Tenn.—Rogers v. Colville, 238 S.W. 80, 83, 145 Tenn. 650, quoting **Corpus Juris**—Colonial Milling Co. v. Holt Bros., 3 Tenn.App. 617.

Tex.—Fitch v. Lomax, Com.App., 16 S.W.2d 530, 66 A.L.R. 758 modifying, Civ.App., 297 S.W. 555—Benskin v. Barksdale, Com.App., 246 S.W. 360, reversing Barksdale v. Benskin, Civ.App., 194 S.W. 402—Bell v. Moody, Civ.App., 147 S.W 2d 852—Genzer v. Fillip, Civ.App., 134 S.W.2d 730, error dismissed, judgment correct—Alexander Co. v. First Nat. Bank, Civ.App., 119 S.W.2d 718, error dismissed—Superior Brewing Co. v. Curtis, Civ. App., 116 S.W.2d 853—Phelps v. Thurber Brick Co., Civ.App., 62 S. W.2d 596—Peoria Life Ins. Co. v. Poynor, Civ.App., 297 S.W. 788, 790, citing **Corpus Juris**—State v. Davisson, Civ.App., 280 S.W. 292, 294, citing **Corpus Juris**—Liverpool & London & Globe Ins. Co., Limited of London, England, v. Baggett, Civ.App., 275 S.W. 313, error denied Baggett v. Liverpool & London & Globe Ins. Co., Limited, of London, England, 277 S.W. 75, 115 Tex. 144.

Va.—American Nat. Bank of Portsmouth v. Ames, 194 S E. 784, 169 Va. 711, certiorari denied 58 S.Ct. 1046, 304 U.S. 577, 82 L.Ed. 1540—Cannon v. Cannon, 163 S E. 405, 158 Va. 12.

Wash.—Inland Finance Co. v. Inland Motor Car Co., 216 P. 14, 125 Wash. 301—Raynor v. Scandinavian-American Bank, 210 P. 499, 122 Wash. 150, 25 A.L.R. 716.

21 C.J. p 1135 note 83.

Estoppel is based on injury resulting from parties' conduct or declarations.

U S.—In re Bastanchury Corporation, C.C.A.Cal., 66 F.2d 653, certiorari denied Turner v. John Deere Plow Co. of Moline, 54 S.Ct. 228, 290 U.S. 700, 78 L.Ed. 602.

Ala.—Emerson-Brantingham Implement Co. v. Arrington, 112 So. 428, 216 Ala. 21.

Neb.—Furstenberg v. Omaha & Council Bluffs St Ry. Co., 272 N W. 756, 132 Neb. 562.

Equitable estoppel does not arise in absence of injury.

U.S.—Sunshine Mining Co. v. Treinies, D C.Idaho, 19 F Supp. 587, affirmed, C C.A., Treinies v. Sunshine Mining Co., 99 F.2d 651, certiorari granted 59 S.Ct. 489, 306 U.S. 624, 83 L.Ed. 1029, affirmed 60 S.Ct. 44, 308 U.S 66, 84 L.Ed. 85, rehearing denied 60 S.Ct. 464, 309 U.S. 693, 84 L.Ed. 1034.

Iowa.—Means v. City of Boone, 241 N.W. 671, 214 Iowa 948—McKeon v. City of Council Bluffs, 221 N.W. 351, 206 Iowa 556, 62 A.L.R. 1006

Mo.—Fisher v. Ely & Walker Dry Goods Co., App., 46 S.W.2d 902.

Injury if estoppel not declared

(1) The party claiming the estoppel must have been misled into such action, or induced to alter his position in such a way, that he will suffer injury if the estoppel is not declared, or the truth is shown, or the other party is permitted to assert the existence of a state of facts at variance with those represented.

U.S.—Campbell v. Fetty, C.C.A.Ga., 271 F. 671.

Ariz.—Bohn v. Hill, 260 P. 1096, 32 Ariz. 545.

Del.—City Loan System of Delaware v. Nordquist, 165 A. 341, 5 W.W. Harr. 371.

Ill.—Adam v. Columbian Nat. Life Ins. Co., 218 Ill.App. 54.

Minn.—Exsted v. Exsted, 279 N.W. 554, 202 Minn. 521, 117 A.L.R. 554.

Miss.—Mississippi State Highway Commission v. West, 179 So. 279, 181 Miss. 206—Garmon v. Fitzgerald, 151 So. 726, 168 Miss. 532—Day v. McCandless, 142 So. 486, 167 Miss. 832—Davis v. Butler, 91 So. 279, 128 Miss. 847, suggestion of error overruled 91 So. 709, 128 Miss. 847.

Mo.—State ex rel. Ben Hur Life Ass'n v. Shain, 119 S.W.2d 236, 342 Mo. 928, quashing certiorari Helm v. Ben Hur Life Ass'n, 107 S.W.2d 844, 233 Mo.App. 138—Missouri Cattle Loan Co. v. Great Southern Life Ins. Co., 52 S W.2d 1, 330 Mo. 988—State ex rel. Moss v. Hamilton, 260 S.W. 466, 303 Mo. 302—City of Hardin v. Cunningham, 226 S.W 872, 285 Mo. 457—Matthews v. Van Cleve, 221 S.W. 34, 282 Mo. 19—Ehlers v. Potter, 219 S.W. 915—State, to Use of Nee, v. Tippin, 268 S W. 665, 217 Mo. App. 480.

Mont.—Scott v. Prescott, 223 P. 490, 69 Mont. 540.

Okl.—Oklahoma Aid Ass'n v. Pecinosky, 30 P.2d 167, 167 Okl. 427.

S.C.—Lower Main Street Bank v. Parker, 1 S.E 2d 181, 189 S.C. 320—Ott v. Ott, 188 S E. 789, 182 S.C. 135.

Tenn.—Southern Coal & Iron Co. v. Schwoon, 239 S.W. 398, 145 Tenn. 191—Rogers v. Colville, 238 S.W. 80, 145 Tenn. 650—Radford v. Littleton, 9 Tenn.App. 361.

Wash.—Debentures, Inc., v. Zech, 73 P.2d 1314, 192 Wash 339.

Wyo.—Willis v. Willis, 49 P.2d 670, 48 Wyo. 403, rehearing denied 54 P.2d 814, 49 Wyo. 296.

(2) He must have been misled into a position from which he cannot withdraw or recede, or he must have been induced to adopt a course which he cannot change, without injury or hardship.

N.Y.—Niagara Falls International Bridge Co. v. Grand Trunk Ry. Co. of Canada, 209 N.Y.S. 79, 212 App. Div. 705.

Or.—Witham v. Witham, 66 P.2d 281, 156 Or. 59, 110 A.L R. 253.

29. Mo.—Losee v. Crawford, 5 S.W. 2d 105, 222 Mo.App. 683.

30. U.S.—Ætna Life Ins. Co. v. Kepler, C.C.A.Neb., 116 F.2d 1—City of Del Rio v. Ulen Contracting Corporation, C.C.A.Tex., 94 F.2d 701, 704, citing **Corpus Juris**—Motter v. Patterson, C C.A.Kan., 68 F.2d 252, affirming, D.C., Patterson v. Motter, 55 F.2d 692—In re Super Trading Co., C.C.A.N.Y., 32 F.2d 480—Fisher v. Clark, C.C.A.N.Y., 22 F.2d 295.

Ark.—Norton v. Maryland Casualty Co., 32 S.W.2d 172, 180 Ark. 609.

Cal.—Williams v. General Ins. Co. of America, 63 P.2d 289, 8 Cal.2d 1—

according to the decisions of the courts, must have been misled to his detriment,[31] or disadvan-

Cohen v. Metropolitan Life Ins. Co., 89 P.2d 732, 32 Cal.App.2d 337—Security-First Nat. Bank of Los Angeles v. Clark, 48 P.2d 167, 8 Cal.App.2d 709—McLaughlin v. Goucher, 28 P.2d 31, 136 Cal.App. 87—Booth v. Los Angeles County, 12 P.2d 72, 124 Cal.App. 259—Conner v. Union Automobile Ins. Co., 9 P.2d 863. 122 Cal.App. 105—Peterson v. Wagner, 198 P. 25, 52 Cal. App. 1.

Conn.—Basak v. Damutz, 135 A. 453, 105 Conn. 378.

Iowa.—Union Properties v. Grant, 294 N.W. 312, 229 Iowa 303—Means v. City of Boone, 241 N.W. 671, 214 Iowa 948—Macheak v. Adamsen, 239 N.W. 574, 575, 214 Iowa 446, citing **Corpus Juris**—Citizens' State Bank of Earlham v. Martens, 215 N.W. 754, 204 Iowa 1378—City Bank of Mitchellville v. Alcorn, 176 N.W. 628, 188 Iowa 592.

Kan.—Johnson v. People's Nat. Bank of Kansas City, 286 P. 214, 130 Kan. 379—Union Building Loan & Savings Ass'n v. Bright, 253 P. 404, 122 Kan. 613—Jacquart v. Jennings, 235 P. 101, 118 Kan. 224.

Ky.—Kinnett v. Abrell, 121 S.W.2d 699, 275 Ky. 276—Dalton v. Shelton, 101 S.W.2d 208, 267 Ky. 40—Rounds v. Owensboro Ferry Co., 69 S.W.2d 350, 253 Ky. 301—Dees' Adm'r v. Dees' Ex'r, 61 S.W.2d 301, 249 Ky. 650—Owens v. National Life & Accident Ins. Co., 29 S.W.2d 557, 234 Ky. 788—Farmers' Nat. Bank of Somerset v. Dodson, 28 S.W.2d 777, 234 Ky. 518.

La.—In re Clover Ridge Planting & Mfg. Co., 151 So. 212, 178 La. 302—Rogers v. Estate of Peter Jung, App., 176 So. 886—Sheeren v. Gulf Ins. Co. of Dallas, Tex., App., 174 So. 380—McWilliams v. Geddes & Moss Undertaking & Embalming Co., App., 164 So. 144—First Nat. Bank v. Guynes, 123 So. 461, 11 La.App. 323.

Me.—Hooper v. Bail, 179 A. 404, 133 Me. 412.

Md.—Home Credit Co. v. Fouch, 142 A. 515. 155 Md. 384.

Mass.—Sheehan v. Commercial Travelers' Mut. Accident Ass'n, 186 N.E. 627, 283 Mass. 543, 88 A.L.R. 975.

Mich.—Cudahy Bros. Co. v. West Michigan Dock & Market Corporation, 280 N.W. 93, 285 Mich. 18—Dobranski v. Lincoln Mut. Casualty Co., 265 N.W. 507, 275 Mich. 1—Atherton v. Michigan Guaranty Corporation, 211 N.W. 83, 237 Mich. 133, 54 A.L.R. 351—Kennedy v. Lynch Timber Co, 198 N.W. 985, 227 Mich. 269.

Miss.—Bridge Creek Drainage Dist. v. Webster, 150 So. 915, 168 Miss. 115.

Mo.—Grafeman Dairy Co. v. Northwestern Bank, 288 S.W. 359, 315 Mo. 849—Fulton v. Kansas City Life Ins. Co., App., 148 S.W.2d 581—First Nat. Bank v. Witherspoon Livestock Commission Co., 90 S.W.2d 453, 230 Mo.App. 285.

Mont.—O'Neill v. Wall, 62 P.2d 672, 103 Mont. 388—In re McGovern's Estate, 250 P. 812, 77 Mont. 182—Hoppin v. Lang, 241 P. 636, 74 Mont. 553.

Nev.—Wilson v. Randolph, 261 P. 654, 50 Nev. 371, rehearing denied 264 P. 697, 50 Nev. 440.

N.Y.—Smith v. Maine, 260 N.Y.S. 425, 145 Misc. 521—Smith v. Vara, 241 N.Y.S. 202, 136 Misc. 500.

N.C.—Wilmington Furniture Co. v. Cole, 178 S.E. 579, 207 N.C. 840, 847.

Okl.—Herrington v Hackler, 74 P.2d 388, 181 Okl. 396—Rosen v. Martin, 226 P. 577, 102 Okl. 65.

Or.—American Bank v. Port Orford Cedar Products Co., 12 P.2d 1014, 140 Or. 138—Second Northwestern Finance Corporation v. Mansfield, 252 P. 400, 121 Or. 236, rehearing denied 254 P. 1022, 121 Or. 236.

Pa.—Fedas v. Insurance Co. of State of Pennsylvania, 151 A. 285, 300 Pa. 555—Giesey v. Cogan, 179 A. 865, 118 Pa.Super. 464—Munce v. Eckard, 87 Pa.Super. 383.

S.C.—American Surety Co. v. Hamrick Mills, 4 S.E.2d 308, 191 S.C. 362, 124 A.L.R. 1147.

S.D.—Iowa Guarantee Mortg. Corporation v. General Motors Acceptance Corporation, 250 N.W. 669, 62 S.D. 18.

Tenn.—State v. Abernathy, 17 S.W.2d 17, 159 Tenn. 175—Boone v. Citizens' Bank & Trust Co., 290 S.W. 39, 154 Tenn. 241, 50 A.L.R. 1369—Dunlap v. P'Pool, 6 Tenn.App. 91—Naive-Spillers Corporation v. Postal Tel. Cable Co., 4 Tenn.App. 435—Wallace v. P'Pool, 4 Tenn. App. 30.

Tex.—Stark v. Hardy, Com.App., 29 S.W.2d 967, setting aside, Civ.App., 19 S.W.2d 394—Kelsay Lumber Co. v. Crowell, Civ.App., 19 S.W.2d 368, error dismissed—Keystone Pipe & Supply Co. v. Milner, Civ.App., 6 S.W.2d 771—Robertson v. Vernon, Civ.App., 3 S.W.2d 573, affirmed, Com.App., 12 S.W.2d 991—Parr v. Gardner, Civ.App., 293 S.W. 859—Texas & Pacific Coal & Oil Co. v. Kirtley, Civ.App., 288 S.W. 619.

Vt.—West River Power Co. v. Bussino, 11 A.2d 263—Weinberg v. Norton, 178 A. 913, 107 Vt. 279—Vinton v. Atlas Assur. Co, 178 A. 909, 107 Vt. 272.

Va.—Cannon v. Cannon, 163 S.E. 405, 158 Va. 12—Parker v. Murphy, 146 S.E. 254, 152 Va. 173.

Wash.—Edwards v. Surety Finance Co. of Seattle, 30 P.2d 225, 176 Wash. 534—McFadden v. Allen-Nelson Mill Co., 272 P. 714, 150 Wash. 249—Raynor v. Scandinavian-American Bank, 210 P. 499, 122 Wash. 150, 25 A.L.R. 716—McPhee v. Tennant & Miles, 215 P. 16, 124 Wash. 617.

W.Va.—Bank of Sutton v. Skidmore, 167 S.E. 144, 113 W.Va. 25—Toro v. Shilling, 152 S.E. 6, 108 W.Va. 612.

Wis.—Caveney v. Caveney, 291 N.W. 818, 234 Wis. 637.

Prejudice is basis of estoppel

Conn.—Halloran v. Fischer, 9 A.2d 290, 126 Conn. 44—Alderman v. Town of West Haven, 200 A. 330, 124 Conn. 391—National Transp Co. v. Toquet, 196 A. 344, 123 Conn. 468.

Prejudice if representation repudiated

An estoppel arises only where a party is led, by the acts or statements of another, into action or a course of conduct which will be prejudicial to him if the other party is permitted to repudiate his acts or deny the truth of his statements.

U.S.—U. S., to Use of Noland Co., v. Maryland Casualty Co., D.C.Md., 38 F.Supp. 479.

Cal.—Seid Pak Sing v. Barker, 10 P.2d 92, 122 Cal.App. 93.

Ky.—Illinois Cent. R. Co. v. Ward. 35 S.W.2d 863, 237 Ky. 478.

N.J.—Tumen v. Monmouth County, 199 A. 78, 16 N.J.Misc. 294.

N.Y.—Eppenbach v. Eppenbach, 215 N.Y.S. 785, 217 App.Div. 26.

31. U.S.—Helvering v. Schine Chain Theatres, C.C.A., 121 F.2d 948—Schloss Bros. & Co. v. Charles Stern Co., C.C.A.Ga., 36 F.2d 628—U. S. Shipping Board Emergency Fleet Corporation v. Galveston Dry Dock & Construction Co., C.C.A.Tex., 13 F.2d 607, certiorari denied Galveston Dry Dock & Construction Co. v. U. S. Shipping Board Emergency Fleet Corporation, 47 S.Ct. 237, 273 U.S. 725, 71 L.Ed. 860—In re Trustees System Co. of Louisville, D.C.Ky., 30 F.Supp. 361—Mahoning Inv. Co. v. U. S., Ct.Cl., 3 F.Supp. 622, certiorari denied 54 S.Ct. 526, 291 U.S. 675, 78 L.Ed. 1064 and Rochester & Pittsburgh Coal & Iron Co. v. U. S., 54 S.Ct. 527, 291 U.S. 675, 78 L.Ed. 1064—Nowata County Gas Co. v. Henry Oil Co., C.C.A.Okl., 269 F. 742.

Ala.—First Nat. Bank v. Burch, 188 So. 859, 237 Ala. 680—Russell v. Soper, 167 So. 261, 232 Ala. 194.

Ark.—Bell v. Koontz, 290 S.W. 597, 172 Ark. 870.

Cal.—Burns v. McCain, 290 P. 623, 107 Cal.App. 291.

Colo.—Thomas v. First Nat. Bank, 51 P.2d 589, 97 Colo. 474.

tage,[32] by the conduct or representations of another on which he relied and by which he was influenced and induced to act, or to refrain from acting, or to change his position; that is, he must have suffered a loss of a substantial character or have been induced to alter his position for the worse in some material respect.[33] As otherwise expressed, the person claiming the estoppel must be adversely affected by the acts or statements of the person

Ill.—Holterman v. Poynter, 198 N.E. 723, 361 Ill. 617, 101 A.L.R. 842.
Iowa—Macheak v. Adamsen, 239 N. W. 574, 214 Iowa 446—People's Sav. Bank v. McCarthy, 217 N.W. 453, 206 Iowa 28.
Minn.—Froslee v. Sonju, 297 N.W. 1—Johnson v. Freberg, 228 N.W. 159, 178 Minn. 594.
Mo.—Fulton v. Kansas City Life Ins. Co., App., 148 S.W.2d 581—State ex rel. McIntosh v. Haworth, App., 124 S.W.2d 653.
Nev.—In re MacDonnell's Estate, 57 P.2d 695, 56 Nev. 504, affirming in part 53 P.2d 625, 56 Nev. 346, rehearing granted 55 P.2d 834, 56 Nev. 504—Farmers & Merchants Nat. Bank of Eureka v. Eureka Land & Stock Co., 49 P.2d 354, 56 Nev. 218—State v. Justice Court of Reno Tp., Washoe County, 207 P. 1105, 46 Nev. 133.
N.M.—First Nat. Bank v. Harlan, 234 P. 305, 30 N.M. 356.
N.Y.—Stanton v. Hawley, 184 N.Y.S. 415, 193 App.Div. 559.
Ohio.—Silber v. Gale, 175 N.E. 886, 38 Ohio App. 248.
Okl.—Southern Coal Co. v. McAlpine Coal Co., 56 P.2d 413, 176 Okl. 492.
S.C.—Duncan v. McCormick County, 6 S.E.2d 265, 192 S.C. 216.
S.D.—Wakonda Independent Consol. School Dist. No. 1 v. McCullough, 258 N.W. 838, 63 S.D. 370.
Tex.—Hubb-Diggs Co. v. Mitchell, Civ.App., 256 S.W. 702.
W.Va.—Spradling v. Spradling, 190 S.E. 537, 118 W.Va. 308.

32. U.S.—Taylor v. Commissioner of Internal Revenue, C.C.A., 89 F. 2d 465, certiorari denied 58 S.Ct. 48, 302 U.S. 727, 82 L.Ed. 561.
Ala.—Brown v. Alabama Great Southern Ry. Co., 121 So. 91, 219 Ala. 87.
Ark.—Baker v. Applen, 26 S.W.2d 109, 181 Ark. 454.
Colo.—Williams v. Hankins, 225 P. 243, 75 Colo. 136.
La.—Sheeren v. Gulf Ins. Co. of Dallas, Tex., App., 174 So. 380.
Mich.—Kaminski v. Cowan, 282 N.W. 902, 287 Mich. 62.
Pa.—Gsell v. Helman, 164 A. 853, 108 Pa.Super. 258.
Tex.—Harris v. Mayfield, Com.App., 260 S.W. 835, reversing, Civ.App., 244 S.W. 857—Gorman v. Gause, Civ.App., 36 S.W.2d 279, affirmed, Com.App., 56 S.W.2d 855.
Wis.—Kitch v. Northwestern Nat. Ins. Co., 207 N.W. 716, 189 Wis. 378.

Gist of estoppel is that the person against whom it is urged shall have so conducted himself so as to lead the person urging it to act in a particular manner to his disadvantage.—Laberee v. Laberee, 228 P. 686, 112 Or. 44, denying rehearing 227 P. 460, 112 Or. 44.

33. Ala.—Dowling v. Sollie & Sollie, 176 So. 340, 343, 234 Ala. 630, citing **Corpus Juris.**
Kan.—Challis v. Hartloff, 18 P.2d 199, 203, 136 Kan. 823, quoting **Corpus Juris.**
Minn.—Schaefer v. Nylin, 202 N.W. 439, 162 Minn. 170, citing **Corpus Juris.**
Mo.—National Match Co. v. Empire Storage & Ice Co., 58 S.W.2d 797, 799, 227 Mo.App. 1115, quoting **Corpus Juris.**
Neb.—Shelby v. Platte Valley Public Power & Irrigation Dist., 278 N.W. 568, 134 Neb. 354—Haschenberger v. Dennis, 225 N.W. 25, 26, 118 Neb. 411, 63 A.L.R. 493, quoting **Corpus Juris.**
Okl.—Downing v. Young Men's Christian Ass'n of University of Oklahoma, 61 P.2d 859, 178 Okl. 292—Hughes v. Sparks, 224 P. 957, 958, 98 Okl. 208, quoting **Corpus Juris.**
Tenn.—Rogers v. Colville, 238 S.W. 80, 83, 145 Tenn. 650, quoting **Corpus Juris**—Colonial Milling Co. v. Holt Bros., 3 Tenn.App. 617.
Tex.—Superior Brewing Co. v. Curtis, Civ.App., 116 S.W.2d 853, 855, citing **Corpus Juris**—State v. Davisson, Civ.App., 280 S.W. 292, 294, citing **Corpus Juris.**
21 C.J. p 1137 note 84.

Substantial prejudice
An essential element of estoppel is that party who seeks benefit thereof must have been led into such course of conduct that he will be substantially prejudiced if other party be permitted to repudiate former action or representation.—Smith v. National Commercial Title & Mortgage Guaranty Co., 198 A. 407, 120 N.J.Law 75.

Substantial prejudice or change of position
Estoppel in equity must rest on substantial grounds of prejudice or change of position, not on technicalities.—Ashwander v. Tennessee Valley Authority, Ala., 56 S.Ct. 466, 297 U.S. 288, 80 L.Ed. 688, affirming, C.C.A., Tennessee Valley Authority v. Ashwander, 78 F.2d 578, reversing, D.C., Ashwander v. Tennessee Valley Authority, 9 F.Supp. 965, certiorari granted 56 S.Ct. 145 (two cases), 296 U.S. 562, 80 L.Ed. 396, rehearing denied 56 S.Ct. 588 (two cases), 297 U.S. 728, 80 L.Ed. 1011, mandate conformed to, D.C., 14 F.Supp. 11.

Material and injurious change of position
An indispensable element of an estoppel is a demonstration that a material and injurious change in position of person asserting the bar has resulted from act of one against whom estoppel is asserted.—In re Canfield's Will, 300 N.Y.S. 502, 165 Misc. 66.

Material disadvantage
Party invoking estoppel must show he will suffer some material disadvantage unless adversary is required to abide by election on which party has placed reliance.—Abercrombie v. United Light & Power Co., D.C.Md., 7 F.Supp. 530.

Serious disadvantage
It is essential to estoppel in pais that the conduct complained of must have induced another to act to his serious disadvantage.—Payne v. Payne, 217 N.W. 756, 241 Mich. 547.

Prejudice, substantial injury, or change of position for worse
Party relying on defense of estoppel must have been prejudiced or induced to change his position for the worse, or to suffer some substantial injury by reason of having been misled—Wisdom's Adm'r v. Sims, 144 S.W.2d 232, 284 Ky. 258.

Change or alteration of position for worse is necessary.
U.S.—City of Roswell, N. M., v. Mountain States Telephone & Telegraph Co., C.C.A.N.M., 78 F.2d 379.
Ark.—T. M. Dover Mercantile Co. v. Dover, 62 S.W.2d 971, 187 Ark. 859.
Del.—Philadelphia Storage Battery Co. v. Radio Corporation of America, Ch., 194 A. 414, rehearing denied 2 A.2d 80, sustained Radio Corporation of America v. Philadelphia Storage Battery Co., Sup., 6 A.2d 329.
Neb.—Wiltse v. Bolton, 272 N.W. 197, 132 Neb. 354—Commercial Inv. Corporation v. Farmers' State Bank of Brunswick, 225 N.W. 758, 118 Neb. 678.
N.C.—Martin v. Bundy, 193 S.E. 831, 212 N.C. 437—Central Bank & Trust Co. v. Wyatt, 131 S.E. 311, 191 N.C. 133.
Tex.—Nelson v. Wilson, Civ.App., 97 S.W.2d 287, error refused—Allen v. Hall, Civ.App., 52 S.W.2d 661—Lloyd v. Singleton, Civ.App., 16 S.W.2d 891.
Utah.—Kelly v. Richards, 83 P.2d 731, 95 Utah 560, 129 A.L.R. 164.

sought to be estopped;[34] harm must result to him from acts done in reliance on the conduct or representations;[35] he must suffer loss, injury, or damage;[36] and where no available right is parted with and no injury suffered there can be no estoppel in pais.[37] A fortiori, an act clearly beneficial to the person setting up the estoppel cannot be relied on.[38] In the absence of injury, it is of course immaterial that the other elements of estoppel are present.[39]

Cause of loss or damage. Even though a party suffers loss or damage, there is no estoppel unless the loss or damage is legally caused by a wrong[40] or by his action or nonaction in rightful reliance on the truth of a representation.[41]

Payment of damages. It has been held that plaintiff is not estopped to claim damages where defendants have been awarded the damages sustained by them;[42] but it has also been held that a person once estopped will not be permitted thereafter to take a position inconsistent with his original attitude even if his adversary is paid for the detriment suffered by him.[43]

Element of waiver. Ordinarily, injury or preju-

34. U.S.—Commissioner of Internal Revenue v. Union Pacific R. Co., C.C.A., 86 F.2d 637—U. S. v. S. F. Scott & Sons, C.C.A.Mass., 69 F.2d 728.

35. La.—Sheeren v. Gulf Ins. Co. of Dallas, Tex., App., 174 So. 380.
Mass.—Tourles v. Grogan, 29 N.E.2d 691, 307 Mass. 70—Abbott v. Bean, 3 N.E.2d 762, 295 Mass. 268—Cleaveland v. Malden Sav. Bank, 197 N.E. 14, 291 Mass. 295—Looney v. Trimount Theatres, 184 N.E. 683, 282 Mass. 275—Lunt v. Ætna Life Ins. Co. of Hartford, Conn., 159 N.E. 461, 261 Mass. 469—Augello v. Hanover Trust Co., 148 N.E. 138, 253 Mass. 160—Nelson v. Wentworth, 137 N.E. 646, 243 Mass. 377.
Pa.—Edelman v. Boardman, 2 A.2d 393, 332 Pa. 85.

Harm from denial
To constitute an equitable estoppel, defendant must have done an act, or made an omission, which has induced complainant to change his position or condition, so that, if defendant is afterward permitted to deny truth of defendant's words or conduct, complainant must suffer harm.—Binns v. Csik, 15 A.2d 808, 128 N.J.Eq. 188.

36. Ill.—Zurich General Accident & Liability Ins. Co. v. Industrial Commission, 156 N.E. 307, 325 Ill. 452.

Loss
(1) In order to invoke equitable estoppel it must appear that because of something that was done or because nothing was done the party invoking the estoppel sustained a loss.—In re Meyer's Will, 24 N.Y.S.2d 184.

(2) He must have been deprived of a right which he otherwise would have possessed or the estoppel must be necessary to protect a right already acquired and which he will lose unless the estoppel is declared.
Ky.—Kentucky Home Life Ins. Co. v. Kittinger, 90 S.W.2d 673, 262 Ky. 525, 103 A.L.R. 1361.
Tex.—Kuykendall v. Spiller, Civ. App., 299 S.W. 522.

Damage
(1) The party claiming an equitable estoppel must have been induced to act or change his position to his damage.
N.H.—Jenness v. Payne, 125 A. 679, 81 N.H. 308.
Wis.—Jandl v. Guziekiewicz, 218 N.W. 593, 195 Wis. 258.

(2) He must have acted on faith of representations in such way that he cannot withdraw without damage.—Silverthorne v. Chapman, 259 Ill. App. 289.

Loss or damage
Equitable estoppel is invocable only to protect party claiming its benefit from some damage or loss which might result if true state of facts should control determination of controversy.—Knox v. Brown, Com.App., 277 S.W. 91, affirming Brown v. Knox, Civ.App., 261 S.W. 791, motion overruled Knox v. Brown, Com.App., 277 S.W. 619.

Loss or injury is essential to estoppel.
Ill.—National Bank of Republic of Chicago v. Wells-Jackson Corporation, 193 N.E. 215, 358 Ill. 356, 98 A.L.R. 618, reversing 272 Ill. App. 561.
Ky.—Patton v. Catlettsburg Nat. Bank, 255 S.W. 690, 200 Ky. 775.
Me.—4-One Box Machine Makers v. Wirebounds Patents Co., 159 A. 496, 131 Me. 70.

Loss or disadvantage
The party claiming the estoppel must have lost something or been placed to some disadvantage by the conduct of the other party.
Mo.—Horwitz v. Schaper, App., 119 S.W.2d 474.
Ohio.—Baranowicz v. Metropolitan Life Ins. Co., 34 N.E.2d 987, 66 Ohio App. 444.

37. Kan.—Challis v. Hartloff, 18 P.2d 199, 203, 136 Kan. 823, quoting **Corpus Juris.**
Neb.—Haschenberger v. Dennis, 225 N.W. 25, 26, 118 Neb. 411, 63 A.L.R. 493, quoting **Corpus Juris.**
Tenn.—Rogers v. Colville, 238 S.W. 80, 83, 145 Tenn. 650, quoting **Corpus Juris**—Colonial Milling Co. v. Holt Bros., 3 Tenn.App. 617.
Tex.—State v. Davisson, Civ.App., 280 S.W. 292, 294, citing **Corpus Juris.** 21 C.J. p 1137 note 85.

Where nothing is parted with in reliance on the acts or conduct of another, there is no estoppel.—Cuneo v. Champlin Refining Co., 62 P.2d 82, 178 Okl. 198.

Right or remedy foregone
The relief of equitable estoppel is administered in favor of one who has been induced to alter his line of conduct in respect of the subject matter in controversy so as to forego some right or remedy.—Ralston Purina Co. v. U. S., Ct.Cl., 58 F.2d 1065, certiorari denied 53 S.Ct. 594, 289 U.S. 732, 77 L.Ed. 1481.

38. Kan.—Challis v. Hartloff, 18 P.2d 199, 203, 136 Kan. 823, quoting **Corpus Juris.**
Neb.—Haschenberger v. Dennis, 225 N.W. 25, 26, 118 Neb. 411, 63 A.L.R. 493, quoting **Corpus Juris.**
Tenn.—Rogers v. Colville, 238 S.W. 80, 83, 145 Tenn. 650, quoting **Corpus Juris.**
21 C.J. p 1138 note 86.

39. Iowa.—Amundson v. Standard Printing & Mfg. Co., 118 N.W. 789, 140 Iowa 464.
Kan.—Challis v. Hartloff, 18 P.2d 199, 203, 136 Kan. 823, quoting **Corpus Juris.**
Okl.—Egan v. Missouri State Life Ins. Co., 59 P.2d 263, 265, 177 Okl. 348, quoting **Corpus Juris.**
Tenn.—Rogers v. Colville, 238 S.W. 80, 83, 145 Tenn. 650, quoting **Corpus Juris.**

40. N.H.—Guay v. Brotherhood Bldg Ass'n, 168 A. 900.

41. N.J.—Ginsberg v. Eastern Life Ins. Co. of New York, 178 A. 378, 118 N.J.Eq. 223, affirmed 184 A. 348, 120 N.J.Eq. 110.

42. Utah.—Griffith v. Maxfield, 218 P. 105, 62 Utah 51.

43. U.S.—In re Brockton Shoe Mfg. Co., D.C.Mass., 8 F.Supp. 959.

dice to the party claiming it is not essential to a waiver;[44] but it may be necessary in a case of implied waiver,[45] and undoubtedly is necessary where the waiver must be based on an estoppel,[46] as where, in the situation dealt with in § 69 b, supra, there is no actual intent to waive and the waiver must be predicated on an estoppel to deny an intent to waive.

§ 75. Default or Wrongful Act of Person Setting Up Estoppel

A party may not properly base a claim of estoppel in his favor on his own wrongful act or dereliction of duty, on fraud committed or participated in by him, or on acts or omissions induced by his own conduct, concealment, or representations.

The doctrine of estoppel is for the protection of innocent persons,[47] and only the innocent may invoke it.[48] There is, in the very nature of the doctrine, some element of the maxim that one must come into a court of equity with clean hands.[49] It is essential that the party claiming the benefit of the estoppel should have proceeded in good faith.[50] A person may not predicate an estoppel in his favor on, or assert such estoppel for the purpose of making effective, obtaining the benefit of, or shielding himself from the results of, his own fraud,[51] violation of law,[52] wrongful act,[53] or other inequitable conduct in the transaction in question;[54] and the same is true of a fraudulent plan which he designed[55] and an attempt to defraud in which he was an active participant.[56] Neither may he base a claim of estoppel on conduct, omissions, or representations induced by his own conduct, concealment, or representations,[57] especially when fraudulent.[58] So one party to a scheme to defraud cannot base an estoppel on another's acts under the scheme.[59] Where the other party does not claim an estoppel, a litigant cannot become entitled to rely on his own fraud or wrong by asserting that he estopped himself thereby.[60] A party is not estopped

44. Ill.—Cleaners & Dyers v. American Mut. Liability Ins. Co. of Boston, 30 N.E.2d 87, 307 Ill.App. 64.
Iowa.—Hemmings v. Home Mut. Ins. Ass'n of Iowa, 203 N.W. 818, 199 Iowa 1311.
Ky.—U. S. Fidelity & Guaranty Co. v Miller, 34 S.W.2d 938, 237 Ky. 43, 76 A.L.R. 12.
N.Y.—Fisher v. U. S. Casualty Co., 245 N.Y.S. 406, 138 Misc. 307.

45. Cal.—Pacific Gas & Electric Co. v Industrial Accident Commission, 47 P.2d 783, 8 Cal.App.2d 499—Cross v. Superior Court of California in and for Imperial County, 256 P. 453, 83 Cal.App. 144.

46. Minn.—Davis v. Newcombe Oil Co., 281 N.W. 272, 203 Minn. 295

Detriment if estoppel not allowed

To invoke doctrine of waiver by estoppel, party need not, as result of inequitable conduct of other party, have suffered some detriment or injury without regard to whether or not estoppel is allowed; it is sufficient that he will suffer detriment or prejudice if the estoppel is not allowed.—Queen Ins. Co. of America v. Baker, 50 P.2d 371, 174 Okl. 273.

47. Cal.—First Nat. Bank v. Reed, 244 P. 368, 198 Cal. 252.

48. Minn.—Dr. Ward's Medical Co. v Wolleat, 199 N.W. 738, 160 Minn. 21.

49. Cal.—Pacific Finance Corporation v. Hendley, 7 P.2d 391, 119 Cal.App. 697.

50. Conn.—Second Nat. Bank v. Dyer, 9 A.2d 503, 126 Conn. 101.
Ga.—Johnson v. Ellis, 158 S.E. 39, 172 Ga. 435.
Ky.—Capital Amusement Co. v. Board of Common Council of City of Frankfort, 276 S.W. 528, 531, 210 Ky. 622, quoting **Corpus Juris.**
N.Y.—Angerosa v. White Co., 290 N. Y.S. 204, 248 App.Div. 425, affirmed 11 N.E.2d 325, 275 N.Y. 524—Winston v. Saugerties Farms, 21 N.Y.S.2d 841.
Okl.—Rosser v. Texas Co., 48 P.2d 327, 173 Okl. 309—Slyman v. Alexander, 259 P. 224, 126 Okl. 232—Hynds v. First State Bank of Stonewall, 242 P. 861, 115 Okl. 275.
21 C.J. p 1138 note 89.

51. U.S.—New York Life Ins. Co. v. Odom, C.C.A.Ga., 93 F.2d 641, certiorari denied Odom v. New York Life Ins. Co., 58 S.Ct. 948, 304 U.S. 566, 82 L.Ed. 1532 and 58 S.Ct. 949, 304 U.S. 566, 82 L.Ed. 1532.
N.Y.—Bridger v. Goldsmith, 38 N.E. 458, 143 N.Y. 424.
Tex.—Cawthon v. Cochell, Civ.App., 121 S.W.2d 414, error dismissed—Cohen v. Lewis, Civ.App., 44 S.W. 2d 468, error refused.

52. N.Y.—People ex rel. Manlius School v. Adams, 256 N.Y.S. 185, 143 Misc. 469.

53. Ky.—Sueskind v. Michael Hardware Co., 15 S.W.2d 528, 228 Ky. 780.
N.J.—New Jersey Nat. Bank & Trust Co. v. Berkshire, Inc., 156 A. 40, 9 N.J.Misc. 933.

54. Okl.—Jackson v. Twin State Oil Co., 218 P. 324, 95 Okl. 96.

55. Ind.—Rushville Nat. Bank of Rushville v. State Life Ins. Co., 1 N.E.2d 445, 210 Ind. 492.

56. Minn.—Stephon v. Topic, 180 N. W. 221, 147 Minn. 263.

57. U.S.—Milwaukee American Ass'n v. Landis, D.C.Ill., 49 F.2d 298.
Ky.—Capital Amusement Co. v. Board of Common Council of City of Frankfort, 276 S.W. 528, 531, 210 Ky. 622, quoting **Corpus Juris.**
Ohio.—Kellogg-Mackay Co. v. O'Neal, 177 N.E. 778, 39 Ohio App. 372—Parmenter v. Mueller, 17 Ohio Cir. Ct., N.S., 104.
Tex.—Reclamation Co. v. Western Brokerage & Supply Co., Civ.App., 57 S.W.2d 274, affirmed Western Brokerage & Supply Co. v. Reclamation Co., 93 S.W.2d 393, 127 Tex. 386.
21 C.J. p 1138 note 90.

Doctrine of estoppel is not applied to penalize innocent party who has been misled to his material prejudice by express representation of another.—Blackstone Valley Gas & Electric Co. v. Rhode Island Power Transmission Co., R.I., 12 A.2d 739.

58. Ky.—Capital Amusement Co. v. Board of Common Council of City of Frankfort, 276 S.W. 528, 531, 210 Ky. 622, quoting **Corpus Juris**—Carter v. Hall, 229 S.W. 132, 191 Ky. 75.
N.J.—Forman v. Grant Lunch Corporation, 166 A. 219, 113 N.J.Eq. 175.
21 C.J. p 1138 note 90.

Act solicited by agent

Estoppel cannot be relied on to create liability where an agent acting solely for the benefit of his principal, actively participated in the deceit and fraud, and solicited the act from the person sought to be estopped by the principal.—First Nat. Bank v. Reed, 244 P. 368, 198 Cal. 252.

59. U.S.—In re Schoenfield, D.C.W. Va., 190 F. 53, affirmed, C.C.A., Salsburg v. Blackford, 204 F. 438.
21 C.J. p 1138 note 93.

60. Ky.—Kelly v. Nussbaum, 291 S. W. 754, 218 Ky. 330.

by a contract or instrument which he is induced by the fraud of the other party to execute,[61] nor is a party estopped to allege and prove fraud for the purpose of foreclosing any relief to either party to the fraud.[62]

There may be such a failure to perform a duty owing by the person claiming the estoppel to the person sought to be estopped as to preclude the former from relying on an estoppel.[63] Where there is no concealment, misrepresentation, or other inequitable conduct by the other party, a party may not properly claim that an estoppel arises in his favor from his own omission or mistake.[64] A person who is actuated by his own interest will not be heard to say that the other party should be estopped from acting on the same impulse.[65]

Of course, where the facts disclose no fraud by a particular party and do not bring the case within any of the foregoing rules, he is not, on account thereof, to be denied the right to plead an estoppel.[66]

§ 76. Mutuality

An estoppel in pais must be mutual in its binding effect.

An estoppel in pais to be binding must be mutual and reciprocal.[67] In other words, both parties must be bound or neither.[68] In some cases, however, it is said that estoppel by misrepresentation is not mutual, but applies to only one party,[69] and that an estoppel arising out of the misconduct of one party is in its very nature unilateral, that party being estopped by reason of the misconduct,[70] and the only sense in which there is a requirement of mutuality in respect of such estoppel is that if the other party takes advantage of the estoppel, he cannot thereafter make claims inconsistent therewith.[71]

§ 77. Certainty

Neither a waiver nor an estoppel will be deemed to exist in the absence of certainty.

Before an estoppel can be raised there must be certainty to every intent, and the facts alleged to constitute it are not to be taken by argument or inference.[72] Nothing can be supplied by intendment.[73] No one should be denied the right to set up the truth unless it is in plain contradiction of

61. Ill.—Corcoran v. Waugh, 13 N.E.2d 961, 964, 368 Ill. 318, citing **Corpus Juris.**
Ky.—Capital Amusement Co. v. Board of Common Council of City of Frankfort, 276 S.W. 528, 531, 210 Ky. 622, quoting **Corpus Juris.**
21 C.J. p 1138 note 91.

62. Colo.—Baker v. Sockwell, 251 P. 543, 80 Colo. 309.

63. Tenn.—Groveland Banking Co. v. City Nat. Bank, 234 S.W. 643, 144 Tenn. 520.

64. Del.—Gott v. Live Poultry Transit Co., 153 A. 801, 17 Del.Ch. 288.
Ga.—Bank of Jonesboro v. Carnes, 2 S.E.2d 495, 187 Ga. 795, affirming Carnes v. Bank of Jonesboro, 198 S.E. 338, 58 Ga.App. 193.

65. S.C.—McMahan v. McMahon, 115 S.E. 293, 122 S.C. 336, 26 A.L.R. 1295.

66. Mo.—Vette v. Hackman, 237 S.W. 803, 292 Mo. 138.

67. U.S.—White v. Croker, C.C.A. Fla., 13 F.2d 321, certiorari denied 47 S.Ct. 108, 273 U.S. 715, 71 L.Ed. 855—Myers v. Ross, D.C.Fla., 10 F.Supp. 409.
Ala.—Madison County v. Williams, 183 So. 452, 236 Ala. 470—Harbin v. Aaron, 110 So. 24, 215 Ala. 218.
Cal.—Wilmans v. Weissman, 102 P.2d 382, 38 Cal.App.2d 693—Moriarty v. California Western States Life Ins. Co., 70 P.2d 684, 22 Cal.App.2d 260—People v. Kovacevich, 65 P.2d 807, 19 Cal.App.2d 335—Toms v. Hellman, 1 P.2d 31, 115 Cal.App. 74.
Ga.—Tarver v. Jones, 131 S.E. 102, 34 Ga.App. 716.
Ill.—Provident Mut. Life Ins. Co. of Philadelphia v. Norcott, 7 N.E.2d 858, 366 Ill. 82—Keal v. Rhydderck, 148 N.E. 53, 317 Ill. 231.
Me.—Burns v. Baldwin-Doherty Co., 179 A. 511, 132 Me. 331.
Neb.—Furstenberg v. Omaha & Council Bluffs St. Ry. Co., 272 N.W. 756, 758, 132 Neb. 562, citing **Corpus Juris.**
N.Y.—Central New York Coach Lines v. Syracuse Herald Co., 13 N.E.2d 598, 277 N.Y. 110, reversing 291 N.Y.S. 247, 249 App.Div. 692—City of New York v. Yellow Taxi Corporation, 284 N.Y.S. 544, 157 Misc. 723—Labianca v. Digianna, 244 N.Y.S. 437, 137 Misc. 725.
21 C.J. p 1139 note 94.

68. Cal.—Wilmans v. Weissman, 102 P.2d 382, 38 Cal.App.2d 693—People v. Kovacevich, 65 P.2d 807, 19 Cal.App.2d 335.
Ill.—Provident Mut. Life Ins. Co. of Philadelphia v. Norcott, 7 N.E.2d 858, 366 Ill. 82—Keal v. Rhydderck, 148 N.E. 53, 317 Ill. 231.
21 C.J. p 1139 note 95.

69. N.C.—Bank of Canton & Trust Co. v. Clark, 151 S.E. 102, 198 N.C. 169.

70. U.S.—Hare & Chase v. National Surety Co., D.C.N.Y., 49 F.2d 447, affirmed, C.C.A., 60 F.2d 909, certiorari denied 53 S.Ct. 222, 287 U.S. 662, 77 L.Ed. 572.

71. U.S.—Hare & Chase v. National Surety Co., supra.

72. Cal.—Toms v. Hellman, 1 P.2d 31, 115 Cal.App. 74—Orange Cove Water Co. v. Sampson, 248 P. 526, 78 Cal.App. 334.
Fla.—Enstrom v. Dunning, 186 So. 806, 812, 136 Fla. 253, quoting **Corpus Juris.**
Ill.—Canavan v. McNulty, 159 N.E. 782, 328 Ill. 388.
Ind.—Wilkerson v. Wood, 143 N.E. 166, 81 Ind.App. 248.
Me.—Augusta Trust Co. v. Augusta, H. & G. R. Co., 187 A. 1, 134 Me 314—Hooper v. Bail, 179 A. 404, 406, 133 Me. 412, citing **Corpus Juris.**
Mo.—Noell v. Remmert, 30 S.W.2d 1009, 1015, 326 Mo. 148, quoting entire section from **Corpus Juris**—Gnekow v. Metropolitan Life Ins. Co., App., 108 S.W.2d 621, 625, reversing 99 S.W.2d 126, quashed State ex rel. Gnekow v. Hostetter, 105 S.W.2d 928, 340 Mo. 1177, quoting **Corpus Juris.**
Tex.—Peoria Life Ins. Co. v. Poynor, Civ.App., 297 S.W. 788.
W.Va.—Werner v. Hopkins, 188 S.E. 128, 117 W.Va. 727—Campbell v. Lynch, 106 S.E. 869, 88 W.Va. 209.
21 C.J. p 1139 note 96.

73. Ark.—Arkansas Nat. Bank v. Boles, 133 S.W. 195, 97 Ark. 43.
Mo.—Gnekow v. Metropolitan Life Ins. Co., App., 108 S.W.2d 621, 625, reversing 99 S.W.2d 126, quashed State ex rel. Gnekow v. Hostetter,

his former allegations or acts.[74] If an act or admission is susceptible of two constructions, one of which is consistent with a right asserted by the party sought to be estopped, it forms no estoppel.[75]

A waiver must be manifested in some unequivocal manner;[76] it will not be implied or deemed to exist except where there has been some absolute, positive, and unequivocal action[77] or inaction inconsistent with the right in question.[78]

B. GROUNDS

1. Express Misrepresentations

§ 78. Representations

Generally an estoppel by misrepresentation arises when and if a false representation is knowingly or negligently made by one person to another ignorant of the facts with the intention that such other act thereon and such other does reasonably rely and act thereon to his prejudice.

Where a person willfully makes a representation intended to induce another to act on the faith of it, or where, whatever his intention, a reasonable man in the situation of that other would believe that it was meant that he should act on it, and in either case that other does act on it as true and alters his position, there is an estoppel in pais to conclude the former from averring against the latter a different state of things as existing at the same time.[79] An estoppel arising out of an express misrepresentation

105 S.W.2d 928, 340 Mo. 1177, quoting **Corpus Juris.**

74. Ky.—South v. Deaton, 68 S.W. 137, 1105, 113 Ky. 312, 24 Ky.L. 196, 533.
Tex.—Peoria Life Ins. Co. v. Poynor, Civ.App., 297 S.W. 788.

75. Ala.—Ware v. Cowles, 24 Ala. 446, 60 Am.D. 482.
Mo.—National Match Co. v. Empire Storage & Ice Co., App., 58 S.W. 2d 797, 799, quoting entire section from **Corpus Juris.**
Ohio.—Allenbaugh v. City of Canton, 28 N.E.2d 354, 137 Ohio St. 128.
Tex.—Peoria Life Ins. Co. v. Poynor, Civ.App., 297 S.W. 788, 790, citing **Corpus Juris.**

76. Pa.—General Electric Co. v. N. K. Ovalle, Inc., 45 Dauph.Co. 376.
67 C.J. p 306 note 87.

77. Vt.—West River Power Co. v. Bussino, 11 A.2d 263.
67 C.J. p 306 notes 88, 89.

Indefinite language

A waiver cannot be predicated on indefinite language.—Clark v. Dye, 197 N.W. 209, 158 Minn. 217.

78. Kan.—Proctor Trust Co. v. Neihart, 288 P. 574, 130 Kan. 698.
67 C.J. p 306 note 90.

Plain inconsistency

Law never implies waiver of legal right, except from conduct plainly inconsistent with assertion thereof.—Ross v. State Life Ins. Co., 143 So. 827, 225 Ala. 410.

79. U.S.—Sias v. Johnson, C.C.A. Mich., 86 F.2d 766—Beeler v. Motter, D.C.Kan., 33 F.2d 788—Cone v. Parish, D.C.Tex., 32 F.Supp. 412, affirmed, C.C.A., Scott v. Cohen, 115 F.2d 704, and Maxwell v. Hunter, 116 F.2d 260—The Argentino, D.C. N.Y., 28 F.Supp. 440—In re Strassburger, D.C.N.Y., 12 F.Supp. 420—Dustin Grain Co. v. McAllister, C.C.A.Ark., 296 F. 611.
Ala.—Calera Development Co. v. Burgin, 107 So. 84, 214 Ala. 214, citing **Corpus Juris.**
Ark.—Johnson v. Commonwealth Building & Loan Ass'n, 31 S.W.2d 136, 182 Ark. 226—Ripley v. Kinard, 244 S.W. 3, 155 Ark. 172.
Cal.—Beyerle v. California Surety Co., 7 P.2d 1034, 120 Cal.App. 236—Pontius v. McLain, 298 P. 541, 113 Cal.App. 452—Standard Oil Co. of California v. Woolner 298 P. 77, 113 Cal.App. 66—Roger v. Struven, 186 P. 817, 44 Cal.App. 528.
Colo.—Scott v. Burlington State Bank, 233 P. 835, 76 Colo. 582.
Ga.—Rieves v. Smith, 192 S.E. 372, 184 Ga. 657, 112 A.L.R. 368—Ashford v. Walters, 127 S.E. 758, 160 Ga. 350.
Idaho.—Quirk v. Bedal, 248 P. 447, 42 Idaho 567.
Ill.—Litchfield Nat. Bank v. McBride, 7 N.E.2d 348, 289 Ill.App. 420—McNeill v. Harrison & Sons, 2 N.E. 2d 959, 286 Ill.App. 120—Scott v. Hatch, 280 Ill.App. 269—Golden v. Cervenka, 216 Ill.App. 397.
Ind.—Kurtz v. Cooperider, 127 N.E. 572, 73 Ind.App. 393.
Iowa.—Hamaker v. Johnson, 202 N. W. 10, 199 Iowa 1298.
Kan.—American Indemnity Co. v. Peak, 274 P. 227, 127 Kan. 606.
Ky.—Wabash Drilling Co. v. Ellis, 20 S.W.2d 1002, 230 Ky. 769—Wheeler & Patton v. Gillespie, 9 S.W.2d 1077, 225 Ky. 727—Montgomery Coal Corporation v. Riddle, 276 S. W. 975, 211 Ky. 26.
La.—Jackson v. United Gas Public Service Co., 198 So. 633, 196 La. 1.
Mass.—Looney v. Trimount Theatres, 184 N.E. 683, 282 Mass. 275.
Minn.—Riethmuller v. Burton, 222 N. W. 929, 176 Minn. 227.
Miss.—Hinds County Water Co. v. Scanlon, 132 So. 567, 159 Miss. 757.
Mo.—Ellenburg v. Edward K. Love Realty Co., 59 S.W.2d 625, 332 Mo 766—Ruckert v. Moore, 295 S.W. 794, 317 Mo. 228—Vette v. Hackman, 237 S.W. 802, 292 Mo. 138—Selle v. Wrigley, 116 S.W.2d 217, 233 Mo.App. 43.
Neb.—Merchants'-Mechanics' First Nat. Bank v. Cavers Elevator Co., 180 N.W. 588, 105 Neb. 321.
N.J.—Karkuff v. Mutual Securities Co., 148 A. 159, 108 N.J.Eq. 128, affirmed 148 A. 160, 108 N.J.Eq. 128.
N.Y.—Phillips v. West Rockaway Land Co., 124 N.E. 87, 226 N.Y. 507—Angerosa v. White Co, 290 N.Y.S. 204, 248 App.Div. 425, affirmed 11 N.E.2d 325, 275 N.Y. 524—Edwards v. Moore, 231 N.Y.S. 303, 224 App.Div. 444—Winchester-Simmons Co. v. Simmons, 227 N.Y. S. 408, 222 App.Div. 639—In re Elliott's Estate, 299 N.Y.S. 211, 164 Misc. 486—Parsons v. Lipe, 286 N.Y.S. 60, 158 Misc. 32, affirmed Parsons v. First Trust & Deposit Co., 277 N.Y.S. 426, 243 App.Div. 681 and 277 N.Y.S. 428, 243 App. Div. 681, affirmed 200 N.E. 31, 269 N.Y. 630.
N.C.—Bank of Canton & Trust Co. v. Clark, 151 S.E. 102, 198 N.C. 169—American Exchange Nat. Bank v. Winder, 150 S.E. 489, 198 N.C. 18—Mote v. White Lake Lumber Co., 135 S.E. 294, 192 N.C. 460.
Okl.—Collings v. Industrial Sav. Soc., 221 P. 1036, 94 Okl 271—Underwood v. Purcell Wholesale Grocery Co., 209 P. 736, 87 Okl. 94.
Or.—Francis Bros. v. Schallberger, 3 P.2d 530, 137 Or. 529, 83 A.L.R. 108.
Pa.—Fried v. Fisher, 196 A. 39, 328 Pa. 497, 115 A.L.R. 147.
R.I.—Berarducci v. Diano, 198 A. 351, 60 R.I. 305—Hatton v. Howard

being an equitable estoppel, all of the essential elements of such an estoppel, considered in §§ 66–77 supra, must be present.[80] Hence for an estoppel by misrepresentation to arise there must exist a

Braiding Co., 129 A. 805, 47 R.I. 47.

Tex.—Guy v. Jones, Civ.App., 132 S.W.2d 490, affirmed Jones v. Guy, Sup., 143 S.W.2d 906—Union Central Life Ins. Co. v. Williams, Civ. App., 99 S.W.2d 319—Union Cent. Life Ins Co. v. Brewer, Civ.App., 60 S.W.2d 849, error refused—City Nat. Bank of Lawton, Okl., v. Lummus Cotton Gin Sales Co., Civ. App., 297 S.W. 563, affirmed Liverpool & London & Globe Ins. Co. v. Lummus Cotton Gin Sales Co., Com App., 6 S.W.2d 728, motion denied 9 S.W.2d 1112—Mead v. King, Civ.App., 285 S.W. 832.

Utah.—Kelly v. Richards, 83 P.2d 731, 95 Utah 560, 129 A.L.R. 164.

Wash.—Butters v. Oles, 214 P. 629, 124 Wash. 380.

Wis.—Norman F. Thiex, Inc. v. General Motors Acceptance Corporation, 259 N.W. 855, 218 Wis. 14.

21 C.J. p 1140 note 6.

"Equitable estoppel is bottomed upon the notion that, when one person makes representations to another which warrant the latter in acting in a given way, the one making such representations will not be permitted to change his position when such change would bring about inequitable consequences to the other person, who relied on the representations and acted thereon in good faith."—J. T. Fargason Co. v. Furst, C.C.A.Ark., 287 F. 306, 310, 311.

Reason for rule

"Equity holds a person to a representation made of a position assumed, where otherwise inequitable consequences would result to another, who in good faith relied thereon. . . . It needs neither consideration nor legal obligation to support it."—Illinois Standard Mortg. Corporation v. Collins, 63 S.W.2d 342, 344, 187 Ark. 902.

Amount of indebtedness

Where plaintiff's debtor made payment by assigning a debt due him from defendants, which defendants accepted, stating at the time that they were indebted to the assignor in a sum more than sufficient to pay the amount assigned, on which statement plaintiff relied, releasing all his remedies against his debtor, defendants were estopped to claim that they did not owe the full amount of the assignment.—Butters v. Oles, 214 P. 629, 124 Wash. 380.

Bank's collection of item

Where note executed by president of plaintiff bank was sent to defendant bank in ordinary course, and thereafter was sent to plaintiff bank for collection, and notice was given to defendant that it was collected, signed by plaintiff's cashier, and monthly reconcilement sheet treated it as collected, plaintiff was estopped to deny collection was in fact made, or from claiming wrongful payment from bank funds.—Keyes v. Security State Bank of Strasburg, N.D., 300 F. 897.

Contract rights

If a party to a contract or transaction induces another to act on the reasonable belief that he will waive certain rights or terms, he will be estopped to insist on such rights to the injury of him who was misled thereby.—Blackman v. Carey, 185 N.W. 87, 192 Iowa 548.

Nature of contract

Where, on death of landlord, his administrator entered into negotiation for sale of premises, and both administrator and purchasers consulted with tenant as to nature of his lease, and tenant represented that he held only under an oral lease, when in fact he was holding under a concealed written lease, tenant was "estopped" from claiming right to possession under the written lease.—Twisselman v. Reed, Cal.App., 110 P.2d 679.

Validity of contract

Fraternal society was estopped from pleading failure of its authorities to ratify prize offer by representation that award would be binding without such ratification.—Hood v. Polish National Alliance of U. S., 246 Ill.App. 137.

Representations in sale of property

Real estate company selling lots on representation that water would be furnished and mains provided could not claim ownership of water mains with right to remove same.—Suburban Real Estate Co. v. Incorporated Village of Silverton, 167 N.E. 474, 31 Ohio App. 452.

Estoppel to deny title

(1) Creditors, giving credit on face of debtor's apparent ownership of property, may invoke estoppel to deny his title.—Basak v. Damutz, 135 A. 453, 105 Conn. 378.

(2) Where a married woman in possession of property sold it, she cannot, having held herself out as owner and given a bill of sale of the property, show that it was the common property of herself and her husband.—Kurtz v. Cooperider, 127 N.E. 572, 73 Ind.App. 393.

(3) Where before plaintiff had fully paid a land contract with realty company of which defendant was president, mortgage on holdings of realty company was foreclosed without plaintiff's knowledge, and defendant continued to receive payments on contract, and after period of redemption expired defendant under an option redeemed land in his own name, defendant was estopped from setting up defense that company had no legal title after leading plaintiff to believe it had.—Commer v. Potter, 205 N.W 172, 232 Mich. 263.

Existence of street

Vendor's representations that a strip of land was a public way and a deed, naming the strip in describing the land conveyed, constituted an estoppel in pais, precluding the vendor from contending that the strip of land was not a public way or street.—Roger v. Struven, 186 P. 817, 44 Cal.App. 528.

Restrictions on use of land

One who sells a parcel subject to a restrictive covenant as to use and representing that the other parcels of the tract are subject to the same restrictions, such representation being an inducing factor in the purchase of such plot, is estopped to deny existence of such restrictions against the other parcels.—Turner v. Howard, 42 N.Y.S. 335, 10 App.Div. 555—Bimson v. Bultman, 38 N.Y.S. 209, 3 App.Div. 198—Sweet v. Hollearn, 252 N.Y.S. 202, 141 Misc. 135.

Defenses to action

Where delay in commencement of action was caused by plaintiffs' reliance on defendant's representation that decision in a similar previously commenced action would be determinative of plaintiffs' rights, defendant was "estopped" from pleading laches or the statute of limitations as a defense to plaintiffs' action.—Adams v. California Mut. Building & Loan Ass'n, Cal., 116 P.2d 75.

Under statute

(1) Statutes exist in some jurisdictions which expressly or in effect embody the rule of the text.

Ala.—White v. Glenn, 87 So. 331, 205 Ala. 303.

Cal.—Twisselman v. Reed, App., 110 P.2d 679.

(2) Under the Georgia statutes, where owner who remained ignorant of his title to land for twenty-seven years, despite convenient means of knowing thereof, induced one to buy land from third person by innocent misrepresentation that land was third person's property, such misrepresentation, coupled with delay in ascertaining truth, constituted "constructive fraud" which purchaser on faith of third person's title could plead as estoppel.—Lanier v. Bryant, 179 S.E. 346, 180 Ga. 409.

80. U.S.—Peterson v. Metropolitan Life Ins. Co., D.C.Iowa, 19 F.2d 74, affirmed, C.C.A., Metropolitan Life Ins. Co. v. Peterson, 19 F.2d 88—Alexander v. General Ins. Co. of America, D.C.Cal., 22 F.Supp.

false representation[81] by the person sought to be estopped,[82] made with knowledge, actual or constructive, of its falsity,[83] to the person seeking the benefits of the estoppel,[84] with the intent that such

157—J. T. Fargason Co. v. Furst, C C A Ark., 287 F. 306.
Ga.—Wilson v. Wilson, 143 S.E. 396, 166 Ga 420—Cairo Banking Co. v. Henderson, 137 S.E. 19, 163 Ga. 629.
Me.—Davis v. U. S Bobbin & Shuttle Co., 112 A. 348, 119 Me. 548.
Md.—Jones v. Northwest Real Estate Co., 131 A 446, 149 Md. 271.
Miss.—Hinds County Water Co. v. Scanlon, 132 So. 567, 159 Miss. 757.
Mo.—State ex inf. McKittrick ex rel. City of California v. Missouri Utilities Co., 96 S W.2d 607, 339 Mo. 385, 106 A.L R. 1169—Davis v. Solomon, App., 243 S W. 410.
N.D.—Security State Bank of Flasher v. Wernick, 199 N.W. 948, 51 N.D. 219.
Or.—Montgomery v. Anglo-California Trust Co., 68 P.2d 1057, 157 Or. 187.
Tex.—Lawson v. First Nat. Bank of Rotan, Civ.App., 150 S.W.2d 279, error dismissed, judgment correct—The Royal Tailors v. Joseph, Civ. App., 239 S.W. 639.
Vt.—Kimball v. New York Life Ins. Co., 126 A. 553, 98 Vt. 192.

Representations standing alone cannot create an estoppel.—Glenn v. Miller, Tex.Civ.App., 82 S.W.2d 167, error dismissed.

Change of policy as to payment of bonds

That American corporation whose bonds were payable in United States gold or in alternative specified currencies formerly announced a policy of paying undepreciated currency to bona fide foreign holders of bonds who had not purchased bonds for speculating after devaluation of American currency by congressional resolution did not prevent corporation from later insisting on its legal rights under the resolution which released the obligation of paying bonds in gold and permitted the payment in devalued United States currency.—Zurich General Accident & Liability Ins. Co. v. Lackawanna Steel Co., 299 N.Y.S. 862, 164 Misc. 498.

81. U.S.—Kearns Coal Corporation v. U. S. Fidelity & Guaranty Co., C. C.A.N.Y., 118 F.2d 33, certiorari denied 61 S.Ct. 1099—Aetna Life Ins. Co. v. Keppler, C.C.A.Neb., 116 F.2d 1—U. S. v. S. F. Scott & Sons, C.C.A.Mass., 69 F.2d 728—News Projection Corporation v. Western Union Tel. Co., D.C.N.Y., 38 F.Supp. 854.
Ark.—Louisiana Petroleum Corporation v. Oil Well Supply Co., 289 S. W. 1, 172 Ark. 386.
Cal.—Rispaud v. Rispaud, 287 P. 466, 209 Cal. 375.
Del.—Colvocoresses v. W. S. Wasserman Co., Del.Super., 190 A. 607, 8 W.W.Harr 253.
Ill.—Sherer-Gillett Co. v. Lang, 149 N.E. 225, 318 Ill. 432, affirming 236 Ill.App. 162
Ind.—Myers v. Department of Financial Institutions, 14 N E.2d 914, 214 Ind. 162.
Iowa.—Halbert v. Halbert, 214 N.W. 535, 204 Iowa 1227.
La.—Walter A. Meller Co. v. Rodessa Gasoline Co., App., 178 So. 687.
Mo.—State ex inf. McKittrick ex rel. City of California v. Missouri Utilities Co., 96 S.W.2d 607, 339 Mo. 385, 106 A.L.R. 1169—Woodside v. Durham, 295 S.W. 772, 317 Mo. 15, 53 A.L.R. 884—Davis v. Solomon, App., 243 S.W. 410.
Mont.—O'Neill v. Wall, 62 P.2d 672, 103 Mont. 388.
N.J.—Trenton Banking Co. v. Howard, Ch., 187 A. 569, affirmed 187 A. 575, 121 N.J.Eq. 85.
Or.—Security Savings & Trust Co. v. Portland Flour Mills Co., 261 P. 432, 124 Or. 276—Bramwell v. Rowland, 261 P. 57, 123 Or. 33.
Va.—Heath v. Valentine, 15 S.E. 2d 98.

Verbal statement may constitute the required misrepresentation.—State ex inf. McKittrick ex rel. City of California v. Missouri Utilities Co., 96 S.W.2d 607, 339 Mo. 385, 106 A L R. 1169.

Change of situation immaterial

Seller of drilling rig is not estopped to claim title under repurchase from purchaser by prior representations to purchaser's creditor that purchaser owned rig where at time of representation purchaser did own rig.—Louisiana Petroleum Corporation v. Oil Well Supply Co., 289 S.W. 1, 172 Ark. 386.

82. U.S.—Aetna Life Ins. Co. v. Kepler, C.C.A.Neb., 116 F 2d 1.
Cal.—Creason v. Creason, 11 P.2d 451, 123 Cal.App. 455.
Del.—In re Trexler Co. of America, 132 A. 144, 15 Del.Ch. 76.
La.—Walter A. Meller Co. v. Rodessa Gasoline Co., App., 178 So. 687.
Mich.—Noakes v. Noakes, 287 N.W. 445, 290 Mich. 231.
Mo.—State ex inf. McKittrick ex rel. City of California v. Missouri Utilities Co., 96 S.W.2d 607, 339 Mo. 385, 106 A.L.R. 1169—Woodside v. Durham, 295 S.W. 772, 317 Mo. 15, 53 A.L.R. 884.
N.J.—Trenton Banking Co. v. Howard, Ch., 187 A. 569, affirmed 187 A. 575, 121 N.J.Eq. 85.
Against whom estoppel available see infra §§ 131–147.

83. U.S.—Anzano v. Metropolitan Life Ins. Co. of New York, C.C. A.N.J., 118 F.2d 430, affirming, D C., 32 F.Supp. 417.
Mo.—Casner v. Heaton, App., 237 S. W. 1042.
Or.—Metropolitan Life Ins. Co. v. Kimball, 94 P.2d 1101.
"The party . . . must have had information as to the true state of affairs, or be in a position to become aware of them."—Sundheim v. Beaver County Building & Loan Ass'n, 14 A.2d 349, 351, 140 Pa.Super. 529.

Stated otherwise

Estoppel in pais will operate if maker knew, or was bound to know that representation was false.
Ga.—Rieves v. Smith, 192 S.E. 372, 184 Ga. 657, 112 A.L.R. 368.
Mo.—Woodside v. Durham, 295 S W. 772, 317 Mo. 15, 53 A.L.R 884—Fulton v. Kansas City Life Ins. Co., App., 148 S.W.2d 581.

Negligence with respect to representation

U.S.—Anzano v. Metropolitan Life Ins. Co. of New York, C.C.A N.J., 118 F.2d 430, affirming, D.C., 32 F Supp. 417.

84. U.S.—Aetna Life Ins Co. v. Kepler, C C.A.Neb., 116 F.2d 1—Wilkoff Co. v. Royal Government of Italy, C.C.A.Ohio, 1 F.2d 264.
Cal.—Creason v. Creason, 11 P.2d 451, 123 Cal.App. 455.
Del.—In re Trexler Co. of America, 132 A. 144, 15 Del.Ch. 76.
Ga.—Randolph v. Merchants & Mechanics Banking & Loan Co., 183 S E. 801, 181 Ga. 671.
Mo.—State ex inf. McKittrick ex rel. City of California v. Missouri Utilities Co., 96 S.W.2d 607, 339 Mo. 385, 106 A L.R. 1169—Swinney v. Modern Woodmen of America, 95 S.W.2d 655, 231 Mo.App. 83.
Tex.—Guggenheim v. Dallas Plumbing Co., Com.App., 59 S.W.2d 105, reversing Gugenheim v. Dallas Plumbing Co., Civ.App., 42 S.W. 2d 268.

Representations to others

That purchasers suing to rescind purchase contract for fraudulent misrepresentations of selling agents had in their employment by vendors represented to others same facts which they used as basis for action to rescind, did not estop them denying truth of such representations.—Dunn v. Security-First Nat. Bank, 21 P.2d 647, 131 Cal.App. 541.

Communication through others

However, the representation must have been made to the party setting up the estoppel, or must have been of such a character and made under such circumstances that the party making it must be taken to have contemplated that it would be communicated to, and acted on, by him.

person act in reliance thereon,[85] and that he actually did reasonably rely and act on such representation to his prejudice.[86]

The estoppel may be predicated on representa-

—Hodge v. Ludlum, 47 N.W. 805, 45 Minn. 290.

85. D.C.—Washington Loan & Trust Co. v. Blair, 75 F.2d 671, 64 App.D.C. 152.
Mo.—Long v. Robinson, 281 S.W. 78, 222 Mo.App. 503.

86. U.S.—Kearns Coal Corporation v. U. S. Fidelity & Guaranty Co., C.C.A.N.Y., 118 F.2d 33, certiorari denied 61 S.Ct. 1099—Ætna Life Ins. Co. v. Kepler, C.C.A.Neb., 116 F.2d 1—Universal Gas Co. v. Central Illinois Public Service Co., C.C.A.Ill., 102 F.2d 164—Pulitzer Pub. Co. v. Current News Features, C.C.A.Mo., 94 F.2d 682, certiorari denied 58 S.Ct. 1040, 304 U.S. 570, 82 L.Ed. 1535—Taylor v. Commissioner of Internal Revenue, C.C.A., 89 F.2d 465, certiorari denied 58 S.Ct 48, 302 U.S. 727, 82 L.Ed. 561—Witwer v. Harold Lloyd Corporation, D.C.Cal., 46 F.2d 792, reversed on other grounds, C.C.A., Harold Lloyd Corporation v. Witwer, 65 F.2d 1, certiorari dismissed Witwer v. Harold Lloyd Corporation, 54 S.Ct. 94, 78 L.Ed. 1507—New York & Cuba Mail S. S. Co. v. Lamborn, D.C.N.Y., 8 F.2d 382, modified on other grounds, C.C.A., 13 F.2d 535—Wilkoff Co. v. Royal Government of Italy, C.C.A.Ohio, 1 F.2d 264—News Projection Corporation v. Western Union Tel. Co., D.C.N.Y., 38 F.Supp. 854—The Tampico, C.C.A.Cal., 270 F. 537.
Ala.—Standard Oil Co. v. Gentry, 1 So.2d 29—Colvin v. Payne, 118 So. 578, 218 Ala. 341.
Ariz.—Davis v. Standard Acc. Ins. Co., 278 P. 384, 35 Ariz. 392.
Ark.—Indiana Lumbermen's Mut. Ins. Co. v. Meyers Stave & Mfg. Co., 261 S.W. 917, 164 Ark. 359.
Cal.—Creason v. Creason, 11 P.2d 451, 123 Cal.App. 455—Long Beach Finance Corporation v. Slocum, 294 P. 428, 110 Cal.App. 603—Robbins v. Law, 192 P. 118, 48 Cal.App. 555—Ghio v. Cline, 187 P. 433, 45 Cal. App. 262.
Del.—Colvocoresses v. W. S. Wasserman Co., 190 A. 607, 8 W.W.Harr. 253—In re Trexler Co. of America, 132 A. 144, 15 Del.Ch. 76.
Ga.—Aiken v. Baynes, 154 S.E. 451, 170 Ga. 784—Groover v. Simmons, 137 S.E. 237, 163 Ga. 778.
Ill.—Bondy v. Samuels, 165 N.E. 181, 333 Ill. 535—Sherer-Gillett Co. v. Long, 149 N.E. 225, 318 Ill. 432, affirming 236 Ill.App. 162—Spadoni v. Frigo, 138 N.E. 226, 307 Ill. 32.
Ind.—Pape v. Pape, 119 N.E. 11, 67 Ind.App. 153.
Iowa.—Toedt v. Bollhoeffer, 218 N.W. 56, 206 Iowa 39—Sonka v. Yonkers, 180 N.W. 876, 191 Iowa 599.
Kan.—Henne v. Wood, 113 P.2d 98, 153 Kan. 673.
La.—Wadley v. Gleason, 190 So. 127, 192 La. 1052—State ex rel. Porterie v. Gulf, Mobile & Northern R. Co., 184 So. 711, 191 La. 163—Life v. Griffith, App., 197 So. 646.
Me.—Shaw v. Pinkham, 147 A. 759, 128 Me. 376.
Minn.—Wiedemann v. Brown, 250 N. W. 724, 190 Minn. 33—Riethmuller v. Burton, 222 N.W. 929, 176 Minn. 227—Farmers' & Merchants' State Bank of Morgan v. Huschke, 205 N.W. 637, 165 Minn. 71.
Miss.—Day v. McCandless, 142 So. 486, 167 Miss. 832.
Mo.—Central States Life Ins. Co. v. Bloom, 137 S.W.2d 517—State ex inf. McKittrick ex rel. City of California v. Missouri Utilities Co., 96 S.W.2d 607, 339 Mo. 385, 106 A.L.R. 1169—Noell v. Remmert, 30 S. W.2d 1009, 326 Mo. 148—Ruckert v. Moore, 295 S.W. 794, 317 Mo. 228—Woodside v. Durham, 295 S. W. 772, 317 Mo. 15, 53 A.L.R. 884—Handlan v. Wycoff, 240 S.W. 458, 293 Mo. 682—Fulton v. Kansas City Life Ins. Co., App., 148 S.W.2d 581—Haggerty v. St. Louis Police Relief Ass'n, App., 141 S.W.2d 174—Foster v. Modern Woodmen of America, App., 138 S.W.2d 18—Swinney v. Modern Woodmen of America, 95 S.W.2d 655, 231 Mo. App. 83—Long v. Robinson, 281 S. W. 78, 222 Mo.App. 503—Davis v. Solomon, App., 243 S.W. 410.
Mont.—Gerard v. Sanner, 103 P.2d 314—O'Neill v. Wall, 62 P.2d 672, 103 Mont. 388.
Neb.—First Nat. Bank of Bridgeport v. First Nat. Bank of Hartington, 196 N.W. 691, 111 Neb. 441—Merchants'-Mechanics' First Nat. Bank v. Cavers Elevator Co., 180 N.W. 588, 105 Neb. 321.
N.H.—Record v. Rochester Trust Co., 192 A. 177, 89 N.H. 1, 110 A.L.R. 1218.
N.Y.—McAleenan v. Massachusetts Bonding & Insurance Co., 133 N.E. 444, 232 N.Y. 199, affirming 180 N.Y.S. 287, 190 App.Div. 657—Trimble v. New York Life Ins. Co., 255 N.Y.S. 292, 234 App.Div. 427—Harvey v. J. P. Morgan & Co., 2 N.Y.S.2d 520, 166 Misc. 455.
N.C.—American Exchange Nat. Bank v. Winder, 150 S.E. 489, 198 N.C. 18.
Or.—Montgomery v. Anglo-California Trust Co., 68 P.2d 1057, 157 Or. 187—American Bank v. Port Orford Cedar Products Co., 12 P.2d 1014, 140 Or. 138—Bramwell v. Rowland, 261 P. 57, 123 Or. 33—Laberee v. Laberee, 228 P. 686, 112 Or. 44, denying rehearing 227 P. 460, 112 Or. 44.
Pa.—Antone v. New Amsterdam Casualty Co., 6 A.2d 566, 335 Pa. 134—Atchison v. United Presbyterian Board of Publication, 109 A. 597, 266 Pa. 47.
R.I.—Hatton v. Howard Braiding Co., 129 A. 805, 47 R.I. 47.
S.C.—Lower Main Street Bank v. Parker, 1 S.E.2d 181, 189 S.C. 320.
S.D.—Hood v. Sioux Steel Co., 287 N. W. 636.
Tex.—Tweedie Footwear Corporation v. Fonville, Civ.App., 115 S.W.2d 421, error refused—Fritz v. Howeth, Civ.App., 297 S.W. 334—Marshburn v. Stewart, Civ.App., 295 S. W. 679—Clem Const. Co. v. Parker, Civ.App., 272 S.W. 228—Foster v. Spearman Equity Exch., Civ. App., 266 S.W. 583—Silverman v. Harmon, Civ.App., 250 S.W. 206—The Royal Tailors v. Joseph, Civ. App., 239 S.W. 639—Wilson v. Robertson, Civ.App., 223 S.W. 285, dismissed for want of jurisdiction.
Utah.—Kelly v. Richards, 83 P.2d 731, 95 Utah 560, 129 A.L.R. 164.
Vt.—Kimball v. New York Life Ins. Co., 126 A. 553, 98 Vt. 192.
Va.—American Mutual Liability Ins. Co. v. Hamilton, 135 S.E. 21, 145 Va. 391.
Wash.—U. S. Fidelity & Guaranty Co. v. Port of Seattle, 13 P.2d 33, 169 Wash. 19—Mount v. Krilich, 230 P. 828, 131 Wash. 627—Lloyd v. Schwaegler, 216 P. 884, 126 Wash. 67.
W.Va.—Cochran v. Craig, 106 S.E. 633, 88 W.Va. 281.
Wis.—Frei v. McMurdo, 77 N.W. 915, 101 Wis. 423.

"In a strict and technical sense, an estoppel arises only when a misrepresentation has prejudiced another who has relied on it."—Deitrick v. Greaney, Mass., 60 S.Ct. 480, 309 U. S. 190, 84 L.Ed. 694, reversing, C.C. A., 103 F.2d 83, modifying, D.C., Deitrick v. Greaney, 23 F.Supp. 758, certiorari granted 60 S.Ct. 104, 308 U.S. 535, 84 L.Ed. 451, certiorari denied Greaney v. Deitrick, 60 S.Ct. 104, 308 U.S. 582, 84 L.Ed. 488, rehearing denied Deitrick v. Greaney, 60 S.Ct. 611, 309 U.S. 697, 84 L.Ed. 1036.

"It is . . . a necessary element of estoppel that the party relying on the representations made was misled to his injury and suffered loss of a substantial character, or has been induced to alter his position for a worse in some material respect."—Skelly v. Ersch, 137 N.E. 106, 108, 305 Ill. 126.

Good-faith reliance

Miss.—Hinds County Water Co. v. Scanlon, 132 So. 567, 159 Miss. 757.

tions not made with fraudulent intent[87] if the person making the same should have known of their falsity,[88] and if of such character as to induce a reasonably prudent man to believe that they were intended to be acted on.[89] If the representation is not such as should induce a prudent person to rely thereon, the person making it will not be estopped thereby.[90]

In some jurisdictions it is essential that the party to whom the representation is made must have in good faith been ignorant of the fact[91] and have had no convenient opportunity of ascertaining the

Time of representation

Misrepresentation must have been made at time of transaction for purpose of procuring benefit sought.—Fest v. Williams, Tex.Civ.App., 89 S.W.2d 1072.

Time of reliance

False representation must be representation of existing fact acted on before it is corrected.—Hopwood Plays v. Kemper, 189 N.E. 461, 263 N.Y. 380, reversing 264 N.Y.S. 924, 239 App Div. 820.

Action or inaction necessary

Vt.—Kimball v. New York Life Ins. Co., 126 A. 553, 98 Vt. 192.

Change of attitude or conduct

It is essential that the person urging the estoppel shall have changed his attitude or conduct on account of such representation.

U.S.—New York & Cuba Mail S. S. Co. v. Lamborn, D.C.N.Y., 8 F.2d 382, modified on other grounds, C.C.A., 13 F.2d 535—News Projection Corporation v. Western Union Tel. Co., D.C.N.Y., 38 F.Supp. 854.

Ill.—Keelin v. Postlewait Co., 102 N.E. 205, 259 Ill. 130.

Change of position

Okl.—Spencer v. First Nat. Bank, 243 P. 943, 116 Okl. 178.

Extent of change of position

(1) It is essential that party change his position to such an extent that he will be substantially prejudiced, not merely technically or formally, if the other be relieved from his representations.—Metropolitan Life Ins. Co. v. Kimball, 94 P.2d 1101, 163 Or. 31.

(2) Reliance to extent making it inequitable for representor to shift position, is necessary element.—Bramwell v. Rowland, 261 P. 57, 123 Or. 33.

Inaction sufficient

U.S.—Bryce v. National City Bank of New Rochelle, D.C.N.Y., 17 F. Supp. 792, affirmed, C.C.A., 93 F. 2d 300.

Forbearance to sue is sufficient act in reliance on misrepresentation to create estoppel.—Virginia Securities Corporation v. Patrick Orchards, C.C.A.Va., 20 F.2d 78.

Estoppel to plead negligent reliance

One making false representation acted on by another to his prejudice is estopped to plead negligence in relying thereon.—Johnson v. Sugg, Tex.Com.App., 291 S.W. 857, reversing Sugg v. Johnson, Civ.App., 284 S.W. 705.

Representation of nonreliance

Purchaser representing to vendor in application and contract to purchase land that he was not relying on agent's representations was held estopped to seek cancellation on ground of agent's misrepresentations not ratified by vendor.—Fortune v. Midland Farms Co., Tex.Civ.App., 8 S.W.2d 236, error refused—Lay v. Midland Farms Co., Tex.Civ.App., 8 S.W.2d 230, error refused.

Action not influenced

Fact that owners of premises without knowledge of defective work made affidavit that work by contractors had been completed to their satisfaction, for purpose of negotiating loan, did not estop them from later setting up cross action for defective work against contractors.—Clem Const. Co. v. Parker, Tex.Civ.App., 272 S.W. 228.

87. Cal.—Standard Oil Co. of California v. Woolner, 298 P. 77, 113 Cal.App. 66.
Kan.—American Indemnity Co. v. Peak, 274 P. 227, 127 Kan. 606.
Mich.—Hetchler v. American Life Insurance Company, 254 N.W. 221, 266 Mich. 608.
Mo.—Fulton v. Kansas City Life Ins. Co., App., 148 S.W.2d 581.
"It is not the law that fraud must exist at the time the declaration is made to support an estoppel. 'All that is meant in the expression that an estoppel must possess an element of fraud is that the case must be one in which the circumstances and conduct would render it a fraud for the party to deny what he had previously induced or suffered another to believe and take action upon. . . . There need be no precedent corrupt motive or evil design.' "—Standard Oil Co. of California v. Woolner, 298 P. 77, 79, 113 Cal. App. 66.

88. Mich.—Hetchler v. American Life Ins. Co., 254 N.W. 221, 266 Mich. 608.
Mo.—Fulton v. Kansas City Life Ins. Co., App., 148 S.W. 581.

89. U.S.—Kearns Coal Corporation v. U. S. Fidelity & Guaranty Co., C.C.A.N.Y., 118 F.2d 33, certiorari denied 61 S.Ct. 1099—U. S. for Use and Benefit of Noland Co. v. Wood, C.C.A.Va., 99 F.2d 80—The Tampico, C.C.A.Cal., 270 F. 537.
Ind.—Pape v. Pape, 119 N.E. 11, 67 Ind.App. 153.
Utah.—Kelly v. Richards, 83 P.2d 731, 95 Utah 560, 129 A.L.R. 164.
Va.—American Mutual Liability Ins. Co. v. Hamilton, 135 S.E. 21, 145 Va. 391.

90. U.S.—J. T. Fargason Co. v. Furst, C.C.A.Ark., 287 F. 306.
Cal.—Robbins v. Law, 192 P. 118, 48 Cal.App. 555.
Md.—Jones v. Northwest Real Estate Co., 131 A. 446, 149 Md. 271.
21 C.J. p 1142 note 8.

Character of representation judicial question

"The representations made must be in themselves sufficient to warrant the action taken, and their sufficiency is a judicial question. It is not enough that the person who heard them deemed that he was warranted in acting as he did; the language used ought of itself to furnish the warrant. One man might consider himself warranted in acting upon representations wholly insufficient to move a more careful and prudent person."—J. T. Fargason Co. v. Furst, C.C.A.Ark., 287 F. 306, 310, 311.

Display of sign as proof of ownership

The fact that oil company's signs were displayed at filling station owned by oil company did not estop oil company, in action for injuries caused by the alleged negligence of one operating the station, to maintain the defense that the one operating the station was an independent contractor rather than an employee and that oil company was not responsible for his negligence.—Reynolds v. Skelly Oil Co., 287 N.W. 823, 227 Iowa 163.

91. U.S.—News Projection Corporation v. Western Union Tel. Co., D.C.N.Y., 38 F.Supp. 854.
Ala.—Pattillo v. Tucker, 113 So. 1, 216 Ala. 572.
Conn.—Basak v. Damutz, 135 A. 453, 105 Conn. 378.
Ill.—Fitzpatrick v. Pitcairn, 20 N.E. 2d 280, 371 Ill. 203, affirming Fitzpatrick v. Wabash Ry. Co., 16 N.E. 2d 764, 296 Ill.App. 531—Bondy v. Samuels, 165 N.E. 181, 333 Ill. 535.
Mo.—Branner v. Klaber, 49 S.W.2d 169, 330 Mo. 306—Thomas v. Modern Woodmen of America, 260 S.W. 552, 218 Mo.App. 10.
Mont.—Gerard v. Sanner, 103 P.2d 314.

fact.[92] In this connection diligence in using means at command to learn the truth is essential[93] except where a confidential relation exists between the parties.[94]

A representation which is uncertain and vague cannot serve as a basis for estoppel.[95]

§ 79. Matters of Fact or of Opinion

Ordinarily only representations of material facts can create an estoppel, not mere expressions of opinion.

To create an estoppel the representation relied on must be a statement of a material fact, and not a mere expression of opinion.[96] A fortiori is this so where the representation is known by the party

Tex.—Fritz v. Howeth, Civ.App., 297 S.W. 334—Marshburn v. Stewart, Civ.App., 295 S.W. 679.
Wis.—Crane v. Esmond, 253 N.W. 780, 214 Wis. 571.

92. U.S.—Anzano v. Metropolitan Life Ins. Co. of New York, C.C.A. N.J., 118 F.2d 430, affirming, D.C., 32 F.Supp. 417—U. S. v. S. F. Scott & Sons, C.C.A.Mass., 69 F.2d 728.
Cal.—Ghio v. Cline, 187 P. 433, 45 Cal.App. 262.
Ga.—Aiken v. Baynes, 154 S.E. 451, 170 Ga. 784.
Ill.—Fitzpatrick v. Pitcairn, 20 N.E. 2d 280, 371 Ill. 203, affirming Fitzpatrick v. Wabash Ry. Co., 16 N.E. 2d 764, 296 Ill.App. 531—Bondy v. Samuels, 165 N.E. 181, 333 Ill. 535.
Mich.—American Trust Co. v. Bergstein, 224 N.W. 327, 246 Mich. 527.
Minn.—Wiedemann v. Brown, 250 N. W. 724, 190 Minn. 33.
Mo.—Ellenburg v. Edward K. Love Realty Co., 59 S.W.2d 625, 332 Mo. 766—Noell v. Remmert, 30 S.W.2d 1009, 326 Mo. 148.
N.J.—Central R. Co. of New Jersey v. MacCartney, 52 A. 575, 68 N.J. Law 165—Trenton Banking Co. v. Howard, Ch., 187 A. 569, affirmed 187 A. 575, 121 N.J.Eq. 85—Brisio v. O'Connor, 182 A. 855, 119 N.J. Eq. 378.
Or.—Montgomery v. Anglo-California Trust Co., 68 P.2d 1057, 157 Or. 187—American Bank v. Port Orford Cedar Products Co., 12 P.2d 1014, 140 Or. 138.
Va.—Heath v. Valentine, 15 S.E.2d 98.

Discovery of truth prevented

If discovery of truth is prevented by act of party making false representation, that the deceived party did not directly rely on the representation but tried otherwise to ascertain the truth does not prevent estoppel from operating.—Scott v. Burlington State Bank, 233 P. 835, 76 Colo. 582.

Equal means of knowledge

(1) Ordinarily, where equal means of knowledge are available to both parties, there is no estoppel.—Sundheim v. Beaver County Building & Loan Ass'n, 14 A.2d 349, 140 Pa.Super. 529.

(2) Where equal means of knowledge are available to both parties, as where in the case of title the public records can be examined, there is no estoppel.—Perry Coal Co. v. Richmond, 4 N.E.2d 891, 287 Ill.App. 298, transferred, see 200 N.E. 329, 362 Ill. 487.

93. Ala.—Pattillo v. Tucker, 113 So. 1, 216 Ala. 572.
Cal.—Robbins v. Law, 192 P. 118, 48 Cal.App. 555.
Conn.—Basak v. Damutz, 135 A. 453, 105 Conn. 378.
Ill.—Perry Coal Co. v. Richmond, 4 N.E.2d 891, 287 Ill.App. 298, transferred, see 200 N.E. 329, 362 Ill. 487.
Iowa.—Toedt v. Bollhoefer, 218 N.W. 56, 206 Iowa 39.

94. Cal.—Robbins v. Law, 192 P. 118, 48 Cal.App. 555.

95. Cal.—American Woodlite Corporation v. Woodlite Corporation, 265 P. 397, 89 Cal.App. 772.

Statements must be clear and reasonably certain in their intendment in order to give rise to an estoppel.—General Electric Co. v. N. K. Ovalle, Inc., 6 A.2d 835, 335 Pa. 439.

Uncertain representations

A notice that a restaurant company controlled by plaintiff had "transferred its lease and business" to execution defendant is so uncertain as not to be considered to estop plaintiff from asserting title to the equipment and furnishings on a sheriff's interpleader to determine ownership.—Speer v. Zeuger, 83 Pa Super. 288.

96. U.S.—Uhlmann Grain Co. v. Fidelity & Deposit Co. of Maryland, C.C.A.Ill., 116 F.2d 105—U. S. v. S. F. Scott & Sons, C.C.A.Mass., 69 F.2d 728—Quirk v. U. S., D.C.Pa., 45 F.2d 631, 638, quoting **Corpus Juris**—Hendler v. U. S., D.C.Md., 17 F.Supp. 558, citing **Corpus Juris**, and affirmed, C.C.A., U. S. v. Hendler, 91 F.2d 680, certiorari granted 58 S.Ct. 284, 302 U.S. 680, 82 L.Ed. 525, reversed on other grounds 58 S.Ct. 655, 303 U.S. 564, 82 L.Ed. 1018, rehearing denied 58 S.Ct. 940, 304 U.S. 588, 82 L.Ed. 1548.
Del.—Colvocoresses v. W. S. Wasserman Co., 190 A. 607, 8 W.W. Harr. 253.
D.C.—C. I. T. Corporation v. Carl, 85 F.2d 809, 66 App.D.C. 232.
Ky.—Robinson v. Paxton, 276 S.W. 500, 210 Ky. 575.
La.—Wadley v. Gleason, 190 So. 127, 192 La. 1052.
Mo.—Central States Life Ins. Co. v. Bloom, 137 S.W.2d 517—Biggs v. Modern Woodmen of America, 82 S.W.2d 898, 336 Mo. 879, 907, quoting **Corpus Juris**, and reversing, App., 71 S.W.2d 783—Thomas v. Modern Woodmen of America, 260 S.W. 552, 218 Mo.App. 10.
Mont.—Continental Supply Co. v. White, 12 P.2d 569, 576, 92 Mont. 254, citing **Corpus Juris**.
N.J.—Berman v. One Forty-Five Belmont Ave. Corporation, 156 A. 830, 109 N.J.Eq. 256—Trenton Banking Co. v. Howard, Ch., 187 A. 569, affirmed 187 A. 575, 121 N.J.Eq. 85.
N.Y.—McAleenan v. Massachusetts Bonding & Ins. Co., 133 N.E. 444, 232 N.Y. 199, affirming, 180 N.Y.S. 287, 190 App.Div. 657—Louis Pizitz Dry Goods Co. v. New York Hamilton Corporation, 239 N.Y.S. 551, 228 App.Div. 325—Witherell v. Kelly, 187 N.Y.S. 43, 195 App.Div. 227.
Pa.—Miller v. Chester-Cambridge Bank & Trust Co., 28 Del.Co. 425.
Tex.—Smith v. Chipley, 16 S.W.2d 269, 118 Tex. 415, answering certified questions, Civ.App., 24 S.W. 2d 87.
Utah.—Kelly v. Richards, 83 P.2d 731, 95 Utah 560, 129 A.L.R. 164.
21 C.J. p 1142 note 12.

Estimate of value

In lessee's action against lessor for conversion of property stored on leased premises, lessee was not precluded from giving opinion as to actual market value of equipment at time of conversion by the fact that prior to commencement of action he had stated, in effort to persuade lessor not to sell equipment, that such equipment represented "near one thousand dollars worth."—Gruber v. Pacific States Savings & Loan Co., 88 P.2d 137, 13 Cal.2d 144.

Matters of judgment

Representation as to matter not equally open to both parties is statement of fact, but representation as to matter resting merely in judgment of person making it is mere expression of opinion, if means of deriving information, on which fair judgment can be predicated, are equally open to both parties and no artifice or fraud is used to prevent person to whom made from making examination and forming his own judgment.—Emery v. Emery, Tex.Civ.App., 75 S.W.2d 725, error dismissed.

to whom it is made to be nothing more than expression of opinion.[97] Thus representations or opinions as to matters of law do not ordinarily base or create an estoppel[98] unless, as it is sometimes held, made under circumstances that render a repudiation inequitable,[99] as where a confidential relation exists between the parties.[1]

§ 80. As to Future Events

Ordinarily a representation as to the future or a promise cannot create an estoppel. To prevent fraud or injustice, however, a promise is sometimes made the basis of an estoppel if the promise has been made to induce action and has in fact done so, usually where abandonment of a right is involved.

The doctrine of estoppel by representation is ordinarily applicable only to representations as to facts either past or present, and not to representations or promises concerning the future which, if binding at all, must be binding as contracts.[2]

97. Mo.—Hammerslough v. Kansas City Bldg., L. & S. Assoc., 79 Mo. 80.
Wyo.—Inter-mountain Building & Loan Ass'n v. Casper Mut. Building & Loan Ass'n, 28 P.2d 103, 104, 46 Wyo 394, 90 A.L.R. 1426, citing **Corpus Juris.**

98. U.S.—Taylor v. Commissioner of Internal Revenue, C.C.A., 89 F.2d 465, certiorari denied 58 S.Ct. 48, 302 U.S. 727, 82 L.Ed. 561—Commissioner of Internal Revenue v. Union Pac. R. Co., C.C.A., 86 F.2d 657—John W. Gottschalk Mfg. Co. v. Springfield Wire & Tinsel Co., C.C.A.Mass., 74 F.2d 583, modified on other grounds 75 F.2d 907—U. S. v. S. F. Scott & Sons, C.C.A.Mass., 69 F.2d 728—Pickwick Corporation v. Welch, D.C.Cal., 21 F.Supp. 664.
Cal.—Robbins v. Law, 192 P. 118, 48 Cal.App. 555.
Del.—Colvocoresses v. W. S. Wasserman Co., 190 A. 607, 8 W.W.Harr. 253.
D.C.—C. I. T. Corporation v. Carl, 85 F.2d 809, 66 App.D.C. 232.
La.—Wadley v. Gleason, 190 So. 127, 192 La. 1052.
Mo.—Thomas v. Modern Woodmen of America, 260 S.W. 552, 218 Mo.App. 10.
Tex.—Smith v. Chipley, 16 S.W.2d 269, 118 Tex. 415, answering certified questions, Civ.App., 24 S.W.2d 87.

Facts known to both parties
U.S.—Hendler v. U. S., D.C.Md., 17 F. Supp. 558, 568, citing **Corpus Juris,** and affirmed, C.C.A., 91 F.2d 680, certiorari granted 58 S.Ct. 284, 302 U.S. 680, 82 L.Ed. 525, reversed on other grounds 58 S.Ct. 655, 303 U.S. 564, 82 L.Ed. 1018, rehearing denied 58 S.Ct. 940, 304 U.S. 588, 82 L.Ed. 1548—Ward v. Ward, C.C.N.Y., 131 F. 946, affirmed 145 F. 1023, 74 C.C.A. 146, motions denied 149 F. 204, 79 C.C.A. 162, certiorari denied 27 S.Ct. 796, 206 U.S. 564, 51 L.Ed. 1190.
Okl.—Chicago, R. I. & P. Ry. Co. v. Sawyer, 56 P.2d 418, 421, 176 Okl. 446, quoting **Corpus Juris.**
Wash.—Turner v. Spokane County, 273 P. 959, 150 Wash. 524.

Mistake
(1) A mistake of law is not ground for an estoppel.
U.S.—Stewart v. U. S., D.C.Cal., 24 F.Supp. 145, reversed on other grounds, C.C.A., 106 F.2d 495, certiorari granted U. S. v. Stewart, 60 S.Ct. 711, 309 U.S. 647, 84 L.Ed. 999, reversed on other grounds 61 S.Ct. 102, rehearing denied 61 S.Ct. 390.
La.—Wadley v. Gleason, 190 So. 127, 192 La. 1052.

(2) One party is not estopped to assert that a contract was still in force because, through a mutual mistake of law, the parties negotiated for a new contract on the assumption that the old one had been canceled, although the representation was made that the contract was canceled.—Detroit & T. S. L. R. Co. v. Detroit, T. & I. R. Co., D.C.Mich., 290 F. 549, reversed on other grounds, C.C.A., Detroit, T. & I. R. Co. v. Detroit & T. S. L. R. Co., 6 F.2d 845.

Representations of fact
Where corporation transferred bonds to stockholders who agreed to pay all additional federal taxes ultimately found to be due from corporation, stockholders' representations to commissioner of internal revenue regarding character of their possession of bonds constituted "representations of facts" and not "representations of law," and estopped stockholders from contending that bonds, contrary to commissioner's determination in reliance on such representations, should have been included in income for year in which bonds were received.—Taylor v. Commissioner of Internal Revenue, C.C.A., 89 F.2d 465, certiorari denied 58 S.Ct. 48, 302 U.S. 727, 82 L.Ed. 561.

99. U.S.—John W. Gottschalk Mfg. Co. v. Springfield Wire & Tinsel Co., C.C.A.Mass., 74 F.2d 583, modified on other grounds 75 F.2d 907.

1. Cal.—Robbins v. Law, 192 P. 118, 48 Cal.App. 555.

The term "confidential relations" is not confined to the strict fiduciary relationship existing between those having definite well-recognized legal relations of trust and confidence, but extends to every possible case in which a fiduciary relation exists as a fact, although it may be a moral, social, domestic, or merely personal relation, and need not be a legal one. —Robbins v. Law, supra.

Right to rely on representation
Cal.—Robbins v. Law, supra.

2. U.S.—Robert Gordon, Inc. v. Ingersoll-Rand Co., C.C.A.Ill., 117 F.2d 654—Jones Store Co. v. Dean, C.C.A.Mo., 56 F.2d 110, certiorari denied Dean v. Jones Store Co., 52 S.Ct. 641, 286 U.S. 559, 76 L.Ed. 1292.
Ark.—Renner v. Progressive Life Ins. Co., 101 S.W.2d 426, 193 Ark. 504—Bottrell v. Farmers' Bank & Trust Co., 291 S.W. 832, 172 Ark. 1165.
Cal.—Bank of America of California v. Pacific Ready-Cut Homes, 10 P.2d 478, 482, 122 Cal.App. 554, citing **Corpus Juris**—Rottman v. Hevener, 202 P. 329, 332, 54 Cal.App. 474, quoting **Corpus Juris**—Thomson v. Langton, 187 P. 970, 45 Cal. App. 415.
Ga.—Britton v. Bowden, 5 S.E.2d 47, 57, 188 Ga. 306, quoting **Corpus Juris**—Fields v. Continental Ins. Co. of City of New York, 152 S.E. 60, 61, 170 Ga. 28, quoting **Corpus Juris.**
Iowa.—Beckley v. New York Life Ins. Co., 295 N.W. 844—Bundy v. Grinnell Canning Co., 244 N.W. 841, 215 Iowa 674.
Minn.—Butler Bros. Co. v. Levin, 207 N.W. 315, 166 Minn. 158.
Mo.—Central States Life Ins. Co. v. Bloom, 137 S.W.2d 517—Briggs v. Modern Woodmen of America, 82 S.W.2d 898, 907, 336 Mo. 879, reversing, App., 71 S.W.2d 783, citing **Corpus Juris**—Rechow v. Bankers' Life Co., 73 S.W.2d 794, 802, 335 Mo. 668, quoting **Corpus Juris**—Swinney v. Modern Woodmen of America, 95 S.W.2d 655, 231 Mo.App. 83—Thomas v. Modern Woodmen of America, 260 S. W. 552, 218 Mo.App. 10.
N.J.—Radey v. Parr, 153 A. 628, 108 N.J.Eq. 27—Berman v. One Forty-Five Belmont Ave. Corporation, Ch., 156 A. 830.
N.Y.—Trimble v. New York Life Ins. Co., 255 N.Y.S. 292, 234 App. Div. 427—Witherell v. Kelly, 187 N.Y.S. 43, 195 App.Div. 227—Harvey v. J. P. Morgan & Co., 2 N.Y.

Notwithstanding the unanimity of the courts with respect to the preceding statement as the statement of a general rule, representations as to the future or promises have been enforced or permitted to operate as a basis of an equitable estoppel if to do otherwise would help perpetrate a fraud or cause injustice in a case where the representation or promise has been made to induce action or is reasonably calculated to induce action and has in fact induced action on the part of the party setting up the estoppel.[3] This exception has come to be known as the doctrine of promissory estoppel.[4] In such cases it is held that the party making the promise is estopped to assert lack of con-

S 2d 520, 166 Misc. 455—Charles E. Quincy & Co. Arbitrage Corporation v. Cities Service Co., 282 N.Y.S. 294, 156 Misc. 83, affirmed Charles E. Quincey & Co. v. Cities Service Co., 1 N.Y.S.2d 654, 253 App.Div. 719.

Okl.—Exchange Nat. Bank of Tulsa v. Essley, 46 P 2d 462, 463, 173 Okl. 2, quoting **Corpus Juris.**

Or.—Metropolitan Life Ins. Co. v. Kimball, 94 P 2d 1101, 163 Or. 31.

Pa.—General Electric Co v. N. K Ovalle, Inc., 6 A.2d 835, 335 Pa. 439—Miller v. Chester-Cambridge Bank & Trust Co., 28 Del. 425—Heitzman v. Mace, 15 Northumb. L J. 1—Levinson v. Frishman, 89 Pittsb.L.J. 306.

R.I.—Anderson v. Polleys, 173 A. 114, 116, 54 R.I. 296, citing **Corpus Juris.**

Tenn.—Barnes v. Boyd, 72 S W.2d 573, 575, 18 Tenn.App. 55, citing **Corpus Juris.**

Tex.—Reclamation Co. v. Western Brokerage & Supply Co., Civ.App., 57 S.W.2d 274, affirmed Western Brokerage & Supply Co. v. Reclamation Co., 93 S.W.2d 393, 127 Tex. 386, quoting **Corpus Juris.**

Wash.—Lloyd v. Schwaegler, 216 P. 884, 126 Wash. 67.

Wyo.—Vogel v. Shaw, 294 P. 687, 693, 42 Wyo. 333, citing **Corpus Juris.**

21 C J. p 1142 note 14.

"Estoppel will not arise simply from a breach of promise as to future conduct, a mere executory agreement, or from a mere disappointment of expectations."—Barnes v. Boyd, 72 S.W.2d 573, 576, 18 Tenn. App. 55.

Extension of time of payment

Cal.—Rathbun v. Security Mfg. Co., 256 P. 296, 82 Cal.App. 793—Rottman v. Hevener, 202 P. 329, 54 Cal. App. 474.

Forbearance

Where a mortgagor substantially improved the mortgaged property in reliance upon the mortgagee's orally expressed intention never to demand payment of the mortgage, the mortgagee was not estopped from foreclosing, since estoppel cannot be based upon the mere expression of future intention.—Thomson v. Langton, 187 P. 970, 45 Cal.App. 415.

Promise without consideration

Contractor's promise to remit to subcontractor's assignee future payments to become payable to subcontractor being without consideration, doctrine of estoppel by representations was held inapplicable.—Bank of America of California v. Pacific Ready-Cut Homes, 10 P.2d 478, 122 Cal.App. 554.

Reservation of nonperformance

Estoppel cannot be predicated on promise reserving to promisor privilege of nonperformance.—Butler Bros. Co. v. Levin, 207 N W. 315, 166 Minn. 158.

Statement of intention

Tex.—Longbotham v. Ley, Civ.App., 47 S.W.2d 1109, error refused.

3. Me.—Colbath v. H. B. Stebbins Lumber Co., 144 A. 1, 127 Me. 406.

Mass.—Raldne Realty Corporation v. Brooks, 183 N.E. 419, 281 Mass 233.

Minn.—Thom v. Thom, 294 N.W. 461.

Pa.—General Electric Co. v. N. K Ovalle, Inc., 6 A.2d 835, 335 Pa. 439—Fried v. Fisher, 196 A. 39, 328 Pa. 497, 115 A.L.R. 147—Miller v. Chester-Cambridge Bank & Trust Co., 28 Del.Co. 425.

Tex.—Gardner v. Platt, Civ.App., 68 S.W.2d 297.

Wyo.—Hanna State & Savings Bank v. Matson, 77 P.2d 621, 53 Wyo. 1.

Estoppel to question acts done by consent or acquiescence see infra § 114.

Other statements of rule

(1) An estoppel might arise from a promise, even though without consideration, if it was intended that the promise be relied on, and in fact it was relied on, and a refusal to enforce it would be virtually to sanction the perpetration of a fraud or result in other injustice.—Fried v. Fisher, 196 A. 39, 328 Pa. 497, 115 A.L.R. 147.

(2) A promise which the promissor should reasonably expect to induce action or forbearance of a definite or substantial character on the part of the promisee, and which does induce such action and forbearance, is binding if injustice can be avoided only by the enforcement of the promise.

Miss.—Brewer v. Universal Credit Co., 192 So. 902—Lusk-Harbison-Jones, Inc. v. Universal Credit Co., Miss., 145 So. 623, 164 Miss. 693.

Pa.—Stelmack v. Glen Alden Coal Co., 14 A.2d 127, 339 Pa. 410—New Eureka Amusement Co. v. Rosinsky, 191 A. 412, 126 Pa.Super. 444—Miller v. Chester-Cambridge Bank & Trust Co., 28 Del. Co. 425.

(3) The foregoing rule is the rule adopted by the American Law Institute Restatement of the Law of Contracts, § 90.

Pa.—Stelmack v. Glen Alden Coal Co., 14 A.2d 127, 339 Pa. 410—Fried v. Fisher, 196 A. 39, 328 Pa. 497, 115 A.L.R. 147—New Eureka Amusement Co. v. Rosinsky, 191 A. 412, 126 Pa.Super. 444.

Wyo.—Hanna State & Savings Bank v. Matson, 77 P.2d 621, 53 Wyo 1.

(4) A mere promise to do or not to do something in the future cannot work an estoppel unless promisee has acted to his disadvantage in reliance thereon so that his status has been changed, and there is an element of actual or constructive fraud —Harvey v. J. P. Morgan & Co., 2 N.Y.S 2d 520, 166 Misc. 455.

Promise inducing surrender of possession

Where plaintiff voluntarily parted with possession of cattle on which he had lien for pasturage, in reliance on promise of bank to pay debt of owner out of his funds, and mortgages were thereafter filed upon cattle, that plaintiff's lien may not have been technically lost did not prevent him from asserting bank's estoppel to break promise, the lien having been lost as to third persons by the surrender.—Holmes v. Hughes, 226 P. 424, 26 Ariz. 413.

4. U S.—Robert Gordon, Inc. v. Ingersoll-Rand Co., C.C.Ill., 117 F. 2d 654.

Me.—Colbath v. H. B. Stebbins Lumber Co., 144 A. 1, 127 Me. 406.

Miss.—Brewer v. Universal Credit Co., 192 So. 902.

Pa.—Stelmack v. Glen Alden Coal Co., 14 A.2d 127, 339 Pa. 410—General Electric Co. v. N. K. Ovalle, Inc., 6 A.2d 835, 335 Pa. 439—Miller v. Chester-Cambridge Bank & Trust Co., 28 Del.Co. 425.

Wyo.—Hanna State & Savings Bank v. Matson, 77 P.2d 621, 53 Wyo. 1.

Aptitude of phrase

The phrase "promissory estoppel" used to designate doctrine that a promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on part of promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of promise, is well chos-

sideration therefor.[5] Of course, a promise cannot be the basis of an estoppel if any other essential element is lacking.[6]

The most frequent application of the doctrine permitting a promise or representation as to the future to raise an estoppel has been said to be the well recognized exception to the general rule presented where the statement relates to an intended abandonment of an existing right, and is made to influence others who have in fact been influenced by it,[7] where substantial injustice will result unen as indicating that the basis of the doctrine is not so much one of contract with a substitute for consideration, as an application of the general principle of estoppel to certain situations.—Fried v. Fisher, 196 A. 39, 328 Pa. 497, 115 A.L.R. 147.

Basis of doctrine

"Promissory estoppel" is based on the same equitable principles as is "estoppel by silence," and, in either case, the one who is estopped has in effect stood by and, in violation of his duty in equity and good conscience to warn another of the real facts, has permitted the other to take some action detrimental to that other's interest, but in case of "promissory estoppel" a promise is made with the intention that it be acted on by the promisee.—Lacy v. Wozencraft, Okl., 105 P.2d 781.

Commercial or noncommercial promise

(1) In some jurisdictions the doctrine of promissory estoppel has been confined to charitable subscription cases.—Charles E. Quincy & Co. Arbitrage Corporation v. Cities Service Co., 282 N.Y.S. 294, 156 Misc. 83, affirmed Charles E. Quincey & Co. v. Cities Service Co., 1 N.Y.S.2d 654, 253 App.Div. 719.

(2) In others it is said that, although doctrine of "promissory estoppel" has ordinarily been applied only in charitable subscription cases, the mere fact that transaction is commercial in nature will not preclude use of that doctrine.—Robert Gordon, Inc, v. Ingersoll-Rand Co., C.C.A.Ill., 117 F.2d 654.

(3) For estoppel in lieu of consideration as a basis for enforcement of charitable subscription see the C.J.S. title Subscriptions § 5, also 60 C.J. p 960 notes 97–99.

Doctrine older than terminology

Pa.—Fried v. Fisher, 196 A. 39, 328 Pa. 497, 115 A.L.R. 147.

5. U.S.—In re Campbell, C.C.A.Cal., 105 F.2d 197, 124 A.L.R. 1243, certiorari denied Corporation of America v. Campbell, 60 S.Ct. 123, 308 U.S. 593, 84 L.Ed. 496.

Extension of time

The holder of a note, given as part payment for ranch, and of trust deed securing note, was estopped by its conduct in orally agreeing that payment of note, as called for by written contract between it and purchaser of ranch need not be made promptly, but could be made within a reasonable time, to assert that its promise of indulgence was without consideration.—In re Campbell, C.C.A.Cal., 105 F.2d 197, 124 A.L.R. 1243, certiorari denied Corporation of America v. Campbell, 60 S.Ct. 123, 308 U.S. 593, 84 L.Ed 496.

Promissory estoppel as a species of consideration for contract see Contracts § 74 notes 38–40.

6. Okl.—Lacy v. Wozencraft, 105 P. 2d 781.

Pa.—Stelmack v. Glen Alden Coal Co., 14 A.2d 127, 339 Pa. 410.

Wash.—U. S. Fidelity & Guaranty Co. v. Port of Seattle, 13 P.2d 33, 169 Wash. 19.

Reliance and damage

(1) Justifiable reliance and irreparable detriment to the promisee are requisite factors.

U.S.—Robert Gordon, Inc., v. Ingersoll-Rand Co., 117 F.2d 654.

Me.—Colbath v. H. B. Stebbins Lumber Co., 144 A. 1, 127 Me. 406.

Pa.—Stelmack v. Glen Alden Coal Co., 14 A.2d 127, 339 Pa. 410.

Wash.—U. S. Fidelity & Guaranty Co. v. Port of Seattle, 13 P.2d 33, 169 Wash. 19.

(2) The action or forbearance induced must be of definite and substantial character, and enforcement of promise must be necessary to avoid injustice.—New Eureka Amusement Co. v. Rosinsky, 191 A. 412, 126 Pa.Super. 444.

7. U.S.—Jones Store Co. v. Dean, C.C.A.Mo., 56 F.2d 110, certiorari denied Dean v. Jones Store Co., 52 S.Ct. 641, 286 U.S. 559, 76 L.Ed. 1292.

Alaska.—Fairhaven Gold Dredging Co. v. Golden Center Mines, 7 Alaska 669.

Cal.—Burgess v. California Mut. Building & Loan Ass'n, 290 P. 1029, 210 Cal. 180.

Conn.—Wolfe v. Wallingford Bank & Trust Co., 1 A.2d 146, 149, 124 Conn. 507.

Ill.—Springfield Marine Bank v. Marbold, 264 Ill.App. 446.

Minn.—Thom v. Thom, 294 N.W. 461—Butler Bros. Co. v. Levin, 207 N.W. 315, 316, 166 Minn. 158, quoting **Corpus Juris.**

Mo.—Rechow v. Bankers' Life Co., 73 S.W.2d 794, 802, 335 Mo. 668, quoting **Corpus Juris**—Swinney v. Modern Woodmen of America, 95 S.W.2d 655, 657, 231 Mo.App. 83, citing **Corpus Juris.**

N.J.—Berman v. One Forty-Five Belmont Ave. Corporation, Ch., 156 A. 830, 832, quoting **Corpus Juris.**

N.Y.—Phillips v. West Rockaway Land Co., 124 N.E. 87, 226 N.Y. 507—Hofmann v. Hofmann, 19 N.Y.S.2d 130, 259 App.Div. 820, affirming 14 N.Y.S.2d 565, 172 Misc. 378, modified on other grounds 28 N.E.2d 964, 283 N.Y. 730, motion denied 29 N.E.2d 668—Witherell v. Kelly, 187 N.Y.S. 43, 46, 195 App. Div. 227, citing **Corpus Juris**—In re Tuozzolo's Will, 259 N.Y.S. 542, 145 Misc. 485.

N.C.—Mote v. White Lake Lumber Co., 135 S.E. 294, 192 N.C. 460.

Okl.—Exchange Nat. Bank of Tulsa v. Essley, 46 P.2d 462, 463, 173 Okl. 2, quoting **Corpus Juris.**

Pa.—General Electric Co. v. N. K. Ovalle, Inc., 6 A.2d 835, 335 Pa. 439—Fried v. Fisher, 196 A. 39, 42, 328 Pa. 497, 115 A.L.R. 147, citing **Corpus Juris**—Miller v. Chester-Cambridge Bank & Trust Co., 28 Del.Co. 425.

R.I.—Bancamerica-Blair Corporation v. Naphen, 200 A. 428, 61 R.I. 155—Berarducci v. Diano, 198 A. 351, 354, 60 R.I. 305, quoting **Corpus Juris.**

Tenn.—Barnes v. Boyd, 72 S.W.2d 573, 575, 18 Tenn.App. 55, citing **Corpus Juris.**

Tex.—Gardner v. Platt, Civ.App., 68 S.W.2d 297, error refused—Reclamation Co. v. Western Brokerage & Supply Co., Civ.App., 57 S.W.2d 274, 277, affirmed Western Brokerage & Supply Co. v. Reclamation Co., 93 S.W.2d 393, 127 Tex. 386, quoting **Corpus Juris** as rule recognized in Texas—Longbotham v. Ley, Civ.App., 47 S.W.2d 1109, error refused.

Wash.—Handy v. Massachusetts Bonding & Insurance Co., 289 P. 1008, 157 Wash. 612.

Wyo.—Hanna State & Savings Bank v. Matson, 77 P.2d 621, 53 Wyo. 1—Vogel v. Shaw, 294 P. 687, 693, 42 Wyo. 333, citing **Corpus Juris.**

21 C.J. p 1143 note 15.

Renunciation, disavowal, or disclaimer of title or right as basis of estoppel see infra § 86.

" 'There is no rule more necessary to enforce good faith than that which compels a person to abstain from enforcing claims which he has induced others to suppose he would not rely on. The rule does not rest upon the assumption that he has obtained any personal gain or advantage, but on the fact that he has induced others to act in such a man-

less the promise is enforced.[8] It has been said that this is the only case in which a representation as to the future can be held to operate as an estoppel.[9]

§ 81. As to Validity of Bills, Notes, Bonds, Stock, Etc.

A person liable on instruments for the payment of money, promising to pay it or representing that the instrument is his valid obligation, without defense thereto, is estopped to deny liability or to assert defenses theretofore existing as to one purchasing the same in reliance on such promise or representation to his prejudice.

Where a person liable on a bill, note, bond, letter of credit, certificate of deposit, stocks, or other security promises a prospective purchaser or assignee to pay the same, or represents to him that the obligation is valid and that there is no defense to it, he is estopped to resist payment in an action by such person, who has taken the paper in reliance on his representation,[10] and will be precluded from

ner that they will be seriously prejudiced if he is allowed to fail in carrying out what he has encouraged them to expect.' Faxton v. Faxon 28 Mich. 159, 161."—Fried v. Fisher 196 A. 39, 42, 328 Pa. 497.

"Wherever necessary to prevent renunciation from working a fraud upon the party misled, the doctrine is applicable and supplies the absence of a consideration for the promise."—Burgess v. California Mut. Building & Loan Ass'n, 290 P. 1029, 1032, 210 Cal. 180.

Consideration unnecessary

No consideration is necessary to support equitable estoppel created by payee of note telling maker she would not demand interest payment promptly when due.—Longbotham v. Ley, Tex.Civ.App., 47 S.W.2d 1109, error refused.

Intended abandonment by party to be estopped

Rule that representations may constitute estoppel if relating to intended abandonment of existing right means intended abandonment by person sought to be estopped, not person claiming estoppel.—Alameda County Title Ins. Co. v. Panella, 24 P.2d 163, 218 Cal. 510.

Limitation of easement

Where a real estate company represented that it would build only a boardwalk between lots and ocean, and a purchaser relied on such representations, the sale subjected the intervening land to a permanent easement in favor of lots sold to plaintiff, except that defendant might erect a boardwalk thereon, and defendant is estopped from asserting title to or selling such land—Phillips v. West Rockaway Land Co., 124 N.E. 87, 226 N.Y. 507.

Modification of contract

By subsequent oral agreement or representation, promisor may be estopped to contend that only written contract or executed oral agreement can modify written contract.—Alameda County Title Ins. Co. v. Panella, 24 P.2d 163, 218 Cal. 510.

Promise to cancel lease

Landlord who, in presence of prospective new tenants, informed tenant that landlord would execute lease with new tenants following day and would cancel tenant's lease was held estopped to deny he had agreed to cancel tenant's lease after tenant executed lease for other property, in reliance on statements of landlord—McNeill v. Harrison & Sons, 2 N.E.2d 959, 286 Ill.App. 120.

Right of preference

Conduct of judgment creditor mortgagee in inducing holder of his personal note to permit destruction of his note and take assignment of judgments estopped him from denying right to claim preference out of fund arising on mortgage foreclosure, as such conduct amounted to representation that judgments would be paid.—In re Barkley's Assigned Estate, 112 A. 113, 268 Pa. 370.

Statements held insufficient

Statements by plaintiff's sales and general managers made at sales meetings urging distributors handling refrigerators manufactured by plaintiff to continue in business during depression, and assuring them that they would regain losses and would receive financial assistance from plaintiff, could not be construed as expressing an intention by plaintiff to abandon right to cancel, without cause, a contract with distributor and hence such statements did not give rise to "promissory estoppel" precluding cancellation, especially where there was no showing that managers were authorized to renounce plaintiff's right of cancellation—General Electric Co. v. N. K. Ovalle, Inc., 6 A.2d 835, 335 Pa. 439.

Waiver of performance of contract

One who has waived strict performance of his contract and made promises on which the other party has acted and altered his position is estopped to assert rights which would work a hardship on the other party.

N.J.—Van Syckel v. O'Hearn, 24 A. 1024, 50 N.J.Eq. 173.
R.I.—Berarducci v. Diano, 198 A. 351, 60 R.I. 305.
Utah.—Lawrence v. Ward, 77 P. 229, 28 Utah 129.

8. Minn.—Thom v. Thom, 294 N.W. 461.

Release of mortgagor

Mortgagee, after representing that mortgagor would be released if quitclaim deed were given by mortgagor's vendee, was held estopped to deny such statement—Ver Straten v. Worth, 243 P. 1104, 79 Colo. 30.

9. U.S.—Union Mut. L. Ins. Co. v. Mowry, R.I., 96 U.S. 544, 24 L. Ed 674.
21 C.J. p 1143 note 16.

10. U.S.—In re Varney, D.C.Ky., 22 F.2d 230, affirmed, C.C.A., Rutherford v. Elliott, 23 F.2d 250.
Ky.—Grooms v. National Bank of Kentucky, 292 S.W. 513, 218 Ky. 846.
La.—Commercial Nat. Bank of Shreveport v. McDaniel, App., 156 So. 43.
Mass.—Cosmopolitan Trust Co. v. Cirace, 142 N.E. 914, 248 Mass. 98.
Minn.—Guaranty Securities Co. v. Exchange State Bank of Minneapolis, 180 N.W. 919, 148 Minn. 60.
Miss.—Dayhood v. Neely, 99 So. 440, 441, 135 Miss. 14, quoting **Corpus Juris.**
Mo.—Universal Credit Co. v. Enyart, 98 S.W.2d 120, 231 Mo.App. 299.
N.Y.—Johannessen v. Munroe, 53 N.E. 535, 158 N.Y. 641.
Tex.—Coleman v. Moore, Civ.App., 87 S.W.2d 300, 302, quoting **Corpus Juris**—Baxter v. Baxter, Civ.App., 225 S.W. 204.
21 C.J. p 1143 note 17.

Guarantee of loan

Contractor's letter to bank, reciting that contractor would make check for subcontractor's estimate payable to subcontractor and bank jointly, was held to constitute guaranty of bank's loan to subcontractor, and contractor was estopped to deny liability thereon.—Watson Co. v. American Exchange Nat. Bank of Dallas, Tex.Civ.App., 284 S.W. 298.

Representation as to validity by assignor

S.C.—Thompson v. Hudgens, 159 S.E. 807, 161 S.C. 450.

Letter of credit

The issuer of an irrevocable letter of credit represents that it has in its possession funds with which to make good such credit and hence is estopped to deny that it received money or its equivalent as against one relying and acting on such let-

setting up a defense which would have been good as between the original parties.[11] It has been held that it is of no importance whether the assurance was given with a fraudulent intent or by mistake only.[12] If there be no absolute promise to pay, there is no estoppel as to defenses arising subsequent to the representations relied on.[13]

In the circumstances under consideration the person liable on the instrument will not be permitted to assert that there has been a material alteration in the instrument,[14] that he did not execute it,[15] that the execution of the instrument was defective[16] or was procured by fraud and misrepresentation,[17] that it was void for nonconformity with the express requirements of a statute,[18] that it was barred by the statute of limitations,[19] that the instrument was invalid by reason of a defense of which he was ignorant at the time of the representation,[20] that he is discharged from liability as indorser for want of notice,[21] that the instrument has been paid,[22] or that it was not due according to its tenor.[23] However, to render this rule operative the representations must be outside of the face of the obligation,[24] and even though they are thus disconnected, if they are made simultaneously with the execution of the obligation, so that there is in effect but a single transaction, no estoppel will arise.[25]

Essential elements. In accordance with general principles heretofore stated, there must be a false representation,[26] made prior to the transfer of the instrument,[27] and the party to whom the representation was made must have been without knowledge or means of knowledge of the true facts,[28] since the party setting up the estoppel must have acted in reliance on the assurances given,[29] the rule having no application where the facts are equally known to both parties,[30] or where the party claiming an estoppel has not altered his position to his prejudice,[31] or where the representations relied on are not plain and positive and such as would mislead a person of ordinary prudence.[32]

ter of credit.—Harkness v. Chase Nat. Bank of City of New York, 280 N.Y.S. 557, 155 Misc. 784.

Promise held indefinite

Cal.—McAfee v. Fisher, 30 P. 811, 64 Cal. 246, 248.

21 C.J. p 1144 note 30.

11. Miss.—Dayhood v. Neely, 99 So. 440, 441, 135 Miss. 14, quoting **Corpus Juris.**

Tex.—Coleman v. Moore, Civ.App., 87 S.W.2d 300, 302, quoting **Corpus Juris**—Baxter v. Baxter, Civ. App., 225 S.W. 204.

21 C.J. p 1144 note 18.

12. Tex.—Coleman v. Moore, Civ. App., 87 S.W.2d 300, 302, quoting **Corpus Juris.**

21 C.J. p 1144 note 19.

13. Mo.—Jennings v. Todd, 24 S.W. 148, 118 Mo. 296, 40 Am.S.R. 373.

14. Ark.—Harrison v. Luce, 43 S.W. 970, 64 Ark. 583.

21 C.J. p 1144 note 20.

15. Ga.—Freny v. Hall, 21 S.E. 163, 93 Ga. 706.

21 C.J. p 1144 note 21.

16. Ala.—Tuskaloosa Cotton-Seed Oil Co. v. Perry, 4 So. 635, 85 Ala. 158.

Failure of husband to join execution

Wife, having induced third person to purchase notes by representations as to validity of vendor's lien securing the notes, will be estopped to assert invalidity of lien by reason of husband's failure to join in execution of notes.—Baxter v. Baxter, Tex. Civ.App., 225 S.W. 204.

17. Ala.—Tapscott v. Gibson, 30 So. 23, 129 Ala. 503.

18. Ky.—Billington v. McColpin, 60 S.W. 923, 22 Ky.L. 1281.

21 C.J. p 1144 note 24.

19. Ky.—McElroy v. Dunn, 5 Ky.Op. 112.

20. Conn.—Preston v. Mann, 25 Conn. 118.

21 C.J. p 1144 note 26.

21. N.H.—Libbey v. Pierce, 47 N.H. 309.

22. Ky.—Grooms v. National Bank of Kentucky, 292 S.W. 513, 218 Ky. 846.

La.—Commercial Nat. Bank of Shreveport v. McDaniel, App., 156 So. 43.

21 C.J. p 1144 note 28.

23. Me.—Haskell v. Monmouth F. Ins. Co., 52 Me. 128.

24. Ill.—Marks v. Pope, 7 N.E.2d 481, 487, 289 Ill.App. 558, quoting **Corpus Juris.**

N.Y.—Schnitzer v. Husted, 18 N.Y.S. 156.

25. Ill.—Marks v. Pope, 7 N.E.2d 481, 487, 289 Ill.App. 558, quoting **Corpus Juris.**

21 C.J. p 1144 note 32.

26. **As to check of another**

One who in good faith introduced prospective depositor, in their joint names, of fictitious check, who made no representations, except true ones, as to identity of depositor and his desire to deposit check, is not estopped to deny liability for loss of bank occasioned by payment of check drawn against such account before discovery of fictitious character of check deposited.—Faulkner v. Bank of Italy, 231 P. 380, 69 Cal.App. 370.

27. Or.—Second Northwestern Finance Corporation v. Mansfield, 252 P. 400, 121 Or. 236, rehearing denied 254 P. 1022, 121 Or. 236.

21 C.J. p 1144 note 34.

28. Or.—American Bank v. Port Orford Cedar Products Co., 12 P.2d 1014, 140 Or. 138.

29. Colo.—Ayer v. Younker, 50 P. 218, 10 Colo.App. 27.

N.Y.—Thorn v. Bell, Lalor 430.

Or.—American Bank v. Port Orford Cedar Products Co., 12 P.2d 1014, 140 Or. 138—Second Northwestern Finance Corporation v. Mansfield, 252 P. 400, 121 Or. 236, rehearing denied 254 P. 1022, 121 Or. 236.

21 C.J. p 1144 note 35, p 1146 note 46.

30. Ind.—Glass v. Murphy, 30 N.E. 1097, 31 N.E. 545, 4 Ind.App. 530.

Ky.—Holzbog v. Bakrow, 160 S.W. 792, 156 Ky. 161, 50 L.R.A.,N.S., 1023.

21 C.J. p 1144 note 36.

31. Neb.—Merchants' - Mechanics' First Nat. Bank v. Cavers Elevator Co., 180 N.W. 588, 105 Neb. 321.

Or.—American Bank v. Port Orford Cedar Products Co., 12 P.2d 1014, 140 Or. 138—Second Northwestern Finance Corporation v. Mansfield, 252 P. 400, 121 Or. 236, rehearing denied 254 P. 1022, 121 Or. 236.

21 C.J. p 1144 note 37.

32. U.S.—J. T. Fargason Co. v. Furst, C.C.A.Ark., 287 P. 306.

21 C.J. p 1144 note 38.

Denial of acceptance of draft

Where the drawee of a draft for the rent of leased premises stated to the payee his reason for disregarding the draft was that the tenant had not shipped him enough cotton to pay it, and in answer to a ques-

So a bank is not liable in equity to the holder for the amount of an unaccepted check acquired on oral representations of the bank that the check was good, and that the holder might take it safely in payment of goods sold.[33]

Validity of signature. A person whose name has been signed to an obligation without his authority as maker, acceptor, or indorser, will be estopped to deny his liability if he so acts or speaks that the holder or intending purchaser is misled as to the validity of the signature, and purchases or relinquishes some right, or otherwise suffers an injury in consequence;[34] and this is true, although he may not actually have intended to ratify or adopt the signature.[35]

The fact of having paid or recognized similar notes will not estop one from contesting his liability on a promissory note on the ground of forgery.[36]

Want, failure, or illegality of consideration. If a person liable on a security for the payment of money represents to an intending purchaser or assignee that he has no defense and will pay the obligation, he precludes himself from afterward setting up a defense of want, failure, or illegality of consideration then existing to his knowledge;[37] but if instead of an absolute promise to pay he merely states that he has no defense to the note, he will not be estopped from setting up a failure of consideration arising subsequently to such statement.[38]

§ 82. As to Mortgages and Judgments

An equitable estoppel may arise with respect to a mortgage or judgment as to which misrepresentations have been made if the essential elements are present.

All essential elements being present, an estoppel may arise with respect to a mortgage or judgment as to which false representations have been made.[39]

tion as to when there would be enough cotton replied, "Eight or ten days," his statement was not sufficient to warrant the payee in believing that the draft would be paid when the cotton was shipped, so as to estop the drawee from denying he accepted the draft after the payee, relying on that statement, had failed to assert his statutory lien on the cotton.—J. T. Fargason Co. v. Furst, supra.

33. Kan.—Rambo v. Argentine First State Bank, 128 P. 182, 88 Kan. 257.

34. Ariz.—Lillywhite v. Coleman, 52 P.2d 1157, 1160, 46 Ariz. 523, citing **Corpus Juris.**
Md.—Home Credit Co. v. Fouch, 142 A. 515, 155 Md. 384.
Mass.—Cosmopolitan Trust Co. v. Cirace, 142 N.E. 914, 248 Mass. 98. 21 C.J. p 1145 note 40.

Representation as to forged instrument

(1) Person whose name was forged to note is estopped to deny liability where before it was due he stated that, although he did not sign it, he would see it paid.—Marsh v. State Bank & Trust Co., 284 S.W. 380, 153 Tenn. 400, 48 A.L.R. 1365.

(2) It has been held that an admission in relation to an obligation not produced or identified, even if unexplained, does not warrant a finding that the alleged maker or indorser has ratified the forgery of his signature or estopped himself from denying his liability.—Sheller v. McKenney, 17 Ill.App. 185—21 C.J. p 1145 note 40 [a].

(3) If representation is that particular note offered for sale by specified person is genuine, the maker is estopped to assert a forgery even though he did not have the note before him when making the representation. The reason given for this rule was that if one of two innocent persons must suffer a loss, it must be borne by the one whose conduct has made the loss possible.—In re Varney, D.C.Ky., 22 F.2d 230, affirmed, C.C.A., Rutherford v. Elliott, 23 F.2d 250.

(4) It is otherwise if the representation is merely that a note signed by the maker exists and the note is not before the maker at the time.—Watkins Land, etc., Co. v. Howeth, 21 S.W. 315, 1 Tex.Civ.App. 277.

35. Me.—Forsyth v. Day, 46 Me. 176.

36. Pa.—Cohen v. Teller, 93 Pa. 123.

37. Miss.—Dayhood v. Neely, 99 So. 440, 135 Miss. 14.
Mo.—Universal Credit Co. v. Enyart, 98 S.W.2d 120, 231 Mo.App. 299.
21 C.J. p 1145 note 44.

Gambling obligation

Miss.—Dayhood v. Neely, 99 So. 440, 135 Miss. 14.

38. Ala.—Maury v. Coleman, 24 Ala. 381, 60 Am.D. 478—Clements v. Loggins, 2 Ala. 514.

39. **Inducing absence of creditor at foreclosure**

A mortgagee, who falsely represented to judgment creditor of mortgagor, with intention that creditor rely thereon, that the mortgage was a good investment and that mortgagee did not desire to part with it, but that, if he should foreclose, he would notify creditor, was estopped to assert rights acquired by foreclosure without notice to creditor who, relying on the representations, did not appear at foreclosure sale, and refrained from insisting on a transfer of mortgage to him for the amount secured thereby as he had the statutory right to do.—Berarducci v. Diano, 198 A. 351, 60 R.I. 305.

Equal knowledge as to invalidity of mortgage

A mortgagor is not estopped to deny validity of a mortgage merely by indorsing notes of the mortgagee for renewal at a bank, after knowing the bank held the mortgage by assignment, he having previously informed the bank that it was invalid. He has done no act or made no statement on the faith of which the bank or any former holder acted to his prejudice in advancing money on the security of the mortgage.—Welch v. Graham, 124 N.Y.S. 945.

Good faith ignorance of facts necessary

A mortgagor was not estopped from disputing amount due by his statement to the then mortgagee as to the amount due, when the slightest care would have revealed a considerable difference between the amount actually due and that represented by the statement, since good faith ignorance of the true facts requires the exercise of due diligence to ascertain the truth.—Pattillo v. Tucker, 113 So. 1, 216 Ala. 572.

Reliance on representation

(1) A certificate declaring a previously executed mortgage to be a valid encumbrance on property cannot operate as an estoppel until some person has acted on the faith of it.—Purdy v. Coar, 17 N.E. 352, 109 N.Y. 448, 4 Am.S.R. 491, reversing 13 Daly 449.

(2) If the false statement was not designed to influence the assignment of the security, and was not relied on by the person setting up the estoppel, the party making it will not be estopped thereby.—Wilcox v. Howell, 44 Barb. 396, affirmed 44 N.Y. 398.

Thus a mortgagor or judgment debtor who makes a false statement, orally or in writing, to influence the assignment of the security or judgment, is estopped from taking advantage of it as against an innocent assignee who has relied thereon,[40] and the same is true of a grantee of a mortgagor who has taken subject to the mortgage.[41] So, too, the holder of mortgage notes who induces a purchaser to take them by representation that the mortgage is a paramount lien is estopped to assert that there is a prior mortgage.[42]

A mortgagee informing a purchaser of the property as to the amount due or extent of the lien is estopped to assert a greater lien or amount due after conclusion of the transaction in reliance on such representation.[43]

Where property, which was subject to mortgages, was about to be sold on foreclosure of the first, one who represented to the second mortgagee that he was the third mortgagee and agreed that, if the second mortgagee would refrain from bidding at the sale, he would, if he purchased the property, discharge the second mortgage, is, after having purchased the property, estopped from denying that he was the third mortgagee.[44]

The sale of land under a deed of trust by a sheriff having been at the request of the legal holders of the note secured, who were present at the sale, bought the land, and took the sheriff's deed, which recited that the sale was at their request, they cannot, as against one to whom they conveyed the land by warranty deed, assert any validity in the deed of trust or the note secured thereby, even if the sheriff was not one authorized by the deed of trust to make a sale under it.[45]

One representing to a purchaser of land encumbered by a deed of trust securing a note that the deed and note were collateral only is estopped from asserting the contrary.[46]

If the assignor of a mortgage of premises injured by fire makes proofs of loss and engages a third person to rebuild representing that he owned the premises, he is estopped to deny liability to such third person.[47]

Where a mortgagor, having only a life estate, but believing that he owned the fee, mortgaged the property and represented to the mortgagee that he owned the fee and the mortgage was foreclosed, and the land bought in by the mortgagee, the mortgagor, on acquiring the outstanding title, was estopped from relying thereon as against the mortgagee.[48]

Abandonment of right. A mortgagee assuring the mortgagor that there would be no deficiency judgment taken, thus reasonably causing the mortgagor to do nothing to protect himself against a deficiency judgment, is estopped to claim under such a judgment, such an assurance indicating an abandonment of an existing right within the exception to the rule requiring a representation to be as to a present or past fact, not a promise as to the future.[49]

§ 83. Admissions and Receipts

Admissions in judicial proceedings as creating estoppel are discussed in §§ 117, 118, 121.

Examine Pocket Parts for later cases.

§ 84. Admissions

Admissions may create an estoppel if other essential elements are present.

Admissions made with a knowledge actual or constructive of the facts, and with the intention, or reasonably calculated, to influence the conduct of another, and which have been relied and acted on to his prejudice by that other, are conclusive against the party making them as between him and the person whose conduct he has thus influenced.[50]

40. Tex.—National Bond & Mortgage Corporation v. Davis, Com.App., 60 S.W.2d 429, reversing Davis v. National Bond & Mortgage Corporation, Civ.App., 45 S.W.2d 272.
21 C.J. p 1146 note 51.

Assignor of note and mortgage, assigned to secure loan, was estopped to deny validity thereof—Thompson v. Hudgens, 159 S.E. 807, 161 S.C. 450.

Genuineness or validity of mortgage
Mass.—Cosmopolitan Trust Co. v. Cirace, 142 N.E. 914, 248 Mass. 98.
N.Y.—Weiss v. Schildkraut, 190 N.Y.S. 293, 116 Misc. 285, affirmed 194 N.Y.S. 988.

41. Vt.—Holman v Boyce, 26 A. 632, 65 Vt. 318, 36 Am.S.R. 861.
21 C.J. p 1146 note 52.

42. Ala.—Winter-Loeb Grocery Co. v. Mutual Warehouse Co., 58 So. 807, 4 Ala. 431.
Ind.—Dodge v. Pope, 93 Ind. 480.

43. Kan.—Citizens Savings & Loan Ass'n v. Warson, 94 P.2d 311, 314, 150 Kan. 432, citing **Corpus Juris.**
Mich.—Continental Bank v. Kowalsky, 225 N.W. 496, 247 Mich. 348.

44. N.Y.—Delisi v. Ficarrotta, 135 N.Y.S. 653, 76 Misc. 488.

45. Mo.—Miller v. New Madrid Banking Co., 139 S.W. 192, 235 Mo. 522.

46. Ark.—Winter v. Humble, 172 S.W. 849, 116 Ark. 588—Rogers v. Galloway Female College, 44 S.W. 454, 64 Ark. 627, 39 L.R.A. 636.

47. Wash.—Manny v. Spokane State Bank, 138 P. 682, 78 Wash. 230.

48. Ky.—Weir's Trustee v. Weir, 129 S.W. 108, 138 Ky. 788.

49. N.Y.—Witherell v. Kelly, 187 N.Y.S. 43, 195 App.Div. 227.
Promise or representations as to the future as basis of estoppel see supra § 80.

50. U.S.—Combs v. Eubank, C.C.A. Ark., 28 F.2d 459—In re Varney, D.C.Ky., 22 F.2d 230, affirmed, C.C.

For an admission so to operate, the essential elements of an equitable estoppel must exist.[51] It must refer to the existence or nonexistence of some material fact,[52] with reference to the matter as to which the estoppel is asserted,[53] and in accord with the general rule requiring the representation to be made to the party asserting the estoppel, see supra § 78, no estoppel as a rule arises from admissions made to third persons who are strangers to the controversy.[54] Furthermore, to operate as an estoppel it is essential that the admission should have been relied on by the party claiming the estoppel,[55] justifiably,[56] and that he should have acted on such

A., Rutherford v. Elliott, 23 F.2d 250.
Ariz.—Bohn v. Hill, 260 P. 1096, 32 Ariz. 545.
Cal.—Moriarty v. California Western States Life Ins. Co., 70 P.2d 684, 22 Cal.App.2d 260.
Kan.—Citizens Savings & Loan Ass'n v. Warson, 94 P.2d 311, 312, 150 Kan. 432, citing **Corpus Juris.**
Ky.—Hester v. O'Rear, 259 S.W. 41, 202 Ky. 176.
Md.—Home Credit Co. v. Fouch, 142 A. 515, 155 Md. 384.
Miss.—Charles Weaver & Co. v. Phares, 184 So. 833, 183 Miss. 735.
N.Y.—In re Hayden's Estate, 16 N.Y.S.2d 126, 172 Misc. 669—Sweet v. Hollearn, 252 N.Y.S. 202, 141 Misc. 135—Weiss v. Schildkraut, 190 N.Y.S. 293, 116 Misc. 285.
Tenn.—Marsh v. State Bank & Trust Co., 284 S.W. 380, 153 Tenn. 400, 48 A.L.R 1365.
Tex.—Glasscock v. Bradley, Civ.App., 152 S.W.2d 439.
Wash.—Butters v. Oles, 214 P. 629, 124 Wash. 380.
21 C.J. p 1146 note 56.

Express or implied admission
N.Y.—New York State Guernsey Breeders' Co-op. v. Noyes, 22 N.Y.S.2d 132, 260 App.Div. 240, modified on other grounds 30 N.E.2d 471, 284 N.Y. 197.

Admission by inconsistent acts
La.—Brown v. Welden, App., 199 So. 620.

Admissions against interest
Neb.—Weisel v. Hobbs, 294 N.W. 448—Gentry v. Burge, 261 N.W. 854, 129 Neb. 493—Resnick v. Kazakes, 243 N.W. 861, 123 Neb. 654.
Tex.—Butler v. Duffey, Civ.App., 288 S.W. 598.

Admissions as to amount of debt
U.S.—Davis v. Akron Feed & Milling Co., C.C.A.Ohio, 296 F. 675.
Kan.—Citizens Savings & Loan Ass'n v. Warson, 94 P.2d 311, 150 Kan. 432.
Wash.—Black v. Yoder, 17 P.2d 850, 171 Wash. 341.

Admissions as to amount of rent
Tenn.—Winer v. Williams, 54 S.W.2d 723, 165 Tenn. 190.
21 C.J. p 1147 note 56 [c].

Admissions as to title to realty
Ark.—Bradshaw v. Darby, 146 S.W. 2d 547.
Cal.—Boggs v. Merced Mining Co., 14 Cal. 279, 367—Moriarty v. California Western States Life Ins. Co., 70 P.2d 684, 22 Cal.App.2d 260—Jones v. Coulter, 243 P. 487, 75 Cal.App. 540.
La.—Jackson v. United Gas Public Service Co., 198 So. 633, 196 La. 1—Mims v. Sample, 186 So. 66, 191 La. 677, 122 A.L.R 249.
Mo.—Roth v. Hoffman, App., 111 S.W.2d 988.
21 C.J. p 1146 note 56 [b].

Admission of ownership of assessable shares
U.S.—Rust v. McLaren, D.C.Kan., 29 F.2d 288.

Bank statement
Ky.—Patton v. Catlettsburg Nat. Bank, 255 S.W. 690, 200 Ky. 775.

Corporate report by officer
Ariz.—Monterey Water Co. v. Voorhees, 43 P.2d 196, 45 Ariz. 338.

Division order as to property
The execution and delivery of a division order designating the interest claimed by each party, in and to the production from an oil and gas mining lease, delivered to the pipe line company receiving the oil runs, is such an assignment of interest as will be binding between the party executing same and the pipe line company, and operates as an estoppel in pais, estoppel in fact, as to the party executing same, from recovering a greater sum against the pipe line company than the amount of the interest designated in the division order.—Texas Co. v. Pettit, 220 P. 956, 107 Okl. 243, dissenting opinion 231 P. 463, 107 Okl. 243.

Matter not constituting admissions
La.—Lewis v. Metropolitan Life Ins. Co., 134 So. 699, 17 La.App. 143.
Pa.—Zidek v. West Penn Power Co., Super., 20 A.2d 810.
21 C.J. p 1146 note 56 [j].
Admissions in judicial proceedings see infra §§ 117, 118, 121.

Admissions not constituting estoppel
(1) Admission in application and notice for franchise to operate ferry that ferry was being operated by company whose franchise had expired does not estop applicant to deny franchise of such company.—Burnside Land Co. v. Connelly & Lee, 291 S.W. 409, 218 Ky. 346.

(2) An insolvent corporation was not estopped, as against a creditor, from claiming that money paid out to one holding stock as collateral was in payment of a loan by reason of a report of the corporation that there was an amount of stock outstanding, which amount included the stock held as collateral.—City Investing Co. v. Gerken, 193 N.Y.S. 271, 200 App.Div. 503.

Admission induced by party asserting estoppel
Where compensation of expert for advising insured as to method of reducing cost of life insurance was contingent on effecting savings, fact that insured followed such expert's suggestions, and in reliance on abstract furnished by him admitted savings had been effected, does not estop insured from denying that savings were effected.—Messick v. Johnson, 30 P.2d 176, 167 Okl. 463.

52. Cal.—Cullinan v. Mercantile Trust Co. of California, 252 P. 647, 80 Cal.App. 377.
Ill.—Illinois Cent. R. Co. v. Phelps, 4 Ill.App. 238.
21 C.J. p 1147 note 57.

53. Kan.—Leavenworth Light & Heating Co. v. Waller, 70 P. 365, 65 Kan. 514, reversing 61 P. 327, 9 Kan.App. 301.

54. Cal.—Moore v. Boyd, 15 P. 670, 74 Cal. 167.
21 C.J. p 1147 note 59.
To whom estoppel available generally see supra § 130.

55. U.S.—Witwer v. Harold Lloyd Corporation, D.C.Cal., 46 F.2d 792, reversed on other grounds, C.C.A., Harold Lloyd Corporation v. Witwer, 65 F.2d 1, certiorari dismissed Witwer v. Harold Lloyd Corporation, 54 S.Ct. 94, 78 L.Ed. 1507.
Ill.—Hatch v. Grand Lodge, Brotherhood of Railroad Trainmen, 233 Ill.App. 495.
Kan.—Johnson v. People's National Bank of Kansas City, 286 P. 214, 130 Kan. 379.
Miss.—Stockner v. Wilczinski, 14 So. 460, 71 Miss. 340.
Mo.—Long v. Robinson, 281 S.W. 78, 222 Mo.App. 503.
Vt.—Poronto v. Sinnott, 95 A. 647, 89 Vt. 479.
Wis.—Weller v. Phillip Gross Realty Co., 180 N.W. 927, 173 Wis. 447.

56. Ind.—Seibold v. Welch, 135 N.E. 258, 78 Ind.App. 238.
Wis.—Jandl v. Guziekiewicz, 218 N.W. 593, 195 Wis. 258.

admissions to his detriment.[57] So where a person has procured another to make an admission for a particular purpose, he having knowledge of the actual facts, he cannot, in a suit against the party making the admission, insist on it as an estoppel.[58]

It has been held that no estoppel arises where the admissions were due to ignorance founded on an innocent mistake.[59]

The fact that an admission is made under oath does not make it conclusive as an estoppel if it would not otherwise operate as such.[60]

Certainty. Based on the rule that the facts of an estoppel must be certain see supra § 77, if an admission is susceptible of two constructions, one of which is consistent with the right asserted by the party sought to be estopped, it forms no basis for an estoppel.[61]

Inconsistency. There is no estoppel as to facts not inconsistent with those admitted.[62]

Offers or attempts at compromise are not the basis of an estoppel.[63]

As to matters of law. While there is some authority to the contrary,[64] it is very generally held that an admission, in order to constitute an estop-

57. Ga.—Pearson v. Brown, 31 S.E. 746, 105 Ga. 802.
Ill.—Hatch v. Grand Lodge, Brotherhood of Railroad Trainmen, 233 Ill App. 495.
Kan.—Johnson v. People's National Bank of Kansas City, 286 P. 214, 130 Kan. 379.
Mo.—Jones v. Park, 222 S.W. 1018, 282 Mo. 610—Long v. Robinson, 281 S.W. 78, 222 Mo.App. 503.
N.Y.—New York State Guernsey Breeders' Co-op. v. Noyes, 22 N.Y.S.2d 132, 260 App.Div. 240, modified on other grounds 30 N.E.2d 471, 284 N.Y. 197.
S.C.—Ex parte American Fertilizing Co., 115 S.E. 236, 122 S.C. 171.
Tex.—Braddock v. Gambill, Civ.App., 291 S.W. 306.
Vt.—Kimball v. New York Life Ins. Co., 116 A. 119, 96 Vt. 19.
Wash.—U. S. Fidelity & Guaranty Co. v. Port of Seattle, 13 P.2d 33, 169 Wash. 19.
Wis.—Weller v. Phillip Gross Realty Co., 180 N.W. 927, 173 Wis. 447—Warder v. Baker, 11 N.W. 342, 54 Wis. 49.
21 C.J. p 1147 note 62.

Admission after transaction

(1) Admissions made after the transactions to which they relate, and from which no loss could result to other parties in interest, do not operate as an estoppel.—Carland v. Day, 4 E.D.Smith, N.Y., 251.

(2) Hence, where architect's decision as to whether work and materials used by subcontractor complied with contract was made after subcontractor had completed the work, and did not influence him in performance of his undertaking, owner was not thereby estopped from suing for subcontractor's negligence, resulting in collapse of walls of building.—Hebbard v. McDonough, 139 N.E. 512, 245 Mass. 204.

Payment not legally due

(1) One is not estopped to deny liability by having made payment not legally due.—Juett v. Cincinnati, N. O. & T. P. Ry. Co., 53 S.W.2d 551, 245 Ky. 379.

(2) Thus property owner paying small repair bill on new railroad overpass to avoid suit was held not estopped to deny liability for subsequent repairs, where old bridge, which property owner had agreed to help maintain, had been destroyed.—Juett v. Cincinnati, N. O. & T. P. Ry. Co., supra.

(3) Payment by participant in automobile collision of hospital bills of occupants of other automobile after he had taken such occupants to hospital immediately following accident and agreed to pay their hospital expenses was not admission of responsibility for accident so as to render such person liable for damage to other automobile.—Griessen v. Cook, La.App., 164 So. 260.

Part payment of debt

Mere payment of part of a debt by one not legally bound, which does not prejudice any one, will not estop him to deny liability for the balance.—O'Malley v. Wagner, 76 S.W. 356, 25 Ky.L. 810.

Request for extension of time to pay

That the debtor, after the maturity of the debt, asks the creditor for indulgence and promises to pay the debt if its collection is not pressed will not estop him from setting up the defense of partial failure of consideration, even though the facts on which that defense is based were known to him when he made the promise, creditor not having been placed in a worse position by such requests and promises.—Maxwell Bros. v. Harrison, 102 S.E. 372, 25 Ga.App. 14.

Absence of knowledge

Certificate of no defense to payment of mortgage debt on premises, executed by grantee of mortgagor, who neither knew thereof nor relied thereon to his detriment, was held not to create estoppel in mortgagor's favor.—Britton v. Roth, 169 A. 146, 313 Pa. 352.

Injury lacking

Brokers are not estopped to show that slip confirming sale of stock was issued by mistake, where no stock was sold on day in question at price specified in customer's order.—Landau v. Wollman, 258 N.Y.S. 947, 144 Misc. 541.

58. N.H.—Davis v. Sanders, 11 N.H. 259.

59. Ky.—Juett v. Cincinnati, N. O. & T. P. Ry. Co., 53 S.W.2d 551, 245 Ky. 379—Dickerson v. Nabb, Ky. Dec. 320, 2 Am.D. 725.
21 C.J. p 1147 note 63.

As to conduct of agent

Where a bank in which an agent had deposited funds of his principals to his own credit, with knowledge of their trust character, had procured their application in payment of a debt of the agent, the owners of the funds were not estopped to maintain a suit against the bank by taking notes of the agent, with personal security, for part of the amount, pursuant to an agreement for settlement made without knowledge by them that the bank had received the money, and which was not carried through, so as to constitute an accord and satisfaction.—Alexander v. Security Bank & Trust Co., D.C.Tex., 273 F. 258, affirmed, C.C.A., Security Bank & Trust Co. v. Geren, 288 F. 317.

60. N.Y.—Smith v. Ferris, 1 Daly 18.

61. Fla.—Enstrom v. Dunning, 186 So. 806, 136 Fla. 253.

62. Tex.—Braddock v. Gambill, Civ. App., 291 S.W. 306.

63. U.S.—Barnes v. South Carolina Public Service Authority, C.C.A. S.C., 120 F.2d 439, affirming, D.C., In re South Carolina Public Service Authority, 37 F.Supp. 28.
Mo.—Young v. Levine, 31 S.W.2d 978, 326 Mo. 593.
Tex.—Poe v. Continental Oil & Cotton Co., Com.App., 231 S.W. 717, reversing, Civ.App., 211 S.W. 488.

64. U.S.—Toppan v. Cleveland, C. & C. R. Co., C.C.Ohio, 24 F.Cas.No. 14,099, 1 Flipp. 74.

pel, must relate to a matter of fact, and a person will not be estopped by an admission as to the law.[65]

§ 85. Receipts

A receipt may create an equitable estoppel if the essential elements are present.

Receipts are not per se estoppels, but are open to explanation between the original parties and others not acting to their injury on the faith of them.[66] A receipt, however, may operate as an estoppel if the essential elements are present.[67] Hence, to the extent of such action and any consequent injury parties are conclusively estopped from disputing the validity of their own writings made for the purpose of inducing action.[68]

§ 86. Renunciation, Disavowal, or Disclaimer of Title or Right

Generally, one who by his renunciation, disavowal, or disclaimer of a right or title has induced another to rely and act thereon is estopped to assert such right or title.

One who, by his renunciation or disclaimer of a right or title, has induced another to believe and act thereon is estopped afterward to assert such right or title.[69] It is very generally held that such

65. U.S.—Grodsky v. Sipe, D.C.Ill., 30 F.Supp. 656, 662, citing **Corpus Juris.**
Cal.—Cullinan v. Mercantile Trust Co. of California, 252 P. 647, 80 Cal.App. 377.
Mo.—Rechow v. Barkers' Life Co., 73 S.W.2d 794, 802, 335 Mo. 668, quoting **Corpus Juris.**
Neb.—Furstenberg v. Omaha & Council Bluffs St. Ry. Co., 272 N.W. 756, 758, 132 Neb. 562, citing **Corpus Juris.**
Okl.—Chicago, R. I. & P. Ry. Co. v. Sawyer, 56 P.2d 418, 421, 176 Okl. 446, quoting **Corpus Juris.**
Tex.—Smith v. Chipley, 16 S.W.2d 269, 118 Tex. 415, answering certified questions, Civ.App., 24 S.W. 2d 87.
21 C.J. p 1148 note 67.

Erroneous legal advice

Erroneous legal advice not an "admission," supporting an estoppel although such advice was acted on by plaintiff to his injury and defendant's benefit, especially when not given in bad faith—Lee v. Hill, 111 S.E. 211, 28 Ga.App. 312.
Opinion as to matter of law as misrepresentation see supra § 79.

66. Ga.—Newcomb v. Wagoner, 132 S.E. 117, 35 Ga.App. 29.
Or.—Bly v. Travellers' Ins. Co., 20 P.2d 1089, 142 Or. 439.
21 C.J. p 1148 note 69.

Intent or agreement of parties may be shown

Ga.—Newcomb v. Wagoner, 132 S.E. 117, 35 Ga.App. 29.

67. Ill.—Stresenreuter Bros. v. Bowes, 233 Ill.App. 143.
Kan.—Wright v. Simpson, 51 P.2d 1, 142 Kan. 507—Perry v. Leavenworth & T. R. Co., 202 P. 587, 110 Kan. 55.
N.J.—Security Credit Corporation v. Whiting Motor Co., 118 A. 695, 98 N.J.Law 45.
Or.—Bly v. Traveller's Ins. Co., 20 P. 2d 1089, 142 Or. 439.
Tenn.—Colonial Milling Co. v. Holt Bros., 3 Tenn.App. 617.

Receipt for wages

Ordinarily, employee who regularly receipts in writing for each week's pay at rate claimed by employer to have been agreed on is barred by "estoppel" from asserting any claim for additional compensation.—Cowell, to Use of Fesler v. Builders, Inc., 11 A.2d 504, 139 Pa.Super. 192.

68. Tenn.—Colonial Milling Co. v. Holt Bros., 3 Tenn.App. 617.
Wis.—Wisconsin Electric Sales Co. v. Fidelity & Deposit Co. of Maryland, 211 N.W. 670, 191 Wis. 645.
21 C.J. p 1148 note 70.
Estoppel by bill of lading of common carrier see Carriers § 127.
Warehouse receipts see the C.J.S. title Warehousemen and Safe Depositories § 64, also 67 C.J. p 483 note 98–p 484 note 8.

69. U.S.—Meacham v. Halley, C.C.A. Tex., 103 F.2d 967, followed in Beckert v. Halley, 104 F.2d 1010, certiorari denied Meacham v. Halley, 60 S.Ct. 86, 308 U.S. 572, 84 L.Ed. 480—U. S. for Use and Benefit of Noland Co. v. Wood, C.C.A. Va., 99 F.2d 80—Sias v. Johnson, C.C.A.Mich., 86 F.2d 766.
Cal.—Burgess v. California Mut. Building & Loan Ass'n, 290 P. 1029, 210 Cal. 180—Spraul v. Garliepp & Mack, 32 P.2d 657, 138 Cal.App. 491.
Colo.—Scott v. Burlington State Bank, 233 P. 835, 76 Colo. 582.
Ga.—Caraker v. Brown, 111 S.E. 51, 152 Ga. 677.
Idaho.—Kilpatrick Bros. Co. v. Campbell, 281 P. 471, 48 Idaho 194—Quirk v. Bedal, 248 P. 447, 42 Idaho 567.
Ill.—Springfield Marine Bank v. Marbold, 264 Ill.App. 446.
Kan.—American Indemnity Co. v. Peak, 274 P. 227, 127 Kan. 606.
Ky.—Childers v. Burger, 21 S.W.2d 805, 231 Ky. 508—Montgomery Coal Corporation v. Riddle, 276 S. W. 975, 211 Ky. 26.
La.—Burns v. Rivero, 189 So. 129, 192 La. 767—Peyrefitte v. Union Homestead Ass'n, App., 185 So. 693.
Md.—Machovec v. Shipley, 189 A. 223, 171 Md. 339.
Minn.—Thom v. Thom, 294 N.W. 461, 464, 208 Minn. 461, citing **Corpus Juris.**
Mont.—Church v. Zywert, 190 P. 291, 58 Mont. 102.
Neb.—Van Kirk v. Beckley, 242 N. W. 358, 360, 123 Neb. 148, citing **Corpus Juris.**
N.J.—City Nat. Bank & Trust Co of Salem v. Deerfield Packing Corporation, 21 A.2d 331, 130 N.J.Eq. 118—Karkuff v. Mutual Securities Co., 148 A. 159, 108 N.J.Eq. 128, affirmed 148 A. 160, 108 N.J.Eq. 128.
N.M.—La Luz Community Ditch Co. v. Town of Alamogordo, 279 P. 72, 78, 34 N.M. 127, quoting **Corpus Juris.**
N.C.—Mote v. White Lake Lumber Co., 135 S.E. 294, 192 N.C. 460—Wells v. Crumpler, 109 S.E. 49, 182 N.C. 350.
Ohio.—First Nat. Bank v. Kehnast, 11 Ohio N.P., N.S., 417.
Or.—Francis Bros. v. Schallberger, 3 P.2d 530, 137 Or. 529, 83 A.L.R. 108.
Pa.—Shive v. Bollinger, 54 York Leg.Rec. 17.
R.I.—Hatton v. Howard Braiding Co., 129 A. 805, 47 R.I. 47.
Tex.—Smith v. Chipley, 16 S.W.2d 269, 118 Tex. 415, answering certified questions, Civ.App., 24 S.W. 2d 87—Peurifoy v. Jones, Civ.App., 49 S.W.2d 949—Smith v. Chipley, Civ.App., 42 S.W 2d 645.
W.Va.—Moore v. Henderson, 105 S.E. 903, 87 W.Va. 699.
Wis.—Dougan v. H. J. Grell Co., 182 N.W. 350, 174 Wis. 17.
Wyo.—Seaman v. Big Horn Canal Ass'n, 213 P. 938, 29 Wyo. 391.
21 C.J. p 1148 note 71.

Statement unnecessarily made

Generally, one is not obliged to inform others whether another is indebted to him, but, if he states that no indebtedness exists, he cannot thereafter deny the statement to the injury of those to whom it was made. —In re A. C. Becken Co., C.C.A.Ill., 75 F.2d 681.

Disclaimer in distinct proceeding

In suit by elevator company, in the nature of a bill of interpleader,

an estoppel may arise from parol statements and declarations,[70] although in some jurisdictions it is held so far as land is concerned that where legal title is vested in one his mere oral disclaimer or admission of no title cannot devest his title.[71] So it has been held that such estoppel may arise from a written instrument other than a specialty,[72] from a formal disclaimer in writing,[73] from testimony, deposition, or affidavit,[74] or from allegations in pleadings,[75] and a representation as to the construction and effect of an instrument of obscure and doubtful character is equally good as an estoppel, if believed and acted on, as is a disclaimer of title to a person about to purchase.[76]

All essential elements of an equitable estoppel must be present for a disclaimer, disavowal, or renunciation to operate as such.[77] Thus in order to create an estoppel by conduct of this character it

to determine claims as to proceeds of a carload of corn, as between the consignee, the carrier, and others, the claim of the consignee to the carload of corn was not defeated by its disclaimer in a suit by another against the carrier.—Omaha Elevator Co. v. Chicago, B & Q. R. Co., 178 N.W. 211, 104 Neb. 566.

One who represents that title is in another is estopped to set up title in himself.

U.S.—Cone v. Parish, D.C.Tex., 32 F. Supp. 412, affirmed, C.C.A., Scott v. Cohen, 115 F.2d 704, and Maxwell v. Hunter, 116 F.2d 260.
Cal.—Johnson v. Schimpf, 239 P. 401, 197 Cal. 43.
Ind.—Bryan v. Reiff, 135 N.E. 886, 192 Ind. 264.
Ky.—Inter-Mountain Coal & Lumber Co. v. Boggs, 56 S.W.2d 705, 247 Ky. 123—Wells v. Burton, 221 S.W. 513, 188 Ky. 281.
Mo.—Stevens v. Stevens, 273 S.W. 1066, 309 Mo. 130—Guy v. Woolridge, 226 S.W. 12.
N.C.—Eastern Banking & Trust Co. v. Collins, 139 S.E. 593, 194 N.C. 363.
R.I.—Hatton v. Howard Braiding Co., 129 A. 805, 47 R.I. 47.
Tex.—Peurifoy v. Jones, Civ.App., 49 S.W.2d 949—Moulton v. Deloach, Civ.App., 253 S.W. 303.

Disavowals or disclaimers held to create estoppel

(1) To assert contract rights generally.

U.S.—The Argentino, D.C.N.Y., 28 F. Supp. 440.
Cal.—Kellogg v. Snell, 270 P. 232, 93 Cal.App. 717.

(2) To assert existence of lease.—Matthews v. Brown, 229 S.W. 731, 148 Ark. 112.

(3) To assert interest in land.

Ark.—Ripley v. Kinard, 244 S.W. 3, 155 Ark. 172.
Cal.—Beyerle v. California Surety Co., 7 P.2d 1034, 120 Cal.App. 236.
Ga.—Fletcher v. Reaves, 110 S.E. 510, 28 Ga.App. 205.
21 C.J. p 1148 note 71 [h].

(4) To assert liens.

U.S.—Virginia Securities Corporation v. Patrick Orchards, C.C.A.Va., 20 F.2d 78.
Ark.—Reynolds v. Cowan Bros. & Hardin, 232 S.W. 941, 148 Ark. 655—Ferguson v. Guydon, 230 S.W. 260, 148 Ark. 295.
Cal.—Bank of Italy v. Cadenasso, 270 P. 931, 206 Cal. 428, adopted 274 P. 536, 206 Cal. 428—Guy v. Leech, 190 P. 1067, 47 Cal.App. 704.
Mass.—Silver v. Roberts Garage, 134 N.E. 610, 240 Mass. 571.

(5) To assert obligation on note.—Bosworth v. Cady, C.C.A.Wis., 72 F.2d 62.

(6) To assert that land is not included within boundaries.

Ky.—Courtney v. Farthing, 137 S.W. 2d 703, 282 Ky. 54.
Tex.—Allen v. Pool, Civ.App., 95 S.W.2d 723.
21 C.J. p 1148 note 71 [i].

(7) To claim interest in property sold on judicial sale.—Quirk v. Bedal, 248 P. 447, 42 Idaho 567—21 C.J. p 1148 note 71 [d].

(8) To claim interest in commissions on sale.—Fankhauser v. Smith, 227 N.Y.S. 373, 223 App.Div. 35.

(9) To insist on forfeiture of lease for assignment.—Standard Oil Co. of California v. Woolner, 298 P. 77, 113 Cal.App. 66.

(10) To seek deficiency judgment.—Union Central Life Ins. Co. v. Williams, Tex.Civ.App., 99 S.W.2d 319.

(11) To withdraw authorization to charge legacies on realty.—In re Tuozzolo's Will, 259 N.Y.S. 542, 145 Misc. 485.

70. La.—Peyrefitte v. Union Homestead Ass'n, App., 185 So. 693.
Tex.—Union Central Life Ins. Co. v. Williams, Civ.App., 99 S.W.2d 319.
21 C.J. p 1149 note 72.

Rule sparingly applied

The rule that one who has intentionally misled a prospective purchaser by disclaiming an interest in land is to be postponed to the party misled, being opposed to the statute of frauds, should be carefully and sparingly applied, and only on the disclosure of clear and satisfactory grounds of justice and equity.—Moore v. Henderson, 105 S.E. 903, 87 W.Va. 699.

71. Va.—McMurray v. Dixon, 54 S.E. 481, 105 Va. 605.
21 C.J. p 1149 note 73.

Mere statement by the owner of land, or his agent, referring to another as the owner, cannot divest the owner of title, nor vest title in the person referred to, but merely operates as an admission to be considered along with other evidence.—Balduini v. Ulibarri, 228 P. 607, 30 N.M. 127.
Divesting title by estoppel in pais generally see infra § 150.

72. U.S.—Dickerson v. Colgrove, Mich., 100 U.S. 578, 25 L.Ed. 618.
21 C.J. p 1149 note 74.

73. Ga.—Caraker v. Brown, 111 S.E. 51, 152 Ga. 677.
La.—Burns v. Rivero, 189 So. 129, 192 La. 767.

74. Cal.—Spraul v. Garliepp & Mack, 32 P.2d 657, 138 Cal.App. 49.
Mont.—Church v. Zywert, 190 P. 291, 58 Mont. 102.
21 C.J. p 1149 note 75.

75. Mont.—Hoppin v. Lang, 241 P. 636, 74 Mont. 558.
Tex.—Smith v. Chipley, Civ.App., 24 S.W.2d 87, certified questions answered 16 S.W.2d 269, 118 Tex. 415.
21 C.J. p 1149 note 76.

76. N.M.—La Luz Community Ditch Co. v. Town of Alamogordo, 279 P. 72, 78, 34 N.M. 127, quoting **Corpus Juris.**
N.Y.—Mattoon v. Young, 2 Hun 559, 5 Thomps. & C. 109.
W.Va.—Moore v. Henderson, 105 S.E. 903, 87 W.Va. 699.

Ambiguous deed

When the right disclaimed by a grantor is based on an ambiguous and uncertain clause in a deed, statements by him as to his intention and understanding of its meaning are entitled to peculiar weight by a prospective purchaser and constitute such constructive fraud as a court of equity will not tolerate as against a good-faith purchaser acting on the representations.—Moore v. Henderson, supra.

Judgment

Representation as to construction of doubtful judgment creates estoppel, if believed and acted on.—La Luz Community Ditch Co. v. Town of Alamogordo, 279 P. 72, 34 N.M. 127.

77. Minn.—Froslee v. Sonju, 297 N.W. 1.
Utah.—Barber v. Anderson, 274 P. 136, 73 Utah 357.
"In the absence of estoppel, one does not lose title to real estate by a mere disclaimer of interest."—Wil-

must appear that when the party against whom the estoppel is claimed made the declarations he was aware of the true state of facts;[78] that the declarations were made with the intent to deceive or with such culpable negligence as to amount to constructive fraud,[79] that the person by whom the estoppel is invoked was not a stranger to the transaction or one whose conduct the declaration was not designed to influence;[80] that he was not only destitute of all knowledge of the true state of facts but also of all convenient or ready means of acquiring such knowledge;[81] that he acted in reliance on the disclaimer[82] and altered his position[83] to his prejudice.[84] It has been held that the mere fact that one who has been induced by fraud to exchange lands states to a subsequent purchaser of the land exchanged, who has knowledge of, and participated in, the fraud, that he was satisfied with the exchange does not work an estoppel.[85]

Promise involving abandonment of right as basis of estoppel is discussed supra § 80.

Necessity of final judgment. A technical disclaimer in pleading, it has been held, will not estop the party pleading it or his privies until final judgment.[86]

Retraction of disclaimer. One who has denied owning certain property may afterward retract such disclaimer, provided no one is injured thereby.[87]

son v. Wilson, 62 S.W.2d 572, 250 Ky. 247.

78. Cal.—Davis v. Davis, 26 Cal. 23, 85 Am.D. 157.
Mont.—Hoppin v. Lang, 241 P. 636, 74 Mont. 558.
Okl.—Langford v. Phillips, 227 P. 413, 100 Okl. 63.
Tex.—Riggs v. Willis, Civ.App., 36 S.W.2d 263, error dismissed.

79. Cal.—Davis v. Davis, 26 Cal. 23, 85 Am.D. 157—Ghio v. Cline, 187 P. 433, 45 Cal.App. 262.
Ill.—Scott v. Hatch, 280 Ill.App. 269.
Tex.—Riggs v. Willis, Civ.App., 36 S.W.2d 263, error dismissed.
Va.—Heath v. Valentine, 15 S.E.2d 98, 177 Va. 896.

80. Ga.—Randolph v. Merchants & Mechanics Banking & Loan Co., 183 S.E. 801, 181 Ga. 671,
La.—Burglass v. Wright, App., 159 So. 176.
21 C.J. p 1150 note 80.

Misrepresentation of size of property

Landowner allegedly misrepresenting size of lot to city officials was not estopped as against mortgagee of adjoining lot from contending that mortgage covered part of landowner's lot.—Randolph v. Merchants & Mechanics Banking & Loan Co., 183 S.E. 801, 181 Ga. 671.

81. U.S.—Myers v. Ross, D.C.Fla., 10 F.Supp. 409.
Ark.—Valley Planting Co. v. Currie, 293 S.W. 746, 173 Ark. 862.
Cal.—Davis v Davis, 26 Cal. 23, 85 Am.D. 157—Ghio v. Cline, 187 P. 433, 45 Cal.App. 262.
Ga.—Randolph v. Merchants & Mechanics Banking & Loan Co., 183 S.E. 801, 181 Ga. 671.
Minn.—Froslee v. Sonju, 297 N.W. 1.
Tex.—Riggs v. Willis, Civ.App., 36 S.W.2d 263, error dismissed—Fritz v. Howeth, Civ.App., 297 S.W. 334.
Va.—Heath v. Valentine, 15 S.E.2d 98.

Discovery of truth prevented

Father obtaining credit for son by representing property to be latter's while withholding from record son's quitclaim deed to mother, in trust for father, was estopped to enforce interest in property as against son's creditor, although deed was recorded before trust deed was given and creditor did not rely on father's statements, but looked up records, since discovery of truth was prevented by father's failure to record deed at the time.—Scott v. Burlington State Bank, 233 P. 835, 76 Colo. 582.

Notice by record

Under statute as to record of conveyances as notice, where a deed had been recorded and a mortgage subsequently executed by the grantor was foreclosed, the prior grantee was not equitably estopped to claim title as against a purchaser at the foreclosure by reason of such grantee's disavowal of title, where such disavowal, if made, was subsequent to the sale, although prior to the time when the purchaser paid the bid price, as the purchaser's rights became fixed by his bid, and he was thereby bound to take whatever title the mortgage conveyed.—Otts v. Sheffield, 92 So. 268, 207 Ala. 125.

Party in possession

Disclaimer filed in mortgage foreclosure action, under a mistake of fact growing out of different descriptions of the same property, is not sufficient to divest title holder of his title and possession, when at the time of filing disclaimer he was in actual possession under fee-simple title, and remained in such possession at the time his title and possession was assailed by the purchaser at the foreclosure sale.—Langford v. Phillips, 227 P. 413, 100 Okl. 63.

82. U.S.—Myers v. Ross, D.C.Fla., 10 F.Supp. 409.
Ark.—Valley Planting Co. v. Currie, 293 S.W. 746, 173 Ark. 862.
Cal.—Kinnison v. Guaranty Liquidating Corporation, 115 P.2d 450, prior opinion 108 P.2d 466—Ghio v. Cline, 187 P. 433, 45 Cal.App. 262.
Ill.—Scott v. Hatch, 280 Ill.App. 269.
Kan.—Henne v. Wood, 113 P.2d 98, 153 Kan. 673.
Ky.—Wilson v. Wilson, 62 S.W.2d 572, 250 Ky. 247—Wright v. Webb, 221 S.W. 510, 188 Ky. 170.
Me.—Shaw v. Pinkham, 147 A. 759, 128 Me. 376.
Minn.—Froslee v. Sonju, 297 N.W. 1.
Miss.—Rice v. Washington County Building & Loan Ass'n, 110 So. 851, 145 Miss. 1.
Mont.—O'Neill v. Wall, 62 P.2d 672, 103 Mont. 388.
N.H.—Duval v. Metropolitan Life Ins. Co., 136 A. 400, 82 N.H. 543. 50 A.L.R. 1276.
N.Y.—In re McPherson, 186 N.Y.S. 661, 114 Misc. 283.
R.I.—Hatton v. Howard Braiding Co., 129 A. 805, 47 R.I. 47.
Tex.—Fritz v. Howeth, Civ.App., 297 S.W. 334—Kelly v. Kelly, Civ.App., 291 S.W. 631, reversed on other grounds, Com.App., 294 S.W. 518.
21 C.J. p 1150 note 82.

83. Me.—Shaw v. Pinkham, 147 A. 759, 128 Me. 376.
21 C.J. p 1150 note 83.

84. U.S.—Myers v. Ross, D.C.Fla., 10 F.Supp. 409.
Me.—Shaw v. Pinkham, 147 A. 759, 128 Me. 376.
Minn.—Froslee v. Sonju, 297 N.W. 1.
Miss.—Rice v. Washington County Building & Loan Ass'n, 110 So. 851, 145 Miss. 1.
Mont.—O'Neill v. Wall, 62 P.2d 672, 103 Mont. 388.
R.I.—Hatton v. Howard Braiding Co., 129 A. 805, 47 R.I. 47.
21 C.J. p 1150 note 84.

85. Iowa.—Jordan v. Cathcart, 102 N.W. 510, 126 Iowa 600.
21 C.J. p 1150 note 85.

86. N.H.—Wells v. Jackson Iron Co., 50 N.H. 85, 91.
21 C.J. p 1150 note 86.

87. Ga.—Frith v. Siler, 32 Ga. 665.
Ill.—Chicago Sanitary Dist. v. Cook,

2. Implied Misrepresentations

§ 87. Silence in General

While mere silence will not raise an estoppel when there is no duty or opportunity to speak, nevertheless an estoppel may arise from inaction or silence amounting to misrepresentation or concealment of the facts.

Mere silence of itself will not raise an estoppel.[88] To make the silence of a party operate as an estoppel the circumstances must have been such as to render it his duty to speak,[89] and there must

48 N.E. 461, 169 Ill. 184, affirming 67 Ill.App. 286.

88. U.S.—City of Del Rio v. Ulen Contracting Corporation, C.C.A. Tex., 94 F.2d 701.
Ala.—Bank of Columbia v. McElroy, 165 So. 105, 231 Ala. 454.
Alaska.—City of Juneau v. Warner, 8 Alaska 249.
Cal.—In re Taggart's Estate, 213 P. 504, 190 Cal. 504, 27 A.L.R. 1360—Gerontopoulos v. Gerontopoulos, 66 P.2d 724, 20 Cal.App.2d 261—Security-First Nat. Bank of Los Angeles v. Spring Street Properties, 67 P.2d 720. 20 Cal.App.2d 618—Hall v. Webb, 226 P. 403, 66 Cal. App. 416.
Ga.—McNabb v Houser, 156 S.E. 595, 171 Ga. 744, 74 A.L.R. 1122.
Idaho.—Neitzel v. Lawrence, 231 P. 423. 40 Idaho 26.
Ky.—Wisdom's Adm'r v. Sims, 144 S. W.2d 232, 284 Ky. 258—Louisville & N. R. Co. v. Dry Branch Coal Co., 65 S.W.2d 1008, 252 Ky. 124.
La.—Rawlings v. Stokes, 193 So. 589, 194 La. 206—Parker v. Ohio Oil Co., 186 So. 604, 608, 191 La. 896, quoting **Corpus Juris.**
Mass.—Childs, Jeffries & Co. v. Bright, 186 N.E. 571, 283 Mass. 283—J. H. Gerlach Co. v. Noyes, 147 N.E. 24, 251 Mass. 558, 45 A. L.R. 961.
Mich.—Farmers' Co-op. Elevator of Fowler v. Sturgis & Sons, 198 N. W. 191, 226 Mich. 437.
Minn.—Conner v. Caldwell, 294 N.W. 650.
Miss.—Lucas v. New Hebron Bank, 180 So. 611, 181 Miss. 762—Strauss Bros. v. Denton, 106 So. 257, 258, 140 Miss. 745, 45 A.L.R. 341, citing **Corpus Juris**—Rayborn v. Mize, 118 So. 623, 151 Miss. 558.
Mo.—Wilkinson v. Lieberman, 37 S. W.2d 533, 536, 327 Mo. 420, citing **Corpus Juris**—Balding v. Farm & Home Savings & Loan Ass'n of Missouri, App., 131 S.W.2d 57, 59, quoting **Corpus Juris**—Roth v. Hoffman, 111 S.W.2d 988, 992, 234 Mo.App. 114, citing **Corpus Juris**—Mitchell v. Newton County Bank, App., 282 S.W. 733—Mitchell v. Newton County Bank, 282 S.W. 729, 220 Mo.App. 223.
Mont.—Sherlock v. Greaves, 76 P.2d 87, 106 Mont. 206.
N.Y.—Hartford Accident & Indemnity Co. v. Oles, 274 N.Y.S. 349, 152 Misc. 876.
Or.—Montgomery v. Anglo-California Trust Co., 68 P.2d 1057, 157 Or. 187—Minto v. Salem Water, Light & Power Co., 250 P. 722, 120 Or. 202.
Pa.—Reifsnyder v. Dougherty, 152 A. 98, 301 Pa. 328—Porter v. National Bank of Boyertown, 32 Berks Co.L.J. 229.
S.C.—Southern Ry. Co. v. Day, 138 S.E. 870. 873, 140 S.C. 388, quoting **Corpus Juris.**
Tenn.—Armistead v. Tennessee Consol. Coal Co., 14 Tenn.App. 434.
Tex.—Simonds v. Stanolind Oil & Gas Co., 114 S.W.2d 226, 134 Tex. 332, reversing 103 S.W.2d 784, rehearing denied 136 S.W.2d 207, 134 Tex. 332—Gulf, C. & S. F. Ry. Co. v. Lakeside Irr. Co., Civ.App., 293 S.W. 939—Holland v. Blanchard, Civ.App., 262 S.W 97, 101, citing **Corpus Juris**—Kelvin Lumber & Supply Co. v. Copper State Mining Co., Civ.App., 232 S.W. 858, dismissed for want of jurisdiction—Kelvin Lumber & Supply Co. v. Copper State Mining Co., Civ.App., 203 S.W. 68, reversed on other grounds, Copper State Mining Co. v. Kelvin Lumber & Supply Co., Com.App., 227 S.W. 938.
Vt.—Dunbar v. Farnum, 196 A. 237, 109 Vt. 313, 114 A.L.R. 996.
Wash.—Commercial Waterway Dist. No. 1 of King County v. King County, 94 P.2d 491, 200 Wash. 538—Rowland v. Cook, 38 P.2d 224, 170 Wash. 624, 101 A.L.R. 180—De Boe v. Prentice Packing & Storage Co., 20 P.2d 1107, 172 Wash. 514.
W.Va.—Monto v. Gillooly, 147 S.E. 542, 544, 107 W.Va. 151, quoting **Corpus Juris**—Campbell v. Lynch, 106 S.E. 869, 88 W.Va. 209.
21 C.J. p 1150 note 89.

Silence due to error of law

Estoppel cannot originate in silence due to error of law.—Commissioner of Internal Revenue v. Union Pac. R. Co., C.C.A., 86 F.2d 637.

Waiver

Waiver cannot be inferred from mere silence.
Ala.—Penney v. Burns, 146 So. 611, 226 Ala. 273.
Mo.—Holt v. National Life & Accident Ins. Co., App., 263 S.W. 524.
Ohio.—Allenbaugh v. City of Canton, 28 N.E.2d 354, 137 Ohio St. 128.

89. U.S.—Grand Trunk Western R. Co. v. H. W. Nelson Co., C.C.A. Mich., 116 F.2d 823, rehearing denied 118 F.2d 252—City of Del Rio v. Ulen Contracting Corporation, C.C.A.Tex., 94 F.2d 701—California Packing Corporation v. Sun-Maid Raisin Growers of California, C. C.A.Cal., 81 F.2d 674, reversing, D. C., 7 F.Supp. 497, certiorari denied Sun Maid Raisin Growers of California v. California Packing Corporation, 56 S.Ct. 833, 298 U.S. 668, 80 L.Ed. 1391—Nelson v Chicago Mill & Lumber Corporation, C.C.A.Ark., 76 F.2d 17, 100 A.L.R. 87—National Dock & Storage Warehouse Co. v. U. S., C.C.A. Mass., 27 F.2d 4, affirming, D.C., 21 F.2d 755—Clark v. Fisher, C.C. A.N.Y., 8 F.2d 588, reversing, D. C., Fisher v. Clark, 3 F.2d 621, and certiorari denied 46 S.Ct. 26, 269 U.S. 570, 70 L.Ed. 417—Jenkins S S. Co. v. Cargo of Barley, D.C. Mich., 28 F.2d 135.
Ala.—Hurst v. Smith, 151 So. 825, 227 Ala. 664.
Alaska.—City of Juneau v. Warner, 8 Alaska 249.
Ark.—First Nat. Bank v. Godbey & Sons, 29 S.W.2d 272, 181 Ark. 1004—Nickel v. Dashko, 298 S.W. 204, 174 Ark. 818—Baker-Matthews Lumber Co. v. Bank of Lepanto, 282 S.W. 995, 170 Ark. 1146—Molitor v. People's Building & Loan Ass'n, 269 S.W. 363. 168 Ark. 53—Indiana Lumbermen's Mut. Ins. Co. v. Meyers Stave & Mfg. Co., 261 S.W. 917, 164 Ark. 359.
Cal.—Bank of America of California v. Pacific Ready-Cut Homes, 10 P. 2d 478, 122 Cal.App. 554.
Conn.—Flaxman v. Capitol City Press, 185 A. 417. 121 Conn. 423—Mangusi v. Vigiliotti, 132 A. 464, 466, 104 Conn. 291, citing **Corpus Juris.**
Del.—Hannigan v. Italo-Petroleum Corporation of America, 181 A. 4, 7 W.W.Harr. 180.
Fla.—Jones v. Watkins, 140 So. 920, 105 Fla. 25—Hendricks v. Stark, 126 So. 293, 99 Fla. 277.
Ga.—McNabb v. Houser, 156 S.E. 595, 171 Ga. 744, 74 A.L.R. 1122—Citizens' & Southern Bank v. Union Warehouse & Compress Co., 122 S. E. 327, 336, 157 Ga. 434, citing **Corpus Juris,** and answers to certified questions conformed to, 122 S.E. 652, 32 Ga.App. 85.
Idaho.—Neitzel v. Lawrence, 231 P. 423, 40 Idaho 26.
Ill.—Lowenberg v. Booth, 162 N.E. 191, 330 Ill. 548.
Ind.—French v. National Refining Co., 26 N.E.2d 47—Wilkerson v. Wood, 143 N.E. 166, 81 Ind.App. 248.

also have been an opportunity to speak,[90] and it] is essential that he should have had knowledge of

Iowa.—First Nat. Bank v. Power Equipment Co., 233 N.W. 103, 211 Iowa 153.

Ky.—Hoosier Drilling Co. v. Ellis, 137 S.W.2d 1084, 282 Ky. 137—Furst & Thomas v. Smith, 133 S.W.2d 941, 280 Ky. 601.

La.—Parker v. Ohio Oil Co., 186 So. 604, 608, 191 La. 896, quoting **Corpus Juris**—State ex rel. Porterie v. Gulf, Mobile & Northern R. Co., 184 So. 711, 191 La. 163—Swain v Louisiana Light & Power Co., 128 So. 538, 13 La.App 515.

Md.—Greenwalt v. McCardell, 12 A.2d 522, 178 Md. 132—Mason v. Dulaney, 124 A. 390, 144 Md. 108.

Mass.—Marsh v. S. M. S. Co., 194 N.E. 97, 289 Mass. 302—J. H. Gerlach Co. v. Noyes, 147 N.E. 24, 251 Mass. 558, 45 A.L.R. 961.

Minn.—Conner v. Caldwell, 294 N.W. 650—Groves v. Byrnes, 231 N.W. 926, 181 Minn. 196—Kuske v. Javne, 226 N.W. 938, 178 Minn. 296—Ashbaugh v. Wright, 188 N.W. 157, 159, 152 Minn. 57, citing **Corpus Juris.**

Mo.—Brown v. Brown, 146 S.W.2d 553—State ex inf. McKittrick ex rel. City of California v. Missouri Utilities Co., 96 S.W.2d 607, 339 Mo. 385, 106 A.L.R. 1169—Engelhardt v. Gravens, 281 S.W. 715—Anthony v. Midwest Live Stock Commission Co., 260 S.W. 94, 98, citing **Corpus Juris**—Balding v. Farm & Home Savings & Loan Ass'n of Missouri, App., 131 S.W. 2d 57, 59, quoting **Corpus Juris**—Finance Service Corporation v. Kelly, 235 S.W. 146.

Mont.—Sherlock v. Greaves, 76 P.2d 87, 106 Mont. 206—Solberg v. Sunburst Oil & Gas Co., 246 P. 168, 76 Mont. 254—Mettler v. Rocky Mountain Sec. Co., 219 P. 243, 68 Mont. 406.

N.H.—Sargent v. Canterbury Mut. Fire Ins. Co., 136 A. 124, 82 N.H. 489—Dudley v. Continental Ins. Co., 131 A. 354, 82 N.H. 167.

N.J.—Minton v. Sutton, 135 A. 693, 100 N.J.Eq. 403, affirmed 139 A. 600, 102 N.J.Eq. 61—Wallace & Tiernan Co. v. U. S Cutlery Co., 128 A. 872, 97 N.J.Eq. 408, affirmed 130 A. 920, 98 N.J.Eq. 699.

N.Y.—Hughes v. John Hancock Mut. Life Ins. Co., 297 N.Y.S. 116, 163 Misc. 31—Hartford Accident & Indemnity Co. v. Oles, 274 N.Y.S. 349, 152 Misc. 876—Dime Sav. Bank of Brooklyn v Fox, 264 N.Y.S. 262, 147 Misc. 24—In re McArdle's Estate, 250 N.Y.S. 276, 287, 140 Misc. 257, citing **Corpus Juris.**

Ohio.—Allenbaugh v. City of Canton, 28 N.E.2d 354, 137 Ohio St. 128—Canan v. Heffey, 161 N.E. 235, 27 Ohio App. 430—Woodruff v. Montgomery, 11 Ohio Cir.Ct.,N S., 72.

Okl.—Pierce v. Jones, 78 P.2d 677, 182 Okl. 515—Cities Service Oil Co v. Boggs, 40 P.2d 638, 170 Okl 335—Hedges v. First Nat. Bank, 39 P.2d 57, 170 Okl. 175—Harris Tourist Bed Co. v. Whitbeck, 294 P. 800, 147 Okl. 109—Bean v Harris, 219 P. 300, 302, 93 Okl. 10, quoting **Corpus Juris.**

Pa.—Reifsnyder v. Dougherty, 152 A. 98, 301 Pa. 328.

Tex.—Coker v. Benjamin, Civ.App., 83 S.W.2d 373, 378, citing **Corpus Juris**—Sovereign Camp, W. O. W., v. Johnson, Civ.App., 64 S.W.2d 1084, reversed on other grounds Johnson v. Sovereign Camp, W. O. W., 83 S.W.2d 605, 125 Tex. 329—Sigmond Rothschild Co. v. Moore, Civ.App., 22 S W.2d 533, 536, citing **Corpus Juris,** and reversed on other grounds, Com.App , 37 S.W. 2d 121—Holland v. Blanchard, Civ. App , 262 S W. 97, 101, citing **Corpus Juris.**

Wash.—Proctor v. Appleby, 188 P. 481, 110 Wash. 403.

W.Va.—Monto v. Gillooly, 147 S.E. 542, 544, 107 W.Va. 151, quoting **Corpus Juris.**

21 C J. p 1150 note 90.

Inaction as basis of estoppel

"Where inaction is depended upon as creating an estoppel, then it must be shown that there was a duty to act."—Sheeren v. Gulf Ins. Co. of Dallas, Tex., La.App., 174 So. 380, 385.

Willful or culpable silence

There must be something willful or culpable in the silence.—C. I. T. Corporation v. Hawley, 95 P.2d 216, 34 Cal.App.2d 66—Lencioni v. Fidelity Trust & Savings Bank of Fresno, 273 P. 103, 95 Cal.App. 490, rehearing denied 274 P. 75, 95 Cal.App. 490—Stern v. Sunset Road Oil Co., 190 P. 651, 47 Cal.App. 353.

Duty to speak to prevent prejudicial action

(1) No duty to speak arises from the mere fact that a person is aware another may take an action prejudicial to himself if the real facts are not disclosed.—Lord Const. Co. v. Edison Portland Cement Co , 138 N.E. 39, 234 N.Y. 411, reversing 190 N. Y.S. 669, 198 App.Div. 584—In re Grube's Will, 7 N.Y.S.2d 194, 169 Misc. 170—First Nat. Bank of Fleischmanns v. Creamery Package Mfg. Co., 21 N.Y.S.2d 976.

(2) A landowner is neither "estopped" to claim title nor is he barred from asserting it by "laches," if his only fault is failure to sue to expunge from the public records a forged or void deed to lands in the possession of no one, which he neither made nor had recorded, although he knows or should know that one of the public unknown to him might purchase the property assuming the validity of the record of the void instrument.—Mosley v. Magnolia Petroleum Co., N.M., 114 P.2d 740.

Waiver

Mo.—Drannek Realty Co. v. Nathan Frank, Inc., 139 S.W.2d 926.

Vt.—Dunbar v. Farnum, 196 A. 237, 109 Vt. 313, 114 A.L.R. 996.

90. Ark.—First Nat. Bank v. Godbey & Sons, 29 S.W.2d 272, 181 Ark. 1004—Baker-Matthews Lumber Co. v. Bank of Lepanto, 282 S. W. 995, 170 Ark. 1146—Indiana Lumbermen's Mut. Ins. Co. v. Meyers Stave & Mfg. Co., 261 S.W. 917, 164 Ark. 359.

Cal.—C. I. T. Corporation v. Hawley, 93 P.2d 216, 34 Cal.App.2d 66—Bank of America of California v. Pacific Ready-Cut Homes, 10 P.2d 478, 122 Cal.App. 554.

Del.—Hannigan v. Italo-Petroleum Corporation of America, 181 A. 4, 7 W.W.Harr. 180.

Fla.—Jones v. Watkins, 140 So. 920, 105 Fla. 25—Hendricks v. Stark, 126 So. 293, 99 Fla. 277.

Ga.—Citizens' & Southern Bank v. Union Warehouse & Compress Co , 122 S E. 327, 336, 157 Ga. 434, citing **Corpus Juris,** and answers to certified questions conformed to, 122 S E. 652, 32 Ga.App. 85.

Idaho.—Neitzel v. Lawrence, 231 P. 423, 40 Idaho 26.

La.—Parker v. Ohio Oil Co., 186 So. 604, 608, 191 La. 896, quoting **Corpus Juris.**

Mo.—Brown v. Brown, 146 S W.2d 553—State ex inf. McKittrick ex rel. City of California v. Missouri Utilities Co., 96 S.W.2d 607, 339 Mo. 385, 106 A.L.R. 1169—Anthony v. Midwest Live Stock Commission Co., 260 S.W. 94, 98, citing **Corpus Juris**—Balding v. Farm & Home Savings & Loan Ass'n of Missouri, App., 131 S.W.2d 57, 59, quoting **Corpus Juris**—Finance Service Corporation v. Kelly, App., 235 S.W. 146.

N.J.—Minton v. Sutton, 135 A. 693, 100 N.J.Eq. 403, affirmed 139 A. 600, 102 N.J.Eq. 61.

N.Y.—Parsons v. Lipe, 286 N.Y.S. 60, 158 Misc. 32, affirmed Parsons v. First Trust & Deposit Co., 277. N.Y.S. 426, 243 App.Div. 681 and 277 N.Y.S. 428, 243 App.Div. 681, affirmed 200 N.E. 31, 269 N.Y. 630.

Ohio.—Woodruff v. Montgomery, 11 Ohio Cir.Ct.,N.S., 72.

Okl.—Bean v. Harris, 219 P. 300, 302, 93 Okl. 10, quoting **Corpus Juris.**

Tex.—Holland v. Blanchard, Civ.App., 262 S.W. 97, 101, citing **Corpus Juris.**

21 C.J. p 1151 note 91.

the facts, and that the adverse party should have been ignorant of the truth, and have been misled into doing that which he would not have done but for such silence.[91]

91. U.S.—Grand Trunk Western R Co. v. H. W. Nelson Co., C.C.A. Mich., 116 F.2d 823, rehearing denied 118 F.2d 252—City of Del Rio v. Ulen Contracting Corporation, C.C.A.Tex., 94 F.2d 701—Nelson v. Chicago Mill & Lumber Corporation, C.C.A.Ark., 76 F.2d 17, 100 A.L.R. 87—New York Life Ins. Co. v. Talley, C.C.A.Iowa, 72 F.2d 715, 718, citing **Corpus Juris**—U. S. v. S F. Scott & Sons, C.C.A Mass., 69 F.2d 728—Gerould Co. v. Arnold Constable & Co., C.C.A.Mass., 65 F. 2d 444—George W. Armbruster, Jr., Inc., v. City of Wildwood, D. C.N.J., 41 F.2d 823—Clark v. Fisher, C.C.A.N.Y., 8 F.2d 588, reversing, D.C., Fisher v. Clark, 3 F.2d 621, and certiorari denied 46 S.Ct. 26, 269 U.S. 570, 70 L.Ed. 417—Lamborn v. Wm. M. Hardie Co., C. C.A.Ohio, 1 F.2d 679, certiorari denied William M. Hardie Co. v. Lamborn, 45 S.Ct. 231, 267 U.S. 594, 69 L.Ed. 804.

Ariz.—Fidelity Building, & Loan Ass'n v. Cox, 84 P.2d 70, 52 Ariz. 514.

Ark.—Gowan v. Robinson, 86 S.W.2d 19, 191 Ark. 356.

Cal.—C. I. T. Corporation v. Hawley, 93 P.2d 216, 34 Cal.App.2d 66—Bank of America of California v. Pacific Ready-Cut Homes, 10 P.2d 478, 122 Cal.App. 554.

Conn.—Mangusi v. Vigliotti, 132 A. 464, 466, 104 Conn. 291, citing **Corpus Juris**—Basek v. Damutz, 135 A. 453, 105 Conn. 378.

Idaho.—Eley v. Lyon, 88 P.2d 507, 60 Idaho 8.

Ill.—Elowe v. Superior Fire Ins. Co., 30 N.E.2d 953, 307 Ill.App. 569—Fyffe v. Fyffe, 11 N.E.2d 857, 292 Ill.App. 539, transferred 4 N.E.2d 368, 364 Ill. 281.

Ky.—Cox v. Simmerman, 48 S.W.2d 1078, 243 Ky. 474—Jones' Adm'x v. Black Mountain Corporation, 61 S. W.2d 1050, 250 Ky. 163.

La.—Parker v. Ohio Oil Co., 186 So. 604, 608, 191 La. 896, quoting **Corpus Juris**—Le Rosen v. North Central Texas Oil Co., 126 So. 442, 169 La. 973, affirming 123 So. 430, 12 La.App. 15—Mahoney v. Perkins, 123 So. 798, 168 La. 1107—Swain v. Louisiana Light & Power Co., 128 So. 538, 13 La.App. 515.

Mass.—Moss v. Old Colony Trust Co., 140 N.E. 803, 246 Mass. 139—Taylor v. Jones, 136 N.E. 382, 242 Mass. 210, certiorari denied Jones v. Taylor, 43 S.Ct. 99, 260 U.S. 742, 67 L.Ed. 491.

Miss.—Plant Flour Mills Co. v. Sanders & Ellis, 157 So. 713, 172 Miss. 539.

Mo.—Delta Realty Co. v. Hunter, 152 S.W.2d 45—Brown v. Brown, 146 S.W.2d 553—State ex inf. McKittrick ex rel. City of California v. Missouri Utilities Co., 96 S.W.2d 607, 339 Mo. 385, 106 A.L.R. 1169—State ex rel. and to Use of Abeille Fire Ins. Co. v. Sevier, 73 S.W.2d 361, 335 Mo. 269, certiorari denied State of Missouri ex rel. and to Use of Abeille Fire Ins. Co. of Paris v. Sevier, 55 S.Ct. 99, 293 U.S. 585, 79 L.Ed. 680—Wilkinson v. Lieberman, 37 S.W.2d 533, 536, 327 Mo. 420, quoting **Corpus Juris**—Anthony v. Midwest Live Stock Commission Co., 260 S.W. 94—Sherman v. International Life Ins. Co. of St. Louis, 236 S.W. 634, 291 Mo. 139, error dismissed and certiorari denied International Life Ins. Co. v. Sherman, 43 S.Ct. 574, 262 U.S. 346, 67 L.Ed. 1018—Balding v. Farm & Home Savings & Loan Ass'n of Missouri, App., 131 S.W.2d 57, 59, quoting **Corpus Juris**—Mitchell v. Newton County Bank, 282 S.W. 729, 220 Mo.App. 223—Mitchell v. Newton County Bank, App., 282 S.W. 733.

Mont.—Sherlock v. Greaves, 76 P.2d 87, 106 Mont. 206—Mettler v. Rocky Mountain Sec. Co., 219 P. 243, 68 Mont. 406.

Neb.—Cech v. Costello, 220 N.W. 236, 117 Neb. 224.

N.J.—Basen v. Clinton Trust Co., 177 A. 675, 13 N.J.Misc. 252, reversed on other grounds 181 A. 67, 115 N. J.Law 546.

Okl.—Lacy v. Wozencraft, 105 P.2d 781—Pierce v. Jones, 78 P.2d 677, 182 Okl. 515—Cities Service Oil Co. v. Boggs, 40 P.2d 638, 170 Okl. 335—Hedges v. First Nat. Bank, 39 P.2d 57, 170 Okl. 175—Ash v. Mickleson, 247 P. 680, 118 Okl. 163.

Tex.—Dallas Trust & Savings Bank v. Brown, Civ.App., 48 S.W.2d 1044, error refused—Harrel v. City of Lufkin, Com.App., 280 S.W. 174, reversing Civ.App., City of Lufkin v. Harrell, 265 S.W. 179—Holland v. Blanchard, Civ.App., 262 S.W. 97, 101, citing **Corpus Juris.**

Va.—Schmelz Bros., Bankers, v. Quinn, 113 S.E. 845, 134 Va. 78.

W.Va.—Monto v. Gillooly, 147 S.E. 542, 544, 107 W.Va. 151, quoting **Corpus Juris**—Campbell v. Lynch, 106 S.E. 869, 88 W.Va. 209.

21 C.J. p 1151 note 92.

Equal means of knowledge

(1) One is not estopped by silence where both parties know or have equal means of knowing the truth.

U.S.—Detroit & T. S. L. R. Co. v. Detroit, T. & I. R. Co., D.C.Mich., 290 F. 549, reversed on other grounds C.C.A., Detroit, T. & I. R. Co. v. Detroit & T. S. L. R. Co., 6 F.2d 845.

Conn.—Flaxman v. Capitol City Press, 185 A. 417, 121 Conn. 423.

Ill.—Lowenberg v. Booth, 162 N.E. 191, 330 Ill. 548.

Miss.—Roberts v. Bookout, 139 So. 175, 162 Miss. 676.

Mo.—Haggerty v. St. Louis Police Relief Ass'n, App., 141 S.W.2d 174.

Mont.—Scott v. Jardine Gold Min. & Mill. Co., 257 P. 406, 79 Mont. 485.

21 C.J. p 1151 note 92 [c].

(2) However, the rule is not applicable to a case where the apparent agreement of one party, with a claim made by the other, prevents the latter from making investigation.—Detroit, T. & I. R Co. v. Detroit & T. S. L. R. Co., C.C.A.Mich., 6 F. 2d 845, reversing, D.C., Detroit & T. S. L. R. Co. v. Detroit, T. & I. R. Co., 290 F. 549.

Knowledge of other's reliance

Mere silence does not work estoppel, unless action of person asserting estoppel was natural result of silence, and party maintaining silence was in situation to know of another's reliance thereon to his injury.

Ark.—First Nat. Bank v. Godbey & Sons, 29 S.W.2d 272, 181 Ark 1004—Baker-Matthews Lumber Co. v. Bank of Lepanto, 282 S.W. 995, 170 Ark. 1146—Pettit-Galloway Co. v. Womack, 268 S.W. 353, 167 Ark. 356—Indiana Lumbermen's Mut. Ins. Co. v. Meyers Stave & Mfg. Co., 261 S.W. 917, 164 Ark. 359.

Me.—Denison v. Dawes, 117 A. 314, 121 Me. 402.

Mass.—J. H. Gerlach Co. v. Noyes, 147 N.E. 24, 251 Mass. 558, 45 A. L.R. 961.

N.Y.—Hartford Accident & Indemnity Co. v. Oles, 274 N.Y.S. 349, 152 Misc. 876—Smith v. Vara, 241 N.Y.S. 202, 136 Misc. 500.

Ohio.—Woodruff v. Montgomery, 11 Ohio Cir.Ct., N.S., 72.

21 C.J. p 1151 note 92 [d].

Nature of conduct to justify reliance

Estoppel by conduct, founded on the silence of the party whose duty it is to speak and so expose all the material facts of a transaction which are within his knowledge and of which the other party is ignorant, involves implied representation of existence of apparent facts, and to justify prudent man in acting thereon it must be plain and not doubtful.—Brichetto v. Raney, 245 P. 235, 76 Cal.App. 232.

Equal obligation

Where party claiming estoppel is under as great an obligation to inform the person sought to be estopped of the real facts as the latter is to inform himself, there is no

Nevertheless, an estoppel may arise from silence as well as from words.[92] "Estoppel by silence"

estoppel.—Stern v. Sunset Road Oil Co., 190 P. 651, 47 Cal.App. 353.

Bad faith

(1) Silence, in order to work an estoppel, must amount to bad faith.

U.S.—Wise v. U. S., D.C.Ky., 38 F. Supp. 130.

Ky.—Wisdom's Adm'r v. Sims, 144 S. W.2d 232, 284 Ky. 258—Shaw v. Farmers' Bank & Trust Co., 31 S. W.2d 893, 235 Ky. 502.

(2) Bad faith cannot be inferred from fact of which person sought to be estopped was ignorant.—Embry v. Long, 75 S.W.2d 1036, 256 Ky. 266—Shaw v. Farmers' Bank & Trust Co., supra.

Intent to deceive

Silence without intent to deceive cannot work an estoppel.—Scott v. Jardine Gold Min. & Mill. Co., 257 P. 406, 79 Mont. 485.

Knowledge before change of position

In a bank's action to recover on notes alleged to have been signed by defendant and her husband, but claimed by defendant to have been signed by her husband only, and that her own name thereto had been forged, plaintiff could not introduce evidence to show an estoppel of defendant to set up the fact of forgery because of failure to speak when required, where it appeared that before plaintiff's rights had been impaired in any way, defendant had denied signing the note.—First Nat. Bank v. Allen, 211 P. 913, 106 Or. 190.

Application of rule in cases of silence as to statements made by another

Tex.—Beazley v. McEver, Civ.App., 238 S.W. 949.

21 C.J. p 1151 note 92 [g].

92. U.S.—In re Walton Hotel Co., C.C.A.Ill., 116 F.2d 110—Crane Co. v. James McHugh Sons, C.C.A.Okl., 108 F.2d 55, affirming, D.C., U. S. ex rel. J. B. Klein Iron & Foundry Co. v. James McHugh Sons, 21 F.Supp. 202—New York Trust Co. v. Watts-Ritter & Co., C.C.A. W.Va., 57 F.2d 1012—United Fuel Gas Co. v. Swiss Oil Corporation, C.C.A.Ky., 41 F.2d 4—McCullough v. Satterthwait, C.C.A.Okl., 11 F.2d 111—Lamborn v. Wm. M. Hardie Co., C.C.A.Ohio, 1 F.2d 679, certiorari denied William M. Hardie Co. v. Lamborn, 45 S.Ct. 231, 267 U.S. 594, 69 L.Ed. 804—Computing Scale Co. v. Barnard Co., Ohio, 259 F. 250, 170 C.C.A. 318.

Ala.—Hinds v. Federal Land Bank of New Orleans, 186 So. 153, 237 Ala. 218—Green v. Federal Land Bank of New Orleans, 183 So. 418, 236 Ala. 431—Gable v. Kinney, 121 So. 511, 219 Ala. 150—Provident Life & Accident Ins. Co. v. Hudgens, 158 So. 757, 229 Ala. 552—Irvin v. Irvin, 93 So. 517, 207 Ala. 493—A. S. Knowles Dry Goods Co. v. Gunter, 85 So. 735, 204 Ala. 411.

Ark.—Rone v. Sawrey, 123 S.W.2d 524, 197 Ark. 472—First Nat. Bank v. Godbey & Sons, 29 S.W.2d 272, 181 Ark. 1004—Baker-Matthews Lumber Co. v. Bank of Lepanto, 282 S.W. 995, 170 Ark. 1146.

Cal.—Laraway v. First Nat. Bank of La Verne, 104 P.2d 95, 39 Cal.App. 2d 718—C. I. T. Corporation v. Hawley, 93 P.2d 216, 34 Cal.App. 2d 66.

Colo.—Bair v. Anderson, 58 P.2d 484, 98 Colo. 532.

Fla.—Connelly v. Special Road & Bridge Dist. No. 5, 126 So. 794, 99 Fla. 456, 71 A.L.R. 923.

Ga.—Smith v. Folsom, 9 S.E.2d 824, 190 Ga. 460.

Ill.—Bondy v. Samuels, 165 N.E. 181, 333 Ill. 535—McGregor v. Keun, 161 N.E. 99, 330 Ill. 106—Oliver v. Ross, 124 N.E. 800, 289 Ill. 624—Chicago Title & Trust Co. v. Szymanski, 7 N.E.2d 608, 289 Ill.App. 600.

Ind.—Kaufmann v. Millies, 18 N.E.2d 970, 106 Ind.App. 569.

Kan.—Waller v. Capper, 53 P.2d 836, 839, 143 Kan. 164, citing **Corpus Juris.**

Ky.—Graves County v. Sullivan, 140 S.W.2d 636, 283 Ky. 130—Furst & Thomas v. Smith, 133 S.W.2d 941, 280 Ky. 601—Cooper v. Ensor, 110 S.W.2d 461, 270 Ky. 670—Morehead Hotel & Apartment Co. v. Lampkin, 101 S.W.2d 670, 267 Ky. 147—Stein Bros. & Boyce v. State Bank of Stearns, 73 S.W.2d 13, 255 Ky. 270—Fischer v. James A. Diskin Co., 57 S.W.2d 538, 247 Ky. 694—Jones v. Kentucky Glycerine Co., 11 S.W.2d 713, 716, 226 Ky. 676, quoting **Corpus Juris**—Skaggs v. Ferguson, 7 S.W.2d 213, 224 Ky. 775—Baird v. Read, 288 S.W. 1014, 217 Ky. 71—Carter v. Tucker, 266 S.W. 9, 205 Ky. 438.

La.—Vosburg v. Federal Land Bank of New Orleans, App., 172 So. 567—Swain v. Louisiana Light & Power Co., 128 So. 538, 13 La.App. 515—Fox v. City of Monroe, 131 So. 483, 15 La.App. 192—Victory Gravel Co. v. Dyer, 134 So. 701, 17 La. App. 123.

Md.—Metropolitan Club v. Hopper, McGaw & Co., 139 A. 554, 153 Md. 666.

Mass.—Moss v. Old Colony Trust Co., 140 N.E. 803, 246 Mass. 139.

Minn.—Froslee v. Sonju, 297 N.W. 1.

Miss.—Kelso v. Robinson, 161 So. 135, 172 Miss. 828—Wellford & Withers v. Arnold, 140 So. 220, 162 Miss. 786—Strauss Bros. v. Denton, 106 So. 257, 258, 140 Miss. 745, 45 A.L.R. 341, citing **Corpus Juris.**

Mo.—Brown v. Brown, 146 S.W.2d 553—State ex inf. McKittrick ex rel. City of California v. Missouri Utilities Co., 96 S.W.2d 607, 339 Mo. 385, 106 A.L.R. 1169—Davis v. Lea, 239 S.W. 823, 293 Mo. 660—Anthony v. Midwest Live Stock Commission Co., 260 S.W. 94, 98, citing **Corpus Juris**—Wilkinson v. Lieberman, 37 S.W.2d 533, 536, 327 Mo. 420, citing **Corpus Juris.**

Mont.—Lindblom v. Employers' Liability Assur. Corp., 295 P. 1007, 1010, 88 Mont. 488, citing **Corpus Juris**—Solberg v. Sunburst Oil & Gas Co., 246 P. 168, 76 Mont. 254.

Neb.—In re Lee's Estate, 290 N.W. 437, 137 Neb. 567—Brisbin v. E. L. Oliver Lodge No. 335 of Brotherhood of Railway Clerks, 279 N.W. 277, 134 Neb. 517.

N.J.—Markowitz v. Berg, 11 A.2d 107, 127 N.J.Eq. 90, affirming 4 A.2d 410, 125 N.J.Eq. 56—Equitable Life Assur. Soc. of U. S. v. Patzowsky, 6 A.2d 390, 122 N.J.Law 482.

N.Y.—First Citizens Bank & Trust Co. of Utica v. Sherman's Estate, 294 N.Y.S. 131, 250 App.Div. 339—Baumann v. Citizens Trust Co. of Binghamton, 289 N.Y.S. 606, 248 App.Div. 9, reargument granted 290 N.Y.S. 266, 248 App.Div. 840, modified on other grounds on reargument 293 N.Y.S. 45, 249 App.Div. 369, affirmed 12 N.E.2d 608, 276 N. Y. 623.

N.C.—Southern Ry. Co. v. W. A. Simpkins Co., 100 S.E. 418, 178 N. C. 273.

N.D.—Bichler v. Ternes, 248 N.W. 185, 63 N.D. 295.

Okl.—Ware Rubber Co. v. Sewell, 91 P.2d 667, 185 Okl. 283.

Pa.—Fried v. Fisher, 196 A. 39, 328 Pa. 497, 115 A.L.R. 147—In re Swartz's Estate, 72 Super. 143—In re Gartner's Estate, 94 Pa. Super. 45.

S.C.—Welch v. Edisto Realty Co., 169 S.E. 667, 170 S.C. 31—Buckeye Cotton Oil Co. v. Cheraw Ginning Co., 140 S.E. 581, 142 S.C. 247—Southern Ry. Co. v. Day, 138 S.E. 870, 873, 140 S.C. 388, quoting entire section from **Corpus Juris.**

Tex.—Johnson v. Sovereign Camp, W. O. W., 83 S.W.2d 605, 125 Tex. 329, reversing Sovereign Camp, W. O. W. v. Johnson, Civ.App., 64 S. W.2d 1084—Silverman v. Harmon, Civ.App., 250 S.W. 206—Lohmann v. Hooper, Civ.App., 87 S.W.2d 803.

Utah.—Tanner v. Provo Reservoir Co., 98 P.2d 695, rehearing denied 103 P.2d 134.

Wash.—Pacific Commercial Co. v. Northwestern Fisheries Co., 197 P. 930, 115 Wash. 608—Karadimas v. Angel, 194 P. 775, 113 Wash. 614.

Wis.—Eau Claire Dells Improvement Co. v. City of Eau Claire, 179 N.W. 2, 172 Wis. 240.

21 C.J. p 1114 note 53, p 1152 note 93.

arises where a person, who by force of circumstances is under a duty to another to speak, refrains from doing so and thereby leads the other to believe in the existence of a state of facts in reliance on which he acts to his prejudice.[93] Inaction or silence may under some circumstances amount to a misrepresentation and concealment of the facts, so as to raise an equitable estoppel.[94] When the silence is of such a character and under such circumstances that it would become a fraud on the other party to permit the party who has kept silent to deny what his silence has induced the other to believe and act on, it will operate as an estoppel.[95] This doctrine rests on the principle that if one maintains silence, when in conscience he ought to speak, equity will debar him from speaking when in conscience he ought to remain silent.[96]

The conduct of a party, sought to be made the

Silence and omission to act as "conduct"

"The term 'conduct,' when applied to a person in its relation to the modern doctrine of equitable estoppel, embraces not only ideas conveyed by words written or spoken and things actually done, but it includes the silence of such person and his omission to act, as well."—Wampol v. Kountz, 85 N.W. 595, 14 S.D. 334, 339, 86 Am.S.R. 765, quoting Farr v. Semmler, 123 N.W. 835, 838, 24 S.D. 290.

Delivery of deed

Grantors are estopped to deny delivery after achieving purpose of deed, which was to enable grantee to procure loan.—Moseley v. Phoenix Mut. Life Ins. Co., 145 S.E. 877, 167 Ga. 491.

Waiver

U.S.—Wheelock v. Commissioner of Internal Revenue, C.C.A.Tex., 77 F.2d 474.

93. Ala.—Provident Life & Accident Ins. Co. v. Hudgens, 158 So. 757, 758, 229 Ala. 552, citing **Corpus Juris.**
Colo.—Fitzwater v. Norcross, 37 P. 2d 522, 95 Colo. 527.
Ga.—H. C. Whitmer Co. v. Petty, 187 S.E. 908, 54 Ga.App. 377—J. R. Watkins Co. v. Rivers, 140 S.E. 770, 37 Ga.App. 559.
Ill.—National Trust Bank v. Seaman, 270 Ill.App. 422—O'Connell v. Heed, 219 Ill.App. 598.
Ky.—Hoosier Drilling Co. v. Ellis, 137 S.W.2d 1084, 282 Ky. 137—Jones v. Kentucky Glycerine Co., 11 S.W.2d 713, 716, 226 Ky. 676, citing **Corpus Juris**—James v. Stokes, 261 S.W. 868, 203 Ky. 127.
La.—First Nat. Bank v. Guynes, 123 So. 461, 11 La.App. 323.
Md.—Mascn v. Dulaney, 124 A. 390, 144 Md. 108.
Mo.—Engelhardt v. Gravens, 281 S. W. 715.
N.Y.—In re McArdle's Estate, 250 N. Y.S. 276, 287, 140 Misc. 257, citing **Corpus Juris.**
N.D.—Baird v. Stephan, 204 N.W. 188, 195, 52 N.D. 568, quoting **Corpus Juris.**
Okl.—Lacy v. Wozencraft, 105 P.2d 781.
R.I.—Personal Finance Co. of Providence v. Henley-Kimball Co., 1 A. 2d 121, 61 R.I. 402, 117 A.L.R. 1476.
S.C.—Ridgill v. Clarendon County, 6 S.E.2d 766, 768, 192 S.C. 321, quoting **Corpus Juris.**
Tenn.—Roysdon v. Terry, 4 Tenn. App. 638, 654, citing **Corpus Juris.**
Tex.—Great Southern Life Ins. Co. v. Dolan, Civ.App., 239 S.W. 236, reversed on other grounds, Com. App., 262 S.W. 475.
21 C.J. p 1061 note 16.

94. Ky.—Thrasher v. Craft, 45 S. W.2d 827, 242 Ky. 101.
Ind.—Seymour Improvement Co. v. Viking Sprinkler Co., 161 N.E. 389, 87 Ind.App. 179.
Mo.—Wilkinson v. Lieberman, 37 S. W.2d 533, 536, 327 Mo. 420, citing **Corpus Juris**—Berry v. Cobb, 20 S. W.2d 296, 298, 223 Mo.App. 934, quoting **Corpus Juris.**
N.H.—Decatur v. Cooper, 157 A. 706, 85 N.H. 250.
Okl.—Gypsy Oil Co. v. Marsh, 248 P. 329, 121 Okl. 135, 48 A.L.R. 876—Bean v. Harris, 219 P. 300, 93 Okl. 10.
21 C.J. p 1152 note 94.

95. U.S.—Detroit, T. & I. R. Co. v. Detroit & T. S. L. R. Co., C.C.A. Mich., 6 F.2d 845, reversing, D.C., Detroit & T. S. L. R. Co. v. Detroit, T. & I. R. Co., 290 F. 549—Lamborn v. Wm. M. Hardie Co., C.C.A.Ohio, 1 F.2d 679, certiorari denied William M. Hardie Co. v. Lamborn, 45 S.Ct. 231, 267 U.S. 594, 69 L.Ed. 804—Dustin Grain Co. v. McAllister, C.C.A.Ark., 296 F. 611—The Isla de Panay, C.C.A. N.Y., 292 F. 723, certiorari granted Austin Nichols & Co. v. The Isla de Panay, 44 S.Ct. 133, 263 U. S. 697, 68 L.Ed. 512, affirmed Austin Nichols & Co. v. The Isla de Panay, 45 S.Ct. 269, 267 U.S. 260, 69 L.Ed. 603.
Ala.—McIntosh v. Hill, 102 So. 101, 212 Ala. 136—Bank of Hartford v. McNeal, 93 So. 617, 207 Ala. 680.
Ark.—Pierce v. Center, 138 S.W.2d 391, 200 Ark. 19.
Iowa.—Garner v. Meredith, 294 N.W. 363.
Md.—Metropolitan Club v. Hopper, McGraw & Co., 139 A. 554, 153 Md. 666.
Minn.—Conner v. Caldwell, 294 N.W. 650.
Miss.—Strauss Bros. v. Denton, 106 So. 257, 140 Miss. 745, 45 A.L.R. 341, citing **Corpus Juris.**
Mo.—Davis v. Lea, 239 S.W. 823, 293 Mo. 660—Berry v. Cobb, 20 S. W.2d 296, 223 Mo.App. 934.
N.J.—Todd v. Exeter Land Co., 146 A. 303, 104 N.J.Eq. 431, reversing 143 A. 428, 103 N.J.Eq. 268.
N.Y.—Brennan v. National Equitable Inv. Co., 160 N.E. 924, 247 N.Y. 486, affirming 224 N.Y.S. 572, 221 App. Div. 658, and reargument denied 162 N.E. 524, 248 N.Y. 569—In re Ayvazian's Estate, 275 N.Y.S. 123, 153 Misc. 467—Hartford Accident & Indemnity Co. v. Oles, 274 N.Y.S. 349, 152 Misc. 876—Tighe v. Empire Bond & Mortgage Corporation, 258 N.Y.S. 278, 144 Misc. 146.
Ohio.—Riley v. Arnold, 19 Ohio N. P., N.S., 273.
W.Va.—Union Bank & Trust Co. v. Dowman, 155 S.E. 465, 109 W.Va. 493, citing **Corpus Juris.**
21 C.J. p 1152 note 95.

Fraud

(1) Fraud is not essential in cases of equitable estoppel arising out of negligent silence, for negligent silence alone, coupled with both an opportunity and a real or apparent duty to speak, suffice for the creation of the estoppel, if the other party is induced by such silence to act to his prejudice.—A. S. Knowles Dry Goods Co. v. Gunter, 85 So. 735, 204 Ala. 411.

(2) Actual or intended fraud is not an element essential to equitable estoppel through silence or inaction, and neither affirmative acts or words nor silence maintained with fraudulent intent to deceive are indispensable elements, but estoppel arises only when the omission to speak is an actual or constructive fraud on the party invoking it or his privies; the existence of equitable estoppel through silence or inaction requires that the party against whom it acts remained silent when he had the opportunity of speaking and when he knew or ought to have known that his silence would be relied on, that action which his statement of the truth would prevent would be taken or omitted, and that injury of some nature or in some degree would result.—In re Grube's Will, 7 N.Y.S.2d 194, 169 Misc. 170.

96. U.S.—In re Walton Hotel Co., C. C.A.Ill., 116 F.2d 110—New York

basis of an estoppel in pais against him by silence, must be viewed in the light of the understanding he then had of his rights, and not in the light of such rights as they may be thereafter determined by the ultimate and conclusive adjudications of the courts.[97]

Failure of judgment debtor to assert invalidity of judgment. A judgment debtor who without objection stands by and suffers the assignment of the judgment against him to an innocent third person will be estopped afterward to assert the invalidity of such judgment.[98]

§ 88. Failure to Assert Title or Right in General

Under certain conditions, a person is estopped who stands by while he sees another commit, or be in the course of committing, an act infringing on his title or right.

Where a person stands by and sees another about to commit, or in the course of committing, an act infringing on his rights and fails to assert his title or right, he will be estopped afterward to assert it.[99] It is necessary to an estoppel that the party against whom it is claimed should at the time be apprised of his rights, since silence without knowledge works no estoppel;[1] and no estoppel arises unless it is

Trust Co. v. Watts-Ritter & Co., C C.A.W.Va., 57 F.2d 1012.
Ala.—Ex parte City of Bessemer, 197 So. 20.
Ark.—Mergenthaler Linotype Co. v. College of the Ozarks, 132 S.W. 2d 8, 198 Ark. 904—Stewart v. Pelt, 131 S.W.2d 644, 198 Ark. 776—Pettit-Galloway Co. v. Womack, 268 S.W. 353, 167 Ark. 356—Stewart Oil Co. v. Bryant, 243 S. W. 811, 153 Ark. 432—Brownfield v. Bookout, 228 S.W. 51, 147 Ark. 555.
Colo.—Moul v. Thompson, 14 P.2d 1004, 91 Colo. 323—Southern Surety Co. v. Peterson, 281 P. 746, 86 Colo. 350.
Fla.—Nichols v. Bodenwein, 146 So. 86, 107 Fla. 25, rehearing denied and amended on other grounds 146 So. 659, 107 Fla. 25—Jones v. Watkins, 140 So. 920, 105 Fla. 25—Hendricks v. Stark, 126 So. 293, 99 Fla. 277.
Iowa.—Iowa State Bank of Hull v. Rons, 212 N.W. 362, 203 Iowa 51.
Ky.—Williams Coal & Coke Co. v. Spears, 125 S.W.2d 745, 277 Ky. 57.
La.—Parker v. Ohio Oil Co., 186 So. 604, 191 La. 896.
N.J.—Todd v. Exeter Land Co., 146 A. 303, 104 N.J.Eq. 431, reversing 143 A. 428, 103 N.J.Eq. 268.
N.Y.—Richmond Hill Realty Co. v. East Richmond Hill Land Co., 285 N.Y.S. 424, 246 App.Div. 301—Noble v. Echo Lake Tavern, 254 N.Y.S. 662, 142 Misc. 427—Gordon v. Schroeder, 246 N.Y.S. 89, 138 Misc. 338.
N.C.—Sugg v. North Carolina Agr. Credit Corporation, 144 S.E. 554, 196 N.C. 97.
Okl.—Hedges v. First Nat. Bank, 39 P.2d 57, 170 Okl. 175—Bean v. Harris, 219 P. 300, 93 Okl. 10.
Pa.—Leininger v. Goodman, 120 A. 772, 277 Pa. 75.
S.C.—King v. Ligon, 185 S.E. 305, 180 S.C. 224—Landrum v. Branyon, 159 S.E. 546, 161 S.C. 235.
Tex.—Silverman v. Harmon, Civ.App., 250 S.W. 206.
Va.—Fitchett v. Parsons, 128 S.E. 457, 142 Va. 163.
Wash.—Harms v. O'Connell Lumber Co., 44 P.2d 785—De Boe v. Prentice Packing & Storage Co., 20 P. 2d 1107, 172 Wash. 514.
W.Va.—Huntington Land Co. v. Meadows, 163 S.E. 842, 112 W.Va. 117.

97. U.S.—Cleveland v. Cleveland, C. C. & St. L. R. Co., C.C.Ohio, 93 F. 113, reversed on other grounds 147 F. 171, 77 C.C.A. 467.
Mo.—Wilkinson v. Lieberman, 37 S. W.2d 533, 536, citing **Corpus Juris.**

98. Pa.—Dawson v. Melvin, 2 L.T. N.S. 203.

99. U.S.—Commodores Point Terminal Co v. Hudnall, D.C.Fla., 3 F.2d 841—Commodores Point Terminal Co. v. Hudnall, D.C.Fla., 283 F. 150—Joo v. U. S., 60 Ct.Cl. 850.
Ark.—Rone v. Sawrey, 123 S.W.2d 524, 527, 197 Ark. 472, quoting **Corpus Juris**—Lynn v. Quillen, 13 S.W.2d 624, 178 Ark. 1150.
Colo.—Buchhalter v. Myers, 276 P. 972, 95 Colo. 419.
Idaho.—Hillcrest Irr. Dist. v. Nampa & Meridian Irr. Dist., 66 P.2d 115, 57 Idaho 403.
Ill.—Harmony Way Bridge Co. v. Leathers, 187 N.E. 432, 353 Ill. 378—Oliver v. Ross, 124 N.E. 800, 289 Ill. 624—Nelson v. Burns, 255 Ill.App. 314.
Iowa.—Browning v. Kannow, 210 N.W. 596, 202 Iowa 465.
Kan.—Myers v. Isern, 75 P.2d 253, 257, 147 Kan. 182, quoting **Corpus Juris.**
Ky.—Viall v. Pepples, 119 S.W.2d 860, 274 Ky. 599—Morgan v. Big Woods Lumber Co., 249 S.W. 329, 198 Ky. 88.
La.—Dupre v. Engelhart, 119 So. 472, 9 La.App. 293.
Mich.—Trowbridge v. Van Wagoner, 296 N.W. 689, 296 Mich. 587—Smith v. O'Dell, 215 N.W. 408, 240 Mich. 185—Bell v. Debs, 204 N.W. 713, 232 Mich. 49—Stone Road Dairy Co. v. Humes, 189 N.W. 883, 220 Mich. 57.
Mo.—Norman v. Summerfield-Jones Const. Co., App., 18 S.W.2d 559, 560, quoting **Corpus Juris,** and transferred, see, Sup., 4 S.W.2d 1064—Berry v. Cobb, 20 S.W.2d 296, 298, 223 Mo.App. 934, quoting **Corpus Juris**—Mitchell v. Newton County Bank, 282 S.W. 729, 731, 220 Mo.App. 223, quoting **Corpus Juris,** and followed in Mitchell v. Newton County Bank, App., 282 S. W. 733—Meier v. Lemay Ferry Bank, App., 226 S.W. 334.
N.J.—Smith v. Commercial Credit Corporation, 165 A. 637, 113 N.J. Eq. 12, affirmed Morrow v. Smith, 170 A. 607, 115 N.J.Eq. 310.
N.Y.—Reeland v. Moore Oil Co., 275 N.Y.S. 489, 242 App.Div. 462—In re McArdle's Estate, 250 N.Y.S. 276, 287, 140 Misc. 257, citing **Corpus Juris**—Hibbard v. Stewart, 1 Hilt. 207.
N.C.—Citizens Bank of Marshall v. Gahagan, 196 S.E. 827, 213 N.C. 511—Colonial Oil Co. v. Jenkins, 193 S.E. 33, 212 N.C. 140—Booth v. Hairston, 136 S.E. 879, 193 N.C. 278, 57 A.L.R. 1186, petition dismissed 141 S.E. 480, 195 N.C. 8.
Or.—Skyles v. Kincaid, 264 P. 432, 124 Or. 443.
Tex.—Employers' Casualty Co. v. Helm, Civ.App., 295 S.W. 955—Silverman v. Harmon, Civ.App., 250 S.W. 206.
Wash.—Skibsaktieselskapet Bestum III v. Duke, 230 P. 650, 131 Wash. 467.
W.Va.—Union Bank & Trust Co. v. Dowman, 155 S.E. 465, 109 W.Va. 493, citing **Corpus Juris.**
21 C.J. p 1152 note 97.

1. Ala.—Fourth Nat. Bank v. Woolfolk, 125 So. 217, 220 Ala. 344.
Ga.—Chattahoochee Fertilizer Co. v. Quinn, 151 S.E. 496, 169 Ga. 801.
La.—Parker v. Ohio Oil Co., 186 So. 604, 191 La. 896—Morris v. Monroe Sand & Gravel Co., 117 So. 763, 166 La. 656.
Mo.—Wells v. Wells, 288 S.W. 950, 221 Mo.App. 936—Mitchell v. Newton County Bank, 282 S.W. 729, 731, 220 Mo.App. 223, quoting **Corpus Juris,** and followed in Mitchell v.

the duty of the party against whom the estoppel is claimed to speak,[2] and unless he has the opportunity to speak.[3] It is further necessary that his silence or passive conduct actually misled the other to his prejudice.[4]

Silence or failure to assert title to property while it is being adversely claimed or occupied is not, of itself, sufficient to create an estoppel.[5] There can be no estoppel where the party claiming it was fully cognizant that he was invading the rights of another,[6] or where he was not justified in believing he had title to the rights involved.[7]

Newton County Bank, App., 282 S. W. 733.

N.Y.—In re Heubach's Will, 300 N. Y.S. 802, 165 Misc. 196.

Tex.—Moore v. Carey Bros. Oil Co., Com.App., 272 S.W. 440, 39 A.L.R. 1247, overruling motion for rehearing 269 S.W. 75, 39 A.L.R. 1247—Cline v. Niblo, Civ.App., 286 S.W. 298, reversed on other grounds, Com.App., 292 S.W. 178, modified on other grounds 8 S.W.2d 633, 117 Tex. 474, 66 A.L.R. 916.

21 C.J. p 1153 note 98.

Knowledge of breach of condition of grant

Where plaintiffs' parents conveyed land to trustee for use for railroad purposes only and subsequently the land became a part of the public highway, plaintiffs and their parents were, under the evidence, chargeable with knowledge of breach of condition in the deed executed by the parents, as of the time when the highway was planned and being constructed and used as such by the public and the plaintiffs who failed to assert their rights until about ten years after the land had become a part of the public highway were "estopped" from maintaining an action of ejectment for recovery of the land.—Trowbridge v. Van Wagoner, 296 N.W. 689, 296 Mich. 587.

2. Ala.—Hurst v. Smith, 151 So. 825, 227 Ala. 664.

Ark.—Polster v. Langley, 144 S.W. 2d 1063.

Ga.—McNabb v. Houser, 156 S.E. 595, 171 Ga. 744, 74 A.L.R. 1122.

Idaho—Johnson v. Dunn, 266 P. 1099, 46 Idaho 25, certiorari denied Coast Lumber Co. v. Johnson, 49 S.Ct. 79, 278 U.S. 567, 73 L.Ed. 510.

Ill.—Marshall v. Pfeiffer, 145 N.E. 411, 314 Ill. 286.

Ky.—Holcomb v. Swift Coal & Timber Co., 65 S.W.2d 741, 251 Ky. 642—Cherry Bros. v. Tennessee Cent. Ry. Co., 299 S.W. 1099, 222 Ky. 79.

Mont.—Shipler v. Potomac Copper Co., 220 P. 1097, 69 Mont. 86.

N.M.—Mosley v. Magnolia Petroleum Co., 114 P.2d 740.

N.Y.—Noble v. Echo Lake Tavern, 254 N.Y.S. 662, 142 Misc. 427.

Ohio.—Stein v. White, 143 N.E. 124, 109 Ohio St. 578—City Loan & Savings Co. v. Sheban, 29 N.E.2d 171, 65 Ohio App. 7.

R.I.—Inman v. Inman, 121 A. 113, 45 R.I. 206.

Tenn.—Frazier v. Brice, 4 Tenn.App. 531.

Utah—Marshall v. Zinn, 199 P. 1029, 58 Utah 505.

Wyo.—Cullyford Co. v. Joss, 246 P. 27, 35 Wyo. 10.

21 C.J. p 1153 note 99.

Failure to record will

In an action to recover land, wherein plaintiff claimed under a will and as owner in fee, and also as life tenant after the termination of a preceding life tenancy, he was not estopped to make a claim because he did not have the will promptly recorded.—Spencer v. Bouchard, 121 A. 164, 123 Me. 15.

Ignorance of representations

Garnishee was not estopped to assert her title to property on ground that garnishee was present when her husband, in purchasing automobile under conditional sales contract, represented that he owned property involved, where garnishee testified that she knew nothing of representations and did not hear them made.—National Bond & Investment Co. v. Murphy, 273 N.W. 57, 224 Wis. 665.

3. Mich.—Sheffield Car Co. v. Constantine Hydraulic Co., 137 N.W. 305, 171 Mich. 423, Ann.Cas.1914B 984.

4. U.S.—White v. Daniel, Ga., 261 F. 70, 171 C.C.A. 666.

Ark.—Slaughter v. Cornie Stave Co., 291 S.W. 69, 172 Ark. 952.

Cal.—Rocha v. Rocha, 240 P. 1010, 197 Cal. 396.

Kan.—Eresch v. Guipre, 51 P.2d 1016, 142 Kan. 747.

Ky.—Wright v. Webb, 221 S.W. 510, 188 Ky. 170.

Me.—Blaisdell Automobile Co. v. Nelson, 154 A. 184, 130 Me. 167.

Miss.—Rice v. Washington County Building & Loan Ass'n, 110 So. 851, 145 Miss. 1.

Mo.—Mitchell v. Newton County Bank, 282 S.W. 729, 220 Mo.App. 223, followed in Mitchell v. Newton County Bank, App., 282 S.W. 733.

Mont.—Hanrahan v. Andersen, 90 P. 2d 494, 108 Mont. 218—Shipler v. Potomac Copper Co., 220 P. 1097, 1100, 69 Mont. 86, citing **Corpus Juris.**

Neb.—Indiana Harbor Belt R. Co. v. Alpirn, 296 N.W. 158—Wiltse v. Bolton, 272 N.W. 197, 132 Neb. 354.

N.Y.—Teetsell v. Ross, 195 N.Y.S. 463, 201 App.Div. 826.

N.D.—Hughes v. Fargo Loan Agency, 178 N.W. 993, 146 N.D. 26.

Or.—Skyles v. Kincaid, 264 P. 432, 124 Or. 443.

Pa.—Berry v. Hoffman, 189 A. 516, 125 Pa.Super. 261.

Tex.—Davis v. Texas Co., Civ.App., 232 S.W. 549, reversed on other grounds Texas Co. v. Davis, 254 S.W. 304, 113 Tex. 321, rehearing overruled 255 S.W. 601, 113 Tex. 321.

Wash.—Ingram v. Aldrich, 83 P.2d 917, 196 Wash. 627.

Wis.—Perkins v. Perkins, 180 N.W. 334, 173 Wis. 421, modified on other grounds 181 N.W. 812, 173 Wis. 421.

21 C.J. p 1154 note 2.

5. Tex.—Simonds v. Stanolind Oil & Gas Co., 114 S.W.2d 226, 134 Tex. 332, reversing, Civ.App., 103 S.W.2d 784, and rehearing denied 136 S.W.2d 207, 134 Tex. 332—Thompson v. Allen, Civ.App., 111 S.W.2d 791, error dismissed—Kelvin Lumber & Supply Co. v. Copper State Mining Co., Civ.App., 203 S.W. 68, reversed on other grounds Copper State Mining Co. v. Kelvin Lumber & Supply Co., Com.App., 227 S.W. 938.

6. Wis.—Perkins v. Perkins, 180 N. W. 334, 173 Wis. 421, modified on other grounds 181 N.W. 812, 173 Wis. 421.

21 C.J. p 1154 note 3.

Constructive notice

(1) Remainderman was not estopped to prevent waste by life tenants by her silence while they were preparing to commit it, where they had constructive notice of her claim.—Salyer's Guardian v. Keeton, 283 S. W. 1015, 214 Ky. 643.

(2) Where five of ten illegitimate children conveyed interest in land which they acquired as irregular heirs of mother, grantees knew of other five children, and deeds stated that children conveyed in their capacity as heirs of their father, of whom their mother was irregular heir, grantees executed oil lease and lessee's attorneys advised lessee to get reliable information as to marital history of the father and mother, other five children were not estopped to assert their interest as against contention that lessee had acted upon the face of the record.—Tyson v. Spearman, 183 So. 201, 190 La. 871.

7. N.Y.—Noble v. Echo Lake Tavern, 254 N.Y.S. 662, 142 Misc. 427.

§ 89. Permitting Sale or Mortgage of Property

A person who knowingly permits his property to be sold or encumbered is estopped from setting up his title or interest as against a person who has been thereby misled to his injury.

A property owner who knowingly permits another to sell or encumber the property, without disclosing his title or objecting to the transaction, is estopped from setting up his title or interest as against a person who has been thereby misled to his injury.[8]

Applications and qualifications of this rule are discussed with respect to real property infra § 90, and with respect to personal property infra § 91.

§ 90. Real Property

An owner of real property who stands by without asserting his title while a third person sells or mortgages the property may be, under certain conditions, estopped as against the purchaser or mortgagee.

An owner of real property who stands by and sees a third person selling or mortgaging it under claim of title without asserting his own title or giving the purchaser or mortgagee any notice thereof is estopped, as against such purchaser or mortgagee, from afterward asserting his title;[9] and, although title does not pass under these circumstances, a conveyance will be decreed by a court of equity.[10] Especially is the rule applicable where the party against whom the estoppel is claimed, in addition to standing by, takes part in making the sale or mortgage.[11]

Elements of liability. To constitute an estoppel of the character under consideration, it is necessary that the subject matter of the sale or mortgage be something in which the interest of the party sought to be estopped is direct and immediate.[12] If there

8. Ga.—Federal Intermediate Credit Bank v. Sherrod, 178 S.E. 477, 50 Ga.App. 501.
N.H.—Putnam v. Employers Liability Assur. Corporation, 4 A.2d 353, 90 N.H. 74.
N.D.—Northwestern Nat. Bank of Minneapolis, Minn., v. Rosenquist, 224 N.W. 909, 57 N.D. 916.
Va.—Easley v. First Nat. Bank, 200 S.E. 603, 172 Va. 94.

9. U.S.—Commodores Point Terminal Co. v. Hudnall, D.C.Fla., 283 F. 150—Virginia Iron, Coal & Coke Co. v. Webb, C.C.A.Ky., 263 F. 821—National Bank of Savannah v. All, S.C., 260 F. 370, 171 C.C.A. 236, reversing, D.C., All v. All, 250 F. 120.
Ala.—Morris v. Sartain, 140 So. 373, 224 Ala. 318.
Cal.—Rafftery v. Kirkpatrick, 85 P.2d 147, 29 Cal.App.2d 503—Connelly v. J. D. Millar Realty Co., 20 P.2d 781, 131 Cal.App. 67—Callahan v. General Oil Well Supply Co., 19 P.2d 508, 130 Cal.App. 32.
Conn.—Reynolds v. Reynolds, 183 A. 394, 121 Conn. 153.
Ga.—Purvis v. Calvert Mortg. Co., 124 S.E. 702, 158 Ga. 879.
Ill.—Lowenberg v. Booth, 162 N.E. 191, 330 Ill. 548.
Ky.—Chesnut v. Allen, 139 S.W.2d 729, 282 Ky. 703—Viall v. Pepples, 119 S.W. 860, 274 Ky. 599—Barnett v. Bank of Commerce, 94 S.W.2d 334, 337, 264 Ky. 179, quoting **Corpus Juris**—Terry v. Ellsworth, 32 S.W.2d 558, 236 Ky. 54—Jones Colliery Co. v. Hall, 295 S.W. 1033, 220 Ky. 706—Oliver v. Creech's Heirs, 286 S.W. 887, 215 Ky. 660—Bennett v. Rice, 273 S.W. 479, 209 Ky. 714.
La.—Skannal v. Hespeth, 198 So. 661, 196 La. 87.
Me.—Central Maine Power Co. v. Rollins, 138 A. 170, 126 Me. 299.
Md.—McNamara v. Feihe, 115 A. 753, 139 Md. 516.
Mich.—Colonial Theatrical Enterprises v. Sage, 237 N.W. 529, 532, 255 Mich. 160, citing **Corpus Juris**—Craig v. Crossman, 177 N.W. 400, 209 Mich. 462.
Miss.—Barron v. Federal Land Bank of New Orleans, 180 So. 74, 182 Miss. 50.
Mont.—First State Bank of Philipsburg v. Mussigbrod, 271 P. 695, 83 Mont. 68.
N.Y.—In re Grube's Will, 7 N.Y.S.2d 194, 169 Misc. 170—Ritz v. Rubin, 201 N.Y.S. 99.
N.C.—Patterson v. Fuller, 167 S.E. 74, 203 N.C. 788.
Okl.—Bean v. Harris, 219 P. 300, 93 Okl. 10.
Va.—Patterson's Ex'rs v. Patterson, 131 S.E. 217, 144 Va. 113—Johnson v. Powhatan Mining Co., 103 S.E. 703, 127 Va. 352.
Wis.—Hustis v. McWilliams, 185 N.W. 159, 175 Wis. 365.
21 C.J. p 1154 note 4.

Duty to assert claim
Those having an adverse claim to land are bound to assert it to the purchaser.—Criswell v. Hullings, 200 A. 683, 132 Pa.Super. 306.

Concealment by third person
In action involving ownership of land as between plaintiff, who claimed to have purchased land in good faith at a trustee's sale, and defendant, who alleged a conspiracy between plaintiff and a defendant's partner who had agreed to purchase land to be held by the copartnership, the fact that partner did not reveal to defendant that the land had been sold to plaintiff did not tend to estop plaintiff from asserting his claim.—Mason v. Gantz, Tex.Civ.App., 226 S.W. 435.

10. U.S.—Kirk v. Hamilton, D.C., 102 U.S. 68, 26 L.Ed. 79.

11. Ala.—Walls v. Downing, 89 So. 503, 206 Ala. 201.
Ga.—De Loach v. Bennett, 119 S.E. 592, 156 Ga. 633.
Ky.—Barnett v. Bank of Commerce, 94 S.W.2d 334, 337, 264 Ky. 179, quoting **Corpus Juris**—Asher v. Mosley, 258 S.W. 320, 201 Ky. 703
Mich.—Colonial Theatrical Enterprises v. Sage, 237 N.W. 529, 255 Mich. 160.
N.J.—Beth Hamedresh Hagodol of Newark v. Isserman, 5 A.2d 786, 125 N.J.Eq. 354, affirming 190 A. 69, 121 N.J.Eq. 335.
Puerto Rico.—Rivera v. Puente, 3 Puerto Rico Fed 393.

Administrator who is life tenant, selling entire fee in decedent's land without mentioning life estate, is estopped, against purchasers, to claim life estate.—Thomas v. Couch, 156 S.E. 206, 171 Ga. 602.

Stockholder in waterworks company, advocating purchase of waterworks by city and assisting in carrying election authorizing purchase, and not disclosing to city his claim to interest in or lien on waterworks, was estopped from asserting as against city that city's grantors did not have good title to waterworks and that grantors were trustees ex maleficio or that municipality took waterworks burdened with trust for stockholder's benefit, where city paid purchase price for property and expended large sums for additions and improvements.—Shaver v. City of Des Moines, 288 N.W. 412, 227 Iowa 411.

12. Fla.—Fairlie v. Scott, 102 So. 247, 88 Fla. 229.
Pa.—Waldron v. Wahl, 133 A. 252, 286 Pa. 237.
W.Va.—Napier v. Northland Coal Co.,

is an intermediate interest on which his own is dependent, he cannot be estopped.[13] An owner of property which another has assumed to convey without authority is not precluded by mere silence from subsequently claiming it.[14] It is indispensable that the party to be concluded should have been fully apprised of his title or interest,[15] and that he should have knowledge of the sale or transfer[16] or of facts sufficient to put him on notice thereof.[17] He should know that his land or interest is the subject of the sale or transfer.[18] It is not enough that he has notice that another is proposing to sell his property, and that he afterward does sell it.[19] Nevertheless, the phrase "stands by," within the equitable principle that one is estopped to claim title to land which, while standing by, he has permitted another to mortgage or sell, does not necessarily mean actual presence, but implies knowledge under such circumstances as render it the duty of the possessor to communicate it.[20]

To constitute an estoppel, it is essential that the party claiming it should be ignorant of the title or interest of the party against whom the estoppel is claimed,[21] and that he should have made due inquiries as to the state of the title.[22] No estoppel arises in favor of one having actual knowledge of the adverse title or interest,[23] where the party against whom the estoppel is claimed was in possession of the land at the time of the conveyance,[24] or where the party claiming the estoppel is bound with constructive notice by the public records.[25] One

124 S.E. 915, 918, 97 W.Va. 247, citing **Corpus Juris.**
21 C.J. p 1155 note 7.

Subsequently acquired title

In suit to quiet title, complainant, who had no interest in land when he attended foreclosure sales which he knew were void, who subsequently acquired title from record owner, and who remained silent when trust deeds and warranty deeds were subsequently executed by parties claiming under foreclosure sales, was not estopped to claim title as against party claiming under one of such warranty deeds.—Lucas v. New Hebron Bank, 180 So. 611, 181 Miss. 762.

13. N.H.—Watkins v. Peck, 13 N.H. 360, 40 Am.D. 156.
N.Y.—Livingston v. New York, O. & W. Ry. Co., 184 N.Y.S. 665, 193 App.Div. 523.
W.Va.—Napier v. Northland Coal Co., 124 S.E. 915 918, 97 W.Va. 247, citing **Corpus Juris.**

14. N.Y.—Thompson v. Simpson, 28 N.E. 627, 128 N.Y. 270, affirming 13 N.Y.S. 90.
Tex.—Simonds v. Stanolind Oil & Gas Co., 114 S.W.2d 226, 134 Tex. 332, reversing Civ.App., 103 S.W.2d 784, and rehearing denied 136 S.W. 2d 207, 134 Tex. 332—Turner v. Germany, Civ.App., 94 S.W.2d 1177, reversed on other grounds Germany v. Turner, 123 S.W.2d 874, 132 Tex. 491—Holland v. Blanchard, Civ.App., 262 S.W. 97.
Estoppel by mere silence see supra § 87.

15. Mich.—Meade v. Robinson, 208 N.W. 41, 234 Mich. 322.
Mo.—Crismond v. Kendrick, 29 S.W. 2d 1100, 325 Mo. 619.
21 C.J. p 1156 note 10.

16. Ark.—Love v. Young, 292 S.W. 669, 173 Ark. 1181.
Ky.—Walters v. Bentley, 32 S.W.2d 747, 748, 236 Ky. 136, citing **Corpus Juris.**
Mich.—Stamp v. Steele, 176 N.W. 464, 209 Mich. 205.
Minn.—Froslee v. Sonju, 297 N.W. 1
Mo.—Mahen v. Tavern Rock, Inc., 37 S.W 2d 562, 565, 327 Mo. 391, citing **Corpus Juris.**
Utah.—Marshall v. Zinn, 199 P. 1029, 58 Utah 595.
21 C.J. p 1156 note 11.

Reasonable opportunity to learn of sale

Even if owner of land sold by his father had a reasonable opportunity to learn of sale, and kept silent, he was not thereby estopped to sue in ejectment.—Saylor v. Kentucky-Cardinal Coal Corporation, 266 S.W. 388, 205 Ky. 724, 50 A.L.R. 666.

Prompt action on discovery

Owner executing deed as security was not estopped to deny validity of grantee's mortgage to defendant, where owner notified defendant of claim of title immediately on discovery of mortgage.—Skupinski v. Provident Mortg. Co., 221 N.W. 338, 244 Mich. 309.

17. N.J.—Northrup v. Ackerman, 92 A. 909, 84 N.J.Eq. 117.

18. Ky.—Fields v. Couch, 184 S.W. 894, 169 Ky. 554.
21 C.J. p 1156 note 13.

19. N.H.—Watkins v. Peck, 13 N.H. 360, 40 Am.D. 156.
21 C.J. p 1156 note 14.

20. Ind.—Gatling v. Rodman, 6 Ind. 289.
R.I.—Gaddes v. Pawtucket Sav. Inst., 80 A. 415, 33 R.I. 177, Ann.Cas.1912 B 407.

21. Ga.—Shaw v. Green, 180 S.E. 732. 180 Ga. 760.
Mich.—Blodgett v. Snobble, 295 N. W. 192, 295 Mich. 374.
21 C.J. p 1156 note 16.

Administrator's sale

Under Civ.Code 1910 § 5737, mere presence of true owner at administrator's sale and his failure to disclose claim and title to land did not estop him or his grantee from asserting title, if purchaser knew of true state of title at time, although land was sold by administrator as property of intestate of whom owner was heir, unless he participated in proceeds either as heir or creditor with knowledge of facts.—Jackson v. Lipham, 123 S.E. 887, 158 Ga. 557.

22. Tex.—Owings v. Porter, Civ. App., 150 S.W.2d 141, error dismissed, judgment correct.

23. Ga.—Jackson v. Lipham, 123 S. E. 887, 158 Ga. 557.
Kan.—Kelling v. Brooks, 275 P. 1077, 128 Kan. 55.
21 C.J. p 1156 note 17.

Payment of taxes

Where A, having an unrecorded deed to land, sold the timber, and persons claiming under the timber deed acquired a deed to the land from one having a subsequent conveyance from A's grantor, the failure of A to pay taxes and their payment by the persons claiming under the timber deed raised no issue of estoppel against him.—Fidelity Lumber Co. v. Adams, Tex.Civ.App., 230 S.W. 177, error dismissed.

24. U.S.—Pond v. Goldstein, C.C.A. Alaska, 41 F.2d 76.
Mich.—Stamp v. Steele, 176 N.W. 464, 209 Mich. 205.
N.D.—Earnest v. First Nat. Bank, 217 N.W. 169, 56 N.D. 309.
21 C.J. p 1156 note 18.

25. Ga.—Norman v. McMillan, 107 S.E. 325, 151 Ga. 363.
Iowa.—Holmes v. Curl, 178 N.W. 406, 189 Iowa 246.
Kan.—Kelling v. Brooks, 275 P. 1077, 128 Kan. 55.
Ky.—Bailey v. Bailey, 151 S.W.2d 374—Cherry Bros. v. Tennessee Cent. Ry. Co., 299 S.W. 1099, 1103, 222 Ky. 79, quoting **Corpus Juris.**
Miss.—Lucas v. New Hebron Bank, 180 So. 611, 181 Miss. 762—Roberts v. Bookout, 139 So. 175, 162 Miss. 676.

who owns land, and is either in possession of it, or holds it by a registered deed, is under no obligation to give notice of his title to one who proposes to purchase from another,[26] but he may not mislead the other party.[27] In accordance with the general rules stated supra §§ 71, 72 governing estoppel in pais, it is essential that the party setting up the estoppel should have relied on the conduct of the party against whom the estoppel is claimed,[28] and that by reason thereof he was induced to purchase, or to take a mortgage of, the land.[29]

§ 91. Personal Property

The owner of an interest in personal property, who, with full knowledge of his rights, permits another to sell, pledge, or otherwise dispose of it, will be estopped to assert his title as against a third person who has relied on, and has been misled by, his acquiescence.

Where one who owns or has an interest in personal property, with full knowledge of his rights, suffers another to deal with it as his own by selling or pledging it, or otherwise disposing of it, he will be estopped to assert his title or right as against a third person who has acted on the faith of, and has been misled by, his acquiescence.[30] Actual presence of the owner at the time of the sale is not indispensable;[31] and it is of no consequence that there was no actual intention to mislead or injure anyone.[32] However, in order to work an estoppel the acquiescence must have been with full knowledge of all the material facts and circumstances attending the particular transaction in respect of which the doctrine is invoked.[33] The real owner is not estopped by representations made by a mortgagor, unless he has au-

Mo.—Williams v. Reid, 37 S.W.2d 537, 542, citing **Corpus Juris.**
N.Y.—Livingston v. New York, O. & W. Ry. Co, 184 N.Y.S. 665, 193 App.Div. 523.
Okl.—Bean v. Harris, 219 P. 300, 93 Okl. 10.
Tenn.—Evans v. Harrell, 1 Tenn. App. 168.
Va.—Steffey v. King, 101 S.E. 62, 126 Va. 120.
21 C.J. p 1156 note 19.
Notice arising from public record see supra § 71.

Duty of record owners to sue
Record owners did not forfeit title by failure to sue to cancel deed from redemptioner at mortgage foreclosure to plaintiff's ancestor.—Huling v. Seccombe, 263 P. 362, 88 Cal. App. 238.

Alteration of instrument
Owner executing deed as security was not estopped to deny validity of grantee's mortgage to defendant, where owner did not discover that clause giving notice of contract back was erased until after defendant paid out whole loan.—Skupinski v. Provident Mortg. Co., 221 N.W. 338, 244 Mich. 309.

26. Ga.—Smith v. Jones, 194 S.E. 556, 185 Ga. 236.
Okl.—Bean v. Harris, 219 P. 300, 93 Okl. 10.
Tex.—Holland v. Blanchard, Civ. App., 262 S.W. 97, 101, quoting **Corpus Juris.**
21 C.J. p 1156 note 20.

Holder of recorded mortgage is under no duty to tell prospective purchaser of existence of mortgage, provided holder remains passive and does not mislead purchaser; but if mortgagor, to induce sale should, within mortgagee's hearing, assert to prospective purchaser that recorded mortgage was fully paid, although not noted on record, mortgagee not making denial would be estopped to assert mortgage had not been paid.—Morris v. Sartain, 140 So. 373, 224 Ala. 318.

27. Ala.—Hurst v. Smith, 151 So. 825, 227 Ala. 664.
Okl.—Bean v. Harris, 219 P. 300, 93 Okl. 10.

Refusal of information by stranger in possession
Where a person about to purchase property in the possession of a stranger to the title honestly and properly asks of the possessor for information as to his rights, and such information is willfully refused, he may deal with the land on the presumption that the title is in fact as disclosed by the record, and the person in possession is estopped from setting up his claim to the injury of him to whom he refuses the information.—Marshall v. Zinn, 199 P. 1029, 58 Utah 505.

28. Mich.—Skupinski v. Provident Mortg. Co., 221 N.W. 338, 244 Mich. 309.
N.M.—Mosley v Magnolia Petroleum Co., 114 P.2d 740.
N.D.—Company A, First Regiment, National Guard Training School v. State, 224 N.W. 661, 58 N.D. 66.
Tex.—Holland v. Blanchard, Civ.App., 262 S.W. 97, 101, quoting **Corpus Juris**—Silverman v. Harmon, Civ. App., 250 S.W. 206.
Va.—Steffey v. King, 101 S.E. 62, 126 Va. 120.
21 C.J. p 1156 note 22.

29. N.M.—Mosley v. Magnolia Petroleum Co., 114 P.2d 740.
Tex.—Holland v. Blanchard, Civ. App., 262 S.W. 97, 101, quoting **Corpus Juris.**
21 C.J. p 1156 note 23.

30. Cal.—Beckjord v. Traeger, 39 P. 2d 523, 3 Cal.App.2d 385, rehearing denied 41 P.2d 172.
Ill.—Miller v. Bennett, 239 Ill.App. 306.
Mo.—Blake v. Keiser, App., 267 S.W. 94.
N.C.—Orchard Scenic Development Co. v. Bon Marche, 189 S.E. 781, 211 N.C. 272.
Okl.—Cities Service Oil Co. v. Boggs, 40 P.2d 638, 170 Okl. 335.
Wash.—Mill & Mine Supply Co. v. Johnson, 261 P. 386, 145 Wash 656—Rostein v. Hines, 198 P. 385, 115 Wash. 644.
W.Va.—Harris v. Coliver, 141 S.E. 791, 105 W.Va. 174.
21 C.J. p 1157 note 24.

"O K." indorsement on bill of sale signed by indorser constitutes certificate of correctness of statements therein, and estops mortgagee-indorser from denying recital that property was free from encumbrances.—Arkansas River Gas Co. v. Molk, 285 P. 561, 130 Kan. 30.

As against attaching creditors
The rule applies to purchasers at the sale, but is inapplicable to attaching creditors of the seller.—Dunham v. Jerome, 49 S.W.2d 637, 226 Mo.App. 1214.

Duty to intervene in legal action
The rule cannot be extended so as to require one to intervene in a law suit with the resultant costs of attorney's fees and other burdens that such an action assumes.—Atlanta Citizens' State Bank v. Ferson, Mo App., 208 S.W. 136—21 C.J. p 1157 note 34.

31. N.Y.—Thompson v. Blanchard, 4 N.Y. 303.

32. Mich.—Ueck v. Meatz, 158 N.W. 888, 192 Mich. 439—Vanneter v. Crossman, 4 N.W. 216, 42 Mich. 465.

33. U.S.—New Jersey Zinc Co. v. Singmaster, D.C.N.Y., 4 F.Supp. 967, modified on other grounds, C.C.A., 71 F.2d 277, certiorari denied Singmaster v. New Jersey Zinc

thorized or acquiesced in them.[34] It is essential that the party against whom the estoppel is claimed should have full knowledge of his title at the time of the sale,[35] and also that he should have knowledge of the sale, encumbrance, or pledge.[36]

To constitute an estoppel, it is essential that the party claiming the estoppel should be in ignorance of the other's title,[37] that he should have been induced to make the purchase by reason of his silence,[38] and that he has sustained injury thereby.[39] No estoppel arises where the party claiming the estoppel has not paid for the property.[40]

§ 92. Public or Judicial Sale

a. In general
b. Foreclosure sale

a. In General

An owner of property, who knowingly stands by and permits it to be sold at judicial sale without asserting his title, ordinarily cannot thereafter assert his claim as against persons misled by his conduct.

Although there is some authority to the contrary,[41] as a general rule, when a person having title to or an interest in property knowingly stands by and suffers it to be sold under a judgment or decree, without asserting his title or right or making it known to the bidders, he cannot afterward set up his claim.[42] Such an act, it has been stated, is clearly inconsistent with the idea of ownership on his part;[43] and the fact that there is no fraudulent intent on his part is immaterial.[44] If the owner has knowledge of an irregularity in the proceedings, but permits the sale to be made without objection, he is estopped to contest its validity afterward,[45] although there are decisions which hold that the rule has no application where the proceedings are void.[46] No estoppel arises where the act relied on as creating it is the result of illegal coercion;[47] and the owner is not estopped from claiming title by permitting the property to be sold at a judicial sale without renewing a claim previously dismissed.[48]

In order to create an estoppel it is essential that the party against whom it is claimed should have known at the time of the sale that his property was the subject of the sale,[49] and that the purchaser should have been in ignorance of the other's title to or interest in the property sold.[50] Mere silence, or the failure to intervene in the proceedings for the sale and to assert title prior to the sale, will not

Co., 55 S.Ct. 106, 293 U.S. 591, 79 L.Ed. 685.
21 C.J. p 1157 note 27.

Failure to act
An owner of wheat stored in warehouse was not estopped from suing for conversion, consisting of sale of such wheat without his knowledge or consent because of fire in warehouse, by failure to assist in salvaging operations, to object, or to request any special treatment with respect to his wheat.—Mitchell v. Munn Warehouse Co., 86 P.2d 174, 59 Idaho 661.

Filing of chattel mortgage does not estop one who had no knowledge of its contents and was not a party to it from claiming the property as his own.
Tex.—Smith v. Coburn, Civ.App., 222 S.W. 344.
Wash.—Spiecker v. First Nat. Bank, 235 P. 822, 134 Wash. 280.

34. Ga.—Mizell Live-Stock Co. v. Smith, 81 S.E. 904, 14 Ga.App. 593.
11 C.J. p 430 note 67.

35. Mo.—Newman v. Hook, 37 Mo. 207, 90 Am.D. 378.

36. Ga.—Federal Intermediate Credit Bank v. Sherrod, 178 S.E. 477, 50 Ga.App. 501.
Idaho.—Mitchell v. Munn Warehouse Co., 86 P.2d 174, 59 Idaho 661.
21 C.J. p 1157 note 29.

37. Ga.—Broadway Apartment Co. v. Barnett, 118 S.E. 601, 30 Ga.App. 562.
Iowa.—Bray v. Flickinger, 28 N.W. 492, 69 Iowa 167.
21 C.J. p 1157 note 30.

38. Del.—Jones v. Savin, 96 A. 756, 6 Boyce 68.
21 C.J. p 1157 note 31.

39. S.C.—Rish v. Jackson, 88 S.E. 380, 104 S.C. 163.
21 C.J. p 1157 note 32.

40. Ky.—Wyeth v. Renz-Bowles Co., 66 S.W. 825, 23 Ky.L. 2337.

41. Mich.—Petit v. Flint & P. M. R. Co., 72 N.W. 238, 114 Mich. 362.
21 C.J. p 1158 note 35.

42. Ala.—White v. Hogland, 96 So. 625, 626, 209 Ala. 537, quoting **Corpus Juris.**
Colo.—In re Smith's Estate, 83 P. 2d 333, 103 Colo. 91.
Ill.—Shippert v. Shippert, 20 N.E.2d 597, 371 Ill. 267.—Moore v. Gilmer, 187 N.E. 466, 353 Ill. 420.
Ind.—Kline v. Hammond Machine & Forge Works, 127 N.E. 220, 76 Ind.App. 573.
Ky.—Neeley v. Guthrie, 32 S.W.2d 567, 236 Ky. 81.—Crawley v. Manion, 228 S.W. 1032, 191 Ky. 12.
La.—Childers v. Adair, 5 La.App. 212.
Mo.—Landis v. Overton, 293 S.W. 371.—Balding v. Farm & Home Savings & Loan Ass'n of Missouri, App., 131 S.W.2d 57.
21 C.J. p 1158 note 36.
Estoppel to deny validity of execution sale see the C.J.S. title Executions § 228, also 23 C.J. p 666 note 62—p 668 note 86.

43. La.—Smith v. Taylor, 14 La. Ann. 663.
Va.—Williams v. Reynolds, 27 S.E. 600.

44. Mo.—Rice v. Bunce, 49 Mo. 231, 8 Am.R. 129.
21 C.J. p 1158 note 38.

45. Colo.—Mesa County Co-op. Ass'n v. McKinney, 256 P. 13, 81 Colo. 513.
21 C.J. p 1158 note 39.

46. Ala.—Friedman v. Waldrop, 12 So. 427, 97 Ala. 434.
Mich.—Grenier v. Hild, 82 N.W. 1052, 124 Mich. 222.

47. Ky.—Owens v. Hudson, 1 Ky. Op. 298.

48. Ga.—Alliance Ins. Co. v. Williamson, 137 S.E. 277, 36 Ga.App. 497.

Where claimant was in possession at time of sale, dismissal of claim to land levied on under execution against her husband was held not to estop her from asserting title to the land sold.—Sikes v. Seckinger, 137 S.E. 833, 164 Ga. 96.

49. Mo.—Gregmore Orchard Co. v. Gilmour, 140 S.W. 763, 159 Mo. App. 204.
21 C.J. p 1158 note 42.

50. U.S.—Crary v. Dye, 28 S.Ct. 360, 208 U.S. 515, 52 L.Ed. 595, affirming 85 P. 1038, 13 N.M. 439, 9 L.R.A.,N.S., 1136.
21 C.J. p 1158 note 43.

constitute an estoppel as against one who is not an innocent purchaser.[51] It is essential that the purchaser should have been misled by the other's silence,[52] and that he should have been induced thereby to make the purchase.[53]

While actual presence of the owner may not be necessary to constitute an estoppel,[54] a mere failure of an owner of property to attend a sale thereof of which he has notice creates no estoppel against him,[55] especially when it appears that he was pursuing another course which presumably appeared to him to be more proper and more likely to accomplish the result of stopping the sale.[56] Where the owner appears at the sale and gives notice of his claim to prospective purchasers, his failure to resort to other remedies afforded by law to prevent the sale does not constitute an estoppel.[57]

Effect of bid by owner. While there is some authority apparently to the contrary,[58] it is generally held that if the owner of property with knowledge of the facts bids on it at a judicial sale without giving notice of his title, he will be estopped thereafter to assert his title or contest the validity of the sale, to the prejudice of one who has acted in reliance on his conduct and in ignorance of the facts.[59]

On the other hand, it has been held that the owner is not estopped by bidding at the sale from setting up his title against the purchaser where he gives notice of his title at the time of the sale,[60] or where the facts are such as to put the purchaser on notice of his title.[61]

b. Foreclosure Sale

The failure of a mortgagor, present at a foreclosure sale, to object, while not estopping him from contesting its validity as against the mortgagee, will estop him as against a purchaser misled by his silence.

The mere fact that the mortgagor of property was present at its sale under foreclosure without objecting thereto will not estop him as against the mortgagee, or his assignee, from contesting the validity of the sale,[62] but such fact will estop him as against a purchaser who has relied on, and has been misled by, his silence.[63] Ordinarily one who fails to assert his title or right at a foreclosure sale will be estopped to assert his claim against one who in ignorance of the facts has relied on his conduct.[64]

51. Kan.—Simmons v. Clark, 99 P. 2d 739, 151 Kan. 431.

Holder of recorded title need not make known existence of that title at public sale purporting to be in contravention thereof, although if statement is made in his presence requiring in good faith a denial, his silence is fraud and works estoppel, and, where deed to partnership realty was of record, heirs of deceased partner were not estopped to set up their title to deceased's interest because one of heirs was present at sale of all property of partnership and did not object, no representation having been made requiring objection.—Hurst v. Smith, 151 So. 825, 227 Ala. 664.

Failure of occupant to assert claim based on unrecorded deed at proceedings against grantor does not estop assertion of rights against purchaser at sheriff's sale.—Earnest v. First Nat. Bank, 217 N.W. 169, 56 N.D. 309.

52. U.S.—McLellan v. Penick, C.C. A.La., 289 F. 366.
Ala.—White v. Hogland, 96 So. 625, 626, 209 Ala. 537, quoting **Corpus Juris.**
Ga.—Commercial Credit Co. v. Britt, 191 S.E. 400, 55 Ga.App. 789—Commercial Credit Co v. Britt, 186 S.E 449, 53 Ga.App. 430.
21 C.J. p 1158 note 44.

53. Ala.—White v. Hogland, 96 So. 625, 626, 209 Ala. 537, quoting **Corpus Juris.**
21 C.J. p 1159 note 45.

54. Mo.—Balding v. Farm & Home Savings & Loan Ass'n of Missouri, App., 131 S.W.2d 57.
Philippine.—Jalbuena v. Lizarraga, 33 Philippine 77.

55. Kan.—Schott v. Linscott, 103 P. 997, 80 Kan. 536.
21 C.J. p 1159 note 47.

56. Kan.—Schott v. Linscott, supra.

57. Tex.—Childers v. Johnson, Civ. App., 143 S.W.2d 123.

58. Mass.—West Newbury First Parish v. Dow, 3 Allen 369.

59. S.C.—Walker v. Hannon, 3 S.E. 2d 243, 191 S.C. 14.
21 C.J. p 1159 note 50.

60. N.J.—Holmdel & Keyport Turnp. Co. v. Conover, 34 N.J.Eq. 364.

61. Mich.—McAuliffe v. Mann, 37 Mich. 539.

62. N.C.—Burnett v. Dunn, Commission & Supply Co., 104 S.E. 137, 180 N.C. 117.
21 C.J. p 1159 note 53.
Waiver of irregularities in sale on foreclosure of:
Chattel mortgages see Chattel Mortgages § 397.
Real estate mortgages see Mortgages § 748, also 42 C.J. p 228 note 4—p 230 note 23.

63. N.C.—Clark v. Carolina Holmes, 128 S.E. 20, 189 N.C. 703—Lewis v. Nunn, 104 S.E. 470, 180 N.C. 159—Burnett v. Dunn Commission & Supply Co., 104 S.E. 137, 180 N.C. 117.
21 C.J. p 1159 note 54.

Mortgagor's bid at sale of his property under foreclosure judgment cured any illegality in sale.—Maloney v. Wilkinson, 129 So. 374, 170 La. 868.

64. Colo.—Moul v. Thompson, 14 P 2d 1004, 91 Colo. 323.
N.J.—E. R. C. Co. v. Hayes, 151 A. 58.
Pa.—Ark Building & Loan Ass'n v. Whelan, 54 Montg.Co. 297.
21 C.J. p 1159 note 55.

That purchaser acquired only mortgagor's title did not prevent him from invoking estoppel against one claiming interest in mortgaged property.—Callahan v. General Oil Well Supply Co., 19 P.2d 508, 130 Cal.App. 32.

Right to compel marshalling of securities
Where a mortgagee procured an assignment of a subsequently executed mortgage on the same and other personal property, which was recorded before his mortgage, and sold all the property at foreclosure, the amount being insufficient to discharge both mortgages, it was held that a person who had procured the mortgaged property not included in the first mortgage on a trade with the mortgagor could not defend an action brought by one to whom he traded the property to recover the property given in trade for failure of consideration on the ground that the mortgagee was required to marshal the securities, where defendant stood by at the sale

Nevertheless no estoppel can be set up against one whose conduct is induced by a mistake of fact common to all the parties.[65] It is essential to the creation of an estoppel that the owner should have known that his property was the subject of, or included in, the sale,[66] that the purchaser should have been in ignorance of his rights,[67] and that the purchaser was induced by his conduct to make the purchase.[68] The grantee of a deed seasonably and effectually recorded is not estopped by mere silence with respect to his title at a sale foreclosing a mortgage executed by his grantor subsequent to the registration of the deed.[69] It has been held that, where the owner is evicted through a breach of the usual covenant of quiet enjoyment and warranty in a deed conveying land and has no actual knowledge of a covenant in a deed in his chain of title making other land, which with such owner's land originally constituted one parcel, primarily chargeable with the payment of a mortgage debt for which his premises are sold on foreclosure, he is not estopped from maintaining an action for the breach of such covenant of quiet enjoyment and warranty by reason of his silence at such sale.[70]

§ 93. Witnessing or Taking Acknowledgment

An owner of land who attests a conveyance or mortgage thereof by a third person without disclosing his interest is, under certain circumstances, estopped to set up his claim; but taking an acknowledgment to such an instrument will not work an estoppel.

A person who has title to, or an interest in, land, and who attests a conveyance or mortgage thereof by a third person and at the time of attestation is aware of the contents of the instrument and remains silent, is estopped to set up a claim to the land conveyed,[71] especially where he receives part of the purchase money.[72]

However, it has been held that the witness will not be estopped where he did not know the contents of the instrument;[73] where the grantee knew of the interest of the attesting witness,[74] or the condition of title was equally open to all the parties;[75] where the fact of the attestation did not influence any one to his prejudice;[76] where the grantor could not be estopped;[77] or where the instrument did not con-

and made no objection.—Harrington v. Furr, 90 S.E. 775, 172 N.C. 610.

Sale of property as a whole

In corporate receivership proceedings, where mortgagee of part of corporate property prayed for foreclosure, and group of stockholders answered, praying for sale of corporate property as an entirety, and court signed foreclosure decree ordering sale of property as an entirety without objection, after group had received copy of proposed decree and notice of hearing thereon and failed to make any objections, a group of stockholders was estopped from asserting that property should not be sold as an entirety.—Guaranty Trust Co. of New York v. Williamsport Wire Rope Co., D.C.Pa., 20 F.Supp. 634, affirmed, C.C.A., Comstedt v. Gilmore, 96 F.2d 766.

65. Me.—Dixfield v. Newton, 41 Me. 221.

66. La.—Blunson v. Knighton, App., 140 So. 302.
S.D.—Gillette v. Abrahams, 174 N.W. 745, 42 S.D. 316.
21 C.J. p 1159 note 57.

Presence of attorneys subsequently retained

Third opponent is not estopped to sue on seizing creditor's indemnity bond because attorneys who subsequently represented him were present at sale and made no protest.—Stevenson v. Exchange Nat. Bank, 120 So. 96, 10 La.App. 179.

67. N.Y.—Syracuse Solar Salt Co. v. Rome, W. & O. R. Co., 22 N.Y.S. 321, 67 Hun 153.
21 C.J. p 1159 note 58.

68. N.J.—Minton v. Sutton, 135 A. 693, 100 N.J.Eq. 403, affirmed 139 A. 600, 102 N.J.Eq. 61.
21 C.J. p 1159 note 59.

Claimant held not estopped

La.—Blunson v. Knighton, App., 140 So. 302.
Va.—Heath v. Valentine, 15 S.E.2d 98.

69. Ala.—Otts v. Sheffield, 92 So. 268, 207 Ala. 125.

70. N.Y.—Jenks v. Quinn, 33 N.E. 376, 137 N.Y. 223, affirming 16 N.Y.S. 240, 61 Hun 427.

71. Ga.—Sikes v. Seckinger, 137 S.E. 833, 164 Ga. 96—Groover v. Simmons, 137 S.E. 237, 163 Ga. 778—Davis v. Bulloch, 130 S.E. 526, 161 Ga. 217—Patterson v. Burns, 103 S.E. 241, 150 Ga. 198.
Tenn.—Rhea v. Redus, 7 Tenn.App. 478.
21 C.J. p 1159 note 62.

Ancillary agreement

One who signs agreement which is material to effect of, and ancillary to, instrument of sale expressly referred to in agreement is presumed to know contents of instrument of sale, although not party thereto, and, until presumption is removed, he is estopped from asserting, as against grantee in instrument of sale, interest in property sold based on any right then outstanding in himself.—Federal Intermediate Credit Bank v. Sherrod, 178 S.E. 477, 50 Ga.App. 501.

Extent or duration of estoppel

Signature of person as witness to option granting mineral rights can operate to estop him from claiming such rights only as long as option remains valid, and attempted revival of option without his knowledge is ineffective to create further estoppel.—Elkhorn Coal Corporation v. Bradley, 288 S.W. 326, 216 Ky. 599.

72. Vt.—Ivers v. Chandler, 1 D. Chipm. 48.

73. Ala.—Coker v. Ferguson, 70 Ala. 284.
Ga.—Chenoweth-Holder Lumber Co. v. Beck & Jones, 155 S.E. 318, 171 Ga. 280—Groover v. Simmons, 137 S.E. 237, 163 Ga. 778—Davis v. Bulloch, 130 S.E. 526, 161 Ga. 217.
La.—Nelson, Curtis & Nelson v. Bridgeman, 92 So. 855, 860, 152 La. 190, citing **Corpus Juris.**
21 C.J. p 1159 note 64.

74. Ga.—Duncan v. Beasley, 161 S.E. 829, 174 Ga. 28.

75. N.Y.—Driscoll v. Brooklyn Union El. Co., 85 N.Y.S. 1000, 42 Misc. 120, affirmed 88 N.Y.S. 745, 95 App. Div. 146.
21 C.J. p 1159 note 65.

Prior recorded deed

One attesting security deed to another held not estopped thereby from asserting her own interest in land, where such interest appeared from prior recorded deed.—Duncan v. Beasley, 161 S.E. 829, 174 Ga. 28.

76. Ga.—Groover v. Simmons, 137 S.E. 237, 163 Ga. 778.
21 C.J. p 1160 note 66.

77. N.H.—Marshall v. Pierce, 12 N.H. 127.
21 C.J. p 1160 note 67.

vey a legal title,[78] although there is authority to the contrary.[79] One attesting a deed as a witness, conveying a part of a tract of land that he himself owned, is not estopped from asserting title to the other part, although the deed recites that the land adjacent to that conveyed belongs to the grantor.[80]

Taking acknowledgment. The fact that one who has title to, or an interest in, land takes an acknowledgment of a conveyance thereof by a third person without disclosing such title or interest creates no estoppel against him, although he may have knowledge of the contents of the instrument and of the condition of the title purporting to be conveyed.[81]

§ 94. Permitting Improvements or Expenditures

A person who knows the facts, and who, without objection, permits another to make improvements or expenditures on, or in connection with, his property, or in derogation of his rights under a claim of title or right, will be estopped to deny such title or right to the prejudice of the other.

One who with knowledge of the facts and without objection suffers another to make improvements or expenditures on, or in connection with, his property, or in derogation of his rights under a claim of title or right, will be estopped to deny such title or right to the prejudice of that other who has acted in reliance on, and been misled by, his conduct;[82] and a fortiori the rule is applicable where the party against whom the estoppel is claimed not only makes no objection but assists in making the improvements.[83] The estoppel may arise, although the period of acquiescence is very short.[84] It has been held, however, by some courts that while an owner who fails to object to the erection of improvements

78. Mich.—Vincent v. Evans, 127 N. W. 760, 165 Mich. 695.

79. Ind.—Spencer Commercial Club v. Bartmess, 123 N.E. 435, 70 Ind. App. 294.

80. N.Y.—College Point Sav. Bank v. Vollmer, 60 N.Y.S. 389, 44 App. Div. 619, affirmed 55 N.E. 1094, 161 N.Y. 626.

81. Tex.—Masterson Irr. Co. v. Foote, Civ.App., 163 S.W. 642.
21 C.J. p 1160 note 71.

82. U.S.—Management & Investment Co. v. Zmunt, C.C.A.Ohio, 59 F.2d 663—New York Trust Co. v. Watts-Ritter & Co., C.C.A.W.Va., 57 F.2d 1012—In re Men's Clothing Code Authority, D.C.N.Y., 18 F. Supp. 541—McClean v. Bradley, D. C. Ohio, 282 F. 1011, affirmed, C.C. A., 299 F. 379, certiorari denied 45 S.Ct. 98, 266 U.S. 619, 69 L.Ed. 471.
Ark.—Brownfield v. Bookout, 228 S. W. 51, 147 Ark. 555.
Cal.—Longley v. Brooks, 92 P.2d 394, 13 Cal.2d 754—Fowler v. Ozcoidi, 60 P.2d 279, 7 Cal.2d 268—Burrow v. Carley, 290 P. 577, 210 Cal. 95—Galli v. Schlobohm, App., 112 P. 2d 905—Los Angeles Athletic Club v. City of Long Beach, 17 P.2d 1061, 128 Cal.App. 427.
Conn.—Newfield Bldg. Co. v. Mohican Co., 136 A. 78, 105 Conn. 488.
Fla.—Seaboard Air Line Ry. Co. v. Dorsey, 149 So. 759, 111 Fla. 22.
Idaho.—Syster v. Hazzard, 229 P. 1110, 39 Idaho 580.
Iowa.—Minear v. Keith Furnace Co., 239 N.W. 584, 213 Iowa 663.
Kan.—Bankers' Mortg. Co. of Topeka v. Dole, 286 P. 258, 130 Kan. 367, rehearing denied 287 P. 906, 130 Kan. 647.
Ky.—Blackburn v. Piney Oil & Gas Co., 128 S.W.2d 192, 278 Ky. 191—Wood Oil Co. v. Ferguson-Willis Oil Co., 76 S.W.2d 632, 256 Ky. 579—Friel v. Grayson Road Corporation, 11 S.W.2d 943, 226 Ky. 794—Shackelford v. Miller, 289 S.W. 222, 217 Ky. 132—Floyd County v. Allen, 227 S.W. 994, 190 Ky. 532—White's Adm'r v. Thompson, 219 S. W. 434, 187 Ky. 480, 8 A.L.R. 1641.
Md.—Greenwalt v. McCardell, 12 A. 2d 522, 178 Md. 132—Cityco Realty Co. v. Slaysman, 153 A. 278, 281, 160 Md. 357, 76 A.L.R. 296, citing **Corpus Juris.**
Mass.—Nadien v. Bazata, 22 N.E.2d 1, 303 Mass. 496—J. H. Gerlach Co. v. Noyes, 147 N.E. 24, 251 Mass. 558, 45 A.L.R. 961—J. H. Gerlach Co. v. Noyes, 134 N.E. 612, 241 Mass. 69.
Mich.—Kirchen v. Remenga, 288 N. W. 344, 291 Mich. 94—Irwin v. Minde, 268 N.W. 756, 276 Mich. 616.
Miss.—Kelso v. Robinson, 161 So. 135, 172 Miss. 828.
Neb.—In re City of Chadron, 186 N. W. 350, 107 Neb. 376.
Nev.—Noble Gold Mines Co. v. Olsen, 66 P.2d 1005, 1011, 57 Nev. 448, quoting **Corpus Juris.**
N.J.—Todd v. Exeter Land Co., 143 A. 428, 103 N.J.Eq. 268, reversed on other grounds 146 A. 303, 104 N.J.Eq. 431.
N.Y.—Singleton v. McGurk, 191 N.Y. S. 232, 117 Misc. 340.
Okl.—Daggs v. Phillips, 86 P.2d 302, 184 Okl. 167—Davis v. Keeche Oil & Gas Co., 214 P. 711, 89 Okl. 226.
Pa.—Aldine Realty Co. of Pittsburgh v. Manor Real Estate & Trust Co., 148 A. 56, 297 Pa. 583, certiorari denied 50 S.Ct. 240, 281 U.S. 726, 74 L.Ed. 1143—Kern v. Greensweig, 190 A. 182, 125 Pa.Super. 430—Knoblauch v. Bankes, 10 Pa. Dist. & Co. 766, 24 Sch.Leg.Rec. 146, 10 Pa.Dist. & Co. 766.
S.C.—Welch v. Edisto Realty Co., 169 S.E. 667, 170 S.C. 31—Southern Ry. Co. v. Day, 138 S.E. 870, 873, 140 S.C. 388, quoting **Corpus Juris.**
Utah.—Tanner v. Provo Reservoir Co., 289 P. 151, 76 Utah 335.
Wash.—Steffen v. Snohomish County, 57 P.2d 1035, 186 Wash. 235—Harms v. O'Connell Lumber Co., 44 P.2d 785, 181 Wash. 696—Monroe Water Co. v. Town of Monroe, 218 P. 6, 126 Wash. 323.
W.Va.—Young v. Columbia Oil Co. of West Virginia, 158 S.E. 678, 110 W.Va. 364.
21 C.J. p 1160 note 73.
Estoppel of owner to deny right to compensation for improvements see the C.J.S. title Improvements § 6, also 31 C.J. p 333 note 90—p 334 note 3.

Development work on mining claims
U.S.—De Lamar Mines of Montana v. Mackay, C.C.A.Nev., 104 F.2d 271—James v. Nelson, C.C.A.Alaska, 90 F.2d 910, certiorari denied 58 S.Ct. 41, 302 U.S. 721, 82 L.Ed. 556.
21 C.J. p 1160 note 73 [i].

Estoppel of grantee of estopped grantor
Where owner of land which had been condemned for railroad allegedly permitted defendant to expend money in changing land to toll road, owner's grantee would be estopped to maintain ejectment or trespass.—MacKenzie v. Corley, 29 P.2d 1044, 94 Colo. 263.

83. Mich.—Kiowiatkowski v. Duluth-Superior Dredging Co., 167 N. W. 970, 201 Mich. 251.
21 C.J. p 1161 note 74.

84. Nev.—Noble Gold Mines Co. v. Olsen, 66 P.2d 1005, 1012, 57 Nev. 448, citing **Corpus Juris.**
S.C.—Southern Ry. Co. v. Day, 138 S.E. 870, 875, 140 S.C. 388, quoting **Corpus Juris.**
W.Va.—Champ v. Nicholas County Court, 78 S.E. 361, 72 W.Va. 475.

on his land may be estopped to claim the improvements, the principle cannot be carried to the extent of estopping him to claim title to the land in an action at law,[85] unless fraud lies at the base of the transaction.[86]

In order to create the estoppel the improvements must have been of a substantial character, otherwise the maxim, De minimis non curat lex, applies,[87] and they must have been made under such circumstances as would call for notice or protest.[88] The party against whom the estoppel is claimed must have a personal interest at the time the improvements were made,[89] and acquiescence or permission on condition that the work shall be so done as not to cause injury will not estop the party to maintain an action for damages.[90] It is essential that at the time the improvements are made the party against whom the estoppel is claimed should have been aware of his title to, or interest in, the property improved,[91] or if he was ignorant of his rights that such ignorance was not the result of gross negligence,[92] or that the title was not equally open to the notice of both parties.[93] It is essential also that the party claiming the estoppel should have acted in ignorance of the other's title or interest[94] and have been influenced by the conduct of the party against whom the estoppel is claimed.[95] No estoppel can be asserted against one who permits another

85. Ga.—Kemp v. Hammock, 87 S.E. 1030, 1032, 144 Ga. 717.
21 C.J. p 1162 note 76.

Estoppel to retain improvements

Where one innocently and in belief that he has right to do so, with consent of holder of legal title, placed on land permanent and valuable improvements, holder of legal title was estopped to retain such improvements without compensating the party making them.—Le Mar v. Lechlider, 185 So. 833, 135 Fla. 703.
Compensation for improvements see the C.J.S. title Improvements §§ 5–14, also 31 C.J. p 313 note 89 et seq.

86. Ala.—Boone v. Gulf, F. & A. R. Co., 78 So. 956, 201 Ala. 560.
21 C.J. p 1162 note 77.

87. U.S.—Wisconsin Cent. R. Co. v. Forsythe, Wis., 15 S.Ct. 1020, 159 U.S. 46, 40 L.Ed. 71.
S.C.—Sullivan v. Moore, 65 S.E. 108, 66 S.E. 561, 84 S.C. 426.

Improvements in lieu of rent

Where a father permitted his daughter and her husband to move on a farm which he intended to deed to them and required them to pay rent and later did not require them to pay rent, when they paid the taxes and made some improvements on the farm, it was held that the improving of the farm did not equal the payment of the rent and did not estop the father claiming title to the land.—Randles v. McCarty, 3 Tenn.App. 191.

88. U.S.—Williams v. Atlantic Coast Line R. Co., C.C.A.S.C., 17 F.2d 17.

Nature of improvements to afford notice

A landowner who had no notice of the passage of ordinances by a borough determining the boundaries of an adjacent street, and who was not charged with notice by reason of improvements or otherwise that the borough was claiming property within his fences, was not guilty of laches in not attacking the ordinances, although he remained quiet for a number of years and the city made improvements in reliance on the ordinances.—Chain v. Borough of Merchantville, 108 A. 303, 93 N.J.Law 326.

89. N.J.—Dillett v. Kemble, 25 N.J.Eq. 66.
21 C.J. p 1162 note 79.

Future life estate

In an action to recover land, wherein plaintiff claimed under a will and as owner in fee, and also as life tenant after the termination of a preceding life tenancy, he was not estopped to make a claim because he failed to claim title when improvements were made, since plaintiff might be excused from taking action until he believed his rights as life tenant had ripened, and since the preceding life tenant could not hold betterments.—Spencer v. Bouchard, 121 A. 164, 123 Me. 15.

90. U.S.—Western Union Tel. Co. v. Louisville & N. R. Co., Ga., 250 F. 199, 162 C.C.A. 335.
N.Y.—Brown v. Bowen, 30 N.Y. 519, 86 Am.D. 406.

91. Cal.—Holzer v. Read, 13 P.2d 697, 216 Cal. 119.
Conn.—Monterosso v. Kent, 113 A. 922, 96 Conn. 346.
Md.—Greenwalt v. McCardell, 12 A.2d 522, 178 Md. 132.
Mo.—Wilkinson v. Lieberman, 37 S.W.2d 533, 327 Mo. 420.
S.C.—Southern Ry. Co. v. Day, 138 S.E. 870, 873, 140 S.C. 388, quoting extensively from **Corpus Juris.**
21 C.J. p 1162 note 81.

92. Conn.—Monterosso v. Kent, 113 A. 922, 96 Conn. 346.
W.Va.—Pocahontas Light & Water Co. v. Browning, 44 S.E. 267, 53 W.Va. 436.

93. Md.—Oberheim v. Reeside, 81 A. 590, 116 Md. 265.
21 C.J. p 1162 note 83.

94. Ga.—McNabb v. Houser, 156 S.E. 595, 171 Ga. 744, 74 A.L.R. 1122.
Iowa.—Gerdts v. Mulford, 298 N.W. 873—Black v. Whitacre, 221 N.W. 825, 206 Iowa 1084.
Ky.—Justice v. Rollins, 106 S.W.2d 140, 269 Ky. 74—Allen v. Henson, 217 S.W. 120, 186 Ky. 201.
Mo.—Wilkinson v. Lieberman, 37 S.W.2d 533, 327 Mo. 420.
Neb.—Wiltse v. Bolton, 272 N.W. 197, 132 Neb. 354.
Okl.—Tulsa Petroleum Corporation v. Westmoreland, 70 P.2d 110, 180 Okl. 459.
Tenn.—Richardson v. Bristol Land & Improvement Co., 1 Tenn.App. 671.
Tex.—Gulf Oil Corporation v. Smith, Civ.App., 145 S.W.2d 280, error refused—Holland v. Blanchard, Civ.App., 262 S.W. 97.
Utah.—Rich v. Stephens, 11 P.2d 295, 79 Utah 411.
21 C.J. p 1162 note 84.

Negligence in ascertaining facts

Conditonal seller of bowling alleys to lessees, with knowledge of lessor, was not negligent, in that it failed to ascertain provisions of lease under which lessor subsequently claimed title to alleys so installed.—J. H. Gerlach Co. v. Noyes, 147 N.E. 24, 251 Mass. 558, 45 A.L.R. 961.

95. Ark.—Stacy v. Stacy, 300 S.W. 437, 175 Ark. 763.
Cal.—Bard v. Kent, App., 116 P.2d 137.
Iowa.—Wallis v. Clinkenbeard, 242 N.W. 86, 214 Iowa 343.
Ky.—Casteel v. Pennington, 14 S.W.2d 753, 228 Ky. 206—Niles v. Meade, 224 S.W. 854, 189 Ky. 243.
La.—Joseph v. Sliman, 6 La.App. 552.
Mo.—Wilkinson v. Lieberman, 37 S.W.2d 533, 327 Mo. 420.
Mont.—Waddell v. School Dist. No. 2 of Yellowstone County, 238 P. 884, 74 Mont. 91.
Neb.—Wiltse v. Bolton, 272 N.W. 197, 132 Neb. 354.
N.Y.—Ridgway v. Cockburn, 296 N.Y.S. 936, 163 Misc. 511.
Or.—Minto v. Salem Water, Light & Power Co., 250 P. 722, 120 Or. 202.
Pa.—Pennell v. Wilkin, 3 Monroe L.R. 30.
Tex.—Turner v. Germany, Civ.App.,

to make improvements without giving notice of his title where the means of knowledge is equally available to both.[96] Mere silence or failure to object does not operate as an estoppel in favor of one making the improvements, where he has knowledge of a convenient and available means of acquiring knowledge of the true state of the title,[97] or where the means of knowledge is equally available to both parties.[98] A landowner cannot excuse his failure to object on the ground that he was ignorant of his rights under a deed of record in his chain of title,[99] and his acquiescence in the drilling of an oil well on land excepted from a mineral deed justifies a conclusion that he had waived the exception.[1]

An estoppel will arise only where the party making the improvements or expenditures believes in good faith that he has a right to do so.[2] No estoppel arises where the party against whom it is claimed had no knowledge of the expenditures or improvements,[3] or that they were in contemplation.[4] If the owner, as soon as he is informed of the expenditures or improvements, protests against their continuance and asserts his ownership to the property on which they are being made, no estoppel arises;[5] and there can be no estoppel where the improvements are made after express notice has been given that the party sought to be estopped claims the property and over his objections.[6]

The owner of a reversion is not, by reason of any small improvements on the land by the life tenant, put on notice that the life tenant supposes he owns the fee;[7] and where a third person makes improve-

94 S.W.2d 1177, reversed on other grounds Germany v. Turner, 123 S.W.2d 874, 132 Tex. 491.
W.Va.—Spradling v. Spradling, 190 S.E. 537, 118 W.Va. 308.
Wis.—Perkins v. Perkins, 180 N.W. 334, 173 Wis. 421, modified on other grounds 181 N.W. 812, 173 Wis. 421.
21 C.J. p 1162 note 85.

Improvements authorized by lease
Where lessee of wharf was given right to extend pier during period of lease, lessor's acquiescence in building of pier did not estop it, on expiration of lease, to demand removal of pier as obstruction to lessors' riparian rights.—Baltimore & Philadelphia Steamboat Co. v. Ministers and Trustees of Starr Methodist Protestant Church in Baltimore City, 130 A. 46, 149 Md. 163.

Unjustifiable reliance on void order
Insurance superintendent, knowingly permitting fire insurance companies to expend large sums and go to great trouble in attempting to refund excess premiums in manner provided by void court order after reversal of judgment setting aside superintendent's rate-reduction order, without objection, was not estopped to assert invalidity of former order, on which companies had no right to rely.—State ex rel. and to Use of Abeille Fire Ins. Co. v. Sevier, 73 S.W.2d 361, 335 Mo. 269, certiorari denied State of Missouri ex rel. and to Use of Abeille Fire Ins. Co. of Paris v. Sevier, 55 S.Ct. 99, 293 U.S. 585, 79 L.Ed. 680.

Estoppel held not shown
Neb.—Shelby v. Platte Valley Public Power & Irrigation Dist., 278 N.W. 568, 134 Neb. 354.
Or.—Laurance v. Tucker, 85 P.2d 374, 160 Or. 474.
Tex.—Van Velzer v. Stryker, Civ. App., 233 S.W. 146.
Utah.—I. X. L. Stores Co. v. Success Markets, 97 P.2d 577, 98 Utah 160.
Wash.—Rogers v. Cation, 115 P.2d 702.

96. Md.—Cityco Realty Co. v. Slaysman, 153 A. 278, 160 Md. 357, 76 A.L.R. 296.
21 C.J. p 1162 note 84 [a].

97. Conn.—Monterosso v. Kent, 113 A. 922, 96 Conn. 346.

98. Md.—Greenwalt v. McCardell, 12 A.2d 522, 178 Md. 132—Cityco Realty Co. v. Slaysman, 153 A. 278, 160 Md. 357, 76 A.L.R. 296.

99. Ky.—Blackburn v. Piney Oil & Gas Co., 128 S.W.2d 192, 278 Ky. 191.

1. Ky.—Blackburn v. Piney Oil & Gas Co., supra.

2. Ky.—Tuck v. Sharer, 28 S.W.2d 22, 234 Ky. 296—Casteel v. Pennington, 14 S.W.2d 753, 228 Ky. 206.
Mont.—Scott v. Jardine Gold Min. & Mill. Co., 257 P. 406, 79 Mont. 485.
Tex.—Carlisle v. Elks Home Ass'n, Civ.App., 253 S.W. 546.
21 C.J. p 1162 note 86.

Term of lease
Where lease was executed by trustee in possession by reason of default in payment of bonds in order for lessee to rely on estoppel in pais against bondholders purchasing at foreclosure sale, to assert termination of lease within five years it was necessary for lessee to allege and prove that he took lease and made advances because of belief that he had a five-year term and that bondholders knew thereof.—Courtwright v. Dimmick, 70 P.2d 269, 22 Cal.App.2d 68.

Failure to agree as to rental
Where hotel keeper surrendered lease to enable owner to improve building, under contract entitling hotel keeper to rent improved building, if terms of renting could be agreed on, and, while improvements were being made, spent large sum of money in buying equipment, hiring servants, and advertising hotel, without agreement with owner as to rent, owner was not estopped from ousting hotel keeper from premises on failure to agree as to rent on theory that he permitted hotel keeper to make expenditures.—Allen v. Whitely, 272 S.W. 724, 209 Ky. 234.

3. Colo.—New Mercer Ditch Co. v. New Cache La Poudre Irrigating Ditch Co., 201 P. 557, 70 Colo. 351
Okl.—Tulsa Petroleum Corporation v. Westmoreland, 70 P.2d 110, 180 Okl. 459.
Pa.—Witman v. Webner, 165 A. 256, 108 Pa.Super. 188, followed in 165 A. 259, 108 Pa.Super. 196.
Wis.—Broadway-Wisconsin Inv. Co v. Sentinel Co., 212 N.W. 646, 192 Wis. 338.
21 C.J. p 1162 note 87.

4. Ga.—Jenkins v. Means, 59 Ga. 55.

5. Pa.—Bittner v. Quemahoning Coal Co., 116 A. 42, 271 Pa. 579.
21 C.J. p 1163 note 88.

Institution of suit within reasonable time
Taxpayer, suing to enjoin proceeding under contract, was not estopped because of large expenditures made by successful bidder before suit was brought, where suit was brought within a reasonably short time after the contract was let.—Reiner v. Clarke County, 241 P. 973, 137 Wash. 194.

6. Ky.—Haggard v. Green, 6 S.W.2d 487, 224 Ky. 441.
N.Y.—Fanger v. Fischer, 229 N.Y.S. 522, 224 App.Div. 667.
21 C.J. p 1163 note 89.

7. S.C.—Sullivan v. Moore, 65 S.E. 108, 84 S.C. 426, rehearing denied 66 S.E. 561, 84 S.C. 426.
21 C.J. p 1162 note 81 [a].

ments pursuant to an agreement with a life tenant, the remainderman, without knowledge of such agreement, is not estopped to deny the title of the third person.[8]

Improvements under void statute or ordinance. Where improvements are made under an unconstitutional law[9] or an invalid ordinance,[10] failure of the owner to object has been held not to work an estoppel, especially where he did not know that the statute or ordinance was invalid,[11] or where, having such knowledge, he resisted the making of the improvements.[12]

§ 95. Construction of Railroad

A person who permits the construction of a railroad on his land may be estopped to deny the right of the railroad company to use the property, although he may have a remedy in damages for injuries arising.

Applying the general rule stated supra § 94, where an owner permits the construction of a railroad on his land, he cannot, after the road is completed and large sums of money are expended on the faith of his apparent acquiescence, deny to the railroad company the right to use the property.[13] Under such circumstances, the owner forfeits his right to maintain ejectment[14] or trespass,[15] or a suit to enjoin the operation of the road.[16] Nevertheless, he is not precluded from a recovery of damages for injuries arising from the construction and operation of the road,[17] especially where the construction is authorized by law and where the owner of the land cannot complain,[18] although this rule may be rendered inoperative by agreement between the parties,[19] or by the positive conduct of the owner amounting to a waiver of his rights.[20]

No estoppel arises against the owner of land where at the time of the making of the improvements by the railroad he was not aware that the land belonged to him[21] or that valuable or permanent improvements were being made,[22] where he objected to every encroachment on his land,[23] or where it did not appear that the company's entry was induced or its occupancy sanctioned or acqui-

8. Ky.—Smith v. Richey, 215 S.W. 429, 185 Ky. 516.

Wife of life tenant

Where husband had life estate in one third of land and husband and wife improved it, acquiescence of trustee holding record title does not give wife a lien by estoppel as against remaindermen.—Baker's Adm'x v. Combs, 284 S.W. 101, 215 Ky. 5.

9. U.S.—Nichols v. Cleveland, Ohio, 247 F. 731, 159 C.C.A. 589.
Ohio—Andrews v. Settles, 16 Ohio Cir.Ct. 638, 9 Ohio Cir.Dec. 191.

10. Ind.—Pettis v. Johnson, 56 Ind. 139.
21 C.J. p 1163 note 91.

11. Ohio—Andrews v. Settles, 16 Ohio Cir.Ct. 638, 9 Ohio Cir.Dec. 191.

12. U.S.—Nichols v. Cleveland, Ohio, 247 F. 731, 159 C.C.A. 589.

13. Ind.—Town of New Point v. Cleveland, C., C. & St. L. R. Co., 107 N.E. 560, 59 Ind.App. 147.
Ky.—Buck Creek R. Co. v. Haws, 69 S.W.2d 333, 253 Ky. 203.
21 C.J. p 1163 note 95.

Disability of railroad

Where a traction company enters on land with the consent of the owner and constructs an interurban railroad track thereon, it may urge that the owner is estopped from ousting it, although it has not complied with municipal ordinances, and does not possess the right to hold land or construct and operate an interurban road.—Knowles v. Northern Texas Traction Co., Tex.Civ.App., 121 S.W. 232, error dismissed.

Mortgagee or beneficiary in deed of trust will not necessarily be estopped by conduct relating to the construction of a railroad which would estop the owner of the land.—Snyder v. Chicago, S. F. & C. R. Co., 20 S.W. 885, 112 Mo. 527.

14. U.S.—Overpeck Land Corporation v. Village of Ridgefield Park, D.C.N.J., 43 F.2d 597, affirmed, C.C.A., 51 F.2d 1082.
Ga.—Atlanta, K. & N. R. Co. v. Barker, 31 S.E. 452, 105 Ga. 534.
Kan.—Missouri Pac. R. Co. v. Gano, 28 P. 155, 47 Kan. 457.
Mo.—Laughlin v. Wells, 283 S.W. 990, 314 Mo. 474.
21 C.J. p 1163 note 96.
Contra Conger v. Burlington & S. W. R. Co., 41 Iowa 419.

Right of assignee

Where one in possession of land under an executory contract for purchase quitclaims to a company a right of way thereon, and afterward assigns his interest under the contract, and after several mesne assignments the holder, knowing of the right of way deed and that the railroad has been run on such right of way nearly ten years without objection, takes a deed to the land, he cannot maintain ejectment against the company.—Stratton v. Omaha & R. V. R. Co., 55 N.W. 1058, 37 Neb. 477.

15. U.S.—Roberts v. Northern Pac. R. Co., Wis., 15 S.Ct. 756, 158 U.S. 1, 39 L.Ed. 873.
Ariz.—Donohoe v. El Paso & S. W. R. Co., 94 P. 1091, 11 Ariz. 293.

16. Ohio.—Coe v. Columbus, P. & I. R. Co., 10 Ohio St. 372, 17 Am.D. 518.
21 C.J. p 1163 note 98.

17. Ky.—Buck Creek R. Co. v. Haws, 69 S.W.2d 333, 253 Ky. 203.
21 C.J. p 1163 note 99.

Injunction pending payment

The mere fact that an owner of land permits a railroad company to enter on and construct its road without making compensation therefor does not estop the owner from maintaining an injunction to restrain the railroad company from using the right of way until compensation therefor is made.—Hibbs v. Chicago & S. W. R. Co., 39 Iowa 340.

18. Md.—Lake Roland El. R. Co. v. Hibernian Soc., 34 A. 1017, 83 Md. 420.
N.Y.—Knox v. Metropolitan El. R. Co., 12 N.Y.S. 848, 58 Hun 517, affirmed 28 N.E. 485, 128 N.Y. 625.

19. Tex.—Evans v. Gulf, C. & S. F. R. Co., 28 S.W. 903, 9 Tex.Civ.App. 124.
21 C.J. p 1164 note 2.

20. W.Va.—Norfolk & W. R. Co. v. Perdue, 21 S.E. 755, 40 W.Va. 442.
21 C.J. p 1164 note 3.

21. Iowa.—Chicago, M. & St. P. R. Co. v. Des Moines Union R. Co., 144 N.W. 54, 165 Iowa 35.
Tex.—Fort Worth & D. C. R. Co. v. Southern Kansas R. Co., Civ.App., 151 S.W. 850.

22. Utah.—Smith v. Oregon Short Line R. Co., 84 P. 108, 30 Utah 246.

23. Colo.—Denver & S. F. R. Co. v.

esced in by anything he said or did.[24] Further, an estoppel will not arise where the railroad is in possession under a lease subject to termination on notice.[25] It has also been held that the rule permitting an estoppel of the owner is limited strictly by considerations of public convenience.[26] A railroad which unlawfully occupies the land of another for a right of way may not hold it simply because possession would enable it more conveniently to carry on its business.[27]

Where a tax in aid of the construction of a railroad has been voted by the taxpayers of a municipality, and the company has constructed its road through the municipality at an expense greatly in excess of the amount of the tax, the taxpayers making no objection to the legality of the vote until after the completion of the road are estopped to object to the validity of the election,[28] unless it is shown that the vote was obtained by fraud of which they were ignorant at the time of such construction.[29]

Railroad companies, and their stockholders and directors, are mutually estopped by agreements between themselves in reliance on which large expenditures have been made without objection.[30]

§ 96. Improvements and Expenditures by Purchasers

A person who knowingly and without objection permits the purchaser of land to make improvements and expenditures thereon is estopped to contest his title where such purchaser has relied on, and has been misled by, his conduct.

Pursuant to the general rule, stated supra § 94, one who knowingly stands by and without objection suffers the purchaser of land to make improvements and expenditures thereon is estopped to contest such purchaser's title, where the purchaser has acted in reliance on, and has been misled by, his conduct;[31] and it is of no importance that there was no willful design to mislead.[32] The rule is applicable, it has been held, although the contract of purchase is oral where there is part performance,[33] or although the conveyance is void for want of a description of the land.[34]

However, no estoppel can arise unless the party against whom it is claimed had a present interest in the land at the time the improvements were made,[35] and was aware of his rights,[36] and unless he knew of the making of the improvements,[37] and unless the party making the improvements acted in reliance on his conduct.[38] No estoppel will arise where the improvements were made with full knowledge of

School Dist. No. 22 in Arapahoe County, 23 P. 978, 14 Colo. 327.
21 C.J. p 1164 note 6.

24. Iowa.—Chicago, M. & St. P. R. Co. v. Des Moines Union R. Co., 144 N.W. 54, 165 Iowa 35.
21 C J. p 1164 note 7.

Unlawful taking

Landowners' acquiescence in use for less than year, where railroad's taking was unlawful, did not estop landowners from recovering title and possession.—Garner v. Chicago, R. I. & G. Ry. Co., Tex.Civ.App., 10 S.W. 2d 132, error refused.

25. Mo.—Laughlin v. Wells, 283 S. W. 990, 314 Mo. 474.

26. Colo.—Chicago, R. I. & P. R. Co. v. Hayes, 113 P. 315, 49 Colo. 333.
21 C.J. p 1164 note 8.

27. Colo.—Chicago, R. I. & P. Ry. Co. v. Hayes, supra.

28. Iowa.—Burlington, C. R. & M. R. Co. v. Stewart, 39 Iowa 267.

29. Iowa.—Sinnett v. Moles, 38 Iowa 25.

30. U.S.—Union Pac. R. Co. v. Chicago, R. I. & P. R. Co., Neb., 51 F. 309, 2 C.C.A. 174, affirmed 16 S. Ct. 1173, 163 U.S. 564, 41 L.Ed. 265.
21 C.J. p 1164 note 11.

31. Ky.—Stephan v. Kentucky Valley Distilling Co., 122 S.W.2d 493, 275 Ky. 705.
Md.—Atkinson v. McCulloh, 132 A. 148, 149 Md. 662.
Mont.—Hogan v. Thrasher, 233 P. 607, 72 Mont. 318.
Nev.—Noble Gold Mines Co. v. Olsen, 66 P.2d 1005, 57 Nev. 448.
N.J.—Crandall v. Graham, 115 A. 178, 93 N.J.Eq. 675, affirmed 117 A. 926, 93 N.J Eq. 675.
Or.—Skyles v. Kincaid, 264 P. 432, 124 Or. 443.
21 C.J. p 1164 note 14.

32. Neb.—Lydick v. Gill, 94 N.W. 109, 68 Neb. 273.

33. Wash.—Kennedy v. Anderson, 94 P. 661, 49 Wash. 14.
21 C.J. p 1164 note 16.

34. Tex.—Patterson v. Patterson, Civ.App., 27 S.W. 837.

35. N.H.—Clark v. Parsons, 39 A. 898, 69 N.H. 147, 76 Am.S.R. 157.
21 C.J. p 1165 note 18.

Payment of taxes

Where plaintiffs' ancestor attempted in good faith to convey realty, but failed to make a good deed, and thereafter defendant, claiming under such deed, paid drainage assessments and greatly enhanced the value of the property to plaintiffs' knowledge, such payment of taxes was held not to estop plaintiffs from claiming title.—Jones v. Himmelberger-Harrison Lumber Co., Mo., 223 S.W. 63.

36. Mich.—Meade v. Robinson, 208 N.W. 41, 234 Mich. 322.
21 C.J. p 1165 note 19.

Prompt action on discovery

Devisees of grantor who acted under mistake in executing deed were not estopped from having deed reformed and title quieted in land unintentionally conveyed by deed, where several years had elapsed before suit was brought and grantees under deed had made improvements on land, and where devisees acted with reasonable promptness in seeking legal counsel after learning of mistake and grantees' income from use of property was equivalent to cost of improvements.—Lauffer v. Smith, 85 S.W.2d 94, 337 Mo. 22.

37. Ala.—Austin v. Jones, 41 So. 408, 148 Ala. 659.

38. Ala.—Austin v. Jones, supra.

Improvements under lease with option to purchase

The executrix of landlord under lease with option to purchase was not estopped from asserting title after tenants had failed to comply with terms of option, by fact that tenants had made valuable improvements, in good faith.—Barcroft v. Livacich, 96 P.2d 951, 35 Cal.App.2d 710.

the equities of the party against whom the estoppel is claimed and for the purpose of protecting the purchaser's rights.[39] Furthermore, the rule has no application where title to the property was acquired by fraud.[40]

Purchasers at judicial sale. As a general rule, where property is purchased at a judicial sale and the purchaser is permitted to make valuable improvements thereon without objection, the owner will be estopped afterward to question the validity of the sale and of the purchaser's title.[41]

However, to create an estoppel it is essential that the party sought to be estopped knew of the improvements,[42] and that the purchaser was misled by his silence.[43] A cotenant, estopped from asserting his claim by permitting a purchaser to make valuable improvements, may, nevertheless, purchase the interest of another, who is not barred and assert such interest.[44] Where a sale in a partition suit is void because made after the death of one of the tenants in common without revivor, his heirs are not estopped from claiming the land as against the purchasers by the fact that the latter made improvements thereon without their objection.[45]

§ 97. Improvements on Near-By Property

The failure of a landowner to object to improvements made on nearby property is no ground for estoppel unless he knew or could have foreseen that an injury to his own property would necessarily result.

A person is not justified in improving his land in reliance on a supposed right to use the land of another without ascertaining his rights;[46] and the failure of a landowner to object to improvements which he sees being made on property near his own is no ground of estoppel, as he is not bound to complain until his rights are encroached on,[47] unless he knew or could have foreseen that an injury to his own property would necessarily result therefrom.[48] The doctrine of estoppel cannot be invoked against a party when any protest on his part against expenditures for improving the land would have been an officious interference with the right of the owner to improve the property as he saw fit.[49] There can be no estoppel where there is nothing to charge the party sought to be estopped with actual knowledge of the improvements,[50] and an estoppel will not arise where the party claiming the estoppel has not relied on the other's conduct.[51] However, it has

39. Ky.—Cline v. Cline, 249 S.W. 348, 198 Ky. 585.

40. Mo.—Lewis v. Barnes, 199 S. W. 212, 272 Mo. 377.

41. N.J.—Todd v. Exetér Land Co., 143 A. 428, 103 N.J Eq. 268, reversed on other grounds 146 A. 303, 104 N.J.Eq. 431.
Or.—Currey v. Smith, 209 P. 232, 105 Or. 82.
21 C.J. p 1165 note 23.

Holder of void tax title

One holding land under tax title void for failure to give notice required by Pub. Acts 1897 No. 229, Comp.L.1915 § 4138 et seq, may not rely on estoppel based on improvements by purchaser, since the tax title is void.—McBride v. Closser, 175 N.W. 388, 208 Mich. 398.

42. Ala.—Austin v. Jones, 41 So. 408, 148 Ala. 659.
W.Va.—Williamson v. Jones, 27 S. E. 411, 43 W.Va. 562, 64 Am.S.R. 891, 38 L.R.A. 694.

43. Colo.—Strahl v. Smith, 70 P. 677, 30 Colo. 392.
21 C.J. p 1165 note 25.

44. Or.—Currey v. Smith, 209 P. 232, 105 Or. 82.

45. N.Y.—Requa v. Holmes, 16 N.Y. 193, 26 N.Y. 338.

46. Md.—Cityco Realty Co. v. Slaysman, 153 A. 278, 160 Md. 357, 76 A.L.R. 296.

47. Ga.—Bosworth v. Nelson, 152 S. E. 575, 170 Ga. 279.
Iowa.—Shuler v. Independent Sand & Gravel Co., 209 N.W. 731, 203 Iowa 134.
Ky.—Johnson v. Stumbo, 126 S.W. 2d 165, 277 Ky. 301.
Md.—Cityco Realty Co. v. Slaysman, 153 A. 278, 160 Md. 357, 76 A.L.R. 296.
Mo.—Greene v. Spinning, App., 48 S.W.2d 51.
N.J.—Coe v. New Jersey Midland R. Co., 28 N.J.Eq. 27.
N.Y.—Noble v. Echo Lake Tavern, 254 N.Y.S. 662, 142 Misc 427.
Okl.—Canada v. City of Shawnee, 64 P 2d 694, 179 Okl. 53.
21 C.J. p 1165 note 27.
Waiver or estoppel with respect to restrictive covenants see Deeds § 169.

Riparian owners held not estopped

Cal.—Empire West Side Irr. Dist. v. Stratford Irr. Dist., 74 P.2d 248, 10 Cal 2d 376.
Mich.—Stuart v. Detroit Finnish Co-op. Summer Camp Ass'n, 269 N.W. 122, 277 Mich. 144.
N.Y.—Thompson v. Ft. Miller Pulp & Paper Co., 181 N.Y.S. 714, 111 Misc. 477, modified on other grounds 186 N.Y.S. 817, 195 App. Div. 271.

48. Mich.—Freeman v. McDonough, 188 N.W. 540, 219 Mich. 132.
21 C.J. p 1165 note 28.

Road closing affecting abutting owners

Where the state required closing of portion of road as condition to acceptance of title to land on both sides of such portion for state park, owners of land abutting remainder of road, who raised no objection until two years after order for closing and eight months after erection of barricades, and until after two hundred ninety-two thousand dollars had been spent on park, which was visited by three hundred thousand people annually, were estopped from compelling reopening of road.—Boyd v. Dillard, Tex.Civ.App., 151 S.W.2d 847, error dismissed, judgment correct.

Riparian owner held not entitled to injunction

Cal.—Martin v. Western States Gas & Electric Co., 47 P.2d 522, 8 Cal. App.2d 226.
N.Y.—Ferguson v. Village of Hamburg, 5 N.E.2d 801, 272 N.Y. 234, modifying 289 N.Y.S. 910, 248 App Div. 667, affirming Hartzell v. Village of Hamburg, 279 N.Y.S. 650, 155 Misc. 345.
Or.—Darling v. Christensen, 109 P.2d 585.

49. Md.—Greenwalt v. McCardell, 12 A.2d 522, 178 Md. 132—Cityco Realty Co. v. Slaysman, 153 A. 278, 160 Md. 357, 76 A.L.R. 296.

50. Ark.—City of Osceola v. Haynie, 227 S.W. 407, 147 Ark. 290.
21 C.J. p 1165 note 29.

51. Ark.—City of Osceola v. Haynie, 227 S.W. 407, 147 Ark. 290.
Ga.—Bosworth v. Nelson, 152 S.E. 575, 170 Ga. 279.

been held that if an owner sees the erection of structures which would necessarily injure his land and so acts as to justify the builder in believing that he desired compensation for damages, he can obtain no relief by injunction.[52]

Where a railway company has been allowed to construct its lines without objection by abutting property owners, and has expended large sums thereon, the operation of the line will not be enjoined by one who either gave his consent thereto or stood by and said nothing while the work was going on;[53] and an owner of property abutting on a street who has joined with other citizens in subscribing to a fund to provide a bonus to induce a railroad company to build a road, and who has agreed to secure permission from the city to operate tracks in the street on which his property is situated and to procure a relinquishment of damages from abutting owners, is estopped from claiming damages due to the construction of the road.[54]

§ 98. Failure to Assert Claim

Under certain circumstances an estoppel may arise from failure to assert a claim, particularly when inquiry is made concerning it.

Where a person having a claim sees another doing an act inconsistent therewith, and stands by in such a manner as to induce the person doing the act, and who might otherwise have abstained from it, to believe that he assents to its doing, he cannot afterward be heard to complain of it.[55]

However, to constitute the estoppel it is necessary that the party against whom it is claimed should be aware of his rights,[56] that there should

Invitation to construct improvements

Landowner was not estopped to complain of highway improvements which were not being constructed at landowner's invitation.—Mobile County v. Barnes-Creary Supply Co., 142 So. 72, 225 Ala. 127.

52. Mich.—Morrison v. Queen City Electric Light & Power Co., 148 N. W. 354, 181 Mich. 624.
21 C.J. p 1165 note 30.

53. Md.—Baltimore & O. R. Co. v. Strauss, 37 Md. 237.
21 C.J. p 1166 note 34.

54. Tex.—Quanah, A. & P. R. Co. v. Dickey, Civ.App., 179 S.W. 69.

55. U.S.—Land Oberoesterreich v. Gude, C.C.A.N.Y., 109 F.2d 635, certiorari denied 61 S.Ct. 30—Dickson v. Neal, C.C.A.Ark., 2 F.2d 533, certiorari denied 46 S.Ct. 19, 269 U.S. 556, 70 L.Ed. 409.
Ala.—Ferrell v. Montgomery, 101 So. 732, 212 Ala. 44.
Ariz.—Green v. Gila Water Co., 285 P. 263, 36 Ariz. 303.
Cal.—McManus v. Montgomery, 84 P. 2d 787, 12 Cal.2d 397—Riedman v. Barkwill, 34 P.2d 744, 139 Cal.App. 564.
Colo.—Terminal Drilling Co. v. Jones, 269 P. 894, 84 Colo. 279.
Conn.—Rocky Hill Incorporated Dist. v. Hartford Rayon Corporation, 190 A. 264, 122 Conn. 392—Bassett v. City Bank & Trust Co., 165 A. 557, 116 Conn. 617.
Fla.—Lafayette County v. Dees, 198 So. 694—Caples v. Taliaferro, 197 So. 861.
Hawaii.—Hawaiian Trust Co. v. Welsh, 34 Hawaii 390.
Ill.—Calame v. Paisley, 130 N.E. 310, 296 Ill. 618.
Kan.—McCarthy v. Sink, 107 P.2d 790, 152 Kan. 659—Cavert v. Ferrell, 255 P. 62, 123 Kan. 254.
La.—Fox v. City of Monroe, 131 So. 483, 15 La.App. 192.
Md.—Thompson v. Winterbottom, 141 A. 343, 154 Md. 581.
N.J.—Epstein v. Sally Lee, Inc., 16 A.2d 463, 125 N.J.Law 429—Cleaves v. Broderson, 196 A. 738, 123 N.J.Eq. 234—Reeves v. Weber, 162 A. 566, 111 N.J.Eq. 454.
N.C.—Citizens Bank of Marshall v. Gahagan, 196 S.E. 827, 213 N.C. 511.
Ohio.—State ex rel. Lander v. Prestien, 16 Ohio N.P., N.S., 289, affirmed 113 N.E. 325, 93 Ohio St. 423—Cloud v. Millikin Nat. Bank of Decatur, Ill., 13 Ohio N.P., N.S., 259.
Pa.—In re Kennedy's Estate, 183 A. 798, 801, 321 Pa. 225, citing **Corpus Juris**—Miller v. Township of North Versailles, 31 Pa.Dist & Co. 139, 86 Pittsb.Leg.J. 8, 29 Mun.L.R. 65.
Tenn.—State ex rel. v. Caldwell, 111 S.W.2d 377, 21 Tenn.App. 396.
Tex.—Elrod v. Foster, Civ.App., 37 S.W.2d 339, error refused—Thompson v. Pitts, Civ.App., 2 S.W.2d 899—Employers' Casualty Co. v. Helm, Civ.App., 295 S.W. 955—Ireland v. Abbott, Civ.App., 234 S.W. 552, dismissed for want of jurisdiction.
Utah.—Tanner v. Provo Reservoir Co., 103 P.2d 134, denying rehearing 98 P.2d 695.
Va.—Big Vein Pocahontas Co. v. Browning, 120 S.E. 247, 137 Va. 34.
Wyo.—Slane v. Curtis, 269 P. 31, 39 Wyo. 1, rehearing denied 270 P. 541, 39 Wyo. 1.
21 C.J. p 1166 note 42.

Claim for services

(1) Wife's silence regarding claim against estate for services, while knowing of pending settlement of estate between husband and testator's other children, estopped wife from prosecuting her claim, but only so far as other children were damaged by silence—Decatur v. Cooper, 157 A. 706, 85 N.H. 250.

(2) Defendants in suit to declare conveyance to them an advancement could not set up claims, not presented to grantor's estate, for services and rent after conveyance, although they are not estopped to deny that conveyance was advancement and that it was not made in consideration of services rendered prior to the conveyance, for which no claim was made.—Ecton v. Flynn, 17 S.W.2d 407, 229 Ky. 476.

(3) Other cases see Theobald v. Hopkins, 101 N.W. 170, 93 Minn. 253.
21 C.J. p 1166 note 42 [b].

Oil and gas leases

One doing nothing to enforce his claim to oil and gas leases, assigned to him, for fourteen years, during which original leases expired by their own limitations and other leases were given to other parties, who developed leased premises and brought in production, was estopped to assert such claim, notwithstanding litigation claimed to have prevented him from carrying out agreement to drill well on leased premises, where there was no evidence that anything in such litigation prevented him from completing well or asserting his rights to leases in any court of competent jurisdiction and no litigation was pending during eight of such fourteen years.—Preston v. Kaw Pipe Line Co., C.C.A.Kan., 113 F.2d 311, certiorari denied 61 S.Ct. 393.

56. N.Y.—In re Feldhus' Will, 300 N.Y.S. 799, 165 Misc. 122, affirmed In re Feldhus' Estate, 6 N.Y.S.2d 508, 254 App.Div. 902, reargument denied 7 N.Y.S.2d 109, 255 App. Div. 780, affirmed In re Feldhus' Will, 20 N.E.2d 17, 280 N.Y. 568.
S.C.—McGee v. Hall, 1 S.E. 711, 26 S.C. 179.

have been a duty to speak,[57] and that the adverse party should have been actually misled,[58] adversely affected,[59] or induced injuriously to alter his position.[60] No estoppel arises as to a cause of action accruing subsequent to the act relied on to create the estoppel,[61] and there can be no estoppel where the party sought to be estopped took timely affirmative action to establish his claim.[62] Mere delay in asserting the claim will not operate as an estoppel.[63]

When inquiry made concerning claim. When a person having a claim is asked concerning it under such circumstances as to render it his duty to speak, and he fails or refuses to make it known, and another is thereby actually misled to his prejudice, he will be thereafter estopped to assert such claim.[64]

However, to make the silence of the party operate as an estoppel the circumstances must be such as to render it his duty to speak.[65] Further, it has been held that there is no principle which requires that evidence of title should be disclosed,[66] or that an account be rendered where the interest of another may depend on the state of the account so long as nothing is done to mislead.[67]

§ 99. Failure to Assert Lien

A lienholder whose failure to assert his lien results in injury to another may be estopped.

If a mortgagee or other lienholder stands by while another acquires an interest in the property, and fails to make known or assert his lien, he will be afterward estopped to do so to the prejudice of that other.[68]

Advice of attorney

The fact that the delay in bringing a cause of action was due to the advice of an attorney of recognized ability that plaintiff had no cause of action is a complete answer to the defense of estoppel, especially where defendant, by bringing suit on notes held by it, could have secured a settlement of all the issues involved.—Weidenfeld v. Pacific Improvement Co., D.C.N.Y., 267 F. 699.

57. U.S.—Detroit & T. S. L. R. Co. v. Detroit, T. & I. R. Co., D.C. Mich., 290 F. 549, reversed on other grounds, C.C.A., Detroit, T. & I. R Co. v. Detroit & T. S. L. R. Co., 6 F.2d 845.
Ark.—American Fidelity & Casualty Co. v. Northeast Arkansas Bus Lines, 146 S.W.2d 165.
Cal.—Standard Live Stock Co. v. Pentz, 269 P. 645, 204 Cal. 618, 62 A.L.R. 1239.
Conn.—New York, N. H. & H R Co. v. Board of Water Com'rs of City of Hartford, 129 A. 384, 102 Conn. 488.
Mo.—Mitchell v. Newton County Bank, 282 S.W. 729, 731, 220 Mo. App. 223, quoting **Corpus Juris**, and followed in Mitchell v. Newton County Bank, App., 282 S W. 733.
N Y.—La Mont Corporation v. La Mont, 7 N.Y.S.2d 729, 255 App.Div. 394, reargument denied 8 N.Y.S.2d 989, 255 App.Div. 962.
N C.—Chappell v. National Surety Co., 133 S.E. 21, 191 N.C. 703.
Va.—Meadows v. Meadows, 129 S.E. 354, 143 Va. 98.
Wash.—J. Bornstein & Sons v. Allen, 220 P. 801, 127 Wash. 314.
21 C.J. p 1167 note 44.

58. Colo.—Webb v. Empire Chief Mining Co., 78 P.2d 974, 102 Colo. 218.
Mich.—Cole v. Findley Tool & Die Co., 287 N.W. 433, 290 Mich. 199.
Miss.—Rea v. McLeod, 109 So. 706, 144 Miss. 256.
21 C.J. p 1167 note 45.

Estoppel held not established

U.S.—Ingram v. Mandler, C.C.A.Okl., 56 F 2d 994.
Conn.—Seymour Mfg. Co. v. Derby Mfg. Co., 109 A. 395, 94 Conn. 311.
La.—Daspit v. Sinclair Refining Co., 3 So.2d 259, 198 La. 9.
Mich.—Spence v. Sturgis Steel Go-Cart Co., 186 N.W. 393, 217 Mich. 147.
Mo.—Taylor v. Farmers Bank of Charlton County, App., 135 S.W.2d 1108.

59. La.—Castleman v. Smith, 86 So. 778, 148 La. 233.

60. U.S.—Wanner v. Louis Wanner, Jr., Inc., D.C.Pa., 300 F. 376.
Mont.—Mundt v. Mallon, 76 P.2d 326, 106 Mont. 242.
N.Y.—In re Duncker's Estate, 22 N. Y.S.2d 29.
Pa.—Villani v. Italian Workingmen Building & Loan Ass'n, 195 A. 476, 129 Pa.Super. 330.
Tex.—Atkins v. Dodds, Civ.App., 121 S.W.2d 1010, error granted.

61. Ark.—Kitchens v. Wheeler, 141 S.W.2d 34, 200 Ark. 671.

62. Cal.—Morrison v. Mutual Life Ins. Co. of New York, 103 P.2d 963, superseding App., 92 P.2d 1024.
Ky.—Carr v. Smith, 137 S.W.2d 415, 281 Ky. 750.

63. La.—Peyrefitte v. Union Homestead Ass'n, App., 185 So. 693—Reed v. Eureka Homestead Soc., App., 143 So. 891.
Pa.—Blue Ridge Metal Mfg. Co. v. Proctor, 194 A. 559, 327 Pa. 424.
Tenn.—Johnson v. De Soto Hardwood Flooring Co., 67 S.W.2d 143, 167 Tenn. 145.
Lapse of time as preventing relief in equity see Equity § 116.

64. Minn.—Havel v. Costello, 175 N.W. 1001, 144 Minn. 441.
N.J.—Ulikowsky v. Casper, 130 A. 454, 98 N.J Eq. 70.
21 C.J. p 1167 note 47.

65. Conn.—Taylor v. Ely, 25 Conn. 250.
Tex.—Crim v. Lukenbill, Civ.App., 21 S.W.2d 83.

Specification of particular claims

A grantee taking property charged with lien of deed of trust could not complain that mortgagee was estopped from claiming, as part of lien indebtedness, any amount for taxes and insurance premiums paid by mortgagee by failing to state that indebtedness included such items when asked amount of indebtedness by grantee's agent, where sums paid for taxes and insurance premiums were incorporated into amount of indebtedness by provision in deed of trust.—Bryan v. Dallas Nat. Bank, Tex Civ.App., 135 S.W.2d 249, error dismissed, judgment correct.

66. N.Y.—Campbell v. Birch, 60 N. Y. 214.
21 C.J. p 1167 note 49.

67. Conn.—Taylor v. Ely, 25 Conn. 250.

68. Cal.—Frick v. Frigidaire Corporation, 7 P.2d 321, 119 Cal.App. 707.
Mo.—Oliver v. Commercial Bank of Wellsville, App., 48 S.W.2d 96.
N.J.—Scheck v. Bowne, 166 A. 189, 113 N.J.Eq. 51—Harrison Improvement Co. v. Guardian Trust Co. of New Jersey, 151 A. 103, 106 N.J.Eq. 445.
S.D.—Ravinia State Bank v. Kirkpatrick, 173 N.W. 863, 42 S.D. 184.
Tex.—Foster v. Christensen, Com App., 67 S.W.2d 246, reversing, Civ App., 42 S.W.2d 460—Moore v Carey Bros. Oil Co., Com.App. 272 S.W. 440, 39 A.L.R. 1247, overruling motion for rehearing, 269 S

However, the circumstances must be such as make it the duty of the lienholder to assert his lien.[69] He will not be estopped where he did not know that the particular property sold was subject to the lien,[70] or where his conduct did not mislead the other party or in any way affect the transaction.[71] Where the lien sufficiently appears of record his mere silence does not constitute an estoppel;[72] and an estoppel does not arise where the facts communicated to the party claiming the estoppel by the party against whom it is claimed, although falling short of notifying him of the extent of the lien, were sufficient to call attention to it and raise an inquiry as to the amount from a prudent man.[73]

§ 100. Concealment of Facts

A person who, by concealing facts, induces another to act in a particular manner will be estopped to set up such facts to the other's prejudice.

Where a person by concealing facts in his possession induces another to act in a manner other than he would have acted had he known such facts, he will afterward be estopped to set up such facts to the other's prejudice.[74]

§ 101. Surrender of Possession of Property

The surrender of possession of property will not estop the party surrendering it from subsequently asserting a right or title thereto unless the circumstances indicate a disclaimer.

The mere surrender of the possession of property to another is not sufficient to estop the party surrendering it from subsequently asserting a right or title thereto,[75] but he may be estopped when the circumstances are such as to indicate a disclaimer of such right or title and it would be inequitable to

W. 75, 39 A.L.R. 1247—McCarty v. Allen, Civ.App., 113 S.W.2d 974—Employers' Casualty Co. v. Helm, Civ.App., 295 S.W. 955.
21 C.J. p 1167 note 51.
Estoppel affecting priority of mortgage see the C.J.S. title Mortgages §§ 283–287, also 41 C.J. p 593 note 55–p 597 note 99.
Estoppel of chattel mortgagee see Chattel Mortgages § 262 b.

Brokers' pledgees, who took over the management of the business of the brokers are estopped to assert lien on stock of customer, which they failed to assert when the customer demanded the securities, the customer being prejudiced because he refrained from taking steps which would have resulted in investigation by the Stock Exchange.—Fisher v. Clark, D.C.N.Y., 3 F.2d 621.

Sale of mortgage

Equity will not permit person to assert interest in another's mortgage after knowingly remaining silent until after sale and transfer of mortgage and payment of purchase price.—Deleski v. Peters Trust Co., 213 N.W. 829, 115 Neb. 547.

Acquiescence of bondholders as estopping trustees

Trustees for holders of bonds of oil company, secured by second mortgage, alone have authority to represent the bondholders, and acquiescence of individual bondholders or their representatives in disposition of proceeds of sale under prior mortgage did not estop the trustees.—Forrey v. Strange, 105 So. 21, 158 La. 941.

69. Ky.—Cubberly v. Lyons, 1 Ky.L. 275, 10 Ky.Op. 712.
21 C.J. p 1168 note 52.

70. Ohio.—Bear v. Colonial Finance Co., 182 N.E. 521, 42 Ohio App. 482.
Tex.—Moore v. Carey Bros. Oil Co., Com.App., 272 S.W. 440, 39 A.L.R. 1247, overruling motion for rehearing 269 S.W. 75, 39 A.L.R. 1247.

71. U.S.—McCampbell v. Warrich Corporation, C.C.A.Ill., 109 F.2d 115, certiorari denied 60 S.Ct. 1077, 310 U.S. 631, 84 L.Ed. 1401, rehearing denied 61 S.Ct. 55.
Ark.—Fayette R. Plumb, Inc., v. Pharr, 295 S.W. 961, 174 Ark. 398—Baker-Matthews Lumber Co. v. Bank of Lepanto, 282 S.W. 995, 170 Ark. 1146.
Ga.—Shaw v. Green, 180 S.E. 732, 180 Ga. 760.
Miss.—Davis v. Butler, 91 So. 279, 128 Miss. 847, suggestion of error overruled 91 So. 709, 128 Miss. 847.
Mo.—Boeckeler Lumber Co. v. Wahlbrink, 177 S.W. 741, 191 Mo.App. 334, affirmed 208 S.W. 840, 276 Mo. 662.
N.J.—Harrison Improvement Co. v. Guardian Trust Co. of New Jersey, 151 A. 103, 106 N.J.Eq. 445.
N.Y.—Neustadter Foundation v. Bernfeld, 1 N.Y.S.2d 58, 165 Misc. 640.
Pa.—Roos v. Fairy Silk Mills, 5 A.2d 569, 334 Pa. 305.
Tex.—Moore v. Carey Bros. Oil Co., Com.App., 272 S.W. 440, 39 A.L.R. 1247, overruling motion for rehearing 269 S.W. 75, 39 A.L.R. 1247.
21 C.J. p 1168 note 53.

Answer to inquiry made

Where mortgage given executor by heir of estate on heir's interest was recorded, executor was under no duty, in answering inquiry as to encumbrances against estate of deceased, to do more than make correct answer, and failure to disclose encumbrance against estate of heir did not estop him from claiming under his mortgage.—Halbert v. Halbert, 214 N.W. 535, 204 Iowa 1227.

Subsequent conduct

That officer of mortgagee, after learning that, prior to execution of mortgage, purchaser of timber from mortgagors under contract giving seven years for removal of timber had received extension agreement from mortgagors, did not inform purchaser of existence of mortgage, did not estop mortgagee from foreclosing mortgage as to standing timber, since conduct relied on to raise estoppel must have been concurrent with, or anterior to, action alleged to have been influenced.—Elmonte Inv. Co. v. Schafer Bros. Logging Co., 72 P.2d 311, 192 Wash. 1.

72. Wash.—Elmonte Inv. Co. v. Schafer Bros. Logging Co., supra—Peterson v. Bergman Cabinet Mfg. Co., 261 P. 381, 145 Wash. 664, 55 A.L.R. 989.

73. Kan.—Croasdale v. Hill, 96 P. 37, 78 Kan. 140.
21 C.J. p 1168 note 54.

74. Ky.—Flinn v. Roberts, 268 S.W. 351, 206 Ky. 655.
Tex.—Tatum v. Caldwell, Civ.App., 40 S.W.2d 894, 897, citing **Corpus Juris.**
21 C.J. p 1168 note 55.

Conduct held insufficient for estoppel

U.S.—Great Northern R. Co. v. Reid, Wash., 157 C.C.A. 382, 245 F. 86.

75. Tex.—Hunnicutt v. Lee, Com.App., 38 S.W.2d 572, 575, citing **Corpus Juris,** and affirming Civ.App., 23 S.W.2d 479.
21 C.J. p 1168 note 56.

permit him to assert the contrary.[76] The party claiming the estoppel must not have had knowledge of the other's claim and must not have been guilty of negligence in failing to ascertain such claim.[77]

3. Negligence

§ 102. Negligence in General

Generally, one who in the transaction in dispute has by culpable negligence led another into the belief of a certain state of facts, proximately causing such other, without negligence on his part, to act on such belief to his prejudice, will be estopped to show that the state of facts referred to did not exist except where the wrong was accomplished by a criminal act on the part of another.

A recognized proposition as to estoppel in pais is that if in the transaction itself which is in dispute a party has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading, and has led, the other to act by mistake on such belief to his prejudice, he cannot be heard afterward as against that other to show that the state of facts referred to did not exist.[78] Since in order to cre-

76. S.C.—Ellis v. Johnson, 141 S.E. 564, 143 S.C. 325.
Tex.—Hunnicutt v. Lee, Com.App., 38 S.W.2d 572, 575, citing **Corpus Juris**, and affirming, Civ.App., 23 S.W.2d 479.
21 C.J. p 1168 note 57.
Renunciation, disavowal, or disclaimer of title or right see supra § 86.

77. Tex.—Hunnicutt v. Lee, Com. App., 38 S.W.2d 572, affirming, Civ. App., 23 S.W.2d 479.

78. Ala.—Green v. Federal Land Bank of New Orleans, 183 So. 418, 236 Ala. 431—Irvin v. Irvin, 93 So. 517, 207 Ala. 493.
Cal.—Trout v. Taylor, 32 P.2d 968, 220 Cal. 652—Overton v. Harband, 44 P.2d 484, 6 Cal.App.2d 455.
Colo.—Gordon v. Pettingill, 96 P.2d 416, 105 Colo. 214.
Ga.—Brown v. Western Union Telegraph Co., 147 S.E. 151, 39 Ga.App. 152.
Iowa.—Monona County v. Gray, 206 N.W. 26, 200 Iowa 1133.
Ky.—Hall's Ex'rs v. Federal Land Bank of Louisville, 110 S.W.2d 676, 270 Ky. 739—Fidelity & Casualty Co. of New York v. Miller, 294 S.W. 1093, 220 Ky. 123.
Miss.—Domick v. Brookhaven Box Co., 120 So. 193, 153 Miss. 22.
Mo.—Scott v. First Nat. Bank, 119 S.W.2d 929, 938, 343 Mo. 77, quoting **Corpus Juris**—Wood v. White Eagle Oil & Refining Co., 274 S.W. 894, 900, 220 Mo.App. 1004, citing **Corpus Juris.**
Neb.—State v. Dunbar State Bank, 237 N.W. 684, 121 Neb. 528.
N.Y.—Drobney v. Sullivan, 266 N.Y.S. 245, 148 Misc. 670—Seaman v. Leonardi, 181 N.Y.S. 868, 110 Misc. 532—Nahe v. Mikkelsen, 177 N.Y.S. 594, 108 Misc. 378.
Ohio.—Murfey, Blossom & Co. v. State ex rel. Fulton, App., 31 N.E. 2d 134, modified on other grounds State ex rel. Squire v. Murfey, Blossom & Co., 2 N.E.2d 866, 131 Ohio St. 289.
R.I.—Hatton v. Howard Braiding Co., 129 A. 805, 47 R.I. 47.
Tex.—Sanger v. Calloway, Com.App., 61 S.W.2d 988, 994, quoting **Corpus Juris**—Hunnicutt v. Lee, Com.App., 38 S.W.2d 572, 575, citing **Corpus Juris**, and affirming, Civ.App., 23 S.W.2d 479—Burkhardt v. Lieberman, Civ.App., 142 S.W.2d 283, 287, quoting **Corpus Juris**, error granted—Pollock Paper & Box Co. v. Southwest Box Co., Civ.App., 57 S.W.2d 231.
21 C.J. p 1169 note 58.

Similar statements of rule

(1) One may be denied right because of neglect to do something at proper time.—Skaggs v. Ferguson, 7 S.W.2d 213, 224 Ky. 775.

(2) Party will not ordinarily be permitted to profit through his own mistake at expense of another who has proceeded lawfully and in good faith.—Lambert v. Morton, 160 S.E. 223, 111 W.Va. 25.

(3) A party cannot avoid reasonable inquiry and then complain that he lacks information which such inquiry would have disclosed.
U.S.—Bankson v. Anderson, D.C.N.Y., 33 F.Supp. 655.
Cal.—Gordon v. Pettingill, 96 P.2d 416, 105 Colo. 214.

Misrepresentation by another

The term "estoppel by negligence" may be applied to the class of cases where a man is estopped by another's misrepresentation, if, in breach of some duty to the person deceived, he has supplied the person making the misrepresentation with that which was necessary to make it credible.—Sugg v. Johnson, Tex.Civ.App., 284 S.W. 705, 712, quoting **Corpus Juris**, and reversed on other grounds, Com.App., Johnson v. Sagg, 291 S.W. 857—21 C.J. p 1060 note 14.

Particular conduct creating estoppel

(1) A party who negligently permits another to contract on faith of an understanding which he can contradict is thereafter estopped from disputing facts in action against person whom he has assisted in deceiving.—Federal Land Bank of New Orleans v. First Nat. Bank, 185 So. 414, 237 Ala. 84.

(2) Loss from incorrect description in deed falls on party who neglected to see description was proper, if third party acquires rights with reference to property ignorant of mistake.—Clark v. Dorsett, 128 So. 79, 157 Miss. 365.

(3) Other cases see Dawkins v. Petteys, 181 S.W. 901, 121 Ark. 498—21 C.J. p 1169 note 58 [a], [c], [d].

Negligence creating estoppel not shown

(1) Executors, not promptly notifying mortgagor to make all payments to them, were not so grossly negligent as to estop them to question final payment to testator's former agent.—Ohlandt v. Craven, 144 S.E. 162, 146 S.C. 450.

(2) Owner of certificates of deposit was not negligent in failing to notify bank of theft until three or four days after discovering loss.—Evenson v. Waukesha Nat. Bank, 207 N.W. 415, 189 Wis. 170.

(3) Surety holding indemnity was not negligent in surrendering securities to principal in possession of evidence of indebtedness and release thereof without further inquiry.—Johnson v. Sugg, Tex.Com.App., 291 S.W. 857, reversing, Civ.App., Sugg v. Johnson, 284 S.W. 705.

(4) Grantor signing deed containing no description, and not acknowledged, was not guilty of negligence preventing attack on validity of deed as against subsequent mortgagee.—Hulburt v. Walker, 179 N.E. 34, 258 N.Y. 8, affirming 248 N.Y.S. 949, 232 App.Div. 875.

(5) Other cases.
Conn.—Monterosso v. Kent, 113 A. 922, 96 Conn. 346.
Ky.—War Fork Land Co. v. Marcum, 202 S.W. 668, 180 Ky. 352.
R.I.—Personal Finance Co. of Providence v. Henley-Kimball Co., 1 A.2d 121, 61 R.I. 402, 117 A.L.R. 1476.

Delay

(1) In determining what constitutes unreasonable delay in asserting rights, creating estoppel, court

ate an equitable estoppel it is not necessary that there should be an intentional moral wrong, see supra § 69, negligence, when there is a duty cast on a person to disclose the truth, may supply the place of intent, where the effect of such negligence is to work a fraud on the party setting up the estoppel.[79]

However, the negligence to operate as an estoppel must have been the neglect of some duty owing to the party claiming the estoppel or to the general public.[80] In addition, it must be in the transaction itself, and be the proximate cause of leading the party into mistake and loss.[81] In no event can an estoppel arise in favor of one who has been guilty of contributory negligence.[82] An estoppel resting wholly on equity cannot be used to shift a loss from one careless person to another when the loss could not have happened without the earlier negligence of plaintiff, and the later negligence of defendant at most only contributed to the result.[83] Further, it is generally held that, where the wrong was accomplished by a criminal act, the crime, and not the negligent act of the party which made it possible, is the proximate cause.[84] As between

must regard circumstances, nature of case, and relief sought, as well as rights of defendant.—State ex rel. Adams v. Coon, 295 S.W. 821, 221 Mo. App. 987.

(2) Seller's delay for ten days in notifying buyer that it would not accept order given agent was not so unreasonable as to estop it from setting up that no contract was made.—Thane Lumber Co. v. J. L. Metz Furniture Co., C.C.A.Ark., 12 F.2d 701.

Failure to read contract before signing

(1) A person sui juris who, in the absence of fraud, signs a written agreement without reading it, is estopped to deny its obligation.

Ind.—Seymour Improvement Co. v. Viking Sprinkler Co., 161 N.E. 389, 87 Ind.App. 179.

Iowa.—McCormack v. Molberg, 43 Iowa 561.

(2) However, this rule does not apply where agreements have been signed through misrepresentation.—Moses v. Carver, 298 N.Y.S. 378, 164 Misc. 204, affirmed 5 N.Y.S.2d 783, 254 App.Div. 402.

79. Cal.—Parke v. Franciscus, 228 P. 435, 194 Cal. 284.

Ind.—Seymour Improvement Co. v. Viking Sprinkler Co., 161 N.E. 389, 87 Ind.App. 179.

Me.—Stubbs v. Franklin & M. R. Co., 64 A. 625, 101 Me. 355.

Tex.—Sanger v. Calloway, Com.App., 61 S.W.2d 988, 994, quoting **Corpus Juris**—Burkhardt v. Lieberman, Civ.App., 142 S.W.2d 283, 287, quoting **Corpus Juris**, error granted—Sugg v. Johnson, Civ.App., 284 S. W. 705, reversed on other grounds Johnson v. Sugg, Com.App., 291 S. W. 857—Finks v. Buck, Civ.App., 27 S.W. 1094.

21 C.J. p 1169 note 60.

80. Cal.—Parke v. Franciscus, 228 P. 435, 194 Cal. 284.

N.Y.—People's Trust Co. v. Smith, 109 N.E. 561, 215 N.Y. 488, L.R.A. 1916B 840, Ann.Cas.1917A 560—Stern v. President and Directors of Manhattan Co., 235 N.Y.S. 634, 134 Misc. 351.

Or.—Schumann v. Bank of California National Ass'n, 233 P. 860, 114 Or. 336, 37 A.L.R. 1531.

Pa.—Egan v. United Gas Improvement Co., 178 A. 683, 319 Pa. 17.

Tex.—Liberty State Bank v. Guardian Savings & Loan Ass'n, 94 S.W.2d 133, 127 Tex. 311, affirming Guardian Savings & Loan Ass'n v. Liberty State Bank, Civ.App., 60 S.W.2d 823.

21 C.J. p 1169 note 61.

Forged indorsement

To make out estoppel for failure of payee to protect himself against his agents collecting proceeds on forged indorsement, it is not enough to show that payee failed to protect himself or public against consequences of forgery, but it must be shown that payee was careless as to some duty owing to maker of note, who was thereby led into paying note to third party.—Oil State Refining Co. v. Bryant, 236 P. 431, 110 Okl. 83.

Nonnegotiable instruments

More persuasive evidence to establish duty of care and breach may be required in situation involving nonnegotiable instruments than negotiable instruments.—Hulburt v. Walker, 179 N.E. 34, 258 N.Y. 8, affirming 248 N.Y.S. 949, 232 App.Div. 875.

81. Ga.—Citizens' & Southern Bank v. Union Warehouse & Compress Co., 122 S.E. 327, 336, 157 Ga. 434, citing **Corpus Juris**, and answers to certified questions conformed to 122 S.E. 652, 32 Ga.App. 85.

Pa.—Egan v. United Gas Improvement Co., 178 A. 683, 319 Pa. 17—Fifth St. Building & Loan Ass'n of Philadelphia v. Kornfeld, 172 A. 703, 315 Pa. 406.

Tenn.—State v. Broadway Nat. Bank, 282 S.W. 194, 198, 153 Tenn. 113, citing **Corpus Juris.**

Tex.—Johnson v. Sugg, Com.App., 291 S.W. 857, reversing Sugg v. Johnson, Civ.App., 284 S.W. 705—Guaranty Bank & Trust Co. v. Beaumont Cadillac Co., Civ.App., 218 S.W. 638, dismissed for want of jurisdiction.

21 C.J. p 1170 note 62.

Delay alone, although unreasonable, without showing of loss or prejudice, will not work estoppel.—Maryland Casualty Co. v. Dickerson, 280 S.W. 1106, 213 Ky. 305—Patton v. Catlettsburg Nat. Bank, 255 S.W. 690, 200 Ky. 775.

Carelessness in intrusting note to another will not preclude setting up forgery of indorsement by such other unless cause of note's acceptance as collateral.—First National Bank v. Barnes, 255 P. 907, 44 Idaho 167

82. Me.—Cadwallader v. Clifton R. Shaw, Inc., 142 A. 580, 584, 127 Me. 172, citing **Corpus Juris.**

Mich.—Andreae v. Wolgin, 241 N.W. 876, 878, 257 Mich. 572, quoting **Corpus Juris.**

Mo.—Wood v. White Eagle Oil & Refining Co., 274 S.W. 894, 900, 220 Mo.App. 1004, quoting **Corpus Juris.**

21 C.J. p 1170 note 63.

83. Mich.—Andreae v. Wolgin, 241 N.W. 876, 878, 257 Mich. 572, quoting **Corpus Juris.**

N.Y.—C. H. Rugg Co. v. Ormrod, 91 N.E. 366, 198 N.Y. 119.

84. N.Y.—People's Trust Co. v. Smith, 109 N.E. 561, 215 N.Y. 488.

Tenn.—State v. Broadway Nat. Bank, 282 S.W. 194, 153 Tenn. 113.

Duty to anticipate crime

No person owes another any duty to anticipate a crime will be committed, and negligence cannot be predicated on failure to act on that belief.—Schumann v. Bank of California, National Ass'n, 233 P. 860, 114 Or. 336, 37 A.L.R. 1531.

Forgery

(1) A forged instrument ordinarily cannot be made the basis of an estoppel by negligence.—Southern States Building & Loan Ass'n v. Mason, Tex.Civ.App., 29 S.W.2d 839.

(2) Payee's carelessness in allowing bookkeeper, who previously misappropriated funds, to handle payee's checks, was not a defense in suit against bank to recover value of check paid by defendant to bookkeeper on latter's forged indorsement of payee's name.—First Nat. Bank v. Montgomery Cotton Mfg. Co., 101 So. 186, 211 Ala. 551.

the original parties to a transaction one fraudulently misled into signing a paper without reading it is not estopped by his negligence from setting up the fraud.[85]

§ 103. Acts Causing Injury to One of Two Innocent Parties

As a general rule, where one of two innocent persons must suffer by the acts of a third, he whose conduct, act, or omission enabled such third person to occasion the loss must sustain it if the other party acted in good faith, without knowledge of the facts, and altered his position to his detriment.

It is a widely recognized principle that wherever one of two innocent persons must suffer by the acts of a third, he who by his conduct, act, or omission has enabled such third person to occasion the loss must sustain it.[86] Equity will not postpone the

(3) Although a person whose name has been forged or signed without authority, not amounting to forgery, may be estopped by his negligent failure to give notice to the person imposed on for an unreasonable time after discovery, he is not estopped by failing to discover the forgery.—Looymans v. Chatham & Phenix Nat. Bank, 200 N.Y.S. 898, 121 Misc. 152.

(4) Owner and holder of note was not guilty of negligence in failing to protect itself against forgery of indorsement.—Oil State Refining Co. v. Bryant, 236 P. 431, 110 Okl. 83.

85. U.S.—Satterwhite v. Harriman Nat. Bank & Trust Co. of City of New York, D.C.N.Y., 13 F.Supp. 489

N.Y.—Hutchison v. Ross, 187 N.E. 65, 262 N.Y. 381, 89 A.L.R. 1007, affirming Ross v. Ross, 253 N.Y.S. 871, 233 App.Div. 626, which reversed 243 N.Y.S. 418, 137 Misc. 795, affirmed Hutchison v. Ross, 253 N.Y.S. 889, 233 App.Div. 516, reargument denied 188 N.E. 102, 262 N.Y. 643, 89 A.L.R. 1023.

21 C.J. p 1170 note 66.

Signer of blank instrument is not estopped by mere lack of prudence, except as to innocent purchaser for value.—Satterwhite v. Harriman Nat. Bank & Trust Co. of City of New York, D.C.N.Y., 13 F.Supp. 489.

86. U.S.—Eliason v. Wilborn, 50 S. Ct. 382, 281 U.S. 457, 74 L.Ed. 962, affirming 167 N.E. 101, 335 Ill. 352, 68 A.L.R. 350—James v. Nelson, C.C.A.Alaska, 90 F.2d 910, certiorari denied 58 S.Ct. 41, 302 U.S. 721, 82 L.Ed. 556—Farmers Nat. Bank & Trust Co. of Reading v. Flexible Truck Corporation, C.C.A.Pa., 81 F.2d 541—City of Wheeling v. John F. Casey Co., C.C.A.W.Va., 74 F.2d 794, certiorari denied 56 S.Ct. 106, 296 U.S. 593, 80 L.Ed. 420—Equitable Life Assur. Soc. v. Thomas, C.C.A.Iowa, 69 F.2d 361, 364, citing **Corpus Juris**—Federal Intermediate Credit Bank of Columbia, S. C., v. Mitchell, C.C.A.S.C., 46 F.2d 301—MacAndrews & Forbes Co. v. U. S., C.C.A.N.J., 23 F.2d 667—Hartford Accident & Indemnity Co. v. Feilbach Co., D.C.Ohio, 39 F.Supp. 740—Royal Indemnity Co. v. Federal Reserve Bank of Cleveland, Cincinnati Branch, D.C. Ohio, 38 F.Supp. 621, affirmed, C C.A., Royal Indemnity Co. v. Federal Reserve Bank of Cleveland, 119 F.2d 778—Hartford Accident & Indemnity Co. v. Petroleum Royalties Co. of Oklahoma, D.C.Okl., 24 F.Supp. 759, modified on other grounds, C.C.A., Petroleum Royalties Co. of Oklahoma v. Hartford Accident & Indemnity Co., 106 F.2d 440, 124 A.L.R. 1403, certiorari denied Hartford Accident & Indemnity Co. v. Petroleum Royalties Co., 60 S.Ct. 384, 308 U.S. 626, 84 L.Ed. 522—The Prilla, D.C.Mass., 21 F.Supp. 383.

Ala.—Federal Land Bank of New Orleans v. Branscomb, 105 So. 585, 213 Ala. 567—Dinsmore v. Cooper, 103 So. 460, 212 Ala. 485—Moore v. First Nat. Bank, 100 So. 349, 211 Ala. 367, 34 A.L.R. 526—J. R. Watkins Medicine Co. v. Hargett, 95 So. 811, 209 Ala. 165—Thompson v. Union Bank & Trust Co., 85 So. 388, 204 Ala. 293.

Ariz.—Hallenbeck v. Regional Agr. Credit Corporation of Salt Lake City, Utah, 56 P.2d 1041, 47 Ariz. 477—California Bank v. Daniel, 288 P. 7, 36 Ariz. 549—Green v. Gila Water Co., 285 P. 263, 36 Ariz. 303—Hughes v. Riggs Bank, 239 P. 297, 29 Ariz. 44—Brandon v. Carr, 237 P. 642, 28 Ariz. 454.

Ark.—Arkansas Power & Light Co. v. Bauer-Pogue & Co., 110 S.W.2d 529, 194 Ark. 1002—Fireman's Fund Ins. Co. v. Leftwich, 90 S.W.2d 497, 192 Ark. 159—Shoptaw v. Sewell, 81 S.W.2d 29, 190 Ark. 639—Georgia Casualty Co. v. Board of Directors of St. Francis Levee Dist., 70 S.W.2d 33, 188 Ark. 1122—O'Berg v. Bank of Sulphur Springs, 37 S.W.2d 700, 183 Ark. 622—The Maccabees v. Pierson, 6 S.W.2d 305, 177 Ark. 243—Commercial Credit Co. v. Hardin, 300 S.W. 434, 175 Ark. 811—Missouri Pac. R. Co. v. Bland, 268 S.W. 22, 167 Ark. 390—Hardy v. Ouachita Nat. Bank of Monroe, La., 265 S. W. 74, 165 Ark. 532—Missouri Pac. R. Co. v. M. M. Cohn Co., 261 S.W. 895, 164 Ark. 335, certiorari denied 45 S.Ct. 126, 266 U.S. 627, 69 L.Ed. 476.

Cal.—Hogan Finance & Mortgage Co. v. Mead, 269 P. 610, 205 Cal. 1—McCreery v. Charlton, 195 P. 670, 185 Cal. 37—Safeway Stores v. King Lumber Co., App., 113 P.2d 483—Phelps v. American Mortg. Co., App., 104 P.2d 880—Tharp v. San Joaquin Valley Securities Co., 66 P.2d 230, 20 Cal.App.2d 20—Damerel v. North American Bond & Mortgage Co., 24 P.2d 237, 133 Cal.App. 290—Bank of America v. Universal Finance Co., 21 P.2d 147, 131 Cal.App. 116—Rankin v. Brown, 20 P.2d 954, 131 Cal.App. 137—Smeade v. Rosen, 8 P.2d 507, 121 Cal.App. 79—Nordin v. First Trust & Savings Bank of Pasadena, 6 P.2d 92, 118 Cal.App. 697—Moss v. Bowman, 3 P.2d 377, 116 Cal.App. 720—Crum v. City of Los Angeles, 294 P. 430, 110 Cal.App. 508—Western States Acceptance Corporation v. Bank of Italy, 285 P. 340, 104 Cal.App. 19—State Finance Co. v. Isaacson, 260 P. 580, 86 Cal.App. 113—Knaugh v. Baender, 257 P. 606, 84 Cal.App. 142—Lynch v. International Banking Corporation, 229 P. 968, 68 Cal.App. 432—Collins v. Eksoozian, 214 P. 670, 61 Cal.App. 184—Chucovich v. San Francisco Securities Corporation, 214 P. 263, 60 Cal.App. 700—First Nat. Bank v. Fickert, 196 P. 112, 51 Cal.App. 99—Butters v. Brawley Star, 191 P. 987, 48 Cal.App. 57—Sherwood v. Robertson, 191 P. 972, 48 Cal.App. 208—Security Mortgage Co. v. Delfs, 191 P. 53, 47 Cal.App. 599—Bishop v. Barndt, 184 P. 901, 43 Cal.App. 149.

Colo.—Gordon v. Pettingill, 96 P.2d 416, 105 Colo. 214—Burck v. Hubbard, 88 P.2d 955, 104 Colo. 83—Bankers' Building & Loan Ass'n v. Watson, 29 P.2d 711, 94 Colo. 308—Trujillo v. Wichita Farm Lighting Co., 14 P.2d 1009, 91 Colo. 307—Colorado Nat. Bank of Denver v. Rehbein, 298 P. 952, 88 Colo. 547—Gioso v. Di Bell, 295 P. 919, 88 Colo. 287—Bray v. Trower, 286 P. 275, 87 Colo. 240—Klein v. Munz, 286 P. 112, 113, 87 Colo. 223, citing **Corpus Juris**—Moore v. Ellison, 261 P. 461, 82 Colo. 478—Greenlees v. Chezik, 190 P. 667, 68 Colo. 521.

Del.—E. I. DuPont de Nemours & Co. v. Laird, Ch., 8 A.2d 162, modified on other grounds 9 A.2d 76.

D.C.—Simpson v. Stern, 70 F.2d 765, 63 App.D.C. 161, certiorari denied 54 S.Ct. 859, 292 U.S. 649, 78 L.Ed. 1499, rehearing denied 55 S.Ct. 66,

interest of one who has omitted no duty devolving] on him to the interests of another whose negligence

293 U.S. 628, 79 L.Ed. 715—Arms & Drury v. Columbia Title Ins. Co. of District of Columbia, 65 F. 2d 811, 62 App.D.C. 178—McKinley v. Crawford, 58 F.2d 528, 61 App. D.C. 123—Davison v. Morgan, 50 F.2d 311, 60 App.D C. 161—Gray v. Jacobsen, 13 F.2d 959, 56 App.D.C. 353, 48 A L.R. 583—Edson Co. v. Harper Motor Co., 12 F.2d 182, 56 App.D.C. 241.

Fla.—Florida Land Holding Corporation v. McMillen, 186 So. 188, 135 Fla. 431—Equitable Life Assur. Soc. of U. S. v. Mittelhauser, 178 So. 559, 130 Fla. 794—Reasoner v. Fisikelli, 153 So. 98, 114 Fla. 102—Marion Mortg. Co. v. Grennan, 143 So. 761, 106 Fla. 913, 87 A.L. R. 1492—Skivesen v. Brown, 133 So. 564, 101 Fla. 1385, affirmed 136 So. 678, 101 Fla. 1389—Commercial Credit Co. v. Parker, 132 So. 640, 101 Fla. 928—Glass v. Continental Guaranty Corporation, 88 So. 876, 81 Fla. 687, 25 A.L R. 312.

Ga.—Nightingale v. Juniata College, 197 S.E. 831, 186 Ga. 365—Atlanta Banking & Savings Co. v. Johnson, 175 S.E 904, 179 Ga. 313, 95 A.L R. 1436—Lilly v. Citizens' Bank & Trust Co., 162 S E. 639, 44 Ga.App. 653—Truluck v. Carolina Portland Cement Co., 130 S. E. 356, 34 Ga.App. 501—Hines v. Wallace, 103 S.E. 439, 25 Ga.App. 377—Hart v. Metropolitan Discount Co., 102 S.E. 375, 24 Ga.App. 807—Citizens' Bank of Maxeys v. Bank of Penfield, 101 S E. 203, 24 Ga.App. 435.

Idaho.—Millick v. O'Malley, 273 P. 947, 47 Idaho 106.

Ill.—Dombro v. Hugo, 19 N.E.2d 183, 370 Ill 381—First Nat. Bank v. Paris, 193 N.E. 207, 358 Ill. 378—Decatur Lumber, & Mfg. Co. v. Crail, 183 N.E. 228, 350 Ill. 319, reversing 264 Ill.App. 244—Connor v. Wahl, 161 N.E. 306, 330 Ill. 136—B & D Investment Co. v. Peters, 274 Ill.App. 500—Culhane v. Layman, 273 Ill.App. 557—Madison & Kedzie State Bank, for Use of Globe Indemnity Co., v. Madison Square State Bank, 271 Ill.App. 12—Winkel v. Haning, 264 Ill.App. 231—Vetesnik v. Magull, 262 Ill. App. 389, affirmed 180 N.E. 390, 347 Ill. 611—Czesna v. Lietuva Loan & Savings Ass'n, 252 Ill.App. 612—Guerten v. Zachas, 256 Ill. App. 386—Patton v. Young, 233 Ill.App. 515—Doster v. Oulvey, 233 Ill.App. 468—Widlar v. Federal Life Ins. Co., 215 Ill.App. 5.

Ind.—Vincennes Savings & Loan Ass'n v. St. John, 12 N.E.2d 127, 213 Ind. 171.

Iowa.—Allen v. Hume, 290 N.W. 687, 227 Iowa 1224—Deater v. City Nat. Bank of Council Bluffs, 272 N.W. 423, 223 Iowa 86—J. W. Squire Co. v. Hedges, 205 N.W. 525, 200 Iowa 877—Tutt v. Smith, 204 N.W. 294, 201 Iowa 107, 48 A.L.R. 394—Keefe v. Cropper, 194 N.W. 305, 196 Iowa 1179.

Kan.—Kinsley Bank v. Aderhold, 292 P. 798, 131 Kan. 448, 76 A.L.R. 1495, modifying 285 P. 597, 130 Kan. 126—Chicago Great Western R. Co. v. Lowry, 239 P. 758, 119 Kan. 336—Gafford Lumber & Grain Co. v. Eaves, 220 P. 512, 114 Kan. 576.

Ky.—T. M. Crutcher Dental Depot v. American Indemnity Co., 106 S. W.2d 621, 623, 269 Ky. 177, citing **Corpus Juris**—Dorman v. Bankers' Trust Co's Receiver, 82 S W.2d 494, 259 Ky. 430—Wood Oil Co. v. Ferguson-Willis Oil Co., 76 S.W.2d 632, 256 Ky. 579—Roberts v. Rider, 73 S.W.2d 17, 255 Ky. 266—Anglo-American Mill Co. v. Kentucky Bank & Trust Co., 47 S W. 2d 951, 243 Ky. 124—Bailey v. Hoover, 26 S.W.2d 522, 233 Ky. 681, citing **Corpus Juris**—Meder v. Silver, 9 S W.2d 1089, 225 Ky. 733—Glens Falls Ins. Co. v. Elliott, 3 S.W.2d 219, 223 Ky. 205—Vanderpool v. Stewart, 279 S.W. 645, 212 Ky. 373—Citizens' Bank of Shelbyville v. Mutual Trust & Deposit Co, 266 S.W. 875, 206 Ky. 86, 40 A.L.R. 1001—Stark v. Petty Bros., 243 S.W. 50, 195 Ky. 445—Power Grocery Co. v. Hinton, 218 S.W. 1013, 187 Ky. 171—Mueller & Martin v. Liberty Ins. Bank, 218 S.W. 465, 187 Ky. 44.

La.—Haley v. Woods, 113 So. 144, 163 La. 911—Thompson v. Hibernia Bank & Trust Co., 86 So. 652, 148 La. 57—Allan Ware Pontiac, Inc., v. First Nat. Bank of Shreveport, App., 2 So.2d 76—General Finance Co. of Louisiana v. Evans, App., 196 So. 581—Yoars v. New Orleans Linen Supply Co., App., 185 So. 525—Lawrence v. Sunrise Petroleum Co., App., 163 So. 742—Reed v. Eureka Homestead Soc., App., 143 So 891—Continental Jewelry Co. v. Weilbacher, 136 So. 110, 17 La.App. 420.

Me.—Goodwin v. Boutin, 155 A. 738, 130 Me. 322.

Mich.—Rossman v. Hutchinson, 286 N.W. 835, 289 Mich. 577—North Detroit Land Co. v. Rominiecki, 241 N W. 221, 257 Mich. 239—American Trust Co. v. Bergstein, 224 N.W. 327, 246 Mich. 527—Schwalm v. Wayne County & Home Sav. Bank, 190 N.W. 772, 221 Mich. 136.

Minn.—Hernlund v. Town & Country Motors, 198 N.W. 662, 159 Minn. 125.

Miss.—Weil Bros. v. Keenan, 178 So. 90, 180 Miss. 697—Clark v. Dorsett, 128 So. 79, 157 Miss. 365—Hall v. Box, 94 So. 221, 131 Miss. 218.

Mo.—Edmonson v. Waterston, 119 S. W.2d 318, 342 Mo. 1082—Goddard Grocer Co. v. Freedman, App., 127 S.W.2d 759—Ava Hardware Co. v. Christensen, App., 122 S.W.2d 92—Kuraner v. Columbia Nat. Bank of Kansas City, 90 S.W.2d 465, 230 Mo App. 358—M. & M. Securities Co. v. General Motors Acceptance Corporation, 79 S.W.2d 521, 230 Mo. App. 900—New York Indemnity Co v. Andrew County Bank, 59 S W.2d 741, 227 Mo.App. 878—C. I. T. Corporation v. Hume, App., 48 S.W.2d 154—General Motors Acceptance Corporation v. Holland, App., 30 S. W.2d 1087—Klebba v. Struempf, 23 S.W.2d 205, 224 Mo.App. 193—B. F. Goodrich Rubber Co. v. Bennett, 281 S.W. 75, 222 Mo.App. 510—Maupin v. Missouri State Life Ins. Co., App., 214 S.W. 398.

Neb.—Bauer v. Bauer, 285 N.W. 565, 136 Neb. 329—First Trust Co. v. Maryott, 283 N.W. 518, 135 Neb. 679—Federal Land Bank of Omaha v. Worley, 282 N.W. 476, 135 Neb. 493—Kansas City Life Ins. Co. v. Neverve, 274 N.W. 390, 133 Neb. 29—First Trust Co. of Lincoln v. Danielson, 270 N.W. 680, 132 Neb. 141—Cavett v. First Nat. Bank, 254 N.W. 689, 127 Neb. 117—Greeley County v. First Nat. Bank, 254 N.W. 502, 126 Neb. 872—Nebraska State Bank of Valparaiso v. May, 220 N.W. 276, 117 Neb. 262—Deleski v. Peters Trust Co., 213 N.W 829, 115 Neb. 547—Taylor v. Flodman, 192 N.W. 340, 109 Neb. 812—Rehmeyer v. Lysinger, 192 N.W. 337, 109 Neb. 805.

N.H.—Howison v. Mechanics Sav Bank, 183 A. 697, 88 N H. 31—General Motors Acceptance Corporation v. Brackett & Shaw Co., 150 A. 739, 84 N.H. 348, 70 A.L.R. 591

N.J.—Atlantic City Nat. Bank v. Commercial Lumber Co., 155 A. 762, 107 N.J.Law 492, 75 A.L.R. 1413—Wysakowska v. Polish-American Building & Loan Ass'n of City of Newark, 115 A. 438, 96 N.J.Law 447, affirming Wysokowski v. Polish-American Building & Loan Ass'n of City of Newark, 113 A. 246, 95 N.J.Law 352—Hofstetter v. Bernett, 178 A. 88, 118 N.J Eq. 143—Stone v. Limouze, 162 A. 617, 111 N.J.Eq. 421—Schultz v. Partrick, 159 A. 793, 110 N J.Eq. 295—Riley v. Maryanski, 156 A. 226, 109 N.J.Eq. 16—Atlantic Guaranty & Title Ins. Co. v. McDevitt, 148 A. 733, 105 N.J.Eq. 570—Wilson v. Walsh, 148 A. 7, 105 N.J.Eq. 396—Sardo v. Fidelity & Deposit Co. of Maryland, 131 A. 73, 98 N.J.Eq. 22, reversed on other grounds 134 A. 774.

N.M.—Shephard v. Van Doren, 60 P. 2d 635, 639, 40 N.M. 380, quoting **Corpus Juris**—Bank of Hatch v.

Mossman, 185 P. 275, 25 N.M. 547—Baca v. Fulton, 5 P. 467, 3 N.M. 215.

N.Y.—Greenbaum v. Werner, 297 N.Y.S. 300, 251 App.Div. 891—Angerosa v. White Co., 290 N.Y.S. 204, 248 App.Div. 425, affirmed 11 N.E.2d 325, 275 N.Y. 524—Van Schaick v. National City Bank of New York, 283 N.Y.S. 372, 245 App.Div. 525, affirmed 3 N.E.2d 189, 271 N.Y. 570—Island Trading Co. v. Berg Bros., 204 N.Y.S. 523, 209 App.Div. 63, affirmed 146 N.E. 345, 239 N.Y. 229—Fleck & Hillman v. Wabash Ry. Co., 193 N.Y.S. 131, 200 App.Div. 482—Hudson Trust Co. v. American Linseed Co., 180 N.Y.S. 17, 190 App.Div. 289, reversed on other grounds 134 N.E. 178, 232 N.Y. 350, which has reargument denied 135 N.E. 908, 233 N.Y. 539—McConnell v. Hellwig, 179 N.Y.S. 882, 190 App.Div. 244—Buxbaum v. Assicurazioni Generali, 25 N.Y.S.2d 357, 175 Misc. 785—Harvey & Co. v. Keiser, 290 N.Y.S. 923, 160 Misc. 944—Fahlbusch v. Consumers Discount Corporation, 288 N.Y.S. 511, 159 Misc. 568—Fredericks v. National City Bank of New York, 281 N.Y.S. 821, 824, 156 Misc. 880, citing **Corpus Juris,** and affirmed 281 N.Y.S. 964, 245 App.Div. 704—Drobney v. Sullivan, 266 N.Y.S. 245, 148 Misc. 670—Smith v. Vara, 241 N.Y.S. 202, 136 Misc. 500—Commercial Credit Corporation v. Northern Westchester Bank, 240 N.Y.S. 5, 136 Misc. 325, affirmed 246 N.Y.S. 888, 231 App.Div. 817, reversed on other grounds 177 N.E. 12, 256 N.Y. 482—Capron v. Utica Ice Co., 217 N.Y.S. 732, 127 Misc. 848—Morris Plan Co. of Albany v. Adler, 213 N.Y.S. 227, 126 Misc. 237—A. Z. A. Realty Corporation v. Harrigan's Café, 185 N.Y.S. 212, 113 Misc. 141—Elm Coal & Oil Corporation v. Lieberman, 18 N.Y.S.2d 344.

N.C.—Lavecchia v. North Carolina Joint Stock Land Bank of Durham, 1 S.E.2d 119, 215 N.C. 73, rehearing denied 3 S.E.2d 276, 216 N.C. 28—Charleston & W. C. Ry. Co. v. Robert G. Lassiter & Co., 177 S.E. 9, 207 N.C. 408—White v. K. B. Johnson & Sons, 172 S.E. 370, 205 N.C. 773—Brown v. Payne, 160 S.E. 353, 201 N.C. 398—Bank of Canton & Trust Co. v. Clark, 151 S.E. 102, 198 N.C. 169—Furst & Thomas v. Merritt, 130 S.E. 40, 190 N.C. 397—Fain Grocery Co. v. Early & Daniels Co., 107 S.E. 497, 181 N.C. 459.

Ohio.—Lippincott Distributing Co. v. Peoples Commercial & Savings Bank, 30 N.E.2d 691, 137 Ohio St. 399, affirming 31 N.E.2d 694, 66 Ohio App. 72—Edgar v. Haines, 141 N.E. 837, 109 Ohio St. 159, 38 A.L.R. 795—Sinclair Refining Co. v. Lecrone Motor Transport Line, App., 34 N.E.2d 822—State Planters Bank & Trust Co. of Richmond, Va., v. Fifth-Third Union Trust Co. of Cincinnati, 10 N.E.2d 935, 56 Ohio App. 309—Falkenberg v. Industrial Fire Ins. Co., 5 N.E.2d 935, 53 Ohio App. 481—Central Trust Co. v. Eureka-Security F. & M. Ins. Co., 198 N.E. 62, 50 Ohio App. 308—Campbell v. Second Nat. Bank, 17 Ohio N.P., N.S., 47, affirmed 4 Ohio App. 158, 21 Ohio Cir.Ct.,N.S., 305, 26 Ohio Cir.Dec. 270—J. F. Jones' Sons v. Peoples Bank Co. of Columbus, 14 Ohio N.P., N.S., 129.

Okl.—Morris v. Packard Dallas Co., 86 P.2d 779, 184 Okl. 277—Joy v. Farmers' Nat. Bank of Chickasha, 11 P.2d 1074, 158 Okl. 1—Stevens v. Pierce, 235 P. 174, 109 Okl. 106.

Or.—Vanderpool v. Burkitt, 234 P. 289, 113 Or. 656—Astoria Nat. Bank v. State Bank of Portland, 222 P. 588, 109 Or. 699—Harth v. Pollock, 193 P. 202, 97 Or. 663.

Pa.—Ervin v. City of Pittsburgh, 14 A.2d 297, 339 Pa. 241—Gramigna v. Board of Ministerial Pensions and Relief of United Presbyterian Church of North America, 199 A. 177, 330 Pa. 335—Haggerty v. Moyerman, 184 A. 654, 321 Pa. 555—Mielcuszny v. Rosol, 176 A. 236, 317 Pa. 91—Puharic v. Novy, 176 A. 233, 317 Pa. 199—Mikos v. Kida, 172 A. 101, 314 Pa. 561—Keller v. New Jersey Fidelity & Plate Glass Ins. Co., 159 A. 40, 306 Pa. 124—Byrne v. Dennis, 154 A. 123, 303 Pa. 72—Petition of Stirling, 140 A. 869, 292 Pa. 194—Williams v. Cook, 137 A. 232, 289 Pa. 207—Commonwealth v. Gutelius, 135 A. 214, 287 Pa. 441—Browne v. Hoekstra, 123 A. 861, 279 Pa. 418—Kienberger v. Lally, 198 A. 453, 130 Pa.Super. 583—Burkhart v. Falco, 176 A. 844, 116 Pa.Super. 263—Steehler v. Volk, 167 A. 424, 109 Pa.Super. 190—Plunkett v. Raniszewski, 165 A. 529, 108 Pa.Super. 506, reargument denied 166 A. 500, 108 Pa.Super. 506—Peters v. Alter, 89 Pa.Super. 34—Byrne v. Dennis, 13 Pa.Dist. & Co. 743, affirmed 154 A. 123, 303 Pa. 72—Ferree v. Gilmore, 10 Pa.Dist. & Co. 305, 15 West.Co. 105—Ambler Nat. Bank v. Roessler, 57 Montg.Co. 129—Shay v. Schrink, 5 Sch.Reg. 310.

R.I.—Thornley Supply Co. v. Madigan, 154 A. 277, 51 R.I. 310—Hatton v. Howard Braiding Co., 129 A. 805, 47 R.I. 47.

S.C.—Patten v. Mutual Ben. Life Ins. Co., 6 S.E.2d 26, 192 S.C. 189, 126 A.L.R. 91—Blackwell v. First Nat. Bank, 194 S.E. 339, 185 S.C. 427—Gullick v. Slaten, 168 S.E. 697, 169 S.C. 244—McFaddin v. Bland, 144 S.E. 592, 147 S.C. 27—Mortgage & Acceptance Corporation v. Stewart, 140 S.E. 804, 142 S.C. 375—Epps v. McCallum Realty Co., 138 S.E. 297, 139 S.C. 481—Davis v. Bland, 136 S.E. 300, 138 S.C. 354—Land v. Reese, 134 S.E. 252, 136 S.C. 267—Leaphart v. Selby, 133 S.E. 451, 135 S.C. 1—Martin v. Palmer, 104 S.E. 308, 115 S.C. 17—Middleton v. Cockfield, 102 S.E. 328, 113 S.C. 282.

Tenn.—Davis v. Union Planters Nat. Bank & Trust Co., 103 S.W.2d 579, 171 Tenn. 383—Frazier v. Lafferty, 263 S.W. 978, 150 Tenn. 105—Schoolfield v. Barnes, 77 S.W.2d 66, 18 Tenn.App. 333—Holston Nat. Bank v. American Christian Missionary Soc., 11 Tenn.App. 72—Peoples Bank of Springfield v. Brown, 8 Tenn.App. 281.

Tex.—West v. First Baptist Church of Taft, 71 S.W.2d 1090, 123 Tex. 388, reversing, Civ.App., 42 S.W.2d 1078—Wilson v. Sherwin-Williams Paint Co., 217 S.W. 372, 110 Tex. 156, affirming, Civ.App., 160 S.W. 418—Parma v. First Nat. Bank, Com.App., 63 S.W.2d 692, reversing, Civ.App., 37 S.W.2d 274—Luckel v. Phillips Petroleum Co., Com.App., 243 S.W. 1068, affirming, Civ.App., 235 S.W. 605—Anderson v. Hale, Civ.App., 144 S.W.2d 318—Dutton v. Kinsey, Civ.App., 124 S.W.2d 446—First Baptist Church of Taft v. West, Civ.App. 120 S.W.2d 528, error refused—Forman v. Irby, Civ.App., 115 S.W.2d 1229, error refused—Blackmon v. Apple, Civ.App., 112 S.W.2d 1057, error dismissed—Western Union Telegraph Co. v. Cosby, Civ.App., 99 S.W.2d 662, error dismissed—Murphy v. Johnson, Civ.App., 54 S.W.2d 158, error dismissed—Busby v. Smith, Civ.App., 53 S.W.2d 138, 144, citing **Corpus Juris,** and reversed on other grounds Smith v. Sorelle, 87 S.W.2d 703, 126 Tex. 353—Uvalde Paving Co. v. Crabb, Civ.App., 7 S.W.2d 678, reversed on other grounds Crabb v. Uvalde Paving Co., Com.App., 23 S.W.2d 300—Keystone Pipe & Supply Co. v. Milner, Civ.App., 6 S.W.2d 771—Security Finance Co. v. Floyd, Civ.App., 294 S.W. 1113—Becker v. American Nat. Bank, Civ.App., 286 S.W. 889—Beard v. Continental State Bank of Beckville, Civ.App., 280 S.W. 840—Dellinger v. Gulf Production Co., Civ.App., 215 S.W. 360, error refused.

Utah.—I. X. L. Stores Co. v. Success Markets, 97 P.2d 577, 98 Utah 160—Transfer Realty Co. v. Lichfield, 33 P.2d 179, 181, 84 Utah 163, citing **Corpus Juris** and rehearing denied 39 P.2d 752, 85 Utah 451—Harrison v. Auto Securities, 257 P. 677, 70 Utah 11, 57 A.L.R. 388.

Va.—Thomasson v. Walker, 190 S.E. 309, 168 Va. 247, 110 A.L.R. 593—McAuley v. Morris Plan Bank of Virginia, 156 S.E. 418, 155 Va. 777—National Valley Bank of Staunton v. U. S. Fidelity & Guaranty Co., 150 S.E. 403, 153 Va. 484—Smith v. Plaster, 144 S.E. 417, 151 Va. 252—Moore v. Hermitage Re-

made it possible for the loss to occur.[87] This principle has been applied in a variety of circumstances, some, but not all involving culpable negligence on the part of the party estopped.[88]

alty Inv. Corp., 133 S.E. 881, 145 Va. 199.

Wash.—Paulsell v. Peters, 115 P.2d 708—General Credit Corporation v. Lee James, Inc., 111 P.2d 762—Von Normann v. Woodson, 46 P.2d 1050, 182 Wash. 271—Defiance Lumber Co. v Bank of California, N. A., 41 P.2d 135, 180 Wash. 533, 99 A.L.R. 426—Hoffman v. Graaf, 38 P.2d 236, 179 Wash. 431—Ross v. Johnson, 19 P.2d 101, 171 Wash. 658—Eatonville State Bank v. Marshall, 17 P.2d 14, 170 Wash. 503—Sims v. U. S. Nat. Bank, 6 P.2d 601, 166 Wash. 119—Kiley v. Bugge, 5 P.2d 1038, 165 Wash. 677—Zoratti v. West Coast Finance Co., 297 P. 1078, 162 Wash. 97—Doucette v. Old Nat. Bank & Union Trust Co., 296 P. 570, 161 Wash. 159—Burtt v. Schoening, 244 P. 381, 138 Wash. 187—Lloyd v. American Can Co., 222 P. 876, 128 Wash. 298—Bonneviere v. Cole, 156 P. 527, 90 Wash. 526.

W.Va.—Jones v. Evans, 15 S.E.2d 166—Shipper v. Downey, 197 S.E. 355, 119 W.Va. 591—Bluefield Nat. Bank v. Bernard, 155 S.E. 306, 109 W.Va. 459—Syderstricker v. Tyler, 152 S.E. 318, 108 W.Va. 471.

Wis.—Yawkey-Crowley Lumber Co. v. Acker, 217 N.W. 313, 194 Wis. 504—Heal v. Stoll, 185 N.W. 242, 176 Wis. 137—Seidl v. Paulu, 183 N.W. 246, 174 Wis. 403.

21 C.J. p 1170 note 67.

Similar statements of rule

(1) As between two innocent persons, he who is in the best position to protect himself should suffer loss.

Miss.—Railway Express Agency v. Bank of Philadelphia, 150 So. 525, 168 Miss. 279.

Tex.—Sackenreuther v. Winston, Civ. App., 137 S.W.2d 93, error refused.

(2) Where, to decide a case, it is necessary to do a financial injury to some one, such injury should be visited on the person who had it in his power to transact the business in such a way that no person need have been hurt.—Bank of California v. Danamiller, 215 P. 321, 125 Wash. 255, 36 A.L.R. 753.

(3) Equity will not hold good what is insufficient in law, if this causes consequences of one's negligence being visited on another.—Klebba v. Struempf, 23 S.W.2d 205, 224 Mo. App. 193.

(4) Burden should fall on the one who made the mistake or caused the condition resulting in loss.—Western Union Telegraph Co. v. Tersheshee, 160 So. 233, 230 Ala. 239.

(5) Where one of two parties to transaction must suffer loss through misconduct of third person, superior equities will be determined from all material circumstances and burden will be allowed to fall where equity and justice place it.—Haskin v. Langdon, 256 N.W. 8, 127 Neb. 535—Johnson v. Kindig, 255 N.W. 236, 127 Neb. 360—Knopf v. Perkins, 255 N.W. 30, 127 Neb. 366—Omaha Elevator Co. v. Chicago, B & Q. R. Co., 178 N.W. 211, 104 Neb. 566.

(6) Further statements see Silverman v. Harmon, Tex.Civ.App., 250 S.W. 206.

87. Ky.—Jefferson County Bank v. Hansen Lumber Co., 55 S.W.2d 54, 56, 246 Ky. 384, citing **Corpus Juris.**

Mo.—Bost v. McFarland, 81 S.W.2d 350, 229 Mo.App. 776.

21 C.J. p 1172 note 68.

Misplaced confidence in person to whom property is intrusted with indicia of ownership is "negligence" within meaning of statutory codification of maxim that, where one of two innocent persons must suffer by the act of a third, he by whose "negligence" it happened must suffer.—Bank of America Nat. Trust & Savings Ass'n v. National Funding Corporation, Cal.App., 114 P.2d 49—Phelps v. American Mortg. Co., 104 P.2d 880, 40 Cal.App.2d 361.

88. **Cases within rule**

(1) Bank negligently signing stock certificate in blank, enabling officer to fraudulently obtain loan thereon from plaintiff bank, should bear loss occurring through its negligence.—Pacific Nat. Bank of San Francisco v. Corona Nat. Bank, 298 P. 144, 113 Cal.App. 366.

(2) Bona fide mortgagee of vendee was held to have claim to property superior to that of vendor asserting title because of fraud of vendee.—Wicklein v. Kidd, 131 A. 780, 149 Md. 412.

(3) Bona fide purchaser of property obtained by his transferor in trade for stolen property holds title in view of rule of estoppel of party enabling another to perpetrate fraud.

Okl.—Nelson v. Jones, 219 P. 667, 93 Okl. 85.

Wash.—Linn v. Reid, 196 P. 13, 114 Wash. 609.

(4) Corporate offeree placing it in the power of its employees to mail an unintended letter rejecting proposed contract, and not offerer, should bear the loss flowing from offerer's execution of similar contract with third person, notwithstanding offeree was innocent of wrongdoing.—E. Frederics, Inc., v. Felton Beauty Supply Co., 198 S.E. 324, 58 Ga.App. 320.

(5) Deceased executing deed enabling third person to substitute unauthorized grantee would be estopped from attacking title of purchaser in good faith.—Klein v. Munz, 286 P. 112, 87 Colo. 223.

(6) Employer whose timekeeper had checks issued to fictitious names, and cashed checks on his own indorsement thereof, was estopped by its negligence from claiming reimbursement from drawee bank.—Young v. Gretna Trust & Savings Bank, 168 So. 85, 184 La. 872.

(7) Guarantor is estopped to assert condition that other person also sign, when a third person intrusted with the instrument delivers it without coguarantor's signature.—W. T. Rawleigh Co. v. Royal, 119 S.E. 339, 30 Ga.App. 706.

(8) If plaintiffs signed papers without understanding contents, those who signed them and acted on faith that all were bound should not suffer by plaintiffs' negligence.—Hohman v. Hohman, 165 A. 812, 164 Md. 594.

(9) Lender making draft payable to its agent and borrowers and sending it to agent, who cashed it on his own indorsement and borrowers' forged signatures, must bear loss from his failure to deliver money.—Lavender v. Buhrman-Pharr Hardware Co., 7 S.W.2d 755, 177 Ark. 656.

(10) Makers executing renewal note without requiring delivery of original, thereby making possible bank cashier's fraud, were liable to transferee.—Sydenstricker v. Tyler, 152 S.E. 318, 108 W.Va. 471.

(11) Mortgagee indorsing cashier's checks in blank and delivering them to attorney who arranged mortgage for delivery to mortgagor was held required to bear loss of attorney's embezzlement.—Wilson v. Walsh, 148 A. 7, 105 N.J.Eq. 396.

(12) One intrusting blank checks to agent must bear loss where check was cashed by another without knowledge of stoppage of payment thereon.—Ladd & Tilton Bank v. Small, 216 P. 862, 126 Wash. 8.

(13) Primary liability for loss occasioned by delay in realizing on judgment rests on those intervening to procure delay.—Bell v. Greenwood, 242 N.Y.S. 149, 229 App.Div. 550.

(14) Warehouseman intrusting warehouse receipts indorsed in blank to his bookkeeper is estopped to claim them from a purchaser for value.—Flexner v. Meyer's Ex'x, 229 S.W. 99, 191 Ky. 133.

(15) Where drawer delivered check to impostor who forged indorsement and cashed check, drawer was estopped to set up forgery.

Ark.—Missouri Pac. R. Co. v. M. M. Cohn Co., 261 S.W. 895, 164 Ark.

Limitations of rule. While the rule stated supra this section is one of quite general application and where properly understood and limited is one of manifest equity, it has, however, many limitations and qualifications[89]. The rule, it has been stated, is mainly confined to cases where the third person whose act or default has occasioned the loss has been in some sense or to some extent the agent of the party who is made to sustain the loss, or when the latter by his acts or negligence has authorized the other party to consider him as such.[90] Furthermore, in accordance with well settled general principles governing equitable estoppels, no estoppel can arise where all the parties interested have equal knowledge of the facts,[91] or where the party setting up the estoppel is chargeable with notice of the facts,[92] or is equally negligent or at fault.[93] Likewise, an estoppel does not arise where no fault or

335, certiorari denied 45 S.Ct 126, 266 U.S. 627, 69 L.Ed. 476—Cureton v. Farmers' State Bank, 227 S.W. 423, 147 Ark. 312.
Ky.—Citizens' Union Nat. Bank v. Terrell, 50 S.W.2d 60, 244 Ky. 16.
N.Y.—Slattery & Co. v. National City Bank of New York, 186 N.Y.S. 679, 114 Misc. 48.

(16) Where one of two public bodies, city or county, must sustain loss of public funds, one whose delinquent official caused loss must suffer.—City of Plainville v. Board of Com'rs of Rooks County, 19 P.2d 719, 137 Kan. 61.

(17) As respects superiority of title to notes which payee transferred to innocent holder for value after having sold notes to another, that one whose conduct occasioned loss must bear it.—Counselman v. Pitzer, 79 F.2d 707, 65 App.D.C. 71, certiorari denied 56 S.Ct. 310, 296 U.S. 650, 80 L.Ed. 463.

(18) Where mortgagor, after discovering that another had forged her signatures to note and mortgage, failed to reveal true facts to mortgagee, mortgagor, and not mortgagee who was innocent third party, was required to bear loss.—Lillywhite v. Coleman, 52 P.2d 1157, 46 Ariz. 523.

(19) Other cases.
Ark.—Security Ins. Co. v. Van Norman, 111 S.W.2d 561, 195 Ark. 200.
Wash.—Beckman v. Ward, 24 P.2d 1091, 174 Wash. 326.
21 C.J. p 1170 note 67 [b].

Cases not within rule

(1) Bona fide purchaser of nonnegotiable paper, such as conditional sales contract, could not cut off defenses to nonnegotiable instrument on theory of estoppel, on ground that when defendant signed and put contract in circulation it thereby made possible loss which occurred by reason of its assignment.—Universal Credit Co. v. National Radio Mfg. Co., 49 P.2d 743, 174 Okl. 178.

(2) Rule that innocent person, first relying on third person whose fraud caused loss, must suffer, was inapplicable, where plaintiff indorsed bill of lading to company, whose treasurer wrongfully sold it to defendant.—Moors v. Weil, C.C.A.N.Y., 20 F.2d 462.

(3) Other cases see Johnson v Geo. C. Bagley El. Co., 156 N.W. 76, 36 S.D. 531—21 C.J. p 1170 note 67 [c].

89. Mich.—Holmes v. Trumper, 22 Mich 427, 7 Am.R. 661.
Mo.—Delaney v. Light, 263 S.W. 813.
Tenn.—State v. Broadway Nat. Bank, 282 S.W. 194, 153 Tenn. 113

90. N.Y.—Fahlbusch v. Consumers Discount Corporation, 288 N.Y.S. 511, 159 Misc 568.
Pa.—Fifth St. Building & Loan Ass'n of Philadelphia v. Kornfeld, 172 A. 703, 315 Pa. 406.
W.Va.—First Nat. Bank v. Aler, 114 S.E. 745, 92 W.Va. 313.
21 C.J. p 1172 note 70.

Rule otherwise stated

"The rule . . . [of comparative innocence] does not apply when the wrongdoer has not been vested by the party sought to be charged with the ordinary indicia of ownership and right of disposal of property, or an apparent authority to do the act from which the loss must accrue to one of two innocent parties."—Bacal v. National City Bank of New York, 262 N.Y.S. 839, 842, 146 Misc. 732.

Accepting payment

Rule that, where one of two innocent parties must suffer, one who made loss possible must bear it, does not avail mortgagor, who paid principal of mortgage debt to bank or its cashier, in absence of evidence that mortgagee held out bank or cashier as his agent.—Huismann v. Althoff, 209 N.W. 525, 202 Iowa 70.

91. Utah.—I. X. L. Stores Co. v. Success Markets, 97 P.2d 577, 98 Utah 160.
21 C.J. p 1172 note 72.

92. Cal.—Ernst v. Searle, 22 P.2d 715, 218 Cal. 233—Cooper v. Tanner, 295 P. 525, 111 Cal.App. 282.
Ill.—Commercial Credit Co. v. Maxey, 7 N.E.2d 155, 289 Ill.App. 209—Alton Banking & Trust Co. v. Alton Building & Loan Ass'n, 6 N.E.2d 921, 289 Ill.App. 177.
La.—Escat v. Leaman, App., 181 So. 621.
Minn.—Danielson v. Tessman, 227 N.W. 852, 178 Minn. 514.
Mo.—Ridings v. Hamilton Sav. Bank, 219 S.W. 585, 281 Mo. 288.
Neb.—First Nat. Bank of Bridgeport v. First Nat. Bank of Hartington, 196 N.W. 691, 111 Neb. 441.
N.C.—Brinson v. Mill Supply Co., 14 S.E.2d 509, 219 N.C. 505—Stansell v. Payne, 127 S.E. 693, 189 N.C. 647.
Wash.—Palm v. Brydges, 13 P.2d 57, 169 Wash 28—Liska v. Beckmann, 12 P.2d 599, 168 Wash. 489.
21 C.J. p 1172 note 73.

One not bona fide purchaser for value without notice cannot invoke rule that party enabling another to perpetrate fraud must bear loss.—Harris v. Warner, 203 N.W. 279, 199 Iowa 1000.

Purchaser of note after maturity is subject to defense of prior payment, notwithstanding confidence reposed in agent by maker enabled agent to perpetrate fraud.
Ga.—Bank of Oglethorpe v. Swindle, 116 S.E. 604, 155 Ga. 69, 33 A.L.R. 695.
Wis.—Michalak v. Nowinski, 264 N.W. 498, 220 Wis. 1.

Party taking security for preëxisting debt cannot invoke estoppel of real owner to claim title to such security.—Farmers' & Merchants' Bank v. Hamilton, 117 S.E. 287, 30 Ga.App. 194.

Evident alteration

Rule making liable innocent person who makes wrong possible does not apply to bank whose check was purchased by one failing to observe an evident material alteration.—Dunbar v. Iowa State Bank, 295 S.W. 835, 221 Mo.App. 979.

93. Cal.—American Bldg. Maintenance Co. v. Indemnity Ins. Co. of North America, 7 P.2d 305, 214 Cal. 608—Dennis v. Bank of America Nat. Trust & Savings Ass'n, 94 P.2d 51, 34 Cal.App.2d 618—Bank of Italy v. Sierra Valley Bank, 248 P. 770, 78 Cal.App. 673.
Colo.—Stark v. Stephens, 233 P. 619, 76 Colo. 550.
Idaho.—Smith v. Boyden, 290 P. 377, 49 Idaho 638.
Ill.—Czesna v. Lietuva Loan & Savings Ass'n, 252 Ill.App. 612.
Mich.—Andreae v. Wolgin, 241 N.W. 876, 257 Mich. 572.
Minn.—Wegersley v. Midland Nat. Bank & Trust Co., 238 N.W. 792, 184 Minn. 393.
N.Y.—Fahlbusch v. Consumers Dis-

negligence is imputable to either party,[94] but it has been held that negligence is immaterial as respects application of the rule of estoppel where one party's confidence put it into the hands of the wrongdoer to perpetrate the wrong.[95]

The act, conduct or omission warranting imposition of liability must occur in the transaction in question and be the proximate cause of the loss.[96] The rule does not apply in cases where the wrong was accomplished through the instrumentality of a criminal act, it being held that in such cases the crime, and not the negligent act, is the proximate cause of the injury.[97] A party may not

count Corporation, 288 N.Y.S. 511, 159 Misc. 568.
Okl.—Gooch v. Natural Gas Supply Co., 51 P.2d 932, 175 Okl. 153.
S.C.—Gray v. Thomas, 161 S.E. 743, 163 S.C. 421.
S.D.—Kalen v. Gelderman, 278 N.W. 165, 66 S.D. 53.
Tenn.—Middle Tennessee Bank v. McKennon, 99 S.W.2d 564, 20 Tenn. App. 416.
Wash.—Grays Harbor Finance Co. v. Sutcliff, 5 P.2d 1002, 165 Wash. 586—Bailey v. E. C. Miller Cedar Lumber Co., 286 P. 57, 155 Wash. 673—Doub v. Rawson, 252 P. 920, 142 Wash. 190—Hill Syrup Co. v. National City Bank of Seattle, 224 P. 578, 129 Wash. 171.

94. U.S.—Petroleum Royalties Co. of Oklahoma v. Hartford Accident & Indemnity Co., C.C.A.Okl., 106 F.2d 440, 124 A.L.R. 1403, modifying, D.C., Hartford Accident & Indemnity Co. v. Petroleum Royalties Co. of Oklahoma, 24 F.Supp. 759, certiorari denied Hartford Accident & Indemnity Co. v. Petroleum Royalties Co., 60 S.Ct. 384, 308 U.S. 626, 84 L.Ed. 522.
Ala.—Scott v. Wilkinson, 110 So. 34, 215 Ala. 235.
Cal.—Verder v. American Loan Soc., 32 P.2d 1081, 1 Cal.2d 17—Union Terminal Warehouse Co. v. Roberti, 261 P. 324, 86 Cal.App. 636.
D.C.—City Bank v. Hamilton Nat. Bank of Washington, 108 F.2d 588, 71 App.D.C. 225.
Ga.—Nowell v. Mayor and Council of Monroe, 171 S.E. 136, 140, 177 Ga. 763, citing **Corpus Juris.**
Ill.—Gustin Bacon Mfg. Co. v. First Nat. Bank, 224 Ill.App. 457, affirmed 137 N.E. 793—Drumm Construction Co. v. Forbes, 224 Ill.App. 271, affirmed 137 N.E. 225, 305 Ill. 303, 26 A.L.R. 764—In re Wedelius' Estate, 266 Ill.App. 69.
Ind.—Peoples State Bank v. Kelly, 136 N.E. 30, 78 Ind.App. 418.
Iowa.—Elliott v. Des Moines Nat. Bank, 228 N.W. 274, 209 Iowa 1258.
Mo.—Delaney v. Light, 263 S.W. 813—U. S. v. Holt, App., 131 S.W.2d 59.
Nev.—Robertson v. C. O. D. Garage Co., 199 P. 356, 45 Nev. 160.
N.Y.—Countryman v. Breen, 271 N.Y.S. 744, 241 App.Div. 392, reversing 263 N.Y.S. 603, 147 Misc. 246, and affirmed 198 N.E. 536, 268 N.Y. 643—Buxbaum v. Assicurazioni Generali, 25 N.Y.S.2d 357, 175 Misc. 785.
Ohio.—Schafstall v. Eastbourne Garage, 30 N.E.2d 571, 65 Ohio App. 481.
Pa.—Fifth St. Building & Loan Ass'n of Philadelphia v. Kornfeld, 172 A. 703, 315 Pa. 406—First Nat. Bank v. Bangor Trust Co., 146 A. 595, 297 Pa. 115—Froio v. Armstrong, 120 A. 693, 277 Pa. 18.
S.C.—South Carolina Nat. Bank of Charleston v. Union County, 160 S.E. 733, 162 S.C. 356—Morris v. Carlisle, 122 S.E. 511, 128 S.C. 417.
Tex.—Phillips v. Citizens' Nat. Bank, Com.App., 15 S.W.2d 550, reversing Wilson v. Shear Co., Civ.App., 3 S.W.2d 849.
21 C.J. p 1172 note 74.

Partner's embezzlement

Allegation that lawyer was liable for partner's embezzlement because inducing confidence by holding himself out as partner stated no cause of action.—Burgess v. Purdy, 148 S.E. 48, 150 S.C. 300.

95. Tex.—Gillette v. Houston Nat. Bank, Civ.App., 139 S.W.2d 646, error dismissed, judgment correct.

96. Ga.—Citizens' & Southern Bank v. Union Warehouse & Compress Co., 122 S.E. 327, 157 Ga. 434, answers to certified questions conformed to, App., 122 S.E. 652, 32 Ga.App. 85.
Pa.—Egan v. United Gas Improvement Co., 178 A. 683, 319 Pa. 17.

Rule otherwise stated and explained

"Under a literal interpretation of it [rule of comparative innocence], if C introduced B to A, and B then defrauded A, C should be held liable for the resulting loss on the theory that his introduction of B to A 'made the fraud possible.' This principle has never been carried by the courts to . . . absurd lengths . . . though it is often oracularly quoted as though it should be taken literally and applied indiscriminately as the touchstone of responsibility wherever fraud appears. The rule can be invoked only with the qualification that the words 'enabling a person to cause the loss' must be understood to mean by some act, conduct, or default in the very transaction in question."—Fifth St. Building & Loan Ass'n of Philadelphia v. Kornfeld, 172 A. 703, 706, 315 Pa. 406.

97. Cal.—Miller v. Citizens' Nat. Trust & Savings Bank of Los Angeles, 36 P.2d 1088, 1 Cal.App.2d 470.
Idaho.—First Nat. Bank v. Barnes, 255 P. 907, 909, 44 Idaho 167, citing **Corpus Juris.**
Ind.—Peoples State Bank v. Kelly, 136 N.E. 30, 32, 78 Ind.App. 418, citing **Corpus Juris.**
Or.—Schumann v. Bank of California, National Ass'n, 233 P. 860, 114 Or. 336, 37 A.L.R. 1531.
Tenn.—State v. Broadway Nat. Bank, 282 S.W. 194, 198, 153 Tenn. 113, quoting **Corpus Juris.**
21 C.J. p 1172 note 76.

Theft of goods

An owner is not estopped from denying title of purchaser of stolen goods, although the theft occurred as a result of the owner's negligence.—Robinson v. Goldfield Merger Mines Co., 213 P. 103, 46 Nev. 291, affirming 206 P. 399, 46 Nev. 291.

Forgery

(1) It has been held that the rule, that of two innocent persons one who puts it in the power of another to do wrong must bear the loss, has no application in cases of forgery.
U.S.—Title Guarantee & Trust Co. v. McIlwain, C.C.A.Cal., 73 F.2d 754—Hartford Accident & Indemnity Co. v. Feilbach Co., D.C.Ohio, 39 F.Supp. 740—Townsend v. Union Trust Co., D.C.Pa., 2 F.Supp. 734.
Ga.—First Nat. Bank v. Harris, 104 S.E. 574, 25 Ga.App. 667.
Idaho.—First Nat. Bank v. Barnes, 255 P. 907, 44 Idaho 167.
Mich.—Graham v. Sinderman, 213 N.W. 200, 238 Mich. 210, 51 A.L.R. 1225.
Tenn.—State v. Broadway Nat. Bank, 282 S.W. 194, 153 Tenn. 113.
Tex.—National Surety Co. v. State Trust & Savings Bank, 29 S.W.2d 1027, 119 Tex. 353.
21 C.J. p 1172 note 76 [b].

(2) The rule has been held inapplicable where bank paid checks on which payee indorsements were forged and depositor was not negligent.—American Sash & Door Co. v. Commerce Trust Co., App., 25 S.W.2d 545, affirmed 56 S.W.2d 1034, 332 Mo. 98.

(3) It has been held, however, that payee, intrusting check unindorsed to agent for deposit as security, was precluded from asserting forgery as against agent's transferee for value.—Pyper v. Climer, 163 N.E. 640, 29 Ohio App. 486.

claim an estoppel where he has not altered his position to his detriment, or sustained loss by reason of the conduct of the party against whom the estoppel is claimed.[98]

§ 104. Clothing Another with Apparent Title or Authority

Where the true owner of property clothes another with apparent title or authority over it and a third person in good faith relies on such ostensible ownership, the true owner is estopped to assert title or power over the property or to deny the title of the ostensible owner.

As a general rule, where the true owner of property holds out another, or allows him to appear as the owner of or as having full power of disposition over the property, and innocent third persons are thus led into dealing with such apparent owner or person having such apparent power of disposition, they will be protected,[99] regardless of whether the true owner has been negligent in intrusting the property to the wrongdoer.[1] However indisputable were the intentions of the owner not to surrender his ownership, when he has surrendered the possession and exhibited the person who has that possession to the world as one having the power to dispose of the property, he will not be heard against an honest buyer who has acted on the confidence imprudently reposed by the owner.[2] In such cases the rights of such third persons do not depend on the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing as against them the existence of the title or power which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance.[3] The rule is espe-

(4) Maxim that where one of two innocent parties must suffer from act of third, he primarily causing loss must bear it, was held inapplicable to indorsees intrusting possession of note for collection to agent who wrongfully sold it, where there was no fault or negligence on its part.—Scott v. Wilkinson, 110 So. 34, 215 Ala. 235.

W.Va.—Barbee v. Amory, 146 S.E. 59, 106 W.Va. 507.

98. Cal.—Bank of Cottonwood v. Henriques, 266 P. 836, 91 Cal.App. 88.

Mo.—Missouri Pac. R. Co. v. Askew Saddlery Co., 256 S.W. 566, 215 Mo.App. 277.

N.Y.—Misener v. Femiano, 244 N.Y.S. 290, 137 Misc. 700.

Pa.—Fifth St. Building & Loan Ass'n of Philadelphia, v. Kornfeld, 172 A. 703, 315 Pa. 406.

S.D.—Crawford State Bank v. Danks, 243 N.W. 735, 60 S.D. 91.

Wash.—Woods v. Metropolitan Nat. Bank, 218 P. 266, 126 Wash. 346.

21 C.J. p 1172 note 75.

Reliance on representation

Rule regarding innocent persons suffering by another's act was held inapplicable, where one lending did not rely on representation that borrower owned land held in trust for father.—Bank of Cottonwood v. Henriques, 266 P. 836, 91 Cal.App. 88.

99. U.S.—New York Life Ins. Co. v. Rees, C.C.A.Mo., 19 F.2d 781—First Nat. Bank v. Mayor and City Council of Baltimore, D.C.Md., 27 F.Supp. 444, affirmed, C.C.A., 108 F.2d 600.

Ala.—Capital Nat. Bank v. Fourth Nat. Bank, 101 So. 424, 211 Ala. 627—Hanby v. Dominick, 90 So. 287, 206 Ala. 539.

Ariz.—Kearby v. Western States Securities Co., 250 P. 766, 31 Ariz. 104.

Cal.—Commercial Credit Co. v. Barney Motor Co., 76 P.2d 1181, 10 Cal.2d 718—Bank of America Nat. Trust & Savings Ass'n v. National Funding Corporation, App., 114 P.2d 49—Phelps v. American Mortg. Co., 104 P.2d 880, 40 Cal.App.2d 361—Schumann-Heink & Co. v. U. S. Nat. Bank, 291 P. 684, 108 Cal.App. 223, rehearing denied 292 P. 547, 108 Cal.App. 223—Carter v. Rowley, 211 P. 267, 59 Cal.App. 486.

Ill.—Lambert v. Dabbs, 23 N.E.2d 734, 302 Ill.App. 400.

Ind.—Indiana Fibre Products Co. v. Cyclone Mfg. Co., 143 N.E. 169, 81 Ind.App. 682.

Kan.—Luzadder v. Hale, 233 P. 1046, 1048, 118 Kan. 85, citing **Corpus Juris.**

Ky.—Whitt v. Kentucky Oil Producing Co., 3 S.W.2d 786, 787, 223 Ky. 348, citing **Corpus Juris.**

La.—Aleman Planting & Mfg. Co. v. Hines, 102 So. 815, 157 La. 625.

Mont.—Harvey E. Mack Co. v. Ryan, 261 P. 283, 80 Mont. 524.

Neb.—Oleson v. Albers, 266 N.W. 632, 130 Neb. 823, 105 A.L.R. 714.

N.J.—Hofstetter v. Bernett, 178 A. 88, 118 N.J.Eq. 143.

N.Y.—Fahlbusch v. Consumers Discount Corporation, 288 N.Y.S. 511, 159 Misc. 568.

Okl.—Harbaugh v. Walker, 62 P.2d 626, 178 Okl. 280—Barrett v. Buchanan, 213 P. 734, 95 Okl. 262.

Or.—Skyles v. Kincaid, 264 P. 432, 437, 124 Or. 443, quoting **Corpus Juris.**

Pa.—In re McGrath's Estate, 22 Erie Co.L.J. 290.

Tex.—Crockett v. Rogers, Civ.App., 137 S.W.2d 185, error dismissed, judgment correct—Gregory v. Newsom, Civ.App., 279 S.W. 912, 915, citing **Corpus Juris.**

Va.—Moore v. Hermitage Realty Inv. Corporation, 133 S.E. 881, 145 Va. 199.

Wash.—Fisher v. Thumlert, 76 P.2d 1018, 1021, 194 Wash. 78, quoting **Corpus Juris**—Bauer v. Commercial Credit Co., 300 P. 1049, 1053, 163 Wash. 210, quoting **Corpus Juris.**

21 C.J. p 1172 note 77.

Permitting sale or mortgage of property as implied misrepresentation see supra §§ 89–93.

From whom acquired

The principle that when owner of property gives to another the external indicia of the right of disposal, sale to innocent purchaser divests title, is not restricted to cases where innocent party has acquired the property from one who received it directly from the true owner as agent.—Morris v. Courts, 1 S.E.2d 687, 59 Ga.App. 666.

1. Tex.—Gillette v. Houston Nat. Bank, Civ.App., 139 S.W.2d 646, error dismissed, judgment correct.

2. La.—Norwalk Iron Works v. West, Mann.Unrep.Cas. 171.

3. Ariz.—Kearby v. Western States Securities Co., 250 P. 766, 31 Ariz. 104.

Cal.—Powers v. Pacific Diesel Engine Co., 274 P. 512, 206 Cal. 334, 73 A.L.R. 1398—Bank of America Nat. Trust & Savings Ass'n v. National Funding Corporation, App., 114 P.2d 49.

Ill.—Drain v. LaGrange State Bank, 135 N.E. 780, 303 Ill. 330.

Minn.—Gustafson v. Equitable Loan Ass'n, 243 N.W. 106, 186 Minn. 236.

Mont.—Harvey E. Mack Co. v. Ryan, 261 P. 283, 80 Mont. 524.

Okl.—Young v. Cole, 216 P. 429, 91 Okl. 113.

Or.—Vanderpool v. Burkitt, 234 P. 289, 113 Or. 656.

Tex.—Crockett v. Rogers, Civ.App.,

cially applicable where the owner has encouraged the parties to deal with each other.[4]

Nevertheless, the rule, although general in its terms, operates only to protect those who, in dealing with others, exercise ordinary caution and prudence,[5] and it is essential to its application that the conduct of the party against whom the estoppel is claimed should clearly amount to the clothing of another with title to, or authority over, the property in question.[6] Further, in accordance with general rules, no estoppel arises in favor of one whose acts were not influenced by such conduct,[7] or who has suffered no injury therefrom.[8]

§ 105. Real Property

The owner of real property who, with notice of his rights, clothes another with apparent title or authority over it may estop himself to deny such title or authority as against one who in ignorance of the true situation relies on such appearance to his prejudice.

The owner of real property, or of an interest therein, by clothing another with an apparent title thereto or with an apparent authority over it, may estop himself to deny such title or authority in the matter of dealing with the property,[9] and this prin-

137 S.W.2d 185, error dismissed, judgment correct.
21 C.J. p 1173 note 79.

4. Or.—Beno v. Norris, 151 P. 731, 77 Or. 506.
21 C.J. p 1173 note 80.

5. Cal.—Metropolitan Finance Corporation of California v. Morf, 109 P.2d 969, 42 Cal.App.2d 756—State Life Ins. Co. v. Williams, 81 P.2d 481, 27 Cal.App.2d 594.
Colo.—Rocky Mountain Fuel Co. v. George N. Sparling Coal Co., 143 P. 815, 26 Colo.App. 260.
Mich.—Andreae v. Wolgin, 241 N.W. 876, 878, 257 Mich. 572, quoting **Corpus Juris.**

6. U.S.—Nave-McCord Mercantile Co. v. Ranney, C.C.A.Mo., 29 F.2d 383—Hartford Accident & Indemnity Co. v. Feilbach Co., D.C.Ohio, 39 F.Supp. 740.
Cal.—Metropolitan Finance Corporation of California v. Morf, 109 P.2d 969, 42 Cal.App.2d 756.
Mich.—Andreae v. Wolgin, 241 N.W. 876, 878, 257 Mich. 572, quoting **Corpus Juris.**
Minn.—Hayes v. Midland Credit Co., 218 N.W. 106, 173 Minn. 554.
Mo.—Foster v. Modern Woodmen of America, App., 138 S.W.2d 18, 26, citing **Corpus Juris.**
21 C.J. p 1173 note 85.

Indicia of ownership

(1) Estoppel operates only against those who have voluntarily conferred on others the usual evidences or indicia of ownership of property, so that they have apparent authority to dispose of it.—Rocky Mountain Fuel Co. v. George N. Sparling Coal Co., 143 P. 815, 26 Colo.App. 260.

(2) Person does not have indicia of ownership unless document of title names him as owner or unless document is negotiable or quasi negotiable.—Ernst v. Searle, 22 P.2d 715, 218 Cal. 233.

7. Ind.—International Harvester Co. of America v. Holley, 18 N.E.2d 484, 106 Ind.App. 329.
Iowa.—Olmstead v. Lee, 200 N.W. 690.
La.—Ross v. Bartley, 1 La.App. 698.
Nev.—Beck v. Curti, 45 P.2d 601, 56 Nev. 72.
N.Y.—People v. Bank of North America, 75 N.Y. 547.
R.I.—General Wine Co. v. Del Nigro, 10 A.2d 678.
Wis.—National Bond & Investment Co. v. Murphy, 273 N.W. 57, 224 Wis. 663.

8. Ill.—Chicago Title & Trust Co. v. Central Trust Co. of Illinois, 144 N.E. 165, 312 Ill. 396, reversing 224 Ill.App. 474—People v. Michigan Avenue Trust Co., 233 Ill.App. 428.
Mo.—Wells v. Wells, 288 S.W. 950, 954, 221 Mo.App. 936, citing **Corpus Juris.**
21 C.J. p 1173 note 84.

9. U.S.—James v. Nelson, C.C.A. Alaska, 90 F.2d 910, certiorari denied 58 S.Ct. 41, 302 U.S. 721, 82 L.Ed. 556.
Ark.—Wade v. Texarkana Building & Loan Ass'n, 233 S.W. 937, 150 Ark. 99.
D.C.—Davison v. Morgan, 50 F.2d 311, 60 App.D.C. 161.
Ill.—Macaulay v. Dorian, 147 N.E. 793, 317 Ill. 126.
Ky.—Jones v. Kentucky Glycerine Co., 11 S.W.2d 713, 226 Ky. 676—Whitt v. Kentucky Oil Producing Co., 3 S.W.2d 786, 223 Ky. 348—Scottsville Oil Co. v. Dye Bros., 262 S.W. 615, 203 Ky. 496.
La.—Jackson v. Creswell, 86 So. 329, 147 La. 914—Hood v. Hood, 128 So. 546, 14 La.App. 424.
Mich.—Stevens v. Wakeman, 182 N.W. 73, 213 Mich. 559.
Miss.—Martin v. First Nat. Bank, 164 So. 896, 176 Miss. 338.
Neb.—Kamrath v. Gilbert, 227 N.W. 148, 119 Neb. 51.
Nev.—Keyworth v. Nevada Packard Mines Co., 186 P. 1110, 43 Nev. 428.
N.J.—Kaplan v. Heiles, 152 A. 855, 107 N.J.Eq. 443.
N.Y.—Ball v. Ball, 244 N.Y.S. 300, 137 Misc. 693.
N.C.—Sansom v. Warren, 2 S.E.2d 459, 215 N.C. 432.
Ohio—First & Citizens' Nat. Bank of Elizabeth City, N. C., v. Seip, 183 N.E. 448, 43 Ohio App. 440.
Or.—Skyles v. Kincaid, 264 P. 432, 124 Or. 443.
Tenn.—Wallace v. P'Pool, 4 Tenn. App. 30.
Tex.—Home Owners' Loan Corporation v. Netterville, Civ.App., 110 S.W.2d 628, reversed on other grounds 132 S.W.2d 93, 134 Tex. 30—Fidelity Lumber Co. v. Bendy, Civ.App., 245 S.W. 981.
Wash.—Woodman v. Fitzsimmons, 206 P. 963, 120 Wash. 136.
W.Va.—Crouch v. Crouse, 169 S.E. 473, 113 W.Va. 788.
21 C.J. p 1173 note 86.

Particular acts creating estoppel

(1) Party is estopped from disputing record title when, by his own negligence, he has held title out to world by means of public record as being good title.—Reasoner v. Fiskelli, 153 So. 98, 114 Fla. 102.

(2) Vendor must stand loss of bargain where signing blank contract of sale and enabling his agent to secure contract with purchaser—Meder v. Silver, 9 S.W.2d 1089, 225 Ky. 733.

(3) Where partnership permitted partner to take title to land in his individual name, and partner executed deeds as security for a personal debt, it was estopped to deny his title as against party taking deeds in good faith—Shoptaw v. Sewell, 81 S.W.2d 29, 190 Ark. 639.

(4) Owner by assisting in completion of new relation between himself and coowner, latter's sale to third person of coowner's interest and vesting legal title in third person, bound himself, heirs, and representatives by election.—Wollenberger v. Hoover, 179 N.E. 42, 346 Ill. 511.

(5) Bank which delayed recording mortgage and whose cashier assured materialmen, before performance of their contract, that property was clear and that bank would finance construction, was held estopped to assert priority by reason of recording its mortgage before filing of lien notices.—Ash v. Honig, C.C.A.N.Y., 62 F.2d 793, certiorari denied Suffern Nat. Bank & Trust Co. v. Ash, 53 S.Ct. 405, 288 U.S. 614, 77 L.Ed. 988.

ciple is especially applicable where he actively advises the party setting up the estoppel to deal with the person whom he has clothed with apparent title to or authority over the property.[10]

However, in order to create the estoppel, there should be either knowledge of his rights in the property on the part of the party estopped[11] or else something which fairly puts him on inquiry to learn the true facts,[12] and also knowledge of the dealings in which the title to or authority over the property is involved,[13] and the existence of circumstances which impose on him the duty to make known his rights to the party claiming the estoppel.[14] There can be no estoppel where the owner did not by words or conduct hold out another as having title.[15] Mere possession by a third person of an undelivered deed does not create an apparent authority to transfer title to another sufficient to estop the grantor of the deed from asserting title.[16] Further it is essential that the party claiming the estoppel should have been ignorant, or not chargeable with knowledge, of the rights of the party against whom the estoppel is claimed;[17] and there can be no estoppel in favor of persons who did not act in reliance on the acts or representations of the party whom it is sought to estop.[18] Ordinarily an estoppel cannot be based on an appearance of

(6) Owner of beneficial interest, not shown of record, may be estopped to assert it against bona fide judgment creditor or subsequent purchaser from judgment debtor when such creditor or purchaser at judicial sale under judgment may reasonably have acquired substantial rights on faith or by reason of record showing interest in judgment debtor.—Laganke v. Sutter, 187 So. 586, 137 Fla. 71—Little v. Saffer, 148 So. 573, 110 Fla. 230—First Nat. Bank v. Savarese, 134 So. 501, 101 Fla. 480.

(7) One inducing forgery of deed from his wife to another cannot question transfer of interest in land by latter.—Breckenridge v. Coffield, Tex.Civ.App., 283 S.W. 310

(8) Other acts see Richardson v. Beaber, 115 N.Y.S. 821, 62 Misc. 542—21 C.J. p 1173 note 86 [a]–[i].

Transfer to enable grantee to obtain credit

While the mere fact that one places title in another does not create an estoppel, an owner who transfers realty to another for purpose of enabling latter to obtain credit may be estopped from repudiating record title, as against creditors who have extended credit on faith of ownership of land.—Furer v. Real Estate Corporation, 154 A. 543, 108 N.J.Eq. 221.

10. Or.—Beno v. Norris, 151 P. 731, 77 Or. 506.
Tex.—Hillmer v. Asher, Com.App., 39 S.W.2d 1011, reversing, Civ. App., 19 S.W.2d 89.
21 C.J. p 1174 note 88.

11. Mo.—Henry Leidner Undertaking Co. v. Vogel, App., 251 S.W. 428.
21 C.J. p 1174 note 89.

12. S.D.—Hohn v. Bidwell, 130 N.W. 837, 27 S.D. 249.

13. Mass.—Liberty Trust Co. v. Hayes, 138 N.E. 582, 244 Mass. 251.
21 C.J. p 1174 note 91.

14. Ind.—First Nat. Bank of Seymour v. Rust, 185 N.E. 127, 131, 205 Ind. 638, citing Corpus Juris.
21 C.J. p 1174 note 92

Taking title in another's name to facilitate resale

That a person took purchased land in the name of his agent for the reason that he could more readily sell the property, or sell it at a better price than if in his own name, was not in itself unlawful or fraudulent so as to estop him from claiming title.—Biles v. Walker, 83 So. 411, 121 Miss. 98, motion sustained 83 So. 753.

Delay in recording a deed or failure to assert ownership promptly will not, of itself, divest one of title, and statutes of registration and limitation are intended to give protection against such negligence or indifference of the landowner.—Simonds v. Stanolind Oil & Gas Co., 114 S.W.2d 226, 134 Tex. 332, reversing 103 S.W.2d 784, rehearing denied 136 S.W.2d 207, 134 Tex. 332.

15. Cal.—Gioscio v. Lautenschlager, 73 P.2d 1230, 23 Cal.App.2d 616.
Mo.—Handlan v. Wycoff, 240 S.W. 458, 293 Mo. 682.
Okl.—Home-Stake Royalty Corporation v. McClish, 103 P.2d 72.

Deed in escrow

Owner by placing deed to prospective purchaser in escrow and loaning abstract to purchaser, for use in obtaining loan from mortgage company for payment of purchase price, did not thereby clothe purchaser with apparent authority to mortgage property.—Perkins v. Wilkins, 64 P.2d 1232, 179 Okl. 197.

16. Ala.—Hollis v. Harris, 11 So. 377, 96 Ala. 288.

Deed as quasi negotiable instrument

Deed to real property is not quasi negotiable instrument so as to bind the grantor by ostensible authority of person in possession to effect a transfer.
U.S.—Title Guarantee & Trust Co. v. McIlwain, C.C.A.Cal., 73 F.2d 754.
Cal.—Ernst v. Searle, 22 P.2d 715, 218 Cal. 233.

17. Cal.—State Life Ins. Co. v Williams, 81 P.2d 481, 27 Cal.App.2d 594.
Ga.—Stonecipher v. Kear, 63 S.E. 215, 131 Ga. 688, 127 Am.S.R. 248.
Miss.—Biles v. Walker, 83 So. 411, 121 Miss. 98, motion sustained 83 So. 753.
Tex.—Alexander Co. v. First Nat. Bank, Civ.App., 119 S.W.2d 718, error dismissed—Holland v. Commonwealth Finance Corporation, Civ.App., 118 S.W.2d 364—Pure Oil Co. v. Coe, Civ.App., 37 S.W.2d 1048

Retention of record title

Possession by son with claim of title, although father is record owner, and continues to pay taxes, does not authorize extension of credit to son, estopping father from reclaiming land.—Cooke v. Fenner & Beane, 108 So. 370, 214 Ala. 558.

18. Ariz.—Chuk v. Katich, 231 P. 923, 27 Ariz. 182.
Conn.—Basak v. Damutz, 135 A. 453, 105 Conn. 378.
Ga.—Hadden v. Smith, 189 S.E. 848, 183 Ga. 772.
Mo.—Henry Leidner Undertaking Co. v. Vogel, App., 251 S.W. 428.
Tex.—Alexander Co. v. First Nat. Bank, Civ.App., 119 S.W.2d 718, error dismissed.
21 C.J. pp 1174, 1175 notes 94–96.

Reliance on owner's acknowledgment as tenant

Party was not estopped from claiming title to land because he had acknowledged himself as tenant of record owner of land, and his wife had contracted to purchase it, where plaintiff did not have knowledge of such acts at time of his purchase and was not induced thereby to purchase the land.—Franklin v. Smith, Tex.Civ.App., 265 S.W. 715.

Judgment creditor

Grantee's failure to record deed until after rendition of compromise judgment did not estop her to claim the land as against judgment creditor, as creditor was not prejudiced, and did not extend credit on strength

ownership accomplished through the instrumentality of a criminal act.[19]

Apparent title in husband. Where the apparent title to, or authority over, real property belonging to a wife is by her permitted to be in her husband, and third persons on the strength of such apparent title or authority acquire rights therein, she will be estopped to deny such title or authority.[20] Especially is this so where she not only acquiesced in but actively assisted in making a sale of the property for her husband's benefit.[21]

Nevertheless, to create an estoppel against the wife it is essential that she should have had knowledge of her title to the property in question[22] and of the facts out of which it is claimed the estoppel arose.[23] It is also essential that the party claiming the estoppel should have been ignorant of her rights or that there should have been nothing to bind him with notice thereof,[24] and that his acts which resulted in prejudice to him were committed in reliance on the wife's conduct.[25] An exception to the rule has also been asserted in the case of judgment creditors of the husband.[26]

§ 106. Personal Property

a. In general
b. Limitations of rule
c. Motor vehicles

a. In General

As a general rule, the owner of personal property may, by clothing another with apparent title to or authority over it, be estopped to deny such title or authority.

The owner of personal property may, by clothing another with an apparent title to or authority over it, estop himself to deny such title or authority.[27]

of debtor's ownership.—Grant v. Cherry, 201 N.W. 588, 199 Iowa 164.

19. Va.—Brooks v. Clintsman, 98 S.E. 742.
21 C.J. p 1175 note 97.

20. Mass.—Hutchins v. Mead, 108 N.E. 67, 220 Mass. 348.
Pa.—South Side Trust Co. v. Fitzharris, 86 A. 694, 239 Pa. 205.
R.I.—Thornley Supply Co. v. Madigan, 154 A. 277, 51 R.I. 310.
21 C.J. p 1175 note 99.

21. Ky.—Overcast v. Lawrence, 131 S.W. 1029, 141 Ky. 25.

22. Tenn.—Battle v. Claiborne, 180 S.W. 584, 133 Tenn. 286.

23. Ind.—First Nat. Bank of Seymour v. Rust, 185 N.E. 127, 131, 205 Ind. 638, citing **Corpus Juris.**
Or.—Lane v. Myers, 141 P. 1022, 70 Or. 376, Ann.Cas.1915D 649.
21 C.J. p 1175 note 3.

24. Va.—Wood v. Lester, 101 S.E. 52, 126 Va. 169.
21 C.J. p 1175 note 4.

Lack of statutory confirmation
Where a wife deeded to husband without statutory confirmation, and husband mortgaged to bank to secure his indebtedness, bank could not defeat wife's suit to quiet title as against it.—MacDougall v. National Bank of Columbus, 104 S.E. 630, 150 Ga. 579.

25. Or.—Lane v. Myers, 141 P. 1022, 70 Or. 376, Ann.Cas.1915D 649.
21 C.J. p 1175 note 5.

26. Pa.—Hay v. Martin, 14 A. 333—Feig v. Meyers, 102 Pa. 10.
21 C.J. p 1176 note 6.

27. U.S.—First Nat. Bank v. Mayor and City Council of Baltimore, C.C.A.Md., 108 F.2d 600, affirming, D.C., 27 F.Supp. 444—New York Life Ins. Co. v. Rees, C.C.A.Mo., 19 F.2d 781.
Ariz.—Kearby v. Western States Securities Co., 250 P. 766, 31 Ariz. 104.
Cal.—Hendricksen v. State Subsidiary, Limited, 45 P.2d 190, 3 Cal.2d 459—Washington Lumber & Millwork Co. v. McGuire, 1 P.2d 437, 213 Cal. 13—Phelps v. American Mortg. Co., 104 P.2d 880, 40 Cal.App.2d 361—Salomon v. Ellis, 94 P.2d 393, 34 Cal.App.2d 672—Barthelmess v. Cavalier, 38 P.2d 484, 2 Cal.App.2d 477—Peninsula Burner & Oil Co. v. McCaw, 3 P.2d 40, 116 Cal.App. 569—Schumann-Heink & Co. v. U. S. Nat. Bank, 291 P. 684, 108 Cal.App. 223, rehearing denied 292 P. 547, 108 Cal.App. 223—Wendling Lumber Co. v. Glenwood Lumber Co., 202 P. 929, 54 Cal.App. 691—E. Bastheim Co. v. Schultz, 188 P. 841, 46 Cal.App. 24.
Colo.—Johnson v. Elliott, 231 P. 675, 76 Colo. 358.
Conn.—Stathis v. Pappas, 126 A. 692, 101 Conn. 514—Abbadessa v. Puglisi, 124 A. 838, 101 Conn. 1.
Ill.—Drain v. La Grange State Bank, 135 N.E. 780, 303 Ill. 330—George E. Hart, Inc., v. Board of Education of City of Chicago, 278 Ill.App. 132—National Bond & Investment Co. v. Shirra, 255 Ill.App. 415—Shapera v. Fargo, 240 Ill.App. 145—Biossat v. Trainor, 225 Ill.App. 271.
Ind.—Barker v. Wood, 161 N.E. 298, 87 Ind.App. 245.
Iowa.—Matalone v. Iowa-Des Moines Nat. Bank & Trust Co., 285 N.W. 648, 226 Iowa 1031.
Kan.—Citizens' Nat. Bank of Chickasha v. Lehrling, 215 P. 828, 113 Kan. 545—Failey v. Flory, 210 P. 346, 112 Kan. 221.
La.—C. V. Hill & Co. v. Interstate Electric Co. of Shreveport, App., 196 So. 396.
Me.—Hunnewell v. Mitchell, 128 A. 190, 124 Me. 293.
Mass.—Loring v. Goodhue, 156 N.E. 704, 259 Mass. 495—International Trust Co. v. Webster Nat. Bank, 154 N.E. 330, 258 Mass. 17, 49 A.L.R. 267—North Shore Blue Book v. Burlen, 152 N.E. 710, 256 Mass. 431.
Mich.—Rossman v. Hutchinson, 286 N.W. 835, 289 Mich. 577.
Minn.—Gustafson v. Equitable Loan Ass'n, 243 N.W. 106, 186 Minn. 236.
Miss.—Gidden Motor Co. v. Johnston, 124 So. 367, 155 Miss. 328.
Mo.—Anthony v. Midwest Live Stock Commission Co., 260 S.W. 94—Goddard Grocer Co. v. Freedman, App., 127 S.W.2d 759.
Mont.—Harvey E. Mack Co. v. Ryan, 261 P. 283, 80 Mont. 524.
Neb.—Greeley County v. First Nat. Bank, 254 N.W. 502, 126 Neb. 872, followed in Cavett v. First Nat. Bank, 254 N.W. 689, 127 Neb. 117.
N.Y.—Baumann v. Citizens Trust Co. of Binghamton, 289 N.Y.S. 606, 248 App.Div. 9, reargument granted 290 N.Y.S. 266, 248 App.Div. 840, modified on other grounds on reargument 293 N.Y.S. 45, 249 App.Div. 369, affirmed 12 N.E.2d 608, 276 N.Y. 623—Hier v. Wightman, 188 N.Y.S. 274, 197 App.Div. 214, affirmed 135 N.E. 954, 233 N.Y. 646—General Motors Acceptance Corporation v. Baker, 291 N.Y.S. 1015, 161 Misc. 238—Fahlbusch v. Consumers Discount Corporation, 288 N.Y.S. 511, 159 Misc. 568—Gorman v. La Bella, 262 N.Y.S. 345, 146 Misc. 408.
N.C.—American Exchange Nat. Bank v. Winder, 150 S.E. 489, 198 N.C. 18.
Okl.—Young v. Cole, 216 P. 429, 91 Okl. 113.

This is especially true where he actively participates in or encourages a sale of the property,[28] as where he leaves goods with a dealer and they are placed with similar goods in a public showroom for the apparent purpose of sale.[29]

Application of rule. The principle just stated has been applied in varying circumstances to different kinds of personal property,[30] and it has been held immaterial whether choses in action are negotiable or nonnegotiable as respects the creation of an estoppel as a result of the placing of apparent title in another.[31]

The principle has been applied to bills of lading,[32] bonds,[33] certificates of deposit,[34] checks,[35] county warrants,[36] duebills,[37] insurance policies,[38] and notes and mortgages.[39] Likewise, the principle

Or.—Vanderpool v. Burkitt, 234 P. 289, 113 Or. 656.
Pa.—In re McLaughlin's Assigned Estate, 124 A. 741, 280 Pa. 597—Leitch v. Sanford Motor Truck Co., 123 A. 658, 279 Pa. 160—Hoeveler-Stutz Co. v. Cleveland Motor Sales Co., 8 Pa.Dist. & Co. 615, affirmed 92 Pa.Super. 425.
Tenn.—Hedges v. Burke, 247 S.W. 91, 147 Tenn. 247.
Tex.—Hunnicutt v. Lee, Com.App., 38 S.W.2d 572, 575, citing **Corpus Juris**, and affirming, Civ.App., 23 S.W.2d 479—Lang v. Harwood, Civ.App., 145 S.W.2d 945—Sackenreuther v. Winston, Civ.App., 137 S.W.2d 93, error refused—First State Bank of Agua Dulce v. First Nat. Bank of Robstown, Civ.App., 282 S.W. 846—Gregory v. Newsom, Civ.App., 279 S.W. 912, 915, citing **Corpus Juris**—Chambers v. Consolidated Garage Co., Civ.App., 210 S.W. 565, affirmed Consolidated Garage Co. v. Chambers, 231 S.W. 1072, 111 Tex. 293.
Wash.—Willett v. Central Yakima Ranches Co., 219 P. 20, 126 Wash. 587.
21 C.J. p 1176 note 7.

From whom acquired

The statutory principle that when owner of property gives to another the external indicia of the right of disposal, sale to innocent purchaser divests title, is not restricted to cases where innocent party has acquired the property from one who received it directly from the true owner as agent.—Morris v. Courts, 1 S.E.2d 687, 59 Ga.App. 666.

28. Ark.—Smith v. Kirkpatrick Finance Co., 28 S.W.2d 1050, 181 Ark. 1031—Commercial Credit Co. v. Hardin, 300 S.W. 434, 175 Ark. 811.
21 C.J. p 1176 note 8.

29. U.S.—Associates Discount Corporation v. Hardesty, D.C., 122 F. 2d 18.
Cal.—Western States Acceptance Corporation v. Bank of Italy, 285 P. 340, 104 Cal.App. 19—Pacific Finance Corporation v. Hendley, 284 P. 736, 103 Cal.App. 335, hearing denied and modified on other grounds, Sup., 285 P. 1048.
D.C.—General Credit v. Universal Credit Co., 99 F.2d 115, 69 App. D.C. 80.
Ill.—L. B. Motors, Inc., v. Prichard, 25 N.E.2d 129, 303 Ill.App. 318.
Ind.—Indiana Investment & Securities Co. v. Whisman, 138 N.E. 512, 85 Ind.App. 109.
Md.—Winakur v. Sapourn, 145 A. 342, 156 Md. 662.
R.I.—Beck v. New Bedford Acceptance Corporation, 3 A.2d 55.
Va.—Boice v. Finance & Guaranty Corporation, 102 S.E. 591, 127 Va. 563, 10 A.L.R. 654.

30. **Particular instances**

(1) One lending securities to mislead bank examiner and public as to bank's condition was estopped to reclaim them as against persons rightfully relying on apparent title of bank.
Fla.—Ashley v. Rowe, 133 So. 551, 101 Fla. 110.
Mich.—Rossman v. Hutchinson, 286 N.W. 835, 289 Mich. 577.

(2) Seller who turned over documents clothing impostor with apparent title, whereby latter induced carrier to make delivery was held estopped to deny as against carrier that impostor was owner.—Chicago, M., St. P. & P. R. Co. v. Flanders, C.C.A.Iowa, 56 F.2d 114.

(3) Creditor who, by virtue of his official position with corporation and also with bank, caused dividend money due debtor from corporation to be placed to debtor's credit on bank's books, so that he might attach the credit, was estopped, in suit for wrongful attachment, from claiming that no such credit in fact existed.—Miller v. Smith, C.C.A.Mo., 1 F. 2d 292.

(4) Other instances see Holdenville First Nat. Bank v. Kissare, 98 P. 433, 22 Okl. 545, 132 Am.S.R. 644—21 C.J. p 1176 note 9 [a]–[d].

31. U.S.—New York Life Ins. Co. v. Brown, C.C.A.S.C., 99 F.2d 199, reversing, D.C., Brown v. New York Life Ins. Co., 22 F.Supp. 82, certiorari denied 59 S.Ct. 487, 306 U.S. 638, 83 L.Ed. 1039.

Applying law of New York

U.S.—First Nat. Bank v. Mayor and City Council of Baltimore, D.C. Md., 27 F.Supp. 444, affirmed, C.C.A., 108 F.2d 600.

Effect of statute

A statute providing in effect that the assignee of a nonnegotiable chose in action shall take it subject to equities existing between the original parties does not affect the rights of those dealing in good faith with an assignee clothed with the indicia of absolute ownership.—New York Life Ins. Co. v. Brown, C.C.A.S.C., 99 F.2d 199, reversing, D.C., Brown v. New York Life Ins. Co., 22 F.Supp. 82, and certiorari denied 59 S.Ct. 487, 306 U.S. 638, 83 L.Ed. 1039.

32. Tex.—First State Bank of Agua Dulce v. First Nat. Bank of Robstown, Civ.App., 282 S.W. 846.

33. Cal.—Grange v. Judah Boas Co., 213 P. 712, 60 Cal.App. 484.
Fla.—Ashley v. Rowe, 133 So. 551, 101 Fla. 110.
Nev.—Strassburg v. Montgomery, 47 P.2d 859, 56 Nev. 183.
Wash.—Rosenkranz v. Guaranty Trust Co., 295 P. 487, 160 Wash. 548.
21 C.J. p 1178 note 16.

34. Md.—Patapsco Nat. Bank v. Meads, 102 A. 993, 131 Md. 573.
21 C.J. p 1177 note 12.

35. Tex.—Johnson v. Puckett, Civ. App., 265 S.W. 713.
21 C.J. p 1177 note 11.

36. Ga.—Lilly v. Citizens' Bank & Trust Co., 162 S.E. 639, 641, 44 Ga.App. 653, citing **Corpus Juris**.
Okl.—Harbaugh v. Walker, 62 P.2d 626, 178 Okl. 280.
21 C.J. p 1177 note 13.

37. Pa.—Rorabaugh v. Schrubb, 25 Pa.Co. 573.

38. Wash.—Schade v. Western Union Life Ins. Co., 215 P. 521, 125 Wash. 200.

39. Cal.—Phelps v. American Mortg. Co., App., 104 P.2d 880—Kaku v. Giffen, 57 P.2d 1001, 13 Cal.App. 2d 683—Stoner v. Security Trust Co., 190 P. 500, 47 Cal.App. 216.
Ill.—Douthit v. Swiney, 141 N.E. 535, 310 Ill. 180.
Minn.—Merchants' Nat. Bank of Crookston, Minn., v. Giller, 203 N.W. 227, 162 Minn. 391.
Miss.—Wilkinson v. Love, 115 So. 707, 149 Miss. 523.
Mo.—Tower Grove Bank & Trust Co. v. Duing, 144 S.W.2d 69—Barnes v. Ganss, App., 72 S.W.2d 884.
N.C.—Brown v. Payne, 160 S.E. 353, 201 N.C. 398.
Okl.—Morris v. Packard Dallas Co., 86 P.2d 779, 184 Okl. 277.
Or.—Astoria Nat. Bank v. State Bank of Portland, 222 P. 588, 109 Or. 699

has been applied to shares of stock.[40]

Apparent title in husband. A wife who knowingly permits her husband to deal with her personal property as his own will be estopped to assert her ownership against persons who have dealt with the husband in reliance on his apparent ownership or authority.[41] However, it is essential that the party claiming the estoppel should have acted in good faith in reliance on the strength of the husband's apparent ownership or authority,[42] and that he was prejudiced by reason thereof.[43]

b. Limitations of Rule

An owner of personal property will be estopped to deny another's ostensible title or authority over it only where, in addition to conferring possession, his acts or conduct are such as to mislead others as to the true ownership, and where the person claiming the estoppel has acted in good faith, without knowledge of the facts, and has suffered loss in dealing with the apparent owner.

In order that the real owner of personal property may be estopped to assert his title against one who has dealt with the apparent owner on the faith of his apparent ownership of, or authority over, it, something more is required than mere possession on the part of the apparent owner,[44] since merely

—U. S. Nat. Bank of Portland v. Holton, 195 P. 823, 99 Or. 419.
Tex.—Shaw v. Borchers, Com.App., 46 S.W.2d 967, reversing, Civ.App., 31 S.W.2d 329.
Wash.—Kiley v. Bugge, 5 P.2d 1038, 165 Wash. 677—First Nat. Bank v. Hessell, 234 P. 662, 133 Wash. 643.
21 C.J. p 1177 note 14.

Particular acts creating estoppel

(1) Surety, investing principal with apparent authority to deliver note, is estopped to deny obligation to innocent holder.—Brown's Adm'r v. Wilson, 1 S.W.2d 767, 222 Ky. 454.

(2) Where mortgagee, through conduct, caused mortgagor to believe that real estate dealer was mortgagee's agent for receiving payments, and dealer appropriated part of payments to his own use, mortgagee, whose negligence made it possible for dealer to commit wrong, must suffer loss.—Millious v. Thompson, 20 P.2d 1060, 94 Mont. 110.

(3) Where owner clothed coöwner with apparent title to certain notes and coöwner's creditors without knowledge of facts dealt with coöwner on faith of his ownership of the notes, failure of creditors to comply with negotiable instruments act in accepting assignment of notes from the coöwner to secure their claim did not affect their right to claim that owner was estopped from asserting superior interest in the notes.—Crockett v. Rogers, Tex.Civ. App., 137 S.W.2d 185, error dismissed, judgment correct.

(4) Other acts see Lyons v. Benney, 79 A. 250, 230 Pa. 117, 34 L.R. A.,N.S., 105—21 C.J. p 1177 note 14 [a].

Note traded by third person

Purchaser for value of nonnegotiable note indorsed in blank by holder named on its face was not put on notice of any equity that might exist in favor of holder merely because note was offered in trade by third person.—Morris v. Packard Dallas Co., 86 P.2d 779, 184 Okl. 277.

40. U.S.—First Nat. Bank v. Mayor and City Council of Baltimore, C.C.A.Md., 108 F.2d 600, affirming, D.C., 27 F.Supp. 444.
Ala.—Capital Nat. Bank v. Fourth Nat. Bank, 101 So. 424, 211 Ala. 627.
Cal.—Powers v. Pacific Diesel Engine Co., 274 P. 512, 206 Cal. 334, 73 A.L.R. 1398—Delannoy v. Quetu, 239 P. 71, 73 Cal.App. 627—Mancini v. Setaro, 232 P. 495, 69 Cal. App. 748—Spellacy v. Young, 186 P. 368, 44 Cal.App. 174.
Ga.—Morris v. Courts, 1 S.E.2d 687, 59 Ga.App. 666.
Ill.—U. S. Gypsum Co. v. Faroll, 15 N.E.2d 888, 296 Ill.App. 47.
Ind.—Meier v. Continental Nat. Bank of Indianapolis, 143 N.E. 377, 83 Ind.App. 109.
Mich.—Bollstrom v. Duplex Power Car Co., 175 N.W. 492, 208 Mich. 15.
N.H.—Howison v. Mechanics Sav. Bank, 183 A. 697, 88 N.H. 31.
Tenn.—Heymann v. Hamilton Nat. Bank, 266 S.W. 1043, 151 Tenn. 21.
Tex.—Gillette v. Houston Nat. Bank, Civ.App., 139 S.W.2d 646, error dismissed, judgment correct—Sackenreuther v. Winston, Civ.App., 137 S.W.2d 93, error refused.
Utah.—Adams v. Silver Shield Min. & Mill. Co., 21 P.2d 886, 82 Utah 586.
Wash.—Zoratti v. West Coast Finance Co., 297 P. 1078, 162 Wash. 97.
21 C.J. p 1177 note 10.

41. Colo.—Schraeder v. Mitchell, 215 P. 147, 73 Colo. 320.
Ill.—See Arthur Lehman & Co. v. Slat, 208 Ill.App. 39.
N.J.—Haines v. Equitable Trust Co., 109 A. 506, 94 N.J.Law 184.
Wyo.—Sorenson v. Howell, 241 P. 1068, 1071, 34 Wyo. 119, citing **Corpus Juris.**
21 C.J. p 1179 note 25.

42. Va.—Wood v. Lester, 101 S.E. 52, 126 Va. 169.
21 C.J. p 1179 note 26.

43. Iowa.—Jones v. Brandt, 10 N.W. 854, 13 N.W. 310, 59 Iowa 332.
21 C.J. p 1179 note 27.

44. U.S.—Hartford Accident & Indemnity Co. v. Feilbach Co., D.C. Ohio, 39 F.Supp. 740—First Nat. Bank v. Mayor and City Council of Baltimore, D.C.Md., 27 F.Supp 444, affirmed, C.C.A., 108 F.2d 600—In re John J. Kingsley, Inc., D.C.Mass., 8 F.Supp. 303, affirmed, C.C.A., Nathanson v. Worcester Bank & Trust Co., 73 F.2d 889.
Cal.—Metropolitan Finance Corporation of California v. Morf, App., 109 P.2d 969—Bice v. Harold L. Arnold, Inc., 243 P. 468, 471, 75 Cal.App. 629, quoting **Corpus Juris**—Pacific Acceptance Corporation v. Bank of Italy, Fresno Branch, 209 P. 1024, 59 Cal.App. 76.
Colo.—First State Bank of Wiggins v. Simmons, 13 P.2d 259, 91 Colo 160—Clay, Robinson & Co. v. Martinez, 218 P. 903, 74 Colo. 10.
Ga.—Darby v. Parrish, 156 S.E. 462, 42 Ga.App. 492.
Iowa.—Swift v. Clarinda Trust & Savings Bank, 177 N.W. 519.
Me.—Cadwallader v. Clifton R. Shaw, Inc., 142 A. 580, 127 Me. 172.
Mass.—Geguzis v. Brockton Standard Shoe Co., 197 N.E. 51, 291 Mass. 368.
Minn.—Hayes v. Midland Credit Co., 218 N.W. 106, 173 Minn. 554.
Mont.—Dever v. Girson, 243 P. 812, 813, 75 Mont. 412, citing **Corpus Juris.**
N.M.—Bank of Commerce of Taiban v. Duckworth, 204 P. 58, 27 N.M. 627—Roberts v. Lubin, 187 P. 551, 25 N.M. 658.
N.Y.—Utica Trust & Deposit Co. v. Decker, 155 N.E. 665, 244 N.Y. 340, reversing 215 N.Y.S. 669, 217 App. Div. 137—Lindner v. Winston, 270 N.Y.S. 829, 151 Misc. 499.
N.C.—American Exchange Nat. Bank v. Winder, 150 S.E. 489, 198 N.C. 18.
Okl.—Martin Coal & Coke Co. v. Brewer, 90 P.2d 653, 185 Okl. 169—Osborn v. Moasco, Inc., 73 P.2d 113, 181 Okl. 140—Shannon v. Nicoma Park Development Co., 54 P. 2d 143, 176 Okl. 53—Yonkman v. Harvey, 271 P. 839, 133 Okl. 252—Trimble v. Smith, 225 P. 364, 98 Okl. 250.

intrusting a third person with possession does not constitute holding him out as owner.[45] While possession may be prima facie evidence of ownership, it is as consistent with other theories, that is, that the person in possession is a bailee or wrongdoer.[46] The owner must go farther, and do, or omit to do, some act of a nature such as to mislead persons as to the true possession of the title.[47] There must be a fraudulent or deceptive purpose in view, or implied from the special circumstances of the case on the part of the true owner,[48] or at least there must be some act or conduct on the part of the real owner whereby the party selling, or otherwise dealing with the property, is clothed with the apparent ownership or authority to sell, and which the real owner will not be heard to deny or question to the prejudice of an innocent third person dealing on the faith of such appearances.[49]

Wash.—Eatonville State Bank v. Marshall, 17 P.2d 14, 170 Wash. 503.

21 C J. p 1178 note 17.

Bailee or trespasser

Where the possession of a seller or pledgor of personalty is that of a bailee or trespasser, the rule that, where one of two innocent persons must suffer, the loss must fall on him whose act or omission made the loss possible does not operate in favor of the pledgee or vendee, who stands in no better position than a person who innocently purchased or acquired stolen property, the owner being entitled to reclaim it where found.—Leitch v. Sanford Motor Truck Co., 123 A. 658, 279 Pa. 160.

45. Colo.—Clay, Robinson & Co. v. Martinez, 218 P. 903, 74 Colo. 10.
Ga.—Darby v. Parrish, 156 S.E. 462, 42 Ga.App. 492.
Mass.—Rogers v. Dutton, 65 N.E. 56, 182 Mass. 187.
N.J.—Leithoff v. Dennis, 98 A. 242, 86 N.J.Eq. 316.
N.M.—Encino State Bank v. Tenorio, 206 P. 698, 28 N.M. 65.
Okl.—Pierce v. Jones, 78 P.2d 677, 182 Okl. 515—Hughes v. Winchell, 33 P.2d 787, 168 Okl. 463.
Tex.—Dunagan v. Griffin, Civ.App., 151 S.W.2d 250, error dismissed—Gregory v. Newsom, Civ.App., 279 S.W. 912, 915, citing **Corpus Juris.**

21 C.J. p 1178 note 17.

Retention by seller

The mere fact that buyer leaves personal property in possession of seller is not evidence of seller's right to sell property and does not give seller external indicia of right of its disposition.—Guthrie v. Hendley, 193 S.E. 80, 56 Ga.App. 438.

Possession by dealer

(1) Although article is allowed to remain in possession of mortgagor for apparent purpose of resale, mortgagee is not estopped to assert title as against bona fide purchaser from mortgagor, if mortgagor is without authority to sell.—General Credit Corporation v. Rohde, 187 A. 676, 122 Conn. 100.

(2) That owner intrusts chattels with dealer in similar merchandise and permits their exhibition for purpose of obtaining offers of purchase has been held insufficient to work estoppel to claim title.—Utica Trust & Deposit Co. v. Decker, 155 N.E. 665, 244 N.Y. 340, reversing 215 N.Y.S. 669, 217 App Div. 137.

Unauthorized declarations of ownership by bailee do not estop the owner from asserting his title.

Okl.—Trimble v. Smith, 225 P. 364, 98 Okl. 250.
Pa.—Leitch v Sanford Motor Truck Co., 123 A. 658, 279 Pa. 160—Hayden v. McMillan, 79 Pa.Super. 1.

46. Mich.—Starr Piano Co. v. Morrison, 124 N.W. 562, 159 Mich. 583

47. U.S.—Hartford Accident & Indemnity Co v. Feilbach Co., D.C. Ohio, 39 F.Supp. 740.
Colo.—Rocky Mountain Fuel Co. v. George N. Sparkling Coal Co., 143 P. 815, 26 Colo.App. 260.
Ill.—Standard Computing Scale Co. v. Dombrowski, 257 Ill.App. 409.
Mass.—Massachusetts Lubricant Corporation v. Socony-Vacuum Oil Co., 25 N.E.2d 719, 305 Mass. 269.
Mont.—Cheadle v. Bardwell, 26 P.2d 336, 339, 95 Mont. 299, quoting **Corpus Juris.**
N.Y.—Fahlbusch v. Consumers Discount Corporation, 288 N.Y.S. 511, 159 Misc. 568.
Okl.—Shannon v. Nicoma Park Development Co., 54 P.2d 143, 176 Okl. 53.
Tenn.—Young v. Harris-Cortner Co., 268 S.W. 125, 152 Tenn. 15, 54 A.L.R. 516, rehearing denied 268 S.W. 1120, 152 Tenn. 34.
Tex.—M. H. Thomas & Co. v. Hawthorne, Civ.App., 245 S.W. 966—Dorsey v. Kemble, Civ.App., 224 S.W. 217.

48. Iowa.—Bihlmeier v. Budzine, 205 N.W. 763, 201 Iowa 398.
S.C.—Noland v. Law, 170 S.E. 439, 170 S.C. 345.

21 C.J. p 1178 note 21.

49. U.S.—First Nat. Bank v. Mayor and City Council of Baltimore, C.C.A.Md., 108 F.2d 600, affirming, D.C., 27 F.Supp. 444—In re Ideal Upholstering Co., D.C.Mass., 28 F.2d 791—Townsend v. Union Trust Co. of Donora, D.C.Pa., 2 F.Supp. 734.
Cal.—Woodsend v. Chatom, 214 P. 965, 191 Cal. 72—Schumann-Heink & Co. v. U. S. Nat. Bank, 291 P. 684, 108 Cal.App. 223, rehearing denied 292 P. 547, 108 Cal.App. 223—Pacific Acceptance Corporation v. Bank of Italy, Fresno Branch, 209 P. 1024, 59 Cal.App. 76.
Ga.—W. A. Patterson Co. v. People's Loan & Savings Co., 123 S.E. 704, 158 Ga. 503, answer to certified questions conformed to 124 S.E. 79, 32 Ga.App. 470.
La.—Holloway v. A. J. Ingersoll Co., 133 So. 819, 16 La.App. 494—J. W. Furrh Mercantile Co. v. Jeter, 132 So. 452, 16 La.App. 40.
Mass.—Place v. Chaffee, 146 N.E. 722, 251 Mass. 508.
Minn.—Gustafson v. Equitable Loan Ass'n, 243 N.W. 106, 186 Minn. 236—Tousley v. First Nat. Bank, 193 N.W. 38, 155 Minn. 162.
Mo.—Anthony v. Midwest Live Stock Commission Co., 260 S.W. 94.
Nev.—Beck v. Curti, 45 P.2d 601, 56 Nev. 72.
N.M.—Skarda v. First Mortg. Loan Co. of Clovis, 214 P. 761, 28 N.M. 536.
N.Y.—General Motors Acceptance Corporation v. Baker, 291 N.Y.S. 1015, 161 Misc. 238—Rosen Coat Co. v. Empire Carriers Corporation, 13 N.Y.S.2d 305.

21 C.J. p 1179 note 22.

Acts or conduct not creating estoppel

(1) One delivering goods to warehouse for processing and storage, separate from those of other shippers, was not estopped to claim title against innocent purchaser from warehouse.—Kendall Produce Co. v. Terminal Warehouse & Transfer Co., 145 A. 511, 295 Pa. 450.

(2) That employer continuously left cattle in employee's possession did not vest in employee indicia of title sufficient to protect one dealing with him as owner.—Irick v. Elkins, 28 P.2d 657, 38 N.M. 113.

(3) Transferee of shares of stock in bank did not clothe another with apparent ownership by permitting him to vote stock and collect dividends where he had no knowledge of the latter's assertion of title.—Mitchell v. Newton County Bank, 282 S.W. 729, 220 Mo.App. 223, followed in Mitchell v. Newton County Bank, App., 282 S.W. 733.

(4) Signing in blank of nonnegotiable instrument by original holder is not sufficient to estop holder from thereafter asserting his title to in-

The rule as to estoppel of the party conferring ostensible ownership or authority on another protects only those who in dealing with the apparent owner act in good faith with ordinary caution and prudence, without actual or constructive knowledge of the true owner's rights.[50] The person alleging the estoppel must have acted and parted with value on the faith of such apparent ownership or authority so that he will be the loser if the appearances to which he trusted are not real.[51] It follows that an owner of personal property who permits another to appear as owner of it is not estopped to assert ownership as against judgment creditors of the latter, since a judgment creditor can never become an innocent purchaser of property sold under his writ of execution but takes only the title of his judgment debtor, and, if the judgment debtor has no title, he takes none.[52]

A seller of personalty taking a forged check in payment for goods is not estopped to claim title as against a transferee from the purchaser.[53]

c. Motor Vehicles

The real owner of an automobile who has so acted as to clothe another with apparent ownership or authority to sell it, as in the case of a car left in a dealer's possession, is generally precluded from denying such ownership or authority as against one who has acquired the property in good faith for a consideration.

If the real owner of an automobile has so acted as to clothe another with apparent ownership or authority to sell it, he will be precluded from denying, as against those who act in good faith on that apparent authority and acquire the property for a consideration, that he had given such authority.[54]

strument.—Noland v. Law, 170 S.E 439, 170 S.C. 345.

Bonds

The doctrine of acquiring title by estoppel should be applied to registered bonds with much more caution than with respect to stock certificates, and a mere assignment in blank of instrument transferable only on books of issuing corporation is insufficient indicia of ownership to carry good title to transferee.—First Nat. Bank v. Mayor and City Council of Baltimore, D.C.Md., 27 F.Supp. 444, affirmed, C.C.A., 108 F.2d 600.

50. U.S.—First Nat. Bank v. Mayor and City Council of Baltimore, D. C.Md., 27 F Supp. 444, affirmed, C. C.A., 108 F.2d 600.

Cal.—Richlin v. Union Bank & Trust Co., 240 P. 782, 197 Cal. 296—Barthelmess v. Cavalier, 38 P.2d 484. 2 Cal App.2d 477—James Mills Orchard Co. v. Bank of American Nat. Trust & Savings Ass'n, 30 P. 2d 626, 137 Cal.App. 299, hearing denied 32 P.2d 342, 137 Cal.App. 299—Pacific Finance Corporation v. Hendley, 284 P. 736, 103 Cal.App. 335, hearing denied and modified on other grounds, Sup., 285 P. 1048—Valentine v. G. S. Donaldson Inv. Co., 260 P. 305, 86 Cal App. 142.

Ga.—Carmichael v. Texas Co., 184 S. E. 397, 52 Ga.App. 751.

Ind.—Franklin Bank of St. Louis, Mo., v. Boeckeler Lumber Co., 147 N.E. 722, 83 Ind.App. 94.

Iowa.—Hubbard v. Robert P. Wallace Co., 208 N.W. 730, 201 Iowa 1143, 45 A.L.R. 1065.

La.—C. V. Hill & Co. v. Interstate Electric Co. of Shreveport, App., 196 So. 396.

Me.—Cadwallader v. Clifton R. Shaw, Inc., 142 A. 580, 127 Me. 172.

Mass.—Essex County Acceptance Corporation v. Pierce-Arrow Sales Co. of Boston, 192 N.E. 604, 288 Mass. 270, 95 A.L.R. 1314.

N.Y.—General Motors Acceptance Corporation v. Baker, 291 N.Y.S. 1015, 161 Misc. 238.

Bailee

Statute making possession of chattels in some circumstances conclusive evidence that absolute property was in possessor was not available to party with whom property was deposited for safekeeping.—O'Brien v. Waggoner, 96 S.W.2d 170, 20 Tenn. App. 145.

51. Cal.—Metropolitan Finance Corporation of California v. Morf, App., 109 P.2d 969.

Ill.—Raleigh Mfg. Co. v. Great Western Smelting & Refining Co., 227 Ill.App. 221.

Iowa.—People's Sav. Bank v. McCarthy, 217 N.W. 453, 206 Iowa 28.

Me.—Cadwallader v. Clifton R. Shaw, Inc., 142 A. 580, 127 Me. 172.

Minn.—Bolton-Swanby Co. v. Owens, 275 N.W. 855, 858, 201 Minn. 162, citing **Corpus Juris.**

Mo.—Ava Hardware Co. v. Christensen, App., 122 S.W.2d 92.

N.Y.—Commercial Credit Corporation v. Northern Westchester Bank, 177 N.E. 12, 256 N.Y. 482, reversing 246 N.Y.S. 888, 231 App.Div. 817, which affirmed 240 N.Y.S. 5, 136 Misc. 325—General Motors Acceptance Corporation v. Baker, 291 N.Y.S. 1015, 161 Misc. 238.

N.C.—American Exchange Nat. Bank v. Winder, 150 S.E. 489, 198 N.C. 18.

Pa.—Taylor v. Commercial Building & Loan Ass'n of Chester, 182 A. 57, 120 Pa.Super. 78.

S.D.—Iowa Guarantee Mortg. Corporation v. General Motors Acceptance Corporation, 250 N.W. 669, 62 S.D. 18.

Tex.—Charles M. Stieff, Inc., v. City of San Antonio, 111 S.W.2d 1086, 130 Tex. 594, reversing City of San Antonio v. Charles M Stieff, Inc., Civ.App., 83 S.W.2d 357—Republic Building & Loan Ass'n v. Simpson, Civ.App., 77 S.W.2d 1101, error dismissed.

21 C.J. p 1179 note 23.

Knowledge and reliance

Indicia of ownership allegedly creating estoppel must be known to the party sought to be estopped and relied on by the party setting up the estoppel.—Encino State Bank v. Tenorio, 206 P. 698, 28 N.M. 65.

Party held bona fide purchaser entitled to invoke estoppel.—L. B. Motors, Inc., v. Prichard, 25 N.E.2d 129, 303 Ill.App. 318—U. S. Gypsum Co. v. Faroll, 15 N.E.2d 888, 296 Ill.App. 47.

52. Ind.—International Harvester Co. of America v. Holley, 18 N.E. 2d 484, 106 Ind.App. 329.

Iowa.—Hess v. Masters, 186 N.W. 6, 192 Iowa 1063.

N.Y.—In re Cooke's Estate, 264 N. Y.S. 336, 344, 147 Misc. 528, citing **Corpus Juris.**

Tex.—R. Piel Gin Co. v. Independent Farmers' Gin Co. of Perry, Civ. App., 257 S.W. 630.

Wash.—Hartford v. Stout, 172 P. 1168, 102 Wash 241.

Wyo.—Sorenson v. Howell, 241 P. 1068, 1071, 34 Wyo. 119, citing **Corpus Juris.**

53. Tenn.—Cowan v. Thompson, App., 152 S.W.2d 1036.

54. Ark.—Denton v. Berryville Auto Service Co., 227 S.W. 608, 147 Ark. 411.

Cal.—Weber & Beckett v. Le Clair, 5 P.2d 449, 118 Cal.App. 423—California Standard Finance Corporation v. Riverside Finance Co., 295 P. 555, 111 Cal.App. 151—W. P. Herbert Co. v. Powell, 266 P. 620, 90 Cal.App. 782—Rapp v. Fred W. Hauger Motors Co., 246 P. 1067, 77 Cal.App. 417.

Kan.—Luzader v. Hale, 233 P. 1046, 118 Kan. 85.

Mo.—Hannibal Inv. Co. v. Schmidt, App., 113 S.W.2d 1048.

Thus, where the owner, or one who has advanced the money to pay for the car, permits it to be kept in the salesroom of a dealer, who holds himself out to the world as owner thereof, and exhibits it for sale, he thereby clothes the dealer with such apparent ownership and authority to sell that he is estopped to assert his own superior title, as against a purchaser from the dealer in good faith and for full value in the regular course of business,[55] or as against one to whom the dealer assigns a mortgage or contract of conditional sale of the car to an innocent purchaser,[56] and this rule prevails notwithstanding an agreement by the dealer to deliver the car to no one except the owner or his order.[57] Similarly, the assignee of a contract of conditional sale of a car, made by a dealer, must see that the car after its recapture is not left under the control of the dealer, to be offered to the public, and where the car remains in the dealer's possession, the assignee is estopped to claim title as

N.Y.—Armstrong v. Boomansour, 228 N.Y.S. 722, 223 App.Div. 511, motion granted Armstrong v. Boomasour, 168 N.E. 439, 251 N.Y. 590, motion granted 170 N.E 134, 252 N.Y. 539. Affirmed 170 N.E. 155, 252 N.Y. 590—Fahlbusch v. Consumers Discount Corporation, 288 N.Y.S. 511, 159 Misc. 568.

Okl.—Young v. Cole, 216 P. 429, 91 Okl. 113.

Or.—Vanderpool v. Burkitt, 234 P. 289, 113 Or. 656.

Pa.—Truck, Tractor & Forwarding Co. v. Baker, 126 A. 239, 281 Pa. 145—Colonial Finance Corporation v. Hagaman & Gove, 81 Pa.Super. 439.

Tex.—Gossett v. Williams, Civ.App., 288 S.W. 594.

42 C.J. p 751 note 53.

Particular acts creating estoppel

(1) That the owner of a car exhibited it as the one to be given the winner of a newspaper subscription contest is sufficient to estop him from claiming title thereto on the ground that it had not been sold to the newspaper, as against the winner of the contest.—Jones v. Burks, 161 S.W. 177, 110 Ark. 108.

(2) One furnishing the money for the purchase of a car, who permits title to be taken in the name of another and possession to be retained by him, is estopped from denying such other's authority to mortgage the automobile to a third person.

Kan.—Luzadder v. Hale, 233 P. 1046, 118 Kan. 85.

Wash.—Hartford v. Stout, 172 P. 1168, 102 Wash. 241.

(3) Where the conditional seller of a car, for the purpose of changing the terms of payment, procures the buyer to execute a new conditional sales agreement, and surrenders the former agreement and the promissory note given therewith, marked paid, he is precluded from asserting title to the car as against an innocent purchaser for value from the conditional buyer, on account of having clothed the buyer with the possession and apparent ownership.—Vanderpool v. Burkitt, 234 P. 289, 113 Or. 656.

55. Ariz.—Kearby v. Western States Securities Co., 250 P. 766, 31 Ariz. 104.

Ark.—Commercial Credit Co. v. Hardin, 300 S.W. 434, 175 Ark. 811.

Cal.—Commercial Credit Co. v. Barney Motor Co., 76 P.2d 1181, 10 Cal.2d 718—California Standard Finance Corporation v. Riverside Finance Co., 295 P. 555, 111 Cal. App. 151—Western States Acceptance Corporation v. Bank of Italy, 285 P. 340, 104 Cal.App. 19.

Fla.—Russell v. Donaldson, 195 So. 198, 142 Fla. 394—Glass v. Continental Guaranty Corporation, 88 So. 876, 81 Fla. 687, 25 A.L.R. 312.

Ill.—L. B. Motors, Inc., v. Prichard, 25 N.E.2d 129, 303 Ill.App. 318—Mason v. Shelton, 11 N.E.2d 224, 292 Ill.App. 640—Illinois Bond & Investment Co. v. Gardner, 249 Ill. App. 337.

Ind.—American Aggregates Corporation v. Wente, 190 N.E. 552, 100 Ind.App. 59.

Kan.—Missouri Finance Corporation v. McCowan, 196 P. 614, 108 Kan. 622.

Md.—Winakur v. Sapourn, 145 A. 342, 156 Md. 662.

Mich.—Wright v. Dwight, 177 N.W. 209, 209 Mich. 678.

Mont.—Rasmussen v. O. E. Lee & Co., 66 P.2d 119, 104 Mont. 278.

N.Y.—Clark v. Flynn, 199 N.Y.S. 583, 120 Misc. 474.

Ohio.—Springfield Loan Co. v. National Guarantee & Finance Co., 27 N.E.2d 257, 63 Ohio App. 508—Edwards v. Automobile Finance Co. of Pennsylvania, 25 N.E.2d 851, 63 Ohio App. 193—Colonial Finance Co. v. McCrate, 19 N.E.2d 527, 60 Ohio App. 68, appeal dismissed 18 N.E.2d 269, 134 Ohio St. 523.

Okl.—Universal Credit Co. v. Reily, 42 P.2d 516, 171 Okl. 286.

Pa.—Atlas Automobile Finance Corporation v. Greenberg, 39 Pa.Dist. & Co. 539.

Tex.—Scruggs v. Crockett Automobile Co., Civ.App., 41 S.W.2d 509, error dismissed.

Utah.—State v. Casperson, 262 P. 294, 71 Utah 68—Jones v. Commercial Investment Trust, 228 P. 896, 64 Utah 151.

Wash.—General Motors Acceptance Corporation v. Arthaud Land Co., 204 P. 194, 118 Wash. 593.

42 C.J. p 751 note 56.

Used car dealer

Owner who leaves his car with a used car dealer for the purpose of finding a purchaser clothes him with the indicia of authority to sell the car, according to the custom of trade, so that good title passes to an innocent buyer.—Rapp v. Fred W Hauger Motors Co., 246 P. 1067, 77 Cal.App. 417—Carter v. Rowley, 211 P. 267, 59 Cal App. 486—42 C.J. p 752 notes 61, 62.

Regular course of business

(1) A bill of sale executed by the dealer to the buyer is admissible as tending to show that the car was purchased in the ordinary course of business.—Finance Corp. v. Jones, 116 A. 277, 97 N.J.Law 106.

(2) Where the owner and the dealer had transactions extending over a considerable period, the purchaser is entitled to show their usual course of dealing both before and after the delivery to the dealer of the car in question, in order to show the dealer's authority to sell in the course of business.—Guaranty Security Corp. v. Eastern SS. Co., 134 N.E. 364, 241 Mass. 120.

(3) Buyer may urge estoppel even though he did not see automobile in dealer's showroom, but bought automobile after a demonstration, in good faith and in regular course of dealer's business.—Beck v. New Bedford Acceptance Corporation, R.I., 3 A.2d 55.

56. Cal.—Commercial Credit Co. v Barney Motor Co., 76 P.2d 1181, 10 Cal.2d 718—Tharp v. San Joaquin Valley Securities Co., 66 P.2d 230, 20 Cal.App.2d 20.

D.C.—General Credit v. Universal Credit Co., 99 F.2d 115, 69 App.D.C. 80.

Mo.—M. & M. Securities Co. v. General Motors Acceptance Corporation, 79 S.W.2d 521, 230 Mo.App. 900.

Pa.—Atlas Automobile Finance Corporation v. Greenberg, 39 Pa.Dist. & Co. 539.

42 C.J. p 751 note 58.

57. Kan.—Missouri Finance Corp. v. McCowan, 196 P. 614, 108 Kan. 622.

against an innocent purchaser without actual notice of the prior sale, even though the contract was properly recorded.[58]

On the other hand, it has been broadly held that merely allowing another to have possession of an automobile is not enough to estop the owner from recovering his property from a third person who has purchased it in good faith from the possessor.[59] An estoppel may not be urged by one who has actual or constructive knowledge of the true ownership,[60] as in the case of a buyer who has not exercised ordinary caution and prudence;[61] nor can an estoppel be raised by one who has not relied and acted on the appearance of ownership.[62] The fact that the real owner permits another to take and hold title and exercise apparent ownership does not estop him to claim title as between himself and the nominal owner,[63] nor as against judgment creditors of the latter,[64] although there is authority to the contrary as to the rights of judgment creditors.[65] It has been held that a dealer's apparent authority to sell a car in his possession, estopping the real owner from denying such authority, does not extend to a pledge or mortgage of the car,[66] at least where the real owner did nothing to mislead the pledgee or mortgagee as to the conditions under which the dealer held possession,[67] but there

58. Cal.—Parke v. Franciscus, 228 P. 435, 194 Cal. 284—Moss v. Bowman, 3 P.2d 377, 116 Cal.App. 720—State Finance Co. v. Isaacson, 260 P. 580, 86 Cal.App. 113—Stukey v. Mihara, 234 P. 919, 71 Cal.App. 355—Chucovich v. San Francisco Securities Corporation, 214 P. 263, 60 Cal.App. 700.
Ill.—First Galesburg Nat. Bank & Trust Co. v. Reyelts, 29 N.E.2d 119, 306 Ill.App. 499.
Mass.—Jeffery v. M. W. Leahy & Co., 155 N.E. 638, 258 Mass. 548.
N.J.—Pollitt v. General Credit Corporation, 176 A. 607, 114 N.J.Law 432.
Va.—Gump Inv. Co. v. Jackson, 218 S.E. 506, 142 Va. 190, 4 A.L.R. 82.

59. Cal.—California Standard Finance Corporation v. Riverside Finance Co., 295 P. 555, 111 Cal.App. 151—Bice v. Harold L. Arnold, Inc., 243 P. 468, 75 Cal.App. 629—Pacific Acceptance Corporation v. Bank of Italy, Fresno Branch, 209 P. 1024, 59 Cal.App. 76.
La.—Overland Texarkana Co. v. Bickley, 94 So. 138, 152 La. 622.
Mass.—Royle v. Worcester Buick Co., 137 N.E. 531, 243 Mass. 143.
Mont.—Dever v. Girson, 243 P. 812, 75 Mont. 412.
Wash.—Eatonville State Bank v. Marshall, 17 P.2d 14, 170 Wash. 503.
42 C.J. p 752 note 72.

Estoppel held not created

(1) The delivery of an automobile to one to be repaired does not thereby clothe the bailee with the indicia of ownership so as to estop bailor as against buyer or mortgagee from bailee.
N.M.—Roberts v. Lubin, 187 P. 551, 25 N.M. 658.
Ohio.—Schafstall v. Eastbour Garage, 30 N.E.2d 571, 65 Ohio App. 481.

(2) The fact that a dealer having possession of a truck under a bailment lease put it on exhibition in a salesroom, where he was engaged in buying and selling such vehicles, would not operate to convert the bailment into a conditional sale, or estop the owner from asserting his title.—Leitch v. Sanford Motor Truck Co., 123 A. 658, 279 Pa. 160.

(3) A chattel mortgagee who had no knowledge that automobile was to be resold in the usual retail way by a retail dealer who represented that the automobile was to be for dealer's own personal use, is not estopped as against a mortgagee of a purchaser from such dealer.—Springfield Loan Co. v. National Guarantee & Finance Co., 27 N.E.2d 257, 63 Ohio App. 508.

(4) Owner who intrusted automobile and blank certificate to third person was held not estopped to assert recovery against one purchasing from third person on forged certificate.—Mitchell v. Porter, 11 P.2d 58, 123 Cal.App. 329.

Exhibition to obtain offers

It has been held that giving possession of automobile to dealer, to exhibit for purpose of obtaining offers of purchase, does not of itself constitute estoppel to claim title.—Utica Trust & Deposit Co. v. Decker, 155 N.E. 665, 244 N.Y. 340, reversing 215 N.Y.S. 669, 217 App. Div. 137.

60. Ohio.—Cincinnati Finance Co. v. First Discount Corporation, 17 N.E. 2d 383, 59 Ohio App. 131.

Sale at wholesale

Sale by retail automobile dealer, at wholesale, to another retail dealer, does not come within protection of rule that innocent purchaser from dealer is protected as against owner or mortgagee of automobile.—Colonial Finance Co. v. McCrate, 19 N.E. 2d 527, 60 Ohio App 68, appeal dismissed 18 N.E.2d 269, 134 Ohio St. 523.

Receipted bill

The mortgagee of an automobile, under a duly recorded mortgage given to secure money borrowed to pay the purchase price of the car, is not estopped from claiming it in the hands of an innocent purchaser for value by the fact that the original seller gave the mortgagor a bill receipted as paid in full, which was delivered by him to his subsequent buyer with the car.—Finance Service Corp. v. Kelly, Mo.App., 235 S.W. 146.

61. R.I.—Rhode Island Hospital Trust Co. v. Devonshire Financial Service Corporation, 167 A. 134, 53 R.I. 443.

62. Cal.—True v. Crane, 7 P.2d 357, 119 Cal.App. 653.
Ky.—Stewart v. Cincinnati Cadillac Co., 275 S.W. 25, 210 Ky. 104.
Minn.—Bolton-Swanby Co. v. Owens, 275 N.W. 855, 201 Minn. 162.

License in borrower's name

That owner permitted license to be issued in name of one to whom he lent the car did not create estoppel, where neither defendant nor person who sold automobile to him knew that license had been issued in borrower's name.—Forrest v. Benson, 233 S.W. 916, 150 Ark. 89.

63. Wash.—Hartford v. Stout, 172 P. 1168, 102 Wash. 241.

64. Ind.—International Harvester Co. of America v. Holley, 18 N.E.2d 484, 106 Ind.App. 329.
Wash.—Lloyd v. MacCallum-Donahoe Co., 219 P. 849, 127 Wash. 180.
42 C.J. p 752 note 70.

65. Colo.—Zuckerman v. Guthner, 96 P 2d 4.

66. Cal.—Pacific Finance Corporation v. Hendley, 7 P.2d 391, 119 Cal.App. 697.
Fla.—Tropical State Bank v. Sunshine Motor Co., 188 So. 595, 137 Fla. 703.
Ind.—Federal Bldg. Co. v. Ford Motor Co., 199 N.E. 163, 101 Ind. App. 286.
Mo.—Globe Securities Co. v. Gardner Motor Co., 85 S.W.2d 561, 337 Mo. 177.
Ohio.—National Guarantee & Finance Co. v. Pfaff Motor Car Co., 176 N.E. 678, 124 Ohio St. 34.

67. Cal.—Metropolitan Finance Cor-

is authority to the contrary.[68]

Where the effect of a statute is to render void a sale not made in compliance with its terms, no title by estoppel can override the express requirements of the statute.[69]

VI. EQUITABLE ESTOPPEL; QUASI ESTOPPEL

§ 107. In General

Quasi estoppel has its basis in election, ratification, affirmance, acquiescence, or acceptance of benefits, and the principle precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken by him.

The term "quasi estoppel" has been applied to certain legal bars which are in some respects analogous to estoppel in pais and which have the same practical operation as an estoppel in pais, but which nevertheless differ from that form of estoppel in essential particulars.[70]

The doctrine classified as quasi estoppel has its basis in election, ratification, affirmance, acquiescence, or acceptance of benefits,[71] and the principle precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken by him.[72] The doctrine applies where it would be unconscionable to allow a person to maintain a position inconsistent with one in which he acquiesced, or of which he accepted a benefit.[73]

§ 108. Prior Acts, Claims, or Conduct Inconsistent with Right Asserted in General

a. Statement of rule
b. Elements, extent, and limits of rule

a. Statement of Rule

As a general rule, where a person has, with knowledge of the facts, acted or conducted himself in a particular manner, or asserted a particular claim, title, or right, he cannot afterward assume a position inconsistent therewith to the prejudice of one who has acted in reliance on such conduct.

The doctrine of equitable estoppel precludes a person from maintaining a position or attitude inconsistent with another position or attitude which is sought to be maintained at the same time or which was asserted at a previous time,[74] and, as a general

poration of California v. Morf, App., 109 P.2d 969.

68. Wash.—Bauer v. Commercial Credit Co., 300 P. 1049, 163 Wash. 210.

69. N.J.—Security Credit Corp. v. Whiting Motor Co., 118 A. 695, 98 N.J.Law 45.

70. Mo.—Headlee v. Cain, App., 250 S.W. 611.
21 C.J. p 1202 note 17.

71. Mo.—Headlee v. Cain, supra.

72. U.S.—Daube v. U. S., Ct.Cl., 5 F.Supp. 769.
Cal.—McDaniels v. General Ins. Co. of America, 36 P.2d 829, 1 Cal.App. 2d 454.
Neb.—Brisbin v. E. L. Oliver Lodge No. 335 of Brotherhood of Railway Clerks, 279 N.W. 277, 134 Neb. 517.
21 C.J. p 1202 note 19.

73. Ky.—Louisville Joint Stock Land Bank v. McMurry, 128 S.W. 2d 596, 278 Ky. 238—Young v. Venters, 18 S.W.2d 277, 229 Ky. 806.
Neb.—Brisbin v. E. I. Oliver Lodge No. 335 of Brotherhood of Railway Clerks, 279 N.W. 277, 134 Neb. 517.

74. U.S.—Wheelock v. Commissioner of Internal Revenue, C.C.A. Tex., 77 F.2d 474—First Nat. Bank v. Glens Falls Ins. Co., of Glens Falls, N. Y., C.C.A.S.C., 27 F.2d 64—Hercules Powder Co. v. Rich, C.C.A.Ark., 3 F.2d 12, certiorari denied 45 S.Ct. 511, 268 U.S. 692, 69 L.Ed. 1160—Heydemann v. Westinghouse Electric & Manufacturing Co., D.C.N.Y., 32 F.Supp. 471—New York Life Ins. Co. v. Howard, D.C.Ky., 2 F.Supp. 89.
Ala.—Reed v. State ex rel. Davis, 174 So. 498, 234 Ala. 306.
Conn.—Gagner v. Petrauskas, 152 A. 145, 112 Conn. 307.
Fla.—Lyle v. Hunter, 136 So. 633, 102 Fla. 972.
Ga.—Cairo Banking Co. v Henderson, 137 S.E. 19, 163 Ga. 629—Elberton & E. R. Co. v. Campbell, 167 S.E. 215, 46 Ga.App. 203.
Idaho.—McIntire v. Butterfield Live Stock Co., 261 P. 237, 45 Idaho 206.
Ill.—Frank v. Frank, 137 N.E. 151, 305 Ill. 181—Louis K. Liggett Co. v. Strum, 249 Ill.App. 263—Bowles Live Stock Commission Co. v. Chicago Live Stock Exchange, 243 Ill. App. 71.
Kan.—In re Shoup's Will, 285 P. 554, 130 Kan. 53—Antrim v. International Life Ins. Co., 275 P. 1084, 128 Kan 65.
Mich.—Bunnell v. Ward, 217 N.W. 68, 241 Mich 404.
Mo.—State ex rel. Johnson v. Weinberg, App., 151 S.W 2d 134—Roberson v. Brotherhood of Locomotive Firemen and Enginemen, App., 114 S.W.2d 136, 233 Mo.App. 159, certiorari quashed State ex rel. Brotherhood of Locomotive Firemen and Enginemen v. Shain, 123 S.W.2d 1, 343 Mo. 666—Sparks v. Gus. V Brecht Butchers' Supply Co., App., 225 S.W. 1022.
Mont.—R. M. Cobban Realty Co. v. Chicago, M. & St. P. Ry. Co. of Montana, 190 P. 988, 58 Mont. 188
Neb.—State v. Smith, 281 N.W. 851, 135 Neb. 423.
N.Y.—In re Hickmott's Estate, 4 N.Y.S.2d 457, 166 Misc. 536, affirmed 10 N.Y.S.2d 918, 256 App Div. 1047.
N.D.—Hafey v. Hafey, 222 N.W. 256, 57 N.D. 381.
Pa.—Love v. Clayton, 134 A. 422, 287 Pa. 205.

Admission of delivery of deed
Grantors of trust deed constructively admit delivery by seeking to have deed released.—Chicago Title & Trust Co. v. Wallace, 250 Ill.App 293.

Ascribing different character to instrument
Owner of equity of redemption cannot treat instrument relating to property as trust mortgage for one purpose and ascribe different character to it for another.—Giblin v Detroit Trust Co., 258 N.W. 635, 270 Mich. 293.

Claiming benefits under repudiated contract
A party may not disregard the terms of a contract and then insist that the other party is bound by such terms.
S.D.—Schmidt v. Potter, 196 N.W. 292, 47 S.D. 77.
Tex.—De Beque v. Ligon, Civ.App..

rule, where a person has, with knowledge of the facts, acted or conducted himself in a particular manner, or asserted a particular claim, title, or right, he cannot afterward assume a position inconsistent with such act, claim, or conduct to the prejudice of another who has acted in reliance on such conduct or representations.[75] The doctrine of estoppel requires of a party consistency of conduct,

286 S.W. 749, reversed on other grounds, Com.App., 292 S.W. 157.
Va.—Clark v. Reynolds, 100 S.E. 468, 125 Va. 626.

Construction of contract

City placing contemporary interpretation on construction contract could not abandon such interpretation to contractors' prejudice.—Jackson v. City of McKeesport, 157 A. 472, 305 Pa. 198.

Inconsistent positions as to effect of law

One may not claim the benefits of a law and also assert that the law is not applicable to him.—Kandelin v. Lee Moor Contracting Co., 24 P.2d 731, 37 N.M. 479.

Recognition of lawfulness of fence

An owner joining his fence to a partition fence is estopped, in an action under a statute requiring an adjoining owner, who has joined his fence to that of plaintiff, to contribute to cost of plaintiff's fence or detach his fence therefrom, from claiming that plaintiff's fence was not a lawful fence.—Burchett v. Leslie, 216 S.W. 850, 186 Ky. 361.

Secrecy of manufacturing process

Where secret process is learned from employee violating bonds of secrecy, defendant, obtaining such knowledge, is estopped to question that process is secret.—Tower Mfg. Co. v. Monsanto Chemical Works, D.C.N.Y., 20 F.2d 386.

75. U.S.—Holly Hill Citrus Growers' Ass'n v. Holly Hill Fruit Products, C.C.A.Fla., 75 F.2d 13—Walbridge-Aldinger Co. v. Rudd, C.C.A.Okl., 26 F.2d 636—Hunn v. Lewis, C.C.A.Iowa, 25 F.2d 271, certiorari denied 49 S.Ct. 30, 278 U.S. 631, 73 L.Ed. 549—Monte Vista Farmers' Co-op. Produce Co. v. Bemis Bro. Bag Co., C.C.A.Colo., 294 F. 8.

Ala.—Hinds v. Federal Land Bank of New Orleans, 186 So. 153, 237 Ala. 218—Dillon v. Hamilton, 160 So. 708, 712, 230 Ala. 310, citing **Corpus Juris**—St. Louis & S. F. Ry. Co. v. Georgia, F. & A. Ry. Co., 104 So. 33, 213 Ala. 108.

Ariz.—Butler v. Quinn, 14 P.2d 250, 40 Ariz. 446—First Nat. Bank v. Standard Accident Ins. Co., 297 P. 864, 38 Ariz. 77.

Ark.—Fuquay v. Desha Bank & Trust Co., 243 S.W. 849, 154 Ark. 303—Fromholtz v. Trumble, 215 S.W. 623, 140 Ark. 282.

Cal.—Morrison v. Mutual Life Ins. Co. of New York, 103 P.2d 963, superseding, App., 92 P.2d 1024—Judson Mfg. Co. v. S. L. Jones & Co., 206 P. 1016, 57 Cal.App. 176

Colo.—Fitzwater v. Norcross, 37 P.2d 522, 524, 95 Colo. 527, citing **Corpus Juris.**

Fla.—Fairlie v. Scott, 102 So. 247, 88 Fla. 229.

Ga.—Hopkins v. Martin, 112 S.E. 117, 153 Ga. 238—City Nat. Bank of San Saba, Tex., v. Bob's Candy & Pecan Co., 191 S.E. 877, 56 Ga.App. 37.

Ill.—Steele v. Rosehill Cemetery Co., 19 N.E.2d 189, 370 Ill. 405, modifying 14 N.E.2d 241, 294 Ill.App. 568, appeal dismissed Rosehill Cemetery Co. v. Steele, 59 S.Ct. 836, 307 U.S. 611, 83 L.Ed. 1494—Lincoln Park Arms Bldg. Corporation, for Use of Schroeder v. U. S. Fidelity & Guaranty Co., 5 N.E.2d 773, 287 Ill.App. 530—Springfield Marine Bank v. Marbold, 264 Ill.App. 446.

Iowa.—Hartford Coal Co. v. Helsing, 263 N.W. 269, 274, 220 Iowa 1010, quoting **Corpus Juris**—North Side State Bank of Rock Springs, Wyo., v. Schreiber, 258 N.W. 690, 219 Iowa 380—Monona County v. Gray, 206 N.W. 26, 200 Iowa 1133—Burns Bros. Co. v. Hasty, 188 N.W. 139.

Kan.—Yeoman v. Morris, 11 P.2d 683, 135 Kan. 566—Westerman v. Corder, 119 P. 868, 86 Kan. 239, 39 L.R.A.,N.S., 500, Ann.Cas.1913C 60.

Ky.—Pettit's Adm'r v. Goetz, 87 S.W.2d 99, 261 Ky. 107—Bynum v. Bailey, 265 S.W. 1110, 205 Ky. 384—Farmer v. Gipson, 257 S.W. 1, 2, 201 Ky. 477, citing **Corpus Juris.**

La.—Corell v. Evangeline Bank & Trust Co., 129 So. 618, 170 La. 1007—E. C. Taylor Co. v. New York & Cuba Mail S. S. Co., 105 So. 379, 159 La. 381, annulling and setting aside 1 La.App. 738—Noyes v. Cox, 120 So. 223, 10 La.App. 202.

Me.—Neely v. Havana Electric Ry. Co., 10 A.2d 358, 136 Me. 352.

Md.—Boyle v. Rider, 110 A. 524, 136 Md. 286.

Mich.—Security Trust Co. v. Sloman, 227 N.W. 698, 700, 248 Mich. 419, quoting **Corpus Juris,** appeal dismissed Sloman v. Security Trust Co., 50 S.Ct. 459, 281 U.S. 704, 74 L.Ed. 1128.

N.Y.—Nichols v. Hurtig & Seamen Theatrical Enterprises, 216 N.Y.S. 191, 217 App.Div. 107, affirmed 157 N.E. 853, 245 N.Y. 549—Slutzkin v. Gerhard & Hey, 191 N.Y.S. 104, 199 App.Div. 5—Parsons v. Lipe, 286 N.Y.S. 60, 158 Misc. 32, affirmed Parsons v. First Trust & Deposit Co., 277 N.Y.S. 426, 243 App.Div. 681, and 277 N.Y.S. 428, 243 App.Div. 681, affirmed 200 N.E. 31, 269 N.Y. 630.

N.C.—Board of Com'rs of Brunswick County v. Inman, 166 S.E. 519, 203 N.C. 542—Meyer v. Reaves, 136 S.E. 561, 193 N.C. 172—Berrier v. Sink, 130 S.E. 714, 190 N.C. 620—Harris v. Carter, 127 S.E. 1, 189 N.C. 295.

Ohio.—Hampshire County Trust Co. of North Hampton, Mass., v. Stevenson, 150 N.E. 726, 731, 114 Ohio St. 1, citing **Corpus Juris**—State ex rel. Lander v. Prestien, 16 Ohio N.P., N.S., 289, affirmed 113 N.E. 325, 93 Ohio St. 423.

Okl.—Egan v. Missouri State Life Ins. Co., 59 P.2d 263, 265, 177 Okl. 348, quoting **Corpus Juris**—Citizens' Bank of Millerton v. Beeson, 231 P. 844, 847, 104 Okl. 293, quoting **Corpus Juris.**

Or.—Montgomery v. Dant & Russell, 196 P. 461, 100 Or. 27.

Pa.—Fried v. Fisher, 196 A. 39, 328 Pa. 497, 115 A.L.R. 147—Gailey v. Wilkinsburg Real Estate & Trust Co., 129 A. 445, 283 Pa. 381—Stone v. C. I. T. Corporation, 184 A. 674, 122 Pa.Super. 71.

S.C.—W. S. Gray Cotton Mills v. Spartanburg County Mills, 137 S.E. 684, 139 S.C. 223—Mauldin v. Milford, 121 S.E. 547, 127 S.C. 508.

S.D.—Western Casualty & Surety Co. v. Lash, 290 N.W. 316, 127 A.L.R. 969.

Tenn.—Sommers v. Thompson, 1 Tenn.App. 410.

Tex.—Worsham Buick Co. v. Isaacs, 51 S.W.2d 277, 121 Tex. 587, 86 A.L.R. 232, answers conformed to Civ.App., 56 S.W.2d 288, reversed on other grounds 87 S.W.2d 252, 126 Tex. 546—Floboots Corporation v. Teas, Civ.App., 110 S.W.2d 180, error dismissed—Holland v. Brown, Civ.App., 66 S.W.2d 1095, 1103, citing **Corpus Juris**—Dooley v. Gray, Civ.App., 54 S.W.2d 558, error dismissed—Elder Mfg. Co. v. The Leader, Civ.App., 25 S.W.2d 274, reversed on other grounds The Leader, Inc., v. Elder Mfg. Co., Com.App., 39 S.W.2d 880—Pendleton v. Pace, Civ.App., 9 S.W.2d 437, 440, citing **Corpus Juris,** error refused—McLendon Hardware Co. v. Black, Civ.App., 264 S.W. 1011.

Va.—Dunlop v. McGehee's Ex'r, 124 S.E. 199, 139 Va. 643.

Wash.—National Credit Co. v. Casco Co., 22 P.2d 670, 173 Wash. 275—Simonds v. Noland, 253 P. 638, 142 Wash. 423—Duke v. L. Y. Stayton Co., 231 P. 171, 132 Wash. 69—State Bank of Connell v. Pacific Grain Co., 215 P. 350, 125 Wash. 149.

21 C.J. p 1202 note 21.

when inconsistency would work substantial injury to the other party.[76]

A person is estopped to take advantage of his own fraud or wrong,[77] or to set up the truth in contradiction of his own conduct so as to make the truth an instrument of fraud.[78] The regularity or validity of an act cannot be raised by one who procured, or is responsible for, it,[79] and where a person has induced, influenced, or advised another to act, or to refrain from acting, in a particular manner, he is estopped to take any position inconsistent with his inducement or advice, to the prejudice of the other person.[80] Thus, where a person has induced or advised another to sell or purchase property, he will be estopped to assert any claim thereto inconsistent with such inducement or advice.[81]

A person who prevents a thing from being done may not avail himself of the nonperformance which he himself has occasioned.[82] Further, the consummation of an agreement may estop a party to the

Inference from declarations or conduct

One is concluded, not only by what he does or says, but by natural and reasonable inference from his declarations or conduct.—Williams Coal & Coke Co. v. Spears, 125 S.W.2d 745, 277 Ky. 57.

Conduct subsequent to original transaction

Estoppel to take title to land from one and vest in another may rest on conduct subsequent to original transaction relied on by the opposite party to his damage.—Krueger v. Groth, 209 N.W. 772, 190 Wis. 387.

Parties in dual positions

Where parties place themselves in dual positions, they cannot be permitted to choose course most favorable to themselves and which course would prejudice rights of third persons if by pursuing another course a more equitable solution of problem would be attained.—Penn Mut. Life Ins. Co. v. Bank of America Nat. Trust & Savings Ass'n, 54 P.2d 453, 5 Cal.2d 288.

76. U.S.—Julian v. Nicholson, C.C.A.Mo., 72 F.2d 35.
Kan.—Lillard v. Johnson County, 172 P. 518, 102 Kan. 822.
Minn.—Le Pak v. Hedberg, 213 N.W. 40, 170 Minn. 495, citing **Corpus Juris.**
N.Y.—In re Wadhams' Estate, 292 N.Y.S. 102, 249 App.Div. 271.

77. S.C.—Pace v. Still, 158 S.E. 120, 160 S.C. 28.
Tex.—Moore v. Carey Bros. Oil Co., Com.App., 272 S.W. 440, 39 A.L.R. 1247, overruling motion for rehearing 269 S.W. 75, 39 A.L.R. 1247.
21 C.J. p 1204 note 22.

78. R.I.—Thornley Supply Co. v. Madigan, 154 A. 277, 51 R.I. 310—Perry v. McGuckian, 121 A. 431, 45 R.I. 259.

Evasion of banking laws

Ill.—Golden v. Cervenka, 216 Ill.App. 397.

79. Tex.—Spence v. State Nat. Bank of El Paso, Com.App., 5 S.W.2d 754, affirming, Civ.App., 294 S.W. 618—Mauritz v. Schwind, Civ.App., 101 S.W.2d 1085, error dismissed.

Correctness of book entries

Where guardian had authority to pay out money for ward from either guardianship fund or trust fund, and was the only one responsible for the book entries, he could not contend that the entries showing expenditures were made from trust fund were incorrect.—In re Carlson's Guardianship, 297 P. 764, 162 Wash. 20.

Failure of officials to perform duty

If mayor and aldermen willfully failed to perform duties with respect to election held to determine whether municipality should become organized under commission form of government, and election was rendered irregular by such failure of duty, mayor and officers would not be permitted to urge such failure to defeat the election.—Green v. State ex rel. Bradford, 193 So. 312, 238 Ala. 659.

80. U.S.—Moore v. Devonian Oil Co., C.C.A.Tex., 98 F.2d 557—Du Bois v. Zimmerman, C.C.A.N.J., 28 F.2d 173.
Cal.—California Bank v. Notrica, 33 P.2d 81, 139 Cal.App. 79.
Ind.—Menzenberger v. American State Bank, 198 N.E. 819, 101 Ind.App. 600.
Iowa.—Foote v. State Sav. Bank, Missouri Valley, Iowa, 206 N.W. 819, 201 Iowa 174.
Ky.—Bynum v. Bailey's Adm'r, 281 S.W. 1007, 213 Ky. 840.
La.—U. S. Fidelity & Guaranty Co. v. Putfark, 158 So. 9, 180 La. 893.
Mo.—Lawson v. Edwards, App., 293 S.W. 794.
Mont.—Orem v. Hansen Packing Co., 7 P.2d 546, 91 Mont. 222.
Nev.—Farmers & Merchants Nat. Bank of Eureka v. Springmeyer, 73 P.2d 825, 58 Nev. 218.
N.H.—Keyes v. Baird, 190 A. 707, 88 N.H. 449.
Tenn.—Murray v. Gouge, 6 Tenn.App. 611.
Tex.—Mauritz v. Schwind, Civ.App., 101 S.W.2d 1085, error dismissed—Priddy v. Green, Civ.App., 220 S.W. 243.
21 C.J. p 1204 note 24.

Inducing court to commit error

A party may not complain of error which he himself induced the court to commit.—Harris v. Jackson, D.C.Okl., 30 F.Supp. 185.

Inducing delay in commencing suit

A party who induces delay in commencing suit is estopped to assert the delay as a defense to the action.
Cal.—Adams v. California Mut. Building & Loan Ass'n, 116 P.2d 75.
Ky.—American Oak Leather Co. v. Cleveland, C., C. & St. L. R. Co., 288 S.W. 347, 216 Ky. 611.

Passive encouragement

Where a person passively encourages an act to be done, he cannot afterward exercise his legal right in opposition to such consent if his conduct or acts of encouragement induced the other party to change his position, so that he will be pecuniarily prejudiced by the assertion of such adverse claim.—Swain v. Seamens, Wis., 9 Wall. (U.S.) 254, 274, 19 L.Ed. 554—Pokegama Sugar Pine Lumber Co. v. Klamath River Lumber & Improvement Co., C.C.Cal., 96 F. 34.

81. Cal.—California Breeders' Sales & Pedigree Co. v. Showers, 260 P. 955, 86 Cal.App. 239.
Ky.—Gillig v. Stofer, 130 S.W.2d 762, 279 Ky. 349.
21 C.J. p 1204 note 25.

Complaint as to use of property purchased

Plaintiff, who induced city to purchase incinerator from his wife, representing that garbage and dead animals could be burned therein, is estopped thereafter to complain of city's use of incinerator for such purpose.—Karcher v. City of Louisville, 281 S.W. 1010, 213 Ky. 824.

82. U.S.—R. H. Stearns Co. of Boston, Mass., v. U. S., 54 S.Ct. 335, 291 U.S. 54, 78 L.Ed. 647, affirming R. H. Stearns Co. v. U. S., 2 F.Supp. 773, certiorari granted R. H. Stearns Co., Boston, Mass., v. U. S., 54 S.Ct. 56, 290 U.S. 611, 78 L.Ed. 534—Comar Oil Co. v. Helvering, C.C.A., 107 F.2d 709.
Cal.—Favali v. Richardson, 285 P. 1062, 104 Cal.App. 301.
Fla.—Smith v. Woodruff, 2 So.2d 583.
N.H.—Dziatlik v. Holy Trinity Polish Nat. Catholic Church, 166 A. 284, 86 N.H. 234.
N.J.—Mahaffey v. Sarshik, 137 A. 887, 101 N.J.Eq. 297.
N.Y.—Dulberg v. Equitable Life

agreement from asserting a claim inconsistent therewith,[83] and a promise which induces reliance by the promisee estops the promisor from defaulting on his promise.[84] A person who has given a certain reason for his conduct touching a matter in controversy will not be permitted, after the situation of the parties has changed, to alter his position to the prejudice of another.[85]

Estoppel by waiver. While waiver is not in the proper sense of the term a species of estoppel,[86] yet where a party to a transaction induces another to act on the reasonable belief that he has waived or will waive certain rights, remedies, or objections which he is entitled to assert, he will be estopped to insist on such rights, remedies, or objections to the prejudice of the one misled.[87] The doctrine of estoppel by waiver, it has been stated, applies in any case to determine the rights of the parties from the time when a mistake of law or of fact becomes known to the party whose rights are affected.[88]

b. Elements, Extent, and Limits of Rule

To constitute an estoppel, the party against whom the estoppel is claimed must have done some act or pursued some course of conduct with knowledge of the facts and of his rights, and, in addition, it is essential that the party claiming the estoppel should have been misled to his prejudice.

To constitute an estoppel by reason of prior acts, claims, or conduct inconsistent with the right asserted, the essential elements of estoppel must exist.[89]

Assur. Soc. of U. S., 12 N.E.2d 554, 277 N.Y. 17, reversing 297 N.Y.S. 166, 252 App.Div. 209.

Or.—Osburn v. De Force, 257 P. 685, 122 Or. 360, motion denied 262 P. 222, 123 Or. 352.

Causing delay in assertion of claim

In action to recover a sum of money awarded plaintiff at "bank night" drawing at a motion picture theater, owners were estopped to claim the advantage of one second's delay on part of plaintiff's husband in claiming prize, where if plaintiff's husband was the one entitled to the prize delay on his part was due to act of owners in permitting their agent to announce the wrong name outside the theater.—St. Peter v. Pioneer Theatre Corporation, 291 N.W. 164, 227 Iowa 1391.

Estoppel of debtor to assert condition of obligation

Right to recover money conditionally owing, notwithstanding condition has not happened because of some act of debtor, rests on estoppel of debtor to insist on the condition; if debtor has acted for purpose of defeating conditional obligation which would probably have accrued, or for purpose of obtaining or retaining benefit at creditor's expense, conditional obligation is converted into absolute obligation, but if there was no likelihood of condition ever happening, and debtor acted in good faith to relieve himself of a useless burden, conditional obligation is not converted into absolute obligation.—Collins v. Atlantic Oil Producing Co., C.C.A.Tex., 74 F.2d 122.

83. Conn.—Seymour Mfg. Co. v. Derby Mfg. Co., 109 A. 395, 94 Conn. 311.

Ill.—Multi Electrical Mfg. Co. v. Lipman Const. Co., 30 N.E.2d 136, 307 Ill.App. 224.

Ky.—Black Motor Co. v. Call, 94 S.W.2d 35, 264 Ky. 40—Walker v. Irvine's Ex'r, 9 S.W.2d 1020, 225 Ky. 699.

N.Y.—In re Eppig's Will, 235 N.Y.S. 416, 134 Misc. 339.

S.C.—Federal Land Bank of Columbia v. Palmer, 171 S.E. 481, 171 S.C. 167.

Wis.—Merchants' & Manufacturers' Bank v. Terrace Realty Co., 177 N.W. 329, 171 Wis. 109.

Agreement to file claim against another

Where payees indorsed and sold a note to a bank, and, on maker's death, cashier agreed with payees that bank would file a claim against maker's estate and look solely to it for payment, but bank failed to file the claim until it was too late, and the claim would have been paid in full had it been duly filed, bank was estopped from charging payees' account with the note.—Bullock v. First Nat. Bank, 194 N.W. 930, 196 Iowa 522.

Separation agreement as to property

Where, pursuant to a separation agreement, husband deeded to wife certain property and promised to pay mortgage thereon, and thereafter husband paid mortgage before he took an assignment of mortgage to himself and another, husband could not take a valid assignment as against his wife.—Kart v. Kart, 196 So. 485, 143 Fla. 274.

Agreement subject to government regulations

When New York bank to which seller of rugs in Belgium had sent documents of title to rugs with instructions that documents were to be delivered only if agreed amount of Belgian francs be paid to bank by buyers, notified buyers of its receipt of the documents and offered to deliver them to the buyers on payment of the Belgian francs, with knowledge of the existence of executive order which imposed certain regulations with respect to Belgian francs, bank and its principals elected to subject the proceeds to such government regulations and could not complain of them in action by buyers to recover possession of the documents.—Herzfeld v. National City Bank of New York, 24 N.Y.S.2d 69, 175 Misc. 534.

84. Cal.—Long v. Thompson, App., 113 P.2d 698.

N.C.—Stevens v. Turlington, 119 S.E. 210, 186 N.C. 191, 32 A.L.R. 870.

85. U.S.—Lamborn v. Cleveland Trust Co., C.C.A.Ohio, 29 F.2d 46.

Va.—Boston v. Shackelford, 175 S.E. 625, 162 Va. 733.

Inconsistency in positions before and after commencement of litigation see infra § 116.

86. U.S.—Hasler v. West India SS. Co., N.Y., 212 F. 862, 129 C.C.A. 382.

21 C.J. p 1240 note 85.

Estoppel and waiver distinguished see supra § 61.

87. Mo.—Walton v. Carlisle, 281 S.W. 402, 313 Mo. 268—Swihart v. Missouri Farmers Mut. Tornado, Cyclone & Windstorm Ins. Co., App., 138 S.W.2d 9.

N.J.—Gonzales v. Harrington Co., 126 A. 40, 2 N.J.Misc. 316.

N.Y.—Biloz v. Tioga County Patrons' Fire Relief Ass'n, 21 N.Y.S.2d 643, affirmed 23 N.Y.S.2d 460, 260 App.Div. 976—Firestone v. Miroth Const. Co., 214 N.Y.S. 239, 215 App.Div. 564.

Tex.—Hodges v. Cole, Civ.App., 117 S.W.2d 822—Priddy v. Green, Civ.App., 220 S.W. 243.

Wis.—Julius v. First Nat. Bank, 256 N.W. 792, 216 Wis. 120.

21 C.J. p 1241 note 86.

88. S.D.—Kenny v. McKenzie, 127 N.W. 597, 25 S.D. 485, 49 L.R.A., N.S., 782.

89. Cal.—Hunt v. Alamitos Land Co., 226 P. 415, 66 Cal.App. 438.

Conn.—Hotchkiss v. Di Vita, 130 A. 668, 103 Conn. 436.

Colo.—Gibbs v. Handy, 259 P. 517, 82 Colo. 297.

Ga.—Americus Finance Co. v. Wilson, 7 S.E.2d 259, 189 Ga. 635—Holton v. Mercer, App., 15 S.E.2d 253.

Mere inconsistency does not give rise to an estoppel, but it is the consequences of the inconsistency which create it.[90]

To constitute an estoppel, it is essential that the party charged therewith should have done, or refrained from doing, some act, or pursued some course of conduct, on which the estoppel may be based,[91] and that in taking the former position he should have acted with knowledge of his rights,[92] and have been aware of the facts in respect of the estoppel claimed.[93] In addition, it is essential that the party invoking the estoppel should have been misled by the acts or conduct of the party against whom the estoppel is claimed,[94] that he changed his

N.Y.—Kyser v. New York Cent. R. Co., 207 N.Y.S. 536, 211 App.Div. 500.

Estoppel not shown

U.S.—U. S. v. Alex Dussel Iron Works, C.C.A.La., 31 F.2d 535—Meyer v. W. R. Grace & Co., C.C.A.Ill., 290 F. 785.

Ark.—Langless v. McCarthy, 277 S. W. 27, 169 Ark. 948.

Ga.—Citizens' & Southern Bank v. Union Warehouse & Compress Co., 122 S.E. 327, 157 Ga. 434, answers to certified questions conformed to App., 122 S.E. 652—Consolidated Warehouse Co. v. Smith, 189 S.E. 724, 55 Ga.App. 216.

Iowa.—Brewer v. Claypool, 275 N.W. 34, 223 Iowa 1235.

Mass.—Splaine v. American Powder Co., 10 N.E.2d 87, 198 Mass. 114

Mich.—Brainard v. Paw Paw Co-op. Ass'n, 200 N.W. 130, 228 Mich. 371—Hallock v. Economy Drawing Table & Mfg. Co., 193 N.W. 825, 223 Mich 249.

Mo.—Branner v. Klaber, 49 S.W.2d 169, 330 Mo. 306—Blackiston v. Russell, 44 S.W.2d 22, 328 Mo. 1164.

Ohio.—Grindle v. Warner, 170 N.E. 31, 33 Ohio App. 532, error dismissed Warner v. Grindle, 172 N.E. 379, 121 Ohio St. 625.

R.I.—Franklin Service Stations v. Sterling Motor Truck Co. of N. E., 147 A. 754, 50 R.I. 336.

S.C.—Duncan v. McCormick County, 6 S.E.2d 265, 192 S.C. 216.

Tenn.—Dushan v. Metropolitan Life Ins. Co., 14 Tenn.App. 422.

Tex.—Bartlett v. Terrell, Civ.App., 292 S.W. 273.

Wash.—Reilly v. New York Life Ins. Co., 47 P.2d 840, 182 Wash. 460.

90. Md.—Marshall v. Security Storage & Trust Co., 142 A. 186, 155 Md. 649.

91. U.S.—Brown-Crummer Inv. Co. v. Paulter, C.C.A.Okl., 70 F.2d 184—Braren v. Horner, C.C.P.A., 49 F. 2d 934, denying rehearing 47 F.2d 358.

Cal.—Porter v. Van Denburgh, 99 P. 2d 265—Wolfson v. Ocean Park Realty Corporation, 299 P. 579, 114 Cal.App. 127—Hume v. Lindholm, 258 P. 1003, 85 Cal.App. 80.

Ga.—Citizens' & Southern Bank v. Union Warehouse & Compress Co., 122 S.E. 327, 157 Ga. 434, answers to certified questions conformed to App., 122 S.E. 652.

Mich.—Brainard v. Paw Paw Co-Op. Ass'n, 200 N.W. 130, 228 Mich. 371.

Mo.—State Bank of Wellston v. Hafferkamp, 287 S.W. 331, 315 Mo. 465—Lawson v. Edwards, App., 293 S. W. 794.

Tex.—Trinity Universal Ins. Co. v. Woitaske, Civ.App., 148 S.W.2d 235, error dismissed, judgment correct—Kallison v. Southland Lumber Co., Civ.App., 136 S.W.2d 879.

Va.—Heath v. Valentine, 15 S.E.2d 98.

Wash.—Hinton v. Carmody, 60 P.2d 1108, 186 Wash 242.

Acts or declarations of others

Party is not estopped by action or declaration of others who have no power to bind him.—Macheak v. Adamsen, 239 N.W. 574, 214 Iowa 446.

Necessity for turpitude

Alleged estoppel to assert title must be based on some degree of turpitude.—Barcroft v. Livacich, 96 P. 2d 951, 35 Cal.App.2d 710.

92. U.S.—Bailey v. Blackmon, C.C.A. S.C., 14 F.2d 16, affirming on rehearing 3 F.2d 252.

Ky.—Esterman-Verkamp Co. v. Rouse, 278 S.W. 124, 211 Ky. 791.

21 C.J. p 1205 note 26.

Knowledge of rights in construing contract

The acts of parties to a contract placing a mutual construction on its provisions are without effect in creating an estoppel unless they act with knowledge of their rights and of existing facts and their contemporaneous acts in construing a contract will be considered as creating an estoppel only where the contract is ambiguous.—Bittner v. Quemahoning Coal Co., 116 A. 42, 271 Pa. 579.

93. U.S.—Montana Life Ins. Co. v. American Surety Co. of New York, C.C.A.Mont., 8 F.2d 801.

Ariz.—Southern Pac. Co. v. Industrial Commission, 91 P.2d 700, 54 Ariz. 1.

D.C.—Castleman v. Avignone, 12 F. 2d 326, 56 App.D.C. 253.

Ga.—Holton v. Mercer, App., 15 S.E. 2d 253.

Idaho.—Aker v. Aker, 20 P.2d 796, 798, 52 Idaho 713, citing **Corpus Juris**, and motion denied 54 S.Ct. 80, 290 U.S. 587, 78 L.Ed. 518.

Minn.—Gunderson v. Anderson, 251 N.W. 515, 190 Minn. 245.

Okl.—Maynard v. Hustead, 90 P.2d 30, 35, 185 Okl. 20, citing **Corpus Juris**—Gypsy Oil Co. v. Marsh, 248 P. 329, 121 Okl. 135, 48 A.L.R. 876.

Wash.—American Nat. Bank of Nashville, Tenn., v. National Bank of Commerce of Seattle, 232 P. 295, 132 Wash. 490.

Wis.—Bergenthal v. State Garage & Trucking Co., 190 N.W. 901, 179 Wis. 42.

21 C.J. p 1205 note 27.

Mistakes in book entries will not constitute an estoppel.—Dulac Cypress Co. v. Houma Cypress Co., 104 So. 722, 158 La. 804.

94. U.S.—Universal Gas Co. v. Central Illinois Public Service Co., C.C.A.Ill., 102 F.2d 164—Pensacola Shipping Co. v. U. S. Shipping Board Emergency Fleet Corporation, C.C.A.Fla., 277 F. 889.

Ala.—Randle v. Dumas, 157 So. 218, 219, 229 Ala. 396, citing **Corpus Juris.**

Cal.—Imes v. MacDonald, 298 P. 173. 175, 113 Cal.App. 427, citing **Corpus Juris**—Handleman v. Pickerill, 257 P. 890, 84 Cal.App. 214—Metcalf v. Guercio, 241 P. 576, 74 Cal. App. 637—Riley v. Brown, 237 P 833, 837, 72 Cal.App. 468, citing **Corpus Juris.**

Ill.—Young v. Illinois Athletic Club, 141 N.E. 369, 310 Ill. 75, 30 A.L.R. 985, affirming 228 Ill.App. 504.

Ind.—Lincoln Nat. Bank & Trust Co. of Fort Wayne v. Nathan, 19 N.E. 2d 243, 215 Ind. 178.

La.—Dulac Cypress Co. v. Houma Cypress Co., 104 So. 722, 158 La. 804.

Mich.—Brear v. Baumgartner, 229 N. W. 602, 249 Mich. 633.

Minn.—Gunderson v. Anderson, 251 N.W. 515, 190 Minn. 245.

Mo.—Meierhoffer v. Swenson, App., 223 S.W. 630—Meierhoffer v. Kennedy, 223 S.W. 624, 204 Mo.App. 351—Berry v. Massachusetts Bonding & Ins. Co., 221 S.W. 748, 203 Mo.App. 459.

Tenn.—Malone, for Use and Benefit of Globe Rutgers Fire Ins. Co. of New York, v. Harth, 12 Tenn.App. 687.

Tex.—Worsham Buick Co. v. Isaacs, 51 S.W.2d 277, 279, 121 Tex. 587, 86 A.L.R. 232, citing **Corpus Juris**, answers conformed to, Civ.App., 56 S.W.2d 288, reversed on other grounds, Com.App., 87 S.W.2d 252, 126 Tex. 546—Chicago, R. I. & G. Ry. Co. v. Edwards, Civ.App., 232 S.W. 356.

21 C.J. p 1205 note 28.

position in reliance thereon,[95] and was justified in so doing,[96] and that he was prejudiced thereby[97] or a benefit resulted to the party against whom the estoppel is claimed.[98]

As the doctrine of estoppel rests on equity, a party is not estopped where the equities are in his favor,[99] or where the conduct relied on to create the estoppel was superinduced by the acts of the party invoking the doctrine.[1] In no event can the estoppel be extended beyond the natural and reasonable import of the acts or conduct relied on to create it.[2] A party is not precluded from asserting a claim which is inconsistent with a previous claim not successfully maintained;[3] nor does the assertion of one claim under an express agreement that it shall not prejudice further claims preclude the assertion subsequently of a claim which might, in the absence of the agreement, be deemed inconsistent.[4]

A person is not estopped to assert title to real estate because of conduct with relation thereto at a time when he had no interest in the property,[5] and, likewise, an owner of realty is not estopped by statements to one who, to his knowledge, has no interest in the property, where he has no intention that the

95. U.S.—U. S. v. McFarland, C.C.A.Md., 15 F.2d 823, certiorari granted 47 S.Ct. 449, 273 U.S. 688, 71 L.Ed. 841, certiorari revoked 48 S.Ct. 27, 275 U.S. 485, 72 L.Ed. 386—U. S. v. Interstate R. Co., D.C.Va., 14 F.2d 328.
Ala.—Lackland v. Turner, 91 So. 877, 207 Ala. 73.
Cal.—Riley v. Brown, 237 P. 833, 72 Cal.App. 468.
Colo.—Wilson v. Van Zant, 275 P. 905, 85 Colo. 276.
Ill.—Rothenberg v. Radtke Bros., 34 N.E.2d 892, 310 Ill.App. 538—Kenny v. T. L. Arzt Foundry Co., 31 N.E.2d 620, 308 Ill.App. 251.
Mo.—Hamilton v. Northeast Mut. Ins. Ass'n, App., 116 S.W.2d 159, 163, citing **Corpus Juris**—Lawson v. Edwards, App., 293 S.W. 794.
N.J.—Canda v. Canda, Ch., 113 A. 503, affirmed 112 A. 727, 92 N.J.Eq. 423, 13 A.L.R. 1029.
Okl.—Gypsy Oil Co. v. Marsh, 248 P. 329, 121 Okl. 135, 48 A.L.R. 876.
Tex.—Irvin v. Irvin, Civ.App., 7 S.W.2d 1103—Kidd-Scruggs Co. v. Tyler Hotel Co., Civ.App., 270 S.W. 566.
Vt.—Randall v. Beryl Lumber Co., 113 A. 872, 95 Vt. 158.
Wash.—Young v. American Can Co., 230 P. 147, 131 Wash. 374.
Wyo.—Williams v. McWhorter, 218 P. 791, 30 Wyo. 229.
21 C.J. p 1205 note 29.

Effect of prior knowledge

Defendant was not in a position to claim that he acted in reliance on his wife and creditor releasing him from certain liabilities, where he knew prior to divorce that they were refusing to do so.—Jordan v. Kittle, 150 N.E. 817, 88 Ind.App. 275.

96. Del.—Arcturus Radio Tube Co. v. Radio Corporation of America, 177 A. 899, 20 Del.Ch. 376.
Ga.—E. Frederics, Inc., v. Felton Beauty Supply Co., 198 S.E. 324, 58 Ga.App. 320.
21 C.J. p 1205 note 30.

Benefit to patrons from agreement between railroads

That agreement whereby complainant railroad permitted another company to use its track for local business enabled patrons to build up their business was held not to estop complainant from suing to enjoin public service commission from compelling it to continue such arrangement.—Texas & P. Ry. Co. v. Louisiana Public Service Commission, D.C.La., 12 F.2d 798.

97. U.S.—U. S. v. Georgia Marble Co., C.C.A.Ga., 106 F.2d 955—Elmore County, Ala., v. Moon, C.C.A.Ala., 293 F. 297—Galle v. Hamburg Amerikanische Packetfahrt Actien Gesellschaft, N.Y., 233 F. 424, 147 C.C.A. 360—Satterwhite v. Harriman Nat. Bank & Trust Co. of City of New York, D.C.N.Y., 13 F.Supp. 493.
Cal.—Riley v. Brown, 237 P. 833, 837, 72 Cal.App. 468, citing **Corpus Juris.**
Ill.—Tramblay v. Hyde Park State Bank, 168 N.E. 6, 336 Ill. 80.
Iowa.—Dow v. Stockport Sav. Bank, 210 N.W. 815, 202 Iowa 594.
La.—Investors Syndicate v. Deposit Guaranty Bank & Trust Co., App., 172 So. 39—Succession of Coleman, 128 So. 44, 13 La.App. 600.
Mass.—Augello v. Hanover Trust Co., 148 N.E. 138, 253 Mass. 160.
Mo.—Lawson v. Edwards, App., 293 S.W. 794.
Okl.—Egan v. Missouri State Life Ins. Co., 59 P.2d 263, 265, 177 Okl. 348, quoting **Corpus Juris.**
Tenn.—Ginn v. Forest Nursery Co., 52 S.W.2d 141, 165 Tenn. 9—Henry v. Tennessee Electric Power Co., 5 Tenn.App. 205.
Tex.—Bell v. Moody, Civ.App., 147 S.W.2d 852, error dismissed, judgment correct—Free v. Smith, Civ.App., 80 S.W.2d 419, reversed on other grounds Smith v. Free, 107 S.W.2d 588, 130 Tex. 23.
Utah.—Decorso v. Booth, 91 P.2d 449, 97 Utah 163.
Vt.—Randall v. Beryl Lumber Co., 113 A. 872, 95 Vt. 158.
Wash.—Reinoehl v. Vervaeke, 82 P.2d 861, 196 Wash. 348.
Wis.—Denham v. Madole, 217 N.W. 423, 194 Wis. 583.
Wyo.—State Bank of Wheatland v. Turpen, 34 P.2d 1, 5, 47 Wyo. 284, citing **Corpus Juris.**
21 C.J. p 1205 note 31.

Sufficiency of injury

Where the purchaser of an oil lease under oral contract from an equitable owner acquired the lease by direct conveyance from the legal holder at his vendor's suggestion, the giving by him of a check for part of the purchase price, which was certified by his bank, and thereby the amount was withdrawn from his account, was sufficient injury to support estoppel against the vendor to attack his title.—Priddy v. Green, Tex.Civ.App., 220 S.W. 243.

98. U.S.—Galle v. Hamburg Amerikanische Packetfahrt Actien Gesellschaft, N.Y., 233 F. 424, 147 C.C.A. 360.
Cal.—Riley v. Brown, 237 P. 833, 72 Cal.App. 468.

99. Tex.—Lee v. Durham, Civ.App., 204 S.W. 1171.

Equities of equal dignity

Under the doctrine of equitable estoppel, equity will not raise a lien in favor of one who has participated in raising an opposing equity of equal dignity in favor of another.—Daniel v. Daniel, 108 So. 42, 214 Ala. 406.

1. Ala.—Lehman v. Clarke, 4 So. 651, 85 Ala. 109.
21 C.J. p 1206 note 34.

2. Mo.—Wood v. White Eagle Oil & Refining Co., 274 S.W. 894, 220 Mo.App. 1004.
Okl.—Fairfax Oil Co. v. Bolinger, 97 P.2d 574, 186 Okl. 20.
Va.—Heath v. Valentine, 15 S.E.2d 98.
21 C.J. p 1206 note 35.

3. Cal.—Asher v. Martin, 279 P. 810, 100 Cal.App. 217.

4. Cal.—Shell Oil Co. v. Hanchett, 63 P.2d 338, 18 Cal.App.2d 240.

5. W.Va.—United Fuel Gas Co. v. Hays Oil & Gas Co., 148 S.E. 76, 107 W.Va. 255.

statements be relied on.[6]

Retention of a copy of a contract for a long period of time does not estop a party from contending that it does not express the agreement of the parties, where he has acted during that period in accordance with his contentions.[7]

Positions not inconsistent. No estoppel arises where the positions taken are not necessarily antagonistic,[8] as where one merely attempts to minimize injury.[9]

§ 109. Acceptance of Benefits

a. In general

b. Elements, extent, and limits of rule

a. In General

Where one having the right to accept or reject a transaction takes and retains benefits thereunder, he ratifies the transaction, is bound by it, and cannot avoid its obligation or effect by taking a position inconsistent therewith.

Where one having the right to accept or reject a transaction takes and retains benefits thereunder, he ratifies the transaction, is bound by it, and cannot avoid its obligation or effect by taking a position inconsistent therewith.[10] A party cannot claim benefits under a transaction or instrument and at the

6. Ga.—Beasley Motor Co. v. Cowart, 154 S.E. 458, 41 Ga.App. 684.

7. U.S.—Missouri Dist. Tel. Co. v. Morris & Co., Mo., 243 F. 481, 156 C.C.A. 179, appeal dismissed 38 S.Ct. 11, 245 U.S. 651, 62 L.Ed. 531.

8. U.S.—Headley Good Roads Co. v. Barber Asphalt Paving Co., C.C.A. Del., 292 F. 119, affirming, D.C., Barber Asphalt Paving Co. v. Headley Good Roads Co., 284 F. 177.
Ala.—Skates v. Perkins, 141 So. 687, 225 Ala. 33.
Ark.—U. S. Fidelity & Guaranty Co. v. Maxwell, 237 S.W. 708, 152 Ark. 64—Rivers v. House, 234 S.W. 641, 150 Ark. 452—Whitlock v. Cohn, 80 S.W. 141, 72 Ark. 83.
Conn.—Rockwell v. New Departure Mfg. Co., 128 A. 302, 102 Conn. 255.
Fla.—Kemp v. Hanna, 110 So. 789, 92 Fla. 913.
Ga.—Logan v. Mobley, 153 S.E. 763, 170 Ga. 615—Groover v. Simmons, 137 S.E. 237, 163 Ga. 778.
Ill.—Downing v. Harris Trust & Savings Bank, 149 N.E. 256, 318 Ill. 323, reversing In re Downing's Estate, 236 Ill.App. 168—Kenny v. T L. Arzt Foundry Co., 31 N.E.2d 620, 308 Ill.App. 251.
Ind.—Russell v. Trustees of Purdue University, 178 N.E. 180, 93 Ind. App. 242.
Iowa.—Garman v. Wettengel, 203 N. W. 266, 199 Iowa 1150.
Kan.—Swaller v. Williamson Milling Co., 226 P. 1001, 116 Kan. 329.
La.—Dehan v. Youree, 117 So. 745, 166 La. 635—Haas v. McCain, 108 So. 305, 161 La. 114.
Mass.—Boston & A. R. Co. v. Freedman, 147 N.E. 848, 253 Mass. 1.
Mich.—Scholten v. Scholten, 214 N. W. 320, 238 Mich. 679—E. Clemens Horst Co. v. Dunn, 200 N.W. 954, 229 Mich. 56.
Miss.—Wilkinson v. Wilson, 123 So. 847, 154 Miss. 726.
Mo.—Person v. City of Independence, App., 114 S.W.2d 175.
N.J.—Child v. C. H. Winans Co., 183 A. 300, 119 N.J.Eq. 556—Schiff v. Alexander, 130 A. 133, 3 N.J.Misc. 817.
N.Y.—Harry Rogers Theatrical Enterprises v. Comstock, 232 N.Y.S. 1, 225 App.Div. 34—Kassin v. M. & L Bldg. Corporation, 214 N.Y.S. 298, 215 App.Div. 588, reversed on other grounds 153 N.E. 559, 243 N.Y. 376.
Pa.—Love v. Clayton, 134 A. 422, 287 Pa. 205—Coens v. Marousis, 119 A. 549, 275 Pa. 478.
R.I.—Daniels v. Aharonian, 7 A.2d 767, reargument denied 9 A.2d 865.
Tex.—Mitchell, Gartner & Thompson v. Young, Civ.App., 135 S.W.2d 308, error refused—Central Nat. Bank of San Angelo v. Cox, Civ. App., 96 S.W.2d 746, error dismissed—Lloyd v. Singleton, Civ. App., 16 S.W.2d 891—Barksdale v. Benskin, Civ.App., 194 S.W. 402, reversed on other grounds, Com App., Benskin v. Barksdale, 246 S. W. 360.
21 C.J. p 1205 note 33.

Offer of compromise as bar to sum due
Fact that purchaser of automobile was at one time willing to compromise and accept less than amount due him under agreement for repurchase was no bar to his maintenance of action for damages for refusal to repurchase.—Brown v. Grow, 144 N.E. 403, 249 Mass. 495.

Rendition of bill as fixing amount
Bills rendered for legal services were held not to estop attorney from claiming larger amount, in action on quantum meruit.—Prager v. New Jersey Fidelity & Plate Glass Ins. Co. of Newark, N. J., 156 N.E. 76, 245 N.Y. 1, 52 A.L.R. 193, modifying 216 N.Y.S. 400, 217 App.Div. 630.

Failure to comply with condition of agreement
An agreement based on a condition which is not complied with by the party claiming estoppel does not effect an estoppel.—Robb v. Midland Acceptance Corporation, 8 S.W.2d 377, 225 Ky. 258.

Waiver
(1) No waiver will be construed from a person's language or conduct unless clearly inconsistent with a purpose to stand on his rights.—Stadler & Stadler v. Long, 241 N.Y.S. 637, 137 Misc. 512.
(2) A waiver of certain rights for a specified period does not estop one to assert the rights after the expiration of that period.—Arcturus Radio Tube Co v. Radio Corporation of America, 177 A. 899, 20 Del.Ch. 376.

9. U.S.—Nocatee Fruit Co. v. Fosgate, C.C.A.Fla., 12 F.2d 250, affirming, D.C., Fosgate v. Nocatee Fruit Co., 299 F. 963 and 3 F.2d 606.
Ill.—Texas Co. v. Hollingsworth, 27 N.E.2d 67, 304 Ill.App. 607, reversed on other grounds, Sup., 31 N.E.2d 944.
Wis.—Denham v. Madole, 217 N.W. 423, 194 Wis. 583.
Duty to minimize damages see Damages §§ 32–36.

Injury from misrepresentation
Assignor of option to purchase land, having abated portion of purchase price to induce assignee to complete contract, on discovery that there was misrepresentation of number of acres, is not estopped to sue vendor for such misrepresentation.—Nocatee Fruit Co. v. Fosgate, C.C.A. Fla., 12 F.2d 250, affirming, D.C., Fosgate v. Nocatee Fruit Co., 299 F. 963 and 3 F.2d 606.

10. U.S.—Schumacher v. Harriett, C.C.A.N.C., 52 F.2d 817, 82 A.L.R. 1—First Nat. Bank v. Glens Falls Ins. Co., of Glens Falls, N. Y., C.C. A.S.C., 27 F.2d 64—Litzke v. Gregory, C.C.A.Ark., 1 F.2d 112—U. S. v. Brooks, D.C.Wash., 28 F.Supp. 712—In re American Rio Grande Land & Irrigation Co., D.C.Tex., 21 F.Supp. 492, modified on other grounds, C.C.A., Hidalgo & Cameron Counties Water Control & Improvement Dist. No. 9 v. American Rio Grande Land & Irrigation Co., 103 F.2d 509, certiorari denied

same time repudiate its obligations.[11] Courts of equity proceed on the theory that there is an implied

American Rio Grande Land & Irrigation Co. v. Hidalgo & Cameron County Water Control & Improvement Dist. No. 9, 60 S.Ct. 88, 308 U.S. 573, 84 L.Ed. 481—Texas Co. v. McMillan, D.C.Tex., 13 F.Supp. 407—Pratt & Whitney Co. v. U. S., Ct.Cl., 10 F.Supp. 148, 151, citing **Corpus Juris**—P. N. Gray & Co. v. Cavalliotis, D.C.N.Y., 276 F. 565, affirmed, C.C.A., Cavalliotis v. P. N. Gray & Co., 293 F. 1018—Farmers' Life Ins. Co. v. Foster Building & Realty Co., 272 F. 864, certiorari denied 42 S.Ct. 94, 257 U. S. 654, 66 L.Ed. 418.

Ala.—Birmingham Trust & Savings Co. v. Strong, 194 So. 200, 239 Ala. 118—Edwards v. Crittenden, 104 So. 277, 213 Ala. 156.

Ark.—Harris v. Thackery, 147 S.W.2d 355—Illinois Standard Mortg. Corporation v. Collins, 63 S.W.2d 342, 187 Ark. 902—Drainage Dist. No. 7, Poinsett County v. Exchange Trust No., 2 S.W.2d 32, 175 Ark. 934, reversed in part on other grounds Exchange Trust Co. v. Drainage Dist. No. 7, Poinsett County, 49 S.Ct. 180, 278 U.S. 579, 73 L.Ed. 517, and affirmed in part 49 S.Ct. 181, 278 U.S. 421, 73 L.Ed. 436—Peay v. Southern Surety Co., 216 S.W. 722, 141 Ark. 265.

Cal.—Tonini v. Ericcsen, 21 P.2d 566, 218 Cal. 43.

Colo.—Fitzwater v. Norcross, 37 P.2d 522, 524, 95 Colo. 527, citing **Corpus Juris.**

Del.—Frank v. Wilson & Co., Ch., 9 A.2d 82—Trounstine v. Remington Rand, Ch., 194 A. 95.

Ga.—Warner v. Hill, 112 S.E. 478, 153 Ga. 510.

Idaho.—Seeley v. Security Nat. Bank of Fairfield, 235 P. 976, 40 Idaho 574.

Ill.—American Radiator Co. v. Walker, 276 Ill.App. 150.

Iowa.—Bates v. First Sav. Bank of Richland, 261 N.W. 797, 801, 219 Iowa 1358, quoting **Corpus Juris.**

La.—Allardyce v. Abrahams, 182 So. 717, 190 La. 686, affirming 178 So. 170, rehearing denied 179 So. 317—Horne v. Beattie, 120 So. 38, 167 La. 647—David v. Roubion, 8 La.App. 689.

Md.—National Union Mortg. Corporation v. Potomac Consol. Debenture Corporation, 16 A.2d 866, 178 Md. 658—Doeller v. Mortgage Guarantee Co., 171 A. 856, 166 Md. 500.

Mich.—Schnack v. Applied Arts Corporation, 278 N.W. 117, 283 Mich. 434.

Minn.—Robie v. Boak, 235 N.W. 384, 183 Minn. 41.

Mo.—Rhodus v. Geatley, 147 S.W.2d 631—Clark v. Clark, 18 S.W.2d 77, 322 Mo. 1219—Adamack v. Herman, App., 33 S.W.2d 135, 138, quoting **Corpus Juris**—Petition of Elliott, 234 S.W. 520, 208 Mo.App. 348, reversed on other grounds 43 S.Ct. 406, 261 U.S. 457, 67 L.Ed. 743.

Neb.—Brisbin v. E. L. Oliver Lodge No. 335 of Brotherhood of Railway Clerks, 279 N.W. 277, 134 Neb. 517.

Nev.—Federal Mining & Engineering Co. v. Pollak, 85 P.2d 1008, 259 Nev. 145.

N.J.—Basen v. Clinton Trust Co., 181 A. 67, 68, 115 N.J.Law 546, quoting **Corpus Juris,** reversing 177 A. 675, 13 N.J.Misc. 252.

N.Y.—Maloy v. Montgomery, 286 N. Y.S. 20, 246 App.Div. 482, affirmed 5 N.E.2d 366, 272 N.Y. 630—Carbone v. Carbone, 2 N.Y.S.2d 869, 166 Misc. 924—In re Gerbereux' Will, 266 N.Y.S. 134, 148 Misc. 461.

N.C.—Berrier v. Sink, 130 S.E. 714, 190 N.C. 620.

N.D.—State v. Mundy, 205 N.W. 684, 53 N.D. 249

Ohio.—State ex rel. Lander v. Prestien, 16 Ohio N.P., N.S., 289, affirmed, 113 N.E. 325, 93 Ohio St. 423.

Or.—Smith v. Martin, 185 P. 236, 94 Or. 132.

S.C.—Baxter v. Camp Mfg. Co., 175 S.E. 513, 515, 173 S.C. 194, quoting **Corpus Juris.**

Tenn.—Walker v. Walker, 2 Tenn. App. 279.

Tex.—DeShazo v. Wool Growers Central Storage Co., Civ.App., 153 S. W.2d 206—Hexemer v. Farm & Home Savings & Loan Ass'n of Missouri, Civ.App., 115 S.W.2d 458, error dismissed—Davis v. Cass County, Civ.App., 111 S.W.2d 751—Mauritz v. Schwind, Civ.App., 101 S.W.2d 1085, error dismissed—McDorman v. Goodell, Civ.App., 69 S.W.2d 428, 431, quoting **Corpus Juris**—Reese v. Hamlett, Civ.App., 223 S.W. 346.

Wash.—Fishback v. Bothell Bus Co., 272 P. 67, 150 Wash. 49.

Wis.—New Dells Lumber Co. v. Chicago, St. P., M. & O. Ry. Co., 268 N.W. 243, 222 Wis. 264.

21 C.J. p 1206 note 37, p 1207 note 38.

Benefits from statutes or regulations

(1) Estoppel is frequently based on acceptance and retention of benefits from a regulation or statute by one who had knowledge or notice of facts and might have rejected or contested such benefits.—Rhodus v. Geatley, Mo., 147 S.W.2d 631.

(2) Generally parties seeking or deriving benefit by exercising special privilege bestowed by law are estopped from denying validity of terms fixed as condition for exercising privilege.—Tovrea Packing Co. v. Live Stock Sanitary Board of Arizona, 34 P.2d 420, 44 Ariz. 151.

(3) Where plaintiff chose to accept license of food administration, and to engage in business under its rules and regulations, it could not thereafter challenge legal force of such rules and regulations.—Stein-Hall Mfg. Co. v. H. M. Glossbrenner & Co., 145 N.E. 526, 84 Ind.App. 306.

(4) The establishment of a town by the legislature, and an investiture of the land in trustees, having been procured by the owner of the land, he and those claiming under him are estopped to deny his title at the time, and the title passes thereby to the trustees.—Coleman v. Morrison, 1 A. K. Marsh. Ky., 406.

(5) When the state legislature has by resolve authorized the conveyance of a certain tract of land to a person, he having, it may be presumed, solicited the grant, and having afterwards acted under it, he and those claiming under him are estopped from denying the title of the state.—Cary v. Whitney, 48 Me 516.

(6) Where a member of the legislature, procured a charter to build a bridge, which he subsequently built, it was held that he was not estopped from asserting that he built the bridge, not under the charter, but under an earlier statute which conferred greater privileges on him. —Dougherty County v. Tift, 75 Ga 815.

Where government and taxpayer, by acquiescence in manner of performing act, have given definite character and effect thereto, taxpayer will not be permitted, after deriving benefit therefrom, to change position at government's expense.—Hartwell Mills v. Rose, C.C.A.Ga., 61 F.2d 441—Houston Production Co. v. U. S., D.C.Tex., 4 F.Supp. 715.

11. La.—Sherer-Gillett Co. v. Bennett, 95 So. 777, 153 La. 304.
Mich.—Webb v. Knauss, 234 N.W. 154, 253 Mich. 197.
Or.—Schafer v. Schafer, 260 P. 206, 122 Or. 620, 59 A.L.R. 707.
Tenn.—Wilson v. Wilson, 130 S.W.2d 140, 23 Tenn.App. 244.
Tex.—McCombs v. Abrams, Civ.App., 28 S.W.2d 584, affirmed, Com.App., 48 S.W.2d 612—Security Nat. Bank of Wichita Falls v. Andrews, Civ. App., 24 S.W.2d 509, reversed on other grounds Andrews v. Security Nat. Bank of Wichita Falls, 50 S. W.2d 253, 121 Tex. 409, 83 A.L.R. 44.
Wash.—Sainsbury v. Wapato Fruit & Cold Storage Co., 232 P. 331, 132 Wash. 455.
21 C.J. p 1208 note 56.

Basis for rule

The rule that a person cannot both benefit by and repudiate an instru-

condition that he who accepts a benefit under an instrument shall adopt the whole, conforming to all its provisions and renouncing every right inconsistent with it.[12]

b. Elements, Extent, and Limits of Rule

To create an estoppel by acceptance of benefits it is essential that the person against whom the estoppel is claimed should have acted with knowledge of the facts and of his rights, and that the party claiming the estoppel should have been without knowledge or means of knowledge of the facts on which he bases his claim of estoppel, and that he be misled to his prejudice.

In order to create an estoppel by the acceptance of benefits, it is essential that the party against whom the estoppel is claimed should have acted with knowledge of the facts and of his rights.[13] and that the party claiming the estoppel was without knowledge or means of knowledge of the facts on which he bases his claim of estoppel,[14] that he was influenced by and relied on the conduct of the person sought to be estopped,[15] and that he changed his position in reliance thereon to his injury.[16] The rule has no application where no injury resulted to anyone except the party against whom the estoppel is claimed.[17]

In addition, it is essential to constitute an estoppel in this class of cases that the benefit received be direct,[18] that the acceptance should not have been induced by false representations,[19] that the transaction and the acceptance of benefits be inconsistent with the claim subsequently asserted,[20] and that its

ment rests on the equitable ground that a person cannot claim inconsistent rights in regard to the same subject.—Federal Mining & Engineering Co. v. Pollak, 85 P.2d 1008, 59 Nev. 145.

Claiming and denying status of common carrier

A towing company cannot claim that it is a common carrier, in order to escape the burden of its agreement to notify a party contracting for towage of the time of loading as being a discriminatory privilege or agreement forbidden to common carriers, and at the same time claim that it is not a common carrier, as respects a common carrier's absolute liability as insurer for the cargo of such party lost in towing.—Cary-Davis Towing Co. v. Spradley, 196 P. 655, 115 Wash. 93.

12. N.Y.—Chipman v. Montgomery, 63 N.Y. 221, affirming 4 Hun 739.

13. U.S.—Buffum v. Peter Barceloux Co., Cal., 53 S.Ct. 539, 289 U.S. 227, 77 L.Ed. 1140, reversing, C.C.A., Peter Barceloux Co. v. Buffum, 61 F.2d 145, certiorari granted 53 S.Ct. 319, 288 U.S. 595, 77 L.Ed. 972, and which reversed, D. C., Buffum v. Peter Barceloux Co., 51 F.2d 80, reversed, C.C.A., Gelinas v. Buffum, 52 F.2d 598, modified 67 F.2d 380, certiorari denied Buffum v. Gelinas, 54 S.Ct. 454, 291 U.S. 670, 78 L.Ed. 1060—Bailey v. New England Mut. Life Ins. Co. of Boston, Mass., D.C.Cal., 35 F.Supp. 1007.
Ala.—Zimmern v. Southern Ry. Co., 96 So. 226, 209 Ala. 284, 29 A.L.R. 1237.
Cal.—Johnson v. California Interurban Motor Transp. Ass'n, 74 P.2d 1073, 24 Cal.App.2d 322.
Ga.—Warner v. Hill, 112 S.E. 478, 153 Ga. 510.
La.—Putnam v. Liquidators of State Nat. Bank, 106 So. 386, 159 La. 936.
Mo.—Morris v. Hanssen, 78 S.W.2d 87, 336 Mo. 169—Petrie v. Reynolds, 219 S.W. 934.
Mont.—Peterson v. School Board of School Dist. No. 1, Cascade County, 236 P. 670, 673, 73 Mont. 442, citing **Corpus Juris.**
N.J.—Canda v. Canda, Ch., 113 A. 503, affirming 112 A. 727, 92 N.J.Eq. 423, 13 A.L.R. 1029.
Okl.—Southwestern Surety Ins. Co. v. Holt, 213 P. 80, 88 Okl. 281.
21 C.J. p 1207 note 40.

14. U.S.—Nelson v. Chicago Mill & Lumber Corporation, 76 F.2d 17, 100 A.L.R. 87.
Cal.—Moss v. Underwriters' Report, 83 P.2d 503, 12 Cal.2d 266, affirming, App., 78 P.2d 221.
Ga.—Bank of Lenox v. Webb Naval Stores Co., 156 S.E. 30, 171 Ga. 464.
Okl.—Southwestern Surety Ins. Co. v. Holt, 213 P. 80, 82, 88 Okl. 281, quoting **Corpus Juris.**
21 C.J. p 1208 note 41.

15. Ala.—Crutchfield's Heirs v. Hudson, 23 Ala. 393.
Kan.—Smith v. Griffith, 184 P. 725, 105 Kan. 357.
Ky.—Kinnett v. Abrell, 121 S.W.2d 699, 275 Ky. 276—James C. Willson & Co. v. City of Ravenna, 104 S.W.2d 965, 268 Ky. 232.
N.J.—Baker v. Soltau, 118 A. 682, 94 N.J.Eq. 544, affirmed 119 A. 924, 94 N.J.Eq. 544.
Okl.—Herrington v. Hackler, 74 P.2d 388, 181 Okl. 396—Southwestern Surety Ins. Co. v. Holt, 213 P. 80, 88 Okl. 281.
21 C.J. p 1208 note 42.

16. Ala.—Steiner, Crum & Weil v. Smith Sons Lumber Co., 93 So. 399, 207 Ala. 442—Smith Sons Lumber Co. v. Steiner, Crum & Weil, 85 So. 758, 204 Ala. 306.
Ariz.—Moore v. Meyers, 255 P. 164, 31 Ariz. 519, reversing 253 P. 626, 31 Ariz. 347.
Cal.—Seid Pak Sing v. Barker, 10 P. 2d 92, 122 Cal.App. 93.
Iowa.—Barber Asphalt Paving Co. v. City of Des Moines, 183 N.W. 456, 191 Iowa 762.
Ky.—Kinnett v. Abrell, 121 S.W.2d 699, 275 Ky. 276.
La.—Rembert v. Fenner & Beane, App., 173 So. 551, annulled on other grounds 175 So. 116, affirmed 177 So. 247, 188 La. 385.
Mass.—Federal Trust Co. v. Bristol County St. R. Co., 109 N.E. 880, 222 Mass. 35.
N.J.—Canda v. Canda, Ch., 113 A. 503, affirming 112 A. 727, 92 N.J. Eq. 423, 13 A.L.R. 1029.
Okl.—Southwestern Surety Ins. Co. v. Holt, 213 P. 80, 88 Okl. 281.
S.C.—Ott v. Ott, 188 S.E. 789, 182 S.C. 135.
S.D.—Casareto v. Johnson, 260 N.W. 705, 63 S.D. 460.
Tex.—Bearden v. Texas Co., Civ.App., 41 S.W.2d 447, 465, citing **Corpus Juris,** affirmed, Com.App., 60 S.W. 2d 1031.

17. Ind.—Williams v. Harrison, 123 N.E. 245, 72 Ind.App. 245.

18. Kan.—Ayres v. Probasco, 14 Kan. 175.

19. Ala.—Eppes v. Thompson, 79 So. 611, 202 Ala. 145.
Ill.—Bruner v. Hicks, 82 N.E. 888, 230 Ill. 536, 120 Am.S.R. 332.

20. Conn.—First Nat. Bank v. Broder, 141 A. 861, 107 Conn. 574.
Ga.—Moore v. Segars, 14 S.E.2d 752—Citizens' & Contractors' Bank v. Maddox, 166 S.E. 227, 175 Ga. 779.
Hawaii.—Daniels v. Bishop Trust Co., 32 Hawaii 167.
Ill.—Merchants' Loan & Trust Co. v. Ummach, 228 Ill.App. 67.
Mich.—Prange v. City of Flint, 187 N.W. 356, 217 Mich. 675.
N.Y.—Harris v. Pearsall, 190 N.Y.S. 61, 116 Misc. 366.
Okl.—Woodruff v. Brady, 72 P.2d 709, 181 Okl. 105, 113 A.L.R. 391.
Pa.—In re Crawford's Estate, 143 A. 214, 293 Pa. 570.
Utah.—Nielson v. Smith, 107 P.2d 158.
21 C.J. p 1208 note 47.

benefit be voluntarily received;[21] and it has been stated that it is only where a party may accept or reject without serious inconvenience that an estoppel arises from the acceptance of benefits.[22] Furthermore no estoppel arises where the person accepting the benefits is entitled to them regardless of the transaction in question.[23]

The rule must be given a reasonable interpretation,[24] and must be applied in a manner to do equity.[25] In no event can the estoppel be extended beyond the exact terms of the agreement or proceedings under which the benefits are accepted.[26]

§ 110. Specific Applications

a. Contracts
b. Deeds, mortgages, and wills
c. Bonds
d. Sales
e. Taking property for public use
f. Judgment, decree, or judicial order
g. Other applications

a. Contracts

A person may be estopped from questioning the existence, validity, and effect of a contract by accepting or claiming benefits thereunder, provided the contract is not void as against public policy or against an express mandate of law.

As a general rule, by accepting benefits a person may be estopped from questioning the existence, validity, and effect of a contract.[27] A party will not

21. Tex.—Grice v. Herrick Hardware Co., Civ.App., 224 S.W 533.
21 C.J. p 1208 note 48.

Acceptance under protest

(1) No estoppel arises if the benefits are received under protest.—Oram v. New Brunswick, 44 A. 883, 64 N.J.Law 19—21 C.J. p 1208 note 52.

(2) This is true especially where in addition to the protest there is an express reservation of the right to attack the validity of the transaction.—Boerum v. Schenck, 41 N.Y. 182.

22. Ohio.—Cincinnati v. Cameron, 33 Ohio St. 336.

23. U.S.—Grand Trunk Western R. Co. v. H. W. Nelson Co., C.C.A. Mich., 116 F.2d 823, rehearing denied 118 F.2d 252—Brown-Crummer Inv. Co. v. Paulter, C.C.A.Okl., 70 F.2d 184.
Cal.—In re McNutt's Estate, App., 98 P.2d 253, 257, citing **Corpus Juris.**
Colo.—Williams v. Hankins, 225 P. 243, 75 Colo. 136.
S.C.—Hubbard v. Beverly, 15 S.E.2d 740, 197 S.C. 476.
Wash.—Paine v. State, 286 P. 89, 156 Wash. 31.
21 C J. p 1208 note 50.

24. Cal.—In re Bruce's Estate, 80 P.2d 82, 27 Cal.App.2d 44.

25. Mo.—Rhodus v. Geatley, 147 S. W.2d 631.

26. Iowa.—Woodward v. Woodward, 268 N.W. 540, 222 Iowa 145.
Tex.—Porter v. Rogers, Civ.App., 293 S.W. 577.
21 C.J. p 1208 note 51.

27. U.S.—McLean v. Texas Co., C.C.A.Tex., 103 F.2d 989, certiorari denied 60 S.Ct. 98, 308 U.S. 579, 84 L.Ed. 485—National Manufacture & Stores Corporation v. Whitman, C.C.A.S.C., 93 F.2d 829—Motter v. Patterson, C.C.A.Kan., 68 F.2d 252, 260, citing **Corpus Juris**—Zumsteg v. Ætna Casualty & Surety Co., C.C.A.Colo., 31 F.2d 65—Grayburg Oil Co. v. Blyth Witter & Co., C.C.A.Tex., 24 F.2d 822—Continental Bank & Trust Co. of New York v. Webster Hall Corporation of America, D.C.Pa., 4 F.Supp. 337, affirmed, C.C.A., Webster Hall Corporation of America v. Continental Bank & Trust Co. of New York, 66 F 2d 558.
Ala.—Birmingham Trust & Savings Co. v. Strong, 194 So. 200, 239 Ala. 118.
Ark.—Pearl City Packet Co. v. Thompson, 143 S.W.2d 14, 200 Ark. 1043.
Fla.—Warren v. Tampa Mortg. Investors' Co., 150 So. 738, 112 Fla. 555.
Ga.—Rieves v. Smith, 192 S.E. 372, 377, 184 Ga. 657, 112 A.L.R. 368, citing **Corpus Juris.**
Ill.—Veroni v. Smith, 131 N.E. 679, 298 Ill. 434, reversing 217 Ill.App. 346.
Kan.—Mohr v. Women's Benefit Ass'n of the Maccabees, 274 P. 210, 127 Kan. 512.
Me.—Wilkins v. Waldo Lumber Co., 153 A. 191, 130 Me. 5.
Md.—Adamstown Canning & Supply Co. v. Baltimore & O. R. Co., 112 A. 286, 137 Md. 199.
Mich.—Schnack v. Applied Arts Corporation, 278 N.W. 117, 283 Mich. 434.
Mo.—Rhodus v. Geatley, 147 S.W.2d 631—Bank of Brumley v. Windes, 282 S.W. 696, 314 Mo. 206—Kusnetzky v. Security Ins. Co., 281 S.W. 47, 313 Mo. 143, 45 A.L.R. 189.
Neb.—Brisbin v. E. L. Oliver Lodge No. 335 of Brotherhood of Railway Clerks, 279 N.W. 277, 134 Neb. 517.
N.H.—Lockwood v. Dickey, 142 A. 689, 83 N.H. 365.
N.Y.—Royal Court Realty Co. v. Thomas, 19 N.Y.S.2d 257, 259 App. Div. 313—Dodds v. McColgan, 225 N.Y.S. 609, 222 App.Div. 126, reversing 211 N.Y.S. 371, 125 Misc. 405—Cook v. Murlin, 195 N.Y.S. 793, 202 App.Div. 552—In re Healey's Will, 291 N.Y.S. 772, 161 Misc 298—Greeley Square Hotel Co. v. Arrow Bus Interstate Co., 234 N Y.S. 87, 134 Misc. 95
N.C.—Farmers' Atlantic Bank v. First Nat. Bank, 152 S.E. 403, 198 N.C. 477.
Ohio.—Union Central Life Ins. Co. v. Clinton Mut. Ins. Ass'n, 199 N.E. 223, 51 Ohio App. 20—Ohio Telephone & Telegraph Co. v. Graham, 2 Ohio N.P., N.S., 302, reversed on other grounds 80 N.E. 1130, 75 Ohio St. 608, 51 Cinc.L.Bul. 612, 4 Ohio L.R. 543.
Okl.—General American Life Ins. Co v. Roach, 111 P.2d 185—General American Life Ins. Co. v. Jacobs, 111 P.2d 188—General American Life Ins. Co. v. Cantrell, 111 P.2d 190—Metropolitan Casualty Ins. Co. of New York v. Heard, 63 P.2d 720, 178 Okl. 461—Kaylor v. Kaylor, 45 P.2d 743, 172 Okl. 535—Huffaker v. Town of Fairfax, 242 P. 254, 115 Okl. 73—Johnson v. Gibson, 220 P. 47, 93 Okl. 194.
Pa.—Richards v. Integrity Trust Co., 177 A. 28, 317 Pa. 513.
S.D.—Henrich v. Newell, 240 N.W. 327, 59 S.D. 372.
Tenn.—Wilson v. Wilson, 130 S.W 2d 140, 23 Tenn.App. 244.
Tex.—Davis v. Cass County, Civ. App., 110 S.W.2d 963—Benson v. Donley County, Civ.App., 38 S.W. 2d 891—Dealers' Granite Corporation v. Faubion, Civ.App., 18 S.W. 2d 737—Shaw v. Etheridge, Civ. App., 15 S.W.2d 722—Lockhart State Bank v. Baker, Civ.App., 264 S.W. 566.
Wash.—Stover v. Winston Bros. Co., 55 P.2d 821, 185 Wash. 416, appeal dismissed Winston Bros. Co. v. Stover, 57 S.Ct. 44, 299 U.S. 508, 81 L.Ed. 376—Yakima Hardware Co. v. Strickler, 2 P.2d 90, 164 Wash. 155—Fidelity Nat. Bank of Spokane v. Fox, 258 P. 335, 144 Wash. 494—Beasley v. Assets Con-

be allowed to assume the inconsistent position of affirming a contract in part by accepting or claiming its benefits, and disaffirming it in part by repudiating or avoiding its obligations, or burdens.[28]

This rule has been applied in various circumstances,[29] as where the objection was made that the contract was not signed by all the parties named therein,[30] nor by the party claiming the estoppel;[31] that it was agreed that the contract should not be binding unless reduced to writing;[32] that the contract was void as in violation of the statute of frauds;[33] that the party claiming the estoppel did not read the contract before signing it;[34] that the contract was not delivered;[35] that the contract was without consideration;[36] that the contract was invalid for want of mutuality,[37] or as containing a potestative condition,[38] or because of the minority of one of the parties;[39] that a contract made with a husband was invalid by reason of the absence of the wife's statutory assent to the contract;[40] that chattels accepted and retained without objection were not up to contract requirements;[41] or that the appraisement provided for by a contract for the sale of improvements was incorrect.[42] In addition, where a person accepts the benefits of a new contract he cannot maintain that the former one is in force.[43]

On the other hand, the rule has no application where the party against whom the estoppel is claimed acts in ignorance of his rights,[44] where the contract expressly provides that nothing in it shall

servation Co., 230 P. 411, 131 Wash. 439.
21 C.J. p 1209 note 59.

Assignment of contract

A distillery was estopped to question the right of buyer to assign its rights under a contract of purchase and sale of the slops of the distillery, where it recognized the assignee as a successor of the buyer and made deliveries to it and received payments from it.—Western Industries Co. v. Mason Malt Whisky Distilling Co., 205 P. 466, 56 Cal.App. 355.

Benefits from rescission of contract

Vendor's acceptance of benefits of rescission of contract estopped her from denying rescission.—Minton v. Mitchell, 265 P. 271, 89 Cal.App. 361.

28. Ala.—American Nat. Ins. Co. v. Few, 141 So. 234, 224 Ala. 576.
Cal.—Grant v. Long, 92 P.2d 940, 33 Cal.App.2d 725.
Ky.—Ashland Supply Co. v. Northwest Engineering Co., 77 S.W.2d 41, 256 Ky. 770.
La.—Reconstruction Finance Corporation v. Tangipahoa Parish School Board, 190 So. 217, 192 La. 1059—Rausch Co. v. Franklin Fire Ins. Co. of Philadelphia, Pa., 143 So. 491, 175 La. 552—Chandler & Chandler v. City of Shreveport, App., 162 So. 437.
Mass.—Mutty & Tirrell v. Vialle, 152 N.E. 615, 256 Mass. 226.
Minn.—Bacich v. Northland Transp. Co., 242 N.W. 379, 185 Minn. 544.
Mo.—Brancato v. Ben Hur Life Ass'n, 128 S.W.2d 1108, 233 Mo.App. 1193—Runnels v. Lasswell, App., 219 S.W. 980.
N.Y.—Svenska Taendsticks Fabrik Aktiebolaget v. Bankers Trust Co., 196 N.E. 748, 268 N.Y. 73, affirming 268 N.Y.S. 186, 239 App.Div. 467.
N.C.—Warren v. Littleton Orange Crush Bottling Co., 168 S.E. 226, 204 N.C. 288—Farmers' Atlantic Bank v. First Nat. Bank, 152 S.E. 403, 198 N.C. 477.
Okl.—Morgan, Baldwin & Co. v. Kanola Oil & Refining Co., 226 P. 335, 102 Okl. 26.
Or.—Schramm v. Burkhart, 2 P.2d 14, 137 Or. 208.
S.D.—Federal Deposit Ins. Corporation of Washington, D. C., v. Western Surety Co., 285 N.W. 909, 66 S.D. 503.
Tenn.—Union Nat. Bank v. Fox, App., 148 S.W.2d 381.
Tex.—W. H. Putegnat Co. v. Fidelity & Deposit Co. of Maryland, Com.App., 29 S.W.2d 1004, reversing Fidelity & Deposit Co. of Maryland v. W. H. Putegnat Co., Civ.App., 15 S.W.2d 729—Baumgardner v. Russell Realty Co., Civ.App., 33 S.W.2d 561, error dismissed.
Utah.—Lawson v. Woodmen of the World, 53 P.2d 432, 88 Utah 267.
Wash.—Post v. Maryland Casualty Co., 97 P.2d 173, 2 Wash.2d 21.
21 C.J. p 1208 note 56.

Third-person beneficiaries

Third-person beneficiaries of a covenant may not claim benefits of covenant and reject its burdens.—McLean v. Texas Co., C.C.A.Tex., 103 F.2d 989, certiorari denied 60 S.Ct. 98, 308 U.S. 579, 84 L.Ed. 485.

29. **Failure to comply with legal formalities**

Ill.—Collins v. Cobe, 104 Ill.App. 142, affirmed 66 N.E. 1079, 202 Ill. 469.

30. Mo.—Wilbur v. Wilbur, App., 201 S.W. 387.
21 C.J. p 1210 note 61.

31. La.—Savage v. Wyatt Lumber Co., 64 So. 491, 134 La. 627.

Signature of trustee

Where defendants had treated a contract by landowners giving an option to plaintiff as a valid contract, and had procured an assignment thereof to plaintiff, and had made a sale thereunder, they were estopped to deny that it was a valid contract because not signed by a trustee for some of the owners.—Smith v. Blodget, 201 P. 584, 187 Cal. 235.

32. Ill.—Miller v. McManis, 57 Ill. 126.
Mo.—Priest v. Oehler, 41 S.W.2d 783, 328 Mo. 590.

33. Or.—Flower v. Barnekoff, 25 P. 370, 20 Or. 132, 11 L.R.A. 149.
Tenn.—Burke v. North Vernon Lumber Mills, 13 Tenn.App. 639.
Tex.—Southern Surety Co. v. Texas Concrete Pipe Co., Civ.App., 62 S.W.2d 534, error dismissed.

34. N.Y.—Culver v. Western Union Tel. Co., 50 N.Y. 691 mem.

35. S.D.—First Nat. Bank v. Wagner, 213 N.W. 3, 51 S.D. 225.
21 C.J. p 1210 note 66.

36. Tex.—George W. Baker & Sons v. Lovorn, Civ.App., 262 S.W. 508.
21 C.J. p 1210 note 67.

37. Ind.—Louisville, N. A. & C. R. Co. v. Flanagan, 14 N.E. 370, 113 Ind. 488, 3 Am.S.R. 674.

38. La.—Sam George Fur Co. v. Arkansas-Louisiana Pipeline Co., 148 So. 51, 177 La. 284—Busch-Everett Co. v. Vivian Oil Co., 55 So. 564, 128 La. 886.

39. Kan.—Metropolitan L. Ins. Co. v. Brubaker, 96 P. 62, 78 Kan. 146, 130 Am.S.R. 356, 18 L.R.A.,N.S., 362, 16 Ann.Cas. 267.

40. Tex.—Texas & St. L. R. Co. v. Robards, 60 Tex. 545, 48 Am.D. 268.

41. La.—Clover v. Gottlieb, 23 So. 459, 50 La.Ann. 568.

42. Ind.T.—Perry v. Farrimond, 82 S.W. 674, 5 Ind.T. 59.

43. Cal.—Richardson v. Hislop, 293 P. 168, 109 Cal.App. 440.
Ill.—Wollenberger v. Hoover, 179 N.E. 42, 346 Ill. 511.
Mo.—Halloway v. Mountain Grove Creamery Co., 228 S.W. 451, 286 Mo. 489.

44. Ariz.—Wiser v. Lawler, 62 P. 695, 7 Ariz. 163, affirmed 23 S.Ct. 624, 189 U.S. 260, 47 L.Ed. 802.
Okl.—Higby v. Martin, 28 P.2d 1097, 167 Okl. 10.

alter, affect, or impair the interest of any of the parties to it,[45] or where the person claiming the estoppel has sustained no injury.[46] Where work done under an unauthorized contract is wholly worthless, it is not a benefit which will estop a party from repudiating the contract.[47] Where items for extra work were not the subject of discussion or contention in the settlement of the amount due on a contract, the payment of the contract price does not operate as an estoppel.[48]

A person does not waive his right to sue for deceit inducing him to enter into a contract by accepting the benefits of the contract.[49]

Contracts against law or public policy. An important exception to the rule usually recognized is that, where the contract is void as against public policy or against an express mandate of the law, a person who has accepted a benefit thereunder will not be estopped to defend against the contract when it is sought to be enforced against him.[50] However, there is some authority to the contrary.[51]

b. Deeds, Mortgages, and Wills

A person may be estopped from questioning the existence, validity, and effect of a deed, mortgage, or will by accepting or claiming benefits thereunder.

By the acceptance of benefits one may be estopped from questioning the existence, validity, and effect of a deed or mortgage.[52] A person claiming under a deed or mortgage cannot occupy inconsistent positions with respect thereto,[53] and he must abide by the adverse features and assume the obligations imposed by the instrument.[54] Where one has an election either to ratify or disaffirm a conveyance, he can either claim under or against it, but he cannot

45. Pa.—Winton Coal Co. v. Pancoast Coal Co., 33 A. 110, 170 Pa. 437.

46. U.S.—Union Producing Co. v. Pardue, C.C.A.La., 117 F.2d 225, affirming Pardue v. United Gas Public Service Co., D.C., 28 F.Supp. 847.
N.Y.—Caflisch v. Clymer State Bank, 169 N.E. 286, 252 N.Y. 226, reversing 235 N.Y.S. 735, 226 App.Div. 456.

Purchaser from one without title
A mortgagee is not estopped from refusing to perform an agreement to release the lien from a part of the land where the estoppel is claimed by an alleged purchaser of the tract who bought from one having no title and hence would sustain no injury by the refusal.—Caflisch v. Clymer State Bank, supra.

47. Cal.—Thomasson v. Grace M. E. Church, 45 P. 838, 113 Cal. 558.

48. U.S.—McFerran v. U. S., 39 Ct. Cl. 441.

49. U.S.—Nocatee Fruit Co. v. Fosgate, C.C.A.Fla., 12 F.2d 250, affirming, D.C., Fosgate v. Nocatee Fruit Co., 299 F. 963, and 3 F.2d 606.

50. Cal.—Herkner v. Rubin, 14 P.2d 1043, 126 Cal.App. 677.
Ind.—Brown v. Columbus Nat. Bank, 37 N.E. 158, 137 Ind. 655, 24 L.R.A. 206.
Mo.—Miller v. Bowen Coal & Mining Co., 40 S.W.2d 485.
Utah.—Dunn v. Utah Serum Co., 238 P. 245, 65 Utah 527.
21 C.J. p 1210 note 79.

Receipt of benefits under similar contracts
One is not estopped to set aside a contract which is illegal as contrary to statute by having received benefits under former contracts of a similar nature.—Hokke v. Passaic County, 127 A. 813, 3 N.J.Misc. 245.

Estoppel as affecting police power
Where a light and power company operating under a franchise covering night service had for more than ten years also furnished day service, such fact was held not to estop the company from denying that the franchise covered day service also, for the police power of the state exercised through the state commission could not be rendered nugatory by an estoppel.—City of Clifton Forge v. Virginia-Western Power Co., 106 S.E. 400, 129 Va. 377.

51. Mich.—Marquette v. Wilkinson, 78 N.W. 474, 119 Mich. 413, 43 L.R.A. 840.
N.Y.—Bonta v. Gridley, 78 N.Y.S. 961, 77 App.Div. 33.

52. Cal.—Lake v. O'Brien, 202 P. 158, 54 Cal.App. 543.
Iowa.—Bowman v. Swanwood Coal Co., 207 N.W. 591, 201 Iowa 1236.
La.—Horne v. Beattie, 120 So. 38, 167 La. 647.
Minn.—Green v. Lidberg, 232 N.W. 511, 181 Minn. 361.
Miss.—White v. Moales, 113 So. 341, 147 Miss. 758.
Ohio.—Stewart v. Yeazell, 21 Ohio Cir.Ct., N.S., 357.
Pa.—Home Owners' Loan Corporation v. Tennent, 19 Erie 464, 86 Pittsb.Leg.J. 70, 51 York Leg.Rec. 176.
Tex.—McAnally v. Texas Co., 76 S.W.2d 997, 124 Tex. 196, affirming, Civ.App., 32 S.W.2d 947—Henderson v. Book, Civ.App., 128 S.W.2d 117, error refused—Macedonia Baptist Church v. Farm & Home Savings & Loan Ass'n, Civ.App., 110 S.W.2d 1013, error dismissed—Staley-Wynne Oil Corporation v. International Shoe Co., Civ.App., 91 S.W.2d 877, 882, citing **Corpus Juris.**
21 C.J. p 1210 note 81.

Equitable estoppel or estoppel by deed
Estoppel of the grantee of a deed is of the nature of equitable estoppel rather than technical estoppel by deed, since the estoppel is not predicated primarily on execution of a formal written instrument which cannot be denied or rebutted but rather on the inability of a person, in the eyes of the law, to acquiesce in, and enjoy the benefits of, a transaction and at the same time reject the accompanying burdens.—In re Solomon, D.C.Pa., 40 F.Supp. 62

53. Tenn.—Nashville Trust Co. v. Winters, 130 S.W.2d 152, 23 Tenn. App. 262.
21 C.J. p 1208 note 56.

Contesting claims of another class
The rule is not violated where one class of persons for whose benefit a deed is made contests the claims of another creditor or class of creditors.—Starr v. Dugan, 22 Md. 58.

54. U.S.—In re Solomon, D.C.Pa., 40 F.Supp. 62.
21 C.J. p 1209 note 58.

Abandonment of benefits
One taking mortgage or interest in property subject to specific lien may be estopped while he retains benefit from disavowing attendant burden, but basis for estoppel is cut away if transaction is lawfully disaffirmed and security abandoned.—Buffum v. Peter Barceloux Co., Cal., 53 S.Ct. 539, 289 U.S. 227, 77 L.Ed. 1140, reversing, C.C.A., Peter Barceloux Co. v. Buffum, 61 F.2d 145, certiorari granted 53 S.Ct. 319, 288 U.S. 595, 77 L.Ed. 972, and which reversed, D.C., Buffum v. Peter Barceloux Co., 51 F.2d 80, reversed, C.C.A., Gelinas v. Buffum, 52 F.2d 598, modified 67 F.2d 380, certiorari denied Buffum v. Gelinas, 54 S.Ct. 454, 291 U.S. 670, 78 L.Ed. 1060.

do both, and, having adopted one course, he cannot afterward pursue the other.[55]

However, to put this rule into operation it is essential that the party accepting the benefits should have knowledge of the facts authorizing him to impeach the instrument,[56] and that the party claiming the estoppel should have been ignorant of the facts out of which the alleged estoppel arose.[57] No estoppel arises against one where the acts claimed to create an estoppel were superinduced by fraud of the party setting up the estoppel.[58]

Wills. Parties who claim under a will cannot be heard to dispute its validity[59] or to assert an interest in hostility to the will.[60]

c. Bonds

(1) In general

(2) Appeal and supersedeas bonds

(1) In General

Where a bond has accomplished its purpose, or the principal has derived benefit from it, the principal and sureties are estopped to deny liability thereon.

It is a rule of general application that, where a bond has accomplished the purpose for which it was given, or the principal has derived benefit from it, both the principal and sureties are estopped to deny liability on the bond on any ground whatever.[61] This rule has been applied to various classes of bonds.[62]

Likewise objections such as the following, it has been held, are not available: That a bail bond failed to describe the crime for which defendant was arrested;[63] that the penalty of the bond was less in amount than required by statute;[64] that the act of a company which executed a bond as surety was ultra vires;[65] that the body to whom the bond was given was without corporate capacity;[66] that a bond given to procure the release of garnished funds is invalid on the ground that no statute authorizes such release;[67] or that a bond conditioned to pay any judgment that might be rendered on a new trial, the giving of which was the condition on which the new trial was granted, was invalid because the court had no right to grant the new trial.[68]

(2) Appeal and Supersedeas Bonds

By voluntarily executing an appeal or supersedeas bond the appellant and his sureties may be estopped to question the sufficiency or validity of the bond and other

55. Nev.—Moore v. Rochester Weaver Min. Co., 174 P. 1017, 42 Nev. 164.

56. Ky.—Kinnett v. Abrell, 121 S.W. 2d 699, 275 Ky. 276.
21 C.J. p 1211 note 83.

57. Ind.—Bryan v. Uland, 1 N.E. 52, 101 Ind. 477.
21 C.J. p 1211 note 84.

58. Ala.—Eppes v. Thompson, 79 So. 611, 202 Ala. 145.
21 C.J. p 1211 note 85.

59. Ala.—Harris v. Kyle, 81 So. 826, 203 Ala. 36.
N.Y.—Barber v. Rowe, 193 N.Y.S. 157, 200 App.Div. 290.

60. N.Y.—De Witt v. Jayne, 225 N. Y.S. 97, 222 App.Div. 674.
Tenn.—Nashville Trust Co. v. Winters, 130 S.W.2d 152, 23 Tenn.App 262—Wilson v. Wilson, 130 S.W. 2d 140, 23 Tenn.App. 244.

61. Cal.—Heine v. Wright, 244 P. 955, 76 Cal.App. 338.
Miss.—State ex rel. Rice v. Terry, 146 So. 140, 167 Miss. 558.
Okl.—C. I. T. Corporation v. Sautbine, 56 P.2d 1175, 1178, 177 Okl. 15, quoting **Corpus Juris.**
21 C.J. p 1211 note 88.

Acceptance of premiums from a successor to the original principal estops the surety from denying liability on the bond.—American Surety Co. of New York v. City of Akron, C.C.A.Ohio, 95 F.2d 966.

Payment by surety

Where, after a surety on the bond of a contractor, who was constructing municipal water and sewer system, had made payment to municipality in compromise of its action for nonfulfillment of the contract, the contractor recovered judgment against the city in the federal court, which judgment was rendered pursuant to a settlement specifically including any claim against the city on account of the surety's payment, it was held that the contractor, having received benefit of the payment by having his judgment increased to include the payment, was estopped from denying the surety's authority to make the same.—Peay v. Southern Surety Co., 216 S.W. 722, 141 Ark. 265.

Where a bond is illegally exacted without consideration, neither the principal nor the surety is estopped to deny liability thereon.—Town of Merton v. Hansen, 229 N.W. 53, 200 Wis. 576.

62. **Various classes of bonds**

(1) Bail bonds.—People v. Russell, 72 N.Y.S. 1, 35 Misc. 765, 16 N.Y.Cr. 57.

(3) Bonds conditioned to pay any judgment rendered on a new trial granted on condition that such bonds be given.—Brenzinger v. American Exch. Co., 19 Ohio Cir.Ct. 536, 10 Ohio Cir.Dec. 775.

(3) Bonds given by a sole heir to secure a decree of distribution.—Olson v. Fish, 77 N.W. 818, 75 Minn. 228.

(4) Bonds of public officers.—Fidelity & Deposit Co. of Maryland v. Mobile County, 27 So. 386, 124 Ala. 144.

(5) Bonds of receivers.—Baker v. Bartol, 7 Cal. 551.

(6) Bonds to procure the release of aliens.—U. S. v. Olson, C.C.A. Minn., 47 F.2d 1070.

(7) Bonds to procure release of garnished funds.—Schradsky v. Dunklee, 48 P. 666, 9 Colo.App. 394.

(8) Forthcoming bonds executed to secure release of property levied on under execution.—Deweese v. Millsaps, 195 S.E. 579, 57 Ga.App. 408—21 C.J. p 1211 note 94.

63. N.Y.—People v. Russell, 72 N.Y. S. 1, 35 Misc 765, 16 N.Y.Cr. 57.

64. Ind.—Trueblood v. Knox, 73 Ind. 310.
21 C.J p 1211 note 97.

65. Ark.—Dunbar v. Cazort-McGehee Co., 131 S.W. 698, 96 Ark. 308.

66. Mo.—St. Louis v. Shields, 62 Mo. 247—Father Matthew Young Men's Total Abstinence & Benevolent Soc. v. Fitzwilliam, 12 Mo.App. 445, affirmed 84 Mo. 406.

67. Colo.—Schradsky v. Dunklee, 48 P. 606, 9 Colo.App. 394.

68. Ohio.—Brenzinger v. American Exch. Bank, 19 Ohio Cir.Ct. 536, 10 Ohio Cir.Dec. 775.

matters; and the acts or conduct of the obligee may estop him from instituting an action against the sureties.

By executing an appeal or supersedeas bond, and thereby in fact obtaining the contemplated benefits pending the disposition of the appeal, the parties may estop themselves from asserting certain defenses to liability on the bond.[69] The general principle is that the obligors are estopped to deny their liability in accordance with the conditions of the bond, where the bond has subserved the purpose for which it was given and appellant has had the benefit of it.[70] Where appellant has obtained the benefit of an appeal, he and his sureties are estopped to question the sufficiency or validity of the appeal or supersedeas bond[71] unless it contravenes some statute or rule of public policy.[72] Thus the obligors may be estopped, by receipt of benefits, to question the sufficiency of the justification[73] approval,[74] or filing[75] of the bond. Likewise, by voluntarily giving the bond and obtaining the benefits thereof, appellant and his sureties are estopped from questioning the jurisdiction of the court to which the appeal is taken;[76] and they are estopped from inquiring into the regularity and validity of the appeal proceedings,[77] even where the proceedings are so defective or unauthorized as to require a dismissal of the ap-

69. Colo.—Swofford Bros. Dry Goods Co. v. Livingston, 65 P. 413, 16 Colo.App. 257.

70. Ill.—English v. Leach, 258 Ill. App. 383.
4 C.J. p 1269 note 28.

71. U.S.—American Employers' Ins. Co. v. Montgomery, C.C.A.Del., 101 F.2d 1005, affirming Montgomery v. American Employers' Ins. Co., D.C., 22 F.Supp. 476 and Montgomery v. Realty Acceptance Corporation, 15 F.Supp. 665, certiorari denied American Employers' Ins. Co. v. Montgomery, 59 S.Ct. 833, 307 U.S. 627, 83 L.Ed. 1512, two cases, and U. S. Casualty Co. v. Montgomery, 59 S.Ct. 833, 307 U.S. 627, 83 L.Ed. 1512—Robertson v. Wilkinson, C.C.A.Tex., 10 F.2d 311.
Fla.—Daubmyre v. Hunter, 144 So. 408, 106 Fla. 858.
Ind.—Heller v. Fidelity & Casualty Co. of New York, 143 N.E. 266, 88 Ind.App. 77.
Iowa.—State ex rel. Havner v. Associated Packing Co., 258 N.W. 456, 219 Iowa 419.
N.M.—McDonald v. Mayon, 168 P. 1069, 23 N.M. 439.
N.Y.—Union Bank of Brooklyn v. American Bonding Co. of Baltimore, 161 N.Y.S. 655, 174 App.Div. 542.
Tex.—Clay v. Richardson, Civ.App., 9 S.W.2d 413.
W.Va.—Baltimore & O. R. Co. v. Vanderwarker, 19 W.Va. 265.
Wyo.—Bortree v. Dunkin, 123 P. 913, 20 Wyo. 376, Ann.Cas.1915C 1205.
3 C.J. p 1202 note 60—4 C.J. p 1269 note 30.

Condition in excess of statutory requirement

Where a party, against whom was issued an injunction to restrain the maintenance of a dam and to require its removal, executed an appeal bond conditioned to pay damages and mesne profits pending the appeal in addition to the condition for payment of the judgment and costs required by Burns St.Annot 1914 § 679, and the opposite party relied on the condition for the payment of damages and mesne profits for his protection against loss caused by the maintenance of the dam, the obligors were estopped, after affirmance of the judgment, to attack the condition for payment of damages and mesne profits as surplusage because not required by the statute.—Woodward v Trout, 129 N.E. 251, 75 Ind.App. 208.

Estoppel of bonding company retaining premium

Where a bonding company with knowledge of an informality in the execution of an appeal bond by its agent received and retained the premium, it was estopped in an action on the bond from urging such informality as a defense.—Farmers' & Merchants' Irr. Co. v. United States Fidelity & Guaranty Co. of Baltimore, 108 N.W. 156, 77 Neb. 144.

Bond by intervener with no right to appeal

Where a party gave a supersedeas bond and his appeal was subsequently dismissed because he had no right to intervene or to appeal, it was held that there was no estoppel to raise the defense of want of consideration for such bond, on a motion, in the original suit, to obtain judgment against the sureties pursuant to statute.—Loudon v. Loudon, 218 P. 442, 63 Cal.App. 204.

72. Ill.—Mix v. People, 86 Ill. 329—Courson v. Browning, 78 Ill. 208.
4 C.J. p 1269 note 31.

73. S.D.—Nichols & Shepard Co. v Horstad, 130 N.W. 776, 27 S.D. 262.

74. Ill.—Jones v. Jones, 223 Ill.App. 214.
Ind.—Small v. Kennedy, 39 N.E. 901, 12 Ind.App. 155.

75. Iowa.—State ex rel. Havner v. Associated Packing Co., 258 N.W. 456, 219 Iowa 419.

Bond filed out of time

(1) According to some cases appellant and his sureties are estopped to deny the legal effect of the bond, although filed out of time.
Ill.—See L. W. Hubbell Fertilizer Co. v. Jacobellis, 199 Ill.App. 379.
Neb.—Adams v. Thompson, 26 N.W. 316, 18 Neb. 541.
3 C.J. p 1202 note 60.

(2) Where a supersedeas bond had been executed, filed, and approved by the clerk of the court in which the judgment was rendered after the time allowed by the court in which execution may be stayed pending the filing of the petition in error and case-made in the supreme court, and plaintiff in error thereafter filed his petition in error and case-made in the supreme court and had the benefit accruing by virtue of the execution of such bond by a stay of such execution pending the disposition of his case in the supreme court, neither he nor his sureties may deny liability on such bond because the same was not filed within the time originally allowed by the court for the same to be filed.—Jones v. First Nat. Bank, 171 P. 848, 69 Okl. 199.

(3) Intended supersedeas bond which, under the applicable statute, was ineffective as a supersedeas bond, because not filed within a specified time after judgment had been rendered, was good as a common-law bond, and hence sureties were liable thereon for damages sustained by appellees.—Martin v. Bogard, 2 S.W.2d 700, 176 Ark. 203.

76. Kan.—Barratt v. Grimes, 63 P. 272, 10 Kan.App. 181.
Ohio.—W. J Donnelly Co. v. Fidelity & Casualty Co., 155 N.E. 558, 23 Ohio App. 370.
Okl.—Cope v. Johnson, 251 P. 985, 123 Okl. 43.

77. U.S.—National Surety Co. v. U. S., C.C.A.Wash., 29 F.2d 92.
Ill.—Gilmore v. Lewinsohn, 189 Ill. App. 546.
Ind.—Heller v. Fidelity & Casualty Co. of New York, 143 N.E. 266, 88 Ind.App. 77.
4 C.J. p 1270 note 37.

Full purpose for which bond given effected

Where an appellant gained the full purpose for which a supersedeas bond was given, he may not successfully assert that the appeal was unnecessary or might have been dis-

peal for want of jurisdiction.[78] However, the obligors may inquire into the validity of an appeal for the purpose of relieving themselves from liability on their undertaking, where appellant derives no benefit from the invalid appeal.[79]

The validity of the judgment on appeal may not be impeached on the ground of defects in the bond.[80] Further, where the result of an appeal is a trial de novo in the appellate court, and such trial is within the jurisdiction of such court and actually had, the question of the validity of the judgment below cannot be raised in a suit on the appeal bond.[81]

Estoppel of obligee. The acts or conduct of the obligee may be such as to constitute an estoppel to bring an action against the sureties on the bond.[82] It has been held or recognized that an appellee may not assert the validity of an appeal bond for the purpose of maintaining an action on the bond after having procured a dismissal of the appeal on the ground of its insufficiency,[83] although the view has been taken that where an appeal bond is insufficient, and appellant fails to furnish a new bond on order of the court, the dismissal of the appeal on motion of appellee does not preclude him from bringing an action on the bond.[84]

d. Sales

A person who knowingly accepts the proceeds of the sale of his property is estopped to assert title as against the purchaser, and one who participates in the proceeds of a sale of a debtor's assets or of a sale under a decree of court cannot attack the validity of the sale.

One who accepts the proceeds of a sale of his property by another with knowledge that it is the proceeds of a sale of his property is estopped to assert title thereto against the purchaser or those claiming under him.[85] A creditor who makes no objection and who participates in the proceeds of the

missed because he had no appealable interest and, therefore, that the bond was void as to him and not enforceable against the sureties.—Buttnick v. Buttnick Jobbing & Investment Co., 227 P. 852, 130 Wash. 411.

78. Ill.—McGinnis v. McGinnis, 225 Ill.App. 340.
Ohio.—W. J. Donnelly Co. v. Fidelity & Casualty Co., 155 N.E. 558, 23 Ohio App. 370.
4 C.J. p 1270 note 38.

79. Wis.—Mueller v. Rice, 136 N.W. 146, 149 Wis. 548.
4 C.J. p 1270 note 39.

80. Mass.—Pray v. Wasdell, 16 N.E. 266, 146 Mass. 324—Granger v. Parker, 7 N.E 785, 142 Mass. 186.
4 C.J. p 1269 note 34.

Misrecital in judgment

Where, on the filing of an appeal bond, appellant has received and accepted all the benefits of his appeal and the supersedeas, his sureties are estopped to set up a misrecital of the judgment, as extinguishing or limiting their liability.
Colo.—Dye v. Dye, 55 P. 205, 12 Colo.App. 206.
Ill.—Farley v. Tenham, 257 Ill.App. 381.

81. Ind.—Butler v. Wadley, 15 Ind. 502.
4 C.J. p 1272 note 59.

82. Tex.—Holland Texas Hypotheek Bank of Amsterdam, Holland v. Broocks, Civ.App., 297 S.W. 1070.

Agreement of appellee to bid amount of judgment on a sale

(1) Appellee who promised to bid the full amount of the original judgment on a sale to satisfy the same, and was relieved from executing a certain bond, was estopped from bringing an action on supersedeas bond where appellee failed to comply with its promise.—Holland Texas Hypotheek Bank of Amsterdam, Holland v. Broocks, supra.

(2) Appellee's offer to bid sufficient to pay the judgment, which was alleged to work an estoppel against a suit on the appeal bond, was not conditioned on sale on day advertised.—Holland Texas Hypotheek Bank of Amsterdam, Holland v. Broocks, supra.

An opinion as to a legal question given by attorney for obligee, at the trial of the original action, in response to a question of the court, does not constitute an estoppel which may be relied on as a defense in an action on a bond subsequently given on appeal from a judgment in favor of the obligee.—Independent School Dist. No. 35 v. Oliver Mining Co., 208 N.W. 952, 169 Minn. 15, affirmed 210 N.W. 856, 169 Minn. 15.

Indorsement of satisfaction on record

In an action on an appeal bond the surety may not successfully set up an estoppel based on plaintiff's act in indorsing a satisfaction on the record of the judgment appealed from and the surety's return to appellant of securities deposited with the surety to protect it against liability, where the surety before returning such securities had acquired knowledge that the amount of the judgment appealed from had actually been paid.—Beasley v. American Surety Co., 243 Ill.App. 447.

83. Wyo.—Bortree v. Dunkin, 133 P. 913, 20 Wyo. 376, Ann.Cas.1915C 1205.
4 C.J. p 1269 note 35.

84. Mich.—Hascall v. Brooks, 63 N. W. 413, 105 Mich. 383.

85. Ala.—McKleroy v. Musgrove, 84 So. 280, 203 Ala 603.
Cal.—Pray v. Anthony, 274 P. 1024, 96 Cal.App. 772—Pacific Acceptance Corporation v Jones, 272 P. 1084, 95 Cal.App. 365.
Ga.—McGowan-Motes Motor Co. v. Whatley, 135 S.E. 509, 36 Ga.App. 109.
Ky.—Young v Venters, 18 S.W.2d 277, 229 Ky. 806—Goodin v. Turner, 300 S.W. 327, 222 Ky. 132—Chapman v. Majestic Collieries Co., 288 S.W. 299, 216 Ky. 652—Schlickman v. Dusing, 224 S.W. 174, 188 Ky. 745.
Mo.—Landis v. Overton, 293 S.W. 371—Allen v. Best, 58 S.W.2d 810, 227 Mo.App. 851.
S.C.—Cothran v. Long Cane Lumber Co., 139 S.E. 850, 141 S.C. 387.
21 C.J. p 1212 note 3.

Remainderman accepting proceeds of life estate

Estoppel is effective against remainderman aiding sale of life estate and participating in proceeds.
Fla.—Commercial Bldg. Co. v. Parslow, 112 So. 378, 93 Fla. 143.
Mo.—Boone v. Oetting, 114 S.W.2d 981, 342 Mo. 269.

Stockholder accepting proceeds of corporate assets

Principal stockholder of corporation cannot affirm sale of corporation's assets to other corporation and hold proceeds and at the same time disaffirm sale as illegal, in action by creditor of corporation to recover against him as stockholder fraudulently withholding assets.—Davis v. Hemming, 127 A. 514, 101 Conn. 713, 39 A.L.R. 133.

Waiver of condition by accepting proceeds

If the vendor of land, knowing that a company was about to pur-

sale of a debtor's assets cannot attack the validity of the sale.[86]

Nevertheless, where it is claimed that a person is estopped from suing for the recovery of property by reason of his having received the proceeds of the sale thereof, it should be made to appear, in order to maintain the plea, that such proceeds were received knowingly, since if he received them ignorantly, supposing that they came from some other source, although he may be compelled to refund, there is no estoppel.[87] The acceptance of a sum of money by a person believing it to be paid for a specified number of chattels does not estop him from claiming the price for other chattels illegally taken.[88] To effect an estoppel the benefit must be actually received[89] and must be of more than an insignificant value.[90] By accepting a part of the purchase price on delivery of the deed the vendor is not estopped to sue the purchaser for the remainder.[91]

A purchaser by retaining possession of the property sold is not estopped to recover damages for the vendor's fraudulent representations inducing the purchase of the property.[92]

Sales in judicial proceedings. Ordinarily those who accept a part or all of the proceeds of a sale of property under a judgment decree or order of court are estopped to claim that the sale was invalid.[93] This rule has been applied to sales under decree in suits to enforce liens on land;[94] to sales in proceedings for partition;[95] to sales by executors and administrators;[96] to sales by receivers;[97] and to sales of land under proceedings for that purpose against nonresidents.[98]

chase the contract from the vendee in ignorance of its requirement that the vendor's written consent be obtained, yet said nothing about the provision, and afterward accepted the benefits of payments which the assignee company made, such vendor is prevented either on the ground of waiver or estoppel from subsequently insisting on the condition at least without returning the payments.—Smith v. Martin, 185 P. 236, 94 Or. 132.

Suit for proceeds as affirming sale

U.S.—People's First Nat. Bank v. Coe Mfg. Co., C.C.A.Ga., 67 F.2d 312.

86. U.S.—Schloss Bros. & Co. v. Charles Stern Co., C.C.A.Ga., 53 F.2d 574.

Participation in sale in bulk

A creditor who participates in a sale in bulk and who consents to the goods being sold in bulk in expectation that the proceeds of the sale will be applied on his indebtedness cannot be heard to say that the sale was fraudulent and void merely because the notice of intent to sell in bulk did not comply with the statute.—Palo Sav. Bank v. Cameron, 168 N.W. 769, 184 Iowa 183.

87. Colo.—James v. James, 274 P. 816, 85 Colo. 154.

Mo.—Patton v. Buxton, 238 S.W. 118.

21 C.J. p 1212 note 5.

Receipt of money paid by subsequent purchasers

A vendor, whose deed and contract with vendees were recorded, and his executors, were held not estopped from recovering the land on vendees' default by accepting money from a vendee which they knew was paid him by subsequent purchasers from him, in the absence of evidence that such purchasers knew that their money was so paid and received, or were misled by vendor or his executors, who were not obligated to inquire into the source of the payments.—Silverman v. Harmon, Tex.Civ.App., 250 S.W. 206.

88. La.—Alleman Planting & Mfg. Co. v. Baker-Wakefield Cypress Co., 64 So. 677, 134 La. 682.

Cutting of timber outside contract

Landowner accepting money from paper company for extension of time to cut and remove timber, sold for sawlogs only, was held not estopped to sue company for value of pulp wood cut and removed.—Haigler v. Southern Advance Bag & Paper Co., La.App., 142 So. 270.

89. Mo.—Rhodus v. Geatley, 147 S.W.2d 631.

Uncashed check

In action to try and determine title to land, where there was no evidence that one plaintiff, who never cashed or negotiated sheriff's check, mailed to such plaintiff, for amount allowed him by judgment as his share of proceeds of partition sale, agreed that mere delivery of check should constitute payment of such amount, and defendant did not plead or prove that sheriff was prejudiced by such plaintiff's retention of check, there was no basis for "estoppel" against him to assert invalidity of such sale.—Rhodus v. Geatley, supra.

90. Mo.—Rhodus v. Geatley, supra.

Insignificant amount received by minors

Children of deceased fee-simple owner of land and her surviving husband, to whom, as such children's natural guardian, insignificant amounts, allotted by judgment in his partition suit as children's shares of proceeds of partition sale to him, were paid while children were infants, were not estopped by acceptance of such shares to assert invalidity of sale in action, brought by them after attaining majority, to try and determine title to land.—Rhodus v. Geatley, supra.

91. Kan.—Smith v. Griffith, 184 P. 725, 105 Kan. 357.

92. Mich.—Poloms v. Peterson, 228 N.W. 711, 249 Mich. 306.

93. Fla.—Moran-Alleen Co. v. Brown, 123 So. 561, 98 Fla. 203.

La.—Womack v. McCook Bros. Funeral Home, 193 So. 652, 194 La. 296, affirming, App., 192 So. 756—Williams v. Brocato, App., 194 So. 67.

Va.—Hiatt v. Tompkins, 10 S.E.2d 489—Smith v. Litton, 188 S.E. 214, 167 Va. 263.

21 C.J. p 1212 note 7.

94. Va.—Marshall v. McDermitt, 90 S.E. 830, 79 W.Va. 245, L.R.A.1917 C 883.

95. Ind.—Teneycke v. Lesh, 151 N.E. 740, 84 Ind.App. 555.

La.—Williams v. Brocato, App., 194 So. 67.

21 C.J. p 1212 note 9.

96. Ga.—Hawkes v. Smith, 81 S.E. 200, 141 Ga. 422.

21 C.J. p 1212 note 10.

97. Ind.—Martin v. Adams Brick Co., 102 N.E. 831, 180 Ind. 181.

Wash.—Farmers' State Bank of Kahlotus v. Pacific Grain Co., 230 P. 648, 131 Wash. 504.

Estoppel against bondholders of debtor

If receiver's supply creditors urged receiver to sell the property, and accepted seventy per cent of their claims out of the proceeds, they would not be estopped to prosecute suit against bondholders, since bondholders should have seen to it that the property brought a sufficient sum to pay off all claims superior to theirs.—Mayotown Lumber Co. v. Nacogdoches Grocery Co., Tex.Civ.App., 221 S.W. 644, affirmed Com.App., 236 S.W. 704.

98. Ky.—Hackler v. Nicholson, 5 Ky.L. 859.

On the other hand, the rule does not apply to one who acted in ignorance of the facts which rendered the sale invalid,[99] and is limited strictly to property included in the proceedings.[1] It has further been held that where there has been a retender of the proceeds to the personal representative making the sale, which was refused, it cannot be declared as a matter of law that the party making the retender is estopped.[2]

e. Taking Property for Public Use

The acceptance of damages awarded in proceedings under which property is taken for public use will ordinarily estop the owner from questioning the validity of the proceedings or to deny that he had legal title at the time of the proceedings, but he is not estopped to assert claims as to other property.

The acceptance of the damages awarded in proceedings under which property has been taken for a public or quasi public use will ordinarily estop the owner from questioning their validity[3] or to deny that he had the legal title at the time of the proceedings;[4] and he cannot thereafter recover the property taken[5] nor attack the proceedings collaterally.[6]

Nevertheless the owner will not be estopped by acceptance of damages from claiming land not described in the verdict in condemnation proceedings,[7] or from invoking the aid of the courts against an improper exercise of the power of eminent domain by agreement relating only to part of the property sought to be taken.[8] The receipt of damages assessed in proceedings before county commissioners for the opening of a private way will not estop the person receiving the same from resisting the opening of the way over his lands, where the money is accepted under a mistake as to the amount of work that will be done in opening the way by the person for whose benefit it is proposed to be opened.[9]

f. Judgment, Decree, or Judicial Order

One who accepts the benefits of a judgment, decree, or judicial order is estopped to deny the validity thereof.

A person who accepts the benefits of a judgment, decree, or judicial order is estopped to deny the validity thereof,[10] whether the invalidity results from want of jurisdiction of the person[11] or of the subject matter of the suit.[12]

The violation of an order or judgment does not, it has been held, estop a party from insisting on the benefits thereunder.[13]

g. Other Applications

The general rule that a person may be estopped by the acceptance of benefits has been applied in various other cases.

The general rule stated in § 109 supra, that a person by accepting the benefits of a transaction is bound by its obligations, has been applied in various other cases.[14] Thus by accepting the benefits

99. Mo.—Grafeman Dairy Co. v. Northwestern Bank, 235 S.W. 435, 290 Mo. 311—Byers v. Jacobs, 64 S.W. 156, 164 Mo. 141.

1. Tex.—Schnabel v. McNeill, Civ. App., 110 S.W. 558.

2. Ga.—Broadhurst v. Hill, 74 S.E. 422, 137 Ga. 833.

3. Ga.—Bibb Brick Co. v. Central of Georgia Ry. Co., 102 S.E. 521, 150 Ga. 65.
N.Y.—Mayo v. Windels, 5 N.Y.S.2d 690, 693, 255 App.Div. 22, citing **Corpus Juris.**
21 C.J. p 1212 note 16.

4. Ala.—Choate v. Southern R. Co., 39 So. 218, 143 Ala. 316.

5. Colo.—Allen v. Colorado Cent. R. Co., 43 P. 1015, 22 Colo. 238.
Mo.—Cape Girardeau & T. B. T. R. Co. v. Southern Illinois & Missouri Bridge Co., 114 S.W. 1084, 215 Mo. 286.

6. Mo.—Cape Girardeau & T. B. T. R. Co. v. Southern Illinois & Missouri Bridge Co., supra.

Maintenance of action for cutting trees
Landowner accepting compensation ascertained in condemnation proceedings for trees cut and land taken is estopped to maintain action for trespass and for debt for willfully cutting trees.—Birmingham-Trussville Iron Co. v. Allied Engineers, 144 So. 1, 225 Ala. 522.

7. Ill.—Union Mut. Life Ins. Co. v. Slee, 13 N.E. 222, 12 N.E. 543, 123 Ill. 57.

8. Minn.—State v. Fourth Judicial Dist. Ct., 158 N.W. 240, 133 Minn. 221.

9. Ind.—Stewart v. Hartman, 46 Ind. 331.

10. U.S.—Wilson v. Union Electric Light & Power Co., C.C.A.Mo., 59 F.2d 580.
Ark.—Harris v. Thackery, 147 S.W.2d 355—Morgan v. Morgan, 283 S.W. 979, 171 Ark. 173.
Colo.—State v. Elkins, 270 P. 875, 84 Colo. 409.
La.—Le Goaster v. Lafon Asylum, 106 So. 329, 159 La. 855.
N.D.—Petters v. Charlson Estate, 285 N.W. 510, 69 N.D. 290—First State Bank of Strasburg v. Schmaltz, 237 N.W. 644, 61 N.D. 150—Hafey v. Hafey, 222 N.W. 256, 57 N.D. 381.
Ohio—Sanborn v. Sanborn, 140 N.E. 407, 106 Ohio St. 641.
Okl.—Turner v. Kirkwood, 31 P.2d 935, 168 Okl. 80—Bluejacket State Bank v. First Nat. Bank, 9 P.2d 2, 155 Okl. 300.
S.C.—Scheper v. Scheper, 118 S.E. 178, 125 S.C. 89.
Tex.—Ward v. Priddy, Civ.App., 57 S.W.2d 586, error refused.
21 C.J. p 1213 note 30.

Modification of decree
Person benefiting by modification of decree cannot afterward, for other purposes beneficial to him, assert its finality.—Multa Trina Ditch Co. v. Strobaugh, 231 P. 48, 76 Colo. 451.

11. U.S.—Burgess v. Nail, C.C.A. Okl., 103 F.2d 37, affirming, D.C., Nail v. American Nat. Bank of Bristow, 21 F.Supp. 385, rehearing denied 22 F.Supp. 977.
N.D.—First State Bank of Strasburg v. Schmaltz, 237 N.W. 644, 61 N.D. 150.

12. U.S.—Burgess v. Nail, C.C.A. Okl., 103 F.2d 37, affirming, D.C., Nail v. American Nat. Bank of Bristow, 21 F.Supp. 385, rehearing denied 22 F.Supp. 977.

13. Tex.—Ward County Water Improvement Dist. No. 3 v. Ward County Irr. Dist. No. 1, Civ.App., 237 S.W. 584, modified on other grounds 295 S.W. 917, 117 Tex. 10.

14. **Arbitration award**
Ga.—Pike v. Stallings, 71 Ga. 860.
21 C.J. p 1213 note 24.

a person may be estopped to deny liability or to repudiate the burdens incident to a land survey,[15] lease,[16] note,[17] check,[18] receipt of money,[19] or provisions in a corporation charter.[20] Likewise the rule may be invoked to prevent the denial, repudiation, or questioning of divisions of property,[21] status of an adopted child,[22] or a status of legitimacy.[23]

A person who accepts an amount as full payment of a claim is estopped to assert a further claim arising out of the same transaction,[24] unless the facts are misrepresented by the party claiming the estoppel.[25] A further claim is not precluded by the acceptance of a payment of money due if it is not agreed or understood by both parties that the payment is in full settlement,[26] or if under an express agreement the payment is accepted on condition that it shall not prejudice the accepter's rights,[27] unless the agreement is unauthorized.[28] Acceptance of delinquent payments under a contract may estop the recipient from insisting on a forfeiture of the contract for nonpayment,[29] but the mere acceptance of delayed payments on a note is not an estoppel to insist on an accelerated maturity clause in the note.[30]

§ 111. Municipal and Quasi Municipal Corporations

a. In general
b. Irregular exercise of power
c. Governmental or proprietary functions

a. In General

Receipt of benefits ordinarily will not estop a municipal corporation to deny the validity of a contract clearly beyond its powers.

Under the general rules set forth infra § 143, and subject to considerations discussed infra this section, it may be broadly stated that ordinarily a municipal corporation is not estopped to deny the want of power to make a contract by receiving the benefits thereof;[31] and it has been held that full per-

15. Mo.—Mengel v. Leach, 226 S.W. 883.

16. U.S.—Union Producing Co. v. Driskell, C.C.A.La., 117 F.2d 229—Eagle Oil Co. v. Sinclair Prairie Oil Co., D.C.Okl., 24 F.Supp. 612, affirmed, C.C.A., 105 F.2d 710.
N.Y.—Miller v. E. & M. Theatre Corporation, 235 N.Y.S. 595, 134 Misc. 634.
Okl.—Carter Oil Co. v. Kennedy, 278 P. 640, 137 Okl. 168—Gypsy Oil Co. v. Karns, 236 P. 608, 110 Okl. 156.
Tex.—North Texas Oil & Refining Co. v. Standard Tank Car Co., Civ. App., 249 S.W. 253.
21 C.J. p 1213 note 26.

Acceptance of rent from lessee's transferee
Lessor, accepting rent from lessee's transferee until transferee exercised option to purchase premises, was held estopped to deny transfer. —Johnson v. Wilson, 142 S.E. 70, 165 Ga. 810.

Effect of coverture
Estoppel of devisee receiving royalties to assail validity of oil lease was held not affected by her coverture.—Bearden v. Texas Co., Tex. Civ.App., 41 S.W.2d 447, affirmed, Com.App., 60 S.W.2d 1031.

Acceptance of rent after forged extension
A lessor who has knowledge that an extension of time has been forged is not estopped to insist on the expiration of the lease at the agreed time by accepting rental during the period for which the lease is validly in force.—Curry v. Hinton, 231 S.W. 217, 191 Ky. 681.

17. Mo.—Webb v. Rolla Produce Co., App., 234 S.W. 1068.
Tex.—Shaw v. Dyer, Civ.App., 62 S.W.2d 617, error dismissed—Short v. Phelps, Civ.App., 274 S.W. 662—Goolsby v. Manning, Civ.App., 270 S.W. 936.
Wis.—Fahrbach v. Fahrbach, 201 N.W. 529, 185 Wis. 404.
21 C.J. p 1213 note 27.

18. Mich.—Gladstone Exch. Bank v. Keating, 53 N.W. 1110, 94 Mich. 429.
21 C.J. p 1213 note 25.

19. Pa.—Federal Land Bank of Baltimore v. King, 143 A. 500, 294 Pa. 86.
21 C.J. p 1213 note 28.

20. Del.—Frank v. Wilson & Co., Ch., 9 A.2d 82.

21. Pa.—In re Tyrrell's Estate, 16 Pa.Dist. & Co. 70.
21 C.J. p 1213 note 29.

22. Tex.—Jones v. Guy, 143 S.W.2d 906, affirming Guy v. Jones, Civ. App., 132 S.W.2d 490.

Benefits to adoptive parents
Adoptive parents and their privies are estopped from asserting invalidity of adoption proceedings or, at least, the status of adopted child when, by performance upon part of child, adoptive parents have received all benefits and privileges accruing from such performance and adoptive parents, by their representations, induced such performance under belief of existence of status of adopted child.—Jones v. Guy, supra.

23. La.—Monette's Succession, 26 La.Ann. 26.
21 C.J. p 1213 note 32.

24. Ill.—Jones v. Winnebago County, 5 N.E.2d 862, 288 Ill.App. 156
Kan.—Jackman v. Kansas Electric Power Co., 251 P. 431, 122 Kan. 19.
N.J.—Overland Const. Co. v. Village of Ridgewood, 130 A. 559, 102 N.J.Law 148.
Wash.—Huston v. Washington Wood & Coal Co., 103 P.2d 1095.

25. Utah.—Ralph A. Badger & Co. v. Fidelity Building & Loan Ass'n, 75 P.2d 669, 94 Utah 97

26. Iowa.—Graettinger Tile Works v. Gjellefald, 214 N.W. 579.
Ky.—Rounds v. Cloverport Fdy. & Machine Co., 167 S.W. 384, 159 Ky 414, Ann Cas.1915D 40.
Miss.—Rhodes v. New Orleans Great Northern R. Co., 91 So. 281, 129 Miss. 78.
Wash.—Scott v. Wilmeroth Service & Cold Storage Co., 292 P. 99, 159 Wash. 77—Holm v. Malott, 287 P. 11, 156 Wash. 421.

27. Iowa.—Nelson v. Hagen, 31 N.W. 875, 72 Iowa 705.

28. N.Y.—People v. Cortland County, 15 N.Y.S. 748.

Unauthorized agreement by county supervisor
N.Y.—People v. Cortland County, supra.

29. Mo.—Wyse v. Miller, 2 S.W.2d 806, 222 Mo.App. 165.

30. Cal.—Young v. Burchill, 274 P. 379, 96 Cal.App. 341.

31. U.S.—Municipality of Rio Piedras v. Serra, Garabis & Co., C.C.A.Puerto Rico, 65 F.2d 691.
Conn.—Silliman & Godfrey Co. v. Town of Westport, 150 A. 502, 111 Conn. 510.
Ga.—Decatur County v. Roberts, 126

formance by the contractor of a contract with a city which is void because opposed to the constitution and laws and contrary to public policy will not prevent the city from pleading its want of power or the illegality of the contract.[32] If the thing done is illegal or not warranted by law, however beneficial it may be, the public is not estopped to deny its validity.[33]

However, there are decisions to the effect that a municipality may be estopped by receipt of benefits to deny the validity of a contract which is beyond its corporate power,[34] unless it restores the benefits received,[35] if it is possible to do so;[36] and this view has been recognized in other decisions with the limitation that the contract must not be malum in se or attended with criminal liability,[37] or that it must not be expressly prohibited by its charter or any law, and that there shall be no bad faith,[38] and this rule has been said to be particularly applicable where the contract has become an executed one.[39] The doctrine of ultra vires, it has been stated, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong.[40]

If no contract was in fact made by a municipality, either by previous authorization or subsequent ratification, the municipality is not liable on the theory of estoppel resulting from benefits received by it.[41]

S.E. 460, 159 Ga. 528, reversing 124 S.E. 810, 32 Ga.App. 771, vacated 126 S.E. 557, 33 Ga.App. 437—Burke v. Wheeler County, 187 S.E. 246, 249, 54 Ga.App. 81, citing **Corpus Juris.**

Ill.—De Kam v. City of Streator, 146 N.E. 550, 316 Ill. 123, reversing 232 Ill.App. 135—Selby v. Village of Winfield, 255 Ill.App. 67.

Mich.—Village of Oak Park v. Van Wagoner, 260 N.W. 743, 746, 271 Mich. 450, quoting **Corpus Juris.**

Mo.—Traub v. Buchanan County, 108 S.W.2d 340, 341 Mo. 727.

Neb.—Nebraska City v. Nebraska City Speed & Fair Ass'n, 186 N.W. 374, 107 Neb. 576.

Tex.—Community Natural Gas Co. v. Northern Texas Utilities Co., Civ. App., 13 S.W.2d 184, error dismissed.

21 C.J. p 1214 note 34.

Employment contracts invalid under wage and budget laws

Where minimum wage law fixed the rate at which an amount paid by city of Phœnix to employees who performed mechanical or manual labor on public works was to be credited, when gross amount budgeted for such purposes, applied at that rate, was exhausted, all contracts of employment for such purposes were automatically terminated and new contracts could not be made by either city or employees, separately or together, under doctrine of waiver or estoppel so as to create liability on part of the city for services performed thereafter. Provisions of budget law may be waived only by legislature, and hence a city could not be held liable on moral obligation to pay wages claimed by employees who performed mechanical and manual labor on public works where amount claimed was in excess of amount budgeted by city for class of labor in question.—City of Phœnix v. Kidd, 92 P.2d 513, 54 Ariz. 75, affirmed 94 P.2d 428, 54 Ariz. 123, followed in City of Phœnix v. Price, 94 P.2d 433, 54 Ariz. 137, affirming 92 P.2d 523, 54 Ariz. 98, followed in City of Phœnix v. Enriquez, 94 P.2d 434, 54 Ariz. 138, affirming 92 P.2d 523, 54 Ariz. 99, followed in City of Phœnix v. Wilson, 94 P.2d 434, 54 Ariz. 139, affirming 92 P.2d 524, 54 Ariz. 100.

Contract contrary to express statutory regulation

Where an architect prepared plans for directors of poor on an unauthorized contract, although poor district accepted benefits of work done, it is not estopped from refusing to pay for his services, as the principle of estoppel does not permit expenditure of public funds contrary to express statutory enactment.—Willis v. Directors of Poor of York County, 130 A. 401, 284 Pa. 138.

Acceptance of benefits as estopping government in respect of unauthorized acts of officers and agents see infra § 142.

32. Ga.—Dawson City Council v. Dawson Waterworks Co., 32 S.E. 907, 106 Ga. 696.

Mich.—Village of Oak Park v. Van Wagoner, 260 N.W. 743, 746, 271 Mich. 450, quoting **Corpus Juris.**

33. Colo.—People v. White, 255 P. 453, 81 Colo. 315.

Ga.—Burke v. Wheeler, 187 S.E. 246, 249, 54 Ga.App. 81, citing **Corpus Juris.**

Iowa.—Du Bois v. City of Oskaloosa, 294 N.W. 302, 229 Iowa 109.

Mich.—Village of Oak Park v. Van Wagoner, 260 N.W. 743, 746, 271 Mich. 450, quoting **Corpus Juris.**

21 C.J. p 1214 note 36.

34. Nev.—Waitz v. Ormsby County, 1 Nev. 370.

21 C.J. p 1214 note 37.

In California

(1) A municipal corporation which has received the benefits of a contract is estopped to deny the want of corporate authority to make the contract.—Argenti v. San Francisco, 16 Cal. 255—21 C.J. p 1214 note 37 [a].

(2) However, it has been held that a county is not estopped to sue county supervisor for sums paid him under void contract, which was contrary to public policy, for printing and supplies without restoring benefits received.—Shasta County v. Moody, 265 P. 1032, 90 Cal.App. 519.

35. Neb.—Grand Island Gas Co. v. West, 45 N.W. 242, 28 Neb. 852.

21 C.J. p 1214 note 38.

Receipt and retention of benefits of loan

A municipal corporation cannot enrich itself by receiving benefits of a loan and retaining all of the advantages gained thereby and urge that note or contract under which loan was received is void.—Brock v. Town of Kentwood, 199 So. 133, 196 La. 318.

36. Iowa.—Turner v. Cruzen, 30 N.W. 483, 70 Iowa 202.

21 C.J. p 1214 note 39.

37. U.S.—California-Oregon Power Co. v. Medford, D.C.Or., 226 F. 957.

38. Wis.—Schneider v. Menasha, 95 N.W. 94, 118 Wis. 298, 99 Am.S.R. 996.

39. Cal.—Argenti v. San Francisco, 16 Cal. 255.

Pa.—Aspinwall-Delafield Co. v. Aspinwall, 77 A. 1098, 229 Pa. 1.

40. U.S.—Ohio & M. R. Co. v. McCarthy, Mo., 96 U.S. 258, 267, 24 L.Ed. 693.

41. Neb.—Scott v. City of Lincoln, 178 N.W. 203, 104 Neb. 546.

Benefits received without knowledge of whole council

The mere receipt of benefits under an unauthorized agreement made by a single member of a city council does not render the city liable on the contract, where such benefits are received without the knowledge of the other members of the council, and there is no ratification.—Scott v. City of Lincoln, supra.

Benefit as part of consideration

That church furnished auditorium

b. Irregular Exercise of Power

Receipt of benefits may estop a municipality from denying the validity of an act or contract which is within its power, but which is invalid because of an informal or irregular exercise of its power.

Under the general rules discussed infra § 144, where the act or contract of a municipal or quasi-municipal corporation is not one which it is without corporate power to make but is unenforceable merely because of an irregular exercise of power in the making or execution of it, the corporation may be estopped to deny the validity of the act or contract where it has accepted the benefits thereof.[42] This doctrine will not be applied, however, to validate a contract where a city council purports to do what it has no power to do by any procedure,[43] and it has been held to be inapplicable where the contract was made in a manner directly contravening mandatory provisions of a statute;[44] nor may such rule be applied to a case where no benefit of a public character was received.[45] Some benefit real and substantial must have been accepted,[46] and if no more has been paid to a municipal or quasi-municipal corporation

for free use of city for public meetings, does not estop city from resisting execution or continuance of contract, not within its powers, to furnish water to church free of charge for use in swimming pool, in absence of allegation that auditorium was furnished as part of consideration of contract, or with full knowledge of city commissioners—City of Fort Worth v. First Baptist Church of Fort Worth, Tex.Civ.App., 268 S.W. 1016.

42. U.S.—Scott County, Ark., v. Advance-Rumley Thresher Co., C.C.A. Ark., 288 F. 739—City of Cleveland v. Walsh Const. Co., C.C.A. Ohio, 279 F. 57, affirming, D.C., Walsh Const. Co. v. City of Cleveland, 271 F. 701.
Cal.—Pedro v. Humboldt County, 19 P.2d 776, 217 Cal. 493—Adams v. Ziegler, 70 P.2d 537, 22 Cal.App.2d 135.
Conn.—Loomis v. Fifth School Dist., 145 A. 571, 109 Conn. 700—Bridgeport Brass Co. v. Drew, 128 A. 413, 102 Conn. 206.
Ill.—Woods v. Village of La Grange Park, 4 N.E.2d 764, 287 Ill.App. 201—James Anderson Co. v. City of Highland Park, 276 Ill.App. 327.
Iowa.—Love v. City of Des Moines, 230 N.W. 373, 210 Iowa 90.
La.—Turfitt v. Police Jury of Tangipahoa Parish, 186 So. 52, 191 La. 635—Clark v. City of Opelousas, 84 So. 433, 147 La. 1.
Mich.—United Sav. Bank of Detroit v. School Dist. No. 5, Fractional, Redford and Livonia Tps., Wayne County, and Farmington Tp., Oakland County, 273 N.W. 753, 280 Mich. 419—American La France & Foamite Industries v. Clifford, 255 N.W. 596, 267 Mich. 326.
Minn.—Chisholm Water Supply Co. v. City of Chisholm, 285 N.W. 895, 205 Minn. 245.
Mo.—Cole County v. Central Missouri Trust Co., 257 S.W. 774, 779, 302 Mo. 222, quoting **Corpus Juris**—Bonsack & Pearce v. School Dist. of Marceline, 49 S.W.2d 1085, 226 Mo.App. 1238.
Neb.—Nebraska City v. Nebraska City Speed & Fair Ass'n, 186 N.W. 374, 107 Neb. 576.
N.Y.—Vandeweghe v. City of New York, 270 N.Y.S. 570, 150 Misc. 815, affirmed 275 N.Y.S. 218, 242 App.Div. 762—Angustine v. Town of Brant, 227 N.Y.S. 305, 131 Misc. 555, affirmed 163 N.E. 732, 249 N.Y. 198, which reversed 230 N.Y.S. 43, 224 App.Div. 290, and reargument denied 166 N.E. 315, 250 N.Y. 537.
Ohio.—Baxter v. Village of Manchester, 28 N.E.2d 672, 64 Ohio App. 220—City of Cincinnati v. Trustees of Cincinnati Southern Ry., 6 Ohio Cir.Ct. 247, 3 Ohio Cir.Dec. 438, affirmed 52 Ohio St. 637, 32 Cinc.L.Bul. 420.
Or.—Pederson v. City of Portland, 24 P.2d 1031, 144 Or. 437.
Tex.—City of Houston v. Finn, Civ.App., 149 S.W.2d 1000—City of Corpus Christi v. Johnson, Civ.App., 54 S.W.2d 865—City of Port Arthur v. Young, Civ.App., 37 S.W.2d 385, error refused.
Wis.—Marathon County v. Industrial Commission, 275 N.W. 437, 225 Wis. 514, reversing 272 N.W. 374, 225 Wis. 514.
21 C.J. p 1215 note 48—44 C.J. p 367 note 61.

Classification of teacher
School district is estopped to deny teacher's classification as permanent employee where board of education classified her as permanent employee in her contract for third consecutive year, and she accepted contract and rendered services thereunder.—Briney v. Santa Ana High School Dist., 21 P.2d 610, 131 Cal.App. 357.

School trustees accepting school funds are estopped to deny school is free to children of state residing in district.—Brinson v. Jackson, 148 S.E. 96, 168 Ga. 353.

Informalities
(1) City keeping and using fire hose is estopped to deny validity of contract for purchase by it of fire hose on account of informalities in execution.
Ark.—City of Ft. Smith v. U. S. Rubber Co., 42 S.W.2d 1004, 184 Ark. 588.
Tex.—B. F. Goodrich Rubber Co. v. Town of Collinsville, Civ.App., 101 S.W.2d 583.

(2) Village, whose contract of purchase of fire engine was intra vires and which retained benefits therefrom, is estopped to deny that purchase was made by formal action of council.—American La France & Foamite Industries v. Village of Clifford, 255 N.W. 596, 267 Mich. 326.

Retaining proceeds from sale of school lands
Where a school district had power to sell land, but the sale was invalid because of irregularities, the district will be estopped thereafter so to claim if it authorized the sale, received the proceeds, turned it into the school treasury, and used it for school purposes, all of which was done by permission of the commissioners' court, and especially is this true where ten or twelve years have passed during which all parties recognized the validity of the sale.—Mecom v. Ford, Civ.App., 256 S.W. 701, conforming to 252 S.W. 491, 113 Tex. 109.

Receipt of benefits not shown
Tex.—First Nat. Bank v. Murchison Independent School Dist., Civ.App., 114 S.W.2d 382.

43. Iowa.—Love v. City of Des Moines, 230 N.W. 373, 210 Iowa 90.
44. Colo.—City of Colorado Springs v. Coray, 139 P. 1031, 25 Colo.App. 460.
45. Iowa.—Love v. City of Des Moines, 230 N.W. 373, 210 Iowa 90

Fraud or negligence without public benefit
The negligence or fraudulent conduct of agent of municipal corporation, such as county, in connection with issuance of warrants thereby, will not bind corporation to any liability by way of "estoppel" or otherwise, if it receives no benefit from transaction.—De Witt v. Kent County, Tex.Civ.App., 148 S.W.2d 213, error dismissed, judgment correct.

46. U.S.—Hoskins v. City of Orlando, C.C.A.Fla., 51 F.2d 901.
Ga.—Killian v. Cherokee County, 150 S.E. 158, 169 Ga. 313.
Tex.—De Witt v. Kent County, Civ.App., 148 S.W.2d 213, error dismissed, judgment correct—City of Lubbock v. Geo. L. Simpson & Co.,

than it would have been entitled to in the absence of the contract, it has been held that such corporation is not estopped to deny its validity.[47] Moreover, as is stated infra § 138, all of the essential elements of an estoppel must have been present.

A grant or license to use a street may estop the city where the city has acquiesced in the improvements made and received benefits therefrom.[48] After proceeds of a bond issue have been received by a school district, it is estopped from asserting a defect in the proceedings leading up to their issuance.[49]

c. Governmental or Proprietary Functions

By the receipt of benefits, a municipality acting in its proprietary capacity may be estopped to deny the validity of irregular or informal action, but it is not estopped to deny the validity of action wholly beyond its power.

Where a municipality is acting in its proprietary, as distinguished from its governmental, capacity, by receipt of benefits it may be estopped from denying the validity of a contract irregularly made by it,[50] although under such circumstances it will not be estopped from denying the validity of a contract wholly beyond its powers.[51]

Irrespective of whether it was exercising a governmental or a proprietary function, a municipality will not be estopped to deny liability because of receipt of benefits where, in fact, it received no benefits.[52]

§ 112. Parties Dealing with Municipal Corporations

One dealing with a municipal corporation may, by receipt of benefits under a contract, be estopped to deny the regularity of the organization of the corporation or to assert that the contract was irregularly executed, although the authorities differ respecting the estoppel of one receiving the benefit of the contract to deny the power of the municipality to make it.

One who has contracted with a municipal corporation in regard to a subject matter within the scope of its powers, and who has received the benefit of the contract, is estopped to deny the regularity and completeness of the organization of the corporation,[53] or to assert that the contract was not executed by the corporation as required by law.[54] It has also been held that one who has had the benefit of a contract with a municipality is estopped to deny the power of the municipality to make the contract;[55] and this rule has been applied where the contract, although ultra vires the corporation, was not illegal because not prohibited by the charter.[56] Furthermore, the rule has been extended to deny the right of the party receiving the benefits of the contract to assert that the contract was void as against public policy.[57] Where a contractor receives full compensation before he is entitled thereto, he, or one claiming under him, is estopped to assert that the contract, although within the power of the city, is not within the power of the particular officers or agents who acted on behalf of the city.[58] One accepting the emoluments of office may be estopped to deny the legality of its creation.[59]

Civ.App., 31 S.W.2d 665, error dismissed.
21 C.J. p 1215 note 49.

47. Iowa.—Gunn v. Mahaska County, 136 N.W. 929, 155 Iowa 527.

48. U.S.—Louisville v. Cumberland Tel. & Tel. Co., Ky., 32 S.Ct. 572, 224 U.S. 649, 56 L.Ed. 934.
21 C.J. p 1215 note 51.
Benefit from municipal building on other land surrendered
Where a town, in consideration of a lot owner's waiver of his rights under a contract to another tract of land, vacated, under the authority of Rev.St.1899 § 1545 par 4, a part of the street in front of his lots, and built a public library on the property surrendered by him, so that it could not restore his former situation, it is estopped to deny the validity of the vacation of the street.—Rohrbaugh v. Mokler, 188 P. 448, 26 Wyo. 514.
Estoppel with reference to grants or licenses to use streets see infra § 145.

49. Ark.—Davis v. White, 284 S.W. 764, 171 Ark. 385.
56 C.J. p 629 note 23.

50. U.S.—W. L. Slayton & Co. v. Panola County, D.C.Tex., 283 F. 330.
Ill.—Sebastian v. School Directors of Dist. No. 53, Clinton County, 28 N.E.2d 340, 306 Ill.App. 282.
Neb.—Nebraska City v. Nebraska City Speed & Fair Ass'n, 186 N.W. 374, 107 Neb. 576.
Estoppel in connection with governmental and proprietary functions see infra § 141.

51. Neb.—Nebraska City v. Nebraska City Speed & Fair Ass'n, supra.

52. U.S.—Southland Ice Co. v. City of Temple, C.C.A.Tex., 100 F.2d 825.

53. Ala.—Sherwood v. Alvis, 3 So. 307, 83 Ala. 115, 3 Am.S.R. 695.

54. Ohio.—City of Columbus v. Federal Gas & Fuel Co., 13 Ohio N.P., N.S., 394.
21 C.J. p 1215 note 54.

55. Ga.—Oliver v. Hall County Memorial Hospital, 8 S.E.2d 138, 140, 62 Ga.App. 95, citing **Corpus Juris.**
21 C.J. p 1215 note 55.

56. Mo.—St. Louis v. Davidson, 14 S.W. 825, 102 Mo. 149, 22 Am.S.R. 764.
21 C.J. p 1216 note 56.

57. Mich.—Marquette v. Wilkinson, 78 N.W. 474, 119 Mich. 413, 43 L.R.A. 840.
21 C.J. p 1216 note 57.

58. Wash.—Spokane v. Costello, 106 P. 764, 57 Wash. 183.

59. Cal.—Lesem v. Getty, 72 P.2d 183, 23 Cal.App.2d 57.
Director of public health
One appointed director of public health and sanitation of San Diego County, although appointed before ordinance creating office was passed, having performed duties of his office and accepted emoluments from it, was a de facto director and was estopped from denying either legality of creation of his office or of his appointment thereto by urging that term of office and manner of appointment were not set forth in charter in accordance with constitutional provision.—Lesem v. Getty, supra.

On the other hand, there are decisions which hold without qualification that neither one who has received the benefits of a contract with a municipal corporation nor those claiming under him, are estopped to set up the want of the corporate authority to make such a contract.[60]

Estoppel to deny validity of ordinance. After a public service corporation has accepted an ordinance imposing limitations of its rates of charge, it is estopped to deny the validity of the ordinance on the ground that the rates fixed are not reasonable.[61]

Estoppel to deny validity of grant or license. The beneficiary of a grant or license who has acquiesced therein and received valuable property under it cannot deny its validity as against the municipal authorities or others.[62]

§ 113. Acquiescence

Acquiescence may be the basis of an equitable estoppel.

Acquiescence as a defense has, generally speaking, a dual nature; it may, on the one hand, rest on the principle of ratification and be denominated "implied ratification," or, on the other hand, rest on the principle of estoppel and be denominated "equitable estoppel."[63]

While acquiescence is akin to laches, both being a species of estoppel,[64] the two doctrines are by no means the same, a much more definite apparent assent to the acts complained of being required in acquiescence than in laches.[65] Acquiescence has also been regarded as a species of waiver.[66]

§ 114. In Acts of Others

a. In general
b. Particular applications of rule

a. In General

A person who, with knowledge of the facts and of his rights, acquiesces in or ratifies an act or transaction is estopped to repudiate such act or transaction as against one who is misled to his prejudice; but an estoppel cannot be extended beyond the natural and reasonable import of the acts or conduct relied on.

As a general rule, where a person with actual or constructive knowledge of the facts induces another by his words or conduct to believe that he acquiesces in or ratifies a transaction, or that he will offer no opposition thereto, and that other, in reliance on such belief, alters his position, such person is estopped from repudiating the transaction to the other's prejudice.[67] This rule obtains regardless

60. Ala.—Pearson v. Duncan, 73 So. 406, 198 Ala. 149.
21 C.J. p 1216 notes 58, 59.

61. Md.—Charles Simon's Sons Co v. Maryland Tel. & Tel. Co., 57 A. 193, 99 Md. 141, 63 L.R.A. 727.

62. Ga.—Kirkland v Macon, 66 Ga. 385.

63. Iowa.—McKeon v. City of Council Bluffs, 221 N.W 351, 353, 206 Iowa 556, 62 A.L.R 1006, citing **Corpus Juris.**
N.Y.—In re Ayvazian's Estate, 275 N. Y.S. 123, 153 Misc. 467.
21 C.J. p 1216 note 62.

Acquiescence as ratification, adoption, or affirmance
"Some courts use the words 'ratification,' 'acquiescence,' 'adoption,' and 'affirmance' in practically the same sense and hold that an estoppel may be based upon any of these matters and in some instances on a waiver. Others hold that there can be no ratification except in the case of an agency of some nature, and an estoppel by acquiescence is sometimes referred to as a quasi estoppel, that is, as one in which a situation is created which is analogous to estoppel and has the same effect as an estoppel in pais."—Mahoning Inv. Co. v. U. S., 3 F.Supp. 622, 629, certiorari denied 54 S.Ct. 526, 291 U.S. 675, 78 L.Ed. 1064 and Rochester & Pittsburgh Coal & Iron Co. v. U. S., 54 S.Ct. 527, 291 U.S. 675, 78 L.Ed. 1064.

Act procured by party estopped
Under doctrine of acquiescence or quasi estoppel, regularity or validity of act procured by one himself cannot be raised.—John H. Spohn Co. v. Bender, 64 P.2d 152, 18 Cal.App.2d 447.

64. Iowa.—Bankers' Trust Co. v. Rood, 233 N.W. 794, 802, 211 Iowa 289, 73 A.L.R. 1421.
"Acquiescence" defined and distinguished see 1 C.J.S. p 915.
"Laches" defined see Equity § 112.

65. Del.—Frank v. Wilson & Co., Ch., 9 A.2d 82.
1 C.J. p 906 note 17.

66. Del.—Frank v. Wilson & Co., supra.

67. U.S.—Augustus v. New Amsterdam Casualty Co. of Baltimore, C. C.A.Ill., 100 F.2d 581, certiorari denied 59 S.Ct. 834, 307 U.S. 631, 83 L.Ed. 1514—Wheelock v. Commissioner of Internal Revenue, C.C.A. Tex., 77 F.2d 474—First Federal Trust Co. v. First Nat. Bank, C. C.A.Nev., 297 F. 353, 356, quoting **Corpus Juris**—Tharp v. U. S., 83 Ct.Cl. 164.
Ala.—Rainwater v. State ex rel. Strickland, 187 So. 484, 237 Ala. 482, 121 A.L.R. 981—Mobile Towing & Wrecking Co. v. Hartwell, 95 So. 191, 208 Ala. 420.
Ark.—Brownfield v. Bookout, 228 S.W. 51, 53, 147 Ark. 555, citing **Corpus Juris.**
Cal.—Oswald v. Schwartz, 185 P. 959, 181 Cal. 620—John H. Spohn Co v. Bender, 64 P.2d 152, 154, 18 Cal. App 2d 447, citing **Corpus Juris**—Dewing v. Chow, 19 P.2d 12, 129 Cal.App. 441.
Colo.—Fitzwater v. Norcross, 37 P.2d 522, 95 Colo 527.
Del.—Trounstine v. Remington Rand. Ch., 194 A. 95.
D.C.—Louis Werner Saw Mill Co. v Helvering, 96 F.2d 539, 68 App.D. C. 267.
Fla.—Kotick v. Durrant, 196 So. 802, 143 Fla. 386.
Ind.—Everly v. Equitable Surety Co., 130 N.E. 227, 190 Ind. 274—Horning v. Moyer, 185 N.E. 303, 96 Ind. App. 374.
Iowa.—Pease v. Citizens' State Bank of Earlham, 214 N.W. 486, 204 Iowa 70.
Ky.—City of Frankfort v. Ballew, 151 S.W.2d 1063, 287 Ky. 141—Louisville Joint Stock Land Bank v. McMurry, 128 S.W.2d 596, 278 Ky. 238.
La.—Ziemer v. City of New Orleans, 197 So. 754, 195 La. 1054—Foster v. City of New Orleans, 99 So. 686, 155 La. 889.
Md.—Union Trust Co. of Maryland v. Mullineaux, 194 A. 823, 173 Md. 124.
Mich.—Clarke v. Detroit & Security

of the particular intent of the party whose acquiescence induces action.[68]

Elements, extent, and limits of rule. Acquiescence imports and is founded on knowledge and assent.[69] The rule of estoppel by acquiescence is inoperative unless it appears that the party against whom it is invoked was fully aware of his rights,[70] or was negligent in failing to acquire such knowledge.[71] It is further necessary that he should have had knowledge, actual or constructive, of all of the material facts and circumstances attending the particular transaction in respect of which the doctrine

Trust Co., 241 N.W. 217, 257 Mich. 416.

Minn.—Froslee v. Sonju, 297 N.W. 1.

Miss.—Fidelity & Deposit Co. v. Doughtry, 179 So. 846, 181 Miss. 586—Mississippi Rural Rehabilitation Corporation v. Ethridge, 177 So. 527.

Mo.—Clark v. Clark, 18 S.W.2d 77, 82, 322 Mo. 1219, citing **Corpus Juris**—Swihart v. Missouri Farmers Mut. Tornado, Cyclone & Windstorm Ins. Co., App., 138 S.W.2d 9.

Neb.—Brisbin v. E. L. Oliver Lodge No. 335 of Brotherhood of Railway Clerks, 279 N.W. 277, 134 Neb. 517.

N.H.—Putnam v. Employers Liability Assur. Corporation, 4 A.2d 353, 90 N.H. 74.

N.J.—Hoehl v. Hibbert, 166 A. 170, 113 N.J.Eq. 114.

N.M.—In re McMillan's Estate, 33 P. 2d 369, 38 N.M. 347.

N.Y.—Dictaphone Corporation v. O'Leary, 29 N.Y.S.2d 352, 262 App. Div. 359—Sheffield Farms Co. v. Ten Eyck, 299 N.Y.S. 340, 252 App. Div. 825—In re Wechsler's Estate, 18 N.Y.S.2d 929, 173 Misc. 802—In re Hayden's Estate, 16 N.Y.S.2d 126, 172 Misc. 669—Robertson v. Schoonmaker, 285 N.Y.S. 204, 158 Misc. 627—In re Sidenberg's Estate, 264 N.Y.S. 704, 147 Misc. 742—In re Beresford's Estate, 262 N. Y.S. 78, 146 Misc. 140—Church v. Grossi, 207 N.Y.S. 106, 124 Misc. 192—Daley v. Walsh, 202 N.Y.S. 750, 122 Misc. 322—Salmon v. Rochester & Lake Ontario Water Co., 197 N.Y.S. 769, 774, 120 Misc. 131, quoting **Corpus Juris**—Wineburgh v. Seeman Bros., 21 N.Y.S. 2d 180.

N.C.—Goldstein v. Baer, 199 S.E. 379, 214 N.C. 832—Miller v. Miller, 157 S.E. 604, 200 N.C. 458.

Ohio.—State ex rel. Swartley v. Kalina, 187 N.E. 645, 46 Ohio App. 19.

Pa.—In re Kennedy's Estate, 183 A. 798, 321 Pa. 225—In re Shoemaker, 121 A. 510, 512, 277 Pa. 424, quoting **Corpus Juris.**

S.D.—Brannigan v. Schneck, 208 N. W. 718, 50 S.D. 116.

Tenn.—Scott v. Hardaway Contracting Co., 68 S.W.2d 944, 17 Tenn. App. 470.

Tex.—Loper v. Meshaw Lumber Co., Civ.App., 104 S.W.2d 597, error dismissed—Hammonds v. Flewellen, Civ.App., 48 S.W.2d 813—De Ramirez v. De Ramirez, Civ.App., 29 S.W.2d 872, error refused.

Va.—Harris v. Citizens Bank & Trust Co., 200 S.E. 652, 172 Va. 111.

Wash.—Hay v. Chehalis Mill Co., 27 P.2d 1095, 175 Wash. 653—De Boe v. Prentice Packing & Storage Co., 20 P.2d 1107, 1110, 172 Wash. 514, citing **Corpus Juris**—Peterson v. Bergman Cabinet Mfg. Co., 261 P. 381, 383, 145 Wash. 664, 55 A.L.R. 989, citing **Corpus Juris.**

W.Va.—Tallman v. Cunningham, 161 S.E. 22, 23, 111 W.Va. 231, citing **Corpus Juris**—Drake v. O'Brien, 130 S.E. 276, 99 W.Va. 582.

Wis.—Brogan v. State, 252 N.W. 566, 214 Wis. 313.

21 C.J. p 1216 note 63—1 C.J. p 906 note 18.

Acquiescence in commission of error

One discovering another acting in error must exercise reasonable diligence in giving notice, if he intends to hold erring party responsible.

Cal.—Matteson v. Bank of Italy, 275 P. 998, 97 Cal.App. 643.

Mich.—Achenbach v. Mears, 261 N. W. 251, 272 Mich. 74.

68. Ark.—Rone v. Sawrey, 123 S. W.2d 524, 197 Ark. 472—Brownfield v. Bookout, 228 S.W. 51, 53, 147 Ark. 555, citing **Corpus Juris.**

Mich.—Peake v. Thomas, 39 Mich. 584.

N.Y.—Salmon v. Rochester & Lake Ontario Water Co., 197 N.Y.S. 769, 774, 120 Misc. 131, quoting **Corpus Juris.**

Pa.—In re Shoemaker, 121 A. 510, 512, 277 Pa. 424, quoting **Corpus Juris.**

Rule otherwise stated

When one "freely does something which fairly and reasonably amounts to a recognition of the validity of . . . [an] act, and which is inconsistent with its subsequent repudiation, a real conscious intent to approve or ratify it is not essential."—Frank v. Wilson & Co., Del. Ch., 9 A.2d 82, 87.

Misrepresentation as essential

To create equitable estoppel, there need be no misrepresentation as to facts; it is sufficient if party sought to be estopped acquiesced in transaction in manner changing relationship of parties and making repudiation of proceedings contrary to equity and good conscience.—Stevens Mfg. Co. v. U. S., Ct.Cl., 8 F.Supp. 720.

69. Okl.—Oklahoma City v. Wells, 91 P.2d 1077, 1084, 185 Okl. 369, 123 A.L.R. 662, citing **Corpus Juris.**

21 C.J. p 1217 note 65.

70. U.S.—Arkansas Natural Gas Corporation v. Sartor, C.C.A.La., 98 F.2d 527, certiorari denied 59 S.Ct. 243, 305 U.S. 649, 83 L.Ed. 420, rehearing denied 59 S.Ct. 250, 305 U. S. 675, 83 L.Ed. 437, conformed to D.C., Sartor v. Arkansas Natural Gas Co., 29 F.Supp 956, reversed on other grounds, C.C.A., Sartor v. Arkansas Natural Gas Corporation, 111 F.2d 772—Mattison-Greenlee Service Corporation v. Culhane, D. C.Ill., 20 F.Supp. 882, reversed on other grounds, C.C.A., 103 F.2d 603—In re Lake Champlain Pulp & Paper Corporation, D.C.N.Y., 20 F 2d 425.

La.—Little v. Barbe, 198 So. 368, 195 La. 1071.

Mass.—Stewart v. John R. Lankenau Co., 156 N.E. 73, 259 Mass. 242—Taylor v. Jones, 136 N.E. 382, 242 Mass. 210, certiorari denied Jones v. Taylor, 43 S.Ct. 99, 260 U.S. 742, 67 L.Ed. 491.

Mo.—Delta Realty Co. v. Hunter, 152 S.W.2d 45.

N.Y.—National Cash Register Co. v. Remington Arms Co., 202 N.Y.S. 691, 122 Misc. 234, reversed on other grounds 209 N.Y.S. 40, 212 App.Div. 343, affirmed 151 N.E. 144, 242 N.Y. 99, reargument denied 152 N.E. 431, 242 N.Y. 569.

Ohio.—Lloyd v. Columbus Citizens Telephone Co., 5 Ohio N.P., N.S., 279.

Va.—Millboro Lumber Co. v. Augusta Wood Products Corporation, 125 S.E. 306, 140 Va. 409.

21 C.J. p 1217 note 67.

Knowledge as to compensation due

(1) That a party acquiesced in erroneous method of computing compensation did not debar it from insisting on proper computation on discovering error.—Ufa Films, Inc., v. Ufa Eastern Division Distribution, 234 N.Y.S. 147, 134 Misc. 129, affirmed Ufa Films, Inc., v. Brill, 235 N.Y.S. 902, 226 App.Div. 869.

(2) Salesman's acceptance of unitemized statements of commissions did not estop him from demanding itemized statements or recovering commissions due and omitted from statements without his knowledge.—Klerlein v. Fred Werner Co., 98 Pa. Super. 440.

71. Tenn.—Smith v. Cross, 140 S.W. 1060, 125 Tenn. 159.

Tex.—Bender v. Brooks, 13 S.W. 653, 61 Tex.Civ.App. 464.

is invoked;[72] he is entitled to a reasonable time to investigate the facts before any estoppel by acquiescence can be claimed.[73] It has also been held that knowledge must extend not only to the wrongful acts in question but also to their injurious consequences;[74] but actual knowledge is not necessary where the ignorance of the real facts was occasioned by culpable negligence.[75]

In addition, it is essential that the party claiming the estoppel should be misled by the acquiescence of the party against whom the estoppel is claimed,[76] and that he should be entitled to rely thereon.[77] Further, it is usually necessary that he should be induced to change his position by reason thereof,[78] and that the acts of acquiescence be such as to prejudice him;[79] but it has been held that in some instances an estoppel may be invoked although no change of position has actually occurred.[80]

72. Colo.—Luxen v. Town of Rifle, 69 P.2d 251, 100 Colo. 540.
Del.—Frank v. Wilson & Co., Ch., 9 A.2d 82.
Iowa.—First Nat. Bank v. White Ash Coal Co., 176 N.W. 287, 188 Iowa 1227, 12 A.L.R. 286.
Ky.—Maxwell v. Bates, 40 S.W.2d 304, 239 Ky. 600.
La.—Hinton v. Smith, 88 So. 549, 149 La. 51—Reed v. Eureka Homestead Soc., App., 143 So. 891.
Mo.—Delta Realty Co. v. Hunter, 152 S.W.2d 45—Brown v. Brown, 146 S.W.2d 553—Missouri Pac R. Co. v. Askew Saddlery Co., 256 S.W. 566, 215 Mo.App. 277.
N.Y.—In re Browning's Estate, 22 N.Y.S.2d 652, 175 Misc. 107.
Wis.—In re Cosgrove's Will, 295 N.W. 784, 236 Wis. 554, 132 A.L.R. 1514.
21 C.J. p 1217 note 69.

Defects in construction

Recovery for defective construction was not precluded by final acceptance of work and payment therefor without knowledge of defects.—United Const. Co. v. Haverhill, N.H., C.C.A.Vt., 22 F.2d 256.

73. Wash.—Cain v. Moore, 103 P. 1130, 54 Wash. 627.

74. Vt.—Royce v. Carpenter, 66 A. 888, 80 Vt. 37.

75. Tex.—Bender v. Brooks, 130 S.W. 653, 61 Tex.Civ.App. 464.

76. U.S.—Grand Trunk Western R. Co. v. H. W. Nelson Co., C.C.A. Mich., 116 F.2d 823, rehearing denied 118 F.2d 252.
Conn.—Bland v. Bregman, 192 A. 703, 123 Conn. 61.
Idaho.—Page v. Savage, 246 P. 304, 42 Idaho 458.
Ky.—Maxwell v. Bates, 40 S.W.2d 304, 239 Ky. 600—Kenmont Coal Co. v. Salyer, 38 S.W.2d 940, 239 Ky. 88.
La.—Hinton v. Smith, 88 So. 549, 149 La. 51.
Mont.—Sherlock v. Greaves, 76 P.2d 87, 106 Mont. 206—Mettler v. Rocky Mountain Sec. Co., 219 P. 243, 68 Mont. 406—Rate v. American Smelting & Refining Co., 184 P. 478, 56 Mont. 277.
Ohio.—City of Columbus v. Columbus Public Service Co., 4 Ohio N.P., N.S., 329.
Okl.—Tulsa Petroleum Corporation v. Westmoreland, 70 P.2d 110, 112, 180 Okl. 459, citing **Corpus Juris.**
Vt.—West River Power Co. v. Bussino, 11 A.2d 263.
21 C.J. p 1217 note 73.

Constructive notice of records

Usually, mere acquiescence will not operate to work an estoppel where constructive notice of records should obtain.—De Boe v. Prentice Packing & Storage Co., 20 P.2d 1107, 172 Wash. 514.

77. U.S.—Filbert v. Arkansas & Missouri Highway Dist., D.C.Ark., 2 F.2d 114.
D.C.—Chinn v. Lewin, 16 F.2d 512, 57 App.D.C. 16, 49 A.L.R. 1480.
Ill.—Hawley v. Florsheim, 44 Ill.App. 320.
Utah.—Cache Valley General Hospital v. Cache County, 67 P.2d 639, 92 Utah 279.

Acquiescence as affecting continuous duty

The bar of acquiescence cannot be availed of to defeat a continuous duty imposed, in absence of special circumstances showing it would be unjust or inequitable to grant the relief asked.—State ex rel. Cashman v. Carmean, 295 N.W. 801, 138 Neb. 819.

78. Cal.—McGushin v. Arnold, 68 P.2d 733, 21 Cal.App.2d 271—Bassi v. Springfield Fire & Marine Ins. Co., 208 P. 154, 57 Cal.App. 707.
Conn.—Bland v. Bregman, 192 A. 703, 123 Conn. 61.
Iowa.—Rich v. Allen, 286 N.W. 434, 226 Iowa 1304.
N.Y.—Vernon Metal & Produce Co. v. Joseph Joseph & Bros Co., 150 N.E. 547, 241 N.Y. 544, modifying 209 N.Y.S. 6, 212 App.Div. 358, and motion granted 152 N.E. 430, 242 N.Y. 568—MacLean v. Hart, 252 N.Y.S. 377, 141 Misc. 222, reversed on other grounds 256 N.Y.S. 999, 235 App.Div. 752, reargument granted 256 N.Y.S. 1023, 235 App.Div. 885, application denied 263 N.Y.S. 704, 238 App.Div. 1, and amended on other grounds 262 N.Y.S. 1012, 238 App.Div. 884.
21 C.J. p 1217 note 75.

Acts affecting situation of parties

Knowledge of his rights on the part of the party allegedly estopped must be accompanied by acts or conduct which affect or interfere with relations or situations of the parties or are inconsistent with repudiation.—In re Lake Champlain Pulp & Paper Corporation, D.C.N.Y., 20 F.2d 425.

79. U.S.—Smith v. First Nat. Bank, C.C.A.N.D., 268 F. 780, certiorari denied First Nat. Bank v. Smith, 41 S.Ct. 218, 254 U.S. 655, 65 L.Ed. 460.
Ariz.—Cohen v. First Nat. Bank, 198 P. 122, 22 Ariz. 394, 15 A.L.R. 701
Cal.—Kindig v. Palos Verdes Homes Ass'n, 91 P.2d 645, 33 Cal.App.2d 349.
Iowa.—Bankers' Trust Co. v. Rood, 233 N.W. 794, 211 Iowa 289, 73 A.L.R. 1421—Hansen v. Town of Anthon, 173 N.W. 939, 187 Iowa 51.
Me.—European & North American Ry. v. Maine Cent. R. Co., 196 A. 642, 135 Me. 338.
Mich.—Glass v. Crossman, 286 N.W. 184, 289 Mich. 130.
Mo.—Missouri Pac. R. Co. v. Askew Saddlery Co., 256 S.W. 566, 215 Mo.App. 277.
Mont.—Sherlock v. Greaves, 76 P.2d 87, 106 Mont. 206—Mettler v. Rocky Mountain Sec. Co., 219 P. 243, 68 Mont 406.
N.M.—Garcia v. Leal, 231 P. 631, 30 N.M. 249.
N.Y.—Hopwood Plays v. Kemper, 189 N.E. 461, 263 N.Y. 380, reversing 264 N.Y.S. 924, 239 App.Div. 820.
Utah.—Decorso v. Booth, 91 P.2d 449, 97 Utah 163.
21 C.J. p 1218 note 76.

80. U.S.—Mahoning Inv. Co. v. U.S., Ct.Cl., 3 F.Supp. 622, 630, certiorari denied 54 S.Ct. 526, 291 U.S. 675, 78 L.Ed. 1064, and Rochester & Pittsburgh Coal & Iron Co. v. U.S., 54 S.Ct. 527, 291 U.S. 675, 78 L.Ed. 1064.

Continuance of course pursued

"Where acquiescence is the ground of the estoppel there is usually no occasion for a change of the position of the party claiming the estoppel and no change is made. All that is shown in these cases is that the acts of the party estopped were such as to mislead the party claiming the estoppel to continue in the course already begun, believing the same to be acceptable to the party estopped."—Mahoning Inv. Co. v. U.S., supra.

It has been held in a number of decisions that mere nonaction or passivity will not create an estoppel in the absence of some other element requiring its invocation;[81] it must appear that the party to be estopped was bound in equity and good conscience actively to evidence his intention not to be bound by the transaction.[82] No estoppel arises by acquiescence in acts other than or different from the acts which the party claiming the estoppel alleges that he is entitled to commit by reason of the estoppel.[83] Further, no estoppel arises where the acquiescence by all concerned is due to a common mistake,[84] where the party claiming it knows that his acts are not lawful and are merely permissive,[85] or where the facts fail to show acquiescence clearly and unambiguously.[86] There can be no assent to acts which one is powerless to prevent.[87] In no event can the estoppel be extended beyond the natural and reasonable import of the acts or conduct relied on to create the estoppel.[88]

81. U.S.—Holbrook Irr. Dist. v Arkansas Valley Sugar Beet & Irrigated Land Co., D.C.Colo., 42 F.2d 541—Mahoning Inv. Co. v. U. S., Ct.Cl., 3 F.Supp. 622, certiorari denied 54 S.Ct. 526, 291 U.S. 675, 78 L.Ed. 1064 and Rochester & Pittsburgh Coal & Iron Co. v. U. S., 54 S.Ct. 527, 291 U.S. 675, 78 L.Ed. 1064.
Ky.—Equitable Life Assur. Soc. of U. S. v. Johnson's Adm'r, 77 S.W.2d 943, 257 Ky. 306.
La.—Rawlings v. Stokes, 193 So. 589, 194 La. 206.
Or.—Minto v. Salem Water, Light & Power Co., 250 P. 722, 120 Or. 202.
21 C.J. p 1218 note 78.

"Estoppel does not ensue from mere silence or acquiescence, where there was no duty on the part of the party sought to be estopped to act or speak, and the opposite party was not led into an injurious situation or condition by such conduct."—McFadden v. Allen-Nelson Mill Co., 272 P. 714, 717, 150 Wash. 249.

Mere delay in taking action is not "acquiescence," but, depending on the facts, may be strong evidence thereof.—Frank v. Wilson & Co., Del.Ch., 9 A.2d 82.

82. Mont.—Mettler v. Rocky Mountain Sec. Co., 219 P. 243, 68 Mont. 406.

83. U.S.—Moss v. Ætna Life Ins. Co., C.C.A.Tenn., 73 F.2d 339.
Ala.—Zimmern v. Southern Ry. Co., 96 So. 226, 209 Ala. 284, 29 A.L.R. 1237.
Colo.—Luxen v. Town of Rifle, 69 P. 2d 251, 100 Colo. 540.
Neb.—Darnell v. City of Broken Bow, 299 N.W. 274.
Ohio.—Gross v. Whitelow, 20 Ohio Cir.Ct., N.S., 116.
Okl.—Fairfax Oil Co. v. Bolinger, 97 P.2d 574, 186 Okl. 20.
Tex.—Trimble v. Stephenville State Bank, Civ.App., 96 S.W.2d 733, 735, quoting **Corpus Juris.**
21 C.J. p 1218 note 77.

84. N.Y.—Hopwood Plays v. Kemper, 189 N.E. 461, 263 N.Y. 380, reversing 264 N.Y.S. 924, 239 App. Div. 820.
21 C.J. p 1218 note 79.

85. Ohio.—City of Columbus v. Columbus Public Service Co., 4 Ohio N.P., N.S., 329.
21 C.J. p 1218 note 80.

Positively illegal act
Acquiescence cannot clothe with legality a positively illegal act, and one cannot ordinarily be estopped to assert direct violation of decisive prohibition of statute or unenforceability of contract contrary to law.—Commissioner of Banks v. Cosmopolitan Trust Co., 148 N.E. 609, 253 Mass. 205, 41 L.R.A. 658.

86. U.S.—Vulcan Mfg. Co v. Maytag Co., C.C.A.Mo., 73 F.2d 136, certiorari granted 55 S.Ct. 347, 293 U.S. 553, 79 L.Ed. 656, certiorari dismissed 55 S.Ct. 403, 294 U.S. 734, 79 L.Ed. 1263—Continental Trust Co. v. United Rys. & Electric Co. of Baltimore, D.C.Md., 7 F. Supp. 265—Clear Creek Oil & Gas Co. v. Ft. Smith Spelter Co., C.C.A. Ark., 274 F. 906—General Contracting Corporation v. U. S., 86 Ct. Cl. 562.
Cal.—Cook v. Western Trust & Savings Bank, 30 P.2d 1006, 137 Cal. App. 436—Hammond v. San Mateo Planing Mill Co., 187 P. 144, 44 Cal.App. 750.
Fla.—City of South Miami v. State ex rel. Landis, 192 So. 624, 140 Fla. 740.
Ga.—MacDougald Const. Co. v. State Highway Department, 2 S.E.2d 197, 59 Ga.App. 708, reversed on other grounds State Highway Department v. MacDougald Const. Co., 6 S.E.2d 570, 189 Ga. 490, mandate conformed to MacDougald Const. Co. v. State Highway Department, 7 S.E.2d 292, 61 Ga.App. 672.
Ill.—People v. Commonwealth Edison Co., 11 N.E.2d 408, 367 Ill. 260, followed in People v. Peoples Gas Light & Coke Co., 11 N.E.2d 929, 367 Ill. 435.
La.—Magnolia Petroleum Co. v. Stubblefield, App., 152 So. 335, reinstated 155 So. 471—Hicks v. Levett, 140 So. 276, 19 La.App. 836—Coco v. Moss Co., 4 La.App. 645.
N.Y.—Farmers' Loan & Trust Co. v. Park & Tilford, 215 N.Y.S. 244, 127 Misc. 59.
N.C.—Peel v. Corey, 144 S.E. 559, 196 N.C. 79.
Okl.—Thompson v. Taylor, 100 P.2d 860.
Pa.—Hagan Lumber Co. v. Duryea School Dist., 121 A. 107, 277 Pa. 345.
Tex.—Bennett v. McKrell, Civ.App., 125 S.W.2d 701, modified on other grounds, Com.App., 144 S.W.2d 242.
21 C.J. p 1218 note 81.

Mitigating damages as acquiescence
A party's acts did not constitute an estoppel where he had not approved of the acts of the other party but was only trying to reduce his damages.—Sledge & Norfleet v. Bondurant, 5 Tenn.App. 319.

87. Cal.—C. W. Clarke Co. v. Walker, 211 P. 1, 190 Cal. 139.
Okl.—Oklahoma City v. Wells, 91 P. 2d 1077, 1084, 185 Okl. 369, 123 A.L.R. 662, citing **Corpus Juris.**
Tex.—Snyder v. Magnolia Petroleum Co., Civ.App., 107 S.W.2d 603, error dismissed.
21 C.J. p 1217 note 66.

Failure to defend against nonexisting obligation
Failure to mention a defense, in the absence of some consideration or element of estoppel, cannot create or recreate an obligation otherwise not existing.—Hubbard v. Matson Nav. Co., 93 P.2d 846, 34 Cal.App.2d 475, certiorari denied 60 S.Ct. 975, 310 U.S. 628, 84 L.Ed. 1399.

88. Ark.—Clay County Ice Co. v. Littlefield, 63 S.W.2d 530, 187 Ark. 911.
La.—Foster v. City of New Orleans, 99 So. 686, 155 La. 889.
Md.—Davey Tree Expert Co. v. Dennis, 125 A. 597, 145 Md. 86.
Mich.—Fox v. John F. Ivory Storage Co., 246 N.W. 147, 261 Mich. 358.
N.Y.—Furniss v. Cruikshank, 130 N. E. 625, 230 N.Y. 495, modifying 181 N.Y.S. 522, 191 App.Div. 450, and modified on other grounds 132 N.E. 884, 231 N.Y. 550.
Tex.—Trimble v. Stephenville State Bank, Civ.App., 96 S.W.2d 733, 735, quoting **Corpus Juris**—Jones County v. Moore, Civ.App., 4 S.W.2d 289, error refused.
Wash.—Commercial Waterway Dist. No. 1 of King County v. King County, 94 P.2d 491, 200 Wash. 538.
21 C.J. p 1218 note 82.

Particular action not precluded
(1) Creditor was not estopped to collect from note indorser by per-

b. Particular Applications of Rule

The rule estopping a party to repudiate a transaction in which he has acquiesced has been applied in various circumstances, such as in controversies arising out of contracts, sales, bills and notes, etc.

The rule, stated in subdivision a of this section, estopping a party from repudiating a transaction in which he has acquiesced has been applied in various circumstances.[89] The rule has been invoked and applied in controversies arising out of contracts generally;[90] in controversies or contentions aris-

mitting, at indorser's request, corporation principal to remove assets from state.—A. H. Scoggin & Co. v. City Nat. Bank, 299 S.W. 1033, 175 Ark. 461.

(2) Railroad was held not estopped from claiming legal rates on shipment of government property by having previously accepted reduced rates.—U. S. v. New York, C. & St. L. R. Co., C.C.A.Ohio, 32 F.2d 887.

(3) Those seeking to prevent sale by county of land acquired by county for a dock site were not estopped from contesting the attempted sale, because they made no objection to the conveyance by the county of a certain portion of the property to another.—Commercial Waterway Dist. No. 1 of King County v. King County, 94 P.2d 491, 200 Wash. 538.

(4) Other cases see Deer Lodge Bank v. Hope Min. Co., 3 Mont. 146, 35 Am.R. 458—21 C.J. p 1218 note 82 [a], [b].

89. **Circumstances creating estoppel**

(1) Parties seeking, for unreasonable delay, forfeiture of timber granted under deed prescribing no time for removal may be estopped by acquiescence in or encouragement of delay.—Stump v. Moore, 140 S.E. 480, 104 W.Va. 513.

(2) Knowledge and acquiescence by record owner that son was including land in financial statements as basis of credit would estop owner from reclaiming land.—Cooke v. Fenner & Beane, 108 So. 370, 214 Ala. 558.

(3) Purchaser of land encumbered by deed of trust, consenting to change of trustees, was estopped to contend that majority of bondholders did not consent to transfer.—Central State Bank v. Benson, 229 N.W. 691, 209 Iowa 1176.

(4) Other circumstances.

Ky.—Horn v. Wells, 69 S.W.2d 1011, 253 Ky. 494.

N.Y.—In re Smith's Will, 216 N.Y.S. 154, 217 App.Div. 701.

Circumstances not creating estoppel

(1) Owner was not estopped to deny city's right to raze his dilapidated buildings because, having received notice to do so himself, he did nothing, and on being notified that city would have the buildings wrecked he took no action to prevent it.—Moll Co. v. Holstner, 67 S.W.2d 1, 252 Ky. 249.

(2) Other circumstances.

Mass.—Lexington & W. C. R. Co. v. Elwell, 8 Allen 371.

Tenn.—Coate v. Tigrett, 4 Tenn.App. 48.

Tex.—Scharbauer v. Lampasas County, Civ.App., 214 S.W. 468, reversed on other grounds, Com.App., 235 S. W. 533.

Encroachment on land

Knowledge and apparent acquiescence in encroachment on land constitute quasi estoppel, precluding owner from obtaining distinctly equitable relief, but not from enforcing legal remedies.—Weis v. Cox, 185 N. E. 631, 205 Ind. 43.

90. U.S.—City of High Point v. Duke Power Co., C.C.A.N C., 120 F. 2d 866, affirming, D.C., 34 F.Supp. 339—Pitcairn v. American Refrigerator Transit Co., C.C.A.Mo, 101 F.2d 929, certiorari denied 60 S.Ct. 78, 308 U.S. 566, 84 L.Ed. 475—Activated Sludge v. Sanitary Dist. of Chicago, D.C.Ill., 33 F.Supp. 692—Hertzel v. Weber, C.C.A.Okl, 283 F. 921.

Ala.—Roberson v. Tennessee Valley Authority, 186 So. 727, 237 Ala. 279—Robinson v. Story, 116 So. 156, 217 Ala. 321—Corona Coal Co. v. Hendon, 106 So. 855, 214 Ala. 139.

Ark.—Smith v. Harwell, 136 S.W.2d 172, 199 Ark. 757.

Del.—Trounstine v. Remington Rand, Ch., 194 A. 95.

Ill.—American Spirits Mfg. Co. v. Western Mfg. & Oil Co., 213 Ill. App. 612.

Kan.—Kaw Valley Drainage Dist. of Wyandotte County v. Missouri Pac. Ry. Co., 195 P. 983, 108 Kan. 314.

La.—Garson Bros. v. Wilson, 93 So. 783, 152 La. 536.

Mo.—Motor Freight Terminal Corporation v. Brooks, App., 132 S.W. 2d 1064—Elmer v. Flett, App., 297 S.W. 985.

N.J.—McCue v. Silcox, 3 A.2d 437, 122 N.J.Law 12—Becker v. Kelsey, 157 A. 177, 9 N.J.Misc. 1265.

Okl.—Pringey v. Maryland Casualty Co., 73 P.2d 461, 181 Okl. 278.

Pa.—In re Shoemaker, 121 A. 510, 277 Pa. 424.

S.C.—Randle v. Pittsburgh Equitable Meter Co., 197 S.E. 678, 187 S. C. 207.

Tex.—Moore v. Winnsboro Grain & Grocery Co., Com.App., 61 S.W.2d 982, reversing Winnsboro Grain & Grocery Co. v. Moore, Civ.App., 36 S.W.2d 781—Harkrider v. Capps, Civ.App., 250 S.W. 1093.

Wis.—Laughlin v. Goff, 214 N.W. 394, 193 Wis. 554, mandate modified on other grounds 215 N.W. 592, 193 Wis. 554.

21 C.J. p 1218 note 86.

Facts constituting estoppel

(1) Vendor who participates in, agrees to, and acquiesces in, the assignment of a contract by the purchaser to a third party, is estopped to assert its nonassignability.—Young v. Adams, 84 So. 1, 122 Miss 1.

(2) Land contract vendors' acquiescence for more than a year in surrender of contract rights by vendees' assignees during which period property damage and loss resulted from vendors' inaction, was held to estop vendors from recovering from assignees balance due on contract.—Denler & Denler Land Co. v. Eby, 269 N.W. 203, 277 Mich. 360.

(3) Seller having voluntarily accepted lawful conditions of contract with state, cannot assert state's lack of power to contract.—American Book Co. v. State, 113 So. 592, 216 Ala. 367.

(4) A husband who had contracted to pay wife one half of proceeds of sale of his property was estopped from contending, in suit instituted several years later to recover money received by wife, that contract and conveyance of property were void.—Godfrey v. Godfrey, 86 P.2d 357, 30 Cal.App.2d 370.

(5) Other cases see Schaeffer v. Coldren, 85 A. 98, 237 Pa. 77, Ann. Cas.1914B 175—21 C.J. p 1218 note 86 [a].

Estoppel not shown

(1) Where a building contract provided that no change should be made without the owner's consent in writing, the owner was not estopped from relying on such contract, where he did not know of changes until the work was completed, notwithstanding he then made no particular protest.—Pence v. Dennie, 182 P. 980, 41 Cal. App. 428.

(2) The acceptance of void tax anticipation warrants as payment for goods did not estop the seller from maintaining suit on its account.—Standard Oil Co. v. Town of Patterson, 21 N.E.2d 12, 300 Ill.App. 385.

(3) Where contractor accedes to demand of other contracting party to perform work, or furnish material which under contractor's construction of the contract, made known to the other party, constitutes a modification, but which other party insists is a compliance with terms of contract, the contractor is not estopped

ing out of sales;[91] bills and notes;[92] bonds;[93] leases;[94] accounts and settlements;[95] partition of property;[96] management and distribution of estates[97] or trust funds;[98] and the use and dedication of highways, streets, and parks.[99]

The rule has also been applied with reference to the use and appropriation of water rights;[1] participation in elections and proceedings subsequent thereto;[2] the delivery of an instrument held in es-

from insisting on his construction of the contract and recovering for work and material thus furnished.

Ga.—MacDougald Const. Co. v. State Highway Department, 2 S.E.2d 197, 59 Ga.App. 708, reversed on other grounds State Highway Department v. McDougald Const. Co., 6 S.E.2d 570, 189 Ga. 490, mandate conformed to MacDougald Const. Co. v. State Highway Department, 7 S.E.2d 292, 61 Ga.App. 672.

Wash.—Schuehle v. City of Seattle, 92 P.2d 1109, 199 Wash. 675.

(4) Other cases.

N.Y.—McNeill v. Hacker, 21 N.Y.S.2d 432.

Wash.—Brown Bros. Lumber Co. v. Preston Mill Co., 145 P. 964, 83 Wash. 648.

Misconstruction of contract

A party to a contract, who knows that the other party is acting under a misconstruction, but permits that action to go on prejudicially, is bound by that misconstruction.—Letta v. Cincinnati Iron & Steel Co., C.C.A.Ohio, 285 F. 707.

91. Ky.—Louisville Joint Stock Land Bank v. McMurry, 128 S.W.2d 596, 278 Ky. 238.

La.—Clement v. Dunn, 122 So. 122, 168 La. 394.

Ohio.—Smith v. Gowan, 18 Ohio Cir. Ct., N.S., 99.

Or.—Smith v. Allen, 24 P.2d 1043, 144 Or. 261.

Wash.—Judish v. Rovig Lumber Co., 222 P. 898, 128 Wash. 287.

Wis.—Schultz v. Three Lakes Drainage Dist., 185 N.W. 190, 175 Wis. 318.

Acts creating estoppel

(1) Seller, subsequently accepting chattel mortgage or conditional sales agreement, could not dispute passing of title because of buyer's noncompliance with contract condition, calling for cash payment and notes.—Vanderwal v. Vanco Dairy Co., 156 S.E. 512, 200 N.C. 314.

(2) Vendee, who acquiesced in statutory cancellation by notice of contract for deed, and surrendered possession, was estopped from attacking notice on technical grounds.—Olive v. Taylor, 234 N.W. 466, 182 Minn. 327.

92. U.S.—Louisiana Agr. Corporation v. Interstate Trust & Banking Co., C.C.A.La., 17 F.2d 751—Peyrefitte v. Union Homestead Ass'n, App., 185 So. 693.

Mo.—Glaus v. Gosche, App., 118 S.W. 2d 42.

Or.—Ertz v. Murray, 19 P.2d 1092, 142 Or. 219.

S.D.—Huron Lodge No. 444, B. P. O. E., v. Hinckley, 222 N.W. 661, 54 S.D. 99, affirming 210 N.W. 200, 50 S.D. 355.

21 C.J. p 1219 note 88.

Objection to person signing as maker

Subcontractor accepting note signed by corporation as payment, without objection that contract called for note signed by officer, was estopped to assert objection thereafter.—American System of Reinforcing v. Breakers Hotel Co., 17 P.2d 138, 217 Cal. 67.

93. Fla.—Lee v. Atlantic Coast Line R. Co., 194 So. 252, 141 Fla. 545.

21 C.J. p 1219 note 89.

Validity of improvement bonds

Fla.—Lee v. Atlantic Coast Line R. Co., supra.

94. U.S.—Riggs v. U. S., D.C.S.C., 12 F.2d 85—Detroit, T. & I. R. Co. v. Detroit & T. S. L. R. Co., C.C.A. Mich., 6 F.2d 845, reversing, D.C., Detroit & T. S. L. R. Co. v. Detroit, T. & I. R. Co., 290 F. 549.

Ala.—Phillips v. Sipsey Coal Mining Co., 118 So. 513, 218 Ala. 296—Corona Coal Co. v. Hendon, 106 So. 855, 214 Ala. 139.

Cal.—Julian v. Schwartz, 60 P.2d 887, 16 Cal.App.2d 310, transferred, see 40 P.2d 818, 2 Cal.2d 280.

Ky.—Davenport v. National Fluorspar Co., 103 S.W.2d 84, 267 Ky. 713.

La.—M. M. Ullman & Co. v. Levy, 133 So. 369, 172 La. 79.

N.J.—Tierney v. Tierney, 143 A. 820, 104 N.J.Eq. 27, affirmed 143 A. 821, 103 N.J.Eq. 336.

Tex.—Caprito v. Grisham-Hunter Corporation, Civ.App., 128 S.W.2d 149, error dismissed, judgment correct—Blumrosen v. Burke, Civ.App., 37 S.W.2d 1070, error dismissed.

21 C.J. p 1219 note 90.

Acceptance of lesser amount for rent

Lessor who without objection accepted monthly rentals in amount less than that specified in lease was estopped from subsequently recovering difference.—Julian v. Gold, 3 P.2d 1009, 214 Cal. 74.

Interpretation of lease

Lessor's acquiescence in lessee's interpretation of terms of lease estops him from disputing such interpretation.—Levin v. Rose, 19 N.E.2d 297, 302 Mass. 378.

95. Ark.—Sprague v. Matthews, 267 S.W. 795, 167 Ark. 375.

Cal.—Fauda v. Fauda, 237 P. 563, 72 Cal.App. 462.

La.—Succession of Ferrill, 117 So. 562, 166 La. 479—Liquidators of Nicholson Pub. Co. v. E. S. Upton Printing Co., 93 So. 91, 152 La. 270.

21 C.J. p 1219 note 91.

98. Ky.—Mullins v. Robinson, 276 S.W. 156, 210 Ky. 461.

Mo.—Clark v. Clark, 18 S.W.2d 77, 322 Mo. 1219.

21 C.J. p 1219 note 92

Acquiescence to judicial proceedings for partition see infra § 115.

97. N.Y.—Woolley v. Hutchins, 186 N.Y.S. 769, 114 Misc. 11, affirmed 189 N.Y.S. 959, 198 App.Div. 964.

Vt.—Sparrow v. Vermont Sav. Bank, 117 A. 667, 96 Vt. 124.

98. Cal.—Walker v. Doak, 290 P. 290, 210 Cal. 30.

Mich.—Draper v. Brown, 117 N.W. 213, 153 Mich. 120.

99. Iowa.—Suiter v. Board of Sup'rs of Scott County, 192 N.W. 133, 195 Iowa 1374.

Mich.—Schurtz v. Wescott, 282 N.W. 870, 286 Mich. 691—Wheat v. Van Tine, 112 N.W. 933, 149 Mich. 314.

Vacation of streets

Okl.—Blackwell, E. & S. R. Co. v. Gist, 90 P. 889, 18 Okl. 516.

21 C.J. p 1220 note 97.

Acquiescence in dedication not shown

Mo.—State ex rel. McIntosh v. Haworth, App., 124 S.W.2d 653.

1. Cal.—Brewer v. Railroad Commission of California, 210 P. 511, 190 Cal. 60, error dismissed 45 S.Ct. 124, 266 U.S. 641, 69 L.Ed. 483.

Mont.—Sherlock v. Greaves, 76 P.2d 87, 106 Mont. 206.

21 C.J. p 1219 note 95.

Mere passive acquiescence, where water rights are involved, does not as a rule create an estoppel.—Holbrook Irr. Dist. v. Arkansas Valley Sugar Beet & Irrigated Land Co., D.C.Colo., 42 F.2d 541—21 C.J. p 1219 note 95 [d].

Pollution of stream

(1) Riparian owner's remedy against pollution of stream is not lost through estoppel by acquiescence.—Forbes v. City of Jamestown, 209 N.Y.S. 99, 212 App.Div. 332.

(2) Other cases see Gale v. Syracuse, 71 N.Y.S. 986, 35 Misc. 465—21 C.J. p 1219 note 95 [b].

2. Ala.—Rainwater v. State ex rel. Strickland, 187 So. 484, 237 Ala. 482, 121 A.L.R. 981.

Tex.—Antoine v. Andrews, Civ.App., 150 S.W.2d 293—Sartin v. Hudson, Civ.App., 143 S.W.2d 817.

21 C.J. p 1219 note 96.

crow;[3] the employment of infants;[4] forged signatures;[5] and in the case of the acquiescence of officers, stockholders, and creditors in corporate acts.[6]

§ 115. In Judicial Proceedings

A person who, with knowledge of the facts and of his rights, assents to, or participates in, judicial proceedings without objection is ordinarily bound by such proceedings as against one who has been misled to his injury.

Where a party with knowledge of the facts assents to, or participates in, judicial proceedings without objection, he is generally bound by such proceedings as against one who has been misled to his injury by such conduct,[7] especially where the party

Estoppel held not shown

(1) Defeated candidate for office was not estopped from attacking nominating petition of successful candidate because of failure to institute injunction proceeding to prevent successful candidate's name from appearing on ballot.—Bogie v. Hill, Ky., 151 S.W.2d 765.

(2) Other cases see Motes v. Davis, 4 S.E.2d 597, 188 Ga. 682, 125 A.L.R. 289.

3. U.S.—Racine Seeder Co. v. Joliet Wire-Check Rower Co., C.C.Ill., 27 F. 367.
Iowa.—Haven v. Kramer, 41 Iowa 382.

4. Conn.—Smith v. Smith, 30 Conn. 111.
21 C.J. p 1220 note 99.

5. U.S.—Western Union Tel. Co. v. City of Davenport, Ohio, 97 U.S. 369, 24 L.Ed. 1047.
21 C.J. p 1220 note 1.

6. U.S.—Wannamaker v. Edisto Nat. Bank of Orangeburg, C.C.A. S.C., 62 F.2d 696—McCullough v. Satterthwait, C.C.A.Okl., 11 F.2d 111—Dold Packing Co. v. Doermann, C.C.A.Neb., 293 F. 315.
Fla.—Redstone v. Redstone Lumber & Supply Co., 133 So. 882, 101 Fla. 226.
Ga.—Mathews v. Fort Valley Cotton Mills, 176 S.E. 505, 179 Ga. 580.
Ill.—Loeber v. 14 West Elm Street Bldg. Corporation, 7 N.E.2d 502, 289 Ill.App. 619—Ford v. Ford Mfg. Co., 222 Ill.App. 76.
Iowa.—Frick v. Rockwell City Canning Co., 181 N.W. 475, 192 Iowa 11.
Mich.—Stott v. Stott Realty Co., 284 N.W. 635, 288 Mich. 35.
N.J.—Murtland Holding Co. v. Egg Harbor Commercial Bank, 196 A. 230, 123 N.J.Eq. 117.
N.Y.—Lutz v. Society of Professional Automobile Engineers of U. S., 249 N.Y.S. 523, reversed on other grounds 248 N.Y.S. 358, 139 Misc. 358.
N.C.—Wright v. Phillips Fertilizer Co., 136 S.E. 716, 193 N.C. 305.
Tex.—Denton Milling Co. v. Blewett, Civ.App., 254 S.W. 236, error denied 278 S.W. 1114, 114 Tex. 582.
Wis.—Reilly v. Allen-Spiegel Shoe Mfg. Co., 199 N.W. 216, 184 Wis. 257—Goodwin v. Bode, 189 N.W. 130, 177 Wis. 275.
21 C.J. p 1220 note 2.

Estoppel held not shown

Del.—Bovay v. H. M Byllesby & Co., Ch., 12 A.2d 178.

Creditor is not estopped by acquiescence which does not induce a change of position on the part of the party claiming estoppel.
Tex.—Commonwealth Nat. Bank of Dallas v. Goldstein, Civ.App., 261 S.W. 538—Wrather v. Parks, Civ. App., 227 S.W. 513.
Wash.—Snyder v. Yakima Finance Corporation, 25 P.2d 108, 174 Wash. 499.

7. U.S.—Walker v. L. Maxcy, Inc., C.C.A.Fla., 103 F.2d 24, certiorari denied 60 S.Ct. 76, 308 U.S. 564, 84 L.Ed. 474—Harris v. Jackson, D.C. Okl., 30 F.Supp. 185—Hoover v. Mortgage Co. for America, C.C.A. Or., 290 F. 891—Turner v. Woodard, Mass., 259 F. 737, 170 C.C.A. 537.
Ala.—First Nat. Bank v. Burch, 188 So. 859, 863, 237 Ala. 680, quoting **Corpus Juris**
Ark.—Scott v. Brown, 254 S.W. 1074, 160 Ark. 489—First Nat. Bank v. Farmers' & Merchants' Bank of Marked Tree, 252 S.W. 34, 159 Ark. 384.
Cal.—Brewer v. Railroad Commission of California, 210 P. 521, 190 Cal. 85—In re Pierce's Estate, 81 P.2d 1037, 28 Cal.App.2d 8—John H. Spohn Co. v. Bender, 64 P.2d 152, 18 Cal.App.2d 447—Plum v. Indian Valley Bank, 4 P.2d 543, 118 Cal.App. 13—Hindle v. Warden, 195 P. 428, 50 Cal.App. 356—Slayden v. O'Dea, App., 189 P. 1062.
Fla.—Bemis v. Loftin, 173 So. 683, 127 Fla. 515.
Ill.—Hopkins v. Gifford, 141 N.E. 178, 309 Ill. 363—Smietanka v. Myers, 35 N.E.2d 514, 311 Ill.App. 91—In re Stahl's Estate, 27 N.E.2d 662, 305 Ill.App. 517—Bryers v. Highland Park Transfer & Storage Co., 245 Ill.App. 400—Acorn Lumber Co. v. Friedlander Box Co., 240 Ill.App. 425.
Iowa.—Wenstrand v. Kiddoo, 268 N. W. 574, 222 Iowa 284—State v. Demara, 231 N.W. 337, 210 Iowa 726.
Kan.—Anderson v. Stockwell, 285 P. 526, 130 Kan. 103.
Ky.—Goodloe v. Anderson, 121 S.W. 2d 958, 275 Ky. 460—Amburgey v. Adams, 245 S.W. 514, 196 Ky. 646.
La.—Planters' Lumber Co. v. Sugar Cane By-Products Co., 110 So. 172, 162 La. 123—Colligan v. Benoit, App., 141 So. 467—Maught v. Cassard, 119 So. 81, 9 La.App. 78.
Mass.—Broitman v. Silver, 180 N.E. 311, 278 Mass. 510—French v. Kemp, 148 N.E. 442, 253 Mass. 75.
Minn.—Robie v. Boak, 235 N.W. 384, 183 Minn. 41.
Miss.—Mobile & O. R. Co. v. Swain, 145 So. 627, 164 Miss. 825.
Mo.—Tremayne v. City of St. Louis, 6 S.W.2d 935, 320 Mo. 120.
Mont.—Kramlich v. Tullock, 277 P. 411, 84 Mont. 601.
Nev.—Mentaberry v. Mentaberry, 220 P. 548, 47 Nev. 326.
N.J.—In re New Jersey Refrigerating Co., 131 A. 832, 99 N.J.Eq. 441.
Ohio.—Sponseller v. Sponseller, 144 N.E. 48, 110 Ohio St. 395.
Okl.—Rule v. Rule, 225 P. 170, 93 Okl. 276.
Or.—Dean v. Dean, 300 P. 1027, 136 Or. 694, 86 A.L.R. 79.
S.C.—Greenwood County v. Watkins, 12 S.E.2d 545, 196 S.C. 51—West v. Jennings, 6 S.E.2d 263, 192 S.C. 225—Zero Church v. Britton, 198 S.E. 848, 188 S.C. 274, certiorari denied 59 S.Ct. 488, 306 U.S. 639, 83 L.Ed. 1040—Way v. Way, 128 S.E. 705, 132 S.C. 288.
Tex.—Empire Gas & Fuel Co. v. Albright, 87 S.W.2d 1092, 126 Tex. 485, reversing Albright v. Collins, Civ.App., 64 S.W.2d 1096—Bearden v. Texas Co., Civ.App., 41 S.W.2d 447, affirmed, Com.App., 60 S.W.2d 1031—Houston Independent School Dist. v. Reader, Civ.App., 38 S.W.2d 610.
Va.—Canada v. C. H. Beasley & Bros 111 S.E. 251, 132 Va. 166.
Wash.—Plummer v. Light, 247 P. 1022, 139 Wash. 670.
Wis.—U. S. Rubber Products v. Twin Highway Tire Co., 288 N.W. 179, 233 Wis. 234.
21 C.J. p 1220 note 4.
Estoppel to object to jurisdiction see Courts § 108.
Stipulations and consents see infra § 120.

Acts creating estoppel

(1) Invalidity of temporary injunction because no bond is given may not be raised by defendant procuring it.—Jackman v. Kansas Electric Power Co., 251 P. 431, 122 Kan. 19.

(2) Party whose counsel expressly consented to judge's entering judgment after resignation, and who participated in judgment entry, moved for suspension of execution, and prepared bills of exceptions and record for writ of error, was estopped to deny judgment's validity.—Eubank &

against whom the estoppel is claimed has accepted benefits or enjoyed rights under the judgment, decree or order rendered therein.[8]

However, the general rule applies only to those persons who are under some duty to act,[9] and who act with knowledge of their rights[10] and of the facts claimed to create an estoppel.[11] In addition, it is essential that the party claiming the estoppel be misled by the conduct of the party against whom the doctrine is invoked,[12] and that in consequence of such conduct he changed his position[13] to his prejudice.[14]

A party is not bound by a proceeding where his conduct does not constitute an assent to, or a par-

Caldwell v. Fuller, 158 S.E. 884, 156 Va. 635

(3) Conditional seller, who instructed buyer's judgment creditor to proceed with execution, was estopped from attacking sale or claiming excess over balance due.—Stanley v. Bedford, Cal., 265 P. 216.

(4) Owners of mortgaged premises by assignment of surplus on foreclosure ratified foreclosure sale, and were estopped from maintaining trustee's deed was ineffective to convey property.—Marsden v. Nipp, 30 S.W.2d 77, 325 Mo. 822.

(5) Parties acquiescing in court's construction of will were equitably estopped from seeking reversal by same court, after advancement of large sums on faith thereof.—In re Leverich's Will, 238 N.Y.S. 533, 135 Misc. 774, affirmed 251 N.Y.S. 870, 234 App.Div. 625.

(6) Administratrix failing to assert ownership to property before final decree and order of distribution was estopped from thereafter questioning ownership in subsequent proceedings.—Hutson v. McConnell, 281 P. 760, 139 Okl. 240.

(7) Other cases see Neal v. Hopkins, 89 A. 322, 87 Md. 19—21 C.J. p 1220 note 4 [a]–[d].

Acts not creating estoppel

(1) Estoppel by laches in instituting suit to avoid judicial sale after lapse of some years was held not shown.—Hirsch v. Northwestern Mut. Life Ins. Co., 13 S.E.2d 165, 191 Ga. 524.

(2) Mortgage sale purchaser was not estopped from excepting to the sale by reason of the deposit made with auctioneer when the property was knocked down.—Byrd v. Day, 114 A. 486, 138 Md. 442.

(3) That meeting wherein bondholders decided to remove trust deed trustee was held more than six months after trustee started proceeding for foreclosure and receiver did not estop bondholders to dispute trustee's right in proceeding for receiver, where proceeding was never served.—City Bank & Trust Co. v. Graf, 165 S.E. 238, 175 Ga. 340.

Compromise of suit

(1) Participation in a compromise settlement of a suit, or acquiescence therein, estops a party from attacking or repudiating such settlement after other persons have relied thereon.

Ky.—Mason v. Cook, 218 S.W. 740, 187 Ky. 260.

Mo.—Schneider v. Schneider, 224 S.W. 1, 284 Mo. 314.

(2) However, a settlement of one cause of action does not estop a party from suing on a separate and distinct cause of action where such party did nothing to lead the other to believe that a settlement was being made for all causes of action.—Cook v. Atlantic Coast Line R. Co., 13 S.E.2d 1, 196 S.C. 230, 133 A.L.R. 1144.

8. U.S.—Watkins v. Madison County Trust & Deposit Co., D.C.N.Y., 40 F.2d 91.

Ala.—First Nat. Bank v. Burch, 188 So. 859, 863, 237 Ala. 680, quoting **Corpus Juris.**

Or.—Warren Const. Co. v. Grant, 299 P. 686, 137 Or. 410, rehearing denied 2 P.2d 1118, 137 Or. 410

R.I.—New England Auto Inv. Co. v. Andrews, 132 A. 883, 47 R.I. 299.

Tex.—Smith v. Chipley, 16 S.W.2d 269, 118 Tex. 415, answering certified questions, Civ.App., 24 S.W.2d 87—Frazier v. Hanlon Gasoline Co., Civ.App., 29 S.W.2d 461, error refused.

Va.—Eubank & Caldwell v. Fuller, 158 S.E. 884, 156 Va. 635.

21 C.J. p 1221 note 5.

Acceptance of benefits see supra §§ 109–112.

9. Ala.—First Nat. Bank v. Burch, 188 So. 859, 863, 237 Ala. 680, quoting **Corpus Juris.**

21 C.J. p 1221 note 6.

Duty to claim attached property

The owner of property attached in an action to which he is not a party may intervene or interplead, but failure to do so will not estop him from claiming ownership.—Flowers v. Spears, 130 S.E. 710, 190 N.C. 747.

Duty to disavow unauthorized suit

One learning of action instituted in foreign jurisdiction in his name without authority need not appear formally and disavow authority; he need only take steps necessary to inform person who might suffer from lack of knowledge.—Pickard v. Automatic Bookkeeping Register Co., 277 P. 965, 34 N.M. 58, 63 A.L.R. 1066.

Duty to procure final hearing

Neglect of defendant, who sought no affirmative relief, to bring the cause to final hearing, after the granting of a preliminary injunction, is not ground for granting affirmative relief against defendant without a trial on the merits.—City of Parkersburg v. Baltimore & O. R. Co., C.C.A.W.Va., 296 F. 74, appeal allowed 297 F. 1019, and reversed on other grounds Baltimore & O. R. Co. v. City of Parkersburg, 45 S.Ct. 382, 268 U.S. 35, 69 L.Ed. 834.

10. Ala.—First Nat. Bank v. Burch, 188 So. 859, 863, 237 Ala. 680, quoting **Corpus Juris.**

La.—Succession of Valenti, 134 So. 95, 172 La. 290.

S.D.—Cobb v. Cobb, 179 N.W. 498, 43 S.D. 388.

21 C.J. p 1221 note 7.

Participation in void proceeding, under mistake of right, does not estop a party from bringing other judicial proceedings.—Sample v. Board of Com'rs of Jefferson County, 196 P. 440, 108 Kan. 498.

11. Ala.—First Nat. Bank v. Burch, 188 So. 859, 863, 237 Ala. 680, quoting **Corpus Juris.**

Pa.—In re Kimmel, 75 A. 23, 226 Pa. 47.

12. U.S.—Western Casualty & Surety Co. v. Beverforden, C.C.A.Mo., 93 F.2d 166, reversing, D.C., 17 F. Supp. 928.

Ala.—First Nat. Bank v. Burch, 188 So. 859, 863, 237 Ala. 680, quoting **Corpus Juris.**

Mich.—Stamp v. Banninga, 191 N.W. 25, 221 Mich. 268.

N.Y.—Gallagher v. Gallagher, 120 N.Y.S. 18, 135 App.Div. 457, affirmed 96 N.E. 1115, 202 N.Y. 572.

21 C.J. p 1221 note 9.

13. Fla.—Spitzer v. Branning, 184 So. 770, 135 Fla. 49.

21 C.J. p 1221 note 10.

14. U.S.—Western Casualty & Surety Co. v. Beverforden, C.C.A.Mo., 93 F.2d 166, reversing, D.C., 17 F. Supp. 928.

Fla.—Spitzer v. Branning, 184 So. 770, 135 Fla. 49.

Iowa.—In re Kladivo's Estate, 176 N.W. 262, 188 Iowa 471.

Tex.—Moore v. Rice, Civ.App., 110 S.W.2d 973, 978, citing **Corpus Juris.**

21 C.J. p 1221 note 11.

ticipation in, the proceeding.[15] Acquiescence may not be inferred from the failure to perform an act which is not within the power of the party alleged to be estopped.[16] Thus the failure to make a defense in a proceeding in which it is not available will not estop the party from making it in a subsequent proceeding in which it is available.[17]

Acquiescence in a judicial proceeding does not estop a party as to matters not involved in such proceeding.[18]

Partition proceedings. Ordinarily a party who participates and acquiesces in proceedings for partition will be estopped subsequently to deny the regularity or validity thereof,[19] except, it has been held, where the partition proceedings were wholly void,[20] or where the participation relied on was superinduced by the fraud of the party claiming the estoppel.[21] An exception to the rule is also allowed in favor of minors and other persons who are incompetent to act.[22]

By participating in partition proceedings a party is not estopped as to matters which were not involved in, or affected by, such proceedings.[23]

§ 116. Inconsistency in Positions before and after Commencement of Litigation

With some qualifications, the general rule is that, where a party gives a reason for his decision and conduct touching anything involved in a controversy, he is estopped after litigation has been begun from changing his ground and putting his conduct on a different consideration.

The general rule is that, where a party gives a reason for his decision and conduct touching anything involved in a controversy, he is estopped after litigation has been begun from changing his ground and putting his conduct on another and different consideration,[24] provided, according to some

15 Ga.—Brooks v. Guthrie, 155 S.E. 793, 42 Ga.App. 296.
Wis.—Lakelands, Inc., v. Chippewa & Flambeau Improvement Co., 295 N.W. 919, 237 Wis. 326—Hoks v. Wollenberg, 243 N.W. 219, 209 Wis. 276, rehearing denied 245 N.W. 128, 209 Wis. 276.

16. U.S.—Stepp v. McAdams, C.C.A. Cal., 97 F.2d 874.

Failure to appeal nonappealable order
U.S.—Stepp v. McAdams, supra.

17. Ala.—First Nat. Bank v. Burch, 188 So. 859, 237 Ala. 680.
Pa.—Allen v. Wolford, 6 A. 752, 4 Pa.Cas. 350.

18. Iowa—Bradford v. Martin, 201 N.W. 574, 199 Iowa 250.
La.—Vincent v. Farmers Bank & Trust Co., 181 So. 540, 189 La. 1073.
Mass.—Inhabitants of Town of Greenfield v. Burnham, 145 N.E. 306, 250 Mass. 203.

19. Ala.—Horst v. Barret, 104 So. 530, 213 Ala. 173.
Kan.—Anderson v. Stockwell, 285 P. 526, 130 Kan. 103.
Ky.—Farmer v. Gipson, 257 S.W. 1, 201 Ky. 477.
La.—Bowers v. Langston, 100 So. 301, 156 La. 188.
Mo.—Roberts v. Adkins, 5 S.W.2d 70, 319 Mo. 787—Jones v. Park, 271 S.W. 370, 307 Mo. 462.
Tex.—Frazier v. Hanlon Gasoline Co., Civ.App., 29 S.W.2d 461, error refused.
W.Va.—Rolfe Coal Mining Co. v. Redden, 135 S.E. 171, 102 W.Va. 59—Spriggs v. McCreery, 104 S.E. 479, 87 W.Va. 204.
21 C.J. p 1221 note 14.

Party construing partition decree in a certain manner is estopped to repudiate such construction where other persons have relied thereon to their detriment.—Baltzell v. Daniel, 149 So. 639, 111 Fla. 303, 93 A.L.R. 1259.

Retention of land
A person is estopped to repudiate the partition proceedings where he has received and retained a part of the land largely in excess of what he was entitled to, and where the balance of the land has passed into the hands of other parties and the ultimate loss would fall on the other parties to the partition proceedings.—Greer v. Ford, 72 S.W. 73, 31 Tex.Civ.App. 389.

Acts not creating estoppel
Heirs knowing of other heirs' pending actions to set aside their deed to mother and make partition of lands, but not objecting to grantors' claims before bringing partition suit, were held not guilty of laches estopping them from maintaining suit where they were not parties and had no rights involved in the other suit.—Skeen v. Van Sickle, 15 P.2d 344, 80 Utah 419.

20. Me.—Cogswell v. Reed, 12 Me. 198.
21 C.J. p 1222 note 15 [a].
Contra Anders v. Anders, 13 N.C. 529.

21. Wis.—Pavelka v. Pavelka, 166 N.W. 9, 166 Wis. 471.
21 C.J. p 1222 note 16.

22. Ind.—Underwood v. Deckard, 70 N.E. 383, 34 Ind.App. 198.
21 C.J. p 1222 note 18.

23. Mass.—Jones v. Stevens, 177 N.E. 91, 276 Mass. 318, 76 A.L.R. 591.
N.C.—Henderson v. Western Carolina Power Co., 157 S.E. 425, 200 N.C. 443, 80 A.L.R. 497.

24. U.S.—Grand Trunk Western R. Co. v. H. W. Nelson Co., C.C.A. Mich., 116 F.2d 823, rehearing denied 118 F.2d 252—Fruit Growers' Express Co. v. Plate Ice Co., C.C.A.N.C., 59 F.2d 605, certiorari denied 53 S.Ct. 91, 287 U.S. 642, 79 L.Ed. 556—Chevrolet Motor Co. v. Gladding, C.C.A.Md., 42 F.2d 440, certiorari denied 51 S.Ct. 78, 282 U.S. 872, 75 L.Ed. 770—McCreary v. Strongman, C.C.A.Pa., 6 F.2d 441—Grimwood v. Munson S. S. Line, C.C.A.N.Y., 273 F. 166—Luckenbach S. S. Co. v. W. R. Grace & Co., C.C.A.Va., 267 F. 676, affirming, D.C., W. R. Grace & Co. v. Luckenbach S. S. Co., 258 F. 49 and 248 F. 953, and certiorari denied Luckenbach S. S. Co. v. W. R. Grace & Co., 41 S.Ct. 14, 254 U.S. 644, 65 L.Ed. 454.
Ark.—Omohundro v. Ottenheimer, 127 S.W.2d 642, 198 Ark. 137.
Ga.—Broyles v. Haas, 180 S.E. 517, 51 Ga.App. 374—Fruit Dispatch Co. v. Petropol, 105 S.E. 48, 25 Ga.App. 839—Cornelius v. Anderson, 102 S.E. 925, 25 Ga.App. 183.
Ill.—Young v. Kich, 15 N.E.2d 692, 369 Ill. 29—People ex rel. Hamilton v. Cohen, 189 N.E. 489, 355 Ill. 499—Kuska v. Vankat, 173 N.E. 343, 341 Ill. 358—Danberg v. Langman, 149 N.E. 245, 318 Ill. 266—Miller v. Gordon, 129 N.E. 809, 296 Ill. 346—Townsend v. Postal Benefit Ass'n of Illinois, 262 Ill.App. 483.
Iowa.—Wenger v. Central Life Assur. Soc. (Mutual), 271 N.W. 220, 222 Iowa 1269.
La.—Nathan Lepow & Sons v. Halk & Bros., 2 La.App. 124.
Neb.—From v. General American Life Ins. Co., 273 N.W. 36, 132 Neb. 731—Serven v. Metropolitan Life Ins. Co., 272 N.W. 922, 132 Neb. 637—McDowell v. Metropolitan Life Ins. Co., 263 N.W. 145, 129 Neb. 764, vacating 260 N.W.

authorities, there would otherwise be a misleading of the adversary to his prejudice or an advantage to the party against whom the doctrine is invoked.[25] However, a party is not estopped from asserting an additional ground which he has not previously asserted where it does not appear that he acted dishonestly or prejudicially misled his adversary,[26] or where he was previously ignorant of the additional ground.[27] An erroneous conclusion of law by the party complained against does not estop him from subsequently asserting his rights under the correct rules of law.[28]

The rule does not require detailed explanations of the grounds of defense.[29] It has been held that the rule does not estop a plaintiff who is defeated on one of several independent causes of action from prosecuting the others,[30] or a person who has a choice of remedies for a wrong.[31]

555. 128 Neb. 23—Pittenger v. Salisbury & Almquist, 251 N.W. 287, 125 Neb. 672—Hamblin v. Equitable Life Assur. Soc., 248 N.W. 397, 124 Neb. 841—Hays v. Christiansen, 209 N.W. 609, 114 Neb. 764—Fischer v. Fuelberth, 192 N.W. 225, 109 Neb. 779—Mitchell v. Brotherhood of Locomotive Firemen and Enginemen, 174 N.W. 422, 103 Neb. 791.

N.Y.—Johnson v. National Life Ins. Co., 268 N.Y.S. 495, 150 Misc. 118, affirmed 277 N.Y.S. 956, 243 App Div. 692—Brown v. C. Rosenstein Co., 200 N.Y.S. 491, 120 Misc. 787, affirmed 203 N.Y.S. 922, 208 App. Div. 799.

Ohio.—Commerce-Guardian Bank v. Catawba Cliffs Beach Club, 7 N. E.2d 830, 54 Ohio App. 437.

Pa.—Bulliet v. Allegheny Trust Co., 131 A. 471, 284 Pa. 561, 42 A.L.R. 1133—Peerless Roofing & Siding Corporation v. Bryson, 29 Del.Co. 448.

Va.—White v. Bott, 158 S.E. 880, 158 Va. 442, modified on other grounds 163 S.E. 397, 158 Va. 442.

Wash.—North Pacific Finance Corporation v. Howell-Thompson Motor Co., 298 P. 424, 162 Wash. 387.

Wis.—Jahns & Knuth Co. v. American Indemnity Co., 196 N.W. 569, 182 Wis. 556.

21 C.J. p 1222 note 19.

Prior position untenable

Where the purchasers of land under a contract with an infant refused to carry out the alleged agreement before a guardian was appointed for the infant and authorized to perform the agreement, the fact that the refusal was based on the untenable ground that the contract had been procured by fraud does not affect the legal result of their action.—Freeman v. Fishman, 139 N.E. 846, 245 Mass. 222.

Different demands

Where defendant tenants, in face of one demand by their lessor, took a certain position, they are not estopped from changing such position in subsequent litigation by the lessor against them to enforce a different demand.—Mecklenburg Real Estate Co. v. Kyoleum Co., 218 S.W. 821, 142 Tenn. 295.

Different aspects of same ground

Common carrier's denial of right of railroad to which fuel oil was consigned to share in revenues as participating carrier pursuant to switching tariff, on ground that such sharing would have been a rebate, did not estop common carrier in subsequent suit to recover revenues which had been subsequently shared under a mistaken belief, from asserting insufficiency of billing, both grounds urged being in accord with the rule of law that the intention of the consignee as to the point at which the common carrier movement is to end must be clearly shown.—Northern Pac. Terminal Co. of Oregon v. Spokane P. & S. Ry., C.C.A. Or., 79 F.2d 773.

25. U.S.—Boehmer Coal Co. v. Burton Coal Co., C.C.A.Mo., 2 F.2d 526—Second Nat. Bank v. Lash Corporation, C.C.A.Pa., 299 F. 371.

Ga.—Georgia Wool Stock Co. v. Transatlantic Clock & Watch Co., 126 S.E. 902, 33 Ga.App. 465—Riverside Academy v. Urigh, 126 S.E. 900, 33 Ga.App. 455—Houser v. Vose, 126 S.E. 869, 33 Ga.App. 451—Kaufman v. Young, 122 S.E. 822, 32 Ga.App. 135—Carter-Moss Lumber Co. v. Lomax, 119 S.E. 534, 30 Ga.App. 718—Union Brokerage Co. v. Beall Bros., 119 S.E. 533, 30 Ga. App. 748.

Tenn.—Canton Cotton Mills v. Bowman Overall Co., 257 S.W. 398, 149 Tenn. 18.

Tex.—American Sulphur Royalty Co. of Texas v. Freeport Sulphur Co., Civ.App., 276 S.W. 448, affirmed Freeport Sulphur Co. v. American Sulphur Royalty Co. of Texas, 6 S.W.2d 1039, 117 Tex. 439, 60 A.L.R. 890—Brown v. Musgrave, Civ. App., 232 S.W. 606.

"The rule that a party, having given a reason for his conduct about a matter in controversy, is estopped, after litigation is begun, from changing his ground . . . is not a rule of universal application . . . [but] is of doubtful application in any case, unless the former position is inconsistent with the position adopted after litigation, or unless the adverse party has been misled or is prejudiced by the change of attitude."—Mecklenburg Real Estate Co. v. Kyoleum Co., 218 S.W. 821, 823, 142 Tenn. 295.

Intent to mislead

Corporation, which refused to make transfer of corporate stock because it questioned pledgor's mental capacity to make it, was held, in absence of fraud or intent to mislead, not estopped, in action by pledgee for conversion and wrongful detention of such stock, to set up defense that blanks in indorsements on certificates surrendered for transfer were not filled.—Palmer v. O'Bannon Corporation, 149 N.E. 112, 253 Mass. 8.

Change of position

Even if a letter from the seller, assigning as the reason for his refusal to deliver a second carload of flour the buyer's failure to pay for the first carload delivered, could be the basis of an estoppel preventing the seller from relying on breach of the contract for the second carload, it does not operate as such estoppel, where the buyer had taken no action, and changed no position, in reliance thereon.—Muslow v. Charles B. Varney Co., 111 A. 629, 79 N.H. 489.

26. Kan.—Morton v. Brinks, 197 P. 210, 108 Kan. 743.

Tenn.—Fidelity Bond & Mortgage Co. v. American Surety Co., 14 Tenn.App. 211.

27. Hawaii.—Kenway v. Heffelfinger, 31 Hawaii 334.

Neb.—Fischer v. Fuelberth, 192 N.W. 225, 109 Neb. 779.

Va.—Blydenstein v. Bussey, 171 S.E. 515, 161 Va. 460.

28. Cal.—Costello v. Sharp, 223 P. 567, 65 Cal.App. 152.

29. Tenn.—Canton Cotton Mills v. Bowman Overall Co., 257 S.W. 398, 149 Tenn. 18.

30. Kan.—Glover v. Berridge, 121 P. 1130, 86 Kan. 611.

21 C.J. p 1222 note 20.

31. U.S.—Union Cent. Life Ins. Co. v. Drake, Neb., 214 F. 536, 131 C.C.A. 82.

§ 117. Prior Claim or Position in Judicial Proceedings

Subject to certain qualifications and limitations, it is a well established principle that a party who has knowingly and deliberately assumed a particular position in judicial proceedings is estopped to assume a position inconsistent therewith to the prejudice of the adverse party. It is frequently required, in order for such estoppel to operate, that the position first assumed should have been successfully maintained.

Subject to modifications and limitations which will appear, it is a well established principle that a party who has knowingly and deliberately assumed a particular position in judicial proceedings is estopped to assume a position inconsistent therewith to the prejudice of the adverse party.[32] Estoppel on this ground cannot be invoked, however, where the position first assumed was taken as a result of ignorance[33] or mistake,[34] or through the act or fault of the party claiming the estoppel;[35] and, clearly, it cannot be invoked where the position complained of is not inconsistent with a former position.[36] Ordinarily, a change of position with re-

32. U.S.—Chandler v. McKerral, C.C.A.Ill., 68 F.2d 343—American Pastry Products Corporation v. United Products Corporation, D.C.Mass., 39 F.2d 181—Texas Co. v. Gulf Refining Co., C.C.A.Tex., 26 F.2d 394, affirming, D.C., 13 F.2d 873, and certiorari denied 49 S.Ct. 27, 278 U.S. 625, 73 L.Ed. 545—Williams v. Mason, D.C.Fla., 289 F. 812.

Ala.—Watt v. Lee, 191 So. 628, 238 Ala. 451—First Nat. Bank v. Burch, 188 So. 859, 237 Ala. 680—Woodham v. Hillman, 178 So. 31, 235 Ala. 224—Wright v. Fannin, 156 So. 849, 229 Ala. 278—Briggs v. Prowell, 93 So. 590, 207 Ala. 629.

Cal.—Mosier v. Suburban Estates, 31 P.2d 209, 137 Cal.App. 574.

Fla.—Lee v. Fowler, 155 So. 647, 115 Fla. 429—Lyle v. Hunter, 136 So. 633, 102 Fla. 972.

Ga.—York v. Lowry, 129 S.E. 793, 34 Ga.App. 389.

La.—Boylan's Detective Agency & Protection Police v. Arthur A. Brown & Co., 102 So. 417, 157 La. 325.

Mich.—Billingsley v. Gulick, 240 N.W. 46, 256 Mich. 606, 79 A.L.R. 166.

Miss.—Yazoo & M. V. R. Co. v. Wade, 139 So. 403, 162 Miss. 699.

Mo.—St. Louis v. St. Louis United R. Co., 174 S.W. 78, 263 Mo. 387, error dismissed 36 S.Ct. 550, 241 U.S. 647, 60 L.Ed. 1220—Losee v. Crawford, 5 S.W.2d 105, 222 Mo.App. 683—Piper v. Wayne Mfg. Co., App., 253 S.W. 437.

N.Y.—Horn v. Bennett, 3 N.Y.S.2d 525, 253 App.Div. 630—Credit Alliance Corporation v. Sheridan Theatre Co., 206 N.Y.S. 389, 210 App.Div. 599, reversing 202 N.Y.S. 217, 121 Misc. 656.

N.C.—Rand v. Gillette, 154 S.E. 746, 199 N.C. 462.

Ohio.—Sleepy Eye Milling Co. v. Welsh, 14 Ohio Cir.Ct.,N.S., 509—Radebaugh v. Citizens Trust & Savings Bank, 26 Ohio N.P., N.S., 347.

Pa.—Etnier v. Pascoe, 119 A. 406, 275 Pa. 308.

Tenn.—Johnston v. Cincinnati, N. O. & T. P. R. Co., 240 S.W. 429, 146 Tenn. 135.

Tex.—Shaw v. American Life Ins. Co., Civ.App., 60 S.W.2d 1110, error dismissed—Christian v. Manning, Civ.App., 59 S.W.2d 234, modified on other grounds Manning v. Christian, 81 S.W.2d 54, 124 Tex. 517.

Va.—Burch v. Grace Street Bldg. Corporation, 191 S.E. 672, 168 Va. 329—Lyric Theatre Corporation v. Vaughan, 191 S.E. 600, 168 Va. 595—Commonwealth v. Beavers, 142 S.E. 402, 150 Va. 33.

Wash.—Hardgrove v. Bowman, 116 P.2d 336—Lloyd v. Schwaegler, 216 P. 884, 126 Wash. 67.

W.Va.—Keller v. Norfolk & W. Ry. Co., 167 S.E. 448, 451, 113 W.Va. 286, citing **Corpus Juris.**

21 C.J. p 1223 note 23, p 1228 note 69.

"He who judicially asserts a fact as a basis of a right, cannot afterward change his position, and assert the contrary."—Lavigne v Louisiana Ry & Nav. Co., 121 So. 251, 253, 9 La.App. 509.

Other statements

(1) "Parties to litigations are necessarily held bound to positions they assume therein."—State v. Baird, 231 S.W. 625, 628, 288 Mo. 62, 15 A.L.R. 1035.

(2) "One who has deliberately taken a particular position in the course of litigation, without mistake induced by the opposite party, must act consistently therewith throughout the litigation."—Great American Indemnity Co. v. Utility Contractors, 111 S.W.2d 901, 906, 21 Tenn.App. 463.

Acquiescence as assumption of position

Where a party silently acquiesces in the erroneous assumption of a fact by the court, he is estopped to complain about the error subsequently.—Bealafelt v. Hicks, 13 Tenn.App. 18.

33. U.S.—G. Amsinck & Co. v. Springfield Grocer Co., C.C.A.Mo., 7 F.2d 855.

Cal.—Panzer-Hamilton Co. v. Bray, 274 P. 769, 96 Cal.App. 460.

Conn.—Cole v. Hawley, 111 A. 892, 95 Conn. 587.

La.—Putnam & Norman v. Levee, App., 186 So. 368, setting aside 160 So. 155.

Md.—Standard Founders v. Oliver, 178 A. 223, 168 Md. 317.

34. U.S.—Firemen's Ins. Co. v. Brooks, C.C.A.Tenn., 19 F.2d 277.

Conn.—Taylor v. Lounsbury-Soule Co., 137 A. 159, 106 Conn. 41.

La.—International Projector Corporation v. Maricella, App., 144 So. 278.

Me.—Loomis v. Green, 7 Me. 386.

N.Y.—Ginsberg v. Sherman, 163 N.Y.S. 1058.

Tenn.—Southern Coal & Iron Co. v. Schwoon, 239 S.W. 398, 145 Tenn. 191.

Mistake of law by party invoking estoppel

Party is not estopped from setting up defense where necessity for claim of estoppel in order to prevail arises from errors of judgment of law on part of one seeking to claim benefit of estoppel.—Hamilton Web Co. v. Page, D.C.R.I., 8 F.Supp. 626.

35. U.S.—G. Amsinck & Co. v. Springfield Grocer Co., C.C.A.Mo., 7 F.2d 855.

La.—Putnam & Norman v. Levee, App., 186 So. 368, setting aside 160 So. 155.

N.J.—Federal Advertising Corporation v. Hundertmark, 160 A. 40, 109 N.J.Law 12.

Okl.—Slyman v. Alexander, 259 P. 224, 126 Okl. 232.

21 C.J. p 1225 note 26, p 1231 note 79.

36. U.S.—U. S. Potash Co. v. McNutt, C.C.A.N.M., 70 F.2d 126, costs taxed 70 F.2d 1003—Fordson Coal Co. v. Asher, C.C.A.Ky., 23 F.2d 325.

Ala.—McFry v. Stewart, 121 So. 517, 219 Ala. 216—Jernigan v. Rainer Mercantile Co., 100 So. 142, 211 Ala. 220, 32 A.L.R. 1337.

Cal.—Keating v. Preston, App., 108 P.2d 479—Haidopoulos v. Woollett, 42 P.2d 1056, 5 Cal.App.2d 229—Brichetto v. Raney, 245 P. 235, 76 Cal.App. 232.

Del.—Arcturus Radio Tube Co. v. Radio Corporation of America, 177 A. 899, 20 Del.Ch. 376.

Fla.—Chase & Co. v. Little, 156 So. 609, 610, 116 Fla. 667, quoting **Corpus Juris.**

Ga.—Lawrence v. Little, 135 S.E. 734, 163 Ga. 138—Cox v. Fort, 104 S.E. 419, 150 Ga. 467—Hall v. Simmons, 179 S.E. 272, 50 Ga.App. 634.

Ill.—Martin v. Karr, 175 N.E. 376,

spect to a pure matter of law does not work an estoppel,[37] particularly where the earlier position has been found unsound or untenable.[38]

The doctrine of estoppel to assume inconsistent positions in judicial proceedings has been said to be one of vague application,[39] and in many cases it has been held inoperative, or has not been applied, under the particular facts and circumstances involved.[40] In no event can estoppel be extended be-

378, 343 Ill. 296, citing **Corpus Juris**—Department of Public Works and Buildings v. Rockwell Cemetery Ass'n, 143 N.E. 875, 312 Ill. 232—Ladone, for Use of Ware, v. National Casualty Co., 279 Ill.App. 258.

Iowa.—Schwanz v. Farmers' Co-op. Co. of Lorimor, 214 N.W. 491, 204 Iowa 1273, 55 A.L.R. 644—German American State Bank of Chalco, Neb., v. Farmers' & Merchants' Sav. Bank of Lidderdale, 211 N.W. 386, 203 Iowa 276.

Kan.—Robertson v. Andrus, 266 P. 53, 125 Kan. 730—Davis v. Davis, 246 P. 982, 121 Kan. 312.

Ky.—Walker v. City of Richmond, 262 S.W. 628, 203 Ky. 481.

La.—Harnischfeger Sales Corporation v. Sternberg Co., 158 So. 556, 180 La. 1059—Fellman's Heirs v. Interstate Land Co., 112 So. 405, 163 La. 529—Ward v. Board of Levee Com'rs of New Orleans Levee Dist., 111 So. 799, 163 La. 397—Boland Mach. & Mfg. Co. v. Favret, App., 177 So. 836—Wallenburg v. Kerry, 133 So. 823, 16 La. App. 221.

Mass.—Levenson v. Ruble, 30 N.E. 2d 840, 307 Mass. 562—Inhabitants of Town of Greenfield v. Burnham, 145 N.E. 306, 250 Mass. 203.

Mo.—In re Franz' Estate, 127 S.W.2d 401, 406, 344 Mo. 510, quoting **Corpus Juris**—Gary Realty Co. v. Swinney, 17 S.W.2d 505, 322 Mo. 450—Viviano v. Ferguson, App., 39 S.W.2d 568—S. J. Travis & Co. v. Means, App., 242 S.W. 164.

Mont.—State v. District Court of Fifteenth Judicial Dist. in and for Rosebud County, 235 P. 751, 73 Mont. 84.

N.Y.—In re Auditore's Adm'x, 229 N.Y.S. 414, 223 App.Div. 654, modified on other grounds In re Auditore's Will, 164 N.E. 242, 249 N.Y. 335, 62 A.L.R. 551, motion denied Parascandola v. National Surety Co., 166 N.E. 315, 250 N.Y. 537, 62 A.L.R. 551.

N.C.—Adams v. Wilson, 131 S.E. 760, 191 N.C. 392.

Pa.—Galion Iron Works & Mfg. Co. v. Hollenback Tp., 146 A. 448, 297 Pa. 68—Greiner v. Brubaker, 16 A.2d 689, 142 Pa.Super. 538.

Tenn.—Scholze v. Scholze, 2 Tenn. App. 80.

Tex.—U. S. Fidelity & Guaranty Co. v. Century Indemnity Co., Civ.App., 78 S.W.2d 737, error dismissed—Robinson v. Hays, Civ.App., 62 S.W.2d 1007.

Vt.—Hinsman v. Marble Sav. Bank, 156 A. 874, 104 Vt. 40.

Va.—Baylor v. Hoover, 109 S.E. 578, 131 Va. 435.

Wash.—White v. Chellew, 185 P. 619, 108 Wash. 526.

W.Va.—Koon v. Monongahela West Penn Public Service Co., 192 S.E. 332, 119 W.Va. 76.

Wis.—Grant v. Asmuth, 218 N.W. 834, 195 Wis. 458—Nitka v. Western Union Telegraph Co., 135 N.W. 492, 149 Wis. 106, 49 L.R.A.,N.S., 337, Ann.Cas.1913C 863.

21 C.J. p 1224 note 25, p 1230 note 72.

Mere increase in amount claimed is not a fatal inconsistency.

Iowa.—Hoskin v. West, 284 N.W. 809, 226 Iowa 612.

La.—Johnson v. Legeai, 84 So. 505, 147 La. 92.

Decrease of claim

"The doctrine of estoppel does not stand in the way of plaintiff's claiming less of the same thing than at the previous trial."—Whitman v. Lowe, 126 A. 513, 517, 98 Vt. 152.

That complainant secured attachment in prohibition proceeding did not estop him from proceeding on theory that action for rescission was for equitable relief.—Fair View Farms Co. v. Superior Court of California in and for Los Angeles County, 10 P.2d 1011, 123 Cal.App. 9.

Motion to correct judgment

Plaintiffs who, having obtained judgment, moved to correct judgment allegedly preventing defendants from perfecting appeal were not thereby judicially estopped to contend that original judgment was final, and enforceable by execution.—Baria v. Taylor, Tex.Civ.App., 57 S.W.2d 858.

Failure to consolidate suits

Failure of defendant to bring about consolidation of trespass actions did not estop defendant from pleading res judicata as to second suit.—Reid v. Singer Sewing Mach. Co., 119 So. 229, 218 Ala. 498.

Levy of execution

The mere fact that plaintiff in fieri facias pointed out an automobile to the sheriff to be levied on under his fieri facias as the property of the defendant in fieri facias did not "estop" plaintiff from denying the title of defendant in another and subsequent proceeding to set the automobile aside as a homestead exemption, since the levy of execution is not of itself a warranty that defendant in fieri facias has any valid title, and it is not even an assertion concerning the nature or validity of the title of the property to be sold thereunder.—Garmon v. Davis, 12 S.E. 2d 209, 63 Ga.App. 815.

37. U.S.—Grodsky v. Sipe, D.C.Ill., 30 F.Supp. 656.

Ill.—Orschel v. Rothschild, 238 Ill. App. 353.

Miss.—Mississippi Power & Light Co. v. Pitts, 179 So. 363, 365, 181 Miss. 344, citing **Corpus Juris.**

Mo.—Charter Oak Inv. Co. v. Felker, App., 60 S.W.2d 655.

Mont.—Graham v. Superior Mines, 49 P.2d 443, 445, 100 Mont. 427, citing **Corpus Juris.**

21 C.J. p 1225 note 34, p 1231 note 80.

38. U.S.—Lapeer Trailer Corporation v. Freuhauf Trailer Co., D.C. Mich., 24 F.2d 595.

La.—Harnischfeger Sales Corporation v. Sternberg Co., 158 So. 556, 180 La. 1059.

Mich.—Binder v. Wlaskolin, 209 N.W. 82, 234 Mich. 672.

Okl.—In re Assessment of Alleged Omitted Property of Kennedy, 58 P.2d 134, 138, 177 Okl. 74, citing **Corpus Juris**—Ross v. Dexter, 219 P. 689, 93 Okl. 73.

"[A party] may make a contention as to a legal status without being prohibited from whatever benefits may result from an adverse ruling."—Tuscaloosa Veneer Co. v. American Mut. Liability Ins. Co., 199 So. 868, 870, 240 Ala. 444.

39. Minn.—Morehart v. Furley, 188 N.W. 1001, 152 Minn. 388.

40. **Party held not estopped**

(1) Nonsuit in action on parol contract to repurchase land was not estoppel in pais against enforcement of contract by defendant to convey part of land to plaintiff's wife.—Martin v. Yonce, 137 S.E. 17, 163 Ga. 694.

(2) Where plaintiff, who was decedent's partner in farming operations, filed claim for wages as an employee, but defendants rejected claim, there was no estoppel.—Hull v. Padgett, 223 N.W. 154, 207 Iowa 430.

(3) Defendant was not estopped to claim board of supervisors had jurisdiction in highway proceedings, where it had predicated motion to dismiss plaintiff's former appeal from order of board on plaintiff's attitude that board had no jurisdiction.—Witham v. Union County, 210 N.W. 535, 202 Iowa 557.

(4) One suing to oust, and have himself decreed, parish school superintendent, was not estopped to de-

yond the natural and reasonable import of the acts or conduct relied on to create the estoppel.[41]

Equitable elements generally. Estoppel against inconsistency in judicial proceedings is generally treated as a phase of equitable estoppel or estoppel in pais, and under this view its operation has been made to depend on the presence or absence of elements essential to equitable estoppel.[42] Thus, as a general rule it is essential, or at least an important factor, that the position first assumed should have resulted in advantage to one party or disadvantage to the other.[43] The party invoking the estoppel must have been misled by the assumption of the first position,[44] must have relied on it,[45] and, so relying, have acted, or refrained from acting, or have changed his position, to his prejudice,[46] or have put

mand that defendant sign contract employing plaintiff as high school principal.—State ex rel. Floyd v. Hodges, 115 So. 747, 165 La. 552.

(5) That one holding life tenant's interest had in former suit asserted ownership of property did not prevent him from claiming as tenant at sufferance after life tenant's death.—Felt v Methodist Educational Advance, 232 N.W. 178, 251 Mich. 512.

(6) Wife's act, as executrix of deceased husband's estate, in inventorying property in dispute as part of estate, did not estop her from claiming resulting trust in property—Roberts v. Roberts, Mo., 291 S.W. 485.

(7) In action on automobile policy, it was held that court would not be justified in refusing to consider case on entire record because plaintiff's counsel had previously taken view of determining questions inconsistent with views subsequently urged.—B. & B. Trucking v. Home Fire & Marine Ins. Co. of California, 209 N.Y.S. 511, 125 Misc. 312, affirmed 214 N.Y.S. 812, 216 App Div. 710.

(8) That parties denied jurisdiction of Michigan court to appoint administrator for legatee, claiming her domicile was in Pennsylvania, did not prevent their subsequently denying that she was ever domiciled in Pennsylvania.—Denny v. Searles, 143 S.E. 484, 150 Va. 701.

(9) Other cases.

Ala.—American Bonding Co. of Baltimore v. Fourth Nat. Bank, 91 So. 480, 206 Ala. 639.

Ga.—Underwood v. Underwood, 159 S.E. 725, 43 Ga.App. 643.

Ill.—People ex rel. Huff v. Palmer, 191 N.E. 199, 356 Ill. 563.

La.—Fitzenreiter v. Feagin, 124 So. 137, 169 La. 35—Ward v. Board of Levee Com'rs of New Orleans Levee Dist., 111 So. 799, 163 La. 397—State ex rel. Wilkinson v. Hingle, 50 So. 616, 124 La. 655.

Mass.—Searls v. Loring, 176 N.E. 212, 275 Mass. 403.

Mich.—Appeal of De Mercy, 272 N.W. 873, 279 Mich. 471—First Nat. Bank v. Holmes, 181 N.W. 46, 213 Mich. 41.

Minn.—Mosloski v. Gamble, 253 N.W. 378, 191 Minn. 170—Morehart v. Furley, 188 N.W. 1001, 152 Minn. 388.

Miss.—Russell v. Federal Land Bank, 176 So. 737, 180 Miss 55.

Mo.—State ex rel. Terry v. Holtkamp, 51 S.W.2d 13, 330 Mo. 608—Long v. Robinson, 281 S.W. 78, 222 Mo App. 503.

N.Y.—In re Tummonds' Estate, 287 N.Y.S. 386, 158 Misc. 592.

Tex.—Knox v. Brown, Com.App., 277 S.W. 91, affirming Brown v. Knox, Civ.App., 261 S.W. 791, and motion overruled Knox v. Brown, Com. App., 277 S.W 619—Jones v. Lockhart, Civ.App., 144 S.W.2d 426, error dismissed, judgment correct—Clarkson v. Ruiz, Civ.App., 140 S. W.2d 206, error dismissed, judgment correct.

Va.—Greenbrier Joint Stock Land Bank v. Opie, 182 S.E. 255, 165 Va. 334.

Wash.—Robinson v. Ebert, 39 P.2d 992, 180 Wash. 387.

Wis.—Mitchell Realty Co. v. City of West Allis, 199 N.W. 390, 184 Wis. 352, 35 A.L.R. 396.

41. La.—Prichard v. McCranie, 107 So. 461, 160 La. 605—Winn v. Strickland, 91 So. 719, 151 La. 235.

Mo.—In re Franz' Estate, 127 S.W. 2d 401, 406, 344 Mo. 510, quoting **Corpus Juris.**

21 C.J. p 1231 note 81.

42. U.S.—Emlenton Refining Co. v. Chambers, C.C.A.Pa., 35 F.2d 273, certiorari denied 50 S.Ct. 160, 280 U.S. 612, 74 L.Ed. 654.

Cal.—Panzer-Hamilton Co. v. Bray, 274 P. 769, 96 Cal.App. 460.

Ky.—Walker v. City of Richmond, 262 S.W. 628, 203 Ky. 481.

La.—Tyler v. Walt, 167 So. 182, 184 La. 659.

Mo.—In re Franz' Estate, 127 S.W.2d 401, 406, 344 Mo. 510, quoting **Corpus Juris**—Pollard v. Ward, 233 S. W. 14, 289 Mo. 275, 20 A.L.R. 936—Long v. Robinson, 281 S.W. 78, 222 Mo.App. 503.

Okl.—Slyman v. Alexander, 259 P. 224, 126 Okl. 232.

43. U.S.—Grodsky v. Sipe, D.C.Ill., 30 F.Supp. 656.

Ala.—McFry v. Stewart, 121 So. 517, 219 Ala. 216.

Cal.—Botwin v. Wise, 189 P. 312, 46 Cal.App. 465.

La.—Maddox v. Robbert, 104 So. 183, 158 La. 394—International Projector Corporation v. Maricella, App., 144 So. 278.

44. Iowa.—Gorman v. Sampica, 211 N.W. 429, 202 Iowa 802.

Kan.—Davis v. Davis, 246 P. 982, 121 Kan. 312.

Ky.—Walker v. City of Richmond, 262 S.W. 628, 203 Ky. 481.

La.—Putnam & Norman v. Levee, App., 186 So. 368, setting aside 160 So. 155—International Projector Corporation v. Maricella, App., 144 So. 278.

Mass.—Levenson v. Ruble, 30 N.E. 2d 840, 307 Mass. 562.

Mo.—Charter Oak Inv. Co. v. Felker, App., 60 S.W.2d 655—Losee v. Crawford, 5 S.W.2d 105, 222 Mo. App. 683.

N.Y.—Kress v. Near, 269 N.Y.S. 569, 239 App.Div. 747.

Okl.—Slyman v. Alexander, 259 P. 224, 126 Okl. 232.

Tex.—Kirby v. Fitzgerald, Civ.App., 57 S.W.2d 362, affirmed 89 S.W. 2d 408, 126 Tex. 411.

Wash.—Hinton v. Carmody, 60 P.2d 1108, 186 Wash. 242.

Wyo.—Willis v. Willis, 49 P.2d 670, 48 Wyo. 403, rehearing denied 54 P 2d 814, 49 Wyo. 296.

21 C.J. p 1225 note 27, p 1231 note 75.

45. U.S.—Galt v. Phoenix Indemnity Co., D.C., 120 F.2d 723—Unterweser Reederei Aktiengesellschaft v. Potash Importing Corporation of America, C.C.A.Ga., 36 F.2d 869.

Fla.—Lee v. Fowler, 155 So. 647, 115 Fla. 429.

La.—Chauvin v. American Mut. Liability Ins. Co., 134 So. 450, 17 La.App. 187.

Mass.—Inhabitants of Town of Greenfield v. Burnham, 145 N.E. 306, 250 Mass. 203.

N.Y.—Metropolitan Life Ins. Co. v. Childs Co., 130 N.E. 295, 230 N. Y. 285, 14 A.L.R. 658, reversing 170 N.Y.S. 237, 183 App.Div. 230, and motion denied 132 N.E. 885, 231 N.Y. 551.

46. U.S.—Galt v. Phœnix Indemnity Co., D.C., 120 F.2d 723—Unterweser Reederei Aktiengesellschaft v. Potash Importing Corporation of America, C.C.A.Ga., 36 F.2d 869—Westchester Fire Ins. Co. of New York v. Norfolk Building & Loan Ass'n, C.C.A.Neb., 14 F.2d 524—G. Amsinck & Co. v. Springfield Grocer Co., C.C.A.Mo., 7 F.2d 855—Grodsky v. Sipe, D.C.Ill., 30 F.Supp. 656—Sunshine Mining Co.

himself in such a position that his rights would be injuriously affected if his opponent were permitted to change his position.[47] There can be no estoppel based on such misleading and reliance where the party invoking it had knowledge equal or superior to that possessed by his adversary, and sufficient to protect him against being misled or relying,[48] or where he had a sufficient opportunity to acquire such knowledge.[49]

Successful maintenance of first position. It is frequently held that estoppel against inconsistent positions in judicial proceedings will operate where the position first assumed has been successfully maintained.[50] A number of cases have expressly

v. Treimes, D.C.Idaho, 19 F Supp. 587, affirmed, C.C.A., Treimes v. Sunshine Mining Co., 99 F 2d 651, certiorari granted 59 S.Ct. 489, 306 U.S. 624, 83 L.Ed. 1029, affirmed 60 S.Ct. 44, 308 U.S. 66, 84 L Ed. 85, rehearing denied 60 S.Ct. 464, 309 U S. 693, 84 L.Ed. 1034—Myers v. Ross, D.C.Fla., 10 F.Supp. 409.

Ala.—First Nat. Bank v. Burch, 188 So. 859, 237 Ala. 680—Dowling v. Sollie & Sollie, 176 So. 340, 234 Ala. 630.

Conn.—Taylor v. Lounsbury-Soule Co., 137 A. 159, 106 Conn. 41.

Ga.—Bryant v. Freeman, App., 16 S. E 2d 113—Wilson v. Owen, 91 S. E. 233, 19 Ga.App. 159

Iowa.—In re Choate's Estate, 192 N. W. 857, 195 Iowa 715.

Kan.—Robertson v. Andrus, 266 P. 53, 125 Kan. 730.

Ky.—Stell v. Williams' Adm'r, 26 S. W.2d 8, 233 Ky. 441—Walker v. City of Richmond, 262 S.W. 628, 203 Ky. 481.

La.—Land v. Land, 164 So. 599, 183 La. 588—International Projector Corporation v. Maricella, App., 144 So 278—Chauvin v. American Mut. Liability Ins. Co., 134 So. 450, 17 La.App. 187.

Mich.—Bowerman v. Detroit Free Press, 283 N.W. 642, 287 Mich. 443, 120 A.L.R. 1230—O'Dell v. Day, 183 N.W. 17, 214 Mich. 566.

Mo.—Norborne Land Drainage Dist. Co. of Carroll County v. Cherry Valley Tp., of Carroll County, 31 S.W.2d 201, 325 Mo. 1197—Pollard v. Ward, 233 S.W. 14, 289 Mo. 275, 20 A.L R. 936—Wilson v. National Ben Franklin Fire Ins. Co., App., 266 S.W. 338.

N.Y.—Metropolitan Life Ins. Co. v. Childs Co., 130 N.E. 295, 230 N.Y. 285, 14 A.L.R. 658, reversing 170 N.Y.S. 237, 183 App Div. 230, and motion denied 132 N.E. 885, 231 N. Y. 551—Kress v. Neer, 269 N.Y.S. 569, 239 App.Div. 747.

Okl.—Slyman v. Alexander, 259 P. 224, 126 Okl. 232.

Pa.—In re Hesse's Estate, 124 A. 739, 280 Pa. 581.

Tenn.—Radford v. Littleton, 9 Tenn. App. 361—McClish v. Superior Fire Ins. Co., 2 Tenn.App. 560.

Tex.—Daugherty v. Roasberry, Civ. App., 229 S.W. 924, error refused.

Vt.—Whitman v. Lowe, 126 A. 513, 98 Vt. 152.

Wash.—Hinton v. Carmody, 60 P.2d 1108, 186 Wash. 242.

Wyo.—Willis v. Willis, 49 P.2d 670, 677, 48 Wyo. 403, citing **Corpus Juris,** and rehearing denied 54 P.2d 814, 49 Wyo. 296.

21 C.J. p 1225 note 28, p 1231 note 76.

47. U.S.—Firemen's Ins. Co. v. Brooks, C.C.A.Tenn., 19 F.2d 277.

Cal.—In re Bryant's Estate, 43 P.2d 529, 3 Cal.2d 58—Spencer v. City of Calipatria, 49 P.2d 320, 9 Cal. App.2d 267—Boomer v. Muir, App., 24 P.2d 570—Fink v. Weisman, 18 P.2d 961, 129 Cal App. 305, 132 Cal.App. 724, affirmed 23 P.2d 438, 132 Cal.App. 724.

Ga.—Piedmont Sav. Co. v. Davis, 190 S.E. 386, 55 Ga.App. 386.

Kan.—Wilson v. Stephenson, 53 P. 2d 874, 876, 143 Kan. 91, quoting **Corpus Juris.**

Ky.—Walker v. City of Richmond, 262 S.W. 628, 630, 203 Ky. 481, quoting **Corpus Juris.**

La.—International Projector Corporation v. Maricella, App., 144 So. 278.

Miss.—Mississippi State Highway Commission v. West, 179 So. 279, 181 Miss. 206.

Mo.—Pollard v. Ward, 233 S.W. 14, 289 Mo. 275, 20 A.L.R 936.

N.C.—Adams v. Wilson, 131 S.E. 760, 191 N.C. 392.

Tenn.—Radford v. Littleton, 9 Tenn. App. 361.

Tex.—Linz v. Eastland County, Com. App., 39 S W.2d 599, 77 A.L.R. 1466, modifying City Nat. Bank v. Eastland County, Civ.App., 12 S. W.2d 662—Eller v. Erwin, Civ.App., 265 S.W. 595—Lomax v. Trull, Civ. App., 232 S.W. 861, dismissed for want of jurisdiction.

Wyo.—Willis v. Willis, 49 P.2d 670, 48 Wyo. 403, rehearing denied 54 P 2d 814, 49 Wyo. 296.

21 C.J. p 1225 notes 29, 30, p 1231 note 77.

48. U.S.—Galt v. Phœnix Indemnity Co., D.C., 120 F.2d 723.

Ill.—Siegel, Cooper & Co. v. Colby, 52 N.E. 917, 176 Ill. 210.

La.—International Projector Corporation v. Maricella, App., 144 So. 278.

Me.—Gordon v. Hutchins, 105 A. 356, 118 Me. 6.

Miss.—Mississippi Power & Light Co. v. Pitts, 179 So. 363, 365, 181 Miss. 344, citing **Corpus Juris.**

Mo.—Charter Oak Inv. Co. v. Felker, App., 60 S.W.2d 655.

Okl.—Slyman v. Alexander, 259 P. 224, 126 Okl. 232.

Wyo.—Willis v. Willis, 49 P 2d 670, 677, 48 Wyo. 403, citing **Corpus Juris,** and rehearing denied 54 P.2d 814, 49 Wyo. 296.

49. Tenn.—Smith v. Medley, 7 Tenn. Civ.App. 111.

50. U.S.—Sinclair Refining Co. v. Jenkins Petroleum Process Co., C. C.A.Me., 99 F.2d 9, certiorari denied Jenkins Petroleum Process Co. v. Sinclair Refining Co, 59 S.Ct. 362, 305 U.S. 659, 83 L.Ed. 427, rehearing denied 59 S.Ct. 484, 306 U. S. 667, 83 L Ed. 1062, second rehearing denied 59 S.Ct. 1035, 307 U.S. 651, 83 L.Ed. 1530—Axelrod v. Osage Oil & Refining Co., C.C.A. Okl., 29 F.2d 712, 729, quoting **Corpus Juris.**

Ala.—Central of Georgia Ry. Co. v. Motherwell, 149 So. 820, 227 Ala 300—McFry v. Stewart, 121 So. 517, 219 Ala. 216.

Fla.—Palm Beach Co. v. Palm Beach Estates, 148 So 544, 548, 110 Fla. 77, citing **Corpus Juris.**

Kan.—Wilson v. Stephenson, 53 P.2d 874, 876, 143 Kan. 91, quoting **Corpus Juris.**

Mich.—Twork v. Munising Paper Co., 266 N.W. 311, 275 Mich. 174.

Minn.—Morehart v. Furley, 188 N.W. 1001, 152 Minn. 388.

Neb.—In re Applications Nos. 2354 and 2374 of Central Nebraska Public Power & Irrigation Dist., 272 N.W. 560, 565, 132 Neb. 547, quoting **Corpus Juris**—Peterson v. Strayer, 237 N.W. 667, 668, 121 Neb. 587, quoting **Corpus Juris,** and modified on other grounds 239 N.W. 213, 121 Neb. 866.

N.J.—Fidelity Union Trust Co. v. Chausmer, 198 A. 828, 831, 120 N. J.Law 208, citing **Corpus Juris.**

Okl.—Johnson v. Gibson, 220 P. 47, 93 Okl. 194.

Pa.—Giesey v. Cogan, 179 A. 865, 118 Pa.Super. 464.

R.I.—Merrill v. Boal, 132 A. 721, 47 R.I. 274, 45 A.L.R. 830.

S.D.—Stevens v. Jas. A. Smith Lumber Co., 222 N.W. 665, 54 S.D. 170.

Wyo.—Hatten Realty Co. v. Bayliss, 290 P. 561, 42 Wyo. 69, 72 A.L.R. 587.

21 C J. p 1223 note 23.

"Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especial-

held that successful maintenance is indispensable.[51] This rule, however, does not require that a favorable decree or judgment should have been rendered,[52] and, while the rule is perhaps more clearly satisfied where a judgment or decree is entered or a cause of action established or defeated in accordance with the position first assumed,[53] it is satisfied also if the first position was acquiesced in or acted on by the adverse party to his detriment,[54] or was the basis of some action by the court, ei-

ly if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."

U.S.—Davis v. Wakelee, N.Y., 15 S. Ct. 555, 156 U.S. 680, 689, 39 L. Ed. 578—Galt v. Phœnix Indemnity Co., D.C., 120 F.2d 723, 726—Queenan v. Mays, C.C.A.Okl., 90 F.2d 525, 533, certiorari denied Board of Com'rs of Creek County, Okl., v. Mays, 58 S.Ct. 45, 302 U.S. 724, 82 L.Ed. 559—Firemen's Ins. Co. v. Brooks, C.C.A.Tenn., 19 F.2d 277, 279.

Ga.—Forrester v. Frizell, 134 S.E. 182, 35 Ga.App. 562.

N.M.—In re Maddison, 255 P. 630, 632, 32 N.M. 252.

S.C.—Zimmerman v. Central Union Bank, 8 S.E.2d 359, 365, 194 S.C. 518.

Party who has proved fact in his own favor cannot deny its existence in favor of his adversary.—Chautauque County Bank v. Risley, 19 N.Y. 369, 75 Am.D. 347, reversing 4 Den. 480.

51. Cal.—Seid Pak Sing v. Barker, 240 P. 765, 197 Cal. 321.

Mich.—Bowerman v. Detroit Free Press, 283 N.W. 642, 287 Mich. 443, 120 A.L.R. 1230—Kruk v. Minneapolis, St. P. & S. S. M. Ry. Co., 229 N.W. 479, 480, 249 Mich. 685, citing **Corpus Juris.**

Or.—Couch v. Scandinavian-American Bank, 197 P. 284, 287, 103 Or. 48, quoting **Corpus Juris,** and modified on other grounds 202 P. 558, 103 Or. 48.

Tex.—Smith v. Chipley, Civ.App., 42 S.W.2d 645, 647, quoting **Corpus Juris.**

Wash.—Smith v. Saulsberry, 288 P. 927, 931, 157 Wash. 270, citing **Corpus Juris.**

21 C.J. p 1224 note 24, p 1229 note 70, p 1232 note 92.

52. Ala.—Woodham v. Hillman, 178 So. 31, 235 Ala. 224.

Fla.—Palm Beach Co. v. Palm Beach Estates, 148 So. 544, 110 Fla. 77.

Iowa.—Thompson v. Illinois Cent. R. Co., 179 N.W. 191, 191 Iowa 35.

53. U.S.—Chicago, S. S. & S. B. R. R. v. Fleming, C.C.A.Ind., 109 F.2d 419.

Ala.—Watt v. Lee, 191 So. 628, 238 Ala. 451—Phillips v. Sipsey Coal Mining Co., 118 So. 513, 218 Ala. 296.

Ariz.—Rossi v. Hammons, 268 P. 181, 34 Ariz. 95.

Colo.—Goodstein v. Silver Plume Mines Co., 245 P. 714, 79 Colo. 269.

Ga.—Hardeman v. Ellis, 135 S.E. 195, 162 Ga. 664—Bryan Bank v. Carter, 196 S.E. 228, 57 Ga.App. 519—Wise v. Hall, 124 S.E. 363, 32 Ga. App. 663—Florence, Phillips & Co. v. Newsome, 106 S.E. 619, 26 Ga. App. 501.

Ill.—Garden City Sand Co. v. Christley, 124 N.E. 729, 289 Ill. 617.

Iowa.—Thompson v. Illinois Cent. R. Co., 179 N.W. 191, 191 Iowa 35.

La.—Conklin v. Caffall, 179 So. 434, 189 La. 301—Choate Oil Corporation v. Glassell, 96 So. 543, 153 La. 715.

Mich.—Majewski v. Martin Bros. Barrel & Box Co., 203 N.W. 102, 230 Mich. 548—Fremont Co-op. Produce Co. v. Lipman, 197 N.W. 544, 226 Mich. 387.

Mo.—Aufderheide v. Polar Wave Ice & Fuel Co., 4 S.W.2d 776, 319 Mo. 337—Swarens v. Amel, App., 296 S.W. 849, transferred, see Swarens v. Pfnisel, 26 S.W.2d 951, 324 Mo. 1245—Smith v. Gaskill, App., 272 S.W. 1087.

N.J.—Fidelity Union Trust Co. v. Chausmer, 198 A. 828, 120 N.J.Law 208—Hurbanis v. Schultz, 15 A.2d 886, 128 N.J.Eq. 215, reversing 6 A.2d 402, 126 N.J.Eq. 95.

N.Y.—Horn v. Bennett, 3 N.Y.S.2d 525, 253 App.Div. 630—In re Tuduri's Estate, 281 N.Y.S. 630, 156 Misc. 317—Nichols v. Howell, 190 N.Y.S. 1, 116 Misc. 340.

N.C.—Rand v. Gillette, 154 S.E. 746, 199 N.C. 462—Harvey v. Kinston Knitting Co., 148 S.E. 45, 197 N.C. 177.

Pa.—Welser v. Ealer, 176 A. 429, 317 Pa. 182—Trustees of Methodist Episcopal Church in Borough of Franklin in Venango County v. Equitable Surety Co., 112 A. 551, 269 Pa. 411.

S.C.—Zimmerman v. Central Union Bank, 8 S.E.2d 359, 194 S.C. 518.

Tex.—Stephenson v. Little, Com.App., 12 S.W.2d 196, affirming Little v. Stephenson, Civ.App., 1 S.W.2d 353—Railroad Commission v. Arkansas Fuel Oil Co., Civ.App., 148 S.W.2d 895, error refused—Breland v. Guaranty Building & Loan Co., Civ.App., 119 S.W.2d 690, error refused—Bond v. Kirby Lumber Co., Civ.App., 47 S.W.2d 891, error dismissed—Kerrigan v. Deatherage, Civ.App., 21 S.W.2d 744.

Va.—Alexander v. Commonwealth, 120 S.E. 296, 137 Va. 477.

Wis.—Blum Bros. Box Co. v. Stumbaugh, 207 N.W. 270, 189 Wis. 254.

"When a litigant obtains an order of the court, based on a fact averred by him, he is forever estopped, while it remains in effect, from asserting, as against his adversary, anything differing from the fact so averred."—Reese v. Adamson, 119 A. 920, 921, 276 Pa. 253.

Validity of contract

A litigant may not defeat his adversary's cause on the theory that a contract was invalid and, in the same or a subsequent action, claim any rights under it.—Hardgrove v. Bowman, Wash., 116 P.2d 336.

Although original position was erroneous, the party who successfully maintained it through a judgment is estopped to assume an inconsistent position.—Central of Georgia R. Co. v. Waldo, 70 S.E. 1121, 9 Ga.App. 182.

54. U.S.—Intertype Corporation v. Pulver, C.C.A.Fla., 65 F.2d 419, affirming, D.C., 2 F.Supp. 4, certiorari denied 54 S.Ct. 75, 290 U.S. 660, 78 L.Ed. 571—Texas Co. v. Gulf Refining Co., C.C.A.Tex., 26 F.2d 394, affirming, D.C., 13 F.2d 873, and certiorari denied 49 S.Ct. 27, 278 U.S. 625, 73 L.Ed. 545—Lichtenberger Ferguson Co. v. Welch, D.C.Cal., 14 F.Supp. 396

Ala.—Woodham v. Hillman, 178 So. 31, 235 Ala. 224.

Ariz.—Commercial Credit Co. v. Eisenhour, 236 P. 126, 28 Ariz. 112, 41 A.L.R. 1274.

Ark.—Hudson v. Union & Mercantile Trust Co., 245 S.W. 9, 155 Ark. 605.

Ga.—Bryan Bank v. Carter, 196 S.E. 228, 57 Ga.App. 519—Florence, Phillips & Co. v. Newsome, 106 S.E. 619, 26 Ga.App. 501.

La.—Guccione v. New Jersey Ins. Co. of Newark, N. J., App., 167 So. 845.

Mich.—Hassberger v. General Builders' Supply Co., 182 N.W. 27, 213 Mich. 489.

N.Y.—Gavin v. Malherbe, 261 N.Y.S. 373, 146 Misc. 51, affirmed 266 N.Y.S. 897, 240 App.Div. 779, affirmed 191 N.E. 486, 264 N.Y. 403.

Pa.—Donahue v. Punxsutawney Borough, 148 A. 41, 298 Pa. 77.

Tex.—McClure v. Fall, Com.App., 67 S.W.2d 231, 232, citing **Corpus Juris.**

Va.—Nagle v. Syer, 143 S.E. 690, 150 Va. 508.

Filing plea or defense

Where a party to a proceeding, with right or duty to file a plea or defense or else be foreclosed as to

ther in opposition to the adversary's claim or with his acquiescence.[55]

It follows that there may be an estoppel where there has been no judicial determination of the merits of the initial position.[56] Thus, before any determination has been reached as to the position first taken, and while still relying thereon, a party cannot also rely on an inconsistent position; thus he cannot at the same time rely on the existence and nonexistence of a particular fact, the truth and falsity of a given proposition, or the validity and invalidity of an instrument or transaction.[57] Of course, where the proceeding in which the original position was taken has terminated without any decision on the merits, a party is not estopped, in the absence of other equitable circumstances, from assuming an inconsistent position.[58]

his rights under it, is induced to withdraw it if filed, or to desist from filing it if ready and intending to do so in proper time, on representation of opposite party that he need not do so and that his right would be otherwise protected, and thus acts to his injury, equity will consider opposite party "estopped" from taking advantage of consequences of his failure so to plead.—Lunsford v. Kersey, 13 S.E.2d 803, 191 Ga. 738.

55. U.S.—McKinney v. Black Panther Oil & Gas Co., C.C.A., 280 F. 486, appeal dismissed Houts v. McKinney, 43 S.Ct. 363, 261 U.S. 628, 67 L.Ed. 834.
Colo.—Peters v. Peters, 261 P. 874, 82 Colo. 503.
Fla.—J. W. McWilliams Co. v. Travers, 118 So. 54, 96 Fla. 203.
La.—Dawson v. Frazar, 90 So. 570, 150 La. 203.
Md.—Camden Sewer Co. v. Mayor and Council of Salisbury, 171 A. 75, 166 Md. 436.
Mass.—Grueby v. Chase Harris Forbes Corporation, 197 N.E. 624, 292 Mass. 156, 100 A.L.R. 1014.
Mich.—Chatham-Trenary Land Co. v. Swigart, 222 N.W. 749, 245 Mich. 430.
Mo.—Maupin v. Longacre, 288 S.W. 54, 315 Mo. 872.
N.Y.—Murray v. Rubel Coal & Ice Corporation, 254 N.Y.S. 372, 234 App.Div. 895—Conlon v. Kelly, 187 N.Y.S. 846, 196 App.Div. 405.
N.C.—Bizzell v. Auto Tire & Equipment Co., 108 S.E. 439, 182 N.C. 98.
Or.—Rehfield v. Winters, 125 P. 289, 62 Or. 299.
Pa.—Donahue v. Punxsutawney Borough, 148 A. 41, 298 Pa. 77.
S.C.—Salley v. McCoy, 195 S.E. 132, 186 S.C. 1.
Vt.—Spaulding & Kimball Co. v. Ætna Chemical Co., 126 A. 588, 98 Vt. 169.

One who induces dismissal of appeal on the ground that the decree is not final cannot afterward claim as against a bill of review that it was final.—Taylor v. Cook, 34 So. 905, 136 Ala. 354.

Restriction of issues

Defendant who in prior litigation invited holding that beach rights were not involved could not claim that such issue was res judicata.—Erit Realty Corporation v. Sea Gate Ass'n, 254 N.Y.S. 678, 234 App.Div. 196, modified on other grounds 182 N.E. 85, 259 N.Y. 466.

Joinder of parties

Defendants, who on motion to join codefendants represented that they were entitled to same relief as plaintiff, were estopped to deny validity of judgment for defaulting codefendant.—Underwood v. Greenlees, 291 P. 777, 131 Kan. 308.

Judgment not on merits

Where guardian ad litem, in motion to quash summons and service of summons, expressly stated that he did not thereby intend to plead to the merits, and the trial court, taking the guardian ad litem at his word, treated the motion as a motion to quash service not constituting a plea to the merits, the guardian ad litem was thereby "estopped" from claiming that the judgment rendered on that motion was a judgment on the merits.—Hershner v. Deibig, 28 N.E.2d 784, 64 Ohio App. 328.

56. Tex.—Seamans Oil Co. v. Guy, 276 S.W. 424, 115 Tex. 93, reversing, Civ.App., 239 S.W. 696, petition granted, 262 S.W. 473, 114 Tex. 42.

57. U.S.—Burns Mortg. Co. v. Hardy, C.C.A.N.H., 94 F.2d 477, affirming, D.C., 19 F.Supp. 827.
Ala.—Brown v. Roberson, 106 So. 181, 214 Ala. 18—Board of Education of Escambia County v. Watts, 95 So. 498, 19 Ala.App. 7, certiorari denied Ex parte Watts, 95 So. 502, 209 Ala. 115.
Cal.—Bradley v. Butchart, 20 P.2d 693, 217 Cal. 731—Bateman v. Kellogg, 211 P. 46, 59 Cal.App. 464.
Ga.—Saunders Bros. v. Payne, 116 S.E. 349, 29 Ga.App. 615, following Bell Bros. v. Western & A. R. Co., 54 S.E. 532, 125 Ga. 510.
Ill.—Wood's Estate v. Tyler, 256 Ill.App. 401.
Iowa.—Pomroy v. Parmlee, 9 Iowa 140, 74 Am.D. 328.
Kan.—Osborne v. Kington, 80 P.2d 1063, 1065, 148 Kan. 314, citing **Corpus Juris.**
La.—Anderson v. Thomas, 141 So. 441, 174 La. 721, reversing 137 So. 378, 19 La.App. 428—Dempster v. Warner, App., 194 So. 127—Horil v. D'Asaro, App., 147 So. 916.
Md.—Bitting v. Home Ins. Co. of New York, 155 A. 329, 161 Md. 56.
Mich.—Bunnell v. Ward, 217 N.W. 68, 241 Mich. 404.
Miss.—D. L. Fair Tie Co. v. Warrell, 112 So. 24, 147 Miss. 412.
Mo.—Randolph v. Moberly Hunting & Fishing Club, 15 S.W.2d 834, 321 Mo. 995.
N.Y.—Nichols v. Emerson, 206 N.Y.S. 13, 210 App.Div. 281, affirmed 150 N.E. 542, 241 N.Y. 531.
S.C.—United Timber Corporation v. Mullins Lumber Co., 141 S.E. 15, 142 S.C. 477.
Tex.—Clark v. Stubbs, Civ.App., 131 S.W.2d 663—Tom v. First Nat. Bank, Civ.App., 104 S.W.2d 130, error dismissed—Williams & Miller Gin Co. v. Knutson, Civ.App., 63 S.W.2d 576—Blumrosen v. Burke, Civ.App., 296 S.W. 987—Miller v. White, Civ.App., 264 S.W. 176.
Va.—Sydnor, Howey & Co. v. Sydnor, 2 S.E.2d 309, 172 Va. 545.
Wash.—Hardgrove v. Bowman, 116 P.2d 336—Kope v. Columbia River Interstate Bridge Commission, 266 P. 1053, 147 Wash. 602—Seattle First National Bank v. Coles, 82 P. 892, 40 Wash. 528.

Reason for rule

"This is only the paraphrase of the fundamental canon of logic on which all accurate reasoning and procedure are based, that the same proposition or affirmative assertion cannot at the same time be true and not true, exist and not exist. In other words, contradictories are incompatible at the same moment."—In re Mesa, 149 N.Y.S. 536, 87 Misc. 242.

Treating cause of action as on contract and in tort

Utah.—Robison v. Robison, 203 P. 340, 59 Utah 315.

Correctness of record

A party invoking the action of the court on the assumption that the record on which the action is to be based is correct will not be permitted to suggest corrections in the record in order to avoid adverse ruling.—Baca v. Ojo del Espiritu Santo Co., 214 P. 767, 28 N.M. 507.

58. Ga.—Jordan v. Jenkins, 86 S.E. 278, 17 Ga.App. 58.
Tex.—Kirby v. Fitzgerald, Civ.App., 57 S.W.2d 362, 368, citing **Corpus Juris.**
21 C.J. p 1230 note 71 [a]–[f].

Whatever the precise limits of the rule as to successful maintenance of the first position may be, there is little question but that, in the absence of other sufficient elements of estoppel, the assumption of inconsistent positions will work no estoppel where the original position was defeated or held untenable or unsound.[59]

Judicial estoppel. The application of the doctrine of equitable estoppel to the assumption of inconsistent positions in judicial proceedings should be distinguished from another doctrine often applied to such inconsistent positions, and known as the doctrine of "judicial" estoppel.[60] This doctrine, it has been said, is not strictly one of estoppel, but partakes rather of positive rules of procedure based on manifest justice and, to a greater or less degree, on considerations of the orderliness, regularity, and expedition of litigation.[61] The elements of reliance and injury which are essential to the operation of equitable estoppel do not enter into judicial estoppel,[62] at least not to the same extent;[63] and while some authorities in applying the doctrine of judicial estoppel have taken cognizance of the presence or absence of such elements,[64] this has been said to be the result of confusing the two doctrines.[65] However, in order to work a judicial estoppel, the position first assumed must have been taken knowingly and free of inducement by the opposite party.[66] Although, as appears in §§ 121 and 122, infra, the doctrine of judicial estoppel applies with particular force to admissions or statements made under sanction of oath, it has been held not restricted to such statements, but applicable to inconsistent positions otherwise taken.[67]

New probate proceeding where earlier procedure held improper.—In re Browning's Will, 294 N.Y.S. 530, 162 Misc. 244.

Action discontinued

Where a bank sued on notes executed to it for money loaned by its president individually, and the president in good faith joined in the suit and verified the petition in which it was claimed that the bank was the owner or holder of notes, such claim being based on the erroneous assumption that the bank would ratify the president's act in making the loan, and thereafter the bank's action was discontinued and the notes assigned to the president, the president was not estopped in his action on the notes from asserting his ownership thereof.—Maddox v. Robbert, 104 So. 183, 158 La. 394

Voluntary or nonprejudicial dismissal

Where the suit is dismissed voluntarily or without prejudice, the fact that a particular position was taken therein does not of itself estop the assumption of an inconsistent position in a subsequent proceeding.

U.S.—Sinclair Refining Co. v. Jenkins Petroleum Process Co., C.C.A.Me., 99 F.2d 9, certiorari denied Jenkins Petroleum Process Co. v. Sinclair Refining Co., 59 S.Ct. 362, 305 U.S. 659, 83 L.Ed. 427, rehearing denied 59 S.Ct. 484, 306 U.S. 667, 83 L.Ed. 1062, second rehearing denied 59 S.Ct. 1035, 307 U.S. 651, 83 L.Ed. 1530.

La.—Elrod v. Hart, App., 146 So. 797.

Pa.—Galion Iron Works & Mfg. Co. v. Hollenback Tp., 146 A. 448, 297 Pa. 68.

59. Ala.—McFry v. Stewart, 121 So. 517, 219 Ala. 216.

Cal.—Fink v. Weisman, 18 P.2d 961, 129 Cal.App. 305, affirmed 23 P.2d 438, 132 Cal.App. 724—Botwin v. Wise, 189 P. 312, 46 Cal.App. 465.

Ga.—Gainesville News v. Harrison, 199 S.E. 559, 58 Ga.App. 744—Kimball v. Kimball, 133 S.E. 295, 35 Ga.App. 462—Florence, Phillips & Co. v. Newsome, 106 S.E. 619, 26 Ga.App. 501.

Ill.—Whittemore v. Weber, 217 Ill. App. 628.

Iowa.—Federal Surety Co. v. France, 238 N.W. 460, 212 Iowa 1403.

La.—Harnischfeger Sales Corporation v. Sternberg Co., 158 So. 556, 180 La. 1059—Appalachian Corporation v. Brooklyn Cooperage Co., 91 So. 539, 151 La. 41.

Mich.—Bowerman v. Detroit Free Press, 283 N.W. 642, 287 Mich. 443.

Mo.—Runnels v. Lasswell, App., 219 S.W. 980.

Okl.—In re Assessment of Alleged Omitted Property of Kennedy, 58 P.2d 134, 138, 177 Okl. 74, citing **Corpus Juris.**

Or.—Couch v. Scandinavian-American Bank, 197 P. 284, 287, 103 Or. 48, quoting **Corpus Juris,** and modified on other grounds 202 P. 558, 103 Or. 48.

21 C.J. p 1224 note 24, p 1229 note 70, p 1232 note 92.

"A person is always permitted to change his contention when he finds his former position untenable."—Merrill v. Boal, 132 A. 721, 726, 47 R.I. 274, 45 A.L.R. 830.

60. Tenn.—Houk v. Memphis Const. Co., 15 S.W.2d 742, 159 Tenn. 103—Sartain v. Dixie Coal & Iron Co., 266 S.W. 313, 150 Tenn. 633—Southern Coal & Iron Co. v. Schwoon, 239 S.W. 398, 145 Tenn. 191—Radford v. Littleton, 9 Tenn.App. 361.

61. Mich.—Hassberger v. General Builders' Supply Co., 182 N.W. 27, 213 Mich. 489.

N.M.—In re Maddison, 255 P. 630, 32 N.M. 252.

Tenn.—Houk v. Memphis Const. Co., 15 S.W.2d 742, 159 Tenn. 103—Southern Coal & Iron Co. v. Schwoon, 239 S.W. 398, 145 Tenn. 191—Fidelity Trust Co. v. Norton, 10 Tenn.App. 132—Radford v. Littleton, 9 Tenn.App. 361.

Tex.—Johnson v. Bingham, Civ.App., 251 S.W. 529, affirmed, Com.App., 265 S.W. 130, modified on other grounds 265 S.W. 884, vacated 269 S.W. 1033—Chicago R. I. & P. R. Co. v. Lopez, Civ.App., 209 S.W. 192.

62. Tenn.—Houk v. Memphis Const. Co., 15 S.W.2d 742, 159 Tenn. 103—Sartain v. Dixie Coal & Iron Co., 266 S.W. 313, 150 Tenn. 633—Southern Coal & Iron Co. v. Schwoon, 239 S.W. 398, 145 Tenn. 191—Fidelity Trust Co. v. Norton, 10 Tenn.App. 132.

63. Tenn.—Fidelity Trust Co. v. Norton, supra.

Tex.—Johnson v. Bingham, Civ.App., 251 S.W. 529, affirmed, Com.App., 265 S.W. 130, modified on other grounds 265 S.W. 884, vacated 269 S.W. 1033.

64. Tenn.—Tate v. Tate, 148 S.W. 1042, 126 Tenn. 169—Allen v. Westbrook, 16 Lea 251.

65. Tenn.—Sartain v. Dixie Coal & Iron Co., 266 S.W. 313, 150 Tenn. 633.

66. Tenn.—Warner v. Maroney, 66 S.W.2d 244, 16 Tenn.App. 78.

67. Tenn.—Stearns Coal & Lumber Co. v. Jamestown R. Co., 208 S.W. 334, 141 Tenn. 203—Stamper v. Venable, 97 S.W. 812, 117 Tenn. 557—Life & Casualty Co. v. Maness, 13 Tenn.App. 416—Radford v. Littleton, 9 Tenn.App. 361.

Judicial estoppel not established

Judicial estoppel is based on the principle that a party cannot take advantage of two inconsistent positions in judicial proceedings, and it

§ 118. In Same Proceeding

Generally, a party is estopped to assume inconsistent positions in the course of the same judicial proceeding.

The general rule as to estoppel to assume inconsistent positions in judicial proceedings generally, as discussed, with its qualifications, in § 117 supra, has been expressly stated to apply, or has been applied, so as to estop a party to assume inconsistent positions in the course of the same judicial proceeding.[68]

Claim inconsistent with contract or title previously asserted. A familiar application of the rule is that a party to an action is estopped from asserting a claim inconsistent with a contract or title in himself or another previously asserted,[69] at least where his first position has been successfully maintained.[70]

Defense or objection inconsistent with previous position. A party to a judicial proceeding is estopped to make a defense or objection inconsistent with a position previously asserted, and successfully maintained, by him.[71]

Inconsistent positions in respect of procedure.

is not established by mere proof of unsworn statements by counsel, made in good faith, and which do not prejudice the adverse party.—Southern Coal & Iron Co. v. Schwoon, 239 S.W. 398, 145 Tenn. 191.

68. U.S.—U. S. Galvanizing & Plating Equipment Corporation v. Hanson-Van Winkle-Munning Co., C.C.A.W.Va., 104 F.2d 856, modifying, D.C., Hanson-Van Winkle-Munning Co. v. U. S. Galvanizing & Plating Equipment Corporation, 24 F. Supp. 249—Tenney Telephone Co v. U. S., C.C.A.Wis., 82 F.2d 788—Virginia Shipbuilding Corporation v. U. S. Shipping Board Emergency Fleet Corporation, D.C.Va., 292 F. 440, affirmed, C.C.A., Virginia Shipbuilding Corporation v. U. S., 22 F.2d 38—In re Ballard, D.C. Tex., 279 F. 574—Jefferson Standard Life Ins. Co. v. Wilson, Ga., 260 F. 593, 171 C.C.A. 357.
Ala.—Dowling v. Sollie & Sollie, 176 So. 340, 234 Ala. 630—Hamilton v. Watson, 112 So. 115, 215 Ala. 550.
Ariz.—Pratt-Gilbert Co. v. Renaud, 213 P. 400, 25 Ariz. 79.
Ark.—Moline Timber Co. v. Taylor, 222 S.W. 371, 144 Ark. 317.
Colo.—Southworth v. Huffaker, 246 P. 261, 79 Colo. 364.
Fla.—State ex rel. Adams v. Lee, 171 So. 333, 126 Fla. 396, 109 A.L.R. 319.
Ga.—McBrien v. Starkweather, 160 S.E. 548, 43 Ga.App. 818.
Ill.—American Radiator Co. v. Walker, 276 Ill.App. 150.
Ind.—Royal Ins. Co., Limited, of Liverpool, v. Stewart, 129 N.E. 853, 190 Ind. 444.
Ky.—Norvelle v. Wanner, 2 S.W.2d 365, 222 Ky. 751—Union Gas & Oil Co. v. Wiedemann Oil Co., 277 S.W. 323, 211 Ky. 361.
Mass.—Kolasinski v. Paczkowski, 29 N.E.2d 747—Barnes v. City of Springfield, 168 N.E. 78, 268 Mass. 497, certiorari denied 50 S.Ct. 246, 281 U.S. 732, 74 L.Ed. 1148.
Miss.—Mississippi State Highway Commission v. West, 179 So. 279, 181 Miss. 206.
Mo.—Bixby v. Backues, 144 S.W.2d 112—National Cypress Pole & Piling Co. v. Hemphill Lumber Co., 31 S.W.2d 1059, 325 Mo. 807—Doebbling v. Hall, 274 S.W. 1049, 310 Mo. 204, 41 A.L.R. 382—City of Festus ex rel. and to Use of Stolzer v. Kausler, App., 105 S.W.2d 646.
N.J.—Katz v. Inglis, 164 A. 421, 110 N.J.Law 358.
N.Y.—Liebowitz v. Arrow Roofing Co., 182 N.E. 58, 259 N.Y. 391, reversing 253 N.Y.S. 996, 234 App.Div. 826.
Okl.—Slyman v. Alexander, 259 P. 224, 126 Okl. 232.
Or.—In re Mead's Estate, 26 P.2d 1103, 145 Or. 150.
Pa.—Brown v. Thompson, 86 Pittsb.Leg.J. 497, 1 Fay.L.J. 178.
R.I.—McAuslan v. Union Trust Co., 125 A. 296, 46 R.I. 176.
Tex.—Rockhold v. Lucky Tiger Oil Co., Civ.App., 4 S.W.2d 1046, error dismissed—Schoellkopf v. Bryan, Civ.App., 284 S.W. 339.
Va.—Burch v. Grace Street Bldg. Corporation, 191 S.E. 672, 168 Va. 329—Lyric Theatre Corporation v. Vaughan, 191 S.E. 600, 168 Va. 595—Byrd v. Pennsylvania R. Co., 145 S.E. 722, 151 Va. 954—Alexander v. Commonwealth, 120 S.E. 296, 137 Va. 477.
W.Va.—Litz v. First Huntington Nat. Bank, 197 S.E. 746, 120 W.Va. 281—Koon v. Monongahela West Penn Public Service Co., 192 S.E. 332, 119 W.Va. 76—Greenbrier Laundry Co. v. Fidelity & Casualty Co. of New York, 178 S.E. 631, 116 W.Va. 88—Atlantic Bitulithic Co. v. Town of Edgewood, 171 S.E. 754, 114 W.Va. 243—Central Trust Co. v. Cook, 163 S.E. 60, 111 W.Va. 637—Ealy v. Shetler Ice Cream Co., 158 S.E. 781, 110 W.Va. 502—Clay County Bank v. Wilson, 158 S.E. 517, 109 W.Va. 684—Thompson v. Beasley, 146 S.E. 885, 107 W.Va. 75—Monongahela West Penn Public Service Co. v. State Road Commission, 139 S.E. 744, 104 W.Va. 183—MacDonald v. Long, 131 S.E. 252, 100 W.Va. 551.
Wyo.—Altman v. Schuneman, 273 P. 173, 39 Wyo. 414.
21 C.J. p 1223 note 23.

Withdrawing admissions
Where party, during trial and before verdict, solemnly made certain admissions, he should not be permitted to withdraw the admissions after verdict.—Kannan v. Assad, 108 S.E. 383, 182 N.C. 77.

69. U.S.—Tenney Telephone Co v. U. S., C.C.A.Wis., 82 F.2d 788.
Ala.—Hampton v. Stewart, 194 So. 509.
Cal.—Bateman v. Kellogg, 211 P. 46, 59 Cal.App. 464.
Iowa.—First Nat. Bank v. Propp, 200 N.W. 428, 198 Iowa 809—Howell v. Jackson, 181 N.W. 788, 192 Iowa 70.
La.—Dempster v. Warner, App., 194 So. 127.
Mich.—Crozier v. Scott, 211 N.W. 634, 237 Mich. 361.
Tex.—Gardner v. Platt, Civ.App., 68 S.W.2d 297, error refused—Rockhold v. Lucky Tiger Oil Co., Civ.App., 4 S.W.2d 1046, error dismissed—Houseman v. Guaranty Securities Co., Civ.App., 293 S.W. 304.
Va.—Baptist v. Slate, 173 S.E. 512, 162 Va. 1.
21 C.J. p 1225 note 35.

Denial of adversary's title
In replevin for goods in store, the warehouseman cannot answer denying plaintiff's ownership and then on the trial claim to hold the property under a lien for storage.—Wyatt v. Henderson, 48 P. 790, 31 Or. 48.

70. Tenn.—Davis v. Bowman, Ch., 46 S.W. 1039.
21 C.J. p 1226 note 36.

71. U.S.—Sebastian Bridge Dist v. Hedrick, C.C.A.Ark., 4 F.2d 346, certiorari denied Elkan v. Sebastian Bridge Dist., 45 S.Ct. 510, 268 U.S. 690, 69 L.Ed. 1159.
Ala.—Elliott v. Vance, 194 So. 515, 517, 239 Ala. 180, quoting **Corpus Juris**—Woodham v. Hillman, 178 So. 31, 235 Ala. 224—McQuagge Bros. v. Thrower, 108 So. 450, 451, 214 Ala. 582, quoting **Corpus Juris.**
Fla.—Smith v. Urquhart, 176 So. 787, 788, 129 Fla. 742, citing **Corpus Juris.**
La.—Thompson v. State Assur. Co., Limited, of Liverpool, England, 107 So. 489, 160 La. 683.

A party who has taken a position with regard to procedure,[72] which has been acted or relied on by his adversary[73] or by the court,[74] is estopped from taking an inconsistent position respecting the same matter, in the same proceeding, to his adversary's prejudice. This rule has been applied to inconsistencies respecting process,[75] changes of venue,[76] parties,[77] pleadings,[78] time of trial,[79] evidence,[80] or instructions.[81]

Admissions or allegations in pleadings estop the party making them from controverting or denying them or adopting a position necessarily inconsistent with them, in the same proceeding,[82] provided the essential elements of estoppel against inconsistency

N.C.—Hill v. Director General of Railroads, 101 S.E. 376, 178 N.C. 607.
Tenn.—Sampson v. Maury Nat. Bank, 8 Tenn.App. 275.
21 C.J. p 1226 note 37.

Acknowledgment of agency
A telegraph company suing defendant, as principal, for the price of a telegram, cannot raise the point in defense to a counterclaim for negligence in its transmission that he was an agent only in delivering it for transmission.—Postal Tel. Cable Co. v. Robertson, 74 N.Y.S. 876, 36 Misc. 785.

Admission of personal liability
One who has defeated an action against himself as executor for certain legacies, on the ground that he is liable personally and not as executor, is estopped from denying his personal liability.—Hutchins v. Hutchins, 42 N.Y.S. 601, 18 Misc. 633.

72. Mo.—State ex rel. Bromschwig v. Hartman, 300 S.W. 1054, 221 Mo. 215.

Disqualification of judge
Fla.—Sommers v. Apalachicola Northern R. Co., 96 So. 151, 85 Fla. 9.

Assent to one of available courses
A litigant cannot assent to a course of procedure with knowledge of his right to another, but with the expectation and hope of winning his point, and, if he loses, then insist that the other course he adopted by which he will be given another chance.—Patton v. Catlettsburg Nat. Bank, 255 S.W. 690, 200 Ky. 775.

73. Ill.—Ellison v. Ward, 8 N.E.2d 951, 290 Ill.App. 529.

74. Ala.—Maryland Casualty Co v. Dupree, 136 So. 811, 223 Ala. 420.
N.C.—Bizzell v. Auto Tire & Equipment Co., 108 S.E. 439, 182 N.C. 98.
Pa.—Bergman v. Straus, 107 A. 810, 264 Pa. 439.
Tex.—Marvin v. Pierson, Civ.App., 115 S.W.2d 712, error dismissed.

75. Ohio.—United & Globe Rubber Mfg. Co. v. Prescott, 24 Ohio N.P., N.S., 142.
21 C.J. p 1226 note 39.

76. Mont.—Stair v. Lunke, 180 P. 569, 56 Mont. 130.
21 C.J. p 1226 note 40.

77. Pa.—Rzasa v. Jarosz, 186 A. 264, 122 Pa.Super. 387.
21 C.J. p 1226 note 41.

Amendment
Defendant who alleges that other persons not made complainants have interest in suit is estopped to question propriety of amendment whereby these parties are made complainants.—Bailey v. American Trust Co., 133 So. 331, 101 Fla. 42.

Intervention
(1) Where plaintiff in replevin filed an answer to a petition in intervention and did not move to strike such petition until after the evidence on the issue had been heard, and the court had jurisdiction of the subject matter, plaintiff was estopped to claim that intervention in replevin was not permissible.—Beatty v. Federal Fireproof Storage Co., 268 Ill. App. 198.

(2) Plaintiff at whose request a third person intervenes is estopped to deny his right to do so.—Sanchez v. Diaz, 9 Puerto Rico 306.

78. Ga.—Lunsford v. Kersey, 13 S.E.2d 803, 191 Ga. 738.
Mo.—State ex rel. Bromschwig v. Hartman, 300 S.W. 1054, 221 Mo. 215.
21 C.J. p 1227 note 42.

Amendment
One who invokes the action of the court in the matter of amending a pleading is estopped from denying the court's right to act on it.—Beecher v. Henderson, 58 So. 805, 4 Ala. App. 543.

79. Wis.—State ex rel. Department of Agriculture v. McCarthy, 299 N.W. 58, 238 Wis. 258.

80. Mo.—Daniel v. Ætna Life Ins. Co., 36 S.W.2d 688, 225 Mo.App. 357—Haney v. Security Ben. Ass'n of Topeka, Kan., 34 S.W.2d 1046, 225 Mo App. 872.
21 C.J. p 1227 note 43.

81. Miss.—Yazoo & M. V. R. Co. v. Wade, 139 So. 403, 162 Miss. 699.
Mo.—State v. Baird, 231 S.W. 625, 288 Mo. 62.

82. U.S.—Turfitt v. Perales, C.C.A. Tex., 63 F.2d 659—Sebastian Bridge Dist. v. Hedrick, C.C.A. Ark., 4 F.2d 346, certiorari denied Elkan v. Sebastian Bridge Dist., 45 S.Ct. 510, 268 U.S. 690, 69 L.Ed. 1159.
Cal.—Petition of Reader, 89 P.2d 654, 32 Cal.App.2d 309.
Conn.—Clover Mfg. Co. v. Austin Co., 125 A. 646, 101 Conn. 208.
Fla.—Bailey v. American Trust Co., 133 So. 331, 101 Fla. 42—J W McWilliams Co. v. Travers, 118 So 54, 96 Fla. 203.
Iowa.—Fairley v. Falcon, 214 N.W. 538, 204 Iowa 290.
Kan.—Tredick v. Birrer, 200 P. 272, 109 Kan. 488.
La.—Dempster v. Warner, App., 194 So. 127—Morehouse Lumber & Building Material Co. v. Jacob & Walker, App., 144 So. 190, affirming 139 So. 713, 18 La.App. 536, and affirmed 147 So 504, 177 La 76—Lavigne v. Louisiana Ry. & Nav. Co., 121 So. 251, 9 La.App. 509.
N.M.—Romero v. Hopewell, 210 P 231, 28 N.M. 259.
Or.—E J Struntz Planing Mill Co. v. Paget, 263 P. 389, 123 Or. 651, denying rehearing 262 P. 263, 123 Or. 651.
Tenn.—American Nat. Bank v. Miles, 79 S.W.2d 47, 18 Tenn.App. 440—Maryland Casualty Co. v. Clark's Creek Drainage Dist. No. 6, 4 Tenn App. 380.
Tex.—Mahone v. Bowman, Civ.App., 70 S.W.2d 323, error dismissed—Gardner v. Platt, Civ.App., 68 S.W.2d 297, error refused—Rockhold v. Lucky Tiger Oil Co., Civ.App., 4 S.W.2d 1046, error dismissed—McClung Const. Co. v. Taylor, Civ. App., 297 S.W. 503.
Va.—Waller v. Eanes' Adm'r, 157 S.E. 721, 156 Va. 389—Lackey v. Price, 128 S.E. 268, 142 Va. 789.
Conclusiveness of allegations or admissions as against pleader see the C.J.S. title Pleading §§ 59–62, also 49 C.J. p 122 note 53–p 128 note 28.
In former proceedings see infra § 121.

Identity of landlord
Where defendants in their answer claim as tenants of another defendant, they are estopped by such answer to claim at trial that they are tenants of plaintiff.—Doebbeling v. Hall, 274 S.W. 1049, 310 Mo. 204, 41 A.L.R. 382.

Individual or corporate character of vendee
In action for goods sold, wherein defendants alleged that plaintiffs contracted with defendant corporation, defendants could not claim that treasurer signed orders individually.—Avoyelles Wholesale Grocery Co. v. Ville Platte Sawmill Co., 135 So. 251, 17 La.App. 56.

in judicial proceedings are present.[83] However, this has been held not true where the admission or allegations were withdrawn,[84] or where the pleadings may be, and are, properly amended;[85] and there is no estoppel where the prior pleadings do not in effect admit or allege as a fact that which is later sought to be denied or controverted,[86] or assert a contention with which a subsequent claim or position is alleged to be inconsistent.[87]

§ 119. In Former Proceedings

As a general rule, a party who has assumed a particular position in a judicial proceeding is estopped to assume an inconsistent position in a subsequent proceeding involving the same parties and questions.

The general rule as to estoppel to assume inconsistent positions in judicial proceedings generally, as discussed, with its qualifications, in § 117 supra, has been expressly stated to apply, or has been applied, so as to estop a party to assume inconsistent positions in successive proceedings.[88] For this doctrine

83. La.—Tyler v. Walt, 167 So 182, 184 La. 659—International Projector Corporation v Maricella, App., 144 So. 278—Chauvin v. American Mut. Liability Ins. Co., 134 So 450, 17 La.App. 187—Martin v. Iverson, 5 La.App. 525.
Miss.—Mississippi State Highway Commission v. West, 179 So. 279, 181 Miss. 206.

84. Ga.—Bray v. C. I. T. Corporation, 179 S.E. 925, 51 Ga.App. 196.
La.—Chauvin v. American Mut. Liability Ins. Co., 134 So. 450, 17 La.App. 187.

85. Iowa.—First Nat. Bank v. Frank, 212 N.W. 705, 203 Iowa 364.
La.—International Projector Corporation v. Maricella, App., 144 So. 278
Tex.—Hubb-Diggs Co. v. Mitchell, Civ.App., 256 S.W. 702.

86. La.—Castleman v. Smith, 86 So. 778, 148 La. 233.
Or.—Popejoy v Boynton, 230 P. 1016, 112 Or. 646, modifying 229 P. 370, 112 Or. 646.
Pa.—In re Keller's Estate, 6 A.2d 575, 335 Pa. 196.
Tex.—Henderson v. Travis, Civ.App., 52 S.W.2d 1068, affirmed Drane v. Saline Valley Colored Baptist Church, 82 S.W.2d 938, 125 Tex. 499.

87. U.S.—Unterweser Reederei Aktiengesellschaft v. Potash Importing Corporation of America, C.C.A.Ga., 36 F.2d 869.
Iowa.—Webber v. King, 218 N.W. 282, 205 Iowa 612.

88. U.S.—Matthews v. U. S., C.C.A. Mo., 113 F.2d 452, certiorari denied 61 S.Ct. 142—Brashear v. Intermountain Building & Loan Ass'n, C.C.A.Cal., 109 F.2d 857, modifying, D.C., 34 F.Supp. 656, and certiorari denied 61 S.Ct. 9—Texas Co. v. Gulf Refining Co., C.C.A. Tex., 26 F.2d 394, affirming, D.C., 13 F.2d 873, and certiorari denied 49 S.Ct. 27, 278 U.S. 625, 73 L.Ed 545—Quarles v. City of Appleton, C.C.A.Wis., 299 F. 508—Williams v. Mason, D.C.Fla., 289 F. 812—Mutual Life Ins. Co. of New York v. Benton, D.C.Mo., 1 F.R.D. 151.
Ala.—Watt v. Lee, 191 So. 628, 238 Ala. 451—First Nat. Bank v. Burch, 188 So. 859, 237 Ala. 680—Wright v. Fannin, 156 So. 849, 229 Ala. 278—Phillips v. Sipsey Coal Mining Co., 118 So 513, 218 Ala 296—Horst v. Barret, 104 So. 530, 213 Ala 173.
Cal.—McManus v. Montgomery, 84 P. 2d 787, 12 Cal.2d 397—Servais v. Klein, 296 P 123, 112 Cal.App. 26—Girard v. Irvine, 275 P. 840, 97 Cal App. 377—Estes v. Hotchkiss, 218 P. 605, 63 Cal.App. 284
Fla.—J. Schnarr & Co. v Virginia-Carolina Chemical Corporation, 159 So. 39, 118 Fla. 258—Chase Co. v Little, 156 So. 609, 610, quoting **Corpus Juris**—Palm Beach Co v. Palm Beach Estates, 148 So. 544, 548, citing **Corpus Juris.**
Ga.—Hardeman v. Ellis, 135 S.E. 195, 182 Ga. 664—Ellis v. Ellis, 130 S.E. 681, 161 Ga. 360—Harris v. Harris, 114 S.E. 333, 154 Ga. 271—Forrester v. Frizzell, 134 S.E. 182, 35 Ga.App. 562.
Ill.—Independent Oil Men's Ass'n v. Fort Dearborn Nat. Bank, 142 N.E. 458, 311 Ill. 278, affirming 226 Ill. App. 570—Garden City Sand Co v. Christley, 124 N.E. 729, 289 Ill. 617—Swords Co. v. Hogland, 278 Ill App. 611—Trumbull v. Gale, 222 Ill.App. 113.
Ind.—Royal Ins. Co., Limited, of Liverpool, v. Stewart, 129 N.E. 853, 190 Ind. 444.
Kan.—McMichael v. Burnett, 17 P.2d 932, 136 Kan. 654.
La.—Succession of Copeland, 148 So. 3, 177 La. 127.
Mass.—City of Boston v. Nielson, 26 N.E.2d 366.
Mich.—Billingsley v. Gulick, 240 N.W. 46, 256 Mich. 606, 79 A.L.R. 166—Washburn v. Peck, 222 N.W. 768, 245 Mich. 351—Weiss v. Stein, 177 N.W. 224, 209 Mich. 482.
Mo.—In re Franz' Estate, 127 S.W. 2d 401, 409, quoting **Corpus Juris**—Smith v. Gaskill, App., 272 S.W. 1087.
Mont.—Schwab v. Peterson, 260 P. 711, 80 Mont. 214.
N.J.—In re Allison's Estate, 150 A. 52, 106 N.J.Eq. 55, reargument denied 152 A. 6, 107 N.J.Eq. 197.
N.Y.—Horn v. Bennett, 3 N.Y.S.2d 525, 253 App.Div. 630—Regal Shoe Co. v. General Outdoor Advertising Co., 293 N.Y.S. 580, 250 App.Div. 54, affirmed 12 N.E.2d 458, 276 N.Y. 522—Houghton v. Thomas, 221 N.Y.S. 630, 220 App.Div. 415, motion denied 159 N.E. 641, 246 N.Y. 535, and affirmed 162 N.E. 509, 248 N.Y. 523, motion denied 162 N.E. 537, 248 N.Y. 591—In re Rainbow's Estate, 298 N.Y.S. 79, 163 Misc 732, affirmed 298 N.Y.S. 89, 25 App.Div. 809.
Okl.—Colvert Ice Cream & Dairy Prod. Co. v. Citrus Prod. Co., 65 P. 2d 455, 457, citing **Corpus Juris.**
Pa.—Donahue v. Punxsutawney Borough, 148 A. 41, 298 Pa. 77.
R.I.—McAuslan v. Union Trust Co., 125 A. 296, 46 R.I. 176.
S.C.—Townsend v. South Carolina Ins. Co., 167 S.E. 5, 10, quoting **Corpus Juris.**
Tenn.—Johnston v. Cincinnati, N. O. & T. P. R. Co., 240 S.W. 429, 146 Tenn. 135—Jetton v. Nichols, 8 Tenn.App. 567—Douglas v. Douglas, 6 Tenn.App. 12.
Tex.—Smith v. Chipley, 16 S.W.2d 269, 118 Tex. 415, answering certified questions, Civ.App., 24 S.W. 2d 87—McClure v. Fall, Com.App., 67 S.W.2d 231, 232, citing **Corpus Juris**—Smith v. Chipley, Civ.App., 42 S.W.2d 645, 647, quoting **Corpus Juris**—Kelsey v. Lietz, Civ.App., 38 S.W.2d 108, error dismissed—Industrial Co. v. Tompkins, Civ. App., 27 S.W.2d 343, error refused—Schaff v. Sanders, Civ.App., 257 S.W. 670, affirmed, Com.App., 269 S.W. 1034.
Va.—Burch v. Grace Street Bldg. Corporation, 191 S.E. 672, 168 Va. 329—Lyric Theatre Corporation v. Vaughan, 191 S.E. 600, 168 Va. 595—Byrd v. Pennsylvania R. Co., 145 S.E. 722, 151 Va. 954.
Wash.—Hardgrove v. Bowman, 116 P.2d 336—White v. Chellew, 185 P. 619, 108 Wash. 526.
W.Va.—Koon v. Monongahela West Penn Public Service Co., 192 S.E. 332, 119 W.Va. 76—Greenbrier Laundry Co. v. Fidelity & Casualty Co. of New York, 178 S.E. 631, 116 W.Va. 88—Atlantic Bitulithic Co. v. Town of Edgewood, 171 S.E. 754, 114 W.Va. 243—Central Trust Co. v. Cook, 163 S.E. 60, 111 W.Va. 637—Ealy v. Shetler Ice Cream Co., 158 S.E. 781, 110 W.Va. 502—Clay County Bank v. Wilson, 158 S.E. 517, 109 W.Va. 684—Thompson v. Beasley, 146 S.E. 885, 107 W.Va.

to be applied, it is commonly required that the parties be the same,[89] and that the same questions be involved.[90] However, some authorities have held that the parties need not be the same where the position assumed in the former proceeding was successfully maintained;[91] and, as appears infra §§ 121 and 122 respectively, judicial estoppel arising from pleadings or testimony in former proceedings may operate for the benefit of persons who were not parties to the former proceedings.

It has been held that what a defendant may do in a criminal court cannot be pleaded as an estoppel against him in a civil action;[92] but there is authority to the contrary.[93] A party cannot deny the validity of steps taken, or the truth of assertions made, by him in another proceeding which would impute to him fraud on administration of justice in such other proceeding.[94]

Position inconsistent with defense or objection interposed in prior action. A party who has successfully or effectively interposed a defense or objection in one action or proceeding cannot shift his ground and take a position in another action or proceeding which is so inconsistent with his former defense or objection as necessarily to disprove its truth or validity.[95] One who successfully pleads

75—Monongahela West Penn P. S. Co. v. State Road Commission, 139 S.E. 744, 104 W.Va. 183—MacDonald v. Long, 131 S.E. 252, 100 W. Va. 551.
21 C.J. p 1228 note 69.

Disclaimer
Courts look with disfavor on party invoking their jurisdiction to gain certain rights and advantages over an adversary, and then asserting in another cause the very matter disclaimed in former suit.—Hill v. Preston, 34 S.W.2d 780, 119 Tex. 522, reversing, Civ.App., 296 S.W. 925—Smith v. Chipley, 16 S.W.2d 269, 118 Tex. 415.

Validity of agreement
Where husband represented to court in divorce proceeding that agreement for wife's maintenance was valid and subsisting, he was thereafter estopped from attacking validity of agreement on ground of illegality.—Short v. Short, 288 P. 1111, 106 Cal.App. 210.

Validity of decree
Assertion by plaintiff in garnishment of rights based on assumed validity of decree against another in favor of judgment creditor precluded plaintiff in garnishment from subsequently asserting invalidity of decree.—Lyle v. Hunter, 136 So. 633, 102 Fla. 972.

Possession of knowledge
Where the grantees of a trustee claimed under the trustee's unauthorized deed in an ejectment suit, and acknowledged they had information as to the trustee's breach of trust in making the deed, they are precluded, in a subsequent ejectment suit, from denying knowledge as to such breach of trust.—Case v. Sipes, 217 S.W. 306, 280 Mo. 110.

89. U.S.—Galt v. Phoenix Indemnity Co., App.D.C., 120 F.2d 723—Myers v. Ross, D.C.Fla., 10 F.Supp. 409.
Kan.—Irvin v. Fant, 206 P. 874, 111 Kan. 336.
N.H.—Wadleigh v. Howson, 189 A. 865, 88 N.H. 365.
N.C.—Rodwell v. Camel City Coach Co., 171 S.E. 100, 205 N.C. 292—Ellis v. Ellis, 136 S.E. 350, 193 N. C. 216.
Tex.—Permian Oil Co. v. Smith, 73 S. W.2d 490, 503, 129 Tex. 413, 111 A.L.R. 1152, quoting **Corpus Juris**, reversing, Civ.App., 47 S.W.2d 500, and rehearing denied 107 S.W.2d 564, 129 Tex. 413, 111 A.L.R. 1152—Linz v. Eastland County, Com. App., 39 S.W.2d 599, 77 A.L.R. 1466, modifying City Nat. Bank v. Eastland County, Civ.App., 12 S.W.2d 662—Railroad Commission v. Arkansas Fuel Oil Co., Civ.App., 148 S.W.2d 895, error refused—Industrial Co. v. Tompkins, Civ.App., 27 S.W.2d 343, error refused.
Wis.—Schwenker v. Parry, 236 N. W. 652, 204 Wis. 590
21 C.J. p 1230 note 73.

Parties must have been adverse in the original proceeding.—Pinell v. Roppo, 234 P. 1035, 134 Wash. 158.

Settlement with different party
A party who denied the validity of a patent in a suit against him, but who settled the suit and acquired the patent, was not estopped from alleging the validity of the patent in a subsequent suit against another party.—Lapeer Trailer Corporation v. Freuhauf Trailer Co., D.C.Mich., 24 F.2d 595.

Actions defended by different insurers
The fact that different insurance companies defend the two actions in the name of defendant does not prevent estoppel.—Welser v. Ealer, 176 A. 429, 317 Pa. 182.

90. U.S.—Galt v. Phoenix Indemnity Co., App.D.C., 120 F.2d 723—Sinclair Refining Co. v. Jenkins Petroleum Process Co., C.C.A.Me., 99 F. 2d 9, certiorari denied Jenkins Petroleum Process Co. v. Sinclair Refining Co., 59 S.Ct. 362, 305 U.S. 659, 83 L.Ed. 427, rehearing denied 59 S.Ct. 484, 306 U.S. 667, 83 L.Ed. 1062, rehearing denied 59 S.Ct. 1035, 307 U.S. 651, 83 L.Ed. 1530.
Ky.—Walker v. City of Richmond, 262 S.W. 628, 203 Ky. 481.
Mass.—Sacks v. McKane, 183 N.E. 140, 281 Mass. 11.
Mo.—Case v. Sipes, 217 S.W. 306, 280 Mo. 110.
N.C.—Rodwell v. Camel City Coach Co., 171 S.E. 100, 205 N.C. 292—Ellis v. Ellis, 136 S.E. 350, 193 N. C. 216.
R.I.—Farrell v. Employers Liability Assur. Corporation, 190 A. 466, 57 R.I. 389.
S.D.—Smith v. Tattersfield, 245 N. W. 49, 60 S.D. 466.
Tex.—Linz v. Eastland County, Com. App., 39 S.W.2d 599, 77 A.L.R. 1466, modifying City Nat. Bank v. Eastland County, Civ.App., 12 S.W.2d 662—Railroad Commission v. Arkansas Fuel Oil Co., Civ.App., 148 S.W.2d 895, error refused—Mahoney v. Mahoney, Civ.App., 103 S.W. 2d 459, 461, error refused, quoting **Corpus Juris**—Industrial Co. v. Tompkins, Civ.App., 27 S.W.2d 343, error refused.
Wis.—Schwenker v. Parry, 236 N.W. 652, 204 Wis. 590.
21 C.J. p 1230 note 74.

Issue as to boundary line
Utah.—Rich v. Stephens, 11 P.2d 295, 79 Utah 411.

91. U.S.—American Metal Cap Co. v. Anchor Cap & Closure Corporation, D.C.N.Y., 278 F. 670, reversed on other grounds, C.C.A., 20 F.2d 725.
Mich.—Gillespie v. Dunn, 224 N.W. 374, 246 Mich 415.
Wyo.—Hatten Realty Co. v. Baylies. 290 P. 561, 42 Wyo. 69, 72 A.L.R. 587.

92. Ark.—Halliday v. Smith, 54 S. W. 970, 67 Ark. 310.

93. Mo.—Western Auction & Storage Co. v. Shore, App., 179 S.W. 769.
21 C.J. p 1231 note 83.

94. U.S.—Shelton v. Southern R. Co., D.C.Tenn., 255 F. 182.
Cal.—Fonner v. Martens, 200 P. 405, 186 Cal. 623.
Ill.—Grimm v. Grimm, 135 N.E. 19, 302 Ill. 511.

95. U.S.—Queenan v. Mays, C.C.A. Okl., 90 F.2d 525, certiorari denied Board of Com'rs of Creek County, Okl., v. Mays, 58 S.Ct. 45, 302 U.S.

a judgment as a bar to an action is estopped from setting up in a subsequent action that the judgment is invalid.[96]

Position inconsistent with title or contract asserted in prior action. A party to an action is estopped from assuming a position which is inconsistent with his assertion of a title or contract in a previous action,[97] at least where such assertion was successfully maintained.[98]

Inconsistent positions in respect of questions of procedure. The rule as to estoppel to assume inconsistent positions in successive proceedings has been applied to inconsistent positions in respect of questions of procedure, such as questions relating to process,[99] venue,[1] remedy,[2] and such as questions

724, 82 L.Ed. 559—Wood v. Franklin Life Ins. Co., C.C.A.Tex., 17 F. 2d 80.
Ala.—Watt v. Lee, 191 So. 628, 238 Ala. 451—Wright v. Fannin, 156 So. 849, 229 Ala. 278.
Ill.—Lake Villa Co-op. Ass'n v. Western Dairy Co., 247 Ill.App. 496—First Nat. Bank v. King, 234 Ill.App. 332.
Iowa.—Hanson v. S. & L. Drug Co., 212 N.W. 731, 203 Iowa 384—Barth v. Severson, 183 N.W. 617, 191 Iowa 770.
Mass.—City of Boston v. Nielsen, 26 N.E.2d 366.
Mich.—Cavosie v. Sinclair Refining Co., 290 N.W. 871, 874, 292 Mich. 468, quoting **Corpus Juris**—Twork v. Munising Paper Co., 266 N.W. 311, 275 Mich. 174—Chatham-Trenary Land Co. v. Swigart, 222 N.W. 749, 245 Mich. 430—Hassberger v. General Builders' Supply Co., 182 N.W. 27, 213 Mich. 489.
N.Y.—Horn v. Bennett, 3 N.Y.S.2d 525, 253 App.Div. 630.
Pa.—Cordingly v. Kelly, 120 A. 398, 276 Pa. 374—Holt v. Pennsylvania Co., 113 A. 745, 271 Pa. 76, 18 A.L.R. 567—Macan v. Scandinavia Belting Co., 107 A. 750, 264 Pa. 384, 5 A.L.R. 1502.
R.I.—Farrell v. Employers Liability Assur. Corporation, 190 A. 466, 57 R.I. 389.
S.C.—Townsend v. South Carolina Ins. Co., 167 S.E. 5, 10, 168 S.C. 302, quoting **Corpus Juris.**
Tex.—Breland v. Guaranty Building & Loan Co., Civ.App., 119 S.W.2d 690, error refused—Ayres v. MacDonald, Civ.App., 233 S.W. 597, reversed on other grounds McDonald v. Ayres, Com.App., 242 S.W. 192.
Wash.—White v. Chellew, 185 P. 619, 108 Wash. 526.
21 C.J. p 1231 note 87.

Equitable cognizance of suit

Where bankrupt, sued in a state court, contended that the suit was not cognizable in equity, and procured its transfer to the law side of the court, where judgment was rendered against him, he and his trustee were estopped to claim the right to set up an equitable defense to the judgment, when sought to be proved in the bankruptcy proceeding.—Weatherman v. Burton, C.C.A.Va., 295 F. 653, certiorari denied Burton v. Weatherman, 44 S.Ct. 454, 264 U.S. 596, 68 L.Ed. 868.

Individual character of obligation

Executrix, having defeated action on notes on ground obligations were individual, was estopped to deny personal liability in subsequent action.—Dodds v. McColgan, 225 N.Y.S. 609, 222 App.Div. 126, reversing 211 N.Y.S. 371, 125 Misc. 405.

Nature of employment

(1) Employers whose insurance company defeated death claim in compensation proceedings on ground minor's employment was hazardous could not deny hazardous nature of employment in subsequent death action.—Besonen v. Campbell, 220 N.W. 301, 243 Mich. 209.

(2) An employer, having successfully defended employee's proceeding for compensation on the ground that the employer was engaged in interstate commerce, was estopped from denying such fact in subsequent action under the Federal Employers' Liability Act.—Buehler v. Philadelphia & R. Ry. Co., 124 A. 325, 280 Pa. 92.

96. S.D.—Bailey v. Wright, 112 N.W. 853, 21 S.D. 349.

97. Ariz.—Arizona Commercial Mining Co. v. Iron Cap Copper Co., 239 P. 290, 29 Ariz. 23, modifying 232 P. 545, 27 Ariz. 202, and certiorari denied 46 S.Ct. 208, 270 U.S. 642, 70 L.Ed. 776.
Cal.—Albertson v. MacFarlane, 201 P. 479, 54 Cal.App. 50.
Iowa.—Redding v. Redding, 284 N.W. 167, 226 Iowa 327.
La.—Crichton v. Krouse, App., 142 So. 635.
N.Y.—Stuart v. New York Community Mausoleum Const. Co., 179 N.Y.S. 73.
Pa.—Strealy v. Spoonhour, 141 A. 250, 292 Pa. 378.

Brokers suing for commission cannot in instant suit assume position of brokers or agents inconsistent with position of purchasers in former suit.—Cerf v. McElroy, Tex.Civ.App., 25 S.W.2d 950, error refused.

98. Ala.—Horst v. Barret, 104 So. 530, 213 Ala. 173.
Cal.—Rose v. Conlin, 198 P. 653, 52 Cal.App. 225, certiorari denied Conlin v. Rose, 42 S.Ct. 56, 257 U.S. 647, 66 L.Ed. 415.
Ga.—Florence, Phillips & Co. v. Newsome, 106 S.E. 619, 26 Ga.App. 501.
Ill.—Webb v. Gilbert, 192 N.E. 252, 357 Ill. 340.
Ind.—Celina Mut. Casualty Co. v. Baldridge, 12 N.E.2d 258, 213 Ind. 198, denying rehearing 10 N.E.2d 904, 213 Ind. 198.
Kan.—Cates v. Munsell, 275 P. 178, 127 Kan. 777.
Mich.—Gillespie v. Dunn, 224 N.W. 374, 246 Mich. 415.
Pa.—Donahue v. Punxsutawney Borough, 148 A. 41, 298 Pa. 77.
Tex.—Johnson v. Bingham, Civ.App., 251 S.W. 529, affirmed, Com.App., 265 S.W. 130, modified on other grounds 265 S.W. 884, vacated 269 S.W. 1033.
Wash.—Hardgrove v. Bowman, 116 P.2d 336—White v. Chellew, 185 P. 619, 108 Wash. 526.
21 C.J. p 1232 note 91.

Right to cut timber

Defendant who has defended his right to cut timber from plaintiff's land in plaintiff's action for trespass, on the ground that he had a right so to do under a contract, is estopped, after court has upheld validity of the contract in such action, from denying its validity in plaintiff's subsequent action under the contract.—Runnels v. Lasswell, Mo.App., 219 S.W. 980.

Validity of insurance

Where vendor sued insurance company on policy in his name covering property which he had sold, and therein contended that his insurance was valid, in subsequent suit by purchasers to recover possession, brought against vendor after he had repaired property, following fire, vendor could not assert that his insurance was invalid.—Cavell v. Trichell, 100 So. 249, 156 La. 136.

99. U.S.—Davis v. Wakelee, N.Y., 15 S.Ct. 555, 156 U.S. 680, 39 L.Ed. 518.
21 C.J. p 1232 note 95.

1. Tex.—Kerrigan v. Deatherage, Civ.App., 21 S.W.2d 744.

2. U.S.—Ætna L. Ins. Co. v. Lyon County, C.C.Iowa, 82 F. 929.
21 C.J. p 1232 note 96.

Theory of case

(1) A plaintiff who successfully maintains an action on the theory that the causes of action there asserted were separate and distinct cannot in a subsequent action be heard to insist on the inconsistent position that the parties are identical

relating to parties,[3] and verdict.[4] A mere consent to a matter of procedure in a case does not bind the party thereto never to litigate any question involved therein in any other case or court.[5]

Jurisdiction. Where a party successfully contends that the court has jurisdiction of a cause, he cannot question such jurisdiction in subsequent proceedings,[6] except, as appears in § 108 of the title Courts, as to jurisdiction of the subject matter. On the other hand, where a party successfully defends an action on the ground that the court is without jurisdiction, he cannot in subsequent action or proceedings assume a position inconsistent therewith.[7] However, it has been held that one who successfully asserts the validity of a decree of a foreign tribunal is not estopped to deny its validity in a subsequent action, the view being taken that the principle of equitable estoppel cannot be invoked to confer jurisdiction on a foreign tribunal.[8] A jurisdictional objection which prevails in one proceeding will not estop the party making it from interposing other objections in a subsequent suit on the same subject matter.[9]

Suit brought or defended in representative capacity. Where suit brought by or against one in a representative capacity is successfully maintained, the party asserting such capacity is estopped to deny it in a subsequent suit.[10] So, also, one who claims under proceedings successfully maintained by one who initiated such proceedings in a representative capacity is estopped to deny such capacity in subsequent proceedings.[11]

§ 120. Stipulations and Consents

In the absence of fraud or mistake, parties to stipulations and agreements entered into in the course of judicial proceedings are ordinarily estopped to take positions inconsistent therewith, at least where the party invoking the estoppel would be prejudiced or injured.

In accordance with the general rule against the assumption of inconsistent positions in judicial proceedings, stated in § 117 supra, parties to stipulations and agreements entered into in the course of judicial proceedings are estopped to take positions inconsistent therewith,[12] in the absence of fraud or mistake.[13] The rule has been held particularly ap-

as well as the causes of action.—Central of Georgia R. Co. v. Waldo, 70 S.E. 1021, 9 Ga.App. 182.

(2) A party to an action who makes no objection to the court trying the action as an equitable action is bound to such theory in a subsequent action.—Michels v. Olmstead, Mo., 15 S.Ct. 580, 157 U.S. 198, 39 L. Ed. 671.

3. U.S.—Wood v. Franklin Life Ins. Co., C.C.A.Tex., 17 F.2d 80.
Ariz.—Rossi v. Hammons, 268 P. 181, 34 Ariz. 95.
Pa.—Trustees of Methodist Episcopal Church in Borough of Franklin in Venango County v. Equitable Surety Co., 112 A. 551, 269 Pa. 411.
21 C.J. p 1232 note 97.

Intervention

A party, who secured exclusion of intervention by drawer of certified check, in a suit on the check against the drawee bank, cannot claim that the drawer was concluded by the judgment against the bank, because he conducted the bank's defense, and might have filed a bill of interpleader to require the drawer and the payee to litigate their controversy.—Koch v. City of Weston, 220 S.W. 1007, 203 Mo.App. 445.

4. Va.—Byrd v. Pennsylvania R. Co., 145 S.E. 722, 151 Va. 954.

5. U.S.—Sharon v. Hill, C.C.Cal., 26 F. 337, 11 Sawy. 291.

6. Tex.—Long v. Martin, Civ.App., 260 S.W. 327, error dismissed 278 S.W. 1115, 114 Tex. 581.
21 C.J. p 1232 note 98.

7. Pa.—Buehler v. Philadelphia & R. Ry. Co., 124 A. 325, 280 Pa. 92.
21 C.J. p 1232 note 99.

8. N.Y.—Percival v. Percival, 94 N. Y.S. 909, 106 App.Div 111, affirmed 79 N.E. 1114, 186 N.Y. 587.
21 C.J. p 1233 note 2.

9. U.S.—Buena Vista County v. Iowa Falls & S. C. R. Co., Iowa, 5 S.Ct. 84, 112 U.S. 165, 28 L.Ed. 680.

10. Colo.—Wason v. Frank, 44 P. 378, 7 Colo.App. 541.
21 C.J. p 1233 note 4.

11. Va.—Norfolk & O. V. Ry. Co. v. Consolidated Turnp. Co., 68 S.E. 346, 111 Va. 131, Ann.Cas.1912A 239.

12. U.S.—Penny Stores v. Mitchell, D.C.Miss., 59 F.2d 789, appeal dismissed Penny Store v. Rice, 53 S. Ct. 122, 287 U.S. 622, 77 L.Ed. 580—W. L. Slayton & Co. v. Panola County, Tex., D.C.Tex., 283 F. 330—Turner v. Woodard, Mass., 259 F. 737, 170 C.C.A. 537.
Fla.—Smith v. Urquhart, 176 So. 787, 129 Fla. 742.
Ga.—Mehrtens v. Knight, 115 S.E. 506, 29 Ga.App. 390.
Ill.—American Radiator Co. v. Walker, 276 Ill.App. 150, 245—Brown v. Schintz, 98 Ill.App. 452, affirmed 67 N.E. 172, 202 Ill. 509.
Miss.—Whittington v. Simrall, 102 So. 572, 137 Miss. 511.
Mo.—Kansas City Carpet Co. v. Smith, App., 25 S.W.2d 539.
N.C.—Kappan v. Assad, 108 S.E. 383, 182 N.C. 77.
Pa.—Rzasa v. Jarosz, 186 A. 264, 122 Pa.Super. 387.
Tex.—Schlittler v. King, Civ.App., 81 S.W.2d 546.

Such estoppel may be invoked by stranger to the stipulation who was a party to, or interested in, the litigation and who relied on the stipulation and acquiesced in the order based thereon.—In re Mattingly's Estate, 270 N.W. 487, 131 Neb. 891—21 C.J. p 1227 notes 45, 47.

Who bound

Where defendants in a suit for realty based on a judgment do not claim under the person against whom the judgment was rendered, they are not estopped by any stipulation made by such person from questioning the validity of the judgment.—Rosenberger v. Gibson, 65 S.W. 237, 165 Mo. 16.

Oral agreement

A rule of court that an agreement between counsel will not be recognized, unless in writing, is limited to agreements relating to the conduct of a case in court, and is inapplicable to the question whether a party is estopped by such an agreement from maintaining a suit.
U.S.—Johnson v. Bradbury, D.C.Me., 272 F. 181.
Ga.—Beverly v. Flesenthall Bro., 83 S.E. 942, 142 Ga. 834—Oliver v. Godley, 142 S.E. 566, 38 Ga.App. 66.

13. N.H.—Blain v. Patterson, 47 N. H. 523.

Knowledge of fraud

A devisee named as executor was

plicable where the stipulation has been acted on and the adverse party would be injured if it were not enforced;[14] indeed, it has been held that some prejudice, injury, or disadvantage to the party setting up the estoppel is indispensable,[15] and that he must have been misled, or induced to do what he would otherwise not have done, or to abstain from doing what he would have done.[16] Further, in order to create an estoppel, the agreement or stipulation must be coextensive with the claim which it is offered to defeat.[17] The agreement must be considered as a whole, in view of the previous dealings of the parties, and in the light of all the surrounding facts and circumstances.[18] A party who has violated such an agreement or stipulation cannot successfully contend that the other party is estopped by it.[19]

Stipulations entered into merely for the purpose of the suit are not operative as an estoppel in a subsequent action.[20] An estoppel cannot be invoked to enforce an agreement to do some act which is forbidden by law.[21]

Among the agreements, consents, and stipulations to which the foregoing rules have been applied are agreements as to the date of rendition of judgment[22] or for settlement of causes;[23] an agreement that a certain person is the common source of title;[24] stipulations for continuances;[25] stipulations that if a foreclosure sale is effected pending an appeal from the foreclosure decree, the proceeds shall be held in court subject to be disposed of pursuant to the mandate and decision of the appellate court;[26] stipulations that the judgment should be for a designated amount or nothing;[27] stipulations in a decree of divorce respecting the amount of alimony;[28] stipulations to waive service of writ or pleading;[29] and stipulations that the suit should abide the final decision to be made in another case brought by plaintiff,[30] that the trustee under a lost deed has power to sell,[31] that a deed be made to the heirs of the purchaser who died before confirmation of the sale,[32] that the judge might sign a skeleton bill of exceptions, which would be complete, except for the transcript of the testimony, and that this should be inserted as it was transcribed,[33] that certain articles

not estopped from seeking cancellation of judgment of probate court denying probate of will on the ground that it was procured by fraudulent agreement between proponents and contestants by agreement to the appointment of contestant as administrator without knowledge of such fraud, since knowledge is an essential of estoppel.—Harris v. Harris, 93 So. 841, 208 Ala. 20.

Presumption of good faith

Court would assume that parties were acting in good faith toward each other at time they executed agreement whereby debtor agreed not to question validity of judgment.—Bancamerica-Blair Corporation v. Naphen, 200 A. 428, 61 R.I. 155.

14. Cal.—Morrow v. Morrow, App., 105 P.2d 129.
R.I.—Bancamerica-Blair Corporation v. Naphen, 200 A. 428, 61 R.I. 155.

15. Pa.—Rhoades' Estate, 1 Lanc. Bar 28.
21 C.J. p 1228 note 64.

16. Mass.—Boston Food Products v. Wilson & Co., 139 N.E. 637, 245 Mass. 550.

17. Tex.—Schlittler v. King, Civ. App., 81 S.W.2d 546.
21 C.J. p 1228 note 65.

Consent to verdict on cross action

Plaintiff was not estopped, by consent to a verdict for defendant on defendant's cross action, from insisting on a verdict in its favor on the original action, since defendant was not misled by plaintiff, or induced to do what it otherwise would not have done, or to abstain from doing what it would have done.—Boston Food Products Co. v. Wilson & Co., 139 N.E. 637, 245 Mass 550.

Notice of waiver

Where a surviving husband, son and granddaughter of deceased signed a waiver of notice in order to secure prompt probate of deceased's will, the son and granddaughter had not thereby estopped themselves from asserting that the surviving husband took realty as a tenant by curtesy, and that his second wife consequently had no dower therein.—Inman v. Inman, 121 A. 113, 45 R.I. 206.

18. R.I.—Bancamerica-Blair Corporation v. Naphen, 200 A. 428, 61 R.I. 155.

19. U.S.—National Marking Mach. Co. v. Triumph Mfg. Co., C.C.A.Mo., 13 F.2d 6.

20. N.Y.—Harrison v. Wilkin, 78 N.Y. 390.

21. Ga.—Walker v. O'Connor, 97 S.E. 276, 23 Ga.App. 22.
21 C.J. p 1228 note 66.

Recovery of property by illegal agreement

Where a party to a civil action, or one whose property was taken in such action, makes agreement with the officer having the property to give a redelivery bond, or makes a cash deposit in lieu of such a bond, and his property is released and returned to him, he cannot thereafter question the legality of the transaction relating to the giving of the bond or the making of the deposit, being estopped from so doing, although the transaction is not in conformity with the statute, but he may, in a proper proceeding, litigate the officer's right to hold the property and question the legality of the proceeding in which the property was taken.—Moss v. Summit County, 208 P. 507, 60 Utah 252, 26 A.L.R. 206.

22. Ind.—Ridgway v. Morrison, 28 Ind. 201.

23. Minn.—Dickinson v. Citizens' Ice & Fuel Co., 165 N.W. 1056, 139 Minn. 201.

24. Tex.—Crabtree v. Whiteselle, 65 Tex. 111.

25. Kan.—Berry v. Dewey, 170 P. 1000, 102 Kan. 392.
Mont.—Russell v. Sunburst Refining Co., 272 P. 998, 83 Mont. 452.

26. U.S.—Halliday v. Stuart, Ark., 14 S.Ct. 302, 151 U.S. 229, 38 L.Ed. 141.

27. Idaho.—Mahoney v. Marshall, 31 P. 809, 3 Idaho (Hasb.) 484.
21 C.J. p 1228 note 53.

28. Cal.—Morrow v. Morrow, App., 105 P.2d 129.
Ill.—Hopper v. Hopper, 19 Ill. 219.

29. Miss.—Walker v. King, 2 Miss. 17.
N.H.—Alton v. Gilmanton, 2 N.H. 520.

30. Tex.—Lamar County v. Talley, Civ.App., 94 S.W. 1069.

31. S.C.—Jones v. Hudson, 23 S.C. 494.

32. N.C.—Flemming v. Strohecker, 23 S.E. 440, 117 N.C. 366.

33. Tenn.—Memphis Consol. Gas & Electric Co. v. Simpson, 103 S.W. 788, 118 Tenn. 532.
21 C.J. p 1228 note 59.

sued for in trover should be retained by defendant and certain articles delivered up to plaintiff;[34] also to a consent to an order renewing execution,[35] consent to revival in the name of the executor,[36] and consent to a journal entry showing that a bill of exceptions was duly perfected.[37]

§ 121. Allegations or Admissions in Pleadings in Former Proceedings

As a general rule, allegations or admissions in pleadings in a former proceeding will estop the party making them from denying their truth in a subsequent proceeding to which he is a party, where the usual elements of estoppel are present. Under the doctrine of judicial estoppel, a party may be estopped by his former pleadings regardless of injury to his adversary.

Although some authorities have held that a party is not estopped from denying in one action what he has admitted or alleged in his pleadings in an entirely separate action, although between the same parties,[38] it is a widely accepted principle that, subject to some qualifications and exceptions, allegations or admissions in pleadings in a former action or proceeding will ordinarily estop the party making them from denying their truth in a subsequent action or proceeding in which he is a party to the prejudice of his opponent, if the usual elements of estoppel by conduct are present.[39] Some cases have

34. N.H.—Blain v. Patterson, 47 N. H. 523.

35. S.C.—McLaurin v. Kelly, 19 S. E. 143, 40 S.C. 486.
21 C.J. p 1228 note 61.

36. Ky.—Palmer v. Kemp, 2 A.K. Marsh. 355.
21 C.J. p 1228 note 62.

37. Ohio.—Potter v. Myers, 31 Ohio St. 103.

38. Ga.—Dixon v. Cassels Co., 130 S.E. 75, 34 Ga.App. 478.
Kan.—Betts v. Gilbert, 87 P.2d 637, 149 Kan. 431—Kington v. Ewart, 164 P. 141, 100 Kan. 49.

39. U.S.—The Seeandbee, C.C.A.Ohio, 102 F.2d 577—Robinson v. Ewert, C.C.A.Okl., 291 F. 9—Columbia Casualty Co. v. Thomas, D.C.Fla., 20 F.Supp. 251.
Ala.—Watt v. Lee, 191 So. 628, 238 Ala. 451—Randle v. Dumas, 157 So. 218, 229 Ala. 396—Blythe v. Enslen, 123 So. 71, 219 Ala. 638—Briggs v. Prowell, 93 So. 590, 207 Ala. 629.
Cal.—Estes v. Hotchkiss, 218 P. 605, 63 Cal.App. 284—Mitchell v. Price, 196 P. 82, 51 Cal.App. 159.
Fla.—Mayes v. Smith, 149 So. 590, 111 Fla 604—Palm Beach Co. v. Palm Beach Estates, 148 So. 544, 110 Fla. 77.
Ill.—Grimm v. Grimm, 135 N.E. 19, 302 Ill. 511.
La.—Bank of Coushatta v. Burch, 148 So. 680, 177 La. 465—Prichard v. McCranie, 107 So. 461, 160 La. 605—Choate Oil Corporation v. Glassell, 96 So. 543, 153 La. 715—Mohawk Oil Co. v. Layne, 86 So. 322, 147 La. 895, certiorari denied 41 S.Ct. 148, 254 U.S. 651, 65 L.Ed. 458.
Mich.—Michaelson v. Simula, 250 N. W. 264, 264 Mich. 457.
Mo.—Rhoads v. Rhoads, 119 S.W.2d 247, 251, 342 Mo. 934, quoting **Corpus Juris.**
Mont.—Bast v. Bast, 217 P. 345, 68 Mont. 69.
Nev.—State v. Second Judicial Dist. Court in and for Washoe County, 241 P. 317, 49 Nev. 145, 43 A.L.R. 1331.
N.J.—Brown v. Brown, 165 A. 643, 112 N.J.Eq. 600—In re Allison's Estate, 150 A. 52, 106 N.J.Eq. 55, reargument denied 152 A. 6, 107 N. J.Eq. 197.
Ohio—Barrett v. W. P. Southworth Co., 172 N.E. 563, 35 Ohio App. 452.
Okl.—Chouteau v. Hoss, 246 P. 844, 118 Okl. 76.
Pa.—Mosholder v. United Real Estate & Coal Co., 124 A. 676, 280 Pa. 517—Giesey v. Cogan, 179 A. 865, 118 Pa.Super. 464.
S.D.—First Nat. Bank v. Wagner, 213 N.W. 3, 51 S.D. 225.
Tenn.—Dalton v. Eller, 284 S.W. 68, 153 Tenn. 418.
Tex.—Breland v. Guaranty Building & Loan Co., Civ.App., 119 S.W.2d 690, error refused.
Wash.—Hedgecock v. Mendel, 263 P. 593, 146 Wash. 404.
W.Va.—MacDonald v. Long, 131 S.E. 252, 100 W.Va. 551.
21 C.J. p 1233 note 8.
Admissions generally as basis of estoppel see supra § 84.
Conclusiveness of:
Allegations or admissions as against pleader see the C.J.S. title Pleading §§ 59–62, also 49 C.J. p 122 note 53–p 128 note 28.
Judicial admissions see the C.J.S. title Evidence § 381, also 22 C.J. p 421 note 98–p 423 note 19.
In same proceeding see supra § 118.
Pleadings and other judicial admissions as basis of estoppel by record see supra § 7.
"Unless the elements of an equitable estoppel are present, proof of the truth will overcome a prior judicial allegation."—Grundmann v. Trocchiano, 125 So. 171, 174, 13 La. App. 277, affirmed 127 So. 748, 13 La. App. 277.

Adversary's admissions or allegations cannot ordinarily estop a party.—Mohawk Oil Co. v. Layne, D.C. La., 270 F. 841.

Disclaimer

Judgment creditor filing disclaimer in mortgage foreclosure proceedings was estopped to thereafter set up any claim in property involved which judgment debtor might acquire.—Kilpatrick Bros. Co. v. Campbell, 281 P. 471, 48 Idaho 194.

Proceeding not inter partes

The Salvation Army was not estopped from taking personalty under residuary clause in will because it had asserted, in a prior proceeding to determine validity of two wills of deceased, that personalty was given to another under will which was later declared invalid, since it had duty to present both wills, assertion was only a conclusion of law on undisputed facts, and probate proceeding is not an action between parties.—Durell v. Martin, 110 S.W. 2d 316, 172 Tenn. 97.

Parties held estopped

(1) Contractee suing municipality for breach of contract to close street was estopped by allegations in former suit denying existence of contract.—Industrial Co. v. Tompkins, Tex.Civ.App., 27 S.W.2d 343, error refused.

(2) An insurer which by its own construction of a policy admits liability in one pleading should be precluded from asserting later under the same state of facts that it is not liable because of an exception to coverage contained in the policy.—Columbia Casualty Co. v. Thomas, D.C.Fla., 20 F.Supp. 251.

(3) Maker of note was estopped on appeal from questioning ownership of alleged assignee where maker in previous action on same note by another party alleged as defense assignee's ownership.—Bank of Coushatta v. Burch, 148 So. 680, 177 La. 465.

(4) Plaintiff, averring, in action for use and occupation, that defendant entered with her permission, and not appealing from adverse judgment cannot assert contrary in subsequent damage suit.—Kertesz v. Feldheim, 139 A. 704, 6 N.J.Misc. 10.

stated the principle as applicable to allegations or admissions made under oath.[40] Clearly, where there is no actual inconsistency or conflict between the averments of the pleadings in the former action and the position taken in the subsequent action, there is no estoppel.[41]

In order to work such an estoppel, it is essential that the issues involved should be the same,[42] and that the allegations or admissions should have been material to the matters adjudicated in the former action;[43] further, there must have been a determination of the prior action,[44] or, at least, the allega-

(5) One making averment as to ownership of land in petition filed in judicial proceeding relating to title to property cannot show different title in subsequent proceeding involving same subject matter.—Strealy v. Spoonhour, 141 A. 250, 292 Pa. 378.

Parties held not estopped

(1) Affidavit, filed by secretary of corporation, reciting abandonment of charter, was held not to estop corporation from subsequently claiming interest in trade marks.—R. S. Howard Co. v. Robertson, 12 F.2d 827, 56 App.D.C. 292.

(2) Plaintiff suing on automobile liability policy was not estopped by pleading in personal injury action from denying insured company was separate entity.—Goss v. Security Ins. Co. of California, 298 P. 860, 113 Cal.App. 577.

(3) That the owner of property destroyed by fire started by a railroad engine had undervalued the improvements on his place in filing his return with the assessor of taxes did not prevent recovery of their value as shown by the evidence.—Hopkins v. Louisiana Ry. & Nav. Co., 92 So. 717, 152 La. 13.

(4) Other cases.

La.—Hebert v. Hebert, App., 187 So. 317.

Pa.—Rothwell v. Kremer & Hoffman, 95 Pa.Super. 36.

Tenn.—Raulston v. Mutual Ben. Health & Accident Ass'n, 118 S.W. 2d 881, 22 Tenn.App. 101.

Tex.—Texas Fire & Casualty Underwriters v. Blair, Civ.App., 130 S.W. 2d 409, error dismissed, judgment correct—Van Cleave v. Bell Oil & Gas Co., Civ.App., 102 S.W.2d 1103, error refused.

40. Ala.—Briggs v. Prowell, 93 So. 590, 207 Ala. 629.

Fla.—Crosby v. Burleson, 195 So. 202, 142 Fla. 443.

Ill.—Grant v. Springer, 161 N.E. 718, 330 Ill. 280.

La.—Pardo's Heirs v. Pardo, 26 La. Ann. 364—Stoma v. Smith, App., 172 So. 202.

S.C.—Cathcart v. Hopkins, 112 S.E. 64, 119 S.C. 190.

Tex.—Appel v. La Velle, Civ.App., 293 S.W. 244.

41. U.S.—American Transp. Co. v. Swift & Co., D.C.N.Y., 22 F.2d 457.

Ala.—First Nat. Bank v. Burch, 188 So. 859, 863, 237 Ala. 680, quoting **Corpus Juris.**

Ariz.—Reilly v. Clyne, 234 P. 35, 27 Ariz. 432, 40 A.L.R. 1005.

Cal.—Stern v. McDonald, 190 P. 221, 47 Cal.App. 79.

Del.—Rudnick v. Schoenberg, 122 A. 902, 2 W.W.Harr. 339.

Iowa.—State Central Sav. Bank of Keokuk v. Mapel, 286 N.W. 517, 226 Iowa 1328—Arnold v. Hosmer, 179 N.W. 92.

La.—Esparros v. Vicknair, 188 So. 37, 192 La. 383—Succession of Grivaud, 187 So. 284, 192 La. 181—Texala Oil & Gas Co. v. Caddo Mineral Lands Co., 93 So. 788, 152 La. 549—Appalachian Corporation v. Brooklyn Cooperage Co., 91 So. 539, 151 La. 41.

N.Y.—Globe Elevator Co. v. American Molasses Co. of New York, 201 N.Y.S. 723, 207 App.Div. 9—In re Ekins, 213 N.Y.S. 162, 126 Misc. 1.

Tenn.—Houk v. Memphis Const. Co., 15 S.W.2d 742, 159 Tenn. 103.

Va.—Simpson v. Simpson, 175 S.E. 320, 162 Va. 621, 94 A.L.R. 909, vacating 169 S.E. 556.

21 C.J. p 1234 note 16.

Different amounts of damages claimed

La.—Johnson v. Legeai, 84 So. 505, 147 La. 92.

Basis of recovery relied on

That plaintiff in previous pleading based his cause of action in part on written contract and in same pleading set out substantially same facts as in subsequent pleading did not present such inconsistent position as to estop him from basing subsequent suit on verbal agreement, implied agreement, or on quantum meruit.—Burkholder v. Henderson, Tex.Civ.App., 97 S.W.2d 297, error dismissed.

Where situation has changed, a party is not estopped from making averments in accordance with such change.—Orndoff v. Consumers' Fuel Co., 162 A. 431, 308 Pa. 165.

42. Ala.—First Nat. Bank v. Burch, 188 So. 859, 237 Ala. 680.

Tex.—Railroad Commission v. Arkansas Fuel Oil Co., Civ.App., 148 S.W.2d 895, error refused.

Vt.—In re Henry's Will, 134 A. 632, 99 Vt. 437, 49 A.L.R. 169.

21 C.J. p 1233 note 9.

Beyond sphere of cause in which they are made judicial admissions do not constitute an estoppel.—Rudnick v. Schoenberg, 122 A. 902, 2 W. W.Harr., Del., 339.

Plea in former criminal case

A plea of "nolo contendere" in a criminal case does not estop defendant to deny facts on which the prosecution was based in subsequent civil proceeding.—Twin Ports Oil Co. v. Pure Oil Co., D.C.Minn., 26 F.Supp. 366.

Pleadings in prior suit in equity are not admissible in an action at law to estop the parties against whom they are offered from changing their position in the latter action, although properly admitted as evidence of admissions by the parties concerned.—Lindsay v. Dutton, 75 A. 1096, 227 Pa. 208—21 C.J. p 1233 note 9 [a].

43. U.S.—Alyea-Nichols Co. v U. S., D.C.Ill., 12 F.2d 998, reversed on other grounds, C.C.A., Pickering v. Alyea-Nichols Co., 21 F.2d 501, certiorari denied Alyea-Nichols Co. v. Pickering, 48 S.Ct. 208, 276 U.S. 617, 72 L.Ed. 733.

Ala.—First Nat. Bank v. Burch, 188 So. 859, 237 Ala. 680.

Ga.—Massachusetts Bonding & Insurance Co. v. U. S. Conservation Co., 122 S.E. 728, 31 Ga.App. 716.

N.Y.—Burns v. Stento, 9 N.Y.S.2d 736.

Tenn.—Houk v. Memphis Const. Co., 15 S.W.2d 742, 159 Tenn. 103.

Tex.—Kirby v. Fitzgerald, 89 S.W.2d 408, 126 Tex. 411, affirming, Civ. App., 57 S.W.2d 362.

21 C.J. p 1233 note 10.

Where admission is merely argumentative, and not an issue in the case, there can be no estoppel.—Mason v. Alston, 9 N.Y. 28, 59 Am.D. 515.

Words of mere description cannot estop a party from showing the truth and the fact.

U.S.—Reynolds v. Adden, La., 10 S. Ct. 843, 136 U.S. 348, 34 L.Ed. 360.

La.—New Orleans v. Sheppard, 10 La. Ann. 268.

Valuation of property

Defendants in expropriation suit were not bound by value stated in petition for possession of decedent's share.—Texas Pacific-Missouri Pac. Terminal R. R. of New Orleans v. Rouprich, 117 So. 276, 166 La. 352.

44. Ala.—First Nat. Bank v. Burch, 188 So. 859, 863, 237 Ala. 680, quoting **Corpus Juris.**

Or.—Twohy Bros. Co. v. Ochoco Irr. Dist., Crook County, 210 P. 873, 108 Or. 1.

tions or admissions must have been acted on by the court in which the pleadings were filed or by the parties claiming the estoppel.[45] The party claiming the estoppel must have been misled;[46] he must have been ignorant of the real facts,[47] and, in reliance on the statements or admissions, he must have changed his position[48] and sustained prejudice by reason thereof.[49]

For the purpose of applying the doctrine of estoppel as to matters contained in a sworn complaint in a prior action, the court is not at liberty to select from the complaint such statements as are against complainant's interests, and to ignore those in his favor.[50] An estoppel based on former judicial ad-

Tenn.—Houk v. Memphis Const. Co., 15 S.W.2d 742, 159 Tenn. 103.
Wyo.—State Bank of Wheatland v. Bagley Bros., 11 P.2d 572, 44 Wyo. 244, rehearing denied 13 P.2d 564, 44 Wyo. 456.
21 C.J. p 1234 note 11.

Voluntary dismissal or nonsuit

(1) A party is not estopped to deny or contradict allegations made in a former proceeding which he voluntarily dismissed or which resulted in a voluntary nonsuit.
Kan.—Lassen v. Lassen, 7 P.2d 120, 134 Kan. 436.
La.—Williams v. Spivy, 169 So. 347, 185 La. 304—Herrington v. Herrington, 127 So. 617, 170 La. 249—Tennent v. Caffery, 113 So. 167, 163 La. 976.
N.C.—Briley v. Roberson, 199 S.E. 73, 214 N.C. 295—Slade v. Sherrod, 95 S.E. 557, 175 N.C. 346.

(2) However, it has been held that allegations by original plaintiff in a sworn petition which he later dismissed, as of nonsuit, that he bid seven hundred dollars for property at partition sale, were a "judicial confession" under statute in favor of defendants alleging in reconvention that he did not pay full amount bid, and estopped such original plaintiff from controverting the allegation.—Stoma v. Smith, La.App., 172 So. 202.

45. U.S.—General Petroleum Corporation of California v. Dougherty, C.C.A.Cal., 117 F.2d 529, modifying, D.C., Dougherty v. General Petroleum Corporation of California, 28 F.Supp. 979.
Ala.—First Nat. Bank v. Burch, 188 So. 859, 863, 237 Ala. 680, quoting **Corpus Juris**—Randle v. Dumas, 157 So. 218, 229 Ala. 396.
Mo.—Rhoads v. Rhoads, 119 S.W.2d 247, 251, 342 Mo. 934, quoting **Corpus Juris.**
21 C.J. p 1234 note 12.

Allegation in effect amended

Allegation by injured party in suit against insured that he and his son were passengers for hire on insured's truck at time of accident did not estop injured party from subsequently maintaining suit against insurer based on theory that they were not passengers for hire, where, after unsuccessful attempt to amend such allegation, insured had alleged that they were not passengers for hire but were trespassers, since such plea in effect waived objection made to amendment.—Lowery v. Zorn, 168 So. 297, 184 La. 1054.

46. U.S.—General Petroleum Corporation of California v. Dougherty, C.C.A.Cal., 117 F.2d 529, modifying, D.C., Dougherty v. General Petroleum Corporation of California, 28 F.Supp. 979—The Seeandbee, C.C.A. Ohio, 102 F.2d 577.
La.—Sanderson v. Frost, 3 So.2d 626, 198 La. 295.
Wash.—Crary v. Coffin, 268 P. 881, 148 Wash. 287.

47. U.S.—Dougherty v. General Petroleum Corporation of California, D.C.Cal., 28 F.Supp. 979, modified on other grounds, C.C.A., General Petroleum Corporation of California v. Dougherty, 117 F.2d 529.
Ala.—First Nat. Bank v. Burch, 188 So. 859, 237 Ala. 680.
Ga.—Allen v. Bacon, 156 S.E. 20, 171 Ga. 479.
Mo.—Rhoads v. Rhoads, 119 S.W.2d 247, 252, 342 Mo.App. 934, citing **Corpus Juris.**
Pa.—Security Trust Co. of Pottstown v. Feist, 5 A.2d 119, 333 Pa. 536.
Tenn.—Houk v. Memphis Const. Co., 15 S.W.2d 742, 159 Tenn. 103.
Tex.—Hartman v. Chumley, Civ.App., 266 S.W. 444.
21 C.J. p 1234 note 17.

48. U.S.—Robinson v. Ewert, C.C.A. Okl., 291 F. 9.
Ala.—First Nat. Bank v. Burch, 188 So. 859, 237 Ala. 680.
Mo.—Richards v. Earls, 133 S.W.2d 381.
Pa.—Security Trust Co. of Pottstown v. Feist, 5 A.2d 119, 333 Pa. 536—Morrett v. Fire Ass'n of Philadelphia, 108 A. 171, 265 Pa. 9.
Tenn.—Houk v. Memphis Const. Co., 15 S.W.2d 742, 159 Tenn. 103.
Tex.—Hartman v. Chumley, Civ.App., 266 S.W. 444.
21 C.J. p 1234 note 18.

So as to admission of conclusion of law

Cal.—Cullinan v. Mercantile Trust Co. of California, 252 P. 647, 80 Cal.App. 377.

49. U.S.—Pitcairn v. American Refrigerator Transit Co., C.C.A.Mo., 101 F.2d 929, certiorari denied 60 S.Ct. 78, 308 U.S. 566, 84 L.Ed. 475—Southern Bell Telephone & Telegraph Co. v. Burke, C.C.A.Ala., 62 F.2d 1015, affirming, D.C., Burke v. Southern Bell Telephone & Telegraph Co., 42 F.2d 742 and 55 F.2d 732—American Transp. Co. v. Swift & Co., D.C.N.Y., 22 F.2d 457—Robinson v. Ewert, C.C.A.Okl., 291 F. 9.
Ala.—First Nat. Bank v. Burch, 188 So. 859, 863, 237 Ala. 680, quoting **Corpus Juris.**
D.C.—Claudy v. Duvall, 5 F.2d 381, 55 App.D.C. 319.
Ill.—Rifkin & Hart v. S. Buchsbaum & Co., 257 Ill.App. 473.
Ky.—Outram v. Paintsville Nat. Bank, 12 S.W.2d 858, 227 Ky. 311—Walker v. City of Richmond, 262 S.W. 628, 630, 203 Ky. 481, quoting **Corpus Juris.**
La.—Sanderson v. Frost, 3 So.2d 626, 198 La. 295—Lotz v. Hurwitz, 141 So. 83, 174 La. 638—Spears v. Spears, 136 So. 614, 173 La. 294—Dehan v. Youree, 117 So. 745, 166 La. 635—Strange v. Continental Supply Co., 115 So. 353, 165 La. 20—Aurienne v. Mt. Olivet, Inc., 96 So. 29, 153 La. 451—Texala Oil & Gas Co. v. Caddo Mineral Lands Co., 93 So. 788, 152 La. 549—Kentwood Bank v. McClendon, 93 So. 748, 152 La. 489—Appalachian Corporation v. Brooklyn Cooperage Co., 91 So. 539, 151 La. 41—Grundmann v. Trocchiano, 125 So. 171, 13 La.App. 277, affirmed 127 So. 748, 13 La.App. 277—Ledner v. Caddo Transfer & Warehouse Co., 124 So. 712, 14 La.App. 366.
Mich.—Ledger v. Northwestern Mut. Life Ins. Co., 241 N.W. 803, 258 Mich. 26.
Pa.—Security Trust Co. of Pottstown v. Feist, 5 A.2d 119, 333 Pa. 536—Morrett v. Fire Ass'n of Philadelphia, 108 A. 171, 265 Pa. 9—Giesey v. Cogan, 179 A. 865, 118 Pa.Super. 464.
Tenn.—Houk v. Memphis Const. Co., 15 S.W.2d 742, 159 Tenn. 103.
21 C.J. p 1233 note 8, p 1234 note 19.
"A judicial allegation thus made in good faith in another suit, without intention to deceive anyone thereby, or to derive any advantage therefrom, and by which no one has been prejudiced, and from which no advantage has been derived, does not estop."—Wiley v. Stewart, 83 So. 260, 262, 145 La. 1081.

50. Colo.—Central Trust Co. v. Culver, 129 P. 253, 23 Colo.App. 317.

Under statute so providing, estoppel to controvert a judicial confession or declaration cannot be invoked by dividing the declaration, the estoppel sought must be as to all of

missions or allegations cannot be invoked to maintain a condition or state of things in violation of a prohibitory law.[51] By making a record in another case a part of his pleading, a party is not estopped from denying the facts adjudicated therein.[52]

Success of pleading. Some authorities have stated the rule as applicable to instances in which the allegations were successfully maintained;[53] and a number have held that judicial allegations of fact pleaded unsuccessfully cannot be made the basis for estoppel,[54] especially where the party urging the estoppel has not been forced into a disadvantageous position.[55] So, it has been held that admissions in pleadings in a former action which were successfully denied by the opposite party work no estoppel;[56] but there is authority apparently to a different effect.[57]

Pleader's ignorance or mistake. There can be no estoppel where the admissions or statements were made through mistake,[58] or without full knowledge of the facts,[59] especially where the facts were within the knowledge of the adverse party.[60]

Assertion of law or opinion. Statements in pleadings in a former suit which are merely assertions of conclusions of law[61] or assertions of opinion,[62] do not create an estoppel, particularly where such conclusions or opinions have been unsuccessfully pleaded.[63]

For and against whom estoppel operative. Estoppels by allegations or admissions in pleadings in a former action or proceeding arise only in favor of

the declaration or none.—Land v. Land, 164 So. 599, 183 La. 588.

51. La.—Ackerman v. Larner, 40 So. 581, 116 La. 101.
21 C.J. p 1234 note 20.

52. N.C.—Latta v. Catawba Electric Co., 59 S.E. 1028, 146 N.C. 385.
21 C.J. p 1235 note 27.

53. Fla.—Mayes v. Smith, 149 So. 590, 111 Fla. 604—Palm Beach Co. v. Palm Beach Estates, 148 So. 544, 110 Fla. 77.
Ga.—Florence, Phillips & Co. v. Newsome, 106 S.E. 619, 26 Ga.App. 501.
La.—Succession of Kranz, 110 So. 750, 162 La. 546.
Tex.—Railroad Commission v. Arkansas Fuel Oil Co., Civ.App., 148 S.W. 2d 895, error refused.

54. La.—Smith v. Phillips, 143 So. 47, 175 La. 198—Lotz v. Hurwitz, 141 So. 83, 174 La. 638—Goudeau v. Roach, 136 So. 88, 173 La. 61—Tennent v. Caffery, 113 So. 167, 163 La. 976—Maddox v. Robbert, 104 So. 183, 158 La. 394—Kentwood Bank v. McClendon, 93 So. 748, 152 La. 489—Appalachian Corporation v. Brooklyn Cooperage Co., 91 So. 539, 151 La. 41—Alsaya v. Johnson, App., 178 So. 518, reinstated 181 So. 204—Allen v. Boyett, 5 La.App. 445.

Scope of employment

Plaintiff's allegations in earlier suit that defendant motorist was acting within scope of employment by partnership composed of defendants did not estop her from alleging in subsequent suit that motorist was acting within scope of employment by defendants individually, where allegations in earlier suit were unsuccessfully made.—Calamia v. Mayer, La.App., 174 So. 668.

Liability for attorneys' fees

Attorneys claiming lien for fees on realty sold at sheriff's sale were not estopped by plea of lien not sustained from subsequently asserting personal liability for fees.—Smith v. Saulsberry, 288 P. 927, 157 Wash. 270.

55. La.—Kentwood Bank v. McClendon, 93 So. 748, 152 La. 489

56. Wyo.—Willis v. Willis, 49 P.2d 670, 677, 48 Wyo. 403, quoting **Corpus Juris**, and rehearing denied 54 P.2d 814, 49 Wyo. 396.
21 C.J. p 1234 note 24, p 1235 note 25.

57. Kan.—McMichael v. Burnett, 17 P.2d 932, 136 Kan. 654.

58. Ala.—First Nat. Bank v. Burch 188 So. 859, 237 Ala. 680.
La.—Wiley v. Stewart, 83 So. 260, 145 La. 1081.
21 C.J. p 1234 note 13.

Involuntary statement

Although an action lies by the sheriff, or an attaching creditor, against a third person, who, on being served with attachment, in order to bind a fund in his hands, has, in accordance with a statutory requirement, given the sheriff a certificate of the amount of the fund, such person is not estopped from showing in such an action that there was a mistake in giving the certificate.—Almy v. Thurber, N.Y., 12 Abb. N.Cas. 459, 65 How.Pr. 481.

59. Ala.—First Nat. Bank v. Burch, 188 So. 859, 237 Ala. 680.
Cal.—Hunter v. Hunter, 43 P. 756, 111 Cal. 261, 31 L.R.A. 411, 52 Am. S.R. 180.
D.C.—Claudy v. Duvall, 5 F.2d 381, 55 App.D.C. 319.
La.—Southern United Ice Co. v. Rapides Grocery Co., App., 187 So. 313.
Pa.—Morrett v. Fire Ass'n of Philadelphia, 108 A. 171, 265 Pa. 9.
Tex.—Kirby v. Fitzgerald, 89 S.W.2d 408, 126 Tex. 411, affirming, Civ. App., 57 S.W.2d 362—Hartman v. Chumley, Civ.App., 266 S.W. 444.
21 C.J. p 1234 note 14.

60. Ala.—First Nat. Bank v. Burch, 188 So. 859, 237 Ala. 680.
La.—Watkins v. Cawthon, 33 La.Ann. 1194—International Projector Corporation v. Maricella, App., 144 So. 278.

61. U.S.—Pitcairn v. American Refrigerator Transit Co., C.C.A.Mo., 101 F.2d 929, certiorari denied 60 S. Ct. 78, 308 U.S. 566, 84 L.Ed. 475—McLoughlin v. Western Union Telegraph Co., D.C.La., 7 F.2d 177
La.—Succession of Price, 198 So. 894, 196 La. 172—Harnischfeger Sales Corporation v. Sternberg Co., 158 So. 556, 180 La. 1059—Aurienne v. Mt. Olivet, Inc., 96 So. 29, 153 La. 451.
Tenn.—Durell v. Martin, 110 S.W.2d 316, 172 Tenn. 97.
Wash.—Smith v. Saulsberry, 288 P. 927, 930, 157 Wash. 270, citing **Corpus Juris.**
21 C.J. p 1234 note 21.
"It is for the court to judge what are the legal consequences of the facts stated."—First Nat. Bank v. Burch, 188 So. 859, 863, 237 Ala. 680, quoting **Corpus Juris.**

62. La.—Strange v. Continental Supply Co., 115 So. 353, 165 La. 20—Roussell v. Realty Co., 69 So. 27, 137 La. 616.

Value of property

La.—State v. Voorhies, 34 La.Ann. 1151.
21 C.J. p 1234 note 23 [a].

63. U.S.—McLaughlin v. Western Union Telegraph Co., D.C.La., 7 F. 2d 177.
La.—Harnischfeger Sales Corporation v. Sternberg Co., 158 So. 556, 180 La. 1059—Strange v. Continental Supply Co., 115 So. 353, 165 La. 20.

Successful assertion as estopping adversary

Where wife successfully defended creditors' suit against husband and wife on ground that debt sued on was community property, creditors were thereafter estopped from asserting, in subsequent suit against wife only, that such debt was separate debt of wife.—H. J. Smith & Sons v. Joiner, La.App., 172 So. 785.

or against the parties to that action or proceeding and those in privity with them,[64] unless, it appears to have been held, the party asserting the estoppel can show that he was misled or prejudiced by such allegation.[65]

Judicial estoppel. Under the doctrine of judicial estoppel, as distinguished from equitable estoppel by inconsistency, a party is estopped merely by the fact of having alleged or admitted in his pleadings in a former proceeding[66] under oath[67] the contrary of the assertion sought to be made. However, such estoppel does not operate if the original averment was made inconsiderately or mistakenly; it must have been made knowingly[68] and free of inducement by the opposite party.[69] At least in so far as this doctrine is applied to statements under oath, its distinctive feature has been said to be the expressed purpose of the court, on broad grounds of public policy, to uphold the sanctity of an oath.[70]

It is not essential under this doctrine that the adverse party should be prejudiced;[71] indeed, it is not even necessary that the party invoking the estoppel should have been a party to the prior proceeding,[72] at least where the party sought to be estopped had gained some advantage or been successful in the original proceeding.[73]

This doctrine is inapplicable where the former statements were immaterial,[74] where they were merely conclusions of law[75] or assertions of opin-

64. Ala.—Randle v. Dumas, 157 So. 218, 229 Ala. 396.
Ga.—Bacon v. Allen, 151 S.E. 369, 169 Ga. 766—Koplin v. Shartle Bros. Mach. Co., 104 S.E. 217, 150 Ga. 509.
Ill.—Schafer v. Robillard, 17 N.E.2d 963, 370 Ill. 92, transferred, see 13 N.E.2d 824, 294 Ill.App. 617.
Iowa.—State Central Sav. Bank of Keokuk v. Mapel, 286 N.W. 517, 226 Iowa 1328.
Ky.—Hill v. Halmhuber, 9 S.W.2d 55, 225 Ky. 394.
Mich.—Bullen v. Chicago & N. W. Ry. Co., 209 N.W. 124, 235 Mich. 240.
Mo.—State ex rel. Terry v. Holtkamp, 51 S.W.2d 13, 330 Mo. 608.
Okl.—Continental Oil Co. v. Logan, 58 P.2d 554, 177 Okl. 273.
Pa.—Morrett v. Fire Ass'n of Philadelphia, 108 A. 171, 265 Pa. 9.
Tenn.—Kobbe v. Harriman Land Co., 201 S.W. 762, 139 Tenn. 251.
Tex.—Railroad Commission v. Arkansas Fuel Oil Co., Civ.App., 148 S.W.2d 895, error refused—American Surety Co. of New York v. Martinez, Civ.App., 73 S.W.2d 109, 113, citing **Corpus Juris.**
Wash.—Wolfe v. Hoefke, 214 P. 1047, 1048, 124 Wash. 495, quoting **Corpus Juris.**
21 C.J. p 1235 notes 28, 31.
Persons affected by equitable estoppel generally see infra §§ 130–147.

Parties must have been adverse
Wash.—Crary v. Coffin, 268 P. 881, 148 Wash. 287—Pinell v. Roppo, 234 P. 1035, 134 Wash. 158.

Prior proceeding unauthorized
Where prior attachment proceeding was instituted against defendant without authorization of owner of land alleged to have been damaged by the cutting and removal of timber, and owner caused the action to be dismissed and instituted an action for injury to property and the cutting and removal of timber, purported admission by plaintiff in the former proceeding that he had received part payment for the timber cut by defendant created no "estoppel" against him.—Byers v. Harper, 13 S.E.2d 389, 64 Ga.App. 404.

Allegations by receiver do not estop trustee, although the same person holds both positions.—Kirby v. Fitzgerald, 89 S.W.2d 408, 126 Tex. 411, affirming, Civ.App., 57 S.W.2d 362.

Estoppel of creditors by trustee
The allegations of the administrator and trustee of an insolvent estate that creditors were general creditors does not raise an estoppel which eliminates proof of the status of the creditors, for a trustee cannot by his admissions estop one of a class of creditors against another.—Goodman v. Wann, 11 Tenn.App. 560.

Attorney in one action who filed a pleading alleging that his client was the sole owner of the property in question was estopped to claim an interest in the property in another proceeding.
La.—Farrar v. Stacy, 2 La.Ann. 210.
Tex.—Houston Oil Co. of Texas v. Village Mills Co., Com.App., 241 S.W. 122, reversing Village Mills Co. v. Houston Oil Co. of Texas, Civ.App., 186 S.W. 785.

65. La.—Southern United Ice Co. v. Rapides Grocery Co., App., 187 So. 313.

66. Tenn.—House v. Wakefield, 42 Tenn. 325—Warner v. Maroney, 66 S.W.2d 244, 16 Tenn.App. 78—Life & Casualty Insurance Co. v. Maness, 13 Tenn.App. 416.
Judicial estoppel by former inconsistent position generally see supra § 117.
Pleadings as basis of estoppel by record see supra § 7.

67. Tenn.—Houk v. Memphis Const. Co., 15 S.W.2d 742, 159 Tenn. 103—Sartain v. Dixie Coal & Iron Co., 266 S.W. 313, 150 Tenn. 633—Corder v. G. B. Sprouse & Co., 100 S.W.2d 1001, 20 Tenn.App. 486—Fidelity Trust Co. v. Norton, 10 Tenn.App. 132—Radford v. Littleton, 9 Tenn.App. 361—Jetton v. Nichols, 8 Tenn.App. 567—Ankenbauer v. Ankenbauer, 6 Tenn.App. 221.
21 C.J. p 1235 note 29.

Affidavit must be made in judicial proceedings before affiant will be judicially estopped by statements made therein.—Helfer v. Mutual Ben. Health & Accident Ass'n, 96 S.W.2d 1103, 170 Tenn. 630, 113 A.L.R. 921.

68. Tenn.—Sartain v. Dixie Coal & Iron Co., 266 S.W. 313, 150 Tenn. 633—Southern Coal & Iron Co. v. Schwoon, 239 S.W. 398, 145 Tenn. 191—Warner v. Maroney, 66 S.W.2d 244, 16 Tenn.App. 78—Boillin-Harrison v. Keeble, 14 Tenn.App. 347—Grigsby v. Rhode Island Co., 11 Tenn.App. 387—Fidelity Trust Co. v. Norton, 10 Tenn.App. 132—Jetton v. Nichols, 8 Tenn.App. 567—Ankenbauer v. Ankenbauer, 6 Tenn.App. 221.
21 C.J. p 1235 note 29.

"The oath to be binding must have been willfully false."—Schultz, Baujan & Co. v. Bell, 130 S.W.2d 149, 151, 23 Tenn.App. 258.

69. Tenn.—Warner v. Maroney, 66 S.W.2d 244, 16 Tenn.App. 78.

70. Tenn.—Sartain v. Dixie Coal & Iron Co., 266 S.W. 313, 150 Tenn. 633.

71. Tenn.—Sartain v. Dixie Coal & Iron Co., supra—Fidelity Trust Co. v. Norton, 10 Tenn.App. 132.

72. Tenn.—Corder v. G. B. Sprouse & Co., 100 S.W.2d 1001, 20 Tenn.App. 486—Williams v. Nottingham, 84 S.W.2d 114, 19 Tenn.App. 162—Ankenbauer v. Ankenbauer, 6 Tenn.App. 221.
21 C.J. p 1235 note 29.

73. Wyo.—Hatten Realty Co. v. Bayliss, 290 P. 561, 42 Wyo. 69, 72 A.L.R. 587.

74. Tenn.—Jetton v. Nichols, 8 Tenn.App. 567.

75. Tenn.—Southern Coal & Iron Co. v. Schwoon, 239 S.W. 398, 145 Tenn. 191.

ion,[76] or where they are not inconsistent with, or contradicted by, the assertions complained of.[77]

§ 122. Testimony in Former Proceedings

As a general rule, a party to a proceeding is estopped to contradict the testimony given by him in a former proceeding, at least where the elements of equitable estoppel are present; but some authorities do not recognize an estoppel to contradict such testimony. Under the doctrine of judicial estoppel, a person can in no event contradict his former sworn testimony unless it was made inconsiderately or mistakenly.

While a number of cases have held or broadly stated that a party is not estopped to contradict the testimony given by him in a prior action or proceeding,[78] nevertheless, under the principle of estoppel to assume inconsistent positions in successive suits, parties have been held estopped from contradicting their testimony given as parties in former proceedings[79] against the same parties,[80] at least if the elements requisite to an equitable estoppel are present,[81] but, it has been held, not otherwise.[82] Where there is no inconsistency in the testimony,[83] or the party sought to be estopped was honestly mistaken as to the facts,[84] no estoppel arises; and the statement of an opinion as to the legal effect of a contract, the facts being known to both parties, will not preclude testimony of a different interpretation on a subsequent trial.[85]

Where the facts established by other evidence make out the party's case, his claim ought not to be denied simply because he himself is estopped to testify so as to falsify his former testimony.[86]

Former testimony not as party. The fact that a person was a witness in a former litigation does not bind him by the result of such litigation, or conclude him from changing his testimony or making an inconsistent claim in a subsequent action to which he is a party,[87] at least in the absence of the necessary elements of an estoppel in pais;[88] and the rule has been applied where no one could sustain injury by the admission of the evidence,[89] where the testimony was merely an erroneous statement of a conclusion of law,[90] where the party in

76. Tenn.—Schultz, Baujan & Co. v. Bell, 130 S.W.2d 149, 23 Tenn.App 258.

77. Tenn.—Jetton v. Nichols, 8 Tenn. App. 567.

78. Ill.—Snydacker v. Brosse, 51 Ill. 357, 99 Am.D. 551.
Mich.—Ledger v. Northwestern Mut. Life Ins. Co., 241 N.W. 803, 258 Mich. 26.
Va.—Chakales v. Djiovanides, 170 S. E. 848, 161 Va. 48.
21 C.J. p 1235 note 32.

"A party to a civil suit may sometimes be estopped by reason of statements made in the pleadings or a previous judgment on the same subject matter or conduct in litigation by which others have been misled, but a litigant, if allowed to testify at all, is not estopped by previous contrary statements even if under oath."—The Seeandbee, C.C.A.Ohio, 102 F.2d 577, 581.

Perishability of property

That lessee in resisting sale of property provisionally and unlawfully seized testified that property would not deteriorate did not estop him from recovering damages for deterioration and breakage.—Dehan v. Youree, 117 So. 745, 166 La. 635.

79. Ill.—Grant v. Springer, 161 N.E. 718, 330 Ill. 280.

"A party, who falsely testified to a fictitious state of facts for his own benefit, will not, when his interest changes, be heard to say what the facts really were."—Yeo v. Cohen, D. C.Mass., 6 F.2d 411.

80. U.S.—Goon Wing Jung v. Johnson, D.C.Mass., 285 F. 576.

81. Tex.—Koger v. Clark, Civ.App., 216 S.W. 434, dismissed for want of jurisdiction.
21 C.J. p 1235 note 33.

82. Conn.—Andrews v. Olaff, 122 A. 108, 99 Conn. 530.
Tex.—Mahoney v. Mahoney, Civ.App., 103 S.W.2d 459, error refused.

No estoppel in absence of

(1) Misleading.—Fordson Coal Co. v. Garrard, 125 S.W.2d 977, 277 Ky. 218, 121 A.L.R. 841.

(2) Prejudice.—Texala Oil & Gas Co. v Caddo Mineral Lands Co., 93 So. 788, 152 La. 549—21 C.J. p 1235 note 33 [c].

(3) Want of knowledge of the matter in issue on the part of the party relying on the estoppel.—Indianapolis Tract. & Terminal Co. v. Henby, 97 N.E. 313, 178 Ind. 239.

83. La.—Texala Oil & Gas Co. v. Caddo Mineral Lands Co., 93 So. 788, 152 La. 549.
Mich.—Marvel Carburetor Co. v. Carter, 274 N.W. 733, 281 Mich. 121, certiorari denied Carter v. Marvel Carburetor Co., 58 S.Ct. 610, 303 U.S. 640, 82 L.Ed. 1100.
Mo.—Audrain County v. Muir, 249 S.W. 383, 297 Mo. 499.
Or.—Crim v. Crim, 139 P. 917, 69 Or. 556.

84. U.S.—Kinghorn v. Pennsylvania R. Co., C.C.A.N.Y., 47 F.2d 588.

85. U.S.—Sturm v. Boker, Ind., 14 S.Ct. 99, 150 U.S. 312, 37 L.Ed. 1092.

86. U.S.—Yeo v. Cohen, D.C.Mass., 6 F.2d 411.

87. N.Y.—Pierce v. Feno, 184 N.Y.S. 851.
Or.—Nalley v. First Nat. Bank, 296 P. 61, 135 Or. 409, 76 A.L.R. 625, denying rehearing 293 P. 721, 135 Or. 409, 76 A.L.R. 625.
Va.—Chakales v. Djiovanides, 170 S. E. 848, 161 Va. 48.
21 C.J. p 1235 note 34.

88. U.S.—Swan Carburetor Co. v. Nash Motors Co., C.C.A.Md., 98 F. 2d 115, affirming, D.C., 25 F.Supp. 21.
Ariz.—City of Phoenix v. Johnson, 75 P.2d 30, 51 Ariz. 115.
N.Y.—Luitwieler v. Luitwieler Pumping Engine Co., 191 N.Y.S. 417.

Nonprejudicial silence

An employee who failed to testify, in suit by his employer against employee's surety to recover sums embezzled by employee, that he had repaid such embezzled sums was not barred by "equitable estoppel" from bringing subsequent action to enjoin execution of the judgment obtained by employer against surety on ground that such judgment was obtained by fraud, in that employee was coerced by threats of criminal prosecution into failing to disclose fact of payment, since equitable estoppel does not result from judicial allegations or testimony, unless party relying on estoppel is adversely affected thereby.—O'Sullivan v. Knop, La.App., 195 So. 366, annulled 198 So. 191.

89. U.S.—Behr v. Connecticut Mut. L. Ins. Co., C.C.Tenn., 4 F. 357, 2 Flipp. 692.

90. Ill.—North Ave. Bldg. & Loan Ass'n v. Huber, 121 N.E. 721, 286 Ill. 375.
21 C.J. p 1236 note 38.

whose behalf the testimony was given failed to prevail on his claim,[91] where the testimony given in the two suits was not clearly inconsistent,[92] where the witness did not know his legal rights and acted under a mistake,[93] where the witness was given no opportunity to testify as to the matters in respect of which an estoppel is claimed,[94] and where no determination was made in respect of the matters concerning which the testimony was given.[95] On the other hand, the testimony of the witness in the former suit may work an estoppel if to permit him to change it in a subsequent suit to which he is a party would operate to the prejudice of the party claiming the estoppel who has acted in reliance thereon.[96]

Subsequent testimony not as party. Testimony by a party to a proceeding does not estop him to testify differently in a subsequent suit between other parties.[97]

Former testimony of others. A party is not estopped by the testimony of others in a former proceeding to which he was not a party;[98] and a party in a case cannot be estopped or concluded by the mere testimony of a witness offered by the adverse party.[99] A party is not estopped by statements made by his own witness which were not material to the issues joined or could not affect the result,[1] or, it has been held, where such witness, when testifying in the former action, was not authorized, as his agent, to speak for him.[2] Obviously, a party is not estopped by the former testimony of his witness where he would not be estopped had he given such testimony himself.[3]

Weight of former testimony where no estoppel. Under the view first stated, that prior statements in testimony do not estop, the statements usually go merely to the question of the credibility of the witness.[4]

Judicial estoppel. Under the doctrine of judicial estoppel as applied in at least one jurisdiction, on grounds of public policy, a party or a witness who states facts under oath, whether in a deposition or during the course of the trial, is estopped to deny such facts in a subsequent suit to which he is a party,[5] although the parties to the second suit may not be the same;[6] but such statements will not estop the party from proving the truth, if he can show that they were made inconsiderately, by mistake, or without full knowledge of the facts.[7] The doctrine

91. N.Y.—Stamp v. Franklin, 39 N.E. 634, 144 N.Y. 607, affirming 27 N.Y.S. 84, 75 Hun 373.

92. Ga.—Wilkinson v. Thigpen, 71 Ga. 497.
Tex.—Weil v. Miller, Civ.App., 215 S.W. 142, dismissed for want of jurisdiction.

93. Mass.—Doolittle v. Dwight, 2 Metc. 561.
Pa.—Macan v. Scandinavia Belting Co., 107 A. 750, 264 Pa. 384, 5 A.L.R. 1502.

94. Colo.—Dregman v. Morgan County Nat. Bank, 162 P. 321, 62 Colo. 277.

95. N.M.—Storz v. Burrage, 65 P. 162, 10 N.M. 692.

96. Iowa.—Andresen v. Andresen, 258 N.W. 107, 109, 219 Iowa 434, citing **Corpus Juris.**
La.—Smith v. Fisher, App., 150 So. 55, 57, quoting **Corpus Juris.**
Miss.—Bracey v. Crisler, 118 So. 138, 151 Miss. 655.
N.Y.—Luitwieler v. Luitwieler Pumping Engine Co., 191 N.Y.S. 111.
21 C.J. p 1236 note 44.

Funds in hands of clerk of court
Where judgment against funds in hands of clerk of district court was substituted for personal judgment because of testimony of clerk that he had money due judgment creditor in his hands, clerk could not, in special proceedings brought to compel him to pay over money, set up defense that he had lost money because of failure of depositary banks.—Andresen v. Andresen, 258 N.W. 107, 219 Iowa 434.

97. U.S.—De Laval Separator Co. v. Vermont Farm Mach. Co., Vt., 135 F. 772, 68 C.C.A. 474.
21 C.J. p 1236 note 45.

98. Ky.—O'Neal v. Turney's Ex'x, 300 S.W. 913, 222 Ky. 361.

99. Or.—De Vol v. Citizens' Bank, 181 P. 985, 92 Or. 606, distinguishing Gardner v. Kinney, 117 P. 971, 60 Or. 292.

Failure to contradict in former action
A party is not estopped to contradict the testimony of an adverse witness by reason of his failure to contradict the same testimony when given in a previous trial of the same cause.
Mich.—Barger v. Bissell, 170 N.W. 76, 204 Mich. 416.
N.Y.—McCormick v. Pennsylvania Cent. R. Co., 1 N.E. 99, 99 N.Y. 65.

1. Pa.—Ayres v. Wattson, 57 Pa. 360.

Inconsistency contained in transcript introduced
Where defendant offered some of the evidence of one of plaintiff's witnesses given in a suit in another court as to a certain matter, plaintiff was not estopped from asserting the truth of the testimony of such witness on the trial because his counsel insisted on the introduction of the whole transcript in the former proceeding, bringing to light the inconsistent testimony, such testimony having been practically placed before the jury by defendant's witness.—Weil v. Miller, Tex.Civ.App., 215 S.W. 142, dismissed for want of jurisdiction.

2. N.Y.—Smith v. Maine, 260 N.Y.S. 425, 145 Misc. 521.

3. Va.—Chakales v. Djiovanides, 170 S.E. 848, 161 Va. 48.

4. U.S.—The Seeandbee, C.C.A.Ohio, 102 F.2d 577.
Pa.—Macan v. Scandinavia Belting Co., 107 A. 750, 264 Pa. 384, 5 A.L.R. 1502.
21 C.J. p 1236 note 51.

5. Tenn.—Black Diamond Collieries v. Deal, 265 S.W. 985, 150 Tenn. 474—Radford v. Littleton, 9 Tenn. App. 361—Jetton v. Nichols, 8 Tenn.App. 567.
21 C.J. p 1236 note 52.

Extrajudicial statements are not within the rule.—Croson v. Marsh, 12 Tenn.App. 33.

6. Tenn.—Black Diamond Collieries v. Deal, 265 S.W. 985, 150 Tenn. 474—Tate v. Tate, 148 S.W. 1042, 126 Tenn. 169—Williams v. Nottingham, 84 S.W.2d 114, 19 Tenn. App. 162—Ankenbauer v. Ankenbauer, 6 Tenn.App. 221.
21 C.J. p 1237 note 53.

7. Tenn.—Schultz, Baujan & Co. v. Bell, 130 S.W.2d 149, 23 Tenn.App. 258.
21 C.J. p 1237 note 54.

Oath must be willfully false, or must have the effect of misleading

is inapplicable, however, where the alleged inconsistent statements are not patently inconsistent,[8] or if they involve a matter of opinion[9] or are immaterial.[10]

§ 123. Prior Recognition or Assertion of Authority, Capacity, Character, or Status

Parties to a transaction or course of dealing may be estopped to deny that the authority, capacity, character, or status of one of them was that which was recognized or asserted in the particular transaction or course of dealing.

If in a particular transaction or course of dealing the authority, capacity, character, or status of one of the parties is recognized or asserted as one of the basic facts on which the transaction proceeds, both parties are, as a rule, estopped to deny that the one occupied that position or sustained that character.[11] This rule has been applied in respect of guardians,[12] partnerships,[13] personal representatives,[14] receivers,[15] and school trustees and agents.[16]

Nevertheless the recognition of the authority or capacity must be clear and unambiguous in order to create an estoppel,[17] and the party invoking the estoppel must have been misled.[18] No estoppel arises where the acts relied on to create it are due to ignorance of the laws of another state which the party is not presumed to know;[19] and a person is not estopped to deny the right of a county to a fund which he is compelled to collect as statutory agent for the county in pursuance of an unconstitutional statute.[20]

§ 124. Official Certificates and Acts

An estoppel may arise out of official certificates and acts.

A party who acts in an official capacity may not thereafter assume a position inconsistent with his acts to the prejudice of another who has relied thereon.[21] Thus a sheriff who undertakes to forfeit a bail bond is estopped to deny its validity,[22] and a tax collector who executes a tax deed is estopped to deny receipt of the entire amount bid at the tax sale.[23]

On the other hand, the fact that an officer after abandoning his office signed a written resignation does not estop him from proving abandonment prior to the date of the resignation;[24] and an estoppel will not arise where the party sought to be estopped obtained no benefit and the party claiming the estoppel suffered no detriment.[25]

§ 125. Prior Assertion or Recognition of Right or Title

If the title of one party to property involved in a transaction is recognized and the dealing proceeds on that basis, both parties are ordinarily estopped to deny that title.

If in making a contract or in a course of dealing the title of one party or the other to the property involved in the transaction is recognized, and the

the other party to his injury.—Behr v. Connecticut Mut. L. Ins. Co., C.C. Tenn., 4 F. 357, 2 Flipp. 692.

8. La.—Texala Oil & Gas Co. v. Caddo Mineral Lands Co., 93 So. 788, 152 La. 549.
Tenn.—Black Diamond Collieries v. Deal, 265 S.W. 985, 150 Tenn. 474—Life & Casualty Insurance Co. v. Maness, 13 Tenn.App. 416.

9. Tenn.—Black Diamond Collieries v. Deal, 265 S.W. 985, 150 Tenn. 474—Schultz, Baujan & Co. v. Bell, 130 S.W.2d 149, 23 Tenn.App. 258.

10. Tenn.—Jetton v. Nichols, 8 Tenn. App. 567.

11. Colo.—In re Schofield's Estate, 73 P.2d 1378, 1383, 101 Colo. 296, quoting **Corpus Juris.**
Fla.—Pearce Produce Co. v. Lee, 148 So. 543, 110 Fla. 225.
Ill.—Chicago Title & Trust Co. v. Szymanski, 7 N.E.2d 608, 289 Ill. App. 600.
La.—Jackson v. United Gas Public Service Co., 198 So. 633, 640, 196 La. 1, quoting **Corpus Juris**—Dorsey v. Ashford, App., 177 So. 88.
N.H.—Manning v. Leavitt Co., 5 A.2d 667, 90 N.H. 167, 122 A.L.R. 249.
N.Y.—Grishman v. The Lincoln, Inc., 28 N.Y.S.2d 488.
Okl.—Mason v. Nibel, 263 P. 121, 129 Okl. 7.
Tex.—Miller v. Dyess, 151 S.W.2d 186, reversing Dyess v. Miller, Civ. App., 126 S.W.2d 538.
Vt.—City of Burlington v. Mayor of City of Burlington, 127 A. 892, 98 Vt. 388.
21 C.J. p 1237 note 55.

12. Minn.—Wheeler v. Benton, 74 N.W. 154, 71 Minn. 456.
21 C.J. p 1237 note 56.

13. Neb.—Gorder v. Pankonin, 119 N.W. 449, 83 Neb. 204, 131 Am.S.R. 629.
21 C.J. p 1237 note 57.

14. Ill.—Barrett v. Ablin, 215 Ill. App. 113.
21 C.J. p 1238 note 58.

15. Mo.—Greeley v. Provident Sav. Bank, 15 S.W. 429, 103 Mo. 212.
21 C.J. p 1238 note 59.

16. Mo.—State v. Dorton, 46 S.W. 948, 145 Mo. 304.
21 C.J. p 1238 note 60.

17. Iowa.—Gipp v. Lynch, 285 N.W. 659, 226 Iowa 1020.
21 C.J. p 1238 note 61.

18. Colo.—Farmers' Bank & Trust Co. v. Miller, 249 P. 644, 80 Colo. 121.

19. N.Y.—Stedman v. Davis, 93 N.Y. 32.
21 C.J. p 1238 note 62.

20. Tenn.—Henry County v. Standard Oil Co., 71 S.W.2d 683, 167 Tenn. 485, 93 A.L.R. 1483.

21. Ark.—Less v. Less, 227 S.W. 763, 147 Ark. 432.
Ill.—Trustees of Schools of Township 36 North, Range 10 East of Third P. M., Will County, v. American Surety Co of New York, 30 N.E.2d 513, 307 Ill.App. 398.
Equitable estoppel against public government and public officers see infra §§ 138–147.

22. Tex.—Turley v. Tobin, Civ.App., 7 S.W.2d 949, error refused.

23. S.C.—Hyman v. Arnold, 189 S.E. 796, 182 S.C. 490.

24. Ga.—Parks v. Ash, 149 S.E. 207, 168 Ga. 868.

25. Ga.—City of Macon v. Whittington, 157 S.E. 127, 42 Ga.App. 622.

dealing proceeds on that basis, both parties are ordinarily estopped to deny that title or to assert anything in derogation of it.[26]

However, to work an estoppel of this character and under such circumstances, it has been held to be necessary that the recognition of title or right be clear and unambiguous.[27] There can be no estoppel by mere inference.[28] Furthermore the statements

26. U.S.—Moore v. Devonian Oil Co., C.C.A.Tex., 98 F.2d 557—Weeks v. Goltra, C.C.A.Mo., 7 F.2d 838, certiorari granted Goltra v. Weeks, 46 S.Ct. 201, 269 U.S. 545, 70 L.Ed. 404, affirmed 46 S.Ct. 613, 271 U.S. 536, 70 L.Ed. 1074—Moretti v. Wiley, C.C.A.Ala., 279 F. 558, certiorari denied 43 S.Ct. 88, 260 U.S. 725, 67 L.Ed. 483.

Cal.—Graves v. Arizona Cent. Bank, 272 P. 1063, 205 Cal. 715—Wyman v. Monolith Portland Cement Co., 39 P.2d 510, 511, 3 Cal.App.2d 540, citing **Corpus Juris.**

Fla.—Kotick v. Durrant, 196 So. 802, 143 Fla. 386—Pearce Produce Co. v. Lee, 148 So. 543, 110 Fla. 225.

Ga.—Fidelity & Deposit Co. of Maryland v. Fine, 194 S.E. 58, 62, 56 Ga.App. 729, quoting **Corpus Juris**—Yarbrough v. Seagraves, 170 S.E. 553, 554, 47 Ga.App. 436, quoting **Corpus Juris.**

Iowa.—Andrew v. First State Bank of Holstein, 228 N.W. 12, 209 Iowa 273.

Ky.—Potter v. Wallace, 215 S.W. 538, 185 Ky. 528.

La.—Jackson v. United Gas Public Service Co., 198 So. 633, 640, 196 La. 1, quoting **Corpus Juris**—Meridian Fertilizer Factory v. Collier, 192 So. 358, 193 La. 815—American Nat. Bank v. Klein, 116 So. 889, 166 La. 216—Simmons v. Kelly, App., 169 So. 791—Codifer v. Holdsworth, 7 La.App. 395.

Mich.—Harris Bros. Co. v. Nichols, 225 N.W. 525, 247 Mich. 89.

Minn.—Le Pak v. Hedberg, 213 N.W. 40, 170 Minn. 495.

Mo.—Thomas v. McDonald, 287 S.W. 442, 315 Mo. 1119.

N.J.—Peppler v. Roffe, 194 A. 548, 122 N.J.Eq. 510.

N.Y.—In re Andrade's Estate, 299 N.Y.S. 329, 164 Misc. 714, affirmed 12 N.Y.S.2d 784, 257 App.Div. 813, motion denied 14 N.Y.S.2d 279, 257 App.Div. 958, reargument denied 14 N.Y.S.2d 279, 259 App.Div. 958—Agoodash Achim of Ithaca v. Temple Beth-El, 263 N.Y.S. 81, 87, 147 Misc. 405, citing **Corpus Juris.**

Ohio.—New York Trust Co. v. General Storage Co., 198 N.E. 286, 50 Ohio App. 366—Lomkin v. Robinson, 10 Ohio N.P., N.S., 1, dismissed 15 Ohio Cir.Ct.,N.S., 126, 24 Ohio Cir.Dec. 91.

Pa.—Cameron v. Townsend, 133 A. 632, 286 Pa. 393.

Tenn.—Mason v. Hamilton Nat. Bank, 1 Tenn.App. 232.

Tex.—Gray v. Allen, Civ.App., 243 S.W. 684.

Wash.—Lanterman v. Nestor, 261 P. 800, 146 Wash. 37.

Wis.—M. C. Gehl Co. v. Brahm, 187 N.W. 1011, 177 Wis. 222.

21 C.J. p 1238 note 63.

Heirs' denial of ancestor's title

Heirs cannot deny the title of their ancestor while asserting a claim to the property under it.—Gentry v. Gentry, 121 S.E. 188, 187 N.C. 29.

Mutual mistake as to owner of property

When owner of money pays it to another under a mutual mistake of fact that person to whom payment is made is owner, under doctrine of equitable estoppel owner cannot set up his title when payment has caused such change in position of person receiving same that it would be unjust to require him to make restitution; an irrevocable change of position, due to mistake by person receiving money, will prevent recovery, when parties were equally to blame for mistake or equally innocent.—Hatton v. Howard Braiding Co., 129 A. 805, 47 R.I. 47.

Estoppel arising from previous ownership

The wife of purchaser from mortgagee which purchased property at foreclosure sale was not subject to restrictions on use of property entered into by mortgagors after giving mortgage, on ground of estoppel arising from wife's previous ownership of property as one of grantees from mortgagors, where wife had no interest in property other than inchoate right of dower; and a purchaser from mortgagee and mortgagee were not estopped from denying any obligation by reason of restructive agreement imposed on property by mortgagors subsequent to execution of mortgage under foreclosure of which purchaser and mortgagee claimed ownership, where no reciprocal negative easement binding on mortgagee or purchaser existed and restriction in mortgagee's contract with purchaser was merely a personal covenant which could be enforced only by mortgagee.—Shedd v. Krushinski, 298 N.W. 490, 298 Mich. 160.

Recognition as consistent with subsequent acquisition of title

Persons having no interest in bankrupt corporation's personal property when one of them bid for some of it or when they received dividends on wage claims filed by them in bankruptcy proceeding were not estopped to claim ownership thereof in action brought by them after conveyance of bankrupt's realty with attached personalty to them by another corporation, which acquired interests therein of persons to whom property was sold by master under mortgage foreclosure decree and by trustee in bankruptcy, as no act of plaintiffs at such times could affect title to realty as against mortgagee; and the fact that attorney for such persons sought to purchase certain fixtures and equipment on premises over two months before clients' purchase, did not estop them from asserting ownership of such personalty in their subsequent action against another corporation, claiming ownership thereof as purchaser from bankruptcy receiver, as such attempt of attorney gave defendant no title to articles in dispute.—Kenny v. T. L. Arzt Foundry Co., 31 N.E.2d 620, 308 Ill.App. 251.

27. Ga.—Yarbrough v. Seagraves, 170 S.E. 553, 554, 47 Ga.App. 436, quoting **Corpus Juris.**

Mich.—Turner v. Rosema, 268 N.W. 757, 276 Mich. 620.

N.Y.—Agoodash Achim of Ithaca v. Temple Beth-El, 263 N.Y.S. 81, 87, 147 Misc. 405, citing **Corpus Juris.**

21 C.J. p 1239 note 64.

Acceptance of mortgage payment after conveyance

Mortgagee and creditor, accepting from mortgagor's attorney payment on a mortgage subsequent to mortgagor's conveyance of the land to his daughter was not estopped from disputing the daughter's title as acquired in fraud of creditors, although the attorney in paying stated that mortgagor "had nothing to do with the matter," since it was immaterial to the mortgagee who paid the money.—Hansen v. First Nat. Bank, 198 N.W. 505, 197 Iowa 1101.

Corporate property in possession of officer

Where officer of corporation was in possession of property solely as agent, in trover suit against subagent, to whom officer had intrusted it to be kept, for recovery of property so intrusted, defendant was not estopped from contending that property was not that of plaintiff but was property of company.—Paschal v. Godley, 129 S.E. 565, 34 Ga.App. 321.

28. Ind.—Tinsley v. Fruits, 51 N.E. 111, 20 Ind.App. 534.

N.Y.—Agoodash Achim of Ithaca v. Temple Beth-El, 263 N.Y.S. 81, 87, 147 Misc. 405, citing **Corpus Juris.**

relied on to create the estoppel must have been made by one in possession at the time.[29] It is also essential that the party against whom the estoppel is claimed did not act in ignorance of his rights,[30] and that he misled the party claiming the estoppel,[31] who changed his position in reliance on his acts.[32] The estoppel cannot be extended beyond the natural and reasonable import of the acts relied on to create it,[33] and one claiming an interest in property may be held to have a lesser interest than that originally asserted.[34]

A true owner of land is not estopped from showing his real title by offering to buy from an adverse claimant;[35] and, where a person has acquired title to lands by adverse possession, his verbal recognition of the title of the prior owner will not, it has been held, estop him from claiming title by adverse possession.[36] A seller of goods who files a claim for damages with a carrier is not estopped from showing that the goods belong to the buyer.[37]

§ 126. By Possession or Acts of Ownership under Claim of Title

A person who has taken possession of, or exercised acts of ownership over, property under claim of right is estopped to assert an inconsistent claim.

Where a person has taken possession of, or exercised acts of ownership over, property under claim of title or right, he is estopped to set up a claim inconsistent with that under which he has acted.[38] Thus a person is estopped from setting up an invalidity in the title under which he has had possession and exercised acts of ownership.[39]

However, possession or acts of ownership under a partial or qualified claim will not estop a person to assert his full rights.[40] There can be no estoppel unless the claim or title set up is inconsistent with that under which the party acted.[41] Where land is purchased by parties whom the vendor assures that he owns all the conflicting titles and will guarantee to them indisputable rights, they are not to be considered as holding under any one of the titles exclusively, but must be viewed as holding under that which would give them the best right, and they are not estopped from resisting eviction by relying on the elder grant.[42] An estoppel is not available in favor of one who has not acted in good faith but fraudulently.[43]

§ 127. By Possession in Subordination to Another's Title

A person who takes possession of property in subordination to another's title is estopped, as against the

29. N.C.—Graybeal v. Davis, 95 N. C. 508.

30. N.Y.—Sanford v. Sanford, 58 N. Y. 69.
Tenn.—Mullins v. Dowling, 4 Tenn. App. 1.

Appraisal without knowledge of interest in property
Appraiser of land in inventory in succession is not estopped from claiming title to such land, where he had no knowledge that he was appraising property in which he had an interest, and description in inventory is not on its face same as description in conveyance under which appraiser claims title.—Bayard v. Baldwin Lumber Co., 103 So. 290, 157 La. 994.

31. U S—Helis v. Ward, D C.La., 20 F.Supp. 514, reversed on other grounds, C.C.A., Ward v. Helis, 102 F.2d 519, rehearing denied 103 F.2d 519, certiorari granted Helis v. Ward, 60 S.Ct. 76, 308 U.S. 537, 84 L.Ed. 452, affirmed 60 S Ct. 283, 308 U.S. 365, 84 L.Ed. 327, rehearing denied 60 S.Ct. 385, 308 U.S. 640, 84 L.Ed. 531.
Ky.—Cavin v. Little, 281 S.W. 480, 213 Ky. 482.
Mass.—Washburn v. Campbell, 166 N. E. 861, 267 Mass. 285.
Or.—Oliver v. Burg, 58 P.2d 245, 154 Or. 1.
Tenn.—Hair v. Farrell, 103 S.W.2d 918, 21 Tenn.App. 12.
Wash.—Chas. M. Thomsen Holding Corporation v. Queen City Broadcasting Co., 62 P.2d 1340, 188 Wash. 524.
21 C.J. p 1239 note 68.

32. Ky.—Warfield Natural Gas Co. v. Ward, 149 S.W.2d 705, 286 Ky. 73.
Mass.—Howe v. Johnson, 128 N.E. 634, 236 Mass. 379.
Wash.—U. S. Fidelity & Guaranty Co. v. Port of Seattle, 13 P.2d 33, 169 Wash. 19.
21 C.J. p 1239 note 69.

33. Wash.—Carroll v. Hill Tract Impr. Co., 87 P. 835, 44 Wash. 569.
21 C.J. p 1239 note 70.

34. Mich.—Felt v. Methodist Educational Advance, 232 N.W. 178, 251 Mich. 512.

35. Tex.—Stanolind Oil & Gas Co. v. State, Civ.App., 114 S.W.2d 699, reversed on other grounds, Sup., 133 S.W.2d 767, modified on other grounds 145 S.W.2d 569.
21 C.J. p 1239 note 64 [a].
Estoppel by deed against grantee see supra § 15.

36. N.M.—Hoskins v. Talley, 220 P. 1007, 29 N.M. 173.

37. La.—Morotock Mfg. Co. v. Britt & Norris, 1 La.App. 692.

38. U.S.—Gruber v. Savannah River Lumber Co., C.C.A.S.C., 2 F.2d 418.
La.—American Nat. Bank v. Klein, 116 So. 889, 166 La. 216.
Mich.—McCurdy v. Van Os, 287 N. W. 890, 290 Mich. 492, 125 A.L.R. 966.
N.C.—Watford v. Pierce, 124 S.E. 838, 188 N.C. 430.
Or.—Foley v. Bouvy, 75 P.2d 14, 158 Or. 327.
21 C J. p 1239 note 71.

Registration of motor vehicle
One who has intentionally registered motor vehicle in his own name, even though in another state, when sued after accident, cannot prove that he never owned vehicle. —Shuba v. Greendonner, 2 N.E.2d 536, 271 N.Y. 189, reversing 283 N.Y. S. 297, 245 App.Div. 566.

39. Mass.—Woburn v. Henshaw, 101 Mass. 193, 3 Am.R. 333.
21 C.J. p 1239 note 72.

40. N.Y.—Melenky v. Melen, 200 N. Y.S. 730, 206 App.Div. 46, modifying 198 N.Y.S. 932, 206 App.Div. 649, and certified questions answered McSweeney v. Melen, 142 N.E. 324, 236 N.Y. 660.
21 C.J. p 1240 note 73.

41. Vt.—Ripley v. Yale, 19 Vt. 156.

42. Ky.—Martin v. Reynolds, 9 Dana 328.

43. Mo.—Mattison v. Ausmuss, 50 Mo. 551.
21 C.J. p 1240 note 76.

other, to deny that title until he has given up the possession so acquired.

One who takes possession of property in subordination to another's title is ordinarily estopped as against that other to deny that title until he has given up the possession so acquired.[44] The rule applies to one who takes an assignment of personal property, expressly subject to a mortgage, and obtains possession under such assignment;[45] to one who, under a contract of loan, agreed to repay a certain sum of money borrowed;[46] and to one who takes or holds possession under a contract of purchase.[47] The rule applies with equal force to a person who continues a possession antecedently held by him with the consent of the party whose title is in question.[48]

However, the estoppel lasts no longer than does the possession so acquired and on which it is founded,[49] and it extends only to the part of the premises actually occupied.[50]

§ 128. Claim under Written Instrument

A person cannot claim both under and against the same instrument.

A person cannot claim both under and against the same instrument.[51] Where the source of title asserted by both parties is the same, and plaintiff claims under a mortgage foreclosure while defendant claims through the mortgagor's will which contained the same description as the mortgage, defendant who had accepted surplus money from the foreclosure sale is estopped from asserting that the property described in the mortgage was not that which he occupied.[52]

§ 129. Requests

A person who requests another to act in a particular manner is estopped to take any position inconsistent with his request to the prejudice of the person so induced to act.

Where a person has acted or refrained from acting in a particular manner on the request of another, the latter is estopped to take any position inconsistent with his own request to the prejudice of the person so induced to act.[53]

However, a party who requests service from a public utility company after such company has without permission constructed its lines across his land is not estopped from asserting any rights he may have had prior to such request;[54] and the fixing of rates by a public service commission as requested by a railroad company does not estop the company subsequently from seeking to enjoin the enforcement of the order of the commission.[55]

44. Ill.—Redmond v. Gillis, 178 N.E. 504, 346 Ill. 223.
La.—Johnson v. Hinds, App., 199 So. 149.
21 C.J. p 1240 note 77.
Estoppel of:
Attorney to deny client's right to funds collected see Attorney and Client § 153.
Auctioneer to assert title see Auctions and Auctioneers § 13 a.
Bailee to deny bailor's title see Bailments § 21.
Purchaser to deny vendor's title see the C.J.S. title Vendor and Purchaser § 280, also 66 C.J. p 1030 note 34—p 1031 note 60.
Receiptor to deny debtor's title see Attachment § 298 c (2).
Tenant to deny landlord's title see the C.J.S. title Landlord and Tenant §§ 266–280, also 35 C.J. p.1224 note 40 et seq.
Vendor to deny purchaser's title see the C.J.S. title Vendor and Purchaser § 280, also 66 C.J. p 1031 note 62.

45. N.Y.—Jones v. Howell, 26 N.Y. Super. 438.

46. Philippine.—Ferrer v. Neri, 9 Philippine 324.

47. N.C.—Love v. Edmonston, 23 N. C. 152.

48. N.C.—Campbell v. Everhart, 52 S.E. 201, 139 N.C. 503.
21 C.J. p 1240 note 81.

49. N.C.—Campbell v. Everhart, supra.
21 C.J. p 1240 note 82.

50. U.S.—Childs v. U. S., C.C.A.La., 5 F.2d 816.
Okl.—Bilby v. Harrison, 227 P. 407, 100 Okl. 67.

51. Ky.—Jeffries v. Hignite, 266 S. W. 901, 206 Ky. 50.
Estoppel by prior acts, claims, or conduct inconsistent with a right claimed under a written instrument see supra § 108.
Validity of bond for title
Where a married woman gave a bond for title which at the time was voidable, such bond could not be claimed by her heirs to be valid for the purpose only of making the purchaser's entry permissive and preventing him from acquiring title by adverse possession, but not valid in other respects so as to entitle the purchaser thereunder to a deed on completing payments.—Longino v. Smith, 249 S.W. 557, 158 Ark. 162.

52. Mo.—Miller v. Halleran, 270 S. W. 427, 219 Mo.App. 195.
Estoppel by acceptance of benefits to repudiate obligations under a written instrument see supra § 110.

53. U.S.—Skelton v. Federal Surety Co., C.C.A.Kan., 15 F.2d 756—Bettis v. Patterson-Ballagh Corporation, D.C.Cal., 16 F.Supp. 455, appeal dismissed, C.C.A., 97 F.2d 992.
Ark.—Drainage Dist. No. 7, Poinsett County, v. Exchange Trust Co., 2 S.W.2d 32, 175 Ark. 934, reversed in part on other grounds Exchange Trust Co. v. Drainage Dist. No. 7, Poinsett County, 49 S.Ct. 180, 278 U.S. 579, 73 L.Ed. 517, and affirmed in part 49 S.Ct. 181, 278 U.S. 421, 73 L.Ed. 436.
Cal.—Fawkes v. Farm Lands Inv. Co., 297 P. 47, 112 Cal.App. 374.
Ky.—James v. Deskins, 129 S.W.2d 129, 278 Ky. 580.
Miss.—Virden v. Staple Cotton Discount Corporation, 198 So. 63.
N.C.—Dixson v. C. E. Johnson Realty Co., 183 S.E. 382, 209 N.C. 354.
Or.—First Nat. Bank v. U. S. Fidelity & Guaranty Co., 271 P. 57, 62, 127 Or. 147, quoting **Corpus Juris**—First Nat. Bank v. Bell, 268 P. 63, 125 Or. 598.
Tex.—San Saba County Water Control & Improvement Dist. No. 1 v. Sutton, Civ.App., 8 S.W.2d 319, reversed on other grounds, Com.App., 12 S.W.2d 134, 70 A.L.R. 1255.
Va.—C. S. Luck & Sons v. Boatwright, 162 S.E. 53, 157 Va. 490.
21 C.J. p 1204 notes 24–25.
One who invites error is estopped from complaining of it.—Rossi v. Hammons, 268 P. 181, 34 Ariz. 95.

54. Vt.—West River Power Co. v. Bussino, 11 A.2d 263.

55. U.S.—Bush v. Texas & P. Ry. Co., D.C.La., 290 F. 1008.

VII. OPERATION AND EFFECT OF EQUITABLE ESTOPPEL

A. PERSONS AFFECTED

§ 130. To Whom Available

An equitable estoppel may be claimed by a party or privy, but not by a stranger or volunteer.

While it has been stated that titles by estoppel, not of record, have no effect except between the parties,[56] ordinarily estoppels in pais are available in favor of privies,[57] provided the privity is created after the event out of which the estoppel arises,[58] and provided the elements of such estoppel are present.[59] However, the mere fact of privity does not, of itself, entitle one to succeed to the right of estoppel.[60] Estoppels operate only between parties and their privies, either in blood, in estate, or in law.[61] A volunteer[62] or stranger to the subject matter made the basis of a claim of estoppel[63] cannot avail himself thereof. Likewise, a person who

56. La.—Brewer v. Wright, 58 So. 160, 130 La. 491.

57. Conn.—Hartford Realization Co. v. Travelers' Ins. Co., 167 A. 728, 731, 117 Conn. 218, citing **Corpus Juris.**
Ky.—Wells v. Burton, 221 S.W. 513, 188 Ky. 281.
Mo.—Roberts v. Adkins, 5 S.W.2d 70, 319 Mo. 787—City of Hardin v. Ferguson, 227 S.W. 1056, 285 Mo. 466—City of Hardin v. Cunningham, 226 S.W. 872, 874, 285 Mo. 457, citing **Corpus Juris.**
N.Y.—In re Healey's Will, 291 N.Y.S. 772, 161 Misc. 298.
Or.—Security Savings & Trust Co. v. Portland Flour Mills Co., 261 P. 432, 124 Or. 276.
Pa.—Miller v. Chester-Cambridge Bank & Trust Co., 28 Del.Co. 425.
Tex.—Farmers State Bank in Merkel v. Largent, Civ.App., 132 S.W. 2d 482, error refused.
21 C.J. p 1179 note 30.

Reason for rule

A person in privity is entitled to the benefit of an estoppel because he comes in after the fact creating the estoppel by succession or representation to the original title or interests.—Masten v. Olcott, 4 N.E. 274, 101 N.Y. 152.

Cotrustees

An estoppel against one trustee who is also the life tenant and remainderman with an optional general testamentary power of appointment, inures to the benefit of his cotrustees.—Brown v. Fidelity Union Trust Co., 9 A.2d 311, 126 N.J.Eq. 406.

Grantor and grantee

(1) One purchasing land from another who was entitled to invoke an estoppel as against claimants thereto may himself rely on the estoppel.
Ky.—Wabash Drilling Co. v. Ellis, 20 S.W.2d 1002, 230 Ky. 769—Lockhart v. Kentland Coal & Coke Co., 207 S.W. 18, 182 Ky. 673.
N.Y.—Ball v. Ball, 244 N.Y.S. 300, 137 Misc. 693.
21 C.J. p 1179 note 30 [b].

(2) The subsequent grantees of realty acquired by them through succession in the chain of title stood in same position as original grantee and were in "privity" with him, as respects their right to set up estoppel as defense to claim of vested remainderman who had not joined in original conveyance.—Bailey v. Stedronsky, 13 N.E.2d 588, 57 Ohio App. 265.

(3) A mortgagee under foreclosed mortgage was deemed to be a "grantee" in chain of title from original grantee of land covered by mortgage, as respects mortgagee's right to set up estoppel as defense to claim of vested remainderman who had not joined in original conveyance.—Bailey v. Stedronsky, supra.

Seller

Seller of stumpage may intervene and recover cost of stumpage in buyer's suit against subpurchaser permitted to hold out cost of stumpage, where buyer acquiesced in subpurchaser holding out such amount.—Firment v. Eicher-Woodland Lumber Co., 5 La.App. 741.

58. N.Y.—Campbell v. Hall, 16 N.Y. 575—Ball v. Ball, 244 N.Y.S. 300, 137 Misc. 693.

59. Tex.—Allen v. Hall, Civ.App., 52 S.W.2d 661.
Elements of equitable estoppel see supra §§ 67–77.

Absence of change of position

Where grantor, on death of grantee, was one of commission to partition land among his heirs, the fact grantor that did not, in such proceedings, assert reservation of one half of mineral interest in land, did not entitle such heirs at law, or their privies in estate, later to assert estoppel to claim interest in minerals against grantor or his privies in estate.—Central Bank & Trust Co. v. Wyatt, 131 S.E. 311, 191 N.C. 133.

Knowledge of facts

Purchaser of vendor's lien notes with notice of release of lien could not claim estoppel of payee to release lien where his predecessors in interest could not claim estoppel.—Allen v. Hall, Tex.Civ.App., 52 S.W. 2d 661.

Nonreliance

(1) An oral waiver by vendor in contract of sale of land of a condition that vendee could not assign his contract without written consent of the vendor was not available to an assignee of the vendee who had no knowledge of such waiver prior to the assignment.—Boyd v. Bondy, 194 P. 393, 113 Wash. 384.

(2) Corporation, which purchased property without knowledge of assurance given by mortgagee to former owner as to possession, could not in its own right claim mortgagee was estopped to take possession.—Hartford Realization Co. v. Travelers' Ins. Co., 167 A. 728, 117 Conn. 218.

60. Conn.—Hartford Realization Co. v. Travelers' Ins. Co., supra.

Termination of estoppel

Estoppel of mortgagee by representations to former owner's receiver that mortgagee would not disturb receiver's possession came to end when property was sold, and purchaser could not rely on estoppel.—Hartford Realization Co. v. Travelers' Ins. Co., supra.

61. Cal.—People v. Main, 242 P. 1078, 1083, 75 Cal.App. 471, citing **Corpus Juris**—In re Hurley's Estate, 83 P.2d 61, 28 Cal.App.2d 584.
Ill.—Metcoff v. Dahlquist, 252 Ill. App. 222.
N.Y.—Campbell v. Hall, 16 N.Y. 575.
Okl.—Oklahoma City v. Pratt, 95 P. 2d 596, 185 Okl. 637—Guy Harris Buick Co. v. Bryant, 233 P. 752, 108 Okl. 117—Fay State Bank v. Boster, 224 P. 513, 98 Okl. 151—Condit v. Condit, 168 P. 456, 66 Okl. 215.
21 C.J. p 1180 note 32.

62. Ind.—Thompson v. Thompson, 9 Ind. 323, 68 Am.D. 638.
21 C.J. p 1180 note 33.

63. U.S.—Federal Land Value Ins. Co. v. Taylor, C.C.A.Cal., 56 F.2d 351—Starrett Corporation v. Fifth Ave. & Twenty-Ninth St. Corporation, D.C.N.Y., 1 F.Supp. 868.
Cal.—People v. Main, 242 P. 1078, 1083, 75 Cal.App. 471, citing **Corpus Juris.**
Ill.—Long v. Burnside, 14 N.E.2d 660, 295 Ill.App. 82.

is not a good-faith purchaser of a note and mortgage cannot claim an estoppel against the real and equitable owner of the note and mortgage.[64] A trustee to whom the owner of property has made a conveyance and who subsequently leased the property back to the owner cannot assert an estoppel against the owner to deny that the transaction was a mortgage, although it issued a prospectus asserting title to the fee was held by the trustee subject to a lease to the owner based on information supplied by the owner.[65]

In order that an estoppel by conduct may be asserted, the representation relied on must have been made to the party by whom or through whom the estoppel is set up,[66] with the purpose of influencing his conduct,[67] or it must have been of such a nature and have been made under such circumstances that the party making it must be taken to have contemplated that it would be communicated to, and acted on by, the other party.[68] When a representation is so general in its terms, or made under such circumstances, as to indicate that it was intended to reach and influence third persons or the community at large, the estoppel may be carried sufficiently far to protect every one who shall have innocently acted on, or been governed by, it.[69]

One who has himself expressly repudiated a contract cannot claim that the other party to the contract is estopped from alleging that the contract had been abandoned.[70]

Mass.—Brady v. Brady, 130 N.E. 677, 238 Mass. 302.

Minn.—Makiesky v. National Guardian Life Ins. Co., 219 N.W. 864, 174 Minn. 554.

Neb.—In re Mattingly's Estate, 270 N.W. 487, 494, 131 Neb. 891, citing **Corpus Juris.**

Pa.—Antone v. New Amsterdam Casualty Co., 6 A.2d 566, 335 Pa. 134.

Tenn.—Bell v. The Maccabees, 82 S.W.2d 229, 18 Tenn.App. 641.

Tex.—Superior Brewing Co. v. Curtis, Civ.App., 116 S.W.2d 853, 855, citing **Corpus Juris.**

21 C.J. p 1180 note 34.

Representations to commercial agency see the C.J.S. title Mercantile Agencies § 6, also 40 C.J. p 640 notes 57–62.

Want of privity

Purchasers of bonds and their successors claiming estoppel were not in privity with stockholder's employee and representative of bond underwriter to whom stockholder made representations to induce sale of bonds.—Security Savings & Trust Co. v. Portland Flour Mills Co., 261 P. 432, 124 Or. 276.

Acquiescence or ratification

A stranger to the transaction is not entitled to avail himself of acquiescence or ratification.—Wood v. White Eagle Oil & Refining Co., 274 S.W. 894, 900, 220 Mo.App. 1004, citing **Corpus Juris**—21 C.J. p 1218 note 83.

Judicial proceeding

(1) Generally, position taken in a former suit does not work estoppel in subsequent suit in favor of stranger.—Hatten Realty Co. v. Baylies, 290 P. 561, 42 Wyo. 69, 72 A.L.R. 587.

(2) Admission in deposition by defendant's predecessor, in other litigation to which predecessors in interest of plaintiff were not parties, does not operate as estoppel in plaintiff's favor.—Central Main Power Co. v. Rollins, 138 A. 170, 126 Me. 299.

Release of vendor's lien

Where vendor's lien notes, although paid, were transferred without recourse to person designated by maker, payee could not be estopped to release lien of record as to person who then had no interest in notes—Allen v. Hall, Tex.Civ.App., 52 S.W.2d 661.

64. Iowa.—Harris v. Warner, 203 N.W. 279, 199 Iowa 1000.

65. U.S.—In re Euclid Doan Co., C.C.A.Ohio, 104 F.2d 712, certiorari denied National City Bank of Cleveland v. Euclid-Doan Co., 60 S.Ct. 291, 308 U.S. 619, 84 L.Ed. 517.

66. Cal.—National Bank of California at Los Angeles v. Exchange Nat. Bank of Long Beach, 199 P. 1, 186 Cal. 172—In re Hurley's Estate, 83 P.2d 61, 28 Cal.App.2d 584—People v. Main, 242 P. 1078, 75 Cal.App. 471

D.C.—Washington Loan & Trust Co. v. Blair, 75 F.2d 671, 64 App.D.C. 152.

Idaho.—Leland v. Isenbeck, 1 Idaho 469.

N.Y.—Winchester-Simmons Co. v. Simmons, 227 N.Y.S. 408, 222 App.Div. 639.

Or.—Security Savings & Trust Co. v. Portland Flour Mills Co., 261 P. 432, 124 Or. 276.

Tex.—Bernard v. Jefferson County Inv. & Bldg. Ass'n, 95 S.W.2d 1307, 128 Tex. 97, affirming, Civ.App., 65 S.W.2d 503.

21 C.J. p 1181 note 35.

Representations to one not an agent

Plaintiffs who made representations to defendant's wife are not estopped to deny defendant's right to have the wife's testimony of such representations received, where the wife was not their agent.—Christian & Taylor v. Fancher, 235 S.W. 397, 151 Ark. 102.

67. Cal.—National Bank of California at Los Angeles v. Exchange Nat. Bank of Long Beach, 199 P. 1, 186 Cal. 172.

21 C.J. p 1181 note 36.

68. Cal.—National Bank of California at Los Angeles v. Exchange Nat. Bank of Long Beach, 199 P. 1, 186 Cal. 172—Parker v. Funk, 197 P. 83, 185 Cal. 347.

D.C.—Washington Loan & Trust Co. v. Blair, 75 F.2d 671, 64 App.D.C. 152.

Or.—Security Savings & Trust Co. v. Portland Flour Mills Co., 261 P. 432, 124 Or. 276.

21 C.J. p 1181 note 37.

Strangers

(1) Where representations were not made to, or intended for, benefit of party seeking to predicate an estoppel thereon, or where the representations are not general or intended to influence third persons, the public at large, or persons occupying a relation to the subject matter of the representations similar to that of him to whom they were made, no estoppel arises of which third person may take advantage.—Farmers' State Bank of Gladstone v. Anton, 199 N.W. 582, 585, 51 N.D. 202, citing **Corpus Juris.**

(2) Other cases see Morgan v. Spangler, 14 Ohio St. 102—21 C.J. p 1181 note 36 [c].

69. Cal.—National Bank of California at Los Angeles v. Exchange Nat. Bank of Long Beach, 199 P. 1, 186 Cal. 172.

Colo.—Crosby v. First Nat. Bank, 76 P.2d 734, 737, 102 Colo. 43, citing **Corpus Juris.**

La.—Richard v. City of New Orleans, 197 So. 594, 195 La. 898.

Ohio.—Rubbo v. Hughes Provision Co., 36 N.E.2d 144, 148, 67 Ohio App. 123, quoting **Corpus Juris,** and affirmed 34 N.E.2d 202, 138 Ohio St. 178.

21 C.J. p 1181 note 38.

70. Mo.—Oak Grove Home Tel. Co. v. Round Prairie Tel. Co., App., 209 S.W. 552.

§ 131. Against Whom Available Generally

Parties and privies may be subject to an estoppel in pais, and there is authority holding that the estoppel may be claimed against any person responsible for a representation although he is not jointly interested in the transaction.

Estoppels in pais are available against parties and privies,[71] provided the privity is created after the event out of which the estoppel arises.[72] However, the rule applies, it has been held, only when subsequent parties represent the rights and estate of the party who created the estoppel and nothing more, and does not apply to a party who, in the process of transferring real estate, has acquired a better title than his predecessor had.[73] An estoppel may be asserted, it has been held, against any person responsible for a statement or representation, although he may not be jointly interested in the enterprise or transaction.[74]

§ 132. Heirs and Personal Representatives

Heirs, next of kin, devisees, and personal representatives are bound by an equitable estoppel existing against the ancestor; but this is true of heirs only when they claim in the same right, and personal representatives of an insolvent estate, when representing the creditors, are not bound by such estoppel.

An heir stands in privity with the ancestor;[75] and an estoppel in pais enforceable against the ancestor is likewise enforceable against the heirs.[76] How-

71. U.S.—Beeler v. Motter, D.C.Kan., 33 F.2d 788—National Cash Register Co. v. Remington Arms Co., D.C.Del., 283 F. 196, affirmed, C. C A., 286 F. 367.

Ala.—Watt v. Lee, 191 So. 628, 238 Ala. 451—Bromberg v. First Nat. Bank, 178 So. 48, 235 Ala. 226—Gable v. Kinney, 121 So. 511, 219 Ala. 150.

Fla.—La Mar v. Lechlider, 185 So. 833, 135 Fla. 703—Smith v. Urquhart, 176 So. 787, 129 Fla. 742—Marion Mortgage Co. v. Grennan, 143 So. 761, 106 Fla. 913, 87 A.L.R. 1492—McAdoo v. Moses, 132 So. 638, 101 Fla. 936—Tilman v. Niemira, 127 So. 855, 99 Fla. 833—Watkins v. Emmerson, 102 So. 10, 88 Fla. 86.

Idaho.—Kilpatrick Bros. Co. v. Campbell, 281 P. 471, 48 Idaho 194.

Ill.—Greer v. Carter Oil Co., 25 N.E. 2d 805, 373 Ill. 168.

Ky.—Wabash Drilling Co. v. Ellis, 20 S.W.2d 1002, 230 Ky. 769.

Md.—Johnson v. Long, 199 A. 459, 465, 174 Md. 478, citing **Corpus Juris.**

Ohio.—Lubric Oil Co. v. Drawe, 160 N.E. 93, 26 Ohio App. 478.

Or.—Security Savings & Trust Co. v. Portland Flour Mills Co., 261 P. 432, 124 Or. 276.

Pa.—Morrett v. Fire Ass'n of Philadelphia, 108 A. 171, 265 Pa. 9.

Philippine.—Gutierrez Repide v. Sackermann, 46 Philippine 897.

S.C.—Thompson v. Hudgens, 159 S. E. 807, 161 S.C. 450.

21 C.J. p 1181 note 40.

Reason for rule

A person in privity is bound by an estoppel because he comes in after the fact creating the estoppel by succession or representation to the original title or interests.

N.Y.—Masten v. Olcott, 4 N.E. 274, 101 N.Y. 152.

N.C.—Citizens' Sav. Bank & Trust Co. v. White, 126 S.E. 745, 747, 189 N.C. 281, quoting **Corpus Juris.**

"Privity" as including participants in profits

"Privity" implies coöperation, but it also includes the thought of sharing or participating in profits from the act out of which estoppel arises. —American Machinery Co. v. Everedy Mach. Co., D.C.Pa., 35 F 2d 526.

Remaindermen

(1) Estoppel, will not run against remainderman, prior to the termination of the life tenancy where life tenant's conduct is consistent with duty toward remainderman.—Mullan v. Bank of Pasco County, 133 So. 323, 101 Fla. 1097—Commercial Bldg. Co. v. Parslow, 112 So. 378, 93 Fla. 143.

(2) However, this rule may not apply where it is shown that the remainderman had actual knowledge of a repudiation or abandonment by the life tenant of his status, and of the holding by him of the property under a different or adverse right, or where the life tenant in good faith and to the knoweldge of the remainderman claims title through sources other than as life tenant, or where there has been an ouster and disseisin of the life tenant or by one claiming through or under him under a claim of right or color of title followed by adverse possession for the statutory period, or where there is some special independent equity in favor of the purchaser who claims under a conveyance from the life tenant.—Mullan v. Bank of Pasco County, supra—Commercial Bldg. Co. v. Parslow, supra.

(3) A vested remainderman who, with knowledge of state of his title, permitted sale of his property by life tenant and received consideration therefor, is estopped from thereafter asserting his title not only against life tenant's immediate grantee, but against all those in privity with immediate grantee, including a mortgagee under foreclosed mortgage executed by remote grantee of property. —Bailey v. Stedronsky, 13 N.E.2d 588, 57 Ohio App. 265.

Prior position in judicial proceeding

(1) Sheriff undertaking to forfeit bail bond by judgment nisi estopped those accepting payment of money thereunder to deny validity.—Turley v. Tobin, Tex.Civ.App., 7 S.W.2d 949, error refused.

(2) A real party in interest, although not one of record, is estopped in a subsequent judicial proceeding against the same adverse parties on the same question to take a position in conflict with his former position to the prejudice of such adverse parties.—Amburgey v. Adams, 245 S.W. 514, 196 Ky. 646.

Surety on district clerk's bond, subrogated to school district in suing bank for conversion, was bound by estoppel against school directors arising from long acquiescence.—New Amsterdam Casualty Co. v. Robertson, 278 P. 963, 129 Or. 663, 64 A.L.R. 1396.

72. N.Y.—In re Farley, 111 N.E. 479, 217 N.Y. 105—Masten v. Olcott, 4 N.E. 274, 101 N.Y. 152.

73. N.Y.—Lyon v. Morgan, 38 N.E. 960, 143 N.Y. 505, affirming 19 N. Y.S. 201, 64 Hun 111.

74. Ill.—Dazey v. Binkley, 121 N.E. 165, 285 Ill. 513.

75. Cal.—In re Davis' Estate, 101 P.2d 761, 38 Cal.App.2d 579, rehearing denied 102 P.2d 545, 38 Cal. App.2d 579.

Ky.—Ginn's Adm'x v. Ginn's Adm'r, 32 S.W.2d 971, 236 Ky. 217.

Neb.—Jorgensen v Crandell, 277 N. W. 785, 791, 134 Neb. 33, citing **Corpus Juris.**

S.C.—Thompson v. Hudgens, 159 S.E. 807, 161 S.C. 450.

S.D.—Ford v. Ford, 124 N.W. 1108, 24 S.D. 644.

76. U.S.—Commodores Point Terminal Co. v. Hudnall, D.C.Fla., 283 F. 150.

Ala.—Watt v. Lee, 191 So. 628, 238 Ala. 451—Bell v. Moss, 183 So. 424, 236 Ala. 437.

Ark.—Ripley v. Kinard, 244 S.W. 3, 155 Ark. 172.

ever, the heirs are not estopped where the elements of equitable estoppel are not present,[77] and they are not bound by an estoppel against the ancestor where they do not claim in the same right.[78] A forced heir is not estopped by the acts or conduct of his ancestor.[79]

Next of kin. Where an equitable estoppel exists against the ancestor, the next of kin are likewise estopped.[80]

Devisees. Devisees are bound by any transaction that was binding on the testator in his lifetime as affecting his title.[81]

Personal representatives. In cases in which a decedent would be estopped, his personal representatives ordinarily will be estopped in the same manner and to the same extent.[82] However, where the es-

Cal.—In re Davis' Estate, 101 P.2d 761, 38 Cal.App.2d 579, rehearing denied 102 P.2d 545, 38 Cal.App.2d 579.

Colo.—Klein v. Munz, 286 P. 112, 87 Colo. 223.

Kan.—Brown v. Parmalee, 285 P. 563, 130 Kan. 165.

Ky.—Gillig v. Stofer, 130 S.W.2d 762, 279 Ky. 349—Alcorn v. Superior Oil Corporation, 53 S.W.2d 528, 245 Ky. 343—Ginn's Adm'x v. Ginn's Adm'x, 32 S.W.2d 971, 236 Ky. 217—Hargis v. Flesher Petroleum Co., 21 S.W.2d 818, 231 Ky. 442—Bogard v. Hindman, 139 S.W. 1058, 145 Ky. 11.

La.—Jackson v. Creswell, 86 So. 329, 147 La. 914—Blunson v. Knighton, App., 140 So. 302.

Me.—Stearns v. Thompson, 186 A. 800, 134 Me. 352, 107 A.L.R. 305.

Mich.—Stone v. Culver, 282 N.W. 142, 286 Mich. 263, 119 A.L.R. 512.

Mo.—Schneider v. Schneider, 224 S.W. 1, 284 Mo. 314—Cape County Sav. Bank v. Wilson, 34 S.W.2d 981, 225 Mo.App. 14.

Neb.—Jorgensen v. Crandell, 277 N.W. 785, 791, 134 Neb. 33, citing **Corpus Juris.**

N.Y.—People v. Foote, 252 N.Y.S. 676, 141 Misc. 409, affirmed 273 N.Y.S. 567, 242 App.Div. 162, motion denied 5 N.E.2d 362, 272 N.Y. 622, appeal dismissed 7 N.E.2d 728, 273 N.Y. 629, and 7 N.E.2d 729, 273 N.Y. 630, certiorari denied Foote v. People of State of New York, 58 S.Ct. 367, 302 U.S. 760, 82 L.Ed. 588.

N.C.—Allen v. Allen, 195 S.E. 801, 213 N.C. 264.

Okl.—Chouteau v. Hoss, 246 P. 844, 118 Okl. 76.

S.C.—Watson v. Watson, 174 S.E. 33, 172 S.C. 362—Ellis v. Johnson, 141 S.E. 564, 143 S.C. 325.

Tex.—Jones v. Guy, 143 S.W.2d 906, 135 Tex. 398, affirming Guy v. Jones, Civ.App., 132 S.W.2d 490—Cubley v. Barbee, 73 S.W.2d 72, 123 Tex. 411, reversing Barbee v. Cubley, Civ.App., 25 S.W.2d 689—Davis v. Lund, Com.App., 41 S.W.2d 57, reversing, Civ.App., 26 S.W.2d 434—Smith v. Rickerts, Civ.App., 38 S.W.2d 644.

Va.—Hall v. Clinchfield Coal Corporation, 170 S.E. 564, 161 Va. 177—Johnson v. Powhatan Mining Co., 103 S.E. 703, 127 Va. 352.

21 C.J. p 1182 note 45.

Estoppel to assert invalidity of mortgage see the C.J.S. title Mortgages § 147, also 41 C.J. p 444 note 90.

Children of heir

Where a daughter by her acts estopped herself from claiming an interest in the father's land, as his heir, such estoppel was equally efficacious in its operation on her children.—Brownfield v. Bookout, 228 S.W. 51, 147 Ark. 555.

Doctrine of ratification

Although equitable estoppel may not apply, because claimants must not only be without knowledge, but without available convenient means of acquiring it, yet where claimants' father withheld a deed to himself and other promoters from record, accepting in lieu thereof a deed to the corporation, his heirs cannot be permitted to assume an inconsistent position and claim under such deed after his receiving benefits as promoter and stockholder.—Johnson v. Powhatan Mining Co., 103 S.E. 703, 127 Va. 352.

77. W.Va.—Millard v. Stepp, 5 S.E.2d 815, 121 W.Va. 662.

78. Iowa.—Evans v. Cole, 281 N.W. 230, 225 Iowa 756.

Mich.—Scholten v. Scholten, 214 N.W. 320, 238 Mich. 679.

Mo.—Boone v. Oetting, 114 S.W.2d 981, 342 Mo. 269.

Tex.—Mead v. King, Civ.App., 285 S.W. 832.

21 C.J. p 1182 note 46.

79. La.—Westmore v. Harz, 35 So. 578, 111 La. 305—Drewett v. Carnahan, App., 183 So. 103.

80. N.Y.—In re Smith's Will, 216 N.Y.S. 154, 217 App.Div. 701.

81. Iowa.—In re Mann's Estate, 208 N.W. 310, 201 Iowa 878.

Estoppel of devisees by acceptance of devise see the C.J.S. title Wills § 1149, also 69 C.J. p 969 note 25—p 974 note 74.

82. U.S.—Strickland v. Peters, C.C.A.Fla., 120 F.2d 53—New York Life Ins. Co. v. Brown, C.C.A.S.C., 99 F.2d 199, reversing, D.C., Brown v. New York Life Ins. Co., 22 F.Supp. 82, certiorari denied 59 S.Ct. 487, 306 U.S. 638, 83 L.Ed. 1039—Chattanooga Sav. Bank v. Brewer, D.C. Tenn., 9 F.2d 982, affirmed, C.C.A., 17 F.2d 79, certiorari denied 47 S.Ct. 764, 274 U.S. 751, 71 L.Ed. 1332.

Fla.—Crosby v. Burleson, 195 So. 202, 142 Fla. 443—Watson v. Phipps, 126 So. 778, 99 Fla. 568

Ga.—Burkhalter v. De Loach, 155 S.E. 513, 171 Ga. 384.

Idaho.—Moore v. Croft, 277 P. 425 426, 47 Idaho 568, citing **Corpus Juris.**

Ill.—Bittner v. Field, 188 N.E. 342, 354 Ill. 215, affirming Field v. Bittner, 267 Ill.App. 346.

La.—Jackson v. Gordon, App., 186 So. 399.

Mich.—Stone v. Culver, 282 N.W. 142, 286 Mich. 263, 119 A.L.R. 512.

Pa.—Krick v. Fairy Silk Co., 166 A. 554, 311 Pa. 202.

S.C.—Thompson v. Hudgens, 159 S.E. 807, 813, 161 S.C. 450, quoting **Corpus Juris.**

21 C.J. p 1182 note 48, p 1207 note 39.

Estoppel to claim property

Husband as administrator is estopped to claim property as that of deceased wife, where her conduct permitted his representation as sole owner in mortgaging property.—Moore v. Croft, 277 P. 425, 47 Idaho 568.

Circumstances not creating estoppel or waiver

(1) Where father, in consideration of bank's extending son's notes until father's death, agreed not to modify bequest to son in father's will and bank's trustees sought to impress a trust on all of father's property for payment of notes, father's legal representatives were not estopped from claiming that son's indebtedness to father should be deducted from any bequest payable to son under will.—Evans v. Cole, 281 N.W. 230, 225 Iowa 756.

(2) Admission in account of executrix of shares of next of kin was not a waiver by executrix' representatives of right to claim entire estate of her deceased husband, where it did not appear that executrix knew of her rights as widow.—In re Knapp's Estate, 253 N.Y.S. 409, 141 Misc. 540.

(3) Other matters see In re Knapp's estate, supra.

tate is insolvent, an estoppel against deceased cannot be asserted against the personal representative who represents the creditors; in such case the only privity existing is between the personal representative and the creditors.[83]

Decedent's estate. Where the elements of equitable estoppel are not present, the estate of a decedent is not estopped to assert the invalidity of an obligation of decedent as a claim against the estate.[84] However, the acts of the personal representative may estop the estate from claiming property of deceased as assets of the estate.[85]

§ 133. Grantees, Mortgagees, and Their Assignees

Unless a grantee has, or should have, knowledge of the facts giving rise to an equitable estoppel against his grantor, he is not bound; and a mortgagee is not subject to an estoppel against the mortgagor, although the assignee of a mortgage is bound by the assignor's estoppel to assert the mortgage.

As a general rule a grantee will not be estopped by any act, conduct, or declaration of his grantor of which he has no notice,[86] or which is subsequent to his conveyance.[87] A common grantee of several grantors is not affected by an estoppel existing against only one of his grantors.[88]

However, the general rule has no application in the case of a mere volunteer.[89] An estoppel of a grantor by conduct to assert title to property extends to his grantee.[90] It has been held that one acquiring a claim to ownership of land by a quitclaim deed would stand in the shoes of his grantor as to an equitable estoppel against the grantor to assert title against parties in possession.[91] Where a grantee at the date of his purchase knew of the existence of the facts which operate as a bar to the claim of his grantor, this knowledge will bar him;[92] and this is the case where he has knowledge which would have put him on inquiry, such as would have led to a knowledge of the facts.[93]

83. Ala.—Mantle Lamp Co. of America v. Merrill, 113 So. 15, 216 Ala. 170.
N.H.—Starr v. Estey, 45 A. 590, 69 N.H. 619.
S.C.—Thompson v. Hudgens, 159 S.E. 807, 813, 161 S.C. 450, quoting **Corpus Juris.**
Wash.—National Grocery Co. v. Kotzebue Fur & Trading Co., 100 P.2d 408, 414, 3 Wash.2d 288, citing **Corpus Juris.**
Executor or administrator as representative of creditors see the C.J.S. title Executors and Administrators § 142, also 23 C.J. p 1170 note 15 et seq.

Representation of creditors as to realty

As regards intestate's realty, administrator stands in shoes of creditors, and has interest opposed to that of heirs at law, so that administrator is not in privity with intestate as regards estoppel relating to realty.—Thompson v. Hudgens, 159 S.E. 807, 161 S.C. 450.

Merger of mortgage

Although intestate was estopped to plead merger and extinction of mortgage pledged to secure loan, administrator was not so estopped.—Thompson v. Hudgens, supra.

84. Wis.—In re Smith's Estate, 277 N.W. 141, 226 Wis. 556.

Absence of change of position

Decedent's estate is not estopped to assert invalidity of decedent's note, made basis of claim against it, as without consideration and void promise to make gift, in absence of showing that payee changed her position in reliance thereon.—In re Smith's Estate, supra.

85. Tex.—Thomas v. Greer, 6 Tex. 372.

86. Fla.—Dade County v. South Dade Farms, 182 So. 858, 133 Fla. 288.
La.—Bayard v. Baldwin Lumber Co., 103 So. 290, 157 La. 994.
N.C.—Citizens' Sav. Bank & Trust Co. v. White, 126 S.E. 745, 747, 189 N.C. 281, quoting **Corpus Juris.**
Or.—Pacific Live Stock & Lumber Co. v. Portland Lumber Co., 189 P. 893, 96 Or. 567.
Tex.—Miller-Vidor Lumber Co. v. Schreiber, Civ.App., 298 S.W. 154.
Wash.—McFadden v. Allen-Nelson Mill Co., 272 P. 714, 150 Wash. 249.
Wis.—Moran v. Wilkinson, 247 N.W. 873, 876, 211 Wis. 669, citing **Corpus Juris.**
21 C.J. p 1183 note 50.

87. Ark.—Naill v. Kirby, 257 S.W. 735, 162 Ark. 140.
N.C.—Citizens' Sav. Bank & Trust Co. v. White, 126 S.E. 745, 747, 189 N.C. 281, quoting **Corpus Juris.**
21 C.J. p 1183 note 51.

88. N.Y.—Welsh v. Taylor, 31 N.E. 896, 134 N.Y. 450, 18 L.R.A. 535, reversing 7 N.Y.S. 376, 4 Silv.Sup. 340.

89. Cal.—Filipini v. Trobock, 62 P. 1066, 66 P. 587, 134 Cal. 441.
21 C.J. p 1183 note 53 [a].

90. Ark.—Rone v. Sawrey, 123 S.W. 2d 524, 197 Ark. 472.
N.Y.—Quigg v. Treadway, 225 N.Y.S. 415, 222 App.Div. 164, affirmed 164 N.E. 577, 249 N.Y. 543.

Where owner of land sold for taxes was estopped by his answer in the tax proceedings from attacking the deed, a remote grantee from him stands in no better light.—Marley v. Norman's Land & Mfg. Co., 232 S.W. 704, 289 Mo. 221.

91. Wis.—Haag v. Gorman, 234 N.W. 337, 203 Wis. 346.
21 C.J. p 1183 note 54.

92. Cal.—Burrow v. Carley, 290 P. 577, 210 Cal. 95.
N.H.—Keyes v. Baird, 190 A. 707, 88 N.H. 449.
N.Y.—Brighton Operating Corporation v. Morrison, 29 N.Y.S.2d 97, 262 App.Div. 895.
Or.—Clasen v. Kennedy, 266 P. 1073, 126 Or. 99.
Wis.—Moran v. Wilkinson, 247 N.W. 873, 876, 211 Wis. 669, quoting **Corpus Juris.**
21 C.J. p 1183 note 55.

Estoppel of grantor as determinative

Whether "privies in estate" of grantor were estopped by grantor's conduct to claim interest in minerals in land is to be considered precisely as if case had arisen between grantor and heirs of grantee.—Central Bank & Trust Co. v. Wyatt, 131 S.E. 311, 191 N.C. 133.

Purchasers assuming liability

Written statements, signed by owners of land, in which they agreed to release the United States government and chamber of commerce of a certain city from liability for damages to improvements on land of which the government had been in possession under lease, in consideration of amounts set forth in their respective statements, are binding as against purchasers of improvements made on land by the government, such purchasers having agreed, as a condition to such purchase, to assume the government's liability to the owners.—Lesser-Goldman Cotton Co. v. Fletcher, 239 S.W. 742, 183 Ark. 17.

93. U.S.—Jones Store Co. v. Dean, C.C.A.Mo., 56 F.2d 110, certiorari

Mortgagees and assignees. A mortgagor by his manner of dealing with the property cannot affect the mortgagee's rights, and his acquiescence or consent cannot prevent the mortgagee from having removed an illegal obstruction on a street in which the mortgagee has an easement.[94] Likewise, the conduct of a mortgagor's vendor, even when estopping the vendor, will not estop a bona fide mortgagee.[95]

However, it has been held that the assignee of a mortgage stands in no better position than his assignor who has estopped himself from setting up the mortgage,[96] although acts or declarations of the assignor subsequent to the assignment cannot affect the rights of the assignee.[97]

§ 134. Persons Acting in Representative Capacity

A person acting in a representative capacity is subject to equitable estoppel, although, with some exceptions, an act done in a representative capacity will not estop one in his individual capacity, and vice versa.

The doctrine of equitable estoppel applies to bind a person in a representative capacity.[98] Thus the receiver of an insolvent bank,[99] an assignee in bankruptcy,[1] or an attorney[2] will be estopped by acts or representations of those with whom they are in privity where the latter would have been estopped thereby. It has been held that estoppels affect parties to actions for the use of another.[3]

Except where the acts of one, who has a dual capacity as representative and individual, are so connected and associated that it is impossible to distinguish his actions in one capacity from the other,[4] or where the act performed in a representative capacity has resulted in individual profit,[5] an act done in a representative capacity will not estop one in his individual capacity,[6] and vice versa.[7] The conduct of officers of a corporation in their official capacity may nevertheless estop them from asserting their rights as individuals.[8]

denied Dean v. Jones Store Co., 52 S.Ct. 641, 286 U.S. 559, 76 L.Ed. 1292.

Kan.—Comstock v. Robertson, 83 P. 1104, 72 Kan. 465.

Wis.—Moran v. Wilkinson, 247 N.W. 873, 876, 211 Wis. 669, quoting **Corpus Juris.**

Bona fide purchaser at judicial sale is affected, to the same extent as the person whose title he buys, by an estoppel in pais which prevented the latter from asserting title.—Blackwood v. Davidson, 132 S.W.2d 799, 198 Ark. 1055.

94. Pa.—People's Nat. Bank v. Liquid Carbonic Co., 75 A. 677, 226 Pa. 503.

21 C.J. p 1183 note 57.

95. Wash.—Bovee v. Seiji Yamamoto, 209 P. 697, 121 Wash. 517.

96. Ind.—Maxon v. Lane, 24 N.E. 683, 124 Ind. 592.

21 C.J. p 1183 note 58.

97. Ga.—Rogers v. Lawrence, 3 S.E. 559, 79 Ga. 185.

21 C.J. p 1183 note 59.

98. U.S.—Beeler v. Motter, D.C.Kan., 33 F.2d 788.

99. Miss.—Nashville First Nat. Bank v. Bennett, 71 So. 169, 111 Miss. 26.

21 C.J. p 1183 note 60.

1. N.Y.—Wilson v. Parshall, 7 N.Y.S. 479.

21 C.J. p 1183 note 61.

Lack of knowledge as preventing estoppel

A bankruptcy trustee who intervened in executor's action on county clerk's bond for money embezzled by his chief deputy, was not estopped from recovering portion of embezzled funds which had been assigned to bankrupt by testator, merely because testator's attorney had learned of certain improprieties in deputy's handling of money while still in safe deposit box, especially in view of facts that it was stipulated that trustee had no notice of the acts or conduct which it was charged constituted the estoppel and that clerk knew of bankrupt's interest in the money prior to the acts of testator's attorney.—Union Bank & Trust Co. of Los Angeles v. Los Angeles County, 81 P.2d 919, 11 Cal.2d 675.

2. N.Y.—Scheidell v. Llewellyn Realty Co., 177 N.Y.S. 529.

Attorneys holding moneys of their client are estopped to attack his title, or deny the right of his creditors to have it applied to the satisfaction of their debts, on any ground not available to the client.—Cowing v. Greene, 45 Barb., N.Y., 585.

Denial of sufficiency of tender

An attorney, who represented a mortgagor in making a tender after institution of foreclosure proceedings to mortgagees, having ceased to be attorney for the mortgagor and having taken an assignment of the mortgage, is estopped from saying that the tender was insufficient, either as to principal, interest, or costs.—Scheidell v. Llewellyn Realty Co., 177 N.Y.S. 529.

3. Ky.—Peddicord v. Hill, 4 T.B. Mon. 370.

4. Va.—Thomasson v Walker, 190 S.E. 309, 168 Va. 247.

5. W.Va.—Yokum v. Yokum, 157 S.E. 579, 110 W.Va. 221.

6. U.S.—Rader v. Star Mill & Elevator Co., Okl., 258 F. 599, 169 C.C.A. 541.

Ala.—Mazer v. City Nat. Bank of Tuscaloosa, 146 So. 885, 886, 25 Ala. App. 372, quoting **Corpus Juris.**

Cal.—Boyles v. Leonardo, 224 P. 1115, 65 Cal.App. 215.

La.—Castleman v. Smith, 86 So. 778, 148 La. 233.

Tex.—Sigel v. Buccaneer Hotel Co., Civ.App., 40 S.W.2d 168, 177, citing **Corpus Juris.**

Va.—Thomasson v. Walker, 190 S.E. 309, 311, 168 Va. 247, quoting **Corpus Juris.**

21 C.J. p 1184 note 64.

Individual acts of executor or administrator as estoppel in representative capacity see the C.J.S. title Executors and Administrators § 150, also 21 C.J. p 1184 notes 64, 65.

Lien of stockholder against corporate property

A stockholder of a corporation, who held a valid vendor's lien on its real estate, is not estopped by the fact that he was a stockholder from asserting such lien as against a void mortgage, which the corporation attempted to make without his knowledge.—Rader v. Star Mill & Elevator Co., Okl., 258 F. 599, 169 C.C.A. 541.

7. Ala.—Mazer v. City Nat. Bank of Tuscaloosa, 146 So. 885, 886, 25 Ala. App. 372, quoting **Corpus Juris.**

Tex.—Sigel v. Buccaneer Hotel Co., Civ.App., 40 S.W.2d 168, 177, citing **Corpus Juris.**

21 C.J. p 1184 note 65.

8. Ky.—Jones v. Kentucky Glycerine Co., 11 S.W.2d 713, 226 Ky. 676.

§ 135. Cestuis Que Trust

An estoppel against the legal title holder binds an undisclosed cestui que trust.

An estoppel good against the holder of the legal title to land is good as against an undisclosed cestui que trust.[9]

§ 136. Strangers

An equitable estoppel is not available against strangers to the subject matter.

As stated in supra § 130, a stranger to the subject matter made the basis of a claim of estoppel cannot avail himself thereof; and by parity of reason an equitable estoppel is not operative against a stranger.[10]

§ 137. Creditors

The authorities disagree as to whether creditors are subject to an equitable estoppel against the debtor.

In some jurisdictions the view prevails that an estoppel which is operative against a debtor is also operative against his creditors.[11] In other jurisdictions the principles above stated have been repudiated and the rule seems to be laid down broadly that creditors are not bound by an estoppel against the debtor.[12]

§ 138. Estoppel against Public Government, and Public Officers

a. In general
b. Estoppel by statute or treaty

a. In General

An equitable estoppel ordinarily may not be invoked against a government or public agency functioning in its governmental capacity; but where the elements of an estoppel are present it may be asserted against the government when acting in its proprietary capacity.

While it has been asserted that estoppels against the public are little favored,[13] subject to limitations considered in this and subsequent sections, the doctrine of equitable estoppel may be invoked against public authorities as well as against private individuals.[14] As is sometimes stated, an equitable es-

Minn.—Wiedemann v. Brown, 250 N. W. 724, 190 Minn. 33.

9. Tenn.—Foster v. Jeffers, 205 S. W. 122, 140 Tenn. 446.
21 C.J. p 1184 note 66.

10. Ill.—Culver v. Village of Glencoe, 220 Ill.App. 97.
Ky.—O'Neal v. Turney's Ex'x, 300 S. W. 913, 222 Ky. 361.
La.—Arent v. Hunter, 133 So. 157, 171 La. 1059, certiorari denied Interstate Natural Gas Co. v. Arent, 52 S.Ct. 28, 284 U.S. 580, 76 L.Ed. 502—Pope v. Most Worshipful St. John's Grand Lodge, 121 So. 259, 9 La.App. 420.
Mich.—Noakes v. Noakes, 287 N.W. 445, 290 Mich. 231.
Miss.—Ravesies v. Martin, 199 So. 282.
Mo.—State ex rel. Terry v. Holtkamp, 51 S.W.2d 13, 330 Mo. 608—La Fon v. Davis, 254 S.W. 50—Pollard v. Ward, 233 S.W. 14, 289 Mo. 275, 20 A.L.R. 936.
N.C.—Citizens' Sav. Bank & Trust Co. v. White, 126 S.E. 745, 189 N.C. 281—Shew v. Call, 26 S.E. 33, 119 N.C. 450, 56 Am.S.R. 678.
Ohio.—Lubric Oil Co. v. Drawe, 160 N.E. 93, 26 Ohio App. 478.
Pa.—Antone v. New Amsterdam Casualty Co., 6 A.2d 566, 335 Pa. 134—In re Killeen's Estate, 165 A. 34, 310 Pa. 182—People's Nat. Bank of Washington v. Eagleson, 157 A. 687, 305 Pa. 337.
R.I.—Aronofsky v. Humes, 147 A. 749.
Pa.—Morrett v. Fire Ass'n of Philadelphia, 108 A. 171, 265 Pa. 9.
Tex.—Fine v. Pratt, Civ.App., 150 S. W.2d 308—Simms v. Mitchell, Civ. App., 44 S.W.2d 1056, reversed on other grounds Mitchell v. Simms, Com.App., 63 S.W.2d 371.
Utah.—Rich v. Stephens, 11 P.2d 295, 79 Utah 411.
21 C.J. p 1184 note 68.

Strangers to judicial proceeding
Persons who are not parties but strangers to judicial proceedings are in no way affected thereby.
Ala.—First Nat. Bank v. Burch, 188 So. 859, 863, 237 Ala. 680, quoting **Corpus Juris.**
Tex.—Clarkson v. Ruiz, Civ.App., 140 S.W.2d 206, error dismissed, judgment correct—American Surety Co. of New York v. Martinez, Civ. App., 73 S.W.2d 109, 113, citing **Corpus Juris,** error refused.
21 C.J. p 1221 note 13.

Estoppel against individual to deny legality of board
Although the government or municipality may be estopped by its acquiescence and recognition to deny the authority of a board to act, a private individual is not thereby estopped to deny the board's legality.—New Orleans v. New Orleans Ry. & Light Co., 82 So. 280, 145 La. 308.

Partner
Letters from builder who was owner's partner did not estop owner from denying authorization to modify plans.—Edwards v. Hall, 141 A. 638, 293 Pa. 97.

Pleading by another
That another's information stated that alleged incompetent was nonresident is not binding on informant alleging alleged incompetent was resident.—State ex rel. Terry v. Holtkamp, 51 S.W.2d 13, 330 Mo. 608.

Representation by superintendent
Company owning property and its lessor are not estopped by unauthorized statements of superintendent of lessee as to company's claim to property made before public sale.—Kentucky River Coal Corporation v. Williams, 10 S.W.2d 617, 226 Ky. 93.

11. Fla.—Marion Mortg. Co. v. Grennan, 143 So. 761, 106 Fla. 913, 87 A.L.R. 1492.
21 C.J. p 1185 note 69.

12. U.S.—Pullman Couch Co. v. Eshelman, C.C.A.N.C., 1 F.2d 885, certiorari denied 45 S.Ct. 197, 266 U. S. 631, 69 L.Ed. 478.
Tex.—Richardson v. Hughes, Civ. App., 146 S.W.2d 255, error dismissed, judgment correct.
21 C.J. p 1185 note 70.

Reasons for this view
As regards estoppel, there is no "privity" between debtor and creditor.—Thompson v. Hudgens, 159 S. E. 807, 812, 161 S.C. 450, citing **Corpus Juris**—21 C.J. p 1185 note 70 [a].

13. U.S.—The Falcon, D.C.Md., 19 F.2d 1009.
Ala.—Greenwood v. State, 161 So. 498, 499, 230 Ala. 405, citing **Corpus Juris**—Union Central Life Ins. Co. v. State, 147 So. 137, 226 Ala. 420.
Cal.—Pacheco v. Clark, App., 112 P. 2d 67.
Mo.—Hecker v. Bleish, 3 S.W.2d 1008, 1018, 319 Mo. 149, citing **Corpus Juris.**
Ohio.—State v. Fenn, 10 Ohio N.P., N.S., 325, affirmed 18 Ohio Cir.Ct., N.S., 375, 25 Ohio Cir.Dec. 75.
21 C.J. p 1186 note 72.

14. U.S.—Police Jury of Richland

toppel may be invoked against the United States, a state, a municipal corporation, or other governmental agency or instrumentality in respect of acts done in its proprietary or private capacity,[15] as distinguished from its governmental or public capacity in the strict scope of which it cannot be estopped;[16] and a failure to observe this distinction or to recognize and point out the absence of one or more of the essential elements of a perfect estoppel may be the reason for decisions and dicta which apparently deny this applicability of the doctrine of equitable estoppel,[17] especially as against a state or the United States,[18] for in some cases, it seems, the doctrine is less liberally applied against the United States or a state than it is against a municipal corporation.[19]

In some decisions it has been stated that the doctrine of estoppel in pais applies to the public only to the extent that it leaves the courts to decide the question by all the circumstances of the case and to hold the public estopped or not, as right and justice may require;[20] and where this view prevails

Parish v. Caldwell & Co., C.C.A. La., 26 F.2d 74.
Ala.—Brown v. Tuskegee Light & Power Co., 168 So. 159, 232 Ala. 361.
Ill.—Clokey v. Wabash Ry. Co., 187 N.E. 475, 353 Ill. 349.
21 C J. p 1186 note 77.

Discussion and reasons for rule

"In Iowa v. Carr, 191 F. 257, 266, 112 C.C.A. 177, quoted in 21 C.J. page 1186, we find: 'The great weight of authority, the stronger reasons and the settled rule upon this subject in the courts of the United States, is that . . . when a sovereignty submits itself to the jurisdiction of a court of equity and prays its aid, its claims and rights are judicable by every other principle and rule of equity applicable to the claims and rights of private parties under similar circumstances.'"—Brown v. Tuskegee Light & Power Co., 168 So. 159, 165, 232 Ala. 361.

Fraud as basis of estoppel

The doctrine of estoppel may be asserted against the government when it or its agents, acting within the scope of their authority, have been guilty of acts amounting to fraud and acted on in good faith by others to their detriment.—U. S. v. Standard Oil Co. of California, D. C.Cal., 20 F.Supp. 427.

15. U.S.—The Falcon, D.C.Md., 19 F.2d 1009.
Ala.—Madison County v. Williams, 183 So. 452, 455, 236 Ala. 470, citing **Corpus Juris.**
Colo.—Van Gilder v. City and County of Denver, 89 P.2d 529, 531, 104 Colo. 76, quoting **Corpus Juris.**
Ga.—City of East Point v. Upchurch Packing Co., 200 S.E. 210, 212, 58 Ga.App. 829, quoting **Corpus Juris.**
Or.—Ebell v. City of Baker, 299 P. 313, 319, 137 Or. 427, citing **Corpus Juris.**
Pa.—Appeal of Valicenti, 148 A. 308, 311, 298 Pa. 276, quoting **Corpus Juris**—City of New Castle v. Withers, 139 A. 860, 861, 291 Pa. 216, 57 A.L.R. 132, quoting **Corpus Juris.**
Wyo.—Seaman v. Big Horn Canal Ass'n, 213 P. 938, 940, 29 Wyo. 391, citing **Corpus Juris.**
21 C.J. p 1186 note 79.

16. Colo.—Armstrong v. Driscoll Const. Co., 110 P.2d 651—McKay v. Public Utilities Commission, 91 P.2d 965, 973, 104 Colo. 402, citing **Corpus Juris**—Van Gilder v. City and County of Denver, 89 P.2d 529, 531, 104 Colo. 76, quoting **Corpus Juris.**
Ga.—City of East Point v. Upchurch Packing Co., 200 S.E. 210, 212, 58 Ga.App. 829, quoting **Corpus Juris.**
Ill.—Benton v. Kaneville Community High School Dist. No. 147, 250 Ill. App. 6.
Kan.—Board of Com'rs of Sedgwick County v. Conners, 245 P. 1030, 1032, 121 Kan. 105, citing **Corpus Juris.**
Mass.—Attorney General v. City of Methuen, 129 N.E. 662, 236 Mass. 564.
Mo.—School Dist. No. 45 of Pemiscot County v. Correll, 286 S.W. 136, 220 Mo.App. 322
Or.—Ebell v. City of Baker, 299 P. 313, 319, 137 Or. 427, citing **Corpus Juris.**
Pa.—Appeal of Valicenti, 148 A. 308, 311, 298 Pa. 276, quoting **Corpus Juris**—City of New Castle v. Withers, 139 A. 860, 861, 291 Pa. 216, 57 A.L.R. 132, quoting **Corpus Juris.**
Tex.—Deutsch v. City of San Angelo, Civ.App., 73 S.W.2d 125.
W.Va.—City of Beckley v. Wolford, 140 S.E. 344, 346, 104 W.Va. 391, citing **Corpus Juris.**
21 C.J. p 1187 note 80, p 1186 note 79.

Departmental opinions, statements, and actions in respect of building requirements and factory operation in certain kinds of buildings may not, although misleading, serve as the basis of an estoppel against a public body since "there can be no estoppel against the public."—Delman, Inc., v. Connel, 252 N.Y.S. 319, 322, 140 Misc. 675, affirmed 266 N.Y.S. 968, 240 App. Div. 816.

Exercise of police power

(1) Neither the state nor its agent, the city, can estop itself from the exercise of police power in protecting the health and welfare of the people.—City of Hutchinson v. White, 233 P. 508, 117 Kan. 622.

(2) Neither contract nor prescription can be interposed to defeat the exercise of the police power, and much less can an estoppel in pais be invoked as against public interest.—Liles v. Creveling, 268 S.W. 625, 151 Tenn. 61.

Controversies between public bodies

Although estoppel may not generally be invoked against a public body acting in a governmental capacity, exceptions may be made where justice and right so require, as in the case of controversies between two classes of the public.—State ex rel. Consolidated School Dist. No. 2 of Pike County v. Haid, 41 S.W.2d 806, 328 Mo. 729, quashing certiorari Consolidated School Dist. No. 2 of Pike County v. Cooper, App., 28 S.W.2d 384—Town of Montevallo v. School Dist., 186 S.W. 1078, 268 Mo. 217.

Matters affecting public interest

A suit involving only the constitutionality of a statute requiring a sheriff to turn over all fees in excess of the salary and office requirements does not affect the public interest to such an extent as to prevent the invoking of the principle of estoppel, since essentially all that is at stake in the suit is the private interest and convenience of the officer.—Saylor v. Trotter, 255 S.W. 590, 148 Tenn. 359, rehearing overruled 257 S.W. 93, 148 Tenn. 375.

17. Ga.—City of East Point v. Upchurch Packing Co., 200 S.E. 210 212, 58 Ga.App. 829, quoting **Corpus Juris.**
21 C.J. p 1187 note 83.

18. Ga.—City of East Point v. Upchurch Packing Co., supra, quoting **Corpus Juris.**
21 C.J. p 1187 notes 83–85.

19. Ga.—City of East Point v. Upchurch Packing Co., supra, quoting **Corpus Juris.**
21 C.J. p 1187 note 85.

20. Ill.—Trustees of Schools v. Village of Cahokia, 192 N.E. 565, 357 Ill. 538—Melin v. Community Con-

it depends largely on the particular facts and circumstances in each case whether the doctrine will be applied.[21]

Presence or absence of elements of estoppel. Where the public as represented by the federal government, a state or municipal government, or other agency, is subject to equitable estoppel, it may be estopped where the necessary elements or grounds of estoppel are present,[22] as where an inconsistent position has been assumed,[23] or where the governmental body or agency has induced or permitted improvements or expenditures on the strength of its express or implied representations.[24]

sol. School Dist. No. 76, 144 N.E. 13, 312 Ill. 376.
21 C.J. p 1187 note 86.

Corpus Juris cited, but the court found it unnecessary to determine the rule of the text.—Madison County v. Williams, 183 So. 452, 455, 236 Ala. 470.

Negative character of estoppel

In connection with the statement of the text it has been asserted that estoppel is negative rather than positive in its nature, and that the principle that the public is estopped, or not, as right and justice may require is not one to be so applied as to promote justice by positive acts but is rather a doctrine invoked merely to prevent injustice and fraud.—Trustees of Schools v. Village of Cahokia, 192 N.E. 565, 357 Ill. 538—Melin v Community Consol. School Dist. No. 76, 144 N.E. 13, 312 Ill. 376.

21. Miss.—Witherspoon v. Meridan, 13 So. 843, 69 Miss. 288.
21 C.J. p 1187 note 87.

22. U.S.—Greene County v. Tennessee Eastern Electric Co., C.C.A. Tenn., 40 F.2d 184.
Ark.—City of Fordyce v. Dallas County, 113 S.W.2d 500, 195 Ark. 552.
Cal.—McGee v. City of Los Angeles, 57 P.2d 925, 6 Cal.2d 390.
Ill.—Dreher v. Baker, 253 Ill.App. 583.
Minn.—Mahnomen County v. Klyver, 230 N.W. 891, 180 Minn. 423.
Mo.—State ex inf. Wilkerson ex rel. City of Silkeston v. Missouri Utilities Co., 137 S.W.2d 456—State ex inf. McKittrick ex rel. City of Springfield v. Springfield City Water Co., 131 S.W.2d 525.
N.Y.—New York & Queens Electric Light & Power Co. v. Delaney, 128 N.E. 131, 229 N.Y. 184, reversing In re New York & Queens Electric Light & Power Co., 179 N.Y.S. 938, 190 App.Div. 934—Turner Const. Co. v. State, 1 N.Y.S.2d 157, 253 App.Div. 784, modified in other respects 18 N.E.2d 143, 279 N.Y. 243—Pace v. Brooklyn & Queens Transit Corporation, 22 N.Y.S.2d 842, 175 Misc. 332—Fischer v Tremaine, 299 N.Y.S. 505, 164 Misc. 576.
N.C.—State v. Thomas, 184 S.E. 529, 209 N.C. 722.
R.I.—Murphy v. Duffy, 124 A. 103, 46 R.I. 210.
S.D.—Stavig v. Van Camp, 193 N.W. 731, 46 S.D. 472.
Tex.—Railroad Commission v Arkansas Fuel Oil Co., Civ.App., 148 S.W.2d 895, error refused.
Va.—City of Richmond v. Virginia Bonded Warehouse Corporation, 138 S.E. 503, 148 Va. 60, 54 A.L.R. 1485.
Wash.—Great Northern Ry. Co. v. Washington Electric Co., 86 P.2d 208, 197 Wash. 627
Wyo.—State v State Board of School Land Com'rs of Wyoming, 191 P. 1073, 27 Wyo. 54, 11 A.L.R. 539.

Knowledge

The register of the state land office to whom bills for newspaper publication of letting of bids were sent was charged with knowledge of irregularities in the publication and hence register could not avoid application of the doctrine of estoppel on ground that he did not have knowledge of the irregularities at time of receiving rental payments under lease.—State ex rel. Shell Oil Co. v. Register of State Land Office, 192 So. 519, 193 La. 883.

23. Ind.—Michigan City v. State ex rel. Seidler, 5 N.E.2d 968, 211 Ind. 586.
Md.—Camden Sewer Co. v. Mayor and Council of Salisbury, 160 A. 4, 162 Md. 454.
N.Y.—In re Wadhams' Estate, 292 N.Y.S. 102, 249 App.Div. 271.
Pa.—Appeal of Susquehanna Collieries Co., 30 Pa.Dist. & Co. 581, 44 Dauph.Co 263.
S.C.—Board of Com'rs for Clarendon County v. Holladay, 189 S.E. 885, 182 S.C. 510, 109 A.L.R. 1496.
Tex.—Payton v. Travis County, Civ. App., 129 S.W.2d 361, error dismissed, judgment correct.
Inconsistency in positions as creating estoppel see supra §§ 108, 116–120.

Liability of litigant for hospital charges

Where municipality in patient's action for injuries prevented inclusion of amount of hospital charges on ground that patient had not paid or become liable for such charges and that credit had been given therefor to her husband, in municipality's suit to establish indebtedness for board, lodging and medical services furnished by municipal hospital and to set off indebtedness against judgment obtained by patient against municipality, municipality would not be permitted to take inconsistent position that patient was liable for such charges and should have recovered for them as part of her damages in her action against municipality.—City of Boston v. Nielsen, Mass., 26 N.E.2d 366.

Water rights

City, recognizing plaintiff's possessory right in entering premises to take water, cannot question plaintiff's title in suit to restrain interference with plaintiff's water supply.—Tubbs v Custer City, 218 N.W. 599, 52 S.D. 458.

24. U.S.—City of Los Angeles v. Borax Consol., C.C.A.Cal., 102 F.2d 52, affirming, D.C., 20 F.Supp. 69, certiorari denied 59 S.Ct. 1042, 307 U.S. 644, 83 L.Ed. 1524, rehearing denied 60 S.Ct. 69, 308 U.S. 633, 84 L.Ed 527—Griffin v. Oklahoma Natural Gas Corporation, C.C.A. Kan., 37 F.2d 545.
Cal.—Times-Mirror Co v. Superior Court in and for Los Angeles County, 44 P.2d 547, 3 Cal.2d 309.
Ga.—City of Athens v. Georgia R. Co., 72 Ga. 800.
Ill.—Hurt v. Hejhal, 259 Ill.App. 221—Rand McNally & Co. v. City of Chicago, 216 Ill.App. 510.
Mo.—City of Mountain View v. Farmers' Telephone Exch. Co., 243 S.W. 153, 294 Mo. 623, affirming, App., 224 S.W. 155.
N.Y.—City of Hudson v. Board of Education of City of Hudson, 287 N.Y.S. 620, 158 Misc. 583.
Acquiescence in improvements made on public streets or other property as creating estoppel see infra § 146.
Permitting improvements or expenditures as creating estoppel see supra §§ 94–97.

Estoppel to deny validity of ordinance

Where substantial expenditures have been made on strength of ordinance or franchise, municipality may be estopped to deny its validity if not clearly ultra vires.—City of Hudson v. Board of Education of City of Hudson, 287 N.Y.S. 620, 158 Misc. 583.

Estoppel to enjoin expenditure

Where creation of debt for construction of city high school was approved by voters and common council and contractor had gone to considerable expense in carrying out contract, city is estopped from en-

On the other hand, a public agency is not estopped where the elements or grounds of estoppel are absent.[25] Thus there is no estoppel where the governmental body or agency did not, in fact, make

joining board of education from expenditure of money received and contractor from performing contract. —City of Hudson v. Board of Education of City of Hudson, supra.

Proof of expenditures as necessary

City is not estopped to enforce amended zoning ordinance introduced several days before, and adopted short time after plaintiff obtained one year permits to install gasoline tanks and pumps and to erect filling station on property which, under amended ordinance, was transferred from commercial to residential district, in absence of evidence showing how much, if anything, plaintiff expended before police interfered.—Geneva Inv. Co. v. City of St. Louis, C.C.A.Mo., 87 F.2d 83, certiorari denied 57 S.Ct. 795, 301 U.S. 692, 81 L.Ed. 1348.

25. U.S.—Standard Oil Co. of California v. U. S., C.C.A.Cal., 107 F. 2d 402, affirming, D.C., U. S. v. Standard Oil Co. of California, 21 F.Supp. 645, certiorari denied Standard Oil Co. of California v. U. S., 60 S.Ct. 469, 309 U.S. 654, 84 L.Ed. 1003, motion granted 60 S.Ct. 581, rehearing denied 60 S. Ct. 708, 309 U.S. 697, 84 L.Ed. 1036, certiorari denied U. S. v. Standard Oil Co. of California, 60 S.Ct. 715, 309 U.S. 673, 84 L.Ed. 1019—Illinois Bell Telephone Co. v. Slattery, C.C.A.Ill., 102 F.2d 58, certiorari denied Slattery v. Illinois Bell Telephone Co., 59 S.Ct. 1045, 307 U.S. 648, 83 L.Ed. 1527 —Bank of Giles County v. Fidelity & Deposit Co. of Maryland, C.C.A. Va., 84 F.2d 321—Heidt v. U. S., C. C.A.Tex., 56 F.2d 559, certiorari denied 53 S.Ct. 8, 287 U.S. 601, 77 L.Ed. 523—The Whippoorwill, D.C.Md., 52 F.2d 985—City of Sanford, Fla., v. Chase National Bank of City of New York, C.C.A.N.Y., 50 F.2d 400, reversing, D.C., 44 F. 2d 206, and certiorari denied Chase Nat. Bank of City of New York v. City of Sanford, Fla., 52 S.Ct. 35, 284 U.S. 660, 76 L.Ed. 559— Maryland Casualty Co. v. City Nat. Bank, C.C.A.Tenn., 29 F.2d 662, certiorari denied 49 S.Ct. 345, 279 U.S. 847, 73 L.Ed. 991—U. S. v. Brown, D.C.Okl., 15 F.2d 565—U. S. v. Marino, D.C.N.Y., 27 F.Supp. 155—U. S. v. Standard Oil Co. of California, D.C.Cal., 20 F.Supp. 427, 452, citing **Corpus Juris**—O. D. Jennings & Co. v. Reinecke, D.C. Ill., 19 F.Supp. 197—City of Dalhart v. Childers, D.C.Tex., 18 F. Supp. 903—Morse Dry Dock & Repair Co. v. U. S., D.C.N.Y., 298 F. 153, affirmed, C.C.A., 1 F.2d 233, certiorari denied 45 S.Ct. 99, 266 U. S. 620, 69 L.Ed. 472—Empire Voting Mach. Co. v. City of Chicago, C.C.A.Ill., 267 F. 162, certiorari denied 41 S.Ct. 14, 254 U.S. 642, 65 L.Ed. 453.

Ala.—Chenault v. City of Russellville, 183 So. 437, 236 Ala. 453.

Alaska.—Berger v. Ohlson, 9 Alaska 605.

Ark.—McRae v. Farquhar & Albright Co., 269 S.W. 375, 168 Ark. 38.

Cal.—Newcomb v. City of Newport Beach, 60 P.2d 825, 7 Cal.2d 393— Lantz v. City of Los Angeles, 196 P. 481, 185 Cal. 262—California Employment Commission v. Black-Foxe Military Institute, Super., 110 P.2d 729—Constantine v. Board of Education of City and County of San Francisco, App., 111 P.2d 698—Struckman v. Board of Trustees of Tracy Union High School, 101 P.2d 151, 38 Cal.App.2d 373— Daugherty v. Superior Court in and for City and County of San Francisco, 74 P.2d 549, 23 Cal.App. 2d 739.

Colo.—Armstrong v. Driscoll Const. Co., 110 P.2d 651.

Ga.—Parker v. Travelers' Ins. Co., 163 S.E. 159, 174 Ga. 525, 81 A.L. R. 472, answers conformed to 163 S.E. 611, 45 Ga.App. 120.

Idaho.—Gray v. Boundary County, 290 P. 399, 49 Idaho 589.

Ill.—People, by Barrett, v. Bradford, 22 N.E.2d 691, 372 Ill. 63— Trustees of Schools of Township, 36 North, Range 10 East of Third P. M., Will County, v. American Surety Co. of New York, 30 N.E. 2d 513, 307 Ill.App. 398—People ex rel. Reilly v. City of Kankakee, 6 N.E.2d 260, 288 Ill.App. 192—Sinclair Refining Co. v. City of Chicago, 246 Ill.App. 152—City of Chicago v. Southern Surety Co., 239 Ill.App. 628—Gage v. Village of Wilmette, 233 Ill.App. 30—Hamilton v. City of Chicago, 227 Ill.App. 291.

Iowa.—Mitchell County v. Odden, 259 N.W. 774, 219 Iowa 793.

Ky.—Bertram v. Wayne County, 3 S.W.2d 1083, 223 Ky. 456.

Mass.—Federal Nat. Bank v. Commonwealth, 185 N.E. 9, 282 Mass. 442—Old Colony Crushed Stone Co. v. Cronin, 176 N.E. 804, 276 Mass. 221.

Mich.—Lawrence Scudder & Co. v. Emmet County, 284 N.W. 691, 288 Mich. 181.

Minn.—State v. Brooks, 236 N.W. 316, 183 Minn. 251—State v. Johnson, 233 N.W. 236, 181 Minn. 510— Blue Earth County v. National Surety Co., 205 N.W. 277, 164 Minn. 390—State v. City of Minneapolis, 204 N.W. 632, 164 Minn. 49.

Mo.—Board of Education of City of St. Louis v. St. Louis County, 149 S.W.2d 878.

N.H.—Jenness v. Payne, 125 A. 679, 81 N.H. 308.

N.Y.—In re Jamaica Bay, City of New York, 293 N.Y.S. 854, 250 App. Div. 124, affirmed In re City of New York by Commission of Docks, 11 N.E.2d 296, 275 N.Y. 458—City of New York v. Coney Island Fire Department, 10 N.Y.S.2d 164, 170 Misc. 787, affirmed 18 N.Y.S.2d 923, 259 App.Div. 286, reargument denied 20 N.Y.S.2d 410.

Ohio.—Russell v. City of Akron, 27 N.E.2d 247, 136 Ohio St. 566—Rogers v. City of Cincinnati, 10 Ohio App. 238.

Pa.—Edelman v. Boardman, 2 A.2d 393, 332 Pa. 85—Kuhn v. Commonwealth, 140 A. 527, 291 Pa. 497.

Tenn.—State v. Broadway Nat. Bank, 282 S.W. 194, 153 Tenn. 113.

Tex.—City of Dallas v. Schawe, Civ. App., 12 S.W.2d 1074, error dismissed—City of Ft. Worth v. Board of Trustees of Independent School Dist. of Ft. Worth, Civ.App., 224 S.W. 294—American Surety Co. of New York v. Board of Trustees of Independent School Dist. of Ft. Worth, 224 S.W. 292.

Utah.—Tooele City v. Elkington, 116 P.2d 406—Cache Valley General Hospital v. Cache County, 67 P.2d 639, 92 Utah 279.

Wash.—Home Owners' Loan Corporation v. City of Tacoma, 102 P.2d 832.

21 C.J. p 1187 note 88, p 1190 note 10.

Acts in which state did not participate

The state cannot be estopped to claim title to its own territory by exercise of unlawful authority thereover by some other government or by an assumption of sovereignty in which the state has no part and to which the people of the state have never consented.—Wortham v. Walker, 128 S.W.2d 1138, 133 Tex. 255.

Inequitable conduct and irreparable injury as essential

Inequitable conduct of city and irreparable injury to persons acting in good faith in reliance thereon are essential to create estoppel in pais against city.—Stuart v. City of Neenah, 255 N.W. 142, 215 Wis. 546.

Consent to action as precluding estoppel

A city, agreeing to public service commission's proposed broad survey and investigation, which resulted in delay in determination of rate for furnishing of water to such city by another city, cannot claim estoppel of city furnishing water to claim any advantage through such delay on ground that it resulted from ap-

a false and material representation,[26] or where such agency lacked the essential knowledge or intent,[27] or where the person claiming estoppel did not rely, or should not have relied, on the representation,[28] or could have learned the facts by the exercise of reasonable diligence,[29] or was not injured as a result of the act or statement of the governmental body,[30] and there can be no estoppel where

plication by such city.—City of Milwaukee v. City of West Allis, 294 N. W. 625, 236 Wis. 371.

Failure to observe law in other instances

In suit against mayor and city council by former police officer for injunctive relief and for reinstatement to police force, it was no answer to defense that plaintiff at time of application was more than fifty years of age and therefore ineligible, that council had appointed others who were over fifty years of age, since the fact that council had failed to observe the law in other instances would not redound to plaintiff's benefit by way of "estoppel", although the fact might be considered in support of a charge that his removal was capricious or arbitrary.—Callis v. Brown, 142 S.W. 2d 675, 283 Ky. 759.

Deportation as affecting military conscription

Jurisdiction to subject a resident Canadian registrant to the draft was not lost by estoppel or waiver, because after his exemption under the first call, afterward revoked, he was sent back to Canada by the immigration authorities as having unlawfully entered, where he returned on a permit and remained until after the Canadian-American Convention went into effect.—Morris v. Johnston, Wash., 260 F. 821, 171 C.C.A. 547.

26. U.S.—Denver & S. L. Ry. Co. v. Moffat Tunnel Improvement Dist., D.C.Colo., 35 F.2d 365, modified on other grounds, C.C.A., Moffat Tunnel Improvement Dist. v. Denver & S. L. Ry. Co., 45 F.2d 715, certiorari denied 51 S.Ct. 485, 283 U.S. 837, 75 L.Ed. 1448.

Cal.—Struckman v. Board of Trustees of Tracy Union High School, 101 P.2d 151, 38 Cal.App.2d 373.

Ky.—Eversole v. Gray, 279 S.W. 638, 212 Ky. 384.

N.H.—Trustees of Phillips Exeter Academy v. Exeter, 11 A.2d 569, 90 N.H. 472.

False and material representation as element of estoppel see supra §§ 67, 68.

27. U.S.—Hoskins v. City of Orlando, Fla., C.C.A.Fla., 51 F.2d 901.

Cal.—Aron v. Leavy, 27 P.2d 377, 219 Cal. 456.

Mont.—Peterson v. School Board of School Dist. No. 1, Cascade County, 236 P. 670, 73 Mont. 442.

Knowledge and intent as elements of estoppel see supra §§ 70, 69.

Knowledge of falsity of representations

Where the governmental authorities lacked knowledge of the falsity of the representations, there could be no estoppel.—Biglow v. Ritter, 108 N.W. 218, 131 Iowa 213—21 C.J. p 1190 note 11.

28. U.S.—Standard Oil Co. of California v. U. S., C.C.A.Cal., 107 F. 2d 402, affirming, D.C., U. S. v. Standard Oil Co. of California, 21 F.Supp. 645, certiorari denied Standard Oil Co. of California v. U. S., 60 S.Ct. 469, 309 U.S. 654, 84 L.Ed. 1003, motion granted 60 S.Ct. 581, rehearing denied 60 S.Ct. 708, 309 U.S. 697, 84 L.Ed. 1036, certiorari denied U. S. v. Standard Oil Co. of California, 60 S.Ct. 715, 309 U.S. 673, 84 L.Ed. 1019—Maryland Casualty Co. v. City Nat. Bank, C.C.A.Tenn., 29 F.2d 662, certiorari denied 49 S.Ct. 345, 279 U.S. 847, 73 L.Ed. 991.

Colo.—Averch v. City and County of Denver, 242 P. 47, 78 Colo. 246.

Ill.—Trustees of Schools of Township 36 North, Range 10 East of Third P. M., Will County, v. American Surety Co. of New York, 30 N.E.2d 513, 307 Ill.App. 398.

Iowa.—Burns & McDonnell Engineering Co. v. Iowa City, 282 N.W. 708, 225 Iowa 1241.

Ky.—Commonwealth v. Nunnelley, 277 S.W. 506, 211 Ky. 409—Mason v. Cook, 218 S.W. 740, 187 Ky. 260.

Mass.—Barnes v. City of Springfield, 168 N.E. 78, 268 Mass. 497, certiorari denied 50 S.Ct. 246, 281 U.S. 732, 74 L.Ed. 1148.

Mich.—Lawrence v. American Surety Co. of New York, 249 N.W. 3, 263 Mich. 586, rehearing denied 250 N.W. 295, 264 Mich. 516, 88 A.L.R. 535.

Mo.—City of Pacific v. Ryan, 28 S. W.2d 652, 325 Mo. 373.

Neb.—State ex rel. Truax v. Burrows, 287 N.W. 178, 136 Neb. 691—State ex rel. Sorensen v. Plateau State Bank, 253 N.W. 433, 126 Neb. 407.

N.Y.—City of Rochester v. New York State Rys., 217 N.Y.S. 452, 127 Misc. 766.

Or.—Coos County v. Elrod, 267 P. 530, 125 Or. 409.

Reliance on representation as element see supra § 71.

Person must be misled

Where the person was not misled the public agency is not estopped.

U.S.—Wilber Nat. Bank of Oneonta v. U. S., N.Y., 55 S.Ct. 362, 294 U.S. 120, 79 L.Ed. 798, affirming, C.C.A., 69 F.2d 526, certiorari granted 55 S.Ct. 94, 293 U.S. 541, 79 L.Ed. 647—De Lano v. City of Tulsa, C.C.A.Okl., 26 F.2d 640, certiorari denied Delano v. City of Tulsa, 49 S.Ct. 179, 278 U.S. 654, 73 L.Ed. 564—Vezina v. U. S., C.C. A.Minn., 284 F. 695.

Ill.—Trustees of Schools of Township 36 North, Range 10 East of Third P. M., Will County, v. American Surety Co. of New York, 30 N.E.2d 513, 307 Ill.App. 398.

Ky.—Selligman v. Western & Southern Life Ins. Co., 126 S.W.2d 419, 277 Ky. 551.

Mo.—Buchanan v. Ralls County, 222 S.W. 1002, 283 Mo. 10.

N.D.—Baird v. Divide County, 228 N.W. 226, 58 N.D. 867.

Or.—Guthrie v. Haun, 76 P.2d 292, 159 Or. 50.

Tex.—Weatherly v. Jackson, 71 S. W.2d 259, 123 Tex. 213, reversing, Civ.App., 46 S.W.2d 1030—Grayburg Oil Co. v. State, Civ.App., 50 S.W.2d 355, error refused.

Wis.—Hogan v. City of Beloit, 184 N.W. 687, 175 Wis. 199.

21 C.J. p 1190 note 12.

29. Mo.—Iowa Bonding & Casualty Co. v. City of Marceline, App., 255 S.W. 577.

Or.—Guthrie v. Haun, 76 P.2d 292, 159 Or. 50.

30. U.S.—Century Electric Co. v. U. S., C.C.A.Mo., 75 F.2d 589, certiorari denied 55 S.Ct. 925, 295 U.S. 766, 79 L.Ed. 1708—Denver & S. L. Ry. Co. v. Moffat Tunnel Improvement Dist., D.C.Colo., 35 F.2d 365, modified on other grounds, C. C.A., Moffat Tunnel Improvement Dist. v. Denver & S. L. Ry. Co., 45 F.2d 715, certiorari denied 51 S.Ct. 485, 283 U.S. 837, 75 L.Ed. 1448—Maryland Casualty Co. v. City Nat. Bank, C.C.A.Tenn., 29 F.2d 662, certiorari denied 49 S.Ct. 662, 279 U.S. 847, 73 L.Ed. 991.

Cal.—Booth v. Los Angeles County, 12 P.2d 72, 124 Cal.App. 259.

Conn.—Town of Darien v. Webb, 162 A. 690, 115 Conn. 581.

Del.—Papaioanu v. Commissioners of Rehoboth, Ch., 20 A.2d 447.

Ill.—Melin v. Community Consol. School Dist. No. 76, 144 N.E. 13, 312 Ill. 376—Trustees of Schools of Township 36 North, Range 10 East of Third P. M., Will County, v. American Surety Co. of New York, 30 N.E.2d 513, 307 Ill.App. 398.

Iowa.—Leach v. Grinnell Sav. Bank of Grinnell, 219 N.W. 483, 205 Iowa 1345.

Ky.—Vaughn v. City of Williamsburg, 53 S.W.2d 690, 245 Ky. 339.

La.—Parish of Jefferson v. Texas Co., 189 So. 580, 192 La. 934, certiorari denied Texas Co. v. Parish

the person setting it up failed to act in good faith.[31]

Where statutes of limitations inapplicable. The general rule, in the absence of a contrary provision of law, that statutes of limitations do not run against the government or the public, see the C.J.S. title Limitations of Actions § 15, also 37 C.J. p 710 note 97–p 714 note 20, has been frequently rendered inoperative in equity by the enforcement of an equitable estoppel against the public;[32] and, indeed, in invoking the doctrine time may not materially affect the case,[33] if, as is always necessary, as explained above in this section, the essential elements of an estoppel are present. While title cannot be acquired against a municipality by adverse possession, the same result may be reached by application of the doctrine of equitable estoppel, as where the municipality is estopped by long continued abandonment or by inequitable conduct to assert its rights in land.[34]

On the other hand, it has been stated that the state is not embraced within the statute of limitations and that by analogy it would not fall within the doctrine of estoppel.[35]

Acquiescence, laches, and nonaction. Mere acquiescence, laches, lapse of time, or nonaction on the part of the public or the public agents or officers does not ordinarily work an estoppel.[36] No estoppel ordinarily results from acquiescence in the

of Jefferson, 60 S.Ct. 138, 308 U.S. 601, 84 L.Ed. 503.

Mo.—City of Hardin v. Cunningham, 226 S.W. 872, 285 Mo. 457.

Okl.—Oklahoma City v. Pratt, 95 P. 2d 596, 185 Okl. 637.

Or.—State v. Goff, 221 P. 1057, 110 Or. 349, affirming 218 P. 556, 110 Or. 349.

Tex.—State v. Davisson, Civ.App., 280 S.W. 292—San Antonio Fire Fighters' Local Union No. 84 v. Bell, Civ.App., 223 S.W. 506, error refused.

21 C.J. p 1190 note 13.

Prejudice as element of estoppel see supra § 74.

Profit rather than prejudice

A county was not estopped from asserting title to a roadway to a ferry crossing by reason of its permitting the grantor to clear and cultivate the land for years, where the landowner profited by the use of the land in excess of expenditure made in clearing it, landowner not paying any taxes upon the same.—Humboldt County v. Van Duzer, 192 P. 192, 48 Cal.App. 640.

Estoppel of drainage district in favor of city

Where county court unauthorizedly made an order permitting municipality to connect its sewage disposal plant with ditch of drainage district, and court revoked the order thirteen days later during same term of court, and municipality had accomplished no substantial construction in the interval, district was not estopped from seeking injunction to restrain municipality permanently from connecting its plant with ditch.—Thompson v. City of Malden, Mo.App., 118 S.W.2d 1059.

31. Iowa.—Greene County v. City Bank of Jefferson, 195 N.W. 3, 196 Iowa 1164, amended on other grounds Greene County, Iowa, v. City Bank of Jefferson, 196 N.W. 94, 196 Iowa 1164.

Pa.—City of Erie v. Piece of Land, 162 A. 445, 308 Pa. 454.

Default or wrongful act of person setting up estoppel see supra § 75.

Partial responsibility of party claiming estoppel

The spending of large sums in reliance on building permit issued by building inspector did not estop building inspector or board of adjustments and appeals from revoking permit where permittee's representative was partially responsible for issuance of permit by building inspector under a misapprehension of fact.—Selligman v. Western & Southern Life Ins. Co., 126 S.W.2d 419, 277 Ky. 551.

32. N.J.—Trenton, etc., Tract. Corp. v. Ewing Tp., 101 A. 1037, 87 N.J. Eq. 397.

21 C.J. p 1188 note 93.

33. Iowa.—Bridges v. Grand View, 139 N.W. 917, 158 Iowa 402.

21 C.J. p 1188 note 94.

34. U.S.—City of Los Angeles v. Borax Consolidated, D.C.Cal., 20 F.Supp. 69, affirmed, C.C.A., 102 F. 2d 52, certiorari denied 59 S.Ct. 1042, 307 U.S. 644, 83 L.Ed. 1524, rehearing denied 60 S.Ct. 69, 308 U. S. 633, 84 L.Ed. 527.

Iowa.—Shultz v. City of Oskaloosa, 187 N.W. 867, 193 Iowa 781.

Slight encroachments as sufficient

A municipality is not estopped from asserting its rights in land by allowing an abutting owner to maintain a highway fence which encroaches on a road slightly at some points, but does not enlarge his possession so much as to challenge the attention of the city officers.—Shultz v. City of Oskaloosa, supra.

Fixtures

Where a town, having accepted gift of a bell, delivered it, or consented to its delivery, to a church knowing that it was to be placed in belfry, and, except for certain conditions, that it would become part of realty, town is estopped to set up title against bona fide purchaser of the church building, record of conditions of gift to town not being constructive notice to such purchaser.—Inhabitants of Town of Andover v. McAllister, 109 A. 750, 119 Me. 153

35. Ill.—People ex rel. Nudelman v. Superior Petroleum Co., 25 N.E.2d 30, 372 Ill. 546—People v. Brown, 67 Ill. 435.

36. U.S.—U. S. v. City of Greenville, C.C.A.S.C., 118 F.2d 963, reversing, D.C., U. S. v. Woodside, 34 F.Supp 281—U. S. v. Tod, D.C. N.Y., 3 F.2d 836—U. S. v. Brass, D.C.N.Y., 37 F.Supp. 698—U. S. v. Brookfield Fisheries, D.C.Or., 24 F. Supp. 712—U. S. v. Standard Oil Co. of California, D.C.Cal., 20 F. Supp. 427, 452, citing **Corpus Juris.**

Ala.—Greenwood v. State, 161 So. 498, 499, 230 Ala. 405, citing **Corpus Juris**—State v. City of Gadsden, 113 So. 6, 216 Ala. 243.

Fla.—Landis v. Reeve, 142 So. 654, 106 Fla. 28, citing **Corpus Juris.**

Ill.—People ex rel. Petty v. Thomas, 198 N.E. 363, 361 Ill. 448—Trustees of Schools v. Village of Cahokia, 192 N.E. 565, 357 Ill. 538.

Kan.—State ex rel. Boynton v. Wheat Farming Co., 22 P.2d 1093, 137 Kan. 697—State v. Paul, 214 P. 425, 113 Kan. 412.

Ky.—Pike County v. Waugh, 1 S.W.2d 1066, 222 Ky. 598.

La.—State ex rel. Board of Com'rs of Tensas Basin Levee Dist. v. Grace, 109 So. 830, 161 La. 1039.

Mass.—Old Colony Crushed Stone Co. v. Cronin, 176 N.E. 804, 276 Mass. 221.

Mo.—State ex inf. McKittrick v. American Colony Ins. Co., 80 S.W. 2d 876, 336 Mo. 406—Hecker v. Bleish, 3 S.W.2d 1008, 1018, 319 Mo. 149, citing **Corpus Juris.**

N.J.—City of Clifton v. East Ridgelawn Cemetery, 4 A.2d 79, 122 N.J. Law 115.

N.Y.—Village of North Pelham v. Ohliger, 214 N.Y.S. 253, 216 App. Div. 728, affirmed 157 N.E. 871, 245 N.Y. 593.

Okl.—State ex rel. King v. Friar, 25 P.2d 620, 165 Okl. 145.

violation of a law,[37] or from failure to collect fees,[38] or from delay in bringing suit.[39]

However, inaction may supply the element of representation necessary to constitute an estoppel as against a municipality,[40] and a municipality may be estopped where, in addition to lapse of time, there appear circumstances rendering it contrary to right and justice for the public to exercise a particular power, or to deny the validity of an act or contract;[41] and there is authority holding that an estoppel by laches may be asserted against the state[42] or other governmental entity.[43]

Or.—State v. Swensk, 89 P.2d 587, 161 Or. 587.
21 C.J p 1188 note 90.

Accepting benefit of repairs to vessel

United States seeking forfeiture of seized vessel was not estopped to claim repairer was not entitled to lien because officer of government stood by and permitted repairs to be made.—La Mascotte IV, D.C.N.Y., 6 F.Supp. 695.

Failure to object to diversion of waters

City was not estopped to assert prior right to waters of river because of failure to object to prior diversion.—City of San Diego v. Cuyamaca Water Co., 287 P. 475, 209 Cal. 105.

Mere denial or waiver of public rights does not estop state or any of its branches.—Booth v. Los Angeles County, 12 P.2d 72, 124 Cal.App. 259.

Tacit approval

Where county school trustees entered into a contract undertaking to pay for maps showing a redistricting of the county into school districts, the fact that the commissioners' court met with the trustees and tacitly approved the contract would not estop the county from denying liability.—Collin County v. Schultz, Tex.Civ.App., 243 S.W. 609.

Consideration of delay in balancing equities

The government's delay in claiming title to school lands on ground that they were of known mineral character at time of official survey, so that title remained in the government, did not work estoppel against the government, but such delay could be considered in dealing with claims of a good-faith transferee for operating costs and expenses.—U. S. v. Standard Oil Co. of California, D.C. Cal., 21 F.Supp. 645, affirmed, C.C.A., Standard Oil Co. of California v. U. S., 107 F.2d 402, certiorari denied 60 S.Ct. 469, 309 U.S. 654, 84 L.Ed. 1003, motion granted 60 S.Ct. 581, and rehearing denied 60 S.Ct. 708, 309 U.S. 697, 84 L.Ed. 1036, and certiorari denied U. S. v. Standard Oil Co. of California, 60 S.Ct. 715, 309 U.S. 673, 84 L.Ed. 1019.

37. Ill.—People ex rel. Nelson v. People's State Bank of Maywood, 188 N.E. 853, 354 Ill. 519, reversing 266 Ill.App. 330.

Deposits in excess of sum of bond

Acquiescence by village trustees for nearly three years in treasurer's deposits in excess of penal sum of depositary bond did not estop village from asserting deposits were in violation of ordinance.—People ex rel. Nelson v. People's State Bank of Maywood, supra.

38. N.J.—City of Clifton v. East Ridgelawn Cemetery, 4 A.2d 79, 122 N.J.L. 115.

Interment fees

Where ordinance permitting location of cemetery within municipality imposed one dollar fee on each interment, municipality could not be estopped, through failure to collect fees for a long period from thereafter asserting its right so to do.—City of Clifton v. East Ridgelawn Cemetery, supra.

39. U.S.—U. S. v. Standard Oil Co. of California, D.C.Cal., 20 F.Supp. 427.

Delay in contesting increase in rates of utility

A city is not estopped from maintaining a suit to enjoin the charging of increased rates by a gas company by the fact that it took no action on notice of the intended increase, but waited until the increased rates had been put in force.—Southwestern Gas & Electric Co. v. City of Shreveport, C.C.A.La., 261 F. 771, affirming, D.C., City of Shreveport v. Southwestern Gas & Electric Co., 258 F. 59, and certiorari denied 40 S.Ct. 394, 252 U.S. 585, 64 L.Ed. 729.

Suit to establish ownership

No estoppel arose from mere delay of United States in bringing suit to be declared owner of school lands on ground that they were of known mineral character at time of official survey, acquiescence or nonaction, even though it resulted in inducing expenditures by occupants of lands, and, in suit by the United States, defendants could not raise as element of estoppel that government's delay in bringing suit brought loss of evidence.—U. S. v. Standard Oil Co. of California, D.C.Cal., 20 F.Supp. 427.

40. Mo.—State ex inf. McKittrick ex rel. City of California v. Missouri Utilities Co., 96 S.W.2d 607, 339 Mo. 385, 106 A.L.R. 1169.

41. Ill.—People ex rel. Petty v. Thomas, 198 N.E. 363, 361 Ill. 448.—City of Chicago v. Chicago & W. I. R. Co., 174 Ill.App. 452.
Mich.—Village of Clawson v. Van Wagoner, 255 N.W. 743, 268 Mich. 148.
Mo.—Barkshire v. Drainage Dist. No. 1 Reformed of Stoddard County, App., 136 S.W.2d 701.
N.Y.—Boardwalk & Seashore Corporation v. Murdock, 22 N.Y.S.2d 611, 175 Misc. 208.
Pa.—Ervin v. City of Pittsburgh, 14 A.2d 297, 339 Pa. 241.
Tex.—City of Port Arthur v. Young, Civ.App., 37 S.W.2d 385, error refused.
Wis.—Eau Claire Dells Improvement Co. v. City of Eau Claire, 179 N.W. 2, 172 Wis. 240.

Positive affirmative acts may not be necessary.—Chicago v. Union Stockyards & Transit Co., 45 N.E. 430, 164 Ill. 224, 35 L.R.A. 281.—21 C.J. p 1188 note 91.

42. La.—State ex rel. Board of School Directors v. Brooklyn Cooperage Co., 128 So. 470, 170 La. 531, certiorari denied State of Louisiana ex rel. Board of School Directors v. Brooklyn Cooperage Co., 51 S.Ct. 74, 282 U.S. 866, 74 L.Ed. 766.
Minn.—State v. Gardiner, 233 N.W. 16, 181 Minn. 513.
Pa.—Commonwealth ex rel. Margiotti v. Union Traction Co. of Philadelphia, 194 A. 661, 327 Pa. 497.

Prolonged recognition of private rights

Commonwealth was estopped to forfeit charters of railway and traction companies on ground that companies had conspired by lease and stock ownership to avoid performing corporate duties, where sixty-five years had elapsed since time of first lease and thirty-five years since time of last lease, leases were of public character, legislature had passed acts dealing with companies, public service commission had recognized resulting street railway system as an operating unit, and investors had purchased stocks and bonds of companies on faith of apparent validity evidenced by state and municipal recognitions.—Commonwealth ex rel. Margiotti v. Union Traction Co. of Philadelphia, 194 A. 661, 327 Pa. 497.

43. Tenn.—Putnam County v. Smith County, 164 S.W. 1147, 129 Tenn. 394.

Estoppel by laches allowed

(1) Where for many years the county authorities knowingly permitted the sheriff to deal with the money received from the federal government for care of its prisoners as a personal matter without account-

Acceptance of benefits. It has been broadly held that irrespective of the rules affecting municipalities, which are considered supra § 111, the United States or a state cannot be estopped by acceptance of benefits.[44] However, other authorities hold that the state may be estopped by acceptance of benefits,[45] as where it is estopped to deny the validity of a contract irregularly entered into.[46] At any rate, no estoppel results where no benefits were in fact received.[47]

Private individuals. While an individual may be estopped to invoke an estoppel against the public,[48] it has been held that the doctrine of estoppel will not apply to a private individual where the public interest is concerned,[49] and that one private individual cannot be given an advantage over another by claiming an estoppel against the public.[50]

b. Estoppel by Statute or Treaty

The public may estop itself by legislative enactment or treaty, although the right to legislate may not be precluded by an estoppel in pais.

It seems to be conceded that the public may estop itself by a valid legislative enactment or ordinance.[51] Further, it seems to be conceded that the

ing, the county was estopped as to past transactions by its laches from requiring the sheriff to pay the full amount received into the county treasury and then resort to his claim against the county for reimbursement, but, if necessary for his protection, the sheriff should be permitted to retain and apply as money advanced by him all amounts shown to have been legitimately expended by him in support of the federal prisoners prior to the commencement of the county's action against him to compel an accounting.—Los Angeles County v. Cline, 197 P. 67, 185 Cal. 299

(2) Where city, although disputing with county over right to receive percentages of gross receipts paid by railroad to county under franchises, permitted railroad to make such payments to county for fifteen years without objection, city was barred by laches from recovering from railroad amounts paid by railroad after city annexed territory wherein railroad operated.—City of Los Angeles v. Los Angeles County, 72 P.2d 138, 9 Cal.2d 624, 113 A.L.R. 370.

Thirty years' delay

Where appellant county joined in the reconstruction of a bridge, and in its maintenance as an intercounty bridge, for thirty years, it was held that notwithstanding the bridge was not formally recorded in appellant county as a county bridge, which would have been a valid objection if interposed before bridge was reconstructed, it was estopped from asserting that fact thirty years later. —Union County v. Northumberland County, 126 A. 197, 281 Pa. 62.

44. U.S.—U. S. v. Standard Oil Co. of California, D.C.Cal., 20 F.Supp. 427.
Ark.—Refunding Board of Arkansas v. State Highway Audit Commission, 70 S.W.2d 1027, 189 Ark. 144.
Acceptance of benefits as estopping government in respect of unauthorized acts of officers and agents see infra § 142.
Receipt of benefits as affecting estoppel of public to deny validity of ultra vires act or contract see infra § 143.

45. Ind.—State v. Wright, 175 N.E. 666, 97 Ind.App. 660.

Benefits of court order

The doctrine that state department cannot be estopped by public officers' unlawful acts does not apply in death action against state highway department, as state department's status as litigant in case wherein it is permitted by law to be sued is subject to same rules as other litigants, in absence of contrary statutory provisions, so that it cannot accept benefits incident to performance of condition precedent required by court order and deny adverse party rights predicated thereon.—Jordan v. State Highway Department, 3 S.E.2d 201, 190 S.C. 397.

46. La.—Reeves v. Leche, 195 So. 542, 194 La. 1070.

Acceptance of rentals under lease

(1) Where the state accepted rental payments for several years in accordance with terms of a state mineral lease, and lessee's obligations under lease had been complied with, and the state did not tender to lessee the money received under lease, the state was "estopped" from asserting that lease was invalid on ground that advertisement for bids contained an error with respect to date at which bids would be received at governor's office.—Reeves v. Leche, supra.

(2) The state and the register of the state land office, after accepting rental payments under oil, gas and mineral lease for several years were estopped to deny validity of the lease because of irregularities in publishing notice of the letting.—State ex rel. Shell Oil Co. v. Register of State Land Office, 192 So. 519, 193 La. 883.

47. Idaho.—State ex rel. Wright v. Gossett, 113 P.2d 415.

Rendition of services for which already obligated

The state was not estopped from questioning constitutionality of statute providing for payment of compensation to speaker of house of representatives and lieutenant governor as president of senate for remaining in Boise, Idaho, in their official capacity a sufficient length of time to complete the unfinished business of the legislature, since the state received no benefit from either the lieutenant governor or the speaker of the house by reason of the services rendered after the session adjourned excepting those benefits which such officers were already required to render to the state and for which a compensation in entirety was fixed.—State ex rel. Wright v. Gossett, supra.

48. Alaska.—Nome v. Reed, 1 Alaska 395.

Acceptance of benefits

Alaska.—Nome v. Reed, supra.

49. Neb.—Furstenberg v. Omaha & Council Bluffs St. Ry. Co., 272 N.W. 756, 758, 132 Neb. 562, citing **Corpus Juris.**
21 C.J. p 1189 note 97.

50. U.S.—U. S. v. La Chappelle, C.C.Wash., 81 F. 152.
Neb.—Furstenberg v. Omaha & Council Bluffs St. Ry. Co., 272 N.W. 756, 132 Neb. 562.

51. Fla.—Lee v. Lang, 192 So. 490, 140 Fla. 782.
21 C.J. p 1186 note 73.

Estoppel to deny recitals in ordinance

In action against a city to recover money apparently deposited under an ordinance to indemnify the city against damages, the city is estopped in law and equity to urge as a defense that the money was paid in under an illegal agreement whereby the city was to keep the money, and from stultifying itself by urging the illegality of the ordinance in question as a defense to depositor's claim for the money, and to deny the truth of the facts recited in the ordinance. —Teich v. City of Chicago, 131 N.E. 605, 298 Ill. 498.

State or subdivisions

An equitable estoppel may be effectuated against a state or its political subdivisions by legislative enactments.—Lee v. Lang, 192 So. 490, 140 Fla. 782.

public may estop itself by treaty,[52] provided the elements of an estoppel are not lacking.[53]

However, municipal authorities are not estopped from denying the validity of an ordinance to the extent that it conflicts with the law or public policy of the state,[54] and a municipality will not be estopped from questioning the validity of a statute under which it has proceeded.[55] An erroneous construction of a statute by a municipality, although acted on for a long period of time, will not bind it.[56]

Right to legislate. The state may not be deprived of the right to legislate by a mere estoppel in pais.[57]

§ 139. General Rule Stated

The general rule respecting the estoppel of the public is stated and discussed supra § 138.

§ 140. Federal and State Governments

a. In general
b. Sovereign and proprietary functions
c. Criminal laws and prosecutions

a. In General

In a proper case an equitable estoppel may be asserted against the federal and state governments.

It has been broadly stated that there can be no estoppel against the United States[58] or a state.[59] Nevertheless, subject to limitations and exceptions considered supra § 138, it is well established that in a "proper case" the doctrine of equitable estoppel may apply as against the federal and state governments,[60] and that under circumstances which would estop a private individual an estoppel may be asserted against the United States,[61] a state,[62] or a state agency, commission, or officer.[63]

52. Alaska.—U. S. v. British Schooners, 5 Alaska 11.
21 C.J. p 1186 note 74.

53. Cal.—McCracken v. San Francisco, 16 Cal. 591.
S.D.—City of Colome v. Von Seggern Bros. & Ludden, 228 N.W. 800, 802, 56 S.D. 390, citing **Corpus Juris.**
21 C.J. p 1186 note 75.

54. W.Va.—State v. City of Charleston, 115 S.E. 576, 92 W.Va. 611.

Right to rely on conflicting provisions of ordinance
A city issuing local improvement district bonds, expressing promise to pay them out of local improvement funds "and not otherwise" and quoting statute confining holder's remedy to enforcement of special assessments for improvements for which bonds were issued, was not estopped by ordinance, establishing revolving fund for payment of such bonds in default, to deny liability for payment thereof from moneys in revolving fund, as holder was not justified in believing that provisions of ordinance were of greater validity than those of statute.—State ex rel. Booth v. Tatro, 92 P.2d 206, 199 Wash. 421.

55. Fla.—State v. Greer, 102 So. 739, 88 Fla. 249, 37 A.L.R. 1298.

56. Ky.—City of Fulton v. Shanklin, 122 S.W.2d 733, 275 Ky. 772.

57. Ala.—State v. City of Gadsden, 113 So. 6, 216 Ala. 243.

58. U.S.—Sternfeld v. U. S., D.C.N.Y., 32 F.2d 789—Huron Portland Cement Co. v. Woodworth, D.C. Mich., 19 F.2d 530—O. D. Jennings & Co. v. Reinecke, D.C.Ill., 19 F. Supp. 197.
Ill.—Davis v. Industrial Commission, 146 N.E. 569, 315 Ill. 341.

Benefit of time limitation
The United States cannot be deprived by waiver or estoppel of the benefit of a time limitation made a condition of a federal court's jurisdiction.—Bono v. U. S., C.C.A.N.Y., 113 F.2d 724.

Inconsistent action as estopping United States
No estoppel arises from government's inconsistent action.—U. S. v. Standard Oil Co. of California, D.C. Cal., 20 F.Supp. 427.

59. Ark.—Refunding Board of Arkansas v. State Highway Audit Commission, 70 S.W.2d 1027, 189 Ark. 144.
Kan.—State ex rel. Boynton v Wheat Farming Co., 22 P.2d 1093, 137 Kan. 697.
N.Y.—In re Certain Lands on North Shore of Harlem River in City of New York, 217 N.Y.S. 544, 127 Misc. 710.
Ohio.—City of Newark v. Public Utilities Commission, 138 N.E. 96, 103 Ohio St. 158—City of Columbus v Public Utilities Commission, 133 N.E. 800, 103 Ohio St. 79.
Okl.—State ex rel. King v. McCurdy, 43 P.2d 124, 171 Okl. 445—State ex rel. King v. Friar, 25 P.2d 620, 165 Okl. 145.
S.C.—Baker v. State Highway Department, 165 S.E. 197, 166 S.C. 481.

Claims against state cannot be created by estoppel.—State v. City of Gadsden, 113 So. 6, 216 Ala. 243.

Limited application of estoppel
The doctrine of estoppel, when invoked against the state, has only a limited application, even when an unauthorized contract on its behalf has been performed, and thereby the state has received a benefit.
Fla.—Camp v. McLin, 32 So. 927, 44 Fla. 510.
Mo.—Aetna Ins. Co. v. O'Malley, 124 S.W.2d 1164, 1166, 343 Mo. 1232, quoting **Corpus Juris.**

60. Okl.—Crosbie v. Partridge, 205 P. 758, 85 Okl. 186.
21 C.J. p 1189 note 1.

"Proper case" as dependent on circumstances
"The courts hold that this defense [that is, equitable estoppel] applies to the state 'in a proper case' without making a more concrete declaration. 'What is a proper case no court seems yet to have attempted to define' (19 Har.Law Rev. 127); nor is there any necessity for any such attempt. It is better that each case be controlled by its own facts."—State v. Horr, 205 N.W. 444, 445, 165 Minn. 1.

61. U.S.—U. S. v. Denver & R. G. W. R Co., C.C.A.Utah, 16 F.2d 374, modifying, D.C., 2 F.2d 873.

62. Fla.—State ex rel. Landis v. Sovereign Camp, W. O. W., 180 So. 33, 131 Fla. 867.
La.—State ex rel. Shell Oil Co. v. Register of State Land Office, 192 So. 519, 193 La. 883.
Minn.—State v. Horr, 205 N.W. 444, 165 Minn. 1.
N.Y.—Turner Const. Co. v. State, 1 N.Y.S.2d 157, 253 App.Div. 784, modified on other grounds 18 N.E. 2d 143, 279 N.Y. 243.
N.C.—State v. Thomas, 184 S.E. 529, 209 N.C. 722.
Ohio.—State v. Tracy, 181 N.E 811, 125 Ohio St. 399—State v. Fenn, 10 Ohio N.P., N.S., 325, affirmed 18 Ohio Cir.Ct.,N.S., 375, 25 Ohio Cir.Dec. 75, followed in 17 Ohio Cir.Ct.,N.S., 150, 26 Ohio Cir.Dec. 462.
Pa.—Commonwealth ex rel. Margiotti v. Delaware Division Canal Co., 45 Dauph.Co. 234.
Wash.—Great Northern Ry. Co. v. Washington Electric Co., 86 P.2d 208, 197 Wash. 627.

63. N.Y.—Fischer v. Tremaine, 299 N.Y.S. 505, 164 Misc. 576.

Proceeding nominally for state. Where a proceeding is not filed by the state or by any of its officers, the fact that the proceeding, such as quo warranto, is brought in the name of the state for technical reasons does not preclude the assertion of the defense of acquiescence or estoppel.[64]

b. Sovereign and Proprietary Functions

The United States or a state ordinarily is not estopped when acting in its sovereign, as distinguished from its proprietary, capacity.

When acting in its sovereign or governmental capacity, the United States[65] or a state[66] ordinarily is not estopped. The doctrine of estoppel will not be applied to deprive the government of the due exercise of its police power,[67] or to affect public revenues[68] or property rights,[69] or to frustrate the purpose of its laws or thwart its public policy.[70]

Tex.—Railroad Commission v. Arkansas Fuel Oil Co., Civ.App., 148 S.W.2d 895, error refused.
Wyo.—State v. State Board of School Land Com'rs of Wyoming, 191 P. 1073, 27 Wyo. 54, 11 A.L.R. 539.

64. Ala.—State v. City of Gadsden, 113 So. 6, 216 Ala. 243.

65. U.S.—U. S. v. Brookfield Fisheries, D.C.Or., 24 F.Supp. 712.
Estoppel to cancel certificate of citizenship see Aliens § 154.

Estoppel of congress to legislate
"Congress cannot be estopped by its silence from exercising its constitutional power of legislation."—U. S. v. Chemical Foundation, C.C.A.Del., 5 F.2d 191, 210, affirming, D.C., 294 F. 300, and modified on other grounds 47 S.Ct. 1, 272 U.S. 1, 71 L.Ed. 131.

Farm Credit Administration, which lends money to farmers unable to obtain credit elsewhere, has been held a governmental and not a business or proprietary agency of the federal government, so that in a suit involving such agency the doctrine of waiver and estoppel does not apply as against the United States.—U. S. v. Thomas, C.C.A.Tex., 107 F.2d 765, reversing, D.C., 27 F.Supp. 433.

Waiver of sovereign right
The United States may not be held to have waived any sovereign right or privilege unless plainly so provided.—Korman v. Federal Housing Administrator, 113 F.2d 743, 72 App.D.C. 245.

66. Colo.—Van Gilder v. City and County of Denver, 89 P.2d 529, 104 Colo. 76.
Ill.—People, by Barrett, v. Bradford, 22 N.E.2d 691, 372 Ill. 63.
Kan.—State v. Paul, 214 P. 425, 113 Kan. 412.
Minn.—State v. Illinois Cent. R. Co., 274 N.W. 828, 200 Minn. 583, rehearing denied 275 N.W. 854, 200 Minn. 583—State v. Horr, 205 N.W. 444, 165 Minn. 1.
Or.—Rohde v. State Industrial Accident Commission, 217 P. 627, 108 Or. 426.
W.Va.—Mewha v. Public Service Commission of West Virginia, 9 S.E.2d 868.
Right to legislate as affected by estoppel in pais see supra § 138 b.

Estoppel as affirmative defense
The principle of sovereignty that a state cannot be sued against its consent defeats a claim of estoppel presented as an affirmative defense, even though facts constituting estoppel as between individuals are shown.—Trustees of Phillips Exeter Academy v. Exeter, 11 A.2d 569, 90 N.H. 472.

Estoppel to deny validity of lease
Acceptance of payments under a lease did not estop the state to deny its validity where it was acting in its sovereign capacity and held title in trust for the public.—State v. Taylor, 256 P. 953, 44 Idaho 353.

Laches of state agency
An estoppel will not arise against the state by reason of laches of agency of the state acting in a governmental capacity.—State v. Swensk, 89 P.2d 587, 161 Or. 281.

67. U.S.—Sanitary Dist. of Chicago v. U. S., Ill., 45 S.Ct. 176, 266 U.S. 405, 69 L.Ed. 352—U. S. v. Taylor, 33 F.2d 608, reversed on other grounds, C.C.A., Taylor v. U. S., 44 F.2d 531, certiorari denied U. S. v. Taylor, 51 S.Ct. 345, 283 U.S. 820, 75 L.Ed. 1436.
Colo.—City and County of Denver v. Tihen, 235 P. 777, 77 Colo. 212.

Estoppel affecting franchise
Where a light and power company operating under a franchise covering night service had for more than ten years also furnished day service, such fact did not estop the company from denying that the franchise covered day service also, and the police power of the state as exercised through the state corporation commission could not be ousted by such an estoppel in pais operating on the parties.—City of Clifton Forge v. Virginia-Western Power Co., 106 S.E. 400, 129 Va. 377.

68. Ill.—People, by Barrett, v. Bradford, 22 N.E.2d 691, 372 Ill. 63—People v. Illinois Women's Athletic Club, 196 N.E. 881, 360 Ill. 577.
Collection of taxes and assessments see infra § 147.

Estoppel forbidden by public policy
"Public policy forbids the application of the doctrine of estoppel to a sovereign state where the public revenues are involved."—People, by Barrett, v. Bradford, 22 N.E.2d 691, 694, 372 Ill. 63—People v. Illinois Women's Athletic Club, 196 N.E. 881, 882, 360 Ill. 577.

Collection of poundage fees
The state was not estopped from claiming statutory lien on equipment of cannery, to enforce payment of poundage fees required of cannery, by delay in bringing suit and fact that owner of the property expended considerable sum of money in removing the property from the cannery, in view of fact that the state in collecting poundage fees was acting in "governmental capacity."—State v. Swensk, 89 P.2d 587, 161 Or. 281.

Moneys illegally refunded
United States is not estopped to require return of moneys illegally refunded by its officers charged with custody and disbursement thereof.—U. S. v. Bartron, D.C.S.D., 35 F.2d 765.

69. U.S.—U. S. v. Warmsprings Irr. Dist., D.C.Or., 38 F.Supp. 239.
Fla.—Martin v. Busch, 112 So. 274, 93 Fla. 535.

Public lands
The United States cannot be estopped by acts or contracts of private persons from exercising its paramount rights and dominion over public lands.—Oklahoma City v. Dobbins, 44 P.2d 148, 172 Okl. 194—Noble v. Oklahoma City, 44 P.2d 135, 172 Okl. 182, certiorari granted 56 S.Ct. 134, 296 U.S. 560, 80 L.Ed. 395, reversed on other grounds 56 S.Ct. 562, 297 U.S. 481, 80 L.Ed. 816—Higgins v. Oklahoma City, 44 P.2d 135, 172 Okl. 182, certiorari granted 56 S.Ct. 134, 296 U.S. 560, 80 L.Ed. 395, reversed on other grounds 56 S.Ct. 562, 297 U.S. 481, 80 L.Ed. 816.

70. U.S.—American Surety Co. of New York v. U. S., C.C.A.Okl., 112 F.2d 903.

Control of waters
(1) Federal government will not be estopped to sue for injunction restraining withdrawal of water from Lake Michigan in excess of that authorized by secretary of war under Act March 3, 1899, § 10, to prevent level of lake from being lowered, if strict construction of government's act, on which estoppel is sought to be predicated, would avoid estoppel.—Sanitary Dist. of Chicago v. U.

On the other hand, when functioning in a proprietary, as distinguished from a governmental, capacity, the doctrine of estoppel may be applied to the United States[71] or a state.[72]

c. Criminal Laws and Prosecutions

Estoppel of the people apparently is not favored in connection with criminal laws and prosecutions, but under some circumstances the doctrine of estoppel may be applied.

The doctrine of estoppel does not, it has been held, apply as against the people in criminal prosecutions,[73] and it has been asserted that the government may be estopped in the enforcement of criminal laws only by some sound public policy, as when its officers have lured accused into the commission of a crime.[74] On the other hand, it has been held that the state is bound by a position assumed by it in a criminal proceeding.[75]

§ 141. Municipal and Quasi-Municipal Corporations in General

a. In general
b. Governmental or proprietary functions

a. In General

Unless it is necessary to further justice, an equitable estoppel ordinarily may not be asserted against a municipal or quasi-municipal corporation.

The principle of estoppel in pais ordinarily is inapplicable to municipalities and quasi municipalities.[76] Nevertheless, in exceptional cases and in furtherance of justice and right, an equitable estoppel may be asserted against a municipal or quasi-municipal corporation,[77] although the courts apply

S., Ill., 45 S.Ct. 176, 266 U.S. 405, 69 L.Ed. 352.

(2) United States is not estopped to sue for injunction restraining withdrawal of water from Lake Michigan in excess of that authorized by the secretary of war under Act March 3, 1899, § 10 because level of lake is being lowered thereby, by Act March 30, 1822, or by Act March 2, 1827, or by issuance by secretary of war of permits authorizing withdrawal of amount greater than that permitted at time suit is brought, and subsequently revoked.—Sanitary Dist. of Chicago v. U. S., supra.

Protection of Indians

(1) Where acts of mining trustees and assignments of lease of Indian coal lands were made ineffectual without approval of the secretary of the interior by act of congress and secretary's regulations, which have the force and effect of law, the defenses of estoppel, ratification, and laches could not be urged in an action by the United States to recover royalties due under lease, since to permit that prerequisite to validity to be rendered unnecessary by application of those defenses would thwart the public policy of the United States to afford protection to Indians with respect to leases of coal lands.—American Surety Co. of New York v. U. S., C.C.A.Okl., 112 F.2d 903.

(2) The surety on a bond executed by lessee of Indian coal lands could not, for purpose of claiming an alteration of its contract of suretyship resulting in its discharge, assert that mining trustees permitted lessee's assignee to carry on operations under an assignment which did not have requisite approval of the secretary of the interior and, for purpose of avoiding ineffectiveness of assignment because of lack of such approval, assert that the United States was estopped to deny the validity of the assignment.—American Surety Co. of New York v. U. S., supra.

71. U.S.—Dayton Airplane Co. v. U. S., C.C.A.Ohio, 21 F.2d 673.

72. Colo.—Van Gilder v. City and County of Denver, 89 P.2d 529, 104 Colo. 76.
Minn.—State v. Horr, 205 N.W. 444, 165 Minn. 1.
Wash.—State v. Carlyon, 7 P.2d 572, 166 Wash. 498.

Administration of hail insurance laws

In carrying out hail insurance laws the state has been held to be acting in its proprietary, and not in its sovereign, capacity, so as to be subject to estoppel while engaged in the business of hail insurance.—Stavig v. Van Camp, 193 N.W. 731, 46 S.D. 472.

Collection of fund claimed in proprietary capacity

Where the state, as a creditor, seeks to collect a fund claimed in its proprietary capacity, the state is bound in its business relations with individuals by the same general principles as control dealings between men and may be subjected to an equitable estoppel.—State v. Carylon, 7 P.2d 572, 166 Wash. 498.

73. U.S.—McDonald v. U. S., C.C.A. Minn, 89 F.2d 128, certiorari denied 57 S.Ct. 925, 301 U.S. 697, 81 L.Ed. 1352, rehearing denied 58 S.Ct. 4, 302 U.S. 773, 82 L.Ed. 599.
N.Y.—People v. Wholey, 177 N.Y.S. 685, 107 Misc. 397.
Equitable estoppel as defense to criminal prosecution see Criminal Law § 42.

74. U.S.—U. S. ex rel. Demarois v. Farrell, C.C.A.Minn., 87 F.2d 957, motion denied Demarois v. Farrel, 58 S.Ct. 31, 302 U.S. 683, 82 L.Ed. 527, rehearing denied 58 S.Ct. 135, 302 U.S. 775, 82 L.Ed. 600.
Entrapment as defense to criminal prosecution see Criminal Law § 45.

Estoppel to assert different ground for arrest

State was not estopped to show that defendant was arrested for violating liquor laws although officers told him arrest was for vagrancy.—State v. Dillon, 284 P. 1016, 155 Wash. 486.

75. Mo.—State v. Baird, 231 S.W. 625, 288 Mo. 62, 15 A.L.R. 1035.

76. Cal.—Ernst v. Hall, 197 P. 809, 51 Cal.App. 747.
N.Y.—Gilliland v. Lincoln-Alliance Bank & Trust Co., 261 N.Y.S. 826, 145 Misc. 827, modified on other grounds 264 N.Y.S. 779, 239 App. Div. 68, affirmed 191 N.E. 543, 264 N.Y. 517.
Pa.—Borough of Edgewood v. Apfel, 86 Pittsb.Leg.J. 405.

Drainage districts

Ill.—County Ditch Drainage and Levee Dist. v. East Side Levee and Sanitary Dist., 245 Ill.App. 367.

School districts

Ill.—Benton v. Kaneville Community High School Dist. No. 147, 250 Ill. App. 6.

77. Cal.—City of Los Angeles v. Los Angeles County, 72 P.2d 138, 9 Cal.2d 624, 113 A.L.R. 370—Times-Mirror Co. v. Superior Court in and for Los Angeles County, 44 P.2d 547, 3 Cal.2d 309—Ernst v. Hall, 197 P. 809, 51 Cal.App. 747.

Affirmative acts

For some purposes the doctrine of estoppel is applicable to municipal corporations, not because of the mere nonaction of its officers to assert a right, but because of some affirmative action influencing another which renders it inequitable for the corporate body to assert a different set of facts.—State v. Town of Hessville, 131 N.E. 46, 191 Ind. 251, rehearing denied 132 N.E. 588, 191 Ind. 251.

the doctrine with caution and only under circumstances clearly demanding its application to prevent manifest injustice.[78]

There is nothnig in the nature of a municipal corporation to exempt it from the application of the doctrine of estoppel as it would apply to a natural person or to a business corporation,[79] and, subject to important restrictions and qualifications,[80] it is well settled that as to matters within the scope of its powers and the powers of its officers[81] the doctrine of equitable estoppel may be applied as against a municipal corporation[82] or quasi-municipal corporation.[83] Thus in a proper case an equitable estoppel may be allowed against a city,[84] coun-

78. Mo.—City of Pacific v. Ryan, 28 S.W.2d 652, 325 Mo. 373—Bragg City Special Road Dist. v. Johnson, 20 S.W.2d 22, 323 Mo. 990, 66 A.L.R. 1053—School Dist. No. 45 of Pemiscot County v. Correll, 286 S.W. 136, 220 Mo.App. 322.

Cities and counties

Doctrine of estoppel will be applied to cities and counties with great caution, so that rights of public will be protected.—State ex inf. McKittrick ex rel. City of California v. Missouri Utilities Co., 96 S.W.2d 607, 339 Mo. 385, 106 A.L.R. 1169.

Stricter application of ultra vires doctrine

As regards the assertion of an estoppel against a municipal corporation, the courts will apply the doctrine of ultra vires more strictly in the case of a public, than in the case of a private, corporation.—Baird v. Divide County, 228 N.W. 226, 58 N.D. 867.

79. Md.—Gaver v. Frederick County Com'rs, 3 A.2d 463, 175 Md. 639.
Tex.—City of Aransas Pass v. Minter, Civ.App., 21 S.W.2d 384, error dismissed.

Estoppel as limited to contractual relations

Estoppel, as applied to cities, is not limited to instances where the city has entered into an express contract; but the doctrine of equitable estoppel is predicated on common honesty, and municipalities as well as individuals are affected by it.—Quarles v. City of Appleton, C.C.A.Wis., 299 F. 508.

Waiver and estoppel in pais may bind or bar a municipal corporation.—Lucier v. City of Manchester, 117 A. 286, 80 N.H. 361.

80. La.—Moore v. New Orleans, 32 La.Ann. 726.

81. U.S.—Quarles v. City of Appleton, C.C.A.Wis., 299 F. 508.
Mo.—Peterson v. Kansas City, 23 S.W.2d 1045, 324 Mo. 454.
Ohio.—Baxter v. Village of Manchester, 28 N.E.2d 672, 64 Ohio App. 220.
S.D.—Missouri River Tel. Co. v. City of Mitchell, 116 N.W. 67, 22 S.D. 191.
Wis.—State v. Pohle, 202 N.W. 148, 185 Wis. 610—Eau Claire Dell's Improvement Co. v. Eau Claire, 179 N.W. 2, 172 Wis. 240.

82. U.S.—Mutual Chemical Co. of America v. Mayor and City Council of Baltimore, D.C.Md., 33 F.Supp 881.
Cal.—City of Los Angeles v. Los Angeles County, 72 P.2d 138, 9 Cal.2d 624, 113 A.L.R. 370.
D.C.—District of Columbia v. Cahill, 54 F.2d 453, 454, 60 App.D.C. 342, citing **Corpus Juris.**
Mo.—State ex inf. McKittrick ex rel. City of Springfield v. Springfield City Water Co., 131 S.W.2d 525.
Neb.—Village of Deshler v. Southern Nebraska Power Co., 277 N.W. 77, 133 Neb. 778—State v. McIlravy, 181 N.W. 554, 105 Neb. 651.
N.H.—Lucier v. City of Manchester, 117 A. 286, 80 N.H. 361.
N.Y.—Buffalo Library v. Wanamaker, 293 N.Y.S. 776, 162 Misc. 26—Vandeweghe v. City of New York, 270 N.Y.S. 570, 150 Misc. 815, affirmed 275 N.Y.S. 218, 242 App.Div. 762.
Ohio.—Village of Wyoming v. Walker, 27 Ohio N.P., N.S., 564—Columbus v. Federal Gas & Fuel Co., 2 Ohio N.P., N.S., 277.
Pa.—Breinig v. Allegheny County, 2 A.2d 842, 332 Pa. 474.
R.I.—Murphy v. Duffy, 124 A. 103, 46 R.I. 210.
Wis.—Marathon County v. Industrial Commission, 275 N.W. 437, 225 Wis. 514, reversing 272 N.W. 374, 225 Wis. 514.
21 C.J. p 1189 note 6.

After dissolution

The doctrine of estoppel has, under statute, been applied as against a municipality, or its representatives, in a suit brought after the dissolution of the corporation.—Branch v. City of Sour Lake, D.C.Tex., 9 F.2d 971, affirmed, C.C.A., City of Sour Lake v. Branch, 6 F.2d 355, certiorari denied 46 S.Ct. 24, 269 U.S. 565, 70 L.Ed. 414.

Where the subject matter is not ultra vires, illegal, or prohibited, the defense of estoppel or acquiescence is available against a municipality.—Salmon v. Rochester & Lake Ontario Water Co., 197 N.Y.S. 769, 120 Misc. 131.

83. Tenn.—Whitlow v. Hardin County, 13 Tenn.App. 347.
21 C.J. p 1190 note 8.

84. Cal.—McGee v. City of Los Angeles, 57 P.2d 925, 6 Cal.2d 390—Times-Mirror Co. v. Superior Court in and for Los Angeles County, 44 P.2d 547, 3 Cal.2d 309.
Ill.—James Anderson Co. v. City of Highland Park, 276 Ill.App. 327—Hurt v. Hejhal, 259 Ill.App. 221—Rand McNally & Co. v. City of Chicago, 216 Ill.App. 510.
Ind.—Michigan City v. State ex rel Seidler, 5 N.E.2d 968, 211 Ind. 586
Md.—Camden Sewer Co. v. Mayor and Council of Salisbury, 160 A. 4, 162 Md. 454.
Mass.—City of Boston v. Nielsen, 26 N.E.2d 366.
Mo.—State ex inf. Wilkerson ex rel. City of Sikeston v. Missouri Utilities Co., 137 S.W.2d 456.
N.Y.—New York & Queens Electric Light & Power Co. v. Delaney, 128 N.E. 131, 229 N.Y. 184, reversing In re New York & Queens Electric Light & Power Co., 179 N.Y.S. 938, 190 App.Div. 934—Pace v. Brooklyn & Queens Transit Corporation, 22 N.Y.S.2d 842, 175 Misc. 332—City of Hudson v. Board of Education of City of Hudson, 287 N.Y.S. 620, 158 Misc. 583.
Va.—City of Richmond v. Virginia Bonded Warehouse Corporation, 138 S.E. 503, 148 Va. 60, 54 A.L.R. 1485.
Wis.—Shulse v. City of Mayville, 271 N.W. 643, 223 Wis. 624.

City annexing town subject to estoppel

After annexation of a town, which would have been equitably estopped, the annexing city is also estopped to deny the lawful presence of electric conduits in the streets of the former town.—Milwaukee Electric Ry. & Light Co. v. City of Milwaukee, 245 N.W. 860, 209 Wis. 668.

Estoppel applicable to any contract

Doctrine of equitable estoppel applies to any contract made by city through offer made in statute or charter, and accepted by citizen or property owner.—Vandeweghe v. City of New York, 270 N.Y.S. 570, 150 Misc. 815, affirmed 275 N.Y.S. 218, 242 App.Div. 762.

Acquiescence in violations of contract

Plaintiff city, with which defendant contracted to construct subways for electric lines and rent space therein, and annually pay to plaintiff the net annual profits in excess of ten per cent on the actual cost to defendant for construction, is estopped to claim a forfeiture of the contract for defendant's omission to keep books and make annual reports to plaintiff's comptroller, as required by the contract, having acquiesced

ty,[85] the District of Columbia,[86] a drainage district,[87] irrigation district,[88] parish,[89] police jury,[90] school district,[91] town,[92] township,[93] or village.[94]

On the other hand, as shown supra § 138, none of such political entities or corporate bodies may be estopped where the essential elements of an estoppel are absent; and the doctrine of estoppel may not be applied to a governmental agency to effect a violation of law.[95]

b. Governmental or Proprietary Functions

In respect of its governmental functions a municipal or quasi-municipal corporation ordinarily may not be estopped; but such an entity may be estopped as to acts done in its proprietary capacity, although in doubtful cases the doubt is resolved in favor of the municipal corporation.

In respect of its governmental functions a municipal or quasi-municipal corporation ordinarily may not be estopped.[96] Thus ordinarily it is not es-

in such violations and required defendant from time to time thereafter to continue construction work.—City of New York v. Consolidated Telegraph & Electrical Subway Co., 188 N.Y.S 666, 196 App.Div. 689, affirmed 135 N.E. 923, 233 N.Y. 574, remittitur amended 135 N.E. 970, 233 N.Y. 686.

85. U.S.—Glades County, Fla., v. Detroit Fidelity & Surety Co., C.C.A.Fla., 57 F.2d 449—Greene County v. Tennessee Eastern Electric Co., C.C.A Tenn., 40 F.2d 184—Scott County, Ark. v. Advance-Rumley Thresher Co., C.C.A.Ark., 288 F. 739.

Cal.—Los Angeles County v. Cline, 197 P 67, 185 Cal. 299.

Iowa.—Plymouth County v. Koehler, 267 N.W. 106, 221 Iowa 1022.

Minn.—Mahnomen County v. Klyver, 230 N.W. 891, 180 Minn. 423.

Neb.—State v. Burt-Washington Drainage Dist., 174 N.W. 316, 103 Neb. 763.

Pa.—Union County v. Northumberland County, 126 A. 197, 281 Pa. 62.

Tenn.—Whitlow v. Hardin County, 13 Tenn.App. 347.

Tex.—Payton v. Travis County, Civ. App., 129 S.W.2d 361, error dismissed, judgment correct—Rusk County v. Maloney, Civ.App., 38 S.W.2d 868, error refused.

Wis.—Marathon County v. Industrial Commission, 275 N.W. 437, 225 Wis. 514, reversing 272 N.W. 374, 225 Wis. 514.

21 C.J. p 1190 note 7.

Liability for medical services

Where medical treatment required by nonresident indigent and his admitted circumstances brought his case within statute requiring county to pay for medical services, the county was estopped to say it did not authorize services rendered by physician.—Board of Com'rs of Crowley County v. Desmond, 90 P. 2d 619, 104 Colo. 269.

86. D.C.—District of Columbia v. Cahill, 54 F.2d 453, 60 App.D.C. 342.

Where the district is acting as a municipal corporation, with relation to strictly corporate affairs, and where the essential elements of an estoppel are present, it may be estopped by its acts and conduct in like manner as an individual.—District of Columbia v. Cahill, supra.

87. Mo.—State ex rel. Nolen v. Nelson, 275 S.W. 927, 310 Mo. 526—Barkshire v. Drainage Dist. No. 1 Reformed of Stoddard County, App., 136 S.W.2d 701.

88. U.S.—Gas Securites Co. v. Antero & Lost Park Reservoir Co., Colo., 259 F. 423, 170 C.C.A. 399, certiorari denied 40 S.Ct. 13, 250 U.S. 667, 63 L.Ed. 1198.

89. U.S.—Police Jury of Richland Parish v. Caldwell & Co., C.C.A. La., 26 F.2d 74.

90. La.—Turfitt v. Police Jury of Tangipahoa Parish, 186 So. 52, 191 La. 635.

91. Ill.—Webster v. Toulon Tp. High School Dist. No. 4, 145 N.E. 118, 313 Ill. 541—Sebastian v. School Directors of Dist. No. 53, Clinton County, 28 N.E 2d 340, 306 Ill.App. 282.

Okl.—New Amsterdam Casualty Co. v. Board of Education of Consolidated School Dist. No. 1 of Nowata County, 253 P. 1012, 124 Okl. 101.

By-laws and rules

A school district is an agency of the commonwealth and a quasi corporation, and as such is subject to rule that by-laws and rules of corporate bodies intended to affect and induce action by third persons are binding on corporate body when accepted and relied on by such persons.—Smith v. School Dist. of Philadelphia, 5 A.2d 535, 334 Pa. 197, followed in Drasin v. School Dist. of Philadelphia, 5 A.2d 540, 334 Pa. 210.

92. Minn.—State v. Johnson, 233 N.W. 236, 181 Minn. 510.

N.Y.—Augustine v. Town of Brant, 227 N.Y.S. 305, 131 Misc. 555, affirmed 163 N.E. 732, 249 N.Y. 198, which reversed 230 N.Y.S. 43, 224 App.Div. 290, and reargument denied 166 N.E. 315, 250 N.Y. 537.

W.Va.—Marmet Gas Co. v. Town of Marmet, 135 S.E. 839, 102 W.Va. 605.

21 C.J. p 1190 note 7.

93. Mich.—Meyer v. Meldrum, 211 N.W. 658, 237 Mich. 318.

21 C.J. p 1190 note 7.

Board of township commissioners

S.C.—Schroeder v. O'Neill, 184 S.E. 679, 179 S.C. 310.

94. Ill.—People ex rel. Village of Colfax v. Maxton, 28 N.E 1074, 139 Ill. 306—Dreher v. Baker, 253 Ill.App. 583.

Neb.—Village of Deshler v. Southern Nebraska Power Co., 277 N.W. 77, 133 Neb. 778.

Ohio.—Baxter v. Village of Manchester, 28 N.E.2d 672, 64 Ohio App. 220.

95. Conn.—Howe v. Civil Service Commission of City of Bridgeport, 20 A.2d 397, 399, 128 Conn. 35.

Civil service commission violating tenure law

The civil service commission of Bridgeport by hearing an appeal from action of the director of maintenance of the board of education in removing plaintiff from position of janitor was not estopped from denying that plaintiff was a permanent appointee, since "the commission could not endow the plaintiff with permanency of tenure by its own action, in violation of law."—Howe v. Civil Service Commission of City of Bridgeport, supra.

96. Cal.—Los Angeles Warehouse Co. v. Los Angeles County, 33 P.2d 1058, 139 Cal.App. 368.

Colo.—Edwards v. Guthner, 103 P.2d 6—Van Gilder v. City and County of Denver, 89 P.2d 529, 104 Colo. 76.

Idaho.—Common School Dist. No. 61 in Twin Falls County v. Twin Falls Bank & Trust Co., 4 P.2d 342, 50 Idaho 711.

Ill.—Hall v. Cook County, 195 N.E. 54, 359 Ill. 528, reversing 274 Ill. App. 503, and transferred, see 187 N.E. 454, 353 Ill. 477—Melin v. Community Consol. School Dist. No. 76, 144 N.E. 13, 312 Ill. 376—Benton v. Kaneville Community High School Dist. No. 147, 250 Ill. App. 6.

Kan.—Board of Com'rs of Sedgwick County v. Conners, 245 P. 1030, 121 Kan. 105.

Mich.—Lovett v. City Treasurer of Detroit, 281 N.W. 576, 286 Mich. 159.

Mo.—State ex inf. McKittrick ex rel. City of Lebanon v. Missouri Standard Tel. Co., 85 S.W.2d 613, 337 Mo. 642—State ex inf. Shartel, ex rel.

topped with regard to its handling of public funds[97] or its performance of other governmental functions.[98]

Nevertheless in a proper case a municipality may be estopped in respect of its governmental functions.[99] Especially may such an estoppel exist where the controversy is between two or more public agencies.[1]

Proprietary functions. A municipal or quasi-municipal corporation may be estopped in respect of its business or proprietary functions.[2] Thus a municipal or quasi-municipal corporation may be es-

City of Sikeston v. Missouri Utilities Co., 53 S.W.2d 394, 331 Mo. 337, 89 A.L.R. 607—State ex rel. Consolidated School Dist. No. 2 of Pike County v. Haid, 41 S.W.2d 806, 328 Mo. 729, quashing certiorari, App., Consolidated School Dist No. 2 of Pike County v Cooper, 28 S.W.2d 384—City of Pacific v. Ryan, 28 S.W.2d 652, 325 Mo. 373—City of Mountain View v. Farmers' Telephone Exch. Co., App., 224 S.W. 155, affirmed 243 S.W. 153, 294 Mo. 623.

Pa.—Appeal of Valicenti, 148 A. 308, 298 Pa. 276.

W.Va.—City of Beckley v. Wolford, 140 S.E. 344, 104 W.Va. 391.

21 C.J. pp 1186, 1187 notes 79, 80.

Public rights

An estoppel does not lie in respect of public rights except under special circumstances which make it highly inequitable or oppressive to enforce such rights.—People ex rel. Petty v. Thomas, 198 N.E. 363, 361 Ill. 448—Melin v. Community Consol. School Dist. No. 76, 144 N.E. 13, 312 Ill. 376.

County acting for state

Principle of estoppel cannot properly be applied to county when it acts as subdivision of state in aid of state's sovereign powers.—Scaling v. Williams, Tex.Civ.App., 284 S.W. 310.

97. Kan.—Board of Com'rs of Woodson County v. City of Yates Center, 32 P.2d 209, 139 Kan. 519—Board of Com'rs of Harvey County v. School Board of School Dist. No. 1, 32 P.2d 812, 139 Kan. 457, followed in Board of Com'rs of Harvey County v. Governing Body of City of Burrton, 32 P.2d 814—School Dist. No. 12 of Ottawa County v. Board of Com'rs of Ottawa County, 1 P.2d 88, 133 Kan. 528.

Collection of revenues

In county's capacity as governmental agency to collect and conserve public revenue, it is not estopped by unauthorized acts of its officials—Board of Com'rs of Sedgwick County v. Conners, 245 P. 1030, 121 Kan. 105.

98. **Storage of seized automobiles**

County, exercising governmental function in storing automobiles seized on criminal charges against owners, is not estopped to deny liability for storage charges incurred after termination of prosecutions.—Los Angeles Warehouse Co. v. Los Angeles County, 33 P.2d 1058, 139 Cal.App. 368.

Public health

It is difficult for a municipality, even by express contract, to estop itself from legislating for the protection of public health—Park Hill Development Co. v. City of Evansville, 130 N.E. 645, 190 Ind. 432.

Selection of parish printer

Police jury, being political body, is not estopped to select parish printer, disregarding bids under unnecessary advertisement therefor since it was exercising governmental powers.—State ex rel. Lanier v. Tangipahoa Parish Police Jury, 120 So. 249, 9 La.App. 727.

Striking name of ineligible from civil service list

Where employee of city and county of Denver who had been provisional stenographer in police department for several years, was permitted to take civil service examination for police operator although he was over the age limit, on condition that he waive his pension rights, and employee passed examination and was placed on the eligible list, the city and county on discovering that members of the police department could not waive their pension rights, had duty to and was not estopped from striking employee's name from the eligible list.—Edwards v. Guthner, Colo., 103 P.2d 6.

99. Mo.—State ex inf. McKittrick ex rel. City of California v. Missouri Utilities Co., 96 S.W.2d 607, 339 Mo. 385, 106 A.L.R. 1169—State ex inf. McKittrick ex rel. City of Lebanon v. Missouri Standard Tel. Co., 85 S.W.2d 613, 337 Mo. 642—State ex inf. Shartel, ex rel. City of Sikeston v. Missouri Utilities Co., 53 S.W.2d 394, 331 Mo. 337, 89 A.L.R. 607—School Dist. No. 45 of Pemiscot County v. Correll, 286 S.W. 136, 220 Mo.App. 322.

Wis.—State v. Pohle, 202 N.W. 148, 185 Wis. 610.

Judicial caution

"When the doctrine of equitable estoppel is applied to municipal corporations in matters pertaining to governmental functions, much caution is to be, and should be, observed."—City of Mountain View v. Farmers' Telephone Exch. Co., Mo. App., 224 S.W. 155, 157, affirmed 243 S.W. 153, 294 Mo. 623.

Necessity for affirmative acts

Before the doctrine of estoppel can be invoked as against a municipal corporation acting in its governmental capacity, there must have been some positive acts by the municipal officers which may have induced the action of the adverse party under circumstances making it inequitable to permit the corporation to stultify itself by retracting what its officers have done, mere nonaction by officers or adverse possession being insufficient.—Melin v. Community Consol. School Dist. No. 76, 144 N.E. 13, 312 Ill. 376.

Matters constituting estoppel

Where districts, affected by order of county committee on common schools annexing territory to a joint district, ignored such order, and for a period of two years neither the joint district nor the others operated under such order, but all the districts involved actually participated in the formation of another joint school district which included a great portion of an annexed territory, such districts were estopped to assert any rights under the order so disregarded, St.1921 §§ 40.03, 40.06, although not applicable, being indicative of the question of public policy involved.—State v. Pohle, 202 N.W. 148, 185 Wis. 610.

1. Mo.—State ex rel. Consolidated School Dist. No. 2 of Pike County v. Haid, 41 S.W.2d 806, 328 Mo. 729, quashing certiorari Consolidated School Dist. No. 2 of Pike County v. Cooper, App., 28 S.W. 2d 384.

Dispute between school districts

School district, receiving school benefits from expenditure of its funds by adjoining district in which it was illegally merged, is estopped from recovering money under facts.—State ex rel. Consolidated School Dist No. 2 of Pike County v. Haid, supra.

2. U.S.—Griffin v. Oklahoma Natural Gas Corporation, C.C.A.Kan., 37 F.2d 545—City and County of Denver v. Denver Tramway Corporation, C.C.A.Colo., 23 F.2d 287, certiorari denied 49 S.Ct. 20, 278 U.S. 616, 73 L.Ed. 539—Mississippi Power Co. v. City of Starkville, D.C. Miss., 4 F.Supp. 833—City of Denver v. Mercantile Trust Co., Colo., 201 F. 790, 120 C.C.A. 100.

Ga.—City of East Point v. Upchurch Packing Co., 200 S.E. 210, 58 Ga.App. 829.

Ill.—Hall v. Cook County, 195 N.E. 54, 359 Ill. 528, reversing 274 Ill. App. 503 and transferred, see 187 N.E. 454, 353 Ill. 477—Melin v. Community Consol. School Dist.

topped in respect of property held in its corporate capacity[3] or in respect of its operation of public utilities.[4]

However, an estoppel against a municipality acting in its proprietary capacity will not be allowed to defeat a mandatory provision of a statute;[5] and, where there is doubt as to whether a municipality should be estopped, the doubt should be resolved in its favor.[6]

§ 142. Acts of Officers and Agents

a. In general
b. Unauthorized acts, admissions, omissions, or opinions
c. Estoppel of officer or agent in public or private capacity

a. In General

The public, in the exercise of a proprietary, as distinguished from a governmental, function, may be estopped by the acts or omissions of its officers acting within the scope of their lawful authority.

The public may be estopped by the acts of any public officer done in the exercise of powers expressly conferred by law.[7] The acts or omissions of its officers, when acting within the scope of their authority, may estop the United States[8] or a state.[9]

A municipal or quasi-municipal corporation as well as a private corporation[10] may be subject to an estoppel in pais from the words, acts, or conduct of its officers or agents as to its business affairs if acting within the scope of their authority,[11] even

No. 76, 144 N.E. 13, 312 Ill. 376—Platt County v. Goodell, 97 Ill. 84

N.Y.—In re Certain Lands on North Shore of Harlem River in City of New York, 217 N.Y.S. 544, 127 Misc. 710.

Okl.—Oklahoma City v. Pratt, 95 P. 2d 596, 185 Okl. 637.

Wis.—Eau Claire Dells Improvement Co. v. City of Eau Claire, 179 N. W. 2, 172 Wis. 240.

Wyo.—Seaman v. Big Horn Canal Ass'n, 213 P. 938, 29 Wyo. 391.

21 C.J. p 1186 note 79.

Necessity that essential elements of estoppel be present see supra § 138.

Failure to exercise business functions

Same rule of strict construction should not be applied in behalf of county where it attempts to take advantage of its own failure to exercise its business functions as is applied in behalf of taxpayer, who must pay taxes sought to be levied.—Hall v. Cook County, 195 N.E. 54, 359 Ill. 528, reversing 274 Ill.App. 503, and transferred, see 187 N.E. 454, 353 Ill. 477.

3. N.Y.—In re Certain Lands on North Shore of Harlem River in City of New York, 217 N.Y.S. 544, 127 Misc. 710.
Okl.—Oklahoma City v. Pratt, 95 P. 2d 596, 185 Okl. 637.

4. Ga.—City of East Point v. Upchurch Packing Co., 200 S.E. 210, 58 Ga.App. 829.

"In the operation of an electric-light and water plant, a municipal corporation is engaged in a non-governmental function, and may be subject to an equitable estoppel where it is guilty of such negligence as to work a fraud on the party setting up the estoppel."—City of East Point v. Upchurch Packing Co., supra.

5. U.S.—Layne-Western Co. v. Buchanan County, C.C.A.Mo., 85 F.2d 343.

6. U.S.—Mississippi Power Co. v. City of Starkville, D.C.Miss., 4 F. Supp. 833.

Grant of utility franchise as estopping municipal operation

Mere sale of municipal light and water plant and distribution system and grant to purchaser of franchise for twenty-five years did not estop city from thereafter issuing bonds for erection of power plant and distribution system, the case for estoppel being, at its strongest, one of doubt, which should be resolved in favor of the municipality.—Mississippi Power Co. v. City of Starkville, supra.

7. Ga.—Citizens' Bank of Moultrie v. Rockdale County, 111 S.E. 434, 152 Ga. 711.

8. U.S.—Ritter v. U. S., C.C.A.Pa., 28 F.2d 265, affirming, D.C., 19 F. 2d 251.

Estoppel by attorneys

The United States is not ordinarily estopped by acts done in pais by its officers, but, when once in court, may be estopped of record by its attorneys and officers therein representing it.—First Nat. Bank v. U. S., D.C. Mo., 2 F.Supp. 107.

Estoppel by record see supra §§ 4–9.

When exercising broad discretionary powers in connection with contracts, a federal officer may estop the United States by his conduct, no one being bound to take notice of limitations on his powers not fixed by statute.—Dayton Airplane Co. v. U. S., C.C.A.Ohio, 21 F.2d 673.

9. N.Y.—People v. Finch, Pruyn & Co., 202 N.Y.S. 582, 207 App.Div. 76, affirmed 144 N.E. 902, 238 N.Y. 584.

10. Ga.—City of East Point v. Upchurch Packing Co., 200 S.E. 210, 211, 58 Ga.App. 829, quoting **Corpus Juris.**
Ill.—Webster v. Toulon Tp. High School Dist. No. 4, 145 N.E. 118, 121, 313 Ill. 541, citing **Corpus Juris.**
Pa.—Breinig v. Allegheny County, 2 A.2d 842, 332 Pa. 474.

11. U.S.—Mutual Chemical Co. of America v. Mayor and City Council of Baltimore, D.C.Md., 33 F. Supp. 881.
Ga.—City of East Point v. Upchurch Packing Co., 200 S.E. 210, 211, 58 Ga.App. 829, quoting **Corpus Juris.**
Ill.—Webster v. Toulon Tp. High School Dist. No. 4, 145 N.E. 118, 121, 313 Ill. 541, citing **Corpus Juris.**
Kan.—Derby Oil Co. v. City of Oxford, 4 P.2d 435, 437, 131 Kan. 59, citing **Corpus Juris.**
Neb.—State v. Burt-Washington Drainage Dist., 174 N.W. 316, 103 Neb. 763.
Or.—Ebell v. City of Baker, 299 P. 313, 319, 137 Or. 427, citing **Corpus Juris.**
Pa.—Borough of Edgewood v. Apfel, 86 Pittsb.Leg.J. 405.
Wyo.—Seaman v. Big Horn Canal Ass'n, 213 P. 938, 940, 29 Wyo. 391, citing **Corpus Juris.**
21 C.J. p 1190 note 15.

Corpus Juris cited with approval in a case in which it was held that the rule of the text was inapplicable to the facts.—Farrow v. City Council of Charleston, 168 S.E. 852, 854, 169 S.C. 373, 87 A.L.R. 981.

Clothing agent with appearance of authority

A municipality "may be estopped to deny the authority of its agents and employees to act if it has the power to, and by its conduct does, clothe an agent with the appearance of authority."—Breinig v. Allegheny County, 2 A.2d 842, 849, 332 Pa. 474.

Board of health is estopped from refusing to issue license to operate abattoir after applicant performed all conditions imposed by conditional

if acting as de facto officers or agents,[12] where the public is acting through its officers or agents in its private or proprietary, as distinguished from its governmental capacity,[13] and the subject matter is not ultra vires.[14] In its governmental capacity a public agency may not be estopped by the acts of its agents.[15] It has been stated that the doctrine of estoppel may be invoked against a municipality where there have been positive acts by municipal officers inducing action by the other party and where it would be inequitable to permit the municipality to stultify itself by retracting what its officers have done.[16] In determining whether a municipal corporation is subject in a particular case to estoppel, it is necessary to ascertain the scope of authority of the municipal agency through which the misrepresentation was made and the relationship of the misrepresentation to the execution of such authority.[17]

The unauthorized acts or statements of govern-

grant of license.—Garber v. Board of Health of City of Paterson, 131 A. 638, 4 N.J.Misc. 83.

Estoppel of city to urge violation of building line restrictions

City approving building plans and specifications, and issuing building permit through its department of public works, is estopped to set up violation of building line restrictions as ground for denial of compensation for value of building in condemnation proceedings.—Keane v. City of Portland, 235 P. 677, 115 Or. 1.

School district is estopped to repudiate contract not ultra vires and legally authorized, where contractor had partly performed before attempted repudiation.—Bonsack & Pearce v. School Dist. of Marceline, 49 S.W.2d 1085, 226 Mo.App. 1238.

12. Ga.—City of East Point v. Upchurch Packing Co., 200 S.E. 210, 211, 58 Ga.App. 829, quoting **Corpus Juris.**

Pa.—Jordan v. Washington & C. R. Co., 25 Pa.Super. 564.

13. Ga.—City of East Point v. Upchurch Packing Co., 200 S.E. 210, 211, 58 Ga.App. 829, quoting **Corpus Juris.**

Tex.—Deutsch v. City of San Angelo, Civ.App., 73 S.W.2d 125, 126, 127, citing **Corpus Juris,** reversed on other grounds City of San Angelo v. Deutsch, 91 S.W.2d 308, 126 Tex. 532.

Meter readings

A city furnishing electric power to consumer was estopped from asserting a claim against consumer on ground that readings of meter measuring the current used should have been multiplied by "40" instead of "30," where superintendent of city's electric light department, acting within the scope of his duties, advised consumer when meter was installed, that meter readings would be multiplied by "30" in measuring the current used.—City of East Point v. Upchurch Packing Co., 200 S.E. 210, 211, 58 Ga.App. 829.

14. Ga.—City of East Point v. Upchurch Packing Co., supra, quoting **Corpus Juris.**

Ind.—Civil City of Indianapolis v. Ostrom R. & Const. Co., 176 N.E. 246, 248, 95 Ind.App. 376, citing **Corpus Juris.**

Ohio.—Mt Vernon v. State, 73 N.E. 515, 71 Ohio St. 428, 104 Am.S.R. 783, 2 Ann Cas. 399.

Ultra vires acts see infra § 143.

15. U.S.—McDonald v U. S., C.C.A.Minn., 89 F.2d 128, certiorari denied 57 S.Ct. 925, 301 U.S. 697, 81 L.Ed. 1352, rehearing denied 58 S.Ct. 4, 302 U.S. 773, 82 L.Ed. 599—U. S. v. Norton, C.C.A.Fla., 77 F.2d 731.

Idaho.—Common School Dist. No. 61 in Twin Falls County v. Twin Falls Bank & Trust Co., 4 P.2d 342, 50 Idaho 711.

Ill.—People, by Barrett, v. Bradford, 22 N.E.2d 691, 372 Ill. 63.

Ky.—Taylor v. City of La Grange, 90 S.W.2d 357, 262 Ky. 383.

S.C.—Farrow v. City Council of Charleston, 168 S.E. 852, 169 S.C. 373, 87 A.L.R. 981.

Estoppel as affected by governmental or proprietary nature of functions see supra §§ 140 b, 141 b.

Draft law

Jurisdiction to subject a resident Canadian registrant to the draft was not lost by estoppel or waiver, because after his exemption under the first call, afterward revoked, he was sent back to Canada by the immigration authorities as having unlawfully entered, where he returned on a permit and remained until after the Canadian-American Convention went into effect.—Morris v. Johnston, Wash., 260 F. 821, 171 C.C.A. 547.

Public lands

(1) As to public lands, government, in view of its unlimited control of own domain and of fact that, in disposing of it, government does not assume attitude of mere seller of realty, is not estopped by mistaken assertion of facts by agents of land department.—U. S. v. Standard Oil Co. of California, D.C.Cal., 20 F.Supp. 427.

(2) The United States was not estopped from claiming title to school lands determined to have been of known mineral character at time of official survey by secretary of interior, by alleged offer by secretary of interior's predecessor to secretary of navy to convey the public lands to secretary of navy and his refusal to accept offer on ground that lands did not contain oil in commercial quantities.—U. S. v. Standard Oil Co. of California, supra.

(3) The United States was not estopped from claiming title to school lands on ground that they were of known mineral character at time of official survey, because of suspension from entry under agricultural laws and subsequent relief from suspension of township in which school lands were situated, nondisclosure of any indication to warrant classification of lands as mineral in examination by special agent, or that register of United States Land Office made statement to surveyor general of state that there were no adverse claims on record against section in which lands were located.—U. S. v. Standard Oil Co. of California, supra.

War risk insurance

The acts of officers and agents will not estop the federal government in connection with war risk insurance, although similar acts might constitute an estoppel if made in connection with policies issued by a private insurance company, since war risk insurance contracts are not issued by the government in its proprietary capacity.—Sternfeld v. U. S., D.C.N.Y., 32 F.2d 789—Coleman v. U. S., D.C.Tenn., 18 F.Supp. 71, affirmed, C.C.A., 100 F.2d 903.

16. Ill.—People ex rel. Petty v. Thomas, 198 N.E. 363, 361 Ill. 448—Trustees of Schools v. Village of Cahokia, 192 N.E. 565, 357 Ill. 538—Webster v. Toulon Tp., High School Dist. No. 4, 145 N.E. 118, 313 Ill. 541.

Nonaction as sufficient to estop public see supra § 138.

Advising company to proceed with drilling pending test of ordinance

Mayor's promise not to prosecute oil company for drilling while validity of ordinance was being tested, and his advice to proceed with the drilling, coupled with the city council's failure to protest, constituting approval of the mayor's advice and promise, estopped city from prosecuting.—Derby Oil Co. v. City of Oxford, 4 P.2d 435, 134 Kan. 59.

17. Tex.—Payne v. First Nat. Bank,

mental officers will not estop the federal, state, or a municipal government, as shown in subdivision b of this section, and their acts as individuals rather than as officials will work no estoppel against the governmental body;[18] nor may a municipality be bound by an act of its agent requiring legislative or executive action.[19]

A contract executed by persons not authorized to represent a municipality is void and the municipality may not be estopped to deny its validity.[20]

b. Unauthorized Acts, Admissions, Omissions, or Opinions

In the absence of subsequent acquiescence or approval, ordinarily the United States, or a state, municipality, or other governmental agency, may not be estopped by the unauthorized acts or omissions of its officers and agents; and it may not be estopped as to matters beyond the scope of its powers or in violation of positive law.

Ordinarily the public may not be estopped by the unauthorized, illegal, or fraudulent acts, admissions, conduct or statements of its officers and agents,[21]

Com.App., 291 S.W. 209, affirming First Nat. Bank v. City of North Pleasanton, Civ.App., 257 S.W. 609.

18. Ky.—Janutola & Comadori Const. Co. v. Taulbee, 16 S.W.2d 1026, 229 Ky. 213.

Councilman, speaking as individual, could not estop city or contractor from asserting improvement lien, where proceedings were regular.—Janutola & Comadori Const. Co. v. Taulbee, supra.

Personal activities of county judge

County judge's efforts to secure enactment of unconstitutional statute regulating sheriff's compensation were to be regarded as personal rather than official activities, and could not estop county from recovering salary sheriff received thereunder.—Roberts v. Roane County, 23 S.W.2d 239, 160 Tenn. 109.

Separate actions of officials

No member of city council, nor mayor, nor city attorney, each acting separately as an individual, could bind city by a contractual obligation creatable only by official action of the city council for architect's fees, nor could any one of them ratify or reinstate contract between city and architect after it became void, or estop the city from denying the validity of the void contract.—Helleberg v. City of Kearney, Neb., 297 N.W. 672.

19. Pa.—Breinig v. Allegheny County, 2 A.2d 842, 332 Pa. 474.

20. Mo.—Eureka Fire Hose Mfg. Co. v. City of Portageville, App., 106 S.W.2d 513.

21. U.S.—Board of Directors of St. Francis Levee Dist. v. Kurn, C.C.A.Mo., 98 F.2d 394, certiorari denied 59 S.Ct. 153, 305 U.S. 647, 83 L.Ed. 418—Brownell v. City of St. Petersburg, D.C.Fla., 38 F.Supp. 1003—Sidney Spitzer & Co. v. Monroe County, D.C.Ala., 274 F. 819.
Ark.—Greene County v. City of Paragould, 265 S.W. 839, 166 Ark. 192.
Cal.—Booth v. Los Angeles County, 12 P.2d 72, 124 Cal.App. 259—Greene v. Town of Lakeport, 239 P. 702, 74 Cal.App. 1—People v. Southern Pac. R. Co., 228 P. 726, 68 Cal.App. 153.
Colo.—Averch v. City and County of Denver, 242 P. 47, 78 Colo. 246.
Ga.—Decatur County v. Roberts, 126 S.E. 460, 159 Ga. 528, reversing 124 S.E. 810, 32 Ga.App. 771—Citizens' Bank of Moultrie v. Rockdale County, 111 S.E. 434, 152 Ga. 711.
Ill.—People, by Barrett, v. Bradford, 22 N.E.2d 691, 372 Ill. 63—Sinclair Refining Co. v. City of Chicago, 246 Ill.App. 152.
Ind.—Citizens' Bank of Anderson v. Town of Burnettsville, 179 N.E. 724, 98 Ind.App. 92.
Iowa.—Independent School Dist. of Town of Ogden, Boone County, v. Samuelson, 270 N.W. 434, 222 Iowa 1063—Mitchell County v. Odden, 259 N.W. 774, 219 Iowa 793.
Ky.—City of Paducah v. Gillispie, 115 S.W.2d 574, 273 Ky. 101.
La.—Roberts v. Davis Bros. Lumber Co., App., 151 So. 126.
Me.—City of Lewiston v. Grant, 113 A. 181, 120 Me. 194.
Mass.—Graton v. City of Cambridge, 145 N.E. 453, 250 Mass. 317.
Mich.—Lawrence v. American Surety Co. of New York, 250 N.W. 295, 264 Mich. 516, 88 A.L.R. 535, denying rehearing 249 N.W. 3, 263 Mich. 586.
Miss.—Gift v. Love, 144 So. 562, 164 Miss. 442, 86 A.L.R. 63.
Mo.—School Dist. No. 45 of Pemiscot County v. Correll, 286 S.W. 136, 140, 220 Mo.App. 322, citing **Corpus Juris.**
Mont.—West v. Minneapolis Mining & Smelting Co., 217 P. 342, 68 Mont. 253.
Neb.—City of Cozad v. Thompson, 252 N.W. 606, 126 Neb. 79.
N.Y.—City of New York v. Wilson & Co., 15 N.E.2d 408, 278 N.Y. 86, modifying 1 N.Y.S.2d 655, 253 App.Div. 719, and reargument denied 16 N.E.2d 350, 278 N.Y. 702—In re Dickens (Franklin) Ave. from Far Rockaway Boulevard to Regina Boulevard, in City of New York, 262 N.Y.S. 817, 238 App.Div. 850, affirmed In re Dickens (Franklin) Ave., City of New York, 188 N.E. 187, 262 N.Y. 699.
N.D.—City of Williston v. Ludowese, 208 N.W. 82, 53 N.D. 797.
Ohio.—Spieker v. Board of Rapid Transit Com'rs., 174 N.E. 15, 17, 37 Ohio App. 102, quoting **Corpus Juris.**
Okl.—State ex rel. Tharel v. Board of Com'rs of Creek County, 107 P.2d 542.
Or.—State v. Claypool, 28 P.2d 882, 145 Or. 615—Smith v. State Industrial Accident Commission, 23 P.2d 904, 144 Or. 480, affirmed 25 P.2d 1119, 144 Or. 480.
S.C.—Farrow v. City Council of Charleston, 168 S.E. 852, 855, 169 S.C. 373, 87 A.L.R. 981, quoting **Corpus Juris.**
S.D.—Lane Independent Consol. School Dist. No 1 of Jerauld County v. Endahl, 234 N.W. 951, 55 S.D. 73.
Tenn.—Macon County v. Dixon, 100 S.W.2d 5, 20 Tenn.App. 425.
Tex.—City of San Angelo v. Deutsch, 91 S.W.2d 308, 310, 126 Tex. 532, citing **Corpus Juris,** and reversing Deutsch v. City of San Angelo, Civ.App., 73 S.W.2d 125—Grayburg Oil Co. v. State, Civ.App., 50 S.W.2d 355, error refused.
Utah.—Genola Town v. Santaquin City, 80 P.2d 930, 96 Utah 88, rehearing denied 85 P.2d 790, 96 Utah 104.
Wash.—State v. Schaaf, 86 P.2d 1112, 1115, 198 Wash. 52, quoting **Corpus Juris**—Brougham v. City of Seattle, 76 P.2d 1013, 194 Wash. 1.

21 C.J. p 1193 note 22.

Act beyond scope of officer's duties

There was no waiver by estoppel of a city as to the sufficiency of a notice of claim for injury to a pedestrian from a defect in street because the claim was drawn by the city engineer at the instance of claimant's son, such act not being in performance of any duty owing to the city.—Hogan v. City of Beloit, 184 N.W. 687, 175 Wis. 199.

Clerical error in records

Board of education of the city of Buffalo, not being bound by a clerk's error in copying into the minute book with an erroneous date a typewritten resolution continuing in force ordinances in effect prior to the true date, was not estopped from asserting, against a discharged principal of a school, that the period of

or by their omissions or neglect,[22] or by their mistaken advice or opinions;[23] but a governmental body may, within the limitations of its powers, be estopped by its acquiescence in, and approval of, acts originally unauthorized.[24] An official's knowledge of the facts will not raise an estoppel when public funds have been illegally disbursed,[25] and the actual knowledge of municipal officers respecting the existence of a claim does not estop the municipality from setting up as a defense the failure to file the claim as required by statute.[26]

The government or its instrumentalities are not

probation at the time she was appointed was two years—O'Connor v. Emerson, 188 N.Y.S. 236, 196 App. Div. 807, affirming 185 N.Y.S. 49, 113 Misc. 472, and affirmed 134 N.E. 572, 232 N.Y. 561.

Improper exercise of appointive power

The city and county of Denver was not estopped from claiming that petitioner was not entitled to position of police matron of city jail under classified civil service by fact that manager of safety and excise had appointed petitioner as police matron, if appointment was improper because petitioner had not taken examination to qualify for position.—Smith v. Stapleton, Colo., 100 P.2d 162.

Purported waiver of statute and regulations

The unauthorized statement of a field agent that it was not necessary for a taxpayer to file a claim did not relieve the taxpayer from the duty of doing so in accordance with the requirements of statute and regulations governing such matter or estop the United States—Ritter v. U. S., C.C.A.Pa., 28 F.2d 265, affirming, D.C., 19 F.2d 251.

Unlawful deposit of public funds

(1) The rule that the state cannot be estopped by the unauthorized or illegal acts of its agents or officers applies to preclude estoppel of the state with reference to their unlawful deposit of state funds.—Fiman v. State of South Dakota, C.C.A.S.D., 29 F.2d 776, certiorari denied 49 S.Ct. 254, 279 U.S. 841, 73 L.Ed. 987.

(2) County was not estopped from recovering from county treasurer and the surety on his bond the amount of county funds which were lost when banks became insolvent, on ground that the banks were not legal depositories, because of the fact that county board exceeded its authority and designated the banks as depositories and told treasurer to deposit county funds therein, nor did the conduct of the county board constitute "constructive fraud."—Garfield County v. Pearl, 295 N.W. 820, 138 Neb. 810, certiorari denied Pearl v. Garfield County, Neb., 61 S. Ct. 1117

"Political bodies are not estopped by the unauthorized and illegal acts of their officers."—Murry v. Union Parish School Board, La.App., 185 So. 305, 307.

Right to assume compliance with duty

County is not estopped to recover on official bonds of county court clerk for excess fee for making out tax book for which he failed to account, on ground that county appropriated and paid such compensation, since county could assume that clerk was complying with law and paying excess into treasury.—State, for Use of Sullivan County, v. O'Dell, 84 S.W.2d 577, 169 Tenn. 248.

22. Ill.—Smith v. Toman, 14 N.E. 2d 478, 368 Ill. 414, 118 A.L.R. 924—People ex rel. Smith v. Woods, 188 N.E. 369, 354 Ill. 224.
Ky.—City of Owensboro v. Board of Trustees of Public Library of Owensboro, 276 S.W. 143, 210 Ky. 482—Gay v. Jackson County Board of Education, 265 S.W. 772, 205 Ky 277.
N.Y.—People v. Baldwin, 188 N.Y.S. 542, 197 App Div. 285, affirming 184 N.Y.S. 715, 113 Misc. 172, and affirmed 135 N.E. 964, 233 N.Y. 672—City of Geneva v. Cayuga Oil Co., 238 N.Y.S. 187, 135 Misc. 673.

Failure to interpose timely defense

A board of education was not estopped by service of summons on the county superintendent, as its chairman, to have a default judgment vacated where the chairman negligently failed to present the defense in time, since neither the state nor any of its governmental agencies should be permitted to suffer any loss that must be borne by the public because of the negligence of a public officer and in this respect the rule differs from that applied to a private corporation, which would have been estopped under the facts of this case.—Clay County Board of Education v. Lewis, 218 S. W. 716, 187 Ky. 231.

23. U.S.—Commissioner of Internal Revenue v. Duckwitz, C.C.A., 68 F 2d 629.
N.Y.—New York City Employees' Retirement System v. Eliot, 196 N. E. 23, 267 N.Y. 193, reversing 275 N.Y.S. 19, 242 App.Div. 396 and dismissing appeal 275 N.Y S. 643, 242 App.Div. 813—City of New York v. Coney Island Fire Department, 10 N.Y.S.2d 164, 170 Misc. 787, affirmed 18 N.Y.S.2d 923, 259 App.Div. 286, reargument denied 20 N.Y.S.2d 410, 259 App.Div. 888, affirmed 32 N.E.2d 827, 285 N. Y. 535.
Tex—Weatherly v. Jackson, 71 S W 2d 259, 123 Tex. 213, reversing, Civ. App., 46 S W.2d 1030.

Advice of water board

Advice constituting mere expression of opinion which was given by authorities of board of water supply to engineer when they offered him leave of absence without pay, or suspension under mistaken belief as to law relating to seniority, did not estop board from opposing right of engineer to formal reinstatement as of date of his application for leave since officers of a city have no power to impose liability upon city by estoppel.—Williams v. Gillespie, 291 N.Y.S. 513, 161 Misc. 156.

Opinion of counsel

(1) The state is not estopped from asserting the incompatibility of the offices of school district treasurer and county commissioner because of an opinion from the office of the attorney general given the treasurer of the school district before he became a candidate for county commissioner on which he relied that they were compatible.—State v. Sword, 196 N. W. 467, 157 Minn. 263.

(2) The city of New York was not estopped to hold the chamberlain of the city personally liable for loss resulting from unlawful investment of infant's funds deposited with the chamberlain, for which the city was liable to the infant, on ground that investment was made in reliance upon advice of the corporation counsel, contained in a written opinion rendered to a predecessor of the chamberlain.—Stanelevitz v. City of New York, 15 N.Y.S.2d 837, 173 Misc. 5.

24. Tex—City of Houston v. Finn, Civ.App., 149 S.W.2d 1000.
Wash.—State v. Schaaf, 86 P.2d 1112, 198 Wash. 52.

Intra vires contract

Where paving contract is intra vires and exercise of engineer's power to order extra work is approved by city over long period, city is estopped from denying the power of its agent.—A. J. Smith Const. Co. v. Marine City, 255 N.W. 209, 267 Mich. 367.

25. N.Y.—In re Collins' Will, 277 N.Y.S. 524, 243 App.Div. 737, reversing In re Collins' Estate, 272 N.Y.S. 842, 151 Misc. 269.

26. Cal.—O'Brien v. City and County of San Francisco, App., 116 P. 2d 450.

estopped by acts of its officers or agents in entering into agreements or arrangements to do what the law does not sanction or permit;[27] and it may not be estopped by acts of its officers or agents in violation of positive law,[28] as by acts in violation of a zoning ordinance,[29] or of fire regulations.[30] The

27. U.S.—U. S. v. City and County of San Francisco, Cal., 60 S.Ct. 749, 310 U.S. 16, 84 L.Ed. 1050, reversing, C C A., City and County of San Francisco v. U. S., 106 F 2d 569, reversing, D.C., U. S. v. City and County of San Francisco, 23 F Supp. 40, certiorari granted 60 S Ct 467, 309 U.S. 642, 84 L.Ed. 996, rehearing denied 60 S.Ct. 1071, 310 U S. 657, 84 L.Ed. 1420—Wilber Nat. Bank of Oneonta, N. Y., v. U. S, N.Y., 55 S.Ct. 362, 294 U.S. 120, 79 L.Ed. 798, affirming, C. C.A., 69 F.2d 526, certiorari granted 55 S Ct. 94, 293 U.S. 541, 79 L Ed. 647—Coleman v. U. S., C.C.A. Tenn., 100 F.2d 903, affirming, D.C., 18 F Supp. 71—Providence Engineering Corporation v. Downey Shipbuilding Corporation, C.C.A.N. Y., 294 F. 641, certiorari denied U. S Shipping Board Emergency Fleet Corporation v. Chase Nat. Bank of City of New York, 44 S. Ct. 334, 264 U.S. 586, 68 L Ed. 862 —Chanslor-Canfield Midway Oil Co. v. U. S., C.C.A.Cal., 266 F. 145, modifying, D.C., U. S. v. Chanslor-Canfield Midway Oil Co., 266 F. 142, and motion granted 41 S.Ct. 148, 254 U.S. 664, 65 L Ed. 464, and 42 S Ct. 46, and appeal dismissed 42 S. Ct. 273, 258 U.S. 631, 66 L.Ed. 801.

D.C.—Cummings v. Societe Suisse Pour Valeurs De Metaux, 85 F.2d 287, 66 App.D.C. 121, followed in Cummings v. Jensen, 85 F.2d 290, 66 App D.C. 124.

N.Y.—In re Rosa's Estate, 16 N.Y.S. 2d 285, 172 Misc. 808.

28. Cal.—Kline v. San Francisco Unified School Dist., App., 104 P. 2d 661, hearing denied 105 P.2d 362.

Conn.—Heise v. City of Hartford, 17 A.2d 8, 127 Conn. 359.

Neb.—State ex rel. Sorensen v. Plateau State Bank, 253 N.W. 433, 126 Neb. 407.

Pa.—Breinig v. Allegheny County, 2 A.2d 842, 332 Pa. 474. See Borough of Edgewood v. Apfel, 86 Pittsb.Leg.J. 405.

Tenn.—Roberts v. Roane County, 23 S.W.2d 239, 160 Tenn. 109—Macon County v. Dixon, 100 S.W.2d 5, 20 Tenn.App. 425.

Tex.—Weatherly v. Jackson, 71 S.W. 2d 259, 123 Tex. 213, reversing, Civ.App., 46 S.W.2d 1030.

Acceptance of bond without requisite corporate surety

Where bond furnished to city by depository was executed by individuals as sureties instead of by a surety company, as required by the statute, the municipality was not estopped by the act of its municipal officers in accepting such bond from claiming that it was ultra vires.—Perkins v. State, 94 So. 460, 130 Miss. 512.

Allowance of claim

(1) A city or county is not estopped by the action of its council or supervisors in allowing an illegal claim in violation of law.—People v. Czaszewicz, 128 N.E. 739, 295 Ill. 11, affirming 216 Ill.App. 329—Cumberland County v. Edwards, 76 Ill. 544.

(2) Where statute requires the allowance of a claim against a county to be shown by a public record, and where the public record shows no such allowance, a county cannot be bound by county officials' certificate of genuineness of fictitious order allowing claim.—W. L. Slayton & Co. of Toledo, Ohio, v. Winston County, C.C.A.Ala., 24 F.2d 761, certiorari denied 49 S.Ct. 28, 278 U.S. 627, 73 L.Ed. 546.

(3) No estoppel can arise by reason of recognition of validity of claim by persons without authority. —U. S. v. Standard Oil Co. of California, D.C.Cal., 20 F.Supp. 427.

Forgery

The state is not estopped to recover against a depository which advances money to cash a state voucher by the fact that the forger of the payee's name is a trusted state employee, nor by any act or omission of any of its officers or agents.—State v. Merchants' Nat. Bank of St. Paul, 177 N.W. 135, 145 Minn. 322.

Issuance of insurance policies

An insurance company obtained no fixed right to issue policies forbidden by statute by reason of consent of state insurance department, nor would state be estopped from denying company's right to issue such policies by reason of such consent.—Department of Insurance of Indiana v. Church Members Relief Ass'n, Ind., 26 N.E.2d 51, 128 A.L.R. 635.

Misconstruction of statute

The alleged fact that department of interior for a period of years construed statute granting government lands to city for power project but prohibiting city from selling or letting right to sell or sublet electric energy to forbid only sale of power for resale did not create an estoppel against United States so as to preclude it from contending that the statute prohibited sale or distribution of power by any private corporation or individual.—U. S. v. City and County of San Francisco, 60 S. Ct. 749, 310 U.S. 16, 84 L.Ed. 1050, reversing, C.C.A., City and County of San Francisco v. U. S., 106 F.2d 569, reversing, D.C., U. S. v. City and County of San Francisco, 23 F.Supp. 40, certiorari granted 60 S.Ct. 467, 309 U S. 642, 84 L.Ed. 996, rehearing denied 60 S.Ct. 1071, 310 U.S. 657, 84 L.Ed. 1420.

Requirement that contract be in writing

A county was not estopped to assert invalidity of commissioner's oral contract to contribute to cost of road improved by township which was invalid under statutes requiring contract by county commissioners involving expenditures exceeding one hundred dollars to be in writing, since statutes requiring contract to be in writing were within cognizance of both parties, who were equally bound to observe statutes.—Township of Luzerne v. Fayette County, 199 A. 327, 330 Pa. 247.

29. Cal.—Magruder v. Redwood City, 265 P. 806, 203 Cal. 665.

N.Y.—Premium Bond Corporation v. City of Long Beach, 291 N.Y.S. 834, 249 App Div. 756.

Tex.—Eckert v. Jacobs, Civ App., 142 S.W.2d 374.

Administrative officer's conduct cannot estop legislative body of city from adopting and enforcing police regulation, such as zoning ordinance. —Lima v. Woodruff, 290 P. 480, 107 Cal.App. 285.

Issuance of permit under a zoning ordinance was the exercise of a governmental and not of a proprietary function, and where its officials issued a permit in violation of law the municipality was not estopped.—Lipsitz v. Parr, 164 A. 743, 164 Md. 222.

Permitting violations as bar to enforcement

The fact that certain city officials had permitted zoning ordinance to be violated for a number of years did not estop city from enforcing the ordinance.—Leigh v City of Wichita, 83 P.2d 644, 148 Kan. 607, 119 A.L.R. 1503.

30. Ky.—Robinson v. Town of Paintsville, 250 S.W. 972, 199 Ky. 247.

City engineer's prior consent to violations

The fact that a city, through its engineer, had consented on prior occasions to the construction of prohibited buildings within the fire limits fixed by an ordinance, and that the withholding of a permit from defendant to construct his building would discriminate against him, is no defense to a mandatory injunction to compel removal of a building erected without a permit.—Robinson v. Town of Paintsville, supra.

government or its instrumentalities are not estopped by acts or statements of agents in excess of corporate powers,[31] or where the subject matter is ultra vires or the contract wholly illegal;[32] nor may the acts of its agent estop the government from exercising its police power.[33] The rule denying an estoppel in such circumstances has been applied where the estoppel against the public is claimed in favor of a public officer or agent by reason of the acts or conduct of other public officers or agents.[34]

Acceptance of benefits. The general rule that the public is not estopped by the unauthorized acts or statements of its officers and agents is not affected by the fact that benefits accrue to, and are accepted by, the public.[35]

Apparent scope of authority. It has been asserted that the state is not estopped by the acts of its officers acting within the apparent scope of their authority,[36] and a fortiori the state is not estopped where the officer lacks even apparent authority to perform the act.[37] The rule that a private corporation which by its conduct leads one to believe that an agent has authority is therefore estopped to deny such authority does not apply to a public body.[38]

Persons dealing with public officers and agents are bound by the constructive notice of the law and the public records as to the measure of their powers and functions,[39] and the public cannot, by the rep-

31. Pa.—Breinig v. Allegheny County, 2 A.2d 842, 332 Pa. 474.

32. U.S.—City of Parkersburg v. Baltimore & O. R. Co., C.C.A.W. Va., 296 F. 74, appeal allowed 297 F. 1019, and reversed on other grounds Baltimore & O. R. Co. v. City of Parkersburg, 45 S.Ct. 382, 268 U.S. 35, 69 L.Ed. 834.

Conn.—Comley ex rel. Fitzroy v. Board of Trustees of Firemen's Relief Fund, 191 A. 729, 733, 122 Conn. 650, citing **Corpus Juris.**

Ky.—Burnside Land Co. v. Connelly & Lee, 291 S.W. 409, 218 Ky. 346.

Md.—Valentine v. Road Directors of Allegany County, 126 A. 147, 146 Md. 199.

Ohio.—Spieker v. Board of Rapid Transit Com'rs., 174 N.E. 15, 17, 37 Ohio App. 102, quoting **Corpus Juris.**

21 C.J. p 1193 note 24.

Void lease by county board

A county board of supervisors which had leased part of courthouse grounds without power to do so was not estopped by execution of lease, by having a suit brought to cancel lease and having it dismissed, and by permitting others to acquire a lease of part of courthouse grounds from suing to cancel lease, since lease was void, and no estoppel could arise.—American Oil Co. v. Marion County, 192 So. 296, 187 Miss. 148.

33. Cal.—Maguire v. Reardon, 183 P. 303, 41 Cal.App. 596, affirmed 41 S.Ct. 255, 255 U.S. 271, 65 L.Ed. 625.

Issuance of permit as bar to destruction of building

City was not estopped to destroy wooden building constructed and maintained within fire limits in violation of City and County of San Francisco Ordinance No. 1198, although building permit to construct building was issued by board of public works, the right to destroy building being an exercise of police power which cannot be bartered away.—Maguire v. Reardon, supra.

Obstructions in stream

The fact that earlier officers of a city may not have resisted encroachments on land appropriated for a channel of a deviating stream does not preclude the present officers from taking legal steps to clear the channel and prevent the placing of additional obstructions in the stream, since, in the exercise of the police power, neither a state nor any of its municipal agencies may be estopped to protect public rights.—City of Hutchinson v. White, 233 P. 508, 117 Kan. 622.

Statements of officials exercising police power

Only reliance which persons who perform work for state or any subordinate agency thereof can have is on language and proper interpretation of statute under which work is performed, and they can acquire no rights by way of estoppel either from their own mistaken interpretation of the statute or from the acts or statements of officials or agencies of the state engaged in the exercise of a delegated police power.—Sacramento and San Joaquin Drainage Dist. v. Riley, 229 P. 957, 194 Cal. 624.

34. Ohio.—Spieker v. Board of Rapid Transit Com'rs., 174 N.E. 15, 17, 37 Ohio App. 102, quoting **Corpus Juris.**

21 C.J. p 1193 note 25.

35. Ohio.—Spieker v. Board of Rapid Transit Com'rs., supra.

S.C.—Farrow v. City Council of Charleston, 168 S.E. 852, 855, 169 S.C. 373, 87 A.L.R. 981, citing **Corpus Juris.**

Wash.—State v. Schaaf, 86 P.2d 1112, 1115, 198 Wash. 52, quoting **Corpus Juris.**

21 C.J. p 1193 note 23.

However, it has been held that a city is not estopped as against an individual injured by officials' unauthorized or negligent acts in performing governmental functions, unless city is benefited by transaction.—City of San Angelo v. Deutsch, 91 S.W.2d 308, 126 Tex. 532, reversing Deutsch v. City of San Angelo, Civ. App., 73 S.W.2d 125.

Acceptance of benefits as effecting estoppel against:

Municipal or quasi-municipal corporation see supra § 111.

State or federal government see supra § 138.

36. Tex.—State v. Davisson, Civ. App., 280 S.W. 292.

37. Tenn.—State v. Broadway Nat. Bank, 282 S.W. 194, 153 Tenn. 113.

Military officer lacking fiscal authority

Second lieutenant, acting as clerk in office of adjutant general, has no apparent authority to issue warrants so as to estop state from recovering money paid on faith of indorsements forged by him on warrants he negotiated.—State v. Broadway Nat. Bank, supra.

38. La.—Brown v. St. Bernard Parish School Board, 131 So. 760, 14 La.App. 460.

Tex.—Horne Zoological Arena Co. v. City of Dallas, Civ.App., 45 S.W. 2d 714.

39. U.S.—Coleman v. U. S., C.C.A. Tenn., 100 F.2d 903, affirming, D.C., 18 F.Supp. 71—City of Dalhart v. Childers, D.C.Tex., 18 F.Supp 903.

Ky.—Pike County v. Waugh, 1 S.W. 2d 1066, 222 Ky. 598.

La.—Roberts v. Davis Bros. Lumber Co., App., 151 So. 126.

Md.—Valentine v. Road Directors of Allegany County, 126 A. 147, 146 Md. 199.

Mo.—Aetna Ins. Co. v. O'Malley, 124 S.W.2d 1164, 343 Mo. 1232—Bragg City Special Road Dist. v. Johnson, 20 S.W.2d 22, 26, 323 Mo. 990, 66 A.L.R. 1053, citing **Corpus Juris.**

N.D.—City of Williston v. Ludowese, 208 N.W. 82, 53 N.D. 797.

Ohio.—Spieker v. Board of Rapid Transit Com'rs, 174 N.E. 15, 17, 37 Ohio App. 102, quoting **Corpus Juris.**

resentations of the officers as to this matter, be estopped to deny their authority,[40] even when acting within the apparent scope of their official functions;[41] and this rule applies to all persons whatsoever who deal with or claim under the municipality either directly or remotely.[42]

Effect of corporate seal. The seal of a municipal corporation attached to a contract does not estop the corporation from inquiring into the power of its officers to make it.[43]

Unlawful custom. The fact that unauthorized or illegal acts of officers and agents have continued for such a length of time as to become customs does not work an estoppel against a public body,[44] and it has been held that the fact that a person entered into a contract with a public officer undertaking to act for, and to bind, a city, does not estop the city from showing that the officer had no authority to make the contract by mere proof that the same officer had previously made similar contracts which the municipality had recognized as binding.[45]

Particular officers. The rule that a public body or instrumentality is not estopped by the unauthorized acts of its officials is peculiarly applicable to the acts of its ministerial officers,[46] or officers of limited authority.[47] An officer or agency of the United States to whom no administrative authority has been delegated cannot estop the United States even by an affirmative undertaking to waive or surrender a public right.[48] A city council may not estop itself from denying that an ordinance has been duly passed.[49] Where a matter is committed to one officer by statute, other officers may not by their conduct estop the municipality in respect of such matter.[50]

A public body may be estopped to proceed against its officials for illegal acts done by them in ignorance of their illegality and in reliance on orders of controlling officers,[51] but there will be no such estoppel where the officials knew of the illegality of their acts.[52]

Particular governmental bodies. The rule that the public may not be estopped by the unauthorized acts, statements, or omissions of its officers and

Okl.—State ex rel. Tharel v. Board of Com'rs of Creek County, 107 P. 2d 542.

Or.—Smith v. State Industrial Accident Commission, 23 P.2d 904, 144 Or. 480, affirmed 25 P.2d 1119, 144 Or. 480.

21 C.J. p 1193 note 26.

Chargeable with notice of mayor's limited authority

Tex.—First Nat. Bank v. Dupuy, Civ. App., 133 S.W.2d 238, error dismissed, judgment correct.

40. Ohio.—Spieker v. Board of Rapid Transit Com'rs, 174 N.E. 15, 17, 37 Ohio App. 102, quoting **Corpus Juris.**

21 C.J. p 1193 note 27.

41. Ohio.—Spieker v. Board of Rapid Transit Com'rs., supra.

21 C.J. p 1193 note 28.

42. Ohio.—Cleveland v. State Bank, 16 Ohio St. 236, 88 Am.D 445.

43. Kan.—Leavenworth v. Rankin, 2 Kan. 352.

21 C.J. p 1193 note 30.

44. Cal.—Hanhart v. Madera County, 245 P. 444, 76 Cal.App. 290.

Colo.—Patterson v. People ex rel. Board of Com'rs of Weld County, 53 P.2d 1187, 98 Colo. 86.

Accepting checks in place of cash

County is not estopped by illegal custom of tax collector to accept checks as payment of taxes.—Vial v. Paradis, 255 P. 643, 44 Idaho 157, 53 A.L.R. 191.

Unlawful allowances for long period

County is not estopped from objecting to unlawful allowances of commissions to tax collectors merely because county treasurers had made such allowances, without objection by any one whose duty it was to object, for sixty-eight years.—Lawrence County v. Horner, 126 A. 783, 281 Pa 336.

45. Mass.—Wormstead v. Lynn, 68 N.E. 841, 184 Mass. 425.

46. Ky.—Vaughn v. City of Williamsburg, 53 S.W.2d 690, 245 Ky. 339.

City treasurer is a ministerial officer whose unauthorized act or statement cannot estop the municipality.

Ky.—Vaughn v. City of Williamsburg, supra.

Neb.—City of Cozad v. Thompson, 252 N.W. 606, 126 Neb. 79.

N.D.—City of Williston v. Ludowese, 208 N.W. 82, 53 N.D. 797.

S.C.—Farrow v. City Council of Charleston, 168 S.E. 852, 169 S.C. 373, 87 A.L.R. 981.

State treasurer's alleged representation to surety that depository bond was canceled was not within scope of his authority and could not estop state.—Lawrence v. American Surety Co. of New York, 250 N.W. 295, 264 Mich. 516, 88 A.L.R. 535, denying rehearing 249 N.W. 3, 263 Mich. 586.

Prohibition officers

The mistaken action of prohibition authorities, resulting from misinterpretation of the law by officers who were administrative agents of the commissioner of internal revenue, did not estop the United States from proceeding to forfeit a boat used for concealment of liquors in an effort to evade the tax.—The Jugoslavia, D.C.La., 21 F.2d 99.

47. Neb.—City of Cozad v. Thompson, 252 N.W. 606, 126 Neb. 79.

S.C.—Farrow v. City Council of Charleston, 168 S.E. 852, 169 S.C. 373, 87 A.L.R. 981.

Necessity that officer have general power

"Estoppel can never be invoked against the public to create power in an officer who purported to act on behalf of the public without authority to do so. Estoppel is rarely allowed against public bodies, and only when the officer, whose conduct is relied on as having created it, had general power to act for the public in the premises, but exceeded his express authority."—Municipality of Rio Piedras v. Serra, Garabis & Co., C.C.A.Puerto Rico, 65 F.2d 691, 694.

48. U.S.—U. S. v. Stewart, Cal., 61 S.Ct. 102, 311 U.S. 60, 85 L.Ed. 40, reversing Stewart v. U. S., C.C.A., 106 F.2d 405, reversing, D.C., 24 F. Supp. 145, certiorari granted U. S. v. Stewart, 60 S.Ct. 711, 309 U.S. 647, 84 L.Ed. 999, rehearing denied 61 S.Ct. 390, 311 U.S 729, 85 L.Ed. 475.

49. Ky.—Eversole v. Gray, 279 S.W. 638, 212 Ky. 384.

50. N.Y.—Ziegler v. City of New York, 281 N.Y.S. 462, 156 Misc. 624, affirmed 291 N.Y.S. 401, 248 App. Div. 873, and 300 N.Y.S. 1152, 253 App Div. 764.

51. Ill.—Chicago Park Dist. v. R. E. Herczel & Co., 26 N.E 2d 119, 373 Ill. 325, affirming 18 N.E.2d 744, 298 Ill.App. 215.

52. Ill.—Chicago Park Dist. v. R. E. Herczel & Co., supra.

agents has been applied to preclude estoppel of the federal or a state government,[53] and of municipal or quasi-municipal corporations,[54] such as cities,

53. U.S.—State of Utah v. U. S., Utah, 52 S.Ct. 232, 284 U.S. 534, 76 L.Ed. 469, affirming, C.C.A., U. S. v. Carbon County Land Co., 46 F. 2d 930, certiorari granted State of Utah v. U. S., 51 S.Ct. 658, 283 U. S. 816, 75 L.Ed. 1432—Cramer v. U. S., Cal., 43 S.Ct. 342, 261 U.S. 219, 67 L.Ed. 622, reversing, C.C.A., 276 F. 78—Jeems Bayou Fishing & Hunting Club v. U. S., La., 43 S.Ct. 205, 260 U.S. 561, 67 L.Ed. 402, affirming, C.C.A., Jeems Bayou Hunting & Fishing Club v. U. S., 274 F. 18—U. S. v. Stewart, C.C.A. Cal., 121 F.2d 705, modifying, D. C., 29 F.Supp 59—Granzow v. Village of Lyons, C.C.A.Ill., 89 F.2d 83—Fiman v. State of South Dakota, C.C.A.S.D., 29 F.2d 776, modifying, D.C., State of South Dakota v Fiman, 29 F.2d 770, and certiorari denied Fiman v. State of South Dakota, 49 S.Ct. 254, 279 U. S. 841, 73 L.Ed. 987—Ritter v. U. S., C.C.A.Pa., 28 F.2d 265, affirming, D.C., 19 F.2d 251—The Jugoslavia, D.C.La., 21 F.2d 99—U. S. v. Standard Oil Co. of California, D.C.Cal., 20 F.Supp 427, 454, citing **Corpus Juris**—U. S. v. Crary, D.C.Va., 2 F.Supp 870—U. S. v. 154 Sacks of Oats, D.C.Va., 294 F. 340.

Ark.—Southwestern Distilled Products v. State ex rel. Humphrey, 136 S.W.2d 166, 199 Ark. 761.

D.C.—Cummings v. Jensen, 85 F.2d 290, 66 App.D.C. 124—Cummings v. Societe Suisse Pour Valeurs De Metaux, 85 F.2d 287, 66 App.D.C. 121.

Ill.—People, by Barrett, v. Bradford, 22 N.E.2d 691, 372 Ill. 63—People ex rel. Ames v. Marx, 18 N.E.2d 915, 370 Ill. 264.

Ind.—Department of Insurance of Indiana v. Church Members Relief Ass'n, 26 N.E.2d 51, 53, 128 A.L.R. 635, citing **Corpus Juris.**

Mich.—Lawrence v. American Surety Co. of New York, 250 N.W. 295, 264 Mich. 516, 88 A.L.R. 535, citing **Corpus Juris,** and denying rehearing 249 N.W. 3, 263 Mich. 586.

Minn.—State v. Merchants' Nat. Bank of St. Paul, 177 N.W. 135, 145 Minn. 322.

Miss.—Gift v. Love, 144 So. 562, 164 Miss. 442, 86 A.L.R. 63—Eastman Oil Mills v. State, 93 So. 484, 130 Miss. 63.

Mont.—Tongue River and Yellowstone River Irr. Dist. v. Hyslop, 96 P.2d 273, 109 Mont. 190—West v. Minneapolis Mining & Smelting Co., 217 P. 342, 68 Mont. 253—Bode v. Rollwitz, 199 P. 688, 60 Mont. 481.

N.H.—Trustees of Phillips Exeter Academy v. Exeter, 11 A.2d 569, 90 N.H. 472.

N.Y.—People v. Baldwin, 188 N.Y.S. 542, 197 App.Div 285, affirming 184 N.Y.S. 715, 113 Misc 172, and affirmed 135 N.E. 964, 233 N.Y. 672

Ohio.—Spieker v. Board of Rapid Transit Com'rs, 174 N.E 15, 17, 37 Ohio App. 102, quoting **Corpus Juris.**

Or.—State v. Claypool, 28 P.2d 882, 145 Or. 615—Smith v. State Industrial Accident Commission, 23 P.2d 904, 144 Or. 480, affirmed 25 P.2d 1119, 144 Or. 480—Rohde v. State Industrial Accident Commission, 217 P 627, 108 Or. 426.

S.C.—Farrow v. City Council of Charleston, 168 S.E. 852, 854, 169 S.C. 373, citing **Corpus Juris.**

Tex.—Weatherly v. Jackson, 71 S.W. 2d 259, 123 Tex. 213, reversing, Civ.App., 46 S.W.2d 1030—Railroad Commission of Texas v. Lacy, Civ. App., 100 S.W.2d 118, error dismissed—State v. Davisson, Civ. App., 280 S.W 292—Nueces County v. Gussett, Civ.App., 213 S.W. 725, reversed on other grounds Gussett v. Nueces County, Com. App., 235 S.W. 857.

Wash.—State ex rel. Department of Finance, Budget and Business v. Thurston County, 108 P.2d 828—State v. Schaaf, 86 P.2d 1112, 1115, 198 Wash. 52, quoting **Corpus Juris.**

21 C.J. p 1191 note 19.

Estoppel as against public policy

Public policy forbids application to state of doctrine of estoppel growing out of conduct and representations of officers.—Ex parte Volker, 233 N.W. 890, 120 Neb. 508, 72 A.L.R. 1267.

Contracts of state

A state is not estopped by the unauthorized contracts of its officers.

Mo.—Ætna Ins. Co. v. O'Malley, 124 S.W.2d 1164, 1166, 343 Mo. 1232, citing **Corpus Juris.**

Neb.—State v. Cochran, 205 N.W. 568, 113 Neb. 846.

59 C.J. p 172 note 9.

Estoppel of state by acquiescence of commissions

That game and fish commission and railroad commission acquiesced in defendant's steps taken to capture oil polluting river, without paying royalty, did not estop state to claim royalty, such commissions having no authority to waive or collect royalties.—Grayburg Oil Co. v. State, Tex. Civ.App., 50 S.W.2d 355, error refused.

Prosecution of public right

United States is not bound by default or mistake of its agents when engaged in prosecution of public right.—U. S. v. Crary, D.C.Va., 1 F. Supp. 406.

Quo warranto

Estoppel does not ordinarily apply against the exercise of a public right, and the interests of the commonwealth usually are held not to be prejudiced by the failure of public officers to do their duty, a principle applying in the absence of a special statutory provision to quo warranto proceedings instituted by the attorney general in behalf of the commonwealth.—Attorney General v. City of Methuen, 129 N.E. 662, 236 Mass. 564.

Waiver of sovereign's immunity to suit

Sovereign's immunity to suit cannot be waived by administrative officers or lost through mere misrepresentation, whether inadvertent or designed.—Coleman v. U. S., C.C.A. Tenn., 100 F.2d 903, affirming, D.C., 18 F.Supp. 71.

54. Conn.—Heise v. City of Hartford, 17 A.2d 8, 127 Conn. 359

Ky.—City of Paducah v Gillispie, 115 S.W.2d 574, 273 Ky. 101—Vaughn v. City of Williamsburg, 53 S.W.2d 690, 245 Ky. 339—Burnside Land Co. v. Connelly & Lee, 291 S.W. 409, 411, 218 Ky. 346, citing **Corpus Juris.**

Md.—Valentine v. Road Directors of Allegany County, 126 A. 147, 146 Md. 199.

Mich.—Lovett v. City Treasurer of Detroit, 281 N.W. 576, 286 Mich. 159.

Neb.—State ex rel. Sorensen v. Plateau State Bank, 253 N.W. 433, 434, 126 Neb. 407, citing **Corpus Juris.**

Ohio.—Spieker v. Board of Rapid Transit Com'rs, 174 N.E. 15, 17, 37 Ohio App. 102, quoting **Corpus Juris.**

Okl.—James v. State, 15 P.2d 591, 160 Okl. 99.

Pa.—City of Philadelphia v. Spangler, 9 Pa.Dist. & Co. 577.

S.C.—Farrow v. City Council of Charleston, 168 S.E. 852, 854, 169 S.C. 373, citing **Corpus Juris.**

Tex.—City of San Angelo v. Deutsch, 91 S.W.2d 308, 310, 126 Tex. 532, citing **Corpus Juris,** and reversing Deutsch v. City of San Angelo, Civ.App., 73 S.W.2d 125.

Wash.—Brougham v. City of Seattle, 76 P.2d 1013, 194 Wash. 1—Gehr v. Ferry County, 36 P.2d 71, 179 Wash. 68.

21 C.J. p 1192 note 20.

Village

(1) That chairman of village board had certified to village treasurer's surety that treasurer had duly accounted for all funds during his term of office did not in itself estop village in suit on treasurer's bond from showing that no accounting had in fact been made.—Village of

counties, towns, and townships,[55] or other governmental agencies or instrumentalities.[56]

Hampton v. Gausman, 286 N.W. 757, 136 Neb. 550.

(2) Where statute prohibited village treasurer from depositing village funds in bank not designated as depository, village was not estopped from asserting illegality of deposit, although it allegedly acquiesced in deposit.—State ex rel. Sorensen v. Plateau State Bank, 253 N.W. 433, 126 Neb. 407.

55. U.S.—Hale County, Tex., v. American Indemnity Co., C.C.A. Tex., 63 F.2d 275, rehearing denied Hale County v. American Indemnity Co., 65 F.2d 1017, certiorari denied American Indemnity Co. v. Hale County, Tex., 54 S.Ct. 207, 290 U.S. 697, 78 L.Ed. 599—City of Weslaco, Tex., v. Porter, C.C.A. Tex., 56 F.2d 6—Brownell v. City of St. Petersburg, D.C.Fla., 38 F. Supp. 1003.

Ark.—Greene County v. City of Paragould, 265 S.W. 839, 166 Ark. 192.

Colo.—Smith v. Stapleton, 100 P.2d 162.

Idaho.—Vial v. Paradis, 255 P. 643, 44 Idaho 157, 53 A.L.R. 191.

Ill.—Rippinger v. Niederst, 148 N.E. 7, 317 Ill. 264.

Iowa.—Mitchell County v. Odden, 259 N.W. 774, 219 Iowa 793—Iowa Electric Co. v. Incorporated Town of Winthrop, 198 N.W. 14, 198 Iowa 196.

Kan.—Board of Com'rs of Woodson County v. City of Yates Center, 32 P.2d 209, 139 Kan. 519—School Dist. No. 12 of Ottawa County v. Board of Com'rs of Ottawa County, 1 P.2d 88, 133 Kan. 528—Board of Com'rs of Sedgwick County v. Conners, 245 P. 1030, 121 Kan. 105.

Me.—City of Lewiston v. Grant, 113 A. 181, 120 Me. 194.

Mass.—Graton v. City of Cambridge, 145 N.E. 453, 250 Mass. 317.

N.Y.—Premium Bond Corporation v. City of Long Beach, 291 N.Y.S. 834, 249 App.Div. 756.

N.D.—City of Williston v. Ludowese, 208 N.W. 82, 53 N.D. 797.

Ohio.—Spieker v. Board of Rapid Transit Com'rs, 174 N.E. 15, 17, 37 Ohio App. 102, quoting **Corpus Juris.**

Okl.—State ex rel. Tharel v. Board of Com'rs of Creek County, 107 P.2d 542—Board of Com'rs of Tulsa County v. News-Despatch Print & Audit Co., 231 P. 250, 104 Okl. 260, followed in Board of Com'rs of Tulsa County v. Co-operative Pub. Co., 231 P. 251, 104 Okl. 262, and Board of Com'rs of Tulsa County v. Walker-Taylor Co., 231 P. 252, 104 Okl. 261.

Pa.—Lawrence County v. Horner, 126 A. 783, 281 Pa. 336.

Tenn.—State v. Bond, 8 S.W.2d 367, 157 Tenn. 326—Macon County v. Dixon, 100 S.W.2d 5, 20 Tenn.App. 425.

Tex.—Urban v. Harris County, Civ. App., 251 S.W. 594.

Utah.—Genola Town v. Santaquin City, 80 P.2d 930, 96 Utah 88, rehearing denied 85 P.2d 790, 96 Utah 104.

Wash.—State v. Schaaf, 86 P.2d 1112, 1115, 198 Wash. 52, quoting **Corpus Juris.**

Wis.—Marathon County v. Industrial Commission, 260 N.W. 641, 218 Wis. 275—Werner v. Industrial Commission, 248 N.W. 793, 212 Wis. 76—Hogan v. City of Beloit, 184 N.W. 687, 175 Wis. 199.

21 C.J. p 1192 note 20.

Acts of officers in excess of statutory or constitutional powers as estopping county see Counties § 174.

Allowance of claim by commissioners as prima facie evidence

Allowance of claim against county by county commissioners is only prima facie evidence of correctness of claim and county's liability thereon and hence county was not estopped to dispute liability on claim allowed which was not properly chargeable to county, or to recover payment made thereon.—U. S. Fidelity & Guaranty Co. v. Cherokee County, 156 So. 777, 26 Ala.App. 196, certiorari denied 156 So. 777, 229 Ala. 303.

Bureau's conduct without city's direction

Compensation bureau's conduct, inducing claimant to withhold filing petition for injuries until year expired, could not raise estoppel against city in the absence of a showing that the bureau's conduct was at the city's direction or suggestion.—Craft v. City of Trenton, 146 A. 366, 104 N.J.Eq. 375.

Matters exclusively within authority of city commission

An officer or employee of a city, not expressly so authorized, cannot bind or estop the city in matters placed exclusively within authority of the city commission, in absence of clear showing that conduct of subordinate officer was so closely related to expressed will of the governing body as to constitute his act that of the commission itself.—Hallman v. City of Pampa, Tex.Civ.App., 147 S.W.2d 543, error refused.

Similarity to rule against liability for negligence

"Estoppel, when applied against a city, imposes loss upon it or deprives it of a right which it would have but for the act constituting the ground of estoppel, and thus is in effect like liability for a negligent act. In both cases conflict arises between the rights or interests of the public and those of the individual. The rule is that when such conflict arises the rights or interests of the individual must yield. This is necessary because the city's public or governmental business must go forward, unimpeded by the fault, negligence, or frailty of those charged with its administration. A court which holds that a city is not liable in damages for injuries suffered from the negligence of its officer or agent engaged in the performance of a governmental function cannot consistently hold that the city is estopped by the act of its officer or agent engaged in the performance of a governmental function."—City of San Angelo v. Deutsch, 91 S.W.2d 308, 310, 126 Tex. 532, reversing Deutsch v. City of San Angelo, Civ.App., 73 S.W.2d 125.

56. Ohio.—Spieker v. Board of Rapid Transit Com'rs., 174 N.E. 15, 17, 37 Ohio App. 102, quoting **Corpus Juris.**

Wash.—State v. Schaaf, 86 P.2d 1112, 1115, 198 Wash. 52, quoting **Corpus Juris.**

Board of education

Ky.—Clay County Board of Education v. Lewis, 218 S.W. 716, 187 Ky. 231.

N.Y.—O'Connor v. Emerson, 188 N.Y.S. 236, 196 App.Div. 807, affirming 185 N.Y.S. 49, 113 Misc. 472, and affirmed 134 N.E. 572, 232 N.Y. 561.

Director General of Railroads

Ky.—Davis v. E. K. Newell Co., 266 S.W. 1061, 206 Ky. 121.

Drainage board

Ill.—Kickapoo Drain. Dist. v. Mattoon, 120 N.E. 256, 284 Ill. 393.

La.—State v. New Orleans Land Co., 79 So. 515, 143 La. 858, certiorari denied 39 S.Ct. 19, 248 U.S. 577, 63 L.Ed. 429.

Harbor commissioners

Where plaintiff rented space, under Pol.Code § 2524, from the state board of harbor commissioners, appointed under Pol.Code pt. 3 art. 9 tit. 6 c. 1, which was terminable on thirty days' notice at pleasure of commission, building of improvements, with or without knowledge of commission, did not create estoppel against commission, so as to enlarge plaintiff's tenure, since no action of commission can enlarge its powers beyond express limitations of the Code.—Taylor v. Spear, 238 P. 1038, 196 Cal. 709.

Industrial commission, being state agency, is not estopped to plead invalidity of its rules.—State ex rel. Kildow v. Industrial Commission of Ohio, 192 N.E. 873, 128 Ohio St. 573.

Levee district

U.S.—Board of Directors of St. Francis Levee Dist. v. Kurn, C.C.A.Mo.,

c. Estoppel of Officer or Agent in Public or Private Capacity

An officer or agent will be estopped in his official capacity wherever his acts would estop the governmental body; but an officer may not be estopped as an official by his unofficial conduct, although he may be estopped as an individual independent of any estoppel against him as an official.

The acts or conduct of a public officer or agent which operate as an estoppel against the public, see subdivision a of this section, also estop the officer or agent in so far as he may be considered a part of the governmental instrumentality,[57] but to that extent only.[58] Where the acts of a public officer or agent do not estop the public, see subdivisions a and b of this section, he himself is not estopped as to his official functions by such acts or conduct;[59] and a public official may not be estopped from the performance of his duties by his previous acts in an unofficial capacity.[60]

However, the acts or conduct of a person may work an estoppel against him as an individual independent of the estoppel created or not created against the public and himself in his official capacity in the exercise of his public functions,[61] unless the grounds or elements of an estoppel are absent, in which case there can be no estoppel against the officer in any capacity, as where through mistake of law an officer who accepts less compensation than

98 F.2d 394, certiorari denied 59 S.Ct. 153, 305 U.S. 647, 83 L.Ed. 418.
21 C.J. p 1193 note 21 [b].

Park board, being unauthorized to delegate to park director authority to purchase animals, could not estop itself from denying director's authority.—Horne Zoological Arena Co. v. City of Dallas, Tex.Civ.App., 45 S.W.2d 714.

Public library board

The board of trustees of a public library is a public corporation and essentially a part of the municipal government, and no neglect nor omission of its officials can estop such body.—City of Owensboro v. Board of Trustees of Public Library of Owensboro, 276 S.W. 143, 210 Ky. 482.

Railroad commission

Estoppel as such would not operate against railroad commission because of failure of its tender board to discharge duty to enforce rules of commission relating to granting of permit to move entrapped fugitive crude oil, although such dereliction, apparently acquiesced in by the commission, would be admissible on the issue of discrimination.—Railroad Commission of Texas v. Lacy, Tex.Civ.App., 100 S.W.2d 118, error dismissed.

School district or board

(1) Where superintendent of school district unauthorizedly contracted with architect to make plans for school building and athletic field, plans were rejected, district neither acquiesced in employment of architect nor accepted benefits of architect's services, school district was not estopped to deny liability to architect.—Pehrson v. School Dist. No. 334, 77 P.2d 1022, 194 Wash. 334.

(2) The rule precluding estoppel based on the acts of state officials is pertinent to the officials of a school district, and school district cannot be estopped by its officials' knowledge of depositary bank's insolvency condition to assert treasurer's liability for negligent deposit and loss of funds therein.—Lane Independent Consol. School Dist. No. 1 of Jerauld County v. Endahl, 224 N.W. 951, 55 S.D. 73.

(3) Other cases.

Cal.—Kline v. San Francisco Unified School Dist., App., 104 P.2d 661, hearing denied 105 P.2d 362.

Iowa.—Independent School Dist. of Ogden, Boone County, v. Samuelson, 270 N.W. 434, 222 Iowa 1063.

La.—Murry v. Union Parish School Board, App., 185 So. 305.

Minn.—First Nat. Bank v. Consolidated School Dist. No. 28 of Jackson County, 240 N.W. 662, 184 Minn. 635, affirming 238 N.W. 634, 184 Minn. 635.

Mo.—School Dist. No. 45 of Pemiscot County v. Correll, 286 S.W. 136, 220 Mo.App. 322.

S.D.—Lane Independent Consol. School Dist. No. 1 of Jerauld County v. Endahl, 224 N.W. 951, 55 S.D. 73.
21 C.J. p 1193 note 21 [c].

State highway department

S.C.—Baker v. State Highway Department, 165 S.E. 197, 166 S.C. 481.

57. Fla.—State ex rel. Barnett Nat. Bank of De Land v. Thursby, 150 So. 252, 112 Fla. 257.
Minn.—State v. Johnson, 233 N.W. 236, 181 Minn. 510.
Pa.—Appeal of Susquehanna Collieries Co., 30 Pa.Dist. & Co. 581, 44 Dauph.Co. 263.
21 C.J. p 1194 note 35.

Commissioner as estopped by acts of deputy

Where deputy commissioner, in charge of district wherein realty was located, considered notice of protest, acted on it, and refused to reduce assessment by city, commissioner of assessments of city was estopped to complain because of the fact that notice of protest was not under oath as provided by statute, and there was in effect a waiver.—Application of Purity Co-op. Bakery Ass'n, 22 N.Y.S.2d 184, 174 Misc. 879.

58. Neb.—Gallaher v. Lincoln, 88 N.W. 505, 63 Neb. 339.
21 C.J. p 1194 note 36.

59. Cal.—Magruder v. Redwood City, 265 P. 806, 203 Cal. 665.
Md.—Mayor and Council of City of Baltimore v. Ercolano, 184 A. 164, 170 Md. 341.
21 C.J. p 1194 note 38.

Mistake of law

Since a public body is not estopped to recover from an officer money it paid to him under mistake of law, such an officer is not estopped to recover from the public body money he failed to collect, although due him for compensation while acting under a mistake of law.—State ex rel. Moss v. Hamilton, 260 S.W. 466, 303 Mo. 302.

Estoppel to assert rights not subject to waiver

Estoppel is a species of waiver and where a public official may not waive a public right he cannot be estopped from asserting that right on the part of the general public.—Kline v. San Francisco Unified School Dist., Cal.App., 104 P.2d 661, hearing denied 105 P.2d 362.

60. Tex.—Alexander v. Singleton, Civ.App., 50 S.W.2d 893, error refused.
Estoppel of persons acting in representative capacity see supra § 134.

Ante-election promises

City officials cannot be estopped to perform their official duties by any ante-election promises or representations.—San Antonio Fire Fighters' Local Union No. 84 v. Bell, Tex.Civ.App., 223 S.W. 506, error refused.

61. Pa.—Miller v. Township of North Versailles, 31 Pa.Dist. & Co. 139, 29 Mun.L.R. 65, 86 Pittsb.Leg.J. 8.
Tenn.—Foster v. Jeffers, 205 S.W. 122, 140 Tenn. 446, 451.
21 C.J. p 1194 note 39.

is due him under the law is not estopped to recover the difference because the public body has suffered no injury.[62]

§ 143. - - Ultra Vires Acts

A municipality or other governmental agency is not estopped to deny the validity of an act or contract beyond its power, and this rule has been applied although the public has accepted benefits or money has been expended on the faith of such act or contract.

The doctrine of ultra vires is applied with greater strictness to public than to private corporations, and, as a rule, a municipality or other public or quasi-public corporation or agency is not estopped by an act or contract which is beyond the scope of its corporate powers,[63] especially where the party claiming the estoppel was aware of the municipal incapacity or used no diligence to ascertain whether it had the power which it assumed to exercise.[64] The operation of the rule is not affected by the fact that the contract was the result of a compromise,[65] or affected by the fact that money has been expended on the faith of the contract,[66] or by reason of a prior erroneous construction of a statute or ordinance.[67] An estoppel to deny the validity of the act of a governmental body may not be based on the very act to which the incapacity relates.[68]

The doctrine of estoppel may not be applied against a municipal corporation or similar body where the subject matter of the act or contract is illegal[69] or malum prohibitum;[70] nor may such a body be estopped to deny liability under a contract which is void.[71] A municipality may not be es-

62. Ariz.—Maricopa County v. Armstrong, 25 P.2d 1023, 42 Ariz. 317.
Idaho.—Doolittle v. Eckert, 24 P.2d 36, 53 Idaho 384.
Mo.—State ex rel. Summers v. Hamilton, 279 S.W. 33, 312 Mo. 157—State ex rel. Moss v. Hamilton, 260 S.W. 466, 303 Mo. 302—State ex rel. Jarvis v. Dearing, App., 274 S.W. 477.

63. U.S.—Hoskins v. City of Orlando, Fla., C.C.A.Fla., 51 F.2d 901—Merrill v. Inhabitants of Town of Gray. D.C.Me., 37 F.Supp. 61—Denver & S. L. Ry. Co. v. Moffat Tunnel Improvement Dist., D.C.Colo., 35 F.2d 365, modified on other grounds, C.C.A., Moffat Tunnel Improvement Dist. v. Denver & S. L. Ry. Co., 45 F.2d 715, certiorari denied 51 S.Ct. 485, 283 U.S. 837, 75 L.Ed. 1448—Town of Conway v. Atlantic Coast Line R. Co., D.C.S.C., 20 F.2d 250—Sidney Spitzer & Co. v. Monroe County, D.C.Ala., 274 F. 819.
Cal.—Los Angeles Dredging Co. v. City of Long Beach, 291 P. 839, 210 Cal. 348, 71 A.L.R. 161—Los Angeles Warehouse Co. v. Los Angeles County, 33 P.2d 1058, 139 Cal. App. 368.
Conn.—Comley ex rel. Fitzroy v. Board of Trustees of Firemen's Relief Fund of Bridgeport, 191 A. 729, 733, 122 Conn. 650, citing **Corpus Juris.**
Fla.—State v. Greer, 102 So. 739, 88 Fla. 249, 37 A.L.R. 1298.
Ga.—National Park Bank of New York v. City of Marietta, 113 S.E. 96, 29 Ga.App. 29.
Ill.—Green v. Hutsonville Tp. High School Dist. No. 201, 190 N.E. 267, 356 Ill. 216.
Ind.—Citizens' Bank of Anderson v. Town of Burnettsville, 179 N.E. 724, 98 Ind.App. 92—City of Indianapolis v. Link Realty Co., 179 N.E. 574, 94 Ind.App. 1.
Mo.—Eureka Fire Hose Mfg. Co. v. City of Portageville, App., 106 S.W.2d 513.
N.M.—Fancher v. Board of Com'rs of Grant County, 210 P. 237, 28 N.M. 179.
N.Y.—In re Certain Lands on North Shore of Harlem River in City of New York, 217 N.Y.S. 544, 127 Misc. 710.
N.C.—Madry v. Town of Scotland Neck, 199 S.E. 618, 214 N.C. 461.
Ohio.—Baxter v. Village of Manchester, 28 N.E.2d 672, 64 Ohio App. 220—Rogers v. City of Cincinnati, 10 Ohio App. 238, 241—City of Defiance v. Council of Defiance, 23 Ohio Cir.Ct. 96.
S.C.—Looper v. City of Easley, 172 S.E. 705, 172 S.C. 11.
Tex.—Nunn-Warren Pub. Co. v. Hutchinson County, Civ.App., 45 S.W.2d 651, error refused—Industrial Co. v. Tompkins, Civ.App., 27 S.W.2d 343, error refused—Grimes County v. W. L. Slayton & Co., Civ. App., 262 S.W. 209.
Wash.—State ex rel. Booth v. Tatro, 92 P.2d 206, 210, 199 Wash. 421, citing **Corpus Juris.**
21 C.J. p 1194 notes 40, 41—44 C.J. p 367 notes 56, 57.

Estoppel against public interest
City is not estopped to assert defense of ultra vires in railroad's action to recover taxes assessed against it in violation of city's agreement where to permit an estoppel would violate the public interest.—Troy Union R. Co. v. City of Troy, 230 N.Y.S. 653, 132 Misc. 534, affirmed 238 N.Y.S. 577, 227 App.Div. 351, affirmed 171 N.E. 798, 253 N.Y. 597.

64. Mont.—Missoula St. R. Co. v. Missoula, 130 P. 771, 47 Mont. 85.
N.J.—Atlantic City Water-Works Co. v. Read, 15 A. 10, 50 N.J.Law 665, affirmed 9 A. 759, 49 N.J.Law 558.

Presumption of knowledge of legal limitations
Persons dealing with municipalities are presumed to know the law and the legal limitations on the contractual power of such bodies and cannot plead estoppel because they could not have been misled.—City of Mobile v. Mobile Electric Co., 84 So. 816, 203 Ala. 574.

65. Minn.—State v. Minnesota Transfer R. Co., 83 N.W. 32, 80 Minn. 108, 50 L.R.A. 656.

66. Md.—Mealey v. Hagerstown, 48 A. 746, 92 Md. 741.
N.C.—Madry v. Town of Scotland Neck, 199 S.E. 618, 214 N.C. 461—Jenkins v. City of Henderson, 199 S.E. 37, 214 N.C. 244.

67. Ill.—Chicago Tel. Co. v. Illinois Mfg. Assoc., 106 Ill.App. 54.

68. Tex.—Drake v. Yawn, Civ.App., 248 S.W. 726.

Purported consolidation of school districts
Where attempt to consolidate two school districts was invalid and null, the fact that the school officials of both districts had for a number of years acquiesced in the consolidation, and one of the districts, having hired an additional teacher, built an addition to the school building and incurred other expenses on the faith of the consolidation, does not estop the officials of the other district from denying the validity of the consolidation, an estoppel cannot be based on the act to which the incapacity relates.—Drake v. Yawn, supra.

69. Ohio.—Baxter v. Village of Manchester, 28 N.E.2d 672, 64 Ohio App. 220.

70. Ohio.—Baxter v. Village of Manchester, supra.

71. Ind.—Mazac v. Michigan City, 189 N.E. 400, 98 Ind.App. 366.

Void as against public policy
There can be no estoppel of a city with respect to a contract void as against public policy.—City of St.

topped by acts or contracts which violate mandatory constitutional or statutory provisions,[72] such as budget laws;[73] and the doctrine of equitable estoppel may not be applied in contravention of a mandatory provision of a statute where the action taken by the public agency is a statutory proceeding rather than a suit of equitable character.[74]

Acceptance of benefits. The rule that a governmental agency may not be estopped by acts or contracts beyond its powers has been held to be unaffected by the fact that benefits have accrued to, and have been accepted by, the public,[75] and some cases in applying the rule have made a distinction between acts and contracts which are merely ultra vires because unauthorized and those which are strictly ultra vires because wholly illegal and void as being positively prohibited by law or against public policy.[76]

The question whether the receipt of benefits will work an estoppel has been considered supra § 111 in respect of municipalities and supra § 138 in respect of the state.

§ 144. Irregular or Unauthorized Method of Exercising Power

A municipality or other governmental agency may be estopped to deny the validity of an act or contract within its power but voidable or irregular, subject to the limitation that no estoppel may arise in favor of one who knowingly participates in the irregularity; and a municipality is not estopped where the power exists but is exercised in a manner directly and clearly violating a statute or other positive law.

Although a municipality or other governmental agency cannot be estopped by its ultra vires acts, see supra § 143, there is nevertheless a broad distinction to be observed between an irregular exercise of a granted power and the total absence or want of power;[77] and the rule is that a municipality or other governmental agency may be estopped, as right and justice may require, where the act or contract relied on to create the estoppel was within its corporate powers, although the method of exercising the power was irregular or unauthorized.[78]

Paul v. Minnesota Transfer Ry. Co., 193 N.W. 175, 155 Minn. 237.

72. U.S.—Empire Voting Machine Co. v. City of Chicago, C.C.A.Ill., 267 F. 162, certiorari denied 41 S.Ct. 14, 254 U.S. 642, 65 L.Ed. 453.
Iowa.—Du Bois v. City of Oskaloosa, 294 N.W. 302.
Ky.—Breathitt County v. Hagins, 277 S.W. 469, 211 Ky. 391.
Neb.—City of Scottsbluff v. Southern Surety Co, 246 N.W. 346, 124 Neb. 260.
Pa.—City of New Castle v Withers, 139 A. 860, 291 Pa. 216, 57 A.L.R. 132—Willis v. Directors of Poor of York County, 130 A. 401, 284 Pa. 138.
Wis.—L. G Arnold, Inc., v. City of Hudson, 254 N.W. 108, 215 Wis. 5.

Constitutional debt limit

Where claim under contract for auditing services for which city had made no appropriation was barred under constitutional debt limit provision, effect of limitation could not be avoided on ground that city, having accepted work and having led auditor to believe that claim would be paid, was estopped to deny claim. —First Nat. Bank v. City of Norman, 75 P.2d 1109, 182 Okl. 7.

Plumbing code

City is not estopped from enforcing state plumbing code by permitting plumbing to be installed contrary to statute.—City of New Castle v. Withers, 139 A. 860, 291 Pa. 216, 57 A.L.R. 132.

Estoppel not urged as authority for violation

A city may be estopped to declare a forfeiture of a lease for acts which it encouraged, even though such acts were a violation of state laws, since the estoppel is not urged as authority for violation of the law, but merely against the city's contract rights to declare a forfeiture.—Eau Claire Dells Improvement Co. v. City of Eau Claire, 179 N.W. 2, 172 Wis. 240.

73. Ariz.—City of Phœnix v. Kidd, 92 P.2d 513, 54 Ariz. 75, affirmed 94 P.2d 428, 54 Ariz. 123, followed in City of Phœnix v. Price, 94 P. 2d 433, 54 Ariz. 137, affirming 92 P.2d 523, 54 Ariz. 98, followed in City of Phœnix v. Enriquez, 94 P. 2d 434, 54 Ariz. 138, affirming 92 P.2d 523, 54 Ariz. 99, followed in City of Phœnix v. Wilson, 94 P 2d 434, 54 Ariz. 139, affirming 92 P.2d 524, 54 Ariz. 100.

74. Cal.—Marin County v. Messner, App., 112 P.2d 731, prior opinion 108 P.2d 74.

County's action under political code

Action by county under section of political code to recover from former county surveyor money paid under invalid agreement respecting rental of surveyor's equipment was not an action on an implied equitable contract for money had and received, and doctrine of equitable estoppel did not preclude county from recovering.—Marin County v. Messner, supra.

75. Mo.—Unionville v. Martin, 68 S. W. 605, 95 Mo.App. 28.
21 C.J. p 1195 note 46.

76. U.S.—Hitchcock v. Galveston, Tex., 96 U.S. 341, 24 L.Ed. 659.
21 C.J. p 1195 note 48.

77. Dak.—Treadway v. Schnauber, 46 N.W. 464, 1 Dak. 236.
La.—State ex rel. Shell Oil Co. v. Register of State Land Office, 192 So. 519, 521, 193 La. 883, quoting **Corpus Juris.**

78. U.S.—Scott County, Ark., v. Advance-Rumley Thresher Co., C.C. A.Ark., 288 F. 739.
Cal.—Adams v. Ziegler, 70 P.2d 537, 22 Cal.App.2d 135.
Conn.—Loomis v Fifth School Dist., 145 A. 571, 109 Conn. 700.
Fla.—State v. Greer, 102 So. 739, 88 Fla. 249, 37 A.L.R. 1298.
Ill.—Avery v. City of Chicago, 178 N.E. 351, 345 Ill. 640—Seely v. Board of Education of Green Valley, Community High School Dist. No. 306, 146 N.E. 187, 315 Ill. 186.
La.—State ex rel. Shell Oil Co. v. Register of State Land Office, 192 So. 519, 521, 193 La. 883, quoting **Corpus Juris.**
Ohio.—Baxter v. Village of Manchester, 28 N.E.2d 672, 64 Ohio App. 220.
Tex.—City of Del Rio v. Lowe, Civ. App., 111 S.W.2d 1208, reversed on other grounds Lowe v. City of Del Rio, 122 S.W.2d 191, 132 Tex. 111—Rusk County v. Maloney, Civ.App., 38 S.W.2d 868, error refused—Grimes County v. W. L. Slayton & Co., Civ.App., 262 S.W. 209.
21 C.J. p 1195 note 51.

Issuance of note without election

Where water improvement district had issued note for purchase price of machinery without an election authorizing it or without sale or exchange of bonds as provided in violation of constitution, laws and set-

This rule has been applied with respect to contracts not complying with the required formalities,[79] or which are claimed not to have been authorized by ordinance,[80] especially where the contracts are within the scope of proprietary, as distinguished from governmental, powers;[81] and to contracts not void but merely voidable,[82] and to contracts not ultra vires or mala prohibita,[83] although entered into by virtue of unconstitutional statutes[84] or invalid ordinances.[85] For the purpose of avoiding liability for injuries to person or property from the construction or maintenance of streets, drains, or sewers, a municipality cannot set up that there has been a failure to comply with some regulation concerning the exercise of the power.[86] Where a municipal corporation dealing with individuals assumes powers on which the validity of its acts depends, and subsequently it develops that the specific powers relied on were not possessed, the municipality is not thereby excused from the performance of its obligations, if they can be performed through the agency of other powers which it does possess.[87]

However, an important limitation of the rule is that no estoppel can arise in favor of one who has knowingly assisted or agreed to assist the municipality in the illegal exercise of its power;[88] and it has been held that the rule will not apply where the method of the exercise of the power is not a mere irregularity but actually forbidden by statute or other positive law,[89] since this in effect brings

tled policy of the state, seller could not recover on note against improvement district upon grounds of ratification or estoppel.—Cameron County Water Imp. Dist. No. 8 v. De La Vergne Engine Co., C.C.A.Tex., 93 F.2d 373.

Employment of architect

County, which had general power to construct necessary county buildings for public purposes, and which ordered county architect to prepare plans for construction of municipal auditorium, and which collected seven hundred fifty thousand dollars of levied tax for purpose of erecting auditorium, and which transferred tax funds to general fund after notice of invalidity of act authorizing election for authorization of issuance of bonds was estopped from setting up ultra vires in architect's action for services rendered.—Hall v. Cook County, 195 N.E. 54, 359 Ill. 528, reversing 274 Ill.App. 503, and transferred, see 187 N.E 454, 353 Ill. 477.

Tenure of teacher

Where a school district or board of education has, without the customary formal action, classified a teacher as entitled to permanent tenure by teaching contracts so reciting or by other affirmative acts, it may become estopped to deny his right to such tenure.—Crawford v. Board of Education of City of Glendale, 67 P.2d 348, 20 Cal.App.2d 391—Briney v. Santa Ana High School Dist., 21 P. 2d 610, 131 Cal.App. 357.

Estoppel of city to assert its own illegality

In action by one to recover deposit from city required by ordinance to be placed in city treasury for satisfaction of claims for damages for vacation of a street, city is estopped to set up defense that ordinance is invalid, in that it was passed for sole benefit of depositor, as city cannot be heard to say that it has exercised its unquestioned power to vacate in an unauthorized or illegal manner.—John M. Smyth Co. v. City of Chicago, 128 N.E. 351, 294 Ill. 136.

79. U.S.—Wykes v. City Water Co., C.C.Cal., 184 F. 752, affirmed 202 F. 357, 120 C.C.A. 485.
La.—State ex rel. Shell Oil Co. v. Register of State Land Office, 192 So. 519, 521, 193 La. 883, quoting **Corpus Juris.**
21 C.J. p 1196 note 52.

Informalities

(1) Although a municipality which has entered into a contract that it could not lawfully make cannot be held liable for breach on ground of estoppel, city may be estopped to deny validity of contract which it had authority to make but which was executed by officer without authority and was entered into without required formalities.—City of Houston v. Finn, Tex.Civ.App., 149 S.W.2d 1000.

(2) The granting of an oil, gas, and mineral lease by the governor pursuant to statutory authority and acceptance of payments thereunder by the register of the land office were exercises of granted power and not ultra vires acts and hence doctrine of estoppel could be invoked by lessee to preclude state from asserting invalidity of lease because two newspapers failed to comply with formality with respect to advertising the letting of bids.—State ex rel. Shell Oil Co. v. Register of State Land Office, 192 So. 519, 193 La. 883.

80. Mo.—Whitworth v. Webb City, 103 S.W. 86, 204 Mo. 579.
44 C.J. p 367 note 59.

81. U.S.—Wykes v. City Water Co., C.C.Cal., 184 F. 752, affirmed 202 F. 357, 120 C.C.A. 485.
Iowa.—Red Oak First Nat. Bank v. Emmetsburg, 138 N.W. 451, 157 Iowa 555, L.R.A.1915A 982.

82. La.—State ex rel. Shell Oil Co. v. Register of State Land Office, 192 So. 519, 521, 193 La. 883, quoting **Corpus Juris.**
Tex.—City of Port Arthur v. Young, Civ.App., 37 S.W.2d 385, error refused.
21 C.J. p 1196 note 53.

83. La.—State ex rel. Shell Oil Co. v. Register of State Land Office, 192 So. 519, 521, 193 La. 883, quoting **Corpus Juris.**
21 C.J. p 1196 note 54.

84. La.—State ex rel. Shell Oil Co. v. Register of State Land Office supra, quoting **Corpus Juris.**
21 C.J. p 1196 note 55.

85. La.—State ex rel. Shell Oil Co. v. Register of State Land Office, supra, quoting **Corpus Juris.**
21 C.J. p 1196 note 56.

86. Mass.—Norton v. New Bedford, 43 N.E. 1034, 166 Mass. 48.
21 C.J. p 1196 note 57.

Maintenance of park

Town, maintaining park for over decade, is estopped to deny legality of its establishment, to avoid liability for negligence where establishment of park was not in strict accord with statute but the conduct and maintenance thereof was as provided by law.—Augustine v. Town of Brant, 227 N.Y.S. 305, 131 Misc. 555, affirmed 163 N.E. 732, 249 N.Y. 198, which reversed 230 N.Y.S. 43, 224 App.Div. 290, and reargument denied 166 N.E. 315, 250 N.Y. 537.

87. Ill.—Maher v. Chicago, 38 Ill. 266.

88. U.S.—Ft. Scott v. W. G. Eads Brokerage Co., Kan., 117 F. 51, 54 C.C.A. 437, certiorari denied 23 S.Ct. 846, 187 U.S. 647, 47 L.Ed. 348.

89. Iowa.—Iowa Electric Co. v. Incorporated Town of Winthrop, 198 N.W. 14, 198 Iowa 196.
Mass.—Reed v. City of Springfield, 154 N.E. 554, 258 Mass. 115—Breckwood Real Estate Co. v. City of Springfield, 154 N.E. 552, 258 Mass. 111.
Miss.—Merchants' Bank & Trust Co.

the case within the ultra vires rule discussed supra § 143.

§ 145. Grants or Licenses to Use Streets

In a proper case a municipality may be estopped to use a street, to claim title therein, to question the validity of a grant or franchise, or to deny the legal existence of the street.

It has been broadly held that estoppel does not operate against the state or its political subdivisions so as to defeat the right of the public to the use of city streets,[90] or to bar the right of a city to abate unlawful encroachments thereon,[91] in the absence of inequitable conduct and resultant injustice.[92] Further, where a grant or license is void because of the entire absence of power to execute it, a municipality is not estopped by its acquiescence;[93] and a municipality's nonaction with respect to an unauthorized use of its streets does not estop it from bringing subsequent ouster proceedings.[94] It has been held that, where a railroad company occupied a street without either a parol or written license from the municipality, the fact that the municipality sits by in silence while the company expends money in constructing the road in the street does not estop the municipality;[95] nor is a city estopped to order the removal of a structure on a sidewalk permitted to be erected under an ordinance expressly providing for revocation at any time.[96]

However, in a proper case the doctrine of equitable estoppel may be invoked against a municipality with regard to its streets.[97] By its acts and conduct a municipality may be estopped to use a street,[98] or to claim title therein,[99] or to question the validity of a grant or license to use the same.[1]

Estoppel to deny existence of street. In a proper case a municipality may be estopped to deny that a way is a public street for which it is responsible.[2]

v. Scott County, 145 So. 908, 165 Miss. 91.
21 C.J. p 1197 note 60.

Failure to make appropriation

Fourth-class city could not be estopped by its actions from denying liability for purchase of land, where provision therefor had not been made in annual appropriation bill as required by a mandatory statute.—Salzer v. City of East Lansing, 249 N.W. 16, 263 Mich. 626.

Restrictions on methods of creating contract

Where creation of a contract in any but a specified way is prohibited, the city may not by waiver, ratification, or acts ordinarily amounting to an estoppel give vitality to the prohibited contract or become bound on principles of restitution, and, where paving contract with city was void for failure of city to comply with statute requiring publication of advertisements for bids, action based on principles of quasi contract, restitution or estoppel would not lie for reasonable value of paving done by plaintiff under the contract.—Federal Paving Corporation v. City of Wauwatosa, 286 N.W. 546, 231 Wis. 655.

Where there is a substantial but irregular compliance with restrictive statutory provisions governing municipal contracts, an estoppel may lie against the municipality to deny the validity of the contract.—Wiese & Hanly v. City of Cincinnati, 17 Ohio N.P.,N.S., 481.

90. Kan.—City of Emporia v. Humphrey, 297 P. 712, 132 Kan. 682, rehearing denied 299 P. 950, 133 Kan. 176.

91. Kan.—City of Emporia v. Humphrey, supra.

92. Wis.—Klinkert v. City of Racine, 188 N.W. 72, 177 Wis. 200.

Necessity of showing injustice and hardship

The rights of the city in duly platted streets and alleys will not be deemed surrendered by estoppel in pais without such acts by the city as to work injustice and hardship on those parties relying on the inequitable conduct of the city.—Klinkert v. City of Racine, supra.

93. U.S.—Continental Illinois Nat. Bank & Trust Co. of Chicago v. City of Middlesboro, C.C.A.Ky., 109 F.2d 960.
Cal.—Simons Brick Co. v. City of Los Angeles, 187 P. 1066, 182 Cal. 230.
Iowa.—State ex rel. County Atty. v. Des Moines City R. Co., 140 N.W. 437, 159 Iowa 259.
S.D.—City of Colome v. Von Seggern Bros. & Ludden, 228 N.W. 800, 56 S.D. 390.
21 C.J. p 1197 note 64.

94. Ohio.—Ohio Electric Power Co. v. State, 167 N.E. 877, 121 Ohio St. 235, affirming State v. Ohio Electric Power Co., 172 N.E. 615, 35 Ohio App. 481.
Wis.—City of Milwaukee v. Milwaukee Electric Ry. & Light Co., 180 N.W. 339, 173 Wis. 400, 13 A.L.R. 802, modified on other grounds 181 N.W. 821, 173 Wis. 400.

95. N.J.—Morris & Essex R. Co. v. Newark, 10 N.J.Eq. 352.
Ohio.—Cincinnati v. Columbia & Cincinnati, St. R. Co., 9 Ohio Dec. (Reprint) 782, 17 Cinc.L.Bul. 192.

96. Ill.—People v. Western Cold Storage Co., 123 N.E. 43, 287 Ill. 612.

97. N.Y.—Freer v. Arnold, 205 N.Y.S. 801, 123 Misc. 619.
Pa.—City of Pittsburgh v. Weinman, 134 A. 382, 286 Pa. 587.
Wis.—Valentine Blatz Brewing Co. v. Milwaukee, 131 N.W. 416, 146 Wis. 239.
Wyo.—Rohrbaugh v. Mokler, 188 P. 448, 26 Wyo. 514.

Acquiescence for long period of time

It has been held that acquiescence for more than forty years barred, by the statute of limitations, the right of the city to object.—Cincinnati v. Columbia & Cincinnati, St. R. Co., 9 Ohio Dec. (Reprint) 782, 17 Cinc.L. Bul. 192.

98. N.Y.—Freer v. Arnold, 205 N.Y.S. 801, 123 Misc. 619.

99. Or.—Dabney v. City of Portland, 263 P. 386, 124 Or. 54.

1. U.S.—City of Denver v. Mercantile Trust Co., Colo., 201 F. 790, 120 C.C.A. 100.
Kan.—O'Leary v. Metropolitan St. Ry. Co., 123 P. 746, 87 Kan. 22, rehearing denied 125 P. 15, 87 Kan. 526.
Md.—City of Hagerstown v. Hagerstown R. Co., 91 A. 170, 123 Md. 183, 7 A.L.R. 1239, Ann.Cas.1916B 1267.
Mo.—State ex inf. Shartel, ex rel. City of Sikeston v. Missouri Utilities Co., 53 S.W.2d 394, 331 Mo. 337, 89 A.L.R. 607.
Neb.—Village of Deshler v. Southern Nebraska Power Co., 277 N.W. 77, 133 Neb. 778.
Wis.—Milwaukee Electric Ry. & Light Co. v. City of Milwaukee, 245 N.W. 856, 209 Wis. 656.
21 C.J. p 1197 note 63.
Estoppel by benefits considered in connection with grant or license to use streets see supra § 111.

2. Ohio.—Craig v. City of Toledo, 21 N.E.2d 1003, 60 Ohio App. 474.
Pa.—See In re Widening, Etc., of Street in Borough of Long Branch, 18 Wash.Co. 62, 29 Mun.L.R. 122.

Where a municipality has exercised control over a way and improved or otherwise recognized it as a public street, it will be estopped to deny that it is a street irrespective of the mode in which it was established;[3] and, where an ordinance has been passed clearly recognizing the existence of a street and providing for its widening and extension, the city may be estopped by the ordinance and acts done under it from setting up that the location is not, in fact, a street.[4]

Private easement. In a proper case a municipality may be estopped to build on municipal land which is encumbered by an easement granted by the municipality to a private party.[5]

§ 146. Acquiescence in Improvements

In a proper case a municipality may be estopped by its acquiescence in the construction of valuable improvements on its streets or other property.

In accordance with, and subject to, the rules discussed supra §§ 138–145, the doctrine of equitable estoppel may be invoked against the public, a municipality, or other public agency, where it has acquiesced in the making by one acting in good faith of such valuable and permanent improvements on its streets, alleys, or other property that it would be unjust and inequitable to allow it to assert title to the property on which the improvements were made[6] or to refuse compensation where such improvements are removed by it,[7] or to terminate a franchise purporting to be perpetual.[8] Especially may a municipality be estopped where it goes further and demands and receives from the party committing the encroachment a stipulation against

Estoppel to assert reverter to grantor

A city from which recovery was sought for personal injuries sustained because of city's failure to keep a street open, in repair, and free from nuisance, was estopped to assert that area in which street was located had reverted to its grantor because of city's failure to observe conditions in the deeds, where grantor had not asserted any claim to the property.—Craig v. City of Toledo, 21 N.E.2d 1003, 60 Ohio App. 474.

3. N.C.—Whitacre v. City of Charlotte, 6 S.E.2d 558, 216 N.C. 687, 126 A.L.R. 438.

4. Wash.—Columbia, etc., R. Co. v. Seattle, 33 P. 824, 34 P. 725, 6 Wash. 332.

5. Tex.—City of Aransas Pass v. Minter, Civ.App., 21 S.W.2d 384, error dismissed.

6. Ill.—Clokey v. Wabash Ry. Co., 187 N.E. 475, 353 Ill. 349—People v. Union Gas & Electric Co., 103 N.E. 245, 111 Ill. 392—Sanitary Dist. of Chicago v. Metropolitan West Side El. R. Co., 89 N.E. 800, 241 Ill. 622—City of Chicago v. Illinois Steel Co., 82 N.E. 286, 229 Ill. 303, 120 Am.S.R. 258—Chicago & N. W. R. Co. v. People ex rel. City of Elgin, 91 Ill. 251.
Iowa.—Johnson v. Shenandoah, 133 N.W. 761, 153 Iowa 493—Deutsmann v. Kuntze, 125 N.W. 1007, 147 Iowa 158.
Kan.—City of Seneca v. St. Joseph & G. I. R. Co., 146 P. 1168, 94 Kan. 323.
Neb.—Village of Deshler v. Southern Nebraska Power Co., 277 N.W. 77, 133 Neb. 778—State v. McIlravy, 181 N.W. 554, 105 Neb. 651.
N.Y.—Freer v. Arnold, 205 N.Y.S. 801, 123 Misc. 619—St. Vincent Female Orphan Asylum v. Troy, 12 Hun 317, reversed on other grounds 76 N.Y. 108, 32 Am.R. 286.
Ohio.—Ebens v. Cincinnati, 2 Handy 236, 12 Ohio Dec. (Reprint) 420—Joseph v. City of Akron, 19 Ohio App. 412.
Or.—Dabney v. City of Portland, 263 P. 386, 124 Or. 54.
Pa.—Lenhart v. Wright, 133 A. 495, 286 Pa. 351.
Tex.—Krause v. El Paso, 106 S.W. 121, 101 Tex. 211, 130 Am.S.R. 831, 14 L.R.A.,N.S., 582—City of Port Arthur v. Young, Civ.App., 37 S.W.2d 385, error refused.
21 C.J. p 1197 note 69.
Permitting improvements as implied representation see supra §§ 94–97.

Estoppel to rely on irregularity

Although proceedings by a city to vacate an alley are not strictly regular, the city is thereafter estopped to claim title to the alley against one improving it in reliance on such vacation.—Blennerhassett v. Town of Forest City, 91 N.W. 1044, 117 Iowa 680.

Highways

Cases concerning public highways may arise, of such a character and founded on such an actual and notorious abandonment of a highway by the public that justice requires assertion of an equitable estoppel against the public in favor of individuals.—Meyer v. Meldrum, 211 N.W. 658, 659, 237 Mich. 318, citing **Corpus Juris**—29 C.J. p 535 note 22.

Route over tideway

Where railroad route through city and over tideway was selected and approved by the common council of the city under the act of incorporation, L.1846, c 216, and where the railroad constructed tracks along such route, spent large amounts in construction and equipment, constructed large freight depots which could be reached only over such right of way, paid hundreds of thousands of dollars in taxes to the city levied on such right of way as property owned by the railroad, and continued to use the land for more than seventy years as such right of way, the city was estopped from denying the railroad's right to use land not parts of streets and avenues for such purpose.—City of New York v. New York Cent. R. Co., 190 N.Y.S. 777, 198 App.Div. 517, affirmed 136 N.E. 311, 234 N.Y. 113.

Use of streets without franchise

Municipality, permitting gas company without franchise to make expenditures and to use its streets, may be estopped to prevent maintenance of pipe line system.—Marmet Gas Co. v. Town of Marmet, 135 S.E. 839, 102 W.Va. 605.

Annexation by city of town estopped

City annexing town after corporation installed electric conduits under street with town chairman's verbal consent and at substantial expense is estopped to deny lawful presence thereof.—Milwaukee Electric Ry. & Light Co. v. City of Milwaukee, 245 N.W. 860, 209 Wis. 668.

7. Tex.—City of San Angelo v. Neilon, Civ.App., 104 S.W.2d 895.

Removal of gutters on widening of street

City which required property owner to locate gutter and curb inside street line was thereby estopped from asserting that placing of gutter and curb and other improvements inside street line precluded owner's recovery of compensation for destruction of improvements when street was paved to its original lines.—City of San Angelo v. Neilon, supra.

8. Mo.—State ex inf. McKittrick ex rel. City of Springfield v. Springfield City Water Co., 131 S.W.2d 525.

claims for damages for the vacation of the street,[9] or where an agent of the city acting under its instructions, and with the concurrence of the party subsequently making the improvements, investigates and reports to the council of the municipality that it has no rights in the land, and such report is received and filed in the records of the city,[10] or where the municipality through its officers has fixed the boundary lines of the street and improvements have been made on the basis thereof.[11]

However, to create an estoppel against a municipality by acquiescence in improvements the essential elements of an estoppel in pais must be present.[12] No estoppel is created against a municipality in respect of an encroachment on a street by an abutting lot owner, of which it has no knowledge,[13] or by a mere casual expression of opinion by a municipal officer that there could be no objection to the encroachment.[14] There is no estoppel because part of a highway was occupied by an abutting landowner under a permit granted by the city;[15] and the fact that abutting owners improve their lots on the basis of the width to which the street was actually opened will not estop the municipality from claiming the full width of the street.[16] An estoppel may not be predicated on the use or occupation of a street or other municipal property under permission which it is contemplated may subsequently be withdrawn;[17] nor may an estoppel arise where the ele-

9. Pa.—In re Melon St., 43 A. 1013, 192 Pa. 331.

10. Cal.—Los Angeles v. Cohn, 35 P 1002, 101 Cal. 373.

11. Pa.—Borough of Milford v. Burnett, 136 A. 669, 288 Pa. 434.

12. U.S.—Town of Conway v. Atlantic Coast Line R Co., D.C S.C., 20 F 2d 250.
Cal.—Stevens v. Oakdale Irr Dist., 90 P.2d 58, 13 Cal.2d 343—San Pedro, L. A. & S. L. R. Co. v. Long Beach, 158 P. 204, 172 Cal. 631—Wheeler v. City of Oakland, 170 P. 864, 35 Cal.App. 671.
Ill.—Close v. City of Chicago, 100 N. E. 215, 257 Ill. 47—City of Edwardsville v. Central Union Telephone Co., 227 Ill App. 424, affirmed 141 N.E. 206, 309 Ill. 48, dismissed Central Union Telephone Co. v. City of Edwardsville, 46 S Ct. 90, 269 U.S. 190, 70 L.Ed. 229—City of Sullivan v. Central Illinois Public Service Co., 221 Ill. App. 561.
Ind.—Lawrenceburgh v. Wesler, 37 N.E. 956, 10 Ind App. 153.
Md.—Cushwa v. Williamsport, 83 A. 389, 117 Md. 306.
Miss.—Witherspoon v Meridian, 13 So. 843, 69 Miss. 288.
Mo.—State ex inf. McKittrick ex rel. City of California v. Missouri Utilities Co., 96 S.W.2d 607, 339 Mo. 385, 106 A.L.R. 1169—Marshall v. City of Springfield, 221 S.W. 17.
Or.—Eugene v. Garrett, 169 P. 649, 87 Or. 435, rehearing denied 170 P. 731, 87 Or. 435—Booth v. Prineville, 143 P. 994, 72 Or. 298, L.R.A.1915B 1084.
Tex.—Galveston, H. & S. A. Ry. Co. v. City of Eagle Pass, Civ.App., 249 S.W. 268, reversed on other grounds, Com.App., 260 S.W. 841—Newton v. City of Dallas, Civ.App., 201 S.W. 703, error refused.
Wis.—State v. Leaver, 22 N.W. 576, 62 Wis. 387.

Consent limited as to time

Where municipality consented to use of its streets by power company for erection of poles to support wires transmitting electricity, and company and its predecessors acted with knowledge that consent was limited in time, in action by municipality to enjoin such use after expiration of franchise, municipality could not be estopped to assert the limitation.—Eastern Shore Public Service Co. v. Town of Seaford, Del., 2 A.2d 265, sustaining Town of Seaford v. Eastern Shore Public Service Co., Ch., 2 A.2d 258, and appeal dismissed Eastern Shore Public Service Co. v. Town of Seaford, 59 S.Ct. 483, 306 U.S. 616, 83 L.Ed. 1024, rehearing denied 59 S.Ct. 589, 306 U.S. 668, 83 L.Ed. 1063.

Expenditures during franchise as precluding action after expiration

Telephone company's expenditures for replacements, additions, and improvements before expiration of franchise granted it by city did not estop latter to sue for injunction in nature of ouster against further maintenance of company's poles, wires, etc., in city's streets and alleys.—City of Roswell, N. M., v. Mountain States Telephone & Telegraph Co., C.C.A.N.M., 78 F.2d 379.

Expenditures made with knowledge of facts

Where town limited its consent to use of public streets by light and power company to twenty years, but did not immediately oust the company's successor from the streets on expiration of the period, and successor subsequently, with full knowledge of the facts, spent money on plant and facilities, town was not thereby estopped from enforcing the limitation.—Town of Seaford v. Eastern Shore Public Service Co., Del.Ch., 2 A.2d 258, sustained Eastern Shore Public Service Co. v. Town of Seaford, Sup., 2 A.2d 265, appeal dismissed Eastern Shore Public Service Co. v. Town of Seaford, 59 S.Ct. 483, 306 U.S. 616, 83 L.Ed. 1024, rehearing denied 59 S.Ct. 589, 306 U.S. 668, 83 L.Ed. 1063.

Use not adverse in character

A town may, by permitting a school district to use a public square as a site for a school building, be estopped to deny the school district's right to use the land for such purpose; but in such case there must be clearly an abandonment by the town or public, and an adverse holding by the school district. The continued occupancy and use of part of a public square by a school district for school purposes for more than sixty years did not estop the town from denying the school district's right to use the public square for school purposes and to construct new building thereon, in the absence of a showing that the school district's use of the land was adverse to the claims of the public, and in view of evidence that that portion of the public square inclosed for school purposes had at the same time been used for the general purposes to which a public square might be put, and had a bandstand and a speaker's stand thereon.—Melin v. Community Consol. School Dist. No. 76, 144 N.E. 13, 312 Ill. 376.

13. Ohio.—Fleming v. City of Steubenville, 184 N.E. 701, 44 Ohio App. 121.
Or.—Oliver v. Synhorst, 109 P. 762, 115 P. 594, 58 Or. 582.

14. Or.—Oliver v. Synhorst, supra.

15. N.Y.—Leo N. Levy Corporation v. Dick, 190 N.Y.S. 238, 116 Misc. 145.

16. Or.—Eugene v. Garrett, 169 P. 649, 87 Or. 435.

17. Colo.—City of Denver v. Girard, 42 P. 662, 21 Colo. 447.
Ill.—Shirk v. City of Chicago, 63 N.E. 193, 195 Ill. 298.
Ind.—Waters v. City of South Bend, 150 N.E. 67, 85 Ind.App. 196.
Ky.—Wood v. Town of Lewisport, 299 S.W. 197, 221 Ky. 566.

ment of reliance is absent.[18]

Further, it is essential that the improvement should have been induced by the acts of the municipality;[19] and it has been held that a claim of irrevocable right in a street or public place cannot be predicated on the ground alone that the public officers saw improvements in course of construction and failed to object.[20] Something more than mere possession of municipal property on the part of private parties must be shown.[21] Improvements of a trivial or insignificant character cannot be made the basis of an estoppel.[22] A fortiori no estoppel can be invoked against a municipality where a lot owner who had placed gates and bars across an adjoining alley, and claimed it by adverse possession, had made no improvements thereon,[23] or where a telephone company, in violation of its franchise, installed party lines but expended no money on representations by the city that it would not enforce the provisions of the franchise.[24] The municipality will not be estopped by acquiescence in a grant, license, or ordinance expressly providing for revocation at any time by the municipality.[25]

Agreement in restraint of right to condemn property. An agreement by city authorities that, if railroad companies would erect a union depot, the city would not attempt to open streets through the premises, does not estop the city from condemning the right to extend its streets through the premises after the erection of the depot.[26]

§ 147. Collection of Taxes and Assessments

The assessment and collection of taxes ordinarily does not estop a government or governmental agency from claiming title to land; and it is only under exceptional circumstances that the government may be estopped in respect of its exercise of the power of taxation.

It is generally held that the United States[27] or a state[28] or municipality[29] is not estopped from subsequently claiming title to property for the ben-

S.C.—Grady v. City of Greenville, 123 S.E. 494, 129 S.C. 89.

Knowledge that permission was temporary in character

Town is not estopped to demand railroad's removal from street of tracks laid under permission of board of county commissioners before town's incorporation, since in such case the railroad knew it had nothing more than a temporary permission.—Town of Conway v. Atlantic Coast Line R. Co., D.C.S.C., 20 F.2d 250.

Express reservation of municipal rights

Where a city owns the fee to land under water outside of the bulkhead line, and thereafter permits an upland private owner to fill in part of the land, under a permit reserving all of the city's rights, such private owner cannot claim to have acquired title thereto against the city under the doctrine of estoppel.—Harway Improvement Co. v. City of New York, 186 N.Y.S. 405, 113 Misc. 788.

18. Mo.—State ex inf. McKittrick ex rel. City of California v. Missouri Utilities Co., 96 S.W.2d 607, 106 A.L.R. 1169.

Knowledge precluding reliance

Where purchasers of property in platted addition had full knowledge of existence of platted streets dedicated to use of public, the failure of public to use streets as such over period of many years while property owners set out trees and shrubs, seeded portions of streets, and buried an oil tank under street, did not estop village from subsequently claiming right to use streets, since the property owners acted with full knowledge of the facts.—Olsen v. Village of Grand Beach, 276 N.W. 481, 282 Mich. 364.

19. U.S.—City of Roswell, N. M., v. Mountain States Telephone & Telegraph Co., C.C.A.N.M., 78 F.2d 379.
Ill.—City of Sullivan v. Central Illinois Public Service Co., 221 Ill.App. 561.
21 C.J. p 1198 note 75.

Mere passivity of a municipality is insufficient.—Solberg v. City of Decorah, 41 Iowa 501.

20. Ky.—Guilfoyle v. Maysville, 112 S.W. 666, 129 Ky. 532.
21 C.J. p 1198 note 76.

21. Ill.—Shirk v. Chicago, 63 N.E. 193, 195 Ill. 298.
21 C.J. p 1199 note 77.

22. Ill.—Kennedy v. Town of Normal, 194 N.E. 576, 359 Ill. 306.
21 C.J. p 1199 note 78.

23. Iowa.—Schultz v. Stringer, 150 N.W. 1063, 168 Iowa 668.

24. Ky.—Louisville v. Louisville Home Tel. Co., 148 S.W. 13, 149 Ky. 234, Ann.Cas.1914A 1240.

25. Ill.—People v. Western Cold Storage Co., 123 N.E. 43, 287 Ill. 612.

26. Tenn.—Mobile, etc., R. Co. v. Union City, 194 S.W. 572, 137 Tenn. 491.

27. U.S.—U. S. v. Standard Oil Co. of California, D.C.Cal., 20 F.Supp. 427.

28. Kan.—State v. Berk, 284 P. 386, 388, 129 Kan. 645, citing **Corpus Juris.**
Ky.—Middleton v. Commonwealth, 254 S.W. 754, 756, 200 Ky. 237, citing **Corpus Juris.**
21 C.J. p 1199 note 84.

29. Ala.—Ft. Payne Co. v. City of Ft. Payne, 114 So. 63, 216 Ala. 679.
Cal.—Gervasoni v. City of Petaluma, 208 P. 120, 189 Cal. 306—Lantz v. City of Los Angeles, 196 P. 481, 185 Cal. 262.
Colo.—Hecker v. City and County of Denver, 252 P. 808, 80 Colo. 390.
Ky.—Middleton v. Commonwealth, 254 S.W. 754, 756, 200 Ky. 237, citing **Corpus Juris**—Busse v. Central Covington, 38 S.W. 865, 39 S.W. 848, 19 Ky.L. 157.
La.—Louisiana Ice Mfg. Co. v. City of New Orleans, 9 So. 21, 43 La.Ann. 217.
Mo.—Kunkel v. Griffith, 29 S.W.2d 64, 325 Mo. 392—Hecker v. Bleish, 3 S.W.2d 1008, 319 Mo. 149—Kinsolving v. W. D. Lasswell Lumber Co., 300 S.W. 506, 318 Mo. 408—Marshall v. City of Springfield, 221 S.W. 17—City of St. Louis v. Cooper Carriage Woodwork Co., 216 S.W. 944.
Mont.—Lockey v. City of Bozeman, 113 P. 286, 42 Mont. 387.
N.Y.—City of Mt Vernon v. New York, N. H. & H. R Co., 133 N.E. 900, 232 N.Y. 309, reversing 169 N.Y.S. 778, 182 App.Div. 259, reargument and amendment of remittitur denied 135 N.E. 970, 233 N.Y. 685—City of Geneva v. Cayuga Oil Co., 238 N.Y.S. 187, 135 Misc. 673.
Tex.—Reynolds v. City of Alice, Civ. App., 150 S.W.2d 455—Guevara v. Guevara, Civ.App., 253 S.W. 345, affirmed, Com.App., 280 S.W. 736.
Wash.—Humphrey v. Krutz, 137 P. 806, 77 Wash. 152.
21 C.J. p 1199 note 84.

efit of the public, by an unauthorized levy and collection of taxes on such property, or even by a levy of taxes and sale of the property for taxes.[30] The assessment or collection of taxes does not estop a municipality from claiming title to land dedicated for a street,[31] or for other public purposes.[32] The fact that one who had dedicated property for a street subsequently vacated listed the vacated property as his own but in such a way as to conceal its location, and paid taxes thereon for several years, is insufficient to establish the defense of estoppel in an action by the municipality to quiet title to the vacated portion of the street.[33] Where a claimant of lands adversely to a county and its grantees, pending litigation as to his rights, and with knowledge that he did not have the legal title, voluntarily procured the land to be assessed in his name, and paid the taxes thereon for a number of years, the acceptance of such taxes will not estop the county, nor its grantee, having knowledge of such facts, from asserting title to the lands.[34] Unauthorized assessments for public improvements will not estop the municipality from setting up a claim of title to the land against which the assessments were made.[35] A railroad may not escape performance of its statutory duties in respect of a bridge on the ground that taxes have been assessed against it or others in connection with the erection and maintenance thereof;[36] nor will the imposition of taxes on a public utility estop a municipality from later ousting it from use of the streets.[37]

However, where, in addition to the levy and collection of taxes, there appear other circumstances rendering it clearly inequitable for the government to claim title, the doctrine of estoppel may be applied.[38]

Estoppel to collect taxes. Taxation being a governmental rather than a proprietary function, ordinarily there can be no estoppel against a government or governmental agency with reference to the enforcement of taxes.[39] The government is not es-

Assessment as "creating" title

Assessment for taxation purposes by municipality does not create title where none existed.—People v. Foote, 252 N.Y.S. 676, 141 Misc. 409, affirmed 273 N.Y.S. 567, 242 App.Div. 162, motion denied 5 N.E.2d 362, 272 N.Y. 622, and appeal dismissed 7 N.E.2d 728, 273 N.Y. 629, and 7 N.E.2d 729, 273 N.Y. 630, certiorari denied Foote v. People of State of New York, 58 S.Ct. 367, 302 U.S. 760, 82 L.Ed. 588.

City's grantee

Where a strip embraced in the west half of a lot was inclosed with the east half which belonged to the city, the mere fact that defendant had for twenty years paid taxes to the city on the west half including such strip was not sufficient to estop the city's grantee from claiming title by adverse possession where he and his grantors had been in the adverse occupancy of the land for more than fifty years.—Ernst v. Hall, 197 P. 809, 51 Cal.App. 747.

30. Mich.—Plumb v. Grand Rapids, 45 N.W. 1024, 81 Mich. 381.

31. Cal.—Wheeler v. City of Oakland, 170 P. 864, 35 Cal.App. 671.
Ky.—Central Land Co. v. Central City, 300 S.W. 362, 222 Ky. 103.
N.J.—Tweddell v. Village of South Orange, 112 A. 511, 95 N.J.Law 327.

Notice to municipality of payment of taxes

Where no notice is given to a municipality that plaintiff pays taxes on lands dedicated for a street, the municipality is not estopped from asserting its right to open the street.—Chafee v. Aiken, 35 S.E. 800, 57 S.C. 507.

Where dedicated property has been actually put in use as a street by a municipality, the fact that the municipality continues to tax the property does not estop it from claiming the property as a street—Hanger v. Des Moines, 80 N.W. 549, 109 Iowa 480—18 C.J. p 86 note 57.

32. Ky.—Morris v. Avondale Heights Co., 291 S.W. 752, 218 Ky. 356.

Park

Ky.—Morris v. Avondale Heights Co., supra.

33. Iowa.—Lake City of Tulkerson, 98 N.W. 376, 122 Iowa 569.

34. U.S.—Bump v. Butler County, C.C.Mo., 93 F. 290.

35. Ind.—Rhodes v. Brightwood, 42 N.E. 942, 145 Ind. 21.

36. N.Y.—In re Henner, 211 N.Y.S. 334, 125 Misc. 472, affirmed 216 N.Y.S. 844, 217 App.Div. 785.

37. Mo.—State ex inf. McKittrick ex rel. City of California v. Missouri Utilities Co., 96 S.W.2d 607, 339 Mo. 385, 106 A.L.R. 1169.

Taxation as "representation" of lawfulness of business

Imposition of property and income tax on electrical company for several years during which company operated in city after expiration of franchise does not estop city from ousting company from use of streets, since taxation was not representation that company's business was a lawful one.—State ex inf. McKittrick ex rel. City of California v. Missouri Utilities Co., supra.

38. La.—State v. Broussard, 116 So. 827, 166 La. 133.

Acquiescence for long period

State, having sold lands on basis of federal government surveys and accepted taxes thereon for fifty years, is estopped to deny correctness of surveys or repudiate sales.—State v. Broussard, supra.

39. Kan.—Board of Com'rs of Harvey County v. School Board of School Dist. No. 1, 32 P.2d 812, 139 Kan. 457, followed in Board of Com'rs of Harvey County v. Governing Body of City of Burrton, 32 P.2d 814—Board of Com'rs of Woodson County v. City of Yates Center, 32 P.2d 209, 139 Kan. 519.
Ky.—Gay v. Jackson County Board of Education, 265 S.W. 772, 205 Ky. 277.
Mich.—Lovett v. City Treasurer of Detroit, 281 N.W. 576, 286 Mich. 159.
Minn.—State v. Illinois Cent. R. Co., 274 N.W. 828, 200 Minn. 583, rehearing denied 275 N.W. 854, 200 Minn. 583.
Pa.—Commonwealth v. Taylor's Ex'r, 147 A. 71, 279 Pa. 335, final decision withheld on reargument, Commonwealth v. Farmer's Loan & Trust Co., 151 A. 692, 301 Pa. 114.
Doctrine of estoppel as applicable to governmental functions see supra §§ 138–141.

Estoppel not to be lightly invoked

While there may be instances where the doctrine can be applied even as to tax matters, the doctrine of estoppel is not to be lightly invoked against the exercise of the sovereign power of the state to levy and collect taxes for the support of the government.—Outer Harbor Dock & Wharf Co. v. City of Los Angeles, 193 P. 137, 49 Cal.App. 120.

topped by previous acts or conduct of its agents with reference to the determination of tax liabilities,[40] and the mistakes or misinformation of its officers will not estop it from collecting taxes due.[41] There can be no estoppel in pais against the government with reference to tax matters where the essential elements of an estoppel are absent.[42] Even if all the other elements of an estoppel are present, there will be no estoppel against the government with reference to tax matters if the representations were made by an officer lacking the necessary authority.[43] Further, the state will not be bound by an estoppel in connection with tax matters on the theory of its privity with individuals who are estopped where the circumstances are not such as to support the claim of privity.[44] The violation of law by an illegal agreement as to assessment may not be made the basis of an estoppel against a school to preclude it from attacking the validity of a tax assessment.[45]

However, under exceptional circumstances there

Estoppel to sue on collector's bond

Where taxpayer recovered judgment against state and county for taxes paid through mistake, and court ordered county tax collector, who was not party to suit, to pay amount of judgment, state was not estopped to sue on collector's bond to governor on ground of invalidity of judgment because of approval by comptroller of public accounts of collector's accounts showing payment of amount of judgment.—American Indemnity Co. v. State, Tex.Civ.App., 104 S.W.2d 68, error dismissed.

40. U.S.—John M. Parker Co. v. Commissioner of Internal Revenue, C.C.A., 49 F.2d 254—Huron Portland Cement Co. v. Woodworth, D.C.Mich., 19 F.2d 530.

Commissioner of internal revenue was not estopped to determine in his own way corporation's tax liability for year in question by fact that former commissioner classified corporation as partial personal service corporation during previous year.—John M. Parker Co. v. Commissoner of Internal Revenue, C.C.A., 49 F.2d 254.

41. U.S.—O. D. Jennings & Co. v. Reinecke, D.C.Ill., 19 F.Supp. 197—Westbrook-Thompson Holding Corporation v. U. S., D.C.Tex., 18 F.Supp. 289, reversed on other grounds, C.C.A., U. S. v. Westbrook-Thompson Holding Corporation, 94 F.2d 532—U. S. v. Nez Perce County, D.C.Idaho, 16 F. Supp. 267, cause remanded, C.C.A., 95 F.2d 232, rehearing denied C.C.A., 95 F.2d 238—U. S. v. Lewis County, D.C.Idaho, 16 F.Supp. 267, cause remanded, C.C.A., 95 F.2d 236, rehearing denied 95 F.2d 238.

Ala.—Durr Drug Co. v. Long, 188 So. 873, 237 Ala. 689.

Ark.—Terminal Oil Co. v. McCarroll, 147 S.W.2d 352—Superior Bath House Co. v. McCarroll, 139 S.W.2d 378, 200 Ark. 233, affirmed 61 S Ct. 503—Southwestern Distilled Products v. State ex rel. Humphrey, 136 S.W.2d 166, 199 Ark. 761.

Ill.—People ex rel. Ames v. Marx, 18 N.E.2d 915, 370 Ill. 264.

Mich.—Lovett v. City Treasurer of Detroit, 281 N.W. 576, 286 Mich. 159.

Erroneous information as to payment of tax

Where a city treasurer gave erroneous information to the effect that the tax on a piece of property had already been paid, when in fact it had not, in a suit to restrain the treasurer and another from selling the property for taxes, the city was not estopped to deny that the tax had not been paid.—Lovett v. City Treasurer of Detroit, supra.

Tax collector's letter as creating estoppel

A letter written by collector of internal revenue to taxpayer, whose surety released indemnity collateral in reliance on statement in letter that records showed no unpaid income taxes in taxpayer's name, did not estop government from maintaining action against surety for interest on delayed tax payments since collector had no authority to furnish a tax search binding on the commissioner.—U. S. v. Globe Indemnity Co., C.C.A.N.Y., 94 F.2d 576, affirming, D.C., 17 F.Supp. 838, certiorari denied Globe Indemnity Co. v. U. S., 58 S.Ct. 1047, 304 U.S 575, 82 L.Ed. 1538.

42. U.S.—Century Electric Co. v. U. S, C.C.A.Mo., 75 F.2d 589, certiorari denied 55 S.Ct. 925, 295 U.S. 766, 79 L.Ed. 1708.

Ariz.—State Tax Commission of Arizona v. Martin, 113 P.2d 640.

Ark.—Hollis & Co. v. McCarroll, 140 S.W.2d 420, 200 Ark. 523

Cal.—Outer Harbor Dock & Wharf Co. v. City of Los Angeles, 193 P. 137, 49 Cal.App. 120.

Colo.—Armstrong v. Driscoll Const. Co., 110 P.2d 651.

Ga.—Steele v. City of Waycross, 10 S.E.2d 867, 190 Ga. 816.

La.—State v. Standard Oil Co. of Louisiana, 178 So. 601, 188 La. 978.

Minn.—State v. Brooks, 236 N.W. 316, 183 Minn. 251.

N.J.—American Ins. Co. v. City of Newark, 15 A.2d 119, 18 N.J.Misc. 516.

N.Y.—Oswego Falls Corporation v. City of Fulton, 265 N.Y.S. 436, 148 Misc. 170, affirmed 268 N.Y.S. 978, 241 App.Div. 560.

Pa.—Commonwealth v. Taylor's Ex'r, 147 A. 71, 279 Pa. 335, final decision withheld on reargument, Commonwealth v. Farmer's Loan & Trust Co., 151 A. 692, 301 Pa. 114.

Absence of injury

Municipality's issuance of tax execution against wrong party does not estop municipality to proceed against true owner, where true owner had not been caused to act to his injury.—Haden v. City of Atlanta, 171 S.E. 703, 177 Ga. 869.

Interest and attorney's fees

By merely agreeing to hold matters in statu quo pending a hearing relative to the validity of a tax act, the state did not estop itself to collect interest and attorney's fees after the act had been held valid.—State v. Great Atlantic & Pacific Tea Co., 183 So. 219, 190 La. 925, certiorari denied Great Atlantic & Pacific Tea Co. v. State of Louisiana, 59 S.Ct. 108, 305 U.S. 637, 83 L.Ed. 410.

43. U.S.—U. S. v. Globe Indemnity Co., D.C.N.Y., 17 F.Supp 838, affirmed, C.C.A., 94 F.2d 576, certiorari denied Globe Indemnity Co. v. U. S., 58 S.Ct. 1047, 304 U.S. 575, 82 L.Ed. 1538.

44. Iowa.—Wooster v. Iowa State Tax Commission, 298 N.W. 922.

Adoption by estoppel; inheritance tax

Where child was taken into adoptive parents' home and treated as a daughter by the parents who did not comply with statute relating to adoption, and it was conceded that in so far as adoptive parents were concerned an "adoption by estoppel" was created, the state was not in such a privity with the adoptive parents as to be bound by the estoppel against them, so as to entitle the child to the exemption and rate of inheritance tax of a legally adopted child, in computing inheritance tax on property passing to child under will of one of the parents.—Wooster v. Iowa State Tax Commission, supra.

45. N.Y.—People ex rel. Manlius School v. Adams, 256 N.Y.S. 185 143 Misc. 469.

Exemption of property

Alleged agreement between schoo and assessors respecting reductior

may be an equitable estoppel of the government in connection with tax matters,[46] and in a proper case a tax official may be estopped with reference to tax matters arising as between him and the government.[47]

B. MATTERS PRECLUDED

§ 148. Extent of Estoppel Generally

An equitable estoppel may be asserted as a defense or for the protection of a right, and, as a general rule, is commensurate with the thing represented and operates to put the party entitled to its benefit in the same position as if the thing represented were true. It may be applied only to protect from loss, and cannot be extended beyond the natural and reasonable import of the representation.

An equitable estoppel when established by the evidence operates as effectively as estoppels by deed or record,[48] and when the facts call for its application it supersedes all other rules.[49] The effect of such an estoppel may prevent the assertion of an unequivocal right or preclude a good defense,[50] and it should not be enforced unless it is substantiated in every particular.[51] It generally may be asserted, not for the creation of a right, but as a matter of defense or for the protection of a right,[52] and, to this extent, may be asserted as a ground for affirmative relief.[53]

of assessment does not estop school from contesting tax on ground property was exempt.—People ex rel. Manlius School v. Adams, 256 N.Y.S. 185, 143 Misc. 469.

46. Wash.—Seward v. Fisken, 210 P. 378, 122 Wash. 225, 27 A.L.R. 1208.

Estoppel to deny capacity in which property held

Under Gen.St.1906 § 513, providing that, where property is held in trust for the purpose of taxation, the fiduciary capacity should be stated, where the state has assessed property of a decedent to trustee, which is the true capacity in which the property is held, and the state sues the trustees for the taxes, it will not be permitted to show that the property is held in a different fiduciary capacity.—State v. Beardsley, 82 So. 794, 77 Fla. 803.

Tax receipt as estopping county to deny payment

A county will be estopped from asserting that a tax has not been paid as against a purchaser who purchased the property and paid the purchase money, or a portion thereof, to seller in reliance on a receipt exhibited, signed by the county treasurer, showing payment of taxes.—Seward v. Fisken, 210 P. 378, 122 Wash. 225, 27 A.L.R. 1208.

Validity of assessment

Where city permitted power company for yearly sums to operate its cable on a bridge and took advantage of an assessment made on the right as a special franchise, under Tax Law art 1 § 2 subd 6, it is in no position to question the validity of the assessment.—New York & Queens Electric Light & Power Co. v. Delaney, 128 N.E. 131, 229 N.Y. 184, reversing In re New York & Queens Electric Light & Power Co., 179 N.Y.S. 938, 190 App.Div. 934.

Voluntary character of tax payment

A city, to which apartment house owner paid illegal tax on washtubs in apartments under protest to relieve property from lien and avoid penalty for delay in payment, is estopped to assert that payment was voluntary, in action to recover amount thereof.—Effell Realty Corporation v. City of New York, 299 N.Y.S. 373, 165 Misc. 176, affirmed 11 N.Y.S.2d 250, 256 App.Div. 972, appeal granted 12 N.Y.S.2d 362, 257 App.Div. 806, affirmed 24 N.E.2d 978, 282 N.Y. 541.

47. S.C.—Salley v. McCoy, 200 S.E. 724, 189 S.C. 157.

Validity of tax executions

Members of county highway commission are estopped to deny validity of tax executions, by which they benefited, in county treasurer's action to recover fees for issuance thereof.—Salley v. McCoy, supra.

48. Iowa.—Lucas v. Hart, 5 Iowa 415.

21 C.J. p 1200 note 89.

49. Ala.—Ex parte City of Bessemer, 197 So. 20, 240 Ala. 52.

Wis.—Union Bank of Milwaukee v. Commercial Securities Co., 157 N.W. 510, 163 Wis. 470.

"In its proper field, estoppel has a power of mastery over all other rules, and is entitled to the distinction of being one of the greatest instrumentalities to promote the ends of justice and which a court of equity affords."—Ex parte City of Bessemer, 197 So. 20, 23, 240 Ala. 52.

50. U.S.—Grand Trunk Western R. Co. v. H. W. Nelson Co., C.C.A. Mich., 116 F.2d 823, rehearing denied 118 F.2d 252.

N.J.—Guarantee Trust Co. v. Hoffman, 199 A. 781, 16 N.J.Misc. 340.

Tex.—Wilson v. Curry, Civ.App., 151 S.W.2d 356, 358, error dismissed, judgment correct.

51. U.S.—Grand Trunk Western R. Co. v. H. W. Nelson Co., C.C.A. Mich., 116 F.2d 823, rehearing denied 118 F.2d 252.

52. U.S.—Dickerson v. Colgrove, Mich., 100 U.S. 578, 580, 25 L.Ed. 618—American Life Ins. Co. of Alabama v. Hutcheson, C.C.A.Tenn., 109 F.2d 424—Leimer v. State Mut. Life Assur. Co. of Worcester, Mass., C.C.A.Mo., 108 F.2d 302—U. S. to Use of Noland Co. v. Maryland Casualty Co., D.C.Md., 38 F.Supp. 479

Ga.—Reese v. Spence, 4 S.E.2d 244, 188 Ga. 349—Cutright v. National Union Fire Ins. Co., App., 15 S.E.2d 540.

Mo.—Brown v. Brown, 146 S.W.2d 553.

Tenn.—Henry County v. Standard Oil Co., 71 S.W.2d 683, 167 Tenn. 485, 93 A.L.R. 1483—McLemore v. Memphis & C. R. Co., 69 S.W. 338, 111 Tenn. 639.

Tex.—Massachusetts Bonding & Insurance Co. v. Dallas Steam Laundry & Dye Works, Civ.App., 85 S.W.2d 937, error refused.

Utah.—I. X. L. Stores Co. v. Success Markets, 97 P.2d 577, 98 Utah 160.

It is rule of evidence which precludes a person from denying the truth of some statement previously made by him, but it is not the basis of an affirmative action.—U. S., to Use of Noland Co. v. Maryland Casualty Co., D.C.Md., 38 F.Supp. 479.

Estoppel does not create cause of action if none otherwise existed.—State v. Shell Pipe Line Corporation, Mo., 139 S.W.2d 510.

Reply to defense

Where plaintiffs brought suit to quiet title to lot, and defendants in their answer claimed fee-simple title to the lot and prayed for decree vesting title in them, plaintiffs had right to plead estoppel against defendants' claim, as against contention that "estoppel" was a weapon of defense and not of offense.—Clark v. Ferguson, Mo., 144 S.W.2d 116.

Object and purpose of equitable estoppel generally see supra § 63.

53. U.S.—Wherman v. Conklin, Iowa, 15 S.Ct. 129, 155 U.S. 314,

It cannot, in the nature of things, be subjected to fixed and settled rules of universal application like legal estoppels or limited by a technical formula, but is entitled to a fair and liberal application like other equitable doctrines that are admitted to suppress fraud and promote honesty and fair dealing.[54] As a general rule, the estoppel is commensurate with the thing represented and operates to put the party entitled to its benefit in the same position as if the thing represented was true.[55] This, however, is the absolute limit of the extent to which the estoppel can operate, for it is a fundamental part of the doctrine of equitable estoppels that the estoppel extends only so far as may be necessary to protect from loss the party entitled to assert it; he may claim indemnification but not profit;[56] and hence it should be limited to what is necessary to put the parties in the same relative position they would have occupied if the predicate of the estoppel had never existed.[57] The estoppel can neither be extended beyond nor cut below the natural and reasonable import of the representation, relied on to create it.[58] It in no case extends beyond the act done or omitted in reliance on the conduct or representation of the party sought to be estopped,[59] and goes no further than to preserve the transaction already entered on.[60] However, the fact that defendant claims a larger estoppel against plaintiff than the court will allow does not prevent defendant receiving such benefit from his claim of estoppel as the case warrants.[61]

Estoppel, ordinarily, cannot be applied to impair the force and effect of a prohibitory law,[62] such as to make good an act forbidden by law;[63] nor can it be applied to deny the existence of a law,[64] or to defend or uphold crime or fraud, or misdoing of any character.[65]

§ 149. Personal Status or Right

Estoppel may be applied to preclude a person from asserting a personal right or privilege.

Estoppel may be applied to preclude a person

39 L.Ed. 167—Jones Store Co. v. Dean, C.C.A.Mo., 56 F.2d 110, certiorari denied Dean v. Jones Store Co., 52 S.Ct. 641, 286 U.S. 559, 76 L.Ed. 1292.

54. Conn.—Preston v. Mann, 25 Conn. 118, 127.
21 C.J. p 1200 note 90.

55. Minn.—Park v. Hudson, 192 N.W. 112, 154 Minn. 471.
21 C.J. p 1200 note 91.

"The doctrine of 'equitable estoppel' * * * is founded on the principle that a person who has induced another to believe and act in a certain manner will not afterwards be allowed to injure or prejudice the rights of such other person because of the acts done under the belief that they were agreed to."—Louisville Joint Stock Land Bank v. McMurry, 128 S.W.2d 596, 600, 278 Ky. 238—Young v. Venters, 18 S.W.2d 277, 278, 229 Ky. 806.

Effect of one being estopped to enforce claim is that his plight is substantially the same as it would have been if the claim had never existed. —Ford v. Huff, C.C.A.Fla., 296 F. 652, reversing, D.C., Huff v. Ford, 289 F. 858, and certiorari denied 45 S.Ct. 90, 266 U.S. 602, 69 L.Ed. 462.

56. Cal.—Camerer v. California Savings & Commercial Bank of San Diego, 48 P.2d 39, 4 Cal.App.2d 159, 100 A.L.R. 667.
Ga.—Reese v. Spence, 4 S.E.2d 244, 182 Ga. 349—Fields v. Continental Ins. Co. of New York, 152 S.E. 60, 170 Ga. 28—Peacock v. Horne, 126 S.E. 813, 159 Ga. 707.
Mo.—State ex rel. Moss v. Hamilton, 260 S.W. 466, 303 Mo. 302.
N.J.—Dunn v. Cutley, 151 A. 367, 8 N.J.Misc. 677.
N.Y.—Parsons v. Lipe, 286 N.Y.S. 60, 158 Misc. 32, affirmed Parsons v. First Trust & Deposit Co., 277 N.Y.S. 426, 243 App.Div. 681 and 277 N.Y.S. 428, 243 App.Div. 681, affirmed 200 N.E. 31, 269 N.Y. 630.
Okl.—Crabb v. Chisum, 80 P.2d 653, 183 Okl. 138—Noble v. Johnson, 291 P. 26, 145 Okl. 46—Naubert v. Navajo Refining Co., 264 P. 151, 129 Okl. 195.
21 C.J. p 1200 note 92.

57. Mo.—State ex rel. Moss v. Hamilton, 260 S.W. 466, 303 Mo. 302.
N.Y.—Parsons v. Lipe, 286 N.Y.S. 60, 158 Misc. 32, affirmed Parsons v. First Trust & Deposit Co., 277 N.Y.S. 426, 243 App.Div. 681 and 277 N.Y.S. 428, 243 App.Div. 681, affirmed 200 N.E. 31, 269 N.Y. 630.

58. La.—Winn v. Strickland, 91 So. 719, 151 La. 235.
N.H.—City of Laconia v. Belknap County, 172 A. 245, 86 N.H. 565—Daley v. Metropolitan Life Ins. Co., 128 A. 531, 81 N.H. 502.
21 C.J. p 1200 note 93.

Admission by insured
Fact that assured credited insurer under one paragraph of policy did not preclude assertion that loss was contemplated by another paragraph. —Dunbar Molasses Corporation v. Home Ins. Co. of New York, D.C.N.Y., 3 F.Supp. 296.

59. U.S.—Orr v. Mutual Life Ins. Co., of New York, C.C.A.Mo., 64 F.2d 561, affirming, D.C., 57 F.2d 901.
21 C.J. p 1200 note 94.

If limitations on waiver clearly appear, waiver cannot be expanded beyond intention of party waiving right, regardless of why he placed limitations on waiver.—Orr v. Mutual Life Ins. Co. of New York, C.C.A.Mo., 64 F.2d 561, affirming, D.C., 57 F.2d 901.

60. Md.—Marshall v. Security Storage & Trust Co., 142 A. 186, 155 Md. 649.

Statements made in one transaction will not preclude the party making them from retracting them in another.—Whitacre v. Culver, 6 Minn. 297.

61. Vt.—Roberts v. W. H. Hughes Co., 83 A. 807, 86 Vt. 76.

62. Ky.—Tobacco By-Products & Chemical Corporation v. Western Dark Fired Tobacco Growers Ass'n, 133 S.W.2d 723, 280 Ky. 469.
La.—Rhodes v. Miller, 179 So. 430, 189 La. 288.
Mass.—Commissioner of Banks v. Cosmopolitan Trust Co., 148 N.E. 609, 253 Mass. 205, 41 A.L.R. 658.
21 C.J. p 1200 note 96.
Estoppel as to pleading statute of limitations see the C.J.S. title Limitations of Actions § 25, also 37 C.J. p 725 note 67—p 728 note 98.

63. La.—Rhodes v. Miller, 179 So. 430, 189 La. 288.
21 C.J. p 1200 note 96.

64. Ark.—State v. Little Rock, Mississippi River, and Texas Ry. Co., 31 Ark. 701.

65. Colo.—Kirby v. Colorado & S. Ry. Co., 119 P. 1056, 51 Colo. 508—Kirby v. Union Pac. R. Co., 119 P. 1042, 51 Colo. 509, Ann.Cas.1913 B 461.
21 C.J. p 1200 note 97.

from insisting on a personal right or privilege to which he otherwise would be entitled,[66] such as from insisting on protection as to a right or privilege given him by a statute enacted for his benefit;[67] but it cannot be applied as to a right given him not alone for his private benefit, but as a matter of public policy in the state's interest.[68]

§ 150. Title or Claim to Property

Estoppel as to the title or right to property is coextensive with, and limited by, the scope of the acts or conduct relied on to create the estoppel. By some decisions title to real property may be divested by estoppel, but there are decisions to the contrary.

Estoppel may be applied to the title to, or rights or interests in, real or personal property.[69] A person may by his acts or conduct preclude himself, on clear and satisfactory grounds of justice and equity, from asserting his title to or interest in land,[70] or from asserting a different title than an instrument purports to convey,[71] or from asserting that the title conveyed is defective,[72] or from denying another's right to the use of the property.[73]

An estoppel affecting the title or right to property is coextensive with, and limited by, the scope of the act or conduct relied on as creating it.[74] Estoppel in pais usually operates only on existing rights and does not apply to an after-acquired right or title;[75] it operates on a right or title which is voidable or defeasible, and not on one which is void.[76] It also does not apply to a right or title derived in another and different manner than that as to which the representation is made;[77] but where a person induces another to purchase property by asserting that it is free from encumbrance, it has been held that he will be estopped afterward to claim under a mortgage or judgment lien existing at the time but subsequently purchased.[78]

Whether title to land divested by estoppel. There is considerable diversity of statement as to whether title to land can be divested by an estoppel in pais, some decisions declaring broadly that it can be so divested or transferred,[79] although the whole trans-

68. Mich.—Mettetal v. Hall, 284 N. W. 698, 288 Mich. 200—Bennett v. Dean, 2 N.W. 680, 41 Mich. 472—Fredenburg v. Lyon Lake M. E. Church, 37 Mich 476—Bennett v. Dean, 35 Mich. 306.

Tex.—Sartin v. Hudson, Civ.App., 143 S.W.2d 817.

Candidate for office of county judge could waive right to have county democratic executive committee's decision require that nominations for county office be by a majority vote, and, by his acts, candidate could be "estopped" to contend that committee had not decided that nominations should be by a majority vote.—Sartin v. Hudson, supra.

67. N.H.—Mulhall v. Nashua Mfg. Co., 115 A 449, 80 N.H. 194—Flynn v. Orient Ins. Co., 92 A. 737, 77 N.H. 431.

Tex.—Sartin v. Hudson, Civ.App., 143 S.W 2d 817.

68. Ariz.—City of Glendale v. Coquat, 52 P.2d 1178, 46 Ariz. 478, 102 A.L.R. 837.

69. Ky.—Louisville Joint Stock Land Bank v. McMurry, 128 S.W. 2d 596, 278 Ky. 238—Stark v. Petty Bros., 243 S.W. 50, 195 Ky. 445—Trimble v. King, 114 S.W. 317, 131 Ky 1, 22 L.R.A.,N.S., 880.

70. U.S.—In re Euclid Doan Co., C.C.A.Ohio, 104 F.2d 712, certiorari denied National City Bank of Cleveland v. Euclid-Doan Co., 60 S. Ct. 291, 308 U.S. 619, 84 L.Ed. 517.

Ga.—Hurley v. Girard Fire & Marine Ins. Co., 183 S.E. 548, 181 Ga. 583—Bussey v. Bussey, 121 S.E. 821, 157 Ga. 648—Coursey v. Coursey, 80 S.E. 462, 141 Ga. 65—Sheppard v. Reese, 40 S.E. 282, 114 Ga 411—National Ben Franklin Fire Ins. Co. v. Hurley, 176 S.E. 780, 49 Ga.App. 815.

Mich.—Colonial Theatrical Enterprises v Sage, 237 N.W. 529, 255 Mich. 160.

Protection of purchaser

Estoppel may be applied to protect purchaser of realty against parties asserting interest therein as owner —Colonial Theatrical Enterprises v. Sage, supra.

71. Mich.—Stone v. Culver, 282 N. W. 142, 286 Mich. 263, 119 A.L.R 512—Spitzley v. Holmes, 240 N.W. 81, 256 Mich. 559.

72. U.S.—American Stave & Cooperage Co. v. Butler County, C.C. Mo., 93 F. 301.

Mich.—Colonial Theatrical Enterprises v. Sage, 237 N.W. 529, 255 Mich. 160.

73. Iowa.—Black v. Whitacre, 221 N.W. 825, 206 Iowa 1084.

Mass.—Cooley v. Boston & M. R. R., 21 N.E.2d 953, 303 Mass. 371, 122 A.L.R. 1166.

Easement by estoppel generally see Easements § 5.

74. Ga.—Reese v. Spence, 4 S.E.2d 244, 188 Ga. 349.

Ill.—Dietz v. Van Speybroeck, 225 Ill.App. 133.

Ind.—Popovich v. Yugoslav Nat. Home Soc., 18 N.E.2d 948, 106 Ind. App. 195.

La.—Winn v. Strickland, 91 So. 719, 151 La. 235.

Mass.—Cooley v. Boston & M. R. R., 21 N.E 2d 953, 303 Mass. 371, 122 A.L.R. 1166.

Tenn.—Williams v. Nottingham, 84 S.W.2d 114, 19 Tenn.App. 162.

Tex.—Cromer v. Schafer, Civ.App., 250 S.W 444.

21 C.J. p 1201 note 99.

Estoppel applies only where the second title is in the party falsely or incautiously alleging the first, and the opposite party is ignorant of the former title. It does not apply where the sufficient title is outstanding in a third person, and was known to both of the contesting parties.—Moncure v. Hanson, 15 Pa. 385.

One estopped by disclaimer in application for writ of error from asserting interest in certain property can not have issues retried on offering to pay opponent any excess she recovered by failure to disclose true facts.—Smith v. Chipley, Tex.Civ. App., 42 S.W.2d 645.

75. Iowa.—Davidson v. Dwyer, 17 N.W. 575, 62 Iowa 332.

21 C.J. p 1201 note 1.

76. Tex.—Wilkinson v. Owens, Civ. App., 72 S.W.2d 330.

77. Mo.—Barrett v. Johannes, 70 Mo. 439.

21 C.J. p 1201 note 2.

78. N.Y.—Briggs v. Landford, 12 N. Y.S. 657, affirming 7 N.Y.S. 358, 8 N.Y.S. 944.

Pa.—Bitting's App., 17 Pa. 211.

79. U.S.—Jones Store Co. v. Dean, C.C.A.Mo., 56 F.2d 110, certiorari denied Dean v. Jones Store Co., 52 S.Ct. 641, 286 U.S. 559, 76 L.Ed. 1292

Ala.—Watt v. Lee, 191 So. 628, 630, 238 Ala. 451.

21 C.J. p 1201 note 4.

Caution in applying rule

"The doctrine of estoppel, when

action may rest in parol,[80] and that the statute of frauds is not available as a defense.[81] On the other hand, other decisions hold that title to realty cannot be divested or conveyed by estoppel.[82] However, it has been well said that whether, in strictness of speech, a title may be "created" by estoppel is a refinement of no value in the light of modern equity jurisprudence,[83] for, although the title does not pass, a conveyance will be decreed by a court of equity[84] in accordance with the maxim that equity considers that done which should have been done.[85]

§ 151. Rights and Liabilities under Contract

Equitable estoppel may apply to preclude the assertion of rights and liabilities under a contract.

Where the facts of the case clearly justify it, the doctrine of equitable estoppel will apply to preclude the assertion of rights and liabilities under a contract,[86] application of the estoppel, in a particular case, being coextensive with, and limited by, the scope of the representation relied on to create it.[87] Such estoppel, however, cannot be applied where

invoked for the purpose of working a change in the title to land, is to be applied with great caution."—Lyon v. Morgan, 38 N.E. 960, 143 N.Y. 505, 509—21 C.J. p 1201 note 4 [b].

Property which may be acquired by eminent domain may be acquired for the same public use by the application of the doctrine of equitable estoppel.—Union Pac. R. Co. v. Greeley, Colo., 189 F. 1, 110 C.C.A. 571.

As not creating technical title

An "estoppel in pais" does not create a technical title in land. Its effect is to conclude a party from denying the effect of his statements or admissions designed to influence, and which have influenced, the conduct of another, and, when so applied, it is as effectual as a deed would be from the party estopped. —Nissen v. McCafferty, 195 N.Y.S. 549, 202 App.Div. 528.

80. Ala.—Watt v. Lee, 191 So. 628, 238 Ala. 451.

81. U.S.—Jones Store Co. v. Dean, C.C.A.Mo., 56 F.2d 110, certiorari denied Dean v. Jones Store Co., 52 S.Ct. 641, 286 U.S. 559, 76 L.Ed. 1292.

82. D.C.—Faulks v. Schrider, 99 F. 2d 370, 69 App.D.C. 137.
Ga.—First Nat. Bank v. Harmon, 199 S.E. 223, 186 Ga. 847—Hurley v. Girard Fire & Marine Ins. Co., 183 S.E. 548, 550, 181 Ga. 583, citing **Corpus Juris**—Alsobrook v. Taylor, 181 S.E. 182, 181 Ga. 10—Fields v. Continental Ins. Co. of City of New York, 152 S.E. 60, 170 Ga. 28—Peacock v. Horne, 126 S.E. 813, 159 Ga. 707—Bussey v. Bussey, 121 S.E. 821, 157 Ga. 648—Sheppard v. Reese, 40 S.E. 282, 114 Ga. 411—National Ben Franklin Fire Ins. Co. v. Hurley, 176 S.E. 780, 783, 49 Ga.App. 815, citing **Corpus Juris.**
Kan.—Cox v. Watkins, 87 P.2d 243, 246, 149 Kan. 209, citing **Corpus Juris.**
La.—Snelling v. Adair, 199 So. 782, 196 La. 624.
Mich.—Kirchen v. Remenga, 288 N.W. 344, 291 Mich. 94—Stone v. Culver, 282 N.W. 142, 286 Mich. 263, 119 A.L.R. 512—Bruun v. Hansen, 275 N.W. 173, 281 Mich. 362—McVannel v. Pure Oil Co., 247 N.W. 735, 262 Mich. 518—Colonial Theatrical Enterprises v. Sage, 237 N.W. 529, 255 Mich. 160—Sprunger v. Ensley, 178 N.W. 714, 211 Mich. 103—Nowlin Lumber Co. v. Wilson, 78 N.W. 338, 119 Mich. 406.
Ohio—Sowa v. Schaefer, 175 N.E. 745, 38 Ohio App. 522.
21 C.J. p 1201 note 5.

This last view is perhaps sustained by the numerous decisions which, as elsewhere shown, hold that title to land cannot be affected in an action at law by an estoppel in pais, see supra § 64.

Rule does not apply where estoppel serves to defend and not to destroy the apparent paper title.—Stone v. Culver, 282 N.W. 142, 286 Mich. 263, 119 A.L.R. 512.

As between legatee and executor

While in a contest between plaintiffs, claiming as legatees under a will, and the executor, the executor might be estopped from setting up title against them, such estoppel would not authorize plaintiffs to assert title under allegations and proof that a deed from testator to his wife had been delivered and accepted by her, and showed no title in testator, since estoppel can convey no title.—Bussey v. Bussey, 121 S.E. 821, 157 Ga. 648.

Mere silence or inaction will not cause a loss of title to property by estoppel.—Snelling v. Adair, 199 So. 782, 196 La. 624—Nielson v. Haas, App., 192 So. 716.

Title to immovables cannot be established by parol evidence, under plea of estoppel.—Lindner v. Cotonio, 143 So. 286, 175 La. 352—Bayard v. Baldwin Lumber Co., 103 So. 290, 157 La. 994.

83. Ala.—Calera Development Co. v. Burgin, 107 So. 84, 214 Ala. 214, quoting **Corpus Juris.**
Mo.—Hubbard v. Slavens, 117 S.W. 1104, 218 Mo. 598.

84. U.S.—Kirk v. Hamilton, D.C., 102 U.S. 68, 26 L.Ed. 79.
Mo.—Hubbard v. Slavens, 117 S.W. 1104, 218 Mo. 598.

85. Mo.—Hubbard v. Slavens, supra.

86. Ala.—Phillips v. Sipsey Coal Mining Co., 118 So. 513, 218 Ala. 296.
Del.—Colvocoresses v. W. S. Wasserman Co., 190 A. 607, 613, 8 W.W. Harr. 253, citing **Corpus Juris.**
Mass.—American Circular Loom Co. v. Wilson, 84 N.E. 133, 198 Mass. 182, 126 Am.S.R. 409.
Vt.—Douglass & Varnum v. Village of Morrisville, 79 A. 391, 84 Vt. 302.
21 C.J. p 1202 note 10.

Elements of estoppel

To estop defendant from relying on real meaning of contract, plaintiff must have been misled by defendant, and thereby induced to sign contract to his prejudice by some clear and positive misrepresentation with respect to its real meaning before he executed it.—Colvocoresses v. W. S. Wasserman Co., Del., 190 A. 607, 8 W.W.Harr. 253.

Plaintiff suing on contract, after answer of non est factum, need not show that contract was executed, but could rely on estoppel.—Seymour Improvement Co. v. Viking Sprinkler Co., 161 N.E. 389, 87 Ind.App. 179.

Statute requiring written contract or executed oral contract to change written contract does not prevent equitable estoppel of party to demand literal compliance with contract.—Walker Valley Oil & Gas Co. v. Parks & Palmer, 262 P. 672, 128 Okl. 286.

87. Ala.—Phillips v. Sipsey Coal Mining Co., 118 So. 513, 218 Ala. 296.
Mass.—Eastern Advertising Co. v. Shapiro, 161 N.E. 240, 263 Mass. 228—American Circular Loom Co. v. Wilson, 84 N.E. 133, 198 Mass. 182, 126 Am.S.R. 409.
Minn.—Riethmuller v. Burton, 222 N.W. 929, 176 Minn. 227.
Okl.—Walker Valley Oil & Gas Co. v. Parks & Palmer, 262 P. 672, 128 Okl. 286.
S.D.—Hood v. Sioux Steel Co., 287 N.W. 636.

Estoppel based on instrument, but without fraudulent connivance, should not be enforced beyond extent necessary to make good loss suffered through acts which form basis of estoppel.—Camerer v. California

the party claiming the estoppel changed his position before the representation was made by the other;[88] nor is it applicable to give validity to an illegal contract,[89] to question the validity of a contract where the question involved is the effectuation of the state's public policy,[90] or to enforce in an action at law a parol change in an executory contract under seal.[91] A statute authorizing proof of failure of consideration for a written contract does not apply where the doctrine of estoppel comes into play.[92]

§ 152. Remedies

Estoppel does not extend to matters affecting the remedy only disconnected from the subject matter of the action.

The doctrine of estoppel does not extend to matters affecting the remedy only, which are foreign to, and disconnected from, the contract or the character in which the parties entered into it;[93] and when applied it should be only to the extent of protecting the party who has been misled against the loss actually occasioned thereby.[94] A party's admission of the priority of a lien does not estop him from relying on and asserting defenses arising subsequent thereto.[95]

VIII. PROCEDURE

A. PLEADING

§ 153. Necessity for Pleading

a. In general

b. Exceptions to rule

c. Effect of failure to plead estoppel

a. In General

Estoppel and waiver ordinarily must be specially pleaded.

At common law an estoppel in pais need not be pleaded, but is available under the general issue;[96]

Savings & Commercial Bank of San Diego, 48 P.2d 39, 4 Cal.2d 159, 100 A.L.R. 667.

Rescission of contract

One who had made an oral contract of sale of a lease under circumstances which estopped him from attacking the purchaser's title, because of payment of part of the price and acceptance of the obligation to pay the balance, cannot, after the lease has become valuable, rescind his contract to the prejudice of the purchaser.—Priddy v. Green, Tex.Civ.App., 220 S.W. 243.

88. Mo.—De Moss v. Economy Furniture & Carpet Co., 74 Mo.App. 117.
21 C.J. p 1202 note 11.

89. Ala.—American Equitable Assur. Co. v. Powderly Coal & Lumber Co., 142 So. 37, 225 Ala. 208—Birmingham Waterworks Co. v. Brown, 67 So. 613, 191 Ala. 457, L.R.A 1915D 1086—Ellis v. Batson, 58 So. 193, 177 Ala. 313.
Cal.—Regan v. Albin, 26 P.2d 475, 219 Cal. 357—Bliss v. California Co-op. Producers, 72 P.2d 885, 23 Cal.App.2d 245.
Ky.—Forbes v. City of Ashland, 55 S.W.2d 917, 246 Ky. 669.
Wash.—Standard Furniture Co. v. Van Alstine, 62 P. 145, 22 Wash. 670.
Estoppel as not validating contracts prohibited by law see Contracts § 279 c.

Assertion of unenforceability

"One cannot ordinarily be estopped from asserting the unenforceability of a contract that is contrary to law.

Ky.—Tobacco By-Products & Chemical Corporation v. Western Dark Fired Tobacco Growers Ass'n, 133 S.W.2d 723, 726, 280 Ky. 469.
Mass.—Commissioner of Banks v. Cosmopolitan Trust Co., 148 N.E. 609, 614, 253 Mass. 205, 41 A.L.R. 658.

90. Ariz.—Corporation Commission v. Pacific Greyhound Lines, 94 P. 2d 443, 54 Ariz. 159
Estoppel as not applicable to validate contract contrary to public policy see Contracts § 279 c.

91. Ill.—Starin v. Kraft, 50 N.E. 1059, 174 Ill. 120, affirming 73 Ill. App. 371.
21 C.J. p 1202 note 13.

92. Mo.—Universal Credit Co. v. Enyart, 98 S.W.2d 120, 231 Mo.App. 299.

93. Ala.—Duncan v. Stewart, 25 Ala. 408, 60 Am.D. 527.

94. N.J.—Campbell v. Nichols, 33 N.J.Law 81.

95. Tex.—Pecos Mercantile Co. v. McKnight, Civ.App., 256 S.W. 933.
Estoppel to assert or deny lien see the C.J.S. title Liens § 16, also 37 C.J. p 332 note 1–p 333 note 7.

96. Conn.—Cupo v. Royal Ins. Co., 126 A. 844, 101 Conn. 586.
Me.—Colby v. Preferred Accident Ins. Co. of New York, 181 A. 13, 15, 134 Me. 18, citing **Corpus Juris.**
Md.—Machovec v. Shipley, 189 A. 223, 171 Md. 339—Bitting v. Home Ins. Co. of New York, 155 A. 329, 331, 161 Md. 56, citing **Corpus Juris.**
Mo.—Bryant v. West, 219 S.W. 355.
N.J.—Guarantee Trust Co. v. Hoffman, 199 A. 781, 783, 16 N.J.Misc. 340, citing **Corpus Juris.**
W.Va.—Tuggle v. Sutherland, 127 S.E. 384, 385, 98 W.Va. 540, quoting **Corpus Juris.**
21 C.J. p 1241 note 89.
Availability of waiver or estoppel on appeal where not urged in court below see Appeal and Error § 233 j.

In Illinois

(1) An estoppel to be available must be pleaded.—Franklin County Building & Loan Ass'n v. Blood, 255 Ill.App. 175—Barnsback v. T. H. Mastin & Co., 245 Ill.App. 242—Lake Forest Water Co. v. Lake Forest, 154 Ill.App. 184.

(2) Defense of estoppel in pais, stated in affidavit of merits, can be availed of under general issue.—White v. Central Trust Co. of Illinois, 259 Ill.App. 68.

(3) Other cases see North Ave. Bldg. & Loan Ass'n v. Huber, 121 N.E. 721, 286 Ill. 375—21 C.J. p 1241 note 89 [a] (1), (3)–(6).

In Michigan

(1) Under the express provisions of Court Rules, rule 23 § 3 estoppel, to be available as an affirmative defense, must be pleaded.—Snider v. Schaffer, 267 N.W. 791, 276 Mich. 92—Stolte v. Krentel, 260 N.W. 127, 271 Mich. 98—Kennedy v. Lynch Timber Co., 198 N.W. 985, 227 Mich. 269.

(2) Formerly in actions at law it was not necessary to plead an estoppel in pais.—Dean v. Crall, 57 N.W. 813, 98 Mich. 591, 39 Am.S.R. 571—21 C.J. p 1241 note 89 [b] (1).

and this has been the rule in some states which have adopted the code system of pleading,[97] while in the state where this system originated the rule has been that an equitable estoppel ordinarily may be made available either by a plea in bar or it may be used as evidence on the trial.[98]

However, in other states where code pleading prevails, and in a few where it does not but in which the matter is regulated by special statutes, subject to certain exceptions discussed in subdivision b of this section, it is necessary to plead estoppels in pais specially,[99] provided there is opportunity to do

(3) In equity cases an estoppel in pais must be pleaded, where it constitutes the basis of a right to sue and ground of relief, or is relied on as a defense.—Goldberg v. Cities Service Oil Co., 266 N.W. 321, 275 Mich. 199.

21 C J. p 1241 note 89 [b] (2).

In Tennessee

(1) Estoppel in pais need not be specially pleaded in action at law, although rule is otherwise in equity cases.—McConnell v. McCleish & Thomas, 19 S.W.2d 251, 159 Tenn. 520—Boone v. Citizens' Bank & Trust Co., 290 S.W. 39, 154 Tenn. 241. 50 A.L.R. 1369—Melody v. Hamblin, 115 S.W.2d 237, 21 Tenn. App 687—Carolina Ins Co. of Wilmington, N. C. v. St. Charles, 98 S. W 2d 1088, 20 Tenn.App. 342.

(2) Estoppel, as estoppel to claim land because of prior conveyance thereof, to be available, must be especially pleaded.—Dunlap v. Sawvel, 223 S.W. 142, 142 Tenn. 696.

97. Minn.—Bemis v. Pacific Coast Casualty Co., 145 N.W. 622, 125 Minn. 54.

21 C.J. p 1242 note 90.

98. N Y.—Feinberg v. Allen, 128 N. Y.S. 906, 143 App.Div. 866, affirmed 101 N.E. 893, 208 N.Y. 215.

21 C.J. p 1242 note 91.

99. U.S.—U. S. Fidelity & Guaranty Co. v. Wilson, C.C.A.Ark., 41 F. 2d 319, 324, citing **Corpus Juris**—Grouf v. State Nat. Bank of St. Louis, C.C.A.Mo., 40 F.2d 2—Beeler v. Motter, D.C.Kan., 33 F.2d 788.

Ala.—Mercantile Finance Corporation of Alabama v. Scruggs, 151 So. 353, 227 Ala. 585, citing **Corpus Juris**—Barksdale v. Strickland & Hazard, 124 So. 234, 220 Ala. 86—Lackland v. Turner, 91 So. 877, 207 Ala. 73.

Alaska.—Fairhaven Gold Dredging Co. v. Golden Center Mines, 7 Alaska 669.

Ark.—Gerard B. Lambert Co. v. Rogers, 255 S.W. 1089, 161 Ark. 307.

Cal.—Lucci v. United Credit & Collection Co., 31 P.2d 369, 220 Cal. 492—Holzer v. Read, 13 P.2d 697, 216 Cal. 119—Promis v. Duke, 281 P. 613, 208 Cal. 420—Fair Oaks Bank v. Johnson, 244 P. 335, 198 Cal. 196—Mahana v. Echo Pub. Co., 183 P. 800, 181 Cal. 233—Bush v. Rogers, App., 109 P.2d 379—McGushin v. Arnold, 68 P.2d 733, 21 Cal.App.2d 271—Peerless Motor Co. v. Sterling Finance Corporation, 34 P.2d 738, 739, 139 Cal.App. 621, citing **Corpus Juris**—Russell v. Stillwell, 288 P. 785, 106 Cal.App. 88—Bishop v. Jordan, 285 P. 1096, 104 Cal.App. 319—State Credit Corporation v. Ranger, 281 P. 663, 101 Cal.App. 310—Ripley Improvement Co. v. Hellman Commercial Trust & Savings Bank, 265 P. 835, 90 Cal App. 83—Ocean Shore R. Co. v. Spring Valley Water Co., 262 P. 53, 87 Cal.App. 188—Chowchilla Nat. Bank v. Nilmeier, 256 P. 298, 83 Cal.App. 18—Lathrop v. Title Ins. & Trust Co., 238 P. 748, 73 Cal. App. 147—Placer County v. Lake Tahoe Ry. & Transportation Co., 209 P. 900, 58 Cal.App. 764—Peterson v. Wagner, 198 P. 25, 52 Cal. App. 1—Stoner v. Security Trust Co., 190 P. 500, 47 Cal.App. 216—Haynes v. Indio Levee Dist., 189 P. 475, 46 Cal.App. 436—Jewell v. Gomes, 186 P. 384, 44 Cal App. 430.

Colo.—Eaton v. Swedlund, 68 P.2d 449, 100 Colo. 436—Howard v. Fisher, 283 P. 1042, 86 Colo. 493—Commercial Inv. Co. v. Newhagen, 266 P. 713, 83 Colo. 533—Ruedy v. Alamosa Nat. Bank, 235 P. 350, 77 Colo. 112—Gillett v. Moore, 223 P. 21, 74 Colo. 484.

Fla.—Lincoln Nat. Life Ins. Co. v. Gordy, 176 So. 860, 129 Fla. 792—W. T. Rawleigh Co. v. Langford, 150 So. 592, 112 Fla. 487.

Ga.—Hirsch v. Northwestern Mut. Life Ins. Co., 13 S E.2d 165, 191 Ga. 524—Fulenwider v. Fulenwider, 5 S.E.2d 20, 188 Ga. 856—Hartsfield Loan & Savings Co. v. Garner, 191 S.E. 119, 184 Ga. 283—Citizens & Southern Bank of Thomaston v. Barron, 181 S E. 859, 181 Ga. 351—National Land & Coal Co. v. Zugar, 155 S.E. 7, 171 Ga. 228—Brown v. Globe & Rutgers Fire Ins. Co., 133 S.E. 260, 161 Ga. 849, reversing 126 S.E. 268, 33 Ga.App. 141, vacating 133 S.E. 263, 35 Ga.App. 342—De Vore v. Baxter, 116 S.E. 610, 155 Ga. 109—Mitcham v. Citizens' Bank of Bullochville, 131 S.E. 181, 34 Ga.App. 707, affirmed Citizens' Bank of Bullochville v. Mitcham, 136 S.E. 798, 163 Ga. 796.

Idaho.—Western Loan & Building Co. v. Bandel, 63 P.2d 159, 57 Idaho 101.

Ind.—Town of St. John v. Gerlach, 150 N.E. 771, 197 Ind. 289—Williamson v. Illinois Cent. R. Co., 128 N.E. 758, 190 Ind. 239—Mazac v. Michigan City, 189 N.E. 400, 98 Ind.App. 366—Seibold v. Welch, 135 N E. 258, 78 Ind.App. 238.

Iowa—Maloney v Rose, 277 N.W. 572, 224 Iowa 1071—Securities Inv. Corporation v. Noltze, 269 N.W. 866, 222 Iowa 678—Wilson v. Lindhart, 249 N.W. 218, 216 Iowa 825—Mote v. Incorporated Town of Carlisle, 233 N.W. 695, 211 Iowa 392—Wilcox v. Ruan, 185 N.W. 70, 192 Iowa 520.

Ky.—Moran v. Choate, 69 S.W.2d 994, 253 Ky 470—Vance v. Atherton, 67 S.W.2d 968, 252 Ky. 591—Kentucky Road Oiling Co. v. Sharp, 50 S.W.2d 535, 244 Ky. 15"—Asher v Pioneer Coal Co, 26 S W.2d 543, 233 Ky. 661—Metropolitan Life Ins. Co. v. Trunick's Adm'r, 16 S. W.2d 759, 229 Ky. 173—Chenoweth v. Bullitt, 6 S.W 2d 1061, 224 Ky. 698—City of Ashland v. Stewart, 282 S.W. 1092, 214 Ky. 234—Hitchcock v. Tackett, 272 S.W. 52, 208 Ky. 803—Loy v. Nelson, 258 S.W 303, 201 Ky. 710.

La.—Hortman-Salmen Co. v. Continental Casualty Co., 129 So. 515, 170 La. 879—Marshall v. Smedley, 117 So. 323, 166 La. 364.

Mo.—Whalen v. Buchanan County, 111 S.W.2d 177, 342 Mo. 33—Missouri Cattle Loan Co. v. Great Southern Life Ins. Co., 52 S.W.2d 1, 330 Mo. 988—Blackiston v. Russell, 44 S.W.2d 22, 328 Mo. 1164—Neville v. D'Oench, 34 S.W.2d 491, 507, 327 Mo. 34, citing **Corpus Juris**—Ambruster v. Ambruster, 31 S W.2d 28, 326 Mo. 51, 77 A.L.R. 782—Scanlon v. Kansas City, 28 S.W 2d 84, 90, 325 Mo. 125—Illinois Fuel Co. v. Mobile & O. R. Co., 8 S.W.2d 834, 319 Mo. 899, certiorari denied Mobile & O. R. Co. v. Illinois Fuel Co., 49 S.Ct. 34, 278 U. S. 640, 73 L.Ed. 555—Haley v. Sipley, 297 S.W. 362, 317 Mo. 505—Bartlett v. McCallister, 289 S.W 814, 316 Mo. 129—Grafeman Dairy Co. v. Northwestern Bank, 288 S. W. 359, 315 Mo. 849—Creek v Gideon & N. I. R. Co., 240 S.W. 128, 293 Mo. 541—Grafeman Dairy Co. v. Northwestern Bank, 285 S. W. 435, 290 Mo. 311—Longo v. John Hancock Mut. Life Ins. Co., App., 142 S.W.2d 871—Prudential Ins. Co. of America v. German Mut. Fire Ins. Ass'n of Lohman, 105 S.W.2d 1001, 231 Mo.App. 699—Thimmig v. General Talking Pictures Corporation, App., 85 S.W.2d 208—Sassman v. State Highway Commission, App., 45 S.W.2d 1093—Ornellas v. Moynihan, App., 16 S.

so.[1] In such jurisdictions evidence of an estoppel in pais is inadmissible in the absence of a special plea;[2] the defense is not available under the general issue or general denial,[3] or under a plea of

W.2d 1007—In re Linn County Bank, 1 S.W.2d 206, 222 Mo.App. 84—Mary C. Marshall Realty Co. v. Zerman, App., 296 S.W. 1057—Horigan Realty Co. v. First Nat. Bank, 273 S.W. 772, 221 Mo.App. 329—Bevan v. Hill, App., 262 S.W. 416—Merchants' & Mfrs' Bank v. S. W. Morten Lumber Co., App., 247 S.W. 432—St. Louis Perfection Tire Co. v. McKinney, 345 S.W. 1100, 212 Mo.App. 355—Neely v. Hines, App., 237 S.W. 906—Windle v. Citizens' Nat. Bank, App., 216 S.W. 1023—Berkshire v. Holcker, 216 S.W. 556, 202 Mo.App. 433.

Mont.—Krueger v. Morris, 107 P.2d 142—Pue v. Lewis and Clark County, 243 P. 573, 75 Mont. 207—Shipler v. Potomac Copper Co., 220 P. 1097, 69 Mont. 86.

Neb.—Curley v. White, 263 N.W. 134, 129 Neb. 829—H. J. Hughes Co. v. Farmers' Union Produce Co., 194 N.W. 872, 110 Neb. 736, 37 A.L.R. 1314.

N.M.—Garcia v. Leal, 231 P. 631, 30 N.M. 249—Hoskins v. Talley, 220 P. 1007, 29 N.M. 173.

N.C.—Aldridge Motors v. Alexander, 9 S.E.2d 469, 217 N.C. 750—Keen v. Parker, 8 S.E.2d 209, 217 N.C. 378—Jenkins v. Wood, 160 S.E. 488, 201 N.C. 460—Laughinghouse v. Great Nat. Ins. Co., 157 S.E. 131, 200 N.C. 434—L. J. Upton & Co. v. Ferebee, 100 S.E. 310, 178 N.C. 194.

N.D.—State Bank of Cooperstown v. Newell, 212 N.W. 848, 55 N.D. 184.

Ohio.—Springfield Loan Co. v. National Guarantee & Finance Co., 27 N.E.2d 257, 63 Ohio App. 508—Allison v. Ohio Savings & Trust Co., 200 N.E. 529, 51 Ohio App. 253—Lubric Oil Co. v. Drawe, 160 N.E. 93, 26 Ohio App. 478.

Okl.—Fibikowski v. Fibikowski, 94 P.2d 921, 185 Okl. 520—Newman v. Roach, 282 P. 287, 140 Okl. 210—Clem Oil Co. v. Oliver, 232 P. 942, 106 Okl. 22.

Or.—Abrahamson v. Brett, 21 P.2d 229, 143 Or. 14—Couch v. Scandinavian-American Bank, 197 P. 284, 103 Or. 48, modified on other grounds 202 P. 558, 103 Or. 48—Shaw v. Corbett, 185 P. 585, 94 Or. 270.

S.D.—Smith v. Poppen, 230 N.W. 229, 57 S.D. 25.

Tex.—Dunagan v. Griffin, Civ.App., 151 S.W.2d 250, error dismissed—Pottinger v. Southwestern Life Ins. Co., Civ.App., 138 S.W.2d 645—City of Waco v. Murray, Civ.App., 137 S.W.2d 1062, error dismissed—Washington Nat. Ins. Co. v. Booker, Civ.App., 123 S.W.2d 975—Cooper Co. v. Werner, Civ.App., 111 S.W.2d 823—Texas & New Orleans Ry. Co. v. Booth, Civ.App., 99 S.W.2d 430, error dismissed—Lincoln Nat. Life Ins. Co. v. Anderson, 71 S.W.2d 555, modified on other grounds 80 S.W.2d 294, 124 Tex. 556, motion overruled 81 S.W.2d 1112, 124 Tex. 556—Shaeffer v. Smyth, 49 S.W.2d 851, affirmed in part and reversed on other grounds in part 78 S.W.2d 935, 124 Tex. 509, rehearing denied and corrected 79 F.2d 847, 124 Tex. 509—Kohn v. Zaludek, Civ.App., 38 S.W.2d 110—Indemnity Ins. Co. of North America v. Kelley, Civ.App., 44 S.W.2d 756—Leon v. Gulf Production Co., Civ.App., 35 S.W.2d 1101, error refused—Crowley v. Williams, Civ.App., 15 S.W.2d 661—Reo Motor Car Co. of Texas v. Barnes, Civ.App., 9 S.W.2d 374—Kelley v. Guaranty Bond State Bank of Mt. Pleasant, Civ.App., 2 S.W.2d 572, modified on other grounds Guaranty Bond State Bank of Mt. Pleasant v. Kelley, Com.App., 13 S.W.2d 69—Moore v. Krenek, Civ.App., 288 S.W. 580, 581, citing **Corpus Juris**—De Beque v. Ligon, Civ.App., 286 S.W. 749, reversed on other grounds, Com.App., 292 S.W. 157—Wolff v. Cohen, Civ.App., 281 S.W. 646—American Mut. Ben. Ass'n v. Language, Civ.App., 281 S.W. 233—Parkersburg, Rig & Reel Co. v. Golden, Civ.App., 277 S.W. 1106—Brann v. Arbuthnot, Civ.App., 274 S.W. 660—Climber Motor Corporation v. Fore, Civ.App., 273 S.W. 284—Foster v. Spearman Equity Exch., Civ.App., 266 S.W. 583—Hemphill County Home Protective Ass'n v. Richardson, Civ.App., 264 S.W. 294—Smith v. Green, Civ.App., 243 S.W. 1006—Gray v. Allen, Civ.App., 243 S.W. 684—Carson v. Taylor, Civ.App., 238 S.W. 261, dismissed for want of jurisdiction—Gulf, C. & S. F. Ry. Co. v. Price, Civ.App., 236 S.W. 776—Holland v. De Walt, Civ.App., 225 S.W. 216, dismissed for want of jurisdiction.

Utah.—Campbell v. Nunn, 2 P.2d 899, 78 Utah 316—Barber v. Anderson, 274 P. 136, 73 Utah 357—Evona Inv. Co. v. Brummitt, 240 P. 1105, 66 Utah 82.

Vt.—Cutler Co. v. Barber, 108 A. 400, 93 Vt. 468.

Va.—American Surety Co. v. Hannah, 130 S.E. 411, 143 Va. 291.

Wash.—Russell v. Mutual Lumber Co., 236 P. 96, 134 Wash. 508.

Wis.—Brogan v. State, 252 N.W. 566, 214 Wis. 313—Evenson v. Waukesha Nat. Bank, 207 N.W. 415, 189 Wis. 170.

21 C.J. p. 1242 note 92.

Estoppel is affirmative defense which must be pleaded.

U.S.—Western Casualty & Surety Co. v. Beverfarden, C.C.A.Mo., 93 F.2d 166, reversing, D.C., 17 F.Supp. 928—Missouri Pac. R. Co. v. Bartlett, C.C.A.Ark., 79 F.2d 275, certiorari denied 56 S.Ct. 142, 296 U.S. 620, 80 L.Ed. 440.

Mo.—Drannek Realty Co. v. Nathan Frank, Inc., 139 S.W.2d 926—Richards v. Earls, 133 S.W.2d 381, 345 Mo. 260—Greene v. Spitzer, 123 S.W.2d 57, 343 Mo. 751—State ex inf. McKittrick ex rel. City of Campbell v. Arkansas-Missouri Power Co., 93 S.W.2d 887, 339 Mo. 15—State ex rel. Consolidated School Dist. No. 2 of Pike County v. Haid, 41 S.W.2d 806, 328 Mo. 729, quashing certiorari Consolidated School Dist. No. 2 of Pike County v. Cooper, App., 28 S.W.2d 384—Laughlin v. Wells, 283 S.W. 990, 314 Mo. 474.

Tex.—Stanolind Oil & Gas Co. v. Midas Oil Co., Civ.App., 143 S.W.2d 138, error refused.

Wash.—Beaulaurier v. Washington State Hop Producers, 111 P.2d 559.

1. U.S.—U. S. Fidelity & Guaranty Co. v. Wilson, C.C.A.Ark., 41 F.2d 319.

Ala.—Lackland v. Turner, 91 So. 877, 207 Ala. 73.

Mont.—Middle States Oil Corporation v. Tanner-Jones Drilling Co., 235 P. 770, 73 Mont. 180.

2. Cal.—Martin v. Pacific Southwest Royalties, App., 106 P.2d 443—State Credit Corporation v. Ranger, 281 P. 663, 101 Cal.App. 310.

Colo.—Lamar Building & Loan Ass'n v. Truax, 33 P.2d 978, 95 Colo. 77.

Ga.—Citizens & Southern Bank of Thomaston v. Barron, 181 S.E. 859, 181 Ga. 351.

Mo.—St. Louis Perfection Tire Co. v. McKinney, 245 S.W. 1100, 212 Mo.App. 355.

Tex.—Adkins v. City of Mission, Civ.App., 105 S.W.2d 383, error dismissed.

3. Idaho.—Commercial Standard Ins. Co. v. Remay, 72 P.2d 859, 58 Idaho 302, 120 A.L.R. 1.

Ind.—Town of St. John v. Gerlach, 150 N.E. 771, 197 Ind. 289—Mutual Oolitic Cut Stone Co. v. Colgren, 173 N.E. 334, 91 Ind.App. 686.

Ky.—Hitchcock v. Tackett, 272 S.W. 52, 208 Ky. 803.

Mo.—Neely v. Hines, App., 237 S.W. 906.

Neb.—H. J. Hughes Co. v. Farmers' Union Produce Co., 194 N.W. 872, 110 Neb. 736, 37 A.L.R. 1314.

21 C.J. p. 1243 note 94.

payment,[4] or of accord and satisfaction.[5]

Estoppel by deed or record. While there is some authority to the contrary,[6] ordinarily, where there is opportunity to do so, an estoppel by deed must be specially pleaded to be availed of;[7] and this is also the rule in respect of estoppels by record.[8]

Estoppel as cause of action or in avoidance of defense. When necessary to plead an estoppel, the rule applies with equal force whether, as observed supra in this section, the estoppel is relied on as a defense, or as an element of a cause of action.[9] Where estoppel is relied on in avoidance of a defense, it must be set up in the replication or reply,[10] except, as is observed in subdivision b (2) of this section, in jurisdictions where replications or replies are not permitted.

What law governs. Under the general rule stated in Conflict of Laws § 22, the law of the forum governs as to the necessity of pleading estoppel.[11]

Waiver. Subject to exceptions noted in subdivision b of this section, according to the decisions waiver must be specially pleaded,[12] whether relied

4. Mass.—Gilson v. Nesson, 94 N E. 471, 208 Mass. 368.

5. Mass.—Gilson v. Nesson, supra.

6. Tenn.—Boone v. Citizens' Bank & Trust Co., 290 S.W. 39, 154 Tenn. 241, 50 A.L.R. 1369.
21 C J. p 1243 note 97.

At law

An estoppel by deed or by record need not be pleaded at law.—Boone v. Citizens' Bank & Trust Co., supra.
Pleading res judicata see the C.J.S. title Judgments §§ 822–848, also 34 C.J. p 1055 note 64 et seq.

7. Tex.—De Beque v. Ligon, Civ. App., 286 S.W. 749, reversed on other grounds, Com.App., 292 S.W. 157.
21 C.J. p 1243 note 99.

8. Idaho.—Burton v. Bayly, 300 P. 359, 360, 50 Idaho 707, citing **Corpus Juris.**
21 C.J. p 1244 note 1.

9. U.S.—Collins v. Atlantic Oil Producing Co, C.C.A.Tex., 74 F.2d 122.
Cal.—Cohen v. Metropolitan Life Ins. Co., 89 P.2d 732, 32 Cal.App.2d 337—McGushin v. Arnold, 68 P.2d 733, 21 Cal.App.2d 271—Fleishbein v. Western Auto Supply Agency, 65 P.2d 928, 19 Cal.App.2d 424—Russell v. Stillwell, 288 P. 785, 106 Cal App. 88—Hanson v. Choynski, 278 P. 255, 99 Cal.App. 327—Sly v. Abbott, 264 P. 507, 89 Cal.App. 209—Chowchilla Nat. Bank v. Nilmeier, 256 P. 298, 83 Cal.App. 18.
Ky.—American Surety Co. of New York v. Noe, 53 S.W.2d 178, 245 Ky. 42—Union Gas & Oil Co. v. Indian-Tex Petroleum Co., 259 S. W. 57, 202 Ky. 236.
La.—Ribundo v. Kemp, 126 So. 577, 12 La.App. 512.
Mo.—McLain v. Mercantile Trust Co., 237 S.W. 506, 292 Mo. 114—Thimmig v. General Talking Pictures Corporation, App., 85 S.W.2d 208—Wilder Nat. Tavern System v. Wilder, App., 18 S.W.2d 114—Berkshire v. Holcker, 216 S.W. 556, 202 Mo.App. 433.
Mont.—Scott v. Jardine Gold Min. & Mill. Co., 257 P. 406, 79 Mont. 485.
Neb.—Curley v. White, 263 N.W. 134, 129 Neb. 829—Diehl v. Johnson, 243 N.W. 901, 123 Neb. 699.
Ohio.—Globe Indemnity Co v Wassman, 165 N.E. 579, 120 Ohio St. 72.
Okl.—Mitchell Drilling Co. v. Robert L. Kinkaid, Inc., 105 P.2d 764—Edwards v. Central Life Assur. Soc. of U. S., 66 P.2d 939, 179 Okl. 584—Skirvin v. Skirvin, 60 P.2d 765, 177 Okl. 480.
Or.—Enterprise Irr. Dist. v. Enterprise Land & Investment Co., 300 P. 507, 137 Or. 468—Walker v. Fireman's Fund Ins Co., 234 P. 542, 114 Or. 545—First Nat. Bank v. Allen, 211 P. 913, 106 Or. 190.
Tex.—Donaldson v. National Life & Accident Ins. Co., Civ.App, 53 S. W.2d 136, error refused—Simms v. Mitchell, Civ.App., 44 S.W.2d 1056, reversed on other grounds, Mitchell v. Simms, Com.App, 63 S. W.2d 371—Upham v. Banister, Civ. App, 44 S.W.2d 1014—Snow v. Prince, Civ.App., 4 S.W.2d 605, affirmed, Com.App., 13 S W.2d 342—Edds v. Edds, Civ.App., 282 S.W. 638—Shelton v. Lemmon, Civ.App., 268 S.W. 177—Chapman v. Clark, Civ App., 262 S.W. 161, affirmed, Com.App., 276 S.W. 197.
Utah.—Payson Building & Loan Soc. v. Taylor, 48 P.2d 894, 87 Utah 302.
21 C.J. p 675 note 15 [c], p 1244 note 3.

Defense appearing on face of complaint

The rule of the text is particularly applicable where a plaintiff relies on estoppel to avail against a defense which would otherwise appear on the very face of the complaint.—Fleishbein v. Western Auto Supply Agency, 65 P.2d 928, 19 Cal. App.2d 424.

10. Ariz.—Munger v. Boardman, 88 P.2d 536, 53 Ariz. 271—Insurance Co. of North America v. Williams, 26 P.2d 117, 42 Ariz. 331.
Colo.—J. R. Watkins Medical Co. v. Johnson, 201 P. 47, 70 Colo. 320.
Idaho.—Peterson v. Universal Automobile Ins. Co., 20 P.2d 1016, 53 Idaho 11.
Ind.—Allen Realty Co. v. Uhler, 146 N.E. 766, 83 Ind.App. 103.
Iowa.—Dierksen v. Pahl, 190 N.W. 423, 194 Iowa 713.
Kan.—Langston v. Hoyt, 194 P. 654, 108 Kan. 245.
Ky.—J. R. Watkins Co. v. Jordan, 60 S.W.2d 984, 249 Ky. 432—Illinois Canning Co v. N. Livingston & Co., 258 S.W. 308, 201 Ky. 756—Lacy v. Layne, 228 S.W. 1, 190 Ky. 667—Louisville Tobacco Warehouse Co. v. Lee, 189 S.W. 16, 172 Ky. 171.
Md.—Furst v. Carrico, 175 A. 442, 167 Md 465, 96 A.L.R. 375—Bitting v. Home Ins Co. of New York, 155 A. 329, 161 Md. 56.
N.J.—Guarantee Trust Co. v. Huffman, 199 A. 781, 783, 16 N.J.Misc. 340, citing **Corpus Juris.**
Or.—First Nat. Bank v. Allen, 211 P. 913, 106 Or. 190.
Tenn.—Sledge & Norfleet v. Bondurant, 5 Tenn.App. 319.
Tex.—W. C. Bowman Lumber Co. v. Pierson, 221 S.W. 930, 110 Tex. 543, 11 A.L.R. 547, answering certified questions, Civ.App., 139 S.W. 618—Sartin v. Hudson, Civ.App., 143 S.W.2d 817—M. S. Kaplan Co. v. Wiley, Civ.App., 33 S.W.2d 289, error refused.
Vt.—Nadeau v. Union Mut. Fire Ins. Co., 1 A.2d 735, 109 Vt. 508.
21 C.J. p 1244 note 4.
Reply alleging estoppel as departure from complaint see the C.J.S. title Pleading § 200, also 49 C.J. p 348 note 83 et seq.

11. Mo.—Illinois Fuel Co. v. Mobile & O. R. Co., 8 S.W.2d 834, 319 Mo. 899, certiorari denied Mobile & O. R. Co. v. Illinois Fuel Co., 49 S.Ct. 34, 278 U.S. 640, 73 L.Ed. 555.

12. U.S.—Hunter Milling Co. v. Koch, C.C.A.Kan., 82 F.2d 735—Reilly v. Beekman, C.C.A.N.Y., 24 F.2d 791.
Cal.—Kadow v. City of Los Angeles, 87 P.2d 906, 31 Cal.App.2d 324.
Ga.—Bryant v. Continental Casualty Co., 199 S.E. 343, 58 Ga.App. 518.
Idaho.—Commercial Standard Ins. Co. v. Remay, 72 P.2d 859, 862, 58 Idaho 302, 120 A.L.R. 1, quoting **Corpus Juris.**
Iowa.—Andrew v. Miller, 250 N.W.

on as a defense,[13] as an element of the cause of action,[14] or in avoidance of a defense.[15]

If the waiver in question arises by reason of an estoppel, to be taken advantage of, it must be pleaded under the principle that, if there is an opportunity to plead an estoppel, it must be pleaded;[16] but, where the waiver contains no element of estoppel, and is not asserted against an opposing litigant, it has been stated that there is no rule of law requiring that it shall be pleaded.[17]

b. Exceptions to Rule

(1) In general
(2) Want of opportunity to plead
(3) Estoppel shown by pleadings or evidence

(1) In General

Various exceptions exist to the rule which requires an estoppel to be specially pleaded.

To the rule stated in subdivision a of this section, that estoppel must be specially pleaded, there are various exceptions.[18]

711, 216 Iowa 1378—Dierksen v. Pahl, 190 N.W. 423, 194 Iowa 713
Ky.—Metropolitan Life Ins. Co. v. Trunick's Adm'r, 16 S.W.2d 759, 229 Ky. 173.
Mo.—Powell v. Dorton, 12 S.W.2d 453, 321 Mo. 639
N.Y.—Oswego Falls Corporation v. City of Fulton, 265 N.Y.S. 436, 148 Misc. 170, affirmed 268 N.Y.S. 978, 241 App.Div. 560.
Ohio.—Landrum v. Fulton, 191 N.E. 917, 47 Ohio App. 376.
Okl.—Barnsdall Nat. Bank v. Dykes, 277 P. 219, 136 Okl. 226—Miller v. Scott, 273 P. 363, 134 Okl. 278—Clem Oil Co. v. Oliver, 232 P. 942, 106 Okl. 22.
Tex.—Hodges v. Cole, Civ.App., 117 S.W.2d 822—Smith v. Security Inv. Co., Civ.App., 16 S.W.2d 926—Bryan & Emery v. Frick-Reid Supply Co., Civ.App., 10 S.W.2d 1023—Van Zandt v. Desdemona Independent School Dist., Civ.App., 283 S.W. 626—Manes v. J. I. Case Threshing Mach. Co., Civ.App., 241 S.W. 757, reversed on other grounds J. I. Case Threshing Mach. Co. v. Manes, Com.App., 254 S.W. 929.

Implied waiver
Iowa.—Guenther v. City of Des Moines, 197 N.W. 326, 197 Iowa 414.

Waiver is affirmative matter which must be pleaded.
U.S.—Western Casualty & Surety Co. v. Beverforden, C.C.A.Mo., 93 F.2d 166, reversing, D.C., 17 F. Supp. 928—U. S., for Use and Benefit of Johnson, v. Morley Const. Co., D.C.N.Y., 17 F.Supp. 378, modified on other grounds, C.C.A., U. S. ex rel. Johnson v. Morley Const. Co., 98 F.2d 781, certiorari denied Maryland Casualty Co. v. U. S. for Use and Benefit of Harrington, 59 S.Ct. 244, 305 U.S. 651, 83 L.Ed. 421.
Cal.—Wood v. Jotham Bixby Co., 84 P.2d 204, 29 Cal.App.2d 294.
Iowa.—Harrington v. Feddersen, 226 N.W. 110, 208 Iowa 564, 66 A.L.R. 59.
Mo.—Drannek Realty Co. v. Nathan Frank, Inc., 139 S.W.2d 926.
Wash.—Beaulaurier v. Washington Hop Producers, 111 P.2d 559.
Wyo.—Barber v. Sheridan Trust & Savings Bank, 78 P.2d 1101, 53 Wyo. 65.

13. U.S.—U. S., for Use and Benefit of Johnson v. Morley Const. Co., D.C.N.Y., 17 F.Supp. 378, modified on other grounds, C.C.A., U. S. ex rel. Johnson v. Morley Const. Co., 98 F.2d 781, certiorari denied Maryland Casualty Co. v. U. S. for Use and Benefit of Harrington, 59 S.Ct. 244, 305 U.S. 651, 83 L.Ed. 421.
Cal.—Martin v. Pacific Southwest Royalties, App., 106 P.2d 443—Wood v. Jotham Bixby Co., 84 P.2d 204, 29 Cal.App.2d 294—Thomsen v. Culver City Motor Co., 41 P.2d 597, 4 Cal.App.2d 639.
Fla.—W. T. Rawleigh Co. v. Langford, 150 So. 592, 112 Fla. 487.
Iowa.—Harrington v. Feddersen, 226 N.W. 110, 208 Iowa 564, 66 A.L.R. 59.
Mo.—Drannek Realty Co. v. Nathan Frank, Inc., 139 S.W.2d 926—Windle v. Citizens' Nat. Bank, App., 216 S.W. 1023.
N.Y.—Davison v. Klaess, 20 N.E.2d 744, 280 N.Y. 252, reversing 5 N.Y.S.2d 623, 254 App.Div. 897.
Tex.—Washington Nat. Ins. Co. v. Booker, Civ.App., 123 S.W.2d 975—Wolff v. Cohen, Civ.App., 281 S.W. 646—Brann v. Arbuthnot, Civ.App., 274 S.W. 660—Smith v. Green, Civ. App., 243 S.W. 1006.
Wash.—Shafer Bros. Land Co. v. Universal Pictures Corporation, 61 P.2d 593, 188 Wash. 33.
Wyo.—Barber v. Sheridan Trust & Savings Bank, 78 P.2d 1101, 53 Wyo. 65.

General denial
Waiver is not open as a defense under a general denial.
Idaho.—Commercial Standard Ins. Co. v. Remay, 72 P.2d 859, 58 Idaho 302, 120 A.L.R. 1.
Mass.—Nashua River Paper Co. v. Lindsay, 136 N.E. 358, 242 Mass 206.
Mo.—Neely v. Hines, App., 237 S.W. 906.
Tex.—Federal Union Ins. Co. v. Hardin, Civ.App., 115 S.W.2d 1144.
49 C.J. p 802 note 52.

14. Cal.—Hanna v. Hirschhorn, 296 P. 891, 112 Cal.App. 438.
Ky.—American Surety Co. of New York v. Noe, 53 S.W.2d 178, 245 Ky. 42.
Ohio—Globe Indemnity Co. v. Wassman, 165 N.E. 579, 120 Ohio St. 72.
Tex.—Upham v. Banister, Civ.App., 44 S.W.2d 1014—Shelton v. Lemmon, Civ.App., 268 S.W. 177.

15. U.S.—Reilly v. Beekman, C.C.A.N.Y., 24 F.2d 791.
Idaho.—Peterson v. Universal Automobile Ins. Co., 20 P.2d 1016, 53 Idaho 11.
Tex.—M. S. Kaplan Co. v. Wiley, Civ.App., 33 S.W.2d 289, error refused.
Reply alleging waiver as departure from complaint see the C.J.S. title Pleading § 200, also 49 C.J. p 348 note 79 et seq.

16. Or.—Thompson v. Union Fishermen's Co-op. Packing Co., 246 P. 733, 118 Or. 436, affirming Thompson v. Union Fisherman's Co-op. Packing Co., 235 P. 694, 118 Or. 436.

17. Or.—Thompson v. Union Fishermen's Co-op. Packing Co., supra.

18. U.S.—U. S. Fidelity & Guaranty Co. v. Wilson, C.C.A.Ark., 41 F.2d 319.
Wis.—Lawton v. Racine, 119 N.W. 331, 137 Wis. 593.

Actions of trover
The general rule does not apply to actions of trover, for the reason that conversion, which is the gist of the action, is ex vi termini, a tortious act, which cannot in law be justified or excused, and any plea alleging matters of justification or excuse other than a release, is equivalent to the plea of not guilty, since it involves a denial of the conversion.—Barksdale v. Strickland & Hazard, 124 So. 234, 237, 220 Ala. 86.

Actions of replevin
In replevin actions, waiver and estoppel may be proved under the general denial without pleading them specially.—Helms v. American Sec. Co. of Indiana, 22 N.E.2d 822, 216 Ind. 1.

An estoppel which is part of the title may be given in evidence although not pleaded;[19] and the failure to plead estoppel is waived by proceeding with the trial of the case without objection.[20] Where on the trial of a claim case a special issue of forgery is formed on the execution of a deed, and this issue is found in favor of claimant, who was the alleged maker of the deed, the adverse party may, even after verdict that the deed was a forgery, broaden the issue formed on the claim case and plead and prove an estoppel in pais arising from representations made by the alleged grantor.[21]

Statutory exceptions. In some jurisdictions certain exceptions to the rule requiring an estoppel to be specially pleaded have been made by statute.[22] Thus, under particular statutes, it is not necessary to plead estoppel specially in actions of ejectment,[23] of trespass to try title,[24] of replevin,[25] or in suits to quiet title.[26]

(2) Want of Opportunity to Plead

Want of opportunity dispenses with the necessity of pleading estoppel specially.

Whatever may be the character of the estoppel, whether in pais, by record, or by deed, a party does not waive the estoppel where he has no opportunity to plead it.[27] This rule applies with equal force wheth-

Estoppel of purchaser to deny validity of contract of purchase might be taken advantage of without plea. —Richardson v. Short, 207 N.W. 610, 201 Iowa 561, modifying 202 N.W. 836.

Representations contained in pleadings

Defendant, on motion to vacate judgment, need not formally plead estoppel arising from representations contained in pleadings.—Underwood v. Greenlees, 291 P. 777, 131 Kan. 308

Consideration of parties' conduct in equity

Equity must consider conduct of parties, even though estoppel is not specially pleaded.—Dreyfuss Dry Goods Co. v. Lines, D.C.La., 18 F.2d 611, reversed on other grounds, C.C. A., 24 F.2d 29.

19. Or.—McCleery v. Woodmen of the World, 297 P. 345, 348, 136 Or. 407, citing **Corpus Juris,** and rehearing denied 299 P. 1004, 136 Or. 407.
21 C J. p 1246 note 29.

Estoppel of licensee to dispute licensor's title

Landowners suing to enjoin landing of a ferry on their premises after termination of parol license were not required to plead estoppel of the licensee to dispute their title while continuing in exercise of the privilege.—Bryant v. West, Mo., 219 S.W. 355.

Title subsequently acquired by vendor

A subsequently acquired title inuring to the vendee by estoppel, see supra §§ 21–35, being a part of the title, may be given in evidence without being specially pleaded.—Willis v. Willis, 166 S.E. 398, 203 N C. 517—Meyer v. Thompson, 112 S E. 328, 183 N.C. 543—Farmers' Bank v. Glenn, 68 N.C. 35.

20. Okl.—McMillan v. Wright, 219 P. 298, 93 Okl. 25.
21 C.J. p 1246 note 30.

21. Ga.—Roberts v. Roberts, 29 S.E. 271, 101 Ga. 765

22. Ind.—McConnell v. American Nat. Bank, 103 N.E. 809, 59 Ind. App. 319.
21 C J. p 1245 note 17 [a].

Interpleader

Under Act May 26, 1897, P.L p 95, regulating procedure in actions of interpleader, the character of the pleadings is defined, and there is nothing therein requiring special pleadings to raise question of estoppel.—Speer v. Zeuger, 83 Pa.Super. 288.

23. N.C.—Keen v. Parker, 8 S.E.2d 209, 217 N.C. 378.
21 C.J. p 1245 note 17 [b].

24. **Plea of not guilty sufficient**

Under a statute providing that under a plea of not guilty defendants in trespass to try title may give evidence of any lawful defense except limitations, it has very generally been held that defendants may, under that plea, prove equitable estoppel; but a later decision of the supreme court reaches the opposite conclusion without noticing the earlier decisions.—Reed v. Robertson, 156 S.W. 196, 106 Tex. 56—Texas Pacific Coal & Oil Co. v. Fox, Tex. Civ.App., 228 S.W. 1021—Rio Bravo Oil Co. v. Sanford, Tex.Civ.App., 217 S.W. 219, dismissed for want of jurisdiction—Village Mills Co. v. Houston Oil Co. of Texas, Tex.Civ.App., 186 S.W. 785, reversed on other grounds Houston Oil Co. of Texas v. Village Mills Co., Com.App., 241 S.W. 122—21 C.J. p 1245 note 17 [b] (2).

Pleading by plaintiff

(1) The customary allegations in trespass to try title are sufficient to authorize proof of any fact tending to establish plaintiff's title, and where recovery is sought on theory of estoppel it is not necessary to specially plead the facts of estoppel.—Franklin v. Smith, Tex.Civ. App., 265 S.W. 715.

(2) However, it has been indicated that an estoppel in avoidance of a defense should be specially pleaded by plaintiff.—Reed v. Robertson, 156 S.W. 196, 106 Tex. 56.

25. U.S.—Intertype Corporation v. Pulver, D.C.Fla., 2 F.Supp. 4, affirmed, C.C.A., 65 F.2d 419, certiorari denied 54 S.Ct. 75, 290 U.S. 660, 78 L Ed. 571.
21 C.J. p 1245 note 17 [c].

Plaintiff need not plead estoppel

Kan.—Fleeson v. Whitcomb, 294 P. 877, 132 Kan. 213, 75 A.L.R. 1368.

26. N.M.—Hoskins v. Talley, 220 P. 1007, 29 N.M. 173.

27. U.S.—U. S. Fidelity & Guaranty Co. v. Wilson, C.C.A.Ark., 41 F.2d 319.

Cal.—Fair Oaks Bank v. Johnson, 244 P. 335, 198 Cal. 196.

Idaho.—Paine v. Strom, 6 P.2d 849, 850, 51 Idaho 532, citing **Corpus Juris.**

Kan.—Bell v. Johnson, 46 P.2d 886, 889, 142 Kan. 360, quoting **Corpus Juris.**

Mich.—Block v. Kelsey, 214 N.W. 87, 239 Mich. 354.

Mont.—Scott v. Prescott, 223 P. 490, 69 Mont. 540—Colwell v. Grandin Inv. Co., 210 P. 765, 767, 64 Mont. 518, citing **Corpus Juris.**

N.C.—L. J. Upton & Co. v. Ferebee, 100 S.E. 310, 178 N.C. 194.

Or.—First Nat. Bank v. Allen, 211 P. 913, 106 Or. 190.

Vt.—Cutler Co. v. Barber, 108 A. 400, 93 Vt. 468.

Wis.—Baierl v. Riesenecker, 230 N. W. 605, 201 Wis. 454, reversing 227 N.W. 9, 201 Wis. 454.
21 C.J. p 1244 note 7.

Party without knowledge

Where the party is without knowledge that his claim must ultimately rest on an estoppel the estoppel need not be pleaded.—Pacific Finance Corporation v. Hendley, 284 P. 736, 103 Cal.App. 335, hearing denied and modified on other grounds, 285 P. 1048—Resetar v. Leonardi, 216 P. 71, 61 Cal.App. 765—Guy v. Leech, 190 P. 1067, 47 Cal.App. 704.

Claim of estoppel secondary

Where plaintiff bases her alleged right to recovery in the first instance

er the estoppel is relied on as a defense,[28] or as an element of a cause of action;[29] and where there was no opportunity to plead an estoppel, it may be shown in evidence without having pleaded it.[30] However, it has been held that the rule that, when a cause is tried on the assumption that new matter in the answer has been put in issue by a reply, the want of a reply cannot be urged in the appellate court is not broad enough to excuse plaintiff's failure to plead estoppel.[31]

Where replication or reply not permitted. Under systems of pleading which permit no replication or reply, the rule, stated in subdivision a of this section, requiring estoppels to be pleaded in avoidance of a defense, has no application, and if plaintiff claims an estoppel against the defense set up in the answer, he is entitled to give evidence concerning it without special pleading.[32] The remedy of defendant if taken by surprise, it is said, is to ask for a postponement.[33]

(3) Estoppel Shown by Pleadings or Evidence

An estoppel ordinarily need not be specially pleaded where the matter constituting the estoppel is apparent on the face of the pleadings or where the estoppel is shown in evidence.

If the matter constituting an estoppel is apparent on the face of the pleadings it need not be specially pleaded to be available,[34] and, as is shown infra § 154, the estoppel usually is available on demurrer.

on the original claim of ownership of the property in question and on her contention that the person through whom defendant acquired title to said property had no authority from her to dispose of the same, defendant is not required in his pleadings to anticipate such other contentions as plaintiff may seek to rely on when her main reliance for her right of recovery has failed her, and which do not appear on the face of her complaint. In such cases, defendant may await the assertion by plaintiff in her proof of such additional foundation for her right of recovery and may then oppose the same with his evidence of an equitable estoppel.—Kenny v. Christianson, 253 P. 715, 200 Cal. 419, 50 A.L.R. 1297—Bush v. Rogers, App., 109 P.2d 379—California Standard Finance Corporation v. Riverside Finance Co., 295 P. 555, 111 Cal. App. 151.

Formal pleadings not contemplated

In proceedings which do not contemplate formal pleadings, estoppel may be shown without pleading it.—Gilcrest v. Des Moines, 137 N.W. 1072, 157 Iowa 525.

28. U.S.—New York Life Ins. Co. v. Rees, C.C.A.Mo., 19 F.2d 781.
Idaho.—Paine v. Strom, 6 P.2d 849, 51 Idaho 532.
21 C.J. p 1244 note 7, p 1245 note 8 [a].

29. Mo.—Thimmig v. General Talking Pictures Corporation, App., 85 S.W.2d 208.

30. U.S.—New York Life Ins. Co. v. Rees, C.C.A.Mo., 19 F.2d 781.
Tenn.—Crum v. Fillers, 6 Tenn.App. 547, 556, quoting **Corpus Juris.**
21 C.J. p 1245 note 10.

31. Mo.—Montague Compressed Air Co. v. Fulton, 148 S.W. 422, 166 Mo.App. 11.

32. U.S.—U. S. Fidelity & Guarantee Co. v. Wilson, C.C.A.Ark., 41 F.2d 319.
Cal.—Buford v. Florin Fruit Growers' Ass'n, 291 P. 170, 210 Cal. 84—First Nat. Finance Corporation v. Five-O Drilling Co., 289 P. 844, 209 Cal. 569—General Motors Acceptance Corporation v. Gandy, 253 P. 137, 200 Cal. 284—McCreery v. Charlton, 195 P. 670, 185 Cal. 37—Beeson v. Schloss, 192 P. 292, 183 Cal. 618—Bliss v. California Co-op. Producers, 72 P.2d 885, 23 Cal.App.2d 245—Corporation of America v. Harris, 43 P.2d 307, 5 Cal.App.2d 452—Favali v. Richardson, 285 P. 1062, 104 Cal.App. 301—California Breeders' Sales & Pedigree Co. v. Showers, 260 P. 955, 86 Cal.App. 239.
Ga.—Rieves v. Smith, 192 S.E. 372, 184 Ga. 657, 112 A.L.R. 368—Brown v. Globe & Rutgers Fire Ins. Co., 133 S.E. 260, 161 Ga. 849, reversing 126 S.E. 268, 33 Ga.App. 141, vacated 133 S.E. 263, 35 Ga.App. 342—Metropolitan Life Ins. Co. v. Bugg, 172 S.E. 829, 48 Ga.App. 363
Idaho.—Hillcrest Irr. Dist. v. Nampa & Meridian Irr. Dist., 66 P.2d 115, 57 Idaho 403—Mabee v. Continental Casualty Co., 219 P. 598, 37 Idaho 667, 37 A.L.R. 348.
La.—Tyson v. York, 188 So. 33, 192 La. 373—Martin v. Louisiana Central Lumber Co., 90 So. 553, 150 La. 157—Monroe Hardware Co. v. Delatte, 4 La.App. 66.
N.Y.—Shear v. Healy, 203 N.Y.S. 387, 208 App.Div. 269, reversing 200 N.Y.S. 770, 121 Misc. 218—Salmon v. Rochester & Lake Ontario Water Co., 197 N.Y.S. 769, 120 Misc. 131
Pa.—Greensburg Title & Trust Co. v. Aspinwall-Delafield Co., 109 A. 631, 266 Pa. 160.
Tenn.—Crum v. Fillers, 6 Tenn.App. 547, 556, quoting **Corpus Juris.**
Wis.—Baierl v. Riesenecker, 230 N.W. 605, 201 Wis. 454, reversing 227 N.W. 9, 201 Wis. 454.
21 C.J. p 1245 note 13.
Necessity for, or allowance of, reply see the C.J.S. title Pleading § 185 et seq, also 49 C.J. p 322 note 94 et seq.

33. La.—Parish School Directors v. Alexander, 51 So. 906, 125 La. 808.

34. Ky.—Goodloe v. Anderson, 121 S.W.2d 958, 275 Ky. 460.
Neb.—Safford v. Flynn, 274 N.W. 461, 133 Neb. 213.
Or.—McCleery v. Woodmen of the World, 297 P. 345, 136 Or. 407, citing **Corpus Juris,** and rehearing denied 299 P. 1004, 136 Or. 407.
Tenn.—Crum v. Fillers, 6 Tenn.App. 547.
Tex.—Shaw v. Borchers, Com.App., 46 S.W.2d 967, 970, citing **Corpus Juris,** and reversing, Civ.App., 31 S.W.2d 329—Federal American Nat. Bank & Trust Co. of Washington, D. C., v. Scott, Civ.App., 103 S.W.2d 1064.
21 C.J. p 1245 note 18.

In declaration or complaint

Cal.—Smith v. Anglo-California Trust Co., 271 P. 898, 205 Cal. 496.
Or.—McCleery v. Woodmen of the World, 297 P. 345, 136 Or. 407, rehearing denied 299 P. 1004, 136 Or. 407.
21 C.J. p 1245 note 18 [a].

In answer

U.S.—Missouri Pac. R. Co. v. Bartlett, C.C.A.Ark., 79 F.2d 275, certiorari denied 56 S.Ct. 142, 296 U.S. 620, 80 L.Ed. 440.
Cal.—Bank of America Nat. Trust & Savings Ass'n v. National Funding Corporation, App., 114 P.2d 49
Neb.—McDowell v. Metropolitan Life Ins. Co., 263 N.W. 145, 129 Neb. 764, vacating 260 N.W. 555, 128 Neb. 23.
Tex.—Shaw v. Borchers, Com.App., 46 S.W.2d 967, reversing, Civ.App., 31 S.W.2d 329.
21 C.J. p 1245 note 18 [b].

Allegation of tender in complaint

Relative to validity of tax sale, allegation of tender in complaint did not excuse plea of estoppel by defendant.—E. McIlhenny's Sons v. Couvillon, 2 La.App. 734.

Estoppel shown by evidence. It has been held in some jurisdictions that an estoppel or waiver which is not specially pleaded is not available, even though established by the evidence.[35]

In other jurisdictions estoppel if established by the evidence, is available although it has not been pleaded.[36] The failure to object to evidence of estoppel waives the objection that the estoppel was not specially pleaded.[37] Further, where the facts showing estoppel or waiver are in issue and are admissible for any purpose under the pleadings, estoppel is available as a defense without being specially pleaded,[38] and evidence of estoppel is admissible without being pleaded in order to rebut evidence introduced by the opposite party.[39] An estoppel or waiver need not be pleaded where it appears in the case made by the party against whom it is invoked.[40] An estoppel against plaintiff is available to defendant, although not pleaded, where it is established by plaintiff's evidence;[41] and plaintiff may urge an

Affidavit of truth of facts

Where the basis of a plea of estoppel is facts which appeared in the pleading previously filed, an affidavit of the truth of the facts alleged is not necessary.—Martin v. Iverson, 5 La.App. 525.

35. U.S.—Gulf Red Cedar Co. v. Cranshaw, 53 So. 812, 169 Ala. 606. 21 C.J. p 1246 note 22.

In Georgia

(1) Judgment based on estoppel not specially pleaded could not be rendered, although evidence admitted without objection showed estoppel.—Hightower v. Blakely Hard Wood Lumber Co., 137 S.E. 22, 163 Ga. 776.

(2) While estoppel when relied on must generally be specially pleaded, the issue may be made by evidence admitted without objection, although there was no plea of estoppel.—Fletcher v. Reaves, 110 S.E. 510, 28 Ga. App. 205.

(3) In payee's suit on note, defendant surety was entitled to benefit of his testimony as to an estoppel irrespective of failure to plead an estoppel, where only objection thereto did not identify particular portion of testimony attacked and did not attack testimony on ground that it was unauthorized by pleadings.—Franklin Savings & Loan Co. v. Branan, 188 S.E. 67, 54 Ga.App. 363.

Waiver

Tex.—Hodges v. Cole, Civ.App., 117 S.W.2d 822.

36. Idaho.—Hillcrest Irr. Dist. v. Nampa & Meridian Irr. Dist., 66 P.2d 115, 57 Idaho 403.

Agreed statement of facts

Agreed facts could be considered as working estoppel, although estoppel was not pleaded.

Cal.—Smith v. Anglo-California Trust Co., 271 P. 898, 205 Cal. 496.

Ohio.—Kellogg-Mackay Co. v. O'Neal, 177 N.E. 778, 39 Ohio App. 372.

Discussion in opening, in evidence, and in findings

Where estoppel was discussed in opening discussion of case and in testimony that followed and was in effect carried into findings, it became issue as effectively as though it had been pleaded.—Beckjord v. Traeger, 39 P.2d 523, 3 Cal.App.2d 385, rehearing denied 41 P.2d 172, 3 Cal.App.2d 385.

Where pleadings and evidence show estoppel

An estoppel may be relied on as a defense, although not pleaded, where the facts pleaded and in evidence show an estoppel to arise.—Baxter v. Village of Manchester, 28 N.E.2d 672, 64 Ohio App. 220—I. J. Goldstein Co. v. Mitchell, 14 Ohio App. 231.

Waiver

Generally, waiver to be available must be pleaded, but parties may make and try issues which are not pleaded.—Andrew v. Miller, 250 N.W. 711, 216 Iowa 1378.

37. U.S.—Lusk v. Bush, Mont., 199 F. 369, 117 C.C.A. 655.

Cal.—Flandreau v. Downey, 23 Cal. 354—Chain v. Ehrman, 268 P. 438, 92 Cal.App. 334.

Ind.—Meier v. Continental Nat. Bank of Indianapolis, 143 N.E. 377, 83 Ind.App. 109.

Kan.—Bell v. Johnson, 46 P.2d 886, 889, 142 Kan. 360, quoting **Corpus Juris.**

Mo.—St. Louis Perfection Tire Co. v. McKinney, 245 S.W. 1100, 212 Mo.App. 355.

Mont.—Middle States Oil Corporation v. Tanner-Jones Drilling Co., 235 P. 770, 73 Mont. 180—Shipler v. Potomac Copper Co., 220 P. 1097, 69 Mont. 86.

N.C.—Moody v. Wike, 107 S.E. 457, 181 N.C. 509.

Ohio.—Harris v. Wallace Manufacturing Co., 95 N.E. 559, 84 Ohio St. 104—I. J. Goldstein Co. v. Mitchell, 14 Ohio App. 231—Baker v. Hall, 9 Ohio N.P., N.S., 396.

Waiver of objections to pleadings by introduction of, or failure to object to, evidence see the C.J.S. title Pleading § 569, also 49 C.J. p 843 notes 6–14.

Rebutting testimony produced to show estoppel

Where, in a suit in equity, testimony of facts which it is claimed raise an estoppel against one party is introduced without objection, and contentious testimony disputing such facts is produced on the other side, the contention for an estoppel may be made at the hearing without having been pleaded—James v. Nelson, C.C.A.Alaska, 90 F.2d 910, 920, citing **Corpus Juris**—Standard Sanitary Mfg. Co. v. Arrott, Pa., 135 F. 750, 68 C.C.A. 388.

38. Mont.—Stagg v. Broadway Garage Co., 286 P. 415, 87 Mont. 254.

Neb.—Fluckey v. Anderson, 273 N.W. 41, 132 Neb. 664—Ross v. First American Ins. Co., 250 N.W. 75, 125 Neb. 329—Yates v. New England Mut. Life Ins. Co., 220 N.W. 285, 117 Neb. 265.

Wis.—Karlen v. Trickel, 207 N.W. 273, 189 Wis. 148.

21 C.J. p 1246 note 24.

Facts going to proof of contract

Where an action is based on a contract, express or implied, facts which estop defendant to deny the construction of the contract claimed go to proof of the contract, and need not be pleaded as an estoppel.—Letta v. Cincinnati Iron & Steel Co., C.C.A.Ohio, 285 F. 707.

39. Ga.—Brown v. Globe & Rutgers Fire Ins. Co., 133 S.E. 260, 263, 161 Ga. 849, citing **Corpus Juris,** and reversing 126 S.E. 268, 33 Ga.App. 141, vacated 133 S.E. 263, 35 Ga. App. 342—Davis v. Citizens-Floyd Bank & Trust Co., 139 S.E. 826, 37 Ga.App. 275.

Mo.—Ess v. Griffith, 40 S.W. 930, 139 Mo. 322.

Neb.—Fluckey v. Anderson, 273 N.W. 41, 43, 132 Neb. 664, quoting **Corpus Juris.**

Wash.—Steffen v. Snohomish County, 57 P.2d 1035, 186 Wash. 235.

40. Mo.—Prudential Ins. Co. of America v. German Mut. Fire Ins. Ass'n of Lohman, 105 S.W.2d 1001, 231 Mo.App. 699—Ornellas v. Moynihan, App., 16 S.W.2d 1007.

41. U.S.—Horn v. Abts, C.C.A.Neb., 19 F.2d 350.

Kan.—Bell v. Johnson, 46 P.2d 886, 142 Kan. 360.

Mo.—Richards v. Earls, 133 S.W.2d 381, 345 Mo. 260—State ex rel. Consolidated School Dist. No. 2 of Pike County v. Haid, 41 S.W.2d 806, 328 Mo. 729, quashing certiorari Consolidated School Dist. No. 2 of Pike County v. Cooper, App., 28 S.W.2d 384—Grafeman Dairy

estoppel established by defendant's evidence,[42] especially where defendant offers the evidence without in any respect restricting it to any particular issue,[43] unless defendant's evidence was not presented voluntarily but was elicited when he was called for cross-examination under statute.[44]

c. Effect of Failure to Plead Estoppel

An estoppel ordinarily is waived by failure to plead it.

Unless the case falls within some of the exceptions discussed in subdivision b of this section, the failure to plead an estoppel operates as a waiver of it.[45] Where a party pleads a fact which he might be estopped to plead and the other party takes issue on the fact instead of relying on the estoppel, and the jury find the fact to be true, judgment will be rendered without regard to the estoppel.[46]

§ 154. Demurrer Raising Defense

Where the facts constituting an estoppel appear in the previous pleading, the estoppel ordinarily may be raised by demurrer.

Where facts sufficient to constitute an estoppel appear on the face of the previous pleading, the estoppel need not be specially pleaded, see supra § 153 b (3), but, may be taken advantage of on demurrer,[47] and it has been held that where a party fails to take advantage of it in such manner, he will be held to have waived the estoppel.[48]

On the other hand, if the facts constituting the estoppel are not apparent on the face of the pleading, a demurrer is not available,[49] but the estoppel must be pleaded by way of answer or plea;[50] and in some jurisdictions it appears that an estoppel or waiver must be raised by plea or answer and may not be taken advantage of on demurrer.[51]

§ 155. Nature and Form of Plea

A plea of estoppel denies the right of a party to insist on particular facts, and at common law the plea should have a formal commencement and conclusion.

The issue which a plea of estoppel presents is not to determine the truth or validity of the particular facts pleaded, but the right and power of the party to insist on them.[52]

A plea of estoppel is not a plea of confession and

Co. v. Northwestern Bank, 288 S.W. 359, 315 Mo. 849—Grafeman Dairy Co. v. Northwestern Bank, 235 S.W. 435, 290 Mo. 311—Fairgate Realty Co. v. Drozda, App., 181 S.W. 398.

Mont.—Shipler v. Potomac Copper Co., 220 P. 1097, 69 Mont. 86.

42. U.S.—Missouri Pac. R. Co. v. Bartlett, C.C.A.Ark., 79 F.2d 275, certiorari denied 56 S.Ct. 142, 296 U.S. 620, 80 L.Ed. 440—Grand Valley Water Users' Ass'n v. Zumbrunn, C.C.A.Colo., 272 F. 943.

Mo.—Prudential Ins. Co. of America v. German Mut. Fire Ins. Ass'n of Lohman, 105 S.W.2d 1001, 231 Mo. App. 699.

Neb.—Safford v. Flynn, 274 N.W. 461, 133 Neb. 213.

43. Colo.—Gilette v. Young, 101 P. 766, 45 Colo. 562.

44. Colo.—Divine v. George, 166 P. 242, 63 Colo. 341.

45. Mo.—Laughlin v. Wells, 283 S.W. 990, 314 Mo. 474.

Mont.—Williard v. Campbell, 11 P.2d 782, 786, 91 Mont. 493, citing **Corpus Juris**, and certiorari granted Clark v. Williard, 54 S.Ct. 103, 290 U.S. 619, 78 L.Ed. 540.

Vt.—Nadeau v. Union Mut. Fire Ins. Co., 1 A.2d 735, 109 Vt. 508.

21 C.J. p 1246 note 33.

46. Mont.—Williard v. Campbell, 11 P.2d 782, 91 Mont. 493, certiorari granted Clark v. Williard, 54 S.Ct. 103, 290 U.S. 619, 78 L.Ed. 540.

21 C.J. p 1247 note 34.

47. U.S.—Western Casualty & Surety Co. v. Beverforden, C.C.A.Mo., 93 F.2d 166, reversing, D.C. 17 F. Supp. 928.

Cal.—Los Angeles Athletic Club v. City of Long Beach, 17 P.2d 1061, 128 Cal.App. 427.

Ky.—Goodloe v. Anderson, 121 S.W.2d 958, 275 Ky. 460—Sloan v. Upchurch, 105 S.W.2d 160, 268 Ky. 454.

Mo.—Koewing v. Greene County Building & Loan Ass'n of Springfield, 38 S.W.2d 40, 327 Mo. 680.

Mont.—Krueger v. Morris, 107 P.2d 142—Hicks v. Stillwater County, 274 P. 296, 84 Mont. 38—Shipler v. Potomac Copper Co., 220 P. 1097, 69 Mont. 86.

Okl.—State ex rel. Green v. Condren, 62 P.2d 635, 178 Okl. 236—Witham v. Gage, 230 P. 718, 106 Okl. 121.

Tenn.—Crum v. Fillers, 6 Tenn.App. 547.

Wis.—Brogan v. State, 252 N.W. 566, 568, 214 Wis. 313, citing **Corpus Juris**.

21 C.J. p 1245 note 19.

48. Ky.—Burdit v. Burdit, 2 A.K. Marsh. 143.

21 C.J. p 1246 note 20.

49. Cal.—Haynes v. Indio Levee Dist., 189 P. 475, 46 Cal.App. 436.

Del.—Frank v. Wilson & Co., Ch., 9 A.2d 82.

21 C.J. p 1246 note 21.

50. Ga.—Hirsch v. Northwestern Mut. Life Ins. Co., 13 S.E.2d 165, 191 Ga. 524.

Ill.—Blanchard Bro. & Lane v. S. G. Gay Co., 124 N.E. 616, 289 Ill. 413.

51. Ala.—Penton v. Brown-Crummer Inv. Co., 131 So. 14, 222 Ala. 155—Glass v. Stamps, 104 So. 237, 213 Ala. 95.

Miss.—Hartsfield v. Lafayette County, 189 So. 177, 185 Miss. 564.

Wash.—Russell v. Mutual Lumber Co., 236 P. 96, 134 Wash. 508.

General demurrer

Tex.—Johnston v. Stephens, 49 S.W.2d 431, 121 Tex. 374, reversing, Civ.App., 300 S.W. 225—Moore v. Krenek, Civ.App., 288 S.W. 580.

Demurrer ore tenus

A defense based on estoppel must be raised by answer and cannot be raised on a demurrer ore tenus or a motion to strike.—Aldridge Motors v. Alexander, 9 S.E.2d 469, 217 N.C. 750.

Waiver

A complaint in action to set aside an arbitration award was not demurrable because plaintiff allegedly waived a portion of its alleged equitable grounds for relief, since waiver must be asserted by way of defense.—Twin Lakes Reservoir & Canal Co. v. Platt Rogers, Inc., Colo., 94 P.2d 1090.

52. Ala.—Sovereign Camp, W. O. W. v. Brownrigg, 163 So. 786, 790, 231 Ala. 162, citing **Corpus Juris**—Emerson-Brantingham Implement Co. v. Arrington, 112 So. 428, 432, 216 Ala. 21, quoting **Corpus Juris**.

Or.—McCleery v. Woodmen of the World, 297 P. 345, 348, 136 Or. 407, citing **Corpus Juris**, and rehearing denied 299 P. 1004, 136 Or. 407.

21 C.J. p 1247 note 35.

avoidance,[53] although it has been stated that it is in the nature of such a plea[54] While the plea is spoken of as a plea in bar,[55] it is not technically such, although, like a plea in bar, it denies the right of action or defense, by denying the right to assert the facts.[56] So the rule that the pleader, if he does not demur, must either traverse or confess and avoid all of the material allegations to which he makes answer, has no application to pleadings in estoppel which are considered to be an exception to the rule.[57]

Form of plea. A plea of estoppel at common law should have a formal commencement and conclusion to mark its special character.[58] It should contain a claim that plaintiff should not be admitted to make use of what the supposed estoppel would exclude;[59] and in its conclusion such a plea, to be efficacious, must rely on the estoppel.[60] At common law a defect in these particulars may be reached by general demurrer.[61]

§ 156. Requisites and Sufficiency of Allegations

The essential facts constituting estoppel or waiver must be pleaded, but it is not necessary that estoppel or waiver be specifically designated as such in the pleading.

When it is necessary to plead an estoppel, see supra § 153, the allegations must be sufficient.[62] Es-

53. Ill.—Dana v. Bryant, 6 Ill. 104.
21 C.J. p 1247 note 36.

54. Tex.—Bell v. Moody, Civ.App., 147 S.W.2d 852, error dismissed, judgment correct.

55. Ill.—East St. Louis v. Flannigen, 34 Ill.App. 596.

56. Ill.—East St. Louis v. Flannigen, 34 Ill.App. 596.
Vt.—Webster v. State Mut. F. Ins. Co., 69 A. 319, 81 Vt. 75.

57. Vt.—Webster v. State Mut. F. Ins. Co., supra.

58. Mich.—Whittemore v. Stephens, 12 N.W. 858, 48 Mich. 573.
21 C.J. p 1247 note 41.
Requisites and sufficiency of allegations see infra § 156.

59. Mich.—Whittemore v. Stephens, 12 N.W. 858, 48 Mich. 573.
21 C.J. p 1247 note 42.

60. Mich.—Whittemore v. Stephens, 12 N.W. 858, 48 Mich. 573.
21 C.J. p 1247 note 43.

61. Ill.—Cook v. Marseilles, 139 Ill. App. 536.
21 C.J. p 1247 note 44.

62. **Allegations held sufficient**
(1) Complaint or petition.
Cal.—Johnson v. Schimpf, 239 P. 401, 197 Cal. 43—Chain v. Ehrman, 268 P. 438, 92 Cal.App. 334.
Ga.—Moore v. Ball, 189 S.E. 227, 183 Ga. 624.
Iowa.—Stacey Fruit Co. v. Sketchley, 183 N.W. 452, 192 Iowa 186.
La.—Columbia Oil Co. v. Police Jury of Natchitoches Parish, App., 194 So. 91.
Neb.—U. S. Tire Dealers Mut. Corporation v. Laune, 296 N.W. 333.
Tex.—Continental Supply Co. v. Forrest E. Gilmore Co. of Texas, Civ. App., 55 S.W.2d 622, error dismissed—McLendon Hardware Co. v. Black, Civ.App., 264 S.W. 1011.
(2) Answer or plea.
Ala.—Cypress v. Green, 127 So. 844, 221 Ala. 64.
Cal.—Burrow v. Carley, 290 P. 577, 210 Cal. 95.
Iowa.—Heinz v. Davenport Bank & Trust Co., 298 N.W. 785.
Mo.—Gehlert v. City of Union, App., 244 S.W. 97.
Okl.—Galloway v. Loffland, 289 P. 774, 144 Okl. 176—Rule v. Rule, 225 P. 170, 93 Okl. 276.
Tex.—McDorman v. Goodell, Civ.App., 69 S.W.2d 428—Busby v. Smith, Civ.App., 53 S.W.2d 138, reversed on other grounds Smith v. Sorelle, 87 S.W.2d 703, 126 Tex. 353—Sigel v. Buccaneer Hotel Co., Civ. App., 40 S.W.2d 168 error refused—Dodson v. Dickey, Civ.App., 247 S.W. 615.
Utah.—Tanner v. Provo Reservoir Co., 289 P. 151, 76 Utah 335
21 C.J. p 1247 note 45 [a] (1).
(3) Cross complaint.—Fifer v. Rachels, 76 N.E. 186, 37 Ind.App. 275.
(4) Replication.—Stillman v. Barney, 4 Vt. 331.
(5) Rejoinder.—Burton v. Wilkinson, 18 Vt. 186, 46 Am.D. 145.

Allegations held insufficient
(1) Complaint or petition.
U.S.—Mower v. Bond, D.C.Idaho, 8 F.2d 518—Chase Nat. Bank of City of New York v. Sayles, D.C.R.I., 6 F.2d 403.
Ala.—Jacksonville Public Service Corporation v. Calhoun Water Co., 123 So. 79, 219 Ala. 616, 64 A.L.R. 1550.
Tex.—Lindsay v. Laughlin, Civ.App., 150 S.W.2d 811, error dismissed, judgment correct.
Utah.—Kelly v. Richards, 83 P.2d 731, 95 Utah 560, 129 A.L.R. 164.
(2) Answer or plea.
U.S.—International Shoe Co. v. Picard & Geismar, D.C.La., 30 F. Supp. 570, affirmed, C.C.A., Mayer v. Gros, 116 F.2d 733.
Ala.—S. A. Williams & Co. v. Newman & Heller, 87 So. 807, 205 Ala. 86—Houston Nat. Bank of Dothan v. Eldridge, 84 So. 430, 17 Ala. App. 235.
Ga.—McElveen v. Floyd, 153 S.E. 615, 41 Ga.App. 537.
Ill.—Sondag v. Keefe, 251 Ill.App. 378—First Trust & Savings Bank of Alton v. Aldinger, 226 Ill.App. 128.
Iowa.—Andrew v. Boyd, 241 N.W. 423, 213 Iowa 1277—Bradford v. Martin, 201 N.W. 574, 199 Iowa 250.
Mo.—Laughlin v. Wells, 283 S.W. 990, 314 Mo. 474.
Ohio.—Lubric Oil Co v. Drawe, 160 N.E. 93, 26 Ohio App. 478.
Utah.—Provo City v. Claudin, 63 P. 2d 570, 91 Utah 60.
(3) Replication
U.S.—Cohen v. Superior Oil Corporation, D.C.Del., 16 F.Supp. 221, affirmed, C.C.A., 90 F.2d 810, certiorari denied 58 S.Ct. 47, 302 U.S. 726, 82 L.Ed. 561.
Ky.—American Oak Leather Co. v. Cleveland, C. C. & St. L. R. Co., 288 S.W. 347, 216 Ky. 611.
Md.—Bitting v. Home Ins. Co. of New York, 155 A. 329, 161 Md. 56.
(4) Counterclaim.—Bank of America Nat. Trust & Savings Ass'n v. Casady, 59 P.2d 444, 15 Cal.App.2d 163.

Pleading in avoidance of defense
Pleading of estoppel, stating facts constituting sufficient reply to defense specially pleaded, is sufficient, if it gives color to defendant's plea by confessing its averments.—Bitting v. Home Ins. Co. of New York, 155 A. 329, 161 Md. 56.

Removing answer of other party by anticipation
Where estoppel is relied on in pleadings, they must meet and remove by anticipation every possible answer of the other party.—Colvocoresses v. W. S. Wasserman Co., 190 A. 607, 8 W.W.Harr., Del., 253.

Strict construction
For the reason that a plea of estoppel forbids party against whom it is invoked from even averring the truth, pleadings of estoppel are strictly construed.—Wallace v. American Life Ins. Co. of Des Moines, Iowa, 237 P. 974, 116 Or. 195.

toppel must be pleaded with particularity and precision, every essential fact being set forth,[63] for nothing can be supplied by inference or intendment;[64] and, indeed, it has been stated that where there is ground for inference or intendment, it will be against and not in favor of the estoppel.[65] The pleading must be certain in every particular,[66] and to every intent,[67] or no estoppel can be adjudged.[68]

Nevertheless, it is a rule of general application that if the allegations amount to an estoppel it is sufficient, although the estoppel is not pleaded in so many words, or specifically designated as such,[69]

Plea referred to merits

Plea of estoppel in suit to annul partition judgment because plaintiffs knew of sale and verified answer of attorney alleged to be unauthorized is properly referred to merits.—Green v. Barnett, 120 So. 666, 10 La.App. 212.

Pleading of unenforceable promise

An unenforceable promise to collect a note promptly is pleadable by indorser as estopping fact.—Birmingham Sav. Bank of Birmingham v. Keller, 215 N.W. 649, 205 Iowa 271, corrected 217 N.W. 874, 205 Iowa 271.

Derivative action

Buyer's cause of action for seller's representations inducing purchase of stock in Massachusetts trust is independent, and not derived through trust.—Winchester-Simmons Co. v. Simmons, 227 N.Y.S. 408, 222 App.Div. 639.

63. U.S.—Coen v. American Surety Co. of New York, C.C.A.Mo., 120 F.2d 393.
Ala.—Industrial Sav. Bank v. Greenwald, 158 So. 734, 229 Ala. 529—S. A. Williams & Co. v. Newman & Heller, 87 So. 807, 205 Ala. 86.
Ariz.—Moore v. Meyers, 253 P. 626, 629, 31 Ariz. 347, citing **Corpus Juris**, and reversed on other grounds 255 P. 164, 31 Ariz. 519.
Cal.—Fleishbein v. Western Auto Supply Agency, 65 P.2d 928, 19 Cal.App.2d 424—California Thorn-Cordage v. Diller, 9 P.2d 594, 121 Cal.App. 542.
Del.—Colvocoresses v. W. S. Wasserman Co., 190 A. 607, 615, 8 W.W.Harr. 253, citing **Corpus Juris.**
Idaho.—Jackson v. Lee, 277 P. 548, 47 Idaho 589—Neitzel v. Lawrence, 231 P. 423, 40 Idaho 26.
Ind.—Geisen v. Karol, 159 N.E. 469, 86 Ind.App. 653.
Ky.—McIntosh v. Wilhoit, 132 S.W.2d 39, 279 Ky. 675.
Mass.—Abbott v. Bean, 3 N.E.2d 762, 295 Mass. 268.
Mo.—Scanlon v. Kansas City, 28 S.W.2d 84, 325 Mo. 125—Grafeman Dairy Co. v. Northwestern Bank, 288 S.W. 359, 363, 315 Mo. 849, citing **Corpus Juris**—Shell v. Conrad, App., 153 S.W.2d 384—Badger Lumber & Coal Co. v. Pugsley, 61 S.W.2d 425, 227 Mo.App. 1203.
Mont.—Scott v. Jardine Gold Min. & Mill. Co., 257 P. 406, 79 Mont. 485.
N.M.—Mosley v. Magnolia Petroleum Co., 114 P.2d 740—Warren v. New York Life Ins. Co., 58 P.2d 1175, 1182, 40 N.M. 253, citing **Corpus Juris.**
N.C.—L. J. Upton & Co. v. Ferebee, 100 S.E. 310, 178 N.C. 194.
Okl.—State ex rel. Green v. Condren, 62 P.2d 635, 178 Okl. 236—Skirvin v. Skirvin, 60 P.2d 765, 177 Okl. 480—Witham v. Gage, 230 P. 718, 106 Okl. 121—Stone v. Easter, 219 P. 653, 93 Okl. 68.
Or.—Mahon v. Harney County Nat. Bank of Burns, 206 P. 224, 104 Or. 323
Tex.—Lloyd v. Singleton, Civ.App., 16 S.W.2d 891—Smith v. Roberts, Civ.App., 218 S.W. 27.
21 C.J. p 1247 note 46.

When estoppel sufficiently pleaded

(1) Estoppel is sufficiently pleaded if main facts on which estoppel rests are set forth, informing opposite party of its nature.—Burrow v. Carley, 290 P. 577, 210 Cal. 95.

(2) An estoppel is sufficiently pleaded where the pleadings show that the party intends to rely on it if facts alleged by the other party, and denied for want of knowledge, are shown.—Schurtz v. Colvin, 45 N.E. 527, 55 Ohio St. 274.

Reference to evidential sources

An attempted plea of estoppel, which does not state the facts on which the pleader bases the plea, but merely refers to sources from which evidence might be adduced to support the plea, is defective.—Wallace v. American Life Ins. Co. of Des Moines, Iowa, 237 P. 974, 116 Or. 195.

Conclusions

(1) Pleading mere conclusion, without stating facts, is insufficient as pleading of estoppel.—Federal Land Bank of Omaha, Neb., v. Sherburne, 239 N.W. 778, 213 Iowa 612, followed in 239 N.W. 784, 213 Iowa 612.

(2) Allegations that plaintiff "permitted" her husband to use and control her property and claim its ownership, and "by her acts, conduct, and representations held him out to the public" as owner, when no "act" or "conduct" or "representation" was stated, nor that she knew of any representations, or was present when they were made, or was ever in a position where she was required to disclose her ownership, alleges only conclusions, and does not disclose an estoppel against plaintiff.—Teagar v. First Nat. Bank, 199 N.W. 250, 198 Iowa 107.

64. U.S.—Coen v. American Surety Co. of New York, C.C.A.Mo., 120 F.2d 393.
Idaho.—Neitzel v. Lawrence, 231 P. 423, 40 Idaho 26.
Ind.—Geisen v. Karol, 159 N.E. 469, 86 Ind.App. 653.
Mo.—Shell v. Conrad, App., 153 S.W.2d 384.
Mont.—Scott v. Jardine Gold Min. & Mill. Co., 257 P. 406, 79 Mont. 485.
Tex.—Lloyd v. Singleton, Civ.App., 16 S.W.2d 891.
21 C.J. p 1247 note 46, p 1248 note 47.

65. U.S.—Coen v. American Surety Co. of New York, C.C.A.Mo., 120 F.2d 393.
Ind.—Geisen v. Karol, 159 N.E. 469, 86 Ind.App. 653.
Mo.—Grafeman Dairy Co. v. Northwestern Bank, 288 S.W. 359, 315 Mo. 849—Shell v. Conrad, App., 153 S.W.2d 384.
21 C.J. p 1248 note 48.
Odiousness of estoppels see supra § 3.

66. Ala.—Industrial Sav. Bank v. Greenwald, 158 So. 734, 229 Ala. 529—S. A. Williams & Co. v. Newman & Heller, 87 So. 807, 205 Ala. 86.
Idaho.—Neitzel v. Lawrence, 231 P. 423, 40 Idaho 26.
Ohio.—Bush v. Critchfield, 5 Ohio 109, 112.

67. Or.—Sabin v. Phœnix Stone Co., 118 P. 494, 119 P. 724, 60 Or. 378.
21 C.J. p 1248 note 50.

68. U.S.—Gager v. Harrison, C.C.Or., 9 F.Cas.No.5,171.
21 C.J. p 1248 note 51.

69. U.S.—James v. Nelson, C.C.A. Alaska, 90 F.2d 910, 918, citing **Corpus Juris,** and certiorari denied 58 S.Ct. 41, 302 U.S. 721, 82 L.Ed. 556.
Ariz.—Munger v. Boardman, 88 P.2d 536, 53 Ariz. 271—Insurance Co. of North America v. Williams, 26 P.2d 117, 42 Ariz. 331.
Cal.—Johnson v. Schimpf, 239 P. 401, 197 Cal. 45—Palvutzian v. Terkanian, 190 P. 503, 47 Cal.App. 47.
Colo.—Howard v. Fisher, 283 P. 1042, 86 Colo. 493—Yellow Jacket Irr. Dist. v. Pleasant Valley Ranch Co., 243 P. 635, 78 Colo. 543—Gillett v. Moore, 223 P. 21, 74 Colo. 484—Field v. Kincaid, 184 P. 832, 67 Colo. 20.
Ky.—Clarke v. Fishback, 262 S.W. 265, 203 Ky. 265.
Mo.—Badger Lumber & Coal Co. v.

especially where no objection is made to the form of the pleading.[70] Mere informality in the pleading will not deprive the pleader of the benefit of the estoppel as long as the facts are sufficiently pleaded.[71]

Particular averments held necessary. In order to plead an equitable estoppel successfully, it is necessary to allege that the acts and representations or conduct constituting the alleged estoppel were done or made with intent that the person pleading the estoppel should act thereon;[72] that the representation was false, if a representation is the basis of the alleged estoppel;[73] that the party against whom the estoppel is claimed was aware of the actual state of facts misrepresented or concealed,[74] or that his conduct was characterized by gross negligence;[75] that the party setting up the estoppel was without knowledge or without convenient and available means of acquiring knowledge of the matters alleged in estoppel;[76] that the party against whom the estoppel is claimed was in a position or relation to the parties which required him to speak or act if the party claiming the estoppel relies on an estoppel arising from silence or acquiescence;[77] that the party claiming the estoppel was misled by the misrepresentations or conduct of the party against whom the estoppel is claimed,[78] and has changed his status or done or omitted to do something because of such

Pugsley, 61 S.W.2d 425, 227 Mo. App. 1203—Stumbaugh v. Hall, App., 30 S.W.2d 160—Berry v. Cobb, 20 S.W.2d 296, 223 Mo.App. 934—Gehlert v. City of Union, App., 244 S.W. 97.

N.D.—State Bank of Cooperstown v. Newell, 212 N.W. 848, 850, 55 N.D. 184, quoting **Corpus Juris.**

Okl.—Clark v. National Aid Life Ass'n, 57 P.2d 832, 177 Okl. 137—Bank of Chelsea v. Elam, 30 P.2d 919, 921, 167 Okl. 650, quoting **Corpus Juris.**

Or.—McCleery v. Woodmen of the World, 297 P. 345, 136 Or. 407, rehearing denied 299 P. 1004, 136 Or. 407—Putnam v. Chase, 212 P. 365, 106 Or. 440.

Tenn.—Fidelity Mut. Life Ins. Co. v. Guess, 101 S.W.2d 694, 171 Tenn. 205—Chandler v. Roddy, 43 S.W.2d 397, 163 Tenn. 338—State v. Patterson, 290 S.W. 973, 155 Tenn. 169—Maryland Casualty Co. v. McTyier, 266 S.W. 767, 150 Tenn. 691, 48 A.L.R. 1168.

Tex.—Shaeffer v. Smyth, Civ.App., 49 S.W.2d 851, affirmed in part and reversed in part on other grounds 78 S.W.2d 935, 124 Tex. 509, rehearing denied and corrected 79 S.W.2d 847, 124 Tex. 509—Shaller v. Allen, Civ.App., 278 S.W. 873—Davis v. Lyons, Civ.App., 274 S.W. 288.

Wash.—Schade v. Western Union Life Ins. Co., 215 P. 521, 125 Wash. 200.

21 C.J. p 1248 note 52.

Formal pleading

A party entitled to an estoppel need not in all cases formally plead the estoppel. If the facts constituting the estoppel are in any way sufficiently pleaded, he is entitled to the benefit of the law arising therefrom.

Neb.—U. S. Tire Dealers Mut. Corporation v. Laune, 296 N.W. 333—Retail Merchants' Service v. John Bauer & Co., 248 N.W. 813, 125 Neb. 61, affirming 246 N.W. 726, 124 Neb. 360—Hastings City Nat. Bank v. Thomas, 65 N.W. 895, 46 Neb. 861.

Okl.—National Aid Life Ass'n v. Clinton, 55 P.2d 781, 176 Okl. 372—Bank of Chelsea v. Elam, 30 P.2d 919, 167 Okl. 650—Hunt v. Tulsa Terrazzo & Mosaic Co., 11 P.2d 521, 157 Okl. 174—Galloway v. Loffland, 289 P. 774, 144 Okl. 176—Daniel v. Pappas, 220 P. 355, 93 Okl. 165—Jones v. Kress, 153 P. 655, 54 Okl. 194.

Word "estoppel" unnecessary

If the facts constituting an estoppel are sufficiently pleaded, the pleader will be given the benefit of that defense, although the word "estoppel" does not appear in his pleading.

Ga.—Fulenwider v. Fulenwider, 5 S.E.2d 20, 188 Ga. 856—Rieves v. Smith, 192 S.E. 372, 184 Ga. 657, 112 A.L.R. 368—Broderick v. Reid, 139 S.E. 18, 164 Ga. 474.

Iowa.—Bibler v. Bibler, 216 N.W. 99, 205 Iowa 639.

Kan.—Yeoman v. Morris, 11 P.2d 683, 135 Kan. 566.

Neb.—Smith v. Liberty Life Ins. Co. of Topeka, Kan., 225 N.W. 688, 118 Neb. 557—Seng v. Payne, 128 N.W. 625, 87 Neb. 812.

Tenn.—Scott v. Hardaway Contracting Co., 68 S.W.2d 944, 17 Tenn. App. 470.

70. Idaho.—Quirk v. Bedal, 248 P. 447, 42 Idaho 567.
21 C.J. p 1248 note 53.

71. N.D.—State Bank of Cooperstown v. Newell, 212 N.W. 848, 55 N.D. 184.
Okl.—Bank of Chelsea v. Elam, 30 P.2d 919, 167 Okl. 650.
21 C.J. p 1249 note 54.

72. Ala.—Houston Nat. Bank of Dothan v. Eldridge, 84 So. 430, 17 Ala.App. 235.
Colo.—Lamar Building & Loan Ass'n v. Truax, 33 P.2d 978, 95 Colo. 77.
Okl.—Skirvin v. Skirvin, 60 P.2d 765, 177 Okl. 480.
21 C.J. p 1249 note 55.
Elements of equitable estoppel see supra §§ 67–77.

73. Ind.—Patterson v. Nixon, 79 Ind. 251.

74. Ariz.—Moore v. Meyers, 253 P. 626, 31 Ariz. 347, reversed on other grounds 255 P. 164, 31 Ariz. 519.
Ind.—Allen Realty Co. v. Uhler, 146 N.E. 766, 83 Ind.App. 103.
Mass.—Seretto v. Schell, 141 N.E. 871, 247 Mass. 173.
21 C.J. p 1249 note 57.

Means of knowledge as actual knowledge

Where the bill of complaint in a suit to quiet title to real estate asserts an estoppel against defendants, an averment showing means of knowledge on the part of defendants is tantamount to an averment of actual knowledge.—Commodores Point Terminal Co. v. Hudnall, D.C. Fla., 283 F. 150.

75. Ark.—Hope Lumber Co. v. Foster & Logan Hardware Co., 13 S.W. 731, 53 Ark. 196
Mont.—Meyendorf v. Frohner, 3 Mont. 282.

76. Ga.—Groover v. Simmons, 137 S.E. 237, 163 Ga. 778.
Ind.—Hartlep v. Murphy, 150 N.E. 312, 197 Ind. 222—Menzenberger v. American State Bank, 198 N.E. 819, 101 Ind.App. 600.
21 C.J. p 1249 note 59.

77. Alaska.—City of Juneau v. Warner, 8 Alaska 249.
21 C.J. p 1249 note 60.

78. Colo.—Johnson v. Johnson, 286 P. 109, 87 Colo. 207.
Del.—Colvocoresses v. W. S. Wasserman Co., 190 A. 607, 615, 8 W.W. Harr. 253, citing **Corpus Juris.**
Ga.—Fulenwider v. Fulenwider, 5 S.E.2d 20, 188 Ga. 856.
Ind.—General Realty Co. v. Silcox, 146 N.E. 408, 84 Ind.App. 451.
Ky.—Federal Surety Co. v. Guerrant, 38 S.W.2d 425, 238 Ky. 562.
La.—Gladney's, Inc., v. Louisiana Magazine, App., 156 So. 659, rehearing refused 158 So. 32.
Minn.—Friend v. Friend, 196 N.W. 814, 158 Minn. 31.

representation or conduct;[79] and that unless the estoppel is sustained, the party setting it up will sustain material injury.[80]

If an estoppel by contract is relied on, see supra §§ 55–58, its terms should be set out.[81]

If an estoppel by a writing is invoked, the original or a copy thereof should be annexed.[82]

If an estoppel by deed is invoked, see supra §§ 10–54, the form of pleading is to rely on the deed as an estoppel, and pray judgment that the party be estopped, or not admitted to deny the facts in the deed, without demanding judgment, si actio, etc.[83] In order to estop one by deed to land, usually it should be alleged and proved that there was a consideration paid the grantor therein for the land, and this must be done, independent of the recitals contained in the deed of the payment of the consideration.[84]

If an estoppel by record is relied on, see supra §§ 4–9, it must be alleged that the facts necessary to create an estoppel of this character appear by the record[85] and that the determination was coram judice.[86]

Waiver. The facts constituting waiver must be alleged.[87] However, if the facts constituting waiver are alleged, it is sufficient, although the waiver is not specifically designated as such.[88]

§ 157. Reply or Demurrer to Pleading Setting Up Estoppel

Where replications are permitted, plaintiff may in his reply set up matter in avoidance of defendant's plea of estoppel.

If defendant pleads facts sufficient to constitute an estoppel, plaintiff may, by replication or reply, set up matter in avoidance of the estoppel.[89] However, in jurisdictions where the practice requires no reply to a defense of this character, the defense will be taken to be denied by operation of law.[90]

Where an answer is good on its face as a plea of payment, but is insufficient as a plea of estoppel, a

Or.—Mahon v. Harney County Nat. Bank of Burns, 206 P. 224, 104 Or. 323.

Tex.—Davis v. Peck, Wright, Peck Inv. Co., Civ.App., 94 S.W.2d 1245, error dismissed—Hill v. Engel, Civ. App., 89 S.W.2d 219, 221, citing **Corpus Juris,** and error refused.

21 C.J. p 1249 note 61.

79. Cal.—Gause v. Pacific Gas & Electric Co., 212 P. 922, 60 Cal. App. 360.

Ga.—Fulenwider v. Fulenwider, 5 S. E.2d 20, 188 Ga. 856.

Minn.—Friend v. Friend, 196 N.W. 814, 158 Minn. 31.

Tex.—Nations v. Ulmer, Civ.App., 139 S.W.2d 352, error dismissed, judgment correct.

21 C.J. p 1249 note 62.

80. Ala.—Houston Nat. Bank of Dothan v. Eldridge, 84 So. 430, 17 Ala.App. 235.

Cal.—Frank v. Crescent Wharf & Warehouse Co., 195 P. 79, 50 Cal. App. 272.

Or.—Bly v. Travellers' Ins. Co., 20 P.2d 1089, 1092, 142 Or. 523, citing **Corpus Juris.**

21 C.J. p 1249 note 63.

81. N.C.—Porter v. Armstrong, 46 S.E. 997, 134 N.C. 447.

82. Ind.—Ashley v. Foreman, 85 Ind. 55.

83. N.Y.—Davis v. Tyler, 18 Johns. 490.

Recitals in bond

(1) A recital in a bond is a solemn admission by the obligor of the truth of the things recited; and hence, when in an action against him the bond is pleaded in hæc verba, the effect is the same as if there was a formal plea of estoppel. —State v. Williams, 77 Mo. 463.

(2) Where irrigation district alleged that bonds sued on were illegally issued, reply denying allegations and attaching copy of notice for special election at which bonds were voted reciting that purpose was to issue bonds for things which answer alleged bonds were issued for constituted good plea of estoppel by recitals in bonds.—Divide Creek Irr. Dist. v. Hollingsworth, C.C.A.Colo., 72 F.2d 859, 96 A.L.R. 937.

Estoppel by mortgage

Allegation that plaintiff was estopped by covenants of mortgage and by decree in foreclosure suit to assert any interest in property is sufficient to present estoppel by mortgage.—Grasswick v. Miller, 267 P. 299, 82 Mont. 364.

84. Tex.—Ford v. Warner, Civ.App., 176 S.W. 885—Haley v. Sabine Valley Timber & Lumber Co., Civ. App., 150 S.W. 596.

85. Vt.—Gray v. Pingry, 17 Vt. 419, 44 Am.D. 345.

Estoppel by pleadings

A replication to show estoppel by pleadings and judgment in another suit between the parties should set out the serial pleadings in such case so that issues therein may appear and their relation to the present case be determined by the court, and the mere setting out of defendant's rejoinder to plaintiff's special replications is insufficient, where the substance of antecedent pleadings was omitted.—Green v. McCord, 85 So. 752, 204 Ala. 364.

86. Mich.—Whittemore v. Stephens, 12 N.W. 858, 48 Mich. 573.

87. Tex.—Manes v. J. I. Case Threshing Mach. Co., Civ.App., 241 S.W. 757, reversed on other grounds, J. I. Case Threshing Mach. Co. v. Manes, Com.App., 254 S.W. 929.

Allegations held sufficient

Ind.—Menzenberger v. American State Bank, 198 N.E. 819, 101 Ind. App. 600.

88. Tex.—Federal Union Ins. Co. v. Hardin, Civ.App., 115 S.W.2d 1144—Manes v. J. I. Case Threshing Mach. Co., Civ.App., 241 S.W. 757, reversed on other grounds J. I. Case Threshing Mach. Co. v. Manes, Com.App., 254 S.W. 929.

W.Va.—Lawhead v. Lucas, 168 S.E. 803, 113 W.Va. 540.

Pleading waiver as "estoppel"

Pleading by defendant of an estoppel to declare sale void on facts showing acquiescence and waiver, without a showing that defendant was misled to his injury, required for "estoppel in pais," was sufficient under common use of word "estoppel" to show acquiescence and waiver estopping plaintiff.—Schramm & Schmieg Co. v. Shope, 205 N.W. 350, 200 Iowa 760.

89. Ala.—Southern Iron & Steel Co. v. Acton, 62 So. 402, 8 Ala.App. 502.

21 C.J. p 1250 note 72.

Necessity for pleading estoppel in avoidance of defense see supra § 153.

90. Iowa.—Gibson v. Iowa Legion of Honor, 159 N.W. 639, 178 Iowa 1156.

Necessity for, or allowance of, reply see the C.J.S. title Pleading § 185 et seq. also 49 C.J. p 322 note 94 et seq.

demurrer to the answer will not be sustained.[91] Where the evidence fails to support plaintiff's plea of estoppel, plaintiff may not take advantage of the failure of an intervener to assail the plea by motion or demurrer.[92]

§ 158. Effect of Pleading Unsuccessfully

It has been asserted that if the plea of estoppel fails judgment follows against defendant filing the plea.

Although it has been held that a plea of estoppel admits the cause of action, and that therefore, if the estoppel fails, judgment follows against defendant,[93] it would seem that a party who has been unsuccessful in pleading an estoppel is not afterward precluded from confessing and avoiding, or traversing the allegations of his adversary, for, as is explained supra § 155, the issue presented by the estoppel is not to determine the truth or validity of the particular facts pleaded, but the right and power of the party to insist on them as a defense.

§ 159. Issues, Proof, and Variance

Estoppel and waiver ordinarily must be proved by the party who asserts them.

General rules as to issues, proof, and variance ordinarily apply as to estoppel.[94]

As is explained in § 153 supra, with certain exceptions, estoppel ordinarily must be specially pleaded in order to be available, and when it is relied on as a defense, evidence thereof usually is inadmissible under the general issue or general denial. Not only must estoppel ordinarily be specially pleaded, but it must be proved by the party asserting it.[95] To sustain the issue the evidence must prove the very facts on which the alleged estoppel is based; the estoppel pleaded cannot be supported by evidence tending to show another and different estoppel,[96] or evidence of a different cause of action or defense.[97] It has been stated, however, that notwithstanding the general rule that an estoppel must ordinarily be pleaded, a contract by estoppel may perhaps be proved under a general allegation that the contract was actually made.[98]

Waiver. Waiver must ordinarily be specially pleaded, see supra § 153, and proved by the party asserting it.[99] The intention of the party to waive

91. Colo.—Tamar Building & Loan Ass'n v. Truax, 33 P.2d 978, 95 Colo. 77.

92. Iowa.—Schoonover v. Osborne, 187 N.W. 20, 193 Iowa 474, 27 A.L.R. 465.

93. Mich.—Whittemore v. Stephens, 12 N.W. 858, 48 Mich. 573.

94. **Limitation of issue to particular matters**

In an action to declare plaintiff owner of realty in fee simple, wherein title was taken in the name of plaintiff's deceased brother, and widow of deceased filed a cross petition for allowance for repairs and improvements on the property, the issue of estoppel is limited to the widow's claim for repairs and improvements.—Rainsbarger v. Rainsbarger, 224 N.W. 45, 208 Iowa 764.

95. U.S.—Western Casualty & Surety Co. v. Beverforden, C.C.A.Mo., 93 F.2d 166, reversing, D.C., 17 F. Supp. 928.
Cal.—Peerless Motor Co. v. Sterling Finance Corporation, 34 P.2d 738, 139 Cal.App. 621.
Colo.—Commercial Inv. Co. v. Newhagen, 266 P. 713, 83 Colo. 533.
Ga.—Fulenwider v. Fulenwider, 5 S.E.2d 20, 188 Ga. 856—Hartsfield Loan & Savings Co. v. Garner, 191 S.E. 119, 184 Ga. 283.
Mo.—Richards v. Earls, 133 S.W.2d 381, 345 Mo. 260—Grafeman Dairy Co. v. Northwestern Bank, 288 S.W. 359, 315 Mo. 849—Horigan Realty Co. v. First Nat. Bank, 273 S.W. 772, 221 Mo.App. 329.
S.D.—Smith v. Poppen, 230 N.W. 229, 57 S.D. 25.
Tex.—Davis v. Peck, Wright, Peck Inv. Co., Civ.App., 94 S.W.2d 1245, error dismissed—Hill v. Engel, Civ.App., 89 S.W.2d 219, error refused—Reo Motor Car Co. of Texas v. Barnes, Civ.App., 9 S.W.2d 374—Chapman v. Clark, Civ.App., 263 S.W. 161, affirmed, Com.App., 276 S.W. 197.
Burden of proof see infra § 160.

Must be found or given in evidence

Before any of the consequences of an estoppel can be claimed the facts constituting it must be found or given in evidence, and it is error for the court to assume in the progress of the trial, for the purpose of deciding on the admissibility of evidence, that an estoppel will be found by the jury.—Lackman v. Wood, 25 Cal. 147.

Insolvency of third person

To estop mortgagee from selling lot in satisfaction of claimed balance of indebtedness, mortgagor's grantee was not required to show that mortgagor, who conveyed lot by full warranty deed, was insolvent when grantee first learned that mortgagee was claiming sum in excess of amount which grantee paid on inquiry, or at time of trial.—McLendon v. Federal Mortg. Co., Tex.Civ.App., 60 S.W.2d 324, error refused.

Title by estoppel

To establish title by estoppel, the evidence must show all necessary elements of estoppel.—Roberts v. Bookout, 139 So. 175, 162 Miss. 676.

Evidence admissible under plea

(1) Under an allegation that plaintiff had full knowledge of a certain contract, and was thereby estopped to assert a claim in opposition thereto, defendant may prove either direct notice to plaintiff or facts from which knowledge may be inferred.—DeLay v. Carney Bros., 69 N.W. 1053, 100 Iowa 687.

(2) Where widow was appointed executrix under her husband's will and her final report recited that by the will she was given use of property of the estate, and that she held such property as widow under terms of the will, testimony showing acceptance of provisions of the will was admissible under plea of estoppel.—Anderson v. Gifft, Iowa, 294 N.W. 721.

96. Mont.—O'Meara v. McDermott, 104 P. 1049, 40 Mont. 38.
21 C.J. p 1250 note 77.

97. Tex.—Marks v. Jones, Civ.App., 154 S.W. 618.

98. Iowa.—Stacey Fruit Co. v. Sketchley, 183 N.W. 452, 192 Iowa 186.
21 C.J. p 1250 note 80.

99. U.S.—Western Casualty & Surety Co. v. Beverforden, C.C.A.Mo., 93 F.2d 166, reversing, D.C., 17 F. Supp. 928.
N.H.—Sargent v. Canterbury Mut. Fire Ins. Co., 136 A. 124, 82 N.H. 489.
Tex.—Smith v. Security Inv. Co., Civ.App., 16 S.W.2d 926—Manes v.

a right or privilege must be proved,[1] and, in addition, the evidence must show knowledge, at the time the waiver is claimed to have occurred, of all of the material facts that would probably have influenced the conduct of the party.[2]

Where so provided by statute, a variance between the pleadings and proof is deemed material only when it misleads the adverse party to his prejudice in maintaining his action or defense on the merits.[3]

B. EVIDENCE

§ 160. Presumptions and Burden of Proof

The burden of proving an estoppel or waiver is on the party asserting it.

Estoppel ordinarily is regarded as affirmative matter,[4] and under the rule that he has the burden of proof who has the affirmative of the issue, a party who alleges, see supra §§ 153, 156, and relies on an estoppel has the burden to establish all of the facts necessary to constitute it,[5] whether the estoppel is

J. I. Case Threshing Mach. Co., Civ.App., 241 S.W. 757, reversed on other grounds J. I. Case Threshing Mach. Co. v. Manes, Com.App., 254 S.W. 929.

Burden of proof see infra § 160.

1. U.S.—Masden v. Travelers' Ins. Co., C.C.A.Mo., 52 F.2d 75, 79 A.L.R. 469.

Intention as element of waiver see supra § 69.

2. Mont.—Enterprise Sheet Metal Works v. Schendel, 173 P. 1059, 55 Mont. 42.

67 C.J. p 311 note 73.

Knowledge as element of waiver see supra § 70.

3. U.S.—Hunter Milling Co. v. Koch, C.C.A.Kan., 82 F.2d 735.

Variance held material

Where plaintiff's pleadings set up written correspondence from defendant as sustaining waiver contended for by plaintiff, admission of oral evidence of waiver is reversible error, since it constitutes a variance from the pleading, thus misleading defendant to his prejudice in maintaining defense.—Hunter Milling Co. v. Koch, C.C.A.Kan., 82 F.2d 735.

4. U.S.—Hull v. Commissioner of Internal Revenue, C.C.A., 87 F.2d 260—Helvering v. Brooklyn City R. Co., C.C.A., 72 F.2d 274.

Hawaii.—Hata v. Dean Witter, 32 Hawaii 760.

La.—Parker v. Ohio Oil Co., 186 So. 604, 191 La. 896.

Mo.—Creek v. Gideon & N. I. R. Co., 240 S.W. 128, 293 Mo. 541.

N.C.—Aldridge Motors v. Alexander, 9 S.E.2d 469, 217 N.C. 750.

Tex.—Stanolind Oil & Gas Co. v. Midas Oil Co., Civ.App., 143 S.W.2d 138, error refused.

5. U.S.—Coen v. American Surety Co. of New York, C.C.A.Mo., 120 F.2d 393—U. S. v. Dickinson, C.C.A.Mass., 95 F.2d 65, affirming, D.C., Cushing v. U. S., 18 F.Supp. 83—Pulitzer Pub. Co. v. Current News Features, C.C.A.Mo., 94 F.2d 682, certiorari denied 58 S.Ct. 1040, 304 U.S. 570, 82 L.Ed. 1535—Van Antwerp v. U. S., C.C.A.Cal., 92 F.2d 871, reversing, D.C., 17 F. Supp. 229—Hull v. Commissioner of Internal Revenue, C.C.A., 87 F. 2d 260—Commissioner of Internal Revenue v. Union Pac. R. Co., C.C.A., 86 F.2d 637—First Nat. Bank v. Mayor and City Council of Baltimore, D.C.Md., 27 F.Supp. 444, affirmed, C.C.A., 108 F.2d 600—Grand Central Public Market v. U. S., D.C.Cal., 22 F.Supp. 119, appeal dismissed, C.C.A., U. S. v. Grand Central Public Market, 98 F.2d 1023.

Cal.—General Motors Acceptance Corporation v. Gandy, 253 P. 137, 200 Cal. 284—Pacific Finance Corporation v. Hendley, 7 P.2d 391, 119 Cal.App. 697—California Standard Finance Corporation v. Riverside Finance Co., 295 P. 555, 111 Cal.App. 151—Hammond Lumber Co. v. Weeks, 287 P. 573, 105 Cal. App. 315—Pacific Finance Corporation v. Hendley, 284 P. 736, 103 Cal.App. 335, hearing denied and modified on other grounds, Sup., 285 P. 1048.

Fla.—Arundel Debenture Corporation v. Le Blond, 190 So. 765, 139 Fla. 668—Laganke v. Sutter, 187 So. 586, 137 Fla. 71—First Nat. Bank v. Savarese, 134 So. 501, 101 Fla. 480—Connelly v. Special Road & Bridge Dist. No. 5, 126 So. 794, 99 Fla. 456, 71 A.L.R. 923.

Ga.—Jackson v. Lipham, 123 S.E. 887, 158 Ga. 557—Jones v. Courts, App., 12 S.E.2d 446.

Hawaii.—Hata v. Dean Witter, 32 Hawaii 760—Daniels v. Bishop Trust Co., 32 Hawaii 167.

Ill.—Svalina v. Saravana, 173 N.E. 281, 341 Ill. 236, 87 A.L.R. 821—Behrendt v. Acocella, 150 N.E. 913, 320 Ill. 308.

Iowa.—Macheak v. Adamsen, 239 N. W. 574, 214 Iowa 446—Loots v. Clancey, 228 N.W. 77, 79, 209 Iowa 442, citing **Corpus Juris.**

Ky.—Shaw v. Farmers' Bank & Trust Co., 31 S.W.2d 893, 235 Ky. 502—Planters'-Farmers' Warehouse Co. of Louisville v. Citizens' Bank of Falmouth, 6 S.W.2d 720, 224 Ky. 466.

La.—Parker v. Ohio Oil Co., 186 So. 604, 191 La. 896—Peyrefitte v. Union Homestead Ass'n, App., 185 So. 693—Burglass v. Wright, App., 159 So. 176, 178, quoting **Corpus Juris**—Blunson v. Knighton, App., 140 So. 302.

Mo.—Rhodus v. Geatley, 147 S.W.2d 631—Globe Securities Co. v. Gardner Motor Co., 85 S.W.2d 561, 337 Mo. 177—Grafeman Dairy Co. v. Northwestern Bank, 288 S.W. 359, 315 Mo. 849—Briscoe v. Merchants & Miners Bank, App., 102 S.W.2d 751—State ex rel. Richards v. Fidelity & Casualty Co. of New York, App., 82 S.W.2d 123—Holmes v. Doe Run Lead Co., App., 223 S. W. 772.

Neb.—Wright v. Loup River Public Power Dist., 277 N.W. 53, 133 Neb. 715—State v. Cheyenne County, 241 N.W. 747, 748, 123 Neb. 1, citing **Corpus Juris.**

N.H.—Muslow v. Charles B. Varney Co., 111 A. 629, 79 N.H. 489.

Ohio.—Martin v. Steinke, 154 N.E. 47, 22 Ohio App. 146—Sutton v. Stacey Mfg. Co., 17 Ohio N.P., N. S., 497.

Pa.—Nick v. Craig, 151 A. 573, 301 Pa. 50.

Tex.—Wentworth v. Collins, Civ. App., 115 S.W.2d 442, error dismissed—Simms v. Mitchell, Civ. App., 44 S.W.2d 1056, 1059, citing **Corpus Juris,** and reversed on other grounds Mitchell v. Simms, Com.App., 63 S.W.2d 371—Calloway v. Bookout, Civ.App., 37 S.W. 2d 243, reversed on other grounds Sanger v. Calloway, Com.App., 61 S.W.2d 988—Ford Motor Co. v Maddox Motor Co., Civ.App., 3 S. W.2d 911, affirmed Maddox Motor Co. v. Ford Motor Co., Com.App., 23 S.W.2d 333—Cattle Raisers' Loan Co. v. Sutton, Civ.App., 271 S.W. 233.

Va.—Heath v. Valentine, 15 S.E.2d 98—Eppes v. Eppes, 195 S.E. 694, 169 Va. 778.

Wash.—Inland Finance Co. v. Inland Motor Car Co., 216 P. 14, 125 Wash. 301.

W.Va.—Brotherhood Inv. Co. v. McArthur, 158 S.E. 175, 176, 110 W. Va. 326, citing **Corpus Juris.**

asserted as a defense,[6] as an element of the cause of action,[7] or in avoidance of a defense,[8] subject to the proper presumptions which may be indulged under the facts of the particular case.[9]

Where a party relies on an estoppel in pais, see supra §§ 59–106, the burden is on such party to prove the essential elements of such an estoppel.[10] It is necessary to show that the party against whom the estoppel is claimed has made an admission or done an act with the intention of influencing the conduct of another, which he had reason to believe as a man of ordinary prudence would influence his conduct, and which is inconsistent with the evidence he proposes to give or the title he proposes to set up;[11] that the party pleading the estoppel was misled by the representations or conduct of defendant;[12] and that he acted in reliance thereon in good

Wis.—In re Smith's Estate, 277 N.W. 141, 226 Wis. 556.
21 C.J. p 1250 note 82.
Weight and sufficiency of evidence see infra § 162.

Estoppel by negligence

Party, relying on negligence as basis of estoppel, see supra §§ 102–106, must show that such negligence was proximate cause of deceit.—Gajanich v. Gregory, 3 P.2d 389, 116 Cal.App. 622—Stoner v. Security Trust Co., 190 P. 500, 47 Cal.App. 216.

Avoiding effect of estoppel

(1) Assignees of mortgage, who were silent while mortgagor conveyed to obtain release, have burden to avoid effect of estoppel arising therefrom—Iowa State Bank of Hull v. Rons, 212 N.W. 362, 203 Iowa 51.

(2) Burden was on payee to show that maker of note obtained possession from payee's secretary contrary to instructions, and not because of payee's intentional or negligent act.—Johnson v. Sugg, Tex.Com.App., 291 S.W. 857, reversing Sugg v. Johnson, Civ.App., 284 S.W. 705.

6. U.S.—Crossett Lumber Co. v. U. S., C.C.A.Ark., 87 F.2d 930, 109 A.L.R. 1348—Brewerton v. U. S., Ct. Cl., 9 F.Supp. 503.
Ala.—Walls v. Downing, 89 So. 503, 206 Ala. 201.
Ga.—Seaboard Air-Line Ry. Co. v. Holliday, 140 S.E. 507, 165 Ga. 200—F. E. Nellis & Co. v. Green & Stallworth, 137 S.E. 843, 36 Ga.App. 684.
Iowa.—Barber Asphalt Paving Co. v. City of Des Moines, 183 N.W. 456, 191 Iowa 762.
Miss.—Canal-Commercial Trust & Savings Bank v. Brewer, 108 So. 424, 143 Miss. 146, 47 A.L.R. 45, motion dismissed 109 So. 8, 143 Miss. 184, and error dismissed 47 S.Ct. 96, 273 U.S. 638, 71 L.Ed. 816.
Mo.—Rhodus v. Geatley, 147 S.W.2d 631—Creek v. Gideon & N. I. R. Co., 240 S.W. 128, 293 Mo. 541.
Nev.—Farmers & Merchants Nat. Bank of Eureka v. Eureka Land & Stock Co., 49 P.2d 354, 56 Nev. 218.
N.M.—Mosley v. Magnolia Petroleum Co., 114 P.2d 740.
N.Y.—St. Vincent's Orphan Asylum v. Madison-Warren Corporation, 233 N.Y.S. 364, 225 App.Div. 379.
N.C.—Aldridge Motors v. Alexander, 9 S.E.2d 469, 217 N.C. 750.
Okl.—Newman v. Roach, 282 P. 287, 140 Okl. 210.
Tex.—Stanolind Oil & Gas Co. v. Midas Oil Co., Civ.App., 143 S.W.2d 138, error refused—Carrasco v. De Leon, Civ.App., 235 S.W. 272—Davies v. Rutland, Civ.App., 219 S.W. 1114, denying motion 219 S.W. 235.
Wash.—Trout v. Shelikoff Packing Co., 38 P.2d 348, 179 Wash. 414.

7. Wash.—Worthy Creek Shingle Co. v. Anderson, 199 P. 756, 116 Wash. 472.

8. Iowa.—Citizens' State Bank of Earlham v. Martens, 215 N.W. 754, 204 Iowa 1378.
Mo.—Linville v. Ripley, 146 S.W.2d 581—Park v. Fidelity & Casualty Co. of New York, App., 279 S.W. 246, certiorari quashed State ex rel. Park v. Daues, 289 S.W. 957, 316 Mo. 346.

9. La.—Burglass v. Wright, App., 159 So. 176.
21 C.J. p 1251 note 84.

Presumption of honesty

Where act relied on as constituting estoppel is equally capable of honest or dishonest interpretation, court must consider that party acted honestly.—Smith v. Vara, 241 N.Y.S. 202, 136 Misc. 500.

Execution levy as assertion of defendant's ownership

The law will not presume that plaintiff in fieri facias, in seeking to enforce his judgment by the mere fact of causing whatever title or pretense of title defendant in fieri facias had to be sold, has deluded or defrauded defendant into the belief that he has an estate in the property which would allow his homestead exemption to operate on it even though he failed and refused to exercise his right to redeem the legal title.—Garmon v. Davis, 12 S.E.2d 209, 63 Ga.App. 815.

Knowledge of extent of powers of governmental agency

One injured by defective condition of a bridge, previously maintained, by county road directors, in another state, is presumed to have known that the directors exceeded their powers in appropriating money to maintain such bridge, precluding estoppel against them.—Valentine v. Road Directors of Allegany County, 126 A. 147, 146 Md. 199.

Mortgage as affecting price of property

As respects estoppel, a purchaser of mortgaged land from bankruptcy trustee of owner of land would be presumed to have paid a higher price for the land if the purchaser and the trustee had not taken into consideration the mortgage, where purchaser acknowledged that land was subject to mortgage—Meridian Fertilizer Factory v. Collier, 192 So. 358, 193 La. 815.

Reliance on abstract of title

It must be presumed that lender, asking nothing more than abstract of title, furnished with application for loan secured by trust deeds, relied on such showing of borrower's title.—Crismond v. Kendrick, 29 S.W.2d 1100, 325 Mo. 619.

Reliance on insurer's date of expiration of extended insurance

Where life insurance company indorsed on lapsed policy statement that insurance was continued in force as paid-up insurance for stated length of time, but mistake was made as to length of time of extension, there was no presumption that insured or beneficiary relied thereon to their injury, which, in absence of other evidence, would show acts or failure to act in reliance on such indorsement, estopping company from setting up such mistake in action on policy.—Kimball v. New York Life Ins. Co., 126 A. 553, 98 Vt. 192.

10. U.S.—Coen v. American Surety Co. of New York, C.C.A.Mo., 120 F.2d 393.

11. U.S.—Current News Features v. Pulitzer Pub. Co., C.C.A.Mo., 81 F.2d 288.
Ala.—Colvin v. Payne, 118 So. 578, 218 Ala. 341.
Cal.—Calidino Hotel Co. of San Bernardino v. Bank of America Nat. Trust & Savings Ass'n, 87 P.2d 923, 31 Cal.App.2d 295.
Va.—Meadows v. Meadows, 129 S.E. 354, 143 Va. 98.
21 C.J. p 1251 note 86.

12. U.S.—Current News Features v. Pulitzer Pub. Co., C.C.A.Mo., 81 F.2d 288.
Iowa.—Federal Land Bank of Omaha, Neb., v. Sherburne, 239 N.W.

faith and in ignorance of the real facts,[13] and that in consequence thereof he will be prejudiced unless the estoppel is allowed.[14]

Waiver. In the absence of evidence clearly tending to establish waiver, it will not be presumed or implied contrary to the intention of parties whose rights would be injuriously affected.[15] A presumption of waiver cannot rest on a presumption that the right alleged to have been waived was known.[16]

The burden of proving waiver is on the party alleging and relying on it.[17]

§ 161. Admissibility

General rules governing the admissibility of evidence ordinarily apply to the admissibility of evidence to prove or disprove an estoppel.

On an issue of estoppel any evidence is admissible which tends to prove or rebut any of the facts essential to the establishment of the estoppel alleged.[18]

On the other hand, where the evidence offered contravenes the general rules of competency or rele-

778, 213 Iowa 612, followed in 239 N.W. 784, 213 Iowa 612.
Ky.—Patton v. Catlettsburg Nat. Bank, 255 S.W. 690, 200 Ky. 775.
La.—Fountain v. Kirby Lumber Corporation, App., 199 So. 603.
Ohio—Sutton v. Stacey Mfg. Co., 17 Ohio N.P., N.S., 497.
Tex.—Bell v. Moody, Civ.App., 147 S.W.2d 852, error dismissed, judgment correct.
W.Va.—Brotherhood Inv. Co. v. McArthur, 158 S.E. 175, 110 W.Va. 326.
21 C.J. p 1251 note 87.

13. D.C.—Crossett Lumber Co. v. U. S., C.C.A.Ark., 87 F.2d 930, 109 A.L.R. 1348.
D.C.—Washington Loan & Trust Co. v. Convention of Protestant Episcopal Church of the Diocese of Washington, 293 F. 833, 54 App.D.C. 14.
Ga.—Carmichael v. Texas Co., 184 S.E. 397, 52 Ga.App. 751.
Iowa—Macheak v. Adamsen, 239 N.W. 574, 214 Iowa 446.
La.—Lafourche Ice & Shrimp Co. v. Gilbeau, App., 185 So. 310.
Nev.—In re MacDonnell's Estate, 57 P.2d 695, 56 Nev. 504, affirming in part 53 P.2d 625, 56 Nev. 346, rehearing granted 55 P.2d 834, 56 Nev. 504.
Or.—Myers v. Olds, 252 P. 842, 121 Or. 249.
Tex.—Wentworth v. Collins, Civ.App., 115 S.W.2d 442, error dismissed.
21 C.J. p 1251 note 88.

14. U.S.—Helvering v. Brooklyn City R. Co., C.C.A., 72 F.2d 274.
Ala.—Colvin v. Payne, 118 So. 578, 218 Ala. 341.
Cal.—Forbes v. City of Los Angeles, 282 P. 528, 101 Cal.App. 781.
Colo.—Rossi v. Colorado Pulp & Paper Co., 299 P. 19, 88 Colo. 461, followed in Myers v. Beck, 299 P. 50, 88 Colo. 457, and Myers v. Colorado Pulp & Paper Co., 299 P. 50, 88 Colo. 459.
Conn.—Du Cotey v. Wilkenda Land Co., 123 A. 265, 100 Conn. 255.
D.C.—Thompson v. Park Sav. Bank, 96 F.2d 544, 68 App.D.C. 272, certiorari denied 59 S.Ct. 82, 305 U.S. 606, 83 L.Ed. 385, and Cox v. Thompson, 59 S.Ct. 66, 305 U.S. 606, 83 L.Ed. 385.
Ky.—Patton v. Catlettsburg Nat. Bank, 255 S.W. 690, 200 Ky. 775.
La.—Fountain v. Kirby Lumber Corporation, App., 199 So. 603—Lafourche Ice & Shrimp Co. v. Gilbeau, App., 185 So. 310.
N.Y.—Harvey v. J. P. Morgan & Co., 2 N.Y.S.2d 520, 166 Misc. 455.
Tex.—Wentworth v. Collins, Civ.App., 115 S.W.2d 442, error dismissed.
Wash.—Auve v. Wenzlaff, 298 P. 686, 162 Wash. 368.
W.Va.—Brotherhood Inv. Co. v. McArthur, 158 S.E. 175, 110 W.Va. 326.
21 C.J. p 1251 note 89.

15. U.S.—In re Zimmerman, D.C.Pa., 35 F.Supp. 13.
Idaho.—Neitzel v. Lawrence, 231 P. 423, 40 Idaho 26.
Mo.—Concrete Engineering Co. v. Grande Bldg. Co., 86 S.W.2d 595, 230 Mo.App. 595.
Tenn.—Koontz v. Fleming, 65 S.W. 2d 821, 17 Tenn.App. 1.

16. N.C.—Alexander v. North Carolina Savings Bank & Trust Co., 71 S.E. 69, 155 N.C. 124.
67 C.J. p 310 note 72.
Knowledge of facts as essential to waiver see supra § 70.

17. U.S.—Anderson v. Missouri State Life Ins. Co., C.C.A.Ky., 69 F.2d 794—Columbia Axle Co. v. American Automobile Ins. Co., C.C.A.Ohio, 63 F.2d 206—Masden v. Travelers' Ins. Co., C.C.A.Mo., 52 F.2d 75, 79 A.L.R. 469—Reynolds v. Detroit Fidelity & Surety Co., C.C.A.Ohio, 19 F.2d 110.
Ill.—Jacksonville Hotel Bldg. Corporation v. Dunlap Hotel Co., 264 Ill.App. 279, modified on other grounds 183 N.E. 397, 350 Ill. 451.
Mo.—Andrews v. Washington Nat. Ins. Co. of Illinois, App., 93 S.W. 2d 1045—Park v. Fidelity & Casualty Co. of New York, App., 279 S.W. 246, certiorari quashed State ex rel. Park v. Daues, 289 S.W. 957, 316 Mo. 346.
Pa.—Dougherty v. Thomas, 169 A. 219, 313 Pa. 287.
Tenn.—Koontz v. Fleming, 65 S.W.2d 821, 17 Tenn.App. 1.
Tex.—Cattle Raisers' Loan Co. v. Sutton, Civ.App., 271 S.W. 233.
67 C.J. p 309 note 57.

Knowledge

The burden of proving knowledge on the part of the party charged with the waiver is on the party relying on it.
U.S.—Garvy v. Blatchford Calf Meal Co., Ill., 119 F.2d 973.
Ill.—McMahel v. Smith, 277 Ill.App. 29.
Me.—Denison v. Dawes, 117 A. 314, 121 Me. 402.
Va.—American Nat. Bank of Portsmouth v. Ames, 194 S.E. 784, 169 Va. 711, certiorari denied 58 S.Ct. 1046, 304 U.S. 577, 82 L.Ed. 1540—Potts v. Mathieson Alkali Works, 181 S.E. 521, 165 Va. 196.
67 C.J. p 309 note 60.

18. Colo.—Moul v. Thompson, 11 P. 2d 1004, 91 Colo. 323.
Ga.—Sikes v. Seckinger, 152 S.E. 65, 170 Ga. 1—Wilson v. Wilson, 143 S.E. 396, 166 Ga. 420.
Idaho.—Kennison v. McMillan Sheep Co., 270 P. 1062, 46 Idaho 754.
La.—Succession of Ferrill, 117 So. 562, 166 La. 479—Burglass v. Wright, App., 159 So. 176.
Mass.—North Shore Blue Book v. Burlen, 152 N.E. 710, 256 Mass. 431.
Mich.—Snider v. Schaffer, 267 N.W. 791, 276 Mich. 92—Goldberg v. Cities Service Oil Co., 266 N.W. 321, 275 Mich. 199.
N.H.—Manning v. Leavitt Co., 5 A. 2d 667, 90 N.H. 167, 122 A.L.R. 249.
Okl.—Colvert Ice Cream & Dairy Products Co. v. Citrus Products Co., 65 P.2d 455, 179 Okl. 285.
Pa.—Fried v. Fisher, 196 A. 39, 328 Pa. 497, 115 A.L.R. 147.
R.I.—Murphy v. Duffy, 124 A. 103, 46 R.I. 210.
S.C.—Stone v. School Dist. No. 17 of Greenville County, 159 S.E. 536, 161 S.C. 249.
Tenn.—Fidelity Trust Co. v. Norton, 10 Tenn.App. 132.
Tex.—Johnson v. Tunstall, Com.App., 25 S.W.2d 828, reversing Tunstall v. Johnson, Civ.App., 13 S.W.2d

vancy, it is inadmissible.[19] It has been stated that rules of evidence are lenient in support of the plea of estoppel.[20]

§ 162. Weight and Sufficiency

a. Estoppel

b. Waiver

a. Estoppel

The essential elements of an estoppel must be clearly and satisfactorily proved.

Every fact essential to an estoppel must be clearly and satisfactorily proved[21] by a preponderance of

240—Bankers Life & Loan Ass'n of Dallas v. Ashford, Civ.App., 139 S.W.2d 858—Astin v. Martin, Civ.App., 289 S.W. 442, reversed on other grounds Martin v. Astin, Com.App., 295 S.W. 584.

21 C.J. p 1251 note 90.

19. Ga.—McCrimmon v. National Bank of Savannah, 105 S.E. 44, 25 Ga.App. 825.

Tex.—Kelly v. Kelly, Civ.App., 291 S.W. 631, reversed on other grounds, Com.App., 294 S.W. 518.

Vt.—Kimball v. New York Life Ins. Co., 116 A. 119, 96 Vt. 19.

21 C.J. p 1252 note 92.

Evidence held immaterial

Whether automobile sales company in possession of car and certificate of registration indorsed by owner at time of pledging it obtained or had possession thereof on prior dates is immaterial on issue of owner's estoppel to dispute its title and power of disposition.—Rapp v. Fred W. Hauger Motors Co., 246 P. 1067, 77 Cal.App. 417.

20. La.—Burglass v. Wright, App., 159 So. 176.

21. Cal.—Lorenz v. Rousseau, 258 P. 690, 85 Cal.App. 1.

Conn.—Basak v. Damutz, 135 A. 453, 105 Conn. 378.

Del.—In re Trexler Co. of America, 132 A. 144, 147, 15 Del.Ch. 76, quoting **Corpus Juris**—Universal Products Co. v. Emerson, 179 A. 387, 6 W.W.Harr. 553, 100 A.L.R. 956.

Fla.—Oates v. New York Life Ins. Co., 178 So. 570—Horton v. Smith-Richardson Inv. Co., 87 So. 905, 907, 81 Fla. 255, citing **Corpus Juris.**

Iowa.—McIntosh v. McIntosh, 234 N.W. 234, 211 Iowa 750—Cheshire v. McCoy & Henry, 218 N.W. 329, 205 Iowa 474—Iowa State Bank of Hull v. Rons, 212 N.W. 362, 203 Iowa 51.

Ky.—Nussbaum v. General Accident, Fire & Life Assur. Corporation, Limited, of Perth, Scotland, 38 S.W.2d 1, 238 Ky. 348.

La.—Whittington v. Town of Glenmara, 1 La.App. 568.

Me.—Augusta Trust Co. v. Augusta, H. & G. R. Co., 187 A. 1, 134 Me. 314—Hooper v. Bail, 179 A. 404, 133 Me. 412.

Mich.—Payne v. Payne, 217 N.W. 756, 241 Mich. 547.

Mo.—State ex rel. Richards v. Fidelity & Casualty Co. of New York, 82 S.W.2d 123—National Match Co v. Empire Storage & Ice Co., 58 S.W.2d 797, 227 Mo.App. 1115, certiorari denied Empire Storage & Ice Co. v. National Match Co., 54 S.Ct. 88, 290 U.S. 668, 78 L.Ed. 577.

N.Y.—Hartford Accident & Indemnity Co. v. Oles, 274 N.Y.S. 349, 152 Misc. 876.

N.D.—Security State Bank of Flasher v. Wernick, 199 N.W. 948, 51 N.D. 219.

Or.—Craswell v. Biggs, 86 P.2d 71, 160 Or. 547.

Pa.—See Roscoe v. Evans Morrow Motor Co., 86 Pittsb.Leg.J. 323.

Tex.—Kelly v. Kelly, Civ.App., 291 S.W. 631, reversed on other grounds, Com.App., 294 S.W. 518.

W.Va.—Campbell v. Lynch, 106 S.E. 869, 88 W.Va. 209.

21 C.J. p 1252 note 93.

Odiousness of estoppels see supra § 3.

Other expressions

(1) By clear and competent evidence.—Holbrook Irr. Dist. v. Arkansas Valley Sugar Beet & Irrigated Land Co., D.C.Colo., 42 F.2d 541.

(2) By clear and convincing evidence.

Ky.—Brake v. Mother of God's Cemetery, 65 S.W.2d 739, 251 Ky. 667—Walters v. Bentley, 32 S.W.2d 747, 236 Ky. 136.

Mo.—Noell v. Remmert, 30 S.W.2d 1009, 326 Mo. 148.

(3) By clear, convincing, and satisfactory evidence.

Iowa.—Bates v. Kleve, 280 N.W. 501, 225 Iowa 255—Stookesberry v. Burgher, 262 N.W. 820, 220 Iowa 916.

Wis.—Eckstein v. Northwestern Mut. Life Ins. Co., 275 N.W. 916, 226 Wis. 60.

(4) By clear, precise, and unequivocal evidence.

Ky.—Planters'-Farmers' Warehouse Co. of Louisville v. Citizens' Bank of Falmouth, 6 S.W.2d 720, 224 Ky. 466.

Pa.—Peoples Nat. Bank of Ellwood City v. Bartel, 193 A. 59, 128 Pa.Super. 128—General Electric Co. v. N. K. Ovalle, Inc., 45 Dauph. Co. 376.

W.Va.—Brotherhood Inv. Co. v. McArthur, 158 S.E. 175, 110 W.Va. 326.

(5) By convincing evidence.

Colo.—Employers Mut. Ins. Co. v. Board of Com'rs of Pitkin County, 78 P.2d 380, 102 Colo. 177.

N.Y.—St. Vincent's Orphan Asylum v. Madison-Warren Corporation, 233 N.Y.S. 364, 225 App.Div. 379.

(6) By strict proof.

Iowa.—City Bank of Mitchellville v. Alcorn, 176 N.W. 628, 188 Iowa 592.

La.—Lawrence v. Sunrise Petroleum Co., App., 163 So. 742—Burglass v. Wright, App., 159 So. 176.

(7) Evidence of an equitable estoppel by matter in pais must be positive, unequivocal, and inconsistent with the contract.—Stevens v. Turlington, 119 S.E. 210, 186 N.C. 191, 32 A.L.R. 870.

Evidence to be weighed with care

Jury, lower court, and appellate court should weigh with great care evidence offered to support plea of equitable estoppel, and if testimony comes from suspicious source, verdict in favor of estoppel should be set aside.—Lohmann v. Hooper, Tex. Civ.App., 87 S.W.2d 803.

Declarations as to ownership of property

Declarations of possessor of property that he is owner, made out of real owner's presence, have no probative force on issue of estoppel.—Yonkman v. Harvey, 271 P. 839, 133 Okl. 252.

Documentary evidence of inconsistent claims

Documentary evidence of previous inconsistent claims made by plaintiff concerning claim sued on, although admissible, is not conclusive and is insufficient, unless it is shown that claims are clearly inconsistent, that prior claim was successfully maintained in former action involving same parties and questions in which a final judgment was rendered, that defendant has been misled, and that it would be unjust to permit plaintiff to change position.—Colvert Ice Cream & Dairy Products Co. v. Citrus Products Co., 65 P.2d 455, 179 Okl. 285.

Prima facie case

In action on a guaranty by wholesaler against retailer's father, a prima facie case of estoppel by silence was made out by evidence that retailer proffered a guaranty purportedly signed by his father as a basis for credit, that wholesaler received the guaranty and notified the father and advised him that credit

the evidence.[22] Where the evidence is evenly balanced, the burden of proof, see supra § 160, is not sustained.[23]

Estoppels cannot be based on mere conjecture;[24] and facts alleged to constitute them will not be taken by argument, inference, or intendment.[25] However, reliance on the representations of another need not be proved by direct evidence, but may be inferred from circumstances.[26] The intention that another should act on a representation or concealment may also be inferred from circumstances.[27]

In various cases, the evidence has been held to be sufficient[28] or insufficient,[29] and in various cases the

would be extended on it, and the father did not denounce his signature on the guaranty as forged, but remained silent, and credit was extended—Ware Rubber Co. v. Sewell, 91 P.2d 667, 185 Okl. 283.

22. Mo.—Briscoe v. Merchants & Miners Bank, App., 102 S.W.2d 751—State ex rel. Richards v. Fidelity & Casualty Co. of New York, App., 82 S.W.2d 123.
Or.—McKinney v. Hindman, 169 P. 93, 86 Or. 545.

23. U.S.—Mackey Wall Plaster Co. v. U. S. Gypsum Co., D.C.Mont., 244 F. 275, affirmed U. S. Gypsum Co. v. Mackey Wall Plaster Co., 252 F. 397, 164 C.C.A. 321.

24. Del.—In re Trexler Co. of America, 132 A. 144, 15 Del.Ch. 76.
N.Y.—White v. Continental Nat. Bank, 64 N.Y. 316, 21 Am.R. 612.
Wis.—Crane v. Esmond, 253 N.W. 780, 783, 214 Wis. 571, citing **Corpus Juris.**

25. Cal.—General Motors Acceptance Corporation v. Gandy, 253 P. 137, 200 Cal. 284—Hammond Lumber Co. v. Weeks, 287 P. 573, 105 Cal. App. 315.
Del.—In re Trexler Co. of America, 132 A. 144, 15 Del.Ch. 76.
Fla.—Enstrom v. Dunning, 186 So. 806, 136 Fla. 253.
Me.—Augusta Trust Co. v. Augusta, H. & G. R. Co., 187 A. 1, 134 Me. 314.
N.D.—Security State Bank of Flasher v. Wernick, 199 N.W. 948, 51 N.D. 219.
Pa.—Peoples Nat. Bank of Ellwood City v. Bartel, 193 A. 59, 128 Pa. Super. 128.
Wis.—Eckstein v. Northwestern Mut. Life Ins. Co., 275 N.W. 916, 226 Wis. 60.
21 C.J. p 1253 note 95.

26. U.S.—Mahoning Inv. Co. v. U. S., Ct.Cl., 3 F.Supp. 622, 630, certiorari denied 54 S.Ct. 526, 291 U.S. 675, 78 L.Ed. 1064 and Rochester & Pittsburgh Coal & Iron Co. v. U.S., 54 S.Ct. 527, 291 U.S. 675, 78 L.Ed. 1064.
Mich.—Hetchler v. American Life Ins. Co., 254 N.W. 221, 266 Mich. 608.
Mo.—Fulton v. Kansas City Life Ins. Co., App., 148 S.W.2d 581.
Vt.—Kimball v. New York Life Ins. Co., 116 A. 119, 96 Vt. 19.

27. Okl.—Lacy v. Wozencraft, 105 P.2d 781.

28. Ala.—Brown v. Alabama Great Southern Ry. Co., 121 So. 91, 219 Ala. 87.
Ariz.—O'Neil v. Goldenetz, 85 P.2d 705, 53 Ariz. 51.
Ark.—Fairbanks, Morse & Co. v. Hogan, 148 S.W.2d 162—Ferguson v. Guydon, 230 S.W. 260, 148 Ark. 295—Denton v. Berryville Auto Service Co., 227 S.W. 608, 147 Ark. 411.
Cal.—Martin v. Feigenberg, 264 P. 477, 203 Cal. 347—Graham-Loftus Oil Corporation v. Mountain View Development Corporation, 99 P.2d 357, 37 Cal.App.2d 315—Jeannerette v. Taylor, 38 P.2d 831, 2 Cal. App.2d 568—Beyerle v. California Surety Co., 7 P.2d 1034, 120 Cal. App. 236—Nordin v. First Trust & Savings Bank of Pasadena, 6 P.2d 92, 118 Cal.App. 697—Weber & Beckett v. Le Clair, 5 P.2d 449, 118 Cal.App. 423—Standard Oil Co. of California v. Woolner, 298 P. 77, 113 Cal.App. 66.
Colo.—Brown v. Ohman, 27 P.2d 588, 93 Colo. 561—Cornucopia Leasing, Min. & Mill. Co. v. Kenney, 259 P. 1033, 82 Colo. 264—Johnson v. Elliott, 231 P. 675, 76 Colo. 358—Herrick v. Woodrow-Shindler Co., 226 P. 137, 75 Colo. 363—Peterson v. Marple, 225 P. 814, 75 Colo. 389.
Fla.—Lee v. Growers Loan & Guaranty Co., 198 So. 193.
Ga.—Peterson v. Vidalia Chemical Co., 156 S.E. 468, 42 Ga.App. 490.
Ill.—Kretschmar v. Goven, Eddins & Co., 21 N.E.2d 932, 301 Ill.App. 8.
Ind.—Niven v. Crawfordsville Trust Co., App., 26 N.E.2d 58.
Ky.—Inter-Mountain Coal & Lumber Co. v. Boggs, 56 S.W.2d 705, 247 Ky. 123—Wabash Drilling Co. v. Ellis, 20 S.W.2d 1002, 230 Ky. 769.
Mich.—Stevens v. Wakeman, 182 N. W. 73, 213 Mich. 559.
Minn.—Lobnitz v. Fairchild, 243 N. W. 62, 186 Minn. 215—Warner Hardware Co. v. Shimon, 242 N. W. 718, 186 Minn. 229.
Mo.—Peterman v. Peterman, 228 S. W. 1062, 286 Mo. 375—McCutcheon Bros. Vehicle & Harness Co. v. Farrar, App., 256 S.W. 509—Meier v. Lemay Ferry Bank, App., 226 S. W. 334.
Nev.—Robinson v. Goldfield Merger Mines Co., 213 P. 103, 46 Nev. 291, affirming 206 P. 399.
N.H.—Manning v. Leavitt Co., 5 A.2d 667, 90 N.H. 167, 122 A.L.R. 249.
N.J.—Dunn v. Cutley, 151 A. 367, 8 N.J.Misc. 677.
N.Y.—Winston v. Saugerties Farms, 29 N.Y.S.2d 292, 262 App.Div. 435.
N.D.—Baird v. Stephan, 204 N.W. 188, 52 N.D. 568.
Ohio.—Clark v. Owensville Building & Loan Co., 187 N.E. 370, 46 Ohio App. 301.
Okl.—Oklahoma City v. Pratt, 95 P. 2d 596, 185 Okl. 637.
Pa.—Fried v. Fisher, 196 A. 39, 328 Pa. 497, 115 A.L.R. 147.
S.C.—Smith v. Williams, 139 S.E. 625, 141 S.C. 265, 54 A.L.R. 964.
Tex.—Moore v. Winnsboro Grain & Grocery Co., Com.App., 61 S.W.2d 982, reversing Winnsboro Grain & Grocery Co. v. Moore, Civ.App., 36 S.W.2d 781—Crockett v. Rogers, Civ.App., 137 S.W.2d 185, error dismissed, judgment correct.—McLendon v. Federal Mortg. Co., Civ.App., 60 S.W.2d 324, error refused—Holbrook v. W. L. Moody & Co., Civ. App., 45 S.W.2d 685—Smith v. Rickerts, Civ.App., 38 S.W.2d 644—Scott v. McGlothlin, Civ.App., 30 S.W.2d 511, affirmed McGlothlin v. Scott, Com.App., 48 S.W.2d 610—Ramsay v. Amberson, Civ. App., 21 S.W.2d 531—Astin v. Martin, Civ.App., 289 S.W. 442, reversed on other grounds Martin v. Astin, Com.App., 295 S.W. 584—Davis v. Lyons, Civ.App., 274 S.W. 288—Welborn v. Earle, Civ.App., 268 S.W. 982.
Utah.—Jones v. Commercial Investment Trust, 228 P. 896, 64 Utah 151.
Va.—Johnson v. Powhatan Mining Co., 103 S.E. 703, 127 Va. 352.
Wash.—Dietl v. Lowman & Pelly Inv. Co., 13 P.2d 462, 169 Wash. 227—Northern Pac. Ry. Co. v. Richey & Gilbert Co., 232 P. 355, 132 Wash. 526.
Wis.—Hustis v. McWilliams, 185 N. W. 159, 175 Wis. 365.
21 C.J. p 1252 note 93 [a].
Sufficiency of evidence to go to jury see infra § 163.

29. U.S.—West v. American Telephone & Telegraph Co., Ohio, 61 S. Ct. 179, 311 U.S. 223, 85 L.Ed. 139, 132 A.L.R. 956, reversing, C.C.A., 108 F.2d 347, certiorari granted 60 S.Ct. 979, two cases, 310 U.S. 618, 84 L.Ed. 1392—Grand Trunk West-

evidence has been held sufficient to show that no | estoppel exists.[30]

ern R. Co. v. H. W. Nelson Co., C.C.A.Mich., 116 F.2d 823, rehearing denied 118 F.2d 252—Petroleum Royalties Co. of Oklahoma v. Hartford Accident & Indemnity Co., C.C.A.Okl., 106 F.2d 440, 124 A.L.R. 1403, modifying, D.C., Hartford Accident & Indemnity Co. v. Petroleum Royalties Co. of Oklahoma, 24 F.Supp. 759, certiorari denied Hartford Accident & Indemnity Co. v. Petroleum Royalties Co., 60 S.Ct. 384, 308 U.S. 626, 84 L.Ed. 522—T. A. D. Jones Co. v. Winchester Repeating Arms Co., C.C.A. Conn., 61 F.2d 774, affirming, D.C., 55 F.2d 944, and certiorari denied Southeastern Investment Co. of Savannah, Ga., v. Tobler, 53 S.Ct. 401, 288 U.S. 609, 77 L.Ed. 983—Nevada Consol. Copper Co. v. Consolidated Coppermines Corporation, D.C.Nev., 44 F.2d 192, affirmed, C.C.A., Consolidated Coppermines Corporation v. Nevada Consolidated Copper Co., 64 F.2d 440, certiorari denied 54 S.Ct. 78, 290 U.S. 664, 78 L.Ed. 574—Wise v. U. S., D.C.Ky., 38 F.Supp. 130—Starrett Corporation v. Fifth Ave. & Twenty-Ninth St. Corporation, D.C.N.Y., 1 F.Supp. 868—Johnson v. Bradbury, D.C.Me., 272 F. 181.

Ark.—Hurst v. Munson, 238 S.W. 42, 152 Ark. 313.

Cal.—Williams v. General Ins. Co. of America, 63 P.2d 289, 8 Cal.2d 1—Davis v. Cline, 195 P. 42, 184 Cal. 548—Security-First Nat. Bank of Los Angeles v. Spring Street Properties, 67 P.2d 720, 20 Cal. App.2d 618—Gray v. Magee, 292 P. 157, 108 Cal.App. 570—Security Trust & Savings Bank v. Carrier, 290 P. 458, 107 Cal.App. 333—City of Los Angeles v. Babcock, 283 P. 314, 102 Cal.App. 571—Orange Cove Water Co. v. Sampson, 248 P. 526, 78 Cal.App. 334.

Conn.—Myers v. Burke, 179 A. 88, 120 Conn. 69.

Del.—Universal Products Co. v. Emerson, 179 A. 387, 6 W.W.Harr. 553, 100 A.L.R. 956.

Fla.—Oates v. New York Life Ins. Co., 178 So. 570.

Ga.—F. S. Royster Guano Co. v. Odum, 146 S.E. 475, 167 Ga. 655—Commercial Credit Co. v. Britt, 191 S.E. 400, 55 Ga.App. 789.

Ill.—Sundstrom v. Village of Oak Park, 30 N.E.2d 58, 374 Ill. 632.

Iowa.—Brauch v. Freking, 258 N.W. 892, 219 Iowa 556—First State Bank of Fredericksburg v. Westendorf, 239 N.W. 73, 213 Iowa 475—Creston Nat. Bank v. Wessels, 232 N.W. 496—Tutt v. Smith, 204 N.W. 294, 201 Iowa 107, 48 A.L.R. 394—Burns Bros. Co. v. Hasty, 188 N.W. 139.

Ky.—Summers v. Summers, 100 S.W. 2d 812, 266 Ky. 793—Cope v. Northup, 86 S.W.2d 672, 260 Ky. 654—Walters v. Bentley, 32 S.W.2d 747, 236 Ky. 136—Planters'-Farmers' Warehouse Co. of Louisville v. Citizens' Bank of Falmouth, 6 S.W. 2d 720, 224 Ky. 466—Hatcher v. Virginia Mining Co., 282 S.W. 1102, 214 Ky. 193—Gates v. Shannon, 255 S.W. 79, 200 Ky. 387.

La.—Tyler v. Walt, 167 So. 182, 184 La. 659—Douglas v. Shepard, App., 193 So. 264.

Md.—Renotas v. Storm, 161 A. 248, 163 Md. 27.

Mich.—Regan v. Consolidated Bakeries, 247 N.W. 171, 262 Mich. 249, affirmed 249 N.W. 32—Clark v. Sheldon, 193 N.W. 876, 223 Mich. 323.

Mo.—Williams v. Reid, 37 S.W.2d 537—Crider v. Meatte, 7 S.W.2d 691, 320 Mo. 474—State Bank of Wellston v. Hafferkamp, 287 S.W. 331, 315 Mo. 465—Grafeman Dairy Co. v. Northwestern Bank, 235 S.W. 435, 290 Mo. 311—Gray v. Clements, 227 S.W. 111, 286 Mo. 100—Blake v. Blake, 226 S.W. 837—Kline v. Groeschner, 219 S.W. 648, 280 Mo. 599—Foster v. Modern Woodmen of America, App., 138 S.W 2d 18.

Mont.—Williard v. Campbell, 11 P. 2d 782, 91 Mont. 493, certiorari granted Clark v. Williard, 54 S.Ct. 103, 290 U.S. 119, 78 L.Ed. 540—Swords v. Occident Elevator Co., 232 P. 189, 72 Mont. 189.

Neb.—In re Kierstead's Estate, 259 N.W. 740, 128 Neb. 654—Graham Ice Cream Co. v. Petros, 254 N.W. 869, 127 Neb. 172—First Nat. Bank of Hastings v. Davis, 242 N.W. 655, 123 Neb. 304—Big Horn Collieries Co. v. Roland, 219 N.W. 233, 116 Neb. 846.

N.Y.—St. Vincent's Orphan Asylum v. Madison-Warren Corporation, 233 N.Y.S. 364, 225 App.Div. 379—Niagara Falls International Bridge Co. v. Grand Trunk Ry. Co. of Canada, 209 N.Y.S. 79, 212 App.Div. 705, modified on other grounds 148 N.E. 797, 241 N.Y. 85—Blumenfeld v. Aronson, 187 N.Y.S. 585, 196 App. Div. 189.

N.C.—Saleeby v. Brown, 129 S.E. 424, 190 N.C. 138.

Okl.—Mitchell Drilling Co. v. Robert L. Kinkaid, Inc., 105 P.2d 764—Oklahoma City v. Pratt, 95 P.2d 596, 185 Okl. 637—Pierce v. Jones, 78 P.2d 677, 182 Okl. 515.

Or.—Nielsen v. Jensen, 24 P.2d 350, 144 Or. 423, motion overruled 24 P.2d 1045, 144 Or. 423—Bramwell v. Rowland, 261 P. 57, 123 Or. 33.

Pa.—General Electric Co. v. N. K. Ovalle, Inc., 45 Dauph.Co. 376.

S.C.—Yawkey v. Lowndes, 148 S.E. 554, 150 S.C. 493—Solen Corporation v. Robertson, 140 S.E. 236, 142 S.C. 56.

Tenn.—Groveland Banking Co. v. City Nat. Bank, 234 S.W. 643, 144 Tenn. 520—First Citizens Nat. Bank v. National Cottonseed Products Co., 11 Tenn.App. 269—West v. Aetna Ins. Co., 11 Tenn.App. 118.

Tex.—Pacific Mut. Life Ins. Co. of California v. Metzger, Com.App., 143 S.W.2d 934, reversing, Civ.App., 124 S.W.2d 417—Smith v. Briggs, Civ.App., 131 S.W.2d 319, error dismissed, judgment correct—Stern v. Maxwell, Civ.App., 44 S.W.2d 482, error dismissed—Boykin v. Black, Civ.App., 31 S.W.2d 501, error refused—Crim v. Lukenbill, Civ.App., 21 S.W.2d 83—Hamilton v. Palmer, Civ.App., 265 S.W. 240.

Va.—Meadows v. Meadows, 129 S.E. 354, 143 Va. 98.

Wash.—Watkins v. Siler Logging Co., 116 P.2d 315—Worthy Creek Shingle Co. v. Anderson, 199 P. 756, 116 Wash. 472.

Wis.—Morris F. Fox & Co. v. Lisman, 237 N.W. 267, 208 Wis. 1, reversed on other grounds 240 N.W. 809, 208 Wis. 1, rehearing denied 242 N.W. 679, 208 Wis. 1—Frank C. Schilling Co. v. Detry, 233 N.W. 635, 203 Wis. 109—Southern Surety Co. v. Metropolitan Sewerage Commission, 204 N.W. 476, 187 Wis. 206, modifying 201 N.W. 980, 187 Wis. 206.

Wyo.—Willis v. Willis, 54 P.2d 814, 49 Wyo. 296, denying rehearing 49 P.2d 670, 48 Wyo. 403.

21 C.J. p 1252 note 93 [b].

Knowledge

Proof that lienholder claimed estoppel to assert lien was present at auction sale is not proof that he heard announcement that land was unencumbered.—Shaw v. Farmers' Bank & Trust Co., 31 S.W.2d 893, 235 Ky. 502.

Estoppel against disinterment of body

Evidence of widow's acquiescence in burial of deceased husband's body in cemetery lot of husband's parents is insufficient to establish estoppel against her attempt to disinter body for reinterment in another cemetery.—Brake v. Mother of God's Cemetery, 65 S.W.2d 739, 251 Ky. 667.

Estoppel of teacher to recover retirement allowances

A teacher was not "estopped" from recovering retirement allowances from date when she reached retirement age on ground that she falsely stated her age on personnel card, under circumstances.—Talbott v. Independent School Dist. of Des Moines, Iowa, 299 N.W. 556.

30. U.S.—Pulitzer Pub. Co. v. Current News Features, C.C.A.Mo., 94 F.2d 682, certiorari denied 58 S.Ct. 1040, 304 U.S. 570, 82 L.Ed. 1535.
Ark.—Turnbow v. Horn, 149 S.W.2d

b. Waiver

Waiver must be clearly and satisfactorily proved.

The elements necessary to constitute a waiver must be clearly and satisfactorily proved.[31] It must be established by evidence that does not leave the matter doubtful or uncertain;[32] but, as in other civil actions, this need be no more than a preponderance of the evidence.[33] Waiver will not be implied from slight circumstances,[34] and is not to be lightly inferred in the face of a clearly expressed intention to insist on the right alleged to have been waived.[35] It will be implied only from an unequivocal and decisive act of the party, clearly showing his purpose to waive the right in question,[36] or from conduct tending to show some element of an estoppel on his part.[37]

The question whether a waiver is established may depend on the nature of the condition or the thing which it is asserted was waived.[38] Thus, the courts, not favoring forfeitures, are usually inclined to take hold of any circumstances which indicate an election to waive a forfeiture,[39] or any agreement to do so on which the party has relied and acted;[40] the waiver of a forfeiture may be sustained by circumstances which do not present the strong equities which would be required to create an estoppel.[41] On the other hand, where a right, statutory or otherwise, has become vested, the courts are slow to declare the same waived, unless the language or the conduct of the party possessing the right shows that he intended to waive it, or his language or conduct are such that it can be clearly inferred, or it may be said as a matter of law that he has waived the right.[42]

Waiver may be shown by words or conduct[43] or both,[44] by express declarations,[45] or by acts and declarations[46] manifesting an intent and purpose not to claim the advantage in question,[47] by direct evidence, or by circumstances,[48] or by a course of

560—Thomas v. Spires, 22 S.W.2d 553, 180 Ark. 671—Berg v. Owens, 300 S.W. 417, 175 Ark. 1169—Imboden v. Talley, 234 S.W. 991, 150 Ark. 567.

Cal.—California Standard Finance Corporation v. Riverside Finance Co., 295 P. 555, 111 Cal.App. 151—Hennessey v. Robinett, 286 P. 700, 104 Cal.App. 693—Peterson v. Wagner, 198 P. 25, 52 Cal.App. 1.

Ky.—Hopper v. Beddow, 141 S.W.2d 278, 283 Ky. 337—Hensley v. Lewis, 128 S.W.2d 917, 278 Ky. 510, 123 A.L.R. 537—Maynard v. Farley, 248 S.W. 1022, 198 Ky. 420.

La.—Celeste Sugar Co. v. Dunbar-Dukate Co., 107 So. 493, 160 La. 694, error dismissed Dunbar-Dukate Co. v. Celeste Sugar Co., 48 S.Ct. 33, 275 U.S. 487, 72 L.Ed. 387—Burglass v. Wright, App., 159 So. 176—Reed v. Eureka Homestead Soc., App., 143 So. 891.

Minn.—Walsh v. Kuechenmeister, 265 N.W. 340, 196 Minn. 483—Cruickshank v. Ellis, 226 N.W. 192, 178 Minn. 103.

Mo.—Lester v. Tyler, 69 S.W.2d 633—Laughlin v. Wells, 283 S.W. 990, 314 Mo. 474.

Tex.—Smith v. Coburn, Civ.App., 222 S.W. 344.

Va.—Cannon v. Cannon, 163 S.E. 405, 158 Va. 12.

21 C.J. p 1252 note 93 [c].

31. Del.—Jones v. Savin, 97 A. 591, 29 Del. 180.

Fla.—Masser v. London Operating Co., 145 So. 79, 106 Fla. 474—Horton v. Smith-Richardson Inv. Co., 87 So. 905, 81 Fla. 255.

Iowa.—Bankers Trust Co. v. Economy Coal Co., 276 N.W. 16, 224 Iowa 36.

La.—Wall v. United Gas Public Service Co., App., 181 So. 562.

Or.—Craswell v. Biggs, 86 P.2d 71, 160 Or. 547.

67 C.J. p 310 notes 61–63.

Evidence held sufficient

Fla.—Lee v. Growers Loan & Guaranty Co., 198 So. 193.

Evidence held insufficient

Iowa.—Burns Bros. Co. v. Hasty, 188 N.W. 139.

Tex.—Smith v. Briggs, Civ.App., 131 S.W.2d 319. Error dismissed, judgment correct.

Consideration for waiver

Presumption that written waiver of interest in shares of stock was supported by a consideration was rebutted by testimony of waiving party and party claiming benefit of waiver that no consideration was paid for waiver.—Gerard v. Sanner, Mont., 103 P.2d 314.

32. Tenn.—Koontz v. Fleming, 65 S.W.2d 821, 17 Tenn.App. 1.

67 C.J. p 309 note 58.

33. N.C.—Bergeron v. Pamlico Ins., etc., Co., 15 S.E. 883, 111 N.C. 45.

Tenn.—Koontz v. Fleming, 65 S.W.2d 821, 17 Tenn.App. 1.

34. Del.—Jones v. Savin, 97 A. 591, 29 Del. 180.

67 C.J. p 310 note 63.

35. U.S.—Anderson v. Missouri State Life Ins. Co., C.C.A.Ky., 69 F.2d 794—Columbia Axle Co. v. American Automobile Ins. Co., C.C.A. Ohio, 63 F.2d 206.

36. Vt.—Dunbar v. Farnum, 196 A. 237, 109 Vt. 313, 114 A.L.R. 996.

Equivalent to estoppel

The act, in effect, must amount to an estoppel.—Davis v. Yorkshire Ins. Co., Mo., 288 S.W. 80.

37. Mo.—Schwab v. Brotherhood of American Yeomen, 264 S.W. 690, 305 Mo. 148.

67 C.J. p 310 note 65.

38. Utah.—Progress Spinning & Knitting Mills Co. v. Southern Nat. Ins. Co., 130 P. 63, 65, 42 Utah 263, 45 L.R.A.,N.S., 122.

39. Ky.—U. S. Fidelity & Guaranty Co. v. Miller, 34 S.W.2d 938, 237 Ky. 43, 76 A.L.R. 12.

67 C.J. p 310 note 67.

40. U.S.—Insurance Co. v. Eggleston, Miss., 96 U.S. 572, 24 L.Ed. 841.

67 C.J. p 310 note 68.

41. Okl.—American Cent. Ins. Co. v. Sinclair, 160 P. 60, 61 Okl. 17.

67 C.J. p 310 note 69.

42. Utah.—O'Donnell v. Parker, 160 P. 1192, 1193, 48 Utah 578.

43. Mass.—Suburban Land Co. v. Brown, 129 N.E. 291, 237 Mass. 166.

67 C.J. p 308 note 36.

44. Mass.—St. John Bros. Co. v. Falkson, 130 N.E. 51, 237 Mass. 399.

45. U.S.—Champion Spark Plug Co. v. Automobile Sundries Co., C.C.A. N.Y., 273 F. 74—Mitchell v. Kemp & Burpee Mfg. Co., C.C.A.Pa., 218 F. 843.

46. Mass.—Eaton v. Globe & Rutgers Fire Ins. Co., 116 N.E. 536, 227 Mass. 354.

67 C.J. p 308 note 39.

47. Me.—Dube v. Simard, 129 A. 488, 124 Me. 369.

67 C.J. p 308 note 40.

48. Conn.—Di Francesco v. Zurich General Accident & Liability Ins. Co., 134 A. 789, 105 Conn. 162.

67 C.J. p 308 note 41.

acts and conduct[49] which amounts to an estoppel.[50] Proof of expressed words,[51] of expressed consent and approval,[52] is not necessary. Expressed consent and approval, of necessity, may be proved by parol.[53]

Knowledge. The proof must be clear that the party against whom the doctrine of waiver is invoked knew what his rights were.[54]

Intention. The intention to waive the right or advantage in question, see supra § 69, must be shown clearly[55] and convincingly.[56] The best evidence of intention is to be found in the language used by the parties.[57] When the only proof of intention rests in what a party does or forbears to do, his acts or omissions to act which are relied on should be so manifestly consistent with, and indicative of, an intent voluntarily to relinquish a then known particular right or benefit that no other reasonable explanation of his conduct is possible.[58]

Intention need not necessarily be proved by expressed declarations,[59] but it may be shown by acts and conduct from which an intention to waive may reasonably be inferred.[60] It may be inferred from circumstances.[61] Intention may be proved by the existence of acts or language so inconsistent with the purpose of the person charged with waiver to stand on his rights as to leave no opportunity for a reasonable inference to the contrary.[62] The intention to waive a right or advantage may be shown even by nonaction;[63] it may be inferred from mere negligence, unexplained.[64]

Intention and meeting of minds. To establish waiver, it has been stated, the evidence must indicate a meeting of minds as well as the intentional forbearance to enforce the right in question.[65]

C. TRIAL

§ 163. Questions of Law and Fact

a. Estoppel
b. Waiver

a. Estoppel

Where the facts are undisputed and only one inference may be drawn, the question of estoppel is one of law, but otherwise it is a question of fact.

Under the rules stated in the C.J.S. title Trial §§ 203–265, also 64 C.J. p 296 note 48 et seq, where there is no dispute about the facts and only one inference can be drawn therefrom, it is a question of law whether or not the facts proved constitute an estoppel.[66] However, under all other circumstances the question whether an estoppel exists is one of

49. Tex.—Citizens' Mut. Aid Ass'n v. Williams, Civ.App., 43 S.W.2d 976.
67 C.J. p 308 note 42.

50. U.S.—Rice v. Fidelity & Deposit Co., Neb., 103 F. 427, 43 C.C.A. 270.
67 C.J. p 309 note 43.

51. N.Y.—Kiernan v. Dutchess County Mut. Ins. Co., 44 N.E. 698, 150 N.Y. 190.
67 C.J. p 309 note 44.

52. U.S.—Marine Iron Works v. Wiess, Tex., 148 F. 145, 78 C.C.A. 279.

53. U.S.—Mitchell v. Kemp & Burpee Mfg. Co., C.C.A.Pa., 218 F. 843.

54. Va.—American Nat. Bank of Portsmouth v. Ames, 194 S.E. 784, 169 Va. 711, certiorari denied 58 S.Ct. 1046, 304 U.S. 577, 82 L.Ed. 1540.
67 C.J. p 311 note 74.
Knowledge as element of waiver see supra § 70.

55. U.S.—Anderson v. Missouri State Life Ins. Co., C.C.A.Ky., 69 F.2d 794—Orr v. Mutual Life Ins. Co. of New York, C.C.A.Mo., 64 F.2d 561, affirming, D.C., 57 F.2d 901.
Del.—Hirzel v. Silker, 156 A. 360, 4 W.W.Harr. 588.
Idaho.—Neitzel v. Lawrence, 231 P. 423, 40 Idaho 26.
Okl.—Clem Oil Co. v. Oliver, 232 P. 942, 106 Okl. 22.
67 C.J. p 311 note 77.
Free from doubt
The intention to waive must be free from doubt.
Iowa.—Bankers Trust Co. v. Economy Coal Co., 276 N.W. 16, 224 Iowa 36.
La.—Wall v. United Gas Public Service Co., App., 181 So. 562.

56. Me.—Johnston v. Columbian Nat. Life Ins. Co., 154 A. 79, 80, 130 Me. 143.

57. U.S.—Masden v. Travelers' Ins. Co., C.C.A.Mo., 52 F.2d 75, 79 A.L.R. 469.
Mont.—Mundt v. Mallon, 76 P.2d 326, 106 Mont. 242.
Okl.—Clem Oil Co. v. Oliver, 232 P. 942, 106 Okl. 22.
67 C.J. p 311 note 79.

58. Ga.—Bryant v. Continental Casualty Co., 199 S.E. 343, 58 Ga.App. 518.
Mont.—Mundt v. Mallon, 76 P.2d 326, 329, 106 Mont. 242, quoting Corpus Juris.
67 C.J. p 311 note 80.

59. U.S.—Masden v. Travelers' Ins. Co., C.C.A.Mo., 52 F.2d 75, 79 A.L.R. 469.
Me.—Dube v. Simard, 129 A. 488, 124 Me. 369.
67 C.J. p 309 note 47.

60. U.S.—Masden v. Travelers' Ins. Co., C.C.A.Mo., 52 F.2d 75, 79 A.L.R. 469.
Me.—Dube v. Simard, 129 A. 488, 124 Me. 369.
Tenn.—Koontz v. Fleming, 65 S.W.2d 821, 17 Tenn.App. 1.
67 C.J. p 309 notes 48–51.

61. Minn.—Farnum v. Peterson-Beddick Co., 234 N.W. 646, 182 Minn. 338.
67 C.J. p 309 note 52.

62. U.S.—Champion Spark Plug Co. v. Automobile Sundries Co., C.C.A.N.Y., 273 F. 74, 79.

63. Me.—Hurley v. Farnsworth, 78 A. 291, 107 Me. 306.
67 C.J. p 309 note 54.

64. Iowa.—Moore v. Order of Railway Conductors of America, 57 N.W. 623, 90 Iowa 721.
67 C.J. p 309 note 55.

65. Cal.—Myers v. Herskowitz, 165 P. 1031, 33 Cal.App. 581.
67 C.J. p 311 note 81.

66. Ariz.—Sovereign Camp, W. O. W., v. Smith, 193 P. 758, 22 Ariz. 1.
Ill.—Illinois Bond & Investment Co. v. Gardner, 249 Ill.App. 337, 345, quoting Corpus Juris.

fact,[67] or a mixed question of law and fact,[68] to be determined by the jury under proper instructions from the court,[69] or by the trial court sitting without a jury.

Mo.—M. & M. Securities Co. v. General Motors Accept. Corp., 79 S.W. 2d 521, 531, 230 Mo.App. 900, quoting **Corpus Juris**—Fernandez v. Mutual Life Ins Co. of Baltimore, 78 S.W.2d 526, 230 Mo.App. 857.
N.D.—Baird v. Stephan, 204 N.W. 188, 194, 52 N.D. 568, citing **Corpus Juris.**
Pa.—Laidley v. Rowe, 119 A. 474, 275 Pa. 389—General Electric Co. v. N. K. Ovalle, Inc., 45 Dauph.Co. 376.
S.C.—Farrow v. City Council of Charleston, 168 S.E. 852, 169 S.C. 373, 87 A.L.R. 981—Padgett v. Cunningham, 153 S.E. 280, 156 S.C. 356.
21 C.J. p 1253 note 97.

Case made by party to be estopped

Where it conclusively appears in the case made by the party against whom the estoppel is invoked, it becomes a question for the court.—Ornellas v. Moynihan, Mo.App., 16 S.W.2d 1007.

Question whether statements constituting estoppel were made

Whether alleged remarks claimed to constitute an estoppel were made is for jury; but whether such remarks, if made, are susceptible of inferences attributed to them, is for court.—General Electric Co. v. N. K. Ovalle, Inc., 6 A.2d 835, 335 Pa. 439.

Record in former suit

Testimony supporting plea of estoppel to assert title to homestead by record in bank's suit to foreclose vendor's lien would not make issue for jury, effect of record being for court.—Chapman v. Clark, Tex.Civ. App., 262 S.W. 161, affirmed, Com. App., 276 S.W. 197.

Admission of evidence resting on controverted facts

An exception to the admission in evidence of the record in another proceeding because defendant was estopped from relying thereon presents no error, where the fact claimed by plaintiff to establish the estoppel was denied by defendant, so that plaintiff, in effect, asked the court to determine a controverted fact in his favor.—Davis v. U. S. Bobbin & Shuttle Co., 112 A. 348, 119 Me. 548.

Evidence held insufficient to go to jury

U.S.—Guardian Trust Co. v. Meyer, C.C.A.Neb., 19 F.2d 186.
Colo.—Farmers' Life Ins. Co. v. Hetherington, 274 P. 926, 85 Colo. 255.
N.C.—Eastern Banking & Trust Co. v. Collins, 139 S.E. 593, 194 N.C. 363.
Okl.—Exchange Nat. Bank of Tulsa v. Essley, 46 P.2d 462, 173 Okl. 2.

Nonsuit held proper

Cal.—Western States Acceptance Corporation v. Bank of Italy, 285 P. 340, 104 Cal.App. 19.

Directed verdict held proper

Ga.—Seaboard Air-Line Ry. Co. v. Holliday, 140 S.E. 507, 165 Ga. 200—Federal Intermediate Credit Bank v. Sherrod, 178 S.E. 477, 50 Ga.App. 501
Tex.—Holland v. Blanchard, Civ. App., 262 S.W. 97.
21 C.J. p 1253 note 97 [a].

When facts regarded as undisputed

Where all the facts and circumstances in evidence showed an intention to hold trustees only in their official capacity, the mere testimony by plaintiff of an unasserted intent to hold them personally liable is not sufficient to require the submission of the issue of his intent to the jury.—Boyle v. Rider, 110 A. 524, 136 Md. 286.

67. Cal.—Parke v. Franciscus, 228 P. 435, 194 Cal. 284—Fleishbein v. Western Auto Supply Agency, 65 P.2d 928, 19 Cal.App.2d 424—Barber v. Mason Mfg. Co., 4 P.2d 606, 118 Cal.App. 1—California Standard Finance Corporation v. Riverside Finance Co., 295 P. 555, 111 Cal.App. 151—Rapp v. Fred W. Hauger Motors Co., 246 P. 1067, 77 Cal.App. 417.
Ind.—Seymour Improvement Co. v. Viking Sprinkler Co., 161 N.E. 389, 87 Ind.App. 179.
Ky.—Anspacher v. Utterback's Adm'r, 68 S.W.2d 15, 252 Ky. 666.
Mass.—Barton v. Morin, 183 N.E. 170, 281 Mass. 98—Calkins v. Wire Hardware Co., 165 N.E. 889, 267 Mass. 52—Augello v. Hanover Trust Co., 148 N.E. 138, 253 Mass. 160—Nelson v. Wentworth, 137 N.E. 646, 243 Mass. 377—Taylor v. Jones, 136 N.E. 382, 242 Mass. 210, certiorari denied Jones v. Taylor, 43 S.Ct. 99, 260 U.S. 742, 67 L.Ed. 491.
N.Y.—In re Miller's Will, 178 N.E. 555, 257 N.Y. 349, modifying 248 N.Y.S. 213, 231 App.Div. 587.
Tex.—Katcsmorak v. Forrest, Civ. App., 59 S.W.2d 319.

Ordinarily a fact question

Mass.—Stern v. Lieberman, 29 N.E. 2d 839—Levin v. Rose, 19 N.E.2d 297, 302 Mass. 378.

68. Mich.—Maxwell v. Bay City Bridge Co., 2 N.W. 639, 41 Mich. 453.

Estoppel in pais

Me.—Roy v. Bellevieu, 108 A. 70, 118 Me. 495.
Minn.—Nieter v. McCaull-Dinsmore Co., 199 N.W. 85, 159 Minn. 395.

69. Cal.—California Packing Corporation v. Lopez, 279 P. 664, 207 Cal. 600, 64 A.L.R. 1412—Lowe v. Copeland, 13 P.2d 522, 125 Cal. App. 315.
Idaho.—Independent Gas & Oil Co. v. T. B. Smith Co., 10 P.2d 317, 322, 51 Idaho 710, citing **Corpus Juris.**
Mo.—Briscoe v. Merchants & Miners Bank, App., 102 S.W.2d 751—State ex rel. Richards v. Fidelity & Casualty Co. of New York, App., 82 S.W.2d 123—Stottlemyre v. Swearingen, App., 297 S.W. 1003.
Mont.—Nelson v. Stukey, 300 P. 287, 292, 89 Mont. 277, 78 A.L.R. 483, citing **Corpus Juris.**
Neb.—Merchants'-Mechanics' First Nat. Bank v. Cavers Elevator Co., 180 N.W. 588, 105 Neb. 321.
N.H.—Muslow v. Charles B. Varney Co., 111 A. 629, 79 N.H. 489.
N.D.—Baird v. Stephan, 204 N.W. 188, 52 N.D. 568.
R.I.—Perry v. McGuckian, 121 A. 431, 45 R.I. 259.
S.C.—McDougald v. Swift & Co., 194 S.E. 899, 185 S.C. 537—Boney v. Cornwell, 109 S.E. 271, 117 S.C. 426.
Tex.—Stanolind Oil & Gas Co. v. Midas Oil Co., Civ.App., 143 S.W.2d 138, error refused—Ellison v. Humble Oil & Refining Co., Civ. App., 106 S.W.2d 1083, reversed on other grounds Humble Oil & Refining Co. v. Ellison, 132 S.W. 2d 395, 134 Tex. 140—McCrea v. Underwood, Civ.App., 73 S.W.2d 593—Sugg v. Johnson, Civ.App., 284 S.W. 705, reversed on other grounds Johnson v. Sugg, Com. App., 291 S.W. 857.
21 C.J. p 1253 note 98.
Review of questions of fact see Appeal and Error §§ 1642–1675.

Ordinarily a jury question

S.C.—Padgett v. Cunningham, 153 S.E. 280, 156 S.C. 356—Van Ness v. Schachte, 141 S.E. 721, 143 S.C. 429.

Evidence held for jury

U.S.—Franklin v. Meredith Co., C.C.A.N.Y., 64 F.2d 109.
Ala.—Standard Oil Co. v. Gentry, 1 So.2d 29—White v. Hogland, 96 So. 625, 209 Ala. 537—Warrant Warehouse Co. v. Cook, 95 So. 282, 209 Ala. 60—Lackland v. Turner, 91 So. 877, 207 Ala. 73.
Ark.—Hal. H. Peel & Co. v. Hawkins, 300 S.W. 420, 175 Ark. 806.
Ga.—E. Frederics, Inc., v. Felton Beauty Supply Co., 198 S.E. 324, 58 Ga.App. 320.
Idaho.—Sullivan v. Mabey, 264 P. 233, 45 Idaho 595.
Ky.—City of Frankfort v. Ballew, 151 S.W.2d 1063, 287 Ky. 141.
Me.—Shaw v. Pinkham, 147 A. 759, 128 Me. 376.
Mass.—Commonwealth Finance Corporation v. Holland System, 160 N.E. 329, 263 Mass. 10.

out a jury.[70]

The direction of a verdict is erroneous when the evidence is conflicting,[71] or where it rests in parol and is not admitted,[72] or where different persons might come to different conclusions from the evidence.[73]

b. Waiver

Waiver is generally a question of fact.

Under the rules stated in the C.J.S. title Trial §§ 203–265, also 64 C.J. p 296 note 48 et seq, the question of waiver is generally one of fact[74] for the jury to decide, under proper instructions of the court,[75] or for the trial court sitting without a jury.[76] The question is one of fact for the jury where it is a matter of inference,[77] or is to be established by the weight of evidence.[78] If the established facts permit reasonable minds to differ as to the inferences or effects from them, a question of fact arises,[79] to be determined by court or jury according as the parties see fit to submit the controversy for decision.[80]

On the other hand, when the necessary facts are undisputed,[81] or are admitted or clearly established,[82] waiver becomes a question of law.[83] The

Mo.—Shell v. Conrad, App., 153 S W.2d 384.
N.Y.—Lockwood v. Title Ins. Co. of New York, 115 N.E. 981, 220 N.Y. 410, reversing 147 N.Y.S. 1123, 163 App.Div. 929.
N.C.—Smith v Phillips, 196 S.E. 305, 213 N.C. 339—American Exchange Nat. Bank v. Winder, 150 S.E 489, 198 N.C. 18.
S.C.—Southern Ry. Co. v. Day, 138 S.E. 870, 140 S.C. 388.
Tenn.—Warner v. Maroney, 66 S.W.2d 244, 16 Tenn.App. 78.
Tex.—Gregory v. Newsom, Civ.App., 279 S.W. 912—Harwood v. Ft. Worth Nat. Bank, Civ.App., 205 S. W. 484, affirmed Fort Worth Nat. Bank v. Harwood, Com.App., 229 S.W 487—Lohmann v. Hooper, Civ. App., 87 S.W.2d 803.

Consideration of all circumstances

Jury may consider all circumstances surrounding transaction, in determining whether plea of estoppel has been sustained by evidence. —Newman v. Roach, 282 P. 287, 140 Okl. 210.

70. Ark.—Thines v. Burkemeyer, 10 S.W.2d 33, 178 Ark. 1200.
Cal.—Lowe v. Copeland, 13 P.2d 522, 125 Cal.App. 315.
Mo.—Briscoe v. Merchants & Miners Bank, App., 102 S.W.2d 751—State ex rel. Richards v. Fidelity & Casualty Co. of New York, App., 82 S.W.2d 123.
N.J.—Caporaso v. Schechner, 158 A. 485, 108 N.J.Law 540.
R.I.—Goggin v. Goggin, 195 A. 593, 59 R.I. 343.
Tex.—Myers v. Daniel, Civ.App., 4 S.W.2d 86—Saner-Whiteman Lumber Co. v. Texas & N. O. R. Co., Civ.App., 282 S.W. 267, reversed on other grounds, Com.App., 288 S.W. 127, rehearing denied 288 S. W. 1063.

71. Ga.—De Loach v. Bennett, 119 S.E. 592, 156 Ga. 633—Crumley v. Laurens Banking Co., 81 S.E. 871, 141 Ga. 603.
Mich.—Superior Steel Spring Co. v. New Era Spring & Specialty Co., 184 N.W. 440, 215 Mich. 594.

72. Mo.—Bradley-Metcalf Co. v. Tootle-Campbell Dry Goods Co., App., 180 S.W. 389.

73. Colo.—International Textbook Co. v. Pratt Mercantile & Publishing Co., 158 P. 712, 61 Colo. 571.

74. U.S.—Universal Gas Co. v. Central Illinois Public Service Co., C.C.A.Ill., 102 F.2d 164.
Conn.—Hendsey v. Southern New England Telephone Co., 20 A.2d 722, 128 Conn. 132.
Iowa.—Jones v. City of Des Moines, 283 N.W. 924, 225 Iowa 1342.
Me.—Roy v. Bellevieu, 108 A. 70, 118 Me. 495.
Mass.—Forman v. Hamilburg, 14 N. E. 2d 137, 300 Mass. 138—Brockton Olympia Realty Co. v. Lee, 165 N. E. 873, 266 Mass. 550.
Mo.—Swihart v. Missouri Farmers Mut. Tornado, Cyclone & Windstorm Ins. Co., App., 138 S.W.2d 9.
Vt.—Cummings v. Connecticut General Life Ins. Co., 148 A. 484, 102 Vt. 351.
67 C.J. p 312 note 84.

Mixed question of law and fact

N.M.—Longwell v. Caron, 31 P.2d 690, 38 N.M. 260.
67 C.J. p 311 note 82.

75. Del.—Keil Motor Co. v. Royal Ins. Co., Limited, of Liverpool, England, 171 A. 201, 6 W.W.Harr. 24.
Idaho.—Troendly v. J. I. Case Co., 8 P.2d 276, 51 Idaho 578.
Md.—Shriver Oil Co. v. Interocean Oil Co., 146 A. 223, 157 Md. 341.
Mo.—State ex rel. Continental Ins. Co. of City of New York v. Becker, 77 S.W.2d 100, 105, 336 Mo. 59, quoting **Corpus Juris**, and quashing Weiss v. Continental Ins. Co., App., 61 S W.2d 392—Macan v. Missouri Mut. Ass'n, App., 60 S.W. 2d 402, certiorari quashed State ex rel. Missouri Mut. Ass'n v. Allen, 78 S.W.2d 862, 336 Mo. 352.
Okl.—Smith v. Minneapolis Threshing Mach. Co., 214 P. 178, 89 Okl. 156.
Pa.—Dougherty v. Thomas, 169 A. 219, 313 Pa. 287—Lang v. Bowen, 189 A. 743, 125 Pa.Super. 226—Johns v. Foley, 29 Del.Co. 38.
S.C.—Hamilton Ridge Lumber Corporation v. Boston Ins. Co., 131 S. E. 22, 133 S.C. 472.
Tex.—Metzler Bros. v. Johnson, Civ. App., 45 S.W.2d 263, error refused.
Wash.—Pacific Commercial Co. v. Northwestern Fisheries Co., 197 P. 930, 115 Wash. 608.
67 C.J. p 312 note 84.
Review of questions of fact see Appeal and Error §§ 1642–1675.

Evidence held for jury

Cal.—California Packing Corporation v. Lopez, 279 P. 664, 207 Cal. 600, 64 A.L.R. 1412.

76. Tex.—Van Zandt v. Desdemona Independent School Dist., Civ.App., 283 S.W. 626.

77. Me.—Robinson v. Pennsylvania F. Ins. Co., 38 A. 320, 90 Me. 385.
67 C.J. p 312 note 85.

78. Tex.—Goodwin v. Abilene State Bank, Civ.App., 20 S.W.2d 1090, error dismissed.
67 C.J. p 312 note 86.

79. Mo.—McNeill v. Wabash Ry. Co., 231 S.W. 649, 207 Mo.App. 161.
Wis.—Nelson v. Caddo-Texas Oil Lands Co., 186 N.W. 155, 176 Wis. 327.
67 C.J. p 312 note 87.

80. Cal.—Lowe v. Copeland, 13 P.2d 522, 125 Cal.App. 315.
67 C.J. p 312 note 88.

81. N.C.—Builders' Supply & Equipment Corporation v. Gadd, 111 S. E. 771, 183 N.C. 447.
Vt.—Cummings v. Connecticut General Life Ins. Co., 148 A. 484, 102 Vt. 351.
67 C.J. p 312 note 89.

82. Mo.—Macan v. Missouri Mut. Ass'n, App., 60 S.W.2d 402, certiorari quashed State ex rel. Missouri Mut. Ass'n v. Allen, 78 S.W. 2d 862, 336 Mo. 352.
67 C.J. p 312 note 90.

Case made by party waiving right

Waiver conclusively appearing in case made by the party against whom the waiver is invoked is a question for the court.—Ornellas v. Moynihan, Mo.App., 16 S.W.2d 1007.

83. Pa.—Pittsburgh Const. Co. v.

question is one of law where but one inference can be drawn from the facts,[84] and it is not error for the court to charge the jury that they constitute waiver.[85] Whether or not the facts in question, if proved, constitute a waiver is a question of law, which the court must decide.[86]

A directed verdict on the ground of waiver is erroneous where the evidence is conflicting.[87] By moving for a directed verdict the maker of the motion admits as true the facts relied on by his adversary as constituting a waiver.[88]

Intention. The existence of the intention to waive the right or advantage in question, see supra § 69, is generally a question of fact.[89] Where the intention is disputed, it necessarily becomes a question for the determination of the jury;[90] it is for the jury to say what the conduct of the party against whom a waiver is claimed means or signifies.[91]

Although rarely to be inferred as a matter of law,[92] intention is not always a question of fact.[93] The intention to waive, although not expressly found, may be inferred as a matter of law where it is a necessary inference from the facts;[94] it may be inferred as a matter of law from conduct[95] where conduct indicating a waiver may be so inconsistent with a purpose to stand on one's rights as to leave no room for a reasonable inference to the contrary.[96]

§ 164. Instructions

Where estoppel or waiver is an issue, appropriate instructions should be given to the jury on submission.

General rules governing instructions ordinarily control the instructions to be given on the issue of estoppel or waiver.[97] Where there is an issue of estoppel, the court should instruct the jury as to the essential elements of the kind of estoppel relied on.[98]

Where estoppel in pais is an issue, see supra §§ 59–106, instructions as to the essential elements of such an estoppel should be given.[99] The court must

West Side Belt R. Co., 75 A. 1029, 227 Pa. 90.
67 C.J. p 312 notes 91, 92.

84. Cal.—Lowe v. Copeland, 13 P.2d 522, 125 Cal.App. 315.
67 C.J. p 312 notes 93, 94.

85. S.C.—Hollings v. Bankers' Union of the World, 41 S.E. 90, 63 S.C. 192.
67 C.J. p 313 note 95.

86. U.S.—Garvy v. Blatchford Calf Meal Co., C.C.A.Ill., 119 F.2d 973.
Idaho.—Troendly v. J. I. Case Co., 8 P.2d 276, 51 Idaho 578.
Ill.—McMahel v. Smith, 277 Ill.App. 29.
67 C.J. p 313 note 96.

87. Mich.—Superior Steel Spring Co. v. New Era Spring & Specialty Co., 184 N.W. 440, 215 Mich. 594.

88. Ill.—McMahel v. Smith, 277 Ill. App. 29.

89. Mo.—State ex rel. Kansas City Life Ins. Co. v. Trimble, 276 S.W. 1020, 310 Mo. 446.
67 C.J. p 313 note 97.

90. U.S.—Champion Spark Plug Co. v. Automobile Sundries Co., C.C.A. N.Y., 273 F. 74, 80.

91. Me.—Colbath v. H. B. Stebbins Lumber Co., 144 A. 1, 127 Me. 406.
67 C.J. p 313 note 99.

92. N.C.—Danville Lumber & Mfg. Co. v. Gallivan Bldg. Co., 97 S.E. 718, 177 N.C. 103.
67 C.J. p 313 note 1.

93. Vt.—Mayo v. Claflin, 106 A. 653, 93 Vt. 76.
67 C.J. p 313 note 2.

94. Conn.—Grippo v. Davis, 104 A. 165, 166, 92 Conn. 693.

95. Vt.—Mayo v. Claflin, 106 A. 653, 93 Vt. 76.
Wis.—Nelson v. Caddo-Texas Oil Lands Co., 186 N.W. 155, 176 Wis. 327.

96. Minn.—Farnum v. Peterson-Beddick Co., 234 N.W. 646, 182 Minn. 338.
67 C.J. p 313 note 5.

97. Ga.—Parker v. Crosby, 102 S.E. 446, 150 Ga. 1.
Instructions see the C.J.S. title Trial §§ 266–448, also 64 C.J. p 510 note 3 et seq.

Clear and explicit

Instructions relating to estoppel should be clear and explicit.—Cox v. Matthews, 17 Ind. 367—21 C.J. p 1254 note 18.

Designation of instructions as estoppel

If the instructions are otherwise proper and sufficient, it is immaterial that the plea of estoppel is not submitted under the designation of estoppel.—Darst v. Ft. Dodge, D. M. & S. Ry. Co., 191 N.W. 288, 194 Iowa 1145—Miller v. Conn, 186 N.W. 902, 193 Iowa 458.

Instruction as to burden of proof

It is the duty of the court where an issue of estoppel is raised properly to instruct the jury as to the burden of proof.—Morgan v. Headley, 59 N.E. 935, 156 Ind. 320.
Burden of proof see supra § 160.

Invasion of province of jury

Instructions relating to estoppel should not invade the province of the jury.—Draffin v. Charleston, C. & C. R. Co., 13 S.E. 427, 34 S.C. 464—21 C.J. p 1254 note 19 [a].

Waiver

(1) While waiver is generally for jury, court should instruct jury of legal effect of finding thereon.—Shriver Oil Co. v. Interocean Oil Co., 146 A. 223, 157 Md. 341.

(2) Submitting question of waiver to jury, unaccompanied by any instruction as to what acts would be sufficient to constitute waiver, is error.—Kahn v. Schleisner, 166 A. 435, 165 Md. 106.

(3) Instruction that plaintiff, to sustain plea of waiver and estoppel, must show reliance on defendant's conduct to its prejudice, has been held to ignore distinction between waiver and estoppel, to contradict previous instruction not requiring such reliance for waiver, and to be incorrect.—Euclid Ave. State Bank v. Nesbitt, 207 N.W. 761, 201 Iowa 506, reversing 204 N.W. 253.

98. Tex.—McCrea v. Underwood, Civ.App., 73 S.W.2d 593.
21 C.J. p 1253 note 4.

Refusal of instructions held improper

In employee's action, against employer, to recover for breach of contract of employment from week to week, refusal to charge that, if employee acquiesced in change in wages by accepting reduced wages for a long period of time he was "estopped" from claiming any damages therefrom, was error.—Cooksey v. Beaumont Mfg. Co., 9 S.E.2d 790, 194 S.C. 395.

99. Mo.—Willock Realty & Loan Co. v. Smith, App., 253 S.W. 45.
N.C.—L. J. Upton & Co. v. Ferebee, 100 S.E. 310, 178 N.C. 194.

instruct the jury that the representations or silence relied on to create the estoppel were intended to deceive,[1] or were so culpably negligent as to amount to fraud;[2] that the party against whom the estoppel is claimed had knowledge of the truth of the material facts represented or concealed;[3] and that the party claiming the estoppel was in ignorance of such facts or without means of ascertaining their existence,[4] that he relied on such representations or silence,[5] and was warranted in so doing,[6] that he changed his position in reliance thereon,[7] and that he will sustain injury unless the estoppel is sustained.[8]

The giving of instructions in relation to estoppel is prejudicial error where estoppel is not pleaded,[9] or where there is no evidence of an estoppel;[10] and, in any event, the court should limit the consideration of the jury to the particular facts relied on to constitute the estoppel.[11] The court need only charge the jury as to the facts relied on to create the estoppel, although there may be other facts beyond those stated which would amount to an estoppel.[12]

§ 165. Verdict, Findings, and Judgment

A general verdict in favor of the party sought to be estopped negatives an estoppel.

A general verdict in favor of the party sought to be estopped establishes the fact that he was not estopped as alleged.[13] All of the essential elements of an estoppel must be included in the finding.[14] A

Instructions held proper

(1) In general.

Ga.—Hill v. Neely, 106 S.E. 729, 151 Ga. 276.

Iowa.—Stacey Fruit Co. v. Sketchley, 183 N.W. 452, 192 Iowa 186.

Minn.—Riethmuller v. Burton, 222 N.W. 929, 176 Minn. 227—Tousley v. First Nat. Bank, 193 N.W. 38, 155 Minn. 162.

Mo.—Citizens' Trust Co. v. Going, 232 S.W. 996, 288 Mo. 505, affirming, App., 224 S.W. 1019—Citizens' Trust Co. v. Going, App., 224 S.W. 1019, affirmed 232 S.W. 996, 288 Mo 505.

(2) A general instruction on estoppel by silence using the expression, "when a person . . . stands by," is correct, the expression "standing by" having lost its primary signification of actual presence or participation.—Piqua State Bank v. Brannum, 173 P. 1, 103 Kan. 25.

Instructions held improper

Ga.—Sikes v. Seckinger, 152 S.E. 65, 170 Ga. 1.

Refusal of instructions held proper

Ga.—Loe v. Brown, 116 S.E. 309, 155 Ga. 24—Hill v. Neely, 106 S.E. 729, 151 Ga. 276.

Pa.—Menamin v. Automobile Banking Corporation, 163 A. 53, 107 Pa.Super. 372.

Refusal of instructions held improper

Ga.—Ferguson v. Bank of Dawson, 179 S.E. 236, 50 Ga.App. 604, conforming to answer 177 S.E. 694, 179 Ga. 861.

1. Ga.—C. I. & M. Dingfelder v. Georgia Peach Growers Exchange, 186 S.E. 425, 182 Ga. 521.
21 C.J. p 1253 note 5.

2. Cal.—Griffeth v. Brown, 18 P. 372, 76 Cal. 260.

3. Ill.—Halloran v. Halloran, 27 N. E. 82, 137 Ill. 100.
21 C.J. p 1253 note 7.

4. Pa.—Richards v. Buffalo, N. Y. & P. R. Co., 19 A. 931, 137 Pa. 524, 21 Am.S.R. 892.

Instructions held improper

Minn.—Makiesky v. National Guardian Life Ins. Co., 219 N.W. 864, 174 Minn. 554.

N.C.—North Carolina Self Help Corporation v. Brinkley, 2 S.E.2d 889, 215 N.C. 615.

5. N.C.—L. J. Upton & Co. v. Ferebee, 100 S.E. 310, 178 N.C. 194.
21 C.J. p 1254 note 9.

6. Ill.—Dinet v. Ehlert, 13 Ill.App. 99.

7. Ill.—Halloran v. Halloran, 27 N. E. 82, 137 Ill. 100.

8. Ill.—Halloran v. Halloran, supra.

Iowa.—Jamison v. Miller, 20 N.W. 491, 64 Iowa 402.

9. Cal.—Fleishbein v. Western Auto Supply Agency, 65 P.2d 928, 19 Cal.App.2d 424—State Credit Corporation v. Ranger, 281 P. 663, 101 Cal.App. 310.

Mo.—Elders v. Memphis Land & Lumber Co., App., 257 S.W. 515.
21 C.J. p 1254 note 14.

Necessity for pleading estoppel see supra § 153.

10. Ga.—Parker v. Crosby, 103 S.E. 446, 150 Ga. 1.

Mo.—Elders v. Memphis Land & Lumber Co., App., 257 S.W. 515.
21 C.J. p 1254 note 15.

11. Tex.—Bender v. Brooks, 130 S. W. 653, 61 Tex.Civ.App. 464.

12. Pa.—Berg v. McCafferty, 12 A. 460, 9 Pa.Cas. 135.

13. N.H.—Concord Coal Co. v. Ferrin, 51 A. 283, 71 N.H. 331, 93 Am.S.R. 496.

14. Cal.—Arp v. Blake, 218 P. 773, 63 Cal.App. 362.
21 C.J. p 1254 note 22.

Implied findings

(1) Express finding on facts relied on as estoppel against allegations of cross complaint was not necessary, where court impliedly found against such facts by finding allegations set up in cross complaint were true.—Fair Oaks Bank v. Johnson, 244 P. 335, 198 Cal. 196.

(2) Where court failed to find existence of agreement between boat club and city park board settling controversy with respect to use of street giving access to club's docks, and there was evidence from which trial court could find that if there was such agreement, persons seeking to use the road by their subsequent acts and conduct did not intend to be bound thereby, parties who had used road for twenty years to reach boat docks were not "estopped" from prosecuting an action to enjoin city officials from restricting use of street to pedestrian traffic.—City of Evansville v. Evansville Boat Club, Ind.App., 27 N.E.2d 389.

Findings held not to show estoppel

(1) Finding that lessor did not by silence or acts lead lessee to believe he could sublease showed no basis for estoppel.—Litchner v. Staples, 273 P. 585, 95 Cal.App. 685.

(2) Finding that mortgagee, who was given worthless check for release and subsequently worthless mortgage and realty did not discover conspiracy to defraud until shortly before beginning suit showed there was no intentional relinquishment of known right and no estoppel to claim damages for fraud.—Davis v. Maislen, 165 A. 451, 116 Conn. 375.

(3) Other cases.

Cal.—City of San Diego v. Cuyamaca Water Co., 287 P. 475, 209 Cal 105—Calidino Hotel Co. of San Bernardino v. Bank of America Nat. Trust & Savings Ass'n, 87 P. 2d 923, 31 Cal.App.2d 295.

Mo.—Mozingo v. Mozingo, App., 149 S.W.2d 897.

Nev.—Ford v. Brown, 200 P. 522, 45 Nev. 202.

Findings as to knowledge

Finding that bailor knew automo-

finding is sufficient if it recites facts from which an estoppel necessarily follows.[15]

Where it is necessary specially to plead estoppel, see supra § 153, if facts constituting an estoppel are not pleaded, a finding that an estoppel exists is unauthorized,[16] but if it is unnecessary to plead estoppel, the court, which bases its decision on estoppel, must make a finding, notwithstanding that the estoppel was not pleaded.[17]

ESTOQUE. In Spanish law, a royal emblem or insignia denoting power and justice.[1]

ESTOVERIA SUNT ARDENDI, ARANDI, CONSTRUENDI, ET CLAUDENDI.[2]

ESTOVERIIS HABENDIS. A writ for a wife judicially separated to recover her alimony or estovers.[3]

ESTOVERS. An allowance made to a person out of an estate or other thing for his or her support, as for food and raiment;[4] hence sustenance out of the goods of the husband;[5] the alimony allowed by the common law to the wife in the case of divorce a mensa et thoro.[6]

As synonymous with "bote," to designate certain rights of common see Common Lands § 4 b (2) notes 55–65.

EST PŒNA PECUNIARIA, SICUT CORPORALIS, ET QUÆLIBET PŒNA CORPORALIS, QUAMVIS MINIMA, MAJOR EST QUALIBET PŒNA PECUNIARIA.[7]

EST QUIDDAM PERFECTIUS IN REBUS LICITIS.[8]

ESTRAYS. See Animals § 85. The term is also used of flotsam at sea.[9]

ESTREAT. From the Latin "extractum."[10]

As a noun, an extract from the records of the criminal courts to serve as a foundation of proceedings against accused and his bail or surety, to amerce them.[11]

In English law, a true copy or duplicate of an original writing, especially of amercements or penalties set down in the rolls of court, to be levied by the bailiff or other officer on every offender;[12] also a forfeited recognizance taken out from among the other records for the purpose of being sent up to the exchequer, that the parties might be sued thereon.[13]

As a verb, to draw out, or extract;[14] to take out a forfeited recognizance from the records of a court, and return it to the court of exchequer, to be prosecuted;[15] and as the past tense or past participle, "estreated," taken from out the other records and

bile was being exhibited for sale has been held to import that bailor knew thereof before sale.—Scruggs v. Crockett Automobile Co., Tex.Civ. App., 41 S.W.2d 509, error dismissed.

Findings as supporting judgment

(1) Jury's finding that payee informed maker of having no interest in notes supported judgment for maker on plea of estoppel, in the absence of objection to manner of submission.—Peurifoy v. Jones, Tex.Civ. App., 49 S.W.2d 949.

(2) Judgment denying mandatory injunction requiring removal of buildings from electric line right of way because of estoppel was held not sustained by findings or evidence.—City of Los Angeles v. Babcock, 283 P. 314, 102 Cal.App. 571.

15. Cal.—Corporation of America v. Harris, 43 P.2d 307, 5 Cal.App.2d 452.

16. Cal.—Fritz v. Mills, 106 P. 725, 12 Cal.App. 113.

17. Cal.—Corporation of America v. Harris, 43 P.2d 307, 5 Cal.App.2d 452.

1. Escriche Diccionario.

2. A maxim meaning "Estovers are for burning, ploughing, building, and inclosing."—Bouvier L.D.

3. Black L.D.

4. Black L.D.

5. Ont.—Lucas v. Knox, 3 Ont. 453, 458.

6. 1 Blackstone Comm. p 441. See generally Divorce § 202 et seq.

7. A maxim meaning "There is a money penalty, just as a bodily punishment, and any corporeal punishment, however small, is greater than a pecuniary penalty"—Adams Gloss.

8. A maxim meaning "There is something more perfect in things allowed."—Black L.D.

9. Black L.D.

10. Black L.D.

11. La.—State v. Dunbar, 10 La. 99, 102.

Statutory equivalent

The act of April 2, 1832, allowing district courts to take certain proceedings with regard to bail bonds and recognizances, operates similarly to what is known under the common law as estreat.—Louisiana Society for Prevention of Cruelty to Children v. Cage, 14 So. 422, 45 La.Ann. 1394.

12. N.S.—Reg. v. Creelman, 25 N.S. 404, 418.

Similarly expressed

(1) A copy or extract from the book of estreats, that is, the rolls of any court, in which the amercements or fines, recognizances, etc., imposed or taken by that court upon or from the accused, are set down, and which are to be levied by the bailiff or other officer of the court; a true copy or note of some original writing or record, and especially of fines and amercements imposed by a court, extracted from the record, and certified to a proper officer or officers authorized and required to collect them.—Black L.D.

(2) "An extract or copy from the record."—Burrill L.D.

13. Black L.D., citing 4 Blackstone Comm. p 253.

14. N.S.—Reg. v. Creelman, 25 N.S. 404, 418.

15. Black L.D.

sent up to the exchequer for suit thereon.[16]

ESTRECIATUS. Straightened, as applied to roads.[17]

ESTREPE. To despoil, lay waste, or strip; to commit waste upon an estate, as by cutting down trees, removing buildings, etc.; also, to injure the value of a reversionary interest by stripping or spoiling the estate.[18]

ESTREPEMENT. A species of aggravated waste, by stripping or devastating the land, to the injury of the reversioner, and especially pending a suit for possession;[19] also an ancient common-law process to prevent waste.[20]

ESTRICTO. In Spanish law, literally "strict," applied to that which is entirely clear and fixed, requiring no interpretation.[21]

ESTUARY. See the C.J.S. title Waters § 2, also 67 C.J. p 676 note 25 [a].

EST UN MAXIME EN NOSTRE LEY "PAROLS POUT PLE."[22]

ESTUPRO. In Spanish law, seduction.[23]

ET. Literally "And." The introductory word of several Latin and law French phrases in more or less common use.[24]

Et cætera or *Et cetera.* Its abbreviated forms are etc. and &C., see Abbreviations 1 C.J.S. p 276 note 5, and p 281 notes 10–12. In itself, the term implies no limitation, and its use is so varied that it is questionable whether it can be said to have any definite use or uniform interpretation;[25] it has even been said to have no well defined meaning;[26] and as sometimes used it is considered as meaningless and without effect,[27] being often disregarded as surplusage,[28] although, under other circumstances, the argument that the term or its abbreviated form means nothing has been rejected.[29]

In its literal and extended meanings, it has been defined as: And others, and other things, and so forth, and so on, or and the rest.[30] The words are generally used when a number of individuals of a class have been specified to indicate that more of the same sort might have been mentioned, but for shortness are omitted;[31] and so applying the "ejusdem generis" rule or the maxim, Noscitur a sociis, the phrase has been used to indicate others of a kind specified;[32] has been construed as referring to others of the like, or of the same, kind;[33] to things or articles of like character with, or of the same kind as, those previously enumerated;[34] and has been restricted to articles directly connected with those specified;[35] or only those things ejusdem generis;[36] to other things of like character[37] or of the same

16. La.—State v. Johnson, 60 So. 702, 703, 132 La. 11—State v. Dunbar, 10 La. 100, 102.

17. Black L.D.

18. Black L.D.

19. Black L.D.

20. Century D.
See generally the C.J.S. titles Ejectment § 57, and Waste § 15, also 67 C.J. p 626 note 60–p 627 note 82.

21. Escriche Diccionario.

22. In French, literally, "It is a maxim in our law 'Words make the plea.'"—Adams Gloss.
21 C.J. p 1255 note 23.

23. Philippine.—U. S. v. De Dios, 8 Philippine 279, 282.

24. Black L.D.

25. Cal.—Hanford Mercantile Store v. Sowlveere, 104 P. 708, 709, 11 Cal.App. 261.

26. Miss.—Lewis v. Ladner, 168 So. 281, 282, 177 Miss. 473, citing **Corpus Juris.**

27. Pa.—Fleck v. Harmstad, 155 A. 875, 877, 304 Pa. 302, 77 A.L.R. 874.
21 C.J. p 1257 note 53.
It is so considered in the designation of parties to an appeal or writ of error, see Appeal and Error § 413 note 35.

28. Cal.—Harrison v. McCormick, 26 P. 830, 831, 89 Cal. 327, 23 Am.S.R. 469.
21 C.J. p 1257 note 54.

29. Tenn.—Wagner v. Brady, 171 N. W. 1179, 130 Tenn. 554.

30. Ky.—Duroff v. Commonwealth, 232 S.W. 47, 49, 192 Ky. 31.
Minn.—Osterberg v. Section 30 Development Co., 200 N.W. 738, 739, 160 Minn. 497
N.J.—Potter v. Borough of Metuchen, 155 A. 369, 370, 371, 108 N.J. Law 447.
Pa.—Fleck v. Harmstad, 155 A. 875, 877, 304 Pa. 302, 77 A.L.R. 874.
Utah.—Muir v. Kay, 244 P. 901, 904, 66 Utah 550, quoting **Corpus Juris.**
21 C.J. p 1255 notes 33–37.

31. La.—Bagley v. Rose Hill Sugar Co., 35 So. 539, 548, 111 La. 249.
Pa.—Fleck v. Harmstad, 155 A. 875, 877, 304 Pa. 302, 77 A.L.R. 874.
Similarly expressed
"It is used to point out that other things which could be mentioned are to be understood."—Osterberg v. Section 30 Development Co., 200 N.W. 738, 739, 160 Minn. 497.

32. N.J.—Potter v. Borough of Metuchen, 155 A. 369, 370, 371, 108 N. J.Law 447.

33. Minn.—Osterberg v. Section 30 Development Co., 200 N.W. 738, 739, 160 Minn. 497.
Pa.—Fleck v. Harmstad, 155 A. 875, 877, 304 Pa. 302, 77 A.L.R. 874.
Tenn.—Wagner v. Brady, 171 S.W. 1179, 130 Tenn. 554.
21 C.J. p 1256 note 39.

34. Pa.—Fleck v. Harmstad, 155 A. 875, 877, 304 Pa. 302, 77 A.L.R. 874—In re Rainier's Estate, 30 Pa. Dist. 35, 50 Pa.Co. 20, 69 Pittsb. Leg.J. 75, 34 York.Leg.Rec. 161.

35. N.Y.—Loeser v. Liebmann, 14 N. Y.S. 569, 570.
Implies necessary matter
"Lord Coke observed long ago that 'an et cetera doth imply some other necessary matter.'"—Bagley v. Rose Hill Sugar Co., 35 So. 539, 548, 111 La. 249.

36. N.C.—Whitaker v. Old Dominion Guano Co., 31 S.E. 629, 123 N.C. 368, 370.
Pa.—In re Rainier's Estate, 30 Pa. Dist. 35, 50 Pa.Co. 20, 69 Pittsb. Leg.J. 75, 34 York Leg.Rec. 161.
21 C.J. p 1256 note 43.

37. Miss.—Hisaw v. Ellison Ridge Consolidated School Dist., 198 So. 557, 558—Lewis v. Ladner, 168 So. 281, 282, 177 Miss. 473, quoting **Corpus Juris.**

character;[38] to other like purposes,[39] or other purposes of a like character to those which have been named.[40] The meaning of the phrase may be governed by the context,[41] by custom,[42] the intention of the parties,[43] or the manner and place in which it is used;[44] but where it can have but one certain meaning it will be given that meaning.[45]

The term has been held equivalent to, or synonymous with, "and others,"[46] or "and so forth" see 3 C.J.S. p 1069 note 99.

Examples of specific construction given to phrases employing the term or its abbreviated forms, "etc.," or "&C.," are listed in the subjoined note,[47] and other examples which have not been the subject of recent adjudications are set out in 21 C.J. p 1255 note 38–p 1257 note 54.

As used specifically in pleadings, statutes, and wills, see the C.J.S. titles Pleading § 58, also 49 C.J. p 120 note 31 [h] (12), and 21 C.J. p 1257 notes 55–59, Statutes § 220, also 59 C.J. p 815 note 64–p 816 note 67, and Wills § 748, also 69 C.J. p 361 note 76.

Other phrases of relatively less importance are listed in the note.[48]

Or.—Naylor v. McColloch, 103 P. 68, 70, 54 Or. 305.

38. Ky.—Bardstown & L. R. Co. v. Metcalfe, 4 Metc. 199, 211, 81 Am. D. 54.
21 C.J. p 1256 note 45.

39. Or.—Stansbury v. First M. E. Church, 154 P. 887, 892, 79 Or 155.
Tex.—Anderson & Kerr Drilling Co. v. Bruhlmeyer, Civ.App., 115 S.W. 2d 1212, 1214.

Applying the familiar maxim, Noscitur a sociis, the term imports other purposes of a like character to those which have been named.—High Ct. I. O. F. v. Schweitzer, 70 Ill.App. 139, 143—21 C.J. p 1255 note 38 [a].

40. Mass.—In re Schouler, 134 Mass. 426, 427.
Pa.—Fleck v. Harmstad, 155 A. 875, 877, 304 Pa. 302, 77 A.L.R. 874.

41. Utah.—Muir v. Kay, 244 P. 901, 903, 904, 66 Utah 550.
21 C.J. p 1256 note 50.

42. Eng.—Parker v. Taswell, 2 De G. & J. 559, 571, 59 Eng.Ch. 440, 44 Reprint 1106, 8 E.R.C. 642—Price v. Griffith, 1 De G. M. & G. 80, 82, 50 Eng.Ch. 63, 42 Reprint 482.

43. N.Y.—Loeser v. Liebmann, 14 N.Y.S. 569, 570.

44. La.—Bagley v. Rose Hill Sugar Co., 35 So. 539, 548, 111 La. 249.

Similarly expressed

The meaning depends much on the description and enumeration of matters and things preceding the term and the subject matter to which it is applied.—Muir v. Kay, 244 P. 901, 904, 66 Utah 550.

45. Pa.—Commonwealth v. Ross, 6 Serg. & R. 427, 428.

46. Pa.—Fleck v. Harmstad, 155 A. 875, 877, 304 Pa. 302, 77 A.L.R. 874.

47. **Phrases construed**

(1) "Balance due for legal services, etc."—Cooper v. Conklin, 189 N.Y.S. 552, 553, 197 App.Div. 205.

(2) "For roads and etc."—Muir v. Kay, 244 P. 901, 903, 66 Utah 550.

(3) "Including jewelry, clothing, etc."—In re McGlathery's Estate, 166 A. 886, 887, 311 Pa. 351.

(4) "Interest on all mortgages, money in bank, house rents, etc."—In re Coleman's Estate, 257 N.Y.S. 831, 835, 143 Misc. 601.

(5) "Iron, junk, hides, etc."—Fleck v. Harmstad, 155 A. 875, 877, 304 Pa. 302, 77 A.L.R. 874.

(6) "My entire crop of Irish and sweet potatoes, corn, etc."—Gallop v. Elizabeth City Milling Co., 100 S. E. 130, 178 N.C. 1.

(7) "Necessary repairs to and replacing equipment, etc."—Potter v. Borough of Metuchen, 155 A. 369, 371, 108 N.J.Law 447.

(8) "Of my books, furniture, etc."—Fleck v. Harmstad, supra.

(9) "One-half interest in all Minerells Paint Rock &C."—Anderson & Kerr Drilling Co. v. Bruhlmeyer, Tex.Civ.App., 115 S.W.2d 1212, 1214.

48. **Other phrases**

(1) "Et adjournatur," literally "And it is adjourned," used in the old reports, where the argument of a cause was adjourned to another day, or where a second argument was had.—Black L.D. See also Adjornatur or Adjournatur 2 C.J.S. p 47 note 1.

(2) "Et al.," see Abbreviations 1 C.J.S. p 276 note 5.

(3) "Et alii e contra," literally, "And others on the other side," a phrase constantly used in the Year Books in describing a joinder in issue.—Black L.D.

(4) "Et alius," abbreviated "et al," see Abbreviations, 1 C.J.S. p 276 note 5, and meaning "and another."—Black L.D.

(5) "Et allocatur," as meaning and it is allowed.—Black L.D.

(6) "Et de ceo se mettent en le pays," as meaning in law French, and of this they put themselves upon the country.—Black L.D.

(7) "Et de hoc ponit se super patriam," literally, "And of this he puts himself upon the country," the formal conclusion of a common law plea in bar by way of traverse, the literal translation being retained in the modern form.—Black L.D., citing 3 Blackstone Comm. p 313.

(8) "Et ei legitur in haec verba," literally, "And it is read to him in these words," formerly used in entering the prayer of oyer on record—Black L.D.

(9) "Et habeas ibi tunc hoc breve," literally, "And have you then there this writ," formal words directing the return of a writ, the literal translation being retained in the modern form of a number of writs.—Black L.D.

(10) "Et habuit," literally, "And he had it," a common phrase in the Year Books, expressive of the allowance of an application or demand by a party.—Black L.D.

(11) "Et hoc paratus est verificare," literally, "And this he is prepared to verify," the Latin form of concluding a plea in confession and avoidance.—Black L.D.

(12) "Et hoc petit quod inquiratur per patriam," literally, "And this he prays may be inquired of by the country," the conclusion of a plaintiff's pleading, tendering an issue to the country, that is, to the jury.—Black L.D.

(13) "Et inde petit judicium," literally, "And thereupon [or thereof] he prays judgment," a clause at the end of pleadings, praying the judgment of the court in favor of the party pleading.—Black L.D.

(14) "Et inde producit sectam," literally, "And thereupon he brings suit," the Latin conclusion of a declaration, except against attorneys and other officers of the court.—Black L.D., citing 3 Blackstone Comm. p 295.

(15) "Et modo ad hunc diem," literally, "And now at this day," the formal beginning of an entry of appearance or of a continuance, the equivalent English words being still used in this connection.—Black L.D.

(16) "Et non," literally "And not," a technical phrase in pleading, which introduces the negative averments of a special traverse, and has the same force and effect as the words "absque

ETABLISSEMENT. See Etablissement or Etablissement 30 C.J.S. p 1235 note 91.

ETCHING. A distinct art, much older than photography,[49] defined as the use of acid to bite a design on metal; and more recently expanded to include the sand-blast process, which uses no acid, but relies on abrasion by sand, emery, or a like substance.[50]

ET CUM DUO JURA IN UNA PERSONA CONCURRUNT, ÆQUAM EST AC SI ESSENT IN DIVERSIS.[51]

ET EST PACTIO DUORUM PLERUMQUE IN IDEM PLACITUM CONSENSUS.[52]

ETHICAL PREPARATION. In pharmaceutical parlance, a term applied to drugs dispensed upon prescription of a dentist or physician and taken from the container kept in the drug store, as distinguished from drugs purchased over the counter in the original package and sold without prescription.[53]

ETHICS. The science of moral duty; more broadly, the science of the ideal human character.[54] Applied to the practice of the professions, it has been said to be the consensus of expert opinion as to the necessity of standards of professional conduct,[55] the subject being more specifically treated in the C.J.S. titles Attorney and Client §§ 23 a, 58, and Physicians and Surgeons § 17, also 48 C.J. p 1099 note 6–p 1101 note 40.

ETHIOPIAN. A term used in the classification of races, the common classification being that of Blumenbach, who makes five. the third of which is Ethiopian or Negro (black) race, occupying all Africa, except the north.[56] As equivalent to "African" see 2 C.J.S. p 1008 note 43, and as distinguished from "Caucasian" see 14 C.J.S. p 38 note 42.

ETHYLENE GLYCOL. The equivalent of glycerin.[57]

ET IMPOTENTIA EXCUSAT LEGEM.[58]

ET IN JURE, NON REMOTA SED PROXIMA CAUSA SPECTATUR.[59]

hoc," instead of which it is occasionally used.—Black L.D. See also Absque Hoc, 1 C.J.S. p 377 note 66.

(17) "Et seq.," see Abbreviations 1 C.J.S. p 276 note 5.

(18) "Et sic," literally, "And so," in the Latin forms of pleading the introductory words of a special conclusion to a plea in bar, the object being to render it positive and not argumentative.—Black L.D.

(19) "Et sic ad judicium," literally, "And so to judgment."—Black L.D.

(20) "Et sic ad patriam," literally, "And so to the country," a phrase used in the Year Books to record an issue to the country.—Black L.D.

(21) "Et sic fecit," literally, "And, he did so."—Black L.D.

(22) "Et sic nil debet," literally, "And so he owes nothing."—Black L.D.

(23) "Et sic pendet," literally, "And so it hangs," used in the old reports to signify that a point was left undetermined.—Black L.D., citing T.Raym. 168.

(24) "Et sic ulterius," literally, "And so further," hence "and so forth," or "and so on."—Black L.D.

(25) "Et uxor," frequently abbreviated "et ux." see Abbreviations 1 C.J.S. p 276 note 5, and judicially noticed as meaning "and wife."—Higgins v. Shepard, 107 S.W. 79, 48 Tex.Civ.App. 365.

(26) "Prist; et alii e contra, et sic ad patriam," literally "Ready; and others, e contra, and so to the country."—Black L.D. sub nom. Et alii e contra.

49. U.S.—Snow v. Laird, Ill., 98 F. 813, 816, 39 C.C.A. 311.

History and early and modern procedure discussed

U.S.—Graphic Arts Co. v. Photo-Chromotype Engraving Co., Pa., 231 F. 146, 148, 149, 145 C.C.A. 334.

50. U.S.—Graphic Arts Co. v. Photo-Chromotype Engraving Co., supra.

51. A maxim meaning "And when two rights blend together (concur) in one person, it is the same as if they were in opposites."—Adams Gloss.

52. A maxim meaning "The consent of two or more in the same will (placitum, that which is their pleasure to arrange between them) constitutes a paction or bargain."—Adams Gloss.

53. U.S.—William S. Merrell Co. v. Anacin Co., Cust. & Pat.App., 109 F.2d 339, 343.

54. Webster New Int.D.

"Jurisprudence" distinguished

"It is the province of ethics to consider of actions in their relation to motives, but jurisprudence deals with actions in their relation to law, and for the most part independently of the motive."—Adler v. Fenton, Wis., 24 How. (U.S.) 407, 410, 16 L.Ed. 696.

Legal ethics

"That branch of moral science which treats of the duties which a member of the legal profession owes to the public, to the court, to his professional brethren, and to his client."—Black L.D.

55. Va.—Goe v. Gifford, 191 S.E. 783, 786, 168 Va. 497.

56. U.S.—In re Ah Yup, C.C.Cal., 1 F.Cas.,No. 104, 5 Sawy. 155, 157.

As including negroes

"In the strictest sense a negro is not an Ethiopian, though both are Africans. In popular parlance the distinction is not observed and the American negro is frequently referred to as an Ethiopian—a fact in no wise to the discredit of the negro, as Ethiopian civilization, culture, and accomplishment are recorded from early historical periods. The prominent place of the Ethiopian in early civilization appears in both sacred and secular chronicle."—White v. White, 150 S.E. 531, 532, 108 W.Va. 128, 66 A.L.R. 518.

57. U.S.—Aerovox Corporation v. Cornell-Dubilier Corporation, C.C. A.N.Y., 108 F.2d 749, 751.

58. A maxim meaning "And inability (or impossibility) excuses (or avoids) the law."—Adams Gloss.

59. A maxim meaning "And in law, not the remote, but the immediate cause is viewed or considered."—Adams Gloss.

ET IN MAJORE SUMMA, CONTINETUR MINOR.[60]

ETIQUETTE OF THE PROFESSION. The code of honor agreed on by mutual understanding and tacitly accepted by members of the legal profession, especially by the bar.[61]

ET LEX PLUS LAUDATUR, QUANDO RATIONE PROBATUR.[62]

ET SICUT AD QUÆSTIONEM JURIS NON RESPONDENT JURATORES, SED JUDICES; SIC AD QUÆSTIONEM FACTI NON RESPONDENT JUDICES, SED JURATORES.[63]

ET UBI EADEM EST RATIO, IDEM EST JUS.[64]

EU. A prefix signifying well, good, advantageous.[65]

EUCAINE. Eucocaine; derived from cocaine; it has two distinct forms "a" and "b" (Alpha and Beta), and is used in the form of hydrochlorides.[66]

EUCHRE. See the C.J.S. title Gaming § 1, also 27 C.J. p 971 note 59.

EUM, QUI NOCENTEM INFAMAVIT, NON ESSE BONUM ÆQUUM, OB EAM REM CONDEMNARI; PECCATA ENIM NOCENTIUM NOTA ESSE, ET OPORTERE ET EXPEDIRE.[67]

EUNDO ET REDEUNDO. Latin, in going and returning; applied to vessels.[68]

EUNDO, MORANDO, ET REDEUNDO. Literally "Going, remaining, and returning." A person who is privileged from arrest, such as a witness, legislator, etc., is generally so privileged eundo, morando, et redeundo; that is, on his way to the place where his duties are to be performed, while he remains there, and on his return journey.[69]

EUNOMY. Equal laws and a well-adjusted constitution of government.[70]

EUNUCH. In its primary and general signification, a castrated male of the human species. In its secondary meaning, unproductive; barren.[71]

EUPHEMISM. A mild, delicate, or indirect word or expression in place of a plainer or more accurate one, which by reason of its meaning or its associations or suggestions might be offensive, unpleasant, or embarrassing,[72] as the use of "intimate" to impute an illicit sexual relationship.[73]

EUQUININE. A preparation more or less directly from cinchona bark, for use in medicine, having substantially the same medicinal qualities as those of sulphate of quinia and other preparations from the same source, but without the bitter taste and disagreeable sensation in the ears which often accompanies the administration of quinine.[74]

EUROPE. The term as used in the British Merchant Shipping Act has been judicially interpreted to mean the continent of Europe,[75] in contradistinction to the United Kingdom.[76]

EUROPEAN PLAN. See the C.J.S. title Innkeepers § 1, also 21 C.J. p 1258 notes 91–94.

EVADE. To avoid by effort or contrivance;[77] to avoid, often by skill, dexterity, or contrivance, or to get away from by artifice.[78]

"Evade" has been distinguished from "avoid" see 7 C.J.S. p 1309 note 6.

EVANGELICAL and **EVANGELIST.** See the C.J.S. title Religious Societies §§ 1, 39, also 21 C.J. p 1258 note 98–p 1259 note 6.

60. A maxim meaning "And in the greater sum the less is included."—Adams Gloss.

61. Black L.D.

62. A maxim meaning "And law is the more praiseworthy when it is approved by reason."—Adams Gloss.

63. A maxim meaning "For jurors are to try the fact, and the judges ought to judge according to the law that riseth upon the fact."
U.S.—Mitchell v. Harmony, N.Y., 13 How. 115, 144, 14 L.Ed. 75.
Mass.—Commonwealth v. Anthes, 5 Gray 185, 205.

64. A maxim meaning "And where the reason is the same, there the law is the same."—Adams Gloss.
Applied in Arding v. Flower, 8 T. R. 534, 536, 101 Reprint 1531.

65. Mont.—State v. Brennan, 300 P. 273, 275, 89 Mont. 479.

66. Mont.—State v. Brennan, supra.

67. A maxim meaning "He who has defamed or accused one who has committed a wicked or criminal act, is not justly or equitably to be condemned on that account; indeed, the marked or notorious sins or transgressions of wicked men ought to be exposed."—Adams Gloss. citing 3 Blackstone Comm. p 125.

68. Black L.D.

69. Black L.D.
See generally Arrest §§ 3, 29 k.
Applied in Carstairs v. Knapp, 10 Montg.Co. (Pa.) 164, 165.

70. Black L.D.

71. Kan.—Eckert v. Van Pelt, 76 P. 909, 910, 69 Kan. 357, 66 L.R.A. 266.

72. Century D.

73. Del.—MacDonough v. A. S Beck Shoe Corporation, Super., 10 A.2d 510, 513.

74. U.S.—U. S. v. Merck, N.Y., 168 F. 244, 245, 94 C.C.A. 74.

75. Eng.—The Glanystwyth, [1899] P. 118, 126.

76. Eng.—The Winestead, [1895] P. 170, 175.

77. Ohio.—Ratterman v. Ingalls, 28 N.E. 168, 170, 48 Ohio St. 468.

78. D.C.—Cohen v. Marx Jewelry Co., 92 F.2d 498, 501, 67 App.D.C. 347.

EVAPORATION. The act of resolving or the state of being resolved into vapor; the conversion of a solid or liquid by heat into vapor, fumes, or steam; vaporization.[79] In a particular connection, evaporation has been held to constitute a natural loss of water, as distinguished from leakage or wasting of water.[80]

EVASIO. Latin, in old practice, an escape from prison or custody.[81]

EVASION. Act of eluding or avoiding, avoidance by artifice.[82] In a particular connection, the term implies a wrongful act as distinguished from an avoidance permitted by law.[83]

In Spanish law, the term means escape, as from a prison.[84]

"Evasion" has been held synonymous with "concealment" see 15 C.J.S. p 795 note 23, and "suppression."[85]

Phrases employing the word are set out in the note.[86]

EVASIVE. Tending or seeking to evade, elusive, shifting, as an evasive argument or plea.[87]

It has been distinguished from "false."[88]

Evasive answer. See the C.J.S. title Pleading § 107, also 49 C.J. p 190 note 55.

EVE. Ordinarily the evening of the day before another day; also defined by the lexicographers as meaning the period immediately preceding an important event, as "on the eve of death," or "on the eve of marriage."[89]

EVEN.

As an Adjective

Situated on a level, or on the same level; being in the same line or plane; also without fractional parts; neither more nor less; entire; unbroken.[90]

Phrases employing the word are set out in the note.[91]

As an Adverb

Also or likewise;[92] although or if.[93]

Phrases employing the word are set out in the note.[94]

79. Century D.
As affecting the amount of duty see Customs Duties § 132.

80. Mont.—Worden v. Alexander, 90 P.2d 160, 108 Mont. 208.

81. Black L.D.

82. Tex.—City of Wink v. Griffith Amusement Co., 100 S.W.2d 695, 701, 129 Tex. 40.
Similarly expressed
(1) A subtle endeavoring to set aside truth or to escape the punishment of law.—Black L.D.
(2) A trick or subterfuge; the act of escaping by means of artifice. —Wharton L.Lex.

83. **As implying illegality**
(1) "The contest between the citizen and his government over taxes will beyond question last as long as that other great struggle with which it is often coupled. To describe its various phases as evasion rather than as avoidance seems to us to use the language of the ultimately victorious contestant rather than to speak as an impartial observer. The artifice or cunning implicit in the first term is not consistent with the approval given by the courts to a disposition of property in the manner best suited to avoid taxation."—Clapp v. Heiner, C.C.A.Pa., 51 F.2d 224, 225.
(2) "When the law draws a line, a case is on one side of it or the other, and if on the safe side is none the worse legally that a party has availed himself to the full of what the law permits. When an act is condemned as an evasion, what is meant is that it is on the wrong side of the line indicated by the policy if not by the mere letter of the law." U.S.—Bullen v. Wisconsin, Wis., 36 S.Ct. 473, 474, 240 U.S. 625, 60 L. Ed. 830—Clapp v. Heiner, C.C.A. Pa., 51 F.2d 224, 225.
Pa.—Wyndmoor Building & Loan Ass'n v. Power Building & Loan Ass'n, 183 A. 367, 369, 121 Pa. Super. 236.

84. Escriche Diccionario.

85. Iowa.—Murray v. Brotherhood of American Yeomen, 163 N.W. 421, 423, 180 Iowa 626.

86. **Phrases construed**
(1) "Evasion of service."—Steinhardt v. Baker, 57 N.E. 629, 630, 163 N.Y. 410.
(2) "Evasion of statute."
Iowa.—State v. Bernstein, 105 N.W. 1015, 1016, 129 Iowa 520.
Mo.—State v. Cook, 80 S.W. 929, 930, 181 Mo. 596.
(3) "Evasion of taxes" see the C. J.S. title Taxation § 62, also 61 C.J. p 173 note 81—p 174 note 93.

87. Black L.D.

88. Ga.—Gaynor v. Travelers' Ins. Co., 77 S.E. 1072, 12 Ga.App. 601.

89. Ill.—Jarvis v. Jarvis, 122 N.E. 121, 124, 286 Ill. 478.

90. Century D.

91. **Phrases construed**
(1) "Even and not fractional."—Clark v. Lawrence County, 111 N.W. 558, 559, 21 S.D. 254.
(2) "Even grade."—Job v. People, 61 N.E. 1079, 1081, 193 Ill. 609.

92. N.Y.—Ulster County Sav. Inst. v. Young, 44 N.Y.S. 493, 494, 15 App.Div. 181.

93. Ark.—May v. Missouri Pac. R. Co., 219 S.W. 756, 757, 143 Ark. 75.

94. **Phrases construed**
(1) "Even if," as meaning "although."—Burnstein v. Cass Ave. & F. G. R. Co., 56 Mo.App. 45, 54. See also Although 3 C.J.S. p 1012 note 39.
(2) "Even if you find for plaintiff," as not necessarily an intimation of the court's opinion that a finding for plaintiff was not probable.—May v. Missouri Pac. R. Co., 219 S.W. 756, 757, 143 Ark. 75.
(3) "Even should you find for the plaintiff."—Manistee Mill Co. v. Hobdy, 51 So. 871, 873, 165 Ala. 411, 138 Am.S.R. 73.
(4) "Even though," as a phrase of inclusion and not of exclusion, and by its use intended to bring within the scope of an instrument a subject or condition that otherwise might not be included, or its inclusion at least be a subject of doubt.—Ulster County Sav. Inst. v. Young, 44 N.Y. S. 493, 494, 15 App.Div. 181.
(5) "Even though you believe from the evidence," as carrying an intimation against the supposition.—Louisville & N. R. Co. v. Parker, 138 So. 231, 237, 249, 223 Ala. 626—Birmingham R. Light & Power Co. v. Saxon, 59 So. 584, 593, 179 Ala. 136.

EVENING. In strictness, that portion of the day which commences at sunset and continues during twilight;[95] from sunset until dark.[96] In common speech, in some localities, the closing part of the day and beginning of the night; the latter part of the day and the earlier part of the night, until bedtime;[97] the period between sunset, or the evening meal, and ordinary bedtime.[98] The term has been distinguished from "afternoon" see 2 C.J.S. p 1011 note 64.

In old English law, the term, in the plural, refers to the delivery at even or night of a certain portion of grass, or corn, etc., to a customary tenant, who performs the service of cutting, mowing, or reaping for his lord, given him as a gratuity or encouragement.[99]

EVENLY BALANCED. Equal in weight or force.[1] It has been compared with "improbable" and "probable."[2]

EVENT. Strictly speaking, an event has reference only to something that has taken place,[3] ordinarily it implies a past occurrence, and, in itself, does not imply futurity.[4] The word has been defined generally as meaning the fact of taking place or occurring;[5] anything that happens or comes to pass as distinguished from a thing that exists;[6] that which comes, arrives, or happens; that which falls out; any incident, good or bad, especially one that is important or remarkable;[7] and, when used with relation to cause and effect, as meaning that which follows from the cause, being called an event because it eventuates from causes;[8] the consequence of anything; the issue, conclusion, or end, that in which an action, operation, or series of operations, terminates;[9] the result;[10] although it has also been said that the word is not restricted to either the result or the cause.[11]

In practice, it has been more specifically defined as the decision of the question before the court;[12] the final outcome and end of the litigation;[13] the final success in an action.[14] Examples of what the term has been held to include, in one or another of the senses above indicated, are given in the subjoined note.[15]

"Event" has sometimes been held equivalent to, or synonymous with, "circumstance" see Circumstance 14 C.J.S. p 1123 in Pocket Parts, "occur-

95. W.Va.—State v. Griggs, 11 S.E. 740, 741, 34 W.Va. 78.

96. Idaho.—Golay v. Stoddard, 89 P. 2d 1002, 1005, 60 Idaho 168.

97. Idaho.—Golay v. Stoddard, supra.

98. Ala.—City of Albany v. Black, 112 So. 433, 216 Ala. 4.

Similarly expressed

From the usual supper time to the usual bedtime, these limits being somewhat indefinite.—State v. Foley, 94 A. 841, 843, 89 Vt. 193.

"Evening school" see the C.J.S. title Schools and School Districts § 2, also 21 C.J. p 1259 note 14.

99. Black L.D.

1. Colo.—New York L. Ins. Co. v. Holck, 151 P. 916, 923, 59 Colo. 416.

2. Colo.—New York L. Ins. Co. v. Holck, supra.

3. "It cannot well be an event until it happens"—Thomson v. Hayes, 111 N.Y.S. 495, 497, 59 Misc. 425.

4. N.Y.—Thomson v. Hayes, supra.

5. Utah.—Whatcott v. Continental Casualty Co., 39 P.2d 733, 736, 85 Utah 406.

6. N.Y.—In re Quinn, 24 N.Y.S.2d 916, 920.

Derived from the Latin "e," out, and "venire," to come.—Century D.

7. Mo.—Schulz v. Great Atlantic & Pacific Tea Co., 56 S.W.2d 126, 127, 331 Mo. 616, citing **Corpus Juris.**

Utah.—Whatcott v. Continental Casualty Co., 39 P.2d 733, 736, 85 Utah 406.

8. Mo.—Schulz v. Great Atlantic & Pacific Tea Co., 56 S.W.2d 126, 127, 331 Mo. 616, quoting **Corpus Juris.**

9. Mo.—Brewer v. Ash Grove Lime & Portland Cement Co., 25 S.W.2d 1086, 1088, 223 Mo.App. 983.

Neb.—Geis v. Geis, 250 N.W. 252, 253, 125 Neb. 394.

N.Y.—Fitch v. Bates, 11 Barb. 471, 473—Thomson v. Hayes, 111 N.Y.S. 495, 497, 59 Misc. 425.

Utah.—Whatcott v. Continental Casualty Co., 39 P.2d 733, 736, 85 Utah 406.

Similarly expressed

Issue, hap, chance, success, that follows doing anything.—State v. Cross, 2 Humphr., Tenn., 301, 303.

10. Mo.—Juhl v. Hussman-Ligonier Co., App., 146 S.W.2d 106, 108—Guillod v. Kansas City Power & Light Co., 18 S.W.2d 97, 100, 224 Mo.App. 382.

Utah.—Whatcott v. Continental Casualty Co., 39 P.2d 733, 736, 85 Utah 406.

Result rather than cause

An event need not necessarily be a cause but may be and generally is a result.—Guillod v. Kansas City Power & Light Co., 18 S.W.2d 97, 100, 224 Mo.App. 382.

11. **It includes** all of steps or connected incidents from first cause to final result. It is not limited in meaning to the initial cause, but may include both cause and effect.—Rinehart v. F. M. Stamper Co., 55 S.W. 2d 729, 732, 227 Mo.App. 653.

12. N.Y.—In re Milliette's Estate, 206 N.Y.S. 342, 345, 123 Misc. 745.

13. Ill.—Commercial Union Assur. Co. v. Scammon, 35 Ill.App. 659, 660.

Similarly expressed

The outcome or the result of a trial or proceeding, of which there may be more than one; not merely the finding of the jury, but the event of the cause.—Myers v. Defries, 5 Ex.D. 180, 185—Myers v. Defries, 5 Ex.D. 15, 18.

14. N.Y.—Benjamin v. Ver Nooy, 61 N.E. 971, 973, 168 N.Y. 578.

15. **Held to include**

(1) The construction of a paragraph in the will before the court.—In re Milliette's Estate, 206 N.Y.S. 342, 345, 123 Misc. 745.

(2) The death of an employee in an accident.—Brewer v. Ash Grove Lime & Portland Cement Co., 25 S.W.2d 1086, 1088, 223 Mo.App. 983.

(3) The dismissal of a complaint at the close of plaintiff's evidence, unless the court shall dismiss without prejudice.—Commercial Sealeaf Co. v. Purepac Corporation, 7 N.Y.S.2d 146, 148, 169 Misc. 133.

(4) The dismissal of a complaint against a joint defendant.—Brooklyn Nat. Bank of New York v. John J. Sullivan, Inc., 285 N.Y.S. 356, 359, 247 App.Div. 285.

(5) The making of a contract.—Brown v. Oneida Knitting Mills, 277 N.W. 653, 655, 226 Wis. 662.

rence,"[16] and "result."[17] It has been distinguished from "accident"[18] and "means."[19]

Fortuitous event. A strong term, used by lawyers for its positive strength, and selected when one wishes to express all of "accident" and more;[20] but said not to refer to causes set in motion by acts which afterward get beyond control.[21] It has been defined as meaning accident;[22] an event happening by chance or accident, occurring unexpectedly, or without known cause;[23] any accident produced by physical causes which are irresistible; such as a loss by lightning or storms, by the perils of the seas, by inundations and earthquakes, or by sudden death or illness.[24] In the subjoined notes examples are given of what, in particular connections, the phrase has been held to include,[25] and not to include.[26]

In the civil law, wherein the corresponding French phrase is "cas fortuit" see Cas 13 C.J.S. p 1768 note 15, it has been defined as meaning that which happens by a cause or force which we cannot resist.[27]

The term has been held equivalent to, or synonymous with, "act of God" see 1 C.J.S. p 1431 note 18, "casus fortuitous" see 14 C.J.S. p 32 note 18, "inevitable accident,"[28] and "unforeseen event."[29] It has been compared with, or distinguished from, "intervening impossibility,"[30] "irresistible force,"[31] and "reasons or causes beyond one's control" see Cause 14 C.J.S. p 51 note 37.

Other phrases are listed in the note;[32] and still other phrases, as to which recent adjudications have

16. Conn.—Dupre v. Atlantic Refining Co., 120 A. 288, 290, 98 Conn 646.
Mo.—Rinehart v. F. M Stamper Co., 55 S.W.2d 729, 732, 227 Mo.App. 653.

17. N.Y.—Fitch v. Bates, 11 Barb. 471, 473.
Tenn.—State v. Cross, 2 Humphr. 301, 303.

18. Mo—Rinehart v. F. M. Stamper Co., 55 S.W.2d 729, 732, 227 Mo.App. 653.

19. **As cause and effect**
"An event is the culmination or end that the 'means' may have produced or brought about. There is the same relationship between means and the event that results, that there is between cause and effect."—Sentinal Life Ins. Co. v. Blackmer, C C. A.Colo., 77 F.2d 347, 350—Continental Casualty Co. v. Willis, C.C.A.Va., 28 F.2d 707, 708, 61 A.L.R. 1069.

20. Wash.—Stertz v. Industrial Insurance Commission, 158 P. 256, 259, 91 Wash. 588, Ann Cas.1918B 354.

21. N.Y.—Taylor v. Syme, 45 N.Y.S. 707, 709, 17 App.Div. 517.

22. Wash.—Depre v. Pacific Coast Forge Co., 259 P. 720, 721, 154 Wash. 263—Stolp v. Department of Labor and Industries, 245 P. 20, 21, 138 Wash. 685—Stertz v. Industrial Insurance Commission, 158 P. 256, 259, 91 Wash. 588, Ann.Cas. 1918B 354.

23. Minn.—Stanton v. Minneapolis St. Ry. Co., 263 N.W. 433, 434, 195 Minn. 457.

24. Wash.—Stertz v. Industrial Insurance Commission, 158 P. 256, 259, 91 Wash. 588, Ann.Cas.1918B 354.
Similarly expressed
That which happens by a cause which cannot be resisted.—Thompson v. Commercial Nat. Bank, 100 So. 688, 690, 156 La. 479.

25. **Held to include**
(1) Death from hemorrhage or embolism, caused by hardening of the arteries, coupled with exertion —Frandila v. Department of Labor and Industries, 243 P. 5, 137 Wash. 530.
(2) Floods.
La.—Farnsworth v. Sewerage & Water Board of New Orleans, 139 So. 638, 641, 173 La. 1105.
N.Y.—Sheldon v. Sherman, 42 Barb. 368, 369.
(3) Formation of ice, due to extreme and unusual cold, which prevents the unloading of a vessel. —Houge v. Woodruff, D C.N.Y., 19 F 136, 138.
(4) Injury sustained while exerting extreme muscular effort in pushing a heavily loaded truck.—Zappala v. Industrial Insurance Commission, 144 P. 54, 55, 82 Wash. 314, L.R.A. 1916A 295.
(5) Poisoning of employees by benzol fumes escaping into improperly ventilated room where they were working.—Seattle Can Co. v. Department of Labor and Industries of Washington, 265 P. 739, 741, 147 Wash. 303.
(6) Rupture in region of heart, caused by extra exertion, together with diseased heart and arteries — Cole v. Department of Labor and Industries, 243 P. 7, 9, 137 Wash. 538.

26. **Held not to include**
(1) Destruction by fire of bales of cotton while loaded in car.—Dejean v. Louisiana Western R. Co., 118 So. 822, 823, 167 La. 111.
(2) Fall of awning because metal framework had no sufficient support after canvas was accidentally burned away.—Thompson v. Commercial Nat. Bank, 100 So. 688, 690, 156 La. 479.
(3) Financial failure due to inability to pay one's debts.—Taylor v. Syme, 45 N.Y.S. 707, 709, 17 App. Div. 517.
(4) Fire destroying school building.—Hughes v. Grant Parish School Board, La.App., 145 So. 794, 797.
(5) Flow of quicksand encountered in excavating for foundation.—Jung v. Gwin, 139 So. 774, 778, 174 La. 111.

27. La.—Lehman, Stern & Co. v. Morgan's Louisiana & T. R. & S. S. Co., 38 So. 873, 874, 115 La. 1, 112 Am.S.R. 259, 70 L.R.A. 562, 5 Ann.Cas. 818.
26 C.J. p 1001 note 2.
Similarly expressed
An event which is unforeseen and caused by superior force, which it is impossible to resist.—Nordheimer v. Alexander, 19 Can.S.C. 248, 263 —26 C.J. p 1001 note 3.

28. Wash.—Stertz v. Industrial Insurance Commission, 158 P. 256, 259, 91 Wash. 588, Ann.Cas.1918B 354.
See also Accident 1 C.J.S. p 441 notes 6–8.

29. U.S.—Viterbo v. Friedlander, La., 7 S.Ct. 962, 968, 969, 120 U.S. 707, 30 L.Ed. 776.

30. La.—Marionneaux v. Smith, App., 163 So. 206, 208.

31. Wash.—Stertz v. Industrial Insurance Commission, 158 P. 256, 259, 91 Wash. 588, Ann.Cas.1918B 354.

32. **Phrases construed**
(1) "'Abide' the event of another case."—Commercial Union Assur. Co. v. Scammon, 35 Ill.App. 659, 660.
(2) "Accidental event" see Accidental 1 C.J.S. p 452 note 43.
(3) "Accidental or uncontrollable events."—Lehman, Stern & Co. v. Morgan's Louisiana & T. R. & S. S. Co., 38 So. 873, 874, 115 La. 1, 112 Am. S.R. 259, 70 L.R.A. 562, 5 Ann.Cas. 818.
(4) "Costs to abide the event" see Costs § 348.

not been found, are set out in 21 C.J. p 1259 note 31 –p 1260 note 39.

EVENTUAL. Final, terminating, or ultimate; also happening as a consequence.[33]

Phrases employing the word are set out in the note.[34]

EVENTUALLY. In an eventual manner, hence finally.[35]

Phrases employing the word are set out in the note.[36]

EVENTUS EST QUI EX CAUSA SEQUITUR; ET DICITUR EVENTUS QUIA EX CAUSIS EVENIT.[37]

EVENTUS VARIOS RES NOVA SEMPER HABET.[38]

EVER. Always, or at all times.[39] Its use in a particular statute has been held to indicate a time both before and after its enactment.[40]

EVERGREEN. As a noun, a plant that retains its verdure through all seasons, as the pine and other coniferous trees, the holly, laurel, holm oak, ivy, rhododendron, and many others.[41]

As an adjective, always green, verdant throughout the year, retaining greenness or verdure throughout the year, not deciduous.[42]

Phrases employing the word are set out in the note.[43]

EVERY.[44] All;[45] all the parts which compose a whole collection or aggregate number, considered in their individuality; all, taken separately one by one, out of an indefinite number; all, of a collective or aggregate number, taken one by one;[46] all the separate individuals which constitute the whole, regarded one by one;[47] each;[48] each and all, or each one and all;[49] each, considered indefinitely as a unitary part of an aggregate;[50] each individual of the whole class, or the whole number. but each separately considered;[51] each one of all.[52] While, generally speaking, the word emphasizes the fact that all the individuals of a class or group are included,

(5) "Event of any suit," taken to mean the legal event of any suit.—Geis v. Geis, 250 N.W. 252, 253, 125 Neb. 394.

(6) "Interested in the event."—In re Milliette's Estate, 206 N.Y.S 342, 345, 123 Misc. 745.

(7) "Unexpected or unforeseen event."—Schulz v. Great Atlantic & Pacific Tea Co, 56 S.W.2d 126, 127, 331 Mo. 616—Brewer v. Ash Grove Lime & Portland Cement Co., 25 S.W.2d 1086, 1088, 223 Mo.App. 983—Guillod v. Kansas City Power & Light Co., 18 S.W.2d 97, 100, 224 Mo. App. 382.

(8) "Unforeseen event" as equivalent to:
"Cas fortuit" see 13 C.J.S. p 1768 note 15.
"Fortuitous event" see supra note 29.
"Irresistible force" and "vis major."
U.S.—Viterbo v. Friedlander, La., 7 S.Ct. 962, 968, 969, 120 U.S. 707, 30 L.Ed. 776.
La.—Knapp v. Guerin, 81 So. 302, 306, 144 La. 754.

33. N.Y.—Van Emburgh v. Ackerman, 3 Redf.Surr. 499, 502.

34. **Phrases construed**
(1) "Eventual condemnation money" see the C.J.S. titles Appeal and Error § 2048, Injunctions § 165, also 21 C.J. p 1260 note 45, and Landlord and Tenant § 696, also 21 C.J. p 1260 note 46.

(2) "Eventual costs."—Smith v. Jackson, 50 S.E. 930, 931, 122 Ga. 856.

(3) "Eventual estate."—Van Emburgh v. Ackerman, 3 Redf.Surr. (N.Y.) 499, 502—21 C.J. p 1260 note 41 [b].

(4) "Eventual waste" see the C.J.S. title Waste § 1, also 67 C.J. p 612 notes 29, 30.

35. Webster Int.D.

36. **Phrases construed**
(1) "Eventually accountable."—McDonald v. Bailey, 14 Me. 101, 103.

(2) "Eventually decide."—Dunkin v. Lawrence, 1 Barb. (N.Y.) 447, 448.

37. A maxim meaning "An event is that which follows from the cause, and is called an event because it eventuates from causes."—Black L.D.

Applied, as a definition of "event"
Mo.—Schulz v. Great Atlantic & Pacific Tea Co., 56 S.W.2d 126, 127, 331 Mo. 616, quoting **Corpus Juris.**

38. A maxim meaning "A new matter always produces various events."—Black L.D.

39. Webster New Int.D.

40. **In construing a statute** which prohibits any person from practicing medicine "who has ever been convicted of a felony," the court said: "The word 'ever' to our minds clearly indicates the legislative intention to prohibit the practice of medicine on the part of any person who has been convicted of a felony either before or after the passage of the law."—People v. Hawker, 46 N.E. 607, 608, 152 N.Y. 234.

41. U.S.—U. S. v. Ouwerkerk, C.C. N.Y., 153 F. 916, 917.

42. U.S.—U. S. v. Ouwerkerk, supra. As contrasted with "deciduous" see 26 C.J.S. p 37 note 43.

43. **Phrases construed**
(1) "Evergreen seedlings."—U. S. v. Ouwerkerk, supra.

(2) "Fruit and ornamental trees, deciduous and evergreen" see Deciduous 26 C.J.S. p 37 note 45.

44. **Formerly spelled "everich,"** that is, ever each—Brown v. Jarvis, 2 De G. F. & J. 168, 172, 63 Eng.Ch. 131, 45 Reprint 586, citing Johnson D.

45. S.D.—Erskine v. Pyle, 213 N.W. 500, 503, 51 S.D. 262.
21 C.J. p 1260 note 67.

46. Wash.—Salo v. Pacific Coast Casualty Co., 163 P. 384, 386, 95 Wash. 109, L.R.A.1917D 613.

47. Ark.—Geary v. Parker, 47 S.W. 238, 239, 65 Ark. 521.
S.C.—State v. Penny, 19 S.C. 218, 221.

48. Pa.—Miller v. Rodd, 131 A. 482, 483, 285 Pa. 16, citing **Corpus Juris.**
21 C.J. p 1260 note 61.

49. Ill.—Venner v. Chicago City R. Co., 92 N.E. 643, 648, 246 Ill. 170, 138 Am.S.R 229, 20 Ann.Cas. 607.
21 C.J. p 1260 note 62.

50. Wash—Salo v. Pacific Coast Casualty Co., 163 P. 384, 386, 95 Wash. 109, L.R.A.1917D 613.

51. Md.—Friedenwald v. Baltimore, 21 A. 555, 74 Md. 116, 124.

52. N.Y.—Purdy v. People, 4 Hill 384, 413—Cox v. Island Mining Co., 73 N.Y.S. 69, 74, 65 App.Div. 508, 515.

whether definite or indefinite in number,[53] having reference to all individually, each, one by one, or to any, as representing all of whom or of which the same thing is predicated,[54] yet, whether employed in a statute or otherwise, the proper meaning to be given the word as used in any particular connection, it seems, should be governed by the legal rules of interpretation,[55] for like the word "all," it may be restrained in its meaning by the context.[56]

Depending on the circumstances, "every" has been both held equivalent to, or synonymous with, and also distinguished from, "all" see 3 C.J.S. 868 note 98, p 869 note 7.1 in Pocket Parts, "any" see 3 C.J.S. p 1401 notes 1, 10, and "each" see 28 C.J.S. p 607 notes 86, 87.

Phrases employing the word are listed in the note;[57] and other phrases as to which recent adjudications have not been found are set out in 21 C.J. p 1261 note 77–p 1262 note 31.

EVERY MAN MUST BE TAKEN TO CONTEMPLATE THE PROBABLE CONSEQUENCES OF THE ACT HE DOES.[58]

EVERYONE. Every person,[59] including a corporation.[60]

EVERYTHING. All things.[61] As used by a testator to pass all his property see the C.J.S. title Wills § 759, also 21 C.J. p 1262 notes 35–38.

EVERYWHERE. As a term frequently used in trade talk, it has been said to be a harmless exaggeration, understood and discounted by all, and not to be taken in its literal sense, as synonymous with "the earth."[62]

EVICCION. In Spanish law, dispossession, ouster.[63]

53. Ky.—Smith v. Hall, 290 S.W. 480, 482, 217 Ky. 615.

54. Wash.—Salo v. Pacific Coast Casualty Co., 163 P. 384, 386, 95 Wash. 109, L.R.A.1917D 613.

55. Miss.—McLarty v. Tibbs, 12 So. 557, 69 Miss. 357, 360.

56. Nev.—State v. McKenney, 2 P. 171, 180, 18 Nev. 182.

57. **Phrases construed**

(1) "All or every," as having the meaning of "any" see 3 C.J.S. p 1400 note 98.

(2) "Every bill."—Erskine v. Pyle, 213 N.W. 500, 502, 51 S.D. 262—21 C. J. p 1261 note 81.

(3) "Every bushel of seed sold by us."—Birk v. Jackson, Tex.Civ.App., 75 S.W.2d 918, 922.

(4) "Every citizen of the United States."—Veatch v. City of Cottage Grove, 289 P. 494, 495, 133 Or. 144.

(5) "Every contract of hiring."—De Gray v. Miller Bros. Const. Co., 173 A. 556, 562, 106 Vt. 259.

(6) "Every corporation."—Getridge v. State Capital Co., 18 P.2d 375, 376, 129 Cal.App. 86—21 C.J. p 1261 note 87.

(7) "'Every' court of record" as equivalent to "'any' court of record" see 3 C.J.S. p 1404 note 33.

(8) "Every individual, firm, partnership, common law trust, corporation, association or other organization," as not including a municipal corporation.—City of Idaho Falls v. Pfost, 23 P.2d 245, 246, 251, 53 Idaho 247.

(9) "Every just set-off or other defense," as including every counterdemand, whether properly denominated as counterclaim or set-off.—Fricke v. W. E. Fuetterer Battery & Supplies Co., 288 S.W. 1000, 1002, 220 Mo.App. 623.

(10) "Every one" as equivalent to "all" see 3 C.J.S. p 868 note 98.

(11) "Every other officer" as meaning every other state officer.—McGregor v. Clark, 116 S.E. 823, 826, 155 Ga. 377.

(12) "Every other thing," as relating to things of same kind.—Northwestern Casualty & Surety Co. v. Industrial Commission, 216 N.W. 485, 486, 194 Wis. 337.

(13) "Every owner of a motor vehicle" as including a municipality.—Kelly v. City of Niagara Falls, 229 N.Y.S. 328, 331, 131 Misc. 934.

(14) "Every part of it in his own handwriting," as including signature—Dulin v. Dulin, 148 S.E. 175, 178, 197 N.C. 215.

(15) "Every person."
Cal.—People v. Graff, 211 P. 829, 830, 59 Cal.App. 706.
N.M.—Hood v. Bond, 77 P.2d 180, 188, 42 N.M. 295.
21 C.J. p 1261 note 3.

(16) "Every person, firm or corporation."
U.S.—Kansas City, Mo. v. Johnson, C.C.A.Mo., 70 F.2d 360, 361.
Wash.—Salo v. Pacific Coast Casualty Co., 163 P. 384, 385, 95 Wash. 109, L.R.A.1917D 613.

(17) "Every person lawfully imprisoned."—Floyd v. State, 105 So. 765, 140 Miss. 884.

(18) "Every person, owning . . . any motor vehicle."—State ex rel. Scott v. Superior Court for Thurston County, 24 P.2d 87, 88, 173 Wash. 547.

(19) "Every person . . . violating any law," as including female offenders.—City of Janesville v. Tweedell, 258 N.W. 437, 438, 217 Wis. 395.

(20) "Every person who shall commit the offense of larceny" as not applying to married woman accused of theft of husband's property.—State v. Arnold, 235 N.W. 373, 374, 182 Minn. 313.

(21) "Every resident of this State" as applying to every person who fulfills requirements of provision as to wartime service, regardless of sex.—Lockhart v. Wolden, Cal., 111 P.2d 319, 320.

(22) "Every stock corporation."
Ill.—Venner v. Chicago City R. Co., 92 N.E. 643, 645, 246 Ill. 170, 138 Am.S.R. 229, 20 Ann.Cas. 607.
N.Y.—Bogardus v Fitzpatrick, 247 N.Y.S. 692, 693, 139 Misc. 533.

(23) "Every substantial portion of the work."—Travelers Ins. Co. v. Cox, Tex.Civ.App., 86 S.W.2d 844, 849.

(24) "Every such railroad company or corporation."—Weitzman v. Bissell Lumber Co., 214 N.W. 353, 355, 193 Wis. 561.

(25) "Every two years from date."—Miller v. Rodd, 131 A. 482, 483, 285 Pa. 16.

(26) "Every way," as distinguished from "each way" see 28 C.J.S. p 607 note 99.

58. A fundamental maxim in the law of evidence.—Black L.D., citing Best Presumptions § 16.
Applied in such C.J.S. titles as: Criminal Law §§ 35, 36; Evidence § 131, also 22 C.J. p 143 notes 13–19; and Homicide § 188, also 30 C.J. p 140 note 49.

59. Can.—Reg. v. Toronto R. Co., 2 Can.Cr.Cas. 471, 480

60. Can.—Union Colliery Co. v. Reg, 4 Can.Cr.Cas. 400, 407.

61. Webster New Int.D.

62. U.S.—Clark Thread Co. v. Armitage, C.C.N.Y., 67 F. 896, 899.

63. Escriche Diccionario.

EVICT. To deprive of the possession of land;[64] to dispossess, or turn out of the possession of lands by process of law. Also to recover land by judgment of law.[65]

Evicted. It has been said that the word properly applies only to realty, and is used to describe either a deprivation of the possession of lands and tenements, or the inability to get promised possession.[66] In connection with a deprivation of possession, it implies an actual possession by the person evicted, before eviction.[67] It has also been applied to public office, and in that sense has been said to mean a deprivation by one of the office, or of the salary attached thereto, to which another is, or may be, entitled.[68] As used in pleading, it is said to have a legal meaning, expelled, moved, and put out.[69]

EVICTION. The term may be employed as referring either to the act or process of evicting, or to the state of being evicted.[70] It is derived from "evinco," meaning to overcome;[71] to evict, to dispossess by judicial course;[72] and has been defined as meaning deprivation of the possession of lands and tenements or inability to get promised possession[73] by reason of the hostile assertion of an irresistible title.[74] The term implies dispossession, ejection, ejectment, or ouster,[75] in some connections, by, or in the interest of, one having a better title.[76] In other connections it has been said to require a willful omission of duty or the commission of a wrongful act;[77] but not necessarily a manual or physical expulsion from the premises,[78] nor an assertion by judicial decision of a paramount title.[79] The term is borrowed from the feudal law, and is often misleading when adopted into our modern systems of conveyancing and of actions.[80] While it properly applies only to realty,[81] by a loose extension it is sometimes applied to the ousting of a person from the possession of chattels;[82] and even from an office.[83]

Eviction of tenant under a lease and eviction of landlord by paramount title see the C.J.S. title Landlord and Tenant §§ 445–459, also 36 C.J. p 255 note 73–p 274 note 93 and 21 C.J. p 1263 notes 54–66.

Phrases employing the word are set out in the note.[84]

EVIDENCE.

As a Noun

As a technical term of the law relating generally to proof in civil actions see Evidence § 1, post p 505, and in criminal prosecutions see Criminal Law § 530; and as specifically applied to particular actions or prosecutions see the sections devoted to adjective law in the various titles throughout this work.

Phrases in which the noun occurs are listed in the note;[85] and for phrases describing the classes

64. Ill.—Sweeting v. Reining, 235 Ill.App. 572, 585.

65. Black L.D.

66. Mich.—Hawkins v. Voisine, 290 N.W 827, 828, 292 Mich. 357, citing **Corpus Juris.**

67. Cal.—Upton v. Toth, 98 P.2d 515, 519, 36 Cal.App.2d 679.

68. Mich.—Hawkins v. Voisine, 290 N.W. 827, 828, 292 Mich. 357, citing **Corpus Juris.**

69. Or.—Moumal v. Parkhurst, 173 P. 669, 671, 89 Or. 348.

70. La.—Bonvillain v. Bodenheimer, 42 So. 273, 275, 117 La. 793.

71. Tenn.—Ferriss v. Harshea, Mart. & Y. 48, 54, 17 Am.D. 782.

72. Eng.—Upton v. Greenlees, 17 C. B. 51, 64, 84 E.C.L. 51, 139 Reprint 986.

73. La.—Bonvillain v. Bodenheimer, 42 So. 273, 277, 117 La. 793.
Mich.—Hawkins v. Voisine, 290 N.W. 827, 828, 292 Mich. 357, citing **Corpus Juris.**

74. La.—Bonvillain v. Bodenheimer, 42 So. 273, 277, 117 La. 793, 799.

75. La.—Bonvillain v. Bodenheimer, supra.
21 C.J. p 1262 notes 49, 52.

76. Vt.—McKillop v. Burton, 74 A. 78, 80, 82 Vt. 403.

77. Ill.—Sweeting v. Reining, 235 Ill.App. 572, 586.

78. Tex.—Nabors v. Johnson, Civ. App., 51 S.W.2d 1081, 1082—Kennerly v. B. F. Avery & Sons Plow Co., Civ.App., 300 S.W. 159, 161.
Wash.—Exeter Co. v. Holland Corporation, 20 P.2d 1, 4, 172 Wash. 323.

79. Iowa.—Thomas v. Becker, 180 N. W. 285, 286, 287, 190 Iowa 237.

80. Iowa.—Thomas v. Becker, supra.
Mass.—Kramer v. Carter, 136 Mass. 504, 507.

81. Mich.—Hawkins v. Voisine, 290 N.W. 827, 828, 292 Mich. 357, citing **Corpus Juris.**

82. Black L.D.

83. Mich.—Hawkins v. Voisine, supra, citing **Corpus Juris.**

84. **Phrases construed**
(1) "Actual eviction" see 1 C.J.S. p 1441 note 24 and the C.J.S. title Landlord and Tenant §§ 445, 450–454, also 36 C.J. p 256 notes 85–87, p 259 note 15–p 261 note 45.

(2) "Constructive eviction" see the C.J.S. titles Covenants § 108, and Landlord and Tenant §§ 445, 455–458, also 36 C.J. p 256 note 88, p 261 note 46–p 270 note 52.

(3) "Eviction by force."—Booker v. McKnight, La.App., 179 So. 332, 333.

(4) "Eviction by title paramount" see the C.J.S. title Landlord and Tenant § 447, also 36 C.J. p 271 note 66–p 273 note 83.

85. **Phrases construed**
(1) "Evidence [or evidences] of debt" and "evidence [or evidences] of indebtedness":
As equivalent to, or synonymous with "securities" or "security."
U.S.—Chicago First Nat. Bank v. U. S., Ct.Cl., 38 F.2d 925, 930.
Neb.—Bank of Commerce v. Hart, 55 N.W. 631, 633, 37 Neb. 197, 40 Am. S.R. 479, 20 L.R.A. 780.
Ohio—Cincinnati, H. & D. R. Co. v. Kleybolte, 88 N.E. 879, 880, 80 Ohio St. 311—Whitely v. Arbogast, 17 Ohio S. & C. P. 569, 574.
56 C.J. p 1278 note 45.
As including various instruments.
U.S.—Cannon v. Nicholas, C.C.A. Colo., 80 F.2d 934, 936.
Cal.—Johnson v. National Surety Co., 5 P.2d 39, 40, 118 Cal.App. 227—People v. Leach, 290 P. 131, 134, 106 Cal.App. 442.

or kinds of evidence, or relating to particular applications of the law of evidence see Evidence § 2 and other appropriate sections as indicated by the title index.

As a Verb

To attest, make plain, prove, or show clearly.[86]

Phrases in which the verb occurs are set out in the note.[87]

Conn.—Goslee v. Rowe, 157 A. 267, 268, 114 Conn 1.
Kan —State v. Van Meter, 289 P. 399, 400, 131 Kan. 140.
Md.—City of Baltimore v. Harper, 129 A. 641, 643, 148 Md 234.
Minn.—Petters & Co. v. Veigel, 209 N W. 9, 10, 167 Minn. 286.
Mo —State ex rel. American Cent Ins. Co. v. Gehner, 9 S.W 2d 621, 623, 320 Mo. 901, 59 A L R. 1041—National Bank of Commerce in St. Louis v. Francis, 246 S.W. 326, 334, 296 Mo. 169.
Mont.—State Board of Examiners, 238 P. 316, 323, 74 Mont. 1.
N Y.—In re Waldstein, 291 N.Y.S. 697, 701, 160 Misc. 763.
Okl.—Bruner v. State, 224 P. 555, 26 Okl.Cr. 448.
Pa.—Commonwealth v. City of Harrisburg, 6 A.2d 863, 866, 335 Pa. 202—Commonwealth v. Imperial Woolen Co., 139 A. 199, 200, 290 Pa. 526—In re Frederick's Estate, 197 A. 642, 646, 130 Pa Super. 373.
S.D.—Hudson v. Sheafe, 171 N.W. 320, 323, 41 S.D. 475.
As not including other instruments.
U.S.—U. S v. Geise, C.C.A.N.Y., 56 F.2d 583, 584—Hiller v. Olmstead, C.C A.Mich., 54 F.2d 5, 7—In re Worth Lighting & Fixture Co., D. C.N.Y., 292 F. 769, 772.
Ark.—England v. Hughes, 217 S W. 13, 14, 141 Ark 235.
Ga.—Rowell v. H. L. Harrell Realty Co., 103 S E 717, 25 Ga.App 585.
Ill —Schifferstein v. Allison, 15 N.E. 275, 276, 123 Ill. 662, 665
Mo.—Industrial Loan & Investment Co. v. Missouri State Life Ins. Co., 3 S W.2d 1046, 1048, 222 Mo App. 1228
Ohio.—Ætna Life Ins. Co. v. Keyser, 194 N E 52, 48 Ohio App. 400.
(2) "Evidence of insurability satisfactory to the company."
U.S.—Bowie v. Bankers Life Co, C. C.A Colo, 105 F.2d 806, 808.
N.Y.—Kallman v. Equitable Life Assur. Soc of U. S, 288 N.Y.S. 1032, 1034, 248 App Div. 146.
(3) "Evidence of interest."—In re Waldstein, 291 N Y.S. 697, 701, 160 Misc. 763.
(4) "Evidence [or evidences] of property."—In re Pierce, 188 N.W. 78, 81, 177 Wis. 104, 111—In re Stark, 134 N.W. 389, 399, 149 Wis 631.
(5) "Evidence of title," defined as a deed or other document establishing the title to property, especially real estate.—Black L.D.
(6) "Give evidence against one's self" as meaning to give evidence which may be thereafter used against one, and which tends to convict him of a crime, either directly or by affording a clue to other facts which may convict.—People v. Buffalo Gravel Corporation, 195 N.Y.S. 940, 948.
(7) "Inculpatory evidence" see Criminal Law §§ 649–656.
(8) "Newly-discovered evidence" see the C.J.S. title New Trial § 101, also 46 C.J. p 243 note 88–p 245 note 1.
(9) "State's evidence" see Criminal Law §§ 46, 437.
(10) "Such evidence of criminality"—Collins v. Loisel, La., 42 S.Ct. 469, 472, 259 U.S. 309, 66 L.Ed 956.

86. U.S.—Indiana Harbor Belt R. Co. v. Jacob Stern & Sons, D.C. Ill., 37 F.Supp. 690, 691.

87. **Phrases construed**
(1) "Evidenced by notation on the bill of lading," as implying that the proof must be made simultaneously with the fact proved —Indiana Harbor Belt R. Co. v. Jacob Stern & Sons, D C Ill., 37 F.Supp. 690, 691.
(2) "Evidencing feature," as usually applied to a group of circumstances which as a whole constitute a feature capable of being associated with a single object.—Webb v. Ritter, 54 S E. 484, 493, 60 W.Va. 193—23 C.J. p 174 note 2 [a].

EVIDENCE

This Title includes means of ascertaining the truth respecting matters of fact in issue in civil actions and proceedings in general; admissibility for that purpose of relevant facts, statements, oral or written, opinions, character, reputation, etc.; modes of proof and production of evidence other than testimony of witnesses, particularly documentary evidence, and exclusion of oral by documentary evidence; burden of making proof, and operation of presumptions; and sufficiency and effect of evidence in civil cases in general.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

Analysis

I. IN GENERAL, §§ 1–5

II. JUDICIAL NOTICE, §§ 6–102
- A. In General, §§ 6–13
- B. Judicial Notice of Statutes or Other Law, §§ 14–27
- C. Other Particular Matters, §§ 28–102

III. BURDEN OF PROOF, §§ 103–113

IV. PRESUMPTIONS, §§ 114–157
- A. Definition and Nature, §§ 114–119
- B. Particular Presumptions, and Presumptions Arising from Particular Facts, §§ 120–157

V. RELEVANCY AND MATERIALITY GENERALLY, §§ 158–185
- A. General Rules, §§ 158–166
- B. Particular Matters, §§ 167–185

VI. COMPETENCY GENERALLY, §§ 186–191

VII. UNSWORN STATEMENTS, §§ 192–269
- A. Hearsay, §§ 192–210
- B. Declarations, §§ 211–238
- C. Independently Relevant Statements, §§ 239–264
  1. *In General*, §§ 239–240
  2. *Circumstantial Evidence*, §§ 241–259
  3. *Statements Constituent of Legal Results*, §§ 260–264
- D. Weight of Testimony as to Unsworn Statements, §§ 265–269

VIII. ADMISSIONS, §§ 270–383
- A. In General, §§ 270–271
- B. Extrajudicial Admissions, §§ 272–298
- C. Judicial Admissions, §§ 299–313
- D. By Whom Made, §§ 314–368
  1. *In General*, §§ 314–321
  2. *Privies and Former Owners Generally*, §§ 322–337
  3. *Transferor, on Issue of Fraud as to Creditors*, §§ 338–341
  4. *Agents and Other Representatives*, §§ 342–368
- E. Proof and Effect, §§ 369–383

IX. FORMER EVIDENCE, §§ 381-402

Divisions X to End in Volume 32

X. RES GESTÆ, §§ 403–421
- A. In General, §§ 403–409
- B. Accompanying Acts or Statement, §§ 410–421

XI. CHARACTER AND REPUTATION, §§ 422–437

XII. OPINION, §§ 438–575
- A. In General, §§ 438–453
- B. Qualifications of Witness, §§ 454–458
- C. Statements of Fact, §§ 459–484
- D. Inferences from Sensation, §§ 485–519
  1. *Ordinary Witness,* §§ 485–517
  2. *Skilled Witness,* §§ 518–519
- E. Judgment of Experts, §§ 520–523
- F. Subjects of Skilled Inference or Expert Judgment, §§ 524–546
- G. Examination of Witnesses, §§ 547–560
  1. *Ordinary Observers,* §§ 547–548
  2. *Skilled Observers and Experts,* §§ 549–560
- H. Tests of Opinion Evidence, §§ 561–566
- I. Weight of Opinion, §§ 567–572
- J. Standard Treatises in Connection with Opinion, §§ 573–575

XIII. RES INTER ALIOS, §§ 576–577

XIV. SIMILAR ACTS OR OCCURRENCES, §§ 578–593
- A. In General, § 578
- B. Similar Acts, §§ 579–582
- C. Similar Occurrences, §§ 583–593

XV. ATTENDANT CIRCUMSTANCES, §§ 594–597

XVI. CAUSATION ESTABLISHED BY INDUCTION, §§ 598–600

XVII. DEMONSTRATIVE OR REAL EVIDENCE; INSPECTION, §§ 601–622
- A. In General, §§ 601–610
- B. Documents, §§ 611–622

XVIII. DOCUMENTARY EVIDENCE, §§ 623–775
- A. In General, §§ 623–625
- B. Public Records and Documents, §§ 626–648
- C. Authenticated Transcript or Copies, §§ 649–675
- D. Private or Unofficial Documents, §§ 676–742
  1. *In General,* §§ 676–681
  2. *Book Entries,* §§ 682–695
  3. *Memoranda and Statements,* §§ 696–698
  4. *Books and Records of Corporations, Associations, and Societies,* §§ 699–702
  5. *Letters, Telegrams, and Other Correspondence,* §§ 703–708
  6. *Photographs and Other Pictures,* §§ 709–716
  7. *Books and Other Printed Publications,* §§ 717–726
  8. *Other Private Records or Documents,* §§ 727–732
  9. *Authentication and Proof of Execution,* §§ 733–742

XVIII. DOCUMENTARY EVIDENCE—Continued

E. ANCIENT DOCUMENTS, §§ 743–752
F. COMPELLING PRODUCTION OF DOCUMENTS, §§ 753–762
G. CONCLUSIVENESS AND EFFECT, §§ 763–775

XIX. BEST AND SECONDARY EVIDENCE, §§ 776–850

A. IN GENERAL, §§ 776–784
B. PAROL EVIDENCE SECONDARY TO WRITTEN EVIDENCE, §§ 785–812
1. *In General,* §§ 785–791
2. *Applications of Rule,* §§ 792–812
C. COPY SECONDARY TO ORIGINAL WRITING, §§ 813–821
D. GROUNDS FOR ADMISSION OF SECONDARY EVIDENCE, §§ 822–834
E. PRELIMINARIES TO ADMISSION OF SECONDARY EVIDENCE, §§ 835–850

XX. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS, §§ 851–1015

A. IN GENERAL, §§ 851–864
B. WRITINGS WITHIN RULE, §§ 865–928.
1. *Public or Official Records, Documents, or Proceedings,* §§ 865–892
2. *Private Writings,* §§ 893–928
C. LIMITATIONS OF, AND EXCEPTIONS TO, RULE, §§ 929–1015

XXI. WEIGHT AND SUFFICIENCY, §§ 1016–1050

A. DEGREE OF PROOF, §§ 1016–1025
B. MEMORY OF WITNESSES, §§ 1026–1030
C. WEIGHT OF EVIDENCE, §§ 1031–1039
D. CONCLUSIVENESS OF EVIDENCE, §§ 1040–1041
E. SUFFICIENCY OF EVIDENCE, §§ 1042–1044
F. PURPOSES FOR WHICH EVIDENCE AVAILABLE, §§ 1045–1046
G. EVIDENCE BEARING ON PARTICULAR FACTS OR ISSUES, §§ 1047–1050

Sub-Analysis

I. IN GENERAL—p 505

§ 1. Preliminary definitions—p 505
2. Evidence—p 505
3. Testimony—p 507
4. Proof—p 508
5. What law governs—p 509

II. JUDICIAL NOTICE—p 509

A. IN GENERAL—p 509

§ 6. Definition, terminology, and distinctions—p 509
7. General scope—p 510
8. Under statute—p 510
9. Matters of common knowledge—p 510
10. Facts once judicially known—p 515
11. Personal knowledge of judge—p 516
12. Mode of ascertaining facts required to be judicially noticed—p 516
13. Use and function—p 519

II. JUDICIAL NOTICE—Continued

B. JUDICIAL NOTICE OF STATUTES OR OTHER LAW—p 523
§ 14. In general—p 523
15. Law of forum—p 524
16. Constitutions and public statutes—p 525
17. Unwritten law—p 532
18. Laws of other states, territories, or provinces—p 532
19. Constitutions and public statutes—p 534
20. Unwritten law—p 536
21. Laws of foreign country—p 537
22. Private statutes—p 538
23. Legislative resolutions—p 539
24. Laws and customs of Indians—p 539
25. Law merchant—p 539
26. International, admiralty, and maritime law—p 539
27. Municipal ordinances or by-laws—p 540

C. OTHER PARTICULAR MATTERS—p 543
§ 28. Business and occupations—p 543
29. Particular businesses or occupations—p 546
30. Customs and usages—p 574
31. Established standards of care—p 575
32. Geography and geographical facts—p 576
33. Particular geographical facts—p 577
34. Government and its administration—p 589
35. Political divisions and bodies—p 590
36. Executive department in general—p 593
37. Officers and official position and authority—p 594
38. Official signatures and seals—p 599
39. Administrative rules and regulations—p 599
40. Acts, practice, and proceedings of officers and boards—p 602
41. Official proclamations, messages, and orders—p 604
42. Official bulletins, reports, and correspondence—p 606
43. Legislative department in general—p 607
44. Judicial department in general—p 610
45. Organization, jurisdiction, and powers of courts—p 610
46. Judicial districts—p 611
47. Terms and sessions of courts and quasi judicial bodies—p 612
48. Judges, justices, and court officials—p 613
49. Practice and procedure—p 616
50. Records, court papers, etc.—p 619
51. Elections and appointments—p 628
52. Mail service—p 630
53. Public surveys—p 631
54. Revenue and taxation—p 632
55. Foreign governments in general—p 635
56. Government flags and seals—p 636
57. Treaties and execution thereof—p 636
58. History and historical facts—p 637
59. General history of state or territory—p 637
60. Local history—p 638
61. Political parties—p 638
62. Wars and insurrections—p 639

II. JUDICIAL NOTICE—Continued

C. Other Particular Matters—Continued

§ 63. Other facts or history—p 642
64. Identity—p 648
65. Language, abbreviations, and symbols—p 648
66. Grammar—p 648
67. Meaning of words and phrases—p 648
68. Abbreviations, initials, and symbols—p 650
69. Foreign language—p 651
70. Literature—p 651
71. Matters of art and skill—p 651
72. Nature and science—p 652
73. Course and laws of nature—p 652
74. Natural forces, and laws of physics and mathematics—p 654
75. Qualities and properties of matter—p 656
76. Scientific facts—p 659
77. Partnerships and members thereof—p 660
78. Phenomena of human life—p 660
79. Life, health, and faculties—p 661
80. Sentiments, sensibilities, capacities, habits, and propensities—p 667
81. Common articles, devices, utilities, and operations—p 671
82. Social customs—p 678
83. Sports, games, recreations, and shows—p 678
84. Family life and household economy—p 679
85. Dangerous character of employment or operation—p 680
86. Private concerns; personal or racial status or conditions—p 680
87. Phenomena of other animal life—p 681
88. Phenomena of vegetable life—p 683
89. Private corporations and associations and members thereof—p 684
90. Charter, name, and residence—p 685
91. Powers and acts—p 685
92. Consolidation or cessation—p 689
93. Religious matters—p 689
94. Road and highway matters—p 690
95. Rural and urban conditions—p 692
96. School matters—p 695
97. Statistics—p 696
98. Census—p 696
99. Mortality tables—p 698
100. Time, days, and dates—p 699
101. Values—p 701
102. Weights and measures—p 707

III. BURDEN OF PROOF—p 708

§ 103. Definitions and distinctions—p 708
104. Burden of proof properly so-called—p 709
105. Negative allegations—p 716
106. Under common-law pleading—p 717
107. Under equity pleading—p 717
108. Under statutory pleading—p 718
109. In special judicial proceedings—p 718
110. Burden of evidence—p 718
111. Effect of presumptions and other substitutes for evidence—p 720

III. BURDEN OF PROOF—Continued

§ 112. Proof of negative facts—p 720
113. Effect of peculiar knowledge or control of evidence—p 721

IV. PRESUMPTIONS—p 722

A. Definition and Nature—p 722

§ 114. In general—p 722
115. Classes of presumptions and distinctions—p 724
116. Presumptions of fact—p 726
117. Presumptions of law—p 731
118. Pseudo-presumptions—p 733
119. Probative force and conflict of presumptions—p 733

B. Particular Presumptions, and Presumptions Arising from Particular Facts—p 735

§ 120. Acceptance of benefits—p 735
121. Capacity of women for childbearing—p 735
122. Character—p 736
123. Chastity—p 736
124. Continuance of fact or condition—p 736
125. Existence of heirs or issue—p 745
126. Good faith; fraud or misconduct—p 745
127. Habits—p 747
128. Identity of persons—p 748
129. Identity of things—p 748
130. Innocence—p 748
131. Intent and understanding—p 750
132. Knowledge of law—p 751
133. Law of sister state or foreign country—p 761
134. Legality or illegality—p 769
135. Love of life and avoidance of danger—p 772
136. Mailing and delivery of mail matter—p 776
137. Nature and condition of property—p 787
138. Official character or status—p 787
139. Ordinary course of affairs—p 788
140. Past and future existence of fact or condition—p 789
141. Personal status and condition—p 791
142. Marriage and legitimacy—p 792
143. Regularity—p 792
144. Ancient proceedings—p 792
145. Judicial proceedings—p 792
146. Official proceedings and acts—p 798
147. Sanity and mental capacity—p 826
148. Sending and delivery of telegrams—p 828
149. Virility of men—p 829
150. Other matters—p 829
151. Presumptions arising from spoliation, fabrication, or nonproduction of evidence—p 844
152. Spoliation in general—p 844
153. Destruction of evidence—p 845
154. Eloignment of witness or evidence—p 846
155. Fabrication of evidence—p 846

IV. PRESUMPTIONS—Continued

B. Particular Presumptions, and Presumptions Arising from Particular Facts—Continued

§ 156. Suppression or withholding of evidence—p 847
157. Presumptions arising from attempts to prevent investigation—p 864

V. RELEVANCY AND MATERIALITY GENERALLY—p 864

A. General Rules—p 864

§ 158. Logical relevancy—p 864
159. Legal relevancy or materiality—p 866
160. Intrinsic sufficiency not required—p 869
161. Circumstantial evidence generally—p 871
162. Supplementary and consistent facts—p 872
163. Matters showing relevancy of other facts or explanatory of facts in evidence or inferences therefrom—p 874
164. Evidence irrelevant unless preceded or followed by other evidence—p 874
165. Negative evidence—p 875
166. Unnecessary evidence—p 877

B. Particular Matters—p 877

§ 167. Ancient facts—p 877
168. Facts of family history—p 877
169. Age—p 877
170. Birth—p 878
171. Name of person or place—p 878
172. Relationship—p 878
173. Identity—p 878
174. Mental condition—p 878
175. Mental state and moral qualities—p 878
176. Nature and condition of property or other subject matter—p 879
177. Pecuniary condition—p 879
178. Motive, intent, and knowledge—p 879
179. Conduct of parties with respect to evidence—p 880
180. Customs and course of business—p 881
181. Value—p 882
182. Real estate—p 883
183. Personal property—p 892
184. Services—p 904
185. Other matters—p 905

VI. COMPETENCY GENERALLY—p 906

§ 186. In general—p 906
187. Evidence wrongfully obtained—p 907
188. Telephone conversations—p 908
189. Proof of act of municipality—p 912
190. Evidence admissible by reason of admission of similar evidence of adverse party—p 913
191. Evidence inadmissible by reason of exclusion of similar evidence of adverse party—p 918

VII. UNSWORN STATEMENTS—p 919

A. Hearsay—p 919

§ 192. Definition—p 919
193. Rule excluding hearsay—p 919

VII. UNSWORN STATEMENTS—Continued

A. HEARSAY—Continued

§ 194. Written or printed hearsay—p 930
195. Composite hearsay—p 937
196. Reputation as to matters of general interest—p 937
197. Reputation as to matters of special or limited interest—p 938
198. Rumors—p 939
199. Tradition—p 939
200. Knowledge acquired from statements of others—p 940
201. Acts based on hearsay—p 941
202. Proof as to character of evidence—p 941
203. Hearsay additional to personal knowledge—p 941
204. Impossibility of obtaining other evidence—p 942
205. Death of declarant—p 942
206. Unavailability or incompetency of declarant—p 944
207. Verification of statements—p 945
208. Statement of results—p 945
209. Remote or collateral facts—p 945
210. Matters to be decided by judge—p 945

B. DECLARATIONS—p 945

§ 211. In general—p 945
212. Irrelevant declarations—p 946
213. Untrustworthiness of declarant—p 947
214. Lack of knowledge—p 947
215. Motive to misrepresent in general—p 948
216. Self-serving declarations—p 948
217. Declarations against interest—p 958
218. Unavailability of declarant as witness—p 960
219. Nature of interest of declarant—p 962
220. Knowledge of declarant—p 965
221. Absence of motive to misrepresent—p 965
222. Adverse character of declaration generally—p 966
223. Declarations of former holder of negotiable paper—p 967
224. Form of declaration—p 967
225. Declarations in course of business or performance of duty—p 967
226. Declarations as to pedigree—p 968
227. Subject matter of declaration—p 970
228. Competency of declarant in general—p 974
229. Relationship to family and proof thereof—p 976
230. Unavailability of direct evidence—p 979
231. Necessity that pedigree be in issue—p 979
232. Form of declaration—p 980
233. Declarations as to matters of public and general interest—p 983
234. Subject of declaration—p 983
235. Competency of declarant and proof thereof—p 984
236. Unavailability of direct evidence—p 986
237. Form of declaration—p 986
238. Dying declarations—p 987

VII. UNSWORN STATEMENTS Continued

C. INDEPENDENTLY RELEVANT STATEMENTS—p 988

1. *In General*—p 988

§ 239. In general—p 988
240. Form of statement—p 989

2. *Circumstantial Evidence*—p 989

§ 241. Basis of opinion generally—p 989
242. Bodily condition—p 990
243. Form of declaration in general—p 991
244. Exclamations of pain—p 993
245. Narrative statements—p 993
246. To whom made—p 994
247. Claim by one in possession—p 997
248. Real property in general—p 1000
249. Declarations as to private boundaries—p 1001
250. Personal property—p 1002
251. Effect of observation—p 1003
252. Fraud and good faith—p 1003
253. Identification—p 1003
254. Mental condition—p 1004
255. Mental state—p 1005
256. Intent and intention—p 1007
257. Knowledge—p 1009
258. Malice, motive, and purpose—p 1011
259. Other declarations admissible as circumstantial evidence—p 1012

3. *Statements Constituent of Legal Results*—p 1012

§ 260. In general—p 1012
261. Contracts, agency, bailment, sale—p 1013
262. Notice, demand, or refusal—p 1014
263. Denial or disclaimer—p 1014
264. Conspiracy, libel, or slander—p 1014

D. WEIGHT OF TESTIMONY AS TO UNSWORN STATEMENTS—p 1015

§ 265. In general—p 1015
266. Statements of decedents—p 1018
267. Positive and negative testimony—p 1018
268. Circumstances tending to disparage testimony—p 1019
269. Circumstances favorable to testimony—p 1021

VIII. ADMISSIONS—p 1022

A. IN GENERAL—p 1022

§ 270. Definitions and distinctions—p 1022
271. To whom made—p 1023

B. EXTRAJUDICIAL ADMISSIONS—p 1023

§ 272. Admissibility in general—p 1023
273. Purpose for which admitted—p 1027
274. Actions or proceedings in which admitted—p 1028
275. By which party provable—p 1028
276. Relevancy and materiality—p 1028
277. Certainty—p 1029

VIII. ADMISSIONS—Continued

B. EXTRAJUDICIAL ADMISSIONS—Continued

§ 278. Voluntary character—p 1030
279. Oral admissions—p 1031
280. Through interpreter—p 1031
281. Over telephone—p 1031
282. Written admissions—p 1032
283. Particular documents or writings—p 1033
284. Ineffective or undelivered documents—p 1037
285. Offers of compromise—p 1038
286. Independent relevancy of offer—p 1046
287. Statement of independent facts—p 1047
288. Offer "without prejudice"—p 1049
289. Functions of court and jury—p 1049
290. Agreements for compromise—p 1050
291. Admissions by conduct—p 1050
292. Settlements or compromises with third persons—p 1055
293. Attempts to suborn perjury or suppress evidence—p 1056
294. Admissions by silence or acquiescence—p 1057
295. Significance of failure to reply—p 1060
296. Determination as to admissibility—p 1063
297. In respect to written statements—p 1064
298. Time, place, and surrounding circumstances—p 1067

C. JUDICIAL ADMISSIONS—p 1067

§ 299. In general—p 1067
300. Form of admission in general—p 1068
301. Pleadings—p 1071
302. In same case—p 1073
303. In other cases—p 1075
304. Abandoned or superseded pleadings—p 1079
305. Unnecessary pleadings—p 1083
306. Amendments proposed but disallowed—p 1083
307. Stipulations and agreements as to facts—p 1083
308. Affidavits and depositions—p 1084
309. Interrogatories and answers thereto—p 1086
310. Claim statements—p 1087
311. Testimony—p 1087
312. Judgments—p 1089
313. Applications for continuances—p 1090

D. BY WHOM MADE—p 1090

1. *In General*—p 1090

§ 314. General statement—p 1090
315. Persons not sui juris—p 1090
316. Interest at time of statement—p 1091
317. Parties to the record—p 1091
318. Coparties—p 1096
319. Nominal parties—p 1099
320. Real parties in interest—p 1099
321. Strangers—p 1100

VIII. **ADMISSIONS**—Continued

D. By Whom Made—Continued

2. *Privies and Former Owners Generally*—p 1101

§ 322. In general—p 1101
323. Necessity for title in declarant—p 1101
324. Real estate—p 1102
325. Grantors—p 1103
326. Mortgagors, donors, and the like—p 1104
327. Deceased owners—p 1104
328. Husband and wife; dower interest—p 1105
329. Personal property—p 1106
330. Sellers—p 1106
331. Mortgagors and pledgors—p 1106
332. Mortgagees—p 1107
333. Assignors—p 1107
334. Deceased owners—p 1108
335. Donors—p 1110
336. Declarations of debtor as affecting creditor—p 1110
337. Independent relevancy—p 1110

3. *Transferor, on Issue of Fraud as to Creditors*—p 1110

§ 338. As affecting declarant—p 1110
339. As affecting transferee—p 1111
340. Statements before transfer—p 1111
341. Statements after transfer—p 1111

4. *Agents and Other Representatives*—p 1112

§ 342. Authority to represent party in general—p 1112
343. Agents and employees in general—p 1113
344. Proof of agency—p 1116
345. Res gestæ statements—p 1118
346. Narrative statements—p 1120
347. Relation must exist when statement made—p 1121
348. Independent relevancy—p 1121
349. Character of agency—p 1122
350. Subagents—p 1123
351. Particular occupations or employments—p 1123
352. Reference to another for information—p 1127
353. Form of statement—p 1127
354. Agents of private corporations—p 1128
355. Officers and employees—p 1130
356. Stockholders—p 1132
357. Agents for railroad corporations—p 1132
358. Agents for street railway corporations—p 1134
359. Public officers or agents—p 1134
360. Particular forms of agency—p 1135
361. Attorneys—p 1135
362. Conspirators and persons acting together—p 1138
363. Domestic relations—p 1141
364. Master and servant—p 1143
365. Partners—p 1144
366. Principal and surety or guarantor—p 1146

VIII. ADMISSIONS—Continued

D. By Whom Made—Continued

4. *Agents and Other Representatives*—Continued

§ 367. Fiduciaries—p 1148

368. Insured and beneficiary—p 1149

E. Proof and Effect—p 1152

§ 369. Laying foundation—p 1152

370. Who may testify—p 1153

371. Connecting admission—p 1154

372. Mode of proof—p 1155

373. Duty to show entire statement—p 1157

374. Explanation or limitation—p 1158

375. Right to show entire statement—p 1159

376. Entire statement to be considered—p 1161

377. Construction of statements—p 1161

378. Denial of statements—p 1164

379. Conclusiveness of admissions—p 1164

380. Extrajudicial admissions—p 1164

381. Judicial admissions—p 1170

382. Weight of admissions—p 1178

383. To which party available—p 1187

IX. FORMER EVIDENCE—p 1187

§ 384. In general—p 1187

385. Nature of former trial—p 1190

386. Tribunal before which evidence given—p 1192

387. Identity of parties—p 1193

388. Privity—p 1194

389. Identity of issues—p 1195

390. Opportunity for cross-examination—p 1197

391. Excuses for nonproduction of witness—p 1197

392. Death—p 1199

393. Absence—p 1200

394. Disqualification—p 1202

395. Mental incapacity—p 1203

396. Inability to attend—p 1203

397. Scope of proof required—p 1204

398. Media of proof—p 1205

399. Notes or memoranda—p 1205

400. Record—p 1207

401. Witnesses—p 1208

402. Effect and impeachment—p 1209

§§ 403 to End in Volume 32

X. RES GESTÆ

A. In General

§ 403. Nature of doctrine

404. Main or principal fact

405. Necessity

406. Admissibility

X. RES GESTÆ—Continued

A. IN GENERAL—Continued

§ 407. Equivocalness
408. Duration or extent
409. Attendant circumstances

B. ACCOMPANYING ACTS OR STATEMENTS

§ 410. By whom done or made
411. Time of act or statement
412. Antecedent facts or statements
413. Subsequent facts or statements
414. Place of act or statement
415. Form of statement
416. Explanatory character
417. Spontaneity
418. Determination as to spontaneity in general
419. Elements for consideration
420. Narrative excluded
421. Expressions of opinion

XI. CHARACTER AND REPUTATION

§ 422. Distinction
423. Admissibility of evidence of character
424. Where character in issue
425. Where character relevant
426. Where action involves charge of crime or wrong
427. Relevancy and materiality
428. Effect of admission of evidence
429. Knowledge of character of third person
430. Admissibility of evidence as to reputation
431. Where reputation in issue
432. Where reputation relevant
433. Mode of proof
434. General reputation
435. Rumor
436. Specific acts
437. Weight of evidence

XII. OPINION

A. IN GENERAL

§ 438. Rule of exclusion
439. Form of statement
440. Unwarranted conclusions
441. Trial by court
442. Specific matters within rule
443. Independent relevancy
444. Relaxation of rule
445. Requirements for admissibility
446. Invasion of province of jury in general
447. Issue as to damages
448. Issue as to negligence
449. Discretion of court
450. Suppositions

XII. OPINION—Continued

A. In General—Continued

§ 451. Understanding
452. Opinion of person not a witness
453. Conclusions of law

B. Qualifications of Witness

§ 454. In general
455. Ordinary observer
456. Skilled witness
457. Expert witness
458. Determination as to competency

C. Statements of Fact

§ 459. By ordinary observer
460. Facts part of common stock of knowledge
461. Complex or collective facts
462. Subjects of testimony in general
463. Animals
464. Business and conduct thereof
465. Contracts, sales, and mortgages
466. Financial condition
467. Health and physical condition
468. Indebtedness
469. Ownership and possession of property
470. Railroads and street railroads
471. Other matters
472. By skilled witness
473. Subjects of testimony in general
474. Accounting
475. Agriculture
476. Animals
477. Building trades
478. Electricity, engineering, manufacturing, and mechanics
479. Law
480. Medicine and surgery
481. Railroads and street railroads
482. Trade terms
483. Customs and usages
484. Other matters

D. Inferences from Sensation

1. *Ordinary Witness*

§ 485. In general
486. Stating facts on which opinion based
487. Positive inferences
488. Negative inferences
489. Appearance
490. Conduct of human beings
491. Conduct of animals
492. Estimates
493. Age and personal identity, status, and characteristics
494. Cause or effect

XII. OPINION—Continued

D. INFERENCES FROM SENSATION—Continued

1. *Ordinary Witness*—Continued

§ 495. Damages
496. Dimensions
497. Distance and space
498. Quality and quantity or capacity
499. Speed
500. Time and duration
501. Value
502. Weight
503. Estimates as to other matters
504. Identity and correspondence
505. Mental condition
506. Of witness
507. Of other persons
508. Intoxication
509. Mental state of animals
510. Mental state of persons
511. Pecuniary condition
512. Physical condition of animals
513. Physical condition of persons
514. Possibility and probability
515. Resemblance
516. Handwriting
517. Other matters

2. *Skilled Witness*

§ 518. In general
519. Stating facts on which opinion based

E. JUDGMENT OF EXPERTS

§ 520. In general
521. Basis of judgment
522. Conjecture excluded
523. Range of testimony

F. SUBJECTS OF SKILLED INFERENCE OR EXPERT JUDGMENT

§ 524. Animals
525. Cause and effect
526. Conduct of business
527. Construction, condition, or repair of structures, machinery, and appliances
528. Damages
529. Due care and proper conduct
530. Electricity, engineering, manufacturing, and mechanics
531. Handwriting
532. Laws and legal matters
533. Management and operation of vehicles, machinery, and appliances
534. Medical, surgical, or physiological matters
535. Mental capacity or condition
536. Basis of inference or judgment
537. Qualifications of witness
538. Statements excluded

XII. OPINION—Continued

F. SUBJECTS OF SKILLED INFERENCE OR EXPERT JUDGMENT—Continued

§ 539. Mental state
540. Mining and excavation
541. Nature, condition, and qualities of objects
542. Physical facts
543. Quantity or capacity
544. Railroads and street railroads
545. Value
546. Other matters involving scientific or other special knowledge

G. EXAMINATION OF WITNESSES

1. *Ordinary Observers*

§ 547. In general
548. Cross-examination

2. *Skilled Observers and Experts*

§ 549. In general
550. Questions
551. Hypothetical questions
552. Establishment of facts stated
553. Knowledge of witness as basis of hypothetical question
554. Questions "upon the evidence"
555. Answers
556. Statement as to cause and effect
557. Answers to hypothetical questions
558. Matters proper for consideration in answering
559. Stating reasons for opinion
560. Cross-examination and redirect examination

H. TESTS OF OPINION EVIDENCE

§ 561. In general
562. Inference
563. Accuracy of observation
564. Facts or premises supplied
565. Correctness of reasoning
566. Judgment of expert

I. WEIGHT OF OPINION

§ 567. In general
568. Inference
569. Judgment of expert
570. Supporting opinion
571. Impairment or impeachment of opinion
572. Conflict of evidence

J. STANDARD TREATISES IN CONNECTION WITH OPINION

§ 573. On direct examination
574. On cross-examination
575. For purpose of contradiction

XIII. RES INTER ALIOS

§ 576. In general
577. Relevancy

XIV. SIMILAR ACTS OR OCCURRENCES

A. IN GENERAL

§ 578. Introductory statement

B. SIMILAR ACTS

§ 579. Rule stated
580. When admitted
581. Course of conduct or dealing
582. Habit

C. SIMILAR OCCURRENCES

§ 583. In general
584. Similarity in essential conditions
585. Continuing facts
586. Experiments
587. Admissibility of evidence
588. Object or purpose of experiment in general
589. In support or explanation of opinion evidence
590. Similarity of conditions
591. Mode of proof
592. Weight of evidence
593. On issue as to value

XV. ATTENDANT CIRCUMSTANCES

§ 594. Capability
595. Skill
596. Presence at given locality
597. System of coördinate action

XVI. CAUSATION ESTABLISHED BY INDUCTION

§ 598. Results where alleged cause present
599. Results where alleged causes absent
600. Results indicating a different cause

XVII. DEMONSTRATIVE OR REAL EVIDENCE; INSPECTION

A. IN GENERAL

§ 601. General statement
602. Power and duty of court
603. Amplification or explanation of evidence
604. Casts
605. Duplicates
606. Models
607. Articles in general
608. Animals
609. Persons
610. Exhibition of injuries

XVII. DEMONSTRATIVE OR REAL EVIDENCE; INSPECTION—Continued

B. DOCUMENTS

§ 611. In general
612. Comparison of handwritings
613. Rule in absence of statute
614. Rule under statutes
615. Qualifications of witness
616. Production of disputed writing
617. The specimen or standard
618. Mode of comparison
619. Mode of testifying
620. Cross-examination
621. Weight of evidence
622. On issue of identity of persons

XVIII. DOCUMENTARY EVIDENCE

A. IN GENERAL

§ 623. Definition and nature
624. Determination as to admissibility
625. Proof of execution and identity

B. PUBLIC RECORDS AND DOCUMENTS

§ 626. In general
627. State papers
628. Laws
629. Judicial records and proceedings
630. Records of courts of probate
631. Justices' records
632. Docket entries, minutes, original papers, etc.
633. Matters included in record
634. Authentication of records generally
635. Authentication of justice's records
636. Of what record is evidence
637. Official registers and documents
638. Particular records and documents
639. Land office records and proceedings
640. Official certificates
641. Records of private writings
642. Other official records or documents
643. Authentication of document
644. Of what record is evidence
645. Explanation of document by custodian
646. Incomplete or altered records
647. Judicial records
648. Character of record as primary or secondary evidence

C. AUTHENTICATED TRANSCRIPT OR COPIES

§ 649. Public records and documents generally
650. Sworn or examined copies
651. Certified copies
652. Judicial records
653. Exemplified copies
654. Office copies

XVIII. DOCUMENTARY EVIDENCE—Continued

C. AUTHENTICATED TRANSCRIPT OR COPIES—Continued

§ 655. Examined or sworn copies
656. Incomplete copies
657. Errors or omissions in transcript
658. Public grants and land office records
659. Records of private writings
660. Certified copies
661. Sworn or examined copies
662. Abstracts of title
663. Certification or exemplification
664. Public records generally
665. Judicial records
666. Federal records
667. Public documents and records of other states
668. Judicial records in general
669. Authentication of judicial records generally
670. Authentication of judicial records under federal statutes
671. Subject matter of authentication of judicial records
672. Defective or incomplete judicial records or copies
673. Documents and records not legislative or judicial
674. State records offered in federal courts
675. Foreign documents or records

D. PRIVATE OR UNOFFICIAL DOCUMENTS

1. *In General*

§ 676. Admissibility in general
677. Recitals
678. Void or defective instruments
679. Documents in foreign language
680. Recording or failure to record
681. Collateral writings

2. *Book Entries*

§ 682. In general
683. Entries in regular course of business
684. Requisites to admissibility in general
685. Form and regularity of accounts
686. Subject matter of entry
687. Absence of entry as proof of negative
688. Person charged; intent
689. Amount charged
690. Time of making entry
691. Impeachment of credit of books
692. Entries by clerks and third persons
693. Requisites to admissibility
694. Book entries as admissions
695. Entries by third persons against interest

3. *Memoranda and Statements*

§ 696. Memoranda
697. In explanation of parol contract
698. Statements prepared for use at trial

XVIII. DOCUMENTARY EVIDENCE—Continued

D. PRIVATE OR UNOFFICIAL DOCUMENTS—Continued

4. *Books and Records of Corporations, Associations, and Societies*

§ 699. Corporate books and records
700. Mode of proof
701. Books and records of unincorporated associations
702. Records of secret societies

5. *Letters, Telegrams, and Other Correspondence*

§ 703. In general
704. Parts of letters
705. Admission of correspondence in entirety
706. Authentication
707. Proof of delivery
708. Address or direction

6. *Photographs and Other Pictures*

§ 709. In general
710. To show personal appearance or identity
711. To show physical condition
712. X-Ray photographs
713. To show location, surroundings, and condition of premises or inanimate objects
714. Photographic copies of documents
715. Accuracy of photograph; time of taking
716. Determination as to admissibility

7. *Books and Other Printed Publications*

§ 717. In general
718. Books of science and learning
719. Mortality and annuity tables
720. Historical works
721. Dictionaries
722. Law commentaries and reports
723. Statute books
724. Market quotations
725. Live stock registers
726. Newspapers

8. *Other Private Records or Documents*

§ 727. Church registers and certificates
728. Hospital records
729. Hotel registers
730. Maps, diagrams, etc.
731. Reports of mercantile agencies
732. Miscellaneous

9. *Authentication and Proof of Execution*

§ 733. Necessity
734. Showing authority to execute
735. Effect of acknowledgment and registration
736. Documents produced on notice
737. Time for proof

XVIII. DOCUMENTARY EVIDENCE—Continued

D. PRIVATE OR UNOFFICIAL DOCUMENTS—Continued

9. *Authentication and Proof of Execution*—Continued

§ 738. Mode of proof
739. Attested instruments
740. Unattested instruments
741. Sufficiency of evidence
742. Testimony of subscribing witnesses

E. ANCIENT DOCUMENTS

§ 743. Definition
744. Admissibility in general
745. Purposes for which admitted
746. Character of instrument
747. Age of document
748. Custody of document
749. Possession under instrument and other circumstances
750. Defects or irregularities
751. Suspicious circumstances
752. Circumstances appearing from extraneous evidence

F. COMPELLING PRODUCTION OF DOCUMENTS

§ 753. Public record or document
754. Private writing by adverse party
755. Notice to produce
756. Application to court and action thereon
757. Time for production
758. Excuses for nonproduction
759. Effect of production
760. Effect of nonproduction
761. Private writing by witness
762. Private writing by stranger

G. CONCLUSIVENESS AND EFFECT

§ 763. In general
764. Legislative journals
765. Judicial records
766. Official records and documents
767. Private writings generally
768. Books of account
769. Market quotations
770. Mortality tables
771. Photographs
772. Pleadings
773. Copies
774. Entire documents to be considered
775. Introduction for particular purpose

XIX. BEST AND SECONDARY EVIDENCE

A. IN GENERAL

§ 776. Definitions
777. The "best evidence rule"
778. Limitations of rule generally

XIX. BEST AND SECONDARY EVIDENCE Continued

A. IN GENERAL—Continued

§ 779. Admissibility of best evidence obtainable
780. Prerequisites to exclusion of evidence
781. Evidence relating to collateral matters
782. Rule confined to documentary evidence
783. Inadmissibility of primary evidence
784. Degrees and kinds of secondary evidence

B. PAROL EVIDENCE SECONDARY TO WRITTEN EVIDENCE

1. *In General*

§ 785. General rule
786. Limitations of rule
787. Writings and records collateral to issue
788. Admissions as to matters evidenced by writings or records
789. Proving results of voluminous writings and records
790. Proof of negative
791. Fact of making or existence of writing

2. *Applications of Rule*

§ 792. Private writings
793. Particular facts and transactions
794. Title to real estate
795. Possession of real property
796. Sales, conveyances, and mortgages of real property
797. Leases and tenancy of real property
798. Boundaries
799. Title to personal property
800. Sales and mortgages of personal property
801. Foreign law
802. Payment and delivery
803. Other facts and transactions
804. Public writings
805. Newspapers
806. Election, appointment, or official character of public officers
807. Records and judicial documents
808. Official records and documents
809. Judicial records and documents
810. Corporate records
811. Records of unincorporated associations
812. Records of deeds and mortgages

C. COPY SECONDARY TO ORIGINAL WRITING

§ 813. General rule
814. Applications of rule
815. Photographs
816. Letterpress copies
817. Copy of a copy
818. Limitations of rule
819. Admission of correctness
820. Writings collateral to issue
821. Duplicate originals and counterparts

XIX. BEST AND SECONDARY EVIDENCE—Continued

D. Grounds for Admission of Secondary Evidence

§ 822. In general
823. Loss or destruction of primary evidence
824. Destruction by party offering secondary evidence
825. Destruction by party against whom secondary evidence offered
826. Private writings
827. Public records and documents
828. Inaccessibility of primary evidence
829. Primary evidence in custody of court
830. Primary evidence held by third person
831. Primary evidence out of jurisdiction
832. Failure of adverse party to produce primary evidence on notice
833. Effect of production of original instrument
834. Effect of noncompliance with notice

E. Preliminaries to Admission of Secondary Evidence

§ 835. In general
836. Proof of execution, existence, and genuineness of original instrument
837. Proof of grounds for admission of secondary evidence
838. Burden of proof and presumptions
839. By whom proof should be made
840. Mode and order of proof
841. Admissibility of evidence
842. Sufficiency of evidence
843. Notice to produce primary evidence
844. Necessity
845. Sufficiency of notice
846. To whom notice given
847. Time for service of notice
848. Proof of service of notice
849. Waiver of notice or of objections to its sufficiency.
850. Proof as to correctness of copy

XX. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS

A. In General

§ 851. Rule stated
852. Legal effect of instrument
853. Time for payment or performance
854. Duration of contract
855. Medium or source of payment
856. Compensation for services
857. Priority of lien
858. Matters excluded by legal implication
859. Proceedings in which rule not applicable
860. Proceedings directly attacking instrument
861. Controversies to which strangers to writing are parties
862. Controversies between parties on same side of instrument
863. Waiver of benefit of rule
864. Rights of third persons

XX. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS—Continued

B. WRITINGS WITHIN RULE

1. *Public or Official Records, Documents, or Proceedings*

§ 865. Judicial records or proceedings
866. Records of probate court
867. Records of justice's court
868. Records of police court
869. Foreign judgments
870. Record as to particular matters
871. Minutes of court
872. Evidence as to jurisdiction
873. Aiding or impeaching one part of record by another
874. Matters not protected
875. Denial of existence of record
876. Official records and documents
877. Legislative records
878. County records and proceedings
879. Municipal records and proceedings
880. Town records
881. School district records
882. Highway records
883. Tax records
884. Land office records
885. Official surveys, maps, and plats
886. Registration or certificate thereof
887. Other official records and documents
888. Transcripts and authenticated copies
889. Records or documents not conclusive
890. Supplying omissions
891. Quasi public records
892. Corporate records

2. *Private Writings*

§ 893. Arbitration and award
894. Assignments
895. Bills and notes
896. Bills of sale
897. Bonds
898. Certificates of stock
899. Charter parties
900. Collateral security or pledges
901. Contracts
902. Requisites of writing
903. Bailments
904. Building and working
905. Carriage
906. Employment
907. Guaranty, suretyship, and indemnity
908. Insurance
909. Partnership
910. Sale or exchange
911. Subscription
912. Miscellaneous

XX. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS Continued

B. WRITINGS WITHIN RULE—Continued

2. *Private Writings*—Continued

§ 913. Deeds
914. Grants of public lands
915. Official deeds
916. Matters as to which deed is conclusive
917. Instruments of compromise and settlement
918. Leases
919. Conclusiveness as to particular matters
920. Letters
921. Licenses
922. Mortgages and deeds of trust
923. Conclusiveness as to particular matters
924. Powers of attorney
925. Printed conditions of sale at auction
926. Receipts
927. Releases
928. Writings not contractual nor amounting to disposition of property

C. LIMITATIONS OF, AND EXCEPTIONS TO, RULE

§ 929. In general
930. Evidence not inconsistent with writing
931. Judicial records
932. Aiding inference from instrument
933. Alterations, erasures, and mutilation
934. Clerical or typographical errors
935. Condition or contingency
936. Sealed instruments generally
937. Bills and notes
938. Bills of sale and contracts of sale
939. Bonds
940. Deeds of conveyance, leases, and mortgages
941. Subscriptions to corporate stock
942. Conditions on which delivery to be made
943. Time for performance of condition
944. Performance of conditions
945. Completeness of writing
946. Connection of different writings
947. Connection of parol agreement with writing between different persons
948. Consideration
949. Sealed instruments generally
950. Deeds of conveyance
951. Bills and notes
952. Other instruments
953. Payment of consideration
954. Where consideration not stated
955. Consistency with expressed consideration
956. Altering or defeating legal effect or operation of instrument
957. Good and valuable considerations
958. Where consideration executory or contractual
959. Construction of language
960. What evidence admissible

XX. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS Continued

C. LIMITATIONS OF, AND EXCEPTIONS TO, RULE—Continued

§ 961. Latent and patent ambiguity
962. Meaning of words, phrases, and abbreviations
963. Date of instrument
964. Discharge, performance, and the like
965. Payment or accord and satisfaction
966. Waiver and estoppel
967. Dispute as to contractual character of writing
968. Formal parts of instrument
969. Identification of writing
970. Inducing cause
971. Illegible writings
972. Invalidating or defeating operation of instrument
973. Disproving authenticity of record
974. Showing that document is not true record
975. Incapacity of party
976. Lack of authority
977. Matters relating to execution or delivery
978. Mistake
979. Fraud
980. Forgery
981. Duress
982. Undue influence
983. Illegality
984. Medium of payment
985. Nature, extent, and origin of liability
986. Noncontractual recitals
987. Papers relating to same transaction
988. Parties to instrument or obligation
989. Showing real party in interest
990. Character in which party acts or contracts
991. Instruments signed by agents
992. Individual or partnership contract
993. Identification of parties
994. Relations of parties
995. Mistake or variance in name
996. Place of execution
997. Prior and contemporaneous collateral agreements
998. Consistency of agreement with writing
999. Completeness of writing
1000. Matters of inducement
1001. Subject of collateral agreement
1002. Separate and independent character of agreement
1003. Particular writings
1004. Subsequent agreements
1005. Sealed agreements and contracts required to be in writing
1006. Applications of principle
1007. Subject matter
1008. Supplying omissions
1009. Corporate records
1010. Sustaining instrument
1011. Writing collateral to issue
1012. Writing not expressing contract of parties

XX. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS—Continued

C. LIMITATIONS OF, AND EXCEPTIONS TO, RULE—Continued

§ 1013. Writing not expressing entire agreement
1014. Writing not in evidence
1015. Other limitations and exceptions

XXI. WEIGHT AND SUFFICIENCY

A. DEGREE OF PROOF

§ 1016. Definitions
1017. Statutory provisions
1018. Preponderance of evidence
1019. Preponderance required
1020. Preponderance sufficient
1021. What constitutes preponderance
1022. Number of witnesses
1023. Clear and convincing proof
1024. Proof beyond a reasonable doubt
1025. Proof of negative facts

B. MEMORY OF WITNESSES

§ 1026. In general
1027. Memory of oral statements
1028. Memory of contents of written instruments
1029. Memory of dates and time of day
1030. Estimates of time

C. WEIGHT OF EVIDENCE

§ 1031. In general
1032. Affidavits and depositions
1033. Written and oral evidence
1034. Evidence which should be excluded on objection
1035. Evidence less strong than party might produce
1036. Answers to leading questions
1037. Positive and negative evidence
1038. Uncontroverted evidence
1039. Circumstantial evidence

D. CONCLUSIVENESS OF EVIDENCE

§ 1040. On party introducing it
1041. Evidence as to value

E. SUFFICIENCY OF EVIDENCE

§ 1042. In general
1043. Of single witness
1044. Inferences from evidence

F. PURPOSES FOR WHICH EVIDENCE AVAILABLE

§ 1045. In general
1046. Evidence introduced by adverse party

G. EVIDENCE BEARING ON PARTICULAR FACTS OR ISSUES

§ 1047. Identity
1048. Pedigree
1049. Value
1050. Other facts or issues

I. IN GENERAL

§ 1. Preliminary Definitions

Definitions of the terms "evidence," "testimony," and "proof" respectively, either as used alone or with qualifying words or phrases, are considered in §§ 2–4 infra.

§ 2. Evidence

Evidence may be defined as that which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue.

Evidence broadly defined, is the means from which an inference may logically be drawn as to the existence of a fact; that which makes evident or plain.[1] Evidence signifies that which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue, either on the one side or on the other.[2] In legal acceptation, the term "evidence" includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved.[3] Although the term "evidence" is sometimes used as synonymous with "facts,"[4] the terms are not really synonymous,[5] for "evidence" is limited to that which may properly be considered by the court or submitted to the jury for its consideration.[6]

Competent evidence. By "competent" evidence is meant that which the very nature of the thing to be proved requires as the fit and appropriate proof in the particular case.[7] The term has also been used and construed as synonymous with "admissible,"[8] "relevant,"[9] and "sufficient" or "adequate."[10] On the other hand, it is clear that evidence may be logically relevant and yet inadmissible because not competent, that is, because not the character of proof which the law permits in the particular case.[11]

To say that evidence is incompetent is equivalent to saying that it is inadmissible.[12]

Direct and circumstantial evidence. Direct evidence is evidence which if believed proves the existence of the fact in issue without any inference or presumption;[13] while circumstantial evidence, as dis-

1. Mich.—Tjernstrom v. Ford Motor Co., 280 N.W. 823, 825, 285 Mich. 450, citing **Corpus Juris.**
22 C.J. p 65 note 2.

Other definitions

U.S.—National Labor Relations Board v. Bell Oil & Gas Co., C.C.A., 98 F.2d 870—Ledbetter v. Bailey, D.C.N.C., 274 F. 375.
S.C.—State v. Heavener, 143 S.E. 674, 146 S.C. 138.
22 C.J. p 65 note 2 [a].

2. U.S.—Oklahoma Gas & Electric Co. v. Bates Expanded Steel Truss Co., D.C.Del., 296 F. 281.
Ill.—Redington v. Craig, 270 Ill.App. 163.
Kan.—Lynch v. Rosenberger, 249 P. 682, 121 Kan. 601.
Ohio.—Leonard v. State, 127 N.E. 464, 100 Ohio St. 456.

3. N.J.—Bednarik v. Bednarik, 16 A.2d 80, 89, 18 N.J.Misc. 633, quoting **Corpus Juris.**
Ohio.—Quay v. Quay, 4 Ohio N.P., N.S., 529
S.C.—Sims v. Clayton, 7 S.E.2d 724, 193 S.C. 98.
22 C.J. p 65 note 3.

"Adminicular evidence," is auxiliary or supplementary evidence, such as is presented for the purpose of explaining and completing other evidence.—Black L.D.

Evidence as part of procedure signifies those rules of law whereby is determined what testimony is to be admitted and what rejected in each case, and the weight to be given to the testimony admitted.—Washington Nat. Ins. Co. v. McLemore, La.App., 163 So. 773.

4. Mo.—Mackey v. First Nat. Bank, 293 S.W. 66, 71.

5. Ind.—Gates v. Haw, 50 N.E. 299, 150 Ind. 370, 372—Woodfill v. Patton, 76 Ind. 575, 579, 40 Am.R. 269.
Mich.—Tjernstrom v. Ford Motor Co., 280 N.W. 823, 825, 285 Mich. 450, citing **Corpus Juris.**

6. U.S.—U. S. v. Lee Huen, D.C.N.Y., 118 F. 442, 456.
22 C.J. p 65 note 5.

"Evidence proper," is something capable of being weighed in scales of reason and compared and estimated with other matter of the probative sort.—Neely v. Provident Life & Accident Ins. Co. of Chattanooga, Tenn., 185 A. 784, 788, 322 Pa. 417.

Matter used to refresh recollection

"Evidence" consists wholly of proof which is admissible and does not include material brought forward only to refresh the recollection of a witness.—U. S. v. Aluminum Co. of America, 1 F.R.D. 62.

7. U.S.—The Colusa, Cal., 248 F. 21, 23, 160 C.C.A. 161, quoting **Corpus Juris.**
Ala.—Hill v. Hill, 113 So. 306, 216 Ala. 435.
Ill.—Wood v. Prudential Ins. Co. of America, 271 Ill.App. 103, 110, quoting **Corpus Juris.**
Okl.—Southern Drilling Co. v. Daley, 25 P.2d 1082, 166 Okl. 33.
22 C.J. p 65 note 11, p 192 note 79—12 C.J. p 235 note 17.

8. Minn.—State v. Johnson, 12 Minn. 476, 93 Am.D. 241.

Properly receivable

Evidence is competent only when it is properly receivable in court of justice.—Haddow v. St. Louis Public Service Co., Mo.App., 38 S.W.2d 284.

9. Conn.—Ryan v. Bristol, 27 A. 309, 63 Conn. 26, 36
Pa.—Ripple v. Ripple, 1 Rawle 386, 389.

10. Iowa.—Niles v. Sprague, 13 Iowa 198, 204.

Similar definitions

(1) Such evidence as, if believed, would authorize a jury to find a fact.—State v. Johnson, 12 Minn. 476, 93 Am.D. 241.

(2) Sufficient evidence to settle unalterably, or prove, the effect of an act.—Hart v. Hart, Tex.Civ.App., 110 S.W. 91.

11. N.Y.—Porter v. Valentine, 41 N.Y.S. 507, 18 Misc. 213.
N.C.—Hart v. Newland, 10 N.C. 122.

12. Ga.—Kirkland v. Ferris, 88 S.E. 680, 145 Ga. 93.
31 C.J. p 405 note 59.

13. Or.—Lake County v. Neilon, 74 P. 212, 44 Or. 14.
22 C.J. p 65 note 16.

Direct evidence

(1) "Direct evidence" describes disputed circumstance, leaving no room for deduction or inference.—Sullivan v. Mountain States Power Co., 9 P.2d 1033, 139 Or. 282.

(2) "Direct evidence," when strictly defined, means that which immediately points to the question at issue, or is evidence of the precise fact at issue and on trial, by witnesses who can testify that they saw the act done, or heard the words spoken which constitute the facts to

cussed infra § 161, is evidence which, without going directly to prove the existence of a fact, gives rise to a logical inference that such fact does exist. The distinction between these two classes of evidence is of little practical value,[14] especially in view of the obvious necessity that all evidence be direct with respect to its own subject matter, for the law will not permit the drawing of an inference from a supposed fact of whose existence there is no direct proof.[15]

Extrinsic evidence may be evidence not legitimately before the tribunal in which the determination of a cause is made.[16]

Judicial evidence. Judicial evidence is that portion of evidence in general which under the rules of legal procedure is received by tribunals as tending to establish the existence of a fact involved in an issue submitted to judicial determination.[17]

Juridical evidence. Evidence of mutable phenomena through human agency addressed to a human tribunal.[18]

Legal evidence. Legal evidence is that from which, according to legal logic, a legal fact is inferable.[19] Legal evidence is admissible evidence.[20]

Positive and negative evidence. The term "positive" has been applied in a number of cases to evidence which is direct as distinguished from circumstantial evidence,[21] but a more accurate use of the term is to denote affirmative as distinguished from negative evidence.[22] Evidence is positive where the witness states that a certain thing did or did not happen or exist, and negative where the witness states that he did not see or know of the happening or existence of a circumstance or fact.[23]

Probable evidence. Presumptive evidence is sometimes called probable evidence from its foundation in probability.[24]

Probative evidence is testimony carrying the quality of proof and having fitness to induce conviction of truth. It consists of fact and reason cooperating as coördinate factors.[25]

Real evidence, sometimes referred to as "physical facts," has been defined as meaning a fact, the existence of which is perceptible to the senses.[26]

Rebutting evidence. Rebutting evidence is that which is given to explain, repel, counteract, or disprove facts given in evidence by the adverse party.[27] It is that evidence which has become relevant

be proved.—Stern v. Employers' Liability Assur. Corporation, Limited, of London, England, Mo.App., 249 S. W. 739.

14. Ill.—Fabian v. Traeger, 117 Ill. App. 176, affirmed 74 N.E. 131, 215 Ill. 220.
N.D.—New Salem State Bank v. Bismarck Elevator & Inv. Co., 153 N. W. 459, 31 N.D. 102.

15. Ind.—Evansville Metal Bed Co. v. Loge, 85 N.E. 979, 42 Ind.App. 461.
22 C.J. p 66 note 20.
"Such evidence must exclude guesswork, conjecture, and speculation as to the existence of the necessary facts."—Bates v. Brown Shoe Co., 116 S.W.2d 31, 33, 342 Mo. 411, citing **Corpus Juris.**
Inference on inference see infra §§ 116, 161.

16. N.Y.—Baldwin v. Buffalo, 35 N. Y. 375, 382.

17. Best Ev., Chamberlayne ed, § 34.
22 C.J. p 65 note 6.

18. Conn.—Mead v. Husted, 52 Conn. 53, 52 Am.R. 554.

19. Pa.—Commonwealth v. Darlington, 9 Pa.Dist. 700, 701.

20. Conn.—West v. Hayes, 51 Conn. 533.

Documentary evidence
Legal evidence is not confined to the human voice or oral testimony; it includes every tangible object capable of making a truthful statement, such evidence being roughly classified as documentary evidence.—Curtis v. Bradley, 31 A. 591, 65 Conn. 99, 28 L.R.A. 143, 48 Am.S.R. 177.

21. Del.—State v. Miller, 32 A. 137, 9 Houst. 564.
Md.—Cooper v. Holmes, 17 A. 711, 712, 71 Md. 20.
22 C.J. p 66 note 21.
"Clear and satisfactory" evidence is not equivalent to "direct and positive" evidence.—Bash v. Bash, 9 Pa. 261.

Distinguished from presumptive evidence
Positive evidence is the direct proof of the fact or point in issue; presumptive evidence consists in the proof of some other fact or facts, from which the point in issue may be inferred.—Davis v. Curry, 2 Bibb, Ky., 238.

22. Del.—Barclay v. Hartman, 43 A. 174, 16 Del. 351.
Ga.—Falkner v. Behr, 75 Ga. 671.

23. Ga.—Daniel v. State, 62 S.E. 539, 4 Ga.App. 843—Hunter v. State, 62 S.E. 466, 4 Ga.App. 761.
N.C.—Carruthers v. Atlantic & Yadkin Ry. Co., 9 S.E.2d 498, 500, 218 N.C. 49, citing **Corpus Juris,** and reversed on other grounds 11 S.E. 2d 157, 218 N.C. 377—State v. Murray, 51 S.E. 775, 139 N.C. 540.
Wis.—Coel v. Green Bay Traction Co., 133 N.W. 23, 25, 147 Wis. 229.
22 C.J. p 66 notes 23, 24.

24. Black L.D.

Distinguished from demonstrative evidence
Probable evidence is essentially distinguished from demonstrative evidence in that it admits of degrees, from the highest moral certainty to the very lowest presumption.—Commonwealth v. Costley, 118 Mass. 1.

25. Ky.—Globe Indemnity Co. v. Daviess, 47 S.W.2d 990, 243 Ky. 356.

26. Vt.—Riggie v. Grand Trunk R. Co., 107 A. 126, 93 Vt. 282.

"As called by the civilians"
N.C.—State v. Spencer, 97 S.E. 155, 176 N.C. 709.

27. U.S.—West Pub. Co. v. Edward Thompson Co., C.C.N.Y., 152 F. 1019.
Iowa.—Potter v. Sims, 111 N.W. 29, 135 Iowa 739.
Mo.—State v. Brown, App., 149 S.W. 2d 414, 418, citing **Corpus Juris.**
Okl.—Seigler v. State, 145 P. 308, 11 Okl.Cr. 131.
22 C.J. p 66 note 25.

Similar definitions
Minn.—Mathews v. Chicago & N. W. R. Co., 202 N.W. 896, 162 Minn. 313.
Mo.—Seibel-Suessdorf Copper & Iron Mfg. Co. v. Manufacturers' Ry. Co., 130 S.W. 288, 230 Mo. 59.
22 C.J. p 66 note 25 [a].

Addressed to evidence
Rebutting testimony is said to be addressed to evidence produced by the opposite party, not to his pleading.—Lux v. Haggin, 10 P. 674, 4 P. 919, 69 Cal. 255, 414.

or important only as an effect of some evidence introduced by the other side.[28] Rebutting evidence means not merely evidence which contradicts the witnesses on the opposite side, but also evidence in denial of some affirmative fact which the answering party has endeavored to prove.[29] It embraces all testimony which tends to counteract or overcome the legal effect of the evidence for the adverse party.[30]

Rule of evidence. A "rule of evidence" may be defined to be the mode and manner of proving the competent facts and circumstances on which a party relies to establish the fact in dispute in judicial procedure.[31]

"Common law of evidence" is a combination of rules regulating the admissibility of evidence in trials in certain courts of law.[32]

§ 3. Testimony

According to its strict legal definition, testimony is evidence which comes to the tribunal through living witnesses speaking under oath or affirmation.

While the term "testimony" is frequently employed as equivalent, in legal effect, to "evidence,"[33] such use is inaccurate, for the two terms are not synonymous.[34] "Evidence" is the broader term and includes all testimony,[35] but "testimony" is accurately used to designate only a particular kind or species of evidence,[36] namely, that which comes to the tribunal through living witnesses speaking under oath or affirmation in the presence of the tribunal.[37] It has also been said that what witnesses say under oath is "testimony," but only so much of

To specified witness

Rebutting testimony to that of a specified witness is any legal testimony which bears against the truth or accuracy of what that witness has sworn.—Davis v. Covington & M. R. Co., 2 S.E. 555, 77 Ga. 322.

"The word 'rebutting' has a twofold signification, both in common and legal parlance. It sometimes means contradictory evidence only; at other times conclusive or overcoming testimony."—Fain v. Cornett, 25 Ga. 184, 186.

28. La.—State v. Smith, 45 So. 415, 120 La. 530.
Okl.—Poppy v. Duggan, 235 P. 165, 109 Okl. 104.

29. N.Y.—Marshall v. Davies, 78 N. Y. 414—Resech v. Columbia Mach. Works & Malleable Iron Co., 163 N.Y.S. 453, 176 App.Div. 780.

30. Ky.—Duckworth v. Routt, 45 S. W.2d 848, 242 Ky. 30—Reserve Loan Life Ins. Co. v. Boreing, 163 S.W. 1085, 157 Ky. 730.

31. N.Y.—Lapham v. Marshall, 3 N.Y.S. 601, 51 Hun 36.

32. N.Y.—In re Lummis, 166 N.Y.S. 936, 939, 101 Misc. 258.

33. U.S.—Oklahoma Gas & Electric Co. v. Bates Expanded Steel Truss Co., D.C.Del., 296 F. 281—U. S. v. Luce, C.C.Del., 141 F. 385.
Ala.—Miller v. Phillips, 178 So. 531, 235 Ala. 298—Crumley v. State, 89 So. 847, 848, 18 Ala.App. 105.
Fla.—Crosby v. State, 106 So. 741, 90 Fla. 381.
Ga.—Hargrove v. State, 45 S.E. 58, 117 Ga. 706.
Ill.—Donham v. Joyce, 100 N.E. 524, 257 Ill. 112.
Iowa.—In re Burcham's Estate, 235 N.W. 764, 211 Iowa 1395—Miller v. Wolf, 18 N.W. 889, 63 Iowa 233.
Md.—Zipus v. United Rys. & Electric Co. of Baltimore City, 108 A. 884, 135 Md. 297.
N.J.—State Highway Commission of New Jersey v. Lincoln Terminal Corporation, N.J., 164 A. 476, 110 N.J.Law 190.
Okl.—Grayson v. Durant, 144 P. 592, 43 Okl. 799—Lilly v. Russell, 44 P. 212, 4 Okl. 94.
Wyo.—Wyuta Cattle Co. v. Connell, 299 P. 279, 43 Wyo. 135.
22 C.J. p. 66 note 26.

Depositions

The word "testimony" as used in the particular case held to be used as a synonym for "depositions."—People v. Lee Ah Chuck, 6 P. 859, 66 Cal. 662.

While there is a difference in the meaning of the words, among the laity and even among lawyers, these words are frequently used interchangeably.—Kneezle v. Scott County Milling Co., Mo.App., 113 S.W.2d 817.

34. U.S.—U. S. v. Lee Huen, D.C.N. Y., 118 F. 442.
Fla.—Crosby v. State, 106 So. 741, 90 Fla. 381.
Idaho.—In re Fisher's Estate, 279 P. 291, 47 Idaho 668.
Ind.—Harris v. Tomlinson, 30 N.E. 214, 130 Ind. 426.
N.J.—Metropolitan Life Ins. Co. v. Lodzinski, 188 A. 681, 121 N.J. Eq. 183—Bednarik v. Bednarik, 16 A.2d 80, 89, 18 N.J.Misc. 633, quoting **Corpus Juris.**
22 C.J. p. 67 note 27.

35. Ind.—Ingel v. Scott, 86 Ind. 518, 521—Sessengut v. Posey, 67 Ind. 408, 33 Am.R. 98.
Md.—Zipus v. United Rys. & Electric Co. of Baltimore City, 108 A. 884, 135 Md. 297.
Ohio.—John Bright Shoe Stores Co. v. Scully, 156 N.E. 155, 24 Ohio App. 15.
22 C.J. p. 67 note 28.

"The word 'testimony' is a restricted, limited term, consisting only of the statements of witnesses, while the word 'evidence' is a comprehensive term, embracing not only testimony, or the statements of witnesses, but also documents, written instruments, admissions of parties, and whatever may be submitted to a court or jury to elucidate an issue or prove a case."—Crooks v. Harmon, 81 P. 95, 96, 29 Utah 304.

Anything perceptible to senses

"Testimony" is not synonymous with evidence, anything perceptible to the five senses constituting "evidence," when submitted to court or jury, if competent.—In re Fisher's Estate, 279 P. 291, 47 Idaho 668.

Exhibits

"Evidence" is a broader term than "testimony" and includes the exhibits.—Worland v. McGill, 160 N. E. 478, 26 Ohio App. 442.

36. N.J.—Bednarik v. Bednarik, 16 A.2d 80, 89, 18 N.J.Misc. 633, quoting **Corpus Juris.**
22 C.J. p. 67 note 29.

37. U.S.—Edelstein v. U. S., Minn., 149 F. 636, 79 C.C.A. 328, 9 L.R.A., N.S., 236, certiorari denied, 27 S.Ct. 791, 205 U.S. 543, 51 L.Ed. 922.
Ark.—Poe v. State, 129 S.W. 392, 95 Ark. 172.
Iowa.—Whisler v. Whisler, 89 N.W. 1110, 117 Iowa 712.
Ky.—Sutton v. Commonwealth, 269 S. W. 754, 207 Ky. 597.
Neb.—Meyers v. State, 198 N.W. 871, 112 Neb. 149.
N.J.—Bednarik v. Bednarik, 16 A.2d 80, 89, 18 N.J.Misc. 633, quoting **Corpus Juris.**
N.M.—Weeks v. Bailey, 263 P. 29, 33 N.M. 193.
N.Y.—McEntyre v. Tucker, 25 N.Y.S. 95, 5 Misc. 228.
Ohio.—Patterson v. State, 171 N.E. 26, 122 Ohio St. 96—Industrial Commission v. Jasionowski, 156 N.E. 616, 24 Ohio App. 66—John Bright Shoe Stores Co. v. Scully, 156 N. E. 155, 24 Ohio App. 15.
Okl.—Southern Pine Lumber Co. v. Ward, 85 P. 459, 16 Okl. 131, af-

it as impresses the mind of the court trying the facts is "evidence."[38]

§ 4. Proof

"Proof" is the result or effect of evidence, while "evidence" is the medium or means by which a fact is proved or disproved.

Judicial "evidence" stands to "proof," when the latter term is properly employed, in the relation of means to an end. Proof is the result; evidence, the means for attaining it.[39] "Evidence" and "proof" are often used as synonymous terms,[40] but such use is inaccurate.[41]

"Affirmative proof" means such evidence of the truth of the matters asserted as tends to establish them, regardless of the character of the evidence offered.[42]

Judicial proof has been defined as a clear and evident declaration and demonstration of a matter which was before doubtful, conveyed in a judicial manner.[43]

Positive proof is affirmative proof, as opposed to negative;[44] direct proof, as contradistinguished from that which is circumstantial or merely presumptive;[45] proof as positive as the circumstances reasonably afford, and positive enough to satisfy the judgment of reasonable men.[46]

Instrument in the law of evidence includes not merely documents, but witnesses, and things ani-

firmed 28 S.Ct. 239, 208 U.S. 126, 52 L.Ed. 420.
Or.—Baker v. Woodward, 6 P. 173, 12 Or. 3
Utah.—Crooks v. Harmon, 81 P. 95, 29 Utah 304.
Wash.—Lyts v. Keevey, 32 P. 534, 5 Wash. 606.
Wis.—State v. Murphy, 107 N.W. 470, 128 Wis. 201.
Wyo.—Wyoming Loan & Trust Co. v. W. H. Holliday, 24 P. 193, 3 Wyo. 386.
22 C.J. p. 67 note 30.

Documentary evidence

The word "testimony" does not include documentary evidence.
Ind.—Barley v. Dunn, 85 Ind. 338—McDonald v. Elfes, 61 Ind. 279.
N.D.—State v. Winney, 128 N.W. 680, 681, 21 N.D. 72.

Maker of instrument

The statements of the maker as a witness on the stand, or before a commissioner, not his declarations out of court, nor evidence of them given by another witness on the stand, was held to be the meaning of the term as used in a statute providing that an instrument may be proved by the testimony of the maker thereof.—Sledge v. Singley, 37 So. 98, 139 Ala. 346.

Name

When a witness is called and sworn, an answer which he makes to a question put by the clerk of the court, demanding his name, is a part of his testimony.—People v. Winters, 49 Cal. 383.

Oath or affirmation is essential

Okl.—Peters v. U. S., 33 P. 1031, 2 Okl. 116.
Tex.—Cauble v. Key, Civ.App., 256 S.W. 654.

Pleadings

The word "testimony" is not broad enough to include the pleadings or other papers filed in the case previous to the trial or hearing.—Commonwealth v. Ensign, 35 Pa.Co. 698, affirmed 40 Pa.Super. 157, 163, affirmed 77 A. 657, 228 Pa. 400, affirmed Ensign v. Commonwealth of Pennsylvania, 33 S.Ct. 321, 227 U.S. 592, 57 L.Ed. 658

Testimonial evidence

The phrase "testimonial evidence" must not be understood as applicable exclusively to assertions made on the witness stand. Any assertion, taken as the basis of an inference to the existence of the matter asserted is testimony, whether made in court or not. Assertions made on the witness stand are merely the commonest class of testimonial evidence. The qualifications of a witness are equally essential in the use of extrajudicial assertions.—State v. Berberick, 100 P. 209, 38 Mont. 423, 16 Ann.Cas. 1077.

38. N.J.—Mick v. Mart, Ch., 65 A. 851.

Truth deduced

What is sworn is "testimony"; what is the truth deduced therefrom is evidence.—Louisville & N. R. Co. v. Rogers, 94 S.E. 321, 21 Ga.App. 324.

39. Ala.—Latikos v. State, 88 So. 45, 17 Ala. App. 592.
Ark.—Walker v. State, 212 S.W. 319, 138 Ark. 517.
Me.—Dupont v. Pelletier, 113 A. 11, 12, 120 Me. 114.
Ohio—Quay v. Quay, 4 Ohio N.P., N.S., 529.
S.C.—Sims v. Clayton, 7 S.E.2d 724, 193 S.C. 98.
Tex.—Jones v. Clements, Civ.App., 41 S.W.2d 1069.
22 C.J. p. 67 note 32.

Any fact or circumstance which leads the mind to the affirmative or negative of any proposition constitutes "proof."—Nauful v. National Loan & Exchange Bank, 97 S.E. 843, 111 S.C. 309.

Link in chain

Proof is only a link in the chain of evidence; it relates to a single thing, or the statement of a single witness, and it is these links of entire proof which, taken together, go to make up the evidence.—Cleveland Metal Bed Co. v. Kutz, 160 N.E. 725, 27 Ohio App. 245.

Perfection of evidence

Proof is the perfection of evidence.
Ill.—Schultz v. Plankinton Bank, 40 Ill.App. 462, 469, affirmed 30 N.E. 346, 141 Ill. 116, 33 Am.S.R. 290.
N.Y.—Daunesburgh v. Jenkins, 40 Barb 574.
S.C.—Hill v. Watson, 10 S.C. 268.

Strict meaning

(1) Evidence before a court or jury in a judicial way has been said to be "proof" in strict legal construction.—Lenox v. United Ins. Co., 3 Johns.Cas.,N.Y., 224.

(2) Such meaning has also been said to be its more common, although less accurate, meaning.—Commonwealth v. Berryman, 72 Pa. Super. 479.

40. Ark.—Walker v. State, 212 S.W. 319, 138 Ark. 517.
Md.—Merrick v. United Rys. & Electric Co. of Baltimore City, 163 A. 816, 163 Md. 641.
22 C.J. p. 67 note 33.

41. S.C.—Sims v. Clayton, 7 S.E.2d 724, 193 S.C. 98.
22 C.J. p. 67 note 34.

Vast difference

"There is a vast difference between evidence and proof. The one convinces, while the other may be false, and of no probative value whatever."—State v. Howard, 111 So. 72, 75, 162 La. 719.

42. Vt.—Glass v. Newport Clothing Co., 8 A.2d 651, 110 Vt. 368.

43. Ga.—Powell v. State, 29 S.E. 309, 101 Ga. 9, 65 Am.S.R. 277.

44. Ga.—Falkner v. Behr, 75 Ga. 671.

45. Mich.—Niles v. Rhodes, 7 Mich. 374.
Pa.—Schrack v. McKnight, 84 Pa. 26.

46. Neb.—Mitchell v. Brotherhood of Locomotive Firemen and Enginemen, 174 N.W. 422, 103 Neb. 791.

mate or inanimate, which may be presented for inspection.[47]

§ 5. What Law Governs

The laws of the forum govern as to the rules of evidence.

It is well established that the courts of one state or country are not bound by the rules of evidence adopted in another jurisdiction, but the admissibility of evidence,[48] as well as the burden of proof,[49] and weight and sufficiency of evidence,[50] is always governed by the lex fori. Where action is brought in a state court to enforce rights given by a federal statute, the rules of evidence of the state courts control, unless it is otherwise provided by the federal law.[51] It has been held, however, that the general rule that a state has the right to prescribe the rules of evidence for its courts has no application where a federal question is involved, as to which the federal acts and decisions are controlling.[52] Evidence tending to impose a liability relates to the right of action and is governed by the lex loci delicti.[53]

II. JUDICIAL NOTICE

A. IN GENERAL

§ 6. Definition, Terminology, and Distinctions

Judicial notice is the cognizance of certain facts which judges and jurors may properly take and act on without proof because they already know them.

Judicial notice or knowledge may be defined as the cognizance of certain facts which judges and jurors may properly take and act on without proof because they already know them.[54] Judicial notice is a branch of the law of evidence,[55] it being a judicial short cut, a doing away, in the case of evidence, with the formal necessity for evidence, there being no real necessity for it.[56] It is said that the term "judicial notice" means no more than that the court will bring to its aid and consider, without proof of the facts, its knowledge of those matters of public concern which are known by all well-informed persons.[57] Judicial notice is properly divided into judicial knowledge and common knowledge. Judicial knowledge is that which the court must possess and take cognizance of, and common knowledge is that which the court may declare ap-

47. Cal.—Cardenas v. Miller, 39 P. 783, 41 P. 472, 108 Cal. 250, 256, 49 Am.S.R. 84.
N.Y.—Loch v. Mayer, 100 N.Y.S. 837, 50 Misc. 442, 448.

48. Mo.—Prentiss v. Illinois Life Ins. Co., 225 S.W. 695—Cox v. Terminal Railroad Ass'n of St. Louis, App., 43 S.W.2d 571, affirmed 55 S.W.2d 685, 331 Mo. 910.
S.C.—Sirgany v. Equitable Life Assur. Soc. of U. S., 175 S.E. 209, 212, 173 S.C. 120, quoting **Corpus Juris.**
Va.—Baise v. Warren, 164 S.E. 655, 158 Va. 505.
22 C.J. p 198 note 32.
Law governing remedies generally, see Conflict of Laws § 22.
Rules of evidence are governed by the law of the forum.
Conn.—Broderick v. McGuire, 174 A. 314, 119 Conn. 83, 94 A.L.R. 890.
N.C.—Howard v. Howard, 158 S.E. 101, 200 N.C. 574.

49. Ala.—Helton v. Alabama Midland R. Co., 12 So. 276, 97 Ala. 275.
Miss.—Boothe v. Teche Lines, 143 So. 418, 165 Miss. 343.
Mo.—Menard v. Goltra, 40 S.W.2d 1053, 328 Mo. 368—Cox v. Terminal Railroad Ass'n of St. Louis, App., 43 S.W.2d 571, affirmed 55 S.W.2d 685, 331 Mo. 910.

50. Cal.—Sayles v. Peters, 54 P.2d 94, 11 Cal.App.2d 401.
Iowa.—Kingery v. Donnell, 268 N.W. 617, 222 Iowa 241.
Miss.—Boothe v. Teche Lines, 143 So. 418, 165 Miss. 343.
Mo.—Menard v. Goltra, 40 S.W.2d 1053, 328 Mo. 368—Cox v. Terminal Railroad Ass'n of St. Louis, App., 43 S.W.2d 571, affirmed 55 S.W.2d 685, 331 Mo. 910.
Cold storage markings
In prosecution for violation of Cold Storage Act by keeping fish in storage for more than twelve months, stamp on boxes, purporting to be time received for storage in Illinois plant, was not probative, for, although such stamp was required by Illinois laws, such law could not impute probative force to markings, as evidence, in this state, in absence of showing that stamp was placed on boxes pursuant to law, or showing as to what force was accorded such marking as evidence under Illinois law.—Green Bay Fish Co. v. State, 202 N.W. 667, 186 Wis. 330.

51. Ark.—Kansas City Southern R. Co. v. Leslie, 167 S.W. 83, 112 Ark. 305, Ann.Cas.1915B 834.

52. Va.—McGuire v. Atlantic Coast Line R. Co., 118 S.E. 225, 136 Va. 382.

53. Ohio.—Yeazel v. Louisville & N. Ry. Co., 13 Ohio App. 499.

54. Ala.—Jobe-Rose Jewelry Co. v. City of Birmingham, 178 So. 215, 216, 235 Ala. 178, citing **Corpus Juris.**
Md.—Hettleman v. Frank, 110 A. 715, 136 Md. 351.
Mo.—Wolf v. Mallinckrodt Chemical Works, 81 S.W.2d 323, 332, 336 Mo. 746, citing **Corpus Juris.**
N.J.—James Mitchell, Inc., v. Krueger's Unknown Executors, 163 A. 10, 10 N.J.Misc. 1176.
Pa.—Sadler v. Sadler, 21 West Co. L.J. 246.
23 C.J. p 58 note 2.
Consideration by jury of matters of general or common knowledge see the C.J.S. title Trial § 463, also 64 C.J. p 1023 note 76.
Other definitions
Ind.—Carter v. Neeley's Estate, 2 N.E.2d 221, 102 Ind.App. 257.
Tex.—Boothe v. American State Bank of Amarillo, Civ.App., 57 S.W.2d 250—Ex parte Ferguson, 15 S.W.2d 650, 112 Tex.Cr. 153.
23 C.J. p 58 note 2 [a].

55. Ill.—Woods v. Village of La Grange Park, 4 N.E.2d 764, 287 Ill. App. 201.

56. Cal.—Varcoe v. Lee, 181 P. 223, 180 Cal. 338.

57. Kan.—State v. Kelly, 81 P. 450, 71 Kan. 811, 70 L.R.A. 450, 6 Ann. Cas. 298.

plicable to the action without the necessity of proof.[58]

"Judicial notice" is the most commonly used term for this function, but it is also termed "judicial knowledge,"[59] "judicial cognizance,"[60] and notice "ex officio."[61] It has also been stated, however, that judicial notice and judicial knowledge are far from being one.[62]

"Legislative notice" distinguished. The phrase "judicial notice" belongs to judicial proceedings and the cases that treat of it have no application whatever to the activities of the legislature. Legislative notice is far broader than judicial notice.[63]

§ 7. General Scope

The list of things covered by judicial notice is constantly expanding, and no exact limit can be placed thereon.

The list of things covered by judicial notice is constantly expanding, and no exact limit can be placed thereon.[64] Generally speaking, judicial knowledge is limited to facts evidenced by public records and facts of general notoriety.[65] Most matters which the court may notice fall into one of two classes, those which come to the knowledge of men generally in the course of the ordinary experience of life, and are therefore in the mind of the trier, or those which are generally accepted by mankind as true and are capable of ready demonstration by means commonly recognized as authoritative.[66]

§ 8. Under Statute

Statutes enumerating matters of which courts may or shall take judicial notice are variously construed as permissive, mandatory, or exclusive.

Some codes and statutes enumerate certain matters of which courts may or shall take judicial notice.[67] The interpretations that various courts have placed on these provisions are not uniform,[68] some provisions having been construed as permissive,[69] and others as mandatory.[70] Some codes by their express terms furnish an exclusive rule on the subject and exclude judicial notice of matters not therein enumerated.[71]

§ 9. Matters of Common Knowledge

Judicial notice will be taken of matters of common knowledge.

Courts may properly take judicial notice of facts that may be regarded as forming part of the common knowledge of every person of ordinary understanding and intelligence.[72] Other common state-

58. Ohio.—Strain v. Isaacs, 18 N.E. 2d 816, 59 Ohio App. 495.

Judicial knowledge "may be defined as the cognizance of certain facts which a judge under the rules of legal procedure, or otherwise, may properly take or act upon without proof because already known to him, or that knowledge which the judge has or is assumed to have by virtue of his office—virtute officii."—Riley v. Wallace, 222 S.W. 1085, 1086, 188 Ky. 471, 11 A.L.R. 337.

59. Wash.—State v. Brooks, 109 P. 211, 58 Wash. 648.
23 C.J. p 58 note 4.

60. Ala.—Teat v. Chapman, 56 So. 267, 1 Ala.App. 491.
Mont.—State v. Harrington, 78 P. 484, 31 Mont. 294.

61. U.S.—U. S. v. Wilson, Pa., 7 Pet. 150, 8 L.Ed. 640—Rice v. Montgomery, C.C.Ind., 20 F.Cas. No.11,753, 4 Biss. 75.
Tex.—Terrell v. State, 41 Tex. 463.
23 C.J. p 58 note 6.

62. U.S.—Shapleigh v. Mier, U.S. Tex., 57 S.Ct. 261, 299 U.S. 468, 81 L.Ed. 355, 113 A.L.R. 253, affirming, C.C.A., 83 F.2d 673, certiorari granted 57 S.Ct. 17, 299 U.S. 524, 81 L.Ed. 386.

63. N.Y.—People v. Goldberger, 163 N.Y.S. 663.

64. Ariz.—Scottish Union & National Ins. Co. v. Phœnix Title & Trust Co., 235 P. 137, 28 Ariz. 22.

As cases are decided the list of things of which courts take judicial notice grows.—State v. Missouri Pac. R. Co., 111 S.W. 500, 212 Mo. 658.

65. Ind.—Illinois Pipe Line Co. v. Coffman, 188 N.E. 217, 219, 98 Ind. App. 419, citing **Corpus Juris.**
Wash.—Gottstein v. Lister, 153 P. 595, 88 Wash. 462, Ann.Cas.1917D 1008.

66. Conn.—Nichols v. Nichols, 13 A. 2d 591, 126 Conn. 614.

Various matters
Courts and judges may take judicial notice of various matters in the progess of a litigation.—Mager v. Wuytack, 178 N.Y.S. 300, 189 App. Div. 104.

67. Mont.—State v. Mountjoy, 271 P. 446, 83 Mont. 162.
23 C.J. p 59 note 12.

Federal practice
These provisions govern the practice of federal courts sitting in the particular state.—Seattle, R. & S. R. Co. v. City of Seattle, C.C.Wash., 190 F. 75.

68. Cal.—Anderson v. State Bd. of Dental Examiners, 149 P. 1006, 27 Cal.App. 1006.

69. Utah.—Hunt v. Monroe, 91 P. 269, 32 Utah 428, 11 L.R.A.,N.S., 249.

Request and relevancy
Although a statute controls as to the matters of which a court will take judicial notice, its purport is merely that while a court may take judicial notice of those matters and things therein enumerated, it will do so only when requested and when they are relevant to some matter in issue.—In re McKee's Estate, 274 N. W. 601, 67 N.D. 504.

70. Cal.—In re Berry, 82 P. 44, 147 Cal. 523, 109 Am.S.R. 160.

71. Mont.—Western Union Telegraph Co. v. State Board of Equalization, 7 P.2d 551, 91 Mont. 310—State v. Mountjoy, 271 P. 446, 83 Mont. 162—McKnight v. Oregon Short Line R. Co., 82 P. 661, 33 Mont. 40.

72. U.S.—Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 57 S.Ct. 724, 301 U.S. 292, 81 L.Ed. 1093, reversing 3 N.E.2d 475, 131 Ohio St. 539—Greeson v. Imperial Irr. Dist., C.C.A.Cal., 59 F.2d 529, affirming, D.C., 55 F.2d 321—Wilcox v. Danner, Cust. & Pat.App., 53 F.2d 711—Ohio Oil Co. v. McFarland, D.C.La., 28 F.2d 441, vacated on other grounds Ohio Oil Co. v. Conway, 49 S.Ct. 256, 279 U. S. 813, 73 L.Ed. 972—Knights of the Ku Klux Klan v. Independent Klan of America, D.C.Ind., 11 F.2d 881—Harris v. Central Nebraska Public Power & Irrigation Dist.,

ments of the rule are that the courts will take notice of whatever is,[73] or ought to be,[74] generally known within the limits of their jurisdiction; and that they ought not to assume ignorance of, or ex-

D.C.Neb., 29 F.Supp. 425—In re Radford, D C.Ky., 8 F Supp. 489, affirmed, C.C A., Louisville Joint Stock Land Bank v. Radford, 74 F.2d 576, certiorari granted 55 S. Ct. 547, 294 U S. 702, 79 L.Ed. 1238, reversed on other grounds 55 S. Ct. 854, 295 U.S. 555, 79 L Ed. 1593, 97 A.L R. 1106, motion denied 55 S. Ct. 918, rehearing denied 56 S.Ct. 82, 296 U.S. 661, 80 L.Ed. 471—Appalachian Electric Power Co. v. Smith, D.C.Va., 4 F.Supp. 6, reversed on other grounds, C.C.A , 67 F.2d 451, certiorari denied 54 S. Ct. 458, 291 U.S. 674, 78 L.Ed. 1063—U. S. v. Sanders, D.C.Tenn., 290 F. 428—U. S. v. Andrews Co., 15 Ct Cust.App. 412—National Electric Signaling Co. v. U. S , 76 Ct.Cl. 545.

Ala.—Coral Gables v. Patterson, 173 So. 4, 233 Ala. 602—City of Birmingham v. Martin, 153 So. 235, 228 Ala. 318—Life & Casualty Ins. Co. of Tennessee v. Bottoms, 143 So. 574, 575, 225 Ala. 382, citing **Corpus Juris**—Independent Life Ins. Co. v. Carroll, 130 So. 402, 222 Ala. 34—Snodgrass v. Snodgrass, 115 So. 21, 217 Ala. 128—Sovereign Camp, W. O. W., v. Allen, 89 So. 58, 206 Ala. 41—J. R. Raible Co. v. State Tax Commission, 194 So. 556, 29 Ala.App. 184, reversed on other grounds 194 So. 560, 239 Ala. 41.

Alaska.—McPhail v. Latouche Packing Co., 8 Alaska 297.

Cal.—Ventura County Harbor Dist. v. Board of Sup'rs of Ventura County, 295 P. 6, 211 Cal. 271—People v. Associated Oil Co., 294 P. 717, 211 Cal. 93—Alphonzo E. Bell Corporation v. Bell View Oil Syndicate, 76 P.2d 167, 24 Cal App.2d 587, followed in 76 P.2d 166, 24 Cal.App.2d 746, 76 P.2d 166, 24 Cal. App.2d 747 and 76 P.2d 166, 24 Cal.App.2d 748—Wood v. Kennedy, 3 P.2d 366, 117 Cal.App. 53.

Colo.—Israel v. Wood, 27 P.2d 1024, 93 Colo. 500—Antlers Athletic Ass'n v. Hartung, 274 P. 831, 85 Colo. 125.

Conn.—Muse v. Page, 4 A.2d 329, 125 Conn. 219.

Fla.—Cook v. Lewis K. Liggett Co., 173 So. 159, 127 Fla. 369—State v. Sarasota County, 159 So. 797, 118 Fla. 629.

Kan.—Bobbitt v. State Highway Commission of Kansas, 26 P.2d 1115, 1118, 138 Kan. 487, citing **Corpus Juris**—State v. Kansas State Highway Commission, 299 P. 955, 959, 133 Kan. 357, citing **Corpus Juris.**

Mo.—City of St. Louis v. Pope, 126 S.W.2d 1201, 1210, 344 Mo. 479, citing **Corpus Juris**—Spoeneman v. Uhri, 60 S.W.2d 9, 12, 332 Mo. 821, citing **Corpus Juris**—McCleary v. Chicago, B. & Q. R. Co., 264 S.W. 376, 381, quoting **Corpus Juris**—Valley Spring Hog Ranch Co. v. Plagmann, 220 S.W. 1, 282 Mo. 1, 15 A.L.R. 266—Boillot v. Income Guaranty Co., 102 S W.2d 132, 231 Mo.App. 531—Buhrkuhl v. F. T. O'Dell Const Co., 95 S.W.2d 843, 232 Mo.App. 967, certiorari quashed State ex rel. F. T. O'Dell Const. Co. v Hostetter, 104 S.W.2d 671, 340 Mo. 1155.

Neb.—In re Bose's Estate, 285 N.W 319, 136 Neb. 156—Lawson v. Union Pac. R. Co., 204 N.W. 791, 113 Neb. 745.

N.J.—James Mitchell, Inc., v. Kreuger's Unknown Executors, 163 A. 10, 10 N.J.Misc. 1176.

N.Y.—People ex rel. Bryant v. Zimmerman, 210 N.Y.S. 269, 213 App Div. 414, affirmed 150 N.E. 497, 241 N.Y. 405, 43 A.L.R. 909—U. S. Pipe & Foundry Co. v. City of Hornell, 263 N.Y.S. 89, 146 Misc. 812—Maylender v. Fulton County Gas & Electric Co., 227 N.Y.S. 209, 131 Misc. 514—Schieffelin v. McLaughlin, 215 N.Y.S. 209, 127 Misc. 56—Seventy-Eighth St. & Broadway Co. v. Rosenbaum, 182 N.Y.S. 505, 111 Misc. 577—Liebmann v. Aldhous, 173 N.Y.S. 553, 105 Misc. 728.

N.C.—Snyder v. Maxwell, 9 S.E.2d 19, 217 N C. 617.

Okl.—Walcher v. First Presbyterian Church of Norman, Okl., 184 P. 106, 76 Okl. 9, 6 A.L.R. 1593.

Tex.—Reynolds v. McMan Oil & Gas Co., Com App., 11 S.W.2d 778, reversing, Civ.App , 279 S.W. 939, and rehearing denied, Com App., 14 S.W.2d 819—Miller v. El Paso County, Civ.App., 146 S.W.2d 1027, reversed on other grounds, Sup., 150 S.W.2d 1000—Wood v. Marfa Independent School Dist., Civ App., 123 S.W 2d 429, reversed on other grounds Marfa Independent School Dist. v. Wood, 141 S.W.2d 590, 135 Tex. 223—Quanah, A. & P. Ry. Co. v. Eblen, Civ App., 87 S.W.2d 540, 543, citing **Corpus Juris**—Houston Press Co. v. Bawden Bros., Civ. App., 51 S.W.2d 438, 440, citing **Corpus Juris**—Gulf, C. & S. F. Ry. Co. v. Bostick, Civ.App., 233 S.W. 112.

Utah.—Salt Lake City v. Board of Education of Salt Lake City, 175 P. 654, 52 Utah 540.

Wash.—Centralia Labor Temple Ass'n v. O'Day, 246 P. 930, 139 Wash. 331.

W.Va.—Brown v. Bottom Creek Coal & Coke Co., 118 S.E. 284, 94 W.Va. 287.

Wis.—State v. Emery, 189 N.W. 564, 178 Wis. 147.

23 C.J. p 59 note 22.

Common experience

Courts take judicial notice of common experience of mankind.—Ladner v. Siegel, 142 A. 272, 293 Pa. 306.

"Common knowledge"

(1) Things of "common knowledge," of which courts take judicial notice, may be matters coming to the knowledge of men generally in the course of the ordinary experiences of life, or they may be matters which are generally accepted by mankind as true and are capable of ready and unquestioned demonstration.—Roden v. Connecticut Co., 155 A. 721, 113 Conn. 408.

(2) Other definitions.—Strain v. Isaacs, 18 N.E.2d 816, 59 Ohio App. 495.

73. Cal.—In re Wirt's Estate, 277 P. 118, 207 Cal. 106.

Kan.—Johnson v. Funk, 297 P. 670, 132 Kan. 793.

Ky.—Riley v. Wallace, 222 S.W 1085, 188 Ky. 471, 11 A.L.R. 337.

Mich.—City of Detroit v. Detroit United Ry., 197 N.W. 697, 226 Mich. 354.

N.Y.—Vadney v. United Traction Co., 183 N.Y.S. 296, 193 App.Div. 329, affirmed 135 N.E 952, 233 N.Y. 643.

S.C.—State v. Broad River Power Co., 181 S.E. 41, 177 S.C. 240.

23 C.J. p 60 note 23.

Presumption of court's knowledge

What everybody knows the courts are presumed to know, and of such matters may take judicial cognizance.

U.S.—Nev-Cal Electric Securities Co. v. Imperial Irr. Dist., C C.A.Cal., 85 F.2d 886, certiorari denied 57 S.Ct. 493, 300 U.S. 662, 81 L.Ed. 871—Hart Coal Corporation v. Sparks, D.C.Ky., 7 F.Supp. 16, vacated on other grounds, C.C.A., Sparks v. Hart Coal Corporation, 74 F.2d 697—General Baking Co. v. Grocers' Baking Co., D.C.Ky., 3 F.Supp. 146.

Fla.—Beatty v. Strickland, 186 So. 542, 136 Fla. 330—State ex rel. Tatham v. Coleman, 166 So. 221, 122 Fla. 819—Jackson v. O'Connell, 154 So. 697, 114 Fla. 705—Layne v. Tribune Co., 146 So. 234, 108 Fla. 177, 86 A.L.R. 466—St. Lucie County Bank & Trust Co. v. Aylin, 114 So. 438, 94 Fla. 528.

74. Cal.—In re Wirt's Estate, 277 P. 118, 207 Cal. 106.

Ill.—See Kreeb v. Lake Erie & W. R. Co., 211 Ill.App. 630.

Kan.—Johnson v. Funk, 297 P. 670, 132 Kan. 793.

Ky.—McFeena's Adm'r v. Paris Home Telephone & Telegraph Co., 227 S. W. 450, 190 Ky. 299.

S.C.—State v. Broad River Power Co., 181 S.E. 41, 177 S.C. 240.

Va.—Vaughan v. Town of Galax, 4 S.E.2d 386, 173 Va. 335.

23 C.J. p 60 note 24.

clude from their knowledge, matters which are known to all persons of intelligence.[75] On the other hand, judicial knowledge of facts is measured by general knowledge of the same facts,[76] and courts will not take judicial notice of facts which are not matters of common and general knowledge.[77] They do not take judicial notice of facts merely because they may be ascertained by reference to dictionaries, encyclopedias, or other publications,[78] nor of facts which the court cannot know without resort to expert testimony or other proof.[79] The truth or falsity of testimony generally is to be de-

75. U.S.—Brougham v. Kansas City, D.C.Mo., 263 F. 115.
Ala.—Sovereign Camp, W. O. W. v. Allen, 89 So. 58, 206 Ala. 41.
Mo.—City of St. Louis v. Pope, 126 S.W.2d 1201, 1210, 344 Mo. 479, citing **Corpus Juris**—State ex rel. Union Electric Light & Power Co. v. Public Service Commission, 62 S.W.2d 742, 333 Mo. 426—Hackworth v. Missouri Southern R. Co., 227 S.W. 1032, 286 Mo. 282, 15 A.L.R. 170.
S.C.—State v. Broad River Power Co., 181 S.E. 41, 177 S.C. 240.
Tex.—Williams v. Chew, Civ.App., 19 S.W.2d 68.
23 C.J. p 60 note 25.

"Courts are not at liberty to entirely disregard facts of general knowledge of which the courts, themselves, are cognizant."—Jackie Cab Co. v. Chicago Park District, 9 N.E.2d 213, 216, 366 Ill. 474, 112 A.L.R. 1410.

"Judges are not necessarily ignorant in court of what everybody else, and they themselves out of court, are familiar with; and there is no reason why they should pretend to be more ignorant or unobserving than the rest of mankind."—Affiliated Enterprises v. Waller, Del., 5 A.2d 257, 261, 1 Terry 28.

76. Mo.—Hackworth v. Missouri Southern R. Co., 227 S.W. 1032, 286 Mo. 282, 15 A.L.R. 170.

77. U.S.—Streckfus Steamers v. Fox, D.C.W.Va., 14 F.Supp. 312.
Cal.—Roy v. Smith, 21 P.2d 151, 153, 131 Cal.App. 148, citing **Corpus Juris.**
Mo.—Morfit v. Thompson, 282 S.W. 113, 219 Mo.App. 506.
Pa.—In re Wood's Estate, 115 A. 865, 272 Pa. 8.
23 C.J. p 60 note 26.

Certainty

Matter, to be a subject of judicial notice, must be known and well established and authoritatively settled, not doubtful or uncertain.—Sproul v. Springman, 147 N.E. 131, 316 Ill. 271.

Notice of particular miscellaneous facts declined

U.S.—U. S. v. About 151.682 Acres of Land in McHenry County, C.C.A.Ill., 99 F.2d 716—Kansas Educational Ass'n of M. E. Church for State of Kansas v. McMahan, C.C.A.Okl., 76 F.2d 957, 100 A.L.R. 384—U. S. v. Bernard, Judae & Co., 15 Ct.Cust.App. 424.
Cal.—Wahl v. Waters, 77 P.2d 1072, 11 Cal.2d 81.
Ill.—Automobile Supply Co. v. Scene-in-Action Corporation, 172 N.E. 35, 340 Ill. 196, 69 A.L.R. 1085—Belcher v. John M. Smyth Co., 243 Ill. App. 65.
Me.—Eddy v. Bangor Furniture Co., 183 A. 413, 134 Me. 168.
Md.—State, to Use of Lorenz v. Machen, 165 A. 695, 164 Md. 579.
Mass.—Andrews v. Jordan Marsh Co., 186 N.E. 71, 283 Mass. 158, 92 A.L.R. 726.
Miss.—Kolb Cleaning & Tailoring Co. v. Mississippi Power & Light Co., 145 So. 910, 166 Miss. 136.
N.H.—Vandell v. Sanders, 155 A. 193, 85 N.H. 143, 80 A.L.R. 550.
N.J.—Kaufer v. Rothman, 135 A. 266, 4 N.J.Misc. 1029, affirmed 137 A. 917, 101 N.J.Eq. 294.
N.Y.—Carnera v. Schmeling, 260 N.Y.S. 82, 236 App.Div. 460—Szilagyi v. Szilagyi, 11 N.Y.S.2d 469, 170 Misc. 1009, affirmed 15 N.Y.S.2d 107, 257 App.Div. 630.
Ohio.—X-Cel Dairy v. City of Akron, 25 N.E.2d 700, 60 Ohio App. 147, appeal dismissed 25 N.E.2d 680, 136 Ohio St. 340.
Pa.—Sebree v. Huntingdon Water Supply Co., 110 A. 142, 267 Pa. 420—Green v. Russell, 48 Dauph.Co. 194.
S.D.—State v. Reeves, 184 N.W. 993, 44 S.D. 568.
Tex.—Dallas Plumbing Co. v. Harrington, Civ.App., 275 S.W. 190
Wash.—Bullock v. Parsons, 74 P.2d 892, 193 Wash. 79.
Wis.—John F. Jelke Co. v. Emery, 214 N.W. 369, 193 Wis. 311, 53 A.L.R. 463.

78. Ala.—Independent Life Ins. Co. v. Carroll, 130 So. 402, 405, 222 Ala. 34, citing **Corpus Juris.**
Cal.—Roy v. Smith, 21 P.2d 151, 153, 131 Cal.App. 148, citing **Corpus Juris.**
Mo.—State ex rel. F. T. O'Dell Const. Co. v. Hostetter, 104 S.W.2d 671, 340 Mo. 1155, quashing certiorari Buhrkuhl v. F. T. O'Dell Const. Co., 95 S.W.2d 843, 232 Mo.App. 967.
23 C.J. p 60 note 27.
Mode of ascertaining facts required to be judicially noticed see infra § 12.

79. Ala.—Independent Life Ins. Co. v. Carroll, 130 So. 402, 405, 222 Ala. 34, citing **Corpus Juris.**
Hawaii—Pua v. Hilo Tribune-Herald, 31 Hawaii 65.
Va.—Vaughan v. Town of Galax, 4 S.E.2d 386, 173 Va. 335.
Wash.—State v. Karsunky, 84 P.2d 390, 396, 197 Wash. 87, quoting **Corpus Juris.**
23 C.J. p 60 note 28.

Specially informed class

The courts cannot take judicial notice of such facts as are known, if at all, only by a specially informed class of persons.—Lickfett v. Jorgenson, 229 N.W. 138, 179 Minn. 321.

Notice of particular miscellaneous facts declined

U.S.—U. S. v. Barker Bros., 17 C.C.P.A.(Customs) 6—U. S. v. Martorelli, 12 Ct.Cust.App. 327—U. S. v. Lee & Co., 9 Ct.Cust.App. 111—U. S. v. Snellenburg & Co., 9 Ct.Cust.App. 59.
Ala.—Southern Ry. Co. v. Curry, 194 So. 523, 239 Ala. 263—Town of Elba v. Cooper, 93 So. 853, 208 Ala. 149—Alexander v. Livingston, 89 So. 520, 206 Ala. 186—Henderson v. Holmes & Dawson, 85 So. 536, 204 Ala. 203
Ariz.—Maloney v. Moore, 52 P.2d 467, 46 Ariz. 452.
Ark.—Gilleylen v. Schoolfield, 35 S.W.2d 356, 183 Ark. 143—Van Dyke v. Mack, 214 S.W. 23, 139 Ark. 524.
Cal.—Bates v. Escondido Union High School Dist. of San Diego County, 24 P.2d 884, 133 Cal.App. 725—Standley v. Knapp, 298 P. 109, 113 Cal.App. 91.
Fla.—West v. Town of Lake Placid, 120 So. 361, 97 Fla. 127.
Ill.—Board of Education of School Dist. No. 41 v. Morgan, 147 N.E. 34, 316 Ill. 143.
Ky.—Riley v. Wallace, 222 S.W. 1085, 188 Ky. 471, 11 A.L.R. 337.
N.H.—Staples v. Dix & Staples Co., 155 A. 43, 85 N.H. 115.
N.J.—James Mitchell, Inc., v. Kreuger's Unknown Executors, 163 A. 10, 10 N.J.Misc. 1176.
N.Y.—Ansorge v. Belfer, 161 N.E. 450, 248 N.Y. 145, reversing 221 N.Y.S. 786, 220 App.Div. 731—In re McCafferty's Will, 264 N.Y.S. 38, 147 Misc. 179—General Inv. Co. v. Interborough Rapid Transit Co., 193 N.Y.S. 881—Leiber v. Goodrich, 5 Cow. 186.
Ohio.—State v. Ford Motor Co., 151 N.E. 171, 114 Ohio St. 221—Cleveland, C., C. & St. L. Ry. Co. v. Lindner, 178 N.E. 322, 40 Ohio App. 265.
Or.—Kesterson v. California-Oregon Power Co., 221 P. 826, reversed on

termined by the jury, and the court cannot take judicial notice that it is false.[80] Also, it is necessary that the community throughout which a fact is supposed to be commonly known should be one whose extent bears some reasonable relation to the territorial jurisdiction of the court itself.[81]

The limits of judicial notice are not capable of being prescribed in general terms with any degree of exactness,[82] but it seems plain from the authorities that notoriety is, generally speaking, the ultimate test when facts are sought to be brought within the realm of judicial notice.[83] This want of exactness, however, comes from the difficulty in many cases of determining what is sufficient notoriety of a given fact to bring it within the judicial notice of the court.[84] Although "a fact must be pretty well known and pretty obvious besides before it can be taken judicial notice of,"[85] it is not necessary for courts to wait, before taking judicial notice of a thing, until everybody knows and understands it.[86] Judicial notice is taken of what is within the knowledge of most men.[87] The test has been said to be: (1) Is the fact one of common, everyday knowledge in the jurisdiction, which every one of average intelligence and knowledge of things about him can be presumed to know? (2) Is it certain and indisputable?[88] A court will not take judicial notice of any fact which is in part dependent on the existence or nonexistence of a fact of which the court has no constructive knowledge.[89]

As the common knowledge of man ranges far and wide, so the doctrine of judicial notice embraces matters curiously diverse,[90] and, in addition to the matters hereinafter discussed in detail in §§ 14–102, a wide variety of particular facts have been judicially noticed as being matters of common knowledge.[91] It should be borne in mind, however, in considering such recognitions as precedents, that

other grounds 228 P. 1092, 114 Or. 22.
Pa.—Sperry & Hutchinson Co. v. Boardman, 46 Dauph.Co. 145.
Tex.—International-Great Northern R. Co. v. Reagan, 49 S.W.2d 414, 121 Tex. 233, affirming, Civ.App., 36 S.W.2d 564—McClintic v. J. D. Young Corporation, Civ.App., 41 S.W.2d 686, reversed on other grounds, Com.App., 66 S.W.2d 676—Grant v. Pendley, Civ.App., 22 S.W.2d 467, reversed on other grounds, Com.App., 39 S.W.2d 596, 78 A.L.R. 638—May v. Southwestern Lumber Co. of New Jersey, Civ. App., 278 S.W. 508.
Wyo.—State Board of Equalization v. Blind Bull Coal Co., 101 P.2d 70, 55 Wyo. 438.
23 C.J. p 60 note 28.

80. Cal.—Bisinger v. Sacramento Lodge, No. 6, B. P. O. E., 203 P. 768, 187 Cal. 578.

81. N.J.—James Mitchell, Inc., v. Kreuger's Unknown Executors, 163 A. 10, 10 N.J.Misc. 1176.
S.C.—State v. Broad River Power Co., 181 S.E. 41, 177 S.C. 240.
23 C.J. p 61 note 29.

82. Wash.—Gottstein v. Lister, 153 P. 595, 88 Wash. 462, Ann.Cas. 1917D 1008.

83. Wash.—Gottstein v. Lister, supra.

Measure

"Judicial knowledge of facts is measured by general knowledge of the same facts."—Hackworth v. Missouri Southern R. Co., 227 S.W. 1032, 286 Mo. 282, 15 A.L.R. 170.

84. Wash.—Gottstein v. Lister, 153 P. 595, 88 Wash. 462, Ann.Cas.1917D 1008.

85. Wis.—International Harvester Co. v. Industrial Commission, 147 N.W. 53, 58, 157 Wis. 167, Ann.Cas. 1916B, 330.

86. Kan.—Topeka v. Stevenson, 99 P. 589, 79 Kan. 394, 131 Am.S.R. 297, 17 Ann.Cas. 491.

87. N.Y.—Porter v. Waring, 69 N.Y. 250, 2 Abb.N.Cas. 230, affirming 51 How.Pr. 295.

88. Cal.—Varcoe v. Lee, 181 P. 223, 180 Cal. 338—Ex parte Kazas, 70 P.2d 962, 22 Cal.App.2d 161, followed in In re Landowitz, 71 P.2d 334, 22 Cal.App.2d 733—Standley v. Knapp, 298 P. 109, 113 Cal.App. 91.
Pa.—Pierson v. London, 156 A. 719, 721, 102 Pa.Super. 176, citing **Corpus Juris.**

Disputable fact

It is not permissible for the court to take judicial knowledge of a fact that may be disputed by competent evidence.
Ala.—Connecticut General Life Ins. Co. v. Smith, 145 So. 651, 226 Ala. 142.
Colo.—People v. City and County of Denver, 272 P. 629, 84 Colo. 576.

Other statements of rule to same effect

Ill.—Valuch v. Rawson, 270 Ill.App. 583.
Okl.—Boatman v. Coverdale, 193 P. 874, 80 Okl. 9.

89. Ohio.—Trepanier v. Toledo & O. C. Ry. Co., 130 N.E. 558, 102 Ohio St. 69.

90. N.Y.—Town of North Hempstead v. Gregory, 65 N.Y.S. 867, 53 App. Div. 350.

91. U.S.—Apex Hosiery Co. v. Leader, Pa., 60 S.Ct. 982, 310 U.S. 469, 84 L.Ed. 1311, 128 A.L.R. 1044, affirming Leader v. Apex Hosiery Co., 108 F.2d 71, certiorari granted Apex Hosiery Co. v. Leader, 60 S. Ct. 589, 309 U.S. 644, 84 L.Ed. 997—Fersing v. Fast, Cust. & Pat.App., 121 F.2d 531—The Denali, C.C.A. Wash., 112 F.2d 952, adhering to 105 F.2d 413, reversing, D.C., 23 F.Supp. 145, certiorari denied Alaska S. S. Co. v. Pacific Coast Coal Co., 61 S.Ct. 65—California Rice Industry v. Federal Trade Commission, C.C.A., 102 F.2d 716—In re Ric-Wil Co., Cust. & Pat.App., 87 F.2d 516—Southern Bell Telephone & Telegraph Co. v. Burke, C.C.A. Ala., 62 F.2d 1015, affirming, D.C., Burke v. Southern Bell Telephone & Telegraph Co., 42 F.2d 742, and 55 F.2d 732—Shields v. Barton, C. C.A.Ill., 60 F.2d 351—Constantin v. Smith, D.C.Tex., 57 F.2d 227, appeal dismissed Sterling v. Constantin, 53 S.Ct. 190, 287 U.S. 378, 77 L.Ed. 375—Bettis v. California Mfg. & Engineering Co., C.C.A.Cal., 41 F. 2d 458—International Silver Co. v. American Silver Co., Cust. & Pat. App., 37 F.2d 622—Palmer & Parker Co. v. U. S., D.C.Mass., 10 F.2d 214—American-La France Fire Engine Co. v. Riordan, C.C.A.N.Y., 6 F. 2d 964, reversing, D.C., 294 F. 567—Quinn v. Southgate Nelson Corporation, D.C.N.Y., 36 F.Supp. 873—Oakland Club v. South Carolina Public Service Authority, D.C.S.C., 30 F.Supp. 334, affirmed, C.C.A., 110 F.2d 84—Baze v. Scott, D.C.Okl., 24 F.Supp. 806—Amazon Petroleum Corporation v. Railroad Commission of Texas, D.C.Tex., 5 F.Supp. 639, reversed on other grounds, C. C.A., Ryan v. Amazon Petroleum Corporation, 71 F.2d 1, certiorari granted Amazon Petroleum Corporation v. Ryan, 55 S.Ct. 102, 293 U.S. 539, 79 L.Ed. 645, reversed on other grounds 55 S.Ct. 241, 293 U. S. 388, 79 L.Ed. 446, followed in, C.C.A., Ryan v. Panama Refining Co., 71 F.2d 8, certiorari granted

Panama Refining Co. v. Ryan, 55 S.Ct. 83, 293 U.S. 539, 79 L.Ed. 645, reversed on other grounds 55 S. Ct. 241, 293 U.S. 388, 79 L.Ed. 446—Douglas v. Edwards, C.C.A N.Y., 298 F. 229, reversing, D.C., 287 F. 919, and certiorari granted Edwards v. Douglas, 45 S Ct. 94, 266 U.S. 596, 69 L Ed. 459, reversed on other grounds Edwards v. Douglas, 46 S.Ct. 85, 269 U S. 204, 70 L.Ed. 235—The E. M. Millard, D.C.N.Y., 285 F. 94—Charles A. Ramsay Co. v. Associated Bill Posters of U. S and Canada, C.C A.N.Y., 271 F. 140, error as to certain parties dismissed 43 S.Ct. 97, and reversed on other grounds 43 S.Ct. 167, 260 U.S. 501, 67 L Ed. 368—U. S. v. Stone & Co., 13 C C.P.A. 233, distinguished in U S. v. Halle Bros. Co., 20 C.C.P.A.(Customs) 281—Hurst & Co. v. U S., 12 Ct.Cust App. 81.

Ala.—State v Weil, 168 So. 679, 232 Ala. 578—Meglemry v. Meglemry, 131 So. 906, 222 Ala. 229—Willis v. Buchman, App, 199 So. 886, reversed on other grounds 199 So. 892, 240 Ala 386, 132 A.L.R. 1179.

Ariz.—Young Mines Co. v. Sevringhaus, 298 P. 628, 38 Ariz. 160.

Ark.—Southwestern Bell Telephone Co v. Adams, 133 S.W.2d 867, 199 Ark. 254—Horne v. Fish, 127 S.W. 2d 623, 198 Ark. 79—Bourland v. Coleman, 60 S.W.2d 1021, 187 Ark 392—Knight v. Equitable Life Assur. Soc., 52 S.W.2d 977, 186 Ark. 150—Fender v. Rogers, 46 S.W.2d 804, 185 Ark. 191.

Cal.—Slavich v. Hamilton, 257 P. 60, 201 Cal. 299—Ex parte Reineger, 193 P. 81, 184 Cal. 97—Spires v. City of Los Angeles, 87 P. 1026, 150 Cal. 64, 11 Ann.Cas. 465—Runyon v. Board of Prison Terms and Paroles, 79 P.2d 101, 26 Cal.App.2d 183—Los Angeles Scenic Studios v. Television, 61 P.2d 1192, 17 Cal App.2d 356—Midwick Country Club v. Los Angeles County, 53 P.2d 1006, 11 Cal.App.2d 217—City of Los Angeles v. Superior Court in and for Inyo County, App., 18 P. 2d 759—Benton v. City of Santa Monica, 289 P. 203, 106 Cal.App. 339—City of Stockton v. Ellingwood, 275 P. 228, 96 Cal.App. 708—City of Stockton v Ellingwood, 248 P. 272, 78 Cal.App. 117.

Colo.—Industrial Commission of Colorado v. Pueblo Auto Co., 207 P. 479, 71 Colo. 424, 23 A.L.R. 348.

Conn.—Bickell v. Morano, 167 A. 722, 117 Conn. 176—Shelton v. City of Shelton, 150 A. 811, 111 Conn. 433—Peters v. Abbott, 109 A. 131, 94 Conn. 363.

Del.—Shaw v. General Chemical Co., 120 A. 850, 2 W.W.Harr. 172.

Fla.—Cassara v. Bowman, 186 So. 514, 136 Fla. 302—Walter J. Bryson Paving Co. v. State, for Use of Lewis Bear Co., 149 So. 563, followed in Walter J. Bryson Paving Co. v. State, for Use of Pace Co., 149 So. 565—State ex rel. Hutchins v. Tucker, 143 So. 754, 106 Fla. 905—Ex parte Lewis, 135 So. 147, 101 Fla. 624—Atlantic & Gulf Fertilizer Co. v. Mayo, 119 So. 513, 97 Fla. 1—Clark Dredging Co. v. Sunny Isles Ocean Beach Co, 116 So. 644, 97 Fla 1077, followed in Palm Beach Ocean Realty Co. v. Atlantic Gulf & Pacific Co., 121 So. 105, 97 Fla 454.

Ill.—Cohen v. North Avenue State Bank, 26 N E.2d 691, 304 Ill.App. 413—Woods v. Lawndale Theatre Corporation, 24 N.E.2d 193, 302 Ill. App. 570—Greer v. Shell Petroleum Corporation, 281 Ill.App. 238—Orange v. Pitcairn, 280 Ill App. 566—Goddard Tool Co. v. Crown Electrical Mfg. Co., 219 Ill.App. 34.

Ind.—Warren v. Indiana Telephone Co., 26 N E 2d 399, affirming, App., 24 N.E.2d 426—Shipley v. Daly, 20 N.E.2d 653, 106 Ind.App. 443.

Iowa.—Doherty v. Edwards, 290 N.W. 672, 227 Iowa 1264—Weyrauch v. Johnson, 208 N.W 706, 201 Iowa 1197—State v. Hinshaw, 198 N.W. 634, 197 Iowa 1265—Kurtz v. Gramenz, 198 N.W 325, 198 Iowa 222—Farmers' Loan & Trust Co. of Sioux City v. Wright County, 183 N.W. 500, 191 Iowa 825.

Kan.—Barker v. Kansas City, 88 P. 2d 1071, 149 Kan. 696.

Ky.—Insurance Co. of North America v. Creech Drug Store, 94 S.W.2d 654, 264 Ky. 364—Soper v. Foster, 51 S.W.2d 927, 244 Ky. 658—Louisville & N. R. Co. v. Birochik, 269 S.W. 720, 207 Ky. 595—Coles v. Morrison, 261 S.W. 600, 202 Ky. 834—White's Adm'r v. Kentucky Public Elevator Co., 216 S.W. 837, 186 Ky. 91.

La.—Industrial Loan & Investment Co. v. Chapman, App., 193 So. 504—Smith v. Saenger Theatres Corporation, App., 186 So. 866—Holbrook v. City of Monroe, App., 157 So. 566.

Me.—Loring v. Maine Cent. R. Co., 152 A. 527, 129 Me. 369.

Md.—Smart v. Graham, 20 A.2d 574—North Ave. Market v. Keys, 164 A. 152, 164 Md. 185.

Mass.—City of Boston v. Santosuosso, 30 N.E.2d 278—Direct Mail Service v. Registrar of Motor Vehicles, 5 N.E.2d 545, 296 Mass. 353, 108 A.L.R. 1391—Alpha Portland Cement Co. v. Commonwealth, 139 N.E. 158, 244 Mass. 530, reversed on other grounds 45 S.Ct. 477, 268 U.S. 203, 69 L.Ed. 916, 44 A.L.R. 1219.

Mich.—Kopprasch v. New York Indemnity Co., 230 N.W. 909, 250 Mich. 491.

Miss.—Masonite Corporation v. Dennis, 168 So. 613, 175 Miss. 855.

Mo.—Higgins v. Smith, 144 S.W.2d 149—Look v. French, 144 S.W.2d 128—Shell Pipe Line Corporation v. Woolfolk, 53 S.W.2d 917, 331 Mo. 410—Osmak v. American Car & Foundry Co., 40 S.W.2d 714, 328 Mo. 159, 77 A.L.R. 722—Ex parte Davison, 13 S.W 2d 40, 321 Mo. 370—Cates v. Evans, App., 142 S. W 2d 654—Isbell v. Biederman Furniture Co., App., 115 S W 2d 46—Gambell v. Irvine, App., 102 S W. 2d 784—Stein v. Buckingham Realty Co., App., 60 S.W 2d 712—Purdy v. Loew's St. Louis Realty & Amusement Corporation, 294 S.W. 751, 220 Mo.App. 854—Karagas v. Union Pac. R. Co., App., 232 S.W. 1100.

Mont.—State v. Russell, 274 P. 148, 84 Mont. 61.

N.H.—Wason v. Nashua, 155 A. 681, 85 N H. 192.

N.J.—Janitscheck v. Mebro Realty Corporation, 150 A. 763, 8 N.J.Misc. 440, affirmed 154 A. 749, 107 N.J. Law 450, 84 A.L.R. 999—Fidelity Union Trust Co. v. Reeves, 125 A. 582, 96 N.J.Eq. 490, affirmed 129 A. 922, 98 N.J.Eq. 412.

N.H.—Kenney v. Wong Len, 128 A. 343, 81 N.H. 427—Belliveau v. John B. Varick Co., 120 A. 884, 81 N. H. 57.

N.M.—Trujillo v. Prince, 78 P.2d 145, 42 N.M. 337.

N.Y.—Madison Products Co. v. Coler, 152 N.E 264, 242 N.Y. 467, reversing 212 N.Y.S. 865, 215 App.Div. 700—Commissioners of Palisades Interstate Park v. Lent, 147 N E. 228, 240 N.Y. 1, affirming 205 N.Y.S. 560, 209 App.Div. 883—Van Vliet & Place v. Gaines, 224 N.Y.S. 481, 221 App. Div. 538, reversed on other grounds 162 N.E. 600, 249 N.Y. 106, 59 A.L. R. 682—Gonch v. Republic Storage Co, 219 N.Y.S. 46, 218 App.Div. 584, affirming Gouch v. Republic Storage Co., 211 N.Y.S. 433, 125 Misc. 791, and reversed on other grounds Gonch v. Republic Storage Co., 157 N E. 136, 245 N.Y. 272, certiorari denied 48 S.Ct. 140, 275 U.S. 567, 72 L.Ed. 430—Kelley v. City of Troy, 211 N.Y.S. 5, 213 App.Div. 496—Safee v. City of Buffalo, 198 N.Y.S. 646, 204 App.Div. 561—Soule v. Bon Ami Co., 195 N.Y.S. 574, 201 App.Div. 794—Falcone v. National Casket Co., 180 N.Y.S. 455, 190 App. Div. 651—Condon v. Derringer, 12 N.Y.S.2d 647, 171 Misc. 381—Freedman v. Clinton Court Corporation, 3 N.Y.S.2d 956, 167 Misc. 801, affirmed 3 N.Y.S.2d 1023, 254 App. Div. 643, reargument denied 5 N.Y. S.2d 508, 254 App.Div. 813, reversed on other grounds 18 N.E 2d 685, 279 N.Y. 736—In re Byrnes' Estate, 287 N.Y.S. 961, 159 Misc. 302, modified on other grounds 290 N.Y.S. 949, 160 Misc. 895—Wagstaff v. Asbury M. E. Church of Tarrytown, 279 N.Y.S. 518, 156 Misc. 24—Sherwin v. Benevolent & Protective Order of Elks, Brooklyn Lodge

what may be proper subjects of judicial notice at one time and place may not be at another.[92]

§ 10. Facts Once Judicially Known

Judicial notice may be taken of facts once judicially known.

A judge may assume judicial knowledge of facts which he has learned through former litigation in the same jurisdiction, or at an earlier hearing in the same case; and he may take judicial cognizance of what he has himself done as judge, as for example that he has in his official capacity signed a certain paper.[93] Facts notorious in a community because connected with protracted or celebrated liti-

No. 22, 265 N.Y.S. 14, 148 Misc. 452—Blindness Headlight Protector v. Harnett, 245 N.Y.S. 346, 138 Misc. 127—In re Jackson's Will, 245 N.Y.S 156, 138 Misc. 167—In re Sharff's Will, 241 N.Y.S. 661, 136 Misc. 627—Jacobs v. Danziger, 227 N.Y.S. 160, 131 Misc. 475—Smith v. Herrman, 225 N.Y.S. 245, 130 Misc. 832—People ex rel. Jacob Ruppert Realty Corporation v. Cantor, 188 N.Y.S. 885, 115 Misc. 519—Seventy-Eighth St. & Broadway Co. v Rosenbaum, 182 N.Y.S. 505, 111 Misc. 577—In re Baron, 6 N Y S 2d 631—Bryan v. Hlawatschek, 191 N.Y.S. 317.

N.C.—Holmes v. York, 166 S E. 889, 203 N.C. 709—Clinard v. Clinard Electric Co., 136 S.E. 1, 192 N.C. 736.

Ohio.—First Nat. Bank v. Rawson, 11 N.E.2d 110, 56 Ohio App. 388—Citizens' Sav. Bank of Pemberville v. Hocker, 170 N.E. 377, 34 Ohio App. 169.

Or.—Home Mortg Co. v. Sitka Spruce Pulp & Paper Co., 36 P. 2d 1038, 148 Or. 502—In re Stewart's Estate, 28 P.2d 642, 145 Or. 460, 91 A.L.R. 818—Bevin v. Oregon-Washington R. & Nav. Co., 298 P. 204, 136 Or. 18, certiorari denied Oregon-Washington R. & Nav. Co. v. Bevin, 52 S.Ct. 21, 284 U.S. 639, 76 L.Ed. 543.

Pa.—Dively v. Penn-Pittsburgh Corporation, 2 A.2d 831, 332 Pa. 65—Walker v. Broad & Walnut Corporation, 182 A. 643, 320 Pa. 504—Long v. Frock, 156 A. 88, 304 Pa. 355—Shindler v. Insurance Co. of North America, 184 A. 262, 121 Pa. Super. 483—United Presbyterian Women's Ass'n of North America v. Butler County, 167 A. 389, 110 Pa.Super. 116—Barron v. Coxe Bros. & Co., 34 Luz.Leg.Reg. 9, affirmed 13 A.2d 94, 140 Pa.Super. 1.

Philippine.—Strong v. Gutierrez, 6 Philippine 680, 687, 5 Off.Gaz. 72, reversed on other grounds in 29 S.Ct. 521, 213 U.S. 419, 53 L.Ed. 853.

R.I.—Malfetano v. United Electric Rys. Co., 191 A. 491, 58 R.I. 129.

Tenn.—Luck v. Louisville & N. R. Co., 69 S.W.2d 899, 167 Tenn. 350—Slatten v. Mitchell, 124 S.W.2d 310, 22 Tenn.App. 547—Winfree v. Coca-Cola Bottling Works of Lebanon, 83 S.W.2d 903, 19 Tenn.App. 144.

Tex.—City of Fort Worth v. Gulf Refining Co., 83 S.W.2d 610, 125 Tex. 512, reversing Gulf Refining Co. v. City of Fort Worth, Civ.App., 36 S.W.2d 285, reversed on other grounds City of Fort Worth v. Gulf Refining Co., Com.App., 55 S.W.2d 792—Motl v. Boyd, 286 S.W 458, 116 Tex. 82, reversing Boyd v. Motl, Civ.App., 236 S.W. 487—Anchor v. Wichita County Water Imp. Dist. No. 2, Com.App., 103 S.W. 2d 135, 129 Tex. 385, 112 A.L.R. 70, affirming 66 S.W.2d 657, 123 Tex. 105—Cheek v. Metzer, 291 S.W. 860, 116 Tex. 356—Travelers Ins. Co. v. Johnson, Civ.App., 131 S. W.2d 242, error dismissed, judgment correct—Safeway Stores of Texas v. Rutherford, Civ.App., 101 S.W.2d 1055, affirmed 111 S.W.2d 688, 130 Tex. 465—Macfadden's Publications v. Hardy, Civ. App., 95 S.W.2d 1023, error refused—Superior Fire Ins. Co. of Pittsburg, Pa., v. Roberts, Civ.App., 84 S.W 2d 810—Gallaher v. U. S. Fidelity & Guaranty Co., Civ.App., 77 S.W.2d 312, error dismissed—State v. Blue Diamond Oil Corporation, Civ.App., 76 S.W.2d 852, followed in State v. International & G. N. Ry. Co., 76 S.W.2d 857, State v. Texas & P. Ry. Co., 76 S.W.2d 857, and State v. St. Louis & S. W. Ry. Co., 76 S.W.2d 857—Danciger Oil & Refining Co. v. Railroad Commission of Texas, Civ.App., 49 S.W. 2d 837, reversed on other grounds Danciger Oil & Refining Co. of Texas v. Railroad Commission of Texas, 56 S.W.2d 1075, 122 Tex. 243—Dial v. Martin, Civ.App., 37 S.W.2d 166, reversed on other grounds, Martin v. Dial, Com.App., 57 S.W.2d 75, 89 A.L.R. 571—Hill v. City of Beaumont, Civ.App., 5 S.W.2d 590, error dismissed—Dockery v. Durham, Civ.App., 3 S.W.2d 514, error dismissed—Winter Garden Dist. Chamber of Commerce v. Winter Garden Fair, Civ.App., 299 S.W. 512—Poe v. Humble Oil & Refining Co., Civ.App., 288 S.W. 264, reversed on other grounds Humble Oil & Refining Co. v. Poe, Com. App., 29 S.W.2d 1019—Connellee v. Magnolia Petroleum Co., Civ.App., 279 S.W. 597, reversed on other grounds Magnolia Petroleum Co. v. Connellee, Com App., 11 S.W.2d 158, followed in Magnolia Petroleum Co. v. Akin, 11 S.W.2d 1113 and rehearing denied 14 S.W.2d 1020 and 20 S.W.2d 758—Express Pub. Co. v. Keeran, Civ.App., 274 S.W. 335—Moore v. Martin, Civ.App., 273 S.W. 961—Hagins v. Wilson, Civ.App., 262 S.W. 770, overruled, Wilson v. Hagins, 295 S.W. 922, 116 Tex. 538—Farmers' Mill & Elevator Co. v. Hodges, Civ.App., 248 S.W. 72, reversed on other grounds, Com.App, 260 S.W. 166—Wichita Falls Electric Co. v. Huey, Civ. App., 246 S.W. 692—Reed v. Lindley, Civ.App., 240 S.W. 348.

Utah.—Dahl v. Utah Oil Refining Co., 262 P. 269, 71 Utah 1—Utah Copper Co. v. Industrial Commission of Utah, 193 P. 24, 57 Utah 118, 13 A.L.R. 1367.

Vt.—Pitts v. Howe Scale Co., 1 A.2d 695, 110 Vt. 27—O'Brien v. Holden, 160 A. 192, 104 Vt. 338—O'Boyle v. Parker-Young Co., 112 A. 385, 95 Vt. 58.

Va.—City of Norfolk v. Travis, 140 S.E. 641, 149 Va. 523, 56 A.L.R. 214—New York Life Ins. Co. v. Kennedy, 135 S.E. 882, 146 Va. 197.

Wash.—Eckerson v. Ford's Prairie School Dist. No. 11 of Lewis County, 101 P.2d 345, 3 Wash.2d 475—North Bend Stage Line v. Department of Public Works, 297 P. 780, 162 Wash. 46—Frank D. Black, Inc., v. Crescent Mfg. Co., 262 P. 125, 146 Wash. 119.

Wis.—Hermance v. Weisner, 279 N. W. 608, 228 Wis. 501, 117 A.L.R. 1437—Halsey, Stuart & Co. v. Public Service Commission of Wisconsin, 248 N.W. 458, 212 Wis. 184—Reiland v. Wisconsin Valley Electric Co., 233 N.W. 91, 202 Wis. 499—State v. Grootemaat, 231 N.W. 628, 202 Wis. 155—State v. Zimmerman, 204 N.W. 803, 187 Wis. 180—Cutter v. Greene, 201 N.W. 373, 185 Wis. 163.

Wyo.—Gray v. Elliott, 257 P. 345, 37 Wyo. 4, 53 A.L.R. 554, denying rehearing 255 P. 593, 36 Wyo. 361, 53 A.L.R. 554.

23 C.J. p 59 note 22 [b] [c].

92a. Cal.—Varcoe v. Lee, 181 P. 223, 180 Cal. 338.
23 C.J. p 61 note 30.

93. Cal.—Schomer v. R. L. Craig Co., 31 P.2d 396, 399, 137 Cal.App. 620, quoting **Corpus Juris.**
Tenn.—Davis v. Robertson, 56 S.W. 2d 752, 753, 165 Tenn. 609, citing **Corpus Juris.**
23 C.J. p 61 notes 39–42.
Judicial notice of court records see infra § 50.

gation naturally come within the knowledge of judges and are accepted as true without proof.[94]

§ 11. Personal Knowledge of Judge

Judicial knowledge is generally limited to what a judge may properly know in his judicial capacity.

Judicial knowledge is limited to what a judge may properly know in his judicial capacity, and he is not authorized to make his individual knowledge of a fact not generally or professionally known the basis of his action.[95] A judge, however, is at liberty to take judicial notice of a fact within his personal knowledge where it amounts to no more than the sharing by the judge as an individual of a matter of general common knowledge,[96] or of a matter generally known in the legal profession of which he is a member, although such knowledge is largely confined to lawyers.[97] Some modern cases permit a judge who knows a rule of common or statutory law in force in a sister state,[98] or foreign country,[99] to take judicial cognizance thereof, but there is authority to the contrary on both the first[1] and second[2] propositions.

§ 12. Mode of Ascertaining Facts Required to Be Judicially Noticed

In ascertaining matters of fact or of law to be judicially noticed, the judge may resort to, or obtain information from, any source of knowledge which he feels would be helpful.

Since judicial cognizance may extend to matters beyond the actual knowledge of the judge,[3] the judge, in ascertaining facts to be judicially noticed may resort to or obtain information from any source of knowledge which he feels would be helpful to him,[4] always seeking that which is most appropri-

94. Ark.—Davies v. Hunt, 37 Ark. 574.

95. U.S.—Leong Kim Wai v. Burnett, C.C.A.Hawaii, 23 F.2d 789, 791, quoting **Corpus Juris.**
Miss.—Gillespie v. Doty, 135 So. 211, 212, 160 Miss. 684, citing **Corpus Juris.**
N.Y.—Maylender v. Fulton County Gas & Electric Co., 227 N.Y.S. 209, 218, 131 Misc. 514, citing **Corpus Juris.**
Ohio.—Strain v. Isaacs, 18 N.E.2d 816, 59 Ohio App. 495.
Pa.—Stone v. New Schiller Building & Loan Ass'n, 142 A. 293, 293 Pa. 161.
Wis.—Kuder v. Waukesha County, 178 N.W. 249, 172 Wis. 141.
23 C.J. p 62 note 50.

Entrances to courthouse
That trial judges know entrances to courthouse and relation of hall of records to it does not make facts judicially noticeable.—Standley v. Knapp, 298 P. 109, 113 Cal.App. 91.

Streets
(1) It has been held that the judge's personal knowledge and recollection of conditions existing in the vicinity is not a proper subject of judicial notice.—Leong Kim Wai v. Burnett, C.C.A.Hawaii, 23 F.2d 789.

(2) Judicial notice has been taken of certain facts with reference to streets in a city, however, because of the personal knowledge thereof by the judge.—City of Little Falls v. Fisk, 24 N.Y.S.2d 460.

Collateral matters
The same strictness is not observed as to proof of collateral matters and those of discretion.—Brown v. Lincoln, 47 N.H. 468—23 C.J. p 62 note 51.

96. Pa.—Schmidt v. Allegheny County, 154 A. 803, 303 Pa. 560.

Judicial notice taken
U.S.—Johnson & Co. v. U. S., 10 Ct. Cust.App. 54.

97. N.Y.—McCarthy v. Woolston, 205 N.Y.S. 507, 210 App.Div. 152.
23 C.J. p 61 note 45.
Judicial notice of law of forum see infra §§ 15–17.
Judicial notice of practice and procedure see infra § 49.
Knowledge of judge in fixing attorney's fees see infra § 101.

98. Ga.—Barranger v. Baum, 30 S.E. 524, 103 Ga. 465, 68 Am.S.R. 113.
23 C.J. p 61 note 46.
Judicial notice of law of sister state generally see infra §§ 18–20.

99. La.—Arayo v. Currel, 1 La. 528, 20 Am.D. 286.
Judicial notice of law of foreign country generally see infra § 21.

1. Mo.—Rashall v. St. Louis, I. M. & S. R. Co., 155 S.W. 426, 249 Mo. 509.
Vt.—State v. Horn, 43 Vt. 20, overruling State v. Rood, 12 Vt. 396.

2. U.S.—Panama Electric R. Co. v. Moyers, Canal Zone, 249 F. 19, 161 C.C.A. 79.

3. Mo.—Buhrkuhl v. F. T. O'Dell Const. Co., 95 S.W.2d 843, 846, 232 Mo.App. 967, citing **Corpus Juris,** and certiorari quashed State ex rel. F. T. O'Dell Const. Co. v. Hostetter, 104 S.W.2d 671, 340 Mo. 1155.
23 C.J. p 169 note 33.

Imputed knowledge
Courts notice without proof all that is necessarily or justly to be imputed to them by way of general outfit for the proper discharge of the judicial function.—Harrison v. People, 140 P. 203, 57 Colo. 137—23 C.J. p 149 note 7.

4. U.S.—Greeson v. Imperial Irr. Dist., C.C.A.Cal., 59 F.2d 529, affirming, D.C., 55 F.2d 321—Friend v. Burnham & Morrill Co., C.C.A. Me., 55 F.2d 150, affirming, D.C., 40 F.2d 662—Tolfree v. Wetzler, D.C.N.J., 22 F.2d 214, 224, citing **Corpus Juris,** and reversed on other grounds, C.C.A., 25 F.2d 553, certiorari denied Wetzler v. Tolfree, 49 S.Ct. 28, 278 U.S. 628, 73 L.Ed 547.
Ala.—Mutual Building & Loan Ass'n v. Moore, 169 So. 1, 232 Ala. 488—Hodge v. Joy, 92 So. 171, 174, 207 Ala. 198, citing **Corpus Juris.**
Miss.—Jefferson Standard Life Ins. Co. v. Noble, 188 So. 289, 291, citing **Corpus Juris**—Harris v. Pounds, 187 So. 891, 185 Miss. 688—Witherspoon v. State, 103 So. 134, 136, 138 Miss. 310, quoting **Corpus Juris.**
Mo.—Buhrkuhl v. F. T. O'Dell Const Co., App., 95 S.W.2d 843, 847, 232 Mo App. 967, citing **Corpus Juris,** and certiorari quashed State ex rel. F. T. O'Dell Const. Co. v. Hostetter, 104 S.W.2d 671, 340 Mo. 1155.
Neb.—State ex rel. Johnson v. Wagner, 297 N.W. 906.
N.Y.—Vadney v. United Traction Co., 183 N.Y.S. 926, 193 App Div. 329, affirmed 135 N.E. 952, 233 N.Y. 643.
Okl.—Consolidated Pipe Line Co. v. Mahon, 3 P.2d 844, 152 Okl. 72.
Tex.—Brown v. Ætna Casualty & Surety Co., Civ.App., 122 S.W.2d 261, reversed on other grounds 145 S.W.2d 171, 135 Tex. 583.
Wash.—Moore v. Dresden Inv. Co., 298 P. 465, 472, 122 Wash. 289, 77 A.L.R. 1258, quoting **Corpus Juris.**
23 C.J. p 169 note 37.

Court will resort to every proper method of ascertaining from state departments whatever it must know judicially, but does not actually know.—Briscoe v. Buzbee, 143 So. 887, 163 Miss. 574, overruling sug-

ate.[5] When the matter is a proper subject of judicial knowledge, the judge, in order to attain mental certainty, may require the assistance of the party who invoked his judicial knowledge, he may investigate the matter for himself, or he may pursue both courses.[6] The scope, direction, and details of such investigation are entirely within the discretion and under the direction of the judge, uncontrolled by the rules of evidence or the wishes or suggestions of the parties;[7] but it is the duty of the judge to pursue inquiries sufficient to make his knowledge real as far as possible,[8] since it is just as much an error for the court to mistake a fact of which it has taken cognizance as to mistake a principle of law.[9] The judge may refer to properly authenticated[10] public official documents or records of all kinds,[11] to dictionaries,[12] encyclopedias,[13] geographies,[14] or other books or periodicals or public addresses.[15] He may even inquire of others.[16] Where the judge is in doubt as to the sovereign character of a party,[17] or as to the recognition by our government of a foreign government,[18] he may call on the executive, particularly the department of state, for the necessary information.

Geographical facts. The judge may inform himself as to the facts of geography, such as the navigable character of a river,[19] the distance between two points,[20] or the location of a given place within the jurisdiction,[21] by resort to histories,[22] geogra-

gestion of error 143 So. 407, 163 Miss. 574.

Elements entering into application of natural laws

Although the court will take judicial notice of the laws of physics, when the court reaches the point where the law of physics should be applied, it should be in full possession of all the elements which enter into its application.—Richardson v. Appalachian Electric Power Co., 175 S.E. 727, 176 S.E. 471, 163 Va. 394.

5. U.S.—Leonard v. Lennox, Colo., 181 F. 760, 104 C.C.A. 296.

6. Ill.—Catlin v. Tilton, 117 N.E. 999, 281 Ill. 601.
N.H.—Attorney General v. Dublin, 38 N.H. 459.
23 C.J. p 169 note 35.

7. Wash.—Moore v. Dresden Inv. Co., 298 P. 465, 472, 162 Wash. 289, 77 A.L.R. 1258, quoting **Corpus Juris.**
23 C.J. p 169 note 36.

8. Wash.—Moore v. Dresden Inv. Co., 298 P. 465, 162 Wash. 289, 77 A.L.R. 1258.

9. U.S.—U. S. v. One Thousand Five Hundred Bales of Cotton, C.C. Tenn., 27 F.Cas.No.15,958.
23 C.J. p 169 note 34.

10. Iowa.—McMillen v. Blattner, 25 N.W. 245, 67 Iowa 287—Koehler v. Hill, 14 N.W. 738, 15 N.W. 609, 60 Iowa 543.

11. Cal.—Livermore v. Beal, 64 P.2d 987, 18 Cal.App.2d 535, certiorari denied 58 S.Ct. 32, 302 U.S. 712, 713, 82 L.Ed. 550, two cases, rehearing denied 58 S.Ct. 260, 302 U.S. 777, 82 L.Ed. 601 and 58 S.Ct. 261, 302 U.S. 778, 82 L.Ed. 601, certiorari denied Boyd v. Elliott, 58 S.Ct. 32, 302 U.S. 712, 82 L.Ed. 550, rehearing denied 58 S.Ct. 260, 302 U.S. 777, 82 L.Ed. 601, certiorari denied Kreiss v. Elliott, 58 S.Ct. 32, 302 U.S. 712, 82 L.Ed. 550, rehearing denied 58 S.Ct. 261, 302 U.S. 778, 82 L.Ed. 601.
Ill.—Boshuizen v. Thompson & Taylor Co., 195 N.E. 625, 626, 360 Ill. 160, citing **Corpus Juris.**
Miss.—Witherspoon v. State, 103 So. 134, 136, 138 Miss. 310, quoting **Corpus Juris.**
23 C.J. p 169 notes 39, 40, p 170 notes 42–48.
Judicial notice of public records see infra § 36.
Official bulletins, reports, and correspondence see infra § 42.

12. U.S.—U. S. v. Stone & Downer Co., 12 Ct.Cust.App. 557, certiorari granted 46 S.Ct. 20, 269 U.S. 542, 70 L.Ed. 402, modified on other grounds 47 S.Ct. 616, 274 U.S. 225, 71 L.Ed. 1013—U. S. v. Doragon Co., 12 Ct.Cust.App. 524, modified on other grounds 13 Ct.Cust.App. 182—Rotograph v. U. S., 1 Ct.Cust. App. 82.
23 C.J. p 170 note 49.
Judicial notice of meaning of words see infra § 67.

Illustrations

In patent infringement suit court may properly consider illustrations found in standard dictionaries and encyclopedias.—Valley Shoe Corporation v. Tober-Saifer Shoe Co., D.C. Mo., 25 F.Supp. 860.

13. Mo.—Felden v. Horton & Coleman, 135 S.W.2d 1115, 234 Mo.App., 421—Buhrkuhl v. F. T. O'Dell Const. Co., 95 S.W.2d 843, 847, 232 Mo.App. 697, citing **Corpus Juris,** and certiorari quashed State ex rel. F. T. O'Dell Const. Co. v. Hostetter, 104 S.W.2d 671, 340 Mo. 1155.
N.Y.—People ex rel. Domingo v. French Bottling Works, 180 N.E. 537, 259 N.Y. 4, affirming People, on Complaint of Domingo, v. French Bottling Works, 252 N.Y.S. 950, 234 App.Div. 680—Emmick v. Hanrahan Brick & Ice Co., 201 N.Y.S. 637, 206 App.Div. 580.
23 C.J. p 170 note 50.

Facts universally known and found in encyclopedias and dictionaries are judicially noticed, if facts are of such universal notoriety and so generally understood that facts may be regarded as forming part of common knowledge of every person.—Standard Life Ins. Co. of the South v. Strong, 89 S.W.2d 367, 19 Tenn.App. 404.

14. Ky.—Zimmerman v. Brooks, 80 S.W. 443, 118 Ky. 85, 25 Ky.L. 2284.
Judicial notice of geographical facts see infra §§ 32, 33.

15. U.S.—The S. C. L. No. 9, D.C. Pa., 37 F.Supp. 386, affirmed, C.C.A., 114 F.2d 964—U. S. v. Davies. Turner & Co., 16 Ct.Cust.App. 50.
N.Y.—Auerbach v. Mr. & Mrs. Foster's Place, 220 N.Y.S. 281, 128 Misc. 875.
23 C.J. p 170 note 52.

Church government

It is within the power of the court to consult standard works of authority on the customs and ecclesiastical laws which govern a religious denomination.—Dyer v. Superior Court of California, 271 P. 113, 94 Cal.App. 260.

16. Cal.—People v. Mayes, 45 P. 860, 113 Cal. 618—Rogers v. Cady, 38 P. 81, 104 Cal. 288, 43 Am.S.R. 100.

17. U.S.—Puente v. Spanish Nat. State, C.C.A.N.Y., 116 F.2d 43.

18. N.Y.—Russian Socialist Federated Soviet Government v. Cibrario, 191 N.Y.S. 543, 198 App.Div. 869.

19. U.S.—U. S. v. The Montello, Wis., 11 Wall. 411, 20 L.Ed. 191.
Kan.—Dana v. Hurst, 122 P. 1041, 86 Kan. 947.

20. Ohio.—Wainright v. Lake Shore, etc., R. Co., 11 Ohio Cir.Dec. 530.

21. Conn.—Keyser v. Coe, 37 Conn. 597.
Me.—State v. Wagner, 61 Me. 178.

22. U.S.—U. S. v. The Montello, Wis., 11 Wall. 411, 20 L.Ed. 191.
Conn.—Keyser v. Coe, 37 Conn. 597.
Me.—State v. Wagner, 61 Me. 178.

phies,[23] public documents,[24] maps, etc.[25]

Matters of law. Since knowledge of the law is of the essence of the judicial office,[26] if a particular judge does not know what the law is on a given point, it is his duty to ascertain it.[27] In so doing he may, as in cases of optional cognizance, resort to any source of information which he thinks enlightening and trustworthy,[28] such as documents in the office of the secretary of state,[29] election returns and records,[30] etc., "always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule."[31] A judge may require the assistance of the parties, as where it is prescribed by the rule of court that all statutes relied on shall be set out in a party's brief.[32] Statutes, opinions, and textbooks are frequently read to the court, not as evidence, but for the purpose of refreshing the memory of the judge.[33]

Where the court is required by statute to take judicial knowledge of the laws of other states see infra §§ 18–20, it is the duty of the court to pursue inquiries sufficient to make that knowledge real as far as possible.[34] Under some statutes the court may take judicial notice of the law of another state as found in the cases cited in the record and collected in the briefs, and the court may consider other pertinent decisions.[35] Some of the statutes expressly authorize the court to acquire knowledge of such laws by consulting any printed book purporting to contain, state, or explain the same.[36]

Meaning or translation of language. Where the court is authorized to construe,[37] or to charge the jury concerning,[38] the ordinary meaning of words, evidence of their common meaning may be received and considered by the court.[39] The court may resort to dictionaries,[40] works of history,[41] or other writings.[42] These works are not strictly evidence,[43] and are not conclusive,[44] but are used, at the option of the judge, to refresh his memory and bring ac-

23. U.S.—U. S. v. The Montello, Wis., 11 Wall. 411, 20 L.Ed. 191.

24. Conn.—Kelsey v. Coe, 37 Conn. 597.
Me.—State v. Wagner, 61 Me. 178, 190.

25. Ill.—Sublette Exch. Bank v. Fitzgerald, 168 Ill.App. 240.
Ohio.—Wainright v. Lake Shore & M. S. R. Co., 11 Ohio Cir.Dec. 530.

County map

Court may, from county map made by state land office and from federal geological survey maps, gather facts which court judicially knows. —International-Great Northern R. Co. v. Reagan, 49 S.W.2d 414, 121 Tex. 233, affirming, Civ.App., 36 S.W. 2d 564.

26. U.S.—Jones v. U. S., Md., 11 S. Ct. 80, 137 U.S. 202, 34 L.Ed. 691.

27. Kan.—Saum v. Dewey, 115 P. 570, 84 Kan. 811.
23 C.J. p 171 notes 79, 80.

28. Mo.—Bowen v. Missouri Pac. R. Co., 24 S.W. 436, 118 Mo. 541, 547.
23 C.J. p 171 note 81.

Unauthenticated copy

That court judicially noticed building ordinance did not require it to admit unofficial unauthenticated copy thereof as amended.—Moore v. Dresden Inv. Co., 298 P. 465, 162 Wash. 289, 77 A.L.R. 1258.

29. Iowa.—Clare v. State, 5 Iowa 509.
Mo.—Bowen v. Missouri Pac. R. Co., 24 S.W. 436, 118 Mo. 541.

30. Colo.—Harrison v. People, 140 P. 203, 57 Colo. 137.
Minn.—State v. Stearns, 75 N.W. 210, 72 Minn. 200.
Miss.—Puckett v. State, 14 So. 452, 71 Miss. 192.

31. U.S.—Gardner v. Barney, N.Y., 6 Wall. 499, 511, 18 L.Ed. 890.

32. U.S.—Richardson County School, Dist. No. 56 v. St. Joseph, F. & M. Ins. Co., Neb., 101 U.S. 472, 25 L.Ed. 868.

33. N.Y.—Lincoln v. Battelle, 6 Wend. 475.
23 C.J. p 171 note 86.

34. Ark.—J. R. Watkins Medical Co. v. Johnson, 196 S.W. 465, 129 Ark. 384.

35. Mass.—Bradbury v. Central Vermont Ry., 12 N.E.2d 732, 299 Mass. 230.

Record or briefs

It is not duty of supreme judicial court of Massachusetts to consider law of Vermont unless it is brought to court's attention by record or briefs, but court is not prevented from considering other pertinent Vermont decisions.—Bradbury v. Central Vermont Ry., supra.

36. Va.—Central Trust Co. v. Hearne, 88 S.E. 450, 78 Va. 6.
W.Va.—Wilson v. Phœnix Powder Mfg. Co., 21 S.E. 1035, 40 W.Va. 413, 52 Am.S.R. 890.
23 C.J. p 171 note 89.

37. Miss.—Rodgers v. Kline, 56 Miss. 808, 31 Am.R. 389.

38. Miss.—Rodgers v. Kline, supra.

39. U.S.—U. S. v. O. M. Baxter, Inc., 16 Ct.Cust.App. 257.
Judicial notice of meaning of words see infra § 67.

40. U.S.—Northwestern Nat. Life Ins. Co. v. Banning, C.C.A.Neb., 63 F.2d 736—James S. Kirk & Co. v. Federal Trade Commission, C.C.A., 59 F.2d 179, certiorari denied Federal Trade Commission v. James S. Kirk & Co., 53 S.Ct. 220, 287 U. S. 663, 77 L.Ed 572—U. S. v. Moscini, 19 C.C.P.A. (Customs) 144—U. S. v. May Department Stores Co., 16 Ct.Cust.App. 353.
23 C.J. p 170 note 65.

Acceptance

The court will accept a dictionary definition of a word rather than the personal understanding of its meaning by a witness who testified — F. W. Myers & Co. v. U. S., 16 Ct. Cust.App. 171.

41. N.H.—Attorney General v. Dublin, 38 N.H. 459, 516.
N.Y.—Kniskern v. St. John's & St. Peter's Lutheran Churches, 1 Sandf.Ch. 439.
23 C.J. p 170 note 66.

42. U.S.—U. S. v. O. M. Baxter, Inc., 16 Ct.Cust.App. 257.
23 C.J. p 170 note 67.

43. U.S.—Brown v. Piper, Mass., 91 U.S. 37, 42, 23 L.Ed. 200.
23 C.J. p 170 note 68.

44. U.S.—U. S. v. May Department Stores Co., 16 Ct.Cust.App. 353—U. S. v. O. M. Baxter, Inc., 16 Ct. Cust.App. 257—U. S. v. Ben Felsenthal & Co., 16 Ct.Cust.App. 15.
N.Y.—People ex rel. Domingo v. French Bottling Works, 180 N.E. 537, 259 N.Y. 4, affirming People, on Complaint of Domingo v. French Bottling Works, 252 N.Y.S. 950, 234 App.Div. 680

Meaning not given

While definitions by standard dictionaries are not controlling for purposes of judicial decision, they are at least persuasive that meanings which they do not embrace are not common.—Aschenbrenner v. U. S. Fidelity & Guaranty Co., Cal., 54 S.Ct. 590, 292 U.S. 80, 78 L.Ed. 1137, reversing, C.C.A., U. S. Fidelity &

tual knowledge up to judicial knowledge.[45] The court may refer to dictionaries and encyclopedias for the definition and scope of scientific terms or names, when necessary to go outside of the record, or where the testimony of experts is conflicting.[46] In rendering the language of an instrument from the Hawaiian into the English language the trial judge is at liberty to use his own knowledge of the Hawaiian language, and also to call to his assistance the official interpreters of the court, and, if it is deemed advisable, other experts.[47]

On matters of public history the judge may examine public documents, histories, or other writings or historical data.[48]

Time, days, and dates. The judge in determining chronological facts, or such facts as the time of the rising and setting of the sun on a given day, may resort to an almanac[49] or calendar,[50] not as evidence[51] but for the purpose of refreshing the memory.[52]

§ 13. Use and Function

a. In general
b. By what courts taken
c. Suggestion or presentation of fact
d. Caution and discretion in use
e. Doctrine of judicial notice inverted
f. When facts are agreed, admitted, or uncontroverted

a. In General

Judicial notice takes the place of evidence.

Proof is not required of facts of which the court takes judicial notice.[53] The doctrine of judicial notice is based on convenience and expediency,[54] and to say that a court will take judicial notice of a fact is merely another way of saying that the usual forms of evidence will be dispensed with if knowledge of the fact can be otherwise acquired.[55] Judicial knowledge is not reached by the use of evidence; it is a matter pertaining to the judicial function and its existence, like that of an admission, stipulation, or rule of presumption, dispenses with evidence as to the point covered.[56] Facts judicially noticed are thereby presented to the court

Guaranty Co. v. Aschenbrenner, 65 F. 2d 976, certiorari granted Aschenbrenner v. U. S. Fidelity & Guaranty Co., 54 S.Ct. 229, 290 U.S. 622, 78 L. Ed. 543, and rehearing denied 54 S. Ct. 861, 292 U.S. 615, 78 L.Ed. 1474.

45. U.S.—Nix v. Hedden, N.Y., 13 S. Ct. 881, 149 U.S. 304, 37 L.Ed. 745—U. S. v. Ben Felsenthal & Co., 16 Ct.Cust.App. 15.

46. U.S.—Panzl v. Battle Island Paper & Pulp Co., D.C.N.Y., 132 F. 607, modified on other grounds 138 F. 48, 70 C.C.A. 474.

47. Hawaii.—Hapai v. Brown, 21 Hawaii 499.

48. U.S.—U. S. v. One Thousand Five Hundred Bales of Cotton, C.C. Tenn., 27 F.Cas.No.15,958.
23 C.J. p 170 notes 54, 55.
Judicial notice of historical facts see infra §§ 58–63.

49. Ind.—Consumers' Co. v. Ruble, 122 N.E. 607, 69 Ind.App. 617.
N.Y.—Auerbach v. Stein, 293 N.Y.S. 545, 162 Misc. 102.
23 C.J. p 170 note 74.
Judicial notice of time, days, and dates see infra § 100.

50. Md.—Line v. Line, 86 A. 1032, 119 Md. 403, Ann.Cas.1914D 192.
N.Y.—Cohn v. Kahn, 35 N.Y.S. 829, 14 Misc. 255.

51. Ala.—Mobile & B. R. Co. v. Ladd, 9 So. 169, 92 Ala. 287.
Cal.—People v. Chee Kee, 61 Cal. 404.
Conn.—State v. Morris, 47 Conn. 179.

52. Ind.—Consumer's Co. v. Ruble, 122 N.E. 607, 69 Ind.App. 617.

53. U.S.—Missouri Utilities Co. v. City of California, D.C.Mo., 14 F. Supp. 613.
Ala.—Jobe-Rose Jewelry Co. v. City of Birmingham, 178 So. 215, 235 Ala. 178—Hodge v. Joy, 92 So. 171, 207 Ala. 198—Louisville & N. R. Co. v. Shikle, 90 So. 900, 206 Ala. 494.
Cal.—Swarzwald v. Cooley, 103 P.2d 580, 39 Cal.App.2d 306—Barron v. Board of Dental Examiners of State of California, App., 113 P.2d 247—Inderbitzen v. Lane Hospital, 12 P.2d 744, 124 Cal.App. 462, hearing denied 13 P.2d 905, 124 Cal.App. 462.
Conn.—Nichols v. Nichols, 13 A.2d 591, 126 Conn. 614—Chiulla de Luca v. Board of Park Com'rs of City of Hartford, 107 A. 611, 94 Conn. 7.
Ga.—Powell v. First Nat. Bank & Trust Co., 199 S.E. 668, 58 Ga.App. 648.
Ill.—See Kreeb v. Lake Erie & W. R. Co., 211 Ill.App. 630.
N.H.—Stocker v. Boston & M. R. R., 143 A. 68, 83 N.H. 401.
N.Y.—Viemeister v. White, 72 N.E. 97, 179 N.Y. 235, 103 Am.S.R. 859, 70 L.R.A. 796, 1 Ann.Cas. 334—Ullmann Realty Co. v. Tamur, 185 N. Y.S. 612, 113 Misc. 538.
N.D.—Schultz v. Winston & Newell Co., 283 N.W. 69, 68 N.D. 674.
Pa.—New York Cent. R. Co. v. James B. Berry Sons' Co., 12 A.2d 588, 338 Pa. 500, certiorari denied James B. Berry Sons' Co. v. New York Cent. R. Co., 61 S.Ct. 31.
Tex.—Levlon v. Dallas Railway & Terminal Co., Civ.App., 117 S.W. 2d 876, error refused.
Wash.—Stanley v. Parsons, 286 P. 654, 156 Wash. 217.
11 C.J. p 949 note 55—25 C.J. p 1001 note 28.

Formal admission in evidence is unnecessary
Tex.—Minardus v. Zapp, Civ.App., 112 S.W.2d 496.

"**The essential purpose** of the rules of judicial notice is to relieve the party from the proof of facts which are so notorious as not to need proof."—Affiliated Enterprises v. Waller, 5 A.2d 257, 261, 1 Terry, Del., 28.

54. Cal.—Benton v. Industrial Accident Commission of California, 240 P. 1021, 74 Cal.App. 411—Anderson v. Board of Dental Examiners, 149 P. 1006, 27 Cal.App. 336.

55. U.S.—Shapleigh v. Mier, U.S. Tex., 57 S.Ct. 261, 299 U.S. 468, 81 L.Ed. 355, 113 A.L.R. 253, affirming, C.C.A., 83 F.2d 673, certiorari granted 57 S.Ct. 17, 299 U.S. 524, 81 L.Ed. 386.

56. U.S.—U. S. v. University of Chicago Press, 23 C.C.P.A.(Customs) 68.
Cal.—Spaulding v. Desmond, 207 P. 896, 188 Cal. 783.
Conn.—Nichols v. Nichols, 13 A.2d 591, 126 Conn. 614.
23 C.J. p 171 note 94.

Aid of evidence
Judicial knowledge could be used in aid of evidence to support venue.

as effectually as though they had been established by proper proof,[57] and are of equal force,[58] and it has even been held that as a means of establishing facts judicial notice is superior to evidence.[59] Although it has been held that parties have no right to introduce evidence of a matter which is the subject of judicial notice,[60] and where they offer such evidence, it may be properly rejected by the court,[61] it has also been held that the taking of judicial notice does not prevent the opponent from disputing the matter if he believes it disputable.[62]

It is essential to the taking of judicial notice of a particular fact that that fact be relevant and material;[63] and the right of a court to exercise judicial knowledge is subordinate to requirements of procedure.[64] Judicial knowledge of one matter does not relieve plaintiff or relator of the burden of proving other material matters.[65]

An essential fact not expressly appearing in a case may be legitimately deduced from another fact or facts of which the court is authorized to take judicial cognizance.[66]

Whatever is judicially known may properly be used by counsel in argument to the jury as a fact established in the case;[67] and it is the right and

—Jackson v. Roddy, 139 So. 354, 224 Ala. 132.

Equivalent to evidence

Facts judicially noticed are equivalent to evidence.—Zickefoose v. Thompson, Mo., 148 S.W.2d 784.

Form of evidence

Judicial notice is a form of evidence.—Del Bosque v. Kakoo Singh, 65 P.2d 951, 19 Cal.App.2d 487—Ex parte Samaha, 19 P.2d 839, 130 Cal. App. 116.

Purpose behind the theory of judicial notice is to relieve the party who requests it from proof.—In re McKee's Estate, 274 N.W. 601, 67 N. D. 504.

Statistics unnecessary

It is unnecessary to cite official statistics to establish what is common knowledge throughout the land —Bucsi v. Longworth Building & Loan Ass'n, 194 A. 857, 119 N.J.Law 120, appeal dismissed 59 S.Ct. 154, 305 U.S. 665, 83 L.Ed. 431.

57. Mo.—Mayes v. Palmer, 103 S.W. 1140, 206 Mo. 293.

Validity of statute

In passing on the validity of a federal statute, facts of which the court could take notice held some evidence that the statute pertained to interstate commerce.—R. C. Tway Coal Co. v. Glenn, D.C.Ky., 12 F. Supp. 570.

Computation of life income

In action for breach of contract to leave a sum sufficient to give adopted daughter certain annual income, the court on proof of daughter's age will itself compute the amount required to give her such income, using as a necessary basis material of which the court may take judicial notice, the chief of which is not the expectancy, but the annuity, tables.—Strakosch v. Connecticut Trust & Safe Deposit Co., 114 A. 660. 96 Conn. 471.

58. Ala.—Sovereign Camp, W. O. W., v. Allen, 89 So. 58, 206 Ala. 41.

59. Conn.—Muse v. Page, 4 A.2d 329, 125 Conn. 219—Beardsley v. Irving, 71 A. 580, 81 Conn. 489.

60. U.S.—U. S. v. Moscini, 19 C.C. P.A.(Customs) 144.
Fla.—State ex rel. Landis v. Thompson, 164 So. 192, 121 Fla. 561.
S.C.—State ex rel. Daniel v. John P. Nutt Co., 185 S.E. 25, 180 S.C. 19, certiorari denied Jno. P. Nutt Co. v. State of South Carolina ex rel. Daniel, 56 S.Ct. 668, 297 U.S. 724, 80 L.Ed. 1007.
23 C.J. p 171 note 95.

Cannot be rebutted

Matters of common knowledge of which courts take judicial notice cannot be rebutted.—Stocker v. Boston & M. R. R., 143 A. 68, 83 N.H. 401.

61. Ind.—Taggart v. Keebler, 154 N. E. 485, 198 Ind. 633.
Kan.—Post v. Hodges, 253 P. 556, 122 Kan. 755.
Mass.—Mazmanian v. Kuken, 189 N. E. 815, 285 Mass. 516.
23 C.J. p 172 note 96.

62. U.S.—Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 57 S.Ct. 724, 301 U.S. 292, 81 L.Ed. 1093, reversing 3 N.E.2d 475, 131 Ohio St. 539.
Kan.—Board of Com'rs of Crawford County v. Radley, 8 P.2d 386, 388, 134 Kan. 704, citing **Corpus Juris.**
Mo.—Brock v. American Cent. Life Ins. Co., App., 44 S.W.2d 200.
Wis.—State ex rel. Attorney General v. Norcross, 112 N.W. 40, 132 Wis. 534, 122 Am.S.R. 998.

63. Ark.—National Life & Accident Ins. Co. v. Whitfield, 53 S.W.2d 10, 186 Ark. 198.
Fla.—Dawkins v. Smithwick, 4 Fla. 158.

Extrinsic inquiry

The rule forbidding extrinsic inquiry to contradict or vary the legal effect of an unambiguous contract applies to judicial knowledge as well as to testimony admitted at the trial.—Reynolds v. McMan Oil & Gas Co., Com.App., 11 S.W.2d 778, reversing, Civ.App., 279 S.W. 939, and rehearing denied, Com.App., 14 S.W.2d 819.

64. Tex.—Fielder v. Parker, Civ. App., 119 S.W.2d 1089.

Dismissal of bill

If bill states prima facie case, it cannot be dismissed because chancellor judicially knows facts which would support an answer, unless his judicial knowledge is so broad that he can properly hold that no facts exist which would controvert the answer.—Reconstruction Finance Corporation v. Central Republic Trust Co., D.C.Ill., 11 F.Supp. 976.

65. N.J.—Center Garage Co. v. Columbia Ins. Co., 115 A. 401, 96 N J.Law 456.
23 C.J. p 172 note 99.

Confirmation of foreclosure sale

That supreme court and chancery court judicially knew that economic conditions were adverse at time of foreclosure sale was insufficient to justify chancery court's refusal to confirm sale wherein purchase price was grossly inadequate, where it did not appear that property would bring greater price at resale.—Martin v. Kelley, 81 S.W.2d 933, 190 Ark. 863.

Street railway strike

Judicial knowledge by the court that a street railway strike was in progress when a passenger was injured would not enable the court to assume without proof that the employees in charge of the particular car were strike breakers and inexperienced, or that they were negligent, where it was stated at the bar, and not denied, that many of the employees of the street car company did not strike.—Robertson v. Washington Ry. & Electric Co., 279 F. 180, 51 App.D.C. 311.

66. Ill.—Dowie v. Sutton, 81 N.E. 395, 227 Ill. 183, 118 Am.S.R. 266—Fuller v. Peoria & P. U. R. Co., 164 Ill.App. 385.
Tex.—Wright v. Hawkins, 28 Tex. 452.

67. Pa.—Wilson v. Van Leer, 17 A. 1097, 127 Pa. 371, 14 Am.S.R. 854.
23 C.J. p 172 note 2.

duty of the court to charge the jury in the trial of a cause as to the existence of facts of which judicial cognizance is taken.[68]

Facts of such common knowledge as to become the subject of judicial notice without proof are an exception to the general rule requiring findings of fact to be based on the evidence.[69]

The invalidity of a statute may be shown by things which will be judicially noticed.[70] The court cannot take judicial knowledge of facts to establish or disprove the very issue on which the case is tried, but only facts collateral to such issue;[71] nor can the court, by taking judicial notice of facts which are not alleged, change the case from that stated by plaintiff.[72]

Aid of pleadings. Neither in criminal, see the C. J.S. title Indictments and Informations § 113, also 31 C.J. p 670 note 35, nor in civil, see the C.J.S. title Pleadings § 7, also 49 C.J. p 36 note 18, cases is it necessary to allege any fact of which the court will judicially take notice.

b. By What Courts Taken

All courts may make use of the doctrine of judicial notice.

To take judicial notice and apply it to the decision of a case is a right which appertains to every court of justice, from the lowest to the highest.[73] The application of the doctrine of judicial notice is not confined to courts of record.[74] Certain boards and special tribunals which are not strictly courts but which partake of their nature and the findings of which partake of the nature of judgments may take judicial notice of certain matters.[75] An appellate court can properly take judicial notice of any matter of which a court of original jurisdiction may properly take notice,[76] and the appellate court will

68. Wash.—Roalsen v. Oregon Stevedoring Co., 267 P. 433, 147 Wash. 672.
23 C.J. 172 note 3.

69. N.Y.—Greenbaum v. Bingham, 94 N.E. 853, 201 N.Y. 343.

70. U.S.—Weaver v. Palmer Bros. Co., Pa., 46 S.Ct. 320, 270 U.S. 402, 70 L.Ed. 654—Quong Wing v. Kirkendall, Mont., 32 S.Ct. 192, 223 U. S. 59, 56 L.Ed. 350—Lisichin v. Andrews, D.C.N.Y., 23 F.Supp. 657.
Ind.—Weisenberger v. State, 175 N. E. 238, 202 Ind. 424.
Or.—Eastern & Western Lumber Co. v. Patterson, 258 P. 193, 124 Or. 112, 60 A.L.R. 528, reversed on other grounds 264 P. 441, 124 Or. 112, 60 A.L.R. 528, and appeal and error dismissed 49 S.Ct. 184, 278 U.S. 581, 73 L.Ed. 518.

71. U.S.—Ex parte Chin Yoke Tung, D.C.Wash., 2 F.Supp. 549.
Affirmative defenses
Supreme court does not take judicial notice of affirmative defenses.—Most Worshipful Prince Hall Grand Lodge, F. & A. M. of Colorado and Jurisdiction v. Most Worshipful Hiram Grand Lodge, F. & A. A. Y. M. of Colorado and Jurisdiction, National Compact Prince Hall Origin, 282 P. 193, 86 Colo. 330.
Crop failures
Court of civil appeals cannot base reversal of judgment for tenants who, in their landlords' action of trespass to try title, have recovered for breach of rental contract by eviction, on its judicial knowledge that particular season was dry, and that no crops were made in that part of country.—Lamar v. Hildreth, Tex. Civ.App., 209 S.W. 167, error refused.

72. U.S.—Visayan Refining Co. v. Standard Transp. Co., D.C.N.Y., 17 F.2d 642.

73. Conn.—Masline v. New York, N. H. & H. R. Co., 112 A. 639, 95 Conn 702—Chiulla de Luca v. Board of Park Com'rs of City of Hartford, 107 A. 611, 94 Conn. 7.
Circuit court of appeals
U.S.—Kennedy v. General Motors Corporation, C.C.A.Mich., 99 F.2d 627, affirming, D.C., 12 F.Supp. 67.
Statutory three-judge district court
U.S.—Streckfus Steamers v. Fox, D. C.W.Va., 14 F.Supp. 312.

74. Cal.—Anderson v. Bd of Dental Examiners, 149 P. 1006, 27 Cal. App. 336.

75. Cal.—Benton v. Industrial Accident Commission of California, 240 P. 1021, 1023, 74 Cal.App. 411, citing **Corpus Juris**—Anderson v. Bd. of Dental Examiners, 149 P. 1006, 27 Cal.App. 336.
United States customs court
(1) The United States customs court, formerly the board of general appraisers, when facts which determine the classification of imported merchandise are ascertainable from an inspection of the goods themselves, may avail itself of common knowledge and experience.—U. S. v. Milton Bradley Co., 16 Ct. Cust.App. 117—U. S. v. Woolworth Co., 10 Ct.Cust.App. 194—17 C.J. p 655 notes 87–97.
(2) When, however, the facts on which proper classification depend are patent to the eye of the expert only, it cannot classify them solely on its own expert knowledge and experience.—Krusi v. U. S., 1 Ct.Cust. App. 168.

76. U.S.—American Legion Post No. 90 of Village of Mamaroneck v. First Nat. Bank & Trust Co. of Mamaroneck, C.C.A.N.Y., 113 F.2d 868—Nev-Cal Electric Securities Co. v. Imperial Irr. Dist., C.C.A. Cal., 85 F.2d 886, certiorari denied 57 S.Ct. 493, 300 U.S. 662, 81 L.Ed. 871.
Cal.—Varcoe v. Lee, 181 P. 223, 180 Cal. 338—Harrison v. Harter, 18 P. 2d 436, 129 Cal.App. 22—Standley v. Knapp, 298 P. 109, 113 Cal.App. 91.
Fla.—Ramsey v. City of Kissimmee, 149 So. 553, 111 Fla. 387.
Iowa.—Edwards v. Kirk, 288 N.W. 875, 227 Iowa 684.
Miss.—Harris v. Pounds, 187 So. 891, 185 Miss. 688.
Mo.—Collins v. Leahy, 146 S.W.2d 609.
N.D.—Schultz v. Winston & Newell Co., 283 N.W. 69, 68 N.D. 674.
S.D.—Johnson v. Drysdale, 285 N.W. 301, 66 S.D. 436.
Utah.—Salt Lake City v. Board of Education of Salt Lake City, 175 P. 654, 52 Utah 540.
4 C.J. p 560 note 66—23 C.J. p 172 note 9.
Liberal application of doctrine
The supreme judicial court is not inclined toward a narrow and illiberal application of the doctrine of judicial notice.—Finlay v. Eastern Racing Ass'n, 30 N.E.2d 859, 308 Mass. 20.
Moot character of questions
The supreme court has the power to notice facts outside the record for the purpose of considering the moot character of the questions before it. —State ex rel. Donnell v. Searcy, Mo., 152 S.W.2d 8.
Statute not raised below
Under a statute providing that an appellate court shall take judicial notice of such acts and resolutions of the legislature as appear to have been relied on in the court below, a statute not relied on in the lower court will not be noticed by the appellate court.—Stevens v. Mirakian,

judicially notice any facts that the court of original jurisdiction must judicially notice.[77]

The necessity of incorporating matters judicially noticed in the record on appeal is discussed in Appeal and Error § 1212.

c. Suggestion or Presentation of Fact

Unless the matter is one of which the court must take notice, or unless it is self-evident, a fact of which a party wishes a court to take notice should be suggested or presented to the court in some way.

Some matters of judicial knowledge are so self-evident as to be ever present in the mind, so that they naturally enter into a decision of any point to which they have application.[78] There are other things, however, which, from motives of policy, the law requires a court judicially to notice, or have knowledge of, but of which in reality it is ignorant. It is the duty of a litigant desiring the advantage of that knowledge to suggest it to the court. The court is not bound to take judicial notice of a fact where it is not called on to do so either by counsel or from other facts introduced in evidence and it is one to which the mind of the court would not ordinarily be directed.[79] On the other hand, an applicable public statute of the state or of the United States may and must be judicially noticed regardless of whether or not it was called to the court's attention by counsel.[80] It has also been held, however, that the rule that the federal courts will take judicial notice of state statutes does not mean that the court must know and apply at all times every statute of the state, without having the existence and contents of such statute brought to its attention at a proper time.[81] In some jurisdictions, although the court will take judicial notice of municipal ordinances, see infra § *27*, ordinances must be called to the court's attention in order for notice thereof to be taken.[82]

d. Caution and Discretion in Use

The taking of judicial notice as to a matter of fact is discretionary, and the power should be exercised with caution.

The doctrine of judicial notice rests on the wisdom and discretion of the courts.[83] The power to take judicial notice is to be exercised by courts with caution; care must be taken that the requisite notoriety exists; and every reasonable doubt upon the subject should be promptly resolved in the negative.[84] Except when required to do so by a mandatory statute, courts are not bound to take judi-

Va., 12 S.E.2d 780—Commonwealth v Castner, Curran & Bullitt, 121 S.E. 894, 138 Va. 81.

77. Wash.—Moore v. Dresden Inv. Co., 298 P. 465, 162 Wash. 289, 77 A.L.R. 1258.

78. Utah.—Nelson v. Jorgenson, 242 P. 945, 946, 66 Utah 360, citing **Corpus Juris.**
23 C.J. p 172 note 13.

79. Ill.—Woods v. Village of La Grange Park, 4 N.E.2d 764, 287 Ill. App. 201.
Mo.—Corbett v. Terminal R. Ass'n of St. Louis, 82 S.W.2d 97, 102, 336 Mo. 972, quoting **Corpus Juris.**
N.D.—In re McKee's Estate, 274 N.W. 601, 67 N.D. 504.
23 C.J. p 172 notes 15–17.

Construing pleadings
Courts in construing pleadings will take cognizance of facts within their judicial knowledge.—Wilson v. Lyon County Bank, D.C.Nev., 4 F.Supp. 608.

Demurrer or motion to strike
It has been held that a demurrer or motion to strike is insufficient to present a fact of which the court can take judicial notice.—People v. Keokuk & Hamilton Bridge Co., 122 N.E. 467, 287 Ill. 246.

Opportunity to explain
Matter which it is claimed the court should judicially notice should be called to its attention so that if there is ground on which it may be contradicted or explained, the adverse party will be afforded an opportunity to do so, and this is particularly true of a claimed admission in a superseded pleading.—Nichols v. Nichols, 13 A.2d 591, 126 Conn. 614.

80. Ga.—Central of Georgia Ry. Co. v. Gwynes, 113 S.E. 183, 185, 153 Ga. 606, quoting **Corpus Juris.**
23 C.J. p 172 note 18.

Pardon and amnesty made by public proclamation of the president has the force of a public law of which courts must take notice whether called to their attention or not.—Jenkins v. Collard, Ohio, 12 S.Ct. 868, 145 U.S. 546, 36 L.Ed. 812.

81. U.S.—Great American Ins. Co. v. Glenwood Irr. Co., C.C.A.Colo., 295 F. 594.

82. Ill.—Kahler v. Marchi, 29 N.E. 2d 854, 307 Ill.App. 23.

83. Ind.—Fletcher Savings & Trust Co. v. American State Bank of Lawrenceburg, 147 N.E. 524, 196 Ind. 118.
Mo.—City of St. Louis v. Niehaus, 139 S.W. 450, 452, 236 Mo. 8.
23 C.J. p 173 notes 19, 20.

84. U.S.—Shapleigh v. Mier, Tex., 57 S.Ct. 261, 299 U.S. 468, 81 L.Ed. 355, 113 A.L.R. 253, affirming, C.C.A., 83 F.2d 673, certiorari granted 57 S.Ct. 17, 299 U.S. 524, 81 L.Ed. 386—Northwestern Nat. Life Ins. Co. v. Banning, C.C.A.Neb., 63 F.2d 736, 737, citing **Corpus Juris**—Appalachian Electric Power Co. v. Smith, D.C.Va., 4 F.Supp. 6, reversed on other grounds, C.C.A., 67 F.2d 451, certiorari denied 54 S.Ct. 458, 291 U.S. 674, 78 L.Ed. 1063.
Cal.—Varcoe v. Lee, 181 P. 223, 180 Cal. 338.
Ind.—Fletcher Savings & Trust Co. v. American State Bank of Lawrenceburg, 147 N.E. 524, 196 Ind. 118.
Minn.—State ex rel. Remick v. Clousing, 285 N.W. 711, 205 Minn. 296, 123 A.L.R. 465.
Miss.—Luckett v. Louisiana Oil Corporation, 158 So. 199, 200, 171 Miss. 570, citing **Corpus Juris.**
Mo.—Morfit v. Thompson, 282 S.W. 113, 219 Mo.App. 506.
23 C.J. p 173 note 21.

Caution
In taking judicial knowledge, great care and caution must be exercised, and court should be reasonably certain as to everything of which it takes judicial knowledge.—Livermore v. Beal, 64 P.2d 987, 18 Cal. App.2d 535, certiorari denied 58 S.Ct. 32, 302 U.S. 712, 713, 82 L.Ed. 550, two cases, rehearing denied 58 S.Ct. 260, 302 U.S. 777, 82 L.Ed. 601, and 58 S.Ct. 261, 302 U.S. 778, 82 L.Ed. 601, certiorari denied Boyd v. Elliott, 58 S.Ct. 32, 302 U.S. 712, 82 L.Ed. 550, rehearing denied 58 S.Ct. 260, 302 U.S. 777, 82 L.Ed. 601, certiorari denied Kreiss v. Elliott, 58 S.Ct. 32, 302 U.S. 712, 82 L.Ed. 550, rehearing denied 58 S.Ct. 261, 302 U.S. 778, 82 L.Ed. 601.

cial notice of matters of fact; whether they will do so or not depends on the nature of the subject, the issue involved, and the apparent justice of the case.[85] Even if the matter is one of judicial cognizance, there is still no error or impropriety in requiring or receiving evidence.[86] On the other hand, where a matter of judicial cognizance is one of law the court is bound to take judicial notice of it.[87]

e. Doctrine of Judicial Notice Inverted

Knowledge of facts of which the court may take judicial notice may be imputed to an ordinarily intelligent adult person.

In many cases where judicial knowledge is based on commonplace observation and experience, the court, by justifiable inversion, will impute the same knowledge to an ordinarily intelligent adult person in a particular instance,[88] unless actual knowledge is required by law;[89] or, on the other hand, the want of such knowledge may be inferred if the court is conscious of its judicial ignorance in that behalf.[90] On the other hand, it has also been held that the rule of judicial notice has no application to persons. It is a rule of evidence for the government of courts, and, under this view, a person cannot be held to have knowledge of all those things of which a court may take judicial notice.[91]

f. When Facts Are Agreed, Admitted, or Uncontroverted

Agreed, admitted, or uncontroverted facts do not preclude the court from taking judicial notice to the contrary.

An uncontroverted allegation in a pleading,[92] uncontroverted evidence produced to establish a fact,[93] or admissions of fact by the parties[94] do not preclude the court from finding the fact to be otherwise by resorting to its judicial knowledge. Stipulations or admissions of counsel cannot bring facts within the sphere of judicial knowledge which in law do not belong there.[95] It has been declared doubtful whether a case can properly be determined on an agreed statement of facts, unless the facts agreed on conform to what is judicially known to be the truth;[96] and, on the other hand, that an appellate court will abstain from exercising judicial knowledge in such a case.[97]

B. JUDICIAL NOTICE OF STATUTES OR OTHER LAW

§ 14. In General

The rules of the common law and the doctrines of equity jurisprudence are subjects of judicial notice.

Judicial notice is taken of the rules of the common law[98] and the doctrines of equity jurispru-

85. Conn.—Chiulla de Luca v. Board of Park Com'rs of City of Hartford, 107 A. 611, 94 Conn. 7.
Ind.—Fletcher Savings & Trust Co. v. American State Bank of Lawrenceburg, 147 N.E. 524, 196 Ind. 118.
La.—Hart v. Standard Oil Co. of Louisiana, 121 So. 737, 168 La. 183.
Mo.—Buhrkuhl v. F. T. O'Dell Const. Co., 95 S.W.2d 843, 232 Mo.App. 967, certiorari quashed State ex rel. F. T O'Dell Const. Co. v. Hostetter, 104 S.W.2d 671, 340 Mo. 1155.
23 C.J. p 173 note 23.

Permissive field broader
Courts may judicially notice much which they cannot be required to notice.—U. S. v. 52 One-Gallon Cans, More or Less, of Salad Oil, D.C.Conn., 16 F.Supp. 385.

Where prima facie proof of a particular fact has been made, the court is not called on or required to take judicial notice of the fact.
Cal.—Tilton v. Russek, 154 P. 860, 171 Cal. 731.
Wis.—Walker v. Ontario, 86 N.W. 566, 111 Wis. 113.

86. Ala.—Shafer v. Myers, 112 So. 230, 215 Ala. 678.
Cal.—Varcoe v. Lee, 181 P. 223, 180 Cal. 338.
Conn.—Nichols v. Nichols, 13 A.2d 591, 126 Conn. 614.
23 C.J. p 173 note 24.

87. Fla.—Atlantic Coast Line R. Co. v. Holliday, 74 So. 479, 73 Fla. 269.
23 C.J. p 173 note 27.

88. Ill.—Montgomery Coal Co. v. Barringer, 75 N.E. 900, 218 Ill. 327.
23 C.J. p 173 note 28.

89. S.D.—Smith v. Johnson, 138 N. W. 18, 30 S.D. 200.
23 C.J. p 173 note 29.

90. Cal.—Pigeon v. Fuller, 105 P. 976, 156 Cal. 691.
23 C.J. p 173 note 30.

91. Cal.—Chavez v. Times-Mirror Co., 195 P. 666, 185 Cal. 20.

92. Ala.—State ex rel. Glenn v. Wilkinson, 124 So. 211, 220 Ala. 172.
Ind.—Graves v. Kelly, 112 N.E. 899, 62 Ind.App. 164.

Allegations disregarded
Any allegations in the pleadings which conflict with facts of which the court must take judicial notice must be disregarded.—Young v. Boy Scouts of America, 51 P.2d 191, 9 Cal. App.2d 760—Roy v. Smith, 21 P.2d 151, 131 Cal.App. 148.

On motion to dismiss
U.S.—Greeson v. Imperial Irr. Dist., C.C.A.Cal., 59 F.2d 529, affirming, D.C., 55 F.2d 321.

93. N.C.—Davis v. Southern R. Co., 87 S.E. 745, 170 N.C. 582, Ann.Cas. 1918A 861.
23 C.J. p 174 note 32.

Time for harvesting grain
Where there was direct evidence that on a particular day it was too late to harvest by binder the grain in question, the court, in the absence of a showing of the variety of grain or whether the season was a normal one, will not, in order to contradict such direct evidence, take judicial notice that on that particular day it was too late to harvest grain by a binder.—Kutner-Goldstein Co. v. Workman, 296 P. 313, 112 Cal. App. 132.

94. N.C.—Commissioners of Hendersonville v. Prudden & Co., 105 S.E. 7, 180 N.C. 496.
Tex.—Pease v. State, Com.App., 208 S.W. 162, modifying, Civ.App., 155 S.W. 657.

95. Wash.—Gottstein v. Lister, 153 P. 595, 88 Wash. 462.
23 C.J. p 174 note 33.

96. Mass.—Russ v. Boston, 31 N.E. 708, 157 Mass. 60.

97. N.Y.—Walton v. Stafford, 43 N. Y.S. 1049, 14 App.Div. 310—North Hempstead v. Gregory, 65 N.Y.S. 867, 53 App.Div. 350.
23 C.J. p 174 note 35.

98. N.H.—F. C. Adams, Inc., v. El-

dence.[99] It is judicially known that the common law of England was the law of the colonies represented in the continental congress;[1] but doctrines established in England since the Declaration of Independence are not judicially noticed where their existence as constituting the law of England is in question.[2]

Judicial notice of natural and physical laws is considered in §§ 73, 74 infra.

Parliamentary law. Judicial notice will be taken of matters of common knowledge concerning parliamentary law.[3]

§ 15. Law of Forum

When exercising original jurisdiction or appellate jurisdiction from another federal court, the federal courts will take judicial notice of the laws of every state and territory of the Union and of the District of Columbia.

The laws of every state and territory of the Union and of the District of Columbia, whether consisting of constitution, public statutes, or judicial decisions, are judicially noticed by federal courts when exercising original jurisdiction or appellate jurisdiction from another federal court.[4] When the United States supreme court is reviewing a judg-

mer F. Thayer Estate, 155 A. 687, 85 N.H. 177, affirmed Adams, Inc., v. Thayer's Estate, 156 A. 697, 85 N.H. 177.

N.Y.—Stokes v. Macken, 62 Barb. 145—King v. O'Brien, 33 N.Y.Super. 49.

23 C.J. p 126 notes 66, 67.

99. Tex.—Nimmo v. Davis, 7 Tex. 26—Hare v. Reily, Civ.App., 269 S.W. 473, affirmed Reily v. Hare, Com.App., 280 S.W. 543.

23 C.J. p 126 note 68.

1. Tex.—Blethen v. Bonner, Civ.App., 52 S.W. 569, reversed on other grounds 53 S.W. 1016, 93 Tex. 141.

23 C.J. p 126 note 69.

2. U.S.—Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 9 S.Ct. 469, 129 U.S. 397, 32 L.Ed. 788.

3. Mont.—Vaughn & Ragsdale Co. v. State Board of Equalization, 96 P. 2d 420, 109 Mont. 52.

23 C.J. p 137 notes 68, 69.

4. U.S.—Bowen v. Johnston, Cal., 59 S.Ct. 442, 306 U.S. 19, 83 L.Ed. 455, affirming Bowen v. Johnson, 97 F. 2d 860, certiorari granted Bowen v. Johnston, 59 S.Ct. 98, 305 U.S. 579, 83 L.Ed. 365—Straton v. New, W. Va., 51 S.Ct. 465, 283 U.S. 318, 75 L.Ed. 1060, answers to certified questions conformed to, C.C.A., 49 F.2d 869—Hogan v. O'Neill, N.J., 41 S.Ct. 222, 255 U.S. 52, 65 L.Ed. 497—Pure Oil Co. v. State of Minnesota, 39 S.Ct. 35, 248 U.S. 158, 63 L.Ed. 180, affirming 158 N.W. 723, 134 Minn. 101—Covington Drawbridge Co. v. Shepherd, Ind., 20 How. 227, 15 L.Ed. 896—Gallup v. Caldwell, C.C.A.Del., 120 F.2d 90, reversing, D.C., 32 F.Supp. 711—Eastman, Gardiner & Co. v. Warren, C.C.A.Miss., 109 F.2d 193—Ayers v. Hartford Accident & Indemnity Co., C.C.A.Ga., 106 F.2d 958—Hutchins v. Pacific Mut. Life Ins. Co. of California, C.C.A.Cal., 97 F.2d 58, affirming, D.C., 20 F. Supp. 150—U. S. v. Brechtel, C.C.A. Iowa, 90 F.2d 516—Therrell v. Commissioner of Internal Revenue, C.C.A.Fla., 88 F.2d 869, followed in Tunnicliffe v. Commissioner of Internal Revenue, 88 F.2d 873, certiorari granted Helvering v. Tunnicliffe, 58 S.Ct. 19, 302 U.S. 666, 82 L.Ed. 514, reversed on other grounds Helvering v. Therrell, 58 S.Ct. 539, 303 U.S. 218, 82 L.Ed. 758, certiorari granted Helvering v. Therrell, 58 S.Ct. 19, 302 U.S. 665, 82 L.Ed. 514, reversed on other grounds 58 S.Ct. 539, 303 U.S. 218, 82 L.Ed. 758, mandate conformed to, C.C.A., Therrell v. Commissioner of Internal Revenue, 97 F.2d 1014 and Tunnicliffe v. Commissioner of Internal Revenue, 97 F.2d 1015—Armstrong v. Alliance Trust Co., C.C.A.Miss., 88 F.2d 449—Lambert v. Central Bank of Oakland, C.C.A. Cal., 85 F.2d 954, certiorari denied 57 S.Ct. 436, 300 U.S. 658, 81 L.Ed. 867—In re Paramount Publix Corporation, C.C.A.N.Y., 85 F.2d 83—McGrath v. Nolan, C.C.A.Or., 83 F.2d 746—Parker v. Parker, C.C.A. Colo., 82 F.2d 575—Town of Bethel v. Atlantic Coast Line R. Co., C.C. A.N.C., 81 F.2d 60, certiorari denied Atlantic Coast Line R. Co. v. Town of Bethel, 56 S.Ct. 952, 298 U.S. 632, 80 L.Ed. 1402—Virginia Beach Bus Line v. Campbell, C.C. A.N.C., 73 F.2d 97, certiorari denied 55 S.Ct. 637, 294 U.S. 727, 79 L.Ed. 1258—Laubenheimer v. Factor, C. C.A.Ill., 61 F.2d 626, certiorari granted Factor v. Laubenheimer, 53 S.Ct. 523, 289 U.S. 713, 77 L.Ed. 1467, affirmed 54 S.Ct. 171, 290 U. S. 276, 78 L.Ed. 315—Stimpson v. Commissioner of Internal Revenue, C.C.A., 55 F.2d 815, certiorari denied 52 S.Ct. 579, 286 U.S. 555, 76 L.Ed. 1289—Greeson v. Imperial Irr. Dist., D.C.Cal., 55 F.2d 321, affirmed, C.C.A., 59 F.2d 529—U. S. v. Central Stockholders' Corporation of Vallejo, C.C.A.Cal., 52 F.2d 322, modifying, D.C., 43 F.2d 977, and followed in U. S. v. Charles S. Howard Co., C.C.A.Cal., 52 F.2d 340—Steele v. Commercial Milling Co., C.C.A.Mich., 50 F.2d 1037, 84 A.L.R. 278—Judith Basin Land Co. v. Fergus County, Mont., C.C.A.Mont., 50 F.2d 792, followed in Welch v. Fergus County, 50 F.2d 795—Brown v. Ford Motor Co., C.C.A.Okl., 48 F.2d 732—Automobile Abstract & Title Co. v. Haggerty, D.C.Mich., 46 F.2d 86—In re Vena, D.C.Wash., 46 F.2d 81—Jacobs v. U. S., C.C.A. Ala., 45 F.2d 34—Gerber v. Schofield, D.C.Pa., 43 F.2d 222, reversed on other grounds, C.C.A., 43 F.2d 225—Schevenell v. Blackwood, C.C.A.Ark., 35 F.2d 421—United Drug Co. v. Graves, D.C. Ala., 34 F.2d 808—Stampalia v. Murphy, D.C.Pa., 34 F.2d 660—Cummings v. U. S., D.C.Minn., 34 F.2d 284—The Presidente Wilson, D.C. Mass., 30 F.2d 466—In re Holley, D.C.Iowa, 25 F.2d 979—Epperson v. Midwest Refining Co., C.C.A. Wyo., 22 F.2d 622—In re Hagin, D. C.La., 21 F.2d 434, affirmed, C.C.A., Phœnix Building & Homestead Ass'n v. E. A. Carrere's Sons, 33 F. 2d 563, certiorari denied 50 S.Ct. 240, 281 U.S. 726, 74 L.Ed. 1143—Land Co. of Florida v. Fetty, C.C. A.Ga., 15 F.2d 942, certiorari denied 47 S.Ct. 477, 273 U.S. 764, 71 L.Ed. 880—Wilkinson v. Mutual Bldg. & Sav. Ass'n, C.C.A.Wis., 13 F.2d 997, affirming, D.C., Mutual Bldg. & Sav. Ass'n v. Wilkinson, 8 F.2d 183—Jennings v. Canady, C.C.A.Okl., 13 F.2d 356, certiorari denied 47 S.Ct. 239, 273 U.S. 728, 71 L.Ed. 862—Lyons v. Reinecke, C.C.A.Ill., 10 F.2d 3—Shanks v. Banting Mfg. Co., D.C.Ohio, 9 F.2d 116—Atlantic Fruit Co. v. Red Cross Line, C.C.A.N.Y., 5 F.2d 218, affirming, D.C., 276 F. 319—Teplitzky v. Pennsylvania R. Co., D.C. Ill., 38 F.Supp. 535—U. S. v. Maniaci, D.C.Mich., 36 F.Supp. 293, affirmed, C.C.A., 116 F.2d 935—Downing v. Davis, D.C.Miss., 34 F.Supp. 872—George v. Stanfield, D.C.Idaho, 33 F.Supp. 486—Baker Driveaway Co. v. Hamilton, D.C.Pa., 29 F.Supp. 693—Johnson v. Clark, D.C.Tex., 25 F.Supp. 285—Stentor Electric Mfg. Co. v. Klaxon Co., D.C.Del., 23 F.Supp. 351—Pickwick Corporation v. Welch, D.C.Cal., 21 F.Supp. 664—Richter v. Empire Trust Co., D. C.N.Y., 20 F.Supp. 289—Hutchins v. Pacific Mut. Life Ins. Co. of California, D.C.Cal., 20 F.Supp. 150, affirmed, C.C.A., 97 F.2d 58—U. S.

ment of a state court, its judicial knowledge is limited to, and coextensive with, that of the court whose judgment it is reviewing. That is, it takes judicial notice of the law of that state,[5] but not of the laws of another state, unless the courts of the state in question are authorized or required by its local law to do so.[6]

§ 16. Constitutions and Public Statutes

Judicial notice is taken of the state and federal constitutions and public statutes.

All courts in the United States take judicial notice of the United States constitution and amendments thereto,[7] and of the public statutes enacted by congress,[8] including those enacted for the Dis-

ex rel. Humphries v. Hunt, D.C.N.Y., 15 F.Supp. 608—Dougherty v. Gutenstein, D.C.N.Y., 19 F.Supp. 782—Board of Drainage Com'rs of McCracken County, for Use of Mayfield Creek Drainage Dist. No. 1, v. Fletcher, D.C.Ill., 7 F.Supp. 587, affirmed, C.C.A., 72 F.2d 8—U. S. Building & Loan Ass'n v. McClelland, D.C.Colo., 6 F.Supp. 293—Morris v. Wisconsin Hydro Electric Co., D.C.N.Y., 4 F.Supp. 991—George L. Squire Mfg. Co. v. National Fire Ins. Co. of Hartford, Conn., D.C.N.Y., 4 F.Supp. 137—Clinton v. Coppedge, D.C.Okl., 2 F. Supp. 935—Faris v. Hope, C.C.A. Mo., 298 F. 727—Kaye v. May, C.C. A.N.J., 296 F. 450—American Clearing Co. v. Walkill Stock Farms Co., D.C.Fla., 293 F. 58—United Divers Supply Co. v. Commercial Credit Co., C.C.A.Fla., 289 F. 316—Norfolk & W. Ry. Co. v. Norton Iron Works, C.C.A.Ky., 279 F. 32—Burntisland Shipbuilding Co. v. Barde Steel Products Corporation, D.C.Del., 278 F. 552—Holbrook, Cabot & Rollins Corporation v. City of New York, D.C.N.Y., 277 F. 840—State of Ohio ex rel. Seney v. Swift & Co., C.C.A.Ohio, 270 F. 141, certiorari denied 42 S.Ct. 47, 257 U.S. 633, 66 L.Ed. 407, and appeal dismissed 43 S.Ct. 22, 260 U.S. 146, 67 L.Ed. 176—Fred Macey Co. v. Macey, Mich., 135 F. 725, 68 C. C.A. 363—State ex rel. Tillman v. Coosaw Mining Co., C.C.S.C., 45 F. 804, affirmed 12 S.Ct. 689, 144 U. S. 550, 36 L.Ed. 537.

D.C.—Hardee v. Washington Loan & Trust Co., 91 F.2d 314, 67 App.D. C. 241—Forrester v. Jerman, 90 F. 2d 412, 67 App.D.C. 167—Old Dominion Stages v. Connor, 90 F.2d 403, 67 App.D.C. 158—Ickes v. Gazzam, 83 F.2d 603, 65 App.D.C. 346

23 C.J. p 127 note 71—25 C.J. p 1001 note 28—42 C.J. p 1202 note 39.

Canal Zone is not foreign territory and federal court judicially knows law prevailing therein.—Taylor v Insurance Co. of North America, D.C.N.Y., 9 F.Supp. 574.

Certification by federal board

Court judicially knew that Alabama unemployment insurance act had been passed and certified by federal social security board.—Chas. C. Steward Mach. Co. v. Davis, C.C.A. Ala., 89 F.2d 207, certiorari granted 57 S.Ct. 673, 300 U.S. 652, 81 L.Ed. 863, affirmed 57 S.Ct. 883, 301 U.S. 548, 81 L.Ed. 1279, 109 A.L.R. 1293.

Courts in District of Columbia take judicial notice of the laws of the states of the Union.—Ingraham v. Commissioner of Internal Revenue, C.C.A., 119 F.2d 223.

Not foreign laws

"For the accepted rule almost since the beginning of our federal jurisprudence has been that the law of any state of the Union, whether statutory or the result of judicial decisions, is a matter of which the courts of the United States may take judicial notice without plea or proof, because the laws of the several states cannot in courts of the United States properly be regarded as foreign laws."—Cray, McFawn & Co. v. Hegarty, Conroy & Co., D.C.N.Y., 27 F.Supp. 93, 95, affirmed, C.C.A., 109 F.2d 443.

Not matter of expert opinion

U.S.—Laubenheimer v. Factor, C.C.A. Ill., 61 F.2d 626, certiorari granted Factor v. Laubenheimer, 53 S.Ct. 523, 289 U.S. 713, 77 L.Ed. 1467, affirmed 54 S.Ct. 191, 290 U.S. 276, 78 L.Ed. 315—Public Service Ry. Co. v. Wursthorn, C.C.A.N.J., 278 F. 408, 414, citing **Corpus Juris**, and certiorari denied 42 S.Ct. 589, 259 U.S. 585, 66 L.Ed. 1076.

Similar legislation in other states may be judicially noticed.—Missouri Pac. R. Co. v. Norwood, Ark., 51 S. Ct. 458, 283 U.S. 249, 75 L.Ed. 1010, affirming, D.C., 42 F.2d 765, and modified on other grounds 51 S.Ct. 652, 283 U.S. 809, 75 L.Ed. 1428—Johnson v. Peterson, C.C.A.S.D., 288 F. 735.

Stipulated statement of facts

State statutes may be considered by federal court, although not embodied in stipulated statement of facts.—Stimpson v. Commissioner of Internal Revenue, C.C.A., 55 F.2d 815, certiorari denied 52 S.Ct. 579, 286 U. S. 555, 76 L.Ed. 1289.

5. U.S.—Adam v. Saenger, 58 S.Ct. 454, 303 U.S. 59, 82 L.Ed. 649, reversing, Tex.Civ.App., 101 S.W.2d 1046, certiorari granted 58 S.Ct. 28, 302 U.S. 668, 82 L.Ed. 515, rehearing denied 58 S.Ct. 640, 302 U.S. 666, 82 L.Ed. 1123, mandate conformed to, Civ.App., 119 S.W.2d 687, certiorari denied Saenger v. Adam, 59 S.Ct. 832, 307 U.S. 628, 83 L.Ed. 1511.

23 C.J. p 127 note 72.

State statutes, on such an appeal, will be judicially noticed, even though enacted since the appeal.—Abie State Bank v. Weaver, 51 S.Ct. 252, 282 U.S. 765, 75 L.Ed. 690, affirming 227 N.W. 922, 119 Neb. 153.

6. U.S.—Treinies v. Sunshine Mining Co., Idaho, 60 S.Ct. 44, 308 U. S. 66, 84 L.Ed. 85, affirming, C.C.A., 99 F.2d 651, affirming, D.C., Sunshine Mining Co. v. Treinies, 19 F. Supp. 587, certiorari granted Treinies v. Sunshine Mining Co., 59 S. Ct. 489, 306 U.S. 624, 83 L.Ed. 1029, rehearing denied 60 S.Ct. 464, 309 U.S. 693, 84 L.Ed. 1034.

23 C.J. p 127 notes 73, 74.

7. Ind.—State ex rel. Fry v. Superior Court of Lake County, 186 N. E. 310, 205 Ind. 355.

La.—Williams v. Windham, 3 La.App. 127.

Okl.—Kelley v. Garfield County Building & Loan Ass'n, 68 P.2d 811, 180 Okl. 253.

23 C.J. p 128 note 88.

Consummation of ratification

The supreme court takes judicial notice of the date of the consummation of the ratification of an amendment to the United States Constitution.—Dillon v. Gloss, Cal., 41 S.Ct. 510, 256 U.S. 368, 65 L.Ed. 994, affirming, D.C., Ex parte Dillon, 262 F. 563.

8. U.S.—U. S. v. Santa Fe Pac. R. Co., C.C.A.Ariz., 114 F.2d 420, certiorari granted 61 S.Ct. 738—Bates v. Atlantic Nat. Bank of Jacksonville, C.C.A.Fla., 101 F.2d 278—Gray v. Texas Co., C.C.A.Minn., 75 F.2d 606—Stimpson v. Commissioner of Internal Revenue, C.C.A., 55 F.2d 815, certiorari denied 52 S.Ct. 579, 286 U.S. 555, 76 L.Ed. 1289—Hazelhurst Oil Mill & Fertilizer Co. v. U. S., Ct.Cl., 42 F.2d 331—Bellaire, Benwood & Wheeling Ferry Co. v. Interstate Bridge Co., C.C.A.W.Va., 40 F.2d 323, certiorari denied 51 S. Ct. 35, 282 U.S. 861, 75 L.Ed. 762—Mather v. Clyde S. S. Co., C.C.A.N. Y., 37 F.2d 49—Thompson v. Missouri Pac. R. Co., C.C.A.Mo., 15 F. 2d 28—Anderson v. U. S. Fidelity & Guaranty Co., D.C.Fla., 8 F.2d 428—Downey v. Geary-Wright Tobacco Co., D.C.Ky., 39 F.Supp. 33—American-Mexican Claims Bureau v. Morgenthau, D.C.D.C., 26 F Supp. 904—Bradford v. Chase Nat. Bank of City of New York, D.C.N. Y., 24 F.Supp. 28, affirmed Berger v. Chase Nat. Bank of City of New York, 105 F.2d 1001, affirmed 60 S.Ct. 707, 309 U.S. 632, 84 L.Ed.

990, rehearing denied 60 S.Ct. 885, 309 U.S. 698, 84 L.Ed. 1037, affirmed Schram v. Chase Nat. Bank of City of New York, 60 S.Ct. 707, 309 U.S. 632, 84 L.Ed. 990. rehearing denied 60 S.Ct. 885, 309 U. S. 698, 84 L.Ed. 1037, affirmed Wardell v. Chase Nat. Bank of City of New York, 60 S.Ct. 707, 309 U S. 632, 84 L.Ed. 990, rehearing denied 60 S.Ct. 885, 309 U S. 698, 84 L.Ed. 1037, affirmed Young v. Chase Nat. Bank of City of New York, 60 S.Ct. 707, 309 U.S. 632, 84 L. Ed. 990, rehearing denied 60 S.Ct. 885, 309 U.S. 698, 84 L.Ed. 1037, affirmed Feucht v. Chase Nat. Bank of City of New York, 60 S Ct. 708, 309 U S. 632, 84 L.Ed. 990, rehearing denied 60 S.Ct. 886, 309 U.S. 698, 84 L.Ed. 1037—Corneli v. Moore, D.C.Mo., 268 F. 993—U. S. v. Forbes, D.C.Ala., 259 F. 585, affirmed, C.C.A., Forbes v. U. S., 268 F. 273—Creek Nation v. U. S., 92 Ct.Cl. 346, certiorari denied 61 S. Ct. 1099, 313 U.S. 581, 85 L.Ed. 1538.

Ala.—Hamilton v. James, 166 So. 425, 231 Ala. 668—J. H. Arnold & Co. v. Gibson, 113 So. 25, 216 Ala. 314—Louisville & N. R. Co. v. Shikle, 90 So. 900, 206 Ala. 494—Moon v. Hines, 87 So. 603, 205 Ala. 355, 13 A.L.R 1020—Western Union Telegraph Co. v. Laslie, 84 So. 864, 17 Ala.App. 303.

Ariz.—Porter v. Hall, 271 P. 411, 34 Ariz. 308—Chambers v. Atchison, T. & S. F. Ry. Co., 255 P. 1092, 32 Ariz. 102.

Ark.—Arkansas Valley Co-op. Rural Electric Co. v. Elkins, 141 S.W.2d 538, 200 Ark. 883.

Cal.—Young v. Boy Scouts of America, 51 P.2d 191, 9 Cal.App.2d 760.

Conn.—Theron Ford Co. v. Home Owners' Loan Corporation, 180 A. 448, 120 Conn. 250.

D.C.—Red Canyon Sheep Co. v. Ickes, 98 F.2d 308, 69 App.D.C. 27—Hurley v. Crawley, 50 F.2d 1010, 60 App.D.C. 245.

Ga.—First Nat. Bank of Colquitt v. Miller, 98 S.E. 402, 23 Ga.App. 441.

Ill.—Adkins v. Adkins, 163 N.E. 823, 332 Ill. 422—Bohm v. Gerdes, 32 N. E 2d 1000, 309 Ill App. 206—City of Detroit v. Wabash Refining Co., 223 Ill.App. 246.

Ind.—State ex rel. Fry v. Superior Court of Lake County, 186 N.E. 310, 205 Ind. 355—Taggart v. Keebler, 154 N.E. 485, 198 Ind. 633—Baltimore & O. S. W. R Co. v. Berdon, 145 N.E. 2, 195 Ind. 265, rehearing denied Baltimore & O. S. R. Co. v. Berdon, 150 N.E. 407, 195 Ind. 265, and certiorari denied Baltimore & O. S. W. R. Co. v. Berdon, 45 S.Ct. 225, 266 U.S. 633, 69 L.Ed. 479—American Nat. Red Cross v. Felzner Post, 159 N.E. 771, 86 Ind.App. 709—Ross v. Lambert, 137 N.E. 185, 79 Ind.App. 30.

Iowa.—Hills Sav. Bank v. Cress, 218 N.W. 74, 76, 205 Iowa 303, citing **Corpus Juris,** and declaring question elaborately annotated therein.

Kan.—Helm v. Hines, 198 P. 190, 109 Kan. 48, denying rehearing 196 P. 426, 109 Kan. 48.

Ky.—Chesapeake & O. Ry. Co. v. Rucker, 54 S.W.2d 642. 246 Ky. 161—Louisville & N. R. Co. v. Nelson, 251 S.W. 672, 199 Ky. 615—McFeena's Adm'r v Paris Home Telephone & Telegraph Co., 227 S.W. 450, 190 Ky. 299.

La.—First Nat. Bank v. Louisiana Tax Commission, 143 So. 23, 175 La. 119, followed in Commercial Nat. Bank of Shreveport v. Louisiana Tax Commission, 143 So. 32, 175 La. 149, and affirmed First Nat. Bank v. Louisiana Tax Commission, 53 S Ct. 511, 289 U.S. 60, 77 L.Ed. 1030, 87 A.L.R. 840, motion denied 53 S.Ct. 521—Williams v. Windham, 3 La App. 127.

Md.—Atkinson v. Philadelphia, B. & W. R. Co., 113 A. 110, 137 Md. 632—Hettleman v. Frank, 110 A. 715, 136 Md 351.

Mass.—Council v. Cohen, 21 N.E.2d 967, 303 Mass. 348.

Mich.—Peacock v. Detroit, G. H. & M. Ry. Co., 175 N.W. 580, 208 Mich. 403, 8 A.L R. 964.

Mo.—Peikert v. Repple, 114 S.W.2d 999, 342 Mo. 274—Rositzky v. Rositzky, 46 S.W.2d 591, 329 Mo. 662—Taylor v. Western Union Telegraph Co., 231 S.W. 78, 207 Mo. App. 145.

Mont.—Federal Land Bank of Spokane v. Myhre, 101 P.2d 1017, 110 Mont. 416—Morgan v. Hines, 211 P. 778, 65 Mont. 306.

Neb.—Federal Farm Mortg. Corporation v. Hughes, 289 N.W. 866, 137 Neb. 454—In re Bose's Estate, 285 N.W. 319, 136 Neb. 156—National Supply Co. v. Chicago & N. W. Ry. Co., 187 N.W. 917, 108 Neb. 326.

N.J.—Bucsi v. Longworth Building & Loan Ass'n, 194 A. 857, 119 N.J. Law 120, appeal dismissed 59 S.Ct. 154, 305 U.S. 665, 83 L Ed. 431.

N.Y.—Ingersoll-Rand Co. v. U. S. Shipping Board Emergency Fleet Corporation, 187 N.Y.S. 695, 195 App.Div. 838—First Citizens Bank & Trust Co. of Utica v. Speaker, 287 N.Y.S. 831, 159 Misc. 427, modified on other grounds 294 N.Y.S. 737, 250 App Div. 824—Jessewich v. Abbene, 277 N.Y.S. 599, 154 Misc. 768—Gallin v. National City Bank of New York, 273 N.Y.S. 87, 152 Misc. 679—Armand Schmoll, Inc., v. U. S. & Australasia S. S. Co., 217 N.Y.S. 883, 128 Misc. 345—Hollender v. Rochester Food Products Corporation, 207 N.Y.S. 319, 124 Misc. 130, affirmed 212 N.Y S. 833, 215 App.Div. 751—Schwartz v. Schwartz, 185 N.Y.S. 659, 113 Misc. 444.

N.C.—Mangum v. Atlantic Coast Line R. Co., 125 S.E. 549, 188 N.C. 689.

N.D.—Regional Agricultural Credit Corporation of Minneapolis v. Stewart, 289 N.W. 801, 803, 69 N.D. 694, citing **Corpus Juris.**

Okl.—Kelley v. Garfield County Building & Loan Ass'n, 68 P.2d 811, 180 Okl. 253.

Pa.—Hendricks v. Pyramid Motor Freight Corporation, 195 A. 907, 328 Pa. 570.

S.C.—Santee Mills v. Query, 115 S.E. 202, 122 S.C. 158.

Tex.—First Nat. Bank v. First State Bank of Jacksonville, Com.App., 291 S.W. 206, affirming, Civ.App., 269 S.W. 154—Wineburgh v. Dallas Poster Advertising Co., Civ. App., 98 S.W.2d 252—Malone v. El Paso County Water Improvement Dist. No. 1, Civ.App., 20 S. W.2d 815, error refused.

Va.—Payne v. L. J. Upton & Co., 152 S.E. 358, 154 Va. 137—Shumaker's Adm'x v. Atlantic Coast Line R. Co., 99 S.E. 739, 125 Va. 393.

Wash.—De Cano v. State, 110 P.2d 627—Peterson v. Pacific S. S. Co., 261 P. 115, 145 Wash. 460, certiorari granted Pacific S. S. Co. v. Peterson, 48 S.Ct. 321, 276 U.S. 612, 72 L.Ed. 731, affirmed 49 S.Ct. 75, 278 U S. 130, 73 L.Ed. 220.

W.Va.—Baltimore & O. R. Co. v. Dellslow Coal Co., 127 S.E. 43, 98 W.Va. 194—Brown v. Bottom Creek Coal & Coke Co., 118 S.E. 284, 94 W.Va. 287—Spring v. American Telegraph & Telephone Co., 103 S.E. 206, 86 W.Va. 192, 10 A.L. R. 951.

Wis.—Switzer v. Weiner, 284 N.W. 509, 230 Wis. 599.

Wyo.—Hudson Oil Co. v. Board of Com'rs of Fremont County, 52 P. 2d 683, 689, 49 Wyo. 1, citing **Corpus Juris**—Pacific-Wyoming Oil Co. v. Carter Oil Co., 226 P. 193, 31 Wyo. 314, rehearing denied 228 P. 284, 31 Wyo. 452.

23 C.J. p 128 note 89.

Bankruptcy orders and forms, having the force of law, may be judicially noticed.

U.S.—Hillsdale Grocery Co. v. Union & People's Nat. Bank of Jackson, Mich., D.C.Mich., 6 F.Supp. 773.

N.Y.—Powell v. Panghorn, 145 N.Y. S. 1073, 161 App.Div. 453.

Land grants

(1) Although the court can take judicial notice of the act of congress granting the right of way to a railroad, it cannot take notice that the grant attached to any particular tract of land, or that a particular tract of land was public land at the time of the taking effect of the grant.—Lasby v. Burgess, 248 P. 190, 76 Mont. 452, followed in Burgess v. Lasby, 248 P. 192, 76 Mont. 452.

(2) The court will take judicial notice of the invalidity of the part of the grant by the United States to

trict of Columbia[9] and by the continental congress.[10] Likewise, from motives of necessity, as well as of public policy,[11] the constitution[12] and public statutes[13] of a state are judicially recognized by all courts of that state.

the Southern Pacific Railroad Company in 1871, 16 St. 573, which overlaps the grant to the Atlantic & Pacific Railway in 1866, 14 St 292.—Huntington v. Donovan, 192 P. 543, 183 Cal. 746—Southern Pac. R. Co. v. Painter, 45 P. 320, 113 Cal. 247.

Mining claims

Judicial notice will be taken of the manner in which, and the laws under which, title to mining claims may be obtained from the United States.

Cal.—Frey v. Garibaldi, 72 P.2d 554, 23 Cal.App.2d 83.

Utah—Jones Mining Co. v. Cardiff Min. & Mill. Co., 191 P. 426, 56 Utah 449.

Property of Indians

It has been held, however, that the supreme court is not presumed conversant with every congressional act relating to the property of the Osage Indians, and, in absence of proper reference thereto, will not search out the details thereof.—In re Martin's Estate, 80 P.2d 561, 183 Okl. 177.

Similar provisions

In interpreting provision of bill appropriating money in settlement of claim against United States, court could take judicial notice that in a very large proportion of all similar bills there was invariably a limitation on the amount of fee which an agent or an attorney might receive.—Nesbit v. Frederick Snare Corporation, 96 F.2d 535, 68 App.D.C. 263, certiorari denied 59 S.Ct. 67, 305 U.S. 608, 83 L.Ed. 387.

State title to lands

Supreme court judicially knows that, when Utah was admitted to statehood, fee to lands under navigable waters vested in state, subject to congress' paramount control for commerce.—State v. Rolio, 262 P. 987, 71 Utah 91.

Statute enacted after filing of petition, but before dismissal thereof, has been judicially noticed.—U. S. v. West Virginia Power Co., C.C.A.W.Va., 91 F.2d 611, certiorari dismissed West Virginia Power Co. v. U. S., 58 S.Ct. 284, 302 U.S. 770, 82 L.Ed. 598.

9. D.C.—International Text-Book Co. v. District of Columbia, 35 App.D.C. 307—Brown v. District of Columbia, 29 App.D.C. 273, 25 L.R.A.,N.S., 98.

18 C.J. p 1385 note 75—23 C.J. p 129 note 90.

Local law

A court can take judicial notice of local statutes, such as a special act of congress incorporating a hospital corporation as a charity.—White v. Central Dispensary and Emergency Hospital, 99 F.2d 355, 69 App.D.C. 122, 119 A.L.R. 1002.

10. Tex.—Blethen v. Bonner, Civ. App., 52 S.W. 571, 573, reversed on other grounds 53 S.W. 1016, 93 Tex. 141.

23 C.J. p 129 note 91.

11. Mo.—Christy v. Wabash R. Co., 191 S.W. 241, 195 Mo.App. 232.

12. Fla.—State ex rel. Landis v. Prevatt, 148 So. 578, 110 Fla. 29.

Ga.—Brooks County v. Elwell, 11 S.E.2d 82, 63 Ga.App. 308.

Ind.—State ex rel. Fry v. Superior Court of Lake County, 186 N.E. 310, 205 Ind. 355.

La.—Williams v. Windham, 3 La.App. 127.

Or.—Eastern & Western Lumber Co. v. Patterson, 258 P. 193, 124 Or. 112, 60 A.L.R. 528, reversed on other grounds 264 P. 441, 124 Or. 112, 60 A.L.R. 528, and appeal and error dismissed 49 S.Ct. 184, 278 U.S. 581, 73 L.Ed. 518.

23 C.J. p 129 note 95.

Adoption of constitutional amendment by popular vote see infra § 51.

Record of constitutional convention see infra § 43.

13. Ala.—State ex rel. Kinney v. St. John, 172 So. 639, 233 Ala. 480—Carnley v. Brunson, 149 So. 87, 88, 227 Ala. 197, citing **Corpus Juris**—Town of Ragland v. St. Clair County, 80 So. 687, 16 Ala.App. 613.

Ariz.—City of Glendale v. Coquat, 52 P.2d 1178, 46 Ariz. 478, 102 A.L.R. 837.

Ark.—Thomas v. Branch, 150 S.W.2d 738.

Cal.—Ventura County Harbor Dist. v. Board of Sup'rs of Ventura County, 295 P. 6, 211 Cal. 271—Marr v. Southern California Gas Co., 245 P. 178, 198 Cal. 278—Shields v. Oxnard Harbor Dist., App., 116 P.2d 131—Arnold v. Universal Oil Land Co., App., 114 P.2d 408—Affonso Bros. v. Brock, 84 P.2d 515, 29 Cal.App.2d 26—Hill v. Superior Court in and for Los Angeles County, 292 P. 662, 109 Cal.App. 91.

Colo.—Walker v. Bedford, 26 P.2d 1051, 93 Colo. 400, following Consolidated Motor Freight v. Bedford, 26 P.2d 1066, 93 Colo. 440—Metalloid Co. v. Luboil Refining Co., 274 P. 826, 85 Colo. 146.

Fla.—Jones v. City of Arcadia, 3 So.2d 338—City of Lakeland v. Select Tenures, Inc., 176 So. 274, 129 Fla. 338—Northern Inv. Corporation v. City of Cocoa, 158 So. 889, 118 Fla. 405—Morrison v. Braddock, 131 So. 124, 100 Fla. 1152—McMullen v. Newmar Corporation, 129 So. 870, 100 Fla. 566, followed in Tyler v. Newmar Corporation, 130 So. 41, 100 Fla. 583, and Tyler v. Britt, 130 So. 41, 100 Fla. 584.

Ga.—Decatur County v. Tampa Wholesale Liquor Co., 9 S.E.2d 701, 62 Ga.App. 716—Southern Ry. Co. v. Lee, 200 S.E. 569, 59 Ga.App. 316—Manufacturing Lumbermen's Underwriters v. South Georgia Ry. Co., 196 S.E. 244, 57 Ga.App. 699—Cantrell v. Davis, 169 S.E. 39, 46 Ga.App. 710, conforming to answer 169 S.E. 38, 176 Ga. 745.

Ill.—In re Monaco, 5 N.E.2d 755, 287 Ill.App. 540—City of Detroit v. Wabash Refining Co., 223 Ill.App. 246—Utpatel v. Chicago Title & Trust Co., 218 Ill.App. 75.

Ind.—State ex rel. Fry v. Superior Court of Lake County, 186 N.E. 310, 205 Ind. 355.

Iowa.—Mathews v. Turner, 236 N.W. 412, 212 Iowa 424—Andrew v. Hartford Accident & Indemnity Co., 223 N.W. 529, 207 Iowa 652.

Kan.—Barker v. Kansas City, 88 P.2d 1071, 149 Kan. 696.

Ky.—Graves County v. Sullivan, 140 S.W.2d 636, 283 Ky. 130—State Highway Commission v. Mitchell, 44 S.W.2d 533, 241 Ky. 553—Ballard v. Cash, 230 S.W. 48, 191 Ky. 312—McFeena's Adm'r v. Paris Home Telephone & Telegraph Co., 227 S.W. 450, 190 Ky. 299—Riley v. Wallace, 222 S.W. 1085, 188 Ky. 471, 11 A.L.R. 337.

La.—Ouachita Securities Corporation v. Cooper, 165 So. 178, 183 La. 995—Wachsen v. Commission Council of Lake Charles, 111 So. 177, 162 La. 823—Miller v. Molony, 103 So. 162, 157 La. 811—Abel v. Gulf Refining Co., App., 138 So. 708, set aside on other grounds 143 So. 82—Williams v. Windham, 3 La.App. 127.

Me.—Inhabitants of York Harbor Village Corporation v. Libby, 140 A. 382, 126 Me. 537.

Md.—State, for Use of Emerson, v. Poe, 190 A. 231, 171 Md. 584—Calvert County Com'rs v. Monnett, 164 A. 155, 164 Md. 101, 86 A.L.R. 1258.

Mass.—Prescott v. Secretary of Commonwealth, 12 N.E.2d 462, 299 Mass. 191—Lawrence Trust Co. v. Chase Securities Corporation, 198 N.E. 905, 292 Mass. 481—Brodsky v. Fine, 160 N.E. 335, 263 Mass. 51.

Mich.—Susich v. Michigan Consol. Gas Co., 291 N.W. 26, 292 Mich. 612—Little v. American State Bank of Dearborn, 249 N.W. 22, 263 Mich. 645.

Courts construing a statute will take judicial notice of an attempted amendment thereof which

Miss.—Haas v. Hancock County, 184 So. 812, 183 Miss. 365.

Mo.—State ex rel. Gaines v. Canada, 131 S.W.2d 217, 344 Mo. 1238, conforming to mandate 59 S.Ct. 232, 305 U.S. 337, 83 L.Ed. 208, reversing 113 S.W.2d 783, 342 Mo. 121, certiorari granted 59 S.Ct. 65, 305 U.S. 580, 83 L.Ed. 365, rehearing denied 59 S.Ct. 356, 305 U.S. 676, 83 L.Ed. 437—Hutcherson v. Thompson, 123 S.W.2d 142, 343 Mo. 884—Rositzky v. Rositzky, 46 S.W.2d 591, 329 Mo. 662—State ex rel. Ford v. Hogan, 27 S.W.2d 21, 324 Mo. 1130—Cartright v. McDonald County, 5 S.W.2d 54, 319 Mo. 848—Kemper v. Gluck, App., 21 S.W.2d 922, affirmed 39 S.W. 330, 327 Mo. 733, certiorari denied Gluck v. Kemper, 52 S.Ct. 29, 284 U.S. 649, 76 L.Ed. 551—Dortch v. Reichel Motor Co., App., 223 S.W. 675.

Mont.—Lillis v. City of Big Timber, 62 P.2d 219, 103 Mont. 206—Conley v. Johnson, 54 P.2d 585, 101 Mont. 376—State ex rel. Odenwald v. District Court of Tenth Judicial Dist. in and for Fergus County, 38 P.2d 269, 98 Mont. 1.

Neb.—State ex rel. Nebraska State Bar Ass'n v. Bachelor, 297 N.W. 138.

N.J.—Mondock v. Gennrich, 21 A.2d 611, 19 N.J.Misc. 499—Hill Const. Co. v. Central R. Co. of New Jersey, 167 A. 757, 11 N.J.Misc. 622, affirming 163 A. 429, 10 N.J.Misc. 1240—Koplin v. Village of South Orange, 142 A. 235, 6 N.J.Misc. 489, followed in Lehmann v. Hersh, 142 A. 556, 6 N.J.Misc. 691, Kantorowitz v. Pancoast, 143 A. 923, 6 N.J.Misc. 1004, Lannagan v. Scott, 143 A. 923, 6 N.J.Misc. 999, Mulcahy v. Pancoast, 143 A. 925, 6 N.J.Misc. 1003, and Sharff v. Scott, 143 A. 926, 6 N.J.Misc. 1000, 1002, affirmed 144 A. 920, 105 N.J.Law 492.

N.Y.—Dietrich v. Palisades Interstate Park Commission, 187 N.Y.S. 454, 114 Misc. 425, followed in 187 N.Y.S. 457, 114 Misc. 429—Schieffelin v. Hylan, 178 N.Y.S. 652, affirmed 179 N.Y.S. 949.

N.C.—Miller v. Roberts, 193 S.E. 286, 212 N.C. 126—Hinton v. Lacy, 137 S.E. 669, 193 N.C. 496.

Ohio.—State ex rel. City Loan & Savings Co. of Wapakoneta v. Taggart, 14 N.E.2d 10, 133 Ohio St. 382—State ex rel. Davis v. Plapp, 16 N.E.2d 586, 58 Ohio App. 321—Toledo, F. & F. Ry. Co. v. Toledo & O. C. Ry. Co., 153 N.E. 295, 21 Ohio App. 231, affirmed 150 N.E. 621, 114 Ohio St. 98.

Okl.—Kelley v. Garfield County Building & Loan Ass'n, 68 P.2d 811, 180 Okl. 253—Chicago, R. I. & P. Ry. Co. v. Gist, 190 P. 878, 79 Okl. 8.

Pa.—In re Annual Controller's Reports for Years 1932, 1933, 1934, 1935 and 1936, Inclusive, 5 A.2d 201, 333 Pa. 489—Goldberg v. Friedrich, 124 A. 186, 279 Pa. 572.

R.I.—Landi v. Kirwin & Fletcher, 157 A. 301, 52 R.I. 57.

S.C.—Atlantic Coast Line R. Co. v. Little, 12 S.E.2d 7, 195 S.C. 455—Boggs v. O'Dell, 3 S.E.2d 486, 190 S.C. 442—State v. Broad River Power Co., 181 S.E. 41, 48, 177 S.C. 240, citing **Corpus Juris**—Winn v. Harby, 164 S.E. 434, 166 S.C. 99.

S.D.—In re Gibbs, 214 N.W. 850, 51 S.D. 464.

Tex.—Anderson v. Polk, 297 S.W. 219, 117 Tex. 73, affirming, Civ.App., 291 S.W. 1112—Martin v. Grandview Independent School Dist., 267 S.W. 461, 114 Tex. 291—Moore v. Lumbermen's Reciprocal Ass'n, Com. App., 262 S.W. 472, correcting former judgment 258 S.W. 1051, which reversed, Civ.App., 241 S.W. 1105—Amsco Pipe Line Co. v. Donico Production Co., Civ.App., 112 S.W.2d 483, error dismissed—Humble Oil & Refining Co. v. Railroad Commission of Texas, Civ. App., 85 S.W.2d 813, error dismissed—Indemnity Ins. Co. of North America v. Williams, Civ. App., 69 S.W.2d 519, reversed on other grounds 99 S.W.2d 905, 129 Tex. 51—Adams v. Stephens County, Civ.App., 41 S.W.2d 989, error refused—Missouri, K. & T. R. Co. v. Johnson, Civ.App., 295 S.W. 944—Moore v. Clem, Civ.App., 295 S.W. 941.

Utah—State v. Rolio, 262 P. 987, 71 Utah 91.

Vt.—State v. Watson, 117 A. 663, 96 Vt. 131.

Va.—Vaughan v. Town of Galax, 4 S.E.2d 386, 173 Va. 335.

Wash.—State ex rel. Hamilton v. Cohn, 95 P.2d 38, 1 Wash.2d 54—Roche v. McDonald, 239 P. 1015, 136 Wash. 322, 44 A.L.R. 444, reversed on other grounds 48 S.Ct. 142, 275 U.S. 449, 72 L.Ed. 365, 53 A.L.R. 1141.

W.Va.—Tokas v. J. J. Arnold Co., 11 S.E.2d 759—Kinney v. Doddridge County Court, 156 S.E. 748, 110 W.Va. 17.

Wis.—McCaffrey v. Town of Lake, 290 N.W. 283, 234 Wis. 251, 127 A.L.R. 233—Journal Printing Co. v. City of Racine, 246 N.W. 425, 210 Wis. 222—Flambeau River Lumber Co. v. Chippewa & Flambeau Improvement Co., 223 N.W. 417, 198 Wis. 134.

23 C.J. p 129 note 96—42 C.J. p 1202 note 38.

Statutes relating to:

Boundaries of political divisions see infra § 33.

Corporations:

Municipal see infra § 35.

Private see infra § 89.

Elections see supra § 1884.

Limitations based on adverse possession see Adverse Possession § 210 f.

Navigability of waters see infra § 33.

Local adoption of general law see infra § 51.

Acts local in application, but of a public character, are judicially noticed.

Ala.—State ex rel. Edmunds v. Moses, 164 So. 562, 231 Ala. 215—Elmore County v. Tallapoosa County, 128 So. 158, 221 Ala. 182—Polytinsky v. Johnston, 99 So. 839, 211 Ala. 99.

Ark.—Farelly Lake Levee Dist. v. Hudson, 273 S.W. 711, 169 Ark. 33.

Md.—Valentine v. Road Directors of Allegany County, 126 A. 147, 146 Md. 199.

Mass.—Brodsky v. Fine, 160 N.E. 335, 263 Mass. 51.

Mo.—In re East Bottoms Drainage & Levee Dist., 259 S.W. 89, 305 Mo. 577.

23 C.J. p 129 note 96 [f].

Application of classification.

Judicial notice will be taken that a particular statutory classification can apply only to a particular subdivision, or particular subdivisions, within the state.

Ala.—Moses v. Tigner, 159 So. 258, 229 Ala. 645, answers conformed to 159 So. 259, 26 Ala.App. 325.

Mo.—State ex rel. State Highway Commission v. Young, 23 S.W.2d 130, 324 Mo. 277—State ex rel. and to Use of Gagnepain v. Daues 15 S.W.2d 815, 322 Mo. 376, conformed to Gagnepain v. Levee Dist. No. 1 of Perry County, App., 28 S.W.2d 1116, and quashing 7 S.W.2d 285, reversed on other grounds 28 S.W.2d 1116 and followed in Rozier v. Levee Dist. No. 1 of Perry County, 7 S.W.2d 288, reversed on other grounds 28 S.W.2d 1116—State ex rel. Moseley v. Lee, 5 S.W.2d 83, 319 Mo. 976—State ex rel. Pollock v. Becker, 233 S.W. 641, 289 Mo. 660.

Or.—In re Pittock's Will, 199 P. 633, 102 Or. 159, 17 A.L.R. 218.

Curative statutes are judicially noticed.

Conn.—Daly v. Fisk, 134 A. 169, 104 Conn. 579.

Fla.—State v. Special Road and Bridge Dist. No. 4 of Martin County, 173 So. 716, 127 Fla. 631, followed in State v. Special Road and Bridge District No. 12 of Martin County, 173 So. 719, 127 Fla. 640, State v. Special Road and Bridge

failed of passage, as indicative of legislative policy,[14] but there is authority to the contrary.[15]

Judicial knowledge of a statute includes the date when it was introduced in the legislature,[16] when it was passed and approved,[17] and when it went into effect[18] or was published;[19] when it was suspended[20] or repealed;[21] facts recited or recognized in the statute,[22] authoritative decisions construing it,[23] and "everything near or remote that determines" what is and what is not a public law of the state or a part of the constitution.[24] The court on appeal will take notice of the passage of an act, since the decision of the lower court, affecting the subject

District No. 16 of Martin County, 173 So. 720, 127 Fla. 640, State v. Special Road and Bridge District No. 18 of Martin County, 173 So. 720, 127 Fla. 641, and State v. Martin County, 173 So. 720, 127 Fla 642—Howarth v. City of De Land, 158 So. 294, 117 Fla. 692, followed in Stewart v. City of De Land, 158 So. 300, 117 Fla. 705—Charlotte Harbor & N. Ry. Co. v. Welles, 82 So. 770, 78 Fla. 227.

N.J.—Campbell v. Ocean City, 141 A. 670, 6 N.J.Misc. 475, followed in Campbell v. Champion, 141 A. 671, 6 N.J.Misc. 478.

S.C.—Green v. City of Rock Hill, 147 S.E. 346, 149 S.C. 234.

Tex.—Miller v. State ex rel. Abney, Civ.App., 115 S.W.2d 1027, reversed on other grounds State ex rel. Abney v. Miller, 128 S.W.2d 1134, 133 Tex. 498.

23 C.J. p 129 note 96 [g].

Existence

"It became a fixed rule of law coming from the common law, and upheld in the United States, that the courts cannot forget the law, neither can a law be blotted out of existence by actual destruction of any evidence of it and therefore blotted from the minds of the courts."—State v. Grant Superior Court, 172 N.E. 897, 900, 202 Ind. 197, 71 A.L.R. 1354.

Judicial notice has been taken

(1) As to statute under which sewage disposal plant is operated by county.—Jones v. Jefferson County, 89 So. 174, 206 Ala. 13.

(2) Of conditions of a bond prescribed by statute.—Matlock v. Johnson, 88 So. 182, 17 Ala.App. 669.

(3) Of the provisions of a certificate of sale of state lands issued by the state, by reason of its being issued in accordance with authority and direction of statutes.—McNeil v. McNeil, 211 P. 988, 61 Utah 141.

(4) Of statute under which a fraternal beneficiary association is organized.—Sharpe v. Grand Lodge, A. O. U. W., of Nebraska, 188 N.W. 100, 108 Neb. 193, modified on other grounds 189 N.W. 176, 108 Neb. 193.

(5) Of the highest rate of interest permitted by statute.—Victor v. Warner, 248 Ill.App. 35.

(6) That bridge contractors are bound to give ample security for the performance of their contracts.—Fairfield v. W. J. Corbett Hardware Co., 215 P. 510, 25 Ariz. 199.

(7) That certain items not involved in present action were chargeable against deceased's estate.—Smith v. Oliver, Mo., 148 S.W.2d 795.

(8) That county has no funds and no authority to enter into prospecting operations for oil on school lands.—Ehlinger v. Clark, 8 S.W.2d 666, 117 Tex. 547, modifying, Civ.App., 284 S.W. 974.

(9) That demands against decedent's estate might be exhibited for allowance at any time within one year after grant of first letters.—Nies v. Stone, 108 S.W.2d 349, transferred, see 117 S.W.2d 407, 232 Mo. App. 1226.

(10) That "fund" referred to in act appropriating sum for injured employee is accident fund provided by Compensation Act.—State ex rel. Trenholm v. Yelle, 25 P.2d 569, 174 Wash. 547, adhered to 28 P.2d 1119, 174 Wash. 547.

(11) That in Nevada one may file suit for divorce after residing in the state for six weeks.—In re Porep, Nev., 111 P.2d 533.

(12) That legislative power of state has enacted laws carrying appropriations, which require prompt collection by state agencies of all state's revenue.—State v. Slusher, 244 P. 540, 117 Or. 498, 58 A.L.R. 114.

(13) That no declaration is made in ordinary appropriation bills as to their not being subject to referendum, although they are nevertheless not referable.—State ex rel. Haynes v. District Court of First Judicial Dist., in and for Lewis and Clark County, 78 P.2d 937, 106 Mont. 470.

(14) That particular statutes were extraordinary and special legislation.—Magee v. Treasurer and Receiver General, 153 N.E. 1, 256 Mass. 512.

(15) Of other matters see Violette v. Macomber, 134 A. 561, 125 Me. 432—23 C.J. p 129 note 96 [b].

Statute of limitations

(1) Judicial notice has been taken of the statute of limitations.—Fyffe v. Fyffe, 183 N.E. 641, 350 Ill. 620.

(2) Statute of limitation, however, is not defense of which court will take judicial notice.—In re Eshenbaugh's Estate, 174 A. 809, 114 Pa. Super. 341.

14. Ark.—United Mut. Life Ins. Co. of Indianapolis, Ind., v. State ex rel. Attorney General, 108 S.W.2d 484, 194 Ark. 371.

Va.—Crook v. Commonwealth, 136 S.E. 565, 147 Va. 593, 50 A.L.R. 1043.

15. S.C.—Charleston Oil Co. v. Poulnot, 141 S.E. 454, 143 S.C. 283, 60 A.L.R. 750.

16. N.Y.—Dale Engineering Co. v. State, 186 N.Y.S. 490, 114 Misc. 233.

17. Alaska.—McPhail v. Latouche Packing Co., 8 Alaska 297.

Ark.—Booe v. Road Improvement Dist. No. 4, Prairie County, 216 S.W. 500, 141 Ark. 140.

Approval or disapproval

Courts take judicial notice of legislative enactments and of their approval or disapproval by governor.—State v. Holmes, 147 N.E. 622, 196 Ind. 157.

Cover bill

Judicial notice would not be taken that bill was not presented to governor until certain date, where cover of bill bore unsigned indorsement reciting that bill was received in governor's office on such date.—McPhail v. Latouche Packing Co., 8 Alaska 297.

18. U.S.—Ruppert v. U. S., Ct.Cl., 22 F.Supp. 428, certiorari denied 59 S.Ct. 94, 305 U.S. 630, 83 L.Ed. 404.

Cal.—People v. Sterling Refining Co., 261 P. 1080, 86 Cal.App. 558.

Fla.—Dixie Music Co. v. Pike, 185 So. 441, 135 Fla. 671.

Ky.—Wilcox v. Schroader's Adm'r, 32 S.W.2d 727, 236 Ky. 91.

23 C.J. p 130 note 97.

19. Tex.—Lester v. Riley, Civ.App., 157 S.W. 458.

23 C.J. p 130 note 98.

20. Ala.—Bernstein v. Humes, 60 Ala. 582, 31 Am.R. 52.

Miss.—Buckingham v. Walker, 48 Miss. 609.

Tenn.—East Tennessee Iron Mfg. Co. v. Gaskell, 2 Lea 742.

21. Ala.—Campbell v. Shelby County, 41 So. 407, 408, 147 Ala. 703.

23 C.J. p 130 note 1.

22. Cal.—Gray v. Reclamation Dist., 163 P. 1024, 174 Cal. 622.

23 C.J. p 130 note 2.

23. Fla.—State ex rel. Landis v. Prevatt, 148 So. 578, 579, 110 Fla. 29, citing **Corpus Juris.**

23 C.J. p 130 note 3.

24. Kan.—Prohibitory Amendment Cases, 24 Kan. 700.

matter of the suit,[25] but judicial notice cannot be taken of a law before the date on which it is to take effect.[26] Judicial notice of the statutes of the state requires the court to take cognizance of a negative, that is, of the absence of any statute containing this or that provision.[27] An amendment of a statute is inseparable from the statute itself and is therefore judicially noticed.[28] The court may take judicial notice of the fact that a portion of a statute, the validity of which is challenged, was attached to the original bill by way of amendment.[29] The existence of a fact necessary to the original or continued application of a statute is not judicially noticed.[30] It is a matter of common knowledge that general revisions of statutes are made without consideration of their prior interpretation.[31] The fact that a statute evidences the public policy may also be judicially noticed.[32]

Courts, in dealing with the validity and construction of a statute, are entitled to take judicial notice of all local factual considerations apparent to the legislative department out of which the impulse for its enactment arose.[33] The evil which the legislature intended to correct in framing a constitutional amendment or a statute is judicially noticed where the knowledge thereof is derived from a consideration of various prior public statutes[34] or public his-

25. Ark.—Rayder v. McGehee East and West Highway Dist., 256 S.W. 35, 161 Ark. 269.

26. Cal.—Vanderbush v. Board of Public Works of City of Los Angeles, 217 P. 785, 62 Cal.App. 771.
Mo.—State ex rel. Brunjes v. Bockelman, 240 S.W. 209.

27. Fla.—State ex rel. Matthews v. Alsop, 163 So. 80, 120 Fla. 628.
Tex.—Ofield v. National Ben. Life Ins. Co., Civ.App., 293 S.W. 271.
23 C.J. p 130 note 5.

Reapportionment
It is common knowledge that legislature has ignored mandate of Constitution requiring reapportionment of state for legislative representation since 1901.—State v. Hinkle, 286 P. 839, 156 Wash. 289.

28. U.S.—Denver & R. G. R. Co. v. Wagner, Colo., 167 F. 75, 92 C.C.A. 527.
Iowa.—Dickey v. Jackson, 165 N.W. 387, 181 Iowa 1155.
N.Y.—In re Spingarn, 159 N.E. 605, 96 Misc. 141, reversed on other grounds 162 N.Y.S. 695, 75 App. Div. 806.

29. Ark.—Pope v. Oliver, 117 S.W.2d 1072, 196 Ark. 394.

30. Pa.—Di Donato v. Philadelphia & R. Ry. Co., 109 A. 627, 266 Pa. 412, certiorari granted Philadelphia & R. R. Co. v. Di Donato, 40 S.Ct. 482, 253 U.S. 480, 64 L.Ed. 1023.
23 C.J. p 131 note 7.

31. N.H.—Niemi v. Boston & M. R. R., 173 A. 361, 87 N.H. 1, affirmed 175 A. 245, 87 N.H. 1.

32. Tex.—Evans v. American Pub. Co., 13 S.W.2d 358, 118 Tex. 433, answering certified question, Civ. App., 8 S.W.2d 809, and rehearing denied 16 S.W.2d 516, 118 Tex. 433, and 16 S.W.2d 984.

33. U.S.—Asher v. Ingels, D.C.Cal., 13 F.Supp. 654.
Ala.—Allgood v. State, 104 So. 847, 20 Ala.App. 665, certiorari granted Ex parte Allgood, 104 So. 851, 213 Ala. 426.
D.C.—Simmons v. District of Columbia, 290 F. 347, 53 App.D.C. 372.
Fla.—State ex rel. Adams v. Lee, 166 So. 249, 122 Fla. 639, affirmed 166 So. 262, 122 Fla. 670, rehearing denied 166 So. 574, 122 Fla. 700, certiorari denied Lee v. State of Florida ex rel. Adams, 57 S.Ct. 15, 299 U.S. 542, 81 L.Ed. 399.
Ky.—Golden v. Blakeman, 3 S.W.2d 1095, 223 Ky. 517.
La.—Davis Loan Co. v. Blanchard, 129 So. 413, 14 La.App. 671, rehearing refused 130 So. 472, 14 La.App. 671.
N.Y.—People, on Complaint of Lifton, v. Capitol Fuels of Queens, 6 N.Y.S.2d 243, 168 Misc. 912, affirmed 11 N.Y.S.2d 22, 170 Misc. 763, affirmed People v. Capitol Fuels of Queens, 23 N.E.2d 547, 281 N.Y. 728.
Wyo.—State ex rel. Murane v. Jack, 71 P.2d 917, 51 Wyo. 173, 112 A.L.R. 161, denying rehearing 70 P.2d 888, 52 Wyo. 173, 112 A.L.R. 161.

Benefit to land
As respects constitutionality of statute authorizing development of electric power by irrigation district, reviewing court could take judicial knowledge that certain land included in district would be benefited.—Nev-Cal Electric Securities Co. v. Imperial Irr. Dist., C.C.A.Cal., 85 F.2d 886, certiorari denied 57 S.Ct. 493, 300 U.S. 662, 81 L.Ed. 871.

Circumstances under which statute was enacted have been judicially noticed.—American Dock Co. v. City of New York, 21 N.Y.S.2d 943, 174 Misc. 813, affirmed 26 N.Y.S.2d 704, 261 App.Div. 1063.

Classified legislation
"In determining the need and propriety of classified legislation, where the same does not appear upon the face of the legislative enactment, the court may resort to its judicial knowledge of the contemporaneous conditions and situation of the people, the existing economic, sociologic, and civic policy of the state, and all other matters of common knowledge."—Martin v. Superior Court of Sacramento County, 227 P. 762, 766, 194 Cal. 93.

In case of invalidity
In action for declaratory judgment determining constitutionality of statute imposing tax on corporate dividends, supreme court could not take judicial notice of facts tending to establish whether legislature would have enacted statute had legislature believed it would be invalid as to foreign corporations.—State ex rel. Froedtert Grain & Malting Co. v. Tax Commission of Wisconsin, 267 N.W. 52, 221 Wis. 225, 104 A.L.R. 1478, denying rehearing 265 N.W. 672, 221 Wis. 225, 104 A.L.R. 1478.

That Mississippi levee was cut under governor's orders, flooding land, was within knowledge of court to be considered in interpreting legislation providing for reparation.—Foret v. Board of Levee Com'rs of Orleans Levee Dist., 125 So. 437, 169 La. 427.

34. Ala.—Hasty v. Marengo County Bank, 86 So. 37, 204 Ala. 229.
Mont.—State ex rel. Haynes v. District Court of First Judicial Dist., In and For Lewis and Clark County, 78 P.2d 937, 106 Mont. 470.
23 C.J. p 131 note 8.

Emergency legislation
(1) In some jurisdictions, it is well known that many acts have been passed during a number of years containing emergency clauses which were attached to the act for the sole purpose of expediting its going into effect, whereas, in fact, there was no emergency.—Furlong v. South Park Com'rs, 151 N.E. 510, 320 Ill. 507.

(2) It is common knowledge that, prior to adoption of the Initiative and Referendum Amendment to the Constitution, an emergency clause was attached to almost all laws enacted, and, to prevent this practice, people inserted in Constitution requirement that fact constituting such emergency be stated.—Gentry v. Harrison, 110 S.W.2d 497, 194 Ark. 916.

tory or common knowledge.[35] In other words, the purpose of a statutory enactment may be judicially noticed.[36] Under a statute providing that the court take judicial notice of the public and private official

35. U.S.—Commonwealth of Kentucky, for Use and Benefit of Kern v. Maryland Casualty Co. of Baltimore, Md., C.C.A.Ky., 112 F.2d 352—Hughes v. Commissioner of Internal Revenue, C.C.A., 38 F.2d 755—Missouri-Kansas-Texas R. Co. v. Williamson, D.C.Okl., 36 F.Supp. 607—Panama Refining Co. v. Railroad Commission of Texas, D.C. Tex., 16 F.Supp. 289—Campbell v. Chase Nat. Bank of City of New York, D.C.N.Y., 5 F.Supp. 156, appeal dismissed U. S. v. Campbell, 54 S.Ct. 455, 291 U.S. 686, 78 L.Ed. 1073, motion denied 54 S.Ct. 459, 291 U.S. 648, 78 L.Ed. 1043, and affirmed, C.C.A., 71 F.2d 669, 94 A.L.R. 708, certiorari denied 55 S.Ct. 108, 293 U.S. 592, 79 L.Ed. 686, affirmed, C.C.A., Campbell v. Medalie, 71 F.2d 671, certiorari denied 55 S.Ct. 108, 293 U.S. 592, 79 L.Ed. 686.

Ala.—State ex rel. Green v. One 5¢ Fifth Inning Base Ball Machine, 3 So.2d 27—Lone Star Cement Corporation v. State Tax Commission of Alabama, 175 So. 399, 234 Ala. 465.

Ariz.—Francis v. Allen, 96 P.2d 277, 54 Ariz. 377, 126 A.L.R. 190—Fairfield v. Foster, 214 P. 319, 25 Ariz. 146.

Cal.—Monk v. Ehret, 219 P. 452, 192 Cal. 186—Kirkpatrick v. Stelling, App., 98 P.2d 566—Los Angeles Ry. Corporation v. Los Angeles County Flood Control Dist., 248 P. 532, 78 Cal.App. 173—Gregory v. Hecke, 238 P. 787, 73 Cal.App. 268—Ex parte Higgins, 195 P. 740, 50 Cal. App. 533.

Colo.—People v. Bradley, 179 P. 871, 66 Colo. 186.

Del.—In re Cypress Farms Ditch, Super., 180 A. 536.

Fla.—State ex rel. Hughes v. Wentworth, 185 So. 357, 135 Fla. 565—State ex rel. Holloway v. Keller, 182 So. 779, 133 Fla. 335—Ex parte Lewis, 135 So. 147, 101 Fla. 624.

Ind.—Bolivar Tp. Board of Finance of Benton County v. Hawkins, 191 N.E. 158, 207 Ind. 171, 96 A.L.R. 271—Wayne Tp. v. Brown, 186 N.E. 841, 205 Ind. 437—National Car Coupler Co. v. Sullivan, 126 N.E. 494, 73 Ind.App. 442.

Iowa.—Priest v. Whitney Loan & Trust Co., 261 N.W. 374, 219 Iowa 1281—Wagner v. Kelso, 193 N.W. 1, 195 Iowa 959.

Kan.—Barker v. Kansas City, 88 P. 2d 1071, 149 Kan. 696.

Ky.—Logan v. City of Louisville, 142 S.W.2d 161, 283 Ky. 518—Martin v. Louisville Motors, 125 S.W. 2d 241, 276 Ky. 696—Ravitz v. Steurele, 77 S.W.2d 360, 257 Ky. 108—Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Ass'n, 271 S.W. 695, 208 Ky. 643, affirmed 48 S.Ct. 291, 276 U.S. 1, 72 L.Ed. 473.

La.—State ex rel. Ellis v. Ferguson, 97 So. 415, 154 La. 237—Connell v. Commission Council of City of Baton Rouge, 96 So. 657, 153 La. 788.

Mich.—Smith v. Behrendt, 270 N.W. 227, 278 Mich. 91.

Miss.—Jefferson Standard Life Ins. Co. v. Noble, 188 So. 289, 185 Miss. 360.

Mo.—State ex inf. McKittrick v. Whittle, 63 S.W.2d 100, 333 Mo. 705, 88 A.L.R. 1099—State ex rel. Barrett v. Dallmeyer, 245 S.W. 1066, 295 Mo. 638.

Mont.—State v. Safeway Stores, 76 P.2d 81, 106 Mont. 182.

Neb.—State ex rel. Nebraska State Bar Ass'n v. Bachelor, 297 N.W. 138.

N.H.—Haselton v. Interstate Stage Lines, 133 A. 451, 82 N.H. 327, 47 A.L.R. 218.

N.J.—Ryan v. Housing Authority of City of Newark, 15 A.2d 647, 125 N.J.Law 336—Rocker v. Cardinal Building & Loan Ass'n of Newark, 179 A. 667, 13 N.J.Misc. 397.

N.Y.—In re Watson's Estate, 123 N.E. 758, 226 N.Y. 384, reversing 174 N.Y.S. 19, 186 App.Div. 48, which affirmed, 172 N.Y.S. 29, 104 Misc. 212, reargument denied 125 N.E. 926, 227 N.Y. 584, and amendment of remittitur granted 126 N.E. 924, 227 N.Y. 645, affirmed Watson v. State Comptroller of New York, 41 S.Ct. 43, 254 U.S. 122, 65 L.Ed. 170—Delaware & Hudson Co. v. Utica, C. & B. R. Co., 21 N.Y.S.2d 410, 174 Misc. 403, affirmed 20 N.Y.S.2d 1012, 259 App.Div. 969, appeal granted 21 N.Y.S.2d 393, 259 App. Div. 986—Handler v. Peter Doelger Brewing Corporation, 17 N.Y. S.2d 275, 173 Misc. 173, affirmed 20 N.Y.S. 404, 259 App.Div. 846, reargument denied 20 N.Y.S. 998, 259 App.Div. 914—Guerlain, Inc., v. F. W. Woolworth Co., 14 N.Y.S. 2d 163, 171 Misc. 990—Bessan v. Public Service Co-Ordinated Transport, 237 N.Y.S. 689, 135 Misc. 368—Browne v. City of New York, 210 N.Y.S. 786, 125 Misc. 1, reversed on other grounds 211 N.Y.S. 306, 213 App.Div. 206, and affirmed 149 N.E. 211, 241 N.Y. 96.

N.C.—Smith v. Fidelity & Deposit Co. of Baltimore, Md., 132 S.E. 792, 191 N.C. 643, error dismissed Fidelity & Deposit Co. of Maryland v. State of North Carolina, 48 S.Ct. 156, 275 U.S. 505, 72 L.Ed. 396—Tobacco Growers' Co-op. Ass'n v. Jones, 117 S.E. 174, 185 N.C. 265, 33 A.L.R. 231.

N.D.—Village of North Fargo v. City of Fargo, 192 N.W. 977, 49 N.D. 597.

Okl.—Chicago, R. I. & P. Ry. Co. v. Gist, 190 P. 878, 79 Okl. 8.

Pa.—Commonwealth ex rel. Kelley v. Pommer, 199 A. 485, 330 Pa. 421.

R.I.—Baginski v. Alcoholic Beverage Commission, 4 A.2d 265.

Tex.—Evans v. American Pub. Co., 13 S.W.2d 358, 118 Tex. 433, answering certified question, Civ.App., 8 S.W.2d 809, and rehearing denied 16 S.W.2d 516, 118 Tex. 433, and 16 S.W.2d 984—Trinity Portland Cement Co. v. Lion Bonding & Surety Co., Com.App., 229 S.W. 483, reversing Lion Bonding & Surety Co. v. Trussed Concrete Steel Co. of Texas, Civ.App., 204 S.W. 1176—Hurt v. Cooper, Civ.App., 113 S.W.2d 929, conforming to certified questions, 110 S.W.2d 896, 130 Tex. 433—Humble Oil & Refining Co. v. Railroad Commission of Texas, Civ.App., 85 S.W.2d 813, error dismissed—Moss v. Bross, Civ.App., 221 S.W. 343.

Vt.—State v. Reynolds, 1 A.2d 730, 109 Vt. 308.

Wash.—Western Finance Corporation v. Thurston County, 23 P.2d 576, 173 Wash. 455—State v. Superior Court in and for Walla Walla County, 223 P. 3, 123 Wash. 460.

Wis.—State ex rel. Torres v. Krawczak, 259 N.W. 607, 217 Wis. 593—Polzin v. Wachtl, 245 N.W. 182, 209 Wis. 289—Town of Bell v. Bayfield County, 239 N.W. 503, 206 Wis. 297.

23 C.J. p. 122 note 95.

Tax on intangibles

In determining validity of tax on intangibles, court may take notice of fact that intangibles have escaped taxation in state.—Redfield v. Fisher, 292 P. 813, 135 Or. 180, 73 A.L.R. 721, rehearing denied Redfield v. Norblad, 295 P. 461, 135 Or. 180, 73 A.L.R. 721, and certiorari denied Fisher v. Redfield, 52 S.Ct. 6, 284 U.S. 617, 76 L.Ed. 526.

Tax sales

It is general knowledge that, during present economic depression and prior to enactment of statute, there were many sales of land for taxes.—Grieb v. National Bank of Kentucky's Receiver, 68 S.W.2d 21, 252 Ky. 753.

36. U.S.—U. S. v. Darby, Ga., 61 S.Ct. 451, 312 U.S. 100, 85 L.Ed. 609, 132 A.L.R. 1430, reversing, D.C., 32 F.Supp. 734—Commonwealth of Kentucky, for Use and Benefit of Kern v. Maryland Casualty Co. of Baltimore, Md., C.C.A.Ky., 112 F. 2d 352.

Iowa.—Massachusetts Mut. Life Ins. Co. v. Shenkberg-Moore Realty Co., 281 N.W. 825, 225 Iowa 1148.

Mo.—Wyatt v. Kansas City Art Institute, 88 S.W.2d 210, 229 Mo.App. 1166.

acts of the legislative department of the state, the courts may examine the legislative history of statutes.[37] The history of legislation embodied in a particular statute may be judicially noticed.[38] Courts may consider the "history of the times" to notice that a proposed constitutional amendment was treated as having failed of adoption.[39] The court is also required to take judicial notice of the general conditions to which the law applies.[40] The mischief which would result from a particular construction of a constitutional provision has been judicially noticed.[41]

The laws of an antecedent government,[42] whether of another nation,[43] state,[44] or territory,[45] which prevailed in territory subsequently acquired by the United States or erected into a state or territory are not for the purposes of judicial notice to be regarded as foreign laws, but rather as laws of the state or territory into which such territory was created, and hence they may be judicially noticed in all cases where the laws of such states and territories are the subject of judicial notice.

§ 17. Unwritten Law

The unwritten law of the forum will be judicially noticed.

Courts judicially know as of course the unwritten law of the forum, which it is their function to administer,[46] including public policy.[47] A common-law court as well as courts of equity will judicially notice the doctrines of equity jurisprudence and practice;[48] and conversely a court sitting in equity judicially knows the doctrines of the common law and the general rules for their administration.[49]

Opinions of the attorney general have been judicially noticed.[50]

§ 18. Laws of Other States, Territories, or Provinces

In the absence of a statute to the contrary, courts do not take judicial notice of the laws of other states.

It is a general rule that the courts of one state do not take judicial notice of the laws of another state,[51] but this rule has been sharply criticiz-

N.Y.—People v. Koch, 294 N.Y.S. 987, 250 App.Div. 623.
Tex.—Gilley v. Ætna Life Ins. Co., Com.App., 35 S.W.2d 136, reversing Ætna Life Ins. Co. v. Gilley, Civ. App., 12 S.W.2d 821, and instructions conformed to 41 S.W.2d 1046.

Uniform Partnership Act

It is well known that Uniform Partnership Act was enacted to give effect to the common-law theory that partners are joint principals in partnership transactions, and not to give effect to legal entity theory.—Sumner v. Brown, 167 A. 315, 312 Pa. 124.

37. Cal.—People v. Sterling Refining Co., 261 P. 1080, 86 Cal.App. 558.

38. Tex.—Fortinberry v. State, Com. App., 283 S.W. 146, reversing State v. Fortinberry, Civ.App., 276 S.W. 466.

39. Ark.—Babb v. City of El Dorado, 278 S.W. 649, 170 Ark. 10.

40. Wis.—First Nat. Bank v. City of Hartford, 203 N.W. 721, 187 Wis. 290, reversed on other grounds 47 S.Ct. 462, 273 U.S. 548, 71 L.Ed. 767, and vacated 214 N. W. 617, 193 Wis. 494.

41. **Buyers of public securities**

The supreme court will take judicial notice that to construe the Constitution as allowing the taxation of bonds of local municipalities would drive from the markets, as prospective buyers of public securities of the state, her counties, and her municipalities, every person or corporation resident within the state. —National Surety Co. v. Starkey, 170 N.W. 582, 41 S.D. 356.

42. Tex.—Martinez v. Gutierrez, Com.App., 66 S.W.2d 678, affirming Gutierrez v. Martinez, Civ.App., 37 S.W.2d 833.
23 C.J. p 128 note 79.

43. U.S.—Municipality of Ponce v. Roman Catholic Apostolic Church, Puerto Rico, 28 S.Ct. 737, 210 U. S. 296, 52 L.Ed. 1068.
Tex.—Martinez v. Gutierrez, Com. App., 66 S.W.2d 678, affirming Gutierrez v. Martinez, Civ.App., 37 S. W.2d 833.
23 C.J. p 128 note 80.

44. W.Va.—Northwestern Bank v. Machir, 18 W.Va. 271.
23 C.J. p 128 note 81.

45. Okl.—Guthrie v. Mitchell, 132 P. 138, 38 Okl. 55.
23 C.J. p 128 note 82.

46. Fla.—Ballenger v. Mark, 155 So. 106, 115 Fla. 95.
Ky.—Owens v. Witmer Co., 121 S.W. 2d 966, 275 Ky. 439.
Tex.—Montgomery v. Huff, Civ.App., 11 S.W.2d 237, error refused.
23 C.J. p 128 note 83.

Construction of will

Judicial notice is taken that in Massachusetts testator's intention controls interpretation of his will. —Holmes v. Dunning, 157 N.E. 358, 260 Mass. 250.

47. Fla.—Hall v. O'Neil Turpentine Co., 47 So. 609, 56 Fla. 324, 16 Ann. Cas. 738.

48. Tex.—Nimmo v. State, 7 Tex. 26.
23 C.J. p 128 note 85.

49. N.Y.—Southgate v. Montgomery, 1 Paige 41.
23 C.J. p 128 note 86.

50. U.S.—Louisiana v. McAdoo, 34 S.Ct. 938, 234 U.S. 627, 58 L.Ed. 1506.
La.—Coco v. Jones, 97 So. 337, 154 La. 124.
Miss.—Briscoe v. Buzbee, 143 So. 887, 163 Miss. 574, overruling suggestion of error 143 So. 407, 163 Miss. 574.

51. Cal.—Nesbit v. MacDonald, 263 P. 1007, 203 Cal. 219.
Del.—Nye Odorless Incinerator Corporation v. Felton, 162 A. 504, 5 W.W.Harr. 236—Wolf v. Keagy, 136 A. 520, 3 W.W.Harr. 362.
Idaho.—Kleinschmidt v. Scribner, 30 P.2d 362, 54 Idaho 185—Cummings v. Lowe, 10 P.2d 1059, 52 Idaho 1.
Ill.—Schaefer v. Dippel, 250 Ill.App. 184—City of Detroit v. Wabash Refining Co., 223 Ill.App. 246.
Kan.—Loewenstein v. Missouri State Life Ins. Co., 242 P. 123, 120 Kan. 75.
Ky.—Travelers Ins. Co. v. Mahon, 117 S.W.2d 909, 273 Ky. 691.
La.—Taylor v. Terzia, 132 So. 781, 171 La. 1040—Security Sales Co. of Louisiana v. Blackwell, 120 So. 250, 9 La.App. 651, modified on other grounds 120 So. 45, 167 La. 667.
Md.—Universal Credit Co. v. Marks, 163 A. 810, 164 Md. 130.
Mass.—John B. Frey Co. v. S. Silk, Inc., 140 N.E. 259, 245 Mass. 534.
Mo.—Corbett v. Terminal R. Ass'n of St. Louis, 82 S.W.2d 97, 336 Mo. 972—First Nat. Bank v. Security Mut. Life Ins. Co., of Binghamton, N.Y., 222 S.W. 832, 283 Mo. 336—Commercial Inv. Co. v. Citizen's State Bank of Pratt, Kan., 54 S. W.2d 424, 227 Mo.App. 498—Lugar v. Missouri Pac. R. Co., 283 S.W.

ed,[52] and the doctrine of judicial notice has been invoked, in the absence of express statutory provision therefor, with respect to the laws of a sister state.[53] In some states the rule has been abrogated by statute, and under such statutes the courts are required or are authorized to take judicial knowledge of the laws of other states,[54] or are authorized to do so when the printed and authenticated volumes are pre-

738, 221 Mo.App. 679—Major v. Aetna Life Ins. Co., App., 260 S. W. 758—Ankrum v. Commercial State Bank of Ridgeway, 244 S.W. 951, 211 Mo.App. 684.

Neb.—Black v. National Union Fire Ins. Co., 240 N.W. 512, 513, 122 Neb. 377, citing **Corpus Juris.**

N.Y.—Vander Horst v. Kittredge, 241 N.Y.S. 302, 229 App.Div. 126—Gavin v. Malherbe, 261 N.Y.S. 373, 146 Misc. 51, affirmed 266 N.Y.S. 897, 240 App.Div. 779, affirmed 191 N.E. 486, 264 N.Y. 403—Ferguson v. Harder, 252 N.Y.S. 783, 141 Misc. 466—In re Mosley's Will, 247 N.Y.S. 520, 138 Misc. 847—In re Larsen's Estate, 242 N.Y.S. 486, 137 Misc. 271—Squier v. Houghton, 226 N.Y.S. 162, 131 Misc. 129.

N.C.—Keasler v. Mutual Life Ins. Co. of New York, 99 S.E. 97, 177 N.C. 394.

Ohio.—Herrell v. Hickok, 11 N.E.2d 339, 133 Ohio St. 66, affirming 13 N.E.2d 358, 57 Ohio App. 213.

Or.—Monnet v. Ullman, 276 P. 244, 129 Or. 44—In re Hodgkin's Estate, 223 P. 738, 110 Or. 381, denying rehearing 221 P. 169, 110 Or. 381.

Pa.—In re Baughman's Estate, 126 A. 58, 281 Pa. 23—Rodgers & Hagerty, Inc. v. Baker, 7 Pa.Dist. & Co. 286.

R.I.—Farrell v. Employers Liability Assur. Corporation, 190 A. 466, 57 R.I. 389.

S.C.—Copeland v. Craig, 8 S.E.2d 858, 193 S.C. 484.

Tex.—U. S. v. Rose, Civ.App., 57 S.W.2d 350, error dismissed—Bell v. Southern Casualty Co., Civ.App., 267 S.W. 531.

Utah.—Home Brewing Co. of Chicago Heights v. American Chemical & Ozokerite Co., 198 P. 170, 58 Utah 219.

Vt.—Wellman v. Mead, 107 A. 396, 93 Vt. 322.

Wash.—Walnut Park Lumber & Coal Co. v. Roane, 17 P.2d 896, 171 Wash. 362.

Wis.—Ellis v. Gordon, 231 N.W. 585, 202 Wis. 134.

23 C.J. p 131 note 10.

Difference from domestic law

(1) The courts do not take judicial notice of the fact that the law of another state differs from that of their own state.

Ind.—Krotts v. Clark Const. Co., 132 N.E. 673, 191 Ind. 354, overruling petition 131 N.E. 921, 191 Ind. 354.

N.Y.—Phœnix Ins. Co. v. Church, 81 N.Y. 218, 37 Am.R. 494, 59 How. Pr. 293, reversing 56 How.Pr. 493, reversing 56 How.Pr. 29.

Pa.—Bubbis v. Duffy & Bros., Inc., 14 Pa.Dist. & Co. 281—Rodgers & Hagerty, Inc. v. Baker, 7 Pa.Dist. & Co. 286

(2) Such fact, however, may be noticed where it is so generally known as to be a matter of common knowledge.

Cal.—Commonwealth Acceptance Corporation v. Jordan, 246 P. 796, 198 Cal. 618.

Mass.—Petition of Commonwealth-Atlantic Nat. Bank of Boston, 144 N.E. 443, 249 Mass. 440.

Effect of judgment

The force and effect given to an Oklahoma judgment must be determined by the laws of Texas, where no proof was made of any construction given thereto by the laws of Oklahoma.—Walker v. Garland, Tex.Com.App., 235 S.W. 1078, affirming, Civ.App., 220 S.W. 399—American Nat. Bank of Oklahoma v. Garland, Tex.Com.App., 235 S.W. 562, affirming American Nat. Bank of Oklahoma City, Okl. v. Garland, Civ.App., 220 S.W. 397.

Not required

The court is not required to take judicial cognizance of the laws of another state.—Bass v. African Methodist Episcopal Church, 116 S.E. 816, 155 Ga. 57.

Questions of fact

(1) Since courts are not required to take judicial notice of the laws of another state, such laws are questions of fact to be pleaded and proved the same as any other fact.

Del.—Silverman v. National Assets Corporation, Ch., 12 A.2d 389.

Ga.—Bolton v. Bluestein, 191 S.E. 388, 55 Ga.App. 782.

Idaho.—Mason v. Pelkes, 59 P.2d 1087, 57 Idaho 10, certiorari denied Pelkes v. Mason, 57 S.Ct. 319, 299 U.S. 615, 81 L.Ed. 453.

Ill.—Davis v. Mosbacher, 252 Ill.App. 536—Davis v. Wirth, 249 Ill.App. 544.

Iowa.—Rastede v. Chicago, St. P., M. & O. Ry. Co., 212 N.W. 751, 203 Iowa 430.

Ky.—Orendorf v. Hunt, 114 S.W.2d 86, 272 Ky. 334—Central Consumers' Co. v. Ralston, 259 S.W. 67, 202 Ky. 94—U. S. Cast Iron Pipe & Foundry Co. v. Henry Vogt Mach. Co., 206 S.W. 806, 182 Ky. 473.

La.—Succession of Marinoni, 148 So. 888, 177 La. 592—Alexander v. Gray, App., 181 So. 639—General Motors Acceptance Corporation v. Budreaux, 119 So. 735, 10 La.App. 626, reversed on other grounds 121 So. 338, 10 La.App. 626.

Md.—Prudential Ins. Co. of America v. Shumaker, 12 A.2d 618, 178 Md. 189.

Mass.—Royle v. Worcester Buick Co., 137 N.E. 531, 243 Mass. 143.

N.Y.—Read v. Lehigh Valley R. Co., 31 N.E.2d 891, 284 N.Y. 435, modifying 17 N.Y.S.2d 99, 258 App.Div. 948 appeal granted 18 N.Y.S.2d 1002, 259 App.Div. 705—Mencher v. Goldstein, 269 N.Y.S. 846, 240 App.Div. 290—Phillips v. Griffen, 259 N.Y.S. 105, 236 App.Div. 209—Harmon v. Alfred Peats Co., 214 N.Y.S. 353, 216 App.Div. 368, reversed on other grounds 154 N.E. 314, 243 N.Y. 473—Keeler v. Templeton, 298 N.Y.S. 193, 164 Misc. 113, motion denied 300 N.Y.S. 868, 165 Misc. 392—In re Smith's Estate, 242 N.Y.S. 464, 136 Misc. 863—Los Angeles Inv. Securities Corporation v. Joslyn, 12 N.Y.S.2d 370, reversed on other grounds 14 N.Y.S.2d 798, 258 App.Div. 762, motion denied 15 N.Y.S.2d 175, 258 App.Div. 821, motion granted 16 N.Y.S.2d 875, 258 App.Div. 1018, motion granted 25 N.E.2d 146, 282 N.Y. 592, appeal dismissed 26 N.E.2d 968, 282 N.Y. 438.

Ohio.—Nickles v. Fenner & Beane, 17 N.E.2d 283, 59 Ohio App. 33—Devine v. Detroit Trust Co., 3 N.E.2d 1001, 52 Ohio App. 446—Yeazel v. Louisville & N. R. Co., 13 Ohio App. 499.

Pa.—In re Craver's Estate, 179 A. 606, 319 Pa. 282—Cochran v. Shetler, 133 A. 232, 286 Pa. 226.

Tex.—American Nat. Bank of Oklahoma v. Garland, Com.App., 235 S.W. 562, affirming American Nat. Bank of Oklahoma City, Okl. v. Garland, Civ.App., 220 S.W. 397—Metropolitan Life Ins. Co. v. Ray, Civ.App., 105 S.W.2d 377.

Vt.—Hillmer v. Grondahl, 199 A. 255, 109 Vt. 388—Grow v. Washburn, 115 A. 226, 95 Vt. 370.

Wis.—Switzer v. Weiner, 284 N.W. 509, 230 Wis. 599.

(2) This is particularly true as to the law in a sister state at a given time.—Redmond v. New Jersey Historical Soc., 18 A.2d 275, 129 N.J.Eq. 57.

52. Pa.—Somers, Ex'x v. Hildenbrand, 29 Pa.Dist. & Co. 229.

53. N.H.—Saloshin v. Houle, 155 A. 47, 85 N.H. 126.

54. Ark.—Rice v. Metropolitan Life Ins. Co., 238 S.W. 772, 152 Ark. 498, 24 A.L.R. 143.

Cal.—First-Trust Joint Stock Land Bank of Chicago v. Meredith, 53 P.2d 958, 5 Cal.2d 214—Du Bois v. Owen, 60 P.2d 1019, 16 Cal.App.2d 552—Tornquist v. Johnson, 13 P.2d 405, 124 Cal.App. 634—Coady v. Legg, 12 P.2d 969, 124 Cal.App. 591.

Conn.—Curry v. Jockmus, 138 A. 809,

sented to the court for examination.[55] Under The Uniform Judicial Notice of Foreign Law Act, the courts are required to take judicial notice of the common law and statutes of every state, territory, and other jurisdiction of the United States,[56] but in order for a litigant to invoke the benefits of such foreign law he must give reasonable notice in the pleadings or otherwise to the adverse party of his intention to do so, such notice being a prerequisite to offering proof of such foreign law or asking the court to take judicial notice thereof.[57] A statute requiring the court to take judicial notice of the statutes and judicial decisions of another state when pleaded does not bring into court the procedure of another state, and refers to the law of another state which a party has a right to plead.[58] Some of the state courts have held that, for the purpose of giving full faith and credit to a judgment of another state, as required by the constitution of the United States, they will take judicial notice of the laws of such other state;[59] but this view has been repudiated by the supreme court of the United States and by many of the state courts.[60]

Judicial notice may be taken that statutes of a particular type have been sustained in various states and their constitutionality upheld by the United States supreme court.[61]

§ 19. Constitutions and Public Statutes

In the absence of statutory authorization, judicial notice will not be taken of the constitutions and public statutes of other states.

It is a general rule that a state or territorial court does not judicially notice the constitution or statutes of another state or territory.[62] In an ever in-

106 Conn. 697—Tuttle v. Jockmus, 138 A. 804, 106 Conn. 683—Warneke v. Preissner, 131 A. 25, 103 Conn. 503—Appeal of Eva, 104 A. 238, 93 Conn. 38.

Ill.—Ford Motor Co. v. National Bond & Investment Co., 14 N.E.2d 306, 294 Ill.App. 585.

Mass.—Holmes v. Dunning, 157 N.E. 358, 260 Mass. 250.

Miss.—Parker v. McCaskey Register Co., 171 So. 337, 177 Miss. 347.

N.Y.—People ex rel. Higley v. Millspaw, 24 N.E.2d 117, 281 N.Y. 441, reversing 12 N.Y.S.2d 435, 257 App. Div. 40.

N.C.—Suskin v. Hodges, 4 S.E.2d 891, 216 N.C. 333.

Pa.—Astrin v. Metropolitan Life Ins. Co., 17 A.2d 887, 341 Pa. 120—United Factors Corporation v. Mogul, 16 A.2d 735, 142 Pa.Super. 506.

23 C.J. p 131 note 12.

Pleading and proof

(1) Under some statutes the court is not required to take judicial notice of the laws of a sister state, and in order for a party to take advantage of the statute he must call the court's attention to such foreign law by pleadings or proof.—Murphy v. Smith, 29 N.E.2d 726, 307 Mass. 64—Hite v. Hite, 17 N.E.2d 176, 301 Mass. 294, 119 A.L.R. 517—Bradbury v. Central Vermont Ry., 12 N.E.2d 732, 299 Mass. 230—Hanson v. Hanson, 191 N.E. 673, 287 Mass 154, 93 A.L.R. 701.

(2) A reviewing court, under such a statute, is not required to take judicial notice of the law of another state except as it is brought to its attention by the record or the briefs.—Smith v. Brown, 19 N.E.2d 732, 302 Mass. 432.

(3) Where reference is made in the brief of one of the parties to the law of a sister state, the appellate court may determine the question according to the law of such state.—Hite v. Hite, supra.

55. N.D.—State v. Rose, 170 N.W. 879, 41 N.D. 251.

56. **Legislative intent**

By the enactment of such law the legislature intended to provide a simple, effective, and expedient method to enable the courts to ascertain the law of other states and territories of the United States.—Prudential Ins. Co. of America v. Shumaker, 12 A.2d 618, 178 Md. 139.

57. Md.—Prudential Ins. Co. of America v. Shumaker, supra.

Minn.—Patterson v. Consumers Roofing Co., 295 N.W. 401—In re Daniel's Estate, 294 N.W. 465.

58. Mo.—Menard v. Goltra, 40 S.W. 2d 1053, 328 Mo. 368.

59. Or.—Cousineau v. Cousineau, 63 P.2d 897, 155 Or. 184, 109 A.L.R. 643.

Wash.—Rubin v. Dale, 288 P. 223, 156 Wash. 676.

23 C.J p 131 note 15.

"Ordinarily the law of a sister state is a fact which must be proved by evidence the same as any other fact, but state courts may, when it is anticipated that a federal question may arise as to the effect of a judgment of a court of another state, take judicial notice of the law of such other state."—Hewett v. Hewett, 116 A. 883, 885, 44 R.I. 308.

60. U.S.—Lloyd v. Matthews, Ky., 15 S.Ct. 70, 155 U.S. 222, 39 L.Ed. 128.

Wis.—Osborn v. Blackburn, 47 N.W. 175, 78 Wis. 209, 23 Am.S.R. 460, 10 L.R.A. 367.

23 C.J. p 131 note 16.

61. Pa.—Rigby v. Great Atlantic & Pacific Tea Co., 13 A.2d 89, 139 Pa.Super. 543.

62. U.S.—Herbert v. Roxana Petroleum Corporation, D.C.Ill., 12 F.2d 81.

Ala.—Lloyds America v. Julian, 179 So. 524, 235 Ala. 465—George D. Witt Shoe Co. v. Mills, 140 So. 578, 224 Ala. 500—State v. McElroy, 125 So. 903, 220 Ala. 452—Alger-Sullivan Lumber Co. v. Union Trust Co., 118 So. 760, 218 Ala. 448.

Ariz.—Bache v. Bache, 262 P. 11, 33 Ariz. 45.

Colo.—Mitchell v. Liggett, 199 P. 486, 70 Colo. 219.

Conn.—Dyer v. Smith, 12 Conn. 384.

Del.—Holland v. Universal Life Co., 180 A. 328, 7 W.W.Harr. 39—Mackenzie Oil Co. v. Omar Oil & Gas Co., 154 A. 883, 4 W.W.Harr. 435, affirmed Phœnix Oil Co. v. Mackenzie Oil Co., 154 A. 894, 4 W.W. Harr. 460.

Ind.—New York, C. & St. L. R. Co. v. Croy, 127 N.E. 146, 189 Ind. 343—Greaf v. Breitenstein, 187 N.E 347, 97 Ind.App. 525—Crume v. Brightwell, 122 N.E. 230, 69 Ind. App. 404.

Ky.—Lape v. Miller, 263 S.W. 22, 203 Ky. 742.

La.—E. B. Hayes Machinery Co. v. Eastham, 84 So. 898, 147 La. 347—Surgan v. Parker, App., 181 So. 86.

Md.—Bartlett v. Smith, 160 A. 440, 161 A. 509, 162 Md. 478.

Minn.—Krause v. Chicago, M & St. P. Ry. Co., 202 N.W. 345, 162 Minn. 102.

Mo.—Rositzky v. Rositzky, 46 S.W. 2d 591, 329 Mo. 662—Crary v. Standard Inv. Co., 285 S.W. 459, 313 Mo. 448—Bopst v. Williams, 229 S.W. 796, 287 Mo. 317—Morriss v. Finkelstein, App., 127 S.W.2d 46—McClintock v. Skelly Oil Co., 114 S.W.2d 181, 232 Mo.App. 1204—Shout v. Gunite Concrete & Construction Co., 41 S.W.2d 629, 226 Mo.App. 388—Scott v. Vincennes Bridge Co., 299 S.W. 145, 220 Mo.

creasing number of jurisdictions, however, by virtue of statutory enactments, courts are required, or are permitted, to take judicial notice of the constitutions and public statutes of other states.[63] The

App. 1213—St. Louis Union Trust Co. v. Universal Glass Co., 299 S.W. 132, 220 Mo.App. 1205—Dunbar v. Iowa State Bank, 295 S.W. 835, 221 Mo.App. 979—Ankrum v. Commercial State Bank of Ridgeway, 244 S.W. 951, 211 Mo.App. 684—Hollipeter, Shonyo & Co. v. Maxwell, 244 S.W. 113, 205 Mo.App. 357.

Mont.—American Sav. Bank & Trust Co. v. Chapman, 202 P. 385, 61 Mont. 408.

N.M.—Gehman v. Lair, 288 P. 604, 35 N.M. 17.

N.Y.—Hale v. West Porto Rico Sugar Co., 193 N.Y.S. 555, 200 App. Div. 577—Shaw v. Blainey, 277 N.Y.S. 466, 154 Misc. 495—Smart v. Smart, 253 N.Y.S. 92, 142 Misc. 121—In re Smith's Estate, 242 N.Y.S. 464, 136 Misc. 863—People v. Marlowe, 203 N.Y.S. 474, 40 N.Y.Cr. 448.

N.C.—Howard v. Howard, 158 S.E. 101, 200 N.C. 574.

Ohio.—Herrell v. Hickok, 11 N.E.2d 869, 133 Ohio St. 66, affirming 13 N.E.2d 358, 57 Ohio App. 213—Louisville & N. R. Co. v. Greene, 149 N.E. 876, 113 Ohio St. 546.

Or.—Hersey v. Gegenheimer, 241 P. 976, 116 Or. 464.

R.I.—Columbian Nat. Life Ins. Co. v. Industrial Trust Co., 190 A. 787, 57 R.I. 468, denying reargument 190 A. 13, 57 R.I. 325—Farrell v. Employers Liability Assur. Corporation, 190 A. 466, 57 R.I. 389.

S.C.—Copeland v. Craig, 8 S.E.2d 858, 193 S.C. 484.

Utah.—Dickson v. Mullings, 241 P. 840, 66 Utah 282, 43 A.L.R. 136.

Vt.—Bristol v. Noyes, 174 A. 924, 106 Vt. 418.

23 C.J. p 133 note 30.

Decision

The courts of Montana cannot take judicial notice that a decree of a probate court in California was made under a particular statute.—In re Bruhns' Estate, 193 P. 1115, 58 Mont. 526.

Question of fact

Since courts cannot take judicial notice of the statutes of other states, such law is a question of fact and must be pleaded and proved the same as any other fact.

Ala.—Kugle v. Harpe, 176 So. 617, 234 Ala. 494, remanding cause 176 So. 616, 27 Ala.App. 566.

Ga.—Jones v. Lawman, 194 S.E. 416, 56 Ga.App. 764, transferred, see 190 S.E. 607, 184 Ga. 25.

Ky.—Norfolk & W. Ry. Co. v. Stewart, 111 S.W.2d 1044, 271 Ky. 348.

Me.—Clark v. Metropolitan Life Ins. Co., 135 A. 357, 126 Me. 7.

Mo.—Crary v. Standard Inv. Co., 285 S.W. 459, 313 Mo. 448.

N.Y.—Hanna v. Lichtenhein, 169 N.Y.S. 589, 182 App.Div. 94, reversed on other grounds 122 N.E. 625, 225 N.Y. 579—Anonymous v. Anonymous, 22 N.Y.S.2d 598, 174 Misc. 906—Gill v. Gill, 18 N.Y.S.2d 114.

N.C.—In re Pruden's Estate, 144 S.E. 533, 196 N.C. 69.

Ohio.—Yeazel v. The Louisville & Nashville R. Co., 32 Ohio C.A. 492—Kerr v. Bowers, 26 Ohio Cir.Ct., N.S., 289.

Or.—McIntosh Live Stock Co. v. Buffington, 241 P. 393, 116 Or. 399.

Pa.—Midwest Piping & Supply Co. v. Thomas Spacing Mach. Co., 167 A. 636, 109 Pa.Super. 571.

S.C.—Copeland v. Craig, 8 S.E.2d 858, 193 S.C. 484.

Tex.—Broderick v. Pardue, Civ.App., 102 S.W.2d 252, error dismissed.

Vt.—General Motors Acceptance Corporation v. Silsby, 187 A. 525, 108 Vt. 375.

Statute of limitations

Courts do not judicially know that foreign states have a statute limiting the time in which certain classes of actions may be commenced.—Culp v. Watkins, 122 N.E. 686, 69 Ind.App. 735—Culp v. Butler, 122 N.E. 684, 69 Ind.App. 668.

63. Ark.—F. W. Offenhauser & Co. v. Cupp, 16 S.W.2d 7, 179 Ark. 361—Great American Ins. Co. v. Stevens, 10 S.W.2d 356, 178 Ark. 84—Virgil R. Coss Mortg. Co. v. Jordan, 267 S.W. 590, 167 Ark. 34—Logan v. Missouri Valley Bridge & Iron Co., 249 S.W. 21, 157 Ark. 528.

Cal.—Anderson v. Derrick, 32 P.2d 1078, 220 Cal. 770—Terry Trading Corporation v. Barsky, 292 P. 474, 210 Cal. 428.

Conn.—Warneke v. Preissner, 131 A. 25, 103 Conn. 503.

Ill.—Ford Motor Co. v. National Bond & Investment Co., 14 N.E.2d 306, 294 Ill.App. 585—Affiliated Underwriters Loan & Finance Co. v. Waits & Baxter Lumber Co., 3 N.E.2d 154, 284 Ill.App. 650—Christensen v. Blinstrup, 1 N.E.2d 273, 284 Ill.App. 163.

Mass.—Portland Maine Pub. Co. v. Eastern Tractors Co., 193 N.E. 888, 289 Mass. 13.

Mich.—Laughlin v. Michigan Motor Freight Lines, 268 N.W. 887, 276 Mich. 545.

Miss.—Floyd v. Vicksburg Cooperage Co., 126 So. 395, 156 Miss. 567.

N.Y.—People ex rel. Higley v. Millspaw, 24 N.E.2d 117, 281 N.Y. 441, reversing 12 N.Y.S.2d 435, 257 App.Div. 40.

Or.—Haley v. Sprague, 111 P.2d 1031.

Vt.—In re Holden's Estate, 1 A.2d 721, 110 Vt. 60, 119 A.L.R. 487.

Wis.—In re Kelly's Will, 204 N.W. 475, 187 Wis. 422.

23 C.J. p 133 note 29.

Absence of statute

Under a statute requiring judicial notice to be taken of statutes of sister states, the court will notice the fact that in a particular field, such as automobile guest statutes, a sister state has no statutory enactments. O'Neal v. Caffarello, 25 N.E.2d 534, 303 Ill.App. 574.

Cases decided before adoption of such statutes adhered to the general rule that judicial notice would not be taken.—Donian v. Danielian, 266 P. 817, 90 Cal.App. 675—23 C.J. p 133 note 29 [a].

Operation of statute

The statute requiring courts to take judicial notice of common law and statutes of every state and to determine such laws, subject to review, is inapplicable to case tried before such statute went into effect.—O'Neal v. Caffarello, 25 N.E.2d 534, 303 Ill.App. 574.

Pleaded statutes

(1) Under some statutes, where the law of another state is pleaded, the court will take judicial notice of the public statutes of such state.—Barnes v. St. Louis-San Francisco Ry. Co., 92 S.W.2d 164, 338 Mo. 497—Corbett v. Terminal R. Ass'n of St. Louis, 82 S.W.2d 97, 336 Mo. 972—Oxford v. St. Louis-San Francisco Ry. Co., 52 S.W.2d 983, 331 Mo. 53—Esmar v. Haeussler, 115 S.W.2d 51, 234 Mo.App. 217, transferred, see 106 S.W.2d 412, 341 Mo. 33—Boneau v. Swift & Co., Mo.App., 66 S.W.2d 172—Byram v. East St. Louis Ry. Co., Mo.App., 39 S.W.2d 376—Noell v. Chicago & E. I. Ry. Co., Mo.App., 21 S.W.2d 937, certiorari denied Chicago & E. I. Ry. Co. v. Noell, 50 S.Ct. 465, 281 U.S. 766, 74 L.Ed. 1174.

(2) Under such a statute, pleading and proof of a foreign statute is necessary before a party can require the court to take judicial notice thereof.—Mississippi Cottonseed Products Co. v. First Nat. Bank in St. Louis, Mo.App., 142 S.W.2d 1106—Morriss v. Finkelstein, Mo.App., 127 S.W.2d 46—Esmar v. Haeussler, 115 S.W.2d 54, 234 Mo.App. 217, transferred, see 106 S.W.2d 412, 341 Mo. 33—Neff v. Sovereign Camp, W. O. W., 48 S.W.2d 564, 226 Mo.App. 899, certiorari denied Sovereign Camp, W. O. W. v. Neff, 52 S.Ct. 501, 286 U.S. 549, 76 L.Ed. 1285—Adamson v. Fogelstrom, 300 S.W. 841, 221 Mo.App. 1243.

(3) Judicial notice cannot be taken, under this statute, of sections of foreign laws which are neither pleaded nor proved, although other sections are well pleaded.—Noell v.

courts sometimes notice generally the legislative source of laws of another state or territory at a prior date,[64] and also notice, as a matter of common knowledge, that uniform or substantially like statutory provisions as to a certain matter exist in all or in a number of states.[65] Where such is a matter of common knowledge, the fact that a constitutional amendment or statute of the forum was patterned after that of another state may be judicially noticed.[66]

§ 20. Unwritten Law

In the absence of a statute to the contrary, courts do not take judicial notice of the unwritten law of another state.

The courts of one state, as a general rule, do not take judicial notice of the unwritten law or judicial decisions of sister states,[67] except for the purpose of construing the laws of the forum or determining what they are,[68] or as evidence of the common or general law.[69] Decisions of a state court construing its statutes will not be judicially noticed in a sister state,[70] except so far as they interpret the rules of the common law existing in the sister state, independently of the statutes.[71] However, the courts of some states notice generally that the common law prevails in divers sister states,[72] or that it was in force at one time in a particular sister state.[73] Judicial notice will be taken that the common law was declared to be a part of the fundamental law of

Chicago & E. I. Ry. Co., Mo.App., 21 S.W.2d 937, certiorari denied Chicago & E. I. Ry. Co. v. Noell, 50 S.Ct. 465, 281 U.S. 766, 74 L.Ed. 1174.

(4) A foreign statute pleaded, but not proved, is not in the case under such statute.—First Nat. Bank v. Gordon, Mo.App., 6 S.W.2d 60.

(5) A mere citation of the statute in the pleadings has been held to be insufficient to enable the court to take judicial notice thereof.—Smith v. Trimble-Compton Produce Co., 9 S.W.2d 865, 222 Mo.App. 777.

(6) Such a statute does not make applicable to a case any law which was not applicable before.—Menard v. Goltra, 40 S.W.2d 1053, 328 Mo. 368.

In Tennessee

(1) Under statute, the reviewing court can take judicial notice of the constitution and statutes of another state only when such laws are proved in the lower court.—Watkins v. Watkins, 22 S.W.2d 1, 160 Tenn. 1—Kaset v. Freedman, 120 S.W.2d 977, 22 Tenn.App. 213—Brown v. Hogan, 14 Tenn.App. 251—23 C.J. p 133 note 29 [b] (2).

(2) Where it appears that the statutes and cases appertaining thereto were read in evidence in the lower court, the reviewing court will take judicial notice thereof, as it is not necessary that they should be copied into the record.—Kaset v. Freedman, supra.

(3) Trial courts do not take notice of the laws of sister states, and such laws, when relied on, must be pleaded and proved.—Kennard v. Illinois Cent. R. Co., 148 S.W.2d 1017.

64. Tex.—Western Union Tel. Co. v. Parsley, 121 S.W. 226, 57 Tex.Civ.App. 8.
23 C.J. p 134 note 32.

65. Ill.—Hartliep Transit Co., for Use of Snow v. Central Mut. Ins. Co. of Chicago, 5 N.E.2d 879, 288 Ill.App. 140.
Wis.—Wisconsin Malting Co. v. City of Manitowoc, 274 N.W. 288, 225 Wis. 393.
23 C.J. p 134 note 33.

Internal affairs of cities

It is common knowledge that, for years prior to adoption of state constitution, legislatures of several states had repeatedly regulated the internal affairs of their cities, and that there had been great opposition to such legislation.—Town of Holyoke v. Smith, 226 P. 158, 75 Colo. 286.

66. Ark.—Paving Dist. No. 36 v. Little, 282 S.W. 971, 170 Ark. 1160.
Del.—Chicago Corporation v. Munds, 172 A. 452, 20 Del.Ch. 142.

67. Ala.—Smith v. Blinn, 127 So. 155, 221 Ala. 24.
Ky.—Lape v. Miller, 263 S.W. 22, 203 Ky. 742—Central Consumers' Co. v. Ralston, 259 S.W. 67, 202 Ky. 94.
Md.—Goldsborough v. Tinsley, 113 A. 861, 138 Md. 411.
Mo.—Rositzky v. Rositzky, 46 S.W.2d 591, 329 Mo. 662—Morriss v. Finkelstein, App., 127 S.W.2d 46—Ankrum v. Commercial State Bank of Ridgeway, 244 S.W. 951, 211 Mo.App. 684—Hollipeter, Shonyo & Co. v. Maxwell, 224 S.W. 113, 205 Mo.App. 357.
N.Y.—In re Weissmann's Will, 243 N.Y.S. 127, 137 Misc. 113, affirmed 247 N.Y.S. 901, 232 App.Div. 698.
Ohio.—Herrell v. Hickok, 11 N.E.2d 869, 133 Ohio St. 66 affirming 13 N.E.2d 358, 57 Ohio App. 213.
S.C.—Copeland v. Craig, 8 S.E.2d 858, 193 S.C. 484—American Nat. Bank of Winter Haven, Fla., v. Caldwell, 164 S.E. 613, 166 S.C. 194.
Tenn.—Illinois Cent. R. Co. v. Miles, 130 S.W.2d 111, 174 Tenn. 676—Kustoff v. Stuyvesant Ins. Co., 22 S.W.2d 356, 160 Tenn. 208.
Tex.—Ferguson-McKinney Dry Goods Co. v. Garrett, Com.App., 252 S.W. 738, reversing, Civ.App., 235 S.W. 245.
Vt.—Bristol v. Noyes, 174 A. 924, 106 Vt. 418—Brown v. Perry, 156 A. 910, 104 Vt. 66.
Wash.—Ware v. Grand Lodge Brotherhood of Railroad Trainmen, 277 P. 383, 152 Wash. 78.
Wis.—Switzer v. Weiner, 284 N.W. 509, 230 Wis. 599.
23 C.J. p 132 notes 17, 21.

68. Kan.—Ferd. Heim Brewing Co. v. Gimber, 72 P. 859, 67 Kan. 834—Hunter v. Ferguson, 13 Kan. 462.
23 C.J. p 132 note 18.

69. Mass.—Merrick v. Betts, 101 N.E. 131, 214 Mass. 223.

70. N.Y.—Southworth v. Morgan, 98 N.E. 490, 205 N.Y. 293, 51 L.R.A., N.S., 56.
23 C.J. p 132 note 23.

71. Or.—De Vall v. De Vall, 109 P. 755, 110 P. 705, 57 Or. 128.

72. La.—Marlatt v. Citizens' State Bank & Trust Co., 156 So. 426, 180 La. 387—Security Sales Co. of Louisiana v. Blackwell, 120 So. 250, 9 La.App. 651, modified on other grounds 120 So. 45, 167 La. 667.
Mo.—Smith v. East St. Louis Ry. Co., App., 152 S.W.2d 204—Boyer v. North End Drayage Co., App., 67 S.W.2d 769—Industrial Acceptance Corporation v. Webb, App., 287 S.W. 657.
N.Y.—Konieczny v. J. Kresse Co., 256 N.Y.S. 275, 234 App.Div. 517.
23 C.J. p 132 note 25.
Presumption as to existence of common law in sister state see Common Law § 20 a.

Community property system

Court must take judicial notice that common law forms basis of jurisprudence of Iowa, and that community property system is unknown to common law and is not prevalent in that state.—Marlatt v. Citizens' State Bank & Trust Co., 156 So. 426, 180 La. 387.

73. Mo.—Rositzky v. Rositzky, 46 S.W.2d 591, 329 Mo. 662.
23 C.J. p 132 note 26.

the territory out of which a sister state was carved,[74] or that a certain state was not carved out of territory at any time governed by the English common law.[75] A state court may take judicial notice that the decisions of the United States supreme court would on a given date constitute the law of the land of a territory over whose courts it exercised appellate jurisdiction.[76]

Statutes in a number of jurisdictions require, or permit, the courts to take judicial notice of the unwritten law of other states.[77] Under some statutes, a proper pleading of the law of a sister state requires the court to take judicial notice, not only of the law itself, but also of judicial decisions of such state interpreting such law.[78] A statute providing that such law may be proved as a fact by parol evidence impliedly excludes judicial notice of it.[79]

§ 21. Laws of Foreign Country

In the absence of a statute to the contrary, courts do not take judicial notice of the laws of a foreign country.

The courts do not take judicial notice of either the written or unwritten laws of a foreign country.[80] Except for matters which may be noticed as

74. Ind.—Henning v. Hill, 141 N.E. 66, 80 Ind.App. 363.

75. Mo.—Fidelity Loan Securities Co. v. Moore, 217 S.W. 286, 280 Mo. 315.

76. Tex.—Stamp v. Eastern R. Co., Civ.App., 161 S.W. 450.

77. Conn.—Warneke v. Preissner, 131 A. 25, 103 Conn. 503.
Ill.—In re Du Mont's Estate, 12 N.E.2d 897, 293 Ill.App. 406.
Miss.—Bradbury v. Central Vermont Ry., 12 N.E.2d 732, 299 Mass. 230.
Mich.—Laughlin v. Michigan Motor Freight Lines, 268 N.W. 887, 276 Mich. 545—Walton School of Commerce v. Stroud, 226 N.W. 883, 248 Mich. 85.
N.J.—O'Keefe v. O'Keefe, 126 A. 451, 96 N.J.Eq. 617.
23 C.J. p 132 note 22.

Evidence of common law
Court takes judicial notice of decisions of highest court of sister state as evidence of common law of that state.—Simon v. Nelson, 170 A. 796, 118 Conn. 154.

Statute not mandatory
The statute permitting courts of New Jersey to take judicial notice of reports of judicial decisions of other states as evidence of the common law of such state is not mandatory.—Redmond v. New Jersey Historical Soc., 18 A.2d 275, 129 N.J.Eq. 57.

78. Mo.—Barnes v. St. Louis-San Francisco Ry. Co., 92 S.W.2d 164, 338 Mo. 497—Corbett v. Terminal R. Ass'n of St. Louis, 82 S.W.2d 97, 336 Mo. 972—Menard v. Goltra, 40 S.W.2d 1053, 328 Mo. 368—O'Connell v. Smith, App., 131 S.W.2d 730—Boneau v. Swift & Co., App., 66 S.W.2d 172—Byram v. East St. Louis Ry. Co., App., 39 S.W.2d 376.

Common law of sister state will not be judicially noticed where statute is pleaded.—Smith v. East St. Louis Ry. Co., Mo.App., 152 S.W.2d 204.

Decisions not construing a foreign statute and not pleaded will not be judicially noticed.—Menard v. Goltra, 40 S.W.2d 1053, 328 Mo. 368.

Statute must be pleaded in order to take judicial notice of decisions—Neff v. Sovereign Camp, W. O. W., 48 S.W.2d 564, 226 Mo.App. 899, certiorari denied Sovereign Camp, W. O. W., v. Neff, 52 S.Ct. 501, 286 U.S. 549, 76 L.Ed. 1285.

79. Okl.—Atchison, T. & S. F. R. Co. v. Lambert, 123 P. 428, 32 Okl. 665.

80. U.S.—Rowan v. Commissioner of Internal Revenue, C.C.A.Tex., 120 F.2d 515—U. S. ex rel. Jelic v. District Director of Immigration and Naturalization, Ellis Island, New York Harbor, C.C.A.N.Y., 106 F.2d 14—Booth Fisheries Co., Ohio, v. Commissioner of Internal Revenue, C.C.A., 84 F.2d 49—Merinos Viesca Y Compania v. Pan American Petroleum & Transport Co., C.C.A.N.Y., 83 F.2d 240, certiorari denied 57 S.Ct. 10, 299 U.S. 547, 81 L.Ed. 403—Commissioner of Internal Revenue v. Hyde, C.C.A., 82 F.2d 174—The Silverpalm, C.C.A.Cal., 79 F.2d 598—Ex parte Hing, D.C.Wash., 22 F.2d 554—In re Hannevig, C.C.A.N.Y., 10 F.2d 941, certiorari denied Wise v. Kettle, 46 S.Ct. 353, 270 U.S. 655, 70 L.Ed. 783—U. S. v. One Zumstein Briefmarken Katalog 1938, D.C.Pa., 24 F.Supp. 516.
Ill.—City of Detroit v. Wabash Refining Co., 223 Ill.App. 246.
Ky.—Stewart's Adm'x v. Bacon, 70 S.W.2d 522, 523, 253 Ky. 748, citing **Corpus Juris.**
Me.—Giberson v. York County Mut. Fire Ins. Co., 142 A. 481, 127 Me. 182.
Minn.—Traders' Trust Co. v. Davidson, 178 N.W. 735, 146 Minn. 224.
Mo.—Scott v. Vincennes Bridge Co., 299 S.W. 145, 220 Mo.App. 1213.
N.Y.—Hanna v. Lichtenhein, 122 N.E. 625, 225 N.Y. 579, reversing 169 N.Y.S. 589, 182 App.Div. 94—Auerbach v. Grand Nat. Pictures, 29 N.Y.S.2d 747, 176 Misc. 1031—Osborne v. Banco Aleman-Antioqueno, 29 N.Y.S.2d 236, 176 Misc. 664—Jann v. United Steel Works Corporation, 1 N.Y.S.2d 951, 166 Misc. 465.
Tex.—Garza v. Klepper, Civ.App., 15 S.W.2d 194, error refused.
Vt.—Wellman v. Mead, 107 A. 396, 93 Vt. 322.
23 C.J. p 134 note 35, p 135 notes 36, 37—56 C.J. p 928 note 56.
International, admiralty, and maritime law see infra § 26.
Laws of antecedent government see supra § 16.

Change in law
Courts of Texas do not judicially know that no change was made in Mexican laws between the time when Texas won its independence and the year 1859.—Martinez v. Gutierrez, Tex.Com.App., 66 S.W.2d 678, affirming Gutierrez v. Martinez, Civ.App., 37 S.W.2d 833.

Merely to direct attention to the law of a foreign country, written in a foreign tongue, does not make it a matter for judicial knowledge.—Rodrigues v. Rodrigues, 190 N.E. 20, 286 Mass. 77.

Neither court nor administrative body can take notice of laws of foreign country.—Smith v. Hays, C.C.A.Iowa, 10 F.2d 115.

Question of fact
(1) In view of the rule that courts will not take judicial notice of the laws of a foreign country, such laws must be pleaded and proved the same as any other question of fact.
U.S.—Banque de France v. Chase Nat. Bank of City of New York, C.C.A.N.Y., 60 F.2d 703—In re Stamenoff, D.C.Mich., 43 F.2d 124—Banque de France v. Equitable Trust Co. of New York, D.C.N.Y., 33 F.2d 202—In re Hannevig, C.C.A.N.Y., 10 F.2d 941, certiorari denied Wise v. Kettle, 46 S.Ct. 353, 270 U.S. 655, 70 L.Ed. 783—Medvedieff v. Cities Service Oil Co., D.C.N.Y., 35 F.Supp. 999—The Vulcania, D.C.N.Y., 32 F.Supp. 815—Jose Taya's Sons Co., of New Orleans v. Compania Arrendataria de Tobacos de Espana, C.C.A.N.Y., 280 F. 825—Panama Electric Co. v. Moyers, Canal Zone, 259 F. 219, 170 C.C.A. 287.

matters of common knowledge,[81] the courts do not notice the details of such laws,[82] but sometimes they notice generally the source, basis, or foundation of the law of a foreign country,[83] or the fact that the law of such country on certain subjects differs from that of this country.[84] A statute providing that the law of a foreign country is to be determined by the court does not authorize the court to take judicial notice of foreign laws.[85] Under some statutes the courts may take judicial notice of the law of a foreign country whenever the same shall be material,[86] but in order to invoke the operation of such a statute the court's attention must be drawn to a statute, code, or other law of such foreign country.[87]

§ 22. Private Statutes

As a general rule, courts do not take judicial notice of private statutes.

In the absence of a constitutional or statutory provision to the contrary,[88] it is a general rule that private statutes of a state, as distinguished from public statutes, are not judicially noticed either by its own courts[89] or by any other courts,[90] and the same is true of private acts of congress.[91] If a statute of

Ill.—Groome v. Freyn Engineering Co., 28 N.E.2d 274, 374 Ill. 113.
Ky.—Stewart's Adm'x v. Bacon, 70 S.W.2d 522, 253 Ky. 748.
Mo.—Crary v. Standard Inv. Co., 285 S.W. 459, 313 Mo. 448.
N.Y.—Croker v. Croker, 168 N.E. 450, 252 N.Y. 24, reversing 234 N.Y.S. 771, 226 App.Div. 784, remittitur amended 169 N.E. 408, 252 N.Y. 345, amending remittitur Croker v. White, 170 N.E. 126, 252 N.Y. 517, which reversed 234 N.Y.S. 772, 226 App.Div. 784—Riley v. Pierce Oil Corporation, 156 N.E. 647, 245 N.Y. 152, affirming 216 N.Y.S. 904, 217 App.Div. 744, and reargument denied 157 N.E. 877, 245 N.Y. 607—Phillips v. Griffen, 259 N.Y.S. 105, 236 App.Div. 209—Weil v. Weil, 237 N.Y.S. 668, 227 App.Div. 378—Smith v. Russo Asiatic Bank, 290 N.Y.S. 471, 160 Misc. 417—In re Rubenstein's Estate, 257 N.Y.S. 637, 143 Misc. 917.
Tenn.—Kaset v. Freedman, 120 S.W.2d 977, 22 Tenn.App. 213.
Tex.—Martinez v. Gutierrez, Com.App., 66 S.W.2d 678, affirming Gutierrez v. Martinez, Civ.App., 37 S.W.2d 833.

(2) "Since the Declaration of Independence, the law of Great Britain and its dependencies is the law of a foreign country and, like any other foreign law, is a matter of fact with which the courts of this country cannot be presumed to be acquainted or take judicial notice of, but which must be pleaded and proved."—Greear v. Paust, 279 N.W. 568, 202 Minn. 633.

81. Union of Soviet Socialist Republics

(1) It is common knowledge that private ownership of property has been abolished in the Union of Soviet Socialist Republics, formerly known as Russia, with the result that none of its nationals there resident is permitted by its laws to have the personal control of any property, which is deemed to belong solely to the state.—In re Landau's Estate, 16 N.Y.S.2d 3, 172 Misc. 651.

(2) After recognition of Russian Soviet government by United States, state courts were bound to take notice that a Russian insurance corporation having a branch in New York state was legally dead under previous decrees of such government.—Moscow Fire Ins. Co. v. Bank of New York & Trust Co., 20 N.E.2d 758, 280 N.Y. 286, affirming 3 N.Y.S.2d 653, 253 App.Div. 644, affirming 294 N.Y.S. 648, 161 Misc. 903, affirmed 1 N.Y.S.2d 640, 253 App.Div. 710, and 1 N.Y.S.2d 641, 253 App.Div. 710, appeal dismissed Moscow Fire Ins. Co. v. Bank of New York & Trust Co., 16 N.E.2d 854, 278 N.Y. 709, reargument denied 21 N.E.2d 890, 280 N.Y. 848, certiorari granted U. S. v. Moscow Fire Ins. Co., 60 S.Ct. 129, 308 U.S. 542, 84 L.Ed. 456, rehearing denied 60 S.Ct. 706, 309 U.S. 697, 84 L.Ed. 1036, motion denied Moscow Fire Ins. Co. v. Bank of New York & Trust Co., 24 N.E.2d 487, 281 N.Y. 818, affirmed U. S. v. Moscow Fire Ins. Co., 60 S.Ct. 725, 309 U.S. 624, 84 L.Ed. 986.

Rights of Jews

Court judicially notices that Jews had very limited civil rights in Russia in 1901.—Machransky v. Machransky, 166 N.E. 423, 31 Ohio App. 482.

82. N.Y.—Riley v. Pierce Oil Corporation, 156 N.E. 647, 245 N.Y. 152, affirming 216 N.Y.S. 904, 217 App. Div. 744, and reargument denied 157 N.E. 877, 245 N.Y. 607.
23 C.J. p 135 note 38.

Rights of married women

Courts will not take judicial notice of the laws of Russia in reference to the property and rights of married women.—Savage v. O'Neil, 44 N.Y. 298.

83. U.S.—Banque de France v. Chase Nat. Bank of City of New York, C.C.A.N.Y., 60 F.2d 703.
N.Y.—Masocco v. Schaaf, 254 N.Y.S. 439, 234 App.Div. 181.
23 C.J. p 135 note 39.

Common knowledge

It may be a matter of common knowledge that the civil law prevails in a particular country, and that trusts in the ordinary sense are unknown to that law.—In re Circle Trading Corporation, C.C.A.N.Y., 26 F.2d 193.

84. N.Y.—Matter of Spondre, 162 N.Y.S. 943, 98 Misc. 524.
23 C.J. p 135 note 40.

85. N.Y.—Smith v. Russo Asiatic Bank, 290 N.Y.S. 471, 160 Misc. 417.

86. Mass.—Vergnani v. Guidetti, 32 N.E.2d 272, 308 Mass. 450.

87. Mass.—Bergeron v. Bergeron, 192 N.E. 86, 287 Miss. 524.

88. U.S.—Case v. Kelly, Wis., 10 S.Ct. 216, 133 U.S. 21, 33 L.Ed. 513.
Cal.—Arnold v. Universal Oil Land Co., App., 114 P.2d 408.
Ky.—Shrader v. Erickson's Ex'r, 145 S.W.2d 63, 284 Ky. 449.
23 C.J. p 136 note 43.

In Arkansas

(1) By virtue of statute, the courts take judicial notice of private statutes.—Carroll County v. Reeves Const. Co., 242 S.W. 821, 154 Ark. 434—Sloan v. Lawrence County, 203 S.W. 260, 134 Ark. 121.

(2) The statute requiring courts to take judicial notice of the laws of other states does not apply to private statutes of those states.—Miller v. Johnston, 72 S.W. 371, 71 Ark. 174.

89. N.C.—Bolick v. City of Charlotte, 132 S.E. 660, 191 N.C. 677.
23 C.J. p 135 note 41.

Local laws

Judicial notice is not taken of local laws.—Caldwell v. Crosser, Tex.Civ.App., 20 S.W.2d 822, error refused.

Special acts

Court does not take judicial notice of special acts of legislature.—Brodsky v. Fine, 160 N.E. 335, 263 Mass. 51.

90. U.S.—Leland v. Wilkinson, R.I., 6 Pet. 317, 8 L.Ed. 412.
Ark.—Miller v. Johnson, 72 S.W. 371, 71 Ark. 174.

91. Ariz.—Chambers v. Atchison, T. & S. F. Ry. Co., 255 P. 1092, 32 Ariz. 102.
23 C.J. p 136 note 44.

a private nature contains a clause declaring it to be a public act, or if there is such a provision in a general law, it will be noticed by the courts as a public act.[92] Courts will also take judicial notice of a private statute which is recognized by a public act[93] or by the constitution,[94] or which is recognized and amended by a public act.[95]

§ 23. Legislative Resolutions

Legislative resolutions of a public character will be judicially noticed.

Courts take judicial notice of legislative resolutions of a public character,[96] but not of private resolutions.[97] By express statute courts are sometimes required to take judicial notice of "all" resolutions published by authority.[98]

§ 24. Laws and Customs of Indians

Except as otherwise continued in force by act of congress, Indian laws and customs are not judicially noticed.

Laws and customs of Indian tribes in the Indian Territory are judicially noticed so far as an act of congress continued them in force after a change in the form of government in that territory.[99] Otherwise the laws of the Indian tribes are not judicially noticed elsewhere than in the tribal courts, and in other courts are required to be pleaded and proved.[1]

§ 25. Law Merchant

Judicial notice will be taken of the law merchant.

Courts take judicial notice of the law merchant as part of the common law.[2] Accordingly, judicial notice will be taken of days of grace, and dies non juridicus, in connection with the presentment of negotiable paper for payment,[3] and the seal of a notary public.[4] Judicial notice, however, will not be taken of a "hussier" or bailiff, an officer exercising, under the local law of France, functions somewhat similar to those of a notary.[5]

§ 26. International, Admiralty, and Maritime Law

International and general maritime law are judicially noticed.

All courts have judicial knowledge of the rules established by the law of nations.[6] The public laws of a foreign nation, on a subject of common concern to all nations, promulgated by the governing powers of a country can be noticed as law by a court of admiralty of that country, and need not be still further proved as a fact.[7] Courts take judicial notice of the general maritime law,[8] including maritime regulations established in a particular country and accepted as obligatory by the principal commercial states of the world.[9] The rule, however, is otherwise where the maritime law of a foreign country is different from our own.[10] In other words it is not the duty or the right of a court of admiralty to take judicial notice of local changes made in the general admiralty law by any foreign nation.[11] It has also been held that the admiralty

92. U.S.—Case v. Kelly, Wis., 10 S. Ct. 216, 133 U.S. 21, 33 L.Ed. 513.
23 C.J. p 136 note 45.

93. Ariz.—Chambers v. Atchison, T. & S. F. Ry. Co., 255 P. 1092, 1093, 32 Ariz. 102, citing **Corpus Juris.**
Minn.—Webb v. Bidwell, 15 Minn. 479.

94. Ind.—Vance v. Farmers' & Mechanics' Bank of Indiana, 1 Blackf. 80.

95. Ill.—Lavalle v. People, 6 Ill.App. 157.

96. Ala.—Western Union Telegraph Co. v. Glover, 86 So. 154, 17 Ala. App. 374.
Cal.—Samish v. Superior Court in and for Sacramento County, 83 P. 2d 305, 28 Cal.App.2d 685.
Tex.—American Ry. Express Co. v. Silverstein-Schlossberg Co., Civ. App., 271 S.W. 242—Western Union Telegraph Co. v. Wallace, Civ.App., 235 S.W. 282—Houston, E. & W. T. Ry. Co. v. Tanner, Civ App., 227 S.W. 713—Western Union Telegraph Co. v. Robinson, Civ.App., 225 S.W. 877—Western Union Telegraph Co. v. Conditt, Civ.App., 223 S.W. 234.
23 C.J. p 136 note 49.

97. Me.—Kingman v. Penobscot County Comrs., 73 A. 1038, 105 Me. 184—Simmons v. Jacobs, 52 Me. 147.

98. Ga.—Combs v. State, 8 S.E. 318, 81 Ga. 780.

99. Okl.—Henson v. Johnson, 246 P. 868, 117 Okl. 87—Scott v. Jacobs, 126 P. 780, 31 Okl. 109.

1. U.S.—Hackett v. Alston, Ind.T., 110 F. 910, 49 C.C.A. 180.
23 C.J. p 136 note 53.

2. Wash.—Ryer Grain Co. v. American Security Bank, 264 P. 1000, 147 Wash. 42.
23 C.J. p 137 note 54.

3. La.—Huie v. Brazeale, 19 La. 457.
Md.—Sasscer v. Farmers' Bank, 4 Md. 409.
N.J.—Reed v. Wilson, 41 N.J.Law 29.
23 C.J. p 137 note 56.

4. U.S.—The Gallego, D.C.N.Y., 30 F. 271.
Or.—Christman v. Salway, 205 P. 541, 103 Or. 666.
23 C.J. p 137 note 58—2 C.J. p 337 note 79.

Of sister states

Under some statutes the courts are authorized to take judicial notice of the seals of notaries public of sister states.—Dahlstrom v. Walker, 194 P. 847, 33 Idaho 374.

5. N.Y.—Chanoine v. Fowler, 3 Wend. 173.

6. Ky.—McFeena's Adm'r v. Paris Home Telephone & Telegraph Co., 227 S.W. 450, 190 Ky. 299.
23 C.J. p 137 note 61.

7. U.S.—Talbot v. Seeman, N.Y., 1 Cranch 1, 38, 2 L.Ed. 15, followed in The New York, 20 S.Ct. 67, 175 U.S. 187, 44 L.Ed. 126, reversing 82 F. 819, 27 C.C.A. 154, 86 F. 814, 30 C.C.A. 628.

8. U.S.—The Paquete Habana, Fla., 20 S.Ct. 290, 175 U.S. 677, 44 L. Ed. 320—The New York, Mich., 20 S.Ct. 67, 175 U.S. 187, 44 L.Ed. 126.
23 C J. p 137 note 63—33 C.J. p 388 note 13 [a].

9. U.S.—Sears v. The Scotia, N.Y., 14 Wall. 170, 20 L.Ed. 822.
23 C.J. p 137 note 64.

10. U.S.—The Matterhorn, Or., 128 F. 863, 63 C.C.A. 331.

11. U.S.—Yang-Tzse Ins. Assoc. v.

courts of this country cannot allow recovery under the law of a foreign country for a maritime tort committed in the waters of such country, without proof of such foreign law, since judicial notice cannot be taken that such foreign law is the same as that of the United States.[12]

§ 27. Municipal Ordinances or By-Laws

As a general rule, judicial notice is taken of municipal ordinances only by municipal courts or in appeals from such courts.

The general rule is that ordinances or by-laws themselves are not judicially known to courts having no special function to enforce them,[13] although the power of municipalities to pass ordinances or by-laws is judicially noticed by the courts within the state.[14] In this respect municipal ordinances are treated as being in the nature of, and on the same footing as, private statutes,[15] the statutes of

Furness, N.Y., 215 F. 859, 132 C. C.A. 201.
23 C.J. p 137 note 66.

12. U.S.—The Hanna Neilsen, C.C.A. N.Y., 273 F. 171, modifying, D.C., 267 F. 729, petition dismissed Tolo v. The Hannah Nielson, 42 S.Ct. 53, 257 U.S. 651, 66 L.Ed. 417, and certiorari denied 42 S.Ct. 93, 257 U.S. 653, 66 L.Ed. 418.

13. U S.—Choctaw, O. & G. R. Co. v. Hamilton, C.C A.Okl, 182 F. 117—Roloff v. Perdue, D.C Iowa, 31 F. Supp. 739.
Cal.—City of Oakland v. Brock, 67 P.2d 344, 8 Cal.2d 639—Ex parte Jackson, 92 P.2d 951, 33 Cal.App. 2d 724—Ex parte Wacholder, 36 P. 2d 705, 1 Cal.App 2d 254—Flood v. Miura, 8 P.2d 552, 120 Cal.App. 467—Pacific Finance Corporation v. City of Lynwood, 300 P. 50, 114 Cal App. 509, rehearing denied 1 P.2d 520, 114 Cal.App. 509—Church v. Grady, 180 P. 548, 40 Cal.App. 194—Muther v. Capps, 177 P. 882, 38 Cal.App. 721.
Conn.—Appeal of Phillips, 154 A. 238, 113 Conn. 40—Young v. Town of West Hartford, 149 A. 205, 111 Conn. 27.
Del.—Myers v. Fortunato, 116 A. 623, 13 Del.Ch. 148.
D C.—Tipp v. District of Columbia, 102 F.2d 264, 69 App.D.C. 400.
Fla.—State ex rel. Foster v. Yocum, 191 So. 35, 140 Fla. 53—Douglass v. Sapotnick, 171 So. 765, 126 Fla. 753, followed in 173 So. 926, 131 Fla. 246
Ga.—Chevrolet Motor Co. v. City of Atlanta, 116 S.E. 287, 155 Ga. 43—Cary v. Highland Bakery, 179 S.E. 197, 50 Ga.App. 553—Davies v. West Lumber Co., 123 S.E. 757, 32 Ga App. 460—Collier v. Schoenberg, 106 S.E. 581, 26 Ga.App. 496.
Ill.—City of Dixon v. Sinow & Weinman, 183 N.E. 570, 350 Ill. 634—City of Chicago v. Municipal Engineering & Contracting Co., 127 N. E. 65, 292 Ill. 614—Butler v. Illinois Traction, Inc., 253 Ill.App. 135—City of Detroit v. Wabash Refining Co., 223 Ill.App. 246—Klonowski v. Crescent Paper Box Mfg. Co., 217 Ill.App. 150.
Ky.—Cline v. Cook, 287 S.W. 927, 216 Ky. 366.
La.—State ex rel. Hourguettes v. City of Gretna. 193 So. 706, 194 La. 460—Valenti v. Oster Bros. Carriage & Wagon Mfg. Co., 98 So. 553, 154 La. 991—City of New Orleans v. Calamari, 91 So. 172, 150 La. 737, 22 A.L.R. 106—Jordan v. Katz & Bestoff, 132 So. 380, 15 La. App. 500—Fidelity Union Casualty Co v. Romero, 122 So. 288, 10 La. App. 796—Williams v. Windham, 3 La.App. 127.
Me.—Ouelette v. Miller, 183 A. 341, 134 Me. 162—Neallus v. Hutchinson Amusement Co., 139 A. 671, 126 Me. 469, 55 A.L.R. 1191.
Md.—Stanley v. City of Baltimore, 126 A. 151, 146 Md. 277, motion overruled 130 A. 181, 146 Md. 277.
Mass.—Brodsky v. Fine, 160 N.E. 335, 263 Mass. 51—Rogers v. Abbott, 142 N.E. 923, 248 Mass. 220.
Mich.—Zawicky v. Flint Trolley Coach Co, 286 N.W. 115, 288 Mich. 655—Hinderer v. Ann Arbor R. Co., 211 N.W. 734, 237 Mich. 232.
Mo.—Hartley v. McKee, App., 86 S. W.2d 359—Robinson v. Ross, App., 47 S.W.2d 122—Durham v. Morrison Tent & Awning Co., 297 S.W. 137, 220 Mo.App. 1161.
Mont.—Dineen v. City of Butte, 272 P. 243, 83 Mont. 370—Carey v. Guest, 258 P. 236, 78 Mont. 415.
Neb.—Spomer v. Allied Electric & Fixture Co., 232 N.W. 767, 120 Neb. 399.
N.J.—K. S. S. Realty Co. v. Ostroff, 135 A. 869, 100 N.J.Eq. 128, affirmed 138 A. 921, 101 N.J.Eq. 771—Hyland v. Parkside Inv. Co., 162 A. 521, 10 N.J.Misc. 1148.
N.Y.—Berke v. Pirwitz, 190 N.Y S. 14.
Ohio.—Page v. Wieland, 28 N.E.2d 583, 137 Ohio St. 198, certiorari denied Wieland v. Page, 61 S Ct. 614—Schulte v. Johnson, 140 N.E. 116, 106 Ohio St. 359—Astrup Co. v. Rehburg, 181 N.E. 551, 42 Ohio App. 126, error dismissed Rehburg v. Astrup Co., 185 N.E. 881, 125 Ohio St. 633—State ex rel. White v. City of Cleveland, 181 N.E 545, 42 Ohio App. 72, affirmed 181 N. E. 24, 125 Ohio St. 230, 86 A.L.R. 1172.
Okl.—Bradley v. Renfrow, 84 P.2d 430, 184 Okl. 25.
S.C.—Steinberg v. South Carolina Power Co., 163 S.E. 881, 883, 165 S.C. 367, quoting **Corpus Juris.**
Tex.—McGuire v. City of Dallas, Civ. App., 151 S.W.2d 617, error dismissed, judgment correct—Checker Cab & Baggage Co. v. Crone, Civ. App., 117 S.W.2d 503, affirmed Crone v. Checker Cab & Baggage Co., 135 S.W.2d 696, 134 Tex. 412—Louisiana Ry. & Nav. Co. of Texas v. Humphreys, Civ.App., 285 S.W. 869, reversed on other grounds Humphries v. Louisiana Ry. & Irr. Co. of Texas, Com App., 291 S.W. 1094—Keller v. Western Paving Co., Civ.App., 218 S.W. 1077.
Wash.—Peterson v. Mayham, 116 P. 2d 259.
Wis.—Brown v. Milwaukee Terminal Ry. Co., 224 N.W. 748, 199 Wis. 575, reversed on other grounds 227 N.W. 385, 199 Wis. 575—O'Brien v. Fred Kroner Hardware Co., 185 N.W. 205, 175 Wis. 238.
18 C.J. p 1385 note 76—23 C.J. p 138 note 79—42 C.J. p 1202 note 40.

Absence of ordinance

Supreme judicial court does not take judicial notice that there is in any case absence of municipal ordinance which may be material to decision of any issue of law or fact.—Wolbarsht v. Donnelly, 197 N.E. 6, 219 Mass. 229.

Question of fact

Municipal ordinances must be pleaded and proved the same as any other fact.
Md.—Chenoweth v. Maloy, 123 A. 77, 143 Md. 622.
Mo.—Murray v. Wells, App., 17 S.W. 2d 613.
Tex.—State ex rel. Osborn v. City of McAllen, 91 S.W.2d 688, 127 Tex 63, reversing, Civ.App., 56 S.W.2d 297—Risk v. City of Shamrock, Civ.App., 61 S.W.2d 153—Parvin v Byers, Civ.App., 16 S.W.2d 914, error dismissed.

Police jury

Courts do not take judicial cognizance of ordinances of police jury.—Lemoine v. Thomas, La.App., 157 So. 170.

14. Fla.—Douglass v. Sapotnick, 171 So. 765, 126 Fla. 753, followed in 173 So. 926, 131 Fla. 246.
S.C.—Steinberg v. South Carolina Power Co., 163 S.E. 881, 883, 165 S. C. 367, quoting **Corpus Juris.**
23 C.J. p 138 note 78.

15. S.C.—Steinberg v. South Caro-

sister states,[16] or the laws of a foreign country.[17] It necessarily follows that judicial cognizance cannot be taken of the amendment[18] or repeal[19] of a municipal ordinance. Judicial notice cannot be taken of an ordinance before its effective date,[20] and the court cannot properly assume to know the date on which an ordinance became effective as law.[21] However, judicial notice may be taken of a city ordinance where there is an admission of the existence thereof by counsel,[22] or where the existence of the ordinance is so generally known that the court may notice it as a matter of common knowledge.[23]

Under some statutes, courts will take judicial notice of municipal ordinances.[24] Some statutes require the courts to take judicial notice of the ordinances of a particular city or cities,[25] or of the ordinances of cities of a certain class,[26] or of any ordinance of a city or village which is pleaded by reference to its title and the date of its approval.[27] A statute not perfectly clear in its language will not be construed as intended to require the courts to take notice of municipal ordinances without proof of their existence.[28] A statute providing that printed and officially published copies of ordinances may be received in evidence without further proof does not authorize judicial notice of the ordinances.[29] Neither is judicial notice of the legislative acts of a city authorized or required by a statute providing that the courts will assume knowledge of the public and private official acts of the legislative, executive, and judicial departments of the state and of the United States.[30] A statute providing that a charter adopted in pursuance of the statutes carrying out the "home rule" provision of the constitution shall

lina Power Co., 163 S.E. 881, 883, 165 S.C. 367, quoting **Corpus Juris.**

23 C.J. p 139 note 80.

16. Mo.—American Packing Co. v. Neece, App., 277 S.W. 605.

17. D.C.—Tipp v. District of Columbia, 102 F.2d 264, 69 App.D.C. 400.

18. Mo.—Hake v. Buck's Stove & Range Co., App., 234 S.W. 1061.

19. Ky.—John L. Humbard Const. Co. v. City of Middlesboro, 36 S.W. 2d 38, 237 Ky. 652.

23 C.J. p 139 note 81.

20. Cal.—Vanderbush v. Board of Public Works of City of Los Angeles, 217 P. 785, 62 Cal.App. 771.

21. Ala.—Adler v. Martin, 59 So. 597, 179 Ala. 97, Excelsior Steam Laundry Co. v. Lomax, 52 So. 347, 166 Ala. 612.

23 C.J. p 139 note 82.

22. Ill.—Weber Co. v. Stevenson Grocery Co., 194 Ill.App. 432.

Tex.—Dallas Railway & Terminal Co. v. Price, Civ.App., 94 S.W.2d 884, 893, citing **Corpus Juris,** and affirmed 114 S.W.2d 859, 131 Tex. 319.

23. Ill.—Valuch v. Rawson, 270 Ill. App. 583.

23 C.J. p 139 note 84.

Adoption of zoning ordinances by many municipalities may be noticed. —Kistler v. Borough of Swarthmore, 4 A.2d 244, 134 Pa.Super. 287.

24. Ill.—Gobeli v. Braga, 35 N.E.2d 429, 311 Ill.App. 46—Doran v Boston Store of Chicago, 30 N.E.2d 778, 307 Ill.App. 456—Kahler v. Marchi, 29 N.E.2d 854, 307 Ill.App. 23—People ex rel. Krajci v. Kelly, 279 Ill.App. 22.

City Home Rule Law § 32 requires the New York courts to take judicial notice of laws enacted thereunder.—Richards v. City of Geneva, 292 N.Y.S. 397, 161 Misc. 572.

25. Ga.—Moore v. Jonesboro, 33 S.E. 435, 107 Ga. 704.

New York City ordinances, under L.1917 c 382, amending the Greater New York Charter § 1556, are judicially noticed in cases tried in such city.—People v. One Hundred and Thirty-One Boerum St. Co., 135 N.E. 327, 233 N.Y. 268, reversing 188 N.Y.S. 943, 196 App.Div. 976—Wirth v. Burns Bros., 128 N.E. 111, 229 N.Y. 148, reversing 172 N.Y.S. 926, 186 App.Div. 892—Greenberg v. Schlanger, 127 N.E. 896, 229 N.Y. 120, reversing 170 N.Y.S. 1083, 183 App.Div. 929—W. N. Stevenson & Co. v. Hartman, 181 N.Y.S. 465, 191 App.Div. 406, reargument denied 181 N.Y.S. 959, 192 App.Div. 900, and reversed on other grounds 132 N.E. 121, 231 N.Y. 378, 18 A.L.R. 1314—Cohen v. A. Goodman & Sons, 178 N.Y.S. 528, 189 App.Div. 209—23 C.J. p 139 note 85 [a].

26. Ala.—Ex parte Connor, 198 So. 850, 240 Ala. 327—Alabama Lumber & Building Material Ass'n v. Mason, 160 So. 232, 230 Ala. 168—Titus v. Braidfoot, 145 So. 423, 226 Ala. 21—J. C. Bryam & Co. v. Livingston, 143 So. 461, 225 Ala. 442—Alabama Great Southern R. Co. v. Goodwin, 131 So. 12, 222 Ala. 59—Williams v. City of Birmingham, 121 So. 14, 219 Ala. 19—Smith v. Baggett, 118 So. 283, 218 Ala. 227—Southern Ry. Co. v. Cates, 100 So. 356, 211 Ala. 282—Barrett v. Rietta, 93 So. 636, 207 Ala. 651—Edwards v. Earnest, 89 So. 729, 206 Ala. 1, 22 A.L.R. 1387—City Cleaning Co. v. Birmingham Waterworks Co., 85 So. 291, 204 Ala. 51—Birmingham Ry., Light & Power Co. v. Kyser, 82 So. 151, 203 Ala. 121.

Ky.—Murphy v. Homans, 150 S.W.2d 14, 286 Ky. 191—Maupin v. City of Louisville, 144 S.W.2d 237, 284 Ky. 195—Home Laundry Co. v. Cook, 125 S.W.2d 763, 277 Ky. 8—Foreman v. Western Union Telegraph Co., 14 S.W.2d 1079, 228 Ky. 300—Board of Trustees of Policemen's Pension Fund v. Schupp, 3 S.W.2d 606, 223 Ky. 269—Louisville & N. R. Co. v. Galloway, 294 S.W. 135, 219 Ky. 595.

23 C.J. p 139 note 86.

Cities not in class

The ordinances of cities or municipalities not within the class designated by statute are not judicially noticed.

Ala.—Smith v. Town of Eclectic, 92 So. 212, 18 Ala.App. 329.

Ky.—Davis v. Pelfrey, 147 S.W.2d 723, 285 Ky. 298—Lawson v. McGregor, 111 S.W.2d 600, 271 Ky. 167—John L. Humbard Const. Co. v. City of Middlesboro, 36 S.W.2d 38, 237 Ky. 652—Hamlin v. Durham, 32 S.W.2d 413, 235 Ky. 842.

27. Minn.—Buhner v. Reusse, 175 N.W. 1005, 144 Minn. 450.

Wash.—Moore v. Dresden Inv. Co., 298 P. 465, 162 Wash. 289, 77 A.L.R. 1258.

23 C.J. p 139 note 87.

Ordinance pleaded by plaintiff to establish defendant's negligence could be examined to ascertain whether it contained provisions making plaintiff's conduct unlawful.—Price v. Gabel, 298 P. 444, 162 Wash. 275.

28. Fla.—Stephens v. Anderson, 79 So. 205, 75 Fla. 575, 577.

29. Md.—Cent. Sav. Bank v. Baltimore, 18 A. 809, 20 A. 283, 71 Md. 515.

23 C.J. p 139 note 89.

30. Or.—Chan Sing v. Astoria, 155 P. 378, 79 Or. 411.

be judicially noticed does not authorize the courts to take judicial notice of city ordinances.[31] A statute providing that courts will take judicial notice of general ordinances of municipalities within the jurisdiction of the trial court are only applicable to the contents of such ordinances as facts when there is no question raised as to the legal existence or validity of the ordinances themselves.[32] A statute requiring judicial notice of general ordinances is inapplicable to ordinances special in their nature.[33]

Municipal courts. Although there is authority to the contrary,[34] it is generally held, sometimes by virtue of statute, that a municipal court will take judicial cognizance of the existence and substance of ordinances in force in the particular municipality.[35] Some courts consider it the imperative duty of municipal courts to take judicial notice of municipal ordinances,[36] while other courts consider it permissive but not obligatory.[37] Judicial notice will not be taken of ordinances or by-laws not enacted by the municipality, but by one of the departments thereof.[38]

Courts reviewing judgments of municipal courts. There is a conflict of authority on the question whether on appeal from a municipal court and trial de novo the appellate court will judicially notice municipal ordinances of which the court below was at liberty to take such notice, some courts holding that they will,[39] and others that they will not.[40] A like conflict exists in the case of a review on the record, some courts holding that they will take judicial notice,[41] and others that they will not.[42] Obviously an appellate court reviewing the judgment of a court not at liberty to take judicial cognizance of municipal ordinances is likewise restricted in that respect.[43]

31. Tex.—City of Amarillo v. Tutor, Com.App., 267 S.W. 697, affirming Tutor v. City of Amarillo, Civ.App., 244 S.W. 632—City of Sweetwater v. Foster, Civ.App., 37 S.W.2d 799.

32. Ill.—Woods v. Village of La Grange Park, 4 N.E.2d 764, 287 Ill.App. 201.

33. Ill.—Arlt v. Chicago Motor Coach Co., 13 N.E.2d 516, 294 Ill. App. 602.

34. Mo.—St. Louis v. Young, 138 S. W. 5, 235 Mo. 44—St. Louis v. Roche, 31 S.W. 915, 128 Mo. 541.
23 C.J. p 137 note 71.

35. Ga.—Lovell v. City of Griffin, 191 S.E. 152, 55 Ga.App. 609, reversed on other grounds Lovell v. City of Griffin, Ga., 58 S.Ct. 666, 303 U.S. 444, 82 L.Ed. 949, conformed to Lovell v. City of Griffin, 197 S.E. 347, 57 Ga.App. 901, vacated 197 S.E. 347, 57 Ga.App. 901.
Neb.—Spomer v. Allied Electric & Fixture Co., 232 N.W. 767, 120 Neb. 399.
N.Y.—Seitz v. Yates Lehigh Coal Co., 255 N.Y.S. 279, 142 Misc. 366—Bender v. Dazian, 180 N.Y.S. 461—Ozurovick v. Gumpel, 180 N.Y.S. 407.
Ohio.—Page v. Wieland, 28 N.E.2d 583, 137 Ohio St. 198, certiorari denied Wieland v. Page, 61 S.Ct. 614—Orose v. Hodge Drive-It-Yourself Co., 9 N.E.2d 671, 673, 132 Ohio St. 607, 111 A.L.R. 954, citing **Corpus Juris**—Bonbright v. Biller, 36 N.E.2d 173, 67 Ohio App. 421—Jackson v. Copelan, 198 N.E. 596, 50 Ohio App. 414.
23 C.J. p 137 note 72, p 138 note 75. "Such courts stand in the same relationship to municipal laws as do courts of general jurisdiction to public laws and, consequently, as to them, the local ordinances are the peculiar law of the forum."—Tipp v. District of Columbia, 102 F.2d 264, 265, 69 App.D.C. 400.

36. Kan.—Solomon v. Hughes, 24 Kan. 211.

37. La.—State v. Judge Cr.Dist. Ct., 30 So. 105, 105 La. 758.

38. N.J.—Wright v. Trenton, 17 A. 1103, 51 N.J.Law 497, followed in Byer v. Harris, 72 A. 136, 77 N.J. Law 304.
23 C.J. p 138 note 76.

39. S.D.—Milbank v. Cronlokken, 135 N.W. 711, 29 S.D. 46, Ann.Cas.1914C 1231.
23 C.J. p 140 note 91.

40. Colo.—Greeley v. Hamman, 20 P. 1, 12 Colo. 94—Garland v. Denver, 19 P. 460, 11 Colo. 534—McIntosh v. Pueblo, 48 P. 969, 9 Colo.App. 460.

41. N.Y.—Ozurovick v. Gumpel, 180 N.Y.S. 407.
23 C.J. p 140 note 93.
In Illinois
(1) By virtue of statute, the reviewing court is required to take judicial notice of all matters of which an inferior court on trial of the case took judicial notice; and, consequently, the reviewing court must take judicial notice of city ordinances if the trial court has taken notice thereof.—American Tank & Installation Co. v. Rudolph Wurlitzer Co., 254 Ill.App. 514.
(2) Prior to the enactment of this statute the rule was to the contrary.—Chicago v. Cullen, 191 Ill.App. 97—Chicago v. Tearney, 187 Ill.App. 441.
In Ohio
(1) The text rule is now followed.—Bonbright v. Biller, 36 N.E.2d 173, 67 Ohio App. 421—Jackson v. Copelan, 198 N.E. 596, 50 Ohio App. 414—Strauss v. Conneaut, 23 Ohio Cir.Ct 320—Keck v. Cincinnati, 4 Ohio S. & C.P. 324, 3 Ohio N.P. 253.
(2) The reason for so holding has been stated as follows: "An ordinance, like a state statute, is matter of fact, except within the jurisdiction of its adoption. In the case at bar the ordinance was matter of law in the municipal court and by what transformation it could become matter of fact in the reviewing court is not apparent. If it was law in the trial court, it was law in the reviewing courts below, if it was law there, it is law here."—Orose v. Hodge Drive-It-Yourself Co., 9 N.E.2d 671, 673, 132 Ohio St. 607, 111 A.L.R. 954.
(3) Some earlier Ohio cases had held to the contrary.—Esch v. Elyria, 27 Ohio Cir.Ct. 446—Chittenden v. Columbus, 26 Ohio Cir.Ct. 531.

42. Minn.—State v. Overby, 133 N. W. 792, 116 Minn. 304.
23 C.J. p 140 note 94.
Statute authorizing municipal courts to take judicial notice of ordinances does not authorize the supreme court, in reviewing a decision of the lower court, to take judicial notice of such ordinances.—Wergin v. Voss, 192 N.W. 51, 179 Wis. 603, 26 A.L.R. 933.

43. Mich.—People v. Quider, 137 N. W. 546, 172 Mich. 280.
Mo.—St. Louis v. Young, 138 S.W. 5, 11, 235 Mo. 44, 63.

C. OTHER PARTICULAR MATTERS

§ 28. Business and Occupations

Judicial notice will be taken of the general course of business and the usual methods of transacting it.

Courts take judicial notice of facts of common knowledge relating to business and occupations, such as the general course of business and the usual methods of transacting it.[44] Judicial notice will be taken of the community's standard of prudent busi-

44. Colo.—City and County of Denver v. Sheriff, 96 P.2d 836.
N.J.—Kanzler v. Smith, 20 A.2d 590, 129 N.J.Eq. 411.
N.Y.—Strasbourger v. Leerburger, 134 N.E. 834, 233 N.Y. 55, affirming 186 N.Y.S. 797, 195 App.Div. 480, amendment of remittitur denied 135 N.E. 920, 233 N.Y. 567.
N.C.—Southeastern Express Co. v. City of Charlotte, 120 S.E. 475, 477, 186 N.C. 668, quoting **Corpus Juris.** 23 C.J. p 62 note 53.

Judicial notice has been taken:

(1) Of facts relating to stocks and bonds.
U.S.—Davis v. U. S., C.C.A.N.Y., 87 F.2d 323, certiorari denied 57 S.Ct. 937, 301 U.S. 704, 81 L.Ed. 1359, rehearing denied 58 S.Ct. 5, 302 U.S. 773, 82 L.Ed. 599.
Cal.—Woodfield v. Wells Fargo Bank & Union Trust Co., 3 P.2d 65, 116 Cal.App. 647.
Mass.—Old Colony Trust Co. v. Comstock, 195 N.E. 389, 101 A.L.R. 1.
Mo.—St. Louis Union Trust Co. v. Toberman, App., 140 S.W.2d 68, transferred, see 134 S.W.2d 45, 345 Mo. 613.
N.Y.—Hudson Trust Co. v. American Linseed Co., 180 N.Y.S. 17, 190 App.Div. 289.
Pa.—In re Shipley's Estate, 12 A.2d 343, 337 Pa. 571.

(2) Of use and methods of advertising.
U.S.—Three-In-One Oil Co. v. U. S., Ct.Cl., 35 F.2d 987—Patent Tube Corporation v. Bristol-Myers Co., D.C.N.Y., 25 F.Supp. 776.
Cal.—People v. St. John, 288 P. 53, 108 Cal.App. 779.
Mich.—People v. Montague, 274 N.W. 347, 280 Mich. 610.

(3) Of various names under which business is carried on.
Colo.—Industrial Commission v. Montgomery, 37 P.2d 532, 95 Colo. 467.
Fla.—Hepburn v. Chapman, 149 So. 196, 109 Fla. 133.
N.Y.—Samuel Stores v. Queen City Credit Clothing Corporation, 283 N.Y.S. 236, 157 Misc. 186, affirmed 289 N.Y.S. 927, 248 App.Div. 677, motion denied 290 N.Y.S. 555, 248 App.Div. 812.
Pa.—James v. Public Service Commission of Commonwealth of Pennsylvania, 177 A. 343, 116 Pa.Super. 577.
Tex.—Wilson v. Standard Accident Ins. Co., Civ.App., 115 S.W.2d 453, error dismissed.

(4) That business institutions rarely survive receivership.—McKinney v. Nayberger, 6 P.2d 228, 138 Or. 203, denying rehearing 2 P.2d 1111, 138 Or. 203.

(5) That business is transacted on faith of persons' apparent title to land.—Phillips v. Bowles, 273 S.W. 85, 209 Ky. 580.

(6) That business of important character is transacted by telephonic communications.—Steadman v. Live Stock Nat. Bank, 202 N.W. 523, 200 Iowa 347.

(7) That certain businesses are seasonal.
Minn.—Bielke v. American Crystal Sugar Co., 288 N.W. 584, 206 Minn. 308.
N.Y.—Anonymous v. Four Anonymous, 18 N.Y.S.2d 578, 173 Misc. 623.

(8) That in transaction of large business, operation at temporary loss is often necessary.—Sunshine Consol. Oil Co. v. Prechel, Tex.Civ.App., 268 S.W. 1051.

(9) That loose-leaf ledgers are largely used.—Holcombe v. State ex rel. Chandler, 200 So. 739, 240 Ala. 590.

(10) That many men, particularly small businessmen, keep their accounts very loosely.—Fatland v. Wentworth & Irwin, 40 P.2d 68, 149 Or. 277, 97 A.L.R. 339.

(11) That meritorious inventions are very often relegated to oblivion through machinations of well-intrenched and powerful competitors.—Keystone Steel & Wire Co. v. Commissioner of Internal Revenue, C.C.A., 62 F.2d 458.

(12) That modern city business institutions provide toilets for employees and patrons.—M. N. Bleich & Co. v. Emmett, Tex.Civ.App., 295 S.W. 223.

(13) That security of some sort is taken where articles are sold on a credit basis.—Franklin Fire Ins. Co. v. Bolling, 3 S.E.2d 182, 173 Va. 228.

(14) That the smaller business enterprises are located in rural districts.—Eldred v. Division of Employment and Security, Department of Social Security, Minn., 295 N.W. 412.

(15) Other matters.
U.S.—Dayton Power & Light Co. v. Public Utilities Commission of Ohio, 54 S.Ct. 647, 292 U.S. 290, 78 L.Ed. 1267, affirming 187 N.E. 18, 127 Ohio St. 137—In re Oberweger, C.C.P.A., 115 F.2d 826—Sullivan & Cromwell v. Colorado Fuel & Iron Co., C.C.A.Colo., 96 F.2d 219—Ruth Iron Co. v. Commissioner of Internal Revenue, C.C.A., 26 F.2d 30—Jones v. Harrison, C.C.A.Mo., 7 F.2d 461, certiorari denied Jones v. Ready, 46 S.Ct. 351, 270 U.S. 652, 70 L.Ed. 781—Alton R. Co. v. U. S., D.C.Mich., 36 F.Supp. 898—Bourjois, Inc., v. McGowan, D.C.N.Y., 12 F.Supp. 787, affirmed, C.C.A., 85 F.2d 510, certiorari denied 57 S.Ct. 753, 300 U.S. 682, 81 L.Ed. 885—In re Hotel Gibson Co., D.C.Ohio, 11 F.Supp. 30—R. J. Godwin's Sons v. U. S., 22 C.C.P.A.(Customs) 340.
Ark.—Independence County v. Independence County Bridge Dist. No. 1, 58 S.W.2d 938, 187 Ark. 140.
Cal.—Ex parte Wacholder, 36 P.2d 705, 1 Cal.App.2d 254.
Del.—Universal Credit Co. v. Spinazzolo, 197 A. 68, 9 W.W.Harr. 117.
D.C.—Heitmeyer v. Federal Communications Commission, 95 F.2d 91, 68 App.D.C. 180.
Ill.—Illinois Life Ins. Co. v. City of Chicago, 244 Ill.App. 185.
Ind.—Cotton v. Commonwealth Loan Co., 190 N.E. 853, 206 Ind. 626—Groub v. Blish, 152 N.E. 609, 153 N.E. 895, 88 Ind.App. 309.
Iowa.—Berg v. Berg, 264 N.W. 821, 221 Iowa 326—In re Diver's Estate, 240 N.W. 622, 214 Iowa 497.
Ky.—Wilhelm v. Orlamuende's Adm'x, 15 S.W.2d 511, 228 Ky. 719.
La.—Knox Glass Bottle Co. v. Golden Gate Liquor Co., App., 174 So. 684.
Mass.—Woolley's Laundry v. Silva, 23 N.E.2d 899, 304 Mass. 383, 126 A.L.R. 752.
Miss.—Gidden v. Gidden, 167 So. 785, 176 Miss. 98.
Mo.—Accomac Realty Co. v. City of St. Louis, 152 S.W.2d 100.
N.H.—Pantebakos v. Rockingham County Light & Power Co., 128 A. 534, 81 N.H. 441, 38 A.L.R. 1063.
N.J.—Weitz v. Preston, 174 A. 429, 113 N.J.Law 271.
N.Y.—Application of Title Guarantee & Trust Co., 25 N.Y.S.2d 656, 261 App.Div. 438—Title Guarantee & Trust Co. v. Geller, 2 N.Y.S.2d 784, 254 App.Div. 574, appeal denied—Union Trust Co. of Rochester v. Kaplan, 292 N.Y.S. 152, 249 App.Div. 280—Yablonowitz v. Korn, 199 N.Y.S. 769, 205 App.Div. 440—

ness methods,[45] of the ordinary rules and necessities of business,[46] and of changes in the methods of conducting and carrying on business.[47] Where such is a matter of common knowledge, the court will take judicial notice that a particular type of business is not carried on within the state.[48] On the other hand, judicial notice will not be taken of matters relating to business and occupations which are not facts of common knowledge.[49]

Contracts, credits, and collections. Judicial notice will be taken of matters of common knowledge pertaining to contracts, credits, and collections.[50] Accordingly, the usual and customary provisions in, or incidents connected with, building and construction contracts,[51] contracts of sale, conveyances, and leases of property,[52] and the usual provisions in, or

Rothstein v. Monette, 17 N.Y.S.2d 369.
Pa.—Philadelpiha Sav. Fund Soc v. City of Bethlehem, 17 A.2d 750, 143 Pa.Super. 449.
S.C.—State v. Standard Oil Co. of New Jersey, 10 S.E.2d 778, 195 S C. 267—Towles v. South Carolina Produce Ass'n, 197 S.E. 305, 187 S.C. 290.
Tenn.—New York Life Ins. Co. v. Bank of Commerce & Trust Co., 111 S.W 2d 371, 172 Tenn. 226, 115 A.L.R. 643.
Tex.—McCaskey Register Co. v. Mann, Civ.App., 273 S W. 1113.
Wash.—Allen v. Merchants' Fire Assur. Corporation of New York, 36 P.2d 545, 179 Wash. 189—Vail v. Seaborg, 207 P. 15, 120 Wash 126.
Wis.—General Bronze Corporation v. Schmeling, 243 N.W. 469, 208 Wis. 565.

45. N.C.—Southeastern Express Co. v. City of Charlotte, 120 S.E. 475, 477, 186 N.C. 668, quoting **Corpus Juris.**
23 C.J. p 62 note 54.

Investments

(1) It is common knowledge that prudent businessmen do not confine their investments to government securities or real estate loans.—People's State Bank & Trust Co. v. Wade, 106 S.W.2d 74, 269 Ky. 89.

(2) The court judicially knew that a real estate loan equalling seventy per cent of value of realty constitutes a high percentage of value of realty.—Sheehy v. O'Donoghue, 94 F.2d 252, 68 App D.C. 127.

46. N.C—Southeastern Express Co. v. City of Charlotte, 120 S.E. 475, 477, 186 N.C. 668, quoting **Corpus Juris.**
23 C.J. p 62 note 55, p 63 note 65.

Business hours

(1) Judicial notice is taken of the ordinary mercantile business hours within the jurisdiction.—Davis v. Hanly, 12 Ark. 645.

(2) Judicial notice is taken that the business hours of a trader differ from those of a banking institution.—Lewis v. Montgomery Supply Co., 52 S.E. 1017, 59 W.Va. 75, 4 L.R.A., N.S., 132.

(3) It has been held that in case of a transaction occurring in a foreign jurisdiction "the court cannot take judicial notice of what constitutes reasonable hours on a business day."—Columbian Banking Co. v. Bowen, 114 N.W. 451, 134 Wis. 218, 225.

Expense of selling

Everybody knows that expenses are necessarily incurred in sales of bond issues of public service corporations.—Ben Avon Borough v. Ohio Valley Water Co., 114 A. 369, 271 Pa. 346.

Interest

It is a matter of common knowledge that interest is paid on money for the use of it.—Lewis v. Dark Tobacco Growers' Co-op. Ass'n, 57 S. W.2d 8, 247 Ky. 301.

Oiled maple floors

It is a matter of common knowledge that many business places have oiled maple floors.—Daigle v. Berkowitz, 262 N.W. 652, 273 Mich. 140—Narregang v. Great Atlantic & Pacific Tea Co., 194 N.W. 410, 224 Mich. 178.

47. Mich.—Gregory v. Wendell, 39 Mich. 337, 33 Am R. 390.
Mo.—Wiggins Ferry Co. v. Chicago & Alton R. Co., 5 Mo.App. 347, reversed on other grounds 73 Mo. 389, 39 Am.R. 519.
23 C J. p 63 notes 56, 57, 58–60

48. S.D—Standard Oil Co. v. Jones, 205 N.W. 72, 48 S.D. 482.

49. Utah.—Walker v. Skliris, 98 P. 114, 34 Utah 353.
23 C.J. p 63 note 61.

50. N.Y.—Executive Service Corporation v. Moss, 10 N.Y.S.2d 103, 256 App.Div. 345.
23 C.J. p 63 note 78.

Interest

It is a matter of common knowledge that money borrowed or money invested is returned with interest added, and that a fixed sum of money due in the future, if presently paid, must be discounted by the interest which may be earned in the meantime.—Chesapeake & O. N. Ry. Co. v. Adams, 269 S.W. 1009, 207 Ky. 668.

Judicial notice has been taken:

(1) That there is no such thing as copy of verbal contract.—Martin v. Baines, 116 So. 341, 217 Ala. 326.

(2) That promissory notes are parts of, connected with, or related to other contracts or agreements.—Utah Lake Irr. Co. v. Allen, 231 P. 818, 64 Utah 511, 37 A.L.R. 651.

(3) Other matters see Chrisman v. Southern California Edison Co, 256 P. 618, 83 Cal.App. 249—23 C.J. p 64 notes 85–91.

51. Ind.—Denny v. Carpenter Const. Co., 168 N.E. 242, 91 Ind.App. 244.
Mass.—Pratt & Forrest Co. v. Strand Realty Co., 123 N.E. 771, 233 Mass. 314.
Mich.—Carleton v. Foundry & Machine Products Co., 165 N.W. 816, 199 Mich. 148
23 C.J. p 63 notes 75, 76.

Arbitration clauses

It is matter of common knowledge that arbitration provisions are almost universal in construction contracts to prevent harassments, delays, and losses likely to result because of differences occurring during progress of work.—McCullough v. Clinch-Mitchell Const. Co., C C.A. Mo., 71 F 2d 17, certiorari denied Clinch-Mitchell Const. Co. v. McCullough, 55 S.Ct. 96, 293 U.S. 582, 79 L Ed. 678.

Public work

It is common knowledge that contractor undertakes public work on basis of labor cost at place of performance.—Ruark v. International Union of Operating Engineers, Local Union No. 37, 146 A. 797, 157 Md. 576.

52. **Judicial notice has been taken:**

(1) Of forms of testimonium clauses.—Burnham v. Wing, 122 A. 577, 123 Me. 237.

(2) Of form of lease in general use in the state.—Rhode Island Hospital Trust Co. v. J. B. Farnum Co., 191 A. 508, 58 R.I. 86.

(3) Of leasing of land for an agreed share of the crop—Taylor v. Crowe, 77 S.W.2d 54, 190 Ark. 71.

(4) Of the furnishing of an abstract of title.—Marti v. Ludeking, 185 N.W. 476, 193 Iowa 500.

(5) That a complete contract for sale of land usually is instrument of many provisos.—Petersen v. Jensen, 177 N.W. 74, 189 Iowa 400.

(6) That many of such instruments are prepared by inexperienced persons.
Ky.—Preston v. Wells, 219 S.W. 173, 187 Ky. 417.
S.D.—Dorman v. Crooks State Bank, 225 N.W. 661, 55 S.D. 209, 64 A.L.R. 614.

incidents connected with mortgages,[53] are judicially noticed. Likewise, judicial notice is taken of matters of common knowledge as to the use of, and the usual incidents relating to, means of credit, such as accommodation paper,[54] and bills of lading.[55]

Employer and employee. The courts will take judicial notice of matters pertaining to the relationship of employer and employee where such are facts of common knowledge.[56] Accordingly, judicial notice has been taken as to compensation of employees injured within the course of their employment, and to various matters arising under particular Workmen's Compensation Acts;[57] matters of common knowledge relating to wages,[58] working on the Sabbath or Sunday,[59] and labor relations between employers and employees.[60] On the other hand, the

(7) That rights acquired under mineral servitudes are property rights.—Ford v. Williams, 179 So. 298, 189 La. 229.

(8) That the vast bulk of sales of personal property are not accompanied by any written evidence thereof.—Lewis v. Tambros, 194 P. 152, 58 Mont. 555.

(9) Other matters.

Ark.—Lewis v. Brown, 224 S.W. 986 145 Ark. 492.

Ill.—Browne v. Vopicka, 261 Ill App 386.

La.—Smith v. Hardy, App., 190 So. 180.

N.Y.—Brenner v. Ebbets-McKeever Exhibition Co., 8 N.Y.S.2d 963, 170 Misc. 278, reversed on other grounds 10 N.Y.S.2d 323, 256 App. Div. 980.

Okl.—Ashur v. McCreery, 300 P. 767, 150 Okl. 111.

Tenn.—Smith v. Prichard, 122 S.W. 2d 829, 22 Tenn.App. 321.

Tex.—John Hancock Mut. Life Ins. Co. v. Duval, Civ.App., 96 S.W.2d 740.

23 C.J. p 63 note 79 [a], [b].

Terms

(1) It is common knowledge that usual terms of farm sale require buyer to pay cash or by bankable note.—Hirtz v. Koppes, 234 N.W. 854, 212 Iowa 536.

(2) Court, however, cannot judicially know what are terms of "customary commercial mineral lease."—Woods v. Rolls, Tex.Civ.App., 268 S.W. 988, affirmed Rolls v. Woods, Com.App., 291 S.W. 532.

(3) On the other hand, it is common knowledge that a mineral lease is granted by lessor with hope and expectation and with written consent to lessee to enter on property, erect derricks, tool houses, and all other necessary things to drill for and produce oil.—Shreveport Armature & Electric Works v. Harwell, La.App., 172 So. 463, followed in Bolinger Gain-Yay, Inc. v. Harwell, 172 So. 471.

Time for leasing

(1) The appropriate time to begin a rental contract for farm land in the state has been judicially noticed.—Penney v. Burns, 146 So. 611, 226 Ala. 273.

(2) It has been held, however, in the absence of a general custom to the contrary, that a court will not take judicial notice that the general time for the leasing of a certain class of buildings is in certain months of the year.—Wells & Newton Co. v. Lorence Realty Co., 167 N.Y.S. 916, 180 App.Div. 424.

Matters not of common knowledge

concerning such contracts, conveyances, and leases cannot be judicially noticed.—Brenton v. Bream, 210 N.W. 756, 202 Iowa 575—23 C.J. p 64 notes 82, 83.

53. Ala.—U. S. Bond & Mortgage Co. v. City of Birmingham, 158 So. 751, 229 Ala. 536.
Ariz.—Hagan v. Cowan, 278 P. 68, 35 Ariz. 334.
Cal.—Gauchet v. McGinnis, 55 P.2d 1255, 13 Cal.App.2d 7.
Ky.—Rhode Island Ins. Co. v. Wurtman, 98 S.W.2d 29, 265 Ky. 835.
La.—Gumpert v. Signal, 156 So. 174, 180 La. 59, affirming, App., 152 So. 403.
Okl.—Mitchell v. Fisher, 32 P.2d 37, 168 Okl. 145.
Pa.—Harper v. Consolidated Rubber Co., 131 A. 356, 284 Pa. 444.
S.C.—Virginia-Carolina Chemical Co. v. Wellbrock, 141 S.E. 103, 143 S.C. 51.
S.D.—Ahearn v. Smith, 211 N.W. 448, 50 S.D. 633.

Acknowledgment

It is common knowledge that grantors or mortgagors sign and acknowledge deeds and mortgages.—Louisville Joint Stock Land Bank v. McNeely, 102 S.W.2d 389, 267 Ky. 425.

Interest

It may be regarded as common knowledge that interest on such notes is not usually paid in advance or before it is due.—McCarthy v. Simon, 142 N.E. 806, 247 Mass. 514.

Form

Court would not take judicial notice of form of mortgage used generally in Russell county.—Sorrells v. Cole, 173 So. 607, 234 Ala. 70.

Foreign standard clause

The court cannot judicially know the contents of a standard mortgage clause in another jurisdiction, at least in the absence of a statute prescribing its terms.—Tarrant Land Co. v. Palmetto Fire Ins. Co., 125 So. 807, 220 Ala. 428.

54. La.—William D. Seymour & Co. v. Castell, 107 So. 143, 160 La. 371.

55. Wash.—Morris v. Canadian Bank of Commerce, 163 P. 1139, 95 Wash. 418, 423.
23 C.J. p 64 note 84.

56. Wis.—General Bronze Corporation v. Schmeling, 250 N.W. 412, 213 Wis. 150, 93 A.L.R. 114.
23 C.J. p 63 note 67.

57. Ky.—McCune v. Wm. B. Pell & Bro., 232 S.W. 43, 192 Ky. 22
La.—White v. J. P. Florio & Co., 126 So. 452, 12 La.App. 508.
N.H.—Douglas v. U. S. Fidelity & Guaranty Co., 127 A. 708, 81 N.H. 371, 37 A.L.R. 1477.
Tex.—Houston Belt & Terminal Ry. Co. v. Davis, Civ.App., 273 S.W. 676.
23 C.J. p 63 notes 70, 71.

58. Idaho—Wright v. Callahan, 99 P.2d 961.
Ill.—Reid v. Smith, 30 N.E.2d 908, 375 Ill. 147, 132 A.L.R. 1286.
Mass.—Colantonio's Case, 4 N.E.2d 1001, 296 Mass. 140.
Mich.—General Motors Corporation v. Read, 293 N.W. 751, 294 Mich. 558, 130 A.L.R. 429.
Tex.—Texas Employers' Ins. Ass'n v. Parr, Com.App., 30 S.W.2d 305, affirming, Civ.App., 16 S.W.2d 354.
23 C.J. p 63 note 69.

Rescue

Court judicially knows there is no customary wage for employee engaged in rescuing another from position of imminent danger.—Conveyors' Corporation of America v. Industrial Commission of Wisconsin, 228 N.W. 118, 200 Wis. 512.

59. Tex.—Petroleum Casualty Co. v. Williams, Com.App., 15 S.W.2d 553, affirming Williams v. Petroleum Casualty Co., Civ.App., 4 S.W.2d 631—Federal Underwriters Exchange v. Bullard, Civ.App., 128 S.W.2d 126.

Conditions requiring Sunday labor

Tex.—Maryland Casualty Co. v. Marshall, Civ.App., 14 S.W.2d 337, error dismissed.

60. U.S.—National Labor Relations Board v. Ford Motor Co., C.C.A., 114 F.2d 905, certiorari denied Ford Motor Co. v. National Labor Relations Board, 61 S.Ct. 621—National Labor Relations Board v. Griswold Mfg. Co., C.C.A., 106 F.2d 713.

court will not take judicial notice of facts which are not matters of common knowledge.[61]

Particular transactions. Courts do not take judicial knowledge of particular transactions between private parties.[62]

Public bodies. Courts may take judicial notice that it is usual for the state, and for all public bodies, to do public work by contract.[63] Facts relating to the sale of bonds and negotiations for loans for public bodies will be judicially noticed if they are matters of common knowledge.[64]

§ 29. Particular Businesses or Occupations

a. In general

b. Agriculture

c. Banks and banking

d. Carriers

e. Insurance

a. In General

Facts of common knowledge relating to various businesses and occupations have been judicially noticed.

Courts have taken judicial notice of matters of common knowledge concerning the following businesses and occupations: Abstractors;[65] accountants;[66] advertising;[67] alcoholic liquor industry;[68] auctioneers;[69] automobile, garage, and filling station businesses;[70] also concerning such businesses

Ill.—Schuster v. International Ass'n of Machinists, Auto Mechanics Lodge No. 701, 12 N.E.2d 50, 293 Ill.App. 177.

N.Y.—May's Furs and Ready to Wear v. Bauer, 26 N.E.2d 279, 282 N.Y. 331, modifying 8 N.Y.S.2d 819, 255 App.Div. 643, appeal denied 11 N.Y.S.2d 237, 256 App.Div. 945, reargument denied 27 N.E.2d 210, 282 N.Y. 804—Triboro Coach Corporation v. New York State Labor Relations Board, 22 N.Y.S.2d 1013—Association of Plumbing and Heating Contractors of Greater New York v. Merten, 17 N.Y.S.2d 828, 173 Misc. 448, affirmed 26 N.Y.S.2d 72, 261 App.Div. 543.

Tenn.—Black Diamond Coal Mining Co. v. Rankin, 98 S.W.2d 311, 170 Tenn. 651

Employee representatives

It is common knowledge that employee representatives are almost invariably labor organizations.—Munsey v. Virginian Ry. Co., D.C.Va., 39 F.Supp. 881.

61. Mo.—State v. Missouri Pac. R. Co., 147 S.W. 118, 237 Mo. 338.
23 C.J. p 63 note 68.

62. Ala.—Connecticut General Life Ins. Co. v. Smith, 145 So. 651, 226 Ala. 142.

Due date

The court cannot take judicial knowledge of the time when an account between a merchant and his customers is due.—Blackburn v. Thompson, 193 S.W. 74, 127 Ark. 438.

63. N.Y.—Danolds v. State, 89 N.Y. 36, 42 Am.R. 277, 14 N.Y.Wkly.Dig. 268, affirming 26 Hun 241, 14 N.Y. Wkly.Dig. 268.

64. Ky.—Hunter v. City of Louisville, 270 S.W. 841, 208 Ky. 326.
23 C.J. p 63 note 73.

65. **Forms employed** may be noticed.—Thomas v. Board of Sup'rs of Wayne County, 182 N.W. 417, 214 Mich. 72.

Labor required

Fla.—Exchange Nat. Bank of Tampa v. Kennedy, 147 So. 572, 109 Fla. 386.

66. **Carrying of doubtful accounts**

U.S.—Ransome Concrete Machinery Co. v. Moody, C.C.A.N.Y., 282 F. 29.

67. U.S.—U. S. v. 52 One-Gallon Cans, More or Less, of Salad Oil, D.C.Conn., 16 F.Supp. 385.

Prevalence of billboards and advertising

Tex.—Burton v. Holland, Civ.App., 278 S.W. 252.

Selling advertising space

Conn.—Masline v. New York, N. H. & H. R. Co., 112 A. 639, 95 Conn. 702.

Use of electric signs

Or.—Paldanius v. Strauss, 198 P. 253, 100 Or. 497.

68. Fla.—Borrego v. Lee, 180 So. 343, 132 Fla. 49, followed in Weiss v. Lee, 180 So. 345, 132 Fla. 56—City of Miami v. State ex rel. Green, 180 So. 45, 131 Fla. 864.

Ill.—Klopp v. Benevolent Protective Order of Elks, Lodge No. 281, 33 N.E.2d 161, 309 Ill.App. 145.

Ky.—City of Louisville v. Martin, 144 S.W.2d 1034, 284 Ky. 490—Glenmore Distilleries Co. v. Department of Revenue, 131 S.W.2d 460, 279 Ky. 505.

Mo.—State ex rel. Klein v. Balsiger, App., 151 S.W.2d 521

N.Y.—Lion Brewery of New York City v. Loughran, 226 N.Y.S. 656, 131 Misc. 331, reversed on other grounds 229 N.Y.S. 216, 223 App.Div. 623.

Tex.—Eckert v. Jacobs, Civ.App., 142 S.W.2d 374.

Wis.—Frank v. Kluchesky, 297 N.W. 399, 237 Wis. 510.
23 C.J. p 74 note 5.

Matters relating to bottles and bottling have been judicially noticed.

U.S.—Caron Corporation v. Maison Jeurelle-Seventeen, D.C.N.Y., 26 F.Supp. 560.

Del.—Slack v. Premier-Pabst Corporation, 5 A.2d 516, 1 Terry 97.

N.M.—State ex rel. Anderson v. Anchor Grocery Co., 46 P.2d 1114, 39 N.M. 342.

Illegal manufacture

Pa.—Commonwealth v. One 1936 Ford Truck, Three Ton, 7 A.2d 532, 136 Pa.Super. 473.

Legal obtainability

U.S.—Sharp v. Barnhart, C.C.A.Ind., 117 F.2d 604—James v. Barnhart, C.C.A.Ind., 117 F.2d 604, certiorari denied 61 S.Ct. 1098.

Use of products

(1) Judicial notice is not taken that a distillery or brewery confines itself, with respect to the raw material it uses, to the produce of the state.—Motlow v. State, 145 S.W. 177, 125 Tenn. 547, L.R.A.1916F 177.

(2) Judicial notice may be taken of use of yeast in beer industries.—Red Star Yeast & Products Co. v. La Budde, C.C.A.Wis., 83 F.2d 394.

69. **Sharp competition**

U.S.—In re Moskowitz, D.C.N.Y., 25 F.Supp. 341.

70. **Judicial notice has been taken:**

(1) Of facts relating to filling stations.

Conn.—City of New Britain v. Kilbourne, 147 A. 124, 109 Conn. 422.

Fla.—State ex rel. Bradford v. Stoutamire, 123 So. 834, 98 Fla. 486, followed in State ex rel. Palmer v. Stoutamire, 123 So. 837, 98 Fla. 496.

Ill.—Fligelman v. City of Chicago, 180 N.E. 797, 348 Ill. 294.

Mass.—Sperry & Hutchinson Co. v. McBride, 30 N.E.2d 269, 307 Mass. 408, 131 A.L.R. 1254.

N.J.—New Order-Equity Building & Loan Ass'n v. Cluesman, 9 A.2d 58, 123 N.J.Law 425.

N.Y.—People ex rel. St. Albans-Springfield Corporation v. Connell

and occupations as: bakeries;[71] barber shops, beauty parlors, and shoe shining parlors;[72] brokerage;[73]

177 N.E. 313, 257 N.Y. 73, modifying 250 N.Y.S. 809, 233 App.Div. 765—Pearson v. Stamford Petroleum Products Corporation, 23 N.Y.S.2d 135.

Tex.—City of San Antonio v. Humble Oil & Refining Co., Civ.App., 27 S.W.2d 868, error dismissed—City of Electra v. Cross, Civ.App., 225 S.W. 795.

(2) Of practice of taking in used car as part of purchase price of a new one.

Iowa.—Heinen v. Motor Inn Corporation, 209 N.W. 415, 202 Iowa 67.

N.Y.—Commercial Credit Corporation v. Third & La Fayette Sts. Garage, 234 N.Y.S. 463, 226 App.Div. 235—Buick Motor Co. v. Buick Used Car Exchange, 229 N.Y.S. 219, 132 Misc. 158.

S.D.—State ex rel. Sioux Falls Motor Co. v. Welsh, 270 N.W. 852, 65 S.D. 68.

Tex.—Allen Motor Sales Co. v. Johnson, Civ.App., 64 S.W.2d 988, error dismissed.

Wis.—Voell v. Klein, 200 N.W. 364, 184 Wis. 620.

(3) That a dealer would have difficulty in selling a particular make of automobile if it were known that he did not carry parts for such cars in stock.—Stockell v. Hailey, 229 S.W. 382, 144 Tenn. 49.

(4) That a large number of new motor vehicles are sold annually.—Merchants Rating & Adjusting Co. v. Skaug, 102 P.2d 227, 4 Wash.2d 46.

(5) That automobiles are sold on credit in most instances.—Allen Motor Sales Co. v. Johnson, supra.

(6) That garage mechanics generally drive automobiles for purpose of testing them.—Brooks v. Neer, 47 P.2d 452, 46 Ariz. 144.

(7) That gasoline excise tax burden is passed on to the consumer.—State Tax Commission v. Board of Education of Jefferson County, 179 So. 197, 235 Ala. 388.

(8) That salesmen are generally authorized to make representations respecting cars to be sold.—Frankowski v. Lawrence Motor Car Co., 176 A. 397, 114 N.J.Law 326.

(9) Other matters.

U.S.—Fogle v. General Credit, D.C., 122 F.2d 45.

Ky.—Wilhelmi v. Berns, 119 S.W.2d 625, 274 Ky. 618.

La.—Krousel v. Thieme, 128 So. 670, 13 La.App. 680.

Mass.—Brooks v. Sears, Roebuck & Co., 19 N.E.2d 39, 302 Mass. 184.

Mich.—Pietrantonio v. Travelers Ins. Co. of Hartford, Conn., 275 N.W. 786, 282 Mich. 111.

Mo.—Reed v. Sensenbaugh, 86 S.W.2d 388, 229 Mo.App. 883.

N.J.—Neel v. Indemnity Ins. Co. of North America, 6 A.2d 722, 122 N.J.Law 560, affirmed 11 A.2d 106, 124 N.J.Law 130—George E. Blakeslee, Inc., v. Jersey City, 112 A. 593, 95 N.J.Law 284.

Tex.—Morriss-Buick Co. v. Pondrom, 113 S.W.2d 889, 131 Tex. 98, reversing, Civ.App., 84 S.W.2d 272, and followed in Morriss-Buick Co. v. Huss, 113 S.W.2d 891, 131 Tex. 102, reversing, Civ.App., 84 S.W.2d 264—Texas Power & Light Co. v. Hale, Civ.App., 276 S.W. 746, reversed on other grounds, Com.App., 283 S.W. 495—Dallas Land & Loan Co. v. Garrett, Civ.App., 276 S.W. 471.

Wis.—Ketterer v. Bay View Nash Co., 212 N.W. 670, 192 Wis. 343.

Matters not of common knowledge cannot be judicially noticed.

U.S.—Jordan v. Buick Motor Co., C.C.A.Wis., 75 F.2d 447.

Mo.—Kapros v. Pierce Oil Corporation, 25 S.W.2d 777, 324 Mo. 992, 78 A.L.R. 722.

R.I.—Sundlun v. Zoning Board of Review of City of Pawtucket, 145 A. 451, 50 R.I. 108.

71. Judicial notice has been taken:

(1) Of use of yeast in bread industry.—Red Star Yeast & Products Co. v. La Buddle, C.C.A.Wis., 83 F.2d 394.

(2) Number of bakeries in large cities and their employment of many persons.—State v. Miksicek, 125 S.W. 507, 225 Mo. 561, 135 Am.S.R. 597.

(3) That a bakery must manufacture its goods for sale every day.—Schultz, Baujan & Co. v. Bell, 130 S.W.2d 149, 23 Tenn.App. 258.

(4) Other matters see California Prune & Apricot Growers Ass'n v. Dobry Flour Mills, C.C.P.A., 101 F.2d 838.

Rate of wages

The court cannot take judicial notice of the local rate of wages for the different grades of work in bakeries.—Smid v. Bernard, 63 N.Y.S. 278, 31 Misc. 35.

72. Judicial notice may be taken:

(1) Of nature of barbering business.

S.C.—State v. Ross, 194 S.E. 439, 185 S.C. 472.

Va.—Ransome v. Craft, 170 S.E. 610, 161 Va. 332.

(2) Of usual prices charged.—State v. Neveau, 294 N.W. 796, 237 Wis. 85, rehearing denied 296 N.W. 622, 237 Wis. 85.

(3) That barber shops are free from the stigma that they are dens of vice.—State v. Paille, 9 A.2d 663, 90 N.H. 347.

(4) That barber trade and that of beauty culturist are closely akin.—State ex rel. Garrison v. Reeve, 139 So. 817, 104 Fla. 196, 79 A.L.R. 1119.

(5) That it is essential to have barbers who are infected with communicable diseases eliminated by physical examinations.—State v. Lockey, 152 S.E. 693, 198 N.C. 551.

(6) That while barbers may at odd times make package sales, they buy, as usual thing, not to sell again, but to utilize.—State v. Cohen, 177 A. 403, 133 Me. 293.

(7) Other matters see State v. Leftwich, 253 P. 448, 142 Wash. 329, 59 A.L.R. 539—23 C.J. p 65 notes 26–28.

Not common knowledge

(1) Adaptability of barbers to jest and humor.—Vann v. Ionta, 284 N.Y.S. 278, 157 Misc. 461.

(2) How long it would take a student to learn, in a barber shop, the means of preventing the spread of communicable diseases from customer to customer cannot be judicially known.—Moler v. Whisman, 147 S.W. 985, 243 Mo. 571, 40 L.R.A., N.S., 629, Ann.Cas.1913D 392.

73. Judicial notice is taken:

(1) In case of purchase and sale of real estate, that seller usually pays commission.—Gordon v. Beck, 239 P. 309, 196 Cal. 768.

(2) That brokers employ forms of collateral notes and collateral agreements when accepting stocks or bonds as collateral.—Colver v. Fraser, Goodwin & Colver, 7 P.2d 24, 166 Wash. 398.

(3) That transfer of securities on exchanges contracted for on spot by two brokers, one of whom represents seller and other represents buyer.—Securities & Exchange Commission v. Torr, D.C.N.Y., 15 F.Supp. 315, reversed on other grounds, C.C.A., 87 F.2d 446.

(4) That Wisconsin real estate brokers' board was bound to look with suspicion on companies dealing in Florida real estate.—State v. Wisconsin Real Estate Brokers' Board, 211 N.W. 292, 192 Wis. 396.

(5) Other matters.

U.S.—Cothran & Connally v. U. S., D.C.Va., 276 F. 48, affirmed, C.C.A., 283 F. 973.

Ill.—Trust Co. of Chicago v. Jackson Park Bldg. Corporation, 25 N.E.2d 616, 303 Ill.App. 531.

N.Y.—Maguire v. Campagnoli & Co., 17 N.Y.S.2d 129.

23 C.J. p 65 note 30–p 66 note 33.

Judicial notice will not be taken:

(1) Of a custom among brokers which is not a matter of common knowledge.—Williamson-Inman & Co. v. Thompson, 187 S.E. 194, 53 Ga.App. 821.

building and construction;[74] building and loan associations;[75] burial associations,[76] canneries;[77] carpentry;[78] cigar stands and lunch counters;[79] city markets;[80] coal industry;[81] collection agencies;[82] conveyancing;[83] cotton ginning;[84] crematories[85] and mortuaries;[86] dealers in securities;[87] domestic

(2) Other matters see 23 C.J. p 66 note 34.

74. It is common knowledge, of which judicial notice will be taken:

(1) That contractors provide themselves with casualty insurance.—Bill White's Market v. Dixie Creek Gold Mining Co., 80 P.2d 712, 159 Or. 406.

(2) That falsework is used in construction of bridges in which concrete is used.—Luten v. Kansas City Bridge Co., D C Mo., 272 F. 533, reversed on other grounds, C.C.A., 285 F. 840.

(3) That labor difficulties often hamper and cause injurious delays in work.—Pallas v. Johnson, 68 P. 2d 559, 100 Colo. 449, 110 A.L.R. 1403.

(4) That large tracts of land are purchased and the development is gradual in blocks and otherwise.—St. Louis Union Trust Co. v. Foster, 190 S.E. 522, 211 N.C. 331.

(5) That when concrete is laid on highway, contractor's job is not done, but he must prepare and put in shape shoulders.—Bracht v. Connell, 170 A. 297, 313 Pa. 397.

(6) Other matters.

Ariz.—Moore v. Pleasant Hasler Const. Co., 72 P.2d 573, 50 Ariz. 317, reversed on other grounds 76 P.2d 225, 51 Ariz. 40.

Cal.—Wilmot v. Golden Gate Inv. Co., 107 P.2d 263, 41 Cal.App.2d 664—Irvine v. J. F. Shea Co., 107 P.2d 80, 41 Cal.App.2d 458—Wingard v. Industrial Accident Commission, 207 P. 1030, 57 Cal.App. 674.

Mass.—Sterns v. Highland Hotel Co., 29 N.E.2d 721, 307 Mass. 90.

Mich.—Stott Realty Co. v. Orloff, 247 N.W. 698, 262 Mich. 375.

Mo.—City of Maplewood ex rel. and to Use of Citizens' Bank of Maplewood v. Johnson, App., 273 S.W. 237.

N.J.—Granato v. Howard Sav. Institution, 198 A. 375, 120 N.J.Law 94.

N.Y.—People v. Levitt, 260 N.Y.S. 458, 145 Misc. 621.

S.D.—Dennis v. Enke, 224 N.W. 925, 55 S.D. 15.

Tex.—Harper v. Local Union No. 520, International Brotherhood of Electrical Workers, Civ.App., 48 S.W.2d 1033, error dismissed.

Wash.—Hopkins v. Department of Labor and Industries, 67 P.2d 872, 190 Wash. 251.

Wis.—State ex rel. Lathers v. Smith, 299 N.W. 43, 238 Wis. 291—Skrzypczak v. Konieczka, 272 N.W. 659, 224 Wis. 455.

23 C.J. p 66 notes 40, 41.

Judicial notice will not be taken:

(1) Of how far modern science has advanced in rendering safe such an operation as adding a story to a factory building.—Jackson v. Butler, 155 S.W. 1071, 249 Mo. 342.

(2) Of how far the customs and usages of carpenters, architects, contracts and builders may, or may not, have caused that to be considered ordinarily safe now, which before, to the uninitiated, would have been held highly dangerous.—Jackson v. Butler, supra.

(3) Other matters see Pennsylvania R. Co v. Board of Public Utility Com'rs, 180 A. 551, 13 N.J.Misc. 766, appeal dismissed 184 A. 842, 116 N.J. Law 527.

75. Judicial notice may be taken:

(1) Of the general nature and purpose of such associations.

U.S.—Wilkinson v. Mutual Bldg. & Sav. Ass'n, C C.A.Wis., 13 F.2d 997, affirming, D.C., Mutual Bldg. & Sav. Ass'n v. Wilkinson, 8 F.2d 183.

Ky.—Middendorf v. Goodale, 259 S. W. 59, 202 Ky. 118.

23 C.J. p 66 notes 35–37.

(2) Of rule of loan value employed by savings and loan associations.—In re Bekins, D C.Wash., 4 F.Supp. 535.

(3) That investments of such associations are regulated by statute.—Bucsi v. Longworth Building & Loan Ass'n, 194 A. 857, 119 N J Law 120, appeal dismissed 59 S.Ct. 154, 305 U.S. 665, 83 L.Ed. 431.

(4) Other facts.

Mo.—Allen v. Jackson County Savings & Loan Ass'n, 115 S.W.2d 7, 232 Mo.App. 1098—Smathers v. Northwestern Nat. Ins. Co. of Milwaukee, Wis., App., 72 S.W.2d 875.

N.J.—Bucsi v. Longworth Building & Loan Ass'n, supra.

76. Ky.—Goodpaster v. Kenton & Campbell Benev. Burial Ass'n, 129 S.W.2d 1033, 279 Ky. 92.

77. Judicial notice has been taken:

(1) Of common size of cans used in canneries.—Union Fishermen's Co-op. Packing Co. v. Point Adams Packing Co., 217 P. 642, 108 Or. 535.

(2) That the wholesaler purchasing from a cannery or a jobber purchasing from a wholesaler does not examine the labels on the cans.—Union Fishermen's Co-op. Packing Co. v. Point Adams Packing Co., supra.

78. Dependency on weather

Del.—Pryor v. Brickley, 5 A.2d 242, 1 Terry 5.

79. N.Y.—Ft. Tryon Arms v. Walsh, 232 N.Y.S. 33, 133 Misc. 353.

80. N J.—Giant Tiger Corporation of Camden v. Board of Com'rs of City of Camden, 4 A.2d 775, 122 N.J.Law 240.

81. U.S.—Price v. Stonega Coke & Coal Co., D.C.W.Va., 26 F.Supp. 172, modified on other grounds Stonega Coke & Coal Co. v. Price, 106 F 2d 411, certiorari denied 60 S.Ct. 263, 308 U.S. 618, 84 L.Ed. 516.

82. Cal.—Koepple v. Morrison, 257 P. 590, 84 Cal.App. 137.

Mo.—Stiles v. Cooter Gin Co., App., 74 S.W.2d 1092.

N Y.—Neander v. Tillman, 249 N.Y. S. 559, 232 App.Div. 189—Neander v. Tillman, 249 N.Y.S. 562, 232 App. Div. 192.

Va.—Bryce v Gillespie, 168 S.E. 653, 160 Va. 137.

83. Ky.—Preston v. Wells, 219 S.W. 173, 187 Ky. 417.

23 C.J. p 73 notes 81, 82.

84. Bond

Court has no judicial knowledge of any occupation, for which no bond is required, similar to operation of commercial gin.—Ex parte Ferguson, 15 S.W.2d 650, 112 Tex.Cr. 153.

Judicial notice has been taken:

(1) That cotton ginning is a business affected with a public interest.—Dothan Oil Mill Co. v. Espy, 127 So. 178, 220 Ala. 605.

(2) That it is a seasonal occupation.—Oklahoma Gas & Electric Co. v. Corporation Commission of Oklahoma, D.C.Okl., 1 F.Supp. 966.

(3) That public gins charge for preparing cotton by separating lint cotton from seed and cleaning and baling lint cotton.—Frazier v. Stone, 156 So. 596, 171 Miss. 56.

(4) That weight slips are given when cotton is actually weighed in to be ginned and baled.—Missouri Pac. R. Co. v. Milton, 233 S.W. 1090, 149 Ark. 670.

(5) Other matters see North American Accident Ins. Co v. Keiser, Tex.Civ.App., 72 S.W.2d 944.

85. Cal.—Abbey Land & Impr. Co. v. San Mateo County, 139 P. 1068, 167 Cal. 434, 52 L.R.A.,N.S., 408, Ann.Cas.1915C 804.

86. Cal.—Forest Lawn Memorial Park Ass'n v. State Board of Embalmers and Funeral Directors, 24 P.2d 887, 134 Cal.App. 73.

87. Fraudulent practices

N.Y.—Dunham v. Ottinger, 154 N.E. 298, 243 N.Y. 423, affirming 217 N.Y.S. 565, 127 Misc. 683, error dismissed 48 S.Ct. 212, 276 U.S. 592, 72 L.Ed. 721.

servants;[88] drugs and druggists;[89] employment agencies;[90] finance companies;[91] fishing industry;[92] fuel companies;[93] grain elevators and warehouses;[94] hospitals;[95] hotels, boarding houses, apartments or tenement houses;[96] ice business;[97] investment trusts;[98] jewelry business;[99] junk dealers;[1] also concerning such other businesses and oc-

88. Cal.—Kerrison v. Unger, 27 P. 2d 927, 135 Cal.App. 607.

89. Judicial notice has been taken:
(1) Of sale of articles other than drugs.
U.S.—Kraft-Phenix Cheese Corporation v. Consolidated Beverages, C. C.P.A., 107 F.2d 1004.
Ariz.—Stewart v. Robertson, 40 P. 2d 979, 45 Ariz. 143.
Va.—Krikorian v. Dailey, 197 S.E. 442, 171 Va. 16.

(2) That alcohol is required as a solvent, preservative, or antiseptic—Reppert v. Utterback, 217 N.W. 545, 206 Iowa 314.

(3) That patent medicines are sold by many reputable druggists.—McGregor v. State Co., 103 S.E. 84, 114 S.C. 48

(4) Other matters see U. S. v. One 1937 Hudson Terraplane Coupé Automobile, Motor No. 285062, Serial No. 701773, D.C.Ky., 21 F.Supp. 600.

90. Class of persons using
N.J.—McBride v. Clark, 127 A. 550, 101 N.J.Law 213, 223, 2 N.J.Misc. 814.

91. Expenses
Pa.—Lansdowne Finance Co. v. Prusky, 182 A. 794, 120 Pa.Super. 555.

92. Difference in methods
Alaska.—Freeman v. Smith, 8 Alaska 229.

93. Dependence on transportation
Mass.—Marinelli v. Board of Appeal of Building Department of City of Boston, 175 N.E. 479, 275 Mass. 169.

Telephone orders
Mich.—Schwannecke v. Genesee Coal & Ice Co., 247 N.W. 761, 262 Mich. 624.

94. It has been judicially noticed:
(1) That agricultural products form a large part of the property ordinarily stored in public warehouses.—John M. Parker Co. v. E. Martion & Co., 88 So. 68, 148 La. 791.

(2) That warehouse can greatly promote its business interests by advancing money to tobacco growers and buyers.—Holt v. Farmers' Loose Leaf Tobacco Warehouse Co., 256 S. W. 6, 201 Ky. 184.

(3) That in South Carolina tobacco belt, tobacco warehousemen receive farmer's leaf tobacco on warehouse floors for purpose of auction sale—Flowers v. Price, 3 S.E.2d 38, 190 S.C. 392.

(4) That whisky is stored in warehouses in barrels charred on the inside, and that particles of charcoal may drop from the staves into the spirits during the storage, which it is desirable should be removed.—Paul Jones & Co. v. Mayes, D.C.Ky., 265 F. 365, affirmed, C.C.A., Mayes v. Paul Jones & Co, 270 F. 121.

(5) That warehouse business does not necessarily require what is known as elevators.—State v. Interstate Surety Co., 201 N.W. 717, 48 S. D. 57.

(6) Other matters.
Iowa.—Arthur v. Chicago, R. I. & P. R. Co., 17 N.W. 24, 61 Iowa 648.
Minn.—Davis v. Kobe, 30 N.W. 662, 36 Minn. 214, 1 Am.S.R. 663.
N.Y.—Carey v. New York Cent. R. Co, 165 N.E. 805, 250 N.Y. 345, reversing 231 N.Y.S. 376, 225 App. Div. 722—Weinstein v. Santini Transfer Co., 278 N.Y.S. 388, 155 Misc. 139.
23 C.J. p 73 note 86.

95. Charitable hospitals
Specific evidence is unnecessary to show the falsity of representations that hospitals would overcharge for an operation if they knew the patient had any property, since it is common knowledge that the great public hospitals are charitable foundations, where ordinarily humanitarian service is rendered freely to those who cannot pay, and at much less than cost to those of slender or moderate means.—Adams v. Whitmore, 139 N. E. 831, 245 Mass. 65.

Judicial notice has been taken:
(1) Of intern's duties.—Eureka-Maryland Assur. Co. v. Gray, D.C., 121 F.2d 104.

(2) That all hospitals, particularly public hospitals, make especial effort to keep proper records of their patients—Preston v. Darcy, La.App., 141 So. 874.

(3) That X-ray photographs are constantly taken in every hospital.—Leone v. Booth S. S. Co., 133 N.E. 439, 232 N.Y. 183, reversing 178 N.Y. S. 620, 189 App.Div. 185, 179 N.Y.S. 932, 190 App.Div. 916.

(4) Other matters.
N.Y.—Goldwater v. Citizens Casualty Co. of New York, 7 N.Y.S.2d 242.
S.C.—Gantt v. Mutual Ben. Health & Accident Ass'n, 176 S.E. 721, 174 S. C. 125.
23 C.J. p 73 notes 87, 88.

96. Judicial notice has been taken:
(1) Of character of hotel porter's services.—Domestic Life & Accident Ins. Co. v. Smith, 82 S.W.2d 293, 259 Ky. 158.

(2) Of prevalence of tourist camps.—Sansing v. Cherokee County Tourist Camp Board, 10 S.E.2d 157, 195 S.C. 7.

(3) Of use of refrigerating devices—Dinkelspeel v. Lewis, 65 P.2d 246, 50 Wyo. 380, denying rehearing 62 P.2d 294, 50 Wyo. 380.

(4) Of hotel dining rooms.—Pacific States Savings & Loan Co. v. Wagner, 57 P.2d 997, 14 Cal.App.2d 126.

(5) That, ordinarily, boarding houses have regular and established rates.—Moore v. Sykes' Estate, 149 So. 789, 167 Miss. 212.

(6) Other matters.
U.S.—Riggle v. Janss Inv. Corporation, C.C.A.Cal., 88 F.2d 111.
Cal.—Van Dorn v. Couch, 64 P.2d 1197, 21 Cal.App.2d Supp. 749.
La.—Ewing v. Braun, App., 196 So. 571.
Mich.—Foltz v. Foltz, 274 N.W. 755, 281 Mich. 179.
N.J.—Britten v. Berger, 12 A.2d 875, 18 N.J.Misc. 215—Coates v. Warren Hotel, 11 A.2d 436, 18 N.J.Misc. 122, award modified on other grounds 13 A.2d 787, 18 N.J.Misc 363.
N.Y.—Canton Steel Ceiling Co. v. Duffy Malt Whisky Co., 192 N.Y.S. 792, 200 App.Div. 306—Schubart v. Hotel Astor, 5 N.Y.S.2d 203, 168 Misc. 431, affirmed 8 N.Y.S.2d 567, 255 App.Div. 1012, affirmed 22 N.E. 2d 167, 281 N.Y. 597—Roberts v. Case Hotel Co., 175 N.Y.S. 123, 106 Misc. 481.
23 C.J. p 73 notes 89–91, 93.

Judicial notice cannot be taken of facts which are not matters of common knowledge.
Mich.—P. Hoffmaster Sons Co. v. Hodges, 118 N.W. 484, 154 Mich. 641.
N.Y.—Bonwit v. Hosford, 177 N.Y.S. 686, 107 Misc. 490.
23 C.J. p 73 notes 92, 94.

97. U.S.—Southwest Utility Ice Co. v. Liebmann, C.C.A.Okl., 52 F.2d 349, affirming, D.C., New State Ice Co. v. Liebmann, 42 F.2d 913, and affirmed 52 S.Ct. 371, 285 U.S. 262, 76 L.Ed. 747.
Ark.—Cap F. Bourland Ice Co. v. Franklin Utilities Co., 22 S.W.2d 993, 180 Ark. 770, 68 A.L.R. 1018.
Tex.—Winn v. Miller, Civ.App., 8 S. W.2d 714, error dismissed.

98. Del.—Standard Oilshares v. Standard Oil Group, 150 A. 174, 17 Del.Ch. 113.

99. Wis.—Wm. H. Schwanke, Inc., v. Wisconsin Telephone Co., 227 N. W. 30, 199 Wis. 552, 68 A.L.R. 1320.

1. Definition
Court may supplement statutory definition of motor vehicle junk business, by facts within judicial notice. —State v. Kievman, 165 A. 601, 116 Conn. 458, 88 A.L.R. 962.

cupations as: livery business;[2] lumber industry;[3] manufacturing;[4] meat packing;[5] mercantile agencies;[6] merchandising business;[7] milliners;[8] milling;[9] motion picture industry[10] and management of actors;[11] newspaper publishing;[12] also concerning oth-

Nature and incidents of business

Md.—State v. Shapiro, 101 A. 703, 131 Md. 168, Ann.Cas.1918E 196.

2. Reduction in business

It is a matter of common knowledge that automobiles have come into more general use in increasing years, and that the tendency thereof is to reduce the livery business—Hogan v. McCombs Bros., 180 N.W. 770, 190 Iowa 650.

3. Judicial notice has been taken:

(1) Of the well-known course of business usual in the lumber industry.—Essex Storage Electric Co. v. Victory Lumber Co., 108 A. 426, 93 Vt 437.

(2) Of matters relating to sawmills.

Ark.—Southern Ice & Utilities Co. v. Bryan, 58 S.W.2d 920, 187 Ark. 186.

Or.—Oregon Box & Mfg. Co. v. Jones Lumber Co., 244 P. 313, 117 Or. 411.

S.C.—Liddell Co. v. Cork, 113 S.E. 327, 23 A.L.R. 800.

(3) That hundreds of logging operations are handled under contracts, leaving to the performing party complete independence in effectuating the purpose of such contracts—J. L. Williams & Sons v. Hunter, 133 S.W. 2d 892, 199 Ark. 391.

(4) That laborer in lumber business is habitually required, in ordinary course of duties, to lift and carry weights.—Bowers v. J. D. Halstead Lumber Co., 236 P. 124, 28 Ariz. 122

(5) Of matters relating to log booms.—Puget Sound Tug & Barge Co. v. Olympic Forest Products Co., D.C.Wash., 21 F.Supp. 940.

(6) That lumber and lumber products to any consequential extent are not produced in Nebraska.—U. S. v. Canfield Lumber Co., D.C.Neb., 7 F. Supp. 694, appeal dismissed, C.C.A., Canfield Lumber Co. v. U. S., 76 F.2d 1003.

(7) Other matters see 23 C.J. p 74 notes 7–11.

4. Judicial notice has been taken:

(1) Of cost accounting in manufacturing.—Rieder v. Rogan, D.C. Cal., 12 F.Supp. 307.

(2) Of expenses entering into manufacturing costs.—Baltimore & O. C. Terminal R. Co. v. Becker Milling Mach. Co., C.C.A.Ill., 272 F. 933.

(3) Of list prices of manufactured articles and common practice of granting discounts therefrom.—A. W. Feeser, Inc., v. American Can Co., D.C.Md., 2 F.Supp. 561.

(4) Other matters.

U.S.—In re Replogle, C.C.P.A., 107 F.2d 592—B. F. Sturtevant Co. v. Commissioner of Internal Revenue, C.C.A., 75 F.2d 316—Fox Typewriter Co. v. Underwood Typewriter Co., C.C.A.Mich., 287 F. 447, certiorari denied 44 S.Ct. 35, 263 U.S. 707, 68 L.Ed. 517.

Ill.—Moody & Waters Co. v. Case-Moody Pie Corporation, 187 N.E. 813, 354 Ill. 82—People v. Cesar, 182 N.E. 448, 349 Ill. 372, certiorari denied Cesar v. People of State of Illinois ex rel. McDonough, 53 S. Ct. 536, 288 U.S. 603, 77 L.Ed. 978.

Pa.—Chambersburg Gas Co. v. Public Service Commission, 176 A. 794, 116 Pa.Super. 196.

Tenn.—Carter v. Victor Chemical Works, 101 S.W.2d 462, 171 Tenn 141.

23 C.J. p 74 notes 12, 13.

5. By-products

Tenn.—Neuhoff Packing Co. v. Sharpe, 240 S.W. 1101, 146 Tenn. 293.

6. Nature

(1) Courts may take judicial notice of the nature of the business of mercantile agencies.—Holmes v. Harrington, 20 Mo.App. 661—23 C.J. p 74 note 14.

(2) Judicial notice may also be taken of the convenience and importance of their ratings in the commercial world to those engaged in business and extending credit to customers.—Houchin Sales Co. v. Angert, C.C.A.Mo., 11 F.2d 115, 117, citing **Corpus Juris.**

7. Brand of soup

Court cannot take judicial notice of fact that widely advertised and sold brand of soup is marked with name "Campbell's Soup Co."—Murphy v. Campbell Soup Co., C.C.A. Mass., 62 F.2d 564.

Judicial notice has been taken:

(1) Of uninvited visitation of private homes by solicitors, peddlers, hawkers, itinerant merchants, and transient vendors of merchandise.—Town of Green River v. Fuller Brush Co., C.C.A.Wyo., 65 F.2d 112, 88 A.L.R. 177, reversing, D.C., Fuller Brush Co. v. Town of Green River, 60 F.2d 613.

(2) That collection of accounts is important part of business where credit is extended.—Ocean Accident & Guaranty Corporation v. Rubin, C.C.A.Cal., 73 F.2d 157, 96 A.L.R. 412.

(3) That "finance plans" employed in distribution and disposal of merchandise are varied.—New Home Sewing Mach. Co. v. Songer, 7 P.2d 238, 91 Mont. 137.

(4) That intricate bookkeeping method in business enterprises of larger communities is not practiced in mercantile and business enterprises of rural communities—In re Magness Bros., D.C.Ark., 5 F.Supp. 578.

(5) Other matters.

U.S.—In re Hub Carpet Co., C.C.A. N.Y., 282 F. 12, certiorari granted Benedict v. Ratner, 42 S.Ct. 591, 259 U.S. 579, 66 L.Ed 1073, and reversed on other grounds 45 S.Ct. 566, 268 U.S. 353, 69 L.Ed. 991.

Ala.—Holt v. Long, 174 So. 759, 234 Ala. 369.

Ark.—Anheuser-Busch v. Manion, 100 S.W.2d 672, 193 Ark. 405.

N.Y.—Singer v. Zabelin, 24 N.Y.S.2d 962.

8. Ill.—Stern McGiveny & Co. v. Keeshin Motor Exp. Co., 34 N.E. 2d 81, 310 Ill.App. 337.

9. Mo.—Sessinghaus Milling Co. v. Hanebrink, 152 S.W. 354, 247 Mo. 212, Ann.Cas. 1914B 875.

10. U.S.—Paramount Pictures v. Leader Press, D.C.Okl., 24 F.Supp. 1004, reversed on other grounds, C.C.A., 106 F.2d 229.

Methods used in production

U.S.—U. S. v. Metro-Goldwyn-Mayer Corporation, 19 C.C.P.A. (Customs) 119.

Matters relating to motion picture theaters

N.J.—Thurber v. Skouras Theatres Corporation, 170 A. 863, 112 N.J. Law 385.

N.Y.—Nabson v. Mordall Realty Corporation, 15 N.Y.S.2d 38, 257 App. Div. 659—Simmons v. Randforce Amusement Corporation, 293 N.Y. S. 745, 162 Misc. 491.

11. Cal.—Meyers v. Nolan, 63 P.2d 1216, 18 Cal.App.2d 319.

12. Judicial notice has been taken:

(1) Of superior advertising facilities of newspapers published in large cities over single publication of small city.—New York Cent. R. Co. v. Public Utilities Commission of Ohio, 154 N.E. 797, 115 Ohio St. 493.

(2) Of particular newspapers.—Commissioners of Hendersonville v. Prudden & Co., 105 S.E. 7, 180 N.C. 496.

(3) Of weekly newspapers.

Ala.—Byrd v. State, 102 So. 223, 212 Ala. 266.

La.—Beasley Motor Co. v. Town of Ruston, 156 So. 179, 180 La. 72.

(4) That damage follows libel imputing dishonesty to newspaper distributor in conduct of his business.—Will v. Press Pub. Co., 164 A. 621, 309 Pa. 539.

(5) That in many rural settlements no newspaper is published.—Sanita-

er businesses and occupations such as: nursery business;[13] painters;[14] pawnbrokers;[15] plumbing business;[16] production of food products;[17] professions,[18] such as the dental,[19] legal,[20] and concerning still oth-

tion Dist. No. 4 of Los Angeles County v. Payne, 241 P. 264, 197 Cal. 448.

(6) That in printing press service dispatch emanating from other localities, article is not considered original composition of newspaper publisher.—Layne v. Tribune Co., 146 So. 234, 108 Fla. 177, 86 A.L.R. 466.

(7) That newspapers are widely circulated and read.—O'Malley v. Statesman Printing Co., 91 P.2d 357, 60 Idaho 326.

(8) Other matters.

Cal.—Bohanon v. James McClatchy Pub. Co., 60 P.2d 510, 16 Cal.App. 2d 188.

Fla.—Layne v. Tribune Co., supra.

N.Y.—Mail & Express Co. v. Parker Axles, Inc., 198 N.Y.S. 20, 204 App. Div. 327—In re Brewster's Estate, 298 N.Y.S. 761, 163 Misc. 820.

Tex.—Houston Press Co. v. Bawden Bros., Civ.App., 51 S.W.2d 438.

23 C.J. p 74 notes 25, 26, 28.

Judicial notice cannot be taken:

(1) For the purpose of declaring a statute invalid, that the existence of a newspaper is not a matter of common knowledge within the zone of its general circulation, or that such common knowledge does not extend to the fact that it is a weekly newspaper.—Byrd v. State, 102 So. 223, 212 Ala. 266.

(2) Of magnitude of newspaper plant.—Birdsong v. Jones, 8 S.W.2d 98, 222 Mo.App. 768.

(3) Of the publisher.

Ga.—Constitution Pub. Co. v. May, 85 S.E. 934, 16 Ga.App. 599.

Ill.—People v. Coal Belt Electric Ry. Co., 142 N.E. 495, 311 Ill. 29.

(4) That paper called "daily" was or was not issued on Sunday.—Hoffman v. Bigham, 24 S.W.2d 125, 324 Mo. 516.

(5) Other matters.

U.S.—Fleming v. Lowell Sun Co., D.C.Mass., 36 F.Supp. 320, vacated on other grounds Lowell Sun Co. v. Fleming, C.C.A., 120 F.2d 213.

N.Y.—Mail & Express Co. v. Hamilton Garment Co., 217 N.Y.S. 284, 127 Misc. 604, reversed on other grounds 220 N.Y.S. 886, 219 App. Div. 815.

Ohio.—State ex rel. Herrick v. Jones, 24 N.E.2d 632, 62 Ohio App. 474.

23 C.J. p 74 note 27, p 75 notes 29, 30, 32.

13. Cal.—Story v. Christin, 95 P.2d 925, 14 Cal.2d 592, 125 A.L.R. 1402, superseding 89 P.2d 144.

14. Ky.—Young v. City of Lexington, 32 S.W.2d 410, 235 Ky. 822.

Mo.—Rickey v. New York Life Ins. Co., 71 S.W.2d 88, 229 Mo.App. 1226.

15. **Shelter to thievery**

Wash.—Asakura v. City of Seattle, 210 P. 30, 122 Wash. 81, reversed on other grounds 44 S.Ct. 515, 265 U.S. 332, 68 L.Ed. 1041.

16. N.C.—State v. Mitchell, 7 S.E. 2d 567, 217 N.C. 244.

Tex.—Gilliland v. Penick-Hughes Co., Civ.App., 33 S.W.2d 533, error refused.

17. **New recipes**

U.S.—In re McKee, C.C.P.A., 95 F. 2d 264.

18. U.S.—District of Columbia v. Murphy, D.C., 119 F.2d 451, certiorari granted 61 S.Ct. 1103.

Mo.—Horton v. Clark, 293 S.W. 362, 316 Mo. 770—State ex rel. Kaegel v. Holekamp, App., 151 S.W.2d 685.

Neb.—State ex rel. Johnson v. Wagner, 297 N.W. 906.

Duties and character

Judicial notice will be taken of the general duties and character of occupations universally classed as professions.—O'Reilly v. Erlanger, 95 N.Y.S. 760, 108 App.Div. 318, 17 N.Y. Ann.Cas. 254, affirming 92 N.Y.S. 56, 46 Misc. 278.

Legal regulation

It is matter of general knowledge that legal regulation of practice of medicine, surgery, and dentistry involves numerous details constituting machinery for efficient regulation.—Spencer v. Hunt, 147 So. 282, 109 Fla. 248.

Professional books

It is common knowledge that professional works are books of period and that their probable life is limited in time.—In re Elsner's Will, 206 N.Y.S. 765, 210 App.Div. 575.

Rescission from necessary standards

It is matter of general knowledge that practitioner having obtained license to practice medicine, surgery, or dentistry sometimes recedes from necessary standards of honesty and scientific efficiency.—Spencer v. Hunt, 147 So. 282, 109 Fla. 248.

19. **Judicial notice has been taken:**

(1) That corporations have been chartered to practice dentistry under state laws and have engaged in such practice in state.—State Dentists v. Gifford, 191 S.E. 787, 168 Va. 508.

(2) That dentist's patients are not placed in dental chair for treatment while wearing overcoat or wraps.—Webster v. Lane, 212 N.Y.S. 298, 125 Misc. 868.

(3) That teeth may break, while being extracted, without any negligence of dentist.—McCartney v. Hyman, 4 A.2d 581, 134 Pa.Super. 524.

(4) Other matters.

Cal.—Barham v. Widing, 291 P. 173, 210 Cal. 206.

Iowa.—Whetstine v. Moravec, 291 N.W. 425.

Tex.—Connor v. City of University Park, Civ.App., 142 S.W.2d 706, error refused.

20. **Judicial notice has been taken:**

(1) Of handling of damage suits on contingent fee basis.

La.—Meunier v. Bernich, App., 170 So. 567.

N.Y.—Lawrence v. Murray, 12 N.Y.S.2d 262, 171 Misc. 666.

(2) Of unprofessional conduct by some members of the bar.

Mich.—Kelley v. Boyne, 214 N.W. 316, 239 Mich. 204, 53 A.L.R. 273.

Ohio.—In re Meck, 200 N.E. 478, 51 Ohio App. 237.

(3) Of usual business of lawyers within state.

Ala.—Berk v. State, 142 So. 832, 225 Ala. 324, 84 A.L.R. 740.

N.J.—Rouse v. Pollard, 18 A.2d 5, 129 N.J.Eq. 47.

(4) That a great majority of lawyers are called on for advice in reference to business and financial matters, especially those who have been counsel for corporations.—Wingert v. Bowie, 128 A. 274, 147 Md. 610.

(5) That claim agents and attorneys in attempting to settle negligence cases seldom admit to their opponents that there is liability.—Luton Mining Co. v. Louisville & N. R. Co., 123 S.W.2d 1055, 276 Ky. 321.

(6) That it is almost impossible to catalogue the many duties performed by administrator's attorney, where estate is large and factions are antagonistic.—Maynard v. Steele, 47 S.W.2d 738, 242 Ky. 745.

(7) That successful prosecution of criminal actions is not proof of proper ethical standards.—In re Waggoner, 206 N.W. 427, 49 S.D. 78.

(8) Other matters.

U.S.—Rinderknecht v. Toledo Ass'n of Credit Men, D.C.Ohio, 13 F.Supp. 555.

Cal.—Kains v. First Nat. Bank, 86 P. 2d 935, 30 Cal.App.2d 447—Anderson v. City Ry. Co., 48 P.2d 969, 9 Cal.App.2d 205—Raskin v. Superior Court in and for Los Angeles County, 33 P.2d 35, 138 Cal.App. 668.

Ill.—Toth v. Samuel Phillipson & Co., 250 Ill.App. 247.

Mo.—In re Noell, 96 S.W.2d 213, 234 Mo.App. 1162.

N.Y.—In re Engel's Estate, 250 N.Y.S. 648, 140 Misc. 276—Mandel v. Donohue, 208 N.Y.S. 807, 124 Misc. 861.

S.C.—Watson v. Watson, 132 S.E. 39, 134 S.C. 147.

er businesses and occupations such as: medical,[21] ministry,[22] nursing[23] professions; radio broadcasting;[24] real estate;[25] restaurant;[26] retail business;[27]

Tex.—Citizens' Nat. Bank of Cameron v. Morrison, Civ.App., 50 S.W. 2d 346—O'Fiel v. Redell, Civ.App., 298 S.W. 142, affirmed Reddell v O'Feil, Com.App., 6 S.W.2d 92—Farmers' Gas Co. v. Calame, Civ. App., 262 S.W. 546.

23 C.J. p 75 note 34 [a].

Judicial notice of attorneys as officers of court see infra § 48.

21. Ky.—Ohio County Drug Co. v. Howard, 256 S.W. 705, 201 Ky. 246, 31 A.L.R. 1355.

Puerto Rico.—U. S. v. Coll y Cuchi, 8 Puerto Rico Fed. 255.

Tex.—Johnson v. State, Civ.App., 267 S.W. 1057.

Judicial notice has been taken:

(1) Of chiropractic system of practice.—Maryland Casualty Co. v. Hill, Tex.Civ.App., 91 S.W.2d 391, error dismissed.

(2) Of the usual means of diagnosis and medical and surgical practice.

Cal.—Lewis v. Johnson, 86 P.2d 99, 12 Cal.2d 558—Reynolds v. Struble, 18 P.2d 690, 128 Cal.App. 716.

Tex.—International Travelers' Ass'n v. Yates, Com.App., 29 S.W.2d 980, reversing Yates v. International Travelers' Ass'n, Civ.App., 16 S. W.2d 301.

(3) That a doctor is to a greater or less extent a chemist.—Associated Indemnity Corporation v. Baker, Tex. Civ.App., 76 S.W.2d 153, error dismissed.

(4) That medical experts are not always right in their opinions.

Ky.—Jefferson Standard Life Ins. Co. v. Hurt, 72 S.W.2d 20, 254 Ky. 603.

N.Y.—Strauss v. Hannig, 6 N.Y.S.2d 459, 169 Misc. 29.

Tex.—El Paso Electric Co. v. Cannon, Civ.App., 69 S.W.2d 532, reversed on other grounds, Com.App., 99 S.W.2d 907.

(5) That medicine is not an exact science, like mathematics, physics, or chemistry, but is peculiarly, and above all others known to man, an uncertain science, based on opinion and best judgment of men who have made a life-long study thereof.—Rice v. Tissaw, Ariz., 112 P.2d 866.

(6) That practitioners of medicine call to their aid persons not physicians or surgeons.—Haggerty's Case, 11 N.E.2d 583, 298 Mass. 466.

(7) Other matters.

Cal.—Leo v. Board of Medical Examiners, 97 P.2d 1046, 36 Cal.App. 2d 490—Warnock v. Kraft, 85 P.2d 505, 30 Cal.App.2d 1.

La.—Weaver v. Mansfield Hardwood Lumber Co., App., 1 So.2d 103—Creel v. Dorsey, App., 159 So. 608.

Mo.—Carson v. Hagist, App., 143 S. W.2d 355.

N.Y.—Sprague v. Spencer, 14 N.Y.S. 2d 673, 172 Misc. 123.

Pa.—Reigle v. Sholly, 14 A.2d 166, 140 Pa Super. 153.

Wis.—In re Williams' Estate, 202 N. W. 314, 186 Wis. 160.

23 C.J. p 75 note 35 [a].

Judicial notice cannot be taken:

(1) That doctor referred to in record is authorized physician.—Smith v. Marshall Ice Co., 217 N.W. 264, 204 Iowa 1348.

(2) Of relative heights of skill which medical profession has attained in various places—Soady v. Washburn, 299 P. 560, 114 Cal.App. 82.

23 C.J. p 75 note 36.

22. Judicial notice has been taken:

(1) That driving an automobile is a substantial part of a minister's profession, and that a minister on occasion has to write out sermons, reports, and resolutions for the various church bodies and assemblies, and write letters of condolence to members of the church or their families and others in an official capacity.—Smoak v. Southeastern Life Ins. Co., 179 S.E. 56, 175 S.C. 324.

(2) Other matters see Semple v. Andrews, 81 P.2d 203, 27 Cal.App. 2d 228.

23. Arduous labor

Wash.—Miller v. Mohr, 89 P.2d 807, 198 Wash. 619.

Compensation

It is matter of common knowledge that practical or untrained nurses do not command same compensation as trained nurses.—Gover's Adm'r v. Waddle, 54 S.W.2d 19, 245 Ky. 652.

Welfare of patient

It is common knowledge that welfare of patient is as much responsibility of nurse as it is of physician.—Norfolk Protestant Hospital v. Plunkett, 173 S.E. 363, 162 Va. 151.

24. U.S.—Associated Press v. KVOS, Inc., C.C.A.Wash., 80 F.2d 575, reversing, D.C., 9 F.Supp. 279, certiorari granted KVOS, Inc. v. Associated Press, 56 S.Ct. 938, 298 U.S. 650, 80 L.Ed. 1379, reversed on other grounds 57 S.Ct. 197, 299 U.S. 269, 81 L.Ed. 183.

Programs

U.S.—Buck v. Debaum, D.C.Cal., 40 F.2d 734.

25. Plowing

The court should judicially notice that plowing was not incident to the occupation of "real estate and investments," notwithstanding that men in this business have been known to plow.—Ogilvie v. Ætna Life Ins. Co. of Hartford, Conn., 209 P. 26, 189 Cal. 406, 26 A.L.R. 116.

26. Preparation of certain foods

It is common knowledge that in conduct of restaurant business certain foods are retailed for consumption by customers on premises in same form as purchased by restaurateur.—Michigan Packing Co. v. Messaris, 241 N.W. 236, 257 Mich. 422.

27. Judicial notice has been taken:

(1) Of products sold by grocers—Private A. S. Realty Corporation v. Julian, 212 N.Y.S. 430, 214 App.Div. 628.

(2) Of the economy of a cash-and-carry store.—Great Atlantic & Pacific Tea Co. v. Ervin, D.C.Minn., 23 F. Supp. 70.

(3) Of the existence of many concerns in a particular city doing gasoline and oil business.—Independent Gas & Oil Co. v. T. B. Smith Co., 10 P.2d 317, 51 Idaho 710.

(4) Of the general practice of vendors of milk in requiring a deposit to guarantee return of bottles.—Milk Commission v. Dade County Dairies, Fla., 200 So. 83.

(5) Of the tracking of snow into stores.

U.S.—Great Atlantic & Pacific Tea Co. v. McLravy, C.C.A.Mich., 71 F 2d 396.

Ohio.—Picman v. Higbee Co., 6 N.E. 2d 21, 54 Ohio App. 55.

(6) That difference between established storekeeper and one opening a store is negligible factor of credit—Woolf v. Fuller, 174 A. 193, 87 N. H. 64, 94 A.L.R. 1067.

(7) That florists display in cabinets or showcases cut flowers in vases.—McNally v. Oakwood, 206 N.Y. S. 759, 210 App.Div. 612, affirmed 148 N.E. 722, 240 N.Y. 600.

(8) That flour is sold to the public under varying brands.—Holt v. Long, Ala., 174 So. 759, 760, 234 Ala. 369, citing **Corpus Juris.**

(9) That fowl are often killed and dressed by poultry raisers and dealers in connection with retail sales.—Petros v. Superintendent and Inspector of Buildings of City of Lynn, 28 N.E.2d 233, 306 Mass. 368, 128 A.L.R. 1210.

(10) That "gift enterprises" are a form of lottery evasion.—City of Wink v. Griffith Amusement Co., 100 S.W.2d 695, 129 Tex. 40, reversing, Civ.App., 78 S.W.2d 1065—38 C.J. p 296 note 10 [c].

(11) That lavatory and toilet facilities are available in department stores generally for the accommodation of patrons.—Christman v. Segal, 17 A.2d 676, 143 Pa.Super. 87.

(12) That many articles are sold under the trade-name of the whole-

salesmen;[28] shipping;[29] stenography;[30] stock exchanges;[31] stockyards;[32] surety business;[33] surveyors;[34] tailoring;[35] taxicabs;[36] trapping of fur-bearing animals;[37] water companies;[38] wholesale

sale or retail dealer.—Williams v. Harrison, C.C.A.Ill., 110 F.2d 989.

(13) That mercantile establishments, as, for example, furniture dealers, etc., not only sell, but rent, their merchandise.—Staacke v. Routledge, 241 S.W. 994, 111 Tex. 489, affirming, Civ.App., 175 S.W. 444.

(14) That stores as well as other places of public use very frequently have sloping floors.—Kelly v. Loft, Inc., 11 A.2d 58, 124 N.J.Law 185.

(15) Other matters.

U.S.—Forst Packing Co. v. C. W. Antrim & Sons, C.C.P.A., 118 F.2d 576—Joseph Tetley & Co. v. Fant Milling Co., C.C.P.A., 111 F.2d 485—In re Keller, Heumann & Thompson Co., C.C.P.A., 81 F.2d 399, certiorari denied Keller, Heumann & Thompson Co. v. Coe, 56 S.Ct. 676, 298 U.S. 656, 80 L.Ed. 1382—Gerdert v. Certified Poultry & Egg Co., D.C.Fla., 38 F.Supp. 964—Collins v. Kidd, D.C.Tex., 38 F.Supp. 634.

Cal.—Madigan v. O. A. Hale & Co., 265 P. 574, 90 Cal.App. 151.

Del.—Keedy v. Sterling Electric Appliance Co., 115 A. 359, 13 Del.Ch. 66.

Fla.—Warren Co. v. Howell, 3 So.2d 167.

Ill.—Woods v. Lawndale Theatre Corporation, 24 N.E.2d 193, 302 Ill.App. 570.

Mass.—Attorney General v. J. P. Cox Advertising Agency, 10 N.E.2d 255, 298 Mass. 383.

N.J.—Lo Bosco v. Resnitzky, 200 A. 1010, 120 N.J.Law 495.

N.Y.—Canfield v. Quayle, 10 N.Y.S.2d 781, 170 Misc. 621—Lovett v. Frederick Loeser & Co., 207 N.Y.S. 753, 124 Misc. 81—People, on Complaint of Jones, v. Mestichelli, 18 N.Y.S.2d 406—People v. Greco, 16 N.Y.S.2d 385.

Or.—Lee v. Meier & Frank Co., 114 P.2d 136.

Tex.—Kiel v. Miller, Civ.App., 234 S.W. 550.

Va.—Hobbs v. Virginia Nat. Bank of Petersburg, 128 S.E. 46, 147 Va. 802, reversed on other grounds 133 S.E. 595, 147 Va. 802.

23 C.J. p 76 notes 59–62.

Judicial notice cannot be taken:

(1) That certain merchandise is sold from "jewelry counter."—U. S. v. Doragon Co., 12 Ct.Cust.App. 524, modified on other grounds 13 Ct.Cust.App. 182.

(2) That children are invited by merchant to come with their parents to the store when purchase is to be made by and for the parent, but notice can be taken that they are permitted or licensed so to do.

Ga.—Petree v. Davison-Paxon-Stokes Co., 118 S.E. 697, 30 Ga.App. 490.

Tex.—Carlisle v. J. Weingarten, Inc., Civ.App., 120 S.W.2d 886, reversed on other grounds, Sup., 152 S.W.2d 1073.

28. Permanency of service

Ky.—Putnam v. Producers' Live Stock Marketing Ass'n, 75 S.W.2d 1075, 256 Ky. 196.

29. Judicial notice has been taken:

(1) That breaking of machinery as the result of which damage occurs is not normal to the operation of a tug.—The William E. Reed, C.C.A.N.Y., 104 F.2d 167.

(2) That hiring of tow-boats is for short service and by many different parties whose financial responsibility cannot be easily ascertained.—The N. P. Doane, C.C.A.Mass., 6 F.2d 516.

(3) That ordinary wooden box barges can be used only in comparatively quiet waters.—Peace River Phosphate Mining Co. v. Mulqueen, C.C.A.Mass., 285 F. 102.

(4) That pontoons are not cargo-bearing hulls.—Conners Marine Co. v. Northwestern Fire & Marine Ins. Co., C.C.A.N.Y., 88 F.2d 637, affirming, D.C., 16 F.Supp. 626.

(5) That scows of the kind required to transport a large quantity of stone could not be obtained in a particular vicinity.—Taylor v. Connett, C.C.A.N.C., 277 F. 945, affirming, D.C., U. S. v. D. L. Taylor Co., 268 F. 635.

(6) That vessels are not accustomed to stop in harbor, except at wharf or similar accommodation.—City of Oakland v. E. K. Wood Lumber Co., 292 P. 1076, 211 Cal. 16, 80 A.L.R. 379.

(7) Other matters.

U.S.—S. L. Shepard & Co. v. Agwilines, Inc., D.C.S.C., 39 F.Supp. 528.

Wash.—McEachran v. Rothschild & Co., 237 P. 711, 135 Wash. 260, modified on other grounds 241 P. 969, 135 Wash. 260.

Judicial notice cannot be taken that to step on a steel deck strewn with small particles of flaxseed involved the danger of slipping.—The Joshua W. Rhodes, D.C.N.Y., 259 F. 604.

30. Time required

The courts have taken judicial notice that where testimony is taken by a stenographer some time is required to reduce it to typewriting.—Oblasser v. Wayne Cir. Judge, 124 N.W. 590, 159 Mich. 665.

31. General nature

Mo.—Dibert v. D'Arcy, 154 S.W. 1116, 248 Mo. 617.

Rules

Court cannot take judicial notice of rules of New York Stock Exchange.—In re Salmon Weed & Co., C.C.A.N.Y., 53 F.2d 335, 79 A.L.R. 379.

32. Judicial notice will be taken:

(1) That a particular stockyard enjoys a monopoly.—Denver Union Stock Yard Co. v. U. S., D.C.Colo., 21 F.Supp. 83, affirmed 58 S.Ct. 990, 304 U.S. 470, 82 L.Ed. 1469.

(2) Other matters see 23 C.J. p 76 notes 68, 69.

33. Custom

It is matter of common knowledge that American Surety Company of New York is commonly spoken of as the American Surety Company.—American Surety Co. of New York v. Blake, 27 P.2d 972, 54 Idaho 1, 91 A.L.R. 153.

Writing of fidelity bonds

S.D.—Shaw v. Brisbine, 260 N.W. 710, 63 S.D. 470.

34. Chainmen

Court takes judicial notice that surveyors must have chainmen and rodmen with them, and that carrying chain or holding rod is not "surveying."—Severance v. Ball, 268 P. 1068, 93 Cal.App. 56.

35. Selection of cloth

The court will take judicial notice that, in the purchase of a tailor-made suit, the purchaser selects the cloth and the style, has his measurements taken, from which the suit is thereafter made and specifies the time for delivery.—Factor v. Peabody Tailoring System, 187 N.W. 984, 177 Wis. 238.

36. In large cities

Courts cannot ignore their common knowledge with respect to the extent of the development of the taxicab business engaged in the transportation of members of the public in the larger cities.—Anderson v. Yellow Cab Co., 191 N.W. 748, 179 Wis. 300, 31 A.L.R. 1197.

Jitneys

Tex.—Burnett v. Riter, Civ.App., 276 S.W. 347.

Noise

It is common knowledge that competition between taxicabs at railway stations is likely to be attended by noisy confusion, annoying those sought to be served.—Delaware, L. & W. R. Co. v. Town of Morristown, N. J., 48 S.Ct. 276, 276 U.S. 182, 72 L.Ed. 523, 56 A.L.R. 756, reversing, C.C.A., 14 F.2d 257, certiorari granted 47 S. Ct. 335, 273 U.S. 686, 71 L.Ed. 840.

37. Profitable industry in Louisiana

U.S.—Prejean v. Delaware-Louisiana Fur-Trapping Co., C.C.A.La., 13 F.2d 71, reversing, D.C., 8 F.2d 357.

38. Charge for water

It is a matter of common knowl-

dealers;[39] and undertakers.[40]

Mining. Judicial notice is taken of notorious facts connected with mines and their operation,[41] of the importance of the mining industry,[42] of the condition and development of particular mining industries,[43] and of the risk and uncertainty of the business.[44] On the other hand, the court will not take judicial notice of facts relating to mines and mining which are not matters of common knowledge.[45]

In accordance with these rules, judicial notice may be taken of facts of common knowledge relating to the oil and gas industries,[46] including notice of such

edge that every water company makes some kind of a charge for water furnished to consumer —Town of Keene v. Town of Roxbury, 126 A. 7, 81 N. H. 332.

39. Judicial notice will be taken:

(1) Of the distinction between a wholesale dealer and a manufacturer.—Kansas City v. Butt, 88 Mo.App. 237.

(2) That wholesale dealers ordinarily make sales to their customers in the state by sending their traveling salesmen to their customers' places of business —State v. Racine Sattley Co., 134 S.W. 400, 63 Tex. Civ App. 663.

40. Cost of funerals

The district court cannot take judicial notice of the usual cost of funerals nor of the minimum cost, nor of the extent of funeral services required in case of a person of small means.—Mondock v. Gennrich, 21 A. 2d 611, 19 N.J.Misc. 499.

41. Ind.—Princeton Coal Min. Co. v. Howell, 92 N.E. 122, 46 Ind.App. 572.

23 C.J. p 74 note 15.

Extraction of minerals

(1) The courts may take judicial knowledge of the fact that processes of crushing, amalgamating, and cyaniding ores will not effect an extraction of one hundred per cent of the metallic contents.—Richardson v. National Ore Purchasing & Reduction Co., 124 P. 779, 34 Nev. 455.

(2) Judicial notice will not be taken of what percentage of mineral can be extracted from a particular class of ore.—Dixon v. Southern Pac. Co., Nev., 172 P. 368, L.R.A.1918D 960.

Judicial notice has been taken

(1) Of competing labor unions in mining industry and evils arising therefrom.—Stanley v. Peabody Coal Co., D.C.Ill., 5 F.Supp. 612.

(2) That coal mining is seasonal employment.—Employers' Mut. Ins. Co. v. Industrial Commission of Colorado, 277 P. 777, 85 Colo. 588.

(3) That fires in mines do occur, and that through negligence or otherwise sufficient means of exit from mines are sometimes not provided in case of a fire.—Wirta v. North Butte Mining Co., 210 P. 332, 64 Mont. 279, 30 A.L.R. 964.

(4) That mine property depreciates rapidly when allowed to remain idle —Fourseam Block Collieries Co. v. John P. Gorman Coal Co., 82 S.W.2d 223, 259 Ky. 132.

(5) That landowners usually dispose of minerals in land in nonproductive territory by executing mineral leases retaining royalty.—Martin v. Dial, Tex.Civ.App., 57 S.W.2d 75, 89 A.L.R. 571, reversing, Civ App., Dial v. Martin, 37 S.W.2d 166.

(6) That mining companies, because of remote location, must furnish houses to employees as part of conducting their business.—T. H. Mastin & Co v. Standard Elkhorn Coal Co., 33 S.W.2d 596, 236 Ky. 482.

(7) That the expense of mining operations is enormous.—Martel v. Hunt, 197 So. 402, 195 La. 701.

(8) Of other matters.

U.S.—In re Roberts Mining & Milling Co., D.C.Nev., 35 F Supp. 678 —Little War Creek Coal Co. v. U. S., D.C.W.Va., 25 F.Supp. 764, reversed on other grounds U. S v. Little War Creek Coal Co., 104 F. 2d 483.

Cal.—Hayward Lumber & Investment Co. v. Pride of Mojave Mining Co., 43 App 2d 146, 110 P.2d 439 —Frey v. Garibaldi, 72 P.2d 554, 23 Cal.App 2d 83.

Idaho.—Kloppenburg v. Mays, 88 P. 2d 513, 60 Idaho 19.

Utah.—Lawley v. Hickenlooper, 212 P. 526, 61 Utah 298.

23 C.J. p 74 notes 15 [a], [b], 16, 17, 19.

42. Colo.—People v. United Mine Workers of America, Dist. 15, 201 P. 54, 70 Colo. 269.

43. Cal.—People v. Associated Oil Co., 294 P. 717, 211 Cal. 93.

Tex.—Skipper-Bivens Oil Co. v. State, Civ.App., 115 S.W.2d 1016, error refused.

In early days

(1) The supreme court takes judicial notice that, in the early days of placer and hydraulic mining, water power was much prized, as indispensable to the operation of such a system of mining.—Williamson v. Railroad Commission, 222 P. 803, 193 Cal. 22.

(2) It is common knowledge that in early days the open ditch was usual method for conveying water for mining and irrigation purposes, and that modern methods would have then been practically prohibitive.—Witherill v. Brehm, 240 P. 529, 74 Cal.App. 286.

44. Ky.—Whitaker v. Green River Coal Co., 122 S.W.2d 1012, 276 Ky 43, 119 A.L.R. 1456.

W.Va.—Garrett v. South Penn Oil Co., 66 S.E. 741, 66 W.Va. 587

23 C.J. p 74 note 18.

45. Wyo.—Barquin v. Hall Oil Co., 201 P. 352, 28 Wyo. 164, rehearing denied 202 P. 1107, 28 Wyo. 164

23 C.J. p 74 notes 20–22.

46. U.S.—U. S. v. Trust No. B. I 35, Bank of America Nat. Trust & Savings Ass'n, C.C.A.Cal., 107 F.2d 22, reversing, D.C., Trust No. B I. 35, Bank of America Nat. Trust & Savings Ass'n v. U. S., 25 F. Supp. 608—Exum v. Laub, C.C.A Tex., 87 F.2d 73—Reynolds v. Cooper, C.C.A.Wyo., 64 F.2d 644, affirming, D.C., Cooper v. Reynolds, 60 F.2d 650, and certiorari granted Reynolds v. Cooper, 54 S.Ct. 66 (three cases), 290 U.S. 616, 78 L. Ed. 538, affirmed 54 S.Ct. 356, 291 U.S. 192, 78 L.Ed. 725—Denker v. Mid-Continent Petroleum Corporation, C.C.A.Okl., 56 F.2d 725, 84 A. L.R. 756—Marblehead Land Co. v. City of Los Angeles, C.C.A.Cal., 47 F.2d 528, affirming, D.C., 36 F.2d 242, and certiorari denied 52 S.Ct. 18, 284 U.S. 634, 76 L.Ed. 540—Empire Natural Gas Co. v. Southwest Pipe Line Co., D.C.Okl., 25 F.2d 742, affirmed Southwest Pipe Line Co. v. Empire Natural Gas Co., C. C.A., 33 F.2d 248, 64 A.L.R. 1229—Marrs v. City of Oxford, D.C.Kan., 24 F.2d 541, affirmed, C.C.A., 32 F. 2d 134, 67 A.L.R. 1336, certiorari denied Ramsey v. City of Oxford, 50 S.Ct. 24, 280 U.S. 563, 74 L.Ed 617, and Marrs v. City of Oxford, 50 S.Ct. 29, 280 U.S. 573, 74 L.Ed 625—Lorraine v. Townsend, D.C. Cal., 2 F.2d 729, affirmed, C.C.A., 8 F.2d 673—St. John v. Brown, D. C.Tex., 38 F.Supp. 385—Kyle v. Wadley, D.C.La., 24 F.Supp. 884.

Cal.—Midland Oil Fields Co. v. Rudneck, 204 P. 1074, 188 Cal. 265—Larson v. Bush, 83 P.2d 955, 20 Cal.App.2d 43—Cornwell v. Buck & Stoddard, 82 P.2d 516, 28 Cal. App.2d 333—Alphonzo E. Bell Corporation v. Bell View Oil Syndicate, 76 P.2d 167, 24 Cal.App.2d 587, followed in 76 P.2d 166, 24 Cal.App.2d 746, 76 P.2d 166, 24 Cal. App.2d 747 and 76 P.2d 166, 24 Cal. App.2d 748—Hollister v. Kingsbury, 18 P.2d 1006, 129 Cal.App.

facts as the risks and uncertainty of the business,[47] the cost of developing oil and gas wells,[48] the employment of geologists in the gas and oil industry,[49] the necessity of preventing the waste of gas,[50] the surreptitious and illegal production of oil,[51] that oil and gas in the ground is in its nature a fugitive and likely to pass from one lease to a well on an adjoining lease,[52] and facts relating to leases and royalty rights;[53] but judicial notice cannot be taken of facts relating to the gas and oil industry which are not matters of common knowledge.[54]

Public utilities. Matters of common knowledge relating to public utilities will be judicially noticed,[55] and particular matters relating to electric

420—Richfield Oil Co. of California v. Hercules Gasoline Co., 297 P. 73, 112 Cal.App. 431.

La.—Platt v. Bender, App., 178 So. 678.

Miss.—Standard Oil Co. v. Stone, 2 So.2d 155.

Okl.—Patterson v. Stanolind Oil & Gas Co., 77 P.2d 83, 182 Okl. 155, appeal dismissed 59 S.Ct. 259, 305 U.S. 376, 83 L.Ed. 231.

Tex.—Humphreys Oil Co. v. Liles, Com.App., 277 S.W. 100, affirming, Civ.App., 262 S.W. 1058—Federal Underwriters Exchange v. Bickham, Civ.App., 136 S.W.2d 880, error granted—Persky v. First State Bank of Vernon, Civ.App., 117 S.W.2d 861—Travelers Ins. Co. v. Cox, Civ.App., 86 S.W.2d 844—State v. Lone Star Gas Co., Civ.App., 86 S.W.2d 484, error refused, reversed on other grounds Lone Star Gas Co. v. State of Texas, 58 S.Ct. 883, 304 U.S. 224, 551, 82 L.Ed. 1304, rehearing denied 58 S.Ct. 1051, 304 U.S. 590, 82 L.Ed. 1549—Gulf Production Co. v. Taylor, Civ.App., 28 S.W.2d 914, error dismissed—Longhart Supply Co. v. Keystone Pipe & Supply Co., Civ.App., 26 S.W.2d 389, error refused—Graham v. Omar Gasoline Co., Civ.App., 253 S.W. 896—Commercial Acceptance Trust v. Parmer, Civ.App., 241 S.W. 586.

Utah.—Empey v. Industrial Commission of Utah, 63 P.2d 630, 91 Utah 234, 108 A.L.R. 801.

Trade-mark signs

Iowa.—Reynolds v. Skelly Oil Co., 287 N.W. 823, 227 Iowa 163.

47. Kan.—Jones v. Jones, 265 P. 66, 125 Kan. 403.

Tex.—Logan v. Elliott, Civ.App., 61 S.W.2d 157, error dismissed—Hatt v. Walker, Civ.App., 33 S.W.2d 489, error dismissed—Curry v. Texas Co., Civ.App., 18 S.W.2d 256, error dismissed—Lincoln v. Kirk, Civ.App., 243 S.W. 671—Minchew v. Morris, Civ.App., 241 S.W. 215.

48. Ark.—Blair v. Clear Creek Oil & Gas Co., 230 S.W. 286, 148 Ark. 301.

Okl.—Burns v. Bastien, 50 P.2d 377, 174 Okl. 40.

Tex.—Shell Petroleum Corporation v. Railroad Commission of Texas, Civ.App., 120 S.W.2d 526, error dismissed, opinion supplemented 120 S.W.2d 560—Shamrock Oil & Gas Co. v. Williams, Civ.App., 63 S.W.2d 570, reversed on other grounds Williams v. Shamrock Oil & Gas Co., 95 S.W.2d 1292, 128 Tex. 146, 107 A.L.R. 269—Murphy v. Johnson, Civ.App., 54 S.W.2d 158, error dismissed—Hunt v. State, Civ.App., 48 S.W.2d 466.

49. Ark.—Brace v. Oil Fields Corporation, 293 S.W. 1041, 173 Ark. 1128.

Tex.—Texas Conservative Oil Co. v. Jolly, Civ.App., 149 S.W.2d 265.

50. U.S.—F. C. Henderson, Inc. v. Railroad Commission of Texas, D.C.Tex., 56 F.2d 218, appeal dismissed 53 S.Ct. 4, 287 U.S. 672, 77 L.Ed. 579.

51. U.S.—Melton v. Railroad Commission of Texas, D.C.Tex., 10 F. Supp. 984.

52. Ark.—Love v. McDonald, 148 S.W.2d 170, 201 Ark. 882.

Mich.—Attorney General v. Pere Marquette Ry. Co., 248 N.W. 860, 263 Mich. 431, 94 A.L.R. 520.

Tex.—Shell Petroleum Corporation v. Railroad Commission of Texas, Civ.App., 120 S.W.2d 526, error dismissed, opinion supplemented 120 S.W.2d 560—Weimer v. Prince & Prince, Civ.App., 246 S.W. 666.

53. Tex.—State Nat. Bank of Corpus Christi v. Morgan, 143 S.W.2d 757, 135 Tex. 509, affirming, Civ.App., 123 S.W.2d 1036—Tennant v. Dunn, 110 S.W.2d 53, 130 Tex. 285, modifying Dunn v. Tennant, Civ.App., 82 S.W.2d 728—Jensen v. Wilkinson, Civ.App., 133 S.W.2d 982, error dismissed, judgment correct—Young v. Jones, Civ.App., 222 S.W. 691.

54. **Assets of oil company** cannot be judicially noticed.—In re Harkness's Estate, 5 Pa.Dist. & Co. 351, affirmed 129 A. 458, 283 Pa. 464, certiorari denied Hanna v. Pennsylvania Co. for Insurance of Lives and Granting Annuities, 46 S.Ct. 104, 269 U.S. 579, 70 L.Ed. 422.

Judicial notice will not be taken:

(1) Of what constitutes a reasonable time for the completion of an oil well—Barquin v. Hall Oil Co., 201 P. 352, 28 Wyo. 164, rehearing denied 202 P. 1107, 28 Wyo. 164.

(2) Of whether any particular oil or gas well is drilled vertically, or whether it departs from the vertical, or in what direction it will depart, and that surface operations in drilling oil well indicated that drillers intended to convert to their own use subsurface properties belonging to others.—Alphonzo E. Bell Corporation v. Bell View Oil Syndicate, 76 P.2d 167, 24 Cal.App.2d 587, followed in 76 P.2d 166, 24 Cal.App.2d 746, 76 P.2d 166, 24 Cal.App.2d 747 and 76 P.2d 166, 24 Cal.App.2d 748.

55. **Character of corporation**

(1) Where such is a matter of common knowledge, judicial notice may be taken that a particular corporation is a public utility.—Alabama Power Co. v. Henson, 191 So. 379, 238 Ala. 348—Alabama Power Co. v. Gladden, 197 So. 374, 29 Ala.App. 438.

(2) On the other hand, a court has declined to take judicial notice of the public utility character of corporations.—Mound Water Co. v. Southern California Edison Co., 194 P. 1014, 184 Cal. 602.

Judicial notice has been taken:

(1) Of matters relating to rates.—Wolf v. United Gas Public Service Co., Tex.Civ.App., 77 S.W.2d 1091, error dismissed.

(2) That public service corporations and others having power of eminent domain are frequently actual or potential competitors.—Olson v. U. S., Minn., 54 S.Ct. 704, 292 U.S. 246, 78 L.Ed. 1236, affirming, C.C.A., 67 F.2d 24, certiorari granted 54 S.Ct. 229, 290 U.S. 623, 78 L.Ed. 543—Karlson v. U. S., Minn., 54 S.Ct. 704, 292 U.S. 246, 78 L.Ed. 1236, affirming, C.C.A., 67 F.2d 24, certiorari granted 54 S.Ct. 229, 290 U.S. 623, 78 L.Ed. 543—Brewster v. U. S., Minn., 54 S.Ct. 704, 292 U.S. 246, 78 L.Ed. 1236, affirming, C.C.A., 67 F.2d 24, certiorari granted 54 S.Ct. 229, 290 U.S. 623, 78 L.Ed. 543—U. S. ex rel. and for Use of Tennessee Valley Authority v. Powelson, C.C.A.N.C., 118 F.2d 79, modifying, D.C., U. S. ex rel. Tennessee Valley Authority v. Southern States Power Co., 33 F. Supp. 519.

(3) That small deposits or guaranties of payment of bills by customers are required.—Combs v. Prestonsburg Water Co., 84 S.W.2d 15, 260 Ky. 169.

(4) That vast bulk of public utility business in state is carried on by corporations.—Gremillion v. Louisiana Public Service Commission, 172 So. 163, 186 La. 295.

(5) Other matters.

U.S.—Mississippi Power Co. v. City of Aberdeen, C.C.A.Miss., 95 F.2d

companies,[56] gas companies,[57] telephone and telegraph companies,[58] and water companies[59] have been judicially noticed. On the other hand, courts cannot take judicial notice of matters pertaining to public utilities which are not matters of common knowledge.[60]

With some qualifications,[61] courts take judicial notice of the great telegraph systems of the country,[62] and the building of telegraph lines within the state.[63] They know that a telegraph line is a public improvement; that property proposed to be taken therefor is for a public use;[64] the duty of a telegraph company to exercise care to prevent its wires from obstructing a public road;[65] familiar

990—United Fuel Gas Co. v Railroad Commission of Kentucky, D. C Ky., 13 F.2d 510, affirmed 49 S.Ct. 150, 278 U.S. 300, 73 L.Ed. 390.

Cal.—City of Los Angeles v. City of Huntington Park, 89 P 2d 702, 32 Cal.App 2d 253.

Minn.—State v. Consumers Power Co., 137 N.W. 104, 119 Minn 225, 41 L R.A.,N.S., 1181, Ann.Cas.1914B 19.

Tex.—Central Power & Light Co. v. Purvis, Civ.App., 67 S.W.2d 1086, error refused.

Wis.—Wisconsin Gas & Electric Co. v. Wisconsin Tax Commission, 266 N.W. 186, 221 Wis. 487, rehearing denied 268 N W. 121, 221 Wis. 487.

23 C.J. p 75 notes 37–40.

56. Judicial notice has been taken:

(1) That the purpose of power line construction whereby wires are suspended from towers, is to "insulate" them.—Capitol Airways v. Indianapolis Power & Light Co., 18 N E.2d 776, 215 Ind. 462.

(2) Other matters.

Ala.—Stroup v. Alabama Power Co., 113 So. 18, 216 Ala. 290, 52 A.L.R. 1075.

Cal.—Pacific Gas & Electric Co. v. Moore, 98 P.2d 819, 37 Cal.App.2d 91.

Tex.—Central Power & Light Co. v. Purvis, Civ.App., 67 S.W.2d 1086, error refused.

23 C.J. p 75 notes 41, 42.

57. U.S.—United Fuel Gas Co. v. Railroad Commission of Kentucky, D.C Ky., 13 F.2d 510, affirmed 49 S.Ct. 150, 278 U.S. 300, 73 L.Ed. 390.

Competition with other fuels

Judicial notice will be taken of the fact that gas is in competition with other forms of fuel, such as oil and electricity.—West Ohio Gas Co. v. Public Utilities Commission of Ohio, 55 S.Ct. 316, 294 U.S. 63, 79 L.Ed. 761, reversing West Ohio Gas Co. v. Public Utilities Commission (City of Lima), 191 N.E. 105, 128 Ohio St. 301, reversed on other grounds West Ohio Gas Co. v. Public Utilities Commission of Ohio, 55 S.Ct. 324, 294 U.S. 79, 79 L.Ed. 773, conformed to 196 N.E. 674, 129 Ohio St. 670.

Corporation

The courts will take judicial notice that the business of supplying a community with gas or electricity for light, etc., is practically always conducted by a corporation.—Hansen v. Vallejo Electric Light & Power Co., 188 P. 999, 182 Cal. 492.

Natural monopoly

It is common knowledge that in most instances the supplying of natural gas for local distribution and consumption is a natural monopoly and that producing and dealing in natural gas is affected with a public interest. Interstate Natural Gas Co. v. Louisiana Public Service Commission, D.C.La., 33 F.Supp. 50.

Process involved

Courts know in a general way the process involved in the manufacture, storage, and distribution, of artificial gas.—Romano v. Birmingham Ry, Light & Power Co., 62 So. 677, 182 Ala. 335, 46 L.R.A.,N.S., 642.

Turning off meters

Court may judicially notice gas company's custom of permitting others than own employees to turn on or shut meters.—Sawyer v. Southern California Gas Co., 274 P. 544, 206 Cal. 366.

58. Cal.—Barron v. Board of Dental Examiners of State of California, App., 113 P.2d 247.

N.Y.—Ratomski v. Quittner, 212 N.Y. S. 53, 214 App.Div. 186—People ex rel. Western Union Telegraph Co. v. Public Service Commission of New York, Second Dist., 183 N.Y. S. 659, 192 App Div. 748, reversed on other grounds 129 N.E. 220, 230 N Y. 95, 12 A.L.R. 960, amendment of remittitur denied 130 N.E. 933, 230 N.Y. 657.

23 C.J. p 76 note 58.

Judicial notice has been taken:

(1) That telephone company does not take possession of message to be sent over its wires, and does not undertake to transmit messages for general public or for its subscribers.—Mentzer v. New England Telephone & Telegraph Co., 177 N.E. 549, 276 Mass. 478, 78 A.L.R. 654.

(2) That telephone company will, on request from "information," furnish free of charge the telephone number of a business subscriber like the Western Union.—Graves v. Northern N Y. Pub. Co., 22 N.Y.S.2d 537, 260 App.Div. 900, motion to dismiss appeal conditionally granted 32 N.E.2d 832.

(3) That there is a difference in costs between ocean cables and land lines.—Western Union Telegraph Co. v. State Board of Equalization, 7 P. 2d 551, 91 Mont. 310.

(4) That the right to maintain telephone lines is usually and customarily accompanied by the right to trim trees to prevent contact with the wires.—Chandler v. Gault, 194 N.W. 33, 181 Wis. 5.

(5) That two-wire method of construction eliminates inductive and conductive difficulty or so far controls it that interference with telephone lines from electric power line is negligible.—Ozarks Rural Electric Co-op. Corporation v. Oliphant, Ark., 144 S.W.2d 41.

Rates

While public service commission may take judicial notice of rates for telegrams on file with it, courts do not.—Wells v. Western Union Telegraph Co., Mo App., 262 S.W. 70.

59. Cal.—Williamson v. Railroad Commission, 222 P. 803, 193 Cal. 22.

Breaking of mains

It is common knowledge that, in the ordinary course of things, water mains do not break if those having the management thereof use proper care.—Juchert v. California Water Service Co., Cal., 106 P.2d 886, prior opinion, App., 97 P.2d 259.

Constant efforts

It is common knowledge that a public utility, such as a waterworks system, requires constant efforts to perfect, repair, reconstruct, replace, extend, maintain, and operate the venture.—Harding v. Watson, Tex. Civ.App., 91 S.W.2d 956.

60. Ala.—Romano v. Birmingham Ry., Light & Power Co., 62 So. 677, 182 Ala. 335, 46 L.R.A.,N.S., 642.

23 C.J. p 75 notes 44, 45.

61. N.Y.—People v. Tierney, 10 N.Y. S. 940, 57 Hun 357, modified on other grounds 27 N.E. 269, 126 N.Y. 166, 12 L.R.A. 251.

23 C.J. p 75 note 46.

62. Mo.—Curtis v. Sexton, 159 S. W. 512, 252 Mo. 221.

63. Ala.—State v. Western Union Telegraph Co., 94 So. 466, 208 Ala. 228.

64. Ala.—Mobile & O. R. Co. v. Postal Cable Co., 24 So. 408, 120 Ala. 21.

23 C.J. p 75 note 48.

65. Ala.—Postal Tel. Cable Co. v. Jones, 32 So. 500, 133 Ala. 217.

procedure connected with the use of the telegraph;[66] that a telegraph is necessary for the operation of a railroad and usually consists of wires strung on posts set alongside the railroad,[67] but not the space that is required for the repair of such a line.[68] While the courts will take judicial knowledge as to the minimum charge made by telegraph companies in the state between given points, this rule cannot be extended so as to require them to take judicial notice of the volume of business conducted by a telegraph company at a particular telegraph office, or that the telegraph company and its agents have frugally conducted the business of the office, or that a particular agent of a telegraph company has acted with reasonable diligence in respect thereof.[69] The functions and duties of particular employees of telegraph companies have been judicially noticed.[70]

b. Agriculture

Matters of common knowledge relating to agriculture may be judicially noticed.

Courts take judicial notice of the general course of agriculture,[71] general customs obtaining among farmers,[72] and in a general way of what constitutes good husbandry[73] and good business policy on the part of farmers.[74] On the other hand, courts will not take judicial notice of matters concerning agriculture which are not matters of common knowledge.[75]

Judicial notice will also be taken of matters of

66. Ill.—People v. Western Union Tel. Co., 46 N.E. 731, 166 Ill. 15, 36 L.R.A. 637.
23 C J. p 75 note 50.

67. Mo —Yarde v. Hines, 238 S.W. 151, 152, 209 Mo.App. 547, citing **Corpus Juris.**
23 C.J. p 75 note 51.

68. La —Youree v. Vicksburg, S. & P. R. Co., 34 So. 779, 110 La. 791.
23 C.J. p 75 note 52.

69. Ala.—Western Union Telegraph Co. v. City of Decatur, 81 So. 199, 16 Ala.App. 679, certiorari denied 81 So. 205, 202 Ala. 593.
23 C.J. p 75 note 53.

70. **Chief special agent**
It is a matter of common knowledge that a chief special agent of telephone and telegraph company is chief of such company's police force. —White v. Pacific Telephone & Telegraph Co., D C.Or., 24 F.Supp. 871.

Messenger boy
Ala —Life & Casualty Ins. Co. of Tennessee v. Bottoms, 143 So. 574, 225 Ala. 382.

Telegraph operators
It is a matter of common knowledge that the work ordinarily and regularly performed by telegraph operators is not manual, nor physical, but is mental.—Ex parte Gouthro, D.C.Mich., 296 F. 506.

71. Okl.—Bristow First Nat. Bank v. Rogers, 103 P. 582, 24 Okl. 357.
23 C.J. p 64 note 93.
Phenomena of vegetable life see infra § 88.

The importance of agriculture has been judicially noticed.
U.S.—F. G. Vogt & Sons v. Rothensies, D.C.Pa., 11 F Supp. 225.
Ill.—People v. First Nat. Bank, 4 N.E.2d 378, 364 Ill. 262, 108 A.L.R. 277.
Mo.—Jasper County Farm Bureau v. Jasper County, 286 S.W. 381, 315 Mo. 560.

Usual work
The kind of work ordinarily done on a farm is common knowledge.—Mundell v. Swedlund, 80 P.2d 13, 59 Idaho 29.

Judicial notice has been taken:
(1) That a farmer's income is not always correctly represented by his bank account.—Allender Co. v. Browning's Adm'x, 46 S.W.2d 116, 242 Ky. 273.

(2) That automobile has made use of horse in supervision of farms obsolete.—Ætna Life Ins. Co. v. Person, 67 S.W.2d 1007, 188 Ark. 864.

(3) That cutting prairie hay and grazing live stock are uses of land for purposes of husbandry in South Dakota and Edmunds County.—Howe v. Shepard, 227 N.W. 839, 56 S.D. 158.

(4) That farmers supply dependents with all necessities and most comforts of life.—Heath v. Stephens, 258 P. 321, 144 Wash. 440.

(5) That "summer fallowing" is the working of the land during the spring and summer of one year so as to destroy weeds and to conserve moisture for the next year's crop.—Letz v. Tempen, 104 P.2d 4, 110 Mont. 477.

(6) That the marketing of tobacco constitutes one of the great basic industries of the United States.—Downey v. Geary-Wright Tobacco Co., D.C.Ky., 39 F.Supp. 33.

(7) That very few farms made operating expenses in 1932 and 1933. —First Trust Joint Stock Land Bank of Chicago v. Jelsma, 268 N.W. 76, 221 Iowa 1191.

(8) Other matters.
U.S.—U. S. v. Irwin, 7 Ct.Cust.App. 360
Cal —Alfalfa Growers of California v. Icardo, 256 P. 287, 82 Cal.App. 641.
Fla.—L. Maxcy, Inc., v. Federal Land Bank of Columbia, 150 So. 248, 111 Fla. 116, affirmed 151 So. 276, 111 Fla. 116.
Iowa.—Downey v. Phelps, 208 N.W. 499, 201 Iowa 826.
Mo.—State ex rel. Ashby v. Medicine Creek Drainage Dist., 224 S. W. 343, 284 Mo. 636.
N.Y.—Kruse v. Town of Ashford, 20 N Y.S.2d 852, 174 Misc. 367.
Utah.—Ocean Accident & Guarantee Co. v. Industrial Commission of Utah, 256 P. 405, 69 Utah 473.
Wyo —Bank of Commerce v. Williams, 69 P.2d 525, 52 Wyo. 1, 110 A.L.R. 1463.

72. S.C.—Bookhart v. Langford, 122 S.E. 866, 128 S.C. 350.
23 C.J. p 64 note 94.

Matters concerning farm tenancies
Tex.—Dallas Joint Stock Land Bank v. Rutherford, Civ.App., 115 S.W. 2d 1160, error dismissed—Wilson v. Beck, Civ.App., 286 S.W. 315.

Replanting crops
Since in replanting so much depends on the character of the season, the time of the original planting, the local climatic conditions at the time when the failure to germinate is ascertained, the nature of the soil, the latitude, and the particular location, it is unsafe to rest the duty of defendant to replant, on which a legal right or liability is based, on a custom judicially noticed.—Casper v. Frederick, 177 N.W. 936, 146 Minn. 112.

73. Mo.—Smith v. Sickenger, App., 202 S.W. 262.
23 C.J. p 64 note 95.

Fertilizers
Court will take judicial notice that in order to farm profitably fertilizers must be used.—Swift & Co. v. Callaham, 131 S.E. 146, 133 S.C. 353.

74. Or.—James Higgins Co. v. Torvick, 106 P. 22, 55 Or. 274.
23 C.J. p 64 note 96.

75. Tex.—Rio Grande & E. P. Ry. Co. v. T. A. Austin & Co., Civ.App., 12 S.W.2d 1070, reversed on other grounds, Com.App., 25 S.W.2d 306.
Wash.—Grays Harbor Commercial Co. v. Yakima Valley Producers' Ass'n, 228 P. 600, 130 Wash. 567.
23 C.J. p 64 notes 97, 98.

common knowledge concerning the raising and marketing of farm products.[76] Within this rule are included judicial notice of facts of common knowledge relating to crops grown within the jurisdiction,[77] whether or not such crops are grown without planting every season,[78] and in a general way the time or season for the sowing or planting,[79] maturity,[80] and the gathering or harvesting of such crops,[81] and the total time covered or required;[82] but the court will not judicially notice the precise day a given crop reaches maturity, especially when it appears that the time of maturity varies,[83] nor will it take judicial notice of any particular day or time on which the pasturing season in any year terminates.[84] Within these general rules judicial notice has been taken of particular matters relating to cattle raising,[85] citrus fruit,[86] and of particular

Evidence to contrary

An appellate court will not use its judicial knowledge, if any, of the fact that no crops were made in a particular part of the country in a certain year as a basis for reversing a judgment or setting aside a verdict of the jury founded on evidence.—Lamar v. Hildreth, Tex.Civ.App., 209 S.W. 167.

76. Minn.—Mason City Production Credit Ass'n v. Sig Ellingson & Co., 286 N.W. 713, 205 Minn. 537, certiorari denied Sig Ellingson & Co. v Mason City Production Credit Ass'n, 60 S.Ct. 130, 308 U.S. 599, 84 L.Ed. 501, rehearing denied 60 S.Ct. 178, 308 U.S. 637, 84 L.Ed. 529.

Injuries

It is common knowledge that injuries frequently occur in operation of mowers, binders, threshers, tractors, corn shellers, hay loaders, and many sorts of geared tools.—Stevens v. Allis-Chalmers Mfg. Co., 100 P.2d 723, 151 Kan. 638.

Selling at retail

It is common knowledge that there are many producers of farm products and produce, such as vegetables and the like, who engage in business of selling produce only to consumers at retail.—Winter v. Barrett, 186 N.E. 113, 352 Ill. 441, 89 A.L.R. 1398.

77. Colo.—City and County of Denver v. Quick, 113 P.2d 999.
Minn.—Casper v. Frederick, 177 N. W. 936, 146 Minn 112
N.Y.—Edward F. Dibble Seedgrower v. Jones, 223 N.Y.S. 785, 130 Misc. 359.
Tex.—Driscoll v. Nolan, Civ.App., 130 S.W.2d 400, set aside 131 S.W.2d 1025.
Utah.—Willis v. Kronendonk, 200 P. 1025, 58 Utah 592, 18 A.L.R. 947.
23 C.J. p 156 notes 63–65.

Lack of proper rainfall

It is common knowledge that yield of grain crops in Iowa is profoundly influenced by lack of proper rainfall.—Slinger v. Farmers' Mut. Hail Ins. Ass'n of Iowa, 258 N.W. 101, 219 Iowa 329.

78. Ala.—Winter-Loeb Grocery Co. v. Boykin, 82 So. 437, 203 Ala. 187.
23 C.J. p 156 notes 66, 67.

79. Iowa.—Albright v. Moeckly, 193 N.W. 625, 196 Iowa 366.
Minn.—Casper v. Frederick, 177 N.W. 936, 146 Minn. 112.
Mo.—Eddington v. Cockrell, App., 286 S.W. 405.
Tex.—Jordan v. Dinwiddie, Civ.App., 205 S.W. 862, reversed on other grounds Dinwiddie v. Jordan, Com App., 228 S.W. 126.
Va.—Mann v Mann, 165 S.E. 522, 159 Va. 240.
23 C.J. p 156 note 68.

80. Ala.—Grooms v. Knox, 142 So. 583, 225 Ala. 250, granting certiorari and reversing 142 So. 582, 25 Ala App. 185.
Ark.—Western Union Telegraph Co v. Bush, 89 S.W.2d 723, 191 Ark. 1085, 103 A.L.R. 367.
Ga.—Whatley v. Virginia-Carolina Chemical Co., 120 S.E. 436, 31 Ga. App 226.
Okl.—Sullivan v. Tipps, 239 P. 895, 113 Okl. 99.
Tex.—Roberts v. Armstrong, Com. App., 231 S.W. 371, reversing, Civ. App., 212 S.W. 227—Miller v. Gray, Civ App., 108 S.W.2d 265, reversed on other grounds, Sup., 149 S.W.2d 582.
23 C.J. p 156 note 69.

Safe period

It is common knowledge that crops have advanced well toward safe period on July 5.—Moss v. Mississippi Live Stock Sanitary Board, 122 So. 776, 154 Miss. 765, followed in Gray v. Mississippi Live Stock Sanitary Board, 122 So. 783, and Turnage v Mississippi Live Stock Sanitary Board, 122 So. 783, and Adams v. Mississippi Live Stock Sanitary Board, 126 So. 204.

Sustenance from soil

Court judicially knows that corn crop in named county has so far matured during November as not to draw sustenance from soil.—Lee v. Missouri Pac. R. Co., 5 P.2d 1102, 134 Kan. 225.

81. Ill.—Bloomington and Normal Ry. & Light Co. v. DeMange, 229 Ill.App. 108.
Ky.—Osborn v. Roberts, 216 S.W 359, 186 Ky. 160.
Minn.—Casper v. Frederick, 177 N W. 936, 146 Minn. 112.
N.Y.—Edward F. Dibble Seedgrower v. Jones, 223 N.Y.S. 785, 130 Misc. 359.
Or.—U. S. Nat. Bank of La Grande v. Miller, 258 P. 205, 122 Or. 285, 58 A.L.R. 339.
Tex.—Knudsen v. J. I. Case Co., Civ. App., 86 S.W.2d 794.
23 C.J. p 156 note 70.

82. Ark.—State v. Lovett-Carnahan Co., 14 S.W.2d 233, 179 Ark. 43—Flinn v. Cullins, 220 S.W. 449, 143 Ark. 431.
23 C.J. p 156 note 71.

83. Cal.—Kutner-Goldstein Co. v. Workman, 296 P. 313, 112 Cal.App. 132.
Iowa.—Frum v. Kueny, 207 N.W. 372, 201 Iowa 327.
23 C.J. p 156 note 72.

84. Vt.—Gove v. Downer, 7 A. 463, 59 Vt. 139.

85. **Judicial notice has been taken:**

(1) That cattle raising is an important industry in this state—Whitaker v. Parsons, 86 So. 247, 80 Fla. 352.

(2) That in arid regions sheep and cattle must be run on the open range.
U.S.—U. S. v. Achabal, D.C.Nev., 34 F.Supp. 1, reversed on other grounds, C.C.A., 122 F.2d 791.
D.C.—Red Canyon Sheep Co. v. Ickes, 98 F.2d 308, 69 App.D.C. 27.

(3) That in parts of the west cattle run at large and are pastured in great stretches of unenclosed land, with no other means of determining their separate ownership than by the brands or marks upon them.—Territory of New Mexico v. Denver & R. G. R. Co., 27 S.Ct. 1, 203 U.S. 38, 51 L.Ed. 78—23 C.J. p 76 note 66.

(4) That the base rates on grazing fees in the national forests are not the same in every national forest for either cattle or sheep.—Brooks v Dewar, Nev., 106 P.2d 755, certiorari granted 61 S.Ct. 738.

86. U.S.—Cohan v. Elder, C.C.A.Cal., 112 F.2d 967—Edwards v. U. S., C.C.A.Cal., 91 F.2d 767, affirming, D.C., U. S. v. Edwards, 16 F.Supp. 53.
Tex.—Berry v. McDonald, Civ.App., 123 S.W.2d 388.

Soils

That soils of Hidalgo and adjacent counties are peculiarly adaptable to citrus fruit production is worthy of judicial notice.—Hidalgo County Water Control & Improvement Dist. No.

matters relating to cotton,[87] dairying and dairy products,[88] fresh vegetables,[89] fruit growers,[90] hops,[91] nurseries,[92] poultry,[93] sheep raising,[94] tobacco,[95] and wheat.[96]

Particular facts, if they are matters of common knowledge,[97] relating to the necessity for irrigation and prominent facts relating to irrigation may be judicially noticed.[98] Courts of some states take judicial cognizance of the fact that in arid or semi-arid parts of the state irrigation is necessary to the successful prosecution of the business of agriculture in all its varied branches;[99] of the usage or practice in such regions of appropriating and applying the water of public streams for agricultural purposes;[1] and of the general time for irrigating a particular crop.[2]

Farm income. Facts of common knowledge relating to the income from farming may be judicially noticed.[3]

1 v. Gannaway, Tex.Civ.App., 13 S.W.2d 204, error refused.

87. Judicial notice has been taken:
(1) Of packing lint cotton into merchantable bales and its sale by weight and grade—B. F. Kay & Son v. Alabama Cotton & Grain Co., 100 So. 863, 211 Ala. 454.

(2) That cotton cannot be planted immediately on arrival of fertilizer—Swift & Co. v. Sullivan, 147 S.E. 315, 149 S.C. 424.

(3) That cotton is crop raised entirely by planting, cultivating, and harvesting, and is classed as fructus industriales.—Harris v. Harris, 116 So. 731, 150 Miss. 729.

(4) That cotton raising is principal industry in state.
Miss.—State ex rel. Jordan v. Gilmer Grocery Co., 125 So. 710, 156 Miss. 99.
Tex.—Ex parte Ferguson, 15 S.W.2d 650, 112 Tex.Cr. 153

(5) The court will take judicial notice of necessity for early planting of cotton crop to minimize damage from boll weevils, and of the effect of boll weevil ravages.—Swift & Co. v. Sullivan, 147 S.E. 315, 149 S.C. 424.

(6) Other matters.
U.S.—Young & Jones v. Hiawatha Gin & Mfg. Co., D.C.Miss., 17 F.2d 193.
La.—Lynn v. Lafitte, App., 177 So. 83.

88. Judicial notice has been taken:
(1) That dairy cattle are usually kept in pastures, lots, and barns.—Witte v. McLaughlin, 189 N.E. 350, 355 Ill. 463.

(2) That dealers in dairy products are largely organized.—Dairymen's League Co-op. Ass'n v. Holmes, 202 N.Y.S. 663, 207 App.Div. 429, affirmed 147 N.E. 171, 239 N.Y. 503, reargument denied 147 N.E. 210, 239 N.Y. 596.

(3) That skimmed milk constitutes a large proportion of the entire milk production.—U. S. v. Carolene Products Co., D.C.Ill., 7 F.Supp. 500.

(4) Other matters.—People v. Shoemaker, 236 N.Y.S. 70, 134 Misc. 542, reversed on other grounds 239 N.Y.S. 71, 228 App.Div. 314—Dairymen's League Co-op. Ass'n v. Metropolitan Casualty Ins. Co. of New York, 8 N.Y.S.2d 403, affirmed 15 N.Y.S.2d 664, 258 App.Div. 847, reargument denied 177 N.Y.S.2d 1002, 258 App.Div. 1030.

89. Iowa.—Dye Produce Co. v. Davis, 209 N.W. 744, 202 Iowa 1008.

90. Colo.—Industrial Commission v. United Fruit Growers Ass'n, 103 P.2d 15, 106 Colo. 223.

91. Compensation of harvesters
Or.—McLaughlin v. Helgerson, 241 P. 50, 116 Or. 310.

92. Planting
It is common knowledge that the great bulk of nursery stocks sold and shipped in this country is planted by the purchaser, not by the seller—Phœnix Nursery Co. v. Trostel, 164 N.W. 995, 166 Wis. 215, L.R.A. 1918B 311.

93. Ind.—Fleckles v. Hille, 149 N.E. 915, 83 Ind.App. 715.
That brooder houses are generally small buildings is a matter of common knowledge of those familiar with rural life.—Moller-Vandenboom Lumber Co. v. Boudreau, Mo.App., 85 S.W.2d 141.

94. Ariz.—In re Greer, 81 P.2d 96, 52 Ariz. 385.
Mont.—Gilmore v. Mulvihill, 98 P.2d 335, 109 Mont. 601.

95. Judicial notice has been taken:
(1) As to tobacco marketing.
N.C.—Grant v. Borden, 168 S.E. 492, 204 N.C. 415.
Va.—James v. Haynes, 168 S.E. 333, 160 Va. 253.

(2) That tobacco is a farm product.—Ellzey v. Smith, 132 So. 92, 159 Miss. 57.

96. Harvesting before maturity
Del.—Cubbage v. Clements, 14 A.2d 378, 1 Terry 497.

97. Local knowledge
Every person in the locality immediately affected may know that a particular tract of land must be irrigated in order to produce crops, and yet the fact is not so generally known through the entire community for which the court is sitting as to authorize or require the judge to know it judicially.
Neb.—Slattery v. Harley, 79 N.W. 151, 58 Neb. 575.
Tex.—McGhee Irr. Ditch Co. v. Hudson, 22 S.W. 398, 85 Tex. 587.

98. U.S.—McCandless v. U. S., C.C.A.Hawaii, 74 F.2d 596, certiorari granted 56 S.Ct. 308, 296 U.S. 570, 80 L.Ed. 403, reversed on other grounds 56 S.Ct. 764, 298 U.S. 342, 80 L.Ed. 1205.
Ariz.—City of Glendale v. Sutter, 95 P.2d 569, 54 Ariz. 326—Adams v. Salt River Valley Water Users' Ass'n, 89 P.2d 1060, 53 Ariz. 374.
Cal.—City of Stockton v. Ellingwood, 275 P. 228, 96 Cal.App. 708—Henika v. Lange, 203 P. 798, 55 Cal.App. 336—Peake v. Harris, 192 P. 310, 48 Cal.App. 363.
Colo.—Baker v. City of Pueblo, 289 P. 603, 87 Colo. 489—Clay Spring Cattle Co. v. Bassett, 233 P. 156, 76 Colo. 510—Nepesta Ditch & Reservoir Co. v. Espinosa, 215 P. 141, 73 Colo. 302—Marlatt v. Prosser, 179 P. 141, 66 Colo. 91.
Idaho.—Hunt v. Bremer, 276 P. 964, 47 Idaho 490.
Or.—Kaylor v. Recla, 84 P.2d 495, 160 Or. 254.
Tex.—Texas Co. v. Burkett, 296 S.W. 273, 117 Tex. 16, 54 A.L.R. 1397, affirming, Civ.App., 255 S.W. 763—Longnecker v. Ward County Water Improvement Dist. No. 3, Civ.App., 253 S.W. 312.
Utah.—Tanner v. Provo Reservoir Co., 289 P. 151, 76 Utah 335—Eden Irr. Co. v. District Court of Weber County, 211 P. 957, 61 Utah 103—Van Wagoner v. Whitmore, 199 P. 670, 58 Utah 418—Brady v. McGonagle, 195 P. 188, 57 Utah 424.
23 C.J. p. 156 notes 74, 75.

99. Neb.—Crawford Co. v. Hathaway, 93 N.W. 781, 67 Neb. 325, 108 Am.S.R. 647, 60 L.R.A. 889.

1. Ariz.—Salladay v. Old Dominion Copper Min. Co., 100 P. 441, 12 Ariz. 124.
Neb.—Crawford Co. v. Hathaway, 93 N.W. 781, 67 Neb. 325, 108 Am.S.R. 647, 60 L.R.A. 889.

2. Tex.—Gill v. Hudspeth County Conservation & Reclamation Dist. No. 1, Civ.App., 88 S.W.2d 517.
23 C.J. p. 64 note 2.

3. Ky.—Polivick v. Polivick, 83 S.W.2d 8, 259 Ky. 653.
Judicial notice of economic conditions generally see infra § 63.

c. Banks and Banking

Courts will take notice of facts of common knowledge relating to banks and banking.

Judicial notice is taken of the different classes of banks[4] and the systems of banking[5] in the state, of the general and universal course and conduct of the banking business,[6] and of the universal practice of banks[7] relative to such matters as bookkeep-

4. Ga.—Linton v. Childs, 32 S.E. 617, 105 Ga. 567.
Ky.—Ravitz v. Steurele, 77 S.W.2d 360, 257 Ky. 108.

Names

(1) Judicial notice is taken that names "National Bank" and "State Bank" may be used only by incorporated banks.—First Nat. Bank v. First State Bank of Jacksonville, Tex.Com.App., 291 S.W. 206, affirming, Civ.App., 269 S.W. 154.

(2) It is well known that a broader latitude has been allowed in matter of similarity of names in banking institutions than perhaps in ordinary commercial enterprises.—New York Trust Co. v. New York County Trust Co., 211 N.Y.S. 785, 125 Misc. 735, affirmed 212 N.Y.S. 882, 215 App. Div. 699.

5. Ind.—State v. Arnold, 38 N.E. 820, 140 Ind. 628.
23 C.J. p. 64 note 7.

Branch banks

It is a matter of common knowledge that in some states branch banks are the exception, and not the general rule.—Warren v. Commerce Union Bank, 274 S.W. 539, 152 Tenn. 67.

Making of chattel loans

It is matter of common knowledge, of which court takes judicial notice, that making of chattel loans is distinctively different sort of business in very many important particulars than that which is usual and customary in commercial banking and other forms of money loaning.—Austin v. City of Seattle, 30 P.2d 646, 176 Wash. 654, 93 A.L.R. 203.

Coöperative and savings banks

(1) Powers and functions of savings and loan society and savings bank are matters of common knowledge.—Baker v. Spokane Sav. Bank, C.C.A.Wash., 71 F.2d 487, affirming, D.C., 5 F.Supp. 538

(2) It is common knowledge that coöperative banks are largely dealt with by persons of small or moderate means as a method of accumulating savings.—Lowell Co-op. Bank v. Co-operative Central Bank, 191 N.E. 921, 287 Mass. 338.

National banks

(1) State supreme court judicially knows that national banks, organized and existing under laws of United States, are corporate entities.—Adler v. First Nat. Bank, 171 So. 904, 233 Ala. 325.

(2) It is judicially known that only banks charted by the United States may use the word "National" as part of the name.
Ky.—Wedding v. First Nat. Bank, 133 S.W.2d 931, 280 Ky. 610.
Tex.—First Nat. Bank v. First State Bank of Jacksonville, Com.App., 291 S.W. 206, affirming, Civ.App., 269 S.W. 154.

6. U.S.—Republic Supply Co. of California v. Richfield Oil Co. of California, C.C.A.Cal., 79 F.2d 375.
La.—Elston, Prince & McDade v. First State Bank of Plain Dealing, 140 So. 510, 19 La.App. 385.
N.Y.—Gallin v. National City Bank of New York, 273 N.Y.S. 87, 152 Misc. 679.
S.C.—Huggins v. Commercial & Savings Bank, 140 S.E. 177, 141 S.C. 480
Tex.—New Liberty Common School Dist. No. 3 v. Merchants' & Planters' Bank, Civ.App., 273 S.W. 330—Farmers' State Bank of Mineola v. Mincher, Civ.App., 267 S.W. 996, reversed on other grounds, Com.App., 290 S.W. 1090.
Wyo.—Wagner v. Spaeth, 254 P. 123, 36 Wyo. 279, rehearing denied 257 P. 5, 37 Wyo. 1.
23 C.J. p. 65 note 8.

Part of law merchant

The business of bankers being part of law merchant, courts take judicial notice of universal custom of bankers.—Bank of California v. City of Portland, 69 P.2d 273, 157 Or. 203, 115 A.L.R. 676, certiorari denied City of Portland v. Bank of California, 58 S.Ct. 476, 302 U.S. 765, 82 L.Ed. 594.
Judicial notice of law merchant see supra § 25.

Judicial notice has been taken:

(1) Of amicable agreement as to respective fields of lawyers and trust companies between banks and local bar association.—People ex rel. Committee on Grievances of Colorado Bar Ass'n v. Denver Clearing House Banks Performing Trust Functions, 59 P.2d 468, 99 Colo. 50.

(2) Of practice of purchasing stocks and securities for depositors and customers.—Block v. Pennsylvania Exchange Bank, 170 N.E. 900, 253 N.Y. 227, reversing 236 N.Y.S. 754, 227 App.Div. 711, reversing 235 N.Y.S. 671, 134 Misc. 153—Dyer v. Broadway Central Bank, 169 N.E. 635, 252 N.Y. 430, reversing 235 N.Y.S. 795, 226 App.Div. 881.

(3) That bank theoretically solvent may be rendered insolvent by condition of panic among its depositors.—Harlem Corporation v. Eadie, 149 S.E. 401, 152 S.C. 242.

(4) That large portion of any bank's assets consists of debts due bank.—Posselius v. First Nat. Bank, 251 N.W. 429, 264 Mich. 687, 90 A.L.R. 342, certiorari denied 54 S.Ct. 631, 292 U.S. 627, 78 L.Ed. 1481.

(5) That the assets of a bank derived from its depositors far exceed its capital and surplus.—Bowes v. National City Bank of New York, 6 N.Y.S.2d 803, 169 Misc. 78.

(6) Other matters.
U.S.—Uhl v. First Nat. Bank & Trust Co. of Kalamazoo, D.C.Mich., 24 F.Supp. 275, affirmed, C.C.A., First Nat. Bank & Trust Co. v. Uhl, 94 F.2d 1013, certiorari denied 58 S.Ct. 1058, 304 U.S. 584, 82 L.Ed. 1546—Smith v. U. S., D.C.Mass., 16 F.Supp. 393.
Ill.—People ex rel. Nelson v. Central Mfg. Dist. Bank, 28 N.E.2d 154, 306 Ill.App. 15.
La.—Rembert v. Fenner & Beane, App., 175 So. 116, annulling 173 So. 551, affirmed 177 So. 247, 188 La. 385.
Mich.—Federal Bond & Mortgage Co. v. Burstein, 192 N.W. 549, 222 Mich. 88.
Pa.—Giffen v. First Nat. Bank & Trust Co. of Greensburg, 187 A. 283, 123 Pa.Super. 476.
23 C.J. p. 65 note 16.

7. W.Va.—Lewis v. Montgomery Supply Co., 52 S.E. 1017, 59 W.Va. 75, 42 L.R.A.,N.S., 132.
23 C.J. p. 65 note 9.

Closing doors

It is common knowledge that closing of bank's doors usually indicates that bank has failed.—State ex rel. Hanbury v. Tunnicliffe, 124 So. 279, 98 Fla. 731.

Pledging assets

Court takes judicial notice of facts indicating that among national banks practice of pledging assets must have been deemed contrary to good banking practice.—Texas & P. Ry. Co. v. Pottorff, Tex., 54 S.Ct. 416, 291 U.S. 245, 78 L.Ed. 777, affirming, C.C.A., 63 F.2d 1, certiorari granted 54 S.Ct. 55, 290 U.S. 609, 78 L.Ed. 533. Amended 54 S.Ct. 525, 291 U.S. 649, 78 L.Ed. 777, rehearing denied 54 S.Ct. 627, 292 U.S. 600, 78 L.Ed. 1464.

Local customs will not be noticed.—First Nat. Bank v. Commercial Bank & Trust Co., 242 P. 356, 137 Wash. 335.

ing,[8] clearings,[9] collections,[10] loans and discounts,[11] investments,[12] deposits,[13] allowance of interest on deposits,[14] balancing pass books,[15] bank statements,[16] uses made of safe deposit boxes,[17] dealings in, and transactions relative to, commercial paper generally,[18] and the use of checks and drafts.[19]

8. U S.—U. S. v. National City Bank of New York, D.C.N.Y., 40 F.Supp. 99.
Tex.—Shaw v. R. C. Flick Mercantile Co, Civ App., 26 S.W.2d 1077, error refused.

Double entry system
S.D.—Holman v. Commercial & Savings Bank, 210 N.W. 730, 50 S.D. 524.

9. Iowa.—Andrew v. Farmers' & Merchants' Sav. Bank of Moravia, 245 N.W. 226, 215 Iowa 1336.

10. Ariz.—State v. Hammons, 14 P. 2d 257, 40 Ariz. 464—City of Douglas v. First Nat. Bank, 239 P. 785, 29 Ariz. 89.
Ill.—Fidelity & Casualty Co. of New York v. Continental Illinois Nat. Bank & Trust Co. of Chicago, 25 N E 2d 550, 303 Ill.App. 595.
Md.—Maryland Title Guarantee Co. v. Alter, 173 A. 200, 167 Md. 244.
N J.—Hockenjos v. Federal Deposit Ins. Corporation, 199 A. 596, 16 N. J Misc. 312.
Wash.—Ryer Grain Co. v. American Security Bank, 264 P. 1000, 147 Wash. 42.
23 C.J. p 65 note 10.

Checks
It is common knowledge that bank in cashing check or accepting it for deposit ordinarily relies only on responsibility of party with whom it deals.—City of New York v. Bronx County Trust Co., 184 N.E. 495, 261 N.Y. 64, affirming 254 N.Y.S. 741, 234 App.Div. 244, and reargument denied 185 N.E. 765, 261 N.Y. 622.

Mingling of funds
Court could not take judicial notice of existence of alleged custom of collecting bank to mingle collections with its own funds, assuming position of debtor to owner.—People ex rel. Nelson v. People's Bank & Trust Co. of Rockford, 187 N.E. 522, 353 Ill. 479, affirming 268 Ill.App. 39.

11. Ark.—Phipps-Reynolds Co. v. McIlroy Bank & Trust Co., 124 S. W.2d 222, 197 Ark. 621—Lea v. Bradshaw, 90 S.W.2d 487, 192 Ark. 135.
Cal.—Say v. Crocker First Nat. Bank, 277 P. 146, 98 Cal.App. 408.
Conn.—Savings Bank of New Britain v. Weed, 185 A. 571, 121 Conn. 414.
Ill.—Continental Illinois Nat. Bank & Trust Co. of Chicago v. Cardwell, 4 N.E.2d 770, 287 Ill.App. 227.
N.J.—Lewis v. Hartmann, 145 A. 461, 7 N.J.Misc. 357.
Tex.—Weaver Hardware Co. v. Solomovitz, 139 N.E. 353, 235 N.Y. 321, modifying 191 N.Y.S. 958, 200 App Div. 853, and reargument denied 142 N.E. 296, 236 N.Y. 591—Roberts v. Hayden, 209 N.Y S. 598, 213 App.Div. 1—Gallin v. National City Bank of New York, 273 N Y.S. 87, 152 Misc. 679.
Tex.—Citizens' Nat. Bank of Stamford v. Stevenson, Com.App., 231 S.W. 364, reversing, Civ.App., 211 S.W. 644.
Wash.—Colver v. Fraser, Goodwin & Colver, 7 P.2d 24, 166 Wash. 398.
23 C.J. p 65 note 11.

By Federal Land Bank
Ga.—Griffith v. Federal Land Bank of Columbia, 10 S E.2d 71, 190 Ga. 578.

Local practice
Practice of banks in rural portions of Iowa of making farm loans as agents for customers may not be noticed.—First Nat. Bank of Guthrie Center v. Anderson, Iowa, 46 S. Ct. 135, 269 U.S. 341, 70 L.Ed. 295.

Mortgages
Court may take judicial notice of common practice of banks of retaining possession of original note and mortgage, with intention of keeping them alive on taking of renewal or collateral note.—Farmers' & Mechanics' Bank v. McNair, 148 S.E. 54, 150 S.C. 267.

Principal source of income
The court judicially knows that buying and discounting commercial paper is one, if not the principal, source of income of national banks.—State v. National Credit Co., 181 So. 769, 236 Ala. 224, followed in National Credit Co. v. State, 181 So. 772, 236 Ala. 227.

12. U.S.—Harriman Nat. Bank v. Commissioner of Internal Revenue, C C.A., 43 F.2d 950.
Mass.—Keating v. Hession, 172 N. E. 111, 272 Mass. 212.
N.J.—Redzina v. Provident Inst. for Savings in Jersey City, 125 A. 133, 96 N.J.Eq. 346, affirming 121 A. 519, 1 N.J.Misc. 334.

13. U.S.—State of Kansas ex rel. Boynton v. Hayes, C.C.A.Kan., 62 F.2d 597.
N.J.—Trenton Banking Co. v. Howard, Ch., 187 A. 569, affirmed 187 A. 575, 121 N.J.Eq. 85.
Tex.—Hatley v. West Texas Nat. Bank of Big Springs, Com.App., 284 S.W. 540, reversing, Civ.App., 272 S.W. 571—Reconstruction Finance Corporation v. Brady, Civ. App., 150 S.W.2d 357, error refused.

Dormant accounts
Mich.—Moore v. Capital Nat. Bank of Lansing, 264 N.W. 288, 274 Mich. 56.

Signature cards
Tenn.—American Nat. Bank v. Miles, 79 S.W.2d 47, 18 Tenn.App. 440.

Withdrawal of funds
It is common knowledge that in 1922 banks generally allowed withdrawal of funds in savings account at any time with only the loss of interest thereon.—Chandler v. Britton, 15 S.E.2d 344, 197 S.C. 303.

14. Ill.—McCormick v. Hopkins, 122 N.E. 151, 287 Ill. 66, reversing Evans v. Illinois Surety Co., 209 Ill.App. 465.
Ind.—Wayne Sewer & Drain Co. v. Ward-Cowan Const. Co., 143 N.E. 290, 195 Ind. 75.
Ky.—Kern v. City of Mt. Sterling, 25 S W.2d 41, 233 Ky. 156.
Ohio.—Fulton v. Stempien, 185 N.E. 887, 44 Ohio App. 373—Fulton v. Campbell, 185 N.E. 883, 44 Ohio App. 376.
23 C.J. p 65 note 12.

Rate
U S.—National Surety Co. v. McCormick, C.C.A.Ill., 268 F. 185.

15. N.Y.—Morgan v. U. S. Mortgage & Trust Co., 101 N.E. 871, 208 N. Y. 218, L.R.A 1915D 741, Ann.Cas. 1914D 462.
23 C.J. p 65 note 13.

16. **Showing outstanding capital stock**
Fla.—Therrell v. Reilly, 151 So. 305, 111 Fla. 805.

17. Neb.—Orchard & Wilhelm Co. v. North, 251 N.W 895, 125 Neb. 723.
Utah.—West Cache Sugar Co. v. Hendrickson, 190 P. 946, 56 Utah 327, 11 A.L.R. 216.

18. Okl.—McNeal v. Gossard, 50 P. 159, 6 Okl. 363.

County warrants
Minn.—State Bank of Mora v. Billstrom, 299 N.W. 199.

19. U.S.—Ali v. Haff, C.C.A.Cal., 114 F.2d 369.
Cal.—Kiekhoefer v. U. S. Nat. Bank of Los Angeles, 39 P.2d 807, 2 Cal. 2d 98, 96 A.L.R. 1244—Greenzweight v. Title Guarantee & Trust Co., 36 P.2d 186, 1 Cal.2d 577—In re Dargie's Estate, 91 P.2d 126, 33 Cal.App.2d 148.
Miss.—Tonnar v. Wade, 121 So. 156, 153 Miss. 722.
N.Y.—Joyce v. Leyland, 209 N.Y.S. 613, 213 App.Div. 36—Potter v. Sager, 171 N.Y.S. 438, 184 App.Div. 327, reversing 161 N.Y.S. 1088, 98 Misc. 25, and affirmed 126 N.E. 920, 228 N.Y. 526.
Ohio.—Frank v. First Nat. Bank, 4 N.E.2d 404, 53 Ohio App. 176.
Tex.—Whitaker v. First Nat. Bank in Houston, Civ.App., 125 S.W.2d 1066, reversed on other grounds,

The fact that a bank failure is a serious calamity to the entire community,[20] and facts relating to insolvent banks,[21] and that charters of banks may be extended from time to time indefinitely,[22] have also been judicially noticed.

Judicial notice will be taken of matters of common knowledge relating to the officers of a bank and their duties and powers,[23] but only if they are matters of common knowledge.[24]

Banking hours are judicially noticed.[25]

The courts cannot take judicial notice of the existence of a bank in any particular place, or in a given town,[26] or of the peculiar methods of business adopted by any bank.[27] A court has declined to take judicial notice of an alleged custom of banks to require prompt payment of notes at maturity or else to have them extended.[28]

Federal Reserve Banks. Judicial notice cannot

First Nat. Bank in Houston v. Whitaker, Com.App., 147 S.W.2d 1074—Texas Mut Life Ins. Ass'n v. Love, Civ.App., 66 S.W.2d 424, error dismissed.

Va.—First Wisconsin Nat. Bank of Milwaukee v. People's Nat Bank of Rocky Mount, Va., 118 S.E. 82, 136 Va. 276.

Wis.—Voell v. Klein, 200 N.W. 364, 184 Wis. 620.

23 C.J. p 65 note 15.

Attaching bills of lading

Courts take judicial notice of custom of attaching bills of lading to drafts.

Iowa.—Dubuque Fruit Co. v. C. C. Emerson & Co., 206 N.W. 672, 201 Iowa 129.

S.D.—Jackson v. Federal Surety Co., 228 N.W. 400 56 S.D. 335.

Wash.—Vickers v. Machinery Warehouse & Sales Co., 191 P. 869, 111 Wash. 576.

Canceled checks

Supreme court takes judicial notice of custom of banks to return canceled checks on first of the month following payment thereof.—Bruce v. First Nat. Bank, 41 P.2d 779, 180 Wash. 614.

Time of presentment

The court cannot take judicial notice of the time or order in which checks were presented and paid on the same day, or in which entries thereof were made on books of the bank, or of the time when the entries were made, or that they were entered in strict order of payment.—Cable v. Iowa State Sav. Bank, 194 N.W 957, 197 Iowa 393, 31 A.L.R. 748, modified on other grounds 197 N.W. 434, 197 Iowa 393, 31 A.L.R. 748.

Time of transit between points

N.Y.—Corn Exch Bank v. Fifth Nat. Bank, 205 N.Y.S. 777, 123 Misc. 328.

20. Iowa.—Priest v. Whitney Loan & Trust Co., 261 N.W. 374, 219 Iowa 1281.

Economic injury

N.J.—McSweeney v. Equitable Trust Co., 198 A. 529, 16 N.J.Misc. 193.

21. U.S.—German Baptist Orphans' Home v. Union Banking Co., D.C. Mich., 13 F.Supp. 814.

Ind.—In re Wainwright's Estate, App., 34 N.E.2d 164.

Iowa.—Priest v. Whitney Loan & Trust Co., 261 N.W. 374, 219 Iowa 1281.

N.J.—Trust Co. of New Jersey v. Jefferson Trust Co., 186 A. 732, 14 N.J.Misc. 656.

S.C.—Zimmerman v. Grendel Mills, 183 S.E. 162, 178 S.C. 346—Anderson v. Ætna Casualty & Surety Co., 178 S.E. 819, 175 S.C. 254.

S.D.—Smith v. McCowan, 244 N.W. 891, 60 S.D. 504.

Assignment of assets

Court will take cognizance of assignments by closed bank of its assets to plaintiff, in his official capacity, without reference to record.—Secretary of Banking v. Miller, 40 Lack Jur., Pa., 17.

Liquidation

Court takes judicial notice that national banks are examined semiannually under direction of comptroller of currency and placed in liquidation if insolvent.—Lucas v. Federal Reserve Bank of Richmond, C.C.A.N.C., 59 F.2d 617.

Particular bank

Where such is a matter of common knowledge and of public record, the insolvency of a particular bank may be judicially noticed.

Ala.—Hastings v. Huber, 1 So.2d 749.

Cal.—Wood v. Kennedy, 3 P.2d 366, 117 Cal.App. 53.

22. Ky.—Saffold v. Wright, 15 S.W. 2d 456, 228 Ky. 594.

23. N.Y.—Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank, 28 N.Y. 425, 26 How.Pr. 1.

Cashier

(1) It is common knowledge that cashier or assistant cashier of bank examines signature to checks, bills, and notes to determine their genuineness.—Kirby v. Brooks, 111 So. 235, 215 Ala. 507.

(2) Court knows that cashiers of rural banks conduct practically all business thereof.—Reorganization Committee of Farmers Bank & Trust Co. v. Title Insurance & Trust Co., 97 S.W.2d 393, 265 Ky. 605, 108 A.L.R. 706.

(3) It is a matter of such common observation that courts cannot be ignorant of the fact that in the administration of the daily affairs of a bank someone beside a cashier must have access to its funds.—La Rose v. Logansport Nat. Bank, 1 N.E. 805, 102 Ind. 332.

Directors

(1) The fact that men of strong financial ability are asked to serve as directors of banks may be noticed.—Chicago Title & Trust Co. v. Munday, 131 N.E. 103, 297 Ill. 555—Albers v. Sullivan, 5 N.E.2d 253, 287 Ill.App. 461.

(2) Notice has been taken that directors devote only a part of their time to the bank's affairs.—Anderson v. Akers, D.C.Ky., 7 F.Supp. 924, rehearing denied 9 F.Supp. 151, supplemented 11 F.Supp. 9, modified on other grounds, C.C.A., Atherton v. Anderson, 86 F.2d 518, certiorari granted Anderson v. Atherton, 57 S. Ct 754, 300 U.S. 652, 81 L.Ed. 863, reversed on other grounds 58 S.Ct. 53, 302 U.S. 643, 82 L.Ed. 500.

(3) Courts judicially know that, at least in the particular state, the duty to make loans does not ordinarily devolve on the directors of a bank.—Green v. Officers and Directors of Knoxville Banking & Trust Co., 182 S.W. 244, 133 Tenn. 609.

24. **Necessary officers**

Courts cannot know judicially what officers and employees are required for the proper conduct of the business of a bank nor define in detail their several functions and duties.—La Rose v. Logansport Nat. Bank, 1 N.E. 805, 102 Ind. 332—23 C.J. p 65 note 21.

25. Ala.—Central Bank & Trust Co. v. Alabama Broom & Mattress Co., 85 So. 738, 204 Ala. 410.

23 C.J. p 65 note 25.

26. Wash.—Bartholomew v. Everett First Nat. Bank, 52 P. 239, 18 Wash. 683.

W.Va.—Lewis v. Montgomery Supply Co., 52 S.E. 1017, 59 W.Va. 75, 4 L.R.A.,N.S., 132.

27. W.Va.—Lewis v. Montgomery Supply Co., supra.

28. Kan.—Livermore v. Ayres, 119 P. 549, 86 Kan. 50.

be taken of acts of a Federal Reserve Bank which are not matters of common knowledge.[29] Judicial notice will be taken of the incorporation of a Federal Reserve Bank and that it is one of the Federal Reserve Banks created by federal statute.[30]

d. Carriers

(1) In general
(2) Railroads
(3) Street railroads

(1) In General

Facts of common knowledge relating to carriers will be judicially noticed.

Facts which are matters of common knowledge appertaining to carriers,[31] such as airlines,[32] express companies,[33] interurban electric railroads,[34] motor vehicle carriers,[35] omnibus lines,[36] and subways and elevated roads,[37] have been judicially noticed.

29. Mont.—Fergus County v. Federal Reserve Bank of Minneapolis, 244 P. 883, 75 Mont. 582.

30. U.S.—Hiatt v. U. S., C.C.A.Ind., 4 F.2d 374, certiorari denied 45 S. Ct. 638, 268 U.S. 704, 69 L.Ed. 1167.

31. Pa.—Harder v. Public Service Commission, 90 Pa.Super. 373.

Matters judicially noticed

(1) Manner of transporting coal to Chicago and of delivering it to customers within city.—City of Chicago v. Waters, 1 N.E.2d 396, 363 Ill. 125.

(2) That actual cost of transportation for the same distance varies greatly in different parts of the state.—McBride v. Reardon, 69 P.2d 975, 105 Mont. 96.

(3) That there is a large interstate movement of Texas wheat.—Girand v Kimbell Milling Co., C.C.A. Tex., 116 F.2d 999.

(4) Other matters.

N.Y.—Bookman v. New York El. R. Co., 33 N.E. 333, 137 N.Y. 302—Putnam v. Marshall, 23 N.Y.S.2d 383, 175 Misc. 76, affirmed 27 N.Y.S.2d 432, 261 App.Div. 976, appeal granted 27 N.Y.S.2d 1022, 261 App. Div. 1093, motion denied 35 N.E.2d 512, 285 N.Y. 851, and reversed on other grounds 36 N.E.2d 673, 286 N.Y. 485.

Tex.—Brown & Root v. Hausenfluck, Civ.App., 293 S.W. 842.

32. **Safe means of transportation**

It is a matter of common knowledge that airlines are held out to the public to be a safe means of transportation.—McCusker v. Curtiss Wright Flying Service, 269 Ill.App. 502.

Customs

There is at present no common knowledge of which courts can take cognizance concerning customs or usual practice of air transport companies regarding operation, inspection, and repair of airplanes.—Wilson v. Colonial Air Transport, 180 N.E. 212, 278 Mass. 420, 83 A.L.R. 329.

33. **Judicial notice has been taken:**

(1) That it is customary for express companies to deliver the shipment when the consignee is known, and if not to mail him a notice of the arrival of the goods.—American Ry. Express Co. v. Santa Anna Gas Co., Tex.Civ.App., 250 S.W. 271, petition for certiorari dismissed 44 S. Ct. 3, 263 U.S. 725, 68 L.Ed. 526.

(2) That in smaller towns express companies do not deliver, while in larger municipalities they do deliver.—Southeastern Express Co. v. City of Charlotte, 120 S.E. 475, 186 N.C. 668.

(3) Other matters see 23 C.J. p 72 notes 78, 79.

Transmission of money

Judicial notice is not taken of the course of business of express companies with reference to the transmission of money.—Downs v. Pacific Express Co., 116 S.W. 9, 135 Mo.App. 330.

Interstate and intra-state commerce

The court may take judicial notice that the American Express Company engages in interstate commerce, and also that it engages in intra-state commerce, but it cannot know without evidence in which commerce a particular employee was engaged when injured.—American Ry. Express Co. v. Compton, 87 So. 810, 205 Ala. 298.

34. Wash.—Day v. Tacoma Ry. & Power Co., 141 P. 347, 80 Wash. 161, L.R.A.1915B 547.
23 C.J. p 72 notes 74–76.

Noise

It is matter of common knowledge that sound of moving interurban electric car is audible much farther away than forty feet.—Moore v. Erie Rys. Co., 162 A. 812, 308 Pa. 573.

35. **Judicial notice has been taken:**

(1) Of difference in busses.—Scioto Valley Ry. & Power Co. v. Public Utilities Commission of Ohio, 157 N.E. 475, 117 Ohio St. 64.

(2) Of usual customs in taking on and discharging passengers.—Thomason v. Chicago Motor Coach Co., 10 N.E.2d 714, 292 Ill.App. 104.

(3) That busses are operated between certain cities.—Blease v. Charleston & W. C. Ry. Co., 144 S.E. 233, 146 S.C. 496.

(4) That interstate commerce by motor vehicle is recent development.—Barrows v. Farnum's Stage Lines, 150 N.E. 206, 254 Mass. 240.

(5) That motor carriers engaged in transportation of freight for hire are badly using the highways.—Kelly v. Finney, 194 N.E. 157, 207 Ind. 557.

(6) That the trucking business has been in high state of confusion in recent years.—Public Utilities Commission v. Weicker Transp. Co., 78 P.2d 633, 102 Colo. 211.

(7) Other matters.

Ark.—Missouri Pacific Transp. Co. v. Pipkin, 133 S.W.2d 851, 199 Ark. 339—Wade v. Brocato, 95 S.W.2d 94, 192 Ark. 826.

Cal.—Frost v. Railroad Commission of California, 240 P. 26, 197 Cal. 230, reversed on other grounds Grost v. Railroad Commission of State of California, 46 S.Ct. 605, 271 U.S. 583, 70 L.Ed. 1101.

Ill.—Thomason v. Chicago Motor Coach Co., 10 N.E.2d 714, 292 Ill. App. 104.

Mo.—Wallace v. Woods, 102 S.W.2d 91, 340 Mo. 452.

N.Y.—Cohen v. Surface Transp. Corporation of New York, 289 N.Y.S. 678, 160 Misc. 247.

Ohio.—Southwestern Bus Co. v. Village of North Olmsted, 181 N.E. 491, 41 Ohio App. 525.

Va.—J. E. Sheets Taxicab Co. v. Commonwealth, 125 S.E. 431, 140 Va. 325—Gruber v. Commonwealth, 125 S.E. 427, 140 Va. 312.

36. Ill.—Parmelee v. McNulty, 19 Ill. 556.

37. **Judicial notice has been taken:**

(1) Of the purposes and circumstances of the installation by a subway company of turnstile gates.—Chakofsky v. Interborough Rapid Transit Co., 203 N.Y.S. 357, 208 App. Div. 407, reversing 195 N.Y.S. 79.

(2) That a particular company is a common carrier.—Crosby v. Chapman, 153 So. 149, 114 Fla. 19, followed in Blair v. Chapman, 153 So. 307, 114 Fla. 22.

(3) That electric cars cannot be started without occasional jerks and jolts.—Binder v. Boston Elevated Ry. Co., 164 N.E. 441, 265 Mass. 589.

(4) That escalators are in general use by the Boston Elevated Railway Company.—Conway v. Boston Elevated Ry. Co., 152 N.E. 94, 255 Mass. 571.

(5) That numerous corporations

Judicial notice may be taken of the great lines of public travel and transportation of property and their connection with each other, and the general course of travel and transportation throughout the country.[38] The public demand and necessity for rapid transit is a matter of common knowledge.[39] The fact that common carriers have been considered as constituting a class by themselves for legislative and constitutional action has been judicially noticed,[40] and facts relating to the regulation of common carriers may be judicially noticed.[41] The fact that particular articles are shipped by common carriers will be noticed.[42] Matters of common knowledge relating to bills of lading will be judicially noticed.[43]

(2) Railroads

(a) In general

(b) Construction, maintenance, equipment, and operation

(a) In General

Matters of common knowledge as to railroads will be judicially noticed.

The railroad business is of such magnitude and so vitally interwoven with the everyday affairs of men that courts will take judicial notice of its general features,[44] but judicial cognizance will not be

perform same public service performed by Boston Elevated Railway Company.—In re Opinion of the Justices, 159 N.E. 55, 261 Mass. 523.

(6) That sliding doors of subway cars are not usually opened until train stops.—Chasn v. Interborough-Rapid Transit Co., 227 N.Y.S. 279, 222 App.Div. 642.

(7) Other matters.—Stollery v. Sprague, 22 N.E.2d 276, 301 Ill.App. 209—23 C.J. p 72 notes 71–73.

38. N.Y.—Smith v. New York Cent. R. Co., 43 Barb. 225, affirmed 41 N.Y. 620.

Judicial notice may be taken:

(1) Of the time which by ordinary means of transportation would be consumed in sending the goods from one point to the other.—Hilbert v. Pennsylvania R. Co., 120 A. 778, 277 Pa. 105.

(2) That carrier would experience no difficulty in delivering package addressed to small town wherein there is only one firm of name similar to that on package if latter reached such town.—Carson, Pirie, Scott & Co. v. Hauk, Tex.Civ.App., 261 S.W. 533

(3) Other matters.—Morris-Wilson Buick Co. v. Robertson, La.App., 146 So. 339.

39. Ind.—Pittsburgh, C., C. & St. L. Ry. Co. v. Nichols, 130 N.E. 546, 78 Ind.App 361.

Complications in city

That transit problems in New York City are exceptionally complicated is matter of common knowledge.—Continental Guaranty Corporation v. Craig, 148 N.E. 548, 240 N.Y. 354, reversing 208 N.Y.S. 705, 212 App. Div. 236.

40. Mo.—Youtsey v. Chicago, R. I. & P. R. Co., 259 S.W. 771.

41. **Filing of schedules**

Courts judicially know that carriers engaged in interstate shipment of freight must make and file schedule of rates with interstate commerce commission.—Robert S. Armstrong & Bros. Co. v. Rowland, 118 So. 502, 22 Ala.App. 613.

Subject to regulation

Ind.—Kelly v. Finney, 194 N.E. 157, 207 Ind. 557.

42. **Cane syrup without spoiling**

La.—New Iberia Nat. Bank v. Teche Canning & Syrup Co., 106 So. 451, 159 La. 946.

Explosives, etc.

Miss.—New Orleans & N. E. R. Co. v. Watson, 128 So. 105, 157 Miss. 243.

Philippine.—Fisher v. Yangco SS. Co., 31 Philippine 1.

Perishable commodities without loss

Va.—Chesapeake & O. Ry. Co. v. W. C. Crenshaw & Co., 138 S.E. 467, 148 Va. 48, 53 A.L.R. 990.

43. Ark.—Missouri Pac. R. Co. v. Toll, 261 S.W. 652, 164 Ark. 327.

44. U.S.—Williams v. Jacksonville Terminal Co., C.C.A.Fla., 118 F.2d 324, affirming, D.C., 35 F.Supp. 267.

Okl.—Lusk v. Henson, 189 P. 191, 78 Okl. 147.

Location of railroads see infra § 33.

World War possession and control of railroads by federal government see infra § 62.

Judicial notice has been taken:

(1) Of competition offered by other means of transportation.

U.S.—Van Schaick v. McCarthy, C.C.A.Colo., 116 F.2d 987.

Va.—Virginia Electric & Power Co. v. Commonwealth, 194 S.E. 775, 169 Va. 688.

(2) Of industrial sidings.—Rice & Lockwood Lumber Co. v. Boston & M. R. R., 31 N.E.2d 219, 308 Mass. 101.

(3) Of the extensiveness of railroad systems.—Gulf, C. & S. F. Ry. Co. v. Hines, Tex.Civ.App., 4 S.W.2d 641—23 C.J. p 67 note 75.

(4) That few railroads of any considerable length are built, except on money borrowed for the purpose and secured by mortgages on the road and right of way.—Southern Pac. Co. v. Erickson, 204 P. 942, 103 Or. 311.

(5) That one of the reasons why railroads have been in financial difficulties during times of economic stress is the relatively large proportion of the indebtedness represented by fixed interest obligations.—In re Chicago, G. W. R. Co., D.C.Ill., 29 F.Supp. 149.

(6) That railroad records show when each car is delivered to consignee as well as how long it is in service and what its recent use has been.—Markley v. Kansas City Southern Ry. Co., 90 S.W.2d 409, 338 Mo. 436.

(7) That since the depression there has been an evolution and change in our economic system, particularly in methods of transportation.—Grand Trunk Western R. Co. v. Brown, D.C.Mich., 32 F.Supp. 784.

(8) That some foreign governments own and operate railroads.—Miller v. Ferrocarrill Del Pacifico De Nicaragua, Me., 18 A.2d 688.

(9) That the Santa Fe Railroad is a "steam railroad."—Whiteman v. Federal Life Ins. Co., D.C.Mo., 1 F.R.D. 95.

(10) Other matters.

U.S.—System Federation No. 40, Railway Employees Department of American Federation of Labor v. Virginian Ry. Co., D.C.Va., 11 F.Supp. 621, affirmed, C.C.A., Virginian Ry. Co. v. System Federation No. 40, Railway Employees Department of American Federation of Labor, 84 F.2d 641, certiorari granted 57 S.Ct. 43, 299 U.S. 529, 81 L.Ed. 389, affirmed Virginian Ry. Co. v. System Federation No. 40, 57 S.Ct. 592, 300 U.S. 515, 81 L.Ed. 789.

Ala.—Alabama Great Southern R. Co. v. Smith, 96 So. 239, 209 Ala. 301.

Fla.—State ex rel. Woodward v. Lee, 155 So. 138, 114 Fla. 855.

Ill.—Lindelsee v. Chicago, O. & P. Ry. Co., 226 Ill.App. 20.

Ind.—New York Cent. R. Co. v. Public Service Commission, 7 N.E.2d

taken of facts relating to railroads which are not matters of common knowledge.[45] Courts take judicial notice of the existence of established railroad routes generally known and used;[46] that railroad companies are common carriers[47] for hire;[48] that they transport not only passengers, but freight also, much of which is very heavy and difficult to handle;[49] that railroads must almost necessarily be operated by corporations and not by individuals;[50] and that a particular railroad is being operated by receivers.[51]

Because it is a matter of common knowledge, the fact is judicially known that the great railroad systems of the country are engaged in both interstate and intra-state commerce,[52] but it is not judicially known that any specific portion of the equipment or any particular employee of a railroad is engaged in interstate, rather than intra-state, commerce at any particular time and place.[53]

Courts are bound to know and judicially recognize the essential differences in the nature and modes of travel and transportation upon railroads and ordinary highways,[54] and the difference between steam railroads and street railroads,[55] as well as the difference between steam railroads and interurban electric railroads.[56]

Business methods, rates, and agreements. Courts take judicial notice of the manner in which ordinary railroad business is conducted;[57] of the customary practices and agreements by and between initial and connecting railroad carriers;[58] of the custom of railroads to carry children under one year of age free when accompanied by an adult passenger paying fare;[59] and of matters of common knowledge

957, 212 Ind. 329—Pitcairn v. Honn, App., 32 N.E.2d 733
N.J.—Central R. Co. of New Jersey v. Martin, 175 A. 637, 114 N.J.Law 69.
Tenn.—Howard & Herrin v. Nashville, C. & St. L. Ry. Co., 284 S.W. 894, 153 Tenn. 649, 46 A.L.R. 1530—Ward v. Gulf, M. & N. R. Co., 134 S.W.2d 917, 23 Tenn.App. 533.
Tex.—Houston E. & W. T. Ry. Co. v. Anderson, Civ.App., 10 S.W.2d 767, reversed on other grounds 36 S.W.2d 983, 120 Tex. 200.
Va.—L. J. Upton & Co. v. Atlantic Coast Line R. Co., 131 S.E. 827, 146 Va. 475.

45. Ky.—Royal Elkhorn Coal Co. v. Elk Horn Coal Corporation, 237 S.W. 1083, 194 Ky. 8.
N.Y.—Ball v. New York Cent. R. Co., 127 N.E. 493, 229 N.Y. 33, reversing 169 N.Y.S. 1084, 183 App. Div. 910.
Judicial notice will not be taken:
(1) Of facts respecting railroad's surplus and dividends.—Levitt v. Attorney General, 151 A. 171, 111 Conn. 634.
(2) Of net earnings of railroad companies.—Nebraska Tel. Co. v. Cornell, 82 N.W. 1, 59 Neb. 737, 80 N.W. 43, 58 Neb. 823.
(3) Of such local matters as character of freight handled by such company in particular yard at given time.—Komar v. Pennsylvania R. Co., 184 A. 293, 121 Pa.Super. 385.

46. N.Y.—Maghee v. Camden, etc., Transp. Co., 45 N.Y. 514, 6 Am.R. 124.
Tex.—Missouri Pac. R. Co. v. Graves, 2 Tex.A.Civ.Cas. § 676.

47. Ala.—Louisville & N. R. Co. v. Benton Mercantile Co., 121 So. 716, 219 Ala. 223—Southern Ry. Co. v. Dickson, 100 So. 665, 211 Ala. 481.
23 C.J. p 66 note 54.

48. U.S.—Condran v. Chicago, M. & St. P. R. Co., Iowa, 67 F. 522, 14 C.C.A. 506, 28 L.R.A. 749.
23 C.J. p 66 note 55.

49. Mo.—Hueston v. Quincy, O. & K. C. R. Co., 189 S.W. 1170.
23 C.J. p 66 note 56.

50. N.Y.—People v. Erie R. Co., 91 N.E. 849, 198 N.Y. 369, 139 Am.S.R. 828, 29 L.R.A.,N.S., 240, 19 Ann.Cas. 811.
23 C.J. p 66 note 57.

51. Okl.—Lusk v. Henson, 189 P. 191, 78 Okl. 147.

52. Pa.—Peak v. Pennsylvania R. Co., 184 A. 295, 121 Pa.Super. 373.
23 C.J. p 66 note 49.
Interstate commerce
(1) Judicial notice has been taken that particular railroads are engaged in interstate commerce.
Mo.—Brewer v. Missouri Pac. R. Co., App., 259 S.W. 825.
N.Y.—City of Buffalo v. New York Cent. R. Co., 212 N.Y.S. 1, 125 Misc. 801, affirmed 218 N.Y.S. 713, 218 App.Div. 810.
Pa.—Komar v. Pennsylvania R. Co., 184 A. 293, 121 Pa.Super. 385.
Wis.—Rosandich v. Chicago, N. S. & M. R. Co., 201 N.W. 391, 185 Wis. 184.
23 C.J. p 66 note 49 [b].
(2) Courts will take judicial notice that work of repairing block signals along main line of railroad engaged in interstate commerce directly affects or facilitates the carriage of interstate commerce.—Brewer v. Missouri Pac. R. Co., supra.
(3) The courts have refused to judicially notice that other railroads were engaged in interstate commerce and that intrastate commerce was only an incident to their general business.—Schultz v. Chicago & A. R. Co., 213 Ill.App. 628.
(4) A court is bound to take notice that the business of a railroad company, as such, located wholly in Puerto Rico, is not interstate commerce and that no part of its receipts qua railroad comes from interstate commerce.—People v. Central Fortuna, 22 Puerto Rico 100.

53. Pa.—Peak v. Pennsylvania R. Co., 184 A. 295, 121 Pa.Super. 373.
23 C.J. p 66 note 50.

54. Mich.—Lake Shore & M. S. R. Co. v. Miller, 25 Mich. 274.

55. Mo.—Ettenson v. Wabash R. Co., 154 S.W. 785, 248 Mo. 395.

56. Ind.—Terre Haute, I. & E. Tract. Co. v. Hunter, 111 N.E. 344, 62 Ind.App. 399.

57. Colo.—Atchison, T. & S. F. R. Co. v. Headland, 33 P. 185, 18 Colo. 477, 20 L.R.A. 822.
23 C.J. p 67 note 83.
Interchanging cars
That railroad cars are interchanged between all carriers is common knowledge.—Doering v. St. Louis & O. R. Co., Mo.App., 63 S.W.2d 450.

58. Cal.—Southern California Commercial Co. v. Alberti, 207 P. 1023, 58 Cal.App. 84.
23 C.J. p 68 note 84.
Agent
Court will not judicially know that a connecting carrier in handling through shipment acts as the agent and employee of carrier from whom it receives shipment, and not as an independent carrier.—Ft. Worth & R. G. Ry. Co. v. Jones, Tex.Civ.App., 212 S.W. 552.

59. Ala.—Southern R. Co. v. Herron, 68 So. 551, 12 Ala.App. 415.

relating to tickets,[60] rates,[61] and regulation of railroads.[62] The courts, however, will not take judicial notice of a lease of the operating part of a railroad, although authorized by the state railroad commission under a statute.[63] The ownership of a particular track cannot be judicially known where the tracks of many independent companies lie in close proximity to each other.[64] The courts take judicial notice of the general custom of railroad companies to carry on their passenger trains, as the baggage of commercial travelers, trunks which, to the knowledge of the carrier, contain merchandise belonging not to the passenger but to his employer;[65] and they will also take judicial notice of restrictions and limitations if they are part of the general custom;[66] but they will not take judicial notice of restrictions which are not a part of the general custom but are placed thereon by a particular railroad company.[67] In some jurisdictions, judicial notice will not be taken of a schedule of rates filed by a carrier with the interstate commerce commission and published as required by law,[68] of an official classification of rates,[69] or of tariffs approved by the state railroad commission;[70] but in other jurisdictions notice will be taken of rates filed in accordance with federal laws,[71] and of reports and tariffs filed with the state railroad commission.[72] It has been held that courts do not take judicial knowledge of calculations necessary to ascertain a freight rate in accordance with the schedule.[73]

(b) Construction, Maintenance, Equipment, and Operation

Matters of common knowledge relating to the construction, maintenance, equipment, and operation of railroads will be judicially noticed.

Courts take judicial notice of facts of general knowledge relating to the construction,[74] maintenance,[75] and equipment[76] of railroads, but judicial

60. Ala.—Pullman Co. v. Riley, 59 So. 761, 5 Ala.App. 561.
Cal.—Edson v. Southern Pac. R. Co., 77 P. 894, 144 Cal. 182.
Mich.—Smith v. Lake Shore, etc., R. Co., 72 N.W. 328, 114 Mich. 460, reversed on other grounds 19 S.Ct. 565, 173 U.S. 684, 43 L.Ed. 858.
23 C.J. p. 68 notes 85, 87, 88.

61. Va.—Norfolk Southern R. Co. v. Hudgins, 142 S.E. 412, 150 Va. 229—Norfolk Southern R. Co. v. Hudgins, 142 S.E. 469, 150 Va. 219.
23 C.J. p. 68 notes 89–91.

62. Mo.—Law Reporting Co. v. Elwood Grain Co., 115 S.W. 475, 135 Mo.App. 10.

Method to secure review of rate
U.S.—St. Louis, I. M. & S. Ry. Co. v. Williams, 40 S.Ct. 71, 251 U.S. 63, 64 L.Ed. 139, affirming 199 S.W. 376, 131 Ark. 442.

63. Tex.—Pecos & N. T. R. Co. v. Chatten, Civ.App., 185 S.W. 911.

64. Tex.—Pierce v. Galveston, H. & S. A. R. Co., Civ.App., 108 S.W. 979.

65. Minn.—McKibbin v. Great Northern R. Co., 80 N.W. 1052, 78 Minn. 232.
Okl.—Kansas City, M. & O. R. Co. v. Fugatt, 150 P. 669, 47 Okl. 727, L.R.A.1916A 545.
S.C.—Fleischman v. Southern R. Co., 56 S.E. 974, 76 S.C. 237, 9 L.R.A., N.S., 519.

66. Minn.—McKibbin v. Great Northern R. Co., 80 N.W. 1052, 78 Minn. 232.

67. Minn.—McKibbin v. Great Northern R. Co., supra.

68. Ga.—Hartwell R. Co. v. Kidd, 74 S.E. 310, 10 Ga.App. 771, followed in Cranor v. Southern R. Co., 78 S.E. 1014, 13 Ga.App. 86.

69. Ill.—Warren v. Cleveland, C. C. & St. L. R. Co., 156 Ill.App. 111.

70. Fla.—Reinschmidt v. Louisville & N. R. Co., 150 So. 266, 112 Fla. 267.

71. Pa.—New York Cent. R. Co. v. James B. Berry Sons' Co., 12 A.2d 588, 338 Pa. 500, certiorari denied James B. Berry Sons' Co. v. New York Cent. R. Co., 61 S.Ct. 31.

72. Wis.—Waldum v. Lake Superior Terminal & Transfer Ry. Co., 170 N.W. 729, 169 Wis. 137—Chicago & N. W. Ry. Co. v. Railroad Commission, 145 N.W. 216, 974, 156 Wis. 47.

73. Ala.—Robert S. Armstrong & Bros. Co. v. Rowland, 118 So. 502, 22 Ala.App. 613.

74. **Judicial notice has been taken:**
(1) Of necessity of levees along certain rivers.—Yazoo & M. V. R. Co. v. Board of Mississippi Levee Com'rs, 195 So. 704, 188 Miss. 889, appeal dismissed 61 S.Ct. 21.

(2) Of spur tracks and what they are.—Cleveland, C., C. & St. L. Ry. Co. v. Commerce Commission, 146 N.E. 606, 315 Ill. 461, 54 A.L.R. 45.

(3) That acquisition of new rights of way by railroad is usually very expensive.—In re Existing Highway-Railroad Crossings at Grade Operated by New York Cent. R. Co., 295 N.Y.S. 831, 251 App.Div. 72.

(4) Other matters.
U.S.—Atchison, T. & S. F. Ry. Co. v. Phillips, D.C.Mo., 13 F.2d 254.
Ky.—Covington & Cincinnati Elevated Railway & Transfer & Bridge Co. v. Sandlin, 133 S.W.2d 733, 280 Ky. 517.
Miss.—Newell Contracting Co. v. Flynt, 161 So. 298, 172 Miss. 719, motion overruled 161 So. 743, 172 Miss. 719.
23 C.J. p. 67 notes 62, 63, 66–68, 76.

75. Mass.—Foley v. Boston & M. R. Co., 79 N.E. 765, 193 Mass. 332, 7 L.R.A.,N.S., 1076.

Reporting of danger
It is a matter of common knowledge that, when a railway's roadway and bridges are not safe, such fact is reported to employees charged with dispatching trains or transmitting orders for their guidance.—Fort Worth & R. G. Ry. Co. v. Woodward, Tex.Civ.App., 254 S.W. 227.

Particular facts noticed
Mass.—Shipp v. Boston & M. R. R., 186 N.E. 653, 283 Mass. 266.

76. **Judicial notice has been taken:**
(1) Of construction of railroad cars.
Iowa.—Markle v. Chicago, R. I. & P. Ry. Co., 257 N.W. 771, 219 Iowa 301—Cashman v. Chicago, B. & Q. R. Co., 250 N.W. 111, 217 Iowa 469.
Mo.—Mackay v. Commonwealth Casualty Co., 34 S.W.2d 564, 224 Mo.App. 1100.
23 C.J. p. 67 note 77.

(2) Of facts concerning railroad engines.
Ill.—Chucklin v. Lowden, 32 N.E.2d 672, 309 Ill.App. 24.
Mo.—Karr v. Chicago, R. I. & P. Ry. Co., 108 S.W.2d 44, 341 Mo. 536.

(3) Of engineer's and fireman's position in cab of locomotive.
Fla.—Penn v. Pearce, 163 So. 288, 121 Fla. 3.
Mo.—March v. Pitcairn, App., 125 S.W.2d 972.
Tex.—St. Louis, S. F. & T. Ry. Co. v. Williams, Civ.App., 104 S.W.2d 103, error dismissed.

(4) That heavy steel rails, rock-ballasted roadbeds, vestibuled trains, and steel coaches are safer than light rails, less durable ballast, wooden cars, and coaches without vestibules.
Gulf, C. & S. F. Ry. Co. v. Conley, 260 S.W. 561, 113 Tex. 472, 32 A.L.

notice is not taken of such facts which are not matters of common knowledge.[77]

Courts take judicial notice of the general features of the everyday practical operation of railroads,[78] and of the common incidents of railway travel,[79] but not of matters outside of common knowledge.[80] For example, courts take cognizance that cinders and smoke,[81] noise,[82] and jerks and jars[83] are incident to the running of trains; of the usual and customary practices in starting and stopping

R. 1183, affirming, Com.App., 252 S W. 737, which reversed, Civ.App., 236 S.W. 521.

(5) That freight cars are not all of same color.—Yardley v. Rutland R. Co., 153 A. 195, 103 Vt. 182

(6) That ladders on freight cars have been standardized.—Thompson v. Missouri Pac. R Co., C.C.A.Mo., 15 F 2d 28.

(7) Other matters.

La.—Hart v. Gulf, M. & N. R. Co, App., 167 So. 166.

Me.—Hodgman v. Sandy River & R. L. R. R, 107 A. 30, 118 Me. 218.

N Y —Trudnowski v. New York Cent. R. Co., 221 N.Y.S. 686, 220 App Div. 503.

Pa —Wood v. Pennsylvania R Co., 170 A 367, 111 Pa Super. 430

Tex —Railroad Commission of Texas v. Texas & N. O. R Co., Civ. App., 42 S.W.2d 1091, error refused.

Utah.—Miller v. Southern Pac Co., 21 P.2d 865, 82 Utah 46, certiorari denied Southern Pac. Co. v. Miller, 54 S.Ct. 207, 290 U.S. 697, 78 L Ed 600.

Wyo.—Chicago & N. W. Ry. Co. v. Hall, 26 P.2d 1071, 46 Wyo. 380.

23 C.J. p 67 notes 77–80.

77. Mo —Morley & M. R. Co. v. Himmelberger, 152 S W. 86, 247 Mo. 179.

23 C.J. p 67 notes 69–74, 81, 82.

78. Ala.—Herzfeld Lumber Co. v. Langley, 93 So. 378, 18 Ala.App. 485.

23 C.J. p 68 note 6.

Judicial notice may be taken:

(1) That engine operatives, with a headlight in good condition, can see for some distance on the right of way on each side of the track.—St. Louis-San Francisco Ry. Co. v. Hill, 121 S.W.2d 869, 197 Ark. 53.

(2) That a good deal of switching is necessary when local freight trains stop at stations.—Meeks v. Graysonia, N. & A. R. Co., 272 S.W. 360, 168 Ark. 966.

(3) That more or less suction is created by a moving train.—Bernier v. Illinois Cent. R. Co., 129 N.E. 747, 296 Ill. 464, affirming 215 Ill.App. 454.

(4) That train is controlled by engineer, not fireman.—Gillis v. Atlantic Coast Line R. Co., 179 S.E. 62, 175 S.C. 223, certiorari denied Atlantic Coast Line R. Co. v. Gillis, 55 S. Ct. 545, 294 U.S. 718, 79 L.Ed. 1251.

(5) That window in passenger train is often raised and lowered by passengers.—Chadwick v. Louisville & N. R. Co., 281 S.W. 1018, 213 Ky. 831, 45 A.L.R. 1537.

(6) Other matters.

U S.—Davis v. Farmers' Co-op. Equity Co., 43 S.Ct. 556, 262 U.S. 312, 67 L.Ed. 996, reversing Farmers' Co-op. Equity Co. v. Payne, 186 N. W. 130, 150 Minn. 534.

Ark.—Missouri Pac. R. Co. v. Nelson, 115 S.W.2d 872, 195 Ark 883.

Colo —Freeman v. Boyer Bros., 261 P. 864, 82 Colo. 509, 55 A.L.R. 1285

Ill.—Grubb v Illinois Terminal Co., 8 N E 2d 934, 366 Ill. 330, reversing 3 N.E.2d 948, 286 Ill.App. 499—Banks v. Hines, 217 Ill.App. 596—Illinois Cent. R. Co. v. Klein, 95 Ill.App. 220.

Md.—Philadelphia, W. & B. R. Co. v. Burkhardt, 34 A. 1010, 83 Md. 516

Mo.—State ex rel. Ferrocarriles Nacionales De Mexico v Rutledge, 56 S.W.2d 28, 331 Mo. 1015, 85 A L. R. 1375, certiorari denied Ferrocarriles Nacionales De Mexico v. Rutledge, 53 S.Ct. 689, 289 U.S. 746, 77 L.Ed. 1492—Thomasson v. Henwood, App., 146 S W.2d 88—Bowen v. Atchison, T. & S F. Ry. Co., App., 256 S.W. 152—King v. Standard Acc. Ins. Co. of Detroit, App., 248 S.W. 984.

Tex.—Atchison, T. & S. F. Ry. Co. v Hix, Civ.App., 291 S.W. 281—Houston Belt & Terminal Ry. Co. v Davis, Civ.App., 273 S.W. 676—Texas Midland R. Co. v. Burt, Civ. App., 243 S.W. 669—Chicago, R. I. & G. Ry. Co. v. Wisdom, Civ.App., 216 S.W. 241, reversed on other grounds Wisdom v. Chicago, R. I. & G. R. Co., Com App., 231 S.W. 344.

23 C.J. p 69 notes 9, 10, 15–17, p 70 notes 19, 20, 32–36.

79. Md.—Baltimore, etc, Turnp. Road v. Cason, 20 A. 113, 72 Md. 377.

Mich —Downey v. Hendrie, 9 N W 828, 46 Mich. 498, 41 Am.R. 177.

80. Mo.—Evans v. Wabash Ry Co., 12 S.W.2d 767, 223 Mo.App. 439.

N.Y.—City of Buffalo v. New York Cent. R. Co., 212 N.Y.S. 1, 125 Misc. 801, affirmed 218 N.Y.S. 713, 218 App.Div. 810.

23 C.J. p 69 note 8.

81. Ky.—Louisville & N. R. Co. v. Commonwealth, 166 S.W. 237, 158 Ky. 773.

Mass.—Shine v. New York, N. H. & H. R. R., 128 N.E. 713, 236 Mass. 419, 11 A.L.R. 1075.

Smoke ordinances

N Y.—City of Buffalo v. New York Cent. R. Co., 212 N.Y S. 1, 125 Misc. 801, affirmed 218 N.Y.S. 713, 218 App.Div. 810.

Entry into cars

It is common knowledge that smoke and gases from locomotive enter passenger coaches regardless of whether doors, windows, and ventilators are closed.—Louisville & N. R Co. v. Turner, 292 S.W. 758, 219 Ky 92.

82. Ark.—Crossett Lumber Co. v. Cater, 144 S.W 2d 1074.

Cal —Smith v. Pacific Electric Ry. Co, 226 P. 626, 66 Cal.App. 485.

Ky.—Chesapeake & O Ry. Co. v. Boyd, 75 S.W.2d 201, 255 Ky. 627.

Pa.—Mamic v. Pittsburgh & W V Ry. Co., 19 A 2d 404, 341 Pa. 486—Rhodes v. Pennsylvania R. Co., 147 A. 854, 298 Pa. 101—Vasilios v. Pennsylvania R Co., 10 A.2d 66, 138 Pa.Super 266

Wis.—Cahoon v Chicago & N. W R. Co, 55 N.W. 900, 85 Wis 570 —Abbot v. Kalbus, 43 N.W. 367, 74 Wis. 504.

23 C.J. p 69 note 12.

However, the court will not take judicial knowledge of noise made by short train traveling three miles per hour —Compton v. Western Ry. of Alabama, 112 So. 148, 215 Ala. 576.

83. Ala.—Atlantic Coast Line R Co. v. J. S. Carroll Mercantile Co., 89 So. 509, 206 Ala. 320.

Ark.—Meeks v. Graysonia, N. & A R. Co., 272 S.W. 360, 168 Ark. 966

Idaho.—Cooper v. Oregon Short Line R Co., 262 P. 873, 45 Idaho 313.

Iowa.—Vincent, Albin & Strahl v. Hines, 200 N.W. 1, 198 Iowa 1224.

Mass.—Maher v. Boston & A. R. Co, 24 N.E.2d 513, 304 Mass. 641—McKay v. Boston & M. R. R., 188 N E 390, 284 Mass. 606—Caranicos v. New York, N. H. & H. R. Co., 178 N.E 542, 277 Mass. 364—Viglas v. Boston, R. B. & L. R. Co., 169 N.E 780, 270 Mass. 264.

Mo.—Dunn v. Alton R. Co., App., 83 S.W.2d 224.

Utah —Morrissey v. Union Pac. R Co., 249 P. 1064, 68 Utah 323.

Va.—Chesapeake & O. Ry. Co. v. Hibbs, 128 S.E. 538, 142 Va. 96, 41 A.L.R. 1083.

23 C.J. p 69 notes 13, 14.

Danger to live stock being shipped

Tex.—Panhandle & S. F. Ry. Co. v. Wilson, Civ.App., 135 S.W.2d 1062, error dismissed—Hines v. Pennington, Civ.App., 240 S.W. 703.

trains;[84] of facts of common knowledge as to the speed of trains;[85] and of the dangers incident to the operation of railroads, and the usual means taken to lessen them.[86] Although the court knows what a mixed or accommodation train is,[87] the make-up of particular trains and the movement of particular railroad cars are not matters which the court may assume to know without evidence.[88] While the time of arrival or departure of trains cannot be judicially noticed,[89] courts know that there are frequent departures from schedule time,[90] and that trains do not run at all times during any given twenty-four hours on any railroad in the state.[91]

Emission of sparks. Courts take judicial notice that locomotives emit sparks in sufficient quantities to communicate fire to combustible materials on which they happen to fall;[92] that the quantity of sparks emitted depends on a number of conditions;[93] that certain types of spark arresters are in general use on the railroads of the country;[94] and that no device has been invented or constructed which can wholly prevent a locomotive from throwing off live sparks under certain circumstances.[95] However, it has been held that since oil has come into use as a fuel it is not a matter of common knowledge that all locomotive engines emit sparks,[96] and one court, while taking judicial notice at a certain date that no spark arrester had been devised which would prevent a locomotive from throwing off live sparks,[97] at a later date declined to take judicial notice that such was the fact.[98] A court has refused to take judicial notice that electric locomotives are the best and safest for preventing fires.[99] While courts take judicial notice that a strong wind may carry sparks from a locomotive a considerable distance,[1] they do not take judicial notice of the exact distance that sparks from locomotives may or may not be carried.[2]

84. Judicial notice has been taken:
(1) Of practice of moving heavy trains with aid of pusher engine.—U. S. v. Chicago, St. P., M. & O. Ry. Co., D.C.Minn., 34 F.2d 812, affirmed, C.C.A., 43 F.2d 300, 71 A.L.R. 507.

(2) That all cars in long train ordinarily cannot be stopped opposite station platform.—Carlson v. Boston & M. R. R., 168 N.E. 171, 269 Mass. 60.

(3) That trains are commonly started while brakemen are stationed on top of freight cars.—Jackson v. Hanrahan, 200 N.W. 202, 198 Iowa 704.

(4) That trains do not always stop at precisely same place at stations.—Tsatsos v. Boston, R. B. & L. R. Co., 166 N.E. 633, 267 Mass. 365.

(5) Other matters see 23 C.J. p 69 note 18, p 70 note 31.

85. Ariz.—Canion v. Southern Pac. Co., 80 P.2d 397, 52 Ariz. 245.
Pa.—Railway Express Agency v. Pennsylvania Public Utility Commission, 4 A.2d 176, 134 Pa.Super. 405.

Negligence
(1) The fact that a particular speed under the circumstances was not negligent has been noticed.—Franklin Grove v. Chicago & N. W. R. Co., 196 Ill.App. 167—23 C.J. p 70 note 24.

(2) Conversely, a court has refused to take notice that a particular speed was negligent.—Sorrell v. Missouri, K. & T. Ry. Co. of Texas, Tex.Civ.App., 230 S.W. 768.

86. Judicial notice has been taken:
(1) Of railroad's knowledge of protective devices at crossing.—Stocker v. Boston & M. R. R., 143 A. 68, 83 N.H. 401.

(2) That danger of railroad crossing accidents increases with number of trains.—Atchison, T. & S. F. Ry. Co. v. La Prade, D.C.Ariz., 2 F. Supp. 855.

(3) That locomotive whistle or bell is more easily heard than roar of train and that travelers usually heed such warnings.—Southern Ry. Co. v. Whetzel, 167 S.E. 427, 159 Va. 796.

(4) That railroad engine whistle is a better warning to motorists than engine bell.—Poague v. Kurn, Mo., 140 S.W.2d 13.

(5) Other matters.
Ark.—Kansas City Southern Ry. Co. v. Sevier County, 286 S.W. 1035, 287 S.W. 404, 171 Ark. 900.
Ind.—Kooken v. Chicago, I. & L. R. Co., 196 N.E. 534, 100 Ind.App. 669.
Mo.—Camp v. Kurn, App., 142 S.W.2d 772.
N.Y.—In re Existing Highway-Railroad Crossings at Grade Operated by New York Cent. R. Co., 295 N.Y. S. 831, 251 App.Div. 72.
Tex.—Standard Accident Ins. Co. v. Thompson, Civ.App., 146 S.W.2d 238, error granted.
23 C.J. p 70 notes 21–23, 25.

87. Miss.—White v. Illinois Cent. R. Co., 55 So. 593, 99 Miss. 651.

88. U.S.—Osborne v. Gray, 36 S.Ct. 486, 241 U.S. 16, 60 L.Ed. 865, affirming 5 Tenn.Civ.App. 519.
23 C.J. p 70 note 27.

89. Mo.—Bishop v. Covenant Mut. L. Ins. Co., 85 Mo.App. 302.
Okl.—Boatman v. Coverdale, 193 P. 874, 80 Okl. 9—Booth & Flinn v. Cook, 193 P. 36, 79 Okl. 280.
22 C.J. p 101 note 32.

90. U.S.—Oregon Short Line & U. N. R. Co. v. Frost, Mont., 74 F. 965, 21 C.C.A. 186.
23 C.J. p 70 note 29.

91. Tex.—City of Waxahachie v. Missouri, K. & T. R. Co., Civ.App., 183 S.W. 61.

92. U.S.—General Ins. Co. of America v. Northern Pac. Ry. Co., C.C. A.Wash., 28 F.2d 574, certiorari granted 49 S.Ct. 252, 279 U.S. 827, 73 L.Ed. 979, affirmed 50 S.Ct. 44, 280 U.S. 72, 74 L.Ed. 172.
N.H.—Russell v. Boston & M. R. R., 141 A. 227, 83 N.H. 246.
23 C.J. p 70 notes 37, 38.

93. Ala.—Louisville & N. R. Co. v. Davis, 75 So. 977.
23 C.J. p 70 note 39.

94. N.Y.—Frace v. New York, L. E. & W. R. Co., 38 N.E. 102, 143 N.Y. 182, reversing 22 N.Y.S. 958, 68 Hun 325.

95. Miss.—Robertson v. Yazoo & M. V. R. Co., 122 So. 371, 154 Miss. 182.
Wash.—Thorgrimson v. Northern Pac. R. Co., 117 P. 406, 64 Wash. 500.
23 C.J. p 70 note 41.

96. Tex.—St. Louis Southwestern R. Co. v. McIntosh, 126 S.W. 692, 59 Tex.Civ.App. 570.

97. Wis.—Menominee River Sash & Door Co. v. Milwaukee & N. R. Co., 65 N.W. 176, 91 Wis. 447.

98. Wis.—Schlag v. Chicago, M. & St. P. R. Co., 139 N.W. 756, 152 Wis. 165.
23 C.J. p 71 note 44.

99. Va.—Norfolk Southern R. Co. v. Fentress, 102 S.E. 588, 127 Va. 87.

1. Ala.—Deason v. Alabama Great Southern R. Co., 65 So. 172, 186 Ala. 100.

2. Ky.—Louisville & N. R. Co. v. Brewer, 186 S.W. 166, 170 Ky. 505.
Tex.—St. Louis Southwestern R. Co.

Officers and employees. Judicial notice is taken of the respective and definite duties and authority of various officers and employees on railroad trains;[3] but only so far as such authority and duties are commonly known.[4] Judicial notice may be taken that private railroad policemen are exclusively creatures of state law.[5]

(3) Street Railroads

Judicial cognizance is taken of matters of common knowledge relating to street railroads.

Matters of common knowledge pertaining to street railroads will be judicially noticed,[6] but facts which are not matters of common knowledge will not be judicially noticed.[7] Accordingly, matters of common knowledge relating to the construction of street

v. McIntosh, 126 S.W. 692, 59 Tex. Civ.App. 570.

"But the height to which sparks can be thrown and the distance to which they can be carried by the wind under a given set of conditions are obviously limited by natural laws, and it cannot be assumed that the limits thus fixed by natural laws are matters of common knowledge." —Russell v. Boston & M. R. R., 141 A. 227, 228, 83 N.H. 246.

3. Ala.—Sovereign Camp, W. O. W., v. Allen, 89 So. 58, 206 Ala. 41.
23 C.J. p 67 note 65, p 68 notes 98, 99, p 71 note 48.

Brakeman

(1) It is common knowledge that brakeman in switching cars may be obliged to walk on track to adjust defective coupler.—Talbert v. Chicago, R. I. & P. Ry. Co., 15 S.W.2d 762, 321 Mo. 1080, certiorari denied Chicago, R. I. & P. Ry. Co. v. Talbert, 50 S.Ct. 26, 280 U.S. 567, 74 L.Ed. 621.

(2) Other matters noticed.

Ark.—Missouri Pac. R. Co. v. Rodden, 59 S.W.2d 599, 187 Ark. 321.

Ind.—Chesapeake & O. Ry. Co. v. Fultz, 161 N.E. 835, 91 Ind.App. 639, certiorari denied 51 S.Ct. 31, 282 U.S. 855, 75 L.Ed. 757.
23 C.J. p 71 note 48 [d].

(3) On the other hand, it has been held that court cannot take judicial notice of the duties required of, or performed by, brakeman in the service of a railroad company.—Gannaway v. Pitcairn, Mo.App., 109 S.W.2d 78.

Conductor

(1) It is a matter of common knowledge that the conductor is the person who has charge of the train, controls its movements, and is held responsible by the company for obedience to its rules and regulations.—Louisville & N. R. Co. v. Renfro, 135 S.W. 266, 142 Ky. 590, 33 L.R.A.,N.S., 133.

(2) Court takes judicial notice that passengers on train do not seek out conductor to tender fares, but that conductor invariably visits passenger and calls for fare.—Vanderbeck v. Chicago, M., St. P. & P. Ry. Co., 230 N.W. 390, 210 Iowa 230.

(3) That conductor of train has entire charge thereof, even to extent that it is his duty to enforce all rules applicable to other members of train crew and see that they perform their duties, is matter of common knowledge.—Hilton v. Southern Ry. Co., 7 S.E.2d 161, 192 S.C. 476.

(4) Other matters see 23 C.J. p 71 note 48 [c].

Dispatcher

Judicial notice may be taken that the train dispatcher is the officer having charge of trains' movements.

Mo.—Burch v. Cleveland, C., C. & St. L. Ry. Co., 40 S.W.2d 688, 328 Mo. 59.

S.C.—Currie v. Davis, 126 S.E. 119, 130 S.C. 408, petition dismissed Davis v. Currie, 45 S.Ct. 88, 266 U.S. 182, 69 L.Ed. 234.

Tex.—Fort Worth & R. G. Ry. Co. v. Woodward, Civ.App., 254 S.W. 227.
23 C.J. p 68 note 6 [b].

Flagman

Supreme court does not judicially notice that it is not duty of flagman on passenger train, when he sees that train is not stopping at signal for one seeking passage at flag station, to do some act in effort to stop train.—Central of Georgia Ry. Co. v. Purifoy, 145 So. 321, 322, 226 Ala. 58, citing **Corpus Juris**, and denying certiorari 145 So. 323, 25 Ala.App. 252.

4. Tex.—Texas & P. Ry. Co. v. Boaz, Civ.App., 22 S.W.2d 492.
23 C.J. p 68 notes 1, 2, p 71 note 49.

5. U.S.—Delaware, L. & W. R. Co. v. Scales, C.C.A.N.Y., 18 F.2d 73.

6. **Operation by corporations**

(1) It may be a fact within the scope of judicial cognizance that street railways are generally carried on by corporations.—Beaumont Tract. Co. v. State, 122 S.W. 615, 57 Tex. Civ.App. 605.

(2) The court will not judicially assume that no others than corporations are so engaged in the state.—Beaumont Tract. Co. v. State, supra.

Matters judicially noticed

(1) That automobiles have seriously affected earnings of street railroads.—Shreveport Rys. Co. v. City of Shreveport, D.C.La., 37 F.2d 910, affirmed, C.C.A., City of Shreveport v. Shreveport Ry. Co., 38 F.2d 945, 69 A.L.R. 340, certiorari denied 50 S.Ct 462, 281 U.S. 763, 74 L.Ed. 1172.

(2) That street railway systems for many years have been operated without operation of motor busses in connection.—Woodward v. City of Seattle, 248 P. 73, 140 Wash. 83.

(3) That white posts indicate street car stops.—McGrath v. Boston Elevated Ry. Co., 154 N.E. 89, 257 Mass. 541.

(4) Other matters see 23 C.J. p 71 notes 50, 51.

7. Mo.—Lester v. Wells, App., 253 S.W. 387.

N.H.—Wright v. Boston & M. R. R., 139 A. 370, 83 N.H. 136, 56 A.L.R. 975.
23 C.J. p 72 notes 54, 55.

Overhead wires

While it is a matter of common observation that in the operation of electric street cars the trolleys frequently become detached from the overhead wire, courts do not judicially know that such mishaps are not preventable by mechanical contrivance.—Kirkpatrick v. Metropolitan St. R. Co., 143 S.W. 865, 161 Mo.App. 515.

Ownership

Courts cannot take notice that a particular person or corporation owns or operates a street railway, or a particular line of steet railway, in a certain city.—El Paso Electric Ry. Co. v. Terrazas, Tex.Civ.App., 208 S.W. 387, error refused—23 C.J. p 72 note 55.

Service unnecessary

The court cannot take judicial notice that the maintenance of service on a certain route would be unnecessary and would result in congestion of the traffic.—Virginia Ry. & Power Co. v. City of Richmond, 106 S.E. 529, 129 Va. 592.

Revenues

Effect of period of price recession on revenues or net return of a street car company cannot be judicially noticed.—Galveston Electric Co. v. City of Galveston, Tex., 42 S.Ct. 351, 258 U.S. 388, 66 L.Ed. 678, affirming, D.C., Galveston Electric Co. v. City of Galveston, 272 F. 147.

car lines,[8] their equipment,[9] and operation[10] will be judicially noticed. Some[11] but not other[12] courts take judicial notice of the approximate distance within which a trolley car running at a certain rate of speed can be stopped.

e. Insurance

Matters of common knowledge appertaining to insurance will be judicially noticed.

The courts take judicial notice of the uniform and universal customs of insurance companies,[13] and of facts of common knowledge relating to insurance.[14] Accordingly judicial notice has been taken of such matters as the ordinary method and course of dealing by which parties procure insurance;[15] insurable interests;[16] matters concerning insurance rates;[17] and judicial notice has been taken of mat-

8. Iowa—City of Dubuque v. Dubuque Electric Co., 177 N.W. 700, 188 Iowa 1192
Mo.—Smith v. Mederacke, 259 S.W. 83, 302 Mo. 538

9. La.—Wylie v. Shreveport Rys. Co., App., 140 So. 715, affirmed 145 So. 513, 176 La. 193.
Pa.—Clonan v. Allegheny Valley Street Ry. Co., 96 Pa.Super. 442.
Tex.—Dallas Railway & Terminal Co. v. Horton, Civ.App., 119 S.W. 2d 122, error dismissed.
23 C.J. p 72 notes 56–59.

Electric trolley coaches
It is general knowledge that electric trolley coaches which are run by overhead electric wire similar to street car except that there are no tracks go rapidly and frequently come to sudden stops to let off or take on passengers.—Zawicky v. Flint Trolley Coach Co., 286 N.W. 115, 288 Mich. 655.

10. **Matters judicially noticed**
(1) Increase of cost of operation.—In re Opinion of the Justices, 122 N. E. 763, 231 Mass. 603.

(2) Irregular movements in operation.
U.S.—Mareiniss v. Sheeran, C.C.A.N. Y., 31 F.2d 976.
Ala.—Bradford v. Birmingham Electric Co., 149 So. 729, 227 Ala. 285.
Mass.—Carson v. Boston El. Ry., 33 N.E 2d 701, 309 Mass. 32.
Mo.—Laycock v. United Rys. Co. of St. Louis, App., 227 S.W. 883, certified questions answered 235 S. W. 91, 290 Mo. 344.
N.Y.—Cull v. Union Ry. Co. of New York City, 183 N.Y.S. 275, 192 App. Div. 649.
Pa.—McClusky v. Shenango Valley Traction Co, 161 A. 424, 105 Pa. Super. 275.
23 C.J. p 72 note 64.

(3) That cars stop at crossings for the purpose of taking on and letting off passengers.—Smith v. Mederacke, 259 S.W. 83, 302 Mo. 538—23 C.J. p 72 note 65.

(4) That electric street car can start smoothly.—Cleveland Ry. Co. v. Hunt, 156 N.E 133, 116 Ohio St. 291, followed in Wilkey v. Cleveland Ry. Co., 177 N.E. 637, 123 Ohio St. 679.

(5) That street cars cannot always stop at exact place along safety zone.—Shepard v. Denver Tramway Corporation, C.C.A Colo., 62 F.2d 339.

(6) That street cars cannot be run with any considerable speed without creating a current of air.—Selibedea v. Worcester Consol. St. Ry Co., 111 N.E. 767, 223 Mass. 76—Furey v. Worcester & S St. Ry. Co, 89 N.E. 531, 203 Mass. 434, 24 L.R.A., N.S., 1304.

(7) That street car motormen clang their gongs almost constantly while going through crowded city streets.—Jackson v. Capital Transit Co., 99 F.2d 380, 69 App D.C. 147, certiorari denied 59 S.Ct. 464, 306 U. S. 630, 83 L.Ed. 1032.

(8) That street cars run on approximately schedule time.—J. Maury Dove Co. v. Cook, 32 F.2d 957, 59 App.D.C. 61.

(9) Usual slowing of speed or stopping at street intersections.—Ross v. San Francisco-Oakland Terminal Rys. Co., 191 P. 703, 47 Cal. App. 753.

(10) Other matters.
Mass.—Weiner v. Boston Elevated Ry. Co., 160 N.E 259, 262 Mass. 539.
Mo.—Byars v. St. Louis Public Service Co., 66 S.W.2d 894, 334 Mo. 278.
N.J.—Markowski v. Public Service Ry. Co., 143 A. 740, 6 N.J.Misc. 1104.
Pa.—Smith v. Pittsburgh Rys. Co., 171 A. 879, 314 Pa 541, followed in Hody v. Pittsburgh Rys. Co., 178 A. 302, 318 Pa. 272.
Tex.—Renegar v. Fort Worth Transit Co., Civ.App., 143 S.W.2d 443.
Wash.—Keller v. City of Seattle, 94 P.2d 184, 200 Wash. 573—Anderson v. Grandy, 283 P. 186, 154 Wash. 547.
23 C.J. p 72 notes 66–70.

11. Mo.—Downs v. United Rys. Co. of St. Louis, 184 S.W. 995.
N.Y.—Young v. Atlantic Ave. R. Co., 31 N.Y.S. 441, 10 Misc. 541.
23 C.J. p 72 note 60.

12. Mich.—Kotila v. Houghton County St. R. Co., 96 N.W. 437, 134 Mich. 314.
23 C.J. p 72 note 61.

13. Mo.—Magers v. Northwestern Mut. Life Ins. Co., 152 S.W.2d 148.
N.Y.—Nagle v. Perkins, 224 N.Y.S. 575, 130 Misc. 808.
23 C.J. p 73 note 95, p 74 note 3.

Matters judicially noticed
(1) The practice, recognized by statute, of reckoning age from nearest birthday.—Prange v. International Life Ins. Co. of St Louis, 46 S. W.2d 523, 329 Mo. 651, 80 A.L.R. 950.

(2) The thoroughness which characterizes the work of title insurance companies—Northwestern Title Ins. Co. v. Fishback, 188 P. 469, 110 Wash. 350.

(3) The various expenses of a life insurance company.—New World Life Ins. Co. v. U. S., Ct.Cl., 26 F. Supp. 444, certiorari denied 60 S.Ct. 179, 308 U.S. 612, 84 L.Ed. 512, vacated 60 S.Ct. 1070, 310 U.S 654, 84 L. Ed. 1419, certiorari granted 60 S Ct. 1070, 310 U.S. 654, 84 L.Ed. 1419, motion denied 61 S.Ct. 8, affirmed 61 S.Ct. 314.

(4) That consent of insurance company to transfer of insured property is generally given by the insurer's local agent.—Kelly v. Utica Fire Ins. Co. of Oneida County, 196 N.Y.S. 795, 203 App.Div. 335.

14. **Insurance as protection** to the sufferer is a matter of common knowledge.—Rozell v. Rozell, 22 N.E. 2d 254, 281 N.Y. 106, affirming 8 N. Y.S.2d 901, 256 App.Div. 61.

15. Wis.—Modern Grinder Mfg. Co. v. Globe & Rutgers Fire Ins. Co. of New York, 212 N.W. 523, 192 Wis. 319.

Not like other contracts
Idaho.—Rauert v. Loyal Protective Ins. Co. of Boston, Mass., 106 P.2d 1015, 61 Idaho 677.

16. Cal.—Boyer v U. S. Fidelity & Guaranty Co., 274 P. 57, 206 Cal. 273.

Conditional owners
Court will take notice of common practice of insurers to insure, against liability, persons having merely conditional ownership in automobile.—Hunt v. Century Indemnity Co., 192 A. 799, 58 R.I. 336, 112 A. L.R. 902.

17. Va.—Phœnix Indemnity Co. v. Anderson, 196 S.E. 629, 170 Va. 406.

ters such as risks acceptable;[18] matters pertaining to insurance hazards,[19] the issuance of policies on applications containing certain representations;[20] the use of medical examiners;[21] the transaction of business through agents,[22] and matters of common knowledge respecting insurance agents[23] and agen-

Discrepancy in rates between different places

U.S.—Leave v. Boston Elevated Ry. Co., D.C.Mass., 14 F.Supp. 775.

Employees' liability insurance rates are judicially known to vary according to danger of work.—Nussbaum v. General Accident, Fire & Life Assur. Corporation, Limited, of Perth, Scotland, 38 S.W.2d 1, 238 Ky. 348.

Fire insurance

It has been judicially noticed that:

(1) A sprinkler system results in the reduction of premiums.—Clifton Trust Co. v. Windsor Mfg. Co., 18 A.2d 35, 125 N.J.Law 619.

(2) Such rates vary according to use made of insured property.—King v. Ohio Valley Fire & Marine Ins. Co., 280 S.W. 127, 212 Ky. 770.

(3) Storing of explosives increases rates.—Louis K. Liggett Co. v. Strum, 249 Ill.App. 263.

(4) That rates under some statutes may be changed only in certain way.—Home Fire & Marine Ins. Co. of California v. Ball, 287 S.W. 555, 216 Ky. 1.

(5) Other matters.—Cooley v. East & West Ins. Co., 61 S.W.2d 656, 166 Tenn. 405.

Life insurance

It is a matter of common knowledge that:

(1) Cost is cheaper the sooner in insured's life it is taken out.—Katz v. New York Life Ins. Co., 15 A.2d 898, 125 N.J.Law 358.

(2) American experience table of mortality is used in fixing insurance rates and premiums and the probable average future life in years of persons.—Duehren v. Stewart, 102 P.2d 784, 39 Cal.App.2d 201.

(3) Long-term insurance policies are written at reduced premium.—De Blois v. Welch, D.C.Mass., 19 F.Supp. 356, affirmed, C.C.A., Welch v. De Blois, 94 F.2d 842.

(4) Premiums for short-term policies are much smaller than premiums on life policies.—Lane v. New York Life Ins. Co., 145 S.E. 196, 147 S.C. 333.

18. Matters considered material to risk

(1) Habits of applicant.—Dudgeon v. Mutual Ben. Health & Accident Ass'n, C.C.A.W.Va., 70 F.2d 49.

(2) Sugar in urine.—New York Life Ins. Co. v. Simons, C.C.A.Mass., 60 F.2d 30, reversing, D.C., New York Life Ins. Co. v. Drooker, 53 F.2d 859, and certiorari denied Simons v. New York Life Ins. Co., 53 S.Ct. 93, 287 U.S. 648, 77 L.Ed. 560.

Judicial notice has also been taken:

(1) Of the impossibility of an insured person who has tuberculosis obtaining other insurance on his life.—National L. Ins. Co. v. Jackson, 89 S.E. 633, 18 Ga.App. 494.

(2) That health and accident policies are daily issued to persons more than fifty years of age.—National Life & Accident Ins. Co. v. Ransdell, 82 S.W.2d 820, 259 Ky. 559.

(3) That life insurance companies do not issue policies until they have received satisfactory knowledge of health of insured.—Rosenblum v. Sun Life Assur. Co. of Canada, 65 P.2d 399, 51 Wyo. 195, 109 A.L.R. 911.

(4) That the moral risk is a determining factor in fire insurer's acceptance or rejection of an application.—Campbell v. National-Ben Franklin Fire Ins. Co., 200 A. 701, 132 Pa.Super. 379.

(5) That no reputable company would issue automobile insurance to applicant reported as running questionable hotel, having been in jail, and having been convicted for driving while intoxicated.—Redmon v. Andrews, 266 P. 178, 147 Wash. 390.

19. Empty buildings

It is a matter of common knowledge that the hazard of fire is much greater when buildings are vacant.

Miss.—Home Ins. Co. v. Hardin, 139 So. 603, 162 Miss. 254.

Pa.—Kinneer v. Southwestern Mut. Fire Ass'n, 185 A. 194, 322 Pa. 100, affirming 179 A. 800, 118 Pa.Super. 312.

Wis.—Frozine v. St. Paul Fire & Marine Ins. Co., 218 N.W. 845, 195 Wis. 494.

23 C.J. p. 59 note 22 [b] (4).

Operation of moonshine still on insured premises does not necessarily increase fire hazard.—St. Paul Fire & Marine Ins. Co. v. Bachmann, W.Va., 52 S.Ct. 270, 285 U.S. 112, 76 L.Ed. 648, reversing, C.C.A., 49 F.2d 158, certiorari granted 52 S.Ct. 31, 284 U.S. 605, 76 L.Ed. 518.

20. D.C.—Washington Fidelity Nat. Ins. Co. v. Burton, 56 F.2d 300, 61 App.D.C. 3, certiorari granted 52 S.Ct. 498, 286 U.S. 536, 76 L.Ed. 1275, reversed on other grounds 53 S.Ct. 26, 287 U.S. 97, 77 L.Ed. 196, 87 A.L.R. 191.

Mich.—Metropolitan Life Ins. Co. v. Jankowski, 280 N.W. 766, 285 Mich. 291.

Tex.—Rio Grande Nat. Life Ins. Co. v. Bandy, Civ.App., 110 S.W.2d 122.

21. S.C.—Ginyard v. Lincoln Ins. Co., 133 S.E. 227, 135 S.C. 48.

22. N.Y.—Ruggles v. American Cent. Ins. Co., 21 N.E. 1000, 114 N.Y. 415, 11 Am.S.R. 674, affirming 1 N.Y.St. 572.

Va.—Modern Woodmen of America v. Lawson, 65 S.E. 509, 110 Va. 81, 135 Am.S.R. 927.

23 C.J. p. 73 note 96.

Authority of agent

Ill.—Sommerio v. Prudential Ins. Co. of America, 7 N.E.2d 631, 289 Ill. App. 520.

General agents in large cities

U.S.—Viles v. Prudential Ins. Co. of America, C.C.A.Colo., 96 F.2d 3.

23. Mo.—State ex rel. John Hancock Mut. Life Ins. Co. v. Hughes, 152 S.W.2d 132, quashing opinion Longo v. John Hancock Mut. Life Ins. Co., App., 142 S.W.2d 871.

N.H.—Hartford Accident & Indemnity Co. v. Lougee, 196 A. 267, 89 N.H. 222.

R.I.—Inventasch v. Superior Fire Ins. Co., 138 A. 39, 48 R.I. 321.

Assistance to applicants

It is common knowledge that insurance agents assist applicants in interpreting questions in applications and formulating answers thereto.—Purcell v. Washington Fidelity Nat. Ins. Co., 16 P.2d 639, 141 Or. 98.

Compensation

It will be judicially noticed:

(1) That all soliciting agents for life insurance companies work on commission basis.—Beasley v. Missouri State Life Ins. Co., 179 S.E. 777, 176 S.C. 156.

(2) That an agent receives the greater part of the first premium on life insurance.

U.S.—In re Graham, D.C.Ky., 22 F. Supp. 233.

Ark.—Wilson v. Whitworth, 125 S.W.2d 112, 197 Ark. 675.—Jernigan v. Lold Rainwater Co., 117 S.W.2d 18, 196 Ark. 251.

Particular matters noticed

(1) That in course of time agents work up large business.—Hobbins v. Hannan, 202 N.W. 800, 186 Wis. 284.

(2) That insurance agents duly licensed by the same company frequently act jointly.—Diefenbach v. Jarett, 186 N.W. 189, 176 Wis. 70.

(3) That insurance business is carried on by agents largely through subordinates.—Barone v. Ætna Life Ins. Co., 183 N.E. 900, 260 N.Y. 410, affirming 256 N.Y.S. 221, 235 App. Div. 759.

(4) That selection of insurance company for particular policy is usually left to agent.

N.Y.—Rose Inn Corporation v. National Union Fire Ins. Co., 232 N.Y.S. 351, 133 Misc. 440, reversed

cies;[24] usual customs attending the collection and payment of premiums;[25] the preparation of their own contracts of insurance;[26] the use and customary activities of adjusters;[27] matters of common knowledge concerning the payment and adjustment of claims;[28] the surrender value of life policies,[29] and the recognized methods of applying such value either in cash payment or the purchase of other insurance;[30] the cancellation of policies;[31] the renewal of policies;[32] and loans on life policies.[33] On the other hand, facts in relation to insurance and insurance companies which are not matters of common knowledge, or subjects of judicial knowledge because of statutory enactments, will not be judicially noticed.[34]

Policies. Facts of common knowledge concern-

on other grounds 243 N.Y.S. 249, 229 App.Div. 349, affirmed 179 N.E. 256, 258 N.Y. 51, 83 A.L.R. 293.
Or.—Port Inv. Co. v. Oregon Mut. Fire Ins. Co., 94 P.2d 734, 163 Or. 1, 124 A.L.R. 1342.

(5) Other matters.—Ward v. Hanchett, Tex.Civ.App., 47 S.W.2d 360, error dismissed Hanchett v. Ward, Com.App., 65 S.W.2d 268.

24. U.S.—In re Chapman, D.C.Ky., 50 F.2d 252.
N.Y.—Gilchrist Transp. Co. v. Worthington & Sill, 184 N.Y.S. 81, 193 App.Div. 250.
Tex.—London & Lancashire Ins. Co. v. Higgins, Civ.App., 68 S.W.2d 1056, error dismissed.

Liability for premiums

A court would not take judicial notice that, by universal custom, insurance agency was liable to insurer for premiums, where court had no actual knowledge of such a custom.—Janvier & Co. v. Fritz, La.App., 180 So. 172, rehearing denied 180 So. 444.

25. Ala.—American Workmen v. Harris, 196 So. 145, 29 Ala.App. 297, certiorari denied 196 So. 147, 239 Ala. 505.

Issuance of premium receipts

Iowa.—Baker v. General American Life Ins. Co., 268 N.W. 556, 222 Iowa 184.

Payment in advance

It is a matter of common knowledge that:

(1) All insurance companies require payment of premiums in advance on bonds executed by them.—Bamberg County v. Maryland Casualty Co., 174 S.E. 917, 173 S.C. 106.

(2) Fire insurers extend credit for premiums, and that life insurers exact payment of premiums in advance.—Kansas City Life Ins. Co. v. Hammett, 149 So. 525, 177 La. 930.

(3) Insurance policies are delivered by insurance agents on payment of part cash and balance evidenced by notes of insured.—Commonwealth v. Sharp, 156 S.E. 570, 155 Va. 714.

Time and collection

(1) It is matter of common knowledge that premiums on life insurance policies are ordinarily paid annually or on an annual basis.—First Texas Prudential Ins. Co. v. Sorley, Tex.Civ.App., 272 S.W. 346.

(2) It is common knowledge that insurers of industrial life policies providing for weekly payments in small amounts frequently have their agents call on insured for collection of premiums which are paid in small sums.—Roseberry v. Home Life Ins. Co., 183 A. 121, 120 Pa. Super. 450.

26. U.S.—Shaw v. U. S. Fidelity & Guaranty Co., C.C.A.N.J., 101 F. 2d 92.
Ala.—Commercial Casualty Ins. Co. v. Hosey, 191 So. 343, 238 Ala. 335.
Mont.—Montana Auto Finance Corporation v. British & Federal Underwriters of Norwich Union Fire Ins. Soc., 232 P. 198, 72 Mont. 69, 36 A.L.R. 1495.
23 C.J. p 73 note 95 [a] (2).

27. U.S.—New York Underwriters' Fire Ins. Co. v. Malham & Co., C.C.A.Ark., 25 F.2d 415.
N.Y.—Bearor v. Kapple, 24 N.Y.S.2d 655.

Authority

Ga.—Collins v. Lambert, 2 S.E.2d 165, 59 Ga.App. 651.

28. **Increased recovery where insurance company is liable**

U.S.—Claverie v. American Casualty Co. of Reading, Pa., C.C.A.N.C., 76 F.2d 570, certiorari denied American Casualty Co. of Reading, Pa. v. Claverie, 56 S.Ct. 102, 296 U.S. 590, 80 L.Ed. 417.

Lack of knowledge

Courts should take common knowledge of the fact that beneficiaries in insurance policies are frequently unaware of the legal effect of steps taken by them in making proofs of loss.—Basham v. Prudential Ins. Co. of America, 113 S.W.2d 126, 232 Mo. App. 782.

Payment without litigation

Fla.—Auto Mut. Indemnity Co. v. Shaw, 184 So. 852, 134 Fla. 815.

Speedy and prompt settlement

Judicial notice will be taken of facts within common knowledge that make desirable speedy and prompt settlement by arbitration of fire insurance losses.—Hardware Dealers' Mut. Fire Ins. Co. of Wisconsin v. Glidden Co., 52 S.Ct. 69, 284 U.S. 151, 76 L.Ed. 214, affirming Glidden Co. v. Retail Hardware Mut. Fire Ins. Co of Minnesota, 233 N.W. 310, 181 Minn. 518, 77 A.L.R. 616.

29. U.S.—Guggenheim v. Rasquin, D.C.N.Y., 28 F.Supp. 322, reversed on other grounds, C.C.A., 110 F. 2d 371, certiorari granted 61 S.Ct. 10, affirmed 61 S.Ct. 507.

30. La.—Succession of Watson v. Metropolitan Life Ins. Co., App., 156 So. 29, rehearing refused 156 So. 590, annulled 162 So. 790, 183 La. 25, and followed in Wells v. Douglas Life Ins. Co., App., 156 So. 34, rehearing dismissed 156 So. 591. Followed in Cryer v. National Life & Accident Ins. Co., App., 156 So. 34, annulled 162 So. 804, 183 La. 67. Followed in Williams v. National Life & Accident Ins. Co., App., 156 So. 34, annulled 162 So. 803, 183 La. 64. Followed in Foley v. National Life & Accident Ins. Co., App., 156 So. 35, annulled 162 So. 798, 183 La. 49.

Use to secure new policies

Ind.—Metropolitan Life Ins. Co. v. Sullivan, 13 N.E.2d 215, 213 Ind. 428.

31. Mo.—National Union Fire Ins. Co. v. Nevils, 274 S.W. 503, 217 Mo. App. 630.
Tex.—Smith v. Washington Nat. Ins. Co., Civ.App., 117 S.W.2d 476.

Failure to pay premiums will cause forfeiture of policies.—Roe v. Best, Tex.Civ.App., 120 S.W.2d 819.

Through local agents

W.Va.—Phoenix Ins. Co. v. Thomas, 138 S.E. 381, 103 W.Va. 574.

32. **Term accident policies**

N.Y.—Penrose v. Metropolitan Life Ins. Co., 296 N.Y.S. 764, 163 Misc. 241.

33. N.Y.—Davis v. Modern Industrial Bank, 18 N.E.2d 639, 279 N.Y. 405, affirming 6 N.Y.S.2d 362, 254 App.Div. 862.

34. **Judicial notice will not be taken:**

(1) Of business rivalry between groups of insurance companies in New York.—New York Life Ins. Co. v. Kaufman, C.C.A.Cal., 78 F.2d 398, certiorari denied 56 S.Ct. 149, 296 U. S. 626, 80 L.Ed. 445.

(2) Of the particular method of keeping books and records in the office of an insurance agent.—Coon v. Boston Ins. Co., 192 P. 1092, 79 Okl. 296.

(3) Of the public rating record which an insurance company is required by statute to maintain.—State ex rel. Agricultural Ins. Co. of Wa-

ing insurance policies may be judicially noticed, such as that insurance policies are but contracts of indemnity,[35] that many forms of insurance policies are on file with the insurance commissioner,[36] that ordinary life insurance policies have a loan value and are assignable,[37] that policies of insurance companies seldom contain identical terms or conditions,[38] that many policies contain a stipulation avoiding the policy for additional unauthorized insurance, while others do not, and that some require additional insurance,[39] that the abuse of attaching riders to policies varied,[40] and that fire insurance policies are generally issued for a term of at least one year.[41]

Matters of common knowledge as to the usual and customary terms of insurance policies,[42] such as forfeiture clauses,[43] or the requirements of reports to the insurer on the happening of events on which the insurer might be liable,[44] are judicially noticed. Standard forms of policies may be judicially noticed,[45] particularly where the terms of such policies are prescribed by statute.[46] On the other hand where the jury found that a fire policy did not contain certain provisions, the reviewing court will not take judicial notice to the contrary on the ground that the policy was a standard policy.[47] In the absence of a statute defining a standard policy for accident insurance, it is common knowledge that such policies are capable of many variations both as to the subjects of risks and other details by the use of what are commonly called "riders."[48]

Kinds of insurance. Judicial notice will be taken of the different kinds and forms of insurance, such as annuity contracts,[49] casualty insurance,[50] fraternal associations,[51] indemnity insurance,[52] industrial policies,[53] liability insurance,[54] life insur-

tertown, N. Y., v. Allen, Mo., 254 S. W. 194.

(4) That assistant superintendents of branch offices of insurers make contracts for insurers concerning burial of insured.—Sullivan v. John Hancock Mut. Life Ins. Co., 165 A. 277, 86 N.H. 184.

(5) Other matters.

Ill.—Premo v. Julius Kessler & Co., 225 Ill.App. 530.

Mo.—Eylar v. Prudential Ins. Co. of America, App., 89 S.W.2d 150.

Wyo.—State v. Jay, 260 P. 180, 37 Wyo. 189.

35. Iowa.—Ryan v. Simeons, 229 N. W. 667, 209 Iowa 1090.

36. Wash.—Nordin v. Commercial Casualty Ins. Co., 28 P.2d 259, 176 Wash. 59.

37. Iowa.—In re Caldwell's Estate, 215 N.W. 615, 204 Iowa 606.

Pledging of money policies

Mass.—Chartrand v. Chartrand, 3 N. E.2d 828, 295 Mass. 293.

38. Ky.—Equitable Life Assur. Soc. of U. S. v. Adams, 83 S.W.2d 461, 259 Ky. 726—Mutual Life Ins. Co. of New York v. Smith, 79 S.W.2d 28, 257 Ky. 709.

39. Ky.—Springfield F. & M. Ins. Co. v. Snowden, 191 S.W. 439, 173 Ky. 664.

40. Wis.—Hobbins v. Hannan, 202 N. W. 800, 186 Wis. 284.

41. Ga.—Superior Fire Ins. Co. v. Peters, 10 S.E.2d 94, 62 Ga.App. 823.

42. Ky.—Jefferson Standard Life Ins. Co. v. Hurt, 72 S.W.2d 20, 254 Ky. 603.

La.—Jones v. Washington Nat. Ins. Co., App., 2 So.2d 696.

Characteristics of radio

It is a matter of common knowledge that a radio receiving set operated by electricity has no characteristics of dynamos, exciters, lamps, motors, or switches as those terms are used in an exclusion clause in a fire insurance policy.—Woods v. Great American Ins. Co., 265 Ill. App. 20.

43. **In small type**

It is common knowledge that generally forfeiture clauses in insurance policies are carefully prepared by insurer, inserted in policy in small type, and rarely if ever read by insured until after loss.—American Ins. Co. v. Millican, 153 So. 448, 26 Ala.App. 31, certiorari denied 153 So. 454, 228 Ala. 357.

44. **In liability insurance policies**

Mo.—Hill v. Jackson, App., 272 S. W. 105.

45. Ariz.—Scottish Union & National Ins. Co. v. Phœnix Title & Trust Co., 235 P. 137, 28 Ariz. 22.

N.Y.—American Surety Co. of New York v. Patriotic Assur. Co., 150 N.E. 599, 242 N.Y. 54, reversing 208 N.Y.S. 828, 213 App.Div. 819, and reargument denied 154 N.E. 602, 243 N.Y. 553.

46. Cal.—Northern Ins. Co. v. National Union F. Ins. Co., 170 P. 434, 35 Cal.App. 481.

Okl.—St. Paul Fire & Marine Ins. Co. v. Wilburn, 229 P. 410, 103 Okl. 132.

Wash.—Richardson v. Superior Fire Ins. Co., 74 P.2d 192, 192 Wash. 553.

Coinsurance clauses

N.Y.—Aldrich v. Great American Ins. Co., New York, 186 N.Y.S. 569, 195 App.Div. 174.

47. Kan.—Grand Lodge, K. P. of Kansas, v. Central States Fire Ins. Co. of Wichita, 15 P.2d 466, 136 Kan. 342.

48. Pa.—McCoy v. Royal Indemnity Co., 164 A. 77, 107 Pa.Super. 486.

49. Iowa.—Hult v. Home Life Ins. Co. of New York, 240 N.W. 218, 213 Iowa 890.

50. Ala.—Faulkner v. Gilchrist, 143 So. 803, 225 Ala. 391.

51. Ill.—Routa v. Royal League, 274 Ill.App. 152.

Tenn.—Tobin v. Estes, 79 S.W.2d 550, 168 Tenn. 403.

Different from old line companies

The difference between fraternal associations and the so-called old-line companies.—Brown v. Steckler, 168 N.W. 670, 40 N.D. 113—23 C.J. p 73 note 97.

52. **Increasing business**

N.C.—Goss v. Williams, 145 S.E. 169, 196 N.C. 213.

Stockholders

It is common knowledge that there are numerous companies engaged in indemnity insurance business, and that many citizens of the state are stockholders.—Beyer v. Safron, 151 N.E. 620, 84 Ind.App. 512.

53. **Purpose**

It is common knowledge that chief aim of industrial policy is to provide ready funds for payment of funeral and other expenses of insured's last illness.—McCarthy v. Metropolitan Life Ins. Co., Mo.App., 90 S.W.2d 158.

54. Ind.—Iroquois Auto Ins. Underwriters v. Stocker, 165 N.E. 77, 88 Ind.App. 564.

Purpose

It is common knowledge that protection against liability for negli-

ance,[55] mutual or assessment insurance companies[56] and of their difficulty, as regards life insurance, of continuing existence after they reach a certain age,[57] title insurance;[58] and workmen's compensation policies.[59]

§ 30. Customs and Usages

Courts will take judicial notice of matters of general custom and usage.

Where a custom or usage is of such notoriety and obtains so extensively as to be a matter of general knowledge and common information,[60] judicial notice is taken thereof by the courts,[61] provided

gence is the principal purpose of liability policies.—Miller v. U. S. Fidelity & Casualty Co., 197 N.E 75, 291 Mass. 445.

55. N.J.—Slurszberg v. Prudential Ins. Co. of America, 192 A. 451, 15 N.J.Misc. 423.

Paid-up policies

Ga.—Metropolitan Life Ins. Co. v. Benton, 192 S.E. 520, 56 Ga.App. 298.

56. Ark.—Ingle v. Batesville Grocery Co., 117 S.W. 241, 89 Ark. 378.

23 C.J. p 73 note 98.

Failure of most mutual companies is due to inability to collect assessment.—State Mut. Rodded Fire Ins. Co. of Michigan v. Randall, 205 N.W. 165, 232 Mich. 210, 41 A.L.R. 973.

57. U.S.—Shera v. Merchants' L. Ins. Co., D.C.Iowa, 237 F. 484, affirmed 245 F. 989, 157 C.C.A. 671.

23 C.J. p 73 note 99.

58. **Custom**

Court will not assume ignorance of custom of title companies as to limiting guaranties of certificate of title.—Laack v. Dimmick, 273 P. 50, 95 Cal.App. 456.

Not common

It is common knowledge that title insurance never became common in Massachusetts.—Commissioner of Insurance v. Conveyancers Title Ins. & Mortg. Co., 6 N.E.2d 780, 296 Mass. 556.

59. **Levy of assessments**

Wis.—In re Builders' Mut. Casualty Co., 282 N.W. 44, 229 Wis. 365, rehearing denied 282 N.W. 504, 229 Wis. 365.

60. Colo.—Cole v. Hess, 63 P.2d 882, 99 Colo. 417.

Ill.—People ex rel. Nelson v. Wiersema State Bank, 197 N.E. 537, 361 Ill. 75, affirming 276 Ill.App. 21—Knass v. Madison & Kedzie State Bank, 188 N.E. 836, 354 Ill. 554, reversing 269 Ill.App. 588, appeal dismissed 54 S.Ct. 632, 292 U.S. 599, 78 L.Ed. 1463, rehearing denied 54 S.Ct. 714, 292 U.S. 604, 78 L.Ed. 1466.

Iowa.—Arthur v. Chicago, R. I. & P. R. Co., 17 N.W. 24, 61 Iowa 648.

La.—Hart v. Standard Oil Co. of Louisiana, 121 So. 737, 168 La. 183.

Mo.—Beebe v. Kansas City, 17 S.W. 2d 608, 223 Mo.App. 642.

N.H.—Stevens v. Mutual Protection Fire Ins. Co., 149 A. 498, 84 N.H. 275, 69 A.L.R. 624.

N.C.—Commissioners of Hendersonville v. Prudden & Co., 105 S.E. 7, 180 N.C. 496.

Under statute

Under a statute providing that general customs among merchants shall be judicially recognized, the custom must be one about which there is and can be no dispute and which is known to all men.—Williamson-Inman & Co. v. Thompson, 187 S.E. 194, 53 Ga.App. 821.

61. U.S.—Prince v. Childs Co., C.C. A.N.Y., 23 F.2d 605—De Blois v. Welch, D.C.Mass., 19 F.Supp. 356, affirmed, C.C.A., Welch v. De Blois, 94 F.2d 842—Standard Appliance Co. v. Standard Equipment Co., C. C.A.Ohio, 296 F. 456—New Jersey Asbestos Co. v. Federal Trade Commission, C.C.A.N.Y., 264 F. 509

Ariz.—Babbitt Bros. Trading Co. v. Marley, 238 P. 392, 28 Ariz. 589.

Cal.—Federal Const. Co. v. Ensign, 210 P. 536, 59 Cal.App. 200.

Del.—In re Beyea's Estate, 15 A.2d 177.

Ind.—Thomas v. Hennes, 135 N.E. 392, 78 Ind.App. 275.

Iowa.—Owens v. Norwood-White Coal Co., 174 N.W. 851, 188 Iowa 1092.

La.—Fletcher v. Crichton, App., 162 So. 435, affirming 159 So. 442, and annulled 164 So. 441, 183 La. 551—In re Canal Bank & Trust Co. in Liquidation, App., 154 So. 498, annulled on other grounds 162 So. 83.

Miss.—Federal Land Bank of New Orleans v. Newsom, 161 So. 864, 175 Miss. 114, affirmed 166 So. 345, 175 Miss. 114.

Mont.—Standard Oil Co. (Indiana) v. State Board of Equalization, 99 P. 2d 229, 110 Mont. 5.

Nev.—State ex rel. Roman Catholic Bishop of Reno v. Hill, 90 P.2d 217, 59 Nev. 231.

N.H.—Sundeen v. Rogers, 141 A. 142, 83 N.H. 253, 57 A.L.R. 950

N.M.—Hester v. Sawyers, 71 P.2d 646, 41 N.M. 497, 112 A.L.R. 536

N.Y.—Commercial Credit Corporation v. Northern Westchester Bank, 177 N.E. 12, 256 N.Y. 482, reversing 246 N.Y.S. 888, 231 App.Div. 817, which affirmed 240 N.Y.S. 5, 136 Misc. 325—Marcus v. Village of Mamaroneck, 16 N.Y.S.2d 626, 258 App.Div. 328, reversed on other grounds 28 N.E.2d 856, 283 N.Y. 325—Jenkins v. 313-321 W. 37th Street Corporation, 12 N.Y.S.2d 739, 257 App.Div. 228, motion denied 25 N.E.2d 148, 282 N.Y. 595, modified on other grounds 31 N.E.2d 503, 284 N.Y. 397—Van Dike v. Pullman Co., 261 N.Y.S. 292, 145 Misc. 452—Rothstein v. Monette, 17 N.Y.S.2d 369—Hamilton v. Ward, 181 N.Y.S. 31.

S.C.—Bomar v. City of Spartanburg, 187 S.E. 921, 181 S.C. 453—Brookhart v. Langford, 122 S.E. 866, 128 S.C. 350.

Tex.—Texas-Louisiana Power Co. v. Webster, Civ.App., 59 S.W.2d 902, affirmed 91 S.W.2d 302, 127 Tex. 126—Gerlach-Barlow Co. v. Patton, Civ.App., 281 S.W. 242.

Wis.—Bassett v. Soelle, 202 N.W. 164, 186 Wis. 53—Fox v. Boldt, 179 N. W. 1, 172 Wis. 333, modifying 178 N.W. 467, 172 Wis. 333.

Wyo.—Holliday v. Templin, 103 P.2d 408.

23 C.J. p 76 note 73.

Customs of Indians see supra § 24.

Part of law

Established customs and usages are to be judicially recognized as part of law.—Hamilton v. Southern Ry. Co., 158 S.E. 75, 200 N.C. 543, certiorari denied Southern Ry. Co. v. Hamilton, 52 S.Ct. 19, 284 U.S. 636, 76 L.Ed. 541.

Particular customs and usages

(1) Declaration of corporate dividends to stockholders as of a certain date.—Richter & Co. v. Light, 116 A. 600, 97 Conn. 364.

(2) Embalming and burial of human bodies.—International-Great Northern R. Co. v. Acker, Tex.Civ. App., 128 S.W.2d 506, error dismissed, judgment correct.

(3) That farmers' dogs run at large.—Schraeder v. Koopman, 209 N.W. 714, 190 Wis. 459.

(4) That Chinese parents send their children to China to be educated there.—Chun Kock Quon v. Proctor, C.C.A.Wash., 92 F.2d 326.

(5) Procedure of town meetings.—Portland Water Co. v. Town of Portland, 118 A. 84, 97 Conn. 628.

(6) Rules of the road followed by motorists.

Mo.—Hangge v. Umbright, 119 S.W. 2d 382.

Vt.—Porter v. Fleming, 156 A. 903, 104 Vt. 76—Lee v. Donnelly, 113 A. 542, 95 Vt. 121.

23 C.J. p 76 note 73 [e].

(7) Stipulation for payment of attorney's fees in promissory note.—

the custom or usage is legal.[62] Conversely, courts will not take judicial notice of a custom which is unreasonable,[63] or which contravenes an established rule of law,[64] or of a usage which is purely local or of limited adoption.[65] Likewise, the court cannot take judicial notice of foreign customs.[66] A custom which is general among the merchants or business men of a large commercial city in the state may be judicially known by the courts of that state,[67] but not by the courts of other states.[68] By virtue of an act of congress local customs relative to the appropriation of water rights are judicially noticed.[69] Judicial notice has been taken of the custom as to demurrage charges in a particular port,[70] but a court has declined to take judicial notice of the custom of a particular port as to the discharge of a vessel.[71] Although it has been held that the court cannot take judicial notice of usages of particular trades,[72] it has also been held that the court will take notice of a general trade usage.[73]

Although a court will take judicial knowledge of a prevailing custom, it will not take judicial notice that in a particular transaction between private parties the custom was followed.[74]

Of religious organizations. Judicial notice is taken that it is a general custom among churches to keep a record of their official acts,[75] and that Seventh-Day Baptists do not work on Sunday.[76] On the other hand, judicial notice is not taken of customs of particular religious denominations, of limited application, such as the practice of the Episcopal Church as to the tenure of a parish minister,[77] whether a usage in Congregational churches requires a record to be made of the ordination of a minister,[78] or of the general organization and administration of the Methodist Episcopal Church.[79] The court cannot take judicial notice of the laws of Israel and the customs prescribed by the sages of the Hebrew race.[80]

§ 31. Established Standards of Care

Judicial notice will be taken of established standards of reasonable care.

The court will assume to know the standard which the community sets up as to reasonable care.[81] However, where the facts, although undisputed, do

Foundation Finance Co. v. Robbins, 153 So. 833, 179 La. 259, reversing, App., 149 So. 166.

(8) That in the absence of extraordinary circumstances the interval between death and burial is ordinarily not longer than three days.—Muller v. Boston Casualty Co., 24 N.E.2d 514, 304 Mass. 549.

(9) That men do not ordinarily violate penal statute on chance it may be declared unconstitutional, but that in ordinary course of business they follow statute.—Perkins v. Pacific Fruit Exchange, 22 P.2d 535, 132 Cal.App. 278.

(10) That ordinarily the architect is employed by owner and not by contractor.—Sugarman Contracting Co. v. Phœnix Finance System, Iowa, 243 N.W. 369.

(11) Use of land to obtain most out of it.—True v. McAlpine, 125 A. 680, 81 N.H. 314.

(12) Other customs and usages see 23 C.J. p 76 note 73 [a]–[i].

62. Md.—Columbia Bank v. Fitzhugh, 1 Harr. & G. 239.
Mass.—Murphy v. Calley, 1 Allen 107.
N.Y.—Rowland v. Miln, 2 Hilt. 150.

63. Wash.—Cady v. Case, 39 P. 375, 11 Wash. 124.

64. N.Y.—Mendetz v. Wood, 148 N.Y.S. 92, 86 Misc. 52.

Posting of notices

Appellate court cannot take judicial notice that usual method of posting notices of execution or trustee's sale in Los Angeles is at various entrances of courthouse and in hall of records.—Standley v. Knapp, 298 P. 109, 113 Cal.App. 91.

65. La.—Fletcher v. Crichton, App., 162 So. 435, affirming 159 So. 442, and annulled 164 So. 441, 183 La. 551.
Mass.—Sluzis' Case, 198 N.E. 262, 292 Mass. 351.
Minn.—Usher v. Eckhardt, 222 N.W. 924, 176 Minn. 210.
Neb.—Corry v. Waldron Seed Co., 181 N.W. 540, 105 Neb. 580.
Nev.—In re Pedroli's Estate, 221 P. 244, 47 Nev. 322.
N.Y.—First Nat. Bank v. Farson, 123 N.E. 490, 226 N.Y. 218, reversing 165 N.Y.S. 119, 178 App. Div. 135, reargument denied 123 N.E. 864, 226 N.Y. 70—Turner-Looker Co. v. Aprile, 187 N.Y.S. 367, 195 App.Div. 706.
Philippine.—Patriarca v. Orate, 7 Philippine 390.
Wash.—First Nat. Bank v. Commercial Bank & Trust Co., 242 P. 356, 137 Wash. 335.
23 C.J. p 77 notes 78–81.

66. U.S.—Ex parte Hing, D.C.Wash., 22 F.2d 554.

67. N.Y.—Bass v. White, 65 N.Y. 565, reversing 7 Lans. 171, and following Porter v. Knapp, 65 N.Y. 564, reversing 6 Lans. 125.
Pa.—Watt v. Hoch, 25 Pa. 411—Koons v. Miller, 3 Watts & S. 271.

68. Ala.—Watt v. Gans, 21 So. 1011, 114 Ala. 264, 62 Am.S.R. 99.

69. Or.—Speake v. Hamilton, 26 P. 855, 21 Or. 3.
23 C.J. p 77 notes 84, 85.

70. S.C.—Union Bank v. Union Ins. Co., 23 S.C.L. 171.

71. U.S.—Bailey v. Manufacturers' Lumber Co., D.C.N.Y., 224 F. 806.

72. Mass.—In re Sluzis' Case, 198 N.E. 262, 292 Mass. 351.

73. U.S.—U. S. v. Stanolind Crude Oil Purchasing Co., C.C.A.Okl., 113 F.2d 194.

74. **Delivery of cotton**

Although the court may take judicial knowledge of a custom that obligations for the payment of rent for farm lands are usually discharged in the early fall, it will not take judicial notice that particular cotton was delivered according to the custom in the early fall.—Connecticut General Life Ins. Co. v. Smith, 145 So. 651, 226 Ala. 142.

75. Mass.—Sawyer v. Baldwin, 11 Pick 492.
Religious matters generally see infra § 93.

76. R.I.—State v. South Kingstown 27 A. 599, 18 R.I. 258, 22 L.R.A. 65.

77. N.Y.—Youngs v. Ransom, 31 Barb. 49.

78. Mass.—Commonwealth v. Hayden, 40 N.E. 846, 163 Mass. 453, 47 Am.S.R. 468, 28 L.R.A. 318.

79. Kan.—Sarahass v. Armstrong, 16 Kan. 192.

80. N.J.—Goldstein v. Goldstein, 98 A. 835, 86 N.J.Eq. 351.

81. Colo.—Griffith v. Denver Cons.

not fall within the range of common observation and experience, the negligent nature of the act is not a matter that may be judicially assumed.[82]

§ 32. Geography and Geographical Facts

Geographical facts may be judicially noticed.

Courts may take judicial notice of geographical facts.[83] Courts have judicial knowledge of the prominent geographical features of the territory over which, or the state in which, they exercise jurisdiction,[84] of the country at large,[85] and of the rest of the world.[86] State courts take judicial notice of the general topography[87] and soil conditions[88] of the state. Although the court will take judicial notice of the soil conditions or topography of a particular locality when such is a matter of common knowledge,[89] where such facts are not mat-

Tramway Co., 61 P. 46, 14 Colo. App. 504, 511.
23 C.J. p 77 note 96—45 C.J. p 1146 notes 44–46.

82. Mass.—Gaynor v. Old Colony & Newport R. Co., 100 Mass 208, 97 Am D. 96—Snow v. Housatonic R. Co., 2 Allen 441, 85 Am D. 720.
Or.—Walsh v. Oregon R. & Nav. Co., 10 Or. 250.

83. U.S.—Consolidated Freightways v. U. S., D.C.Utah, 34 F.Supp. 576.
Ill.—Lowden v. Illinois Commerce Commission, 33 N.E.2d 430, 376 Ill. 225.
Mo.—Gaty v. United Rys. Co., 251 S. W. 61—McAdoo v. Metropolitan Life Ins. Co., 110 S.W.2d 845, 233 Mo.App. 900.

84. Ala.—Sadler v. Radcliff, 111 So. 231, 215 Ala. 499—Western Union Telegraph Co. v. Beasley, 87 So. 858, 205 Ala. 115—Bosarge v. State, 121 So. 427, 23 Ala App. 18, certiorari denied 121 So. 428, 219 Ala. 154, and certiorari denied 50 S.Ct. 26, 280 U.S. 568, 74 L Ed. 621.
Ark.—Metropolitan Life Ins. Co. v. Fry, 41 S.W 2d 766, 184 Ark. 23—Sharp v. Drainage Dist. No. 7 of Poinsett County, 261 S.W. 923, 164 Ark. 306.
Cal.—Johnson v. Ulrey, 257 P. 505, 201 Cal. 456—City and County of San Francisco v. Boyle, 215 P. 549, 191 Cal. 172.
Fla.—Martin v. Dade Muck Land Co., 116 So. 449, 195 Fla. 530, appeal dismissed M. B. Garris Properties v. Martin, 49 S.Ct. 25, 278 U.S. 560, 73 L.Ed. 505.
Ky.—White v. Crouch, 133 S.W.2d 753, 280 Ky. 637—Boreing v. Garrard, 275 S.W. 374, 210 Ky. 135.
La.—State v. Clement, 178 So. 493, 188 La. 923.
Mass.—In re Ulmer, 167 N.E. 749, 268 Mass. 373.
Mo.—Tackett v. Tinnenbrink, App., 112 S.W 2d 160.
N.Y.—Smith v. Village of Pleasantville, 20 N.Y.S.2d 594.
N.C.—Standard Accident Ins. Co. v. Harrison-Wright Co., 178 S.E. 235, 207 N.C. 661.
Pa.—Schmidt v. Allegheny County, 154 A. 803, 303 Pa. 560.
Tex.—State v. Bradford, 50 S.W.2d 1065, 121 Tex. 515, affirming in part and reversing in part, Civ.App., 25 S.W.2d 706—International-Great Northern R. Co. v. Reagan, 49 S. W.2d 414, 121 Tex 233, affirming Civ.App., 36 S.W.2d 564—Johnson v. McMahon, 15 S.W.2d 1023, 118 Tex 633.
Vt.—Vermont Hydro-Electric Corporation v. Dunn, 112 A. 223, 95 Vt. 144 12 A L.R. 1495.
Wis.—South Shore Utility Co. v. Railroad Commission of Wisconsin, 240 N.W. 784, 207 Wis. 95.
23 C.J. p 78 note 99.

Landmarks

Court takes judicial cognizance of location of permanent landmarks and fixed monuments.—Conyers v. State, 123 So. 817, 98 Fla. 417.

Matters of general knowledge

"We judicially know the different sections of our state, its products and industries, because such are taught in the schools, and are matters of general knowledge."—Hackworth v. Missouri Southern R. Co., 227 S.W. 1032, 286 Mo. 282, 15 A.L.R. 170.

Judicial notice has been taken:

(1) As to area of state.—The Best Foods v. Welch, D.C Idaho, 34 F.2d 682.

(2) As to area of irrigated land.—Stewart v. Verde River Irrigation & Power Dist., 68 P.2d 329, 49 Ariz. 531.

(3) As to location of particular valley.—Kautz v. Zurich General Accident & Liability Ins. Co., 300 P. 34, 212 Cal. 576.

(4) Of the map of the state.—Bonner v. Jackson, 251 S.W. 1, 158 Ark. 526.

(5) That a particular city is a state capital.—Weintraub v. Rosen, C.C.A.Ill., 93 F.2d 544.

(6) Other matters.
U.S.—Constantin v. Smith, D.C.Tex., 57 F.2d 227, appeal dismissed Sterling v. Constantin, 53 S.Ct. 190, 287 U.S. 378, 77 L.Ed. 375.
Colo.—People ex rel. Atty. Gen. v. Jersin, 74 P.2d 668, 101 Colo. 406.
23 C.J. p 78 note 99 [a].

85. U.S.—Weintraub v. Rosen, C.C. A Ill., 93 F.2d 544—U. S. v. 146,157 Gallons of Alcohol, D.C.N.J., 3 F. Supp. 450, reversed on other grounds C.C.A., The Helen, 72 F.2d 772, certiorari denied U. S. v. Matoil Service & Transport Co., 55 S.Ct. 125, 293 U.S. 605, 79 L.Ed. 697, followed in C.C.A., Rizzo v. U. S., 73 F 2d 1010, certiorari denied U. S. v. Rizzo, 55 S Ct. 406, 294 U.S. 709, 79 L.Ed. 1244.
Ala.—Herzfeld Lumber Co. v. Langley, 93 So. 378, 18 Ala.App. 485.
23 C.J. p 78 note 1.

Alaska

In considering rights of destitute seamen, court judicially knows Alaska is geographically foreign to United States.—Alaska S. S. Co. v. U. S., D.C.Wash., 60 F.2d 135, affirmed, C.C.A., 63 F.2d 398, certiorari granted 54 S.Ct. 49, 290 U.S. 608, 78 L. Ed. 532, reversed on other grounds 54 S.Ct. 159, 290 U.S. 256, 78 L.Ed 302.

District of Columbia

(1) The court takes judicial cognizance of the fact that the District of Columbia, which, from his seal, appears to be notary's residence, is the District of Columbia, the capital of the United States.—Wildman v. Means, 94 So. 823, 208 Ala. 487.

(2) Other matters relating to District of Columbia see 23 C.J. p 78 note 1 [b].

86. U.S.—The India Arrow, C.C.A. Tex., 116 F.2d 8, certiorari denied Collins v. Socony-Vacuum Oil Co., 61 S.Ct. 1098—U. S. v. Hunter, C. C.A.Fla., 80 F.2d 968.
23 C.J. p 78 note 2.

87. La.—State v. Clement, 178 So 493, 188 La. 923.
Minn.—Erickson v. Stearns County, 252 N.W. 219, 190 Minn. 433.
23 C.J. p 79 note 10.

88. Mo.—De Paige v. Douglas, 136 S.W. 345, 234 Mo. 78.
23 C.J. p 79 note 11.

General knowledge

It is a matter of general knowledge that lands situated in lower stretches of the Mississippi river lying one and one-half to three miles back from the river are not cultivatable, but consist of salt marshes interspersed with deep cypress swamps and are almost inaccessible.—Fernandez v. Wilkinson, 103 So. 537, 158 La. 137.

89. U.S.—Dalche v. Board of Com'rs of Orleans Levee Board, D.C.La., 49 F.2d 374.
Ariz.—In re Bonds of Drainage Dist. No. 4, in and for Maricopa County, 193 P. 833, 22 Ariz. 31.

ters of general knowledge they fall outside the range of judicial knowledge.[90]

Although under some circumstances the court may refuse to take judicial notice that a county is located in the arid portion of the state,[91] or that a particular piece of land is arid,[92] notice has been taken that certain cities or counties are located in an arid or semiarid region of the state.[93] Judicial notice of facts relating to climate generally are discussed in § 73.

Commercial geography. Facts of common knowledge relating to commercial geography within the jurisdiction of the court,[94] or in other states,[95] or the country at large[96] will be judicially noticed.

§ 33. Particular Geographical Facts

a. Lakes, streams, and mountains
b. Names, location, and boundaries
c. Blocks and lots, streets, and street numbers
d. Place named but not otherwise described
e. Distance and time of travel or transportation between places
f. Existence and location of public means of transportation
g. Location of public buildings

a. Lakes, Streams, and Mountains

Judicial notice is taken of the existence, location, and other facts of notoriety concerning prominent lakes, rivers, and mountains.

Among the geographical facts judicially noticed by the courts are the courses and character of the great rivers of the country.[97] Courts take judicial notice of the existence and location within the states in which they exercise jurisdiction of prominent lakes and rivers,[98] and courts will take

Cal.—Mogle v. Moore, 104 P 2d 785, superseding 96 P.2d 147—City of Oakland v. Williams, 103 P.2d 168, 15 Cal.2d 542.

Tex.—Jefferson County Drainage Dist. No. 6 v. McFaddin, Civ.App., 291 S.W. 322, affirmed, McFaddin v. Jefferson County Drainage Dist. No 6, Com.App., 4 S.W.2d 33.

90. Vt.—Vermont Hydro-Electric Corporation v. Dunn, 112 A. 223, 95 Vt. 144, 12 A.L.R. 1495.

Sameness of soil

A court has refused to take notice that conditions as to soil and topography at different places within the state are the same.—Santa Cruz v. Enright, 30 P. 197, 95 Cal. 105.

91. **Condemnation proceedings**

In a proceeding in which a corporation may wish to condemn lands, under a statute providing that unappropriated water within the arid portions of the state may be diverted from its natural channel for irrigation, it would be necessary for the corporation to prove that the county was in the arid portion of the state. —McGhee Irrigating Ditch Co. v Hudson, 22 S.W. 398, 85 Tex. 587, reversing, Civ.App., 21 S.W. 175, rehearing denied 22 S.W. 967, 85 Tex. 587.

92. Neb.—Slattery v. Harley, 79 N. W. 151, 58 Neb. 575.

93. Tex.—Barstow Town Co. v. Carr, Civ.App., 234 S.W. 555.
23 C.J. p 79 note 13.

94. U.S.—Weintraub v. Rosen, C.C. A.Ill., 93 F.2d 544—In re Parker Bros. & Johnson, D.C.N.C., 279 F. 425.

Particular facts noticed

(1) Gas and oil areas, including their location.

Cal.—Boone v. Kingsbury, 273 P 797, 206 Cal. 148, followed in 274 P. 61, 206 Cal. 791, Shudde v Kingsbury, 274 P. 61, 206 Cal. 792, Workman v. Kingsbury, 274 P. 62, 206 Cal. 793, Hickey Bros. Co. v Kingsbury, 274 P. 62, 206 Cal. 794, Harthorn v Kingsbury, 274 P. 62, 206 Cal. 795, Chamberlin v. Kingsbury, 274 P. 62, 206 Cal. 796, and Ballard v. Kingsbury, 274 P. 63, 206 Cal. 797, appeal dismissed and certiorari denied Workman v. Boone, 50 S Ct. 66, 280 U.S. 517, 74 L.Ed. 587, 588—Atlas Development Co. v. National Surety Co., 212 P. 196, 190 Cal. 329.

Kan.—Hushaw v. Kansas Farmers' Union Royalty Co., 86 P.2d 559, 149 Kan. 64, appeal dismissed Kansas Farmers' Union Royalty Co. v. Hushaw, 59 S Ct. 1046, 307 U.S. 615, 83 L.Ed 1496, rehearing denied 60 S.Ct. 70, 308 U.S. 634, 84 L.Ed. 527.

Tex.—Southern Underwriters v. Boswell, Civ.App., 141 S.W.2d 442, error granted.

23 C J. p 79 note 18.

(2) Proportion of area of state in timber land.—The Best Foods v. Welch, D.C.Idaho, 34 F.2d 682.

(3) Fact that automobiles are not manufactured within state.—Geo. B. Wallace, Inc. v. Pfost, 65 P.2d 725, 57 Idaho 279, 110 A.L.R. 613.

(4) That the development of the resources of the state has been slower than in other states.—Campbell v Wyoming Development Co., 100 P. 2d 124, 55 Wyo. 347, rehearing denied 102 P.2d 745, 55 Wyo. 347.

(5) That the stockyards in Kansas City were located partly in Kansas.—Travis v. Glick, 91 P.2d 41, 150 Kan. 132, adhered to 96 P.2d 624, 150 Kan. 718.

(6) Other matters.

U.S.—Consolidated Freightways v. U. S., D C Utah, 34 F.Supp. 576.

N.Y.—Postley v. Kafka, 211 N.Y.S. 382, 213 App.Div. 595.

23 C.J. p 79 notes 15–21.

Matters not within common knowledge

It has been held that whether gasoline is produced in the state in commercial quantities is not within common knowledge.—Spur Distributing Co. v. Lindsey, 62 S.W.2d 53, 166 Tenn. 424, appeal dismissed 54 S. Ct. 81, 290 U.S. 588, 78 L.Ed. 519.

95. Cal.—Nichols v. Moore, 183 P. 531, 181 Cal. 131.
23 C.J. p 79 note 23.

96. Ind.—Gatling v. Newell, 9 Ind. 572.
23 C.J. p 79 note 22.

Arid sections

Judicial notice will be taken that many sections of the western part of the United States are arid.—Pacific Live Stock Co. v. Read, C.C. A.Nev., 5 F.2d 466.

97. Ill.—Lowden v. Illinois Commerce Commission, 33 N.E.2d 430, 376 Ill. 225.

98. U.S.—Appalachian Electric Power Co. v. Smith, D C.Va., 4 F.Supp. 6, reversed on other grounds C.C. A., 67 F.2d 451, certiorari denied 54 S Ct. 458, 291 U.S. 674, 78 L. Ed. 1063.

Ala.—Chestang v. Bower, 140 So. 537, 224 Ala. 469—Leslie v. Click, 128 So 170, 221 Ala. 163

Ark.—Drainage Dist. No. 7, Poinsett County, v. Exchange Trust Co., 2 S.W.2d 32, 175 Ark. 934, reversed in part on other grounds Exchange Trust Co. v. Drainage Dist. No. 7, Poinsett County, 49 S.Ct. 180, 278 U S. 579, 73 L.Ed. 517, and af-

judicial notice of their relation to county[99] or city[1] lines, and to the distribution of population[2] and other facts of notoriety concerning them,[3] or facts found in public statutes with relation to such waters.[4] On the other hand, the courts cannot take judicial notice of the character of a river where its name is not found on any general map of the state, and it is not found in any general history of the country, or defined in any public statute, and is not of such notoriety as to be known generally to the people of the state;[5] neither do they take judicial notice of the precise point of water parting between one drainage area and another,[6] or the extent of encroachments of a river on lands adjoining it.[7] Likewise, the court will not take judicial notice that a spring about a mile from a river is a tributary thereto, at least as against a positive allegation in the pleading to the contrary.[8]

Judicial notice may be taken of a matter of common knowledge that there is no bridge of a certain length over any river in the state;[9] but it is doubt-

firmed in part 49 S.Ct. 181, 278 U.S. 421, 73 L.Ed. 436.
Minn.—Erickson v. Stearns County, 252 N.W. 219, 190 Minn. 433.
S.C.—Brasington v. Williams, 141 S.E. 375, 143 S.C. 223—Robson v. Cantwell, 141 S.E. 180, 143 S.C. 104.
Tenn.—Wilson v. Calhoun, 11 S.W.2d 906, 157 Tenn. 667.
Tex.—State v. Bradford, 50 S.W.2d 1065, 121 Tex. 515, affirming in part and reversing in part, Civ.App., 25 S.W.2d 706—Humphreys-Mexia Co. v. Arseneaux, 297 S.W. 225, 116 Tex. 603, 53 A.L.R. 1147, affirming Humphreys-Mexia Oil Co. v. Arsenaux, Civ.App., 244 S.W. 280—Hoefs v. Short, 273 S.W. 785, 114 Tex. 501, 40 A.L.R. 833, affirming, Civ.App., 190 S.W. 802.
Utah.—Robinson v. Thomas, 286 P. 625, 75 Utah 446.
23 C.J. p 79 note 24.

Creek

The supreme court will take judicial cognizance of the sections of the state through which a certain creek passes.—Harrison v. Abington, 215 S.W. 255, 140 Ark. 115.

Natural boundary to lot

Fla.—Otto v. Harllee, 161 So. 402, 119 Fla. 266, followed in Lee v. Harllee, 165 So. 405, 119 Fla. 274, and Fillo v. Harllee, 161 So. 405, 119 Fla. 274.

99. U.S.—U. S. v. Crary, D.C.Va., 1 F.Supp. 406.
Ark.—Harrison v. Abington, 215 S.W. 255, 140 Ark. 115.
Fla.—Dowling v. W. R. Hodges & Son, 179 So. 702, 131 Fla. 672.
23 C.J. p 79 note 25, p 80 note 30.

1. Fla.—Day v. City of St. Augustine, 139 So. 880, 104 Fla. 261.
Tex.—Fidelity & Casualty Co. of New York v. Branton, Civ.App., 70 S.W.2d 780, error dismissed—Anderson v. Polk, Civ.App., 291 S.W. 1112, affirmed 297 S.W. 219, 117 Tex. 73.
23 C.J. p 79 note 26.

2. Ill.—Harmon v. Chicago, 110 Ill. 400, 51 Am.R. 698.
Ind.—State v. Wabash Paper Co., 48 N.E. 653, 51 N.E. 949, 21 Ind.App. 167.
23 C.J. p 80 note 27.

3. Cal.—Miller & Lux v. Sacramento and San Joaquin Drainage Dist., 187 P. 1041, 182 Cal. 252, certiorari denied and error dismissed 41 S.Ct. 404, 256 U.S. 129, 65 L.Ed. 859.
23 C.J. p 80 note 28.

Particular matters noticed

(1) Facts relating to floods of rivers and streams.
U.S.—State of Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., Okl., 61 S.Ct. 1050, affirming, D.C., 37 F. Supp. 93—Harris v. Central Nebraska Public Power & Irrigation Dist., D.C.Neb., 29 F.Supp. 425—Pacific Live Stock Co. v. Rickey, D.C.Nev., 8 F.Supp. 772.
Ark.—Drainage Dist. No. 7, Poinsett County, v. Exchange Trust Co., 2 S.W.2d 32, 175 Ark. 934, reversed in part on other grounds Exchange Trust Co. v. Drainage Dist. No. 7, Poinsett County, 49 S.Ct. 180, 278 U.S. 579, 73 L.Ed. 517, and affirmed in part 49 S.Ct. 181, 278 U.S. 421, 73 L.Ed. 436.
Ky.—Montgomery v. Pennsylvania Ry. Co., 137 S.W.2d 412, 281 Ky. 745
La.—Ross v. Board of Levee Com'rs of Nineteenth Louisiana Levee Dist., 162 So. 639, 182 La. 841.

(2) Flow of water in mountain streams.
Cal.—Mammoth Gold Dredging Co. v. Forbes, 104 P.2d 131, 39 Cal.App.2d 739.
Colo.—Antero & Lost Park Reservoir Co. v. Lowe, 194 P. 945, 69 Colo. 409.

(3) Lowering of water level in certain lakes.—Kavanaugh v. Baird, 217 N.W. 2, 241 Mich. 240, reversed on other grounds 235 N.W. 871, 253 Mich. 631—Nedtweg v. Wallace, 208 N.W. 51, 237 Mich. 14, affirmed 211 N.W. 647, 237 Mich. 14.

(4) Size and volume.—In re Bonds of Drainage Dist. No. 4 in and for Maricopa County, 193 P. 833, 22 Ariz. 31.

(5) That islands in Mississippi river are subject to overflow.—State v. Cissna, 270 S.W. 963, 168 Ark. 565.

(6) That there are many pools in every running stream, and that, when bed of stream is not rock, deep places are found below bridges and culverts.—Melendez v. City of Los Angeles, 68 P.2d 971, 8 Cal.2d 741.

(7) That there is almost no water power in South Georgia and Florida.—Georgia Power & Light Co. v. Georgia Public Service Commission, D.C.Ga., 8 F.Supp. 603.

(8) That the Rio Grande river changes its banks.—Board of Trustees of Town of Casa Colorado Land Grant v. Pooler, 28 P.2d 519, 38 N.M. 87.

(9) Other matters.
Ariz.—Le Febvre v. Callaghan, 263 P. 589, 33 Ariz. 197.
Cal.—Melendez v. City of Los Angeles, 68 P.2d 971, 8 Cal.2d 741—People v. Glenn-Colusa Irr. Dist., 15 P.2d 549, 127 Cal.App. 30.
Ill.—Joyce-Watkins Co. v. Industrial Commission, 156 N.E. 346, 325 Ill. 378.
Mo.—City of Independence, to Use of Flournoy, v. Dickinson, 27 S.W.2d 1081, 224 Mo.App. 899.
N.Y.—Greenspan v. Yaple, 194 N.Y.S. 658, 201 App.Div. 575, reversing 189 N.Y.S. 115.
Tex.—Manry v. Robison, 56 S.W.2d 438, 122 Tex. 213—McClung Const. Co. v. Muncy, Civ.App., 65 S.W.2d 786, error dismissed.
Utah.—Richlands Irr. Co. v. Westview Irr. Co., 80 P.2d 458, 96 Utah 403.
23 C.J. p 80 note 28 [a].

4. Kan.—Dana v. Hurst, 122 P. 1041, 86 Kan. 947.
N.Y.—Matter of Mohawk River Bridge, 112 N.Y.S. 428, 128 App.Div. 54, 56.

5. N.Y.—People v. Allen, 42 N.Y. 378, reversing 1 Lans. 248.
Creek not generally known cannot be judicially noticed.—Maylender v. Fulton County Gas & Electric Co., 227 N.Y.S. 209, 131 Misc. 514.

6. Minn.—Gaffney v. Sederberg, 131 N.W. 333, 114 Minn. 319.

7. Ark.—McCall v. North Pine Bluff Realty Co., 188 S.W. 1178, 125 Ark. 553.

8. Colo.—Colorado & Utah Coal Co. v. Walter, 226 P. 864, 75 Colo. 489.

9. Tex.—Galveston, H. & S. A. R. Co. v. Patterson, Civ.App., 46 S.W. 848.

ful whether judicial notice can be taken of the location of any particular bridge.[10]

Sometimes judicial notice is taken of the approximate width of a certain sound at a particular point within the state,[11] and that the topography of the state does not permit all of its inhabitants to be served with water by means of a single system of works.[12]

The tidal[13] or nontidal[14] character of certain bays, rivers, and streams, or parts thereof, is judicially noticed; but there is no law which requires the court to take judicial notice of the extent of the flow of the tide over blocks of land,[15] nor can the court know that any particular block is still subject to the ebb and flow of the tide.[16] While the court may take judicial notice of the general names and geographical positions of districts indicated on an admiralty map of the sea,[17] yet it will not, merely from an allegation that a vessel was near certain shoals which are in the high seas, take judicial notice that the vessel was at a particular time on the high seas rather than within the three-mile limit.[18]

Navigability. Courts take judicial notice of the navigability of streams constituting great national highways of commerce,[19] as well as the navigability[20] or nonnavigability[21] of smaller streams within the jurisdiction. Such matters are sometimes deemed to be common or general knowledge,[22] but judicial notice thereof is sometimes placed on the ground of historical knowledge[23] or statutory recognition.[24] The court may also take judicial notice that a lake within its jurisdiction is a navigable body of water.[25] On the other hand, unless the navigability of smaller streams is a matter of common knowledge,[26] if their status has not been so established by law the court cannot take judicial notice that they are navigable.[27] In the case of a

10. N.C.—Hipp v. Farrell, 86 S.E. 570, 169 N.C. 551.

11. N.C.—Whitehurst v. Kerr, 68 S.E. 913, 153 N.C. 76.

12. Cal.—San Joaquin & K. R. Canal & Irrigation Co. v. Stevenson, 128 P. 924, 164 Cal. 221.

13. Fla.—State ex rel. Islands v. Mayo, 119 So. 134, 96 Fla. 860.
Tex.—Jefferson County Drainage Dist. No. 6 v. McFaddin, Civ.App., 291 S.W. 322, affirmed McFaddin v. Jefferson County Drainage Dist. No. 6, Com.App., 4 S.W.2d 33.
23 C.J. p. 80 note 39.

14. Vt.—Boutwell v. Champlain Realty Co., 94 A. 108, 89 Vt. 80, Ann.Cas.1918A 726.
23 C.J. p. 80 note 40.

15. Cal.—People v. Southern Pac. Co., 171 P. 294, 177 Cal. 555.

16. Cal.—People v. Southern Pac. Co., supra.

17. Eng.—Birrell v. Dryer, 9 App. Cas. 345.
23 C.J. p. 81 note 43.

18. N.Y.—Finley v. Atlantic Transport Co., 153 N.Y.S. 439, 90 Misc. 480, affirmed 157 N.Y.S. 1124, 172 App.Div. 907.

19. U.S.—Grand River Dam Authority v. Going, D.C.Okl., 29 F.Supp. 316—U. S. v. Griffin, D.C.Va., 58 F.2d 674.
Ill.—Sikes v. Moline Consumers' Co., 127 N.E. 342, 293 Ill. 112—Bohm v. Gerdes, 32 N.E.2d 1000, 309 Ill. App. 206.
Mo.—McClain v. Kansas City Bridge Co., App., 83 S.W.2d 132, reversed on other grounds 88 S.W.2d 1019, 338 Mo. 7.
Tex.—Brownsville & Matamoros Municipal Bridge Co. v. Gateway Bridge Co., Civ.App., 2 S.W.2d 1012.
23 C.J. p. 81 note 46.

Columbia River
Federal court takes judicial notice that Columbia River is a navigable stream in fact as well as in law.—Continental Land Co. v. U. S., C.C.A. Wash., 88 F.2d 104, certiorari denied 58 S.Ct. 36, 302 U.S. 715, 82 L.Ed. 552.

Missouri River
The district court judicially knows that in the early history of Nebraska the Missouri River was navigable to Fort Peck and beyond, but that with the coming of better means of transportation, navigation was abandoned and that there was practically no navigation on the Missouri River as far as Omaha until the construction of the recent controlled channel.—Harris v. Central Nebraska Public Power & Irrigation Dist., D.C.Neb., 29 F.Supp. 425.

20. U.S.—State of Arizona v. State of California, 51 S.Ct. 522, 283 U.S. 423, 75 L.Ed. 1154—Alabama Power Co. v. Gulf Power Co., D.C.Ala., 283 F. 606.
Ark.—Hill v. McClintock, 1 S.W.2d 564, 175 Ark. 1059.
Fla.—Carlton, for Use of Franklin County, v. Constitution Indemnity Co., 157 So. 431, 117 Fla. 143—Day v. City of St. Augustine, 139 So. 880, 104 Fla. 261.
La.—State ex rel. Board of Com'rs of Atchafalaya Basin Levee Dist. v. Capdeville, 83 So. 421, 146 La. 94, certiorari denied Atchafalaya Land Co. v. Capdeville, 40 S.Ct. 346, 252 U.S. 581, 64 L.Ed. 727—Town of Napoleonville v. Boudreaux, App., 142 So. 874.
Tex.—Brown v. Ætna Casualty & Surety Co., Civ.App., 122 S.W.2d 261, reversed on other grounds 145 S.W.2d 171, 135 Tex. 583.
23 C.J. p. 81 note 47.

Navigable streams
The courts of the state are bound to take judicial notice of the navigable streams of the state, when used in the broad sense, where the bed of river is retained in the public and not deeded to the adjoining landowners.—Hobart-Lee Tie Co. v. Grabner, 219 S.W. 975, 206 Mo.App. 96.

21. Ill.—City of Springfield v. North Fork Outlet Drainage Dist., 249 Ill. App. 133.
Mo.—Slovensky v. O'Reilly, 233 S.W. 478—Grobe v. Energy Coal & Supply Co., 275 S.W. 67, 217 Mo. App. 342—Hobart-Lee Tie Co. v. Grabner, 219 S.W. 975, 206 Mo.App. 96.
23 C.J. p. 81 note 48.

22. Ind.—Ross v. Faust, 54 Ind. 471, 474, 23 Am.R. 655.
23 C.J. p. 81 note 49.

23. Mo.—Slovensky v. O'Reilly, 233 S.W. 478.
23 C.J. p. 81 note 50.

24. S.D.—State v. White River Valley R. Co., 129 N.W. 1034, 27 S.D. 65.
23 C.J. p. 81 note 51.

25. Cal.—City of Los Angeles v. Aitken, 52 P.2d 585, 10 Cal.App.2d 460.
Utah.—Robinson v. Thomas, 286 P. 625, 75 Utah 446.

26. N.J.—Newark Express & Transportation Co. v. Delaware, L. & W. R. Co., 98 A. 472, 89 N.J.Law 494.
Vt.—Boutwell v. Champlain Realty Co., 94 A. 108, 89 Vt. 80, Ann.Cas. 1918A 726.
23 C.J. p. 82 note 56.

27. U.S.—Appalachian Electric Power Co. v. Smith, D.C.Va., 4 F.Supp. 6, reversed on other grounds, C.C.A., 67 F.2d 451, certiorari denied

river judicially known to be navigable, the precise point between its source and mouth at which navigability ceases, unless it is or ought to be within the realm of general knowledge, is not a subject of judicial notice but requires proof.[28]

Mountains and elevations. The existence, location, and elevation of prominent mountains in the jurisdiction[29] and of great mountain ranges[30] are judicially known. It is sometimes matter of common knowledge that in a certain part of the state elevations are commonly referred to as height above sea level[31] and are indicated in feet.[32]

b. Names, Location, and Boundaries

(1) Nation, states, and territories
(2) Political divisions

(1) Nation, States, and Territories

Judicial notice may be taken of the name, location, and boundaries of the nation, states, and territories.

The boundaries of the United States are judicially known by the federal courts,[33] and a state court will take judicial notice of the boundaries of the United States, at least where they coincide with the state line.[34] Courts take judicial notice of the name of the state,[35] and of the established boundaries of the state[36] or territory,[37] where they are sitting or over which they exercise jurisdiction, and also know that a certain tract or region is[38] or is not[39] included therein. State courts judicially know the location of the sister states of the Union,[40] and of a territory.[41] They know that Alaska is a part of the United States,[42] and that the boundary lines of Oregon territory were finally settled to be the forty-second parallel on the south and the forty-ninth on the north.[43] The creation of a new state out of territory of a preëxisting state is judicially noticed.[44]

(2) Political Divisions
(a) In general
(b) Counties and county seats
(c) Cities and villages
(d) Townships and districts

(a) In General

Judicial notice will usually be taken of the names, locations, and boundaries of the political divisions of the government within which the court exercises juris-

54 S.Ct. 458, 291 U.S. 674, 78 L.Ed. 1063.
Ill.—Sproul v. Springman, 147 N.E. 131, 316 Ill. 271.
23 C.J. p 81 notes 52, 55.

Connecting watercourse
Court cannot, on basis of early statutes declaring San Joaquin River navigable, take judicial notice of existence of natural water course connecting Kings and San Joaquin Rivers.—Chowchilla Farms v. Martin, 25 P.2d 435, 219 Cal. 1.

28. U.S.—Alabama Power Co. v. Gulf Power Co., D.C.Ala., 283 F. 606—U. S. v. Brewer-Elliott Oil & Gas Co., D.C.Okl., 249 F. 609, affirmed, C.C.A., Brewer-Elliott Oil & Gas Co. v. U. S., 270 F. 100, affirmed 43 S.Ct. 60, 260 U.S. 77, 67 L.Ed. 140.
Pa.—Brush v. Lehigh Valley Coal Co., 138 A. 860, 290 Pa. 322.
23 C.J. p 81 note 54.

29. U.S.—Law v. Smith, C.C.A.Cal., 288 F. 7.
Cal.—Vela v. Huberty, 35 P.2d 531, 1 Cal.2d 466.
Tenn.—Wilson v. Calhoun, 11 S.W.2d 906, 157 Tenn. 667.
Tex.—State v. Bradford, 50 S.W.2d 1065, 121 Tex. 515, affirming in part and reversing in part, Civ. App., 25 S.W.2d 706—Humphreys-Mexia Co. v. Arseneaux, 297 S.W. 225, 116 Tex. 603, 53 A.L.R. 1147, affirming Humphreys-Mexia Oil Co. v. Arsenaux, Civ.App., 244 S.W. 280—Hoefs v. Short, 273 S.W. 785, 114 Tex. 501, 40 A.L.R. 833, affirming, Civ.App., 190 S.W. 802.
23 C.J. p 82 note 57.

30. Or.—Southern Pac. Co. v. Erickson, 204 P. 942, 103 Or. 311.
23 C.J. p 82 note 58.

31. Cal.—Thoits v. Byxbee, 167 P. 166, 34 Cal.App. 226—Federal Constr. Co. v. Wold, 158 P. 340, 30 Cal.App. 360.

32. Cal.—Thoits v. Byxbee, 167 P. 166, 34 Cal.App. 226.

33. U.S.—Young v. California State Board of Pharmacy, C.C.A.Cal., 273 F. 30.
23 C.J. p 82 note 61.

34. Tex.—Reese v. Cobb, Civ.App., 135 S.W. 220.
23 C.J. p 82 note 62.

35. La.—Tuyes v. Chambers, 81 So. 265, 144 La. 723.

36. N.C.—Watson v. Western Union Telegraph Co., 101 S.E. 81, 178 N.C. 471.
23 C.J. p 82 note 64.

Coast lines
Court takes judicial notice of coast lines of state.—Boone v. Kingsbury, 273 P. 797, 206 Cal. 148, followed in 274 P. 61, 206 Cal. 791, Shudde v. Kingsbury, 274 P. 61, 206 Cal. 792, Workman v. Kingsbury, 274 P. 62, 206 Cal. 793, Hickey Bros. Co. v. Kingsbury, 274 P. 62, 206 Cal. 794, Harthorn v. Kingsbury, 274 P. 62, 206 Cal. 795, Chamberlin v. Kingsbury, 274 P. 62, 206 Cal. 796, and Ballard v. Kingsbury, 274 P. 63, 206 Cal. 797. Appeal dismissed and certiorari denied Workman v. Boone, 50 S.Ct. 66, 280 U.S. 517, 74 L.Ed. 587, 588.

Decision establishing boundary
The appellate court will take judicial cognizance of a suit in the supreme court of the United States to determine the boundary between Texas and Oklahoma, and the judgment therein.—Durham v. Scrivener, Tex.Civ.App., 259 S.W. 606, affirmed, Com.App., 270 S.W. 161.

37. U.S.—Hoyt v. Russell, Mont., 6 S.Ct. 881, 117 U.S. 401, 29 L.Ed. 914.
23 C.J. p 82 note 65.

38. Ga.—Perry v. State, 39 S.E. 315, 113 Ga. 938.
23 C.J. p 82 note 66.

39. Ala.—Smitha v. Flournoy, 47 Ala. 345.
23 C.J. p 82 note 67.

40. Mo.—Curtis v. Sexton, 159 S.W. 512, 252 Mo. 221.

41. Tex.—Swofford v. State, 3 Tex. App. 76.
23 C.J. p 82 note 69.

42. Or.—Zuckerman v. Sanitarium Co., 179 P. 911, 92 Or. 90.

43. Ill.—Woodbury v. U. S. Casualty Co., 120 N.E. 8, 285 Ill. 227.

44. Iowa.—Darrah v. Watson, 36 Iowa 116.
Ky.—Delano v. Jopling, 1 Litt. 117—Holley v. Holley, Litt.Sel.Cas. 505, 12 Am.D. 342.
23 C.J. p 82 note 72.

diction, but such notice will generally not be taken of such divisions in other states.

Courts judicially know the geographical position and extent of the political divisions of the government within which they exercise jurisdiction,[45] whether these divisions exist for election purposes[46] or for the direct administration of governmental functions.[47] Except where the fact can be noticed as a matter of common knowledge, a state court has no judicial knowledge that a named political division exists in another state or territory,[48] unless it is a county or other political division of a parent state and was created before the separation.[49]

Location of privately owned lands with regard to political divisions is not as a general rule judicially noticed,[50] but it is otherwise if such location is connected with, or involved in, a matter of a public nature,[51] such as a public survey, see infra § 53.

(b) Counties and County Seats

Courts take judicial notice of geographical facts relating to counties.

Courts judicially notice geographical facts relating to counties,[52] the date of their organization[53] where they are directly created by public acts of the legislature[54] rather than by acts in pais,[55] their names,[56] geographical position,[57] location,[58] relative positions in the state,[59] geographical shape,[60] boundaries,[61] and area.[62] If the county boundaries and the location of a place within the county are judicially known, a point at a given distance from that place may be judicially known to

45. U.S.—Hoyt v. Russell, Mont., 6 S.Ct. 881, 117 U.S. 400, 29 L.Ed. 914.
23 C.J. p. 83 note 77 [a].

46. Colo.—Las Animas County v. People, 91 P. 36, 40 Colo. 366.
23 C.J. p. 82 note 73.

47. U.S.—U. S. v. Jackson, Va., 104 U.S. 41, 26 L.Ed. 651.
23 C.J. p. 83 notes 74, 75.

48. S.D.—Sherman v. Beam, 130 N.W. 442, 27 S.D. 218.
23 C.J. p. 86 note 48.

49. Me.—Hudson v. Webber, 72 A. 184, 104 Me. 429.
23 C.J. p. 86 note 50.

50. Minn.—Kretzschmar v. Meehan, 77 N.W. 41, 74 Minn. 211.
23 C.J. p. 83 note 80.

51. U.S.—Hoyt v. Russell, Mont., 6 S.Ct. 881, 117 U.S. 401, 29 L.Ed. 914.

52. Ala.—Elmore County v. Tallapoosa County, 128 So. 158, 221 Ala. 182.
Fla.—Realty Co. v. Fraleigh-Smith Inv. Co., 107 So. 174, 90 Fla. 769.
Tex.—Wood v. Marfa Independent School Dist., Civ.App., 123 S.W.2d 429, reversed on other grounds Marfa Independent School Dist. v. Wood, 141 S.W.2d 590, 135 Tex. 223.
Wyo.—State v. Snyder, 225 P. 1102, 31 Wyo. 333, denying rehearing 219 P. 735, 30 Wyo. 287
23 C.J. p. 83 note 83.

Existence of many municipalities within certain counties has been noticed.—Dugan Bros. v. Zorn, 261 N.Y.S. 592, 145 Misc. 611.

Small and sparsely settled
The courts may take judicial cognizance that Bradford County is a small, sparsely settled county.—Davis v. Brewer, 186 So. 207, 135 Fla. 752.

53. Wyo.—Sheridan County v. Patrick, 104 P. 531, 107 P. 748, 18 Wyo. 130.
23 C.J. p. 83 note 84.

54. Ind.—Buckinghouse v. Gregg, 19 Ind. 401.

55. Ind.—Buckinghouse v. Gregg, supra.
Kan.—State v. Ruth, 21 Kan. 582, 587.
23 C.J. p. 83 note 86.

56. Iowa.—Baily v. Birkhofer, 98 N.W. 594, 123 Iowa 59.
23 C.J. p. 83 note 87.

57. U.S.—Greeson v. Imperial Irr. Dist., C.C.A.Cal., 59 F.2d 529, affirming, D.C., 55 F.2d 321.

58. Fla.—Dowling v. W. R. Hodges & Son, 179 So. 702, 131 Fla. 672.
Ky.—White v. Crouch, 133 S.W.2d 753, 280 Ky. 637.
La.—State v. Clement, 178 So. 493, 188 La. 923.
Mo.—State ex inf. Gentry v. Armstrong, 286 S.W. 705, 315 Mo. 298.
23 C.J. p. 83 note 88.

Meridians and base line
(1) Judicial notice will be taken whether a particular county or parish is east or west of the principal meridian, and whether it is north or south of the base line.
Ark.—Kunze v. Blackwood, 113 S.W.2d 705, 195 Ark. 658.
La.—Harrill v. Pitts, 193 So. 562, 194 La. 123.
Wis.—Tregloan v. Hayden, 282 N.W. 698, 229 Wis. 500.

(2) The location of a county with relation to a particular principal meridian may also be noticed.—Federal Land Bank of St. Louis v. McColgan, 59 S.W.2d 1052, 332 Mo. 860.

(3) Public surveys generally, see infra § 53.

59. Cal.—Kautz v. Zurich General Accident & Liability Ins. Co., 300 P. 34, 212 Cal. 576.
Ind.—Ayrshire Coal Co. v. Thurman, 127 N.E. 810, 128 N.E. 764, 73 Ind. App. 578.
23 C.J. p. 83 note 89.

Adjoining counties
It is a matter of common knowledge that many counties in Texas have more than two adjoining counties.—Burlington-Rock Island R. Co. v. Garlitz, Tex.Civ.App., 151 S.W.2d 889.

Separation
Court takes judicial notice that Marin County is separated from San Francisco by Golden Gate.—Kautz v. Zurich General Accident & Liability Ins. Co., 300 P. 34, 212 Cal. 576.

60. Tex.—Hughes v. Adams, Cr., 119 S.W. 134.

61. Ala.—Elmore County v. Tallapoosa County, 128 So. 158, 221 Ala. 182.
Ark.—Harrison v. Abington, 215 S.W. 255, 140 Ark. 115.
Ind.—Allen v. Gilkison, 132 N.E. 12, 76 Ind.App. 233.
Pa.—Patton v. Lawrence County Com'rs, 13 Pa.Dist. & Co. 248.
Tex.—Fidelity & Casualty Co. of New York v. Branton, Civ.App., 70 S.W.2d 780, error dismissed.
23 C.J. p. 83 note 91.

62. Ala.—Elmore County v. Tallapoosa County, 128 So. 158, 221 Ala. 182.
Tex.—Wood v. Marfa Independent School Dist., Civ.App., 123 S.W.2d 429, reversed on other grounds Marfa Independent School Dist. v. Wood, 141 S.W.2d 590, 135 Tex. 223.
23 C.J. p. 84 note 92.

City outside county
Court judicially knows that no other city than St. Louis can be without confines of a county.—State ex inf. Gentry v. Armstrong, 286 S.W. 705, 315 Mo. 298.

One of largest counties in state
Ark.—Washington County v. Davis, 258 S.W. 324, 162 Ark. 335.

be inside the county limits;[63] or the court may judicially know that the place is not certainly within the county.[64] On the other hand, a court has declined to take judicial notice that a point a certain distance from a particular city is within a particular county.[65]

Official surveys being judicially noticed, a described section or range may be judicially known to be in a particular county, see infra § 53, but, unless a subject of statutory recognition,[66] the court cannot take judicial notice that a particular piece of land is within a certain county.[67]

County seats. The identity and location of particular county seats are judicially known to the courts.[68] Likewise, judicial notice will be taken that a particular town is not a county seat.[69]

(c) Cities and Villages

Judicial notice will be taken of cities within the state and of prominent cities outside the state.

Courts of states and territories take judicial notice of the cities[70] and boroughs[71] therein, although incorporated under a preceding government;[72] their names;[73] their location[74] as within the state

63. Neb.—Grosc v. Bredthauer, 284 N.W. 869, 136 Neb. 43.
Ohio.—Connecticut Mut. Life Ins. Co. v. Shelly Seed Corporation of Holgate, 189 N.E. 654, 46 Ohio App 548.
Tex.—Martin v. Turnblow, Civ.App., 96 S.W.2d 730, followed in 96 S.W. 2d 731—Wherry v. Inman, Civ.App., 77 S.W.2d 1083.
23 C.J p 84 note 93—52 C.J. p 130 note 68.

64. Ala.—Ward v. Janney, 16 So. 73, 104 Ala. 122, 125.

65. Tex.—Conner v. Manning, Civ. App., 54 S.W.2d 249.

66. **Transfer from one county**
Where by statute certain lots of land were transferred from one county to another, the courts may take judicial notice of their location in the county to which they were transferred.—Mizell v. Schubert, 121 S.E. 852, 31 Ga.App. 651.

67. Mich.—Pine Saw Logs v. Sias, 5 N.W. 414, 43 Mich. 356.
Minn.—Kretzschmar v. Meehan, 77 N. W. 41, 74 Minn. 211.

68. Ala.—State Bank of Elberta v. Peterson, 145 So. 154, 226 Ala. 13—Polytinsky v. Johnston, 99 So. 839, 211 Ala. 99.
Ark.—McGregor v. Cain, 7 S.W.2d 13, 177 Ark. 474.
Cal.—Wood v. Silvers, 96 P.2d 366, 369, 35 Cal.App.2d 604, citing **Corpus Juris,** and rehearing denied and opinion modified on other grounds 97 P.2d 265, 35 Cal.App. 2d 604.
Ga.—Powell v. First Nat. Bank & Trust Co., 199 S.E. 668, 58 Ga.App. 648—Bowman v. Davis, 180 S.E. 917, 51 Ga.App. 917.
Ind.—McLeaster v. City of Lawrenceburg, 12 N.E.2d 389, 104 Ind. App. 572.
Nev.—Crayne v. Crayne, 13 P.2d 222, 54 Nev. 205, 84 A.L.R. 716.
N.J.—Borough of Chatham v. Board of Conservation and Development, 147 A. 720, 7 N.J.Misc. 958, reversed on other grounds 152 A. 11, 107 N.J.Law 101.
Ohio.—State v. Peters, 25 Ohio N.P., N.S., 69, modified on other grounds 112 Ohio St. 249.
Okl.—Langley v. Albert, 282 P. 608, 140 Okl. 176.
Tex.—Turner v. Tucker, 258 S.W. 149, 113 Tex. 434, reversing Tucker v. Tucker, Civ.App., 255 S.W. 641—Knudsen v. J. I. Case Co., Civ. App., 86 S.W.2d 794—Fidelity & Casualty Co. of New York v. Branton, Civ.App., 70 S.W.2d 780, error dismissed—Pevehouse v. Morton, Civ.App., 63 S.W.2d 904—Great American Indemnity Co. v. Essary, Civ.App., 57 S.W.2d 891, error dismissed—St. Paul Fire & Marine Ins. Co. v. Earnest, Civ.App., 293 S.W. 677, affirmed 296 S.W. 1088, 116 Tex. 565—Smith & Davis Mfg. Co. v. Citizens' State Bank of Marshall, Civ.App., 267 S.W. 1016, affirmed Dobbs v. Smith & Davis Mfg. Co., Com.App., 291 S.W. 208.
Wyo.—Bunten v. Rock Springs Grazing Ass'n, 215 P. 244, 29 Wyo. 461.
23 C.J. p 84 notes 97, 98.

Removal
The court will take judicial notice of the fact that the county seat was removed by the Legislature.—King v. Randall, 190 P. 979, 44 Nev. 118, 13 A.L.R. 730.

69. Tex.—Austin v. Bain, Civ.App., 283 S.W. 638.

70. N.M.—Hutcheson v. Atherton, 99 P.2d 462, 44 N.M. 144.
Utah.—Christenson v. Nielsen, 54 P. 2d 430, 88 Utah 336.
23 C.J. p 84 note 99.

Municipalities within city
It is common knowledge that a number of other municipalities, some of considerable size, are located within suburban territory of St. Louis.—State ex rel. Ferguson-Wellston Bus Co. v. Public Service Commission of State of Missouri, 58 S.W.2d 312, 332 Mo. 283.

Part of another town
Court will take judicial notice that North Weymouth is not a town but is a part of town of Weymouth.—Doyle v. Goldberg, 1 N.E.2d 1, 294 Mass. 105.

71. N.J.—State v. Wildwood, 84 A 274, 83 N.J.Law 188.
Pa.—In re Sheraden Borough, 34 Pa. Super. 639.

72. Cal.—Payne v. Treadwell, 16 Cal. 220.

73. Iowa.—Wertheimer & Degen v Shultice, 211 N.W. 568, 202 Iowa 1140.
23 C.J. p 84 notes 3–4.

74. U.S.—Greeson v. Imperial Irr. Dist., C.C.A.Cal., 59 F.2d 529, affirming, D.C., 55 F.2d 321.
Ala.—Pickens County v. Jordan, 196 So. 121, 239 Ala. 589—King v. Scott, 116 So. 681, 217 Ala. 511.
Cal.—Johnston v. Wolf, 280 P. 980, 208 Cal. 286—City and County of San Francisco v. Boyle, 215 P. 549, 191 Cal. 172—People v. Siderius, 84 P.2d 545, 549, 29 Cal.App.2d 361, citing **Corpus Juris**—Rich v. McClure, 248 P. 275, 78 Cal.App. 209.
Colo.—Marron v. Helmecke, 67 P.2d 1034, 100 Colo. 364.
Fla.—Conyers v. State, 123 So. 817, 98 Fla. 417.
Iowa.—First Nat. Bank v. Anderson, 192 N.W. 6, 196 Iowa 587, reversed on other grounds 46 S.Ct. 135, 269 U.S. 341, 70 L.Ed. 295.
La.—Pugh v. Police Jury of Livingston Parish, 200 So. 450, 196 La. 1025.
Mich.—Gilbert v. Traverse City, 255 N.W. 585, 267 Mich. 257.
Mo.—State ex inf. Gentry v. Armstrong, 286 S.W. 705, 315 Mo. 298.
Or.—Southern Pac. Co. v. Erickson, 204 P. 942, 103 Or. 311.
Tenn.—Wilson v. Calhoun, 11 S.W.2d 906, 157 Tenn. 667.
Tex.—Port Iron & Supply Co. v. Casualty Underwriters, Civ.App., 118 S.W.2d 627—Wherry v. Inman, Civ. App., 77 S.W.2d 1083—Brownsville & Matamoros Municipal Bridge Co. v. Gateway Bridge Co., Civ.App., 2 S.W.2d 1012—Winder v. King, Civ.App., 297 S.W. 689, affirmed, Com.App., 1 S.W.2d 587.
Vt.—State v. Gamelin, 13 A.2d 204.
Wash.—Schmidt v. Powell, 180 P. 892, 107 Wash. 53.
23 C.J. p 84 note 5.

Particular facts noticed
(1) Geographical situation of San

or territory,[75] or within a particular county[76] or within a particular township,[77] or within the jurisdiction of the court, see infra § 46, or with relation to each other;[78] and their boundaries,[79] as fixed by statute[80] or by a municipal charter constituting a public act,[81] and by consequence what lands they include.[82] Other geographical facts of common knowledge relating to cities of commercial importance within the jurisdiction of the court need not be proved.[83] It has been held, however, that courts cannot know the boundaries of cities, where such boundaries are not established by public stat-

Francisco and maritime traffic between it and regions from which bubonic plague originally came.—Spreckels v. City and County of San Francisco, 244 P. 919, 76 Cal.App. 267.

(2) That city of Pineville is built at the point where the Wilderness Road crossed the Cumberland River, such fact being a matter of history.—Boreing v. Garrard, 275 S.W. 374, 210 Ky. 135.

(3) That particular city is not located on bank of particular river.—B. F. Kay & Son v. Alabama Cotton & Grain Co., 100 So. 863, 211 Ala. 454.

75. Ill.—Paul v. Weber, 223 Ill.App. 257.

76. Ala.—Abates v. Timbes, 108 So. 534, 214 Ala. 591—White v. City of Decatur, 144 So. 872, 25 Ala.App. 274, certiorari denied 144 So. 873, 225 Ala. 646, 86 A.L.R. 914.
Ark.—Moore v. Exelby, 281 S.W. 671, 170 Ark. 908.
Cal.—In re Casella's Guardianship, 23 P.2d 782, 133 Cal.App. 80.
Ga.—Rogers v. Toccoa Power Co., 131 S.E. 517, 161 Ga. 524, 44 A.L.R. 534.
Ind.—Wharton v. Wharton, 32 N.E 2d 695—In re Perry, 148 N.E. 163, 83 Ind.App. 456—Sowers v. Schommer, 144 N.E. 851, 82 Ind.App. 479.
Mich.—Westlawn Cemetery Ass'n v. Codd, 213 N.W. 143, 238 Mich. 119.
Mo.—Gaty v. United Rys. Co., 251 S.W. 61—Darby v. Weber Implement Co., 208 S.W. 116, 203 Mo. App. 200.
Mont.—Silver v. Morin, 240 P. 825, 74 Mont. 398.
Nev.—Crayne v. Crayne, 13 P.2d 222, 54 Nev. 205, 84 A.L.R. 716.
S.C.—People's Bank of Rock Hill v. People's Bank of Anderson, 115 S. E. 736, 122 S.C. 476.
Vt.—State Treasurer v. Bishop, 39 Vt. 353.
Wash.—Schmidt v. Powell, 180 P. 892, 107 Wash. 53.
Wis.—York v. Cole, 208 N.W. 944, 190 Wis. 179.
23 C.J. p 84 note 7.

Conversely, judicial notice will be taken that a particular town is not within a particular county.—Langley v. Albert, 282 P. 608, 140 Okl. 176.

Portion in county

Where town of Galax was situated in both counties of Carroll and Grayson, court would not take judicial notice that greater part of town was situated in Carroll County.—Vaughan v. Town of Galax, 4 S.E 2d 386, 173 Va. 335.

Number of cities

Court takes judicial notice that there are many cities and villages in Cook County.—Heroux v. Romanowski, 168 N.E. 305, 336 Ill. 297.

County seats

(1) In Texas the courts will take judicial notice of the location of city in a particular county if it is a county seat.—Heid Bros. v. Smiley, Tex.Civ.App., 144 S.W.2d 952—Indemnity Ins. Co. of North America v. Williams, Civ.App., 69 S.W.2d 519, reversed on other grounds 99 S.W. 2d 905, 219 Tex. 51—Strawn Merchandise Co. v. Texas Grain & Hay Co., Civ.App., 230 S.W. 1094.

(2) Judicial notice, however, will not be taken of such fact if it is not a county seat.—Petroleum Casualty Co. v. Crow, Tex.Civ.App., 16 S.W.2d 917—Cassidy-Southwestern Commission Co. v. Chupick Bros., Tex.Civ. App., 225 S.W. 215—Vivian v. State, 16 Tex.App 262.

77. Ind.—Eastburn v. Board of Finance of Union Tp. of St. Joseph County, 194 N.E. 860, 100 Ind.App. 200.
23 C.J. p 85 note 8.

Ward of parish

Court of appeal takes cognizance of fact city of Bogalusa is situated in fourth ward of Washington Parish.—Rester v. Moody & Stewart, 130 So. 254, 16 La.App. 177, reversed on other grounds 134 So. 690, 172 La. 510.

78. Ala.—State v. Biggs, 95 So. 908, 19 Ala.App. 160.
Ariz.—Silva v. Menderson, 17 P.2d 809, 41 Ariz. 258.
Cal.—City of Oakland v. Williams, 103 P.2d 168, 15 Cal.2d 542—Warnock v. Kraft, 85 P.2d 505, 30 Cal. App.2d 1.
Conn.—Portland Water Co. v. Town of Portland, 118 A. 84, 97 Conn. 628.
Ill.—City of Chicago v. Waters, 1 N. E.2d 396, 363 Ill. 125—Taylor v. City of Berwyn, 17 N.E.2d 1007, 297 Ill App. 417, affirmed 22 N.E.2d 930, 372 Ill. 124.
N.J.—Connell v. Commonwealth Casualty Co., 115 A. 352, 96 N.J.Law 510.
Wash.—Wolfe v. Henry Gerlich Tie & Timber Co., 211 P. 753, 123 Wash. 70.
23 C.J. p 85 note 10.

79. Ala.—Tennessee Coal, Iron & R. Co. v. State, 193 So. 143, 239 Ala. 19—Jones v. Fields, 150 So. 914, 25 Ala.App. 570.
Cal.—People ex rel. McGroarty v. City of Los Angeles, 50 P.2d 101, 9 Cal.App.2d 431—Gardner v. City Council of Tujunga, 35 P.2d 562, 140 Cal.App. 351.
Ohio.—Leisgang v. City of Cincinnati, 15 N.E.2d 158, 57 Ohio App. 513.
Or.—Rosenau v. Lansing, 234 P. 270, 113 Or. 638, denying rehearing 232 P. 648, 113 Or. 638.
Tex.—Thomason v. Pacific Mut. Life Ins. Co. of California, Civ.App., 74 S.W.2d 162, error refused.
23 C.J. p 85 note 11.

80. Cal.—De Baker v. Southern California R. Co., 39 P. 610, 106 Cal. 257, 46 Am.S.R. 237.
Kan.—Topeka v. Cook, 84 P. 376, 72 Kan. 595, 596.

81. Minn.—Baumann v. Granite Sav. Bank, etc., Co., 68 N.W. 1074, 66 Minn. 227.
Or.—Eugene v. Garrett, 169 P. 649, 170 P. 731, 87 Or. 435.

82. Ill.—Maton Bros. v. Central Illinois Public Service Co., 191 N.E. 321, 356 Ill. 584, affirming 269 Ill. App. 99.
Iowa.—Bahner v. City of Des Moines, 296 N.W. 728.
23 C.J. p 85 note 14.

Outside city

Court takes judicial notice that certain land is outside city.—Connecticut Light & Power Co. v. Bennett, 141 A. 654, 107 Conn. 587.

83. Colo.—Public Utilities Commission v. Weicker Transp. Co., 78 P. 2d 633, 102 Colo. 211.
Ga.—Gulf Refining Co. v. Miller, 108 S.E. 25, 151 Ga. 721.
Mass.—Clohecy v. City of Haverhill, 12 N.E.2d 834, 299 Mass. 378.
23 C.J. p 79 notes 8, 9.

Beverly Hills

It is common knowledge of which a reviewing tribunal may take judicial notice that city of Beverly Hills is the place of residence of numerous "stars" and "executives" of the motion picture industry.—Hart v. City of Beverly Hills, 79 P.2d 1080, 11 Cal.2d 343.

Shreveport, La. is judicially recognized as a leading oil center.—In re DeSoto Crude Oil Purchasing Corporation, D.C.La., 35 F.Supp. 1.

ute,[84] and, in jurisdictions where township lines are not noticed, a city is not judicially known to be in a particular township.[85] Likewise, whether a city is in a particular precinct of the county will not be judicially noticed.[86]

Wards are not judicially noticed by courts of general jurisdiction,[87] unless such subdivisions are directly established by a public law.[88] However, a local court may judicially know that a city where it sits or within its jurisdiction contains a certain number of wards.[89] The court cannot judicially know that on a specified date a certain ward of a particular city constituted one election district.[90]

Courts cannot take judicial notice that particular points or localities are within or without the boundaries of a municipal corporation.[91]

State courts judicially know the location of cities outside the state where they are well-known,[92] but it has been held that the court cannot take judicial notice of the location of a town in another state[93] or whether a particular point is part of such a city.[94] The situation of such cities as related to tidewater is also judicially noticed.[95] The location of a city in a foreign country has also been judicially noticed.[96]

Villages. Judicial notice will be taken of the existence of villages in the state,[97] their names,[98] and their location in respect of other municipalities,[99] or as being in a particular town or township[1] or county.[2] The fact that a village is located on a certain railroad has also been judicially noticed.[3]

(d) Townships and Districts

It is generally held that courts will take judicial notice of the names, location, and boundaries of townships and districts.

Courts take judicial notice of the statutory division of a state into towns or townships;[4] their names[5] and numbering;[6] their location[7] and area;[8] and their boundaries, where the precise boundaries are declared by law,[9] but not where they are made and unmade at the discretion of county courts.[10]

84. Tenn.—Alexander v. Virginia, etc., R. Co., 201 S.W. 134, 139 Tenn. 52.
23 C.J. p 85 note 15.

85. Mo.—Backenstoe v. Wabash, etc., R. Co., 86 Mo. 492—Cook v. Kurn, App., 124 S.W.2d 673—Mayes v. St. Louis, K. & N. W. R. Co., 71 Mo.App. 140.

86. Tex.—Pevehouse v. Morton, Civ. App., 63 S.W.2d 904.

87. Ind.—Moberry v. Jeffersonville, 38 Ind. 198.
23 C.J. p 85 note 18.

88. N.Y.—Armstrong v. Cummings, 20 Hun 313.

89. Pa.—Fire Ins. Co. v. Keller, 9 Pa.Dist. 61.

90. Mo.—McGowan v. Gardner, 172 S.W. 408, 186 Mo.App. 484.

91. Ala.—Massey v. Illinois Cent. R. Co., 112 So. 184, 22 Ala.App 63.
Ind.—Halstead v. City of Brazil, 147 N.E. 629, 83 Ind.App. 53.
Tenn.—Bristol Telephone Co. v. Weaver, 243 S.W. 299, 146 Tenn. 511.
Tex.—Great American Indemnity Co. v. Essary, Civ.App., 57 S.W.2d 891, error dismissed.
23 C.J. p 85 note 22.

92. Ala.—Van Heuvel v. Roberts, 127 So. 506, 221 Ala. 83.
Iowa.—Hammers v. Chicago Great Western R. Co., 175 N.W. 311, 187 Iowa 1277.
Nev.—Summerfield v. Hines, 197 P. 690, 45 Nev. 60.
N.C.—McCullough v. Scott, 109 S.E 789, 182 N.C. 865.
Or.—Collins v United Brokers' Co., 194 P. 458, 99 Or. 556.
23 C.J. p 78 notes 4, 5.

In some early cases the courts refused to take judicial notice of cities in another state.—Yale v. Ward, 30 Tex. 17—23 C.J. p 79 note 7.

93. Tex.—King v. Chicago, R. I. & G. Ry. Co., Civ.App., 241 S.W. 180.

94. N.Y.—Oneida Nav. Corporation v. Alliance Assur. Co., 218 N.Y.S. 667, 128 Misc. 575.

95. U.S.—Peyroux v. Howard, La., 7 Pet. 324, 8 L.Ed. 700—Ex parte Lair, D.C.Kan., 177 F. 789, reversed on other grounds 195 F. 47, 115 C.C.A. 49.
23 C.J. p 78 note 6.

96. Tex.—Brownsville & Matamoros Municipal Bridge Co. v. Gateway Bridge Co., Civ.App., 2 S.W.2d 1012.

97. Ala.—State v. Ellis, 100 So. 866, 211 Ala. 489.

Incorporated villages
Courts take judicial notice of the incorporated villages of the state.
N.D.—Page v. Farmery, 150 N.W. 471, 29 N.D. 209.
23 C.J. p 86 note 39.

98. Neb.—Bartling v. Wait, 148 N.W. 507, 96 Neb. 532.

99. N.Y.—Lowville, etc., R. Co. v. Elliott, 89 N.E. 1104, 196 N.Y. 545, affirming 101 N.Y.S. 328, 115 App. Div. 884.

1. N.Y.—Wood v. People, 1 Hun 381, 3 Thomps. & C. 506, reversed on other grounds 59 N.Y. 117.

2. Mich.—People v. Telford, 23 N.W. 213, 56 Mich. 541.
23 C.J. p 86 note 43.

3. N.M.—Gallegos v. Conroy, 29 P. 2d 334, 38 N.M. 154.
Location of railroads see infra this section.

4. Me.—State v. Simpson, 39 A. 287, 91 Me. 83.
23 C.J. p 85 note 23.

5. Ark.—Chicago, etc., R. Co. v Perry County, 112 S.W. 977, 87 Ark. 406.
Me.—State v. Simpson, 39 A. 287, 91 Me. 83.
23 C.J. p 85 note 24.

6. Ill.—Kile v. Yellowhead, 80 Ill 208.

7. Cal.—Nelson v. Thomas, 283 P 982, 103 Cal.App. 108—Adams v. Slee, 268 P. 959, 92 Cal.App. 708
N.Y.—Northeastern Shares Corporation v. International Ins. Co. of New York, 269 N.Y.S. 351, 240 App. Div. 80, affirmed 193 N.E. 326, 265 N.Y. 574.
23 C.J. p 85 notes 26–29, p 86 notes 30–32.

8. Mich.—Fractional School Dist. No. 1 of Barry Tp. v. Township School Dist. of Barry Tp., 242 N.W. 843, 259 Mich. 75.
N.Y.—Jarl Co. v. Village of Croton-on-Hudson, 265 N.Y.S. 271, 148 Misc. 150, 153, affirmed 263 N.Y.S. 956, 238 App.Div. 865, affirmed 188 N.E. 60, 262 N.Y. 551.

9. Ind.—Shields v. Pyles, 99 N.E 742, 180 Ind. 71.
Tex.—Boston v. State, 5 Tex.App. 383, 32 Am.R. 575.
23 C.J. p 86 note 34.

10. Ala.—State v. Moses, 164 So. 562, 564, 231 Ala. 131, quoting **Corpus Juris.**
23 C.J. p 86 note 35.

Where it is provided by statute that in each township there shall also be a school township of the same name of the civil township, except that the word "school" shall precede the name, and it is conceded or established that there is in a certain county a township of a certain name, the court will take judicial notice that there is also in that county a school corporation of a similar name.[11]

Districts. Judicial notice has been taken of the boundaries of bridge districts,[12] an election district,[13] irrigation district,[14] forest preserve district,[15] and school district.[16] The court cannot take judicial notice of the boundary lines of supervisor's districts.[17] Ordinarily the court does not know judicially the boundaries of a road improvement district;[18] but, where the statute creating the district specifies the boundaries of the district and the roads to be improved, the court will take cognizance judicially of the location of the sections of land in their relation to each other.[19] Judicial notice of judicial districts is discussed in § 46 infra.

Where a precinct forming a subdivision of a county is set off and established by the county court, and its boundaries are subject to change by that body, the court cannot take judicial notice of such boundaries at any given time.[20]

c. Blocks and Lots, Streets, and Street Numbers

Unless recognized by statute, or a matter of common knowledge, judicial notice is not taken of blocks and lots, streets, and street numbers in cities and towns.

The courts know that cities are divided into blocks, lots, streets, and alleys.[21] The particularity, however, of the knowledge called for in order that the court may judicially know the location of streets, their width, direction, numbering, etc., is so great, and the facilities of various courts for acquiring such knowledge are so different, that much diversity of decision exists on the point. Courts have declined to take judicial notice of city streets,[22] including such facts as their names,[23] location,[24] direction,[25] or width;[26] or of their relation to each other,[27] such as the distance between such streets,[28] or of the location of an alley,[29] or of an intersection of certain streets or avenues.[30] The court likewise cannot take judicial cognizance of the condi-

11. Ind.—State v. Stevens, 114 N.E. 873, 63 Ind.App. 561.

12. **On navigable streams**
Judicial notice has been taken that many bridge districts in the state do not border on navigable streams. —Conway County Bridge Dist. v. Williams, 75 S.W.2d 814, 189 Ark. 929.

13. N.Y.—Wicksel v. Cohen, 187 N.E. 634, 262 N.Y. 446, followed in Rosenberg v. Board of Elections of City of New York, 193 N.E. 340, 265 N.Y.S. 604.

14. Or.—Harney Valley Irr. Dist. v. Weittenhiller, 198 P. 1093, 101 Or. 1.

15. Ill.—People v. McEldowney, 140 N.E. 12, 308 Ill. 575.

16. Ala.—Board of Education of Jefferson County v. State, 131 So. 239, 222 Ala. 70.

Changing of lines
It is matter of common knowledge that common school district lines frequently change.—People v. Madison, 148 N.E. 247, 317 Ill. 477.

Consolidated district
The supreme court judicially knows that Watson Consolidated School District No. 2 in Atchison County comprises at least two districts besides village district of Watson.—State at Inf. McKittrick ex rel. Martin v. Stoner, Mo., 146 S.W.2d 891.

17. Miss.—Henry v. Sunflower County, 71 So. 742, 111 Miss. 434.

18. Ark.—Van Dyke v. Mack, 214 S.W. 23, 139 Ark. 524.

19. Ark.—Sebastian County Road Impr. Dist. v. Hocott, 217 S.W. 258, 141 Ark. 301.

20. Or.—State v. Carmody, 91 P. 441, 60 Or. 143, 145.

21. Okl.—Emery v. Stansbury, 49 P.2d 155, 173 Okl. 478.
23 C.J. p 87 note 60.

Intervening streets
It is matter of common knowledge that streets intervene between blocks in town laid out into lots and blocks.—Broun v. Texas & N. O. R. Co., Tex.Civ.App., 295 S.W. 670.

22. Ill.—Fifty-Ninth Street Lumber Co. v. Emery, 237 Ill.App. 416.
Mo.—Columbia Taxicab Co. v. Mercurio, App., 236 S.W. 1096—Fidelity & Casualty Co. of New York v. Kansas City Rys. Co., 231 S.W. 277, 207 Mo.App. 137.
Utah.—Christenson v. Nielsen, 54 P.2d 430, 88 Utah 336—In re Phillips' Estate, 44 P.2d 699, 86 Utah 358.

Boulevards
Under a statute requiring courts to take cognizance of ordinances of cities of the first class, the court will not take notice of a boulevard in such a city unless it has been so designated by ordinances regularly adopted.—Newbold v. Brotzge, 272 S.W. 755, 209 Ky. 218.

23. Iowa.—Baily v. Birkhofer, 98 N.W. 594, 123 Iowa 59.

24. Fla.—Summerland, Inc., v. City of Punta Gorda, 134 So. 611, 101 Fla. 543, followed in Warden Apartment House v. City of Punta Gorda, 134 So. 614, 101 Fla. 550—Anderson v. Ocala, 64 So. 775, 67 Fla. 204, 52 L.R.A.,N.S., 287
Ga.—Causey v. Swift & Co., 196 S.E. 228, 57 Ga.App. 604
Ind.—Pittsburgh, C., C. & St. L. R. Co. v. Philpott, 127 N.E. 827, 75 Ind.App. 59, rehearing denied 128 N.E. 662, 75 Ind.App 59.
Tenn.—Bristol Telephone Co. v. Weaver, 243 S.W. 299, 146 Tenn. 511.
Tex.—El Paso Electric Ry. Co. v. Terrazas, Civ.App., 208 S.W. 387, error refused.
Utah.—In re Phillips' Estate, 44 P.2d 699, 86 Utah 358.

25. Mo.—Fidelity & Casualty Co. of New York v. Kansas City Rys. Co., 231 S.W. 277, 207 Mo.App. 137.

26. Iowa.—Coe College v. Cedar Rapids, 95 N.W. 267, 120 Iowa 541.
N.Y.—Porter v. Waring, 69 N.Y. 250, 2 Abb.N.Cas. 230, affirming 51 How. Pr. 295—Kellinger v. Forty-Second St., etc., R. Co., 50 N.Y. 206.

27. Mo.—Fidelity & Casualty Co. of New York v. Kansas City Rys. Co., 231 S.W. 277, 207 Mo.App. 137.

28. Ga.—Causey v. Swift & Co., 196 S.E. 228, 57 Ga.App. 604.
Ill.—West Chicago St. R. Co. v. Vandehouten, 58 Ill.App. 318.

29. Kan.—Topeka v. Cook, 84 P. 376, 72 Kan. 595.

30. Ill.—Brun v. P. Nacey Co., 108 N.E. 301, 267 Ill. 353, reversing 183 Ill.App. 129.
23 C.J. p 87 note 67.

In business district
(1) It has been held that the

tions of the streets of a city, or the extent to which abutting land is developed in any section, or the public necessities at any given place on a given street.[31] Sometimes, however, judicial notice is taken of streets in prominent cities of the state or in cities within the jurisdiction of the court,[32] of the names,[33] location,[34] general direction,[35] and relation to each other[36] of such streets, and of their character as public highways[37] and business streets,[38] if such is the fact. Judicial knowledge of this kind is generally limited to long established and well-known streets and is not extended to those less commonly known.[39]

The court will not take judicial notice of the amount of travel on a street from the mere name of the street.[40] Of course a court cannot judicially know anything about a named street in the absence of any evidence that it is in a town, city, or county of the state, or even in the state.[41] Courts do not take judicial notice of a negative such as that there are not in a certain city any alleys having sidewalks.[42]

The system of numbering employed in New York City is judicially noticed by courts sitting in that city,[43] but in other jurisdictions the courts decline to take judicial notice of the particular place or locality designated by a street or lot number.[44] Where all of a certain street is by statute included in a stated judicial district, judicial notice will be taken that a designated number on that street is within the district;[45] but it is otherwise if the street is not wholly within the district.[46] The court may also take judicial notice of matters of common knowledge in the community where it sits, such as the relative positions of street numbers and street corners in well-known portions of the city.[47] Judicial notice has been taken that a particular lot is within the territorial limits of a particular city.[48]

Plats. The courts do not ordinarily take judicial notice of maps, plats, or surveys of lots and blocks in streets and cities,[49] or of the contents thereof,[50] or of the relative situation of lots and blocks as shown thereon;[51] but, where a plan has been approved by statute, the courts judicially know the lo-

court will not take judicial notice that a designated street intersection is in the business district of a city.—Columbia Taxicab Co. v. Mercurio, Mo.App., 236 S.W. 1096.

(2) There is, however, authority to the contrary.—Collom v. Bloch, 232 P. 486, 69 Cal.App. 33.

31. Me.—State v. Small, 137 A. 398, 126 Me. 235.
Mo.—City of St. Louis v. St. Louis Theater Co., 100 S.W. 627, 202 Mo. 690.

32. Cal.—Katz v. Helbing, 271 P. 1062, 205 Cal. 629, 62 A.L.R. 825—McKinley v. Dalton, 17 P.2d 160, 128 Cal.App. 298.
Me.—Paulauskis' Case, 135 A. 824, 126 Me. 32.
N.Y.—New England S. S. Co. v. Geo. H. Merrill Co. of New York, 194 N.Y.S. 908, 118 Misc. 715.
23 C.J. p 87 note 68.

Street intersection

Supreme court takes judicial notice that intersection at Fifth and Main is one of busiest in Little Rock.—Arkansas Central Power Co. v. Hildreth, 296 S.W. 33, 174 Ark. 529.

33. U.S.—Bucari v. Fili, D.C.Pa., 31 F.Supp. 433—Mabray v. Union Pac. R. Co., D.C.Colo., 5 F.Supp. 397.
Ala.—Dupree v. State, 42 So. 1004, 148 Ala. 620.

34. Cal.—Kingston v. Hardt, 62 P. 2d 1376, 18 Cal.App.2d 61.
23 C.J. p 87 note 70.

35. Cal.—Young v. City of Los Angeles, 260 P. 798, 86 Cal.App. 13.
23 C.J. p 87 note 71.

36. N.Y.—Tuttle & Bailey Mfg. Co. v. General Electric Co., 197 N.Y.S. 683, 120 Misc. 87.
23 C.J. p 87 note 72.

Street intersection held a matter of common knowledge.—Kingston v. Hardt, 62 P.2d 1376, 18 Cal.App.2d 61.

37. N.Y.—Porter v. Waring, 69 N. Y. 250—Whittaker v. Eighth Avenue R. Co., 28 N.Y.Super. 650.
23 C.J. p 87 note 73.

38. Cal.—Smith v. Southern Pac. Co., 255 P. 500, 201 Cal. 57—Varcoe v. Lee, 181 P. 223, 180 Cal. 338—Young v. City of Los Angeles, 260 P. 798, 86 Cal.App. 13.

Character of street

(1) Courts may in a proper instance take judicial notice of the character in some respects of a street.—Sinclair v. Pioneer Truck Co., 196 P. 281, 51 Cal.App. 174.

(2) It may be accepted as a matter of judicial knowledge that South Main Street and Eighth Street in Los Angeles are busy thoroughfares and are usually congested with pedestrians and vehicular travel at 1:20 in the afternoon.—Reaugh v. Cudahy Packing Co., 208 P. 125, 189 Cal. 335.

Judicial notice not taken

Cal.—Duggan v. Forderer, 249 P. 533, 79 Cal.App. 339.

39. Ala.—Dupree v. State, 42 So. 1004, 148 Ala. 620.
Mo.—Breckinridge v. American Cent. Ins. Co., 87 Mo. 62—State v. Ruth, 14 Mo.App. 226.

40. Minn.—Engel v. Minneapolis St. Ry. Co., 183 N.W. 842, 149 Minn. 356.

41. Ill.—Rost v. F. H. Noble & Co., 147 N.E. 258, 316 Ill. 357, reversing 232 Ill.App. 430.
23 C.J. p 87 note 76.

42. Ill.—J. Burton Co. v. Chicago, 86 N.E. 93, 236 Ill. 383, 15 Ann. Cas. 965, reversing 140 Ill.App. 344.

43. N.Y.—Canavan v. Stuyvesant, 27 N.Y.S. 413, 7 Misc. 113—Krasutzky v. Clara de Hirsch Home for Working Girls, 150 N.Y.S. 1058.

44. Ala.—Jones v. Fields, 150 So. 914, 25 Ala.App. 570.
Fla.—Davant v. City of Brooksville, 144 So. 666, 107 Fla. 292.
23 C.J. p 87 note 80.

45. N.Y.—People v. Kelly, 20 Hun 549; Armstrong v. Cummings, 20 Hun 313.

46. N.Y.—People v. Kelly, 20 Hun 549.
23 C.J. p 87 note 82.

47. Colo.—National Optical Co. v. U. S. Fidelity & Guaranty Co., 235 P. 343, 77 Colo. 130.

48. Tex.—American Fidelity & Casualty Co. v. Williams, Civ.App., 34 S.W.2d 396, error refused.

49. Minn.—Williams v. Langevin, 41 N.W. 936, 40 Minn. 180.
23 C.J. p 88 note 83.

50. Mich.—Cicotte v. Anciaux, 18 N. W. 793, 53 Mich. 227.

51. Mich.—Shepard v. Shepard, 36 Mich. 173.

cation of streets as platted thereon,[52] and the relation of such streets to one another, and the directions in which they run,[53] but not the correct location on the ground of the streets therein platted.[54] Facts of common knowledge relating to city plats may be judicially noticed,[55] but facts relating to such plats which are not otherwise entitled to be judicially noticed and which are not matters of common knowledge will not be noticed.[56]

d. Place Named but Not Otherwise Described

Although a county or city named but not otherwise described may be inferred to be the county or city wherein the court is sitting, generally a court will not judicially notice that a place merely designated by name is within or without the state.

A county designated by name, without reference to any state, will be judicially inferred to be the county of that name in the state where the court sits.[57] A like rule is usually,[58] although not invariably,[59] applied in the case of a named city or town. On the other hand, a court cannot judicially know whether a place designated by name, its corporate character not being mentioned, is either within[60] or without[61] the state.

e. Distance and Time of Travel or Transportation between Places

Courts may take judicial knowledge of the distance and time of travel or transportation between places.

Judicial knowledge of geographical facts frequently enable courts judicially to know, with sufficient accuracy for their purpose in the instant case, the distance between places within or without their territorial jurisdiction,[62] particularly where such distances are established by law,[63] or fixed by public surveys,[64] and in many cases courts have taken cognizance of the length of time consumed in travel or carriage of goods between places by present modes of conveyance.[65] It has been held, however, that judicial notice cannot be taken of the precise distances between different places in counties.[66]

52. Cal.—Whiting v. Quackenbush, 54 Cal. 306.

53. Cal.—Brady v. Page, 59 Cal. 52.

54. Cal.—Diggins v. Hartshorne, 41 P. 283, 108 Cal. 154.

55. **Subdividing into lots**
It is a matter of common knowledge that the original plat of many cities and towns in Iowa embraced tracts or parcels therein that were not subdivided into lots at the time of the original platting.—Turner v. Cobb, 192 N.W. 847, 195 Iowa 831.

56. **Particular numbered tract**
The courts cannot take judicial notice that a particular county is the only county within the state having a certain numbered tract subdivided or a map book numbered in a certain manner.—Saterstrom v. Glick Bros., Sash Door & Mill Co., 5 P.2d 21, 118 Cal.App. 379.

57. Wash.—Chapman v. Milliken, 239 P. 4, 136 Wash. 74.
23 C.J. p 86 note 51–53.

58. Minn.—Baumann v. Granite Sav. Bank, etc., Co., 68 N.W. 1074, 66 Minn. 227.
23 C.J. p 86 note 54.

59. Ga.—Perry v. State, 39 S.E. 315, 113 Ga. 936.
23 C.J. p 86 note 55.

60. Ark.—St. Louis, etc., R. Co. v. Cady, 55 S.W. 929, 67 Ark. 512.
23 C.J. p 87 note 57.

61. Ala.—Smith v. Robinson, 11 Ala. 270—Richardson v. Williams, 2 Port. 239.
23 C.J. p 87 note 58.

62. U.S.—The Wahkeena, D.C.Wash., 51 F.2d 106—Munson S. S. Lines v. Newman, C.C.A.Fla., 24 F.2d 416.
Ala.—American Automobile Ins. Co. v. Carson, 102 So. 219, 212 Ala. 293.
Ariz.—Silva v. Menderson, 17 P.2d 809, 41 Ariz. 258.
Cal.—Warnock v. Kraft, 85 P.2d 505, 30 Cal.App.2d 1—Broyles v. Mahon, 237 P. 763, 72 Cal.App. 484—Miller v. Ferguson, 203 P. 772, 55 Cal.App. 502.
Conn.—Lloyd & Elliott v. Parke, 157 A. 272, 114 Conn. 12.
Ill.—People v. Meyering, 178 N.E. 80, 345 Ill. 449.
Ind.—Morris v. Miller, 179 N.E. 29, 93 Ind.App. 534—Indiana Liberty Mut. Ins. Co. v. Strate, 148 N.E. 425, 83 Ind.App. 493.
Ky.—Chesapeake & O. R. Co. v. Coleman Fruit Co., 294 S.W. 463, 219 Ky. 794.
Mont.—Helena Adjustment Co. v. Claflin, 243 P. 1063, 75 Mont. 317.
Mo.—State ex rel. Alton R. Co. v. Shain, 143 S.W.2d 233, quashing record Brown v. Alton R. Co., 132 S.W.2d 713.
Mont.—Batchoff v. Butte Pacific Copper Co., 198 P. 132, 60 Mont. 179.
N.J.—Borough of Chatham v. Board of Conservation and Development, 147 A. 720, 7 N.J.Misc. 958, reversed on other grounds 152 A. 11, 107 N.J.Law 101.
N.Y.—Muschler v. General Metalsmiths, 211 N.Y.S. 693, 125 Misc. 643.
Or.—Nicholas v. Yamhill County, 192 P. 410, 102 Or. 615.
Pa.—Hilbert v. Pennsylvania R. Co., 120 A. 778, 277 Pa. 105.
S.C.—John T. Stanley Co. v. Kaufman, 171 S.E. 32, 170 S.C. 521.
Tex.—Reilly v. Buster, Civ.App., 52 S.W.2d 521, reversed on other grounds 82 S.W.2d 931, 125 Tex. 323—Boyd v. Genitempo, Civ.App., 260 S.W. 934.
Utah.—Anderson v. State, 238 P. 557, 65 Utah 512.
Wyo.—State ex rel Kane v. Dobler, 81 P.2d 300, 53 Wyo. 252, 117 A.L.R. 1393.
23 C.J. p 88 note 92, p 89 note 8.

In foreign country
Judicial notice can be taken of fact that distance between Manzanillo and Mexicali, Mexico, is approximately one thousand two hundred miles.—Kishan Singh v. Carr, C.C.A. Cal., 88 F.2d 672.

63. Cal.—Hegard v. California Ins. Co., 11 P. 594, 2 Cal.Unrep.Cas. 663.

64. U.S.—Hoyt v. Russell, Mont., 6 S.Ct. 881, 117 U.S. 401, 29 L.Ed. 914.
Judicial notice of public surveys see infra § 53.

65. Cal.—Taecker v. Parker, 93 P. 2d 197, 34 Cal.App.2d 143.
Tenn.—Tennessee Cent. R. Co. v. Tedder, 98 S.W.2d 307, 170 Tenn. 639.
Va.—Omohundro v. Palmer, 164 S.E. 541, 158 Va. 693.
23 C.J. p 88 note 95.

Newspapers published in county
It is common knowledge that Maricopa County's newspapers published outside Phœnix can be reached therefrom within thirty minutes, except that of Buckeye, which can be reached in hour, and that all are connected by telephone.—Osborn v. Mitten, 6 P.2d 902, 39 Ariz. 372.

66. Me.—Goodwin v. Appleton, 22 Me. 453.

f. Existence and Location of Public Means of Transportation

The existence and location of public means of transportation may be judicially noticed.

The courts will judicially notice the existence of public transportation systems between different cities within the state.[67] As a fundamental fact of general knowledge a court knows of the existence and location of railroads,[68] whether they are wholly within its jurisdiction,[69] or only partly so,[70] and knows to what system, if any, they belong.[71] On the other hands, courts have refused to take judicial notice that certain railroads run through certain states,[72] that a railroad is doing business in another state,[73] and that certain railroads are competitive.[74] Courts will also, to a not very well defined extent, notice the minor facts connected with railroad locations in their jurisdiction.[75] Thus it has been held that the courts may know that railroads are in operation between two places,[76] that these points are within a certain county,[77] especially if they are post offices,[78] the geographical positions of towns on the line of a railroad,[79] and that a railroad cannot be located in a given direction from one place to another without passing through a third.[80] In like manner courts will notice that a town contains a station on a certain railroad,[81] or that it is a railroad center,[82] or that a certain city in the state is not on a railroad.[83] Courts, however, cannot notice more minute facts.[84] Neither can they notice matters in futuro.[85] Although some courts take notice of stations,[86] other courts decline to do so.[87] Courts have both taken[88] and declined to take[89] judicial notice of the termini of railroads.

g. Location of Public Buildings

Judicial notice may be taken of facts of common knowledge relating to the location of public buildings.

Judicial notice has been taken of the location of

67. Wash.—Lassiter v. Shell Oil Co., 62 P.2d 1096, 188 Wash. 371.

68. Ill.—City of Chicago v. Waters, 1 N.E.2d 396, 363 Ill. 125—Lindelsee v. Chicago, O. & P. Ry. Co., 226 Ill.App. 20, 24, citing **Corpus Juris.**
Ind.—Indiana Creosoting Co. v. McNutt, 5 N.E.2d 310, 210 Ind. 656.
Mass.—New York Cent. & H. R. R. Co. v. York & Whitney Co., 119 N.E. 855, 230 Mass. 206, affirmed in part and reversed in part on other grounds 41 S.Ct. 509, 256 U.S. 406, 65 L.Ed. 1016.
Mich.—Amyot v. Lamb, 190 N.W. 741, 221 Mich. 256.
Tex.—Lancaster v. Mebane, Civ.App., 260 S.W. 256—King v. Chicago, R. I. & G. Ry. Co., Civ.App., 241 S.W. 180.
Va.—Morgan v. Pennsylvania R. Co., 138 S.E. 566, 148 Va. 272.
23 C.J. p 89 note 99.

Counties

Court will take judicial notice that main line of Great Northern Railway does not run through Lewis and Clark County, Montana, but does run through Flathead County.—O'Hanion v. Great Northern Ry. Co., 245 P. 518, 76 Mont. 128.

69. U.S.—Terminal R. Ass'n of St. Louis v. Kimbrel, C.C.A.Mo., 105 F.2d 262.
Ill.—Lindelsee v. Chicago, O. & P. Ry. Co., 226 Ill.App. 20, 24, citing **Corpus Juris.**
23 C.J. p 89 note 1.

70. Ill.—Lindelsee v. Chicago, O. & P. Ry. Co., supra, citing **Corpus Juris.**
23 C.J. p 89 note 2.

71. Tex.—Missouri Pac. R. Co. v. Graves, 2 Tex.A.Civ.Cas. § 676.
23 C.J. p 89 note 3.

72. Ill.—Wabash Ry. Co. v. Lindsey, 269 Ill.App. 152.

73. Tenn.—Illinois Cent. R. Co. v. Miles, 130 S.W.2d 111, 174 Tenn. 676.

74. Tex.—East Line, etc., R. Co. v. Rushing, 6 S.W. 834, 69 Tex. 306
23 C.J. p 89 note 5.

75. Tex.—St. Louis, B. & M. Ry. Co. v. Lane, Civ.App., 248 S.W. 59.
23 C.J. p 89 note 6.

Particular facts noticed

(1) That town is without railroad communication with county seat.—State v. Snyder, 225 P. 1102, 31 Wyo. 333, denying rehearing 219 P. 735, 30 Wyo. 287.

(2) Other matters see 23 C.J. p 89 note 6 [a].

76. Tex.—Texas Electric Ry. v. Shelton, Civ.App., 286 S.W. 526, 527, citing **Corpus Juris.**
23 C.J. p 89 note 7.

77. Ind.—Indianapolis, etc., R. Co. v. Case, 15 Ind. 42.
N.M.—Friday v. Santa Fé Cent. R. Co., 120 P. 316, 16 N.M. 434.

78. Ala.—Smith v. Flournoy, 47 Ala. 345.
Ga.—Central R., etc., Co. v. Gamble, 3 S.E. 287, 77 Ga. 584.

79. Ark.—St. Louis, etc., R. Co. v. Magness, 57 S.W. 933, 68 Ark. 289.
23 C.J. p 89 note 11.

80. U.S.—Phelps v. Lewiston, C.C.N.Y., 19 F.Cas.No.11,076, 15 Blatchf. 131.

81. Ark.—St. Louis, etc., R. Co. v. Magness, 57 S.W. 933, 68 Ark. 289.
23 C.J. p 89 note 13.

82. Tex.—Texas, etc., R. Co. v. Black, 27 S.W. 118, 87 Tex. 160—Gulf, etc., R. Co. v. State, 10 S.W. 81, 72 Tex. 404, 13 Am.S.R. 815, 1 L.R.A. 849.

83. Ala.—Green v. Lineville Drug Co., 43 So. 216, 150 Ala. 112, 124 Am.S.R. 17.

84. Tex.—Texarkana, etc., R. Co. v. Schevoight, Civ.App., 181 S.W. 802—Freeman v. McElroy, Civ.App., 149 S.W. 428.
23 C.J. p 89 note 16.

85. U.S.—McKeown v. Northern Pac. R. Co., C.C.Mont., 45 F. 464.
Ala.—Georgia Pac. R. Co. v. Gaines, 7 So. 382, 88 Ala. 377.
23 C.J. p 89 note 17.

Number of stations between two points

86. Mo.—Rissell v. St. Louis-San Francisco Ry. Co., 81 S.W.2d 621, 336 Mo. 845.

87. Okl.—St. Louis, etc., R. Co. v. Williams, 107 P. 428, 25 Okl. 662.
Tex.—Missouri, etc., R. Co. v. Lightfoot, 106 S.W. 395, 48 Tex.Civ.App. 120.

88. Ala.—Smitha v. Flournoy, 47 Ala. 345.
23 C.J. p 89 note 19.

Terminal connection

Conceding that a court may take judicial notice of the location, routes, and termini of the lines of an important railroad, it must include in such notice every part of the system, and the fact, if it be a fact, that it performs the service of a terminal connection for other roads in moving their cars to their ultimate point of destination in a city.—U. S. v. Chicago, B. & Q. R. Co., C.C.A.Colo., 293 F. 185.

89. Mo.—Wright v. Quincy, etc., R. Co., 95 S.W. 293, 119 Mo.App. 469.

public buildings,[90] the state prison,[91] and of an Indian reservation.[92] Judicial notice is also taken of facts of common knowledge relating to the location of public school buildings.[93] While the courts take judicial notice generally of the present existence and location of schoolhouses as being within a certain number of miles of a particular place of business in a city,[94] they do not take notice of the former existence and location of a particular schoolhouse in a certain town in the state.[95]

§ 34. Government and Its Administration

Judicial notice will be taken of general matters relating to government and its administration.

Judicial notice is taken of the division of government into three branches or departments, namely, legislative, executive, and judicial,[96] of the public official acts of the coördinant branches of the same government,[97] and, generally speaking, of the records thereof and their contents.[98] Consequently statutes expressly requiring judicial notice of public and private official acts of the legislative, executive, and judicial departments of the state and of the United States are merely declaratory of the preëxisting rule on the subject, except for the added provision for notice of private official acts.[99]

Public activities within the common experience of men within the jurisdiction are judicially known,[1] and a wide variety of matters relating to government and its administration has been judicially noticed,[2] including facts relating to public institu-

90. Cal.—Times-Mirror Co. v. Superior Court in and for Los Angeles County, 44 P.2d 547, 3 Cal.2d 309.

91. Ind.—Murphy v. Daly, 188 N.E. 769, 206 Ind. 179.

92. U.S.—Deere v. St. Lawrence River Power Co., C.C.A.N.Y., 32 F.2d 550, affirming, D.C., Deere v. State of New York, 22 F.2d 851.

93. Utah.—Salt Lake City v. Salt Lake City Bd. of Education, 175 P. 654, 52 Utah 540.
23 C.J. p 89 note 21, p 90 note 24.

94. U.S.—Laughter v. McLain, D.C. Tenn., 229 F. 280.

95. Or.—Burch v. Amity, 180 P. 312, 92 Or. 152.

96. Mont.—U. S. v. Williams, 12 P. 851, 6 Mont. 379.

97. Me.—Prince v. Skillin, 71 Me. 361, 36 Am.R. 325.
23 C.J. p 90 note 28.
Acts, practice, and proceedings of officers and boards see infra § 40.

98. Miss.—Adam v. Standard Oil Co., 53 So. 692, 97 Miss. 879.
23 C.J. p 90 note 29.

99. Mont.—U. S. v. Williams, 12 P. 851, 6 Mont. 379.
23 C.J. p 90 note 30.

1. U.S.—Greeson v. Imperial Irr. Dist., 59 F.2d 529, affirming, D.C., 55 F.2d 321.

2. Mo.—State v. Missouri, K. & T. R. Co., 172 S.W. 35, 262 Mo. 507, 516, L.R.A.1915C 778.
23 C.J. p 90 notes 31-35.

Judicial notice has been taken:

(1) Of facts regarding incorporation of Shipping Board Emergency Fleet Corporation and that United States became sole stockholder.—U. S. v. Brown, 160 N.E. 13, 247 N.Y. 211, reversing and answering certified question 222 N.Y.S. 391, 220 App.Div. 692—Norton v. Southern Ry. Co., 246 N.Y.S. 676, 138 Misc. 784.

(2) Of financial conditions of counties.—Fiscal Court of Scott County v. Davidson, 82 S.W.2d 801, 259 Ky. 498.

(3) That for many years a number of employees of the state, in its various activities, have been husband and wife.—Caldwell v. Board of Regents of University of Arizona, 96 P.2d 401, 54 Ariz. 404.

(4) That identifying marks are usually found on heroin and morphine when legally possessed, their source being easily traced.—U. S. v. One 1937 Hudson Terraplane Coupé Automobile, Motor No. 285062, Serial No. 701773, D.C.Ky., 21 F.Supp. 600.

(5) That many laws intended to protect public put restraints on acts and conduct of men of honest motives and purposes.—Goe v. Gifford, 191 S.E. 783, 168 Va. 497.

(6) That many women are employed in public service.—In re Opinion of the Justices, 22 N.E.2d 49, 303 Mass. 631, 123 A.L.R. 199.

(7) That Public Works Administration is one of agencies of United States created for purpose of relieving unemployment.—Memphis Power & Light Co. v. City of Memphis, 112 S.W.2d 817, 172 Tenn. 346.

(8) That state of Minnesota has an excellent National Guard, well trained and well equipped.—Strutwear Knitting Co. v. Olson, D.C. Minn., 13 F.Supp. 384.

(9) That the government through its different bureaus and agencies necessarily moves slowly.—Fleming v. Tidewater Optical Co., D.C.Va., 35 F.Supp. 1015.

(10) That there are naval vessels under jurisdiction of war department.—Campbell Coal & Coke Co. v. Pennsylvania R. Co., 135 A. 650, 288 Pa. 36.

(11) That very substantial portion of every county's financial outlay is for supplies.—Thomas v. Buchanan County, 51 S.W.2d 95, 330 Mo. 627.

(12) Of other matters.
U.S.—National Fire Ins. Co. of Hartford, Conn. v. School Dist. No. 68, Sequoyah County, Okl., C.C.A.Okl., 115 F.2d 232—Stewart Die Casting Corporation v. National Labor Relations Board, C.C.A., 114 F.2d 849, certiorari denied 61 S.Ct. 449—Universal Credit Co. v. U. S., C.C.A. N.C., 111 F.2d 764.
Ala.—Southern Industrial Institute v. Lee, 175 So. 365, 234 Ala. 404.
Ark.—Oates v. Rogers, 144 S.W.2d 457.
Cal.—Hicks v. Ocean Shore R. R., App., 109 P.2d 1032—Pacific Gas & Electric Co. v. Moore, 98 P.2d 819, 37 Cal.App.2d 91—San Bernardino County v. Industrial Accident Commission, 37 P.2d 122, 1 Cal.App.2d 598.
Fla.—State ex rel. Gibbs v. Gordon, 139 So. 437, 138 Fla. 312—Perry Trading Co. v. City of Tallahassee, 174 So. 854, 128 Fla. 424, 111 A.L.R. 463.
Kan.—State ex rel. Boynton v. Atherton, 30 P.2d 291, 139 Kan. 197.
La.—State v. Owin, 186 So. 46, 191 La. 617.
Mo.—Rogers v. Metropolitan Life Ins. Co., App., 122 S.W.2d 5.
Mont.—Guillot v. State Highway Commission of Montana, 56 P.2d 1072, 102 Mont. 149.
N.J.—Public Service Electric & Gas Co. v. City of Camden, 192 A. 222, 118 N.J.Law 245.
N.Y.—Madden v. Reavy, 31 N.E.2d 756, 284 N.Y. 418, reversing 21 N.Y.S.2d 382, 260 App.Div. 355—In re Skuse's Estate, 1 N.Y.S.2d 202, 165 Misc. 554.
Or.—American Federation of Labor v. Bain, 106 P.2d 544, 130 A.L.R. 1278.
Pa.—Commonwealth v. One Dodge Motortruck, 191 A. 590, 326 Pa. 120, 110 A.L.R. 919—Miller v. Bashore, 45 Dauph.Co. 67.
Tenn.—Soukup v. Sell, 104 S.W.2d 830, 171 Tenn. 437, modified on other grounds 105 S.W.2d 107, 171

tions,[3] public lands,[4] and public improvements.[5] In the Canal Zone the courts must take judicial notice of the government of the United States.[6]

Insular possessions. Judicial notice may be taken that Puerto Rico is an insular possession of the United States with power to enact laws not in conflict with the act of congress relating to territories and insular possessions.[7]

§ 35. Political Divisions and Bodies

Judicial notice will be taken of political divisions and bodies in the state, and of facts relating to such divisions and bodies which fall within the usual rules entitling them to such notice.

The courts take judicial notice of the local subdivisions of the state,[8] and of the political divisions established by law in the state or territory wherein

Tenn. 491—Hagan v. Black, 17 S.W.2d 908, 159 Tenn. 290.
Tex.—Ætna Casualty & Surety Co. v. Hawn Lumber Co., 97 S.W.2d 460, 128 Tex. 296, modifying, Civ. App., 62 S.W.2d 329, rehearing denied and modified, 98 S.W.2d 167, 128 Tex. 296—Acker v. Thompson, Civ.App., 128 S.W.2d 852, error granted.

3. U.S.—Gropper v. Warner Bros. Pictures, D.C.N.Y., 38 F.Supp. 329.
Ark.—Underwood v. Farrell, 299 S.W. 5, 175 Ark. 217.
Vt.—In re Hook, 115 A. 730, 95 Vt. 497, 19 A.L.R. 610.

Care of prisoners

It is matter of common knowledge that prisoners may require medical or surgical care or nursing which cannot be furnished in county jail because of inadequate facilities.—Bartron Clinic v. Kallemeyn, 245 N.W. 393, 60 S.D. 598.

Engaging in business

The supreme court may take judicial notice of the fact that reclamation service is not engaged in business or mercantile pursuits.—Ada County v. Bottolfsen, 102 P.2d 287, 61 Idaho 363.

San Diego Mission

Judicial notice has been taken that the San Diego Mission is not a state institution.—Frohliger v. Richardson, 218 P. 497, 63 Cal.App. 209.

4. **Facts judicially noticed**

(1) That government land grants in Saline County to Union Pacific Railroad covered agricultural lands and no other.—Crum v. Guffey-Gillespie Oil Co., 230 P. 299, 117 Kan. 54.

(2) That lands comprised in grants by the government to the state of Wyoming for particular purposes are so located that in thousands of separate tracts throughout the state there is hardly a community where it may not become necessary, or has not become necessary, to locate a public road across some part of them.—Ross v. Trustees of University of Wyoming, 222 P. 3, 30 Wyo. 433.

(3) That the colonial government as a matter of policy studiously avoided granting the river bed.—West Virginia Pulp & Paper Co. of Delaware v. Peck, 178 N.Y.S. 663, 189 App.Div. 286, 190 App.Div. 891, affirming 171 N.Y.S. 1065, 104 Misc. 172.

(4) That title to the lands surrounding substantially all the great ponds of the state of Maine and bordering on their outlet streams has passed into private ownership.—In re Opinions of the Justices, 106 A. 865, 118 Me. 503, 523.

(5) That vast bodies of land originally covered with timber in some of the public land states have been acquired by private entry, cleared, and brought under cultivation.—U. S. v. Payne, Wash., 44 S.Ct. 352, 264 U.S. 446, 68 L.Ed. 782, affirming, C. C.A., 284 F. 827.

(6) Other facts.
U.S.—Begue v. Grizzly Live Stock & Land Co., D.C.Cal., 1 F.Supp. 229.
Vt.—University of Vermont and State Agr. College v. Ward, 158 A. 773, 104 Vt. 239.

5. **Judicial notice has been taken:**

(1) Of character and importance of particular improvements.—Union Sulphur Co. v. Parish of Calcasieu, 96 So. 787, 153 La. 857.

(2) Of facts relating to method of paying for public improvements.
U.S.—Moffat Tunnel Improvement Dist. v. Denver & S. L. Ry. Co., C. C.A.Colo., 45 F.2d 715, modifying, D.C., Denver & S. L. Ry. Co. v. Moffat Tunnel Improvement Dist. 35 F.2d 365, and certiorari denied Moffat Tunnel Improvement Dist., v. Denver & S. L. Ry. Co., 51 S.Ct. 485, 283 U.S. 837, 75 L.Ed. 1448.
Ky.—Fiscal Court of Scott County v. Davidson, 82 S.W.2d 801, 259 Ky. 498.
Miss.—Madison County v. Howard, 80 So. 524, 119 Miss. 133.

(3) Of purpose of particular public improvement.—Greeson v. Imperial Irr. Dist., D.C.Cal., 55 F.2d 321, affirmed, C.C.A., 59 F.2d 529.

(4) Of usual and customary provisions in contracts for public improvements.—Miller v. Incorporated Town of Milford, 276 N.W. 826, 224 Iowa 753, 114 A.L.R. 1423.

(5) That the expenditure of many millions of dollars for a national defense project in a locality or county, will redound in material values to the county and state.—State ex rel. Gibbs v. Gordon, 189 So. 437, 138 Fla. 312.

(6) Of other matters.
U.S.—Greeson v. Imperial Irr. Dist., D.C.Cal., 55 F.2d 321, affirmed, C. C.A., 59 F.2d 529.
Mont.—Irion v. Hyde, 81 P.2d 353, 107 Mont. 84.
Ohio.—City of Cincinnati v. Board of Education of City School Dist. of City of Cincinnati, 27 N.E.2d 413, 63 Ohio App. 549, appeal dismissed 31 N.E.2d 440, 137 Ohio St. 568.
S.C.—Greenwood County v. Watkins, 12 S.E.2d 545, 196 S.C. 51—Banister v. Lollis, 190 S.E. 511, 183 S.C. 218—Green v. City of Rock Hill, 147 S.E. 346, 149 S.C. 234.
Tex.—West v. Probst, Com.App., 6 S.W.2d 96, reversing, Civ App., 251 S.W. 289—Bush v. City of Denton, Civ.App., 284 S.W. 251.

Judicial notice cannot be taken:

(1) Of administrative policy of those engaged in supervising prisons and prison labor.—State v. Whitfield, 257 N.W. 601, 216 Wis. 577.

(2) Of the location of a sewer.—City of Bloomington v. Davis, 140 N.E. 4, 309 Ill. 20.

(3) Of other matters.—Commonwealth Public Service Co. of Montana v. City of Deer Lodge, 29 P.2d 667, 96 Mont. 48.

6. Canal Zone.—Canal Zone v. Mena, 2 Canal Zone 170.

7. U.S.—George L. Squire Mfg. Co v. National Fire Ins. Co. of Hartford, Conn., D.C.N.Y., 4 F.Supp 137.

8. Miss.—King v. Caraway, 97 So. 422, 132 Miss. 679.
23 C.J. p 90 note 37.

Particular facts noticed

(1) The number of townships in the state.
Ind.—Postlewaite v. Hasse, 186 N.E 761, 205 Ind. 396.
Ohio.—State v. Tracy, 149 N.E. 392, 113 Ohio St. 434.

(2) That only consolidated city and county in California is city and county of San Francisco.—Esberg v Badaracco, 259 P. 730, 202 Cal. 110.

(3) The existence of counties.—Elmore County v. Tallapoosa County, 128 So. 158, 221 Ala. 182.

(4) That county is political subdivision of state.—Young v. Juneau County, 212 N.W. 295, 192 Wis. 646.

(5) That in many counties the jail is in the courthouse building.—White v. Scarritt, 111 S.W.2d 18, 341 Mo. 1004, affirming White v. McCoy Land Co., 87 S.W.2d 672, 229 Mo.App. 1019 and 101 S.W.2d 763.

it exercises jurisdiction.[9] Judicial notice of geographical facts relating to political divisions is discussed supra § 33.

Courts will take judicial notice that a sister state of the Union is a sovereign state.[10]

Districts. The creation and existence of districts,[11] their incorporation by public act,[12] the time of their organization,[13] the purposes for which they are created,[14] and facts of common knowledge relating to such districts,[15] may be judicially noticed; but facts relating to such districts which do not fall within the rules as to matters of law, history, or common knowledge which may be judicially noticed will not be noticed without proof.[16]

Municipal corporations. In accordance with general principles relating to judicial notice of statutes generally, see supra § 16, the courts of a state take judicial notice of public acts of the state creating, chartering, conferring powers on, or otherwise relating to, municipal corporations, and of general municipal incorporation laws.[17] The fact of the in-

(6) Other facts see Dickerson v. Dickerson, Tex.Civ.App., 207 S.W. 941.

9. Cal.—McKinley v. Dalton, 17 P.2d 160, 128 Cal.App. 298.
Miss.—King v. Caraway, 97 So. 422, 132 Miss. 679.
Mo.—Curry v. Crull, 116 S.W.2d 125, 342 Mo. 553.
23 C.J. p 90 note 38.

10. N.D.—Paulus v. State of South Dakota, 227 N.W. 52, 59 N.D. 643.

11. Drainage districts
Tex.—Harris County Drainage Dist. No. 12 v. City of Houston, Com.App., 35 S.W.2d 118, reversing, Civ.App., 11 S.W.2d 833.
Utah—Colorado Development Co. v. Creer, 80 P.2d 914, 96 Utah 1, rehearing denied 84 P.2d 785, 96 Utah 19.

Division of county into civil districts may be judicially noticed.—Louisville & N. R. Co. v. Hobbs, 5 Tenn.Civ.A. 282.

Fresh-water supply district
Tex.—State v. Stickle, Civ.App., 11 S.W.2d 837, error dismissed.

12. Fire district
R.I.—Foley v. Ray, 61 A. 50, 27 R.I. 127.

13. Ark.—Norfleet v. Hampson, 209 S.W. 651, 137 Ark. 600.
Cal.—Laist v. Nichols, 33 P.2d 866, 139 Cal.App. 202.
23 C.J. p 91 notes 42, 43.

14. School districts
It is well known that school districts are created for purpose of levying special taxes and incurring debts for school purposes.—Gauthier v. Parish School Board of Avoyelles Parish, 115 So. 479, 165 La. 256.

15. U.S.—In re Imperial Irr. Dist., D.C.Cal., 38 F.Supp. 770.

Indebtedness at certain date
Ark.—Ledbetter v. Hall, 87 S.W.2d 996, 191 Ark. 791.

16. Judicial notice will not be taken:
(1) That no preliminary surveys, plans, specifications and estimates of the road proposed to be constructed and improved were filed, as required by statute, before the order of a county court was entered creating a highway district.—Wilson v. Osceola & Little River Road Impr. Dist. No 1, 192 S.W. 371, 127 Ark. 310.

(2) That a school district has incorporated as an independent school district and has levied taxes—Ammerman v. Bourland, Tex.Civ App., 230 S.W. 804.

(3) That a school district was not in existence at a certain date.—Seaboard Air Line Ry. Co. v. Dorchester Consol. School Dist., 146 S.E. 510, 39 Ga.App. 185.

17. U.S.—Jackson v. Denver Producing & Refining Co., C.C.A.Okl., 96 F.2d 457—Phenix City, Ala., v. Southern Bell Telephone & Telegraph Co., D.C.Ala., 33 F.Supp. 283
Ala.—State ex rel. Glenn v. Wilkinson, 124 So. 211, 220 Ala. 172
Cal.—Weigle v. City and County of San Francisco, 72 P.2d 902, 23 Cal.App.2d 274—People ex rel. McGroarty v. City of Los Angeles, 50 P.2d 101, 9 Cal.App.2d 431.
Fla.—Tillson v. State ex rel. Landis, 172 So. 918, 127 Fla. 215—State ex rel. Tatham v. Coleman, 166 So. 221, 122 Fla. 819—Gulf View Apartments v. City of Venice, 145 So. 842, 108 Fla. 41—Escott v. City of Miami, 144 So. 397, 107 Fla. 273.
Md.—Mayor and City Council of Baltimore v. Baltimore Steam Packet Co., 164 A. 878, 164 Md. 284.
Minn.—City of St. Paul v. Twin City Motor Bus Co., 250 N.W. 572, 189 Minn. 612—Oehler v. City of St. Paul, 219 N.W. 760, 174 Minn. 410.
Mo.—State ex rel. Kansas City v. Trimble, 298 S.W. 833, 317 Mo. 1208, quashing opinion State ex rel. Linday v. Kansas City, App., 20 S.W.2d 1, and followed in State ex rel. Kansas City v. Trimble, Sup., 298 S.W. 835, quashing opinion State ex rel. Ross v. Kansas City, App., 20 S.W.2d 16 (first case), and followed in State ex rel. Kansas City v. Trimble, Sup., 298 S.W. 836, quashing opinion State ex rel. Young v. Kansas City, App., 20 S.W.2d 11 (first case) and State ex rel. Gough v. Kansas City, 20 S.W.2d 14, and followed in State ex rel. Kansas City v. Trimble, Sup., 298 S.W. 837, quashing opinion State ex rel. Neyhart v. Kansas City, App., 20 S.W.2d 12—Heather v. City of Palmyra, 276 S.W. 872, 311 Mo. 32—In re East Bottoms Drainage & Levee Dist., 259 S.W. 89, 305 Mo. 577—State ex rel. Boatmen's Bank v. Reynolds, 218 S.W. 337, 281 Mo. 1, quashing record, Boatmen's Bank v. Semple Place Realty Co., 213 S.W. 900, 202 Mo App 57—State ex rel. Bruening Realty Co. v. Thomas, 211 S.W. 667, 278 Mo. 85—City of Hopkins v. Kansas City, St. J. & C. B. R. Co., 79 Mo. 98—Tinsley v. Washington Nat. Ins. Co., App., 97 S.W. 2d 874—Wiget v. City of St. Louis, 85 S.W.2d 1038, 337 Mo App. 799, 100 A.L.R. 1284—State ex rel. Strait v. Brooks, 293 S.W. 471, 220 Mo.App. 708.
N.M.—State v. City of Albuquerque, 249 P. 242, 248, 31 N.M. 576, citing Corpus Juris.
Okl.—City of Ardmore v. Excise Board of Carter County, 8 P.2d 2, 155 Okl. 126—Ex parte Bochmann, 201 P. 537, 20 Okl.Cr. 78.
Pa.—Upper Merion Tp. v. Borough of Bridgeport, 149 A. 490, 299 Pa. 297.
Tex.—City of Fort Worth v. Davidson, 296 S.W. 288, 117 Tex. 89, rehearing denied 298 S.W. 421—Johnson v. City of Fort Worth, Com. App., 299 S.W. 883, reversing City of Fort Worth v. Johnston, Civ.App., 294 S.W. 690—Hallman v. City of Pampa, Civ.App., 147 S.W. 2d 543, error refused—McDonald v. Doyschen, Civ.App., 28 S.W.2d 243—Reegan v. City of Galveston, Civ.App., 24 S.W.2d 61, error dismissed—City of Dallas v. Springer, Civ.App., 8 S.W.2d 772—City of Electra v. Taylor, Civ.App., 297 S.W. 496—Harris v. City of Port Arthur, Civ.App., 267 S.W. 349—Cawthon v. City of Houston, Civ. App., 212 S.W. 796, reversed on other grounds, Com.App., 231 S.W. 701.
Va.—Town of Narrows v. Board of Sup'rs of Giles County, 105 S.E. 82, 128 Va. 572.
Wash.—Shaw v. City of Yakima, 48 P.2d 630, 183 Wash. 200.
Wis.—Brown v. Milwaukee Terminal

corporation of a municipality is generally noticed,[18] although in some jurisdictions the fact of incorporation under the general laws is not judicially noticed,[19] particularly where there are several acts under which a city may be incorporated.[20] Where the statute provides for a final order of incorporation by judgment of a court of record, the fact of incorporation may be judicially noticed.[21] In the absence of a statute requiring it, judicial notice is not taken of private or special statutes creating or conferring powers on municipal corporations.[22] Also in the absence of statutory requirement, judicial notice is not taken of home rule or initiative charters of cities or towns;[23] but under some statutes such notice is required after the filing or recording of the charter in the office of a designated official as therein provided.[24] Where, under the state constitution, power is delegated for cities to

Ry. Co., 224 N.W. 748, 199 Wis. 575, reversed on other grounds 227 N.W. 385, 199 Wis. 575.

Wyo.—City of Casper v. Joyce, 88 P. 2d 467, 54 Wyo. 198.

23 C.J. p 91 note 47.

Judicial notice of:

Geographical facts relating to counties, cities, and towns, see supra § 33.

Rural and urban conditions see infra § 95.

Municipal ordinances or by-laws see supra § 27.

Charters supersede statutes

"Courts take judicial cognizance of the charter provisions of cities under a charter form of government, for the reason that by both the Constitution and statutes such charter provisions, when not inconsistent with the Constitution, supersede the statutes pertaining to municipal affairs, and thereby become the superior law of the state in matters pertaining to municipal affairs, and the courts are charged with knowledge of such provisions."—Perrine v. Bonaparte, 282 P. 332, 140 Okl. 165—Pitts v. Allen, 281 P. 126, 127, 138 Okl. 295.

City court

N.Y.—Millspaugh v. Paduch, 20 N.Y.S.2d 756, 174 Misc. 365.

Confirmed by statute

Supreme court could take judicial notice of city charter confirmed by statute which charter was filed with clerk of circuit court, notwithstanding charter was not re-enacted in hæc verba in statute.—Ramsey v. City of Kissimmee, 149 So. 553, 111 Fla. 387.

Lack of power

It may be judicially noticed that a city may not engage in the business of telephone service.—Pacific Telephone & Telegraph Co. v. City of Seattle, D.C.Wash., 14 F.2d 877.

Particular powers noticed

(1) Power to condemn property.—Tampa Shipbuilding & Engineering Co. v. City of Tampa, 136 So. 458, 102 Fla. 549.

(2) Power to regulate traffic.—Douglass v. Sapotnick, 171 So. 765, 126 Fla. 753, followed in 173 So. 926, 131 Fla. 246.

Where original trial was in municipal court

Ohio.—Jackson v. Copelan, 198 N.E. 596, 50 Ohio App. 414.

18. U.S.—Chicago, M. & St. P. Ry. Co. v. City of Spencer, D.C.Iowa, 283 F. 824.

Ala.—C. C. Snyder Cigar & Tobacco Co. v. Stutts, 107 So. 73, 214 Ala. 132—Jones v. Fields, 150 So. 914, 25 Ala.App. 570.

Cal.—L. A. Paving Co. v. Los Angeles Foundry Co., 186 P. 593, 181 Cal. 685—Rich v. McClure, 248 P. 275, 78 Cal.App. 209.

Fla.—Ramsey v. City of Kissimmee, 149 So. 553, 111 Fla. 387.

Ill.—Village of Broadview v. Dianish, 167 N.E. 106, 335 Ill. 299, appeal dismissed and certiorari denied Dianish v. Village of Broadview, 50 S.Ct. 67, 280 U.S. 518, 74 L.Ed. 588.

Ind.—City of Hobart v. State, 154 N.E. 384, 198 Ind. 574.

Ky.—City of London v. Barnett, 15 S.W.2d 286, 228 Ky. 471.

La.—Tiller v. City of Monroe, 5 La.App. 473.

Miss.—Owen v. Anderson, 80 So. 386, 119 Miss. 66.

Tenn.—Bristol Telephone Co. v. Weaver, 243 S.W. 299, 146 Tenn. 511—Stricklin v. Louisville & N.R. Co., 2 Tenn.App. 141.

23 C.J. p 91 note 47, p 92 note 49.

Few unincorporated towns

The fact that there are very few unincorporated towns in the state may be judicially noticed.—Southern Grocery Stores v. South Carolina Tax Commission, D.C.S.C., 55 F.2d 931.

In Texas

(1) Judicial notice has been taken that particular cities are municipal corporations.—Thomason v. Pacific Mut. Life Ins. Co. of California, Civ.App., 74 S.W.2d 162, error refused—Williams v. Chew, Civ.App., 19 S.W.2d 68.

(2) The court has refused to take judicial notice that particular towns are incorporated.—Thomason v. Pacific Mut. Life Ins. Co. of California, supra—Ammerman v. Bourland, Civ.App., 230 S.W. 804.

19. Mo.—City of Hopkins v. Kansas City, St. J. & C. B. R. Co., 79 Mo. 98.

N.M.—State v. City of Albuquerque, 249 P. 242, 248, 31 N.M. 576, citing **Corpus Juris.**

23 C.J. p 91 note 48.

Town or city

Where no act of incorporation was called to supreme court's attention, court could not take judicial notice that certain place was town or city—Winborne v. Mackey, 174 S.E. 577, 206 N.C. 554.

20. N.M.—State v. City of Albuquerque, 249 P. 242, 31 N.M. 576.

21. Iowa.—Newland v. Iowa R., etc., Co., 159 N.W. 244, 179 Iowa 228.

23 C.J. p 92 note 50.

22. Tex.—Davis v. Border Mortg. Co., Civ.App., 281 S.W. 642.

23 C.J. p 92 note 51.

23. Fla.—State ex rel. Norris v. Chancey, 176 So. 78, 129 Fla. 194, 113 A.L.R. 576.

23 C.J. p 92 note 52.

24. Or.—Lechleidner v. Carson, 68 P.2d 482, 156 Or. 636—Askay v. Maloney, 179 P. 899, 92 Or. 563.

Tex.—State ex rel. Brauer v. City of Del Rio, Civ.App., 92 S.W.2d 287—Real Estate Land Title & Trust Co. v. Beryle, Civ.App., 88 S.W.2d 767—Smith v. City of Port Arthur, Civ.App., 62 S.W.2d 385—City of Sweetwater v. Foster, Civ.App., 37 S.W.2d 799—Cameron v. City of Waco, Civ.App., 8 S.W.2d 249.

23 C.J. p 92 note 53.

Adoption under Home Rule Amendment

Court of civil appeals judicially knows that a city charter was adopted under Home Rule Amendment to Constitution.—Magnolia Petroleum Co. v. Beck, Tex.Civ.App., 41 S.W.2d 488, error dismissed.

In California

By virtue of the state constitution, when a city charter ratified by the people of the city has been submitted to the legislature and has been approved by concurrent resolution and where the copies of the charter have been filed as required, the courts must take judicial notice of the charter.—Taylor v. Cole, 257 P. 40, 201 Cal. 327—Spaulding v. Desmond, 207 P. 896, 188 Cal. 783—Tilden v. Blood, 58 P.2d 381, 14 Cal.App.2d 407—Coen v. City of Los Angeles, 234 P. 426, 70 Cal.App. 752.

frame their own charters, judicial notice may be taken whether a particular city framed its own charter or was organized under the general laws.[25] The existence within the state of towns having a particular form of government has been judicially noticed.[26]

Various matters relating to the government of municipalities and its administration have been judicially noticed,[27] but such facts not falling within the usual rules entitling them to be so noticed will not be judicially noticed.[28]

§ 36. Executive Department in General

Judicial notice may be taken of public records of general public interest.

Courts may take judicial cognizance of public records of general public interest,[29] including public records in the federal and state executive departments,[30] and records of other public officers,

25. Mo.—Kansas City ex rel. Barlow v. Robinson, 17 S.W.2d 977, 322 Mo. 1050, dissenting opinion, 32 S.W.2d 1075—State ex rel Gentry v. Curtis, 4 S.W.2d 467, 319 Mo. 316.

26. N.J.—Winne v. Casale, 126 A. 324, 100 N.J Law 291, affirming Winne v. Cassale, 123 A. 533, 99 N.J Law 345.

27. **Particular matters noticed**

(1) Facts relating to city fire departments.—Osborn v. Cohen, 4 N.E.2d 289, 272 N.Y. 55, 106 A.L.R. 1468—Deth v. Castimore, 281 N.Y.S. 114, 245 App.Div. 156, modifying 278 N.Y.S. 587, 154 Misc. 906.

(2) Facts relating to municipal power and water systems.

Cal.—City of Los Angeles v. City of Huntington Park, 89 P.2d 702, 32 Cal App.2d 253.

La.—Gisclard v. City of Donaldsonville, 106 So. 287, 159 La. 738.

Tex.—South Texas Public Service Co. v. Jahn, Civ.App., 7 S.W.2d 942, error refused.

Va.—Alexandria Water Co. v. City Council of Alexandria, 177 S.E. 454, 163 Va. 512.

(3) Facts relating to the zoning of cities.

U.S.—Cromwell-Franklin Oil Co. v. Oklahoma City, D.C.Okl., 14 F.Supp. 370.

Cal.—Miller v. Board of Public Works of City of Los Angeles, 234 P. 381, 195 Cal. 477, 38 A.L.R. 1479, error dismissed 47 S.Ct. 460, 273 U.S. 781, 71 L.Ed. 889.

Wis.—Higbee v. Chicago, B. & Q. R. Co., 292 N.W. 320, 235 Wis. 91, 128 A.L.R. 734.

(4) Great diversity of a city's proprietary and governmental interests.—Musto-Keenan Co. v. City of Los Angeles, 34 P.2d 506, 139 Cal. App. 506.

(5) Public operations of particular city.—Williams v. City of Birmingham, 121 So. 14, 219 Ala. 19.

(6) That great majority of municipal corporations in the state perform only governmental functions.—City of Bowling Green v. Bandy, 270 S.W. 837, 208 Ky. 259.

(7) That municipal waterworks system is essential to operation of sewerage system and that two systems bear real relationship to each other in some ways.—Roach v. City of Columbia, 174 S.E. 461, 172 S.C. 478.

(8) Other matters.

Fla.—Carey v. Town of Gulfport, 191 So. 45, 140 Fla. 40, followed in Town of Gulfport v. Certain Lands, 191 So. 46, 140 Fla. 44, 191 So. 47, two cases, 140 Fla. 45, 46, and 191 So. 48, 140 Fla. 47—State ex rel. Tatham v. Coleman, 166 So. 221, 122 Fla. 819.

Ga.—Neese v. City of Atlanta, 165 S.E. 165, 45 Ga.App. 376.

Ill.—Stripe v. Yager, 180 N.E. 915, 348 Ill. 362.

Ind.—McLeaster v. City of Lawrenceburg, 12 N.E.2d 389, 104 Ind.App. 572, followed in Fitch v. City of Lawrenceburg, 12 N.E.2d 391, 104 Ind.App. 704.

Ky.—Fowler v. Obier, 7 S.W.2d 219, 224 Ky. 742.

La.—Baton Rouge Waterworks Co. v. Louisiana Public Service Commission, 100 So. 710, 156 La. 539.

N.J.—Linwood Co. v. Gardner, 153 A. 99, 9 N.J.Misc. 139.

N.Y.—People ex rel. Neary Memorials v. Harvey, 274 N.Y.S. 789, 242 App.Div. 831—Moore v. Murphy, 14 N.Y.S.2d 421, 171 Misc. 677—Rosenthal v. McGoldrick, 5 N.Y.S.2d 531, 167 Misc. 673, reversed on other grounds 6 N.Y.S.2d 360, 254 App.Div. 859, affirmed 18 N.E.2d 315, 279 N.Y. 688, reargument denied 19 N.E.2d 660, 280 N.Y. 11.

Pa.—Suermann v. Hadley, 193 A. 645, 327 Pa. 190.

Tex.—Loard v. Como, Civ.App., 137 S.W.2d 880, error refused—City of Port Arthur v. Young, Civ.App., 37 S.W.2d 385, error refused—Moon v. Alred, Civ.App., 277 S.W. 787.

Vt.—E. B. & A. C. Whiting Co. v. City of Burlington, 175 A. 35, 106 Vt. 446.

Wash.—Petersen v. City of Seattle, 71 P.2d 668, 191 Wash. 537.

23 C.J. p 90 note 31 [a] (1).

28. Minn.—State ex rel. Remick v. Clousing, 285 N.W. 711, 205 Minn. 296, 123 A.L.R. 465.

S.D.—Beers v. City of Watertown, 177 N.W. 502, 43 S.D. 14.

29. Fla.—Conyers v. State, 123 So. 817, 98 Fla. 417.

23 C.J. p 169 note 39.

30. U.S.—Chicago, M., St. P. & P. R. Co. v. Hedges, D.C.Wash., 5 F. Supp. 752.

Cal.—Allen v. Industrial Accident Commission, 43 P.2d 787, 3 Cal.2d 214—Wood v. Kennedy, 3 P.2d 366, 117 Cal.App. 53.

Fla.—State ex rel. Douglas v. Cone, 182 So. 449, 133 Fla. 17—Grand Lodge, Knights of Pythias, of North America, South America, Europe, Asia, Africa, and Australia, Jurisdiction of Florida, v. Moore, 163 So. 108, 120 Fla. 761.

W.Va.—Charleston Nat. Bank v. Fox, 194 S.E. 4, 119 W.Va. 438.

23 C.J. p 169 note 40, p 170 note 42

Approval of bill

Supreme court takes judicial notice of executive record of governor's approval of bill passed by legislature.—State ex rel. Thompson v. Davis, 169 So. 199, 124 Fla. 592.

Land Office

(1) Under a statute providing that courts take judicial notice of the public and private official acts of the executive departments of the state and of the United States, notice will be taken of the records and documents of the General Land Office of the United States.

Cal.—Arnold v. Universal Oil Land Co., App., 114 P.2d 408—People v. Tulare Packing Co., 78 P.2d 763, 25 Cal.App.2d 717—Livermore v. Beal, 64 P.2d 987, 18 Cal.App.2d 535, certiorari denied 58 S.Ct. 32, 302 U.S. 712, 713, 82 L.Ed. 550, two cases, rehearing denied 58 S.Ct. 260, 302 U.S. 777, 82 L.Ed. 601 and 58 S.Ct. 261, 302 U.S. 778, 82 L.Ed. 601, certiorari denied Boyd v. Elliott, 58 S.Ct. 32, 302 U.S. 712, 82 L.Ed. 550, rehearing denied 58 S.Ct. 260, 302 U.S. 777, 82 L.Ed. 601, certiorari denied Kreiss v. Elliott, 58 S.Ct. 32, 302 U.S. 712, 82 L.Ed. 550, rehearing denied 58 S.Ct. 261, 302 U.S. 778, 82 L.Ed. 601—Sheehan v. Vedder, 292 P. 175, 108 Cal.App. 419.

Or.—Frizeen v. Swanton, 34 P.2d 939, 148 Or. 250.

23 C.J. p 170 note 45.

(2) This notice includes notice of grants of mineral rights to defend-

committees, and administrative bodies,[31] at least to the extent that such records are required by law.[32] In determining the question of the validity of the expenditure of public officers, the court may take judicial notice of the public records of such officers.[33] In some jurisdictions the courts do not take judicial notice of records in the county recorder's office,[34] or of such facts concerning them as that they have been destroyed by fire.[35]

Judicial notice may be taken of matters of common knowledge relating to the manner of keeping public records.[36]

Judicial knowledge is confined to the record when an official act of the executive department is called in question, and such record is authentic and complete in itself.[37] The court has no power to take judicial knowledge of a state of facts existing in pais that will destroy a public record and leave the public officers, whose duty it is to make records of the transactions of their offices, under suspicion of fraudulent conduct.[38]

Judicial notice of judicial records is discussed infra § 50.

§ 37. Officers and Official Position and Authority

Judicial notice will be taken of public officers and official position and authority within the jurisdiction of the court.

It has been declared that a court is presumed to know all public officers in civil affairs within its jurisdiction.[39] The authority of public officers as prescribed by the constitution or a public statute is judicially known to the courts.[40] Where, how-

ants by United States made by secretary of interior and commissioner of General Land Office of the United States.—Livermore v. Beal, supra.

Secretary of state

(1) Judicial notice will be taken of the records in the office of the secretary of state.

Ark.—Harger v. Oklahoma Gas & Electric Co., 111 S.W.2d 485, 195 Ark. 107, certiorari denied 58 S. Ct. 1038, 304 U.S. 569, 82 L.Ed. 1534.

Fla.—State ex rel. Stringer v. Lee, 2 So.2d 127—Cherry Lake Farms v. Love, 176 So. 486, 129 Fla. 469—State ex rel. Lane Drug Stores v. Simpson, 166 So. 227, 122 Fla. 582, affirmed 166 So. 262, 122 Fla. 670, followed in State ex rel. Lane Drug Stores v. Carswell, 166 So. 249, 122 Fla. 639, rehearing denied 166 So. 574, 122 Fla. 700, and rehearing denied State ex rel. Lane Drug Stores v. Simpson, 166 So. 574, 122 Fla. 700, certiorari denied Simpson v. State of Florida ex rel. Lane Drug Stores, 57 S.Ct. 15, 299 U.S. 543, 81 L.Ed. 399.

Miss.—Mississippi-Gulfport Compress & Warehouses v. Public Service Commission, 196 So. 793, 189 Miss. 166.

Mont.—State ex rel. Casey v. Brewer, 88 P.2d 49, 107 Mont. 550.

Or.—Christman v. Salway, 205 P. 541, 103 Or. 666.

Tenn.—Hanover v. Boyd, 121 S.W. 2d 120, 173 Tenn 426.

W.Va.—Charleston Nat. Bank v. Fox, 194 S.E. 4, 119 W.Va. 438.

Wis.—In re McKenzie's Estate, 287 N.W. 695, 232 Wis. 425—Hillier v. Lake View Memorial Park, 243 N. W. 406, 208 Wis. 614.

23 C.J. p 170 note 41.

(2) This includes notice of a bill as filed in such office.—State ex rel. Gibbs v. Couch, 190 So. 723, 139 Fla. 353.

(3) Conversely, the court will notice that a particular senate bill was not filed in such office as law.—Carnley v. Brunson, 149 So. 87, 227 Ala. 197.

(4) Such records may also be noticed in determining whether a statute was passed in accordance with constitutional requirements.

Ariz.—Cox v. Stults Eagle Drug Co., 21 P.2d 914, 42 Ariz. 1.

Fla.—Harrison v. Wilson, 163 So. 233, 120 Fla. 771.

Okl.—Dyer v. Shaw, 281 P. 776, 139 Okl. 165

31. D.C.—Fletcher v. Jones, 105 F. 2d 58, 70 App.D.C. 179, certiorari denied 60 S.Ct. 116, 308 U.S. 555, 84 L.Ed. 467.

Particular files and records noticed

(1) Files of public service commission.—Wisconsin Power & Light Co. v. City of Beloit, 254 N.W. 119, 215 Wis. 439, followed in 254 N.W. 126, 215 Wis. 454.

(2) Patent Office records.—Tolfree v. Wetzler, D.C.N.J., 22 F.2d 214, reversed on other grounds, C.C.A., 25 F.2d 553, certiorari denied Wetzler v. Tolfree, 49 S.Ct. 28, 278 U.S. 628, 73 L.Ed. 547.

(3) Records in office of insurance commissioner.—Gully v. Lumbermen's Mut. Casualty Co., 168 So. 609, 176 Miss. 388, overruling suggestion of error 166 So. 541, 176 Miss. 388.

(4) Records of bank commissioner.—McCrary v. Schenebeck, 87 S. W.2d 572, 191 Ark. 698, affirmed Schenebeck v. McCrary, 56 S.Ct. 672, 298 U.S. 36, 80 L.Ed. 1031.

Particular records held not subject of judicial notice

(1) Files of the General Land Office with respect to a railroad's right-of-way map.—Great Northern Ry. Co. v. Steinke, 43 S.Ct. 316, 261 U.S. 119, 67 L.Ed. 564, reversing 183 N. W. 1013, 48 N.D. 112.

(2) Penitentiary records.—Essick v. Essick, 167 So. 420, 175 Miss. 412.

32. Ark.—State ex rel. Holt v. State Board of Education, 112 S.W.2d 18, 195 Ark. 222.

33. Utah.—Pleasant Valley Coal Co. v. Salt Lake County, 48 P. 1032, 15 Utah 97.

34. N.M.—Blake v. Cavins, 185 P. 374, 25 N.M. 574.

35. N.M.—Blake v. Cavins, supra.

36. **Label**

It is a matter of common knowledge that it is the general practice in keeping public records to have on each book a label designating the character of instruments recorded in it.—Guerin v. Sunburst Oil & Gas Co., 218 P. 949, 68 Mont. 365.

Town records

That town records are often lost is common knowledge.—People ex rel. Minard v. Donovan, 240 N.Y.S. 766, 228 App.Div. 596.

37. Ala.—State v. Joseph, 57 So. 942, 175 Ala. 579, Ann.Cas.1914D 248.

Fla.—Amos v. Gunn, 94 So. 615, 84 Fla. 285.

38. Fla.—Amos v. Gunn, supra.

39. Ill.—Rockford v. Mower, 102 N. E. 1032, 259 Ill. 604.

40. Ala.—Greene v. Boaz, 47 So. 255, 157 Ala. 68.

Ind.—Daily v. State, 87 N.E. 4, 171 Ind. 646, transferred, see 86 N.E 498, 42 Ind.App. 690.

Mo.—State v. Gates, 67 Mo. 139.

Judicial notice of:

Authority of notary see Affidavits § 47.

Official character of person taking acknowledgment see Acknowledgments § 166.

Powers of officers to take affidavits see Affidavits §§ 43, 110.

School district trustees

Judicial notice will be taken of general nature of trusteeship of

ever, the burden of the action is usurpation of judicial power, no basis exists for taking judicial notice of the law imposing the duties.[41] The increase of responsibilities of the state executive officers since the framing of the state constitution has been judicially noticed.[42]

Judicial notice of judges, justices, and court officials will be hereinafter considered in § 48.

The establishment, under federal laws, of labor forums for the equitable adjustment of labor disputes has been judicially noticed.[43]

Location or residence. Judicial notice may be taken, where such is the case, that a federal administrative body is located in the District of Columbia,[44] and that the official residence of a federal officer is in the District of Columbia.[45] Likewise, state courts may take judicial notice that certain state officers are located in the state capital.[46]

Federal officers. The courts take judicial notice of the powers and duties of the president of the United States.[47] They judicially know who is or was the executive head of the United States;[48] the principal officers of state in the national government;[49] the heads of departments and of bureaus therein,[50] and their chief subordinates;[51] the permanent[52] or pro tempore[53] commissioner of patents; the commissioner of the general land office,[54] his pro tempore substitute,[55] and principal subordinate officials;[56] the personnel of the United States tariff commission;[57] the collector of internal revenue and his deputy;[58] the comptroller of the currency or a deputy acting as comptroller,[59] and facts of common knowledge concerning his agents;[60] and United States consuls.[61] The federal courts also have power to take judicial notice of the official capacities of certain individuals as officers and employees of the United States,[62] as well as the extent of their authority and the scope of their duties.[63]

The fact that a federal officer must act through his authorized representatives, particularly in war time, and that a contract must contemplate such

school district trustees.—American Ins. Co. v. Newberry, 112 So. 195, 215 Ala. 587.

41. Mo.—State ex rel. United States Fidelity & Guaranty Co. v. Harty, 208 S.W. 835, 276 Mo. 583.
23 C.J. p 97 note 55.

42. Or.—Jory v. Martin, 56 P.2d 1093, 153 Or. 278.

43. N.J.—Bayonne Textile Corporation v. American Federation of Silk Workers, 168 A. 799, 114 N.J.Eq 307, modified on other grounds 172 A. 551, 116 N.J.Eq. 146, 92 A.L.R. 1450.

44. U.S.—Juell v. Commissioner of Immigration & Naturalization, D.C.N.Y., 37 F.Supp. 533, modified on other grounds, C.C.A., 121 F.2d 728—International Molders Union of North America v. National Labor Relations Board, D.C.Pa., 26 F Supp. 423.

45. U.S.—Caplis v. Helvering, D.C. N.Y., 4 F.Supp. 181—Klein v. Hines, D.C.Ill., 1 F.R.D. 649.

46. Wis.—State ex rel. Dinneen v. Larson, 284 N.W. 21, 231 Wis. 207, rehearing denied 286 N.W. 41, 231 Wis. 207.
23 C.J. p 101 note 84.

47. Canal Zone.—Canal Zone v. Mena, 2 Canal Zone 170.

48. Fla.—Liddon v. Hodnett, 22 Fla. 442.

49. D.C.—Backus Portable Steam Heater Co. v. Simonds, 2 App.D.C. 290.
La.—Herriot v. Broussard, 4 Mart. N.S. 260.

50. Kan.—Lyman Flood Prevention Ass'n v. City of Topeka, 106 P.2d 117, 152 Kan. 484.
Okl.—In re Son-se-gra's Will, 189 P. 865, 78 Okl. 213.
23 C.J. p 98 note 17.
At certain time
D.C.—Mellon v. Brewer, 18 F.2d 168, 57 App.D.C. 126, 53 A.L.R. 1519, certiorari denied Brewer v. Mellon, 48 S.Ct. 28, 275 U.S. 530, 72 L.Ed. 409.

51. U.S.—U. S. ex rel. Petach v. Phelps, C.C.A.Vt., 40 F.2d 500.
Okl.—In re Son-se-gra's Will, 189 P. 865, 78 Okl. 213.
Second assistant secretary of labor
A federal court will take judicial notice that the person signing a deportation warrant as second assistant secretary of labor was such officer.—MacKusick v. Johnson, C.C. A.Mass., 3 F.2d 398.

52. D.C.—Backus Portable Steam Heater Co. v. Simonds, 2 App.D.C. 290.

53. U.S.—New York & M. L. R. Co. v. Winans, Pa., 17 How. 30, 15 L. Ed. 27.

54. Fla.—Liddon v. Hodnett, 22 Fla. 442.

55. La.—Barton v. Hempkin, 19 La. 510.

56. Ala.—Bullock v. Wilson, 5 Port. 338.
23 C.J. p 98 note 22.

57. **At particular time**
U.S.—Frischer & Co. v. Bakelite Corporation, Cust. & Pat.App., 39 F.2d 247, certiorari denied Frischer & Co. v. Tariff Commission & Bakelite Corporation, 51 S.Ct. 29, 282 U.S. 852, 75 L.Ed. 755.

58. Pa.—Lerch v. Snyder, 4 A. 336, 112 Pa. 161.

59. D.C.—Roth v. Baldwin, 74 F.2d 1003, 64 App.D.C. 90, certiorari denied 55 S.Ct. 649, 295 U.S. 737, 79 L.Ed. 1684.
23 C.J. p 98 note 23.

60. **National bank conservator**
Court takes judicial cognizance that national bank conservator is usually a temporary agent and in usual course of events is discharged and affairs of bank returned to officers thereof or to a receiver.—Kingsley v. O'Neal, 173 So. 445, 127 Fla. 610.

61. **At Calcutta**
The supreme court can take judicial notice of the fact that the consul general of the United States, who is stationed at Calcutta, is the principal diplomatic or consular officer resident in India, and also of the person holding that office.—Collins v. Loisel, La., 42 S.Ct. 469, 259 U.S. 309, 66 L.Ed. 956.

62. D.C.—Booth v. Fletcher, 101 F. 2d 676, 69 App.D.C. 351, certiorari denied, Fletcher v. Booth, 59 S.Ct 835, 307 U.S. 628, 83 L.Ed. 1511.

63. D.C.—Cooper v. O'Connor, 99 F 2d 135, 69 App.D.C. 100, 118 A.L.R. 1440, followed in 99 F.2d 143, 69 App.D.C. 108, certiorari denied 59 S.Ct. 146, 305 U.S. 642, 83 L.Ed. 414, rehearing denied 59 S.Ct. 241, 305 U.S. 673, 83 L.Ed. 436, rehearing denied 59 S.Ct. 1030, 307 U.S. 651, 83 L.Ed. 1529, certiorari denied 59 S.Ct. 146, 305 U.S. 643, 83 L.Ed. 414, rehearing denied 59 S.Ct. 242, 305 U.S. 673, 83 L.Ed. 436, and rehearing denied 59 S.Ct. 1035, 307 U.S. 651, 83 L.Ed. 1529.

representation may be judicially noticed.[64]

State officers and boards. It is well settled that the courts of the state take judicial notice of the public officers of the state and the source of their authority.[65] The courts of a state judicially know who is, or was at any time, the chief executive thereof,[66] or of any government formerly exercising sovereignty therein.[67] Both state[68] and federal[69] courts take judicial notice of the secretary of state. Other officials,[70] whether appointed by the executive[71] or elected by the legislature,[72] and even an incumbent of an office at a remote date,[73] have been judicially recognized, such as state agents,[74] attorneys-general,[75] state auditors,[76] auditors general and other deputies,[77] tax officials,[78] registers of the land office,[79] commissioners of excise,[80] bank commissioners,[81] insurance commissioners,[82] commissioners of deeds,[83] and notaries.[84] The date of

64. U.S.—Dayton Airplane Co. v. U. S., C.C.A.Ohio, 21 F.2d 673

65. Ala.—State ex rel. Glenn v. Wilkinson, 124 So. 211, 220 Ala. 172.
Tenn.—Gulf Refining Co. v. Frazier, 83 S.W.2d 285, 19 Tenn.App. 76.

Conversely, the court may take judicial notice that named persons appointed as attorneys for state under contract were not officials of state authorized by law to represent state. —MacDougall v. Board of Land Com'rs of Wyoming, 49 P.2d 663, 48 Wyo. 493.

All commissioned officers
Ala.—Davis v. Teague, 125 So. 51, 220 Ala. 309, appeal dismissed 50 S.Ct. 248, 281 U.S. 695, 74 L.Ed. 1123.
Ga.—Marshall v. Walker, 170 S.E. 267, 47 Ga.App. 195.
23 C.J. p 97 note 79.

Date of creation
Ala.—Prudential Casualty Co. v. Kerr, 80 So. 97, 202 Ala. 259.
23 C.J. p 97 note 57.

Officers created by statute
Ill.—People v. City of Chicago, 158 N.E. 424, 327 Ill. 62.

Official roster
Court may take judicial notice of official roster of state officers in determining character of officer.—State v. Blake, 169 N.E. 599, 121 Ohio St. 511.

66. Ala.—Oberhaus v. State, 55 So. 898, 173 Ala. 483.
23 C.J. p 97 notes 58, 59.

Lieutenant governor
The courts will take judicial notice that one who signed an extradition warrant as acting governor was the duly elected and qualified lieutenant governor, and had the authority, and was required, in the absence of the governor, to act as such.—Ex parte Roselle, 222 S.W. 248, 87 Tex.Cr. 470.

67. La.—Jones v. Gale, 4 Mart. 635 —Hayes v. Berwick, 2 Mart. 138, 5 Am.D. 727.

68. Ala.—Prudential Casualty Co. v. Kerr, 80 So. 97, 202 Ala. 259.

69. U.S.—Richardson v. McChesney, Ky., 31 S.Ct. 43, 218 U.S. 487, 54 L.Ed. 1121.
23 C.J. p 97 note 62.

70. Ala.—Buckner v. Graves, 98 So. 22, 210 Ala. 294.
23 C.J. p 97 note 63.

Adjutant general of militia
The supreme court takes judicial notice that the adjutant general is the principal staff officer of the organized militia of the state.—Wright v. White, Or., 110 P.2d 948.

Clerk of senate
Facts of common knowledge as to the public esteem in which a man was held, by reason of his public service of exceptional merit as clerk of the senate, were judicially noticed.—In re Opinion of the Justices, 136 N.E. 157, 240 Mass. 616, 23 A.L.R. 610.

71. Ala.—Aiken v. McMillan, 106 So. 150, 213 Ala. 494—Colgin v. State Bank, 11 Ala. 222.

Guardian ad litem
Reviewing court takes notice of fact that certain person was designated by governor to serve as guardian ad litem for certain county.—Jones v. Henderson, 153 So. 214, 228 Ala. 273.

72. Ala.—Colgin v. State Bank, 11 Ala. 222.
Tenn.—Bennett v. State, Mart. & Y. 133.

73. Ill.—Fisk v. Hopping, 48 N.E. 323, 169 Ill. 105.
23 C.J. p 97 note 66.

74. Tex.—Roach v. Fletcher, 32 S.W. 585, 11 Tex.Civ.App. 225.

Counsel for state
In action by state to collect compensation premiums and penalties on behalf of department of labor and industries, court could not take judicial notice that counsel for state had been admitted to practice and were employed by department for purpose of making such collections. —State v. Gattavara, 47 P.2d 18, 182 Wash. 325.

75. S.D.—State v. Reeves, 184 N.W. 1007, 44 S.D. 612.
23 C.J. p 97 note 68.

Deputies
Supreme court takes judicial notice of practice in attorney general's office to apply term "Assistant Attorney General" to all deputies exercising powers of attorney general.—State ex rel. Colorado River Commission v. Frohmiller, 52 P.2d 483, 46 Ariz. 413.

76. Idaho.—Doolittle v. Eckert, 24 P.2d 36, 53 Idaho 384.
Ind.—Daily v. State, 87 N.E. 4, 171 Ind. 646, transferred, see 86 N.E. 498, 42 Ind.App. 690.

77. Mich.—People v. Johr, 22 Mich. 461.

78. N.Y.—New York v. Vanderveer, 86 N.Y.S. 659, 91 App.Div. 303.

79. Tenn.—State v. Cooper, Ch., 53 S.W. 391.

80. N.Y.—Matter of Decatur St., 117 N.Y.S. 855, 133 App.Div. 321.

81. Ala.—Colgin v. State Bank, 11 Ala. 222.

Identity
Tex.—Saur v. South Texas Bank & Trust Co., Civ.App., 85 S.W.2d 265, 266, error dismissed, citing **Corpus Juris.**

Superintendent of banks
Court takes judicial notice of person occupying position of superintendent of banks and that such person is given authority to collect assets of insolvent bank taken over for liquidation.—Toler v. Mobley, 159 S.E. 387, 43 Ga.App. 745.

82. Ala.—Prudential Casualty Co. v. Kerr, 80 So. 97, 202 Ala. 259.
Minn.—State v. Brotherhood of American Yeomen, 126 N.W. 404, 111 Minn. 39.

Superintendent of insurance
N.Y.—Hakala v. Van Schaick, 12 N.Y.S.2d 928, 171 Misc. 418.

83. Ill.—Fisk v. Hopping, 48 N.E. 323, 169 Ill. 105.

84. Or.—Christman v. Salway, 205 P. 541, 103 Or. 666.
23 C.J. p 97 note 77.

Notary public is state officer, and this court will take judicial notice of his accession, his official seal, and his continuance in office, and, for the purpose of informing itself in relation to such facts, will refer to the official records of the state department.—Butts v. Purdy, 125 P. 313, 127 P. 25, 63 Or. 150.

accession to office,[85] the term of office[86] and expiration thereof,[87] and the salary paid[88] are likewise noticed. Some,[89] but not other,[90] courts take judicial notice of de facto state officers.

The creation of a state board will be judicially noticed.[91] A state board created and named by statute will be judicially noticed apart from the titles to office of its individual members.[92] The fact that certain state officials are, by virtue of their office, members of certain state boards will be judicially noticed.[93] Judicial notice may be taken that a certain board is a state bureau, and that the officers thereof are public officers, making its employees state employees.[94] While the court may judicially know that a certain person is, and has been for some time, secretary of a state commission, yet it cannot know that he was secretary at an unknown time when certain certificates were made.[95]

County officers. Judicial notice is taken of county administrative officers within the jurisdiction of the court,[96] such as auditors,[97] board of education,[98] commissioners,[99] coroner,[1] health officer,[2] supervisors,[3] registers,[4] jail keepers,[5] tax collectors and

85. Ala.—Davis v. Teague, 125 So. 51, 220 Ala. 309, appeal dismissed 50 S.Ct. 248, 281 U.S. 695, 74 L.Ed. 1123.
Miss.—Lindsey v. Attorney-General, 33 Miss. 508, 528.

86. Ga.—Patten v. Miller, 8 S.E.2d 757, 190 Ga. 123.
Tex.—Houston Printing Co. v. Tennant, Civ.App., 76 S.W.2d 762, 763, citing **Corpus Juris,** and certified questions answered 39 S.W.2d 1089, 120 Tex. 539, mandamus denied Houston Printing Co. v. McClendon, 76 S.W.2d 764, 124 Tex. 399.
23 C.J. p 97 note 81.

87. Ala.—Davis v. Teague, 125 So. 51, 220 Ala. 309, appeal dismissed 50 S.Ct. 248, 281 U.S. 695, 74 L. Ed. 1123.
Nev.—State v. Carson Valley Bank, 47 P.2d 384, 56 Nev. 133.
23 C.J. p 97 note 82.

88. Tex.—Pink v. State, Civ.App., 105 S.W.2d 265, affirmed Carpenter v. Pink, 124 S.W.2d 981, 133 Tex. 82.

89. N.Y.—New York v. Vanderveer, 86 N.Y.S. 659, 91 App.Div. 303.
Tex.—Roach v. Fletcher, 32 S.W. 585, 11 Tex.Civ.App. 225.
Wis.—State v. Williams, 5 Wis. 308, 68 Am.D. 65.

90. Ala.—Birmingham v. Edwards, 77 So. 841, 201 Ala. 251—Williams v. Finch, 41 So. 834, 148 Ala. 674.

91. Tex.—Houston Printing Co. v. Tennant, Civ.App., 76 S.W.2d 762, 763, citing **Corpus Juris,** and certified questions answered 39 S.W. 2d 1089, 120 Tex. 539, mandamus denied Houston Printing Co. v. McClendon, 76 S.W.2d 764, 124 Tex. 399.

92. N.Y.—State Bd. of Pharmacy v. Bellinger, 122 N.Y.S. 651, 138 App. Div. 12.

93. Mont.—State v. Rouleau, 219 P. 1096, 68 Mont. 520.
23 C.J. p 97 note 86.

94. S.D.—Van v. Gunderson, 225 N.W. 54, 55 S.D. 95.

95. Ala.—Louisville & N. R. Co. v. Boggs, 74 So. 337, 199 Ala. 225.

96. Ala.—Earp v. Bishop, 132 So. 36, 222 Ala. 235.
Cal.—In re Spiers, 59 P.2d 838, 840, 15 Cal.App.2d 487, citing **Corpus Juris.**
Ky.—Commonwealth v. McGoodwin, 268 S.W. 548, 206 Ky. 762.
23 C.J. p 98 note 90.

Judicial notice has been taken:
(1) Of law fixing terms of office of county officers.—Board of Com'rs of Kingfisher County v. Shutler, 281 P. 222, 139 Okl. 52.

(2) That several counties in Arkansas adopted local acts fixing number of county officers and their salaries.—Tindall v. Searan, 90 S.W.2d 476, 192 Ark. 173.

(3) That the larger the population of a county the greater is the responsibility of county officers.—State ex rel. Baker v. Gray, 152 So. 620, 133 Fla. 23.

(4) That there are a number of counties whose officials are paid salaries, while in other counties officials are paid fees for their services.—Conway County Bridge Dist. v. Fullerton, 117 S.W.2d 1065, 196 Ark. 413.

(5) Other matters see 23 C.J. p 98 note 90 [a].

97. Minn.—State v. Gut, 13 Minn. 341.
23 C.J. p 98 note 91.

Quasi-state officer
It is common knowledge that the state pays two thirds of the salaries of county auditors and that they are therefore quasi-state officers.—Plowden v. Beattie, 193 S.E. 651, 185 S.C. 229.

98. **Body corporate**
Judicial cognizance is taken that board of public instruction is body corporate, with only statutory powers.—State ex rel. Glisson v. Board of Public Instruction for Duval County, 123 So. 545, 98 Fla. 81.

County commissioner
It is matter of common knowledge that county commissioner of schools must have educational qualifications not possessed by ordinary citizen to perform duties of his office properly —Tedrow v. McNary, 258 N.W. 868, 270 Mich. 332.

Expiration of terms of office
Fla.—State ex rel. Glisson v. Board of Public Instruction for Duval County, 123 So. 545, 98 Fla. 81.

Powers
Fla.—State ex rel. Glisson v. Board of Public Instruction for Duval County, 123 So. 545, 98 Fla. 81.

Number of members
Ark.—School Dist. No. 18 v. Grubbs Special School Dist., 43 S.W.2d 765, 184 Ark. 863.

99. Mo.—State v. Gates, 67 Mo. 139
Jurisdiction
Supreme court takes judicial knowledge of numerous projects that come within scope of statutory jurisdiction of board of commissioners. —State ex rel. Minniear v. Eckman, 187 N.E. 327, 205 Ind. 550.

1. **Defendant no longer coroner**
Ill.—Purcell v. Bundesen, 265 Ill. App. 540.

2. **Death certificate**
Supreme court takes judicial notice that certain person was health officer of county on certain date, and that death certificate was issued by him as registrar.—Prudential Ins. Co. v. Calvin, 148 So. 837, 227 Ala. 146.

3. W.Va.—Greenbrier County v. Livesay, 6 W.Va. 44.

Resignation
The supreme court will not take judicial notice of the resignation of a county road supervisor, in the absence of provisions in the statute for record of such resignation in the archives of the state.—Arledge v. Chilton County, 185 So. 419, 237 Ala. 96.

4. Tenn.—Fancher v. De Montegre, 1 Head 40.

5. Cal.—Ex parte Bargagliotti, 92 P. 96, 6 Cal.App. 333.
Ill.—Feld v. Loftis, 140 Ill.App. 530, affirmed 88 N.E. 281, 240 Ill. 105.

other tax officials,[6] and treasurers.[7] The court will not take judicial notice of the number or salaries of assistant county officers where these matters depend on the needs of the county and the action of certain state or county officials.[8]

City and town officers. Matters prescribed by statute or which are of common knowledge relating to the official position and authority of city and town officers and employees may be judicially noticed.[9] The courts will know judicially the principal executive officers of a city or town,[10] its trustees,[11] and the legal powers of municipal officers.[12] A county court should judicially know who is, or who was at any time, the mayor of a city in the county,[13] the persons holding the office of city clerk in the various cities within the county in which the court is held,[14] and the official character as city collector of one to whom a warrant for the collection of a special assessment had been issued.[15] Some appellate courts decline to take judicial notice of the officers of a municipal corporation,[16] but in other jurisdictions such notice has been taken.[17] The first officers of a municipality under a former government are sometimes judicially noticed as a matter of history.[18]

Judicial notice may be taken of matters of common knowledge relating to city employees,[19] such as firemen[20] and relating to city employees such as

6. Okl.—Weatherly v. Cloworth Dev. Co., 166 P. 156, 63 Okl. 307.
23 C.J. p 98 note 96.

Assessors

(1) Supreme court takes judicial notice of duties of board of assessors prescribed by statute.—Bistor v. Board of Assessors of Cook County, 179 N.E. 120, 346 Ill. 362, 78 A.L.R. 686.

(2) Court judicially knows that term of office of assessor expired on a certain date.—Couch v. Earnest, Tex.Civ.App., 62 S.W.2d 988, error dismissed.

7. Pa.—Rauch v. Commonwealth, 78 Pa. 490.

Book supplied

It is common knowledge that county treasurers as a rule are supplied with a permanent book in which omitted property is listed and assessed and taxes levied.—Bennett v. Finkbine Lumber Co., 198 N.W. 1, 199 Iowa 1085.

Duty to account

Court will take judicial notice that retiring county treasurer has duty to account for and turn over to successor all money received in official capacity during his term of office less such as is legally paid out.—City of Bisbee v. Cochise County, 36 P.2d 559, 44 Ariz. 233, followed in City of Douglas v. Kitchel, 36 P.2d 564, 44 Ariz. 246.

Sufficiency of room furnished

The court will not take judicial notice that the room furnished a county treasurer was insufficient.—Buchanan v. Ralls County, 222 S.W. 1002, 283 Mo. 10.

8. Ill.—People v. Chicago & E. I. R Co., 118 N.E. 2, 281 Ill. 177.

9. N.Y.—Veronica Realty Corporation v. Cranford-Locher, Inc., 267 N.Y.S. 443, 149 Misc. 428.

Municipal clerk

The supreme court judicially knows that the municipal clerk is not only the city's clerical officer, but is the custodian of all of its books, records, and papers, and that part of his duties is to keep the governing officers of the city informed concerning those records and papers —City of Aberdeen v. Bank of Amory, Miss., 2 So.2d 153.

Salaries and fees

It is a matter of common knowledge that cities have salaried officers whose services are at the disposal of the city, while the clerks of towns as a class are persons engaged in their own business, and receive little if any, salary for their official duties beyond their statutory fees.—O'Brien v. City of Manchester, 152 A. 720, 84 N.H. 492.

10. **Particular officers**

(1) Personnel of school board.—Union School Dist. of City of Saginaw v. Council of City of Saginaw, 206 N.W. 573, 232 Mich. 639.

(2) Street commissioners.—St. Louis v. Greely, 14 Mo.App. 578.

(3) Superintendents of streets and their deputies —Himmelmann v. Hoadley, 44 Cal. 213.

11. **Trustees**

(1) Judicial notice will be taken of the trustees of a town or township.—Inglis v. State, 61 Ind. 212.

(2) Court will take judicial notice of regular meetings of board of council of towns, and that a meeting was a regular meeting, although minutes denominated it "first called meeting."—Town of Nortonville v. Woodward, 231 S.W. 224, 191 Ky. 730.

(3) Courts judicially know that township trustee has charge of many public records, documents, and papers which are matters of public concern, and which public may seasonably demand right to inspect.—Marion Tp. of Boone County v. Howard, 147 N.E. 619, 196 Ind. 167, followed in Jackson Tp. of Boone County v. Bowman, 147 N.E. 621, 196 Ind. 729.

12. Ill.—Lynn v. People, 48 N.E. 964, 170 Ill. 527—Jones v. Lake View, 38 N.E. 688, 151 Ill. 663.
Tex.—Alford v. State, 8 Tex.App 545.

13. Ala.—Lucas v. Boyd, 47 So. 209, 156 Ala. 427.

14. Ill.—Rockford v. Mower, 102 N. E. 1032, 259 Ill. 604.

15. Ill.—Brackett v. People, 3 N.E 723, 115 Ill. 29.

16. Mo.—State v. Brown, 72 Mo.App. 651.
23 C J. p 98 note 10.

17. Colo.—People v. Hall, 100 P. 1129, 45 Colo. 303.

18. Tex.—McCarty v. Johnson, 49 S W. 1098, 20 Tex.Civ.App. 184.

19. N.Y.—Deodati v. Kern, 21 N E 2d 355, 280 N.Y. 366, 122 A.L.R. 1446, reversing 9 N.Y.S.2d 401, 256 App. Div. 803, reargument denied 10 N. Y.S.2d 859, 256 App.Div. 920.

Danger

It is common knowledge that a superintendent of highways is constantly called on to perform hazardous duties.—Dann v. Town of Veteran, 5 N.Y.S.2d 997, 254 App.Div 462, affirmed 17 N.E.2d 130, 278 N Y. 461, reargument denied 18 N.E.2d 697, 279 N.Y. 760.

Experts

It is common knowledge that for years experts have been employed by departments of city of New York, and no question raised as to payment of their compensation.—Buck v. City of New York, 216 N.Y.S. 128, 127 Misc. 354.

Steward and chef

It is common knowledge that duties of steward and chef are different.—Dykstra v. State, 181 N E. 488, 42 Ohio App. 141.

20. **Judicial notice has been taken:**

(1) Of advantages of ex-service men as firemen.
Cal.—Cook v. Mason, 283 P. 891, 103 Cal.App. 6.
Iowa.—Herman v. Sturgeon, 293 N. W. 488.

(2) Of the different class of service rendered by the fire chief and his assistant from that rendered by other officers of the department.—

policemen.[21]

§ 38. Official Signatures and Seals

Official signatures and seals of federal, state, and local officers will be judicially noticed within their respective jurisdictions.

The signature of a public officer, within the jurisdiction, to any document required to be signed by him in his official capacity will be judicially noticed,[22] and it has been declared that the court will take judicial notice of the official capacity of the signer, even though it is not shown by the writing.[23] In order to be judicially noticed, a foreign seal must be the great seal of a state, or at least the seal of the secretary of state attesting the seal and official character of the official signing.[24] Accordingly courts are not authorized to take judicial notice of, or notice of the genuineness of, signatures of minor officers of foreign countries,[25] or the seal of a city in another state and the signature of its registrar and recorder.[26]

Federal officers. State and federal courts judicially notice the official signatures and seals of the president of the United States,[27] and of other important federal officers, such as the heads of the various departments of the federal government and their chief subordinate officers,[28] commissioners of patents,[29] or consuls and their deputies.[30]

State officers. State courts judicially know the great seal of their own state,[31] the signature and official seal of any governor of the state,[32] of the heads of departments,[33] and of other state officers and agents.[34]

County and city officers. State courts take judicial notice of the signatures and seals of county executive officers,[35] and the signatures of their deputies appointed by statutory authority and acting for them.[36] Signatures of leading city officers are held to be subjects of judicial notice.[37]

§ 39. Administrative Rules and Regulations

Administrative rules and regulations of the federal and state executive departments, and of the well known administrative bodies, will be judicially noticed.

State courts take judicial notice of the rules of federal executive departments,[38] the rules and reg-

State v. Lincoln, 154 N.W. 217, 98 Neb. 634.

(3) That city firemen, when on duty, devote greater portion of their time to standing by for fire alarms.—State ex rel. Kern v. Arnold, 49 P.2d 976, 100 Mont. 346, 100 A.L.R. 1071.

(4) That employment as a member of a municipal fire department is of very uncertain duration.—Union Traction Co. v. Taylor, 135 N.E. 255, 81 Ind.App. 257.

(5) That firemen in going to fires are called on to exhibit courage.—Raymore v. Kansas City Public Service Co., Mo.App., 141 S.W.2d 103.

(6) That officers of fire department do not by themselves operate the motors which run the trucks nor handle the ladders, picks, axes, and other implements used in fire fighting.—Mason v. City of Los Angeles, 20 P.2d 84, 130 Cal.App. 224.

(7) Other matters.

Cal.—Chavoya v. Industrial Accident Commission, 72 P.2d 236, 22 Cal. App.2d 652.

Mich.—Powell v. Village of Fenton, 214 N.W. 968, 240 Mich. 94.

21. Judicial notice will be taken:

(1) That city's traffic officers are required to guard and protect the traveling public as regards both nonresident and resident owners and operators of motor vehicles.—Daily v. City of Owensboro, 77 S.W.2d 939, 257 Ky. 281.

(2) That many of the local police officers spend much of their time and effort in performing duties in which the state at large is interested.—Police Protective Ass'n of Colorado v. Warren, 76 P.2d 94, 101 Colo. 586.

(3) That a particular police force was established under, and regulated by, a particular statute.—Shelmadine v. City of Elkhart, 129 N.E. 878, 75 Ind.App. 493.

(4) That convicted felons are not proper persons in any capacity on police force.—Pirotte v. Civil Service Commission of City of Los Angeles, 22 P.2d 763, 132 Cal.App. 394.

22. Wash.—State v. Courser, 92 P.2d 264, 267, 199 Wash. 559, quoting **Corpus Juris.**

23 C.J. p 98 note 24.

23. Ill.—People v. Paulsen, 146 Ill. App. 534.

24. Conn.—Creer v. Active Automobile Exch., 121 A. 888, 99 Conn. 266.

25. N.D.—In re Markhus' Estate, 249 N.W. 310, 63 N.D. 566.

26. Conn.—Creer v. Active Automobile Exch., 121 A. 888, 99 Conn. 266.

27. U.S.—Gardner v. Barney, N.Y., 6 Wall. 499, 18 L.Ed. 890.

Cal.—Yount v. Howell, 14 Cal. 465.

23 C.J. p 99 note 41.

28. Okl.—In re Son-se-gra's Will, 189 P. 865, 78 Okl. 213.

29. U.S.—New York & M. L. R. Co. v. Winans, Pa., 17 How. 30, 15 L. Ed. 27.

30. Conn.—Barber v. Mexico International Co., 48 A. 758, 73 Conn. 587.

31. Ill.—Chicago & A. R. Co. v. Keegan, 39 N.E. 33, 152 Ill. 413.

32. Ky.—Jackson v. Rose, 3 S.W.2d 641, 223 Ky. 285.

23 C.J. p 98 note 29.

33. Va.—Commonwealth v. Dunlop, 16 S.E. 273, 89 Va. 431.

34. Ky.—Jackson v. Rose, 3 S.W.2d 641, 223 Ky. 285—Riley v. Wallace, 222 S.W. 1035, 188 Ky. 471, 11 A.L.R. 337.

23 C.J. p 99 notes 31–37.

Signature and seal of notary noticed as matter of law merchant see supra § 25.

35. La.—State v. Hopkins, 42 So. 660, 118 La. 99.

23 C.J. p 99 note 38.

36. Cal.—Himmelmann v. Hoadley. 44 Cal. 213, 226.

La.—State v. Hopkins, 42 So. 660, 118 La. 99.

Wis.—Martin v. Aultman, 49 N.W. 749, 80 Wis. 150.

37. La.—Rosetta Gravel Co. v. Dickenson, 1 La.A. (Orleans) 111.

Puerto Rico.—People v. Giron, 25 Puerto Rico 34.

38. Cal.—Parker v. James E. Granger, Inc., 52 P.2d 226, 4 Cal.2d 668, appeal dismissed and certiorari denied Parker v. James Granger, Inc., 56 S.Ct. 958, 298 U.S. 644, 80 L.Ed. 1375—Arnold v. Universal Oil Land Co., App., 114 P.2d 408—Downer v. Grizzly Livestock & Land Co., 43 P.2d 843, 6 Cal.App.2d 39.

D.C.—Gay Union Corporation v. Wallace, 112 F.2d 192, 71 App.D.C. 382,

ulations of federal boards and commissions,[39] and regulations of the United States army.[40] Minor administrative rules and regulations such as the causes for which admission will be granted into a veteran's hospital, will not be judicially noticed.[41]

State courts may take judicial notice of the rules and regulations of the various departments of the state government,[42] and regulations of considerable notoriety established by important state boards and commissions,[43] and even of rules and regulations of administrative bodies set up by municipalities, where they are well known.[44] Sometimes judicial notice is taken of certain rules on the ground that they have the force and effect of statutes,[45] or that they were adopted pursuant to statutory authority,[46] or because they have become subjects of common knowledge.[47] On the other hand, sometimes due to the circumstances of the particular case,

certiorari denied 60 S.Ct. 1098, 310 U.S. 647, 84 L.Ed. 1414.
Ohio.—Seward v. National Surety Co., 165 N.E. 537, 120 Ohio St. 47, affirming National Surety Co. v. Seward, 165 N.E. 588, 31 Ohio App. 206—Boone v. State, 141 N.E. 841, 844, 109 Ohio St. 1, citing **Corpus Juris**—Ogden v. Transcontinental Airport of Toledo, 177 N.E. 536, 538, 39 Ohio App. 301, citing **Corpus Juris.**
Wash.—Brooks v. City of Seattle, 74 P.2d 1008, 193 Wash. 253, certiorari denied 59 S.Ct. 62, 305 U.S. 601, 83 L.Ed. 381.
23 C.J. p 99 note 45.

Comptroller of currency
D.C.—Cooper v. O'Connor, 99 F.2d 135, 69 App.D.C. 100, 118 A.L.R. 1440, followed in 99 F.2d 143, 69 App.D.C. 108, certiorari denied 59 S.Ct. 146, 305 U.S. 642, 83 L.Ed. 414, rehearing denied 59 S.Ct. 241, 305 U.S. 673, 83 L.Ed. 436, rehearing denied 59 S.Ct. 1030, 307 U.S. 651, 83 L.Ed. 1529, certiorari denied 59 S.Ct. 146, 305 U.S. 643, 83 L.Ed. 414, rehearing denied 59 S.Ct. 242, 305 U.S. 673, 83 L.Ed. 436, and rehearing denied 59 S.Ct. 1035, 307 U.S. 651, 83 L.Ed. 1529.

Treasury department regulations
Okl.—R. W. Hart & Co. v. Harris, 83 P.2d 565, 183 Okl. 588.
23 C.J. p 99 note 45 [c].

Department of interior
Cal.—Alford v. Hesse, 279 P. 831, 100 Cal.App. 66
23 C.J. p 99 note 45 [b].

Post office department
U.S.—Foshay v. U. S., D.C.N.Y., 54 F.2d 668.
23 C.J. p 99 note 45 [d].

Department of agriculture
Idaho.—State ex rel. Taylor v. Taylor, 78 P.2d 125, 58 Idaho 656—McFall v. Arkoosh, 215 P. 978, 37 Idaho 243.
23 C.J. p 99 note 45 [e].

39. Ala.—Webb v. J. G. White Engineering Corporation, 85 So. 729, 204 Ala. 429—Lawrenceburg Roller Mills Co. v. Chas. A. Jones & Co., 85 So. 719, 204 Ala. 59.
Md.—Hettleman v. Frank, 110 A. 715, 136 Md. 351.
N.D.—Regional Agricultural Credit Corporation of Minneapolis v. Stewart, 289 N.W. 801, 69 N.D. 694.
Ohio.—Black v. City of Berea, 32 N.E.2d 1, 6, 137 Ohio St. 611, citing **Corpus Juris.**
Tex.—Minarduš v. Zapp, Civ.App., 112 S.W.2d 496.

Quasi-governmental agencies
Regulations of governmental and quasi-governmental agencies are matters of judicial notice.—American Nat. Red Cross v. Felzner Post, 159 N.E. 771, 86 Ind.App. 709.

Repeal
Courts take judicial notice of rules and regulations promulgated by authority of the Lever Act, but such notice is not taken of an abandonment of a requirement under such act without formal repeal by competent authority.—Morris Adler & Co. v. J. E. Jones & Co., 94 So. 816, 208 Ala. 481.

40. Ind.—Vermillion County v. Hammond, 83 Ind. 453.
23 C.J. p 99 note 46.

Official records
The court will take judicial notice that the army and navy keep official records of persons who have served in those departments.—Richardson v. Kansas Soldiers' Compensation Board, 92 P.2d 114, 150 Kan. 343.

41. Ala.—Sovereign Camp, W. O. W., v. Moore, 186 So. 123, 237 Ala. 156.

42. **Rules of practice of state department**
Miss.—Briscoe v. Buzbee, 143 So. 887, 163 Miss. 574, overruling suggestion of error 143 So. 407, 163 Miss. 574.

Rule made pursuant to statutory authority
Wash.—North Pac. Coast Freight Bureau v. Department of Public Works, 286 P. 86, 156 Wash. 137.

43. Cal.—Drillon v. Industrial Accident Commission, 110 P.2d 64, prior opinion 104 P.2d 518.
Conn.—Roden v. Connecticut Co., 155 A. 721, 113 Conn. 408.
Ohio.—Duncan v. Evans, 20 N.E.2d 729, 60 Ohio App. 265, affirmed 17 N.E.2d 913, 134 Ohio St. 486—Industrial Commission of Ohio v. Collela, 17 Ohio App. 301.
Wis.—Nicolai v. Wisconsin Power & Light Co., 277 N.W. 674, 227 Wis. 83.
Wyo.—Bunten v. Rock Springs Grazing Ass'n, 215 P. 244, 253, 29 Wyo. 461, citing **Corpus Juris.**
23 C.J. p 99 note 44—71 C.J. p 1057 note 44.

Quarantine regulations
Ark.—Housley v. State, 266 S.W. 957, 166 Ark. 453.
Cal.—O'Neal v. Seabury, 74 P.2d 1082, 24 Cal.App.2d 308.

44. Ill.—Pedersen v. Logan Square State & Savings Bank, 32 N.E.2d 644, 309 Ill.App. 54, reversed on other grounds, Sup., 36 N.E.2d 732.
N.Y.—Tamburrino v. Sterrick Delivery Corporation, 271 N.Y.S. 765, 241 App.Div. 221—Sinno v. Sinno, 21 N.Y.S.2d 964, 174 Misc. 869.

Rules of municipal civil service commission constituted a "public document" or "record" which the court of appeals could consider.—Ackerman v. Kern, 22 N.E.2d 247, 281 N.Y. 87, affirming 11 N.Y.S.2d 374, 256 App.Div. 626, motion denied 22 N.E.2d 487, 281 N.Y. 663.

45. Del.—Becker v. State, 185 A. 92, 99, 7 W.W.Harr. 454, citing **Corpus Juris.**
Mont.—Johnson v. Lincoln County, 146 P. 471, 50 Mont. 253.
Okl.—Oils, Inc. v. Corporation Commission of Oklahoma, 25 P.2d 703, 165 Okl. 202, citing **Corpus Juris.**

Publication in acts of general assembly
The court took judicial notice of public service commission rule which had been published in the acts of the general assembly.—Brownlee v. Charleston Motor Express Co., 200 S.E. 819, 189 S.C. 204.

Violations penalized
Supreme court will take judicial notice of building code adopted by the industrial commission, which has the force of criminal statutes in the sense that the violation of its provisions are penalized.—Skrzypczak v. Konieczka, 272 N.W. 659, 224 Wis. 455.

46. Minn.—Bunten v. Eastern Minnesota Power Co., 228 N.W. 332, 335, 178 Minn. 604, citing **Corpus Juris.**

47. Ala.—Ferguson v. Starkey, 68 So. 348, 192 Ala. 471.
23 C.J. p 99 note 55.

courts have declined to take notice of the rules and regulations of state or local administrators or administrative bodies, where such rules and regulations are not made subjects of judicial notice by statute and where they are not matters of common knowledge.[48] Judicial notice may be taken of the legislative history of the provisions of a statute which is claimed to ratify and legalize the regulations of an administrative board.[49]

Federal courts take judicial notice of rules and regulations of executive departments and administrative boards of the government promulgated by authority of acts of congress,[50] but not of regulations of inferior executive boards slightly affecting the general public.[51]

Interstate commerce commission. In some jurisdictions judicial notice is taken of the rules and

48. Cal.—Schmidt v. Pursell, 190 P. 846, 47 Cal.App. 440.
Idaho—Bothwell v. Bryant, 210 P. 1003, 36 Idaho 337.
Ill.—Butler v. Illinois Traction, Inc., 253 Ill.App. 135.
Ind.—Blessinger v. Olinger, 187 N.E. 684, 97 Ind.App. 636—Wright v. Weil Bros. & Co., 130 N.E. 878, 75 Ind.App. 497—Standard Cabinet Co. v. Landgrave, 128 N.E. 358, 73 Ind.App. 625.
Iowa.—Graf v. Employés' Liability Assur. Corporation, 180 N.W. 297, 190 Iowa 445.
Mass.—Finlay v. Eastern Racing Ass'n, 30 N.E.2d 859, 308 Mass. 20—Wolbarsht v. Donnelly, 197 N.E. 6, 291 Mass. 229.
Miss.—Covington County v. Pickering, 85 So. 114, 123 Miss. 20.
Mo.—Moss v. Wells, 249 S.W. 411—Wooldridge v. Scott County Milling Co., App., 102 S.W.2d 958.
Mont.—State ex rel. Magelo v. Industrial Accident Board, 59 P.2d 785, 102 Mont. 455—Williams v. Anaconda Copper Mining Co., 29 P.2d 649, 96 Mont. 204.
N.J.—Apgar v. Weona Building & Loan Ass'n of East Orange, 176 A. 355, 13 N.J.Misc. 121.
N.Y.—Fahey v. Wright, 11 N.Y.S.2d 359, 256 App.Div. 474—Townley v. Bruckman, 5 N.Y.S.2d 899, 168 Misc. 422.
Tex.—American Employers' Ins. Co. v. Thompson, Civ.App., 11 S.W.2d 358, error dismissed.
Utah.—Carter v. Industrial Commission, 290 P. 776, 76 Utah 520.
Wis.—State ex rel. Attorney General v. Fasekas, 269 N.W. 700, 233 Wis. 356.
23 C.J. p 99 notes 47–51, 54, 57.

Existence of rule

Court of appeals cannot take judicial notice of fact that industrial commission has or has not adopted rule on given subject.—Crouch v. Fisher, 159 S.E. 746, 43 Ga.App. 484.

49. U.S.—U. S. v. McFarland, C.C.A.Md., 15 F.2d 823, certiorari granted 47 S.Ct. 449, 273 U.S. 688, 71 L.Ed. 841, certiorari revoked 48 S.Ct. 27, 275 U.S. 485, 72 L.Ed. 386.

50. U.S.—American Legion Post No. 90 of Village of Mamaroneck v. First Nat. Bank & Trust Co. of Mamaroneck, C.C.A.N.Y., 113 F.2d 868—Standard Oil Co. of California v. U. S., C.C.A.Cal., 107 F.2d 402, affirming, D.C., U. S. v. Standard Oil Co. of California, 21 F.Supp. 645, certiorari denied Standard Oil Co. of California v. U. S., 60 S.Ct. 469, 309 U.S. 654, 84 L.Ed. 1003, motion granted 60 S.Ct. 581, rehearing denied 60 S.Ct. 708, 309 U.S. 697, 84 L.Ed. 1036, certiorari denied U. S. v. Standard Oil Co. of California, 60 S.Ct. 715, 309 U.S. 673, 84 L.Ed. 1019—U. S. v. Stand, C.C.A.Okl., 102 F.2d 472—U. S. ex rel. Ohm v. Perkins, C.C.A.N.Y., 79 F.2d 533—The Lake Galera, C.C.A.N.Y., 60 F.2d 876, affirming, D.C., The Lake Pachuta, 56 F.2d 627, and certiorari denied Jamison v. U. S., 53 S.Ct. 314, 287 U.S. 670, 77 L.Ed. 578—U. S. v. Lawson, C.C.A. Idaho, 50 F.2d 646—Lyons Milling Co. v. Goffe & Carkener, C.C.A. Kan., 46 F.2d 241, 83 A.L.R. 501, affirming, D.C., Goffe & Clarkener v. Lyons Milling Co., 26 F.2d 801—Brown v. White, C.C.A.Kan., 24 F.2d 392—Foster v. Biddle, C.C.A. Kan., 14 F.2d 280—Deal v. U. S., C.C.A.Alaska, 11 F.2d 3, certiorari granted 46 S.Ct. 630, 271 U.S. 656, 70 L.Ed. 1135, and reversed on other grounds 47 S.Ct. 613, 274 U.S. 277, 71 L.Ed. 1045—Seber v. Spring Oil Co., D.C.Okl., 33 F.Supp. 805—Kingan & Co. v. Smith, D.C. Ind., 17 F.Supp. 217—Consolidated Gas Co. of New York v. Hardy, D.C.N.Y., 14 F.Supp. 223—Anderson v. Akers, D.C.Ky., 7 F.Supp. 924, rehearing denied 9 F.Supp. 151, supplemented 11 F.Supp. 9, modified on other grounds, C.C.A., Atherton v. Anderson, 86 F.2d 518, certiorari granted Anderson v. Atherton, 57 S.Ct. 754, 300 U.S. 652, 81 L.Ed. 863, reversed on other grounds 58 S.Ct. 53, 302 U.S. 643, 82 L.Ed. 500—Boan v. U. S., D.C. Idaho, 3 F.Supp. 219—Claffy v. Forbes, D.C.Wash., 280 F. 233—Cassarello v. U. S., D.C.Pa., 271 F. 486, affirmed, C.C.A., 279 F. 396—Accardo v. Fontenot, D.C.La., 269 F. 447, affirmed, C.C.A., Fontenot v. Accardo, 278 F. 871—Colyer v. Skeffington, D.C.Mass., 265 F. 17, reversed on other grounds, C.C.A., Skeffington v. Katzeff, 277 F. 129—Benton Harbor-St. Joseph Gas & Fuel Co. v. Middle West Coal Co., C.C.A.Mich., 271 F. 216—U. S. v. Dominici, N.Y., 78 F. 334, 24 C.C.A. 116.
D.C.—Lewis-Hall Iron Works v. Blair, 23 F.2d 972, 57 App.D.C. 364, certiorari denied 48 S.Ct. 529, 277 U.S. 592, 72 L.Ed. 1004—Thorsch v. Miller, 5 F.2d 118, 55 App.D.C. 295, appeal dismissed 47 S.Ct. 577, 274 U.S. 763, 71 L.Ed. 1318—Santa Fé Pac. R. Co. v. Payne, 267 F. 653, 50 App.D.C. 95, reversed on other grounds 42 S.Ct. 466, 259 U.S. 197, 66 L.Ed. 896, followed in 267 F. 656, 50 App. D.C. 98, reversed on other grounds 42 S.Ct. 466, 259 U.S. 197, 66 L.Ed. 896.
23 C.J. p 100 note 58.

"It may be laid down as a general rule, deducible from the cases, that wherever, by the express language of any act of congress, power is intrusted to either of the principal departments of government to prescribe rules and regulations for the transaction of business in which the public is interested, and in respect to which they have a right to participate, and by which they are to be controlled, the rules and regulations prescribed in pursuance of such authority become a mass of that body of public records of which the courts take judicial notice."—Caha v. U. S., Kan., 14 S.Ct. 513, 517, 152 U.S. 211, 38 L.Ed. 415—Downey v. Geary-Wright Tobacco Co., D.C.Ky., 39 F.Supp. 33, 35.

Customs regulations

Judicial notice may be taken of customs regulations.—U. S. v. Billings, C.C.N.Y., 190 F. 359, modified on other grounds 34 S.Ct. 421, 232 U.S. 261, 58 L.Ed. 596.

51. U.S.—The E. A. Packer, N.Y., 11 S.Ct. 794, 140 U.S. 360, 35 L.Ed. 453—The H. B. Rawson, N.Y., 162 F. 312, 89 C.C.A. 20—The Clara & The Reliance, N.Y., 55 F. 1021, 5 C.C.A. 390.
23 C.J. p 100 note 59.

Regulation of federal reserve board is not such departmental action as will be judicially noticed.—Capital Grain & Feed Co. v. Federal Reserve Bank of Atlanta, D.C.Ga., 3 F.2d 614.

regulations[52] and orders[53] of the interstate commerce commission, at least where they are matters of common knowledge;[54] but in other jurisdictions judicial notice will not be taken of the rules and regulations of such commission,[55] and, in accordance with the rules governing the use of judicial notice generally, see supra § 13, a state court, in the absence of a statute to the contrary, is not required to take judicial notice of an order of the commission,[56] even though it is published in reports of the commission.[57] Where, by statute, an order of the commission is given the force of law, the courts, of course, will take judicial notice of such orders.[58] Items included by the commission in a railroad rate base may be noticed by the courts.[59] Judicial notice may be taken of a decision of the interstate commerce commission that a particular railroad was not engaged in interstate commerce.[60]

Railroad commission. Some courts decline to take judicial cognizance of the acts of a railroad commission,[61] while other courts take cognizance of orders granted by such a commission,[62] including such matters as classification and rates established.[63]

§ 40. Acts, Practice, and Proceedings of Officers and Boards

Judicial notice may be taken of the public official acts, practice, and proceedings of public officers and boards which are of a general public interest, or which are matters of common knowledge.

Judicial notice is taken of the public national acts of the executive head of the nation,[64] the official acts, practice, and proceedings of the federal executive departments,[65] the public acts of a governor

52. Ark.—St. Louis-San Francisco Ry. Co. v. Barron, 267 S.W. 582, 166 Ark. 641.
Mo.—De Pass v. B. Harris Wool Co., 144 S.W.2d 146—Huckleberry v Missouri Pac. R. Co., 26 S.W.2d 980, 324 Mo. 1025.

Force of statute
Such rules will be judicially noticed since they have the force and effect of a statute.—Houston Belt & Terminal Ry. Co. v. Davis, Tex.Civ. App., 273 S.W. 676.

Rules passed pursuant to Federal Safety Appliance Act
Tex.—Chicago, R. I. & G. Ry. Co. v. Harris, Civ App., 28 S.W.2d 611, error dismissed.
Vt.—Goulette's Adm'r v. Grand Trunk Ry. Co., 107 A. 118, 93 Vt. 266.

53. U.S.—New Jersey & N. Y. R. Co. v. U. S., 80 Ct.Cl. 243.
Ohio—New York, C. & St. L. R. Co. v. Van Dorp, 173 N.E. 445, 36 Ohio App. 530.

Reinstatement
At least where it is practically admitted by counsel, the reëntry or reinstatement by the interstate commerce commission of an order of reparation which has been temporarily set aside may be judicially noticed by a federal court.—Morgan's Louisiana & T. R. & SS. Co. v. Isaac Joseph Iron Co., Ohio, 243 F. 149, 156 C.C.A. 15.

54. N.Y.—City of Buffalo v. New York Cent. R. Co., 212 N.Y.S. 1, 125 Misc. 801, affirmed 218 N.Y.S. 713, 218 App.Div. 810.

55. U.S.—El Dorado Terminal Co. v. General American Tank Car Corporation, C.C.A.Cal., 104 F.2d 903, certiorari granted General American Tank Car Corporation v. El Dorado Terminal Co., 60 S.Ct. 85, 308 U.S. 533, 84 L.Ed. 449, reversed on other grounds 60 S.Ct. 325, 308 U.S. 422, 84 L.Ed. 361, rehearing denied 60 S.Ct. 465, 309 U.S. 694, 84 L.Ed. 1035—Thompson v. Missouri Pac. R. Co., C.C.A.Mo., 15 F.2d 28.
Ga.—Brown v. Western Union Telegraph Co., 147 S.E. 151, 153, 39 Ga.App. 152, citing **Corpus Juris.**
Ill.—City of Detroit v. Wabash Refining Co., 223 Ill.App. 246.

Baggage
Judicial notice will not be taken of a definition by the interstate commerce commission of what shall be included in the term "baggage."—House v. Chicago & N. W. R. Co., 138 N.W. 809, 30 S.D. 321, Ann.Cas. 1915C 1045—23 C.J. p 99 note 52.

Southern rate book
Court does not judicially know what southern rate book is.—Robert S. Armstrong & Bros. Co. v. Rowland, 118 So. 502, 22 Ala.App. 613.

56. Iowa.—Fay v. Chicago, R. I. & P. Ry. Co., 173 N.W. 69, 186 Iowa 573.

57. Mo.—Banaka v. Missouri Pac. R. Co., 186 S.W. 7, 193 Mo.App. 345.
23 C.J. p 102 note 10.

58. Mo.—Hiatt v. Wabash Ry. Co., 69 S.W.2d 627, certiorari denied Wabash Ry. Co. v. Hiatt, 55 S.Ct. 72, 293 U.S. 560, 79 L.Ed. 661.

59. U.S.—Denver Union Stock Yard Co. v. U. S., D.C.Colo., 21 F.Supp. 83, affirmed 58 S.Ct. 990, 304 U.S. 470, 82 L.Ed. 1469.

60. U.S.—Smyth v. Asphalt Belt Ry. Co., C.C.A.Tex., 12 F.2d 14, amending, D.C., 292 F. 876, and transferred, see 45 S.Ct. 242, 267 U.S. 326, 69 L.Ed. 629.

61. Cal.—Mound Water Co. v. Southern California Edison Co., 194 P. 1014, 184 Cal. 602.
Tex.—Thompson v. San Antonio & A. P. R. Co., 32 S.W. 427, 11 Tex. Civ.App. 145.

62. Ga.—Clements v. Seaboard Air Line Ry. Co., 124 S.E. 516, 158 Ga. 764.

63. Ga.—Central of Georgia R. Co v. Butler Marble & Granite Co., 68 S.E. 775, 8 Ga.App. 1.

64. U.S.—Ackman v. Northern States Contracting Co., C.C.A.Ky., 110 F. 2d 774.
23 C.J. p 100 notes 61–66.

Indian reservations
Judicial notice is taken of the establishment of Indian reservations by executive order.
U.S.—Apis v. U. S., D.C.Cal., 88 F. 931.
Dak.—U. S. v. Beebe, 11 N.W 505, 2 Dak. 292.

65. U.S.—Fidler v. Roberts, C.C.A. Ill., 41 F.2d 305.
Cal.—Dougherty v. California Ketleman Oil Royalties, 69 P.2d 155 9 Cal.2d 58—Parker v. James E. Granger, Inc., 52 P.2d 226, 4 Cal 2d 668, appeal dismissed and certiorari denied Parker v. James Granger, Inc., 56 S.Ct. 958, 298 U. S. 644, 80 L.Ed. 1375—Arnold v Universal Oil Land Co., App., 114 P.2d 408—Bourdieu v. Seaboard Oil Corporation of Delaware, 100 P.2d 528, 38 Cal.App 2d 11.
D.C.—Red Canyon Sheep Co. v. Ickes, 98 F.2d 308, 69 App D.C. 27.
Mont.—Valley County v. Thomas, 97 P.2d 345, 109 Mont. 345.
23 C.J. p 100 note 68.

Particular official acts noticed
U.S.—Verde River Irrigation & Power Dist. v. Salt River Valley Water Users' Ass'n, C.C.A.Ariz, 94 F.2d 936.

Under statute requiring judicial notice of the public and official acts of the executive departments of the United States, if the comptroller's

of a state,[66] and the public acts, practice, and proceedings of other officers or boards, including local or inferior officers or boards.[67] Judicial notice of such acts, however, is usually confined to such acts as are of general public interest[68] or as are matters of common knowledge,[69] and the courts decline to notice judicially the acts of inferior officers of purely local interest,[70] and even the executive acts of high officials where they are of slight general importance.[71] Likewise, unless such facts are matters of common knowledge, and in the absence of a statute to the contrary, courts do not take judicial notice of the acts of governmental officials with respect to particular transactions,[72] nor is notice taken of the details or manner in which a state officer performs the various duties of his office.[73] While courts do not take judicial notice of the modes by which executive officers carry into effect a public statute,[74] nor whether a particular official act was properly done,[75] the regular course of business in and practice of the great executive departments or bureaus of the national or of the state government, including the long continued practical construction given by them to statutes governing their action, have much the force of unwritten law and may become so notorious as to be judicially known to the courts.[76]

As a general rule courts cannot take judicial no-

original order appointing a receiver for a national bank is produced the court must take judicial notice of the document.—Kibble v. Morris, 53 P.2d 1150, 101 Mont. 308.

66. Ga.—Patten v. Miller, 8 S.E.2d 757, 190 Ga. 123.
Ohio.—Kohler v. State, 156 N.E. 510, 24 Ohio App. 272.
23 C.J. p 100 note 69.

Pardons

Court judicially knows that major number of pardons are not issued because of innocence of recipients.—State v. Hazzard, 247 P. 957, 139 Wash. 487, 47 A.L.R. 538.

67. U.S.—Asiatic Petroleum Corporation v. Italia Societa Anonima Di Navigazione, C.C.A.Pa., 119 F.2d 610—U. S. v. Price, C.C.A.Tex., 95 F.2d 687, certiorari denied Price v. U. S., 59 S.Ct. 63, 305 U.S. 601, 83 L.Ed. 382, and U. S. v. Price, 59 S.Ct. 83, 305 U.S. 602, 83 L.Ed. 382—Bartos v. U. S. Dist. Court for Dist. of Nebraska, C.C.A.Neb., 19 F.2d 722, reversing, D.C., In re Bartos, 13 F.2d 138—U. S. v. Pacific Forwarding Co., D.C.Wash., 8 F.Supp. 647.
Cal.—Rich v. McClure, 248 P. 275, 78 Cal.App. 209.
Colo.—Mitchell v. Jones, 88 P.2d 557, 104 Colo. 62.
D.C.—Strasburger v. Schram, 93 F.2d 246, 68 App.D.C. 87.
Ind.—Gaddis v. Barton School Tp. of Gibson County, 164 N.E. 499, 89 Ind.App. 369.
Mass.—Doyle v. Goldberg, 1 N.E.2d 1, 294 Mass. 105.
Mich.—Robson v. Commissioner of State Land Office, 111 N.W. 906, 148 Mich. 12.
Mont.—Miller Ins. Agency v. Porter, 20 P.2d 643, 646, 93 Mont. 567, citing **Corpus Juris.**
Or.—Crown Mills v. Oregon Electric Ry. Co., 21 P.2d 214, 144 Or. 25—In re Water Rights of Deschutes River and Tributaries, 286 P. 563, 134 Or. 623, modified on other grounds 294 P. 1049, 134 Or. 623, appeal dismissed Columbia-Deschutes Power Co. v. Stricklin, 54 S.Ct. 83, 290 U.S. 590, 78 L.Ed. 520.
Tex.—Cathey & Carrell v. Terrell, 45 S.W.2d 956, 121 Tex. 130.
Utah.—State Board of Land Com'rs v. Ririe, 190 P. 59, 56 Utah 213.
Wyo.—Bunten v. Rock Springs Grazing Ass'n, 215 P. 244, 253, 29 Wyo. 461, citing **Corpus Juris.**
23 C.J. p 100 note 70, p 101 note 86.

Acting through representatives

Courts judicially know that director of aircraft production must act through authorized representatives.—Dayton Airplane Co. v. U. S., C.C.A.Ohio, 21 F.2d 673.

Employment of attorneys

Court judicially knows that attorneys have been employed by highway commission and that commission has paid for services without legislative objection or prohibition.—Parker v. Pace & Davis, 82 S.W.2d 259, 190 Ark. 950.

Stipulations filed by plaintiff with the federal trades commission may be judicially noticed.—S. S. Kresge Co. v. Davies, C.C.A.Mo., 112 F.2d 708.

68. Ohio.—Guckenberger v. Dexter, 8 Ohio S. & C.P. 530, 5 Ohio N.P. 429.
W.Va.—Spring v. American Telegraph & Telephone Co., 103 S.E. 206, 86 W.Va. 192, 10 A.L.R. 951.
23 C.J. p 100 notes 72–75.

69. La.—Board of Levee Com'rs of Orleans Levee Dist. v. Orangedale Colony Co., 113 So. 772, 164 La. 77.

Informality

It is common knowledge that hearings before boards of revision are conducted with extreme informality.—Appeal of Susquehanna Collieries Co., 6 A.2d 831, 335 Pa. 337.

70. Ga.—Armistead v. Beavers, 124 S.E. 61, 32 Ga.App. 464.
Ohio.—Village of Englewood v. Bettis, 30 Ohio N.P., N.S., 491.
Utah.—Bacon v. Plain City Irr. Co., 52 P.2d 427, 87 Utah 564.
W.Va.—Spring v. American Telegraph & Telephone Co., 103 S.E. 206, 86 W.Va. 192, 10 A.L.R. 951.
23 C.J. p 100 notes 76, 78, 79.

Official translator

Judicial notice will be taken of the action by the governor in appointing a person official translator, but judicial notice will not be taken of his specific acts of translation.—Aiken v. McMillan, 106 So. 150, 213 Ala. 494.

Relating to domestic animals

The court will not take judicial notice of an order by the board of commissioners permitting domestic animals to run at large.—Atkinson v. Mott, 26 N.E. 217, 102 Ind. 431.

71. Ala.—Carson Cadillac Corporation v. City of Birmingham, 167 So. 794, 232 Ala. 312.
Minn.—Dole v. Wilson, 16 Minn. 525

72. Ala.—Carson Cadillac Corporation v. City of Birmingham, 167 So. 794, 232 Ala. 312.

73. Iowa.—Graf v. Employés' Liability Assur. Corporation, 180 N.W. 297, 190 Iowa 445.

74. Idaho.—White Pine Mfg. Co. v. Morey, 112 P. 674, 19 Idaho 49.
Md.—Chesapeake & O. Canal Co. v. Baltimore & O. R. Co., 4 Gill & J. 1.

Jail limits

The court takes judicial notice of general statutes, but is not bound to take such notice of jail limits legally and definitely established thereunder.—Singer v. Knott, 142 N.E. 435, 237 N.Y. 110, reversing 196 N.Y.S. 565, 203 App.Div. 556 and reargument denied 143 N.E. 744, 237 N.Y. 563.

75. Tex.—Roach v. Fletcher, 32 S.W. 585, 11 Tex.Civ.App. 225.

76. U.S.—Smith v. U. S., D.C.Iowa, 56 F.2d 636—U. S. v. One Oldsmobile Coupé, D.C.Idaho, 22 F.2d 441—U. S. v. Republic Steel Corporation, D.C.Ohio, 11 F.Supp. 117.
Ind.—Cotton v. Commonwealth Loan Co., 190 N.E. 853, 206 Ind. 626.
Mich.—Kelly v. Kelly, 292 N.W. 479, 293 Mich. 530.

tice that public officers have not performed their duties.[77] In accordance with the rules already considered in § 13 as to discretion in the use of judicial notice, courts ordinarily are not required to take notice of the actions of local boards.[78]

Drainage district. When a drainage district is asserting legal rights it stands no higher than an individual, and the court will not take judicial notice of its proceedings other than those relating to its incorporation.[79]

Officers of sister state. Judicial notice is not ordinarily taken of the acts of an officer of a sister state.[80]

§ 41. Official Proclamations, Messages, and Orders

Courts may take judicial notice of official proclamations, messages, and orders of the president of the United States and of the governor of the state.

Courts take judicial cognizance of proclamations[81] and orders[82] issued by the chief executive. Thus courts take judicial notice of the proclamation of the president of the existence of a state of war between the United States and a foreign country;[83]

Mo.—Castilo v. State Highway Commission of Missouri, 279 S.W. 673, 312 Mo. 244.
N.Y.—Armitage v. Board of Education of City of Auburn, 203 N.Y.S. 325, 122 Misc. 586, affirmed 205 N.Y.S. 910, 210 App.Div. 812, and affirmed 148 N.E. 699, 240 N.Y. 548.
Or.—Broadway-Madison Corporation v. Fisher, 102 P.2d 194.
Tex.—Short v. W. T. Carter & Bro., 126 S.W.2d 953, 959, 133 Tex. 202, citing **Corpus Juris,** reversing Sessums v. W. T. Carter & Bro., Civ.App., 121 S.W.2d 486, appeal dismissed W. T. Carter & Bros. v. Short, 60 S.Ct. 140, 308 U.S. 513, 84 L.Ed. 438.
Wash.—Depre v. Pacific Coast Forge Co., 259 P. 720, 145 Wash. 263.
Wis.—State ex rel. Lathers v. Smith, 299 N.W. 43, 238 Wis. 291—Hillier v. Lake View Memorial Park, 243 N.W. 406, 208 Wis. 614.
23 C.J. p 101 note 83.

Police power

The court may take judicial notice that the police power has a peremptory quality, and that its exercise by police officials is often summary.—Harbeck v. Sioux City, 202 N.W. 507, 199 Iowa 763.

77. Ariz.—People's Finance & Thrift Co. v. Pima County, 38 P.2d 643, 44 Ariz. 440.
La.—Charles Wirth Realty & Investment Co. v. Tropical Clothing & Mfg. Co., App., 160 So. 455, reinstated 161 So. 908.

Fraudulent certificates

Court, in proceedings for deportation of person admitted by special board of inquiry, could not judicially know that board issued numerous fraudulent certificates.—Fong Lum Kwai v. U. S., C.C.A.Hawaii, 49 F.2d 19.

78. Wis.—Horlick v. Swoboda, 267 N.W. 38, 221 Wis. 373.

79. Mo.—Elsberry Drain. Dist. v. Harris, 184 S.W. 89, 267 Mo. 139.

80. N.Y.—People ex rel. Sidran v. Warden of City Prison, 220 N.Y.S. 529, 129 Misc. 327.

81. U.S.—Hazelhurst Oil Mill & Fertilizer Co. v. U. S., Ct.Cl., 42 F.2d 331—Mather v. Clyde S. S. Co., C.C.A.N.Y., 37 F.2d 49—Vowinckel v. First Federal Trust Co., C.C.A.Cal., 10 F.2d 19.
Ala.—Louisville & N. R. Co. v. Shikle, 90 So. 900, 206 Ala. 494—Western Union Telegraph Co. v. Glover, 86 So. 154, 17 Ala.App. 374—Western Union Telegraph Co. v. Laslie, 84 So. 864, 17 Ala.App. 303.
Ind.—Baltimore & O. S. W. R. Co. v. Berdon, 145 N.E. 2, 195 Ind. 265, rehearing denied Baltimore & O. S. R. Co. v. Berdon, 150 N.E. 407, 195 Ind. 265, and certiorari denied Baltimore & O. S. W. R. Co. v. Berdon, 45 S.Ct. 225, 266 U.S. 633, 69 L.Ed. 479.
Kan.—Helm v. Hines, 198 P. 190, 109 Kan. 48, denying rehearing 196 P. 426, 109 Kan. 48.
Ky.—McFeena's Adm'r v. Paris Home Telephone & Telegraph Co., 227 S.W. 450, 190 Ky. 299.
Md.—Atkinson v. Philadelphia, B. & W. R. Co., 113 A. 110, 137 Md. 632—Hettleman v. Frank, 110 A. 715, 136 Md. 351.
Mass.—Phillips v. Davis, 147 N.E. 96, 251 Mass. 263, certiorari denied Davis v. Phillips, 46 S.Ct. 101, 269 U.S. 573, 70 L.Ed. 418—West v. New York, N. H. & H. R. Co., 123 N.E. 621, 233 Mass. 162.
Mich.—Peacock v. Detroit, G. H. & M. Ry. Co., 175 N.W. 580, 208 Mich. 403, 8 A.L.R. 964.
Mo.—Taylor v. Western Union Telegraph Co., 231 S.W. 78, 207 Mo.App. 145.
Mont.—Morgan v. Hines, 211 P. 778, 65 Mont. 306.
Neb.—Federal Farm Mortg. Corporation v. Hughes, 289 N.W. 866, 137 Neb. 454—In re Bose's Estate, 285 N.W. 319, 136 Neb. 156.
Pa.—Angelicchio v. Director General of Railroads, 81 Pa.Super. 393.
Tex.—Minardus v. Zapp, Civ.App., 112 S.W.2d 496—American Ry. Express Co. v. Silverstein-Schlossberg Co., Civ.App., 271 S.W. 242—Western Union Telegraph Co. v. Robinson, Civ.App., 225 S.W. 877.
W.Va.—Brown v. Bottom Creek Coal & Coke Co., 118 S.E. 284, 94 W.Va. 287—Spring v. American Telegraph & Telephone Co., 103 S.E. 206, 86 W.Va. 192, 10 A.L.R. 951.
23 C.J. p 101 note 89.

82. U.S.—Ackman v. Northern States Contracting Co., C.C.A.Ky., 110 F.2d 774—Hazelhurst Oil Mill & Fertilizer Co. v. U. S., Ct.Cl., 42 F.2d 331—Munich Reinsurance Co. v. First Reinsurance Co. of Hartford, C.C.A.Conn., 6 F.2d 742, affirming, D.C., 300 F. 345, and appeal dismissed, 47 S.Ct. 458, 273 U.S. 666, 71 L.Ed. 830.
Cal.—Livermore v. Beal, 64 P.2d 987, 18 Cal.App.2d 535, certiorari denied 58 S.Ct. 32, 302 U.S. 712, 713, 82 L.Ed. 550, two cases, rehearing denied 58 S.Ct. 260, 302 U.S. 777, 82 L.Ed. 601 and 58 S.Ct. 261, 302 U.S. 778, 82 L.Ed. 601, certiorari denied Boyd v. Elliott, 58 S.Ct. 32, 302 U.S. 712, 82 L.Ed. 550, rehearing denied 58 S.Ct. 260, 302 U.S. 777, 82 L.Ed. 601, certiorari denied Kreiss v. Elliott, 58 S.Ct. 32, 302 U.S. 712, 82 L.Ed. 550, rehearing denied 58 S.Ct. 261, 302 U.S. 778, 82 L.Ed. 601.
D.C.—U. S. ex rel. Crow v. Mitchell, 89 F.2d 805, 67 App.D.C. 61—Hurley v. Crawley, 50 F.2d 1010, 60 App.D.C. 245.
N.Y.—In re Rosenberg's Will, 202 N.Y.S. 324, 208 App.Div. 707—Ingersoll-Rand Co. v. United States Shipping Board Emergency Fleet Corporation, 187 N.Y.S. 695, 195 App.Div. 838.
23 C.J. p 101 note 90.

Part of law

A general order of the president, conferring on the commanders of designated camps authority to convene general courts-martial, is a part of the law of the land, which the court judicially notices without averment or proof.—Givens v. Zerbst, Ga., 41 S.Ct. 227, 255 U.S. 11, 65 L.Ed. 475, affirming, D.C., Ex parte Givens, 262 F. 702.

83. N.Y.—Hughes v. Techt, Sup. 1919, 176 N.Y.S. 356, 106 Misc. 524, affirmed 177 N.Y.S. 420, 188 App.Div. 743, which is affirmed Techt v. Hughes, 128 N.E. 185, 229 N.Y. 222.
23 C.J. p 101 note 91.

of a proclamation fixing the status of alien enemies;[84] of a proclamation taking over telephone and telegraph companies during wartime as well as all public orders issued thereunder;[85] of the proclamations of the president taking possession and assuming control of transportation systems for war purposes, designation of an agent against whom suits might be brought, and of the general orders of the director-general made for the transaction of the business of transportation under the president's proclamations;[86] of proclamations concerning treaties negotiated with foreign countries;[87] and of the proclamation closing all the banks in the United States.[88]

Courts of the state take judicial notice of proclamations[89] and executive orders[90] of the governor, such as calling an extraordinary session of the legislature;[91] declaring legislation in force;[92] closing all of the banks in the state;[93] constituting certain days legal holidays;[94] declaring the result of an election;[95] forfeiting the charter of a corpora-

84. Ill.—Kristel v. Michigan Cent. R. Co., 213 Ill.App 518.

85. Ky.—McFeena's Adm'r v. Paris Home Telephone & Telegraph Co., 227 S.W. 450, 190 Ky. 299.
Tex.—Western Union Telegraph Co. v. Wallace, Civ.App., 235 S.W. 282—Western Union Telegraph Co. v. Conditt, Civ.App., 223 S.W. 234.

86. Ala.—Louisville & N. R. Co. v. Shikle, 90 So. 900, 206 Ala. 494—Moon v. Hines, 87 So. 603, 205 Ala. 355, 13 A.L.R. 1020.
Ill.—Lerette v. Davis, 225 Ill.App. 93, affirmed Lerette v. Director General of Railroads, 137 N.E. 811, 306 Ill. 348.
Ind.—Baltimore & O. S. W. R. Co. v. Berdon, 145 N.E. 2, 195 Ind. 265, rehearing denied Baltimore & O. S. R. Co. v. Berdon, 150 N.E. 407, 195 Ind. 265, and certiorari denied Baltimore & O. S. W. R. Co. v. Berdon, 45 S.Ct. 225, 266 U.S. 633, 69 L.Ed. 479—Ross v. Lambert, 137 N.E. 185, 79 Ind.App. 30.
La.—Powell-Myers Lumber Co. v. Tremont & Gulf Ry. Co., 2 La.App. 164.
Mass.—West v. New York, N. H & H. R. Co., 123 N.E. 621, 233 Mass. 162.
Mo.—Preston v. Union Pac. R. Co., 239 S.W. 1080, petition for certiorari dismissed Davis v. Preston, 43 S.Ct. 14, 260 U.S. 753, 67 L.Ed. 496—Hite v. St. Joseph & G. I. Ry. Co., 225 S.W. 916—Rhodes v. Missouri Pac. R. Co., App., 234 S.W. 1026.
Mont.—Mitchell v. Northern Pac. Ry. Co., 208 P. 903, 63 Mont. 500.
Neb.—National Supply Co. v. Chicago & N. W. Ry. Co., 187 N.W. 917, 108 Neb. 326.
N.C.—Wright v. Davis, 117 S.E. 347, 185 N.C. 354.
Tex.—Davis v. Hagan, Civ.App., 255 S.W. 484—Minter v. Gulf, C. & S. F. R. Co., Civ.App., 245 S.W. 476—Cobb v. Payne, Civ.App., 240 S.W. 610—Houston, E. & W. T. Ry. Co. v. Tanner, Civ.App., 227 S.W. 713.
Va.—Payne v. L. J. Upton & Co., 152 S.E. 358, 154 Va. 137.
23 C.J. p 101 notes 92, 93.
"The proclamation by the President as authorized by the act of Congress is a matter of record in the executive department of the federal government, and has such binding effect and relation to the statute, and is of such universal public notoriety as that for all purposes of judicial cognizance by courts it stands on the same basis as the act of Congress."—Central of Georgia Ry Co. v. Gwynes, 113 S.E. 183, 184, 153 Ga. 606, answers to certified questions conformed to 113 S.E. 464, 29 Ga.App. 7.

Suit against United States
The court judicially knows that a suit against the director general of railroads, regardless of which individual holding that office was named as a party therein, is, in effect, a suit against the United States government.—U. S. Railroad Administration v. Monahan, 138 N.E. 785, 79 Ind.App. 673, overruling petition 137 N.E. 778, 79 Ind.App. 673.

87. U.S.—Foreign & Domestic Music Corporation v. Twentieth Century-Fox Film Corporation, D.C.N.Y., 19 F.Supp. 769.
N.D.—Kosel v. First Nat. Bank, 214 N.W. 249, 55 N.D. 445.

88. Ala.—Hamilton v. James, 166 So. 425, 231 Ala. 668.
Ill.—Behrens v. First Nat. Bank, 27 N.E.2d 333, 305 Ill.App. 215.
Mo.—Shannon County ex rel. Winona Consol. School Dist. v. Shannon County Bank, 86 S.W.2d 1070, 229 Mo.App. 895.
Tex.—Levy Plumbing Co. v. Standard Sanitary Mfg. Co., Civ.App., 68 S.W.2d 273, error refused.

89. Ala.—Carnley v. Brunson, 149 So. 87, 227 Ala. 197.
Mo.—Lauck v. Reis, 274 S.W. 827, 310 Mo. 184.
S.C.—Heyward v. Long, 183 S.E. 145, 178 S.C. 351, 114 A.L.R. 1130.

90. Fla.—Johns v. State, 197 So. 791.

91. Ark.—Ark-Ash Lumber Co. v. Pride & Fairley, 258 S.W. 335, 162 Ark. 335—Booe v. Road Improvement Dist. No. 4, Prairie County, 216 S.W. 500, 141 Ark. 140.
Colo.—In re Opinion of the Justices, 29 P.2d 705, 94 Colo. 215.
Tenn.—Corn v. Fort, 95 S.W.2d 620, 170 Tenn. 377, 106 A.L.R. 647.

Supplemental call
Supreme court takes notice of supplemental call by governor, during extra session of legislature, specifying passage of revenue law for school purposes.—Sims v. Weldon, 263 S.W. 42, 165 Ark. 13.

92. Ind.—Dowdell v. State, 58 Ind 333.

Will publish
Court knows, regardless of allegations of complaint and suggestions furnished by demurrer, that in due course and before first Monday in January, 1926, governor will publish his proclamation relative to taking effect of laws passed by general assembly in 1925, as required by statute.—State v. Holmes, 147 N.E. 622, 196 Ind. 157.

93. Ala.—Hamilton v. James, 166 So. 425, 231 Ala. 668.
D.C.—Hardee v. Washington Loan & Trust Co., 91 F.2d 314, 67 App.D.C 241.
Ill.—Behrens v. First Nat. Bank, 27 N.E.2d 333, 305 Ill.App. 215.
Mo.—Shannon County ex rel. Winona Consol. School Dist. v. Shannon County Bank, 86 S.W.2d 1070, 1073, 229 Mo.App. 895, citing **Corpus Juris.**
Tex.—Levy Plumbing Co. v. Standard Sanitary Mfg. Co., Civ.App., 68 S.W.2d 273, error refused.

Bank moratorium
Courts take judicial notice of a bank moratorium.—Town of La Fayette v. Williams, 168 So. 668, 232 Ala. 502—Moore v. Esslinger, 167 So. 328, 232 Ala. 251—King v. Porter, 160 So. 101, 230 Ala. 112.

Not evidence of bank's insolvency
Mich.—Lawrence v. DeBoer, 262 N.W. 660, 273 Mich. 172.

94. Cal.—Poheim v. Meyers, 98 P. 65, 9 Cal.App. 31.
Mich.—People v. Ackerman, 45 N.W. 367, 80 Mich. 588.

Thanksgiving Day
Wash.—Kelliher v. Investment & Securities Co., 30 P.2d 985, 177 Wash. 82, appeal dismissed 55 S.Ct. 105, 293 U.S. 519, 79 L.Ed. 633.

95. Okl.—Ex parte Smith, 154 P. 521, 49 Okl. 716.
23 C.J. p 101 note 97.

tion;[96] or establishing a cattle quarantine.[97] The courts of a state take judicial notice of official messages issued in the exercise of the constitutional authority of the executive;[98] but federal courts do not take judicial notice of facts stated in reports or messages of a governor to the state legislature.[99]

Judicial notice is taken of a proclamation of general amnesty[1] or of pardon and amnesty,[2] but not of a mere pardon by the executive.[3]

Judicial notice will be taken of a proclamation of the United States secretary of state that the requisite number of states have ratified an amendment to the federal constitution.[4]

Rules, regulations, and orders of administrative bodies are discussed supra § 39.

Military commander. Some courts decline to take notice of the various orders issued by a military commander in the exercise of the authority conferred on him,[5] but other courts take judicial notice of general rules of commanding officers acting as military governors.[6] Secret confidential orders of the chief military censor are not judicially noticed.[7]

Orders of boards of county commissioners. An order of a board of county commissioners, made pursuant to statutory authority, is a matter of which courts in that county will not take notice unless it is proved as other facts must be proved.[8]

§ 42. Official Bulletins, Reports, and Correspondence

As a general rule, official bulletins, reports, and correspondence may be judicially noticed.

As a general rule, sometimes by virtue of statutory provision, judicial notice is taken of public documents,[9] which may consist of such matters as reports of the federal and state executive departments,[10] official bulletins and publications,[11] and reports of a general public interest of other public

96. Utah.—Consolidated Mills & Feed Yards Co. v. Patterson, 221 P. 159, 62 Utah 506.

97. Tex.—Missouri, K. & T. R. Co. v. McIlhaney, 129 S.W. 153, 60 Tex.Civ.App. 598.

98. Ala.—Carnley v. Brunson, 149 So. 87, 227 Ala. 197.
Mo.—Lauck v. Reis, 274 S.W. 827, 310 Mo. 184—Wells v. Missouri Pac. R. Co., 19 S.W. 530, 110 Mo. 286, 15 L.R.A. 847.

99. U.S.—Houston & T. R. Co. v. State of Texas, 20 S.Ct. 545, 177 U.S. 66, 44 L.Ed. 672.

1. U.S.—Lincoln v. U. S., 49 Ct.Cl. 300.

2. U.S.—Jenkins v. Collard, Ohio, 12 S.Ct. 868, 145 U.S. 546, 36 L.Ed. 812.

3. U.S.—U. S. v. Wilson, Pa., 7 Pet. 150, 8 L.Ed. 640.
23 C.J. p 101 notes 2, 3.

4. Vt.—Chase v. Billings, 170 A. 903, 106 Vt. 149.

5. U.S.—Burke v. Miltenberger, La., 19 Wall. 519, 22 L.Ed. 158.
Va.—Johnston v. Wilson, 29 Gratt. 379, 70 Va. 379.

6. La.—New Orleans Canal, etc., Co. v. Templeton, 20 La.Ann. 141, 96 Am.D. 385—Taylor v. Graham, 18 La.Ann. 656, 89 Am.D. 699—Lanfear v. Mestier, 18 La.Ann. 497, 89 Am.D. 658.
Tex.—Gates v. Johnson County, 36 Tex. 144.

7. Tex.—Rose Mfg. Co. v. Western Union Telegraph Co., Civ.App., 251 S.W. 337.

8. Ala.—State ex rel. Edmunds v. Moses, 164 So. 562, 231 Ala. 215.
Ind.—State v. Wheaton, 138 N.E. 820, 193 Ind. 30.
Tex.—Employers' Casualty Co. v. Smith, Civ.App., 284 S.W. 991—Poole v. Pierce-Fordyce Oil Ass'n, Civ.App., 209 S.W. 706.
23 C.J. p 137 note 70.

Grant of franchise
Court cannot take judicial notice of franchise granted by county commissioners to maintain bulkhead in county road.—West v. Keith, 283 P. 198, 154 Wash. 682.

9. U.S.—Greeson v. Imperial Irr. Dist., C.C.A.Cal., 59 F.2d 529, affirming, D.C., 55 F.2d 321—U. S. v. West Virginia Power Co., D.C. W.Va., 33 F.Supp. 756.
Cal.—Young v. Boy Scouts of America, 51 P.2d 191, 9 Cal.App.2d 760.
Fla.—Conyers v. State, 123 So. 817, 98 Fla. 417.
23 C.J. p 169 note 39, p 170 note 46.

Correspondence of federal officers of such a character as to constitute public documents may be judicially noticed.—Southern Pac. Land Co. v. Meserve, 198 P. 1055, 186 Cal. 157—23 C.J. p 102 note 17.

10. U.S.—Tempel v. U. S., Ill., 39 S.Ct. 56, 248 U.S. 121, 63 L.Ed. 162—Tolfree v. Wetzler, D.C.N.J., 22 F.2d 214, reversed on other grounds C.C.A., 25 F.2d 553, certiorari denied Wetzler v. Tolfree, 49 S.Ct. 28, 278 U.S. 628, 73 L.Ed. 547.
Ark.—State ex rel. Holt v. State Board of Education, 112 S.W.2d 18, 195 Ark. 222.
Idaho.—Alberthesen v. State, 96 P. 2d 437, 60 Idaho 715.
Miss.—Jefferson Standard Life Ins. Co. v. Noble, 188 So. 289, 185 Miss. 360.
S.D.—Elfring v. Paterson, 285 N.W. 443, 66 S.D. 458.
23 C.J. p 102 note 22, p 169 note 40, p 170 note 42.

Tax reports
Under rules as to judicial notice, the court, in determining whether increase of valuation by state board of equalization was constructively fraudulent, may examine reports of tax commissioner and state board of equalization as printed at public expense and showing assessed valuation of similar lands in other counties.—Bunten v. Rock Springs Grazing Ass'n, 215 P. 244, 29 Wyo. 461.

11. U.S.—Atlantic Transport Co. of West Virginia v. Rosenberg Bros & Co., C.C.A.Cal., 34 F.2d 843, affirming, D.C., Rosenberg Bros. & Co. v. Atlantic Transport Co., of West Virginia, 25 F.2d 739—Stitzell Weller Distillery v. Wallace, D.C.D.C., 30 F.Supp. 1010, affirmed App.D.C., Stitzel-Weller Distillery v. Wickard, 118 F.2d 19—In re Plumer, D.C.Cal., 9 F.Supp. 923.
Ariz.—State v. Cull, 260 P. 1023, 32 Ariz. 532.
23 C.J. p 170 note 48.

Administrative body
"But the authorities relied upon by appellant to prove the impropriety of taking judicial notice of a government publication issued by a department of the government are not in point. They refer to courts, which do not profess to be informed on various specialized subjects, and not to administrative agencies which are experts in their own fields. It is certainly reasonable for the Secretary of Agriculture to take judicial notice of one of his own department's publications, and to base his findings of fact on such notice."—A. J. Conroy, Inc., v. Weyl-Zuckerman & Co., D.C.Cal., 39 F.Supp. 784, 787.

Bulletins of federal pure food commissioner, however, have been held not to be subject to judicial no-

officers, committees, and administrative bodies,[12] at least where such reports are made and published by authority of law,[13] or have been adopted by state statute.[14] The fact that certain public officers make reports may also be judicially noticed.[15] Some federal courts have declined to take judicial notice of particular facts set out in state publications.[16]

§ 43. Legislative Department in General

Courts may take judicial notice, as a general rule, of legislative journals, and of other facts of common knowledge or of law relating to the legislative department.

The journals of the two houses of congress are judicially noticed by both federal and state courts.[17] Senate documents may be judicially noticed.[18] Notice has also been taken of matters being considered by congress,[19] and that a present determined policy of congress is one of economy.[20] Judicial notice is also taken of reports of commissions to congress and proceedings thereon.[21]

Of state. State and federal courts judicially recognize the existence of a state legislature.[22] Courts judicially know when the state legislature is in session,[23] the length and time of sessions,[24] the time

tice.—Commonwealth v. Kephart, 35 Pa.Co. 337.

File wrapper of patent is not a subject of judicial notice.—Gatch Wire Goods Co. v. W. A. Laidlaw Wire Co., C.C.A.Ill., 108 F.2d 433.

Geodetic surveys

The court will resort to publications issued by the department of commerce describing and delineating the United States coast and geodetic surveys.—Boone v. Kingsbury, 273 P. 797, 206 Cal. 148, followed in 274 P. 61, 206 Cal. 791, Shudde v. Kingsbury, 274 P. 61, 206 Cal. 792, Workman v. Kingsbury, 274 P. 62, 206 Cal. 793, Hickey Bros. Co. v. Kingsbury, 274 P. 62, 206 Cal. 794, Hartshorn v. Kingsbury, 274 P. 62, 206 Cal. 795, Chamberlin v. Kingsbury, 274 P. 62, 206 Cal. 796, and Ballard v. Kingsbury, 274 P. 63, 206 Cal. 797, appeal dismissed and certiorari denied Workman v. Boone, 50 S.Ct. 66, 280 U.S. 517, 74 L.Ed. 587, 588.

Index numbers of wholesale prices of United States department of labor may be judicially noticed.—Town of Mamaroneck v. New York Interurban Water Co., 212 N.Y.S. 639, 126 Misc. 382.

Statement by private citizen

A statement made in a bulletin issued by the office of experiment stations of the United States department of agriculture, by a private citizen on his own initiative and not at the instance of the government, that the scientific name of the plant from which the merchandise in issue comes was euryale ferox, has no evidentiary value, and is not admissible in evidence to prove such fact. If the plant was scientifically known as euryale ferox, it was necessary to prove it as any other fact, it not having been shown to have a name of which the court may take judicial notice.—Doap Leun Hong Co. v. U. S., 19 C.C.P.A.(Customs) 313.

12. U.S.—U. S. v. Best & Co., Cust. & Pat.App., 86 F.2d 23.
Conn.—General Hospital Soc. of Connecticut v. New Haven County, 14 A.2d 746, 127 Conn. 53.
D.C.—Fletcher v. Jones, 105 F.2d 58, 70 App.D.C. 179, certiorari denied 60 S.Ct. 116, 308 U.S. 555, 84 L.Ed. 467.
23 C.J. p 102 notes 12–15, p 170 note 43.

Distribution

It is common knowledge that copies of reports of board of city trusts are distributed to all members of general assembly, of city council, of board of judges of Philadelphia, to various city officials, and to principal libraries in Philadelphia.—Brown v. Brancato, 184 A. 89, 321 Pa. 54.

Railroad commission

(1) Reports of a state railroad commission have been judicially noticed by some state courts.—Chicago & N. W. R. Co. v. State R. Comm., 145 N.W. 216, 974, 156 Wis. 47.

(2) Other courts have refused to take such notice.—Cincinnati, W. & B. R. Co. v. Hoffhines, 22 N.E. 871, 46 Ohio St. 643.

Particular reports noticed

(1) Report of department administering workmen's compensation fund.—In re Roby, 93 P.2d 940, 54 Wyo. 439—In re Harnsberger, 3 P.2d 80, 43 Wyo. 226.

(2) Reports of interstate commerce commission on statistics of railroads.—Terminal R. Ass'n of St. Louis v. Kimbrel, C.C.A.Mo., 105 F.2d 262.

(3) Weather report.—Texas & P. Ry. Co. v. Greene, Tex.Civ.App., 291 S.W. 929, affirmed, Com.App., 299 S.W. 639.
23 C.J. p 170 note 44.

13. Vt.—In re Fulham's Estate, 119 A. 433, 96 Vt. 308.

Required by law

The court takes judicial notice of the public reports of the several departments of the state to the extent that the reports are required by law.—State ex rel. Holt v. State Board of Education, 112 S.W.2d 18, 195 Ark. 222.

14. Cal.—Gammon v. McKevitt, 195 P. 726, 50 Cal.App. 656.

15. U.S.—U. S. ex rel. Charley v. McGowan, D.C.Wash., 2 F.Supp. 426, affirmed, C.C.A., 62 F.2d 955, certiorari granted U. S. v. McGowan, 53 S.Ct. 790, 289 U.S. 721, 77 L.Ed. 1472, affirmed 54 S.Ct. 95, 290 U.S. 592, 78 L.Ed. 522, and U. S. v. Bakers Bay Fish Co., 54 S.Ct. 95, 290 U.S. 592, 78 L.Ed. 522.

16. U.S.—U. S. v. Aluminum Co. of America, D.C.N.Y., 35 F.Supp. 820.
23 C.J. p 102 note 23.

17. La.—State v. Long, 140 So. 13, 16, 174 La. 169, citing **Corpus Juris.**
23 C.J. p 102 note 24.

18. U.S.—U. S. v. Aluminum Co. of America, D.C.N.Y., 1 F.R.D. 71.

19. U.S.—Moore v. Cleveland Ry. Co., C.C.A.Ohio, 108 F.2d 656—John A. Gebelein, Inc., v. Milbourne, D.C.Md., 12 F.Supp. 105.
N.Y.—Outlet Embroidery Co. v. Derwent Mills, 172 N.E. 462, 254 N.Y. 179, 70 A.L.R. 1440, answering question certified 239 N.Y.S. 831, 228 App.Div. 776, and affirming 239 N.Y.S. 182, 228 App.Div. 113.

20. **Preference to appropriation**

Courts may take judicial notice that in present determined policy of economy congress may not be expected to give preference to appropriation acts for purposes of research and education concerning tree and plant life.—Miller v. U. S., 57 F.2d 424, 61 App.D.C. 58.

21. U.S.—Greeson v. Imperial Irr. Dist., C.C.A.Cal., 59 F.2d 529, affirming, D.C., 55 F.2d 321.

22. Cal.—People v. Burt, 43 Cal. 560.

23. Ark.—United Mut. Life Ins. Co. of Indianapolis, Ind., v. State ex rel. Attorney General, 108 S.W.2d 484, 194 Ark. 371.
Ga.—Stanley v. Sims, 195 S.E. 439, 185 Ga. 518.
Ky.—Commonwealth v. Kentucky Jockey Club, 38 S.W.2d 987, 238 Ky. 739.
La.—State ex rel. Fernandez v. Feucht, 161 So. 179, 182 La. 134, affirming, App., 157 So. 557.
S.C.—Weston v. Williams, 2 S.E.2d 381, 190 S.C. 112.

24. U.S.—First Nat. Bank v. Buder, D.C.Mo., 8 F.2d 883, reversed on other grounds, C.C.A., Buder v.

when a particular session thereof terminated,[25] and the number of regular and special sessions between two dates;[26] and they know in a general way who constitute its members,[27] as well as the number composing the different branches.[28] Judicial notice will also be taken that members of the general assembly have taken an oath to support the state constitution.[29] The court may also take judicial notice of the action or lack of action of the legislature.[30] The practice of the legislature of passing many bills in the closing hours of the session has been judicially noticed.[31] Judicial notice is not taken that a particular person is privileged from arrest because he is a member of the legislature.[32] The court has no judicial knowledge whether or not there are proper and legitimate modes of expending money in procuring the passage of an act of the legislature.[33]

Judicial notice has been taken of the appointment,[34] existence,[35] and the reports[36] of legislative committees; but some courts have declined to take judicial notice of such reports.[37]

Journals of the legislature being not only the official records of a coördinate branch of government kept under requirement of law, but also important as bearing on the validity and meaning of statute law which it is the function of courts to know and enforce are, according to the weight of authority, judicially noticed by the courts.[38] In a few jurisdictions the rule is to the contrary, or tends to the

First Nat. Bank, 16 F.2d 990, certiorari denied First Nat. Bank v. Buder, 47 S.Ct. 588, 274 U.S. 743, 71 L.Ed. 1321.

Convenings and adjournments

The dates of convenings and adjournments of the senate are judicially known to the courts.—Britton v. Bowden, 5 S.E.2d 47, 188 Ga. 806.

25. Alaska.—McPhail v. Latouche Packing Co., 8 Alaska 297.

Mo.—Utz v. Dormann, 39 S.W.2d 1053, 328 Mo. 253.

23 C.J. p 102 note 29.

26. Mont.—State v. Stewart, 187 P. 641, 57 Mont. 144.

27. La.—State v. Kennard, 25 La. Ann. 238.

Wyo.—State v. Schnitger, 95 P. 698, 16 Wyo. 479.

23 C.J. p 102 note 30.

28. Mo.—State v. Mason, 55 S.W. 636, 155 Mo. 486.

S.C.—Thompson v. Livingston, 107 S.E. 581, 116 S.C. 412.

29. Colo.—In re Senate Resolution No. 2 Concerning Constitutionality of House Bill No. 6, 31 P.2d 325, 94 Colo. 101.

30. U.S.—First Nat. Bank v. Buder, D.C.Mo., 8 F.2d 883, reversed on other grounds, C.C.A., Buder v. First Nat. Bank, 16 F.2d 990, certiorari denied First Nat. Bank v. Buder, 47 S.Ct. 588, 274 U.S. 743, 71 L.Ed. 1321.

31. Ill.—People ex rel. Petersen v. Hughes, 25 N.E.2d 75, 372 Ill. 602.

32. Va.—Prentiss v. Commonwealth, 5 Rand. 697, 22 Va. 697, 16 Am.D. 782.

Wis.—State v. Polacheck, 77 N.W. 708, 101 Wis. 427.

33. Ind.—Judah v. Vincennes Univ. 16 Ind. 56.

34. Ala.—State v. Torbert, 77 So. 37, 200 Ala. 663.

35. N.J.—State v. Brewster, 99 A. 338, 89 N.J.Law 658.

36. Ala.—State v. Torbert, 77 So. 37, 200 Ala. 663.

Mo.—State v. Gordon, 139 S.W. 403, 236 Mo. 142.

23 C.J. p 102 note 35.

Reports of executive commissions see supra § 42.

37. Me.—State v. Dow, 53 Me. 305.

38. Alaska.—McPhail v. Latouche Packing Co., 8 Alaska 297.

Ariz.—Giragi v. Moore, 58 P.2d 1249, 48 Ariz. 33, 110 A.L.R. 314, affirmed 64 P.2d 819, 49 Ariz. 74, 110 A.L.R. 320, appeal dismissed 57 S.Ct. 946, 301 U.S. 670, 81 L.Ed. 1334.

Ark.—Wiseman v. Madison Cadillac Co., 88 S.W.2d 1007, 191 Ark. 1021, 103 A.L.R. 1208—McCrary v. Schenebeck, 87 S.W.2d 572, 191 Ark. 698, affirmed Schenebeck v. McCrary, 56 S.Ct. 672, 298 U.S. 36, 80 L.Ed. 1031—McAdams v. Henley, 273 S.W. 355, 169 Ark. 97, 41 A.L.R. 629

Fla.—State ex rel. X-Cel Stores v. Lee, 166 So. 568, 122 Fla. 685, affirmed 166 So. 262, 122 Fla. 670, rehearing denied 166 So. 574, 122 Fla. 700—State ex rel. Lane Drug Stores v. Simpson, 166 So. 227, 122 Fla. 582, affirmed 166 So. 262, 122 Fla. 670, following State ex rel. Lane Drug Stores v. Carswell, 166 So. 249, 122 Fla. 639, rehearing denied 166 So. 574, 122 Fla. 700, rehearing denied State ex rel. Lane Drug Stores v. Simpson, 166 So. 574, 122 Fla. 700, certiorari denied Simpson v. State of Florida ex rel. Lane Drug Stores, 57 S.Ct. 15, 299 U.S. 543, 81 L.Ed. 399—Gwynn v. Hardee, 110 So. 343, 92 Fla. 543—State v. Carley, 104 So. 577, 89 Fla. 361.

Idaho.—In re Garrett Transfer & Storage Co., 23 P.2d 739, 53 Idaho 200—State v. Eagleson, 181 P. 935, 32 Idaho 280.

La.—State ex rel. Porterie v. Smith, 166 So. 72, 184 La. 263.

Mich.—Ruffertshafer v. Robert Gage Coal Co., 289 N.W. 151, 291 Mich. 254—Remus v. City of Grand Rapids, 265 N.W. 755, 274 Mich. 577—Wilson v. Atwood, 258 N.W. 773, 270 Mich. 317.

Miss.—Witherspoon v. State, 103 So. 134, 138 Miss. 310.

Mo.—State ex rel. Donnell v. Searcy, 152 S.W.2d 8—State ex rel. Karbe v. Bader, 78 S.W.2d 835, 336 Mo. 259.

Neb.—Moeller, McPherin & Judd v. Smith, 255 N.W. 551, 127 Neb. 424—Day v. Walker, 247 N.W. 350, 124 Neb. 500—Elmen v. State Board of Equalization and Assessment, 231 N.W. 772, 120 Neb. 141

N.Y.—Browne v. City of New York, 213 App.Div. 206, reversing 210 N.Y.S. 786, 125 Misc. 1, affirmed 149 N.E. 211, 241 N.Y. 96.

S.C.—State v. Broad River Power Co., 181 S.E. 41, 48, 177 S.C. 240, citing **Corpus Juris.**

S.D.—Elfring v. Paterson, 285 N.W. 443, 66 S.D. 458—Nash v. Giffen, 246 N.W. 299, 61 S.D. 114.

Vt.—In re Fulham's Estate, 119 A. 433, 96 Vt. 308.

W.Va.—Charleston Nat. Bank v. Fox, 194 S.E. 4, 119 W.Va. 438.

Wis.—State v. P. Lorillard Co., 193 N.W. 613, 181 Wis. 347.

23 C.J. p 102 note 39.

Certified copy

When judicial notice is taken of the senate journal the court, in order to acquire knowledge of its contents, may examine original journal, copy thereof certified to by its custodian, or copy thereof published under statute.—Witherspoon v. State, 103 So. 134, 138 Miss. 310.

Printed record

(1) The printed record of journal entries may be judicially noticed.

Ark.—Fulkerson v. Refunding Board, 147 S.W.2d 980, 201 Ark. 957—Phillips v. Rothrock, 110 S.W.2d 26, 194 Ark. 945—Sparling v. Refunding Board, 71 S.W.2d 182, 189 Ark. 189—Williams v. Parnell, 51 S.W.2d 863, 185 Ark. 1105—Hargrove v. Arnold, 26 S.W.2d 581, 181 Ark. 537—Crowe v. Security Mortg. Co., 5 S.W.2d 346, 176 Ark.

contrary.[39] When collaterally involved in litigated cases, legislative journals impart absolute verity, and judicial notice cannot extend further than the journals themselves.[40] On the other hand, in jurisdictions where judicial notice of legislative journals is taken, it extends not only to the contents of such journals,[41] but also to their existence and function in legislation,[42] their printing, publication, and distribution,[43] and the fact that they are kept in compliance with the law.[44] Judicial notice may be taken of legislative journals before they are published,[45] or before they are filed in the office of the secretary of state.[46] Courts generally cannot judicially notice the contents of legislative bills as introduced,[47] but under a statute providing for the certification and filing of copies of all printed bills, the court will notice the contents of a bill properly certified and filed in the office of the secretary of state.[48]

Of municipality. The courts have taken judicial notice of aldermen,[49] of the name and official signature of the clerk of a city council or board of aldermen,[50] and of the fact of common knowledge that the duties of city councils are ordinarily performed to a great extent through the agency of committees of their membership,[51] and that among these is usually a committee having special charge and oversight of the public ways within the municipality.[52] They do not take judicial notice that an ordinance or other action of the legislative body of a city is unreasonably discriminatory.[53] It seems that any court which takes judicial notice of municipal ordinances, see supra § 27, will in like manner notice such journals and records of the lawmaking body of the municipality as affect the validity or construction of the ordinances.[54] The court may take judicial notice of the fact that municipal boards usually have available to them the services of experienced counsel, and that contracts are let only on the advice and approval of counsel.[55]

Record of constitutional convention. Judicial notice is taken of the record of the proceedings of a

1130—Connor v. Blackwood, 2 S.W. 2d 44, 176 Ark. 139—Bush v. Martineau, 295 S.W. 9, 174 Ark. 214—Sims v. Weldon, 263 S.W. 42, 165 Ark. 13—Road Improvement Dist. No. 16 v. Sale, 243 S.W. 825, 154 Ark. 551.

(2) Notice of such records will be taken regardless of any agreement of the parties concerning the same.—Ruddell v. Gray, 285 S.W. 2, 171 Ark. 547.

Proof of publication

Supreme court takes judicial notice of contents of such journals to determine whether necessary proof of publication was attached to special or local law when introduced.—Anderson v. Board of Public Instruction for Hillsborough County, 136 So. 334, 102 Fla. 695.

Reports of special committees appearing in the journal may be judicially noticed.—Nash v. Giffen, 246 N.W. 299, 61 S.D. 114.

39. Va.—Vaughan v. Town of Galax, 4 S.E.2d 386, 173 Va. 335.
23 C.J. p 103 notes 40, 41.

In Colorado it is held that it is not incumbent on courts to take judicial notice of the contents of such journals when not pleaded, and that their contents must be proved when relied on.—People v. Bristol, 20 P.2d 309, 92 Colo. 325—23 C.J. p 103 note 41 [a].

40. U.S.—Kentucky-Tennessee Light & Power Co. v. City of Paris, Tenn., C.C.A.Tenn., 48 F.2d 795, certiorari denied City of Paris, Tenn., v. Kentucky-Terminal Light & Power Co., 52 S.Ct. 20, 284 U.S. 638, 76 L.Ed. 543.

Fla.—Amos v. Gunn, 94 So. 615, 84 Fla. 285.

Matters improperly incorporated

"So while courts have no judicial power to control the judgment of discretion of legislative officials in the preparation or publication of legislative journals, even after the Legislature has finally adjourned, their duty of judicially noticing legislative journals as importing absolute verity, when collaterally involved in a litigated case affecting private legal rights, necessarily entitles a litigant, who may be adversely affected by what purports to be a legislative record, to have expunged from such record, and consequently put beyond the range of the court's judicial notice of his prejudice, any matters that may have been incorporated in a putative legislative record without authority to the Legislature, or by direction of the Legislature acting in excess of its legislative powers."—State ex rel. Landis v. Thompson, 164 So. 192, 197, 121 Fla. 561.

41. Wis.—State v. Polacheck, 77 N.W. 708, 101 Wis. 427.

42. Fla.—Amos v. Mosley, 77 So. 619, 74 Fla. 555, L.R.A.1918C 482.

43. Fla.—Amos v. Mosley, supra.
23 C.J. p 103 note 45.

Printed pamphlets

In determining the validity of a statute where it is attacked on the ground that the constitutional requirements were not observed in its passage, it is the duty of the court to take notice that the legislature caused the records of their proceedings to be published daily in pamphlet form; and it is the duty of the court to take judicial notice of these daily journals to satisfy itself about what actually transpired in the legislature in the passage of the act.—State ex rel. Board of Com'rs of Indian River Mosquito Control Dist. v. Helseth, 140 So. 655, 104 Fla. 208, dismissing proceeding State ex rel. Board of Com'rs of Indian River Mosquito Control Dist. v. Board of Com'rs of Indian River County, 138 So. 625, 103 Fla. 946.

44. Ark.—Niven v. Jefferson County Road Impr. Dist. No. 14, 200 S.W. 997, 132 Ark. 240.

45. Tenn.—Heiskell v. Knox County, 177 S.W. 483, 132 Tenn. 180, Ann. Cas.1916E 1281—Todtenhausen v. Knox County, 177 S.W. 487, 132 Tenn. 169.

46. N.M.—Earnest v. Sargent, 150 P. 1018, 20 N.M. 427.

47. S.D.—Ex parte Hoese, 204 N.W. 174, 48 S.D. 337.

48. S.D.—Elfring v. Paterson, 285 N.W. 443, 66 S.D. 458.

49. Pa.—Fox v. Commonwealth, 81 Pa. 511.

50. Ky.—Barret v. Godshaw, 12 Bush. 592.

51. Iowa.—Blake v. Bedford, 151 N.W. 74, 170 Iowa 128.

52. Iowa.—Blake v. Bedford, supra.

53. Cal.—Ex parte Quong Wo, 118 P. 714, 161 Cal. 220.
23 C.J. p 103 note 54.

54. Or.—Portland v. Yick, 75 P. 706, 40 Or. 439, 102 Am.S.R. 633.
23 C.J. p 103 note 56.

55. U.S.—Gibson v. Smoot Engineering Corporation, D.C.Del., 50 F.2d 203.

constitutional convention.[56]

§ 44. Judicial Department in General

Judicial notice of particular facts relating to the judicial department are discussed in detail in the sections immediately following.

Examine Pocket Parts for later cases.

§ 45. Organization, Jurisdiction, and Powers of Courts

Judicial notice will be taken of the organization, jurisdiction, and powers of the courts of the state created by the constitution or by statute.

Judges of state courts take judicial notice of the existence, organization, jurisdiction, and powers of their own court[57] and of other tribunals created by the constitution or established by statute.[58] Federal courts are regarded as domestic tribunals by the state courts, and judicial notice is taken of their jurisdiction,[59] including jurisdiction over places ceded by the state[60] but not of their jurisdiction over land purchased or condemned by the United States.[61]

In other states. State courts may notice in a general way the existence of and jurisdiction of courts in other states,[62] or in Canada,[63] and salient facts

56. Neb.—Moeller, McPherin & Judd v. Smith, 255 N.W. 551, 127 Neb. 424—Elmen v. State Board of Equalization and Assessment, 231 N.W. 772, 120 Neb. 141.
23 C.J. p 103 note 49.

57. Cal.—Fitzpatrick v. Sonoma County, 276 P. 113, 97 Cal.App. 588
Fla.—West 132 Feet, etc., v. City of Orlando, 86 So. 197, 80 Fla. 233, reversing 91 So. 369, 80 Fla. 229.
La.—Cavin v. Camus, App., 164 So. 645.
Pa.—Commonwealth ex rel. Ballou v. Halifax Tp. Sup'rs, 7 Pa.Dist. & Co. 663, 29 Dauph.Co. 127.
23 C.J. p 103 note 58.

On appeal

The supreme court of appeals, of its own motion, will take judicial notice of lack of jurisdiction in the trial courts.—Commonwealth v. P. Lorillard Co., 105 S.E. 683, 129 Va. 74.

58. Ala.—Jefferson County v. Busby, 148 So. 411, 226 Ala. 293, answer conformed to 148 So. 415, 25 Ala.App. 449—Mobile County v. Byrne, 117 So. 83, 218 Ala. 5—Jones v. Fields, 150 So. 914, 25 Ala.App. 570—Baskin v. Taylor, 93 So. 336, 18 Ala.App. 462, certiorari denied Ex parte Baskin, 93 So. 921, 208 Ala. 695.
Fla.—Milton v. City of Marianna, 144 So. 400, 107 Fla. 251—State ex rel. Veal v. Barrs, 140 So. 908, 105 Fla. 27—Osceola Fertilizer Co. v. Sauls, 123 So. 780, 98 Fla. 339.
Ind.—Millers Nat. Ins. Co. v. American State Bank of East Chicago, 190 N.E. 433, 206 Ind. 511—Murphy v. Daly, 188 N.E. 769, 206 Ind. 179—Dinkla v. Miles, 188 N.E. 577, 206 Ind. 124—Fletcher Savings & Trust Co. v. American State Bank of Lawrenceburg, 147 N.E. 524, 196 Ind. 118—Glansman v. Ledbetter, 130 N.E. 230, 190 Ind. 505.
Iowa.—Frazier v. Wood, 242 N.W. 78, 214 Iowa 237.
Mich.—Wiley v. Lindsay, 191 N.W. 826, 221 Mich. 533.
Tex.—Duclos v. Harris County, 263 S.W. 562, 114 Tex. 147, affirming, Civ.App., 251 S.W. 569—Burns v. Napier, Civ.App., 19 S.W.2d 578.
23 C.J. p 103 note 59.

County courts

Fla.—Ex parte Sirmans, 116 So. 282, 94 Fla. 832.
N.Y.—People ex rel. Ursoy v. Superintendent of New York State Training School for Girls at Hudson, N. Y., 198 N.Y.S. 432, 120 Misc. 353.
Tex.—Wilkenfeld v. Ballard, Civ. App., 84 S.W.2d 279.
23 C.J. p 103 note 59 [b].

Municipal courts

Ill.—People ex rel. Soble v. Gill, 193 N.E. 192, 358 Ill. 261.
Ind.—Capitol Amusement Co. v. Washington & New Jersey Realty Co., 164 N.E. 715, 90 Ind.App. 389.
Mich.—Gildemeister v. Lindsay, 180 N.W. 633, 212 Mich. 299.
Pa.—Commonwealth ex rel. Kelley v. Brown, 193 A. 258, 327 Pa. 136.
S.D.—In re Gibbs, 214 N.W. 850, 51 S.D. 464.
23 C.J. p 103 note 59 [c].

Justices of the peace

Mo.—Motor Acceptance v. Clayton, App., 119 S.W.2d 996.
23 C.J. p 103 note 59 [f].

Abolition

Supreme court judicially knows that civil court of record of Hillsborough County was abolished.—Ferlita v. Figarrota, 145 So. 605, 106 Fla. 578.

Exclusive jurisdiction

Court judicially knows that there are other misdemeanors than those of which exclusive jurisdiction is vested in St. Louis court of criminal correction.—State ex rel. MacNish v. Landwehr, 60 S.W.2d 4, 332 Mo. 622.

Number of departments

Or.—Crowther v. Jones, 236 P. 267, 114 Or. 543.
Wash.—State v. Superior Court for Lewis County, 230 P. 154, 131 Wash. 448.

Number of judges

Ala.—Jefferson County v. Busby, 148 So. 411, 226 Ala. 293, answer conformed to 148 So. 415, 25 Ala.App. 449.
Fla.—State ex rel. Palmer v. Atkinson, 156 So. 726, 116 Fla. 366, 96 A.L.R. 539.

Outside judges

That Cook County court's business for many years has necessitated having outside judges in constant service therein is common knowledge.—City of Chicago v. McCluer, 171 N.E. 737, 339 Ill. 610, 638, appeal dismissed Foreman Trust & Savings Bank v. City of Chicago, 51 S.Ct. 37, 282 U.S. 906, 75 L.Ed. 797.

Particular property

Not even the judges, who under Rev.St 1919 § 2947, create and determine the boundaries of the districts of justices of the peace, can take judicial notice that a certain piece of real estate, for possession of which action was brought before a certain justice, is within his district, although by § 2948 all courts are required to take judicial notice of the boundaries of the districts as fixed by said judges.—Peters v. Simpson, Mo.App., 241 S.W. 463.

Sections or divisions

Ga.—Ratliffe v. Hartsfield Co., 176 S.E. 151, 49 Ga.App. 598, reversed on other grounds 184 S.E. 324, 181 Ga. 663, conformed to 184 S.E. 328, 52 Ga.App. 765.
La.—Piazza v. McDermott, 101 So. 269, 156 La. 930.

59. Ala.—Womack v. Dearman, 7 Port. 513.
Ga.—Headman v. Rose, 63 Ga. 458.

60. Tex.—Lasher v. State, 17 S.W. 1064, 30 Tex.App. 387, 28 Am.S.R. 922.

61. Cal.—People v. Collins, 39 P. 16, 105 Cal. 504.

62. Ala.—Dozier v. Joyce, 8 Port. 303, 312.
Mo.—Burns v. Ætna Life Ins. Co., 123 S.W.2d 185, 234 Mo.App. 1207.
Wash.—Rubin v. Dale, 288 P. 223, 156 Wash. 676.

63. N.Y.—Lazier v. Westcott, 26 N.Y. 146, 82 Am.D. 404.

regarding them, as that the supreme courts are courts of record,[64] or that a circuit court, district court, or court of common pleas in a sister state is a court of general jurisdiction;[65] but judicial notice of such matters has also been declined.[66]

Federal courts notice the existence, organization and jurisdiction of their own and other federal courts of every grade,[67] including those of bankruptcy,[68] and the jurisdiction of their own subordinate officers, such as commissioners[69] and magistrates appointed by the court.[70] Also they take judicial notice of the jurisdiction of the courts of the state wherein they are sitting.[71]

Seals. Judicial notice will be taken of the official seals of state and federal courts,[72] but not of the seals of foreign municipal courts.[73] The seal of a court of admiralty[74] or vice admiralty[75] will be judicially noticed, as those courts are recognized by the law of nations.

§ 46. Judicial Districts

Judicial notice will be taken of the judicial districts or circuits within the state.

The court will take judicial notice of the various judicial districts,[76] the courts included,[77] their relative locations within the state,[78] their boundaries,[79] and their territorial extent.[80] A state court judicially knows the boundaries of the state[81] and those of federal judicial districts,[82] and the location of, counties, municipalities, or other known places therein.[83] Judicial notice will also be taken of counties coming within a class designated by a constitutional provision requiring a certain number of magisterial districts.[84]

64. Mich.—Morse v. Hewett, 28 Mich. 481—Shotwell v. Harrison, 22 Mich. 410.
Tex.—Houston Oil Co. v. Kimball, 122 S.W. 533, 124 S.W. 85, 103 Tex. 94.

65. S.D.—Cole v. Sassenberry, 230 N.W. 22, 56 S.D. 595.
23 C.J. p 104 note 70.

66. Ill.—Royal League v. Kavanagh, 84 N.E. 178, 233 Ill. 175, affirming 134 Ill.App. 75.
23 C.J. p 104 note 71.

Existence
Courts of Nevada cannot take judicial notice of existence of superior court in another state.—Davis v. Davis, 13 P.2d 1109, 54 Nev. 267.

67. U.S.—Cole v. Rustgard, C.C.A. Alaska, 68 F.2d 316.
23 C.J. p 104 note 72.

Name
United States court of appeals has judicial knowledge of fact that name of supreme court of District of Columbia was changed by act of congress to the district court of the United States for the District of Columbia.—Booth v. Fletcher, 101 F.2d 676, 69 App.D.C. 351, certiorari denied, Fletcher v. Booth, 59 S.Ct. 835, 307 U.S. 628, 83 L.Ed. 1511.

68. U.S.—Lathrop v. Stuart, C.C. Ohio, 14 F.Cas.No.8,113, 5 McLean 167.
Alaska.—McKenna v. Randle, 5 Alaska 590.
23 C.J. p 104 note 73.

69. U.S.—Ex parte Lane, D.C.Mich., 6 F. 34.

70. Alaska.—In re Hernandez, 5 Alaska 421.

71. U.S.—Cappetta v. Atlantic Refining Co., D.C.Conn., 12 F.Supp. 89.
23 C.J. p 104 note 76.

72. Ala.—Womack v. Dearman, 7 Port. 513.
La.—Dwight v. Splane, 11 Rob. 487.
N.Y.—Delafield v. Hand, 3 Johns. 310.

73. Md.—De Sobry v. De Laistre, 2 Harr. & J. 191, 3 Am.D. 535.
N.Y.—Delafield v. Hands, 3 Johns. 310.

74. U.S.—Croudson v. Leonard, D. C., 4 Cranch 434, 2 L.Ed. 670.
23 C.J. p 104 note 62.

75. U.S.—Yeaton v. Fry, D.C., 5 Cranch 335, 3 L.Ed. 117.

76. Ky.—Harlan County v. Brock, 55 S.W.2d 49, 246 Ky. 372.
Ohio.—Paul v. Paul, 29 N.E.2d 812, 65 Ohio App. 246.
23 C.J. p 104 note 80.

Satisfaction with statute
Court takes judicial notice that presiding circuit judge act has given general satisfaction.—Lamb v. Board of Auditors of Wayne County, 209 N.W. 195, 235 Mich. 95.

77. Fla.—Realty Co. v. Fraleigh-Smith Inv. Co., 107 So. 174, 90 Fla. 769.

78. W.Va.—State v. Hudson, 125 S.E. 813, 97 W.Va. 679.

79. Puerto Rico.—Horton v. Robert, 11 Puerto Rico 168.

Justice district
Fla.—Conyers v. State, 123 So. 817, 98 Fla. 417.

80. Ind.—Heacock v. Arnold, 169 N.E. 89, 90 Ind.App. 476.
Ky.—Harlan County v. Brock, 55 S.W.2d 49, 246 Ky. 372.
Mo.—State ex rel. Ford v. Hogan, 27 S.W.2d 21, 324 Mo. 1130—State v. Buckner, 234 S.W. 651, 291 Mo. 320.
S.D.—State v. Reeves, 184 N.W. 993, 44 S.D. 568.
Tex.—National Mut. Casualty Co. v. Lambert, Civ.App., 149 S.W.2d 1086, error dismissed, judgment correct.
23 C.J. p 104 note 82.

In one county
The number of judicial districts in a particular county may be judicially noticed.—Kendall v. Ramsey, 19 S.W.2d 1020, 179 Ark. 984—McGregor v. Cain, 7 S.W.2d 13, 177 Ark. 474.

Moving from county to county
The court of civil appeals will take judicial notice that judicial district of which Henderson County is a part is composed of several counties, and that the judge moves from county to county in discharging his official duties, and that official court reporter follows the judge's itinerary.—Rudolph v. Hanes, Tex.Civ.App., 106 S.W.2d 743.

81. Ark.—Lindsey v. Bloodworth, 134 S.W. 959, 97 Ark. 541.
23 C.J. p 104 note 86.

82. N.Y.—Milliken v. Dotson, 102 N.Y.S. 564, 117 App.Div. 527, appeal dismissed 89 N.E. 1105, 195 N.Y. 523.
23 C.J. p 104 note 87.

83. Ala.—Jones v. Fields, 150 So. 914, 25 Ala.App. 570.
Fla.—Ex parte Sirmans, 116 So. 282, 94 Fla. 832.
N.C.—Reid v. Reid, 155 S.E. 719, 199 N.C. 740.
Tex.—Love v. Worsham, Civ.App., 101 S.W.2d 598.
23 C.J. p 104 notes 83, 88, p 105 notes 89–91.

In particular city
Court of civil appeals takes judicial notice that eighty-eighth district court is located in Eastland, Tex.—Continental Oil & Gas Production Co. v. Austin, Tex.Civ.App., 17 S.W.2d 1114.

One-county circuits or districts
Ala.—Jefferson County v. Busby, 148 So. 411, 226 Ala. 293, answer conformed to 148 So. 415, 25 Ala.App. 449.
Nev.—Crayne v. Crayne, 13 P.2d 222, 54 Nev. 205, 84 A.L.R. 716.

84. Ky.—Felts v. Linton, 289 S.W. 312, 217 Ky. 305.

A federal court takes judicial notice of the boundaries of federal judicial districts as related to political divisions of the state, and judicially knows what counties in a state are within a particular federal district.[85] The court will also take notice of what district a particular city is in.[86]

§ 47. Terms and Sessions of Courts and Quasi Judicial Bodies

Courts know their own terms and sessions and the terms of other courts of the state as established by law.

All courts judicially know the terms and sessions of their own courts;[87] the legal power to adjourn;[88] and the terms of other courts of the state, that is, the beginning and duration or possible length as established by law,[89] rather than by order,[90] but not the actual close, end, or adjournment,[91] unless it is by operation of law.[92] They also take judicial notice of the legally established sittings of important administrative boards exercising semijudicial functions, such as county commissioners.[93] Knowledge of the beginning and duration of terms implies recognition of the coincidence in the month and week of a designated day of the term,[94] and, conversely, in what term of the court a particular date falls,[95] and therefore whether an act done on a particular day was done in term time or after the term had

85. U.S.—U S. v. Stannard, D.C.N.Y., 207 F. 198—Gruetter v. Cumberland Tel. & Tel. Co., C C.Tenn., 181 F. 248.

86. U.S.—Miller v. Southern Bell Telephone & Telegraph Co., C.C.A. S C., 279 F. 806.

87. Ark.—Southwest Power Co. v. Price, 22 S.W.2d 373, 180 Ark. 567, certiorari denied 50 S.Ct. 353, 281 U.S. 753, 74 L Ed. 1163, appeal dismissed 50 S.Ct. 407, 281 U.S. 703, 74 L Ed 1128.
Ky.—Roberts v. Turk, 7 S.W.2d 849, 225 Ky. 100.
23 C.J. p 105 note 93.

88. Ala.—Harrison v. Meadors, 41 Ala. 274.

89. U.S.—Meyer v. Kerrigan, C.C.A. Cal., 67 F.2d 599.
Ala.—Ex parte Beaird, 116 So 367, 217 Ala. 355—Ray v. City of Birmingham, 103 So 460, 212 Ala. 480—Lewis v. Martin, 98 So. 635, 210 Ala. 401—State v. Thurman, 88 So. 61, 17 Ala.App. 656.
Ark.—McDonald v. Olla State Bank, 93 S.W.2d 325, 192 Ark. 603—Pope v. Shannon Bros., 79 S.W.2d 278, 190 Ark. 441—Glenn v. Killough, 72 S.W.2d 216, 189 Ark. 265—Castera v. Commercial Building & Loan Ass'n, 41 S.W.2d 1082, 184 Ark 128—Johnson v. Edwards, 299 S.W. 998, 176 Ark. 1204.
Colo.—People v. District Court of Second Judicial Dist. in and for City and County of Denver, 299 P. 5, 89 Colo. 88—People v. District Court of Second Judicial Dist. in and for City and County of Denver, 299 P. 1, 89 Colo. 78.
Conn.—Simpson v. Young Men's Christian Ass'n of Bridgeport, 172 A. 855, 118 Conn. 414.
Fla.—State v. Merritt, 99 So. 230, 86 Fla. 164.
Ga.—Logan v. Hammond, 117 S.E. 428, 155 Ga. 514.
Ind.—Stanley v. Stanley, 131 N.E. 35, 190 Ind. 528—Heacock v. Arnold, 169 N.E. 89, 90 Ind App. 476—Ayrshire Coal Co. v. Thurman, 127 N. E. 810, 128 N.E. 764, 73 Ind.App. 578—H. W. Johns-Manville Co. v. South Shore Mfg. Co., 123 N E. 648, 70 Ind.App. 484
Ky.—Snyder v. Snyder, 77 S.W.2d 404, 257 Ky. 148—Beliles v. Whittaker, 251 S.W. 190, 199 Ky. 431.
Mich.—Cullen v. Voorhies, 205 N W. 177, 232 Mich. 420
Mo.—State ex rel. Midwest Pipe & Supply Co. v. Haid, 52 S.W.2d 183, 330 Mo. 1093—State ex rel. Ford v. Hogan, 27 S W.2d 21, 324 Mo 1130—Von Eime v. Fuchs, 8 S.W. 2d 824, 320 Mo. 746—Floyd v. Klein, App., 298 S W. 99.
Tex.—National Mut. Casualty Co. v. Lambert, Civ.App., 149 S W.2d 1086, error dismissed, judgment correct—Saros v. Strickland, Civ.App., 148 S.W.2d 865, error dismissed, judgment correct—Cummins v. Democratic Executive Committee of Lampasas County, Civ.App., 97 S. W.2d 368—Temple v. Moores, Civ. App., 45 S.W.2d 340—Dial v. Martin, Civ.App., 37 S.W.2d 166, reversed on other grounds Martin v. Dial, Com.App., 57 S.W.2d 75, 89 A.L.R. 571—Pantaze v. Fox-Head Spring Beverage Co., Civ App., 23 S.W.2d 514, affirmed 37 S.W 2d 724, 120 Tex. 270—Wilson v. Shear Co., Civ.App., 284 S W. 654, affirmed in part and reversed in part on other grounds Shear Co. v. Wilson, Com. App., 292 S W. 531, motion overruled 294 S.W. 843—Hunt v. Ziegler, Civ.App., 271 S.W. 936, affirmed Ziegler v. Hunt, Com.App., 280 S. W. 546—Blanton Banking Co. v Taliaferro, Civ.App., 262 S.W. 196—Pollard v. Speer, Civ App., 207 S.W. 620.
Wyo.—Gilpatrick v. Perry, 188 P. 442, 26 Wyo. 538.
23 C J. p 105 note 95.

County courts

(1) Where the beginning of terms of county courts is fixed by statute, judicial notice will be taken thereof by the appellate court.—Wyman v. American Mortg. Corporation, Tex. Civ.App., 45 S.W.2d 629.

(2) The rule is otherwise, however, where the regular terms of county courts are held at such times as may be fixed on and entered of record by the county court.—Doak v. Smith, 116 S.E. 691, 93 W.Va. 133.

(3) Likewise the appellate court cannot take judicial notice of the number or length of terms of a county court where the commissioner's courts of the various counties may fix the terms of the county courts.—Hall v. Butereg Co., Tex. Civ.App., 114 S.W.2d 403.

(4) As regards sufficiency of posting of notices of probate, appellate court could not take judicial knowledge that county court did not prescribe dates of terms of that court.—Idar v. Uehlinger, Tex.Civ.App., 49 S W.2d 998, error refused.

Finality of judgment

Supreme court would take judicial knowledge that term of court at which certain decree was entered had elapsed and that decree became final.—Vance v. Harkey, 55 S.W.2d 785, 186 Ark. 730.

90. Tex.—Poole v. Pierce-Fordyce Oil Assoc., Civ.App., 209 S.W. 706.

91. Mo.—Higdon v. Ming, App., 236 S W. 384.
Vt.—Beam v. Fish, 172 A. 617, 106 Vt. 219.
23 C.J. p 105 note 97.

92. Ala.—Morris v. Corona Coal Co., 109 So. 278, 215 Ala. 47—Pitts v. Walker, 103 So. 850, 212 Ala. 645.
Tex.—Commercial Credit Co. v Ramsey, Civ.App., 138 S.W 2d 191, error dismissed judgment correct.

93. Ill.—Kane County v. Young, 31 Ill. 194.
Ind.—Collins v. State, 58 Ind. 5.

94. Ind.—Lewis v. Wintrode, 76 Ind. 13.
Time, days, and dates generally see infra § 100.

95. U.S.—Meyer v. Kerrigan, C.C.A. Cal., 67 F.2d 599.
Ind.—State v. Superior Court of Marion County, 174 N.E. 732, 202 Ind. 456.
23 C.J. p 105 note 1.

expired.[96] Matters of common knowledge relating to terms of court may also be judicially noticed, such as that terms of particular courts often last until the day before the succeeding term,[97] and that a long term was necessary in a particular court because of accumulated business.[98]

§ 48. Judges, Justices, and Court Officials

Judicial notice is taken of the judges and justices within the state, and of numerous other court officials.

Courts judicially know who are the judges,[99] present or past,[1] of their own or other courts within the state or jurisdiction, including justices of the peace;[2] the date of their appointment or election[3] and that on which they qualify[4] or take office;[5] under what law they are commissioned,[6] and whether a proper commission has issued;[7] their terms of office;[8] their salaries;[9] their official signatures;[10] the fact that a certain judge continued to hold office until the expiration of his term;[11] and the date when a particular judge resigned[12] or died,[13] or

96. Ala.—Moss v. Winston, 118 So. 739, 218 Ala. 364—State v. Cunninghame, 113 So. 309, 216 Ala. 423.
Ark.—Morgan v. Scott-Mayer Commission Co., 48 S.W.2d 838, 185 Ark. 637.
Ind.—Knue v. Knue, 28 N.E.2d 76.
Mo.—State ex rel Berkshire v. Ellison, 230 S.W. 970, 287 Mo. 654.
Tex.—Stanolind Oil & Gas Co. v. McKenzie, Civ.App., 115 S.W.2d 1204, error dismissed.
W.Va.—Hall v. Shelton, 116 S.E. 12, 93 W.Va. 592.
23 C.J. p 105 note 2.

97. U.S.—Northwestern Public Service Co. v. Pfeifer, C.C.A.S.D., 36 F. 2d 5.

98. Ky.—South Mountain Coal Co. v. Rowland, 265 S.W. 320, 204 Ky. 820.

99. Ala.—Jefferson County v. Busby, 148 So. 411, 226 Ala. 293, answer conformed to 148 So. 415, 25 Ala.App. 449—Stover v. Hill, 94 So. 826, 208 Ala. 575—Hodge v. Joy, 92 So. 171, 207 Ala. 198—Bell v. State, 22 So. 526, 115 Ala. 25.
Ariz.—Payne v. Williams, 56 P.2d 186, 47 Ariz. 396—In re Spriggs, 284 P. 521, 36 Ariz. 262.
Fla.—Stearns v. Stearns, 143 So. 642, 106 Fla. 440—Ex parte Sirmans, 116 So. 282, 94 Fla. 832—Realty Co. v. Fraleigh-Smith Inv. Co., 107 So. 174, 90 Fla. 769.
Ill.—Paulsen v. McAvoy Brewing Co., 226 Ill App. 605.
Ind.—Heacock v. Arnold, 169 N.E. 89, 90 Ind.App. 476—Folger v. Barnard, 125 N.E. 460, 73 Ind.App. 523.
Mo.—Robertson v. McFarland, 87 S.W.2d 1067, 229 Mo.App. 1116.
N.M.—Luna v. Cerrillos Coal R. Co., 218 P. 435, 29 N.M. 161, motion for rehearing on the merits denied 226 P. 655, 29 N.M. 647.
Pa.—In re Additional Law Judge, 53rd Judicial Dist., 10 Pa.Dist. & Co. 577.
23 C.J. p 105 note 4.

Presiding judge
Court judicially knows who was presiding judge of county court at given term.—Tucker v. Yandow, 135 A. 600, 100 Vt. 169.

Resignation
Supreme court takes judicial notice that district judge, who resigned, is not now district judge.—Boise-Kuna Irr. Dist. v. Hartson, 285 P. 456, 48 Idaho 572

1. D.C.—Booth v. Fletcher, 101 F.2d 676, 69 App.D.C. 351, certiorari denied, Fletcher v. Booth, 59 S.Ct. 835, 307 U.S. 628, 83 L.Ed. 1511.
23 C.J. p 106 note 5.

2. Ala.—Burford v. Gordon, 189 So. 76, 238 Ala. 24—Hill v. Wittmeier, 96 So. 327, 209 Ala. 355.
23 C.J. p 106 note 6.

Qualification
Although law required election of two justices of peace in town, court cannot take judicial notice that two justices of peace qualified and were acting as such at time in question.—People v. Chicago, M. & St. P. Ry. Co., 145 N.E. 725, 314 Ill. 378.

Locality of office
Courts will take judicial notice of the official character of the justices of the peace in their own States, but the locality of a justice's office is not such a matter of public notoriety as to be a subject of judicial recognition.—Dacus v. Knoxville Outfitting Co., 9 Tenn.App. 683.

3. Ala.—State ex rel. Gravitt v. Kellett, 162 So. 303, 230 Ala. 510.
Ill.—Paulsen v. McAvoy Brewing Co., 226 Ill.App. 605.
Ind.—State v. Superior Court of Marion County, 174 N.E. 732, 202 Ind. 456.
Mo.—Robertson v. McFarland, 87 S.W.2d 1067, 229 Mo.App. 1116.
23 C.J. p 106 note 7.

Senior judge
In mandamus to compel circuit court judge of eleventh judicial circuit to act in the cause, supreme court took judicial notice that respondent circuit judge was senior in commission to other circuit judges in judicial circuit.—State ex rel. Palmer v. Atkinson, 156 So. 726, 116 Fla. 366, 96 A.L.R. 539.

4. N.M.—Luna v. Cerrillos Coal R. Co., 218 P. 435, 29 N.M. 161, motion for rehearing on the merits denied 226 P. 655, 29 N.M. 647.

5. Ind.—State v. Superior Court of Marion County, 174 N.E. 732, 202 Ind. 456.

At time of trial
In determining whether circuit judge had authority to sit in cause in third judicial circuit as trial judge, supreme court would take judicial notice that, at time of trial, circuit judge was duly elected, qualified, and acting judge of circuit court for twelfth judicial circuit.—Archerd v. Burk, 36 P.2d 338, 148 Or. 444.

6. Pa.—Clark v. Commonwealth, 29 Pa. 129.

7. La.—Follain v. Lefevre, 3 Rob 13.

8. Ala.—State ex rel. Gravitt v. Kellett, 162 So. 303, 230 Ala. 510—Hill v. Wittmeier, 96 So. 327, 209 Ala. 355.
Ariz.—Payne v. Williams, 56 P.2d 186, 47 Ariz. 396.
Ill.—Paulsen v. McAvoy Brewing Co., 226 Ill.App. 605.
N.M.—Luna v. Cerrillos Coal R. Co., 218 P. 435, 29 N.M. 161, motion for rehearing on the merits denied, 226 P. 655, 29 N.M. 647.
Okl.—Barnett v. Hepburn, 269 P. 384, 40 Okl.Cr. 377.
Or.—Mason, Ehrman & Co. v. Lewis' Estate, 276 P. 281, 131 Or. 242, reversed on other grounds 281 P. 123, 131 Or 242.
23 C.J. p 106 note 10.

9. Tex.—McKinney v. O'Connor, 26 Tex. 5.

10. Okl.—Apple v. Ellis, 150 P. 1057, 50 Okl. 80.
23 C.J. p 106 note 12.

11. Ill.—Dunaway v. Brush, 206 Ill App. 179.

12. Ala.—Ex parte Peterson, 33 Ala 74.
Ill.—People v. McConnell, 40 N.E. 608, 155 Ill. 192.

Fact of retirement
Supreme court judicially knows of circuit court judge's retirement.—State ex rel. Thompson v. Rutledge, 59 S.W.2d 641, 332 Mo. 603.

13. Ga.—Stephens v. Reid, 6 S.E.2d 728, 730, citing **Corpus Juris.**
Mass.—Broitman v. Silver, 180 N.E. 311, 278 Mass. 510.
23 C.J. p 106 note 15.

when for any other reason he ceased to be a judge.[14] The number of judges in a particular district may also be judicially noticed.[15] Judicial notice, however, is not taken of the absence of a judge from the jurisdiction;[16] of his handwriting other than his signature;[17] of an unofficial signature;[18] that a particular judge was presiding on a given date when there is another judge of the court;[19] or that the judge and a person appearing in another capacity with an identical name are one and the same person.[20] A court cannot know who are the judges of courts of record in another state.[21] Judicial notice is taken of a special judge appointed to hold a term of court,[22] but not of a special judge or judge pro tempore selected to try a specific cause.[23]

Retired federal judges. It is a matter of common knowledge that retired federal judges have in fact discharged a large measure of the duties appertaining to regular active service.[24]

Court officials. Courts judicially notice their own officials[25] and their official signatures,[26] and usually a state court takes the same judicial notice of the officials of other courts of the state.[27] Where such is a matter of common knowledge, judicial notice may be taken of the practice of paying the compensation to court officers on allowances made by the court.[28]

Clerks. All courts judicially know their own clerks[29] and deputy clerks[30] and their names.[31] Appellate courts take judicial notice of the clerks of courts over which they exercise appellate jurisdiction.[32] The lower state courts have in several instances taken judicial notice of the clerk[33] and deputy clerk[34] of another court in the same or another[35] county in the state, although it has been indicated that a court will not judicially know an

14. N.M.—Luna v. Cerrillos Coal R. Co., 218 P. 435, 29 N.M. 161, motion for hearing on the merits denied 226 P. 655, 29 N.M. 647.
Tenn.—Hicks v. Hicks, 79 S.W.2d 802, 168 Tenn. 539.
23 C.J. p 106 note 16.

Elevation
Court of appeal will take judicial cognizance that certain district judge had been elevated to supreme court and that a new district judge had succeeded him in the district court. —Hammond Box Co. v. Carmello Musso & Co., La.App., 172 So. 790.

15. Mich.—Oxford v. Berry, 170 N. W. 83, 204 Mich. 197.
N.Y.—People ex rel. Ferris v. Horton, 264 N.Y.S. 84, 147 Misc. 506, affirmed 269 N.Y.S. 579, 239 App. Div. 610.

Quorum
The supreme court will take judicial knowledge of fact that there are four circuit judges in the eleventh judicial circuit and that three of them constitute a quorum to transact appellate business.—Western Casualty & Surety Co. v. Rotter, 191 So. 78, 139 Fla. 854

16. Puerto Rico.—Bonnie Fruit Co. v. Davila, 7 Puerto Rico 430.

17. Tex.—Missouri, K. & T. R. Co. v. Hurdle, Civ.App., 142 S.W. 992.

18. Ala.—Reach v. Quinn, 48 So. 540, 159 Ala. 340.

19. La.—State v. Fenderson, 28 La. Ann. 328.
23 C.J. p 106 note 20.

20. Cal.—San Joaquin County v. Budd, 30 P. 967, 96 Cal. 47.
23 C.J. p 106 note 21.

21. Wis.—Fellows v. Menasha, 11 Wis. 558.

22. Ala.—Bell v. State, 22 So. 526, 115 Ala. 25.
N.C.—Reid v. Reid, 155 S.E. 719, 199 N.C. 740.—Bohannon v. Virginia Trust Co., 153 S.E. 263, 198 N.C. 702.—Greene v. Stadiem, 149 S.E. 685, 197 N.C. 472.

23. Okl.—Apple v. Ellis, 150 P. 1057, 50 Okl. 80.

24. U.S.—Booth v. U. S., Ct.Cl., 54 S.Ct. 379, 291 U.S. 339, 78 L.Ed. 836.

25. N.Y.—In re Behncke's Will, 16 N.Y.S.2d 496, 172 Misc. 862.
23 C.J. p 106 note 26.

Referees
(1) Judicial notice will be taken of referees.
U.S.—In re Day Lumber Co., D.C. Wash., 8 F.2d 146.
N.Y.—Eldridge v. Wolfe, 221 N.Y.S. 508, 129 Misc. 617.

(2) It is common knowledge that almost all official referees received their appointments after attaining the age of seventy years.—Decker v. Canzoneri, 9 N.Y.S.2d 210, 256 App. Div. 68.

26. Cal.—Alderson v. Bell, 9 Cal. 315.
Neb.—Zug v. Forgan, 90 N.W. 1129, 3 Nebr. (Unoff.) 149.
N.Y.—Mackinnon v. Barnes, 66 Barb. 91.

27. Tenn.—Major v. State, 2 Sneed 11.

28. Ind.—Etzold v. Board of Com'rs of Huntington County, 146 N.E. 842, 82 Ind.App. 655.

29. Miss.—Favre v. Louisville & N. R. Co., 178 So. 327, 180 Miss. 843.
23 C.J. p 106 note 30.

Present and past
Court takes judicial notice of present and past clerks of circuit court. —Davis v. Teague, 125 So. 51, 220 Ala. 309, appeal dismissed 50 S.Ct. 248, 281 U.S. 695, 74 L.Ed. 1123.

30. Minn.—State v. Barrett, 41 N.W. 459, 40 Minn. 65.
23 C.J. p 106 note 31.

31. Ind.—Mountjoy v. State, 78 Ind. 172.
Minn.—State v. Barrett, 41 N.W. 459, 40 Minn. 65.

32. Ala.—Tennessee-Hermitage Nat. Bank v. Hagan, 119 So. 4, 218 Ala. 390.
Ind.—State v. Freiberg, 122 N.E. 771. 70 Ind.App. 1.
N.J.—Mahnken v. Meltz, 116 A. 794, 97 N.J.Law 159.
Tenn.—Gulf Refining Co. v. Frazier, 83 S.W.2d 285, 19 Tenn.App. 76.
Tex.—Marion Mach. Foundry & Supply Co. v. Central Motor Co., Civ. App., 285 S.W. 933.
23 C.J. p 106 note 33.

Ex officio
Court of appeal judicially knows that county clerk and his deputy are ex officio clerks of superior court.—Union Bank & Trust Co. of Los Angeles v. Los Angeles County, 38 P.2d 442, 2 Cal.App.2d 600.

Filling of vacancies
The appellate division can take judicial notice that vacancies in the office of assistant clerk of the supreme court are always filled by promotion examinations from the ranks of attendants.—Kelty v. Kaplan, 199 N.Y.S. 337, 205 App.Div. 487.

33. Tex.—Goodwin v. Harrison, 66 S.W. 308, 28 Tex.Civ.App. 7.
23 C.J. p 107 note 34.

34. W.Va.—State v. Citizens' Trust & Guaranty Co., 77 S.E. 902, 72 W. Va. 181.

35. Ala.—White v. Rankin, 8 So. 118, 90 Ala. 541.
Ky.—Marsee v. Middlesborough Town Lands Co., 65 S.W. 118, 23 Ky.L. 1258.
Tenn.—Major v. State, 2 Sneed 11.

officer of another court.[36] Judicial notice of clerks and their deputies includes knowledge of their duties[37] and term of office,[38] identification of their signatures,[39] whether the official designation is given as "clerk"[40] or "deputy,"[41] or is represented merely by initials,[42] or is otherwise not given in full.[43]

State courts do not as a rule take judicial cognizance of clerks of courts in other states,[44] their signatures,[45] or official seals;[46] but in one state clerks of courts of record in other states are judicially noticed, to the extent at least of judicially recognizing their certificates of acknowledgment of deeds of land situated in the state.[47]

The clerk of a federal court sitting within the state may be judicially noticed,[48] but not the clerk of a federal court in another state.[49] However, a territorial court judicially recognizes the clerk of a federal court sitting in another state.[50]

Sheriffs, constables, and marshals. State courts judicially know who are the officers appointed by law for the service of process, such as the sheriffs of the several counties,[51] tax collectors acting as sheriffs under statutory authority,[52] city marshals authorized to serve process,[53] and constables acting as court officers;[54] their duties,[55] their terms of office,[56] their identity,[57] and their names and signatures,[58] even where the official title is indicated by initials,[59] or after a successor has been elected and is performing the duties of the office.[60] It has been held that officers such as deputy sheriffs, not commissioned in the name of the state, are not judicially recognized;[61] but other cases are to the contrary.[62] Federal courts will take judicial notice of United States marshals.[63] State courts do not judicially notice a deputy United States marshal,[64] or the official character of a sheriff of a county in another state.[65]

Prosecuting and other attorneys. Prosecuting attorneys within the jurisdiction,[66] their character as county officers,[67] the commencement and duration

36. Mich.—Norvell v. McHenry, 1 Mich. 227.
23 C.J. p 107 note 38.

37. Miss.—Columbian Mut. Life Ins. Co. v. Craft, 185 So. 225, 186 Miss. 234.

38. N.M.—State ex rel. Mirabal v. Greer, 21 P.2d 819, 37 N.M. 292.

39. Ala.—Buckner v. Graves, 98 So. 22, 210 Ala. 294.
N.J.—Mahnken v. Meltz, 116 A. 794, 97 N.J.Law 159.
23 C.J. p 107 note 39.

40. Minn.—State v. Barrett, 41 N. W. 459, 40 Minn. 65.
W.Va.—Central Land Co. v. Calhoun, 16 W.Va. 361.

41. Ill.—Dyer v. Last, 51 Ill. 179.
Minn.—State v. Barrett, 41 N.W. 459, 40 Minn. 65.
23 C.J. p 107 note 41.

42. Ind.—Buell v. State, 72 Ind 523.
Ky.—Marsee v. Middlesborough Town Lands Co., 65 S.W. 118, 23 Ky.L. 1258.

43. W.Va.—State v. Citizens' Trust & Guaranty Co., 77 S.E. 902, 72 W.Va. 181.
23 C.J. p 107 note 43.

44. Ala.—Ex parte Jones, 66 Ala. 202—Teat v. Chapman, 56 So. 267, 1 Ala.App. 491.
Mo.—Winham v. Kline, 77 Mo.App. 36.

45. Mo.—Rigler v. McClure, 175 S. W. 256, 189 Mo.App. 710.

46. Mo.—Rigler v. McClure, supra.

47. Mich.—Munroe v. Eastman, 31 Mich. 283—Morse v. Hewett, 28 Mich. 481—Shotwell v. Harrison, 22 Mich. 410.

48. La.—U. S. v. U. S. Bank, 11 Rob. 418.

49. La.—U. S. v. U. S. Bank, supra.
23 C.J. p 107 note 49.

50. U.S.—Buford v. Hickman, Ark. Super., 4 F.Cas.No.2,114a, Hempst. 232.

51. Ind.—Hitt v. Carr, 130 N.E. 1, 77 Ind.App. 488.
Mo.—Sowers-Taylor Co. v. Collins, App., 14 S.W.2d 692.
23 C.J. p 107 note 51.

52. Tex.—Burnett v. Henderson, 21 Tex. 588.

53. Mich.—Fleugel v. Lards, 66 N. W. 585, 108 Mich. 682.

54. Del.—Harris v. Buehler, 40 A. 733, 17 Del. 346.
La.—Graham v. Gibson, 14 La. 146.
Pa.—Fire Ins. Co. v. Keller, 9 Pa. Dist. 61.

55. **Away from office**
It is common knowledge that a sheriff in discharge of responsible duties is not expected to be always found in his office.—Houston Chronicle Pub. Co. v. Thomas, Tex.Civ.App., 262 S.W. 243.

Need for car
It is common knowledge that sheriff in any of populous counties of state must have automobile at command for immediate use.—State v. Graham, 240 P. 560, 136 Wash. 403.

56. Ala.—State, for Use of Houston County v. U. S. Fidelity & Guaranty Co., 195 So. 426, 239 Ala. 445—Ragland v. Wynn, 37 Ala. 32.
Mo.—Swabey v. Boyers, App., 71 S. W.2d 110.

57. Ala.—McMullen v. Daniel, 155 So. 687, 229 Ala. 194.

58. Ga.—J. R. Watkins Co. v. Seawright, 149 S.E. 389, 40 Ga.App. 314, conforming to answers to certified questions 149 S.E. 45, 168 Ga. 750.
23 C.J. p 107 note 56.

59. Ala.—Miller v. McMillan, 4 Ala. 527.

60. Ala.—Ryan v. Young, 41 So. 954, 147 Ala. 660.

61. Ala.—Land v. Patterson, Minor p 14.
Ark.—State Bank v. Curran, 10 Ark. 142.
23 C.J. p 107 note 59.

62. Tex.—Burrow v. Brown, 59 Tex. 457.
Wis.—Martin v. Aultman, 49 N.W. 749, 80 Wis. 150.
23 C.J. p 107 note 60.

Appointment at own request
Supreme court will take judicial notice that many deputies, such as deputy sheriffs, are appointed at their own request to serve their personal interests.—Monterey County v. Rader, 248 P. 912, 199 Cal. 221, 47 A.L.R. 359.

63. U.S.—Consolidated Gas Co. of New York v. Hardy, D.C.N.Y., 14 F.Supp. 223.

64. Wis.—Ward v. Henry, 19 Wis. 76, 88 Am.D. 672.

65. Or.—Griffin v. Griffin, 187 P. 598, 95 Or. 78.

66. U.S.—Anderson v. Rohrer, D.C. Fla., 3 F.Supp. 367.
23 C.J. p 107 note 64.

67. Cal.—Reid v. Superior Court in and for Trinity County, 186 P. 634, 44 Cal.App. 349.

of their terms of office,[68] and their duties and authority[69] are judicially known. In some jurisdictions, the fact that a city attorney is head of the city's legal department is a matter of common knowledge.[70]

An attorney at law is judicially recognized by the court in which he is admitted to practice.[71] The date of his admission to practice,[72] and his signature in his professional capacity when attached to pleadings, etc.,[73] are likewise known; but not his signature in a personal capacity,[74] as, for example, when he is acting as his own attorney.[75] Although the court may judicially notice the residence of the members of its own bar,[76] a court cannot judicially know particular facts concerning an attorney of its bar, as that he is in actual practice[77] or has removed from the state,[78] or that he is plaintiff in an action in the court by a party bearing his name;[79] and a superior court will not take judicial notice of attorneys admitted to practice in lower courts but not members of its own bar.[80]

Receivers. The court by which a receiver was appointed will take notice of such appointment.[81] The nature and extent of the powers of a receiver appointed by a court of bankruptcy, being matters of public law, are judicially known.[82]

§ 49. Practice and Procedure

Courts take judicial notice of their own rules, but, in the absence of a statute to the contrary, they do not take notice of the rules of other tribunals. Matters of common knowledge relating to practice in court will be judicially noticed.

Courts take judicial cognizance of the rules of practice prevailing in their own tribunal,[83] and assume a general similarity in the procedure of other courts.[84] In the absence of a valid statute to the contrary,[85] courts do not take judicial notice of

68. Ky.—Commonwealth v. McGoodwin, 268 S.W. 548, 206 Ky. 762.
23 C.J. p 107 note 66.

69. U.S.—Anderson v. Rohrer, D.C. Fla., 3 F.Supp. 367.

Drawing of papers

It is common knowledge that, throughout the state, county attorneys in small counties personally attend to work of drawing informations, instructions, and other papers in criminal cases.—Hyde v. Mineral County, 236 P. 248, 73 Mont. 363.

Practice

Court took judicial notice that it had been practice of some state's attorneys to appear in other counties and defend respondents charged with committing crimes therein and to appear in proceedings in which state was opposing party or had adverse interests.—In re Wakefield, 177 A. 319, 107 Vt. 180.

70. Ariz.—State Consol. Pub. Co. v. Hill, 3 P.2d 525, 39 Ariz. 21, rehearing denied and modified on other grounds 4 P.2d 668, 39 Ariz. 163.

71. Ill.—People v. Conzo, 23 N.E.2d 210, 301 Ill.App. 524—Beckers v. City of Kankakee, 213 Ill.App. 538.
N.Y.—Smiley v. Hayat Carpet Cleaning Co., 261 N.Y.S. 224, 146 Misc. 319.
Ohio.—Squire v. Bates, 5 N.E.2d 690, 132 Ohio St. 161.
23 C.J. p 108 note 67.
Judicial notice of legal profession generally see supra § 29.

However, it has been held that the court should not take judicial notice that a named person was an attorney.—White v. Haralson, 124 So. 417, 220 Ala. 189.

Conversely, judicial notice is taken that the name of a certain person does not appear on the roll kept by the clerk of the supreme court as a person licensed to practice as an attorney.—Bennie v. Triangle Ranch Co., 216 P. 718, 73 Colo. 586.

Particular facts about attorneys noticed

(1) That attorneys in city of Oakland outnumber those in other portions of same state bar district.—Solon v. State Bar of California, 24 P.2d 770, 218 Cal. 752.

(2) That attorney was actively practicing in state courts, notwithstanding his name was not on roll.—Pomeroy v. Collins, 243 P. 657, 198 Cal. 46.

72. Ohio.—Squire v. Bates, 5 N.E.2d 690, 132 Ohio St. 161.

73. N.Y.—Markes v. Epstein, 13 N.Y.Civ.Proc. 293.
Tex.—Strippelmann v. Clark, 11 Tex. 296.

74. Minn.—Masterson v. Le Claire, 4 Minn. 163.

75. Cal.—Alderson v. Bell, 9 Cal. 315.
Minn.—Masterson v. Le Claire, 4 Minn. 163.

76. U.S.—Porter v. Cooke, D.C.La., 20 F.Supp. 681.
S.D.—Chamberlain Sanitarium & Benevolent Ass'n of Seventh Day Adventists v. American Railway Express Co., 181 N.W. 841, 43 S.D. 604.

77. Wis.—Cothren v. Connaughton, 24 Wis. 134, 138.

78. Wis.—Sutton v. Chicago, St. P., M. & O. R. Co., 73 N.W. 993, 98 Wis. 157.

79. Mich.—Belden v. Blackman, 76 N.W. 979, 118 Mich. 448.
23 C.J. p 108 note 73.

80. Ariz.—Clark v. Morrison, 52 P. 985, 5 Ariz. 349.

81. Del.—Cahall v. Lofland, 108 A. 752, 12 Del.Ch. 162.
23 C.J. p 108 note 76.

82. Alaska.—McKenna v. Randle, 5 Alaska 590.

83. U.S.—In re Manufacturing Lumbermen's Underwriters, D.C.Mo., 18 F.Supp. 114.
Ill.—Brinkman v. Paulciewski, 245 Ill.App. 307—Brown v. Sprague, 229 Ill.App. 338.
Ind.—Black v. Parham, 199 N.E. 472, 101 Ind.App. 416.
La.—Wallace v. Martin, App., 166 So. 874—Albany Farm Bureau Strawberry Growers' Co-op. Ass'n v. Farris, 123 So. 394, 11 La.App. 295—General Securities Co. v. Odom, 123 So. 392, 11 La.App. 301.
Mont.—State ex rel. Odenwald v. District Court of Tenth Judicial Dist. in and for Fergus County, 38 P.2d 269, 98 Mont. 1.
Tex.—Sinz v. Meredith, Civ.App., 116 S.W.2d 464.
23 C.J. p 108 note 78.

84. Md.—Contee v. Pratt, 9 Md. 67—Oliver v. Palmer, 11 Gill. & J. 426.
Mass.—Newell v. Newton, 10 Pick. 470.

85. Ill.—Paulick v. National Bank of Republic, 279 Ill.App. 160—Chicago Title & Trust Co. v. Johnson, 268 Ill.App. 184—P. J. Claussen Co. v. Illinois Cent. R. Co., 259 Ill.App. 87.
Ky.—Kammerer v. Brown, 27 S.W.2d 959, 234 Ky. 199.
23 C.J. p 108 notes 82, 83.

Absence of rule

Under a statute requiring that judicial notice be taken of the rules of the lower court, the reviewing court will take notice that there is no rule as to a particular matter.—Whalen v. Twin City Barge & Grav-

the rules of practice in other courts of equal or inferior authority,[86] or of the practice or procedure of courts in another state.[87] A federal court exercising original jurisdiction or jurisdiction by removal from a state court takes judicial notice of the laws of the state, see supra § 15, but not of the rules of a state court affecting procedure.[88]

Matters of common knowledge relating to practices in court, or proceedings in courts, or matters generally known to the legal profession, although not established by statute or court rule, have been judicially noticed,[89] as has been procedure estab-

el Co., 280 Ill.App. 596, certiorari denied Twin City Barge & Gravel Co v. Whalen, 56 S.Ct. 590, 297 U.S. 714, 80 L.Ed. 1000.

Certified rules

Court of appeals takes judicial notice, under statute, of circuit court rules certified to it.—Combs v. Allen, 271 S.W. 598, 208 Ky. 519.

Operation of statute

Since a statute providing that an appellate court on review shall take judicial notice of all rules of practice adopted by the inferior court is remedial, judicial notice will be taken of such rules even though a final judgment was entered in the case before the act went into effect. —Capital State Sav. Bank v. Larson, 255 Ill.App. 479.

86. Ala.—Jefferson County Burial Soc. v. Scott, 118 So. 644, 218 Ala. 354.
Cal.—Gammon v. Ealey & Thompson, 275 P. 1005, 97 Cal.App. 452.
Colo.—Alsup v. Alsup, 230 P. 796, 76 Colo. 260.
Idaho.—Judy v. Reilly Atkinson & Co., 87 P.2d 451, 59 Idaho 752—Peters v. Walker, 215 P. 845, 37 Idaho 195.
Ill.—Kimber v. Kimber, 148 N.E. 293, 317 Ill. 561—Hooper v. Rooney, 127 N.E. 711, 293 Ill. 370—Dewar v. Loy, 248 Ill.App. 396. See McDonald v. Lehigh Valley R. Co., 191 Ill.App. 628.
La.—Herring v. Price, App., 169 So. 349.
Me.—Davis v. Cass, 142 A. 377, 127 Me. 167.
Mo.—State ex rel. Clinton Const. Co. v. Johnson, 272 S.W. 928—Gilpin v. Ætna Life Ins. Co., 132 S.W.2d 686, 234 Mo.App. 566—Pesch v. Boswell, App., 84 S.W.2d 151—Schraner v. Massman Const. Co., App., 48 S.W.2d 104—Patowsky v. Horwitz, 6 S.W.2d 668, 222 Mo.App. 894—E. D. Tyner Const. Co. v. Schoellkopf, App., 3 S.W.2d 735—Coffield v. Lindell, App., 1 S.W.2d 848—Hirsch v. Hirsch, App., 273 S.W. 151—O'Donnell v. New York Life Ins. Co., App., 251 S.W. 82—Fox-Miller Grain Co. v. Stephans, App., 217 S.W. 994.
Mont.—Williams v. Anaconda Copper Mining Co., 29 P.2d 649, 96 Mont. 204—Pincus v. Pincus' Estate, 26 P.2d 986, 95 Mont. 375—Middle States Oil Corporation v. Tanner-Jones Drilling Co., 235 P. 770, 73 Mont. 180.
Neb.—Federal Farm Mortg. Corporation v. Hughes, 291 N.W. 475, 137 Neb. 820.
Wash.—Larson v. Department of Labor and Industries, 25 P.2d 1040, 174 Wash. 618.
23 C.J. p 108 note 84.

87. Mass.—Newell v. Newton, 10 Pick. 470.
Mont.—Adams v. Stenehjem, 146 P. 469, 50 Mont. 232.

88. U.S.—Irvine v. Elliott, D.C.Del., 203 F. 82—Randall v. New England Order of Protection, C.C.Vt., 118 F. 782—Yarnell v. Felton, D.C.Tenn., 104 F. 161.

89. **Judicial notice has been taken:**

(1) Of fixed court costs for action to quiet title.—Stanley v. Parsons, 286 P. 654, 156 Wash. 217.

(2) Of the comparatively short time required for due prosecution of an execution levy.—Whittaker v. Chenault, 232 S.W. 391, 192 Ky. 81.

(3) Of the congested condition of certain courts.
U.S.—Celite Corporation v. Dicalite Co., C.C.A.Cal., 96 F.2d 242, certiorari denied Celite Corporation v. Decalite Co., 59 S.Ct. 101, 305 U.S. 633, 83 L.Ed. 407.
Tex.—In re House Bill No. 537 of Thirty-Eighth Legislature, 256 S.W. 573, 113 Tex. 367.

(4) Of the uncertainty of outcome of litigation.—Benner v. Lunt, 136 A. 814, 126 Me. 167.

(5) That causes assigned for trial are frequently settled, dismissed, continued, or otherwise disposed of without trial.—Hagar v. Galles, Iowa, 244 N.W. 700.

(6) That certain orders are made without formality of trial.—In re Carson's Estate, 265 N.W. 648, 221 Iowa 367.

(7) That courts in granting divorces fix amount for support of children in accordance with father's ability to pay and parties' financial status.—Huff v. Merchants Parcel Delivery Co., 18 N.E.2d 471, 106 Ind.App. 110—Denning v. Star Pub. Co., 180 N.E. 685, 94 Ind.App. 300.

(8) That drafting and filing petition for bankrupt's discharge is simple, short, and inexpensive.—In re MacLauchlan, C.C.A.N.Y., 9 F.2d 534—In re Malta, D.C.N.Y., 58 F.2d 771.

(9) That informal stipulations between counsel are frequently made, observed, and relied on, although unsigned.—M. Lewis & Sons v. Illinois Cent. R. Co., 259 S.W. 903, 150 Tenn. 94.

(10) That jurors enhance damages when informed damages will be paid by insurance companies.—Holman v. Cole, 218 N.W. 795, 242 Mich. 402.

(11) That magistrates do not keep office open at night.—Fouraker v. Kidd Springs Boating and Fishing Club, Tex.Civ.App., 65 S.W.2d 796.

(12) That many men not possessing the qualifications of electors under the Massachusetts constitution of 1780 have served as jurors.—In re Opinion of the Justices, 130 N.E. 685, 237 Mass. 591.

(13) That orders of county fiscal court are not signed by county or presiding judge at end of each order.—Louisville & N. R. Co. v. Bullitt County, 57 S.W.2d 506, 247 Ky. 489.

(14) That private persons rarely file criminal complaints, although statute authorizes them to do so.—State on Inf. of McKittrick v. Graves, Mo., 144 S.W.2d 91—State, on inf. McKittrick, v. Wymore, 132 S.W.2d 979, 345 Mo. 169.

(15) That record is frequently not enrolled during term at which order is made or judgment rendered.—People ex rel. McDonough v. Jarecki, 185 N.E. 570, 352 Ill. 207.

(16) That right of appeal and review de novo has been a determining factor in selection by counsel of forum for litigation.—Willis & Turner v. Moore & Davis, 271 S.W. 736, 151 Tenn. 562.

(17) That statute providing for waiver of jury trial is frequently availed of.—Whitney v. U. S., C.C.A.Wash., 8 F.2d 476.

(18) That strictness of pleading has been materially lessened.—Rubin v. Platt Music Co., 268 P. 396, 92 Cal.App. 203.

(19) That trial court, in certifying statement of facts, simply certifies to its contents.—Schultz v. Anderson, 71 P.2d 365, 191 Wash. 326.

(20) That trial courts frequently do not pass on the admissibility of evidence until both parties have rested.—American Workmen v. Ledden, 120 S.W.2d 346, 196 Ark. 902, 120 A.L.R. 201.

(21) Other matters.
U.S.—U. S. v. Collins, C.C.A.W.Va., 61 F.2d 1002—Mitchell v. Lay, C.C.A.Cal., 60 F.2d 941—Baltimore & O. R. Co. v. Bole, D.C.W.Va., 31

lished by statute;[90] but matters of practice or proceedings which are not a matter of common knowledge, and which are not established by statute or court rule, will not be judicially noticed.[91]

The judge may take judicial notice of facts which occurred in open court in the trial of the cause,[92] and the trial court takes judicial notice of any action taken in court by counsel in cases there pending.[93] Courts are without knowledge as to how or why or on what reasoning a jury found their verdict.[94] Of course, the court cannot take judicial knowledge of what will happen in further proceedings in the case.[95]

F.Supp. 221—In re Wolverine Bumper & Specialty Co., D.C.Mich., 24 F.Supp. 423—U. S. v. Standard Oil Co. of California, D.C.Cal., 20 F.Supp. 427—In re Kelly Springfield Tire Co., D.C.Md., 13 F.Supp. 724—Holmberg v. Southern Minnesota Joint Stock Land Bank of Minneapolis, D.C.Minn., 10 F.Supp. 795—In re Paramount Publix Corporation, D.C.N.Y., 8 F.Supp. 644.

Ala.—Tennessee-Hermitage Nat. Bank v. Hagan, 119 So. 4, 218 Ala. 390—Payne v. Roy, 90 So. 605, 206 Ala. 432.

Ark.—Stanton v. Arkansas Democrat Co., 106 S.W.2d 584, 194 Ark. 135—Arkansas Power & Light Co. v. Mason, 87 S.W.2d 988, 191 Ark. 804—W. B. Worthen Co. v. Delinquent Lands, 75 S.W.2d 62, 189 Ark. 115, reversed on other grounds W. B. Worthen Co. ex rel. Board of Com'rs of Street Improvement Dist No. 513 of Little Rock, Ark., v. Kavanaugh, 55 S.Ct. 555, 295 U.S. 56, 79 L.Ed 1298, 97 A.L.R. 905.

Cal.—Moore v Superior Court in and for City and County of San Francisco, 263 P. 1009, 203 Cal. 238—Los Angeles County v. Emme, App., 108 P.2d 695—Boyes v. Evans, 58 P.2d 922, 14 Cal.App.2d 472—In re Olsen's Estate, 50 P.2d 70, 9 Cal.App 2d 374—Union Bank & Trust Co. of Los Angeles v. Los Angeles County, 38 P.2d 442, 2 Cal.App.2d 600—Rio Grande Oil Co. v. Seaboard Surety Corporation of America, 33 P.2d 887, 139 Cal.App. 164—Curran v. Superior Court in and for Fresno County, 236 P 975, 72 Cal.App. 258.

Del.—Russell v. Mayor and Council of Wilmington, 162 A. 71, 5 W.W. Harr. 193—Lofland v. Cahall, 115 A. 458, 13 Del Ch. 370.

Fla.—Courtney v Central Trust Co., 150 So. 276, 112 Fla. 298.

Ill.—People ex rel. McDonough v. Chicago, M., St. P. & P. R. Co., 188 N.E. 404, 354 Ill. 438—People v. Morris, 170 N.E. 216, 338 Ill. 335—People v. Yonker, 184 N.E 228, 351 Ill. 139—Morrissey v. Morrissey, 19 N.E.2d 835, 299 Ill.App. 173.

Iowa.—Woods v. Brown, 223 N.W. 868, 207 Iowa 944.

Mich.—Detroit Bar Ass'n v. Union Guardian Trust Co., 276 N.W. 365, 282 Mich. 216, followed in Detroit Bar Ass'n v. Detroit Trust Co., 276 N.W. 372, 282 Mich. 237, and Detroit Bar Ass'n v. Equitable Trust Co., 276 N.W. 373, 282 Mich. 238, rehearing denied Detroit Bar Ass'n v. Union Guardian Trust Co, 281 N.W. 432, 282 Mich. 707—Shambleau v. Hoyt, 251 N.W. 778, 265 Mich. 560—Cullen v. Voorhies, 205 N.W. 177, 232 Mich. 420

Miss.—Sabougla Drainage Dist. No. 2 of Calhoun and Webster Counties v. People's Bank & Trust Co. of Tupelo, 1 So 2d 219.

Mo.—State ex rel. and to Use of City of St. Louis v. Priest, 152 S.W.2d 109.

Mont.—Allen v. Petrick, 222 P 451, 69 Mont. 373.

Nev.—In re Porep, 111 P.2d 533—Bowers v. Charleston Hill Nat. Mines, 256 P. 1058, 50 Nev. 99

N.J.—Nightengale v. Public Service Co-ordinated Transport, 149 A. 526, 8 N.J.Misc. 238.

N.M.—Mosley v. Magnolia Petroleum Co., 114 P.2d 740.

N.Y.—McCarthy v. Woolston, 205 N.Y.S. 507, 210 App.Div. 152—Hopkins v. Hawkins, 211 N.Y.S. 588, 125 Misc. 561, affirmed 212 N.Y.S. 834, 215 App.Div. 751—Ohmann v. Harnett, 6 N.Y.S.2d 199, 168 Misc. 521—Guaranty Trust Co. of New York v. National Surety Co., 227 N.Y.S. 189, 131 Misc. 679.

S.C.—Fant v. Home Bank & Trust Co., 151 S.E. 792, 154 S.C. 445.

Tex.—Mann v. Risher, 116 S.W.2d 692, 131 Tex. 498, affirming Poland v. Risher, Civ.App., 88 S.W.2d 1106—Southern Underwriters v. Dykes, Civ.App., 145 S.W.2d 1105—Texas Employers Ins Ass'n v. Mitchell, Civ.App., 142 S.W.2d 626, error dismissed, judgment correct—Petroleum Producers Co. v. Stolley, Civ. App., 137 S.W.2d 207, error dismissed, judgment correct—Cleburne Nat. Bank v. Bowers, Civ. App., 113 S.W.2d 578, conforming to answer to certified question 112 S.W.2d 717, 130 Tex. 637—Rudolph v. Hanes, Civ.App., 106 S.W.2d 743—Sovereign Camp, W. O. W., v. Wiggins, Civ.App., 94 S.W.2d 1237—Tide Water Oil Co. v. Railroad Commission, Civ.App., 76 S.W.2d 553—Tilton v. Sharp, Civ.App., 52 S.W.2d 289—Tate v. Standard Accident Ins. Co., Civ.App., 32 S.W.2d 932, error refused—Shoemaker v. Harrington, Civ.App., 30 S.W.2d 539, affirmed Shoemaker v. American Nat. Ins. Co., Com.App., 48 S.W.2d 612.

Utah.—Caldwell v. Erickson, 213 P. 182, 61 Utah 265.

Va.—Anderson v. Biazzi, 186 S.E. 7, 166 Va. 309.

Wash.—Stanley v. Parsons, 286 P. 654, 156 Wash. 217.

Wis.—In re Southard's Estate, 242 N.W. 584, 208 Wis. 150—Ernest v. Schmidt, 223 N.W. 559, 199 Wis. 440, reversed in part on other grounds 227 N.W. 26, 199 Wis. 440.

23 C.J. p 108 note 80 [a].

90. Vt.—State v. Marsh, 40 A. 836, 70 Vt. 288.

23 C.J. p 108 note 81.

91. Size of courtroom

Judicial notice cannot be taken of size of courtroom where case was tried.—Atkins v. Torson, Mo.App., 12 S.W.2d 930.

Suits for false claims

The institution and maintenance of suits for false claims is recognized, but to what extent in comparison with honest ones is not a matter of judicial notice; nor is it a matter of such notice in what measure false claims are successful.—Chiuchiolo v New England Wholesale Tailors, 150 A 540, 84 N.H. 329.

92. Ind.—Wabash Ry. Co. v. City of Gary, 132 N.E 737, 191 Ind. 394—Moerecke v. Bryan, 108 N.E. 948, 183 Ind. 591.

Okl.—Dancy v. Owens, 258 P. 879, 126 Okl. 37—State v. Owens, 256 P. 704, 125 Okl. 66, 52 A.L.R. 1270.

Tex.—Hardy v. City of Throckmorton, Civ.App., 62 S.W.2d 1104.

Force of recollection

Trial court's personal recollection of prior agreements, orders, and proceedings in same lawsuit has binding force of accredited evidence, fact that no record thereof was made at time being immaterial.—Board of Com'rs of Allen County v. Board of Education of Iola, 51 P.2d 973, 142 Kan. 770.

93. N.H.—Dolber v. Young, 123 A. 218, 81 N.H. 157.

94. Ga.—Hicks v. Walker, 87 S.E 152, 17 Ga.App. 391.

95. Recovery and issues

On motion for change of venue, judicial notice will not be taken of the fact that the amount of damages claimed is greater than is likely to be allowed by a jury, or that defendant will put in issue the amount of the damages claimed, so as to jus-

§ 50. Records, Court Papers, Etc.

a. In general
b. In same case or in engrafted, ancillary, or supplementary proceedings
c. In other cases in same court
d. Records of other courts

a. In General

A court may take judicial notice of its own records for all proper purposes.

A court will take judicial notice of its own records for all proper purposes,[96] including records in cases tried in, and removed from, another

tify an affidavit of merits.—Walling v. Williams, 192 P. 34, 183 Cal. 600.

96. U.S.—U. S. v. California Co-op. Canneries, D.C., 49 S.Ct. 423, 279 U.S. 553, 73 L.Ed. 838—Kelly v. Johnston, C.C.A.Cal., 111 F.2d 613, certiorari denied 61 S.Ct. 710, rehearing denied 61 S.Ct. 803—In re Maxwell, C.C.A.Tex., 100 F.2d 749—Pagett v. McCauley, C.C.A.Wash., 95 F.2d 839—Meyer v. Kerrigan, C.C.A.Cal., 67 F.2d 599—Hatch v. Morosco Holding Co., D.C.N.Y., 56 F.2d 640, affirmed, C.C.A., 61 F.2d 944, certiorari denied 53 S.Ct. 404, 288 U.S. 613, 77 L.Ed. 986—Bowe-Burke Mining Co. v. Willcuts, D.C.Minn., 45 F.2d 394—St. Louis-San Francisco R. Co. v. Byrnes, C.C.A.Mo., 24 F.2d 66—Saunders v. Piggly Wiggly Corporation, D.C.Tenn., 1 F.2d 582—State of Missouri ex rel. and to Use of Darr v. A. B. Collins & Co., D.C.Mo., 34 F.Supp. 549—Sunkist Drinks v. California Fruit Growers Exchange, D.C.N.Y., 25 F.Supp. 400—U. S. v. Marini, D.C.N.Y., 16 F.Supp. 963—Connecticut Mut. Life Ins. Co. v. Lawrence, D.C.Mich., 15 F.Supp. 13—Karnes v. Keck, D.C.Ill., 11 F.Supp. 577—Commonwealth Bank & Trust Co. of San Antonio, Tex., v. Collins Mortg. Co., D.C.Iowa, 10 F.Supp. 460—U. S. v. Pacific Forwarding Co., D.C.Wash., 8 F.Supp. 647—Gerson, Beesley & Hampton v. Shubert Theatre Corporation, D.C.N.Y., 7 F.Supp. 399—Wilson v. Lyon County Bank, D.C.Nev., 4 F.Supp. 608—Freeman-Sweet Co. v. Luminous Unit Co., C.C.A.Ill., 264 F. 107, modifying, D.C., Luminous Unit Co. v. Freeman-Sweet Co., 249 F. 876, certiorari denied 40 S.Ct. 482, 253 U.S. 486, 64 L.Ed. 1025.

Ala.—Jobe-Rose Jewelry Co. v. City of Birmingham, 178 So. 215, 216, 235 Ala. 178, citing **Corpus Juris**—Jackson v. Chemical Nat. Bank, 112 So. 105, 215 Ala. 538—Quick v. McDonald, 108 So. 529, 214 Ala. 587.

Ariz.—MacRae v. MacRae, 112 P.2d 213—Sims Printing Co. v. Kerby, 106 P.2d 197.

Cal.—In re Fulton's Estate, 48 P.2d 120, 8 Cal.App.2d 423—People v. Rhodes, 30 P.2d 1026, 1029, 137 Cal.App. 385, citing **Corpus Juris**—Field v. Hughes, 25 P.2d 241, 242, 134 Cal.App. 325, quoting **Corpus Juris**—Hurley v. Lake County, 298 P. 123, 113 Cal.App. 291—Lapique v. Plummer, 195 P. 293, 50 Cal.App. 88.

Colo.—Burson v. Adamson, 25 P.2d 723, 93 Colo. 301.

D.C.—Booth v. Fletcher, 101 F.2d 676, 69 App.D.C. 351, certiorari denied, Fletcher v. Booth, 59 S.Ct. 835, 307 U.S. 628, 83 L.Ed. 1511.

Fla.—Bayview Homes Co. v. Sanders, 136 So. 234, 102 Fla. 516.

Ill.—Sherman & Ellis v. Journal of Commerce and Commercial Bulletin, 259 Ill.App. 453—Beckers v. City of Kankakee, 213 Ill.App. 538.

Ind.—Blankenbaker v. State, 166 N.E. 265, 201 Ind. 142—State ex rel. Department of Financial Institutions of Indiana v. Topf's Estate, 13 N.E.2d 883, 105 Ind.App. 530—Ashley v. Canida, 192 N.E. 317, 99 Ind.App. 313.

Iowa.—Farmers' State Sav. Bank of Promise City v. Miles, 221 N.W. 449, 206 Iowa 776—Dayton v. Pacific Mut. Life Ins. Co., 210 N.W. 945, 202 Iowa 753—Hagedorn v. Rockafellow, 180 N.W. 688, 190 Iowa 553.

La.—State ex rel. Harner v. Karpe, 92 So. 124, 151 La. 585.

Mich.—In re Marxhausen's Estate, 225 N.W. 632, 247 Mich. 192.

Mo.—Collins v. Leahy, 146 S.W.2d 609—Gill v. Buchanan County, 142 S.W.2d 665—Houck v. Little River Drainage Dist., 119 S.W.2d 826, 343 Mo. 28—State ex rel. W. A. Ross Const. Co. v. Skinker, 106 S.W.2d 409, 341 Mo. 28—State ex rel. Union Electric Light & Power Co. v. Public Service Commission, 62 S.W.2d 742, 333 Mo. 426—State ex rel. Jones v. Miller, 221 S.W. 88—State ex rel. Stanley v. American Surety Co. of New York, 102 S.W.2d 823, 231 Mo.App. 343—Fly v. Jackson, 45 S.W.2d 919, 226 Mo.App. 203.

N.H.—Wellington v. Wellington, 192 A. 153, 88 N.H. 482.

N.J.—Township of North Bergen v. Luckenbach Terminals, 19 A.2d 331, 129 N.J.Eq. 387.

N.Y.—In re Hatlee's Estate, 14 N.Y.S.2d 763, 171 Misc. 1032—Gleason v. H. M. Byllesby & Co., 290 N.Y.S. 436, 160 Misc. 613—In re Greenberg's Will, 286 N.Y.S. 56, 158 Misc. 446—In re Lichtman's Estate, 265 N.Y.S. 415, 148 Misc. 228—In re Blake's Will, 263 N.Y.S. 310, 146 Misc. 780—Edgar A. Levy Leasing Co. v. Cohen, 261 N.Y.S. 145, 145 Misc. 810—In re Morningstar's Will, 257 N.Y.S. 240, 143 Misc. 620—In re Surpless' Estate, 255 N.Y.S. 730, 143 Misc. 48.

Ohio.—Gillen v. Industrial Commission of Ohio, 17 N.E.2d 663, 59 Ohio App. 241.

Okl.—Dancy v. Owens, 258 P. 879, 126 Okl. 37—State v. Owens, 256 P. 704, 125 Okl. 66, 52 A.L.R. 1270—Parmenter v. Rowe, 200 P. 683, 87 Okl. 158.

Tex.—Edmondson v. Carroll, Civ.App., 134 S.W.2d 378, error dismissed, judgment correct—Sinz v. Meredith, Civ.App., 116 S.W.2d 464—Hobbs v. Boyd, Civ.App., 292 S.W. 947—Covert v. Calvert, Civ.App., 287 S.W. 117—Long v. Martin, Civ.App., 260 S.W. 327, error dismissed 278 S.W. 1115, 114 Tex. 581.

Vt.—Weiner v. Prudential Ins. Co. of America, 1 A.2d 708, 110 Vt. 22, 118 A.L.R. 1237.

Va.—West v. L. Bromm Baking Co., 186 S.E. 291, 166 Va. 530.

Wash.—Guardianship of Robinson, 115 P.2d 734.

Wyo.—State v. Grace, 5 P.2d 301, 43 Wyo. 454.

23 C.J. p. 109 note 89, p. 109 notes 92–94, p. 110 notes 95–99—4 C.J. p. 561 notes 74, 75.

Decrees

Court takes judicial knowledge of its own decrees.—Beggs v. Brooker, Tex.Civ.App., 79 S.W.2d 642, affirmed Beggs v. Fite, 106 S.W.2d 1039, 130 Tex. 46.

Fact of keeping

Circuit court of appeals takes judicial notice that courts of second circuit for a long time have kept a decree book as part of minutes of court.—The Washington, C.C.A.N.Y., 16 F.2d 206.

Papers filed

Court will take judicial cognizance of all papers filed therein.—Johnston v. Geary, 33 P.2d 757, 84 Utah 47.

Industrial board may take judicial notice of its own records.—Carter v. Neeley's Estate, 2 N.E.2d 221, 102 Ind.App. 257.

Manner of keeping

Ala.—Holcombe v. State ex rel. Chandler, 200 So. 739, 240 Ala. 590.

Opinions

The supreme court will take judicial cognizance of its own opinions.—Investors Homestead Ass'n v. Anglada, 192 So. 69, 193 La. 596.

Pleadings will be judicially noticed.—Parker v. Sims, 51 S.W.2d 517,

court.[97] Accordingly a court, by the use of judicial notice of its records, may ascertain such facts as that a certain case[98] or appeal[99] is or is not pending, that a claim is or is not barred by the statute of limitations,[1] and other facts which may be obtained from its records.[2]

Unless otherwise entitled to judicial notice, matters outside the record ordinarily will not be noticed.[3] Acts done in the clerk's office dehors the record will not be judicially noticed,[4] although the rule is otherwise when a fact of this nature, such as payment of money into court, is entered as of record.[5]

The court may examine records[6] or docket entries,[7] either of its own motion[8] or at the suggestion of counsel,[9] to ascertain the relevant facts set forth in them; but its judicial knowledge does not have greater force and effect than would be accorded the evidence of which it supplies the place.[10]

b. In Same Case or in Engrafted, Ancillary, or Supplementary Proceedings

A court may take judicial notice of its own records in the same case or in engrafted, ancillary, or supplementary proceedings.

In a case on trial in any court its records are actually or constructively before the judge. He will therefore take judicial notice of them and the facts which they establish,[11] as in dealing with pleas in

185 Ark. 1111—23 C.J. p 109 note 92 [a] (6).

Summons

Supreme court takes judicial notice of summons, and its date.—First Nat. Bank v. American Surety Co. of New York, 267 N.Y.S. 565, 239 App.Div. 282.

97. Md.—Boteler v. State, 8 Gill & J. 359.

98. Ala.—State v. Kimbrell, 88 So. 351, 18 Ala.App. 68.
Tex.—Carr v. Cleveland, Civ.App., 86 S.W.2d 858, error refused.
23 C.J. p 110 note 1.

99. Cal.—Field v. Hughes, 25 P.2d 241, 134 Cal.App. 325.
Ga.—Bibb Brick Co. v. Central of Georgia Ry. Co., 102 S.E. 521, 150 Ga. 65.

1. U.S.—Ben C. Jones & Co. v. West Pub. Co., C.C.A.Tex., 270 F. 563, error dismissed 46 S.Ct. 208, 270 U.S. 665, 70 L.Ed. 789.
Okl.—Blakeney v. Francis, 231 P. 464, 105 Okl. 11.
Tex.—Watts v. Gibson, Civ.App., 33 S.W.2d 777.
23 C.J. p 110 note 3.

2. Wash.—Doremus v. Root, 63 P. 572, 23 Wash. 710, 54 L.R.A. 649.
23 C.J. p 110 notes 4–7.

3. Cal.—Hurley v. Lake County, 298 P. 123, 113 Cal.App. 291—City of Stockton v. Frisbie & Latta, 270 P. 270, 93 Cal.App. 277.
N.C.—Southerland v. Crump, 153 S.E. 845, 199 N.C. 111.
N.D.—In re McKee's Estate, 274 N.W. 601, 67 N.D. 504.
Utah.—Staats v. Staats, 226 P. 677, 63 Utah 470.

Affidavit

Court could not take judicial notice of affidavit of service of notice of trial merely filed among papers of cause, but not introduced in evidence.—Hurley v. Lake County, 298 P. 123, 113 Cal.App. 291.

An execution not being a part of the record proper until after it is returned, until that time the court out of which it issued cannot take judicial notice of its issuance, much less of the action of an officer in making a levy under it.—First Nat. Bank v. Brown, Mo., 264 S.W. 677—Nichols Wire & Sheet Co. v. Brown, Mo., 264 S.W. 677—Oliver Chilled Plow Works v. Brown, Mo., 264 S.W. 677—John Deere Plow Co. of St. Louis v. Brown, 264 S.W. 675, 305 Mo. 182—Orlando v. Surwald, Mo.App., 47 S.W.2d 228.

Service of process

Ill.—Hunsaker v. Watts, 257 Ill.App. 351.

4. Tex.—Foster v. Chicago, R. I. & T. R. Co., 31 S.W. 529, 10 Tex.Civ.App. 476.
23 C.J. p 110 note 8.

5. N.Y.—Goldman v. Swartwout, 102 N.Y.S. 302, 304, 117 App.Div. 185.
23 C.J. p 110 note 9.

6. Vt.—Dewey v. St. Albans Trust Co., 12 A. 224, 60 Vt. 1, 6 Am.S.R. 84.

7. Vt.—Dewey v. St. Albans Trust Co., supra—Armstrong v. Colby, 47 Vt. 359.

8. U.S.—Freshman v. Atkins, C.C.A.Tex., 294 F. 867, affirming, D.C., In re Freshman, 290 F. 609, certiorari granted Freshman v. Atkins, 44 S.Ct. 404, 264 U.S. 578, 68 L.Ed. 858, and affirmed 46 S.Ct. 41, 269 U.S. 121, 70 L.Ed. 193.
23 C.J. p 110 note 12.

9. Vt.—Bacon v. Boston & M. R. R. Co., 77 A. 858, 83 Vt. 528.
23 C.J. p 110 note 13.

10. Ala.—Neville v. Kenney, 28 So. 452, 125 Ala. 149, 82 Am.S.R. 230.

11. U.S.—Pitcairn v. Fisher, C.C.A. Iowa, 78 F.2d 649—Walsh Const. Co. v. U. S. Guarantee Co., C.C.A. Iowa, 76 F.2d 240, certiorari denied 56 S.Ct. 120, 296 U.S. 605, 80 L.Ed. 428—McDonough v. Owl Drug Co., C.C.A., 75 F.2d 45, certiorari denied 55 S.Ct. 829, 295 U.S. 750, 79 L.Ed. 1694—U. S. v. Diamond, D.C.N.Y., 50 F.2d 263, appeal dismissed, C.C.A., 50 F.2d 1075—Franz v. Buder, C.C.A.Mo., 34 F.2d 353—In re Levinson, D.C.Wash., 5 F.2d 75—In re Charles Nelson Co., D.C.Cal., 27 F.Supp. 673—In re Kent Refining Co., D.C.Mich., 20 F.Supp. 661—Western Powder Mfg. Co. v. Interstate Coal Co., D.C.Ill., 13 F.Supp. 77—The Golden Gate, C.C.A.Cal., 286 F. 105—Ben C. Jones & Co. v. West Pub. Co., C.C.A.Tex., 270 F. 563, error dismissed 46 S.Ct. 208, 270 U.S. 665, 70 L.Ed. 789—U. S. v. North American Oil Consolidated, C.C.A.Cal., 264 F. 336, affirming, D.C., 242 F. 723, appeal dismissed, 1922, 42 S.Ct. 315, 258 U.S. 633, 66 L.Ed. 802.
Ala.—Maya Corporation v. Smith, 196 So. 125, 239 Ala. 470—Berman v. Wreck-A-Pair Bldg. Co., 175 So. 269, 234 Ala. 293—Snodgrass v. Snodgrass, 115 So. 21, 217 Ala. 128—Stephenson v. Stephenson, 112 So. 119, 215 Ala. 545—Alabama Power Co. v. Goodwin, 106 So. 239, 214 Ala. 15—McDonald v. Stephens, 85 So. 746, 204 Ala. 359.
Alaska.—Alaska Siberian Nav. Co. v. Polet, 7 Alaska 374.
Ark.—Parker v. Sims, 51 S.W.2d 517, 185 Ark. 1111.
Cal.—Johnston v. Ota, App., 110 P.2d 507—Petition of Reader, 89 P.2d 654, 32 Cal.App.2d 309—Gackstetter v. Market St. Ry. Co., 52 P.2d 998, 10 Cal.App.2d 713—Schomer v. R. L. Craig Co., 31 P.2d 396, 137 Cal.App. 620.
Colo.—Jensen v. Jensen, 40 P.2d 238, 96 Colo. 151—Gates v. Hepp, 35 P.2d 857, 95 Colo. 285.
Conn.—Nichols v. Nichols, 13 A.2d 591, 126 Conn. 614—Stolman v. Boston Furniture Co., 180 A. 507, 120 Conn. 235.
D.C.—Parks v. Calvert, 15 F.2d 895, 56 App.D.C. 381.
Fla.—State ex rel. Du Pont Ball v. Livingston, 139 So. 360, 104 Fla. 33.
Ga.—Ellis v. First Nat. Bank of Atlanta, 186 S.E. 813, 814, 182 Ga. 641, citing **Corpus Juris**—Durham Iron Co. v. Durham, 7 S.E.2d 804,

abatement, motions to dismiss, or for a new trial based on defects in the record.[12] Accordingly, when necessary for the administration of justice in a given case, the court will take such notice of all previous and undisputed proceedings therein as appear of record, certified or authenticated as required by law, and required by law to be on file or of record in the cause,[13] including facts as to the action of the court[14] or of the judge[15] on a former hearing. In some jurisdictions it is held that the courts may take notice of the facts shown on former trials,[16] but according to other authority the evidence at a former trial is not a proceeding, or part of a proceeding, within the rule that courts may take judicial notice of prior proceedings in the same action.[17] The record on a prior appeal in the

62 Ga.App. 361—Dixon v. Weatherly, 192 S.E. 830, 56 Ga.App. 406.
Idaho.—Russell v. Bow, 295 P. 437, 50 Idaho 264.
Ill.—People v. McKinlay, 11 N.E.2d 933, 367 Ill. 504.
Ind.—Pennsylvania R. Co. v. Hough, 161 N.E. 705, 88 Ind.App. 601—Horner v. Daily, 133 N.E. 585, 77 Ind.App. 378—Ashley v. Canida, 192 N.E. 317, 99 Ind.App. 313.
Kan.—Baron v. Lyman, 18 P.2d 137, 136 Kan. 842—Post v. Hodges, 253 P. 556, 122 Kan. 755.
La.—McCoy v. Arkansas Natural Gas Corporation, 190 So. 391, 193 La. 238.
Md.—Hart v. Hart, 166 A. 414, 165 Md. 77.
Mo.—Pennington v. Kansas City Rys. Co., 223 S.W. 428, 284 Mo. 1—Bennett v. Metropolis Pub. Co., App., 148 S.W.2d 109—Robison v. Chicago Great Western R. Co., App., 66 S.W.2d 180—Sanders v. Ray Printing Co., App., 45 S.W.2d 876.
Mont.—In re Kostohris' Estate, 29 P.2d 829, 96 Mont. 226.
Neb.—Solomon v. A. W. Farney, Inc., 286 N.W. 254, 259, 136 Neb. 338, quoting **Corpus Juris.**
N.M.—In re Landers' Estate, 283 P. 49, 34 N.M. 431.
N.Y.—Capitol Motion Picture Supply Corporation v. Joan of Arc Pictures, 19 N.Y.S.2d 116, 173 Misc. 773—In re Behncke's Will, 16 N.Y.S.2d 496, 172 Misc. 862—In re Reilly's Estate, 300 N.Y.S. 1285, 165 Misc. 214—In re Clarke, 260 N.Y.S. 750, 145 Misc. 660.
N.C.—Petition of Peaden, 154 S.E. 832, 199 N.C. 486.
Okl.—Dime Savings & Trust Co. v. Humphreys, 53 P.2d 665, 175 Okl. 497—Ward v. Schwab, 232 P. 849, 106 Okl. 29.
Pa.—Ulakovic v. Metropolitan Life Ins. Co., 16 A.2d 41, 339 Pa. 571—In re Philadelphia Co. for Guaranteeing Mortgages, 17 A.2d 662, 143 Pa.Super. 407.
Tenn.—Stone v. O'Neal, 90 S.W.2d 548, 552, 19 Tenn.App. 512, citing **Corpus Juris.**
Tex.—Olivares v. Garcia, 91 S.W.2d 1059, 127 Tex. 112, affirming, Civ.App., 56 S.W.2d 243—Republic Ins. Co. v. Highland Park Independent School District, Civ.App., 123 S.W.2d 784, error dismissed, 125 S.W.2d 270, 133 Tex. 545—Bevill v. Rosenfield, Civ.App., 113 S.W.2d 340, error dismissed—Andrews v. Hedrick Sav. Bank of Hedrick, Iowa, Civ.App., 103 S.W.2d 838—Davis v. Donalson, Civ.App., 91 S.W.2d 763, error dismissed—Carr v. Cleveland, Civ.App., 86 S.W.2d 858, error refused—American Fidelity & Casualty Co. v. Bradley, Civ.App., 70 S.W.2d 645, error dismissed—Griffith v. Tipps, Civ.App., 69 S.W.2d 846—Waggoner v. Edwards, Civ.App., 68 S.W.2d 655—McCormick v. Southwestern Life Ins. Co., Civ.App., 35 S.W.2d 502—National Life & Accident Ins. Co. of Nashville, Tenn., v. Taree, Civ.App., 8 S.W.2d 291, error dismissed—Humphreys v. Young, Civ.App., 293 S.W. 655—Lopez v. Mexico-Texas Petroline & Asphalt Co., Civ.App., 281 S.W. 326.
Utah.—Rockwood v. Rockwood, 236 P. 457, 65 Utah 261.
Wash.—In re Laack's Estate, 62 P.2d 1087, 188 Wash. 462—United Truck Lines v. Department of Public Works of Washington, 42 P.2d 1104, 181 Wash. 318—Regenvetter v. Ball, 229 P. 321, 131 Wash. 155—Parkes v. Burkhart, 172 P. 908, 101 Wash. 659, modified on other grounds In re Parkes' Estate, 178 P. 830, 105 Wash. 586
23 C.J. p 110 note 15, p 111 note 19.

Date of institution of suit

(1) The court may take judicial notice of the date of filing of a petition or complaint
U.S.—Securities and Exchange Commission v. Torr, D.C.N.Y., 22 F. Supp. 602.
Ill.—Linehan v. Morton, 221 Ill.App. 70—Elliott v. Atchison, T. & S. F. R. Co., 262 Ill.App. 466.
Mo.—Berkbigler v. Scott County Milling Co., App., 275 S.W. 599.
Tex.—Askey v. Power, Com.App., 36 S.W.2d 446, reversing, Civ.App., 21 S.W.2d 326—Watts v. Gibson, Civ.App., 33 S.W.2d 777—Liberty Life Ins. Co. v. Moore, Civ.App., 10 S.W.2d 178, error dismissed.

(2) The court may likewise notice the date on which a claim was filed.—O'Grady v. State, 194 N.Y.S. 423, 118 Misc. 693.

(3) Other cases involving notice of date of institution of suit see 23 C.J. p 110 note 15 [a].

Execution

The execution with the sheriff's return thereon is a part of the record of the case in which it is issued, and of which the chancellor will take judicial notice in proceeding on motion to quash the levy.—Jobe-Rose Jewelry Co. v. City of Birmingham, 178 So. 215, 235 Ala. 178.

Industrial accident commission may judicially notice its former decision in same case.—Benton v. Industrial Accident Commission of California, 240 P. 1021, 74 Cal.App. 411.

The signature of a party to an action will, under some circumstances, be judicially noticed.—Tischner v. Rutledge, 77 P. 388, 35 Wash. 285, 287—23 C.J. p 111 note 20.

Time to answer

Courts may take judicial notice that time to answer in a pending suit had not expired.—Ritchey Lithographing Corporation v. Robertson-Cole Distributing Corporation, 191 N.Y.S. 870, 199 App.Div. 362.

12. Mo.—State v. Ulrich, 19 S.W. 656, 110 Mo. 350.
S.D.—Searls v. Knapp, 58 N.W. 807, 5 S.D. 325, 49 Am.S.R. 873.
23 C.J. p 111 note 16.

13. Cal.—Hollenbach v. Schnabel, 35 P. 872, 101 Cal. 312, 40 Am.S.R. 57.
Colo.—Hughes v. Jones, 3 P.2d 1074, 89 Colo. 455.
N.Y.—Brooklyn Public Library v. City of New York, 226 N.Y.S. 491, 222 App.Div. 422, affirmed 166 N.E. 179, 250 N.Y. 495, reargument and amendment of remittitur denied, 168 N.E. 438, 251 N.Y. 589—In re Grube's Will, 7 N.Y.S.2d 794.
Ohio.—Decker v. Kolleda, 14 N.E.2d 417, 57 Ohio App. 442.
Or.—Oden v. Oden, 69 P.2d 967, 157 Or. 73.
Tenn.—Davis v. Robertson, 56 S.W.2d 752, 165 Tenn. 609.
Tex.—Universal Credit Co. v. Vance, Civ.App., 117 S.W.2d 508, error dismissed—Mathews v. Myers, Civ.App., 42 S.W.2d 1099—Snow v. Cook, Civ.App., 278 S.W. 520.

14. Tex.—Jones v. Chronister Lumber Co., Civ.App., 204 S.W. 704.
23 C.J. p 111 note 17.

15. Ill.—Bailey v. Kerr, 54 N.E. 165, 180 Ill. 412—Secrist v. Petty, 109 Ill. 188.
Mo.—State v. Ulrich, 19 S.W. 656, 110 Mo. 350.

16. Tex.—Traders & General Ins. Co. v. Rhodabarger, Civ.App., 109 S.W.2d 1119, error dismissed.

17. Minn.—Taylor v. Northern States Power Co., 264 N.W. 139,

same case in the same court may be judicially noticed[18] and the decision on the former appeal will be judicially noticed.[19] Where, however, on account of differences in the theory advanced and facts presented the decision on the former appeal is not the law of the case in subsequent proceedings, see Appeal and Error § 1964 d, it will not be judicially noticed as such.[20] Likewise, in some instances, the court has refused to take judicial notice of its record, and the facts disclosed by such record, in a prior appeal.[21]

In considering the sufficiency of the petition, the court can take judicial notice only of those matters of record in existence at the time the petition was filed.[22] The court will not take judicial notice of the truth of statements made on a preliminary motion raising objections to the trial of the action before the judge in the court below.[23] An appellate court will not, under guise of taking judicial notice of the record, take judicial cognizance of facts occurring subsequently to the judgment or order appealed from where such facts would have been considered by the lower court if they had preëxisted the judgment and where they are not such facts as would be pertinent on a motion to dismiss the appeal;[24] nor can an appellate court know that the judgment appealed from was rendered upon an agreement to arbitrate, or upon an award.[25]

In engrafted, ancillary, or supplementary proceedings. An original record will be judicially noticed by the same court, in proceedings that are engrafted on, or ancillary to, it,[26] such as scire facias to revive a judgment,[27] a petition to set aside a

196 Minn. 22—MacIntyre v. Albers, 221 N.W. 526, 175 Minn. 411.

18. U.S.—City of Orlando v. Murphy, C.C.A.Fla., 94 F.2d 426—McLeod v. Boone, C.C.A.Cal., 91 F.2d 71—Speers Sand & Clay Works v. Pratt, C.C.A.Md., 37 F.2d 571.
Ala.—Alabama Water Co. v. City of Anniston, 151 So. 457, 227 Ala. 579—Cartwright v. Hughes, 147 So. 399, 226 Ala. 464—Aiken v. McMillan, 106 So. 150, 213 Ala. 494—Ex parte Jackson, 103 So. 558, 212 Ala. 496—Wade v. Kay, 97 So. 129, 210 Ala. 122—Hines v. Minniard, 94 So. 302, 208 Ala. 176.
Ariz.—McCarrell v. Turbeville, 75 P.2d 361, 51 Ariz. 166.
Cal.—In re Bruce's Estate, 80 P.2d 82, 27 Cal.App.2d 44—Gackstetter v. Market St. Ry. Co., 52 P.2d 998, 999, 10 Cal.App.2d 713, quoting **Corpus Juris.**
Colo.—Hughes v. Jones, 3 P.2d 1074, 89 Colo. 455.
Conn.—Bishop v. City of Meriden, 169 A. 41, 117 Conn. 499—Borden v. Town of Westport, 151 A. 512, 112 Conn. 152.
Fla.—Pavlis v. Atlas-Imperial Diesel Engine Co., 172 So. 57, 126 Fla. 808.
Idaho.—Blaine County Inv. Co. v. Mays, 15 P.2d 734, 736, 52 Idaho 381, citing **Corpus Juris.**
Ill.—George v. Walters, 224 Ill.App. 1.
La.—Biri v. Biri, 149 So. 457, 177 La. 792.
Mo.—Collins v. Leahy, 146 S.W.2d 609—Sabol v. St. Louis Cooperage Co., 31 S.W.2d 1041, 1043, citing **Corpus Juris**—Bushman v. Barlow, 15 S.W.2d 329, 321 Mo. 1052—Fath v. City of Cape Girardeau, App., 132 S.W.2d 1073.
N.M.—Alamogordo Improvement Co. v. Palmer, 216 P. 686, 28 N.M. 590.
N.Y.—Susquehanna Silk Mills v. Rebora, 263 N.Y.S. 858, 238 App.Div. 100, reversed on other grounds 189 N.E. 687, 263 N.Y. 539—Brooklyn Public Library v. City of New York, 226 N.Y.S. 491, 222 App.Div. 422, affirmed 166 N.E. 179, 250 N.Y. 495, reargument and amendment of remittitur denied 168 N.E. 438, 251 N.Y. 589.
Tex.—Jones v. City of Uvalde, Civ.App., 144 S.W.2d 932, error refused—Ferrell v. Ertel, Civ.App., 100 S.W.2d 1084, error dismissed.
Wash.—Cloquet v. Department of Labor and Industries, 282 P. 201, 154 Wash. 363.
Wis.—Nehring v. Niemerowicz, 276 N.W. 325, 226 Wis. 285.
23 C.J. p 111 note 21—4 C.J. p 561 note 76.

History of litigation

Supreme court takes judicial notice of history of litigation as disclosed by its own records and its previous opinions therein.—Lockard v. Industrial Commission, 25 P.2d 132, 93 Colo. 179.

19. Mont.—Lloyd v. City of Great Falls, 87 P.2d 187, 107 Mont. 588.
23 C.J. p 111 note 22.

On remand

Where case is remanded by appellate court to lower court, lower court should take judicial notice of appellate court's opinion.—Carpenter v. Carpenter, 106 S.W.2d 620, 269 Ky. 187—Tuttle v. Irvine Const. Co.'s Receiver, 90 S.W.2d 359, 262 Ky. 361.

20. Puerto Rico.—Aparicio v. Christianson, 25 Puerto Rico 1, followed in Arbona v. Christianson, 25 Puerto Rico 16.

21. Neb.—Calmelet v. Sickl, 74 N.W. 407, 54 Neb. 97.
4 C.J. p 561 note 77.

22. Ohio.—Sloan v. Gitman, 9 N.E.2d 366, 55 Ohio App. 188.

23. N.Y.—Auerfeld v. Feuer, 98 N.Y.S. 687.

24. N.Y.—Public Service Commission for First Dist. v. Brooklyn Borough Gas Co., 178 N.Y.S. 93, 189 App.Div. 62, modifying 171 N.Y.S. 937, 104 Misc. 315.

25. Tex.—Hamilton v. Eiland, Civ.App., 181 S.W. 260.

26. U.S.—In re Bishop, D.C.N.Y., 13 F.Supp. 905.
Mo.—Ford v. Stevens Motor Car Co., 232 S.W. 222, 209 Mo.App. 144
Tex.—Davis v. Donalson, Civ.App., 91 S.W.2d 763, error dismissed—Griffith v. Tipps, Civ.App., 69 S.W.2d 846—First State Bank of Lorraine v. Jackson, Civ.App., 13 S.W.2d 979—Dallas Joint Stock Land Bank v. Dallas County Levee Improvement Dist. No. 9, Civ.App., 2 S.W.2d 305, 306, citing **Corpus Juris,** error refused—Connellee v. Witty, Civ.App., 246 S.W. 715, 716, citing **Corpus Juris.**
Wash.—State v. Superior Court for King County, 277 P. 850, 152 Wash. 323.
23 C.J. p 112 note 28.

In redemption proceedings, court judicially knows when foreclosure proceedings were concluded.—Castera v. Commercial Building & Loan Ass'n, 41 S.W.2d 1082, 184 Ark. 128.

Motion to reinstate case, dismissed for want of prosecution, or for new trial, filed during same term as original suit in which meritorious cause of action was stated, need not allege facts showing meritorious cause of action, as court will take judicial notice of pleadings.—Blair & Hughes Co. v. Short, Tex.Civ.App., 271 S.W. 199.

On bill for review

Tex.—Andrade v. Donnelly, Civ.App., 70 S.W.2d 256—Griffith v. Tipps, Civ.App., 69 S.W.2d 846.

27. Ill.—Eau Claire Bank v. Reed, 83 N.E. 820, 232 Ill. 238, 122 Am.S.R. 66—Reed v. Waterbury Nat. Bank, 135 Ill.App. 165, affirmed 83 N.E. 188, 231 Ill. 246.

default judgment,[28] successive adjudications of water rights in the same district,[29] petition for allowance of attorney's[30] or guardian's[31] fees, and certain proceedings to enforce a judgment, order, or decree,[32] such as proceedings in contempt.[33] On this principle courts take judicial cognizance of the record of the original suit and of the facts shown by it in supplementary proceedings by way of garnishment,[34] or in proceedings against a stockholder on a judgment against a corporation;[35] and it is not prejudicial error for a court to reject the record altogether when it is offered as evidence.[36] Where, however, garnishment[37] or other[38] proceedings are independent, a judgment recovered in the main action must be duly proved in the new proceedings.

c. In Other Cases in Same Court

Courts ordinarily do not in one case take judicial notice of their own records in other cases.

As a general rule courts do not in one case take judicial notice of their own records in other cases,[39] even though the trial judge in fact knows or

28. Ind.—Macy v. Lindley, 99 N.E. 790, 54 Ind.App. 157.
Mo.—Pelz v. Bollinger, 79 S.W. 146, 180 Mo. 252.

29. Colo.—Huerfano Valley Ditch & Reservoir Co. v. Hinderlider, 256 P. 305, 81 Colo. 468.
23 C.J. p 112 note 31.

30. Ala.—Lewis v. Wilkinson, 186 So. 150, 237 Ala. 197.
Mass.—Culhane v. Foley, 26 N.E.2d 331, 305 Mass. 542.

Entry of decree in main action
Ala.—Wade v. Kay, 97 So. 129, 210 Ala. 122.

31. Ala.—Frazer v. First Nat. Bank, 178 So. 441, 235 Ala. 252, 126 A.L.R. 1.

32. Ga.—Taliaferro v. Farkas, 166 S.E. 426, 46 Ga.App. 9.
Mich.—Kolakowski v. Cyman, 281 N.W. 332, 285 Mich. 585.
23 C.J. p 112 note 32.

33. Utah.—Utah Power & Light Co. v. Richmond Irr. Co., 13 P.2d 320, 80 Utah 105.
23 C.J. p 112 note 33.

34. Ill.—Poncher v. Mohawk Auto Equipment Co., 244 Ill.App. 218—Dandridge v. Northern Trust Co., 218 Ill.App. 138.
Tex.—First Nat. Bank in George West v. Frost Nat. Bank of San Antonio, Civ.App., 142 S.W.2d 555, error dismissed, judgment correct—Hale County State Bank v. Bray, Civ.App., 97 S.W.2d 337, error refused—Camden Fire Ins. Ass'n v. First Nat. Bank, Civ.App., 84 S.W.2d 889, error dismissed—Becker v. Cooper, Civ.App., 22 S.W.2d 1083, error dismissed—Revere Oil Co. v. Bank of Chillicothe, Civ.App., 255 S.W. 219.
23 C.J. p 112 note 34.

Reversal of original judgment
Judicial knowledge will be taken of reversal of judgment in original action pending appeal from judgment against garnishee, and garnishment proceedings dismissed.—Keeton v. Robinson, 110 So. 839, 144 Miss. 899.

35. Ill.—Pease v. Underwriters' Union, 1 Ill.App. 287.
Mo.—Ollesheimer v. Thompson Mfg. Co., 44 Mo.App. 172.

36. Mo.—Spengler v. Kaufman, 43 Mo.App. 5.
Use and function of judicial notice generally see supra § 13.

37. Tex.—Tripplett v. Hendricks, Civ.App., 212 S.W. 754.
23 C.J. p 112 note 37.

38. U.S.—McDonald v. Clearwater Shortline R. Co., C.C.Idaho, 164 F. 1007.
N.J.—State v. Hudson County Electric Co., 38 A. 818, 61 N.J.Law 144
Or.—State v. Sieber, 88 P. 313, 49 Or. 1.

39. U.S.—A. G. Reeves Steel Const. Co. v. Weiss, C.C.A.Ohio, 119 F.2d 472—In re Interstate Oil Corporation, C.C.A.Cal., 63 F.2d 674—Parady v. Caterpillar Tractor Co., C.C.A.Ill., 48 F.2d 166—Morse v. Lewis, C.C.A.W.Va., 54 F.2d 1027, certiorari denied 52 S.Ct. 640, 286 U.S. 557, 76 L.Ed. 1291—National Surety Co. v. U. S., C.C.A.Wash., 29 F.2d 92—U. S. v. One 1935 Model Pontiac Sedan Automobile, Motor No. 6-11834, D.C.Ky., 15 F.Supp. 604, reversed on other grounds, C.C.A., U. S. v. One 1935 Model Pontiac Sedan Automobile, 105 F.2d 149.
Ala.—Crossland v. First Nat. Bank, 172 So. 255, 257, 233 Ala. 432, citing **Corpus Juris**—Quick v. McDonald, 108 So. 529, 214 Ala. 587.
Ariz.—Stewart v. Phœnix Nat. Bank, 64 P.2d 101, 103, 49 Ariz. 34, citing **Corpus Juris.**
Cal.—Johnston v. Ota, App., 110 P.2d 507—Bank of America Nat. Trust & Savings Ass'n v. Button, 74 P.2d 81, 23 Cal.App. 651—In re Fulton's Estate, 59 P.2d 508, 15 Cal.App.2d 202—In re Fulton's Estate, 48 P.2d 120, 8 Cal.App.2d 423—Plum v. Indian Valley Bank, 4 P.2d 543, 118 Cal.App. 13—Brown v. Brown, 256 P. 595, 83 Cal.App. 74.
D.C.—White v. Central Dispensary and Emergency Hospital, 99 F.2d 355, 69 App.D.C. 122, 119 A.L.R. 1002.
Fla.—Pavlis v. Atlas-Imperial Diesel Engine Co., 172 So. 57, 126 Fla. 808—Adams v. Adams, 170 So. 697, 126 Fla. 217—Atlas Land Corporation v. Norman, 156 So. 885, 116 Fla. 800—State ex rel. Du Pont Ball v. Livingston, 139 So. 360, 104 Fla. 33.
Ill.—People v. Chicago & E. I. Ry. Co., 168 N.E. 294, 336 Ill. 506—People v. Keokuk & Hamilton Bridge Co., 129 N.E. 87, 295 Ill. 176, error dismissed Keokuk & Hamilton Bridge Co. v. People of State of Illinois ex rel. McCallister, 42 S.Ct. 462, 258 U.S. 613, 66 L.Ed. 790.
Ind.—Fletcher Savings & Trust Co. v. American State Bank of Lawrenceburg, 147 N.E. 524, 196 Ind. 118.
Iowa.—Kostlan v. Mowery, 226 N.W. 32, 208 Iowa 623.
Ky.—Maynard v. Allen, 124 S.W.2d 765, 276 Ky. 485.
La.—Cumberland Tel. & Tel. Co. v. St. Louis, I. M. & S. R. Co., 41 So. 492, 117 La. 199—Phillips v. Albrecht, App., 179 So. 629.
Me.—Ladd v. Merrill, 111 A. 428, 119 Me. 377.
Miss.—Bank of Indianola Liquidating Corporation v. Moore, 171 So. 693, 177 Miss. 572.
Mont.—State v. District Court of the Sixth Judicial Dist. in and for Park County, 236 P. 553, 73 Mont. 297.
Neb.—Witzenburg v. State, 299 N.W. 533.
Nev.—Giannopulos v. Chachas, 257 P. 618, 50 Nev. 269, citing **Corpus Juris.**
N.M.—Dodrill v. State Bank of Alamagordo, 297 P. 144, 35 N.M. 342.
N.Y.—City Bank Farmers Trust Co. v. Title Guarantee & Trust Co., 15 N.Y.S.2d 211.
N.D.—Wickum v. Arneson, 249 N.W. 709, 63 N.D. 594.
Ohio.—Foltzer v. City of Cincinnati, App., 36 N.E.2d 192—Schubeler v. Lilly, 155 N.E. 699, 23 Ohio App. 481.
Okl.—Simpson v. Highfill, 45 P.2d 115, 172 Okl. 141.
Or.—Oden v. Oden, 69 P.2d 967, 157 Or. 73.
Pa.—John Deere Plow Co. v. Hershey, 134 A. 490, 287 Pa. 92—Walter v. Baldwin, 193 A. 146, 126 Pa.Super. 589—R. K. O. Distributing Corporation v. Shook, 164 A. 855, 108 Pa.Super. 383, followed in Metro Goldwyn Mayer Distributing Corporation v. Shook, 164 A. 858, 108 Pa.Super. 391—Beaver Bene-

remembers the contents thereof,[40] or even though the parties are the same.[41] At least, the court cannot be required or expected to take such notice.[42] This general rule, however, is not an inflexible one and has several exceptions.[43] The fact that such exceptions exist indicate that the rule is not based on lack of power but is a rule of expediency,[44] to be applied or refused application as the equities and justice of the cases require.[45] It has also been indicated that a broad restriction of the power to take judicial notice of its own records is not well suited to the conduct of the business of an appellate court.[46] Consequently, in the exercise of their discretion,[47] at least where such records are properly called to their attention,[48] for one purpose or another courts have frequently taken notice of their

ficial Ass'n v. Fraternal Order Beavers, 14 Pa.Dist. & Co. 669—Seltzer v. City of Reading, 33 Berks Co.L.J. 230.

S.D.—Schreier v. Veglahn, 227 N.W. 487, 56 S.D. 125.

Tenn.—Union Nat. Bank v. Fox, App., 148 S.W.2d 381—Hudson v. Shoulders, 122 S.W.2d 817, 819, 22 Tenn.App. 301, citing **Corpus Juris.**

Tex.—Grayson v. Rodermund, Civ. App., 135 S.W.2d 178—Jones Hardware Co. v. Telford, Civ.App., 63 S.W.2d 735, citing **Corpus Juris**—First State Bank of Loraine v. Jackson, Civ.App., 13 S.W.2d 979—Short v. Blair & Hughes Co., Civ. App., 230 S.W. 427.

Utah.—Spencer v. Industrial Commission, 20 P.2d 618, 81 Utah 511—Robison v. Kelly, 255 P. 430, 431, 69 Utah 376, citing **Corpus Juris.**

Va.—Wilson v. Wilson, 118 S.E. 270, 136 Va. 643.

W.Va.—Carper, for Use and Benefit of Phœnix Assur. Co., Limited, of London, v. Montgomery Ward & Co., 13 S.E.2d 643.

Wyo.—Tibbals v. Graham, 61 P.2d 279, 50 Wyo. 277, rehearing denied 62 P.2d 285, 50 Wyo. 277, hearing denied 66 P.2d 1048, 51 Wyo. 350—Sidlo, Simons, Day & Co. v. Phillips, 49 P.2d 243, 244, 48 Wyo. 390, citing **Corpus Juris.**

23 C.J. p 113 notes 39, 40—4 C.J. p 561 note 79.

"The reason for the rule above referred to is that the decision of a cause must depend upon the evidence introduced. If the courts should recognize judicially facts adjudicated in another case, it makes those facts, though unsupported by evidence in the case in hand, conclusive against the opposing party; while if they had been properly introduced they might have been met and overcome by him."—Paridy v. Caterpillar Tractor Co., C.C.A.Ill., 48 F.2d 166, 169.

Facts

The court will not take judicial notice of facts on which its former decisions were based to the extent of recognizing them as facts in the case under consideration.

U.S.—Becker Steel Co. of America v. Cummings, D.C.N.Y., 16 F.Supp. 601.

Miss.—Interstate Co. v. Jolly, 125 So. 406, 156 Miss. 199, suggestion of error overruled 125 So. 838, 156 Miss. 199.

Tex.—Scott v. Clark, Civ.App., 38 S.W.2d 382.

Proof of issue

Where a showing of the existence of some record or entry in another case in the court is essential to enable a party to a cause to bear his burden of proof on some matter at issue, the court will not take judicial notice thereof, and the record itself must be introduced in evidence.—Richards Brick Co. v. Wright, 82 S.W.2d 274, 231 Mo.App. 946.

Residence of petitioner

Where a statute confers jurisdiction of nonresident guardians and nonresident wards where the ward has real or personal property situated in the county, in a proceeding to remove the disability of minority the court cannot take judicial notice that petitioner is a resident because guardianship proceedings are pending in the court at the time.—Dulion v. Folkes, 120 So. 437, 153 Miss. 91.

40. Ill.—People v. McKinlay, 11 N.E.2d 933, 367 Ill. 504.

Ohio.—Burke v. McKee, 164 N.E. 776, 30 Ohio App. 236.

Pa.—Naffah v. City Deposit Bank, 13 A.2d 63, 339 Pa. 157—Steel v. Levy, 127 A. 766, 767, 282 Pa. 338, citing **Corpus Juris**—Weaver v. Reinhart, 11 Pa.Dist. & Co. 120, 124, 24 Sch.Leg.Rec. 313, quoting **Corpus Juris.**

Wash.—Bodenock v. Cater's Motor Freight System, 86 P.2d 766, 769, 198 Wash. 21, quoting **Corpus Juris.**

23 C.J. p 113 note 41.

41. U.S.—Paridy v. Caterpillar Tractor Co., C.C.A.Ill., 48 F.2d 166.

Ark.—Parker v. Sims, 51 S.W.2d 517, 185 Ark. 1111.

Mo.—Walker v. Ross, App., 71 S.W.2d 124.

Pa.—Commonwealth v. Ball, 121 A. 191, 277 Pa. 301, 29 A.L.R. 626.

Wash.—Large v. Shively, 58 P.2d 808, 186 Wash. 490.

42. Cal.—Lapique v. Plummer, 196 P. 300, 51 Cal.App. 207.

Mo.—Edwards v. American Ry. Express Co., App., 216 S.W. 781.

Tenn.—Boyd v. Merchants Delivery Co. & Clarkson, 7 Tenn.App. 416.

43. Cal.—City of Los Angeles v. Abbott, 17 P.2d 993, 217 Cal. 284, followed in 19 P.2d 47 (first case), 129 Cal.App. 787, 19 P.2d 47 (second case), 129 Cal.App. 788, 19 P.2d 47 (third case), 129 Cal.App. 789, and 19 P.2d 48 (first case), 129 Cal.App. 790, 19 P.2d 48 (second case), 129 Cal.App. 791, 19 P.2d 48 (third case), 129 Cal.App. 792.

Particular exceptions recognized

(1) In disbarment proceedings.—In re King, Or., 105 P.2d 870.

(2) In divorce suits.—Hall v. Hall, 186 A. 318, 122 Pa.Super. 242.

(3) Where the court is seeking to determine what is a reasonable exercise of its discretion.—Hobbs v. Town of Hot Springs, 106 P.2d 856, 860, 44 N.M. 592, quoting **Corpus Juris**—23 C.J. p 114 note 44.

(4) Other exceptions see 23 C.J. p 113 notes 42, 43, p 114 note 45.

44. Cal.—City of Los Angeles v. Abbott, 17 P.2d 993, 217 Cal. 284, followed in 19 P.2d 47 (first case), 129 Cal.App. 787, 19 P.2d 47 (second case), 129 Cal.App. 788, 19 P.2d 47 (third case), 129 Cal.App. 789, and 19 P.2d 48 (first case), 129 Cal.App. 790, 19 P.2d 48 (second case), 129 Cal.App. 791, 19 P.2d 48 (third case), 129 Cal.App. 792.

45. U.S.—Morse v. Lewis, C.C.A.W.Va., 54 F.2d 1027, certiorari denied 52 S.Ct. 640, 286 U.S. 557, 76 L.Ed. 1291.

Cal.—Bank of America Nat. Trust & Savings Ass'n v. Button, 74 P.2d 81, 23 Cal.App. 651.

Unreasonable hardship

The only exception to the rule is when unreasonable hardship would result.—Johnston v. Ota, Cal.App., 110 P.2d 507.

46. "It frequently becomes necessary to notice our records to enable us to properly dispose of the matters which come before us. The situation of the parties is often, if not usually, such that it is impossible to have inserted in the transcript on appeal previous action taken in this court. If we are prohibited from taking judicial notice of our records in previous matters, we may be driven to the absurd result of having two judgments diametrically opposed to each other."—Alamogordo Improvement Co. v. Palmer, 216 P. 686, 688, 28 N.M. 590.

47. Conn.—Davis v. Maislen, 165 A. 451, 116 Conn. 375.

48. Fla.—Belle Mead Development

records in other cases,[49] and it has been held that courts may notice, from their records, the cases brought to them and the disposition thereof.[50] Also a court may take judicial notice of, and give effect to, its own records in another, but interrelated, proceeding,[51] particularly where the issues and parties

Corporation v. Reed, 153 So. 843 114 Fla. 300.

Reference in pleadings

"With respect to the judicial notice by a court of its own records we do not wish to be understood as holding that in all cases courts may notice the record of other proceedings therein, even though they be between the same parties and involve the same subject-matter. See 23 Corpus Juris 113, § 1920. But where a party refers to such other proceeding or judgment in his pleading for any purpose, the court on demurrer by the other party may and should take judicial notice of the entire proceeding in so far as it is relevant to the question of law presented."—Cogburn v. Callier, 104 So. 328, 330, 213 Ala. 38.

Where judgment is pleaded

Ala.—Crossland v. First Nat. Bank, 172 So. 255, 233 Ala. 432.

Fla.—Leatherman v. Alta Cliff Co., 153 So. 845, 114 Fla. 305.

49. Ariz.—Hislop v. Rodgers, 92 P. 2d 527, 54 Ariz. 101.

Mo.—St. ex rel. Horton v. Bourke, 129 S.W.2d 866, 344 Mo. 826—Siemers v St. Louis Electric Terminal Ry. Co., 125 S W.2d 865, 343 Mo. 1201.

N.H.—Wellington v. Wellington, 192 A. 153, 88 N.H. 482.

Administrative tribunal may take notice of results reached by it in other cases.—Hoffman v. Public Service Commission, 99 Pa.Super. 417.

Insolvency of bank

The court may take judicial notice from its records in other cases of the insolvency of a bank, where not to do so would be a travesty on justice.—Wood v. Kennedy, 3 P.2d 366, 117 Cal.App. 53.

50. Ala.—Alabama Power Co. v. City of Scottsboro, 190 So. 412, 238 Ala. 230.

Ky.—Wiman v. First Christian Church of Mayfield, 117 S.W.2d 989, 273 Ky. 821.

Decisions and judgments

A court may take judicial notice of its own decisions and judgments.

Ala.—Hamrick v. Town of Albertville, 155 So. 87, 228 Ala. 666—Elmore County v. Tallapoosa County, 128 So. 158, 221 Ala. 182.

Cal.—Nordin v. Bank of America Nat. Trust & Savings Ass'n, 52 P. 2d 1018, 11 Cal.App 2d 98.

D.C.—Fletcher v. Wheat, 100 F.2d 432, 69 App.D C. 259, certiorari denied 59 S.Ct. 794, 307 U.S. 621, 83 L.Ed. 1500.

Ill.—People ex rel. McDonough v. Chicago, M., St. P. & P. R. Co, 188 N.E. 404, 354 Ill. 438—People v. Cleveland, C., C. & St. L. Ry. Co., 143 N.E. 425, 312 Ill. 48.

Iowa.—Mathews v. Turner, 236 N.W. 412, 212 Iowa 424

Ky.—Owens v. Witmer Co., 121 S.W. 2d 966, 275 Ky. 439.

N.Y.—Slater v. Slater, 204 N.Y.S. 112, 208 App.Div. 567, affirmed 148 N.E. 703, 240 N.Y. 557.

Ohio.—State ex rel. Gaede v. Guion, 158 N.E. 748, 117 Ohio St. 327.

Tex.—Bauer v. Taylor, Civ.App., 118 S.W 2d 826, error refused—Jones v. Osbolt, Civ.App., 46 S.W.2d 422, error refused—Montgomery v. Huff, Civ.App., 11 S.W.2d 237, error refused.

Fact of litigation on a particular issue may be judicially noticed.

Ill.—People ex rel. McDonough v. Chicago, M., St. P. & P. R. Co., 188 N E. 404, 354 Ill. 438.

N.Y.—City of New York v. Interborough Rapid Transit Co., 236 N. Y.S. 449, 134 Misc. 827.

51. U S.—Alexander v. Hillman, W Va., 56 S.Ct. 204, 296 U.S. 222, 80 L.Ed. 192, reversing, C C A., 75 F 2d 451, certiorari granted 55 S Ct. 826 (two cases), 295 U S. 725, 79 L. Ed. 1677—West Ohio Gas Co. v. Public Utilities Commission of Ohio, 55 S Ct. 316, 294 U.S. 63, 79 L Ed. 761, reversing West Ohio Gas Co. v. Public Utilities Commission (City of Lima), 191 N.E 105, 128 Ohio St. 301, reversed on other grounds West Ohio Gas Co. v. Public Utilities Commission of Ohio, 55 S.Ct. 324, 294 U.S. 79, 79 L.Ed. 773, conformed to 196 N.E. 674, 129 Ohio St. 670—National Fire Ins. Co. of Hartford v. Thompson, 50 S Ct. 288, 281 U.S 331, 74 L Ed. 881, affirming, D.C., Ætna Ins. Co. v. Hyde, 34 F.2d 185—Freshman v. Atkins, Tex., 46 S.Ct. 41, 269 U.S. 121, 70 L.Ed. 193, affirming, C.C.A., 294 F. 867, which affirmed, D.C., In re Freshman, 290 F. 609—Kithcart v. Metropolitan Life Ins. Co., C.C.A.Mo., 119 F.2d 497—A. G. Reeves Steel Const. Co. v. Weiss, C.C.A.Ohio, 119 F.2d 472—Terminal R. Ass'n of St. Louis v. Kimbrel, C C.A.Mo., 105 F 2d 262—U. S. v. Nudelman, C. C.A.Ill., 104 F.2d 549, certiorari denied Nudelman v. U. S., 60 S.Ct. 115, 308 U.S. 589, 84 L.Ed. 493—O'Donnell v. U. S., C.C.A.Cal., 91 F.2d 14, certiorari granted U. S. v. O'Donnell, 58 S.Ct. 146, 302 U.S. 677, 82 L.Ed. 523, reversed on other grounds 58 S.Ct. 708, 303 U. S. 501, 82 L Ed. 980—Kithcart v. Metropolitan Life Ins. Co., C.C.A. Mo., 88 F.2d 407—Suren v. Oceanic S. S. Co., C.C.A.Cal., 85 F.2d 324, certiorari denied 57 S.Ct. 430, 300 U.S. 653, 81 L.Ed. 863—Hamilton Gas Co. v. Watters, C C A.W.Va., 79 F.2d 438, affirming, D.C., Watters v. Hamilton Gas Co., 10 F. Supp. 323—Wallace v. Franz, C.C. A., 68 F.2d 313—Morse v. Lewis, C.C.A.W.Va., 54 F.2d 1027, certiorari denied 52 S.Ct. 640, 286 U.S. 557, 76 L.Ed. 1291—Iberia Petroleum Corporation v. Acadian Production Corporation of Louisiana, D.C.La., 34 F.Supp. 995—Reynolds v. Imlay, D.C.D.C., 33 F.Supp. 564, motion denied, C.C.A., 118 F.2d 53—Sunkist Drinks v. California Fruit Growers Exchange, D.C.N.Y., 25 F.Supp. 400—Barnes v. Boyd, D.C.W.Va., 8 F.Supp. 584, affirmed, C.C.A., 73 F.2d 910, certiorari denied 55 S.Ct. 550, 294 U.S. 723, 79 L.Ed. 1254, rehearing denied 55 S.Ct. 647, 295 U.S. 768, 79 L.Ed. 1708.

Ala.—Ex parte Blackmon, 191 So. 356, 238 Ala. 369—Crowson v. Cody, 110 So. 46, 215 Ala. 150.

Ariz.—Sims Printing Co. v. Kerby, 106 P.2d 197—Regan v. First Nat. Bank, 101 P.2d 214, 55 Ariz. 320—Hershey v. Banta, 99 P.2d 81, 55 Ariz. 93, followed in Hershey v. Republic Life Ins. Co., 99 P.2d 85, 55 Ariz. 104—Engle v. Clark, 90 P. 2d 994, 53 Ariz. 472—Stewart v. Phœnix Nat. Bank, 64 P.2d 101, 49 Ariz. 34.

Conn.—Shaw v. Spelke, 147 A. 675, 110 Conn. 208.

D.C.—Booth v. Fletcher, 101 F.2d 676, 69 App D.C. 351, certiorari denied, Fletcher v. Booth, 59 S Ct. 835, 307 U S. 628, 83 L.Ed. 1511.

Ind.—Rooker v. Fidelity Trust Co., 177 N.E. 454, 202 Ind. 641—Ensor v. Bennett, 132 N.E. 379, 76 Ind. App. 467.

Iowa.—Benjamin v. Jackson, 223 N. W. 383, 207 Iowa 581.

La.—Fleischmann Co. v. Conway, 122 So. 845, 168 La. 547, followed in Gerde-Newman & Co v. Conway, 122 So. 849, 168 La. 559—McDonald v. Union Indemnity Co., App., 149 So. 143—Gottlieb v. Schloss, 5 La.App. 379—Monroe Hardware Co. v. Delatte, 4 La.App. 66.

Mass.—Cosmopolitan Trust Co. v. Suffolk Knitting Mills, 143 N.E 138, 247 Mass. 530.

Miss.—McCandless v. Clark, 159 So. 542, 544, 172 Miss. 315, citing **Corpus Juris.**

Mo.—W. A. Ross Const. Co. v. Chiles, 130 S.W.2d 524, 344 Mo. 1084—Bloecher v. Duerbeck, 92 S.W.2d 681, 338 Mo. 535—Hockenberry v. Cooper County State Bank of Bunceton, 88 S.W.2d 1031, 338 Mo. 31—Kinnerk v. Smith, 41 S.W.2d 381, 328 Mo. 513—Sabol v. St. Louis

are the same or practically the same.[52] In some jurisdictions the courts take judicial notice of the record in another suit in the same court where the judgment rendered therein is set up as an estoppel or in bar of recovery,[53] but in other jurisdictions the courts hold that such a situation presents no exception to the general rule and that judicial notice will not be taken.[54]

In application of rules of stare decisis and res judicata. A prior decision of the same court settling a question of law involved in the instant case will be judicially noticed.[55] Likewise, in applying the doctrine of res judicata, the court may take judicial notice of its determinations as alleged in a complaint.[56]

Cooperage Co., 31 S.W.2d 1041—Thompson v. Scott, 19 S.W.2d 1063, 323 Mo. 790—Bushman v. Barlow, 15 S.W.2d 329, 321 Mo. 1052—Custer v. Kroeger, 280 S.W. 1035, 313 Mo. 130, 44 A.L.R. 1328—State ex rel. Ponath v. Hamilton, 240 S.W. 445—Julian v. Commercial Assur. Co., 279 S.W. 740, 220 Mo.App. 115—Runnels v. Lasswell, App., 272 S.W. 1032—State ex rel. Larson v. Mathieson, App., 261 S.W. 335.

Neb.—Witzenburg v. State, 299 N.W. 533

N.J.—Deamer v. Borough of Bergenfield, 151 A. 450, 8 N.J.Misc. 627.

N.M.—Hobbs v. Town of Hot Springs, 106 P.2d 856, 860, 44 N.M. 592, quoting **Corpus Juris.**

N.Y.—Rossbach v. Rosenblum, 20 N.Y.S.2d 725, 260 App.Div. 206, affirmed 31 N.E.2d 509, 284 N.Y. 745—Clinton Trust Co. v. 142–144 Joralemon St. Corporation, 263 N.Y.S. 359, 237 App.Div. 789, rearument denied 263 N.Y.S. 366, 238 App.Div. 858—In re McGlone's Will, 13 N.Y.S.2d 76, 171 Misc. 612, reversed on other grounds 17 N.Y.S.2d 316, 258 App.Div. 596, reversed on other grounds 32 N.E.2d 539, 284 N.Y. 527—In re Goldowitz' Estate, 274 N.Y.S. 617, 153 Misc. 182—In re Clarke, 260 N.Y.S. 750, 145 Misc. 660.

Ohio.—State v. Kauffman, 153 N.E. 897, 22 Ohio App. 282.

Okl.—Schneider v. Decker, 291 P. 80, 144 Okl. 213.

Tex.—Jones v. City of Uvalde, Civ.App., 144 S.W.2d 932, error refused—Texas Employers Ins. Ass'n v. Watkins, Civ.App., 135 S.W.2d 296—Ferguson v. Ferguson, Civ.App., 127 S.W.2d 1018, error dismissed—Hunt Production Co. v. Burrage, Civ.App., 104 S.W.2d 84, error dismissed—Griffith v. Tipps, Civ.App., 69 S.W.2d 846.

Vt.—Lariviere v. Larocque, 168 A. 559, 105 Vt. 460, 91 A.L.R. 1514.

Va.—Heller v. American Alliance Ins. Co., 141 S.E. 138, 149 Va. 262.

Wash.—Guardianship of Robinson, 115 P.2d 734.

23 C.J. p 114 note 46.

Appointment of receiver

Court by which receiver was appointed will, in subsequent action by such receiver, take notice of such appointment, of the parties to suit wherein appointment was made and of main purpose of such suit.—Cahall v. Lofland, 108 A. 752, 12 Del.Ch. 162

Criminal case

Trial court in equity may take judicial notice of judgment roll in criminal case in same court.—U. S. v. Greater New York Live Poultry Chamber of Commerce, D.C.N.Y., 53 F.2d 518 (second case).

Discharge in bankruptcy

In investigating the merits of an application for a discharge in bankruptcy, the court may take judicial notice of its own records of the proceedings on a former application.—Freshman v. Atkins, C.C.A.Tex., 294 F. 867, affirming, D.C., In re Freshman, 290 F. 609, and certiorari granted Freshman v. Atkins, 44 S.Ct. 404, 264 U.S. 578, 68 L.Ed. 858, affirmed 46 S.Ct. 41, 269 U.S. 121, 70 L.Ed. 193—In re Emery, D.C.Mich., 6 F.Supp. 896.

Extent of use

Although it is proper for the court to take judicial notice of its records in a related case, it should not take a statement therein appearing with the same effect as though it were in evidence.—German v. German, 3 A.2d 849, 125 Conn. 84.

Same transaction

The records of the court in another case involving the same transaction have been judicially noticed.

Mo.—State ex rel. Jones v. Miller, 221 S.W. 88.

Tex.—Butler v. Church, Civ.App., 110 S.W.2d 145.

Supersedeas bond

Where case is remanded to lower court, such court on filing of mandate as well as court of appeals will take judicial notice of appellate court's opinion in another action in same court to recover on supersedeas bond.—Tuttle v. Irvine Const. Co.'s Receiver, 90 S.W.2d 359, 262 Ky. 361.

52. U.S.—A. G. Reeves Steel Const Co. v. Weiss, C.C.A.Ohio, 119 F.2d 472—U. S. v. North American Oil Consolidated, C.C.A.Cal., 264 F. 336, affirming, D.C., 242 F. 723, and appeal dismissed 42 S.Ct. 315, 258 U.S. 633, 66 L.Ed. 802.

Ariz.—Clifford v. White, 94 P.2d 875, 54 Ariz. 252.

Conn.—State ex rel. Campo v. Osborn, 10 A.2d 687, 126 Conn. 214—McCleave v. John J. Flanagan Co., 160 A. 305, 115 Conn. 36.

Ky.—Maynard v. Allen, 124 S.W.2d 765, 276 Ky. 485—Dix v. Carmack, 117 S.W.2d 1036, 273 Ky. 844—Board of Education of Cumberland County v. Jones, 240 S.W. 65, 194 Ky. 603.

N.J.—Eder v. Hudson County Circuit Court, 140 A. 883, 104 N.J.Law 260.

N.D.—Stead v. Manhart, 185 N.W. 1009, 48 N.D. 536

Ohio.—Klick v. Snavely, 164 N.E. 233, 119 Ohio St. 308.

Tex.—Jones v. City of Uvalde, Civ.App., 144 S.W.2d 932, error refused—Traders & General Ins. Co. v. Rhodabarger, Civ.App., 109 S.W.2d 1119, error dismissed—Davis v. Donalson, Civ.App., 91 S.W.2d 763, error dismissed—Hake v. Dilworth, Civ.App., 54 S.W.2d 583—Bickle v. City of Panhandle, Civ.App., 43 S.W.2d 640, error refused—Cochran County v. Boyd, Civ.App., 26 S.W.2d 364, error refused—Cocke v. Wright, Civ.App., 23 S.W.2d 449, affirmed, Com.App., 39 S.W.2d 590.

Orders

Court make take judicial notice of his own orders in previous case between same parties on same subject.—Scott v. Clark, Tex.Civ.App., 38 S.W.2d 382, 384, citing **Corpus Juris.**

53. Cal.—Roberts v. Roberts, 253 P. 1112, 81 Cal.App. 499.

Mo.—Shelly v. Ozark Pipe Line Corporation, App., 2 S.W.2d 115, reversed on other grounds Shelley v. Ozark Pipe Line Corporation, 37 S.W.2d 518, 327 Mo. 238, 75 A.L.R. 1316.

Tex.—Ætna Ins. Co. v. Dancer, Com.App., 215 S.W. 962, reversing, Civ.App., 181 S.W. 772.

23 C.J. p 114 note 47.

54. U.S.—Missouri Utilities Co. v. City of California, D.C.Mo., 14 F.Supp. 613—New York Merchandise Co. v. U. S., 13 Ct.Cust.App. 494.

Pa.—Naffah v. City Deposit Bank, 13 A.2d 63, 339 Pa. 157.

23 C.J. p 114 note 48.

55. Fla.—State ex rel. Landis v. Prevatt, 148 So. 578, 579, 110 Fla. 29, citing **Corpus Juris.**

23 C.J. p 114 note 50.

56. U.S.—Bowe-Burke Mining Co. v. Willcuts, D.C.Minn., 45 F.2d 394.

N.D.—Burdick v. Farmers' Mercantile Co., 184 N.W. 4, 48 N.D. 227.

Facts

Supreme court judicially noticing former opinion has before it, not only law therein decided, but facts

d. Records of Other Courts

Courts ordinarily do not take judicial notice of the records of other courts.

In the absence of statutory requirement,[57] except for notice of the fact of their existence,[58] state courts do not take judicial notice of the records of other courts in the state[59] or of federal courts.[60] It has been held, however, that an appellate court in its discretion may take judicial notice of the files of the lower court,[61] and it has also been held that a state court should take judicial notice of the formal judgments of the federal courts when such judgments are duly made public.[62] Federal courts do not take judicial notice of the records of other federal[63] or state[64] courts, except in special circumstances, as where the contents of the record are of general notoriety.[65] In some instances federal courts have taken judicial notice of related matters appearing in published reports of a state court;[66] and a state court, in construing a statute, took judicial notice of a long and uninterrupted practical construction given to it by a present surrogate and his predecessors in another county.[67] Since the federal courts take judicial notice of the judicial opinions of any state of the Union, see supra § 15, it is permissible for a federal court to examine the record resulting in an opinion in a state court in order to ascertain the grounds on which the opinion is based.[68] The federal court, however, need not accept, as proved, facts so regarded by the state court.[69]

On plea of res judicata, the opinion of the ap-

stated in opinion as basis therefor.—Sabol v. St. Louis Cooperage Co., Mo., 31 S.W.2d 1041.

57. Cal.—Ohm v. San Francisco, 25 P. 155, 3 Cal Unrep.Cas. 314.
23 C J. p 115 note 51.

58. N.Y.—In re Paige's Estate, 262 N.Y S. 870, 146 Misc. 885.

59. Ala.—Housing Authority of Birmingham Dist. v. Abney, 2 So 2d 428—Crossland v. First Nat. Bank, 172 So. 255, 233 Ala. 432—Welch v. State, 183 So. 879, 883, 28 Ala.App. 273, citing **Corpus Juris,** and certiorari denied 183 So. 886, 236 Ala. 577.
Colo.—McAllister v. McAllister, 209 P. 788, 72 Colo. 28.
Ga.—Barber v. City of Rome, 146 S. E. 856, 39 Ga App. 225.
Ind.—State ex rel. Department of Financial Institutions of Indiana v. Topf's Estate, 13 N.E.2d 883, 105 Ind.App. 530.
Iowa.—Lawrence v. Melvin, 211 N.W. 410, 202 Iowa 866.
La.—New Orleans Industrial Canal Land & Harbor Development Co. v. Kohler, App., 150 So. 874—Fruge v. Langley, App., 146 So. 486, followed in 146 So. 487.
Mass.—Grenda v. Kitchen, 170 N.E. 619, 270 Mass. 559.
Nev.—Giannopulos v. Chachas, 257 P. 618, 50 Nev. 269.
Pa.—Naffah v. City Deposit Bank, 13 A 2d 63, 329 Pa. 157—R. K. O. Distributing Corporation v. Shook, 164 A. 855, 108 Pa.Super. 383, followed in Metro Goldwyn Mayer Distributing Corporation v. Shook, 164 A. 858, 108 Pa.Super. 391.
Tex.—Smith v. Burns, Civ.App, 107 S.W.2d 397—Keystone Pipe & Supply Co. v. Osborne, Civ.App, 73 S. W.2d 120—Andrade v. Donnelly, Civ.App., 70 S.W.2d 256—Erwin v. Victory Motor Co., Civ.App., 33 S. W.2d 867.
Wash.—Mackall-Paine Veneer Co. v. Vancouver Plywood Co., 32 P.2d 530, 177 Wash. 503—Merrick v. Neely, 255 P. 936, 143 Wash. 588.
W.Va.—Carper, for Use and Benefit of Phœnix Assur. Co., Limited of London. v. Montgomery Ward & Co., 13 S.E 2d 643
23 C J. p 115 note 52—4 C.J. p 561 note 78.

On appeal

(1) On appeal the appellate court cannot take judicial notice of the records of the lower court.—State ex rel. Department of Financial Institutions of Indiana v. Topf's Estate, 13 N.E.2d 883, 105 Ind.App. 530—23 C. J. p 115 note 52 [b].

(2) A statement, indorsed on the verdict as returned by the jury, to the effect that the court approves of the verdict, is not sufficient to charge an appellate court with judicial knowledge of the fact that a judgment has been entered below.—La Plant v. Axelson, 209 P. 637, 72 Colo. 95.

60. Ark.—Bolton v. Missouri Pac. R. Co., 229 S.W. 1025, 148 Ark. 319.
N.Y.—Palmer v. Larchmont Manor Co., 30 N.E.2d 599, 284 N Y. 288, affirming 20 N.Y.S.2d 165, 259 App. Div 823, affirming 14 N.Y.S 2d 417, reargument denied 20 N.Y.S.2d 170, 259 App.Div. 834, and reargument denied 32 N E.2d 822.
23 C.J. p 115 note 53.

61. Conn.—State ex rel. Campo v. Osborn, 10 A.2d 687, 126 Conn. 214—McCleave v. John J. Flanagan Co., 160 A. 305, 115 Conn. 36.

Court calendar

The supreme court will take judicial notice of court calendar of the Howard County court.—Howard County v. Fayette Bank, Mo., 149 S. W.2d 841.

62. Ariz.—McRae v. Dodt, 72 P.2d 444, 50 Ariz 336.

Final decree

The supreme court will take judicial notice of the fact that a final decree was entered in a federal court in a particular action and subsequent proceedings involved therein.—George v. Time, Inc., 19 N.Y.S.2d 385, 259 App.Div. 324.

62. U.S.—Divide Creek Irr. Dist. v. Hollingsworth, C C.A.Colo., 72 F.2d 859, 96 A L.R. 937—Gasoline Products Co. v. Champlin Refining Co., D.C.Me., 46 F.2d 511.
D.C.—White v. Central Dispensary and Emergency Hospital, 99 F.2d 355, 69 App.D.C. 122, 119 A.L.R. 1002.
23 C.J. p 115 note 54.

Order mentioned in brief

Appellate court could judicially notice restraining order omitted from record but mentioned in briefs, where order was matter of record in court below.—Chicago Title & Trust Co. v. Fox Theatres Corporation, C.C.A.N.Y., 69 F.2d 60, 91 A.L.R. 991.

64. U.S.—Eberle v. Sinclair Prairie Oil Co., D.C.Okl., 35 F.Supp. 296—Becker Steel Co. of America v. Cummings, D.C.N.Y., 16 F.Supp. 601.

65. U.S.—In re Durrant, C.C.Cal., 84 F. 314.
23 C.J. p 115 note 55.

Findings of fact as to the navigability of a river, made by the district court, court of appeals, and the United States supreme court may be judicially noticed.—Grand River Dam Authority v. Going, D.C.Okl., 29 F.Supp. 316.

66. U.S.—Moore v. Moore, Pa., 255 F. 497, 166 C.C.A. 573—Barker v. Eastman, C.C.N H., 192 F. 559, affirmed 206 F. 865, 124 C.C.A. 525.
23 C.J. p 115 note 56.

67. N.Y.—Lowman v. Billington, 119 N.Y S. 825, 65 Misc. 111.

68. U.S.—Atlantic Fruit Co. v. Red Cross Line, C.C.A.N.Y., 5 F.2d 218, affirming, D.C., 276 F. 319.

69. U.S.—Atlantic Fruit Co. v. Red Cross Line, supra.

pellate court in a prior case between the same parties may be judicially noticed by the trial court.[70] Likewise, judicial notice has been taken in habeas corpus proceedings that another federal court has exercised jurisdiction with respect to petitioner and concerning the causes of which he complains.[71]

Bankruptcy proceedings in the federal courts are not judicially noticed in the state courts or in any court other than the initial court of bankruptcy.[72]

§ 51. Elections and Appointments

Matters of general law or common knowledge relating to elections and appointments by the president or governor will be judicially noticed.

State courts judicially know general election laws.[73] Accordingly courts judicially know the years of general registration,[74] the dates of holding primary elections,[75] general elections,[76] or a special election provided for by a general law;[77] but a court has declined to take judicial notice of the time when elections are held under special acts of the legislature.[78] Courts also take judicial notice of what officers are to be elected, or were elected, at the regular elections,[79] and the result of the election as shown by official returns.[80] What party

70. U.S.—Art Metal Const. Co. v. U. S., Ct.Cl., 13 F.Supp. 756.

71. D.C.—Beard v. Bennett, 114 F.2d 578, 72 App.D.C. 269.

72. U.S.—In re Barrett & Co., D.C. Ga., 27 F.2d 159, affirmed, C.C.A., Rhodes v. Elliston, 29 F.2d 737—In re Dayton Coal & Iron Co., D.C. Tenn., 291 F. 390.
Ga.—Starbuck v. Wallins Nat. Bank, 161 S.E. 633, 44 Ga.App. 377—Riggs v. Kinney, 140 S.E. 41, 37 Ga.App. 307.
Ind.—Peoples State Bank of Crown Point v. Bankers Trust Co. of Gary, Lake County, 4 N.E.2d 674, 102 Ind.App. 647.
Iowa.—Reining v. Nevison, 213 N.W. 609, 203 Iowa 995.
Mich.—Union Trust Co. v. Detroit Trust Co., 216 N.W. 442, 240 Mich. 646.
N.J.—Perfection Garment Co. v. Crosby Stores, 158 A. 380, 109 N.J.Eq. 450.
N.Y.—Palmer v. Larchmont Manor Co., 30 N.E.2d 599, 600, 284 N.Y. 288, citing **Corpus Juris**, and affirming 20 N.Y.S.2d 165, 259 App.Div. 823, affirming 14 N.Y.S.2d 417, reargument denied 20 N.Y.S.2d 170, 259 App.Div. 834, and reargument denied 32 N.E.2d 822.
Ohio.—Doyle v. Moore, 30 N.E.2d 345, 65 Ohio App. 409—Hoiles v. Fidelity & Deposit Co. of Maryland, 18 Ohio App. 332.
Tex.—Galloway v. Marietta State Bank, Civ.App., 258 S.W. 532, reversed on other grounds Marietta State Bank v. Galloway, Com.App., 269 S.W. 776.
23 C.J. p. 115 note 58.

Discharge
The state court cannot take judicial notice of a discharge in bankruptcy, unless discharge is brought before it in some appropriate manner.—Duncan v. Southern Sav. Bank, 200 S.E. 561, 59 Ga.App. 228.

Filing of petition
In corporate receivership case, the court was held to have judicial knowledge from its own records of fact that corporation had filed petition under Bankruptcy Act.—Wells Fargo Bank & Union Trust Co. v. McDuffie, C.C.A.Cal., 88 F.2d 382.

73. Kan.—State v. Freeman, 55 P.2d 362, 365, 143 Kan. 315, citing **Corpus Juris.**
Miss.—Wood v. State, 142 So. 747, 169 Miss. 790.
23 C.J. p. 92 note 68.

Form of ballot
Judicial notice is taken of required form of ballot in referring legislative measure to people.—Davis v. Van Winkle, 280 P. 495, 130 Or. 304, denying rehearing 278 P. 91, 130 Or. 304.

74. Cal.—Chester v. Hall, 204 P. 237, 55 Cal.App. 611.

75. Miss.—Wood v. State, 142 So. 747, 169 Miss. 790—Brumfield v. Brock, 142 So. 745, 169 Miss. 784.
W.Va.—State ex rel. Clayton v. Neal, 11 S.E.2d 109.

76. Cal.—Hill v. Superior Court in and for Los Angeles County, 292 P. 662, 109 Cal.App. 91.
Conn.—Post v. Dillane, 178 A. 595, 119 Conn. 655.
Idaho.—Payette County v. Baldridge, 296 P. 194, 50 Idaho 310.
Kan.—State v. Freeman, 55 P.2d 362, 365, 143 Kan. 315, citing **Corpus Juris.**
N.C.—Rasberry v. Hicks, 155 S.E. 616, 199 N.C. 702.
Ohio.—Browne v. Village of Ripley, 36 N.E.2d 50, 67 Ohio App. 112.
Tex.—Smith v. Blunt, Civ.App., 127 S.W.2d 325—State v. Hall, Civ.App., 76 S.W.2d 880, error dismissed.
23 C.J. p. 92 note 69.

Municipal election
Ind.—Wabash Ry. Co. v. City of Gary, 132 N.E. 737, 191 Ind. 394.

Time for casting absentee vote may be judicially noticed.—Cummins v. Democratic Executive Committee of Lampasas County, Tex.Civ.App., 97 S.W.2d 368.

Time of closing
Where statute fixed time of closing of election, it was unnecessary to introduce proof on such question.—Marcum v. Melton, 21 S.W.2d 291, 231 Ky. 244.

77. Ind.—Wampler v. State, 47 N.E. 1068, 148 Ind. 557, 38 L.R.A. 829.
Tex.—Eldridge v. Fort Worth Transit Co., Civ.App., 136 S.W.2d 955, error dismissed, judgment correct.

78. Ark.—Gaster v. Dermott-Collins Road Improvement Dist., 248 S.W. 2, 156 Ark. 507.
Judicial notice of private statutes generally see supra § 22.

79. Ala.—Baker v. Conway, 108 So. 18, 214 Ala. 356.
Ariz.—State ex rel. Sullivan v. Moore, 64 P.2d 809, 49 Ariz. 51.
Cal.—Reid v. Superior Court in and for Trinity County, 186 P. 634, 44 Cal.App. 349.
Ill.—Paulsen v. McAvoy Brewing Co., 226 Ill.App. 605.
Mo.—State on Inf. of McKittrick v. Graves, 144 S.W.2d 91.
23 C.J. p. 92 note 71.

Election of particular officers noticed
(1) County recorder.—Vinson v. O'Malley, 220 P. 393, 25 Ariz. 552, 37 A.L.R. 877.
(2) Justices of the peace.—State v. Grange, 165 N.E. 239, 200 Ind. 506.
(3) Sheriff.
Md.—Hopkins v. North, 135 A. 367, 151 Md. 553, 49 A.L.R. 1303.
Wis.—Martin v. Aultman, 49 N.W. 749, 80 Wis. 159.
(4) Other officers see 23 C.J. p. 92 notes 72–80.

80. Ala.—Head v. Hood, 107 So. 854, 214 Ala. 353.
Cal.—Chambers v. Ashley, 91 P.2d 932, 33 Cal.App.2d 390.
23 C.J. p. 92 note 82.

Returns filed with secretary of state
The supreme court would judicially notice, from official returns of the election commissioners filed with the secretary of state, the number of votes received by the candidates for district attorney general at special election.—Hanover v. Boyd, 121 S.W. 2d 120, 173 Tenn. 426.

Municipal election
Courts will take judicial notice of municipal election and result there-

"tickets" were before the voters at a general election is likewise a matter which may be judicially noticed,[81] as may be the parties entitled to a place on the ballot.[82] Judicial notice is sometimes taken of a contest of an election,[83] and in an election contest the court will take judicial notice that the contestee had been declared elected.[84] The federal courts take judicial notice of the dates of elections;[85] but the dates of elections in one state are not judicially known by the courts of other states.[86]

A state court judicially notices the governor's appointments to offices,[87] but judicial notice will not be taken of such appointments in other states.[88] Judicial notice is also taken of appointments by the president of the United States,[89] and that nominations by the president sent to the senate are usually referred to the appropriate committee for investigation and report.[90]

Matters of common knowledge concerning elections[91] and appointments[92] may be judicially noticed, but facts which are not established by law nor are matters of common knowledge will not be judicially noticed.[93]

Elections on propositions. The fact that an election on a proposition was had will be judicially no-

of in city in which court is located.—Lamm v. Chambers, Tex.Civ.App., 18 S.W.2d 212.

To determine population

Under a statute providing that for certain purposes the vote cast in the last presidential election shall be used as a basis for determining population, judicial notice may be taken of the returns of such election.—Cartright v. McDonald County, 5 S.W.2d 54, 319 Mo. 848.

81. Ind.—State v. Downs, 47 N.E. 670, 148 Ind. 324.

82. Ky.—Eagle v. Cox, 103 S.W.2d 682, 268 Ky. 58.

83. Ala.—Lewis v. Bruton, 74 Ala. 317, 49 Am.R. 816.
Mass.—Greenwood v Registrars of Voters of City of Fitchburg, 184 N.E. 390, 282 Mass. 74.

84. Ala.—Davis v. Teague, 125 So. 51, 220 Ala. 309, appeal dismissed 50 S.Ct. 248, 281 U.S. 695, 74 L.Ed. 1123.

85. U.S.—Richardson v. McChesney, Ky., 31 S.Ct. 43, 218 U.S. 487, 54 L.Ed. 1121.
23 C.J. p 93 note 84.

86. N.Y.—Taylor v. Rennie, 35 Barb. 272.

87. Ala.—State v. Kellett, 162 So. 303, 305, 230 Ala. 510, citing **Corpus Juris.**
Ga.—Patten v. Miller, 8 S.E.2d 757, 190 Ga. 123.
Tex.—Houston Printing Co. v. Tennant, Civ.App., 76 S.W.2d 762, certified questions answered 39 S.W.2d 1089, 120 Tex. 539, mandamus denied Houston Printing Co. v. McClendon, 76 S.W.2d 764, 124 Tex. 399.
Wis.—State, on Complaint of Ryan v. Roden, 262 N.W. 629, 219 Wis. 132.
23 C.J. p 94 notes 93–98

88. **Notary public**
Ala.—Knight v. Hill, 102 So. 221, 212 Ala. 280.

89. Ala.—Louisville & N. R. Co. v. Shikle, 90 So. 900, 206 Ala. 494—Moon v. Hines, 87 So. 603, 205 Ala. 355, 13 A.L.R. 1020.
Ind.—Davis v. Zirkle, 138 N.E. 266, 80 Ind.App. 396.
N.C.—Wright v. Davis, 117 S.E. 347, 185 N.C. 354.
N.D.—Asch v. Washburn Lignite Coal Co., 186 N.W. 757, 48 N.D. 734.
23 C.J. p 94 notes 99–2.

90. U.S.—Wallace v U. S., 42 S.Ct. 221, 257 U.S. 541, 66 L.Ed. 360 affirming 55 Ct.Cl. 396 and petition for rehearing and motion to remand denied 42 S.Ct. 318, 258 U.S. 296, 66 L.Ed. 626.

91. **Particular matters noticed**
(1) Interest of voters in and their attendance on elections—City of St. Louis v. Pope, 126 S.W.2d 1201, 344 Mo. 479.

(2) Interpretation by Democratic state central committee of rule fixing time within which pledge must be filed—Williamson v. Montgomery, 51 S.W.2d 987, 185 Ark. 1129.

(3) That candidates whose names appear at the head of the list have a distinct advantage.—Elliott v. Secretary of State, 294 N.W. 171, 295 Mich. 245.

(4) That election for following term is most generally made in advance of vacancy created by expiration of current term—Walker v. Fox, 287 S.W. 228, 216 Ky. 33.

(5) That elections are often required to exercise a discretion in the decision of questions clearly administrative.—State v. Holmes, 147 N.E. 622, 196 Ind. 157.

(6) That nomination for public office by majority party in this state is practically equivalent to election.
Ark.—Cain v. Carl-Lee, 283 S.W. 365, 171 Ark. 155.
Tex.—State v. Meharg, Civ.App., 287 S.W. 670.

(7) That persons appointed judges of election are of well-known political affiliations.—Evans v. Reiser, 2 P.2d 615, 78 Utah 253, rehearing denied 3 P.2d 253, 78 Utah 307.

(8) That results of elections are often surprising.—Otero v. Ewing, 110 So. 648, 162 La. 453, 56 A.L.R. 249.

(9) That special elections of importance, where the municipalities and counties often encumber themselves with large debts, or fill vacancies in public offices, are frequently held.—Perkins v. Lucas, 246 S.W. 150, 197 Ky. 1.

(10) That under our election system large sums of money exceeding necessary expenses are used.—Tribune Co. v. Thompson, 178 N.E. 203, 345 Ill. 439.

(11) Other matters.
Colo.—Israel v. Wood, 27 P.2d 1024, 93 Colo. 500—Armstrong v. Simonson, 271 P. 627, 84 Colo. 472.
La.—State ex rel. Chess & Wymond Co. of Louisiana v. Grace, 175 So. 825, 188 La. 129.
Md.—Norris v. Mayor and City Council of Baltimore, 192 A. 531, 172 Md. 667.
Mass.—Independent-Progressive Party v Secretary of Commonwealth of Massachusetts, 164 N.E. 654, 266 Mass. 18.
N.J.—Byrne v. Scipio, 192 A. 444, 121 N.J.Eq. 539.
N.Y.—Oldfield v. Snedeker, 227 N.Y.S. 430, 131 Misc 820.
S.C.—Young v. Sapp, 166 S.E. 354, 167 S.C. 364.
Tex.—Markowsky v. Newman, 136 S.W.2d 808, 134 Tex. 440, answers to certified questions conformed to, Civ.App., 138 S.W.2d 896—Scurry v. Nicholson, Civ.App., 9 S.W.2d 747, reversed on other grounds Nicholson v. Scurry, 28 S.W.2d 512, 119 Tex. 250.
23 C.J. p 93 note 91.

92. N.Y.—Gauthier v. Rice, 285 N.Y.S. 116, 246 App.Div. 179.
Or.—State ex rel. Smith v. Tazwell, 111 P.2d 1021.

93. Miss.—Martin v. Board of Sup'rs of Winston County, 178 So. 315, 181 Miss. 363.

ticed,[94] and, conversely, the fact that a proposition was not submitted to the electors may likewise be noticed.[95] The courts take judicial notice of facts necessary to a decision of the question whether or not a statute or constitutional amendment has been ratified by popular vote,[96] and hence they know, if such is the fact, that a constitutional amendment has been adopted.[97] Courts will recognize the provisions of a statute authorizing its adoption by a city or other political subdivision;[98] but except in some instances in some jurisdictions[99] the courts do not take judicial notice of the local adoption of a general law or of the results of an election on a question or proposition submitted to the voters of a county, township, state, village or other district or political subdivision,[1] unless required by statute to do so,[2] or unless the result of such election is entitled to judicial notice as a matter of common knowledge.[3]

Initiative measure. It is a matter of common knowledge that an initiative measure is originated by some organization or a small group of people and that they circulate a petition requiring the signatures of only a small per cent of the voters; that the measure is then placed on the ballot and a large number of the population, not knowing what the context of the act is, rely solely on its title as a guide to intelligent voting thereon.[4]

Voting machines. The court may take judicial notice of the mechanical means or operation whereby a voter records his choice of candidates on a voting machine.[5]

§ 52. Mail Service

Judicial notice will be taken of the usual course of business of the mails.

Judicial notice will be taken of the usual course of business of the mails.[6] Judicial notice may be taken that daily mails pass between certain points.[7] In a number of cases the courts have taken judicial notice of the approximate time required for the transportation of mail between two places and its delivery in due course to the addressee,[8] as well as of the time for delivery in due course of a letter where the sender and addressee are in the same city;[9] but in a few cases the courts have declined to take judicial notice of the character of mail communication,[10] or of the time required for the transportation of mail[11] between two places; and in some jurisdictions the courts, while doubting their power to take judicial notice of the existence of regular mail service between two places generally, do so in a particular case where the existence of such service is a matter of common knowledge.[12] Courts do not take judicial notice of the time of the arrival or departure of mails or trains, or of the number of mails between different places.[13] It is common knowledge that short delays often occur in the mat-

94. Ariz.—Gibson v. Board of Sup'rs of Cochise County, 179 P. 640, 20 Ariz. 222.

95. U.S.—Jackson v. Denver Producing & Refining Co., C.C.A.Okl., 96 F.2d 457.

96. Ind.—State v. Swift, 69 Ind. 505.
23 C.J. p 93 note 86.

97. Kan.—Prohibitory Amendment Cases, 24 Kan. 700.
Mo.—Carmody v. St. Louis Transit Co., 87 S.W. 913, 188 Mo. 572.

98. S.D.—Glirbas v. City of Sioux Falls, 264 N.W. 196, 64 S.D. 45.

99. Ariz.—Gibson v. Board of Sup'rs of Cochise County, 179 P. 640, 20 Ariz. 222.
Ga.—Hall v. Simmons, 188 S.E. 597, 54 Ga.App. 568
23 C.J. p 93 note 88.

1. Ill.—People v. Champaign County, 121 N.E. 635, 286 Ill. 363, error dismissed Champaign County v. People of State of Illinois ex rel. City of Champaign, 40 S.Ct. 218, 250 U.S. 679, 63 L.Ed. 1203.
Minn.—Olson v. Pederson, 288 N.W. 856, 206 Minn. 415.
S.D.—Glirbas v. City of Sioux Falls, 264 N.W. 196, 197, 64 S.D. 45, citing **Corpus Juris**—Beers v. City of Watertown, 177 N.W. 502, 43 S.D. 14.
23 C.J. p 93 note 89.

2. Or.—State v. Deschutes County, 173 P. 158, 88 Or. 661.
23 C.J. p 93 note 90.

3. Del.—Lard v. Delaware Liquor Commission, Gen.Sess., 17 A.2d 230.
Tex.—Moore v. Gordon, Civ.App., 122 S.W.2d 239, error dismissed.

4. Cal.—Wallace v. Zinman, 254 P. 946, 200 Cal. 585, 62 A.L.R. 1341.

5. N.Y.—Application of Robinton, 218 N.Y.S. 3, 128 Misc. 163.

6. N.Y.—In re Saffold, 220 N.Y.S. 200, 128 Misc. 422.
Ohio.—Hitz v. Ohio Fuel Gas Co., 183 N.E. 768, 43 Ohio App. 484.
23 C.J. p 96 notes 46, 47.
Return of letter
It is common knowledge that, under postal regulations, sender of letter may by proper application to postal authorities have the letter delivered back to the sender at any time before it is delivered by the postal authorities to the addressee.—Pikeville Nat. Bank & Trust Co. v. Shirley, 135 S.W.2d 426, 281 Ky. 150, 126 A.L.R. 919.

7. Conn.—Lloyd & Elliott v. Parke, 157 A. 272, 114 Conn. 12.

8. U.S.—Weaver v. U. S., C.C.A.N.C., 72 F.2d 20.
Ill.—Keogh v. Peck, 147 N.E. 266, 316 Ill. 318, 38 A.L.R. 1151.
23 C.J. p 96 note 48.

9. N.Y.—News Syndicate Co. v. Gatti Paper Stock Corporation, 176 N.E. 169, 256 N.Y. 211, reversing 246 N.Y.S. 882, 231 App.Div. 812 and 238 N.Y.S. 886, 228 App.Div. 688, reargument denied 177 N.E. 190, 256 N.Y. 678—Struhl v. Travelers Ins. Co., 7 N.Y.S.2d 881, 255 App.Div. 527, affirmed 22 N.E.2d 162, 281 N.Y. 584—Dulberg v. Equitable Life Assur. Soc. of U.S., 292 N.Y.S. 232, 249 App.Div. 785—Morel v. Stearns, 75 N.Y.S. 1082, 37 Misc. 486.

10. Iowa.—Ferrier v. Storer, 19 N.W. 288, 63 Iowa 484, 50 Am.R. 752.

11. Colo.—McConnell v. Schultz, 128 P. 876, 23 Colo.App. 194.
Va.—Early v. Preston, 1 Pat. & H. 228.
22 C.J. p 101 note 34.

12. Puerto Rico.—Carrera v. New York, etc., SS. Co., 25 Puerto Rico 781.

13. Okl.—Chapman v. State, 263 P.

ter of mail delivery.[14]

Judicial notice will be taken of the post offices within the jurisdiction.[15] Also the courts will take judicial notice that a free delivery system is not in force in all cities and villages in the state,[16] and that in such case the usual post-office address of many persons is merely the name of the city, the addition of a street address being unnecessary and unusual.[17]

Facts of common knowledge or established by statute relating to registered mails may be judicially noticed,[18] such as that registration of mail guarantees a stricter responsibility on the part of the supervising government,[19] and that it is the slowest method of transmitting mail;[20] and the courts take judicial notice of the well-known distinction between a registered letter and one posted for special delivery.[21]

Matters which are not of common knowledge or established by statute relating to the mails and use thereof cannot be judicially noticed.[22]

§ 53. Public Surveys

Public or governmental surveys may be judicially noticed.

The courts take judicial notice of public or government surveys and the general system thereof;[23]

453, 454, 129 Okl. 83, quoting **Corpus Juris.**
22 C J. p 101 notes 32, 33.

14. U.S.—Oxford Bank v. U. S., Ct Cl, 44 F 2d 253.

15. Ind.—Clayton v. Fletcher Savings & Trust Co., 155 N.E. 539, 89 Ind App. 431.

16. Neb.—Bartling v. Wait, 148 N. W 507, 96 Neb. 532.

17. Neb.—Bartling v Wait, supra.

18. N.Y.—O'Tier v. Sell, 235 N.Y.S. 534, 226 App Div. 434, followed in Uda v. Yale Upholstering Mfg Co., 242 N.Y S. 862, 229 App Div. 842.

Record and receipt

(1) Court takes judicial cognizance of fact that post office makes record of registered mail and gives receipt therefor which is usually kept by tax collector when sending registered notice of tax delinquency.—Calcasieu Mercantile Co. v. Frank, La.App., 161 So. 201.

(2) It is common knowledge that registered mail must be receipted for when offered for delivery.—Buffalo Cadillac Corporation v. Eisele, 266 N.Y S. 165, 148 Misc. 592.

(3) The supreme court takes judicial notice that return receipt signed by person to whom registered mail is addressed does not contain the date of mailing but does contain the date of arrival at the post office of destination.—Dairy Distributers v. Department of Agriculture and Markets, 280 N W. 400, 228 Wis. 418.

Registry office

Judicial notice may be taken that a particular post office was registry office.—Matlock v. Citizens' Nat. Bank of Salmon, 250 P. 648, 43 Idaho 214, 50 A L.R. 1418.

19. Idaho.—Matlock v. Citizens' Nat. Bank of Salmon, supra.

20. Tex.—El Jardin Immigration Co. v. Karlan, Civ.App., 247 S.W 671.

Delivery less prompt than regular mail

U S.—Weaver v. U. S., C.C A.N C., 72 F.2d 20.

21. Puerto Rico.—Moreno v. Abril, 10 Puerto Rico 484.

22. **Judicial notice cannot be taken:**

(1) Of extent and ramifications of rural free delivery routes.—Charles Tire Co. v. Owens, 186 A. 737, 7 W W Harr., Del., 507.

(2) That a particular mail box was authorized and maintained under the postal laws.—Schwartz v. Schwartz, 185 N.Y S. 659, 113 Misc 444

(3) That there was prepayment of postage on a particular letter and that it was properly addressed.—In re Application 7600 to Appropriate 30 Second Feet of Water, 225 P. 605, 63 Utah 311.

23. U S.—Quapaw Land Co. v. Bolinger, C.C A La., 32 F.2d 627, certiorari granted 50 S.Ct. 34, 280 U. S. 542, 74 L Ed 602, set aside on jurisdictional grounds 50 S Ct. 244, 281 U.S. 693, 74 L.Ed. 1122.

Ala.—Chestang v. Bower, 140 So 537, 224 Ala. 469—McMillan v. Aiken, 88 So 135, 205 Ala. 35.

Cal.—Adams v. Slee, 268 P. 959, 961, 92 Cal.App. 708, citing **Corpus Juris**—Wagner v. City of Inglewood, 200 P. 60, 53 Cal App. 356.

Ind.—Allen v. Gilkison, 132 N E. 12, 76 Ind App. 233.

Mich.—Fowler v. Sapre, 220 N W. 733, 735, 243 Mich. 266, citing **Corpus Juris.**

Mo.—Frazier v. Shantz Realty Estate & Investment Co., 123 S.W.2d 124, 343 Mo. 861—Federal Land Bank of St. Louis v. McColgan, 59 S W.2d 1052, 332 Mo. 860—Drainage Dist. No 3 of Pemiscot County v. Sharp, App., 59 S.W.2d 755

Tex.—Williams v. Chew, Civ.App., 19 S.W 2d 68—Hamman v. San Jacinto Rice Co., Civ.App., 229 S. W. 1008, error granted.

Wash.—Greenblum v. Gregory, 294 P. 971, 160 Wash. 42.
23 C J. p 95 note 20.

Call omitted

Where description in decree omitted call between the last call of the description employed in the decree and the beginning point, such call would be supplied by the supreme court by taking judicial notice as to government surveys.—Hinds v. Federal Land Bank of New Orleans, 186 So. 153, 237 Ala. 218.

Field notes

Court could judicially notice contents of surveyor's field notes produced from files of land office.—Inyo Marble Co. v. Loundagin, 7 P.2d 1067, 120 Cal.App. 298.

Inaccuracies

It is a matter of general observation to bench and bar that a large percentage of the original government surveys of agricultural lands were in some degree inaccurate.—Capps v. Clark, 195 N.W. 372, 196 Iowa 758.

Land lots

Judicial notice has been taken of the shape of land lots in particular counties, and of the directions in which their lines run.—Benton v. Munday, 187 S E. 874, 183 Ga 228—Rowland v. Matthews, 113 S.E. 442, 153 Ga. 849—Harper v Hesterlee, 109 S.E. 902, 152 Ga. 251—Darley v. Starr, 102 S.E. 819, 150 Ga. 88.

Monuments

(1) Courts take judicial notice that at all government section corners permanent monuments exist.—Trustee of Schools v. Dassow, 151 N. E. 896, 321 Ill. 346—City of Chicago v. Chicago, B & Q R. Co., 150 N E. 250, 319 Ill. 351.

(2) Court judicially knows that government survey system does not call for any physical monuments at centers of sections.—Matthews v. Parker, 299 P. 354, 163 Wash. 10.

Public lands

Under a statute providing that courts will take judicial notice of

the area,[24] location,[25] as being within a state,[26] county,[27] township,[28] city,[29] or judicial district,[30] of the lands surveyed; their numbering;[31] the existence and location of the base and meridian lines;[32] the relative position of counties or townships to base and meridian lines or points of the compass;[33] and nomenclature[34] and relative size[35] of the territorial divisions thus established; how the divisions are constituted in particular instances,[36] including the position of the range lines;[37] the relative positions of sections in the same township;[38] and the location of fractional townships,[39] or, on the other hand, that a particular legal subdivision of a section of land is not fractional,[40] or that the township lines coincide with the sectional.[41] Judicial notice cannot be taken of the topography of the land surveyed,[42] or of its minor subdivisions,[43] nor probably of the position, on the ground, of a particular lot.[44] It is common knowledge that in past years the evidences of the government surveys were more likely to be found, and that the bearings of present day surveys, where courses and distances are relied on, are liable to be in error, or, rather, fail to follow the original lines, unless some original corners or lines aid in making a check and correction of trial lines.[45]

§ 54. Revenue and Taxation

Courts will take judicial notice of facts relating to revenue and taxation which are established by law or which are matters of common knowledge.

Judicial notice will be taken of facts relating to revenue and taxation which are established by law or which are matters of common knowledge,[46] but

government surveys of public lands, a survey made by the federal government of lands acquired from Mexico before confirming private grants by that state is a survey of public lands.—Wagner v City of Inglewood, 200 P. 60, 53 Cal.App. 356.

Tract book

Supreme court takes judicial notice of tract book of government surveys.—Snodgrass v. Snodgrass, 115 So. 21, 217 Ala. 128.

24. Ala.—McMillan v. Aiken, 88 So. 135, 205 Ala. 35—Hunt v. Jones, 84 So. 718, 203 Ala. 541.
23 C.J. p 95 note 21.

Land lots

The area of land lots in particular counties has been judicially noticed. —Morris v. Hasty, 151 S.E. 490, 169 Ga. 781—Rowland v. Mathews, 113 S.E. 442, 153 Ga. 849—Harper v. Hesterlee, 109 S.E. 902, 152 Ga. 251—Darley v. Starr, 102 S.E. 819, 150 Ga. 88—23 C.J. p 88 note 89.

Quarter section

Court takes judicial notice that quarter section of land contains one hundred sixty acres and that particular quarter section is a full one.—Newport v. Hatton, 231 P. 987, 195 Cal. 132.

25. Ala.—Dean v. Lusk, 3 So.2d 310 —State ex rel. Kinney v. Town of Steppville, 168 So. 433, 232 Ala. 407.
Ariz.—Silva v. Menderson, 17 P.2d 809, 41 Ariz. 258.
Cal.—Brown v. Sweet, 272 P. 614, 95 Cal.App. 117.
Fla.—Morrison v. Braddock, 131 So. 124, 125, 100 Fla. 1152, citing **Corpus Juris.**
Ind.—Cleveland, C. C. & St. L. Ry. Co. v. Smith, 138 N.E. 347, 192 Ind. 674.
La.—Ducre v. Milner, 115 So. 646, 165 La. 433.
Tex.—Barrow v. Boyles, Civ.App., 21 S.W.2d 716, affirmed 61 S.W.2d 783, 122 Tex. 416.
Wash.—Dietz v. Bartell, 207 P. 663, 120 Wash. 443.
23 C.J. p 95 note 22.

26. Ala.—King v. Kent, 29 Ala. 542.
Ark.—Alphin v. Banks, 102 S.W.2d 558, 193 Ark. 563.

27. Ark.—Pope v. Shannon Bros., 114 S.W.2d 1, 195 Ark. 770—Rogers v. Magnolia Oil & Gas Co., 245 S.W. 802, 156 Ark. 103.
Mo.—Curry v. Crull, 116 S.W.2d 125, 342 Mo. 553—Federal Land Bank of St Louis v. McColgan, 59 S.W. 2d 1052, 332 Mo. 860
Or.—Sammons v. Paterson, 270 P. 499, 127 Or. 11.
23 C.J. p 95 note 24.

Land lots

Judicial cognizance will be taken of the location in a particular county of certain land lots, as found in the record of the office of secretary of state.—Hatton v. Johnson, 121 S.E. 404, 157 Ga. 313.

28. Mich.—Dexter v. Cranston, 2 N.W. 674, 41 Mich. 448.
23 C.J. p 96 note 25.

29. Cal.—De Baker v. Southern California R. Co., 39 P. 610, 106 Cal. 257, 46 Am.S.R. 237.
23 C.J. p 96 note 26.

30. Ark.—Lindsey v. Bloodworth, 134 S.W. 959, 97 Ark. 541.

31. Ind.—Allen v. Gilkison, 132 N.E. 12, 76 Ind.App. 233.
23 C.J. p 96 note 28.

32. Wis.—Tregloan v. Hayden, 282 N.W. 698, 229 Wis. 500.
23 C.J. p 96 note 29.

33. Kan.—Chaput v. Demars, 244 P. 1042, 120 Kan. 612, denying rehearing 243 P. 311, 120 Kan. 273.
Wyo.—Robinson Mercantile Co. v. Davis, 187 P. 931, 26 Wyo. 484.
23 C.J. p 96 note 30.

Range

The court will take judicial notice that a particular range could not possibly be within a particular county.—Chapman v. Milliken, 239 P. 4, 136 Wash. 74.

34. Cal.—Quinn v. Windmiller, 8 P. 14, 67 Cal. 461.
23 C.J. p 96 note 31.

35. Ill.—Hill v. Bacon, 43 Ill. 477.
Tex.—Parker v. Chancellor, 11 S.W. 503, 73 Tex. 475.

36. Ala.—Rucker v. Tennessee, etc., R. Co., 58 So. 465, 176 Ala. 456.
23 C.J. p 96 note 33.

37. Miss.—Muse v. Richards, 12 So. 821, 70 Miss. 581.
Wash.—Schmidt v. Powell, 180 P. 892, 107 Wash. 53.

38. Ark.—Sebastian County Road Improvement Dist. v. Hocott, 217 S.W. 258, 141 Ark. 301.
23 C.J. p 96 note 35.

39. Ala.—Webb v. Mullins, 78 Ala. 111.

40. Ind.—Peck v. Sims, 22 N.E. 313, 120 Ind. 345.
23 C.J. p 96 note 37.

41. Ill.—Kile v. Yellowhead, 80 Ill. 208.

42. Ill.—Wilcox v. Jackson, 109 Ill. 261.

43. Ohio.—Stanberry v. Nelson, Wright 766.

44. Cal.—Goodwin v. Scheerer, 40 P. 18, 106 Cal. 690.
23 C.J. p 96 note 41.

45. Ala.—Ford v. Bradford, 103 So. 549, 212 Ala. 515.

46. **Judicial notice has been taken:**
(1) Of legislative policy in taxation.—Johns v. Weeks, 191 So. 187, 140 Fla. 141.

(2) Of varying classifications in fixation of license fees.—City of Andalusia v. Fletcher, 198 So. 64, 240 Ala. 110.

(3) That all who pay income taxes do so on the basis which will call for the least amount of pay-

judicial notice cannot be taken of facts relating to taxation which rest purely in pais and are not of general notoriety,[47] or which are not certain or indisputable.[48] Accordingly, judicial notice has been taken of matters prescribed by law or which are of common knowledge pertaining or relating to the levy[49] and assessment[50] of taxes, and pertaining or

ment—Morton v. Commissioner of Internal Revenue, C.C.A., 109 F.2d 47.

(4) That it is unnecessary to provide an express remedy whereby taxpayers may restore the right to assess income taxes after the passage of the period limited by statute.—Joy Floral Co. v. Commissioner of Internal Revenue, 29 F.2d 865, 58 App.D.C. 277.

(5) That real property in the state is subject to taxation at its reasonable value.—Pinney v. Pinney, 245 P. 329, 66 Utah 612.

(6) That tax laws and the amount of the tax to be paid seldom, if ever, remain constant.—San Pedro, L. A. & S. L. R. Co. v. Atchison, T. & S. F. Ry. Co., 191 P. 536, 183 Cal 342.

(7) That, under prevailing system of taxation, a large amount of personal property habitually escapes the tax rolls.—Northern Pac. Ry. Co. v. Adams County, D C.Wash., 1 F. Supp 163, appeal dismissed, C.C.A., 63 F.2d 1012 and Adams County v. Spokane, P. & S. Ry. Co., 66 F.2d 1008, reversed on other grounds Chicago, M. St. P. & P. R. Co. v. Adams County, 72 F.2d 816.

(8) Other matters.

U.S.—Brown-Crummer Inv. Co. v. Paulter, C.C.A.Okl., 70 F.2d 184—Great Lakes Steel Corporation v. Lafferty, D.C.Mich., 12 F.Supp. 55, affirmed Wayne County Board of Review v. Great Lakes Steel Corporation, 57 S.Ct. 329, 300 U.S. 29, 81 L Ed. 485—City of Hattiesburg v. First Nat. Bank, D.C.Miss., 8 F. Supp. 157, affirmed 9 F.Supp. 519—Stewart Dry Goods Co. v. Lewis, D.C.Ky., 8 F Supp. 396, reversed on other grounds 55 S.Ct. 525, 294 U.S. 550, 79 L.Ed. 1054, rehearing denied 55 S.Ct. 652, 295 U S. 768, 79 L Ed. 1709, Levy v. Lewis, 55 S. Ct. 652, 295 U.S. 768, 79 L.Ed. 1709, J. C. Penney Co. v. Lewis, 55 S. Ct. 652, 295 U.S. 768, 79 L.Ed. 1709, and Kroger Grocery & Baking Co. v. Lewis, 55 S.Ct. 652, 295 U.S. 768, 79 L.Ed. 1709—Stewart Dry Goods Co. v. Lewis, D.C.Ky., 7 F.Supp. 438.

Ark.—Leonard v. Smith, 61 S.W.2d 682, 187 Ark. 695—Kirk v. High, 273 S.W. 389, 169 Ark. 152, 41 A. L.R. 782—Smith v. Lawson, 43 S. W.2d 544, 184 Ark. 825.

Cal.—Meriwether Inv. Co. v. Lampton, 53 P.2d 147, 4 Cal.2d 697.

Conn—Blodgett v. Cosgrove, 167 A. 925, 117 Conn. 301.

Idaho.—Lyons v. Bottolfsen, 101 P.2d 1, 61 Idaho 281—City of Idaho Falls v. Pfost, 23 P.2d 245, 53 Idaho 247.

Ind.—State v. McRoberts, 192 N.E. 428, 207 Ind. 293.

Ky.—Martin v Louisville Motors, 125 S.W.2d 241, 276 Ky. 696.

Md.—Norris v. Mayor and City Council of Baltimore, 192 A. 531, 172 Md. 667.

Mass—Massachusetts Hospital Life Ins. Co. v. Shulman, 12 N E 2d 856, 299 Mass. 312.

Mich.—Child Welfare Soc. of Flint v. Kennedy School Dist., 189 N.W. 1002, 220 Mich. 290.

Mont.—State ex rel. Kleve v. Fischl, 77 P.2d 392, 106 Mont. 282.

N.M—Vermejo Club v. French, 85 P. 2d 90, 43 N.M 45.

Pa.—City and County of Philadelphia v. Samuels, 12 A.2d 79, 338 Pa. 321, affirming Sley System Garages v. City of Philadelphia, 5 A.2d 583, 135 Pa.Super. 440—Wilson v. School Dist. of Philadelphia, 195 A. 90, 328 Pa. 225, 113 A.L.R. 1401.

Tex.—Persky v. First State Bank of Vernon, Civ.App., 117 S.W.2d 861.

Utah.—Elkins v. Millard County Drainage Dist. No. 3, 294 P. 307, 77 Utah 303—Van Wagoner v. Whitmore, 199 P. 670, 58 Utah 418

Wash.—State ex rel. Northern Pac. Ry. Co. v. Henneford, 99 P.2d 616, 3 Wash.2d 48—State ex rel. Johnson v. City of Dayton, 93 P.2d 909, 200 Wash. 91—State ex rel. Mason County Logging Co. v. Wiley, 31 P.2d 539, 177 Wash. 65.

23 C.J. p 94 note 13.

Tax records

(1) Some courts have declined to take judicial notice of facts contained in the records of tax proceedings by a board of supervisors.—Auditor-Gen. v. Clifford, 107 N.W. 287, 143 Mich. 626.

(2) Other courts have taken judicial notice that certain matters would not be entered in the tax records.—State v. Murray County Thirteenth Judicial Dist. Ct., 168 N.W. 184, 140 Minn. 375.

47. Ill.—People v. Chicago, etc., R. Co., 100 N.E. 266, 256 Ill. 476.
23 C.J. p 94 note 14.

Counties' practice

Court could not, in interpretation of insurance taxation statute, take judicial notice of counties' practice, under prior law.—State v. Jay, 260 P. 180, 37 Wyo. 189.

48. Mo.—In re Lankford, 197 S.W. 147, 272 Mo. 1.
Or.—Dayton v. Multnomah County, 55 P. 23, 34 Or. 239.
23 C.J. p 94 note 15.

Reasonableness of fee

The court cannot judicially know that a license fee of twenty-five cents for each jitney bus per day for inspection and superintendence provided for in a city ordinance is unreasonable.—McLendon v. Kerr, 97 So. 145, 210 Ala. 110.

49. Ind.—Simmons v. Woodward, 26 N.E.2d 37.
Ky.—Fox v. Board for Louisville & Jefferson County Children's Home, 50 S.W.2d 67, 244 Ky. 1.
N.Y.—Auerbach v. Mr. & Mrs. Foster's Place, 220 N.Y.S. 281, 128 Misc. 875.
Wyo.—Bunten v. Rock Springs Grazing Ass'n, 215 P. 244, 253, 29 Wyo. 461, citing **Corpus Juris.**
23 C.J. p 94 note 9.

Based on assessed valuation

That county and district tax levy is based on assessed valuation is matter of common knowledge.—Smith v. Board of Sup'rs of Washington County, 154 S.E. 479, 155 Va. 343.

50. Ark.—Withrow v. City of Nashville, 224 S W. 614, 145 Ark. 340.
Cal.—Rutledge v. City of Eureka, 234 P. 82, 195 Cal. 404—Miller & Lux v. Sacramento and San Joaquin Drainage Dist., 187 P. 1041, 182 Cal. 252, certiorari denied and error dismissed 41 S.Ct. 404, 256 U.S. 129, 69 L.Ed. 859—Davis v. Day, 277 P. 741, 98 Cal.App. 557—Schainman v. All Persons, 275 P. 225, 96 Cal App. 753, rehearing denied 276 P. 113, 96 Cal.App. 753—Green v. Palmer, 229 P. 876, 68 Cal. App. 393.
Ind.—Hasse v. Bielefeld, 150 N.E. 413, 197 Ind. 498.
La.—State ex rel. Day v. Rapides Parish School Board, 103 So. 757, 158 La. 251—Brown Paper Mill Co. v. Fisher, 134 So. 708, 16 La.App. 427.
Mich.—Petition of Auditor General, 187 N.W. 527, 217 Mich. 695.
N.Y.—Auerbach v. Mr. & Mrs. Foster's Place, 220 N.Y.S. 281, 128 Misc. 875.
Or.—Morris, Mather & Co. v. Port of Astoria, 15 P.2d 385, 390, 141 Or. 251, citing **Corpus Juris.**
S.D—Beveridge v. Baer, 241 N.W. 727, 59 S.D. 563, 84 A.L.R. 189.
Tex.—Holt v. Wichita County Water Improvement Dist. No. 2, Civ.App., 48 S.W.2d 527, reversed on other grounds, Com.App., 63 S.W.2d 369—McPhail v. Tax Collector of Van Zandt County, Civ.App., 280 S.W. 260.
Va.—Strother Drug Co. v. Taylor, 168 S.E. 756, 160 Va. 427.

relating to the payment[51] and collection[52] of taxes. Judicial notice has also been taken of matters of common knowledge relating to tax anticipation warrants,[53] tax rates,[54] and tax sales.[55] Although the

Wyo.—Bunten v. Rock Springs Grazing Ass'n, 215 P. 244, 253, 29 Wyo. 461, citing **Corpus Juris.**
23 C.J. p 94 note 10.

Matters judicially noticed

(1) Difficulty in securing listing of all taxable property.—Chicago & N. W. Ry. Co. v. Rowley, D.C Wyo., 1 F Supp. 729.

(2) Regular year for assessment.—Western Public Service Co. v. Wheeler County, 252 N.W. 609, 126 Neb. 120

(3) That income as such was never assessed or taxed as "property" in Idaho.—Diefendorf v. Gallet, 10 P.2d 307, 51 Idaho 619.

(4) Time of assessment.

U.S.—St. Louis & S. W Ry. Co. v. Nattin, D C.La., 27 F.2d 766, affirmed 48 S.Ct. 438, 277 U.S. 157, 72 L Ed. 830.

N.Y.—Brecher v. 11 West 42d St., 229 N.Y.S. 560, 132 Misc. 329, reversed on other grounds 232 N.Y.S. 142, 133 Misc. 423.

(5) That very few mineral leases are rendered for taxes.—Kirby v. Transcontinental Oil Co., Tex Civ. App., 33 S.W. 2d 472, error refused.

Valuation of property

(1) Facts of general notoriety relating to the valuation of property for tax purposes will be judicially noticed.

U.S.—In re St. Paul Garage Co., D. C Md., 22 F.Supp. 32.

Ark.—Fisher v. Texarkana Forest Park Paving Dist. No. 3, 26 S.W. 2d 111, 181 Ark. 450.

Fla.—Henderson v. Leatherman, 163 So. 310, 120 Fla. 496.

Ind.—New Albany Trust Co. of New Albany v. Taylor, 144 N.E. 855, 82 Ind App. 1.

Ky.—Harley v. Harley, 74 S.W.2d 195, 255 Ky. 370.

Miss.—Knox v. Southern Paper Co., 108 So. 288, 143 Miss. 870, followed in Knox v. L. N. Dantzler Lumber Co., 108 So. 290, Knox v. Dantzler Shipbuilding & Dry Dock Co., 108 So. 290, and Knox v. Van Cleave Lumber Co., 108 So. 290.

N.Y.—People ex rel. Union Bag & Paper Corporation v. Fitzgerald, 2 N.Y S 2d 290, 166 Misc. 237.

Wis.—Peninsular Power Co. v. Wisconsin Tax Commission, 218 N.W. 371, 195 Wis. 231
23 C.J. p 94 note 10 [a] (3), (4).

(2) Courts, however, do not take judicial notice of valuation of property for tax purposes by taxing authorities in particular cases.

Ala.—State v. Neuhoff, 196 So. 130, 239 Ala. 584.

N.J.—Central R. Co. of New Jersey v. State Tax Department, 169 A. 489, 112 N.J.Law 5, affirming Central R. Co. of New Jersey v. State Board of Tax Appeals, 162 A. 889, 109 N J Law 395, and certiorari denied Central R. Co. of New Jersey v. State Tax Commission, 55 S.Ct. 79, 293 U.S. 568, 79 L.Ed. 667.

51. Ky.—Beauchamp v. Matthews, 135 S.W.2d 863, 281 Ky 351.

Mo.—Graves v. Purcell, 85 S.W.2d 543, 337 Mo. 574.

Utah.—Elkins v. Millard County Drainage Dist. No. 3, 294 P. 307, 77 Utah 303.

Wyo.—Bunten v. Rock Springs Grazing Ass'n, 215 P. 244, 253, 29 Wyo. 461, citing **Corpus Juris.**
23 C.J. p 94 note 11.

Before delinquency

It is common knowledge that payments of taxes are often made at an earlier date than the day on which payment must be made to avoid delinquency.—Chadwick v. City of Crawfordsville, 24 N.E.2d 937, 128 A.L.R. 469.

52. U.S.—Gulley v. Wisdom, C.C.A. Miss., 69 F.2d 495.

Pa.—Borough of Hawthorn v. Smith, 180 A. 28, 119 Pa.Super. 27.

Wyo.—Bunten v. Rock Springs Grazing Ass'n, 215 P. 244, 253, 29 Wyo. 461, citing **Corpus Juris.**
23 C J. p 94 note 12.

Delinquent taxes

(1) Judicial notice may be taken of the large sums due in delinquent taxes.—Slimp v. Wise County, Tex. Civ.App., 96 S.W 2d 537—Cherokee County v. Odom, Civ.App., 297 S.W. 1055, reversed on other grounds 15 S.W.2d 538, 118 Tex. 288.

(2) The fact that all taxes levied are never all collected may be judicially noticed.—Refsnes v. Oglesby, 73 P.2d 90, 50 Ariz. 494.

(3) The time when taxes become delinquent may be judicially noticed.—Simmons v. Woodward, Ind., 26 N. E.2d 37.

(4) It is common knowledge that all taxes levied are not paid.—Oregon City v. Clackamas County, 247 P. 772, 118 Or. 546.

(5) It is common knowledge that taxes are collected from time to time after periods of years when they are due.—People v. Chicago & A. R. Co., 154 N.E. 893, 324 Ill. 179.

(6) Other matters relating to delinquent taxes.

Ark.—Thomas v. Branch, 150 S.W.2d 738.

Tex.—Hunt v. State, 217 S.W. 1034, 110 Tex. 204, reversing State v. Hunt, Civ App., 207 S.W. 636.
23 C.J. p 94 note 12 [b].

Executions

The supreme court will take judicial notice of fact that tax executions are not issued by county treasurer until during year following the year for which the taxes are due.—Wallace v. Sumter County, 1 S.E.2d 345, 189 S.C. 395.

When taxes are due or are collected

U.S.—Fidelity & Deposit Co. of Maryland v. Howard, C.C.A Ga., 67 F.2d 961, certiorari granted Lewis v. Fidelity & Deposit Co. of Maryland, 54 S.Ct. 563, 291 U S. 658, 78 L.Ed. 1050, affirmed 54 S.Ct. 848, 292 U.S. 559, 78 L Ed. 1425, 92 A.L.R. 794—St. Louis & S. W. Ry. Co. v. Nattin, D.C.La., 27 F.2d 766, affirmed 48 S.Ct. 438, 277 U.S. 157, 72 L.Ed. 830

Ala.—Harris v. Cope, 183 So. 407, 236 Ala. 415.

Ill.—People's Nat. Bank of Monmouth v. Fernald, 252 Ill.App. 5.

Or.—School Dist. No. 24 of Marion County v. Smith, 191 P. 506, 97 Or. 1.

53. U.S.—Rogers & Tracy v Board of Education of Park Ridge, C. C.A.Ill., 99 F.2d 773.

54. Ariz.—Smith v. Mahoney, 197 P. 704, 22 Ariz. 342.

Mass.—In re Opinion of the Justices, 9 N.E.2d 189, 297 Mass. 582.

Mo.—Hudgins v. Mooresville Consol. School Dist, 278 S.W. 769, 312 Mo. 1.

N Y.—Auerback v. Mr. & Mrs. Foster's Place, 220 N.Y.S. 281, 128 Misc. 875.

Wash.—State v. Northern Pac. Ry. Co., 48 P.2d 931, 183 Wash. 33, followed in State v. Great Northern Ry. Co., 48 P.2d 938, 183 Wash. 698, and Pacific Telephone & Telegraph Co. v. Tax Commission of Washington, 48 P.2d 938, 183 Wash. 697, affirmed 56 S Ct. 522, 297 U S. 403, 80 L.Ed. 760, 105 A.L.R. 1—Kalmans v. Powles, 209 P. 5, 121 Wash. 203, 29 A.L.R. 618.

Wis.—Ashland County Bank v. Village of Butternut, 241 N.W. 638, 208 Wis. 90, 82 A.L.R. 865.

On securities

The supreme court could take judicial notice that securities owned by residents of state bore rate of interest less than taxes they would be required to pay if such intangibles were held subject to taxation under tax statutes.—Maricopa County v. Trustees of Arizona Lodge No. 2, F. & A. M, 80 P.2d 955, 52 Ariz. 329.

55. Ala.—Downing v. City of Russellville, 3 So.2d 34.

Ark.—Michael v. Wood, 68 S.W.2d 459, 188 Ark. 980.

Fla.—Milton v. City of Marianna, 144 So. 400, 107 Fla. 251.

La.—State ex rel. McGregor v. Diamond, App., 167 So. 760.

Or.—State ex rel. Umatilla County v. Davis, 85 P.2d 379, 161 Or. 127, re-

court must take judicial notice of the constitutional methods provided for raising revenue, it cannot take notice of the amount so raised and received.[56] It judicially knows the purposes for which funds raised by taxation may be used;[57] and that a county has other sources of revenue than its general tax levy.[58]

§ 55. Foreign Governments in General

Judicial notice will be taken of foreign governments which have been recognized as sovereign states by the United States, and facts of common knowledge relating to foreign governments may likewise be judicially noticed.

The recognition of a foreign government is a political act which is binding on the courts and is, therefore, judicially noticed by them;[59] and courts take judicial notice whether or not a foreign government has been recognized as a sovereign state by our government.[60] The existence of a foreign government which has been formally recognized by our government,[61] and the identity of its colonies or other political dependencies,[62] and of its ports of entry,[63] are judicially known. The fact that the government of a foreign country which is recognized by the United States has been overthrown,[64] that there is another government in such country which has not been recognized by our government,[65] and that such government is the only one existing in such country,[66] may be judicially noticed. Courts, however, have no judicial knowledge of subordinate departments existing under foreign governments.[67] Neither can judicial notice be tak-

hearing denied 88 P.2d 314, 161 Or. 127.

Tax deeds cannot be judicially noticed in respect of their forms or dates, or whether or not they are void upon their face, where it is notorious that their form varies from time to time.—Fitschen v. Olson, 119 N.W. 3, 155 Mich. 320.

56. Idaho.—Stein v. Morrison, 75 P. 246, 9 Idaho 426.

57. Tex.—J. I. Case Threshing Mach. Co. v. Camp County, Civ.App., 218 S.W. 1.

58. Ark.—Fussell v. Mallory, 134 S. W. 631, 97 Ark. 465.

59. U.S.—U. S. v. Bank of New York & Trust Co., C.C.A.N.Y., 77 F.2d 866, affirming, D.C., 10 F. Supp. 269, certiorari granted 56 S.Ct. 111, 296 U.S. 558, 80 L.Ed. 393, affirmed 56 S.Ct. 343, 296 U. S. 463, 80 L.Ed. 331, and affirmed, C.C.A., U. S. v. President and Directors of Manhattan, 77 F.2d 881—Republic of China v. Merchants' Fire Assur. Corporation of New York, C.C.A.China, 30 F.2d 278—The Penza, D.C.N.Y., 277 F. 91.

D.C.—U. S. ex rel. Cardashian v. Snyder, 44 F.2d 895, 59 App.D.C. 387, certiorari denied 51 S.Ct. 351, 283 U.S. 827, 75 L.Ed. 1440.

23 C.J. p 115 note 60.

Flags and seals see infra § 56.

Geographical facts see supra §§ 32, 33.

Historical facts see infra § 63.

Law see supra § 21.

Nationality of particular persons see infra § 86.

Official language of foreign country see infra § 69.

Treaties see infra § 57.

Assignment of Russian claims

The court takes judicial notice that coincident with the assignment by the Russian Soviet government to the United States of claims against American nationals the president recognized the Soviet government and normal diplomatic relations were established between that government and the government of the United States followed by an exchange of ambassadors.—U. S. v. Belmont, N.Y., 57 S.Ct. 758, 301 U.S. 324, 81 L.Ed. 1134, reversing, C.C.A., 85 F.2d 542, certiorari granted 57 S. Ct. 313, 299 U.S. 537, 81 L.Ed. 396, motion denied 57 S.Ct. 505, 300 U.S. 641, 81 L.Ed. 856.

Carranza government of Mexico

La.—Monte Blanco Real Estate Corporation v. Wolvin Line, 35 So. 242, 147 La. 563.

Tex.—Terrazas v. Donohue, Civ.App., 227 S.W. 206, affirmed 275 S.W. 396, 115 Tex. 146.

23 C.J. p 115 note 60 [a].

60. U.S.—Puente v. Spanish Nat. State, C.C.A.N.Y., 116 F.2d 43—Amtorg Trading Corporation v. U. S., C.C.P.A., 71 F.2d 524—Amtorg Trading Corporation v. U. S., 21 C.C.P.A.(Customs) 532.

N.Y.—Russian Socialist Federated Soviet Government v. Cibrario, 191 N.Y.S. 543, 198 App.Div. 869—Reisfeld v. Jacobs, 176 N.Y.S. 223, 107 Misc. 1.

61. U.S.—Lehigh Valley R. Co. v. State of Russia, C.C.A.N.Y., 21 F. 2d 396, certiorari denied 48 S.Ct. 159, 275 U.S. 571, 72 L.Ed. 432.

23 C.J. p 115 note 61.

62. U.S.—Williams v. Suffolk Ins. Co., Mass., 13 Pet. 415, 10 L.Ed. 226, affirming, C.C., 29 F.Cas.No. 17,738, 3 Sumn. 270.

23 C.J. p 116 note 63.

63. U.S.—The India Arrow, C.C.A. Tex., 116 F.2d 8, certiorari denied Collins v. Socony-Vacuum Oil Co., 61 S.Ct. 1098.

N.Y.—Yucatan v. Argumedo, 157 N. Y.S. 219, 92 Misc. 547.

64. U.S.—Lehigh Valley R. Co. v. State of Russia, C.C.A.N.Y., 21 F. 2d 396, certiorari denied 48 S.Ct. 159, 275 U.S. 571, 72 L.Ed. 432—Banco de Espana v. Federal Reserve Bank of New York, D.C.N.Y., 28 F.Supp. 958, affirmed, C.C.A., 114 F.2d 438.

Mass.—Universal Adjustment Corporation v. Midland Bank, Limited, of London, England, 184 N.E. 152, 281 Mass. 303, 87 A.L.R. 1407.

65. N.Y.—Sokoloff v. National City Bank of New York, 199 N.Y.S. 355, 120 Misc. 252, reversed on other grounds 204 N.Y.S. 69, 208 App. Div. 627, affirmed 145 N.E. 917, 239 N.Y. 158, 37 A.L.R. 712.

Existence of de facto government may be judicially noticed.—Wulfsohn v. Russian Socialist Federated Soviet Republic, 195 N.Y.S. 472, 202 App.Div. 421.

66. N.Y.—Joint Stock Co. of Volgakama Oil & Chemical Factory v. National City Bank of New York, 206 N.Y.S. 476, 210 App.Div. 665, affirmed 148 N.E. 552, 240 N.Y. 368, reargument denied 150 N.E. 532, 241 N.Y. 509.

Nonexistence

(1) The fact that a foreign government, which at best constituted only a de facto entity, has ceased to exist may be judicially noticed where such is a matter of common knowledge.—Nankivel v. Omsk All-Russian Government, 142 N.E. 569, 237 N.Y. 150, reversing 197 N.Y.S. 467, 203 App.Div. 740.

(2) However, it has been held that the court would not take judicial notice that the Kerensky government had been overthrown and that the judiciary of the country had been paralyzed.—Gurdus v. Philadelphia Nat. Bank, 116 A. 672, 273 Pa. 110, 23 A.L.R. 1227.

67. U.S.—Schoerken v. Swift, etc., Co., C.C.N.Y., 7 F. 469, 19 Blatchf. 209.

Town officials

The supreme judicial court "can have no judicial knowledge respect-

en in a suit in rem against a steamship owned by a private corporation that the steamship is in the public service and under the control of a foreign government as an admiralty transport.[68] Likewise, the solvency of a foreign state cannot be judicially noticed.[69]

Judicial notice may be taken of facts of common knowledge relating to foreign countries, such as the identity of their principal officials,[70] general conditions existing in such countries,[71] and the practice of many foreign governments to own and operate railroads.[72] The official acts of minor officials of foreign countries cannot be judicially noticed.[73]

§ 56. Government Flags and Seals

Judicial notice will be taken of the flags and great seals of governments which have been recognized as sovereign nations by our government.

In conformity to the law of nations all courts in a government, where that government has recognized the existence of a foreign nation, but not in the absence of such recognition,[74] will take cognizance of the flag and great seal[75] of that nation or its provinces.[76] For a like reason,[77] reinforced by the construction of a federal statute,[78] all courts in the United States take judicial notice of the seals of the several states and territories,[79] but these seals are not judicially known in the courts of a foreign nation.[80] The seal of the United States is judicially noticed by state courts.[81] Seals of municipalities, domestic[82] or foreign,[83] except the seal of the city of London,[84] or the seals of executive departments in other states or countries,[85] will not be judicially noticed in the absence of statutory requirement.[86]

§ 57. Treaties and Execution Thereof

Judicial notice will be taken of treaties entered into between the United States and foreign countries or Indian tribes, and, at least in the courts of the states concerned, of treaties between states of the Union.

All courts in the United States take judicial notice of treaties made between the United States and foreign governments,[87] or Indian tribes,[88] and ju-

ing records of town officers in Italy."—In re Derinza, 118 N.E. 942, 229 Mass. 435, 444.

68. U.S.—In re Muir, N.Y., 41 S.Ct. 185, 254 U.S. 522, 65 L.Ed. 383.

69. N.Y.—Hebblethwaite v. Flint, 101 N.Y.S. 43, 115 App.Div. 597.

70. U.S.—Banco de Espana v. Federal Reserve Bank of New York, D.C.N.Y., 28 F.Supp. 958, affirmed, C.C.A., 114 F.2d 438.

71. U.S.—U. S. ex rel. Boraca v. Schlotfeldt, C.C.A.Ill., 109 F.2d 106.
N.Y.—Chase Nat. Bank of New York City v. Reinicke, 10 N.Y.S.2d 420—Sommer v. Taylor, 190 N.Y.S. 153—Schlein v. Public Nat. Bank of New York, 180 N.Y.S. 128—Rosenblatt v. Josephsohn, 172 N.Y.S. 719.
Pa.—In re Stede's Estate, 38 Pa. Dist. & Co. 209, 29 Del.Co. 250.

72. U.S.—Oliver American Trading Co v. Government of U. S. of Mexico, C.C.A.N.Y., 5 F.2d 659.

73. N.D.—In re Markhus' Estate, 249 N.W. 310, 63 N.D. 566.

74. U.S.—U. S. v. Palmer, Mass., 3 Wheat. 610, 4 L.Ed. 471.

75. N.H.—Watson v. Walker, 23 N.H. 471.
23 C.J. p 116 note 70.

76. N.Y.—Lazier v. Westcott, 26 N.Y. 146, 82 Am.D. 404.
23 C.J. p 116 note 71.

77. Tex.—Phillips v. Lyons, 1 Tex. 392.
23 C.J. p 116 note 72.

78. U.S.—U. S. v. Johns, 4 Dall 412, 1 L.Ed. 888, 26 F.Cas.No.15,481, 1 Wash.C.C. 363.
23 C.J. p 116 note 73.

79. U.S.—Patterson v. Winn, Ga., 5 Pet. 233, 8 L.Ed. 108.
23 C.J. p 116 note 74.

80. Tex.—Phillips v. Lyons, 1 Tex. 392.

81. Cal.—Yount v. Howell, 14 Cal. 465.

82. N.J.—Vaughn v. Hawkinson, 35 N.J.Law 79.
Pa.—Duffey v. Bellefonte Presb. Cong., 48 Pa. 46.

83. Pa.—Foster v. Shaw, 7 Serg. & R. 156.
23 C.J. p 116 note 78.

84. N.J.—Vaughn v. Hawkinson, 35 N.J.Law 79.
23 C.J. p 116 note 79.
However, a court has refused to take judicial notice of the seal of the city of London.—Chew v. Keck, 4 Rawle (Pa.) 163.

85. U.S.—Church v. Hubbard, Mass., 2 Cranch 187, 2 L.Ed. 249—Schoerken v. Swift, etc., Co., C.C.N.Y., 7 F. 469, 19 Blatchf. 209.

86. Pa.—Duffey v. Bellefonte Presb. Cong., 48 Pa. 51.

87. U.S.—The Taigen Maru, C.C.A. Wash., 73 F.2d 922, certiorari granted in part Van Der Weyde v. Ocean Transport Co., 56 S.Ct. 177, 296 U.S. 567, 80 L.Ed. 401, reversed on other grounds 56 S.Ct. 392, 297 U.S. 114, 80 L.Ed. 515—Munich Reinsurance Co. v. First Reinsurance Co. of Hartford, C.C.A.Conn., 6 F.2d 742, affirming, D.C., 300 F. 345, and appeal dismissed 47 S.Ct. 458, 273 U.S. 666, 71 L.Ed. 830—American-Mexican Claims Bureau v. Morgenthau, D.C.D.C., 26 F.Supp. 904.
N.J.—In re Swistak's Estate, 18 A.2d 561, 129 N.J.Eq. 138
Pa.—In re Blaga's Estate, 12 Pa. Dist. & Co. 222, 21 North Co. 382.
23 C.J. p 92 note 54.

Knowledge of plaintiff
Plaintiffs must be deemed to have had knowledge of treaty proclaimed by the president to be a public statute.—Pettibone v. Cook County, D.C.Minn., 31 F.Supp. 881.

Provisions of treaties
(1) Court judicially notices that by no treaty has Turkish government consented to be sued in United States courts.—U. S. ex rel. Cardashian v. Snyder, 44 F.2d 895, 59 App.D.C. 387, certiorari denied 51 S.Ct. 351, 283 U.S. 827, 75 L.Ed. 1440.

(2) Court takes judicial notice that there is no treaty of extradition between Republic of Greece and United States.—Republic of Greece v. Koukouras, 162 N.E. 345, 264 Mass. 318, 59 A.L.R. 891.

(3) It is common knowledge that practically every nation with whom the United States has commercial relations has a most-favored-nation treaty.—Minerva Automobiles v. U. S., C.C.P.A., 96 F.2d 836.

88. U.S.—Cherokee Nation v. U. S., 80 Ct.Cl. 1.
Wyo.—Hudson Oil Co. v. Board of Com'rs of Fremont County, 52 P.2d 683, 689, 49 Wyo. 1, citing **Corpus Juris.**
23 C.J. p 92 note 55.

Practical construction given such treaties by the parties thereto will be judicially noticed.—People ex rel. Schuyler v. Livingstone, 205 N.Y.S. 888, 123 Misc. 605.

dicial notice may be taken, at least in the courts of the states concerned, of treaties between the various states in the Union.[89] Judicial notice of treaties includes notice of their dates[90] and ratification.[91] Likewise, courts must take judicial knowledge of the historical data leading up to treaties, as well as the construction of them by both the executive and judicial branches of the government;[92] and notice may be taken of the contents of public documents executed pursuant to their provisions,[93] and the public acts done and proclamations issued in carrying them into effect.[94] On the other hand, judicial notice is not taken of superseded treaties,[95] or of foreign laws and usages referred to in treaties,[96] or of acts done under a treaty with an Indian tribe which affect only a small portion of the tribe.[97]

Judicial notice of these matters is sometimes placed on the ground that treaties are in the same category as domestic constitutions and statutes of which judicial notice must be taken,[98] and sometimes on the ground that they are historical and notorious facts.[99]

§ 58. History and Historical Facts

Judicial notice may be taken of historical facts.

Courts may take judicial notice of matters of public history,[1] including the political history of foreign countries.[2] Judicial notice of history includes notice of matters of current history.[3] Courts, however, cannot assume knowledge of the secondary and more minute circumstances connected with historical events, although of general interest,[4] and, of course, before judicial notice may be taken of an alleged historical fact, it must be certain and undisputable.[5]

§ 59. General History of State or Territory

A court in a state may take judicial notice of the history of events in the state.

The courts of a state and federal courts sitting therein will judicially know the general history of the state.[6] This principle has been applied to the

89. Mo.—Speas v. Kansas City, 44 S.W.2d 108, 329 Mo. 184.

90. N.D.—Kreuger v. Schultz, 70 N.W. 269, 6 N.D. 310.

91. Minn.—Carson v. Smith, 5 Minn. 78, 77 Am.D. 539.

92. Tex.—San Lorenzo Title & Improvement Co. v. Caples, Civ.App., 48 S.W.2d 329, affirmed 73 S.W.2d 516, 124 Tex. 33.

93. U.S.—Callsen v. Hope, D.C.Alaska, 75 F. 758.
23 C.J. p 92 note 58.

94. U.S.—U. S. v. Reynes, La., 9 How. 127, 13 L.Ed. 74—Daigle v. U. S., Me., 237 F. 159, 150 C.C.A. 305.
Proclamations generally see supra § 41.

95. N.Y.—Ryan v. Knorr, 19 Hun 540.

96. U.S.—Dainese v. Hale, D.C., 91 U.S. 13, 23 L.Ed. 190.

97. Minn.—Dole v. Wilson, 16 Minn. 525.

98. Neb.—Butschkowski v. Brecks, 143 N.W. 923, 94 Neb. 532.
N.J.—Seaboard Trust Co. v. Topken, 20 A.2d 709, 130 N.J.Eq. 46.
23 C.J. p 92 note 63.

99. U.S.—U. S. v. Reynes, La., 9 How. 127, 13 L.Ed. 74—Daigle v. U. S., Me., 237 F. 159, 150 C.C.A. 305.

1. U.S.—Akira Ono v. U. S., C.C.A. Cal., 267 F. 359.
Cal.—City of San Diego v. Cuyamaca Water Co., 287 P. 475, 209 Cal. 105.
Ind.—Inland Steel Co. v. Jelenovic, 150 N.E. 391, 84 Ind.App. 373.
Mo.—City of St. Louis v. Pope, 126 S.W.2d 1201, 344 Mo. 479—Rositzky v. Rositzky, 46 S.W.2d 591, 329 Mo. 662—State ex rel. Pollock v. Becker, 233 S.W. 641, 289 Mo. 660—W. J. Howey Co. v. Cole, 269 S.W. 955, 219 Mo.App. 34, certiorari quashed State ex rel Cole v. Trimble, 269 S.W. 959, 307 Mo. 57.
Pa.—Commonwealth v. Ball, 121 A. 191, 277 Pa. 301, 29 A.L.R. 626.
Va.—Vaughan v. Town of Galax, 4 S.E.2d 386, 173 Va. 335.
23 C.J. p 116 note 84.

2. Cal.—Ocean Industries v. Superior Court of California, in and for Santa Cruz County, 252 P. 722, 200 Cal. 235.
Ga.—Herndon v. State, 174 S.E. 597, 607, 178 Ga. 832, citing **Corpus Juris.**

Movement for secession
Court takes judicial notice that for decades there was well defined movement for secession in certain portions of Austria-Hungary.—Industrial Commission of Ohio v. Rotar, 179 N.E. 135, 124 Ohio St. 418, affirming Rotar v. Industrial Commission of Ohio, 178 N.E. 208, 40 Ohio App. 168.

Occupation of Roumania
The admiralty court may take judicial notice of the occupation of Roumania by Germany under its protectorate.—The Prahova, D.C.Cal., 38 F.Supp. 418.

Persecution of Jews
It is common knowledge that at the present time in Central Europe the Jews are being persecuted, that their property is being confiscated, and that they are obliged to seek sanctuary in other countries.—U. S. ex rel. Weinberg v. Schlotfeldt, D.C. Ill., 26 F.Supp. 283.

3. Cal.—Williamson v. Railroad Commission, 222 P. 803, 193 Cal. 22—People v. Gidaly, 93 P.2d 660, 35 Cal.App.2d Supp. 758—James v. Kuhn, 8 P.2d 526, 121 Cal.App. 69.
Ky.—South Mountain Coal Co. v. Rowland, 265 S.W. 320, 204 Ky. 820.
Mo.—State ex rel. Crutcher v. Koeln, 61 S.W.2d 750, 332 Mo. 1229—Title Guaranty Trust Co. v. Sessinghaus, 28 S.W.2d 1001, 325 Mo. 420—State ex rel. Barrett v. Dallmeyer, 245 S.W. 1066, 295 Mo. 638.
Tex.—Lombardo v. City of Dallas, 73 S.W.2d 475, 124 Tex. 1, affirming, Civ.App., 47 S.W.2d 495—Williams v. Castleman, 247 S.W. 263, 112 Tex. 193—Lingo Lumber Co. v. Hayes, Civ.App., 64 S.W.2d 835.
23 C.J. p 117 note 85.

Existing international conditions may be judicially noticed.—The Denny, D.C.N.J., 40 F.Supp. 92.

4. U.S.—Cross v. Sabin, C.C.Tenn., 13 F. 308.
Tenn.—Kelley v. Story, 6 Heisk. 202.
W.Va.—Simmons v. Trumbo, 9 W. Va. 358.

5. Tex.—Barreda v. Milmo Nat. Bank, Civ.App., 241 S.W. 743, affirmed, Com.App., 252 S.W. 1038.

History of vessel
Court cannot take judicial cognizance of history of vessel in determining whether it belonged to United States or was public vessel.—L. Littlejohn & Co. v. U. S., D.C.N.Y., 49 F.2d 467.

6. Iowa.—Mathews v. Turner, 236 N.W. 412, 212 Iowa 424.

history of land ownership in the state;[7] the date of the discovery of valuable minerals in the state;[8] and facts in relation to water supply and appropriation of state waters,[9] the registry of titles,[10] execution of a great public improvement,[11] and numerous other and miscellaneous historical facts.[12]

§ 60. Local History

Judicial notice may be taken of facts of local history which are of general knowledge.

Judicial notice may be taken of salient facts of local history known generally in the particular community;[13] but facts of no general or public interest cannot be considered as covered by judicial knowledge as matter of history.[14]

§ 61. Political Parties

Judicial notice may be taken of historical facts relating to political parties.

Ky.—White v. Crouch, 133 S.W.2d 753, 280 Ky. 637—Boreing v. Garrard, 275 S.W. 374, 210 Ky. 135.

La.—State ex rel. Porterie v. Walmsley, 162 So. 826, 183 La. 139, appeal dismissed Board of Liquidation v. Board of Com'rs of Port of New Orleans, 56 S.Ct. 141, 296 U.S. 540, 80 L.Ed. 384, rehearing denied Board of Liquidation, City Debt of New Orleans v. Board of Com'rs of Port of New Orleans, 56 S.Ct. 246, 296 U.S. 663, 80 L.Ed. 473.

Wyo.—People v. Shawver, 222 P. 11, 30 Wyo. 366—Bunten v. Rock Springs Grazing Ass'n, 215 P. 244, 253, 29 Wyo. 461, citing **Corpus Juris.**

23 C.J. p 120 note 71.

"Of matters of state history the courts are not more ignorant than the general public."—Hackworth v. Missouri Southern R. Co., 227 S.W. 1032, 286 Mo. 282, 15 A.L.R. 170.

Current history

Ky.—Jefferson County Fiscal Court v. Jefferson County ex rel. Grauman, 128 S.W.2d 230, 278 Ky. 68.

Mich.—Behrendt v. Wilcox, 269 N. W. 155, 277 Mich. 232.

N.Y.—Urbis Realty Co. v. Globe Realty Co., 194 N.Y.S. 535, 201 App. Div. 533.

S.C.—Hearon v. Calus, 183 S.E. 13, 178 S.C. 381.

23 C.J. p 120 note 71 [a].

7. Tex.—Fielder v. Houston Oil Co. of Texas, Com.App., 208 S.W. 158, affirming in part and reversing in part, Civ.App., 165 S.W. 48, rehearing overruled Fielder v. Houston Oil Co., Com.App., 210 S.W. 797.

23 C.J. p 121 note 71½.

Judicial notice has been taken:

(1) Of facts surrounding Spanish grant to city disclosed by history of state.—Anderson v. Polk, 297 S.W. 219, 117 Tex. 73, affirming, Civ.App., 291 S.W. 1112.

(2) That large tracts of land in the northern part of the state were permitted to be sold for delinquent taxes after the valuable timber had been removed therefrom.—Lawson v. Bishop, 180 N.W. 596, 212 Mich 691.

(3) Other matters see Finch, Pruyn & Co. v. State, 203 N.Y.S. 165, 122 Misc. 404—23 C.J. p 121 note 71½ [a].

8. La.—Trumbull v. Sample, 104 So. 479, 158 La. 629.

9. Cal.—San Joaquin, etc., Co. v. Stevinson, 128 P. 924, 164 Cal. 221.

Utah.—Deseret Live Stock Co. v. Hooppiania, 239 P. 479, 66 Utah 25.

23 C.J. p 121 note 81.

10. **Pine lands**

It is common knowledge that pine lands were considered of little value during state's early history, and that owners did not register titles as systematically as in other sections.—Alger-Sullivan Lumber Co. v. Union Trust Co., 118 So. 760, 218 Ala. 448.

11. Fla.—Martin v. Dade Muck Land Co., 116 So. 449, 95 Fla. 530, appeal dismissed M. B. Garris Properties v. Martin, 49 S.Ct. 25, 278 U.S. 560, 73 L.Ed. 505.

23 C.J. p 122 note 87.

12. U.S.—Sperry Oil & Gas Co. v. Chisholm, C.C.A.Okl., 282 F. 93, affirming, D.C., Chisholm v. Creek & Indiana Development Co., 273 F. 589 and certiorari granted 43 S.Ct 363, 261 U.S. 611, 67 L.Ed. 826, and affirmed in part and reversed in part on other grounds 44 S.Ct. 372, 264 U.S. 488, 68 L.Ed. 803.

Alaska.—U. S. v. Lynch, 8 Alaska 135.

Ky.—Logsdon v. Howard, 133 S.W.2d 60, 280 Ky. 342.

La.—Irvine v. Noone, 2 La.App. 675.

Mass.—In re Opinion of the Justices, 143 N.E. 808, 247 Mass. 589.

Mo.—State ex rel. City of Boonville v. Hackmann, 240 S.W. 135, 293 Mo. 313.

Nev.—Studebaker Bros. Co. of Utah v. Witcher, 195 P. 334, 44 Nev. 442.

S.C.—Gardner v. Blackwell, 166 S.E. 338, 167 S.C. 313.

Wis.—Fox v. Koehnig, 209 N.W. 708.

23 C.J. p 121 note 72, p 122 note 90.

Famous men

Judicial notice may be taken of historical facts relating to famous men of the state.—Smith v. Smith, 11 N.Y.S.2d 1015—23 C.J. p 122 note 88.

13. U.S.—U. S. v. Otley, D.C.Or., 34 F.Supp. 182.

Ala.—Cummings v. S. Funkenstein Co., 81 So. 343, 17 Ala.App. 7.

Ill.—Benson v. Liberty Trust & Sav. Bank, 264 Ill.App. 382.

Ky.—Commonwealth v. Sparks, 255 S.W. 859, 201 Ky. 5—Crick v. Rash, 229 S.W. 63, 190 Ky. 820.

Tex.—Fitzgerald v. Boyles, Civ.App., 66 S.W.2d 347, error dismissed—Anderson v. Polk, Civ.App., 291 S. W. 1112, affirmed 297 S.W. 219, 117 Tex. 73.

23 C.J. p 122 notes 91, 94.

Destruction of records

The district court properly took judicial notice that the records of the parish had been destroyed by fire, and that certain books of conveyances were included in the records destroyed.—Grotevant v. Dorresteim, 94 So. 372, 152 La. 734.

Highways, etc.

In counties where the court is conversant with its general affairs, judicial notice may be taken of the existence of highways, bridges, public buildings, and abandoned turnpikes; but such notice must be predicated on a general knowledge of local history in relation to the highway.—Commonwealth v. Ball, 121 A. 191, 192, 277 Pa. 301, 29 A.L.R. 626, citing **Corpus Juris.**

Local drought

Court takes judicial notice of local drought.—Quanah, A. & P. Ry. Co. v. Eblen, Tex.Civ.App., 87 S.W. 2d 540, error refused—23 C.J. p 122 note 92.

Public awards

Court may take judicial notice of public acts of trustees in conferring awards pursuant to terms of trust.—Bok v. McCaughn, C.C.A.Pa., 42 F.2d 616, followed in Mutual Aid & Benefit Ass'n of Forstmann & Huffmann Employees v. Commissioner of Internal Revenue, 42 F.2d 619.

14. **Surname of law partner**

Mo.—Reineman v. Larkin, 121 S.W. 307, 222 Mo. 156.

23 C.J. p 122 note 93.

Former location of buildings

The supreme court cannot take judicial notice of the former existence or respective locations of a certain schoolhouse and church or old meetinghouse, or of a certain tavern.—Burch v. City of Amity, 180 P. 312, 92 Or. 152.

Since a court will take judicial cognizance of the political history of the country and state,[15] it will thereby inform itself generally of the existence of organized political parties,[16] governed by rules and regulations[17] of their own adoption,[18] and more particularly it will inform itself of the date of birth,[19] the party name,[20] and the relative strength[21] of prominent political organizations; and that the same person is sometimes the nominee, at an election, of more than one political party.[22] The court, however, will not attempt to take judicial notice of the character of the Communist party, and that it advocates the overthrow of the government by force and violence,[23] although it has also been held that the program of the Red International Labor Union and the Communists is a matter of general knowledge.[24]

§ 62. Wars and Insurrections

Judicial notice may be taken of historical facts of general knowledge relating to wars and insurrections.

Courts judicially know whether the United States is or is not at war,[25] and judicial notice will be taken of an existing war between our own country and a foreign power,[26] at least after the fact has been formally recognized by other departments of the government.[27] The existence of a war between foreign nations has been judicially noticed,[28] as has been the existence of a state of war between a foreign country and one of her colonies seeking independence,[29] and the state of a civil war in a foreign country.[30] The court will take judicial notice that after the signing and ratification of the Treaty of Paris the Philippine Islands were in a state of insurrection against the government of the United States.[31] It has been judicially noticed that it would be highly dangerous to the peace of the United States that a vessel flying the American flag enter the waters of warring nations.[32]

Civil War. Judicial notice will be taken of salient

15. Mo.—State v. Bland, 46 S.W. 440, 144 Mo. 534, 41 L.R.A. 297.
23 C.J. p 123 note 10, p 124 note 11.

16. S.D.—State v. Metcalf, 100 N.W. 923, 18 S.D. 393, 67 L.R.A. 331.

Socialist party

It is a matter of common knowledge that Socialists in this country have lately become sharply divided into two classes or cults; one advocating and seeking the proposed change in our social and governmental system by constitutional methods, and one advocating or seeking to accomplish it by force.—In re Lithuanian Workers' Literature Soc., 187 N.Y.S. 612, 196 App.Div. 262.

17. S.D.—State v. Metcalf, 100 N.W. 923, 18 S.D. 393, 67 L.R.A. 331.
23 C.J. p 124 note 13.

18. W.Va.—State v. Kanawha County Ct., 88 S.E. 662, 78 W.Va. 168.

19. Mo.—State v. Kortjohn, 150 S.W. 1060, 246 Mo. 34.
W.Va.—Rider v. Braxton County Ct., 82 S.E. 1083, 74 W.Va. 712.
23 C.J. p 124 note 15.

20. Neb.—Porter v. Flick, 84 N.W. 262, 60 Neb. 773.
23 C.J. p 124 note 16.

21. Mo.—State v. Wright, 158 S.W. 823, 251 Mo. 325, Ann.Cas.1915A 588.
23 C.J. p 124 note 17.

Place on ballot

In a proceeding to restrain county clerk from entering intervener's name on ballot at general election as Republican candidate for county sheriff, the court of civil appeals would take judicial notice that the Republican party came within meaning of a statute authorizing each political party whose nominee for governor received a stated number of votes in last general election to nominate candidates for state, district, and county offices.—Pulliam v. Trawalter, Tex.Civ.App., 120 S.W.2d 108.

22. Mo.—State v. Bland, 46 S.W. 440, 144 Mo. 534, 41 L.R.A. 297.
23 C.J. p 124 note 18.

23. U.S.—Ex parte Fierstein, C.C.A. Cal., 41 F.2d 53.
Wash.—State ex rel. Huff v. Reeves, 106 P.2d 729, 5 Wash. 637, 130 A.L.R. 1465.

24. U.S.—Murdoch v. Clark, C.C.A. R.I., 53 F.2d 155.

25. U.S.—Johnson v. Biddle, C.C.A. Kan., 12 F.2d 366, affirming, D.C., Ex parte Johnson, 3 F.2d 705.
23 C.J. p 117 note 88.

Failure to perform act

While the existence of war or any fact of general public notoriety may be noticed by the courts without proof, the court will not take notice without proof that a party's failure to perform a particular act was due to the existence of war or any general public condition.—Kline Car Corporation v. Watkins Motor Co., 106 S.E. 211, 26 Ga.App. 338.

26. Mich.—Kneeland-Bigelow Co. v. Michigan Cent. R. Co., 174 N.W. 605, 207 Mich. 546.
23 C.J. p 118 note 13.

27. U.S.—In re Wulzen, D.C.Ohio, 235 F. 362, Ann.Cas.1917A 274.
23 C.J. p 118 note 14.

28. U.S.—The Austvard, D.C.Md., 34 F.Supp. 431, 437, citing **Corpus Juris.**
N.Y.—Schostal v. Compagnie Generale Transatlantique, 22 N.Y.S.2d 345, reversed on other grounds, 27 N.Y.S.2d 688—In re Ramberg's Estate, 20 N.Y.S.2d 619, 174 Misc. 306.

China

It is a matter of common knowledge that the Japanese forces are engaged in military operations in China and that China is in a state of turmoil.—Siegal v. Public Nat. Bank & Trust Co. of New York, 7 N.Y.S.2d 771.

Danger to shipping

It is common knowledge that neutral ships carrying contraband to England during present war are under a real and substantial danger of being sunk by German submarines and that the total loss of British ships has been terrific.—The George J. Goulandris, D.C.Me., 36 F.Supp. 827.

Norway

The orphan's court could take judicial notice of the chaos existing on April 15, 1940, in the Kingdom of Norway as result of the German invasion.—In re Tenneson's Estate, 12 A.2d 363, 18 N.J.Misc. 245.

29. U.S.—Spain v. The Conception, C.C.S.C., 6 F.Cas.No.3,137, 2 Wheel. Cr., N.Y., 507, 1 Brunn.Coll.Cas. 597—The Maria Josepha, C.C.S.C., 16 F.Cas.No.9,078, 1 Brunn.Coll. Cas. 500, 2 Wheel.Cr., N.Y., 600.

30. U.S.—Campbell v. American Export Lines, D.C.N.Y., 32 F.Supp. 43.
23 C.J. p 118 note 18.

31. Kan.—La Rue v. Kansas Mut. L. Ins. Co., 75 P. 494, 68 Kan. 539.

32. N.Y.—Hopkins v. Moore-McCormack Lines, 22 N.Y.S.2d 72, 175 Misc. 109.

historical facts relating to the Civil War.[33]

World War. The courts take judicial notice of the existence of the World War,[34] that a particular foreign country was involved therein,[35] of the critical period of the war,[36] of certain notorious facts connected with the war,[37] of facts relating to the conduct of the United States before its entry into the war,[38] of the declaration of peace following the war,[39] and of conditions growing out of the war.[40] The courts know judicially the date on which congress declared war,[41] that on a particular date the United States government was at war,[42] and the date of the termination of the war.[43] Judicial notice will be taken of the extraordinary conditions attending the participation by the United States in the World War,[44] such as a government requisition-

33. Mo.—Doneghy v. Robinson, 210 S.W. 655.
23 C.J. p 118 note 20, p 119 note 35

34. U.S.—U. S. v. Hamburg-Amerikanische Packet-Fahrt-Actien Gesellschaft, N.Y., 36 S.Ct. 212, 239 U.S. 466, 60 L.Ed. 387, reversing, D.C., 216 F. 971.

35. Ill.—Follett v. Illinois Cent. R. Co., 209 Ill.App. 81.

36. Iowa.—Banks v. C. C. Taft Co., 174 N.W. 576, 188 Iowa 559.

International situation

Court may take judicial notice of international situation at time of passage of National Defense Act of 1916 under authority of which Wilson Dam and its auxiliary plants were constructed.—Ashwander v. Tennessee Valley Authority, Ala., 56 S.Ct. 466, 297 U.S. 288, 80 L.Ed. 688, affirming, C.C.A., Tennessee Valley Authority v. Ashwander, 78 F. 2d 578, reversing, D.C., Ashwander v. Tennessee Valley Authority, 9 F. Supp. 965, certiorari granted 56 S.Ct. 145, two cases, 296 U.S. 562, 80 L.Ed. 396, rehearing denied 56 S.Ct. 588, two cases, 297 U.S. 728, 80 L.Ed. 1011, mandate conformed to, D.C., 14 F.Supp. 11.

37. U.S.—Brandon Corporation v. Jones, D.C.S.C., 33 F.2d 969, reversed on confession of error, C.C. A., Jones v. Brandon Corporation, 42 F.2d 1016.
Ill.—National Zinc Co. v. Industrial Commission, 127 N.E. 135, 292 Ill. 598.
Mass.—Lajoie v. Milliken, 136 N.E. 419, 242 Mass. 508.
N.Y.—Roy Realty Co. v. B. Altman & Co., 184 N.Y.S. 458, 194 App.Div. 43, reversed on other grounds 132 N.E. 883, 231 N.Y. 549—Plischner v. Taylor, 193 N.Y.S. 236.
23 C.J. p 119 notes 40–42.

Injury to ships

The court takes judicial notice that constant attempts were being made throughout the war to injure American ships, not only on the high seas, but also in our own ports. —Pan-American Petroleum Transp. Co. v. Robins Dry Dock & Repair Co., C.C.A.N.Y., 281 F. 97, certiorari denied Robins Dry Dock & Repair Co. v. Pan American Petroleum & Transport Co., 42 S.Ct. 589, 259 U.S. 586, 66 L.Ed. 1076.

38. Miss.—R. T. Clark & Co. v. Miller, 122 So. 475, 154 Miss 233.
Mo.—Seested v. Post Printing & Publishing Co., 31 S.W.2d 1045, 326 Mo. 559.

39. U.S.—U. S. v. Wallis, C.C.A.N. Y., 279 F. 401.

40. U.S.—Illinois Bell Telephone Co. v. Moynihan, D.C.Ill., 38 F.2d 77, set aside on other grounds Smith v. Illinois Bell Telephone Co., 51 S.Ct. 65, 282 U.S. 133, 75 L.Ed. 255, conformed to, D.C., Illinois Bell Telephone Co. v. Gilbert, 3 F.Supp. 595, reversed on other grounds and cross appeal dismissed, Lindheimer v. Illinois Bell Telephone Co., 54 S.Ct. 658, 292 U.S. 151, 78 L.Ed. 1182.
Ala.—Miller v. Herzberg, 81 So. 555, 202 Ala. 613.
Ark.—Beeson v. La Vasque, 223 S.W. 355, 144 Ark. 522.
Cal.—Warfield v. Anglo & London Paris Nat. Bank, 260 P. 881, 202 Cal. 345.
Ill.—Schaeffer v. Potzel, 238 Ill.App. 335.
Mass.—City of Boston v. Treasurer and Receiver General, 130 N.E. 390, 237 Mass. 403, affirmed City of Boston v. Jackson, 43 S.Ct. 129, 260 U.S. 309, 67 L.Ed. 274.
Neb.—Home Builders v. Busk, 182 N.W. 589, 106 Neb. 86—In re Babson, 180 N.W. 562, 105 Neb. 317.
N.Y.—Zimmerman v. Roessler & Hasslacher Chemical Co., 240 N.Y. 501, 148 N.E. 659, affirming 207 N. Y.S. 370, 211 App.Div. 321, motion to amend remittitur granted 150 N.E. 534, 241 N.Y. 512—Safee v. City of Buffalo, 198 N.Y.S. 646, 204 App.Div. 561—Erdreich v. Zimmermann, 179 N.Y.S. 829, 190 App. Div. 443, reversing 176 N.Y.S. 762, 107 Misc. 508—Haber v. S. A. Jacobson Co., 173 N.Y.S. 524, 185 App. Div. 650—Sylvan Mortgage Co. v. Stadler, 185 N.Y.S. 293, 113 Misc. 659, reversed on other grounds 188 N.Y.S 165, 115 Misc. 311, affirmed 191 N.Y.S. 955, 199 App.Div. 965—Guttag v. Shatzkin, 185 N.Y.S. 71, 113 Misc. 362, reversed on other grounds 186 N.Y.S. 47, 194 App. Div. 509, reversed on other grounds 130 N.E. 929, 230 N.Y. 647.
N.C.—Piedmont Power & Light Co. v. L. Banks Holt Mfg. Co., 111 S. E. 623, 183 N.C. 327.
S.C.—J. B. Colt Co. v. Hallman, 110 S.E. 462, 118 S.C. 404.
Tex.—J. M. Radford Grocery Co v. Halper, Civ.App., 274 S.W. 1023.
Utah.—National Bank of the Republic v. Beckstead, 250 P. 1033, 68 Utah 421.
Wash.—State v. Listman, 288 P. 913, 157 Wash. 229.
Wis.—Schroeder v. Berlin Arcade Real Estate Co., 184 N.W. 542, 175 Wis. 79.
23 C.J. p 119 notes 43, 44.

Claims

Courts judicially know that revenue acts passed during and after war resulted in claims against United States which could not all be heard in court of claims.—Schwab v. U. S., C.C.A.Ill., 17 F.2d 34.

In Russia

Ill.—Fishman v. West Side Nat. Bank of Chicago, 228 Ill.App. 315.
23 C.J. p 119 note 43 [a].

41. Neb.—Marshall v. Bush, 167 N. W. 59, 102 Neb. 279.
N.Y.—Siemund v. Schmidt, 168 N.Y. S. 935.

42. U.S.—Frazier v. Anderson, C.C. A.Kan., 2 F.2d 36.
Ind.—Wells Fargo & Co. Express v. Allbright, 133 N.E. 753, 78 Ind.App. 574.
Tex.—Galveston, H. & S. A. Ry. Co. v. Blankfield, Civ.App., 211 S.W. 808.
23 C.J. p 119 notes 47, 48.

43. Ind.—Stein-Hall Mfg. Co. v. H. M. Glossbrenner & Co., 145 N.E. 526, 84 Ind.App. 306.
Ky.—Fennell v. Frisch's Adm'r, 234 S.W. 198, 192 Ky. 535.
23 C.J. p 119 note 49.

Signing of Armistice

It is common knowledge that on signing of Armistice the World War was actually at an end, and was so regarded by every one.—Scott v. Commissioner of Civil Service, 172 N.E. 218, 272 Mass. 237.

44. U.S.—Ransome Concrete Machinery Co. v. Moody, C.C.A.N.Y., 282 F. 29.
D.C.—U. S. Shipping Board Emergency Fleet Corporation v. Levensaler, 290 F. 297, 53 App.D.C. 322.
N.Y.—Levy v. Delaware, L. & W. R. Co., 207 N.Y.S. 592, 211 App.Div. 503.
Wash.—Clements v. Cook, 191 P. 874, 112 Wash. 217.
23 C.J. p 119 note 50, p 120 notes 54–59.

ing under the Lever Act,[45] the placing under custody of the property of enemy aliens,[46] the assumption by the government of the management and operation of the railroads of the country,[47] the prices fixed by the war industries board,[48] the government's wartime control of the sales and consumption of sugar,[49] the assumption by the government of jurisdiction over the reservation at Muscle Shoals,[50] the control by the government of the telephone and telegraph systems,[51] the interest of the government in the building of ships to overcome the submarine menace,[52] the creation of the United

Approval of prices

It is a matter of common knowledge that, in war emergency, navy compensation board could not personally approve prices at which materials should be purchased under thousands of contracts made by United States.—Bethlehem Shipbuilding Corporation v. West & Dodge Co., C. C.A.Mass., 10 F.2d 289.

45. N.Y.—Segal v. Chemical Importing & Mfg. Co., 199 N.Y.S. 250, 205 App.Div. 220.

46. Ill.—Kristel v. Michigan Cent. R. Co., 213 Ill.App. 518.

47. U.S.—Schoening v. Chicago, B. & Q. R. Co., C.C.A.Wyo., 30 F.2d 803.
Ala.—Way v. Waters-Tonge Lumber Co., 100 So. 219, 211 Ala. 132—Watson v. Birmingham Belt R. Co., 96 So. 257—Shikle v. Louisville & N. R. Co., 95 So. 358, 209 Ala. 83—Louisville & N. R. Co. v. Shikle, 90 So. 900, 206 Ala. 494—Hines v. Wimbish, 85 So. 765, 204 Ala. 350—McDougal v. Louisville & N R Co., 85 So. 880, 17 Ala.App. 468—Hines v. Laurendine, 84 So. 780, 17 Ala.App. 350.
Ark.—Arkansas Central R. Co. v. Walker, 234 S.W. 619, 150 Ark. 514.
Cal.—Bell v. Southern Pac. Co., 208 P. 970, 189 Cal. 421.
Colo.—Chicago, B. & Q. R. Co v. Public Utilities Commission, 190 P. 539, 68 Colo. 475.
Ind.—Davis v. Robinson, 142 N.E. 403, 194 Ind. 536, rehearing overruled 143 N.E. 513, 194 Ind. 536—Davis v. Zirkle, 138 N.E. 266, 80 Ind.App. 396—Chicago, T. H. & S. E. Ry. Co. v. Nixon, 131 N E. 532, 76 Ind.App. 86.
Ky.—Blackburn v. Louisville & N. R. Co., 259 S.W. 359, 202 Ky. 293.
Mich.—Kneeland-Bigelow Co. v. Michigan Cent. R. Co., 174 N.W. 605, 207 Mich. 546.
Mo.—Stookey v. St. Louis-San Francisco Ry. Co., 249 S.W. 141, 215 Mo.App. 411—Hamm v. Chicago, B. & Q. R. Co., 245 S.W. 1109, 211 Mo. App. 460, transferred, see, Sup., Ham v. Chicago, B. & Q. R. Co, 235 S.W. 1046—Yarde v. Hines, 238 S.W. 151, 152, 209 Mo.App. 547, citing **Corpus Juris**—Rhodes v. Missouri Pac. R. Co., App., 234 S. W. 1026—Hanks v. Hines, App., 219 S.W. 978—Cravens v. Hines, App., 218 S.W. 912.
Mont.—Morgan v. Hines, 211 P. 778, 65 Mont. 306.
Neb.—National Supply Co. v. Chicago & N. W. Ry. Co., 187 N.W. 917, 108 Neb. 326.
N.Y.—Cohen v. John Curtin, Inc, 177 N Y.S. 246, 107 Misc. 622, affirmed 181 N.Y.S. 931, 191 App.Div. 952.
Okl.—Chicago, R. I & P. Ry. Co. v Goldsmith, 220 P. 620, 93 Okl. 204—Chicago, R. I. & P. Ry. Co. v. Davis, 220 P. 582, 93 Okl. 208.
Tex.—Gulf, C. & S. F. Ry. Co. v. Hill, Civ.App., 284 S.W. 594—Gulf. C. & S. F. Ry. Co. v. Bostick, Civ. App., 233 S.W. 112—Payne v. White House Lumber Co., Civ.App., 231 S.W. 417.
Wis—Hurley v. Chicago & N. W. Ry. Co., 193 N.W. 68, 180 Wis. 290—Grundman v. Davis, 190 N.W. 839, 179 Wis. 35.
23 C.J. p 119 note 51.
Notice of presidential proclamations taking over railroads see supra § 41.

Admission to contrary

In a suit against a railway company for personal injuries sustained while the railway was under federal control wherein the railway company admitted its ownership and operation of the railroad and that plaintiff was struck by a train of defendant and injured, the court will not take judicial notice that such admissions were not true.—Trepanier v. Toledo & O. C. Ry. Co., 130 N.E. 558, 102 Ohio St. 69.

Date of taking control

Mo.—Kersten v. Hines, 223 S.W. 586, 283 Mo. 623.
Mont.—Stevens v. Hines, 206 P. 441, 63 Mont. 94.
Tex.—Davis v. Lock, Civ.App., 251 S.W. 288.

Delay and confusion

Ky.—Hogg v. Forsythe, 248 S.W. 1008, 198 Ky. 462.

Increased costs

U.S.—Adams v. Mellon, C.C.A.Ill., 51 F.2d 620, modifying, D C., 39 F. 2d 80 and certiorari granted 52 S. Ct. 208, 284 U.S. 614, 76 L.Ed. 525, reversed on other grounds Adams v. Mills, 52 S.Ct. 589, 286 U.S. 397, 76 L.Ed. 1184.

Identity of director general

Ala.—McAdoo v. Booker, 88 So. 196, 17 Ala.App. 623—Hines v. Laurendine, 84 So. 780, 17 Ala.App. 350

Officers and agents employed

Mass.—Phillips v. Davis, 147 N.E. 96, 251 Mass. 263, certiorari denied Davis v. Phillips, 46 S.Ct. 101, 269 U.S. 573, 70 L.Ed. 418.

Resignation of agent

U.S.—Davidson v. Payne, C.C.A.Kan., 289 F. 69, affirming, D.C., 281 F. 544.

Tariffs and rate regulations issued by railroad administration are not judicially noticed.—Nast v. San Antonio, U. & G. Ry. Co., Tex.Civ.App., 261 S.W. 1011, reversing, San Antonio, U. & G. Ry. Co. v. Nast, Civ. App., 240 S.W. 596.

Termination of control

U S.—Crawshaw v. Corbett, C.C.A. Mo., 264 F. 962.
Conn.—Levitt v. Attorney General, 151 A. 171, 111 Conn. 634.
Mass.—New York Cent. R. Co. v. Stoneman, 127 N.E. 506, 236 Mass. 81.
Mo.—State ex rel. St. Louis-San Francisco Ry. Co. v. Public Service Commission of Missouri, 235 S.W. 131, 290 Mo. 389, reversed on other grounds St. Louis-San Francisco Ry. Co. v. Public Service Commission of Missouri, 43 S.Ct. 380, 261 U.S. 369, 67 L.Ed. 701—German v. Chicago, M. & St P. Ry. Co., App., 276 S.W. 1041.
Wis.—Hurley v. Chicago & N. W. Ry. Co., 193 N.W. 68, 180 Wis. 290.

48. Wash.—Clements v. Cook, 191 P. 874, 112 Wash. 217.

49. U.S.—Sears v. Federal Trade Commn., C.C.A., 258 F. 307.

50. Ala.—Webb v. J. G. White Engineering Corporation, 85 So. 729, 204 Ala. 429.

51. **Equipment under control** is not subject of judicial notice.—Wynne v. Southern Bell Telephone & Telegraph Co., 126 S.E. 864, 33 Ga.App. 516, conforming to answer to certified questions 126 S.E. 388, 159 Ga. 623.

Termination of federal control

Mo.—Taylor v. Western Union Telegraph Co., 231 S.W. 78, 207 Mo. App. 145.

52. U.S.—Southern Bridge Co. v. U. S. Shipping Board Emergency Fleet Corporation, D.C.Ala., 266 F. 747.

Actions

In determining whether an action against the Emergency Fleet Corporation is one against the United States, judicial notice will be taken of historical facts of general interest.—Ingersoll-Rand Co. v. U. S. Shipping Board Emergency Fleet Corporation, 187 N.Y.S. 695, 195 App. Div. 838.

States Shipping Board Emergency Fleet Corporation,[53] the issuance of bonds by the government,[54] the requisitioning by the shipping board of a great part of the shipping of the country,[55] and the government's urgent need for airplanes.[56]

§ 63. Other Facts of History

Judicial notice has been taken of various historical facts.

In addition to the facts discussed in detail in the preceding sections, numerous historical facts have been judicially noticed.[57] For example, courts judicially know the historical facts concerning the political action of their own country in foreign affairs.[58] Judicial notice will also be taken that Indians, at a certain time, subsisted by hunting and fishing,[59] of the history of the Six Nations of Indians,[60] of the territories out of which a state of the Union was constituted,[61] and, at least in some cases, of the history of foreign possessions subsequently acquired by the United States.[62] The courts know, as historical facts, that California was once a part of Mexico,[63] that Mexico was a Spanish colony for about three hundred years before it became an independent republic,[64] and that it was the policy of the Spanish and Mexican governments, in making grants, to give front, if possible, on some stream.[65] The fact that Florida was acquired by purchase from Spain in 1819 will likewise be judicially noticed.[66] It will be noticed that slavery existed in certain of the American states prior to the Civil War.[67] The courts take judicial notice, as a matter of public history, of the existence of labor unions,[68] the size and extent of their membership generally,[69] of the facts that frequent conflicts have occurred between employers and employees in vari-

53. N.Y.—Shea v. Export S. S. Corporation, 170 N.E. 477, 253 N.Y. 17, reversing 233 N.Y.S. 893, 226 App. Div. 696.

54. Mont.—Grosfield v. First Nat. Bank, 236 P. 250, 73 Mont. 219.

55. U.S.—The G. A. Flagg, D.C. Mass., 256 F. 852.

56. U.S.—American Propeller & Manufacturing Co. v. U. S., Ct.Cl., 14 F.Supp. 168, modified on other grounds 17 F.Supp. 215, certiorari granted 57 S.Ct. 491, 300 U.S. 648, 81 L.Ed. 860, reversed on other grounds 57 S.Ct. 521, 300 U.S. 475, 81 L.Ed. 751.

57. U.S.—State of Arizona v. State of California, 51 S.Ct. 522, 283 U.S. 423, 75 L.Ed. 1154—Burnet v. Niagara Falls Brewing Co., 51 S.Ct. 262, 282 U.S. 648, 75 L.Ed. 594, affirming, C.C.A., Niagara Falls Brewing Co. v. Commissioner of Internal Revenue, 38 F.2d 217, certiorari granted Lucas v. Niagara Falls Brewing Co., 50 S.Ct. 352, 281 U.S. 712, 74 L.Ed. 1134—Person v. U. S., C.C.A.Ark., 112 F.2d 1, certiorari denied 61 S.Ct. 35—Greeson v. Imperial Irr. Dist., D.C.Cal., 55 F.2d 321, affirmed, C.C.A., 59 F.2d 529—The Mazel Tov, D.C.R.I., 51 F.2d 292, reversed on other grounds, C.C.A., 56 F.2d 921, certiorari granted Cook v. U. S., 53 S.Ct. 10, 287 U.S. 581, 77 L.Ed. 509, reversed on other grounds, 53 S.Ct. 305, 288 U.S. 102, 77 L.Ed. 641—Swift & Co. v. Federal Trade Commission, 8 F.2d 595, petition dismissed 46 S.Ct. 13, 269 U.S. 593, 70 L.Ed. 429, certiorari granted 46 S.Ct. 107, 269 U.S. 548, 70 L.Ed. 405, reversed on other grounds Federal Trade Commission v. Western Meat Co., 47 S.Ct. 175, 272 U.S. 554, 71 L.Ed. 405.

Fla.—Grand Lodge, Knights of Pythias, of North America, South America, Europe, Asia, Africa and Australia, Jurisdiction of Florida, v. Moore, 163 So. 108, 120 Fla. 761.

Ga.—Railey v. United Life & Accident Ins. Co., 106 S.E. 203, 26 Ga. App. 269.

N.Y.—People ex rel. Bryant v. Zimmerman, 150 N.E. 497, 241 N.Y. 405, 43 A.L.R. 909, affirming 210 N.Y.S. 269, 213 App.Div. 414, affirming People ex rel. Bryant v. Sheriff of Erie County, 206 N.Y.S. 533, 123 Misc. 859, affirmed People of New York ex rel. Bryant v. Zimmerman, 49 S.Ct. 61, 278 U.S. 63, 73 L.Ed. 184, 62 A.L.R. 785—Waterloo Woolen Mfg. Co. v. State, 194 N.Y.S. 155, 118 Misc. 516.

23 C.J. p 117 note 4, p 118 notes 5, 6, p 120 notes 60, 61.

Public lands

It is common knowledge that, whenever public lands have been opened to entry, there has been a rush and scramble to be first to obtain them.—U. S. v. Fisher, D.C.La., 11 F.2d 629.

Railroads

Historical facts relating to railroads may be judicially noticed.—State v. Carlson, 182 P. 544, 104 Kan. 485—23 C.J. p 123 notes 98–6.

State of communication at a particular time in the state's history, and the impossibility of traveling a particular distance in a given time, may be judicially noticed.—Clements v. Texas Co., Tex.Civ.App., 273 S.W. 993.

Telephone companies

A continuing contest between telephone companies for supremacy in the state and their methods of warfare may be judicially noticed.—Home Tel. Co. v. Sarcoxie Light & Telephone Co., 139 S.W. 108, 236 Mo. 114, 36 L.R.A.,N.S., 124.

58. U.S.—Neely v. Henkel, N.Y., 21 S.Ct. 302, 180 U.S. 109, 45 L.Ed. 448, affirming 103 F. 631.

23 C.J. p 117 note 87.

59. U.S.—U. S. v. Slotts, D.C.Wash., 49 F.2d 619.

60. N.Y.—Howard v. Moot, 64 N.Y. 262, affirming 2 Hun 475, 5 Thomps. & C. 89.

61. Tex.—Western Union Tel. Co. v. Parsley, 121 S.W. 226, 57 Tex. Civ.App. 8.

23 C.J. p 117 note 91.

62. U.S.—Municipality of Ponce v. Roman Catholic Apostolic Church, Puerto Rico, 28 S.Ct. 737, 210 U.S. 296, 52 L.Ed. 1068.

23 C.J. p 117 note 92.

63. Ind.—Krouse v. Krouse, 95 N.E. 262, 48 Ind.App. 3.

64. Mo.—Booth v. Scott, 205 S.W. 633, 276 Mo. 1.

65. Tex.—Rosetti v. Camille, Civ. App., 199 S.W. 526.

66. Ala.—Bank of Cottonwood v. Hood, 149 So. 676, 227 Ala. 237.

67. U.S.—Miller v. McQuerry, C.C. Ohio, 17 F.Cas.No.9,583, 5 McLean 469.

N.Y.—Jack v. Martin, 12 Wend. 311, affirmed 14 Wend. 507.

Civil rights

It is matter of judicial knowledge that when charter was granted to Independent Order of Odd Fellows in Georgia in 1843, persons of color had no civil rights, and were not subject to be chartered, and could not have obtained a charter.—Graves v. District Grand Lodge No. 18, 129 S.E. 783, 161 Ga. 110.

68. Ala.—Birmingham Paint & Roofing Co. v. Crampton & Tharpe, 39 So. 1020.

69. Ky.—Axton-Fisher Tobacco Co. v. Evening Post Co., 183 S.W. 269, 169 Ky. 64, L.R.A.1916E 667, Ann. Cas.1918B 560.

ous states,[70] and that there is a conflict between the unions affiliated with the American Federation of Labor and those affiliated with the Committee for Industrial Organization.[71] Some courts also take notice, as a part of the history of the country, that labor unions have adopted and promulgated rules and regulations for the protection and guidance of labor, which are carefully observed by the members;[72] but other courts decline to assume judicial knowledge of the compact or agreement, or its nature, or of the principles and tenets by which laborers belonging to a union are bound.[73]

Circulating medium. Courts will notice as a historical fact of great notoriety and importance the nature of the circulating medium at a particular time,[74] and the popular language in reference to it.[75] They will take judicial notice of a change from a gold basis to a paper standard,[76] of the different classes of notes and bills in circulation as money at any particular time,[77] and of the elimination of gold and silver and United States paper currency from circulation in the Confederate States and the general facts connected with the issuing, use, and depreciation of the Confederate currency.[78] It is not judicially known that there were no Mexican bank notes before a certain date, particularly where such fact is disputed.[79]

Judicial notice of the value of the circulating medium is discussed in § 101 infra.

Economic conditions. The court will take judicial notice of general economic conditions,[80] in-

70. N.Y.—New York Cent. & H. R. R. Co. v. Williams, 118 N.Y.S. 785, 64 Misc. 15.

Evils arising from controversies

It is common knowledge that an aroused public opinion and the vigorous enforcement of the criminal law, resulting in the prosecution and punishment of scores of labor malefactors, has tended to curb breaches of the peace, assault and battery, and like evils arising from labor controversies.—American Federation of Labor v. Bain, Or., 106 P. 2d 544, 130 A.L.R. 1278.

Picketing

It is matter of common knowledge that labor unions do not limit use of picketing to occasions when union employees are on strike because of labor disputes between them and their employers.—C. S. Smith Metropolitan Market Co. v. Lyons, Cal., 106 P.2d 414, prior opinion, App., 89 P.2d 425.

71. U S —Jefferson Electric Co. v. National Labor Relations Board, C. C.A., 102 F.2d 949—M and M Wood Working Co. v. Plywood & Veneer Workers Local Union No. 102, D.C. Or., 23 F.Supp. 11.

72. Ky.—Axton-Fisher Tobacco Co. v. Evening Post Co., 183 S.W. 269, 169 Ky. 64, L R.A.1916E 667, Ann. Cas.1918B 560.

73. Ala.—Birmingham Paint & Roofing Co. v. Crampton & Tharpe, 39 So. 1020.

74. N.J.—Incitti v. Ferrante, 175 A. 908, 12 N.J.Misc. 840.
23 C J. p 120 note 62.

Existing obligations

It is common knowledge that states, municipalities, and railroads and public utilities, while receiving their income under new devalued dollar standard, have generally outstanding bonds with gold clause, and that similar situation exists with respect to numerous industrial corporations which have issued gold bonds and must receive payment for products in existing currency, as respects validity of Joint Resolution in effect abrogating gold clauses in existing obligations.—Norman v. Baltimore & O. R. Co., 55 S.Ct. 407, 294 U S 240, 79 L Ed. 885, 95 A.L.R. 1352, affirming 191 N.E. 726, 265 N.Y. 37, 92 A.L.R. 1523, which affirmed 270 N.Y.S. 928, 241 App.Div. 803, and certiorari granted 55 S.Ct. 103, 293 U.S. 546, 79 L.Ed. 650—U. S. v. Bankers' Trust Co., 55 S.Ct. 407, 294 U.S. 240, 79 L.Ed. 885, 95 A.L.R. 1352, affirming, D.C., In re Missouri Pac. R. Co. 7 F.Supp. 1, certiorari granted U. S. v. Bankers' Trust Co., 55 S.Ct. 145 (two cases), 293 U S. 548, 79 L.Ed. 652.

Payments due in gold

Judicial notice may be taken that amount of bonds and notes payable in United States gold coin exceeds, by many billions of dollars, amount of mined gold in world, although precise amount of such gold obligations cannot be proved.—In re Missouri Pac. R. Co., D.C.Mo., 7 F.Supp. 1, certiorari granted U. S. v. Bankers' Trust Co., 55 S.Ct. 145 (two cases), 293 U.S. 548, 79 L.Ed. 652, affirmed 55 S.Ct. 407, 294 U.S. 240, 79 L.Ed. 885, 95 A.L.R. 1352.

75. Ky.—Lampton v. Haggard, 3 T. B Mon. 149.

76. U.S.—U. S. v. American Gold Coin, C.C.Mo., 24 F.Cas.No.14,439, 1 Woolw. 217.
23 C.J. p 120 note 65.

77. Tex —Lumpkin v. Murrell, 46 Tex. 51.

78. Ala.—Morris v. Morris, 58 Ala. 443—Riddle v. Hill, 51 Ala. 224.
23 C.J. p 120 note 67.

79. Tex.—Barreda v. Milmo Nat. Bank, Civ.App., 241 S.W. 743, affirmed, Com.App., 252 S.W. 1038.

80. U.S.—United Gas Public Service Co. v. State of Texas, Tex., 58 S. Ct. 483, 303 U.S. 123, 625, 82 L.Ed. 702, affirming United Gas Public Service Co. v. State, 89 S.W.2d 1094—Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 57 S.Ct. 724, 301 U.S. 292, 81 L.Ed. 1093, reversing 3 N E.2d 475, 131 Ohio St. 539—Great Northern Ry. Co. v. Weeks, N D., 56 S.Ct. 426, 297 U.S. 135, 80 L.Ed. 532, reversing, C.C A., 77 F.2d 405, certiorari granted 56 S Ct. 108, 296 U.S. 558, 80 L.Ed 393—Madden v. Mac Sim Bar Paper Co., C.C.A. Mich., 103 F.2d 974, certiorari denied 60 S.Ct. 102, 308 U.S. 556, 84 L.Ed. 468, rehearing denied 60 S. Ct. 136, 308 U.S. 635, 84 L.Ed. 528—Reconstruction Finance Corporation v. McCormick, C.C.A.Ill., 102 F.2d 305, affirming, D.C., Reconstruction Finance Corporation v. Central Republic Trust Co., 17 F.Supp. 263, certiorari denied McCormick v. Reconstruction Finance Corporation, 60 S.Ct. 90, two cases, 308 U S. 558, 84 L.Ed. 469, Werner v. Reconstruction Finance Corporation, 60 S.Ct. 90, 308 U.S. 558, 84 L Ed. 469, Bele v. Reconstruction Finance Corporation, 60 S.Ct. 90, 308 U.S. 558, 84 L.Ed. 469, and Utility & Industrial Corporation v. Reconstruction Finance Corporation, 60 S.Ct. 90, 308 U.S. 558, 84 L.Ed. 469—Rhodes v. Commissioner of Internal Revenue, C.C.A., 100 F. 2d 966—In re Hotel Martin Co. of Utica, C C.A.N.Y., 83 F.2d 233—Warner Bros. Pictures v. Lawton-Byrne-Bruner Ins. Agency Co., C. C A.Mo., 79 F.2d 804—Escher v. Harrison Securities Co., C.C.A Cal., 79 F.2d 777—Denver Union Stock Yard Co. v. U. S., D.C.Colo., 57 F. 2d 735—Jacobs v. First Nat. Bank, C.C.A.La., 48 F.2d 17, certiorari denied 52 S.Ct. 18, 284 U.S. 634, 76 L.Ed. 540—U. S. v. Coal Cargo of The Henry County, D.C.Pa., 11 F. 2d 805, affirmed, C.C.A., 11 F.2d 809, certiorari denied U. S. v. A

Cargo of About 3,253 Tons of Coal, 47 S.Ct. 92, 273 U.S. 696, 71 L. Ed. 845—U. S. v. Coal Cargo of The Franklin County, D.C.Pa., 11 F.2d 805, affirmed, C.C.A., 11 F.2d 809, certiorari denied U. S. v. A Cargo of About 3,248 Tons of Coal, 47 S.Ct. 93, 273 U.S. 696, 71 L.Ed 845—Grand Trunk Western R. Co v. Brown, D.C.Mich., 32 F.Supp. 784—In re Baldwin Locomotive Works, D.C.Pa., 21 F.Supp 94—In re Oval Wood Dish Corporation, D.C.N.Y., 16 F.Supp. 656—Lowden v. Iowa-Des Moines Nat. Bank & Trust Co., D.C.Iowa, 10 F.Supp. 430, affirmed, C.C.A., Iowa-Des Moines Nat. Bank & Trust Co. v. Lowden, 84 F.2d 856, certiorari denied 57 S.Ct. 109, 299 U.S. 584, 81 L.Ed. 430, and modification denied 86 F.2d 378—Franklin Process Co. v. Hoosac Mills Corporation, D.C.Mass., 8 F.Supp. 552, reversed on other grounds, C.C.A., Butler v. U. S., 78 F.2d 1, certiorari granted U. S. v. Butler, 56 S.Ct. 144, 296 U. S. 561, 80 L.Ed. 396, affirmed 56 S. Ct 312, 297 U.S. 1, 80 L.Ed. 477, 102 A.L.R. 914—In re Durband, D.C.Iowa, 8 F.Supp. 63—U. S. v. Calistan Packers, D.C.Cal., 4 F. Supp. 660—A. Magnano Co. v. Dunbar, D.C.Wash., 2 F.Supp. 417, affirmed A. Magnano Co. v. Hamilton, 54 S.Ct. 599, 292 U.S. 40, 78 L.Ed. 1109.

Ala.—First Nat. Bank of Opp v. Wise, 3 So.2d 68—First Nat. Bank v. Basham, 191 So. 873, 238 Ala. 500, 125 A.L.R. 656—Indemnity Ins. Co. of North America v. Holiway, 170 So. 329, 233 Ala. 100—Coral Gables v. Patterson, 166 So. 40, 231 Ala. 649.

Ariz.—Biles v. Robey, 30 P.2d 841, 43 Ariz. 276—Taylor v. Kingman Feldspar Co., 18 P.2d 649, 41 Ariz. 376.

Ark.—Matthews v. Bailey, 130 S.W. 2d 1006, 198 Ark. 703—Miller v. Miller, 100 S.W.2d 74, 193 Ark. 362—Reiman v. Rawls, 68 S.W.2d 470, 188 Ark. 983—Winfree v. Jones, 38 S.W.2d 28, 183 Ark. 679.

Cal.—Petition of Reader, 89 P.2d 654, 32 Cal.App 2d 309—Weaver v. Grunbaum, 87 P.2d 406, 31 Cal.App. 2d 42—Calihan v. Yellow Cab Co. of San Diego, 13 P.2d 931, 125 Cal. App. 649.

Colo.—City and County of Denver v. Lyttle, 103 P.2d 1, 106 Colo. 157—In re Herrington's Estate, 70 P. 2d 337, 101 Colo. 27, 112 A.L.R. 828.

Fla.—Gryzmish v. Krim, 170 So. 717, 126 Fla. 191—Sikes v. Dade Lumber Co., 123 So. 918, 98 Fla. 451.

Idaho.—State ex rel. Taylor v. Union Pac. R. Co., 89 P.2d 1005, 60 Idaho 185.

Ill.—Peoples Gas Light & Coke Co. v. Slattery, 25 N.E.2d 482, 373 Ill. 31, certiorari denied Peoples Gas & Coke Co. v. Hart, 60 S.Ct. 724, 309 U.S. 634, 84 L.Ed. 991—People ex rel. Wilson v. Wabash Ry. Co., 14 N.E.2d 650, 368 Ill. 497—Reif v. Barrett, 188 N.E. 889, 355 Ill 104—People ex rel. Mulvey v. City of Chicago, 12 N.E.2d 13, 292 Ill. App 589—Peoples Gas Light & Coke Co. v. Slattery, 5 N.E.2d 285, 287 Ill.App. 379—Chicago Title & Trust Co. v. Chicago Trust Co., 1 N.E.2d 87, 284 Ill.App. 247—Bunker Hill Country Club v. McElhatton, 282 Ill.App. 221—Fetherston v National Republic Bancorporation, 280 Ill.App. 151—People ex rel Krajci v. Kelly, 279 Ill.App. 22—Goddard Tool Co. v. Crown Electrical Mfg Co., 219 Ill.App. 34.

Ind.—Cooper v. Morris, 200 N.E. 222, 210 Ind. 162.

Iowa.—In re State Bank of Central City, 294 N.W. 260—First Trust Joint Stock Land Bank of Chicago v. Arp, 283 N.W. 441, 225 Iowa 1331, 120 A.L.R. 932—Jackley-Wiedman & Co. v. One-Minute Washer Co., 262 N.W. 97, 220 Iowa 486, 101 A.L.R. 1216—Williams Sav. Bank v. Murphy, 259 N.W. 467, 219 Iowa 839—In re Rorick's Estate, 253 N.W. 916, 218 Iowa 107—O'Bryon v. Weatherly, 206 N.W. 828, 201 Iowa 190.

Ky.—Burton v. Burton's Committee, 90 S.W.2d 687, 262 Ky. 499—Grieb v. National Bank of Kentucky's Receiver, 68 S.W.2d 21, 252 Ky. 753—Collopy v. Dorman, 63 S.W.2d 610, 250 Ky. 513.

La.—Marionneaux v. Smith, App., 163 So. 206, rehearing denied 164 So. 456—Simmons v. Doullut & Ewin, App., 145 So. 708, rehearing denied 146 So 772—Webb v. Key, App., 144 So. 650—United Shoe Stores Co. v. Burt, App., 142 So. 370.

Mass.—Spiegel v. Beacon Participations, 8 N.E.2d 895, 297 Mass. 398—Howes Bros. Co. v. Massachusetts Unemployment Compensation Commission, 5 N.E.2d 720, 296 Mass. 275, certiorari denied 57 S. Ct. 434, 300 U.S. 657, 81 L.Ed. 867—Campbell v. City of Boston, 195 N.E. 802.

Mich.—Detroit Trust Co. v. Hockett, 270 N.W. 243, 278 Mich. 124—Schnitz v. Grand River Ave. Development Co., 259 N.W. 900, 271 Mich. 253—Curtiss v. Wilmarth, 236 N.W. 773, 254 Mich. 242.

Minn.—Shumaker v. Hoover, 288 N. W. 839, 206 Minn. 458.

Miss.—Atlantic Life Ins. Co. v. Klotz, 181 So. 519, 182 Miss. 243.

Mo.—Naslund v. Moon Motor Car Co., 134 S.W.2d 102, 345 Mo. 465—State ex rel. St. Paul & Kansas City Short Line R. Co. v. Public Service Commission, 98 S.W.2d 699, 339 Mo. 641.

Mont.—State v. Safeway Stores, 76 P.2d 81, 106 Mont. 182.

Neb.—In re Bose's Estate, 285 N. W. 319, 136 Neb. 156.

N.J.—Bucsi v. Longworth Building & Loan Ass'n, 194 A. 857, 119 N.J. Law 120, appeal dismissed 59 S. Ct. 154, 305 U.S. 665, 83 L.Ed. 431—Heller v. City of Plainfield, 194 A. 260, 119 N.J.Law 37, reversing 190 A. 47, 15 N.J.Misc. 211—Canter Sample Furniture House v. Retail Furniture Employees Local No. 109, 196 A. 210, 122 N.J.Eq. 575—Young v. Weber, 175 A. 273, 117 N.J.Eq. 242—Shonnard v. Elevator Supplies Co., 161 A. 684, 111 N.J.Eq 94—Trust Co. of New Jersey v. Jefferson Trust Co., 186 A. 732, 14 N.J.Misc. 656—Williams v. Williams, 174 A. 423, 12 N.J.Misc. 641—City of Bayonne v. State Board of Taxes and Assessments, 167 A. 880, 11 N.J.Misc. 694—Fornataro v. Atlantic Coast Building & Loan Ass'n, 163 A. 240, 10 N.J. Misc. 1248—In re Election of Directors of P. Lorillard Co., 155 A. 257, 9 N.J.Misc. 646.

N.M.—Andrews v. McMahan, 85 P. 2d 743, 43 N.M. 87, 120 A.L.R 697—Kyle v. Chaves, 74 P.2d 1030, 42 N.M. 21.

N.Y.—In re Board of Water Supply of City of New York, 14 N.E.2d 789, 277 N.Y. 452, reversing 1 N.Y.S.2d 62, 253 App.Div. 38—City of Rochester v. Union Free School Dist. No. 4 of Town of Livonia, Livingston County, 5 N.Y.S.2d 747, 255 App.Div. 96, reargument denied City of Rochester v. Union Free School Dist. No. 4 of Town of Livonia, 7 N.Y.S.2d 232, 255 App.Div. 752, affirmed City of Rochester v. Union Free School Dist. No. 4 of Livonia, 19 N.E.2d 928, 280 N.Y. 531—Budowski v. Atlas Steel Casting Co., 263 N.Y.S. 255, 237 App. Div. 667—People v. Federated Radio Corporation, 214 N.Y.S. 670, 216 App.Div. 250, affirmed 154 N. E. 655, 244 N.Y. 33—Delaware & Hudson Co. v. Utica, C. & B. R. Co., 21 N.Y.S.2d 410, 174 Misc. 403, affirmed 20 N.Y.S.2d 1012, 259 App. Div 969, appeal granted 21 N.Y.S. 2d 393, 259 App.Div. 986—In re Public Parks, Borough of Queens, City of New York, 17 N.Y.S.2d 209, 172 Misc. 877, modified on other grounds 25 N.Y.S.2d 511, 261 App.Div. 936—Caivano v. Brill, 11 N.Y.S.2d 498, 171 Misc. 298—Mallina v. Mallina, 4 N.Y.S.2d 27, 167 Misc. 343—Grosvenor v. Holland, 288 N.Y.S. 105, 158 Misc. 925, reversed on other grounds 291 N.Y. S. 202, 249 App.Div. 672—People ex. rel. Tipaldo v. Morehead, 282 N.Y.S. 576, 156 Misc. 522, reversed on other grounds 200 N.E. 799, certiorari granted Morehead v. People of State of New York ex rel. Tipaldo, 56 S.Ct. 670, 297 U.S. 702, 80 L.Ed. 991, affirmed 56 S.Ct. 918, 298 U.S. 587, 80 L.Ed. 1347, 103 A. L.R. 1445, rehearing denied 57 S. Ct. 4, 299 U.S. 619, 81 L.Ed. 456—In re Staten Island Nat. Bank & Trust Co., 282 N.Y.S. 163, 156 Misc.

cluding such matters as competition in particular industries;[81] financial reverses suffered by many

330—Yaswen v. Pollock, 280 N.Y S. 512. 155 Misc. 475—President, etc., of Manhattan Co. v. Williams, 274 N.Y S. 338, 152 Misc. 901—In re Balfe's Will, 274 N.Y.S 284, 152 Misc 739, modified on other grounds 280 N Y S. 128, 245 App Div 22—In re Farrell's Estate, 272 N Y.S. 852, 152 Misc. 118—In re Connelly's Estate, 271 N Y.S. 368, 151 Misc. 310—In re Sonn's Estate, 271 N.Y S 350, 151 Misc. 487—Farmers' & Mechanics' Sav. Bank of City of Lockport v. Eagle Bldg. Co., 271 N.Y S. 306, 151 Misc. 249—In re Junkersfeld's Estate, 269 N.Y.S. 514, 150 Misc. 436, appeal dismissed 272 N.Y S. 919, 242 App Div. 708, reversed on other grounds 279 N.Y S. 481, 244 App.Div. 260, motion denied 291 N.Y.S. 159, 248 App Div. 886—Sherwin v. Jonas, 267 N.Y.S. 759, 149 Misc. 481, reversed on other grounds 269 N.Y. S. 121, 150 Misc. 342—Kuhn v. Cermac Realty Co., 265 N.Y.S. 861, 148 Misc. 324—In re McCafferty's Will, 264 N.Y.S. 38, 147 Misc. 179—Kuhn v. Simons, 255 N.Y.S. 633, 143 Misc. 21—Campbell Const. Co. v. Garai, 251 N.Y.S. 676, 140 Misc. 603—In re Winburn's Will, 249 N. Y.S. 758, 140 Misc. 18—In re First Nat. Bank of City of New York, 25 N Y.S.2d 221.

Ohio.—East Ohio Gas Co. v. Public Utilities Commission of Ohio, 12 N E 2d 765, 133 Ohio St. 212—Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 3 N E.2d 475, 131 Ohio St. 539, reversed on other grounds 57 S Ct. 724, 301 U. S. 292, 81 L.Ed. 1093.

Or.—Teachers' Retirement Fund Ass'n of School Dist. No. 1, Multnomah County, v. Pirie, 46 P.2d 105, 150 Or. 435—Morris, Mather & Co. v. Port of Astoria, 15 P.2d 385, 141 Or. 251.

Pa.—Fuller v. Palazzolo, 197 A. 225, 329 Pa. 93—In re Gardner's Estate, 185 A. 804, 323 Pa. 229—Bell Telephone Co. of Pennsylvania v. Pennsylvania Public Utility Commission, 5 A.2d 410, 135 Pa. Super. 218, appeal dismissed 60 S Ct. 411, 309 U S. 30, 84 L.Ed. 563—Peterson v. McNeely, 189 A. 765, 125 Pa. Super. 55—Morris Water Co. v. Public Service Commission, 180 A. 72, 118 Pa Super. 416—Fire Ass'n of Philadelphia v. Taggart, 49 Dauph.Co. 386.

R.I.—Wrenn v. Charles J. Ehrlich, Inc., 194 A. 534, 59 R.I. 87.

S.C.—McNulty v. Owens, 199 S.E 425, 188 S.C. 377—Federal Land Bank of Columbia v. Garrison, 193 S.E. 308, 185 S.C. 255, certiorari denied Jeffries v. Federal Land Bank of Columbia, 58 S.Ct. 28, 302 U.S. 708, 82 L.Ed. 547—Dukes v Jefferson Standard Life Ins. Co., 174 S.E. 463, 172 S.C. 502—State ex rel. Zimmerman v. Gibbes, 172 S.E. 130, 171 S.C. 209.

Tenn.—State ex rel. Wilson v. Meek, App., 146 S.W.2d 961.

Tex.—Quanah, A & P. Ry. Co. v. Eblen, Civ.App., 87 S.W.2d 540, error refused—Tucker v. Adkins, Civ.App., 76 S.W 2d 815—Levy Plumbing Co. v. Standard Sanitary Mfg. Co., Civ.App., 68 S.W.2d 273, error refused—George v. First Nat. Bank, Civ.App., 67 S.W.2d 324, error refused—Beaumont Petroleum Syndicate v. Broussard, Civ.App., 64 S W.2d 993, appeal dismissed Plainview Bldg. & Loan Ass'n v. Robbins, 73 S.W.2d 92, 123 Tex. 408, answer conformed to Guardian Trust Co. v. Turner, Civ.App., 73 S.W.2d 1047—Murphy v. Phillips, Civ.App., 63 S.W.2d 404, appeal dismissed 73 S.W.2d 92, 123 Tex. 409, answer conformed to Guardian Trust Co. v. Turner, Civ. App., 73 S W.2d 1047, followed in Martindale Mortg. Co. v. Nichols, 63 S.W.2d 1118, Carr v. Baldwin, 64 S W.2d 1116, Christian v. Jones, 64 S.W.2d 1117, appeal dismissed 73 S.W.2d 92, 123 Tex. 409, answer conformed to Guardian Trust Co. v. Turner, Civ.App., 73 S.W.2d 1047, followed in Dallas Joint Stock Land Bank v. Sutherland, Civ. App., 64 S.W.2d 1117, vacated Sutherland v. Dallas Joint Stock Land Bank, 73 S W.2d 54, 124 Tex. 114, followed in Jefferson Standard Life Ins. Co. v. Adrean, Civ.App., 64 S W.2d 1118, appeal dismissed Adrean v. Jefferson Standard Life Ins. Co., 73 S.W.2d 92, 123 Tex. 410, answer conformed to Guardian Trust Co. v. Turner, Civ.App., 73 S.W.2d 1047, followed in Rabel v. Cowen, 64 S.W.2d 1118, appeal dismissed Cowen v. Rabel, 73 S.W. 2d 92, 123 Tex. 410, answer conformed to Guardian Trust Co. v. Turner, Civ.App., 73 S.W.2d 1047, followed in Rabel v. Orive, 64 S.W. 2d 1118, appeal dismissed Orive v. Rabel, 73 S.W.2d 92, 123 Tex. 410, answer conformed to Guardian Trust Co. v. Turner, Civ.App., 73 S W 2d 1047, followed in Rogers v. Jones, 64 S.W.2d 1119, appeal dismissed 73 S.W.2d 92, 123 Tex. 409, answer conformed to Guardian Trust Co. v. Turner, Civ.App., 73 S.W.2d 1047.

Va.—McClintock v. Royall, 4 S.E 2d 369, 173 Va. 408—Koteen v. Bickers, 177 S.E. 904, 163 Va. 676.

Wash.—State ex rel. Country Club of Seattle v. Department of Public Service, 86 P.2d 1104, 198 Wash. 37—Bullock v. Parsons, 74 P.2d 892, 193 Wash 79.

Wis.—Home Owners' Loan Corporation v. Robinson, 285 N.W. 768, 231 Wis. 248—In re West's Estate, 284 N.W. 565, 231 Wis. 377—Fetzer v. State Bank of Forestville, 282 N.W. 639, 229 Wis. 452—State v. Industrial Commission, 242 N.W. 321, 207 Wis. 652.

"That there is a nation-wide depression existing and prevailing, which is neither a psychological idealism nor an incongruous fancy, but a regrettable reality, manifesting itself in every vocation and business by its presence in every community, is common knowledge, not only to the layman, but to the courts."—Leeper Oil Co. v. Rowland, 39 S W.2d 486, 489, 239 Ky. 295.

Economic changes during recent years

U.S.—Plimpton v. Mattakeunk Cabin Colony, D.C.Conn., 9 F.Supp. 288.

Foreclosure sales

Court may take judicial notice that outside competing bids are rare in sales on foreclosure of large mortgages because of depression, and that such sales are often little more than steps in reorganization and refinancing plan.—Clinton Trust Co. v 142-144 Joralemon St. Corporation, 263 N.Y.S. 359, 237 App.Div. 789, reargument denied 263 N.Y S. 366, 238 App.Div. 858.

Height of depression

Wis.—In re Pratt's Estate, 266 N.W. 230, 221 Wis. 114.

Labor conditions

While trial court may take judicial notice of general labor conditions existing in 1919, it cannot take judicial notice that such conditions interfered with delivery of silos under a contract by a certain concern.—Johnston v. O'Connell, 183 N.W. 283, 44 S.D. 232.

Lack of cash

It is matter of general knowledge, particularly during last several years, that there are many persons who have ample assets and are not insolvent but lack cash in hand.—Irving Trust Co. v. Manufacturers' Trust Co., D.C.N.Y., 6 F.Supp. 185.

Yield from investments

The supreme court will judicially notice that the trend and course of yield from invested property in its various forms, kind, and character during the past ten years has been downward, and that in general the yield has been reduced from one half to one third.—State v. Hampton Water Works Co., N.H., 18 A.2d 765, rehearing denied 19 A.2d 435.

81. U.S.—State Line & Sullivan R. Co. v. Phillips, D.C.Pa., 17 F.Supp. 607, affirmed, C C.A., 98 F.2d 651, 120 A.L.R. 441, certiorari denied 59 S.Ct. 103, 305 U.S. 635, 83 L. Ed. 408—McCormick S. S. Co. v. U. S., D.C.Cal., 16 F.Supp. 45.

families;[82] seasonal shut downs in particular industries;[83] steps taken to provide relief to needy;[84] the conditions affecting agriculture,[85] banks and banking,[86] mines and mining,[87] municipalities,[88] and railroads;[89] the difficulty of raising money;[90] the existence of an emergency;[91] the noncompletion of buildings because of the depression;[92] the upward trend of business;[93] and of the existence of

82. Wyo.—Lonabaugh v. Lonabaugh, 22 P.2d 199, 46 Wyo. 23.

83. U.S.—John Conlon Coal Co v. Westchester Fire Ins. Co. of New York, D.C.Pa., 16 F.Supp. 93, affirmed, C.C.A., Westchester Fire Ins. Co. of New York v. John Conlon Coal Co., 92 F.2d 160, certiorari denied 58 S.Ct. 271, 302 U.S. 751, 82 L.Ed. 581—John Conlon Coal Co. v. Rochester American Ins. Co., New York, D.C.Pa., 16 F.Supp. 91.

84. Ill.—People ex rel. Witte v. Franklin, 186 N.E. 137, 352 Ill. 528.

Miss.—Wilson Banking Co. Liquidating Corporation v. Colvard, 161 So. 123, 172 Miss. 804.

N.Y.—Beggs v. Kern, 32 N.E.2d 529, 284 N.Y. 504, modifying 18 N.Y.S.2d 740, 258 App.Div. 1049, affirming 15 N.Y.S.2d 342, 172 Misc. 556, reargument denied 19 N.Y.S.2d 149, 259 App.Div. 714.

85. U.S.—Frost v. Corporation Commission of Oklahoma, D.C.Okl., 26 F.2d 508, reversed on other grounds 49 S.Ct. 235, 278 U.S. 515, 73 L.Ed. 483.

Minn.—O'Brien v. Lien, 199 N.W. 914, 160 Minn. 276.

S.D.—Snow v. South Shore Independent School Dist., 283 N.W. 530, 66 S.D. 379.

Liquidation of debts at less than face value

Iowa.—McFarland v. Johnston, 260 N.W. 32, 219 Iowa 1108.

Storing of corn

It is common knowledge that corn was generally stored after 1932, and that government loans were made thereon for purpose of holding it for a higher price.—R. P. Andreas & Son v. Hempy, 276 N.W. 791, 224 Iowa 561.

86. U.S.—U. S. ex rel. Willoughby v. Howard, C.C.A.Ill., 96 F.2d 893, conforming to 58 S.Ct. 309, 302 U.S. 445, 82 L.Ed. 352, reversing, C.C.A., Howard v. U. S., 87 F.2d 243, certiorari granted U. S. ex rel. Willoughby v. Howard, 57 S.Ct. 930, 301 U.S. 677, 81 L.Ed. 1337, rehearing denied 58 S.Ct. 524, 303 U.S. 666, 82 L.Ed. 1123—Atherton v. Anderson, C.C.A.Ky., 86 F.2d 518, modifying, D.C., Anderson v. Akers, 7 F.Supp. 924, rehearing denied 9 F.Supp. 151, opinion supplemented 11 F.Supp. 9, certiorari granted Anderson v. Atherton, 57 S.Ct. 754, 300 U.S. 652, 81 L.Ed. 863, reversed on other grounds 58 S.Ct. 53, 302 U.S. 643, 82 L.Ed. 500—Schram v. Gerson, D.C.Wis., 29 F.Supp. 1000—American Tobacco Co. v. South Carolina Nat. Bank, D.C.S.C., 15 F.Supp. 215—Great Atlantic & Pacific Tea Co. v. Citizens' Nat. Bank, D.C.Pa., 2 F.Supp. 29, affirmed, C.C.A., 66 F.2d 883.

Ind.—South Bend State Bank v. Department of Financial Institutions, 11 N.E.2d 689, 213 Ind. 396.

Iowa.—In re State Bank of Central City, 294 N.W. 260.

Ky.—Harlin v. Calvert's Adm'x, 70 S.W.2d 524, 253 Ky. 752.

S.C.—Beasley v. Missouri State Life Ins. Co., 179 S.E. 777, 176 S.C. 156.

Tenn.—Hayes v. State, 18 S.W.2d 1, 159 Tenn. 314—State ex rel. Wilson v. Meek, App., 146 S.W.2d 961.

Tex.—Security State Bank of Tahoka v. Spinnler, Civ.App., 78 S.W.2d 275—Brenan v. Eubank, Civ.App., 56 S.W.2d 513.

Vt.—State v. Reynolds, 1 A.2d 730, 109 Vt. 308.

87. U.S.—Morris-Poston Coal Co. v. Commissioner of Internal Revenue, C.C.A., 42 F.2d 620.

88. Fla.—Clover Leaf, Inc., v. City of Jacksonville, 199 So. 923.

N.J.—Heil v. Mayor and Board of Com'rs of City of Wildwood, 164 A. 868, 11 N.J.Misc. 171.

N.Y.—Liebowitz v. Goldwater, 23 N.Y.S.2d 76, 175 Misc. 211.

89. U.S.—Atchison, T. & S. F. Ry. Co. v. U. S., Ill., 52 S.Ct. 146, 284 U.S. 248, 76 L.Ed. 273, reversing, D.C., 51 F.2d 510—Baltimore & O. R. Co. v. U. S., D.C.Ohio, 5 F.Supp. 929, affirmed U. S. v. Baltimore & O. R. Co., 55 S.Ct. 268, 293 U.S. 454, 79 L.Ed. 587.

N.J.—Central R. Co. of New Jersey v. Board of Public Utility Com'rs, 170 A. 246, 112 N.J.Eq. 215, 172 A. 357, 112 N.J.Eq. 559, affirmed Central R. Co. of New Jersey v. State Highway Commission, 176 A. 725, 114 N.J.Law 397 and State Highway Commission v. Board of Public Utility Com'rs, 176 A. 725, 114 N.J.Law 398.

S.C.—Southern Ry. Co. v. Public Service Commission, 10 S.E.2d 769, 195 S.C. 247.

Street railroads

Pa.—Bell Telephone Co. of Pennsylvania v. Pennsylvania Public Utility Commission, 12 A.2d 479, 139 Pa.Super. 529.

90. Conn.—Brand v. Woolson, 180 A. 293, 120 Conn. 211.

To refinance loan

Iowa.—First Trust Joint Stock Land Bank of Chicago v. Jelsma, 268 N.W. 76, 221 Iowa 1191.

91. U.S.—Home Building & Loan Ass'n v. Blaisdell, 54 S.Ct. 231, 290 U.S. 398, 78 L.Ed. 413, 88 A.L.R. 1481, affirming Blaisdell v. Home Building & Loan Ass'n, 249 N.W. 334, 189 Minn. 422, 86 A.L.R. 1507, and 249 N.W. 893, 189 Minn. 448—Duke Power Co. v. Greenwood County, S. C., D.C.S.C., 10 F.Supp. 854, supplemented 12 F.Supp. 70, and cause remanded, C.C.A., Greenwood County v. Duke Power Co., 79 F.2d 995, and reversed on other grounds 81 F.2d 986, certiorari granted Duke Power Co. v. Greenwood County, 56 S.Ct. 941, 298 U.S. 651, 80 L.Ed. 1379, reversed on other grounds 57 S.Ct. 202, 299 U.S. 259, 81 L.Ed. 178—U. S. v. Shissler, D.C.Ill., 7 F.Supp. 123.

Cal.—Brown v. Ferdon, 54 P.2d 712, 5 Cal.2d 226.

Ind.—Bolivar Tp. Board of Finance of Benton County v. Hawkins, 191 N.E. 158, 207 Ind. 171, 96 A.L.R. 271.

Iowa.—First Trust Joint Stock Land Bank of Chicago v. Arp, 283 N.W. 441, 225 Iowa 1331, 120 A.L.R. 932.

N.J.—Hourigan v. North Bergen Tp., 172 A. 193, 785, 113 N.J.Law 143, affirming Hourigan v. North Bergen Tp. in Hudson County, 165 A. 74, 11 N.J.Misc. 194—Savings Investment & Trust Co. v. Associated Bankers Title & Mortgage Guaranty Co., 192 A. 584, 122 N.J.Eq. 95.

N.Y.—Li-Mo Realty Corporation v. Davis, 4 N.Y.S.2d 858, 167 Misc. 829—Morrison v. Gentler, 273 N.Y.S. 952, 152 Misc. 710.

However it has been held that the court cannot take judicial notice of the existence of an emergency warranting emergency legislation; and, assuming that such emergency did exist at the time of enactment of such statute, the court could not notice that it continued to time of suit.—Waterville Realty Corporation v. City of Eastport, 8 A.2d 898, 136 Me. 309.

Termination of emergency may be judicially noticed.

U.S.—Chastleton Corporation v. Sinclair, 44 S.Ct. 405, 264 U.S. 543, 68 L.Ed. 841, reversing 290 F. 348, 53 App.D.C. 373.

Ala.—First Nat. Bank v. Jaffe, 196 So. 103, 239 Ala. 567.

Ariz.—Pouquette v. O'Brien, 100 P.2d 979, 55 Ariz. 248.

92. Colo.—El Jebel Shrine Ass'n v. McGlone, 26 P.2d 108, 93 Colo. 334.

93. Ill.—Peoples Gas Light & Coke Co. v. Slattery, 5 N.E.2d 285, 287 Ill.App. 379.

unemployment and need.[94] The courts will take judicial notice of general economic and commercial history between certain dates,[95] an increase[96] or decrease[97] in the cost of living, and the prevalence in a particular year or years of a condition of general prosperity or inflation,[98] or of a severe financial panic and industrial depression throughout the country[99] or a large section thereof;[1] but not that

94. Cal.—Gillum v. Johnson, 62 P 2d 1037, 7 Cal 2d 744, 108 A.L.R. 595, rehearing denied 63 P.2d 810, 7 Cal.2d 744, 108 A L.R. 595—City and County of San Francisco v. Collins, 13 P.2d 912, 216 Cal. 187—Newman v. Industrial Accident Commission, 18 P.2d 977, 129 Cal. App 534.
Colo.—McNichols v. City and County of Denver, 74 P.2d 99, 101 Colo. 316.
Ind.—Martin v. Loula, 194 N.E. 178, 208 Ind. 346, rehearing denied 195 N E. 881, 208 Ind. 346, followed in White v. White, 194 N E. 355, 208 Ind. 314, rehearing denied 196 N.E. 95, 208 Ind. 314, followed in Indianapolis Morris Plan Co. v. Fitzgerald, 194 N.E. 355, 207 Ind. 708, Tam v. East Side Loan Co., 194 N. E. 355, 207 Ind. 709, Benson v. Sandusky, 194 N.E. 355, 207 Ind. 709, and Barlow v. Kellar, 194 N.E. 356, 207 Ind. 709.
Mo.—Jennings v. City of St. Louis, 58 S.W.2d 979, 332 Mo. 173, 87 A.L. R. 365.
N.J.—Ryan v. Housing Authority of City of Newark, 15 A.2d 647, 125 N. J.Law 336.
N.Y.—New York Steam Corporation v. City of New York, 197 N.E. 172, 268 N.Y. 137, 99 A.L.R. 1157, affirming 278 N.Y.S. 539, 243 App.Div. 772, affirming 276 N.Y.S. 99, 153 Misc. 493—Blek v. Wilson, 186 N E. 692, 262 N.Y. 253, motion denied 188 N.E. 99, 262 N.Y. 636, amended 188 N.E. 124, 262 N.Y. 694, and reversing 262 N.Y.S. 416, 237 App. Div. 712, modifying 259 N.Y.S. 443, 145 Misc. 373.
Wis.—Northern Hotel Co. v. Industrial Commission, 270 N.W. 66, 223 Wis. 297—Milwaukee Linen Supply Co. v. Ring, 246 N.W. 567, 210 Wis. 467.

95. U.S.—McRoberts v. Spaulding, D.C.Iowa, 32 F.2d 315—Stanfa v. Bynum, D.C.La., 37 F.Supp. 962—State of Ohio ex rel. Squire v. Metropolitan Life Ins. Co., D.C.Ohio, 36 F.Supp. 457—U. S. v. Henderson, D.C.Nev., 29 F.Supp. 1006—MacFarland v. Hanes, D.C N.C., 286 F. 937.
La.—Cooley v. Meridian Lumber Co., 197 So. 255, 195 La. 631.
Mass.—Purdie v. Roche, 24 N.E.2d 674, 304 Mass. 647.
Mo.—Covey v. Pierce, 82 S.W.2d 592, 229 Mo.App. 424.
S.C.—Mason v. Williams, 9 S.E.2d 537, 194 S.C. 290.
Tenn.—Young v. Phillips, 93 S.W. 2d 634, 170 Tenn. 169, 104 A.L.R. 975—State ex rel. Wilson v. Meek, App., 146 S.W.2d 961.
Tex.—Southern Underwriters v. Boswell, Civ.App., 141 S W.2d 442, error granted.
Wyo.—Dallas Dome Wyoming Oil Fields Co. v. Brooder, 97 P.2d 311, 55 Wyo. 109.
23 C.J. p 117 note 98.

Increase in costs

U S.—State of Missouri ex rel. Southwestern Bell Telephone Co. v Public Service Commission of Missouri, Mo., 43 S.Ct. 544, 262 U S. 276, 67 L Ed. 981, 31 A.L R. 807, reversing 233 S.W. 425.

96. Cal.—Los Angeles County v. State, 222 P. 153, 64 Cal.App. 290.
Ill.—Waiswila v Illinois Cent. R. Co., 220 Ill.App. 113.
Md.—In re Wilmer, 111 A. 118, 137 Md. 29
Mich.—Fricke v. City of Grand Rapids, 270 N W. 697, 278 Mich. 323.
S.D.—State v. Reeves, 184 N.W. 993, 44 S D. 568.
Wyo.—State v. Thompson, 18 P.2d 619, 45 Wyo. 350.
23 C.J. p 117 note 99.

97. Iowa—Keller v. Keller, 243 N. W. 182, 214 Iowa 909.

98. U.S.—Anderson v. Abbott, D.C. Ky., 32 F.Supp. 328—In re Parker Bros. & Johnson, D.C.N.C., 279 F. 425.
N.Y.—Town of Mamaroneck v. New York Interurban Water Co., 212 N.Y.S. 639, 126 Misc. 382.
Tenn.—American Nat. Bank v. Wade, 12 Tenn.App. 367.
Tex.—Ft. Worth & D. C. Ry. Co. v. Smithers, Civ.App., 228 S.W. 637.

99. U.S.—Du Pont v. Deputy, C.C.A. Del., 103 F.2d 257, reversing, D.C., 22 F.Supp. 589, certiorari granted Deputy v. Dupont, 60 S.Ct. 89, 308 U.S. 533, 84 L.Ed. 449, reversed on other grounds Deputy v. Du Pont, 60 S Ct. 363, 308 U S. 488, 84 L.Ed. 416—U. S. ex rel. Willoughby v. Howard, C.C.A Ill., 96 F.2d 893, conforming to 58 S.Ct. 309, 302 U. S. 445, 82 L.Ed. 352, reversing, C.C. A., Howard v. U. S., 87 F.2d 243, certiorari granted U S. ex rel. Willoughby v. Howard, 57 S.Ct. 930, 301 U S. 677, 81 L Ed. 1337, rehearing denied 58 S Ct. 524, 303 U.S. 666, 82 L Ed. 1123—Ransome Concrete Machinery Co. v. Moody, C. C.A.N Y., 282 F. 29—In re B & R. Glove Corporation, C.C.A.N.Y., 279 F. 372.
Ala.—First Nat. Bank v. Basham, 191 So. 873, 238 Ala. 500, 125 A.L.R. 656—Coral Gables v. Patterson, 166 So. 40, 231 Ala. 649.
Ariz.—Stults Eagle Drug Co. v. Luke, 62 P.2d 1126, 48 Ariz. 467.
Ark.—Martin v. Kelley, 81 S.W.2d 933, 190 Ark. 863—American Southern Trust Co. v. McKee, 293 S W. 50, 173 Ark. 147.
Cal.—White v. Citizens Nat. Trust & Savings Bank of Los Angeles, App., 116 P.2d 117.
Ill.—Kinney v. Lindgren, 26 N.E.2d 471, 373 Ill. 415, reversing 21 N.E. 2d 332, 300 Ill.App. 610—People ex rel. Mulvey v. City of Chicago, 12 N E.2d 13, 292 Ill.App. 589.
Iowa.—Murphy v. Smith, 269 N.W. 748, 222 Iowa 780—Grinnell Sav. Bank v. Gordon, 191 N.W. 852, 195 Iowa 208.
Mich.—Schnitz v. Grand River Ave. Development Co., 259 N.W. 900, 271 Mich. 253.
Mo.—Saxbury v. Coons, 98 S W.2d 662—Title Guaranty Trust Co. v. Sessinghaus, 28 S.W.2d 1001, 325 Mo. 420.
Neb.—In re Bose's Estate, 285 N.W. 319, 136 Neb. 156.
Tenn.—Clack v. Standefer, App., 147 S W.2d 764—McCuiston v. Haggard, 109 S.W.2d 413, 21 Tenn.App. 277.
Tex.—South Texas Coaches v. Eastland, Civ.App., 101 S.W.2d 878, error dismissed—Liebreich v. Tyler State Bank & Trust Co., Civ.App., 100 S.W.2d 152, error dismissed.
Wash.—State ex rel. Hamilton v. Martin, 23 P.2d 1, 173 Wash. 249.
Wis.—In re West's Estate, 284 N.W. 565, 231 Wis. 377—Judevine v. Benzies-Montanye Fuel & Warehouse Co., 269 N.W. 295, 222 Wis. 512, 106 A.L.R. 1443—In re Pratt's Estate, 266 N.W. 230, 221 Wis. 114.
23 C J. p 117 note 1.

Business failures

It is matter of common knowledge that after the close of the World War any enterprise might fail without fraudulent purposes or mismanagement of its affairs.—National Bank of the Republic v. Beckstead, 250 P. 1033, 68 Utah 421.

Effect on commercial enterprises

Court judicially knows that from March to September, 1930, commercial enterprises were generally regarded as extremely hazardous.—U. S. Nat. Bank & Trust Co of Kenosha, Wis., v. Sullivan, C C.A.Wis., 69 F.2d 412.

Stock market crash

Cal.—Camerer v. California Savings & Commercial Bank of San Diego, 48 P.2d 39, 4 Cal.2d 159, 100 A. L R. 667.

1. U.S.—Idaho Power Co. v. Thompson, D.C.Idaho, 19 F.2d 547.
23 C.J. p 117 note 2.

Florida land boom and effect thereof

U.S.—Rhodes v. Commissioner of In-

the effect of a certain panic was to reduce the earnings of a particular individual below what they would have been prior to the panic.[2]

§ 64. Identity

Ordinarily, judicial notice will not be taken of the identity of a particular person.

The courts do not take judicial notice of the identity of persons by reason of identity of Christian names and middle initials,[3] nor that a person involved in the case is identical with a person of the same name mentioned in another reported case.[4] It is a matter of common knowledge, however, that the initial of the second Christian name of a person is frequently omitted.[5]

§ 65. Language, Abbreviations, and Symbols

Particular matters relating to language, abbreviations, and symbols are discussed in detail in the sections immediately following.

Examine Pocket Parts for later cases.

§ 66. Grammar

The rules of grammar are judicially noticed.

Judicial notice may be taken of the generally accepted rules of grammar.[6]

§ 67. Meaning of Words and Phrases

Judicial notice may be taken of the usual meanings of words and phrases.

A judge judicially knows the ordinary meaning of English words,[7] the changes which in popular ac-

ternal Revenue, C.C.A., 100 F.2d 966—Findlay v. Florida East Coast Ry. Co., D.C.Fla., 3 F.Supp. 393, affirmed, C.C.A., 68 F.2d 540, certiorari denied 54 S.Ct. 629, 292 U. S. 623, 78 L.Ed. 1478.

Ala.—Coral Gables v. Patterson, 173 So. 4, 233 Ala. 602.

Fla.—Pierson v. Bill, 182 So. 631, 133 Fla. 81—Gryzmish v. Krim, 170 So. 717, 126 Fla. 191—State ex rel. Davis v. City of Clearwater, 139 So. 377, 106 Fla. 761, affirmed 146 So. 836, 106 Fla. 761, 108 Fla. 635.

2. Ala.—Louisville & N. R. Co. v. Holland, 55 So. 1001, 173 Ala. 675.

3. Fla.—Johnson v. Baker, 74 So. 210, 73 Fla. 6.

4. Utah.—Murdock v. Farrell, 163 P. 1102, 49 Utah 314.

5. Iowa.—Vanderwilt v. Broerman, 206 N.W. 959, 201 Iowa 1107.

6. **Enumerations**

It is common learning as a matter of grammar that when in an enumeration of persons or things the conjunction is placed immediately before the last of the series, the same connective is understood between the previous members.—Wilcox v. Warren Construction Co., 186 P. 13, 95 Or. 125, 13 A.L.R. 211.

7. U.S.—New York Life Ins. Co. v. Calhoun, C.C.A.Mo., 97 F.2d 896—Northwestern Nat. Life Ins. Co. v. Banning, C.C.A.Neb., 63 F.2d 736—Cheek-Neal Coffee Co. v. Hal Dick Mfg. Co., Cust. & Pat.App., 40 F.2d 106—Application of Reo Motor Car Co., D.C., 16 F.2d 349—Coleman v. U. S., Ct.Cl., 37 F.Supp. 273—U. S. v. Moscini, 19 C.C.P.A. (Customs) 144—U. S. v. May Department Stores Co., 16 Ct.Cust. App. 353—U. S. v. O. M. Baxter, Inc., 16 Ct.Cust.App. 257—U. S. v. Flory & Co., 15 Ct.Cust.App. 156—U. S. v. Stone & Downer Co., 12 Ct.Cust.App. 557, certiorari granted 46 S.Ct. 20, 269 U.S. 542, 70 L.Ed. 402, modified on other grounds 47 S.Ct. 616, 274 U.S. 225, 71 L.Ed. 1013.

Ala.—Dulaney v. Burns, 119 So. 21, 218 Ala. 493.

Iowa.—Statter v. Herring, 251 N.W. 715, 217 Iowa 410.

Ky.—Louisville Trust Co. v. Commissioners of Sinking Fund of City of Louisville, 84 S.W.2d 30, 260 Ky. 219—Bingham's Adm'r v. Commonwealth, 244 S.W. 781, 196 Ky. 318.

Mo.—City of St. Charles ex rel. Palmer v. Schulte, 264 S.W. 654, 305 Mo. 124—Wendel v. City Ice Co. of Kansas City, 22 S.W.2d 215, 224 Mo.App. 152.

N.J.—New Jersey State Board of Optometrists v. S. S. Kresge Co., 174 A. 353, 113 N.J.Law 287, modified on other grounds 181 A. 152, 115 N.J.Law 495.

N.Y.—Colyer v. North American Accident Ins. Co., 230 N.Y.S. 473, 132 Misc. 701.

N.C.—Fenner v. Tucker, 196 S.E. 357, 213 N.C. 419.

N.D.—State v. Equitable Life Assur. Soc. of U. S., 282 N.W. 411, 68 N.D. 641.

Ohio.—Andrews v. Tax Commission of Ohio, 21 N.E.2d 106, 135 Ohio St. 374.

Okl.—Melton v. Sneed, 109 P.2d 509—McGee v. Urschel, 58 P.2d 1228, 177 Okl. 337.

Tenn.—Nashville, C. & St. L. Ry. & L. and Louisville & N. R. Co. v. Carroll Co., 12 Tenn.App. 380—Yellow Cab Co. v. Teller, 9 Tenn. App. 416.

Tex.—Lawrie v. Miller, Com.App., 45 S.W.2d 172, reversing Miller v. Lowrie, Civ.App., 25 S.W.2d 984. 23 C.J. p 124 note 25.

Mode of ascertaining facts required to be judicially noticed see supra § 12.

Drummer

Ky.—John Matthews Apparatus Co. v. Renz, 61 S.W.2d 9, 22 Ky.L. 1528. 19 C.J. p 790 note 5 [b].

"Home"

Cal.—In re Winzeler's Estate, App., 108 P.2d 720.

Meaning attributable

In proceedings involving meaning of language used by Massachusetts testator in his will, the surrogate concluded that, in absence of factual showing that connotation of words differs in Massachusetts from their connotation in New York, meaning to be attributed to them by courts in both states is identical.—In re Ward's Will, 1 N.Y.S.2d 928, 165 Misc. 949.

Nautical terms

(1) The court judicially knows that word "Bells" is a nautical term for "O'Clock," and that eight bells after midnight means eight o'clock in the morning.—Brooks v. Great Atlantic & Pacific Tea Co., C.C.A.Cal., 92 F.2d 794.

(2) Admiralty courts may take notice of terms in general use in maritime affairs.—Maryland Casualty Co. v. Lawson, C.C.A.Fla., 101 F.2d 732.

Synonyms

The fact that certain words are used synonymously may be judicially noticed.—Monroe's Adm'r v. Federal Union Life Ins. Co., 65 S.W.2d 680, 251 Ky. 570—23 C.J. p 124 note 25 [b].

Under some statutes judicial notice is taken of meaning of all English words and phrases and all legal expressions.—Rohr v. Stanton Trust & Savings Bank of Great Falls, 245 P. 947, 76 Mont. 248—23 C.J. p 124 note 25 [c].

Well recognized meaning

Court judicially knows that word "budget" has well recognized gen-

ceptation the meaning of words undergoes,[8] and that the same word is susceptible of being used with different meanings.[9] Courts will take judicial notice of the meaning of words and idioms which have acquired a special significance, although such departure from correct usage be confined to particular classes of society;[10] but testimony is necessary where the words have a local meaning different from their ordinary acceptation.[11] Judicial notice may also be taken of matters of common knowledge relating to the names commonly applied to particular things.[12] A term of art or science commonly known is judicially known.[13] Judicial notice may be taken of the legal significance of words,[14] and it is common knowledge that many words have a meaning at law different from that of common speech.[15] The terminology of a particular trade or business is not a matter of which courts can take judicial notice,[16] unless it is a matter of common knowledge.[17]

Slang. Ordinarily the court cannot take judicial notice of the meanings of slang words or expressions,[18] but, where a word, although at first it was used simply as a slang expression and hence was beyond the pale of judicial cognizance, yet has come into such frequent use to convey a particular meaning that it no longer can be considered as simply the language of slang and understood only by the vulgar, the court cannot affect to be ignorant of the meaning thereof.[19]

Phrases. The judge will judicially know the meaning of phrases used in ordinary speech,[20] of

eral meaning.—Graves v. Purcell, 85 S.W.2d 543, 337 Mo. 574.

8. Ky.—Vanada v. Hopkins, 1 J.J. Marsh. 285, 19 Am.D. 92—Lampton v. Haggard, 3 T.B.Mon. 149.
"It is a matter of common knowledge that even the popular usage of words varies from time to time as new conditions arise, or new or improved methods of doing things are discovered."—State v. Hennessy Co., 230 P. 64, 65, 71 Mont. 301.

9. U.S.—Westerlund v. Black Bear Min. Co., Colo., 203 F. 599, 121 C.C.A. 627.
23 C.J. p 124 note 27.

10. U.S.—Johnson v. Weedin, C.C.A. Wash., 16 F.2d 105.

11. Kan.—State v. Baldwin, 12 P. 318, 36 Kan. 1.
Mich.—People v. Gastro, 42 N.W. 937, 75 Mich. 127.
Or.—Martin v. Eagle Dev. Co., 69 P. 216, 41 Or. 448.
23 C.J. p 125 note 28.

12. U.S.—Miles Laboratories v. Pepsodent Co., Cust. & Pat.App. 104 F. 2d 205.

606 and lues
Judicial notice has been taken that "606" is a name frequently used for salvarsan, a specific for syphilis, and that "lues" is a term frequently used to designate that disease.—In re Visaxis' Estate, 273 P. 165, 95 Cal. App. 617.

Truck
It is common knowledge that an automobile constructed with closed cab and light pickup body mounted on passenger chassis is not referred to as a truck.—Gaumnitz v. Indemnity Ins. Co. of North America, 37 P.2d 712, 2 Cal.App.2d 134.

13. U.S.—U. S. v. Heinze, C.C.N.Y., 161 F. 425.
Iowa.—State v. Wilhite, 109 N.W. 730, 132 Iowa 226, 11 Ann.Cas. 180.

14. Tex.—Anders v. Johnson, Civ. App., 284 S.W. 1057, affirmed, Com. App., 288 S.W. 168.

15. N.Y.—Adler v. Deegan, 167 N.E. 705, 251 N.Y. 467, reargument denied 170 N.E. 148, 252 N.Y. 574, and remittitur amended 170 N.E. 164, 252 N.Y. 615.
Tenn.—Jenkins v. Harris, 83 S.W.2d 562, 19 Tenn.App. 113.

"Heirs" and "children"
It is common knowledge that many people use the word "heirs" and the word "children" as meaning one and the same thing.
Ky.—Bentley v. Consolidation Coal Co., 272 S.W. 48, 209 Ky. 63.
Miss.—Strickland v. Delta Inv. Co., 137 So. 734, 163 Miss. 772.
Tex.—Texas Co. v. Meador, Civ.App., 243 S.W. 991, reversed on other grounds, Com.App., 250 S.W. 148.

16. Ala.—Meadow River Lumber Co. v. Black, 153 So. 293, 228 Ala. 279 denying certiorari 153 So. 290, 26 Ala.App. 28.
Tex.—Milk Products Co. v. Johnson, Civ.App., 295 S.W. 263.
23 C.J. p 125 note 30.

"Equipment"
(1) The court cannot take judicial notice of what the term "equipment" includes as used in a contract for sale of theater equipment.—Bligh v. Laflar, 178 P. 353, 91 Or. 388, rehearing denied 179 P. 238, 91 Or. 388.

(2) The practical meaning of the term "drilling equipment" and the use of "casing shoes" and "clamps" is not so universally known as to compel judicial notice that the general term "drilling equipment" embraces the materials mentioned.—Moore v. Houston Oil Co., Tex.Civ.App., 259 S.W. 168.

17. Tex.—Carter v. Texas Co., 87 S.W.2d 1079, 126 Tex. 388, affirming Texas Co. v. Andrade, Civ.App., 52 S.W.2d 1063—State Nat. Bank of Corpus Christi v. Morgan, Civ. App., 123 S.W.2d 1036, affirmed 143 S.W.2d 757, 135 Tex. 509.

18. N.Y.—Boyle v. MacDougall, 218 N.Y.S. 285, 128 Misc. 225.
23 C.J. p 125 note 32.

19. Cal.—Edwards v. San Jose Printing & Pub. Co., 34 P. 128, 99 Cal. 431, 37 Am.S.R. 70.

"Racket"
Court knows, and it is matter of common knowledge, that word "racket" is often oddly and innocently used to describe one's vocation or business or diversion, as the football racket, without meaning or intending any approbrious or defamatory reflection, and that general public not only knows this but also uses same kind of slang.—Central Arizona Light & Power Co. v. Akers, 46 P.2d 126, 45 Ariz. 526.

20. Tex.—First Nat. Bank v. First State Bank of Jacksonville, Com. App., 291 S.W. 206, affirming, Civ. App., 269 S.W. 154.
23 C.J. p 125 note 35.

Meaning of particular phrases noticed
(1) "Agricultural products."—Mixon v. Green, 193 So. 8, 187 Miss. 343.

(2) "Ambulance-chaser."—Kelley v. Boyne, 214 N.W. 316, 239 Mich. 204, 53 A.L.R. 273.

(3) "Automobile graveyard."—Rebman v. Murry, Pa., 29 Mun.L.R. 165.

(4) "Executive departments of government."—State ex rel. McKinley Pub. Co. v. Hackmann, 282 S.W. 1007, 314 Mo. 33.

(5) "Fire and theft" as used in automobile insurance.—Service Finance Corporation v. Brombaugh, Tex.Civ. App., 135 S.W.2d 503.

(6) "Political campaign."—State ex rel. Green v. City of Cleveland, Ohio App., 33 N.E.2d 35.

(7) "Private dwelling."—Loudenslager v. Stafford, 116 A. 770, 91 N.J.

legal phrases and expressions in common use,[21] and mutations in the meaning of phrases;[22] but he cannot notice the meaning of phrases without well established significance.[23] The court cannot take judicial notice that an expression used in a written instrument has a technical meaning, and if so what that meaning is, and that the parties intended to use it in that sense.[24] However, judicial notice has been taken of the meaning of some technical medical phrases.[25]

§ 68. Abbreviations, Initials, and Symbols

Judicial notice may be taken of the meaning of common abbreviations, initials, and symbols.

The courts take judicial notice of the meaning of abbreviations,[26] symbols,[27] and initials[28] in common use and generally known, but judicial notice will not be taken of the meaning of abbreviations, symbols, or initials where such meaning is not generally known and where they have no meaning without explanation,[29] or where they have merely a local meaning.[30] Judges may properly decline to hear evidence to establish a meaning of an ordinary

Eq. 1, followed in 116 A. 771, 91 N. J.Eq. 150, 151.

(8) "Trial balance."—Ferro v. Lagomarsino, 188 P. 626, 45 Cal.App. 741.

(9) Other phrases see Turner-Looker Co. v. Aprile, 187 N.Y.S. 367, 195 App.Div. 706—23 C.J. p 125 note 35 [a].

"Motor driven car" is not:

(1) An airplane.—Monroe's Adm'r v. Federal Union Life Ins. Co, 65 S.W.2d 680, 251 Ky. 570.

(2) A motor cycle—Salo v. North American Acc Ins. Co., 153 N.E. 557, 257 Mass. 303.

21. Me.—Preble v. Hunt, 27 A. 151, 85 Me. 267, 269.
23 C J. p 125 note 36.

"Judges of inferior courts"

It is a matter of common knowledge that in common parlance neither town councilmen nor city commissioners are referred to as "judges of inferior courts."—Birmingham Realty Co v. City of Birmingham, 87 So. 840, 205 Ala. 278.

Use

It is common knowledge that the phrase "heirs and assigns" continues to be used by many conveyancers, although it has ceased to be necessary.—In re Minor's Estate, 211 P. 807, 59 Cal.App. 616.

22. Ky.—Vanada v. Hopkins, 1 J.J. Marsh. 285, 19 Am.D. 92—Lampton v. Haggard, 3 T B.Mon. 149.

23. U.S.—Julius Forstmann & Co. v. U. S., 26 C.C P.A.(Customs) 336.
Iowa.—Fowler v. Stoner-McCray System, 193 N.W. 416, 196 Iowa 452.
Mich—Moore v. Mitchell, 270 N.W. 197, 278 Mich. 10.
N.Y.—Ostro v. Safir, 1 N.Y.S.2d 377, 165 Misc. 647.
Wis.—Osgood Co. v. Peterson Const. Co., 286 N.W. 54, 231 Wis. 541.
23 C.J. p 125 note 38.

"Colored men"

There is no legal technical signification to the phrase "colored men," which the courts are bound judicially to know.—Pauska v. Daus, 31 Tex 67.

24. Mont—Lehrkind v. McDonnell, 153 P. 1012, 51 Mont. 343.

25. N.Y.—In re Gedney, 142 N.Y.S. 157, 175.

26. Ill.—People v. Thompson, 129 N.E. 155, 295 Ill. 187.
23 C.J. p 125 note 46.

Dates

(1) Judicial notice may be taken of common abbreviations for dates.—Howell v. Howell, 98 So. 630, 210 Ala. 429—Sovereign Camp, W. O. W., v. Reed, 94 So. 910, 208 Ala. 457.

(2) Thus the court knows the date indicated by "12/28/28" or similar abbreviations.—Kennedy v. Hudson, 138 So. 282, 224 Ala. 17—Hodges v Westmoreland, 96 So. 573, 209 Ala. 498—Cunningham Hardware Co. v. Louisville & N. R. Co., 96 So. 358, 209 Ala. 327—Cochran v. State, 89 So. 278, 206 Ala. 74.

Description of land

Initials and abbreviations commonly used in the description of land may be judicially noticed.—Schmidt v. Powell, 180 P. 892, 107 Wash. 53—23 C.J. p 126 notes 49, 50.

Names

(1) Judicial notice will be taken of the ordinary and commonly used abbreviations of names.
Ind.—State ex rel. Scher v. Ayres, 26 N.E.2d 1002.
Tex—State Bank & Trust Co. v. W. O. Horn & Bro., Civ.App., 295 S.W. 698.
45 C.J. p 375 notes 94, 95.

(2) This is not the case, however, of less common abbreviations.—Curtis v. Marrs, 29 Ill. 508—45 C.J. p 375 note 96.

(3) Common nicknames may also be judicially noticed.—Lewis v West Side Trust & Savings Bank of Chicago, 30 N.E 2d 767, 307 Ill.App. 473, transferred, see 25 N.E.2d 818, 373 Ill. 245, and reversed on other grounds 36 N.E.2d 573.

27. Tex.—Curry v. Texas Co., Civ. App., 8 S.W.2d 206, error dismissed. 23 C.J. p 125 note 47, p 126 notes 49 50.

Symbols used by engineers and architects and peculiar to their profession are not judicially recognized. —Hart v. Brooklyn, 52 N.Y.S. 113, 31 App.Div. 517.

28. Cal.—Whitaker v. Dunlap-Morgan Co., 186 P. 181, 44 Cal.App. 140. 23 C.J. p 125 note 48.

Particular initials

(1) "C. O. D."—Morris v. Supplee, 57 A. 566, 208 Pa. 253.
11 C.J. p 24 note 53 [a]—23 C.J. p 125 note 48 [c].

(2) "F. O B."
Ala.—J. H. Hamlen & Son v. Rosengrant, 100 So. 217, 211 Ala. 186—County Board of Education of Jefferson County v. Cement Products Co., 96 So. 236, 209 Ala. 310.
Cal.—Hind v. Overseas Agencies, 208 P. 110, 189 Cal. 319.
23 C.J. p 125 note 48 [d].

(3) "M. D."—Becker v. Humphries, 130 S.E. 379, 34 Ga.App. 644.

(4) "N." and "S." when applied to directions.—Village of Bradley v. New York Cent. R. Co., 129 N.E. 744, 296 Ill. 383.

(5) "R. F. D."—Palatka Building & Loan Ass'n v. Levey, 147 So. 212, 109 Fla. 293.

(6) "S/D B/L."—Attalla Oil & Fertilizer Co. v. Goddard, 92 So. 794, 207 Ala. 287.

(7) Other initials see 23 C.J. p 125 note 48, p 126 notes 49, 50.

29. Ill.—People v. Thompson, 129 N.E. 155, 295 Ill. 187.
Tex.—Service Finance Corporation v. Brombaugh, Civ.App., 135 S.W.2d 503—Redmon v. Leach, Civ.App., 130 S.W.2d 873, error dismissed, judgment correct—Milk Products Co. v. Johnson, Civ.App., 295 S.W. 263.
23 C.J. p 126 note 52.

30. Minn.—Keith v. Hayden, 2 N.W. 495, 26 Minn. 212.

word, abbreviation, or other symbol which is contrary to the judicial knowledge of the judge.[31]

Marks used by writers and proof readers. The court will take judicial notice of a caret, and if a document has a caret at an interlineation it will be read in the order of the words as indicated.[32]

Printers' marks at the foot of an advertisement, probably placed there in the printing office when it went into the compositor's hands, cannot be given a significance by judicial knowledge.[33]

§ 69. Foreign Language

Courts ordinarily cannot take judicial notice of the meaning of words in a foreign language.

With some exceptions,[34] courts cannot take judicial notice of the meaning of words in a foreign language.[35] They do not know the words in general use,[36] or the proper orthography[37] or the pronunciation[38] of names in a foreign language.

It is common knowledge that the easiest way to learn a foreign language is to associate only with those who speak and use it.[39] Judicial notice is taken that the official language of Mexico is Spanish;[40] and that "attorneys and counselors at law" are ordinarily not known by that title in countries outside the United States.[41]

§ 70. Literature

Judicial notice may be taken of facts of common knowledge relating to literature.

Courts have judicially the same knowledge as the community at large of matters of literature embraced in average education or reading.[42]

§ 71. Matters of Art and Skill

Facts of common knowledge relating to matters of art and skill may be judicially noticed.

Facts of common knowledge relating to matters of art and skill will be judicially noticed,[43] but

31. Mass.—Greenfield First Nat. Bank v. Coffin, 38 N.E. 444, 162 Mass. 180.
N.D.—Power v. Bowdle, 54 N.W. 404, 3 N.D. 107, 44 Am.S.R. 511, 21 L.R.A. 328.

32. Neb.—Collins v. Hughes & Riddle, 278 N.W. 888, 134 Neb. 380.
23 C.J. p 126 note 55.

33. Md.—Johnson v. Robertson, 31 Md. 476.
23 C.J. p 126 note 56.

34. Hawaii.—Hapai v. Brown, 21 Hawaii 499—John II Est., Ltd. v. Judd, 13 Hawaii 319.
23 C.J. p 126 note 60.

35. N.Y.—Friscia v. Gargiulo, 12 N.Y.S.2d 973.
23 C.J. p 126 note 61.

36. U.S.—Rossmann v. Garnier, Mo., 211 F. 401, 128 C.C.A. 73, modifying, D.C., 195 F. 175.

37. Minn.—State v. Johnson, 3 N.W. 982, 26 Minn. 316.

38. Minn.—State v. Johnson, supra.
Tex.—Galveston, H. & S. A. R. Co. v. Sanchez, Civ.App., 65 S.W. 893.
23 C.J. p 126 note 64.

39. Neb.—Nebraska Dist. Evangelical Lutheran Synod v. McKelvie, 175 N.W. 531, 104 Neb. 93.

40. Mo.—Booth v. Scott, 205 S.W. 633, 276 Mo. 1.

41. N.Y.—Fair v. Kenny, 171 N.Y.S. 694, 103 Misc. 412.

42. N.Y.—Halsey v. New York Soc. for Suppression of Vice, 136 N.E. 219, 234 N.Y. 1, affirming 185 N.Y.S. 931, 194 App.Div. 961.
23 C.J. p 140 note 97.

43. U.S.—In re Maybach, Cust. & Pat.App., 107 F.2d 610—In re Seelig, Cust. & Pat.App., 81 F.2d 753—Fink v. V. Foscato, Inc., C.C.A.N.Y., 79 F.2d 842, reversing, D.C., 7 F. Supp. 768—In re Harshberger, Cust. & Pat.App., 67 F.2d 925—In re Copperweld Steel Co., Cust. & Pat. App., 62 F.2d 363—Ford Motor Co. v. Ohio Stamping & Engineering Co., C.C.A.Ohio, 56 F.2d 807—Anthony Co. v. U. S., Ct.Cl., 54 F.2d 165, new trial denied 56 F.2d 481—Bassick Mfg. Co. v. Adams Grease Gun Corporation, C.C.A.N.Y., 52 F.2d 36, modifying, D.C., 39 F.2d 904, affirmed 54 F.2d 285, certiorari granted Adams Grease Gun Corporation v. Bassick Mfg. Co., 52 S.Ct. 312, 285 U.S. 531, 76 L.Ed. 926, certiorari dismissed 52 S.Ct. 495, 286 U.S. 567, 76 L.Ed. 1298—Tropic-Aire, Inc., v. Sears, Roebuck & Co., D.C.Minn., 44 F.2d 577, affirmed, C.C.A., 44 F.2d 580, certiorari denied 51 S.Ct. 217, 282 U.S. 904, 75 L.Ed. 796—In re White, Cust. & Pat.App., 39 F.2d 974—In re Dennison Mfg. Co., Cust. & Pat. App., 39 F.2d 720—Fredericks v. Erie R. Co., C.C.A.N.Y., 36 F.2d 716—Chicago Auditorium Ass'n v. Willing, C.C.A.Ill., 20 F.2d 837, reversing, D.C., Chicago Auditorium Ass'n v. Cramer, 8 F.2d 998, and certiorari granted Willing v. Chicago Auditorium Ass'n, 48 S.Ct. 122, 275 U.S. 519, 72 L.Ed. 404, reversed on other grounds 48 S.Ct. 507, 277 U.S. 274, 72 L.Ed. 880—Fulton Co. v. Bishop & Babcock Co., D.C.Ohio, 17 F.2d 999, modified on other grounds, C.C.A., 17 F.2d 1006—W. A. Baum & Co. v. Becton, Dickinson & Co., D.C.N.J., 20 F.Supp 707, affirmed, C.C.A., W. A. Baum Co. v. Becton, Dickinson & Co., 101 F.2d 476—Henson v. Fidelity & Columbia Trust Co., D.C.Ky., 3 F.Supp. 950, affirmed, C.C.A., 68 F.2d 144, rehearing denied 69 F.2d 778—Dulien Steel Products, Inc., v. U. S., 27 C.C.P.A. 285—Gasifier Mfg. Co. v. Ford Motor Co., D.C. Mo., 1 F.R.D. 10, appeal dismissed, C.C.A., 116 F.2d 498.
Ariz.—City of Phoenix v. Johnson, 75 P.2d 30, 51 Ariz. 115.
Ark.—Simon v. Girard Fire & Marine Ins. Co., 57 S.W.2d 559, 186 Ark. 1014.
Cal.—National Automobile Ins. Co. v. Industrial Accident Commission of California, 32 P.2d 356, 220 Cal. 642—San Mateo County v. Christen, 71 P.2d 88, 22 Cal.App.2d 375—Globe Indemnity Co. v. Henderson, 202 P. 683, 54 Cal.App. 510.
D.C.—Metropolitan Engineering Co. v. Coe, 78 F.2d 201, 64 App.D.C. 317—In re Willis, 26 F.2d 567, 58 App.D.C. 195.
Ill.—Hall v. Cook County, 195 N.E. 54, 359 Ill. 528, reversing 274 Ill. App. 503, and transferred, see 187 N.E. 454, 353 Ill. 477.
Ky.—Ferguson v. Gregory, 287 S.W. 952, 216 Ky. 382—Ohio County Drug Co. v. Howard, 256 S.W. 705, 201 Ky. 346, 31 A.L.R. 1355.
La.—Scott v. Boylston, App., 177 So. 812—Petty v. Jones, 121 So. 372, 10 La.App. 409.
Mass.—Smith v. New England Aircraft Co., 170 N.E. 385, 270 Mass. 511, 69 A.L.R. 300.
N.J.—Becker v. Pickersgill, 143 A. 859, 105 N.J.Law 51.
N.Y.—Biddles, Inc., v. Enright, 146 N.E. 625, 239 N.Y. 354, 39 A.L.R. 766, affirming 203 N.Y.S. 920, 208 App.Div. 790—Ira S. Bushey & Sons v. American Ins. Co., 142 N.E. 340, 237 N.Y. 24, affirming 199 N.Y.S. 929, 206 App.Div. 715, and rear-

judicial notice cannot be taken of such facts unless they are matters of common knowledge.[44] Courts are inclined not to take judicial notice of those facts in the realm of mechanics which would better be presented by the testimony of those who have made special observation therein, or who have had special experience, or who as experts can be more safely trusted to testify as to the truth of a particular fact rather than to rely on an assumed knowledge, which might actually be mistaken.[45]

In patent proceedings or in an infringement suit the court will take judicial notice of all matters of general scientific knowledge;[46] all matters in common use, and all matters of common knowledge;[47] such mechanical devices as are of common knowledge among all;[48] and the nature of a patented invention.[49] On the other hand, as a general rule, judicial notice will not be taken of other matters which must be established by evidence.[50]

§ 72. Nature and Science

Judicial notice of particular facts relating to nature and science are discussed in detail in the sections immediately following.

Examine Pocket Parts for later cases.

§ 73. Course and Laws of Nature

Judicial notice is taken of the unquestioned laws of nature.

Judicial knowledge is taken of the familiar and unquestioned laws of nature and of the existence of facts which must have happened according to the constant course of nature,[51] and judicial notice of

gument denied 143 N.E. 732, 237 N.Y. 536—People ex rel 71 Park Ave. v. Goldfogle, 235 N.Y.S. 189, 226 App.Div. 241, affirmed 171 N.E. 788, 253 N.Y. 572—Effell Realty Corporation v. City of New York, 299 N.Y.S. 373, 165 Misc. 176, affirmed 11 N.Y.S.2d 250, 256 App.Div. 972, appeal granted 12 N.Y.S.2d 362, 257 App.Div. 806, affirmed 24 N.E.2d 978, 282 N.Y. 541—Capitol Trust Co. v. City of Schenectady, 231 N.Y.S. 119, 133 Misc. 56—Rapid Transit Subway Const. Co. v. City of New York, 223 N.Y.S. 24, 129 Misc. 714, modified on other grounds 246 N.Y.S. 869, 231 App. Div. 721, modified on other grounds 182 N.E. 145, 259 N.Y. 472—Puleo v. Stanislaw Holding Corp., 213 N.Y.S. 601, 126 Misc. 372.

Ohio.—East Ohio Building & Loan Co. v. Holland Furnace Co., 194 N.E. 598, 48 Ohio App. 545.

Or.—Albany State Bank v. Anthony, 254 P. 806, 121 Or. 277.

S.C.—Green v. City of Rock Hill, 147 S.E. 346, 149 S.C. 234.

Tex.—Williams v. De Fee, Civ.App., 77 S.W.2d 729—English v. Miller, Civ.App., 43 S.W.2d 642, error refused—Dallas Plumbing Co. v. Harrington, Civ.App., 275 S.W. 190.

Va.—Virginia Electric & Power Co. v. Lowry, 184 S.E. 177, 166 Va. 207—Richmond Cedar Works v. West, 147 S.E. 196, 152 Va. 533—Burr v. Virginia Railway & Power Co., 145 S.E. 833, 151 Va. 934.

Wis.—U. S. Fidelity & Guaranty Co. v. Western Iron Stores Co., 220 N.W. 192, 196 Wis. 339, 59 A.L.R. 1232.

44. U.S.—Kramer v. Mills Lumber Co., C.C.A.Mo., 24 F.2d 313, 60 A.L.R. 366.

Cal.—Swyny v. Caylor, 46 P.2d 979, 7 Cal.App.2d 627.

R.I.—James v. Rhode Island Auditorium, 199 A. 293, 60 R.I. 405.

Tex.—Evans v. Bryant, Civ.App., 29 S.W.2d 484, error refused.

Wis.—Maryland Casualty Co. v. Thomas Furnace Co., 201 N.W. 263, 185 Wis. 98.

45. Miss.—Luckett v. Louisiana Oil Corporation, 158 So. 199, 171 Miss. 570.

46. U.S.—Luten v. Allen, D.C.Kan., 254 F. 587, affirmed, C.C.A., 263 F. 986.

Standard works in library

In a patent infringement suit judicial notice may be taken of facts appearing in standard works accessible in every considerable library.—Werk v. Parker, Pa., 39 S.Ct. 197, 249 U.S. 130, 63 L.Ed. 514, affirming, C.C.A., 231 F. 121, which affirms, D.C., 221 F. 644.

47. U.S.—Kanne & Bessant v. Eaglelet Metal Spinning Co., D.C.N.Y., 54 F.2d 131—Wilcox v. Danner, Cust. & Pat.App., 53 F.2d 711—Luten v. Allen, D.C.Kan., 254 F. 587, affirmed, C.C.A., 263 F. 986.

D.C.—Re Excelsior Shoe Co., 40 App. D.C. 480.

Commercial success

It is common knowledge that the patentability of an improvement device is not necessarily determined by commercial success.—Hewes & Potter v. Meyerson, C.C.A.N.Y., 64 F.2d 336, reversing, D.C., 51 F.2d 405.

Invention

(1) In determining whether patent covers process involving invention, court may consider matters of common knowledge.—Friend v. Burnham & Morrill Co., C.C.A.Me., 55 F.2d 150, affirming, D.C., 40 F.2d 662.

(2) This is particularly true where the court is construing a patent in an old field.—Universal Form Clamp Co. v. Taxis, C.C.A.Ill., 267 F. 578, certiorari denied Taxis v. Universal Form Clamp Co., 41 S.Ct. 14, 254 U.S. 642, 65 L.Ed. 453.

Particular facts noticed as common knowledge

U.S.—Capezio v. Chicago Theatrical Shoe Co., C.C.A.Ill., 88 F.2d 77—Everybody's Tool & Die Works v. Costa, C.C.A.N.Y., 79 F.2d 126—In re Mavrogenis, Cust. & Pat.App., 57 F.2d 361—Flat Slab Patents Co. v. Turner, C.C.A.Minn., 285 F. 257, certiorari denied Turner v. Flat Slab Patents Co., 43 S.Ct. 700, 262 U.S. 752, 67 L.Ed. 1215.

48. U.S.—Luten v. Allen, D.C.Kan., 254 F. 587, affirmed, C.C.A., 263 F. 986.

What is usual

In patent infringement suit, court could take judicial notice of what is usual in mechanical world.—A. C. Gilbert Co. v. United Electric Mfg. Co., D.C.Mich., 58 F.2d 988, affirmed, C.C.A., 58 F.2d 990.

49. U.S.—Luten v. Allen, D.C.Kan., 254 F. 587, affirmed, C.C.A., 263 F. 986.

50. U.S.—Huston v. Barrett, C.C.A.Ga., 23 F.2d 907.

Prior art

On motion to dismiss because patents in suit are void on their face for want of invention, court cannot judicially notice prior art.—Coca Cola Co. v. Whistle Co. of America, D.C.Del., 20 F.2d 261.

51. Ala.—Powell v. Edwards, 187 So. 716, 237 Ala. 572.

Ark.—Payne v. Cotner, 230 S.W. 275, 148 Ark. 401—Murphy v. Murphy, 222 S.W. 721, 144 Ark. 429.

Ga.—Central of Georgia Ry. Co. v. Lawley, 126 S.E. 273, 33 Ga.App. 375—Roberson v. Southern Ry. Co., 117 S.E. 270, 30 Ga.App. 226.

Ky.—Cronin v. Cronin, 27 S.W.2d 950, 234 Ky. 207.

Pa.—Horen v. Davis, 118 A. 22, 274 Pa. 244—Lessig v. Reading Transit & Light Co., 113 A. 381, 270 Pa. 299.

the laws of nature is sometimes required by statute.[52] The court, however, will decline to know judicially the operation of such laws of nature as may be neutralized or offset by others and consequently are variable in their action; and it will not take such notice where the existence of a minor law of nature or its operation in a particular instance is disputed.[53]

Climate. Facts of general knowledge relating to the climate of the state,[54] and facts of general

Tex.—Meeker v. Teer, Civ.App., 122 S.W.2d 338, error dismissed—Hagins v. Wilson, Civ.App., 262 S.W. 770, overruled on other grounds Wilson v. Hagins, 295 S.W. 922, 116 Tex. 538.

Vt.—Goldberg v. Gintoff, 20 A.2d 114, 112 Vt. 43—Wellman v. Wales, 129 A. 317, 98 Vt. 437.

23 C.J. p 140 note 98—42 C.J. p 1202 notes 36, 37.

Judicial notice has been taken:

(1) Of possibility of different climatological conditions in different parts of city at same time.—Home Ins. Co. of New York v. Denver Western Baseball Co., 257 P. 265, 82 Colo. 86.

(2) That fogs occur in city of Baltimore and adjacent territory with sufficient frequency to justify reasonable expectation that they will from time to time recur.—Mayor and City Council of Baltimore v. Thompson, 189 A. 822, 171 Md. 460

(3) That irregular surfaces are likely to form unexpectedly where snow is melting and freezing.—Staples v. City of Spencer, 271 N.W. 200, 222 Iowa 1241.

(4) That northeast storm is frequently accompanied by high winds.—The B. B. No. 21, C.C.A.N.Y., 54 F.2d 532.

(5) Other matters.

Cal.—Katenkamp v. Union Realty Co., 53 P.2d 387, 11 Cal.App.2d 63.

Ga.—Southland Coffee Co. v. City of Macon, 3 S.E.2d 739, 60 Ga.App. 253.

Me.—Ogunquit Beach Dist. v. Perkins, 21 A.2d 660.

Mich.—Davenport v. Centerville Water & Electric Co., 192 N.W. 705, 222 Mich. 181.

Mont.—Donich v. Johnson, 250 P. 963, 77 Mont. 229.

N.Y.—People v. Foote, 273 N.Y.S. 567, 242 App.Div. 162, affirming 252 N.Y.S. 676, 141 Misc. 409, and motion denied 5 N.E.2d 362, 272 N.Y. 622, appeal dismissed 7 N.E.2d 728, 273 N.Y. 629 and 7 N.E.2d 729, 273 N.Y. 630, certiorari denied Foote v. People of State of New York, 58 S.Ct. 367, 302 U.S. 760, 82 L.Ed. 588.

Ohio.—Christen v. City of Cincinnati, 24 N.E.2d 717, 62 Ohio App. 528.

Pa.—Myer v. Curry, 135 A. 234, 287 Pa. 489.

23 C.J. p 140 note 98 [a]–[d], p 141 notes 1–5.

Tides

(1) Judicial notice may be taken of the ebb and flow of the tides.

U.S.—C. F. Harms Co. v. Turner Const. Co., C.C.A.N.Y., 3 F.2d 591, affirming, D.C., 290 F. 612.

Cal.—Muchenberger v. City of Santa Monica, 275 P. 803, 206 Cal. 635.

23 C.J. p 141 note 99.

(2) It is common knowledge that ocean swells and tidal waves occur at unpredictable periods of time.—Ware v. Security-First Nat. Bank of Los Angeles, 61 P.2d 936, 7 Cal.2d 604.

(3) "The law takes notice of three kinds of tides, viz.: 1. The high spring tides, which are the fluxes of the sea, at those tides, which happen at the two equinoctials; 2. The spring tides, which happen twice every month, at the full and change of the moon; 3. The neap, or ordinary tides, which happen at the change and full of the moon, twice in twenty-four hours."—Bolsa Land Co. v. Vaqueros Major Oil Co., 76 P.2d 519, 521, 25 Cal.App.2d 75.

23 C.J. p 141 note 99 [a].

52. Cal.—Hosking v. Danforth, 36 P.2d 427, 1 Cal.App.2d 178.

Idaho.—Wells v. Robinson Const. Co., 16 P.2d 1059, 52 Idaho 562.

23 C.J. p 142 note 9.

53. Cal.—People v. Ebanks, 49 P. 1049, 117 Cal. 652, 40 L.R.A. 269.

Ind.—Chicago, St. L. & P. R. Co. v. Champion, 32 N.E. 874.

23 C.J. p 141 note 6.

Application of scientific laws to facts of particular case is not matter of judicial knowledge.—Roy v. Smith, 25 P.2d 251, 134 Cal.App. 240, petition denied Roy v. Pacific Gas & Electric Co., 26 P.2d 650, 134 Cal.App. 240.

Preservative effect of cold

Although the preservative effect of cold will be judicially noticed, notice will not be taken of the particular temperature which will best preserve a particular variety of fruit.—Crystal Ice & Cold Storage Co. v. Renschler Produce Co., 278 P. 874, 99 Cal.App. 417.

54. U.S.—The Mendocino, D.C.La., 34 F.2d 783—Spencer Kellogg & Sons v. Great Lakes Transit Corporation, D.C.Mich., 32 F.Supp. 520—Southern Pac. Co. v. Railroad Commission of California, D.C.Cal., 10 F.Supp. 918.

Cal.—Harker v. Southern California Edison Co., 256 P. 848, 83 Cal.App. 204.

Mass.—Collins v. Collins, 16 N.E.2d 665, 301 Mass. 151

Mich.—Bernstein v. Illinois Cent. R. Co., 208 N.W. 679, 234 Mich. 614.

Mo.—Hurley v. Illinois Cent. R. Co., 282 S.W. 97, 221 Mo.App. 478.

Ohio.—Christen v. City of Cincinnati, 24 N.E.2d 717, 62 Ohio App. 528.

Utah.—Amussen Land & Securities Co. v. Co-Operative Drug Co., 206 P. 704, 60 Utah 73.

23 C.J. p 141 note 2.

Dust storms

Tex.—Mallet Land & Cattle Co. v. State, Civ.App., 84 S.W.2d 260, error granted, reversed on other grounds State v. Mallet Land & Cattle Co., 88 S.W.2d 471, 126 Tex. 392.

Floods

(1) Court may take judicial notice that floods or crevasses along Mississippi River in Louisiana come only in spring and early summer, and danger is over after midsummer.—Catherine Planting & Mfg. Co. v. Pointe Coupee Trust & Savings Bank, 107 So. 711, 160 La. 963.

(2) The courts may take judicial cognizance that in month of February heavy rains and melting snows in the mountains cause certain rivers in state to overflow their banks, and that islands in sloughs of delta section of rivers frequently are in danger from high flood waters.—Higgins v. Monckton, 83 P.2d 516, 28 Cal.App.2d 723.

(3) Other facts relating to floods see Short v. Pierce County, 78 P.2d 610, 194 Wash. 421—23 C.J. p 142 note 15 [e].

Post-harvest season

It is common knowledge that post-harvest period in Maine for transportation of fresh fruits and vegetables from farms to canneries is of exceeding short duration due to early frosts and road conditions.—State v. King, 188 A. 775, 135 Me. 5.

Present season

The court must judicially notice the abundant seasonable rainfall and the favorable seasonable weather now prevalent throughout most of the state, indicating a favorable crop season.—Replogle v. Ebert, 274 N.W. 37, 223 Iowa 1007.

Winds

It is common knowledge that sea winds increase in intensity after early morning hours, in city of Vernon.—Alechoff v. Los Angeles Gas & Electric Corporation, 257 P. 569, 84 Cal.App. 33.

knowledge relating to the climate elsewhere,[55] may be judicially noticed. The courts will notice the average annual rainfall,[56] and the necessity of irrigation for the production of crops.[57] Variations of climate, or meteorological conditions in particular places at particular times, however, cannot be judicially known,[58] although the fact that there may be variations in the weather may be noticed.[59]

§ 74. Natural Forces, and Laws of Physics and Mathematics

Judicial notice will be taken of facts generally known and accepted relating to natural forces, and the laws of physics and mathematics.

The courts take judicial notice of the natural forces,[60] as well as of the primary and commonly known laws of physics,[61] as well as of the primary

Winter gardens

It is judicially known that winter gardens have long been successfully cultivated near San Antonio.—Winter Garden Dist. Chamber of Commerce v. Winter Garden Fair, Tex. Civ.App., 299 S.W. 512.

55. Mo.—Aeby v. Missouri Pac. R. Co., 285 S.W. 965, 313 Mo. 492, certiorari granted Missouri Pac. R. Co. v. Aeby, 47 S.Ct. 108, 273 U.S. 679, 71 L.Ed. 836, and reversed on other grounds 48 S.Ct. 177, 275 U.S. 426, 72 L.Ed. 351, mandate conformed to Aeby v. Missouri Pac. R. Co., 6 S.W.2d 1115.

Heat of the tropics may be judicially noticed.—Kaufer Co. v. Luckenbach S. S. Co., D.C.Wash., 294 P. 978.

56. Tex.—Chicago, R. I. & G. Ry. Co. v. Tarrant County Water Control & Improvement Dist. No. 1, 73 S.W.2d 55, 123 Tex. 432, answering certified questions, Civ.App., 76 S.W.2d 147, and certiorari denied 55 S.Ct. 921, 295 U.S. 762, 79 L.Ed. 1704—International-Great Northern R. Co. v. Reagan, 49 S.W.2d 414, 121 Tex. 233, affirming, Civ. App., 36 S.W.2d 564.

57. Colo.—People ex rel. Rogers v. Letford, 79 P.2d 274, 102 Colo. 284.

Judicial notice of agriculture generally see supra § 29.

58. Or.—Simms v. Sullivan, 198 P. 240, 100 Or. 487, 15 A.L.R. 678.

23 C.J. p 141 note 8.

Vicissitudes of season or climate, if relied on as important, must be proved like other facts.—Southern Utilities Co. v. Murdock, 128 So. 430, 99 Fla. 1086—23 C.J. p 141 note 8 [a].

59. Mo.—Armstrong v. City of Monett, 228 S.W. 771.

60. Ark.—Murphy v. Murphy, 222 S.W. 721, 144 Ark. 429.

Colo.—Bieser v. Stoddard, 216 P. 707, 73 Colo. 554.

Ga.—Central of Georgia Ry. Co. v. Lawley, 126 S.E. 273, 33 Ga.App. 375.

Ill.—Mueth v. Jaska, 23 N.E.2d 805, 302 Ill.App. 289.

Mich.—Prove v. Interstate Stages, 231 N.W. 41, 250 Mich. 478.

Tex.—Levlon v. Dallas Railway & Terminal Co., Civ.App., 117 S.W.2d 876, 878, citing **Corpus Juris,** error refused—Taylor v. Tarrant County Water Control & Improvement Dist. No. 1, Civ.App., 86 S.W.2d 511, error dismissed.

Vt.—Wellman v. Wales, 129 A. 317, 98 Vt. 437.

23 C.J. p 142 notes 10, 14, p 143 notes 20–23.

Law of gravitation

(1) The law of gravitation is judicially noticed.

Colo.—In re Nix, 45 P.2d 176, 96 Colo. 540.

Pa.—Kovacs v. Ajhar, 196 A. 876, 130 Pa.Super. 149.

Utah.—Curby v. Bennett Glass & Paint Co., 103 P.2d 657.

23 C.J. p 140 note 98 [b].

(2) It is a fact of which judicial notice may be taken that the principle of conveying and distributing a mobile substance by gravity has found exemplification for centuries.—Concrete Appliances Co. v. Gomery, Pa., 46 S.Ct. 42, 269 U.S. 177, 70 L.Ed. 222, affirming, C.C.A., 291 F. 486, which reversed, D.C., 284 F. 518.

(3) Specific gravity of human body has been judicially noticed.—Buckley v. Massachusetts Bonding & Insurance Co., 192 P. 924, 113 Wash. 13.

61. U.S.—The S. C. L. No. 9, D.C. Pa., 37 F.Supp. 386, affirmed, C.C.A., 114 F.2d 964.

Ark.—Murphy v. Murphy, 222 S.W. 721, 144 Ark. 429.

Ill.—Mueth v. Jaska, 23 N.E.2d 805, 302 Ill.App. 289.

Mich.—Prove v. Interstate Stages, 231 N.W. 41, 250 Mich. 478.

Tex.—Levlon v. Dallas Railway & Terminal Co., Civ.App., 117 S.W.2d 876, 878, citing **Corpus Juris,** error refused.

Va.—Richardson v. Appalachian Electric Power Co., 175 S.E. 727, 163 Va. 394—Richardson v. Appalachian Electric Power Co., 176 S.E. 471, 163 Va. 394.

Wis.—Goetz v. Herzog, 246 N.W. 573, 210 Wis. 494.

23 C.J. p 142 note 11.

Judicial notice has been taken:

(1) Of expansion and contraction of metals in heat and cold.

U.S.—Interstate Power Co. v. Thomas, C.C.A.Minn., 51 F.2d 964, 84 A.L.R. 681.

Fla.—American Dist. Electric Protective Co. v. Seaboard Air Line Ry. Co., 190 So. 820, 139 Fla. 451.

(2) Of the principles of hydraulic pressure.—Hemminger v. City of Des Moines, 203 N.W. 822, 199 Iowa 1302.

(3) That a black surface will reflect substantially less light than a light surface.—Zickefoose v. Thompson, Mo., 148 S.W.2d 784.

(4) That for every action there is a compensating reaction, and that action and reaction equalize.

U.S.—Min-A-Max Co. v. Sundholm, D.C.Iowa, 24 F.Supp. 89, affirmed, C.C.A., 102 F.2d 187, certiorari denied 59 S.Ct. 1034, 307 U.S. 637, 83 L.Ed. 1519.

N.H.—Leavitt v. Bacon, 200 A. 399, 89 N.H. 383.

(5) That rifle ball striking smooth surface at slight angle will ricochet at an angle, because a rifle bullet while moving forward is rapidly revolving on its longitudinal axis.—Gamer v. New York Life Ins. Co., C.C.A.Mont., 76 F.2d 543.

Principles of optics

(1) It is common knowledge that headlight directed within certain area intensifies darkness without the lighted portion.—Sawdey v. R. W. Rasmussen Co., 290 P. 684, 107 Cal.App. 467.

(2) It is common knowledge that substantial objects are visible in greatly varying degrees when artificial light is thrown on them.—Arps v. City and County of Denver, 257 P. 1094, 82 Colo. 189.

(3) Judicial notice that a lighted electric car passing over a dark track can be seen before daylight will be taken.—Maryland Electric Rys. Co. v. Lapp, 120 A. 250, 142 Md. 163.

(4) The effect of cross rays of light has been judicially noticed.—Cowan v. Georgia Railroad & Banking Co., 184 S.E. 635, 52 Ga.App. 677.

(5) On the other hand, judicial notice of such matter has been denied.—Wm. A. Smith Const. Co. v. Brumley, C.C.A.Okl., 88 F.2d 803.

(6) Judicial notice will be taken of the course of travel of light.—Bennett v. Atchison, T. & S. F. Ry. Co., 183 N.W. 424, 191 Iowa 1333.

(7) Other matters.

Ky.—Chesapeake & O. Ry. Co. v. Hayes' Adm'r, 128 S.W.2d 763, 278 Ky. 461.

La.—Del Buono v. Illinois Cent. R. Co., 124 So. 694, 12 La.App. 35.

and commonly known laws of mechanics,[62] and mathematics;[63] and courts are judicially cognizant of facts concerning these forces so far as they are within the knowledge of persons of ordinary information.[64] On the other hand, special effects and modes of operation of physical substances and forces, which are not commonly known, and an understanding as to the application of which to the particular case may require scientific or expert knowledge not possessed by the court and jury, or about which experts may differ, or which might conceivably vary in effects under peculiar or special con-

N.J.—Linzmayer v. Phair, 156 A. 918, 9 N.J.Misc. 1154.
23 C.J. p 140 note 98 [c].

62. Ark.—Murphy v. Murphy, 222 S.W. 721, 144 Ark. 429.
Mich.—Prove v. Interstate Stages, 231 N.W. 41, 250 Mich. 478.
Tex.—Levlon v. Dallas Railway & Terminal Co., Civ.App., 117 S.W.2d 876, 878, citing **Corpus Juris,** error refused.
23 C.J. p 142 note 12.

63. Ark.—Payne v. Cotner, 230 S.W. 275, 148 Ark. 401—Murphy v. Murphy, 222 S.W. 721, 144 Ark. 429.
Ill.—Mueth v. Jaska, 23 N.E.2d 805, 302 Ill.App. 289.
Mich.—Prove v. Interstate Stages, 231 N.W. 41, 250 Mich. 478.
N.H.—Town of Tilton v. Sharpe, 155 A. 44, 85 N.H. 138.
Pa.—Horen v. Davis, 118 A. 22, 274 Pa. 244—Lessig v. Reading Transit & Light Co., 113 A. 381, 270 Pa. 299.
Tex.—Levlon v. Dallas Railway & Terminal Co., Civ.App., 117 S.W.2d 876, 878, citing **Corpus Juris,** error refused.
23 C.J. p 142 note 13.

64. U.S.—The S. C. L. No. 9, D.C. Pa., 37 F.Supp. 386, affirmed, C.C.A., 114 F.2d 964.
Tex.—English v. Miller, Civ.App., 43 S.W.2d 642, 644, error refused.
23 C.J. p 142 note 15.

Judicial notice has been taken:

(1) Of effect of breach in levee.—Meyerholz v. Board of Sup'rs in and for Louisa County, 204 N.W. 452, 200 Iowa 237.

(2) Of natural laws and facts arising therefrom relating to fires.
U.S.—Cornec v. Baltimore & O. R. Co., C.C.A.Md., 48 F.2d 497, modifying, D.C., The Richelieu, 27 F.2d 960, and certiorari denied Baltimore & O. R. Co. v. Cornec, 52 S.Ct. 9, 284 U.S. 621, 76 L.Ed. 530.
Cal.—Midwick Country Club v. Los Angeles County, 53 P.2d 1006, 11 Cal.App.2d 217.
Mass.—Gates v. Boston & M. R. R., 151 N.E. 320, 255 Mass. 297.
Mo.—Williamson v. Kansas City Stock Yards, App., 217 S.W. 614.
N.J.—Myers v. State, 132 A. 335, 4 N.J.Misc. 251.
Wash.—Mensik v. Cascade Timber Co., 258 P. 323, 144 Wash. 528.
23 C.J. p 142 note 15 [d].

(3) Of deterioration of various substances when exposed to the weather.
U.S.—A. Hofmann, Inc., v. U. S., Cust & Pat.App., 71 F.2d 316.
Cal.—Spore v. Washington, 274 P. 407, 96 Cal.App. 345.
Ill.—Maton Bros. v. Central Illinois Public Service Co., 269 Ill.App. 99, affirmed 191 N.E. 321, 356 Ill. 584.
Mo.—State ex inf. Mansur ex rel. Fowler v. McKown, 290 S.W. 123, 315 Mo. 1336—O'Gorman v. Kansas City, 93 S.W.2d 1132, 233 Mo.App. 124.
R.I.—Dugan v. Simas, 116 A. 753, reargument denied 117 A. 274.
Wash.—Garretson v. Parker, 230 P. 139, 131 Wash. 360.

(4) Of facts relating to the cause of air currents.
Mo.—Hurley v. Illinois Cent. R. Co., 282 S.W. 97, 221 Mo.App. 478.
Wyo.—Northwest States Utilities Co. v. Brouilete, 65 P.2d 223, 51 Wyo. 132, rehearing denied 69 P.2d 623, 51 Wyo. 132.

(5) Of suction caused by a passing boat.—The Robert Fulton, C.C.A.N.Y., 10 F.2d 424—The James W. Follette, D.C.N.Y., 6 F.Supp. 27, reversed on other grounds, C.C.A., 68 F.2d 827.

(6) That an appliance subjected to high pressure is no stronger than its weakest point.—Venne v. Damrow Bros. Co., 212 N.W. 796, 192 Wis. 249.

(7) That, when freezing and snow follow rain, numerous places in general use by pedestrians become slippery.—Missouri Pac. R. Co. v. Aeby, 48 S.Ct. 177, 275 U.S. 426, 72 L.Ed. 351, reversing Aeby v. Missouri Pac. R. Co., 285 S.W. 965, 313 Mo. 492, certiorari granted Missouri Pac. R. Co. v. Aeby, 47 S.Ct. 108, 273 U.S. 679, 71 L.Ed. 836, mandate conformed to Aeby v. Missouri Pac. R. Co., 6 S.W.2d 1115.

(8) Other matters.
U.S.—Hennig v. Evans, Cust. & Pat. App., 64 F.2d 684—U. S. v. Griffin, D.C.Va., 58 F.2d 674—Morrison Mill Co. v. Hartford Fire Ins. Co. of Hartford, Conn., D.C.Wash., 32 F.2d 271, affirmed, C.C.A., 35 F.2d 862—Mar-De-Passy Corporation v. U. S., Ct.Cl., 37 F.Supp. 141.
Ala.—Green v. Davis, 153 So. 240, 228 Ala. 162.
Ark.—Arkansas Power & Light Co. v. Beauchamp, 43 S.W.2d 234, 184 Ark. 698.
Cal.—Roy v. Smith, 25 P.2d 251, 134 Cal.App. 240, petition denied Roy v. Pacific Gas & Electric Co., 26 P.2d 650, 134 Cal.App. 240.
Col.—Dwinelle v. Union Pac. R. Co., 92 P.2d 741, 104 Colo. 545.
Ill.—Commissioners of Union Drainage Dist. No. 1 v. Commissioners of Union Drainage Dist. No. 6, 26 N.E.2d 85, 373 Ill. 347—City of Flora, for Use of Liberty Mut. Ins. Co. v. Bryden, 21 N.E.2d 323, 300 Ill.App. 1.
Ind.—Townsend & Freeman Co. v. Taggart, 144 N.E. 556, 81 Ind.App. 610.
Ky.—Noe v. Bengey, 125 S.W.2d 721, 276 Ky. 807.
Mass.—Cavanagh v. F. W. Woolworth Co., 32 N.E.2d 256, 308 Mass. 423.
Miss.—Dowling v. Whites Lumber & Supply Co., 154 So. 703, 170 Miss. 267.
Mo.—Thomasson v. Henwood, App., 146 S.W.2d 88—Axon v. Kansas City Public Service Co., App., 142 S.W.2d 342—Tackett v. Linnenbrink, App., 112 S.W.2d 160—Bicanic v. Kroger Grocery & Baking Co., App., 83 S.W.2d 917, certiorari quashed State ex rel. Kroger Grocery & Baking Co. v. Hostetter, 98 S.W.2d 683, 339 Mo. 630—Jackson v. Missouri Pac. Ry. Co., 42 S.W.2d 932, 226 Mo.App. 29.
Mont.—Irion v. Hyde, 105 P.2d 666, 110 Mont. 570—Wibaux Realty Co. v. Northern Pac. Ry. Co., 54 P.2d 1175, 101 Mont. 126.
N.H.—Cooley v. Public Service Co., 10 A.2d 673, 90 N.H. 460.
Ohio.—Sharp v. Higbee Co., 10 N.E.2d 932, 56 Ohio App. 278.
Okl.—Cities Service Gas Co. v. Eggers, 98 P.2d 1114, 186 Okl. 466, 126 A.L.R. 1278.
Tenn.—Draper v. Louisville & N. R. Co., 66 S.W.2d 1003, 17 Tenn.App. 213.
Tex.—McMahan v. City of Abilene, Civ.App., 261 S.W. 455, error dismissed City of Abilene v. McMahan, Com.App., 292 S.W. 525—Gulf, C. & S. F. Ry. Co. v. Leatherbury, Civ.App., 259 S.W. 598, certiorari denied Leatherbury v. Gulf, C. & S. F. Ry. Co., 44 S.Ct. 636, 265 U.S. 594, 68 L.Ed. 1197.
Vt.—Town of Bennington v. Fillmore & Slade, 130 A. 137, 98 Vt. 405.

Judicial notice will not be taken:

(1) Of alleged facts which are contrary to the court's knowledge of natural forces.—Goddard v. Berlin Mills Co., 131 A. 601, 82 N.H. 225.

(2) Of facts which are not apparent from the court's knowledge of physical forces.—Meeker v. Teer, Tex.Civ.App., 122 S.W.2d 338, error dismissed.

ditions, will not be judicially recognized, but will be left to proper modes of proof.[65] Thus while many matters pertaining to electricity are judicially noticed,[66] highly technical facts relating to electricity and the manifestations of electric current which fall within the domain of an electrical engineer or scientific expert will not be judicially noticed.[67] The meeting of interacting forces is so frequently followed by unlooked-for results that courts in such cases should not indulge in arbitrary deductions from physical law and fact, except when they appear to be clear and irrefutable to reasonable minds.[68]

§ 75. Qualities and Properties of Matter

Judicial notice will be taken of facts of common knowledge relating to the qualities and properties of matter.

Judicial notice will be taken of facts generally known concerning the qualities and properties of various substances.[69] Among other things, courts will take judicial notice of the qualities of such

65. Ga.—Central of Georgia Ry. Co v. Lawley, 126 S.E. 273, 33 Ga.App. 375.
23 C.J. p 142 note 16.

Reflection of light
Court could not take judicial notice that painted white line reflected white light only in white light and did not reflect white in red and blue beams.—Miller v. Poli's New England Theatres, 7 A.2d 845, 125 Conn. 610.

66. **Judicial notice has been taken:**
(1) Of dangerous character of electricity.
Ala.—Alabama Utilities Co. v. Champion, 160 So. 346, 230 Ala. 263.
Ark.—Pine Bluff Co. v. Bobbitt, 294 S.W. 1002, 174 Ark. 41.
Cal.—Bartuluci v. San Joaquin Light & Power Corporation, 69 P.2d 440, 21 Cal.App.2d 376—Summers v. Industrial Accident Commission, App., 24 P.2d 366.
Ind.—Ayrshire Coal Co. v. Wilder, 129 N.E. 260, 75 Ind.App. 137.
Tenn.—Tennessee Electric Power Co. v. Hanson, 79 S.W.2d 818, 18 Tenn. App. 542.
Tex.—McGinty v. Texas Power & Light Co., Civ App., 71 S.W.2d 354, error refused—Morton Salt Co. v. Wells, Civ.App., 35 S.W.2d 454, affirmed 70 S.W.2d 409, 123 Tex. 151.
Va.—Blackwell v. Hub Furniture Corporation, 177 S.E. 64, 163 Va. 621.
23 C.J. p 142 note 17 [a] (2).

(2) That a flash or spark inevitably follows a short circuit.—Elcomb Coal Co. v. Gray's Adm'x, 115 S.W. 2d 1056, 273 Ky. 230.

(3) Of facts generally known relating to atmospheric electricity, including lightning.
Ky.—Caledonian Ins. Co. v. Naifeh, 16 S.W.2d 1046, 229 Ky. 293.
N.Y.—Madura v. City of New York, 144 N.E. 505, 238 N.Y. 214, affirming Madura v. Bronx Parkway Commission, 201 N.Y.S. 639, 206 App.Div. 598.
Tex.—Olivares v. San Antonio Public Service Co., Civ.App., 134 S.W. 2d 821, error refused—Texas Compensation Ins. Co. v. Ellison, Civ. App., 71 S.W.2d 309, error dismissed—U. S. Fidelity & Guaranty Co v. Rochester, Civ.App., 281 S W. 306, affirmed 283 S.W. 135, 115 Tex. 404.
Wis.—Newman v. Industrial Commission, 234 N W. 495, 203 Wis. 358.

(4) Other matters.
Ark.—Southwestern Gas & Electric Co. v Murdock, 37 S.W.2d 100, 183 Ark. 565.
Cal.—Coughlin v. Great Western Power Co., 191 P. 920, 183 Cal. 548.
Ga.—Neary v. Georgia Public Service Co., 107 S.E. 893, 27 Ga.App. 238.
Ill.—Simmons v. Commonwealth Edison Co., 203 Ill.App 367.
Mo.—Buhrkuhl v. F. T. O'Dell Const. Co., 95 S.W.2d 843, 232 Mo.App. 967, certiorari quashed State ex rel. F. T. O'Dell Const. Co. v. Hostetter, 104 S.W.2d 671, 340 Mo. 1155.
N.H.—Cooley v. Public Service Co., 10 A.2d 673, 90 N.H. 460.
Pa.—Shapiro v. Philadelphia Electric Co., 21 A.2d 26—Alexander v. Nanticoke Light Co., 58 A. 1068, 209 Pa. 571, 67 L.R.A. 475.
23 C J. p 142 note 17 [a].

67. Ga.—Central of Georgia Ry. Co. v. Lawley, 126 S.E. 273, 33 Ga.App. 375.
23 C.J. p 142 note 18.

Barking wire
It is common knowledge that one cannot foresee at what point a wire carrying electricity will break and that, when a taut wire snaps, it is impossible to tell how it will fall.—Cooley v. Public Service Co., 10 A.2d 673, 90 N.H. 460.

Jumping
Court cannot judicially notice, either physically or scientifically, that electricity will not jump several feet through air to human being without material contact with current.—Bowen v. Hall-Baker Grain Co., 67 S.W.2d 536, 228 Mo.App. 332.

Lightning
(1) In absence of proof of surrounding circumstances, court would not take judicial notice that highway worker holding handles of plow ran greater hazard from being struck by lightning than person not so engaged.—Wells v. Robinson Const. Co., 16 P.2d 1059, 52 Idaho 562.

(2) Judicial notice of other facts relating to lightning refused.
Ariz.—Netherton v. Lightning Delivery Co., 258 P. 306, 32 Ariz. 350.
Minn.—Lickfett v. Jorgenson, 229 N. W. 138, 179 Minn. 321.
Mo.—Felden v. Horton & Coleman, 135 S W.2d 1115, 234 Mo.App. 421.

Precise nature of electricity is not matter of common knowledge or subject of judicial notice.—G. E. Lothrop Theatres Co. v. Edison Electric Illuminating Co. of Boston, 195 N. E. 305, 290 Mass. 189.

68. Mo.—Stokes v. Metropolitan St. R. Co., 160 S.W. 46, 173 Mo.App. 676.
23 C.J. p 143 note 19.

Inexplicable happenings
It is common knowledge that inexplicable happenings do occur.
Ark.—Pierce Oil Corp. v. City of Hope, 191 S.W. 405, 127 Ark. 38, affirmed 39 S.Ct. 172, 248 U.S. 498, 63 L.Ed. 381.
La.—Miller v. Hartford Live Stock Ins. Co., 116 So. 182, 165 La. 777.
Mo.—Van Houten v. Kansas City Public Service Co., 122 S.W.2d 868, 233 Mo.App. 423.
23 C J. p 143 note 19 [c].

Origin of fire
It is common knowledge that, when mystery surrounds origin of fire, defective electric wires are invariably charged as cause.—Boomer v. Southern California Edison Co., 267 P. 178, 91 Cal.App. 375.

69. Ga.—Central of Georgia Ry. Co. v. Lawley, 126 S.E. 273, 33 Ga.App. 375.
Pa.—Horen v. Davis, 118 A. 22, 274 Pa 244.
23 C.J. p 143 note 24.

Water
(1) It is common knowledge that water will spread over a flat surface.—Murff v. Louisiana Highway Commission, La.App., 146 So. 328, rehearing denied 146 So. 767.

(2) That water can serve as a carrier of disease germs to one drinking it is a matter within judicial notice, but what the conditions essential to the destruction of such

germs in water of a flowing stream may be is not.—State v. Heller, 196 A. 337, 123 Conn. 492, appeal dismissed Heller v. State of Connecticut, 58 S.Ct. 765, 303 U.S. 627, 82 L.Ed. 1088.

(3) It is well known that water is heavier than oil, and will displace oil when it gets in an oil sand.—Palmer Corporation v. Collins, 284 S.W. 95, 214 Ky. 838.

(4) Judicial notice of other matters relating to water, its nature and properties.

Iowa.—Horn v. Milwaukee Mechanics Ins. Co., 290 N.W. 8, 227 Iowa 1045.

Ohio.—Christen v. City of Cincinnati, 24 N.E.2d 717, 62 Ohio App. 528.

Wood

(1) It is common knowledge that ordinary wood buried in ground rots in relatively short time.—Tharpe v. Sibley Lake Bisteneau & S. Ry. Co., La.App., 144 So. 274.

(2) Facts relating to the decay of railroad crossties will be judicially noticed.

Ala.—W. T. Smith Lumber Co. v. Fox, 164 So. 214, 231 Ala. 159, reversing 164 So. 213, 26 Ala.App. 587.

Iowa.—Woodard v. Chicago, R. I. & P. Ry. Co., 185 N.W. 978, 193 Iowa 516.

23 C.J. p 143 note 24 [n] (5).

Qualities and properties of particular matters judicially noticed

(1) Banana peeling.—Yazoo & M. V. R. Co. v. Hawkins, 132 So. 742, 159 Miss. 775.

(2) Candy as food.—Andrews v. Tax Commission of Ohio, 21 N.E.2d 106, 135 Ohio St. 374.

(3) Carbolic acid.—Mutual Ins. Co. of Richmond v. Marshall, 161 S.E. 61, 157 Va. 427.

(4) Cast iron and its tendency to crack.—First Nat. Bank v. Royal Indemnity Co., 186 N.W. 934, 193 Iowa 221.

(5) Chocolate after hardening—Eskimo Pie Corporation v. Levous, C.C.A.N.J., 35 F.2d 120, affirming, D. C., 24 F.2d 599.

(6) Cement or concrete.

Ala.—Lone Star Cement Corporation v. State Tax Commission of Alabama, 175 So. 399, 234 Ala. 465.

Pa.—Pope v. Reading Co., 156 A. 106, 304 Pa. 326.

23 C.J. p 143 note 24 [a].

(7) Coal.

Ala.—Davis v. Zimmern, 99 So. 307, 211 Ala. 63.

Ky.—Staley v. Wehmeier, 219 S.W. 408, 187 Ky. 445.

Mich.—McMorran v. Cleveland Cliffs Iron Co., 234 N.W. 163, 253 Mich. 65.

(8) Cotton.

La.—Stewart Bros. Cotton Co. v. Dufilho, 133 So. 521, 16 La.App. 148.

N.H.—Riordan v. Nashua Mfg. Co., 127 A. 705, 81 N.H. 384.

Tex.—Gulf, C. & S. F. Ry. Co. v. Downs, Civ.App., 70 S.W.2d 318, error refused.

(9) Crepe or crinkled fabric.—Kemper-Thomas Co. v. J. P. Gordon Co., C.C.A.Ohio, 67 F.2d 478—Angier v. Nehring Electrical Works, C.C.A. Ill., 45 F.2d 354, affirming, D.C., 37 F.2d 953.

(10) Fire clay as valuable mineral. —Oberdan v. Evens & Howard Fire Brick Co., Mo.App., 296 S.W. 161.

(11) Hay.—Hoffman v. Wisconsin Lumber Co., Mo.App., 262 S.W. 414.

(12) Ice and snow.

U.S.—Icyclair, Inc., v. National Popsicle Corporation, C.C.A.Cal., 94 F.2d 669.

N.Y.—Rosenberg v. City of New York, 9 N.Y.S.2d 653, 256 App.Div. 927, affirmed 21 N.E.2d 877, 280 N. Y. 815.

(13) Indelible pencil as ink.—Thrailkill v. Smith, 138 N.E. 532, 106 Ohio St. 1.

(14) Insulation on electric wires. —Majors v. Ozark Power & Water Co., 222 S.W. 501, 205 Mo.App. 337.

(15) Lime putty.—Camp v. Peel, 92 P.2d 428, 33 Cal.App.2d 612.

(16) Loose earth as occupying more space than in its natural condition —Road Improvement Dist. No. 5 of Crittenden County, Ark., v. Roach, C.C.A.Ark., 18 F.2d 755.

(17) Lye.—Schultz v. Kinabrew, La.App., 177 So. 450.

(18) Meat.—Carey & Skinner v. U. S., 16 Ct.Cust.App. 382—23 C.J. p 145 note 33.

(19) Methyl alcohol as not being harmful by external application in small quantities in dilution.—Masonite Corporation v. Hill, 154 So. 295, 170 Miss. 158, 95 A.L.R. 157.

(20) Milk as highly perishable.— First Nat. Stores v. Lewis, 155 A. 534, 51 R.I. 448.

(21) Paint.—U. S. Fidelity Guaranty Co. v. Youmans, Ga.App., 176 S. E. 808.

(22) Quinine as being regarded as a medicine.—New Amsterdam Casualty Co. v. Perryman, 140 So. 342, 162 Miss. 864.

(23) Rubber and its adhesive qualities and effect of its application to smooth surfaces as retarding progress.—Brown v. Rhoades, 137 A. 58, 126 Me. 186, 53 A.L.R. 834.

(24) Slippery floors.

N.Y.—Conroy v. Saratoga Springs Authority, 19 N.Y.S.2d 538, 259 App.Div. 365, affirmed 31 N.E.2d 197, 284 N.Y. 723.

Pa.—McCann v. Gordon, 172 A. 644, 315 Pa. 367.

(25) Soda water.—Douglas v. First Nat. Stores, 172 A. 723, 54 R.I. 278.

(26) Steam pipes as not hot enough to ignite clothing.—Indian Creek Coal & Mining Co. v. Hebert, 131 N.E. 422, 76 Ind.App. 108.

(27) Stones.

Ark.—McEachin v. Yarborough, 74 S. W.2d 228, 189 Ark. 434.

Mich.—Woolman Const. Co. v. Cochrane, 209 N.W. 127, 235 Mich. 117, modified 213 N.W. 455, 238 Mich. 206.

(28) Other matters.

U.S.—Boyd v. Frenchee Chemical Corporation, D.C.N.Y., 37 F.Supp. 306—The Westmoreland, D.C.N.Y., 14 F.Supp. 762, affirmed, C.C.A., 86 F.2d 96—U. S. v. American Aniline Products, Inc., 22 C.C.P.A. (Customs) 380.

Ariz.—Southern Pac. Co. v. Itule, 74 P.2d 38, 51 Ariz. 25, 115 A.L.R. 1268.

Cal.—Sischo v. City of Los Banos, 80 P.2d 1020, 26 Cal.App.2d 642, denying rehearing 80 P.2d 116, 26 Cal.App.2d 642.

Ky.—City of Frankfort v. Ballew, 151 S.W.2d 1063, 287 Ky. 141—City of Louisville v. Martin, 144 S.W.2d 1034, 284 Ky. 490.

Mass.—Blake v. Great Atlantic & Pacific Tea Co., 164 N.E. 486, 266 Mass. 12.

Miss.—Harris v. Pounds, 187 So. 891, 185 Miss. 688.

Mo.—Obert v. Dunn, 41 S.W. 901, 140 Mo. 476—Helton v. Hawkins, 290 S.W. 91, 221 Mo.App. 93.

N.J.—Walker v. F. & W. Grand 5–10–25 Cent Stores, 137 A. 563, 5 N.J.Misc. 541, affirmed 140 A. 922, 104 N.J.Law, 450.

Ohio.—Kuehner v. Johnson, App., 34 N.E.2d 996—Carson v. S. H. Kress & Co., 10 N.E.2d 180, 56 Ohio App. 178.

Pa.—Bremer v. W. W. Smith, Inc., 191 A. 395, 126 Pa.Super. 408.

Tex.—Paluxy Asphalt Co. v. Helton, Civ.App., 144 S.W.2d 453, error dismissed, judgment correct—Pitzer & West v. Thigpen, Civ.App., 68 S.W. 2d 324, error dismissed—Texas Pacific Coal & Oil Co. v. Comanche Duke Oil Co., Civ.App., 274 S.W. 193, reversed on other grounds, Com.App., Comanche Duke Oil Co. v. Texas Pacific Coal & Oil Co., 298 S.W. 554—Gulf, C. & S. F. Ry. Co. v. Clement, Civ.App., 220 S.W. 407, affirmed Clement v. Gulf, C. & S. F. R. Co., Com.App., 236 S.W. 714.

Utah.—Curby v. Bennett Glass & Paint Co., 103 P.2d 657.

Wis.—Beznor v. Howell, 233 N.W. 758, 203 Wis. 1.

17 C.J. p 655 notes 88–93—23 C.J. p 144 note 30, p 145 notes 31–37.

things as gas,[70] petroleum and petroleum products,[71] gunpowder,[72] dynamite,[73] or the like or sim-

70. Ill.—Maton Bros. v. Central Illinois Public Service Co., 269 Ill. App. 99, affirmed 191 N.E. 321, 356 Ill. 584.
Ky.—Maise v. Imperial Oil Co., 137 S.W.2d 1104, 282 Ky. 124.
N.Y.—In re Hayward's Will, 256 N.Y.S. 607, 143 Misc. 401, affirmed In re Hayward, 260 N.Y.S. 995, 237 App.Div. 823, reargument denied In re Hayward's Adm'r, 261 N.Y.S. 993, 237 App.Div. 886.
Tex.—Phœnix Assur. Co., Limited, of London, v. Texas Cities Gas Co., Civ.App., 100 S.W.2d 156, 158, citing **Corpus Juris**—Fort Worth Gas Co. v. Cooper, Civ.App., 241 S.W. 282.
Va.—City of Richmond v. James, 197 S.E. 416, 170 Va. 553, 116 A.L.R. 967.
23 C.J. p 144 notes 26, 30 [a], [b].

Judicial notice has been taken:

(1) Of the use of natural gas as a commodity.
Ark.—Clear Creek Oil & Gas Co. v. Ft. Smith Spelter Co., 230 S.W. 897, 148 Ark. 260.
Mont.—Gallatin Natural Gas Co v. Public Service Commission, 256 P. 373, 79 Mont. 269.

(2) That gas unlike oil cannot be brought to the surface and stored to await a market for it—Transcontinental Oil Co v. Spencer, C.C.A. La., 6 F.2d 866, reversing, D.C., Spencer v. Transcontinental Oil Co., 2 F.2d 273.

(3) That illuminating gas contains poison and if inhaled in sufficient quantities will cause death and may exhaust oxygen if burned in small rooms.—Ocean Accident & Guarantee Corporation v. Schachner, C.C.A.Ill., 70 F.2d 28.

(4) That natural gas is so inflammable that it will ignite with instant explosion immediately on application of flame to it.—Arkansas Natural Gas Co. v. Sealy, 267 S.W. 569, 167 Ark. 1.

71. La.—State v. Louisiana Oil Refining Corporation, 160 So. 290, 181 La. 659.
Tex.—Rudco Oil & Gas Co. v. Lemasters, Civ.App., 146 S.W.2d 806, error dismissed, judgment correct.
23 C.J. p 144 note 27.

Crude oil

(1) Inflammable and combustible nature of crude oil is matter of common knowledge.
Ky.—Crouch v. Noland, 38 S.W.2d 471, 238 Ky. 575.
Tex.—Port Terminal R. Co. v. Brimer, Civ.App., 19 S.W.2d 111, error refused.
23 C.J. p 144 note 30 [d].

(2) The court will take judicial notice that crude oil is not wholly free from impurities.—U. S. v. Stanolind Crude Oil Purchasing Co., C.C.A. Okl., 113 F.2d 194.

Gasoline and kerosene

(1) Judicial notice may be taken of the explosive and inflammable character of gasoline and kerosene.
U.S.—Standard Oil Co. v. City of Marysville, Kan., 49 S.Ct. 430, 279 U.S. 582, 73 L.Ed. 856, affirming, C.C.A., City of Marysville v. Standard Oil Co., 27 F.2d 478, certiorari granted Standard Oil Co. v. City of Marysville, 49 S.Ct. 177, 278 U.S. 596, 73 L.Ed. 527, and rehearing denied Standard Oil Co. v. City of Marysville, 50 S.Ct. 79 Interpretation of decision denied 51 S.Ct. 38, 282 U.S. 797, 75 L.Ed. 718—Simkins v. R. L. Morrison & Son, C.C.A.Ga., 107 F.2d 121—Burnett v. Amalgamated Phosphate Co., C.C.A.Fla., 96 F.2d 974, certiorari denied 59 S.Ct. 153, 305 U.S. 647, 83 L.Ed. 418.
Ill.—Fligelman v. City of Chicago, 180 N.E. 797, 348 Ill. 294—Bellomy v. Bruce, 25 N.E.2d 428, 303 Ill.App. 349.
Ind.—Zeppenfeld v. Franklin Motor Service Co., 134 N.E. 487, 77 Ind. App. 687.
Me.—Loring v. Maine Cent. R. Co., 152 A. 527, 129 Me. 369.
Mass.—Teasdale v. Beacon Oil Co., 164 N.E. 612, 266 Mass. 25.
Mich.—Gust v. Muskegon Co-op. Oil Co., 198 N.W. 175, 226 Mich. 532, 32 A.L.R. 772.
Miss.—Murry Chevrolet Co. v. Cotten, 152 So. 657, 169 Miss. 521.
Mo.—Parton v. Phillips Petroleum Co., 107 S.W.2d 167, 231 Mo.App. 585—Helton v. Hawkins, 290 S.W. 91, 221 Mo.App. 93—Train v. Atchison, T. & S. F. Ry. Co., 253 S.W. 497, 214 Mo.App. 354—Ormsby v. A.B.C. Fireproof Warehouse Co., 253 S.W. 491, 214 Mo.App. 336.
N.C.—Jennings v. Standard Oil Co. of New Jersey, 173 S.E. 582, 206 N.C. 261.
Okl.—Palacine Oil Co. v. Philpot, 289 P. 281, 144 Okl. 123.
S.C.—McCoy v. Town of York, 8 S.E.2d 905, 193 S.C. 390.
S.D.—Niagara Fire Ins. Co. of New York v. Standard Oil Co., 257 N.W. 55, 63 S.D. 143.
R.I.—McArthur v. Dutee W. Flint Oil Co., 146 A. 484, 50 R.I. 226.
Tex.—Lombardo v. City of Dallas, 73 S.W.2d 475, 124 Tex. 1, affirming, Civ.App., 47 S.W.2d 495—Nesmith v. Magnolia Petroleum Co., Civ.App., 82 S.W.2d 721—Scott v. Champion Bldg. Co., Civ.App., 28 S.W.2d 178.
Va.—American Oil Co. v. Nicholas, 157 S.E. 754, 156 Va. 1.
W.Va.—State v. Stark, 122 S.E. 533, 96 W.Va. 176.
23 C.J. p 144 notes 27, 30 [e].

(2) It has been held, however, that judicial notice cannot be taken that kerosene is explosive, since it is not necessarily and invariably so.—Wood v. Northwestern Ins. Co., 46 N.Y. 421.

(3) Judicial notice may be taken that there is nothing inherently dangerous in gasoline, but that its danger arises from negligent use.
Me.—Loring v. Maine Cent. R. Co., 152 A. 527, 129 Me. 369.
N.J.—Sarno v. Gulf Refining Co., 124 A. 145, 99 N.J.Law 340, affirmed 130 A. 919, 102 N.J.Law 223.
Tex.—City of Electra v. Cross, Civ. App., 225 S.W. 795.

(4) Court knows as matter of law that casing-head gas contains both oil and gas.—Reynolds v. McMan Oil & Gas Co., Tex.Com.App., 11 S.W.2d 778, reversing, Civ.App., 279 S.W. 939, and rehearing denied, Com.App., 14 S.W.2d 819.

(5) The court can take judicial knowledge of what happens when coal oil is poured on the coals in the kitchen stove, and that, unless there is a flame, gas generates.—Jordan v. Rieker, 205 P. 1043, 119 Wash. 513.

(6) It is common knowledge that gasoline and benzine are commonly and generally used for cleaning furs.—Weininger v. Metropolitan Fire Ins. Co., 195 N.E. 420, 359 Ill. 584, 98 A.L.R. 169.

(7) Other facts judicially noticed.
U.S.—Hartford Accident & Indemnity Co v. Jones, C.C.A.Tex., 80 F.2d 680, certiorari denied 56 S.Ct. 674, 298 U.S. 655, 80 L.Ed. 1381.
Ky.—Cumberland River Oil Co. v. Dicken, 131 S.W.2d 927, 279 Ky. 700.
N.Y.—Jenkins v. 313-321 W. 37th Street Corporation, 12 N.Y.S.2d 739, 257 App.Div. 228, motion denied 25 N.E.2d 148, 282 N.Y. 595, modified on other grounds 31 N.E.2d 503, 284 N.Y. 397.

Oil tanks

It is common knowledge that oil storage tanks do not ordinarily explode, in absence of negligence.—Phœnix Assur. Co., Limited, of London v. Texas Holding Co., 252 P. 1082, 81 Cal.App. 61.

72. Ill.—Gerrard v. Porcheddu, 243 Ill.App. 562.
Mass.—Rabinovitz v. National Fire Ins. Co., 155 N.E. 435, 258 Mass. 508.
23 C.J. p 144 note 28.

73. Judicial notice has been taken:

(1) That the only practical way to explode dynamite is with detonating or fulminating caps.—Southwest Cotton Co. v. Clements, 213 P. 1005,

ilar matters,[74] in respect of their explosive, inflammable, or combustible nature. On the other hand, judicial notice will not be taken of qualities and properties of matter where such facts are not certain or are not matters of common knowledge.[75]

Judicial notice of facts relating to common articles, devices, utilities, and operations are discussed in § 81 infra.

Intoxicating liquors. Judicial notice will be taken of facts of common knowledge relating to the composition and intoxicating qualities of certain liquors,[76] but judicial notice will not be taken that any beverage called "beer" is intoxicating in fact.[77] The effect of alcohol on the human body may also be judicially noticed.[78] While courts take judicial notice that beer and other alcoholic liquors taken in sufficient quantities will produce intoxication,[79] they cannot be charged as a matter of law with judicial knowledge of the quantity necessary to intoxicate a particular person.[80] Difference in individual susceptibilities to the influence of intoxicating liquor is a fact of common and judicial knowledge.[81] Judicial notice of facts relating to intoxicating liquors in criminal cases is discussed in Criminal Law §§ 535–537.

§ 76. Scientific Facts

Judicial notice will be taken of generally known scientific facts.

Judicial notice will be taken of scientific facts known to all men of ordinary understanding and intelligence,[82] or distinctly recognized in a domes-

25 Ariz. 124, rehearing denied 215 P. 156, 25 Ariz. 169.

(2) That dynamite caps are easily exploded.—Atex Const. Co. v. Farrow, Tex.Civ.App., 71 S.W.2d 323, error refused.

(3) Other matters see 23 C.J. p 144 note 29 [a].

74. Pa.—Pierson v. London, 156 A. 719, 721, 102 Pa.Super. 176, citing **Corpus Juris.**
23 C.J. p 144 note 30.
Judicial notice has been taken of explosive character:
(1) Of dust clouds.—Cornec v. Baltimore & O. R. Co., C.C.A.Md., 48 F. 2d 497, modifying, D.C., The Richelieu, 27 F.2d 960, and certiorari denied Baltimore & O. R. Co. v. Cornec, 52 S.Ct. 9, 284 U.S. 621, 76 L.Ed. 530.
(2) Of dynamite caps.
Mo.—Diehl v. A. P. Green Fire Brick Co., 253 S.W. 984, 299 Mo. 641.
Vt.—Goupiel v. Grand Trunk Ry. Co., 111 A. 346, 94 Vt. 337.
(3) Of fireworks.—Ex parte Clark, 140 S.W.2d 854, 139 Tex.Cr. 385.
23 C.J. p 144 note 30 [f].

75. Kan.—Cherokee & P. Coal & Min. Co. v. Wilson, 28 P. 178, 47 Kan. 460.
23 C.J. p 145 note 39.
Judicial notice will not be taken:
(1) Of deterioration of stored liquors through evaporation, soakage, etc.—Dejon v. Smedley Co., 144 A. 473, 108 Conn. 659.
(2) Of the bottling and packing of champagnes and their distinctive properties.—Caron Corporation v. Maison Jeurelle-Seventeen, D.C.N.Y., 26 F.Supp. 560.
(3) Of the nature of carbon monoxide gas and how it operates to produce its effects.—Cleaver v. Central States Life Ins. Co., Mo., 142 S.W.2d 474, 129 A.L.R. 1094.
(4) Of the period that such apparatus as a soda tank can safely be used without repair or renewal.—Russell v. Spaulding, 130 N.E. 195 238 Mass. 206.
(5) Of whether compounding or blending distillate and kerosene with casing-head gas will produce gasoline.—State v. Johnson, 160 So. 788, 181 La. 992.
(6) That asphalt paint will explode when afire.—American Sand & Gravel Co. v. Reeves, 151 So. 477, 168 Miss. 608.
(7) That charcoal is predisposed to generate internal heat, sufficient to start fire.—Eckman Chemical Co. v Chicago & N. W. Ry. Co., 185 N.W. 444, 107 Neb. 268.
(8) Other matters.
U.S.—In re Kokatnur, Cust. & Pat. App., 109 F.2d 650.
La.—Convent v. Lama, App., 172 So. 553.
Miss.—Harris v. Pounds, 187 So. 891, 185 Miss. 688.
Okl.—Shell Petroleum Corporation v. Worley, 91 P.2d 679, 185 Okl. 265
Tex.—Hanson v. Ponder, Com.App., 300 S.W. 35, affirming in part and reversing in part, Civ.App., 293 S. W. 219, rehearing denied, Com. App., 3 S.W.2d 426, and motion granted 5 S.W.2d 767—Pitzer & West v. Thigpen, Civ.App., 68 S. W.2d 324, error dismissed.
Vt.—Village of St. Johnsbury v. Cenedella, 194 A. 382, 109 Vt. 174.
23 C.J. p 145 note 39.

76. U.S.—Alksne v. U. S., C.C.A. Mass., 39 F.2d 62, certiorari denied 50 S.Ct. 467, 281 U.S. 768, 74 L. Ed. 1175—Monroe Cider Vinegar & Fruit Co. v. Riordan, C.C.A.N.Y., 280 F. 624, reversing, D.C., 274 F. 736.
Ark.—Wald v. State ex rel. Robinson, 111 S.W.2d 553, 196 Ark. 1180.
Cal.—Ex parte Simmons, 250 P. 684, 199 Cal. 590.
Fla.—McLeod v. Sebring, 173 So. 153, 127 Fla. 441.
Ill.—City of Kewanee v. Puskar, 139 N.E. 60, 308 Ill. 167.
Iowa.—State v. Klein, 174 N.W. 481.
Okl.—One Chevrolet Coach Automobile v. State, 43 P.2d 774, 171 Okl. 545.
Tex.—Traders & General Ins Co. v. Grant, Civ.App., 137 S.W.2d 213. 33 C.J. p 496 note 78, p 499 note 28.

77. Ky.—Louisville & N. R. Co. v. Falls City Ice & Beverage Co., 61 S.W.2d 639, 249 Ky. 807, 91 A.L.R. 509.

78. U.S.—Commercial Casualty Ins. Co. v. Stinson, C.C.A.Mich., 111 F. 2d 63, certiorari denied 61 S.Ct. 25.

79. Ohio.—Kirk v. Birkenbach, App., 32 N.E.2d 76.

80. Cal.—Martin v. Board of Sup'rs of Lake County, 26 P.2d 843, 845, 135 Cal.App. 96, citing **Corpus Juris.**
Wis.—Steinkrause v. Eckstein, 175 N.W. 988, 170 Wis. 487.

81. U.S.—Hoagland v. Canfield, C.C.N.Y., 160 F. 146.
Or.—Lynn v. Stinnette, 31 P.2d 764, 147 Or. 105.

82. U.S.—Tolfree v. Wetzler, D.C.N.J., 22 F.2d 214, reversed on other grounds, C.C.A., 25 F.2d 553, certiorari denied Wetzler v. Tolfree, 49 S.Ct. 28, 278 U.S. 628, 73 L.Ed. 547—General Baking Co. v. Grocers' Baking Co., D.C.Ky., 3 F. Supp. 146—Luten v. Allen, D.C. Kan., 254 F. 587, affirmed, C.C.A., 263 F. 986—Illinois Cudahy Packing Co. v. Kansas City Soap Co., D.C.Kan., 247 F. 556, affirmed, C.C. A., Kansas City Soap Co. v. Illinois Cudahy Packing Co., 265 F. 108.
Ala.—Shafer v. Myers, 112 So. 230, 215 Ala. 678.
Ariz.—City of Phœnix v. Breuninger, 72 P.2d 580, 50 Ariz. 372.

tic public statute;[83] but such notice will not be taken of facts which, if known at all, are known only by a specially informed class of persons.[84]

§ 77. Partnerships and Members Thereof

Judicial notice may be taken of the status of a partnership and of the liabilities of partners.

The courts are cognizant of the status of a partnership and the character of the liability of its members.[85] Judicial notice will be taken of the extent of the authority of a partner to bind a trading or commercial partnership with reference to a commercial paper,[86] but not of his implied authority, if any, to make a guaranty or warranty in connection with sales of property of the partnership.[87] The courts cannot take judicial cognizance of the dissolution of a banking firm.[88]

§ 78. Phenomena of Human Life

Judicial notice may be taken of well-known facts relating to the phenomena of human life.

Well-known facts concerning the phenomena of human life in its various forms need not be proved;[89] and judicial notice may be taken of facts of common knowledge relating to the common activities of men,[90] as well as notice of particular

Ark.—Payne v. Cotner, 230 S.W 275, 148 Ark. 401.

Cal.—People v. Associated Oil Co., 294 P. 717, 211 Cal. 93—Green v. General Petroleum Corporation, 270 P. 952, 205 Cal. 328, 60 A.L.R. 475—Coughlin v Great Western Power Co., 191 P. 920, 183 Cal. 548—Alphonzo E Bell Corporation v. Bell View Oil Syndicate, 76 P.2d 167, 24 Cal.App 2d 587, followed in 76 P.2d 166, 24 Cal.App 2d 746, 76 P.2d 166, 24 Cal.App 2d 747, and 76 P.2d 166, 24 Cal App 2d 748—Roy v. Smith, 21 P.2d 151, 131 Cal. App. 148.

Ga.—Neary v. Georgia Public Service Co., 107 S.E 893, 27 Ga.App. 238.

Iowa.—Appleby v. Cass, 234 N.W. 477, 211 Iowa 1145.

Ky.—Henry Porter & Co. v. Lacy, 105 S W 2d 818, 268 Ky. 666—Palmer Corporation v. Collins, 284 S. W. 95, 214 Ky. 838.

Mich.—Northwest Home Owners Ass'n v. City of Detroit, 299 N.W. 740, 298 Mich 622.

Miss.—Cudahy Packing Co. v. Baskin, 155 So. 217, 170 Miss. 834.

Mo.—Valley Spring Hog Ranch Co. v. Plagmann, 220 S.W. 1, 282 Mo. 1, 15 A.L.R. 266—Brock v. American Cent. Life Ins. Co., App., 44 S.W.2d 200.

N.Y.—Madura v. City of New York, 238 N.Y. 214, 144 N.E. 505, affirming Madura v. Bronx Parkway Commission, 201 N.Y.S. 639, 206 App.Div. 598—In re Swahn's Will, 285 N.Y.S. 234, 158 Misc. 17.

N.C.—Mulford v. Cotton States Hotel Co., 197 S.E. 169, 213 N.C. 603.

Ohio.—Industrial Commission of Ohio v. Carden, 195 N.E. 551, 129 Ohio 344.

Or.—Cody v. Black, 192 P. 282, 97 Or. 343, denying petition 191 P. 319, 97 Or. 343.

Pa.—Griffith v. Atlantic Refining Co., 157 A. 791, 305 Pa. 386.

R.I.—First Nat. Stores v. Lewis, 155 A. 534, 51 R.I. 448.

Tex.—Reynolds v. McMan Oil & Gas Co., Com.App., 11 S.W.2d 778, reversing, Civ.App., 279 S.W. 939, and rehearing denied, Com.App., 14 S.W 2d 819—Texas Hotel Co. of Longview v. Wier, Civ.App., 116 S. W.2d 1169, error refused—Schram v. Pearl Oil Corporation, Civ.App., 90 S.W 2d 846, error granted—English v. Miller, Civ.App., 43 S.W.2d 642, error refused.

Va.—Batcheller v. Commonwealth ex rel. Rector and Visitors of University of Virginia, 10 S.E 2d 529—Pearcey v. St. Paul Fire & Marine Ins. Co., 177 S.E. 843, 163 Va. 928.

Wash.—Buckley v. Massachusetts Bonding & Insurance Co., 192 P. 924, 113 Wash. 13.

Wis.—Pfeffer v. City of Milwaukee, 177 N.W. 850, 171 Wis. 514, 10 A.L.R. 128.

23 C.J. p 145 notes 41–44.

Benefit of scientific research

It is common knowledge that scientists engaged in the development and propagation of various species of plants, trees, and shrubs have developed some that have proved to be of great benefit to man.—People ex rel. Hellyer v. Morton, 25 N.E.2d 504, 373 Ill. 72.

83. Kan.—Cheek v. Missouri, K. & T. R. Co., 131 P. 617, 89 Kan. 247.

23 C J. p 146 note 45.

84. U.S.—Wm. A. Smith Const. Co. v. Brumley, C.C.A.Okl., 88 F.2d 803—U. S. v. Brown & Co., 9 Ct. Cust.App. 146.

Ga.—Alabama Great Southern R. Co v. McBryar, App., 15 S.E.2d 563.

Ill.—Kesner v. Consumers' Co., 255 Ill.App. 216.

Neb.—Corry v. Waldron Seed Co., 181 N.W. 540, 105 Neb. 580.

Ohio.—Tippie v. State, 34 Ohio Cir. Ct. 203.

Tenn.—Standard Life Ins. Co. of the South v. Strong, 89 S.W.2d 367, 19 Tenn.App. 404.

23 C.J. p 146 note 46.

"Scientific facts, in order to attract judicial notice, must be universally known, so that they are found in encyclopedias and dictionaries, or in the treatises of standard authors, or must be of such notoriety and so generally understood that they have become a part of the common knowledge of all."—Raney & Hamon v. Hamilton & White, Tex. Civ.App., 234 S.W. 229, 231.

85. La.—Cameron v. Orleans & J. R. Co., 32 So. 208, 108 La. 83.

86. Ala.—Lichenstein v. Murphree, 62 So. 444, 9 Ala.App. 108.

87. N.Y.—Ann Arbor First Nat Bank v. Farson, 123 N.E. 490, 226 N.Y. 218.

88. Wis.—In re Harrington, 125 N. W. 986, 142 Wis. 447.

89. U.S.—Hoagland v. Canfield, C. C.N.Y., 160 F. 146.

90. Judicial notice may be taken:

(1) Of erection of monuments—Schieffelin v. Hylan, 140 N.E. 689, 236 N.Y. 254, affirming 199 N.Y.S. 948, 206 App.Div. 659, which affirmed 199 N.Y.S. 641, 120 Misc. 512.

(2) Of facts relating to assemblies of people.

N.J.—Whitehead v. Board of Public Utility Com'rs of New Jersey, 151 A. 369, 107 N.J.Law 41, affirmed 156 A. 766, 108 N.J.Law 258.

N.Y.—Koffler v. American Ry. Express Co., 214 N.Y.S. 787, 126 Misc. 838.

Pa.—American Baseball Club of Philadelphia v. City of Philadelphia, 167 A. 891, 312 Pa. 311, 92 A.L.R. 386, appeal dismissed 54 S.Ct. 128, 290 U.S. 595, 78 L.Ed. 524.

(3) Of facts relating to crimes.

Cal.—Lewis v. Quinn, 19 P.2d 236, 217 Cal. 410.

Ky.—Commonwealth v. Polk, 75 S. W.2d 761, 256 Ky. 100—Howard v. Whittaker, 64 S.W.2d 173, 250 Ky. 836.

N.Y.—Kean v. National Surety Co., 149 N.E. 849, 241 N.Y. 252, reversing 210 N.Y.S. 105, 213 App.Div. 750, and motion denied 152 N.E. 399, 242 N.Y. 495.

Wash.—Sherman Clay & Co. v. Brown, 231 P. 166, 131 Wash. 679.

(4) Of facts relating to walking and the usual speed of walkers.

Mo.—Zickefoose v. Thompson, 148 S. W.2d 784—McGowan v. Wells, 24 S.W.2d 633, 324 Mo. 652.

facts discussed in detail in the sections immediately following. On the other hand, judicial notice will not be taken of facts relating to the activities of men where such facts are not part of the common knowledge of most people within the jurisdiction, or which are contrary to such common knowledge.[91]

§ 79. Life, Health, and Faculties

Judicial notice may be taken of well-known facts relating to human life, health, and faculties.

N.Y.—Wood v. Woodlawn Improvement Ass'n Transp. Corporation, 214 N.Y.S. 398, 215 App.Div. 628, affirmed 161 N.E 197, 247 N.Y. 598—Grubman v. City of New York, 27 N.Y.S.2d 757.

Pa.—Kolich v. Monongahela Ry. Co., 154 A 705, 303 Pa. 463.

Va.—Jones v. Hanbury, 164 S.E. 545, 158 Va. 842.

Wis.—Smith v. Clayton Const. Co., 206 N.W. 67, 189 Wis. 91.

(5) Of facts relating to wills.

Ill.—Corcoran v. Williams, 271 Ill. App. 312.

N.J.—In re Cook's Estate, 179 A. 259, 118 N.J.Eq. 288, 99 A.L.R. 551, affirming 166 A. 32, 113 N.J.Eq. 225.

(6) Of labor disturbances.

U.S.—Williams v. Great Southern Lumber Co., D C La., 13 F.2d 246, reversed on other grounds, C.C.A., Great Southern Lumber Co. v. Williams, 17 F.2d 468, certiorari granted Williams v. Great Southern Lumber Co, 48 S.Ct. 19, 275 U.S. 511, 72 L Ed. 399, affirmed 48 S.Ct. 417, 277 U.S 19, 72 L.Ed. 761.

N.Y.—People ex rel. Frank v. McCann, 237 N Y S. 85, 227 App.Div. 57, affirmed 170 N.E. 898, 253 N.Y. 221.

Tex.—Hudson v. St. Louis Southwestern Ry. Co. of Texas, Com. App., 293 S.W. 811, affirming in part and reversing in part on other grounds St. Louis Southwestern Ry. Co. of Texas v. Hudson, Civ. App, 286 S.W. 766, and rehearing denied Hudson v. St. Louis Southwestern Ry. Co. of Texas, 295 S. W. 577.

(7) Of the minimum amount of money a person requires for necessaries.

Md.—McCaddin v. McCaddin, 82 A. 554, 116 Md. 567.

Tex.—Irwin v. Irwin, Civ.App., 110 S W. 1011.

23 C.J. p 150 note 26.

(8) Of the price of labor.—Bell v. Barnet, 2 J.J.Marsh, Ky., 516—23 C. J. p 150 note 25.

(9) Of various places where people may be expected or expected to go or pass.

U.S.—Southern Ry. Co. v. Matthews, C.C.A.Tenn, 29 F.2d 52, certiorari denied Matthews v. Southern Ry. Co., 49 S Ct. 264, 279 U.S. 844, 73 L Ed. 989.

Mich.—Reed v. Bliss & Van Auken Lumber Co., 196 N.W. 420, 225 Mich. 164.

(10) Other matters.

U S.—Williams Oil-O-Matic Heating Corporation v. Bliss, Cust. & Pat. App., 54 F.2d 430.

Ark.—Cherry v. Leonard, 75 S.W.2d 401, 189 Ark 869—Baucum v. Arkansas Power & Light Co., 15 S. W.2d 399, 179 Ark. 154.

Cal.—Sieroty v. City of Huntington Park. 295 P. 564, 111 Cal.App. 377—Schleif v. Grigsby, 263 P. 255, 88 Cal.App. 174.

D.C.—Holman v. Ryon, 56 F.2d 307, 61 App D C. 10.

Fla.—Cook v. Lewis K. Liggett Co., 173 So. 159, 127 Fla. 369.

Hawaii.—Young v. Kee, 32 Hawaii 179.

Iowa.—Orth v. Gregg, 250 N.W. 113, 217 Iowa 516—Wilkinson v. National Life Ass'n of Des Moines, 211 N.W. 238, 203 Iowa 960—Lundy v. City of Ames, 209 N.W. 427, 202 Iowa 100

Ky.—Lexington Ry. System v. True, 124 S.W.2d 467, 276 Ky. 446—Illinois Cent. R. Co. v. Applegate's Adm'x, 105 S.W.2d 153, 268 Ky. 458—Hansen v. Frankfort Chair Co., 60 S W.2d 349, 249 Ky. 194—Louisville & N. R. Co. v. Loesch, 284 S.W. 1097, 215 Ky. 452, 47 A. L.R. 347.

La.—De Latour v. Roosevelt Hotel, App, 1 So.2d 353—Terwilliger v. Union Fire, Accident & General Ins. Co., App., 185 So. 43—McPherson v. Hillyer Deutsch-Edwards Inc., App., 143 So. 89.

Mass.—Doyle v. Goldberg, 1 N.E.2d 1, 294 Mass. 105.

Mo.—Vannoy v. Duvall Trust Co., 29 S.W.2d 692—Nordquist v. Nordquist, 14 S W.2d 583, 321 Mo. 1244, transferred, see, App., 278 S.W. 810—Hente v. Michie, App., 151 S. W.2d 107—McCrary v. Michael, 109 S W.2d 50, 233 Mo.App. 797—Carroll v. Missouri Power & Light Co., 96 S.W.2d 1074, 231 Mo.App. 265—Tuttle v. Kline's Inc., 89 S.W.2d 676, 230 Mo.App. 230.

N.Y.—People, by Van Schaick, v. Title & Mortgage Guarantee Co. of Buffalo, 190 N.E. 153, 264 N.Y. 69, affirming 270 N.Y.S. 446, 149 Misc. 915, and 269 N.Y.S. 16, 149 Misc. 643—In re Streb's Will, 288 N.Y.S. 334, 247 App Div. 556—Clark v. New York Hotel Statler Co., 227 N.Y.S. 671, 223 App.Div. 237—Rosenfeld v. Rosenfeld, 2 N.Y.S.2d 107, 165 Misc. 885—In re New York Title & Mortgage Co., 289 N.Y.S. 771, 160 Misc. 67, affirmed 297 N.Y.S. 52, 251 App.Div. 415, reversed on other grounds 13 N.E 2d 41, 277 N.Y. 66, 115 A L.R 614—Hazzard v. Chase Nat. Bank of City of New York, 287 N.Y.S. 541, 159 Misc. 57, affirmed 14 N.Y.S.2d 147, 257 App.Div. 950, appeal granted 14 N.Y S.2d 1021, 258 App.Div. 709, affirmed 26 N.E.2d 801, 282 N.Y. 652, reargument denied 28 N.E.2d 406, 283 N.Y. 682, and certiorari denied 61 S Ct. 319.

Ohio.—Home Owners' Loan Corporation v. Doolittle, 13 N.E.2d 920, 57 Ohio App. 329—O Neill v. Dan Cohen Co., 198 N.E. 883, 50 Ohio App. 530.

Or.—Big Butte Horse & Cattle Ass'n v. Anderson, 289 P. 503, 133 Or. 171, 70 A L R. 399.

Pa.—Baker v. Moore, 166 A. 362, 311 Pa. 38—Earley v. Philadelphia & Reading Coal & Iron Co., 19 A.2d 615, 144 Pa.Super. 301.

Tenn.—Southern Ry. Co. v. Whaley, 98 S.W.2d 1061, 170 Tenn. 668—Bowen v. Hannah, 71 S.W.2d 672, 167 Tenn 451.

Tex.—St. Louis Southwestern Ry. Co. of Texas v State, 261 S.W. 996, 113 Tex. 570, 33 A.L.R. 367, reversing State v. St. Louis S. W. Ry. Co. of Texas, Civ.App., 197 S. W. 1006—McBeth v. Streib, Civ. App., 96 S.W.2d 992—Deutsch v. City of San Angelo, Civ.App., 73 S.W.2d 125, reversed on other grounds City of San Angelo v. Deutsch, 91 S.W.2d 308, 126 Tex. 532—Boothe v. American State Bank of Amarillo, Civ.App., 57 S. W.2d 250—Hubb Diggs Co. v. Bell, Civ.App., 297 S.W. 682, certified questions answered 293 S.W. 808, 116 Tex. 427, reversed on other grounds, Com.App., 1 S.W.2d 575—Robertson v. Holden, Civ.App., 297 S.W. 327, reversed on other grounds Robertson & Mueller v. Holden, Com.App., 1 S.W.2d 570.

Va.—Coleman v. Pearman, 165 S.E. 371, 159 Va. 72.

Wash.—Knopp v. Kemp & Hebert, 74 P.2d 924, 193 Wash. 160—Turtle v. Fitchett, 287 P. 7, 156 Wash. 328.

Wis.—Rosenbluth v. State, 269 N.W. 292, 222 Wis. 623—In re Fortner's Will, 206 N.W. 969, 188 Wis. 594—In re Hamburger's Will, 201 N.W. 267, 185 Wis. 270, 37 A.L.R. 1413.

Wyo.—Lonabaugh v. Lonabaugh, 22 P.2d 199, 46 Wyo. 23.

91. N.H.—Bunten v. Davis, 133 A. 16, 82 N.H. 304, 45 A.L.R. 1409.

Okl.—In re Noel's Heirship, 10 P.2d 259, 156 Okl. 177.

Judicial notice will be taken of generally known medical and other scientific facts relating to human life,[92] health,[93] and faculties.[94] For example, among other things, judicial notice may be taken of well-known facts relating to the anatomy and physiology of man;[95] of the diseases to which men are

92. **Judicial notice may be taken:**
(1) Of the ordinary length and limitation of human life.—Peluso v. City Taxi Co., 182 P. 808, 41 Cal. App. 297—23 C.J. p 146 note 55.

(2) That some person had sexual access to a woman who gave birth to a child.—State v. Bowen, 153 S.W. 1033, 247 Mo. 584.

(3) That, when a child's lungs and organs are fully developed, even in a seven months' baby, it is frequently capable of living.—Scott v. McPheeters, 92 P.2d 678, 33 Cal.App.2d 629, hearing denied Sup., 93 P.2d 562, 33 Cal.App.2d 629.

(4) Other facts.
Cal.—Thomsen v. Burgeson, 79 P.2d 136, 26 Cal.App.2d 235.
Ill.—American State Bank of Bloomington v. National Life Ins. Co., 17 N.E.2d 256, 297 Ill.App 137.
Ky.—Franks' Ex'r v. Bates, 128 S.W.2d 739, 278 Ky. 337—Smith v. Gilligan's Adm'r, 124 S.W.2d 798, 276 Ky. 533.
La.—Rochell v. Shreveport Grain & Elevator Co., App., 188 So. 429.
Mass.—Stevens v. William S. Howe Co., 176 N.E. 208, 275 Mass. 398—In re Ginley, 138 N.E. 719, 244 Mass. 346.
Or.—Wells v. Clark & Wilson Lumber Co., 235 P. 283, 114 Or. 297.
23 C.J p 147 notes 64–65.

93. U.S.—West Coast Hotel Co. v. Parrish, 57 S.Ct. 578, 300 U.S. 379, 81 L.Ed. 703, 108 A.L.R. 1330, affirming Parrish v. West Coast Hotel Co., 55 P.2d 1083, 185 Wash. 581.
Cal.—City of South Pasadena v. City of San Gabriel, 25 P.2d 516, 134 Cal.App. 403, certiorari denied 54 S.Ct. 642, 292 U.S. 602, 78 L.Ed. 1465—Inderbitzen v. Lane Hospital, 12 P.2d 744, 124 Cal.App. 462, hearing denied 13 P.2d 905, 124 Cal. App. 462.
Ill.—Allith-Prouty Co. v. Industrial Commission, 185 N.E. 267, 352 Ill. 78.
Mass.—In re Opinion of the Justices, 186 N.E. 490, 282 Mass. 619.
Mo.—Boll v. Condie-Bray Glass & Paint Co., 11 S.W.2d 48, 321 Mo. 92—Valley Spring Hog Ranch Co. v. Plagmann, 220 S.W. 1, 282 Mo. 1, 15 A.L.R. 266—Kelly v. Kansas City Building & Loan Ass'n, 81 S.W.2d 440, 229 Mo.App. 686.
N.Y.—Wager v. White Star Candy Co., 217 N.Y.S. 173, 217 App.Div. 316—Pattison v. State, 267 N.Y.S. 525, 149 Misc. 198, affirmed 273 N.Y.S. 445, 242 App.Div. 673—People ex rel. Home for Hebrew Infants of City of New York v. Walsh, 227 N.Y.S. 570, 131 Misc. 581—Webster Apartments v. City of New York, 193 N.Y.S. 650, 118 Misc. 91.
Pa.—Sapper v. Mathers, 133 A. 565, 286 Pa. 364, 47 A.L.R. 1172—Holgate Bros. Co. v. Bashore, 45 Dauph.Co. 274.
Va.—Whipple v. Fidelity & Casualty Co. of New York, 113 S.E. 878, 134 Va. 195.
Wyo.—Villalpando v. City of Cheyenne, 65 P.2d 1109, 51 Wyo. 300.

Judicial notice may be taken:
(1) Of facts relating to milk.
Ark.—Wiseman v. Affolter, 92 S.W.2d 388, 192 Ark. 509.
Ind.—Albert v. Milk Control Board, 200 N.E. 688, 210 Ind. 283.
Pa.—Dairymen's Co-op. Sales Ass'n v. Public Service Commission of Pennsylvania, 177 A. 770, 318 Pa. 381, 98 A.L.R. 218—Rohrer v. Milk Control Board, 184 A. 133, 121 Pa. Super. 281.
R.I.—First Nat. Stores v. Lewis, 155 A. 534, 51 R.I. 448.
Wis.—City of Milwaukee v. Childs Co., 217 N.W. 703, 195 Wis. 148.

(2) Of facts relating to slum areas and their hazard to public health.
Ill.—Krause v. Peoria Housing Authority, 19 N.E.2d 193, 370 Ill. 356.
Va.—Mumpower v. Housing Authority of City of Bristol, 11 S.E.2d 732, 176 Va. 426.

(3) Of substantial number of towns in state where no physician resides.—Covey v. Robinson, 152 A. 279, 84 N.H. 439.

(4) That many persons think they are in good health when they are not, and many others think they are in bad health when they are not.—McLaurin v. Mutual Life Ins. Co. of New York, 104 S.E. 327, 115 S.C. 59.

94. **Judicial notice has been taken:**
(1) Of the increased power of certain faculties caused by additional demands made on them.
Utah.—North Beck Mining Co. v. Industrial Commission of Utah, 200 P. 111, 58 Utah 486.
Vt.—Jacobs v. Holden Leonard Co., 4 A.2d 343, 110 Vt. 245.
23 C.J. p 148 note 73.

(2) Other matters.—Ætna Life Ins. Co. v. McCullagh, 229 S.W. 1033, 191 Ky. 226—23 C.J. p 148 notes 74–78.

95. N.Y.—Shaw v. Tague, 177 N.E. 417, 257 N.Y. 193, affirming 247 N.Y.S. 892, 232 App.Div. 720.
Pa.—Lidwinofsky's Pet., 7 Pa.Dist. 188.
23 C.J. p 146 notes 56–60.

Reaction time
(1) Judicial notice may be taken that some time must elapse before the human mind and muscular system can act in case of a sudden emergency.
Mo.—Stark v. Berger, 125 S.W.2d 870, 344 Mo. 170—Karr v. Chicago, R. I. & P. Ry. Co., 108 S.W.2d 44, 341 Mo. 536—McGowan v. Wells, 24 S.W.2d 633, 324 Mo. 652—Thomasson v. Henwood, App., 146 S.W.2d 88.
Wis.—Vale v. Noe, 179 N.W. 572, 172 Wis. 421.

(2) That such "reaction time" is usually about three-quarters of a second has been judicially noticed.—Ashbrook v. Cleveland Ry. Co., Ohio App., 34 N.E.2d 992.

(3) It has also been held, however, that the court does not take judicial notice of any established degree of exactness of the time.—Knight v. Wabash Ry. Co., Mo., 85 S.W.2d 392.

Judicial notice may be taken:
(1) Of deleterious effect of quicklime causing injury.—Katz v. Helbing, 271 P. 1062, 205 Cal. 629, 62 A.L.R. 825.

(2) Of the effect of long hours of labor on a youth.—Britton v. Wabash Ry. Co., 203 N.W. 484, 230 Mich. 628, certiorari denied Wabash Ry. Co. v. Britton, 46 S.Ct. 102, 269 U.S. 575, 70 L.Ed. 420.

(3) Of the infirmities of advancing years.
U.S.—Preferred Accident Ins. Co. of New York v. Combs, C.C.A.Neb., 76 F.2d 775.
Ark.—Phillips Petroleum Co. v. Jenkins, 82 S.W.2d 264, 190 Ark. 964, affirmed 56 S.Ct. 611, 297 U.S. 629, 80 L.Ed. 943, rehearing denied 56 S.Ct. 745, 298 U.S. 691, 80 L.Ed. 1409—Nelson v. Murray, 224 S.W. 486, 145 Ark. 247.
Cal.—In re Henderson's Estate, 112 P.2d 605, prior opinion 105 P.2d 937.
Iowa.—In re Paczoch's Estate, 211 N.W. 500, 202 Iowa 849.

(4) Of the laws of hygiene.—Valley Spring Hog Ranch Co. v. Plagmann, 220 S.W. 1, 282 Mo. 1, 15 A.L.R. 266.

(5) Of the naturally deep breathing of sleep.—Gilchrist v. Kansas City Rys. Co., Mo., 254 S.W. 161.

(6) That an individual may be identified by his voice.—Bell v. McDonald, 139 N.E. 613, 308 Ill. 329.

(7) That a person may be unconscious one moment and fully conscious and sane shortly thereafter.—Whitacre v. Kelly, 134 S.W.2d 121, 345 Mo. 489.

(8) That circulation of the blood through any body tissue is necessary in order that it may not die, become gangrenous, and slough away.

subject,[96] and in a general way of the causes or sources of such diseases,[97] and the remedies or

—Spirakoff v. Pluto Coal Mining Co., Colo., 100 P.2d 154.

(9) That oleomargarine is healthful, nutritious food.—John F. Jelke Co. v. Emery, 214 N.W. 369, 193 Wis. 311, 53 A.L.R. 463.

(10) That operations cause pain and suffering.—Houston Clinic v Busch, Tex.Civ.App., 64 S.W.2d 1103, error dismissed.

(11) Other facts.

U.S.—Commercial Casualty Ins. Co. v. Stinson, C.C.A.Mich., 111 F.2d 63, certiorari denied 61 S.Ct. 25—Fidelity Mut. Life Ins. Co. v. Powell, C.C.A.Md., 74 F.2d 525—Ætna Life Ins. Co. of Hartford, Conn., v Kelley, C.C.A.Mo., 70 F.2d 589, 93 A.L.R. 471.

Ark.—Plunkett v. Hays, 21 S.W.2d 851, 180 Ark. 505.

Cal.—Thomsen v. Burgeson, 79 P.2d 136, 26 Cal.App.2d 235

D.C.—Hoage v. Royal Indemnity Co., 90 F.2d 387, 67 App.D.C. 142, certiorari denied Royal Indemnity Co v. Cardillo, 58 S.Ct. 122, 302 U.S. 736, 82 L.Ed. 569, rehearing denied 58 S.Ct. 270, 302 U.S. 778, 82 L.Ed. 602.

Iowa.—Paulson v. Hanson, 285 N.W. 189, 226 Iowa 858.

Ky.—Equitable Life Assur. Soc. of U. S. v. Spencer, 90 S.W.2d 704, 262 Ky. 478.

La.—Stockman v. Tremont Lumber Co., App., 155 So. 30.

Mich.—Narregang v. Great Atlantic & Pacific Tea Co., 194 N.W. 410, 224 Mich. 178.

Miss.—Gower v. Strain, 145 So. 244, 169 Miss. 344.

Mo.—Rockenstein v. Rogers, 31 S.W.2d 792, 326 Mo. 468—Bell v. S. S. Kresge Co., App., 129 S.W.2d 932.

N.H.—Lenz v. Standard Oil Co. of New York, 186 A. 329, 88 N.H. 212.

N.J.—Lazzio v. Primo Silk Co., 177 A. 251, 114 N.J.Law 450, affirmed 180 A. 881, 115 N.J.Law 506—Coates v. Warren Hotel, 11 A.2d 436, 18 N.J.Misc. 122, award modified on other grounds 13 A.2d 787, 18 N.J.Misc. 363—Zito v. Ingersoll, 147 A. 400, 7 N.J.Misc. 893.

N.Y.—Welch v. Enright, 15 N.Y.S.2d 339, 257 App.Div. 685, appeal denied 18 N.Y.S.2d 746, 259 App.Div. 761.

Ohio.—Willett v. Rowekamp, 16 N.E.2d 797, 58 Ohio App. 465, affirmed 16 N.E.2d 457, 134 Ohio St. 285—O'Neill v. Dan Cohen Co., 198 N.E. 883, 50 Ohio App. 530.

Pa.—Shapiro v. Philadelphia Electric Co., 21 A.2d 26—Barrett v S. S. Kresge Co., 19 A.2d 502, 144 Pa.Super. 516—Consentino v. Union Paving Co., 173 A. 470, 113 Pa.Super. 295.

Tex.—Boone v. Henry, Civ.App., 151 S.W.2d 323—El Paso Electric Co. v. Cannon, Civ.App., 69 S.W.2d 532, reversed on other grounds, Com.App., 99 S.W.2d 907.

Va.—Mutual Life Ins. Co. of New York v. Grimsley, 168 S.E. 329, 160 Va. 325.

Wis.—Zurich General Accident & Liability Ins. Co. v. Industrial Commission, 233 N.W. 772, 203 Wis. 135—Bryden v. Priem, 209 N.W. 703, 190 Wis. 483—In re Emerson's Will, 198 N.W. 441, 183 Wis. 437.

23 C.J. p 147 notes 67, 68, p 148 notes 70–72.

96. U.S.—Home Life Ins. Co v Madere, C.C.A.Miss., 101 F.2d 292.

Ark.—Woodmen of the World v. Brown, 106 S.W.2d 591, 194 Ark. 219.

La.—Donovan v. Standard Oil Co. of Louisiana, App., 197 So. 320

Mich.—Janssen v. Mulder, 205 N.W. 159, 232 Mich. 183.

Miss.—Sovereign Camp, W. O. W., v. Slaon, 101 So. 195, 136 Miss. 549.

Neb.—Russo v. Swift & Co., 286 N.W. 291, 293, 136 Neb. 406, quoting **Corpus Juris.**

23 C.J. p 146 note 61.

Judicial notice has been taken:

(1) Of allergies.

Ark.—Frankes, Inc., v. Bennett, 146 S.W.2d 163.

N.Y.—Cleary v. John M. Maris Co., 19 N.Y.S.2d 38, 173 Misc. 954.

(2) Of angina pectoris.—Liberty Nat. Life Ins. Co. v. Tellis, 146 So. 616, 226 Ala. 283.

(3) Of arteriosclerosis.—Ætna Life Ins. Co of Hartford, Conn., v. Kelley, C.C.A.Mo., 70 F.2d 589, 93 A.L.R. 471—Order of the United Commercial Travelers of America v. Nicholson, C.C.A.N.Y., 9 F.2d 7.

(4) Of cancer.

Ala.—Champion v. Life & Casualty Ins. Co. of Tennessee, 141 So. 363, 25 Ala.App. 101.

R.I.—Prudential Ins. Co. of America v. Tanenbaum, 167 A. 147, 53 R.I. 355.

(5) Of colds.

U.S.—Willey v. Alaska Packers' Ass'n, C.C.A.Cal., 18 F.2d 8, affirming, D.C., 9 F.2d 937.

Okl.—Oklahoma Natural Gas Co. v. Graham, 111 P.2d 173.

(6) Of the danger of pus infection.—Travelers' Ins. Co. v. Plaster, 98 So. 909, 210 Ala. 607.

(7) Of pneumonia.—Rinehart v. F. M. Stamper Co., 55 S.W.2d 729, 227 Mo.App. 653.

(8) Of rabies.—Carmen v. Eli Lilly & Co., Ind.App., 32 N.E.2d 729.

(9) Of smallpox.—Booth v. Board of Education of Fort Worth Independent School Dist., Tex.Civ.App., 70 S.W.2d 350.

(10) That in early stages silicosis is difficult to detect.—Moffett v. Harbison-Walker Refractories Co., 14 A.2d 111, 339 Pa. 112.

(11) Other diseases.

Ky.—Equitable Life Assur. Soc. of U. S. v. Burns, 71 S.W.2d 1009, 254 Ky. 487.

Mo.—Childers v. National Life & Accident Ins. Co., App., 37 S.W.2d 490.

23 C.J. p 147 note 66.

97. Ga.—McCrary v. City of Rome, 115 S.E. 283, 29 Ga.App. 384.

Ky.—American Rolling Mill Co. v. Pack, 128 S.W.2d 187, 278 Ky. 175.

La.—Hill v. Louisiana Coca-Cola Bottling Co., App., 170 So. 45.

Neb.—Russo v. Swift & Co., 286 N.W. 291, 293, 136 Neb. 406, quoting **Corpus Juris.**

N.J.—Bobertz v. Hillside Tp., 19 A.2d 801, 126 N.J.Law 416, affirming 15 A.2d 796, 125 N.J.Law 321, affirming 14 A.2d 495, 18 N.J.Misc. 399, reversing 9 A.2d 689, 17 N.J.Misc. 396.

N.M.—Stevenson v. Lee Moor Contracting Co., 115 P.2d 342.

Pa.—Russell v. Scott Paper Co., 13 A.2d 81, 140 Pa.Super. 84.

Tex.—American General Ins. Co. v. Webster, Civ.App., 118 S.W.2d 1082, error dismissed.

Wis.—Universal Granite Quarries Co. v. Industrial Commission, 272 N.W. 863, 224 Wis. 680.

23 C.J. p 146 note 62.

Hernia

(1) It is well-known that hernia may be produced from many causes. Straining and heavy lifting are common causes, but severe coughing, sudden falls, and any violent physical action also may bring about conditions terminating in hernia.—Capers v. Arkansas Natural Gas Corporation, La.App., 195 So. 618.

(2) It is a matter of common knowledge that thousands of men suffer from inguinal hernia, and that many of them are able to point to the time and place where it developed and the physical strain or exertion which occasioned it, but yet were never prostrated by it.—Buncle v. Sioux City Stockyards Co., 185 N.W. 139, 192 Iowa 555.

(3) Other facts relating to hernia see 23 C.J. p 146 note 62 [g].

Waste and refuse

(1) The courts take judicial notice of the fact that sewers preserve the health of the residents of a city and elevate their moral tone, and thereby encourage right living.—McMurry v. Kansas City, 223 S.W. 615, 283 Mo. 479.

(2) The court will take judicial notice that the removal of refuse from homes of dwellers in a village will promote sanitary conditions.—Lyman v. Village of Potsdam, 127 N.E. 312,

cures therefor;[98] of well-known facts relating to emotional or mental disturbances;[99] of the nature and effect of injuries, diseases, and physical defects;[1] of the character of particular diseases as be-

228 N.Y. 398, reversing 169 N.Y.S. 1103, 183 App.Div. 910.

(3) Other facts see 23 C.J. p 146 note 62 [a].

Water and drinking utensils

(1) It is a matter of common knowledge that impure milk and uncleanliness generally, if permitted at public drinking fountains, would be a fruitful source of disease.—Kirby v. City of Paragould, 251 S.W. 374, 159 Ark. 29.

(2) Other facts see 23 C.J. p 146 note 62 [b].

Water

That water can serve as a carrier of disease germs to one drinking it is a matter within judicial notice, but what the conditions essential to the destruction of such germs in water of a flowing stream may be is not.—State v. Heller, 196 A. 337, 123 Conn. 492, appeal dismissed Heller v. State of Connecticut, 58 S.Ct. 765, 303 U.S. 627, 82 L.Ed. 1088.

98. U.S.—U. S. v. Ivey, C.C.A.Okl., 64 F.2d 653.
Miss.—New Amsterdam Casualty Co. v. Perryman, 140 So. 342, 162 Miss. 864.
Neb.—Russo v. Swift & Co., 286 N.W. 291, 293, 136 Neb. 406, quoting **Corpus Juris.**
Pa.—Cooper v. Metropolitan Life Ins. Co., 186 A. 125, 323 Pa. 295, 111 A.L.R. 598.

Diabetes

(1) Judicial notice has been taken that since the discovery and general use of insulin, diabetes is not necessarily permanently disabling.—U. S. v. Elmore, C.C.A.Fla., 68 F.2d 551.

(2) On the other hand it has also been held that the court would not assume as a matter of common knowledge, without competent medical evidence to that effect, that diabetes is a progressive, incurable disease.—Poignee v. John Hancock Mut. Life Ins. Co., Mo.App., 147 S.W.2d 677.

Vaccination

Facts of common knowledge relating to vaccination will be judicially noticed.
Mass.—Spofford v. Carlton, 131 N.E. 314, 238 Mass. 528.
Tex.—Booth v. Board of Education of Fort Worth Independent School Dist., Civ.App., 70 S.W.2d 350.
23 C.J. p 148 notes 79, 80.

99. U.S.—New York Life Ins. Co. v. Doerksen, C.C.A.Kan., 75 F.2d 96—Hardy-Burlingham Mining Co. v. Baker, C.C.A.Ky., 10 F.2d 277.
Cal.—Drummey v. State Board of Funeral Directors and Embalmers, 87 P.2d 848, 13 Cal.2d 75—Laubscher v. Blake, 46 P.2d 836, 7 Cal.App.2d 376.
Colo.—National Lumber & Creosoting Co. v. Kelly, 75 P.2d 144, 101 Colo. 535.
Iowa.—Rastede v. Chicago, St. P., M. & O. Ry. Co., 212 N.W. 751, 203 Iowa 430—Waters v. Waters, 207 N.W. 598, 201 Iowa 586.
La.—In re Corbin, 175 So. 636, 187 La. 968—Landry v. Landry, 130 So. 866, 171 La. 280—Verret v. Koelmel, 110 So. 421, 162 La. 277.
Me.—Appeal of Martin, 179 A. 655, 133 Me. 422.
Md.—Mecutchen v. Gigous, 132 A. 425, 150 Md. 79.
N.Y.—In re Lindsay's Estate, 241 N.Y.S. 513, 136 Misc. 555, affirmed 254 N.Y.S. 921, 234 App.Div. 841—Sleicher v. Sleicher, 228 N.Y.S. 711, reversed on other grounds 231 N.Y.S. 538, 224 App.Div. 529, reversed on other grounds 167 N.E. 501, 251 N.Y. 366.
Tenn.—Colsher v. Tennessee Electric Power Co., 84 S.W.2d 117, 19 Tenn. App. 166.
Tex.—Sherman v. State Board of Dental Examiners, Civ.App., 116 S.W.2d 843, error refused.
Vt.—Souther v. Souther, 151 A. 504, 103 Vt. 48.

Admission of insanity

It is common knowledge that insane persons are usually the last to admit fact of insanity.—Cornwell v. Cornwell, App.D.C., 118 F.2d 396.

Cruelty

It is common knowledge that some cruel people are not insane, that some insane people are not cruel, and that some insane people are cruel.—Pfuelb v. Pfuelb, 122 S.W.2d 128, 275 Ky. 588.

Need for medical care

It is common knowledge that many persons think they need medical attention when in fact they do not.—Lowman v. Amphitheatre School Dist. No. 10, Ariz., 109 P.2d 617.

Subsequent sanity

It is well-known that an insane person may often become sane at a later time.—In re Cornell, 18 A.2d 151, 111 Vt. 454—23 C.J. p 147 note 63 [f].

Suicide

(1) It is matter of common knowledge that persons commit suicide notwithstanding abundant reasons to be satisfied with their lot in life.—Burkett v. New York Life Ins. Co., C.C.A.Miss., 56 F.2d 105.

(2) It is common knowledge that sane persons do not ordinarily kill themselves.—Fidelity & Casualty Co. of New York v. Driver, C.C.A.Ga., 79 F.2d 713—Travelers' Ins. Co. v. Wilkes, C.C.A.Fla., 76 F.2d 701, certiorari denied Hirsig v. Travelers' Ins. Co., 56 S.Ct. 120, 296 U.S. 604, 80 L.Ed. 428.

(3) It is matter of common knowledge that all periodical drunkards do not intend when in that condition to commit suicide.—Young v. Travelers' Ins. Co., C.C.A.Okl., 68 F.2d 83, reversing, D.C., 2 F.Supp. 624.

(4) Other facts relating to suicides.—Brotherhood of Maintenance of Way Employees v. Page, 123 S.W.2d 536, 197 Ark. 498.

1. U.S.—Yellow Cab Co. v. Keane, C.C.A.Ill., 93 F.2d 290—Dobbins v. U. S., C.C.A.N.M., 91 F.2d 78—Stewart v. American Life Ins. Co., C.C.A.Kan., 89 F.2d 743—U. S. v. Martin, C.C.A.Kan., 80 F.2d 460—U. S. v. Kerr, C.C.A.Or., 61 F.2d 800—Niemczewski v. U. S., D.C.Me., 55 F.2d 728—New York Life Ins. Co. v. Alman, C.C.A.Ala., 22 F.2d 98, certiorari denied Alman v. New York Life Ins. Co., 48 S.Ct. 433, 277 U.S. 586, 72 L.Ed. 1000—Birdsell v. U. S., D.C.Colo., 4 F.Supp. 140.
Ariz.—Sovereign Camp, W. O. W. v. Daniel, 62 P.2d 1144, 48 Ariz. 479.
Ark.—Missouri Pacific Transp. Co. v. Sharp, 108 S.W.2d 579, 194 Ark. 405.
Cal.—Frenzer v. Mutual Ben. Health & Accident Ass'n, 81 P.2d 197, 27 Cal.App.2d 406—Wires v. Litle, 80 P.2d 1010, 27 Cal.App.2d 240, hearing denied 82 P.2d 388, 27 Cal.App.2d 240—Lamborn v. Lamborn, 251 P. 943, 80 Cal.App. 494.
Conn.—Toth v. Perry, 182 A. 464, 120 Conn. 680.
Ill.—Rittler v. Industrial Commission, 184 N.E. 654, 351 Ill. 338.
Ind.—Syracuse Cabinet Co. v. Leedy, 167 N.E. 149, 89 Ind.App. 518.
Iowa.—Gebhardt v. McQuillen, 297 N.W. 301.
Ky.—Elcomb Coal Co. v. Gray's Adm'x, 115 S.W.2d 1056, 273 Ky. 230—Mutual Life Ins. Co. of New York v. Dause, 76 S.W.2d 233, 256 Ky. 448—Olson v. Triplett, 75 S.W.2d 366, 255 Ky. 724—Equitable Life Assur. Soc. of U. S. v. Burns, 71 S.W.2d 1009, 254 Ky. 487—Louisville & N. R. Co. v. Turner, 292 S.W. 758, 219 Ky. 92.
La.—Phillips v. Yazoo & M. V. R. Co., App., 183 So. 43—Marler v. Industrial Lumber Co., App., 155 So. 266.
Me.—Guthrie v. Mowry, 184 A. 895, 134 Me. 256—Foster v. Congress Square Hotel Co., 145 A. 400, 128 Me. 50, 67 A.L.R. 239.
Md.—Prudential Ins. Co. of America v. Brookman, 175 A. 838, 167 Md. 616.
Mich.—Kubiak v. Briggs Mfg. Co., 282 N.W. 427, 286 Mich. 329.

ing material to insurance risk;[2] the use of intoxicating liquors;[3] of the effects of and of facts relating to dangerous situations, accidents, and accidental injuries.[4] On the other hand, judicial notice

Minn.—Plotke v. Metropolitan Life Ins. Co., 299 N.W. 216.
Mo.—Hennings v. Hallar, 149 S.W.2d 338—Conn v. Chestnut Street Realty Co., App., 133 S.W.2d 1056—Boillot v. Income Guaranty Co., 102 S.W.2d 132, 231 Mo.App. 531.
Mont.—Cacic v. Slovenska Narodna Podporna Jednota of Chicago, Ill., 59 P.2d 910, 102 Mont. 438.
N.Y.—Wolfson v. Metropolitan Life Ins. Co., 28 N.Y.S.2d 490, 262 App. Div. 886—Welch v. Enright, 15 N.Y.S.2d 339, 257 App.Div. 685, appeal denied 18 N.Y.S.2d 746, 259 App. Div. 761—In re Gardiner's Will, 227 N.Y.S. 550, 131 Misc. 874.
Pa.—Consona v. Coulborn & Co., 158 A. 300, 104 Pa.Super. 170.
S.C.—Smoak v. Southeastern Life Ins. Co., 179 S.E. 56, 175 S.C. 324.
Tex.—Roland v. Employers' Casualty Co., Civ.App., 290 S.W. 895, affirmed Employers Casualty Co. v. Roland, Com.App., 1 S.W.2d 568—Dohman v. Texas Employers' Ins. Ass'n, Civ.App., 285 S.W. 848.
Utah.—Hurley v. Town of Bingham, 228 P. 213, 63 Utah 589—North Beck Mining Co. v. Industrial Commission of Utah, 200 P. 111, 58 Utah 486.
Va.—Travelers Ins. Co. v. Brinkley, 184 S.E. 225, 166 Va. 147.
23 C.J. p 147 note 63, p 148 note 82.

Judicial notice may be taken:

(1) Of facts relating to broken bones.

Ark.—Missouri Pacific Transp. Co. v. Simon, 135 S.W.2d 336, 199 Ark. 289.
Cal.—Winters v. Yamaguchi, 97 P.2d 833, 36 Cal.App.2d 328—Hendricks v. Industrial Accident Commission of California, 78 P.2d 189, 25 Cal.App.2d 534.
La.—Thornton v. Mercer, App., 199 So. 407.
Or.—Hamilton v. Finch, 109 P.2d 852, rehearing denied 111 P.2d 81.
Vt.—Goldberg v. Gintoff, 20 A.2d 114, 112 Vt. 43.

(2) That blood poisoning not infrequently follows cuts.—Mandles v. Guardian Life Ins. Co. of America, D.C.Colo., 32 F.Supp. 619, affirmed, C.C.A., 115 F.2d 994.

(3) That persons suffering the loss of an arm or leg may follow some occupations.

U.S.—Miller v. U. S., C.C.A.Ga., 71 F.2d 361, certiorari granted 55 S.Ct. 212, 293 U.S. 551, 79 L.Ed. 654, affirmed 55 S.Ct. 440, 294 U.S. 435, 79 L.Ed. 977, rehearing denied 55 S.Ct. 635, 294 U.S. 734, 79 L.Ed. 1262—Metropolitan Life Ins. Co. v. Foster, C.C.A.Ga., 67 F.2d 264—U. S. v. Ivey, C.C.A.Okl., 64 F.2d 653—U. S. v. Mayfield, C.C.A.Okl., 64 F.2d 214.
Ala.—Equitable Life Assur. Soc. of U. S. v. Davis, 164 So. 86, 231 Ala. 261.
Ohio.—Mosher v. Equitable Life Assur. Soc. of U. S., 14 N.E.2d 413, 57 Ohio App. 435.

(4) That severe bodily injury causes pain.

Idaho.—Pierstorff v. Gray's Auto Shop, 74 P.2d 171, 58 Idaho 438
Vt.—Goldberg v. Gintoff, 20 A.2d 114, 112 Vt. 43—Bolton v. Ovitt, 67 A. 881, 80 Vt. 362.

(5) Other matters.

Ala.—Copeland v. Central of Georgia Ry. Co., 105 So. 809, 213 Ala. 620.
N.Y.—Muzio v. Metropolitan Life Ins. Co., 291 N.Y.S. 955, 249 App. Div. 177.

2. Pa.—Engle v. National Council, Junior Order United American Mechanics of U. S. of North America, Beneficiary Degree, 1 A.2d 798, 133 Pa.Super. 149.

Particular diseases

(1) Cancer.—All States Life Ins. Co. v. Johnson, 194 So. 877, 239 Ala. 392—Metropolitan Life Ins. Co. v. Chambers, 146 So. 524, 226 Ala. 192—Miller v. Metropolitan Life Ins. Co., 106 So. 335, 214 Ala. 4.

(2) Pernicious anemia.—Roush v. Metropolitan Life Ins. Co., 176 A. 809, 116 Pa.Super. 162.

(3) For other diseases see particular diseases discussed infra notes 6–22.

On the other hand, it has been held that courts take no judicial knowledge of materiality of insured's misrepresentations regarding his having syphilis, cirrhosis of liver, splenomegalia, or œdema of lungs on or before date of life policies.—Metropolitan Life Ins. Co. v. Chambers, 146 So. 524, 226 Ala. 192.

3. U.S.—Commercial Casualty Ins. Co. v. Stimson, C.C.A.Mich., 111 F.2d 63, certiorari denied 61 S.Ct. 25—In re Riverbank Canning Co., Cust. & Pat.App., 95 F.2d 327—Order of United Commercial Travelers of America v. Tripp, C.C.A.Colo., 63 F.2d 37.
Ark.—Sovereign Camp, W. O. W., v. Sams, 108 S.W.2d 1089, 194 Ark. 557.
Cal.—Johnston v. Brewer, 105 P.2d 365, 40 Cal.App.2d 583.
Ill.—Harrington v. Travis, 182 N.E. 769, 349 Ill. 606.
Ky.—Rennolds' Adm'x v. Waggener, 111 S.W.2d 647, 271 Ky. 300—Sanders v. Lakes, 109 S.W.2d 36, 270 Ky. 98—Toppass v. Perkins' Adm'x, 104 S.W.2d 423, 268 Ky. 186—W. F. Robinson & Son v. Jones, 72 S.W.2d 16, 254 Ky. 637—Brady v. B. & B. Ice Co., 45 S.W.2d 1051, 242 Ky. 138.
La.—Emerson v. Shirley, 175 So. 909, 188 La. 196—Leland v. Leland, 154 So. 443, 179 La. 533.
Mich.—Hemington v. Hemington, 190 N.W. 683, 221 Mich. 206.
Tex.—Peveto v. Smith, Civ.App., 113 S.W.2d 216, modified on other grounds 133 S.W.2d 572, 134 Tex. 308—Pacific Greyhound Lines v. Vermillion, Civ.App., 87 S.W.2d 312, error dismissed.
Va.—Crowell v. Duncan, 134 S.E. 576.

4. U.S.—Kennedy v. Maryland Casualty Co. of Baltimore, Md., D.C. La., 26 F.2d 501—Dierks Lumber & Coal Co. v. Brown, C.C.A.Ark., 19 F.2d 732—Kitsap County Transp. Co. v. Harvey, C.C.A.Wash., 15 F.2d 166, 48 A.L.R. 1420.
Ark.—Life & Casualty Ins. Co. of Tennessee v. De Arman, 90 S.W.2d 206, 192 Ark. 11.
Cal.—Rafferty v. City of Marysville, 280 P. 118, 207 Cal. 657—Hendricks v. Industrial Accident Commission of California, 78 P.2d 189, 25 Cal.App.2d 534—Denman v. City of Pasadena, 282 P. 820, 101 Cal.App. 769.
Conn.—Ritter v. City of Shelton, 135 A. 535, 105 Conn. 447.
Ky.—City of Pikeville v. Williams, 280 S.W. 467, 213 Ky. 52.
Mass.—Ray v. Western Union Telegraph Co., 154 N.E. 853, 258 Mass. 303.
Mo.—Thompson v. Quincy, O. & K. C. R. Co., 18 S.W.2d 401—Mick v. John R. Thompson Co., App., 77 S.W.2d 470.
Mont.—Toole v. Paurine Parisian Dye House, 39 P.2d 965, 98 Mont. 191.
N.J.—Miller v. Borough of Belmar, 129 A. 761, 101 N.J.Law 481.
N.Y.—Rohlfs v. Weil, 279 N.Y.S. 642, 244 App.Div. 467, affirmed 3 N.E.2d 588, 271 N.Y. 444—Schabel v. Onseyga Realty Co., 251 N.Y.S. 280, 233 App.Div. 208.
Ohio.—Arnold v. Ohio Gas & Electric Co., 162 N.E. 765, 28 Ohio App. 434.
Or.—Spicer v. Benefit Ass'n of Railway Employees, 17 P.2d 1107, 142 Or. 574.
Pa.—Schroeffel v. Great Atlantic & Pacific Tea Co., 200 A. 694, 132 Pa.Super. 233.
Vt.—Amidon v. Twin State Gas & Electric Co., 147 A. 694, 102 Vt. 267.
Va.—Virginia Electric & Power Co. v. Walker, 148 S.E. 694, 152 Va. 883—R. G. Lassiter & Co. v. Grimstead, 132 S.E. 709, 114 Va. 773.
Wis.—Hamus v. Weber, 226 N.W. 392, 199 Wis. 320—Smith v. Clayton Const. Co., 206 N.W. 67, 189

will not be taken of facts relating to human life, health, and faculties which are not matters of common knowledge, which facts must be shown by expert witnesses.[5]

Anthrax. While it is a matter of general knowledge that anthrax is primarily a disease of animals, such as sheep, which may be transmitted to men when handling infected animal materials, like wool,[6] a court or commission is not justified in taking judicial notice that hides such as those in question usually or frequently contain anthrax germs, and that a person working about them with an open wound is likely to receive the germ and die of anthrax.[7]

Period of gestation. Judicial notice will be taken of the ordinary period of gestation,[8] and of the fact that such period is subject to many exceptions.[9] Neither the mean nor the extremes of the period of gestation, however, is so commonly and precisely known that the court may take judicial notice of them.[10]

Tuberculosis. Judicial notice may be taken of facts of common knowledge relating to tuberculosis in humans,[11] such as the existence of tests which will disclose the existence of the infection,[12] that the disease is curable while in its incipient stage,[13]

Wis. 91—Kocha v. Union Transfer Co., 205 N.W. 923, 188 Wis. 133.
Dangerous character of employment or operations see infra § 85.

Conversely, judicial notice will not be taken of facts relating to accidental injuries, or places of danger likely to cause injury, where such facts are not a matter of common knowledge.
Cal.—Yore v. Pacific Gas & Electric Co., 277 P. 878, 99 Cal.App. 81.
Ohio.—Kroger Grocery & Baking Co. v. McCune, 188 N.E. 568, 46 Ohio App. 291.
Pa.—Finch v. Horn & Hardart Baking Co., 94 Pa.Super. 599.

5. Ala.—Harris v. State, 177 So. 311, 28 Ala.App. 23.
Cal.—Burr v. Policy Holders' Life Ins. Ass'n, 17 P.2d 1014, 128 Cal. App. 563—Southern California Edison Co. v. Industrial Accident Commission of State of California, 243 P. 455, 457, 75 Cal.App. 709, citing **Corpus Juris.**
Iowa.—Carey v. Davis, 180 N.W. 889, 190 Iowa 720, 12 A.L.R. 904.
Ky.—Ohio County Drug Co. v. Howard, 256 S.W. 705, 201 Ky. 346, 31 A.L.R. 1355.
Mass.—Halnan v. New England Telephone & Telegraph Co., 5 N.E.2d 209, 296 Mass. 219—Foss v. Mutual Life Ins. Co. of New York, 141 N.E. 498, 247 Mass. 10—Smardon v. Metropolitan Life Ins. Co., 137 N.E. 742 243 Mass. 599.
Mo.—Smith v. Harbison-Walker Refractories Co., 100 S.W.2d 909, 340 Mo. 389—Wolf v. Mallinckrodt Chemical Works, 81 S.W.2d 323, 336 Mo. 746—Smallwood v. St. Louis-San Francisco Ry. Co., 263 S.W. 550, 217 Mo.App. 208—Koprivica v. Standard Acc. Ins. Co., App., 218 S.W. 689.
N.H.—L'Esperance v. Sherburne, 155 A. 203, 85 N.H. 103.
23 C.J. p 148 notes 81, 83, 84.

"Hibbs" treatment

Industrial commission cannot take judicial notice of what is involved in "Hibbs" or "Albee" treatment.—Southern California Edison Co. v. Industrial Accident Commission of State of California, 243 P. 455, 75 Cal.App. 709.

Pathology of disease

Tenn.—Standard Life Ins. Co of the South v. Strong, 89 S.W.2d 367, 19 Tenn.App. 404.

Judicial notice cannot be taken of increase of insurance risk:

(1) By attack of appendicitis.—Sovereign Camp, W. O. W., v. Rowe, 143 So. 171, 225 Ala. 336.

(2) By cardio-nephritis.—Independent Life Ins. Co. v. Carroll, 130 So. 402, 222 Ala. 34.

6. Pa.—McCauley v. Imperial Woolen Co., 104 A. 617, 261 Pa. 312.

7. N.Y.—Eldridge v. Endicott, Johnson & Co., 126 N.E. 254, 228 N.Y. 21, 20 A.L.R. 1, reversing 177 N.Y.S. 863, 189 App.Div. 53.

8. Del.—Equitable Trust Co. v. McComb, 168 A. 203, 206, 19 Del.Ch. 387, citing **Corpus Juris.**
Ky.—Cronin v. Cronin, 27 S.W.2d 950, 234 Ky. 207.
Mass.—Commonwealth v. Kitchen, 11 N.E.2d 482, 299 Mass. 7.
N.Y.—In re Holthausen's Will, 26 N.Y.S.2d 140, 175 Misc. 1022—Milone v. Milone, 290 N.Y.S. 863, 160 Misc. 830—In re Wells' Will, 221 N.Y.S. 714, 129 Misc. 447.
23 C.J. p 146 note 54.

9. Ala.—McDaniel v. State, 135 So. 421, 423, 223 Ala. 363, citing **Corpus Juris.**
23 C.J. p 148 note 95.

10. Md.—Harward v. Harward, 196 A. 318, 173 Md. 339.
23 C.J. p 148 note 94.

Possible extent

The time to which the period of gestation possibly might extend is not a matter of common knowledge.—Commonwealth v. Kitchen, 11 N.E.2d 482, 299 Mass. 7.

11. Ariz.—Sovereign Camp, W. O. W. v. Daniel, 62 P.2d 1144, 48 Ariz. 479—Security Ben. Ass'n v. Small, 272 P. 647, 34 Ariz. 458.
Mo.—Smiley v. John Hancock Mut. Life Ins. Co. of Boston, Mass., App., 52 S.W.2d 12.
Tex.—Texas Employers' Ins. Ass'n v. Barron, Civ.App., 21 S.W.2d 78, reversed on other grounds Barron v. Texas Employers' Ins. Ass'n, Com.App., 36 S.W.2d 464.

Character of pulmonary tuberculosis

U.S.—U. S. v. McIver, C.C.A.N.C., 77 F.2d 208.

Characteristics

The court will take judicial notice of the infectious and hereditary characteristics of tuberculosis.—Sobol v. Sobol, 150 N.Y.S. 248, 88 Misc. 277.

Insurance risk

It is common knowledge that tuberculosis is a disease of such character as to be material to an insurance risk.
Ala.—New York Life Ins. Co. v. Crumpton, 160 So. 332, 230 Ala. 147—Metropolitan Life Ins. Co. v. Chambers, 146 So. 524, 226 Ala. 192—Independent Life Ins. Co. v. Seale, 121 So. 714, 219 Ala. 197—Southern Life & Health Ins. Co. v. Morgan, 113 So. 540, 216 Ala. 529—Metropolitan Life Ins. Co. v. Hyche, 108 So. 40, 214 Ala. 447—Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees v. Riggins, 107 So. 44, 214 Ala. 79, reversing 107 So. 43, 21 Ala.App. 249—Booker T. Washington Burial Ins. Co. v. Williams, 173 So. 269, 27 Ala.App. 393—National Life & Accident Ins. Co. v. Cummings, 172 So. 353, 27 Ala.App. 355.
Wis.—Monahan v. Mutual Life Ins. Co. of New York, 212 N.W. 269, 192 Wis. 102.

12. U.S.—Peoria Life Ins. Co. v. Smith, D.C.Mich., 47 F.2d 279.

13. U.S.—U. S. v. Dupre, C.C.A.La., 110 F.2d 315—U. S. v. Crew, C.C.A.La., 84 F.2d 869—U. S. v. Johnson, C.C.A.Ala., 81 F.2d 867—U. S. v. Little, C.C.A.La., 77 F.2d 420—U. S. v. Walker, C.C.A.La., 77 F.2d 415, certiorari denied Walker v. U. S., 56 S.Ct. 132, 296 U.S. 612, 80 L.Ed.

and that many cases of tuberculosis are arrested, and that the patient thereafter can do light work.[14]

Venereal diseases. Judicial notice may be taken of venereal diseases,[15] and of the general course of such diseases.[16] The courts judicially know that syphilis is a serious disease,[17] and that it may be contracted by a person entirely innocent of sexual commerce with one tainted therewith;[18] but they do not judicially know that in every case it increases the risk of loss within the law of insurance,[19] or that a nervous condition is a characteristic of the disease.[20] The courts decline judicially to know the possible effects of a venereal disease,[21] or that gonococcus infection is not communicable except by actual contact.[22]

Vision. Judicial notice may be taken of facts of common knowledge relating to human vision,[23] but judicial notice will not be taken of such facts which are not matters of common knowledge.[24]

§ 80. Sentiments, Sensibilities, Capacities, Habits, and Propensities

Judicial notice may be taken of facts of common knowledge relating to the sentiments, sensibilities, habits, and propensities of people.

Courts will take judicial notice of human sentiments[25] and sensibilities,[26] and courts will take ju-

434—U. S. v. Sumner, C.C.A.Ky., 69 F.2d 770—Walters v. U. S., C.C.A. Tex., 63 F.2d 299—Andrews v. U. S., C.C.A.Ark., 63 F.2d 184—U. S. v. McCreary, C.C.A.Or., 61 F.2d 804—U. S. v. Rentfrow, C.C.A.Okl., 60 F.2d 488—Eggen v. U. S., C.C.A. Minn., 58 F.2d 616—Hirt v. U. S., C.C.A.N.M., 56 F.2d 80—Watts v. U. S., D.C.Miss., 24 F.Supp. 969—Moore v. U. S., D.C.Pa., 19 F.Supp. 921—Elliott v. U. S., D.C.Ky., 13 F.Supp. 132—Parrigan v. U. S., D.C.Ky., 6 F.Supp. 333—Smith v. U. S., D.C.Ky., 5 F.Supp. 475.

14. U.S.—U. S. v. Messinger, C.C.A. W.Va., 68 F.2d 234.

15. N.Y.—Oppenheim v. Kridel, 140 N.E. 227, 236 N.Y. 156, 28 A.L.R. 320, modifying 198 N.Y.S. 157, 204 App.Div. 305, motion denied 142 N.E. 261, 236 N.Y. 507, and reargument denied 142 N.E. 317, 236 N.Y. 643.

16. N.J.—Manion v. Eder Erecting Co., 187 A. 40, 14 N.J.Misc. 741.

Permanent disability

Court takes judicial notice that syphilis, even when it results in general paralysis, does not necessarily result in permanent and total disability from the time of infection.—U. S. v. Seattle Title Trust Co., C.C.A.Wash., 53 F.2d 435.

17. Ala.—Metropolitan L. Ins. Co. v. Goodman, 65 So. 449, 10 Ala. App. 446.

18. Miss.—Morris v. City of Columbia, 186 So. 292, 184 Miss. 342.
N.Y.—People v. Waldo, 143 N.Y.S. 818, 158 App.Div. 936—Ritter v. Equitable Life Assur. Soc. of U. S., 265 N.Y.S. 341, 148 Misc. 120.
Wash.—In re Gifford, 74 P.2d 475, 192 Wash. 562, 114 A.L.R. 348.

19. Ala.—National Life & Accident Ins. Co. v. Logan, 153 So. 868, 228 Ala. 409—Ex parte Mutual Life Ins. Co. of New York, 149 So. 875, 227 Ala. 276, denying certiorari Mutual Life Ins. Co. of New York v. Mankin, 149 So. 873, 25 Ala.App. 501—National Life & Accident Ins. Co. v. Baker, 147 So. 427, 226 Ala. 501—Louisiana State Life Ins. Co. v. Phillips, 135 So. 841, 223 Ala. 5—Life Ins. Co. of Virginia v. Mann, 186 So. 583, 28 Ala.App. 425, certiorari denied 186 So. 586, 237 Ala. 253—Metropolitan L. Ins. Co. v. Goodman, 65 So. 449, 10 Ala. App. 446.

20. Ala.—St. Louis, etc., R. Co. v. Savage, 50 So. 113, 163 Ala. 55.

21. Ala.—Empire Impr. Co. v. Lynch, 62 So. 16, 181 Ala. 473.

22. Cal.—Ex parte Johnston, 180 P. 644, 40 Cal.App. 242.

23. Conn.—Baldwin v. City of Norwalk, 112 A. 660, 96 Conn. 1.
Ky.—Chesapeake & O. Ry. Co. v. Hayes' Adm'r, 128 S.W.2d 763, 278 Ky. 461.
La.—Wink v. Thompson, App., 2 So. 2d 693.
Va.—Ferguson v. Virginia Tractor Co., 197 S.E. 438, 170 Va. 486.

Judicial notice may be taken:

(1) Of difficulty or inability to see through glass obscured by water or moisture.
Cal.—Phillips v. Hobbs-Parson Co., 227 P. 622, 67 Cal.App. 199.
Iowa.—Gilliam v. Chicago, R. I. & P. Ry. Co., 222 N.W. 12, 206 Iowa 1291.

(2) That any person may lose either or both eyes.—Davis v. Christmas, Tex.Civ.App., 248 S.W. 126.

(3) That fogs are usually penetrable to the eye and that, although visibility may be low, if a motorist proceeds with due care, progress may be made through them with reasonable safety.—Rabenold v. Hutt, 283 N.W. 865, 226 Iowa 321.

(4) That nothing is more confusing to the vision than alternate lights and shadows.—Douville v. Northeastern Warehouse Co., 10 A.2d 394, 337 Pa. 188.

(5) That, when a person comes from a well lighted street into a darkened room, it requires some time for the eyes to become adjusted to the change in light conditions.—Johnson v. Mathews-Moran Amusement Co., Or., 102 P.2d 703.

(6) Other matters.
Ala.—Page v. Prudential Ins. Co. of America, 165 So. 388, 231 Ala. 405.
Cal.—Shelton v. Ackerman, 4 P.2d 598, 117 Cal.App. 679.
Conn.—Kerr v. Connecticut Co., 140 A. 751, 107 Conn. 304.
23 C.J. p 148 notes 97–3.

24. Mont.—Gordon v. Northern Pac. R. Co., 104 P. 679, 39 Mont. 571, 18 Ann.Cas. 583.
23 C.J. p 148 note 4, p 149 note 6.

Discrimination

Judicial notice cannot be taken that persons who have lost the sight of one eye are discriminated against in the matter of employment as drill press operators.—International Harvester Co. v. Industrial Commission, 147 N.W. 53, 157 Wis. 167, Ann.Cas. 1916B 330.

25. U.S.—Broad-Grace Arcade Corporation v. Bright, D.C.Va., 48 F.2d 348, affirmed 52 S.Ct. 137, 284 U.S. 588, 76 L.Ed. 507.
Ky.—Harden v. Harden, 230 S.W. 307, 191 Ky. 331, 17 A.L.R. 576.
Mo.—Howlett v. State Social Security Commission, App., 146 S.W.2d 94, certified to Howlett v. Social Security Commission, 149 S.W.2d 806.

Desire for decent burial

It is common knowledge that desire for decent burial is inherent and that many make great sacrifices for such purpose.—American Citizen's Labor Protective Inst. of Texas v. Wesley, Tex.Civ.App., 9 S.W.2d 498.

26. U.S.—Marrs v. City of Oxford, D.C.Kan., 24 F.2d 541, affirmed, C.C.A., 32 F.2d 134, 67 A.L.R. 1336, certiorari denied Ramsey v. City of Oxford, 50 S.Ct. 24, 280 U.S. 563, 74 L.Ed. 617, and Marrs v. City of Oxford, 50 S.Ct. 29, 280 U.S. 573, 74 L.Ed. 625—K. & L. Oil Co. v. Oklahoma City, D.C.Okl., 14 F.Supp. 492.
Fla.—Cook v. Lewis K. Liggett Co., 173 So. 159, 127 Fla. 369.

dicial notice of human capacities,[27] habits,[28] and propensities[29] at least in so far as they are matters

Miss.—Williams v. Montgomery, 186 So. 302, 184 Miss. 547.
N.Y.—Foy Productions v. Graves, 3 N.Y.S.2d 573, 253 App Div. 475, transferred, see 299 N.Y.S. 671, 164 Misc. 479, affirmed 15 N.E.2d 435, 278 N.Y. 498.
S.D.—Johnson v. Drysdale, 285 N.W. 301, 66 S.D. 436.
23 C.J. p 149 note 11.

Foreign wars

It is common knowledge that a vast majority of the people of the United States are opposed to the country's engaging in a war on foreign soil, and that a vast majority of the students attending some of the leading universities in the United States have gone on record as opposing war except in case the shores of the United States are invaded.—Santana v. Item Co., 189 So. 442, 192 La. 819.

Religious emotions

It is common knowledge that the religious emotions are easily aroused, and when aroused to the prejudice of a party the reason yields to such prejudice, and naturally prevents a jury from acting deliberately and fairly on the issues they must determine.—Ogodzinski v. Gara, 181 N. W. 227, 173 Wis. 371.

Response to calls for help

Willingness with which American people respond to calls for help is matter of common knowledge.—Reaves v. Catawba Mfg. & Electric Power Co., 174 S.E. 413, 206 N.C. 523.

Vivisection

(1) It is a matter of common knowledge that a large number of persons oppose vivisection.
U.S.—Old Colony Trust Co. v. Welch, D.C.Mass., 25 F.Supp. 45.
D.C.—Pennsylvania Co. for Insurance on Lives and Granting of Annuities v. Helvering, 66 F.2d 284, 62 App.D.C. 254.

(2) It is also matter of common knowledge that societies for purpose of vivisection have been established.—Pennsylvania Co. for Insurance on Lives and Granting of Annuities v. Helvering, supra.

27. Va.—Davis v. Alderson, 100 S. E. 541, 125 Va. 681.
23 C.J. p 150 notes 22, 23.

Judicial notice will be taken:

(1) Of decreased earning capacity in old age.—Letourneau v. Davidson, 188 N.W. 462, 218 Mich. 334.

(2) That experience is required to handle articles of great weight.—Evans v. Southern Wheel Co., Mo. App., 273 S.W. 749.

(3) Of difficulty of witnesses judging speed and distances, particularly at night.
D.C.—Washington Ry. & Electric Co. v. Stuart, 267 F. 632, 50 App.D.C. 74, certiorari denied 41 S.Ct. 63, 254 U.S. 649, 65 L.Ed. 456.
Mo.—O'Donnell v. Wells, 21 S.W.2d 762, 323 Mo. 1170—Finley v. Austin, App., 132 S.W.2d 1109.
N.H.—Legere v. New England Furniture Co., 200 A. 394, 89 N.H. 423, affirmed 1 A.2d 924, 89 N.H. 423—Clark v. Boston & Maine R. R., 182 A. 175, 87 N.H. 434.
Or.—Nyhart v. Oregon Stages, 268 P. 982, 126 Or. 105.
S.C.—Horne v. Southern Ry. Co., 197 S.E. 31, 186 S.C. 525, 116 A.L.R. 745.
Wash.—Jensen v. Culbert, 236 P. 101, 134 Wash. 599.
Wyo.—Merback v. Blanchard, 109 P. 2d 49, denying rehearing 105 P.2d 272.

(4) Of facts of common knowledge relating to the capabilities of witnesses.
Cal.—Ex parte Mooney, 73 P.2d 554, 10 Cal.2d 1, certiorari denied Mooney v. Smith, 59 S.Ct. 61, 305 U.S. 598, 83 L.Ed. 379—Globe Cotton Oil Mills v. Industrial Accident Commission, 221 P. 658, 64 Cal.App. 307.
Ky.—Herfurth v. Horine, 98 S.W.2d 21, 266 Ky. 19.
Mo.—McBride v. Mercantile-Commerce Bank & Trust Co., 48 S.W. 2d 922, 330 Mo. 259—Messer v. St. Louis-San Francisco Ry. Co., App., 274 S.W. 864.
N.J.—Cirillo v. United Engineers & Constructors, 3 A.2d 596, 121 N.J. Law 511, reversing 198 A. 768, 120 N.J.Law 225, reversing 185 A. 912, 14 N.J.Misc. 459—Wickham v. Monmouth Memorial Hospital, 162 A. 891, 10 N.J.Misc. 1086.
Pa.—McClellan v. Fox, 177 A. 823, 318 Pa. 433—Cameron v. Berger, 1 A.2d 529, 132 Pa.Super. 484, affirmed 7 A.2d 293, 336 Pa. 229.
S.C.—Lee v. Boykin, 103 S.E. 777, 114 S.C. 480, 11 A.L.R. 1328.
Tex.—Lyne v. Coon, Civ.App., 241 S. W. 569.

(5) That persons of immature years, or those whose wills are weakened by age or disease, are more easily duped by designing people than are mature persons in the enjoyment of normal health and vigor.
Ala.—Raia v. Raia, 108 So. 11, 214 Ala. 391.
Md.—Brown v. Scott, 117 A. 114, 140 Md. 258, 22 A.L.R. 810.

(6) That same person's handwriting at different times and on different occasions varies noticeably.
Mo.—Whetsel v. Forgey, 20 S.W.2d 523, 323 Mo. 681.
Tex.—Neilon v. Texas Trust & Security Co., Civ.App., 147 S.W.2d 321, error dismissed, judgment correct.

(7) Other facts.
Ark.—Everton Silica Sand Co. v. Hicks, 125 S.W.2d 793, 197 Ark. 980—Frauenthal & Schwartz v. Bank of El Paso, 280 S.W. 1001, 170 Ark. 322, 44 A.L.R. 871.
Cal.—Bellman v. San Francisco High School Dist., 81 P.2d 894, 11 Cal.2d 576—Sieck v. Hall, 34 P.2d 844, 139 Cal.App. 279.
Ind.—Keane v. Remy, 168 N.E. 10, 201 Ind. 286.
Ky.—Markendorf v. Friedman, 133 S. W.2d 516, 280 Ky. 484, 127 A.L.R. 416, appeal dismissed Friedman v. Markendorf, 60 S.Ct. 610, 309 U.S. 627, 84 L.Ed. 987.
Miss.—Harris v. Pounds, 187 So. 891, 185 Miss. 688—Messina v. New York Life Ins. Co., 161 So. 462, 173 Miss. 378—Miller v. Miller, 159 So. 112, 173 Miss. 44.
Pa.—Puhl v. Pennsylvania Public Utility Commission, 11 A.2d 508, 139 Pa.Super. 152.
Tex.—Fidelity & Casualty Co. of New York v. Harrison, Civ.App., 274 S.W. 1002.
Wis.—Canzoneri v. Heckert, 269 N. W. 716, 223 Wis. 25.

Judicial notice will not be taken that fifteen-year-old girl is incompetent to drive an automobile.—Perry v. Simeone, 239 P. 1056, 197 Cal. 132.

28. **Judicial notice may be taken:**

(1) That men generally try to compose their differences before going to court.—Wilkinson v. Phœnix Ry. Co. of Arizona, 236 P. 704, 28 Ariz. 216.

(2) That many people sleep with their windows up with the temperature lower than fifty degrees, and that they air their rooms before retiring.—Kraft v. West Hotel Co., Iowa, 185 N.W. 895.

(3) That most young men smoke cigarettes when at work.—Palmer v. Keene Forestry Ass'n, 112 A. 798, 80 N.H. 68, 13 A.L.R. 995.

(4) Other facts.
Ill.—A. J. Oosterbeek Motor Co. v. Joy, 268 Ill.App. 278.
Iowa.—State v. Hamilton, 204 N.W. 209, 200 Iowa 343.
N.H.—Kenney v. Wong Len, 128 A. 343, 81 N.H. 427.
N.J.—Coughlin v. Sullivan, 126 A. 177, 100 N.J.Law 42.
N.Y.—In re Erlanger's Estate, 259 N. Y.S. 610, 145 Misc. 1—Whitney v. Whitney Elevator & Warehouse Co., 200 N.Y.S. 792, 121 Misc. 461—Hood v. Pullman Co., 198 N.Y.S. 231, 120 Misc. 242.
Wis.—Henderson v. O'Leary, 187 N. W. 994, 177 Wis. 130, 24 A.L.R. 942.

29. Ark.—Whitaker v. Mitchell, 18 S.W.2d 1026, 179 Ark. 993.
Cal.—Allred v. Pioneer Truck Co., 176 P. 455, 179 Cal. 315—People

of common knowledge. Courts may also take judicial notice of human nature[30] and the incentives commonly operating on human conduct,[31] for human nature constitutes part of the evidence in every case.[32] In applying these rules, the court will take judicial notice of the habits of the people among whom it is held and their characteristics,[33] of the offensive character of a particular business or operation, where such is a matter of common knowledge,[34] and of other facts arising under the application of such rules;[35] but judicial notice will not be taken of such facts where they are not matters of common knowledge.[36]

Common belief. The court may take judicial knowledge of a common belief[37] of the people of

v. Gidaly, 93 P.2d 660, 35 Cal.App. 2d Supp. 758.
Ind.—National Biscuit Co. v. Roth, 146 N.E. 410, 83 Ind.App. 21.
Ky.—Mutual Life Ins. Co. of New York v. Louisville Trust Co., 269 S.W. 1014, 207 Ky. 654.
S.D.—H. C. Bay Co. v. Ridnour, 206 N.W. 463, 49 S.D. 27.

Horseplay

It is matter of common knowledge that horseplay of some kind is to be expected in groups of employees
Ind.—Chicago, I. & L. Ry. Co. v. Clendennin, 143 N.E. 303, 81 Ind. App. 323.
Tex.—Cassel v. U. S. Fidelity & Guaranty Co., 283 S.W. 127, 115 Tex. 371, 46 A.L.R. 1137, reversing U. S. Fidelity & Guaranty Co. v. Cassell, Civ.App., 243 S.W. 504.

30. Ky.—Kentucky Ass'n of Highway Contractors v. Williams, 280 S.W. 937, 213 Ky. 167, 45 A.L.R. 544.
La.—Tippett v. F. W. Woolworth Co., App., 3 So.2d 461—Keyhea v. Woodard-Walker Lumber Co., App., 147 So. 830.
R.I.—Greene v. Harris, 11 R.I. 5.
S.C.—Green v. City of Bennettsville, 15 S.E.2d 334, 197 S.C. 313.
Tex.—Texas Employers Ins. Ass'n v. Sparrow, Civ.App., 109 S.W.2d 1137, reversed on other grounds 133 S.W.2d 126, 134 Tex. 352.
Va.—Milligan v. Milligan, 133 S.E. 672, 145 Va. 184.
23 C.J. p 149 note 9.

Bias or prejudice

(1) Judicial notice will be taken of the well-known bias or prejudice of people, or of particular people.—Kuntz v. Spence, Tex.Com.App., 67 S.W.2d 254, reversing, Civ.App., 48 S.W.2d 413—23 C.J. p 149 note 9 [e].

(2) Accordingly, judicial notice has been taken of the prejudice of sailors in favor of their ship.—The Willowpool, D.C.N.Y., 12 F.Supp. 96, affirmed, C.C.A., John W. Higman & Co. v. The Willowpool, 86 F.2d 1002—The Horaisan Maru. D.C.N.Y., 5 F. Supp. 311, reversed, C.C.A., Yokohama Specie Bank v. Mitsui & Co., 73 F.2d 526, certiorari denied 55 S. Ct. 648, 295 U.S. 736, 79 L.Ed. 1684.

(3) It is likewise known that attorneys are reluctant to complain of the misconduct of their brethren.—State v. Kaufmann, 209 N.W. 417, 202 Iowa 157.

(4) It is common knowledge that possessor of prejudice or bias may be unconscious of his prejudice or bias—Williams v. Rodocker, Tex.Civ. App., 84 S.W.2d 556.

Instinct of self-preservation

(1) Judicial notice will be taken of the instinct of self-preservation.—Kirincich v. Standard Dredging Co., C.C.A.N.J., 112 F.2d 163, vacating, D.C., 27 F.Supp. 219—23 C.J. p 149 note 9 [c].

(2) The normal human being's love of life has also been judicially noticed.—Griffith v. Continental Casualty Co., 253 S.W. 1043, 299 Mo. 426—Gilpin v. Ætna Life Ins. Co., 132 S.W.2d 686, 234 Mo.App. 566.

31. U.S.—United States v. Wells, Ct.Cl., 51 S.Ct. 446, 283 U.S. 102, 75 L.Ed. 867—Worcester County Trust Co. v. U. S., D.C.Mass., 35 F.Supp. 970.
Del.—Affiliated Enterprises v. Waller, 5 A.2d 257, 1 Terry 28.
Mass.—Petition of Commonwealth-Atlantic Nat. Bank of Boston, 144 N.E. 443, 249 Mass. 440.
Miss.—Spengler v. Williams, 6 So. 613, 67 Miss. 1.
Mo.—State ex rel. Union Electric Light & Power Co. v. Public Service Commission, 62 S.W.2d 742, 747, 333 Mo. 426, citing **Corpus Juris.**
N.Y.—In re Katz's Estate, 239 N.Y. S. 722, 135 Misc. 861.
Wis.—In re Keenan's Will, 176 N.W. 857, 171 Wis. 94.

32. R.I.—Greene v. Harris, 11 R.I. 5.

33. Ga.—Wolfe v. Georgia R. & Electric Co., 58 S.E. 899, 2 Ga.App. 499.
23 C.J. p 149 notes 16–18.

Reading trust indenture

It is a matter of common knowledge that purchasers of debentures secured by trust mortgage seldom, if ever, examine terms of trust indenture.—Hazzard v. Chase Nat. Bank of City of New York, 287 N.Y. S. 541, 159 Misc. 57, affirmed 14 N.Y.S.2d 147, 257 App.Div. 950, appeal granted 14 N.Y.S.2d 1021, 258 App. Div. 709, affirmed 26 N.E.2d 801, 282 N.Y. 652, reargument denied 28 N.E. 2d 406, 283 N.Y. 682, and certiorari denied 61 S.Ct. 319, 311 U.S. 708, 85 L.Ed. 460.

34. Cal.—Ex parte Mathews, 214 P 981, 191 Cal. 35.
Del.—Myers v. Fortunato, 110 A. 847, 12 Del.Ch. 374, reversing 108 A. 678. 12 Del.Ch. 140.
Fla.—National Container Corporation v. State ex rel. Stockton, 189 So. 4, 138 Fla. 32, 122 A.L.R. 1000.
Tex.—Royalty v. Strange, Civ.App., 220 S.W. 421, error refused.
23 C.J. p 149 note 12.

Filling station

Judicial notice could not be taken that there are unusual noises made by automobiles stopping and starting at filling stations and that odors emitted when starting and stopping travel from fifty to one hundred twenty-five feet.—Texas Co. v. Brandt, 191 P. 166, 79 Okl. 97.

Undertaking establishment

(1) Generally.
Miss.—Williams v. Montgomery, 186 So. 302, 184 Miss. 547.
N.Y.—Moore v. U. S. Cremation Co., 286 N.Y.S. 639, 158 Misc. 621, reversed on other grounds 291 N.Y. S. 289, 249 App.Div. 637, reversed on other grounds 9 N.E.2d 795, 275 N.Y. 105, 113 A.L.R. 1124, reargument denied 11 N.E.2d 743, 275 N.Y. 544, 113 A.L.R. 1124.
R.I.—Drabble v. Zoning Board of Review of City of Providence, 159 A. 828, 52 R.I. 228.
23 C.J. p 149 note 12 [a].

(2) It is common knowledge that person seeking to buy home would not likely select one adjacent to undertaking establishment.—Jack Lewis, Inc., v. Mayor and City Council of Baltimore, 164 A. 220, 164 Md. 146, appeal dismissed 54 S.Ct. 56, 290 U.S. 585, 78 L.Ed. 517.

Warming up airplanes

Judicial notice may be taken that the noise incident to warming up of airplanes could not possibly occasion any annoyance to objectors whose homes were over one-half mile from the airport.—Batcheller v. Commonwealth, Va., 10 S.E.2d 529.

35. Mass.—Strachan v. Beacon Oil Co., 146 N.E. 787, 251 Mass. 479.
23 C.J. p 149 notes 13–15, p 150 notes 20, 21.

36. Mo.—Farmers' Bank v. Worthington, 46 S.W. 745, 145 Mo. 91, 101.

37. N.Y.—People v. Charles Schweinler Press, 108 N.E. 639, 214 N.Y. 395, Ann.Cas 1916D 1059, affirming 148 N.Y.S. 725, 163 App.Div. 620.

the state.[38] Common belief, however, in order to become such common knowledge as to be judicially noticed by the court, must be common in the state, although in a matter pertaining to science it may be strengthened somewhat by the general acceptance of mankind.[39] Local and temporary conditions of public sentiment and local public controversies are not within the class of facts of which the court may take judicial cognizance.[40]

Children and young persons. Judicial notice will be taken of facts of common knowledge relating to children and young persons,[41] such as their capabilities,[42] their habits and curiosity,[43] their needs,[44] their propensities,[45] and differences in the precocity of children.[46] Where it is beyond question that a child is so young that it cannot perform valuable services, the trial court may take judicial notice of the fact;[47] but where there is doubt, especially where it is alleged that the child is precocious, the safer rule is not to take judicial notice but to sub-

Grey hair
It is common knowledge or belief that hair may grow white in single night from sudden fears.—Shaw v. Tague, 177 N.E. 417, 257 N.Y. 193, affirming 247 N.Y.S. 892, 232 App. Div. 720.

38. N.Y.—Viemeister v. White, 72 N. E. 97, 179 N.Y. 235, 103 Am.S.R. 859, 70 L.R.A. 796, 1 Ann.Cas. 334
23 C.J. p 150 note 42.

39. N.Y.—Viemeister v. White, 72 N.E. 97, 179 N.Y. 235, 103 Am.S.R. 859, 70 L.R.A. 796, 1 Ann.Cas. 334, affirming 84 N.Y.S. 712, 88 App.Div. 44.

40. Cal.—Hartigan v. Los Angeles, 149 P. 590, 170 Cal. 313.

41. Iowa.—Stephens v. Treat, 209 N. W. 282, 202 Iowa 1077—McKiddy v. Des Moines Electric Co., 206 N.W. 815, 202 Iowa 225.
Mo.—Williams v. Kansas City, C. C. & St. J. Ry. Co., 6 S.W.2d 48, 222 Mo.App. 865.
N.H.—Saad v. Pappageorge, 133 A. 24, 82 N.H. 294.
N.J.—Bolcar v. Mintz, 195 A. 619, 119 N.J.Law 219, affirmed 198 A. 847, 120 N.J.Law 186
N.Y.—Lane v. City of Buffalo, 250 N. Y.S. 579, 232 App.Div. 334.
Or.—Forrest v. Turlay, 266 P. 229, 125 Or. 251.
Utah.—Utah Fuel Co. v. Industrial Commission of Utah, 245 P. 381, 67 Utah 25, 45 A.L.R. 882.
Va.—Flory v. Smith, 134 S.E. 360, 145 Va. 164, 48 A.L.R. 654.
23 C.J. p 150 note 37.

Cigarettes
(1) It is common knowledge that the size and mildness of a cigarette tempt the young to indulgences which produce tobacco addicts.—Ploch v. City of St. Louis, 138 S.W. 2d 1020, 345 Mo. 1069.

(2) Other facts relating to use of cigarettes by young persons see 23 C.J. p 150 note 33 [a].

Juvenile delinquency
It is common knowledge that problem of juvenile delinquency grows more acute progressively with an increasing density of population.—Hutcheson v. Atherton, 99 P.2d 462, 44 N.M. 144.

42. Ill.—Segal v. Chicago City Ry Co., 256 Ill.App. 569, motion denied 171 N.E. 922, 339 Ill. 635.
23 C.J. p 150 note 35.

Child of ten
It is common knowledge that a normal child ten years of age is competent to care for a child four and one-half years of age.—Reid v. City Coach Co., 2 S.E.2d 578, 215 N. C. 469, 123 A.L.R. 140.

Perils of water
It is common knowledge that perils of water are instinctively known by ten-year-old boy.—Melendez v. City of Los Angeles, 68 P.2d 971, 8 Cal. 2d 741.

43. Miss.—Spengler v. Williams, 6 So. 613, 67 Miss. 1.
23 C.J. p 150 note 32.

Attractive objects and places
(1) Judicial notice has been taken that various objects and places have an attraction for children.
Mo.—Kansas City ex rel. Barlow v. Robinson, 17 S.W.2d 977, 322 Mo. 1050, dissenting opinion 32 S.W.2d 1075, 322 Mo. 1050—Davoren v. Kansas City, 273 S.W. 401, 308 Mo. 513, 40 A.L.R. 473.
N.Y.—Cunningham v. City of Niagara Falls, 272 N.Y.S. 720, 242 App. Div. 39.
23 C.J. p 150 note 32 [a].

(2) It is common knowledge that almost any contrivance which can be used by young children as a whirligig or teeter is attractive to them.—Jaworski v. Detroit Edison Co., 178 N.W. 71, 210 Mich. 317.

(3) On the other hand, judicial notice has been taken that other appliances do not constitute an attractive nuisance.—Ray v. Hutchison, 68 S.W.2d 948, 17 Tenn.App. 477.

Reputation
It is common knowledge, especially in the school room, that precocious children eleven years of age can and do establish a good or bad reputation for truth and veracity.—Crowson v. Swan, 178 S.E. 898, 164 Va. 82.

44. Wis.—Ninneman v. State Industrial Commn., 176 N.W. 909, 171 Wis. 190.

For mother's love
Iowa.—Wood v. Wood, 262 N.W. 773, 220 Iowa 441.

Support
(1) It is common knowledge that many parents are supporting children who are capable of self-support.—Morrill v. Charles Bianchi & Sons, 176 A. 416, 107 Vt. 80.

(2) Court may take judicial notice that by reason of condition of health, dependency of one dependent on another may exist long after age of maturity.—Soderstrom v. Missouri Pac. R. Co., Mo.App., 141 S.W.2d 73.

45. N.Y.—Boylhart v. Di Marco & Reimann, 200 N.E 793, 270 N.Y. 217, reversing 280 N.Y.S. 781, 244 App.Div. 785.
Utah.—Wilcox v. Wunderlich, 272 P. 207, 73 Utah 1.
Wis.—Ptak v. Kuetemeyer, 196 N.W. 855, 182 Wis. 357, dissenting opinion 197 N.W. 363, 182 Wis. 357.
23 C.J. p 150 note 33.

Judicial notice may be taken:
(1) That boys climb trees.
La.—Bourgoyne v. Louisiana Public Utilities Co., App., 150 So. 68, rehearing refused 152 So. 150.
Tex.—Texas General Utilities Co. v. Nixon, Civ.App., 81 S.W.2d 250, error refused.

(2) Of heedless and impulsive conduct of children.—Fleming v. Star Pub. Co., 81 P.2d 293, 195 Wash. 395, set aside 84 P.2d 1008, 195 Wash. 395.

(3) Of unexpected movements of children, such as darting across street.
N.H.—Bullard v. McCarthy, 195 A. 355, 89 N.H. 158.
Wis.—Hanes v. Hermsen, 236 N.W. 646, 205 Wis. 16.

(4) That children are not watchful or mindful of danger.
Mich.—Gwitt v. Foss, 203 N.W. 151, 230 Mich. 8.
Utah.—Woodward v. Spring Canyon Coal Co., 63 P.2d 267, 90 Utah 578.

46. Ga.—James v. Central of Georgia R. Co., 75 S.E. 431, 138 Ga. 415, 41 L.R.A.,N.S., 795, Ann.Cas.1913D 468.

47. Ga.—Atlanta Cons. St. R. Co. v. Arnold, 28 S.E. 224, 100 Ga. 566.
23 C.J. p 150 note 38.

mit the question to the jury.[48]

Women. Judicial notice will be taken of the sensibility of women to the exposure of their person,[49] and of their resentment to the laying of hands on their person by strangers;[50] that a charge of unchastity must necessarily cause anguish and humiliation to a virtuous woman, enjoying a good name and reputation;[51] that in a condition of advanced pregnancy women are more sensitive and more suspicious than they are at other times;[52] that the physical structure and maternal functions of women place them at such a disadvantage in the struggle for existence as to form a substantial difference between the sexes;[53] and that women are not better qualified than men to resist libidinous approaches.[54] Facts of common knowledge relating to the capabilities of women will also be judicially noticed.[55]

Veracity and mendacity. Judicial notice has been taken that race affords no criterion of the veracity of a witness,[56] and a court cannot affirm of any race of people, of whatever color or condition, that they are always liars.[57] It is common knowledge, however, that enslaved peoples develop an inordinate propensity for lying and that this is characteristic of most oriental nations.[58] Women in general are not judicially known to be addicted to perjury.[59]

§ 81. Common Articles, Devices, Utilities, and Operations

Judicial notice will be taken of facts of common knowledge relating to common articles, devices, utilities, and operations.

The courts judicially notice articles and things in common use and the facts in relation to them which are commonly known.[60] Judicial notice is taken of discoveries and inventions that have become of general and common use, and of the nature and use of common mechanical devices,[61] such as

48. Ga.—James v. Central of Georgia R. Co., 75 S.E. 431, 138 Ga. 415, 41 L.R.A.,N.S., 795, Ann.Cas. 1913D 468.
23 C.J. p 150 note 39.

49. N.Y.—Bloom v. Brooklyn & Queens Transit Corporation, 272 N.Y.S. 511, 151 Misc. 136.

50. Tex.—Chicago, R. I. & G. R. Co. v. Wisdom, Civ.App., 216 S.W. 241.
23 C.J. p 150 note 27.

51. Wis.—Hacker v. Heiney, 87 N.W. 249, 111 Wis. 313.

52. Or.—Parman v. Parman, 185 P. 922, 94 Or. 307.

53. Ill.—Ritchie v. Wayman, 91 N.E. 695, 244 Ill. 509, 27 L.R.A., N.S., 994.
23 C.J. p 150 note 30.

54. N.Y.—People v. Barberi, 43 N.E. 635, 149 N.Y. 256, 52 Am.S.R. 717.

55. **Judicial notice has been taken:**
(1) That in the past many women relied implicitly on their husbands for attention to all their business affairs.—Fowlkes v. White, 121 S.E. 888, 138 Va. 438.

(2) That the average woman, without business training or knowledge of business affairs, would not understand the legal effect of a conversation, following the giving of a deed of trust.—Schmelz Bros., Bankers, v. Quinn, 113 S.E. 845, 134 Va. 78.

(3) That wives are not usually experienced in business, do not know what they may sign without making their separate property liable nor what they must not sign to avoid making it liable.—Loomis v. Gray, 90 P.2d 529, 60 Idaho 193.

56. U.S.—Lau Hu Yuen v. U. S., C.C.A.Hawaii, 85 F.2d 327.

57. Ala.—Fonville v. State, 8 So. 688, 91 Ala. 39.
23 C.J. p 151 note 46.

58. U.S.—U. S. v. Lee Huen, D.C. N.Y., 118 F. 442.

59. U.S.—Gaines v. Relf, La., 12 How. 472, 13 L.Ed. 1071.
23 C.J. p 151 notes 47, 48.

60. U.S.—Borg-Warner Corporation v. Easy Washing Mach. Corporation, Cust. & Pat.App., 104 F.2d 65—Casco Products Corporation v. Zaiger, D.C.Mass., 15 F.Supp. 1014, affirmed, C.C.A., 93 F.2d 210—U. S. v. Ellis Silver Co., 16 Ct.Cust.App. 570—U. S. v. Sheldon & Co., 14 Ct. Cust.App. 260.
Mo.—Cheney v. Terminal R. R. Ass'n of St. Louis, App., 70 S.W.2d 66.
N.Y.—Harburger v. Stern Bros., 189 N.Y.S. 74.
23 C.J. p 151 note 51.
Management and conduct of occupations see supra §§ 28, 29.
Qualities and properties of matter see supra § 75.
Scientific facts see supra § 76.

Judicial notice of facts in relation to particular articles
(1) Candies.—Andrews v. Tax Commission of Ohio, 21 N.E.2d 106, 135 Ohio St. 374.

(2) Diesel engines.—Letz Mfg. Co. v. Public Service Commission of Indiana, 4 N.E.2d 194, 210 Ind. 467.

(3) Glass jars and bottles.
Ill.—Crandall v. Stop & Shop, 6 N.E. 2d 685, 288 Ill.App. 543.
La.—Gunter v. Alexandria Coca Cola Bottling Co., App., 197 So. 159.

(4) Hinges.—Callaghan v. R. H. White Co., 22 N.E.2d 10, 303 Mass. 413.

(5) Milldams.—Whitcher v. State, 181 A. 549, 87 N.H. 405.

(6) Pistols.—Warren v. Pilot Life Ins. Co., 9 S.E.2d 479, 217 N.C. 705.

(7) Sawed-off shotguns.—Lane v. Washington Daily News, 85 F.2d 822, 66 App.D.C. 245.

(8) Secondhand articles.—Ex parte Scott, 91 S.W.2d 748, 130 Tex.Cr. 29.

(9) Suit cases.—Comstock v. Maryland Casualty Co. of Baltimore, Iowa, 179 N.W. 962.

(10) Used machinery.—Southern Amusement Corporation v. Summers, 129 So. 489, 23 Ala.App. 595.

(11) Windows.—Culbreath v. M. Kutz Co., 140 S.E. 419, 37 Ga.App. 425.

(12) Other examples see Oklahoma City v. West, 7 P.2d 888, 155 Okl. 63—Oklahoma City v. Page, 6 P.2d 1033, 153 Okl. 285—23 C.J. p 151 notes 53–57, p 152 notes 74–81.

61. Tex.—English v. Miller, Civ. App., 43 S.W.2d 642, 644, quoting **Corpus Juris.**
23 C.J. p 151 notes 58, 59.

Depreciation
It is common knowledge that all machinery constantly depreciates in strength and usefulness.
U.S.—Lynch v. International Harvester Co. of America, C.C.A.Okl., 60 F.2d 223.
N.Y.—In re Colliton's Estate, 271 N.Y.S. 163, 150 Misc. 616.

Failure to operate
(1) That machinery gets out of order, becomes defective, and fails to operate, is a matter of common knowledge.—Norfolk & W. Ry. Co. v. Simmons, 103 S.E. 609, 127 Va. 419.

(2) This is particularly true of electrical devices.—Chesapeake & O.

the airplane,[62] the bicycle,[63] locomotives,[64] gasoline engines,[65] motor cycles,[66] washing machines,[67] watches,[68] telephones,[69] radios,[70] refrigerators,[71] sewing machines,[72] typewriters,[73] power-driven saws,[74] and other devices.[75] Judicial notice will also be taken of such common objects as the sleigh,[76] the snowplow,[77] screens,[78] shovels,[79] stoves,[80] elevators,[81] the hammer,[82] and water containers.[83]

Ry. Co. v. Gayle, 112 S.E. 785, 132 Va. 433.

(3) It is common knowledge that breaks in equipment occur at unexpected times when there is no unusual or special strain—Meredith v. City of Milwaukee, 236 N.W. 112, 204 Wis. 344.

62. U.S.—Carns v. Callison, Cust. & Pat.App., 53 F.2d 546.
N.Y.—Platt v. Erie County Agricultural Society, 149 N.Y.S. 520, 164 App.Div. 99—Rochester Gas & Electric Corporation v. Dunlop, 266 N.Y.S. 469, 148 Misc. 849.
Ohio.—Smith v. Industrial Commission, App., 32 N.E.2d 56.
23 C.J. p 151 note 62.

Navigation
Mass.—Smith v. New England Aircraft Co., 170 N.E. 385, 270 Mass. 511, 69 A.L.R. 300.

No longer an experiment
N.Y.—Hesse v. Rath, 230 N.Y.S. 676, 224 App.Div. 344, affirmed 164 N.E. 342, 249 N.Y. 436.

63. U.S.—Gormelly, Jeffery Mfg. Co. v. Western Wheel Works, Ill., 84 F. 968, 28 C.C.A. 586.
23 C.J. p 151 note 61.

Turning
It is common knowledge that at an extremely slow speed a bicycle can turn in almost its length and would not need a wide turn to enter a lane at a right angle.—Wickman v. Bohle, 196 A. 326, 173 Md. 694.

64. Tex.—Railroad Commission of Texas v. Texas & N. O. R. Co., Civ. App., 42 S.W.2d 1091, error refused.

Noise
Court will take judicial notice that locomotives do not proceed silently.—Ray v. Lehigh Valley R. Co., 184 A. 445.

65. U.S.—Erie R. Co. v. Murphy, C.C.A.N.Y., 9 F.2d 525.
Ky.—Cincinnati, N. O. & T. P. R. Co. v. Bell, 271 S.W. 690, 208 Ky. 600—Cincinnati, N. O. & T. P. R. Co. v. Bell, 271 S.W. 689, 208 Ky. 597.

66. La.—Reil v. McNaspy, App., 177 So. 393.
N.Y.—Colyer v. North American Accident Ins. Co., 230 N.Y.S. 473, 132 Misc. 701.

67. **Wringers**
It is common knowledge that operators of electrically-driven wringers on washing machines frequently have their hands caught in rollers.—Horvath v. Morrison, 17 A.2d 656, 143 Pa.Super. 360—Ebbert v. Philadelphia Electric Co., 191 A. 384, 126 Pa.Super. 351, affirmed 198 A. 323, 330 Pa. 257.

68. U.S.—U. S. v. European Watch & Clock Co., 11 Cust.App. 363.

69. Mo.—State ex inf. McKittrick ex rel. City of Lebanon v. Missouri Standard Tel. Co., 85 S.W.2d 613, 337 Mo. 642.
23 C.J. p 151 note 60.

Sound in thunderstorms
It is common knowledge that a telephone diaphragm will emit a loud sound in thunderstorms and at other times.—Cooley v. Public Service Co., 10 A.2d 673, 90 N.H. 460.

70. **It is common knowledge:**
(1) That dynamic radio has completely superseded magnetic radio and that transition began in fall of 1928.—Queen City Woodworks & Lumber Co. v. Crooks, D.C.Mo., 7 F.Supp. 684.

(2) That new radios have scratches, mars, loose knobs, and extra holes.—Baker v. Ward, 250 N.W. 109, 217 Iowa 581.

(3) That outside radio antennæ are separate units easily detached from one set and usable with another.—U. S. v. Janson Co., 16 Ct. Cust.App. 315.

(4) Other matters see Texas Power & Light Co. v. Culwell, Tex.Civ. App., 19 S.W.2d 816, reversed on other grounds, Com.App., 34 S.W.2d 820, modified on other grounds, 37 S.W.2d 123.

71. Ill.—Guardian Life Ins. Co. of America v. Swanson, 3 N.E.2d 324, 286 Ill.App. 278.

72. **Embroidery attachments**
U.S.—Durbrow & Hearne Mfg. Co. v. U. S., 9 Ct.Cust.App. 148.

73. U.S.—Decorated Metal Mfg. Co. v. U. S., 12 Ct.Cust.App. 140.
Vt.—Hooper v. Kennedy, 137 A. 194, 100 Vt. 314.

Defects
It is matter of common knowledge that typewriters, after considerable use, develop defects appearing in variation in alignment.—Bernard v. Francez, 117 So. 565, 166 La. 487.

Slip of finger
It is common knowledge that the keyboard of a standard typewriter is so arranged that it is easy by a mere slip of the finger to write "of" when the writer is thinking of and intends to write the word "or," while it is improbable that "of" should be substituted for "and" in the same manner.—State ex rel. Sullivan v. Burns, 77 P.2d 215, 51 Ariz. 384.

74. **Dangerous character noticed**
Ill.—Board of Education of High School Dist. No. 502 v. Industrial Commission, 134 N.E. 70, 301 Ill. 611.
Ky.—Bringardner Lumber Co. v. Middleton, 124 S.W.2d 52, 276 Ky. 247.

75. Mo.—Post v. Chicago, etc., R. Co., 97 S.W. 233, 121 Mo.App. 562.
23 C.J. p 152 notes 65–73.

76. N.Y.—Vadney v. United Traction Co., 183 N.Y.S. 926, 193 App. Div. 329, affirmed 135 N.E. 952, 233 N.Y. 643.

77. Mich.—Jefferson v. Sault Ste. Marie, 130 N.W. 610, 166 Mich. 340.
23 C.J. p 152 note 64.

Motive power
It is common knowledge that motor trucks are used to supply motive power for highway snow plows.—Euto v. (American) Lumbermen's Mut. Casualty Co. of Illinois, 288 N.Y.S. 232, 247 App.Div. 613.

78. **It is common knowledge:**
(1) That screens have secondary purpose of protecting persons from falling through window, and that screens constructed and placed in window casing in manner ordinarily done are sufficiently secure to withstand pressure of person leaning against them.—Shaw v. Butterworth, 38 S.W.2d 57, 327 Mo. 622.

(2) That use of removable and adjustable slatted screens at ends of front porch is general for purpose of adding to owner's convenience and comfort in use of porch.—Ash v. Tate, 73 F.2d 518, 64 App.D.C. 9.

79. U.S.—Tower v. U. S., 7 Cust. App. 408.

80. **Attachment to realty**
It is common knowledge that ranges are ordinarily "attached" to real estate by less substantial connections than an air conditioning and heating system.—Gar Wood Industries v. Colonial Homes, 24 N.E.2d 767, 305 Mass. 41, 126 A.L.R. 591.

81. Tex.—City Nat. Bank v. Pigott, Civ.App., 270 S.W. 234.

82. **Chips**
Court judicially knows that hammers, whether with round or flat faces, when used to crush rocks will cause chips to fly.—Choate v. City of Springfield, Mo.App., 74 S.W.2d 869.

83. **Leaving when first filled**
N.H.—Turner v. Globe Automatic Sprinkler Co., 128 A. 529, 81 N.H. 443.

The courts have also taken judicial notice of the use of electricity,[84] of the use of X-rays,[85] and of the use of building materials.[86] It is a matter of common knowledge that refined kerosene is used to furnish light, as fuel for oil stoves, and for kindling fires;[87] that oil is used as furnace fuel;[88] that gas is piped into buildings from underground;[89] that houses are frequently moved from one plot of ground to another;[90] that trapdoors in sidewalks are temporarily opened to place wares in, or remove them from, basements;[91] and that the cleaning and polishing of hardwood floors is expected.[92] Judicial knowledge likewise extends to the general state of development in mechanical arts.[93] The courts, however, will not take judicial notice of particular facts of limited general importance in relation to articles or mechanical devices; judicial notice in this respect is confined to matters of general and common knowledge.[94]

Photography. Where photographs are offered in evidence, courts will judicially notice the art of photography, the mechanical and chemical process employed, the scientific principles on which they are based, and their results.[95] They may judicially notice that all civilized communities rely on photographic pictures for taking and presenting resemblances of persons and of animals, of scenery and of natural objects, of buildings and of artificial objects.[96] They may also notice, as a matter of common knowledge, that under some circumstances photographs may be inaccurate and misleading.[97]

Nuisances. The obnoxious character of certain matters has been held to be of such notoriety that judicial notice might be taken that they constitute a nuisance,[98] but the courts have refused to take

84. U.S.—Pacific Gas & Electric Co. v. Sacramento Municipal Utility Dist., C.C.A.Cal., 92 F.2d 365, affirming, D.C., 17 F.Supp. 685, certiorari denied 58 S.Ct. 610, 303 U.S. 640, 82 L.Ed. 1100.

Appliances

It is a matter of common knowledge that among the appliances made use of for the production, distribution, and application of electric energy are dynamos, wires, and other kindred devices which require supervision and attention.—Hungerford v. Mutual Life Ins. Co. of New York, 180 N.W. 849, 190 Iowa 852.

Constant use

It is common knowledge that most consumers of electrical energy are constant users.—State Tax Commission v. City of Logan, 54 P.2d 1197, 88 Utah 406.

Electric lights

Facts of common knowledge relating to electric lights will be judicially noticed.

U.S.—Missouri Public Service Corporation v. Fairbanks, Morse & Co., D.C.Mo., 19 F.Supp. 45.

N.Y.—Wilhelm v. Lehigh Valley R. Co., 213 N.Y.S. 58, 215 App.Div. 28.

Tenn.—Tennessee Electric Power Co. v. Sims, 108 S.W.2d 801, 21 Tenn.App. 233.

23 C.J. p 152 note 84.

85. Cal.—Wires v. Litle, 80 P.2d 1010, 27 Cal.App.2d 240, hearing denied 82 P.2d 388, 27 Cal.App.2d 240.

N.J.—Klein v. Boylan, 179 A. 638, 115 N.J.Law 295.

N.Y.—Gilbert v. Klar, 228 N.Y.S 183, 223 App.Div. 200.

Tex.—Texas & Pac. Ry. Co. v. Cassaday, Civ.App., 148 S.W.2d 471, error dismissed, judgment correct.

Availability of X-rays to physicians of a particular city will be judicially noticed.—Wright v. Conway, 242 P. 1107, 34 Wyo. 1, denying rehearing 241 P. 369, 34 Wyo. 1.

Burns

(1) It is common knowledge that application of X-ray not infrequently results in a burn.—Grubb v. Groover, 67 F.2d 511, 62 App.D.C. 305, certiorari denied Groover v. Grubb, 54 S.Ct. 377, 291 U.S. 660, 78 L.Ed. 1052.

(2) Court takes judicial notice that in hands of specialists there is little or no danger in use of X-ray.—Gilbert v. Klar, 228 N.Y.S. 183, 223 App.Div. 200.

Use of electricity

It is general knowledge that there are portable X-ray machines and that electricity is indispensable in operation and use of X-ray machine.—Commonwealth Life Ins. Co. v. Brandon, 97 S.W.2d 2, 265 Ky. 434.

86. **Unslaked lime**

Pa.—Leoni v. Reinhard, 194 A. 490.

87. Ark.—Goode v. Pierce Oil Corporation, 286 S.W. 1009, 171 Ark. 863.

Ga.—Shermer v. Crowe, 186 S.E. 224, 53 Ga.App. 418.

23 C.J. p 153 note 13.

88. **Recent use**

It is common knowledge that the use of oil as furnace fuel has become common only in the last few years, and that damage by escape of smoke and soot therefrom is not uncommon.—Solomon v. U. S. Fire Ins. Co. of New York, 165 A. 214, 53 R.I. 154, reargument denied 166 A. 254.

89. Md.—Tong v. Feldman, 136 A. 822, 152 Md. 398, 51 A.L.R. 1291.

90. Ark.—Austin v. Federal Land Bank of St. Louis, 68 S.W.2d 468, 188 Ark. 971.

91. Ky.—Cecil v. Oertel Co., 40 S. W.2d 328, 239 Ky. 825.

92. Ala.—Alabama Power Co. v. McIntosh, 122 So. 677, 219 Ala. 546.

93. U.S.—In re Waldheim, Cust. & Pat.App., 36 F.2d 140.

Ala.—Underwood Typewriter Co. v. Marengo County Bank, 81 So. 543, 17 Ala.App. 47, certiorari denied 82 So. 158, 203 Ala. 128.

Mich.—Cool v. Fighter, 214 N.W. 162, 239 Mich. 42.

23 C.J. p 152 notes 82, 83.

Date of invention

It is common knowledge that in 1851 the telephone had not been invented.—City of Cherokee v. Northwestern Bell Telephone Co., 202 N. W. 886, 199 Iowa 727.

94. U.S.—Card v. Standard Coal & Coke Co., D.C.Tenn., 202 F. 351—Parsons v. Seelye, Mass., 100 F. 452, 40 C.C.A. 484.

Mo.—Reynolds v. Maryland Casualty Co., 201 S.W. 1123, 274 Mo. 83.

23 C.J. p 152 note 85.

95. N.Y.—People, on Complaint of Strosahl v. Cross & Brown Co., 251 N.Y.S. 138, 232 App.Div. 587.

23 C.J. p 152 note 86.

96. N.Y.—Cowley v. People, 83 N. Y. 464, 38 Am.R. 464, affirming 21 Hun 415, 8 Abb.N.Cas. 1.

97. Conn.—Cunningham v. Fair Haven & W. R. Co., 43 A. 1047, 72 Conn. 244.

23 C.J. p 152 note 88.

98. Cal.—Marshall v. Standard Oil Co. of California, 61 P.2d 520, 17 Cal.App.2d 19.

S.D.—Johnson v. Drysdale, 285 N. W. 301, 66 S.D. 436.

Sale and use of fireworks

Ala.—Chappell v. City of Birmingham, 181 So. 906, 236 Ala. 363.

such notice in the case of other matters.[99]

Motor vehicles have become of such general use and form so large a part of the daily lives and experiences of the people that judicial knowledge may be taken of those prominent facts in regard to them or their operation which are a part of the common knowledge of every person of ordinary understanding and observation.[1] Accordingly, judicial notice has been taken of matters of common knowledge

99. Tex.—Bowie Sewerage Co. v. Chandler, Civ.App., 138 S.W.2d 585. 23 C.J. p 153 notes 89, 92.

1. Miss.—Luckett v. Louisiana Oil Corporation, 158 So. 199, 171 Miss. 570—Avery v. Collins, 157 So. 695, 171 Miss. 636, motion overruled 158 So. 552, 171 Miss. 636—Williams v. Lumpkin, 152 So. 842, 169 Miss. 146—Myers v. Tims, 138 So. 578, 161 Miss. 872.
Mo.—Spoeneman v. Uhri, 60 S.W.2d 9, 332 Mo. 821.
N.Y.—Camden Fire Ins. Ass'n v. Bleem, 227 N.Y.S. 746, 132 Misc. 22.
Tex.—Levlon v. Dallas Railway & Terminal Co., Civ.App., 117 S.W. 2d 876, error refused.
23 C.J. p 151 note 63—42 C.J. p 1201 note 30.

Judicial notice has been taken:
(1) Of facts relating to automobile insurance.
Iowa.—Keller v. Dodds, 277 N.W. 467, 224 Iowa 935.
Mich.—Sutzer v. Allen, 209 N.W. 918, 236 Mich. 1.
S.C.—Pardue v. Pardue, 166 S.E. 101, 167 S.C. 129.
Tenn.—Bourne v. Barlar, 67 S.W.2d 751, 17 Tenn.App. 375.

(2) Of facts relating to the development of the automobile.—Fergus Motor Co. v. Sorenson, 235 P. 422, 73 Mont. 122.

(3) Of facts relating to the parking of automobiles.
Ala.—Harrison v. Mobile Light & Railroad Co., 171 So. 742, 233 Ala. 393.
Miss.—Oliver Bus Lines v. Skaggs, 164 So. 9, 174 Miss. 201.
N.Y.—Buffalo Park Lane v. City of Buffalo, 294 N.Y.S. 413, 162 Misc. 207.
Pa.—City and County of Philadelphia v. Samuels, 12 A.2d 79, 338 Pa. 321, affirming Sley System Garages v. City of Philadelphia, 5 A.2d 583, 135 Pa.Super. 440—Harkins v. Somerset Bus Co., 162 A. 163, 308 Pa. 109.
Tex.—Harper v. City of Wichita Falls, Civ.App., 105 S.W.2d 743, error refused.

(4) Of facts relating to trucks.
Fla.—Muse v. Kaler Bros., 162 So. 507, 120 Fla. 221.
Miss.—Maryland Casualty Co. v. Adams, 131 So. 544, 159 Miss. 88.

(5) Of perils of driving.—Continental Casualty Co. v. Pouquette, C.C.A.Ariz., 28 F.2d 958.

(6) Of types of automobiles.—State v. Preston, 206 P. 304, 103 Or. 631, 23 A.L.R. 414.

(7) That motor vehicles are frequent subjects of larceny.
Cal.—Ex parte Higgins, 195 P. 740, 50 Cal.App. 533.
Mo.—Star Square Auto Supply Co. v. Gerk, 30 S.W.2d 447, 325 Mo. 968.
Tex.—Bankers & Shippers Ins. Co. of New York v. Ellis Green Motor Co., Civ.App., 102 S.W.2d 294, error dismissed.

(8) Other matters.
U.S.—Rachlin v. Libby-Owens-Ford Glass Co., C.C.A.N.Y., 96 F.2d 597—U. S. v. Bosch Magneto Co., 13 Ct. Cust.App. 569.
Ala.—McPherson v. Martin, 174 So. 791, 234 Ala. 244—City of Birmingham v. Martin, 153 So. 235, 228 Ala. 318.
Cal.—Rawlins v. Lory, App., 111 P. 2d 973—Castro v. Sutter Creek Union High School Dist., 77 P.2d 509, 25 Cal.App.2d 372—Almanerz v. San Diego Electric Ry. Co., 59 P. 2d 513, 15 Cal.App.2d 423—Miola v. Newhouse, 37 P.2d 1043, 2 Cal.App. 2d 380—Klemko v. Ryer, 4 P.2d 998, 118 Cal.App. 238—Whyte v. City of Sacramento, 224 P. 1008, 65 Cal.App. 534.
Conn.—Bartlett v. Travelers' Ins. Co., 167 A. 180, 117 Conn. 147.
Fla.—Burnett v. Allen, 154 So. 515, 114 Fla. 489, followed in 154 So. 519, 114 Fla. 499.
Idaho.—Joslin v. Idaho Times Pub. Co., 91 P.2d 386, 60 Idaho 235.
Ill.—Schachtrup v. Hensel, 14 N.E.2d 897, 295 Ill.App. 303—Toms v. Ketterer, 237 Ill.App. 135.
Ind.—Midland Trail Bus Lines v. Martin, 194 N.E. 862, 100 Ind. App. 206.
Iowa.—Andersen v. Christensen, 268 N.W. 527, 222 Iowa 177—Gilliam v. Chicago, R. I. & P. Ry. Co., 222 N.W. 12, 206 Iowa 1291.
Ky.—Rennolds' Adm'x v. Waggener, 111 S.W.2d 647, 271 Ky. 300—Sanders v. Lakes, 109 S.W.2d 36, 270 Ky. 98—Brady v. B. & B. Ice Co., 45 S.W.2d 1051, 242 Ky. 138.
La.—Haddad v. Commercial Motor Truck Co., 84 So. 197, 146 La. 897, 9 A.L.R. 1380.
Me.—Sylvia v. Etscovitz, 189 A. 419, 135 Me. 80.
Md.—Slacum v. Jolley, 138 A. 244, 153 Md. 343.
Mich.—Slee v. Neller, 197 N.W. 530, 226 Mich. 151.
Miss.—Luckett v. Louisiana Oil Corporation, 158 So. 199, 171 Miss. 570—Avery v. Collins, 157 So. 695, 171 Miss. 636, motion overruled 158 So. 552, 171 Miss. 636.
Mo.—Buehler v. Festus Mercantile Co., 119 S.W.2d 961, 343 Mo. 139—Brown v. Callicotte, 73 S.W.2d 190—Boland v. St. Louis-San Francisco Ry. Co., 284 S.W. 141—Crupe v. Spicuzza, App., 86 S.W.2d 347—Francis v. Missouri Pac. Transp. Co., App., 85 S.W.2d 915—Thornton v. Union Electric Light & Power Co., 72 S.W.2d 161, 230 Mo.App. 637—Rosenstein v. Lewis Automobile Co., App., 34 S.W.2d 1023.
N.H.—Loughlin v. Johnson, 195 A. 685, 89 N.H. 191—Johnson v. Boston & M. R. R., 143 A. 516, 83 N.H. 350, 61 A.L.R. 1178.
N.J.—Dodge & Bliss Co. v. Jersey City, 144 A. 14, 103 N.J.Eq. 552, reversed on other grounds 148 A. 783, 105 N.J.Eq. 545—Rapp v. Butler-Newark Bus Line, 138 A. 377, 103 N.J.Law 512, affirmed 140 A. 921, 104 N.J.Law 444—Thornton v. Cater, 111 A. 158, 94 N.J.Law 435—Eastmond v. Wachstein, 135 A. 67, 4 N.J.Misc. 966.
N.Y.—Goodman v. Brown, 298 N.Y.S. 574, 164 Misc. 145.
N.C.—Newbern v. Leary, 1 S.E.2d 384, 215 N.C. 134.
Pa.—Urian v. Equitable Life Assur. Soc., 165 A. 388, 310 Pa. 342—Saar v. Saar, 17 A.2d 745, 143 Pa.Super. 528.
S.C.—Bailey v. Smith, 128 S.E. 423, 132 S.C. 212.
Tenn.—Nashville, C. & St. L. Ry. v. Barnes, 152 S.W.2d 1023—Russell v. Furniture Renewal, 151 S.W.2d 1066—Roddy Mfg. Co. v. Dixon, 105 S.W.2d 513, 21 Tenn.App. 81.
Tex.—Levlon v. Dallas Railway & Terminal Co., Civ.App., 117 S.W. 2d 876, error refused—Commercial Standard Ins. Co. v. Billings, Civ. App., 114 S.W.2d 709, error dismissed—Harper v. City of Wichita Falls, Civ App., 105 S.W.2d 743, error refused—City of Waco v. Branch, Civ.App., 8 S.W.2d 271, conforming to answer to certified questions 5 S.W.2d 498, 117 Tex. 394, and error refused.
Va.—Richmond Coca-Cola Bottling Works v. Andrews, 3 S.E.2d 419, 173 Va. 240—Drumwright v. Walker, 189 S.E. 310, 167 Va. 307.
Vt.—Shaw v. Moore, 162 A. 373, 104 Vt. 529, 86 A.L.R. 1139.
Wash.—Kerr v. Hansen, 249 P. 977, 140 Wash. 459.
Wis.—Bowen v. Town of Osceola, 200 N.W. 766, 185 Wis. 11.
Wyo.—Loney v. Laramie Auto Co.,

pertaining to construction of automobiles,[2] lights on automobiles,[3] necessity of repairs,[4] particular facts about particular makes of cars,[5] physical facts in connection with the use and operation of automobiles,[6] risks of injury to person or property by au-

255 P. 350, 36 Wyo. 339, 53 A.L.R. 73.
23 C.J. p 151 note 63.

2. U.S.—Ternstedt Mfg. Co. v. Motor Products Corporation, C.C.A.Mich., 119 F.2d 834, affirming, D.C., 30 F.Supp. 288—Ekstrom v. U. S., Ct. Cl., 21 F.Supp. 338.
La.—Gulf & S. I. R. R. v. Sutter Motor Car Co., App., 146 So. 59—Kern v. Knight, 127 So. 133, 13 La. App. 194.
Miss.—Williams v. Lumpkin, 152 So. 842, 169 Miss. 146.
Mo.—Hoelzel v. Chicago, R. I. & P. Ry. Co., 85 S.W.2d 126, 337 Mo. 61.
Tex.—Tarry Warehouse & Storage Co. v. Duvall, Civ.App., 94 S.W.2d 1249, reversed on other grounds 115 S.W.2d 401, 131 Tex. 466.

Ambulances
La.—Rushing v. Mulhearn Funeral Home, App., 200 So. 52.

Height of fenders
Conn.—Grzybowski v. Connecticut Co., 164 A. 632, 116 Conn. 292.

Wheels rotating on common axis
U.S.—Leishman v. Associated Wholesale Electric Co., D.C.Cal., 36 F. Supp. 804.

3. Judicial notice has been taken:
(1) Of blinding effect of headlights at night.
Mich.—Ruth v. Vroom, 222 N.W. 155, 245 Mich. 88, 62 A.L.R. 1528.
N.H.—Putnam v. Bowman, 195 A. 865, 89 N.H. 200.
Wash.—Long v. Hicks, 21 P.2d 281, 173 Wash. 17.

(2) That lights on automobiles are not ordinarily as blinding on a three-lane highway as when the automobiles are approaching on a narrower road, and that they are not as blinding when coming under large arc lights.—Beckley v. Vezu, 73 P.2d 296, 23 Cal.App.2d 371.

(3) That design of modern automobile lighting is to direct ray downward.
Cal.—Sawdey v. R. W. Rasmussen Co., 290 P. 684, 107 Cal.App. 467.
N.Y.—Donnelly v. State, 228 N.Y.S. 579, 131 Misc. 909.

(4) That light rays from automobile headlights diverge and illuminate not only the road ahead but side of road for considerable distance.—Grimes v. St. Louis-San Francisco Ry. Co., 106 S.W.2d 462, 341 Mo. 129.

(5) That lights of automobile of standard height are about three feet above the ground.—State ex rel. Kansas City Southern Ry. Co. v. Shain, 105 S.W.2d 915, 340 Mo. 1195, quashing Adams v. Kansas City Southern Ry. Co., App., 83 S.W.2d 913.

(6) Other matters.
U.S.—Moore v. Chicago, B. & Q. R. Co., D.C.Mo., 28 F.Supp. 804.
Cal.—Mallett v. Southern Pac. Co., 68 P.2d 281, 20 Cal.App.2d 500.
Conn.—Schmeiske v. Laubin, 145 A. 890, 109 Conn. 206.
Iowa.—Lukin v. Marvel, 259 N.W. 782, 219 Iowa 773.
La.—Mansur v. Abraham, App., 164 So. 418, affirming, App., 159 So. 146, followed in, App., 159 So. 154, conforming to 164 So. 421, 183 La. 633, following, Merey v. Abraham, App., 164 So. 420.
Or.—Lovett v. Gill, 20 P.2d 1070, 142 Or. 534.
Tex.—Epting v. Nees, Civ.App., 25 S.W.2d 717, error refused.

4. N.Y.—Studebaker Corporation of America v. Silverberg, 199 N.Y.S. 190.

On highways
Tex.—Ford Motor Co. v. Madden, Civ. App., 42 S.W.2d 165, affirmed Ford Motor Co. v. Maddin, 76 S.W.2d 474, 121 Tex. 131.

5. Fords
La.—Kennedy v. Opdenweyer, 121 So. 636, 11 La.App. 532, rehearing denied 123 So. 906, 11 La.App. 532.
Mo.—Wallen v. Mississippi River & B. T. Ry. Co., App., 267 S.W. 12.
Pa.—Mahoney v. City of Pittsburgh, 181 A. 590, 320 Pa. 44.
Tex.—Western Union Telegraph Co. v. Stone, Civ.App., 283 S.W. 259.

6. U.S.—Moore v. Chicago, B. & Q. R. Co., D.C.Mo., 28 F.Supp. 804.
Ark.—Hobbs-Western Co. v. Carmical, 91 S.W.2d 605, 192 Ark. 59—Schlosberg v. Doup, 63 S.W.2d 337, 187 Ark. 931.
Cal.—Labarthe v. McRae, 104 P.2d 75, 39 Cal.App.2d 565—Stacey v. Hayes, 88 P.2d 165, 31 Cal.App.2d 422—Davis v. Lane, 75 P.2d 565, 24 Cal.App.2d 400—Hosking v. Danforth, 36 P.2d 427, 1 Cal. App.2d 178—Flynn v. Bledsoe Co., 267 P. 887, 92 Cal.App. 145.
Colo.—City and County of Denver v. Henry, 38 P.2d 895, 95 Colo. 582.
Ga.—Norris v. American Ry. Express Co., 118 S.E. 686, 156 Ga. 150—Mayor and Council of Buford v. Medley, 197 S.E. 494, 58 Ga.App. 48.
Ky.—D. G. Hayes Wholesale Grocery Co. v. Fortney's Adm'r, 126 S.W.2d 864, 277 Ky. 441—Norfolk & W. Ry. Co. v. Hensley's Adm'r, 67 S.W.2d 510, 252 Ky. 347—Teague v. Princeton Ice & Storage Co., 265 S.W. 611, 205 Ky. 231.
La.—Hamilton v. F. Strauss & Son, App., 154 So. 489.
Me.—Gould v. Maine Central Transp. Co., 9 A.2d 263, 136 Me. 336—Sylvia v. Etscovitz, 189 A. 419, 135 Me. 80.
Miss.—Gulf & S. I. R. Co. v. Simmons, 121 So. 144, 153 Miss. 327.
Mo.—Fitzpatrick v. Kansas City Southern Ry. Co., 146 S.W.2d 560—Dodson v. Gate City Oil Co., 88 S.W.2d 866, 338 Mo. 183—Crupe v. Spicuzza, App., 86 S.W.2d 347—Wilks v. Gilliam, App., 80 S.W.2d 702—Thornton v. Union Electric Light & Power Co., 72 S.W.2d 161, 230 Mo.App. 637—Allison v. Dittbrenner, App., 50 S.W.2d 199.
N.H.—Bridgham v. Town of Effingham, 174 A. 769, 87 N.H. 103—Tirrell v. Johnston, 171 A. 641, 86 N.H. 530, affirmed 55 S.Ct. 238, 293 U.S. 533, 79 L.Ed. 641—Dube v. Sevigne, 123 A. 894, 81 N.H. 221.
N.J.—Warshawsky v. Nevins Bus Co., 153 A. 114, 9 N.J.Misc. 227.
N.M.—Silva v. Waldie, 82 P.2d 282, 42 N.M. 514.
N.Y.—Payne v. City of New York, 14 N.E.2d 449, 277 N.Y. 393, 115 A.L.R. 1495, reversing 296 N.Y.S. 245, 250 App.Div. 778—Galbraith v. Busch, 196 N.E. 36, 267 N.Y. 230, reversing 275 N.Y.S. 655, 242 App. Div. 793.
Or.—Fleming v. Gerlinger Motorcar Co., 168 P. 289, 86 Or. 195.
Pa.—McIntyre v. Pope, 191 A. 607, 326 Pa. 172—Hirth v. Marano, 170 A. 438, 112 Pa.Super. 187.
S.C.—State ex rel. Daniel v. John P. Nutt Co., 185 S.E. 25, 180 S.C. 19, certiorari denied Jno. P. Nutt Co. v. State of South Carolina ex rel. Daniel, 56 S.Ct. 668, 297 U.S. 724, 80 L.Ed. 1007—McDonald v. State Highway Department, 164 S.E. 920, 166 S.C. 415.
Tenn.—Huber v. Wilson, 126 S.W. 2d 893, 23 Tenn.App. 109.
Tex.—San Antonio Public Service Co. v. Henry, Civ.App., 102 S.W.2d 479—City of Waco v. Branch, Civ. App., 8 S.W.2d 271, conforming to answer to certified questions 5 S.W.2d 498, 117 Tex. 394, and error refused.
Va.—Bristow v. Brauer, 7 S.E.2d 93, 175 Va. 118—Kent v. Miller, 189 S.E. 332, 167 Va. 422—Lucas v. Craft, 170 S.E. 836, 161 Va. 228—Fagg v. Carney, 165 S.E. 419, 159 Va. 118—Jones v. Hanbury, 164 S.E. 545, 158 Va. 842.
Wash.—Kegler v. Hogland Transfer Co., 85 P.2d 1051, 197 Wash. 566—Caylor v. B. C. Motor Transp., 71 P.2d 162, 191 Wash. 365—Gabrielsen v. City of Seattle, 272 P. 723, 150 Wash. 157, 63 A.L.R. 200, af-

tomobiles,[7] sales of automobiles,[8] shifting gears,[9] speed of operation,[10] speedometers,[11] starting and stopping cars,[12] the mechanism of gasoline mo-

firmed 278 P. 1071, 152 Wash. 700, 63 A.L.R. 200.
Wis.—Beck v. Fond Du Lac Highway Committee, 286 N.W. 64, 231 Wis. 593—Seligman v. Orth, 236 N.W. 115, 205 Wis. 199—Hughes v. Rentschler Floral Co., 213 N.W. 625, 193 Wis. 49.
42 C.J. p 1202 notes 32, 34.

Control of car

The fact that the driver's ability to control the car diminishes as the speed increases may be judicially noticed.—Allison v. Dittbrenner, Mo.App., 50 S.W.2d 199—Seithel v. St. Louis Dairy Co., Mo.App., 16 S.W.2d 687.

Noise

Judicial notice has been taken of notorious facts relating to the noise of operating automobiles.
Ala.—Hilburn v. McKinney, 96 So. 61, 209 Ala. 229.
Del.—Law v. Gallegher, 197 A. 479, 9 W.W.Harr. 189.
N.Y.—Hammer v. Bloomingdale Bros., 213 N.Y.S. 743, 215 App.Div. 308.

Skidding

(1) The tendency of cars to skid on slippery or icy roads, especially when the brakes are suddenly applied, may be judicially noticed.
Ky.—Risen v. Consolidated Coach Corporation, 118 S.W.2d 712, 274 Ky. 342—Gilreath v. Blue & Gray Transp. Co., 108 S.W.2d 1002, 269 Ky. 787, followed in 108 S.W.2d 1004, 269 Ky. 791.
Pa.—McCracken v. Curwensville Borough, 163 A. 217, 309 Pa. 98, 86 A.L.R. 1379—Geiger v. Dowdy, 170 A. 420, 111 Pa.Super. 485.
S.C.—McDonald v. State Highway Department, 164 S.E. 920, 166 S.C. 415.
Vt.—Johnson v. Burke, 183 A. 495, 108 Vt. 164—L'Ecuyer v. Farnsworth, 170 A. 677, 106 Vt. 180.

(2) It is universal knowledge that motor vehicles may skid on slippery roads without fault on account of manner of their handling, or on account of being there.
Me.—Chaisson v. Williams, 156 A. 154, 130 Me. 341.
N.H.—Burns v. Cote, 164 A. 771, 86 N.H. 167.

(3) That the danger of skidding increases as speed increases is common knowledge.—Wolfe v. State, for Use of Brown, 194 A. 832, 173 Md. 103.

(4) That chains on automobile are valueless to protect against skidding, when once started, is common knowledge to automobile drivers.—Smith v. Levison, 226 N.Y.S. 311, 222 App.Div. 310.

(5) The court will not take judicial notice of whether likelihood of automobile's skidding would have been greater or less if automobile had come upon ice at a slower rate of speed.—Gould v. Gould, 6 A.2d 24, 110 Vt. 324—Johnson v. Burke, 183 A. 495, 108 Vt. 164.

(6) It is common experience that automobile may skid on a slippery hill, but not that it will slide broadside down a hill and across a level space.—Folger v. Pittsburgh Rys. Co., 139 A. 858, 291 Pa. 205.

(7) Other facts relating to skidding.
La.—Rodriguez v. Abadie, App., 168 So. 515.
R.I.—Peters v. United Electric Rys. Co., 165 A. 773, 53 R.I. 251, modified on other grounds 167 A. 122.
Tex.—Dallas Ry. & Terminal Co. v. Garrison, Com.App., 45 S.W.2d 183, reversing, Civ.App., 30 S.W.2d 1108.
Wis.—Pecor v. Home Indemnity Co. of New York, 291 N.W. 313, 234 Wis. 407.

Unlighted cars on highway

It is matter of general knowledge that unlighted or defectively lighted motor vehicles which have been stopped at night on traveled highway are the cause of many collisions.—Merback v. Blanchard, Wyo., 105 P.2d 272, rehearing denied 109 P.2d 49.

7. Cal.—Heron v. Riley, 289 P. 160, 209 Cal. 507.
La.—Galloway v. Wyatt Metal & Boiler Works, 181 So. 187, 189 La. 837, annulling, App., 180 So. 206—Spearman v. Stover, App., 170 So. 259.
Mass.—Mitchell v. Lonergan, 189 N.E. 39, 285 Mass. 266—In re Opinion of the Justices, 147 N.E. 681, 251 Mass. 569.
S.C.—Heslep v. State Highway Department of South Carolina, 171 S.E. 913, 171 S.C. 186.
42 C.J. p 1202 note 33.

Compensation

It is common knowledge that nature and extent of damage to automobile may be such that replacement or repair of broken parts will not compensate insured.—Rossier v. Union Automobile Ins. Co., 291 P. 498, 134 Or. 211.

Damage to structures impeding progress

N.H.—Cozzi v. Hooksett, 153 A. 317, 84 N.H. 530, affirmed 155 A. 41, 84 N.H. 530.

Greatest hazard

It is common knowledge that one of the greatest hazards to which general trucking is subjected is the negligence of third persons on highways over which trucking is done, with whom employer has no connection.—In re Byrne, 86 P.2d 1095, 53 Wyo. 519.

Injury to car from uneven roads

Wis.—Bell v. American Ins. Co., 181 N.W. 733, 173 Wis. 533, 14 A.L.R. 179.

Killed or injured

It is common knowledge that many persons are killed or injured annually by automobiles.
Or.—Hinckley v. Marsh, 263 P. 886, 124 Or. 1.
Tenn.—Rutherford v. City of Nashville, 79 S.W.2d 581, 168 Tenn. 499.
Tex.—New Way Lumber Co. v. Smith, 96 S.W.2d 232, 128 Tex. 173, affirming Smith v. New Way Lumber Co., Civ.App., 84 S.W.2d 1104.

8. Chattel commonly bought and sold

Mass.—Clark v. Henshaw Motor Co., 140 N.E. 593, 246 Mass. 386.

9. Judicial notice has been taken:

(1) That automobile creates additional noise after shift from high to intermediate gear.—Dean v. Chicago, B. & Q. R. Co., 229 N.W. 223, 211 Iowa 1347.

(2) That cars sometimes stall in shifting from intermediate to low gear on steep, unknown roads.—Clune v. Mercereau, 1 P.2d 101, 89 Colo. 227.

10. Judicial notice has been taken:

(1) That an automobile cannot ordinarily be operated at much, if any, lower rate of speed than such as will permit its being stopped within three or four feet.—Wener v. Pope, 273 S.W. 92, 209 Ky. 553.

(2) That automobiles travel at low rate of speed for some distance immediately after they begin to move.—Ruggles v. John Deere Plow Co., Tex.Civ.App., 146 S.W.2d 456, error refused.

(3) That automobiles can be run over smooth ways, where there is little traffic, much more easily, safely, and quickly than over rough roads, or where progress is delayed by other vehicles.—Mathewson v. Edison Electric Illuminating Co., 122 N.E. 743, 232 Mass. 576.

(4) That automobiles travel on concrete country road at speed of upward of forty miles an hour.—Harkins v. Somerset Bus Co., 162 A. 163, 308 Pa. 109.

(5) Other facts.
N.Y.—Keane v. Felshin, 16 N.Y.S.2d 448, 258 App.Div. 269.
N.C.—Jones v. Bagwell, 177 S.E. 170, 207 N.C. 378.

11. Cal.—Trowbridge v. Briggs, 35 P.2d 426, 140 Cal.App. 554.

12. U.S.—Perucca v. Baltimore & O. R. Co., C.C.A.Pa., 35 F.2d 113, certiorari denied Baltimore & O. R. Co. v. Perucca, 50 S.Ct. 236, 281 U.S. 721, 74 L.Ed. 1139—Contrella v

tors,[13] the practice of licensing motor vehicles,[14] the serial or manufacturer's number of automobiles,[15] tires.[16] Likewise, judicial notice has been taken of matters relating to the use of automo-

Baltimore & O. R. Co., C.C.A.Pa., 35 F.2d 113, certiorari denied Baltimore & O. R. Co. v. Contrella, 50 S.Ct. 236, 281 U.S. 721, 74 L.Ed 1139.

Ind.—Waking v. Cincinnati, I. & W. R. Co., 125 N.E. 799, 72 Ind.App. 401.

Iowa.—Scott v. Hansen, 289 N.W. 710.

Mass.—Bartlett v. Town Taxi, 160 N.E 797, 263 Mass. 215.

Mo.—Dowler v. Kurn, App., 119 S.W. 2d 852—Crane v. Sirkin & Needles Moving Co., App., 85 S.W.2d 911—Peck v. W. F. Williamson Advertising Service in St. Louis, App., 68 S.W.2d 847—McMillan v. Isreal, App., 30 S.W.2d 626.

N.Y.—Rosenberg v. American Ry. Express Co., 198 N.Y.S. 224.

Ohio.—Lynch v. Pennsylvania R. Co., 194 N.E. 31, 48 Ohio App. 295.

Pa.—Smith v. Lehigh Valley Transit Co., 145 A. 818, 296 Pa. 212.

Tex.—Levlon v. Dallas Railway & Terminal Co., Civ.App., 117 S.W. 2d 876, error refused—Autry v. Dallas Railway & Terminal Co., Civ.App., 98 S.W.2d 254, error dismissed.

Va.—Stratton v. Bergman, 192 S.E. 813, 169 Va. 249—Linton v. Virginia Electric & Power Co., 174 S. E. 667, 162 Va. 711—Virginian Ry. Co. v. Green, 169 S.E. 570, 160 Va. 838—Virginian Ry. Co. v. Haley, 157 S.E. 776, 156 Va. 350.

Wash.—Ritter v. Johnson, 300 P. 518, 163 Wash. 153, 79 A.L.R. 1270.

Wis.—Sovich v. Loewn, 223 N.W. 429, 198 Wis. 89.

Defective brakes

It is common knowledge that automobile with defective brakes is dangerous instrumentality, in view of its power, weight, and speed.—Bogart v. Cohen-Anderson Motor Co., Or., 98 P.2d 720.

Hand brake

It is common knowledge that a good used automobile, with an effective hand brake pulled up into its proper position, will not leave its place of rest even on an incline unless some external force be applied.—Georgia Highway Express v. Sturkie, 9 S.E.2d 683, 62 Ga.App. 741.

Stopping distance

(1) Facts of common knowledge relating to the limits within which an automobile traveling at a given speed may be stopped may be judicially noticed.

U.S.—Davis v. Schroeder, C.C.A.Mo., 291 F. 47.

Ill.—Grubb v. Illinois Terminal Co., 8 N.E.2d 934, 366 Ill. 330, reversing 3 N.E.2d 948, 286 Ill.App. 499.

Iowa.—Wright v. Chicago, R. I. & P. R. Co., 268 N.W. 915, 222 Iowa 583.

La.—Eggleston v. Louisiana & A. Ry. Co., App., 192 So. 774.

Mo.—Bollinger v. St. Louis-San Francisco Ry. Co., 67 S.W.2d 985—Spoeneman v. Uhri, 60 S.W.2d 9, 332 Mo. 821—Chawkley v. Wabash Ry. Co., 297 S.W. 20, 317 Mo. 782—Rosanbalm v. Thompson, App., 148 S.W.2d 830—Danklef v. Armbruster, App., 91 S.W.2d 660—Johnson v. Missouri Pac. R. Co., App., 72 S.W.2d 889—Cross v. Wears, App., 67 S.W.2d 517.

Wash.—De Temple v. Schafer Bros. Logging Co., 13 P.2d 446, 169 Wash 102.

Wis.—Weitzman v. Bissell Lumber Co., 214 N.W 353, 193 Wis. 561.

(2) The court will decline, however, to take judicial notice of the precise distance within which an automobile traveling at a given rate of speed may be stopped.

Conn.—Muse v. Page, 4 A.2d 329, 125 Conn. 219.

Mo.—McCombs v. Ellsberry, 85 S.W. 2d 135, 337 Mo. 491—Spoeneman v. Uhri, 60 S.W.2d 9, 332 Mo 821—Cluck v. Abe, 40 S.W.2d 558, 328 Mo. 81—Neill v. Alton R. Co., App., 113 S.W.2d 1073.

(3) Where the evidence shows to the contrary, the court will not take judicial notice that an automobile traveling at a given speed could have stopped at a given distance.—Spreng v. Flaherty, 177 N.E. 528, 40 Ohio App. 21.

13. Okl.—Champlin Refining Co. v. Dugan, 270 P. 559, 133 Okl. 20.

Grease

It is common knowledge that automotive engines require grease or oil to keep them functioning effectively.—Bassick Mfg. Co. v. Rogers Products Co., D.C.N.J., 39 F.2d 123.

Use of gasoline

Cal.—Harrison v. Harter, 18 P.2d 436, 129 Cal.App. 22.

Okl.—Magnolia Petroleum Co. v. Wright, 254 P. 41, 124 Okl. 55—McPherson v. First Presbyterian Church of Woodward, 248 P. 561, 120 Okl. 40, 51 A.L.R. 1215.

14. R.I.—Staples v. Spelman, 165 A. 783, 53 R.I. 244.

Va.—C. I. T. Corporation v. W. J. Crosby & Co., 7 S.E.2d 107, 175 Va. 16.

Number of particular county

Supreme court could not take judicial notice that license plate bearing particular number was a particular county number, in absence of proof of anything other than the number.—Putnam v. Bussing, 266 N. W. 559, 221 Iowa 871.

15. Mass.—Wise v. Kennedy, 142 N. E 755, 248 Mass. 83.

However, it has also been held that the court cannot take judicial notice that manufacturer would not use similar numbers on two automobiles, or that it would not place same factory number on two automobiles and at same time use different engine or motor numbers.—Glens Falls Ins. Co. v. Hall, Ky., 79 S.W.2d 383.

Changing

Court judicially knows that automobile identifying number is sometimes destroyed, to prevent tracing or recovery of stolen motor vehicle.—Star Square Auto Supply Co. v. Gerk, 30 S.W.2d 447, 325 Mo. 968.

Only positive identification

Ariz.—C. I. T. Corporation v. Naudack, 38 P.2d 310, 44 Ariz. 413.

16. **Anticipation of speed**

It is common knowledge that automobiles are operated at times at a speed of approximately sixty miles an hour, and manufacturers of automobile tires must reasonably anticipate that automobiles will be driven at times at such speed.—Nebelung v. Norman, 96 P.2d 327, superseding 89 P.2d 713, 14 Cal 2d 647.

Judicial notice has been taken:

(1) That defective tires frequently cause automobile accidents.—Glazer v. Grob, 3 A.2d 895, 136 Me. 123.

(2) That some automobile tire makers evolved from earlier bicycle tire industry.—Firestone Tire & Rubber Co. v. U. S. Rubber Co., C.C.A. Ohio, 79 F.2d 948, certiorari denied U. S. Rubber Co. v. Firestone Tire & Rubber Co., 56 S.Ct. 945, 298 U.S. 679, 80 L.Ed. 1399, and 56 S.Ct. 946, 298 U. S. 679, 80 L.Ed. 1399.

(3) That tires may give miles of service after sustaining injury.—Newville v. Weller, 251 N.W. 21, 217 Iowa 1144.

(4) That tire punctures frequently occur.—Long v. Steffen, 215 N.W. 892, 194 Wis. 179, 61 A.L.R. 1155.

(5) That used tires are frequently stolen and sold.—City of Chicago v. Peterson, 282 Ill.App. 260.

(6) That the majority of motor vehicles in use on highways of Georgia use pneumatic tires.—Benton Rapid Express v. Sammons, 10 S.E. 2d 290, 63 Ga.App. 23.

(7) Other matters.

Md.—Samuel Bevard Manuro Products Co. v. Baughman, 173 A. 40, 167 Md. 55.

Me.—Dostie v. Lewiston Crushed Stone Co., 8 A.2d 393, 136 Me. 284.

Miss.—Monsour v. Farris, 181 So. 326, 181 Miss. 803.

Mo.—Walters v. Adams Transfer & Storage Co., App., 141 S.W.2d 205.

biles,[17] and visibility from cars.[18] The court, however, cannot judicially notice matters in respect of motor vehicles which are not matters of common knowledge.[19]

§ 82. Social Customs

Judicial notice may be taken of social customs.

The general social customs in vogue through the community are known to the court.[20] A court will not take judicial notice that "all hotels" of the state are used for gambling, drinking, and forbidden love.[21]

§ 83. Sports, Games, Recreations, and Shows

Judicial notice may be taken of facts of common knowledge relating to sports, games, recreations, and shows.

Facts patent to all persons concerning popular pastimes of the people are judicially known.[22] Ac-

N.J.—Grier v. Scandura, 169 A. 674, 112 N.J.Law 152.
N.Y.—Kemp v. Stephenson, 247 N.Y.S. 650, 139 Misc. 38.

17. Ark.—St. Louis-San Francisco Ry. Co v. Road Improvement Dist. No. 7, 4 S.W.2d 505, 176 Ark. 731.
Iowa—State v. One Certain Automobile, 243 N.W. 303, 214 Iowa 1088.
Miss.—Gough v. Harrington, 141 So. 280, 163 Miss. 393.
Mo.—Allen v. Chicago, B. & Q. Ry. Co., 281 S.W. 737, 313 Mo. 42.
Tenn.—Rutherford v. City of Nashville, 79 S.W.2d 581, 168 Tenn. 499—Chattanooga Dayton Bus Line v. Burney, 23 S.W.2d 669, 160 Tenn. 294.
42 C.J. p 1202 note 31.

Collisions with pedestrians
It is common knowledge that collisions between motor vehicles and pedestrians frequently occur on the highways without fault on the part of the drivers of the vehicles and due to causes entirely beyond their control, such as the negligence of pedestrians themselves.—Arnold v. Wood, 3 S.E.2d 374, 173 Va. 18.

For purposes other than travel
Fla.—Lehman v. Gear, 147 So. 853, 109 Fla. 552—Lehman v. Fitzgerald, 147 So. 855, 109 Fla. 556.

Standard of care
Courts judicially know of greatly increased automobile travel, but not that standard of care in keeping highways safe for travel has been lowered.—Beebe v. Kansas City, 17 S.W.2d 608, 223 Mo.App. 642.

18. **Hand signals**
It is common knowledge that a hand signal can seldom be seen by driver of an on-coming automobile at night when both vehicles have their lights turned on.—Butner v. Spease, 6 S.E.2d 808, 217 N.C. 82.

Windows in curtains
Va.—Virginian Ry. Co. v. Bacon, 157 S.E. 789, 156 Va. 337.

19. **Defect**
Judicial notice cannot be taken of a defect in an automobile, resulting in the injury complained of, where no defect therein has been shown.—Dr. Pepper Bottling Co. v. Gordy, 164 So. 236, 174 Miss. 392.

Reasonableness of license fee
In determining whether license fee for operating motor vehicles is so unreasonable as to brand act imposing it as revenue measure supreme court cannot take judicial notice of revenue produced, number of motor vehicles in state, amount of fee exacted from each, cost of administering law, etc.—State v. Pepper, 226 P. 1108, 70 Mont. 596.

Judicial notice will not be taken:
(1) Of angle at which spread of good headlights on automobile extends laterally.—Cook v. Missouri Pac. R. Co., Mo.App., 51 S.W.2d 171.

(2) Of how long compression of a truck motor in gear, but not running, will hold when motor is in good condition.—Clairmont v. Cilley, 153 A. 465, 85 N.H. 1.

(3) Of the existence of foot rails in automobiles so constructed as to permit passengers to entangle their legs therein.—Hedges v. Mitchell, 194 P. 620, 69 Colo. 285.

(4) Of time necessary to repair an automobile.—Sherwood v. American Ry. Express Co., 103 So. 436, 158 La. 43.

(5) That a blow-out of the front tire of an automobile running at fifteen miles an hour could not cause the car to run into a ditch alongside the road.—Klein v. Beeten, 172 N.W. 736, 169 Wis. 385, 5 A.L.R. 1237.

(6) That at time and place where collision occurred there was such unusual traffic as to supply evidence of grossness of driver's negligence.—Koger v. Hollahan, Fla., 198 So. 685, 131 A.L.R. 886.

(7) Other matters.
Ala.—Harris v. Cope, 183 So. 407, 236 Ala. 415.
Miss.—Luckett v. Louisiana Oil Corporation, 158 So. 199, 171 Miss. 570.
N.J.—Rich v. Inter-City Transp. Co., 165 A. 296, 11 N.J.Misc. 243.
42 C.J. p 1202 note 35.

20. Ill.—People v. Gard, 175 Ill.App. 486, affirmed 102 N.E. 255, 259 Ill. 238.
23 C.J. p 153 notes 94–95.
Customs and usages generally see supra § 30.

Cocktail parties
It is common knowledge that drinking of intoxicating liquor is probably as prevalent among women as among men and that great numbers of men and women, young and old, indulge in drinking parties, commonly known as cocktail parties, promiscuously and without segregation of sexes.—Le Moine v. Spicer, Fla., 1 So.2d 730.

Drinking of wine
It is a matter of common knowledge that the United States is not a wine-drinking country, such as are some of the European countries.—In re Riverbank Canning Co., Cust. & Pat.App., 95 F.2d 327.

Time of eating
It is common knowledge that people in country towns are generally at their noonday meal between the hours of 12 and 1 o'clock, and that this is especially true of officers and those who frequent courthouses.—Reisenberg v. Hankins, Tex.Civ.App., 258 S.W. 904.

21. S.D.—State v. Denis, 167 N.W. 151, 40 S.D. 219.

22. Iowa.—Golf View Realty Co. v. Sioux City, 269 N.W. 451, 222 Iowa 433.
Ky.—Watral's Adm'r v. Appalachian Power Co., 115 S.W.2d 372, 273 Ky. 25.
N.Y.—Miller v. Board of Education Union Free School Dist. No. 1, Town of Oyster Bay, 291 N.Y.S. 633, 249 App.Div. 738—Levy v. Cascades Operating Corporation, 27 N.Y.S.2d 258, 176 Misc. 373.
S.D.—Lass v. Lass, 217 N.W. 383, 52 S.D. 302—Nancolas v. Jones, 196 N.W. 749, 47 S.D. 157.
23 C.J. p 153 note 98.

"All American"
It is common knowledge that the term "All American" has a peculiar significance in the realm of sports, being indicative of supremacy, superiority, and distinction in the athletic world.—R. W. Eldridge Co. v. Southern Handkerchief Mfg. Co., D.C.S.C., 23 F.Supp. 179.

Games
It is common knowledge that there are many and differently named and played games which use cards, dominoes, dice, tables, and banks.—Hurt

cordingly, judicial notice has been taken of, and of facts of common knowledge relating to, such sports, games, and recreations as baseball,[23] dancing,[24] dog racing,[25] football,[26] games of chance,[27] golf,[28] hockey,[29] horse races,[30] moving pictures,[31] philately or stamp collecting,[32] ping-pong,[33] roller coasters,[34] skiing,[35] wrestling,[36] and of the yachting season.[37] Courts, however, are ignorant of the procedure at dog shows.[38]

§ 84. Family Life and Household Economy

Facts of common knowledge relating to family life and household economy may be judicially noticed.

The courts take judicial notice of things commonly known concerning family life and household economy,[39] such as the changing conditions in the

v. Oak Downs, Inc., Tex.Civ.App., 85 S.W.2d 294, appeal dismissed Oak Downs v. Hurt, Sup., 97 S.W.2d 673.

Propensity for gambling

It is a matter of common knowledge that the American people have a propensity for gambling, some in a large way and many many more in a small way.—Brassel v. Benham, Ohio App., 32 N.E.2d 482.

Race tracks

It is common knowledge that race tracks are constructed for various purposes and by various means.—Smith v. McCoy, 235 N.W. 661, 58 S. D. 256.

Rodeo parades

It is common knowledge that horses are ridden in Frontier Days rodeo parades and have been so ridden for many years without injury to any one.—O'Keefe v. Cheyenne Chamber of Commerce, Wyo., 105 P.2d 279.

23. Cal.—Quinn v. Recreation Park Ass'n, 46 P.2d 144, 3 Cal.2d 725.
Mo.—Grimes v. American League Baseball Co., App., 78 S.W.2d 520.
Ohio.—Cincinnati Baseball Club Co. v. Eno, 147 N.E. 86, 112 Ohio St. 175.
Okl.—State v. Lawrence, 130 P. 508, 9 Okl.Cr. 16.
Tex.—Western Union Telegraph Co. v. Eckhardt, Com.App., 20 S.W.2d 759, denying rehearing 11 S.W.2d 777, which modified, Civ.App., 2 S. W.2d 505—Keys v. Alamo City Baseball Co., Tex.Civ.App., 150 S.W. 2d 368.

Relating what occurred

It is common knowledge that an average attendant at a baseball game can intelligently relate in conversation what occurred before his eyes, play by play.—National Exhibition Co. v. Teleflash, D.C.N.Y., 24 F.Supp. 488.

24. Cal.—Hardwick v. Board of School Trustees of Fruitridge School Dist., Sacramento County, 205 P. 49, 54 Cal.App. 696.

25. Fla.—State ex rel. Hollywood Jockey Club v. Stein, 182 So. 863, 133 Fla. 530.

26. Iowa.—Sieberts v. Spangler, 118 N.W. 292, 140 Iowa 236.
23 C.J. p 153 note 1.

27. Ala.—State ex rel. Green v. One 5¢ Fifth Inning Base Ball Machine, 3 So.2d 27—Kennedy v. Shamblin, 174 So. 773, 234 Ala. 230, followed in Kropp v. Shamblin, 174 So. 774, 234 Ala. 231.
Fla.—Eccles v. Stone, 183 So. 628, 134 Fla. 113.
Vt.—Advance Whip & Novelty Co. v. Benevolent Protective Order of Elks of Montpelier, 170 A. 95, 106 Vt. 72.

Pinball machines

Fla.—Eccles v. Stone, 183 So. 628, 134 Fla. 113.
N.Y.—Shapiro v. Moss, 281 N.Y.S. 72, 245 App.Div. 835, affirmed 1 N. E.2d 353, 270 N.Y. 609—Times Amusement Corporation v. Moss, 290 N.Y.S. 794, 160 Misc. 930, affirmed 287 N.Y.S. 327, 247 App.Div. 771.

Slot machines

(1) Generally.
Fla.—Eccles v. Stone, 183 So. 628, 134 Fla. 113—Jackson v. O'Connell, 154 So. 697, 114 Fla. 705.
Or.—Stangier v. Goad, 97 P.2d 191, 163 Or. 314.

(2) The court, however, cannot take judicial notice that every slot machine is a gambling device.—Kirk v. Morrison, 146 So. 215, 108 Fla. 144.

28. Ill.—Bunker Hill Country Club v. McElhatton, 282 Ill.App. 221.
Mo.—Aquamsi Land Co. v. City of Cape Girardeau, 142 S.W.2d 332.

Calling "fore"

Mo.—Page v. Unterreiner, App., 106 S.W.2d 528.

Golf shafts

The court of customs and patent appeals will not take judicial notice that all golf shafts bear the same relation to the head of the club.—In re Schmidt, Cust. & Pat.App., 97 F.2d 157.

29. Cal.—Thurman v. Ice Palace, 97 P.2d 999, 36 Cal.App.2d 364.
N.Y.—Ingersoll v. Onondaga Hockey Club, 281 N.Y.S. 505, 245 App.Div. 137.

30. Utah.—Utah State Fair Ass'n v. Green, 249 P. 1016, 68 Utah 251.
23 C.J. p 153 note 3.

Judges

Mass.—Finlay v. Eastern Racing Ass'n, 30 N.E.2d 859, 308 Mass. 20.

Parimutuel betting

Mass.—Finlay v. Eastern Racing Ass'n, supra.

31. U.S.—In re Statewide Theatres Corporation, D.C.Del., 4 F.Supp. 86—Metro-Goldwyn-Mayer Distributing Corporation v. Bijou Theatre Co. of Holyoke, D.C.Mass., 3 F. Supp. 66.
Ind.—Olsen v. Edgerly, 18 N.E.2d 937, 106 Ind.App. 223.
Tex.—City of Dallas v. Urbish, Civ. App., 252 S.W. 258.
Wash.—Olsen v. John Hamrick's Tacoma Theatres, 115 P.2d 718.
23 C.J. p 153 notes 5, 6.

32. Cal.—American Philatelic Soc. v. Claibourne, 46 P.2d 135, 3 Cal. 2d 689.

33. U.S.—U. S. v. Strauss, N.Y., 136 F. 185, 69 C.C.A. 201.
23 C.J. p 153 note 2.

34. Cal.—Pontecorvo v. Clark, 272 P. 591, 95 Cal.App. 162.

35. N.Y.—Morse v. State, 29 N.Y.S. 2d 34, 262 App.Div. 324.

36. Pa.—McCoy v. Spriggs, 157 A. 523, 102 Pa.Super. 500.

37. U.S.—The Conqueror, N.Y., 17 S.Ct. 510, 166 U.S. 110, 41 L.Ed. 937.
23 C.J. p 153 note 4.

38. N.Y.—Van Heusen v. Argenteau, 87 N.E. 437, 194 N.Y. 309, reversing 109 N.Y.S. 238, 124 App.Div. 776.
23 C.J. p 153 note 7.

39. **Judicial notice has been taken:**

(1) That addition of one more to household consisting of several persons does not necessarily increase cost of maintenance in proportion to addition.—Utah Fuel Co. v. Industrial Commission of Utah, 245 P. 381, 67 Utah 25, 45 A.L.R. 882.

(2) That a man would not expect to be killed for returning home intoxicated.—Riggins v. Equitable Life Assur. Soc. of U. S., 14 S.E.2d 182, 64 Ga.App. 834.

(3) That chicken pie usually contains chicken bones.—Mix v. Ingersoll Candy Co., 59 P.2d 144, 6 Cal.2d 674.

(4) That in many families a large portion of community savings are invested in various forms of insurance.—Occidental Life Ins. Co. v. Powers, 74 P.2d 27, 192 Wash. 475, 114 A.L.R. 531.

(5) That marriages of girls sixteen years of age and less are, and have been, of frequent occurrence in Lou-

manner of living,[40] the extensive use of polished and waxed hardwood floors furnished with rugs,[41] the placing of a card in a window by those desiring ice,[42] that toilet soaps may be and are used for laundry purposes,[43] that stairs can be mopped without endangering the safety of those having occasion to use them,[44] and that stairways in residences and private homes are not ordinarily barred by gates or lights therein left burning throughout the night.[45] It is a matter of common knowledge that no injury can be inflicted that would be more harmful and result in more material damage to livable premises than to deprive them of the comfort of pure and wholesome water.[46] It is common knowledge that it costs money to rear, nurture, and educate children and that the amount varies according to the ambition, ability, and earning capacity of the parents and the station in life maintained by them.[47] It is also a matter of common knowledge that food, clothing, and expenses in sending a child to school are "necessaries."[48]

§ 85. Dangerous Character of Employment or Operation

Facts of common knowledge relating to the dangerous character of particular employments or operations may be judicially noticed.

The dangerous character of a particular employment or operation,[49] or the comparative danger under different conditions,[50] or the lack of hazard,[51] is sometimes judicially noticed. Only such hazards, however, as are within common knowledge are judicially known;[52] and sometimes judicial notice of a danger or hazard will not be taken without regard to, or in the absence of evidence of, attendant conditions.[53]

§ 86. Private Concerns; Personal or Racial Status or Conditions

Judicial notice will be taken of only such private concerns as are of public interest and of general knowledge.

Judicial notice is not taken of purely private concerns when they are not connected with, or necessarily involved in, a matter of a public nature,[54]

isiana.—Succession of Curtis, 109 So. 832, 161 La. 1045.

(6) That recognition of paternity of alleged illegitimate child is not usually divulged to strangers, groups, or assemblages.—In re Wise's Estate, 221 N.W. 567, 206 Iowa 939.

(7) That sweet potatoes are a staple food product in some states.—Collins & G. R. Co. v. Beasley, 136 S. E. 167, 36 Ga.App. 241.

(8) That those who are taught to respect parental authority in their early years also conform to laws of land and conventions of society throughout their adult life.—In re Schein, 69 P.2d 293, 156 Or. 661.

(9) Other facts.

Iowa.—Hewitt v. Blaise, 211 N.W. 479, 202 Iowa 1109.

La.—Brown v. Wade, 145 So. 790.

Mo.—Saxbury v. Coons, 98 S.W.2d 662—In re Rash's Estate, App., 256 S.W. 525.

N.Y.—Singer v. Zabelin, 24 N.Y.S.2d 962.

Pa.—Ottavi v. Timothy Burke Stripping Co., 14 A.2d 188, 140 Pa.Super. 389.

Tex.—City of Fort Worth v. George, Civ.App., 108 S.W.2d 929, error refused.

Vt.—Valenti v. Imperial Assur. Co., 176 A. 413, 107 Vt. 65.

23 C.J. p 153 notes 10–12.

40. Okl.—Walcher v. First Presbyterian Church of Norman, Okl., 184 P. 106, 76 Okl. 9, 6 A.L.R. 1593.

41. Iowa.—Nelson v. Smeltzer, 265 N.W. 924, 221 Iowa 972.

42. U.S.—In re Goggins, Cust. & Pat. App., 86 F.2d 419.

43. U.S.—Mione Mfg. Co. v. U. S., C.C.A.Pa., 114 F.2d 647.

44. Cal.—De Verdi v. Weiss, 60 P.2d 879, 16 Cal.App.2d 439.

45. Mo.—Bruce v. Baer, App., 76 S.W.2d 423.

46. Va.—Kerr v. Clinchfield Coal Corporation, 192 S.E. 741, 169 Va. 149.

47. Tex.—Hemsell v. Summers, Civ. App., 138 S.W.2d 865.

Variance

It is common knowledge that expenditures for support and maintenance of children in different homes vary widely.—Dawson v. Dawson, 135 S.W.2d 458, 23 Tenn.App. 556.

48. Mo.—Davis v. Gould, 131 S.W.2d 360, 234 Mo.App. 42.

49. Ark.—Phillips Petroleum Co. v. Berry, 65 S.W.2d 533, 188 Ark. 431.

Ill.—City of Rock Island v. Industrial Commission of Illinois, 122 N.E. 82, 287 Ill. 76.

Mass.—Randolph's Case, 141 N.E. 865, 247 Mass. 245.

Mich.—Stern v. Franklin, 287 N.W. 880, 290 Mich. 467.

Mo.—Mosely v. Sum, 130 S.W.2d 465, 344 Mo. 969—Ebert v. Emerson Electric Mfg. Co., App., 264 S.W. 453.

N.Y.—Rohlfs v. Weil, 3 N.E.2d 588, 271 N.Y. 444, affirming 279 N.Y.S. 642, 244 App.Div. 467—Simmons v. Radio Printing Corporation, 5 N.Y.S.2d 345, 254 App.Div. 521, affirmed 18 N.E.2d 866, 279 N.Y. 783, reargument denied 20 N.E.2d 20, 280 N.Y. 571—Rabiner v. Rosenberg, 28 N.Y.S.2d 533.

23 C.J. p 153 note 15.

Explosive character of particular substances see supra § 75.

50. Ill.—Rock Island v. State Industrial Commn., 122 N.E. 82, 287 Ill. 76.

Mo.—Scrivner v. Missouri Pac. R. Co., 169 S.W. 83, 260 Mo. 421.

23 C.J. p 153 note 16.

Dependent on circumstances

It is a fact of common knowledge that certain acts are dangerous under some circumstances and comparatively free from danger under others.—Continental Casualty Co. v. Whitmore, 137 N.E. 575, 79 Ind.App. 157.

51. La.—Stockstill v. Sears-Roebuck & Co., App., 151 So. 822.

23 C.J. p 154 note 17.

52. U.S.—Hampton v. Des Moines & C. I. R. Co., C.C.A.Iowa, 65 F.2d 899—Erie R. Co. v. Vajo, C.C.A. Ohio, 41 F.2d 738.

Mont.—Burk v. Montana Power Co., 255 P. 337, 79 Mont. 52.

23 C.J. p 154 note 18.

53. Mass.—Herlihy v. Little, 86 N. E. 294, 200 Mass. 284.

23 C.J. p 154 note 19.

54. U.S.—Hoyt v. Russell, Mont., 6 S.Ct. 881, 117 U.S. 401, 29 L.Ed. 914—Juell v. Commissioner of Immigration & Naturalization, D.C. N.Y., 37 F.Supp. 533, modified on other grounds, C.C.A., 121 F.2d 728.

Ala.—White v. Haralson, 124 So. 417, 220 Ala. 189.

Mo.—Bellovich v. Griese, 100 S.W. 2d 261.

but judicial notice will be taken of such facts when of a public nature and a matter of common knowledge.[55] While judicial notice might be taken that the names of certain persons mentioned in the record were those belonging to an English speaking race, the court could not judicially know that they were citizens of this country,[56] nor does the court judicially know that a person who affixes to his name a title of nobility is a resident of a particular foreign country.[57] The court will not take judicial notice of the legal status of any particular Indian,[58] or of the degree or quantity of Indian blood possessed by any particular person or by the member of any particular Indian tribe.[59] Courts may properly take judicial notice of the relation existing between the white and colored races in the state, or at least in that portion of the state in which they are sitting,[60] and that it is an insult to a white man to charge him with having negro blood in his veins, at least in a state where intermarriage between the races has been long forbidden.[61] Some courts take judicial notice that, viewed from a social standpoint, the negro race is in mind and morals inferior to the Caucasian.[62] It is common knowledge that Japanese do not readily assimilate with other races, especially the white race.[63] The courts do not take judicial notice that there is a violent prejudice against a certain Caucasian race.[64] Judicial notice will not be taken that people of a particular nationality are less intelligent or less capable of looking out for themselves than other nationalities.[65]

§ 87. Phenomena of Other Animal Life

Facts of common knowledge relating to the phenomena of animal life may be judicially noticed.

General facts of natural history relating to the animal kingdom are within the judicial cognizance.[66] Judicial notice is taken of what animals are domestic,[67] and prominent facts in regard to such animals,[68] such as their habits, instincts, and

S.D.—Beers v. City of Watertown, 177 N.W. 502, 43 S.D. 14.
Tex.—Fuller v. Texas Park Lot, Civ. App., 133 S.W.2d 605.
Wyo.—Cuthbertson v. Union Pac. Coal Co., 62 P.2d 311, 50 Wyo. 441.

Solvency

Courts are not judicially cognizant of the solvency of a litigant or the condition of his or its property—State v. Clements, 95 P. 845, 37 Mont. 100, 127 Am.S.R. 705.

55. **Judicial notice may be taken:**

(1) That certain classes of people are often without financial means, and are frequently illiterate.
Ky.—Kenton & Campbell Benev. Burial Ass'n v. Quinn, 50 S.W.2d 554, 244 Ky. 260.
La.—Harris v. Southern Carbon Co., App., 162 So. 430.

(2) That domicile is usually in accord with residence and business location.—Urschel v. Forgan, C.C.A. Kan., 297 F. 210.

(3) That it is usually quite difficult to ascertain financial standing of an individual with mechanical certainty.—Mitvalsky v. Mitvalsky, 179 N.W. 520, 191 Iowa 8.

(4) That there is an "industrial old age" and what might be styled a social old age, an economic human obsolescence, entirely distinct from the evening of life.—Sigman v. Rudolph Wurlitzer Co., 11 N.E.2d 878, 57 Ohio App. 4.

(5) Other matters.
U.S.—National Labor Relations Board v. Lion Shoe Co., C.C.A., 97 F.2d 448.
Cal.—Goodall v. Brite, 54 P.2d 510, 11 Cal.App.2d 540.
Neb.—Nebraska District of Evangelical Lutheran Synod of Missouri, Ohio, and Other States v. McKelvie, 175 N.W. 531, 104 Neb. 93, 7 A.L.R. 1688.
Tex.—Sportatorium, Inc., v. State, Civ.App., 115 S.W.2d 483, error dismissed.
23 C.J. p 154 notes 21, 22, 24, 25.

56. Conn.—State v. Travelers' Ins. Co., 40 A. 465, 70 Conn. 590, 66 Am.S.R. 138.

57. Cal.—De Tolna v. De Tolna, 67 P. 1045, 135 Cal. 575.

58. Utah.—Murdock v. Farrell, 163 P. 1102, 49 Utah 314.

59. Okl.—Harriss v. Leeper Bros. Lumber Co., 176 P. 412, 74 Okl. 204.
23 C.J. p 154 note 30.

60. U.S.—Stultz v. Cousins, Tenn., 242 F. 794, 155 C.C.A. 382.
Ky.—Axton-Fisher Tobacco Co. v. Evening Post Co., 183 S.W. 269, 169 Ky. 64, L.R.A.1916E 669, Ann.Cas. 1918B 560.

Reason for rule

The courts cannot shut their eyes to conditions that are everywhere about them as a part of the social order and domestic economy of the state.—Axton-Fisher Tobacco Co. v. Evening Post Co., supra.

Status

Courts of justice can take judicial notice of status of those who belong to colored race.—Succession of David v. Richard, 1 La.App. 237.

61. Ga.—Wolfe v. Georgia R. & Electric Co., 58 S.E. 899, 2 Ga.App. 499.
23 C.J. p 154 note 33.

62. Ga.—Wolfe v. Georgia R. & Electric Co., supra.
23 C.J. p 154 note 34.

63. U.S.—Farrington v. T. Tokushige, C.C.A.Hawaii, 11 F.2d 710, certiorari granted 47 S.Ct. 99, 273 U.S. 677, 71 L.Ed. 835, and affirmed 47 S.Ct. 406, 273 U.S. 284, 71 L.Ed. 646.

64. Ill.—Hoxie v. Pfaelzer, 167 Ill. App. 79.
23 C.J. p 154 note 35.

65. N.H.—Pantebakos v. Rockingham County Light & Power Co., 128 A. 534, 81 N.H. 441, 38 A.L.R. 1063.

66. U.S.—Lyon v. Marine, Md., 55 F. 964, 5 C.C.A. 359.
Alaska.—U. S. v. Japanese Schooner Kensei Maru, 3 Alaska 627.
23 C.J. p 154 note 37.

Mice

It is common knowledge that mice are timid if persons are present and active.—Kenney v. Wong Len, 128 A. 343, 81 N.H. 427.

67. Alaska.—In re Burkell, 2 Alaska 108.
Ill.—Swartzbaugh v. People, 85 Ill. 457.
W.Va.—State v. Gould, 26 W.Va. 258.
23 C.J. p 155 note 38.

68. U.S.—U. S. v. Stewart, C.C.A. Cal., 121 F.2d 705, modifying, D. C., 29 F.Supp. 59—Manhattan Oil Co. v. Mosby, C.C.A.Mo., 72 F.2d 840, certiorari denied 55 S.Ct. 237, 293 U.S. 623, 79 L.Ed. 710.
Iowa.—Higgins v. Decorah Produce Co., 242 N.W. 109, 214 Iowa 276.
Mich.—H. Ginsberg & Sons v. Wabash R. Co., 189 N.W. 1018, 219 Mich. 665, 28 A.L.R. 518, affirmed Ginsberg v. Wabash R. Co., 193 N.W. 286, 222 Mich. 560.
N.M.—Mitchell v. City of Roswell, 111 P.2d 41, 45 N.M. 92.
Tex.—Panhandle & S. F. Ry. Co. v.

propensities,[69] but judicial notice will not be taken of matters relating to domestic animals, which are not of common knowledge.[70]

Notorious facts concerning diseases and injuries of animals are judicially known,[71] as, for example, that some diseases develop within a certain period,[72] and that the time is not the same in all cases or with all diseases.[73] Judicial notice, however, will be denied if the alleged facts are not within common experience or knowledge.[74]

Insects and pests. Facts of common knowledge relating to insects and pests will be judicially no-

Wilson, Civ.App., 135 S.W.2d 1062, error dismissed—St. Louis Southwestern Ry. Co. of Texas v. Culberson, Civ.App., 248 S.W. 111.
Wash.—Leddy v. Great Northern R. Co., 210 P. 354, 122 Wash. 136.
23 C.J. p 155 notes 42, 48.

69. U.S.—Edgar-Morgan Co. v. Alfocorn Milling Co., D.C.Mo., 270 F. 344, reversed on other grounds, C. C.A., Alfocorn Milling Co. v. Edgar-Morgan Co., 282 F. 394, certiorari denied Edgar-Morgan Co. v. Alfocorn Milling Co., 43 S.Ct. 246, 260 U.S. 745, 67 L.Ed. 493.
Idaho.—Cooper v. Oregon Short Line R. Co., 262 P. 873, 45 Idaho 313.
Mass.—Maguire v. American Ry. Express Co., 129 N.E. 439, 237 Mass. 226.
Miss.—Crosby v. Burge, 1 So.2d 504, 190 Miss. 739.
Mo.—Moran v. Chicago, B. & Q. R. Co., App., 255 S.W. 331.
N.Y.—Gaccione v. State, 18 N.Y.S.2d 161, 173 Misc. 367.
Va.—Tate v. Ogg, 195 S.E. 496, 170 Va. 95.
W.Va.—Walke v. Premier Pocahontas Collieries Co., 117 S.E. 905, 94 W. Va. 38.
23 C.J. p 155 note 39.

Burro

A burro is to the common knowledge ordinarily one of the most gentle and inoffensive of animals.—Arizona Livestock Co. v. Washington, 84 P.2d 588, 52 Ariz. 591.

Cattle

(1) Generally.—In re Colliton's Estate, 271 N.Y.S. 163, 150 Misc. 616—23 C.J. p 155 notes 46, 47.

(2) That herding of sheep in large numbers on grass land tends to destroy value for cattle range, and that such condition continues for a year or longer, is matter of common knowledge.—Big Butte Horse & Cattle Ass'n v. Anderson, 289 P. 503, 133 Or. 171, 70 A.L.R. 399.

Dogs

(1) Courts judicially know that dogs as a class are intelligent enough to understand the danger of being run over by trains or other vehicles and alert enough to avoid such danger under ordinary circumstances.—Alabama Great Southern R. Co. v. Smith, 96 So. 239, 209 Ala. 301.

(2) That a pack of dogs is more likely to manifest vicious propensities than a single dog is common knowledge.—Meier v. Hartman, 266 Ill.App. 466.

(3) Judicial notice of other facts relating to dogs.
Cal.—Miller v. City of Arcadia, 9 P. 2d 587, 121 Cal.App. 660.
Miss.—Hull v. Scruggs, 2 So.2d 543.

Horses

(1) Generally.
Idaho.—Cooper v. Oregon Short Line R. Co., 262 P. 873, 45 Idaho 313.
Mass.—Verna v. Boston Transcript Co., 192 N.E. 502, 288 Mass. 160.
Miss.—Crosby v. Burge, 1 So.2d 504, 190 Miss. 739.
N.H.—Smith v. Hooper, 192 A. 496, 89 N.H. 36.
N.J.—Tabaka v. Gerard, 169 A. 722, 12 N.J.Misc. 110.
23 C.J. p 155 note 39 [b].

(2) Judicial notice has been taken that certain objects do, or do not, usually frighten horses.—McCleary v. Chicago, B. & Q. R. Co., Mo., 264 S.W. 376—23 C.J. p 155 notes 44, 45.

(3) A court, however, has refused to take judicial notice that a steam roller would usually frighten a horse.—Boulder v. Stewardson, 143 P. 820, 26 Colo.App. 290.

Mule

(1) The kicking propensity of the mule is a matter of common knowledge.
Ala.—Atlantic Coast Line R. Co. v. J. S. Carroll Mercantile Co., 89 So. 509, 206 Ala. 320.
Mo.—Roy v. North Kansas City Development Co., App., 226 S.W. 965, affirming 209 S.W. 990.
23 C.J. p 155 note 39 [c].

(2) It is common knowledge that it is necessary for some one to be present to control work of mules.—Terry v. Little, 18 S.W.2d 916, 179 Ark. 954.

(3) It is common knowledge that mules will occasionally walk or run away.—Alaska Lumber Co. v. Spurlin, 37 S.W.2d 82, 183 Ark. 576.

70. Mo.—Vaughn v. St. Louis-San Francisco Ry. Co., 15 S.W.2d 901, 223 Mo.App. 732—Denny v. City of Puxico, App., 4 S.W.2d 475.
Tex.—De Garza v. Magnolia Petroleum Co., Civ.App., 107 S.W.2d 1078, error dismissed.
23 C.J. p 155 notes 40, 41—3 C.J. p 147 note 12.

Bulls

(1) Bulls as class are not judicially known to be dangerous.—Lander v. Shannon, 268 P. 145, 148 Wash. 93.

(2) It has been held, however, that the court will take judicial notice that a four-year-old bull has a dangerous and unpredictable character.—Gaccione v. State, 18 N.Y.S.2d 161, 173 Misc. 367.

Mule

Appellate court will not take judicial notice of conduct of mule immediately after being snowballed, or under any given circumstances.—John T. Griffin Truck Corporation v. Smith, 142 S.E. 385, 150 Va. 95.

71. Fla.—Campoamor v. State Live Stock Sanitary Board, 182 So. 277, 136 Fla. 451—McSween v. State Live Stock Sanitary Board of Florida, 122 So. 239, 97 Fla. 749, 750, 65 A.L.R. 508.
Ga.—Rowland v. Morris, 111 S.E. 389, 152 Ga. 842.
Mo.—Clinkenbeard v. Reinert, 225 S. W. 667, 284 Mo. 569, 13 A.L.R. 485—Brune v. De Benedetty, App., 261 S.W. 930.
23 C.J. p 155 note 49—3 C.J. p 59 note 17.

Quarantines

Miss.—Moss v. Mississippi Live Stock Sanitary Board, 122 So. 776, 154 Miss. 765, followed in Gray v. Mississippi Live Stock Sanitary Board, 122 So. 783, and Turnage v. Mississippi Live Stock Sanitary Board, 122 So. 783, and Adams v. Mississippi Live Stock Sanitary Board, 126 So. 204.

72. **Texas fever tick**
Ark.—Payne v. Cotner, 230 S.W. 275, 148 Ark. 401.

73. Mo.—Gillespie v. Louisville, etc., R. Co., 129 S.W. 277, 144 Mo.App. 508.

74. Tex.—Raney & Hamon v. Hamilton & White, Civ.App., 234 S.W. 229.
23 C.J. p 155 note 51.

Difference of opinion among competent authorities as to the cause and character of a certain disease may justify courts in refusing to adjudge the disputed questions by the exercise of judicial cognizance, and subsequent progress of scientific investigation may produce a notoriously unanimous opinion on the same questions so as to require the judicial notice to be taken that was formerly denied.—Grimes v. Eddy, 28 S.W. 756, 126 Mo. 168, 47 Am.S.R. 653, 26 L.R.A. 638—Bradford v. Floyd, 80 Mo. 207—23 C.J. p 155 note 52.

ticed.[75] It is a matter of common knowledge that cockroaches, ants, and other objectionable insects will sometimes appear in dwelling houses to the annoyance of the occupants,[76] and the dangers with which the presence of house flies is fraught is a matter of common knowledge.[77] The characteristics of the gopher will probably not be judicially recognized, but, if that notice were taken, no doubt would be entertained that, when the entrance of such rodent's tunnels was opened up, the animal would attempt with earth to fill the aperture and thus exclude the light.[78]

Wild animals. Judicial notice will be taken of facts of common knowledge relating to wild animals.[79] Sometimes the courts take judicial notice that there are no wild animals of a certain class in the state.[80] The fact that foxes, once captured and escaped, do not have animum revertendi is so well and universally known that the court will take judicial notice thereof.[81]

§ 88. Phenomena of Vegetable Life

Judicial notice may be taken of facts of common knowledge relating to vegetable life.

The courts take judicial notice of the prominent facts of vegetable life[82] and growth.[83] Judicial notice may also be taken of diseases and pests infesting plants within the state, and the usual means of eradicating them.[84] On the other hand, judicial notice will not be taken of such facts as are of minor importance and not actually within the sphere of common observation and knowledge, even though they may be ascertained by reference to technical treatises.[85] Judicial notice of facts relating to agriculture are discussed in § 29 b supra.

Weeds and thistles. The fact that a particular plant is generally regarded as a weed may be judicially noticed.[86] A court may notice generally that in the state, the right of way of railroads has on it more or less dry grass and weeds.[87] The court cannot take judicial notice that a particular locality along a railroad right of way was free from Russian thistles at a particular time, although it may take judicial notice that the thistle grew throughout the state and was a great nuisance.[88]

Perishable nature. The perishable nature of certain vegetables[89] and the fact that vegetable matter

75. Ky.—City of Frankfort v. Ballew, 151 S.W.2d 1063, 287 Ky. 141.
La.—West v. Seigle Theatre, App., 200 So. 339.
23 C.J. p 156 notes 55–57.

76. Mass.—Hopkins v. Murphy, 124 N.E. 252, 233 Mass. 476.

77. Me.—Williams v. Sweet, 110 A. 316, 119 Me. 228, 10 A.L.R. 121.
Mo.—Valley Spring Hog Ranch Co. v. Plagmann, 220 S.W. 1, 282 Mo. 1, 15 A.L.R. 266.

Carriers of diseases
N.M.—Mitchell v. City of Roswell, 111 P.2d 41, 45 N.M. 92.

Danger to meat
It is common knowledge that flies will attack and lay eggs on fresh clean meat and that maggots will hatch and develop in very short time thereafter.—Reese v. Smith, 70 P.2d 933, 9 Cal.2d 324.

78. Or.—Hill v. Tualatin Academy, 121 P. 901, 61 Or. 190.

79. U.S.—Cerritos Gun Club v. Hall, 96 F.2d 620, affirming, C.C.A.Cal., 21 F.Supp. 163.
Fla.—State Live Stock Sanitary Board v. Sheets, 178 So. 901, 131 Fla. 41.
La.—State v. Clement, 178 So. 493, 188 La. 923.

Hunting enterprises
The court takes judicial notice of the existence in California of a large number of hunting enterprises which lure migratory game fowl to their properties with grain to be shot by their stockholders and members.—Cerritos Gun Club v. Hall, C.C.A.Cal., 96 F.2d 620, affirming, D.C., 21 F.Supp. 163.

80. Ill.—Swartzbaugh v. People, 85 Ill. 457.
W.Va.—State v. Gould, 26 W.Va. 258.

81. Miss.—Hughes v. Reese, 109 So. 731, 144 Miss. 304.

82. U.S.—Ross & Co. v. U. S., 9 Ct. Cust.App. 235.
Cal.—Pfitzer v. Candens, 200 P. 839, 53 Cal.App. 737.
Colo.—Park Floral Co. v. Industrial Commission, 91 P.2d 492, 104 Colo. 350.
Ind.—Morley v. Cleveland, C., C. & St. L. R. Co., 194 N.E. 806, 100 Ind App. 515.
Me.—Ray v. E. I. Dupont De Nemours & Co, 120 A. 47, 122 Me. 350—Rogers v. Kendall, 119 A. 616, 122 Me. 248.
Tex.—Thurman v. Kirkland, Civ.App., 260 S.W. 677.
23 C.J. p 156 note 61.

Bermuda grass
Tex.—Mosheim v. Rollins, Civ.App., 79 S.W.2d 672, error dismissed.

Chlorophyll
The court may judicially notice the fact that "chlorophyll" is the green coloring matter of plants, and that, owing to its instability, it has never been obtained absolutely pure.—U. S. v. One Can of Kololiva, D.C.Mass., 24 F.Supp. 110.

Salt
It is common knowledge that salt deposited on land kills vegetation and renders land sterile.—Paluxy Asphalt Co. v. Helton, Tex.Civ.App., 144 S.W.2d 453, error dismissed, judgment correct.

Poison ivy
(1) Court judicially notices peculiar properties of plant life in so far as they are generally known, and that poison ivy is dangerous and poisonous.—Polizzano v. Mapes Holding Co., 180 A. 419, 421, 115 N.J.Law 352, citing **Corpus Juris**, and affirmed 182 A. 842, 116 N.J.Law 190.

(2) Court cannot, however, assume common knowledge of poison ivy plant which would compel its recognition by servant when mowing bushes.—Kimball v. Clark, 177 A. 183, 133 Me. 263.

83. Ark.—Flinn v. Cullins, 220 S.W. 449, 143 Ark. 431.
23 C.J. p 156 note 62.

84. Cal.—Gregory v. Hecke, 238 P. 787, 73 Cal.App. 268.

Watery soft rot
Judicial notice has been taken of the fact that watery soft rot is a disease of field origin.—A. J. Conroy, Inc., v. Weyl-Zuckerman & Co., D.C. Cal., 39 F.Supp. 784.

85. U.S.—U. S. v. Squibb, 2 Cust. App. 353.

86. U.S.—U. S. v. 154 Sacks of Oats, D.C.Va., 294 F. 340.

87. Mont.—Diamond v. Northern Pac. R. Co., 13 P. 367, 6 Mont. 580.

88. Tex.—Vance v. Southern Kansas R. Co., Civ.App., 152 S.W. 743.

89. U.S.—The Heranger, D.C.Cal., 20 F.Supp. 986, affirmed, C.C.A., 101 F.2d 953.

will decay[90] may be judicially noticed. It is a matter of common knowledge that potatoes are subject to decay,[91] that ventilation is necessary to prevent their decay during transportation by ship,[92] and that, while frozen potatoes have some value for the purpose of immediate consumption, they will not keep.[93] The courts, however, cannot take judicial notice of the fact that onions are perishable property.[94] It is a well recognized fact that fruit for a short time will stand a low degree of temperature without damage, while under a temperature several degrees higher, but prevailing for a longer time, damage will result from the cold.[95]

Trees. Judicial notice will be taken of facts generally known relating to trees,[96] but facts which are of minor importance and not generally known will not be noticed.[97] Judicial notice may well be taken of the fact that banana trees are capable of holding water; but it is not an accepted fact that they naturally and commonly hold water for the length of time and under the circumstances required to breed mosquito larvæ.[98]

§ 89. Private Corporations and Associations and Members Thereof

Judicial notice will be taken of well-known facts relating to associations.

Facts of common knowledge relating to associations generally may be judicially noticed,[99] as may be notice of the organization,[1] name,[2] nature,[3] purposes,[4] and other facts of notoriety[5] of well-known associations; but particular facts about particular

90. Ariz.—Southern Pac. Co. v. Itule, 74 P.2d 38, 51 Ariz. 25, 115 A.L.R. 1268.
Mo.—Valley Spring Hog Ranch Co. v. Plagmann, 220 S.W. 1, 282 Mo. 1, 15 A.L.R. 266.

91. Or.—Hurst v. Hill, 188 P. 973, 96 Or. 311—James Higgins Co. v. Torvick, 106 P. 22, 55 Or. 274.

92. U.S.—The Lake Fabyan, C.C.A. Va., 283 F. 771.

93. S.D.—Beck v. Chicago, etc., R. Co., 164 N.W. 74, 39 S.D. 297.

94. N.Y.—William R. Mankoff v. Erie R. Co., 161 N.Y.S. 345, 97 Misc. 421.

95. Cal.—Ferraris v. Southern Pac. Co., 191 P. 45, 47 Cal.App. 560.

96. **Particular facts judicially noticed:**
(1) That fruit trees in Washington are dormant during winter months—Stuhlmiller v. Stuhlmiller, 248 P. 393, 140 Wash. 175.

(2) That fruit trees require annual pruning, spraying, and cultivation.—Twin Falls Bank & Trust Co. v. Weinberg, 257 P. 31, 44 Idaho 332, 54 A.L.R. 1527.

(3) That not every tree planted will survive even under most favorable conditions.—Barnes v. Cocke, 296 P. 909, 112 Cal.App. 319.

(4) That valuable timber, such as cypress, must have water for its continued life and growth.—Matthews v. Panola-Quitman Drainage Dist., 130 So. 910, 158 Miss. 647.

(5) The rate of growth of particular trees or shrubs.
U.S.—Petition of Diamond Coal & Coke Co., D.C.Pa., 297 F. 238, affirmed, C.C.A., Diamond Coal & Coke Co. v. Iron City Sand Co., 297 F. 246, certiorari denied Diamond Coal & Coke Co. v. Hazelwood Dock Co., 44 S.Ct. 638, 265 U.S. 595, 68 L.Ed. 1197.
N.C.—Gaffney v. Phelps, 178 S.E. 231, 207 N.C. 553.

(6) Other facts.
Cal.—Haley v. Santa Fé Land Improvement Co., 42 P.2d 1078, 5 Cal. App.2d 415.
Vt.—Barton Sav. Bank & Trust Co. v. Hamblett, 178 A. 900, 107 Vt. 311.
23 C.J. p 157 notes 85–92.

97. Tex.—Abilene & S. Ry. Co. v. Herman, Civ.App., 47 S.W.2d 915, error dismissed.
23 C.J. p 157 note 93.

98. Hawaii.—Territory v. Araujo, 21 Hawaii 56, Ann.Cas.1915B 1212.

99. U.S.—Pendennis Club v. U. S., D. C.Ky., 20 F.Supp. 758.
Mass.—Tripp v. Fay, 163 N.E. 174, 264 Mass. 516.

"Life membership"
It is common knowledge, of which judicial notice will be taken, that "life membership" in social club is membership for life, subject to earlier termination only by resignation or dishonorable expulsion.—Masonic Country Club of Western Michigan v. Holden, D.C.Mich., 12 F.2d 951, reversed on other grounds, C.C.A., 18 F.2d 553.

1. U.S.—Crooks v. Kansas City Hay Dealers' Ass'n, C.C.A.Mo., 37 F.2d 83, affirming, D.C., Kansas City Hay Dealers' Ass'n v. Crooks, 28 F.2d 909.
Cal.—In re Cate, App., 270 P. 968, rehearing denied 271 P. 356, supplemented 273 P. 617.

2. **"Klan"**
Courts judicially know that word "Klan" designates the Knights of the Ku Klux Klan, and word "Klansmen" the members thereof.—Knights of the Ku Klux Klan v. Independent Klan of America, D.C.Ind., 11 F.2d 881.

3. U.S.—Pink v. Fidelity & Deposit Co. of Maryland, C.C.A.N.Y., 88 F. 2d 630, affirming, D.C., 15 F.Supp. 715, certiorari granted Fidelity & Deposit Co. of Maryland v. Pink, 57 S.Ct. 939, 301 U.S. 678, 81 L.Ed. 1338, reversed on other grounds 58 S.Ct. 162, 302 U.S. 224, 82 L.Ed. 213, rehearing denied 58 S.Ct. 407, 302 U.S. 780, 82 L.Ed. 603.
Ill.—American Industrial Finance Corporation v. Sholz, 279 Ill.App. 45.

Large organization
It is common knowledge that order of Woodmen of the World is large association with many thousands of members.—Perry v. Sovereign Camp, W. O. W., 174 S.E. 397, 172 S.C. 456.

4. Fla.—Grand Lodge, Knights of Pythias, of North America, South America, Europe, Asia, Africa and Australia, Jurisdiction of Florida, v. Moore, 163 So. 108, 120 Fla. 761.

American Bar Association
Conn.—Rosenthal v. State Bar Examining Committee, 165 A. 211, 116 Conn. 409, 87 A.L.R. 991.

Parent-teachers' associations
Ky.—Thompson v. Bridges, 273 S.W. 529, 209 Ky. 710.

Red International of Labor Unions
Secretary of labor in deportation proceedings may take common knowledge that the Red International of Labor Unions and its American branch, Trade Union Unity League, is a body opposed to organized government and favors overthrow of United States government by force.—U. S. ex rel. Boric v. Marshall, D. C.Pa., 4 F.Supp. 965, appeal dismissed, C.C.A., 67 F.2d 1020, certiorari granted 54 S.Ct. 345, 290 U.S. 623, 78 L.Ed. 543, certiorari dismissed 54 S.Ct. 371, 290 U.S. 709, 78 L.Ed. 609.
Political parties see supra § 61.

5. Ky.—Cannon v. Brotherhood of Railroad Trainmen, 89 S.W.2d 620, 262 Ky. 113.
N.Y.—In re Dolphin, 147 N.E. 538, 240 N.Y. 89, dismissing appeal 203 N.Y.S. 472, 208 App.Div. 223—People ex rel. Bryant v. Zimmerman,

associations, which are not matters of common knowledge, cannot be noticed judicially.[6]

§ 90. Charter, Name, and Residence

Judicial notice may be taken of the charter of a corporation where it is a public act.

The courts do not take judicial notice of the provisions of a charter of a private corporation[7] where it is a private act;[8] but they do take judicial notice of a charter where it is a public act,[9] where it is recognized by the constitution of the state,[10] where notice is authorized by rules of court,[11] or where the charter is required by statute to be deposited in the office of the secretary of state.[12] While the court may know what should be in the charter of a corporation organized under a particular law,[13] yet where the court is advised only generally that the corporation is organized under a law permitting organization for different purposes it cannot judicially know the character of the corporation[14] or the contents of its charter.[15]

Name. The name of a corporation is sometimes judicially noticed,[16] but it has been held that it will not be unless the corporation was created by, and named in, a public legislative act.[17] It is common knowledge that corporations frequently do not use the words "incorporated" or "limited" which form a part of their corporate name.[18] Judicial notice will be taken that a name which implies a financial, commercial, or manufacturing organization, which are the usual subjects of incorporation, imports a corporation.[19]

The legal residence or principal office of a domestic corporation is judicially noticed by the courts in some states.[20]

§ 91. Powers and Acts

Judicial notice may be taken of facts of common knowledge and of public statutes relating to the existence, powers, and acts of corporations.

Apart from statutes[21] and court rules[22] requiring judicial notice, the courts, by applying general principles, take judicial notice of matters of common[23]

210 N.Y.S. 269, 213 App.Div. 414, affirmed 150 N.E. 497, 241 N.Y. 405, 43 A.L.R. 909—People ex rel. Bryant v. Sheriff of Erie County, 206 N.Y.S. 533, 123 Misc. 859—Dairymen's League Co-op. Ass'n v. Metropolitan Casualty Ins. Co. of New York, 8 N.Y.S.2d 403, affirmed 15 N.Y.S.2d 664, 258 App.Div. 847, reargument denied 17 N.Y.S.2d 1002, 258 App.Div. 1030.

Tex.—Wirtz v. Sovereign Camp, W. O. W., 268 S.W. 433, 114 Tex. 471, affirming Sovereign Camp, W. O. W. v. Wirtz, Civ.App., 254 S.W. 637—Ross v. Sutter, Civ.App., 223 S. W. 273.

Wash.—Shawcroft v. Standard Accident Ins. Co. of Detroit, 30 P.2d 987, 177 Wash. 106.

Leader

Court can take judicial notice of fact that Samuel Gompers was head of American Federation of Labor.—Centralia Labor Temple Ass'n v. O'Day, 246 P. 930, 139 Wash. 331.

6. Ariz.—White v. Hamilton, 299 P. 124, 38 Ariz. 256.

Hawaii.—Heylin v. Yil, 30 Hawaii 606.

Brotherhood of Railroad Trainmen

Court cannot take judicial notice that membership in Brotherhood of Railroad Trainmen is limited to one hazardous occupation.—Summers v. Summers, 118 So. 912, 218 Ala. 420.

7. D.C.—White v. Central Dispensary and Emergency Hospital, 99 F. 2d 355, 69 App.D.C. 122, 119 A.L.R. 1002.

Va.—Commonwealth v. Castner, Curran & Bullitt, 121 S.E. 894, 138 Va. 81.

23 C.J. p 160 note 32.

8. N.J.—Jersey City v. Jersey City & B. R. Co., 57 A. 445, 70 N.J.Law 360.

9. Ark.—State Bank v. Watkins, 6 Ark. 123.

Ind.—Hankins v. Lawrence, 8 Blackf. 266—White Water Valley Canal Co. v. Boden, 8 Blackf. 130.

Mass.—Bleck v. East Boston Co., 18 N.E.2d 536, 302 Mass. 127.

Tenn.—Anderson v. Peters, 124 S.W. 2d 717, 22 Tenn.App. 563.

23 C.J. p 160 note 34.

10. Ind.—Vance v. Farmers' & Mechanics' Bank, 1 Blackf. 80.

11. Pa.—Hiester v. Gouglersville Band, 24 Pa.Dist. 765.

12. Ark.—Austell v. Union Central Life Ins. Co., 2 S.W.2d 22, 175 Ark. 1143.

Ga.—Georgia Southern & F. Ry. Co. v. Smiley, 108 S.E. 273, 151 Ga. 795—Railroad Commission of Georgia v. Macon Ry. & Light Co., 106 S.E. 282, 151 Ga. 256—Sheppard v. Georgia Ry. & Power Co., 121 S.E. 868, 31 Ga.App. 653—Robertson v. Tallulah Falls Ry. Co., 116 S.E. 65, 29 Ga.App. 530—Bank of Lumpkin v. People's Bank of Athens, 108 S.E. 835, 27 Ga.App. 459.

23 C.J. p 160 note 37.

13. Mo.—Brennan v. Cabanne M. E. Church, South, 192 S.W. 982.

14. D.C.—White v. Central Dispensary and Emergency Hospital, 99 F. 2d 355, 69 App.D.C. 122, 119 A.L.R. 1002.

Mo.—Brennan v. Cabanne M. E. Church, South, 192 S.W. 982.

15. Mo.—Brennan v. Cabanne M. E. Church, South, supra.

16. Ga.—Railroad Commission of Georgia v. Macon Ry. & Light Co., 106 S.E. 282, 151 Ga. 256.

23 C.J. p 160 note 41.

17. Ind.—Johnson v. Indianapolis, 16 Ind. 227.

23 C.J. p 160 note 42.

18. La.—Merchandise Reporting Co. v. Weiss & Goldring, App., 168 So. 336.

19. Ga.—Stephens v. Bibb Inv. Co., 187 S.E. 709, 54 Ga.App. 321.

20. Ga.—Wallace v. Southern Express Co., 67 S.E. 694, 7 Ga.App. 565—White v. Atlanta, etc., R. Co., 63 S.E. 234, 5 Ga.App. 308.

21. Tenn.—Coal Creek Cons. Coal Co. v. East Tennessee Iron, Iron & Coal Co., 59 S.W. 634, 105 Tenn. 563.

23 C.J. p 157 note 97.

22. Pa.—Hiester v. Gouglersville Band, 24 Pa.Dist. 765.

23. U.S.—Wallace's Estate v. Commissioner of Internal Revenue, C. C.A., 101 F.2d 604—U. S. v. Hendler, C.C.A.Md., 91 F.2d 680, affirming, D.C., Hendler v. U. S., 17 F. Supp. 558, certiorari granted U. S. v. Hendler, 58 S.Ct. 284, 302 U.S. 680, 82 L.Ed. 525, reversed on other grounds 58 S.Ct. 655, 303 U.S. 564, 82 L.Ed. 1018, rehearing denied 58 S.Ct. 940, 304 U.S. 588, 82 L.Ed. 1548—In re Paramount Publix Corporation, C.C.A.N.Y., 90 F. 2d 441, 111 A.L.R. 889, affirming,

or historical[24] knowledge relative to corporations, and of all the provisions of public statutes of the state creating, authorizing, regulating, granting rights to, conferring powers or imposing duties on, or otherwise relating to private corporations, including both general corporation laws and acts which are of a private nature but which, either by their own provisions or by the provisions of a general law, are declared to be public acts.[25] Likewise, by an application of general principles, unless private or special statutes are by statute made a subject of judicial notice,[26] the courts do not take judicial notice of private statutes of the state creating or relating to corporations,[27] or of

D.C., 15 F.Supp. 465—Trowbridge v. U. S., D.C Conn., 32 F.Supp. 852.
Ill.—Stark, for Use of State Loan Ass'n, v. Boggs, 7 N.E.2d 369, 289 Ill.App. 461.
Iowa—Fleming v. Fleming, 230 N. W. 359, 211 Iowa 1251.
Mass.—Clark v. New England Telephone & Telegraph Co., 121 N.E. 497, 231 Mass. 546.
N.Y.—Hotaling v. A. B. Leach & Co., 159 N.E. 870, 247 N.Y. 84, 57 A.L.R. 1136, affirming 222 N.Y.S. 822, 221 App.Div. 756—Atlantic Mills v. New York Cent. R. Co., 214 N.Y.S. 123, 126 Misc. 349—Gerdes v. Reynolds, 28 N.Y.S.2d 622.
N.C.—Snow v. De Butts, 193 S.E. 224, 212 N C. 120.
Va.—Alexandria Water Co. v. City Council of Alexandria, 177 S.E. 454, 163 Va. 512.
23 C.J. p 157 note 1.

Judicial notice has been taken:

(1) Of financial distress of particular corporation.—Boston & M. R. R. v. Town of Greenfield, 149 N.E. 322, 253 Mass. 391.

(2) Of various facts relating to stockholders.
U.S.—Louis K. Liggett Co. v. Baldridge, 49 S.Ct. 57, 278 U.S 105, 73 L.Ed. 204, reversing, D.C., 22 F.2d 993, and followed in Pratter v. Lascoff, 135 N.E. 716, 261 N.Y. 509, affirming 258 N.Y.S. 1002, 236 App. Div. 713, which affirmed 249 N.Y. S. 211, 140 Misc. 211, and certiorari denied Lascoff v. Pratter, 53 S.Ct. 785, 289 U.S. 754, 77 L.Ed. 1498.
Cal.—Guaranty Loan Co. v. Fontanel, 190 P. 177, 183 Cal. 1.
La.—McWilliams v. Geddes & Moss Undertaking & Embalming Co., App., 164 So. 144.
N Y.—Dresdner v. Goldman Sachs Trading Corporation, 269 N.Y.S. 360, 240 App.Div 242, reversing 265 N.Y.S. 913, 148 Misc. 541.
Tex.—Yakey v. Chapman Milling Co., Civ.App., 74 S.W.2d 148, error dismissed.

(3) Of various facts relating to the capital stock of corporations.
U.S.—Southwestern Bell Telephone Co. v. Middlekamp, D.C.Mo., 1 F. 2d 563.
Mass.—American Uniform Co. v. Commonwealth, 129 N.E. 622, 237 Mass. 42.
N.Y.—Broderick v. Aaron, 191 N.E. 19, 264 N.Y. 368, 92 A.L.R. 1422, reversing 269 N.Y.S. 190, 240 App. Div. 94, and motion denied 191 N. E. 636, 264 N.Y. 704.

(4) That certified public accountants are frequently employed to examine corporate books.—Gaynor v. Village of Port Chester, 129 N.E. 657, 230 N Y. 210, reversing 176 N.Y. S. 900, 188 App.Div. 975.

(5) That during the past few years many corporations have been unable to pay dividends either on common stock or preferred stock.—Davison v. Parke, Austin & Lipscomb, 35 N. E.2d 618, 285 N.Y. 500, modifying 23 N.Y.S.2d 557, 260 App.Div. 860, affirming 19 N.Y.S.2d 117, 173 Misc. 782, appeal denied 24 N.Y.S 2d 982, 260 App.Div. 924.

(6) Other matters.
U.S.—Illinois Bell Telephone Co. v. Gilbert, D C.Ill., 3 F.Supp. 595, conforming to Smith v. Illinois Bell Telephone Co., 51 S Ct. 65, 282 U. S. 133, 75 L.Ed. 255, setting aside, D.C., Illinois Bell Telephone Co. v. Moynihan, 38 F.2d 77, reversed on other grounds and cross appeal dismissed Lindheimer v. Illinois Bell Telephone Co., 54 S.Ct. 658, 292 U.S. 151, 78 L.Ed. 1182.
Cal.—Commercial Security Co. v. Modesto Drug Co., 184 P. 964, 43 Cal. App. 162.
23 C.J. p 157 note 1 [a].

24. Utah.—Nash v. Alpine Irr. Co., 197 P. 603, 58 Utah 84.
23 C.J. p 157 note 2.

25. U.S.—Muller v. Boston & M. R. R., D C.N.H., 9 F.Supp. 802.
Fla.—Grand Lodge, Knights of Pythias, of North America, South America, Europe, Asia, Africa and Australia, Jurisdiction of Florida, v. Moore, 163 So. 108, 111, 120 Fla. 761, quoting **Corpus Juris,** and declaring that the text is sustained by numerous authorities.
Ill.—People v. James Millikin University, 163 N.E. 313, 331 Ill. 559.
Ind.—American Nat. Red Cross v. Felzner Post, 159 N.E. 771, 86 Ind. App. 709.
Ky.—Rasnick v. W. M. Ritter Lumber Co., 219 S.W. 801, 187 Ky 523—Swann v. Commonwealth, 184 S. W. 868, 169 Ky. 565.
Mass—Boynton v. Middlesex Mut. Fire Ins. Co., 4 Metc. 212, 215.
Mont—Conley v. Johnson, 54 P.2d 585, 101 Mont. 376.
N.Y.—In re Wilkins' Will, 226 N.Y. S. 415, 131 Misc. 188—Bank of Utica v. Magher, 18 Johns. 341.
Tex.—United Brotherhood of Carpenters and Joiners of America, Carpenters Union No. 213, v. Carpenters and Joiners Union of Texas, Civ.App., 110 S.W.2d 1209, followed in Union No. 7 of Bricklayers and Masons International Union of America v. Brick and Stone Masons Union No. 1 of Texas, 110 S.W.2d 1213, error dismissed Union No. 7 of State of Texas, of Bricklayers and Masons of International Union of America v. Brick and Stone Masons Union No. 1 of Texas, 120 S.W.2d 248, 131 Tex. 632, error dismissed United Brotherhood of Carpenters and Joiners of America, Carpenters Union No. 213 v. Carpenters and Joiners Union of Texas, 120 S.W.2d 248, 131 Tex. 631.
Utah.—Jones Mining Co. v. Cardiff Min. & Mill. Co., 191 P. 426, 56 Utah 449.
23 C.J. p 158 note 3—7 C.J. p 488 note 5

Absence of statute

Judicial notice will be taken of the fact that there is no public act creating a particular corporation.—Hurlburt v. Britain, 2 Dougl., Mich., 191.

Amendments

Statute providing that acts of incorporation are public acts of which courts will take notice without allegation or proof applies equally to amendments of acts of incorporation.—Bleck v. East Boston Co., 18 N.E.2d 536, 302 Mass. 127.

Passage of act

Judicial notice has been taken that both branches of the legislature recently passed a new corporation act, vitally changing the essential principles of existing law, even though the act, at the time of the decision, had not been approved by the governor.—Stanton v. State Tax Commission of Ohio, 159 N.E. 340, 26 Ohio App. 198, affirmed State v. Zangerle, 159 N.E. 823, 117 Ohio St. 436.

26. Cal.—Inderbitzen v. Lane Hospital, 12 P.2d 744, 124 Cal.App. 462, hearing denied 13 P.2d 905, 124 Cal.App. 462.

27. Mo.—Bailey v. Trustees of Lincoln Academy, 12 Mo. 174.
Tex.—Holloway v. Memphis, E. P. & P. R. Co., 23 Tex. 465, 76 Am.D. 68.
23 C.J. p 158 note 5—7 C.J. p 488 note 6.

matters of fact relating to corporations or associations not deducible from the face of any statutory provision, or of common knowledge, especially the affairs of a particular corporation or association.[28] As a rule, courts do not notice without proof the fact of acceptance of a charter or the organization of a domestic corporation under a general law,[29] or under which one of several laws it was organized,[30] whether it had adopted the provisions of some other act,[31] or that a corporation has taken certain action with respect to property or otherwise;[32] nor will the courts notice the by-laws of a private corporation,[33] or the existence, powers, or duties of officers of a corporation,[34] unless such facts are matters of public law[35] or of common knowledge.[36] Courts do not judicially notice the seals of private corporations or associations, but they must be proved.[37]

Corporation sale. The existence of a corporation sale being shown, the courts take judicial notice that the office has civil rights and duties, but courts do not take judicial notice of the nature and scope of such civil rights and duties.[38]

Foreign corporations. In accordance with the general rule as to judicial notice of the law of another forum, see supra §§ 18–21, courts, as a general rule, do not take judicial notice of either the public or private statutes of another jurisdiction, whether of a sister state or territory[39] or of a foreign country,[40] which relate to corporations; and judicial notice will not be taken of facts relating to foreign corporations which are not matters of common knowledge or otherwise entitled to judicial notice under the application of general principles relating to such notice.[41] Accordingly, in the absence of circumstances otherwise entitling it to judicial notice, the courts cannot take judicial notice of the appointment by a foreign corporation of an agent to receive and acknowledge service of process.[42] On the other hand, it has also been held that the fact that a foreign corporation is licensed to do business in the state and that it maintains general offices within the state, may be judicially noticed,[43] and the fact that a corporation is doing business within the jurisdiction may be noticed.[44] Of course, facts of common knowledge relating to

28. Cal.—Mound Water Co. v. Southern California Edison Co., 194 P. 1014, 184 Cal. 602.
Ill.—Wood v. Meyer, 240 Ill.App. 100.
N.Y.—People v. Marlowe, 203 N.Y.S. 474, 40 N.Y.Cr. 448—Mallory v. Barrett, 194 N.Y.S. 677, 118 Misc. 749.
Wash.—Larsen v. Betcher, 195 P. 27, 114 Wash. 247.
Wyo.—Pennoyer v. Dubois State Bank, 249 P. 795, 35 Wyo. 319—Mahan v. Wyopo Co., 189 P. 633, 27 Wyo 17.
23 C.J. p 158 note 9.

Carey Act corporation
Judicial notice will not be taken of the existence of a Carey Act corporation.—Coulson v. Aberdeen-Springfield Canal Co., 227 P. 29, 39 Idaho 320.

29. Ind.—Danville & White Lick Plank-Road Co. v. State, 16 Ind. 456.
23 C.J. p 159 note 10.

30. Ind.—Danville & White Lick Plank-Road Co. v. State, supra.

31. Ind.—Danville & White Lick Plank-Road Co. v. State, supra.

32. Ill.—Dunlap v. Wilson, 32 Ill. 517.
23 C.J. p 159 note 13.

33. Ind.—Elkhart Hydraulic Co. v. Turner, 84 N.E. 812, 170 Ind. 455.
Nev.—Caldwell v. Wedekind Mines Co., 267 P. 827, 51 Nev. 32.
23 C.J. p 159 note 14.

34. N.Y.—Hardin v. Morgan Lithograph Co., 160 N.E. 388, 247 N.Y. 332, reversing 220 N.Y.S. 864, 219 App.Div. 817.
23 C.J. p 159 note 15.

35. Mo.—Brown v. Citizens' State Bank, 134 S.W.2d 116, 345 Mo. 480.
23 C.J. p 159 note 16.

36. U.S.—Baltimore & O. R. Co. v. Foar, C.C.A.Ind., 84 F.2d 67.
N.Y.—Broadway Boxing Club v. Bushwick Nat. Bank, 216 N.Y.S. 713, 127 Misc. 515.
Or.—Fleming v. Ambulance Co., 62 P.2d 1331, 155 Or. 351, rehearing denied 64 P.2d 519, 155 Or. 351.
Wash.—McAvoy v. Weber, 88 P.2d 448, 198 Wash. 370.
23 C.J. p 159 note 17.

37. N.J.—Robertson v. Burstein, 146 A. 355, 105 N.J.Law 375, 65 A.L.R. 324, reversing 141 A. 92, 104 N.J.Law 218.
Pa.—Collins v. Tracy Grill & Bar Corporation, 19 A.2d 617, 144 Pa. Super. 440.
23 C.J. p 159 note 18—14 C.J. p 337 note 74.

38. Cal.—Roman Catholic Archbishop of San Francisco v. Industrial Accident Commission, 230 P. 1, 194 Cal. 660.
Corporation sole defined see Corporations § 15.
Judicial notice of religious matters see infra § 93.

39. Mo.—Sovereign Camp W. O. W. v. Downing, App., 201 S.W. 951.
23 C.J. p 158 notes 6, 7.

40. Or.—Law Trust Soc. v. Hogue, 62 P. 380, 63 P. 690, 37 Or. 544.
23 C.J. p 158 note 8.

41. Ind.—Dark Tobacco Growers' Co-op. Ass'n v. Robertson, 150 N.E. 106, 84 Ind.App. 51.
Mo.—American Extension School of Law v. Ragland, 112 S.W.2d 110, 232 Mo.App. 763.

Compliance with law
(1) The supreme court would not take judicial notice that a foreign corporation did not comply with the law authorizing it to do business in the state.—Pekin Cooperage Co. v. State ex rel. Pike County, 122 S.W. 2d 468, 197 Ark 341.

(2) However, it has also been held that the presumption is that secretary of state has done his duty in preparing lists of foreign corporations qualified to do business in state, as required by Acts 1919 c 184, and court will judicially notice absence of name of corporation from such lists, and presume corporation unqualified.—National Plastic Relief Co. v. Signal Amusement Co., 269 S.W. 40, 151 Tenn. 235.

42. La.—National Park Bank v. Concordia Land & Timber Co., 97 So. 272, 154 La. 31.
Miss.—Masonite Corporation v. Burnham, 146 So. 292, 164 Miss. 840, 91 A.L.R. 752—National Surety Co. v. Board of Sup'rs of Holmes County, 83 So. 8, 120 Miss. 706, setting aside 81 So. 792, 120 Miss. 565.
23 C.J. p 159 note 19.

43. Cal.—Braun v. New York Life Ins. Co., App., 115 P.2d 880.

44. U.S.—Summerall v. United Fruit Co., D.C.N.Y., 11 F.Supp. 963, affirmed, C.C.A., 80 F.2d 1020, certiorari denied 56 S.Ct. 680, 298 U.S. 658, 80 L.Ed. 1384.

foreign corporations may be judicially noticed.[45]

Religious and charitable institutions. Courts will take judicial notice of religious corporations created by public law.[46] The court may take judicial notice that in the prominent cities of our states there are numerous organized charities that are not incorporated as well as those that are incorporated.[47] Judicial notice may be taken of the fact that most religious institutions are of a charitable nature.[48] Judicial notice is not taken of the existence or nonexistence of local religious societies;[49] and where the statutes of the state authorize the formation of corporations for religious and other purposes the court does not judicially know that a certain corporation is a religious corporation.[50] In the application of general rules as to the taking of judicial notice, the courts have taken, or declined to take, judicial notice of particular facts relating to particular religious or charitable organizations.[51] Judicial notice of religious matters generally will be discussed in detail in § 93 infra.

Reports of corporations. In some states by force of certain statutes reports by railroad companies to a state board or commission may be noticed judicially.[52]

Federal matters. The federal courts, including the supreme court of the United States, judicially know the existence, name, and powers of a corporation created by an act of congress,[53] and the powers or privileges conferred by act of congress on a state corporation.[54] Likewise, state courts have taken judicial notice of federal corporations.[55] A

45. Fact of foreign charters

It is a matter of common knowledge that a great number of corporations, essentially local in the scope of their activities, conduct business under charters granted by foreign jurisdictions.—Levy v. Pacific Eastern Corporation, 275 N.Y.S. 291, 153 Misc. 488.

46. Cal.—Roman Catholic Archbishop of San Francisco v. Industrial Accident Commission, 230 P. 1, 194 Cal. 660.

47. N.Y.—People v. Powers, 41 N. E. 432, 147 N.Y. 104, 35 L.R.A. 502, reversing 31 N.Y.S. 1131, 83 Hun 449, affirming 29 N.Y.S. 950, 8 Misc. 628.

48. Wash.—In re Foss' Estate, 196 P. 10, 114 Wash. 681.

49. Ill.—St. Paul's Parish Protestant Episcopal Church v. East St. Louis, 92 N.E. 322, 245 Ill. 470.

50. Mo.—Brennan v. Cabanne M. E. Church, South, 192 S.W. 982.
23 C J. p 159 note 24.

51. Masonic order

(1) Judicial notice has been taken of the masonic order.—Most Worshipful Prince Hall Grand Lodge, F. & A. M. of Colorado and Jurisdiction, v. Most Worshipful Hiram Grand Lodge, F. & A. A. Y. M. of Colorado and Jurisdiction, National Compact Prince Hall Origin, 273 P. 648, 85 Colo. 17.

(2) Both on the grounds of common knowledge and of provisions contained in the acts of incorporation, the courts have taken judicial notice that the society of free masons is a purely charitable corporation.—Burdine v. Grand Lodge, 37 Ala. 478.

(3) Judicial notice, however, will not be taken that particular masonic lodges outside the state are charitable institutions.—In re Wirt's Estate, 277 P. 118, 207 Cal. 106.

(4) Facts relating to the Masonic order which are not matters of common knowledge will not be judicially noticed.

Colo.—Most Worshipful Prince Hall Grand Lodge, F. & A. M. of Colorado and Jurisdiction v. Most Worshipful Hiram Grand Lodge, F. & A. A. Y. M. of Colorado and Jurisdiction, National Compact Prince Hall Origin, 282 P. 193, 86 Colo. 330.

Miss.—Cuney v. State, 108 So. 298, 142 Miss. 894.

(5) "The fact that Masonry is a secret order only emphasizes the impropriety and impossibility of our taking judicial notice of its inner workings."—Most Worshipful Prince Hall Grand Lodge, F. & A. M. of Colorado and Jurisdiction v. Most Worshipful Hiram Grand Lodge, F. & A. A. Y. M. of Colorado and Jurisdiction, National Compact Prince Hall Origin, 273 P. 648, 652, 85 Colo. 17.

Odd Fellows

Judicial notice may be taken that more than one order of Odd Fellows exists in the state, where such is the case.—Ford v. Grand United Order of Odd Fellows of State of Texas, Tex.Civ.App., 50 S.W.2d 856, error dismissed.

Red Cross

Judicial notice may be taken of the fact that the American National Red Cross is a corporation, and of its organization, its activities, and authority to receive gifts.

Alaska.—In re Lanart's Estate, 9 Alaska 535.

Ind.—American Nat. Red Cross v. Felzner Post, 159 N.E. 771, 86 Ind. App. 709.

Y. M. C. A.

While the court may know historically that the association originally founded under the name of Young Men's Christian Association was essentially charitable, it cannot know judicially that the many independent organizations now existing under the same name are so, especially where the laws of the state permit incorporation for business as well as for charitable purposes, and the character of a particular corporation depends on its articles of incorporation.—Susman v. Young Men's Christian Assoc., 172 P. 554, 101 Wash. 487.

52. Wis.—Chicago & N. W. R. Co. v. Railroad Commn., 145 N.W. 216, 156 Wis. 47.
23 C.J. p 159 note 20.
Judicial notice of public records generally see supra § 36.

53. U.S.—State of Alabama v. Acacia Mut. Life Ass'n, D.C.Ala., 3 F. 2d 697.
23 C.J. p 159 note 28.

54. U.S.—Pennsylvania R. Co. v. Baltimore & N. Y. R. Co., C.C.N. Y., 37 F. 129.
23 C.J. p 159 note 29.

55. Ind.—American Nat. Red Cross v. Felzner Post, 159 N.E. 771, 86 Ind.App. 709.

Judicial notice has been taken:

(1) Of statutory facts relating to the Home Owners' Loan Corporation, such as its nature and purposes.

Ariz.—Home Owners' Loan Corporation v. Bank of Arizona, 94 P.2d 437, 54 Ariz. 146.

Cal.—Home Owners' Loan Corporation v. Gordon, 97 P.2d 845, 36 Cal. App.2d 189.

D.C.—Fletcher v. Jones, 105 F.2d 58, 70 App.D.C. 179, certiorari denied 60 S.Ct. 116, 308 U.S. 555, 84 L.Ed. 467.

(2) That National Farm Loan associations, organized under the Federal Farm Loan Act, have a separate corporate entity from federal land banks.—Hinds v. Federal Land Bank of New Orleans, 179 So. 194, 235 Ala. 360.

state court will take judicial notice of general laws relative to the incorporation of national banks;[56] and federal courts have taken judicial notice of the existence of all national banks without proof of organization under the National Bank Act.[57]

§ 92. Consolidation or Cessation

Judicial notice will not be taken of the consolidation or cessation of corporations unless it is a matter so declared by a public statute or a matter of common knowledge.

The courts take judicial notice of the legal consequences of consolidation of domestic corporations,[58] but not that corporations have consolidated under a statute authorizing them to do so,[59] or of a foreign law authorizing consolidation,[60] or of the legal consequences of a consolidation of foreign corporations.[61] Judicial cognizance is not taken that one corporation is the successor of another,[62] unless made so by legislation.[63] Where congress, the creating power of the corporation, and the supreme court of the United States have both recognized one corporation as the successor of another, state courts will take judicial notice of such fact.[64] While the expiration of a charter has been judicially noticed,[65] the courts do not take judicial notice that the existence of a corporation whose charter has not expired by limitation has ceased.[66]

§ 93. Religious Matters

General religious matters may be judicially noticed.

Judicial notice may be taken of general religious matters which are of common knowledge,[67] but courts will not take cognizance of religious matters which are purely ecclesiastical,[68] or which are not matters of common knowledge.[69] Accordingly, judicial notice may be taken of the various religious denominations,[70] and, according to the de-

56. Idaho.—Iowa First Nat. Bank v. Walker, 148 P. 46, 27 Idaho 199.
23 C.J. p 159 note 30.

57. U.S.—U. S. v. Williams, D.C. Ind., 28 F.Cas.No.16,706, 4 Biss. 302.
23 C.J. p 159 note 31.

58. Mich.—Jackson Cons. Tract. Co. v. Jackson Cir. Judge, 119 N.W. 915, 155 Mich. 522.

59. Mo.—Southgate v. Atlantic & Pacific R. Co., 61 Mo. 89.

60. Mich.—Brown v. Dibble, 32 N. W. 656, 65 Mich. 520.

61. Mich.—Jackson Cons. Tract. Co. v. Jackson Cir. Judge, 119 N.W. 915, 155 Mich. 522.

62. Mo.—St. Louis v. St. Louis, I. M. & S. R. Co., 154 S.W. 55, 248 Mo. 10.
Tex.—Hayden v. Consolidated Underwriters, Civ.App., 40 S.W.2d 167.

63. Ga.—Atlanta & W. P. R. Co. v. Atlanta, B. & A. R. Co., 54 S.E. 736, 125 Ga. 529.

64. Mont.—Lasby v. Burgess, 248 P. 190, followed in 248 P. 192.

65. Ga.—Terry v. Merchants' & Planters' Bank of Savannah, 66 Ga. 177.

66. Tenn.—Shea v. Knoxville & Kentucky R. Co., 6 Baxt. 277.

67. Ala.—Blount v. Sixteenth St. Baptist Church, 90 So. 602, 603, 206 Ala. 423, citing **Corpus Juris.**

Judicial notice has been taken:

(1) Of the relative functions of a church and a society holding land in trust for the church.—Bristol Baptist Church v. Connecticut Baptist Convention, 120 A. 497, 98 Conn. 677.

(2) That as legally defined, a parsonage is a house set apart for the minister's residence, and at common law is a portion of the land and titles established by law for the maintenance of a minister.—State v. Kittle, 105 S.E. 775, 87 W. Va. 526.

(3) That hospitals are considered as legitimate objects of church ownership.—St. Louis Union Trust Co. v. Oregon Annual Conference of M. E. Church, D.C.Or., 14 F.Supp. 35.

(4) That the members of the clergy are all held in high veneration, especially by the female communicants of their churches.—In re Doyle's Estate, 124 A. 51, 95 N.J.Eq. 682.

(5) That religious congregations maintain organizations and engage in church activities, and appoint or elect from membership officers to transact business.—Gullett v. First Christian Church of Meridian, 122 So. 732, 154 Miss. 516.

(6) That the term "Christian Church" can easily, according to the context, identify a religious denomination having its origin in Kentucky and numerous congregations throughout the country, all of those of the "household of faith" being "Christians," and the word "catholic" in its broad sense meaning the church universal.—Kentucky Christian Missionary Soc. v. Moren, 102 S.W.2d 335, 267 Ky. 358.

(7) Other matters.
Ark.—Brookfield v. Beamon, 282 S. W. 364, 170 Ark. 996.
Iowa.—Gardner v. Trustees of Main St. M. E. Church of Ottumwa, 250 N.W. 740, 217 Iowa 1390.
Neb.—Application of Tyler, 283 N.W. 512, 135 Neb. 667.
N.Y.—Shaffer v. Temple Beth Emeth of Flatbush, 190 N.Y.S. 841, 198 App.Div. 607.—In re Fleishfarb's Will, 271 N.Y.S. 736, 151 Misc. 399.
Ohio.—Katz v. Goldman, 168 N.E. 763, 33 Ohio App. 150.
Tex.—Rodgers v. Fleming, Civ.App., 295 S.W. 326, reversed, Com.App., 3 S.W.2d 77.
23 C.J. p 161 note 62.

68. U.S.—Friedman v. Swift & Co., D.C.N.Y., 18 F.Supp. 596.
Ind.—Kompier v. Thegza, 13 N.E.2d 224, 213 Ind. 542.
N.Y.—Rector, Churchwardens & Vestrymen of Christ's Church at Pelham v. Collett, 204 N.Y.S. 315, 208 App.Div. 695.

69. Tenn.—Sweeney v. Newspaper Printing Corporation, 147 S.W.2d 406.

70. **Christian Science**

(1) The Christian Science religion is so widely known that courts will take judicial notice of its general teachings.—Northern Trust Co. v. Commissioner of Internal Revenue, C.C.A., 116 F.2d 96—23 C.J. p 161 note 56.

(2) There is an early case, however, to the contrary.—Evans v. State, 9 Ohio S. & C.P. 222, 6 Ohio N.P. 129.

Methodist church

(1) Court takes judicial notice that Methodist Episcopal church of United States is great and commendable religious organization.—Methodist Episcopal Church of U. S. of America v. Walters, D.C.Mo., 50 F.2d 416.

(2) It is manifest, as a matter of common knowledge, that the ascertainment of the persons who may be members of the Methodist Episcopal church in the United States of America must depend on the ecclesiastical rules and discipline of the

cisions of the courts, judicial notice may be taken of the salient facts concerning the Bible,[71] but the duties devolving on the members of particular churches cannot be judicially noticed.[72]

§ 94. Road and Highway Matters

Judicial notice will be taken of facts of common knowledge relating to roads and highways.

Matters of common knowledge relating to roads and highways may be judicially noticed,[73] such as

constituted authorities of the denomination.—Atty.-Gen. v. Armstrong, 120 N.E. 678, 231 Mass. 196.

(3) Court judicially knows Methodist Episcopal plan of church government, although not provisions of doctrines and discipline.—Dunn v. Ellisor, 141 So. 700, 225 Ala. 15.

(4) Supreme court judicially knows that districts under Methodist Episcopal church government are subject to change by proper church authorities.—Dunn v. Ellisor, supra.

Mormon church

Judicial notice has been taken of the creed and general doctrine of the Mormon church and the principle of "celestial marriage" peculiar to the mormon sect.—Hilton v. Roylance, 69 P. 660, 25 Utah 129, 95 Am.S.R. 821, 58 L.R.A. 723.

Protestant Episcopal church

Judicial notice cannot be taken of the authority of vestrymen of the Protestant Episcopal church over the affairs of their parish.—Hill Est. Co. v. Whittlesey, 57 P. 345, 21 Wash. 142.

Roman Catholic church

(1) Judicial notice has been taken that the Roman Catholic church is a sectarian institution.—Frohliger v. Richardson, 218 P. 497, 63 Cal.App. 209.

(2) Judicial notice cannot be taken of the laws or polity of the Roman Catholic church.

Mass.—Mady v. Holy Trinity Roman Catholic Polish Church, 111 N.E. 413, 223 Mass. 23.

Wis.—Katzer v. Milwaukee, 79 N.W. 745.

(3) Neither will judicial notice be taken of its nature and powers as to its civil rights and duties.

Mass.—Mady v. Holy Trinity Roman Catholic Polish Church, supra.

N.Y.—Baxter v. McDonnell, 49 N.E. 667, 155 N.Y. 83, 40 L.R.A. 670, reversing 45 N.Y.S. 765, 18 App. Div. 335.

(4) Likewise, judicial notice will not be taken of the authority of a pastor of a Roman Catholic congregation.

N.Y.—Baxter v. McDonnell, supra.

Pa.—McGlynn v. Hoban, 42 Pa.Super. 478.

(5) Judicial notice has been taken that the San Diego Mission is owned by the Roman Catholic church.—Frohliger v. Richardson, 218 P. 497, 63 Cal.App. 209.

71. N.Y.—Right Worshipful Eastern District Grand Lodge No. 1, Independent Order of Good Samaritans and Daughters of Samaria of North America and the West Indies v. Johnson, 177 N.Y.S. 500, 107 Misc. 249.
23 C.J. p 160 note 53.

72. Mo.—Ballew v. Thompson, App., 259 S.W. 856.

73. **Judicial notice has been taken:**

(1) Of conditions of unimproved roads.

N.Y.—Roberts v. Town of Eaton, 202 N.Y.S. 360, 207 App.Div. 56, reversed on other grounds 144 N.E. 667, 238 N.Y. 420, 36 A.L.R. 411.

Pa.—Bartholomew v. Baker, 17 A.2d 724, 143 Pa.Super. 149.

(2) Of federal aid roads and federal aid in building roads.

N.M.—Gallegos v. Conroy, 29 P.2d 334, 38 N.M. 154.

Tex.—Southwestern Greyhound Lines v. Railroad Commission of Texas, 99 S.W.2d 263, 128 Tex. 560, 109 A.L.R. 1235, reversing Railroad Commission of Texas v. Southwestern Greyhound Lines, Civ.App., 92 S.W.2d 296.

Wis.—Schaettle v. State Highway Commission, 271 N.W. 63, 223 Wis. 528.

(3) Of loose enforcement of speed laws.—Smith v. Pure Oil Co., 128 S.W.2d 931, 278 Ky. 430.

(4) Of matters relating to state highway system.

Ala.—Johnson v. Robinson, 192 So. 412, 238 Ala. 568.

Ill.—Hamann v. Lawrence, 188 N.E. 333, 354 Ill. 197.

Ky.—City of Pineville v. Robbins, 22 S.W.2d 607, 232 Ky. 218.

N.C.—Davis v. Alexander, 162 S.E. 372, 202 N.C. 130.

S.C.—Robson v. Cantwell, 141 S.E. 180, 143 S.C. 104.

(5) Of necessity of condemnation proceedings.—Barnes v. Wade, 58 P.2d 297, 297 Utah 1.

(6) That any pavement is more or less slippery when wet.

Ohio—Oyster v. Kuhn, 32 N.E.2d 80, 65 Ohio App. 533.

S.C.—McDonald v. State Highway Department, 164 S.E. 920, 166 S.C. 415.

(7) That electric light, heat, and power companies and telephone and street railway companies maintain poles, wires, and apparatus, in, on, and under public ways.—Vigeant v. Postal Telegraph Cable Co., 157 N.E. 651, 260 Mass. 335, 53 A.L.R. 867.

(8) That grass plots and parkways are now component and necessary parts of streets and highways.—Bridges Asphalt Co. v. Jacobsmeyer, Mo., 142 S.W.2d 641.

(9) That jurors of even ordinary intelligence know what is the "wrong" side of the road.—Parker v. Jakovich, Tex.Civ.App., 115 S.W.2d 790, error dismissed.

(10) That revenues will not permit guard rails on roads in thinly settled portions of the state.—Wyant v. Faith Tp. in Meade County, 207 N.W. 87, 49 S.D. 220.

(11) That telephone poles are commonly located in parking of streets, and that only part of width of street is devoted to vehicle traffic.—Greenland v. City of Des Moines, 221 N.W. 953, 206 Iowa 1298.

(12) That the user of a road through uninclosed woodland is, in effect, a user by license or permission of owner of land.—Savannah River Lumber Corporation v. Bray, 200 S.E. 760, 189 S.C. 237.

(13) Other matters.

Ala.—Pickett v. Matthews, 192 So. 261, 238 Ala. 542.

Ark.—Missouri Pac. R. Co. v. Westerfield, 92 S.W.2d 862, 192 Ark. 558.

Ill.—People ex rel. Singer v. Illinois Cent. R. Co., 26 N.E.2d 840, 373 Ill. 523.

Iowa.—Harris v. Chicago, M., St. P. & P. R. Co., 278 N.W. 338, 224 Iowa 1319—Lindloff v. Duecker, 251 N.W. 698, 217 Iowa 326.

La.—Karp v. Powers, 124 So. 781, 12 La.App. 518.

Mass.—Adams v. Town of Bolton, 9 N.E.2d 562, 297 Mass. 459, 111 A.L.R. 856.

Mich.—Township of Elba v. Gratiot County, 283 N.W. 615, 287 Mich. 372—City of Menominee v. Menominee County, 277 N.W. 863, 283 Mich. 146.

N.H.—Kelly v. Simoutis, 4 A.2d 868, 90 N.H. 87.

N.Y.—Kittle v. Town of Kinderhook, 212 N.Y.S. 410, 214 App.Div. 345.

Pa.—Smith v. Kurtz, 34 Pa.Dist. & Co. 439.

Tex.—Jackson v. Edmondson, Civ. App., 129 S.W.2d 369, reversed on other grounds, Com.App., 151 S.W. 2d 794.

Vt.—Ellison v. Colby, 8 A.2d 637, 110 Vt. 431.

Wash.—Gregory v. County Com'rs of Kitsap County, 188 P. 761, 110 Wash. 476.

23 C.J. p 161 notes 65–67.

the existence[74] and location[75] of a highway between particular cities within the state; the extent of,[76] the construction,[77] maintenance,[78] methods of lighting,[79] and the tendency to eliminate curves in,[80] highways; the use of roads and highways;[81]

74. Tenn.—Maxwell v. Kirkpatrick, 116 S.W.2d 340, 22 Tenn App. 21.
Wash.—Lassiter v. Shell Oil Co., 62 P.2d 1096, 188 Wash. 371.

Paved highway
Ark.—Plunkett-Jarrell Grocer Co. v. Freeman, 92 S.W.2d 849, 192 Ark. 380.

Public road
Sometimes judicial notice is taken that a road between certain places is a public road.—Principe v. American R. Co., 22 Puerto Rico 282.

75. N.Y.—Northeastern Shares Corporation v. International Ins. Co. of New York, 269 N.Y.S. 351, 240 App.Div. 80, affirmed 193 N.E. 326, 265 N.Y. 574—Smith v. Village of Pleasantville, 20 N.Y.S.2d 594.
Pa.—Schmidt v. Allegheny County, 154 A. 803, 303 Pa. 560.

Skyline Drive
The court will take judicial notice that Skyline Drive was in the Shenandoah National Park, which is common knowledge.—Buttery v. Robbins, Va., 14 S.E.2d 544.

76. **Thousands of miles within state**
Mich.—Longstreet v. Mecosta County, 200 N.W. 248, 228 Mich. 542.

77. U.S.—U. S. v. Canadian Pac. Ry. Co., D.C.Wash., 4 F.Supp. 851, affirmed, C.C.A., Canadian Pac. R. Co. v. U. S., 73 F.2d 831.
Fla.—Carlton v. Mathews, 137 So. 815, 103 Fla. 301.
Tex.—Brown & Root v. Weldy, Civ. App., 75 S.W.2d 915.

Expansion joints
It is common knowledge that expansion joints are necessary in a concrete pavement, and such joints and joint-filler are therefore a part of the pavement, and are sufficiently itemized in an estimate of the probable cost of an improvement if contained in a general description and cost estimate of the concrete slab as completed.—Patton v. Village of Palestine, 136 N.E. 727, 304 Ill. 489.

Fill
It is common knowledge that wet road fill becomes more stable as it dries, and that pressure on bulkhead decreases.—Strong & MacDonald v. King County, 267 P. 436, 147 Wash. 678.

For use by motor vehicles
It is matter of common knowledge that number of motor vehicles exceeds all others and that different highway construction as to durability and smoothness is required for their convenience.—Opinion of the Justices, 148 N.E. 889, 250 Mass. 591.

Mixture of concrete
It is a matter of common knowledge that wearing surface of ordinary concrete combined curb and gutter is a richer mixture than the body, and that coarse materials used in body mixture are omitted from mixture used in wearing surface.—City of Lewistown v. Baldwin, 145 N.E. 616, 314 Ill. 564.

Paving
(1) Judicial notice will be taken of the general nature and use of materials employed for paving.—Duby v. Jackson, 72 N.W. 568, 69 Minn. 342—23 C.J. p 66 note 38.

(2) Court takes judicial notice that paving brick must necessarily have been distributed along roadside some time before they were laid.—John Johnson Const. Co. v. State, 207 N.Y. S. 570, 211 App.Div. 512.

(3) Judicial notice will be taken that certain pavements are not laid in the winter months.—Barber Asphalt Pav. Co. v. Wabash, 86 N.E. 1034, 43 Ind.App. 167.

Cost
It is common knowledge that heavy vehicles increase cost of construction and maintenance of highways.—State ex rel. Daniel v. John P. Nutt Co., 185 S.E. 25, 180 S.C. 19, certiorari denied Jno. P. Nutt Co. v. State of South Carolina ex rel. Daniel, 56 S.Ct. 668, 297 U.S. 724, 80 L.Ed. 1007.

78. N.Y.—Lendrum v. Village of Cobleskill, 183 N.Y.S. 215, 192 App. Div. 828.

Actions against municipalities
Courts may take notice of the many actions brought against municipalities for injuries through negligent maintaining of highways.—Rose v. Town of Richmond, 211 N.Y.S. 721, 214 App.Div. 142.

Edge adjoining shoulders
It is common knowledge that edges of asphalt surface of roads adjoining gravel shoulders break away because of traffic and weather, leaving depressions of various depths and widths.—Zacharer v. Town of Wakefield, 195 N.E. 893, 291 Mass. 90.

79. Mo.—State ex rel. City of St. Louis v. Public Service Commission, 110 S.W.2d 749, 341 Mo. 920 appeal dismissed Laclede Gas Light Co. v. Public Service Commission of Missouri, 58 S.Ct. 988, 304 U.S. 398, 82 L.Ed. 1422.

80. Idaho.—Grangeville Highway Dist. v. Ailshie, 290 P. 717, 49 Idaho 603.

81. U.S.—Deppman v. Murray, D.C. Wash., 5 F.Supp. 661.
Conn.—Kurtz v. Morse Oil Co., 158 A. 906, 114 Conn. 336.
Ill.—Mantonya v. Wilbur Lumber Co., 251 Ill.App. 364.
Mass.—Commonwealth v. Reardon, 185 N.E. 40, 282 Mass. 345.
Tex.—Texas Consol. Theaters v. Mauldin, Civ.App., 152 S.W.2d 930—Jackson v. Edmondson, Civ.App., 129 S.W.2d 369, error granted reversed on other grounds, Com.App., 151 S.W.2d 794.

By commercial motor vehicles
(1) Generally.
U.S.—Southern Motorways v. Perry, D.C.Ga., 39 F.2d 145.
Iowa.—Iowa Motor Vehicle Ass'n v. Board of Railroad Com'rs, 221 N.W. 364, 207 Iowa 461, 75 A.L.R. 1, affirmed 50 S.Ct. 151, 280 U.S. 529, 74 L.Ed. 595.

(2) The supreme court would take judicial notice that trucks not used by common or contract carriers create a substantial amount of traffic over highways, but cannot take judicial notice of conditions of employment in those industries.—H. P. Welch Co. v. State, 199 A. 886, 89 N. H. 428, 120 A.L.R. 282, affirmed H. P. Welch Co. v. State of New Hampshire, 59 S.Ct. 438, 306 U.S. 79, 83 L.Ed. 500.

By pedestrians
Ill.—Blumb v. Getz, 8 N.E.2d 620, 366 Ill. 273, reversing 4 N.E.2d 49, 286 Ill.App. 623, conformed to 13 N.E.2d 1019, 294 Ill.App. 432.

Cardinal highways
It is common knowledge that cardinal highways of state are designed and constructed primarily for rapid transit thereon by motorcars, and that motorcars have come to be universal and almost exclusive means of transportation over such highways.—Koock v. Goodnight, Tex.Civ. App., 71 S.W.2d 927, error refused.

Contribution to support
It is common knowledge that trucking industry of Nevada has for years contributed meagerly to support of highways of state, compared to use it makes of them and abuse resulting from such use.—Ex parte Iratacable, 30 P.2d 284, 55 Nev. 263.

Day and night
It is a matter of common knowledge that motor vehicles travel the highways in great numbers and at frequent intervals both day and night.—Williams Bros. v. Brannon, 31 S.W.2d 403, 182 Ark. 361.

Encouragement of tourists
It is common knowledge that "tourist industry" is one of most valuable assets of people of mountain sections of North Carolina and that tourists are encouraged to visit by presence of roads.—Reed v. State

traffic conditions;[82] the usual traffic signals and warnings;[83] the beneficial effect of good roads and streets;[84] intersections with other roads and railroads,[85] and the need for overhead crossings;[86] and matters relating to bridges.[87] On the other hand, judicial notice will not be taken of facts relating to roads and highways which are not matters of common knowledge.[88]

§ 95. Rural and Urban Conditions

Rural and urban conditions which are of common knowledge will be judicially noticed.

The courts take judicial notice of rural[89] and urban[90] conditions which are matters of common

Highway and Public Works Commission, 184 S.E. 513, 209 N.C. 648.

In interstate traffic

N.H.—State v. Moore, 13 A.2d 143, 91 N.H. 16—In re Opinion of the Justices, 129 A. 117, 81 N.H. 566, 39 A.L.R. 1023.

Moving buildings

It is well known that streets are used for moving buildings which could not be done with wires stretched thirty-five feet above surface.—Incorporated Town of Ackley v. Central States Electric Co., 214 N.W. 879, 204 Iowa 1246, 54 A.L.R. 474.

Vehicles of excessive weight

The court will take judicial notice that use of the public roads and bridges by vehicles of excessive weight is calculated to result, not only in injury to public property, but also in danger to all who travel such thoroughfares.—People v. Linde, 173 N.E. 361, 341 Ill. 269, 72 A.L.R. 997.

82. Cal.—Graybiel v. Auger, 222 P. 635, 64 Cal.App. 679—McPherson v. Walling, 209 P. 209, 58 Cal.App. 563.
Fla.—Morrison v. Farnell, 171 So. 528, 126 Fla. 385.
Ill.—Hamann v. Lawrence, 188 N.E. 333, 354 Ill. 197.
Mich.—Rapid Ry. Co. v. Michigan Public Utilities Commission, 196 N.W. 518, 225 Mich. 425.
23 C.J. p 161 note 72.

83. Ala.—City of Albany v. Black, 112 So. 433, 216 Ala. 4.
Cal.—Sandstoe v. Atchison, T. & S. F. Ry. Co., 82 P.2d 216, 28 Cal.App.2d 215.
Conn.—Aaronson v. City of New Haven, 110 A. 872, 94 Conn. 690, 12 A.L.R. 328.
La.—Monroe Hardware Co. v. Monroe Transfer & Warehouse Co., App., 167 So. 498.
Ohio.—Wolfe v. Baskin, 28 N.E.2d 629, 137 Ohio St. 284.
Wash.—Clark v. City of Bremerton, 97 P.2d 112, 1 Wash.2d 689—Eldredge v. Garrison, 52 P.2d 1240, 184 Wash. 687.
W.Va.—Riley v. City of Ronceverte, 151 S.E. 174, 108 W.Va. 222.

Fact of giving warning of danger

Mont.—Koppang v. Sevier, 75 P.2d 790, 106 Mont. 79.

Purpose of automatic traffic lights

Vt.—Stone v. Wood, 157 A. 829, 104 Vt. 105.

84. S.C.—Atlanta & C. A. L. Ry. Co. v. City of Easley, 109 S.E. 285, 117 S.C. 494.

85. Ind.—New York Cent. R. Co. v Casey, 14 N.E.2d 714, 214 Ind. 464, followed in Dyer v. New York Cent. R. Co., 14 N.E.2d 719, 214 Ind 695, rehearing denied 17 N.E.2d 839, 214 Ind. 695.
Iowa.—Sexauer v. Dunlap, 222 N.W. 420, 207 Iowa 1018.
Wis.—Gundlach v. Chicago & N. W. Ry. Co., 179 N.W. 577, 172 Wis. 438, mandate amended 179 N.W. 985, 172 Wis. 438.

Crossing warning

It is a matter of common knowledge that cross arms indicate a railroad crossing and nothing else.—McFadden v. Baldwin, Mo.App., 119 S.W.2d 36.

Danger

A crossing over railroad track near ten foot cut, rendering approaching trains invisible to those using crossing, is judicially known to be dangerous.—Louisville & N. R. Co. v. Geoghagan, 261 S.W. 1104, 203 Ky. 198.

Injury on intersection

It is a matter of common knowledge that public highways and railroad rights of way intersect, and that a person might be injured by being struck, knocked down, or run over on a public highway, when, at the same time he was also on a railroad right of way.—Murphey v. Inter-Ocean Casualty Co., 186 N.E. 902, 98 Ind.App. 668.

86. Ind.—Root v. State, 192 N.E. 447, 207 Ind. 312.
Tex.—Paschall v. Gulf, C. & S. F. Ry. Co., Civ.App., 100 S.W.2d 183, modified on other grounds Campbell v. Paschall, 121 S.W.2d 593, 132 Tex. 226.

Avoidance of grade crossings

It is common knowledge that grade crossings are avoided in modern road building.—MacGregor v. Miller, 154 N.E. 707, 324 Ill. 113.

87. **Guard rails**

Court takes judicial notice, that bridges constructed by state and federal governments are not usually constructed with guard rails for protection of pedestrians.—Illinois Cent. R. Co. v. Bloodworth, 145 So. 333, 166 Miss. 602.

Narrower than roadbed

N.Y.—Rickhold v. City of Niagara Falls, 210 N.Y.S. 676, 213 App.Div. 451.

Repairs

It is matter of common knowledge that all bridges over navigable streams are necessarily repaired from time to time and worn parts thereof replaced with new parts.—City of Benwood v. Interstate Bridge Co., D.C.W.Va., 30 F.Supp. 952.

88. **Canal**

A court cannot take judicial notice of the fact that a certain canal is a public highway.—New York & B'klyn Saw-mill & Lumber Co. v. Brooklyn, 71 N.Y. 580, affirming 8 Hun 37.
23 C.J. p 161 note 71.

Condition at particular time

Judicial notice is not taken of the condition of the roads at a particular time.—McCormick Harvesting Mach. Co. v. Jacobson, 42 N.W. 499, 77 Iowa 582.

89. Ill.—Franklin Grove v. Chicago & Northwestern R. Co., 196 Ill.App. 167.

Need for diligent supervision

It is a matter of common knowledge that in sparsely settled districts there is no need of that diligent supervision or regulation which is required in densely populated municipalities.—McDonald v. Board of Chosen Freeholders of Hudson County, 121 A. 297, 98 N.J.Law 386, reversed on other grounds 122 A. 801, 99 N.J.Law 170.

Modern improvements

It is a matter of common knowledge that in many rural sections modern improvements already exist and are in daily use.—Crawford v. Alabama Power Co., 128 So. 454, 221 Ala. 236.

Rural areas

Judicial notice may be taken that much of the area of largest counties is rural outside corporate limits of municipalities.—State ex rel. Shirley v. Lutz, 147 So. 429, 226 Ala. 497.

90. U.S.—Lau Hu Yuen v. U. S., C. C.A.Hawaii, 85 F.2d 327—Booth v. Gilbert, C.C.A.Mo., 79 F.2d 790.
Ala.—State ex rel. Shirley v. Lutz, 147 So. 429, 226 Ala. 497.
Cal.—Deese v. City of Lodi, 69 P.2d 1005, 21 Cal.App.2d 631—Ex parte Wacholder, 36 P.2d 705, 1 Cal.App. 2d 254.
Ill.—City of Chicago v. Ames, 7 N.E.2d 294, 365 Ill. 529, 109 A.L.R. 1509—City of Chicago v. Green Mill Gardens, 137 N.E. 126, 305 Ill. 87.

knowledge. Accordingly, judicial notice has been taken of particular matters pertaining to streets and sidewalks in towns and cities,[91] of traffic conditions

La.—State ex rel. Porterie v. Housing Authority of New Orleans, 182 So 725, 190 La. 710.
Mass.—Clohecy v. City of Haverhill, 12 N.E.2d 834, 299 Mass. 378.
Mich.—People v. Harley, 203 N.W. 531, 230 Mich. 676.
Mo.—Pearrow v. Thompson, 121 S.W. 2d 811, 343 Mo. 490—Badger Lumber Co. v. Mullins, 275 S.W. 957, 310 Mo. 602—State ex inf. Mallett ex rel. Wommack v. City of Joplin, App., 52 S.W.2d 602, affirmed State ex inf. Mallett ex rel. Womack v. City of Joplin, 62 S.W.2d 393, 332 Mo. 1193.
N.Y.—In re Loewus' Will, 202 N.Y.S. 406, 207 App.Div. 816—Rome Trust Co. v. Cummings, 206 N.Y.S. 728, 123 Misc. 884—Elbert v. Village of North Hills, 28 N.Y.S.2d 317—Smith v. Village of Pleasantville, 20 N.Y.S.2d 594—Brown v. Farda, 194 N.Y.S. 247, affirmed 198 N.Y.S. 903, 206 App.Div. 652.
Tex.—Turner v. Tucker, 258 S.W. 149, 113 Tex. 434, reversing Tucker v. Tucker, Civ.App., 255 S.W. 641—C. D. Shamburger Lumber Co. v. Delavan, Civ.App., 106 S.W.2d 351, error refused—National Union Fire Ins. Co. of Pittsburgh, Pa., v. Richards, Civ.App., 290 S.W. 912.
Utah.—Board of Education of Alpine School Dist., Utah County, v. Board of Education of Salt Lake City, 219 P. 542, 62 Utah 302.
Va.—City of Richmond v. Hood Rubber Products Co., 190 S.E. 95, 168 Va. 11.
23 C.J. p 165 note 56, p 166 notes 59, 60.

City hall

It is common knowledge that in town of about six hundred inhabitants it is usual and customary to use city hall building for social purposes if it is large enough.—City of Hughes Springs v. Lips, C.C.A.Tex., 118 F.2d 238.

"Boom" towns

Tex.—Eidelbach v. Davis, Civ.App., 99 S.W.2d 1067, error dismissed.

Crossing of rivers

Court takes judicial notice that problem of crossing wide rivers by bridges, tunnels, or tubes is important question to large cities separated by rivers from main highways.—Robson v. Cantwell, 141 S.E. 180, 143 S.C. 104.

Gambling

The supreme court will take judicial notice that gambling is permitted to flourish to a greater extent in cities than elsewhere and that slot machines are the most often used of any of devices.—Clemons v. Wilson, 98 P.2d 423, 151 Kan. 250.

Relief of injured

Courts know as matter of common knowledge that all large cities have ample facilities for immediate relief of injured persons.—Hughes v. Gregory Bus Lines, 128 So. 96, 157 Miss. 374.

Stables

It is common knowledge that stables are maintained in all cities and towns, and that they can be kept clean.—Taulbee v. Miller, 9 S.W.2d 296, 225 Ky. 516.

Utilization of waters

Court will take judicial notice that towns are constructed with large lakes and rivers and bays within their area and municipal facilities are constructed for public utilization of such waters.—U. S. ex rel. Brown-Crummer Inv. Co. v. Town of North Miami, D.C.Fla., 11 F.Supp. 69.

91. Tenn.—McCay v. Du Pont Rayon Co., 96 S.W.2d 177, 20 Tenn.App. 157.

Interest in improvement

In these days of the almost universal use of motor vehicles for the transportation of passengers and freight, it is a matter of common knowledge that the improvement of a street within a city may well be of more than local interest and benefit.—City of Oakland v. Garrison, 228 P. 433, 194 Cal. 298.

Judicial notice has been taken as to:

(1) Boulevards.
Cal.—Strong v. Hancock, 258 P. 60, 201 Cal. 530.
Mo.—Prescott, Wright, Snider Co. v. Mellody-McGilley Funeral Home, 118 S.W.2d 499, 233 Mo.App. 332.

(2) Condition of streets as slippery when wet or damp.—Mayor and Council of City of Cumberland v. Turney, 9 A.2d 561, 177 Md. 297.

(3) Endeavors of city to bring about grade crossing elimination.—Central R. Co. of New Jersey v. Simandl, 1 A.2d 312, 124 N.J.Eq. 207, affirmed 4 A.2d 281, 125 N.J.Eq. 91.

(4) Flushing of streets to free them from dirt, trash, and the like for sake of cleanliness.—Davis v. City of Greenville, 167 S.E. 682, 168 S.C. 476.

(5) Hazard presented by intersecting streets.
Cal.—Riggs v. Gasser Motors, 72 P. 2d 172, 22 Cal.App 2d 636.
R.I.—Dembicer v. Pawtucket Cabinet & Builders Finish Co., 193 A. 622, 58 R.I. 451.

(6) Ice on crosswalks.—Staples v. City of Spencer, 271 N.W. 200, 222 Iowa 1241.

(7) Matters concerning the parking of motor vehicles.
Iowa.—Mooney v. Canier, 197 N.W. 625, 198 Iowa 251.
Ky.—Miller's Adm'r v. City of Pineville, 126 S.W.2d 844, 277 Ky. 390.
Pa.—Sley System Garages v. City of Philadelphia, 5 A.2d 583, 135 Pa. Super. 440, affirmed City and County of Philadelphia v. Samuels, 12 A.2d 79, 338 Pa. 321.

(8) Rights of person entering on main street from side street.—Wallace v. Parnell, 28 N.E.2d 569, 306 Ill.App. 310.

(9) The existence of sidewalk doors.—Staples v. Senders, Or., 101 P.2d 232, modifying 96 P.2d 215—Lewis v. Jake's Famous Crawfish, 36 P.2d 352, 148 Or. 340.

(10) Stoops on sidewalks in particular cities.
La.—Mendoza v. Glorioso, 120 So. 57, 167 La. 701.
N.Y.—Hausman v. Jacobs, 197 N.Y.S. 629, 120 Misc. 61.

(11) That the loop and Wilson Ave districts in Chicago are severally highly congested areas for travel and transportation.—City of Chicago v. Rhine, 2 N.E.2d 905, 907, 363 Ill. 619, 105 A.L.R. 1045, citing **Corpus Juris.**

(12) The necessity for drainage of paving.—In re Meyer, 197 N.W. 970, 158 Minn. 433, reversed on other grounds 199 N.W. 746, 158 Minn. 433.

(13) Traffic conditions in large cities.—People v. Kastings, 138 N.E. 269, 307 Ill. 92.

(14) Various things as constituting obstructions on or along streets.
U.S.—In re Madison Rys. Co., C.C.A. Wis., 102 F.2d 178.
Ky.—Weppner v. City of Louisville, 107 S.W.2d 1057, 269 Ky. 528.

(15) Other matters.
Cal.—Whiting v. National City, 69 P.2d 990, 9 Cal.2d 163—Rauch v. Southern California Gas Co., 273 P. 1111, 96 Cal.App. 250.
D.C.—District of Columbia v. Smith, 93 F.2d 650, 68 App.D.C. 104.
Iowa.—Incorporated Town of Ackley v. Central States Electric Co., 214 N.W. 879, 204 Iowa 1246, 54 A.L.R. 474.
Ky.—White Const. Co. v. City of Madisonville, 121 S.W.2d 55, 275 Ky. 416—Wigginton's Adm'r v. Louisville Ry. Co., 75 S.W.2d 1046, 256 Ky. 287—City of Louisville v. Carr, 263 S.W. 674, 204 Ky. 119—City of Lancaster v. Broaddus, 216 S.W. 373, 186 Ky. 226.
Mo.—Sheridan v. City of St. Joseph, 110 S.W.2d 371, 232 Mo.App. 615—Miners' Bank of Carterville v. Clark, 257 S.W. 139, 216 Mo.App. 130.

and means of handling traffic,[92] of housing conditions in important cities of the state,[93] of the need of an adequate water supply for a large city,[94] of the growth and development of cities,[95] of the principal occupation of a city,[96] of the existence of business and residence districts outside of incorporated cities and towns,[97] of the fact that stores are found in great abundance in thickly populated communities,[98] of property restrictions,[99] of rights to light and air,[1] of the ownership of property by nonresidents,[2] of benefits arising from the creation

Mont.—Ricker v. City of Helena, 218 P. 1049, 68 Mont. 350.
Neb.—Sullivan v. Chicago & N. W. Ry. Co., 258 N.W. 38, 128 Neb. 92, certiorari denied 55 S.Ct. 831, 295 U.S. 749, 79 L.Ed. 1694.
N.Y.—Kuhn v. Village of East Syracuse, 204 N.Y.S. 697, 209 App.Div. 186—Segfried Const. Co. v. City of New York, 209 N.Y.S. 429, 124 Misc. 622.
N.C.—Gettys v. Town of Marion, 10 S.E.2d 799, 218 N.C. 266.
Ohio.—Bonbright v. Biller, 36 N.E.2d 173, 67 Ohio App. 421—State ex rel. Crabbe v. City of Columbus, 153 N.E. 174, 21 Ohio App. 1.
Tex.—City of San Antonio v. San Antonio Academy, Civ.App., 259 S.W. 995.
Wash.—Gabrielsen v. City of Seattle, 272 P. 723, 150 Wash. 157, 63 A.L.R. 200, affirmed 278 P. 1071, 152 Wash. 700, 63 A.L.R. 200.
Wis.—Heller v. Baird, 210 N.W. 680, 191 Wis. 288.
Wyo.—Villalpando v. City of Cheyenne, 65 P.2d 1109, 51 Wyo. 300.

Right to use

The courts can take judicial knowledge that any one is entitled to the use of streets and highways maintained by municipalities and that a person coming into contact with a wire on a public street is not a trespasser.—Florida Power & Light Co. v. Bridgeman, 182 So. 911, 133 Fla. 195—23 C.J. p 165 note 57, p 166 note 62, p 145 note 32.

92. D.C.—Jackson v. Capital Transit Co., 99 F.2d 380, 69 App.D.C. 147, certiorari denied 59 S.Ct. 464, 306 U.S. 630, 83 L.Ed. 1032—Smallwood v. District of Columbia, 17 F.2d 210, 57 App.D.C. 58.
Ill.—Tuttle v. Checker Taxi Co, 279 Ill.App. 455.
N.Y.—City of New York v. New York Cent. R. Co., 9 N.E.2d 931, 275 N.Y. 287, reversing 295 N.Y.S. 127, 250 App.Div. 743—Shifman v. Whalen, 137 N.E. 331, 234 N.Y. 283, reversing 192 N.Y.S. 950, 200 App.Div. 878—Great Atlantic & Pacific Tea Co. v. City of New York, 17 N.Y.S.2d 270, 173 Misc. 470—Schubart v. Hotel Astor, 5 N.Y.S.2d 203, 168 Misc. 431, affirmed 8 N.Y.S.2d 567, 255 App.Div. 1012, affirmed 22 N.E.2d 167, 281 N.Y. 597.
Tex.—Lamar & Smith v. Stroud, Civ.App., 5 S.W.2d 824, error dismissed.
23 C.J. p 166 note 58.

Parking areas

It is common knowledge that, in cities, considerable areas are devoted to parking and storing motor vehicles.—City of Chicago v. Ben Alpert, Inc., 13 N.E.2d 987, 368 Ill. 282.

93. N.Y.—Paterno Investing Corporation v. Katz, 184 N.Y.S. 129, 112 Misc. 242.

Private garages

It is common knowledge that private garages are often built as an integral part of a dwelling house.—Hilsinger v. Schwartz, 133 A. 184, 99 N.J.Eq. 288.

94. Cal.—Wehrle v. Board of Water and Power Com'rs of Los Angeles, 293 P. 67, 211 Cal. 70.

95. Ala.—Pilcher v. City of Dothan, 93 So. 16, 207 Ala. 421.
Cal.—Wehrle v. Board of Water and Power Com'rs of Los Angeles, 293 P. 67, 211 Cal. 70—Watkins v. Pension Board of City of Sacramento, 267 P. 323, 91 Cal.App. 542.
Mich.—In re Spears, 198 N.W. 952, 227 Mich. 525.
Mo.—State ex rel. McCaffrey v. Bailey, 272 S.W. 921, 308 Mo. 444.
Okl.—Peerless Realty & Operating Co. v. City of Tulsa, 87 P.2d 118, 184 Okl. 335.
Tex.—Williams v. Castleman, 247 S.W. 263, 112 Tex. 193.
Va.—Blair v. Rorer's Adm'r, 116 S.E. 767, 135 Va. 1, motion for leave to file petition denied 43 S.Ct. 704, 262 U.S. 234, 67 L.Ed. 1206.
Wis.—Christensen v. Mann, 204 N.W. 499, 187 Wis. 567, 41 A.L.R. 1192.

Development of oil field

The court, in determining whether the amount of land included within the city limits was reasonably necessary to take care of the future growth of the city, could properly consider as a matter of judicial knowledge the fact that the development of an oil field adjacent to a town is reasonably calculated to bring about a large increase in the population as well as in industrial enterprises.—State v. Hellman, 36 S.W.2d 1002, 120 Tex. 282.

Growth of summer resort town

along lake shore line is a matter of common knowledge.—Creery v. Town of Okoboji, 253 N.W. 810, 217 Iowa 1312.

Necessity for zoning ordinances

U.S.—Morrison v. Pettigrew, D.C.N.Y., 14 F.2d 453.

Subdivision of farm lands

Ill.—Forest Preserve Dist. of Cook County v. Dearlove, 169 N.E. 753, 337 Ill. 555.

96. Del.—Dupont v. Mills, 196 A. 168, 9 W.W.Harr. 42, 119 A.L.R. 174.
N.C.—Storm v. Town of Wrightsville Beach, 128 S.E. 17, 189 N.C. 679.
Tex.—Hornsby v. Crystal Beach Park, Civ.App., 41 S.W.2d 82, error dismissed.

Visitors

It is common knowledge that Concord has only small area devoted to strictly business activities and has numerous visitors every year due to its historic and literary interest.—General Outdoor Advertising Co. v. Department of Public Works, 193 N.E. 799, 289 Mass. 149, appeal dismissed General Outdoor Advertising Co. v. Callahan, 56 S.Ct. 495, 297 U.S. 725, 80 L.Ed. 1008, General Outdoor Advertising Co. v. Hoar, 56 S.Ct. 495, 297 U.S. 725, 80 L.Ed. 1008, and Brink v. Callahan, 56 S.Ct. 496, 297 U.S. 725, 80 L.Ed. 1008.

97. Del.—State v. Shaw, 192 A. 610, 8 W.W.Harr. 352.

98. Del.—City of Wilmington v. Turk, 129 A. 512, 14 Del.Ch. 392.

99. **Effect of removing**

It is a matter of common knowledge that letting down property restrictions for one lot owner will eventually deprive all coöwners of the benefits of restrictive covenants.—Continental Oil Co. v. Fennemore, 299 P. 132, 38 Ariz. 277.

Residential districts

The court will take judicial notice that many families desire to own homes for residence purposes which shall be distinct and separate from residences occupied by other families, and that there is a strong and growing tendency everywhere to set aside special districts to be used exclusively for such purposes.—Ainsworth v. Elder, 9 P.2d 1007, 40 Ariz. 71.

1. **Incident to city life**

It is a matter of common knowledge that houses are built close together in cities, and that slight interference with the air entering a building is merely an incident to city life.—Lincoln v. McGehee Hotel Co., 29 S.W.2d 668, 181 Ark. 1117.

2. Ill.—Littell v. City of Peoria, 29 N.E.2d 533, 374 Ill. 344—People ex rel. Moshier v. City of Springfield, 19 N.E.2d 598, 370 Ill. 541.

of parks,[3] and that it costs more to live in a city than in a hamlet, and that the cost varies with the size of the community.[4] On the other hand, judicial notice will not be taken of rural and urban conditions which are not matters of common knowledge.[5] Courts do not take judicial notice of the character of a city neighborhood[6] or of the indebtedness of a city.[7]

§ 96. School Matters

Facts of common knowledge relating to school matters may be judicially noticed.

Judicial notice will be taken of facts of common knowledge pertaining to school matters,[8] such as facts relating to the subjects taught at a particular time,[9] the expenses of a public school,[10] school buses,[11] when public schools are in session,[12] the distance that may be traveled by students,[13] institutions of higher learning,[14] the erection of stadia

3. Mo.—In re Condemnation of Property for Park in City of St. Joseph, 263 S.W. 97, error dismissed Corby's Estate v. City of St. Joseph, 45 S.Ct. 351, 267 U.S. 578, 69 L.Ed. 797.

4. Ill.—Littell v. City of Peoria, 29 N.E.2d 533, 374 Ill. 344—People ex rel. Moshier v. City of Springfield, 19 N.E.2d 598, 370 Ill. 541.

5. Mo.—St. Louis v. St. Louis Theatre Co., 100 S.W. 627, 202 Mo. 690.
23 C.J. p 166 notes 61, 63.

6. Mich.—Zawicky v. Flint Trolley Coach Co., 286 N.W. 115, 288 Mich. 655.

7. Or.—Public Market Co. of Portland v. City of Portland, 83 P.2d 440, 160 Or. 155.

8. U.S.—Cinema Schools v. Westchester Fire Ins. Co., D.C.Cal., 1 F.Supp. 37.
Fla.—State ex rel. Fronton Exhibition Co. v. Stein, 198 So. 82.
La.—Elliott v. Corell, App., 158 So. 698.
Mass.—Board of Assessors of Boston v. Garland School of Home Making, 6 N.E.2d 374, 296 Mass. 378.
N.Y.—Kay v. Board of Higher Education of City of New York, 18 N.Y.S.2d 821, 173 Misc. 943, affirmed 20 N.Y.S.2d 1016, 259 App. Div. 879, appeal dismissed 21 N.Y.S.2d 396, 259 App.Div. 1000, and 29 N.E.2d 657, 284 N.Y. 578—Trent v. International Ry. Co., 290 N.Y.S 915, 249 App.Div. 17, affirmed 7 N.E 2d 725, 273 N.Y. 622.
Tex.—Fikes v. Sharp, Civ.App., 112 S.W.2d 774, error refused.
23 C J. p 161 notes 75–78.

Military instruction

Supreme court takes judicial notice of long established voluntary cooperation between federal and state authorities in respect of the military instruction given in land grant colleges.—Hamilton v. Regents of University of California, 55 S.Ct. 197, 293 U.S. 245, 79 L.Ed. 343, affirming 28 P.2d 355, 219 Cal 663, and rehearing denied 55 S.Ct. 345, 293 U.S. 633, 79 L.Ed. 717.

School lands

(1) It is common knowledge that tract used for main branch of University at Austin was set aside for campus purposes by commissioners, surveying seat for government under enactment of Texas Republic.—Splawn v. Woodard, Tex.Civ.App., 287 S.W. 677.

(2) Execution of mortgage on school lands, approved by supreme court, will be judicially noticed.—Trustees of Schools of Tp. No. 38 North v. City of Chicago, 32 N.E.2d 180, 308 Ill.App. 391, transferred, see 26 N.E.2d 839, 373 Ill. 508.

Vivisection

Court judicially knows that vivisection is practiced by men devoting their lives to scientific research in control of human disease, in large medical centers.—Pennsylvania Co. for Insurance on Lives and Granting of Annuities v. Helvering, 66 F. 2d 284, 62 App.D.C. 254.

Voting population

It is common knowledge that, where rural territory is attached to a municipality for school purposes, larger part of voting population resides in municipality.—Roswell Municipal School Dist. No. 1, Chaves County, v. Patton, 58 P.2d 1192, 40 N.M. 280.

9. Mont.—McNair v. School Dist. No. 1 of Cascade County, 288 P. 188, 87 Mont. 423, 69 A.L.R. 866.
Wash.—Wilson's Modern Business College v. King County, 104 P.2d 580, 4 Wash.2d 636.

10. School for colored children

It is a matter of common knowledge that the chief expense of a school for colored children, where it is probable that the attendance will be small, is the compensation of the teacher.—De Hart v. School Dist. No. 39, St. Louis County, 263 S.W. 242, 214 Mo.App. 651.

Payment by state

It is common knowledge, which may be judicially noticed, that for a number of years the cost of building programs of school districts approved by state board of education has been defrayed in large measure out of state funds, and only in a minor degree has the cost fallen on local districts.—Dupont v. Mills, 196 A. 168, 9 W.W.Harr., Del., 42, 119 A.L.R. 174.

11. La.—Hamner & Co. v. Johnson, 135 So. 77, 16 La.App. 580.

12. Ill.—People ex rel. McCoy v. McCahey, App., 15 N.E.2d 988.
La.—State ex rel. School Board of Red River Parish v. Kennington, App., 197 So. 182—Dean v. Winn Parish School Board, App., 193 So. 245, followed in Bates v. Winn Parish School Board, 193 So. 246.
Mont.—Robinson v. F. W. Woolworth Co., 261 P. 253, 80 Mont. 431.
Or.—Crane v. School Dist. No. 14 of Tillamook County, 188 P. 712, 95 Or. 644.
Tex.—Trustees of Independent School Dist. of Cleburne v. Johnson County Democratic Executive Committee, Civ.App., 52 S.W.2d 68, reversed on other grounds 52 S.W.2d 71, 122 Tex. 48.

13. Ill.—People v. France, 145 N.E. 240, 314 Ill. 51.

Need for transportation

Judicial notice has been taken that it is not reasonable to require children to walk from three to five miles to school, and that such a great distance would subject them to exposure, and make it impossible for them to receive the benefits of the school system.—Gordon v. Wooten, 152 So. 481, 168 Miss. 717.

14. U.S.—Porter v. Commissioner of Internal Revenue, C.C.A., 60 F.2d 673, certiorari granted 53 S.Ct. 121, 287 U.S. 591, 77 L.Ed. 516, affirmed 53 S.Ct. 451, 288 U.S. 436, 77 L.Ed. 880.
Ala.—Alabama College v. Harman, 175 So. 394, 234 Ala. 446.
Ill.—People v. University of Illinois, 159 N.E. 811, 328 Ill. 377.
Mo.—Aquamsi Land Co. v. City of Cape Girardeau, 142 S.W.2d 332.
N.Y.—In re Neil's Estate, 191 N.Y.S. 362, 117 Misc. 498.
Utah.—Chez ex rel. Weber College v. Utah State Bldg. Commission, 74 P.2d 687, 93 Utah 538.

Athletic activities

Tex.—Sportatorium, Inc., v. State, Civ.App., 115 S.W.2d 483, error dismissed.

Commercial activity

On application for permit for operation of airport by University of Virginia, the state corporation commission will take judicial notice that university conducts incidental enterprises of a commercial nature without involving university in commer-

by institutions of higher learning,[15] and the advantage of housing students near a university.[16] Judicial notice is also taken of the statutes of the state relating to public schools.[17] Facts of common knowledge relating to school teachers, principals, and superintendents are also judicially noticed.[18]

§ 97. Statistics

Common statistical knowledge is a proper subject of judicial notice.

Judicial notice may be taken of that which is common statistical knowledge.[19] Accordingly, judicial notice may be taken of the birth statistics published by the department of commerce.[20]

Judicial notice of the laws of mathematics is discussed in § 74 supra.

§ 98. Census

Judicial notice may be taken of a federal or state census and of facts established thereby.

Courts know the facts generally known to have been established by statistics in much the same way and for much the same reason that they know the facts set forth in the almanac. The court cannot verify the facts; but, where statistics are official, prepared by public officers acting under provision of law, the duty of the court to know the law and recognize the existence of acts done under it stimulates and indorses the court's knowledge of the facts established by such statistics, in which the community shares. Courts, therefore, will take judicial knowledge of the results of a census taken under federal[21] or state[22] authority. The court will take

cial activity.—Batcheller v. Commonwealth ex rel. Rector and Visitors of University of Virginia, 10 S.E.2d 529, 176 Va. 109.

Not a public corporation

N.J.—In re Voorhees' Estate, 196 A. 365, 123 N.J.Eq. 142, affirmed 3 A.2d 891, 121 N.J.Law 594, affirmed 10 A.2d 650, 124 N.J.Law 35.

Purpose and needs

Mont.—State ex rel. Wilson v. State Board of Education of Montana, 56 P.2d 1079, 102 Mont. 165.

Payment of expenses

That tuition and other charges of public and privately endowed educational institutions are much less than required to pay running expenses is matter of common knowledge. —Ettlinger v. Trustees of Randolph-Macon College, C.C.A.Va., 31 F.2d 869.

15. Ariz.—Alexander v. Phillips, 254 P. 1056, 31 Ariz. 503, 52 A.L.R. 244.

16. N.Y.—City of Syracuse v. Snow, 205 N.Y.S. 785, 123 Misc. 568.

17. N.C.—City of Hickory v. Catawba County, 173 S.E. 56, 206 N.C. 165.

18. Miss.—Ladner v. Talbert, 83 So. 748, 121 Miss. 592.
23 C.J. p 161 note 79.

Matters judicially noticed

(1) That a school teacher and a school principal perform entirely different duties.—O'Connor v. Emerson, 188 N.Y.S. 236, 196 App.Div. 807, affirming 185 N.Y.S. 49, 113 Misc. 472, and affirmed 134 N.E. 572, 232 N.Y. 561.

(2) That in the past male public school teachers have commanded larger salaries than women teaching same subjects.—Moses v. Board of Education of City of Syracuse, 217 N.Y.S. 265, 127 Misc. 477, affirmed 218 N.Y.S. 827, 218 App.Div. 811, reversed on other grounds 156 N.E. 631, 245 N.Y. 106.

(3) That teachers' duties do not end with the school session.—England v. Fairview School Dist. No. 16 of Power County, 77 P.2d 655, 58 Idaho 633.

(4) That many school teachers in fact remain in one place for long period of years, notwithstanding short-term annual contracts.—Dodd v. Lorenz, 231 N.W. 422, 210 Iowa 513.

(5) The general supervisory nature of the duties of a superintendent of schools.—Caverno v. Fellows, 15 N.E.2d 483, 300 Mass. 331.

(6) Other matters.

D.C.—Cobb v. Howard University, 106 F.2d 860, 70 App.D.C. 339, certiorari denied 60 S.Ct. 175, 308 U.S. 611, 84 L.Ed. 510.

Ind.—Hutton v. Gill, 8 N.E.2d 818, 212 Ind. 164, transferred, see App., 7 N.E.2d 1011.

Ky.—Hunter v. Board of Education of Floyd County, 96 S.W.2d 265, 265 Ky. 162.

La.—Bank of Winnfield v. Brumfield, 124 So. 628, 11 La.App. 647.

Mass.—Caverno v. Fellows, 15 N.E.2d 483, 300 Mass. 331—Caverno v. Fellows, 190 N.E. 739, 286 Mass. 440.

Okl.—Poindexter v. Board of Education of Independent School Dist. No. 39 of Gage, 49 P.2d 1092, 174 Okl. 192.

Tenn.—Patey v. Metropolitan Life Ins. Co., 93 S.W.2d 1271, 19 Tenn. App. 634.
23 C.J. p 161 note 79.

19. U.S.—Tracy v. Commissioner of Internal Revenue, C.C.A., 53 F.2d 575, certiorari denied 53 S.Ct. 83, 287 U.S. 632, 77 L.Ed. 548.

Pa.—See Commonwealth v. Shaffer, 35 Pa.Dist. & Co. 125.

20. U.S.—City Bank Farmers' Trust Co. v. U. S., D.C.N.Y., 5 F.Supp. 871, affirmed, C.C.A., 74 F.2d 692.

21. Ala.—Reynolds v. Collier, 85 So. 465, 204 Ala. 38—Burnette v. State, 181 So. 299, 300, 28 Ala.App. 110, citing **Corpus Juris.**

Ill.—Coal Creek Drainage & Levee Dist. v. Sanitary Dist. of Chicago, 167 N.E. 807, 336 Ill. 11, reversing 254 Ill.App. 289.

Ind.—Groves v. Board of Com'rs of Lake County, 199 N.E. 137, 209 Ind. 371—Gruber v. State, 148 N.E. 481, 196 Ind. 436.

Miss.—Dow v. Town of D'Lo, 152 So. 474, 169 Miss. 240—Brown v. Reeves, 92 So. 825, 129 Miss. 755.

Mo.—Roberts v. Benson, 142 S.W.2d 1058—Carter County v. Huett, 259 S.W. 1057, 303 Mo. 194—State ex rel. Wallace v. Summers, 9 S.W.2d 867, 222 Mo.App. 782.

N.Y.—Smith v. Village of Pleasantville, 20 N.Y.S.2d 594.

Tex.—L. E. Whitham & Co. v. Allen, Civ.App., 64 S.W.2d 1024, 1025, error dismissed, citing **Corpus Juris.**

Va.—Blair v. Rorer's Adm'r, 116 S.E. 767, 135 Va. 1, motion denied 43 S.Ct. 704, 262 U.S. 234, 67 L.Ed. 1206.

Wash.—State v. Smith, 270 P. 306, 149 Wash. 173, adhered to 284 P. 796, 155 Wash. 422.

Wis.—Watts v. National Rent-A-Car Co., 237 N.W. 276, 205 Wis. 140—Watts v. Rent-A-Ford Co., 236 N.W. 521, 205 Wis. 140—Grimm v. Bayfield County, 182 N.W. 466, 174 Wis. 43.
23 C.J. p 161 note 80.

Census at prior dates, as well as the latest, may be judicially noticed.

Ala.—Watts v. State, 109 So. 762, 215 Ala. 95, denying certiorari 109 So. 762, 21 Ala.App. 516.

Fla.—Knowlton v. City of St. Petersburg, 150 So. 269, 111 Fla. 835.

Iowa.—Hatter v. Icenbice, 223 N.W. 527, 207 Iowa 702.

Mo.—State ex rel. Alton R. Co. v. Public Service Commission, 70 S.W.2d 52, 54, 334 Mo. 985, citing **Corpus Juris.**
23 C.J. p 161 note 80 [a].

22. Ala.—Bradford v. State, 147 So.

judicial notice of the population of the state,[23] counties,[24] cities,[25] towns,[26] townships,[27] and villages.[28] In addition the court takes judicial notice of the public statutes of the state, see supra § 16, and hence, where a statute makes a classification according to the population of governmental subdivisions, the court judicially knows that a particular subdivision belongs to a particular class,[29] or that certain towns, cities, or counties are not within the operation and scope of certain legislation,[30] or that

182, 183, 226 Ala. 342, citing **Corpus Juris.**
Fla.—Knowlton v. City of St. Petersburg, 150 So. 269, 111 Fla. 835.
23 C.J. p 161 note 81.

Fact of taking
Court judicially knows that no state census was taken before a certain time—State v. Smith, 270 P. 306, 149 Wash. 173, adhered to 284 P. 796, 155 Wash. 422.

23. Ark.—Metropolitan Life Ins. Co. v. Fry, 41 S.W.2d 766, 184 Ark. 23.
Ky.—Butler v. Stephens, 84 S.W. 745, 119 Ky. 616, 27 Ky.L. 241.

24. U.S.—Greeson v. Imperial Irr. Dist., C.C.A.Cal., 59 F.2d 529, affirming, D.C., 55 F.2d 321—In re B. P. Lientz Mfg. Co., D.C.Mo., 32 F.Supp. 233.
Ala.—Garner v. McCall, 178 So. 210, 235 Ala. 187—McNeill v. Motor Sales Co., 94 So. 365, 208 Ala. 310—Reynolds v. Collier, 85 So. 465, 204 Ala. 38.
Cal.—Martin v. Superior Court of Sacramento County, 227 P. 762, 194 Cal. 93.
Ind.—Porter v. State ex rel. Hays, 196 N.E. 238, 208 Ind. 410.
Mo.—State ex rel. Moseley v. Lee, 5 S.W.2d 83, 319 Mo. 976—Carter County v. Huett, 259 S.W. 1057, 303 Mo. 194—State ex rel. and to Use of Tadlock v. Mooneyham, 253 S.W. 1098, 212 Mo.App. 573.
Or.—State v. Hawks, 222 P. 1071, 110 Or. 497.
Tex.—Smith v. Patterson, 242 S.W. 749, 111 Tex. 535, opinion conformed to, Civ.App., 242 S.W. 752.
Va.—Shelton v. Sydnor, 102 S.E. 83, 126 Va. 625.
23 C.J. p 161 note 83.

25. U.S.—Weintraub v. Rosen, C.C.A.Ill., 93 F.2d 544—Greerson v. Imperial Irr. Dist., C.C.A.Cal., 59 F.2d 529, affirming, D.C., 55 F.2d 321—In re B. P. Lientz Mfg. Co., D.C.Mo., 32 F.Supp. 233—U. S. v. D. L. Taylor Co., D.C.N.C., 268 F. 635, affirmed, C.C.A., Taylor v. Connett, 277 F. 945.
Ala.—State ex rel. Kinney v. St. John, 172 So. 639, 233 Ala. 480—Bradford v. State, 147 So. 182, 183, 226 Ala. 342, citing **Corpus Juris**—Reid v. City of Mobile, 104 So. 787, 213 Ala. 321—Griffin v. Fowler, 81 So. 426, 17 Ala.App. 44, reversed on other grounds Ex parte Fowler, 82 So. 112, 203 Ala. 98.
Cal.—City and County of San Francisco v. Boyle, 215 P. 549, 191 Cal. 172—In re Simpson, 217 P. 789, 62 Cal.App. 549.
Del.—In re Cereini, 189 A. 443, 8 W.W.Harr. 134.
Fla.—Knowlton v. City of St. Petersburg, 150 So. 269, 111 Fla. 835.
Idaho.—Independent Gas & Oil Co. v. T. B. Smith Co., 10 P.2d 317, 320, 51 Idaho 710, citing **Corpus Juris.**
Ill.—North West Cab Co. v. Central Mut. Ins. Co., 266 Ill.App. 192.
Ind.—State v. Morris, 155 N.E. 198, 199 Ind. 78—City of Lebanon v. Walker, 164 N.E. 637, 88 Ind.App. 498—Shelmadine v. City of Elkhart, 129 N.E. 878, 75 Ind.App. 493.
Iowa—First Nat. Bank v. Anderson, 192 N.W. 6, 196 Iowa 587, reversed on other grounds 46 S.Ct. 135, 269 U.S. 341, 70 L.Ed. 295.
Mich.—Fortner v. Koch, 261 N.W. 762, 272 Mich. 273.
Mo.—Aquamsi Land Co. v. City of Cape Girardeau, 142 S.W.2d 332—Newdiger v. Kansas City, 114 S.W.2d 1047, 342 Mo. 252, affirming, App., 106 S.W.2d 51—Kansas City ex rel. Barlow v. Robinson, 32 S.W.2d 1075—Kansas City ex rel. Barlow v. Robinson, 17 S.W.2d 977, 322 Mo. 1050—Heather v. City of Palmyra, 276 S.W. 872—Devine v. Wells, 254 S.W. 65, 300 Mo. 177—Martone v. Bryan, 130 S.W.2d 962, 233 Mo.App. 1249.
N.Y.—House v. Bodour, 7 N.Y.S.2d 443, 168 Misc. 766—Marfisi v. Wilson & Co., 5 N.Y.S.2d 179, 166 Misc. 881, affirmed 5 N.Y.S.2d 184—Canton v. The Palms, Inc., 273 N.Y.S. 239, 152 Misc. 347.
Okl.—Kansas City Southern Ry. Co. v. Wood, 259 P. 262, 126 Okl. 275.
S.D.—In re Gibbs, 214 N.W. 850, 51 S.D. 464.
Tex.—Bowie Sewerage Co. v. Chandler, Civ.App., 138 S.W.2d 585, error dismissed, judgment correct—Simms v. O. L. Crigler Co., Civ.App., 47 S.W.2d 686, 687, citing **Corpus Juris**—Hufstedler v. City of Lubbock, Civ.App., 40 S.W.2d 982, 983, citing **Corpus Juris**—Urban v. Harris County, Civ.App., 251 S.W. 594.
23 C.J. p 162 note 84.

26. Ala.—Pickens County v. Jordan, 196 So. 121, 239 Ala. 589.
Ark.—Metropolitan Life Ins. Co. v. Fry, 41 S.W.2d 766, 184 Ark. 23.
Iowa.—Hatter v. Icenbice, 223 N.W. 527, 207 Iowa 702.
Pa.—Pittsburgh Rys. Co. v. Public Service Commission, 188 A. 549, 124 Pa.Super. 266.
Tex.—First Nat. Bank v. Osborne, Civ.App., 113 S.W.2d 695.
23 C.J. p 162 note 85.

27. Ind.—Stellhorn v. Allen County, 110 N.E. 89, 60 Ind.App. 14.
Mo.—State ex rel. Hart v. Mazuch, App., 68 S.W.2d 923.
Pa.—Pittsburgh Rys. Co. v. Public Service Commission, 188 A. 549, 124 Pa.Super. 266.

28. Mo.—State at Inf. McKittrick ex rel. Martin v. Stoner, 146 S.W.2d 891—Duncan v. Chicago, B. & Q. R. Co., App., 149 S.W.2d 920.
Neb.—Hornberger v. State, 66 N.W. 23, 47 Neb. 40.

29. Ala.—Colbert County v. Tennessee Valley Bank, 144 So. 803, 225 Ala. 632.
Ark.—Kendall v. Ramsey, 19 S.W.2d 1020, 179 Ark. 984.
Ind.—State v. Morris, 155 N.E. 198, 199 Ind. 78—St. Joseph County v. Claeys, 5 N.E.2d 1008, 103 Ind.App. 192—Schroeder v. City of New Albany, 170 N.E. 83, 91 Ind.App. 62—Mueller v. Board of Com'rs of Marion County, 127 N.E. 15, 73 Ind.App. 196.
Iowa.—Independent School Dist. of Luverne in Kossuth and Humboldt Counties v. Consolidated School Dist. of Vernon Tp., Humboldt County, 288 N.W. 920, 227 Iowa 707—State v. Darling, 246 N.W. 390, 216 Iowa 553, 88 A.L.R. 218.
Kan.—Barker v. Kansas City, 88 P.2d 1071, 149 Kan. 696.
La.—Clark v. City of Opelousas, 84 So. 433, 147 La. 1.
Miss.—Gordon v. Wooten, 152 So. 481, 168 Miss. 717.
Mo.—Hoffman v. Bigham, 24 S.W.2d 125, 324 Mo. 516—State ex rel. Moseley v. Lee, 5 S.W.2d 83, 319 Mo. 976—Steinbrenner v. City of St. Joseph, 226 S.W. 890, 285 Mo. 318—Shackleford v. City of Jefferson, 150 S.W. 1123, 167 Mo.App. 59.
N.J.—Dellabello v. Central R. Co. of New Jersey, 124 A. 59, 99 N.J.Law 348.
Pa.—New Brighton Borough v. Pulaski Tp. School Dist., 9 Pa.Dist. & Co. 366.
Va.—Kirkpatrick v. Board of Sup'rs of Arlington County, 136 S.E. 186, 146 Va. 113.
Wyo.—State v. Sheldon, 213 P. 92, 29 Wyo. 233.
23 C.J. p 162 note 89.

30. Or.—Nicklin v. Parsley, 218 P. 750, 108 Or. 669.
23 C.J. p 162 note 90.

the statute can apply to only one county[31] or particular counties,[32] or to one city,[33] in the state. Other facts of general interest obtained from the official census will be noticed,[34] such as the fact that the majority of the state population is urban,[35] and that a particular county is sparsely settled.[36] Courts, however, will not take judicial notice of the population of a school district,[37] sanitary district,[38] or other subdivision or district not shown by any official census.[39] A legally unofficial estimate of population, although made by a public body, will not be judicially accepted as determinative.[40] A mere colorable proceeding on the part of the legislative body of a city without any substantial compliance with the law, as to the taking of such census, would not impart any notice of the number of the inhabitants of the city;[41] but, where the statute is general in its terms and quite indefinite as to the character of the census to be taken or the method to be pursued in the taking thereof, a substantial compliance with the statute is sufficient to authorize the court to recognize the census taken as official and to take judicial notice of the population of the city as shown thereby, even though some of the proceedings connected with the taking and showing of the result of the census are quite informal.[42]

Estimate of population with census as factor. As a fact of common knowledge, increase in population subsequent to the last official census may be judicially noticed.[43] Under the general rule that the preceding, as well as the last, official census may be judicially noticed, judicial cognizance may be taken of the rate of increase shown by each successive census,[44] and a broad conclusion as to the probable rate of increase in the immediate future may be legitimate,[45] unless the case is one in which absolute certainty is required.[46] It is doubtful if there is any judicially recognized ratio whereby a closely approximate estimate of population can be made by comparison of the number of votes cast at a general state or county election, or of the number of school children shown by a census, with a preceding official census of population;[47] but common knowledge of the population of the state may enable a court to know judicially that there are not a specified number of electors in the state.[48]

§ 99. Mortality Tables

Judicial notice may be taken of standard mortality tables.

The courts take judicial notice of the standard mortality tables and of their contents showing the natural expectancy of life at a given age[49] of

31. Ala.—Mobile County v. State ex rel. Cammack, 197 So. 6, 240 Ala. 37—Steber v. State, 155 So. 708, 229 Ala. 88, denying certiorari 155 So. 706, 26 Ala.App. 148.
Ark.—Street Improvement Dists. Nos. 481 and 485 v. Hadfield, 43 S.W.2d 62, 184 Ark. 598—Simpson v. Matthews, 40 S.W.2d 991, 184 Ark. 213.
Cal.—Ex parte Brady, 224 P. 252, 65 Cal.App. 345.
Fla.—State ex rel. Blalock v. Lee, 1 So.2d 193—State ex rel. Crim v. Juvenal, 163 So. 569, 119 Fla. 86, 121 Fla. 69.
Ill.—People ex rel. Clarke v. Jarecki, 1 N.E.2d 855, 363 Ill. 180.
Ky.—Board of Drainage Com'rs of Fulton County v. Board of Levee Com'rs of Fulton County, 230 S.W. 959, 191 Ky. 470.
Tex.—Wood v. Marfa Independent School Dist., Civ.App., 123 S.W.2d 429, reversed on other grounds Marfa Independent School Dist. v. Wood, 141 S.W.2d 590, 135 Tex 223.
23 C.J. p 162 note 91.

32. Fla.—Manatee County v. Davidson, 181 So. 889, 132 Fla. 295.

33. Ala.—Ward v. State, 139 So. 416, 224 Ala. 242.
Ind.—Rosencranz v. City of Evansville, 143 N.E. 593, 194 Ind. 499.

34. Ind.—Wasson v. Indianapolis First Nat. Bank, 8 N.E. 97, 107 Ind. 206.
23 C.J. p 162 notes 92–94, 96.
Time consumed
Judicial notice may be taken of the fact that an enumeration of the inhabitants of a state ordinarily occupies some time for its completion. —People v. Rice, 31 N.E. 921, 135 N. Y. 473, 16 L.R.A. 836, affirming 20 N.Y.S. 293, 65 Hun 236.
Usual method
"As a matter of common knowledge it is usually and generally understood that the population of a country or a section thereof is determined by an enumeration or census of its inhabitants."—People ex rel. Nicholson v. Board of Trustees of Police Pension Fund of Village of Hinsdale, 281 Ill.App. 394, 402.

35. Fla.—City of Pensacola v. Lawrence, 171 So. 793, 126 Fla. 830.

36. Fla.—Davis v. Brewer, 186 So. 207, 135 Fla. 752.

37. Ill.—People v. Kankakee School Dist. Bd. of Education, 107 N.E 131, 265 Ill. 618.

38. Ill.—Coal Creek Drainage & Levee Dist. v. Sanitary Dist. of Chicago, 167 N.E. 807, 336 Ill. 11, reversing 254 Ill.App. 289.

39. Wash.—State v. Board of Com'rs of King County, 263 P. 735, 146 Wash. 449.

40. Wash.—State v. Brooks, 109 P. 211, 58 Wash. 648.
23 C.J. p 162 note 98.

41. Mo.—State v. Wooten, 122 S.W. 1101, 139 Mo.App. 221.

42. Mo.—State v. Marshall, 167 S. W. 1050, 183 Mo.App. 593.

43. N.C.—Angelo v. City of Winston-Salem, 136 S.E. 489, 193 N.C. 207, 52 A.L.R. 662, affirmed 47 S. Ct. 763, 274 U.S. 725, 71 L.Ed. 1329.
23 C.J. p 163 note 3.

44. N.Y.—Union College v. New York, 73 N.Y.S. 51, 65 App.Div. 553, affirming 65 N.E. 853, 173 N.Y. 38, 93 Am.S.R. 569.

45. Colo.—In re Senate Bill No. 293, 39 P. 522, 21 Colo. 38.
Wash.—Times Printing Co. v. Star Pub. Co., 99 P. 1040, 51 Wash. 667, 670, 16 Ann.Cas. 414.
23 C.J. p 163 note 6.

46. N.Y.—Adams v. Elwood, 68 N. E. 126, 176 N.Y. 106, affirming 70 N.Y.S. 1134, 61 App.Div. 622, 76 N. Y.S. 1008, 72 App.Div. 632.
23 C.J. p 163 note 7.

47. Neb.—Kokes v. State, 76 N.W. 467, 55 Neb. 691.
23 C.J. p 163 note 10.

48. Wash.—Gottstein v. Lister, 153 P. 595, 88 Wash. 462.
23 C.J. p 163 note 11.

49. Ala.—Alabama Great Southern Ry. Co. v. Norrell, 143 So. 904, 225

healthy persons[50] in employments not extrahazardous.[51] While there is some variance in the different tables, yet the courts know that an equal or even greater difference in expectation of life may arise from other causes.[52] A person's probable earnings during his period of life expectancy cannot be judicially known.[53]

Annuity tables. Judicial notice may be taken of annuity tables.[54]

§ 100. Time, Days, and Dates

Judicial notice may be taken of facts disclosed by the almanac and calendar relating to time, days, and dates.

Courts will judicially notice the things properly belonging to an almanac.[55] The courts take judicial notice of the calendar[56] and of the periods within the calendar.[57] They take judicial notice of the computation of time,[58] the subdivision of the year into months, weeks, and days,[59] the days of the week,[60] the order of succeeding days of the week,[61] the number of days in a month,[62] the coincidence of days of the week with days of the month,[63] and of the days of the month with those of the year.[64] Likewise, courts judicially notice

Ala. 503—Alabama Great Southern R. Co. v. Cornett, 106 So. 242, 214 Ala. 23.
Cal.—Henricks v. Metropolitan Life Ins. Co, 53 P.2d 991, 994, citing **Corpus Juris.**
Conn.—Sims v. Smith, 161 A. 239, 115 Conn. 279.
Fla.—Holstun v. Embry, 169 So. 400, 124 Fla. 554.
Kan.—Whetstine v. Atchison, T. & S. F. Ry. Co., 7 P.2d 501, 134 Kan. 500—Stroup v. Northeast Oklahoma R. Co., 254 P. 396, 123 Kan. 206, denying rehearing 253 P. 242, 102 Kan. 587.
Miss.—Tucker v. Gurley, 176 So. 279, 179 Miss. 412, citing **Corpus Juris.**
Mo.—Selle v. Selle, 88 S.W.2d 877, 337 Mo. 1234—Hohlstein v. St. Louis Roofing Co., 42 S.W.2d 573, 328 Mo. 899, transferred, see App., 49 S.W.2d 226—Langan v. U. S. Life Ins. Co., App., 121 S.W.2d 268, transferred, see 114 S.W.2d 984, transferred, see 130 S.W.2d 479, 344 Mo. 989, 123 A.L.R. 1409—Cole v. Long, 227 S.W. 903, 207 Mo.App. 528.
N.Y.—McKenna v. McGoldrick, 27 N.Y.S.2d 58, 262 App.Div. 702.
Or.—Babcock v. Gray, 107 P.2d 846.
Tex.—Southland-Greyhound Lines v. Cotten, Civ.App., 55 S.W.2d 1066, reversed on other grounds 91 S.W.2d 326, 126 Tex. 596.
Wash.—Piland v. Yakima Motor Coach Co., 298 P. 419, 162 Wash. 456—Roalsen v. Oregon Stevedoring Co., 267 P. 433, 147 Wash. 672—Heath v. Stephens, 258 P. 321, 144 Wash. 440.
23 C.J. p 163 note 13.
Admissibility of mortality tables generally see infra § 719.
Weight and effect of mortality tables generally see infra § 770.

Causes of mortality

It is common knowledge that insurance rates are based on an average expectancy of life, derived from experience tables which embrace death by legal execution as well as all other causes of mortality.—Sandel v. Philadelphia Life Ins. Co., 122 S.E. 591, 128 S.C. 239—Weeks v. New York Life Ins. Co., 122 S.E. 586, 128 S.C. 223.

Children

Supreme court judicially knows that children fifteen and sixteen years of age will more likely reach majority than predecease their mother's sister and her heirs.—In re Eaton's Estate, 16 P.2d 433, 170 Wash. 280.

Particular tables

(1) The court may take judicial notice of mortality tables in common use.—Ewens v. Newman, 21 P.2d 1007, 131 Cal.App. 602—Gallentine v. Fierro, 294 P. 59, 110 Cal.App. 345—23 C.J. p 163 note 13 [b] (1).

(2) American Experience Tables.
Ind.—Ziffrin v. Bolitho, App., 25 N.E.2d 675.
W.Va.—Drake v. Clay Hardware & Supply Co., 157 S.E. 35, 36, 110 W.Va. 63, citing **Corpus Juris.**
23 C.J. p 163 note 13 [b] (4).

(3) American Table of Mortality.
Mont.—McNair v. Berger, 15 P.2d 834, 92 Mont. 441.
N.M.—Rheinboldt v. Fuston, 278 P. 361, 34 N.M. 146.
23 C.J. p 163 note 13 [b] (3).

(4) Carlisle Tables of Mortality.
Ind.—Ziffrin v. Bolitho, App., 25 N.E.2d 675—Standard Oil Co. of Indiana v. Thomas, 13 N.E.2d 336, 105 Ind.App. 610.
N.D.—Schultz v. Winston & Newell Co., 283 N.W. 69, 68 N.D. 674.
23 C.J. p 163 note 13 [b] (5).

50. Ky.—Chicago Veneer Co. v. Jones, 135 S.W. 430, 143 Ky. 21.
Mich.—Denman v. Johnston, 48 N.W. 565, 85 Mich. 387.

51. Ky.—Chicago Veneer Co. v. Jones, 135 S.W. 430, 143 Ky. 21.

52. Wash.—Suell v. Jones, 96 P. 4, 49 Wash. 582, 585.
23 C.J. p 164 notes 18, 19.

53. Tex.—White v. Southern Kansas R. Co., Civ.App., 146 S.W. 692.

54. Conn.—Strakosch v. Connecticut Trust & Safe Deposit Co., 114 A. 660, 96 Conn. 471.
N.Y.—Pettinelli v. Degnon Contracting Co., 217 N.Y.S. 679, 218 App.Div. 7.

55. Del.—State v. Chandler, 2 Del. 553.
23 C.J. p 164 notes 22–25.
Historical matters see supra §§ 58–63.
Human reaction time see supra § 79.
Time for transmission or delivery of mail see supra § 52.
Time of travel or transportation between places see supra § 33.

56. Mo.—Queen City Inv. Co. v. Kreider, 31 S.W.2d 1002.
Wash.—Kelliher v. Investment & Securities Co., 30 P.2d 985, 177 Wash. 82, appeal dismissed 55 S.Ct. 105, 293 U.S. 519, 79 L.Ed. 633.
23 C.J. p 164 note 26.

57. Nev.—State v. Williams, 102 P. 974, 31 Nev. 360.

58. Ind.—State Board of Tax Com'rs v. McDaniel, 160 N.E. 347, 199 Ind. 708—Farmers' Bank & Trust Co. of Knox v. Starke County Trust & Savings Bank, 184 N.E. 411, 96 Ind.App. 1.
23 C.J. p 164 note 28.

59. Tex.—McAllister v. State, 116 S.W. 582, 55 Tex.Cr. 264.

60. Mo.—Spring v. Giefing, 289 S.W. 825, 315 Mo. 525.
23 C.J. p 164 note 30.

61. Mo.—Christy v. Wabash R. Co., 191 S.W. 241, 195 Mo.App. 232.

Sunday

It is common knowledge that first day of week is called Sunday.—Cincinnati Traction Co. v. Krauss, 161 N.E. 563, 28 Ohio App. 205.

62. Ga.—Charleston, etc., R. Co. v. Cottonseed Oil Co., 96 S.E. 586, 22 Ga.App. 337.

63. U.S.—Wright v. Farmers Nat. Grain Corporation, C.C.A.Ill., 83 F.2d 666.
Ark.—Great Southern Fraternal Union v. Gunthrop, 277 S.W. 882, 169 Ark. 1211.
Me.—Bean v. Ingraham, 147 A. 191, 128 Me. 238.
23 C.J. p 164 note 33.

64. Conn.—Schmidt v. Manchester, 103 A. 654, 92 Conn. 551.

the day of the week on which any particular date has fallen,[65] although it has been held that this rule will not be extended so as to cover an unreasonable time in the past.[66] The subdivision of the day into hours and their order of succession are also judicially noticed.[67] The time when the moon[68] or the sun[69] rises or sets on a particular day is judicially known, as well as the time of the several changes of the moon,[70] and the speed at which the sun sinks below the horizon, the duration of twilight,[71] and the presence[72] or absence[73] of daylight, the natural conditions of visibility,[74] the direction in which the sun casts a shadow,[75] and the height of the moon[76] at a given time of a particular day.

Legal days. Courts are bound to take judicial cognizance of what are and what are not legal days.[77]

"Standard" time. The facts that very soon after the act of congress adopting a standard time went into effect the standard of time established by and under it was adopted and came into general use by the people throughout the United States,[78] and that

65. U.S.—Virginia Bridge & Iron Co. v. Camp, C.C.A.Fla., 11 F.2d 589, reversing, D.C., 298 F. 510.
Ala.—Hanover Fire Ins. Co. v. Street, 176 So. 350, 234 Ala. 537—Herren v. Beck, 164 So. 904, 231 Ala. 328—Ex parte Campbell, 157 So. 675, 229 Ala. 422—J. R. Watkins Co. v. Pace, 101 So. 758, 212 Ala. 63—Pelham v. Virginia-Carolina Chemical Corporation, 121 So. 448, 23 Ala.App. 93—C. D. Chapman & Co. v. Cullifer, 120 So. 297, 23 Ala. App. 31.
Alaska.—McPhail v. Latouche Packing Co., 8 Alaska 297.
Cal.—Hiner v. Olson, 73 P.2d 945, 23 Cal.App.2d 227, denying rehearing 72 P.2d 890, 23 Cal.App.2d 227.
Ga.—Farm Products Co. v. Eubanks, 116 S.E. 327, 29 Ga.App. 604.
Ill.—Lange v. Massachusetts Mut. Life Ins. Co., 273 Ill.App. 356.
Ind.—Smith Tp., of Whitley County v. Miller, 179 N.E. 22, 93 Ind.App. 578.
Ky.—Whitmer v. Cardwell, 238 S.W. 1048, 194 Ky. 351.
Mass.—Merchants' Discount Co. v. Simon, 193 N.E. 561, 289 Mass. 62.
Mich.—Dabits v. Hauser, 177 N.W. 951, 210 Mich. 414.
Mo.—Clark v. Powell's Estate, 208 S.W. 31.
N.J.—Janowski v. Przebieglec, 114 A. 419, 92 N.J.Eq. 453.
N.Y.—Russell v. Kniffin, 194 N.Y.S. 792, 118 Misc. 808—In re Seymour, 185 N.Y.S. 373, 113 Misc. 421.
Pa.—Ankeny v. Lohr, 99 Pa.Super. 203.
Tenn.—Parrish v. Williams, 83 S.W. 2d 895, 169 Tenn. 186.
Utah.—Thompson v. Industrial Commission of Utah, 273 P. 311, 73 Utah 212—Independent Gas & Oil Co. v. Beneficial Oil Co., 266 P. 267, 71 Utah 348—Nelson v. Jorgenson, 242 P. 945, 66 Utah 360.
W.Va.—Kasmas v. Bini, 163 S.E. 442, 443, 111 W.Va. 687, citing **Corpus Juris.**
23 C.J. p 164 note 35.

Two dates
Court judicially knows that June 4 and June 25, 1924, were Wednesdays, and that three Sundays intervened.—Hoffman v. Bigham, 24 S.W. 2d 125, 324 Mo. 516.

66. "It is easy for the court to consult the calendar when a date is involved touching upon what may be classed as current matters to determine the day of a given date, but in this case it has been almost nine years since the note sued on became due. It would entail an unreasonable hardship upon the court to have to determine if May 6, 1923, fell on Sunday"—Agurs v. Putter, 140 So. 833, 834, 19 La.App. 550, reversing 137 So. 640, 19 La.App. 550.
67. Ind.—Hedderich v. State, 1 N.E. 47, 101 Ind. 564, 51 Am.R. 768.
N.Y.—Safford v. Douglas, 4 Edw. 537.
68. Cal.—Beyerle v. Clift, 209 P. 1015, 59 Cal.App. 7.
Mo.—Dodge v. City of Kirkwood, App., 260 S.W. 1012.
Pa.—Kovalchik v. Demo, 94 Pa.Super. 167.
23 C.J. p 165 note 39.
69. U.S.—Delaware, L. & W. R. Co. v. Koske, 49 S.Ct. 202, 279 U.S. 7, 73 L.Ed. 578, reversing Koske v. Delaware, L. & W. R. Co., 142 A. 43, 104 N.J.Law 627, certiorari granted Delaware, L. & W. R. Co. v. Koske, 49 S.Ct. 13, 278 U.S. 586, 73 L.Ed. 521.
Cal.—Fouch v. Werner, 279 P. 183, 99 Cal.App. 557.
Del.—Le Gates v. Ennis, 180 A. 325, 7 W.W.Harr. 31, citing **Corpus Juris.**
Kan.—Calvin v. Schaff, 213 P. 814, 113 Kan. 103.
La.—Wittenberg v. Trautman, 3 La. App. 787.
Minn.—Cohen v. Silverman, 190 N. W. 795, 153 Minn. 391.
Mo.—McGowan v. Wells, 24 S.W.2d 633, 324 Mo. 652—Sterr v. Wells, App., 273 S.W. 1092—Dodge v. City of Kirkwood, App., 260 S.W. 1012.
N.Y.—Brown v. McCullough, 270 N.Y. S. 37, 240 App.Div. 381, appeal denied 191 N.E. 618, 264 N.Y. 669, and affirmed 193 N.E. 429, 265 N.Y. 652—Auerbach v. Stein, 293 N.Y.S. 545, 162 Misc. 102.
Pa.—Kovalchik v. Demo, 94 Pa.Super. 167.
S.D.—Hill v. Bradshaw, 231 N.W. 540, 57 S.D. 178.
23 C.J. p 165 note 40.
70. Ill.—Fuller v. Peoria, etc., R. Co., 164 Ill.App. 384.
71. Utah.—Preece v. Oregon Short Line R. Co., 161 P. 40, 48 Utah 551.
72. La.—Gaubert v. Ed. E. Hebert Co., App., 174 So. 716.
23 C.J. p 165 note 44.
73. U.S.—Cudahy Packing Co. v. Luyben, C.C.A.Neb., 9 F.2d 32.
Ala.—Birmingham Electric Co. v. Hereford, 149 So. 862, 25 Ala.App. 465, certiorari denied 149 So. 863, 227 Ala. 321.
Mass.—Lyons v. Todina, 29 N.E.2d 6, 306 Mass. 592.
S.D.—Staib v. Tarbell, 273 N.W. 652, 65 S.D. 304—Hill v. Bradshaw, 231 N.W. 540, 57 S.D. 178.
23 C.J. p 165 note 45.
74. Mo.—Dodge v. City of Kirkwood, App., 260 S.W. 1012.
Or.—Fuller v. Oregon-Washington R. & Nav. Co., 181 P. 338, 93 Or. 160, rehearing denied 181 P. 991, 93 Or. 160, certiorari denied Oregon-Washington R. & Nav. Co. v. Fuller, 40 S.Ct. 56, 251 U.S. 551, 64 L. Ed. 410.
23 C.J. p 165 note 46.
75. Tex.—Chicago, R. I. & G. Ry. Co. v. Wisdom, Civ.App., 216 S.W. 241, reversed on other grounds Wisdom v. Chicago, R. I. & G. R. Co., Com.App., 231 S.W. 344.
76. Cal.—Beyerle v. Clift, 209 P. 1015, 59 Cal.App. 7.
77. Mo.—Schlingmann v. Fiedler, 3 Mo.App. 577.
Holidays may be judicially noticed.
U.S.—Manley v. Northumberland County, D.C.Pa., 32 F.Supp. 775.
Mo.—Shannon County ex rel. Winona Consol. School Dist. v. Shannon County Bank, 86 S.W.2d 1070, 229 Mo.App. 895.
78. Tex.—McFarlane v. Whitney, 134 S.W.2d 1047, 134 Tex. 394, reversing, Civ.App., 106 S.W.2d 406.
23 C.J. p 165 note 53.
Some codes of civil procedure enumerate "the measure of time" as one of the facts of which courts take judicial notice.—Fruitvale Bank v. Fi-

such fixed single standard was found to be not only beneficial but necessary in the operation of railroads and other means of transportation and in conducting business, government and private, and social affairs,[79] are so generally known that the courts may and should take judicial knowledge of them. The difference between actual or sun time and standard or railroad time is a matter of common knowledge of which the courts take judicial notice.[80] It has been held that a court will not take judicial notice of what system of time prevails and is in general use in a particular city or community outside of the jurisdiction in which it is sitting.[81]

§ 101. Values

Although judicial notice will be taken of matters of common knowledge relating to the values of property, courts do not assume to know the exact value of specific property.

Courts do not usually assume to know the value of particular articles or other pieces of property.[82] Facts of common knowledge, however, relating to values generally may be judicially noticed.[83] Thus

delity, etc., Co., 170 P. 852, 35 Cal. App. 666.

79. Tex.—McFarlane v. Whitney, 134 S.W.2d 1047, 134 Tex. 394, reversing, Civ.App., 106 S.W.2d 406.

80. Kan.—State v. Murray, 110 P. 103, 83 Kan. 148.
Tex.—Walker v. Terrell, Civ.App., 189 S.W. 75.
23 C.J. p 165 note 52.

81. U.S.—New York Globe & Rutgers F. Ins. Co. v. David Moffat Co., N.Y., 154 F. 13, 83 C.C.A. 91.
23 C.J. p 165 note 54.

82. U.S.—Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 57 S.Ct. 724, 301 U.S. 292, 81 L.Ed. 1093, reversing 3 N.E.2d 475, 131 Ohio St. 539—U. S. v. Bird, 11 Ct.Cust.App. 229.
Ala.—Isom v. Johnson, 87 So. 543, 205 Ala. 157.
Ind.—Illinois Pipe Line Co. v. Coffman, 188 N.E. 217, 98 Ind.App. 419.
Minn.—Sleeper v. Zeiter, 227 N.W. 662, 178 Minn. 622.
Nev.—Curti v. Franceschi, 111 P.2d 53.
Tex.—City of Dallas v. Johnson, Civ. App., 54 S.W.2d 1024.
Utah.—Van Wagoner v. Whitmore, 199 P. 670, 58 Utah 418.
23 C.J. p 166 note 65.

Comparative values

The supreme court cannot take judicial notice of the comparative values of gypsum and gypsite.—Certain-Teed Products Corporation v. Comly, 87 P.2d 21, 54 Wyo. 79.

Life insurance policy

The rule that courts will take judicial notice of ordinary mathematical propositions as well as of scientific facts which universal experience has rendered axiomatic is not applicable to the ascertainment of the present net value of a life insurance policy depending partly on extraneous facts and partly on the accuracy of an intricate calculation.—Heuring v. Central States Life Ins. Co. of St. Louis, 120 S.W.2d 176, 232 Mo.App. 731—23 C.J. p 166 note 68.

83. U.S.—Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 57 S.Ct. 724, 301 U.S. 292, 81 L.Ed. 1093, reversing 3 N.E.2d 475, 131 Ohio St. 539—Great Northern Ry. Co. v. Weeks, N.D., 56 S.Ct. 426, 297 U.S. 135, 80 L.Ed. 532, reversing, C.C.A., 77 F.2d 405, certiorari granted 56 S.Ct. 108, 296 U.S. 558, 80 L.Ed. 393—In re Llewellin, C.C.A.Ill., 86 F.2d 588—Laird v. Commissioner of Internal Revenue, C.C.A., 85 F.2d 598—In re Hagerstown Silk Co., C.C.A.Md., 69 F.2d 790, certiorari denied Wingert v. Smead, 55 S.Ct. 70 (two cases), 293 U.S. 558, 79 L.Ed. 659—Industrial Lumber Co. v. Commissioner of Internal Revenue, C.C.A., 58 F.2d 123—U. S. v. Corona Coal Co., C.C.A.Ala., 23 F.2d 673, affirming, D.C., Corona Coal Co. v. U. S., 21 F.2d 489—Mandelbaum v. Goodyear Tire & Rubber Co., C.C.A. Iowa, 6 F.2d 818—In re Dover Boiler Works, D.C.N.J., 38 F.Supp. 701—East Bay Water Co. v. McLaughlin, D.C.Cal., 24 F.Supp. 222, appeal dismissed, C.C.A., McLaughlin v. East Bay Water Co., 104 F.2d 1016—Irving Trust Co. v. Manufacturers' Trust Co., D.C.N.Y., 6 F.Supp. 185—Jackson v. Sunlit Fruit Co., C.C.A.Cal., 283 F. 767—U. S. v. American Linseed Co., D.C.Ill., 275 F. 939, reversed on other grounds U. S. v. American Linseed Oil Co., 43 S.Ct. 607, 262 U.S. 371, 67 L.Ed. 1035.
Ala.—First Nat. Bank v. Basham, 191 So. 873, 238 Ala. 500, 125 A.L.R. 656—Coral Gables v. Patterson, 166 So. 40, 231 Ala. 649.
Cal.—Atlas Development Co. v. National Surety Co., 212 P. 196, 190 Cal. 329—In re Dargle's Estate, 91 P.2d 126, 33 Cal.App.2d 148—Antognini v. Grandi Co., 265 P. 378, 89 Cal.App. 628.
Del.—Bodell v. General Gas & Electric Corporation, 132 A. 442, 15 Del.Ch. 119, affirmed 140 A. 264, 15 Del.Ch. 420.
Fla.—State v. Sarasota County, 159 So. 797, 118 Fla. 629—E. O Painter Fertilizer Co. v. Foss, 145 So. 253, 107 Fla. 464.
Ill.—Neeson v. Sangamon County Mining Co., 147 N.E. 369, 316 Ill. 397—Kinney v. Lindgren, 15 N.E.2d. 618, 296 Ill.App. 635.
Iowa.—Nelson v. Sioux City, 226 N. W. 41, 208 Iowa 709.
Me.—Dubovy v. Woolf, 143 A. 58, 127 Me. 269.
Mich.—Cate v. Michigan Coffee Co., 201 N.W. 477, 229 Mich. 357.
Miss.—Nash Mississippi Valley Motor Co. v. Childress, 125 So. 708, 156 Miss. 157.
Mo.—Marr v. Marr, 117 S.W.2d 230, 342 Mo. 656—Brunk v. Hamilton-Brown Shoe Co., 66 S.W.2d 903, 910, 334 Mo. 517, citing Corpus Juris—Hanks v. Hines, App., 219 S.W. 978.
N.H.—Rosenblum v. Griffin, 197 A. 701, 89 N.H. 314, 115 A.L.R. 1367.
N.J.—Center Garage Co. v. Columbia Ins. Co., 115 A. 401, 96 N.J.Law 456—Ballinger v. Bartolett, 127 A. 671, 3 N.J.Misc. 80.
N.Y.—Autocar Sales & Service Co. v. Hansen, 283 N.Y.S. 669, 245 App. Div. 474, modified on other grounds 1 N.E.2d 830, 270 N.Y. 414—New York Yellow Cab Co. Sales Agency v. Courtlandt Garage & Realty Corporation, 227 N.Y.S. 315, 223 App. Div. 44—Crandall v. A. B. Leach & Co., 223 N.Y.S. 127, 221 App.Div. 263—A. C. & H. M. Hall Realty Co. v. Moos, 192 N.Y.S. 530, 200 App.Div. 66, affirming 188 N.Y.S. 858, 115 Misc. 506—Universal Credit Co. v. Lowell, 2 N.Y.S.2d 743, 166 Misc. 15—People ex rel. New York Cent. R. Co. v. Thompson, 282 N.Y.S. 269, 156 Misc. 536—In re Sonn's Estate, 271 N.Y.S. 350, 151 Misc. 487—Application of People by Van Schaick, 266 N.Y.S. 603, 149 Misc. 18—In re Lewis, 254 N. Y.S. 703, 142 Misc. 392—In re Aubke's Estate, 235 N.Y.S. 304, 134 Misc. 310—Saglineni v. Merrimack Mut. Fire Ins. Co., 228 N.Y. S. 537, 132 Misc. 122.
Ohio.—East Ohio Gas Co. v. Public Utilities Commission of Ohio, 12 N.E.2d 765, 133 Ohio St. 212.
Or.—Fisher v. City of Astoria, 269 P. 853, 126 Or. 268, 60 A.L.R. 260—Lynch v. Sable-Oberteuffer-Peterson, 260 P. 222, 122 Or. 597, 55 A.L.R. 180.

the courts take judicial notice of matters of common knowledge concerning the effect of modes of sale or other matters on values,[84] matters considered in estimating values,[85] that the valuation of certain articles is ascertainable only by inquiry,[86] and that a valuation of many articles is to a large extent a matter of opinion.[87] The court may judicially know that certain things have a value[88] or market value,[89] that certain things do not have a market value, or a market value at a particular time,[90] and that certain things are without value.[91] Likewise, judicial notice may be taken of general fluctuations in prices,[92] that certain things have a

Pa.—Baldwin v. Devereux Schools, 154 A. 21, 302 Pa. 569.
R.I.—Butler v. Rhode Island Mut. Liability Ins. Co., 171 A. 328, 54 R.I. 204.
S.C.—Howle v. Mountain Ice Co., 165 S.E. 724, 167 S.C. 41.
Tenn.—Shipley v. American Central Ins. Co., 109 S.W.2d 100, 21 Tenn App. 259—Securities Inv. Co. v. White, 91 S.W.2d 581, 19 Tenn.App. 540.
Tex.—International-Great Northern R. Co. v. Oehler, Civ.App., 262 S. W. 785—Montgomery v. Gallas, Civ.App., 225 S W. 557.
Va.—McClintock v. Royall, 4 S.E.2d 369, 173 Va. 408—Alexandria Water Co. v. City Council of Alexandria, 177 S.E. 454, 163 Va. 512.
Wis.—Ketterer v. Bay View Nash Co., 212 N.W. 670, 192 Wis. 343.
23 C.J. p 167 notes 86–88.

Ferry site
Everyone knows that free bridge near ferry site will destroy value of ferry site.—Desha v. Independence County Bridge Dist. No. 1, 3 S.W.2d 969, 176 Ark. 253.

Judging of values
It is common knowledge that man of ordinary intelligence cannot judge value of secondhand car by its outward appearance.—Springfield Fire & Marine Ins. Co. v. Nix, 138 So. 598, 162 Miss. 669.

84. Or.—White v. Oregon Realty Exch. Inv. Co., 236 P. 269, 114 Or. 636.
23 C.J. p 166 note 69.

Forced sale
It is well-known that often under a forced sale the real value of property cannot be obtained.
U.S.—In re Kentucky Book Mfg. Co., D.C.Ky., 30 F.Supp. 400.
Cal.—Bradley v. Butchart, 20 P.2d 693, 217 Cal. 731.
Ill.—Straus v. Chicago Title & Trust Co., 273 Ill.App. 63.
Ky.—Levassor v. Central Sav. Bank & Trust Co. of Covington, 60 S.W. 2d 597, 249 Ky. 206.
Tenn.—Treadwell Realty Co. v. City of Memphis, 116 S.W.2d 997, 173 Tenn. 168.
Wis.—Newlander v. Riverview Realty Co., 298 N.W. 603, 238 Wis. 211.
23 C.J. p 166 note 69 [a] (4).

85. U.S.—Foss v. Commissioner of Internal Revenue, C.C.A., 75 F.2d 326—Johnson v. U. S., Ct.Cl., 44 F. 2d 244.
Fla.—McCreary v. Cohen, 149 So. 208, 108 Fla. 421, followed in Bryan v. Cohen, 149 So. 210, 108 Fla. 224, 420, reversed on other grounds 149 So. 211, 108 Fla. 421, 89 A.L.R. 1001.
N.Y.—Peabody v. Interborough Rapid Transit Co., 209 N.Y.S. 376, 124 Misc. 801, affirmed 209 N.Y.S. 893—Windsor Residences v. 201 East 18th St. Corporation, 25 N.Y.S.2d 329.
Va.—Manufacturers Trust Co. v. Roanoke Water Works Co., 1 S.E.2d 318, 172 Va. 242.
23 C.J. p 167 note 70.

By different persons
It is common knowledge that different persons, equally well qualified, use different methods in fixing value on property.—City of Norfolk v. Snyder, 170 S.E. 721, 161 Va. 288.

86. Vt.—Bean v. Colton, 130 A. 580, 99 Vt. 45.

87. Tex.—Royal Ins. Co. v. Humphrey, Civ.App., 201 S.W. 426.
23 C.J. p 167 note 71.

88. Colo.—Model Land & Irrigation Co. v. Hoehne Ditch Co., 202 P. 712, 70 Colo. 484.
Fla.—Brooksville Abstract Co. v. Kirk, 133 So. 629, 101 Fla. 175.
Nev.—Curti v. Franceschi, 111 P.2d 53.
N.Y.—Morrison v. Phillips, 263 N.Y. S. 816, 147 Misc. 238.

Beautiful scenery
Court judicially notices that beautiful scenery has economic value to commonwealth.—General Outdoor Advertising Co. v. Department of Public Works, 193 N.E. 799, 289 Mass. 149, appeal dismissed General Outdoor Advertising Co. v. Callahan, 56 S.Ct. 495, 297 U.S. 725, 80 L.Ed. 1008, General Outdoor Advertising Co. v. Hoar, 56 S.Ct. 495, 297 U.S. 725, 80 L.Ed. 1008, and Brink v. Callahan, 56 S.Ct. 496, 297 U.S. 725, 80 L.Ed. 1008.

Dogs
It is well recognized that considerable sums of money are invested in dogs.—Duff v. Louisville & N. R. Co., 292 S.W. 814, 219 Ky. 238.

For certain purposes
It is a matter of common knowledge among farmers and breeders that a jack has no value except for breeding purposes.—Neal v. Crowson, Mo.App., 231 S.W. 1033.

89. Cal.—Stark v. Shemada, 204 P. 214, 187 Cal. 785.
23 C J. p 167 note 72.

Fictitious market
It is common knowledge that fictitious market is sometimes created for shares of stock.—Twachtman v. Connelly, C.C.A.Ohio, 106 F.2d 501.

Stock subscription rights
It is common knowledge that rights to subscribe for new stock frequently have substantial market value.—Allen v. Commissioner of Corporations and Taxation, 172 N.E. 643, 272 Mass. 502, 70 A.L.R. 1299.

90. U.S.—Wyoming Nat. Bank of Wilkes Barre v. Curl & Bennett, D.C.Pa., 20 F.Supp. 117.
N.Y.—Muskegon S. S Corporation v. Fisk, 193 N.Y.S 463, 200 App.Div. 621.
Tex.—Wright Titus, Inc., v. Swafford, Civ.App., 133 S.W.2d 287, error dismissed, judgment correct—American General Ins. Co. v. Bell, Civ.App., 116 S.W.2d 877.
Wis.—Krueger v. Topp-Stewart Tractor Co., 185 N.W. 249, 175 Wis. 264.

Absence of ready market
N.Y.—In re Sawin's Estate, 19 N.Y. S.2d 465, 173 Misc. 428.

Arms and military equipment are valuable only as military equipment and have no general market value under ordinary conditions.—State v. Stoddard, 69 So. 980, 13 Ala.App. 560.

Golf course
It is a matter of common knowledge that there is no sale for a golf course in or adjacent to a city of the size of Oshkosh.—State v. Petrick, 178 N.W. 251, 172 Wis. 82.

Family enterprises
It is matter of common knowledge that holdings in family enterprise carried on as common-law trust are of uncertain market value.—Herpolsheimer v. Michigan Trust Co., 246 N.W. 81, 261 Mich. 209, affirmed 248 N.W. 610.

Large manufacturing plants are not subject to frequent transfers establishing a market value.—State v. Norsman, 169 N.W. 429, 168 Wis. 442.

91. Kan.—Oliver Farm Equipment Co. v. Rich, 4 P.2d 465, 134 Kan. 23.

92. U.S.—Indianapolis Water Co. v. McCart, C.C.A.Ind., 89 F.2d 522, reversing, D.C., 13 F.Supp. 110, cer-

fluctuating value,[93] of general changes in values,[94] or that there has been no substantial change in prices generally,[95] since a certain date.

Real estate. Although the court will not take judicial notice of the value of particular tracts of real property,[96] courts will take judicial notice of matters of common knowledge relating to the value of real property generally,[97] such as conditions af-

tiorari granted McCart v. Indianapolis Water Co., 58 S.Ct. 14, 302 U.S. 665, 82 L.Ed. 513, modified on other grounds 58 S.Ct. 324, 302 U.S. 419, 82 L.Ed. 336—Illinois Bell Telephone Co. v. Gilbert, D.C.Ill., 3 F.Supp. 595, conforming to Smith v. Illinois Bell Telephone Co., 51 S.Ct. 65, 282 U.S. 133, 75 L.Ed. 255, setting aside, D.C., Illinois Bell Telephone Co. v. Moynihan, 38 F.2d 77, reversed on other grounds and cross appeal dismissed Lindheimer v. Illinois Bell Telephone Co., 54 S.Ct. 658, 292 U.S. 151, 78 L.Ed. 1182.

Conn.—Shepard v. Union & New Haven Trust Co., 138 A. 809, 106 Conn. 627.

La.—Van Baast v. Thibaut Feed Mills, App., 151 So. 226—Stromer v. Dupont, App., 150 So. 32.

Utah.—Afton Live Stock Co. v. Peterson, 220 P. 710, 62 Utah 437.

Wis.—City of La Crosse v. Railroad Commission of Wisconsin, 178 N.W. 867, 172 Wis. 233.

93. U.S.—Gray v. Cornelius, D.C.Okl., 40 F.2d 67.

Ala.—H. M. Price Hardware Co. v. Meyer, 138 So. 543, 224 Ala. 35.

Cal.—Blake v. Bennett, 1 P.2d 513, 115 Cal.App. 207.

Ind.—Davis v. Hunter, 138 N.E. 785, 79 Ind.App. 462.

Ky.—McDonald v. Baker, 269 S.W. 338, 207 Ky. 293.

Mass.—Dana v. Wildey Sav. Bank, 2 N.E.2d 450, 294 Mass. 462.

N.Y.—Sinclair Refining Co. v. Unadilla Motor & Supply Co., 213 N.Y.S. 81, 126 Misc. 292.

Ohio.—City of New Philadelphia v. Hurst, 14 N.E.2d 1021, 57 Ohio App. 479.

Tex.—Texas Military Institute of San Antonio v. Sun Oil Co., Civ.App., 112 S.W.2d 329, error dismissed.

Utah.—In re Thompson's Estate, 269 P. 103, 72 Utah 17.

Va.—Virginia Public Service Co. v. Steindler, 187 S.E. 353, 166 Va. 686, 105 A.L.R. 1413.

23 C.J. p 167 notes 75–78.

Cause

It is common knowledge that happening of many unforeseen events causes fluctuation of securities' prices.—A. B. Collins & Co. v. Quentin, Mo.App., 71 S.W.2d 758.

94. U.S.—Central Kentucky Natural Gas Co. v. Railroad Commission of Kentucky, Ky., 54 S.Ct. 154, 290 U.S. 264, 78 L.Ed. 307, reversing, D.C., 60 F.2d 137, motion denied 54 S.Ct. 82—Banton v. Belt Line Ry. Corporation, N.Y., 45 S.Ct. 534, 268 U.S. 413, 69 L.Ed. 1020—U. S. Nat. Bank & Trust Co. of Kenosha, Wis., v. Sullivan, C.C.A.Wis., 69 F.2d 412.

Iowa.—In re Rorick's Estate, 253 N.W. 916, 218 Iowa 107.

Ky.—Harlin v. Calvert's Adm'x, 70 S.W.2d 524, 253 Ky. 752.

La.—Baer-Thayer Hardwood Co. v. Fornea, App., 146 So. 521.

Mass.—First Nat. Bank v. Truesdale Hospital, 192 N.E. 150, 288 Mass. 35.

Neb.—Emerson v. Citizens' State Bank of Thedford, 251 N.W. 285, 125 Neb. 632.

N.J.—Kean v. Union County Park Commission, 18 A.2d 279, 129 N.J.Eq. 67, reversed on other grounds 22 A.2d 256.

N.Y.—In re First Nat. Bank of City of New York, 25 N.Y.S.2d 221.

Tenn.—State ex rel. Wilson v. Meek, App., 146 S.W.2d 961.

Tex.—Texas Nat. Bank of Beaumont v. Edson, Civ.App., 149 S.W.2d 257, error refused.

Stocks of corporations

Changes in value of stocks of corporations have been judicially noticed.—Wallace v. Franz, C.C.A., 68 F.2d 313—Staples v. Pan-American Wall Paper & Paint Co., C.C.A.Pa., 63 F.2d 701—In re Wilson, C.C.A.Ill., 16 F.2d 177.

95. U.S.—McCardle v. Indianapolis Water Co., Ind., 47 S.Ct. 144, 272 U.S. 400, 71 L.Ed. 316.

96. Ala.—Moseley v. Neville, 129 So. 12, 221 Ala. 429.

Ky.—Louisville & N. R. Co. v. Burnam, 284 S.W. 391, 214 Ky. 736.

N.Y.—Berkshire Life Ins. Co. of Pittsfield, Mass., v. Van Voorhis, 283 N.Y.S. 95, 245 App.Div. 592.

23 C.J. p 166 note 65 [e].

Rental value

Court cannot take judicial notice of rental value of farm land.—Illinois Pipe Line Co. v. Coffman, Ind.App., 188 N.E. 217.

97. U.S.—Commissioner of Internal Revenue v. Shattuck, C.C.A., 97 F.2d 790—New York Life Ins. Co. v. King, C.C.A.Mo., 93 F.2d 347—Readinger v. Rorick, C.C.A.Ohio, 92 F.2d 140, certiorari denied 58 S.Ct. 364, 302 U.S. 758, 82 L.Ed. 586—St. Paul Trust & Savings Bank v. American Clearing Co., D.C.Fla., 291 F. 212, affirmed, C.C.A., Citizens' Savings Bank & Trust Co. of Hamilton, Ohio, v. St. Paul Trust & Savings Bank, 10 F.2d 1017.

Ala.—De Moville v. Merchants & Farmers Bank of Greene County, 170 So. 756, 233 Ala. 204.

Alaska.—Rickert v. Thompson, 8 Alaska 398.

D.C.—Willner v. Hazen, 111 F.2d 511, 71 App.D.C. 373.

Ill.—First Nat. Bank v. Bryn Mawr Beach Bldg. Corporation, 6 N.E.2d 654, 365 Ill. 409, 109 A.L.R. 1123, affirming 283 Ill.App. 267.

Iowa.—Metropolitan Life Ins. Co. of New York City v. Henderson, 278 N.W. 621, 224 Iowa 1238—Bates v. Maiers, 272 N.W. 444, 223 Iowa 183—First Trust Joint Stock Land Bank of Chicago v. Jelsma, 268 N.W. 76, 221 Iowa 1191.

Ky.—Burton v. Burton's Committee, 90 S.W.2d 687, 262 Ky. 499—Swift Coal & Timber Co. v. Board of Tax Sup'rs of Letcher County, 3 S.W.2d 1067, 223 Ky. 461—Terrell v. Cheatham, 255 S.W. 262, 200 Ky. 667—Long Fork Ry. Co. v. Sizemore, 211 S.W. 193, 184 Ky. 54.

La.—Fontenot v. Ludeau, 182 So. 125, 190 La. 133.

Mich.—Detroit Trust Co. v. Hockett, 270 N.W. 243, 278 Mich. 124—Schnitz v. Grand River Ave. Development Co., 259 N.W. 900, 271 Mich. 253—Farrell v. Hannan Real Estate Exchange, 232 N.W. 209, 251 Mich. 669.

Minn.—Shumaker v. Hoover, 288 N.W. 839, 206 Minn. 458.

Mo.—T. J. Moss Tie Co. v. Allen, App., 8 S.W.2d 1038.

N.Y.—In re School Site on West 187th St., Borough of Manhattan, City of New York, 226 N.Y.S. 536, 222 App.Div. 554, affirmed In re Lands North of West 187th St. in Borough of Manhattan, City of New York, 166 N.E. 335, 250 N.Y. 588—In re Quintana's Estate, 286 N.Y.S. 418, 158 Misc. 701.

Pa.—Appeal by Borough of Millbourne, 198 A. 49, 329 Pa. 321.

S.D.—Kreger v. City of Clear Lake, 195 N.W. 498, 46 S.D. 614.

Tex.—Humble Oil & Refining Co. v. State, Civ.App., 104 S.W.2d 174, error refused—Randals v. State, Civ.App., 15 S.W.2d 715—West v. Giesen, Civ.App., 242 S.W. 312.

Va.—Pruner v. State Highway Com'r, 4 S.E.2d 393, 173 Va. 307.

Wis.—Suring State Bank v. Giese, 246 N.W. 556, 210 Wis. 489, 85 A.L.R. 1477.

Timberlands

(1) It is common knowledge that timberlands are chiefly valuable for timber growing on them.—Winton Lumber Co. v. Shoshone County, 294 P. 529, 50 Idaho 130.

fecting such value,[98] and the general changes in the value of such property.[99] On different facts

(2) General falling of property values including timberland during 1930 is common knowledge.—Boston v. Shackelford, 175 S.E. 625, 162 Va. 733.

(3) Judicial notice has been taken that many years ago timberlands were of but little value.—Martin v. Jordan, 105 A. 104, 117 Me. 574.

Rental values

N.Y.—First Nat. Bank v. Dise, 292 N. Y.S. 210, 161 Misc. 488.

98. Cal.—Joerger v. Pacific Gas & Electric Co., 276 P. 1017, 207 Cal. 8.

Ill.—Illinois Light & Power Co. v. Bedard, 175 N.E. 851, 343 Ill. 618.

Ky.—City of Hazard v. Eversole, 35 S.W.2d 313, 237 Ky. 242—Commonwealth v. Combs, 17 S.W.2d 748, 229 Ky. 627.

La.—Dick v. Lovell, App., 2 So.2d 272.

Md.—Jack Lewis, Inc., v. Mayor and City Council of Baltimore, 164 A. 220, 164 Md. 146, appeal dismissed 54 S.Ct. 56, 290 U.S. 585, 78 L.Ed. 517.

N.Y.—Central Sav. Bank in City of New York v. City of New York, 18 N.E.2d 151, 279 N.Y. 266, reversing 5 N.Y.S.2d 451, 254 App.Div. 502, 121 A.L.R. 607, amended 19 N.E. 2d 659, 280 N.Y. 9, 121 A.L.R. 615, certiorari denied City of New York v. Central Sav. Bank in City of New York, 59 S.Ct. 790, 306 U.S. 661, 83 L.Ed. 1058—People v. S. W. Straus & Co., 282 N.Y.S. 972, 156 Misc. 642.

Tex.—Pitts v. Camp County, 39 S. W.2d 608, 120 Tex. 558, answers to certified questions conformed to, Civ.App., 42 S.W.2d 853—McKinley v. Salter, Civ.App., 136 S.W.2d 615, error dismissed, judgment correct. Appeal dismissed 61 S.Ct. 734.

Accessibility to market

It is common knowledge that one of most vital elements affecting value of farm is accessibility to market.—Welton v. Iowa State Highway Commission, 233 N.W. 876, 211 Iowa 625.

Business and residential

It is common knowledge that business property and residential property respectively have peculiar values, and that a combination has depreciating effect on values of either.—Bernstein v. Minney, 274 P. 614, 96 Cal.App. 597.

Lands requiring irrigation

(1) It is common knowledge that value of land requiring irrigation consists principally in water supply.—Ramirez v. Electrical Dist. No. 4, Pinal County, 294 P. 614, 37 Ariz. 360.

(2) That land in semiarid portion of state is of little or no value without irrigation is common knowledge.—State Land Board v. Davidson, 34 P.2d 608, 147 Or. 504.

99. U.S.—Rhodes v. Commissioner of Internal Revenue, C.C.A., 100 F.2d 966—Beedle v. Campbell, C.C. A.Mo., 100 F.2d 798, certiorari denied Campbell v. Beedle, 59 S.Ct. 835, 307 U.S. 631, 83 L.Ed. 1514—In re Hotel Martin Co. of Utica, C.C.A.N.Y., 83 F.2d 233—Brite v. W. J. Howey Co., C.C.A.Fla., 81 F. 2d 840—Burns Mortg. Co. v. Bond Realty Corporation, C.C.A.Fla., 47 F.2d 985—In re Wilson, C.C.A.Ill., 16 F.2d 177—In re Corn Kelly Corporation, D.C.N.Y., 32 F.Supp. 572, affirmed, C.C.A., City of New York v. Cornkelly Corporation, 111 F.2d 644—In re St. Paul Garage Co., D. C.Md., 22 F.Supp. 32—Edwards v. Rector, Church Wardens and Vestrymen of Trinity Church in City of New York, D.C.N.Y., 5 F.Supp. 335, affirmed, C.C.A., 77 F.2d 884, certiorari denied 56 S.Ct. 151, 296 U.S. 628, 80 L.Ed. 446—Morris Plan Bank of Richmond, Va. v. Henderson, D.C.N.C., 57 F.2d 326.

Ark.—Mitchell v. Powell, 109 S.W.2d 155, 194 Ark. 638—Deaner v. Gwaltney, 108 S.W.2d 600, 194 Ark. 332—Jefferson v. Souter, 233 S.W. 804, 150 Ark. 55.

Cal.—Alexander v. State Capital Co., 70 P.2d 619, 9 Cal.2d 304.

Fla.—Harbeson v. Mering, 2 So.2d 886—City of Coral Gables v. State, 176 So. 40, 128 Fla. 874—Smith v. Massachusetts Mut. Life Ins. Co., 156 So. 498, 116 Fla. 390, 95 A.L.R. 508—Reese v. Levin, 123 So. 809, 98 Fla. 397, followed in Hilliard v. Futch, 127 So. 341, 99 Fla. 654—R. E. L. McCaskill Co. v. Dekle, 102 So. 252, 88 Fla. 285.

Idaho.—Brummund v. Romig, 81 P.2d 1085, 59 Idaho 312.

Ill.—Klee v. Chicago Trust Co., 6 N. E.2d 442, 365 Ill. 354, reversing 1 N.E.2d 548, 284 Ill.App. 112—Crowder v. Scott State Bank of Bethany, 5 N.E.2d 387, 365 Ill. 88, 108 A.L.R. 990—Dillon v. Elmore, 198 N.E. 128, 361 Ill. 356, affirming 276 Ill.App. 548—Reynolds v. Peterson, 190 N.E. 288, 356 Ill. 223—Turner v. Schuh, 17 N.E.2d 517, 297 Ill.App. 317—Cutler v. Hicks, 268 Ill.App. 161.

Ind.—In re McCurdy's Guardianship, 29 N.E.2d 199.

Iowa.—Evans v. Evans, 297 N.W. 867—Hartz v. Truckenmiller, 293 N.W. 568—In re Jeffrey's Estate, 280 N. W. 536, 225 Iowa 316—Bankers Life Co. v. City of Emmetsburg, 278 N.W. 311, 224 Iowa 1287—First Trust Joint Stock Land Bank of Chicago v. Jelsma, 268 N.W. 76, 221 Iowa 1191—Farmers' Sav. Bank v. Ringgenberg, 253 N.W. 826, 218 Iowa 86—Larson v. Larson, 196 N.W. 41—Stephens v. Wood, 195 N.W. 239, 196 Iowa 1394—Herwehe v. Schultz, 184 N.W. 289, 191 Iowa 1280.

Ky.—Risner v. Risner, 87 S.W.2d 970, 261 Ky. 359.

Me.—Maine Unemployment Compensation Commission v. Maine Sav. Bank, 3 A.2d 897, 136 Me. 136.

Mich.—Myers v. C. W. Toles & Co., 283 N.W. 603, 287 Mich. 340—Hilliard v. Schram, 281 N.W. 405, 285 Mich. 68—MacNear v. Malow, 276 N.W. 433, 282 Mich. 239—Frey v. Farmers & Mechanics Bank of Ann Arbor, 262 N.W. 911, 273 Mich. 284.

Minn.—Sleeper v. Zeiter, 227 N.W. 662, 178 Minn. 622.

Miss.—Wilson Banking Co. Liquidating Corporation v. Colvard, 161 So. 123, 172 Miss. 804.

Mo.—Peterson v. Kansas City Life Ins. Co., 98 S.W.2d 770, 339 Mo. 700, 108 A.L.R. 583—Saline County v. Thorp, 88 S.W.2d 183, 337 Mo. 1140—Arnold v. Arnold, 222 S.W. 996.

Neb.—Emerson v. Citizens' State Bank of Thedford, 251 N.W. 285, 125 Neb. 632.

N.J.—Schefrin v. Wilensky, 111 A. 660, 92 N.J.Eq. 109, affirmed 114 A. 927, 92 N.J.Eq. 705.

N.Y.—First Citizens Bank & Trust Co. of Utica v. Sherman's Estate, 294 N.Y.S. 131, 250 App.Div. 339—People ex rel. 180 Varick Street Corporation v. Miller, 2 N.Y.S.2d 444, 166 Misc. 253—Corn Exchange Bank Trust Co. v. Ekenberg, 292 N.Y.S. 142, 161 Misc. 62—Grosvenor v. Holland, 288 N.Y.S. 105, 158 Misc. 925, reversed on other grounds 291 N.Y.S. 202, 249 App. Div. 672.

N.D.—McGuigan v. Heuer, 268 N.W. 679, 66 N.D. 710.

Or.—Teachers' Retirement Fund Ass'n of School Dist. No. 1, Multnomah County, v. Pirie, 46 P.2d 105, 150 Or. 435—In re Fehlmann's Estate, 292 P. 1029, 134 Or. 33, 72 A.L.R. 949—Marsh v. Arthur C. Marsh Co., 55 P.2d 1111, 153 Or. 134, 104 A.L.R. 981.

Pa.—In re Williamson's Estate, 153 A. 765, 302 Pa. 462.

S.D.—Schomer v. Scott, 274 N.W. 556, 65 S.D. 353.

Tenn.—Sommers v. Thompson, 1 Tenn.App. 410.

Tex.—Shell Petroleum Corporation v. Howth, Civ.App., 133 S.W.2d 253, error granted—Tucker v. Adkins, Civ.App., 76 S.W.2d 815—Howard v. Republic Bank & Trust Co., Civ. App., 76 S.W.2d 187, error dismissed—Humble Oil & Refining Co. v. State, Civ.App., 3 S.W.2d 559, error refused—Johnson v. Ewing, Civ.App., 276 S.W. 784—Kollaer v.

the courts have in some cases taken judicial notice that a pecuniary consideration recited in a deed was merely nominal,[1] while in other cases they have declined to take judicial notice that the recited consideration was inadequate.[2] Although the court may take judicial notice that there has been a depreciation in the value of property generally throughout the state during a given period of time, it cannot know the extent of such depreciation.[3]

Cotton. The court will take judicial notice of what is common knowledge among the cotton trade relating to cotton,[4] such as that cotton is a world staple and that its price is approximately fixed everywhere by the daily market quotations furnished by the cotton exchanges in the world's great markets,[5] that the daily price of cotton fluctuates,[6] that the staple is bought and sold at prices minutely graduated according to its classified quality as fixed by world-wide standards,[7] that there is for every day in the year a specific and ascertainable market price for each of the designated grades,[8] and that the slight variations in price for different localities are founded on the varying cost of transportation to the centers of consumption and distribution.[9] On the other hand, judicial notice will not be taken of facts relating to the value of cotton, which are not matters of common knowledge.[10]

Wheat. As a general rule judicial notice will not be taken of the market price of wheat at any particular date,[11] but facts of common knowledge relating to the value of wheat will be judicially noticed.[12] It is a matter of judicial knowledge that the market price of the different standard grades of wheat bear a direct, although perhaps a varying, relation to each other,[13] and that the market price of sack wheat, including, as it does, the labor of sacking and the cost of the sacks, is higher than that of bulk wheat.[14]

Puckett, Civ.App., 232 S.W. 914, dismissed for want of jurisdiction.
Va.—Norfolk & W. R. Co. v. Richmond Cedar Works, 170 S.E. 5, 160 Va. 790.
Wis.—In re Pratt's Estate, 266 N.W. 230, 221 Wis. 114—In re Pfister's Estate, 255 N.W. 911, 216 Wis. 42, rehearing denied 256 N.W. 245, 216 Wis. 42—State v. Wisconsin Real Estate Brokers' Board, 211 N.W. 292, 192 Wis. 396—Christensen v. Mann, 204 N.W. 499, 187 Wis. 567, 41 A.L.R. 1192.
Wyo.—State Bank of Wheatland v. Bagley Bros., 13 P.2d 564, 44 Wyo. 244, denying rehearing 11 P.2d 572, 44 Wyo. 456.
23 C.J. p 167 notes 80, 83–84.

Cause
It is a matter of common knowledge that depreciation in farm values was caused principally by depreciation in price of farm products.—Metropolitan Life Ins. Co. of New York City v. Henderson, 278 N.W. 621, 224 Iowa 1238.

Deflation in realty values
Ark.—Reiman v. Rawls, 68 S.W.2d 470, 188 Ark. 983.
Fla.—R. E. L. McCaskill Co. v. Dekle, 102 So. 252, 88 Fla. 285.
Ill.—Peritz v. Taub, 279 Ill.App. 264.
Iowa.—Royer v. Erb, 259 N.W. 584, 219 Iowa 705—Steffy v. Schultz, 246 N.W. 910, 215 Iowa 837—Dickerson v. Morse, 212 N.W. 933, 203 Iowa 480.
Mo.—Krueger v. Licklider, 76 S.W. 2d 113.
Ohio.—Self v. Leffler, 30 Ohio N.P., N.S., 211.
Tenn.—Sommers v. Thompson, 1 Tenn.App. 410.
23 C.J. p 167 notes 81, 82.
However, it has been held that the courts cannot take judicial cognizance of the condition of the real estate market, as it changes from time to time.—Blixt v. Eltoma Realty Co., 122 N.Y.S. 861, 138 App.Div. 499.

Decline in rental values of realty will be judicially noticed.
U.S.—Leo v. Pearce Stores Co., D.C. Mich., 57 F.2d 340.
Mo.—Krueger v. Licklider, 76 S.W. 2d 113.

1. Ala.—York v. Leverett, 48 So. 684, 159 Ala. 529.
23 C.J. p 167 note 89.

2. Tex.—Baldwin v. Drew, Civ.App., 180 S.W. 614—Rule v. Richards, Civ.App., 149 S.W. 1073.
23 C.J. p 167 note 90.

3. Utah.—Malmberg v. Baugh, 218 P. 975, 62 Utah 331.

4. Miss.—Williams v. W. M. Hardee & Son, 106 So. 17, 140 Miss. 155.

5. Ala.—Baker v. Lehman, 65 So. 321, 186 Ala. 493.
17 C.J. p 655 note 96.

New York market
The fact that the local market price, and the New Orleans market price, for cotton follow as a general rule the New York market price may be judicially noticed.
Ala.—South Carolina Cotton Growers' Co-op. Ass'n v. Weil, 126 So. 637, 220 Ala. 568.
Tex.—Lloyd v. Silvers, Civ.App., 274 S.W. 253.

6. Tex.—Dargan v. Robinson, Civ. App., 140 S.W.2d 561, error dismissed—Western Union Telegraph Co. v. Seguin Farmers' Union Gin Co., Civ.App., 246 S.W. 430.

7. Tex.—Brass v. Texarkana & Ft. Smith Ry. Co., 218 S.W. 1040, 110 Tex. 281, reversing Texarkana & Ft. S. Ry. Co. v. Brass, Civ.App., 175 S.W. 778—Smith v. Coburn, Civ.App., 222 S.W. 344.
23 C.J. p 167 note 97.

Color
It is common knowledge that price of cotton is affected by its color.—Jackson County Gin Co. v. McCuistion, 5 S.W.2d 729, 177 Ark. 60.

Cotton seed
Court takes judicial notice that there is general market for cotton seed rather than one limited in time and place.—Merchants' Cotton Oil Co. v. Acme Gin Co., Tex.Civ.App., 284 S.W. 680.

8. Ala.—Baker v. Lehman, 65 So. 321, 186 Ala. 493.
Tex.—Dargan v. Robinson, Civ.App., 140 S.W.2d 561, error dismissed.

9. Ala.—Baker v. Lehman, 65 So. 321, 186 Ala. 493.

10. S.C.—Linder v. Cowpens Cotton Oil Co., 144 S.E. 73, 146 S.C. 355.

11. N.D.—Towne v. St. Anthony, etc., Co., 77 N.W. 608, 8 N.D. 200.

Fluctuations
It is common knowledge that the price of wheat fluctuates greatly.—Quaile & Co. v. William Kelly Milling Co., 43 S.W.2d 369, 184 Ark. 717, 79 A.L.R. 183.

12. Wash.—Commercial State Bank v. Palmerton-Moore Grain Co., 277 P. 389, 152 Wash. 89, followed in McEachern v. Palmerton-Moore Grain Co., 277 P. 393, 152 Wash. 699.

13. Wis.—Sheffield-King Milling Co. v. Jacobs, 175 N.W. 796, 170 Wis. 389.
23 C.J. p 167 note 93.

14. Wash.—Farmers' Grain & Supply Co. v. Lemley, 181 P. 858, 105

Of circulating medium. Courts recognize the value of the circulating medium,[15] the premium on gold coin,[16] and, with some exceptions,[17] the equivalents in currency of the United States of current coin of other countries.[18] The Philippine courts do not take judicial notice of the difference between the values of Philippine and Mexican pesos.[19] The value of bank note currency at different times is not judicially noticed;[20] but the fact that there was some depreciation in value in a particular state the court may judicially notice as an historical fact.[21]

Of services. The reasonable value of services in a particular case will not be judicially noticed where it is not a matter of such common knowledge as to dispense with testimony on the subject.[22] Matters of common knowledge relating to the value of services, however, may be judicially noticed.[23]

Some courts take the view that the compensation which the professional services of the bar command is a matter of which the court must be presumed to have some knowledge, and that such knowledge cannot with propriety be wholly ignored in passing on controversies involving the value of such services and in determining their reasonable value,[24] especially where the services are rendered in the jurisdiction of the court and to a greater or less extent in its presence.[25] Other courts adopt the rule that the reasonable value of an attorney's services is not a subject of judicial notice.[26] A judge is not at

Wash. 508, reversing on rehearing 178 P. 640, 103 Wash. 508.

15. Cal.—O'Meara v. Haiden, 268 P. 334, 204 Cal. 354, 60 A.L.R. 1381.
Ga.—Ocilla Southern R. Co. v. McInvale, 105 S.E. 451, 26 Ga.App. 106.
Ill.—Holcomb v. Magee, 217 Ill.App. 272.
Iowa.—Mitvalsky v. Mitvalsky, 179 N.W. 520, 191 Iowa 8.
Wis.—Rebholz v. Wettengel, 248 N. W. 109, 211 Wis. 285.
23 C.J. p 120 note 64.

The reason for the court's knowledge of standards of value is in part at least that they are established by law.—Pimentel v. Gutierrez, 14 Philippine 49.

Appreciation of costs
U.S.—Vincennes Water Supply Co. v. Public Service Commission of Indiana, C.C.A.Ind., 34 F.2d 5, certiorari denied Public Service Commission of Indiana v. Vincennes Water Supply Co., 50 S.Ct. 26, 280 U.S. 567, 74 L.Ed. 621.

Decreased purchasing power
Ark.—Missouri Pac. R. Co. v. Elvins, 4 S.W.2d 528, 176 Ark. 737.
Ill.—Ehrenheim v. Yellow Cab Co., 239 Ill.App. 403—Maskaliunas v. Chicago & W. I. R. Co., 235 Ill. App. 198, affirmed 149 N.E. 23, 318 Ill. 142.
Ky.—Hitchcock v. Tackett, 272 S.W. 52, 208 Ky. 803.
La.—Van Baast v. Thibaut Feed Mills, App., 151 So. 226—Stromer v. Dupont, App., 150 So. 32.
Mo.—Hurst v. Chicago, B. & Q. R. Co., 219 S.W. 566, 280 Mo. 566, 10 A.L.R. 174—Hance v. United Rys. Co. of St. Louis, App., 223 S.W. 123—Yates v. United Rys. Co. of St. Louis, App., 222 S.W. 1034.
N.J.—Bowes v. Public Service Ry. Co., 110 A. 699, 94 N.J.Law 378.
S.C.—Martin v. Palmer, 104 S.E. 308, 115 S.C. 17.
Tex.—Ward v. Cathey, Civ.App., 210 S.W. 289, error refused.
23 C.J. p 120 note 64 [b].

Difference in purchasing power of money at different times is common fact which court may properly notice.—Rowe v. Rennick, 297 P. 603, 112 Cal.App. 576.

Enhanced purchasing power of money, where such is the case, has been judicially noticed.—Wyble v. Putfork, La.App., 141 So. 776—Bell v. First Nat. Life Ins. Co., La.App., 141 So. 484.

Trade journal figures
The court will not accept the figures arrived at by writers in trade journals as to the value of the dollar.—Bell v. First Nat. Life Ins. Co., supra.

16. U.S.—U. S. v. American Gold Coin, C.C.Mo., 24 F.Cas.No.14,439, Woolw. 217.
17. U.S.—H. N. Hill & Co. v. U. S., 26 C.C.P.A.Customs 295.
23 C.J. p 168 note 15.
18. N.Y.—Nemours-Stevens, Limited, v. Nemours Trading Corporation, 197 N.Y.S. 241, 204 App.Div. 38.
23 C.J. p 168 note 16.
19. U.S.—U. S. v. Burns, C.C.Ohio, 24 F.Cas.No.14,691, 5 McLean 23.
N.M.—U. S. v. Fuller, 20 P. 175, 4 N. M. 358.
20. Ky.—Letcher v. Kennedy, 3 J.J. Marsh 701—Feemster v. Ringo, 5 T.B.Mon. 336.
21. Ky.—Perrit v. Crouch, 5 Bush. 199.
22. N.Y.—Birkmire v. Campus Realty Corporation, 227 N.Y.S. 653, 223 App.Div. 226, reversed on ground that valuation of services was reasonable under showing made 171 N.E. 799, 253 N.Y. 598.
Wash.—Old Nat. Bank of Spokane v. Lewis County, 242 P. 961, 137 Wash. 436.
Wis.—Tullgren v. Karger, 181 N.W. 232, 173 Wis. 288.
23 C.J. p 168 note 1.

Farm labor
Supreme court of appeals cannot take judicial notice of price per day of farm labor, but knows that young, active, and healthy man could have earned more than double sixty-four cents a day between October, 1924, and May, 1925.—Branch v. Branch, 132 S.E. 303, 144 Va. 244.

23. Mont.—Hopkins v. Paradise Heights Fruit Growers' Ass'n, 193 P. 389, 58 Mont. 404.
N.Y.—Bogacki v. Zolemski, 256 N. Y.S. 166, 143 Misc. 140, affirmed Bogacki v. Zalemski, 261 N.Y.S. 1036, 238 App.Div. 764.
Tex.—Southland-Greyhound Lines v. Cotten, Civ.App., 55 S.W.2d 1066, reversed on other grounds 91 S.W. 2d 326, 126 Tex. 596—Texas & N. O R. Co. v. Parry, Civ.App., 1 S.W. 2d 760, reversed on other grounds, Com.App., 12 S.W.2d 997.

Causes of variances
It is common knowledge that compensation varies according to opinion of value of services and business conditions.—William S. Gray & Co. v. U. S., Ct.Cl., 35 F.2d 968.

Changes in wages
It is common knowledge that, while rates of wages do not ordinarily change suddenly and, barring sickness or accident, a man's earning power is not likely to be suddenly diminished, yet during a period of years there may be a substantial change both in rates of wages and in actual earning power.—Wiley v. Moyer, 15 A.2d 145, 339 Pa. 405, 130 A.L.R. 161—Rooney v. Maczko, 172 A. 151, 315 Pa. 113.

24. N.Y.—In re Owen's Estate, 259 N.Y.S. 892, 144 Misc. 688.
Wash.—Lee v. Willman, 230 P. 148, 131 Wash. 279.
23 C.J. p 168 note 3.
25. Iowa.—Kratz v. Heins, 169 N.W. 33.
23 C.J. p 168 note 4.
26. Ala.—Decatur Mineral, etc., Co.

liberty to use as judicial knowledge his personal knowledge that certain attorney's fees charged are higher than customary for like services, against the uncontradicted evidence that such fees are reasonable.[27] Judicial notice may be taken of the various elements entering into a determination of the reasonable value of an attorney's services.[28]

Judicial notice may be taken of the fact that the charge for a surgical operation is not according to any fixed rule.[29] The courts have no judicial knowledge of the value of a physician's services under given circumstances.[30]

Rates of interest. The current rates of interest on moneyed securities is a matter of common knowledge and public history of which the courts will take judicial notice.[31] When such is the case, courts will take judicial notice of a decline in the general interest rates, and one court has taken notice of the amount of the decline,[32] although another court has refused to do so.[33] The rate of interest which government securities bear has been judicially noticed.[34] The court can take judicial notice of the present condition of the financial market,[35] and the fact that interest rates at the present time are low will be judicially noticed.[36]

§ 102. Weights and Measures

Facts legally established or of common knowledge relating to weights and measures may be judicially noticed.

No proof is required of weights[37] or of measures[38] legally established or in common use; but

v. Palm, 21 So. 315, 113 Ala. 531, 59 Am.S.R. 140.
23 C.J. p 168 notes 5–8.

Outside of court

(1) The court cannot take judicial notice of the value of legal services not performed under the eye of the court.—In re Wood's Estate, 115 A. 865, 272 Pa. 8.

(2) The rule, however, may be to the contrary where the services are performed within the observation of the court.—See In re McHugh's Estate, 57 Montg.Co., Pa., 299.

27. N.Y.—Matter of Van Nostrand, 24 N.Y.S. 850, 3 Misc. 396.

28. U.S.—National City Bank of New York v. Saldana Crosas Realty Corporation, C.C.A.Puerto Rico, 86 F.2d 923.
Ind.—Winslow Gas Co. v. Plost, 122 N.E. 594, 69 Ind.App. 611.

Expenses of an attorney have been judicially noticed.—Straus v. Victor Talking Mach. Co., C.C.A.N.Y., 297 F. 791.

29. La.—Theodore v. Ellis, 75 So. 655, 141 La. 709.

30. Cal.—Citron v. Fields, 85 P.2d 534, 30 Cal.App.2d 51.
R.I.—Scanlon v. Anderson, 144 A. 146, 49 R.I. 470.
Wis.—In re Watzek's Estate, 247 N.W. 330, 211 Wis. 50.
23 C.J. p 168 note 12.

31. U.S.—Simpson v. U. S., 40 S.Ct. 367, 252 U.S. 547, 64 L.Ed. 709, affirming 53 Ct.Cl. 640—City of Danville v. Chesapeake & O. Ry. Co., D.C.Va., 34 F.Supp. 620—Olin J. Stephens, Inc., v. American Real Estate Co., D.C.N.Y., 279 F. 435.
Ky.—Chesapeake & O. Ry. Co. v. Dixon, 290 S.W. 1064, 218 Ky. 84.
Mo.—State ex rel. City of St. Joseph v. Busby, 274 S.W. 1067—State ex rel. Home Planners Depository v. Hughes, 253 S.W. 229, 299 Mo. 529, 28 A.L.R. 1305.
N.Y.—Furniss v. Cruikshank, 130 N.E. 625, 230 N.Y. 495, modifying 181 N.Y.S. 522, 191 App.Div. 450, and modified on other grounds 132 N.E. 884, 231 N.Y. 550—In re Weir's Will, 14 N.Y.S.2d 655, 172 Misc. 74—In re Cohn's Estate, 285 N.Y.S. 279, 158 Misc. 96.
N.C.—Latta v. Trustees of General Assembly of Presbyterian Church in U. S., 196 S.E. 862, 213 N.C. 462.
23 C.J. p 123 note 8.

Difficulty to secure earnings

In determining whether the five per cent rate of return allowed gas company by commerce commission was confiscatory, the court would take judicial notice of fact that it would be difficult to invest a sum comparable to the value of gas company's property, so as to earn five per cent.—Peoples Gas Light & Coke Co. v. Slattery, 25 N.E.2d 482, 373 Ill. 31, appeal dismissed Peoples Gas & Coke Co. v. Hart, 60 S.Ct. 724, 309 U.S. 634, 84 L.Ed. 991.

Factors influencing rate

(1) It is common knowledge that rate exacted for money increases as value of security offered lessens, and that brokers, and frequently lenders themselves, demand commissions, which demands at times are influenced by exigencies and necessities of borrower.—Ryan v. Austin, Iowa, 202 N.W. 562.

(2) It is common knowledge that interest rate on loans varies according to circumstances.—Lee v. Beauchamp, 300 S.W. 401, 175 Ark. 716.

Income yielding quality

Courts, in administration of trust fund, will take judicial notice of fund's income yielding quality.—In re Archambault's Estate, 162 A. 801, 308 Pa. 549.

Small loans

It is a matter of common knowledge that persons who have no banking credit and require small loans to pay debts, meet taxes, or provide funds for emergency needs have always found difficulty in obtaining money unless they paid a very high rate of interest, amounting in many cases to oppression.—Ex parte Fuller, 102 P.2d 321, 15 Cal.2d 425.

32. U.S.—Natural Gas Pipeline Co. of America v. Federal Power Commission, C.C.A., 120 F.2d 625.

33. Ohio.—East Ohio Gas Co. v. Public Utilities Commission, 28 N.E.2d 599, 137 Ohio St. 225.

34. U.S.—Henkels v. Miller, D.C.N.Y., 298 F. 947, affirmed, C.C.A., 4 F.2d 988—Henkels v. Miller, D.C.N.Y., 298 F. 947, affirmed, C.C.A., 4 F.2d 988, reversed on other grounds Henkels v. Sutherland, 46 S.Ct. 524, 271 U.S. 298, 70 L.Ed. 953.
Iowa.—Stein v. Sharpe, 295 N.W. 155.

County indebtedness

It is a matter of common knowledge that many of the counties in Arizona are paying an exorbitant rate of interest on their outstanding or floating indebtedness.—Doan v. Board of Sup'rs of Yuma County, 187 P. 265, 21 Ariz. 240.

35. N.Y.—Powell v. Hill, 170 N.Y.S. 915.
23 C.J. p 167 note 91.

36. La.—Southern Bell Telephone & Telegraph Co. v. Louisiana Public Service Commission, 174 So. 180, 187 La. 137.
N.Y.—In re Hotaling, 294 N.Y.S. 953, 250 App.Div. 489.

37. Mo.—Koprivica v. Standard Acc. Ins. Co., App., 218 S.W. 689.
23 C.J. p 169 note 19—17 C.J. p 655 note 97.

38. Mo.—State v. Blands, 74 S.W. 3, 101 Mo.App. 618.
23 C.J. p 169 note 20.

weights not thus fixed or familiarly known,[39] or uniform,[40] and measures not standard or commonly known,[41] are not judicially noticed. While the court may not judicially know the exact maximum and minimum weight of a certain matter, yet it may know that such matter necessarily has a maximum and minimum weight.[42] Facts of common knowledge will be judicially noticed in determining the reasonableness of statutes providing for a standardization of containers.[43]

The science of mensuration is a branch of pure mathematics with which the court is presumed to be acquainted.[44] The quantity of land in a league is judicially known,[45] and other obvious and easily ascertainable facts about the area of land may be judicially noticed;[46] but it has been held that judicial notice will not be taken of the exact area of land within given metes and bounds.[47] It is a matter of common knowledge that it is very difficult to estimate the area of unfenced fields,[48] especially where they are of irregular shape and surrounded by brush preventing a view from one field to another.[49] It is of common knowledge that distances are frequently measured by pacing or stepping and assuming a pace or step to be three feet.[50]

Units of distance. Matters of common knowledge relating to units of distance will be judicially noticed.[51]

III. BURDEN OF PROOF

§ 103. Definitions and Distinctions

The phrase "burden of proof," as used by the courts, is ambiguous; it is used indiscriminately as meaning either the necessity of establishing a fact or the necessity of making or meeting a prima facie showing.

The phrase "burden of proof," as used by the courts, is one of double meaning,[52] which circum-

Cavan

"We also take judicial notice of the fact that a cavan contains 25 gantas."—Barreto v. Reyes, 10 Philippine 489, 491, 6 Off.Gaz. 706.

39. Vt.—Carrow v. Barre R. Co., 52 A. 537, 74 Vt. 176.
23 C.J. p 169 note 21.

40. Ala.—Elmore v. Parrish, 54 So. 203, 170 Ala. 499.
23 C.J. p 169 note 22.

Cotton bales

Tex.—Jarvis v. Crisp, Civ.App., 95 S.W.2d 177—Early-Foster Co. v. Tom B. Burnett & Co., Civ.App., 224 S.W. 316.
23 C.J. p 169 note 22 [a].

Logs

It is common knowledge that timber or logs have considerable weight which varies according to species of log or timber, but weight of timber or logs is not a matter of common knowledge.—Harris v. Pounds, 187 So. 891, 185 Miss. 688.

41. Ala.—South, etc., R. Co. v. Wood, 74 Ala. 449, 49 Am.R. 819.
23 C.J. p 169 note 23.

42. Ala.—Thompson v. Strong, 74 So. 34, 199 Ala. 23.
23 C.J. p 169 note 25.

43. Cal.—Ex parte Fujii, 207 P. 537, 189 Cal. 55.

"It is a matter of common knowledge that enforced standardization of containers is essential to the economic handling, shipping, and selling of horticultural products, for, among other reasons, it prevents fraud and deception in sales, provides the best method of stowage, and eliminates many sizes that complicate the problems of transportation."—Pacific States Box & Basket Co. v. Gehlar, D.C.Or., 9 F.Supp. 341, 342, affirmed Pacific States Box & Basket Co. v. White, 56 S.Ct. 159, 296 U.S. 176, 80 L.Ed. 138, 101 A.L.R. 853.

44. Cal.—Scanlan v. San Francisco, etc., R. Co., 55 P. 694, 6 Cal.Unrep. Cas. 210.

45. Tex.—Long v. Shelton, Civ.App., 126 S.W. 40.

46. Mo.—State ex rel. and to Use of Parman v. Manring, 58 S.W.2d 269, 332 Mo. 235.

47. Tex.—Tison v. Smith, 8 Tex. 147.

48. Wis.—Eberhardt v. Randall, 166 N.W. 6, 166 Wis. 480.

49. Wis.—Eberhardt v. Randall, supra.

50. U.S.—Transcontinental Ins. Co. v. Stanton, C.C.A.Ill., 74 F.2d 935.

51. Mo.—Lueders v. St. Louis, etc., R. Co., 161 S.W. 1159, 253 Mo. 97.
23 C.J. p 169 note 31.

Eighty rods

Court judicially notices that "eighty rods" is four hundred and forty yards, or quarter of mile.—Sing v. St. Louis-San Francisco Ry. Co., Mo., 30 S.W.2d 37.

Nautical miles

It is common knowledge that on the oceans, seas, and coastal waters generally distances are measured in nautical miles.—Buttimer v. Detroit Sulphite Transp. Co., D.C.Mich., 39 F.Supp. 222.

52. U.S.—Kohlsaat v. Parkersburg & Marietta Sand Co., C.C.A.W.Va., 266 F. 283, 11 A.L.R. 686.
Ala.—Birmingham Trust & Savings Co. v. Acacia Mut. Life Ass'n, 130 So. 327, 221 Ala. 561.
Colo.—American Ins. Co. v. Naylor, 70 P.2d 349, 351, 101 Colo. 34, quoting entire section from **Corpus Juris.**
Ga.—Richter Bros. v. Atlantic Co., 200 S.E. 462, 464, 59 Ga.App. 134, quoting **Corpus Juris.**
Ill.—Sellers v. Kincaid, 135 N.E. 429, 303 Ill. 216—Donovan v. St. Joseph's Home, 129 N.E. 1, 295 Ill. 125.
Ky.—Galloway Motor Co. v. Huffman's Adm'r, 137 S.W.2d 379, 281 Ky. 841.
Minn.—Anderson v. M. Berg & Sons, 212 N.W. 9, 170 Minn. 53.
Mo.—State ex rel Strohfeld v. Cox, 30 S.W.2d 462, 325 Mo. 901—Downs v. Horton, 230 S.W. 103, 287 Mo. 414, affirming 209 S.W. 595—Stofer v. Dunham, App., 208 S.W. 641.
Neb.—Moore v. Williams, 196 N.W. 695, 111 Neb. 342.
N.H.—Spilene v. Salmon Falls Mfg. Co., 108 A. 808, 79 N.H. 326.
N.Y.—Blaustein v. Pan American Petroleum & Transport Co., 21 N.Y.S. 2d 651, 724, 174 Misc. 601, quoting **Corpus Juris** and modified on other grounds 31 N.Y.S.2d 934, 263 App. Div. 97—In re Braunfeld's Estate, 288 N.Y.S. 637, 159 Misc. 687, affirmed 293 N.Y.S. 509, 249 App. Div. 805.
N.C.—Hunt v. Eure, 127 S.E. 593, 189 N.C. 482.
Or.—Hansen v. Oregon-Washington R. & Nav. Co., 188 P. 963, 97 Or. 190, rehearing denied 191 P. 655, 97 Or. 190.
Pa.—Henes v. McGovern, 176 A. 503, 317 Pa. 302.
R.I.—Giblin v. Dudley Hardware Co., 117 A. 418, 44 R.I. 371.
W.Va.—Sattarelli v. Cropper, 155 S.E. 312, 109 W.Va. 430.
22 C.J. p 67 note 37.

stance has been the cause of confusion[53] so great as to suggest the propriety of adopting a less objectionable term.[54] The ambiguity lies in the indiscriminate use of the phrase "burden of proof," as meaning either the necessity of establishing the existence of a certain fact or set of facts by evidence which preponderates to a legally required extent,[55] or the necessity which rests on a party at any particular time during a trial to create a prima facie case in his own favor or to overthrow one when created against him.[56] To avoid confusion, the phrase "burden of proof" will, in this article, be confined to the necessity of finally establishing a fact, since that is held to be the primary or more appropriate meaning of the phrase;[57] the other meaning of burden of proof will be represented by the phrase "burden of evidence." Thus, the burden of proof and the burden of evidence are not the same thing;[58] the burden of evidence may be defined as the burden of making or meeting a prima facie showing as to an issue.[59]

The effect of evidence is to be distinguished from the burden of proof.[60]

§ 104. Burden of Proof Properly So-Called

a. In general
b. Application of general rule

a. In General

The burden of proof as to a fact or issue generally rests on the party asserting or pleading it, or having the affirmative of the issue, and remains on that party throughout the trial.

The rules as to the burden of proof are important and indispensable in the administration of justice,[61] and constitute a substantial right of the party on

53. U.S.—Wong Kam Chong v. U S., C.C.A.Hawaii, 111 F.2d 707—Ætna Ins. Co. of Hartford, Conn. v. Taylor, C.C.A.Ga., 86 F.2d 225.
Pa.—Wright v. Straessley, 182 A. 682, 321 Pa. 1—Henes v. McGovern, 176 A. 503, 317 Pa. 302.
22 C.J. p 67 note 38.

54. Vt.—Rutland R., Light & Power Co. v. Williams, 98 A. 85, 90 Vt. 276, 280.
22 C J. p 67 note 39.

55. U.S.—Wong Kam Chong v. U. S., C.C.A Hawaii, 111 F.2d 707—Department of Water and Power of City of Los Angeles v. Anderson, C.C.A.Nev., 95 F.2d 577, certiorari denied 59 S.Ct. 67, 305 U.S. 607, 83 L.Ed. 386—Cochran v. Pittsburgh & L. E. R. Co., D.C.Ohio, 31 F.2d 769—Kohlsaat v. Parkersburg & Marietta Sand Co., C.C.A.W.Va., 266 F. 283, 11 A.L.R. 686.
Ill.—Sellers v. Kincaid, 135 N.E. 429, 303 Ill. 216—Donovan v. St. Joseph's Home, 129 N.E. 1, 295 Ill. 125—Behnke v. President and Board of Trustees of Village of Brookfield, 9 N.E.2d 232, 233, 366 Ill.App. 516, citing **Corpus Juris.**
Iowa.—Wilson v. Findley, 275 N.W. 47, 223 Iowa 1281.
Kan.—Thompson v. Dyson, 244 P. 867, 120 Kan. 591.
Mo.—Lampe v. Franklin American Trust Co., 96 S.W.2d 710, 339 Mo. 361, 107 A.L.R. 465—McCloskey v. Koplar, 46 S.W.2d 557, 329 Mo. 527, 92 A.L.R. 641—Spencer v. Barlow, 5 S.W.2d 28, 319 Mo. 835—Campbell v. Terminal R. Ass'n of St. Louis, App., 126 S.W.2d 915—Diamant v. Stein, 116 S.W.2d 273, 232 Mo.App. 1174—Stofer v. Dunham, App., 208 S.W. 641.
N.H.—Spilene v. Salmon Falls Mfg. Co., 108 A. 808, 79 N.H. 326.
N.Y.—Lynch v. Figge, 192 N.Y.S. 873, 200 App.Div. 92.
N.D.—Guild v. More, 155 N.W. 44, 32 N.D. 432.
Ohio.—Martin v. City of Columbus, 127 N.E. 411, 101 Ohio St 1.
Or.—Hansen v. Oregon-Washington R. & Nav. Co., 188 P. 963, 97 Or. 190, rehearing denied 191 P. 655, 97 Or. 190.
22 C.J. p 68 note 40.

"Burden of proof on the whole case" and "burden of proof of the whole case under the pleadings," as used in statute and court rule, respectively, giving party having such respective burdens right to open and conclude argument, have been held to have same meaning and to give right to party against whom judgment must be entered under settled pleadings, should neither side introduce any evidence.—Walker v. Money, Civ.App., 93 S.W.2d 602, affirmed 120 S.W.2d 428, 132 Tex. 132.

56. U.S.—Wong Kam Chong v. U. S., C.C.A.Hawaii, 111 F 2d 707—Kohlsaat v. Parkersburg & Marietta Sand Co., C.C.A.W.Va., 266 F. 283, 11 A.L.R. 686.
Ill.—Behnke v. President and Board of Trustees of Village of Brookfield, 9 N.E.2d 232, 233, 366 Ill. 516, citing **Corpus Juris**—Sellers v. Kincaid, 135 N.E. 429, 303 Ill. 216—Donovan v. St. Joseph's Home, 129 N.E. 1, 295 Ill. 125.
Iowa.—Wilson v Findley, 275 N.W. 47, 223 Iowa 1281.
Mo.—Stofer v. Dunham, App., 208 S.W. 641.
N.H.—Spilene v. Salmon Falls Mfg. Co., 108 A. 808, 79 N.H. 326.
Or.—Hansen v. Oregon-Washington R. & Nav. Co., 188 P. 963, 97 Or. 190, rehearing denied 191 P. 655, 97 Or. 190.
22 C.J. p 68 note 41.

Such usage is inapt
N.C.—Speas v. Merchants' Bank & Trust Co. of Winston-Salem, 125 S.E. 398, 401, 188 N.C. 524, citing **Corpus Juris.**

57. U.S.—Kohlsaat v. Parkersburg & Marietta Sand Co, C.C.A.W.Va., 266 F. 283, 11 A.L.R. 686.
Ill.—Behnke v. President and Board of Trustees of Village of Brookfield, 9 N.E.2d 232, 233, 366 Ill. 516, citing **Corpus Juris.**
Mo.—Spencer v. Barlow, 5 S.W.2d 28, 319 Mo. 835.
N.H.—Spilene v. Salmon Falls Mfg. Co., 108 A. 808, 79 N.H. 326.
N.Y.—Blaustein v. Pan American Petroleum & Transport Co., 21 N.Y.S. 2d 651, 174 Misc. 601, modified on other grounds 31 N.Y.S.2d 934, 263 App.Div. 97.
Or.—Carroll v. Royal Mail Steam Packet Co., 279 P. 861, 130 Or. 294.

58. Cal.—Smith v. Hollander, 259 P. 958, 85 Cal.App 535—Smith v. Hollander, App., 257 P. 577.
Neb.—Leichner v. First Trust Co. of Lincoln, 274 N.W. 475, 477, 133 Neb. 170, citing **Corpus Juris.**
N.D.—Guild v. More, 155 N.W. 44, 32 N.D. 432.
Or.—Carroll v. Royal Mail Steam Packet Co., 279 P. 861, 130 Or. 294.

59. Mo.—McCloskey v. Koplar, 46 S.W.2d 557, 329 Mo. 527, 92 A.L.R. 641—Campbell v. Terminal R. Ass'n of St. Louis, App., 126 S.W. 2d 915.
Neb.—Olson v. Omaha & C. B. St. Ry. Co., 289 N.W. 356, 358, 137 Neb. 216, citing **Corpus Juris.**
Wyo.—First Nat. Bank v. Ford, 216 P. 691, 694, 30 Wyo. 110, 31 A.L.R. 1441.
22 C.J. p 68 note 42 [a].

60. Ala.—Hill v. Nichols, 50 Ala. 336.

61. Mo.—Clapper v. Lakin, 123 S.W. 2d 27, 33, 343 Mo. 710, quoting **Corpus Juris.**
N.C.—Fisher v. Jackson, 4 S.E.2d

whose adversary the burden rests;[62] they should therefore be jealously guarded and rigidly enforced by the courts.[63]

The general rule is that the burden of proof rests on the party who has the affirmative of the issue,[64] as determined by the pleadings,[65] or, where

847, 216 N.C. 302—Hunt v. Eure, 127 S.E. 593, 189 N.C. 482—Skyland Hosiery Co. v. American Ry. Express Co., 114 S.E. 823, 184 N.C. 478.

22 C.J. p 70 note 49.

62. Mo.—Clapper v. Lakin, 123 S.W. 2d 27, 33, 343 Mo. 710, quoting **Corpus Juris.**

N.C.—Arnold v. State Bank & Trust Co., 11 S.E.2d 307, 218 N.C. 433—Fisher v. Jackson, 4 S.E.2d 847, 216 N.C. 302—Fenner v. Tucker, 196 S.E. 357, 213 N.C. 419—Williams v. Philadelphia Life Ins. Co., 193 S.E. 728, 212 N.C. 516—Wilson v. Inter-Ocean Casualty Co., 188 S.E. 102, 210 N.C. 585—Boone v. Collins, 161 S.E. 543, 202 N.C. 12—Hunt v. Eure, 127 S.E. 593, 189 N.C. 482—Skyland Hosiery Co. v. American Ry. Express Co., 114 S.E. 823, 184 N.C. 478.

22 C.J. p 70 note 50.

63. N.C.—Fisher v. Jackson, 4 S.E. 2d 847, 216 N.C. 302—Hunt v. Eure, 127 S.E. 593, 189 N.C. 482—Skyland Hosiery Co. v. American Ry. Express Co., 114 S.E. 823, 184 N.C. 478.

22 C.J. p 70 note 51.

64. U.S.—Majestic Securities Corporation v. Commissioner of Internal Revenue, C.C.A., 120 F.2d 12—Reliance Life Ins. Co. v. Burgess, C.C.A.Mo., 112 F.2d 234, certiorari denied Burgess v. Reliance Life Ins. Co., 61 S.Ct. 137, rehearing denied 61 S.Ct. 391—New York Life Ins. Co. v. Stoner, C.C.A.Mo., 109 F.2d 874, 876, quoting **Corpus Juris**—Gilmore v. U. S., C.C.A.Miss., 93 F.2d 774, certiorari denied 58 S.Ct. 1039, 304 U.S. 569, 82 L.Ed. 1534—Florida Fruit Canners v. Walker, C.C.A.Fla., 90 F.2d 753, certiorari denied Walker v. Florida Fruit Canners, 58 S.Ct. 140, 302 U.S. 738, 82 L.Ed. 570—Howells State Bank v. Novotny, C.C.A.Neb., 69 F.2d 32—Barnett v. Kunkel, Okl., 259 F. 394, 170 C.C.A. 370.

Ala.—Horton v. Spears, 191 So. 622, 238 Ala. 464—U. S. Cast Iron Pipe & Foundry Co. v. Williams, 104 So. 28, 213 Ala. 115—City of Anniston v. Jewel Tea Co., 88 So. 351, 18 Ala.App. 4.

Ark.—Johnson v. Mitchell, 260 S.W. 710, 164 Ark. 1.

Cal.—Herbert v. Lankershim, 71 P. 2d 220, 9 Cal.2d 409—Montgomery v. Board of Administration of City Employees' Retirement System of San Diego, 93 P.2d 1046, 34 Cal. App.2d 514, rehearing denied 94 P. 2d 610, 34 Cal.App.2d 514—Brooks v. Sessagesimo, 34 P.2d 766, 139 Cal.App. 679—Manufacturers' Finance Corporation v. Pacific Wholesale Radio, 19 P.2d 1013, 130 Cal.App. 239.

Colo.—American Ins. Co. v. Naylor, 70 P.2d 349, 352, 101 Colo. 34, quoting entire section from **Corpus Juris.**

Ill.—Noyes v. Gold, 34 N.E.2d 1, 310 Ill.App. 1.

Iowa.—McKeever v. Batcheler, 257 N.W. 567, 568, 219 Iowa 93, quoting **Corpus Juris**—Hoover v. First American Fire Ins. Co. of New York, 255 N.W. 705, 710, 218 Iowa 559, quoting **Corpus Juris**—Randell v. Iowa State Highway Commission, 241 N.W. 685, 214 Iowa 1.

La.—Greene v. Delafield, 121 So. 339, 10 La.App. 590—Rayville State Bank v. Mangham State Bank, 2 La.App. 710.

Md.—Singewald v. Singewald, 166 A. 441, 165 Md. 136.

Mich.—Pike v. Gilbert, 198 N.W. 923, 227 Mich. 515.

Mo.—Griffith v. Continental Casualty Co., 253 S.W. 1043, 299 Mo. 426.

Mont.—Gibbons v. Huntsinger, 74 P. 2d 443, 448, 105 Mont. 562, citing **Corpus Juris.**

N.J.—Collins Realty Co. v. Sale, 144 A. 585, 104 N.J.Eq. 138—Schomer v. Hoffman, 131 A. 919, 920, 102 N. J.Law 347, citing **Corpus Juris.**

N.M.—Kuchan v. Strong, 46 P.2d 55, 39 N.M. 281—Navajo Live Stock & Trading Co. v. Gallup State Bank, 189 P. 1108, 26 N.M. 153.

N.Y.—In re Auditore's Estate, 240 N.Y.S. 502, 136 Misc. 664, affirmed In re Auditore's Will, 250 N.Y.S. 902, 233 App.Div. 740, appeal dismissed In re Parascandola, 178 N. E. 792, 257 N.Y. 554.

N.C.—Arnold v. State Bank & Trust Co., 11 S.E.2d 307, 218 N.C. 433—Hobb v. Cobb, 176 S.E. 288, 207 N.C. 128—Speas v. Merchants' Bank & Trust Co. of Winston-Salem, 125 S.E. 398, 188 N.C. 524—Model Mill Co. v. Webb, 80 S.E. 232, 164 N.C. 87.

Ohio.—Martin v. City of Columbus, 127 N.E. 411, 101 Ohio St. 1—Swearingin v. Rendigs, 4 N.E.2d 695, 53 Ohio App. 221—Klein & Heffelman Co. v. Peterman, 26 Ohio Cir.Ct.,N.S., 233.

Okl.—Fitzgearld v. Fitzgearld, 56 P. 2d 789, 176 Okl. 612—Graves Farm Loan Inv. Co. v. Vance, 35 P.2d 896, 169 Okl. 177—R. C. Jones Cotton Co. v. State, 282 P. 622, 139 Okl. 212.

Or.—Gwin v. Crawford, 100 P.2d 1012—Gray v. Wassell, 4 P.2d 625, 138 Or. 274.

Pa.—Zenner v. Goetz, 188 A. 124, 324 Pa. 432—Fazio v. Pittsburgh Rys. Co., 182 A. 696, 321 Pa. 7—Doud v. Hines, 112 A. 528, 269 Pa. 182—In re Siglin's Estate, 20 Pa.Dist. & Co. 105.

S.C.—Ford v. Atlantic Coast Line R. Co., 168 S.E. 143, 169 S.C. 41, affirmed Atlantic Coast Line R. Co. v. Ford, 53 S.Ct. 249, 287 U.S. 502, 77 L.Ed. 457.

S.D.—Peck v. Peck, 212 N.W. 872, 51 S.D. 157.

Tenn.—Hansard v. Ferguson, 132 S. W.2d 221, 23 Tenn.App. 306.

Tex.—Federal Underwriters Exchange v. Price, 145 S.W.2d 951, 957, citing **Corpus Juris**—Beverly v. Siegel, Civ.App., 51 S.W.2d 743—Cameron Compress Co. v. Kubecka, Civ.App., 283 S.W. 285—Guaranty State Bank v. Shirey, Civ.App., 258 S.W. 1109—Prairie Oil & Gas Co. v. Wright, Civ.App., 238 S.W. 974—Donoho v. Carwile, Civ.App., 214 S. W. 553, error refused.

Wash.—Wilder v. Nolte, 79 P.2d 682, 195 Wash. 1.

Vt.—Houran v. Preferred Accident Ins. Co. of New York, 195 A. 253, 109 Vt. 258.

22 C.J. p 68 note 43, p 71 note 66, p 72 note 67, p 74 note 81.

Whether plaintiff or defendant

Party substantially asserting affirmative of issue, whether he be nominally plaintiff or defendant, has burden of proof.—Wilson v. Inter-Ocean Casualty Co., 188 S.E. 102, 210 N.C. 585.

Burden of proof always rests on actor, and never on the reus.—Hunt v. Eure, 127 S.E. 593, 189 N.C. 482.

Where cause of action is prosecuted against two or more, if the burden of proof is on plaintiff as to either of them, the court, in the exercise of a sound discretion, has the right to give plaintiff the burden of proof on the whole case jointly.—New Ellerslie Fishing Club v. Stewart, 93 S.W. 598, 123 Ky. 8, 29 Ky.L. 414, 9 L.R.A.,N.S., 475.

Burden of explaining memorandum

The burden is on the offerer of a document called for to explain a memorandum by third parties appearing thereon, if it improperly appears there.—Stucker v. Shumaker, 139 A. 114, 290 Pa. 348.

65. U.S.—Reliance Life Ins. Co. v. Burgess, C.C.A.Mo., 112 F.2d 234, certiorari denied Burgess v. Reliance Life Ins. Co., 61 S.Ct. 137, rehearing denied 61 S.Ct. 391.

Ala.—Stroup v. Alabama Power Co., 113 So. 18, 216 Ala. 290, 52 A.L.R. 1075.

Ark.—Holland v. Bonner, 218 S.W. 665, 142 Ark. 214.

Fla.—Mach v. Mayo, 86 So. 222, 80 Fla. 372.

Ga.—Grimsley v. Morgan, 172 S.E.

there are no pleadings, by the nature of the investigation;[66] so, the party asserting or pleading a fact or issue generally has the burden of proof as to such fact or issue.[67] This rule is founded on the obvious purpose of facilitating justice by serving the convenience of the court.[68] The test for determining which party has the affirmative, and therefore the burden of establishing a case, is found in the result of an inquiry as to which party would be successful if no evidence at all were given, the burden being, of course, on the adverse party.[69]

The burden of proof exists only in connection with an issue of fact.[70]

One asserting a right or privilege in derogation

49, 178 Ga. 40—Little v. Dolvin, 103 S.E. 35, 25 Ga.App. 264.
Ill.—Noyes v. Gold, 34 N.E.2d 1, 310 Ill.App. 1.
Iowa.—Hoover v. First American Fire Ins. Co. of New York, 255 N. W. 705, 710, 218 Iowa 559, quoting **Corpus Juris.**
Ky.—Moss v. Mittel, 69 S.W.2d 1046, 253 Ky. 504.
Mo.—Watson v. Chicago Great Western R. Co., 287 S.W. 813, 221 Mo. App. 621.
Neb.—Gutzmer v. Nelsen, 236 N.W. 614, 121 Neb. 214—Pierce v. Miller, 187 N.W. 105, 107 Neb. 851.
N.M.—Kuchan v. Strong, 46 P.2d 55, 39 N.M. 281—Navajo Live Stock & Trading Co. v. Gallup State Bank, 189 P. 1108, 26 N.M. 153.
N.Y.—In re Carpenter's Will, 12 N.Y.S.2d 724, 171 Misc. 363.
Okl.—Graves Farm Loan Inv. Co. v. Vance, 35 P.2d 896, 169 Okl. 177—Youngblood v. Roake, 253 P. 1017, 124 Okl. 84—Davis v. Kelley, 219 P. 923, 96 Okl. 17.
Wash.—Flessher v. Carstens Packing Co., 179 P. 100, 105 Wash. 694.
22 C.J. p 69 note 44.

Whole pleading must be considered.—Southerland Bros. v. Huntington Gravel & Supply Co., 22 S.W.2d 614, 232 Ky. 245.

Negative allegation

(1) Whether allegation is negative or affirmative is material in determining where burden of proof should be placed.—Glou v. Security Ben. Ass'n, 173 A. 883, 114 Pa.Super. 139.

(2) However, negative character of allegation will not necessarily relieve party of burden.—Kuchan v. Strong, 46 P.2d 55, 39 N.M. 281.

Burden of proof is not changed by mispleading unless misleading to adverse party.—Yazoo & M. V. R. Co. v. M. Levy & Sons, 106 So. 525, 141 Miss. 199—22 C.J. p 69 note 44 [a].

Effect of admission

Rule that burden of proof is determined from an examination of the pleadings cannot be changed even by admission on trial of all material allegations of complaint or petition which plaintiff or petitioner would be required in first instance to prove.—In re Carpenter's Will, 12 N.Y.S.2d 724, 171 Misc. 363.

66. Colo.—American Ins. Co. v. Naylor, 70 P.2d 349, 352, 101 Colo. 34, quoting **Corpus Juris.**
Iowa.—Hoover v. First American Fire Ins. Co. of New York, 255 N. W. 705, 710, 218 Iowa 559, quoting **Corpus Juris.**
N.M.—Navajo Live Stock & Trading Co. v. Gallup State Bank, 189 P. 1108, 26 N.M. 153.
22 C.J. p 68 note 43.

Absence of written pleadings

Rules as to burden of proof are same where no written pleadings are required as in actions where they are filed.—Andrews v. Votaw, 240 Ill.App. 311.

67. U.S.—In re Cohn, D.C.Tex., 16 F. Supp. 644, affirmed, C.C.A., Lasswell v. Stein-Block Co., 93 F.2d 322.
Ala.—Ex parte Grimmett, 152 So. 263, 228 Ala. 1, reversing Grimmett v. State, 152 So. 262, 26 Ala.App. 56—Robinson v. Smith, 92 So. 546, 207 Ala. 378.
Ariz.—Durazo v. Ayers, 188 P. 868, 21 Ariz. 373.
Cal.—Holwick v. Walker, 45 P.2d 374, 6 Cal.App.2d 669.
Colo.—Gertner v. Limon Nat. Bank, 257 P. 247, 82 Colo. 13—Hickman-Lunbeck Grocery Co. v. Hager, 227 P. 829, 75 Colo. 554.
Ill.—J. R. Watkins Medical Co. v. Bailey, 217 Ill.App. 460.
Iowa.—Griffin v. Stuart, 270 N.W. 442, 222 Iowa 815—Co-operative Sales Co. v. Van der Beek, 259 N. W. 586, 219 Iowa 974.
La.—Moore v. Louisiana & Arkansas Ry. Co., 3 La.App. 731.
Mass.—Smith v. Hill, 122 N.E. 310, 232 Mass. 188, 2 A.L.R. 1667, certiorari granted Hill v. Smith, 42 S. Ct. 92, 257 U.S. 630, 66 L.Ed. 406, and affirmed 43 S.Ct. 219, 260 U.S. 592, 67 L.Ed. 419.
Mo.—Clapper v. Lakin, 123 S.W.2d 27, 343 Mo. 710.
Neb.—Cohen v. Swanson Petroleum Co., 276 N.W. 190, 133 Neb. 581—In re Fenske's Guardianship, 236 N.W. 441, 121 Neb. 177.
N.Y.—Lopp v. Lopp, 181 N.Y.S. 476, 191 App.Div. 500—In re Mead's Estate, 261 N.Y.S. 328, 145 Misc. 893.
N.C.—Stein v. Levins, 171 S.E. 96, 205 N.C. 302—Speas v. Merchants' Bank & Trust Co. of Winston-Salem, 125 S.E. 398, 188 N.C. 524—Poindexter v. Call, 109 S.E. 26, 182 N.C. 366.
Pa.—In re Yeager's Estate, 117 A. 67, 273 Pa. 359—Franks v. Franks, 196 A. 578, 129 Pa.Super. 487.
S.C.—Jackson v. Frier, 144 S.E. 66, 146 S.C. 322—Oates v. Fountain, 101 S.E. 830, 113 S.C. 372.
S.D.—Tripp State Bank of Tripp v. Jerke, 189 N.W. 514, 45 S.D. 580, denying rehearing 188 N.W. 314, 45 S.D. 448.
Tex.—Schlottmann v. Wiese, Civ. App., 86 S.W.2d 44, error dismissed—Capitol Building & Loan Ass'n of Texas v. Sosa, Civ.App., 72 S.W.2d 936—Miller v. Fallwell, Civ.App., 42 S.W.2d 644—Chancellor v. Norwich Union Indemnity Co., Civ. App., 2 S.W.2d 495, reversed on other grounds Norwich Union Ins. Co. v. Chancellor, 5 S.W.2d 494, rehearing denied 7 S.W.2d 71—Cotten v. Willingham, Civ.App., 232 S.W. 572.
Vt.—Stewart v. Waterman, 123 A. 524, 97 Vt. 408.
Wyo.—First Nat. Bank v. Ford, 216 P. 691, 30 Wyo. 110, 31 A.L.R. 1441.

68. Ill.—Stevenson v. Marony, 29 Ill. 532.
La.—Dranguet v. Prudhomme, 3 La. 83.

69. U.S.—Reliance Life Ins. Co. v. Burgess, C.C.A.Mo., 112 F.2d 234, certiorari denied Burgess v. Reliance Life Ins. Co., 61 S.Ct. 137, rehearing denied 61 S.Ct. 391.
Colo.—American Ins. Co. v. Naylor, 70 P.2d 349, 352, 101 Colo. 34, quoting **Corpus Juris.**
Iowa.—Cakerice v. Reiss, 297 N.W. 305.
Ky.—Galloway Motor Co. v. Huffman's Adm'r, 137 S.W.2d 379, 281 Ky. 841—Colovos' Adm'r v. Gouvas, 108 S.W.2d 820, 269 Ky. 752, 113 A.L.R. 871—Rose v. Gatliff Coal Co., 99 S.W.2d 214, 266 Ky. 416—Warfield Natural Gas Co. v. Wright, 25 S.W.2d 1036, 233 Ky. 378—Southerland Bros. v. Huntington Gravel & Supply Co., 22 S.W.2d 614, 232 Ky. 245.
Miss.—Mississippi State Highway Commission v. Hillman, 195 So. 679, suggestion of error overruled 198 So. 565, 189 Miss. 850.
N.Y.—In re Fee's Estate, 271 N.Y.S. 608, 151 Misc. 410.
Puerto Rico.—Comelin v. Schulze, 1 Puerto Rico Fed. 289—Cavol v. Balseiro, 1 Puerto Rico 253.
Tex.—Walker v. Money, 120 S.W.2d 428, 431, 132 Tex. 132, quoting **Corpus Juris.**
22 C.J. p 70 note 52.

70. Wis.—Wiger v. Mutual Life Ins.

of the common law has the burden of proof;[71] and one who relies on an exception to a general rule has the burden of proving that the case falls within the exception,[72] unless the nonexistence of the exception is made a condition of the application of the rule.[73]

That a matter lies peculiarly within the knowledge of a party will be considered in determining the burden of proof as to such matter.[74]

The burden of proof, properly so called, does not shift; it rests throughout the case, as to each issue, on the party originally having the burden as to such issue,[75] notwithstanding the fact that the case is one in which the doctrine of res ipsa loquitur may

Co. of New York, 236 N.W. 534, 205 Wis. 95.

71. N.Y.—In re Green's Estate, 280 N.Y.S. 692, 155 Misc. 641, affirmed In re Green's Will, 284 N.Y.S. 370, 246 App.Div. 583.

Statutory right

(1) One seeking relief under a statute commonly must prove himself within the statute's terms.—Sullivan v. Quinlivan, 32 N.E.2d 209, 308 Mass. 339.

(2) Burden of establishing statutory right unknown to common law rests on person asserting such right.—In re Dooling's Will, 285 N.Y.S. 603, 158 Misc. 333.

72. Iowa.—Everts v. Jorgensen, 289 N.W. 11, 227 Iowa 818.
Mo.—Hunter v. American Ry. Express Co., App., 4 S.W.2d 847.
Tex.—Continental Oil Co. of Texas v. Graham, Civ.App., 8 S.W.2d 719.

Exception in statute

(1) The party relying on a statutory exception has the burden of bringing himself within it.
U.S.—Barringer v. Dinkler Hotels Co., C.C.A.S.C., 61 F.2d 82—Jones v. H. D. & J. K. Crosswell, C.C.A. S.C., 60 F.2d 827, reversing, D.C., H. D. & J. K. Crosswell v. Jones, 52 F.2d 880.
Tex.—Fidelity Oil Co. of New Jersey v. Swinney, Civ.App., 260 S.W. 1111, overruling motion to retax costs 254 S.W. 137.

(2) Where exception is included in enacting clause, one claiming under statute must prove that his case does not come within terms of exception.—In re Sitkin's Will, 271 N.Y.S. 688, 151 Misc. 448.

73. Ala.—Protective Life Ins. Co. v. Swink, 132 So. 728, 222 Ala. 496.
N.Y.—In re Sitkin's Will, 271 N.Y.S. 688, 151 Misc. 448.

74. Pa.—Fazio v. Pittsburgh Rys. Co., 182 A. 696, 321 Pa. 7—Glou v. Security Ben. Ass'n, 173 A. 883, 114 Pa.Super. 139.

75. U.S.—Commercial Molasses Corporation v. New York Tank Barge Corporation, C.C.A.N.Y., 114 F.2d 248, certiorari granted 61 S.Ct. 394, and affirmed 61 S.Ct. 840, vacated 61 S.Ct. 938—Gilmore v. U. S., C.C.A.Miss., 93 F.2d 774, certiorari denied 58 S.Ct. 1039, 304 U. S. 569, 82 L.Ed. 1534—Howells State Bank v. Novotny, C.C.A.Neb., 69 F.2d 32—Sheinman v. Chalmers, C.C.A.Pa., 33 F.2d 902, affirming, D.C., In re Sheinman, 33 F.2d 901—Cochran v. Pittsburgh & L. E. R. Co., D.C.Ohio, 31 F.2d 769—New York Life Ins. Co. v. Ross, C.C.A.Tenn., 30 F.2d 80, certiorari denied 49 S.Ct. 348, 279 U.S. 852, 73 L.Ed. 995—Guinan v. Boston Cape Cod & New York Canal Co., C.C.A.N.Y., 1 F.2d 239—In re Locust Bldg. Co., C.C.A.N.Y., 299 F. 756, certiorari denied Keighley v. American Trust Co., 44 S.Ct. 635, 265 U.S. 590, 68 L.Ed. 1195—Kohlsaat v. Parkersburg & Marietta Sand Co., C.C.A.W.Va., 266 F. 283, 11 A.L.R. 686.
Ala.—Lawson v. Mobile Electric Co., 85 So. 257, 204 Ala. 318.
Ariz.—Harvey v. Aubrey, 87 P.2d 482, 53 Ariz. 210—Miller v. Springfield, 45 P.2d 666, 45 Ariz. 458—Southwest Cotton Co. v. Ryan, 199 P. 124, 129, 22 Ariz. 520, citing **Corpus Juris.**
Cal.—Montgomery v. Board of Administration of City Employees' Retirement System of San Diego, 93 P.2d 1046, 34 Cal.App.2d 514, rehearing denied 94 P.2d 610, 34 Cal.App.2d 514—Valentine v. Provident Mut. Life Ins. Co. of Philadelphia, 55 P.2d 1243, 12 Cal.App.2d 616.
Colo.—American Ins. Co. v. Naylor, 70 P.2d 349, 101 Colo. 34.
Ill.—Ermold v. Bear, 193 N.E. 184, 358 Ill. 233—People v. Oswald, 172 N.E. 819, 821, 340 Ill. 434—Sellers v. Kincaid, 135 N.E. 429, 303 Ill. 216—Noyes v. Gold, 34 N.E.2d 1, 310 Ill.App. 1.
Ind.—Nicholich v. Shasovich, 125 N. E. 803, 72 Ind.App. 294.
Iowa.—Allbaugh v. Ashby, 284 N.W. 816, 226 Iowa 574—Hoover v. First American Fire Ins. Co. of New York, 255 N.W. 705, 218 Iowa 559—Loranz & Co. v. Smith, 214 N.W. 525, 204 Iowa 35, 53 A.L.R. 662—Landry v. Oversen, 174 N.W. 255, 187 Iowa 284.
Ky.—Prudential Ins. Co. of America v. Tuggle's Adm'r, 72 S.W.2d 440, 254 Ky. 814—Moss v. Mittel, 69 S. W.2d 1046, 253 Ky. 504.
Me.—In re Loomis' Will, 174 A. 38, 133 Me. 81.
Mass.—West v. State Street Exchange, 146 N.E. 37, 250 Mass. 537
Mich.—Douglas Shoe Co. v. Pere Marquette Ry. Co., 217 N.W. 12, 241 Mich. 297.
La.—Wallace v. Shreveport Rys. Co., App., 175 So. 86.
Md.—Crowther v. Hirschmann, 197 A. 868, 174 Md. 100.
Mich.—Douglas Shoe Co. v. Pere Marquette Ry. Co., 217 N.W. 12, 241 Mich. 297.
Minn.—Anderson v. M. Berg & Sons, 212 N.W. 9, 170 Minn. 53—Demeules v. Jewel Tea Co., 114 N.W. 733, 103 Minn. 150, 123 Am.S.R. 315, 14 L.R.A.,N.S., 954.
Mo.—Tower Grove Bank & Trust Co. v. Duing, 144 S.W.2d 69—Clapper v. Lakin, 123 S.W.2d 27, 343 Mo. 710—Bond v. St. Louis-San Francisco Ry. Co., 288 S.W. 777, 315 Mo. 987—Griffith v. Continental Casualty Co., 253 S.W. 1043, 299 Mo. 426—Downs v. Horton, 230 S. W. 103, 287 Mo. 414, affirming, App., 209 S.W. 595—Campbell v. Terminal R. Ass'n of St. Louis, App., 126 S.W.2d 915—Diamant v. Stein, 116 S.W.2d 273, 232 Mo. App. 1174—Turner v. National Benev. Soc., 28 S.W.2d 125, 224 Mo. App. 463—Mason v. Geist, App., 263 S.W. 236—Menzenworth v. Metropolitan Life Ins. Co., App., 249 S.W. 113—Williams v. Modern Woodmen of America, 221 S.W. 414, 204 Mo.App. 135—Stofer v. Dunham, App., 208 S.W. 641.
Mont.—Gibbons v. Huntsinger, 74 P. 2d 443, 105 Mont. 562—Arnold v. Genzberger, 31 P.2d 296, 96 Mont. 358.
Neb.—Pierce v. Miller, 187 N.W. 105, 107 Neb. 851.
N.H.—Spilene v. Salmon Falls Mfg. Co., 108 A. 808, 79 N.H. 326.
N.J.—Carroll v. Prudential Ins. Co. of America, 15 A.2d 810, 125 N.J. Law 397—Cella v. Roth, 174 A. 703, 113 N.J.Law 458—Kresse v. Metropolitan Life Ins. Co., 168 A. 634, 111 N.J.Law 474.
N.M.—Navajo Live Stock & Trading Co. v. Gallup State Bank, 189 P. 1108, 26 N.M. 153.
N.Y.—In re Carpenter's Will, 12 N. Y.S.2d 724, 171 Misc. 363—In re Braunfeld's Estate, 288 N.Y.S. 637, 159 Misc. 687, affirmed 293 N.Y.S. 509, 249 App.Div. 805.
N.C.—Williams v. Philadelphia Life Ins. Co., 193 S.E. 728, 212 N.C. 516—Stein v. Levins, 171 S.E. 96, 205 N.C. 302—Morgan v. Citizens' Bank of Spring Hope, 129 S.E. 585, 190 N.C. 209, 42 A.L.R. 1299—Speas v. Merchants' Bank & Trust Co. of

be applied.[76]

Difficulty of proof. A party is not relieved of the burden of proof by the difficulty or inconvenience of satisfying it.[77]

Where a party erroneously assumes the burden of proof as to a particular allegation or the burden of evidence as to a particular fact, the mistake will not be corrected in an appellate court.[78]

Proof by either party. The burden of proof is satisfied by actual proof of the facts of which proof is necessary, regardless of which party introduces the evidence.[79]

When case closed and submitted. When the evidence is all in and the case is submitted for determination, there can obviously no longer be any question as to the burden of proof, so far as that term is concerned with the order of production of evidence;[80] but at this stage the questions arising from the rule as to the burden of proof in its true sense and the obligation of a party to make out his case by the required quantum of evidence become of the utmost importance, and must be considered by court or jury in arriving at a determination.[81]

b. Application of General Rule

Plaintiff has the burden of proof as to the elements of his cause of action, and defendant has the burden of establishing special or affirmative defenses and cross claims.

In accordance with the general rule, stated in subdivision a supra, that a party has the burden of proof as to those issues as to which he has the affirmative, plaintiff has the burden of proof as to

Winston-Salem, 125 S.E. 398, 188 N.C. 524.

Ohio.—Martin v. City of Columbus, 127 N.E. 411, 101 Ohio St. 1

Or.—Givin v. Crawford, 100 P.2d 1012—Judson v. Bee Hive Auto Service Co., 297 P. 1050, 136 Or. 1, 74 A.L.R. 944, reversing 294 P. 588, 136 Or. 1, 74 A.L.R. 944.

Pa.—Zenner v. Goetz, 188 A. 124, 324 Pa. 432—Wright v. Straessley, 182 A. 682, 321 Pa. 1—Doud v. Hines, 112 A. 528, 269 Pa. 182—Pfordt v. Educators Beneficial Ass'n, 14 A.2d 170, 140 Pa.Super. 170—Guise v. New York Life Ins. Co., 191 A. 626, 127 Pa.Super. 127.

S.D.—McKiver v. Theo. Hamm Brewing Co., 297 N.W. 445—Peck v. Peck, 212 N.W. 872, 51 S.D. 157.

Tenn.—Whipple v. McKew, 60 S.W. 2d 1006, 166 Tenn. 31—Shockley v. Morristown Produce & Ice Co., 11 S.W.2d 900, 158 Tenn. 148—Hansard v. Ferguson, 132 S.W.2d 221, 23 Tenn.App. 306—Chattanooga-Dayton Bus Line Co. v. Lynch, 6 Tenn.App. 470.

Tex.—Walker v. Money, 126 S.W.2d 428, 431, 132 Tex. 132, citing **Corpus Juris,** and affirming 93 S.W.2d 602—National Aid Life Ass'n v. Driskill, Civ.App., 138 S.W.2d 238—Willow Hole Independent School Dist. v. Smith, Civ.App., 123 S.W. 2d 708, error refused—Rains County v. Spears, Civ.App., 120 S.W.2d 867—Loving County v. Higginbotham, Civ.App., 115 S.W.2d 1110, error dismissed—Walker v. Money, Civ.App., 93 S.W.2d 602, 604, citing **Corpus Juris,** and affirmed 120 S.W.2d 428, 132 Tex. 132—Miller v. Fallwell, Civ.App., 42 S.W.2d 644—Boaz v. Harris, Civ.App., 30 S.W.2d 810—Fort Worth State Bank v. Irving, Civ.App., 241 S.W. 277, reversed on other grounds Irving v. Fort Worth State Bank, Com.App., 256 S.W. 584—Pierce v. Baker, Civ.App., 238 S.W. 699, 701, citing **Corpus Juris**—Donoho v. Carwile, Civ.App., 214 S.W. 553, error refused—Producers' Oil Co. v. State, Civ.App., 213 S.W. 349.

Va.—Darden v. Murphy, 11 S.E.2d 579, 176 Va. 511—Redford v. Booker, 185 S.E. 879, 166 Va. 561.

Vt.—Town of Manchester v. Town of Townsherd, 2 A.2d 207, 110 Vt. 136—White River Chair Co. v. Connecticut River Power Co. of New Hampshire, 162 A. 859, 105 Vt. 24.

Wash.—Flessher v. Carstens Packing Co., 179 P. 100, 105 Wash. 694.

Wyo.—First Nat. Bank v. Ford, 216 P. 691, 694, 30 Wyo. 110, 31 A.L.R. 1441, citing **Corpus Juris.**

22 C.J. p 69 note 48, p 76 note 2.

Shifting of burden of evidence does not affect the position of the burden of proof.

Mo.—Campbell v. Terminal R. Ass'n of St. Louis, App., 126 S.W.2d 915.

Neb.—Olson v. Omaha & C. B. St. Ry. Co., 289 N.W. 356, 358, 137 Neb. 216, citing **Corpus Juris.**

Or.—Foster v. Farra, 243 P. 778, 783, 117 Or. 286, citing **Corpus Juris.**

22 C.J. p 78 note 19.

Burden of proof cannot rest on both sides

N.C.—DeHart v. Jenkins, 190 S.E. 218, 211 N.C. 314.

Wis.—Carle v. Nelson, 130 N.W. 467, 145 Wis. 593.

76. U.S.—Cochran v. Pittsburgh & L. E. R. Co., D.C.Ohio, 31 F.2d 769.

77. Ark.—Pine Bluff Co. v. Bobbitt, 294 S.W. 1002, 174 Ark. 41.

Ky.—Union Cent. Life Ins. Co. v. Jackson, 242 S.W. 588, 195 Ky. 438.

N.M.—Kuchan v. Strong, 46 P.2d 55, 39 N.M. 281.

Impossibility of proof of material facts does not change rules of evidence, but leaves the one having the burden of proof with a claim that is unenforceable.—Henry H. Cross Co. v. Simmons, C.C.A.Ark., 96 F.2d 482.

Availability; hostile witness

That fact essential to party's case must come from mouth of hostile witness or is otherwise unavailable does not relieve party of burden of proving such essential fact.—Middletown Trust Co. v. Bregman, 174 A. 67, 118 Conn. 651.

78. Ariz.—Copper State Mining Co. v. Kidder, 179 P. 641, 642, 20 Ariz. 224, quoting **Corpus Juris.**

22 C.J. p 70 note 56.

Plaintiff is not compelled to prove more than is necessary to entitle him to the prayed relief, and it is immaterial that he assumes a burden of proof greater than required.—Fransham v. Tow Bros., 196 N.W. 71, 196 Iowa 1082.

79. U.S.—Ætna Ins. Co. of Hartford, Conn., v. Taylor, C.C.A.Ga., 86 F.2d 225.

Ga.—Ætna Ins. Co. v. Trimmier, 157 S.E. 340, 42 Ga.App. 745.

Mo.—Malone v. St. Louis-San Francisco R. Co., 213 S.W. 864, 202 Mo. App. 489.

Pa.—Pfordt v. Educators Beneficial Ass'n, 14 A.2d 170, 140 Pa.Super. 170.

22 C.J. p 70 note 57.

Falsity of opponent's testimony does not prove what is true, and disbelief does not supply need of proof.—Clairmont v. Culley, 153 A. 465, 85 N.H. 1.

False denial

Ordinarily, party must produce affirmative proof regardless of whether denial of adverse party is untrue.—Pariso v. Towse, C.C.A.N.Y., 45 F. 2d 962.

80. Pa.—Quirk v. Metropolitan L. Ins. Co., 12 Pa.Super. 250.

22 C.J. p 70 note 54.

81. N.Y.—Farmers' L. & T. Co. v. Siefke, 39 N.E. 358, 144 N.Y. 354.

22 C.J. p 70 note 55.

all the elements of his claim or cause of action.[82] The burden is on defendant to prove matter in avoidance,[83] special[84] or affirmative[85] defenses, and other new matter urged by him as ground for

82. Ala.—Green v. Waynesboro Motor Co., 116 So. 363, 217 Ala. 348—City of Anniston v. Oliver, 185 So. 187, 28 Ala.App. 390—Metropolitan Life Ins. Co. v. Brown, 177 So. 178, 27 Ala.App. 602.
Cal.—Indemnity Ins. Co. of North America v. Watson, 16 P.2d 760, 128 Cal.App. 10—Holt v. Yellow Cab Co. of San Diego, 12 P.2d 472, 124 Cal.App. 385—Stonaker v. Big Sisters Hospital, 2 P.2d 520, 116 Cal.App. 375.
Fla.—Ness v. Cowdery, 149 So. 33, 110 Fla. 427—Ambrecht Lumber Co. v. Adair, 108 So. 222, 91 Fla. 460.
Ga.—Grimsley v. Morgan, 172 S.E. 49, 178 Ga. 40—Kimsey v. Rogers, 142 S.E. 667, 166 Ga. 176—Windham v. Taylor, 156 S.E. 744, 42 Ga.App. 521—Central of Georgia Ry. Co. v. Barnett, 134 S.E. 126, 35 Ga.App. 528—Standard Paint & Lead Works v. Powell, 109 S.E. 513, 27 Ga.App. 691.
Idaho.—Grisinger v. Hubbard, 122 P. 853, 21 Idaho 469, Ann.Cas.1913E 87.
Ind.—Deep Vein Coal Co. v. Dowdle, 33 N.E.2d 981—Peoples State Bank v. Caterpillar Tractor Co., 12 N.E. 2d 123, 213 Ind. 235—Nicholich v. Shasovich, 125 N.E. 803, 72 Ind. App. 294.
Iowa.—Fitz v. Forbes, 226 N.W. 117, 208 Iowa 970.
Ky.—Agnew v. L. W. Henneberger Co., 63 S.W.2d 592, 250 Ky. 482—Elkhorn Land & Improvement Co. v. Wallace, 24 S.W.2d 560, 232 Ky. 741—James Grocery Co. v. Walter O. Birk Candy Co., 14 S.W.2d 214, 228 Ky. 11—Standard Auto Ins. Ass'n v. Wade, 266 S.W. 646, 205 Ky. 788.
La.—Van Os v. Gray, 127 So. 75, 12 La.App. 698—Citizens' Hardware & Furniture Co. v. Chicago, R. I. & P. Ry. Co., 125 So. 299, 12 La.App. 132—Bank of Winnfield v. Citizens Bank of Campti, 5 La.App. 152—Gamberg v. Steinberg & Co., 3 La. App. 419—Stott v. Talbert, 2 La. App. 472.
Md.—Crowther v. Hirschmann, 197 A. 868, 174 Md. 100.
Mass.—Pappathanos v. Coakley, 161 N.E. 804, 263 Mass. 401.
Mich.—Albers v. Pommerening, 278 N.W. 108, 283 Mich. 389—Christiansen v. Hilber, 276 N.W. 495—Caruso v. Weber, 241 N.W. 198, 257 Mich. 333.
Miss.—Town of Ackerman v. Choctaw County, 128 So. 757, 157 Miss. 594.
Mo.—Connole v. East St. Louis & S. Ry. Co., 102 S.W.2d 581, 340 Mo. 690—Cluck v. Abe, 40 S.W.2d 558, 328 Mo. 81—White v. Prudential Ins. Co. of America, App., 127 S.W.2d 98—Robards v. Kansas City Public Service Co., 125 S.W.2d 891, 233 Mo.App. 962—Shade v. Brinkopf, App., 119 S.W.2d 444—Turner v. National Benev. Soc., 28 S.W. 2d 125, 224 Mo.App. 463—Evans v. Williams, 4 S.W.2d 867, 222 Mo. App. 705.
Mont.—Tucker v. Missoula Light & Water Co., 250 P. 11, 77 Mont. 91.
N.J.—Kresse v. Metropolitan Life Ins. Co., 168 A. 634, 111 N.J.Law 474.
N.Y.—St. Andrassy v. Mooney, 186 N.E. 867, 262 N.Y. 368, reversing 261 N.Y.S. 935, 237 App.Div. 859, reargument denied 262 N.Y.S. 907, 238 App.Div. 793.
N.C.—Bank of French Broad v. Catawba Const. Co., 164 S.E. 621, 203 N.C. 100.
Ohio.—Liberty Highway Co. v. Callahan, 157 N.E. 708, 24 Ohio App. 374.
Okl.—Gourley v. Northwestern Nat. Life Ins. Co., 220 P. 645, 94 Okl. 46—Davis v. Kelley, 219 P. 923, 96 Okl 17.
Or.—Judson v. Bee Hive Auto Service Co., 297 P. 1050, 136 Or. 1, 74 A.L.R. 944, reversing 294 P. 588, 136 Or. 1, 74 A.L.R. 944—Carroll v. Royal Mail Steam Packet Co., 279 P. 861, 130 Or. 294.
Pa.—Bokin v. Rusackas, 32 Luz.Leg. Reg. 321.
S.C.—Baugh & Sons Co. v. Graham, 148 S.E. 220, 150 S.C. 398—Oates v. Fountain, 101 S.E. 830, 113 S.C. 372.
S.D.—Farmers' State Bank of Turton v. Van Houten, 219 N.W. 206, 52 S.D. 528.
Tex.—Greene v. Smith, Civ.App., 148 S.W.2d 909—Miller v. Fallwell, Civ.App., 42 S.W.2d 644—Stinnett v. Paramount-Famous Lasky Corporation of New York, Com.App., 37 S.W.2d 145, affirming Paramount-Famous Lasky Corporation of New York v. Stinnett, Civ.App., 17 S.W.2d 125—Boaz v. Harris, Civ.App., 30 S.W.2d 810—Otjen v. Mitchell, Civ.App., 27 S.W.2d 835—Williams Sign Co. v. Rodgers, Civ.App., 24 S.W.2d 478—Cameron Compress Co. v. Kubecka, Civ. App., 283 S.W. 285—Rooney v. Porch, Civ.App., 223 S.W. 245, reversed on other grounds, Com. App., 239 S.W. 910.
Va.—Ward v. Clark, 177 S.E. 212, 163 Va. 770—Virginia Electric & Power Co. v. Lenz, 164 S.E. 572, 158 Va. 732—Boggs v. Plybon, 160 S.E. 77, 157 Va. 30—Saunders v. Temple, 153 S.E. 691, 154 Va. 714—Harriss, Magill & Co. v. John H. Rodgers & Co., 129 S.E. 513, 143 Va. 815.
W.Va.—Legg v. Junior Mercantile Co., 142 S.E. 259, 105 W.Va. 287.
22 C.J. p 72 note 69, p 73 notes 70–71, p 74 note 82, p 75 note 86—19 C.J. p 1151 note 3.

That some of plaintiff's evidence was undisputed did not relieve him of the burden of proving all the things he was required to show.—Thompson v. Burnsmeyer, Iowa, 171 N.W. 584.

Admission of material facts

When all the material facts alleged in the complaint are admitted, the burden of proof is on defendant.—James Conforti Const. Co. v. Neek Realty Corporation, 212 N.Y.S. 393, 125 Misc. 876.

Common and civil law distinguished

Common law is distinguished from civil law in that person who would seek to recover damages from another has burden of proof and duty to satisfy court by fair preponderance of evidence as to truth of those facts which he must prove in order to recover.—Royce v. Rosasco, 287 N.Y.S. 692, 159 Misc. 236.

83. Fla.—Roux v. Indian Lumber Co., 161 So. 270, 119 Fla. 280.
Ga.—Windham v. Taylor, 156 S.E. 744, 42 Ga.App. 521.
Minn.—Anderson v. M. Burg & Sons, 212 N.W. 9, 170 Minn. 53.
Miss.—Harris v. Sims, 124 So. 325, 155 Miss. 207.
Mo.—Evans v. Williams, 4 S.W.2d 867, 222 Mo.App. 705.
22 C.J. p 74 note 74, p 75 note 83.

84. Ala.—Willingham v. Wesley Hardware Co., 149 So. 703, 227 Ala. 280.
La.—Clarke Garage Co. v. Rosenberg, 128 So. 62, 13 La.App. 374.
Or.—Booth-Kelly Lumber Co. v. Williams, 188 P. 213, 95 Or. 476.
Tex.—Cameron Compress Co. v. Kubecka, Civ.App., 283 S.W. 285—Peck & Hickernell v. Noble Oil & Development Co., Civ.App., 267 S. W. 1018.
22 C.J. p 73 note 73.

Burden limited to special defense

The statute providing for a rule on defendant to plead specially does not cast the burden of proof generally on defendant, and filing of special plea does not change the burden of proof nor justify plaintiff in holding back proof in chief until after defendant has offered proof on special plea.—Hansard v. Ferguson, 132 S.W.2d 221, 23 Tenn.App. 306.

85. U.S.—Ocean Accident & Guaranty Corporation v. Rubin, C.C.A. Cal., 73 F.2d 157, 96 A.L.R. 412—Rinehart & Dennis Co. v. Childress & Taylor, Va., 257 F. 37, 168 C.C. A. 249.
Cal.—Weir v. New York Life Ins.

denying the plaintiff relief.[86] However, defendant, by specially pleading matter which he could prove under a denial of the plaintiff's allegations, does not assume the burden of proof as to such matters.[87] Plaintiff has the burden of proof as to new matter set up by way of reply[88] or replication.[89]

Where defendant asserts a cross complaint,[90] cross bill,[91] cross action,[92] counterclaim,[93] recoup-

Co., 36 P.2d 847, 1 Cal.App.2d 516—Bennett v. Northwestern Nat. Ins. Co., 257 P. 586, 84 Cal.App. 130.

Conn.—De Santo v. Burkle, 138 A. 788, 106 Conn. 677.

Fla.—Heitman v. Davis, 172 So. 705, 127 Fla. 1—Bourne v. State Bank of Orlando & Trust Co., 142 So. 810, 106 Fla. 46.

Ga.—Hanover Fire Ins. Co. v. Pruitt, 2 S.E.2d 123, 59 Ga.App. 777—Williamson-Inman & Co. v. Thompson, 187 S.E. 194, 53 Ga.App. 821.

Ind.—Nicholich v. Shasovich, 125 N.E. 803, 72 Ind.App. 294.

Iowa.—Ballard v. Ballard, 285 N.W. 165, 226 Iowa 699—Griffin v. Stuart, 270 N.W. 442, 222 Iowa 815.

Ky.—Cobb v. Farmers & Merchants Bank, 103 S.W.2d 264, 267 Ky. 744—Ledford v. Hubbard, 292 S.W. 345, 219 Ky. 9—Chaplin & Bloomfield Turnp. Road Co. v. Nelson County, 77 S.W. 377, 378, 25 Ky.L. 1154.

Md.—Crowther v. Hirschmann, 197 A. 868, 174 Md. 100.

Mass.—Hughes v. Williams, 118 N.E. 914, 229 Mass. 467.

Mo.—Rucker v. Alton R. Co., 123 S.W.2d 24, 343 Mo. 929—Kurfiss v. Cowherd, 121 S.W.2d 282, 233 Mo.App. 397—Bennett v. National Union Fire Ins. Co., 80 S.W.2d 914, 230 Mo.App. 939—Turner v. National Benev. Soc., 28 S.W.2d 125, 224 Mo.App. 463—Hall v. American Ins. Union, App., 27 S.W.2d 1076—Scott v. Scott, App., 265 S.W. 864.

N.J.—Desmidt v. Desmidt, 20 A.2d 424, 130 N.J.Eq. 23.

N.Y.—In re Smathers' Will, 274 N.Y.S. 109, 152 Misc. 774.

N.C.—Jones v. Waldroup, 7 S.E.2d 366, 217 N.C. 178.

Okl.—Gaines Bros. Co. v. Gaines, 56 P.2d 869, 176 Okl. 576—Tradesmen's Nat. Bank of Oklahoma City v. Harris, 291 P. 38, 145 Okl. 54—Tancred v. Holuby, 254 P. 75, 124 Okl. 97—Equitable Surety Co. v. Sapp, 187 P. 917, 77 Okl. 221.

Pa.—Baldwin v. Devereux Schools, 154 A. 21, 302 Pa. 569—Doud v. Hines, 112 A. 528, 269 Pa. 182—Lit Bros., to Use of Kaplan, v. Goodman, 18 A.2d 519, 144 Pa.Super. 43.

S.C.—McCabe v. Sloan, 191 S.E. 905, 184 S.C. 158—Lorick & Lowrance v. Julius H. Walker & Co., 150 S.E. 789, 153 S.C. 309.

Tex.—Seinsheimer v. Burkhart, 122 S.W.2d 1063, 132 Tex. 336, modifying, Civ.App., 93 S.W.2d 1231—American Nat. Ins. Co. v. Points, Civ.App., 131 S.W.2d 983, error dismissed, judgment correct—Willis v. Smith, Civ.App., 120 S.W.2d 899, error dismissed—Johnson v. Magnolia Petroleum Co., Civ.App., 75 S.W.2d 283—W. L. Macatee & Sons v. Chambers, Civ.App., 69 S.W.2d 486, affirmed Indemnity Ins. Co. of North America v. W. L. Macatee & Sons, 101 S.W.2d 553, 129 Tex. 166—Miller v. Fallwell, Civ.App., 42 S.W.2d 644—Boaz v. Harris, Civ.App., 30 S.W.2d 810—Davies v. Rutland, Civ.App., 219 S.W. 235, motion denied 219 S.W. 1114—McDonald v. Stafford, Civ.App., 213 S.W. 732.

Utah.—Miller v. Southern Pac. Co., 21 P.2d 865, 82 Utah 46, certiorari denied Southern Pac. Co. v. Miller, 54 S.Ct. 207, 290 U.S. 697, 78 L.Ed. 600.

Vt.—Francis v. London Guarantee & Accident Co., 138 A. 780, 100 Vt. 425.

Va.—Harriss, Magill & Co. v. John H. Rodgers & Co., 129 S.E. 513, 143 Va. 815.

22 C.J. p 69 note 44 [b], p 73 note 72, p 75 note 83.

Defense to whole case or issues

Defendant has the burden of establishing all affirmative defenses, whether they relate to the whole case or only to certain issues in the case.

N.C.—Williams v. Philadelphia Life Ins. Co., 193 S.E. 728, 212 N.C. 516.

Wyo.—First Nat. Bank v. Ford, 216 P. 691, 30 Wyo. 110, 31 A.L.R. 1441.

Matters held to be affirmative defenses within this rule:

(1) Fraud.—Greene v. Spitzer, 123 S.W.2d 57, 343 Mo. 751.

(2) Laches.

Cal.—Brown v. Oxtoby, App., 114 P.2d 622—Smallpage v. Turlock Irr. Dist., 79 P.2d 752, 26 Cal.App.2d 538.

N.Y.—Tiffany & Co. v. Tiffany Productions, 264 N.Y.S. 459, 147 Misc. 679, affirmed 260 N.Y.S. 821, 237 App.Div. 801, affirmed 188 N.E. 30, 262 N.Y. 482.

Wyo.—Harney v. Montgomery, 213 P. 378, 29 Wyo. 362.

(3) Settlement or ratification.—Omaha Alfalfa Milling Co. v. Hallen, 179 N.W. 1010, 105 Neb. 193.

(4) Other matters see 22 C.J. p 73 note 72 [a].

86. Cal.—Rancho Santa Margarita v. Vail, 81 P.2d 533, 11 Cal.2d 501.
Hawaii.—Henry Waterhouse Trust Co. v. Freitas, 33 Hawaii 139.
La.—Guillory v. Meyers, App., 149 So. 260—Schwartz Bros. v. Shaheen, 8 La.App. 68.
Ohio.—McDonald & Frazier v. Schervish, 26 Ohio Cir.Ct.,N.S., 394.
Pa.—Lit Bros. to Use of Kaplan, v. Goodman, 18 A.2d 519, 144 Pa.Super. 43—Petro v. Birtley, 32 Luz.Leg.Reg. 461, 464.
22 C.J. p 69 note 44 [c].

87. Ga.—Williamson-Inman & Co. v. Thompson, 187 S.E. 194, 53 Ga.App. 821.
Okl.—Streeter v. State, 7 P.2d 636, 154 Okl. 160.
Pa.—Bartow v. Bartow, 28 Del.Co. 233.
R.I.—Mt. Ida School for Girls v. Kerr, 154 A. 565.
Wash.—Steward v. C. M. Kopp Co., 234 P. 1053, 134 Wash. 150—Schmitz v. Mathews, 233 P. 660, 133 Wash. 335.

88. Ariz.—Mutual Ben. Health & Accident Ass'n v. Ferrell, 27 P.2d 519, 42 Ariz. 477.
22 C.J. p 69 note 44 [d].

If petitioner adopts position of avoidance after an answer has been interposed, which unanswered and established would destroy the cause of action alleged, he, in effect, pleads new matter in attempted destruction of the admittedly prima facie valid defense and in respect thereof must bear the burden of proof.—In re Blank's Estate, 11 N.Y.S.2d 1002, 171 Misc. 93.

89. Fla.—Bourne v. State Bank of Orlando & Trust Co., 142 So. 810, 106 Fla. 46.

90. Cal.—Axis Petroleum Co. v. Taylor, App., 108 P.2d 978
Colo.—Rubey v. Clammer, 194 P. 360, 69 Colo. 329.
Ind.—Scott v. Dilley, 101 N.E. 313, 53 Ind.App. 100.

91. Ill.—Marvin v. Kelsey, 27 N.E.2d 469, 373 Ill. 589, 128 A.L.R. 1295.
Neb.—Fitzsimmons v. Gilmore, 278 N.W. 262, 264, 134 Neb. 200, quoting **Corpus Juris.**
Utah.—Herriman Irr. Co. v. Butterfield Min. Co., 57 P. 537, 19 Utah 453, 51 L.R.A. 930.

92. Tenn.—Greene v. Smith, Civ.App., 148 S.W.2d 909—Davis v. Border Mortg. Co., Civ.App., 281 S.W. 642.

93. U.S.—Allis-Chalmers Mfg. Co. v. U. S., 79 Ct.Cl. 453.
Ariz.—Durazo v. Ayers, 188 P. 868, 21 Ariz. 373.
Conn.—De Santo v. Burkle, 138 A. 788, 106 Conn. 677.

ment,[94] set-off,[95] or reconventional demand,[96] the burden is on him to establish every element of the claim. Plaintiff has the burden of proof as to an affirmative defense to such a claim.[97]

In cases of intervention by one who asserts a right of claim adverse to both parties to an action, the burden of proof rests on the intervener to establish his claim,[98] but the burden resting on the party to the main action who has the affirmative of the issue to establish his contention as against the other party is not affected.[99]

§ 105. Negative Allegations

The burden of proof as to a negative proposition rests on the party asserting it, except, under some authorities, where the facts are peculiarly within the adverse party's knowledge.

Whenever the establishment of an affirmative case requires proof of a material negative allegation, such as that the case does not come within an exception provided for, the party who makes such allegation has the burden of proving it,[1] except, according to some authorities, where the facts are peculiarly within the adverse party's knowledge;[2]

Ill.—Edward Edinger Co. v. Willis, 260 Ill.App. 106.
Iowa.—Fritz v. Whitlock, 196 N.W. 943.
Ky.—Darnell v. Johnston, 272 S.W. 381, 209 Ky. 95.
Mo.—Herr v. Graef, App., 267 S.W. 30—Anger v. McCorkle, App., 253 S.W. 72.
Neb.—Citizens Nat. Bank of Muskogee v. Rawley, 267 N.W. 151, 131 Neb. 10.
N.Y.—American Oil Co. v. Coughlin, 24 N.Y.S.2d 731, 261 App.Div. 852—James K. Thomson Co. v. International Compositions Co., 181 N.Y.S. 637, 191 App.Div. 553.
N.C.—Barber v. Edwards, 12 S.E.2d 234, 218 N.C. 731—Lummus Cotton Gin Co. v. Wise, 157 S.E. 20, 200 N.C. 409.
Or.—Powder Valley State Bank v. Hudelson, 144 P. 494, 74 Or. 191.
Pa.—Chandler v. Lafferty, 128 A. 507, 282 Pa. 550.
S.C.—Sunshine v. Furtick, 102 S.E. 784, 114 S.C. 32.
Tex.—Greene v. Smith, Civ.App., 148 S.W.2d 909.
22 C.J. p 75 note 99.

94. Del.—E. F. Houghton & Co. v. Alpha Process Co., 93 A. 669, 5 Boyce 383—Beaver Dam Marble Co. v. William H. Jones & Co., 92 A. 1012, 5 Boyce 272.
Fla.—Jacksonville Paper Co. v. Smith & Winchester Mfg. Co., 2 So.2d 890—Ness v. Cowdery, 149 So. 33, 110 Fla. 427.
Ill.—Edward Edinger Co. v. Willis, 260 Ill.App. 106.
Me.—Petersen Oven Co. v. Fickett, 117 A. 575, 121 Me. 413.
Mass.—Zani v. Garrison Hall, 14 N.E.2d 118, 300 Mass. 128—Betts v. Rendle, 128 N.E. 790, 236 Mass. 441.
22 C.J. p 75 note 97.

95. Fla.—Jacksonville Paper Co. v. Smith & Winchester Mfg. Co., 2 So.2d 890—Ness v. Coudery, 149 So. 33, 110 Fla. 427.
Ill.—Anglo-California Trust Co. v. Essanay Film Mfg. Co., 155 N.E. 26, 324 Ill. 249—Schroeder v. Goldsmith, 260 Ill.App. 318—Edward Edinger Co. v. Willis, 260 Ill.App. 106—Albrecht v. Dillon, 224 Ill. App. 421—Steinberg v. Schwartz, 219 Ill.App. 138—Roberts v. Cat-Nak Mfg. Co., 216 Ill.App. 245—Carrier-Low Co. v. Keys, 162 Ill. App. 311. See Carterville Mining Co. v. Eldridge, 199 Ill.App. 534.
Ind.—Feucht v. Real Silk Hosiery Mills, 12 N.E.2d 1019, 105 Ind.App. 405.
Ky.—Lyric Piano Co. v. Purvis, 241 S.W. 69, 194 Ky. 826.
Mo.—Hunterbrinker v. Tappmeyer, App., 223 S.W. 692.
Neb.—Citizens Nat. Bank of Muskogee v. Rawley, 267 N.W. 151, 131 Neb. 10.
N.Y.—American Oil Co. v. Coughlin, 24 N.Y.S.2d 731, 261 App.Div. 852.
N.C.—Barber v. Edwards, 12 S.E.2d 234, 218 N.C. 731.
Okl.—Pine v. Bradley, 101 P.2d 799, 187 Okl. 126.
Pa.—Caven-Williamson Ammonia Co. v. Ice Mfg. Co., 27 Pa.Super. 381.
22 C.J. p 75 note 99.

96. La.—Culbertson v. Cousin, 119 So. 548, 9 La.App. 198, affirmed 119 So. 535, 167 La. 520—Stringfellow v. Nowlin Bros., 102 So. 869, 157 La. 683—Harper v. Noble, 123 So. 171, 11 La.App. 159.
22 C.J. p 75 note 98.

97. Pa.—McKnight v. Newell, 57 A. 39, 207 Pa. 562.
22 C.J. p 76 note 1.

98. La.—Campbell v. J. I. Campbell Co., 41 So. 696, 117 La. 402, 41 So. 702, 117 La. 418.
22 C.J. p 76 note 4.

99. Ga.—Eastmore v. Bunkley, 39 S.E. 105, 113 Ga. 637.

1. U.S.—U. S. v. Grogg, D.C.Va., 9 F.2d 424.
Ala.—New York Life Ins. Co. v. Beason, 155 So. 530, 229 Ala. 140—Protective Life Ins. Co. v. Swink, 132 So. 728, 729, 222 Ala. 496, citing **Corpus Juris**—City of Mobile v. McClure, 127 So. 832, 221 Ala. 51—Somerall v. Citizens' Bank, 101 So. 429, 211 Ala. 630—Buckner v. Graves, 98 So. 22, 210 Ala. 294.
Ariz.—Harvey v. Aubrey, 87 P.2d 482, 53 Ariz. 210.
Ark.—Rodgers v. Snow, 84 S.W.2d 611, 613, 191 Ark. 266, citing **Corpus Juris**—Austin v. Dermott Canning Co., 34 S.W.2d 773, 182 Ark. 1128.
Cal.—Jolley v. Clemens, 82 P.2d 51, 61, 28 Cal.App.2d 55, quoting **Corpus Juris.**
Ga.—Brown v. Parks, 160 S.E. 238, 173 Ga. 228—Jackson v. Jackson, 199 S.E. 251, 58 Ga.App. 493—New Amsterdam Casualty Co. v. Seals, 190 S.E. 870, 55 Ga.App. 569.
Ky.—Porter v. Moore, 252 S.W. 97, 200 Ky. 95.
La.—Laborde v. Louisiana R. & Nav. Co., 2 La.App. 331.
N.J.—Collins Realty Co. v. Sale, 144 A. 585, 104 N.J.Eq. 138.
N.C.—Hood ex rel. Pinetops Banking Co. v. Cobb, 176 S.E. 288, 289, 207 N.C. 128, quoting **Corpus Juris.**
Ohio.—Radebaugh v. Citizens Trust & Savings Bank, 26 Ohio N.P., N.S., 347.
Tex.—Rosenthal Dry Goods Co. v. Hillebrandt, Com.App., 7 S.W.2d 521, 523, quoting **Corpus Juris,** and reversing, Civ.App., 299 S.W. 665—Willow Hole Independent School Dist. v. Smith, Civ.App., 123 S.W. 2d 708, error refused—Clements v. Texas Co., Civ.App., 273 S.W. 993.
22 C.J. p 70 note 59.

Establishing affirmative opposite

Where the most appropriate mode of proof is by establishing the affirmative opposite of the allegation, the text rule is especially applicable.
U.S.—New York Life Ins. Co. v. Stoner, C.C.A.Mo., 109 F.2d 874, 876, quoting **Corpus Juris,** and certiorari granted Stoner v. New York Life Ins. Co., 61 S.Ct. 8, reversed on other grounds 61 S.Ct. 336, 311 U.S. 464, 85 L.Ed. 284, rehearing denied 61 S.Ct. 609.
Ariz.—Southwest Cotton Co. v. Ryan, 199 P. 124, 129, 22 Ariz. 520, quoting **Corpus Juris.**
22 C.J. p 71 note 60.

New matter alleged as defense

Generally defendant has burden to prove new matter alleged as defense, although new matter requires proof of negative.—Bernesen v. Fish, 28 P.2d 67, 135 Cal.App. 588.

2. U.S.—U. S. v. Grogg, D.C.Va., 9 F.2d 424, 426, citing **Corpus Juris.**
Ala.—New York Life Ins. Co. v. Beason, 155 So. 530, 229 Ala. 140—

but the asserted exception as to negative allegations peculiarly within the adverse party's knowledge is said to relate to the burden of evidence and does not affect the burden of proof properly so called.[3]

Allegations not part of case. A party is not required to prove negative allegations which are merely necessary as pleadings but constitute no part of his case.[4]

§ 106. Under Common-Law Pleading

Under common-law pleading, the burden of proof as to any issue is on the party holding the affirmative thereof; so, if defendant denies an allegation material to plaintiff's case, plaintiff has the burden of establishing it; and a defendant relying on an affirmative defense which plaintiff denies has the burden of proving every material allegation relied on by him.

Under the common-law system of pleading, the burden of proof as to any issue is on the party holding the affirmative of the issue to establish the substance of his contention by the required preponderance of evidence;[5] but not necessarily to explain or disprove the allegations of his opponent.[6] It follows that, where a defendant denies an allegation material to plaintiff's case, the burden is on plaintiff to establish its truth,[7] whether the action is in contract[8] or in tort.[9] Should defendant not traverse, generally or specifically, the allegations of plaintiff's case, but rely on an affirmative defense,[10] as in abatement,[11] or confession and avoidance,[12] which plaintiff denies, the burden of proof is on defendant to prove every material allegation relied on by him, although the replication itself is argumentative,[13] or the declaration negatives the defense by anticipation.[14] Where a replication does not traverse or deny defendant's affirmative defense, but confesses and seeks to avoid it by setting up new facts which are themselves denied, the burden of proof is on plaintiff.[15] If a rejoinder is not a traverse, but a plea in confession and avoidance, the burden is on defendant to prove such new matter, and it is not incumbent on plaintiff to produce evidence in support of his replication.[16] If plaintiff does not take issue with a rejoinder, but pleads specially by rebutter, plaintiff has the burden of proving the rebutter, while defendant is relieved of proving the rejoinder.[17]

§ 107. Under Equity Pleading

In equity, the party having the affirmative of an issue has the burden of proof as to such issue.

In equity, as at law, the party who has the affirmative of an issue has the burden of proof as to such issue,[18] and a plaintiff in equity has the burden of proving all allegations of his bill not admitted

Protective Life Ins. Co. v. Swink, 132 So. 728, 222 Ala. 496—City of Mobile v. McClure, 127 So. 832, 221 Ala. 51—Somerall v. Citizens' Bank, 101 So. 429, 211 Ala. 630.
Ariz.—Southwest Cotton Co. v. Ryan, 199 P. 124, 129, 22 Ariz. 520, quoting **Corpus Juris.**
Ky.—Porter v. Moore, 252 S.W. 97, 200 Ky. 95.
Contra Vinton Oil & Sulphur Co. v. Gray, 66 So. 357, 135 La. 1049.
22 C.J. p 71 note 63.

3. Ala.—City of Mobile v. McClure, 127 So. 832, 221 Ala. 51.
N.H.—Caswell v. Maplewood Garage, 149 A. 746, 84 N.H. 241, 73 A.L.R. 433.
Peculiar knowledge or control of evidence as affecting burden of evidence see § 113.

4. Cal.—Dickey v. Kuhn, 289 P. 242, 245, 106 Cal.App. 300, citing **Corpus Juris.**
22 C.J. p 71 note 64.

5. Ga.—New South Rubber Co. v. Muse, 109 S.E. 296, 27 Ga.App. 549.
22 C.J. p 71 note 66, p 72 note 67.

6. N.H.—Smith v. Hooper, 192 A. 496, 89 N.H. 36.
22 C.J. p 72 note 68.

7. Fla.—Guaranty Life Ins. Co. of Florida v. Hall Bros. Press, 189 So. 243, 138 Fla. 176.
Ind.—City of Indianapolis v. Evans, 24 N.E.2d 776.
Ky.—Coffman v. Saat, 271 S.W. 668, 208 Ky. 591.
Mo.—Mason v. Geist, App., 263 S.W. 236.
Tex.—Hatt v. Walker, Civ.App., 33 S.W.2d 489, error dismissed—Bracewell v. Balentine, Civ.App., 25 S.W.2d 279, error dismissed.
Wyo.—First Nat. Bank v. Ford, 216 P. 691, 30 Wyo. 110, 31 A.L.R. 1441.
22 C.J. p 72 note 69.

Plea of non est factum places burden on other party to prove signing of paper.
Ky.—Taylor's Adm'r v. Scott, 291 S.W. 393, 218 Ky. 302.
Tex.—Michaelson v. Green, Civ.App., 85 S.W.2d 1116, error dismissed—Ward v. Weaver, Civ.App., 19 S.W.2d 140, affirmed, Com.App., 34 S.W.2d 1093.

8. Ga.—New South Rubber Co. v. Muse, 109 S.E. 296, 27 Ga.App. 549.
22 C.J. p 73 note 70.

9. Ky.—Rose v. Gatliff Coal Co., 99 S.W.2d 214, 266 Ky. 416.
22 C.J. p 73 note 71.

10. Ga.—Jones v. Knightstown Body Co., 184 S.E. 427, 52 Ga.App. 667.
W.Va.—McDonald v. Stewart, 158 S.E. 177, 179, 110 W.Va. 280, quoting **Corpus Juris.**
22 C.J. p 73 note 72, p 74 note 75.

11. Tex.—Peck & Hickernell v. Noble Oil & Development Co., Civ.App., 267 S.W. 1018.
22 C.J. p 73 note 73, p 74 note 75.

12. Ga.—Little v. Dolvin, 103 S.E. 35, 25 Ga.App. 264.
Tex.—American Nat. Bank of Wichita Falls v. Haggerton, Civ.App., 250 S.W. 279.
19 C.J. p 1151 note 7—22 C.J. p 74 notes 74, 75.

13. Miss.—Fox v. Hilliard, 35 Miss. 160.

14. Neb.—Henry v. Ward, 68 N.W. 518, 49 Neb. 392.
Tex.—Hill v. Allison, 51 Tex. 390.

15. Fla.—Bourne v. State Bank of Orlando & Trust Co., 142 So. 810, 106 Fla. 46.
22 C.J. p 74 note 78.

16. Ill.—Millar v. Sollitt, 131 Ill. App. 196.

17. Ala.—Sovereign Camp, W. O. W., v. Harris, 153 So. 870, 228 Ala. 417.

18. Ark.—White v. Williams, 89 S.W.2d 927, 192 Ark. 41.
N.Y.—Hurwitz v. Dukas, 186 N.Y.S. 276, 195 App.Div. 416.
22 C.J. p 74 note 81.
Matters to be proved in equity see Equity §§ 439–443.

by the answer.[19] Where defendant pleads an affirmative defense or sets up in his answer facts in avoidance, the burden of proof is on him.[20]

§ 108. Under Statutory Pleading

Under code practice the burden of proof as to any issue is on the party having the affirmative thereof; plaintiff has the burden of establishing allegations in the statement of his claim which are not admitted.

Under code practice, the burden of proof as to any issue is on the party having the affirmative of the issue.[21] The burden of proof is on plaintiff to establish allegations in the statement of his claim which are not admitted,[22] even though defendant's denial is argumentative,[23] or is accompanied by a plea qualifying the denial, but not admitting the truth of the allegation.[24] Defendant may, instead of making a distinct affirmative plea, state in his answer a sufficient number of express admissions to establish plaintiff's prima facie case and so transfer the burden of proof to himself,[25] and he has the burden of proving new matter set up in his answer,[26] even where no reply is allowed;[27] but the burden on plaintiff of proving alleged facts essential to his cause of action, cast on him by a general denial, is not removed by an allegation of those facts on information and belief in a verified plea setting up an affirmative defense.[28]

§ 109. In Special Judicial Proceedings

In special judicial proceedings, the burden of proof is on the party seeking affirmative relief.

In special judicial proceedings, the rule is that he who seeks affirmative relief has the burden of convincing the court that action should be taken in his favor.[29]

§ 110. Burden of Evidence

The burden of evidence at any particular time rests on the party who would be defeated if no further evidence were introduced; when a prima facie case is established, the burden of evidence is shifted to the adverse party, and the burden may shift from side to side during the course of the trial.

The burden of evidence, defined in § 103 supra, sometimes termed the burden of producing, or going forward with, the evidence,[30] or the burden of procedure,[31] shifts, or may shift, from side to side during the progress of the trial.[32] Its position at any particular time is controlled by the logical ne-

19. Fla.—Dees v. American Agr. Chemical Co., 96 So. 289, 86 Fla. 28.
22 C.J. p 74 note 82.

20. Neb.—Fitzsimmons v. Gilmore, 278 N.W. 262, 264, 134 Neb. 200, quoting **Corpus Juris.**
22 C.J. p 75 note 83.

21. Ala.—Carver v. Eads, 65 Ala. 190.
Kan.—Woodson Mach. Co. v. Morse, 28 P. 152, 47 Kan. 429.

22. Ind.—Fay v. Burditt, 81 Ind. 433, 42 Am.R. 142.
22 C.J. p 75 note 86.

23. Iowa.—Homire v. Rodgers, 37 N.W. 572, 74 Iowa 395.
22 C.J. p 75 notes 88, 89.

24. Ky.—Breeding v. Stoneman, 6 J. J.Marsh. 376.
N.Y.—Balmford v. Grand Lodge A. O. U. W., 42 N.Y.S. 881, 19 Misc. 1.

25. Ga.—Hunter v. Sanders, 38 S.E. 406, 113 Ga. 140.
22 C.J. p 75 note 91.

26. Ind.T.—Gatlin v. Vaut, 91 S.W. 38, 6 Ind.T. 254.

27. Ind.T.—Gatlin v. Vaut, supra.

28. N.Y.—Balmford v. Grand Lodge A. O. U. W., 42 N.Y.S. 881, 19 Misc. 1.

29. N.Y.—People v. Second Dist. Public Serv. Commn., 145 N.Y.S. 513, 159 App.Div. 546, affirmed 109 N.E. 252, 215 N.Y. 241.
22 C.J. p 76 note 3.

30. Mont.—Gibbons v. Huntsinger, 74 P.2d 443, 105 Mont. 562.
N.H.—Spilene v. Salmon Falls Mfg. Co., 108 A. 808, 79 N.H. 326.
N.C.—Williams v. Philadelphia Life Ins. Co., 193 S.E. 728, 212 N.C. 516.
Pa.—Wright v. Straessley, 182 A. 682, 328 Pa. 1—Pfordt v. Educators Beneficial Ass'n, 14 A.2d 170, 140 Pa.Super. 170—Guise v. New York Life Ins. Co., 191 A. 626, 127 Pa.Super. 127.
Tenn.—Shockley v. Morristown Produce & Ice Co., 11 S.W.2d 900, 158 Tenn. 148.
Vt.—Town of Manchester v. Town of Townshend, 2 A.2d 207, 110 Vt. 136.
Va.—Redford v. Booker, 185 S.E. 879, 166 Va. 561.

31. Ariz.—Harvey v. Aubrey, 87 P. 2d 482, 53 Ariz. 210—Miller v. Stringfield, 45 P.2d 666, 45 Ariz. 458.
Mich.—Douglas Shoe Co. v. Pere Marquette Ry. Co., 217 N.W. 12, 241 Mich. 297.
Mo.—Mason v. Geist, App., 263 S. W. 236.

32. U.S.—Sheinman v. Chalmers, C.C.A.Pa., 33 F.2d 902, affirming, D. C., In re Sheinman, 33 F.2d 901—Guinan v. Boston Cape Cod & New York Canal Co., C.C.A.N.Y., 1 F. 2d 239—In re Locust Bldg. Co., C.C.A.N.Y., 299 F. 756, certiorari denied Keighley v. American Trust Co., 44 S.Ct. 635, 265 U.S. 590, 68 L.Ed. 1195—Kohlsaat v. Parkersburg & Marietta Sand Co., C.C.A. W.Va., 266 F. 283, 11 A.L.R. 686.
Ala.—Lawson v. Mobile Electric Co., 85 So. 257, 204 Ala. 318.
Ariz.—Harvey v. Aubrey, 87 P.2d 482, 53 Ariz. 210—Miller v. Stringfield, 45 P.2d 666, 45 Ariz. 458.
Ill.—Sellers v. Kincaid, 135 N.E. 429, 303 Ill. 216.
Ky.—Galloway Motor Co. v. Huffman's Adm'r, 137 S.W.2d 379, 281 Ky. 841.
La.—Wallace v. Shreveport Rys. Co., App., 175 So. 86.
Md.—Crowther v. Hirschmann, 197 A. 868, 174 Md. 100.
Mass.—West v. State Street Exchange, 146 N.E. 37, 250 Mass. 537.
Minn.—Anderson v. M. Burg & Sons, 212 N.W. 9, 170 Minn. 53.
Mo.—Tower Grove Bank & Trust Co. v. Duing, 144 S.W.2d 69—Bond v. St. Louis-San Francisco Ry. Co., 288 S.W. 777, 315 Mo. 987—Downs v. Horton, 230 S.W. 103, 287 Mo. 414, affirming, App., 209 S.W. 595—Mason v. Geist, App., 263 S. W. 236—Menzenworth v. Metropolitan Life Ins. Co., App., 249 S. W. 113.
Mont.—Gibbons v. Huntsinger, 74 P. 2d 443, 105 Mont. 562.
N.H.—Spilene v. Salmon Falls Mfg. Co., 108 A. 808, 79 N.H. 326.
N.J.—Carroll v. Prudential Ins. Co. of America, 15 A.2d 810, 125 N.J. Law 397.
N.Y.—In re Braunfeld's Estate, 288 N.Y.S. 637, 159 Misc. 687, affirmed 293 N.Y.S. 509, 249 App.Div. 805.

cessities of making proof which a party is under at the time, the burden being always on that party against whom the decision of the tribunal would be given if no further evidence were introduced.[33] It results from this that at the beginning of every trial the burden of proof and the burden of evidence as to any particular issue are generally on the same party.[34] This burden of evidence is so continued until the party having the burden of proof establishes a prima facie case;[35] nothing less will shift the burden of evidence.[36] When such a prima facie case is established, the burden of evidence is shifted to the adverse party;[37] the adverse party may, by the production of evidence destroying the prima facie case against him, satisfy the burden and restore it to the original party.[38] This process continues until the stock of relevant facts is exhausted.[39]

In determining whether the burden has shifted, the court may consider which party has in his control the more evidence.[40]

The burden of evidence as to any particular fact rests, generally speaking, on the party to whose case the fact is material.[41]

N.C.—Williams v. Philadelphia Life Ins. Co., 193 S.E. 728, 212 N.C. 516—Speas v. Merchants' Bank & Trust Co. of Winston-Salem, 125 S.E. 398, 188 N.C. 524.
Or.—Judson v. Bee Hive Auto Service Co., 297 P. 1050, 136 Or. 1, 74 A.L.R. 944, reversing 294 P. 588, 136 Or. 1, 74 A.L.R. 944—Carroll v. Royal Mail Steam Packet Co., 279 P. 861, 130 Or. 294.
Pa.—Zenner v. Goetz, 188 A. 124, 324 Pa. 124—Wright v. Straessley, 182 A. 682, 321 Pa. 1—In re Yeager's Estate, 117 A. 67, 273 Pa. 359—Pfordt v. Educators Beneficial Ass'n, 14 A.2d 170, 140 Pa.Super. 170—Guise v. New York Life Ins. Co., 191 A. 626, 127 Pa.Super. 127.
S.D.—McKiver v. Theo. Hamm Brewing Co., 297 N.W. 445—Peck v. Peck, 212 N.W. 872, 51 S.D. 157.
Tenn.—Shockley v. Morristown Produce & Ice Co., 11 S.W.2d 900, 158 Tenn. 148—Chattanooga-Dayton Bus Line Co. v. Lynch, 6 Tenn. App. 470.
Tex.—Pierce v. Baker, Civ.App., 238 S.W. 699, 701, citing **Corpus Juris**—Producers' Oil Co. v. State, Civ. App., 213 S.W. 349.
Vt.—Town of Manchester v. Town of Townshend, 2 A.2d 207, 110 Vt. 136.
Va.—Darden v. Murphy, 11 S.E.2d 579, 176 Va. 511—Redford v. Booker 185 S.E. 879, 166 Va. 561.
Wyo.—First Nat. Bank v. Ford, 216 P. 691, 694, 30 Wyo. 110, 31 A.L.R. 1441, citing **Corpus Juris.**
19 C.J. p 1151 notes 4, 5.

Matter for court, not jury

The legal rules as to the shifting of the burden of evidence are for the court's guidance, not the jury's.
Mo.—State ex rel. Stevens v. Arnold, 30 S.W.2d 1015, 326 Mo. 32.
N.H.—Caswell v. Maplewood Garage, 149 A. 746, 84 N.H. 241, 73 A.L.R. 433.

33. Ill.—Donovan v. St. Joseph's Home, 129 N.E. 1, 295 Ill. 125.
22 C.J. p 76 notes 6, 7.

34. U.S.—Ætna Ins. Co. of Hartford, Conn., v. Taylor, C.C.A.Ga., 86 F.2d 225
Ala.—Dorough v. Alabama Great Southern R. Co., 128 So. 602, 221 Ala. 305—Atlantic Coast Line R. Co. v. J. W. Maddox & Co., 98 So. 276, 210 Ala. 444.
Minn.—Zillah Transp. Co. v. Ætna Ins. Co., 221 N.W. 529, 175 Minn. 398.
Neb.—Olson v. Omaha & C. B St. Ry. Co., 289 N.W. 356, 358, 137 Neb. 216, citing **Corpus Juris.**
N.Y.—Caruso-Rinella-Battaglia Co. v. New York Cent. R. Co., 226 N.Y.S. 308, 222 App.Div. 371.
22 C.J. p 76 note 8, p 77 notes 9–14.

Where material allegations of complaint are admitted, the burden of going forward with evidence is on defendant.—James Conforti Const. Co. v. Neek Realty Corporation, 212 N.Y.S. 393, 125 Misc. 876.

35. Mo.—Campbell v. Terminal R. Ass'n of St. Louis, App., 126 S.W. 2d 915.
22 C.J. p 77 notes 15, 16.

36. Mich.—Bly v. Brady, 71 N.W. 521, 113 Mich. 176.
22 C.J. p 78 note 17.

37. Ill.—Noyes v. Gold, 34 N.E.2d 1, 310 Ill.App. 1.
Iowa.—Howard & Harper v. Chicago, B. & Q. R. Co., 195 N.W. 153, 196 Iowa 1378.
Ky.—Brown Coal Co. v. Madisonville Coal Sales Agency, 25 S.W.2d 37, 233 Ky. 169.
La.—First Nat. Bank v. Jones, 172 So. 155, 186 La. 269, transferred, see App., 161 So. 54—Wallace v. Shreveport Rys. Co., App., 175 So. 86.
Mich.—Douglas Shoe Co. v. Pere Marquette Ry. Co., 217 N.W. 12, 241 Mich. 297.
Mo.—McCloskey v. Koplar, 46 S.W.2d 557, 329 Mo. 527, 92 A.L.R. 641—Hill v. Connecticut Mut. Ins. Co. of Hartford, App., 146 S.W.2d 651—Campbell v. Terminal R. Ass'n of St. Louis, App., 126 S.W.2d 915—Waters v. Bankers' Life Ass'n of Des Moines, Iowa, 50 S.W.2d 183, 226 Mo.App. 1188.
Mont.—Gibbons v. Huntsinger, 74 P. 2d 443, 105 Mont. 562—Arnold v. Genzberger, 31 P.2d 296, 96 Mont. 358.
N.J.—Kresse v. Metropolitan Life Ins. Co., 168 A. 634, 111 N.J.Law 474.
Or.—Foster v. Farra, 243 P. 778, 783, 117 Or. 286, citing **Corpus Juris.**
S.D.—Peck v. Peck, 212 N.W. 872, 51 S.D 157.
Tenn.—Macon County v. Dixon, 100 S.W.2d 5, 20 Tenn.App. 425.
Tex.—City of Wichita Falls v. Lipscomb, Civ.App., 50 S.W.2d 867, error refused—Thornell v. Missouri State Life Ins. Co., Civ.App., 229 S.W. 653, affirmed, Com.App., 249 S.W. 203—Producers' Oil Co. v. State, Civ.App., 213 S.W. 349.
Va.—Darden v. Murphy, 11 S.E.2d 579, 176 Va. 511.
Wyo.—First Nat. Bank v. Ford, 216 P. 691, 30 Wyo. 110, 31 A.L.R. 1441.
22 C.J. p 78 note 18.

38. Mo.—Campbell v. Terminal R. Ass'n of St. Louis, App., 126 S.W. 2d 915—Citizens' Trust Co. v. Ward, App., 230 S.W. 653.
Or.—Foster v. Farra, 243 P. 778, 783, 117 Or. 286, citing **Corpus Juris.**
Tex.—Straus v. Shamblin, Civ.App., 120 S.W.2d 598, 604, citing **Corpus Juris.**
22 C.J. p 78 note 20.

Amount of evidence necessary

The prima facie case need not be overcome by preponderance of evidence, but need only be balanced or put in equipoise, and the burden of evidence then shifts back to party having the burden of proof.—First Nat. Bank v. Ford, 216 P. 691, 30 Wyo. 110, 31 A.L.R. 1441—22 C.J. p 78 note 20 [a].

39. N.D.—Guild v. More, 155 N.W. 44, 32 N.D. 432.
22 C.J. p 78 note 21.

40. Ga.—Phillips v. Lindsey, 120 S.E. 923, 31 Ga.App. 479.

41. U.S.—Alphonso v. American Iron & Machine Works Co., D.C.La., 39 F.Supp. 934, 939, citing **Corpus Juris.**
S.C.—Ellis v. Atlantic Coast Line R.

§ 111. Effect of Presumptions and Other Substitutes for Evidence

A presumption or other substitute for evidence shifts the burden of evidence, but not the burden of proof.

While it is often loosely said that a presumption shifts the burden of proof,[42] cases distinguishing between the concepts of burden of proof, properly so called, and burden of evidence, or using the phrases in their precise meanings, hold that the position of the burden of proof, properly so called, is not affected by a presumption,[43] but that a presumption shifts the burden of evidence.[44]

A presumption may establish a prima facie case and sustain the burden of evidence as to the issue it covers.[45] The same result may be effected by any substitute for evidence, such as judicial admissions,[46] rules of substantive law,[47] the rule res ipsa loquitur,[48] and statutory regulations prescribing what shall constitute prima facie evidence of specified facts.[49]

On the position of the burden of proof, properly so called, the existence of any particular inference of fact can have no effect, even should it constitute a prima facie case,[50] or should further proof be excused by a rule of law.[51]

§ 112. Proof of Negative Facts

The party asserting a negative has the burden of evidence as to such matter.

The party whose contention requires proof of a negative fact has the burden of evidence to prove that fact,[52] except as the rule may be modified by

Co., 174 S.E. 17, 21, 172 S.C. 333, quoting **Corpus Juris.**
22 C.J. p 78 note 22.

42. U.S.—Heiner v. Donnan, Pa., 52 S.Ct. 358, 285 U.S. 312, 76 L.Ed. 772, answering certified questions, D.C., Donnan v. Heiner, 48 F.2d 1058—Fidelity & Deposit Co. of Maryland v. Grand Nat. Bank of St. Louis, C.C.A.Mo., 69 F.2d 177, reversing, D.C., 2 F.Supp. 666.
22 C.J. p 79 note 25.

43. U.S.—Equitable Life Assur. Soc. of U. S. v. MacDonald, C.C.A. Wash., 96 F.2d 437, certiorari denied 59 S.Ct. 86, 305 U.S. 624, 83 L.Ed. 399.
Cal.—In re Hansen's Estate, 100 P.2d 776, 38 Cal.App.2d 99, prior opinion 98 P.2d 797—Manufacturers' Finance Corporation v. Pacific Wholesale Radio, 19 P.2d 1013, 130 Cal. App. 239.
Colo.—American Ins. Co. v. Naylor, 70 P.2d 349, 101 Colo. 34.
Ill.—Paulsen v. Cochfield, 278 Ill.App. 596.
Iowa.—Hoover v. First American Fire Ins. Co. of New York, 255 N. W. 705, 218 Iowa 559.
La.—Wallace v. Shreveport Rys. Co., App., 175 So. 86.
S.C.—Ford v. Atlantic Coast Line R. Co., 168 S.E. 143, 169 S.C. 41, affirmed Atlantic Coast Line R. Co. v. Ford, 53 S.Ct. 249, 287 U.S. 502, 77 L.Ed. 457.
S.D.—McKiver v. Theo. Hamm Brewing Co., 297 N.W. 445.
22 C.J. p 79 note 23.

44. U.S.—Western & A. R. R. v. Henderson, 49 S.Ct. 445, 279 U.S. 639, 73 L.Ed. 884, reversing 144 S. E. 905, 167 Ga. 22, which affirmed 137 S.E. 855, 36 Ga App. 679, and appeal dismissed 49 S.Ct. 176, 278 U.S. 577, 73 L.Ed. 516, reversed on other grounds 49 S.Ct. 186, conformed to 149 S.E. 101, 40 Ga.App. 184—Equitable Life Assur. Soc. of U. S. v. MacDonald, C.C.A.Wash., 96 F.2d 437, certiorari denied 59 S Ct. 86, 305 U.S. 624, 83 L.Ed. 399—Department of Water and Power of City of Los Angeles v. Anderson, C.C.A.Nev., 95 F.2d 577, certiorari denied 59 S.Ct. 67, 305 U.S. 607, 83 L.Ed. 386—Gilmore v. U. S., C.C.A Miss., 93 F.2d 774, certiorari denied 58 S.Ct. 1039, 304 U.S. 569, 82 L.Ed. 1534.
Cal.—Valentine v. Provident Mut. Life Ins. Co. of Philadelphia, 55 P. 2d 1243, 12 Cal.App.2d 616—Manufacturers' Finance Corporation v. Pacific Wholesale Radio, 19 P.2d 1013, 130 Cal.App. 239.
Conn.—Comley ex rel. Fitzroy v. Board of Trustees of Firemen's Relief Fund of City of Bridgeport, 191 A. 729, 122 Conn. 650.
Iowa.—Hoover v. First American Fire Ins. Co. of New York, 255 N. W. 705, 218 Iowa 559.
Mo.—Canty v. Halpin, 242 S.W. 97, 294 Mo. 118.
Neb.—Olson v. Omaha & C. B. St. Ry. Co., 289 N.W. 356, 358, 137 Neb. 216, citing **Corpus Juris.**
N.J.—Ocean County Nat. Bank v. Stillwell, 197 A. 286, 123 N.J.Eq. 337.
Pa.—Donze v. Devlin, 195 A. 882, 329 Pa. 1.
S.C.—Ford v. Atlantic Coast Line R. Co., 168 S.E. 143, 169 S.C. 41, affirmed Atlantic Coast Line R. Co. v. Ford, 53 S.Ct. 249, 287 U.S. 502, 77 L.Ed. 457.
S.D.—McKiver v. Theo. Hamm Brewing Co., 297 N.W. 445.
Tenn.—Melody v. Hamblin, 115 S. W.2d 237, 21 Tenn.App. 687.

Effect on general issue

Where presumption arises in plaintiff's favor, it does not convert defendant's general issue into affirmative defense, but makes it incumbent on defendant to present his proofs. —Whipple v. McKew, 60 S.W.2d 1006, 166 Tenn. 31.

45. Ga.—Alston v. Mobley, 155 S.E. 81, 82, 42 Ga.App. 98, citing **Corpus Juris.**
Miss.—New Orleans & G. N. R. Co. v. Walden, 133 So. 241, 244, 160 Miss. 102, citing **Corpus Juris.**
Tenn.—Melody v. Hamblin, 115 S.W. 2d 237, 21 Tenn.App 687.
Wash.—Criez v. Sunset Motor Co., 213 P. 7, 123 Wash. 604, 32 A.L.R. 627.
22 C.J. p 79 note 24.

46. Kan.—Woodson Mach. Co. v. Morse, 28 P. 152, 47 Kan. 429.
22 C.J. p 80 note 26.

47. Cal.—In re Chadbourne, 114 P. 1012, 15 Cal.App. 363.
22 C.J. p 80 note 28.

48. Cal.—Bauhofer v. Crawford, 117 P. 931, 16 Cal App. 676.

49. Miss.—Sovereign Camp, W. O. W., v. Garner, 87 So. 458, 125 Miss. 8.
22 C.J. p 80 note 30.

50. Ill.—Johnson v. Pendergast, 139 N.E. 407, 308 Ill. 255, reversing 225 Ill.App. 624.
22 C.J. p 80 note 31.

51. Ohio.—New York L. Ins. Co. v. La Boiteaux, 5 Ohio Dec. (Reprint) 242, 4 Am.L.Rec. 1.

52. Ala.—Western Union Tel. Co. v. Brazier, 65 So. 95, 10 Ala.App. 308.
Ill.—Hooper v. Talbot, 175 N.E. 783, 343 Ill. 590—Paulsen v. Cochfield, 278 Ill.App. 596.
Ky.—Union Cent. Life Ins. Co. v. Jackson, 242 S.W. 588, 590, 195 Ky. 438, citing **Corpus Juris.**
La.—Jackson v. Brewster, App., 169 So. 166, 168, citing **Corpus Juris.**
N.H.—Upton v. Conway Lumber Co., 128 A. 802, 81 N.H. 489.
Pa.—Pratt v. Magee and McClure, 1 Pa.Dist. & Co. 565, 567, 50 Pa.Co. 629, 69 Pittsb.Leg.J. 814, citing **Corpus Juris.**
Tex.—Morgenroth v. First State

the fact, discussed infra § 113, that the evidence as to such issue is peculiarly within the adverse party's knowledge or control.

In deciding, however, what quantum of evidence shall be deemed sufficient, the practical limitations on proof imposed by the nature of the subject matter or the relative situation of the parties will be considered.[53] The court will more promptly discharge a litigant from the burden of evidence where the proposition is a negative one;[54] and the burden of evidence is sustained by proof which renders probable the existence of the negative fact,[55] circumstantial evidence being sufficient,[56] and nothing in the nature of a demonstration being required.[57]

§ 113. Effect of Peculiar Knowledge or Control of Evidence

The burden of evidence may be imposed on the party best able to sustain it; so the party having peculiar knowledge of facts, or control of evidence, relating to an issue may have the burden of evidence as to it, particularly in the case of a negative averment.

In the administration of justice it is desirable that the burden of producing evidence be placed on the party best able to sustain it,[58] and there is authority for the view that the burden of evidence as to an issue rests on the party having the greater means of knowledge.[59] A narrower formulation is that where the evidence as to an issue is peculiarly within the knowledge or control of a party, the burden of evidence as to such issue rests on him.[60] It is very generally held that, where the party who has not the general burden of proof possesses positive and complete knowledge concerning the existence of facts which the party having that burden is called on to negative, or has peculiar knowledge or control of evidence as to such matters, the burden rests on him to produce the evidence,[61] the

Bank, 66 S.W.2d 458, 462, citing **Corpus Juris.**
22 C.J. p 80 note 33.

Dependence on circumstances
Whether burden to prove negative averment lies on plaintiff or defendant depends on circumstances of case; burden to prove negative averment in bill is on plaintiff, where it is as easy for latter to prove averment as for defendant to disprove it.—Hooper v. Talbot, 175 N.E. 783, 343 Ill. 590.

53. Ala.—Somerall v. Citizens' Bank, 101 So. 429, 432, 211 Ala. 630, citing **Corpus Juris.**
22 C.J. p 81 note 34.

54. Ga.—Phillips v. Lindsey, 120 S.E. 923, 31 Ga.App. 479.

55. Ky.—Union Cent. Life Ins. Co. v. Jackson, 242 S.W. 588, 590, 195 Ky. 438, quoting **Corpus Juris.**
22 C.J. p 81 note 35.

56. Mass.—Commonwealth v. Locke, 114 Mass. 288.

57. Vt.—Thayer v. Viles, 23 Vt. 494.
22 C.J. p 81 note 37.

58. Idaho.—Idaho Power Co. v. City of Buhl, 111 P.2d 1088, 1091, citing **Corpus Juris.**
Ky.—Taylor v. Jones, 69 S.W.2d 372, 375, 253 Ky. 285, citing **Corpus Juris**—Ledford v. Hubbard, 292 S.W. 345, 348, 219 Ky. 9, quoting **Corpus Juris.**
Miss.—Price v. Haney, 164 So. 590, 591, 174 Miss. 176, quoting **Corpus Juris,** and overruling suggestion of error 163 So. 684.
Neb.—Fitzsimmons v. Gilmore, 278 N.W. 262, 264, 134 Neb 200, quoting **Corpus Juris.**
Or.—West v. Kern, 171 P. 413, 1050, 88 Or. 247, L.R.A.1918D 920.
Pa.—Carl v. Grand Union Co., 161 A. 429, 430, 105 Pa.Super. 371, citing **Corpus Juris.**

59. U.S.—Merriam v. Venida Blouse Corporation, D.C.N.Y., 23 F.Supp. 659.
Ill.—Belding v. Belding, 192 N.E. 917, 358 Ill. 216, reversing 272 Ill.App. 196.
La.—Spyker v. International Paper Co., 138 So. 109, 173 La. 580—State ex rel. Leary v. Hughes, App., 185 So. 69—Rousseau v. Texas & P. Ry. Co., 4 La.App. 691, 698, citing **Corpus Juris**—J. C. Healy Co. v. Burglass, 1 La.App. 741.

60. U.S.—Cliett v. Scott, C.C.A.Tex., 102 F.2d 725.
Ind.—Ross v. Indiana Natural Gas & Oil Co., 130 N.E. 440, 78 Ind.App. 219, rehearing denied 131 N.E. 794, 78 Ind.App. 219.
Ky.—McArthur v. Payne, 258 S.W. 684, 201 Ky. 793.
La.—Kennon v. Brooks-Scanlon Co., 86 So. 675, 148 La. 120.
Mo.—Emory v. Emory, 53 S.W.2d 908, 913, citing **Corpus Juris**—Ward v. Scott County Milling Co., App., 47 S.W.2d 250, 254, citing **Corpus Juris**—Williams v. Connecticut Fire Ins. Co., App., 47 S.W. 2d 207, 210, citing **Corpus Juris**—Pauley v. Business Men's Assur. Co of America, 261 S.W. 340, 343, 217 Mo.App. 302, citing **Corpus Juris.**
Neb.—Olson v. Omaha & C. B. St. Ry. Co., 289 N.W. 356, 359, 137 Neb. 216, citing **Corpus Juris.**
N.H.—H. P. Welch Co. v. State, 199 A. 886, 89 N.H. 428, 120 A.L.R. 282, affirmed H. P. Welch Co. v. State of New Hampshire, 59 S.Ct. 438, 306 U.S. 79, 83 L.Ed. 500.
N.C.—Anthony v. American Express Co., 124 S.E. 753, 188 N.C. 407—Wm. M. Lloyd Co. v. Poythress, 116 S.E. 584, 185 N.C. 180.
Ohio.—Olszowy v. Cleveland Ry. Co., 192 N.E. 366, 47 Ohio App. 529—Armour & Co. v. Yoter, 178 N.E. 596, 40 Ohio App. 225.
Or.—Anderson v. Palmer, 224 P. 629, 111 Or. 137.
S.C.—Smith v. Ashmore, 192 S.E. 565, 184 S.C. 316.
Tex.—Spencer v. Pettit, Civ.App., 17 S.W 2d 1102, affirmed, Com.App., 34 S.W.2d 798—Royal Neighbors of America v. Fletcher, Civ.App., 230 S.W. 476.
Va.—Lyric Theatre Corporation v. Vaughan, 191 S.E. 600, 168 Va. 595.
Wyo.—Hildebrand v. Chicago, B. & Q. R. R., 17 P.2d 651, 658, 45 Wyo. 175, citing **Corpus Juris,** and affirming 13 P.2d 1081, 44 Wyo. 488.
22 C.J. p 81 notes 41, 42.

Litigant who has control of proof must produce it.—Miller v Lykes Bros.-Ripley S. S. Co., C.C.A.La., 98 F.2d 185, certiorari denied 59 S.Ct. 150, 305 U.S. 641, 83 L.Ed. 413.

Burden of proof not shifted
In suit to cancel deeds as forgeries, defendant, although having failed to produce original deeds in evidence when demanded, did not have burden to show that deeds were genuine.—Hull v. Hull, 61 S.W.2d 451, 187 Ark. 631.

61. Ariz.—Southwest Cotton Co. v. Ryan, 199 P. 124, 22 Ariz. 520.
Ky.—Ledford v. Hubbard, 292 S.W. 345, 348, 219 Ky. 9, quoting **Corpus Juris**—Union Cent. Life Ins. Co. v. Jackson, 242 S.W. 588, 590, 195 Ky. 438, citing **Corpus Juris.**
La.—Jackson v. Brewster, App., 169 So. 166, 168, citing **Corpus Juris.**
Miss.—Price v. Haney, 164 So. 590, 591, 174 Miss. 176, quoting **Corpus**

negative averment being taken as true unless disproved by the party having such knowledge or control.[62] The party on whom the burden is put by his peculiar knowledge or control is obliged to go no further than necessity requires.[63]

However, mere difficulty or inconvenience in discharging a burden of making proof does not displace it;[64] and as a matter of principle the difficulty only relieves the party having the burden of evidence from the necessity of creating positive conviction entirely by his own evidence,[65] so that, when he produces such evidence as it is in his power to produce, its probative effect is enhanced by the silence of his opponent.[66]

The court will more readily hold that a party has sustained the burden of evidence where the issue is one as to which the evidence is peculiarly within the adverse party's knowledge or control.[67]

Where the party on whom rests the burden of evidence as to a particular fact has the essential documents or evidence within his control, a peculiar clearness of proof is demanded,[68] although the fact is negative.[69]

IV. PRESUMPTIONS

A. DEFINITION AND NATURE

§ 114. In General

A presumption is an inference of the existence or nonexistence of some fact which courts or juries are required or permitted to draw from the proof of other facts. It has been said to be in the nature of evidence, but has also been considered as a rule of law as to which party shall first proceed and go forward with the evidence.

A presumption is an inference of the existence or nonexistence of some fact which courts or juries are required or permitted to draw from the proof of other facts;[70] an inference which common sense, enlightened by human knowledge and experience, draws from the connection, relation, and coincidence of facts and circumstances with each other.[71]

Juris, overruling suggestion of error 163 So. 684, 174 Miss. 176.
Neb.—Fitzsimmons v. Gilmore, 278 N.W. 262, 265, 134 Neb. 200, quoting **Corpus Juris.**
N.Y.—In re Sitkin's Will, 271 N.Y.S. 688, 151 Misc. 448.
Okl.—Guaranty Life Ins. Co. v. Nelson, 101 P.2d 627, 630, 187 Okl. 56, citing **Corpus Juris.**
Pa.—Besecker v. General Acceptance Corporation, 17 A.2d 916, 143 Pa. Super. 367.
Wyo.—Board of Com'rs v. Byron, Drainage Dist., 75 P.2d 759, 763, citing **Corpus Juris.**
22 C.J. p 81 notes 40–42.

Issue held not peculiarly within party's knowledge
U.S.—U. S. v. Grogg, D.C.Va., 9 F. 2d 424.
Pa.—Valles v. Peoples-Pittsburgh Trust Co., 13 A.2d 19, 339 Pa. 33.

62. Ala.—Protective Life Ins. Co. v. Swink, 132 So. 728, 222 Ala. 496—City of Mobile v. McClure, 127 So. 832, 221 Ala. 51—City of Anniston v. Jewel Tea Co., 88 So. 351, 18 Ala.App. 4.
Ill.—Hooper v. Talbot, 175 N.E. 783, 343 Ill. 590—Trakas v. Cokins, 224 Ill.App. 327.
La.—Collins v. Magee, 130 So. 267, 15 La.App. 66.
N.C.—Speas v. Merchants' Bank & Trust Co. of Winston-Salem, 125 S.E. 398, 188 N.C. 524.

63. Miss.—Price v. Haney, 164 So. 590, 591, 174 Miss. 176, quoting **Corpus Juris**, and overruling suggestion of error 163 So. 684, 174 Miss. 176.
22 C.J. p 82 note 43.

64. Ala.—Western Union Tel. Co. v. Brazier, 65 So. 95, 10 Ala.App. 308.
22 C.J. p 82 note 44.

65. Ky.—Union Cent. Life Ins. Co. v. Jackson, 242 S.W. 588, 195 Ky. 438.
22 C.J. p 82 note 45.

66. Okl.—Van Arsdale v. Young, 95 P. 778, 21 Okl. 151.
22 C.J. p 82 note 46.
Presumptions arising from suppression or withholding of evidence see infra § 156.

67. Ga.—Phillips v. Lindsey, 120 S. E. 923, 31 Ga.App. 479.
Ky.—Stevenson v. Yates, 208 S.W. 820, 183 Ky. 196.
Tex.—Beaumont, S. L. & W. Ry. Co. v. Myrick, Civ.App., 208 S.W. 935, dismissed for want of jurisdiction.
22 C.J. p 71 note 61.

68. Ala.—Brown v. Raisin Fertilizer Co., 26 So. 891, 124 Ala. 221.
N.C.—Cook v. Guirkin, 25 S.E. 715, 119 N.C. 13.

69. U.S.—Colorado Coal & Iron Co. v. U. S., Colo., 8 S.Ct. 131, 123 U. S. 307, 31 L.Ed. 182.

70. Neb.—Smith v. Fall, 241 N.W. 560, 122 Neb. 783.
Okl.—Neilan Co. v. Miller, 52 P.2d 783, 786, 175 Okl. 104, quoting **Corpus Juris.**
22 C.J. p 82 note 50.

In California there are no presumptions except those enumerated in its code of civil procedure.—Setrakian v. Naftzger, Cal.App., 215 P. 564.

71. Ill.—Commercial Credit Co. v. Maxey, 7 N.E.2d 155, 158, 289 Ill. App. 209, citing **Corpus Juris.**
Mich.—Thompson v. Southern Michigan Transp. Co., 246 N.W. 174, 176, 261 Mich. 440, quoting **Corpus Juris.**
Okl.—Neilan Co. v. Miller, 52 P.2d 783, 786, 175 Okl. 104, quoting **Corpus Juris.**
22 C.J. p 82 note 51.
"Presumptions arise as follows: They are either (1) a procedural expedient, or (2) a rule of proof production based on comparative availability of material evidence to the respective parties, or (3) a conclusion firmly based upon the generally known results of wide human experience, or (4) combination of (1) and (3)."—Watkins v. Prudential Ins. Co. of America, 173 A. 644, 648, 315 Pa. 497, 95 A.L.R. 869.

Natural result may be inferred to follow when causes calculated to produce certain result are shown in operation at certain time.—Maravas v. American Equitable Assur. Corporation of New York, 136 A. 364, 82 N. H. 533.

Other definitions and expositions
Ill.—Trustees of Schools of Tp. No. 8 v. Lilly, 26 N.E.2d 489, 373 Ill. 431.
Mich.—Michigan Aero Club v. Shelley, 278 N.W. 121, 283 Mich. 401—

Nature. It has been said in some jurisdictions, particularly under some statutory provisions, that a true legal presumption is in the nature of evidence, and is to be weighed as such;[72] but it has also been considered that a presumption is generally only a rule of law as to which party shall first proceed and go forward with the evidence, to prove an issue,[73] the presumption being against the party having the burden of proof.[74]

Presumptions arise from motives of public policy and for the sake of greater certainty.[75]

Presumptions are indulged in only to supply facts, and do not arise where the facts are known.[76]

Kimber v. Michigan Light Co., 203 N.W. 110, 229 Mich. 663.

N.Y.—Hussey v. Flanagan, 142 N.E. 594, 237 N.Y. 227, reversing 200 N.Y.S. 549, 206 App.Div. 187—In re Raisbeck's Will, 102 N.Y.S. 967, 969, 52 Misc. 279.

Pa.—Watkins v. Prudential Ins. Co. of America, 173 A. 644, 315 Pa. 497, 95 A.L.R. 869.

Wyo.—Quinlan v. Jones, 198 P. 352, 27 Wyo. 410.

72. Cal.—Westberg v. Willde, 94 P. 2d 590, 14 Cal.2d 360, superseding, App., 85 P.2d 507—People v. Chamberlain, 60 P.2d 299, 7 Cal.2d 257—In re Pitcairn's Estate, 59 P.2d 90, 6 Cal.2d 730—Smellie v. Southern Pac. Co., 299 P. 529, 212 Cal. 540—In re Wiechers' Estate, 250 P. 397, 199 Cal. 523, certiorari denied Wiechers v. Wiechers, 47 S. Ct. 476, 273 U.S. 762, 71 L.Ed. 879—In re Braue's Estate, App., 114 P.2d 386—Duehren v. Stewart, 102 P.2d 784, 39 Cal.App.2d 201—Scott v. Sheedy, 102 P.2d 575, 39 Cal.App.2d 96—Brill v. Brill, 102 P.2d 534, 38 Cal.App 2d 741—Wachner v. Richardson, 58 P.2d 714, 14 Cal.App.2d 422—California Trust Co. v. Cohn, 48 P.2d 744, 748, 9 Cal. App.2d 33—Asbury v. Goldberg, 47 P.2d 311, 8 Cal.App.2d 70—Ross v. Real Estate Inv. Co., 28 P.2d 52, 135 Cal.App. 563—Gayton v. Pacific Fruit Express Co., 15 P.2d 217, 127 Cal.App. 50—Gray v. Fred B. Neuhoff Co., 12 P.2d 1036, 1041, 124 Cal.App. 567—Black v. Southern Pac. Co., 12 P.2d 981, 124 Cal. App. 321—Pitt v. Southern Pac. Co., 9 P.2d 273, 121 Cal App. 228—Barrett v. Harman, 1 P.2d 458, 460, 115 Cal.App. 283—Fortier v. Hogan, App, 1 P.2d 23—Beers v. California State Life Ins. Co, 262 P. 380, 87 Cal.App. 440—Grantham v. Ordway, 182 P. 73, 40 Cal.App. 758.

Mont.—Gagnon v. Jones, 62 P.2d 683, 103 Mont. 365—Vonault v. O'Rourke, 33 P.2d 535, 540, 97 Mont. 92.

Or.—Judson v. Bee Hive Auto Service Co., 294 P. 588, 589, 136 Or. 1—City Motor Trucking Co. v. Franklin Fire Ins. Co. of Philadelphia, Pa., 239 P. 812, 116 Or. 102.

Utah.—U. S. v. Clark, 14 P. 288, 291, 5 Utah 226.

Vt.—In re Cowdry's Will, 60 A. 141, 77 Vt. 359, 363, 3 Ann.Cas. 70.

22 C.J. p 83 note 54.

Nature of rule permitting presumption

Rebuttable presumption is "evidence," and rule or principle which permits indulgence in such presumption is a rule of evidence and not a canon of pleading.—Graybiel v. Consolidated Ass'ns, 60 P.2d 164, 16 Cal. App.2d 20.

Rejection

Uncontradicted presumptions, declared by statute to furnish satisfactory evidence of fact to be proved, cannot be rejected arbitrarily by trial court because of suspicious circumstances in testimony offered to support them.—De Hart v. Allen, Cal.App., 111 P.2d 342.

73. U.S.—Grossman v. Kridel, C.C. A.N.Y., 90 F.2d 624—In re Trustees System Co. of Louisville, D. C.Ky., 30 F.Supp. 361.

Ill.—Guild v. Metropolitan Life Ins. Co., 25 N.E.2d 558, 303 Ill.App. 509.

Iowa.—Brogan v. Lynch, 214 N.W. 514, 204 Iowa 260.

Mich.—Gibson v. Dymon, 274 N.W. 739, 281 Mich. 137.

Neb.—Bohmont v. Moore, 295 N.W. 419, 138 Neb. 784, 133 A.L.R. 270, rehearing denied 297 N.W. 559, 138 Neb. 907, 133 A.L.R. 279.

N.H.—New Hampshire Sav. Bank v. McMullen, 185 A. 158, 88 N.H. 123.

Pa.—See Halpern v. Gottesman, 2 Fay.L J. 39.

S.D.—McKiver v. Theo. Hamm Brewing Co, 297 N.W. 445—Honrath v. New York Life Ins. Co, 275 N.W. 258, 65 S.D. 480, 112 A.L.R. 1272.

22 C.J. p 83 note 55.

Where facts are peculiarly within knowledge of defendant and difficult for plaintiff to prove, presumption may be employed to meet burden of proof.—Harper v. Highway Motor Freight Lines, Tex.Civ.App., 89 S. W.2d 448, error dismissed.

74. Ind.—Cleveland, etc., R. Co. v. Moore, 90 N.E. 93, 45 Ind.App. 58.

75. Colo.—American Ins. Co. v. Naylor, 70 P.2d 349, 101 Colo. 34.

N.Y.—In re Callahan's Estate, 254 N.Y.S. 46, 142 Misc. 28, affirmed In re Callahan, 259 N.Y.S. 987, 236 App Div. 814, affirmed In re Callahan's Estate, 188 N.E. 48, 262 N.Y. 524.

Or.—Boyd v. Olcott, 202 P. 431, 438, 102 Or. 327, citing **Corpus Juris.**

22 C.J. p 83 note 57.

Necessity as basis for presumptions

Presumptions owe their existence to necessity and are based on general experience. The necessity which brings them into existence is the fact that in their absence many meritorious causes would fail through inability to produce affirmative evidence of essential facts, concerning the existence of which the general experience of men leaves but slight doubt.—Beggs v. Metropolitan Ins. Co., 257 N.W. 445, 446, 219 Iowa 24, citing **Corpus Juris.**

76. U.S.—Guaranty Trust Co. of New York v. Minneapolis & St. L. R. Co., C.C.A.Minn., 36 F.2d 747, modifying, D.C., 33 F.2d 512, and certiorari denied 50 S.Ct. 407, 281 U.S. 756, 74 L.Ed. 1166—George Haiss Mfg. Co. v. Link Belt Co., D.C.Pa., 50 F.2d 450, modified on other grounds, C.C.A., 63 F.2d 479—Parrott v. Noel, D.C.Va., 8 F.2d 368.

Cal.—Conway v. Supreme Council Catholic Knights of America, 70 P. 223, 225, 137 Cal. 384.

Del.—Slivka v. Mroczka, 132 A. 862, 3 W.W.Harr. 163.

Ill.—Nelson v. Stutz Chicago Factory Branch, 173 N.E. 394, 341 Ill. 387, reversing 254 Ill.App. 526—Weger v. Robinson Nash Motor Co., 172 N.E. 7, 340 Ill. 81, reversing 255 Ill.App. 549—Coal Creek Drainage & Levee Dist. v. Sanitary Dist. of Chicago, 167 N.E. 807, 336 Ill. 11, reversing 254 Ill. App. 289—Lohr v. H. Barkmann Cartage Co., 167 N.E. 35, 335 Ill. 335—In re Dedmore's Estate, 257 Ill.App. 519.

Ky.—Poindexter's Adm'r v. Alexander, 125 S.W.2d 981, 277 Ky. 147—Prudential Ins. Co. of America v. Tuggle's Adm'r, 72 S.W.2d 440, 442, 254 Ky. 814, citing **Corpus Juris.**

Mich.—Christiansen v. Hilber, 276 N. W. 495, 282 Mich. 403—Gibson v. Dymon, 274 N.W. 739, 281 Mich. 137.

Mo.—Nelson v. C. Heinz Stove Co., 8 S.W.2d 918, 320 Mo. 655—Erhart v. Dietrich, 24 S.W. 188, 191, 118 Mo. 418—Berry v. Adams, App., 71 S.W.2d 126—Niederhelm v. Missouri-Kansas-Texas R. Co, App., 68 S.W.2d 895—Francis v. Willits, App., 30 S.W.2d 203—Vallery v. Hesse Bldg. Material Co., App., 211 S.W. 95.

Presumptions must be based on some necessity, and the court will not go into the domain of presumptions where direct proof can be obtained.[77]

§ 115. Classes of Presumptions and Distinctions

Presumptions have been divided into various classes and kinds, but in general may best be divided into presumptions of fact and presumptions of law; or they may otherwise be classified as conclusive or rebuttable.

While it has been said that there is but one type of presumption in the strict legal meaning of the word, and that is merely a general rule of law that under some circumstances, in the absence of any evidence to the contrary, a jury is compelled to reach a certain conclusion of fact, which presumption is raised only in the absence of any real evidence of the existence of the ultimate fact in question, but which is not in and of itself evidence,[78] it has otherwise been said that there are at least four kinds of presumptions: Conclusive presumptions of law; rebuttable presumptions of law; mixed presumptions; and presumptions of fact.[79]

Presumptions may be broadly classified as presumptions of fact, defined and considered infra § 116, and presumptions of law, defined and considered infra § 117. The distinction between these classes of presumptions is that a presumption of fact may be, and a presumption of law must be, regarded by the trier of fact.[80]

Conclusive or rebuttable presumptions. Presumptions are frequently classified as either conclusive or rebuttable.[81] A conclusive presumption is a rule of substantive law, rather than a rule of evidence,[82] while a disputable or rebuttable presumption is a species of evidence that may be accepted and acted on when there is no other evidence to uphold the contention for which it stands;[83] one which may be overcome by other evidence.[84] When a statute makes a presumption conclusive, it cannot be contradicted by evidence.[85] The rule in respect of irrebuttable presumptions rests on grounds of expediency or policy so compelling in character as to override the generally fundamental requirement of law that fact questions must be resolved according to proof;[86] and evidence of certain kinds of

N.Y.—U. S. Trust Co. of New York v. Frelinghuysen, 28 N.Y.S.2d 448, 262 App.Div. 259—Castellani v. Castellani, 28 N.Y.S.2d 879, 176 Misc. 763—In re Simpson's Estate, 24 N.Y.S.2d 954, 175 Misc. 718.

Or.—Metropolitan Casualty Ins. Co. of New York v. N. B. Lesher, Inc., 52 P.2d 1133, 152 Or. 161.

Tenn.—Winfree v. Coca-Cola Bottling Works of Lebanon, 83 S.W.2d 903, 19 Tenn.App. 144

Tex.—Town of Refugio v. Strauch, Com.App., 29 S.W.2d 1041, reversing, Civ.App., 20 S.W.2d 326—Shear Co. v. Wilson, Com.App., 292 S.W. 531, affirming in part and reversing in part Wilson v. Shear Co., Civ. App., 284 S.W. 654, motion overruled, Com.App., 294 S.W. 843—Geffert v. Yorktown Independent School Dist., Com.App., 290 S.W. 1083, reversing, Civ.App., 285 S.W. 345—Crabb v. Zanes Freight Agency, Civ.App., 123 S.W.2d 752, error dismissed, judgment correct—Martin v. Texas Co., Civ.App., 89 S.W.2d 260, 268, quoting **Corpus Juris**—Traders' & General Ins. Co. v. Emmert, Civ.App., 76 S.W.2d 208, error refused—Sterling Nat. Bank & Trust Co. of New York v. Ellis, Civ. App., 75 S.W.2d 716, error dismissed—Galveston, H. & S. A. Ry. Co. v. Brewer, Civ.App., 4 S.W.2d 320, error refused—West's Ex'rs v. Cameron County, Civ.App., 4 S.W.2d 111, reversed on other grounds, Com.App., 14 S.W.2d 836.

Va.—Kavanaugh v. Wheeling, 7 S.E. 2d 125, 175 Va. 105—Boggs v. Plybon, 160 S.E. 77, 157 Va. 30—Schmitt v. Redd, 143 S.E. 884, 151 Va. 333.

Wash.—Snodderly v. Brotherton, 21 P.2d 1036, 173 Wash. 86.

22 C.J. p 83 note 58.

77. Cal.—In re Bryant's Estate, 43 P.2d 529, 3 Cal.2d 58.

Idaho.—Packard v. O'Neill, 262 P. 81, 45 Idaho, 427, 56 A.L.R. 317.

N.Y.—In re Eichelberger's Estate, 273 N.Y.S. 535, 152 Misc. 834—In re Tuttle's Estate, 247 N.Y.S. 825, 139 Misc. 16, reversed on other grounds 254 N.Y.S. 65, 234 App.Div. 1, and affirmed Conklin v. Tuttle, 184 N.E. 136, 260 N.Y. 663.

Okl.—Neilan Co. v. Miller, 52 P.2d 783, 786, 175 Okl. 104, quoting **Corpus Juris.**

Tex.—Christopher v. City of El Paso, Civ.App., 98 S.W.2d 394, 400, error dismissed, citing **Corpus Juris.**

22 C.J. p 83 note 59.

78. Ariz.—Seiler v. Whiting, 84 P. 2d 452, 52 Ariz. 542.

79. Ala.—Donald v. Swann, 137 So. 178, 24 Ala.App. 463, certiorari denied 137 So. 181, 223 Ala. 493.

N.C.—Lee v. Pearce, 68 N.C. 76.

80. Mo.—Basham v. Prudential Ins. Co. of America, 113 S.W.2d 126, 232 Mo.App. 782.

81. Ga.—Bryan v. Walton, 20 Ga. 480.

22 C.J. p 82 note 52.

Strength of presumption depends on presence of full basis on which it rests.—Dent v. Foy, 107 So. 210, 214 Ala. 243.

82. Ind.—Messmore v. Madison Glue Mfg. Co., 145 N.E. 556, 82 Ind.App. 184.

Iowa.—Farnsworth v. Hazelett, 199 N.W. 410, 197 Iowa 1367, 38 A.L.R. 814.

Md.—United Life & Accident Ins. Co. v. Prostic, 182 A. 421, 169 Md. 535.

Burden of proof or evidence

"Presumptions" as relating burden of proof or burden of evidence are rules of law.—Bond v. St Louis-San Francisco Ry. Co., 288 S.W. 777, 315 Mo. 987.

83. Cal.—Noble v. Key System, 51 P.2d 887, 10 Cal.App.2d 132.

Inference of law which holds good until invalidated by proof or a stronger presumption.—Brandt v. Morning Journal Ass'n, 80 N.Y.S. 1002, 81 App.Div. 183, 185, affirmed 69 N.E. 1120, 177 N.Y. 544.

84. Or.—Weis v. Allen, 35 P.2d 478, 147 Or. 670.

Province of rebuttable presumption

Rebuttable presumption cannot override fact which trier of facts believes to be established by evidence, but the province of a rebuttable presumption is to resolve doubt as to ultimate fact where evidence is not convincing either way.—Hartford-Empire Co. v. Obear-Nester Glass Co., C.C.A.Mo., 71 F.2d 539, affirming, D.C., 51 F.2d 85, certiorari denied 55 S.Ct. 345, 293 U.S. 625, 79 L.Ed. 712.

85. Cal.—Gayton v. Pacific Fruit Express Co., 15 P.2d 217, 127 Cal. App. 50.

86. U.S.—U. S. v. Provident Trust Co., Ct.Cl., 54 S.Ct. 389, 291 U.S.

facts is excluded because its admission would injure some other cause more than it would help the cause of truth, and because avoidance of that injury is considered of more consequence than possible harm to the cause of truth.[87] The characterization of presumptions as rebuttable and irrebuttable is, however, not altogether accurate, for the reason that as a practical matter every presumption is rebuttable by proof that the facts are actually otherwise.[88]

Distinguished from inference. The fundamental characteristic of a presumption, as distinguished from an inference, is that the former affects the duty of producing further testimony, not merely the weight of that already produced.[89] It has also been said that a presumption is a rule which the law makes upon a given state of facts, while an inference is a conclusion which, by means of data founded upon common experience, natural reason draws from facts which are proved;[90] an inference is a permissive deduction while a presumption is a deduction directed to be drawn by law.[91] On the other hand, it has been considered that the terms inference, probability, assumption and presumption, have substantially the same meaning and import when used in legal writings and opinions,[92] but probabilities have been held not legal presumptions.[93]

Dry presumptions. The rules which impose the burden of proof upon certain parties, when designated as presumptions, are "dry presumptions," having only a technical existence, and barren of all probative character when the case goes to the jury on conflicting evidence.[94]

Mixed presumption. A presumption which consists chiefly of certain presumptive inferences which, from their strength, importance, or frequent occurrence, have become in fact a quasi presumption of law; called mixed, because the court lays down the law and the jury acts upon it.[95]

Natural and artificial presumptions. A natural presumption is the presumption arising when a fact is proved, wherefrom by reason of the connection founded on experience, the existence of another fact is directly inferred.[96] A legal or artificial presumption is, where the existence of the one fact is not direct evidence of the existence of the other, but the one fact existing and being proved, the law raises an artificial presumption of the existence of the other.[97]

272, 78 L.Ed. 793, affirming Provident Trust Co. v. U. S., 2 F.Supp. 472, certiorari granted U. S. v. Provident Trust Co., 54 S.Ct. 66, 290 U.S. 614, 78 L.Ed. 536.

87. U.S.—U. S. v. Provident Trust Co., supra.

88. U.S.—Blakeslee v. Smith, D.C. Conn., 26 F.Supp. 28, affirmed, C.C.A., 110 F.2d 364.
Ark.—Gray v. Gray, 133 S.W.2d 874, 199 Ark. 152.
Iowa—Wilson v. Findley, 275 N.W. 47, 223 Iowa 1281.
Ky.—Prudential Ins. Co. of America v. Tuggle's Adm'r, 72 S.W.2d 440, 254 Ky. 814.
La.—Breeland v. Kenner, App., 174 So. 678.
Pa.—Rhodes v. Pennsylvania R. Co., 147 A. 854, 298 Pa. 101.
Tex.—Texas Pacific Coal & Oil Co. v. Wells, Civ.App., 151 S.W.2d 927—Crabb v. Zanes Freight Agency, Civ.App., 123 S.W.2d 752, error dismissed, judgment correct.
22 C.J. p 82 note 53.

89. U.S.—Erie R. Co. v. Murphy, C.C.A.N.Y., 9 F.2d 525.
N.J.—Ocean County Nat. Bank v. Stillwell, 197 A. 286, 123 N.J.Eq. 337.
22 C.J. p 83 note 60.

90. Cal.—Maupin v. Solomon, 183 P. 198, 41 Cal.App. 323.
22 C.J. p 83 note 61.

"Inference" is a logical deduction from circumstances known to exist, and not merely a presumption or substitute for evidence.—Norfolk Coca-Cola Bottling Works v. Krausse, 173 S.E. 497, 162 Va. 107.

Court must infer that which is inferable.—Ritchie v. Sheffield Farms Co., 222 N.Y.S.2d 724, 129 Misc. 765.

"Presumption" created by statute is interchangeable with "inference" arising from facts, as regards not being dispelled as matter of law by contradictory evidence.—Bushnell v. Yoshika Tashiro, 2 P.2d 550, 115 Cal.App. 563.

Weakened probative effect of inference
Where, by reason of a countervailing circumstance, the natural probative worth of an inference is weakened, the law does not raise the inference to the level of a presumption.—Ocean County Nat. Bank v. Stillwell, 197 A. 286, 123 N.J.Eq. 337.

91. Ariz.—Starkweather v. Conner, 38 P.2d 311, 44 Ariz. 369.
Cal.—Engstrom v. Auburn Automobile Sales Corporation, 77 P.2d 1059, 11 Cal.2d 64—Anderson v. I. M. Jameson Corporation, 59 P.2d 962, 7 Cal.2d 60—Day v. General Petroleum Corporation, 89 P.2d 718, 32 Cal.App.2d 220—Crooks v. White, 290 P. 497, 107 Cal.App. 304—Perry v. A. Paladini, Inc., 264 P. 580, 89 Cal.App. 275.
Mo.—Rose v. Missouri Dist. Telegraph Co., 43 S.W.2d 562, 328 Mo. 1009, 81 A.L.R. 400—Frye v. St. Joseph Ry., Light, Heat & Power Co., 99 S.W.2d 540, 231 Mo.App. 407—Merkel v. Railway Mail Ass'n, 226 S.W. 299, 205 Mo.App. 484.
Ohio.—Collins v. McClure, 26 N.E.2d 780, 63 Ohio App. 312.
Okl.—Stumpf v. Montgomery, 226 P. 65, 101 Okl. 257, 32 A.L.R. 1490.
Or.—Judson v. Bee Hive Auto Service Co., 297 P. 1050, 136 Or. 1, 74 A.L.R. 944, reversing 294 P. 588, 136 Or. 1, 74 A.L.R. 944.

92. Ill.—Paulsen v. Cochfield, 278 Ill.App. 596.
22 C.J. p 83 note 62—50 C.J. p 418 notes 35, 36.

Circumstance synonymous
An instruction that, if defendant made a threat, it was a presumption of guilt was not erroneous, the word "presumption" having been used as synonymous with "circumstance."—Grigsby v. Moffat, 2 Humphr., Tenn., 487.

93. Pa.—Watkins v. Prudential Ins. Co. of America, 173 A. 644, 315 Pa. 497, 95 A.L.R. 869.

94. Vt.—Sheldon v. Wright, 67 A. 807, 80 Vt. 298, 320.

95. N.C.—Lea v. Pearce, 68 N.C. 76.
40 C.J. p 1230 note 40.

96. N.J.—Gulick v. Loder, 13 N.J. Law 68, 23 Am.D. 711.
45 C.J. p 394 note 94.

97. N.J.—Gulick v. Loder, supra.

A violent presumption is one which is very strong and forcible, although not necessarily conclusive or irrebuttable—an inference which the law unhesitatingly requires to be drawn from given facts—a conclusion quite self-evident from the premises;[98] one where the connection between the fact to be inferred and that which is proved is found by experience and observation to be invariable in all instances.[99]

§ 116. Presumptions of Fact

a. In general
b. Necessary basis

a. In General

A presumption of fact is that mental process by which the existence of one fact is inferred from proof of some other fact or facts with which experience shows it is usually associated by succession or coexistence.

A presumption of fact is that mental process by which the existence of one fact is inferred from proof of some other fact or facts with which experience shows it is usually associated by succession or coexistence.[1] It is inseparable from inductive reasoning as an inference of the unknown from proof of the known.[2] It has been said that every presumption is originally a presumption of fact, but may become a presumption of law, and even indisputable in the course of time by universal acceptance of its truth or general recognition of its convenience as a rule of decision.[3] As commonly used in the law of evidence the term "presumption of fact" is applied to certain of the more frequent and strongly probative of the great mass of these logical inferences. In connection with this specific use, not only must the fact from which the inference is drawn be established in evidence, as stated infra § 116 b, and not rest on the accuracy of a reasoning process; but the inference to which it gives rise should, in the majority of cases, be strong and almost inevitable.[4] A failure to comply with these requirements when announcing such a presumption has been severely criticized[5] and the caution deserves attention, as it is on the legally recognized presumptions of fact that the true "presumptions" or assumptions of law are based. It follows from the nature of a presumption of fact that it is rebuttable.[6]

98. Ala.—Shealy v. Edwards, 75 Ala. 411.
67 C.J. p 251 notes 6, 7, 9.

99. Ky.—Davis v. Curry, 2 Bibb, 238.
67 C.J. p 251 note 8.

1. Tenn.—Cox v. Nance, App., 143 S.W.2d 897.
22 C.J. p 83 note 63.
Other definitions and expositions
U.S.—Minnesota Pig & Cattle Co. v. Rorick, C.C.A.Mich., 41 F.2d 691.
Ala.—Williams v. Wilson, 97 So. 911 210 Ala. 289.
Ark.—Shaul v. Katzenstein, 290 S. W. 966, 172 Ark. 932.
Cal.—Clary v. Lindley, 86 P.2d 920, 30 Cal.App.2d 571.
Ill.—Podolski v. Stone, 58 N.E. 340, 343, 186 Ill. 540.
Ind.—Chicago, I. & L. Ry. Co. v. Pritchard, 79 N.E. 508, 512, 168 Ind. 398, 9 L.R.A.,N.S., 857, rehearing denied 81 N.E. 78, 168 Ind. 398, 9 L.R.A.,N.S., 857—Indianapolis & Cincinnati Traction Co. v. Montfort, 139 N.E. 677, 80 Ind.App. 639—Pittsburgh, C. C. & St. L. Ry. Co. v. Bennett, 35 N.E. 1033, 1039, 9 Ind.App. 92.
Iowa.—Beggs v. Metropolitan Life Ins. Co., 257 N.W. 445, 219 Iowa 24, 95 A.L.R. 863.
Mich.—Blodgett v. Snobble, 295 N.W. 192, 295 Mich. 374.
Mo.—Finks v. Viking Refrigerators, App., 147 S.W.2d 124—State ex rel. Baumann v. Doder, App., 121 S.W. 2d 263.
Neb.—Smith v. Gardner, 55 N.W. 245, 36 Neb. 741.
N.Y.—Wisniewski v. New York Cent. R. Co., 238 N.Y.S. 429, 228 App. Div. 27—In re Shupack's Estate, 287 N.Y.S. 184, 158 Misc. 873—In re Katz's Estate, 239 N.Y.S. 722, 135 Misc. 861.
N.C.—Hunt v. Eure, 127 S.E. 593, 189 N.C. 482.
Pa.—Watkins v. Prudential Ins. Co. of America, 173 A. 644, 315 Pa. 497, 95 A.L.R. 869.
S.C.—Lawrence v. Southern Ry.—Carolina Division, 167 S.E. 839, 169 S.C. 1.
Tex.—Merryman v. Zeleny, Civ.App., 143 S.W.2d 410—Texas Employers' Ins. Ass'n v. Birdwell, Civ.App., 39 S.W.2d 159, error refused.
Utah.—In re Lambourne's Estate, 93 P.2d 475, 97 Utah 393.
Va.—Yeary v. Holbrook, 198 S.E. 441, 171 Va. 266.
Wyo.—Campbell v. Wyoming Development Co., 100 P.2d 124, 55 Wyo. 347, rehearing denied 102 P.2d 745, 55 Wyo. 347.
22 C.J. p 83 note 63 [a].
"Presumption" supplies place of rational inference and is for that reason to be distinguished sharply from "presumption of fact."—Pariso v. Towse, C.C.A.N.Y., 45 F.2d 962.

2. Iowa.—Graham v. Courtright, 161 N.W. 774, 180 Iowa 594.
22 C.J. p 84 note 64.

3. Pa.—Watkins v. Prudential Ins. Co. of America, 173 A. 644, 315 Pa. 497, 95 A.L.R. 869.

4. Kan.—Duncan v. Chicago, R. I. & P. R. Co., 108 P. 101, 82 Kan. 230.
22 C.J. p 84 note 66.

5. N.Y.—O'Gara v. Eisenlohr, 38 N. Y. 296.
22 C.J. p 84 note 67.

6. U.S.—American Alliance Ins. Co. v. Brady Transfer & Storage Co., C.C.A.Iowa, 101 F.2d 144—Miller v. Union Pac. R. Co., C.C.A.Mo., 63 F.2d 574, certiorari granted 54 S.Ct. 48, 290 U.S. 607, 78 L.Ed. 532, reversed on other grounds 54 S.Ct. 172, 290 U.S. 227, 78 L. Ed. 285—New York & Cuba Mail S. S. Co. v. Continental Ins. Co. of City of New York, D.C.N.Y., 32 F.Supp. 251, reversed on other grounds, C.C.A., 117 F.2d 404—Northern Pac. Ry. Co. v. Henneford, D.C.Wash., 15 F.Supp. 302, reversed on other grounds Henneford v. Northern Pac. Ry. Co., 58 S.Ct. 415, 303 U.S. 17, 82 L.Ed. 619.
Ark.—Missouri Pac. R. Co. v. Hood, 135 S.W.2d 329, 199 Ark. 520—Gray v. Gray, 133 S.W.2d 874, 199 Ark. 152.
Cal.—Pierson v. Bradfield, App., 111 P.2d 460—Duehren v. Stewart, 102 P.2d 784, 39 Cal.App.2d 201—Clary v. Lindley, 86 P.2d 920, 30 Cal.App. 2d 571—Fortier v. Hogan, 1 P.2d 23, 115 Cal.App. 50—Maryland Casualty Co. v. Little, 282 P. 968, 102 Cal.App. 205—Landsrath v. Industrial Accident Commission of California, 247 P. 227, 77 Cal.App. 509.
Ill.—Lohr v. H. Barkmann Cartage Co., 167 N.E. 35, 335 Ill. 325—Sharp v. Sharp, 164 N.E. 685, 333 Ill. 267.

The term "presumption of fact" has been said to be a misnomer in that it amounts to no more than an inference drawn by the jury.[7]

b. Necessary Basis

A presumption of fact must not be drawn from premises which are uncertain, but must be founded on facts established by direct evidence. Presumptions may not be founded on presumptions.

An inference of fact should not be drawn from premises which are uncertain,[8] but the facts on which an inference may legitimately rest must, it is said, be established by direct evidence as if they were the very facts in issue.[9] It follows that one presumption cannot be based on another presump-

Iowa.—Beggs v. Metropolitan Life Ins. Co., 257 N.W. 445, 219 Iowa 24, 95 A.L.R. 863—Kauffman v. Logan, 174 N.W. 366, 187 Iowa 670.
Ky.—Webber's Adm'x v. Louisville & N. R. Co., 87 S.W.2d 348, 261 Ky. 257.
Md.—Wright v. Lewis, 158 A. 704, 161 Md. 674.
Mich.—Blodgett v. Snobble, 295 N.W. 192, 295 Mich. 374—Michigan Aero Club v. Shelley, 278 N.W. 121, 283 Mich. 401—Christiansen v. Hilber, 276 N.W. 495, 282 Mich. 403—Essmeister v. Roadway Transit Co., 266 N.W. 391, 275 Mich. 387.
Mo.—Stack v. General Baking Co., 223 S.W. 89, 283 Mo. 396—Finks v. Viking Refrigerators, App., 147 S.W.2d 124—Raw v. Maddox, 93 S.W.2d 282, 230 Mo.App. 515—Turner v. National Benev. Soc., 28 S.W.2d 125, 224 Mo.App. 463—Fowler v. Crockett, App., 281 S.W. 116—Koprivica v. Standard Acc. Ins. Co., App., 218 S.W. 689.
Mont.—Johnson v. Kaiser, 65 P.2d 1179, 104 Mont. 261—Ashley v. Safeway Stores, 47 P.2d 53, 100 Mont. 312—In re Wray's Estate, 19 P.2d 1051, 93 Mont. 525.
N.J.—Carroll v. Prudential Ins. Co. of America, 15 A.2d 810, 125 N.J. Law 397.
N.Y.—Kennell v. Rider, 233 N.Y.S. 252, 225 App.Div. 391, affirmed 170 N.E. 159, 252 N.Y. 602—Schick v. Wolf, 202 N.Y.S. 601, 207 App.Div. 652—Nestor v. Pabst Brewing Co., 181 N.Y.S. 477, 191 App.Div. 312—Van Schaick v. Aron, 10 N.Y.S.2d 550, 170 Misc. 520.
Pa.—In re Lodge's Estate, 134 A. 472, 287 Pa. 184—Kelly v. Director General of Railroads, 118 A. 436, 274 Pa. 470—Williams v. Metropolitan Edison Co., 110 A. 92, 267 Pa. 158—Kunkel v. Kunkel, 110 A. 73, 267 Pa. 163.
R.I.—E. S. Company v. Rocheleau, 161 A. 145, 52 R.I. 378.
Tex.—Simonds v. Stanolind Oil & Gas Co., 136 S.W.2d 207, 134 Tex. 332, denying rehearing 114 S.W.2d 226, 134 Tex. 332, reversing 103 S.W.2d 784, 134 Tex. 332—Moore v. Wooten, Com.App., 280 S.W. 742, reversing, Civ.App., 265 S.W. 210, rehearing denied 283 S.W. 153—Merryman v. Zeleny, Civ.App., 143 S.W.2d 410—Crabb v. Zanes Freight Agency, Civ.App., 123 S.W.2d 752, error dismissed, judgment correct—Loving County v. Higginbotham, Civ.App., 115 S.W.2d 1110, error dismissed—Bibby v. Bibby, Civ.App., 114 S.W.2d 284, error dismissed—Walker v. Koger, Civ.App., 99 S.W.2d 1034, error dismissed—American Surety Co. of New York v. Cross, Civ.App., 80 S.W.2d 470—Neblett & Norman v. Goukas, Civ.App., 40 S.W.2d 1113—Hill County v. Colonial Trust Co., Civ.App., 18 S.W.2d 787, reversed on other grounds Colonial Trust Co. v. Hill County, Com.App., 27 S.W.2d 144—Langford v. El Paso Baking Co., Civ.App., 1 S.W.2d 476, error dismissed.
Vt.—Tyrrell v. Prudential Ins. Co. of America, 192 A. 184, 109 Vt. 6, 115 A.L.R. 392—Simpson v. Central Vermont Ry. Co., 115 A. 299, 95 Vt. 388.
Va.—Kavanaugh v. Wheeling, 7 S.E.2d 125, 175 Va. 105—Fugate v. Carter, 144 S.E. 483, 151 Va. 108.
W.Va.—First Nat. Bank v. Tri-State Equipment & Repair Co., 152 S.E. 635, 108 W.Va. 686—Dwight v. Hazlett, 147 S.E. 877, 107 W.Va. 192, 66 A.L.R. 102.
22 C.J. p 84 note 68.

Opposing evidence for jury

"Presumption of fact" is called into being by proof, and opposing evidence must be weighed by jury as judges of facts proved.—Mullins v. Ritchie Grocer Co., 35 S.W.2d 1010, 183 Ark. 218.

7. Wyo.—Hoge v. George, 200 P. 96, 27 Wyo. 423, 18 A.L.R. 469.
22 C.J. p 84 note 69.

8. U.S.—Mikolajczyk v. Allcutt, C.C.A.Pa., 102 F.2d 82.
Fla.—Atlantic Coast Line R. Co. v. McIntosh, 198 So. 92.
Ind.—Pioneer Coal Co. v. Hardesty, 133 N.E. 398, 77 Ind.App. 205.
Me.—Eastport Water Co. v. E. A. Holmes Packing Co., 117 A. 311, 121 Me. 345—Bennett v. Thurston, 114 A. 459, 120 Me. 368.
Neb.—Smith v. Fall, 241 N.W. 560, 122 Neb. 783.
N.H.—Watkins v. Hustis, 109 A. 713, 79 N.H. 285.
Okl.—Roy v. St. Louis-San Francisco Ry. Co., 4 P.2d 1038, 153 Okl. 270.
S.C.—Lawrence v. Southern Ry.—Carolina Division, 167 S.E. 839, 169 S.C. 1.
Tex.—Middleton v. Brawley, Civ.App., 12 S.W.2d 257, 260, quoting **Corpus Juris**—Texas Employers' Ins. Ass'n v. Shipley, Civ.App., 260 S.W. 646, 650, quoting **Corpus Juris.**
W.Va.—Antonowich v. Home Life Ins. Co., 179 S.E. 601, 116 W.Va. 155.
22 C.J. p 84 note 70.

9. U.S.—Chicago, M. & St. P. Ry. Co. v. Coogan, 46 S.Ct. 564, 271 U.S. 472, 70 L.Ed. 1041, reversing Coogan v. Chicago, M. & St. P. Ry. Co., 200 N.W. 477, 160 Minn. 411, certiorari granted Chicago, M. & St. P. R. Co. v. Coogan, 45 S.Ct. 462, 267 U.S. 589, 69 L.Ed. 802.
Cal.—Metter v. Los Angeles Examiner, 95 P.2d 491, 35 Cal.App.2d 304.
Ky.—Donahue v. Louisville & N. R. Co., 118 S.W.2d 716, 274 Ky. 364.
La.—Perot v. Carolina Ins. Co. of Wilmington, N. C., App., 171 So. 458.
Miss.—Mobile & O. R. Co. v. Clay, 125 So. 819, 156 Miss. 463, certiorari denied Clay v. Mobile & O. R. Co., 51 S.Ct. 24, 282 U.S. 844, 75 L.Ed. 749.
Mo.—Pape v. Ætna Casualty & Surety Co., App., 150 S.W.2d 569.
Mont.—Ashley v. Safeway Stores, 47 P.2d 53, 100 Mont. 312.
N.H.—Boston & M. R. R. v. Peterborough R. R., 166 A. 275, 86 N.H. 217.
N.J.—Cichocki v. Geigy Co., 183 A. 463, 14 N.J.Misc. 232.
Okl.—Chicago, R. I. & P. Ry. Co. v. Anderson, 286 P. 787, 142 Okl. 276—Columbian Nat. Life Ins. Co. v. Wirthle, 176 P. 406, 73 Okl. 302.
Pa.—Commonwealth ex rel. District Attorney v. Dobrowski, 5 Pa.Dist. & Co. 16, 17, 23 Luz.Leg.Reg. 31, 72 Pittsb.Leg.J. 234.
Tenn.—Shockley v. Morristown Produce & Ice Co., 11 S.W.2d 900, 158 Tenn. 148.
Tex.—Middleton v. Brawley, Civ.App., 12 S.W.2d 257, 260, quoting **Corpus Juris**—Texas Employers' Ins. Ass'n v. Shipley, Civ.App., 260 S.W. 646, 650, quoting **Corpus Juris**—Beazley v. McEver, Civ.App., 238 S.W. 949.
W.Va.—Clark v. Matheny, 193 S.E. 800, 802, 119 W.Va. 264, citing **Corpus Juris.**
Wis.—Wm. Esser & Co. v. Industrial Commission of Wisconsin, 211 N.W. 150, 191 Wis. 473.
22 C.J. p 84 note 71.

Prior or subsequent facts

Courts may draw reasonable infer-

tion,[10] and it has been broadly asserted in many decisions that inferences cannot be founded on inferences from facts existing prior to or subsequent to event for purpose of reaching conclusion of fact.—Shaughnessy v. Morrison, 165 A. 553, 116 Conn. 661.

Reasonable inferences drawn from affirmative facts proved are evidence and not presumptions on presumptions.

N.M.—Hepp v. Quickel Auto & Supply Co., 25 P.2d 197, 37 N.M. 525.

Or.—Gray v. Hammond Lumber Co., 232 P. 637, 113 Or. 570, rehearing denied 233 P. 561, 113 Or. 570.

22 C.J. p 84 note 71 [a].

Presumption as proof

In action for conversion of personalty contained in filling station wherein there was no direct testimony showing what personalty was in station when defendant took possession thereof, and wherein trial court found that defendant converted personalty, presumption that property which plaintiff had left locked in station remained and continued in condition in which he left it is strong enough to warrant accepting as true presumed fact that defendant had possession of property.—Williams v. Sinclair Refining Co., 47 P.2d 910, 39 N.M. 388.

10. U.S.—Southern Ry. Co. v. Stewart, C.C.A.Mo., 115 F.2d 317, modified on other grounds 119 F.2d 85—Equitable Life Ins. Co. of Iowa v. Halsey, Stuart & Co., C.C.A.Ill., 112 F.2d 302, certiorari granted 61 S.Ct. 40, and reversed on other grounds 61 S.Ct. 623—Miller v. Union Pac. R. Co., C.C.A.Mo., 63 F.2d 574, certiorari granted 54 S.Ct. 48, 290 U.S. 607, 78 L.Ed. 532, reversed on other grounds, 54 S.Ct. 172, 290 U.S. 227, 78 L.Ed. 285—Lincoln Nat. Life Ins. Co. v. Erickson, C.C.A.Minn., 42 F.2d 997—General Reinsurance Corporation v. Southern Surety Co. of Des Moines, Iowa, C.C.A.Iowa, 27 F.2d 265—People's Bank of Sanford, N. C., v. Fidelity & Deposit Co. of Maryland, D.C.N.C., 4 F.Supp. 379, affirmed, C.C.A., Fidelity & Deposit Co. of Maryland v. People's Bank, 72 F.2d 932, certiorari denied 55 S.Ct. 348, 293 U.S. 627, 79 L.Ed. 714—Southwestern Bell Telephone Co. v. City of San Antonio, D.C.Tex., 2 F.Supp. 611, affirmed 4 F.Supp. 570, set aside, C.C.A., 75 F.2d 880, certiorari denied City of San Antonio v. Southwestern Bell Telephone Co., 55 S.Ct. 835, 295 U.S. 754, 79 L.Ed. 1698—J. W. Ringrose Co. v. W. & J. Sloane, D.C.Pa., 266 F. 402, affirmed, C.C.A., 272 F. 445.

Ala.—Williams v. Wilson, 97 So. 911, 210 Ala. 289—Gadsden General Hospital v. Bishop, 96 So. 145, 209 Ala. 272—Byars v. James, 94 So. 536, 208 Ala. 390.

Ark.—Jones v. Leighton, 142 S.W.2d 505, 200 Ark. 1015.

Cal.—In re Velladao's Estate, 88 P.2d 187, 31 Cal.App.2d 355—Walsh v. American Trust Co., 47 P.2d 323, 325, 7 Cal.App.2d 654, citing **Corpus Juris.**

Colo.—Dodo v. Stocker, 219 P. 222, 74 Colo. 95.

Fla.—Atlantic Coast Line R. Co. v. Seward, 150 So. 257, 112 Fla. 326.

Idaho.—Common School Dist. No. 27 in Twin Falls County v. Twin Falls Nat. Bank, 299 P. 662, 50 Idaho 668—Johnson v. Richards, 294 P. 507, 50 Idaho 150—Swetland v. New World Life Ins. Co., 206 P. 190, 35 Idaho 109.

Ill.—Darmody v. Kroger Grocery & Baking Co., 280 Ill.App. 253, affirmed 1 N.E.2d 56, 362 Ill. 554—Fitch v. Monarch Accident Ins. Co., 239 Ill.App. 479—Henninger v. Inter-Ocean Casualty Co., 217 Ill.App. 542.

Ind.—Pennsylvania R. Co. v. Johnson, 169 N.E. 358, 91 Ind.App. 412.

Iowa.—Poweshiek County v. Merchants' Nat. Bank of Grinnell, 228 N.W. 32, 209 Iowa 467, 82 A.L.R. 39—Gregory v. Kirkman Consol. Independent School Dist., 173 N.W. 243, 186 Iowa 914.

Kan.—McKenzie v. New York Life Ins. Co., 112 P.2d 86, 153 Kan. 439—Schmidt v. Twin City State Bank, 100 P.2d 652, 151 Kan. 667.

Ky.—National Life & Accident Ins. Co. v. Clark, 93 S.W.2d 847, 263 Ky. 779.

Mich.—Standard Drug Store v. A. E. Wood & Co., 198 N.W. 960, 227 Mich. 333.

Miss.—Masonite Corporation v. Dennis, 168 So. 613, 175 Miss. 855—Hinman v. Sabin, 112 So. 871, 147 Miss. 509.

Mo.—Mendenhall v. Neyer, 149 S.W.2d 366—Brainard v. Missouri Pac. Co., 5 S.W.2d 15, 319 Mo. 890—State ex rel. Missouri Public Utilities Co. v. Cox, 250 S.W. 551, 298 Mo. 427, quashing Book v. Missouri Public Utilities Co., App., 242 S.W. 433—Phillips v. Travelers' Ins. Co. of Hartford, Conn., 231 S.W. 947, 288 Mo. 175—Pape v. Ætna Casualty & Surety Co., App., 150 S.W.2d 569—Harding v. Federal Life Ins. Co., App., 34 S.W.2d 198—Frost v. Central Business Men's Ass'n, App., 246 S.W. 628—Weber v. Valier & Spies Milling Co., App., 242 S.W. 985—Boggess v. Kansas City Rys. Co., 229 S.W. 404, 207 Mo.App. 1—Merkel v. Railway Mail Ass'n, 226 S.W. 299, 205 Mo. App. 484—Atherton v. Railway Mail Ass'n, App., 221 S.W. 752—Kilroy v. Charles L. Crane Agency Co., 218 S.W. 425, 203 Mo.App. 302.

Mont.—Ashley v. Safeway Stores, 47 P.2d 53, 100 Mont. 312—Doran v. U. S. Building & Loan Ass'n, 20 P.2d 835, 94 Mont. 73—Holt v. Sather, 264 P. 108, 81 Mont. 442—Fisher v. Butte Electric Ry Co., 235 P. 330, 72 Mont. 594—Osborne v. Supreme Lodge, Knights of Pythias, Insurance Department, 222 P. 456, 69 Mont 361—Kern v. Payne, 211 P 767, 65 Mont. 325—First Nat. Bank v. Sorenson, 210 P. 900, 65 Mont. 1.

Neb.—Peabody v. Continental Life Ins. Co., 257 N.W. 482, 128 Neb. 23—Lebs v. Mutual Ben. Health & Accident Ass'n, 247 N.W. 19, 124 Neb. 491.

N.J.—Parave v. Public Service Interstate Transp. Co., 160 A. 375, 109 N.J.Law 155—Adriance v. Schenck Bros., 112 A. 408, 95 N.J.Law 185—McCombe v. Public Service Ry. Co., 112 A. 255, 95 N.J.Law 187.

N.Y.—In re Wyllie's Estate, 236 N.Y.S. 370, 134 Misc. 715.

N.D.—Miller v. Northern Pac. Ry. Co., 118 N.W. 344, 346, 18 N.D. 19, 19 Ann.Cas. 1215.

Ohio.—Sobolovitz v. Lubric Oil Co., 140 N.E. 634, 107 Ohio St. 204.

Okl.—Star v. Brumley, 263 P. 1086, 129 Okl. 134—Schaff v. Ferry, 232 P. 407, 105 Okl. 259—Stumpf v. Montgomery, 226 P. 65, 101 Okl. 257, 32 A.L.R. 1490.

Or.—Keller v. Johnson, 194 P. 185, 99 Or. 113.

Pa.—Neely v. Provident Life & Accident Ins. Co. of Chattanooga, Tenn., 185 A. 784, 322 Pa. 417—Fox v. Davey Compressor Co., 178 A. 469, 318 Pa. 331—Carroll v. Willow Brook Co., 165 A. 550, 108 Pa. Super. 580—Buck v. Quaker City Cab Co., 75 Pa.Super. 440—Perkins v. Philadelphia National Bank, 19 Pa.Dist. & Co. 475—McHugh v. McHugh, 17 Pa.Dist. & Co. 247—Commonwealth ex rel. District Attorney v. Dobrowski, 5 Pa.Dist. & Co., 16, 17, 23 Luz.Leg.Reg. 31, 72 Pittsb.Leg.J. 234—Preston v. Schroeder, 27 Del.Co. 350.

S.C.—Craig v. Clearwater Mfg. Co., 200 N.E. 765, 189 S.C. 176.

Tenn.—Nashville, C. & St. L. Ry. v. Sutton, App., 104 S.W.2d 834—Gulf Refining Co. v. Frazier, 83 S.W.2d 285, 19 Tenn.App. 76—Tennessee-Jellico Coal Co. v. Young, 79 S.W.2d 815, 18 Tenn.App. 537.

Tex.—Green v. Texas & P. Ry. Co., 81 S.W.2d 669, 125 Tex. 168, reversing, Civ.App., 50 S.W.2d 353—International Travelers' Ass'n v. Bettis, 35 S.W.2d 1040, 120 Tex. 67, reversing, Civ.App., 3 S.W.2d 478—Community Natural Gas Co. v. Henley, Com.App., 24 S.W.2d 10, reversing, Civ.App., 11 S.W.2d 207—Pease v. State, Com.App., 208 S.W. 162, modifying, Civ.App., 155 S.

ferences.[11] This rule has been said to be not a | rule of general application but a rule of reason gov-

W. 657—Texas Pacific Coal & Oil Co. v. Wells, Civ.App., 151 S.W.2d 927—Whitefield v. Whitefield, Civ. App., 140 S.W.2d 347—Texas Indemnity Ins Co. v. Staggs, Civ. App., 138 S.W.2d 174, conforming to answers to certified questions 134 S.W.2d 1026, 134 Tex. 318, error dismissed by agreement—Longhorn Drilling Corporation v. Padilla, Civ.App., 138 S.W.2d 164—Dilbeck v. Blackwell, Civ.App., 126 S.W.2d 760, error refused—Traders & General Ins. Co. v. Boysen, Civ.App., 123 S.W.2d 1016, error dismissed, judgment correct—Loving County v. Higginbotham, Civ.App, 115 S.W.2d 1110, error dismissed—Lone Star Gas Co. v. Eckel, Civ App., 110 S.W.2d 936—Walker v. Koger, Civ.App., 99 S.W. 2d 1034, error dismissed—Standard Realty Co. v. Bacon, Civ.App., 60 S. W.2d 844, error dismissed—Fidelity Union Casualty Co. v. Carey, Civ. App, 38 S.W.2d 169, affirmed, Com. App., 55 S.W.2d 795—Chicago, R. I. & G. Ry. Co. v. Harris, Civ.App., 28 S.W.2d 611, error dismissed—Robert Oil Corporation v. Garrett, Civ.App., 22 S.W.2d 508, affirmed, Com.App., 37 S.W.2d 135—Texas Unity Oil Co. v. Dolman, Civ.App., 8 S.W.2d 815, error dismissed—Hudgins v. Kansas City, M. & O. R. Co., Civ.App., 2 S.W.2d 958, error refused—Missouri-Kansas-Texas R. Co of Texas v. Mars, Civ. App., 294 S.W. 941, reversed on other grounds, Com.App., Mars v. Missouri-Kansas-Texas R. Co of Texas, 298 S.W. 271, affirmed Missouri-Kansas-Texas R. Co. of Texas v. Mars, 49 S Ct. 103, 278 U.S. 258, 73 L.Ed. 316—Harris v. Missouri-Kansas-Texas R. Co., Civ. App., 283 S.W. 895—Parrish v. Parrish, Civ.App., 280 S.W. 901—Missouri, K. & T. Ry. Co. of Texas v. Orr, Civ.App., 272 S.W. 343—Galveston, H. & S. A. Ry. Co. v. Landeros, Civ.App., 264 S.W. 524—Texas Employers' Ins. Ass'n v. Shipley, Civ.App., 260 S.W. 646, 650, quoting **Corpus Juris**—Stovall v. Martin, Civ.App., 210 S.W. 321.

Utah.—Karren v. Barr, 225 P. 1094, 63 Utah 344—Johnson v. Silver King Consol. Mining Co. of Utah, 179 P. 61, 54 Utah 34.

Vt.—Riggie v. Grand Trunk Ry. Co., 107 A. 126, 93 Vt. 282, error dismissed 41 S.Ct. 5, 254 U.S. 658, 65 L.Ed. 461.

Va.—Yeary v. Holbrook, 198 S.E. 441, 171 Va. 266—Johnson v. Richmond, F. & P. R. Co., 169 S.E. 603, 160 Va. 766.

Wash.—Prentice Packing & Storage Co. v. United Pac. Ins. Co., 106 P. 2d 314, 5 Wash.2d 144—Mumma v. Town of Brewster, 24 P.2d 438, 174 Wash. 112—Johnson v. Western Express Co., 181 P. 693, 107 Wash. 339.

22 C J. p 85 note 72.

Negligence

A presumption of negligence cannot be based on another presumption or inference, but the circumstances or facts from which the inference is to be drawn must be proved and not themselves presumed.—Looney v. Metropolitan R. Co., D.C., 26 S.Ct. 303, 200 U.S. 480, 50 L.Ed. 564—45 C.J. p 1146 note 52.

Presumptions held not improper as founded on presumptions.

Ariz.—Southwest Cotton Co. v. Clements, 213 P. 1005, 25 Ariz. 124, rehearing denied 215 P. 156, 25 Ariz. 169—Arizona Binghampton Copper Co. v. Dickson, 195 P. 538, 22 Ariz. 163, 44 A.L.R. 881.

Mo.—Jamison v. Kansas City, 17 S. W.2d 621, 223 Mo.App. 684—Joyce v. Missouri & Kansas Telephone Co., App., 211 S W. 900.

R.I.—Swartz v. Edwards Motor Car Co., 139 A. 466, 49 R.I. 18.

11. U.S.—Old South Lines v. McCuiston, C.C.A.Ga., 92 F.2d 441—Old South Lines v. McCuiston, C.C. A.Ga., 92 F.2d 439—Brown v. Maryland Casualty Co., C.C.A.Mo., 55 F 2d 159—Tucker v. Traylor Engineering & Mfg. Co., C.C.A.Okl., 48 F.2d 783—U. S. v. Mammoth Oil Co., C.C.A.Wyo., 14 F 2d 705, reversing, D C., 5 F.2d 330, and certiorari granted Mammoth Oil Co. v. U. S., 47 S.Ct. 332, 273 U S. 686, 71 L Ed. 840, affirmed 48 S.Ct. 1, 275 U.S. 13, 72 L.Ed. 137—The Glasgow Maru, D.C.Tex., 1 F.2d 503—Lee v. Walworth Co., D C.N. Y., 1 F R.D. 569.

Ala.—Johnson v. Louisville & N. R. Co., 198 So. 350, 240 Ala. 219—Equitable Life Assur. Soc. of U. S. v. Welch, 195 So. 554, 239 Ala. 453—Rowe v. Alabama Power Co., 167 So. 324, 232 Ala. 257—Goslin-Birmingham Mfg. Co. v. Gantt, 131 So. 905, 222 Ala. 321—Atlantic Coast Line R. Co. v. R. L. Cooper Lumber Co., 122 So. 661, 219 Ala. 484.

Cal.—Hamilton v. Pacific Electric Ry. Co., 86 P.2d 829, 12 Cal.2d 598—Robbiano v. Bovet, 24 P.2d 466, 218 Cal. 589—Jenkins v. National Paint & Varnish Co., 61 P. 2d 780, 17 Cal.App.2d 161.

Conn.—Sliwowski v. New York, N. H. & H. R. Co., 108 A. 805, 94 Conn. 303.

Idaho.—Wells v. Robinson Const. Co., 16 P.2d 1059, 52 Idaho 562.

Ill.—Fier v. Chicago Orpheum Co., 14 N.E.2d 860, 295 Ill.App. 247.

Ind.—Ward Bros. Co. v. Zimmerman, 180 N.E. 25, 94 Ind.App. 130.

Ky.—Amburgy's Adm'x v. Chesapeake & O. Ry. Co., 114 S.W.2d 1093, 272 Ky. 571—City of Ashland v. Burley, 96 S.W.2d 581, 265 Ky. 176—Ferguson v. Billups, 50 S.W.2d 35, 244 Ky. 85.

Mo.—Bollinger v. St. Louis-San Francisco Ry. Co., 67 S.W 2d 985—State ex rel. City of St. Charles v. Haid, 28 S.W.2d 97, 325 Mo. 107, denying quashal of opinion Cregger v. City of St. Charles, 11 S. W.2d 750, 224 Mo.App. 232—Cardinale v. Kemp, 274 S.W. 437, 309 Mo. 241—Raw v. Maddox, 93 S.W. 2d 282, 230 Mo.App. 515—Hasenjaeger v. Missouri-Kansas-Texas R. Co, 53 S.W.2d 1083, 227 Mo. App. 413—Freeman v. Kansas City Public Service Co., App., 30 S.W. 2d 176—Berry v. Peacock Coal & Development Co., App., 253 S.W. 456.

N.Y.—Wolfson v. Metropolitan Life Ins. Co., 28 N.Y.S.2d 490, 262 App. Div. 886—Doernberg v. Fine, 299 N.Y.S. 973, 252 App.Div 868—Grawunder v. Beth Israel Hospital Ass'n, 272 N.Y.S. 171, 242 App. Div. 56, affirmed 195 N.E. 221, 266 N.Y. 605—Warner v. New York, O. & W. Ry. Co., 204 N.Y.S. 607, 209 App.Div. 211, reversing, 201 N.Y. S. 454, motion to dismiss appeal granted 147 N E. 172, 239 N.Y. 507—Wass v. Western Union Telegraph Co., 10 N.Y.S.2d 956.

N.C.—Auten v. City of Asheville, 193 S.E. 387, 212 N.C. 380.

Ohio.—Hoppe v. Industrial Commission of Ohio, 30 N.E.2d 703, 137 Ohio St. 367—St. Marys Gas Co. v. Brodbeck, 151 N.E. 323, 114 Ohio St. 423—Apseloff v. Northwestern Nat. Ins. Co., App., 36 N. E.2d 194—Frommel v. Coney Island, App., 36 N.E.2d 9—Sheley v. Swing, 29 N.E.2d 364, 65 Ohio App. 109—Augusta v. Paradis, 22 N.E. 2d 578, 61 Ohio App. 323—Kramers v. Chesapeake & O. Ry. Co., 22 N. E 2d 227, 60 Ohio App. 556—East Ohio Gas Co. v. Van Orman, 179 N.E. 147, 41 Ohio App. 56—New York, C. & St. L. R. Co. v. Bowles, 171 N.E. 844, 35 Ohio App. 145—Bourdelis v. Trinity Cathedral, 166 N.E. 248, 31 Ohio App. 38—Lashure v. East Ohio Gas Co., 165 N.E. 305, 31 Ohio App. 161, affirmed 162 N.E. 41, 119 Ohio St. 9—Searer v. Lower, 158 N.E. 199, 25 Ohio App. 328.

Okl.—Highway Const. Co. v. Shue, 49 P.2d 203, 173 Okl. 456—Prest-O-Lite Co. v. Howery, 37 P.2d 303, 169 Okl. 408—Star v. Brumley, 263 P. 1086, 129 Okl. 134—Schaff v. Ferry, 232 P. 407, 105 Okl. 259.

Or.—Hamilton v. Finch, 111 P.2d 81, denying rehearing 109 P.2d 852—Vale v. State Industrial Accident Commission, 86 P.2d 956, 160 Or. 569—Hayes v. Ogle, 21 P.2d 223, 143 Or. 1.

erning only when the proved facts and their reasonable implications furnish no basis for agreement or disagreement by persons of average intelligence as to whether the factum probandum has been established;[12] but there is in fact no rule of law that forbids the resting of one inference on facts whose determination is the result of other inferences.[13] On the contrary, inferences may be based on facts whose determination is the result of other inferences,[14] so long as the first inference is based on such evidence as to be regarded as a proved fact[15] and the conclusion reached is not too remote.[16] A

Tenn.—General Outdoor Advertising Co. v. Coley, 131 S.W.2d 305, 23 Tenn.App. 292—Umstattd v. Metropolitan Life Ins. Co., 110 S.W.2d 342, 21 Tenn.App. 312—Nashville, C. & St. L. Ry. v. Sutton, 104 S.W.2d 834, 21 Tenn.App. 31—Nashville Gas & Heating Co. v. Phillips, 69 S.W.2d 914, 17 Tenn.App. 648—Martin v. Braid Electric Co., 9 Tenn.App. 542.

Tex.—Houston Fire & Casualty Ins. Co. v. Biber, Civ.App., 146 S.W.2d 442, error dismissed, judgment correct—Hager v. Hager, Civ.App., 127 S.W.2d 234—Poe v. Poe, Civ. App., 118 S.W.2d 831, error refused—Schumacher v. Missouri Pac. Transp. Co., Civ.App., 116 S.W.2d 1136, error dismissed—Chicago, R. I. & G. Ry. Co. v. Rhone, Civ.App., 105 S.W.2d 707, error dismissed—Massachusetts Bonding & Insurance Co. v. Cannon, Civ.App., 81 S.W.2d 293—Pool v. Joy, Civ.App., 61 S.W.2d 581.

Vt.—Laird v. State of Vermont Highway Department, 3 A.2d 552, 110 Vt. 195—In re Gates' Estate, 179 A. 159, 107 Vt. 304—Breding v. Champlain Marine & Realty Co., 172 A. 625, 106 Vt. 288—Andrews v. Watkins' Estate, 160 A. 176, 104 Vt. 321—Vermont Shade Roller Co. v. Burlington Traction Co., 150 A. 138, 102 Vt. 489, rehearing denied 153 A. 563, 103 Vt. 293—Wellman v. Wales, 129 A. 317, 98 Vt. 437—Wellman v. Wales, 122 A. 659, 97 Vt. 245.

Va.—Wade v. Chesapeake & O. Ry. Co., 193 S.E. 491, 169 Va. 448.

Purpose and extent of rule

The statutory rule that an inference may not be based on an inference is merely a means of testing logically the relevancy or sufficiency of evidence to prove a fact in dispute, and is not intended to inhibit reasoning processes, and does not forbid judgments based on circumstantial evidence, but a fact that has not been legally proved may not be assumed, and a conclusion may not be based on such a fact.—McKay v. State Industrial Accident Commission of Oregon, 87 P.2d 202, 161 Or. 191.

Inferences held not improper as based on inferences.

U.S.—Metropolitan Life Ins. Co. v. Armstrong, C.C.A.Neb., 85 F.2d 187—Standard Oil Co. of New York v. R. L. Pitcher Co., C.C.A.Me., 289 F. 678.

Ill.—Paoli v. Loyal Protective Ins. Co., 6 N.E.2d 909, 289 Ill.App. 87

Mich.—Dean v. Benton Harbor-St. Joe. Ry. & Light Co., 203 N.W. 952, 231 Mich. 23.

Mo.—Fulton v. Kansas City Life Ins. Co., App., 148 S.W.2d 581.

N.Y.—Allen v. Stokes, 23 N.Y.S.2d 443, 260 App.Div. 600, reargument denied 24 N.Y.S.2d 994, 260 App. Div. 1007.

Or.—Stanton v. Hazelwood Confectionery Co., 46 P.2d 96, 150 Or. 513.

Pa.—Madden v. Great Atlantic & Pacific Tea Co., 162 A. 687, 106 Pa. Super. 474.

12. Mo.—Wills v. Berberich's Delivery Co., 134 S.W.2d 125, 345 Mo. 616.

13. Conn.—Sliwowski v. New York, N. H. & H. R. Co., 108 A. 805, 94 Conn. 303.

Ind.—Orey v. Mutual Life Ins. Co. of New York, 19 N.E.2d 547, 215 Ind. 305.

14. Conn.—Ruerat v. Stevens, 155 A. 219, 113 Conn. 333.

Ind.—Orey v. Mutual Life Ins. Co. of New York, 19 N.E.2d 547, 215 Ind. 305—Scottish Union & National Ins. Co. v. B. E. Linkenhelt & Co., 121 N.E. 373, 70 Ind.App. 324.

Iowa.—Martin v. Bankers' Life Co. of Des Moines, 250 N.W. 220, 216 Iowa 1022.

Miss.—Masonite Corporation v. Hill, 154 So. 295, 170 Miss. 158, 95 A.L.R. 157.

N.J.—Jackson v. Delaware, L. & W. R. Co., 170 A. 22, 111 N.J.Law 487.

Pa.—Aurand v. Universal Carloading & Distributing Co., 200 A. 285, 131 Pa.Super. 502—Del Gaizo Distributing Corporation v. Gallacher, 192 A. 144, 127 Pa.Super. 53.

Necessity of case as determining factor

Inference may be based on another inference only so far as reasonable necessities of case in interest of justice require, and an inference on inference cannot prevail when fact sought to be thus established is capable of more satisfactory proof by direct evidence within reasonable power of party holding burden to produce. Thus, plaintiff suing for injuries sustained while swimming could not recover on evidence composed of inference on inference to show water contained irritant poisons from effluent from defendant's plant where plaintiff did not introduce proof of chemical analysis of water.—Masonite Corporation v. Hill, 154 So. 295, 170 Miss. 158, 95 A.L.R. 157.

15. Ala.—Williams v. Wilson, 97 So. 911, 210 Ala. 289.

Fla.—Atlantic Coast Line R. Co. v. McIntosh, 198 So. 92.

Ind.—Spencer Light, Heat & Power Co. v. Board of Com'rs of Owen County, 128 N.E. 700, 74 Ind.App. 199.

Okl.—Gypsy Oil Co. v. Ginn, 3 P.2d 714, 152 Okl. 30.

Pa.—Aurand v. Universal Carloading & Distributing Co., 200 A. 285, 131 Pa.Super. 502.

Tex.—Western Union Telegraph Co. v. Hill, Civ.App., 4 S.W.2d 668, error refused—Western Union Telegraph Co. v. Alred, Civ.App., 4 S.W.2d 666, error refused.

Va.—Virginian Ry. Co. v. London, 139 S.E. 328, 148 Va. 699.

Circumstance shown by direct evidence is fact proved, and not one inferred, relative to rule against pyramided inferences.—Craycroft v. Crawford, Tex.Com.App., 285 S.W. 275, reversing, Civ.App., 275 S.W. 124, rehearing denied, Com.App., 287 S.W. 244.

16. Mo.—Wills v. Berberich's Delivery Co., 134 S.W.2d 125, 345 Mo. 616—Martin v. St. Louis-San Francisco Ry. Co., 46 S.W.2d 149, 329 Mo. 729, certiorari denied St. Louis-San Francisco Ry. Co. v. Martin, 52 S.Ct. 644, 286 U.S. 562, 76 L. Ed. 1294—Krug v. Mutual Life Ins. Co. of New York, App., 149 S.W. 2d 393.

Where probability becomes mere possibility

An inference may be drawn from a primary fact and a subsequent inference drawn therefrom, but as the chain lengthens the safety and dependability of the ultimate inference, measured by legal standards, becomes weaker and weaker until probability becomes only possibility, and when that stage is reached, however strong the possibility may be, the proof is insufficient to support a judgment.—Keffer v. American Stores Co., Pa., 2 Fay.L.J. 43.

Probative force of inference based on inference

The more remote the inference, the more feeble is its probative force.—Burns v. Prudential Ins. Co. of America, 283 Ill.App. 442.

fact may not be inferred without proof, and another inference drawn from the fact thus assumed.[17] A fact found from circumstantial evidence may be used as a basis for a presumption.[18] It is permissible for a court or jury to draw several conclusions or presumptions of fact from the same state of circumstances,[19] and in order that a presumption may be indulged, it is not necessary to believe that the thing presumed has been actually done, but it is sufficient if the evidence leads to a conclusion that it may have been done, and that its existence would be the solution of the difficulty arising from its nonexistence.[20]

§ 117. Presumptions of Law

A presumption of law is an inference which, in the absence of direct evidence on the subject, the law requires to be drawn from the existence of certain established facts.

A presumption of law is an inference which, in the absence of direct evidence on the subject, the law requires to be drawn from the existence of certain established facts;[21] a presumption which the law compels, and which may be conclusive or rebuttable;[22] a rule of law announcing a definite probative weight attached by jurisprudence to a proposition of logic. It is an assumption made by the law that a strong[23] inference of fact is prima facie correct, and will therefore sustain the burden of evidence, until conflicting facts on the point are shown.[24] Where such evidence is introduced, the presumption is functus officio and drops out of

17. Pa.—Gorman v. Simon Brahm's Sons, 148 A. 40, 298 Pa. 142.

18. Tenn.—Nashville Gas & Heating Co. v. Phillips, 69 S.W.2d 914, 17 Tenn.App. 648—Read Phosphate Co. v. Vickers, 11 Tenn.App. 146—Adamant Stone & Roofing Co. v. Vaughn, 7 Tenn.App. 170.

Sufficiency of evidence required to support inference

Although a conclusion as to an ultimate fact may be based on an inference from circumstantial evidence, in reaching such conclusion, the inference as to the ultimate fact may not be based on an inference as to the existence of the circumstantial facts, and when an inference of the probability of the ultimate fact must be drawn from facts whose existence is itself based only on an inference or chain of inferences, all prior links in the chain of inferences must be shown with the same certainty as is required in criminal cases, in order to support a final inference of the probability of the ultimate fact in issue.—New York Life Ins. Co. v. McNeely, 79 P.2d 948, 52 Ariz. 181.

Circumstances as evidence

That circumstances tending to prove a material fact are shown only as matters of inference from other circumstances may justify the jury in considering them as diminishing the weight or value of the conclusion or final inference, but does not render them inadmissible.—Welsch v. Charles Frusch Light & Power Co., 193 N.W. 427, 197 Iowa 1012.

19. U.S.—Falstaff Brewing Corporation v. Thompson, C.C.A.Neb., 101 F.2d 301, certiorari denied 59 S.Ct. 834, 307 U.S. 631, 83 L.Ed. 1514.
Mo.—State ex rel. Mulcahy v. Hostetter, 139 S.W.2d 939, dismissing certiorari Mulcahy v. Terminal R. Ass'n of St. Louis, App., 123 S.W.2d 235—Morris v. E. I. Du Pont de Nemours & Co., 109 S.W.2d 1222, 341 Mo. 821—Krug v. Mutual Life Ins. Co. of New York, App., 149 S.W.2d 393—Fulton v. Kansas City Life Ins. Co., App., 148 S.W.2d 581—American Veterinary Laboratories v. Glidden Co., 59 S.W.2d 53, 227 Mo.App. 799—Vortriede v. St. Louis Public Service Co., App., 58 S.W.2d 492—Allen v. Chicago, R. I. & P. Ry. Co., 54 S.W.2d 787, 227 Mo.App. 468, transferred, see 37 S.W.2d 607, 327 Mo. 526—Cregger v. City of St. Charles, 11 S.W.2d 750, 224 Mo.App. 232, quashal of opinion denied State ex rel. City of St. Charles v. Haid, 28 S.W.2d 97, 325 Mo. 107.
Ohio—House v. Stark Iron & Metal Co., App., 34 N.E.2d 592.
Tex.—Employers' Liability Assur. Corporation v. Mills, Civ.App., 81 S.W.2d 1028, error dismissed—Texas Employers' Ins. Ass'n v. Shipley, Civ.App., 260 S.W. 646, 650, quoting **Corpus Juris.**
Vt.—Gero v. John Hancock Mut. Life Ins. Co., 18 A.2d 154, 111 Vt. 462.
22 C.J. p 86 note 73.

20. Tex.—Texas Employers' Ins. Ass'n v. Shipley, Civ.App., 260 S.W. 646, 650, quoting **Corpus Juris.**
22 C.J. p 86 note 74.

21. Ohio.—Black River Lumber Co. v. Kent, 177 N.E. 380, 381, 39 Ohio App. 241, quoting **Corpus Juris.**

22. Mo.—State ex rel. Baumann v. Doder, App., 121 S.W.2d 263.

Conclusive presumption of law is an inference which must be drawn from proof of given facts and which no evidence will overcome.
Mo.—Beck v. Kansas City Public Service Co., App., 48 S.W.2d 213, transferred, see, Sup., 37 S.W.2d 589.
Tenn.—Lyon v. Guild, 52 Tenn. 175, 182, 5 Heisk. 175.

"Rebuttable presumption" is inference which obtains until overthrown by proof.—Beck v. Kansas City Public Service Co., Mo.App., 48 S.W.2d 213, transferred, see, Sup., 37 S.W.2d 589.

Theory of "legal presumption" is that law conclusively attaches certain significance to certain facts as public policy, and refuses to permit real facts to be shown as in accord with presumption, and a legal presumption cannot be nullified by alleging error in law.—Grennon v. New Orleans Public Service, 136 So. 309, 17 La.App. 700.

23. Ga.—Georgia Ry. & Power Co. v. Shaw, 149 S.E. 657, 660, 40 Ga.App. 341, quoting **Corpus Juris.**
22 C.J. p 124 note 50.

24. U.S.—Metropolitan Life Ins. Co. v. Goodwin, C.C.A.Va., 92 F.2d 274—Puget Sound Electric Ry. v. Benson, Wash., 253 F. 710, 165 C.C.A. 304.
Ala.—Sovereign Camp, W. O. W., v. Dennis, 87 So. 616, 17 Ala.App. 642, certiorari denied Ex parte Sovereign Camp, W. O. W., 87 So. 620, 205 Ala. 316.
Cal.—Kott v. Hilton, App., 114 P.2d 666.
Colo.—Neighbors of Woodcraft v. Hildebrandt, 54 P.2d 889, 98 Colo. 231.
Ga.—Georgia Ry. & Power Co. v. Shaw, 149 S.E. 657, 660, 40 Ga.App. 341, quoting **Corpus Juris.**
Ill.—Johnson v. Pendergast, 139 N.E. 407, 308 Ill. 255, reversing 225 Ill.App. 624.
Mass.—Giligian v. New England Truck Co., 163 N.E. 651, 265 Mass. 51.
N.J.—Kresse v. Metropolitan Life Ins. Co., 168 A. 634, 111 N.J.Law 474.
N.Y.—Kennell v. Rider, 233 N.Y.S. 252, 225 App.Div. 391, affirmed 170 N.E. 159, 252 N.Y. 602—Brandt v. Morning Journal Ass'n, 80 N.Y.S. 1002, 81 App.Div. 183, affirmed 69 N.E. 1120, 177 N.Y. 544.
Or.—French v. State Industrial Ac-

sight,[25] but the evidence must be credible.[26] Where evidence of equally credible witnesses for and against a presumption of law is equally balanced, the presumption will prevail.[27] Legal presumptions are for the guidance of the trial court.[28]

cident Commission, 68 P.2d 466, 156 Or. 443.
Pa.—Watkins v. Prudential Ins. Co. of America, 173 A. 644, 315 Pa. 497, 95 A.L.R. 869.
R.I.—Normandin v. Parenteau, 150 A. 460.
S.C.—Joyner v. South Carolina R Co., 1 S.E. 52, 26 S.C. 49, 55.
S.D.—Honrath v. New York Life Ins. Co., 275 N.W. 258, 65 S.D. 480, 112 A.L.R. 1272.
Va.—Simpson v. Simpson, 175 S.E. 320, 162 Va. 621, 94 A.L.R. 909, vacating 169 S.E. 556.
Wash.—McMullen v. Warren Motor Co., 25 P.2d 99, 174 Wash. 454.
Wis.—State ex rel. Northwestern Development Corporation v. Gehrz, 283 N.W. 827, 230 Wis. 412.
22 C.J. p 124 note 51.

Other definitions and expositions

"Legal presumption" is a rule of law laid down by the judge and attaching to evidentiary facts certain procedural consequences as to duty of production of other evidence by opponent.
U.S.—In re John B. Rose Co., C.C.A. N.Y., 275 F. 409.
Cal.—Levins v. Rovegno, 12 P. 161, 71 Cal. 273, modified on other grounds 12 P. 343—Beers v. California State Life Ins. Co., 262 P. 380, 87 Cal.App. 440.
Conn.—Valentine v. Pollak, 111 A. 869, 95 Conn. 556—Vincent v. Mutual Reserve Fund Life Ass'n, 58 A. 963, 966, 77 Conn. 281.
Mo.—Joyce v. Missouri & Kansas Telephone Co., App., 211 S.W. 900.
N.Y.—Hogan v. O'Brien, 208 N.Y.S. 477, 212 App.Div. 193, affirming 206 N.Y.S. 831, 123 Misc. 865—In re Van Tassell's Will, 196 N.Y.S. 491, 119 Misc. 478.
Okl.—Echols v. Hurt, 243 P. 493, 116 Okl. 43—Kramer v. Nichols-Chandler Home Building & Brokerage Co., 229 P. 767, 103 Okl. 208, reversing 220 P. 338, 93 Okl. 227.
Tenn.—Siler v. Siler, 277 S.W. 886, 152 Tenn. 379.
Tex.—Mitchell v. Stanton, Civ.App., 139 S.W. 1033, 1036, error refused.
Utah.—Chamberlain v. Larsen, 29 P. 2d 355, 83 Utah 420.
Wyo.—Worth v. Worth, 49 P.2d 649, 48 Wyo. 441, 103 A.L.R. 107.
22 C.J. p 124 note 51 [a].

Fiction of law

(1) A "legal presumption" has been called a fiction of law and an assumption for convenience, but assumption is waived where contrary proof is introduced.—H. G. Hill Co. v. Squires, Tenn.App., 153 S.W.2d 425.

(2) "Fictions are to be distinguished from presumptions of law. By the former, something known to be false or unreal is assumed as true; by the latter, an inference is set up, which may be and probably is true, but which, at any rate, the law will not permit to be controverted."—Black L.D. p 495.

As maxims

"Presumptions of law" usually have force of legal maxims and becomes rules of law with definite procedural consequences.—Watkins v. Prudential Ins. Co. of America, 173 A. 644, 315 Pa. 497, 95 A.L.R. 869.

25. U.S.—U. S. ex rel. Scharlon v. Pulver, C.C.A.N.Y., 54 F.2d 261, followed in U. S. ex rel. Kohl v. Mulligan, 54 F.2d 1085—Pariso v. Towse, C.C.A.N.Y., 45 F.2d 962.
Ariz.—Seiler v. Whiting, 84 P.2d 452, 52 Ariz. 542.
Ark.—Mullins v. Ritchie Grocer Co., 35 S.W.2d 1010, 183 Ark. 218.
Ga.—Gibson v. Gibson, 187 S.E. 155, 54 Ga.App. 187—National Life & Accident Ins. Co. v. Hankerson, 175 S.E. 590, 49 Ga.App. 350—Hamby v. Crisp, 172 S.E. 842, 48 Ga.App. 418—Georgia Ry. & Power Co. v. Shaw, 149 S.E. 657, 660, 40 Ga.App. 341, quoting **Corpus Juris.**
Ill.—Osborne v. Osborne, 156 N.E. 306, 325 Ill. 229—Bassett v. Heiens, 30 N.E.2d 528, 307 Ill.App. 426.
Me.—Callahan v. Amos D. Bridges Sons, 147 A. 423, 128 Me. 346.
Mich.—Jackson City Bank & Trust Co. v. Sternburg, 274 N.W. 806, 281 Mich. 313, 112 A.L.R. 1195—Maki v. William Bonifas Lumber Co., 270 N.W. 805, 278 Mich. 610—Patt v. Dilley, 263 N.W. 749, 273 Mich. 601.
Miss.—Halloway v. Halloway, 198 So. 738, 189 Miss. 723—Wilson v. City of Lexington, 121 So. 859, 153 Miss. 212, corrected 124 So. 268, 155 Miss. 157.
Mo.—Finks v. Viking Refrigerators, App., 147 S.W.2d 124—Gilpin v. Ætna Life Ins. Co., 132 S.W.2d 686, 234 Mo.App. 566—Frye v. St. Joseph Ry., Light, Heat & Power Co., 99 S.W.2d 540, 231 Mo.App. 497—Viking Equipment Co. v. Central Hotel Co., 91 S.W.2d 94, 230 Mo.App. 304.
Neb.—Auld v. Auld, 240 N.W. 756, 757, 122 Neb. 576, citing **Corpus Juris.**
N.J.—Dunn v. Goldman, 168 A. 299, 111 N.J.Law 249.
N.Y.—U. S. Trust Co. of New York v. Frelinghuysen, 28 N.Y.S.2d 448, 262 App.Div. 259—Castellani v. Castellani, 28 N.Y.S.2d 879, 176 Misc. 763—In re Simpson's Estate, 24 N.Y.S.2d 954, 175 Misc. 718—Aarons v. Standard Varnish Works, 296 N.Y.S. 312, 163 Misc. 84, affirmed 3 N.Y.S.2d 910, 254 App.Div. 560—In re Goldman's Estate, 282 N.Y.S. 787, 156 Misc. 817.
Okl.—Echols v. Hurt, 243 P. 493, 116 Okl. 43—Kramer v. Nichols-Chandler Home Building & Brokerage Co., 229 P. 767, 103 Okl. 208, reversing 220 P. 338, 93 Okl. 227.
Or.—Kantola v. Lovell Auto Co., 72 P.2d 61, 157 Or. 534—French v. State Industrial Accident Commission, 68 P.2d 466, 156 Or. 443.
R.I.—Normandin v. Parenteau, 150 A. 460—McIver v. Schwartz, 145 A. 101, 50 R.I. 68.
S.D.—Honrath v. New York Life Ins. Co., 275 N.W. 258, 65 S.D. 480, 112 A.L.R. 1272.
Tex.—Buro v. Home Ben. Ass'n, Civ. App., 28 S.W.2d 902, error dismissed.
Utah.—Buckley v. Francis, 6 P.2d 188, 78 Utah 606.
Wash.—McMullen v. Warren Motor Co., 25 P.2d 99, 174 Wash. 454.
W.Va.—Dwight v. Hazlett, 147 S.E. 877, 107 W.Va. 192, 66 A.L.R. 102.
Wyo.—Worth v. Worth, 49 P.2d 649, 48 Wyo. 441, 103 A.L.R. 107.
22 C.J. p 124 note 52.

Presumption of law which arises merely as rule of procedure or for administrative convenience may be destroyed by positive evidence on behalf of him against whom it operates, but a presumption of law arising naturally and logically from the facts proved is not destroyed by evidence on behalf of him against whom it operates and remains in the case to the end unless overcome by evidence to the contrary.—State ex rel. Baumann v. Doder, Mo.App., 121 S.W. 2d 263.

Rebuttal of presumption

(1) "Rebuttal of presumption" means establishing to satisfaction of jury facts disproving presumption, or introduction of evidence sufficient to contradict presumption.—Georgia Ry. & Power Co. v. Shaw, 149 S.E. 657, 40 Ga.App. 341.

(2) Disputed medical theory is not evidence to rebut presumption of law.—In re Wells' Will, 221 N.Y.S. 714, 129 Misc. 447.

26. Wyo.—Hildebrand v. Chicago, B. & Q. R. R., 17 P.2d 651, 45 Wyo. 175, affirming 13 P.2d 1081, 44 Wyo. 488.

27. Va.—Rowe v. Rowe, 130 S.E. 771, 144 Va. 816.

28. Tex.—Jennings v. Sovereign Camp, W. O. W., Civ.App., 296 S. W. 961.

§ 118. Pseudo-Presumptions

Pseudo-presumptions may be described as so-called presumptions which are in reality not based on inferences of fact but are the statement of rules of substantive law.

In the administration of justice the courts indulge in certain pseudo-presumptions which are not really based on any inference of fact but amount rather to a statement of certain rules of substantive law or of administration which it has been found convenient, and even necessary, to apply in the trial of cases.[29] These pseudo-presumptions are considered hereinafter, as are the various true presumptions of law and of fact, in §§ 120–157.

Examine pocket parts for later cases.

§ 119. Probative Force and Conflict of Presumptions

Presumptions have no probative force, as a general rule. They may, however, support a finding, in a proper case. Where presumptions conflict, one may overcome the other; the stronger of two presumptions, or the less general, prevailing.

No general rule can be laid down as to the effect of a particular presumption in the actual trial of a case, since this depends on the purpose it is designed to serve.[30] It has been said that a presumption cannot in itself possess probative weight,[31] but merely necessitates evidence to meet the prima facie case which it creates;[32] that when the function of a presumption of law sustaining the burden of evidence is ended by the introduction of rebut-

29. Cal.—Murphy v. Sheftel, 9 P.2d 568, 570, 121 Cal.App. 533, citing **Corpus Juris.**

30. Conn.—O'Dea v. Amodeo, 170 A. 486, 118 Conn. 58.
N.Y.—In re Eichelberger's Estate, 273 N.Y.S. 535, 152 Misc. 834.

31. U.S.—U. S. ex rel. Jelic v. District Director of Immigration and Naturalization, Ellis Island, New York Harbor, C.C.A.N.Y., 106 F.2d 14—Equitable Life Assur. Soc. of U. S. v. Sieg, C.C.A.Ohio, 74 F.2d 606—U. S. ex rel. Scharlon v. Pulver, C.C.A.N.Y., 54 F.2d 261, followed in U. S. ex rel. Kohl v. Mulligan, 54 F.2d 1085—Ariasi v. Orient Ins. Co., C.C.A.Cal., 50 F.2d 548—U. S. v. Le Duc, C.C.A.Minn., 48 F.2d 789, certiorari denied Leduc v. U. S., 52 S.Ct. 14, 284 U.S. 631, 76 L.Ed. 537—Fidelity & Casualty Co. of New York v. Niemann, C.C.A.Mo., 47 F.2d 1056—New York Life Ins. Co. v. Ross, C.C.A.Tenn., 30 F.2d 80, certiorari denied 49 S.Ct. 348, 279 U.S. 852, 73 L.Ed. 995.
Conn.—O'Dea v. Amodeo, 170 A. 486, 118 Conn. 58—Clark v. Diefendorf, 147 A. 33, 109 Conn. 507.
Fla.—Powell v. Jackson Grain Co., 184 So. 492, 497, 134 Fla. 596.
Ill.—Coal Creek Drainage & Levee Dist. v. Sanitary Dist. of Chicago, 167 N.E. 807, 336 Ill. 11, reversing 254 Ill.App. 289.
Md.—Western Maryland R. Co. v. Shivers, 61 A. 618, 101 Md. 391.
Mich.—Madyck v. Shelley, 278 N.W. 110, 283 Mich. 396—Christiansen v. Hilber, 276 N.W. 495, 282 Mich. 403—Gillett v. Michigan United Traction Co., 171 N.W. 536, 205 Mich. 410.
Mo.—State ex rel. Strohfeld v. Cox, 30 S.W.2d 462, 325 Mo. 901, quashing certiorari Meyer Milling Co. v. Strohfeld, 20 S.W.2d 963, 224 Mo.App. 508—Schmidt v. Missouri Pac. Ry. Co., 90 S.W. 136, 191 Mo. 215, 3 L.R.A.,N.S., 196.
Neb.—Aeschleman v. Haschenburger Co., 254 N.W. 899, 127 Neb. 207.
N.H.—Caswell v. Maplewood Garage, 149 A. 746, 84 N.H. 241, 73 A.L.R. 433.
N.J.—Domanowski v. Prudential Ins. Co. of America, 182 A. 906, 116 N.J.Law 247—Dunn v. Goldman, 168 A. 299, 301, 111 N.J.Law 249, citing **Corpus Juris.**
N.Y.—Royce v. Rosasco, 287 N.Y.S. 692, 159 Misc. 236.
N.C.—State v. Herring, 160 S.E. 891, 895, 201 N.C. 543.
Okl.—English v. Traders' Compress Co., 31 P.2d 588, 590, quoting **Corpus Juris**—Cotcha v. Ferguson, 25 P.2d 767, 165 Okl. 295.
Pa.—Smith v. Kingsley, 200 A. 11, 331 Pa. 10—De Reeder v. Travelers Ins. Co., 198 A. 45, 329 Pa. 328—Walters v. Western & Southern Life Ins. Co., 178 A. 499, 318 Pa. 382, affirming 172 A. 406, 113 Pa.Super. 221—Watkins v. Prudential Ins. Co. of America, 173 A. 644, 315 Pa. 497, 95 A.L.R. 869—Kelly v. Hudson Coal Co., 179 A. 753, 119 Pa.Super. 405.
R.I.—Smith v. Tompkins, 161 A. 221, 222, 52 R.I. 434, citing **Corpus Juris**—E. S. Company v. Rocheleau, 161 A. 145, 52 R.I. 378—Normandin v. Parenteau, 150 A. 460—McIver v. Schwartz, 145 A. 101, 50 R.I. 68—Minutilla v. Providence Ice Cream Co., 144 A. 884, 50 R.I. 43, 63 A.L.R. 334—Van Ausdall v. Van Ausdall, 135 A. 850, 48 R.I. 106—Colangelo v. Colangelo, 125 A. 285, 286, 46 R.I. 138, citing **Corpus Juris.**
S.D.—McKiver v. Theo. Hamm Brewing Co., 297 N.W. 445—Honrath v. New York Life Ins. Co., 275 N.W. 258, 65 S.D. 480, 112 A.L.R. 1272.
Tenn.—Wright v. Bridges, 65 S.W.2d 265, 267, 16 Tenn.App. 576, quoting **Corpus Juris.**
Utah.—In re Bryan's Estate, 25 P.2d 602, 82 Utah 390.
Vt.—Tyrrell v. Prudential Ins. Co. of America, 192 A. 184, 109 Vt. 6, 115 A.L.R. 392.
Wash.—Selover v. Ætna Life Ins. Co., 38 P.2d 1059, 180 Wash. 236.
W.Va.—Jenkins v. Spitler, 199 S.E. 368, 370, 120 W.Va. 514, citing **Corpus Juris.**
22 C.J. p 156 note 34.

Not to be weighed against evidence

Presumptions cannot be weighed against evidence, since they fade out in the light of evidence no matter how contradictory the evidence may be, and the facts "appear" when the evidence from which facts may be found is introduced, and presumptions disappear when facts appear. Thus where unimpeached witnesses testify distinctly and positively to a fact and are uncontradicted, their testimony should be credited and have the effect of overcoming a mere presumption.—Christiansen v. Hilber, 276 N.W. 495, 282 Mich. 403.

Statutes authorizing weighing of presumptions against evidence

A statute creating disputable presumption to be weighed against contrary evidence is not unconstitutional as denying due process.—Smellie v. Southern Pac. Co., 299 P. 529, 212 Cal. 540.

32. Ill.—Trustees of Schools of Tp. No. 8 v. Lilly, 26 N.E.2d 489, 373 Ill. 431—Brown v. Brown, 160 N.E. 149, 329 Ill. 198.
Mich.—Christiansen v. Hilber, 276 N.W. 495, 282 Mich. 403.
Neb.—Bohmont v. Moore, 295 N.W. 419, 138 Neb. 784, 133 A.L.R. 270, rehearing denied 297 N.W. 559, 138 Neb. 907, 133 A.L.R. 279.
N.J.—Dunn v. Goldman, 168 A. 299, 300, 111 N.J.Law 249, citing **Corpus Juris.**
N.Y.—Kennell v. Rider, 233 N.Y.S. 252, 225 App.Div. 391, affirmed 170 N.E. 159, 252 N.Y. 602.
Wis.—Hanson v. Engebretson, 294 N.W. 817, 237 Wis. 126.
22 C.J. p 157 note 35.

ting testimony, as stated supra § 117, the presumption of law disappears, leaving in evidence the basic fact, which still retains its probative force and is capable of being weighed against other facts,[33] and that, as stated supra § 115, a presumption of fact becomes inoperative when the actual facts are disclosed, or when it is incumbent on the party relying on the presumption to know the facts.[34] Nevertheless, a presumption stands in lieu of evidence and supports a finding,[35] if not rebutted,[36] or even though there is positive evidence against it.[37] It is logically impossible to balance a fact or the legitimate inferences from it with an assumption, maxim, or other rule of law.[38] Disputable presumptions disappear from the case when controverted or contradicted by undisputed testimony or evidence of the party relying on them.[39] Juries may not without reason overturn legal presumptions.[40]

Conflict of presumptions. Where there is a conflict of presumptions one presumption may be overcome by the other.[41] Thus, where presumptions are of unequal weight, the stronger will prevail.[42] For example, when it is sought to prove fraud by

33. U.S.—Department of Water and Power of City of Los Angeles v. Anderson, C.C.A.Nev., 95 F.2d 577, certiorari denied 59 S.Ct. 67, 305 U.S. 607, 83 L.Ed 386.
Cal.—Fortier v. Hogan, 1 P.2d 23, 115 Cal.App. 50
22 C.J. p 157 note 37.

34. Mo.—Schaub v. Kansas City Southern R. Co., 113 S.W. 1163, 133 Mo.App 444.

35. Cal.—Westberg v. Willde, 94 P. 2d 590, 14 Cal 2d 360, superseding, App., 85 P.2d 507—In re Wiechers' Estate, 250 P. 397, 199 Cal. 523, certiorari denied Wiechers v. Wiechers, 47 S.Ct. 476, 273 U.S. 762, 71 L.Ed. 879—Scott v. Sheedy, 102 P. 2d 575, 39 Cal App.2d 96—Brill v. Brill, 102 P.2d 534, 38 Cal.App.2d 741—Perry v. A. Paladini, Inc., 264 P. 580, 89 Cal.App. 275—Simon Newman Co. v. Woods, 259 P. 460, 85 Cal.App. 360.
Ind.—Scottish Union & National Ins. Co. v. B. E. Linkenhelt & Co., 121 N.E. 373, 70 Ind.App. 324.
Iowa.—Beggs v. Metropolitan Life Ins. Co., 257 N.W. 445, 219 Iowa 24, 95 A.L.R. 863.
Ky.—Massachusetts Bonding & Insurance Co. v. Dale, 50 S.W.2d 40, 244 Ky. 50.
Me.—Jones v. Granite State Fire Ins. Co., 37 A. 326, 328, 90 Me. 40.
Mont.—Story Gold Dredging Co. v. Wilson, 76 P.2d 73, 106 Mont. 166—McMahon v. Cooney, 25 P.2d 131, 95 Mont. 138.
Or.—Templeton v. Bockler, 144 P. 405, 73 Or. 494.
22 C.J. p 157 note 40.

36. U.S.—Williams v. Vreeland, N. J., 244 F. 346, 156 C.C.A. 632.

Uncontroverted disputable presumptions are binding on court or jury, but direct or indirect controverting evidence raises fact issue for determination.—Simonton v. Los Angeles Trust & Savings Bank, 270 P. 672, 205 Cal. 252.

37. U.S.—New York Life Ins. Co. v. Gamer, C.C.A.Mont., 106 F.2d 375, certiorari denied 60 S.Ct. 294, 308 U.S. 621, 84 L.Ed. 518—Falstaff Brewing Corporation v. Thompson, C.C.A.Neb., 101 F.2d 301, certiorari denied 59 S.Ct. 834, 307 U.S. 631, 83 L.Ed. 1514.
Ala.—Western Union Telegraph Co. v. Gorman, 185 So. 743, 237 Ala. 146.
Cal.—People v. Chamberlain, 60 P. 2d 299, 7 Cal.2d 257—In re Pitcairn's Estate, 59 P.2d 90, 6 Cal. 2d 730—Smellie v. Southern Pac. Co., 299 P. 529, 212 Cal. 540—Bard v. Kent, App., 116 P.2d 137—In re Braue's Estate, App., 114 P.2d 386—Woodward v. Southern Pac. Co., 94 P.2d 1028, 35 Cal.App.2d 130, certiorari denied Southern Pac. Co. v. Woodward, 60 S.Ct. 614, 309 U.S. 670, 84 L.Ed. 1016—Lieber v. Rigby, 94 P.2d 49, 34 Cal.App.2d 582—Asbury v. Goldberg, 47 P.2d 311, 8 Cal App.2d 70—Hackley v. Southern Pac. Co., 45 P 2d 447, 6 Cal. App.2d 611, certiorari denied Southern Pac. Co. v. Hackley, 56 S.Ct. 153, 296 U.S. 630, 80 L.Ed. 447—Vaughan v. People's Mortg. Co., 20 P.2d 335, 130 Cal.App. 632—Bushnell v. Yoshika Tashiro, 2 P.2d 550, 115 Cal.App. 563.
Mo.—State ex rel. Baumann v. Dodder, App., 121 S.W.2d 263.
N.J.—Welles v. Schaffer, 129 A. 622, 98 N.J.Eq. 31.
22 C.J. p 157 note 42.

Presumption made evidence by statute

A disputable presumption, made evidence by statute, may not be dispelled by mere conflict in evidence, and is not dispelled unless the fact opposed thereto is proved as a matter of law.—Ohran v. Yolo County, 104 P.2d 700, 40 Cal.App.2d 298.

Question for jury

(1) A disputable presumption may be controverted by other evidence, and, if such evidence is introduced, jury may weigh evidence and determine whether it sufficiently contradicts presumption, and such a presumption has no weight against an admitted fact and cannot prevail against a proved fact, but is not overcome merely because evidence has been introduced in opposition thereto.—Noble v. Key System, 51 P. 2d 887, 10 Cal.App.2d 132.

(2) In first instance it is for court to say whether evidence is sufficient as matter of law to overcome a presumption, and, if not, question is for jury under proper instruction.—Luna v. Seattle Times Co., 59 P.2d 753, 186 Wash. 618, 105 A.L.R. 932.

38. N.H.—Lisbon v. Lyman, 49 N.H. 553, 563.
22 C.J. p 157 note 43.

39. Cal.—Westberg v. Willde, 94 P. 2d 590, 14 Cal.2d 360, superseding, App., 85 P.2d 507—Smellie v. Southern Pac. Co., 299 P. 529, 212 Cal. 540—Rogers v Interstate Transit Co., 297 P. 884, 212 Cal. 36, certiorari denied Interstate Transit Co. v. Rogers, 52 S.Ct. 22, 284 U.S. 640, 76 L.Ed. 545—Mar Shee v. Maryland Assur. Corporation, Baltimore, 210 P. 269, 190 Cal 1—Bard v. Kent, App., 116 P.2d 137—Day v. General Petroleum Corporation, 89 P.2d 718, 32 Cal.App.2d 220—Clary v. Lindley, 86 P.2d 920, 30 Cal.App.2d 571—Brewer v. Southern Pac. Co., 84 P.2d 230, 29 Cal.App.2d 251.

40. Utah.—Karren v. Bair, 225 P. 1094, 63 Utah 344.

41. U.S.—U. S. v. Mandel Bros., 10 Ct.Cust.App. 44.
Ind.—Hitt v. Carr, 130 N.E. 1, 77 Ind App. 488.
Vt.—Simpson v. Central Vermont Ry. Co., 115 A. 299, 95 Vt. 388.

Question of fact

Where there are two conflicting pieces of evidence, both prima facie in character, it cannot be ruled as matter of law that either has controlling effect over other.—Town of Lexington v. Ryder, 6 N.E.2d 828, 296 Mass. 566.

42. Mont.—McMahon v. Cooney, 25 P.2d 131, 95 Mont. 138.
N.Y.—In re Tuttle's Estate, 247 N. Y.S. 825, 139 Misc. 16, reversed on other grounds 254 N.Y.S. 65, 234 App.Div. 1, and affirmed Conklin v. Tuttle, 184 N.E. 136, 260 N.Y. 663—In re Cofer's Estate, 196 N.Y. S. 767, 119 Misc. 587, affirmed 199 N.Y.S. 916.

Particular presumptions weighed

Conn.—Richey v. First Nat. Bank & Trust Co., 195 A. 732, 123 Conn.

the presumption of payment arising from the possession of a negotiable instrument by a person liable on it,[43] or to establish bigamy by the inference of marriage from reputation and cohabitation or the continuance of a former marriage relation,[44] it is commonly declared that the presumption of proper conduct is not overcome by the presumptions mentioned.[45] Where it can be presumed that a party acted rightfully, it should not be presumed from the same facts that he acted wrongfully.[46] In the absence of other evidence, a less general presumption prevails over a more general presumption.[47]

B. PARTICULAR PRESUMPTIONS, AND PRESUMPTIONS ARISING FROM PARTICULAR FACTS

§ 120. Acceptance of Benefits

It is presumed that individuals act as their self-interest requires, and assent to acts by others which are beneficial; the renunciation of a right is not to be presumed.

It is a generally recognized presumption that individuals will act in the manner which their self-interest requires.[48]

Thus it is presumed that individuals assent to acts by third persons which are beneficial.[49] However, before the assent of, or acceptance by, a person will be presumed, it must clearly appear that a benefit to such person will result.[50]

It is not to be presumed that a person renounces a right.[51] Thus, it is not to be presumed that claimant intended to surrender a well-secured claim for one no better secured.[52]

§ 121. Capacity of Women for Childbearing

An adult woman is presumed to be capable of bearing children, and with respect to property rights, the presumption is not affected by her age.

In accordance with the rules, considered in § 150 infra, regarding presumptions as to health and physical condition, an adult woman is presumed to have the normal capacity to bear children.[53]

Effect of age. In the United States the law conclusively presumes, generally in cases involving the rule against perpetuities, the devolution of property, or the right or title to property, that a woman is capable of bearing children at any age of adult life.[54] However, it has been held that this pre-

360—Home Owners' Loan Corporation v. Sears, Roebuck & Co., 193 A. 769, 123 Conn. 232.
N.Y.—Hoppenstedt v. Amy, 174 N.Y.S. 742.
N.D.—Holtan v. Beck, 125 N.W. 1048, 20 N.D. 5—Salzer Lumber Co. v. Claflin, 113 N.W. 1036, 16 N.D. 601.
S.C.—Sibley v. Sibley, 70 S.E. 615, 88 S.C. 184, Ann.Cas.1912C 1170.

43. Ark.—Excelsior Mfg. Co. v. Owens, 25 S.W. 868, 58 Ark. 556.

44. Pa.—Feustal v. Krul, 8 Pa.Dist. & Co. 369.
22 C.J. p 157 note 49.

45. Minn.—Coffman v. Christenson, 113 N.W. 1064, 102 Minn. 460.
22 C.J. p 157 note 50.

46. Cal.—Grossman v. Yip Wing, 216 P. 634, 62 Cal.App. 121.
La.—Coleman v. Washington, 120 So. 42, 167 La. 658.
Mont.—Burgess v. Lasby, 9 P.2d 164, 91 Mont. 482.
N.J.—Sillart v. Standard Screen Co., 194 A. 787, 119 N.J.Law 143.
N.C.—Anthony v. American Express Co., 124 S.E. 753, 188 N.C. 407, 36 A.L.R. 460.
Tex.—California State Life Ins. Co. v. Kring, Civ.App., 208 S.W. 372

47. Cal.—McKay v. McKay, 195 P. 385, 184 Cal. 742—Walsh v. American Trust Co., 47 P.2d 323, 7 Cal.App.2d 654.

48. Conn.—Waterman v. Sprague Mfg. Co., 12 A. 240, 55 Conn. 554.

49. U.S.—City R. Co. v. Citizens' St. R. Co., Ind., 17 S.Ct. 653, 166 U.S. 557, 41 L.Ed. 1114.
22 C.J. p 109 note 6.
Presumption of acceptance by:
Assignee see Assignments § 140 a (2).
Creditors to assignment for their benefit see Assignments for Benefit of Creditors § 17 c.
Devisee or legatee of beneficial devise or bequest see the C.J.S. title Wills § 1148, also 69 C.J. p 969 note 15 et seq.
Donee of beneficial gift see the C.J.S. title Gifts § 65, also 28 C.J. p 672 note 72 et seq.
Grantee of deed for his benefit see Deeds § 186.

50. Mass.—Hill v. Hill, 179 N.E. 241, 278 Mass. 44.
Exercise of power of disposition
Benefit that would have resulted to trust beneficiary from exercise of power to dispose of interest does not warrant presumption that he would have exercised it in favor of his mother if advised of his rights.—Hill v. Hill, supra.

51. La.—Cusimano v. Ferrara, 129 So. 630, 170 La. 1044.

52. La.—Pontchartrain Apartments v. Maryland Casualty Co., 129 So. 671, 171 La. 67.

53. Ill.—Roedler v. Vandalia Bus Lines, 281 Ill.App. 520.

54. Ark.—Love v. McDonald, 148 S.W.2d 170, 201 Ark. 882—Adamson v. Wolfe, 139 S.W.2d 674, 200 Ark. 360—Bowen v. Frank, 18 S.W.2d 1037, 179 Ark. 1004.
Cal.—Fletcher v. Los Angeles Trust & Savings Bank, 187 P. 425, 182 Cal. 177.
Del.—Du Pont v. Du Pont, 159 A. 841, 18 Del.Ch. 316.
Fla.—Byers v. Beddow, 142 So. 894, 897, 106 Fla. 166, citing **Corpus Juris.**
Ill.—Carter v. Lewis, 4 N.E.2d 853 364 Ill. 434—Dustin v. Brown, 130 N.E. 859, 297 Ill. 499—Hill v. Sangamon Loan & Trust Co., 129 N.E. 554, 295 Ill. 619.
Ind.—Burrell v. Jean, 146 N.E. 754, 196 Ind. 187—Reasoner v. Herman, 134 N.E. 276, 191 Ind. 642.
Ky.—Shepherd v. Moore, 140 S.W.2d 810, 283 Ky. 181—Renaker v. Tanner, 83 S.W.2d 54, 260 Ky. 281—Futrell v. Futrell's Ex'r, 7 S.W.2d 232, 224 Ky. 814—Azarch v. Smith, 1 S.W.2d 968, 222 Ky. 566—Brown v. Owsley, 248 S.W. 889, 198 Ky. 344—Aulick v. Summers, 217 S.W. 1024, 186 Ky. 810.
Mich.—Rozell v. Rozell, 186 N.W. 489, 217 Mich. 324.
Mo.—Loud v. St. Louis Union Trust Co., 249 S.W. 629, 298 Mo. 148.
N.J.—Schumacher v. Howard Sav.

sumption has definitely limited uses,[55] and that the presumption may be rebutted in cases where title to, or the devolution of, property will not be affected.[56]

§ 122. Character

It is generally presumed that the character of an individual is good.

It is a generally recognized presumption, which merely states a rule as to the burden of evidence, that the character of an individual is good.[57] However, in some jurisdictions there is no presumption as to whether the general reputation or character of a person is good or bad.[58]

§ 123. Chastity

A rebuttable presumption exists in favor of chastity and virtue.

There is a presumption against immorality and in favor of chastity and virtue.[59] However, this presumption may be rebutted by evidence to the contrary.[60]

§ 124. Continuance of Fact or Condition

a. In general
b. Applications of rule

a. In General

Proof of the existence at a particular time of a fact of a continuous nature gives rise to an inference or rebuttable presumption that the fact exists at a subsequent time.

Proof of the existence at a particular time of a fact of a continuous nature gives rise to an inference, within logical limits, that it exists at a subsequent time.[61]

Inst., 8 A.2d 908, 126 N.J Eq. 325—Graves v. Graves, 120 A. 420, 94 N. J.Eq. 268—Application of Smith, 118 A. 271, 94 N.J Eq 1—Riley v. Riley, 113 A. 777, 92 N.J.Eq 465.
N.C.—Smith v. Moore, 100 S.E. 702, 178 N C. 370.
Pa.—In re Sterrett's Estate, 150 A. 159, 300 Pa. 116.
Tenn.—Jordan v. Jordan, 239 S.W. 423, 145 Tenn. 378—Stewart v. Chattanooga Sav. Bank, 12 Tenn. App 68—Barnett v. Daniel, 11 Tenn App. 443.
22 C.J. p 125 note 56.
Presumptions as to virility of men see infra § 149.

Presumption as rebuttable
The presumption is not rebuttable even by an agreed statement of fact. —Williams v. Frierson, 105 S.E. 475, 150 Ga. 797.

Particular circumstances
(1) Widow having children well advanced in years.—Tiffany v. Thomas, 190 S.E. 101, 168 Va. 31.

(2) Fifty-two years old.—Gettins v. Grand Rapids Trust Co., 228 N. W. 703, 249 Mich. 238.

(3) Sixty-eight years old.—Oleson v. Somogyi, 115 A. 526, 93 N.J Eq. 506, affirming 107 A. 798, 90 N.J.Eq. 342.

(4) Sixty-nine years old —Weberpals v. Jenny, 133 N.E. 62, 300 Ill. 145.

(5) Other circumstances see 22 C. J. p 125 note 56 [a].

55. Conn.—Ansonia Nat. Bank v. Kunkel, 136 A. 588, 105 Conn. 744.

56. U.S.—United States v. Provident Trust Co., Ct.Cl., 54 S.Ct. 389, 291 U.S. 272, 78 L.Ed. 793.

Presumption held rebutted
U.S.—Ninth Bank & Trust Co. v. U. S., D.C.Pa., 15 F.Supp. 951—City Bank Farmers' Trust Co. v. U. S., D.C.N.Y., 5 F Supp. 871, affirmed, C.C.A., 74 F.2d 692.

57. Cal.—Smith v. Smith, 87 P.2d 863, 31 Cal.App.2d 272.
Ill.—Western Cold Storage Co. v. New Amsterdam Casualty Co., 262 Ill.App. 133.
22 C.J. p 145 note 27.

Jurors
Jurors are presumed to be of good moral character.—Murphy v. Carolina Power & Light Co., 146 S.E. 204, 196 N.C. 484.

Party to civil action
This presumption applies in favor of a party to a civil action.—Lewis v. Williams, 89 S.E. 647, 105 S.C. 165 —22 C.J. p 145 note 28.

Presumption of falsity of contrary statement
A statement which reflects on the good character of a person is presumed to be false.—Sowers v. Wells, 114 P.2d 828, 154 Kan. 134.

Application for license to do business is not within such rule, and it has been held, in connection with such application, to be common knowledge that not every opulent individual or corporation is reliable or entitled to confidence.—Ætna Casualty & Insurance Co. v. Sullivan, 143 A. 687, 83 N.H. 426.

58. Ala.—Tingle v. Worthington, 110 So. 143, 215 Ala. 126.

59. Ky.—Barrett v. Vander-Meulen, 94 S.W.2d 983, 264 Ky. 441.
Mass.—Janevesian v. Esa, 174 N.E. 279, 274 Mass. 231.
Or.—Richter v. Richter, 245 P. 321, 117 Or. 621.
Tex.—Burchard v. Woodward, Civ. App., 223 S.W. 707.
22 C.J. p 145 note 31.
Presumption of chastity in:
Civil action for seduction see the C.J.S. title Seduction § 17, also 57 C.J. p 29 notes 23–31.
Criminal prosecution for rape see the C.J.S. title Rape § 46, also 52 C.J. p 1053 notes 63, 64, 73–83, p 1054 note 84.
Criminal prosecution for seduction see the C.J.S. title Seduction § 45, also 57 C.J. p 61 note 39–p 62 note 50.

Faithfulness of wife
Presumption is that wife was faithful to husband.—Darrow v. Geisen, 200 N.E. 711, 102 Ind.App. 14.

60. Cal.—People v. Laine, 182 P. 986, 41 Cal.App. 345.

61. U.S.—Dunbar v. Commissioner of Internal Revenue, C.C.A., 119 F.2d 367, 370, quoting **Corpus Juris**—National Labor Relations Board v. Piqua Munising Wood Products Co., C.C.A., 109 F.2d 552 —National Labor Relations Board v. National Motor Bearing Co., C. C.A., 105 F.2d 652—Liverpool & London & Globe Ins. Co. of Liverpool, England, v. Nebraska Storage Warehouses, C.C.A.Neb., 96 F.2d 303 —G. W. Sheldon & Co. v. Hamburg Amerikanische Packetfahrt-Actien-Gesellschaft, C.C.A.N.J., 28 F.2d 249—In re Paul, D.C.Pa., 14 F.2d 703—Byron Jackson Co. v. U. S., D.C.Cal., 35 F.Supp. 665—In re Rogers, D.C.W.Va., 20 F.Supp. 120, 130, quoting **Corpus Juris**—U. S. v. Great Pacific Co., 23 C.C.P.A. (Customs) 319.
Ala.—South Highlands Infirmary v. Imperial Laundry Co., 149 So. 106, 107, 25 Ala.App. 461, citing **Corpus Juris.**
Ariz.—Day v. Frazer, 78 P.2d 140, 51 Ariz. 474.
Cal.—San Francisco Breweries v. Superior Court in and for City and County of San Francisco, 251 P. 935, 80 Cal.App. 433.
Conn.—Johnson v. Charles William Palomba Co., 157 A. 902, 114 Conn.

The limits of time within which the inference of continuance possesses sufficient probative force to be relevant vary with each case.[62] Always strongest in the beginning[63] the inference steadily diminishes in force with lapse of time, at a rate proportionate to the quality of permanence belonging to the fact in question, until it ceases or perhaps is supplanted by a directly opposite inference.[64] In other words, it will be inferred that a given fact or set of facts, the existence of which at a particular time is once established in evidence, continues to exist so long as such facts usually do exist.[65]

108, 80 A.L.R. 441—Ealahan v. Ealahan, 119 A 349, 98 Conn. 176

Ga.—Clark v. Baker, 196 S E. 750, 186 Ga. 65—Chapman v. Chapman, 1 S E 2d 697, 698, 59 Ga.App. 602, quoting **Corpus Juris.**

Ill.—New York Cent. R Co. v. Lehigh Stone Co, 220 Ill.App 563—Thompson v. Crains, 216 Ill.App 300, modified on other grounds 128 N E 508

Ind.—Edwards v. Hudson, 14 N.E.2d 705, 214 Ind. 120—Northern Indiana Public Service Co. v. Millender, App., 24 N.E.2d 817—Anderson v. State, 132 N.E. 265, 76 Ind.App. 361.

Iowa.—Hazen v. Donohoe, 226 N.W. 33, 34, 208 Iowa 582, citing **Corpus Juris.**

Ky.—Ross v. Steele, 49 S W.2d 309, 243 Ky. 505—Commonwealth v. Brown, 39 S.W.2d 223, 226, 239 Ky. 197, quoting at length from **Corpus Juris**—Mutual Life Ins. Co. of New York v. Louisville Trust Co., 269 S.W. 1014, 207 Ky. 654.

Mass.—Malden Trust Co. v George, 22 N E 2d 74, 303 Mass. 528.

Mo.—City of Cape Girardeau v. Hunze, 284 S.W. 471, 478, 314 Mo. 438, 47 A.L.R. 25, citing **Corpus Juris**—McDaniels v. Cutburth, 270 S.W 353—King v. Missouri Pac. R. Co., 263 S W. 828—Eberle v. Koplar, App, 85 S.W.2d 919—Gray v. Union Electric Light & Power Co., App., 282 S.W. 490, 493, citing **Corpus Juris.**

Neb.—Reitz v. Petersen, 269 N.W. 811, 131 Neb. 706—Lincoln Joint Stock Land Bank of Lincoln v. Bexten, 250 N.W. 84, 125 Neb. 310.

N J.—Rein v. Travelers Ins. Co., 12 A.2d 864, 866, 124 N.J.Law 554, quoting **Corpus Juris.**

N.Y.—Gaston & Co. v. All Russian Zemsky Union, 224 N.Y.S. 522, 221 App.Div. 732, 221 App.Div. 73—People ex rel. 180 Varick Street Corporation v. Miller, 2 N.Y.S 2d 444, 166 Misc 253—In re Shupack's Estate, 287 N.Y.S. 184, 158 Misc. 873—Irving Trust Co. v. Gunder, 271 N Y.S. 795, 816, 152 Misc. 83, citing **Corpus Juris**—In re Ray's Estate, 270 N.Y.S 333, 150 Misc. 728—Gallagher v. Perot, 202 N Y. S. 441, 443, 122 Misc. 845, citing **Corpus Juris**—In re Hunt's Estate, 197 N.Y S. 633, 120 Misc. 174.

Ohio.—City of New Philadelphia v Hurst, 14 N.E.2d 1021, 57 Ohio App. 479.

Pa.—Donze v. Devlin, 195 A. 882, 329 Pa. 1—Brennan v. Pine Hill Collieries Co, 167 A 776, 312 Pa 52—In re Kaufmann's Estate, 127 A. 133, 281 Pa. 519—Dinger v Friedman, 123 A. 641, 644, 279 Pa. 8, citing **Corpus Juris.**

S C.—Nimmer v. Northwestern R Co., 107 S E. 479, 116 S.C. 190.

Tex.—Mayhew v. McFarland, Sup., 153 S.W 2d 428, 431, quoting **Corpus Juris**—Martinez v. Gutierrez, Com App, 66 S W.2d 678, affirming Gutierrez v. Martinez, Civ.App., 37 S.W.2d 833—Ætna Casualty & Surety Co. v. Dixon, Civ.App., 145 S W.2d 620, error refused—Montgomery Ward & Co. v. Levy, Civ. App, 136 S.W.2d 663, error dismissed, judgment correct—Safety Casualty Co. v. Walls, Civ.App., 117 S.W.2d 879, 882, quoting **Corpus Juris**—Ferguson v. Conklin, Civ.App, 51 S.W.2d 622—Sanders v. Farrier, Civ.App., 271 S.W. 293, 299, citing **Corpus Juris**—Northern Texas Traction Co. v. Smith, Civ. App., 223 S.W. 1013

Wis.—State ex rel. Northwestern Development Corporation v. Gehrz, 283 N.W. 827, 230 Wis. 412—Racine County v. Industrial Commission of Wisconsin, 246 N W. 303, 210 Wis 315—S. S Kresge Co v. Garrick Realty Co, 245 N.W. 118, 209 Wis. 305.

Wyo.—Holliday v. Templin, 103 P.2d 408, 413, citing **Corpus Juris**—Kennison v. Chokie, 100 P.2d 97, 98, citing **Corpus Juris**—Davis v Minnesota Baptist Convention of Minneapolis, Minn., 16 P.2d 48, 45 Wyo. 148.

22 C.J. p 86 note 75.

62. U.S.—Liverpool & London & Globe Ins. Co. of Liverpool, England, v. Nebraska Storage Warehouses, C.C.A.Neb, 96 F.2d 30, 36, quoting **Corpus Juris.**

Ky.—Cole v. Ohio Fuel Co., 17 S.W.2d 1029, 1030, 229 Ky. 771, quoting **Corpus Juris.**

Mont.—Sommer v. Wigen, 62 P.2d 333, 336, 103 Mont. 327, citing **Corpus Juris.**

Utah—Jensen v. Logan City, 57 P. 2d 708, 89 Utah 347.

63. Ky.—Cole v. Ohio Fuel Co., 17 S W.2d 1029, 1030, 229 Ky. 771, quoting **Corpus Juris.**

Mont—Sommer v. Wigen, 62 P.2d 333, 336, 103 Mont. 327, citing **Corpus Juris.**

22 C.J. p 87 note 76.

64. U.S.—Liverpool & London & Globe Ins. Co. of Liverpool, England, v. Nebraska Storage Warehouses, C.C.A Neb., 96 F.2d 30, 36, quoting **Corpus Juris**—In re J. H. Small Shoe Co., D.C.Conn., 13 F.2d 143, reversed on other ground, C. C A., 16 F.2d 205.

Ky.—Pacific Mut. Life Ins. Co. v. Meade, 134 S.W.2d 960, 964, citing **Corpus Juris**—Cole v. Ohio Fuel Oil Co., 17 S.W.2d 1029, 1030, 229 Ky. 771, quoting **Corpus Juris.**

Mont.—Sommer v. Wigen, 62 P.2d 333, 336, 103 Mont. 327, citing **Corpus Juris**—Doran v. U. S. Building & Loan Ass'n, 20 P 2d 835, 94 Mont. 73.

Utah.—Jensen v. Logan City, 57 P.2d 708, 89 Utah 347.

22 C.J. p 87 note 77.

Change of river bank or channel

The location of a river bank or channel cannot be presumed, over a period of many years, not to have changed.

Mo.—Nothstine v. Feldmann, 250 S. W. 589, 298 Mo. 365.

N.M.—Board of Trustees of Town of Casa Colorado Land Grant v. Pooler, 28 P.2d 519, 38 N.M. 87.

Change in circumstances of ward and his estate

There is no presumption that the circumstances surrounding a ward and his estate were the same six years after granting of license to sell his estate as they were at the time of the granting of such license.—In re Kuschel's Guardianship, 201 N.W. 319, 161 Minn. 219.

Circumstances of applicant for relief

Where applicant for blind relief shows that he was properly certified as of the year 1905, presumption would not exist that he was entitled to relief in 1935 where the county commissioners denied that he was so entitled.—Evans v. Harper, 13 N.E. 2d 639, 294 Ill.App. 164.

Effect of alcoholic beverages

Lapse of time following indulgence in alcoholic beverages is important consideration in determining whether person indulging was subject to its influence at later period.—Murdie v. Maryland Casualty Co., D.C.Nev., 52 F 2d 888, appeal dismissed, C.C.A., Maryland Casualty Co. v. Murdie, 57 F.2d 1081.

65. Cal.—Shaffer v. Noziglia, 220 P. 431, 64 Cal.App. 93.

Hawaii.—Henry Waterhouse Trust Co. v. Rawlins, 33 Hawaii 876.

Ky.—Cole v. Ohio Fuel Oil Co., 17 S. W.2d 1029, 1030, 229 Ky. 771, quoting **Corpus Juris.**

The inference is extremely faint in connection with matters of intrinsic impermanency;[66] and where a fact or condition is not reasonably continuous in its nature, there is no presumption of its continuance.[67] Moreover, the presumption does not apply where there has been a change in conditions.[68]

Presumption as rebuttable. Inferences of continuance are merely inferences of fact and may, therefore, be rebutted.[69]

The inference or presumption disappears when evidence to the contrary,[70] or, it has been held, any evidence, conflicting or otherwise,[71] is introduced. However, evidence which merely raises a doubt of the continuance of the existence of facts shown to have existed has been held to be insufficient to rebut the presumption.[72]

Discretion of court. It is a matter resting largely in the discretion of the trial court whether and to what extent the presumption of the continuance of existing conditions should be entertained.[73]

Jurisdictional fact. The presumption as to the continuance of a fact does not apply to the averment of a jurisdictional fact which must appear as existing at the time when an order based thereon is made.[74]

b. Applications of Rule

(1) Matters pertaining to person
(2) Relations between persons
(3) Property and financial matters
(4) Other applications

(1) Matters Pertaining to Person

The presumption of continuance of facts has been applied to matters pertaining to the person, such as

Mo.—King v. Missouri Pac. R. Co., 263 S.W. 828—Gray v. Union Electric Light & Power Co., App., 282 S.W. 490.
Mont.—Sommer v. Wigen, 62 P.2d 333, 103 Mont. 327—McKenzie v. Evans, 29 P.2d 657, 96 Mont. 1—State v. Banking Corporation of Montana, 241 P. 626, 74 Mont. 491.
Vt.—Merchants' Nat. Bank v. Carpenter, 165 A. 909, 105 Vt. 339.
Wash.—Kesner v. Inland Empire Land Co., 272 P. 29, 150 Wash. 1.
22 C.J. p 87 note 78.

66. Ohio.—City of New Philadelphia v. Hurst, 14 N.E.2d 1021, 57 Ohio App. 479.
22 C.J. p 87 note 80 [a] [c].

Rule otherwise stated

"Where the situation has inherent in it the likelihood of a change of state or the circumstances are such as to present opportunities for either natural forces or the intervention of persons or animals to cause a change in the situation, the testimony of a state presumed to continue must be fairly near the time of the event it is presumed to continue to and the more volatile the situation the nearer to the event must the observation be in order to become probative."—Jensen v. Logan City, 57 P.2d 708, 717, 89 Utah 347.

Possession of sum of money

U.S.—In re J. H. Small Shoe Co., D.C.Conn., 13 F.2d 143, reversed on other grounds, C.C.A., 16 F.2d 205.
Pa.—McCabe v. Commonwealth, 8 A. 45, 3 Pa.Cas. 426.

67. Hawaii.—Henry Waterhouse Trust Co. v. Rawlins, 33 Hawaii 876.
Iowa.—Burris v. Titzell, 177 N.W. 557, 189 Iowa 1322, modified on other grounds 179 N.W. 851, 189 Iowa 739.
Mo.—Deal v. Bank of Smithville, App., 52 S.W.2d 201.
Ohio.—Industrial Commission of Ohio v. Carden, 195 N.E. 551, 129 Ohio St. 344.
22 C.J. p 87 note 82.

Actions of people

(1) There is no presumption that a small child, when free and awake, continues in any one place.—Dangelo v. Pennsylvania R. Co., 152 A. 743, 301 Pa. 579.

(2) Fact that employee, when last seen alive, had steel shovel, did not warrant presumption that, when struck by lightning, he had steel shovel in his hands, subjecting him to special hazard or peculiar danger from elements greater than other persons in community, especially where shovel was not discovered near employee's body.—Industrial Commission of Ohio v. Carden, 195 N.E. 551, 129 Ohio St. 344.

Population

There is no presumption that population of district remained same from 1920 till April 1922, in view of steady prior increase.—Coal Creek Drainage & Levee Dist. v. Sanitary Dist. of Chicago, 167 N.E. 807, 336 Ill. 11, reversing 254 Ill.App. 289.

Visibility

In determining engineer's negligence in running through open switch, it cannot be presumed that switch light could have been seen as far at 10:47 p. m., the time of the accident, as it could an hour before.—Gray v. Baltimore & O. R. Co., C.C.A.Ill., 24 F.2d 671, 59 A.L.R. 461.

68. Mo.—Slack v. Kansas City Gas Co., 120 S.W.2d 70, 233 Mo.App. 306.

Change of judiciary system

Presumption that, when the judiciary has once adopted a rule of construction, it will be adhered to and considered as prevailing until the contrary is shown, does not apply with equal force when there has been an entire change of the judiciary system.—Western Union Tel. Co. v. Parsley, 121 S.W. 226, 57 Tex. Civ.App. 8—22 C.J. p 87 note 81.

69. U.S.—R. L. Witters Associates v. Ebsary Gypsum Co., D.C.Fla., 19 F.Supp. 646.
Ark.—United Fidelity Life Ins. Co. v. Dempsey, 122 S.W.2d 170, 197 Ark. 221.
Colo.—People v. District Court of Second Judicial Dist., 255 P. 447, 81 Colo. 163.
N.Y.—Levy v. Wallach, 178 N.Y.S. 216.
Tex.—Moore v. Wooten, Com.App., 280 S.W. 742, reversing, Civ.App., 265 S.W. 210, rehearing denied, Com.App., 283 S.W. 153—Sanders v. Farrier, Civ.App., 271 S.W. 293, 299, citing **Corpus Juris.**
22 C.J. p 87 note 85.

70. Cal.—People v. Goddard, 191 P. 1012, 47 Cal.App. 730.
Wis.—State ex rel. Northwestern Development Corporation v. Gehrz, 283 N.W. 827, 230 Wis. 412.

71. Vt.—Zabarsky v. Employers' Fire Ins. Co., 123 A. 520, 97 Vt. 377.

72. Pa.—Commonwealth v. Hudson Coal Co., 134 A. 413, 287 Pa. 64, error dismissed Hudson Coal Co. v. Commonwealth of Pennsylvania, 48 S.Ct. 17, 275 U.S. 575, 72 L.Ed. 434.

73. S.C.—Tate v. Mauldin, 154 S.E. 431, 157 S.C. 392.
S.D.—Yankton Nat. Bank v. Benson, 146 N.W. 582, 33 S.D. 399, Ann.Cas.1916B 1011.
Utah.—Jensen v. Logan City, 57 P. 2d 708, 89 Utah 347.

74. Mich.—New York Baptist Union v. Atwell, 54 N.W. 760, 95 Mich. 230.

mental or physical condition, state of mind, reputation, habits, status, etc.

The rule discussed in subdivision a of this section respecting the presumption of continuance of facts once shown to exist has been applied to afford a presumption of the continuance of a condition of bodily health or strength;[75] state of mind,[76] such as intention,[77] or knowledge of particular facts;[78] reputation or character[79] as to veracity[80] or chastity;[81] and personal habits.[82]

In addition, the rule has been applied to the personal[83] or legal[84] status of a person; celibacy[85] or the married state;[86] domicile,[87] settlement,[88] residence,[89] or place of doing business;[90] absence;[91] occupation;[92] and to official[93] or fiduciary[94] position.

Mental condition; sanity or insanity. Once a

75. Ill.—Hamer v. Globe Mut. Life Ins Co., 243 Ill.App. 109.
Mo.—Canty v. Halpin, 242 S.W. 97, 294 Mo 118
22 C J. p 87 note 89.

Epilepsy
Tex.—Traders & General Ins. Co. v. Hunter, Civ.App., 95 S.W.2d 158, error dismissed.

Inability to take anæsthetic or submit to operation one year before will not be presumed to continue to exist, since such condition is not of a permanent and continuous nature.—Burris v. Titzell, 177 N.W. 557, 189 Iowa 1322, modified on other grounds 179 N.W. 851, 189 Iowa 739.

Presumption as rebuttable
Ark.—United Fidelity Life Ins. Co. v. Dempsey, 122 S.W.2d 170, 197 Ark. 221.
Mo.—Canty v. Halpin, 242 S W. 97, 294 Mo. 118.

76. Mass.—Conroy v. Fall River Herald News Co., 28 N E 2d 729, 306 Mass. 488, 132 A.L.R. 927.

77. Conn.—Van Guilder v. Van Guilder, 123 A. 19, 100 Conn. 142.
22 C.J. p 88 note 92—45 C.J. p 1147 note 61.

Duration of presumption
Presumption of continuance of intention endures for at least the ordinary time it would take to carry the intention into effect.—Reitz v. Petersen, 269 N.W. 811, 131 Neb. 706.

78. N.Y.—In re Rogers' Will, 293 N. Y.S. 626, 250 App.Div. 26.

Knowledge acquired through agent
Principal who, through agent, acquires certain knowledge in connection with particular transaction, is deemed to continue to have such knowledge in all subsequent transactions of same character between same parties—In re Rogers' Will, supra.

79. Ill.—People ex rel. Aken v. Puffer, 8 N.E 2d 198, 290 Ill.App. 196.
Ky.—Pacific Mut. Life Ins. Co. v. Meade, 134 S.W.2d 960, 281 Ky. 36.
Wyo.—Kennison v. Chokie, 100 P.2d 97, 98, citing **Corpus Juris.**
22 C.J. p 88 note 93.

80. Mo.—Wood v. Matthews, 73 Mo. 477.
22 C.J. p 88 note 94.

81. Wyo.—Kennison v. Chokie, 100 P.2d 97, 98, citing **Corpus Juris.**
22 C.J. p 88 note 95.

82. Ky.—Pacific Mut. Life Ins. Co. v. Meade, 134 S.W.2d 960, 281 Ky. 36.
Wyo.—Kennison v. Chokie, 100 P.2d 97, 98, citing **Corpus Juris.**
22 C.J. p 88 note 3.

83. Mo.—Westinghouse Electric & Mfg. Co. v. Hodge, 167 S.W. 1186, 181 Mo.App. 232.
22 C.J. p 88 note 96.

84. Cal.—Citizens State Bank of Long Beach v. Gentry, 67 P.2d 364, 20 Cal.App 2d 415.
22 C J. p 88 note 97.

Alienage or citizenship
U.S.—U. S. ex rel. Meyer v. Day, C. C.A.N.Y., 54 F.2d 336.
22 C.J. p 88 note 97 [a], p 89 note 12.

Corporation "doing business" in state
(1) The status of "doing business" within state within statute governing service of process on foreign corporations, when once established, is presumed to continue unless controverted by other evidence.—Thew Shovel Co. v. Superior Court in and for City and County of San Francisco, 95 P.2d 149, 35 Cal.App.2d 183—San Francisco Breweries v. Superior Court in and for City and County of San Francisco, 251 P. 935, 80 Cal.App. 433.

(2) The continuance of the situation which impelled a foreign corporation to comply with statute requiring designation by foreign corporations doing business in state of a local agent for service of legal process may be presumed; but the presumption is subject to rebuttal proof.—R. L. Witters Associates v. Ebsary Gypsum Co., D.C.Fla., 19 F. Supp. 646.

(3) That corporation engaged someone as agent for certain negotiations is not evidence that he was "doing business" as agent for corporation more than a year later.—Burch v. Ingham Lumber Co., 102 So. 19, 212 Ala. 204.

Status as civil service employee
N.Y.—Manning v. City of New York, 263 N.Y.S. 790, 147 Misc. 384, reversed on other grounds 268 N.Y. S. 807, 150 Misc. 292.

85. Tex.—Goldsmith v. Mitchell, Civ.App., 57 S.W.2d 188, error dismissed.
22 C.J. p 88 note 98.

86. Ky.—Kentucky Stave Co. v. Page, 125 S W. 170.
22 C.J p 88 note 99.

87. La.—Simmon's Succ., 34 So. 101, 109 La. 1095.
Mo.—Walker v. Walker, 1 Mo.App. 404.

88. Mass.—Randolph v. Easton, 23 Pick. 242.

89. Ala.—South Highlands Infirmary v. Imperial Laundry Co., 149 So. 106, 25 Ala.App. 461.
22 C.J. p 89 note 15.

Lapse of many years
Persons cannot conclusively be presumed to retain same address during pendency of determination of federal income tax deficiency, which continued for many years.—Dilks v. Blair, C.C.A., 23 F.2d 831.

90. Tex.—Mayhew v. McFarland, Sup., 153 S.W.2d 428.

91. Ky.—Commonwealth v. Pollitt, 76 S.W. 412, 25 Ky.L. 790.
22 C.J. p 89 note 16.

92. Me.—McManus v. Peerless Casualty Co., 95 A. 510, 114 Me. 98.
22 C.J. p 89 note 17.

93. Wis.—Ryan v. Olson, 197 N.W. 727, 183 Wis. 290.
22 C.J. p 90 note 21.

Director or officer of corporation
Mo.—Eberle v. Koplar, App., 85 S.W. 2d 919.
Wis.—State ex rel. Northwestern Development Corporation v. Gehrz, 283 N.W. 827, 230 Wis. 412.
22 C.J. p 90 note 21 [d] [e].

Presumption held rebutted
Wis.—State ex rel. Northwestern Development Corporation v. Gehrz, 283 N.W. 827, 230 Wis. 412.

94. U.S.—In re Rogers, D.C.W.Va., 20 F.Supp. 120, 130, quoting **Corpus Juris.**
22 C.J. p 90 note 22.

Where grantee took as trustee, presumption existed that such condition of title continued unless evidence showed change therein.—Dobroth v. Jensen, 180 N.E. 785, 348 Ill. 157.
22 C.J. p 90 note 22 [a].

Guardian of minor is presumed to continue as such throughout minority of ward.—Anderson v. State, 132 N.E. 265, 76 Ind.App. 361.

mental condition is shown to have existed, it will be presumed to have continued,[95] provided the condition is of a continuous nature.[96] Thus, where insanity has been established, it will be presumed to have continued,[97] provided it is of a chronic or permanent nature;[98] and if the insanity, admitted or proved, is only temporary, occasional, or intermittent in its nature, the presumption of its continuance does not arise.[99] The presumption of the continuance of a condition once established also applies to sanity.[1]

95. Iowa.—Hazen v. Donohoe, 226 N.W. 33, 34, 208 Iowa 582, citing **Corpus Juris.**
Mo.—Canty v. Halpin, 242 S.W. 97, 294 Mo. 118.
22 C.J. p 87 note 90.

Lack of intellectual capacity ten years before accident may be shown as tending to prove similar lack when accident occurred.—Dziedzie v. Newmarket Mfg. Co., 136 A. 261, 82 N.H. 472

96. Ill.—Peters v. Peters, 33 N.E.2d 425, 376 Ill. 237.
22 C.J. p 87 note 90 [a].

Delirium, which is a disordered state, more or less temporary, of the mental faculties is not presumed to continue.—Sommerville v. Greenhood, 210 P. 1048, 65 Mont. 101—32 C.J. p 758 note 42 [a].

97. U.S.—Meoteris v. U. S., C.C.A. Ill., 108 F.2d 402—U. S. ex rel. Shaw v. Van De Mark, D.C.N.Y., 3 F.Supp. 101.
Fla.—Kuehmsted v. Turnwall, 155 So. 847, 115 Fla. 692.
Ga.—Stanley v. Stanley, 175 S.E. 496, 179 Ga. 135—Stanfield v. Hursey, 136 S.E. 826, 36 Ga.App. 394.
Idaho.—Witthoft v. Commercial Development & Investment Co., 268 P. 31, 46 Idaho 313.
Ill.—Hanon v. Kansas City Life Ins. Co., 269 Ill.App. 135.
Ind.—Langdon v. Langdon, 183 N.E. 400, 204 Ind. 321, 85 A.L.R. 1297.
Iowa.—Davidson v. Piper, 265 N.W. 107, 221 Iowa 171—Anspach v. Littler, 253 N.W. 120, 217 Iowa 787—Bettenga v. Stewart, 244 N.W. 279, 214 Iowa 1284—Hazen v. Donohoe, 226 N.W. 33, 208 Iowa 582—Carr v. Carr, 225 N.W. 948, 209 Iowa 160—Waters v. Waters, 207 N.W. 598, 201 Iowa 586.
Ky.—Hitt v. Campbell, 214 S.W. 785, 185 Ky. 80.
Me.—Appeal of Martin, 179 A. 655, 133 Me. 422—Austin W. Jones Co. v. State, 119 A. 577, 122 Me. 214.
Mass.—Hermanson v Seppala, 172 N.E. 87, 272 Mass. 197.
Mo.—Fendler v. Roy, 58 S.W.2d 459, 465, 331 Mo. 1083, citing **Corpus Juris**—State ex rel. Bartlett v. Littrell, 26 S.W.2d 768, 325 Mo. 35.
N.J.—Coombs v. Witte, 140 A. 408, 104 N.J.Law 519.
N.Y.—In re Prentice's Will, 181 N.Y.S. 679, 110 Misc. 456—Von Meyer v. Varcoe, 175 N.Y.S. 826, 106 Misc 426.
Ohio.—Ex parte Remus, 162 N.E. 740 119 Ohio St. 166.
Or.—In re Dugan, 76 P.2d 961, 158 Or. 439—Johnson v. Johnson, 264 P. 842, 124 Or. 480.
R.I.—McKenney v. Burney, 143 A. 778, 49 R.I. 423—Ex parte Palmer, 59 A. 746, 26 R.I. 486.
Tenn.—Kirk v. Sumner County Bank & Trust Co., App., 153 S.W.2d 139—Melody v. Hamblin, 115 S.W.2d 237, 21 Tenn.App. 687—Bank of Commerce & Trust Co. v. Stavros, 103 S.W.2d 593, 20 Tenn.App. 662—Brewer v. Griggs, 10 Tenn.App. 378.
Tex.—Gersdorff v. Torres, Com.App., 293 S.W. 560, affirming in part, reversing in part Torres v. Gersdorff, Civ.App., 287 S.W. 668—Benjamin State Bank v. Reed, Civ.App., 139 S.W.2d 172—Bryson v. Karslake, Civ.App., 71 S.W.2d 614, error dismissed—Billups v. Gallant, Civ. App., 37 S.W.2d 770, error refused.
Wash.—Criez v. Sunset Motor Co., 213 P. 7, 123 Wash. 604, 32 A.L.R. 627.
W.Va.—Wright v. Wright, 88 S.E. 606, 78 W.Va 57.
Wis.—In re Hogan, 287 N.W. 725, 232 Wis. 521.
22 C.J. p 88 note 91.

During commitment
Ga.—Lawrence v. Boswell, 118 S.E. 45, 155 Ga. 690.
Tex.—West Lumber Co. v. Henderson, Com.App., 252 S.W. 1044, modifying, Civ.App., 238 S.W. 710—National Surety Co. v. Landers, Civ.App., 235 S.W. 275, dismissed for want of jurisdiction.

Necessity for judicial determination of insanity

Judicial determination of insanity is essential, it has been held, before the presumption will be raised; and a mere order of commitment by a county court to the state hospital has been held insufficient.—Hoff v. State, 18 N.E.2d 671, 279 N.Y. 490, reversing 299 N.Y.S. 763, 252 App.Div. 837.

Cure

It will not be presumed that insanity has been cured.—In re Shupack's Estate, 287 N.Y.S. 184, 158 Misc. 873.

As vesting interest under will

Where one named as beneficiary in will, executed by testator prior to becoming insane, claimed vested interest in estate of testator during his lifetime, it was held that there is no presumption that insanity will continue until death.—Jones v. Eastham, Tex.Civ.App., 36 S.W.2d 538, error refused.

98. Ala.—Zeigler v. Coffin, 123 So. 22, 219 Ala. 586, 63 A.L.R. 942—Hall v. Britton, 113 So. 238, 216 Ala. 265—Washam v. Beaty, 99 So. 163, 210 Ala. 635.
Ga.—Sovereign Camp, W. O. W., v. Ellis, 1 S.E.2d 677, 59 Ga.App. 608.
Ill.—Turley v. Turley, 30 N.E.2d 64, 374 Ill. 571.
Iowa.—First Nat. Bank v. Sarvey, 198 N.W. 496, 198 Iowa 1067.
Me.—Appeal of Martin, 179 A. 655, 133 Me. 422.
Md.—Birchett v. Smith, 133 A. 117, 150 Md. 369.
Miss.—Parkinson v. Mills, 159 So. 651, 172 Miss. 784.
Mont.—In re Redfern's Estate, 208 P. 1072, 64 Mont. 49.
N.Y.—People ex rel. Thaw v. Lamb, 118 N.Y.S. 389.
N.C.—Mangum v. Brown, 156 S.E. 535, 200 N.C. 296.
Wash.—In re Miller's Estate, 116 P.2d 526—Dean v. Jordan, 79 P.2d 331, 194 Wash. 661—Fletcher v. Miller, 52 P.2d 304, 185 Wash. 299.
32 C.J. p 758 note 41.

Senile dementia, which condition is permanent and progressive in its nature, and not occasional or intermittent, is presumed to continue to exist.
Cal.—In re Alexander's Estate, 295 P. 53, 111 Cal.App. 1.
Ill.—Donovan v. St. Joseph's Home, 129 N.E. 1, 295 Ill. 125.
Tex.—Mason v. Rodriguez, 115 S.W. 868, 53 Tex.Civ.App. 445.

99. Ala.—Equitable Life Assur. Soc. of U. S. v. Welch, 195 So. 554, 239 Ala. 453.
Mass.—Hermanson v. Seppala, 172 N.E. 87, 272 Mass 197.
N.Y.—Von Meyer v. Varcoe, 175 N.Y.S. 826, 106 Misc. 426.
Okl.—Keenan v. Scott, 225 P. 906, 99 Okl. 63.
S.C.—Morris Fertilizer Co. v. Bonner, 119 S.E. 826, 126 S.C. 284.
Tenn.—Melody v. Hamblin, 115 S.W. 2d 237, 21 Tenn.App. 687.
32 C.J. p 758 note 42.

Presumption of sane interval

Where only occasional fits of insanity are shown, presumption is that a particular act was performed in a sane interval.—Brown v. Eckhardt, 129 S.W.2d 1122, 23 Tenn.App. 217.

1. Ga.—Morse v. Caldwell, 191 S.E. 479, 55 Ga.App. 804.

The presumption that a mental condition shown to have existed continues is rebuttable by the introduction of conflicting evidence.[2] The presumption that a person shown to have been insane continued so is rebuttable[3] by clear and satisfactory evidence that the person had recovered,[4] or that the act in question was performed during a lucid interval.[5]

(2) Relations between Persons

The presumption of the continuance of established facts has been applied to various relations existing between persons, including the relation of husband and wife.

The rule stated in subdivision a of this section respecting the presumption of the continuance of established facts or conditions has been applied to relations between persons.[6] Especially has the rule been applied where the relation is contractual,[7] as in the case of partnership,[8] principal and agent,[9]

Pa.—Roberts v. Washington Trust Co., 170 A. 291, 313 Pa. 584, certiorari denied 54 S.Ct. 778, 292 U.S. 608, 78 L.Ed. 1469, and rehearing denied 54 S.Ct. 857, 292 U.S. 613, 78 L.Ed. 1472.
S.C.—Cathcart v. Stewart, 142 S.E. 498, 144 S.C. 252.
22 C.J. p. 88 note 91

2. Mo.—Canty v. Halpin, 242 S.W. 97, 294 Mo. 118

3. N.J.—In re Wilson's Will, 153 A. 107, 107 N.J.Eq. 604, affirmed 158 A. 342, 110 N.J.Eq. 68.
N.Y.—In re Prentice's Will, 181 N.Y.S. 679, 110 Misc. 456.
S.D.—Davis v. Davis, 124 N.W. 715, 24 S.D. 474.

4. N.Y.—In re Prentice's Will, 181 N.Y.S. 679, 110 Misc. 456.

Sufficiency of recovery

It has been held unnecessary to show that the person has been restored to the full possession of his mental vigor.—Roberts v. Pacific Tel. & Tel. Co., 160 P. 965, 93 Wash. 274
32 C.J. p. 758 note 45.

Presumption held rebutted

(1) By conduct of insane person and all his relatives and friends.—Field v. Koonce, 12 S.W.2d 772, 178 Ark. 862, 68 A.L.R. 1303.

(2) Where decedent was discharged from an insane asylum twelve years before his death, especially as there was evidence that after discharge he successfully carried on his business affairs.—Jones v. Winstead, 120 S.E. 89, 186 N.C. 536.

(3) Where testator, before executing will, was discharged from insane asylum with certificate of sanity, and conducted business for twenty-eight years.—In re Crabtree's Will, 156 S.E. 98, 200 N.C. 4.

Presumption held not rebutted

(1) By release for short period from asylum.—Gersdorff v. Torres, Tex.Com.App., 293 S.W. 560, affirming in part and reversing in part Torres v. Gersdorff, Civ.App., 287 S.W. 668.

(2) By testimony that more than two years before institution of suit the insane person had done her own housework, transacted her own business, and was granted a divorce from her husband, where her release from the insane asylum was only conditional.—National Surety Co. v. Landers, Tex.Civ.App., 235 S.W. 275, dismissed for want of jurisdiction.

5. N.Y.—In re Prentice's Will, 181 N.Y.S. 679, 110 Misc. 456.
32 C.J. p. 758 note 47.

Sufficiency of showing

(1) When it is sought to be proved that an act was done in a lucid interval, sanity must be shown as of the very time of the act in question.—Fishburne v. Ferguson, 4 S.E. 575, 84 Va. 87—32 C.J. p. 758 note 46.

(2) It is not sufficient to show a lucid interval before and after the day of the act.—Ricketts v. Jolliff, 62 Miss. 440.
32 C.J. p. 758 note 47.

6. Ala.—State v. Retail Credit Co., 151 So. 474, 25 Ala.App. 568, certiorari denied 151 So. 475, 227 Ala. 577.
Pa.—Brown v. McCurdy, 122 A. 169, 278 Pa. 19.
22 C.J. p. 88 note 4.

Relations between corporations

Mont.—Gallatin Natural Gas Co. v. Public Service Commission, 256 P. 373, 79 Mont. 269.

Course of business dealing between persons

U.S.—In re Rogers, D.C.W.Va., 20 F.Supp. 120, 130, quoting **Corpus Juris.**
N.Y.—Hastings v. Brooklyn L. Ins. Co., 34 N.E. 289, 138 N.Y. 473.

Creditor and debtor

(1) Where the relationship of creditor and debtor between parties becomes fixed, it is presumed to continue in the absence of evidence to the contrary.—New York Cent. R. Co. v. Lehigh Stone Co., 220 Ill.App. 563.

(2) However, where a creditor-debtor relationship was not a continuing one, but terminated with each transaction, the presumption does not apply.—Deal v. Bank of Smithville, Mo.App., 52 S.W.2d 201.

Tenancy in common

Cal.—Klumpke v. Henley, 140 P. 289, 313, 24 Cal.App. 35.
Tex.—Bolding v. Camp, Com.App., 6 S.W.2d 94, reversing, Civ.App., 296 S.W. 1116, and modified on other grounds, Com.App., 7 S.W.2d 867.

7. U.S.—In re Rogers, D.C.W.Va., 20 F.Supp. 120, 130, quoting **Corpus Juris.**
Vt.—Stewart v. Waterman, 123 A. 524, 97 Vt. 408.
22 C.J. p. 88 note 5.

Independent contractor

Tex.—Winerich Motor Sales Co. v. Ochoa, Civ.App., 58 S.W.2d 193, reversed on other grounds Ochoa v. Winerich Motor Sales Co., 94 S.W.2d 416, 127 Tex. 542, remanding cause for further consideration Winerich Motor Sales Co. v. Ochoa, Civ.App., 98 S.W.2d 235.

Continuance of agreement

Agreement to compensate employee by payment of three thousand dollars per year and fifteen per cent of the profits, having been fulfilled for a year, is presumed continued during the following year.—In re Brown's Estate, 190 N.Y.S. 184, 116 Misc. 483.

8. Tex.—Ferguson v. Conklin, Civ.App., 51 S.W.2d 622.
22 C.J. p. 89 note 6.

9. Ala.—State v. Retail Credit Co., 151 So. 474, 25 Ala.App. 568, certiorari denied 151 So. 475, 227 Ala. 577.
Mont.—Exchange State Bank of Glendive v. Occident Elevator Co., 24 P.2d 126, 95 Mont. 78, 90 A.L.R. 740—Healy v. Ginoff, 220 P. 539, 69 Mont. 116.
N.J.—Mimnagh v. Falato, 164 A. 393, 110 N.J.Law 266.
N.C.—Morris Plan Industrial Bank v. Howell, 158 S.E. 203, 200 N.C. 637.
Or.—Laam v. Green, 211 P. 791, 106 Or. 311.
22 C.J. p. 89 note 7.

Established authority of agent is presumed to continue until the contrary is shown.

Ariz.—Consolidated Nat. Bank of Tucson v. Cunningham, 238 P. 332, 28 Ariz. 518.
Mo.—Graham v. St. Louis & S. F. Ry. Co., App., 273 S.W. 221.
N.H.—Sheehan v. Elliott Mfg. Co., 145 A. 139, 83 N.H. 542, 71 A.L.R. 633.

Conflict with other presumptions

Although supreme court in another case had held that corporate defendant had agent for service of process

landlord and tenant,[10] or master and servant.[11]

Domestic relations. In the absence of contrary evidence, the relation of husband and wife is presumed to continue,[12] as is also the fact that they are living together,[13] or have separated.[14] An illicit relation, once established, is presumed to continue in the absence of contrary proof.[15]

(3) Property and Financial Matters

The presumption of continuance of established facts or condition has been applied to matters relating to property, such as its status, value, condition, etc.; and it has also been applied to financial matters, such as one's financial condition and indebtedness.

The general rule respecting the presumption of continuance of a fact or condition shown to have existed, see subdivision a of this section, has been applied to matters relating to property,[16] such as the status of property;[17] the value of property;[18] the existence of an encumbrance;[19] and the condition[20] and location[21] of property.

four years before suit was instituted, the presumption that such agency still exists is overcome by presumption of verity arising from judgment rendered on record regular on its face, and embracing petition alleging that defendant was permanently absent from the state and not represented therein.—National Park Bank v. Concordia Land & Timber Co., 97 So. 272, 154 La. 31.

10. Me.—Longfellow v. Longfellow, 54 Me. 240
N.J.—Dobbelaar v. Hughes, 156 A. 469, 109 N.J.Eq. 200.
Pa.—Donze v. Devlin, 195 A. 882, 329 Pa. 1.
22 C.J. p 89 note 9.

11. N.Y.—Currie v. International Magazine Co., 175 N.E. 530, 256 N. Y. 106, reversing 244 N.Y.S. 792, 230 App.Div. 786.
Tex.—Ætna Casualty & Surety Co. v. Dixon, Civ.App., 145 S.W.2d 620, error refused.
22 C.J. p 89 note 10.

12. Ga.—Griffin v. Miller, 116 S.E. 339, 29 Ga.App. 585.

13. Ill.—Stoutenborough v. Rammel, 123 Ill.App. 487.

14. Mont.—Bordeaux v. Bordeaux, 115 P. 25, 43 Mont. 102.
22 C.J. p 88 note 2.

15. Pa.—Appeal of Reading F. Ins. & Trust Co., 6 A. 60, 113 Pa. 204, 57 Am.R. 448.
22 C.J. p 89 note 11.

16. Mo.—Gray v. Union Electric Light & Power Co., App., 282 S. W. 490.

17. Va.—Marcy v. Graham, 128 S.E. 550, 142 Va. 285.

Status as homestead; rebuttal
Presumption that property once occupied as homestead continues to be occupant's homestead is merely rebuttable presumption of fact, disappearing when confronted with facts.—Sterling Nat. Bank & Trust Co. of New York v. Ellis, Tex.Civ. App., 75 S.W.2d 716, error dismissed.

18. U.S.—Blumenthal Co. v. U. S., 12 Ct.Cust.App. 176.
La.—Stout v. Haynes, 115 So. 823, 165 La. 680.
N.Y.—Feigenbaum v. Hizsnay, 175 N. Y.S. 223, 187 App.Div. 126, reversing 171 N.Y.S. 1037, 104 Misc. 147 —People ex rel. 180 Varrick Street Corporation v. Miller, 2 N.Y.S.2d 444, 166 Misc. 253.
22 C.J. p 91 note 42, 42 [a].

Value of trust at time of qualification of original trustee would be accepted as basis of computation of commissions payable to successor trustee, in absence of showing to contrary.—In re Morrisey's Will, 12 N.Y.S.2d 324, 171 Misc. 204.

Increase in value is not presumed. —Hamall v. Petru, 163 N.E. 338, 331 Ill. 465.

Shares of stock
The value of corporate stocks is not within this rule, since it is common knowledge that their worth is or may be constantly fluctuating.
Ohio.—City of New Philadelphia v. Hurst, 14 N.E.2d 1021, 57 Ohio App. 479.
Utah.—In re Thompson's Estate, 269 P. 103, 72 Utah 17.

19. N.Y.—Bryan L. Kennelly, Inc., v. Shapiro, 226 N.Y.S. 692, 222 App.Div. 488, affirmed 166 N.E. 309, 250 N.Y. 524.

Prices of commodities are within the rule.—Scott v. Wilmeroth Service & Cold Storage Co., 292 P. 99, 159 Wash. 77.

20. Mo.—Gray v. Union Electric Light & Power Co., App., 282 S.W. 490.
N.J.—Wallraff v. W. J. B. Motor Truck Co., 118 A. 743, 98 N.J.Law 67.
S.C.—Tate v. Mauldin, 154 S.E. 431, 435, 157 S.C. 392, quoting **Corpus Juris.**
Utah.—Jensen v. Logan City, 57 P. 2d 708, 89 Utah 347.
Contra
Conn.—Antel v. Poli, 123 A. 272, 100 Conn. 64.
22 C.J. p 90 note 26—45 C.J. p 1147 note 61.

Animals
Iowa.—McCoy v. Wabash Ry. Co., 231 N.W. 353, 210 Iowa 1075.
Vt.—Partridge v. Cole, 119 A. 398, 96 Vt. 281, 32 A.L.R. 854.

Seaworthiness of vessel
Wash.—Lesicich v. North River Ins. Co., 71 P.2d 35, 191 Wash. 305.

Elevator in good working order one week before accident, was presumed to have continued so down to time of accident, in absence of contrary evidence.—McGreal v. Merchants Warehouse Co., 183 A. 356, 121 Pa.Super. 336.

Light placed on obstruction is presumed to remain during the night.—The R. B. M Burke, D.C.Pa., 294 F. 987—22 C.J. p 90 note 26 [c].

Transportation of goods
(1) Goods delivered to a carrier in good condition will be presumed to continue so until the contrary is proved.—Bronstein v. Pennsylvania R. R., D.C.Pa., 33 F.Supp. 716—22 C. J. p 90 note 26 [e].

(2) This rule, however, applies only where the property is in the custody of the carrier or carriers, and does not apply after the goods come into the possession of the consignor, or come into the possession of the consignee, and are reshipped. —Price v. Shawmut S. S. Co., 207 N. Y.S. 30, 212 App.Div. 51.

Effect of natural laws
Presumption that property continues in the condition once shown to have existed cannot be indulged where it would run counter to natural laws, as where property that would be affected by the elements is left exposed to them.—Hawkins v. Byrn, 261 S.W. 930, 150 Tenn. 1.

Likelihood of intervening circumstances
In determining whether the condition of a place or thing at the time of an injury can be evidenced by showing its condition before that time, the propriety of an inference that no substantial change has occurred depends on the likelihood of intervening circumstances.—Millman v. U. S. Mortgage & Title Guaranty Co. of New Jersey, 1 A.2d 265, 121 N. J.Law 28.

Evidence held not to raise presumption
Me.—Russ v. Eastman Car Co., 120 A. 176, 122 Me. 380.
Mont.—Doran v. U. S. Building & Loan Ass'n, 20 P.2d 835, 94 Mont. 73.

21. U.S.—Thomas A. Edison, Inc. v. U. S., 65 Ct.Cl. 190.
22 C.J. p 90 note 27.

Ownership and control of property. The presumption of continuance of a fact or condition has been applied to tenure of real[22] or personal[23] property, and to the control thereof.[24] Except where there is evidence to the contrary,[25] where it is shown that certain property belongs to a particular person, the law presumes that the ownership remains unchanged,[26] and a person is presumed to remain in possession of property of which he is shown to have been in possession at one time,[27]

Persons and animals are not within this rule.—Whiteaker v. Missouri Pac. R Co., Mo.App., 28 S.W.2d 680

Note in bank

Vt.—Merchants' Nat. Bank v. Carpenter, 165 A. 909, 105 Vt. 339.

Presumption in conflict with law

Presumption cannot be indulged that oil-drilling outfit having been left on property is still there, where restoration is a condition of rescission.—Hawkins v. Byrn, 261 S.W. 980, 150 Tenn. 1.

22. Ala.—Alabama State Land Co. v. Kyle, 13 So. 43, 99 Ala. 474.
22 C.J. p 90 note 19.

23. Or.—Templeton v. Bockler, 144 P. 405, 73 Or. 494.
22 C.J. p 90 note 20.

24. Conn.—Killian v. Logan, 162 A. 30, 115 Conn. 437.

Government control of telephone system is presumed to continue in absence of evidence to the contrary.—McFeena's Adm'r v. Paris Home Telephone & Telegraph Co., 227 S.W. 450, 190 Ky. 299.

25. U.S.—American Alliance Ins. Co. v. Brady Transfer & Storage Co., C.C.A.Iowa, 101 F.2d 144.

Admission in pleadings

Mo.—H. B. McCray Lumber Co. v. Standard Const. Co., App., 285 S.W. 104.

26. U.S.—Collins v. Streitz, C.C.A. Ariz., 95 F.2d 430, certiorari denied 59 S.Ct. 67, 305 U.S. 608, 83 L.Ed 387.
Ala.—Vidmer v. Lloyd, 69 So. 480, 193 Ala. 386, Ann.Cas.1917A 576.
Cal.—Jones v. Peck, 218 P. 1030, 63 Cal.App. 397—Moore v. California-Michigan Land & Water Co., 203 P. 139, 55 Cal.App. 184.
Ga.—Haas & Howell v. Godby, 125 S.E. 897, 33 Ga.App. 218.
Ill.—Kirk v. Kirk, 156 N.E. 294, 325 Ill. 296—Eggers v. Hardwick, 155 Ill.App. 254.
Iowa.—Williams v. Burnside, 222 N.W. 413, 416, 207 Iowa 239, citing **Corpus Juris**—Roberts v. Morse, 181 N.W. 678, 190 Iowa 1344—Carr v. King & Tomlinson, 169 N.W. 133, 184 Iowa 734.
Mo.—O'Malley v. Heman Const. Co., 164 S.W. 565, 255 Mo. 386—H. B. McCray Lumber Co. v. Standard Const. Co., App., 285 S.W. 104—Newell v. La Font, App., 251 S.W. 472.
Neb.—Finegold v. Union Outfitting Co., 193 N.W. 331, 110 Neb. 202.
N.Y.—Irving Trust Co. v. Gunder, 271 N.Y.S. 795, 816, 152 Misc. 83, citing **Corpus Juris**—Gallagher v. Perot, 202 N.Y.S 441, 443, 122 Misc. 845, citing **Corpus Juris**—In re Cofer's Estate, 200 N.Y.S. 906, 121 Misc. 292.
Okl.—Gentry v. McCurry, 273 P. 222, 134 Okl. 182.
Pa.—In re Kaufmann's Estate, 127 A. 133, 281 Pa. 519—McConville v. Ingham, 112 A. 85, 268 Pa. 507.
S.D.—Goodlad v. Smejkal, 190 N.W. 1017, 46 S.D. 112.
Tex.—Sanders v. Farrier, Civ.App., 271 S.W. 293, error dismissed.
Wash.—Automotive Collateral Co. v. Beckman, 278 P. 417, 152 Wash. 534.
22 C.J. p 90 note 39.

Corporate stock

N.Y.—Hutson v. Title Guarantee & Trust Co., 195 N.Y.S. 316, 118 Misc. 795.
S.D.—Nichols v. Nordness, 184 N.W. 358, 44 S.D. 540.
22 C.J. p 90 note 39 [d].

Promissory notes

(1) Presumption has been applied to ownership of promissory notes.
Ga.—Hobbs v. Citizens' Bank of Wrens, 124 S.E. 72, 32 Ga.App. 522.
Ind.—Conner v. Martin, 92 N.E. 3, 46 Ind.App. 141.

(2) However, on a motion to strike out an answer, it has been held that from the fact that plaintiff may have been the owner of notes sued on and bearer coupons, which were collected on September 1, it does not necessarily follow that plaintiff was their owner on September 2, when complaint was verified, or on September 3, when suit was commenced.—General Inv. Co. v. Interborough Rapid Transit Co., 193 N.Y.S. 881.

(3) Moreover, it has been held that promissory notes are not customarily owned by the same person for many years, and that the presumption of ownership would not apply over a period of sixteen years.—McKenzie v. Evans, 29 P.2d 657, 96 Mont. 1.

Right to use or occupy property is presumed to continue.—New Dells Lumber Co. v. Chicago, St. P., M. & O. Ry. Co., 277 N.W. 673, 226 Wis. 614, denying rehearing 276 N.W. 632, 226 Wis. 614, and 276 N.W. 637, 226 Wis. 628.

Duration; realty and personalty

Duration of the presumption varies with the nature of the property affected, and generally the presumption endures a much greater time with respect to real property than with many forms of personalty.—Ealahan v. Ealahan, 119 A. 349, 98 Conn. 176.

Presumption of nonownership

Proof that a person did not own certain property at a certain time raises presumption that he is not entitled to such property at later date.—Rauer v. Rynd, 150 P. 780, 27 Cal.App. 556.

Ownership of fire engine and liability for its operation.—City of Austin v. Schlegel, Tex.Com.App., 257 S.W. 238, 239, affirming, Civ.App., 228 S.W. 291.

27. U.S.—U. S. v. Goldstein, C.C.A. N.Y., 105 F.2d 150—Poor v. American Locomotive Co., C.C.A.Ill., 67 F.2d 626.
Cal.—Jones v. Peck, 218 P. 1030, 63 Cal.App. 397.
Ga.—Securities Trust Co. v. Marshall, 118 S.E. 478, 30 Ga.App. 379.
Ill.—Corney v. Corney, 257 Ill.App. 13.
Ky.—Howard v. Mitchell, 105 S.W.2d 128.
Mass.—Galdston v. McCarthy, 18 N.E.2d 331, 302 Mass. 36.
Mo.—Roelofson v. Whitten, App., 249 S.W. 688.
Neb.—Finegold v. Union Outfitting Co., 193 N.W. 331, 110 Neb. 202.
Nev.—Studebaker Bros. Co. of Utah v. Witcher, 195 P. 334, 44 Nev. 442.
N.Y.—John T. Clark Realty Co. v. Harris, 2 N.Y.S.2d 137, 253 App. Div. 325, 908, appeal denied.
Okl.—Bardon v. Endejan, 262 P. 693, 128 Okl. 293—Hutchinson Gin Co. v. Latimer County Nat. Bank of Wilburton, 233 P. 438, 106 Okl. 159.
S.D.—Bradshaw v. Brady, 177 N.W. 366, 43 S.D. 24—Redwater Land & Canal Co. v. Reed, 128 N.W. 702, 26 S.D. 466.
Tenn.—Higgins v. Lewis, 137 S.W.2d 308, 317, 23 Tenn.App. 648, citing **Corpus Juris.**
22 C.J. p 91 note 40.

Corporate funds

Kan.—Pioneer Mortg. Co. v. Randall, 213 P. 668, 113 Kan. 62.

Deed

Ala.—Acree v. Shaw, 80 So. 817, 202 Ala. 433.
Ky.—Petty's Heirs v. Petty, 231 S.W. 52, 191 Ky. 612.

Letter

Ala.—Brilliant Coal Co. v. Sparks, 81 So. 185, 16 Ala.App. 665, certiorari denied Ex parte Brilliant Coal Co., 82 So. 161, 203 Ala. 131.

Trust fund

Mass.—Hull v. Adams, 190 N.E. 510, 286 Mass. 329.

although the inference may cease by reason of the lapse of considerable time or the ephemeral character of the subject matter.[28]

Financial matters. The presumption of continuance of a fact or condition has been applied to a financial condition shown to have existed,[29] such as solvency or insolvency.[30]

A contract obligation shown to have existed at one time will be presumed to continue until its discharge is shown,[31] and an indebtedness shown to have existed is presumed to continue.[32] The nature of a transaction by which an indebtedness was secured is presumed to remain the same in the absence of a modification.[33]

(4) Other Applications

The presumption of continuance of established facts has been applied to laws, ordinances, legal principles, a state of legality or illegality, nuisances, and various other matters.

Laws which have once been proved or known to exist will be presumed to have continued in effect, in the absence of evidence to the contrary.[34] Thus, a city charter will be presumed to remain in force as originally enacted,[35] and where a city ordinance is shown to have been in force on a certain date, the presumption is that it continued in force.[36] Similarly, the presumption has been applied to prin-

Possession held by agent

The presumption is that one placed in charge and taking possession of premises for another continued so to hold them, until the contrary is shown.—Philadelphia Trust Co. v. Johnson, Tex.Civ.App., 257 S.W. 280—22 C.J. p 91 note 40 [b].

Character of possession; adverse possession

(1) The presumption of continuance applies as regards the character of the possession.—Caffrey v. McFarland, 1 Phila., Pa., 555.

(2) Where defendant had been in possession of the surface of the land in question under a deed recognizing plaintiff's right and title to coal, for purposes of determining whether trespass for removal of coal was barred by limitations, it would be presumed that defendant's possession corresponded with, and continued in accord with, the title under which he entered.—Consolidation Coal Co. v. Friedline, 3 A.2d 200, 134 Pa.Super. 1.

(3) Adverse possession, if shown to have existed, will be presumed to have continued.—Alabama State Land Co. v. Matthews, 53 So. 174, 168 Ala. 200, 202—22 C.J. p 91 note 40 [a].

(4) Similarly, absence of adverse possession, shown by quieting title decree, was presumed to continue, in absence of evidence to contrary.—Gray v. Alabama Fuel & Iron Co., 113 So. 35, 216 Ala. 416.

(5) Proof that possession of land by another than record owner was permissive in its incipiency gives rise to presumption that same party's subsequent possession thereof was also permissive; but such presumption may be overthrown by evidence that his continued possession was adverse to record owner.—Dial v. Armstrong, 113 S.W.2d 503, 195 Ark. 621.

28. N.C.—Adams v. Clark, 53 N.C. 56.
22 C.J. p 91 note 41.

29. Mich.—Grand Rapids Trust Co. v. Ben Rose Tire Co., 249 N.W. 847, 264 Mich. 268.
Mo.—Eberle v. Koplar, App., 85 S.W.2d 919.
N.Y.—Di Ionna v. Terry & Tench Co., 197 N.Y.S. 131, 203 App.Div. 270—Irving Trust Co. v. Gunder, 271 N.Y.S. 795, 816, 152 Misc. 83, citing **Corpus Juris**—Gallagher v. Perot, 202 N.Y.S. 441, 443, 122 Misc. 845, citing **Corpus Juris.**
22 C.J. p 90 note 24.

Collectability of accounts

Mont.—Thornton-Thomas Mercantile Co. v. Bretherton, 80 P. 10, 32 Mont. 80.

Salary

(1) Where the salary one was receiving is established, it will be presumed that such salary continued.—Kinsella v. Kinsella, Mo.App., 60 S.W.2d 747.

(2) However, such presumption may be rebutted by checks and vouchers showing reduced salaries receipted for.—Moon Motor Car Co. v. Moon, C.C.A.Mo., 58 F.2d 90.

Betterment of condition

One worth a certain amount at an earlier time is presumed to be worth such amount at a later time, but there is no presumption that he has doubled the amount.—Barish v. Barish, 180 N.W. 724, 190 Iowa 493.

30. U.S.—Marks v. Wenzel, D.C.N.Y., 6 F.Supp. 981, affirmed, C.C.A., 70 F.2d 1019.
Colo.—Lawson v. Sigfrid, 262 P. 1018, 83 Colo. 116.
Ind.—Edwards v. Hudson, 14 N.E.2d 705, 214 Ind. 120—Gushwa v. Gushwa, 177 N.E. 366, 93 Ind.App. 68.
N.Y.—Irving Trust Co. v. Gunder, 271 N.Y.S. 795, 152 Misc. 83—In re Auditore's Estate, 240 N.Y.S. 502, 136 Misc. 664, affirmed In re Auditore's Will, 250 N.Y.S. 902, 233 App.Div. 740, appeal dismissed In re Parascandola, 178 N.E. 792, 257 N.Y. 554.
22 C.J. p 90 note 25.

Duration of presumption

(1) Insolvency is not presumed to continue forever, but for as long as such state of affairs usually continues under similar circumstances.—Kesner v. Inland Empire Land Co., 272 P. 29, 150 Wash. 1—22 C.J. p 90 note 25 [a].

(2) Insolvency will not be presumed to continue for three and one-half years.—Shaffer v. Noziglia, 220 P. 431, 64 Cal.App. 93.

31. N.C.—Love v. Edmonston, 27 N.C. 354.

32. U.S.—In re Rogers, D.C.W.Va., 20 F.Supp. 120, 130, quoting **Corpus Juris.**
Conn.—Goslee v. Rowe, 157 A. 267, 114 Conn. 1.
22 C.J. p 90 note 38.

33. Idaho.—Isaak v. Journey, 15 P.2d 1069, 52 Idaho 392.

34. Tex.—Martinez v. Gutierrez, Com.App., 66 S.W.2d 678, affirming Gutierrez v. Martinez, Civ.App., 37 S.W.2d 833—State v. Hall, Civ.App., 76 S.W.2d 880, error dismissed.
Application to laws of sister state or foreign country see infra § 133.

Legislative distinction as to tariff commodities will be presumed to continue.—Hampton, Jr., & Co. v. U.S., 12 Ct.Cust.App. 490, rehearing denied 12 Ct.Cust.App. 582.

35. Or.—Rusk v. Montgomery, 156 P. 435, 80 Or. 93.

36. Ala.—Payne v. Roy, 90 So. 605, 206 Ala. 432.
Ga.—Brooks v. Carver, 190 S.E. 389, 55 Ga.App. 362.
Ky.—Illinois Cent. R. Co. v. McGuire's Adm'r, 38 S.W.2d 913, 239 Ky. 1.
Mont.—McManus v. Butte Electric Ry. Co., 219 P. 241, 68 Mont. 379.
22 C.J. p 92 note 44—43 C.J. p 580 note 97.

Duration

Presumption of continuance of existence of ordinance for two and one-half years has been held proper.—Northern Texas Traction Co. v. Smith, Tex.Civ.App., 223 S.W. 1013.

ciples and rules adopted by the judiciary.[37]

Legality or illegality; nuisance. The presumption of continuance of established facts applies to a state of facts which are lawful and regular, and such state will be presumed to continue.[38]

In addition, the presumption applies to statutory violations of a continuous nature, such as engaging in a business or profession,[39] or doing some other act,[40] without having secured the required license or permit; but, on the other hand, where it is shown that the required consent was once obtained, it will be presumed to have continued.[41] A nuisance once shown to exist will be presumed to continue;[42] and where one has consented to a nuisance, such consent will be presumed to continue until withdrawn.[43]

Other matters. The presumption of the continuance of facts or a condition shown to exist has been applied to a highway or street once legally laid out;[44] a rule of a corporation;[45] rules for the operation of street railroads;[46] the pendency of an action shown to have been commenced;[47] the navigability of a stream;[48] and to other facts and conditions.[49]

§ 125. Existence of Heirs or Issue

Presumptions regarding the existence of heirs or issue are discussed in Descent and Distribution § 81 b.

§ 126. Good Faith; Fraud or Misconduct

It is generally presumed that all persons act honestly, properly, in good faith, and without fraud.

In the absence of proof to the contrary, it is proper to indulge a presumption that in their business and social relations all persons act honestly and properly[50] and, likewise, according to the decisions

37. Tex.—Western Union Tel. Co. v. Parsley, 121 S.W. 226, 57 Tex. Civ.App. 8.

Basis of court's classification of certain property for taxation purposes must be presumed to continue.—Commonwealth v. Hudson Coal Co., 134 A. 413, 287 Pa. 64, error dismissed Hudson Coal Co. v. Commonwealth of Pennsylvania, 48 S.Ct. 17, 275 U.S. 575, 72 L.Ed. 434.

38. Vt.—Holton v. Hassam, 111 A. 389, 94 Vt. 324.

39. Iowa.—State v. Kindy Optical Co., 248 N.W. 332, 216 Iowa 1157—State v. Fray, 241 N.W. 663, 214 Iowa 53, 81 A.L.R. 286.

Ky.—Commonwealth v. Brown, 39 S.W.2d 223, 239 Ky. 197.

40. Mich.—Norris v. American Steam Pump Co., 237 N.W. 382, 255 Mich. 144.

Employment of minor

Mich.—Norris v. American Steam Pump Co., supra.

41. Iowa.—Dougherty v. French, 170 N.W. 767, 185 Iowa 975.

42. U.S.—U.S. v. Conner, D.C.Del., 51 F.2d 866—U.S. v. Flood, D.C.Del., 51 F.2d 865—U.S. v. Barnes, D.C.Del., 51 F.2d 849—Engler v. U.S., C.C.A.Minn., 25 F.2d 37—Shore v. U.S., C.C.A.Ill., 282 F. 857.

Wyo.—State v. Bernweiser, 271 P. 13, 39 Wyo. 314.

46 C.J. p. 787 note 32.

Rebuttal

Presumption that immoral acts testified to were continued until the time of the commencement of the action was overcome by evidence that the persons having committed such immoral acts were evicted prior to the commencement of the action, especially in view of presumption that the law has been obeyed and the fact that the nuisance constituted a crime.—People v. Goddard, 191 P. 1012, 47 Cal.App. 730.

43. Ky.—City of Frankfort v. Ballew, 151 S.W.2d 1063, 287 Ky. 141.

44. N.Y.—In re Amethyst St., Unionport Road and Rhinelander Ave. in City of New York, 178 N.Y.S. 225, 189 App.Div. 181—Scheibel v. Burr, 177 N.Y.S. 881, 108 Misc. 551, reversed on other grounds 183 N.Y.S. 49, 192 App.Div. 438, affirmed 130 N.E. 293, 230 N.Y. 277, reargument denied 134 N.E. 575, 232 N.Y. 568.

Pa.—Commonwealth ex rel. Walker v. Centre County Com'rs, 9 Pa. Dist. & Co. 571, 41 York Leg.Rec. 173.

22 C.J. p. 92 note 45.

45. Mich.—Coston v. Ann Arbor R. Co., 167 N.W. 940, 201 Mich. 232.

22 C.J. p. 90 note 35.

46. Mo.—Paquin v. St. Louis & Suburban R. Co., 90 Mo.App. 118.

22 C.J. p. 90 note 36.

47. Ariz.—Day v. Frazer, 78 P.2d 140, 51 Ariz. 474.

Ind.—Huegel v. Townsley, 12 N.E.2d 761, 213 Ind. 339.

22 C.J. p. 90 note 29.

48. Wis.—Nekoosa Edwards Paper Co. v. Railroad Commission, 228 N.W. 144, 201 Wis. 40, rehearing denied 229 N.W. 631, 201 Wis. 40, affirmed 51 S.Ct. 352, 283 U.S. 787, 75 L.Ed. 1415.

49. N.Y.—Orim v. Oil Transfer Corporation, 29 N.Y.S.2d 203, 262 App.Div. 433.

22 C.J. p. 90 notes 30–34, p. 92 note 46.

Seat occupied in automobile; driver

Where it is shown that shortly before an accident a person was occupying a certain seat in an automobile or was driving, it will be presumed that he continued to do so at the time of the accident, in the absence of evidence to the contrary.

Cal.—Sutton v. Tanger, 1 P.2d 521, 115 Cal.App. 267.

Conn.—Sigel v. Gordon, 167 A. 719, 117 Conn. 271—Weidlich v. New York, N. H. & H. R. Co., 106 A. 323, 93 Conn. 438.

Property contracted for

Where it is shown that property contracted for is in existence, and that the party is able to perform the contract, such state of affairs will be presumed to continue until contrary proof is introduced.—State Finance Co. v. Hamacher, 17 P.2d 610, 171 Wash. 15.

Bank's system of handling collections

Mont.—State v. Banking Corporation of Montana, 241 P. 626, 74 Mont. 491.

Conspiracy

Mo.—First Nat. Bank v. Wilson, 222 S.W. 381.

50. U.S.—McDonald v. Robertson, C.C.A.Mich., 104 F.2d 945—American Surety Co. of New York v. Citizens' Nat. Bank of Roswell, N.M., C.C.A.N.M., 294 F. 609.

Ariz.—Consolidated Nat. Bank of Tucson v. Cunningham, 238 P. 332, 28 Ariz. 518.

Cal.—Lowe v. Copeland, 13 P.2d 522, 125 Cal.App. 315.

Ill.—Willson v. Labhart, 269 Ill.App. 93, transferred, see 182 N.E. 752, 350 Ill. 165.

Kan.—Sowers v. Wells, 114 P.2d 828, 154 Kan. 134.

Ky.—Kuechler v. Rubbathen, 99 S.W.2d 193, 266 Ky. 390—Farmers' Nat. Bank v. Jones, 28 S.W.2d 787, 234 Ky. 591, 70 A.L.R. 335.

La.—Curran & Treadway v. American Bonding Co. of Baltimore, 192

of the courts, act in good faith,[51] especially where the parties whose conduct is being considered are

So. 335, 193 La. 763, annulling, App., 187 So. 348—Crescent Cigar & Tobacco Co. v. National Casualty Co., App., 155 So. 505.
Miss.—Robinson v McShane, 140 So. 725, 163 Miss 626—Orgill Bros. v. Perry, 128 So 755, 157 Miss. 543.
Mo.—Bradshaw v. Metropolitan Life Ins. Co., App., 110 S.W.2d 834—Croghan v. Savings Trust Co., 85 S.W.2d 239, 231 Mo.App. 1161.
N.Y.—Ehrich v. Guaranty Trust Co. of New York, 186 N.Y.S. 103, 194 App.Div. 658, affirmed 135 N.E. 950, 233 N.Y. 637.
N.D.—Jolley v. Begeman, 256 N.W. 912, 65 N.D. 205.
Or.—Feldschau v. Clatsop County, 208 P. 764, 105 Or. 237.
Pa.—Troop v. Franklin Savings & Trust Co., 139 A. 492, 291 Pa. 18.
S.C.—In re Nightingale's Estate, 189 S.E. 890, 182 S.C. 527.
S.D.—Poppke v. Poppke, 231 N.W. 933, 934, 57 S.D. 262, citing **Corpus Juris.**
Tex.—Jasper State Bank v. Goodrich, Civ.App., 107 S.W.2d 600, error dismissed.
Wash.—Hansen v. American Bonding Co. of Baltimore, 48 P.2d 653, 183 Wash. 390—Gustafson v. Cullen, 283 P. 1087, 155 Wash. 107.
W.Va.—LaFollette v. Croft, 14 S.E. 2d 917.
Wyo.—Campbell v. Wyoming Development Co., 102 P.2d 745, 55 Wyo. 347, denying rehearing 100 P.2d 124, 55 Wyo. 347.
22 C.J. p 146 note 51.

Rule otherwise stated

"In law every intendment that harmonizes with honesty and fair dealing must be presumed in the light of the facts."
Miss.—Darden v. American Bank & Trust Co., 130 So. 507, 510, 158 Miss. 742, quoting **Corpus Juris.**
Wis.—Forest County v. Shaw, 136 N.W. 642, 646, 150 Wis. 294.

Act referred to honest motive

As between two explanations or constructions of an act, or inferences therefrom, that one which renders the act consistent with principles of honesty, good faith, and fair dealing will be favored, rather than one which involves the opposite.
U.S.—Fidelity & Deposit Co. of Maryland v. Grand Nat. Bank of St. Louis, C.C.A.Mo., 69 F.2d 177, reversing, D.C., 2 F.Supp. 666—U. S. v. Mammoth Oil Co., D.C. Wyo., 5 F.2d 330, reversed on other grounds, C.C.A., 14 F.2d 705, and affirmed Mammoth Oil Co. v. U. S., 48 S.Ct. 1, 275 U.S. 13, 72 L.Ed. 137.
Cal.—Original Min. & Mill. Co. v. San Joaquin Light & Power Corporation, 30 P.2d 47, 220 Cal. 152.
Ill.—Beebe v. Kirkpatrick, 214 Ill. App. 157.
Mo.—Swabey v. Boyers, App., 71 S.W.2d 110—Robertson v. Johnson, 243 S.W. 215, 210 Mo.App. 585.
N.Y.—Hartford Accident & Indemnity Co. v. Oles, 274 N.Y.S. 349, 152 Misc. 876.
Pa.—In re Culhane's Estate, 2 A.2d 567, 133 Pa.Super. 339, affirmed 5 A.2d 377, 334 Pa. 124.
Utah.—Utah Nat. Bank v. Nelson, 111 P. 907, 38 Utah 169.

Intent

(1) The legal presumption is that parties to contracts valid on their face intend in good faith to perform them.—Cleage v. Laidley, Mo., 149 F. 346, 79 C.C.A. 284.

(2) It should not be assumed that a party intended to do less than was promised.—Marine Midland Trust Co. of New York v. Alleghany Corporation, D.C.N.Y., 28 F.Supp. 680.

Truthfulness of statements or testimony

(1) Truthfulness will be presumed in the absence of evidence to the contrary.
U.S.—McKee v. Alexander, D.C.Okl., 48 F.2d 838.
Mont.—Montana Nat. Bank of Billings v. Yellowstone County, 252 P. 876, 78 Mont. 62, reversed on other grounds 267 P. 304, 82 Mont. 380, conforming to mandate 48 S.Ct. 331, 276 U.S. 499, 72 L.Ed. 673.
Tenn.—Atkins v. Smith, 9 Tenn.App. 212.
Tex.—Crim v. Lukenbill, Civ.App., 21 S.W.2d 83.
22 C.J. p 145 note 45 [b].

(2) There is no presumption that witness was willfully and corruptly testifying falsely, even though there was error in testimony.—Western Show Co. v. Mix, 173 A. 183, 315 Pa. 139.

(3) If testimony containing inconsistencies and incongruities is irreconcilable, presumption of reason, as well as of law, will impute the variance to an innocent misconception rather than to a willful and corrupt misrepresentation.—The Seeandbee, C.C.A.Ohio, 102 F.2d 577.

(4) There is no presumption that an employee of, or one retained by, one of the parties to an action will not testify truthfully.
N.Y.—Schwartz v. Prudential Ins. Co. of America, 21 N.Y.S.2d 68, 259 App.Div. 1052.
Okl.—Thrasher v. St. Louis & S. F. Ry. Co., 206 P. 212, 86 Okl. 88.
Presumption of truthfulness as resulting from presumption of innocence see infra § 130.

Lobbying

Means used to present merits of measure before legislative body are presumed fair and open.—California Bean Growers' Ass'n v. Rindge Land & Navigation Co., 248 P. 658, 199 Cal. 168, 47 A.L.R. 904.

Trustees are presumed to perform their trusts honestly and in good faith.
U.S.—Speers Sand & Clay Works v. American Trust Co., C.C.A.Md., 20 F.2d 333—Watling v. Watling, D.C.Mich., 15 F.2d 719, affirmed, C.C.A., 27 F.2d 193.
Cal.—Widney v. Southern Pac. Co., 7 P.2d 1046, 120 Cal.App. 291.
N.Y.—In re Bohenko's Estate, 4 N.Y.S.2d 420, 254 App.Div. 140.

Trust agreement would not be presumed to have been designed as a scheme to entrap and defraud investors, but would be presumed to have been intended honestly and in good faith.—Tannenbaum v. Seacoast Trust Co. of Asbury Park, 198 A. 855, 16 N.J.Misc. 234, affirmed 5 A.2d 778, 125 N.J.Eq. 360.

51. U.S.—McDonald v. Robertson, C.C.A.Mich., 104 F.2d 945—Fidelity & Deposit Co of Maryland v. Grand Nat. Bank of St. Louis, C.C.A.Mo., 69 F.2d 177, reversing, D.C., 2 F.Supp. 666—Flynn & Emrich Co. v. Federal Trade Commission, C.C.A., 52 F.2d 836.
Cal.—Todd v. Payne, 246 P. 816, 77 Cal.App. 306—Arakelian v. Sears, 200 P. 757, 53 Cal.App. 646.
Conn.—Town of Enfield v. Hamilton, 148 A. 353, 110 Conn. 319.
Iowa.—Hornish v. McConnell, 182 N.W. 406, 191 Iowa 308.
La.—Skannal v. Hespeth, 198 So. 661, 196 La. 87—Laborde v. Louisiana R. & Nav. Co., 2 La.App. 331.
Mass.—Town of Saugus v. B. Perini & Sons, 26 N.E.2d 1, 305 Mass. 403—Higgins v. Gilchrist Co., 17 N.E. 2d 160, 301 Mass. 386—Spiegel v. Beacon Participations, 8 N.E.2d 895, 297 Mass. 398—Malinoski v. D. S. McGrath, Inc., 186 N.E. 225—Harding v. Townsend, 182 N.E. 369, 280 Mass. 256.
Mich.—Ryan v. New York Cent. R. Co., 255 N.W. 365, 267 Mich. 202.
Mo.—State ex rel. Douglas v. Reynolds, 209 S.W. 100, 276 Mo. 688.
Or.—Feldschau v. Clatsop County, 208 P. 764, 105 Or. 237.
S.D.—Poppke v. Poppke, 231 N.W. 933, 934, 57 S.D. 262, citing **Corpus Juris.**
Tex.—Southern Surety Co. v. Lafferty, Civ.App., 43 S.W.2d 460, reversed on other grounds Nacogdoches County v. Lafferty, Com.App., 61 S.W.2d 994.
Va.—Wertz v. Clay, 160 S.E. 27, 157 Va. 363.
22 C.J. p 147 note 52.

Attorneys in their professional duties

Okl.—First Nat. Bank v. Clay, 177 P. 115, 74 Okl. 112.
22 C.J. p 146 note 51 [b].

dead;[52] and dishonesty[53] or bad faith[54] will not be presumed, but must be proved. This presumption is, however, rebuttable by proof to the contrary;[55] and will not be indulged where there are suspicious circumstances.[56]

Fraud. Fraud is not presumed,[57] except when a statute so provides,[58] or there are special circumstances,[59] but, on the contrary, the presumption is always against fraud.[60]

§ 127. Habits

An individual is presumed to be of good habits.

Good faith of seller is presumed.
La.—Samuel Stamping & Enameling Co. v. Monroe Furniture Co., App., 171 So. 463, amended and rehearing refused 172 So. 217.

In matter of possession of land good faith is always presumed.—Bodcaw Lumber Co. of Louisiana v. Walker, 136 So. 191, 17 La.App. 373.

Insurance societies doing business in state are presumed to have in all things proceeded in good faith.—Sovereign Camp, W. O. W., v. Rhyne, 158 So 472, 171 Miss. 687—Birchett v. Anderson, 133 So. 129, 160 Miss. 144.

Prosecution of suits
La.—Wilson v. Henderson, App., 191 So. 602.

52. Va.—Camp Mfg. Co. v. Green, 106 S.E 394, 129 Va. 360.

53. Colo.—People v. Texas Co., 275 P. 896, 85 Colo. 289.
Ky.—Kuechler v. Rubbathen, 99 S. W 2d 193, 266 Ky. 390.
La.—Curran & Treadway v. American Bonding Co. of Baltimore, 192 So. 335, 193 La. 763, annulling, App., 187 So. 348.

Fiduciary
Courts will not indulge in presumption of dishonesty of a fiduciary.—In re Kennedy's Estate, 266 N. Y.S. 883, 149 Misc. 188—St. Andrew's Protestant Episcopal Church of Astoria v. Crisfield Homes, Inc., 11 N. Y.S.2d 16.

54. U.S.—Equitable Trust Co. of New York v. Washington-Idaho Water, Light & Power Co., D.C. Wash., 300 F. 601.
Iowa.—Harris v. Randolph, 236 N.W. 51, 213 Iowa 772.
La.—Antoine Lumber Co. v. Southern Bag & Paper Co, 131 So. 852, 171 La. 696—Haigler v. Southern Advance Bag & Paper Co., App., 142 So. 270.
Wash.—Dodge v. Scripps, 37 P.2d 896, 179 Wash. 308, certiorari denied 55 S.Ct. 649, 295 U.S. 739, 79 L.Ed. 1686.

Cancellation of lease
Bad faith was not presumed, where landlord canceled lease under clause giving him right to do so if dissatisfied.—Jepson v. Conner, 232 N.W. 693, 210 Iowa 1267.

Check in excess of deposits
Bad faith, or knowledge that funds on deposit are insufficient to cover check issued against them, is not to be presumed from mere issuance of check in excess of amount on deposit.—Thorson v. Wisconsin Life Ins. Co., 273 N.W. 416, 227 Wis. 254.

55. Wash.—Inland Finance Co. v. Inland Motor Car Co., 216 P. 14, 125 Wash. 301.

Presumption of fact
The presumption that a transfer of personalty for a substantial consideration was taken in good faith is a "presumption of fact," is subject to contradiction, and is for the trial court to weigh in the light of all the evidence.—Hifler v. Calmac Oil & Gas Corporation, 10 N.Y.S.2d 531, 258 App Div. 78, affirmed 16 N.Y.S.2d 104, 258 App.Div. 78.

56. Mo.—Conrad v. Diehl, 129 S.W. 2d 870, 344 Mo. 811.

Straw men
Real estate transactions made through straw men should be viewed with suspicion.—Conrad v. Diehl, supra—Ryan v. Stubblefield, Mo., 100 S.W.2d 444.

Agent acting as individual
Presumption of good faith on the part of an agent does not obtain where it is shown that the agent acted as an individual, and not in a fiduciary capacity.—Reynolds v. Reynolds, Tex.Civ.App., 224 S.W. 382.

57. Cal.—Lyders v. Wilsey, 271 P. 383, 94 Cal.App. 493.
Ill.—First Nat. Bank v. Trott, 236 Ill.App. 412.
N.J.—Bayonne v. Standard Oil Co., 78 A. 146, 81 N.J.Law 717.
Or.—U. S. Nat. Bank of Portland v. Embody, 25 P.2d 149, 144 Or. 488.
Vt.—Dunnett v. Shields, 123 A. 626, 97 Vt. 419.
Wash.—Dodge v Scrips, 37 P.2d 896, 179 Wash. 308, certiorari denied 55 S.Ct 649, 295 U.S. 739, 79 L. Ed. 1686.
22 C.J. p 147 note 53.
Presumption against fraud in actions for fraud generally see the C.J.S. title Fraud § 94 et seq, also 27 C. J. p 44 note 55 et seq.

Opportunity for perpetration of fraud is not sufficient to raise presumption of fraud.—Bland v. Paradice Colonization Co., La.App., 146 So. 778.

Property not owned
It is presumed that one will not convey property which he does not own, nor a greater interest than that he owns; and it will not be presumed that a person intended to convey property which he does not own.
La.—Federal Land Bank of New Orleans v. Ballard, App., 187 So. 326.
Mich.—Powers v. Fisher, 272 N.W. 737, 279 Mich. 442.
Tex.—Hanks v. Magnolia Petroleum Co., Civ.App., 14 S.W.2d 348, affirmed, Com.App, 24 S.W.2d 5—Massie v. Hutcheson, Civ.App., 296 S.W. 939.

Results of chemical tests
Court will not assume that records of sugar factory as to chemical tests of juices of cane are incorrect or fraudulent.—J. P. Hudson & Sons Co. v. Godchaux Co., 118 So. 81, 166 La. 912.

58. Okl.—Williams v. Wichita Fourth Nat. Bank, 82 P. 496, 15 Okl. 477, 2 L.R.A.,N.S., 334, 6 Ann. Cas. 790.

Statement shortly after injury
Under statute so providing, injured person's statement made within thirty days of injuries is presumably fraudulent for use in action for damages for the injuries, and statute should be construed so as to accomplish its purpose.—Lestico v. Kuehner, 283 N.W. 122, 204 Minn. 125.

Rebuttal
(1) Statutory presumption is rebuttable where it was not intended to be conclusive.
Minn.—Lestico v. Kuehner, supra.
Okl.—Williams v. Wichita Fourth Nat. Bank, 82 P. 496, 15 Okl. 477, 2 L.R.A.,N.S., 334, 6 Ann.Cas. 790.
(2) Statutory presumption that statement secured from injured person within thirty days of injury is fraudulent disappears completely and for whole case when evidence demonstrates that there is nothing fraudulent about questioned statements.—Swanson v. Swanson, 265 N. W. 39, 196 Minn. 298—Cosgrove v. McGonagle, 264 N.W. 134, 196 Minn. 6.

59. **Confidential relation**
Transactions between persons occupying confidential relations by which one obtains undue advantage are presumed fraudulent.—Housewright v. Steinke, 158 N.E. 138, 326 Ill. 398.

60. Cal.—Williams v. Spazier, 25 P. 2d 851, 134 Cal.App. 340.
Tex.—Colonial Trust Co. v. Hill County, Com.App, 27 S.W.2d 144, reversing Hill County v. Colonial Trust Co., Civ.App., 18 S.W.2d 787.
22 C.J. p 147 note 54.

There is a presumption, similar to the presumption of good character, see § 122 supra, that an individual is of good habits.[61]

§ 128. Identity of Persons

It is generally presumed that when a letter or telegram is received signed by one from whom a reply is expected, such communication is that of the person whose name is so signed; and a presumption of identity may arise in the case of a telephonic communication.

While it has been held that the receipt of a letter purporting to be signed by a person is not evidence that it was written by him,[62] it has also been held that where a letter is transmitted and received through the mail there is a presumption that it was sent by the person referred to therein as the sender;[63] and, as a general rule, where a letter or telegram is received in answer to a prior communication of the receiver, and with the name of the addressee of such prior communication signed thereto, a presumption arises that the latter communication is that of the person whose name is signed thereto,[64] especially, in the case of a letter, if it is written on his business stationery.[65] Similarly, when a person seeks a telephone connection with another, it is presumed that the person with whom the caller is connected is the person called if he purports to be such person.[66]

An identity of name as indicating presumptively an identity of person is considered in the C.J.S. title Names § 15, also 16 C.J. p 542 notes 3–7, 22 C.J. p 92 note 52–p 94 note 68, 23 C.J. p 57 notes 56–58.

§ 129. Identity of Things

Objects of the same name or description are, within limits, presumed to be identical.

It may be presumed within reasonable limits that objects of the same name or description are identical.[67]

§ 130. Innocence

There is a presumption in favor of innocence which applies in civil, as well as in criminal, cases.

It is a well established principle that in the absence of evidence to the contrary the presumption is always in favor of innocence;[68] and while this principle is most important in criminal cases, see Criminal Law § 581, it is frequently invoked and relied on in civil cases,[69] and applies whether the

61. N.Y.—In re Townley, 144 N.Y.S. 750, affirmed 149 N.Y.S. 1114, 164 App.Div. 919.
22 C.J. p 145 note 45.

62. N.C.—Beard v. Southern R. Co., 55 S.E. 505, 143 N.C. 136.

63. N.Y.—In re Seymour, 185 N.Y.S. 373, 113 Misc. 421.

64. D.C.—Campbell v. Willis, 290 F. 271, 53 App.D.C. 296.
Ill.—Hoffman v. Department of Finance, 30 N.E.2d 34, 36, citing **Corpus Juris.**
N.J.—Leunis Co. v. Singer, 130 A. 457, 102 N.J.Law 68.
Wyo.—First Nat. Bank v. Ford, 216 P. 691, 699, 30 Wyo. 110, 31 A.L.R. 1441, citing **Corpus Juris.**
22 C.J. p 94 note 70, p 107 note 46.
Communications as prima facie genuine see infra 706.

65. S.C.—Leesville Mfg. Co. v. Morgan Wood & Iron Works, 55 S.E. 768, 75 S.C. 342.
22 C.J. p 94 note 71.

66. D.C.—Campbell v. Willis, 290 F. 271, 53 App.D.C. 296.
Mo.—Guest v. Hannibal & St. Joseph R. Co., 77 Mo.App. 258.
S.D.—L. A. McKean Auto Co. v. O'Marro, 223 N.W. 354, 54 S.D. 435, reversing 220 N.W. 144, 53 S.D. 55.
Agent
It is presumed that person answering telephone business inquiry at railway office is agent of railroad.—Rock Island & Peoria R. Co. v. Potter, 36 Ill.App. 590.

67. U.S.—Stahl v. Ertel, C.C.Ill., 62 F. 920.
22 C.J. p 94 note 72.
Identity of transaction
Where notes were of same date as bill of sale, and were cut from same sheet of paper, it was presumed that they were given for the property conveyed by the bill.—Gaulden v. Lawrence, 33 Ga. 159.
Instrument bearing later date
Where bond for title to a lot described it as part of the K plat, it cannot be assumed that a plat by K, dated subsequent to the bond for title is an exact duplicate of the plat referred to in the bond for title.—Hancock v. Gumm, 107 S.E. 872, 151 Ga. 667, 16 A.L.R. 1003.

68. U.S.—Fidelity & Deposit Co. of Maryland v. Grand Nat. Bank of St. Louis, C.C.A.Mo., 69 F.2d 177, reversing, D.C., 2 F.Supp. 666.
Cal.—Williams v. Spazier, 25 P.2d 851, 134 Cal.App. 340—Black v. Southern Pac. Co., 12 P.2d 981, 124 Cal.App. 321—Bailar v. Yewell, 295 P. 860, 111 Cal.App. 472.
Mass.—Broughton v. Boston & M. R. R., 194 N.E. 816, 290 Mass. 80—Janevesian v. Esa, 174 N.E. 279, 274 Mass. 231—Patterson v. Pendexter, 156 N.E. 687, 259 Mass. 490.
Ohio.—Dirion v. Brewer, 151 N.E. 818, 20 Ohio App 298.
Pa.—Wittmer's Estate, 88 Pittsb. Leg.J. 251.
Vt.—Dunnett v. Shields, 123 A. 626, 97 Vt. 419.
W.Va.—LaFollette v. Croft, 14 S.E. 2d 917.
22 C.J. p 144 note 20.
Common law is distinguished from civil law by, among other things, presumption of innocence until proof of guilt.—Royce v. Rosasco, 287 N.Y.S. 692, 159 Misc. 236.
Where different inferences may be drawn from same circumstances, court must presume in favor of innocent conduct, rather than guilty misconduct or intentional wrong.
Colo.—Cass v. Blake, 56 P.2d 42, 98 Colo. 381.
N.J.—Gilson v. Gilson, 174 A. 685, 116 N.J.Eq. 556.
N.C.—Troxler v. Bevill, 3 S.E.2d 8, 215 N.C. 640.
Tenn.—Memphis Cotton Press & Storage Co. v. Hanson, 4 Tenn.App. 293.
22 C.J. p 144 note 20 [b].
Where there are two conflicting presumptions, one of which is in favor of innocence, and another which would be followed with a taint of guilt, the one in favor of innocence must prevail.—Acuff v. New York Life Ins. Co., 239 S.W. 551, 210 Mo.App. 356.

69. Ala.—Home Ins. Co. of New York v. Murphy, 137 So. 393, 223 Ala. 566—Williams v. Wilson, 97 So. 911, 210 Ala. 289.
Ark.—State ex rel. Attorney General

question of innocence or guilt is directly or only collaterally involved.[70]

The presumption of innocence is not a presumption of law, but is merely evidentiary;[71] as a restatement of the presumption against illegality, see § 134 infra, it regulates the burden of evidence.[72] While it has been held that its probative weight is limited,[73] and that, being rebuttable,[74] it is effective as evidence only until disproved,[75] it has also

v. Broadaway, 93 S.W.2d 1248, 192 Ark. 634.
Cal.—Aronson v. Bank of America Nat. Trust & Savings Ass'n, 72 P.2d 548, 9 Cal.2d 640—In re Nelson's Estate, 216 P. 368, 191 Cal. 280—Brill v. Brill, 102 P.2d 534, 38 Cal. App.2d 741—Arakelian v. Sears, 200 P. 757, 53 Cal.App. 646—Guidera v. Lapiana, 199 P. 557, 52 Cal. App. 460.
Md.—Marsiglia v. Marsiglia, 159 A. 914, 162 Md. 700.
Mass.—Jubilee Yacht Club v. Gulf Refining Co., 140 N.E. 280, 245 Mass. 60.
Mo.—Brigham City Fruit Growers' Ass'n v. G. H. Zollmann Produce Co., 220 S.W. 911.
Mont.—Hawaiian Pineapple Co. v. Browne, 220 P. 1114, 69 Mont. 140.
N.J.—Angersbach v. South River Police Pension Commission, 3 A.2d 873, 122 N.J.Law 1—Michaels v. Michaels, 110 A. 573, 91 N.J.Eq. 408.
Or.—Millar v. Semler, 3 P.2d 987, 137 Or. 610, denying rehearing Miller v. Semler, 2 P.2d 233, 137 Or. 610.
Pa.—American Nat. Bank of Camden, N. J., v. Kirk, 177 A. 801, 317 Pa. 551—Brennan v. Pine Hill Collieries Co., 167 A. 776, 312 Pa. 52.
S.C.—Oliver v. McWhirter, 100 S.E. 533, 112 S.C. 555.
Tenn.—Independent Life Ins. Co. v. Knight, 2 Tenn.App. 259.
Vt.—Belock v. State Mut. Fire Ins Co., 185 A. 100, 108 Vt. 252, followed in Belock for Benefit of Cramton v. Union Mut. Fire Ins Co., 185 A. 106, 108 Vt. 264, and Belock for Benefit of Cramton v. Vermont Mut. Fire Ins. Co., 185 A. 106, 108 Vt. 265—Clark v. Demars, 146 A. 812, 102 Vt. 147.
22 C.J. p 144 note 24.

Attorney in disbarment proceeding
Miss.—Ex parte Redmond, 125 So. 833, 156 Miss. 439.

Change of law pending suit
Where the conduct charged against defendant in a negligence case was criminal at the time, a presumption of innocence available to him in the civil action arose, although the statute making the act complained of a crime was repealed prior to the bringing of the civil action, in view of statute that repeal shall not affect acts done or rights acquired.—Thayer v. Glynn, 106 A. 834, 93 Vt. 257.

Application to wrongful acts generally
(1) The rule does not apply where the act charged, although wrongful, is not fraudulent, dishonest, or criminal.—Adams v. Cook, 100 A. 42, 91 Vt. 281.

(2) The presumption of innocence is not evidence in defendant's favor, in trover.—Livanovitch v. Livanovitch, 131 A. 799, 99 Vt. 327.

In New York
(1) It has been broadly stated that the presumption of innocence is not indulged in civil actions.—In re Byrnes' Estate, 290 N.Y.S. 76, 160 Misc. 474—Coplay Cement Mfg. Co. v. Loeb, 207 N.Y.S. 659, 124 Misc. 640, affirmed 213 N.Y.S. 784, 215 App Div. 805—22 C.J. p 144 note 24 [d] (1).

(2) However, even in cases holding against such presumption in civil actions it has been held that there may be an inference against the commission of a crime in a proper case.—In re Byrnes' Estate, supra.

(3) Further, it has been indicated that the presumption does apply in civil cases, but not to the same extent that it does in criminal cases.—In re Callahan's Estate, 254 N.Y.S. 46, 142 Misc. 28, affirmed In re Callahan, 259 N.Y.S. 987, 236 App Div. 814, affirmed In re Callahan's Estate, 188 N.E. 48, 262 N.Y. 524.

(4) Thus, in many cases the presumption has been accepted, or it has been held that where evidence is susceptible of two constructions the one not implying crime or moral turpitude should be favored.—Berkey v. Third Ave. Ry. Co., 155 N.E. 58, 244 N.Y. 84, 50 A.L.R. 599, reversing 217 N.Y.S. 156, 217 App.Div. 504, motion denied 155 N.E. 914, 244 N.Y. 602, 50 A.L.R. 599—Fox Film Corporation v. Loughman, 251 N.Y.S. 693, 233 App.Div. 58, reversed on other grounds People ex rel. Fox Film Corporation v. Loughman, 180 N.E. 885, 259 N.Y. 30—In re Irving's Will, 190 N.Y.S. 622, 198 App.Div. 414—In re Eichelberger's Estate, 273 N.Y.S. 535, 152 Misc. 834—In re Callahan's Estate, supra.
22 C.J. p 144 note 24 [d] (2).

70. Cal.—Serv-U-Garbage Co. v. Board of Health of City and County of San Francisco, 290 P. 519, 107 Cal.App. 386.
Ill.—John M. Bransfield Co. v. Kingery, 283 Ill.App. 405.
S.C.—Oliver v. McWhirter, 100 S.E. 533, 112 S.C. 555.
22 C.J. p 144 note 26.

Truth of witnesses or evidence
(1) Testimony or other evidence is presumed to be true since it is presumed that witnesses or others would not commit the crime of perjury or falsification.
U.S.—Gung You v. Nagle, C.C.A.Cal., 34 F.2d 848.
Iowa.—Windahl v. Hasselman, 200 N.W. 583, 198 Iowa 1001.
La.—Fridge v. Talbert, 158 So. 209, 180 La. 937—Hirtzler v. Hirtzler, 109 So. 504, 161 La. 823—Britt v. Nashville Bridge Co., App., 171 So. 493
Mo.—Kansas City ex rel. Barlow v. Robinson, 17 S.W.2d 977, 322 Mo. 1050, dissenting opinion 32 S.W.2d 1075, 322 Mo. 1050.
22 C.J. p 144 note 26 [a].

(2) This is so even though the witness is an employee of one of the parties.—Canion v. Southern Pac. Co., 80 P.2d 397, 52 Ariz. 245.
Presumption of truthfulness as resulting from presumption of honesty and good faith see supra § 196.

71. Ala.—Ex parte Sovereign Camp, W. O. W., 87 So. 620, 205 Ala. 316, denying certiorari Sovereign Camp W. O. W. v. Dennis, 87 So. 616, 17 Ala.App. 642.

72. Mo.—State v. Ellison, 187 S.W. 23, 268 Mo. 239.
22 C.J. p 144 note 25.

73. Ala.—Mutual Life Ins. Co. of New York v. Maddox, 128 So. 383, 221 Ala. 292, followed in 128 So. 387 (two cases), 221 Ala. 295.

Weight dependent on other evidence
While this presumption is in nature of evidence aiding jury in arriving at correct conclusion from circumstantial or conflicting evidence, and the burden in overcoming this presumption is to establish the contrary to the reasonable satisfaction of the jury, it is not evidence in the sense that it would create a conflict even though evidence to the contrary was undisputed.—Mutual Life Ins. Co. of New York v. Maddox, supra.

74. Miss.—Redmond v. Marshall, 137 So. 733, 162 Miss. 359.
Or.—Metropolitan Casualty Ins. Co. of New York v. N. B. Lesher, Inc., 52 P.2d 1133, 152 Or. 161.

Mere preponderance of evidence is sufficient.
Pa.—Sharpe v. Federal Window & Office Cleaning Co., 19 A.2d 509, 144 Pa.Super. 231.
Vt.—Clark v. Demars, 146 A. 812, 102 Vt. 147.

75. Mont.—Gagnon v. Jones, 62 P.2d 683, 103 Mont. 365.
22 C.J. p 144 note 22.

been held that it continues as evidence throughout the trial, and is to be considered with all of the other evidence.[76]

§ 131. Intent and Understanding

Every sane person is presumed to intend the natural and probable consequences of his voluntary words and acts, and to intend to discharge his legal obligations.

It is presumed that every person, if sane[77] and comprehending,[78] knows and intends the natural and probable,[79] but not the remote or incidental,[80] consequences of his voluntary words and acts, including the legal consequences;[81] and this has been called a conclusive presumption.[82] It is also presumed that he intends to do that which he does,[83] and that he understands the nature of instruments signed by him,[84] although executed by mark,[85] or executed for him under his direction,[86] and even

When prima facie case has once been established, there is no presumption of innocence left.—Millar v. Semler, 3 P.2d 987, 137 Or. 610, denying rehearing Miller v. Semler, 2 P.2d 233, 137 Or. 610.

76. Vt.—Belock v. State Mut. Fire Ins. Co., 185 A. 100, 108 Vt. 252, followed in Belock for Benefit of Cramton v. Union Mut Fire Ins. Co., 185 A. 106, 108 Vt. 264, and Belock for Benefit of Cramton v. Vermont Mut Fire Ins. Co., 185 A. 106, 108 Vt. 265—Clark v. Demars, 146 A. 812, 102 Vt. 147.

77. Vt.—Domina v. Pratt, 13 A.2d 198, followed in 13 A.2d 204—Benway v. Hooper, 8 A.2d 658, 110 Vt. 497.

78. N.Y.—In re Brogan's Estate, 300 N.Y.S. 447, 165 Misc. 111.

79. U.S.—American Security & Trust Co. v Frost, App.D.C., 117 F.2d 283, certiorari denied Frost v. American Security & Trust Co., 61 S.Ct. 829—Texas Co. v. Roos, C.C.A.Tex., 93 F.2d 330, affirming, D.C., Burton v. Roos, 20 F.Supp. 75—In re Gill, C.C.A.Ala., 92 F.2d 810—Diamond v. New York Life Ins. Co., D.C. Ill., 42 F.2d 910, affirmed, C C.A., 50 F.2d 884, certiorari denied 52 S.Ct. 25, 284 U.S. 647, 76 L.Ed. 549—In re Weisberger, D.C Pa., 41 F. 2d 275—General Motors Acceptance Corporation v. U. S., C.C.A.Mich., 40 F.2d 599, affirming, D.C., U S. v. Chevrolet Truck, Motor No. 3802777, 30 F.2d 830—In re Danville Hotel Co., C.C.A.Ill., 38 F.2d 10, affirming in part and reversing in part, D.C., 33 F.2d 162—Houchin Sales Co. v. Angert, C.C.A.Mo., 11 F.2d 115—Lovett v. Faircloth, C.C. A.Ga., 10 F.2d 301, certiorari denied Faircloth v. Lovett, 46 S.Ct. 355, 270 U.S. 659, 70 L.Ed. 785—U. S. v. One Ford V-8 Sedan, 1934 Model, D.C.Ky., 11 F.Supp. 515—In re Wernecke, D.C.N.Y., 1 F.Supp. 127—Navassa Guano Co. v. Cockfield, S.C., 253 F. 883, 165 C.C.A. 363, 6 A.L.R. 1168, reversing, D.C., 244 F. 222.

Ark.—Sturdy v. Hall, 143 S.W.2d 547—Metcalf v. Jelks, 8 S.W.2d 462, 177 Ark. 1023.

Cal.—Schwartz v. Brandon, 275 P. 448, 97 Cal.App. 30—Knight v. Bentel, 179 P. 406, 39 Cal.App. 502.

Colo.—Dikeou v. Food Distributors Ass'n, 108 P.2d 529.

Conn.—Lengyel v. Peregrin, 132 A. 459, 104 Conn. 285.

Del.—Leech v Husbands, 152 A. 729, 4 W.W.Harr. 362.

Hawaii.—Yuen v. French, 29 Hawaii 625.

Ind.—Cotton v. Commonwealth Loan Co., 190 N.E. 853, 206 Ind. 626.

Iowa.—Siesseger v. Puth, 248 N.W. 352, 216 Iowa 916—State v. Fray, 241 N.W 663, 214 Iowa 53, 81 A.L R. 286—L. Terry & H. Rosenberg v. American Ins. Co., 211 N.W. 716, affirming 203 N.W. 17, 202 Iowa 1291.

Ky.—Massachusetts Bonding & Insurance Co v. Dale, 50 S.W.2d 40, 244 Ky. 50—Griffith v. Clark Mfg. Co., 279 S W. 971, 212 Ky. 498—E. L. Martin & Co. v. A. B. Maggard & Son, 267 S.W. 1102, 206 Ky. 558.

Nev.—In re Arnold's Estate, 110 P.2d 204.

N.Y.—Kohler v. National Surety Corporation, 275 N.Y.S. 279, 153 Misc 429—Burgess Bros. Co. v. Stewart, 184 N.Y.S. 199, 112 Misc. 347, affirmed 185 N.Y.S. 85, 194 App.Div. 913.

Ohio.—Jackson v. Bryant, 169 N.E. 825, 33 Ohio App. 468.

Or.—Nicolai-Neppach Co. v. Abrams, 240 P. 870, 116 Or. 424.

Pa.—Rees v. R. A Bowers Co., 124 A. 653, 280 Pa. 474.

S.C.—Gardner v. Kirven, 191 S.E. 814, 184 S C. 37.

Tex.—City of Farmersville v. Texas-Louisiana Power Co, Civ App., 55 S.W.2d 195, 202, citing **Corpus Juris,** and reversed on other grounds Texas-Louisiana Power Co. v. City of Farmersville, Com.App., 67 S.W. 2d 235—Norris v. Stoneham, Civ. App., 46 S.W.2d 363.

Va.—Bourne v. Richardson, 113 S.E. 893, 133 Va. 441.

Vt.—Benway v. Hooper, 8 A.2d 658, 110 Vt. 497—Ex parte Cote, 106 A. 519, 93 Vt. 10

Wis.—John F. Jelke Co. v. Hill, 242 N.W. 576, 208 Wis. 650.

22 C.J. p 143 note 13.

Legislature is presumed to have intended effect which its action or nonaction produces.—Coombs v. Darling, 166 A. 70, 116 Conn. 643—Hartley v. Vitiello, 154 A. 255, 113 Conn. 74, followed in MacDonald v. Newman, 154 A. 259, 113 Conn 756—State v. Staub, 23 A. 924, 61 Conn. 553.

Persons, even when acting officially, are presumed to intend the necessary consequences of their acts, especially if such consequences are known to them beforehand, so that it must be presumed that the higher rates for use of sewers were imposed by city officials on property owners to accumulate a fund for the general benefit of the city, and thereby enable them to assess a lower rate of tax for general purposes.—City of Madera v. Black, 184 P. 397, 181 Cal. 306.

Unlawful act

The presumption that a person intends natural consequence of his unlawful act does not apply in civil action against a third person.—Warren v. Pilot Life Ins. Co., 9 S.E 2d 479, 217 N C. 705.

80. U S.—Apex Hosiery Co. v Leader, D C Pa., 20 F.Supp. 138, reversed on other grounds, C.C.A., 90 F 2d 155, reversed on other grounds Leader v. Apex Hosiery Co, 58 S. Ct. 362, 302 U.S. 656, 82 L Ed. 508.

22 C.J. p 143 note 14.

81. Pa.—In re Brolasky's Estate, 163 A. 292, 309 Pa. 30.

Vt.—Ex parte Cote, 106 A. 519, 93 Vt. 10.

82. U.S.—In re Bowman Hardware & Electric Co., D.C.Ill., 3 F Supp. 82, reversed on other grounds, C. C.A., 67 F.2d 792.

Ill.—Carlson v. Carpenter Contractors' Ass'n, 224 Ill.App. 430, affirmed 137 N E. 222, 305 Ill. 331, 27 A.L R. 625.

Neb.—Peterson v. Wahlquist, 249 N. W. 678, 125 Neb. 247, 89 A.L.R. 747.

Tenn.—Jamison v. Metropolitan Life Ins. Co., App., 145 S.W.2d 553.

83. Ala.—Myers v. Baker, 135 So. 643, 24 Ala.App. 387.

84. Del.—Du Pont v. Du Pont, 164 A. 238, 19 Del.Ch. 131.

22 C.J. p 143 note 15.

85. D.C.—Lipphard v. Humphrey, 28 App.D.C., 355, affirmed 28 S.Ct. 561, 209 U.S. 264, 52 L.Ed. 783, 14 Ann. Cas. 872.

22 C.J. p 143 note 16.

86. N.Y.—Harris v. Story, 2 E.D. Smith 363.

though written in a language which he is unable to read or understand.[87]

Every person is presumed to have the intention of discharging whatever duty the law casts upon him,[88] even though the obligation is self-imposed;[89] and, if the intention with which an act is done is fairly open to two interpretations, that interpretation will be favored which assumes that it was performed with a right, rather than a wrong, intention.[90]

It has been said that, since intent is an operation of the mind, it should be proved and found as a fact, and is rarely to be inferred as a matter of law.[91]

Manufacturers of articles ordinarily used for specific purposes will be deemed to intend that they will be appropriated to such use.[92]

§ 132. Knowledge of Law

a. In general
b. Limits of presumption
c. Change or repeal of law

a. In General

All persons are presumed to know the general public laws of the state or country where they reside, and the legal effect of their acts.

Subject to qualifications and limitations which will appear, the general rule is that all persons are presumed to know, and are bound to take notice of, the general public laws[93] of the country or state

87. Pa.—Pusic v. Salak, 104 A. 751, 261 Pa. 512.

88. Ga.—Tattnall Bank v. Harvey, 198 S.E. 724, 186 Ga. 752.

89. Colo.—Doherty v. Short, 14 P.2d 484, 91 Colo. 241.
Or.—Multnomah County v. Dant & Russell, 75 P.2d 986, 158 Or. 350.

90. Mo.—Stephens v. Stephens, 232 S.W. 979.
R.I.—Blackstone Canal Nat. Bank v. Oast, 121 A. 223, 45 R.I. 218.

91. N.C.—Danville Lumber & Mfg. Co. v. Gallivan Bldg. Co., 97 S.E. 718, 177 N.C. 103.
22 C.J. p. 143 note 19.

92. Vt.—Advance Whip & Novelty Co. v. Benevolent Protective Order of Elks of Montpelier, 170 A. 95, 106 Vt. 72.

93. U.S.—Wilber Nat. Bank of Oneonta, N. Y., v. U. S., N.Y., 55 S. Ct. 362, 294 U.S. 120, 79 L.Ed. 798, affirming, C.C.A., 69 F.2d 526, certiorari granted 55 S.Ct. 94, 293 U. S. 541, 79 L.Ed. 647—Hamburg-American Line v. U. S., N.Y., 54 S.Ct. 491, 291 U.S. 420, 78 L.Ed. 887, affirming, C.C.A., 65 F.2d 369, certiorari granted 54 S.Ct. 79, 290 U.S. 615, 78 L.Ed. 538—U. S. v. Glidden Co., C.C.A.Ohio, 119 F.2d 235—U. S. v. Royal Indemnity Co., C.C.A.N.Y., 116 F.2d 247, certiorari granted Royal Indemnity Co. v. U. S., 61 S.Ct. 838, and affirmed 61 S.Ct. 995—Jorgensen v. Swope, C.C.A.Wash., 114 F.2d 988—The Standella, C.C.A.Tex., 108 F.2d 619—Meacham v. Halley, C.C.A.Tex., 103 F.2d 967, followed in Beckert v. Halley, 104 F.2d 1010, certiorari denied Meacham v. Halley, 60 S.Ct. 86, 308 U.S. 572, 84 L.Ed. 480—Cameron County Water Imp. Dist. No. 8 v. De La Vergne Engine Co., C.C.A.Tex., 93 F.2d 373—Philadelphia Nat. Bank v. Raff, C.C.A. Ohio, 76 F.2d 843, affirming, D. C., 4 F.Supp. 230, and certiorari denied 56 S.Ct. 118, 296 U.S. 601, 80 L.Ed. 426—In re Hackett, Hoff & Thiermann, C.C.A.Wis., 70 F.2d 815, affirming, D.C., 6 F.Supp. 638, certiorari granted Marine Nat. Exchange Bank of Milwaukee v. Kalt-Zimmers Mfg. Co., 55 S.Ct. 85, 293 U.S. 540, 79 L.Ed. 645, reversed on other grounds 55 S.Ct. 226, 293 U. S. 357, 79 L.Ed. 427—Texas & P. Ry. Co. v. Pottorff, C.C.A.Tex., 63 F.2d 1, certiorari granted 54 S.Ct. 55, 290 U.S. 609, 78 L.Ed. 533, affirmed 54 S.Ct. 416, 291 U. S. 245, 78 L.Ed. 777, amended on other grounds 54 S.Ct. 525, 291 U. S. 649, 78 L.Ed. 777, rehearing denied 54 S.Ct. 627, 292 U.S. 600, 78 L.Ed. 1464—Wourdack v. Becker, C.C.A.Mo., 55 F.2d 840, certiorari denied 52 S.Ct. 501, 286 U.S. 548, 76 L.Ed. 1285—The A. S. Sherman, D.C.N.Y., 51 F.2d 782—Luckenbach S. S. Co. v. American Mills Co., C.C.A.La., 24 F.2d 704, reversing, D.C., American Mills Co. v. Luckenbach S. S. Co., 20 F.2d 217—In re Lake Champlain Pulp & Paper Corporation, D.C.N.Y., 20 F.2d 425—Thompson v. U. S., D.C.Minn., 8 F.2d 175—Union Producing Co. v. Parkes, D.C.La., 40 F.Supp. 163—Ross v. Beacham, D.C.S.C., 33 F. Supp. 3—In re Kalb, D.C.Wis., 32 F.Supp. 356, affirmed, C.C.A., 116 F.2d 775, certiorari denied Kalb v. Feuerstein, 61 S.Ct. 940—Equitable Life Assur. Soc. of U. S. v. Moore, D.C.Ill., 29 F.Supp. 179—Jewell v. U. S., D.C.Ky., 27 F.Supp. 836—Anderson v. Atkinson, D.C.Ill., 22 F.Supp. 853—Birdsell Mfg. Co. v. Anderson, D.C.Ky., 20 F.Supp. 571, affirmed, C.C.A., 104 F.2d 340—Fidelity Life Ass'n v. Board of Public Instruction for Martin County, State of Florida, D.C.Fla., 10 F. Supp. 657, reversed on other grounds, C.C.A., Board of Public Instructions for Polk County, Fla. v. Gillespie, 81 F.2d 586—Missouri Utilities Co. v. City of California, D.C.Mo., 8 F.Supp. 454, appeal dismissed, C.C.A., 79 F.2d 1003—Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Ohio Farmers' Ins. Co., D.C.Pa., 7 F.Supp. 701, affirmed, C.C.A., Ohio Farmers' Ins. Co. v. Pennsylvania Co. for Insurance on Lives and Granting Annuities, 72 F.2d 369—Hackler v. Farm & Home Savings & Loan Ass'n, D.C.Mo., 6 F.Supp. 610, appeal dismissed, C.C.A., 73 F.2d 999—Schrikker v. U. S., 13 Ct. Cust.App. 562.
Ala.—Birmingham Bar Ass'n v. Phillips & Marsh, 196 So. 725, 239 Ala. 650—Universal Electric Const. Co. of Alabama v. Robbins, 194 So. 194, 239 Ala. 105—Tucker v. State ex rel. Poole, 165 So. 249, 252, 231 Ala. 350, citing **Corpus Juris**—American Book Co. v. State, 113 So. 592, 216 Ala. 367—M. Hohenberg & Co. v. Hendrix, 105 So. 195, 213 Ala. 406—Greer v. Marriott, 167 So. 597, 27 Ala.App. 108, certiorari denied 167 So. 599, 232 Ala. 194.
Ariz.—Conway v. State Consolidated Pub. Co., 112 P.2d 218.
Ark.—Henderson v. Gladish, 128 S.W. 2d 257, 198 Ark. 217—Hill v. American Book Co., 285 S.W. 20, 171 Ark. 427—Walden v. Fallis, 283 S. W. 17, 171 Ark. 11, 45 A.L.R. 1396—Bost v. Road Improvement Dist. No. 4 of Pope County, 261 S.W. 659, 163 Ark. 607—Bost v. Road Improvement Dist. No. 4 of Pope County, 260 S.W. 724, 163 Ark. 607—Hanson v. Brown, 213 S.W. 12, 139 Ark. 60.
Cal.—El Dorado Irr. Dist. v. Browne, 13 P.2d 921, 216 Cal. 269—Blake v. City of Eureka, 258 P. 945, 201 Cal. 643—Boehm v. Spreckels, 191 P. 5, 183 Cal. 237—Zottman v. San Francisco, 20 Cal. 97, 81 Am.D. 96—Richards v. Pacific Southwest Discount Corporation, App., 112 P. 2d 698—Lakeside Park Ass'n of Kelseyville v. Keithly, App., 110 P.2d 1055—In re Hein's Estate, 90 P.2d 100, 32 Cal.App.2d 438—Miller

v. City of Martinez, 82 P.2d 519, 28 Cal.App.2d 364—Jordan v. Williams Irr. Dist., 57 P.2d 566, 13 Cal App.2d 465—Butler v. Hastings, App., 34 P.2d 751—Los Angeles Warehouse Co. v. Los Angeles County, 33 P.2d 1058, 139 Cal App. 368—Perkins v. Pacific Fruit Exchange, 22 P.2d 535, 132 Cal. App 278—Barnett v. Marsili, 21 P. 2d 650, 131 Cal App. 337—Vaughan v. People's Mortg. Co., 20 P.2d 335, 130 Cal.App. 632—General Paint Corporation v. Seymour, 12 P.2d 990, 124 Cal.App. 611—Kuck v. Raftery, 4 P.2d 552, 117 Cal.App. 755—Bent Bros. v. Campbell, 281 P. 717, 101 Cal App. 456—Bridges v. Price, 273 P. 92, 95 Cal.App. 394—Pilger v. City of Paris Dry Goods Co., 261 P. 328, 86 Cal.App 277—Brown v. City Council of City of Long Beach, App., 258 P. 693

Colo.—Jensen v. Jensen, 18 P.2d 1016, 92 Colo. 169—Swenson v. McFerson, 17 P.2d 530, 91 Colo. 519—New Jersey Fidelity & Plate Glass Ins. Co. v. Patterson, 284 P. 334, 86 Colo. 580—Wilson v. Monte Vista Potato Growers' Co-op Ass'n, 260 P. 1080, 82 Colo. 428—Pomeranz v. Class, 257 P. 1086, 82 Colo. 173—School Dist. No. 98 of Adams County v. Pomponi, 247 P. 1056, 79 Colo. 658—Silberfeld v. Solomon, 202 P. 113, 70 Colo. 413.

Conn.—Stevens v. Neligon, 164 A. 661, 116 Conn. 307—Meister v. Gale, 139 A. 700, 107 Conn. 52.

Del.—Black, for Use of Smulska, v. H. Feinberg Furniture Co., 3 A.2d 62, 9 W.W.Harr 523—Lowe v. Williams, Ch., 18 A 2d 424.

Fla.—In re Comstock's Estate, 197 So. 121, 143 Fla. 500—Chicago Trust Co. v. Knabb, 196 So. 200, 142 Fla. 767—State ex rel. First Presbyterian Church of Miami v. Fuller, 182 So. 888, 133 Fla. 554, rehearing denied 183 So. 726, 134 Fla. 212—Caravasios v. Vanderpool & Co., 182 So. 603, 133 Fla. 112—Harris v. City of Sarasota, 181 So. 366, 132 Fla. 568—Barnett v. Ozark Corporation, 180 So. 376, 131 Fla. 831—Pembroke v. Peninsular Terminal Co., 146 So. 249, 108 Fla. 46—Hamilton v. Vero Beach Reserve Mortg. Co., 144 So. 362, 107 Fla. 65—Cragin v. Ocean & Lake Realty Co., 133 So. 569, 101 Fla. 1324, followed in Mabson v. Christ, 134 So. 43, rehearing denied 140 So. 671, 104 Fla. 606, and affirmed Cragin v. Ocean & Lake Realty Co., 135 So. 795, 101 Fla. 1324, appeal dismissed Girard Trust Co. v. Ocean & Lake Realty Co., 52 S.Ct. 494, 286 U.S. 523, 76 L.Ed. 1267—McDaniel v. McElvy, 108 So. 820, 91 Fla. 770, 51 A.L.R. 731—State v. Greer, 102 So. 739, 88 Fla. 249, 37 A.L.R. 1298.

Ga.—National Surety Corporation v Gatlin, 15 S.E.2d 180—Citizens' Bank of Colquitt v. American Surety Co. of New York, 164 S.E. 817, 174 Ga. 852, reversing American Surety Co. of New York v. Citizens' Bank of Colquitt, 160 S.E. 546, 44 Ga.App. 57, and conformed to American Surety Co. of New York v Citizens' Bank of Colquitt, 164 S.E. 902, 45 Ga.App. 405.

Idaho.—Telford v. Bingham County Farmers' Mut. Ins. Co., 16 P.2d 983, 52 Idaho 461—The Columbia Motors Co. v. Ada County, 247 P. 786, 42 Idaho 678, 48 A.L.R. 950.

Ill.—Klein v. Mangan, 17 N.E.2d 958, 369 Ill. 645, transferred, see 22 N.E.2d 269, 301 Ill App. 203—Bundesen v. Lewis, 15 N.E.2d 520, 368 Ill. 623, reversing 9 N.E.2d 327, 291 Ill App. 83—Elmhurst State Bank v. Stone, 178 N.E. 362, 346 Ill 157—Wylie v. Fisher, 169 N.E 237, 337 Ill. 488—Eliason v. Wilborn, 167 N.E. 101, 335 Ill. 352, 68 A.L.R. 350, affirmed 50 S.Ct. 382, 281 U.S. 437, 74 L.Ed. 962—Duck Island Hunting & Fishing Club v. Edward Gillen Dock, Dredge & Construction Co., 161 N.E. 300, 330 Ill. 121—Harry Goldstine Realty Co. v City of Chicago, 29 N.E.2d 283, 306 Ill App. 556—Mitchell v. Comstock, 27 N.E.2d 620, 305 Ill. App. 360—Janisch v. Reynolds, 254 Ill.App. 569—Bird-Sykes Co v. McNamara, 252 Ill App. 262—Hanson v. Clark, 246 Ill.App. 496—A. L. Jones Co. v. Chicago, M. & St. P Ry. Co., 213 Ill.App. 283.

Ind.—French v National Refining Co., 26 N.E.2d 47—Iterman v. Baker, 15 N.E 2d 365, 214 Ind. 308—Board of School Com'rs of City of Indianapolis v. State ex rel. Bever, 5 N.E.2d 307, 211 Ind. 257, rehearing denied 6 N.E.2d 702, 211 Ind 257—Cotton v. Commonwealth Loan Co., 190 N.E. 853, 206 Ind. 626—Sterne v. Fletcher American Co., 181 N.E. 37, 204 Ind. 35—State Life Ins. Co. v. Thiel, 20 N.E.2d 693, 107 Ind.App. 75—Indiana Trust Co. v. Beagley, 15 N.E 2d 758, 105 Ind.App. 502—Hudnut v. Indiana De Luxe Cab Co., 182 N.E. 711, 98 Ind.App. 44—Flick v. Jordan, 129 N.E. 42, 74 Ind.App. 314.

Iowa.—Reconstruction Finance Corporation v. Deihl, 296 N.W. 385—Kowalke v. Evernham, 232 N.W. 670, 210 Iowa 1270—In re Caylor's Estate, 227 N.W. 103, 208 Iowa 1208—Norwood v. Parker, 224 N.W. 831, 208 Iowa 62—In re Culbertson's Estate, 215 N.W. 761, 204 Iowa 473—Fairley v. Falcon, 214 N.W. 538, 204 Iowa 290—Des Moines Improvement Co. v. Holland Furnace Co., 212 N.W. 551, 204 Iowa 274—Edwards v. Marquis, 212 N.W. 376—McClatchey v. Marquis, 212 N.W. 374, 203 Iowa 76—Stout v. Ruschke, 202 N.W. 88, 199 Iowa 402—Pagel v. Tietje, 186 N.W. 938, 193 Iowa 467.

Kan.—State v. School Board of Tecumseh Rural High School Dist. No. 4, 204 P. 742, 110 Kan. 779.

Ky.—Owens v. Maryland Casualty Co., 141 S.W.2d 867, 283 Ky. 462—Fisher v. Booher, 107 S.W.2d 307, 269 Ky. 501—Womack-Rayburn Co. v. Town of Worthington, 91 S.W. 2d 13, 262 Ky. 710—Hubley's Guardian Ad Litem v. Wolfe, 82 S.W.2d 830, 259 Ky. 574, 101 A.L.R. 1359—Knott County Board of Education v. Martin, 76 S.W.2d 601, 256 Ky. 515—U. S. Bond & Mortgage Corporation v. Berry, 61 S.W.2d 293, 249 Ky. 610—Hunt v. Smith, 230 S.W. 936, 191 Ky. 443, 17 A.L.R. 588—Golden v. Riverside Coal & Timber Co., 211 S.W. 761, 184 Ky. 200.

La.—Treigle v. Acme Homestead Ass'n, 160 So. 637, 181 La. 941, 98 A.L.R. 69, reversed on other grounds 56 S.Ct. 408, 297 U.S. 189, 80 L.Ed. 575, 101 A.L.R. 1284, rehearing denied 56 S.Ct. 587, 297 U.S. 728, 80 L.Ed. 1010, followed in Sokolsky v. Equitable Homestead Ass'n., 160 So 646, 181 La. 970, Treigle v. Thrift Homestead Ass'n., 160 So. 646, 181 La. 971, reversed on other grounds Treigle v. Acme Homestead Ass'n., 56 S. Ct. 408, 297 U.S. 189, 80 L.Ed. 575, 101 A.L.R. 1284, rehearing denied 56 S.Ct. 587, 287 U.S. 728, 80 L. Ed. 1010, followed in Treigle Sash Factory v. Conservative Homestead Ass'n., 160 So. 647, 181 La. 972, reversed on other grounds Treigle v. Acme Homestead Ass'n., 56 S. Ct. 408, 297 U.S 189, 80 L.Ed. 575, 101 A.L.R. 1284, rehearing denied 56 S.Ct. 587, 297 U.S. 728, 80 L. Ed. 1010, followed in Treigle Sash Factory v. Union Homestead Ass'n, 160 So. 647, 181 La. 973, reversed on other grounds Treigle v. Acme Homestead Ass'n, 56 S.Ct. 408, 297 U.S. 189, 80 L.Ed. 575, 101 A.L.R. 1284, rehearing denied 56 S. Ct. 588, 297 U.S. 728, 80 L.Ed. 1010, followed in Mitchell v. Conservative Homestead Ass'n., 160 So. 648, 181 La. 973, reversed on other grounds Treigle v. Acme Homestead Ass'n, 56 S.Ct. 408, 297 U.S. 189, 80 L.Ed. 575, 101 A.L.R. 1284, rehearing denied 56 S.Ct. 588, 297 U.S. 728, 80 L.Ed. 1010—Sheridan v. New Orleans Great Northern R. Co., 119 So. 530, 167 La. 505, reversing 119 So. 465, 9 La. App. 308—State ex rel. Wall v. Coverdale, App., 175 So. 492—Jeane v. Johnson, App., 154 So. 757—George E Breece Lumber Co. v. Morris, 141 So. 787, 19 La.App. 875—Vuillemont v. Gonsulin, 134 So. 419, 17 La.App. 661—Alexander, Hamilton Institute v. Hollis, 133 So. 458, 16 La.App. 448.

Md.—Goldsborough v. De Witt, 189 A. 226, 171 Md. 225—Kiser v. Lucas, 185 A. 441, 170 Md. 486—J. T.

Donohue Realty Co. v. Wagner, 141 A. 337, 154 Md. 588—Marburg v. Mercantile Bldg. Co., 140 A. 836, 154 Md. 438—Citizens' Nat. Bank of Pocomoke City v. Custis, 138 A. 261, 153 Md. 235, 53 A.L.R. 1165—Goldman v. Harford Road Bldg. Ass'n, 133 A. 843, 150 Md. 677.

Mass.—Nochemson v. Aronson, 181 N.E. 188, 279 Mass. 278—Nelson v. American Telephone & Telegraph Co., 170 N.E. 416, 270 Mass. 471—Loring v. Commissioner of Public Works of City of Boston, 163 N.E. 82, 264 Mass. 460—Cosmopolitan Trust Co. v. Leonard Watch Co., 143 N.E. 827, 249 Mass. 14.

Mich.—Cassidy v. Kraft-Phenix Cheese Corporation, 280 N.W. 814, 285 Mich. 426—Achenbach v. Mears, 261 N.W. 251, 272 Mich. 74—Lenger v. Hulst, 244 N.W. 187, 259 Mich. 640—Kardynal v. Grezezinski, 238 N.W. 213, 255 Mich. 421—Glieberman v. Fine, 226 N.W. 669, 248 Mich. 8—Carland v. United Engineering Co., 176 N.W. 564, 209 Mich. 244.

Minn.—Judd v. City of St. Cloud, 272 N.W. 577, 198 Minn. 590.

Miss.—Woodrich v. St. Catherine Gravel Co., 195 So. 307, 188 Miss. 417, 127 A.L.R. 1179—Fornea v. Goodyear Yellow Pine Co., 178 So. 914, 181 Miss. 50—State ex rel. Rice v. Hasson Grocery Co., 170 So. 234, 177 Miss. 204, 107 A.L.R. 663—Pearl Realty Co. v. State Highway Commission, 154 So. 292, 170 Miss. 103—Everett v. Williamson, 143 So. 690, 163 Miss. 848—McKinnon v. Gowan Bros., 90 So. 243, 127 Miss. 545.

Mo.—State ex rel. and to Use of Breit v. Shain, 119 S.W.2d 758, 342 Mo. 1148, quashing record Breit v. Bowland, 100 S.W.2d 599, 231 Mo. App. 433, transferred, see 92 S.W.2d 110—State, on Inf. of McKittrick, v. Cameron, 117 S.W.2d 1078, 342 Mo. 830—Hillside Securities Co. v. Minter, 254 S.W. 188, 300 Mo. 380—Torwegge v. O'Reilly, 239 S.W. 116, 292 Mo. 613—Stephens v. Stephens, 232 S.W. 979—Bushnell v. Mississippi & Fox River Drainage Dist. of Clark County, 111 S.W.2d 946, 233 Mo.App. 921, transferred, see 102 S.W.2d 871, 340 Mo. 811—Isaac T. Cook Co. v. Craddock-Terry Co., App., 109 S.W.2d 731—Day v. National Bond & Investment Co., App., 99 S.W.2d 117—In re Flynn's Estate, 67 S.W.2d 771, 228 Mo.App. 1197—Massachusetts Bonding & Insurance Co. v. Simonds-Shields-Lonsdale Grain Co., 49 S.W.2d 645, 226 Mo.App. 1071—Hunter v. Hays, App., 36 S.W.2d 957—Williams v. Ravanna Bank, 289 S.W. 34, 221 Mo.App. 887—Carter v. George, 264 S.W. 463, 216 Mo.App. 308—Hubbard v. Hubbard, App., 264 S.W. 422.

Mont.—Continental Supply Co. v. Abell, 24 P.2d 133, 95 Mont. 148—Erlandson v. Erskine, 248 P. 209, 76 Mont. 537.

Nev.—Grant and McNamee v. Payne, 107 P.2d 307, 132 A.L.R. 568—In re Howard's Estate, 227 P. 1016, 48 Nev. 100, rehearing denied 232 P. 783, 48 Nev. 100.

N.H.—Trustees of Phillips Exeter Academy v. Exeter, 11 A.2d 569, 90 N.H. 472.

N.J.—Kozler v. New York Telephone Co., 108 A. 375, 93 N.J.Law 279—In re Lamb, 105 A. 448, 92 N.J.Law 338, certiorari dismissed Bullock v. Northampton Tp., 110 A. 196, 93 N.J.Law 452, and affirmed Bullock v. Northampton Tp. in Burlington, 110 A. 197, 93 N.J.Law 452—Hickey v. Kahl, 19 A.2d 33, 129 N.J.Eq. 233—Reiner v. Fidelity Union Trust Co., 8 A.2d 175, 126 N.J.Eq. 78, reversed on other grounds 13 A.2d 291, 127 N.J.Eq. 377, 128 A.L.R. 964—Wiencke v. Branch-Bridge Realty Corporation, 4 A.2d 415, 125 N.J.Eq. 135—New York & New Jersey Water Co. v. Passaic Consol. Water Co., 140 A. 781, 102 N.J.Eq. 276, appeal dismissed 49 S.Ct. 95, 278 U.S. 576, 73 L.Ed. 515—Green v. Frost, 136 A. 304, 100 N.J.Eq. 447—Board of Health of Jersey City v. Fruhman, 143 A. 736, 6 N.J.Misc. 1021.

N.M.—McCanna v. Mutual Investment & Agency Co., 26 P.2d 231, 37 N.M. 597.

N.Y.—Morris v. Morris, 5 N.E.2d 56, 272 N.Y. 110, reversing 285 N.Y.S. 633, 247 App.Div. 751—People ex rel. Kight v. Lynch, 174 N.E. 696, 255 N.Y. 323, reversing 240 N.Y.S. 790, 228 App.Div. 861, and remittitur denied 177 N.E. 135, 256 N.Y. 550—Mabie v. Fuller, 174 N.E. 450, 255 N.Y. 194, reversing 240 N.Y.S. 452, 229 App.Div. 7, reversing 230 N.Y.S. 448, 132 Misc. 632—Mandell v. Cole, 155 N.E. 106, 244 N.Y. 221, reversing 216 N.Y.S. 870, 217 App.Div. 800—Schafran & Finkel v. M. Lowenstein & Sons, 4 N.Y.S.2d 693, 254 App.Div. 218, reversed on other grounds 19 N.E.2d 1005, 280 N.Y. 164, reargument denied 21 N.E.2d 196, 280 N.Y. 687—Fearon v. Treanor, 288 N.Y.S. 368, 248 App.Div. 225, affirmed 5 N.E.2d 815, 272 N.Y. 268, 109 A.L.R. 1229, reargument denied 7 N.E.2d 677, 273 N.Y. 528, 109 A.L.R. 1229, remittitur amended 8 N.E.2d 36, 273 N.Y. 645, appeal dismissed 57 S.Ct. 933, 301 U.S. 667, 81 L.Ed. 1332, rehearing denied 58 S.Ct. 6, 302 U.S. 774, 82 L.Ed. 600—City of Buffalo v. Hawks, 236 N.Y.S. 89, 226 App.Div. 480, affirmed 168 N.E. 438, 251 N.Y. 588—Rosenblatt v. Surprise Bldg. Co., 228 N.Y.S. 369, 223 App.Div. 426, motion denied 164 N.E. 566, 249 N.Y. 515, affirmed 166 N.E. 342, 250 N.Y. 606—Bernhan Chemical & Metal Corporation v. Ship-A-Hoy, 193 N.Y.S. 372, 200 App.Div. 399—Standard Chemicals & Metals Corporation v. Waugh Chemical Corporation, 185 N.Y.S. 207, 194 App.Div. 254, reversed on other grounds 131 N.E. 566, 231 N.Y. 51, 14 A.L.R. 1054—Greenwich Sav. Bank v. Cabin Holding Corporation, 26 N.Y.S.2d 791, 176 Misc. 89—In re Amico's Estate, 24 N.Y.S.2d 772, 175 Misc. 656—Rogers v. Rogers, 22 N.Y.S.2d 659, 174 Misc. 841—In re Northrip's Will, 6 N.Y.S.2d 722, 168 Misc. 542, reversed on other grounds 15 N.Y.S.2d 789, 258 App.Div. 71, affirmed 27 N.E.2d 205, 282 N.Y. 797—In re Riecke's Will, 1 N.Y.S.2d 301, 165 Misc. 566—First Citizens Bank & Trust Co. of Utica v. Speaker, 287 N.Y.S. 831, 159 Misc. 427, modified on other grounds 294 N.Y.S. 737, 250 App.Div. 824—Moore v. U. S. Cremation Co., 286 N.Y.S. 639, 158 Misc. 621, reversed on other grounds 291 N.Y.S. 289, 249 App.Div. 637, reversed on other grounds 9 N.E.2d 795, 275 N.Y. 105, 113 A.L.R. 1124, reargument denied 11 N.E.2d 743, 275 N.Y. 544, 113 A.L.R. 1124—Goldwyn Loan & Investment Corporation v. Weinfeld, 258 N.Y.S. 217, 144 Misc. 159—Conway v. North Side Lumber Co., 252 N.Y.S. 476, 141 Misc. 231—Leary v. Village of Lawrence, 252 N.Y.S. 409, 141 Misc. 549—Dougherty v. Burger, 234 N.Y.S. 274, 133 Misc. 807—Schifferdecker v. Busch, 225 N.Y.S. 106, 130 Misc. 625—Pross v. Excelsior Cleaning & Dyeing Co., 179 N.Y.S. 176, 110 Misc. 195—Cullinane v. Travelers Ins. Co., 26 N.Y.S.2d 933—In re Auto Mut. Indemnity Co., 14 N.Y.S.2d 601.

N.C.—Barnes v. Crawford, 160 S.E. 464, 201 N.C. 434—Garris v. Young, 139 S.E. 448, 194 N.C. 340.

N.D.—Catholic Order of Foresters v. State, 271 N.W. 670, 67 N.D. 228, 109 A.L.R. 979, appeal dismissed Catholic Order of Foresters v. State of North Dakota, 57 S.Ct. 796, 301 U.S. 665, 81 L.Ed. 1331—Thompson v. North Dakota Workmen's Compensation Bureau, 268 N.W. 710, 66 N.D. 756.

Ohio.—Murfey, Blossom & Co. v. State ex rel. Fulton, App., 31 N.E.2d 134, modified on other grounds State ex rel. Squire v. Murfey, Blossom & Co., 2 N.E.2d 866, 131 Ohio St. 289—Brown v. Jacoby, 9 N.E.2d 693, 55 Ohio App. 250.

Okl.—Fourth Nat. Bank v. Board of Com'rs of Craig County, 95 P.2d 878, 186 Okl. 102—Champlin Refining Co. v. Magnolia Petroleum Co., 62 P.2d 249, 178 Okl. 203—News Dispatch Printing & Audit Co. v. Board of Com'rs of Adair County, 57 P.2d 1156, 177 Okl. 162—Town of Red Fork v. Gantt-Baker, 266 P. 444, 130 Okl. 175—Na-

tional Surety Co. v. Craig, 220 P. 943, 94 Okl. 63—American Inv. Co. v. Brewer, 181 P. 294, 74 Okl. 271.

Or.—Bill White's Market v. Dixie Creek Gold Mining Co., 80 P 2d 712, 159 Or. 406—Holder v. Harris, 253 P. 869, 121 Or. 432, modified on other grounds 254 P 1021, 121 Or. 432—Palmiter v. Hackett, 185 P. 1105, 95 Or. 12, modified on other grounds 186 P. 581, 95 Or. 12.

Pa.—In re Kearney, 7 A.2d 159, 136 Pa Super. 78—Lipkin v. Bernstein, 95 Pa.Super. 346—Premier Cereal & Beverage Co. v. Pennsylvania Alcohol Permit Bd., 9 Pa.Dist. & Co. 554, 75 Pittsb.Leg J. 681, affirmed 140 A. 858, 292 Pa. 127.

R.I.—Sutcliffe v. Pawtucket Amusement Co., 155 A. 578, 51 R I. 493, 77 A.L R. 833—Kenyon v. United Electric Rys. Co., 151 A. 5, 51 R I. 90.

S.C.—Gardner v. Blackwell, 166 S E. 338, 167 S.C. 313—Benn v. Camel City Coach Co., 160 S.E. 135, 162 S.C. 44.

S.D.—Hollister Bros. v. De Werd Milling Co., 251 N.W. 805, 62 S D. 62.

Tenn.—Brandon v. Kentucky-Tennessee Light & Power Co., 116 S.W. 2d 1029, 173 Tenn 258—State ex rel. McConnell v. First State Bank, 124 S.W.2d 726, 22 Tenn.App. 577—Hyder v. Hyder, 66 S W.2d 235, 16 Tenn.App. 64—Brown v Brown, 64 S.W.2d 59, 16 Tenn.App. 230.

Tex.—Gossett v. Green, 133 S W 2d 762, 134 Tex 282, affirming Shaw v. Green & Welhausen, Civ.App., 106 S W 2d 344—Germany v. Turner, 123 S W.2d 874, 132 Tex. 491, reversing Turner v. Germany, Civ. App, 94 S.W.2d 1177—Braniff Inv. Co. v. Robertson, 81 S.W.2d 45, 124 Tex. 524, 100 A.L R. 1421, reversing, Civ.App., 74 S.W.2d 425—Thompson v. First State Bank, 211 S.W. 977, 109 Tex. 419—Toler v. Fertitta, Com.App., 67 S.W.2d 229, reversing Fertitta v. Toler, Civ. App., 43 S.W 2d 467—Prim v. Farmers' Nat. Bank of Dublin, Com.App., 51 S.W.2d 684, amending 44 S.W.2d 943, affirming in part and reversing in part, Civ.App., 28 S.W.2d 941—Texas Employers' Ins. Ass'n v. Tabor, Com.App, 283 S. W. 779, affirming, Civ.App., 274 S. W. 309—Trinity Portland Cement Co. v. Lion Bonding & Surety Co., Com.App., 229 S.W. 483, reversing, Lion Bonding & Surety Co. v. Trussed Concrete Steel Co. of Texas, Civ App., 204 S.W. 1176—Blankenship v. Stallings, Civ.App., 141 S.W.2d 957, error dismissed, judgment correct—Empire Ins. Co. of Texas v. Cooper, Civ.App., 138 S.W. 2d 159, error dismissed—Beeler v. Loock, Civ.App., 135 S.W.2d 644, error dismissed—Fakes v. Vilven, Civ.App., 119 S.W.2d 895, error dismissed—Rio Grande Nat. Life Ins. Co. v. Bandy, Civ.App., 110 S. W.2d 122—Towns v. Traders & General Ins. Co., Civ.App., 107 S W 2d 460—Mauritz v. Schwind, Civ App, 101 S.W.2d 1085, error dismissed—State v. Perlstein, Civ. App, 79 S W.2d 143, error dismissed—Blue Diamond Motor Bus Co. v. Hale, Civ App., 69 S.W.2d 228, error dismissed—Smith v. City of Port Arthur, Civ.App., 62 S.W. 2d 385—Christian v Manning, Civ. App., 59 S.W.2d 234, modified on other grounds Manning v. Christian, 81 S.W.2d 54, 124 Tex. 517—Nagle, Witt, Rollins Engineering Co. v. La Salle County Water Improvement Dist. No. 1, Civ.App., 44 S.W.2d 1025, error dismissed—Willacy County v. Turner, Civ. App., 40 S W.2d 843, reversed on other grounds Turner v. Willacy County, Com.App., 58 S.W.2d 12—Baxter v. Jarrell, Civ App., 34 S. W.2d 315—Shoemaker v. Harrington, Civ.App., 30 S.W.2d 539, affirmed Shoemaker v. American Nat. Ins. Co., Com App., 48 S. W.2d 612—Camp v. Thomas, Civ. App, 26 S.W.2d 470, error refused—Fluhman v. Matthewson, Civ.App, 24 S W.2d 751, reversed on other grounds Matthewson v. Fluhman, Com.App., 41 S.W.2d 204—E. Y. Chambers & Co. v. Little, Civ.App., 21 S.W 2d 17, error refused—Norwich Union Indemnity Co. v. Wilson, Civ.App., 17 S.W.2d 68, error dismissed—Ragland v. Austin, Civ.App, 284 S W. 330—Markus v. Austin, Civ.App., 284 S. W. 326—Wilson v. Shear Co., Civ. App., 284 S W. 654, affirmed in part and reversed in part on other grounds Shear Co. v. Wilson, Com. App., 292 S.W. 531, motion overruled 294 S.W. 843—City of Houston v. Wynne, Civ.App., 279 S.W. 916, error refused Wynne v. City of Houston, 281 S.W. 544, 115 Tex. 255—Glenn v. Dallas County Bois d'Arc Island Levee Dist., Civ.App., 275 S.W. 137, conforming to answer to certified questions, 268 S. W. 452, 114 Tex. 325, reversed on other grounds, Civ.App., 282 S W. 339, and reversed on other grounds Dallas County Bois D'Arc Island Levee Dist. v. Glenn, Com.App., 288 S.W. 165—Texas & N. O. R. Co. v. H. & C. Newman, Civ.App., 273 S.W. 335—Hancock v. Blumentritt, Civ.App., 269 S.W. 177—Nystel v. Gully, Civ.App., 257 S W. 286—New England Equitable Ins. Co. v. Mechanics'-American Nat. Bank of St. Louis, Civ.App., 213 S.W. 685, reversed on other grounds Mechanics' & American Nat. Bank of St. Louis v. New England Equitable Ins. Co., Com. App., 234 S.W. 1087—Richardson v. Bermuda Land & Live Stock Co., Civ.App., 210 S.W. 746, reversed on other grounds Com.App., 231 S.W. 337—Headlee v. Fryer, Civ.App, 208 S.W. 213, dismissed by agreement.

Vt.—University of Vermont and State Agr. College v. Ward, 158 A. 773, 104 Vt. 239.

Va.—Manieri v. Seaboard Air Line Ry. Co., 137 S E. 496, 147 Va. 415.

Wash.—State ex rel Lyle v Superior Court for Pierce County, 102 P.2d 246, 3 Wash 2d 702—Home Owners' Loan Corporation v. Rawson, 83 P.2d 765, 196 Wash. 548—Metropolitan Life Ins. Co. v. Hansen, 38 P.2d 387, 179 Wash. 537—Lewis v. City of Seattle, 24 P.2d 427, 174 Wash 219, affirmed 27 P. 2d 1119, 174 Wash. 219—In re McHugh's Estate, 4 P.2d 834, 165 Wash. 123—Union Oil Co. of California v. Hale, 2 P.2d 87, 163 Wash. 503.

Wis.—Neillsville Shipping Ass'n v. Lastofka, 274 N.W. 280, 225 Wis. 350—Thauer v. Smith, 250 N.W. 842, 213 Wis. 91—In re Lower Baraboo River Drainage Dist., 225 N. W. 331, 199 Wis 230, 63 A.L R. 1165—Wisconsin Electric Sales Co. v. Fidelity & Deposit Co of Maryland, 211 N.W. 670, 191 Wis. 645—State v. Zimmerman, 204 N.W. 803, 187 Wis. 180.

Wyo.—In re National Building & Loan Ass'n of America, 72 P.2d 1113, 52 Wyo. 195—Corthell v. Board of Com'rs of Albany County, 8 P 2d 812, 44 Wyo. 71.

22 C.J. p 148 note 67, p 150 note 76 [a]—26 C.J. p 1207 note 89—44 C. J. p 1242 note 42.

Presumed knowledge of:

Court rules see Courts § 176 b.

Schedules and tariff rates for transportation by common carriers see Carriers §§ 275 c, 302 a (3).

Statute under which corporation is organized and from which it derives its powers see Corporations §§ 487, 762, 942.

Statutes governing municipal corporations see the C.J.S. title Municipal Corporations § 125, also 43 C. J. p 203 note 7; § 979, also 44 C.J. p 74 note 23; § 986, also 44 C.J. p 87 note 37; § 1966, also 44 C.J. p 1242 note 42.

Statutory limitations on power of officers or agents of counties see Counties § 174.

Statutory limitations on power of state officers see the C.J.S. title States § 113, also 59 C.J. p 173 note 14.

Statutory limitations on power of United States officers see the C. J.S. title United States § 38, also 65 C.J. p 1277 note 75.

Statutory limitations on school boards and officers see the C.J.S. title Schools and School Districts § 277, also 56 C.J. p 484 note 20—p 485 note 21; § 328, also 56 C.J. p 545 note 63.

"Pseudo-presumption"
Cal.—Murphy v. Sheftel, 9 P.2d 568, 570, 121 Cal.App. 533.
Tex.—Ft. Worth, etc., R. Co. v. Southern Kan. R. Co., Civ.App., 151 S.W. 850, 855.

Foundation of rule
"The familiar legal maxims, that every one is presumed to know the law, and that ignorance of the law excuses no one, are founded upon public policy and in necessity, and the idea back of them is that one's acts must be considered as having been done with knowledge of the law, for otherwise its evasion would be facilitated and the courts burdened with collateral inquiries into the content of men's minds."—Atlas Realty Corporation v. House, 192 A. 564, 567, 123 Conn. 94.

Equal knowledge of parties
The law is presumed to be equally within the knowledge of all parties.
Cal.—Zeh v. Alameda Community Hotel Corporation, 10 P.2d 190, 122 Cal.App. 366.
Okl.—National Surety Co. v. Craig, 220 P. 943, 94 Okl. 63.

Actual knowledge immaterial
"All persons are presumed to know the law. Whether they do in reality know it or not is immaterial as its effects are visited upon all alike."—Miles v. Kilgore, La.App., 191 So. 556, 559.

Opinion or advice as to validity
"A person is charged, at his peril, with knowledge of the law, and is not excusable from obeying it by reason of his personal opinion that the law is unconstitutional, nor can the advice of counsel affecting the validity of any act affect its validity."—State ex rel. Rice v. Hasson Grocery Co., 170 So. 234, 238, 177 Miss. 204, 107 A.L.R. 663.

Treaty provisions
U.S.—Pettibone v. Cook County, Minn., C.C.A.Minn., 120 F.2d 850, affirming, D.C., 31 F.Supp. 881.

Ruling of bureau of internal revenue which was not a regulation or even a treasury decision did not have quality of law of which taxpayer is charged with knowledge.—Van Antwerp v. U. S., C.C.A.Cal., 92 F.2d 871, reversing, D.C., 17 F.Supp. 229.

Correct interpretation of the law is presumed.
Ark.—Hill v. American Book Co., 285 S.W. 20, 171 Ark. 427.
Ind.—Board of School Com'rs of City of Indianapolis v. State ex rel. Bever, 5 N.E.2d 307, 211 Ind. 257, rehearing denied 6 N.E.2d 702, 211 Ind. 257.

Date statute becomes law
(1) Everyone is presumed to know the provisions of a statute from the date it becomes effective.
Mo.—State ex rel. Jacobsmeyer v. Thatcher, 92 S.W.2d 640, 338 Mo. 622.
N.Y.—Gilbert v. Ackerman, 53 N.E. 753, 159 N.Y. 118—Ralston v. Fifth Ave Bond & Mortgage Co., 224 N.Y.S. 44, 130 Misc. 556, affirmed 228 N.Y.S. 882, 223 App.Div. 863, appeal dismissed 164 N.E. 587, 249 N.Y. 569.
Tex.—Bruton v. Texas Power & Light Co., Civ.App., 44 S.W.2d 462.
22 C.J. p 148 note 67 [a] (16).

(2) One must take notice of an act at the time of its passage rather than its effective date.
Minn.—Duncan v. Menard, 21 N.W. 714, 32 Minn. 460.
Ohio.—Matthews v. Raff, 186 N.E. 887, 45 Ohio App. 242, error dismissed 186 N.E. 402, 126 Ohio St. 511.

(3) Where an act is passed which does not become a law until a certain date, a person is not chargeable with notice until it becomes a law; but, where an act becomes a law immediately on passage, but contains provisions postponing the effective date, all persons are chargeable from the date of passage.—Coleman v. Superior Court in and for Calaveras County, 26 P.2d 673, 135 Cal.App. 74.

Courts are presumed to know the law.
Conn.—Stevens v. Neligon, 164 A. 661, 116 Conn. 307—Cunningham v. Cunningham, 44 A. 41, 72 Conn. 157.
Ind.—State v. Grant Superior Court, 172 N.E. 897, 202 Ind. 197, 71 A.L.R. 1354.
Tenn.—Summers v. Bond-Chadwell Co., App., 145 S.W.2d 7.
Tex.—Colonial Trust Co. v. Hill County, Com.App., 27 S.W.2d 144, reversing Hill County v. Colonial Trust Co., Civ.App., 18 S.W.2d 787—Wilson v. Shear Co., Civ.App., 284 S.W. 654, affirmed in part and reversed in part on other grounds, Shear Co. v. Wilson, Com.App., 292 S.W. 531, motion overruled 294 S.W. 843—White v. Calaway, Civ.App., 282 S.W. 642.

The legislature is presumed to know the law, including judicial construction and interpretation.
U.S.—Ward v. Southern Sand & Gravel Co., D.C.N.C., 33 F.2d 773
Ala.—Rogers v. Wells, 113 So. 524, 216 Ala. 514.
Cal.—In re Garthwaite's Estate, 21 P.2d 465, 131 Cal.App. 321—Gorman v. Sacramento County, 268 P. 1083, 92 Cal.App. 656.
Conn.—Coombs v. Darling, 166 A. 70, 116 Conn. 643—Hartley v. Vitiello, 154 A. 255, 113 Conn. 74, followed in MacDonald v. Newman, 154 A. 259, 113 Conn. 756—Westville & Hamden Loan Co. v. Pasqual, 145 A. 758, 109 Conn. 110—State v. Staub, 23 A. 924, 61 Conn. 553.
Ill.—Kocsis v. Chicago Park Dist., 198 N.E. 847, 362 Ill. 24—People ex rel. Sweitzer v. Orrington Co., 195 N.E. 642, 360 Ill. 289—Sylvester v. Buda Co., 281 Ill.App. 139.
Ind.—Town of Brownsburg v. Trucksess, 185 N.E. 315, 98 Ind.App. 322.
Iowa.—In re Dolmage's Estate, 212 N.W. 553, 203 Iowa 231.
Ky.—T. M. Crutcher Dental Depot v. Miller, 64 S.W.2d 466, 251 Ky. 201.
La.—State ex rel. Varnado v. Louisiana Highway Commission, 147 So. 361, 177 La. 1—Hortman-Salmen Co. v. White, 123 So. 711, 168 La. 1057.
Me.—State v. Webber, 133 A. 738, 125 Me. 319.
Mich.—In re Reynolds' Estate, 264 N.W. 399, 274 Mich. 354.
Mo.—In re Graves, 30 S.W.2d 149, 325 Mo. 888.
Mont.—Young v. Board of Trustees of Broadwater County High School, 4 P.2d 725, 90 Mont. 576.
N.Y.—Eastman Kodak Co. v. Richards, 204 N.Y.S. 246, 123 Misc. 83.
Or.—Webber v. Bailey, 51 P.2d 832, 151 Or. 488—Rorick v. Dallas City, 12 P.2d 762, 140 Or. 342.
Pa.—Appeal of Free, 151 A. 583, 301 Pa. 82—In re McCaskey's Estate, 143 A. 209, 293 Pa. 497—Philadelphia v. Miller, 42 Pa.Super. 471.
Tex.—Countz v. Mitchell, 38 S.W.2d 770, 120 Tex. 324, answering certified questions, Civ.App., 48 S.W.2d 803—Shaw v. U. S. Fidelity & Guaranty Co., Com.App., 48 S.W.2d 974, 83 A.L.R. 1113, reversing State Bank of Commerce v. U. S. Fidelity & Guaranty Co., Civ.App., 28 S.W.2d 184.
Utah.—Rasmussen v. Zundel, 248 P. 135, 67 Utah 456.
Va.—Savage v. Commonwealth, 147 S.E. 262, 152 Va. 992.
W.Va.—Hall v. Baylous, 153 S.E. 293, 109 W.Va. 1, 69 A.L.R. 527.
Wyo.—Benedict v. Citizens' Nat. Bank of Casper, 5 P.2d 277, 43 Wyo. 427—Morrison v. Cottonwood Development Co., 266 P. 117, 38 Wyo. 190.
33 C.J. p 286 note 94.

Particular persons or entities presumed to have knowledge:
(1) Administrative officers.—State v. Holmes, 147 N.E. 622, 196 Ind. 157.

(2) Assessor.—Daly v. Fisk, 134 A. 169, 104 Conn. 579.

(3) Attorney.
La.—Naef v. Miller-Goll Mfg. Co., 140 So. 32, 174 La. 232—Succession of Gilmore, 102 So. 94, 157 La. 130.
Md.—Turk v. Grossman, 17 A.2d 122.
N.Y.—In re Sexton's Estate, 4 N.Y.S.2d 111, 166 Misc. 631—In re Desotelle's Estate, 258 N.Y.S. 119, 143 Misc. 732.
Okl.—Vinson v. Davis, 183 P. 902, 76 Okl. 43.
Wash.—In re Krueger's Estate, 21 P.2d 1030, 173 Wash. 114.

(4) Automobile driver.

Conn.—Rindge v. Holbrook, 149 A. 231, 111 Conn. 72.

Ill.—Van Meter v. Gurney, 240 Ill. App. 165.

Iowa.—Siesseger v. Puth, 248 N.W. 352, 216 Iowa 916.

La.—Hatch v. Bayou Rapides Lumber Co., App., 200 So. 41—Dow v Brown, App., 193 So. 239.

Mich.—Marciniak v. Sundeen, 270 N. W. 729, 278 Mich. 407.

N.Y.—Camden F. Ins. Ass'n v Bleem, 227 N.Y.S. 746, 132 Misc. 22.

Ohio.—Morris v. Bloomgren, 187 N. E. 2, 127 Ohio St. 147, 89 A.L.R. 831, affirming Bloomgren v. Morris, 186 N.E. 404, 44 Ohio App. 451—Williams v. Judd, App., 34 N.E. 2d 799.

Tex.—Kasch v. Anton, Civ.App., 81 S.W.2d 1097.

(5) Bankruptcy trustee.—Ingels v. Boteler, C.C.A.Cal., 100 F.2d 915, certiorari granted Boteler v. Ingels, 59 S.Ct. 792, two cases, 307 U.S. 617, 83 L.Ed 1497, affirmed 60 S.Ct. 29, 308 U.S. 57, 521, 84 L.Ed 78, 442.

(6) Banks and officers thereof.

U.S.—Federal Reserve Bank of Richmond v. Malloy, N.C., 44 S.Ct. 296, 264 U.S. 160, 68 L.Ed. 617, 31 A.L.R. 1261, affirming, C.C.A., 291 F. 763, which affirmed, D.C., Malloy v. Federal Reserve Bank of Richmond, 281 F. 997—Standard Accident Ins. Co. of Detroit, Mich., v. Federal Nat. Bank of Shawnee, C.C.A.Okl., 112 F.2d 692, adhered to, C.C.A., 115 F.2d 34—Pickett v. Trixler, C.C.A.Ind., 93 F.2d 178, certiorari denied 58 S.Ct. 751, 303 U.S. 652, 82 L.Ed. 1113—Hamburg Bank v. Ouachita Nat. Bank in Monroe, C.C.A.Ark., 78 F.2d 100, certiorari denied Ouachita Nat. Bank v. Hamburg Bank, 56 S.Ct. 382, 296 U.S. 655, 80 L.Ed. 467—Texas & P. Ry. Co. v. Pottorff, C.C.A.Tex., 63 F.2d 1, certiorari granted 54 S.Ct. 55, 290 U.S. 609, 78 L.Ed. 533, affirmed 54 S.Ct. 416, 291 U.S. 245, 78 L.Ed. 777, amended on other grounds 54 S.Ct. 525, 291 U.S. 649, 78 L.Ed. 777, rehearing denied 54 S.Ct. 627, 292 U.S. 600, 78 L.Ed. 1464—Page v. Jones, C.C.A.Okl., 7 F.2d 541, certiorari denied Jones v. Page, 46 S.Ct. 203, 269 U.S. 587, 70 L.Ed. 426—First Nat. Bank v. Mayor and City Council of Baltimore, D.C.Md., 27 F. Supp. 444, affirmed, C.C.A., 108 F.2d 600—Coos County v. Berlin Nat. Bank, D.C.N.H., 21 F.Supp. 523—Hillsdale Grocery Co. v. Union & People's Nat. Bank of Jackson, D.C.Mich., 6 F.Supp. 773.

Conn.—Savings Bank of Rockville v. Wilcox, 167 A. 713, 117 Conn. 196.

Ill.—McRoberts v. Minier, 270 Ill. App. 1.

Ind.—National Surety Co. v. State, 161 N.E. 832, 90 Ind.App. 524.

Iowa.—Olin Cemetery Ass'n of Olin v. Citizens Sav. Bank of Olin, 270 N.W. 455, 222 Iowa 1053, 112 A.L.R. 1205—Bates v. Madison County Sav. Bank of Winterset, 269 N.W. 341, 222 Iowa 370—Ottumwa Boiler Works v. M. J. O'Meara & Son, 218 N.W. 920, 206 Iowa 577.

La.—Commercial Nat. Bank of Shreveport v. McDaniel, App., 156 So. 43

Mo.—Brown v. Maguire's Real Estate Agency, App., 101 S.W.2d 41, reversed on other grounds 121 S.W. 2d 754, 343 Mo. 336—Round Prairie Bank of Fillmore v. Downey, App., 64 S.W.2d 701—Deal v. Bank of Smithville, App., 52 S.W.2d 201.

Okl.—State v. Moreland, 3 P.2d 803, 152 Okl. 37.

Pa.—In re Harr, 186 A. 120, 323 Pa. 380.

S.C.—South Carolina Nat. Bank of Charleston v. Union County, 160 S.E. 733, 162 S.C. 356.

Tex.—Farmers' State Bank & Trust Co. v. Gorman Home Refinery, Com.App., 3 S.W.2d 65, affirming, Civ.App., 273 S.W. 694—Wray v. Citizens' Nat. Bank of Dublin, Com.App., 288 S.W. 171, affirming, Civ.App., 282 S.W. 659—First Nat. Bank v. Dickson, Civ.App., 59 S.W. 2d 179—People's Guaranty State Bank of Tyler v. Castle, Civ.App., 218 S.W. 519.

22 C.J. p 148 note 67 [a] (7).

(7) Carrier.—Alabama Great Southern R. Co. v. F. A. Hulett & Son, 131 So. 814, 159 Miss. 333.

(8) City and officials and employees thereof.

U.S.—Adams v. Cribbis, D.C.Colo., 17 F.Supp. 723.

Cal.—Bent Bros. v. Campbell, 281 P. 717, 101 Cal.App. 456.

Miss.—U. S. Fidelity & Guaranty Co. v. State, 83 So. 610, 121 Miss. 369.

N.Y.—Schieffelin v. Goldsmith, 170 N.E. 905, 253 N.Y. 243, 68 A.L.R. 1376, reversing 237 N.Y.S. 248, 227 App.Div. 246.

Tex.—City of Beaumont v. Stephenson, Civ.App., 95 S.W.2d 1360, error dismissed.

(9) Constable.

Ala.—Blackwell v. Hawkins, 145 So. 477, 226 Ala. 149.

(10) Corporation and officers or stockholders thereof.

U.S.—Shepard v. City Co. of New York, D.C.Minn., 24 F.Supp. 682, appeal dismissed, C.C.A., City Co. of New York v. Shepard, 106 F. 2d 994.

Colo.—Home Owners' Loan Corporation v. Public Water Works Dist. No. 2, 92 P.2d 745, 104 Colo. 466.

Fla.—Caravasios v. Vanderpool & Co., 182 So. 603, 133 Fla. 112.

Ill.—Citizens Water Works v. Hughes, 199 N.E. 265, 362 Ill. 136, 102 A.L.R. 401.

Ind.—Benner-Coryell Lumber Co. v. Indiana Unemployment Compensation Board, 29 N.E.2d 776, certiorari denied Indiana Unemployment Compensation Board v. Benner-Coryell Lumber Co., 61 S.Ct 741.

Ky.—Warren Oil & Gas Co. v. Gardner, 212 S.W. 456, 184 Ky. 411.

Md.—Diamond Match Co. v. State Tax Commission, 200 A. 365, 175 Md. 234.

N.J.—Studerus Oil Co. v Bienfang, 4 A.2d 787, 122 N.J.Law 238.

N.Y.—People ex rel. Smyth v. Lynch, 175 N.E. 344, 255 N.Y. 629, denying reargument 173 N.E. 571, 254 N.Y. 427, which reversed 243 N.Y.S. 156, 229 App.Div. 353.

N.C.—Leggett Electric Co. v. Morrison, 139 S.E. 455, 194 N.C. 316.

Pa.—Fidelity Trust Co. v. Union Nat. Bank of Pittsburgh, 169 A. 209, 313 Pa. 467, certiorari denied Union Nat. Bank of Pittsburgh v. Fidelity Trust Co., 54 S.Ct. 530, 291 U.S. 680, 78 L.Ed. 1068.

(11) Employee; employer.

U.S.—Midland Steel Products Co. v. National Labor Relations Board, C.C.A., 113 F.2d 800.

Ariz.—Industrial Commission v. Arizona Power Co., 297 P. 452, 38 Ariz. 44, affirming 295 P. 305, 37 Ariz. 425.

Cal.—Hoffman v. Department of Industrial Relations, Division of Industrial Accidents and Safety, 287 P. 974, 209 Cal. 383, 68 A.L.R. 294—Schwartz v. Brandon, 275 P. 448, 97 Cal.App. 30.

Colo.—Midget Consol. Gold Mining Co. v. Industrial Commission of Colorado, 193 P. 493, 69 Colo. 218.

Mo.—Walker v. Sheffield Steel Corporation, 27 S.W.2d 44, 224 Mo.App. 849.

Ohio.—Miles v. Electric Auto-Lite Co., 15 N.E.2d 532, 133 Ohio St. 613.

Tex.—Dallas Hotel Co. v. Buffington, Civ.App., 294 S.W. 610.

(12) Insurance company and employees thereof.

U.S.—Central Union Fire Ins. Co. v. Kelly, C.C.A.Kan., 282 F. 772.

Mo.—Friedman v. State Mut. Life Assur. Co. of Worcester, Mass., App., 108 S.W.2d 156—Cheek v. National Life Ins. Co. of United States of America, 207 S.W. 882, 200 Mo.App. 533.

Va.—Westchester F. Ins. Co. v. Ocean View Pleasure Pier Co., 56 S.E. 584, 106 Va. 633.

(13) Police officer.

Cal.—Butler v. Hastings, 34 P.2d 751, 139 Cal.App. 641.

Md.—Hitzelberger v. State, 196 A. 288, 173 Md. 435.

N.J.—Zober v. Turner, 144 A. 608, 7 N.J.Misc. 171, affirmed 148 A. 894, 106 N.J.Law 86.

(14) Public officials generally.

Ill.—Trustees of Schools of Tp. No. 8 v. Lilly, 26 N.E.2d 489, 373 Ill. 431.

Mass.—Goodale v. Commissioners for

Worcester County, 178 N.E. 228, 277 Mass. 144.
Mich.—Rupert v. Wade, 287 N.W. 425, 290 Mich. 180
Mo.—State v. Weatherby, 129 S.W.2d 887, 344 Mo. 848—State ex rel. and to Use of Parman v. Manring, 58 S.W.2d 269, 332 Mo. 235.
Mont.—State v. Callow, 254 P. 187, 78 Mont. 368.
Okl.—State v. Moreland, 3 P.2d 803, 152 Okl. 37.
Tex.—City of Abilene v. Fryar, Civ. App., 143 S.W.2d 654—Adams v. Stephens County, Civ.App., 41 S.W.2d 989, error refused.
Wash.—Hansen v. Agnew, 80 P.2d 845, 195 Wash. 354.

(15) School teacher.

Ariz.—School Dist. No. 6 of Apache County v. Whiting, 79 P.2d 959, 52 Ariz. 207.
Mo.—Wood v. Consolidated School Dist. No. 13, App., 7 S.W.2d 1018.
N.C.—Spruill v. Davenport, 100 S.E. 527, 178 N.C. 364.

(16) State commission.—Murphy v. Uhl, 149 A. 566, 159 Md. 7.

(17) Taxpayer.

U.S.—Pettibone v. Cook County, Minn., C.C.A.Minn., 120 F.2d 850, affirming, D.C., 31 F.Supp. 881—Zellerbach Paper Co. v. Helvering, C.C.A., 69 F.2d 852, certiorari granted 54 S.Ct. 866 (two cases) 292 U.S. 621, 78 L.Ed. 1477, reversed on other grounds 55 S.Ct. 127, 293 U.S. 172, 79 L.Ed. 264—Thomaston Cotton Mills v. Rose, C.C.A.Ga., 62 F.2d 982, certiorari denied 53 S.Ct. 785, 289 U.S. 754, 77 L.Ed. 1499—Pickwick Corporation v. Welch, D.C.Cal., 21 F.Supp. 664—U. S. v. Heinemann Chemical Co., D.C.Pa., 15 F.Supp. 365, reversed on other grounds, C.C.A., Heinemann Chemical Co. v. U. S., 92 F.2d 302.
La.—Central Savings Bank & Trust Co. v. City of Monroe, 194 So. 767, 194 La. 743.
Me.—Gilmartin v. Emery, 160 A. 874, 131 Me. 236.
Tex.—Mexia Independent School Dist. v. City of Mexia, 133 S.W.2d 118, 134 Tex. 95.

(18) Testator.

U.S.—Fidelity & Columbia Trust Co. v. Lucas, C.C.A.Ky., 66 F.2d 116, reversing, D.C., 52 F.2d 298—Cleveland Clinic Foundation v. Humphrys, C.C.A.Ohio, 97 F.2d 849, 121 A.L.R. 163, certiorari denied 59 S.Ct. 93, 305 U.S. 628, 83 L.Ed. 403—American Security & Trust Co. v. Frost, App.D.C., 117 F.2d 283, certiorari denied Frost v. American Security & Trust Co., 61 S.Ct. 829.
Ark.—Ellsworth v. Arkansas Nat. Bank, 109 S.W.2d 1258, 194 Ark. 1032.
Cal.—In re Flint's Estate, 177 P. 451, 179 Cal. 552—In re Childs' Estate, 68 P.2d 306, 21 Cal.App.2d 103.
Colo.—In re Grigsby's Estate, 56 P.2d 1318, 98 Colo. 489—In re Bourquin's Estate, 286 P. 114, 87 Colo. 144—Blatt v. Blatt, 243 P. 1099, 79 Colo. 57, 57 A.L.R. 221.
Conn.—Starr v. Watrous, 165 A. 459, 116 Conn. 448—Bridgeport City Trust Co. v. Shaw, 161 A. 341, 115 Conn. 269—Mooney v. Tolles, 149 A. 515, 111 Conn. 1, 70 A.L.R. 608.
D.C.—Shoemaker v. Newman, 65 F.2d 208, 62 App.D.C. 120, 89 A.L.R. 1034, certiorari denied 54 S.Ct. 72, 290 U.S. 656, 78 L.Ed. 568.
Fla.—Bross v. Bross, 167 So. 669, 123 Fla. 758—Lowrimore v. First Savings & Trust Co. of Tampa, 140 So. 891, 102 Fla. 740, modifying 140 So. 887, 102 Fla. 740.
Ill.—Tuttle v. Gunderson, 254 Ill. App. 552, certiorari dismissed 173 N.E. 175, 341 Ill. 36—Carroll v. Wilkerson, 249 Ill.App. 98.
Ind.—Easterday v. Easterday, 10 N.E.2d 764, 105 Ind.App. 80—Sieb v. Miller, 2 N.E.2d 794, 102 Ind.App. 389.
Iowa.—In re Schroeder's Estate, 293 N.W. 492—In re Kielsmark's Will, 177 N.W. 690, 188 Iowa 1378, 11 A.L.R. 156.
Kan.—Tomb v. Bardo, 114 P.2d 320, 153 Kan. 766.
Ky.—Hubley's Guardian Ad Litem v. Wolfe, 82 S.W.2d 830, 259 Ky. 574, 101 A.L.R. 1359—Hatcher v. Pruitt, 22 S.W.2d 133, 231 Ky. 731.
Md.—Frank v. Wareheim, 16 A.2d 851—Textor v. Textor, 183 A. 247, 170 Md. 128—Longerbeam v. Iser, 150 A. 793, 159 Md. 244—Johnson v. Stringer, 148 A. 447, 158 Md. 315—Perkins v. Safe Deposit & Trust Co. of Baltimore, 113 A. 877, 138 Md. 299.
Mich.—Montgomery v. Trombley, 267 N.W. 648, 276 Mich. 439.
Mo.—St. Louis Union Trust Co. v. Hill, 76 S.W.2d 685, 336 Mo. 17—Hood v. St. Louis Union Trust Co., 66 S.W.2d 837, 334 Mo. 404—Graham v. Karr, 55 S.W.2d 995, 331 Mo. 1157—Trautz v. Lemp, 46 S.W.2d 135, 329 Mo. 580—Hannibal Trust Co. v. Elzea, 286 S.W. 371, 315 Mo. 485—Wetzel v. Hecht, 220 S.W. 888, 281 Mo. 610—Long v. Long, App., 38 S.W.2d 288.
Neb.—In re Hunter's Estate, 262 N.W. 41, 129 Neb 529.
N.H.—Franklin Nat. Bank v. Gerould, 10 A.2d 257, 90 N.H. 397.
N.J.—People's Nat. Bank of Elizabeth v. Tipper, 136 A. 187, 100 N.J.Eq. 431—Price v. United Hebrew Charities, 129 A. 712, 3 N.J.Misc. 706.
N.Y.—In re Koch's Estate, 27 N.E.2d 10, 282 N.Y. 462, reversing In re Koch's Will, 15 N.Y.S.2d 667, 258 App.Div. 843, appeal granted 17 N.Y.S.2d 886, 258 App.Div. 1030—Brown v. Gardner, 135 N.E. 325, 233 N.Y. 261, reversing judgment 184 N.Y.S. 911, 194 App.Div. 942—Farmers' Loan & Trust Co. v. Winthrop, 202 N.Y.S. 456, 207 App.Div. 356, modified on other grounds 144 N.E. 686, 238 N.Y. 477—In re Goldsmith's Estate, 25 N.Y.S.2d 419, 175 Misc. 757—In re Hayden's Estate, 16 N.Y.S.2d 126, 172 Misc. 669—In re Stanfield's Estate, 10 N.Y.S.2d 613, 170 Misc. 447, affirmed In re Stanfield's Will, 12 N.Y.S.2d 1022, 257 App.Div. 932, reargument denied In re Stanfield, 14 N.Y.S.2d 279, 257 App.Div. 957—In re Sexton's Estate, 4 N.Y.S.2d 111, 166 Misc. 631—In re Baker's Estate, 1 N.Y.S.2d 72, 164 Misc. 622—In re Tuck's Estate, 300 N.Y.S. 1132, 165 Misc. 346, affirmed In re Tuck's Will, 11 N.Y.S.2d 226, 256 App.Div. 971, appeal granted 12 N.Y.S.2d 363, 257 App.Div. 806, affirmed 23 N.E.2d 535, 281 N.Y. 697—In re Murphy's Estate, 283 N.Y.S. 545, 157 Misc. 5—In re Harris' Estate, 271 N.Y.S. 464, 150 Misc. 758—In re Rich's Estate, 268 N.Y.S. 321, 149 Misc. 843, affirmed In re Rich's Will, 271 N.Y.S. 1061, 242 App.Div. 613—In re Pulitzer's Estate, 249 N.Y.S. 87, 139 Misc. 575, opinion supplemented 251 N.Y.S. 549, 140 Misc. 572, affirmed In re Pulitzer, 260 N.Y.S. 975, 237 App.Div. 808—In re Wilkening's Will, 244 N.Y.S. 115, 137 Misc. 451—In re Canfield's Estate, 241 N.Y.S. 364, 136 Misc. 551, affirmed In re Canfield's Will, 245 N.Y.S. 778, 231 App.Div. 708, affirmed 177 N.E. 161, 256 N.Y. 610—In re Bernheimer's Estate, 240 N.Y.S. 410, 136 Misc. 566—In re Bush's Estate, 236 N.Y.S. 331, 134 Misc. 494—In re Kelly's Will, 235 N.Y.S. 683, 134 Misc. 399.
Ohio.—Nelson v. Minton, 187 N.E. 576, 46 Ohio App. 39—McColm v. Orebaugh, 178 N.E. 280, 40 Ohio App. 238.
Pa.—In re Jeffery's Estate, 3 A.2d 393, 333 Pa. 15—In re Erk's Estate, 166 A. 656, 311 Pa. 185—In re Mayer's Estate, 137 A. 627, 289 Pa. 407.
R.I.—Smith v. Bradford, 154 A. 272, 51 R.I. 289—Union Trust Co. v. Campi, 151 A. 131, 51 R.I. 76.
Tenn.—Hill v. Maloney, 108 S.W.2d 791, 21 Tenn.App. 216.
Tex.—Henderson v. Stanley, Civ. App., 150 S.W.2d 152, error granted—Haupt v. Michaelis, 231 S.W. 706, reversing Michaelis v. Haupt, Civ.App., 212 S.W. 274.
Va.—Denny v. Searles, 143 S.E. 484, 150 Va. 701.
Wyo.—Bentley v. Whitney Benefits, 281 P. 188, 41 Wyo. 11.
22 C.J. p 148 note 67 [a] (4), (5)—69 C.J. p 133 note 45.

(19) Trustee.

D.C.—Holman v. Ryon, 56 F.2d 307, 61 App.D.C. 10.
Ill.—Bennett v. Weber, 154 N.E. 105, 323 Ill. 283.
N.J.—Appeal of Larrabee, 130 A. 195, 98 N.J.Eq. 655.

where they reside or do business,[94] as well as the legal meaning of terms employed in establishing legal relations,[95] and the legal effect of their acts.[96] Such a presumption has frequently been declared conclusive, sometimes in general terms and sometimes with respect to particular persons or matters.[97]

Legal holidays. One is presumed to know the

On dealing with a bank is chargeable with notice of its powers and limitations.
U.S.—Awotin v. Atlas Exchange Nat. Bank of Chicago, 55 S.Ct. 674, 295 U.S. 209, 79 L.Ed. 1393, affirming 275 Ill.App. 530, certiorari granted 55 S.Ct. 545, 294 U.S. 703, 79 L.Ed. 1239, followed in Kimen v. Atlas Exchange Nat. Bank of Chicago, 55 S.Ct. 677, 295 U.S. 215, 79 L.Ed. 1398—Sponge Exch. Bank of Tarpon Springs v. Commercial Credit Co., C.C.A.Fla., 263 F. 20, certiorari denied Commercial Credit Co. v. Sponge Exch. Bank of Tarpon Springs, 40 S.Ct. 587, 253 U.S. 496, 64 L.Ed. 1030.
Conn.—Shippee v. Pallotti, Andretta & Co., 159 A. 896, 114 Conn. 658.
Ill.—Continental Illinois Nat. Bank & Trust Co. of Chicago v. Peoples Trust & Sav. Bank of Chicago, 9 N.E.2d 53, 366 Ill. 366—Thrift, Inc., v. State Bank & Trust Co., 19 N.E.2d 126, 298 Ill.App. 501.
N.Y.—In re State Bank of Canastota, N.Y., 263 N.Y.S. 388, 238 App.Div. 39, affirmed 189 N.E. 702, 263 N.Y. 571—Jacob Ruppert Realty Corporation v. Bank of U. S., 281 N.Y.S. 761, 156 Misc. 93, affirmed 292 N.Y.S. 997, 249 App.Div. 721, motion denied 293 N.Y.S. 412, 249 App.Div. 803, affirmed 12 N.E.2d 611, 276 N.Y. 629.

94. U.S.—U. S. v. One Zumstein Briefmarken Katalog 1938, D.C.Pa., 24 F.Supp. 516.
Ark.—Hill v. American Book Co., 285 S.W. 20, 171 Ark. 427.
Colo.—Wright v. Muehlberg, 242 P. 634, 78 Colo. 461.
D.C.—Buchanan v. National Savings & Trust Co., 23 F.2d 994, 57 App.D.C. 386.
Ky.—Hubley's Guardian Ad Litem v. Wolfe, 82 S.W.2d 830, 259 Ky. 574, 101 A.L.R. 1359.
Md.—Hospelhorn v. Poe, 198 A. 582, 174 Md. 242, 118 A.L.R. 682.
N.Y.—Bernhan Chemical & Metal Corporation v. Ship-A-Hoy, 193 N.Y.S. 372, 200 App.Div. 399.
S.C.—Temple v. McKay, 174 S.E. 23, 172 S.C. 305.
Tex.—Grange v. Kayser, Civ.App., 80 S.W.2d 1007—Moyers v. Carter, Civ.App., 61 S.W.2d 1027, error refused.
Wis.—State v. Zimmerman, 204 N.W. 803, 187 Wis. 180.
22 C.J. p 149 note 68—69 C.J. p 134 note 46.
Law of place as implied term of contract see Contracts § 330.

95. Cal.—Mammoth Gold Dredging Co. v. Forbes, 104 P.2d 131, 39 Cal.App.2d 739.
Mass.—Dumaine v. Dumaine, 16 N.E.2d 625, 301 Mass. 214, 118 A.L.R. 834—Wheeler v. Moulton, 195 N.E. 777, 290 Mass. 567.
Pa.—In re Lusk's Estate, 9 A.2d 363, 336 Pa. 465, 125 A.L.R. 787.
22 C.J. p 149 note 69.
Same presumption as to legislature
Ark.—Southeast Arkansas Levee Dist. v. Turner, 45 S.W.2d 512, 184 Ark. 1147.
Iowa.—Groenendyk v. Fowler, 215 N.W. 718, 204 Iowa 598.
Men learned in the law are presumed to interpret words "fair cash value" in tax statutes as construed by court.—Tremont & Suffolk Mills v. City of Lowell, 170 N.E. 819, 825, 271 Mass. 1.

96. U.S.—Wolfberg v. State Mut. Life Assur. Co. of Worcester, Mass., C.C.A.Mo., 36 F.2d 171—Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Ohio Farmers' Ins. Co., D.C.Pa., 7 F.Supp. 701, affirmed, C.C.A., Ohio Farmers' Ins. Co. v. Pennsylvania Co. for Insurance on Lives and Granting Annuities, 72 F.2d 369.
Ariz.—Maricopa Laundry Co. v. Levandoski, 9 P.2d 1014, 40 Ariz. 91.
Del.—Atterbury v. Consolidated Coppermines Corporation, Ch., 20 A.2d 743.
Fla.—Bryan v. St. Andrews Bay Community Hotel Corporation, 126 So. 142, 99 Fla. 132, followed in Sudduth v. St. Andrews Bay Community Hotel Corporation, 126 So. 302, 99 Fla. 151.
Ga.—Claxton Bank v. Smith, 129 S.E. 142, 33 Ga.App. 265.
Ind.—Gary Hobart Savings & Loan Ass'n v. Strong, 190 N.E. 373, 99 Ind.App. 422, rehearing denied 192 N.E. 772, 99 Ind.App. 422.
Iowa.—Fairley v. Falcon, 214 N.W. 538, 204 Iowa 290—Goldstein v. Mundon, 210 N.W. 444, 202 Iowa 381.
Minn.—Allen v. Hoopes, 249 N.W. 570, 189 Minn. 391.
Mo.—Vail v. Midland Life Ins. Co., App., 108 S.W.2d 147—Lomax v. Cramer, 216 S.W. 575, 202 Mo.App. 365.
N.M.—Points v. Wills, 97 P.2d 374, 44 N.M. 31.
N.Y.—In re Bush's Estate, 236 N.Y.S. 331, 134 Misc. 494.
Okl.—Champlin Refining Co. v. Magnolia Petroleum Co., 62 P.2d 249, 178 Okl. 203—Hall v. Dollarhide, 244 P. 813, 116 Okl. 180—National Surety Co. v. Craig, 220 P. 943, 94 Okl. 63.
Or.—L. B. Menefee Lumber Co. v. MacDonald, 260 P. 444, 122 Or. 579.
Pa.—In re Loesch's Estate, 185 A. 191, 322 Pa. 105
Tex.—George v. Reynolds, Civ.App., 53 S.W.2d 490, error dismissed—Sinclair v. Durham, Civ.App., 20 S.W.2d 1084.

97. U.S.—Pettibone v. Cook County, Minn., C.C.A.Minn., 120 F.2d 850, affirming, D.C., 31 F.Supp. 881—Southern Ry. Co. v. Query, D.C.S.C., 21 F.2d 333—Guettel v. U.S., D.C.Mo., 17 F.Supp. 725, affirmed, C.C.A., 95 F.2d 229, 118 A.L.R. 1060, certiorari denied 59 S.Ct. 64, 305 U.S. 603, 83 L.Ed. 383.
Ala.—Allgood v. State, 104 So. 847, 20 Ala.App. 665, certiorari granted Ex parte Allgood, 104 So. 851, 213 Ala. 426.
Ark.—Miller County Bank & Trust Co. v. Beasley, 262 S.W. 981, 165 Ark. 44.
Cal.—City of Inglewood v. Los Angeles County, 280 P. 360, 207 Cal. 697.
Conn.—Stevens v. Neligon, 164 A. 661, 116 Conn. 307—Cunningham v. Cunningham, 44 A. 41, 72 Conn. 157.
Ga.—City of Savannah v. Wade, 98 S.E. 464, 148 Ga. 766
Ill.—Rubin v. Strandberg, 212 Ill.App. 327, affirmed 122 N.E. 808.
Iowa.—Priest v. Whitney Loan & Trust Co., 261 N.W. 374, 219 Iowa 1281—Mitchell County v. Odden, 259 N.W. 774, 219 Iowa 793—Booth v. Cady, 257 N.W. 802, 219 Iowa 439—In re Durey's Estate, 245 N.W. 236, 215 Iowa 257.
Minn.—Bergerson v. Great Northern Ry. Co., 196 N.W. 670, 158 Minn. 20.
Mo.—Poe v. Illinois Cent. R. Co., 99 S.W.2d 82, 339 Mo. 1025—Strickler v. Consolidated School Dist. No. 1 of Knox County, 291 S.W. 136, 316 Mo. 621, 50 A.L.R. 1287—Walker v. Sheffield Steel Corporation, 27 S.W.2d 44, 224 Mo.App. 849—Hunter v. American Ry. Express Co., App., 4 S.W.2d 847.
Mont.—State v. Callow, 254 P. 187, 78 Mont. 368.
N.Y.—In re Sexton's Estate, 4 N.Y.S.2d 111, 166 Misc. 631.
N.C.—People's Nat. Bank of Winston-Salem v. Southern States Finance Co., 133 S.E. 415, 192 N.C. 69, 48 A.L.R. 519.
Tenn.—Summers v. Bond-Chadwell Co., App., 145 S.W.2d 7.
Tex.—E. H. Stafford Mfg. Co. v. Wichita School Supply Co., 23 S.W.2d 695, 118 Tex. 650—Unsell v. Federal Land Bank of Houston, Civ.App., 138 S.W.2d 305, error

legal holidays prescribed by the legislature,[98] but not holidays appointed by an executive officer.[99]

b. Limits of Presumption

(1) In general
(2) Where good faith involved
(3) City ordinances and resolutions
(4) Law of sister state or foreign country

(1) In General

Knowledge of the law will not be imputed to every person for all purposes, nor are persons presumed to know how a law will be construed. The presumption of knowledge is regarded as merely expressing the rule that ignorance of the law will not relieve from the legal consequences of wrongful acts or of contractual obligations.

It has been broadly stated that the presumption that everyone knows the law is a rule of necessity and is limited in its scope by the reason for it,[1] that it exists wherever necessary to the due administration of justice,[2] and that it merely expresses the rule that ignorance of law will not relieve from the legal consequences of wrongful acts or of contractual obligations.[3] Although, as appears in subdivision a of this section, a number of decisions have held the presumption to be conclusive, the statement of such a presumption by courts and text writers has been called loose language,[4] and its existence declared doubtful[5] and even denied;[6] and other decisions have held that knowledge of the law will not be imputed to every person for all purposes, since there is no inference of fact that the law is known,[7] and that actual knowledge, as a mat-

granted—Ferris v. Langston, Civ. App., 253 S.W. 309.

Va.—Denny v. Searles, 143 S.E. 484, 150 Va. 701.

"However violent the presumption may be that every man knows the law, it nevertheless conclusively prevails."—Kasch v. Anton, Tex.Civ. App., 81 S.W.2d 1097, 1100.

"Well-nigh conclusive"

U.S.—Jorgensen v. Swope, C.C.A. Wash., 114 F.2d 988, 989.

98. Cal.—Adolph Ramish, Inc. v. Behr, 104 P.2d 410, 411, 40 Cal.App. 2d 54.

99. Cal.—Adolph Ramish, Inc. v. Behr, supra.

Reason for rule

"Holidays appointed by the President and Governor may be selected on short notice and vary according to the exigencies of the circumstances."—Adolph Ramish, Inc. v. Behr, supra.

1. Wis.—Topolewski v. Plankinton Packing Co., 126 N.W. 554, 143 Wis. 52.

2. Cal.—Murphy v. Sheftel, 9 P.2d 568, 121 Cal.App. 533.
Colo.—Mesa County Co-op. Ass'n v. McKinney, 256 P. 13, 81 Colo. 513.
Wis.—Topolewski v. Plankinton Packing Co., 126 N.W. 554, 143 Wis. 52.

3. U.S.—Southern Ry. Co. v. Query, D.C.S.C., 21 F.2d 333—Schrikker v. U. S., 13 Ct.Cust.App. 562.
Ala.—Brent v. State, 43 Ala. 297.
Ariz.—Moore v. Meyers, 253 P. 626, 31 Ariz. 347, reversed on other grounds 255 P. 164, 31 Ariz. 519.
Ark.—Henderson v. Gladish, 128 S.W.2d 257, 198 Ark. 217—Hanson v. Brown, 213 S.W. 12, 139 Ark. 60—United Order of Good Samaritans v. Meekins, 244 S.W. 439, 155 Ark. 407, 28 A.L.R. 89.
Cal.—In re Heim's Estate, 90 P.2d 100, 32 Cal.App.2d 438—Zeh v. Alameda Community Hotel Corporation, 10 P.2d 190, 122 Cal.App. 366—Murphy v. Sheftel, 9 P.2d 568, 570, 121 Cal.App. 533, citing **Corpus Juris.**
Colo.—Home Owners Loan Corporation v. Public Water Works Dist. No. 2, 92 P.2d 745, 104 Colo. 466.
Conn.—Richey v. First Nat. Bank & Trust Co., 195 A. 732, 123 Conn. 360—Atlas Realty Corporation v. House, 192 A. 564, 123 Conn. 94—Usher v. Waddington, 26 A. 538, 62 Conn. 412.
D.C.—Momsen-Dunnegan-Ryan Co. v. Helvering, 68 F.2d 754, 63 App.D.C. 9
Ga.—Ryan v. State, 30 S.E. 678, 104 Ga. 78—Harper v. Atlanta & W. P. R. Co., 125 S.E. 885, 33 Ga.App. 259.
Ill.—Le Gout v. Le Vieux, 169 N.E. 809, 338 Ill. 46.
La.—Jeanne v. Johnson, App., 154 So. 757.
Mich.—Cassidy v. Kraft-Phenix Cheese Corporation, 280 N.W. 814, 285 Mich. 426—Black v. Ward, 27 Mich. 191, 15 Am.R. 162.
Miss.—State ex rel. Rice v. Hasson Grocery, 170 So. 234, 177 Miss. 204, 107 A.L.R. 663.
Mo.—German Evangelical B. Church of Concordia v. Reith, 39 S.W.2d 1057, 1062, 327 Mo. 1098, citing **Corpus Juris.**
Mont.—Hicks v. Stillwater County, 274 P. 296, 84 Mont. 38—Brundy v. Canby, 148 P. 315, 50 Mont. 454.
N.M.—Points v. Wills, 97 P.2d 374, 44 N.M. 31.
N.Y.—Municipal Metallic Bed Mfg. Corporation v. Dobbs, 171 N.E. 75, 253 N.Y. 313, 68 A.L.R. 1376, reversing 238 N.Y.S. 885, 228 App. Div. 659—People v. Klock, 106 N.Y.S. 267, 55 Misc. 46.
Okl.—State v. Moreland, 3 P.2d 803, 152 Okl. 37.
Pa.—In re Kearney, 7 A.2d 159, 136 Pa.Super. 78.
R.I.—Kenyon v. United Electric Rys. Co., 151 A. 5, 51 R.I. 90.
S.C.—Fairey v. Strange, 104 S.E. 325, 115 S.C. 10.
Tex.—West Texas Utilities Co. v. Ellis, 126 S.W.2d 13, 133 Tex. 104, reversing, Civ.App., 102 S.W.2d 234—Dallas Hotel Co. v. Buffington, Civ.App., 294 S.W. 610—Willie v. Hays, Civ.App., 269 S.W. 503—Ferris v. Langston, Civ.App., 253 S.W. 309.
Utah—State ex rel. Utah Savings & Trust Co. v. Salt Lake City, 99 P. 255, 35 Utah 25, 18 Ann.Cas. 1130.
22 C.J. p 150 note 71, p 151 note 88—66 C.J. p 179 note 16.

4. N.M.—Points v. Wills, 97 P.2d 374, 44 N.M. 31.

5. N.M.—Points v. Wills, supra.

6. N.Y.—Municipal Metallic Bed Mfg. Corporation v. Dobbs, 171 N.E. 75, 253 N.Y. 313, 68 A.L.R. 1376, reversing 238 N.Y.S. 885, 228 App. Div. 659.
S.C.—Fairey v. Strange, 104 S.E. 325, 115 S.C. 10.

7. U.S.—Jorgensen v. Swope, C.C.A. Wash., 114 F.2d 988—U. S. v. Smith, D.C.N.C., 27 F. 854.
Ariz.—Conway v. State Consolidated Pub. Co., 112 P.2d 218.
Cal.—Murphy v. Sheftel, 9 P.2d 568, 570, 121 Cal.App. 533, citing **Corpus Juris.**
Conn.—Daly v. Fisk, 134 A. 169, 104 Conn. 579—Blakeman v. Blakeman, 39 Conn. 320.
D.C.—Momsen-Dunnegan-Ryan Co. v. Helvering, 68 F.2d 754, 63 App.D.C. 9.
Ga.—Hawthorne v. Pope, App., 180 S.E. 920—Harper v. Atlanta & W. P. R. Co., 125 S.E. 885, 33 Ga.App. 259.
Ill.—Hanson v. Clark, 246 Ill.App. 496.
Mass.—Wheeler v. Moulton, 195 N.E. 777, 290 Mass. 567—Vogel v. Brown, 87 N.E. 686, 201 Mass. 261.
Mo.—German Evangelical B. Church of Concordia v. Reith, 39 S.W.2d 1057, 1062, 327 Mo. 1098, citing **Corpus Juris**—Vesper v. Ashton, 118 S.W.2d 84, 233 Mo.App. 204.
Mont.—Hicks v. Stillwater County,

ter of fact, is not established by the presumption alone.[8]

The presumption is not available for the purpose of supplying evidence of a fact material to the controversy.[9]

Persons are not presumed to know how the courts will construe the law,[10] or that a particular law is, or will be held by the courts to be, unconstitutional;[11] nor is the general public presumed to know instructions given or regulations formulated by executive officers for carrying a law into effect;[12] but a post-office employee will be presumed to know the general postal regulations.[13]

Special or private laws are not within the rule and knowledge of them is not presumed.[14]

Illegal or void statutes. It has been said that the presumption that every man knows the law does not hold him to a knowledge of statutes which for any reason are illegal or void.[15]

(2) Where Good Faith Involved

Knowledge of law will not be presumed in order to charge a party with bad faith.

A knowledge of law will not be presumed in order to charge a party with bad faith,[16] nor is there, on the question whether or not one has acted corruptly, a conclusive presumption that he knows the law.[17]

(3) City Ordinances and Resolutions

Persons residing in, or having dealings with, a city are presumed to know its ordinances.

City ordinances[18] and resolutions[19] are presumed

274 P. 296, 84 Mont. 38—Brundy v. Canby, 148 P. 315, 50 Mont. 454.
N.M.—Points v. Wills, 97 P.2d 374, 44 N.M. 31.
N.Y.—In re Snell's Estate, 17 N.Y.S. 2d 510, 173 Misc. 282.
Okl.—Hall v. Dollarhide, 244 P. 813, 116 Okl. 180.
Pa.—In re Kearney, 7 A.2d 159, 136 Pa.Super. 78.
R.I.—Smith v. Bradford, 154 A. 272, 51 R.I. 289.
Tex.—Navarro Oil Co. v. Cross, Civ. App., 150 S.W.2d 117, error granted—White v. Calaway, Civ.App., 282 S.W. 642.
Utah.—State ex rel. Utah Savings & Trust Co. v. Salt Lake City, 99 P. 255, 35 Utah 25, 18 Ann.Cas. 1130.
W.Va.—Commercial Banking & Trust Co. v. Doddridge County Bank, 194 S.E. 619, 119 W.Va. 449.
22 C.J. p 148 note 67 [d], p 149 note 70, p 151 note 88

Weight to be given to presumption varies according to circumstances—Smith v. Bradford, 154 A. 272, 51 R.I. 289.

In passing on the character of their acts, "we may say that all persons are treated as if they knew the law."—Municipal Metallic Bed Mfg. Corporation v. Dobbs, 171 N.E. 75, 76, 253 N.Y. 313, 68 A.L.R. 1376, reversing 238 N.Y.S. 885, 228 App.Div. 659.

Mistake as to legal right

"A mistake by a party as to his antecedent existing legal right, as distinguished from a mistake as to the legal import of the act done," is recognized as a ground for relief.
Del.—In re McFarlin, 75 A. 281, 282, 9 Del.Ch. 430.
Ill.—Hanson v. Clark, 246 Ill.App. 496, 504.

8. Cal.—Murphy v. Sheftel, 9 P.2d 568, 121 Cal.App. 533.
Mich.—Glieberman v. Fine, 226 N.W. 669, 248 Mich. 8—Black v. Ward, 27 Mich. 191, 15 Am.R. 162—People v. Rix, 6 Mich. 144.

9. Cal.—Murphy v. Sheftel, 9 P.2d 568, 570, 121 Cal.App. 533, citing **Corpus Juris.**
Miss.—Caffey v. Tindall, 56 So. 177, 99 Miss. 851.

10. La.—Delouche v. Rosenthal, 78 So. 970, 143 La. 581.
22 C.J. p 150 note 80.

11. U.S.—United States v. Realty Company, La., 16 S.Ct. 1120, 163 U.S. 427, 41 L.Ed. 215—Missouri Utilities Co. v. City of California, D.C.Mo., 8 F.Supp. 454, appeal dismissed, C.C.A., 79 F.2d 1003.
Ala.—Cooper v. Hawkins, 176 So. 329, 234 Ala. 636.
Contra Holland v. Atlantic Stevedoring Co., 205 N.Y.S. 397, 210 App. Div. 129, affirmed 147 N.E. 214, 239 N.Y. 605.
22 C.J. p 150 note 81.

12. Tex.—State v. Palacios, Civ. App., 150 S.W. 229.

13. Tenn.—East Tennessee, Virginia & Georgia R. Co. v. White, 15 Lea 340.

14. Tenn.—East Tennessee, Virginia & Georgia R. Co. v. White, supra.
22 C.J. p 150 note 76.

15. U.S.—King Tonopah Min. Co. v. Lynch, D.C.Nev., 232 F. 485.

16. La.—Delouche v. Rosenthal, 78 So. 970, 143 La. 581.
Mo.—Vesper v. Ashton, 118 S.W.2d 84, 89, 233 Mo.App. 204, citing **Corpus Juris.**
N.Y.—Plunkett v. O'Connor, 295 N.Y.S. 492, 162 Misc. 839.
22 C.J. p 150 note 84.

17. Mass.—Vogel v. Brown, 87 N.E. 686, 201 Mass. 261.
22 C.J. p 150 note 85.

18. Ala.—Oppenheim v. City of Florence, 155 So. 859, 229 Ala. 50.
Ark.—Jones v. Hadfield, 96 S.W.2d 959, 192 Ark. 224, 109 A.L.R. 488, certiorari denied Fidelity & Deposit Co. of Maryland v. Jones, 57 S.Ct. 506, 300 U.S. 667, 81 L.Ed. 875.
Ill.—Board of Education of City of Rockford v. City of Rockford, 24 N.E.2d 366, 372 Ill. 442—C. D. Gammon Co. v. Standard Trust & Savings Bank, 158 N.E. 810, 327 Ill. 489—Harry Goldstine Realty Co. v. City of Chicago, 29 N.E.2d 283, 306 Ill.App. 556—Kesner v. Consumers' Co., 255 Ill.App. 216.
Ky.—Nussbaum v. General Accident, Fire & Life Assur. Corporation, Limited, of Perth, Scotland, 38 S.W.2d 1, 238 Ky. 348.
La.—Sheridan v. Police Jury of Washington Parish, 82 So. 386, 145 La. 403.
Mo.—Hickman v. Union Electric Light & Power Co., 226 S.W. 570—Woodard v. Bush, 220 S.W. 839, 282 Mo. 163—City of St. Louis v. Missouri Pac. Ry. Co., 211 S.W. 671, 278 Mo. 205—Lux v. Milwaukee Mechanics' Ins. Co., 295 S.W. 847, 221 Mo.App. 999, transferred, see, Sup., 285 S.W. 424.
Tex.—Coke v. Uvalde Paving Co., Civ.App., 76 S.W.2d 150.
Va.—Millman v. Swan, 127 S.E. 166, 141 Va. 312.
22 C.J. p 150 note 72.

Conclusive presumption
Va.—Virginia Electric & Power Co. v. Wynne, 141 S.E. 829, 149 Va. 882.

Knowledge by bank
Ill.—People ex rel. Nelson v. People's State Bank of Maywood, 188 N.E. 853, 354 Ill. 519, reversing 266 Ill.App. 330.

Presumption held not applicable to ordinance.—Palmiter v. Hackett, 185 P. 1105, 95 Or. 12, modified on other grounds 186 P. 581, 95 Or. 12.

19. N.Y.—Lincoln Trust Co. v. Williams Bldg. Corporation, 128 N.E.

to be known to persons living in the city or having dealings with it; but a person is not presumed to know the ordinances of a city in another state.[20] It will not be presumed, according to one authority, that the state legislature had knowledge of a municipal ordinance;[21] but it has been held that the legislature, in passing an act contemporaneous with a local law covering the same subject, will be deemed to have acted with full knowledge of the local law.[22]

(4) Law of Sister State or Foreign Country

A person is not presumed to know the law of a sister state or foreign country, unless he engages in business, performs work, or owns land, therein.

A person is not presumed to know the law of a sister state or foreign country,[23] unless he engages in business,[24] or undertakes the performance of work,[25] therein, or owns, or deals in, land situated therein.[26] A mistake concerning the statute of another state is treated as a mistake of fact.[27]

c. Charge or Repeal of Law

Persons are presumed to know that laws are subject to change or repeal.

Persons are presumed to know that laws are subject to change[28] or repeal;[29] and, when the law is changed in a particular respect or with respect to a particular matter, all persons are presumed to know of the change.[30]

§ 133. Law of Sister State or Foreign Country

In the absence of a showing to the contrary, the presumption is often indulged that the law of a sister state is the same as, or in accord with, that of the forum; but authorities differ as to the presumption of similarity with respect to the laws of the various foreign countries. More particularly, the common law of a foreign jurisdiction operating under the common law is generally presumed to be similar to the common law of the forum; and many states indulge a presumption of similarity as to the statute law of a sister state, although others do not.

In the absence of a proper showing to the contrary, the presumption is often indulged in by the different courts that the law of a sister state[31]

209, 229 N.Y. 313, reversing 169 N.Y.S. 1045, 183 App.Div. 225

20. Mo.—Woodard v. Bush, 220 S.W. 839, 282 Mo. 163.

21. Mo.—State v. Missouri Pac. R. Co., 174 S.W. 73, 262 Mo. 720.

22. N.Y.—Robia Holding Corporation v. Walker, 246 N.Y.S. 210, 230 App.Div. 666, affirming 239 N.Y.S. 659, 136 Misc. 358, and affirmed 178 N.E. 747, 257 N.Y. 431.

23. U.S.—Smeltzer v. White, Iowa, 92 U.S. 390, 23 L.Ed. 508—First Nat. Bank & Trust Co. of Muskogee v. Heilman, C.C.A.Kan., 62 F.2d 157—U. S. v. One Zumstein Briefmarken Katalog 1938, D.C.Pa., 24 F.Supp. 516.
Ill.—Hale v. Hale, 237 Ill.App. 410.
Minn.—In re Daniel's Estate, 294 N.W. 465.
Mo.—Woodard v. Bush, 220 S.W. 839, 282 Mo. 163.
N.J.—Shannon v. Ryan, 111 A. 155, 91 N.J.Eq. 491, reversing, Ch., 108 A. 773.
22 C.J. p 150 note 74.

Permitting foreign corporation to do business in state

Mississippi authorities which granted permission to surety company, incorporated in New York state, to do business in Mississippi were chargeable with knowledge of the statutes of the state of New York, and that New York state had power to order destruction of surety company.—In re National Surety Co., 27 N.E.2d 505, 283 N.Y. 68, affirming 16 N.Y.S.2d 101, 258 App.Div. 789, appeal denied In re Cooper's Estate, 17 N.Y.S.2d 221, 258 App.Div. 876, motion denied In re National Surety Co., 29 N.E.2d 668, 284 N.Y. 593, certiorari denied Laughlin v. Pink, 61 S.Ct. 175.

24. U.S.—American Mut. Liability Ins. Co. v. McCaffrey, C.C.A.Tex., 37 F.2d 870, affirming, D.C., McCaffrey v. American Mut. Liability Ins. Co., 32 F.2d 791, and certiorari denied American Mut. Liability Ins. Co. v. McCaffrey, 50 S.Ct. 354, 281 U.S. 751, 74 L.Ed. 1162—Stern v. National City Co., D.C.Minn., 25 F.Supp. 948, affirmed, C.C.A., City Co. of New York v. Stern, 110 F.2d 601, reversed on other grounds 61 S.Ct. 823.
N.C.—Parks-Cramer Co. v. Southern Express Co., 117 S.E. 505, 185 N.C. 428, certiorari denied Southern Exp. Co. v. Parks-Cramer Co., 44 S.Ct. 180, 263 U.S. 717, 68 L.Ed. 522.
22 C.J. p 149 note 68.

25. U.S.—American Mut. Liability Ins. Co. v. McCaffrey, C.C.A.Tex., 37 F.2d 870, affirming, D.C., McCaffrey v. American Mut. Liability Ins. Co., 32 F.2d 791, and certiorari denied American Mut. Liability Ins. Co. v. McCaffrey, 50 S.Ct. 354, 281 U.S. 751, 74 L.Ed. 1162.

26. Ala.—Coral Gables v. Patterson, 181 So. 236, 236 Ala. 201.
Fla.—McGillick v. Chapman, 184 So. 26, 134 Fla. 220.
Tex.—Erwin v. Holliday, 112 S.W.2d 177, 131 Tex. 69, affirming Holliday v. Erwin, Civ.App., 85 S.W.2d 355.

27. Tenn.—King v. Doolittle, 1 Head 77.
22 C.J. p 150 note 75.

Foreign laws are regarded as facts.—In re Daniel's Estate, Minn., 294 N.W. 465.

28. Conn.—E. M. Loew's Enterprises v. International Alliance of Theatrical Stage Employees, 17 A.2d 525, 127 Conn. 415
Md.—Bartlett v. Ligon, 109 A. 473, 135 Md. 620.
N.J.—Veix v. Seneca Building & Loan Ass'n of Newark, 19 A.2d 219, 126 N.J.Law 314, 133 A.L.R. 1486, reversing 13 A.2d 796, 18 N.J.Misc. 275, 280.
N.Y.—Rogers v. Rogers, 22 N.Y.S.2d 659, 174 Misc. 841.
22 C.J. p 150 note 78.

29. Md.—Bartlett v. Ligon, 109 A. 473, 135 Md. 620.
22 C.J. p 150 note 79.

30. Cal.—Bridges v. Price, 273 P. 72, 95 Cal.App. 394.
Ind.—Easterday v. Easterday, 10 N.E.2d 764, 105 Ind.App. 80.
Mich.—Montgomery v. Trombley, 267 N.W. 648, 276 Mich. 439.
N.Y.—Gilbert v. Ackerman, 53 N.E. 753, 159 N.Y. 118.
22 C.J. p 150 note 79.

31. U.S.—Treinies v. Sunshine Mining Co., Idaho, 60 S.Ct. 44, 308 U.S. 66, 84 L.Ed. 85, affirming, C.C.A., 99 F.2d 651, affirming, D.C., Sunshine Mining Co. v. Treinies, 19 F.Supp. 587, certiorari granted Treinies v. Sunshine Mining Co., 59 S.Ct. 489, 306 U.S. 624, 83 L.Ed. 1029, rehearing denied 60 S.Ct. 464, 309 U.S. 693, 84 L.Ed. 1034.
Ala.—Bank of Cottonwood v. Hood, 149 So. 676, 227 Ala. 237—C. D.

Chapman & Co. v. Cullifer, 120 So. 297, 23 Ala.App. 31.

Ariz.—Davis v. Standard Acc. Ins. Co., 278 P. 384, 35 Ariz. 392.

Cal.—Kelsey v. Miller, 263 P. 200, 203 Cal. 61—In re Barton's Estate, 238 P. 681, 196 Cal. 508—Popp v. Exchange Bank, 208 P. 113, 189 Cal. 296—Vegetable Oil Corporation v. Twohy, 260 P 813, 86 Cal. App. 409—Garcia v. Sainz, 210 P. 534, 59 Cal.App. 246—Klaffki v. Kauffman, 198 P. 36, 52 Cal.App. 48—Anthony v. Tarpley, 187 P. 779, 45 Cal.App. 72.

Conn.—Union & New Haven Trust Co. v. Watrous, 146 A. 727, 109 Conn. 268.

Fla.—Barnes v. Liebig, 1 So.2d 247.

Ga.—Trustees of Jesse Parker Williams Hospital v. Nisbet, 7 S.E.2d 737, 189 Ga. 807.

Idaho.—Mason v. Pelkes, 59 P 2d 1087, 57 Idaho 10, certiorari denied Pelkes v. Mason, 57 S.Ct. 319, 299 U.S. 615, 81 L Ed. 453—Cummings v. Lowe, 10 P.2d 1059, 52 Idaho 1—Mechanics & Metals Nat. Bank of City of New York v. Pingree, 232 P. 5, 40 Idaho 118.

Ill.—People ex rel. Crofts v. Wait, 243 Ill.App. 367—Hardinger v. Gaines, 217 Ill.App. 612.

Ind.—Spielman v. Herskovitz, 134 N. E. 909, 78 Ind.App. 131.

Iowa.—Bowen v. Bowen, 258 N.W. 882, 219 Iowa 550—Northern Finance Corporation v. Meinhardt, 226 N.W. 168, 209 Iowa 895—Barnett v. Blakeley, 209 N.W. 412, 202 Iowa 1—Tansil v. McCumber, 206 N.W. 680, 201 Iowa 20—Scott v. Mundy & Scott, 188 N.W. 972, 193 Iowa 1360, 23 A.L.R. 460.

Kan.—Gigoux v. Moore, 184 P. 637, 105 Kan. 361—Bice v. Nelson, 181 P. 558, 105 Kan. 23, denying rehearing 180 P. 206, 105 Kan. 23.

La.—E. B. Hayes Machinery Co. v. Eastham, 84 So. 898, 147 La. 347—Wasson v. Gatling, App., 184 So. 596—Platt v. Bender, App., 178 So. 678—Theriot v. Tassin, App., 146 So. 729—Snyder v. Davidson, 129 So. 185, 15 La.App. 695, affirmed Snyder v. Davison, 131 So. 64, 15 La.App. 695, affirmed 134 So. 89, 172 La. 274.

Md.—Commonwealth of Pennsylvania v. Fidelity & Deposit Co. of Maryland, 121 A. 920, 143 Md. 29.

Mass.—Miller v. U. S Fidelity & Casualty Co., 197 N.E. 75, 291 Mass. 445—Park & Pollard Co. v. Agricultural Ins. Co., 130 N.E. 208, 238 Mass. 187—Eastman Marble Co. v. Vermont Marble Co., 128 N.E. 177, 236 Mass. 138.

Mont.—Quickenden v. Hulbert, 272 P. 994, 83 Mont. 501.

N.M.—Norment v. Turley, 246 P. 748, 31 N.M. 400—Carron v. Abounador, 214 P. 772, 28 N.M. 491.

N.Y.—Read v. Lehigh Valley R. Co., 31 N.E.2d 891, 284 N.Y. 435, modifying 17 N.Y.S.2d 99, 258 App.Div. 948, appeal granted 18 N.Y.S.2d 1002, 259 App.Div. 705—Mencher v. Goldstein, 269 N.Y.S. 846, 240 App. Div. 290—Scanlon v. Kuehn, 232 N.Y.S. 592, 225 App.Div. 256—In re Standish, 188 N.Y.S. 900, 197 App.Div. 176, affirmed 135 N.E. 972, 233 N.Y. 689—In re Gaubert's Estate, 299 N.Y.S. 619, 164 Misc. 768—In re Shuff's Estate, 272 N.Y.S. 418, 151 Misc. 754—In re Sitkin's Will, 271 N.Y.S. 688, 151 Misc. 448—In re Horner's Estate, 268 N.Y.S. 74, 149 Misc. 695—In re Gellis' Estate, 252 N.Y.S. 725, 141 Misc. 432—In re Mosley's Will, 247 N.Y.S. 520, 138 Misc. 847—In re Smith's Estate, 242 N.Y.S. 464, 136 Misc. 863—Bullock v. Bullock, 234 N.Y.S. 705, 134 Misc. 250, affirmed 236 N.Y.S. 760, 227 App.Div. 714.

N.D.—Bowers v. Great Northern Ry. Co., 259 N.W. 99, 65 N.D. 384, 99 A.L.R. 1443.

Ohio.—Mendelson v. Mendelson, 173 N.E. 615, 123 Ohio St. 11—Baid's, Inc., v. Frankel, 10 N.E.2d 787, 56 Ohio App. 305—Devine v. Detroit Trust Co., 3 N.E.2d 1001, 52 Ohio App. 446—Lutton v. Mt. Ida School, 185 N.E. 429, 44 Ohio App. 322.

Okl.—Hinds v. Atlas Acceptance Corporation, 63 P.2d 29, 31, 178 Okl. 474, citing **Corpus Juris**—McRoberts v. McRoberts, 57 P.2d 1175, 177 Okl. 156—Beck v. Davis, 54 P. 2d 371, 175 Okl. 623—Neuhardt v. Miller, 298 P. 890, 148 Okl. 298—Sohner v. Welliver, 218 P. 1069, 95 Okl. 73.

Or.—Cousineau v. Cousineau, 63 P 2d 897, 155 Or. 184, 109 A.L.R. 643—Ex parte Ashley, 231 P. 153, 113 Or. 43.

Pa.—In re Craver's Estate, 179 A. 606, 319 Pa. 282—General Motors Acceptance Corporation v. Foley, 166 A. 909, 311 Pa. 477—Cochran v. Shetler, 133 A. 232, 286 Pa. 226—Roberts v. Freihofer Banking Co., 129 A. 574, 283 Pa. 573—In re Baughman's Estate, 126 A. 58, 281 Pa. 23—Quaker Worsted Mills Corporation v. Howard Trucking Corporation, 198 A. 691, 131 Pa.Super. 1—New York Hotel Statler Co. v. Girard Nat. Bank, 87 Pa.Super. 94—Semple v. Kramer, 83 Pa.Super. 161—Bayuk Bros. v. Wilson Martin Co., 81 Pa.Super. 195—In re Breintall's Estate, 26 Pa.Dist. & Co. 408—Commonwealth v. One Oldsmobile Automobile, 8 Pa.Dist. & Co. 169—Somerset Co. v. Bloom, 29 Del.Co. 365.

R.I.—Potemkin v. Leach, 13 A.2d 250.

S.D.—Lemon v. Prudential Ins. Co. of America, 269 N.W. 90, 64 S.D. 588—Commercial Credit Co. v. Nissen, 207 N.W. 61, 49 S.D. 303, 51 A.L.R. 287, modified on other grounds 213 N.W. 943, 51 S.D. 357, 51 A.L.R. 287—Tobin v. Bruce, 171 N.W. 603, 41 S.D. 513, certiorari denied Bruce v. Tobin, 40 S.Ct. 56, 251 U.S. 552, 64 L.Ed. 410.

Tenn.—Chumley v. Anderton, 103 S. W.2d 331, 20 Tenn.App. 621—Moak v. Continental Casualty Co., 4 Tenn.App. 287—Loud v. Hamilton, Ch.A., 51 S.W. 140, 45 L.R.A. 400.

Tex.—Nevill v. Gulf, C. & S. F. Ry. Co., Com.App., 244 S.W. 980, reversing, Civ.App., 187 S.W. 388, and reversed on other grounds, Com.App., 252 S.W. 483—Hicks v. Rapides Grocery Co., Civ.App., 101 S.W.2d 1042—Heidingsfelder v. Rodgers, Civ.App., 96 S.W.2d 147—Cate v. Perry, Civ.App., 11 S.W.2d 352—National Cattle Loan Co. v. Armstrong, Civ.App., 8 S.W.2d 767, error refused—Bell v. Southern Casualty Co., Civ.App., 267 S.W. 531—Hayes v. Texas Employers' Ins. Ass'n, Civ. App., 254 S.W. 501—Walker v. Garland, Civ.App., 220 S.W. 399, affirmed, Com.App., 235 S.W. 1078—American Nat. Bank of Oklahoma City, Okl. v. Garland, Civ.App., 220 S.W. 397, affirmed American Nat. Bank of Oklahoma v. Garland, Com.App., 235 S.W. 562—Ash v. Fidelity Mut. Life Ass'n, 63 S.W. 944, 26 Tex. Civ.App. 501, error refused.

Utah.—Dickson v. Mullings, 241 P. 840, 66 Utah 282, 43 A.L.R. 136—McGarry v. Industrial Commission of Utah, 222 P 592, 63 Utah 81.

Wash.—Lino v. Hole, 291 P. 1079, 159 Wash. 16—Wamsley v. Rostad, 272 P. 722, 150 Wash. 192—Freyman v. Day, 182 P. 940, 108 Wash. 71.

Wis.—Buckeye v. Buckeye, 234 N.W. 342, 203 Wis. 248—Ellis v. Gordon, 231 N.W. 585, 202 Wis. 134.

22 C.J. p 151 notes 92, 94, 95, p 152 note 97.

Application of lex fori for lack of proof of foreign law see Conflict of Laws § 9 b.

Presumption is rebuttable

N.H.—Connecticut Valley Lumber Co. v. Maine Cent. R. Co., 103 A. 263, 78 N.H. 553.

Public policy

In the absence of a showing to the contrary, the law of a sister state will be presumed to be the same as the law of the local forum in respect to public policy.—Glanton v. Renner, 149 S.W.2d 748, 285 Ky. 808.

Rule of other jurisdiction undetermined

Where court of another jurisdiction has not determined rule on certain proposition, its law thereon will be presumed same as law of the forum.—McDonald v. Hartford Trust Co., 132 A. 902, 104 Conn. 169.

Origin of state unknown

Where no proof is adduced as to what law exists in another state, and no such judicial knowledge can be had of the origin of such state as would raise the presumption of the

or that the law of a territory,[32] either generally or as to the particular point in controversy, is the same as, or in accord with, the law of the forum. More specifically, it is presumed, in the absence of evidence, that the law of a sister state,[33] especially its common law,[34] is in accord with the

prevalence there of the common law, it will be presumed that the lex fori is the law of such state.—C. D. Chapman & Co. v. Cullifer, 120 So. 297, 23 Ala.App. 31—12 C.J. p 202 note 89.

Insurance

Although an insurance policy provides that it shall be construed according to the law of a foreign state, such law, in the absence of proof, will be presumed to be the same as that of the forum as to the effect and materiality of representations.—Ashe v. Fidelity Mut. Life Ass'n, Tex.Civ.App., 63 S.W. 944.

Sale of corporate assets

In the absence of showing as to the laws of another state with regard to the sale of all the assets of one corporation to another, it will be assumed that these laws are similar to the general rules prevailing in the forum, excluding from consideration any peculiar statutory provisions.—Murrin v. Archbald Consol. Coal Co., 134 N.E. 563, 232 N.Y. 541, affirming 187 N.Y.S. 606, 196 App. Div. 107.

32. Tex.—Ex parte Latham, 82 S.W. 1046, 47 Tex.Cr. 208.

Wash.—Smaby v. Shrauger, 115 P.2d 967.

22 C.J. p 152 note 96.

Foreign law not in force

There has been a judicial refusal to entertain a presumption that any rules of law of France, Spain, or Mexico were ever at any time in force in the Oregon territory.—Woodbury v. U. S. Casualty Co., 120 N.E. 8, 284 Ill. 227.

33. Colo.—Fern v. Crandell, 246 P. 270, 79 Colo. 403.

Ill.—Opp v. Pryor, 128 N.E. 580, 294 Ill. 538—O'Neal v. Caffarello, 25 N.E.2d 534, 303 Ill.App. 574.

Ind.—International Harvester Co. of America v. Holley, App., 18 N.E. 2d 484—Morley v. Cleveland, C., C. & St. L. R. Co., 194 N.E. 806, 100 Ind.App 515—Chalmers & Williams v. Surprise, 123 N.E. 841, 70 Ind. App. 646.

Ky.—Dortch's Ex'r v. Willoughby, 113 S.W.2d 832, 272 Ky. 231.

Mass.—Sjostedt v. Webster, 28 N.E. 2d 239—Weisberg v. Hunt, 131 N. E. 471, 239 Mass. 190.

N.J.—Redmond v. New Jersey Historical Soc., 18 A.2d 275, 129 N.J. Eq. 57.

N.Y.—Marchant v. Mead-Morrison Mfg. Co., 169 N.E. 386, 252 N.Y. 284, modifying and affirming 235 N.Y.S. 370, 226 App.Div. 397, and reargument denied 171 N.E. 770, 253 N.Y. 534, appeal dismissed Mead-Morrison Mfg. Co. v. Marchant, 51 S.Ct. 104, 282 U.S. 808, 75 L.Ed. 725—Harmon v. Alfred Peats Co., 214 N.Y.S. 353, 216 App. Div. 368, reversed on other grounds 154 N.E. 314, 243 N.Y. 473—Secklir v. Penney, 266 N.Y.S. 327, 148 Misc. 807, affirmed 280 N.Y.S. 1009, 244 App.Div. 830.

Or.—Sterrett v. Stoddard Lumber Co., 46 P.2d 1023, 150 Or. 491.

R.I.—Owens v. Hagenbeck-Wallace Shows Co., 192 A. 158, 58 R.I. 162, 112 A.L.R. 113, reargument denied 192 A. 464, 58 R.I. 268, 112 A.L.R. 113—Columbian Nat. Life Ins. Co. v. Industrial Trust Co., 190 A. 13, 57 R.I. 325, reargument denied 190 A. 787, 57 R.I. 468.

S.C.—Alexander v. Martin, 189 S.E. 468, 182 S.C. 399.

22 C.J. p 151 notes 94, 95, p 152 note 97, p 156 note 13.

District of Columbia

In absence of contrary proof, assumption is that law of District of Columbia is same as common law of the forum, governing commercial transactions.—Weissman v. Banque de Bruxelles, 173 N.E. 835, 254 N.Y. 488, reversing 241 N.Y.S. 826, 229 App Div. 713.

34. U.S.—Waggaman v. General Finance Co. of Philadelphia, C.C.A. Pa., 116 F.2d 254.

Conn.—Jump v. Ensign-Bickford Co., 167 A. 90, 117 Conn. 110.

Ill.—Jones v. St. Louis Structural Steel Co., 267 Ill.App. 576—St. Paul Cattle Loan Co. v. Hansman, 215 Ill App. 190.

Ky.—Crabtree v. Petroleum Exploration, 137 S.W.2d 713, 282 Ky. 32—Rose v. Rose, 118 S.W.2d 529, 274 Ky. 208—Travelers Ins. Co. v. Mahon, 117 S.W.2d 909, 273 Ky. 691—Hauser v. Public Service Co. of Indiana, 111 S.W.2d 657, 271 Ky. 206—Federal Materials Co. v. Williams-Detwiler Co., 84 S.W.2d 3, 260 Ky. 162—Dunning v. Gibbs, 280 S.W. 483, 213 Ky. 81—Central Consumers' Co. v. Ralston, 259 S.W. 67, 202 Ky 94—United States Cast Iron Pipe & Foundry Co. v. Henry Vogt Mach. Co., 206 S.W. 806, 182 Ky. 473.

Me.—Reid v. Cromwell, 183 A. 758, 134 Me. 186—Rose v. Osborne, 180 A. 315, 133 Me. 497—Greeley v. Greeley, 107 A. 296, 118 Me. 491.

Mass.—American Garment Co. v. Taylor, 33 N.E.2d 296, 308 Mass. 527—Rice & Lockwood Lumber Co. v. Boston & M. R. R., 31 N.E.2d 219, 308 Mass. 101—Hite v. Hite, 17 N. E.2d 176, 301 Mass. 294, 119 A.L.R. 517—Bradbury v. Central Vermont Ry., 12 N.E.2d 732, 299 Mass. 230—Rosenblatt v. Holstein Rubber Co., 183 N.E. 705, 281 Mass. 297—Haller v. Workingmen's Co-Op. Bank, 160 N.E. 324, 263 Mass. 37, 56 A.L.R. 1320—John B. Frey Co. v. S. Silk, Inc., 140 N.E. 259, 245 Mass. 534—Royle v. Worchester Buick Co., 137 N.E. 531, 243 Mass. 143—Butterworth v. Smith, 133 N. E. 100, 240 Mass. 192—Tucker v. Columbian Nat. Life Ins. Co., 122 N.E 285, 232 Mass. 224.

Mich.—Amos v. Walter N. Kelley Co., 215 N.W. 397, 240 Mich. 257.

Miss.—Interstate Life & Accident Co. v. Pannell, 152 So. 635, 169 Miss. 50.

N.Y.—Cherwien v. Geiter, 5 N.E 2d 185, 272 N.Y. 165, affirming 279 N.Y.S. 553, 244 App.Div. 814—Kreitzman v. Indemnity Ins. Co. of North America, 15 N.Y.S.2d 25, 257 App Div. 627—Mergentime v. New England Telephone & Telegraph Co., 8 N.Y.S 2d 637, 255 App.Div. 628, reargument denied 10 N.Y.S.2d 674—Konieczny v. J. Kresse Co., 256 N.Y.S. 275, 234 App.Div. 517—Vander Horst v. Kittredge, 241 N. Y.S. 302, 229 App.Div. 126—Jackson v. Tallmadge, 214 N.Y.S. 528, 216 App.Div. 100, modifying 208 N.Y.S. 551, 124 Misc. 389, affirmed 158 N.E. 48, 246 N.Y. 133—Harmon v. Alfred Peats Co., 214 N.Y.S. 353, 216 App Div. 368, reversed on other grounds 154 N.E. 314, 243 N.Y. 473—Maxwell v. Thompson, 186 N.Y.S. 208, 195 App.Div. 616, motion denied 132 N.E. 881, 231 N.Y. 542, and affirmed 134 N.E. 596, 232 N.Y. 619—Shaw v. Blainey, 277 N.Y.S. 466, 154 Misc. 495—Gavin v. Malherbe, 261 N.Y.S. 373, 146 Misc. 51, affirmed 266 N.Y.S. 897, 240 App.Div. 779, affirmed 191 N.E. 486, 264 N.Y. 403—Universal Credit Co. v. Knights, 261 N.Y.S. 252, 145 Misc. 876—Community Hotel Corporation of Long Branch, N. J., v. Gilbert, 241 N.Y.S. 352, 135 Misc. 676—Stricks v. Siegel, 238 N.Y.S. 154, 135 Misc. 608, modified on other grounds 245 N.Y.S. 372, 138 Misc. 266—Brassell v. John Hancock Mut. Life Ins. Co. of Boston, Mass., 235 N.Y.S. 195, 134 Misc. 274—Carv v. Carman, 190 N.Y.S. 193, 116 Misc. 463—Hifler v. Calmac Oil & Gas Corporation, 10 N.Y.S.2d 531.

Or.—Cousineau v. Cousineau, 63 P 2d 897, 155 Or. 184, 109 A.L.R. 643.

R.I.—New England Auto Inv. Co. v. Andrews, 132 A. 883, 47 R.I. 299.

Tenn.—Kennard v. Illinois Cent. R. Co., 148 S.W.2d 1017—Chumley v. Louisville & Nashville R. Co., 5 Tenn.Civ.A. 73.

Wash.—Tatum v. Marsh Mines Consolidated, 184 P. 628, 108 Wash.

common law of the forum. In some cases, particularly where the law of the forum is statutory and the assumption of similarity is not made, the presumption has been indulged that the law in the sister state is that of the general common law,[35] including the law merchant,[36] and such part of the statutory law of England as existed before the separation and was generally adopted by the American states,[37] and, further, that the common law is the same in the several states.[38]

A presumption of similarity of law is especially indulged where the sister state was at one time part of the sovereignty of the forum,[39] or has adopted a similar system of jurisprudence.[40]

Many authorities hold that the presumption of uniformity may be indulged, in the absence of a showing to the contrary, with respect to the statutory law of the forum,[41] or with respect to the

367, affirmed 187 P. 410, 108 Wash 367.
Wis.—Switzer v. Weiner, 284 N.W. 509, 230 Wis. 599—Jensen v. Jensen, 279 N.W. 628, 228 Wis. 77.
12 C.J. p 200 note 79—22 C.J. p 151 notes 94, 95, p 152 note 97.

Equity

"Where nothing to the contrary appears, it will be presumed that the equity doctrine of a sister state is the same as that of the former where the courts of both states have an equity jurisdiction."—Johnston v. Gawtry, 83 Mo. 339, 342—22 C.J. p 151 note 94.

Interpretation of common law

In the absence of proof to the contrary, it is presumed that the courts of another state agree with those of the forum in the interpretation of the common law.—In re Smith's Estate, 242 N.Y.S. 464, 136 Misc. 863.

Absence of common-law right

A right not arising under the common law of the forum is not presumed to exist under common law of foreign state.—Downs v. Bedford, 146 S.E. 514, 39 Ga.App. 155.

Rule held unchanged by statute

Statute providing that unwritten or common law of another state may be proved as a fact by oral evidence was held not to change the rule stated in the text.—Cherwien v. Geier, 5 N.E.2d 185, 272 N.Y. 165, affirming 279 N.Y.S. 553, 244 App.Div. 814.

State other than original colonies

Since Florida was not one of the thirteen original colonies or derived from territory belonging thereto, a contract of that state would be construed by Georgia courts according to statutes and laws of Georgia, in absence of any pleaded particular statute of that state governing the construction of the contract, or any pleaded general statute adopting the common law of England.—Trustees of Jesse Parker Williams Hospital v. Nisbet, 7 S.E.2d 737, 189 Ga. 807.

State not having common law

(1) Louisiana is not a common-law state and no presumptions of similarity can be drawn as to its law.—Kennard v. Illinois Cent. R. Co., Tenn., 148 S.W.2d 1017.

(2) Since right to specific performance in Missouri comes from the equitable doctrine of the common law, it cannot be presumed that the laws as to specific performance are the same in Texas as in Missouri, because Texas had no common law.—Fidelity Loan Securities Co. v. Moore, 217 S.W. 286, 280 Mo. 315.

35. Ky.—Glanton v. Renner, 149 S.W.2d 748, 285 Ky. 808—Bank of Commerce v. Windmuller, 50 S.W. 548, 106 Ky. 395, 20 Ky.L. 1951.
La.—Martin v Boler, 13 La.Ann. 369.
N.J.—Title Guarantee & Trust Co. v. Trenton Potteries Co., 38 A. 422, 56 N.J.Eq. 441.
N.Y.—In re Rathbone's Estate, 11 N.Y.S.2d 506, 170 Misc. 1030.
Ohio.—Yeazel v. The Louisville & Nashville R Co., 32 Ohio C.A. 492.
Pa.—Prudential Loan Soc. v. Mayer, 25 Pa.Dist. 885.
8 C.J. p 87 note 97—22 C.J. p 155 note 14.
Presumption as to existence of common law in sister state or foreign country see Common Law § 20 a.

Rights of married persons

In the absence of proof to the contrary, it will be presumed by the courts of one state that the common law prevails in another state as to the rights of married persons.—Knippenberg v. Morris, 80 Ind. 540—30 C.J. p 508 note 76.

Validity of note

It cannot be presumed that note valid at common law was prohibited or not enforceable by any statute in state wherein executed and payable.—Arthur A. Bishop & Co. v. Thompson, 130 A. 701, 99 Vt. 17.

36. Mo.—Equitable L. Assur. Soc. v. National Bank of Commerce, App., 181 S.W. 1176.
8 C.J. p 87 note 95—22 C.J. p 156 note 15.

Bills and notes

(1) The law merchant as to bills and notes is presumed to be the same in other states as in the state where the action is brought.—Dubois v. Mason, 127 Mass. 37, 34 Am.R. 335.

(2) So in a suit on a bill or a note governed by foreign law the provisions of that law as to the allowance of days of grace will be presumed to be the same as those of the law merchant, in the absence of evidence to the contrary.—Reed v. Wilson, 41 N.J.Law 29—8 C.J. p 1002 note 62.

(3) Where it appears that the Uniform Negotiable Instruments Law has not been adopted in a sister state, the presumption is, in the absence of proof to the contrary, that the law of such sister state is the general law merchant as understood and applied in the forum prior to the adoption of said statute.—Continental Supply Co. v. Fisher Oil Co., 91 So. 287, 150 La. 890.

37. Ill.—Bradley v. Peabody Coal Co., 99 Ill.App. 427.

38. Mass.—Barber Asphalt Paving Co. v. Staples, 140 N.E. 262, 246 Mass. 40.
22 C.J. p 156 note 17.

39. N.C.—State v. Patterson, 24 N.C. 346, 38 Am.D. 699.
Ohio.—Moton v. Dewell, 32 Ohio Cir. Ct. 35.

40. Mo.—Tennent v. Union Cent. L. Ins. Co., 112 S.W. 754, 133 Mo.App. 345.
22 C.J. p 153 note 99.

41. Cal.—In re Morgan's Estate, 265 P. 241, 203 Cal. 569—Mercantile Acceptance Co. v. Frank, 265 P. 190, 203 Cal. 483, 57 A.L.R. 696—Lefrooth v. Prentice, 259 P. 947, 202 Cal. 215—Hurlbut v. Quigley, 180 P. 613, 180 Cal. 265—Hudson v. Von Hamm, 259 P. 374, 85 Cal.App. 323—Klaffki v. Kauffman, 198 P. 36, 52 Cal.App. 48.
Idaho.—Owen v. Taylor, 114 P.2d 258.
Ill.—People v. Schaedel, 173 N.E. 172, 340 Ill. 560, affirming 250 Ill. App. 409—Kincaid Trust & Savings Bank of Kincaid, Ill., v. Hawkins, 234 Ill.App. 64—Thoms v. Thoms, 222 Ill.App. 618—Lincoln v. Riley, 217 Ill.App. 571.
Contra Schaefer v. Dippel, 250 Ill. App. 184.
Iowa.—Pfeffer v. Corey, 233 N.W. 126, 211 Iowa 203—In re Warner's Estate, 229 N.W. 241, 209 Iowa 948.
Kan.—Mercado v. Nelson, 235 P. 123, 125, 118 Kan. 302, citing **Corpus Juris**—Werner, Mosiman & Co. v. Winzer, 202 P. 80, 109 Kan. 647.
La.—Succession of Gibson, 173 So. 185, 186 La. 723—Busby v. Busby, 122 So. 599, 168 La. 510—Brooks-Scanlon Co. v. Railroad Commission of Louisiana, 81 So. 727, 144

La. 1086, certiorari granted 39 S. Ct. 495, 250 U.S. 639, 64 L.Ed. 1184, reversed on other grounds 40 S. Ct. 183, 251 U.S. 396, 64 L.Ed. 323, and ordered on mandate 84 So. 443, 147 La. 24—Supervisor of Public Accounts of Louisiana v. Twelve Cases of Smoking Tobacco, App., 172 So. 364, 366, citing **Corpus Juris**—Holmes & Barnes v. Shawnee Milling Co., 5 La.App. 391.

Contra Consolidated Cos. v. Laws, 124 So. 775, 11 La.App. 676.

Mont.—McMahon v. Cooney, 25 P.2d 131, 95 Mont. 138.

Neb.—People's State Bank v. Smith, 231 N.W. 141, 120 Neb. 29—Franks v. Horrigan, 231 N.W. 27, 120 Neb. 1—First State Bank of Herrick v. Conant, 221 N.W. 691, 117 Neb. 562.

Ohio.—Young v. W. E. Hutton & Co., App., 31 N.E.2d 728—Baid's, Inc., v. Frankel, 10 N.E.2d 787, 56 Ohio App. 305.

Okl.—Hinds v. Atlas Acceptance Corporation, 63 P.2d 29, 31, 178 Okl. 474, citing **Corpus Juris**—Cherokee Public Service Co. v. Harry Cragin Lumber Co., 49 P.2d 723, 174 Okl. 67—Scanlon v. Klopfenstein, 3 P.2d 869, 152 Okl. 162.

Or.—Cousineau v. Cousineau, 63 P.2d 897, 155 Or. 184, 109 A.L.R. 643.

Pa.—Oberlin v. Parry, 134 A. 460, 287 Pa. 224—Riccardi Motor Car, Inc., v. Weinstein, 98 Pa.Super. 41.

Tenn.—Shepard & Gluck v. Thomas, 246 S.W. 836, 147 Tenn. 338—Hyder v. Hyder, 66 S.W.2d 235, 16 Tenn.App. 64.

Tex.—Abeel v. Weil, 283 S.W. 769, 115 Tex. 490—Edwards v. Keller, Civ.App., 133 S.W.2d 823, error dismissed, judgment correct—Andrews v. Hedrick Sav. Bank of Hedrick, Iowa, Civ.App., 103 S.W. 2d 838—Mauritz v. Schwind, Civ. App., 101 S.W.2d 1085, error dismissed—Hicks v. Rapides Grocery Co., Civ.App., 101 S.W.2d 1042—Brand v. Eubank, Civ.App., 81 S. W.2d 1023, error dismissed—Wheeler v. Lee, Civ.App., 53 S.W. 2d 648, set aside on other grounds Lee v. Wheeler, 84 S.W.2d 695, 126 Tex. 15—First Nat. Bank v. Friend, Civ.App., 23 S.W.2d 482—U. S. Fidelity & Guaranty Co. v. Richey, Civ.App., 18 S.W.2d 231, error refused—Ellis v. Emil Blum Co., Civ.App., 242 S.W. 1101—Golden Rod Oil Co. No. 1 v. Noble, Civ. App., 233 S.W. 524, dismissed for want of jurisdiction—Kinney v. Tri-State Telephone Co., Civ.App., 201 S.W. 1180, reversed on other grounds, Com.App., 222 S.W. 227.

Utah.—Shurtliff v. Oregon Short Line R. Co., 241 P. 1058, 66 Utah 161.

Wash.—Walnut Park Lumber & Coal Co. v. Roane, 17 P.2d 896, 171 Wash. 362—Williams v. Great Northern Ry. Co., 184 P. 340, 108 Wash. 344.

Wyo.—Wright v. Krouskop, 108 P.2d 262, 264, citing **Corpus Juris.**

22 C.J. p 154 note 6.

Particular statutes or statutory matters as to which a presumption of similarity has been indulged.

(1) Adoption.—Corison v. Williams, 208 P. 331, 58 Cal.App. 282.

(2) Anti-trust laws.—Byrd v. Crazy Water Co., Tex.Civ.App., 140 S. W.2d 334—J. R. Watkins Co. v. McMullan, Civ.App., 6 S.W.2d 823.

(3) Authority to sue.

La.—Mobley v. Hibernia Bank & Trust Co., 140 So. 251, 19 La.App. 414.

Tenn.—McWhorter v. Gibson, 84 S. W.2d 108, 19 Tenn.App. 152.

Tex.—Ferguson-McKinney Dry Goods Co. v. Garrett, Com.App., 252 S.W. 738, reversing, Civ.App., 235 S.W. 245.

(4) Broker's license.—Silverberg v. Baum, 273 P. 47, 95 Cal.App. 535

(5) Chiropractic.—Park v. Coulson, Tex.Civ.App., 139 S.W.2d 667.

(6) Community rights or property.

N.M.—Carron v. Abounador, 214 P. 772, 28 N.M. 491.

Tex.—Ruggles v. Seedig, Civ.App., 247 S.W. 650.

22 C.J. p 154 note 6 [d].

(7) Conditional sales.

Mont.—Harvey E. Mack Co. v. Ryan, 261 P. 283, 80 Mont. 524.

Tenn.—Great American Indemnity Co. v. Utility Contractors, 111 S. W.2d 901, 21 Tenn.App. 463.

Wis.—Defiance Mach. Works v. Gill, 175 N.W. 940, 170 Wis. 477.

(8) Continuance of corporate existence.—George D. Witt Shoe Co. v. Mills, 140 So. 578, 224 Ala. 500.

(9) Covenant as running with the land.—Platner v. Vincent, 202 P. 655, 187 Cal. 443.

(10) Decedents' estates.

Cal.—In re Foreman's Estate, 60 P. 2d 310, 16 Cal.App.2d 96—In re Moore's Estate, 47 P.2d 533, 7 Cal. App.2d 722, hearing denied 48 P.2d 28, 7 Cal.App.2d 722.

Tex.—Pendleton v. Hare, Com.App., 231 S.W. 334, reversing Hare v. Pendleton, Civ.App., 214 S.W. 948—Webb v. Reynolds, Com.App., 207 S.W. 914, reversing, Civ.App., 160 S.W. 152.

Wash.—In re Barclay's Estate, 95 P.2d 393, 1 Wash.2d 82.

22 C.J. p 154 note 6 [a].

(11) Divorce; alimony; custody of children.

Ill.—People v. Schaedel, 173 N.E. 172, 340 Ill. 560, affirming 250 Ill.App. 409.

Iowa.—Matson v. Matson, 173 N.W. 127, 186 Iowa 607.

Nev.—Foy v. Smith's Estate, 81 P.2d 1065, 58 Nev. 371.

Tex.—Bell v. Wedgworth, Civ.App., 73 S.W.2d 920, error refused—Floyd v. Fidelity Union Casualty Co., Civ.App., 13 S.W.2d 909, reversed on other grounds, Com.App., 24 S.W.2d 363, rehearing denied 39 S.W.2d 1091.

Utah.—Smith v. Smith, 291 P. 298, 77 Utah 60.

(12) Entry of judgment.—Oberlin v. Parry, 134 A. 460, 287 Pa. 224.

(13) Extradition laws.—Ex parte Pinkus, 25 S.W.2d 334, 114 Tex.Cr. 326.

(14) Insurance.

Iowa.—Sovereign Camp, W. O. W. v. Russell, 241 N.W. 395, 214 Iowa 39.

Neb.—Kernan v. Modern Woodmen of America, 232 N.W. 590, 120 Neb. 333.

(15) Interest rates.

Cal.—Nesbit v. MacDonald, 263 P. 1007, 203 Cal. 219.

Mont.—Kalman v. Treasure County, 275 P. 743, 84 Mont. 285.

Utah.—Gillespie v. Blood, 17 P.2d 822, 81 Utah 306.

Wyo.—H. E. Wright & Co. v. Douglas, 183 P. 786, 26 Wyo. 305.

(16) Legitimation of children.—In re Wray's Estate, 19 P.2d 1051, 93 Mont. 525.

(17) Limitations of actions.

Iowa.—Williams v. Burnside, 222 N. W. 413, 207 Iowa 239—Kellum v. Robinson, 188 N.W. 821, 193 Iowa 1277.

Tenn.—O'Brien v. Biles, 1 Tenn.App. 595.

22 C.J. p 154 note 6 [c].

(18) Merger of organizations.—Independent Order of Puritans v. Brown, Tex.Civ.App., 229 S.W. 939.

(19) Notice of time of trial.—Uplinger v. Yonkin, 190 P. 822, 47 Cal. App. 435.

(20) Performance bonds.—Pearson Lumber Co. v. Cooper, Tex.Civ.App., 54 S.W.2d 231, error refused.

(21) Recording of conveyances.—Hawkins v. Stoffers, 276 P. 452, 40 Wyo. 226, rehearing denied 278 P. 76, 40 Wyo. 226.

(22) Sale of evidences of debt.—Springhorn v. Roberts, 250 P. 1112, 77 Mont. 395—State v. American Bank & Trust Co. of Great Falls, Mont., 247 P. 336, 338, 76 Mont. 445, citing **Corpus Juris.**

(23) Service of process or other papers.

Cal.—In re Wiechers' Estate, 250 P. 397, 199 Cal. 523, certiorari denied Wiechers v. Wiechers, 47 S. Ct. 476, 273 U.S. 762, 71 L.Ed. 879.

Okl.—Royal Neighbors of America v. Fletcher, 227 P. 426, 99 Okl. 297.

Tex.—In re Keen's Estate, Civ.App., 77 S.W.2d 588—Moorhead v. Transportation Bank of Chicago, Ill., Civ. App., 62 S.W.2d 184.

(24) Traffic law.—Van Riper v. Constitutional Government League, 96 P.2d 588, 1 Wash.2d 635, 125 A.L.R. 1100.

constitutional law of the forum[42] and that of a sister state or territory. Other authorities, however, hold that there is no presumption as to what the statute law of a sister state is;[43] and, more particularly, they hold that there is no presumption of similarity of statute laws,[44] at least where the change from the common law is radical,[45] although the presumption may be indulged in the case of statutes which are declaratory of the common law.[46] It has been held that it is to be presumed that a statute of a sister state will be

(25) Venue.
Iowa.—Beach v. Youngblood, 247 N. W. 545, 215 Iowa 979.
Neb.—National Fidelity Life Ins. Co. v. Gordon, 264 N.W. 155, 130 Neb 130.

(26) Workmen's compensation—Freyman v. Day, 182 P. 940, 108 Wash. 71.

Construction or effect of similar statute

(1) It is presumed that the same construction is applicable to similar statutes of the sister state and of the forum—Howe v. Ballard, 89 N. W. 136, 113 Wis. 375.

(2) There is a presumption that effect of foreign statute is same as that of similar statute of the forum.—Kaplan v. Reid Bros., 285 P. 868, 104 Cal.App. 268.

Presumption of absence of law

In absence of a showing that there is any law in a sister state which would give its courts authority to alter decree with respect to past-due installments for support, the presumption must be indulged that there is no such law.—Boyer v. Andrews, 196 So. 825, 143 Fla. 462.

Exception in case of well known matter

No presumption that Missouri had a prohibition statute like that of Kansas, the forum, was indulged, where it was well known that Missouri was not a prohibition state.—Danciger v. Cooley, 157 P. 453, 98 Kan. 38, rehearing denied 158 P. 1119, 98 Kan. 484, affirmed 39 S.Ct. 119, 248 U.S. 319, 63 L.Ed. 266.

In Missouri

(1) The statute law of a noncommon-law state is presumed to be the some as the statute law of Missouri.—Industrial Acceptance Corporation v. Webb, App., 287 S.W. 657—Roy v. Kansas City, 224 S.W. 132, 204 Mo.App. 332.

(2) There is no presumption that the statute law of a common-law state is the same as the statute law of Missouri.—Rositzky v. Rositzky, 46 S.W.2d 591, 329 Mo. 662—Mississippi Cottonseed Products Co. v. First Nat. Bank in St. Louis, App., 142 S.W.2d 1106—Sisk v. Chicago, B. & Q. R. Co., App., 67 S.W.2d 830—Boyer v. North End Drayage Co., App., 67 S.W.2d 769—Industrial Acceptance Corporation v. Webb, App., 287 S.W. 657—Kissane v. Brewer, 232 S.W. 1106, 208 Mo.App. 244.

(3) Some cases have held, without express reference to the sister state as being a common-law state or not, that the law or statutes of such sister state are in accord with the law or statutes of Missouri.—Wooldridge v. Bryan, 270 S.W. 658, 307 Mo. 234—Bennett v. Lohman, 238 S.W. 792, 292 Mo. 477—Hill v Kansas City Rys. Co., 233 S.W. 205, 289 Mo. 193—Kinsley Bank of Kinsley, Kan., v Woods, App., 61 S.W.2d 384—Dunbar v. Iowa State Bank, 295 S.W. 835, 221 Mo App. 979—Rees v. Metropolitan Life Ins. Co, App., 251 S.W. 395—Stricker v. Metropolitan Life Ins. Co, App., 237 S.W. 894.

(4) It is not presumed that jurisdictional requirements exist, under the laws of a sister state, which do not exist under the law of Missouri.—Keena v. Keena, 10 S.W.2d 344, 222 Mo.App. 825.

42. Iowa.—Harris v. Harris, 215 N. W. 661, 205 Iowa 108.
Contra Droge El. Co. v. W. P. Brown Co., 151 N.W. 1048, 172 Iowa 4.
22 C.J. p 154 note 6 [e].

Conflicting presumption

Where a special act of another state is shown, the presumption in favor of the constitutionality of legislative acts will prevent a presumption that the constitution of the other state contains a prohibition against such acts, although there should be such a prohibition in the constitution of the forum.—Fidelity Ins., Trust & Safe Deposit Co. v. Nelson, 70 P. 961, 30 Wash. 340—22 C.J. p 156 note 29.

43. Ky.—Stewart's Adm'x v. Bacon, 70 S.W.2d 522, 253 Ky. 748.

Negotiable instruments law

It will not be presumed that a negotiable instruments law is in force in a sister state, but it will be presumed that the common law prevails.—Demelman v. Brazier, 79 N E. 812, 193 Mass. 588.

Taxation

In a proceeding to tax resident trustees on personal property, such as stocks and bonds, located in a foreign state and bequeathed by a foreign testator to residents of another foreign state, it cannot be presumed that there is any law in the state where the property is located which allows it to tax the property.—Welch v. Boston, 109 N.E. 174, 221 Mass. 155, Ann.Cas.1917D 946.

44. Me.—Greeley v. Greeley, 107 A. 296, 118 Me. 491.
Md.—Goldsborough v. Tinsley, 113 A. 861, 863, 138 Md. 411, citing **Corpus Juris.**
Mass.—John B. Frey Co. v. S. Silk, Inc, 140 N.E. 259, 245 Mass. 534
Mich.—Kling v. Fries, 33 Mich. 275.
N.Y.—Miller v. Vanderlip, 33 N.E.2d 51, 285 N.Y. 116, modifying 20 N. Y.S 2d 330, 259 App.Div. 624—Wilcox Silver Plate Co. v. Green, 9 Hun 347, affirmed 72 N.Y. 17—Brassell v. John Hancock Mut. Life Ins. Co. of Boston, Mass, 235 N.Y. S. 195, 134 Misc. 274—Bernstein v. Fuerth, 229 N.Y.S. 791, 132 Misc. 343—Thuna v. Wolf, 223 N.Y.S. 765, 130 Misc. 306, reversed on other grounds 228 N.Y.S. 658, 132 Misc. 56—Hifler v. Calmac Oil & Gas Corporation, 10 N.Y.S.2d 531.
N.D.—Douglas County State Bank v. Sutherland, 204 N.W. 683, 52 N.D. 617.
22 C.J. p 155 note 9.

Divorce laws

N.Y.—Pearson v. Pearson, 173 N.Y. S. 563, 104 Misc. 675.

Operation of motor vehicles

Ky.—Wilford v. Cooper, 98 S.W.2d 39, 266 Ky. 64.
N.Y.—Shaw v. Blainey, 277 N.Y.S. 466, 154 Misc. 495—Kemp v. Stephenson, 247 N.Y.S. 650, 139 Misc. 38.

Liability without negligence

It is not presumed that a sister state has enacted a statute like that of the forum making a railroad liable, without regard to negligence, for injuries to domestic animals.—Atchison, T. & S. F. R. Co. v. Betts, 15 P. 821, 10 Colo. 431.

Statutes presumed different

The statutes of other states are presumed to be different from the statutes of the forum if their judicial decisions are different from those of the forum.—Chavez v. Haynie, 225 P. 852, 75 Colo. 414.

In federal court

Where action for breach of contract was originally brought in federal court, there is no presumption that laws of state where contract was made are same as laws of state of forum.—Brown v. Ford Motor Co., C.C.A Okl., 48 F.2d 732.

45. Md—Dickey v. Pocomoke City Nat. Bank, 43 A. 33, 89 Md. 280.
N.Y.—Pearson v. Pearson, 173 N.Y. S. 563, 104 Misc. 675.

46. N.Y.—Standard Casing Co. v. California Casing Co., 135 N.E. 834, 233 N.Y. 413, reversing 188 N.Y.S. 358, 197 App.Div. 187.

given a construction in such state such as will enable those having claims thereunder to enforce them as therein provided.[47]

Foreign countries generally. In the case of a foreign country which has a common-law jurisprudence,[48] such as England[49] or Canada,[50] it is presumed that the law of such country, or at least its common law, corresponds with that of the forum. As to other countries, particularly those which have essentially different institutions, or which operate under the civil law, some authorities have refused to indulge a presumption of similarity;[51] thus, there is no presumption that the common law of the forum obtains in foreign countries whose jurisprudence is not based on the common law.[52] On the other hand, it has been presumed that even in such countries a contract creates liability,[53] and that liability exists in all foreign jurisdictions for rudimentary wrongs or torts;[54] further, in many cases a presumption of similarity has been extended to foreign countries without express reference to the system of jurisprudence there prevailing.[55] As to

Or.—Sterrett v. Stoddard Lumber Co., 46 P.2d 1023, 150 Or. 491.

47. N.Y.—Verdicchio v. McNab, etc., Mfg. Co., 164 N.Y.S. 290, 178 App. Div. 48.
22 C.J. p 156 note 32.

48. U.S.—Bonsalem v. Byron S. S. Co., C.C.A.N.Y., 50 F.2d 114, reversing, D.C., 43 F.2d 443.
Me.—Rose v. Osborne, 180 A. 315, 133 Me. 497.
N.Y.—Hongkong & Shanghai Banking Corporation v. Lazard-Godchaux Co. of America, 201 N.Y.S. 771, 207 App.Div. 174, motion denied 143 N.E. 761, 237 N.Y. 604, and affirmed 147 N.E 216, 239 N.Y. 610—Auerbach v. Grand Nat. Pictures, 29 N.Y.S.2d 747, 176 Misc. 1031.
22 C.J. p 153 note 3 [a].

49. U.S.—Greenough v. Munroe, D.C. N.Y., 2 F.Supp. 104.
N.Y.—Auerbach v. Grand Nat. Pictures, 29 N.Y.S 2d 747, 176 Misc. 1031—Castellani v. Castellani, 28 N.Y.S.2d 879, 176 Misc. 763—Ellis v. Kelsey, 195 N.Y.S. 126, 118 Misc. 763, affirmed 210 N.Y.S. 846, 214 App.Div. 784.
R.I.—Carr v. Railton, 18 A.2d 646, reargument denied 20 A.2d 374.
22 C.J. p 153 note 3 [a].

Particular statute is not presumed to exist in Great Britain.—Maia v. Lamport & Holt, 252 N.Y.S. 201, 141 Misc. 140.

50. U.S.—Fix v. International Bridge Co., C.C.A.N.Y., 117 F.2d 137.
Conn.—McLoughlin v. Shaw, 111 A. 62, 95 Conn. 102.
Ill.—Dempster v. Stephen, 63 Ill.App. 126.
Me.—Frost v. C. W. Cone Taxi & Livery Co., 139 A. 227, 126 Me. 409.
N.Y.—Munden v. McDaniel, 274 N.Y. S. 278, 152 Misc. 472.
Tex.—Woodbury v. Galveston, H. & S. A. Ry. Co., Civ.App., 209 S.W. 432, certiorari granted Galveston, H. & S. A. Ry. Co. v. Woodbury, 39 S.Ct. 493, 250 U.S. 637, 63 L.Ed. 1183, and reversed on other grounds 41 S.Ct. 114, 254 U.S. 357, 65 L.Ed. 301.

So as to Ontario
Ky.—Stewart's Adm'x v. Bacon, 70 S.W.2d 522, 253 Ky. 748.

Statutory law
Some authorities have refused to indulge a presumption of similarity as to the statutory law of Canada and that of a state.
U.S.—Gordon v. Commissioner of Internal Revenue, C.C.A., 75 F.2d 429.
Ky.—Stewart's Adm'x v. Bacon, 70 S.W.2d 522, 253 Ky. 748.
N.Y.—Arbury v. De Niord, 152 N.Y.S. 763.

51. U.S.—Bonsalem v. Byron S. S. Co., C.C.A.N.Y., 50 F.2d 114, reversing, D.C., 43 F.2d 443—Standard Oil Co. of New York v. Tampico Nav. Co., D.C.N.Y., 21 F.2d 795.
22 C.J. p 153 note 4.

Particular countries
(1) Brazil.—Maia v. Lamport & Holt, 252 N.Y.S. 201, 141 Misc. 140.
(2) Russia.
Mass.—Carmen v. Higginson, 140 N. E. 246, 245 Mass. 511.
N.Y.—In re Chinsky's Estate, 288 N. Y.S. 666, 159 Misc. 591—Dougherty v. National City Bank of New York, 285 N.Y.S. 491, 157 Misc. 849.
(3) Other countries see 22 C.J. p 153 note 4.

52. U.S.—Commissioner of Internal Revenue v. Hyde, C.C.A., 82 F.2d 174.
N.Y.—Russell v. Societe Anonyme Des Etablissements Aeroxon, 274 N.Y.S. 794, 242 App.Div. 801, affirmed 197 N.E. 185, 268 N.Y. 173—Christie v. Cerro de Pasco Copper Corporation, 211 N.Y.S. 143, 214 App.Div. 820, affirmed 154 N.E. 603, 243 N.Y. 557—Castellani v. Castellani, 28 N.Y.S.2d 879, 176 Misc. 763.
22 C.J. p 153 note 4.

53. Mass.—Parrot v. Mexican Cent. R. Co., 93 N.E. 590, 207 Mass. 184.
22 C.J. p 154 note 5.

Agreement of carriage
Court may assume that agreement of carriage, made in Italy, creates obligation under civil law, but cannot assume extent to which carrier may value goods thereunder.—E. Gerli & Co. v. Cunard S. S. Co., C.C.A.N.Y., 48 F.2d 115.

Insurance policy
In action on insurance policies, made and to be performed in Russia, presumption is that Russian law entitles insurer to whatever contract provides shall be given.—Sliosberg v. New York Life Ins. Co., 211 N.Y.S. 270, 125 Misc. 417, modified on other grounds 217 N.Y.S. 226, 217 App.Div. 685.

English rule as that of Europe
The rule in England as to construction of a charter party was presumed to represent the continental point of view.—Rederiaktiebolaget Atlanten v. Aktieselskabet Korn-Og Foderstof Kompagniet, N.Y., 40 S. Ct. 332, 252 U.S. 313, 64 L.Ed. 586, affirming Aktieselskabet Korn-Og Foderstof Kompagniet v. Rederiaktiebolaget Atlanten, 250 F. 935, 163 C.C. A. 185, Ann.Cas.1918C 491, which affirms, D.C., 232 F. 403.

54. U.S.—Bonsalem v. Byron S. S. Co., C.C.A.N.Y., 50 F.2d 114, reversing, D.C., 43 F.2d 443.

Support of children
It is presumed that, in all civilized countries, parents are obliged to support minor children.—Vogel's Case, 153 N.E. 175, 257 Mass. 3.

55. Cal.—Seth v. Lew Hing, 14 P.2d 537, 125 Cal.App. 729, rehearing denied 15 P.2d 190, 125 Cal.App. 729.
N.Y.—In re Marsland's Estate, 254 N.Y.S. 293, 142 Misc. 230—In re Klyszewski's Estate, 250 N.Y.S. 264, 140 Misc. 241—In re Mosley's Will, 247 N.Y.S. 520, 138 Misc. 847—In re Smith's Estate, 242 N.Y.S. 464, 136 Misc. 863.
22 C.J. p 153 note 3.

"There is no presumption that the law of foreign countries is unlike ours."—The Fort Gaines, D.C.Md., 18 F.2d 413, 414—The Hoxie, C.C.A. Md., 297 F. 189, 190, affirming, D.C., 291 F. 599, certiorari denied American Exp. Co. v. U. S., 45 S.Ct. 91, 266 U.S. 608, 69 L.Ed. 465.

Argentine Republic
The laws of the Argentine Republic relating to the purchase of a draft are presumably in accord with the law merchant as recognized in New York.—Scura v. National City Bank of New York, 177 N.Y.S. 75, 107 Misc. 93.

some countries the authorities are not in entire agreement.[56]

Nature and strength of presumption; judicial notice. The presumption of similarity of the laws of another state has been said to be nothing more than a rule of procedure which places on the party claiming dissimilarity the burden of so proving.[57] A presumption of similarity of common law or statute law will obtain only in the absence of judicial cognizance as to such law,[58] or of pleading and proof as to such law, by direct or circumstantial evidence.[59] The presumption that the law of a sister state is the same as that of the forum may be rebutted by decisions of the highest court of the sister state,[60] or by proof as to the statutes of such state on the subject.[61]

Penalty; forfeiture; avoidance of transaction. An assumption of similarity will not be indulged

Canada
La.—Doiron v. Vacuum Oil Co., 113 So. 748, 164 La. 15.
Ecuador
N.Y.—In re Dumarest's Estate, 262 N.Y.S. 450, 146 Misc. 442.
Guatemala
Cal.—Christ v. Superior Court in and for City and County of San Francisco, 296 P. 612, 211 Cal. 593.
Peru
U.S.—Heredia v. Davies, C.C.A.Va., 12 F.2d 500, modifying, D.C., The Apurimac, 7 F.2d 741.
56 C.J. p. 929 note 59 [a].
Scotland
In the absence of proof to the contrary, it has been presumed that the commercial law of Scotland was the same as that of the forum.—Chase v. Alliance Ins. Co., 9 Allen, Mass., 311.

56. Cuba
(1) It has been held that no presumption of similarity is indulged with respect to the law of Cuba, a country not under the common law.—Cuba R. Co. v. Crosby, N.J., 32 S. Ct. 132, 222 U.S. 473, 56 L.Ed. 274, 38 L.R.A.,N.S., 40, reversing 170 F. 369, 95 C.C.A. 539, affirming, C.C., Crosby v. Cuba R. Co., 158 F. 144—22 C.J. p. 153 note 4.

(2) However, such a presumption has been indulged.—Robert Reis & Co. v. New York Trust Co., 239 N.Y.S. 568, 136 Misc. 141.

France
(1) Presumption of similarity indulged.
Del.—Bouree v. Trust Francais des Actions de la Franco-Wyoming Oil Co., 127 A. 56, 14 Del.Ch. 332.
N.Y.—Gregg v. Gregg, 231 N.Y.S. 221, 133 Misc. 109—Revillon v. Demme, 185 N.Y.S. 443, 114 Misc. 1.

(2) Presumption not indulged.—Barrielle v. Bettman, D.C.Ohio, 199 F. 838.

Germany
(1) The mode of executing a will is not presumed to be the same in Germany, a non-common-law jurisdiction, as in Maryland.—In re De Garmendia's Estate, 125 A. 897, 146 Md. 47.

(2) However, it has been indicated that in some respects the laws of Germany may, in the absence of proof, be assumed similar to those of the forum.—In re Stephani's Estate, 300 N.Y.S. 813, 164 Misc. 240.

Italy
(1) The presumption has been indulged that the law of Italy as to a maritime lien for demurrage is the same as that of the United States.—The Arizpa, C.C.A.Md., 63 F.2d 42, certiorari denied U. S. v. Consolidation Coal Co., 54 S.Ct. 66, 290 U.S. 648, 78 L.Ed. 562.

(2) On the other hand, there has been a refusal to presume that Italian law as to the validity of a marriage by proxy corresponded with the law of the forum.—Cosulich Societa Triestina Di Navigazione v. Elting, C.C.A.N.Y., 66 F.2d 534.

Mexico
(1) Presumption of similarity indulged.
U.S.—Mexican Cent. R. Co. v. Glover, Tex., 107 F. 356, 46 C.C.A. 334.
Ariz.—Wells Fargo & Co., Express, S. A., v. Tribolet, 50 P.2d 878, 46 Ariz. 311.
Cal.—In re Jones, 201 P. 944, 54 Cal. App. 423.
Ohio.—Bobala v. Bobala, App., 33 N.E.2d 845.
Tex.—Mexican Cent. R. Co. v. Olmstead, Civ.App., 60 S.W. 267, citing Mexican Nat. R. Co. v. Jackson, 33 S.W. 857, 89 Tex. 107, 59 Am.S.R. 28, 31 L.R.A. 276 and Armendiaz v. De la Serna, 40 Tex. 291.
Wash.—Dailey v. Dailey, 282 P. 830, 154 Wash. 499.
22 C.J. p. 153 note 3 [d].

(2) Presumption not indulged.
Mass.—Parrot v. Mexican Cent. R. Co., 93 N.E. 590, 207 Mass. 184, 34 L.R.A.,N.S., 261.
Mo.—Booth v. Scott, 205 S.W. 633, 276 Mo. 1.
N.Y.—Lucia Min. Co. v. Evans, 131 N.Y.S. 280, 146 App.Div. 416.
Norway
(1) Presumption of similarity indulged.—The Hanna Nielsen, D.C. Wash., 25 F.2d 984.

(2) Presumption not indulged.—The Samnanger, D.C.Ga., 298 F. 620.

57. Or.—Cousineau v. Cousineau, 63 P.2d 897, 155 Or. 184, 109 A.L.R. 643.

58. U.S.—Cuba R. Co. v. Crosby, N. J., 32 S.Ct. 132, 222 U.S. 473, 56 L.Ed. 274, 38 L.R.A.,N.S., 40.
Mo.—Wade v. Boone, 168 S.W. 360, 184 Mo.App. 88.
Judicial cognizance of law of other jurisdictions see supra §§ 18–21.
Effect of judicial notice statute
Where attention of the court is not called to statute or decision of another state, parties cannot take advantage of statute providing that the courts of the forum shall take judicial notice of foreign laws, and it will be presumed that law of other state on subject in question is same as that of the forum, or at least the same as the common law of the forum.—Hanson v. Hanson, 191 N.E. 673, 287 Mass. 154, 93 A.L.R. 701—Seemann v. Eneix, 172 N.E. 243, 272 Mass. 189.

59. Iowa.—Woodard v. Security Ins. Co. of New Haven, Conn., 207 N.W. 351, 201 Iowa 378.
Ky.—Crawford v. Ruby, 275 S.W. 517, 210 Ky. 166.
N.Y.—Walgreen Co. v. Diamond, 292 N.Y.S. 513, 249 App.Div. 387.
22 C.J. p. 151 note 92.
Construction of common law
To overcome the presumption that the construction of the common law in another state is the same as that in the forum, such other construction must be pleaded and proved.—Illinois Cent. R. Co. v. Ryan, Tex.Civ.App., 214 S.W. 642.
Standard form of insurance policy
Where a statute of a sister state, requiring a standard form of fire insurance policy, has been pleaded, it is not presumed that such sister state has another statute which has not been pleaded, and which would be contrary in part to the provisions of the standard policy.—Woodard v. Security Ins. Co. of New Haven, Conn., 207 N.W. 351, 201 Iowa 378.

60. Pa.—Bayuk Bros. v. Wilson Martin Co., 81 Pa.Super. 195.

61. Cal.—In re Hunsicker, 223 P. 411, 65 Cal.App. 114.
Nonexistence of statute
A presumption of similarity of statute law is overcome by proof of the nonexistence of such statute in the sister state.—Ruggles v. Seedig, Tex.Civ.App., 247 S.W. 650.

where to do so would impose a penalty,[62] or work a forfeiture;[63] and no assumption will be made regarding the law of a foreign country which would avoid a transaction.[64]

Presumption of continuance. In general, where similarity of the law of a foreign jurisdiction, or of a provision of the foreign law, is established, such similarity or provision of law will be assumed to continue to exist;[65] so this presumption of continuance is applied where a similarity of law has been shown[66] or is recognized or assumed to exist,[67] as in case of a former unity of territory,[68] or where a particular rule, statutory[69] or unwritten,[70] has been shown to be part of the law of a foreign country[71] or a sister state.[72] The repeal of a statute by the legislature of the forum carries no implication of the repeal of a similar statute in the foreign state.[73]

The court will presume that the common law has remained unchanged in England since the separation of the United States from that country.[74]

Disabilities and privileges of coverture. According to some authorities, if the statute of the state where the contract of a married woman was made is not proved, it will be presumed that the common-law rule prevails in that state.[75] Other authority holds that in the absence of contrary proof, the court will not presume that the common law prevails in another jurisdiction,[76] but will presume that statutory law similar to its own regulating the rights of married women prevails.[77]

§ 134. Legality or Illegality

There is a presumption in favor of legality and of intent to comply with the law.

There is a presumption in favor of legality and compliance with the law,[78] and against illegali-

62. Cal.—Klaffki v. Kauffman, 198 P. 36, 38, 52 Cal.App. 48, citing **Corpus Juris.**
Tenn.—Brakebill & Hamilton v. South Knoxville Contracting & Const. Co., 14 Tenn.App. 531.
22 C.J. p 153 note 1.

63. Tenn.—Brakebill & Hamilton v. South Knoxville Contracting & Const. Co., supra.
22 C.J. p 153 note 2, p 155 note 11.

64. Ala.—Western Union Tel. Co. v. Way, 4 So. 844, 83 Ala. 542.
Ill.—Smith v. Whitaker, 23 Ill. 367.

65. Wash.—State ex rel. Grismer v. Merger Mines Corporation, 101 P. 2d 308, 3 Wash.2d 417.
22 C.J. p 156 note 27.

66. N.Y.—In re Huss, 27 N.E. 784, 126 N.Y. 537, 12 L.R.A. 620.
22 C.J. p 156 note 20.

67. La.—Graham v. Williams, 21 La. Ann. 594.

68. N.Y.—Stokes v. Macken, 62 Barb. 145.

69. Mass.—Allied Furriers' Corporation v. Lisker, 138 N.E. 571, 244 Mass. 411.
Mont.—Walker Motor Exchange v. Lindberg, 284 P. 270, 86 Mont. 513.
Tex.—McGee v. Stark, Civ.App., 127 S.W.2d 589, error dismissed, judgment correct.
Wash.—State ex rel. Grismer v. Merger Mines Corporation, 101 P.2d 308, 3 Wash.2d 417.
22 C.J. p 156 note 23.

Uniform act

Where a sister state has adopted the Uniform Negotiable Instruments Act, it may be presumed that its terms are the same as those in the original uniform act.—Shepard v. Hilton, 163 A. 805, 11 N.J.Misc. 8.

70. Mo.—Wade v. Boone, 168 S.W. 360, 184 Mo.App. 88.
22 C.J. p 156 note 24.

71. Tex.—Martinez v. Gutierrez, Com.App., 66 S.W.2d 678, affirming Gutierrez v. Martinez, Civ.App., 37 S.W.2d 833.
22 C.J. p 156 note 25.

72. Ga.—Seaboard Air Line R. Co. v. Phillips, 43 S.E. 494, 117 Ga. 98.
22 C.J. p 156 note 26.

73. La.—Ex p. Lafonta, 2 Rob. 495.

74. N.Y.—Stokes v. Macken, 62 Barb. 145.

75. Ga.—Shores-Mueller Co. v. Bell, 94 S.E. 83, 21 Ga.App. 194.
30 C.J. p 729 note 77.

76. Kan.—Furrow v. Chapin, 13 Kan. 107.

77. Kan.—Furrow v. Chapin, supra.

78. U.S.—Fidelity & Deposit Co. of Maryland v. Grand Nat. Bank of St. Louis, C.C.A.Mo., 69 F.2d 177, reversing, D.C., 2 F.Supp. 666—Sutherland v. Behn, Meyer & Co., D.C., 33 F.2d 643, certiorari denied Behn, Meyer & Co. v. Sutherland, 50 S.Ct. 38, 280 U.S. 589, 74 L.Ed. 638.
Cal.—Black v. Southern Pac. Co., 12 P.2d 981, 124 Cal.App. 321—Patterson v. Southern Trust Co., 251 P. 938, 80 Cal.App. 411—Ehlers v. Bihn, 235 P. 673, 71 Cal.App. 479.
Colo.—New York Life Ins. Co. v. Haru Fukushima, 220 P. 994, 74 Colo. 236.
Ga.—Beavers v. Le Sueur, 3 S.E.2d 667, 188 Ga. 393—Georgia Casualty Co. v. McRitchie, 166 S.E. 49, 45 Ga.App. 697—Southern Brighton Mills v. Taber Mill, 162 S.E. 515, 44 Ga.App. 513—Suddath v. Blanchard & Calhoun, 146 S.E. 798, 39 Ga.App. 262—White County Bank v. Clermont State Bank, 140 S.E. 767, 37 Ga.App. 268.
Ind.—Toni v. Kingan & Co., 15 N.E. 2d 80, 214 Ind. 611—Sasse v. Newburgh Light & Water Co., 169 N.E. 880, 90 Ind.App. 700.
Ky.—Howard v. Mitchell, 105 S.W. 2d 128.
La.—Woodard v. Johnson, 152 So. 65, 178 La. 501—Hamilton v. Lee, App., 144 So. 249.
Mass.—Broughton v. Boston & M. R. R., 194 N.E. 816, 290 Mass. 80—Janevesian v. Esa, 174 N.E. 279, 274 Mass. 231—Jubilee Yacht Club v. Gulf Refining Co., 140 N.E. 280, 245 Mass. 60.
Miss.—Mississippi Power Co. v. Sellers, 133 So. 594, 160 Miss. 513—Alabama Great Southern Ry. Co. v. F. A. Hulett & Son, 131 So. 814, 159 Miss. 333.
Mo.—Missouri Power & Light Co. v. Creed, App., 32 S.W.2d 783, transferred, see 30 S.W.2d 605, 325 Mo. 1194.
N.Y.—Lee v. City Brewing Corporation, 18 N.E.2d 628, 279 N.Y. 380, reversing 4 N.Y.S.2d 773, 254 App. Div. 779—Longley v. Coons, 280 N.Y.S. 17, 244 App.Div. 391, affirmed 198 N.E. 571, 268 N.Y. 712—Lundy v. Orr, 199 N.Y.S. 480, 205 App. Div. 296—In re Seymour, 185 N.Y.S. 373, 113 Misc. 421.
Pa.—Philadelphia Real Estate Inv. Corporation v. Frazier, 29 Del.Co. 460.
S.D.—Grinde v. Dakota Trust & Savings Bank, 222 N.W. 670, 54 S.D. 175, citing **Corpus Juris.**
Tenn.—Snyder Bros., General Agency, v. Morgan, App., 141 S.W.2d 508.
Tex.—First Nat. Bank v. First State Bank of Jacksonville, Com.App.,

ty;[79] conversely, there is no presumption in favor of illegality, or violation of statute,[80] or against legality.[81] In other words, facts consistent with legality are presumed to exist,[82] and where a situation is explainable on the basis of legality it will be assumed that such is the true explanation.[83] These principles present a rule of administration that he who claims the existence of illegality must prove it.[84]

With respect to an intent to obey or violate the law, the same principles obtain; that is, the presumption is in favor of an intent to obey the law,[85] and against any intent to violate it;[86] conversely,

291 S.W. 206, affirming, Civ.App., 269 S.W. 154—Haynes v. Western Union Telegraph Co., Com.App., 231 S.W. 361, reversing Western Union Telegraph Co. v. Haynes, Civ.App., 212 S.W. 260—Wichita Falls & S. R. Co. v. Lindley, Civ.App., 143 S.W.2d 428, error dismissed, judgment correct—Kent v. National Supply Co. of Texas, Civ.App., 36 S.W.2d 811, error refused.

Vt.—Capital Garage Co. v. Powell, 118 A. 524, 96 Vt. 145.

Wis.—State v. Wisconsin Real Estate Brokers' Board, 211 N.W. 292, 192 Wis. 396.

22 C.J. p 147 note 59.

Presumption of innocence see supra § 130.

Statutory presumption of obedience of law.—McMahon v. Cooney, 25 P.2d 131, 95 Mont. 138.

License to drive

A driver of motor vehicle involved in accident is presumed to have obeyed law making it misdemeanor to drive such vehicle without driver's license, in absence of evidence that he did not have license.—Head v. Wilson, 97 P.2d 509, 36 Cal.App.2d 244.

Children attending school outside of district will be presumed to have been attending in accordance with statutory authority.—Alexander v. State, 127 So. 696, 158 Miss. 177, followed in State ex rel. Mabry v. Alexander, 127 So. 699.

Particular statutes presumed followed

(1) Fair Labor Standards Act.—Fleming v. Bernardi, D.C.Ohio, 1 F.R.D. 624.

(2) Statutes regulating practice of dentistry.

Cal.—Messner v. Board of Dental Examiners of California, 262 P. 58, 87 Cal.App. 199.

La.—State ex rel. Louisiana State Dental Soc. v. Louisiana State Board of Dentistry, 150 So. 292, 177 La. 1112.

(3) Acts regulating securities.

U.S.—Planters' Operating Co. v. Commissioner of Internal Revenue, C.C.A., 55 F.2d 583.

Ga.—Tomberlin v. Waycross Commercial Hotel Co., 152 S.E. 300, 41 Ga.App. 77, certiorari denied Waycross Commercial Hotel Co. v. Tomberlin, 160 S.E. 92, 173 Ga. 224.

Mont.—Hodgkiss v. Northland Petroleum Consol., 67 P.2d 811, 104 Mont. 328.

(4) Statute concerning partnerships doing business under a fictitious name.—Crisp v. Nunn, 47 P.2d 139, 173 Okl. 203—Hill v. Paige Motor Co., 253 P. 97, 123 Okl. 254.

Presumption as evidence

The presumption that the law has been obeyed is evidence, at least until rebutted.

Cal.—Northwestern Pac. R. Co., 93 P.2d 821, 34 Cal.App.2d 451.

Or.—Coates v. Marion County, 189 P. 903, 96 Or. 334.

79. Ill.—Stephens v. Collison, 161 N.E. 68, 330 Ill. 48.

Mo.—Produce Exch. Bank v. North Kansas City Development Co., App., 212 S.W. 898.

N.C.—Williams v. Greensboro Fire Ins. Co., 185 S.E. 21, 209 N.C. 765.

Okl.—Young v. Stephenson, 200 P. 225, 82 Okl. 239, 24 A.L.R. 978.

Tex.—Citizens' Nat. Bank of Abilene v. Overstreet, Civ.App., 77 S.W.2d 250, error refused.

22 C.J. p 147 note 56.

80. U.S.—Fleming v. Dierks Lumber & Coal Co., D.C.Ark., 39 F. Supp. 237.

Ala.—Home Ins. Co. of New York v. Scharnagel, 148 So. 596, 227 Ala. 60—Walls v. Decatur Fertilizer Co., 111 So. 214, 215 Ala. 426.

Cal.—Walker v. Kimball Fruit Co., 289 P. 623, 209 Cal. 629—Brooks v. Sessagesimo, 34 P.2d 766, 139 Cal.App. 679.

Iowa.—Kutchera v. Graft, 184 N.W. 297, 191 Iowa 1200, 26 A.L.R. 1257.

La.—Laborde v. Louisiana R. & Nav. Co., 2 La.App. 331.

Mo.—Sebastian County Coal & Mining Co. v. Mayer, 274 S.W. 770, 310 Mo. 104—Nomath Hotel Co. v. Kansas City Gas Co., 223 S.W. 975, 204 Mo.App. 214.

N.D.—Lindberg v. Burton, 171 N.W. 616, 41 N.D. 587.

Okl.—Foreman v. Chicago, R. I. & P. Ry. Co., 74 P.2d 350, 181 Okl. 259.

Or.—Miller v. Ashley & Rumelin, 271 P. 596, 127 Or. 215.

Pa.—Pickel v. Hoffner, 27 North.Co. 166.

Tenn.—Auburn Nashville Company v. Graham, 13 Tenn.App. 444.

Tex.—Jasper State Bank v. Goodrich, Civ.App., 107 S.W.2d 600, error dismissed—Towns v. Traders & General Ins. Co., Civ.App., 107 S.W.2d 460—Spencer v. Rhea Finance Co., Civ.App., 62 S.W.2d 631, error dismissed.

Wis.—Nygaard v. Wadhams Oil Co., 284 N.W. 577, 231 Wis. 236.

22 C.J. p 147 note 58.

Forgery

There is no presumption that a person will commit forgery.

Miss.—Hart v. Moore, 158 So. 490, 171 Miss. 838.

Okl.—Oil State Refining Co. v. Bryant, 236 P. 431, 110 Okl. 83.

81. Mo.—Allen v. Jessup, 192 S.W. 720.

22 C.J. p 147 note 57.

82. Okl.—Cyr v. Walker, 116 P. 931, 29 Okl. 281, 35 L.R.A.,N.S., 795.

22 C.J. p 148 note 60.

83. U.S.—The Enos, D.C.Wash., 24 F.Supp. 387.

Iowa.—Golf View Realty Co. v. Sioux City, 269 N.W. 451, 454, 222 Iowa 433, quoting **Corpus Juris.**

Tex.—Gilley v. Ætna Life Ins. Co., Com.App., 35 S.W.2d 136, reversing Ætna Life Ins. Co. v. Gilley, Civ.App., 12 S.W.2d 821, and instructions conformed to 41 S.W.2d 1046.

22 C.J. p 148 note 61.

84. Iowa.—Golf View Realty Co. v. Sioux City, 269 N.W. 451, 454, 222 Iowa 433, quoting **Corpus Juris.**

Minn.—Banner Grain Co. v. Burr Farmers' Elevator & Supply Co., 202 N.W. 740, 162 Minn. 334.

22 C.J. p 148 note 62.

85. N.Y.—Berkey v. Third Ave. Ry. Co., 155 N.E. 58, 244 N.Y. 84, 50 A.L.R. 599, reversing 217 N.Y.S. 156, 217 App.Div. 504, motion denied 155 N.E. 914, 244 N.Y. 602, 50 A.L.R. 599.

Pa.—Rau v. Wilkes-Barre & E. R. Co., 167 A. 230, 311 Pa. 510.

Tex.—Nevels v. Harris, 102 S.W.2d 1046, 129 Tex. 190, 109 A.L.R. 1464, affirming, Civ.App., 95 S.W.2d 1315.

86. Cal.—Alphonzo E. Bell Corporation v. Bell View Oil Syndicate, 76 P.2d 167, 24 Cal.App.2d 587, followed in 76 P.2d 166, 24 Cal.App.2d 746, 76 P.2d 166, 24 Cal.App.2d 747, and 76 P.2d 166, 24 Cal.App.2d 748.

Ky.—Boden v. Harter, 41 S.W.2d 920, 240 Ky. 138.

La.—Goldsmith v. Parsons, App., 161 So. 879, on remand 161 So. 175, 182 La. 122, and affirming, App., 156 So. 822, reinstating 154 So. 68.

N.C.—Bundy v. Commercial Credit Co., 157 S.E. 860, 200 N.C. 511.

there is no presumption of intent to violate the law.[87]

Although the exact order in which acts took place may be shown if required by the interests of justice,[88] it will be assumed, in the absence of evidence to the contrary, that the order in which acts are done is that which is essential to their legal operation;[89] in other words, where an act is done which can be done legally only after the performance of some prior act, proof of the later act carries with it a presumption of due performance of the prior act.[90] In an action on a contract, the validity of which depends on whether one of the parties was licensed or authorized to transact the particular business to which the contract related, it will be presumed that he was duly authorized.[91]

In applying the foregoing principles, presumptions have been indulged in favor of the legality of particular agreements or instruments[92] and their purposes,[93] the purposes of an organization,[94] the conduct of a business,[95] the activities of a charitable or religious corporation,[96] the issuance of bonds,[97] the possession of various documents or instruments,[98] and the possession of, or an entry on, land.[99]

Right to rely on presumption. In general, every person has a right to presume that every other person will perform his duty and obey the law.[1]

Strengthening or rebuttal of presumption. The presumption of compliance with the law may be fortified by evidence.[2] On the other hand, except

87. U.S.—Rookwood Pottery Co. v. Commissioner of Internal Revenue, C C A., 45 F.2d 43.
Ga.—Morton v. Talmadge, 144 S.E. 111, 166 Ga. 620.

Performance of contract

There is no presumption that the parties to a contract which can be performed legally intend to perform it in an illegal manner.—Crawford v. Imperial Irr. Dist., 253 P. 726, 200 Cal. 318.

88. Wis.—Knowlton v. Culver, 2 Pinn 243, 1 Chandl. 214, 52 Am. D 156.

89. Cal.—H. D. Roosen Co. v. Pacific Radio Pub. Co., 11 P.2d 873, 123 Cal.App. 525
Tex.—Slaughter v. Qualls, Civ.App., 149 S.W.2d 651, error granted.
22 C.J. p 148 note 65.

Conditions precedent to exercise of power

It is presumed that the conditions precedent to the valid exercise of a power of sale have been complied with.
Miss.—Melchor v. Casey, 161 So. 692, 173 Miss. 67.
N.C.—Pearce v. Watkins, 14 S.E.2d 653, 219 N.C. 636.

Procurement of franchise

Court would not presume that utilities corporation proceeded to erect transmission line on highway without making an application and procuring franchise.—Swartzwelter v. Iowa Southern Utilities Corporation, 250 N.W. 121, 216 Iowa 1060.

90. U.S.—American Ry. Express Co. v. Lindenburg, 43 S.Ct. 206, 260 U.S. 584, 67 L.Ed. 414, reversing Lindenburg v. American Ry. Express Co., 106 S.E. 884, 88 W.Va. 439—Sutherland v. Behn, Meyer & Co., D.C., 33 F.2d 643, certiorari denied Behn, Meyer & Co. v. Sutherland 50 S.Ct. 38, 280 U.S. 589, 74 L.Ed. 638.
Mo.—Hartwell v. Parks, 144 S.W. 793, 240 Mo. 537.

91. Mo.—American Ins. Co. v. Smith, 73 Mo. 368.
22 C.J. p 148 note 63.

License as collateral question

In cases where the question of a license arises only collaterally, as in a suit by one of whom the license is required to recover fees, commissions, or other compensation, the presumption is that a license was procured.—Bird v. Trench, 240 Ill.App. 363.

92. Ill.—Board of Education of City of Rockford v. City of Rockford, 24 N.E.2d 366, 372 Ill. 442.
Ky.—Clark County Const. Co. v. State Highway Commission, 58 S.W.2d 388, 248 Ky. 158.
N.J.—O'Gorman & Young v. Phœnix Assur. Co., Limited, of London, England, 146 A. 370, 105 N.J.Law 642, affirmed O'Gorman & Young v. Hartford Fire Ins. Co., 51 S.Ct. 130, 282 U.S. 251, 75 L.Ed. 324, 72 A.L.R. 1163
Okl.—Winnebago State Bank v. Hall, 260 P. 497, 127 Okl. 215.
8 C.J. p 1002 notes 63, 64—22 C.J. p 147 note 59 [c].
Presumption of legality of contracts generally see Contracts § 585.

93. N.Y.—Walsh v. Gray, 212 N.Y.S. 230, 214 App.Div. 296.
Wis.—In re Horkan's Estate, 214 N.W. 438, 193 Wis. 286.

94. N.Y.—Michaels v. Hillman, 183 N.Y.S. 195, 112 Misc. 395.

95. U.S.—Fidelity & Deposit Co. of Maryland v. Grand Nat. Bank of St. Louis, C.C.A.Mo., 69 F.2d 177, reversing, D.C., 2 F.Supp. 666.
Pa.—Commonwealth ex rel. Schnader v. Keystone Indemnity Exchange, 47 Dauph.Co. 7.
Presumptions as to corporate acts and records see infra § 150.

Mining of coal

Absent proof to contrary, presumption is that mining and carrying away of coal was done by authority of owner, since otherwise it would be a criminal offense.—Brennan v. Pine Hill Collieries Co., 167 A. 776, 312 Pa. 52.

96. N.Y.—St. Malachy's Home v. Hylan, 200 N.Y.S. 856, 121 Misc. 344.

97. Tenn.—Storie v. Norman, 130 S.W.2d 101, 174 Tenn. 647.

98. Mass.—Glover v. Waltham Laundry Co., 127 N.E. 420, 235 Mass. 330.
N.Y.—Smith v. Wagner, 174 N.Y.S. 205, 106 Misc. 170.
Wis.—Seffens v. Carisch, 208 N.W. 905, 190 Wis. 144.

Savings bank books

N.Y.—Davlin v. Title Guarantee & Trust Co., 241 N.Y.S. 712, 229 App. Div. 269, affirmed 175 N.E. 312, 255 N.Y. 559.

99. U.S.—La Terre Co. v. Billiot's Shell Island, C.C.A.La., 103 F.2d 53, affirming, D.C., 20 F.Supp. 106.
Cal.—Patterson v. Southern Trust Co., 251 P. 938, 80 Cal.App. 411—Grossman v. Yip Wing, 216 P. 634, 62 Cal.App. 121.
Mont.—McLaughlin v. Bardsen, 145 P. 954, 50 Mont. 177.
Pa.—Consolidation Coal Co. v. Friedline, 3 A.2d 200, 134 Pa.Super. 1.

1. Cal.—Pinello v. Taylor, 17 P.2d 1039, 128 Cal.App. 508.
Tenn.—P. & B. Storage & Transfer Co. Inc. v. Lane, 11 Tenn.App. 237.

Mortgagee accepting conveyance of premises in satisfaction of mortgage debt could presume that mortgagor would not commit crime by failing to notify mortgagee of liens against the premises.—McCraney v. Morris, 170 S.E. 276, 170 S.C. 250, 95 A.L.R. 622.

2. U.S.—Smith v. Pacific Alaska Airways, C.C.A.Alaska, 89 F.2d 253, certiorari denied Pacific Alaska Airways v. Smith, 58 S.Ct. 20, 302 U.S. 700, 82 L.Ed. 541.

as statutes may otherwise prescribe,[3] the presumption is rebuttable.[4] It may be overcome by evidence which only balances it, a preponderance of the evidence not being required.[5]

§ 135. Love of Life and Avoidance of Danger

a. In general
b. Suicide

a. In General

There are presumptions favoring love of life, avoidance of harm or danger, and with some limitations, exercise of ordinary care.

In the absence of evidence to the contrary, there is a presumption that a person possesses a love of life and the instinct to preserve it.[6] So, it is presumed that no one will voluntarily do an act which places his own life[7] or the lives of others[8] in danger; on the contrary, the presumption is that a person will endeavor to avoid danger.[9]

Exercise of care. It is sometimes stated broadly that there is a presumption that a person killed or injured, or one encountering peril, was exercising ordinary care at the time,[10] the presumption being based on the instinct of self-preservation and the disposition of men to avoid personal harm,[11] or, in some jurisdictions, on statute.[12] With these statements, however, should be contrasted the principles set forth in the C.J.S. title Negligence §§ 205, 206, also 45 C.J. p 1151 note 10–p 1162 note 42, as to the absence of such a presumption in instances where a party has the burden of proving his freedom from contributory negligence. In any event, this presumption is prima facie only,[13] and rebuttable;[14] it ceases on a showing of facts nega-

3. **Registration of deed**
Under at least one statute, there is a conclusive presumption that a deed registered for more than twenty years was registered on lawful authority; and no distinction is made between a void acknowledgment and a defective acknowledgment.—Richardson v. Schwoon, 3 Tenn.App. 512.

4. U.S.—Smith v. Pacific Alaska Airways, C.C.A.Alaska, 89 F.2d 253, certiorari denied Pacific Alaska Airways v. Smith, 58 S.Ct. 20, 302 U.S. 700, 82 L.Ed. 541.
Misinterpretation of statute
Evidence that part of retail price of text-books went to central depository rebutted presumption that the company selling the books made its bid according to correct interpretation of a law requiring company to pay cost of depository; but such misinterpretation of the statute does not overcome presumption that other companies made bids according to legal interpretation thereof.—Hill v. American Book Co., 285 S.W. 20, 171 Ark. 427.

5. Cal.—Anderson v. Southern Pac. Co., 18 P.2d 703, 129 Cal.App. 206.

6. Ill.—Consumers Co. v. Industrial Commission, 4 N.E.2d 34, 364 Ill. 145, 107 A.L.R. 811—Hill v. Richardson, 281 Ill.App. 75.
Mo.—Andrus v. Business Men's Acc. Ass'n of America, 223 S.W. 70, 283 Mo. 442, 13 A.L.R. 779—Bear v. Sovereign Camp, W. O. W., 230 S.W. 369, 207 Mo.App. 82.
Or.—Fink v. Prudential Ins. Co. of America, 90 P.2d 762, 162 Or. 37.
Escape from fire
In action for death in fire, defended on ground that deceased did not avail himself of existing facilities of escape, it will be presumed that deceased tried to escape, and that he wanted to live rather than die.—Newell v. Boatmen's Bank, 216 S.W. 918, 279 Mo. 663.

7. Ky.—Illinois Cent. R. Co. v. Applegate's Adm'x, 105 S.W.2d 153, 268 Ky. 458—Wilder's Adm'r v. Southern Mining Co., 96 S.W.2d 436, 265 Ky. 219—Owen Motor Freight Lines v. Russell's Adm'r, 86 S.W.2d 708, 260 Ky. 795.
Mo.—Zickefoose v. Thompson, 148 S.W.2d 784.
Tex.—J. Lee Vilbig & Co. v. Lucas, Civ.App., 23 S.W.2d 516, error dismissed.
Self inflicted injury
(1) The presumption is against an injury's being intentionally self-inflicted.
Ark.—Railway Mail Ass'n v. Johnson, 215 S.W. 682, 140 Ark. 289.
Tex.—Perkins v. Nail, Civ.App., 37 S.W.2d 211, error refused.
22 C.J. p 95 note 79 [a].
(2) Self-inflicted death presumed accidental see infra § 135 b.

8. Tex.—J. Lee Vilbig & Co. v. Lucas, Civ.App., 23 S.W.2d 516, error dismissed.

9. Or.—Fink v. Prudential Ins. Co. of America, 90 P.2d 762, 162 Or. 37.

10. Kan.—Gaffney v. Atchison, T. & S. F. Ry. Co., 192 P. 736, 107 Kan. 486.
Ky.—Illinois Cent. R. Co. v. Applegate's Adm'x, 105 S.W.2d 153, 268 Ky. 458.
La.—Kern v. Knight, 127 So. 133, 13 La.App. 194.
Pa.—Lamp v. Pennsylvania R. Co., 158 A. 269, 305 Pa. 520, 84 A.L.R. 1217—Yuhasz v. Pitt Const. Co., 157 A. 461, 305 Pa. 166.
Tex.—J. Lee Vilbig & Co. v. Lucas, Civ.App., 23 S.W.2d 516, error dismissed.
22 C.J. p 94 note 74.
Presumption is evidence, at least until rebutted.—Harper v. Northwestern Pac. R. Co., 93 P.2d 821, 34 Cal.App.2d 451—Blodget v. Preston, 5 P.2d 25, 118 Cal.App. 297.
Presumption as inference
The word "presumption," as used in an instruction that the law presumes that a person injured, prompted by a natural instinct to avoid danger, exercised care, is not used in its ordinary technical sense, but as meaning inference, and as a substitute for the word "inference."—Bell v. Incorporated Town of Clarion, 84 N.W. 962, 964, 113 Iowa 126.
No eyewitnesses
The law invokes the presumption of due care out of necessity where there are no eyewitnesses.—Wolf v. New York, C. & St. L. R. Co., Mo., 148 S.W.2d 1032.
Corpus Juris cited for general discussion of subject.—Wolf v. New York, C. & St. L. R. Co., Mo., 148 S.W.2d 1032, 1037.

11. Fla.—Harris v. Florida Public Service Co., 129 So. 333, 100 Fla. 90.
Kan.—Gaffney v. Atchison, T. & S. F. Ry. Co., 192 P. 736, 107 Kan. 486.
Ky.—Wilder's Adm'r v. Southern Mining Co., 96 S.W.2d 436, 265 Ky. 219.
La.—Kern v. Knight, 127 So. 133, 13 La.App. 194.
N.H.—Huntress v. Boston & M. R. Co., 34 A. 154, 66 N.H. 185, 49 Am.S.R. 600.
22 C.J. p 94 note 74.

12. Cal.—Blodget v. Preston, 5 P.2d 25, 118 Cal.App. 297.
Mont.—Grant v. Nihill, 210 P. 914, 64 Mont. 420.

13. Iowa.—Bussler v. Chicago, M. & St. P. Ry. Co., 145 N.W. 533, 165 Iowa 361.
Pa.—Connerton v. Delaware & H. Canal Co., 32 A. 416, 169 Pa. 339, 341.

14. Fla.—Harris v. Florida Public

tiving the exercise of ordinary care.[15] Further, it has been considered that no such presumption should be indulged in the case of an injured person who is living, and testifies, or is able to testify, as to the circumstances under which the injury was received.[16]

Animals. It may be presumed that a dog will avoid danger or not move into it,[17] unless he is helpless or indifferent to danger.[18]

b. Suicide

There is a rebuttable presumption against suicide on the part of a sane, normal person. Authorities differ as to whether the presumption is one of law and whether it is itself evidence.

There is no presumption of suicide,[19] nor does such a presumption arise from the mere fact of death in an unknown manner;[20] there is, rather, a presumption against suicide or self-destruction[21]

Service Co., 129 So 333, 100 Fla. 90.

22 C.J. p 95 notes 76, 77.

15. U.S.—Perucca v. Baltimore & O. R. Co., C.C.A.Pa., 35 F.2d 113, certiorari denied Baltimore & O. R. Co. v. Perucca, 50 S.Ct. 236, 281 U. S. 721, 74 L.Ed. 1139—Contrella v. Baltimore & O. R. Co., C.C.A Pa., 35 F 2d 113, certiorari denied Baltimore & O R. Co. v. Contrella, 50 S. Ct 236, 281 U.S. 721, 74 L Ed. 1139.
Fla.—Harris v. Florida Public Service Co., 129 So. 333, 100 Fla. 90.
Kan.—Gaffney v. Atchison, T. & S. F. Ry. Co., 192 P. 736, 107 Kan. 486.
Mo.—Zickefoose v. Thompson, 148 S. W.2d 784.
Pa.—Lamp v. Pennsylvania R. Co., 158 A. 269, 305 Pa. 520, 84 A.L.R. 1217.

22 C J. p 95 note 78.

In California

(1) Presumption of ordinary care may outweigh positive evidence to contrary—Blodget v. Preston, 5 P.2d 25, 118 Cal.App. 297.

(2) Presumption loses its evidentiary weight only where facts admitted or established by proof are irreconcilable with presumption.—Whicker v. Crescent Auto Co., 66 P. 2d 749, 20 Cal.App.2d 240.

(3) Presumption disappears when controverted by indisputable evidence of party relying on it, but not when controverted by party against whom it is invoked.—Fortier v. Hogan, 1 P.2d 23, 115 Cal.App. 50.

16. Iowa.—Reynolds v. Keokuk, 34 N.W. 167, 72 Iowa 371, 373.

22 C.J. p 95 note 75.

Inability to testify; insanity

(1) Where plaintiff, after being struck by automobile, was incapable of testifying, it would be assumed that she exercised ordinary care for her own safety.—Jedlicka v. Shackelford, Mo.App., 270 S.W. 125.

(2) As regards presumption of due care, one rendered incurably insane by injury is as one dead.—Schuemelpfenning v. Wells, Mo., 24 S.W.2d 154.

17. Ala.—Owen v. Southern Ry. Co., 133 So. 33, 222 Ala. 499.

18. Ala.—Owen v. Southern Ry. Co., supra.

19. Ala.—New York Life Ins. Co. v. Turner, 104 So. 643, 213 Ala. 286.
Cal.—Bissinger & Co. v. Industrial Accident Commission, 287 P. 540, 105 Cal.App. 441.
Ky.—Illinois Cent. R. Co. v. Applegate's Adm'x, 105 S.W.2d 153, 268 Ky. 458.
Mo.—Prentiss v. Illinois Life Ins. Co., 225 S.W. 695.
Neb.—De Bruler v. City of Bayard, 247 N.W. 347, 124 Neb. 566.
N.Y.—Mandi v. Metropolitan Life Ins. Co., 257 N.Y.S. 71, 143 Misc. 771.
Or.—Fink v. Prudential Ins. Co. of America, 90 P 2d 762, 162 Or. 37.
Tenn.—Metropolitan Life Ins. Co. v. Staples, 5 Tenn.App. 436.
Wash.—Howard v. Equitable Life Assur. Soc. of U. S., 85 P.2d 253, 197 Wash. 230, 119 A.L.R. 1302.

Violent death

(1) Suicide will not be presumed from mere fact of violent death.—Missouri State Life Ins. Co. v. Roper, C.C.A.Ala., 44 F.2d 897.

(2) Suicide will not be presumed from death in unknown manner by gunshot wounds.—Standard Accident Ins. Co. v. Kiker, 165 S.E. 850, 45 Ga. App. 706.

(3) Neither murder nor suicide is presumed from mere fact of killing by gunshot wound.—McClure v. New York Life Ins. Co., D.C.La., 50 F.2d 972.

20. Neb.—De Bruler v. City of Bayard, 247 N.W. 347, 124 Neb. 566.

21. U.S.—Connecticut Mut. Life Ins. Co. v. Tenahan, C.C.A.Mich., 112 F. 2d 375, mandate amended 113 F.2d 935, Michigan law—Eastern Commercial Travelers Accident Ass'n v. Sanders, C.C.A.Mass., 108 F.2d 643—Connecticut General Life Ins. Co. v. Maher, C.C.A., 70 F.2d 441, 445, citing **Corpus Juris**—Equitable Life Assur. Soc. of U. S. v. Halliburton, C.C.A.Okl., 67 F.2d 854—Metropolitan Life Ins. Co. v. Hogan, C.C.A.Ill., 63 F.2d 654—Frankel v. New York Life Ins. Co., C.C.A.Okl., 51 F.2d 933.
Ark.—Central States Life Ins. Co. v. McElwee, 133 S.W.2d 881, 199 Ark. 410—Brotherhood of Maintenance of Way Employees v. Page, 122 S. W.2d 536, 197 Ark. 498—Grand Lodge, A. O. U. W. of Arkansas v. Mode, 247 S.W. 386, 157 Ark. 62—Guardian Life Ins. Co. v Dixon, 240 S.W. 25, 152 Ark. 597—Eminent Household of Columbian Woodmen v. Matlock, 221 S.W. 858, 144 Ark. 126—Central Coal & Coke Co. v. Burns, 215 S.W. 265, 140 Ark. 147.
Colo.—Hershey v. Agnew, 262 P. 526, 83 Colo. 89.
Ga.—Standard Accident Ins. Co. v. Kiker, 165 S.E. 850, 45 Ga App. 706.
Ill.—E E. Walsh Teaming Co. v. Industrial Commission, 125 N.E. 331, 290 Ill. 536—Lauer v. Elgin, J. & E Ry. Co., 27 N.E.2d 315, 305 Ill. App. 200.
Iowa.—Reddick v. Grand Union Tea Co., 296 N.W. 800—Warner v. Equitable Life Ins. Co. of Iowa, 258 N.W. 75, 219 Iowa 916.
Ky.—Wilder's Adm'r v. Southern Mining Co., 96 S.W.2d 436, 265 Ky. 219—Louisville & N. R. Co. v. Snow's Adm'r, 30 S.W.2d 885, 235 Ky. 211.
La.—Bayles v. Jefferson Standard Life Ins. Co., App., 148 So. 465.
Me.—Moriarty's Case, 138 A. 555, 126 Me. 358.
Miss.—Jefferson Standard Life Ins. Co. v. Jefcoats, 143 So. 842, 164 Miss. 659—Massachusetts Protective Ass'n v. Cranford, 102 So. 171, 137 Miss. 876.
Mo.—Zickefoose v. Thompson, 148 S. W.2d 784—Darby v. Henwood, 145 S W.2d 376—Jenkins v. Kurn, 144 S.W.2d 76, certiorari granted 61 S. Ct. 740, 312 U.S. 675, 85 L.Ed. 1116, and reversed on other grounds 61 S.Ct. 934, 313 U.S. 256, 85 L.Ed. 1316, mandate conformed to 156 S. W.2d 668—Stewart v. Laclede Gas Light Co., 241 S.W. 909—Basham v. Prudential Ins. Co. of America, 113 S.W.2d 126, 232 Mo.App. 782—Bergman v. Supreme Tent, Knights of Maccabees of the World, 220 S W. 1029, 203 Mo.App. 685.
N.J.—Carroll v. Prudential Ins. Co. of America, 15 A.2d 810, 125 N.J. Law 397—Angersbach v. South River Police Pension Commission, 3 A.2d 873, 122 N.J.Law 1—Jackson v. Delaware, L. & W. R. Co., 170 A. 22, 111 N.J.Law 487.
N.Y.—Butterfield v. State, 193 N.Y.S. 228, 118 Misc. 273.
Ohio.—Mitchell v. Industrial Commission of Ohio, 19 N.E.2d 769, 135 Ohio St. 110.
Or.—Fink v. Prudential Ins. Co. of

on the part of one who came to his death under circumstances not explained,[22] if, as will appear, deceased was sane. The presumption has been said to have its basis in the love of life and the instinct of self-preservation,[23] the fear of death,[24] the fact that self-destruction is contrary to the general conduct of mankind,[25] the immorality of taking one's own life,[26] and the presumption of innocence of crime.[27]

Some authorities consider, or refer to, the presumption as one of law;[28] but this view has been criticized[29] and the presumption considered as one of fact.[30] According to some authorities, the presumption is in the nature of evidence,[31] and can be considered as evidence even when proof on the subject has been introduced;[32] according to others, the presumption is not of itself evidence,[33] can nev-

America, 90 P 2d 762, 780, 162 Or. 37, citing **Corpus Juris.**

S.C.—McMillan v. General American Life Ins. Co., 9 S.E.2d 562, 194 S. C. 146—McLane v. Reliance Life Ins. Co. of Pittsburgh, 6 S.E.2d 13, 192 S.C. 245—Marsh v. Pioneer-Pyramid Life Ins. Co., 176 S.E. 878, 174 S.C. 59—MacKendree v. Southern States Life Ins. Co. of Alabama, 99 S.E. 806, 112 S.C. 335.

S.D.—Honrath v. New York Life Ins. Co., 275 N.W. 258, 65 S.D. 480, 112 A.L.R. 1272.

Tenn.—Bryan v. Aetna Life Ins. Co., 130 S.W.2d 85, 174 Tenn. 602—Lee v. Tennessee Central Ry. Co., 9 Tenn.App. 284—Metropolitan Life Ins. Co. v. Staples, 5 Tenn.App. 436.

Tex.—Texas & N. O. R. Co. v. Ewing, Civ App., 46 S.W.2d 398, error dismissed.

Wash.—Stempel v. Oregon Life Ins. Co., 290 P. 222, 157 Wash. 678.

Wis.—Vacek v. Prudential Ins. Co. of America, 277 N.W. 100, 226 Wis. 454.

22 C.J. p 95 note 79.

Application of rule in actions on life insurance policies see the C.J.S. title Insurance § 1319, also 37 C.J. p 618 note 5—p 620 note 26.

22. U.S.—N. Y. Life Ins. Co. v. Weaver, C.C.A.Ga., 8 F.2d 680.

Fla.—Mutual Life Ins. Co. of New York v. Bell, 3 So.2d 487—Mutual Life Ins. Co. of New York v. Johnson, 166 So. 442, 122 Fla. 567.

Mich.—Stuckum v. Metropolitan Life Ins. Co., 277 N.W. 891, 283 Mich. 297.

Mo.—Basham v. Prudential Ins. Co. of America, 113 S.W.2d 126, 232 Mo.App. 782.

Neb.—Falkinburg v. Prudential Ins. Co. of America, 273 N.W. 478, 132 Neb. 831—Dodder v. Aetna Life Ins. Co. of Hartford, Conn., 175 N. W. 651, 104 Neb. 70.

22 C.J. p 95 note 80.

Disappearance

"There is a presumption that one who disappeared has not committed suicide."—Mandi v. Metropolitan Life Ins. Co., 257 N.Y.S. 71, 74, 143 Misc. 771.

23. Ala.—New York Life Ins. Co. v. Turner, 104 So. 643, 213 Ala. 286.

Ill.—E. E. Walsh Teaming Co. v. Industrial Commission, 125 N.E. 331, 290 Ill. 536.

La.—Bayles v. Jefferson Standard Life Ins. Co., App., 148 So. 465.

S.D.—Honrath v. New York Life Ins. Co., 275 N.W. 258, 65 S.D. 480, 112 A.L.R. 1272.

Tenn.—Metropolitan Life Ins. Co. v. Staples, 5 Tenn.App. 436.

Wis.—Wiger v. Mutual Life Ins. Co. of New York, 236 N.W. 534, 205 Wis. 95.

24. U.S.—Jefferson Standard Life Ins. Co. v. Clemmer, C.C.A.Va., 79 F.2d 724, 103 A.L.R. 171.

S.D.—Honrath v. New York Life Ins. Co., 275 N.W. 258, 65 S.D. 480, 112 A.L.R. 1272.

25. U.S.—Fidelity & Casualty Co. of New York v. Driver, C.C.A.Ga., 79 F.2d 713—Travelers' Ins. Co. v. Wilkes, C.C.A.Fla., 76 F.2d 701, certiorari denied Hirsig v. Travelers Ins. Co., 56 S.Ct. 120, 296 U.S. 604, 80 L.Ed. 428—Frankel v. New York Life Ins. Co., C.C.A.Okl., 51 F.2d 933.

26. U.S.—Frankel v. New York Life Ins. Co., supra.

Wis.—Wiger v. Mutual Life Ins. Co. of New York, 236 N.W. 534, 205 Wis. 95.

27. N.Y.—Van Kleeck v. Dutchess County R. Co., 28 N.Y.S. 902, 78 Hun 263.

Vt.—Walcott v. Metropolitan L. Ins. Co., 24 A. 992, 64 Vt. 221, 33 Am.S. R. 923.

28. U.S.—Equitable Life Assur. Soc. of U. S. v. Halliburton, C.C.A.Okl., 67 F.2d 854—Wirthlin v. Mutual Life Ins. Co., C.C.A.Utah, 56 F.2d 137, 86 A.L.R. 138—Frankel v. New York Life Ins. Co., C.C.A.Okl., 51 F.2d 933.

Ark.—Central States Life Ins. Co. v. McElwee, 133 S.W.2d 881, 199 Ark. 410—Mutual Life Ins. Co. of New York v. Raymond, 4 S.W.2d 536, 176 Ark. 879.

Mich.—Stuckum v. Metropolitan Life Ins. Co., 277 N.W. 891, 283 Mich. 297.

Mo.—Basham v. Prudential Ins. Co. of America, 113 S.W.2d 126, 232 Mo.App. 782.

S.C.—McMillan v. General American Life Ins. Co., 9 S.E.2d 562, 194 S. C. 146.

29. Pa.—Watkins v. Prudential Ins. Co. of America, 173 A. 644, 648, 649, 315 Pa. 497, 95 A.L.R. 869.

Nature of presumption

"The so-called 'presumption against suicide' is . . . merely a permissible consideration of the nonprobability of death by suicide. . . . [It] is merely an inference or argument; it is not . . . a 'legal presumption binding on the jury, prima facie, till disproved.'"—Watkins v. Prudential Ins. Co. of America, supra.

30. U.S.—Fidelity & Casualty Co. of New York v. Driver, C.C.A.Ga., 79 F.2d 713.

Minn.—State v. Industrial Commission of Minnesota, 195 N.W. 766, 157 Minn. 33, 36 A.L.R. 394.

S.C.—MacKendree v. Southern States Life Ins. Co. of Alabama, 99 S.E. 806, 112 S.C. 335.

31. Iowa—Reddick v. Grand Union Tea Co., 296 N.W. 800.

Ohio.—Mitchell v. Industrial Commission of Ohio, 19 N.E.2d 769, 135 Ohio St. 110.

22 C.J. p 95 note 79 [b].

32. Tenn.—Bryan v. Ætna Life Ins. Co., 130 S.W.2d 85, 174 Tenn. 602.

Weight as evidence

In the presence of proof as to the manner of death, the presumption against suicide is not given the same weight as actual evidence, although it may be considered therewith as an aid to determine whether death was accidental or suicidal.—Mitchell v. Industrial Commission of Ohio, 19 N.E.2d 769, 135 Ohio St. 110.

33. U.S.—New York Life Ins. Co. v. Gamer, Mont., 58 S.Ct. 500, 303 U. S. 161, 82 L.Ed. 726, 114 A.L.R. 1218—Jefferson Standard Life Ins. Co. v. Clemmer, C.C.A.Va., 79 F. 2d 724, 730, 103 A.L.R. 171.

Fla.—Mutual Life Ins. Co. of New York v. Johnson, 166 So. 442, 447, 122 Fla. 567.

Minn.—State v. Industrial Commission of Minnesota, 195 N.W. 766, 157 Minn. 33, 36 A.L.R. 394.

W.Va.—McDaniel v. Metropolitan Life Ins. Co., 195 S.E. 597, 119 W. Va. 650.

22 C.J. p 156 note 34 [c].

Effect of presumption

(1) "The presumption against suicide is not evidence, but it does require the opposing party to bring forth evidence to overcome it."—Carroll v. Prudential Ins. Co. of

er be given weight as evidence,[34] and is a rule to which resort may be had only when there is a failure of evidence.[35]

While the presumption against suicide is a strong one,[36] and stands until overcome by testimony,[37] it is prima facie only,[38] rebuttable,[39] and not a rigid rule of law.[40] The presumption operates to its fullest extent only where there is no proof as to whether the death was accidental or suicidal.[41] It disappears, or at least does not prevail, where the proof shows the manner of death[42] or points to suicide,[43] or where the circumstances are wholly in-

America, 15 A.2d 810, 813, 125 N.J. Law 397.

(2) Presumption against suicide is not evidence, but it controls result when there is lack of competent evidence to show death by suicide, and also controls in cases of death by unexplained violence if defendant relies on suicide and fails to go forward with proof thereof.—Mutual Life Ins. Co. of New York v. Johnson, 166 So. 442, 122 Fla. 567.

(3) Where evidence discloses a state of facts consistent with accident or suicide, the presumption against suicide, although not evidentiary in character, accomplishes a function of evidence for that particular occasion.—Gilpin v. Ætna Life Ins. Co., 132 S.W.2d 686, 234 Mo. App. 566.

34. U.S.—New York Life Ins. Co. v. Gamer, Mont., 58 S.Ct. 500, 303 U.S. 161, 82 L.Ed. 726, 114 A.L.R. 1218—Connecticut Mut. Life Ins. Co. v. Lanahan, C.C.A.Mich., 112 F.2d 375, mandate amended 113 F.2d 935—Reliance Life Ins. Co. v. Burgess, C.C.A.Mo., 112 F.2d 234, certiorari denied Burgess v. Reliance Life Ins. Co., 61 S.Ct. 137, rehearing denied 61 S.Ct. 391.

Evidence of accident required

In action for accidental death benefits under life policies, jury could consider nonprobability of death by suicide; but such nonprobability could not take place of evidence required of plaintiff that death was accidental.—Walters v. Western & Southern Life Ins. Co., 178 A. 499, 318 Pa. 382, affirming 172 A. 406, 113 Pa.Super. 221.

35. Minn.—State v. Industrial Commission of Minnesota, 195 N.W. 766, 157 Minn. 33, 36 A.L.R. 394.

When testimony is offered to rebut the presumption, it disappears and is not to be treated as evidence.

U.S.—Connecticut Mut. Life Ins. Co. v. Lanahan, C.C.A.Mich., 112 F.2d 375, 376, mandate amended 113 F.2d 935.

Mich.—Stuckum v. Metropolitan Life Ins. Co., 277 N.W. 891, 283 Mich. 297.

36. Ark.—Home Life Ins. Co. v. Miller, 33 S.W.2d 1102, 182 Ark. 901.

Ga.—Standard Accident Ins. Co. v. Kiker, 165 S.E. 850, 45 Ga.App. 706.

Minn.—State v. Industrial Commission of Minnesota, 195 N.W. 766, 157 Minn. 33, 36 A.L.R. 394.

N.Y.—Mandi v. Metropolitan Life Ins. Co., 257 N.Y.S. 71, 143 Misc. 771.

Tex.—Texas & N. O. R. Co. v. Ewing, Civ.App., 46 S.W.2d 398, error dismissed.

Wis.—Wiger v. Mutual Life Ins. Co. of New York, 236 N.W. 534, 205 Wis. 95.

Painful death

Presumption against suicide is particularly strong where method of suicide would be very painful.—Dow v. U. S. Fidelity & Guaranty Co., 7 N.E.2d 426, 297 Mass. 34.

Statutory presumption

The presumption against suicide is stronger where statutes provide that no willful intention to cause death shall be presumed "in the absence of substantial evidence to the contrary."—Dubinsky v. Kofsky, 275 N.Y.S. 365, 369, 242 App.Div. 342, reversed on other grounds 195 N.E. 234, 266 N.Y. 631.

37. Ala.—New York Life Ins. Co. v. Beason, 155 So. 530, 229 Ala. 140.

Ark.—Brotherhood of Maintenance of Way Employees v. Page, 123 S.W.2d 536, 197 Ark. 498.

Colo.—Hershey v. Agnew, 262 P. 526, 83 Colo. 89.

Ga.—Standard Accident Ins. Co. v. Kiker, 165 S.E. 850, 45 Ga.App. 706.

Verdict of coroner's jury does not overcome the presumption.—New York Life Ins. Co. v. Turner, 104 So. 643, 213 Ala. 286.

Physician's conclusion that deceased met death by his own hand from overdose of opium compound is not sufficient to overcome the presumption of love of life.—Gill v. Sovereign Camp, W. O. W., 236 S.W. 1073, 209 Mo.App. 63.

38. Miss.—Jefferson Standard Life Ins. Co. v. Jefcoats, 143 So. 842, 164 Miss. 659.

Neb.—Falkinburg v. Prudential Ins. Co. of America, 273 N.W. 478, 132 Neb. 831—Dodder v. Ætna Life Ins. Co. of Hartford, Conn., 175 N.W. 651, 104 Neb. 70—Grosvenor v. Fidelity & Casualty Co. of N. Y., 168 N.W. 596, 102 Neb. 629.

39. Ark.—Brotherhood of Maintenance of Way Employees v. Page, 123 S.W.2d 536, 197 Ark. 498—Home Life Ins. Co. v. Miller, 33 S.W.2d 1102, 182 Ark. 901—Grand Lodge, A. O. U. W. of Arkansas v. Mode, 247 S.W. 386, 157 Ark. 62.

Fla.—Mutual Life Ins. Co. of New York v. Johnson, 166 So. 442, 122 Fla. 567.

Ga.—Jefferson Standard Life Ins. Co. v. Bentley, 190 S.E. 50, 55 Ga.App. 272.

Miss.—Jefferson Standard Life Ins. Co. v. Jefcoats, 143 So. 842, 164 Miss. 659.

Mo.—Bergman v. Supreme Tent, Knights of Maccabees of the World, 220 S.W. 1029, 203 Mo.App. 685.

Neb.—Falkinburg v. Prudential Ins. Co. of America, 273 N.W. 478, 132 Neb. 831—Dodder v. Ætna Life Ins. Co. of Hartford, Conn., 175 N.W. 651, 104 Neb. 70.

N.J.—Carroll v. Prudential Ins. Co. of America, 15 A.2d 810, 125 N.J. Law 397.

Tenn.—Metropolitan Life Ins. Co. v. Staples, 5 Tenn.App. 436.

Wis.—Vacek v. Prudential Ins. Co. of America, 277 N.W. 100, 226 Wis. 454.

22 C.J. p 96 note 81.

40. U.S.—Fidelity & Casualty Co. of New York v. Driver, C.C.A.Ga., 79 F.2d 713—Travelers' Ins. Co. v. Wilkes, C.C.A.Fla., 76 F.2d 701, certiorari denied Hirsig v. Travelers Ins. Co., 56 S.Ct. 120, 296 U.S. 604, 80 L.Ed. 428.

Ohio.—Mitchell v. Industrial Commission of Ohio, 19 N.E.2d 769, 135 Ohio St. 110.

41. Ohio.—Mitchell v. Industrial Commission of Ohio, supra.

42. U.S.—Wirthlin v. Mutual Life Ins. Co., C.C.A.Utah, 56 F.2d 137, 86 A.L.R. 138.

Ga.—New York Life Ins. Co. v. King, 112 S.E. 383, 28 Ga.App. 607.

Mo.—Andrus v. Business Men's Acc. Ass'n of America, 223 S.W. 70, 283 Mo. 442, 13 A.L.R. 779.

Neb.—Falkinburg v. Prudential Ins. Co. of America, 273 N.W. 478, 132 Neb. 831—Dodder v. Ætna Life Ins. Co. of Hartford, Conn., 175 N.W. 651, 104 Neb. 70—Grosvenor v. Fidelity & Casualty Co. of N. Y., 168 N.W. 596, 102 Neb. 629.

43. U.S.—Frankel v. New York Life Ins. Co., C.C.A.Okl., 51 F.2d 933—New York Life Ins. Co. v. Weaver, C.C.A.Ga., 8 F.2d 680—Young v. Travelers' Ins. Co., D.C.Okl., 2 F.Supp. 624, reversed on other grounds, C.C.A., 68 F.2d 83.

Ind.—Prudential Ins. Co. v. Dolan, 91 N.E. 970, 46 Ind.App. 40.

Minn.—State v. Industrial Commission of Minnesota, 195 N.W. 766, 157 Minn. 33, 36 A.L.R. 394.

consistent with any hypothesis of accidental death,[44] or where the proof leaves no room for any reasonable hypothesis but suicide.[45]

The evidence required to overcome the presumption is not confined to that of eyewitnesses,[46] although where circumstantial evidence is relied on the facts shown must be such as to exclude any reasonable hypothesis of natural or accidental death,[47] or, in other words, must exclude every reasonable hypothesis except suicide.[48] It has been held that a mere preponderance of evidence is sufficient to rebut this presumption;[49] but clear, cogent, and convincing evidence has been required.[50]

Presumption of accidental death. As a general rule, the presumption is that a death was accidental, not suicidal,[51] where the cause was either accident or suicide[52] and there is no evidence explaining the cause.[53] Even self-inflicted death is presumed to have been accidental rather than suicidal.[54] On the other hand, it has been asserted that accidental death, as opposed to self-inflicted death, is no more to be legally presumed than suicide is to be presumed against homicide.[55]

Sanity or insanity of deceased. The presumption against suicide exists where deceased was sane[56] and normal,[57] but not where the person whose death is unexplained was insane.[58] Even a slight mental unsoundness or derangement may be considered in determining whether deceased committed suicide, although it does not prevent giving weight to the presumption against suicide.[59]

§ 136. Mailing and Delivery of Mail Matter

a. In general
b. Address
c. Mailing
d. Time of receipt
e. Rebuttal of presumption

Neb.—De Bruler v. City of Bayard, 247 N.W. 347, 124 Neb. 566.
Ohio.—Mitchell v. Industrial Commission of Ohio, 19 N.E.2d 769, 135 Ohio St. 110.
"As soon as testimony, especially of eyewitnesses to the death, is presented from which the fair inference may be drawn that the death was in fact suicidal, the presumption to the contrary vanishes."—Abbott v. Metropolitan Life Ins. Co., 276 N.W. 506, 508, 282 Mich. 433.

44. Fla.—Mutual Life Ins. Co. of New York v. Johnson, 166 So. 442, 122 Fla. 567.

45. U.S.—Equitable Life Assur. Soc. of U. S. v. Halliburton, C.C.A.Okl., 67 F.2d 854.
Ga.—Jefferson Standard Life Ins. Co. v. Bentley, 190 S.E. 50, 55 Ga.App. 272.

46. Ark.—Brotherhood of Maintenance of Way Employees v. Page, 123 S.W.2d 536, 197 Ark. 498.

47. N.Y.—Mandi v. Metropolitan Life Ins. Co., 257 N.Y.S. 71, 143 Misc. 771.
22 C.J. p 96 note 83.

48. Mo.—Prentiss v. Illinois Life Ins. Co., 225 S.W. 695.
N.Y.—Mandi v. Metropolitan Life Ins. Co., 257 N.Y.S. 71, 143 Misc. 771.

49. Mo.—Norman v. Order United Commercial Travelers, 145 S.W. 853, 163 Mo.App. 175.
22 C.J. p 96 note 82.

50. N.Y.—Mandi v. Metropolitan Life Ins. Co., 257 N.Y.S. 71, 143 Misc. 771.

51. U.S.—Equitable Life Assur. Soc of U. S. v. Halliburton, C.C.A.Okl., 67 F.2d 854.
Natural or accidental
"Where a person is found dead, there is a strong presumption that his death was natural or accidental."—Standard Accident Ins. Co. v. Kiker, 165 S.E. 850, 851, 45 Ga.App. 706.
Violent death
(1) "Where an unexplained death by violence is shown, nothing else appearing, it is presumed that the death resulted from accidental means."—Warren v. Pilot Life Ins. Co., 9 S.E.2d 479, 480, 217 N.C. 705.
(2) "Neither suicide nor murder will be presumed from the mere fact of a violent death . . . and the inference therefore arises that such death was accidental."—Missouri State Life Ins. Co. v. Roper, C.C.A. Ala., 44 F.2d 897, 898.

52. Ill.—Consumers Co. v. Industrial Commission, 4 N.E.2d 34, 364 Ill. 145, 107 A.L.R. 811.
Minn.—Manley v. Harvey Lumber Co., 221 N.W. 913, 175 Minn. 489
Neb.—Farmers' Grain & Supply Co. of Minden v. Blanchard, 178 N.W. 257, 104 Neb. 637.
Swallowing poison
Where an insured died as the result of swallowing poison, on the question of whether the act was accidental or intentional there is a presumption from the love of life that it was accidental, and this presumption obtains until evidence is adduced in explanation.—Andrus v. Business Men's Acc. Ass'n of America, 223 S.W. 70, 283 Mo. 442, 13 A.L.R. 779.

53. N.Y.—Mandi v. Metropolitan Life Ins. Co., 257 N.Y.S. 71, 73, 143 Misc. 771.
Deceased in good health
Where the evidence shows deceased to have been in good health, and there is a complete absence of evidence showing a suicide, it must be presumed that death was accidental.—Sparks Milling Co. v. Industrial Commission, 127 N.E. 737, 293 Ill. 350.

54. Ark.—Brotherhood of Maintenance of Way Employees v. Page, 123 S.W.2d 536, 197 Ark 498—Bassett v. Mutual Ben. Health & Accident Ass'n, 12 S.W.2d 893, 178 Ark. 906—Mutual Life Ins. Co of New York v. Raymond, 4 S.W.2d 536, 176 Ark. 879—Eminent Household of Columbian Woodmen v Matlock, 221 S.W. 858, 144 Ark. 126.
22 C.J. p 95 note 79 [a].

55. Pa.—Watkins v. Prudential Ins. Co. of America, 173 A. 644, 315 Pa. 497, 95 A.L.R. 869.

56. Ala.—New York Life Ins. Co. v. Beason, 155 So. 530, 229 Ala. 140—New York Life Ins. Co. v. Turner, 104 So. 643, 213 Ala. 286.
Kan.—Arkansas River Gas Co. v. Molk, 9 P.2d 623, 135 Kan. 152—O'Brien v. New England Mut. Life Ins. Co., 197 P. 1100, 1103, 109 Kan. 138, citing **Corpus Juris.**
22 C.J. p 95 note 79.
Presumption of sanity see infra § 147.

57. Ala.—New York Life Ins. Co. v. Beason, 155 So. 530, 229 Ala. 140.
Tex.—Malley v. Union Indemnity Co., Com.App., 12 S.W.2d 1002, reversing Union Indemnity Co. v. Malley, Civ.App., 1 S.W.2d 923.

58. S.D.—Honrath v. New York Life Ins. Co., 275 N.W. 258, 65 S.D. 480, 112 A.L.R. 1272.
22 C.J. p 96 note 84.

59. Iowa.—Van Norman v. Modern Brotherhood of America, 121 N.W. 1080, 143 Iowa 536.

a. In General

There is a strong presumption that mail matter properly addressed, stamped, and mailed was received by the addressee.

In the absence of evidence to the contrary, proof that a letter or other mail matter was properly addressed, stamped, and mailed raises a presumption that it was received by the addressee.[60] Some au-

60. U.S.—Columbian Nat. Life Ins Co. v. Rodgers, C.C.A.Kan., 93 F.2d 740—Standley v. Graham Production Co., C.C.A.Tex, 83 F 2d 489, certiorari denied 57 S.Ct. 115, 299 U S. 593, 81 L Ed. 437—Haag v. Commissioner of Internal Revenue, C C A., 59 F.2d 516—In re R. B. Rose Co., D.C.N.Y., 43 F 2d 446—Livingston v. Becker, D.C.Mo., 40 F 2d 673—Ripy v. Cloverleaf Life & Casualty Co., C C A Tex, 9 F 2d 324—Boerner v. U S., D.C.N Y., 30 F.Supp. 635, affirmed, C.C.A., 117 F 2d 387—Profit v. Seaboard Mut. Casualty Co., D.C.Md, 28 F Supp. 202, reversed on other grounds Seaboard Mut. Casualty Co. v. Profit, 108 F.2d 597, 126 A.L.R. 1105—In re Knepper, D.C.N Y., 12 F.Supp. 989—In re Harris Bros., D.C.Ark., 5 F Supp. 191—Creasy v. U. S, D C.Va, 4 F Supp. 175—Bloch v. Eastern Mach Screw Corporation, C.C.A Ohio, 281 F. 777—J. W. Ringrose Co. v. W. & J. Sloane, D.C Pa, 266 F. 402, affirmed, C.C A., 272 F. 445—In re Leterman, Becher & Co., N.Y., 260 F. 543, 171 C C.A. 327, certiorari denied Coleman & Co v. Tawas Co., 40 S.Ct. 14, 250 U. S. 668, 63 L.Ed. 1198.

Ala.—Brotherhood of Railroad Trainmen v. Jennings, 168 So. 173, 177, 232 Ala. 438, citing **Corpus Juris**—Franklin Life Ins. Co. v. Brantley, 165 So 834, 231 Ala. 554—Corinth Bank & Trust Co. v. Cochran, 121 So. 66, 219 Ala. 81—Sorrell v. Scheuer, 96 So. 216, 209 Ala. 268—W. T. Rawleigh Co. v. Deavours, 95 So. 459, 209 Ala. 127—Byars v. James, 94 So. 536, 208 Ala. 390.

Ariz.—Merchants' & Manufacturers' Ass'n v. First Nat. Bank, 14 P.2d 717, 40 Ariz. 531.

Ark.—Dengler v. Dengler, 120 S.W. 2d 340, 196 Ark. 913—Travelers Ins. Co. v. Thompson, 99 S.W.2d 254, 193 Ark. 332—Taylor v. Corning Bank & Trust Co, 38 S.W.2d 557, 183 Ark. 757—Knight v. American Ins. Union, 288 S.W. 395, 172 Ark. 303.

Cal —Valente v. Sica, 36 P.2d 1086, 1 Cal App 2d 478.

Colo.—Stark Lumber Co. v. Keystone Inv. Co, 20 P.2d 306, 92 Colo. 259, followed in 20 P.2d 308, 92 Colo. 266—Conklin v. Shaw, 185 P. 661, 67 Colo. 169.

D.C —Campbell v. Willis, 290 F. 271, 53 App.D.C. 296.

Ga.—Arnold v. Darby, 176 S E. 914, 49 Ga.App. 629—Hart v. Little, 146 S.E. 338, 39 Ga.App. 106—Home Ins. Co. v. Head, 138 S.E. 275, 36 Ga.App. 779—Saunders & McMullen v. Hudson, 119 S.E. 535, 30 Ga.App. 732—Lowenstein v. Johnston, 98 S. E 111, 23 Ga App. 261—American Tie & Timber Co. v. Tyler, 90 S.E. 86, 18 Ga.App. 640.

Idaho.—Hobson v. Security State Bank, 57 P.2d 685, 56 Idaho 601—In re Idaho Mut. Ben. Ass'n, 53 P. 2d 1171, 56 Idaho 272—American Surety Co. of New York v. Blake, 27 P.2d 972, 54 Idaho 1, 91 A.L.R. 153—Matlock v. Citizens' Nat. Bank of Salmon, 250 P. 648, 43 Idaho 214, 50 A.L.R. 1418.

Ill.—Ladd v. Cochran & McCluer Co., 274 Ill.App. 427—Wakenight v. West, 217 Ill.App. 199.

Iowa —Gregory v. Kirkman Consol. Independent School Dist, 173 N.W. 243, 186 Iowa 914.

Kan.—Miller v Kansas City, Kan., Chamber of Commerce, 41 P.2d 715, 141 Kan. 459—Prescott, Wright, Snider Co v. City of Cherryvale, 4 P 2d 457, 459, 134 Kan. 53, citing **Corpus Juris**—Shriver v. Union Stockyards Nat. Bank, 232 P. 1062, 1067, 117 Kan. 638, quoting **Corpus Juris.**

Ky.—Executive Committee of Christian Education and Ministerial Relief for Presbyterian Church of U. S. v. Fidelity & Columbia Trust Co., 117 S.W.2d 958, 273 Ky. 715—Inter-Southern Life Ins. Co. v. Cochran, 83 S.W.2d 11, 259 Ky. 677—Commonwealth Life Ins. Co. v. Gault's Adm'rs, 76 S.W.2d 618, 256 Ky. 625—Globe Indemnity Co. v. Daviess, 65 S.W.2d 456, 251 Ky. 442—Benefit Ass'n of Railway Employees v. Hancock, 58 S.W.2d 578, 248 Ky. 315—H C Witmer Co. v. McClung, 57 S.W.2d 648, 247 Ky. 625—Harlan County v. Howard, 56 S W.2d 365, 246 Ky. 791—Home Ins. Co of New York v. Roll, 218 S W. 471, 187 Ky. 31.

La.—Hortman-Salmen Co. v. Continental Casualty Co., 129 So. 515, 170 La. 879—Harvey v. Kuhnholz, 3 La.App. 794.

Md —McFerren v. Goldsmith-Stern Co., 113 A. 107, 137 Md 573, 18 A. L.R. 1125

Mass.—Petition of Liberty Mut. Ins. Co., 9 N.E.2d 718, 298 Mass 75—Massachusetts Biographical Soc. v. Howard, 125 N.E. 605, 234 Mass. 483.

Mich.—Barstow v. Federal Life Ins. Co, 242 N.W. 862, 259 Mich. 125—Merchants' Nat. Bank v. Detroit Trust Co., 242 N.W. 739, 258 Mich. 526, 85 A.L R 350—O'Connor v. March Automatic Irr. Co., 218 N.W. 784, 242 Mich. 204, affirmed 223 N.W. 228, 245 Mich. 593—Ewing v. Klatt, 209 N.W. 838, 235 Mich. 536.

Minn.—In re Devenney's Estate, 256 N.W. 104, 192 Minn. 265—Outcault Advertising Co. v Farmers' & Merchants' State Bank of Greenbush, 187 N.W. 514, 151 Minn. 500—Legal News Pub. Co. v. George C. Knispel Cigar Co., 172 N.W. 317, 142 Minn. 413.

Mo.—Armour & Co. v. American Automobile Ins. Co., 80 S.W.2d 685, 336 Mo. 551—State ex rel. Thompson ex rel. Pugh v. Bright, 250 S. W. 599, 298 Mo 335—Fleming v. Anderson, 232 S W. 718—Gilbert v. Malan, 100 S.W.2d 606, 231 Mo.App. 469—In re Farmers' & Merchants' Bank of Center, Mo., App., 83 S.W. 2d 198—Williams v. Northeast Mut. Ins. Ass'n, App, 72 S.W.2d 166, 167, citing **Corpus Juris**—Williams v. Northeast Mut. Ins. Ass'n, App., 51 S.W.2d 142—McCaskey Register Co. v. Erffmeyer, App, 46 S.W.2d 256—Hawes v. American Central Ins. Co of St Louis, 7 S.W 2d 479, 222 Mo.App. 1057—Barnett v. Western Union Telegraph Co., App., 287 S W. 1064

Mont —W. J. Lake & Co. v. Montana Horse Products Co., 97 P.2d 590, 109 Mont. 434—Renland v. First Nat. Bank, 4 P.2d 488, 90 Mont. 424—Stewart v. Arrow Creek Development Co, 212 P. 1107, 66 Mont. 238.

N H —Woodsville Fire Dist. v. Cray, 187 A 478, 88 N.H. 264.

N.J.—Schaffer v. Hurd, 130 A. 228, 98 N.J.Eq. 143—First-Mechanics Nat. Bank of Trenton v. Niedt, 151 A. 448, 8 N.J.Misc. 701.

N.M.—Hood v. Bond, 77 P.2d 180, 182, 42 N.M. 295, citing **Corpus Juris.**

N Y.—Trusts & Guarantee Co. v. Barnhardt, 1 N E 2d 459, 270 N.Y. 350, reversing Union Trust Co. v. Barnhardt, 281 N.Y.S. 40, 245 App. Div. 829—News Syndicate Co. v. Gatti Paper Stock Corporation, 176 N.E. 169, 256 N.Y. 211, reversing 246 N.Y.S. 882, 231 App.Div. 812 and 238 N Y.S. 886, 228 App Div. 688, reargument denied 177 N.E. 190, 256 N.Y. 678—Dulberg v. Equitable Life Assur. Soc. of U. S., 292 N.Y.S. 232, 249 App.Div 785—Garber v. Firemen's Ins. Co. of Newark, N. J., 2 N.Y.S.2d 801, 167 Misc. 124—Frank M. McCurdy Co. v. Wegner, 220 N.Y.S. 213, 129 Misc. 230—Youssoupoff v. Widener, 215 N Y.S. 24, 126 Misc. 491, affirmed 219 N Y.S. 942, 319 App.Div. 712, affirmed 158 N.E. 64, 246 N.Y. 174—Sinclair Refining Co. v. Unadilla Motor & Supply Co., 213 N.Y. S. 81, 126 Misc 292—In re Rowley's Will, 186 N.Y.S. 656, 114 Misc. 375—In re Seymour, 185 N.Y.S. 373,

thorities base the rule on the presumption or probability that officers and employees of the post-office department will do their duty,[61] while others consider that the true basis of the presumption is found in the regularity and certainty with which, according to common experience, the mail is carried;[62] and in a few jurisdictions the presumption is based on statute.[63] The presumption does not arise until all the facts on which it rests are clearly shown to exist.[64]

As to registered mail, there is a presumption that it was delivered,[65] and that the person who signed

113 Misc. 421—Tudor Triangle v. Konrad, 24 N.Y.S.2d 429—Roxbury Light & Power Co. v. Dimmick, 196 N.Y.S. 320.

N.C.—B. F. Eagles & Co. v. East Carolina Ry., 113 S.E. 512, 184 N.C. 66—Green v. Ben Vonde Co., 107 S.E. 139, 181 N.C. 317.

N.D.—Dawson Farmers' Elevator Co. v. Opp, 223 N.W. 350, 57 N.D. 598.

Okl.—Mid-Continent Life Ins. Co. v. Freeman, 74 P.2d 1163, 181 Okl. 355—Keeling v. Travelers Ins. Co., Hartford, Conn., 67 P.2d 944, 180 Okl. 99—U. S. Fire Ins. Co. of City of New York v. L. C. Adam Mercantile Co., 245 P. 885, 117 Okl. 73.

Or.—Coffey v. Northwestern Hospital Ass'n, 183 P. 762, 96 Or. 100, rehearing denied 189 P. 407, 96 Or. 100.

Pa.—Fox v. Davey Compressor Co., 178 A. 469, 318 Pa. 331—Jacobs v. Mohnton Trust Co., 149 A. 887, 299 Pa. 527—Thomas v. Employers' Liability Assur. Corporation, Limited, of London, England, 130 A. 322, 284 Pa. 129

S.C.—Calder v. Commercial Casualty Ins. Co., 188 S.E. 864, 182 S.C. 240—Allen v. Jefferson Standard Life Ins. Co., 137 S.E. 214, 139 S.C. 41—Burbage v. Jefferson Standard Life Ins. Co., 136 S.E. 230, 138 S.C. 208.

Tenn.—W. E. Richmond & Co. v. Security Nat. Bank, 64 S.W.2d 863, 16 Tenn.App. 414.

Tex.—Southland Life Ins. Co. v. Greenwade, Civ.App., 143 S.W.2d 648, error granted—National Aid Life Ass'n v. Driskill, Civ.App., 138 S.W.2d 238, 241, quoting **Corpus Juris**—Lumbermen's Reciprocal Ass'n v. Hull, Civ.App., 23 S.W.2d 842, error dismissed—Davis v. Petroleum Casualty Co., Civ.App., 13 S.W.2d 981—Lumbermen's Reciprocal Ass'n v. Henderson, Civ.App., 1 S.W.2d 646, affirmed in part and reversed in part on other grounds, Com.App., 15 S.W.2d 565—Wichita Valley Ry. Co. v. Davis, Civ.App., 275 S.W. 169—Francis v. International Travelers' Ass'n, Civ.App., 260 S.W. 938, 945, affirmed International Travelers' Ass'n v. Francis, 23 S.W.2d 282, 119 Tex. 1, citing **Corpus Juris**—Thompson v. Kleinman, Civ.App., 259 S.W. 593—Texas Co. v. Wimberly, Civ.App., 213 S.W. 286.

Va.—Carroll v. Hutchinson, 200 S.E. 644, 172 Va. 43—Gemmell v. Powers, 195 S.E. 501, 170 Va. 43—Yanago v. Ætna Life Ins. Co., 178 S.E. 904, 164 Va. 258.

Wash.—Collins v. Collins, 275 P. 571, 151 Wash. 201—J. & H. Goodwin Co. v. Schwaegler, 266 P. 177, 147 Wash. 547—Avgerinion v. First Guaranty Bank, 252 P. 535, 142 Wash. 73—Kubey v. Travelers' Protective Ass'n of America, 187 P. 335, 109 Wash. 453.

W.Va.—Antonowich v. Home Life Ins. Co., 179 S.E. 601, 602, 116 W.Va. 155, citing **Corpus Juris.**

Wis.—Bursack v. Davis, 225 N.W. 738, 199 Wis. 115—Reeves v. Midland Casualty Co., 174 N.W. 475, 170 Wis. 370, rehearing denied 174 N.W. 959, 170 Wis. 370.

22 C.J. p 96 note 92.

Presumption of receipt of telegrams see infra § 148.

Effect of presumption

When the presumption arises, the burden rests on the addressee to prove that he never received the communication, or the information that it contained, from any authorized source.—Executive Committee of Christian Education and Ministerial Relief for Presbyterian Church of U. S. v. Fidelity & Columbia Trust Co., 117 S.W.2d 958, 273 Ky. 715.

Rule unaffected by contents

"The contents of the envelope have nothing to do with the rule or the reason for it. Hence, it applies just as much where a legal paper is mailed as where the inclosure is an ordinary business communication."—In re Nelson's Estate, 231 N.W. 218, 220, 180 Minn. 570—22 C.J. p 96 note 92 [1].

Loss of contents

Plaintiff's evidence that he inclosed a letter in an envelope, and the presumption that it remained there, rebut an argument that the envelope may have been empty when received.—Ladd v. Cochran & McCluer Co., 274 Ill.App. 427.

Action against indorser

Presumption applies in action against indorser of note, under common-law rule and under Canadian and New York statutes—Trusts & Guarantee Co. v. Barnhardt, 1 N.E.2d 459, 270 N.Y. 350, reversing Union Trust Co. v. Barnhardt, 281 N.Y.S. 40, 245 App.Div. 829.

61. U.S.—Boerner v. U. S., D.C.N.Y., 30 F.Supp. 635, affirmed, C.C.A., 117 F.2d 387.
Ark.—Travelers Ins. Co. v. Thompson, 99 S.W.2d 254, 193 Ark. 332.
Iowa—Forrest v. Sovereign Camp, W. O. W., 261 N.W. 802, 220 Iowa 478.
Me.—Perry v. Park Street Motor Corporation, 143 A. 274, 127 Me. 365.
N.Y.—News Syndicate Co. v. Gatti Paper Stock Corporation, 176 N.E. 169, 256 N.Y. 211, reversing 246 N.Y.S. 882, 231 App.Div. 812 and 238 N.Y.S. 886, 228 App.Div. 688, reargument denied 177 N.E. 190, 256 N.Y. 678.
Va.—Carroll v. Hutchinson, 200 S.E. 644, 172 Va. 43—Myers v. Bibee Grocery Co., 138 S.E. 570, 148 Va. 282.
22 C.J. p 97 note 94.

62. U.S.—Creasy v. U. S., D.C.Va., 4 F.Supp. 175.
Ala.—Brotherhood of Railroad Trainmen v. Jennings, 168 So. 173, 176, 232 Ala. 438, citing **Corpus Juris.**
Minn.—In re Nelson's Estate, 231 N.W. 218, 219, 180 Minn. 570, quoting **Corpus Juris.**
Mo.—Williams v. Northeast Mut. Ins. Ass'n, App., 72 S.W.2d 66.
Okl.—Keeling v. Travelers Ins. Co., Hartford, Conn., 67 P.2d 944, 180 Okl. 99.
Va.—Gemmell v. Powers, 195 S.E. 501, 170 Va. 43.
22 C.J. p 97 note 96.
"The presumption is based on the fact that the postoffice is a public agency charged with the duty of transmitting letters, and on the assumption that what ordinarily results from the transmission of a letter through the mails probably resulted in the given case."—Bank of Ipswich v. Harding County Farmers Mut. Fire & Lightning Ins. Co., 225 N.W. 721, 723, 55 S.D. 261, 63 A.L.R. 925.

63. Cal.—Reid v. Holcomb, 218 P. 76, 63 Cal.App. 89—Sime v. Hunter, 195 P. 935, 50 Cal.App. 629.
22 C.J. p 96 note 92 [c].

64. Iowa.—Forrest v. Sovereign Camp, W. O. W., 261 N.W. 802, 220 Iowa 478—Gregory v. Kirkman Consol. Independent School Dist., 173 N.W. 243, 186 Iowa 914.

65. Iowa.—Sorensen v. Farmers Mut. Hail Ins. Ass'n of Des Moines, 286 N.W. 494, 226 Iowa 1316, 123 A.L.R. 1000.
Okl.—Miller v. Penwell, 239 P. 651, 652, 112 Okl. 163, quoting **Corpus Juris,** and followed in Guthrie v. Penwell, 239 P. 653, 112 Okl. 77.
22 C.J. p 97 note 97.

the receipt therefor had authority so to do;[66] and the date of the registry receipt acknowledging delivery of a letter duly posted and registered by mail, is such prima facie proof of receipt on that date as to require the addressee to rebut it.[67]

Nature and strength of presumption. The presumption of the receipt of mail matter from its regular mailing is considered by most authorities a presumption of fact, based on the circumstances of the particular case,[68] and not a presumption at law;[69] however, some authorities have characterized the presumption as one of law.[70] Still others have referred to proof of due mailing not as creating a presumption, either of fact or of law, but rather as prima facie evidence of receipt,[71] or as a legal basis, or relevant circumstance warranting an inference or finding that the letter was received in due course.[72]

The presumption of receipt of matter properly mailed is a strong one,[73] and is sufficient to justify a finding of receipt in the absence of evidence to the contrary.[74] Indeed, in the absence of evidence of the nonreceipt of the letter by the addressee, it has been considered the duty of the court or jury to find in favor of the presumption,[75] and the verdict of a jury or the finding of a judge in opposition to this inference of fact, when based on no evidence of nonreceipt,[76] or of delay in transmission,[77] is against the weight of the evidence and will not be allowed to stand. However the pre-

66. Ala.—Farmers' Mut. Ins. Assoc. v. Tankersley, 69 So. 410, 13 Ala. App. 524.
La.—Reed v. Stinson, App., 188 So 509.
Okl.—Miller v. Penwell, 239 P. 651, 652, 112 Okl. 163, quoting **Corpus Juris,** and followed in Guthrie v. Penwell, 239 P. 653, 112 Okl. 77.

Effect of surrounding circumstances

The presumption arising from return receipt signed by person purporting to be addressee's agent may be strengthened, weakened, or overcome by proof of attendant pertinent circumstances.—E. Clemens Horst Co. v. Grand Rapids Brewing Co., 273 N. W. 388, 280 Mich. 49.

67. Ga.—Lewis v. Phillips-Boyd Pub. Co., 89 S.E. 177, 18 Ga.App. 181.

68. U.S.—Columbian Nat. Life Ins. Co. v. Rodgers, C.C.A.Kan., 93 F.2d 740—Leahy v. U. S., C.C.A.Mont., 15 F.2d 949, affirming, D.C., 10 F. 2d 617—Creasy v. U. S., D.C.Va., 4 F.Supp 175.
Ark.—W. T. Rawleigh Co. v. Moore, 121 S.W.2d 106, 196 Ark. 1148.
Kan.—Shriver v. Union Stockyards Nat. Bank, 232 P. 1062, 1067, 117 Kan. 638, quoting **Corpus Juris.**
Ky.—Executive Committee of Christian Education and Ministerial Relief for Presbyterian Church of U. S. v. Fidelity & Columbia Trust Co., 117 S.W.2d 958, 273 Ky. 715.
Mass.—Massachusetts Biographical Soc. v. Howard, 125 N.E. 605, 234 Mass. 483.
Mo.—Williams v. Northeast Mut. Ins. Ass'n, App., 72 S.W.2d 166, 167, citing **Corpus Juris.**
N.Y.—Diehl v. Becker, 125 N.E. 533, 227 N.Y. 318, affirming 174 N.Y.S. 100, 186 App.Div. 16.
Okl.—Keeling v. Travelers Ins. Co., Hartford, Conn., 67 P.2d 944, 180 Okl. 99.
Tenn.—W. E. Richmond & Co. v. Security Nat. Bank, 64 S.W.2d 863, 16 Tenn.App. 414.
Tex.—Southland Life Ins. Co. v. Greenwade, Civ.App., 143 S.W.2d 648, error granted—National Aid Life Ass'n v. Driskill, Civ.App., 138 S.W.2d 238, 241, quoting **Corpus Juris**—Davis v. Petroleum Casualty Co., Civ.App., 13 S.W.2d 981.
Va.—Frieden v. Cluett, Peabody & Co., 128 S.E. 61, 64, 142 Va. 738, citing **Corpus Juris.**
22 C.J. p 97 note 1.

69. U.S.—Leahy v. U. S., C.C.A. Mont., 15 F.2d 949, affirming, D. C., 10 F.2d 617.
Ark.—W. T. Rawleigh Co. v. Moore, 121 S.W.2d 106, 196 Ark. 1148
Ky.—Executive Committee of Christian Education and Ministerial Relief for Presbyterian Church of U. S. v. Fidelity & Columbia Trust Co., 117 S.W.2d 958, 273 Ky. 715.
22 C.J. p 98 note 2.

70. Ala.—Sorrell v. Scheuer, 96 So. 216, 209 Ala. 268.
N.Y.—Roxbury Light & Power Co. v. Dimmick, 196 N.Y.S. 320.
22 C.J. p 98 note 3.

71. Ga.—Arnold v. Darby, 176 S.E. 914, 49 Ga.App. 629.
Ill.—Keogh v. Peck, 147 N.E. 266, 316 Ill. 318, 38 A.L.R. 1151—National Trust Bank v. Seaman, 270 Ill.App. 422.
Iowa.—Travelers' Ins. Co. of Hartford, Conn., v. Farmers' Mut. Fire Ins. Ass'n of Monona County, 233 N.W. 153, 211 Iowa 1051.
Me.—Perry v. Park Street Motor Corporation, 143 A. 274, 127 Me. 365.
Md.—Stiegler v. Eureka Life Ins. Co. of Baltimore, 127 A. 397, 146 Md. 629.
Mass.—Old Colony R. Co. v. Board of Assessors of Quincy, 26 N.E.2d 313, 305 Mass. 509—Hobart-Farrell Plumbing & Heating Co. v. Klayman, 19 N.E.2d 805, 302 Mass. 508—Avisais' Case, 188 N.E. 497, 285 Mass. 56—Eveland v. Lawson, 132 N.E. 719, 240 Mass. 99.
N.C.—Carden v. Sons and Daughters of Liberty, 102 S.E. 610, 179 N.C. 399.
Tex.—Hobson v. Wise County Home Protective Ass'n, Civ.App., 214 S. W. 583.
22 C.J. p 98 note 4 [a].

72. Ky.—Benge's Adm'r v. Garrison, 248 S.W. 1050, 198 Ky. 447—Proctor v. Ray, 240 S.W. 1063, 194 Ky. 746—Continental Ins. Co. v. Hargrove, 116 S.W. 356, 131 Ky. 837.
Tex.—American Nat. Ins. Co. v. Callahan, 81 S.W.2d 504, 125 Tex. 222, affirming, Civ.App., 51 S.W.2d 1083.

73. Ariz.—Merchants' & Manufacturers' Ass'n v. First Nat. Bank, 14 P.2d 717, 720, 40 Ariz. 531, citing **Corpus Juris.**
Or.—Coffey v. Northwestern Hospital Ass'n, 183 P. 762, 96 Or. 100, rehearing denied 189 P. 407, 96 Or. 100
22 C.J. p 98 note 3.

On the other hand, that the presumption is not a strong one was indicated in an early case, where it was said that the presumption is "contradicted daily by the immense dead letter collections never received by correspondents, and requiring the constant employment of several clerks to overhaul and dispose of, in our own general post-office alone."—Allen v. Blunt, C.C.Mass., 1 F.Cas. No.217, 2 Robb.Pat.Cas. 530, 2 Woodb. & M. 121.

74. Ark.—Taylor v. Corning Bank & Trust Co., 38 S.W.2d 557, 183 Ark. 757.
Mo.—Hall v. American Ins. Union, App., 27 S.W.2d 1076.
Wash.—Avgerinion v. First Guaranty Bank, 252 P. 535, 142 Wash. 73.

75. Conn.—Pitts v. Hartford L. & Annuity Ins. Co., 34 A. 95, 66 Conn. 376, 50 Am.S.R. 96.

76. Ariz.—Merchants' & Manufacturers' Ass'n v. First Nat. Bank, 14 P.2d 717, 720, 40 Ariz. 531, citing **Corpus Juris.**
22 C.J. p 98 note 4.

77. Ky.—Sullivan v. Kuykendall, 82 Ky. 483, 58 Am.R. 981.
22 C.J. p 98 note 5

sumption is not conclusive,[78] and does not apply under all circumstances.[79]

Circumstances affecting presumption. The presumption of receipt of mail matter may be affected by other facts;[80] thus, the presumption is strengthened where it is shown that it was not returned to the sender, although the envelope bore a return address,[81] where the addressee is well-known,[82] where the letter is found in the possession of the addressee,[83] where receipt of the letter is not denied,[84] where the conduct of the addressee is inconsistent with nonreceipt of the letter,[85] or where the addressee acknowledges receipt of a letter, and the letter in question was the only one written to him by the writer at about that time.[86] Where several papers were inclosed in one envelope and sent by mail, and it is shown that one of them was received, the presumption that all of them were received is strong.[87]

b. Address

Receipt of mail matter by the person for whom it was intended is not presumed unless it was properly addressed to him.

Receipt of mail matter by the person for whom it was intended cannot be presumed unless it is proved that the matter was properly addressed to him,[88]

78. Ala.—Corinth Bank & Trust Co. v. Cochran, 121 So. 66, 219 Ala. 81.
Ga.—Home Ins. Co. v. Head, 138 S.E. 275, 36 Ga.App. 779.
Ky.—Executive Committee of Christian Education and Ministerial Relief for Presbyterian Church of U. S. v. Fidelity & Columbia Trust Co., 117 S.W.2d 958, 273 Ky. 715.
Md.—Sloan v. Grollman, 77 A. 577, 113 Md. 192, Ann.Cas.1912A 544.
Mich.—Barstow v. Federal Life Ins. Co, 242 N.W. 862, 259 Mich. 125.
Minn.—Outcault Advertising Co. v. Farmers' & Merchants' State Bank of Greenbush, 187 N.W. 514, 151 Minn. 500.
Miss.—McCreary v. Stevens, 126 So. 4, 156 Miss. 330.
Mo.—Knotts v. Sentinel Life Ins. Co., 67 S.W.2d 798, 228 Mo.App. 353.
Tex.—Hill v. Lester, Civ.App., 91 S.W.2d 1152, error dismissed.
Va.—Carroll v. Hutchinson, 200 S.E. 644, 172 Va. 43.
Rebuttal of presumption see infra § 136 e.

"The evidence of mailing does no more than create a presumption that the letter reached its destination."—Curry v. Mackenzie, 146 N.E. 375, 377, 239 N.Y. 267, reversing 204 N.Y.S. 901, 208 App.Div. 849.

Not proof as matter of law

Proof of mailing, although not specifically contradicted, is not proof of receipt as matter of law.—Hall v. American Ins. Union, Mo.App., 27 S.W.2d 1076.

79. Ala.—Cleghorn v. State, 62 So. 329, 8 Ala.App. 272.
22 C.J. p 96 note 92 [1].

Postal employee

The presumption is unavailable to a postal employee against whom a claim is made because of irregularities and losses on his route; so far as he is concerned the presumption carries up to, but not through, his route, so that the inference is that he received the package.—Boerner v. U. S., D.C.N.Y., 30 F.Supp. 635, affirmed, C.C.A., 117 F.2d 387.

Statute requiring registered mail

The presumption of receipt of a letter sent by ordinary mail does not satisfy the requirements of a statute providing for notice by registered mail—Universal Credit Co. v. Clay County Trading Co., 180 So. 259, 235 Ala. 577.

80. U.S.—Leahy v. U. S., C.C.A. Mont., 15 F.2d 949, affirming, D.C., 10 F.2d 617.

Receipt of other letters

(1) Evidence that another letter, addressed in same manner as letter in question, was received by addressee, may be considered in determining whether or not presumption will arise—W. E. Richmond & Co. v. Security Nat. Bank, 64 S.W.2d 863, 16 Tenn.App. 414.

(2) Proof that a letter, properly addressed and stamped and bearing the sender's return address, was deposited in the same mail as two other letters addressed to other offices of the addressee, and that the other two letters were received, raises a rebuttable presumption that the first letter was received.—Hand & Johnson Tug Line v. Canada S. S. Lines, C.C.A.Ohio, 281 F. 779.

Application for life insurance

Presumption that applicant for life insurance received mailed notice of declination of application was particularly applicable where no policy was ever issued.—Columbian Nat. Life Ins. Co. v. Rodgers, C.C.A.Kan., 93 F.2d 740.

Carbon copy

Mailing of letter and production of carbon copy thereof raised presumption that addressee received it.—Harper v. Thurlow, 270 S.W. 607, 168 Ark. 491.

81. Ga.—Darby v. McIntyre, 174 S.E. 181, 49 Ga.App. 115.
La.—Henderson v. C. M. Thibodeaux Co., App., 177 So. 414.
Mass.—Johnston v. Cassidy, 181 N.E. 748, 279 Mass. 593.
Mo.—Roland v. Gassman, App., 44 S.W.2d 658.
N.Y.—Crawford v. Erbsloh, 244 N.Y.S. 502, 137 Misc. 790.
22 C.J. p 101 note 35.

82. U.S.—Atlantic Monthly Co. v. Post Pub. Co., D.C.Mass., 27 F.2d 556.

83. U.S.—J. W. Ringrose Co. v. W. & J. Sloane, D.C.Pa., 262 F. 545.
22 C.J. p 101 note 36.

Production at trial

(1) Where letter mailed by insured to agent was produced at trial by insurer, jury could find that agent forwarded letter to insurer.—Struble v. National Liberty Ins. Co. of America, 233 N.W. 417, 252 Mich. 566.

(2) A letter was presumed to have been duly received where such fact was not denied and where in fact the letter was offered in evidence by the addressee.—Florsheim Bros. Dry Goods Co. v. U. S., D.C.La., 26 F.2d 505, affirmed, C.C.A., 29 F.2d 895, certiorari granted 50 S.Ct. 17, 280 U.S. 539, 74 L.Ed. 600, affirmed 50 S.Ct. 215, 280 U.S. 453, 74 L.Ed. 542.

84. Ala.—Alabama Mineral Land Co. v. McFry, 184 So. 192, 236 Ala. 632.
Ark.—Cady v. Guess, 124 S.W.2d 213, 197 Ark. 611.
Ga.—Wilson v. Martin, 109 S.E. 294, 27 Ga.App. 549.
Va.—Gemmell v. Powers, 195 S.E. 501, 170 Va. 43.

85. N.H.—Woodman v. Jones, 8 N.H. 344.
22 C.J. p 101 note 37.

86. Vt.—Whitney Wagon Works v Moore, 17 A. 1007, 61 Vt. 230.

87. N.J.—Melvin v. Purdy, 17 N.J. Law 162.

88. U.S.—U. S. v. Rice, D.C.Tex., 281 F. 326, 330, quoting **Corpus Juris.**
Ala.—Denson v. Kirkpatrick Drilling Co., 144 So. 86, 225 Ala. 473.
Ark.—Dengler v. Dengler, 120 S.W.2d 340, 196 Ark. 913—Runyan v. Community Fund of Little Rock and North Little Rock, 31 S.W.2d 743, 182 Ark. 441.
Ga.—Prudential Ins. Co. of America v. Franklin, 180 S.E. 869, 51 Ga.App. 496—Ninth Dist. Agricultural and Mechanical School v. Wofford Pow-

at the city or town where he resides or has his place of business,[89] with the street and number if it is a city of considerable size,[90] or at the post office where he usually receives his mail.[91]

c. Mailing

(1) In general

(2) Prepayment of postage

(1) In General

Due mailing at a proper depository must be shown to support the presumption of receipt of mail matter. The fact of mailing may be shown by proof of an office practice.

In order to support a presumption of receipt of mail matter, there must be satisfactory proof that it was duly mailed,[92] and there must be shown all

er Co., 139 S.E. 916, 37 Ga.App. 271—Brazell v. Hearn, 127 S.E. 479, 33 Ga.App. 490—Ailey v. Lindale Co-op. Store, 125 S.E. 717, 33 Ga.App. 63—W. T. Rawleigh Medical Co. v. Burney, 102 S.E. 358, 25 Ga.App. 20.

Iowa.—Central Trust Co. v. City of Des Moines, 218 N.W. 580, 583, 205 Iowa 742, citing **Corpus Juris**—Gregory v. Kirkman Consol. Independent School Dist., 173 N.W. 243, 186 Iowa 914.

Kan.—Breedlove v. General Baking Co., 23 P.2d 482, 138 Kan. 143.

Ky.—Executive Committee of Christian Education and Ministerial Relief for Presbyterian Church of U S. v. Fidelity & Columbia Trust Co., 117 S.W.2d 958, 273 Ky. 715—Globe Indemnity Co. v. Daviess, 65 S.W.2d 456, 251 Ky. 442—Brown v. Union Cent. Life Ins. Co., 44 S.W.2d 514, 241 Ky. 514—Home Ins. Co. of New York v. Roll, 218 S.W. 471, 187 Ky. 31.

La.—Hortman-Salmen Co. v. Continental Casualty Co., 129 So. 515, 170 La. 879.

Md.—Stiegler v. Eureka Life Ins. Co. of Baltimore, 127 A. 397, 146 Md. 629.

Miss.—McCreary v. Stevens, 126 So. 4, 156 Miss. 330.

Mo.—Welch v. Noah, App., 52 S.W. 2d 493.

N.D.—Dawson Farmers' Elevator Co. v. Opp, 223 N.W. 350, 57 N.D. 598.

Okl.—Henry H. Cross Co. v. Bell Oil & Gas Co., 263 P. 1105, 129 Okl. 188.

Tex.—Thompson v. Kleinman, Civ. App., 259 S.W. 593—Bruck Bros. v. Lipman, Speir & Hahn, Civ.App., 228 S.W. 303.

22 C.J. p 98 note 9.

Matter mailed to wrong address is not presumed to have been received by the addressee.

Tex.—Crow v. Thompson, Civ.App., 131 S.W.2d 1064, error dismissed, judgment correct.

Wash.—Spokane Valley State Bank v. Murphy, 274 P. 702, 150 Wash. 640.

Where addressee had moved, and there was no evidence that he left a forwarding address, the presumption of receipt was destroyed.—Kansas City Life Ins. Co. v. Cox, C.C.A.Tenn., 104 F.2d 321.

89. Iowa.—Lundy v. Skinner, 263 N. W. 520, 220 Iowa 831.

22 C.J. p 98 note 10.

90. Md.—Lansburgh v. M. P. Howlett, Fish & Oyster Co., 138 A. 269, 271, 153 Md. 312, quoting **Corpus Juris.**

22 C.J. p 98 note 11.

Well known firm

"It seems that where the addressee is a well-known business firm in a large city, or a public official, the want of a street address on a letter otherwise properly addressed, stamped, and mailed, does not overcome the presumption of delivery."—Ennis-Bayard Petroleum Co. v. Plainville Mill & Elevator Co., 235 P. 119, 121, 118 Kan. 202.

Receipt of previous letters

Where many previous letters without street address were promptly received by addressee, want of street address on a subsequent letter did not destroy presumption of its receipt.—Ennis-Bayard Petroleum Co. v. Plainville Mill & Elevator Co., supra.

Notice to post office of change

"If a party has changed his place of business, and has informed the post-office of it, there is a presumption or inference that the letter has been delivered at the new address."—Marston v. Bigelow, 22 N.E. 71, 150 Mass. 45, 54, 5 L.R.A. 43—22 C.J. p 98 note 11 [b].

91. Mass.—Shelburne Falls Nat. Bank v. Townsley, 102 Mass. 177, 181, 3 Am.S.R. 445.

22 C.J. p 99 note 12.

92. U.S.—Livingston v. Becker, D. C.Mo., 40 F.2d 673—U. S. v. Rice, D.C.Tex., 281 F. 326, 330, 335, quoting **Corpus Juris.**

Ala.—Denson v. Kirkpatrick Drilling Co., 144 So. 86, 225 Ala. 473—Tharp v. Loeb Hardware Co., 135 So. 412, 24 Ala.App. 344.

Ark.—Dengler v. Dengler, 120 S.W.2d 340, 196 Ark. 913—Runyan v. Community Fund of Little Rock and North Little Rock, 31 S.W.2d 743, 182 Ark. 441.

Ga.—Prudential Ins. Co. of America v. Franklin, 180 S.E. 869, 51 Ga. App. 496—Palmer-Murphy Co. v. Rawlings, 132 S.E. 646, 35 Ga.App. 196—Brazell v. Hearn, 127 S.E. 479, 33 Ga.App. 490—W. T. Rawleigh Medical Co. v. Burney, 102 S.E. 358, 25 Ga.App. 20.

Iowa.—Central Trust Co. v. City of Des Moines, 218 N.W. 580, 583, 205 Iowa 742, citing **Corpus Juris.**

Kan.—Miller v. Kansas City, Kan., Chamber of Commerce, 41 P.2d 715, 141 Kan. 459.

Ky.—Executive Committee of Christian Education and Ministerial Relief for Presbyterian Church of U. S. v. Fidelity & Columbia Trust Co., 117 S.W.2d 958, 273 Ky. 715—Globe Indemnity Co. v. Daviess, 47 S.W.2d 990, 243 Ky. 356—Brown v. Union Cent. Life Ins. Co., 44 S.W. 2d 514, 241 Ky. 514—Home Ins. Co. of New York v. Roll, 218 S.W. 471, 187 Ky. 31.

Miss.—McCreary v. Stevens, 126 So. 4, 156 Miss. 330.

Mo.—Welch v. Noah, App., 52 S.W. 2d 493.

N.Y.—James E. Cashman, Inc., v. Spellman, 251 N.Y.S. 240, 233 App. Div. 45.

N.D.—Dawson Farmers' Elevator Co. v. Opp, 223 N.W. 350, 57 N.D. 598.

Okl.—Mid-Continent Life Ins. Co. v. Freeman, 74 P.2d 1163, 181 Okl. 355—Henry H. Cross Co. v. Bell Oil & Gas Co., 263 P. 1105, 129 Okl. 188.

Tex.—Bruck Bros. v. Lipman, Speir & Hahn, Civ.App., 228 S.W. 303.

Wash.—Haugen v. Department of Labor and Industries, 48 P.2d 565, 183 Wash. 398.

22 C.J. p 99 note 13.

Presumption of mailing

(1) "There is no presumption with respect to the mailing; that fact must be proved by competent evidence."—McGonigle v. Prudential Ins. Co. of America, 46 P.2d 687, 693, 100 Mont. 203.

(2) Mailing of a letter is not presumed from the mere fact that it was written or dictated.—Phelps v. Holden, 175 A. 250, 107 Vt. 1—Jacobs v. National Accident & Health Ins. Co., 151 A. 565, 103 Vt. 5—22 C.J. p 99 note 14 [c].

(3) However, where a copy of a letter which an official had the duty of sending was found in his desk after his death, the original was presumed to have been sent.—Farmers' State Bank & Trust Co. of Gorman v. Central State Bank of Dallas, Tex.Civ.App., 281 S.W. 632.

Construction of testimony

(1) Testimony that a letter was "mailed" is equivalent to a state-

those things which are necessary to impose on the government officers and employees the duty of transmitting and delivering the matter.[93] Such proof need not consist of direct and positive testimony to the ultimate fact of mailing;[94] and proof of the existence of an office practice or custom in the mailing of letters, together with proof that the custom was followed in the particular instance, may constitute sufficient evidence of mailing to support a presumption of due receipt.[95] Where proof of an office routine or business practice is relied on to establish mailing, the person who is claimed to have mailed the letter ordinarily must appear[96] and testify that he complied with the custom and performed his duty;[97] but there is authority to the contrary.[98]

The mail matter must have been deposited in the United States mail at one of the depositories provided by the United States for receiving mail.[99]

ment that it was properly addressed, stamped, and deposited in a proper place for the receipt of mail, and raises a presumption that it was received in due course.

Mo.—Williams v. Northeast Mut. Ins. Ass'n, App., 51 S.W.2d 142—J. L. Price Brokerage Co. v. Chicago, R. I. & P. Ry. Co., 230 S.W. 374, 207 Mo.App. 8—Ward v. Morr Transfer & Storage Co., 95 S.W. 964, 965, 119 Mo.App. 83.

Wis.—Reeves v. Casualty Co., 174 N.W. 475, 170 Wis. 370, rehearing denied 174 N.W. 959, 170 Wis. 370.

22 C.J. p 99 note 13 [a].

(2) Testimony of attorney that he forwarded letter "through due course of mail," imports that letter was properly addressed, stamped, and deposited in mail.—Wichita Valley Ry. Co. v. Davis, Tex.Civ.App., 275 S.W. 169, 170.

(3) Testimony that a person "wrote" a letter to another has been held sufficient to authorize an inference that it was received, in the absence of evidence of nonreceipt.—Sinclair Refining Co. v. Giddens, 187 S.E. 201, 54 Ga.App. 69.

(4) Testimony that witness "supposed" stamped letter reached United States mail is no evidence that it reached custody of United States authorities.—Tharp v. Loeb Hardware Co., 135 So. 412, 413, 24 Ala.App. 344.

(5) Other testimony see 22 C.J. p 99 note 14 [d].

93. Iowa.—Forrest v. Sovereign Camp, W. O. W., 261 N.W. 802, 220 Iowa 478.

Enclosure in wrapper

It must appear that the matter mailed was enclosed in a wrapper or otherwise prepared for transmission through the mail.—Forrest v. Sovereign Camp, W. O. W., supra—Central Trust Co. v. City of Des Moines, 218 N.W. 580, 205 Iowa 742.

94. U.S.—U. S. v. Rice, D.C.Tex., 281 F. 326, 330, 335, quoting **Corpus Juris.**

Ark.—Travelers Ins. Co. v. Thompson, 99 S.W.2d 254, 257, 193 Ark. 332, quoting **Corpus Juris.**

22 C.J. p 99 note 14.

95. U.S.—Citizens' Bank & Trust Co. of Middlesboro, Ky., v. Allen, C.C.A.Va., 43 F.2d 549—Livingston v. Becker, D.C.Mo., 40 F.2d 673.

Iowa.—Central Trust Co. v. City of Des Moines, 218 N.W. 580, 205 Iowa 742

Kan.—Prescott, Wright, Snider Co. v. City of Cherryvale, 4 P.2d 457, 459, 134 Kan. 53, citing **Corpus Juris.**

Ohio.—Hitz v. Ohio Fuel Gas Co., 183 N.E. 768, 43 Ohio App. 484.

Pa.—Mankin v. Parry, 70 Pa.Super. 558.

22 C.J. p 99 note 14 [a], [b].

Long series of correspondence

Rule that no presumption of delivery of mail arises without proof of actual deposit in mail and prepayment of postage is inapplicable to long series of correspondence handled in usual course of business.—Stewart Bros. v. Brewer, 148 So. 657, 177 La. 389.

Requirements as to office practice

(1) To establish mailing of a letter in the absence of direct evidence, there must be proof of an invariable custom in an office of depositing mail in a certain receptacle, that the letter in question was deposited in such receptacle, and that the employee whose duty it was to deposit the mail in the post office either actually deposited that mail in the post office or that it was his invariable custom to deposit every letter left in the usual receptacle.—U. S. v. Rice, D.C.Tex., 281 F. 326.

(2) Proof of a mere "custom" to mail all letters is insufficient, for "the word 'custom' implies only that such letters are generally and usually mailed."—Collins v. Hoover, 218 S.W. 940, 942, 205 Mo.App. 93.

96. Mo.—Peirson-Lathrop Grain Co. v. Barker, App., 223 S.W. 941.

97. Ala.—Birmingham News Co. v. Moseley, 141 So. 689, 225 Ala. 45

Ill.—Meyer v. Krug, 19 N.E.2d 111, 298 Ill.App. 625.

Ohio.—Hitz v. Ohio Fuel Gas Co., 183 N.E. 768, 43 Ohio App. 484.

Okl.—Henry H. Cross Co. v. Bell Oil & Gas Co., 263 P. 1105, 129 Okl. 188.

Pa.—Mankin v. Parry, 70 Pa.Super. 558.

Wash.—Farrow v. Department of Labor and Industries, 38 P.2d 240, 179 Wash. 453.

Wis.—Frank v. Metropolitan Life Ins. Co., 277 N.W. 643, 227 Wis. 613—Federal Asbestos Co. v. Zimmermann, 177 N.W. 881, 171 Wis. 594, 25 A.L.R. 5.

Reason for rule

"We cannot presume the stenographer performed her duty, and, upon that, base a presumption that the letter was received. One presumption may not be based on another"—Mankin v. Parry, 70 Pa.Super. 558, 560.

Proof held insufficient

The presumption does not arise on evidence that a letter was merely placed in a cigar box used to hold letters which were to be mailed by some grocery employee, there being no direct or positive evidence that it was so mailed.—W. T. Rawleigh Medical Co. v. Burney, 102 S.E. 358, 25 Ga.App. 20.

98. Kan.—J. I. Case Co. v. Sinning Bros. Motor Co., 21 P.2d 328, 330, 137 Kan. 581.

"In the modern manner of carrying on business where there are thousands of letters sent out every day, testimony that a particular piece of mail was put into the routine of being mailed is sufficient evidence that it was mailed without producing an employee of the company who can testify that it was dropped into the mail box."—J. I. Case Co. v. Sinning Bros. Motor Co., supra

99. Iowa.—Gregory v. Kirkman Consol Independent School Dist., 173 N.W. 243, 186 Iowa 914.

"Due posting" includes not only writing and addressing the letter, but also stamping and placing it in the United States mail.—Tharp v. Loeb Hardware Co., 135 So. 412, 24 Ala.App. 344.

"Mailed" explained

"By the term 'mailed' is necessarily meant the deposit of the letter in a United States post office or United States postal mail box, or in the custody of a United States mail collector."—W. T. Rawleigh Medical Co. v. Burney, 102 S.E. 358, 359, 25 Ga.App. 20.

A letter deposited in a post office is duly mailed.[1] However, the deposit need not be at the post office,[2] and it is sufficient that the letter was deposited in a government street letter box,[3] a mail box on a rural delivery route,[4] or a mail chute shown to be connected with a government letter box.[5] A letter delivered to an official letter carrier while on his official route,[6] or to a United States mail agent while on duty on a mail train,[7] is duly mailed; but it is not sufficient to show that the letter was given to a regular mail carrier to perform acts outside his duties before placing it in the mail.[8]

A postmark on the envelope affords a presumption that the letter was mailed.[9]

Where a letter was mailed in a foreign country to an address in the United States, the court has refused to draw an inference of receipt.[10]

Date of mailing. It is not presumed that a letter was mailed on the day indicated by the postmark on the envelope,[11] although such postmark is a circumstance for the jury to consider.[12] The date of a letter authorizes no inference or presumption that it was mailed on that day;[13] nor is the date of a check evidentiary as to when it was mailed.[14] A presumption that a letter, received many days after the sender's death, was not mailed before such death does not preclude proof that it was in fact mailed while the sender was alive.[15]

(2) Prepayment of Postage

Due mailing, to support the presumption of receipt, requires prepayment of the postage.

It is very generally held that matter is not duly mailed, so as to give rise to a presumption of receipt by the addressee, unless it appears that the matter was duly stamped, or, in other words, that the postage was prepaid.[16] It has, however, been

1. Cal.—Schneider v. Oakman Cons Min. Co, 176 P. 177, 38 Cal App. 338.
Conn.—Hartford Bank v. Hart, 3 Day 491, 3 Am D. 274.

2. Mass.—Prudential Trust Co. v. Hayes, 142 N E 73, 247 Mass 311.

3. Mass.—Prudential Trust Co. v. Hayes, supra.
22 C J. p 99 note 16.

4. N.D.—Kvale v. Keane, 168 N W. 74, 39 N.D. 560.
S.D.—Bank of Ipswich v. Harding County Farmers Mut. Fire & Lightning Ins. Co., 225 N.W. 721, 55 S.D. 261, 63 A L R. 925.
Tex.—Garrison v. Great Southern Life Ins. Co., Civ App., 72 S W.2d 692, error dismissed.

5. Mass.—Prudential Trust Co. v. Hayes, 142 N.E. 73, 247 Mass. 311.
22 C.J. p 99 note 18.

Necessity of showing connection

Proof that letter was dropped in mail chute in building containing mail box is sufficient proof of mailing without proving a direct connection of the chute with such box.—Talmadge v. Clewiston Iron Co., 252 Ill.App. 508.

6. Pa.—Pearce v. Langfit, 101 Pa. 507, 47 Am.R. 737.
22 C.J. p 99 note 19.

7. Iowa.—Watson v. Richardson, 80 N.W. 407, 110 Iowa 673.

8. Okl.—Mid-Continent Life Ins. Co. v. Freeman, 74 P.2d 1163, 181 Okl. 355.

Postman requested to stamp and mail

Giving letters and money to postman, requesting him to stamp and mail letters, is insufficient.—New York Life Ins. Co. v. Quinn, 157 So. 902, 171 Miss. 396.

9. U.S.—U. S. v. Noelke, C.C.N.Y., 1 F. 426, 17 Blatchf. 554.
22 C.J. p 99 note 21.

10. Mass.—Oliver v. Newburyport Ins. Co., 3 Mass. 37, 3 Am.D. 77.

11. N.Y.—National City Bank of New York v. Horowitz, 267 N.Y.S. 527, 149 Misc. 531.
Wash.—Farrow v. Department of Labor and Industries, 38 P.2d 240, 179 Wash. 453.
22 C.J. p 99 note 23.

12. Mass.—Shelburne Falls Nat. Bank v. Townsley, 102 Mass. 177, 3 Am.R. 445.

Postmark as some evidence

A postmark is some evidence that the envelope was not deposited in the post office a few days earlier; and the existence of other postmarks which are not legible does not destroy the probative force of the legible postmark.—Hurley Bros. v. Haluptzok, 171 N.W. 928, 142 Minn. 269.

13. Cal.—Cowan v. Tremble, 296 P. 91, 111 Cal.App. 458.
22 C.J. p 99 note 25.

14. Ky.—Union Gas & Oil Co. v. Indian-Tex Petroleum Co., 259 S. W. 57, 202 Ky. 236.

15. N.Y.—Spanhake v. Teachers' Retirement Board, 226 N.Y.S. 744, 131 Misc. 383, reversed on other grounds 229 N.Y.S. 408, 224 App. Div. 75, affirmed 164 N.E. 601, 249 N.Y. 605.

16. Ala.—Denson v. Kirkpatrick Drilling Co., 144 So. 86, 225 Ala. 473—Tharp v. Loeb Hardware Co., 135 So. 412, 24 Ala.App. 344.
Ark.—Dengler v. Dengler, 120 S.W.2d 340, 196 Ark. 913.
Ga.—Prudential Ins. Co. of America v. Franklin, 180 S.E. 869, 51 Ga. App. 496—Ninth Dist. Agricultural and Mechanical School v. Wofford Power Co., 139 S.E. 916, 37 Ga.App. 271—Brazell v. Hearn, 127 S.E. 479, 33 Ga.App. 490—Ailey v. Lindale Co-op. Store, 125 S.E. 717, 33 Ga. App. 63—W. T. Rawleigh Medical Co. v. Burney, 102 S.E. 358, 25 Ga. App. 20.
Ind.—Glaser v. Williamsburg City Fire Ins. Co., 125 N.E. 787, 72 Ind. App. 319.
Iowa.—Central Trust Co. v. City of Des Moines, 218 N.W. 580, 583, 205 Iowa 742, citing **Corpus Juris**—Gregory v. Kirkman Consol. Independent School Dist., 173 N.W. 243, 186 Iowa 914.
Ky.—Executive Committee of Christian Education and Ministerial Relief for Presbyterian Church of U. S. v. Fidelity & Columbia Trust Co., 117 S.W.2d 958, 273 Ky. 715—Globe Indemnity Co. v. Daviess, 47 S.W.2d 990, 243 Ky. 356—Brown v. Union Cent. Life Ins. Co., 44 S. W.2d 514, 241 Ky. 514—Home Ins. Co. of New York v. Roll, 218 S.W. 471, 187 Ky. 31.
La.—McWilliams v. Reith, 88 So. 913, 914, 149 La. 298, citing **Corpus Juris.**
Miss.—McCreary v. Stevens, 126 So. 4, 156 Miss. 330.
Mo.—Welch v. Noah, App., 52 S.W. 2d 493.
N.D.—Dawson Farmers' Elevator Co. v. Opp, 223 N.W. 350, 57 N.D. 598.
Okl.—Henry H. Cross Co. v. Bell Oil & Gas Co., 263 P. 1105, 129 Okl. 188.
Pa.—Cairns v. Matthews, 162 A. 501, 106 Pa.Super. 582.
Tex.—Brown County Farmers' Ass'n v. Heid Bros., Civ.App., 37 S.W.2d 1067, 1068, citing **Corpus Juris**—Thompson v. Kleinman, Civ.App., 259 S.W. 593—Bruck Bros. v. Lip-

asserted that evidence that a letter was mailed raises a presumption that the necessary postage was paid,[17] and that an officer's return that service was "duly" made by mail may be regarded as a statement that postage was prepaid, where the addressee does not pretend that in fact he did not receive the notice mailed.[18]

d. Time of Receipt

The presumption is that mail matter was received in the ordinary course of the mails.

The addressee of mail matter is presumed to have received it as soon as it could have been transmitted to him in the ordinary or regular course of the mails, or as it is otherwise expressed, in due course of the mails.[19]

Receipt at a particular time cannot ordinarily be presumed unless there is proof of the course of the mails, or the probable time necessary for transmission,[20] as well as of the date of mailing,[21] except where such facts may be judicially noticed, see supra § 52. However, the presumption has been held to be that a letter mailed in a city to a place within the same city was received on the following day,[22] at least where mailed in the evening;[23] and it has

man, Speir & Hahn, Civ.App., 228 S.W. 303.
22 C.J. p 100 note 26.

17. Mo.—Williams v. Northeast Mut. Ins. Ass'n, App., 51 S.W.2d 142—J. L. Price Brokerage Co. v. Chicago, R. I. & P. Ry. Co., 230 S.W. 374, 207 Mo.App. 8.
Pa.—Estes Mills Co. v. Stewart & Shannon Co., 81 Pa.Super. 536
Tex.—Wichita Valley Ry. Co. v. Davis, Civ.App., 275 S.W. 169.
Wis.—Reeves v. Casualty Co., 174 N.W. 475, 170 Wis. 370, rehearing denied 174 N.W. 959, 170 Wis. 370.
22 C.J. p 100 note 27.

18. N.Y.—People v. Crane, 26 N.E. 736, 125 N.Y. 535.

19. U.S.—Columbian Nat. Life Ins. Co. v. Rodgers, C.C.A.Kan., 93 F.2d 740—Stern Bros. & Co. v. Burnet, C.C.A., 51 F.2d 1042—Ripy v. Cloverleaf Life & Casualty Co., C.C.A. Tex., 9 F.2d 324.
Ala.—W. T. Rawleigh Co. v. Deavours, 95 So. 459, 209 Ala. 127—Corley v. Vizard, 84 So. 299, 203 Ala. 564.
Ark.—W. T. Rawleigh Co. v. Moore, 121 S.W.2d 106, 196 Ark. 1148—Taylor v. Corning Bank & Trust Co., 38 S.W.2d 557, 183 Ark. 757
Cal.—Valente v. Sica, 36 P.2d 1086, 1 Cal.App.2d 478.
Colo.—Stark Lumber Co. v. Keystone Inv. Co., 20 P.2d 306, 92 Colo. 259, followed in 20 P.2d 308, 92 Colo. 266.
Ga.—Saunders & McMullen v. Hudson, 119 S.E. 535, 30 Ga.App. 732—Georgia Land Co. v. Davis, 111 S.E. 219, 28 Ga.App. 398.
Idaho.—Hobson v. Security State Bank, 57 P.2d 685, 56 Idaho 601—In re Idaho Mut. Ben. Ass'n, 53 P.2d 1171, 56 Idaho 272.
Ill.—Wakenight v. West, 217 Ill.App. 199.
Ind.—Groher v. Colgate-Palmolive-Peet Co., 178 N.E. 242, 94 Ind.App. 234.
Kan.—Shriver v. Union Stockyards Nat. Bank, 232 P. 1062, 1067, 117 Kan. 638, quoting **Corpus Juris.**
Ky.—Inter-Southern Life Ins. Co. v. Cochran, 83 S.W.2d 11, 259 Ky. 677—Commonwealth Life Ins. Co. v. Gault's Adm'rs, 76 S.W.2d 618, 256 Ky. 625—Home Ins. Co. of New York v. Roll, 218 S.W. 471, 187 Ky. 31.
La.—Hortman-Salmen Co. v. Continental Casualty Co., 129 So. 515, 170 La. 879
Minn.—Outcault Advertising Co. v. Farmers' & Merchants' State Bank of Greenbush, 187 N.W. 514, 151 Minn. 500.
Mo.—In re Farmers & Merchants Bank of Center, Mo., App., 83 S.W.2d 198—Williams v. Northeast Mut. Ins. Ass'n, App., 72 S.W.2d 166, 167, citing **Corpus Juris**—McCaskey Register Co. v. Erffmeyer, App., 46 S.W.2d 256—Roland v. Gassman, App., 44 S.W.2d 658.
Mont.—W. J. Lake & Co. v. Montana Horse Products Co., 97 P.2d 590, 109 Mont. 434—Stewart v. Arrow Creek Development Co., 212 P. 1107, 66 Mont. 238.
N.J.—Alexander v. Rekoon, 139 A. 796, 104 N.J.Law 1.
N.Y.—Garber v. Firemen's Ins. Co. of Newark, N. J., 2 N.Y.S.2d 801, 167 Misc. 124—Youssoupoff v. Widener, 215 N.Y.S. 24, 126 Misc. 491, affirmed 219 N.Y.S. 942, 219 App.Div. 712, affirmed 158 N.E. 64, 246 N.Y. 174.
Pa.—Fox v. Davey Compressor Co., 178 A. 469, 318 Pa. 331.
S.C.—Calder v. Commercial Casualty Ins. Co., 188 S.E. 864, 182 S.C. 240—Burbage v. Jefferson Standard Life Ins. Co., 136 S.E. 230, 138 S.C. 208—Weathers v. Sovereign Camp, W. O. W., 112 S.E. 44, 119 S.C. 402.
Tenn.—W. E. Richmond & Co. v. Security Nat. Bank, 64 S.W.2d 863, 16 Tenn.App. 414.
Tex.—National Aid Life Ass'n v. Driskill, Civ.App., 138 S.W.2d 238, 241, quoting **Corpus Juris**—Lumbermen's Reciprocal Ass'n v. Henderson, Civ.App., 1 S.W.2d 646, affirmed in part and reversed in part on other grounds, Com.App., 15 S.W.2d 565—Midland Rubber Co. v. Waldman, Civ.App., 246 S.W. 109—Texas Co. v. Wimberly, Civ.App., 213 S.W. 286.
Wis.—Bursack v. Davis, 225 N.W. 738, 199 Wis. 115.
22 C.J. p 100 note 29.

Reasonably prompt delivery

The court has a right to consider the probability of a reasonably prompt delivery of notice which was mailed.—State of Ohio ex rel. Squire v. Union Trust Co. of Pittsburgh, 8 A.2d 476, 137 Pa.Super. 75.

Date on return receipt

Where the letter was registered, the signed return receipt was prima facie evidence that the letter was received on the date of the receipt.—Ladd v. Cochran & McCluer Co., 274 Ill.App. 427.

20. Okl.—Chapman v. State, 263 P. 453, 129 Okl. 83.
Tex.—Bruck Bros. v. Lipman, Speir & Hahn, Civ.App., 228 S.W. 303.
22 C.J. p 101 notes 30, 32–34.

During war

The uncertainty of the mails during the war with Germany is well known, so that, to raise the presumption of delivery of a letter, the probable time necessary for transmission of the letter should have been proved.—Bruck Bros. v. Lipman, Speir & Hahn, Tex.Civ.App., 228 S.W. 303.

21. Okl.—Chapman v. State, 263 P. 453, 454, 129 Okl. 83, quoting **Corpus Juris.**
22 C.J. p 101 note 31.

22. N.Y.—Dulberg v. Equitable Life Assur. Soc. of U.S., 12 N.E.2d 554, 277 N.Y. 17, reversing 297 N.Y.S. 166, 252 App.Div. 209—News Syndicate Co. v. Gaiti Paper Stock Corporation, 176 N.E. 169, 256 N.Y. 211, reversing 246 N.Y.S. 882, 231 App.Div. 812 and 238 N.Y.S. 886, 228 App.Div. 688, reargument denied 177 N.E. 190, 256 N.Y. 678—Dulberg v. Equitable Life Assur. Soc. of U.S., 292 N.Y.S. 232, 249 App.Div. 785.

23. N.Y.—Struhl v. Travelers Ins. Co., 7 N.Y.S.2d 881, 255 App.Div. 527, affirmed 22 N.E.2d 162, 281 N.Y. 584—Ludmerer v. New York Life Ins. Co., 19 N.Y.S.2d 272.

also been held in the case of a letter mailed to a point in the same city that it was delivered either on the day of mailing or on the following day.[24] In the case of a letter mailed from one city to another, it has been assumed, under the particular circumstances, that it did not reach the addressee until the next day,[25] or that it reached him not later than the second day after mailing.[26]

e. Rebuttal of Presumption

The presumption of receipt of mail matter may be rebutted. According to most authorities, evidence of nonreceipt creates an issue of fact.

The presumption of due receipt of a letter or other mail matter may be rebutted[27] by evidence that it was not in fact delivered or received,[28] or was not received in the ordinary course of the mails,[29] or by evidence tending to show that the letter was never mailed.[30] The inference of delivery to the addressee in person may be destroyed by a contrary inference arising from a course of busi-

24. N.J.—Alexander v. Rekoon, 139 A. 796, 104 N.J.Law 1.

25. Md.—Brown Method Co. v. Ginsberg, 138 A. 402, 153 Md. 414.

26. Ind.—Continental Nat. Bank of Indianapolis v. Discount & Deposit State Bank of Kentland, 157 N.E. 433, 199 Ind. 290.
22 C.J. p 100 note 29 [b].

27. U.S.—Columbian Nat. Life Ins. Co. v. Rodgers, C.C.A.Kan., 93 F.2d 740—Ripy v. Cloverleaf Life & Casualty Co., C.C.A.Tex., 9 F.2d 324—Profit v. Seaboard Mut. Casualty Co., D.C.Md., 28 F.Supp. 202, reversed on other grounds, C.C.A., Seaboard Mut. Casualty Co. v. Profit, 108 F.2d 597, 126 A.L.R. 1105—Creasy v. U. S., D.C.Va., 4 F.Supp. 175.
Ala.—Brotherhood of Railroad Trainmen v. Jennings, 168 So. 173, 176, 232 Ala. 438, citing **Corpus Juris**—W. T. Rawleigh Co. v. Deavours, 95 So. 459, 209 Ala. 127.
Ark.—Travelers Ins. Co. v. Thompson, 99 S.W.2d 254, 193 Ark. 332—Taylor v. Corning Bank & Trust Co., 38 S.W.2d 557, 183 Ark. 757.
Ga.—Hart v. Little, 146 S.E. 338, 39 Ga.App. 106.
Ill.—Barbee v. Evans, 220 Ill.App. 154.
Iowa.—Bloomfield State Bank v. Seabury, 204 N.W. 259, 200 Iowa 37—Gregory v. Kirkman Consol. Independent School Dist., 173 N.W. 243, 186 Iowa 914.
Kan.—Miller v. Kansas City, Kan., Chamber of Commerce, 41 P.2d 715, 141 Kan. 459—Shriver v. Union Stockyards Nat. Bank, 232 P. 1062, 1067, 117 Kan. 638, quoting **Corpus Juris.**
Ky.—Inter-Southern Life Ins. Co. v. Cochran, 83 S.W.2d 11, 259 Ky. 677—H. C. Whitmer Co. v. McClung, 57 S.W.2d 648, 247 Ky. 625—Harlan County v. Howard, 56 S.W.2d 365, 246 Ky. 791.
Mich.—Merchants' Nat. Bank v. Detroit Trust Co., 242 N.W. 739, 258 Mich. 526, 85 A.L.R. 350—Ewing v. Klatt, 209 N.W. 838, 235 Mich. 536.
Mo.—Fleming v. Anderson, 232 S.W. 718—Williams v. Northeast Mut. Ins. Ass'n, App., 72 S.W.2d 166, 167, citing **Corpus Juris**—Hawes v. American Central Ins. Co. of St. Louis, 7 S.W.2d 479, 222 Mo.App. 1057.
N.J.—Magazine Repeating Razor Co. v. Weissbard, 7 A.2d 411, 125 N.J.Eq. 593.
N.Y.—Frank M. McCurdy Co. v. Wegner, 220 N.Y.S. 213, 129 Misc. 230
N.C.—Green v. Ben Vonde Co., 107 S.E. 139, 181 N.C. 317.
Okl.—Mid-Continent Life Ins. Co. v. Freeman, 74 P.2d 1163, 181 Okl. 355—Keeling v. Travelers Ins. Co., Hartford, Conn., 67 P.2d 944, 180 Okl. 99—U. S. Fire Ins. Co. of City of New York v. L. C. Adam Mercantile Co., 245 P. 885, 117 Okl. 73.
Pa.—Fox v. Davey Compressor Co., 178 A. 469, 318 Pa. 331—Jacobs v. Mohnton Trust Co., 149 A. 887, 299 Pa. 527—Edelson v. American Employers' Ins. Co., 9 Pa.Dist. & Co. 514, 40 Lanc.L.Rev. 441, affirmed 92 Pa.Super. 90, 41 Lanc.L.Rev. 25.
S.C.—Calder v. Commercial Casualty Ins. Co., 188 S.E. 864, 182 S.C. 240.
Tenn.—W. E. Richmond & Co. v. Security Nat. Bank, 64 S.W.2d 863, 16 Tenn.App. 414.
Tex.—National Aid Life Ass'n v. Driskill, Civ.App., 138 S.W.2d 238, 241, quoting **Corpus Juris**—Thompson v. Kleinman, Civ.App., 259 S.W. 593.
W. Va.—Antonowich v. Home Life Ins. Co., 179 S.E. 601, 602, 116 W.Va. 155, citing **Corpus Juris.**
22 C.J. p 101 note 40.

Registered mail

Presumption that registered mail was forwarded as such yields to contrary proof.—Henderson v. Mayer, 126 So. 531, 12 La.App. 531.

28. Ga.—Union Brokerage Co. v. Beall Bros., 119 S.E. 533, 30 Ga.App. 748—W. T. Rawleigh Medical Co. v. Burney, 102 S.E. 358, 25 Ga.App. 20.
Ill.—Wakenight v. West, 217 Ill.App. 199.
Ky.—Globe Indemnity Co. v. Daviess, 65 S.W.2d 456, 251 Ky. 442—Home Ins. Co. of New York v. Roll, 218 S.W. 471, 187 Ky. 31.
Miss.—McCreary v. Stevens, 126 So. 4, 156 Miss. 330.
Mo.—Williams v. Northeast Mut. Ins. Ass'n, App., 72 S.W.2d 66.
Mont.—Renland v. First Nat. Bank, 4 P.2d 488, 90 Mont. 424.
N.Y.—Cheesman v. Cheesman, 196 N.Y.S. 820, 203 App.Div. 533, reversed on other grounds 139 N.E. 775, 236 N.Y. 47—People v. S. W. Straus & Co., 285 N.Y.S. 648, 158 Misc. 186, 222, modified on other grounds in part 289 N.Y.S. 209, 248 App.Div. 785, affirmed 290 N.Y.S. 423, 248 App.Div. 785.
N.D.—Dawson Farmers' Elevator Co. v. Opp, 223 N.W. 350, 57 N.D. 598.
Tex.—Texas Co. v. Wimberly, Civ.App., 213 S.W. 286.
Va.—Yanago v. Aetna Life Ins. Co., 178 S.E. 904, 164 Va. 258
Wash.—Collins v. Collins, 275 P. 571, 151 Wash. 201.
22 C.J. p 101 note 41.

Receipt by unauthorized persons

(1) Mailed notices are not presumed received by addressees, where it appears that they were in fact received by persons not shown to be authorized agents of addressees.—White v. Bank of Rex, 150 S.E. 565, 40 Ga.App. 558.

(2) The presumption of receipt was overcome by testimony showing receipt of letters by others than corporation to which they were addressed.—E. Clemens Horst Co. v. Grand Rapids Brewing Co., 273 N.W. 388, 280 Mich. 49.

Third persons' denial of receipt

(1) Presumption was not rebutted by testimony of addressee's husband that addressee never received notice.—Darby v. McIntyre, 174 S.E. 181, 49 Ga.App. 115.

(2) Presumption was held not overcome by testimony of office manager not under duty to receive letter that the letter was not received.—Home Ins. Co. v. Head, 138 S.E. 275, 36 Ga.App. 779.

29. Ky.—Home Ins. Co. of New York v. Roll, 218 S.W. 471, 187 Ky. 31.
Mass.—Old Colony R. Co. v. Board of Assessors of Quincy, 26 N.E.2d 313, 305 Mass. 509.
Tex.—Texas Co. v. Wimberly, Civ.App., 213 S.W. 286.
22 C.J. p 102 note 42.

30. Mo.—Gilbert v. Malan, 100 S.W.2d 606, 231 Mo.App. 469.

ness routine in the addressee's office whereby letters are diverted from him to the hands of an employee.[31]

As a general rule, evidence of nonreceipt of mail matter does not nullify the presumption,[32] even though it consists of the addressee's positive denial of receipt,[33] but merely creates an issue of fact for the jury, or for the court sitting without a jury,[34] with such weight given to the presumption as the trier of facts thinks it entitled to,[35] the burden of proving receipt remaining throughout on the party who asserts it.[36] However, according to some authorities the addressee's positive denial of the receipt of mail matter renders the presumption of little weight[37] or may even entirely overcome it, especially if uncontradicted;[38] and it has been held

31. U.S.—Schutz v. Jordan, N.Y., 11 S.Ct. 906, 141 U.S. 213, 35 L.Ed. 705.

Proof of diversion not conclusive

Evidence by addressee that another person in his employment opened his mail, and that addressee had never seen nor heard of the communication, and that the same cannot be found in his office after careful search, does not conclusively establish as a fact that he did not receive the communication.—Wilson v. Martin, 109 S.E. 294, 27 Ga.App. 549.

Receipt by department of bank

Testimony that certain officers of a bank did not receive, through the bank's mailing department, a notice mailed to the bank, did not overcome the presumption that the notice was received by the bank's mailing department.—Merchants' Nat. Bank v. Detroit Trust Co., 242 N.W. 739, 258 Mich. 526, 85 A.L.R. 350.

32. Md.—McFerren v. Goldsmith-Stern Co., 113 A. 107, 137 Md. 573, 18 A.L.R. 1125.
Mich.—Barstow v. Federal Life Ins. Co., 242 N.W. 862, 259 Mich. 125.
Mo.—In re Farmers & Merchants Bank of Center, Mo., App., 83 S.W.2d 198—Williams v. Northeast Mut. Ins. Ass'n, App., 72 S.W.2d 66.
Neb.—City of Omaha v. Yancey, 135 N.W. 1044, 91 Neb. 261.
Tenn.—National Union Fire Ins. Co. v. Owens, 14 Tenn.App. 556, 560, quoting **Corpus Juris.**
22 C.J. p 102 note 45.

Continuance as evidence

Presumption of receipt of letter from proof of mailing continues as evidence even after introduction of proof to contrary.
U.S.—Atlantic Dredging & Construction Co. v. Nashville Bridge Co., C.C.A.Fla., 57 F.2d 519.
Tex.—Southland Life Ins. Co. v. Greenwade, Civ.App., 143 S.W.2d 648, error granted.

33. Idaho.—American Surety Co. of New York v. Blake, 27 P.2d 972, 54 Idaho 1, 91 A.L.R. 153.
Mich.—Lee v. Huron Indemnity Union, 97 N.W. 709, 135 Mich. 291.
Tenn.—National Union Fire Ins. Co. v. Owens, 14 Tenn.App. 556, 560, quoting **Corpus Juris.**
22 C.J. p 102 note 44.

34. U.S.—General Motors Acceptance Corporation v. American Ins. Co., C.C.A.Fla., 50 F.2d 803, certiorari denied American Ins. Co. v. General Motors Acceptance Corporation, 52 S.Ct. 130, 284 U.S. 676, 76 L.Ed. 571—Leahy v. U. S., C.C.A. Mont., 15 F.2d 949, affirming, D.C., 10 F.2d 617—Bloch v. Eastern Mach. Screw Corporation, C.C.A. Ohio, 281 F. 777.
Ala.—Franklin Life Ins. Co. v. Brantley, 165 So. 834, 836, 231 Ala. 554, citing **Corpus Juris**—Corinth Bank & Trust Co. v. Cochran, 121 So. 66, 219 Ala. 81—Calkins v. Vaughan, 114 So. 570, 574, 217 Ala. 56, citing **Corpus Juris.**
Ark.—W. T. Rawleigh Co. v. Moore, 121 S.W.2d 106, 196 Ark. 1148.
Ga.—American Tie & Timber Co. v. Tyler, 90 S.E. 86, 18 Ga.App. 640.
Ill.—Wakenight v. West, 217 Ill.App. 199.
Ky.—Globe Indemnity Co. v. Daviess, 65 S.W.2d 456, 251 Ky. 442—Eastham v. Stumbo, 279 S.W. 1109, 212 Ky. 685.
Md.—McFerren v. Goldsmith-Stern Co., 113 A. 107, 137 Md. 573, 18 A.L.R. 1125.
Mass.—Lee v. Gorham, 42 N.E. 556, 165 Mass. 130.
Mich.—Barstow v. Federal Life Ins. Co., 242 N.W. 862, 259 Mich. 125.
Miss.—McCreary v. Stevens, 126 So. 4, 156 Miss. 330.
Mo.—Williams v. Northeast Mut. Ins. Ass'n, App., 72 S.W.2d 66—J. L. Price Brokerage Co. v. Chicago, R. I. & P. Ry. Co., 230 S.W. 374, 207 Mo.App. 8.
Mont.—Renland v. First Nat. Bank, 4 P.2d 488, 493, 90 Mont. 424, quoting **Corpus Juris.**
Neb.—City of Omaha v. Yancey, 135 N.W. 1044, 91 Neb. 261.
N.J.—MacWhinney v. Jacobson, 162 A. 401, 109 N.J.Law 477, reversing 156 A. 281, 9 N.J.Misc. 958—Magazine Repeating Razor Co. v. Weissbard, 7 A.2d 411, 125 N.J.Eq. 593—Schaffer v. Hurd, 130 A. 228, 98 N.J.Eq. 143.
N.Y.—Hastings v. Brooklyn Life Ins. Co., 34 N.E. 289, 138 N.Y. 473, 53 N.Y.St. 63—Westwitt Realty Corporation v. Burger, 209 N.Y.S. 486, 212 App.Div. 622, reversing 203 N.Y.S. 430, 122 Misc. 653—Frank M. McCurdy Co. v. Wegner, 220 N.Y.S. 213, 129 Misc. 230—Youssoupoff v. Widener, 215 N.Y.S. 24, 126 Misc. 491, affirmed 219 N.Y.S. 942, 219 App.Div. 712, affirmed 158 N.E. 64, 246 N.Y. 174.
N.C.—B. F. Eagles & Co. v. East Carolina Ry., 113 S.E. 512, 184 N.C. 66.
N.D.—Dawson Farmers' Elevator Co. v. Opp, 223 N.W. 350, 57 N.D. 598.
Or.—Coffey v. Northwestern Hospital Ass'n, 183 P. 762, 96 Or. 100, rehearing denied 189 P. 407, 96 Or. 100.
S.C.—Greenwood Grocery Co. v. Canadian County Mill & Elevator Co., 57 S.E. 867, 77 S.C. 219.
Tenn.—National Union Fire Ins. Co. v. Owens, 14 Tenn.App. 556, 560, quoting **Corpus Juris.**
Tex.—Wichita Valley Ry. Co. v. Davis, Civ.App., 275 S.W. 169—Northern Assur. Co., Limited, of London v. Morrison, Civ.App., 162 S.W. 411, error refused.
Va.—Yanago v. Ætna Life Ins. Co., 178 S.E. 904, 164 Va. 258.
W.Va.—Antonowich v. Home Life Ins. Co., 179 S.E. 601, 602, 116 W.Va 155, citing **Corpus Juris.**
22 C.J. p 99 note 13 [b], p 102 note 45.

35. Mass.—Marston v. Bigelow, 22 N.E. 71, 150 Mass. 45, 5 L.R.A 43.
Mo.—Williams v. Northeast Mut. Ins. Ass'n, App., 72 S.W.2d 166.
Tenn.—National Union Fire Ins. Co. v. Owens, 14 Tenn.App. 556, 560, quoting **Corpus Juris.**

36. U.S.—Bloch v. Eastern Mach. Screw Corporation, C.C.A.Ohio, 281 F. 777.
Mass.—Huntley v. Whittier, 105 Mass. 391, 7 Am.R. 536.
Tenn.—National Union Fire Ins. Co. v. Owens, 14 Tenn.App. 556, 560, quoting **Corpus Juris.**
Tex.—National Aid Life Ass'n v. Driskill, Civ.App., 138 S.W.2d 238 241, quoting **Corpus Juris.**

37. Wash.—Gibson v. Rouse, 142 P. 464, 81 Wash. 102.

38. U.S.—Ripy v. Cloverleaf Life & Casualty Co., C.C.A.Tex., 9 F.2d 324.
Colo.—Conklin v. Shaw, 185 P. 661, 67 Colo. 169.
Ga.—Prudential Ins. Co. of America v. Franklin, 180 S.E. 869, 51 Ga.App. 496—Arnold v. Darby, 176 S.E. 914, 49 Ga.App. 629—Hart v. Little, 146 S.E. 338, 39 Ga.App. 106—Hodges v. Planters' & People's Mut. Fire Ass'n of Georgia, 139 S.E. 362, 37 Ga.App. 203—Home Ins. Co. v. Head, 138 S.E. 275, 36 Ga.

that such denial, or other proof of nonreceipt, raises a presumption that the letter was never mailed.[39]

Testimony of the addressee that the letter was not received should be regarded with caution,[40] and his failure to recollect whether or not the letter was received,[41] or his impression that it was not received,[42] or the fact that he had no record of the receipt of the letter,[43] or that the letter was not found on file,[44] or was not found among his papers after his death,[45] is usually deemed insufficient to overcome the presumption of receipt. The presumption is not overcome by testimony of some of the officers of a corporation or firm that they did not receive the letter, where it is not also shown that no one else in authority received it.[46]

§ 137. Nature and Condition of Property

Particular property is presumed to be in the nature and condition usually found in similar circumstances.

With respect to the nature and condition of property, it may be presumed that the situation is that which is usually found to exist under circumstances similar to those of the particular case;[47] but there can be no presumption that a condition which, while not extraordinary, is other than that which is usually found to exist, was present in any particular case.[48]

§ 138. Official Character or Status

It will be presumed that a public officer has been duly elected or appointed and has qualified; but the presumption may be rebutted.

It will be presumed that public officers, including persons acting in an official capacity,[49] have been duly elected or appointed[50] and that they have qual-

App. 779—Lowenstein v. Johnston, 98 S.E. 111, 23 Ga.App. 261.
Ky.—Benefit Ass'n of Railway Employees v. Hancock, 58 S.W.2d 578, 248 Ky. 315.
La.—State ex rel Guaranty Bank & Trust Co. v. Downs, 119 So. 723, 10 La.App 234.
Mo.—McCaskey Register Co. v. Erffmeyer, App., 46 S.W.2d 256.
22 C.J. p 102 note 49.

Disappearance as prima facie evidence

As soon as evidence is introduced that warrants a finding that letter failed to reach its destination, the artificial compelling force of the prima facie evidence of delivery disappears, and evidence of nondelivery has to be weighed against likelihood that the mail service was efficient in the particular instance with no artificial weight on either side of the balance.—Hobart-Farrell Plumbing & Heating Co. v. Klayman, 19 N.E.2d 805, 302 Mass. 508.

Return address

The presumption is entirely overcome by uncontradicted evidence of nonreceipt unless there was aliunde evidence that it was in fact received; and the mere fact that a return address was on the envelope, and that the letter was never returned, does not of itself amount to such aliunde evidence.—W. T. Rawleigh Medical Co. v. Burney, 102 S.E. 358, 25 Ga.App. 20.

Contradiction of addressee

Presumption that addressee received letter is not conclusively rebutted by denial of receipt where addressee's testimony has been contradicted.—Bennett v. Igleheart Bros., 139 S.E. 431, 37 Ga.App. 200.

Rule held inapplicable

The rule that the presumption of receipt may be rebutted by uncontradicted evidence of nonreceipt does not apply to the mailing of an acceptance of a contract in response to an offer previously mailed, except that the evidence of nonreceipt may be considered with other circumstances on the question of mailing.—Rowntree Bros. v. Bush, 111 S.E. 217, 28 Ga.App. 376.

39. Idaho.—Hobson v. Security State Bank, 57 P.2d 685, 56 Idaho 601—Matlock v. Citizens' Nat. Bank of Salmon, 250 P. 648, 43 Idaho 214, 50 A.L.R. 1418.
N.H.—Wilson v. Frankfort Marine, Accident & Plate Glass Ins. Co., 91 A. 913, 77 N.H. 344.
Okl.—Keeling v. Travelers Ins. Co. Hartford, Conn., 67 P.2d 944, 945, 180 Okl. 99, citing **Corpus Juris.**
Tex.—Border State Life Ins. Co. v. Noble, Civ.App., 138 S.W.2d 119, error dismissed, judgment correct—Texas Mut. Life Ins. Ass'n v. Adams, Civ.App., 77 S.W.2d 581, error dismissed.

40. N.Y.—Matter of Wiltse, 25 N.Y.S. 733, 5 Misc. 105.
22 C.J. p 102 notes 51, 52.

41. Tenn.—W. E. Richmond & Co. v. Security Nat. Bank, 64 S.W.2d 863, 16 Tenn.App. 414.
22 C.J. p 102 note 53.

42. Ala.—Pioneer Sav. & Loan Co. v. Thompson, 22 So. 511, 115 Ala. 552.
Ill.—Ashley Wire Co. v. Illinois Steel Co., 45 N.E. 410, 164 Ill. 149, 56 Am.S.R. 187.

43. Mo.—Covell v. Western Union Tel. Co., 147 S.W. 555, 164 Mo.App. 630.

44. U.S.—In re Knepper, D.C.N.Y., 12 F.Supp. 989
Ky.—Inter-Southern Life Ins. Co. v. Cochran, 83 S.W.2d 11, 259 Ky. 677—Commonwealth Life Ins. Co. v. Gault's Adm'rs, 76 S.W.2d 618, 256 Ky. 625.
Tenn.—Gaar, Scott & Co. v. Stark, Ch.App., 36 S.W. 149
Tex.—Farmers' State Bank & Trust Co. of Gorman v. Central State Bank of Dallas, Civ.App., 281 S.W. 632.

Presumption held overcome

Testimony describing method of receiving, opening, and indexing mail in office, search for letter assertedly mailed, and a failure to find it, constituted a denial that letter had been received sufficient to overcome presumption that letter had been mailed.—Seglin Const. Co. v. State, 22 N.Y.S.2d 94.

45. N.H.—Sabre v. Smith, 62 N.H. 663.

46. U.S.—Hand & Johnson Tug Line v. Canada S. S. Lines, C.C.A. Ohio, 281 F. 779.
Tenn.—W. E. Richmond & Co. v. Security Nat. Bank, 64 S.W.2d 863, 16 Tenn.App. 414.

47. Or.—Van Dusen Inv. Co. v. Western Fishing Co., 124 P. 677, 126 P. 604, 63 Or. 7.
22 C.J. p 151 note 89.

48. Mont.—Masich v. American Smelting & Refining Co., 118 P. 764, 44 Mont. 36.
22 C.J. p 151 note 90.

49. Tex.—Kernagan v. Ft. Worth, Civ.App., 194 S.W. 626.
22 C.J. p 142 note 78.

50. U.S.—Bandy v. U. S., D.C.Tenn., 33 F.Supp. 752.
Ark.—McKenzie v. City of De Witt, 121 S.W.2d 71, 196 Ark. 1115.
Ga.—Anderson v. Howard, 129 S.E. 567, 34 Ga.App. 292.
Ky.—Carter v. Sympson, 8 B.Mon. 155.
Mass.—Brazill v. Green, 137 N.E. 346, 243 Mass. 252.
N.J.—Hartley v. County Board of

ified.[51] An application of this presumption is found in cases where one who is charged with liability for certain acts seeks to justify himself under his official authority.[52] The presumption applies with regard to foreign, as well as domestic, officers.[53] However, the presumption of a regular appointment does not apply to a public officer seeking to recover salary attached to the office, or the benefits of a pension system.[54]

Officers to whom applicable. Among officers to whom this presumption has been applied may be mentioned a highway officer;[55] internal revenue officers;[56] justices of the peace;[57] military officers;[58] a notary public;[59] an officer of elections;[60] an officer of the federal patent office;[61] peace officers, such as policemen and constables;[62] a probate judge or surrogate;[63] a public surveyor;[64] revenue and customs officers;[65] school officers;[66] sheriffs;[67] tax officers;[68] and a United States marshal.[69]

Presumption rebuttable. The presumption that a person assuming to act in the capacity of a public officer was duly appointed is prima facie merely, and may be rebutted.[70]

Prospective election or appointment. Where a time is fixed by statute for the election or appointment of an officer, it is to be presumed that the election or appointment will be made according to law, although such provision may be directory rather than mandatory.[71]

§ 139. Ordinary Course of Affairs

Unless a contrary showing is made, the presumption is that the ordinary course of business or conduct was followed in a particular case.

It is a well established rule of evidence that events or facts which usually happen or coexist in the ordinary course of business and other human affairs are presumed to have happened or coexisted in any particular case, unless the contrary appears from the evidence.[72] In the absence of a contrary

Elections of Passaic County, 107 A. 817, 93 N.J.Law 313.
Pa.—Lerch v. Snyder, 4 A. 336, 112 Pa. 161.
22 C.J. p 142 note 79—46 C.J. p 959 note 86.

Requirement of appointment in writing under seal

The existence of a requirement that the appointment to the particular office be in writing and under seal is immaterial.
U.S.—U. S. v. Bachelder, C.C.N.H., 24 F.Cas.No.14,490, 2 Gall. 15.
Iowa—Burke v. Cutler, 43 N.W. 204, 78 Iowa 299.

51. U.S.—Stone ex rel. Colonna v. Tillinghast, C.C.A.Mass., 32 F.2d 447.
Ky.—Handley v. Graham, 219 S.W. 417, 187 Ky. 316.
Mo.—State ex rel. McAllister v. Sanderson, 217 S.W. 60, 280 Mo. 258.
22 C.J. p 142 note 80.

52. Me.—Hutchings v. Van Bokkelen, 34 Me. 126.
22 C.J. p 142 note 81.

53. Vt.—Spaulding v. Vincent, 24 Vt. 501.

54. Cal.—Burke v. Edgar, 7 P. 488, 67 Cal. 182—Carrick v. Sherman, 288 P. 143, 105 Cal.App. 546.

55. N.J.—State v. Ferguson, 31 N.J.Law 107.

56. U.S.—Keeley v. Sanders, Tenn., 99 U.S. 441, 25 L.Ed. 327.
Pa.—Lerch v. Snyder, 4 A. 336, 112 Pa. 161.

57. U.S.—Ingraham v. U. S., R.I., 15 S.Ct. 148, 155 U.S. 434, 39 L.Ed. 213.
22 C.J. p 142 note 86.

58. Ky.—Carter v. Sympson, 8 B. Mon. 155.
22 C.J. p 142 note 88.

59. La.—Ledoux v. Jamieson, 18 La. Ann. 130.

60. N.J.—Hartley v. County Board of Elections of Passaic County, 107 A. 817, 93 N.J.Law 313.
N.Y.—People v. Cook, 14 Barb. 259, affirmed 8 N.Y. 67, 59 Am.D. 451.

61. U.S.—Woodworth v. Hall, C.C. Mass., 30 F.Cas.No.18,016, 1 Woodb. & M. 248.

62. Mass.—Commonwealth v. Kane, 108 Mass. 423, 11 Am.R. 373.
Wis.—Miller v. Fay, 40 Wis. 633.

Unqualified certification of a person to board of police commissioners as eligible for appointment as policeman creates presumption that civil service commission found respondent to be of good moral character.—Klevesahl v. Byington, 37 P. 2d 179, 1 Cal.App.2d 671.

63. Neb.—Taylor v. Tilden, 3 Neb. 339.

Person acting in the absence of the probate judge will be presumed to have been duly appointed, where the record does not show it.—Taylor v. Tilden, supra.

64. U.S.—Baeder v. Jennings, C.C. N.J., 40 F. 199, appeal dismissed 14 S.Ct. 1156, 154 U.S. 506, 38 L.Ed. 1075.

65. U.S.—State of Missouri v. Federal Lead Co., D.C.Mo., 265 F. 305—U. S. v. Bachelder, C.C.N.H., 24 F.Cas.No.14,490, 2 Gall. 15.
22 C.J. p 143 note 96.

66. N.Y.—Colton v. Beardsley, 38 Barb. 29.
22 C.J. p 143 note 97.
Evidence of election or appointment of school officers generally see the C.J.S. title Schools and School Districts § 110, also 56 C.J. p 308 notes 35–40.

67. N.Y.—Potter v. Luther, 3 Johns. 431.
Tex.—Burrow v. Brown, 59 Tex. 457.

68. Mo.—State v. Timbrook, 144 S.W. 843, 240 Mo. 226.
R.I.—Kent v. Atlantic De Laine Co., 8 R.I. 305.

69. Pa.—Killpatrick v. Frost, 2 Grant 168.

70. Me.—Hutchings v. Van Bokkelen, 34 Me. 126.
Mass.—Brazil v. Greene, 137 N.E. 346, 243 Mass. 252.
Mo.—State ex rel. Davidson v. Caldwell, 276 S.W. 631, 310 Mo. 397.
N.H.—Johnston v. Wilson, 2 N.H. 202, 9 Am.D. 50.
R.I.—Kent v. Atlantic De Laine Co., 8 R.I. 305.

71. Mass.—Atty.-Gen. v. Loomis, 114 N.E. 676, 225 Mass. 372.

72. U.S.—Minnesota Pig & Cattle Co. v. Rorick, C.C.A.Mich., 41 F.2d 691—Thorn v. Browne, Ark., 257 F. 519, 168 C.C.A. 469, certiorari denied Browne v. Thorne, 39 S.Ct. 494, 250 U.S. 645, 63 L.Ed. 1187.
Ariz.—Consolidated Motors v. Skousen, 109 P.2d 41, 132 A.L.R. 1040.
Cal.—People v. Swiggy, 232 P. 174, 69 Cal.App. 574.
Ill.—New York Cent. R. Co. v. Lehigh Stone Co., 220 Ill.App. 563—Paden v. Rockford Palace Furniture Co., 220 Ill.App. 534, certiorari denied in Rockford Palace Furniture Co. v. Paden, 42 S.Ct. 54, 257 U.S. 645, 66 L.Ed. 413.
Mo.—First Nat. Bank v. Crutcher, App., 15 S.W.2d 888.

showing, it is to be presumed that the ordinary course of business or conduct was followed in a particular case.[73] Conversely, where facts and circumstances are not such as human experience indicates usually coexist, it will not be presumed that they coexist in any particular case.[74]

Presumptions arising from the ordinary course of affairs are presumptions of fact, and like other presumptions of fact, are rebuttable[75] and may be overcome by substantial countervailing evidence.[76]

Presumptions as to particular matters not specifically treated herein, as for example, presumptions relating to knowledge of facts or to corporate acts and records, are discussed infra § 150.

§ 140. Past and Future Existence of Fact or Condition

a. Past existence of fact or condition
b. Future existence of fact or condition

a. Past Existence of Fact or Condition

Mere proof of the existence of a present condition or state of facts generally does not raise any presumption that the same condition or facts existed at a prior date, but the rule is not of universal application.

As a general rule mere proof of the existence of a present condition or state of facts or proof of the existence of a condition or state of facts at a given time, does not raise any presumption that the same condition or facts existed at a prior date,[77] since inferences or presumptions of fact ordinarily do not run backward.[78]

Mont.—Crawford v. Pierse, 185 P. 315, 56 Mont. 371.
Ohio.—Hitz v. Ohio Fuel Gas Co., 183 N.E. 768, 43 Ohio App. 484.
Tex.—West Texas Utilities Co. v. Ellis, Civ.App., 102 S.W.2d 234, reversed on other grounds 126 S.W. 2d 13, 133 Tex. 104.
Wis.—Estes v. Crosby, 175 N.W. 933, 171 Wis. 73, 8 A.L.R. 1377, amendment of mandate denied 177 N.W. 512, 171 Wis. 73, 8 A.L.R. 1377.
Wyo.—Sylvester v. Armstrong, 84 P.2d 729, 732, 53 Wyo. 382, citing **Corpus Juris.**
22 C.J. p 103 note 68–70.

Rule applicable to corporations
The presumption applies to corporations as well as individuals.
Okl.—Morton v. Central Nat. Bank of Okmulgee, 43 P.2d 394, 171 Okl. 494.
Or.—First National Bank v. Frazier, 22 P.2d 325, 143 Or. 662
Tex.—Breckenridge Hotel Co. v. J. M. Radford Grocery Co., Civ.App., 33 S.W.2d 1074, rehearing denied 35 S.W.2d 464.
22 C.J. p 107 note 70.
Particular presumptions as to corporate acts and records see infra § 150.

Production of evidence
When it is to the interest of a party to make the existence of any fact clear, it is fair to assume that such party has offered all the evidence within reach, and the fact must be determined on that assumption.—Briscoe v. Philadelphia & R. Ry. Co., D.C.Pa., 274 F. 476, affirmed, C.C.A., Philadelphia & R. Ry. Co. v. Briscoe, 279 F. 680.

Understanding of telephoned message
Where message has been spoken over telephone, rebuttable presumption arises that it was heard as it was spoken.—Western Union Telegraph Co. v. Baltz, 299 S.W. 377, 175 Ark. 167.

73. U.S.—Western Union Telegraph Co. v. Brown, C.C.A.Minn., 294 F. 167—U. S. v. Wanamaker, 14 Ct. Cust.App. 285.
Ark.—Bartel v. Ingram, 11 S.W.2d 488, 178 Ark. 699.
Cal.—Perkins v. Pacific Fruit Exchange, 22 P.2d 535, 132 Cal.App. 278—Serv-U-Garbage Co. v. Board of Health of City and County of San Francisco, 290 P. 519, 107 Cal. App. 386—Morrice v. Fitch, 263 P. 269, 88 Cal.App. 10—Beers v. California State Life Ins. Co., 262 P. 380, 87 Cal.App. 440—Patterson v. Southern Trust Co., 251 P. 938, 80 Cal.App. 411—Arakelian v. Sears, 200 P. 757, 53 Cal.App. 646.
Mont.—California Packing Corporation v. McClintock, 241 P. 1077, 75 Mont. 72.
Or.—Spexarth v. Rhode Island Ins. Co. of Providence, R. I., 245 P. 515, 118 Or. 22.
22 C.J. p 105 notes 20, 21.

74. Tex.—Cauble v. Hanson, Com. App., 249 S.W. 175, affirming, Civ. App., 224 S.W. 922.
22 C.J. p 107 note 55.

75. Cal.—Savings & Loan Soc. v. Burnett, 39 P. 922, 106 Cal. 514—Beers v. California State Life Ins. Co., 262 P. 380, 87 Cal.App. 440.

76. Conn.—O'Dea v. Amodeo, 170 A. 486, 118 Conn. 58.

77. U.S.—Liverpool & London & Globe Ins. Co. of Liverpool, England v. Nebraska Storage Warehouses, C.C.A.Neb., 96 F.2d 30.
Ark.—Eudora Motor Co. v. Womack, 111 S.W.2d 530, 532, 195 Ark. 74, citing **Corpus Juris.**
Ill.—Franklin County Building & Loan Ass'n v. Blood, 255 Ill.App. 175—Rengel v. Schoden, 178 Ill. App. 151
La.—McGregor v. Saenger-Ehrlich Enterprises, 195 So. 624, 627, quoting **Corpus Juris.**
Md.—American Fidelity Co. of Montpelier, Vt., v. State, 109 A. 99, 135 Md. 326.
Mo.—Snowwhite v. Metropolitan Life Ins. Co., 127 S.W.2d 718, 722, 344 Mo. 705, quoting **Corpus Juris**—Harrison v. St. Louis-San Francisco Ry Co., 99 S.W.2d 841, 843, 339 Mo. 821, quoting **Corpus Juris**—Conduitt v. Trenton Gas & Electric Co., 31 S.W.2d 21, 326 Mo. 133—Caldwell v. Payne, 246 S.W. 312, certiorari denied Davis v. Caldwell, 43 S.Ct. 520, 262 U.S. 743, 67 L. Ed. 1210.
Mont.—Doran v. U. S. Building & Loan Ass'n, 20 P.2d 835, 94 Mont. 73.
N.Y.—Niehoff-Schultze Grocery Co. v. Gross, 199 N.Y.S. 196, 205 App. Div. 67, affirmed 143 N.E. 722, 237 N.Y. 509, and reargument denied 143 N.E. 743, 237 N.Y. 563.
Pa.—Hanley v. Peoples Natural Gas Co., 188 A. 157, 325 Pa. 6.
R.I.—Hurley v. Randall, 111 A. 530.
Utah.—Gibson v. Equitable Life Assur. Soc. of U. S., 36 P.2d 104, 84 Utah 452.
Vt.—Houghton v. Grimes, 164 A. 371, 105 Vt. 230.
22 C.J. p 92 note 47.

Presumption as arising from doctrine of continuity
The doctrine of continuity, see supra § 124, does not include a presumption that something shown to exist had previously existed.—Glenn v. Tankersley, 200 S.E. 709, 187 Ga. 129.

78. U.S.—U. S. v. One 1939 Model Ford Pickup Truck, Motor No. 4662201, D.C.S.C., 35 F.Supp. 905, citing **Corpus Juris.**
Ill.—Rengel v. Schoden, 178 Ill.App. 151.
Mass.—Beacon Trust Co. v. Wright, 192 N.E. 70, 288 Mass. 1—Blodgett v. Springfield St. Ry. Co., 158 N.E. 660, 261 Mass. 333.
Mo.—Snowwhite v. Metropolitan Life Ins. Co., 127 S.W.2d 718, 344 Mo.

However, the general rule is not of universal application.[79] Whether the past existence of a condition or state of facts may be inferred or presumed from proof of the existence of a present condition or state of facts, or proof of the existence of a condition or state of facts at a given time, depends largely on the facts and circumstances of the individual case,[80] and on the likelihood of intervening circumstances as the true origin of the present existence or the existence at a given time.[81] Accordingly, in some circumstances, an inference as to the past existence of a condition or state of facts may be proper,[82] as, for example, where the present condition or state of facts is one that would not ordinarily exist unless it had also existed at the time as to which the presumption is invoked.[83] An inference that a state of affairs existed at a certain time may be reinforced by evidence that it continued to exist at a subsequent time.[84]

Financial condition. Proof of the existence of a particular financial condition on a given date may or may not establish the basis of a logical inference that such condition existed at a date prior thereto, depending on the length of time over which it is sought to carry the inference back and the facts and circumstances of the particular case.[85]

Insanity. Proof of insanity does not create a presumption of its past existence,[86] unless it is

705—Conduitt v. Trenton Gas & Electric Co., 31 S.W.2d 21, 326 Mo. 133.
Mont.—Doran v. U. S. Building & Loan Ass'n, 20 P.2d 835, 94 Mont. 73.
N.Y.—Hanna v. Stedman, 130 N.E. 566, 230 N.Y. 326, reversing 173 N.Y.S. 223, 185 App.Div. 491—In re Morrisey's Will, 12 N.Y.S.2d 324, 171 Misc. 204—In re Frank's Estate, 275 N.Y.S. 843, 153 Misc. 688—In re Bates' Will, 274 N.Y.S. 93, 152 Misc. 627—In re Smith's Estate, 242 N.Y.S. 464, 136 Misc. 863—Joannes Bros. Co. v. Czarnikow-Rionda Co., 201 N.Y.S. 409, 121 Misc. 474, affirmed 205 N.Y.S. 930, 209 App.Div. 868.
Or.—Deniff v. Charles R. McCormick & Co., 210 P. 703, 704, 105 Or. 697, citing **Corpus Juris.**
Wash.—McDaniel v. Crabtree, 254 P. 1091, 143 Wash. 168.
22 C.J. p 92 note 47.

79. U.S.—U. S. v. Herberger, D.C. Wash., 272 F. 278.
Kan.—Phipps v. Consolidated Flour Mills Co., 213 P. 637, 113 Kan. 118.
Mass.—Beacon Trust Co. v. Wright, 192 N.E. 70, 288 Mass. 1.
Tex.—Ross v. Green, 139 S.W.2d 565, 135 Tex. 103, affirming, Civ.App., 128 S.W.2d 477.
22 C.J. p 92 notes 48, 49.

80. U.S.—Liverpool & London & Globe Ins. Co. of Liverpool, England, v. Nebraska Storage Warehouses, C.C.A.Neb., 96 F.2d 30.
Conn.—Johnson v. Charles William Palomba Co., 157 A. 902, 114 Conn. 108, 80 A.L.R. 441.
Kan.—Phipps v. Consolidated Flour Mills Co., 213 P. 637, 113 Kan. 118.
Tex.—Ross v. Green, 139 S.W.2d 565, 135 Tex. 103, affirming, Civ.App., 128 S.W.2d 477.
Utah.—Jensen v. Logan City, 57 P.2d 708, 89 Utah 347.

81. N.J.—Millman v. U. S. Mortgage & Title Guaranty Co. of New Jersey, 1 A.2d 265, 121 N.J.Law 28.
Tex.—Ross v. Green, Civ.App., 128 S.W.2d 477, affirmed 139 S.W.2d 565, 135 Tex. 103.

82. U.S.—Crowell Bros. v. Panhandle Grain & Elevator Co., C.C.A. Okl., 271 F. 129, certiorari denied Panhandle Grain & Elevator Co. v. Cromwell Bros., 42 S.Ct. 48, 257 U.S. 635, 66 L.Ed. 408.
Ark.—Eudora Motor Co. v. Womack, 111 S.W.2d 530, 195 Ark. 74.
Cal.—Crinella v. Northwestern Pac. R. Co., 259 P. 774, 85 Cal.App. 440.
Mass.—Conroy v. Fall River Herald News Co., 28 N.E.2d 729, 306 Mass. 488, 132 A.L.R. 927.
Mo.—Harrison v. St. Louis-San Francisco Ry. Co., 99 S.W.2d 841, 339 Mo. 821.
N.D.—Grand Forks County v. Baird, 209 N.W. 782, 54 N.D. 315.
R.I.—Goff v. Craft's, Inc., 20 A.2d 520, reargument denied 21 A.2d 10.
22 C.J. p 92 notes 48, 49.

83. U.S.—Cantor v. Reno Nat. Bank, D.C.Nev., 18 F.Supp. 931, 932, citing **Corpus Juris.**
Cal.—Swarzwald v. Cooley, 103 P.2d 580, 39 Cal.App.2d 306.
Kan.—Donley v. Amerada Petroleum Corporation, 106 P.2d 652, 655, quoting **Corpus Juris**—Phipps v. Consolidated Flour Mills Co., 213 P. 637, 638, 113 Kan. 118, quoting **Corpus Juris.**
Ky.—Harlin v. Calvert's Adm'x, 70 S.W.2d 524, 526, 253 Ky. 752, citing **Corpus Juris.**
Mo.—Gray v. Kurn, 137 S.W.2d 558, 568, citing **Corpus Juris**—Allen v. Chicago, R. I. & P. Ry. Co., App., 54 S.W.2d 787, 794, citing **Corpus Juris.**
22 C.J. p 92 note 49.

84. Mich.—Howland v. Davis, 40 Mich. 545.
S.C.—Tate v. Mauldin, 154 S.E. 431, 435, 157 S.C. 392, quoting **Corpus Juris.**

85. U.S.—Mandelbaum v. Goodyear Tire & Rubber Co., C.C.A.Iowa, 6 F.2d 818.
Ky.—Harlin v. Calvert's Adm'x, 70 S.W.2d 524, 253 Ky. 752.
Mass.—Beacon Trust Co. v. Wright, 192 N.E. 70, 288 Mass. 1.
22 C.J. p 92 note 49 [a] (3).

Prior solvency inferred or presumed
U.S.—Andresen v. Kaercher, C.C.A. Minn., 38 F.2d 462—Cantor v. Reno Nat. Bank, D.C.Nev., 18 F.Supp. 931.
N.Y.—In re Auditore's Estate, 240 N.Y.S. 502, 136 Misc. 664, affirmed In re Auditore's Will, 250 N.Y.S. 902, 233 App.Div. 740, appeal dismissed In re Parascandola, 178 N.E. 792, 257 N.Y. 554.
Presumptions as to solvency see infra § 141.

Prior insolvency inferred or presumed
Ky.—Harlin v. Calvert's Adm'x, 70 S.W.2d 524, 253 Ky. 752.
Mass.—Beacon Trust Co. v. Wright, 192 N.E. 70, 288 Mass. 1.
N.Y.—Wilmot Engineering Co. v. Blanchard, 203 N.Y.S. 700, 208 App.Div. 218.

Prior insolvency not inferred or presumed
Iowa.—Ryan v. Cooper, 205 N.W. 302, 201 Iowa 220—Richardson v. Cheshire, 188 N.W. 146, 193 Iowa 930.
N.Y.—Hopfan v. Knauth, 282 N.Y.S. 219, 156 Misc. 545—In re Auditore's Estate, 240 N.Y.S. 502, 136 Misc. 664, affirmed In re Auditore's Will, 250 N.Y.S. 902, 233 App.Div. 740, appeal dismissed In re Parascandola, 178 N.E. 792, 257 N.Y. 554—Gaylord v. Anderson, 213 N.Y.S. 25, 126 Misc. 283, affirmed 219 N.Y.S. 819, 219 App.Div. 759.
Okl.—Vacuum Oil Co. v. Quigg, 259 P. 858, 127 Okl. 61—State v. Mobley, 241 P. 155, 112 Okl. 152.
Tex.—Brenan v. Eubank, Civ.App., 56 S.W.2d 513.

86. Ala.—Knight v. Knight, 21 So. 407, 113 Ala. 597.
Cal.—In re Dolbeer, 86 P. 695, 149 Cal. 227, 9 Ann.Cas. 795—Olivera v. Grace, App., 116 P.2d 146—In re Peterkin's Estate, 73 P.2d 897, 23 Cal.App.2d 597.
Iowa.—Davidson v. Piper, 265 N.W. 107, 221 Iowa 171.

shown to be of an habitual and permanent nature.[87]

b. Future Existence of Fact or Condition

Ordinarily, there is no presumption that a state of facts or conditions which is shown to exist will continue to exist in the future.

Ordinarily, there is no presumption that a state of facts or conditions which is shown to exist will continue to exist in the future.[88]

However, in a proper case, the existence of life on a given date will give rise to an inference of fact or presumption that it will continue in the future,[89] although it will not be presumed to continue indefinitely.[90]

§ 141. Personal Status and Condition

Various presumptions arise in respect of personal status and condition, such as those relating to solvency, infancy, etc.

Various presumptions may arise in respect of personal status and condition.[91]

In the absence of contrary evidence, it will be presumed that a child was born alive[92] and was conceived two hundred and eighty days before birth;[93] that persons shown to be brother and sister are of the full blood;[94] that parties are of legal age[95] and competent to bind themselves;[96] that litigants are sui juris when they appear as such,[97] and that children under twelve years of age are not sui juris;[98] that a party plaintiff has legal capacity to sue[99] and is a resident of the county in which he sues;[1] and that a person is solvent and not insolvent.[2]

On the other hand, there exists no presumption

Adjudication of insanity as raising presumption of prior insanity see the C.J.S. title Insane Persons § 32, also 32 C.J. p 647 notes 5–9.

Presumptions as to sanity and mental capacity see infra § 147.

Intermittent or temporary insanity

Where the insanity shown to exist is merely intermittent or temporary and not permanent, no presumption of its existence at a given prior time arises.—Sommerville v. Greenhood, 210 P. 1048, 65 Mont. 101.

87. Ala.—Odom v. State, 56 So. 913, 174 Ala. 4.

88. Tenn.—Foster v. Adcock, 30 S.W.2d 239, 161 Tenn. 217, 70 A.L.R. 569.

22 C.J. p 92 note 51.

Presumption as part of doctrine of continuity

The doctrine of continuity is limited to the presumption that something which has been shown to have existed has thereafter continued to exist, see supra § 124, and does not include a presumption that something shown to exist will continue in the future.—Glenn v. Tankersley, 200 S.E. 709, 187 Ga. 129.

89. N.Y.—In re Shupack's Estate, 287 N.Y.S. 184, 158 Misc. 873.

Attainment of majority

In the entire absence of facts on which might be based a contrary inference, the natural presumption is that a boy ten years old will live to be twenty-one years old.—Wharton v. Jackson, 185 N.W. 428, 107 Neb. 288.

In computing estate tax exemptions, it is proper to assume that existing circumstances will continue until beneficiary of testamentary trust attains age when principal is made payable to him and that his contingently vested interest will not be divested by his death before reaching that age.—In re Person's Estate, 263 N.Y.S. 781, 147 Misc. 398.

90. N.Y.—In re Shupack's Estate, 287 N.Y.S. 184, 158 Misc. 873.

91. **Joint liability of promisors**

Statutory presumption of joint liability of persons uniting in promise is not conclusive.—Cole v. Low, 254 P. 676, 81 Cal.App. 633.

Need of educational fund

In the absence of a contrary showing, it will be presumed that a man forty-eight years of age has finished his education and is not in need of an educational fund.—Suggett's Trustees v. Pirtle, 251 S.W. 959, 199 Ky. 713.

Quantum of Indian blood

In the absence of proof, court will not presume that an Indian of the Chickasaw Tribe is of such a quantum of blood as to render her land subject to restriction.—Harriss v. Leeper Bros. Lumber Co., 176 P. 412, 74 Okl. 204.

92. N.C.—Turner v. Person, 95 S.E. 362, 175 N.C. 219, L.R.A.1918D 1082.

93. N.Y.—In re Wells' Will, 221 N.Y.S. 714, 129 Misc. 447.

Gestation and birth according to ordinary course

Under Code Civ.Proc. § 1963 subd 28, it must be presumed that gestation and birth of infant occurred according to ordinary course of nature, in absence of contrary showing based on scientific hypothesis.—People v. Swiggy, 232 P. 174, 69 Cal.App. 574.

94. Ohio.—Ossman v. Schmitz, 24 Ohio Cir.Ct. 709.

95. U.S.—Collins v. Streitz, C.C.A. Ariz., 95 F.2d 430, certiorari denied 59 S.Ct. 67, 305 U.S. 608, 83 L.Ed. 387.

Mont.—State ex rel. Hamilton v. District Court of Second Judicial Dist. of Montana, 57 P.2d 1227, 102 Mont. 341.

22 C.J. p 145 note 37 [a] (1).

96. Wash.—Armstrong v. Modern Woodmen of America, 178 P. 1, 105 Wash. 356.

97. N.H.—Moore v. Roxbury, 159 A. 357, 85 N.H. 394.

22 C.J. p 145 note 37 [a] (2), (3).

98. N.Y.—Grealish v. Brooklyn, Q. C. & S. R. Co., 114 N.Y.S. 582, 130 App.Div. 238, affirmed 91 N.E. 1114, 197 N.Y. 540.

99. Okl.—Harrington v. Central States Fire Ins. Co. of Wichita, Kan., 36 P.2d 738, 169 Okl. 255, 96 A.L.R. 859—General American Oil Co. v. Wagoner Oil & Gas Co., 247 P. 99, 118 Okl. 183, rehearing denied 260 P. 780, 127 Okl. 208.

1. Ill.—Traders' Mut. L. Ins. Co. v. Humphrey, 109 Ill.App. 246, affirmed 69 N.E. 875, 207 Ill. 540.

2. Cal.—Hasenjeager v. Voth, 267 P. 146, 91 Cal.App. 394.

Iowa.—Schooler Motor Co. v. Bankers' Trust Co., 247 N.W. 628, 216 Iowa 1147—Caldwell v. City of Ottumwa, 200 N.W. 336, 198 Iowa 666—Carter v. Schraeder, 175 N.W. 329, 187 Iowa 1245—Sherman v. Smith, 169 N.W. 216, 185 Iowa 654.

La.—Garson Bros. v. Wilson, 93 So. 783, 152 La. 536.

Minn.—Riethmuller v. Burton, 222 N.W. 929, 176 Minn. 227.

N.J.—Fidelity Union Trust Co. v. Matthews, 17 A.2d 154, 128 N.J.Eq. 475.

N.Y.—Rodgers v. Rodgers, 174 N.Y.S. 24, 186 App.Div. 77—In re Demmerle, 225 N.Y.S. 190, 130 Misc. 684.

Tex.—Shaw v. McShane, Civ.App., 33 S.W.2d 277, reversed on other grounds, Com.App., 50 S.W.2d 278.

Wash.—City of Tacoma v. Peterson, 25 P.2d 1034, 174 Wash. 621.

22 C.J. p 145 note 35.

of insolvency[3] or no presumption concerning a person's credit;[4] and it will not be presumed that a person is an infant[5] or under a disability to sue.[6]

§ 142. Marriage and Legitimacy

Presumptions in respect of marriage are discussed in the C.J.S. title Marriage § 43; also 22 C.J. p 145 note 40 [a] (3)–(4), and 38 C.J. p 1322 note 57–p 1330 note 93, while presumptions relating to the legitimacy of children are considered in Bastards § 3.

§ 143. Regularity

In the absence of a contrary showing, the presumption is in favor of the regularity and validity of private transactions.

In the absence of a contrary showing, the presumption is in favor of the regularity and validity of private transactions.[7]

Presumptions as to the regularity of ancient, judicial, and official proceedings are treated in §§ 144–146 infra, while in § 150 infra are considered the presumptions relating to the regularity of corporate acts and proceedings and the regularity of writings generally.

§ 144. Ancient Proceedings

The presumption is in favor of the validity of ancient proceedings.

On proof of a fact so ancient as to suggest inherent difficulty in proving preliminary or attendant facts, all circumstances necessary to its legal validity will be assumed to exist.[8]

However, such a presumption does not arise where the proper evidence consists of records or public documents in the custody of officers charged with their preservation and safe-keeping, unless they are proved to have been lost or destroyed.[9]

§ 145. Judicial Proceedings

Unless the contrary appears, it will generally be presumed that the proceedings of a judicial tribunal are regular and valid and that judicial acts and duties have been and will be duly and regularly performed.

Unless the contrary appears or is shown,[10] it will generally be presumed that the proceedings of a ju-

3. U.S.—Zell v. Bankers' Utilities Co., C.C.A.Cal., 77 F.2d 22, 27, citing **Corpus Juris.**
N.Y.—Gaylord v. Anderson, 213 N.Y.S. 25, 126 Misc. 283, affirmed 219 N.Y.S. 819, 219 App Div. 759.

4. Or.—Stubblefield v. Montgomery Ward & Co., 98 P.2d 14, 163 Or. 432, 125 A.L.R. 1240, denying rehearing 96 P.2d 774, 163 Or. 432, 125 A.L.R. 1228.

5. Ind.—Foltz v. Wert, 2 N.E. 950, 103 Ind. 404.
22 C.J. p 145 note 40 [a] (1).

Under fourteen years
The court is under no duty to assume that plaintiff's intestate was under fourteen years of age.
Ala.—Beavers v. Southern Ry. Co., 103 So. 887, 212 Ala. 600.
Ariz.—Garner v. Arizona Egyptian Cotton Co., 197 P. 231, 22 Ariz. 318.

6. Ga.—Arnold v. Limeburger, 49 S.E. 812, 122 Ga. 72.

7. U.S.—In re Tidewater Coal Exchange, C.C.A.N.Y., 280 F. 638, affirming, D.C., 274 F. 1008, 1011, and certiorari denied Delaware Steamship & Commerce Corporation v. New England Coal & Coke Co., 42 S.Ct. 587, 259 U.S. 584, 66 L.Ed. 1075.
Cal.—Arakelian v. Sears, 200 P. 757, 53 Cal.App. 646—Lauman v. Concordia Fire Ins. Co. of Milwaukee, Wis., 195 P. 951, 50 Cal.App. 609.
N.Y.—Rowan v. Possehl, 18 N.Y.S.2d 574, 173 Misc. 898—In re Eichelberger's Estate, 273 N.Y.S. 535, 152 Misc. 834.

Mortgage foreclosure
In the absence of evidence to the contrary, the foreclosure of a mortgage, being shown, is presumed to be regular and valid.—Williams v. Oates, 102 So. 712, 212 Ala. 396—Harton v. Little, 57 So. 851, 176 Ala. 267.

Increase of rates
Presumption will be indulged that readjustment and increase of rates of fraternal benefit society, duly made through its constituted authority, was equitable and necessary until contrary is shown.—Constable v. Supreme Tent of Maccabees of the World, 284 S.W. 515, 218 Mo.App. 632.

Action of canvassing board of labor organization
There is no presumption against validity of action of canvassing board of international labor organization in rejecting vote of local union because there was no quorum at its meeting.—Carey v. International Brotherhood of Paper Makers, 206 N.Y.S. 73, 123 Misc. 680.

8. Ala.—Laird v. Columbia Loan & Investment Co., 114 So. 203, 216 Ala. 619.
Fla.—Peninsular Naval Stores Co. v. Mathers, 119 So. 333, 96 Fla. 620.
Wyo.—Campbell v. Wyoming Development Co., 100 P.2d 124, 136, 55 Wyo. 347, citing **Corpus Juris,** and rehearing denied 102 P.2d 745, 55 Wyo. 347.
22 C.J. p 127 note 80.

Presumption as to due execution
of ancient instrument, being one of fact, is rebuttable.—Loving County v. Higginbotham, Tex.Civ.App., 115 S.W.2d 1110, error dismissed—Southwestern Settlement & Development Co. v. Village Mills Co., Tex.Civ.App., 245 S.W. 975.

9. Me.—Brunswick First Parish v. McKean, 4 Me. 508.

10. Ark.—Taylor v. Georgia State Savings Ass'n, 218 S.W. 180, 141 Ark. 425.
Cal.—Steuri v. Junkin, 82 P.2d 34, 27 Cal.App.2d 758—Buchanan v. Superior Court in and for City and County of San Francisco, App., 279 P. 1004.
Del.—Slivka v. Mroczka, 132 A. 862, 3 W.W.Harr. 163.
Neb.—In re Isaac's Estate, 189 N.W. 297, 108 Neb. 662—Moran v. Catlett, 165 N.W. 946, 102 Neb. 21.
Ohio.—Martin v. Fisher, 158 N.E. 287, 25 Ohio App. 372.
Okl.—Rock Island Implement Co. v. Pearsey, 270 P. 846, 133 Okl. 1—Appeal of Barnett, 252 P. 410, 122 Okl. 160, followed in 252 P. 418, 122 Okl. 169—Royal Neighbors of America v. Fletcher, 227 P. 426, 99 Okl. 297.
S.C.—Cannon v. Haverty Furniture Co., 183 S.E. 469, 179 S.C. 1.
Tex.—Moorhead v. Transportation Bank of Chicago, Ill., Civ.App., 62 S.W.2d 184.
Va.—Sanders v. School Board of Prince William County, 163 S.E. 394, 158 Va. 303.

Disqualification of judge
Where it appears that the judge who presided was disqualified, the

dicial tribunal are regular and valid,[11] and that judicial acts and duties have been, and will be, duly and regularly performed.[12] Such presumption of regularity arises where the court is one of general

presumption of regularity does not obtain.—Burnham v. Hardy Oil Co., Tex.Civ.App., 152 S.W. 182.

Appointment of curator ad hoc

The presumption of omnia rite acta can be indulged to show the regularity of the appointment of a curator ad hoc to an absent defendant only in absence of the facts themselves.—Abbott v. Pratt, 81 So. 296, 144 La. 741.

Burden of proof

One challenging order of court in discretionary matter has burden of establishing abuse of discretion.—Campbell v. Campbell, 225 N.W. 805, 58 N.D. 244.

Evidence insufficient to overcome presumption

N.C.—Johnson v. Sink, 9 S.E.2d 371, 217 N.C. 702.

11. U.S.—In re Bartlett Oil & Gas Corporation, D.C.Okl., 44 F.2d 616—U. S. v. French, D.C.Mich., 9 F. Supp. 30—Fordham v. Marrero, C.C.A.Puerto Rico, 273 F. 61.

Ala.—Laird v. Columbia Loan & Investment Co., 114 So. 208, 216 Ala. 619.

Ariz.—Barth v. Hall, 299 P. 122, 38 Ariz. 251—Brewer v. Morgan, 263 P. 630, 33 Ariz. 225.

Ark.—White v. Milburn, 122 S.W.2d 589, 197 Ark. 373—Road Improvement Dist. No. 4 of Johnson County v. Burkett, 266 S.W. 930, 167 Ark. 176—Taylor v. Georgia State Savings Ass'n, 218 S.W. 180, 141 Ark. 425—Smith v. Wallis-McKinney Coal Co., 215 S.W. 385, 140 Ark. 218.

Cal.—In re Wiechers' Estate, 250 P. 397, 199 Cal. 523, certiorari denied Wiechers v. Wiechers, 47 S.Ct. 476, 273 U.S. 762, 71 L.Ed. 879—Homestake Mining Co. v. Superior Court of City and County of San Francisco, 54 P.2d 535, 11 Cal.App.2d 488—Dady v. Superior Court in and for Los Angeles County, 36 P.2d 1092, 1 Cal.App.2d 581—Warden v. Bailey, 24 P.2d 192, 133 Cal.App. 383—Galletta v. Justice Court of City and County of San Francisco, 238 P. 133, 73 Cal.App. 95.

Colo.—First Mortg. Securities Co. v. Fader, 64 P.2d 1278, 100 Colo. 22.

Fla.—Hepburn v. Chapman, 149 So. 196, 109 Fla. 133.

Ga.—Waters v. Durrence, 182 S.E. 186, 181 Ga. 359—Stanaland v. Horne, 142 S.E. 142, 165 Ga. 685—Harper v. Lindsey, 132 S.E. 639, 162 Ga. 44.

Hawaii.—In re Estate of Lee Chuck, 33 Hawaii 445.

Idaho.—Harkness v. Utah Power & Light Co., 291 P. 1051, 49 Idaho 756.

Ill.—Boyle v. Boyle, 247 Ill.App. 554.

Ind.—Sisk v. Dean Bros. Co., 185 N.E. 158, 96 Ind.App. 366.

Iowa.—Kreamer v. Wendel, 214 N.W. 712, 204 Iowa 20.

Ky.—Wood Oil Co. v. Commonwealth, 244 S.W. 429, 196 Ky. 196—Noble v. People's Stock & Poultry Feed Co., 225 S.W. 491, 189 Ky. 549.

La.—Mariana v. Eureka Homestead Soc., 158 So. 642, 181 La. 125—Vidrine v. Deshotels, 158 So. 618, 181 La. 50—Horney v. Scott, App., 171 So. 172—Jackson v. Brewster, App., 169 So. 166—Jackson v. Swift & Co., App., 151 So. 816.

Me.—Marchavich's Case, 124 A. 209, 123 Me. 495.

Md.—Power v. Allied Asphalt Products Corporation, 159 A. 251, 162 Md. 175.

Mich.—Northrup v. Jay, 247 N.W. 717, 262 Mich. 463.

Minn.—In re Fay, 180 N.W. 533, 147 Minn. 472.

Mo.—Hollowell v. Schuyler County, 18 S.W.2d 498, 322 Mo. 1230—State ex rel. Levee Dist. No. 2 of Perry County v. Thompson, 285 S.W. 972, 315 Mo. 92—Bushman v. Bushman, 279 S.W. 122, 311 Mo. 551—Eversmeyer v. Broyles, 216 S.W. 317, 280 Mo. 99—Gilbert v. Malan, 100 S.W.2d 606, 231 Mo.App. 469—Muse v. E. A. Whitney & Son, 56 S.W.2d 848, 227 Mo.App. 640—State ex rel. Aufderheide v. Stolte, App., 1 S.W.2d 209—Hartford Fire Ins. Co. v. Stanfill, App., 259 S.W. 867.

Mont.—Cocanougher v. Montana Life Ins. Co., 64 P.2d 845, 103 Mont. 536—Gravelin v. Porier, 250 P. 823, 77 Mont. 260.

N.J.—Wolf v. Mosie, 156 A. 374.

N.M.—In re Hay's Guardianship, 17 P.2d 943, 37 N.M. 55.

N.Y.—Hiser v. Davis, 137 N.E. 596, 234 N.Y. 300, affirming 194 N.Y.S. 275, 201 App.Div. 213—People ex rel. Kammerer v. Brophy, 7 N.Y.S.2d 34, 255 App.Div. 831, affirmed 20 N.E.2d 1006, 280 N.Y. 618—Herlihy v. Watkins, 300 N.Y.S. 242, 252 App.Div. 605.

N.C.—Freeman v. Morrison, 199 S.E. 12, 214 N.C. 240—Miles F. Bixler Co. v. Britton, 134 S.E. 488, 192 N.C. 199—Farmers' & Merchants' Bank v. Duke, 122 S.E. 1, 187 N.C. 386.

Ohio.—Krieger's Cleaners & Dyers v. Benner, 175 N.E. 871, 38 Ohio App. 18—Martin v. Fisher, 158 N.E. 287, 25 Ohio App. 372.

Okl.—Manuel v. Kidd, 258 P. 732, 126 Okl. 71—Teague v. Smith, 204 P. 439, 85 Okl. 12.

Pa.—Stern & Co. v. Honikman, 163 A. 919, 108 Pa.Super. 10.

Tenn.—Mullens v. Mullens, 29 S.W.2d 261, 161 Tenn. 165—Savage v. Savage, 4 Tenn.App. 277.

Tex.—McCardell v. Lea, 235 S.W. 518, 11 Tex. 380, affirming, Civ.App., 200 S.W. 562—Barrow, Wade, Guthrie & Co. v. Stroud, Civ.App., 125 S.W.2d 365—Keystone Pipe & Supply Co. v. Osborne, Civ.App., 73 S.W.2d 120—Hart v. Wilson, Civ.App., 53 S.W.2d 1029, error refused—Peveto v. Richardson, Civ.App., 38 S.W.2d 133, error dismissed—Johnston v. Stephens, Civ.App., 300 S.W. 225, reversed on other grounds 49 S.W.2d 431, 121 Tex. 374—Hobbs v. Boyd, Civ.App., 292 S.W. 947—Calvert v. Bennett, Civ.App., 286 S.W. 303—Biggins v. State, 3 S.W.2d 816, 109 Tex.Cr. 218.

Vt.—Cootey v. Remington, 189 A. 151, 108 Vt. 441—In re Blake, 175 A. 252, 107 Vt. 18.

Va.—Wood v. Kane, 129 S.E. 327, 143 Va. 281—Honaker Lumber Co. v. Kiser, 113 S.E. 718, 134 Va. 50.

Wash.—In re Deming's Guardianship, 73 P.2d 764, 192 Wash. 190—State ex rel. Corbett v. Superior Court for King County, Department No. 10 thereof, 48 P.2d 617, 183 Wash. 373—Liebenwald's Estate v. Green, 231 P. 165, 166, 132 Wash. 26, quoting **Corpus Juris.**

W.Va.—Gibson v. Thorn, 12 S.E.2d 535—State v. Thompson, 130 S.E. 456, 100 W.Va. 253—Forest Glen Land Co. v. George, 122 S.E. 543, 96 W.Va. 209.

Wis.—Langen v. Borkowski, 206 N.W. 181, 188 Wis. 277, 43 A.L.R. 622.

Wyo.—White Automobile Co. v. Hamilton, 226 P. 687, 31 Wyo. 390.

22 C.J. p. 128 note 83.

Presumption of verity attaches to judgments of court of record.

U.S.—Detroit Trust Co. v. Union Guardian Trust Co., C.C.A.Mich., 65 F.2d 73.

Ill.—Townsend v. Gregory, 132 Ill.App. 192.

Mo.—Harrison v. Slaton, 49 S.W.2d 31.

Sufficiency of presumption

Presumption of regularity is not sufficient to overcome assertion by appellee of want of notice of time of settling and signing bill of exceptions.—Stoneroad v. Beck, 231 P. 642, 30 N.M. 202.

12. U.S.—Douglas v. New York, N. H. & H. R. Co., 49 S.Ct. 355, 279 U.S. 377, 73 L.Ed. 747, affirming 162 N.E. 53, 248 N.Y. 580, certiorari granted 49 S.Ct. 25, 278 U.S. 590, 73 L.Ed. 523, and affirming 227 N.Y.S. 797, 223 App.Div. 782—Ex parte Penney, C.C.A.Wash., 103 F.2d 27—Hall v. Johnston, C.C.A.Cal., 91 F.2d 363—American Mut. Liability Ins. Co. v. McDonough, C.C.A.Ill., 61 F.2d 558, affirming, D.

C., 1 F.Supp. 888, and certiorari denied 53 S.Ct. 386, 288 U.S. 602, 77 L.Ed. 977—Durant v. Bennett, D C. S C., 54 F.2d 634—Hotard v. Brodr Wilhelmsen Aktieselskabet, C.C.A. La., 23 F 2d 668—Venice Hunting & Trapping Co. v. Salinovich, D.C. La., 10 F.2d 222, reversed on other grounds, C.C.A., 16 F.2d 121—Watson v. U. S., D.C.N.C., 34 F Supp. 777—Nail v. American Nat. Bank of Bristow, D C.Okl., 21 F.Supp. 385, rehearing denied Nail v. American Nat. Bank of Bristow, Okl., 22 F.Supp. 977, affirmed, C.C.A., Burgess v. Nail, 103 F.2d 37—Burton v. Equitable Life Assur. Soc. of U. S., D.C.Okl., 21 F Supp. 62—Ex parte Lynch, D.C Ind., 18 F Supp 673—National Fertilizer Ass'n v. Bradley, D.C.S.C., 18 F.Supp 263, affirmed 57 S.Ct. 748, 301 U.S. 178, 81 L.Ed. 990—Melton v. Beard, D. C.Ga., 15 F.Supp. 980—Leahy v. Kunkel, D.C.Ind., 4 F.Supp. 849.

Ala.—Parker v. Farish, 1 So.2d 596—Roberts v. Grayson, 173 So. 38, 233 Ala. 658—Walker County v. Burdeshaw, 169 So. 227, 232 Ala. 621—Whaley v. First Nat. Bank, 155 So. 574, 229 Ala. 153—Quick v. McDonald, 108 So. 529, 214 Ala. 587—Smith v. Smith, 103 So. 557, 212 Ala. 522.

Cal.—Davis v. Conant, 51 P.2d 151, 10 Cal.App.2d 73—MacFarland v. Superior Court in and for Orange County, 38 P.2d 800, 3 Cal.App.2d 173—Lichtenberg v. Burdell, 281 P. 518, 101 Cal.App. 20—Boyd v. Superior Court in and for Los Angeles County, 279 P. 672, 100 Cal. App. 33—Brown v. Superior Court of California in and for Los Angeles County, 234 P. 409, 70 Cal. App. 732—Benning v. Nevis, 204 P. 866, 56 Cal.App. 192.

Colo.—New York Life Ins. Co. v. Haru Fukushima, 220 P. 994, 74 Colo. 236.

Conn.—Davis v. Maislen, 165 A. 451, 116 Conn. 375—Doris v. McFarland, 156 A. 52, 113 Conn. 594.

Fla.—Sloan v. Hutchingson, 163 So. 61, 120 Fla. 747—State ex rel. Gardiner v. Blanton, 150 So. 263, 112 Fla. 305.

Ga.—Kimsey v. Mickel, 12 S.E.2d 567, 191 Ga. 158—New York Life Ins. Co. v. Gilmore, 157 S.E. 188, 171 Ga. 894, reversing 149 S.E. 799, 40 Ga.App. 431, and conformed to 159 S.E. 288, 43 Ga.App. 442—Hughes v. Georgia Power Co., App., 15 S. E.2d 466—Crowe v. Vaughn, 151 S. E. 692, 40 Ga.App. 848.

Idaho.—Elliott & Healy v. Wirth, 198 P. 757, 34 Idaho 797.

Ill.—Bauman v. C. I. T. Corporation, 190 N.E. 696, 356 Ill. 336—Tanner v. Tanner, 157 N.E. 161, 326 Ill. 302—Lingle v. Bulfer, 153 N.E. 589, 322 Ill. 606—Beebe v. Kirkpatrick, 152 N.E. 539, 321 Ill. 612, 47 A.L.R. 891—Mitchell v. Eareckson, 250 Ill.App. 508.

Ind.—City Nat. Bank & Trust Co of South Bend v. American Nat. Bank at Indianapolis, 27 N.E.2d 764—State ex rel. Sluss v. Appellate Court of Indiana, 17 N.E.2d 824, 214 Ind. 686—J C. Penney, Inc., v. Kellermeyer, 19 N.E 2d 882, 107 Ind.App. 253, rehearing denied 22 N.E 2d 899, 107 Ind.App. 253—Etzold v. Board of Com'rs of Huntington County, 146 N.E. 842, 82 Ind.App. 655—Fidelity & Deposit Co. of Maryland v. Hall, 128 N.E 702, 74 Ind.App. 115—Kurtz v. Cooperider, 127 N.E. 572, 73 Ind. App. 393

Iowa—Read v. Gregg, 247 N.W. 199, 215 Iowa 792—Harris v. Randolph, 236 N.W. 51, 213 Iowa 772.

Kan.—Wyatt v. Collins, 180 P. 789, 105 Kan. 182, rehearing denied 180 P. 992, 105 Kan. 182.

Ky.—Kengreen Gas Utilities Corporation v. Crozer, 51 S.W.2d 262, 244 Ky. 440—Big Sandy & C. R. Co. v. Measell's Adm'r, 42 S.W.2d 747, 240 Ky. 571—Hogg v. Lorenz, 29 S.W. 2d 17, 234 Ky. 751—Elkhorn Coal Co. v. Wright, 18 S.W.2d 862, 230 Ky. 33—McBride v. Alles, 2 S.W.2d 391, 222 Ky. 725—Hays v. Adams, 294 S W. 1039, 220 Ky. 196—Black Mountain Corporation v. Jowdy, 268 S.W. 794, 207 Ky. 113—Hunley v. Perryman, 267 S.W. 206, 206 Ky. 243.

La.—Scott v. Gordon, 168 So. 134, 184 La. 1017—Vidrine v. Deshotels, 158 So. 618, 181 La. 50—Lampton Reid & Co. v. Fortenberry, App., 168 So. 711, denying rehearing 168 So. 36.

Mich.—Denison v. Crowley, Milner & Co., 271 N.W. 735, 279 Mich. 211.

Miss.—National Casualty Co. v. Hallan, 138 So. 572, 163 Miss. 164.

Mo.—Jones v. Peterson, 72 S.W.2d 76, 335 Mo. 242—Dimity v. Dimity, 62 S.W.2d 859—Hollowell v. Schuyler County, 18 S.W.2d 498, 322 Mo. 1230—State ex rel. Clinton Const. Co. v. Johnson, 272 S.W. 928—First Nat. Bank v. Cook, App., 74 S.W. 2d 846—In re Kellam's Estate, 53 S.W.2d 401, 227 Mo.App. 291—Tompkins v. Harris, 236 S.W. 368, 208 Mo.App. 661.

Mont.—Rohr v. Stanton Trust & Savings Bank of Great Falls, 245 P. 947, 76 Mont. 243—State v. Tesla, 223 P. 107, 69 Mont. 503—Hawley v. Richardson, 198 P. 450, 60 Mont. 118.

N.J.—Wardell v. Warshofsky, 159 A. 694, 10 N.J.Misc. 519.

N.Y.—Albrecht v. Canfield, 36 N.Y. S. 940, 92 Hun 240, 72 N.Y.St. 323—In re New York Title & Mortgage Co., 9 N.Y.S.2d 994, 170 Misc. 109—People ex rel. Ackerson v. Warden of City Prison, Kings County, 3 N.Y.S.2d 412, 167 Misc. 475—In re Vanderbilt, 276 N.Y.S. 745, 153 Misc. 884—Bridenbaker v. Kissell, 227 N Y S. 384, 131 Misc. 534, affirmed 234 N.Y.S. 751, 226 App.Div. 850—People v. Humphrey, 202 N.Y.S. 772, 122 Misc. 303.

Ohio.—Judy v. Trollinger, 144 N.E. 44, 110 Ohio St. 576—Swearingin v. Rendigs, 4 N.E 2d 695, 53 Ohio App. 221.

Or.—Allen v. Levens, 199 P. 595, 101 Or. 466, affirming 198 P. 907, 101 Or. 466.

S.C.—Cannon v. Haverty Furniture Co., 183 S.E. 469, 179 S C. 1—State v. Kizer, 162 S E. 444, 164 S.C. 383, 81 A.L.R. 722.

Tenn.—Stiner v. Powells Valley Hardware Co, 75 S.W.2d 406, 168 Tenn. 99.

Tex.—Moore v. Davis, Com.App., 32 S.W.2d 181, denying rehearing 27 S.W.2d 153, affirming, Civ.App., 16 S W.2d 380—Moore v. Wooten, Com. App., 280 S.W. 742, reversing, Civ. App., 265 S.W. 210, rehearing denied, Com.App, 283 S.W. 153—Blue Bonnet Life Ins. Co. v. Robinson, Civ App., 153 S.W.2d 200—Holt v. International Great Northern R. Co., Civ.App., 152 S.W.2d 472—Texas & N. O. R. Co. v. Young, Civ. App, 148 S.W.2d 229—Burnett v. Tipton, Civ App., 89 S.W.2d 440, error dismissed—Harden v. Coffee, Civ.App., 59 S.W.2d 436, error dismissed—Cockrell v. Work, Civ. App., 17 S.W.2d 174, affirmed 61 S. W.2d 787, 122 Tex. 406—Darlington v. Allison, Civ.App., 12 S.W.2d 839, error dismissed—Keystone Pipe & Supply Co. of Texas v. Milnor, Civ. App, 297 S W. 1089—Bird v. Alexander, Civ.App, 294 S.W. 305—Gilmore v. Sammons, Civ.App., 269 S.W. 861—Ex parte Lassiter, 18 S. W.2d 637, 113 Tex.Cr. 18.

Utah.—Wasatch Oil Refining Co. v. Wade, 63 P.2d 1070, 92 Utah 50.

Va.—Griffin v. Tomlinson, 165 S E. 374, 159 Va. 161—A. S. White & Co. v. Jordan, 98 S.E. 24, 124 Va. 465.

W.Va.—Gibson v. Thorn, 12 S.E.2d 535.

Where record is silent, it will be presumed in favor of the judgment that what ought to have been done was rightly done.—In re Wiechers' Estate, 250 P. 397, 199 Cal. 523, certiorari denied Wiechers v. Wiechers, 47 S.Ct. 476, 273 U.S. 762, 71 L.Ed. 879—Steuri v. Junkin, 82 P.2d 34, 27 Cal.App.2d 758—Buchanan v. Superior Court in and for City and County of San Francisco, Cal.App., 279 P. 1004.

Holding court outside county or district

Where a judge holds court outside his regular county or district, it is presumed that he does so lawfully, if there is a legal method in which he can do so.

Ariz.—Payne v. Williams, 56 P.2d 186, 47 Ariz. 396.

jurisdiction,[13] and even though it is a court of a sister state or foreign country.[14] It is likewise applicable to the acts and proceedings of courts of inferior[15] or special[16] jurisdiction, provided jurisdiction has attached.[17] No presumptions are indulged against the validity of judgments of a court of record;[18] nor will a violation of duty by courts or judicial officers be presumed in the absence of evidence.[19] The same presumptions of regularity that obtain in a collateral proceeding do not obtain where the attack on a judgment is a direct attack.[20] Presumptions as to jurisdiction are discussed in Courts §§ 96–100.

Particular presumptions which may arise in respect of judicial proceedings vary according to the facts and circumstances of the specific case.[21] In

Cal.—In re Newman's Estate, 16 P. 887, 75 Cal. 213, 7 Am.S.R. 146.
Colo.—Empire Land & Canal Co. v. Engley, 23 P. 452, 14 Colo. 289.

Jurors are presumed to do their duty, and there is presumption that they have regarded their oaths.—Wannamaker v. Traywick, 134 S.E. 234, 136 S.C. 21.

Grand jury

It will be assumed, on motion to quash subpœnas duces tecum, that the grand jury will not act other than as the law prescribes and permits.—U. S. v. Invader Oil Corporation, D.C.Cal., 5 F.2d 715.

13. U.S.—Gentry v. State of Missouri, ex rel. and to Use of Butler, C.C.A.Mo., 32 F.2d 159.
Ala.—Fowler v. Fowler, 122 So. 440, 219 Ala. 453.
Idaho—Harkness v. Utah Power & Light Co., 291 P. 1051, 49 Idaho 756.
Ind.—Sisters of Mercy of Jeffersonville v. Hourff, 154 N.E. 680, 87 Ind. App. 140.
Mass.—Corkum v. Clark, 161 N.E. 912, 263 Mass. 378—Farquhar v. New England Trust Co., 158 N.E. 836, 261 Mass. 209.
Mo.—Ex parte Gounis, 263 S.W. 988, 304 Mo. 428.
Neb.—Hassett v. Durbin, 271 N.W. 867, 132 Neb. 315.
N.Y.—Hiser v. Davis, 137 N.E. 596, 234 N.Y. 300, affirming 194 N.Y.S. 275, 201 App.Div. 213.
Okl.—Abraham v. Homer, 226 P. 45, 102 Okl. 12—Royal Neighbors of America v. Fletcher, 227 P. 426, 99 Okl. 297.
Tex.—Easterline v. Bean, Civ.App., 15 S.W.2d 734, reversed on other grounds 49 S.W.2d 427, 121 Tex. 327—Burton v. McGuire, Civ.App., 3 S.W.2d 576, affirmed, Com.App., 41 S.W.2d 238—Hare v. Reily, Civ. App., 269 S.W. 473, affirmed Reily v. Hare, Com.App., 280 S.W. 543.
22 C.J. p 128 note 85.

14. Ind.—Berry-Enright Lumber Co. v. Gardner, 7 N.E.2d 523, 104 Ind. App. 9.
N.J.—Griswold v. Kelly-Springfield Tire Co., 120 A. 324, 94 N.J.Eq. 308.
N.Y.—In re Bellmer's Estate, 258 N.Y.S. 964, 144 Misc. 462.
S.D.—Cole v. Sassenberry, 230 N.W. 22, 23, 56 S.D. 595, citing **Corpus Juris.**
Wash.—Liebenwald's Estate v. Green, 231 P. 165, 166, 132 Wash. 26, quoting **Corpus Juris.**
22 C.J. p 129 note 87.

Nonresident defendant not served in state

The "presumption, however, does not extend to a case where it appears from the record that the defendant was a nonresident and did not voluntarily appear in court, and it does not appear that service of process was made upon him within the state."—Corkum v. Clark, 161 N.E. 912, 914, 263 Mass. 378.

When overcome

Presumption of regularity of proceedings of foreign court rendering judgment is overcome only when jurisdictional defect expressly appears.—Clark v. Wesendorf, 275 P. 925, 35 Ariz. 172.

15. D.C.—Rudolph v. Lockwood, 2 F.2d 319, 55 App.D.C. 101.
Wash.—Liebenwald's Estate v. Green, 231 P. 165, 166, 132 Wash. 26, quoting **Corpus Juris.**
Wyo.—Campbell v. Wyoming Development Co., 100 P.2d 124, 55 Wyo. 347.
22 C.J. p 129 note 86.

"The policy of the law is to indulge liberal presumptions in favor of the validity of the action of inferior courts when a substantial observance of the requirements of the law is apparent."—Citizens Coal Co. v. Foley, 129 S.W.2d 131, 132, 278 Ky. 573—Mayhew v. Kentucky River Coal Corporation, 38 S.W.2d 452, 456, 238 Ky. 509.

16. Kan.—Hager v. Wilson, 186 P. 974, 106 Kan. 127.
Wash.—Liebenwald's Estate v. Green, 231 P. 165, 166, 132 Wash. 26, quoting **Corpus Juris.**
22 C.J. p 129 note 86.

Quasi-judicial body

The presumption also applies to an executive board exercising quasi-judicial functions.—U. S. v. Kinkead, D.C.N.J., 248 F. 141, affirmed, C.C.A., 250 F. 692.

17. Cal.—In re Hunsicker, 223 P. 411, 65 Cal.App. 114.
Or.—Steiwer v. Steiwer, 230 P. 359, 112 Or. 485.

Justice of peace

There are no presumptions in favor of the judgment of a justice of the peace.—Perkins v. Peterson, 185 P. 660, 67 Colo. 101.

18. Tex.—Ex parte Kuehne, 12 S.W.2d 790, 111 Tex.Cr. 363.

19. U.S.—Durant v. Bennett, D.C.S.C., 54 F.2d 634—Stephenson v. Daly, D.C.Ind., 1 F.Supp. 865.
Cal.—A. Paladini, Inc., v. Superior Court in and for City and County of San Francisco, 21 P.2d 941, 218 Cal. 114—Boyd v. Superior Court in and for Los Angeles County, 279 P. 672, 100 Cal.App. 33.
Colo.—People v. District Court of Twelfth Judicial Dist. of Colorado in and for Conejos County, 218 P. 745, 74 Colo. 40, error dismissed Clay v. District Court of Twelfth Dist. of State of Colorado, 45 S.Ct. 228, 267 U.S. 574, 69 L.Ed. 794.
Fla.—Curtis v. Albritton, 132 So. 677, 101 Fla. 853.
Iowa.—Harris v. Randolph, 236 N.W. 51, 213 Iowa 772.
Mass.—Preston v. Peck, 180 N.E. 671, 279 Mass. 16.
Mo.—Curtin v. Zerbst Pharmacal Co., 62 S.W.2d 771, 333 Mo. 346, transferred, see 72 S.W.2d 152, 229 Mo. App. 82—State ex rel. Clinton Const. Co. v. Johnson, 272 S.W. 928.
S.C.—State v. Kizer, 162 S.E. 444, 164 S.C. 383, 81 A.L.R. 722.
Wyo.—Doherty v. Patterson, 239 P. 1045, 33 Wyo. 374.

Invalid stipulation

Court should not presume that counsel intended to make invalid stipulation attempting to deprive court of power to set aside award in statutory arbitration.—Carey v. Herrick, 263 P. 190, 146 Wash. 283.

20. Ill.—Oulvey v. Little, 233 Ill. App. 553.

21. **Presumptions proper under facts**

(1) That judgment dismissing petition was in bar.—Snyder v. Fahey, 168 N.W. 117, 183 Iowa 1118.

(2) That plaintiff dismissed before entry of final judgment as to defendant not mentioned.—Parker Motor Co. v. Hamilton, Tex.Civ.App., 9 S.W.2d 426.

(3) That in rem judgment was based on constructive service only.—Fischer v. Jackson, 239 Ill.App. 322.

(4) That equity court concurred in jury finding.—Sullivan v. Wilson

the absence of a contrary showing, it will be presumed that parties are citizens of the state of the forum and that their causes of action arose therein;[22] that a party to whom the state courts are open can obtain therein every right to which he is entitled;[23] that a judicial record speaks the truth;[24] that a judgment appearing of record is the judgment of the court,[25] is valid and subsisting[26] and was rendered only after a hearing according to law;[27] that a judgment or decree conforms to the pleadings,[28] is based on proper and sufficient evidence,[29] stipulations,[30] or proceedings,[31] and is a correct judicial determination of the rights of the parties;[32] that a judgment by default was rendered

Mercantile Co., 290 S.W. 938, 172 Ark. 914.

(5) That instruments incorporated by reference into petition for sale by administratrix, not complained of as not conforming to statute, are regular—Harkness v. Utah Power & Light Co., 291 P. 1051, 49 Idaho 756.

(6) That all property of company in state passed into hands of its ancillary receiver appointed by federal court, and was administered by him before final discharge.—Standard Oil Co. v. Sugar Products Co., 107 So. 566, 160 La. 763.

(7) That property sold by bankruptcy trustee was listed by bankrupt among its assets.—Cornell v. Gobin, 238 P. 344, 49 Nev. 101.

(8) That statutory recognizance was entered into.—Penn v. Penn, 130 A. 244, 98 N.J.Eq. 151.

(9) That petition and bond for removal to federal court were never presented to state court or to judge thereof.—Bahls v. Welfare Loan Soc. of La Fayette, D.C.Ind., 17 F.2d 379.

(10) That request for party to join in appeal was not in writing.—Parker v. New England Oil Corporation, D.C.Mass., 15 F.2d 236.

(11) Other presumptions.

Cal.—Rappaport v. Payne, 35 P.2d 183, 139 Cal.App. 772.
Ga.—Lewis v. Patterson, 12 S.E.2d 593, 191 Ga. 348.
Idaho.—Elliott & Healy v. Wirth, 198 P. 757, 34 Idaho 797.
Mont.—Gravelin v. Porier, 250 P. 823, 77 Mont. 260.
N.Y.—In re Anderson's Estate, 13 N.Y.S.2d 504, 171 Misc. 795.
Tenn.—Orman v. Bransford Realty Co., 73 S.W.2d 713, 168 Tenn. 70.
Tex.—Magnolia Petroleum Co. v. Caswell, Civ.App., 295 S.W. 653, reversed on other grounds, Com.App., 1 S.W.2d 597, rehearing denied 7 S.W.2d 867, certiorari denied Caswell v. Magnolia Petroleum Co., 49 S.Ct. 34, 278 U.S. 640, 73 L.Ed. 555—Reeves v. Fuqua, Civ.App., 277 S.W. 418.

Presumptions not proper under facts

(1) That there will be a second trial of an action.—Pioneer Trust Co. v. Missouri Pac. R. Co., 224 S.W. 106, 204 Mo.App. 289.

(2) That purchaser at execution sale paid mortgage out of price of adjudication.—Rosenthal Sloan Millinery Co. v. Picone, La.App., 141 So. 494.

(3) Other presumptions see Orman v. Bransford Realty Co., 73 S.W.2d 713, 168 Tenn. 70.

22. Iowa.—Farmers' & Merchants' Nat. Bank of Fort Worth, Tex., v. Anderson, 250 N.W. 214, 216 Iowa 988—Van Patten v. Bredow, 39 N.W. 907, 75 Iowa 589.

23. U.S.—Atchison, T. & S. F. R. Co. v. Weeks, D.C.Tex., 248 F. 970, reversed on other grounds, C.C.A., 254 F. 513.

24. U.S.—Hall v. Johnston, C.C.A. Cal., 91 F.2d 363.
Cal.—Flores v. Flores, 204 P. 54, 55 Cal.App. 595.
Va.—Farant Inv. Corporation v. Francis, 122 S.E. 141, 138 Va. 417. "One of the disputable presumptions of law is that a judicial record when not conclusive does still correctly determine or set forth the rights of the parties."
Cal.—Argabrite v. Argabrite, 206 P. 81, 82, 56 Cal.App. 650.
Mont.—Cocoanougher v. Montana Life Ins. Co., 64 P.2d 845, 848, 103 Mont. 536.
Or.—Allen v. Levens, 199 P. 595, 596, 101 Or. 466, affirming 198 P. 907, 101 Or. 466.

Recitals in judgment or decree are presumed true and in accordance with the facts.
Ala.—Benton v. Benton, 99 So. 300, 211 Ala. 43.
N.M.—Miera v. Sammons, 248 P. 1096, 31 N.M. 599.
N.Y.—Melchers v. Bertolido, 192 N.Y.S. 781, 118 Misc. 196.

Clerk's record of witness's fees

Clerk's record of attendance and mileage fees of witnesses is presumed to be correct.—Joyner v. City of Seattle, 258 P. 479, 144 Wash. 641.

Order made on record; good cause

"Ordinarily, where an order is made upon the record, and it is recited that there is cause, the presumption is that good and adequate cause exists."—Borowicz v. Hamann, 207 N.W. 426, 428, 189 Wis. 212.

25. Mo.—Schulte v. Schulte, 140 S.W.2d 51, affirming, App., 127 S.W.2d 748—Stimson v. Cathedral Min. & Smelting Co., 174 S.W. 420, 264 Mo. 190.

26. Tex.—Heidingsfelder v. Rodgers, Civ.App., 96 S.W.2d 147.

27. Mont.—State v. Broadwater County Fourteenth Judicial Dist. Ct., 152 P. 753, 51 Mont. 310.
22 C.J. p 129 note 90.

28. Ala.—Cobbs v. Norville, 151 So. 576, 227 Ala. 621.
Tex.—Byers v. Christian, Civ.App., 87 S.W.2d 314.
Utah.—Cooke v. Cooke, 248 P. 83, 67 Utah 371.
22 C.J. p 129 note 91.

Appointment of receiver

Where state court appointed receiver but made no findings, presumption arises that appointment was based on only legal ground disclosed by pleadings.—In re Bartlett Oil & Gas Corporation, D.C.Okl., 44 F.2d 616.

29. Ga.—Fountain v. Tarver, 104 S.E. 443, 150 Ga. 628.
La.—J. R. Watkins Co. v. Bankston, 1 La.App. 641.
Okl.—Esch v. Callaway, 251 P. 1028, 123 Okl. 38—Ross v. Alworth, 231 P. 885, 105 Okl. 155—Dunkin v. Galloway, 181 P. 939, 75 Okl. 125.
Utah.—Erickson v. McCollough, 63 P.2d 595, 91 Utah 159, 109 A.L.R. 332.

30. Utah.—Erickson v. McCullough, supra.

31. Utah.—Erickson v. McCullough, supra.

32. U.S.—Harrison v. Love, C.C.A. Mich., 81 F.2d 115—Drilling & Exploration Corporation v. Webster, C.C.A.Cal., 69 F.2d 416—Sprague v. Aderholt, D.C.Ga., 45 F.2d 790.
Ark.—McKnelly v. Fears, 22 S.W.2d 398, 180 Ark. 1167.
Colo.—Riant Amusement Co. v. Bailey, 249 P. 7, 80 Colo. 65.
Fla.—State v. Wright, 145 So. 598, 107 Fla. 178—Harrington v. Bowman, 143 So. 651, 106 Fla. 86, modifying 136 So. 229, 102 Fla. 339—Quigley v. Cremin, 113 So. 892, 94 Fla. 104, modifying 109 So. 312.
Ga.—Atlantic Coast Line R. Co. v. Morgan, 8 S.E.2d 393, 190 Ga. 98.
Ind.—Berry-Enright Lumber Co. v. Gardner, 7 N.E.2d 523, 104 Ind.App. 9.
Ky.—Happy Coal Co. v. Brashear, 92 S.W.2d 23, 263 Ky. 257.
La.—Tyler v. Whitney-Central Trust & Savings Bank, 102 So. 325, 157 La. 249.
Mass.—Prenguber v. Agostini, 193 N.E. 743, 289 Mass. 222.
N.Y.—People ex rel. Wiesenthal v. Dunne, 186 N.Y.S. 452, 195 App.Div. 225.

after the expiration of all legal delays to which defendants were entitled before filing their answer;[33] that special terms of court were properly convened and regularly held;[34] that special judges were regularly appointed or selected;[35] that a judgment roll was actually filed in the clerk's office, and that it contained the judgment appearing in the judgment book;[36] that a decision was made and filed on the day of its date;[37] that a retraxit after judgment was entered by plaintiff in person;[38] that a district judge, in hearing habeas corpus proceedings, will proceed correctly, both as to questions of procedure and practice and as to the final decision;[39] that a motion was properly called for trial and that the proceedings thereon were regular;[40] that an entry of appearance was regular,[41] and that the parties had due notice of all proceedings;[42] that findings as to the publication of notice were sustained by competent and sufficient evidence;[43] that there was a proper judgment directing issuance of execution;[44] that execution has been issued on a judgment under which garnishment is applied for, and that the judgment is not dormant;[45] that a summons in garnishment was not sued out until after the return of an execution nulla bona;[46] that the court acted in the interest of justice in holding a case to trial;[47] that an adjournment granted was based on sufficient grounds, or at least on grounds which the court, acting in good faith, adjudged to be sufficient;[48] that leave to sue was obtained before a suit to foreclose was brought against a receiver in the same court in which he was appointed;[49] that, where one of the parties to proceedings for the determination of heirship died during the pendency of such proceedings, his administrator was properly substituted as a party;[50] that a warrant issued by the judge of a county court was regular, and that the judge discharged his duty with reference thereto;[51] that attorneys obtain the information contained in the pleadings filed by them from their clients;[52] that an attorney who confessed judgment was an attorney of record authorized to practice in the courts of the state;[53] that jurors are men of good character and sufficient intelligence;[54] that the jury does not know the effect of its answers to special issues;[55] that grand jury proceedings are secret;[56] that foreclosure proceedings were regular, and that all necessary parties

N.C.—Elias v. Board of Com'rs of Buncombe County, 153 S.E. 323, 198 N.C. 733.
N.D.—Campbell v. Campbell, 225 N.W. 805, 58 N.D. 244.
Or.—Weber v. Empire Holding Corporation, 41 P.2d 1084, 149 Or. 503.
R.I.—In re Rathbun, 110 A. 649, 43 R.I. 173.
22 C.J. p 129 note 92.

Affirmance of judgment
Federal circuit court of appeals was bound to presume that affirmance of judgment of Kentucky circuit court by Kentucky court of appeals embodied the deliberate judgment of that court.—First Trust Co. of St. Paul v. Board of Education of Whitley County, C.C.A., 78 F.2d 114, reversing, D.C., 5 F.Supp. 49.

Any correction or amendment of its record made by the superior court is conclusively presumed to have been properly made when such record is collaterally drawn in question.—Halpern v. Superior Court in and for Alameda County, 212 P. 916, 190 Cal. 384.

Where contrary affirmatively appears the text rule does not apply.—Sanders v. School Board of Prince William County, 163 S.E. 394, 158 Va. 303.

33. La.—Sullivan v. Maynor, 61 So. 682, 132 La. 598.

34. U.S.—Stockslager v. U. S., Alaska, 116 F. 590, 54 C.C.A. 46.
Ohio.—Merchant v. North, 10 Ohio St. 251.

35. Cal.—In re Kent's Estate, 57 P. 2d 901, 6 Cal.2d 154.
Ky.—Clendennen v. Commonwealth, 240 S.W. 1065, 195 Ky. 741.

36. N.Y.—Burke v. Kaltenbach, 109 N.Y.S. 225, 125 App.Div. 261.

37. N.Y.—Kennedy v. Smith, 195 N.Y.S. 196, 202 App.Div. 249

38. **Record held to show entry by attorney**
Or.—Hill v. Wilson, 250 P. 840, 119 Or. 636.

39. Mont.—State v. First Judicial Dist. Ct., 104 P. 872, 40 Mont. 17.

40. La.—Howcott v. Smart, 51 So. 64, 125 La. 50.

41. Ill.—Vayette v. Myers, 136 N.E. 467, 303 Ill. 562, certiorari denied Myers v. Vayette, 43 S.Ct. 249, 260 U.S. 749, 67 L.Ed. 495.

42. Wyo.—Campbell v. Wyoming Development Co., 100 P.2d 124, 134, 55 Wyo. 347, citing **Corpus Juris.** 22 C.J. p 129 note 1.

Duly summoned parties are presumed always to be in court attending to their causes, either in person or by counsel, and so are bound to notice the steps taken therein.—Mussman v. Pepples, 49 S.W.2d 592, 243 Ky. 674—Nicely v. Hickman, 221 S.W. 566, 188 Ky. 258.

In chancery cases, all parties to suit in which order or decree is being made referring to such parties are presumed at time thereof to be already in court through proper service of process or appearance.—Gover v. Mann, 153 So. 895, 114 Fla. 128.

43. Ark.—King v. Dickinson-Reed-Randerson Co., 269 S.W. 365, 168 Ark. 112.
22 C.J. p 130 note 2.

44. Tex.—Clements v. Texas Co., Civ.App., 273 S.W. 993.

45. Tex.—Baze v. Island City Mfg. Co., Civ.App., 94 S.W. 460.

46. Neb.—Brunke v. Gruben, 122 N.W. 37, 84 Neb. 806.

47. U.S.—Fugitt v. Lake Erie & W. R. Co., D.C.Ohio, 287 F. 556.

48. Iowa.—Gilman v. Weiser, 118 N.W. 774, 140 Iowa 554.

49. Wash.—Payson v. Jacobs, 80 P. 429, 38 Wash. 203.

50. Cal.—In re Horman, 140 P. 11, 167 Cal. 473, followed in In re Whalen, 140 P. 12, 167 Cal. 797.

51. Ky.—Schooler v. Yancey, 118 S.W. 940, 133 Ky. 695.

52. Tex.—Western Oil Fields Corporation v. Nowlin, Civ.App., 288 S.W. 554.

53. Ill.—Bowman v. Powell, 127 Ill. App. 114.

54. N.C.—Greene v. Greene, 9 S.E. 2d 413, 217 N.C. 649—Davis v. Long, 126 S.E. 321, 189 N.C. 129.

55. Tex.—Lane v Cunningham, Civ. App., 38 S.W.2d 906, reversed on other grounds, Com.App., 58 S.W. 2d 35.

56. Conn.—Filosi v. Crossman, 149 A. 774, 111 Conn. 178.

were joined;[57] that a probate court appointing an administrator was informed of the facts;[58] that letters of administration were actually delivered after the administration bond was given, as required by statute;[59] that a probate judge signed the minutes of his court containing an order granting an administrator authority to sell land;[60] that an executor's sale of decedent's property was properly authorized;[61] that a court of probate jurisdiction, in appointing an administrator of the estate of one who died testate, intended that its appointee should be administrator with the will annexed;[62] that in probate proceedings the widow of the testator was cited to elect whether or not she would take under the will, and elected to take the more valuable estate;[63] that a county court, by proper orders, continued a temporary administrator in office so long as was necessary for the purpose of the appointment;[64] that an order for the sale of land of decedent was based on a petition duly filed and presented to the court;[65] that a lunatic was present at the inquest at which he was adjudged insane;[66] that a court was satisfied of the legality of a trust before appointing a trustee;[67] that a guardian was duly and regularly appointed under authority of law,[68] and by reason of his special fitness;[69] that the findings of a court are regular in every respect,[70] and cover all the issues presented at the trial;[71] that a special proceeding for the sale of land was regular;[72] and that in an action to determine the validity of a swamp land maintenance assessment, the court, such being its duty, would have allowed any valid defense to be shown, if presented at any time before judgment, although not pleaded.[73] In aid of a final judgment in partition, the court must assume, if necessary, that the interlocutory finding and order was so modified as to conform to the final judgment.[74] Where an administrator de bonis non is appointed after the discharge of administrators, it will be presumed, in the absence of anything to the contrary, that the order closing the estate was set aside, and the administration legally continued.[75] Where a will named trustees with power to sell, and provided for a substituted trustee on the death of one of the trustees named and the court approved a sale made by the substituted trustee and the other surviving trustees, it must be presumed that the court had before it due proof of the death of such trustee.[76]

On the other hand, there is no presumption as to when an attorney files a paper, or that he has filed it within the time prescribed by statute;[77] and where a court, in ordering deeds to be recorded, never undertook judicially to pass on the validity of such an instrument, the recordation of a conveyance executed by one as attorney for another raises no presumption that a power of attorney was produced.[78] The possession of files by a clerk of court raises no presumption of regularity with respect to a notice filed with him.[79] Whatever the authority of courts of equity to shorten statutes of limitation or destroy causes of action may be, there should be no presumption in favor of the exercise of such authority.[80]

§ 146. Official Proceedings and Acts

a. In general
b. Qualifications of rule
c. Applications of rule to particular officers or bodies
d. Applications of rule to particular acts

a. In General

Official acts or duties are, in the absence of evidence

57. N.C.—Sutton v. Jenkins, 60 S.E. 643, 147 N.C. 11.

58. Ala.—Milbra v. Sloss-Sheffield Steel & Iron Co., 62 So. 176, 182 Ala. 622, 46 L.R.A.,N.S., 274.

59. Mich.—Brown v. Hannah, 115 N. W. 980, 152 Mich. 33.

60. Ga.—Floyd v. Ricketson, 59 S. E. 909, 129 Ga. 668.

61. Ga.—Bailey v. Layfield, 122 S.E. 193, 157 Ga. 546.

62. Ky.—Young v. Chesapeake & O. R. Co., 125 S.W. 241, 136 Ky. 784. 22 C.J. p 130 note 14.

63. Ohio.—Weaver v. Kling, 31 Ohio Cir.Ct. 199, affirmed 89 N.E. 1127, 80 Ohio St. 717.

64. Tex.—El Paso & Southwestern Co. v. La Londe, Civ.App., 173 S. W. 890.

65. Ga.—Steadham v. Rogers, 80 S. E. 624, 141 Ga. 146. 22 C.J. p 130 note 17.

66. Ky.—Porter v. Eastern Kentucky Insane Asylum, 90 S.W. 263, 121 Ky. 816, 28 Ky L. 796—Eversole v. Eastern Kentucky Insane Asylum, 100 S.W. 300, 30 Ky.L. 989.

67. Cal.—Silverston v. San Francisco Mercantile Trust Co., 122 P. 976, 18 Cal.App. 180.

68. Iowa.—Hindorff v. Sovereign Camp W. O. W., 129 N.W. 831, 150 Iowa 185.

69. S.D.—Ritter v. Riley, 216 N.W. 351, 51 S.D. 379, 56 A.L.R. 533.

70. Md.—Houston v. Wilcox, 88 A. 32, 121 Md. 91.

71. Cal.—Todd v. Payne, 246 P. 816, 77 Cal.App. 306.

72. N.C.—McKellar v. McKay, 72 S. E. 375, 156 N.C. 283.

73. Cal.—Swamp Land Reclamation Dist. No. 341 v. Blumenberg, 106 P. 392, 156 Cal. 539.

74. Ind.—Long v. Schowe, 103 N.E. 785, 181 Ind. 13.

75. Tex.—Waterman Lumber & Supply Co. v. Robins, Civ.App., 159 S. W. 360.

76. S.D.—Spencer v. Lyman, 131 N. W. 802, 27 S.D. 471.

77. Or.—Everding v. Gebhardt Lumber Co., 175 P. 611, 176 P. 186, 90 Or. 207.

78. U.S.—Virginia & West Virginia Coal Co. v. Charles, D.C.W.Va., 251 F. 83.

79. Iowa.—Carter v. Utterback, 204 N.W. 446, 200 Iowa 82.

80. N.H.—Le Brun v. Boston & M. R. R., 131 A. 441, 82 N.H. 170.

to the contrary, presumed to have been properly performed; and, as a general rule, it is presumed that a public official discharges his duty or performs an act required by law in accordance with the law and the authority conferred upon him, and that he acts fairly, impartially, and in good faith.

In the absence of evidence to the contrary, there is always a presumption that official acts, including ministerial acts,[81] or duties have been properly performed,[82] and in some states this presumption is

81. Iowa.—Smith v. Knox Dist. Tp., 42 Iowa 522.
Ky.—Livingston County v. Dunn, 51 S.W.2d 450, 244 Ky. 460—Board of Education of City of Jackson v. Caudill, 15 S.W.2d 452, 228 Ky. 652.
Okl.—Moore v. Porterfield, 257 P. 307, 125 Okl. 217.

82. U.S.—U. S. v. Chemical Foundation, Del., 47 S.Ct. 1, 272 U.S. 1, 71 L.Ed. 131, modifying on other grounds, C.C.A., 5 F.2d 191, which affirmed, D.C., 294 F. 300—Atchison, T. & S. F. Ry. Co. v. Elephant Butte Irr. Dist. of New Mexico, C.C.A.N.M., 110 F.2d 767—Board of Sup'rs of Rockland County v. Knickerbocker Ice Co., C.C.A.N.Y., 80 F.2d 248—Commissioner of Internal Revenue v. Owens, C.C.A., 78 F.2d 768—O'Donnell v. Cullen, C.C.A.Wyo., 76 F.2d 955—Weaver v. U. S., C.C.A.N.C., 72 F.2d 20—U. S. v. Barry, C.C.A.Tenn., 67 F.2d 763, certiorari denied Barry v. U. S., 54 S.Ct. 857, 292 U.S. 648, 78 L.Ed. 1498—Diamond Alkali Co. v. Heiner, D.C.Pa., 39 F.2d 645, modified on other grounds, C.C.A., 60 F.2d 505, certiorari granted Heiner v. Diamond Alkali Co., 53 S.Ct. 221, 287 U.S. 593, 77 L.Ed. 517, reversed on other grounds 53 S.Ct. 413, 288 U.S. 502, 77 L.Ed. 921—Denver & S. L. Ry. Co. v. Moffat Tunnel Improvement Dist., D.C. Colo., 35 F.2d 365, modified on other grounds, C.C.A., Moffat Tunnel Improvement Dist. v. Denver & S. L. Ry. Co., 45 F.2d 715, certiorari denied 51 S.Ct. 485, 283 U.S. 837, 75 L.Ed. 1448—Alonzo B. Hayden, Inc., v. Town of Covington, D.C. La., 27 F.2d 354, affirmed, C.C.A., Town of Covington v. Alonzo B. Hayden, Inc., 27 F.2d 360—Hunter Glover Co. v. Harvey Steel Products Corporation, D.C.Tenn., 3 F. 2d 634—Smith v. U. S., D.C.Mont., 32 F.Supp. 657—Redlands Foothill Groves v. Jacobs, D.C.Cal., 30 F. Supp. 995—U. S. ex rel. Ulmer v. Phillips, D.C.Mont., 24 F.Supp. 115—Isbrandtsen-Moller Co. v. U. S., D.C.N.Y., 14 F.Supp. 407, affirmed 57 S.Ct. 407, 300 U.S. 139, 81 L.Ed. 562—U. S. v. Standard Silk Co., D.C.N.Y., 12 F.Supp. 54—In re Harris Bros., D.C.Ark., 5 F.Supp. 191.
Ala.—Cox v. Williams, 3 So.2d 129—Walton v. City of Mobile, 167 So. 247, 232 Ala. 200—State v. Board of School Com'rs of Mobile County, 63 So. 76, 183 Ala. 554.
Ariz.—Ison v. Western Vegetable Distributors, 59 P.2d 649, 48 Ariz. 104—Bank of Lowell v. Cox, 279 P. 257, 262, 35 Ariz. 403, citing **Corpus Juris.**
Cal.—Berkeley High School Dist. of Alameda County v. Coit, 59 P.2d 992, 7 Cal.2d 132—Hannon v. Madden, 5 P.2d 4, 214 Cal. 251—Tulare County v. City of Dinuba, 270 P. 201, 205 Cal. 111—Marr v. Southern California Gas Co., 245 P. 178, 198 Cal. 278—Southern Pac. Land Co. v. Meserve, 198 P. 1055, 186 Cal. 157—McCracken v. Hummel, App., 110 P.2d 700—Gilmore v. State Compensation Ins. Fund, 73 P.2d 640, 23 Cal.App.2d 325—Hayman v. City of Los Angeles, 62 P.2d 1047, 17 Cal.App.2d 674—City of South Pasadena v. City of San Gabriel, 25 P.2d 516, 134 Cal.App. 403, certiorari denied 54 S.Ct. 642, 292 U.S. 602, 78 L.Ed. 1465.
Colo.—State Civil Service Commission v. Hoag, 293 P. 338, 88 Colo. 169.
Conn.—Olson v. Musselman, 15 A.2d 879, 127 Conn. 228—Comley ex rel. Brown v. Lawlor, 174 A. 415, 119 Conn. 155—Ingham v. Brooks, 111 A. 209, 95 Conn. 317.
Del.—State, to Use of Henderson, v. Clark, 13 A.2d 445, 1 Terry 441, reversed on other grounds, Sup., 20 A.2d 127.
D.C.—Proctor & Gamble Co. v. Coe, 96 F.2d 518, 68 App.D.C. 246, certiorari denied 59 S.Ct. 65, 305 U.S. 604, 83 L.Ed. 384.
Fla.—State ex rel. W. R. Clark Printing & Binding Co. v. Lee, 163 So. 702, 121 Fla. 320.
Ga.—City of La Grange v. Frosolona, 183 S.E. 99, 52 Ga.App. 232—Georgia Power Co. v. Fincher, 168 S.E. 109, 46 Ga.App. 524.
Idaho.—American Fruit Growers v. Walmstad, 260 P. 168, 44 Idaho 786.
Ill.—Trustees of Schools of Tp. No. 8 v. Lilly, 26 N.E.2d 489, 373 Ill. 431—Stubbs v. Industrial Commission, 124 N.E. 527, 289 Ill. 525—People ex rel. Bunge v. Downers Grove Sanitary Dist., 281 Ill.App. 426—Gard v. Dolbeare, 223 Ill. App. 496.
Ind.—Gruber v. State, 148 N.E. 481, 196 Ind. 436—Bailey v. Board of Com'rs of Clinton County, 143 N.E. 690, 81 Ind.App. 474.
Iowa.—Pugh v. Polk County, 263 N.W. 315, 220 Iowa 794—Fulton v. Sherman, 238 N.W. 88, 212 Iowa 1218—Incorporated Town of Norwalk v. Warren County, 232 N.W. 682, 210 Iowa 1262.
Ky.—Citizens Coal Co. v. Foley, 129 S.W.2d 131, 278 Ky. 573—Walker v. Horton, 118 S.W.2d 781, 274 Ky. 310—Bryant v. Birdwell, 117 S.W.2d 907, 273 Ky. 767—Tipton v. Brown, 117 S.W.2d 217, 273 Ky. 496—West v. Nantz' Adm'r, 101 S.W.2d 673, 267 Ky. 113—Mollette v. Board of Education of Van Lear Graded Dist., 86 S.W.2d 990, 260 Ky. 737—Louisville & N. R. Co. v. Bullitt County, 57 S.W.2d 506, 247 Ky. 489—Layson v. Nicholas County Board of Education, 29 S.W.2d 626, 235 Ky. 70—Shanks v. Northcutt, 3 S.W.2d 208, 223 Ky. 138—Hines v. May, 230 S.W. 924, 191 Ky. 493.
La.—State ex rel. Todd v. Mills, 184 So. 350, 191 La. 1—Hampton v. Drew, 82 So. 375, 145 La. 374.
Mass.—Openshaw v. City of Fall River, 192 N.E. 46, 287 Mass. 426.
Mich.—United Sav. Bank of Detroit v. School Dist. No. 5, Fractional, Redford and Livonia Tps., Wayne County, and Farmington Tp., Oakland County, 273 N.W. 753, 280 Mich. 419—Veldman v. City of Grand Rapids, 265 N.W. 790, 275 Mich. 100—Prudential Ins. Co. of America v. Dworkin, 253 N.W. 233, 235, 266 Mich. 105, quoting **Corpus Juris.**
Minn.—Ingelson v. Olson, 272 N.W. 270, 199 Minn. 422, 110 A.L.R. 167.
Miss.—Slay v. Lowery, 119 So. 819, 152 Miss. 356.
Mo.—State ex rel. and to Use of City of St. Louis v. Priest, 152 S.W.2d 109—State ex inf. Attorney General ex rel. Lincoln v. Bird, 244 S.W. 938, 295 Mo. 344—Gilbert v. Malan, 100 S.W.2d 606, 231 Mo. App. 469—Swabey v. Boyers, App., 71 S.W.2d 110.
Mont.—E. J. Lander & Co. v. Brown, 99 P.2d 216, 110 Mont. 128—Anderson v. Wirkman, 215 P. 224, 67 Mont. 176.
Neb.—Majerus v. School Dist. No. 52 of Richardson County, 299 N.W. 178, 179, citing **Corpus Juris**—O. M. Campbell Co. v. City of Harvard, 243 N.W. 653, 123 Neb. 539.
Nev.—State v. Daugherty, 231 P. 384, 48 Nev. 299.
N.H.—Covey v. Robinson, 152 A. 279, 84 N.H. 439.
N.Y.—Scahill v. Drzewucki, 279 N.Y.S. 933, 244 App.Div. 530, followed in McGovern v. Drzewucki, 279 N.Y.S. 940, 244 App.Div. 876, reversed on other grounds 199 N.E. 506, 269 N.Y. 343—Kennedy v. Smith, 195 N.Y.S. 196, 202 App.Div. 249—Cochran v. Levy, 25 N.Y.S.2d 960, 175 Misc. 666—Starling Realty Corporation v. State, 20 N.Y.S.2d 878, 174 Misc. 375, affirmed 26 N.Y.S.2d 47, 261 App.Div. 363—Wall v. Great

expressly prescribed by statute.[83] Stated in another way, it is, as a general rule, presumed that a public official properly and regularly discharges his duties, or performs acts required by law, in accordance with the law and the authority conferred on him,[84] and that he will not do any act contrary to

Atlantic & Pacific Tea Co., 295 N Y. S. 360, 162 Misc. 635—Broderick v. Aaron, 264 N.Y S. 15, 147 Misc 854, affirmed 266 N Y.S. 970, 240 App.Div. 823 and 267 N.Y S. 939, 240 App Div. 873—J. W. Brennan Const. Co. v. State, 191 N Y.S. 253, 117 Misc. 816—Sullivan v. Whitney, 25 N.Y.S.2d 762.

N.C —Freeman v. Morrison, 199 S.E. 12, 214 N.C. 240—Griffith v. Board of Education of Forsyth County, 112 S E. 10, 183 N C. 408.

Ohio—State v. Schneider, 134 N.E. 443, 103 Ohio St. 492—Swearingin v. Rendigs, 4 N E.2d 695, 53 Ohio App. 221—Fischer v. City of Cleveland, 181 N.E 668, 42 Ohio App. 75.

Okl.—Standish Pipe Line Co. v. Cleveland County Excise Board, 114 P.2d 945—McQuiston v. Tyler, 97 P.2d 552, 186 Okl. 315—Wedgwood v. Boyd, 51 P.2d 299, 174 Okl. 531—Griggs v. Reeser Motor Co., 16 P.2d 252, 159 Okl. 279—Anderson v. Malone, 6 P.2d 795, 154 Okl 4—Burton v. Mee, 4 P.2d 33, 152 Okl. 220—Gypsy Oil Co. v. Roop, 299 P. 444, 148 Okl. 104—Bonaparte v. Nelson, 285 P. 100, 142 Okl. 54—Hicks v. Sanders, 269 P. 297, 132 Okl. 242—Eagle Loan & Investment Co. v. Turner, 241 P. 138, 113 Okl. 251—Garrett v. State, 238 P. 846, 113 Okl. 63—Gamble v. Emery, 221 P. 514, 94 Okl 167.

Or.—Sine v. City of La Grande, 300 P. 348, 136 Or. 568—Horsefly Irr. Dist. v Hawkins, 271 P. 194, 127 Or. 176—In re Lyon's Guardianship, 265 P. 1087, 128 Or. 94.

Pa.—Commonwealth v. Dauphin County, 6 A 2d 870, 335 Pa. 177—In re Snyder's Case, 13 Pa.Dist. & Co. 143—In re Brookville's Election, 5 Pa.Dist. & Co. 54, 15 Mun. L.R. 77—Commonwealth ex rel. Schnader v. Keystone Indemnity Exchange, 47 Dauph.Co. 7.

S.C.—Felder v. Johnston, 121 S.E. 54, 127 S.C. 215.

Tenn.—Hull v. Vaughn, 107 S.W.2d 219, 171 Tenn. 642—Morton v. Hancock County, 30 S.W.2d 250, 161 Tenn. 324—Burns v. Duncan, 133 S.W.2d 1000, 23 Tenn.App. 374.

Tex.—Anderson v. Polk, 297 S.W. 219, 117 Tex. 73, affirming, Civ. App., 291 S.W. 1112—United Production Corporation v. Hughes, Com.App., 152 S.W.2d 327—C. R. Miller Mfg. Co. v. Coleman, Com. App., 29 S.W.2d 991, affirming Coleman v. Miller, Civ.App , 19 S.W.2d 829—Richards v. Rule, Com.App., 207 S.W. 912, reversing Rule v. Richards, Civ.App., 159 S.W. 386—Williams v. Pure Oil Co., Civ.App., 49 S.W.2d 846, affirmed 78 S.W.2d 929, 124 Tex. 341—Ex parte Haynes, 267 S.W 490, 93 Tex Cr 609.

Vt.—Town of Manchester v. Town of Townnshend, 2 A.2d 207, 110 Vt. 136.

Va.—Commonwealth v. Deford Co., 120 S.E. 281, 137 Va. 542.

Wash.—Camp v. Peterson, 71 P.2d 1074, 191 Wash. 634—Torp's Estate v. Town of Wilson Creek, 245 P. 32, 138 Wash. 695.

W.Va.—Thompson v. Norfolk & W. Ry. Co, 182 S E 880, 116 W.Va. 705—Title Ins. Co. of Richmond v. Carver, 166 S E. 697, 113 W.Va. 58—Vorholt v. Vorholt, 160 S.E. 916, 111 W.Va. 196.

Wis.—Netherton v. Frank Holton & Co, 205 N.W. 388, 189 Wis. 461, vacated on other grounds denying motion to dismiss appeal 206 N. W. 919, 189 Wis. 461, mandate vacated 207 N.W. 953, 189 Wis. 461.

22 C.J p 130 note 30.

Payment of military officer

National Guard officer will be assumed to have been paid by United States, as required by law, for services while attending military school, rifle meet, and encampment under authority from president and secretary of war, on appeal from judgment dismissing complaint in mandamus to compel payment by state —Croaff v. Harris, 247 P. 126, 30 Ariz. 357.

Rates, established by a tribunal having authority to establish them, are prima facie lawful and reasonable.—Golden Cycle Mining & Reduction Co. v. Colorado Springs Light, Heat & Power Co., 192 P. 493, 68 Colo. 588.

83. Cal.—In re Sharon's Estate, 177 P. 283, 179 Cal. 447—Monterey Club v. Superior Court in and for Los Angeles County, App., 112 P. 2d 321—Whitworth v. Jones, 209 P. 60, 58 Cal.App. 492—Title Insurance & Trust Co. v. Pfenninghausen, 207 P. 927, 57 Cal.App. 655.

Iowa.—McKinley v. Lucas County, 244 N.W. 663, 215 Iowa 46.

Mont.—Beyerlein v. Whitcomb, 26 P. 2d 349, 95 Mont. 293—State v. Phelps, 19 P.2d 319, 93 Mont. 277.

N D.—Bowman County v. McIntyre, 202 N.W. 651, 52 N.D. 225.

Or.—Kernin v. City of Coquille, 21 P.2d 1078, 143 Or. 127.

84. U.S.—Anniston Mfg. Co. v. Davis, Ala., 57 S Ct. 816, 301 U.S. 337, 81 L Ed 1143, affirming, C.C.A., 87 F.2d 773, affirmed Lincoln Mills of Alabama v. Davis, 15 F.Supp. 257, certiorari granted Anniston Mfg. Co. v. Davis, 57 S.Ct. 493, 300 U.S. 649, 81 L.Ed. 861, rehearing denied Lincoln Mills of Alabama v. Davis, 89 F 2d 1012, and rehearing denied Anniston Mfg. Co. v. Davis, 58 S. Ct. 3, 302 U.S. 772, 82 L Ed. 599—Utah Power & Light Co. v Pfost, Idaho, 52 S Ct. 548, 286 U.S. 165, 76 L Ed. 1038, affirming, D C., 54 F.2d 803—Board of Public Instruction for Brevard County v. Osburn, C.C.A Fla., 101 F.2d 919—Madison v. Phillips Petroleum Co., C.C A. Tex., 88 F.2d 515, certiorari denied 57 S.Ct. 946, 301 U.S. 703, 81 L.Ed. 1358—Royal Oak Drain Dist, Oakland County, v. Keefe, C.C.A. Mich., 87 F.2d 786—O'Donnell v. Cullen, C.C.A Wyo., 76 F.2d 955—Anderson v. P. W. Madsen Inv. Co., C.C.A.Utah, 72 F 2d 768—Fidelity & Casualty Co. of New York v. Brightman, C.C.A.Mo., 53 F.2d 161—Harjim, Inc., v. Owens, 52 F.2d 530, reversed on other grounds, C. C.A., 64 F.2d 306, certiorari denied 54 S.Ct. 71, 290 U.S. 655, 78 L. Ed. 568—Greene v. Uniacke, C.C.A. Fla., 46 F 2d 916, certiorari denied 51 S Ct. 493, 283 U S 847, 75 L.Ed. 1455—United Thacker Coal Co. v. Commissioner of Internal Revenue, C.C.A., 46 F.2d 231—Sabin v. U. S., Ct Cl., 44 F.2d 70—City of San Antonio v. Rubin, C.C.A Tex., 42 F.2d 107—U. S. ex rel. Petach v. Phelps, C.C.A.Vt, 40 F.2d 500—U. S. v. Boynton, D C Wash., 49 F.2d 810, reversed on other grounds, C. C A., 53 F.2d 297—Hatch v U S., D.C N.Y., 29 F.2d 213—Humboldt Land & Cattle Co. v. Allen, D.C. Nev, 14 F 2d 650, affirmed 47 S.Ct. 574, 274 U.S. 711, 71 L.Ed. 1314—Herkness v. Irion, D.C.La., 11 F. 2d 386, reversed on other grounds 49 S.Ct. 40, 278 U.S. 92, 73 L.Ed. 198—New York Telephone Co. v. Prendergast, D.C.N.Y, 11 F.2d 162—Nitro Development Co. v. U. S, D.C.W.Va., 5 F.2d 99, reversed on other grounds, C C.A., U. S. v. Nitro Development Co., 11 F.2d 75, certiorari denied Nitro Development Co. v. U. S., 46 S Ct. 630, 271 U S. 678, 70 L.Ed. 1147—Nebraska Gas & Electric Co. v. City of Stromsburg, Neb., C.C.A.Neb., 2 F.2d 518—Quackenbush v. Yankton, S.D., 186 F. 991, 108 C.C.A. 661—In re Giacobbi, D.C.N.Y., 32 F.Supp. 508, affirmed, C.C.A., U. S. ex rel. Giacobbi v. Fluckey, 111 F 2d 297—Sunray Oil Co. v. Thompson, D.C.Tex., 13 F.Supp. 867—Fleming v. Bernardi, D.C.Ohio, 1 F.R D. 624—Lamport Mfg. Supply Co. v. U. S., 65 Ct. Cl. 579—Edison Storage Battery Co. v. U. S., 67 Ct.Cl. 543—Cresca Co. v. U. S., 15 Ct.Cust.App. 105—Porges & Levy v. U. S., 10 Ct.Cust. App. 244.

Ala.—Cox v. Williams, 3 So.2d 129—Grayson v. Schwab, 179 So. 377,

235 Ala. 398—State, on Behalf of Henry, v. State ex rel. Hotel Tutwiler Operating Co., 162 So. 365, 230 Ala. 657—Smith v. State, 136 So. 266, 24 Ala.App. 412, conforming to answers to certified questions 136 So. 265, 223 Ala. 11, and reversed on other grounds 136 So. 270, 223 Ala. 346.

Ariz.—Donaldson v. Sisk, 113 P.2d 860—Altman v. Pace, 65 P.2d 1164, 49 Ariz 231—Proctor v. Hunt, 29 P.2d 1058, 43 Ariz. 198—Board of Sup'rs of Apache County v. Udall, 1 P.2d 343, 38 Ariz. 497.

Ark.—McKenzie v. City of De Witt, 121 S.W.2d 71, 196 Ark. 1115—Slaton v. Pride, 115 S.W.2d 547, 195 Ark. 1055—Phillips v. Rothrock, 110 S.W.2d 26, 194 Ark. 945—State ex rel. Attorney General v. Broadaway, 93 S.W.2d 1248, 192 Ark. 634—Wasson v. Lillard, 74 S.W.2d 637, 189 Ark. 546—Dozier v. Ragsdale, 55 S.W.2d 779, 186 Ark. 654.

Cal.—Hannon v. Madden, 5 P.2d 4, 214 Cal. 251—Metropolitan Life Ins. Co. v. Rolph, 194 P. 1005, 184 Cal. 557—Cutting v. Vaughn, 187 P. 19, 182 Cal. 151—Bullard v. Riverside County Drainage Dist. Improvement No. 3, 107 P.2d 929, 41 Cal.App.2d 900—Ex parte Hartmann, 76 P.2d 709, 25 Cal.App.2d 55—People v. Chambers, 72 P.2d 746, 22 Cal.App.2d 687—People ex rel. Strong v. Whittier, 24 P.2d 219, 133 Cal.App. 316—Los Angeles Athletic Club v. City of Long Beach, 17 P.2d 1061, 128 Cal.App. 427—Hansen v. Carr, 238 P. 1048, 73 Cal.App. 511—Nelson v. Anderson-Cottonwood Irr. Dist., 196 P. 292, 51 Cal.App. 92—Herald v. Glendale Lodge No. 1289, B. P. O. E. of United States, 189 P. 329, 46 Cal.App. 325.

Colo.—Town of Morrison v. Burke, 84 P.2d 461, 103 Colo. 167—Schoolfield v. School Dist. No. 1 in Custer County, 70 P.2d 353, 101 Colo. 56—Rossi v. Colorado Pulp & Paper Co., 299 P. 19, 88 Colo. 461, followed in Myers v. Beck, 299 P. 50, 88 Colo. 457, and Myers v. Colorado Pulp & Paper Co., 299 P. 50, 88 Colo. 459—Broadbent v. McFerson, 250 P. 852, 80 Colo. 264—Guiraud v. Nevada Canal Co., 245 P. 485, 79 Colo. 289.

Conn.—Town of Enfield v. Hamilton, 148 A. 353, 110 Conn. 319—Wofsey v. New York & S. Ry. Co., 138 A. 136, 106 Conn. 254—State v. Atchison, 135 A. 456, 105 Conn. 315—State v. Mills, 121 A. 561, 99 Conn 217, 36 A.L.R. 500.

D.C.—Laughlin v. Cummings, 105 F.2d 71, 70 App.D.C. 192—Cooper v. O'Connor, 99 F.2d 135, 69 App.D.C. 100, 118 A.L.R. 1440, followed in 99 F.2d 143, 69 App.D.C. 108, certiorari denied 59 S.Ct. 146, 305 U.S. 642, 83 L.Ed. 414, rehearing denied 59 S.Ct. 241, 305 U.S. 673, 83 L.Ed. 436, rehearing denied 59 S.Ct. 1030, 307 U.S. 651, 83 L.Ed. 1529, certiorari denied 59 S.Ct. 146, 305 U.S. 643, 83 L.Ed. 414, rehearing denied 59 S.Ct. 242, 305 U.S. 673, 83 L.Ed. 436, rehearing denied 59 S.Ct. 1035, 307 U.S. 651, 83 L.Ed 1529.

Fla.—Higbee v. Housing Authority of Jacksonville, 197 So. 479, 143 Fla. 560.

Ga.—Town of McIntyre v. Scott, 12 S.E.2d 883, 191 Ga. 473—Hogg v. City of Rome, 6 S.E.2d 48, 189 Ga. 298—West v. Lewis, 4 S.E.2d 171, 188 Ga. 437—Browne v. Benson, 137 S.E. 626, 163 Ga. 707—Georgia Power Co. v. Fincher, 168 S.E. 109, 46 Ga.App. 524—Georgia Casualty Co. v. McRitchie, 166 S.E. 49, 45 Ga.App. 697—Alston v. Mobley, 155 S.E. 81, 42 Ga.App. 98—Suddath v. Blanchard & Calhoun, 146 S.E. 798, 39 Ga.App. 262—White County Bank v. Clermont State Bank, 140 S.E. 767, 37 Ga.App. 268.

Idaho.—Cohn v. Sorenson, 219 P. 1059, 38 Idaho 37.

Ill.—People ex rel. Petersen v. Hughes, 25 N.E.2d 75, 372 Ill. 602—City of Chicago v. Ben Alpert, Inc., 13 N.E.2d 987, 368 Ill. 282—People ex rel. Gill v. Diversey Hotel Corporation, 4 N.E.2d 365, 364 Ill. 298—Meyer v. Pfahler, 199 N.E. 801, 362 Ill. 336—People v. Chicago, R. I. & P. Ry. Co., 160 N.E. 841, 329 Ill. 467—People v. Hunt, 142 N.E. 522, 311 Ill. 291—Snyder v. Whitney, 34 N.E.2d 95, 310 Ill.App. 297—Peoples Gas Light & Coke Co. v. Slattery, 5 N.E.2d 285, 287 Ill.App. 379—Gard v. Dolbeare, 223 Ill.App. 496.

Ind.—Southern Indiana Gas & Electric Co. v. City of Boonville, 20 N.E.2d 648, 215 Ind. 552—Board of Com'rs of Elkhart County v. Murray, 1 N.E.2d 932, 210 Ind 186—Hall v. Smith, 176 N.E. 558, 92 Ind. App. 509—Flora v. Brown, 138 N.E. 767, 79 Ind.App. 454.

Iowa.—Interstate Power Co. v. Incorporated Town of McGregor, 296 N.W. 770—Putnam v. Russing, 266 N.W. 559, 562, 221 Iowa 871, citing **Corpus Juris**—Butler v. City of Des Moines, 258 N.W. 755, 219 Iowa 956—Ebinger v. Wahrer, 238 N.W. 587, 213 Iowa 84—In re Ost's Estate, 235 N.W. 70, 211 Iowa 1085—Hutchins v. Jones Piano Co., 228 N.W. 281, 209 Iowa 394.

Ky.—Citizens Coal Co. v. Foley, 129 S.W.2d 131, 278 Ky. 573—Milner v. Gibson, 61 S.W.2d 273, 249 Ky. 594—Big Sandy & C. R. Co. v. Measell's Adm'r, 42 S.W.2d 747, 240 Ky. 571—Cary v. Simpson, 39 S.W.2d 668, 239 Ky. 381—Baker v. Combs, 239 S.W. 56, 194 Ky. 260—Booth v. Board of Education of City of Owensboro, 229 S.W. 84, 191 Ky. 147.

La.—Le Bourgeois v. City of New Orleans, 82 So. 268, 145 La. 274—Reed v. Stinson, App., 188 So. 509.

Me.—Perry v. Park Street Motor Corporation, 143 A. 274, 127 Me. 365.

Mass.—School Committee of City of Lowell v. City of Lowell, 164 N.E. 91, 265 Mass. 353—Bradley v. Board of Zoning Adjustment of City of Boston, 150 N.E. 892, 255 Mass. 160—Moore Drop Forging Co. v. Fisher, 132 N.E. 169, 239 Mass. 434.

Mich.—Village of Clawson v. Van Wagoner, 255 N.W. 743, 268 Mich. 148—School Dist. of City of Lansing v. City of Lansing, 249 N.W. 848, 264 Mich. 272—Casterline v. Meyers, 197 N.W. 561, 226 Minn. 155.

Minn.—Ingelson v. Olson, 272 N.W. 270, 199 Minn. 422, 110 A.L.R. 167—Leach v. Woodhill Realty Co., 194 N.W. 104, 156 Minn. 73—Skrove v. Town Board of Towns of Belmont and Christiana in Jackson County, 191 N.W. 584, 154 Minn. 118.

Miss.—Town of Magee v. Mallett, 174 So. 246, 178 Miss. 629—Brotherhood of Railroad Trainmen v. Agnew, 155 So. 205, 170 Miss. 604—Trotter v. Frank P. Gates & Co., 139 So. 843, 162 Miss. 569.

Mo.—Waterman v. Chicago Bridge & Iron Works, 41 S.W.2d 575, 328 Mo. 688—Stocker v. City of Richmond Heights, App., 132 S.W.2d 1116—Yowell v. Mace, 290 S.W. 96, 221 Mo.App. 85.

Mont.—Judith Basin County v. Livingston, 298 P. 356, 89 Mont. 438.

Neb.—Majerus v. School Dist. No. 52 of Richardson County, 299 N.W. 178—Application of Chicago, B. & Q. R. Co., 295 N.W. 389, 138 Neb. 767.

N.Y.—Kenny v. Valentine, 295 N.Y.S. 359, 250 App.Div. 880, reversed on other grounds 12 N.E.2d 513, 276 N.Y. 381—People v. Ryan, 243 N.Y.S. 644, 230 App.Div. 252—Richmond Rys. v. Gilchrist, 233 N.Y.S. 184, 225 App.Div. 371—Rogers v. Village of Cato, 177 N.Y.S. 470, 188 App.Div. 813—Application of Durland, 16 N.Y.S.2d 405, 172 Misc. 960, affirmed In re Durland, 23 N.Y.S.2d 10, 260 App.Div. 425, reargument denied 25 N.Y.S.2d 1013, 261 App.Div. 847—People ex rel. Lehigh Valley Ry. Co. v. Harris, 6 N.Y.S.2d 794, 168 Misc. 685, affirmed 12 N.Y.S.2d 1011, 257 App.Div. 912, affirmed 24 N.E.2d 476, 281 N.Y. 786—Wall v. Great Atlantic & Pacific Tea Co., 295 N.Y.S. 360, 162 Misc. 635—Buffalo Fire Appliance Corporation v. Mountaindale Fire Dist., 246 N.Y.S. 620, 138 Misc. 285—Bareham v. City of Rochester, 220 N.Y.S. 66, 128 Misc. 642, modified on other grounds 222 N.Y.S. 141, 221 App.Div. 36 and 158 N.E. 51, 246 N.Y. 140—Ludmerer v. New York Life Ins. Co., 19 N.Y.S.2d 272.

Ohio.—Ferber v. Board of Trustees of Berlin Tp., 191 N.E. 444, 47

his official duty or omit to do anything which such duty may require.[85]

In accordance with the general rule, it is to be presumed that everything done by an officer in connection with the performance of an official act in the line of his duty was legally done,[86] whether

Ohio App. 449—Fischer v. City of Cleveland, 181 N.E. 668, 42 Ohio App. 75—Whigham v. State, 177 N.E. 229, 39 Ohio App. 163.

Okl.—Board of Education of City of Shawnee v. American Nat. Co., 275 P. 285, 135 Okl. 253—Oklahoma City v. Coombs, 257 P. 295, 125 Okl. 194—Hamilton Tp, of Okmulgee County v. Underwood, 198 P. 300, 81 Okl. 256.

Or.—Fowler v. Gehrke, 111 P.2d 831—Sine v. City of La Grande, 300 P. 348, 136 Or. 568—Fitzgerald v. Neal, 231 P. 645, 113 Or. 103.

Pa.—Garr v. Fuls, 133 A. 150, 286 Pa. 137—O'Hay v. Tormey, 98 Pa Super. 237—In re Stover's Estate, 56 Montg.Co. 66.

S.C.—Woodworth v. Gallman, 10 S E.2d 316, 195 S C. 157—Kirton v. Howard, 134 S E. 859, 137 S.C. 11.

S.D.—Adamson v. Minnehaha County, 293 N.W. 542—Mershon-Welsh Co. v. International State Bank, 213 N. W. 723, 51 S.D. 308.

Tenn.—Lummus Cotton Gin Co. v. Arnold, 269 S.W. 706, 151 Tenn. 540—Burns v. Duncan, 133 S.W.2d 1000, 23 Tenn.App. 374.

Tex.—Ocean Accident & Guaranty Corporation v. May, Com.App., 15 S.W.2d 594, reversing May v. Ocean Accident & Guarantee Corporation, Civ.App., 6 S.W.2d 803—Burks v. Neutzler, Com.App., 7 S.W.2d 65, denying motion 2 S.W.2d 416, which reversed, Civ.App., 289 S.W. 436—Stewart v. Moore, Com.App., 291 S.W. 886—Austin Bros. v. Patton, Com.App., 288 S.W. 182, reversing, Civ.App., 245 S.W. 991, modified on other grounds, Com.App., 290 S.W. 153 motion denied 294 S.W. 537—Donoho v. Hunter, Com.App., 287 S.W. 47, reversing 276 S.W. 174, which affirmed, Civ.App., 242 S. W. 282—Shupe v. City of Fort Stockton, Civ.App., 123 S.W.2d 408—Willacy County Water Control and Improvement Dist. No. 1 v. Lewis, Civ.App., 119 S.W.2d 159—Western Metal Mfg. Co. of Texas v. Cameron County Water Improvement Dist. No. 8, Civ.App., 105 S.W. 2d 700, error dismissed—Donna Independent School Dist. v. Sanders, Civ.App., 57 S.W.2d 857—W. T. Carter & Bro. v. Bendy, Civ.App., 251 S.W. 265—Dallas County Levee Improvement Dist. No. 3 v. Ayers, Civ.App., 246 S.W. 1112—Findlay v. State, Civ.App., 238 S.W. 956, second rehearing overruled 239 S. W. 996, affirmed 250 S.W. 651, 113 Tex. 30—City of San Antonio v. Newnam, Civ.App., 218 S.W. 128, dismissed for want of jurisdiction—Ex parte Sloan, 106 S.W.2d 271, 132 Tex.Cr. 573—Gould v. State, 255 S.W. 1118, 96 Tex.Cr. 100—Gould v. State, 254 S.W. 1118, 95 Tex. Cr. 502—Gould v. State, 252 S.W. 772, 94 Tex.Cr. 18.

Vt.—Town of Manchester v. Town of Townshend, 2 A.2d 207, 110 Vt. 136.

Wash.—In re Deming's Guardianship, 73 P.2d 764, 192 Wash. 190—Tabb v. Funk 19 P.2d 668, 172 Wash 189—School Dist. No. 38 of Lincoln County v. Morgan, 266 P. 150, 147 Wash. 321—State v. State Board of Equalization, 249 P. 996, 140 Wash. 433.

W.Va.—Wilson v. Fleming, 109 S.E. 810, 89 W.Va. 553.

Wis.—Aberg v. Moe, 226 N.W. 301, 198 Wis. 349, denying rehearing 224 N.W. 132, 198 Wis. 349, and appeal dismissed and certiorari denied Moe v. Aberg, 50 S.Ct. 69, 280 U.S. 522, 74 L.Ed. 590—Wisconsin Electric Sales Co. v. Fidelity & Deposit Co. of Maryland, 211 N.W. 670, 191 Wis. 645—Bernstein v. City of Milwaukee, 149 N.W. 382, 158 Wis. 576, L.R.A.1915C 435.

Wyo.—Campbell v. Wyoming Development Co., 100 P.2d 124, 136, 55 Wyo. 347, citing **Corpus Juris,** and rehearing denied 102 P.2d 745, 55 Wyo. 347.

22 C.J. p 130 note 30, p 133 note 31—33 C.J. p 348 note 96.

Nature of presumption

The presumption that officers have done their duty is a legal presumption, but does not supply proof of substantial facts.—U. S. v. Ross, Ct. Cl., 92 U S. 281, 23 L.Ed. 707.

Foreign law

(1) It is presumed that officer enforcing liability of person of sister state proceeded according to law of that state.—Duke v. Olson, 240 Ill. App. 198.

(2) In absence of proof to the contrary, it is presumed that official act of officer in another state has been performed as required by law of that state.—Lummus Cotton Gin Co. v. Arnold, 269 S.W. 706, 151 Tenn. 540.

Obedience to orders of court

Presumption exists that officers will recognize and obey orders of court of competent jurisdiction.—City of Shidler v. H. C. Speer & Sons Co., C.C.A.Okl., 62 F.2d 544.

85. Iowa.—McLeland v. Marshall County, 201 N.W. 401, 199 Iowa 1232, modified on other grounds 203 N.W. 1, 199 Iowa 1232.

N.Y.—In re Whitman, 121 N.E. 479, 225 N.Y. 1, reversing 172 N.Y.S. 748, 185 App.Div. 571, motion denied 173 N.Y.S. 465, 186 App Div. 953—Starling Realty Corporation v. State, 20 N.Y.S.2d 878, 174 Misc. 375, affirmed 26 N.Y.S.2d 47, 261 App.Div. 363.

Okl.—Board of Education of City of Shawnee v. American Nat. Co., 275 P. 285, 135 Okl. 253.

Wash.—State v. Hinkle, 228 P. 299, 130 Wash. 525.

86. U.S.—McKay v. Rogers, C.C.A. Okl., 82 F.2d 795—Mores v. Jackson, D.C.Wash, 60 F.2d 598—Carney v. City of Grinnell, Iowa, C.C.A.Iowa, 53 F.2d 44.

Ark.—Dozier v. Ragsdale, 55 S.W.2d 779, 186 Ark. 654.

Ga.—Americus Grocery Co. v. Pitts Banking Co., 149 S.E. 776, 169 Ga. 70—Crowe v. Vaughn, 151 S.E. 692, 40 Ga.App. 848.

Iowa.—Harbacheck v. Moorland Telephone Co., 226 N.W. 171, 208 Iowa 552.

Ky.—Mollette v. Board of Education of Van Lear Graded Dist., 86 S.W. 2d 990, 260 Ky. 737—Monroes' Guardian ad Litem v. Monroe, 285 S.W. 250, 215 Ky. 440.

Me.—Benson v. Inhabitants of Town of Newfield, 1 A.2d 227, 136 Me. 23.

Md.—Wischhusen v. American Medicinal Spirits Co., 163 A. 685, 163 Md. 565.

Mass.—Comerford v. Meier, 19 N.E.2d 711, 302 Mass. 398—Universal Mach. Co. v. Alcoholic Beverages Control Commission, 16 N.E.2d 53, 301 Mass. 40—Lajoie v. Milliken, 136 N.E. 419, 242 Mass. 508.

Mich.—Prudential Ins. Co. of America v. Dworkin, 253 N.W. 233, 235, 266 Mich. 105, quoting **Corpus Juris.**

Mo.—Woolridge v. La Crosse Lumber Co., 236 S.W. 294, 297, 291 Mo. 239, 19 A.L.R. 1068, citing **Corpus Juris.**

Mont.—Swords v. Simineo, 216 P. 806, 68 Mont. 164.

Okl.—McQuiston v. Tyler, 97 P.2d 552, 186 Okl. 315—Garrett v. State, 238 P. 846, 113 Okl. 63.

Pa.—Breinig v. Allegheny County, 2 A.2d 842, 332 Pa. 474—Smith v. Kurtz, 34 Pa.Dist. & Co. 439, 443, citing **Corpus Juris.**

Tenn.—Manis v. Farmers Bank of Sullivan County, 98 S.W.2d 313, 170 Tenn. 656—Burns v. Duncan, 133 S.W.2d 1000, 23 Tenn.App. 374.

Tex.—C. R. Miller Mfg. Co. v. Coleman, Com.App., 29 S.W.2d 991, affirming Coleman v. Miller, Civ.App., 19 S.W.2d 829—Farm & Home Savings & Loan Ass'n of Missouri v. Muhl, Civ.App., 37 S.W.2d 316, error refused.

subsequent[87] or prior to the act,[88] such as giving notice,[89] or determining the existence or performance of conditions prescribed as a prerequisite to legal action,[90] and where some preceding act or preëxisting fact is necessary to the validity of an official act the presumption in favor of the validity of the official act is presumptive proof of such preceding act or preëxisting fact.[91] On the other

Wash.—School Dist. No. 88 of Lincoln County v. Morgan, 266 P. 150, 147 Wash. 321.
22 C J. p 133 note 31.

Official's action in executing state statute which in terms does not abridge privilege or immunities of United States' citizens, or deny equal protection of laws, is presumed legal.—Washington v. State, 116 So. 470, 95 Fla. 289, certiorari denied Washington v. State of Florida, 49 S.Ct. 8, 278 U.S. 599, 73 L.Ed. 528.

87. Mich.—United Sav. Bank of Detroit v. School Dist. No. 5, Fractional, Redford and Livonia Tps., Wayne County, and Farmington Tp, Oakland County, 273 N.W. 753, 280 Mich. 419—Prudential Ins Co. of America v. Dworkin, 253 N.W. 233, 266 Mich. 105.
22 C.J p 134 note 35.

Proceedings to protect public interest If municipal authorities confronted with conditions tolerated through previous years and being multiplied deem it advisable to proceed by injunction in case of a public nuisance regarded as conspicuous and hurtful, it will be assumed that when the city is sustained appropriate proceedings will follow to protect the public interest all along the line.—McCraney v. City of Leeds, Ala., 1 So.2d 894.

88. Iowa.—Higgins v. Board of Sup'rs of Dickinson County, 176 N.W. 268, 188 Iowa 448.
Pa.—Commonwealth ex rel. District Attorney v. Dobrowolski, 5 Pa Dist. & Co. 16, 23 Luz.Leg.Reg. 31, 72 Pittsb.Leg.J. 234.
22 C.J. p 134 note 32.

89. U.S.—Grand River Dam Authority v. Going, D.C.Okl., 29 F.Supp. 316.
Mo.—State ex rel. Kersey v. Sims, App., 286 S.W. 832, transferred, see 274 S.W. 359, 309 Mo. 18.
Wyo.—Carstensen v. Brown, 185 P. 567, 26 Wyo. 356.
22 C.J. p 134 note 33.

90. U.S.—Anderson v. P. W. Madsen Inv. Co., C.C.A.Utah, 72 F.2d 768—Ariasi v. Orient Ins. Co., C.C.A. Cal., 50 F.2d 548—U. S. v. Indemnity Co. of North America, D.C. Ala., 4 F.Supp. 636, affirmed, C.C. A., Indemnity Ins. Co. of North America v. U. S., 74 F.2d 22—Norwegian Nitrogen Products Co. v. U. S., 20 C.C.P.A.(Customs) 27, certiorari granted 53 S.Ct. 84, 287 U.S. 586, 77 L.Ed. 512, affirmed 53 S.Ct. 350, 288 U.S. 294, 77 L.Ed. 796.
Ala.—Smith v. State, 129 So. 681, 24 Ala.App. 15.
Ariz.—Consolidated Motors v. Skousen, 109 P.2d 41, 43, 132 A.L.R. 1040, citing **Corpus Juris.**
Ark.—West Twelfth St. Road Imp. Dist. No. 30 v. Kinstley, 63 S.W.2d 980, 188 Ark. 77—Wilcox v. McCallister, 56 S.W.2d 765, 186 Ark. 901.
Cal.—Birch v. Monroe, 234 P. 125, 70 Cal.App. 656—Swall v. Los Angeles County, 184 P. 406, 42 Cal. App. 758.
Fla.—Pridgen v. Sweat, 170 So. 653, 125 Fla. 598.
Ga.—Benton v. Maddox, 192 S.E. 316, 56 Ga App 132.
Idaho.—Smith v. Canyon County, 226 P. 1070, 39 Idaho 222.
Ind.—Heathco v. State ex rel. Addison, 199 N.E. 260, 209 Ind. 667—Bailey v. Board of Com'rs of Clinton County, 143 N.E. 690, 81 Ind. App. 474.
Iowa.—Mason City Brick & Tile Co. v. Lamson, 180 N.W. 314, 190 Iowa 365, followed in Heil Co. v. Lamson, 180 N.W. 321, and Wisconsin Iron & Wire Works v. Dunphy-Fridstein Co., 180 N.W. 321—Clay v. Independent School Dist. of Cedar Falls, 174 N.W. 47, 187 Iowa 89.
La.—Delahoussaye v. Board of Trustees of City of New Iberia, 103 So. 152, 157 La. 782.
Mich.—Prudential Ins. Co. of America v. Dworkin, 253 N.W. 233, 266 Mich. 105.
Mo.—State ex rel. School Dist. No. 34, Lincoln County v. Begeman, 2 S.W. 2d 110, 221 Mo.App. 257.
N.J.—Reed v. Independence Tp. in Warren County, 107 A. 174, 93 N. J.Law 101.
N.Y.—Noyes v. Erie & Wyoming Farmers Co-op. Corporation, 22 N. E.2d 334, 281 N.Y. 187, reversing 10 N.Y.S.2d 114, 170 Misc. 42—Marks v. Bruckman, 9 N.Y.S.2d 947, 170 Misc. 709—Raquette Falls Land Co. v. State, 207 N.Y.S. 750, 124 Misc. 687.
Okl.—McCasland v. Board of Com'rs of Adair County, 258 P. 750, 126 Okl. 103.
Pa.—City of Erie v. Piece of Land, 162 A. 445, 308 Pa. 454.
Tex.—Bevers v. Winfrey, Civ.App., 260 S.W. 627.
Wash.—State v. Superior Court of Chelan County, 182 P. 962, 108 Wash. 58, error dismissed State of Washington ex rel. McPherson Bros. Co. v. Douglas County, 41 S Ct. 446, 255 U.S. 566, 65 L.Ed. 789.
22 C.J. p 134 note 34.

A public officer who makes or lets a contract must be presumed to have complied with the necessary preliminaries.—McGovern v. City of New York, 138 N.E. 26, 234 N.Y. 377, 25 A.L.R. 1442, modifying 196 N.Y.S. 162, 202 App.Div. 361, and remittitur amended and reargument denied 142 N.E 262, 236 N.Y. 508.

When executive department has passed on prerequisites of act of congress, there is presumption of regularity of such administrative acts.—Baker v. U. S., C.C.A.Puerto Rico, 27 F.2d 863, certiorari denied U.S. v. Baker, 49 S.Ct. 185, 278 U.S. 656, 73 L.Ed. 565.

91. U.S.—R. H. Stearns Co. of Boston, Mass, v. U. S., Ct. Cl., 54 S. Ct. 325, 291 U.S. 54, 78 L.Ed. 647, affirming R. H. Stearns Co. v. U. S., 2 F.Supp. 773, certiorari granted R. H. Stearns Co., Boston, Mass., v. U. S., 54 S.Ct. 56, 290 U.S. 611, 78 L.Ed. 534—U. S. v. Royer, 45 S. Ct 519, 268 U.S. 394, 69 L.Ed. 1011, affirming Koyer v. U. S., 59 Ct.Cl. 199—Knox County v. Ninth Nat. Bank of City of New York, Mo., 13 S.Ct. 267, 147 U.S. 91, 37 L.Ed. 13—Bank of the United States v. Dandridge, Va., 12 Wheat. 64, 6 L. Ed. 552—La Terre Co. v. Billiot's Shell Island, D.C.La., 20 F.Supp. 106, affirmed, C.C.A., 103 F.2d 53.
Ariz.—City of Bisbee v. Cochise County, 36 P.2d 559, 44 Ariz. 233, followed in City of Douglas v. Kitchel, 36 P.2d 564, 44 Ariz. 246.
Ark.—State ex rel. Attorney General v. Broadaway, 93 S.W.2d 1248, 192 Ark. 634.
Fla.—First Nat. Bank v. Filer, 145 So. 204, 107 Fla. 526, 87 A.L.R. 267.
Idaho.—Adams County v. First Bank of Council, 272 P. 699, 47 Idaho 89.
Ind.—Bailey v. Board of Com'rs of Clinton County, 143 N.E. 690, 81 Ind.App. 474.
Neb.—Majerus v. School Dist. No. 52 of Richardson County, 299 N.W. 178.
N.Y.—Beers v. Hotchkiss, 175 N.E. 506, 256 N.Y. 41, reversing 245 N.Y.S. 478, 230 App Div. 447, which affirmed 238 N.Y.S. 463, 135 Misc. 796—Demings v. Supreme Lodge Knights of Pythias, 30 N.E. 572 131 N.Y. 522—Mandeville v. Reynolds, 68 N Y. 528.
Okl.—Garrett v. State 238 P. 846, 113 Okl. 63—Williamson-Halsell-Frazier Co. v. State, 171 P. 453, 68 Okl. 40.
Tex.—Weatherly v. Jackson, 71 S.W. 2d 259, 123 Tex. 213, reversing, Civ.App., 46 S.W.2d 1030—Farm & Home Savings & Loan Ass'n of Missouri v. Muhl, Civ.App., 37 S.

hand, it will not be presumed that a public official has or will fail to discharge his duty or otherwise be guilty of official irregularity;[92] it will not be presumed that he has or will act arbitrarily or unreasonably.[93]

Fairness and good faith; discretion. It is also

W 2d 316, error refused—Stoker v. Stoker, Civ.App., 254 S.W. 398, opinion construed 260 S.W. 1076.

Where the existence of a fact in pais is essential to the validity of the act of a ministerial board, the general presumption of right acting which attends all official acts applies, and it will be presumed that the necessary fact existed.—State v. Dugan, 19 S W. 195, 110 Mo. 138.

A government grant, such as a lease of naval reserve oil lands, is clothed with the presumption that the preceding steps required by law have been observed.—U. S. v. Mammoth Oil Co., D.C Wyo., 5 F 2d 330, reversed on other grounds, C.C A., 14 F 2d 705 and affirmed Mammoth Oil Co. v. U. S., 48 S.Ct. 1, 275 U.S. 13, 72 L.Ed. 137.

92. U.S.—Chas. C. Steward Mach. Co. v. Davis, Ala., 57 S.Ct. 883, 301 U.S. 548, 81 L.Ed. 1279, 109 A.L.R. 1293, affirming, C C.A., 89 F.2d 207, certiorari granted 57 S.Ct. 673, 300 U.S. 652, 81 L.Ed. 863—Board of Trade of Kansas City v. Milligan, C.C.A.Mo., 90 F.2d 855, affirming, D.C., 16 F.Supp. 859, certiorari denied 58 S.Ct. 40, 302 U.S. 710, 82 L.Ed. 549—Continental Baking Co. v. Woodring, D.C.Kan., 55 F.2d 347, affirmed 52 S.Ct. 595, 286 U.S. 352, 76 L Ed 1155, 81 A.L.R. 1402—Jungst v. Baldridge, D.C.Idaho, 51 F 2d 379, appeal dismissed 51 S.Ct. 20, 282 U.S. 906, 75 L.Ed. 797—New York Telephone Co. v. Prendergast, D C.N.Y., 11 F.2d 162—U. S. v. Union Pac. R. Co., 34 F.Supp. 4, modified on other grounds Union Pac. R. Co. v. U. S., 61 S.Ct. 1064—Paramino Lumber Co. v. Marshall, 18 F.Supp. 645, affirmed, C.C.A., 95 F. 2d 203, certiorari denied 59 S.Ct. 63, 305 U.S. 603, 83 L Ed. 382—Troy Nat. Bank v. Russell County, D.C.Ala., 291 F. 185.

Ala.—Hovater v. Franklin County, 116 So. 526, 217 Ala. 439—Pilcher v. City of Dothan, 93 So. 16, 207 Ala. 421.

Ariz.—Fairfield v. W. J. Corbett Hardware Co., 215 P. 510, 25 Ariz. 199—Pinal County v. Nicholas, 179 P. 650, 20 Ariz. 243.

Cal.—Carter v. Stevens, 295 P. 28, 211 Cal. 281—Walker v. Kimball Fruit Co., 289 P. 623, 209 Cal. 629—Stuart Arms Co. v. City and County of San Francisco, 263 P. 218, 203 Cal. 150.

Fla.—National Container Corporation v. State ex rel. Stockton, 189 So. 4, 138 Fla. 32, 122 A.L.R. 1000.

Ill.—Gard v. Dolbeare, 223 Ill.App. 496.

Ind.—Hitt v. Carr, 130 N E. 1, 77 Ind App. 488.

Kan.—Burke v. State Board of Canvassers, 107 P.2d 773, 152 Kan. 826, 132 A.L R. 356.

Ky.—Eagle v. City of Corbin, 122 S. W.2d 798, 275 Ky 808—Milliken v. Harrod, 122 S.W.2d 148, 275 Ky. 597—Walker v. Perkins, 76 S.W. 2d 251, 256 Ky. 442—Anspacher v. Utterback's Adm'r, 68 S.W.2d 15, 252 Ky. 666—Tartar v. Skaggs, 211 S.W 203, 184 Ky. 58.

La.—Gulf Refining Co. of Louisiana v. McFarland, 97 So. 433, 154 La. 25, affirmed 44 S.Ct. 402, 264 U.S. 573, 68 L.Ed. 856.

Md.—Applestein v. Osborne, 143 A. 666, 156 Md. 40.

Mass.—Police Com'r for City of Boston v. City of Boston, 181 N.E. 790, 279 Mass. 577—Anglim v. City of Brockton, 179 N.E. 289, 278 Mass. 90—Ayer v. Cram, 136 N.E. 338, 242 Mass. 30.

Mich.—Warnshuis v. State Board of Registration in Medicine, 281 N. W. 410, 285 Mich. 699.

Mo.—State ex rel. and to the Use of Livingston County v. Hunt, 152 S W 2d 77—In re Moynihan, 62 S. W.2d 410, 332 Mo. 1022, 91 A.L.R. 74—Little Prairie Special Road Dist. v. Pemiscot County, 249 S.W. 599, 297 Mo. 568—Hughes v. Maryland Casualty Co., 76 S.W.2d 1101, 229 Mo.App. 472.

N.Y.—Earl Carroll Realty Corporation v. New York Edison Co., 252 N.Y.S. 538, 141 Misc. 266—Herder v. Clifford, 230 N.Y.S. 464, 132 Misc. 666, appeal dismissed 232 N. Y.S. 56, 225 App.Div. 780, affirmed 234 N.Y.S. 811, 227 App.Div. 645, reversed on other grounds 169 N. E. 118, 252 N.Y. 141.

N.C.—Corporation Commission v. Stockholders of Bank of Beulaville, 155 S.E. 445, 199 N.C. 586.

Okl.—Oklahoma City v. Coombs, 257 P. 295, 125 Okl. 194.

Or.—Breese v. Bramwell, 223 P. 239, 110 Or. 105.

Tex.—City of Richmond v. Allred, 71 S.W.2d 233, 123 Tex. 365—Robinson v. Bradley, Civ.App., 141 S.W. 2d 425—Shupe v. City of Fort Stockton, Civ.App., 123 S.W.2d 408—McKenzie Const. Co. v. City of San Antonio, Civ.App., 50 S.W.2d 349, error refused—Independent School Dist. v. Salvatierra, Civ. App., 33 S.W.2d 790, appeal dismissed and certiorari denied Salvatierra v. Independent School Dist., 52 S.Ct. 28, 284 U.S. 580, 76 L.Ed. 503—Montfort v. Commissioners' Court of Navarro County, Civ.App., 226 S.W. 424—White v. Fahring, Civ.App., 212 S.W. 193, error refused.

Utah.—Utah Oil Refining Co. v. Millard County Drainage Dist. No. 4, 50 P.2d 774, 90 Utah 67.

Vt.—Valcour v. Village of Morrisville, 158 A. 83, 104 Vt. 119.

Va.—Ficklen v. City of Danville, 131 S E. 689, 146 Va. 426, rehearing denied 132 S.E. 705, 146 Va. 426.

W.Va.—Hamrick v. McCutcheon, 133 S.E. 127, 101 W.Va. 485.

22 C J. p 136 note 52.

Arbitrary presumption cannot be indulged that official funds were used by public officer in payment of personal obligations.—Fidelity & Deposit Co. of Maryland v. Highland Trust & Savings Bank, C.C.A.Tenn., 44 F.2d 697.

Motives of public official are not presumed to be corrupt or fraudulent, but the contrary is the law.

Ariz.—Yuma County v. Hanneman, 28 P.2d 622, 42 Ariz. 561.

N.Y.—Wilmerding v. O'Brien, 268 N Y.S. 206, 149 Misc. 735.

Construction of statute

Court cannot assume that enforcement officials will construe or apply statute so as to render it obnoxious to Federal Constitution.—Garrett Transfer & Storage Co. v. Pfost, 33 P.2d 743, 54 Idaho 576.

93. U S.—Douglas v. Noble, 43 S.Ct. 303, 261 U.S. 165, 67 L Ed. 590, reversing, D.C., Noble v. Douglas, 274 F. 672—Greeson v. Imperial Irr. Dist., D.C.Cal., 55 F.2d 321, affirmed, C.C.A., 59 F.2d 529—Doherty v. McAuliffe, D.C.Mass., 7 F. Supp. 49, vacated on other grounds, C C.A., 74 F.2d 800, certiorari denied McAuliffe v. Doherty, 55 S.Ct. 639, 294 U.S. 730, 79 L.Ed. 1260.

Ark.—Ellison v. Oliver, 227 S.W. 586, 147 Ark. 252.

Cal.—Carter v. Stevens, 295 P. 28, 211 Cal. 281—Esberg v. Badaracco, 259 P. 730, 202 Cal. 110—People v. Henry, 21 P.2d 672, 131 Cal.App. 82.

Ga.—State v. Regents of University System of Georgia, 175 S.E. 567, 179 Ga. 210.

Ill.—People v. Witte, 146 N.E. 178, 315 Ill. 282, 37 A.L.R. 672.

Mont.—State v. Stark, 52 P.2d 890, 100 Mont. 365.

N.Y.—M. L. Weiss, Inc., v. Whalen, 238 N.Y.S. 95, 135 Misc. 290.

Or.—Cancilla v. Gehlhar, 27 P.2d 179, 145 Or. 184.

Wash.—Chief Petroleum Corporation v. City of Walla Walla, 116 P.2d 560—In re Local Imp. Dist. No. 1 of Water Dist. No. 49, King County, 81 P.2d 289, 195 Wash. 439—

presumed, as an element of the general rule, that a public officer, in the discharge of his official duties, whether or not an oath has been required,[94] acts fairly, impartially, and in good faith,[95] and in the

Twichell v. City of Seattle, 179 P 127, 106 Wash. 32.

94. Cal.—MacIntyre v. Retirement Board of City and County of San Francisco, App., 109 P.2d 962.

95. U.S.—Board of Trade of Kansas City v. Milligan, C.C.A.Mo., 90 F 2d 855, affirming, D.C., 16 F.Supp. 859, certiorari denied 58 S.Ct. 40, 302 U.S. 710, 82 L.Ed. 549—Southwestern Bell Telephone Co. v. City of San Antonio, C.C.A.Tex., 75 F. 2d 880, setting aside, D.C., 2 F. Supp. 611, affirmed 4 F.Supp. 570, and certiorari denied City of San Antonio v. Southwestern Bell Telephone Co., 55 S Ct. 835, 295 U S. 754, 79 L.Ed. 1698—Reynolds v U. S. ex rel. Koleff, C.C.A.Ind., 70 F.2d 39, certiorari denied U. S. ex rel. Koleff v. Reynolds, 55 S.Ct. 105 (two cases), 293 U.S. 590, 79 L Ed. 685—Liberty Cent. Trust Co. v. Greenbrier College for Women, D. C.W.Va., 50 F 2d 424, affirmed 51 S. Ct. 493, 283 U.S. 800, 75 L.Ed. 1422—Denver & S. L. Ry. Co. v. Moffat Tunnel Improvement Dist., D C. Colo., 35 F.2d 365, modified on other grounds, C.C.A., Moffat Tunnel Improvement Dist. v. Denver & S. L. Ry. Co., 45 F 2d 715, certiorari denied 51 S.Ct. 485, 283 U.S. 837, 75 L.Ed. 1448—Butcher v. Maybury, D.C.Wash., 8 F.2d 155—Texas & N. O. R. Co. v. U. S., D.C. Mo., 10 F Supp. 198, affirmed 55 S. Ct. 784, 295 U.S. 395, 79 L.Ed. 1501—U. S. v. Powers, D.C.Mich., 274 F. 131—Pollen v. U. S., 85 Ct.Cl. 673.

Ark.—Matthews v. Bailey, 130 S.W. 2d 1006, 198 Ark. 703—State ex rel. Attorney General v. Broadaway, 93 S.W.2d 1248, 192 Ark. 634.

Cal.—Aronson v. Bank of America Nat. Trust & Savings Ass'n, 72 P.2d 548, 9 Cal.2d 640—Livingstone v. MacGillivray, 36 P.2d 622, 1 Cal. 2d 546—Metropolitan Water Dist. of Southern California v. Whitsett, 10 P.2d 751, 215 Cal. 400—Ventura County Harbor Dist. v. Board of Sup'rs of Ventura County, 295 P. 6, 211 Cal. 271—Crowe v. Boyle, 193 P. 111, 184 Cal. 117—MacIntyre v. Retirement Board of City and County of San Francisco, App., 109 P.2d 962—Irwin v. City of Los Angeles, 39 P.2d 851, 3 Cal.App.2d 495.

Colo.—Commonwealth Irr. Co. v. Rio Grande Canal Water Users' Ass'n, 45 P.2d 622, 96 Colo. 478—State Civil Service Commission v. Hoag, 293 P. 338, 88 Colo. 169.

Ga.—Gormley v. Elson, 5 S.E.2d 643, 189 Ga. 259.

Ill.—Chicago Park Dist. v. R. E Herczel & Co., 26 N.E.2d 119, 373 Ill. 325, affirming 18 N.E.2d 744, 298 Ill.App. 215—People ex rel. McDonough v. Mills Novelty Co., 192 N E. 236, 357 Ill. 285—Tribune Co. v. Thompson, 174 N.E. 561, 572, 342 Ill. 503, citing **Corpus Juris**—People v. Witte, 146 N.E. 178, 315 Ill. 282, 37 A.L.R. 672—Michuda v. Sanitary Dist. of Chicago, 27 N.E.2d 582, 305 Ill.App. 314—Jacobs v City of Chicago, 244 Ill. App. 132.

Ind.—In re Northwestern Indiana Telephone Co., 171 N.E. 65, 201 Ind. 667.

Kan.—Wright v. Federal Reserve Life Ins. Co., 293 P. 945, 131 Kan. 601, certiorari denied 51 S.Ct. 560, 283 U.S. 851, 75 L.Ed. 1459

Ky.—Rawlings v. City of Newport, 121 S.W.2d 10, 275 Ky. 183—West v. Nantz' Adm'r, 101 S.W.2d 673, 267 Ky. 113—Knox County Board of Education v. Fultz, 43 S.W.2d 707, 241 Ky. 265.

Me.—Inhabitants of Fort Fairfield v. Inhabitants of Millinocket, 12 A.2d 173, 136 Me. 426.

Mass.—Charles I. Hosmer, Inc., v. Commonwealth, 19 N.E.2d 800, 302 Mass. 495—Prescott v. Secretary of Commonwealth, 12 N.E.2d 462, 299 Mass. 191—Selectmen of Town of Milton v. Judge of Dist. Court of East Norfolk, 189 N.E. 607, 286 Mass. 1—Larkin v. County Com'rs of Middlesex, 174 N.E. 684, 274 Mass. 437—School Committee of City of Lowell v. City of Lowell, 164 N.E. 91, 265 Mass. 353—Broderick v. Department of Mental Diseases of Commonwealth of Massachusetts, 160 N.E. 404, 263 Mass. 124—Curtis v. City of Boston, 132 N.E. 181, 239 Mass. 401.

Mo.—Stocker v. City of Richmond Hights, App., 132 S.W.2d 1116.

Neb.—City of Scottsbluff v. Southern Surety Co., 246 N.W. 346, 124 Neb. 260—Meeske v. Baumann, 241 N.W. 550, 122 Neb. 786, 83 A.L.R. 131.

N.J.—Aronsohn v. Mayor and Council of Borough of Fort Lee, 173 A. 339, 12 N.J.Misc. 557—Van Saun v. Township Committee of Pequannock Tp., 150 A. 770, 8 N.J. Misc. 486.

N.Y.—Evans v. Berry, 186 N.E. 203, 262 N.Y. 61, 89 A.L.R. 387, reversing 258 N.Y.S. 473, 236 App.Div. 334, reversing 253 N.Y.S. 569, 141 Misc. 920—Schieffelin v. Goldsmith, 170 N.E. 905, 253 N Y. 243, reversing 237 N.Y.S. 248, 227 App. Div. 246—Olmstead v. Westchester County Alcoholic Beverage Control Board, 3 N.Y.S.2d 964, 254 App. Div. 63—Picone v. City of New York, 29 N.Y.S.2d 539, 176 Misc. 967—O'Connor v. Greene, 21 N.Y.S. 2d 631, 174 Misc. 597—Application of Schoonmaker, 20 N.Y S.2d 901, 174 Misc. 461—Wilmerding v. O'Brien, 268 N.Y.S. 206, 149 Misc. 735—People ex rel. Home for Hebrew Infants of City of New York v. Walsh, 227 N.Y.S. 570, 131 Misc. 581—Kennedy v. Foley, 177 N.Y.S. 849.

N.C.—Carlyle v. State Highway Commission, 136 S.E. 612, 193 N.C. 36.

N.D.—Jolley v. Begeman, 256 N.W. 912, 65 N.D. 205.

Ohio.—State ex rel. Stine v. Atkinson, 34 N.E.2d 207, 138 Ohio St. 217—State v. Schneider, 134 N.E. 443, 103 Ohio St. 492.

Or.—Latourette v. Kruse, 10 P.2d 592, 139 Or. 422.

Pa.—Hill v. Alexander, 11 A.2d 884, 33 Pa. 26.

Tex.—Mexia Independent School Dist. v. City of Mexia, 133 S.W. 2d 118, 134 Tex. 95—Mayer v. Kostes, Civ.App., 71 S.W.2d 398, error refused—Ferguson v. Johnson, Civ.App., 57 S.W.2d 372, error dismissed.

Va.—Benson v. City of Norfolk, 177 S.E. 222, 163 Va. 1037—Ferguson v. Board of Sup'rs of Roanoke County, 113 S.E. 860, 133 Va. 561.

Wash.—In re Deming's Guardianship, 73 P.2d 764, 192 Wash. 190—Blade v. Town of La Conner, 9 P.2d 381, 167 Wash. 403.

Wis.—School Dist. No. 3 of Town of Adams v. Callahan, 297 N.W. 407, 237 Wis. 560.

22 C.J. p 135 note 38.

"Courts will not assume that public officers will act dishonestly or dishonorably, or use their public trust for private ends, and, in the absence of proof to the contrary, officers will be presumed to have acted in the exercise of their powers in the interests of the public and within the authority granted them."—Stocker v. City of Richmond Hights, Mo.App., 132 S.W.2d 1116, 1118.

Refusal of information by government officer

The presumption obtains that in the exercise of the authority to refuse information deemed necessary in the prosecution of a suit against the United States, the officers of the government have acted in good faith, especially in the absence of any proof that their action has been exercised arbitrarily, capriciously, or with intent to injure the plaintiffs.—Pollen v. U. S., 85 Ct.Cl. 673.

Every reasonable supposition is indulged in favor of the honesty of purpose of public officers.—Universal Mach. Co. v. Alcoholic Beverages Control Commission, 16 N.E.2d 53, 301 Mass. 40—Morrison v. Selectmen of Town of Weymouth, 181 N.E. 786, 279 Mass. 486.

exercise of a sound judgment or discretion,[96] for the purpose of promoting the public good and protecting the public interest.[97]

Officers of former government. The general presumption in favor of the validity of official acts applies to the acts of officers of a former government.[98]

Official act not questioned. The inference of regularity acquires additional force where persons whose interests are adversely affected by an official act do not question its validity for a long period.[99]

In favor of individuals or officer. The presumption is available to sustain the regularity of official acts in favor of individuals who rely thereon,[1] and may also be relied on by the officer himself where it is sought to hold him liable for failure to perform or to perform properly a duty imposed on him.[2]

b. Qualifications of Rule

The general rule as to the presumption of regularity of official acts or duties is subject to qualifications with respect to when, and the extent to which, it obtains, and as to its being rebuttable.

The general presumption that an official act or duty has been regularly performed is subject to qualifications.[3] It generally is indulged only where the legality of an official act is questioned collaterally,[4] and not where it is directly attacked[5] or where a question of jurisdiction is involved.[6] The

There is no presumption of bad faith on the part of public officers.
Iowa.—Monter v. Board of Sup rs of Webster County, 174 N.W. 407, 187 Iowa 625.
N.Y.—Sundstrom v. State, 144 N.Y.S. 390, 159 App.Div. 241, reversed on other grounds 106 N.E. 924, 213 N. Y. 68.
Or.—Breese v. Bramwell, 223 P. 239, 110 Or. 105.
Wis.—State v. Outagamie County Board, 185 N.W. 184, 175 Wis. 253.
Presumption of good faith in general see supra § 126.

96. U.S.—Greeson v. Imperial Irr. Dist., D.C.Cal., 55 F.2d 321, affirmed, C.C.A., 59 F.2d 529.
Ark.—Rural Special School Dist. No. 21 v. Common School Dist. No. 87, 35 S.W.2d 587, 183 Ark. 329—Board of Education of Lonoke County v. Lonoke County, 29 S.W.2d 268, 181 Ark. 1046.
Cal.—Ex parte West, 243 P 55, 75 Cal.App. 591—Shorr v. City of Azusa, 177 P. 513, 38 Cal.App. 709.
Iowa.—Monter v. Board of Sup'rs. of Webster County, 174 N.W. 407, 187 Iowa 625.
Mont.—State v. Mills, 261 P. 885, 81 Mont. 86.
Ohio.—State v. Schneider, 134 N.E. 443, 103 Ohio St. 492.
Or.—Ring v. Patterson, 1 P.2d 1105, 137 Or. 234.
Pa.—Leary v. City of Philadelphia, 172 A. 459, 314 Pa. 458—Day v. School Dist. of Amwell Tp., 128 A. 846, 283 Pa. 248.
Tex.—Ætna Casualty & Surety Co. v. Love, 121 S.W.2d 986, 132 Tex. 280, affirming Love v. Ætna Casualty & Surety Co., Civ.App., 99 S.W 2d 646.
Va.—Benson v. City of Norfolk, 177 S.E. 222, 163 Va. 1037.
Wash.—Chief Petroleum Corporation v. City of Walla Walla, 116 P.2d 560.

An abuse of discretionary power will not be assumed in the absence of clear and convincing evidence.
Wash.—Cawsey v. Brickey, 144 P. 938, 82 Wash 653.
Wis.—City of Milwaukee v. Taylor, 282 N.W. 448, 229 Wis. 328.

97. Cal.—People v. Galena, 70 P.2d 724, 24 Cal.App.2d Supp. 770.
Ill.—Wolbach v. Rubens, 138 N.E. 521, 307 Ill. 186.
Mass.—Ayer v. Cram, 136 N.E. 338, 242 Mass. 30.
Mo.—Stocker v. City of Richmond Hights, App., 132 S.W.2d 1116.
Neb.—Best v. City of Omaha, 293 N W. 116.
Pa.—Hibbs v. Arensberg, 119 A. 727, 276 Pa. 24—Barnes v. Scranton Poor Dist., 160 A. 241, 105 Pa. Super. 149.
"Public officers are all presumed to be servants of the public, working harmoniously together in the interests of their employer, and willing to lay aside their own personal feelings in the interest of the better transaction of public business."—Merrill v. Phelps, 84 P.2d 74, 78, 52 Ariz. 526.

Acts of executive officers are presumed to have been done for the public good.—Barnes v. Scranton Poor Dist., 160 A. 241, 105 Pa.Super. 149.

98. Tex.—Jones v. Garza, 11 Tex. 186—State v. Sullivan, 9 Tex. 156—Hancock v. McKinney, 7 Tex. 384.

99. U.S.—U. S. v. O'Donnell, Cal., 58 S.Ct. 708, 303 U.S. 501, 82 L. Ed. 980, reversing O'Donnell v. U. S., 91 F.2d 14, certiorari granted U. S. v. O'Donnell, 58 S.Ct. 146, 302 U.S. 677, 82 L.Ed. 523—Donsing v. U. S., C.C.A.Wis., 113 F.2d 615.
Ky.—Steele v. Commonwealth, 26 S. W.2d 747, 233 Ky. 719.
N.C.—Carr v. Little, 123 S.E. 625, 188 N.C. 100.
Okl.—Sebranek v. Board of Com'rs of Garfield County, 27 P.2d 632, 166 Okl. 295.
S.C.—Kirton v. Howard, 134 S.E. 859, 137 S.C. 11.
Tex.—Griffin v. Hale, 112 S.W.2d 1042, 131 Tex. 152, affirming, Civ. App., 87 S.W.2d 497—State v. Sun Oil Co., Civ.App., 114 S.W.2d 936, error refused.
22 C.J. p 135 note 39.

A procedure adhered to for a number of years with regard to a particular matter will be presumed to have been followed in any particular case.—Prevost v. Morgenthau, 106 F. 2d 330, 70 App.D.C. 306, affirming 22 F.Supp. 43.

1. Ga.—Whitfield v. State, 180 S.E. 630, 51 Ga.App. 439.
22 C.J. p 135 note 40.

2. Mass.—Horgan v. Boston El. R. Co., 94 N.E. 386, 208 Mass. 287.
22 C.J. p 135 note 41.

3. Ky.—Shanks v. Northcutt, 3 S.W. 2d 208, 223 Ky. 138.

4. Ga.—Whitfield v. State, 180 S.E. 630, 51 Ga.App. 439—Crowe v. Vaughn, 151 S.E. 692, 40 Ga.App. 848.
Mo.—Williams v. Luecke, App., 152 S.W.2d 991.
Neb.—Majerus v. School Dist. No. 52 of Richardson County, 299 N.W. 178.

5. U.S.—Crane v. Nichols, D.C.Tex., 1 F.2d 33.
Cal.—City of Los Angeles v. Glassell, 262 P. 1084, 203 Cal. 44—In re Stobie's Estate, 86 P.2d 883, 30 Cal. App.2d 525.
Tex.—Texas Motor Coaches v. Railroad Commission, Civ.App., 41 S. W.2d 1074—Brite v. Atascosa County, Civ.App., 247 S.W. 878.

Presumption of verity attaching to railroad commission's order permitting operation of competitive bus line does not obtain on general demurrer to petition directly attacking legality of order.—Texas Motor Coaches v. Railroad Commission, Tex.Civ.App., 41 S.W.2d 1074.

6. N.Y.—Royce v. Rosasco, 287 N. Y.S. 692, 159 Misc. 236.

presumption also applies only where a duty is imposed on an official to act in a certain way,[7] and assumes that the law tells him what his duties are;[8] and therefore the presumption that an officer will discharge his duties according to law does not apply where his duties are not specified by law and he is given unlimited discretion.[9] The extent to which the presumption shall obtain in a particular case is generally to be determined by the court from the facts and circumstances as shown by the pleadings and proof.[10]

The presumption cannot be used as a substitute for proof of a definite and material fact,[11] such as substantive independent facts essential to establish an issue;[12] neither can the presumption be used as a basis for presuming irregularity in another act by the same[13] or a different[14] officer; nor will it avail to supply a fact which the official record affirmatively shows to be absent,[15] or which is required to be a matter of record;[16] nor, in the absence of other evidence, will the presumption prevail over an official record to the contrary.[17] The presumption cannot be indulged to the extent of supplying the necessary authority for an act,[18] or to sustain official action where the mandatory requirements of a statute concerning such action are wholly disregarded,[19] or to show that the other party to the transaction properly performed certain authorized acts on his part.[20] The rule that one presumption cannot be based on another, stated supra § 116, precludes using the presumption that one officer has

7. Conn.—Olson v. Musselman, 15 A.2d 879, 127 Conn. 228.

8. Conn.—State v. Coleman, 113 A. 385, 96 Conn. 190.

9. Conn.—State v. Coleman, supra.

10. Ind.—Gibson v. Searcy, 137 N.E. 182, 192 Ind. 515.
Iowa.—Chicago & N. W. Ry. Co. v. Board of Sup'rs of Monona County, 194 N.W. 213, 196 Iowa 447.
Mo.—State ex rel. Hog Haven Farms v. Pearcy, 41 S.W.2d 403, 328 Mo. 560.
Where official action was not regularly performed, as alleged by defendant and admitted by plaintiff, the presumption does not apply.—Kernin v. City of Coquille, 21 P.2d 1078, 143 Or. 127.

11. U.S.—U. S. v. Ross, Ct.Cl., 92 U.S. 281, 23 L.Ed. 707.
Cal.—Morgan v. Superior Court in and for Kings County, 290 P. 569, 210 Cal. 28—In re Sharon's Estate, 177 P. 283, 179 Cal. 447.
Ga.—Whitfield v. State, 180 S.E. 630, 51 Ga.App. 439.
Idaho.—Common School Dist. No. 27 in Twin Falls County v. Twin Falls Nat. Bank, 299 P. 662, 50 Idaho 668.
Ind.—State v. Grand Superior Court, 172 N.E. 897, 202 Ind. 197, 71 A.L.R. 1354.
Iowa.—McKinley v. Lucas County, 244 N.W. 663, 215 Iowa 46
Ky.—Shanks v. Northcutt, 3 S.W.2d 208, 209, 223 Ky. 138, quoting **Corpus Juris.**
Mo.—Ex parte Corvey, 287 S.W. 879, 220 Mo.App. 602.
N.C.—Barton v. Grist, 136 S.E. 344, 193 N.C. 144.
N.D.—Bowman County v. McIntyre, 202 N.W. 651, 52 N.D. 225.
Okl.—Maney v. Boise Title & Trust Co., 244 P. 170, 116 Okl. 202.
Tex.—Pease v. State, Com.App., 208 S.W. 162, modifying, Civ.App., 155 S.W. 657—McDonald v. City of Dallas, Civ.App., 69 S.W.2d 175, affirmed City of Dallas v. McDonald, 98 S.W.2d 167, 130 Tex. 299, withdrawn on rehearing 103 S.W.2d 725, 130 Tex. 299, reversed on other grounds 103 S.W.2d 725, 130 Tex. 299, rehearing denied 107 S.W.2d 987, 130 Tex. 299.
W.Va.—Hamrick v. McCutcheon, 133 S.E. 127, 101 W.Va. 485.
22 C.J. p 135 note 42.
Compliance with statutory requirements
No presumption as to regularity of acts of public officers can take place of proof that city complied with charter and statutory requirements prohibiting incurring liabilities in excess of appropriations except for extreme emergency.—Continental Const. Co. v. City of Lawrence, 9 N.E.2d 550, 297 Mass. 513, 111 A.L.R. 699.
Where a statute requires clear and competent proof of a certain fact, the presumptions that the law has been obeyed and that official duty has been regularly performed cannot be relied on to prove such fact.—Cavalli v. Luckett, 104 P.2d 708, 40 Cal.App.2d 250.
Exercise of reasonable care
The presumption that an officer of the law has properly performed his duty does not extend to the extent of absolving him from liability, in the absence of a showing that he exercised reasonable care.—Foster v. Wooley, 220 P. 938, 93 Okl. 53.

12. Okl.—Maney v. Boise Title & Trust Co., 244 P. 170, 116 Okl. 202.

13. Ky.—Shanks v. Northcutt, 3 S.W.2d 208, 223 Ky. 138.
R.I.—Foster v. Berry, 14 R.I. 601.
Tex.—Randall v. Collins, 52 Tex. 435.

14. Ky.—Shanks v. Northcutt, 3 S.W.2d 208, 209, 223 Ky. 138.
22 C.J. p 135 note 44.

15. Ga.—Whitfield v. State, 180 S.E. 630, 632, 51 Ga.App. 439, quoting **Corpus Juris.**
Ky.—Ely v. U. S. Coal & Coke Co., 49 S.W.2d 1021, 243 Ky. 725—Shanks v. Northcutt, 3 S.W.2d 208, 209, 223 Ky. 138.
22 C.J. p 135 note 45.

16. Wash.—Puget Sound Nav. Co. v. Director and Supervisors of Department of Public Works of Washington, 278 P. 189, 152 Wash. 417.

17. Tex.—Hallum v. Coleman, Civ.App., 214 S.W. 989, reversed on other grounds Coleman v. Hallum, Com.App., 232 S.W. 296.

18. Tex.—Richards v. Rule, Com.App., 207 S.W. 912, reversing Rule v. Richards, Civ.App., 159 S.W. 386.

19. U.S.—F. Vitelli & Son v. U. S., 39 S.Ct. 544, 250 U.S. 355, 63 L.Ed. 1028, reversing Vitelli & Son v. U. S., 7 Ct.Cust.App. 243.
Ind.—Van Der Veer v. State, 165 N.E. 265, 97 Ind.App. 1.
Iowa.—McKinley v. Lucas County, 244 N.W. 663, 215 Iowa 46.
Pa.—Hill v. Alexander, 11 A.2d 884, 338 Pa. 26.
Tex.—Freestone County v. McKinney, Civ.App., 285 S.W. 340, reversed on other grounds McKinney v. Freestone County, Com.App., 291 S.W. 529.
22 C.J. p 135 note 47.
Yea and nay vote
No presumptions can be indulged as to taking of yea and nay vote by county council as required by statute.—Van Der Veer v. State, 165 N.E. 265, 97 Ind.App. 1.

20. Mo.—Reid v. Gees, 210 S.W. 878, 277 Mo. 556.
Signing duplicate lease
The presumption of right official conduct will not affect a presumption that a lessee from a municipality, the ordinance of which authorized the city authorities to sign one copy of a lease and the lessee to sign another, did in fact execute the duplicate contemplated by the ordinance.—Reid v. Gees, supra.

performed his duty as the basis for a further presumption that another officer has performed a duty which was dependent on the performance of a duty of the first officer.[21]

Presumption rebuttable. The presumption of regularity of official acts is rebuttable by affirmative evidence of irregularity or failure to perform duty,[22] but the burden of producing such evidence rests on him who asserts unlawful or irregular conduct.[23] The presumption, however, prevails until

21. U.S.—U. S. v. Carr, Ct.Cl., 10 S.Ct. 182, 132 U.S. 644, 33 L.Ed. 483.
Pa.—Commonwealth ex rel. District Attorney v. Dobrowolski, 5 Pa.Dist. & Co. 16, 17, 23 Luz.Leg.Reg. 31, 72 Pittsb.Leg.J. 234.

22. U.S.—Hall v. Johnston, C.C.A. Cal., 91 F.2d 363—Giacobbi, D.C. N.Y., 32 F.Supp. 508, affirmed U. S. ex rel. Giacobbi v. Flukey, C.C.A., 111 F.2d 297.
Ala.—Planters' Chemical & Oil Co. v. Daniel, 96 So. 424, 209 Ala. 363.
Ark.—Wasson v. Lillard, 74 S.W.2d 637, 189 Ark. 546.
Cal.—Hart v. Capital Film Co., 202 P. 483, 54 Cal.App. 659.
Colo.—Rossi v. Colorado Pulp & Paper Co., 299 P. 19, 88 Colo. 461, followed in Myers v. Beck, 299 P. 50, 88 Colo. 457, and Myers v. Colorado Pulp & Paper Co., 299 P. 50, 88 Colo. 459.
Del.—State, to Use of Henderson, v. Clark, 13 A.2d 445, 1 Terry 441, reversed on other grounds, Sup., 20 A.2d 127.
Ga.—Kuttner v. Swanson, 2 S.E.2d 230, 59 Ga.App. 818—Brinson v. Georgia R. Bank & Trust Co., 165 S.E. 321, 323, 45 Ga.App. 459, citing **Corpus Juris.**
Idaho.—Lloyd Corporation v. Bannock County, 25 P.2d 217, 53 Idaho 478.
Iowa.—In re Ost's Estate, 235 N.W. 70, 211 Iowa 1085—First Trust Joint-Stock Land Bank of Chicago, Ill. v. Jansen, 251 N.W. 711, 117 Iowa 439.
Kan.—Jackman v. Lawrence Drilling & Development Co., 187 P. 258, 106 Kan. 59.
Ky.—Board of Education of Barbourville v. Knox County Board of Education, 84 S.W.2d 62, 260 Ky. 115—Shanks v. Northcutt, 3 S.W.2d 208, 223 Ky. 138.
Me.—Benson v. Inhabitants of Town of Newfield, 1 A.2d 227, 136 Me. 23.
Mo.—Gilbert v. Malan (Central Mut. Ins. Co. of Chicago), 100 S.W.2d 606, 615, 231 Mo.App. 469, citing **Corpus Juris.**
Pa.—Mortgage Building & Loan Ass'n v. J. B. Van Sciver & Co., 155 A. 920, 304 Pa. 408—Foresman v. Gregg Tp., 147 A. 64, 297 Pa. 369—Falkinburg v. Venango Tp., 147 A. 62, 297 Pa. 358—In re Wanger, 32 Pa.Dist. & Co. 512—Walz v. Wilson Borough, 6 Pa.Dist. & Co. 534, 12 Lehigh Co.L.J. 79, 19 North.Co. 387, 17 Mun.L.R. 103, 18 Mun.L.R. 89—Davis v. Commonwealth Trust Co., 45 Daugh.Co. 16.
Tex.—Short v. W. T. Carter & Bro., 126 S.W.2d 953, 133 Tex. 202, reversing Sessums v. W. T. Carter & Bro., Civ.App., 121 S.W.2d 486, appeal dismissed W. T. Carter & Bros. v. Short, 60 S.Ct. 140, 308 U.S. 513, 84 L.Ed. 438—Ætna Casualty & Surety Co. v. Love, 121 S.W.2d 986, 132 Tex. 280, affirming Love v. Ætna Casualty & Surety Co., Civ.App., 99 S.W.2d 646—W. T. Carter & Bro. v. Bendy, Civ.App., 251 S.W. 265.
Wash.—School Dist. No. 88 of Lincoln County v. Morgan, 266 P. 150, 147 Wash. 321—Torp's Estate v. Town of Wilson Creek, 245 P. 32, 138 Wash. 695—Eberhart v. Murphy, 194 P. 415, 113 Wash. 449, reversing 188 P. 17, 110 Wash. 158.
W.Va.—Liberty Coal Co. v. Bassett, 150 S.E. 745, 108 W.Va. 293.
22 C.J. p 135 note 50.
"The rule is adopted for the protection of the public; but it may always be rebutted by actual proof that a duty was not performed."—Shanks v. Northcutt, 3 S.W.2d 208, 209, 223 Ky. 138.
"Denominational disputable presumption" is the term applied by some statutes to a presumption of regularity of official duty.—Bowman County v. McIntyre, 202 N.W. 651, 52 N.D. 225.
Competency of witnesses
Neither a clerk of court nor his assistant is a competent witness to impeach the presumption of the regularity of their official acts.—Athey v. Oregon Short Line R. Co., 165 P. 1116, 30 Idaho 318.
Rebuttal of record
The presumption that record of case in which accused was convicted truly describes proper performance of various functions of officers involved may be rebutted by a showing, outside the record, of abuse of due process in failure of judicial or administrative officer in granting to accused his rights of which officer had knowledge, but which accused was unable to make available for use in his behalf.—Hall v. Johnston, C. C.A.Cal., 91 F.2d 363.

23. U.S.—City of San Antonio v. Rubin, C.C.A.Tex., 42 F.2d 107—Smith v. U. S., D.C.Mont., 32 F. Supp. 657.
Ark.—State ex rel. Attorney General v. Broadaway, 93 S.W.2d 1248, 192 Ark. 634—Rural Special School Dist. No. 21 v. Common School Dist. No. 37, 35 S.W.2d 587, 183 Ark. 329.
Cal.—Nilsson v. State Personnel Board of California, 78 P.2d 467, 25 Cal.App.2d 699—Clark v. Conley School Dist. of Kern County, 261 P. 723, 86 Cal.App. 527.
Colo.—Guiraud v. Nevada Canal Co., 245 P. 485, 79 Colo. 289.
D.C.—Proctor & Gamble Co. v. Coe, 96 F.2d 518, 68 App.D.C. 246, certiorari denied 59 S.Ct. 65, 305 U.S. 604, 83 L.Ed. 384.
Ill.—Tribune Co. v. Thompson, 174 N. E. 561, 342 Ill. 503.
Ind.—Flora v. Brown, 138 N.E. 767, 79 Ind.App. 454.
Iowa.—First Trust Joint Land Bank of Chicago, Ill. v. McNeff, 264 N. W. 105, 220 Iowa 1225.
Minn.—Skrove v. Town Board of Towns of Belmont and Christiana in Jackson County, 191 N.W. 584, 154 Minn. 118.
Mo.—State ex rel. and to Use of City of St. Louis v. Priest, 152 S. W.2d 109—Martin v. Kansas City, App., 224 S.W. 141—Roy v. Kansas City, 224 S.W. 132, 204 Mo.App. 332.
Mont.—O'Brien v. School Dist. No. 1 of Silver Bow County, 219 P. 113, 68 Mont. 432.
N.Y.—Wilmerding v. O'Brien, 268 N. Y.S. 206, 149 Misc. 735.
N.D.—Jones v. Brightwood Independent School Dist. No. 1, 247 N. W. 884, 63 N.D. 275.
Okl.—Standish Pipe Line Co. v. Cleveland County Excise Board, 114 P.2d 945.
Pa.—Campbell v. School Dist. of Borough of Bellevue, 195 A. 53, 328 Pa. 197, 113 A.L.R. 841—Day v. School Dist. of Amwell Tp., 128 A. 846, 283 Pa. 248—Hibbs v. Arensberg, 119 A. 727, 276 Pa. 24—Miller v. Borough of New Oxford, 165 A. 766, 109 Pa.Super. 85—Barnes v. Scranton Poor Dist., 160 A. 241, 105 Pa.Super. 149—In re Snyder's Case, 13 Pa.Dist. & Co. 143—Best v. Blue Ridge Water Supply Co., 7 Pa.Dist. & Co. 549, 20 North.Co. 55—In re Brookvill's Election, 5 Pa.Dist. & Co. 54, 15 Mun.L.R. 77—Davis v. Commonwealth Trust Co., 45 Dauph.Co. 16.
R.I.—Gelinas v. Fugere, 180 A. 346, 55 R.I. 225—Carpenter v. Comery, 121 A. 538, 45 R.I. 266.
Tenn.—Siler v. Siler, 277 S.W. 886, 152 Tenn. 379—Lummus Cotton Gin Co. v. Arnold, 269 S.W. 706, 151 Tenn. 540.
Tex.—Lackey v. State Board of Barber Examiners, Civ.App., 113 S.W. 2d 968—Gulf Production Co. v. State, Civ.App., 231 S.W. 124.

it is overcome by clear and convincing evidence to the contrary,[24] and, where either party offers proof which contradicts the presumption, the parties are bound by such proof;[25] but uncertain, unreliable, and conflicting testimony is not sufficient to overcome the presumption,[26] and, unless the presumption is rebutted, it becomes conclusive.[27] Every reasonable intendment will be made in support of the presumption,[28] and in case of doubt as to an officer's act being lawful or unlawful it should be construed to be lawful.[29]

Wash.—Blade v. Town of La Conner, 9 P.2d 381, 167 Wash. 403.
W.Va.—Forest Glen Land Co. v. George, 122 S.E. 543, 96 W.Va. 209.
22 C J. p 135 note 51.

24. U.S.—U. S. v. Chemical Foundation, Del., 47 S.Ct. 1, 272 U.S. 1, 71 L.Ed. 131, modifying on other grounds, C.C.A., 5 F.2d 191, which affirmed, D C., 294 F. 300—Erie R Co. v Johnson, C.C.A.Ohio, 106 F.2d 550—U. S. v. Barry, C.C.A. Tenn., 67 F.2d 763, certiorari denied Barry v. U. S., 54 S.Ct. 857, 292 U.S. 648, 78 L.Ed. 1498—In re Giacobbi, D.C.N.Y., 32 F.Supp. 508, affirmed U. S. ex rel. Giacobbi v. Flukey, C.C.A., 111 F 2d 297—Redlands Foothill Groves v. Jacobs D.C.Cal, 30 F.Supp. 995—Boydston v. Continental & Commercial Trust & Savings Bank, C.C.A.Okl., 298 F. 31—Lamport Mfg. Supply Co. v. U. S., 65 Ct Cl. 579—U. S. v. McCullough Seed Co., 13 Ct.Cust.App. 237.
Alaska.—Graff v. Town of Seward, 9 Alaska 205.
Cal.—In re Stobie's Estate, 86 P.2d 883, 30 Cal.App.2d 525.
Colo.—People ex rel. Moore v. Lory, 31 P.2d 1112, 94 Colo. 595.
Conn.—Comley ex rel. Fitzroy v. Board of Trustees of Firemen's Relief Fund of City of Bridgeport, 191 A. 729, 122 Conn. 650.
D.C.—Proctor & Gamble Co. v. Coe, 96 F.2d 518, 68 App.D.C. 246, certiorari denied 59 S.Ct. 65, 305 U.S. 604, 83 L.Ed. 384.
Ind.—Gruber v. State, 148 N.E 481, 196 Ind. 436.
Iowa.—Priest v. Whitney Loan & Trust Co., 261 N.W. 374, 219 Iowa 1281—Maben v. Olson, 175 N.W. 512, 187 Iowa 1060.
Ky.—Rawlings v. City of Newport, 121 S.W 2d 10, 275 Ky. 183—Bryant v. Birdwell, 117 S.W.2d 907, 273 Ky. 767—Tipton v. Brown, 117 S. W.2d 217, 273 Ky. 496—West v. Nantz' Adm'r, 101 S.W.2d 673, 267 Ky. 113—Milner v. Gibson, 61 S. W.2d 273, 249 Ky. 594.
La.—State ex rel. McGregor v. Diamond, App., 167 So. 760.
Mass.—Lajoie v. Milliken, 136 N.E. 419, 242 Mass. 508.
Minn.—Ingelson v. Olson, 272 N.W. 270, 199 Minn. 422, 110 A.L.R. 167.
Neb.—Majerus v. School Dist. No. 52 of Richardson County, 299 N.W. 178.
N.Y.—Browne v. Walker, 229 N.Y.S. 26, 131 Misc. 736.
Ohio.—Fischer v. City of Cleveland, 181 N.E. 668, 42 Ohio App. 75.
Okl.—Standish Pipe Line Co. v. Cleveland County Excise Board, 114 P.2d 945—Moore v. Porterfield, 257 P. 307, 125 Okl. 217—Oklahoma City v. Coombs, 257 P. 295, 125 Okl. 194—Tonini & Bramblett v. Board of County Com'rs, 229 P. 263, 100 Okl. 246—Gamble v. Emery, 221 P. 514, 94 Okl. 167—Hamilton Tp. of Okmulgee County v. Underwood, 198 P. 300, 81 Okl. 256.
Or.—Pacific Telephone & Telegraph Co. v. Wallace, 75 P.2d 942, 158 Or. 210.
Pa.—Jefferson County v. Rose Tp., Jefferson County, 129 A. 78, 283 Pa. 126—American Seating Co. v. Murdock, 169 A. 250, 111 Pa.Super. 242.
S.D.—Adamson v. Minnehaha County, 293 N.W. 542.
Tex.—Findlay v. State, Civ.App., 238 S.W. 956, second rehearing overruled 239 S.W. 996, affirmed 250 S. W. 651, 113 Tex. 30.
W.Va.—Wilson v. Fleming, 109 S.E 810, 89 W.Va. 553.
Wis.—Netherton v. Frank Holton & Co., 205 N.W. 388, 189 Wis. 461, order vacated denying motion to dismiss appeal 206 N.W. 919, 189 Wis. 461, mandate vacated 207 N. W. 953, 189 Wis. 461.

Proof of a failure to take a step required by law is sufficient to overcome a presumption of regularity in the conduct of public officers.—Scullin v. Cities Service Oil Co., 22 N.E. 2d 666, 304 Mass. 75.

25. U.S.—Hunter Glover Co. v. Harvey Steel Products Corporation, D. C.Tenn., 3 F.2d 634.

26. U.S.—Harrell v. Aderhold, C.C.A. Ga., 73 F.2d 189.
Kan.—Hendrickson v. Sheetz, 210 P. 1109, 112 Kan. 296.
Ky.—Fischer v. Eby, 114 S W.2d 763, 272 Ky. 545.
N.Y.—Browne v. Walker, 229 N.Y.S. 26, 131 Misc. 736.
Okl.—Jackson v. Sadler, 44 P.2d 838, 172 Okl. 56.
Pa.—American Seating Co. v. Murdock, 169 A. 250, 111 Pa.Super. 242.
Va.—Norfolk & W. Ry. Co. v. Haun, 187 S.E. 481, 167 Va. 157.
Wis.—State v. Common Council of City of West Allis, 188 N.W. 601, 177 Wis. 537.

The presumption will support a finding that an official duty was regularly performed, even though there is evidence to the contrary.—People v. Siemsen, 95 P. 863, 153 Cal. 387.

Affidavit of an officer which tends to impeach a certificate made by him may, if necessary, be treated as having no probative force, in view of the presumption that he did his duty and stated truth in his certificate.—Sawyer v. Robison, 268 S.W. 151, 114 Tex. 437.

A mere mistake is insufficient to overcome the presumption.—Hannon v. Madden, 5 P.2d 4, 214 Cal. 251.

27. Ark.—Vanderford v. Monroe County Road Improvement Dist. No. 4, 244 S.W. 448, 155 Ark. 391.
Cal.—Nilsson v. State Personnel Board of California, 78 P.2d 467, 25 Cal.App.2d 699—Los Angeles Athletic Club v. City of Long Beach, 17 P.2d 1061, 128 Cal.App. 427.
Ga.—Brinson v. Georgia R. Bank & Trust Co., 165 S.E 321, 323, 45 Ga.App. 459, citing **Corpus Juris.**
Iowa.—Cross v. Donohoe, 210 N.W. 532, 202 Iowa 484
Mont.—State v. District Court of Fourth Judicial Dist., in and for Ravalli County, 232 P. 201, 72 Mont. 213.
Or.—State v. Tillamook, 124 P. 637, 62 Or. 332, Ann Cas.1914C 483.
Tex.—Mayer v. Kostes, Civ.App., 71 S.W.2d 398, error refused.

28. U.S.—In re Harris Bros., D.C. Ark., 5 F.Supp. 191.
Ark.—Rural Special School Dist. No. 21 v. Common School Dist. No. 87, 35 S.W.2d 587, 183 Ark. 329.
Mass.—Universal Mach. Co. v. Alcoholic Beverages Control Commission, 16 N.E.2d 53, 301 Mass. 40—Slack v. Building Inspector of Town of Wellesley, 160 N.E. 285, 262 Mass. 404.
Miss.—Scott County v. Dubois, 130 So. 106, 158 Miss. 245.
Mo.—Kansas City v. Brown, 227 S. W. 89, 286 Mo. 1.
Mont.—Anderson v. Wirkman, 215 P. 224, 67 Mont. 176.
R.I.—Carpenter v. Comery, 121 A. 538, 45 R.I. 266.

29. Mich.—Boyer v. Backus, 276 N. W. 564, 282 Mich. 593, motion denied 280 N.W. 756, 282 Mich. 701, certiorari denied 59 S.Ct. 147, 305 U.S. 644, 83 L.Ed. 416, rehearing denied 59 S.Ct. 248, 305 U.S. 674, 83 L.Ed. 437.
Mo.—State by Bothwell ex rel. Gray v. Schuster, 227 S.W. 60, 285 Mo. 399—Ex parte Corvey, 287 S.W. 879, 220 Mo.App. 602.
Tex.—Beard v. Marshall, Civ.App., 32 S.W.2d 496.

Person holding two offices. Where a person holding two offices performs an official act, he will be presumed to have acted in the capacity which would render his action valid.[30]

c. Applications of Rule to Particular Officers or Bodies

The presumption of regularity applies to the official acts and proceedings of individual officers and of official boards and legislative bodies.

The presumption of regularity is not confined to the acts of individual officers but applies also to the acts of boards,[31] such as administrative boards or bodies,[32] and to acts of legislative bodies.[33]

Among the numerous classes of officers or official bodies in favor of whose acts a presumption of regularity has been entertained are the following: Administrative officers;[34] administrators or executors;[35] an alcalde in territory formerly governed by Spanish law;[36] an alderman;[37] an appraiser;[38]

30. La.—Selby v. Bass, 19 La. 499—Whittington v. Whittington, 24 La. Ann. 157.

31. Iowa.—Welton v. Iowa State Highway Commission, 233 N.W. 876, 211 Iowa 625.
Kan.—Four-S Razor Co. v. Guymon, 205 P. 635, 110 Kan. 745.
Ky.—Booth v. Board of Education of City of Owensboro, 229 S.W. 84, 191 Ky. 147.
N.Y.—Beckmann v. Talbot, 15 N.E. 2d 556, 278 N.Y. 146, reversing 300 N.Y.S. 6, 252 App.Div. 870, reargument denied 16 N.E.2d 849, 278 N.Y. 700.
Wis.—State v. Krause, 202 N.W. 319, 186 Wis. 59.
22 C.J. p 136 note 54.

Same as individual

State board or commission is entitled to be treated in law action precisely as individual, and no inferences or presumptions may be drawn against them unless proper in action between individuals.—Welton v. Iowa State Highway Commission, 233 N.W. 876, 211 Iowa 625.

32. U.S.—Thompson v. Consolidated Gas Utilities Corporation, Tex., 57 S.Ct. 364 300 U.S. 55, 81 L.Ed. 510, affirming, D.C., Consolidated Gas Utilities Corporation v. Thompson, 14 F.Supp. 318—State Corporation Commission of Kansas v. Wall, C.C.A.Kan., 113 F.2d 877.
Fla.—State ex rel. Hollywood Jockey Club v. Stein, 182 So. 863, 133 Fla. 530.
Ill.—People ex rel. McDonough v. Mills Novelty Co., 192 N.E. 236, 357 Ill. 285.
Mich.—Warnshuis v. State Board of Registration in Medicine, 281 N.W. 410, 285 Mich. 699.
N.J.—Stevens v. Busch Cleaners & Dyers Service, 171 A. 821, 116 N.J. Eq. 331.
Or.—Pacific Telephone & Telegraph Co. v. Wallace, 75 P.2d 942, 153 Or. 210.
Tex.—Lackey v. State Board of Barber Examiners, Civ.App., 113 S.W. 2d 968.

War Industries Board

Mo.—Wisconsin & Arkansas Lumber Co. v. Buschow Lumber Co., App., 257 S.W. 840.

33. Mass.—Bryant v. Pittsfield, 85 N.E. 739, 199 Mass. 530.
22 C.J. p 136 note 55.

Presumption in favor of judicial acts distinguished

N.J.—Public Service Gas Co. v. Public Utility Comrs., 87 A. 651, 84 N.J.Law 463, 467, affirmed 92 A. 606, 94 A. 634, 95 A. 1079, 87 N.J.Law 581, L.R.A.1917B 930, L.R.A.1918A 421, appeal dismissed 37 S.Ct. 243, 242 U.S. 666, 61 L.Ed. 552—22 C.J. p 136 note 55 [c].

34. U.S.—U. S. v. Johnson, C.C.A. Okl., 87 F.2d 155, affirming, D.C., 11 F.Supp. 897—Greenwood County v. Duke Power Co., C.C.A.S.C., 81 F. 2d 986, reversing, D.C., Duke Power Co. v. Greenwood County, 12 F. Supp. 70, remanded, C.C.A., Greenwood County v. Duke Power Co., 79 F.2d 995, reversing, D.C., Duke Power Co. v. Greenwood County, S.C., 10 F.Supp. 854, certiorari granted Duke Power Co. v. Greenwood County, 56 S.Ct. 941, 298 U.S. 651, 80 L.Ed. 1379, reversed on other grounds 57 S.Ct. 202, 299 U.S. 259, 81 L.Ed. 178—Franklin Process Co. v. Hoosac Mills Corporation, D.C.Mass., 8 F.Supp. 552, reversed on other grounds, C.C.A., Butler v. U.S., 78 F.2d 1, certiorari granted U.S. v. Butler, 56 S. Ct. 144, 296 U.S. 561, 80 L.Ed. 396, affirmed 56 S.Ct. 312, 297 U.S. 1, 80 L.Ed. 477, 102 A.L.R. 914.
Alaska.—Graff v. Town of Seward, 9 Alaska 205.
Cal.—In re Stobie's Estate, 86 P.2d 883, 30 Cal.App.2d 525.
D.C.—Dunn v. Ickes, 115 F.2d 36, 72 App.D.C. 325.
Fla.—Higbee v. Housing Authority of Jacksonville, 197 So. 479, 143 Fla. 560.
N.Y.—Royce v. Rosasco, 287 N.Y.S. 692, 159 Misc. 236.
Ohio.—Morton v. City of Cincinnati, 22 N.E.2d 581, 61 Ohio App. 329.
Or.—Pacific Telephone & Telegraph Co. v. Wallace, 75 P.2d 942, 153 Or. 210.

Discretionary matters

A presumption of correctness attaches to the action of administrative officials with respect to matters committed to their discretion, and the exercise of such discretion will not be disturbed if based on substantial testimony and not manifestly arbitrary and unreasonable.—Graff v. Town of Seward, 9 Alaska 205.

35. Cal.—Aronson v. Bank of America Nat. Trust & Savings Ass'n, 72 P.2d 548, 9 Cal.2d 640—Bryson v. Manhart, 54 P.2d 778, 11 Cal.App. 2d 691—Lesser v. Pomin, 39 P.2d 451, 3 Cal.App.2d 117.
Conn.—City Nat. Bank v. City of Bridgeport, 147 A. 181, 109 Conn. 529.
Fla.—Glidden v. Gutelius, 119 So. 140, 96 Fla. 834, rehearing denied Glidden v. Getulius, 120 So. 1, 96 Fla. 834.
Ga.—Wilson v. Aldenderfer, 189 S.E. 907, 183 Ga. 760—Darnell v. State, 170 S.E. 63, 177 Ga. 279.
Ill.—In re Jackson's Estate, 21 N.E. 2d 792, 300 Ill.App. 500—Austin v. City Bank of Milwaukee, 5 N.E.2d 585, 288 Ill.App. 36.
Iowa.—Murphy v. Hahn, 223 N.W. 756, 208 Iowa 698—Leach v. Farmers' Sav. Bank of Hamburg, 213 N. W. 414, 205 Iowa 114, 56 A.L.R. 801, followed in Leach v. Grinnell Sav. Bank of Grinnell, 213 N.W. 417, and rehearing denied and modified on other grounds 217 N.W. 437, 205 Iowa 114, 56 A.L.R. 801.
Mich.—Greenberg v. Mosley's Estate, 279 N.W. 904, 284 Mich. 683.
N.Y.—In re Witkind's Estate, 4 N.Y. S.2d 933, 167 Misc. 885—In re Chisholm's Will, 264 N.Y.S. 352, 148 Misc. 158—In re Chisholm's Will, 263 N.Y.S. 423, 147 Misc. 99.
Tex.—Wixom v. Bowers, Civ.App., 152 S.W.2d 896—Krider v. Hempftling, Civ.App., 137 S.W.2d 83.
Utah.—In re Kohn's Estate, 189 P. 409, 56 Utah 17.
22 C.J. p 136 note 56.

36. Cal.—Payne v. Treadmill, 16 Cal. 220.

37. Ala.—Green v. State ex rel. Bradford, 193 So. 312, 238 Ala. 659.
N.H.—Broderick v. Hunt, 89 A. 302, 77 N.H. 139.

38. Ark.—Arnold v. Watson, 121 S. W. 354, 91 Ark. 328.
Pa.—American Seating Co. v. Murdock, 169 A. 250, 111 Pa.Super. 242.
22 C.J. p 136 note 59.

attorneys at law;[39] attorneys general;[40] auditors of court;[41] auditors of public accounts;[42] and bankruptcy officials.[43]

The presumption of regularity has also been applied in favor of the acts of boards of adjustment,[44] of arbitration,[45] of education,[46] of equalization,[47] of estimate,[48] of forestry,[49] of health,[50] of medical examiners,[51] of milk control,[52] of motion picture censors,[53] of prison directors,[54] of public works,[55] of registration,[56] and of roads and revenues;[57] a dental board;[58] a state debt-funding board;[59] an exemption board acting under the selective draft law;[60] an industrial accident board;[61] the National Labor Relations Board;[62] a parole board;[63] a school district governing board;[64] and a utilities board.[65]

39. Ariz.—Smith v. Washburn & Condon, 297 P. 879, 38 Ariz. 149.
La.—Jefferson v. Stringfellow, 86 So. 774, 148 La. 223.
Mo.—State ex rel. Terry v. Holtkamp, 51 S.W.2d 13, 330 Mo. 608.
Tex.—Houston Land & Trust Co. v. Sheldon, Civ.App., 69 S.W.2d 796, error dismissed.
22 C.J. p 136 note 60.

40. U.S.—Brinkley v. Hassig, C.C.A. Kan., 83 F.2d 351—Archer v. Heath, C.C.A.Wash., 30 F.2d 932.
Cal.—Epperson v. Jordan, 82 P.2d 445, 12 Cal.2d 61.
Okl.—Leedy v. Brown, 113 P. 177, 27 Okl. 489.
Tenn.—Malone v. Peay, 7 S.W.2d 40, 157 Tenn. 429.
Tex.—Lloyds of Texas v. Bobbitt, Civ.App., 40 S.W.2d 897, error dismissed, Com.App., 55 S.W.2d 803.
22 C.J. p 136 note 61.

41. Mass.—Chelmsford Fdy. Co. v. Shepard, 92 N.E. 75, 206 Mass. 102.
22 C.J. p 137 note 62.

42. Ill.—Barrett v. Reuter, 7 N.E. 2d 74, 289 Ill.App. 221.
Ky.—Brown's Ex'x v. Green, 211 S.W. 860, 184 Ky. 300.

43. U.S.—Wheeler-Fisher & Co. v. Commissioner of Internal Revenue, C.C.A., 54 F.2d 294.

44. Iowa.—Anderson v. Jester, 221 N.W. 354, 206 Iowa 452.

Exception from zoning ordinance

Proceedings of board of adjustment in granting exception or variance from zoning ordinance are presumed to be regular.—Anderson v. Jester, supra.

45. Mass.—Moore Drop Forging Co. v. Fisher, 132 N.E. 169, 239 Mass. 434.
Mo.—School Dist. No. 42, Audrain County, v. School Dist. No. 45, Audrain County, 254 S.W. 726, 212 Mo.App. 670.

Investigating strike

It must be presumed that in investigating a strike under a statute a board of conciliation and arbitration will proceed in accordance with law and will not violate constitutional guaranties of personal liberty and individual freedom.—Moore Drop Forging Co. v. Fisher, 132 N.E. 169, 239 Mass. 434.

Presumption in favor of award generally see Arbitration and Award § 130.

46. U.S.—Board of Public Instruction for Brevard County v. Osburn, C.C.A.Fla., 101 F.2d 919—First Trust Co. of St. Paul v. Board of Education of Whitley County, C.C.A.Ky., 78 F.2d 114, reversing, D.C., 5 F.Supp. 49.
Ark.—Board of Conference Claimants v. Phillips, 63 S.W.2d 988, 187 Ark. 1113.
Cal.—Esberg v. Badaracco, 259 P. 730, 202 Cal. 110—Salmon v. Allen, 36 P.2d 153, 1 Cal.App.2d 115.
Ill.—Green v. Hutsonville Tp. High School Dist. No. 201, 190 N.E. 267, 356 Ill. 216.
Ky.—Board of Education of Barbourville v. Knox County Board of Education, 84 S.W.2d 62, 260 Ky. 115—Board of Education of Bowling Green v. Simmons, 53 S.W.2d 940, 245 Ky. 493—Knox County Board of Education v. Fultz, 43 S.W.2d 707, 241 Ky. 265—Cunningham v. Shelby County Board of Education, 261 S.W. 266, 202 Ky. 763.
La.—Lemann v. Ascension Parish School Board, 103 So. 517, 158 La. 81.
N.J.—Sleight v. Board of Education of City of Paterson, 170 A. 598, 112 N.J.Law 422, reversing 159 A. 707, 10 N.J.Misc. 523.
Tenn.—Hyder v. Morgan, 144 S.W. 2d 785—Morton v. Hancock County, 30 S.W.2d 250, 161 Tenn. 324—Sherman v. Cate, 16 S.W.2d 25, 159 Tenn. 69.
22 C.J. p 137 note 63.

47. Ky.—McCracken Fiscal Court v. McFadden, 122 S.W.2d 761, 275 Ky. 819.
22 C.J. p 137 note 64.

48. Nev.—Knox v. Kearney, 142 P. 526, 37 Nev. 393.

49. Md.—Chesapeake & P. Tel. Co. of Baltimore City v. Goldsborough, 94 A. 322, 125 Md. 666, Ann.Cas. 1917A 1.

50. Cal.—Butterworth v. Boyd, 82 P. 2d 434, 12 Cal.2d 140, 126 A.L.R. 838.
Mo.—State ex rel. Ball v. State Board of Health, 26 S.W.2d 773, 325 Mo. 41.

51. U.S.—Brinkley v. Hassig, C.C.A. Kan., 83 F.2d 351.
Tex.—State Bd. of Medical Examiners v. Taylor, 129 S.W. 600, 103 Tex. 444.

52. N.Y.—Baldwin v. Dellwood Dairy Co., 270 N.Y.S. 418, 150 Misc. 762.

53. Kan.—Mid-West Photo-Play Corp. v. Miller, 169 P. 1154, 102 Kan. 356.

54. Cal.—Ex parte Sichofsky, 257 P. 439, 201 Cal. 360, 53 A.L.R. 615.
Mont.—Anderson v. Wirkman, 215 P. 224, 67 Mont. 176.

55. Ind.—Regenstreif v. Merz, 6 N.E.2d 702, 212 Ind. 112.
22 C.J. p 137 note 69.

56. Colo.—Burbank v. Board of Com'rs of Eagle County, 201 P. 43, 70 Colo. 302.
N.Y.—Matter of Matthews, 128 N.Y.S. 537, 143 App.Div. 561.

Board of registration in medicine

Mass.—Davis v. Calderwood, 146 N.E. 708, 251 Mass. 283.

57. Ga.—Browne v. Benson, 137 S.E. 626, 163 Ga. 707—Buchanan v. James, 61 S.E. 125, 130 Ga. 546.

58. Fla.—Pridgen v. Sweat, 170 So. 653, 125 Fla. 598.

59. Colo.—Post Printing & Publishing Co. v. Shafroth, 124 P. 176, 53 Colo. 129.
22 C.J. p 137 note 72.

60. U.S.—U.S. v. Kinkead, D.C.N.J., 248 F. 141, affirmed 250 F. 692, 162 C.C.A. 654.

61. Tex.—Public Indemnity Co. v. Pearce, Civ.App., 56 S.W.2d 906, error dismissed—Employers' Indemnity Corporation v. Felter, Civ.App., 264 S.W. 137, reversed on other grounds, Com.App., 277 S.W. 376.

62. U.S.—Inland Steel Co. v. National Labor Relations Board, C.C.A., 105 F.2d 246.

63. U.S.—Christianson v. Zerbst, C.C.A.Kan., 89 F.2d 40—Harrell v. Aderhold, C.C.A.Ga., 73 F.2d 189.

64. Cal.—Berkeley High School Dist. of Alameda County v. Coit, 59 P.2d 992, 7 Cal.2d 132.

65. N.J.—Hollinshead v. Atlantic City R. Co., 131 A. 915, 102 N.J. Law 303.
Presumption of regularity of orders and regulations of public utilities commission in general see the C.

The presumption also applies in favor of the acts of a city clerk;[66] a city council;[67] a city recorder;[68] clerks of court;[69] the clerk of a grand jury;[70] and a collector of customs duties.[71]

It has also been applied to the acts of a commissioners' court;[72] and to commissioners of various kinds,[73] as, for instance, agriculture and markets,[74]

J.S. title Public Utilities § 57, also 51 C.J. p 66 notes 20–25.

66. Cal.—Crowl v. Board of Trustees of City of Southgate, 292 P. 985, 109 Cal.App. 214.
Mo.—State v. Ross, 143 S.W. 502, 160 Mo.App. 682.
N.Y.—Postal Telegraph Cable Co. v. City of Jamestown, 187 N.Y.S. 491, 114 Misc. 689.

67. Cal.—Marr v. Southern California Gas Co., 245 P. 178, 198 Cal. 278—Ex parte West, 243 P. 55, 75 Cal.App. 591—Ellis Landing & Dock Co. v. City of Richmond, 234 P. 336, 70 Cal.App. 720.
Idaho.—Thomas v. Glindeman, 195 P. 92, 33 Idaho 394.
Ill.—People v. Hoffman, 152 N.E. 597, 322 Ill. 174—People v. Elgin, J. & E Ry. Co., 132 N.E. 204, 298 Ill. 574.
Iowa.—Scott v. City of Waterloo, 274 N.W. 897, 223 Iowa 1169—Waldman v. Sanders Motor Co., 243 N. W. 555, 214 Iowa 1139.
Mass.—Curtis v. City of Boston, 132 N.E. 181, 239 Mass. 401.
Neb.—Best v. City of Omaha, 293 N. W. 116.
N.Y.—Casler v. Tanzer, 234 N.Y.S. 571, 134 Misc. 48.
Or.—Gow Why v. City of Marshfield, 5 P.2d 696, 138 Or. 167.
Pa.—Commonwealth v. Tice, 116 A. 316, 272 Pa. 447.
S.C.—Stone v. City Council of City of Greenville, 102 S.E. 755, 113 S. C. 407.
S D.—State v. Eastcott, 220 N.W. 613, 53 S.D. 191.
Wash.—Chief Petroleum Corporation v. City of Walla Walla, 116 P.2d 560.
22 C.J. p 137 note 75.

Honest discretion

Without allegation of fraud, city council is presumably guided by honest discretion in approving assessments.—Keller v. City of Los Angeles, 11 P.2d 448, 123 Cal.App. 99.

Borough council

N.J.—Aronsohn v. Mayor and Council of Borough of Fort Lee, 173 A. 339, 12 N.J.Misc. 557.

Commission council of city

La.—State ex rel. Porterie v. Housing Authority of New Orleans, 182 So. 725, 190 La. 710.

Town council

R.I.—Carpenter v. Town Council of Town of Warwick, 124 A. 100, 45 R.I. 494.

Village council

Mich.—American La France & Foamite Industries v. Village of Clifford, 255 N.W. 596, 267 Mich. 326.

68. Or.—State v. Dalles City, 143 P. 1127, 72 Or. 337, Ann.Cas.1916B 855.

69. Ala.—Townsend v. Adair, 134 So. 637, 223 Ala. 150.
Ark.—Cain v. Carl-Lee, 281 S.W. 661, 170 Ark. 859.
Cal.—Wutchumna Water Co. v. Superior Court in and for Tulare County, 12 P.2d 1033, 215 Cal. 734—Andrews v. Metzner, 257 P. 203, 83 Cal.App. 764—Hart v. Capital Film Co., 202 P. 483, 54 Cal.App. 659—Fischer v. Lukens, 182 P. 967, 41 Cal.App. 358.
Fla.—Long v. Sphaler, 105 So. 101, 89 Fla. 499.
Ga.—Benton v. Maddox, 192 S.E. 316, 56 Ga.App. 132.
Iowa.—Grimes Sav. Bank v. McHarg, 276 N.W. 781, 224 Iowa 644—First Trust Joint-Stock Land Bank of Chicago, Ill., v. Jansen, 251 N.W. 711, 217 Iowa 439—Andrew v. Haag, 245 N.W. 436, 215 Iowa 282—State v. Beaton, 180 N.W. 166, 190 Iowa 216, denying rehearing 178 N.W. 1, 190 Iowa 216.
Ky.—Boyd County v. Boyd Fiscal Court, 56 S.W.2d 959, 247 Ky. 183—Huckabee v. Black Mountain Corporation, 24 S.W.2d 299, 232 Ky. 599—Monroes' Guardian ad Litem v. Monroe, 285 S.W. 250, 215 Ky. 440.
Mo.—State ex rel. and to Use of Livingston County v. Hunt, 152 S.W. 2d 77—Swabey v. Boyers, App., 71 S.W.2d 110.
Mont.—Burgess v. Lasby, 9 P.2d 164, 91 Mont. 482.
N.M.—Baca v. Coury, 204 P. 57, 27 N.M. 611.
R.I.—Grieco v. Jackvony, 109 A. 801, 43 R.I. 26.
Tex.—Brown v. Bonougli, 232 S.W. 490, 111 Tex. 275—Ocean Accident & Guaranty Corporation v. May, Com.App., 15 S.W.2d 594, reversing May v. Ocean Accident & Guarantee Corporation, Civ.App., 6 S W.2d 803—Texas Building & Mortgage Co. v. Morris, Civ.App., 123 S. W.2d 365, error dismissed—Lanier v. King, Civ.App., 112 S.W.2d 815—Buttrill v. Occidental Life Ins. Co., Civ.App., 31 S.W.2d 833—Clements v. Texas Co., Civ.App., 273 S.W. 993—W. T. Wilson Grain Co v. Louis Tobian & Co., Civ.App., 247 S.W. 906—Zarate v. Cantu, Civ. App., 225 S.W. 285—Chandler v Riley, Civ.App., 210 S.W. 716.
W.Va.—Wilson v. Fleming, 109 S.E 810, 89 W.Va. 553.
Wyo.—McDonald v. Mulkey, 210 P 940, 29 Wyo. 99—Carstensen v Brown, 185 P. 567, 26 Wyo. 356.
22 C.J. p 137 note 77.

The presumption cannot be extended to a private citizen who attempts to perform the clerk's duty, without any legal obligation to do so.—James v. State, 17 S.W. 432, 21 Tex. App. 353.

Clerk pro tempore

Tex.—Currie v. Dobbs, Civ.App., 10 S.W.2d 438.

Correction of error

(1) A clerk of court, in correcting a clerical error in court records, is presumed to act under the direction of the court.—Fryer v. Lambert, 277 S.W. 48, 169 Ark. 979.

(2) Direction of court in making records generally see Clerks of Court § 39.

70. Iowa.—State v. Pitkin, 114 N.W. 550, 137 Iowa 22.

71. U.S.—Erhardt v. Ballin, N.Y., 150 F. 529, 80 C.C.A. 271.

72. Tex.—Bexar County v. Hatley, 150 S.W.2d 980, modifying Hatley v. Bexar County, Civ.App., 144 S. W.2d 695—Cook v. Nacogdoches County, Civ.App., 147 S.W.2d 943, error dismissed, judgment correct—Broocks v. State, Civ.App., 41 S. W.2d 714, 719 (two cases)—Anderson v. Parsley, Civ.App., 37 S.W. 2d 358, error refused—City Nat. Bank v. Eastland County, Civ.App., 12 S.W.2d 662, modified on other grounds Linz v. Eastland County, Com.App., 39 S.W.2d 599, 77 A.L. R. 1466—White v. Calaway, Civ. App., 282 S.W. 642—Brite v. Atascosa County, Civ.App., 247 S.W. 878.

Fraud not presumed

That unqualified commissioners' court acted fraudulently in accepting unqualified county judge's resignation, then reappointing him, could not be presumed.—State v. Jordan, Tex.Civ.App., 28 S.W.2d 921, error dismissed.

73. Ark.—Hill v. American Book Co., 285 S.W. 20, 171 Ark. 427.
Colo.—Board of Com'rs of Colorado State Soldiers' and Sailors' Home v. Dunlap, 265 P. 94, 83 Colo. 360.
Kan.—Wright v. Federal Reserve Life Ins. Co., 293 P. 945, 131 Kan. 601, certiorari denied 51 S.Ct. 560, 283 U.S. 851, 75 L.Ed. 1459.
Mass.—Ayer v. Cram, 136 N.E. 338, 242 Mass. 30.
Okl.—Concho Washed Sand Co. v. Worthing, 26 P.2d 415, 166 Okl. 105.
Tex.—Anderson v. Parsley, Civ.App., 37 S W.2d 358, error refused.
Wash.—City of Seattle v. Dutton, 265 P. 729, 147 Wash. 224.
22 C.J. p 137 note 80.

74. N.Y.—Noyes v. Erie & Wyoming

bank,[75] city,[76] civil service,[77] corporation,[78] county,[79] court,[80] drainage,[81] education,[82] election,[83] equalization,[84] excise,[85] fish and game,[86] highway,[87] insurance,[88] and has been applied to commis-

Farmers Co-op. Corporation, 22 N.E.2d 334, 281 N.Y. 187, reversing 10 N.Y.S.2d 114, 170 Misc. 42.

75. Mass.—Lowell Co-op. Bank v. Co-operative Central Bank, 191 N.E. 921, 287 Mass. 338.
Mo.—State ex rel. Freeling v. National City Bank of Kansas City, 274 S.W. 945, 220 Mo.App. 474, transferred, see State of Oklahoma ex rel. Freeling v. National City Bank of Kansas City, 267 S.W. 118.
N.C.—Security Nat. Bank (Tarboro Unit) v. Bridgers, 176 S.E. 295, 207 N.C. 91.
Tex.—Shaw v. R. C. Flick Mercantile Co., Civ.App., 26 S.W.2d 1077, error refused.
22 C.J. p 137 note 81.

76. Fla.—National Container Corporation v. State ex rel. Stockton, 189 So. 4, 138 Fla. 32, 122 A.L.R. 1000.
Ky.—Eagle v. City of Corbin, 122 S.W.2d 798, 275 Ky. 808.
Tex.—McKenzie Const. Co. v. City of San Antonio, Civ.App., 50 S.W.2d 349, error refused—San Antonio Fire Fighters' Local Union No. 84 v. Bell, Civ.App., 223 S.W. 506, error refused—Independent Order of Puritans v. Brown, Civ.App., 229 S.W. 939.
22 C.J. p 137 note 82.

77. Cal.—City and County of San Francisco v. Boyd, 110 P.2d 1036—Jones v. O'Toole, 212 P. 9, 190 Cal. 252—Mann v. Tracy, 196 P. 484, 185 Cal. 272—Hackett v. Morse, 188 P. 308, 45 Cal.App. 788.
Ill.—McKenna v. South Park Comrs., 198 Ill.App. 369—People v. Chicago, 127 Ill.App. 118.
N.Y.—Schieffelin v. Lahey, 152 N.E. 690, 243 N.Y. 102, reversing 209 N.Y.S. 915, 213 App.Div. 865, which affirmed 204 N.Y.S. 120, 122 Misc. 358.
Or.—Cole v. City of Portland, 190 P. 720, 96 Or. 645.

78. U.S.—People's Bank of Sanford, N. C. v. Fidelity & Deposit Co. of Maryland, D.C.N.C., 4 F.Supp. 379, affirmed, C.C.A., Fidelity & Deposit Co. of Maryland v. People's Bank, 72 F.2d 932, certiorari denied 55 S.Ct. 348, 293 U.S. 627, 79 L.Ed. 714.
N.C.—Corporation Commission v. Stockholders of Bank of Beulaville, 155 S.E. 445, 199 N.C. 586.
Or.—Umpqua Broccoli Exchange v. Um-Qua Valley Broccoli Growers, 245 P. 324, 117 Or. 678—McIntosh Live Stock Co. v. Buffington, 241 P. 393, 116 Or. 399.
Va.—Virginia Electric & Power Co. v. Commonwealth, 194 S.E. 775, 169 Va. 688.

79. Ga.—Perry v. Bank of Ellijay, 187 S.E. 18, 182 Ga. 768—Bailey v. Miller County, 102 S.E. 178, 24 Ga.App. 746.
Idaho.—Lloyd Corporation v. Bannock County, 25 P.2d 217, 53 Idaho 478.
Ind.—Board of Com'rs of Elkhart County v. Murray, 1 N.E.2d 932, 210 Ind. 186—State v. Richey, 172 N.E. 119, 202 Ind. 116—Hull v. Board of Com'rs of La Porte County, 143 N.E. 589, 195 Ind. 150—Bailey v. Board of Com'rs of Clinton County, 143 N.E. 690, 81 Ind.App. 474—Board of Com'rs of Boone County v. Adler, 133 N.E. 602, 77 Ind.App. 296.
Md.—Gordon v. Commissioners of Montgomery County, 164 A. 676, 164 Md. 210.
Mass.—Larkin v. County Com'rs of Middlesex, 174 N.E. 684, 274 Mass. 437.
Mont.—Hendrickson v. Powell County, 112 P.2d 199—State v. Board of Com'rs of Cascade County, 296 P. 1, 89 Mont. 37—State v. Mills, 261 P. 885, 81 Mont. 86.
N.M.—Zamora v. Archuleta, 10 P.2d 822, 36 N.M. 181.
Okl.—Board of Com'rs of Pottawatomie County v. A. C. Davis & Sons, 86 P.2d 782, 184 Okl. 258—Jackson v. Sadler, 44 P.2d 838, 172 Okl. 56—Tonini & Bramblett v. Board of County Com'rs, 229 P. 263, 100 Okl. 246.
Wash.—Potter v. Whatcom County, 245 P. 11, 138 Wash. 571—State v. Superior Court of Chelan County, 182 P. 962, 108 Wash. 58, error dismissed State of Washington ex rel. McPherson Bros. Co. v. Douglas County, 41 S.Ct. 446, 255 U.S. 566, 65 L.Ed. 789.
Wis.—George A. Peterson Co. v. Iowa County, 191 N.W. 565, 179 Wis. 329.
22 C.J. p 137 note 84.

80. Ga.—Kuttner v. Swanson, 2 S.E.2d 230, 59 Ga.App. 818.

81. U.S.—Royal Oak Drain Dist., Oakland County, v. Keefe, 87 F.2d 786.
Ill.—People v. Schenck, 96 N.E. 864, 252 Ill. 441.

82. N.Y.—People ex rel. Hylan v. Finegan, 176 N.Y.S. 12, 187 App.Div. 937, affirming Hylan v. Finegan, 174 N.Y.S. 45, 105 Misc. 685, reversed on other grounds 125 N.E. 97, 227 N.Y. 219.
Deputy commissioner of education
N.Y.—Cochran v. Levy, 25 N.Y.S.2d 960, 175 Misc. 666.

83. Ark.—McKenzie v. City of De Witt, 121 S.W.2d 71, 196 Ark. 1115.
Miss.—State v. Ratliff, 66 So. 538, 108 Miss. 242.

84. N.Y.—Matter of Webster, 94 N.Y.S. 1050, 106 App.Div. 360, affirmed 79 N.E. 1118, 186 N.Y. 549.
22 C.J. p 138 note 87.

85. Ala.—State v. Montgomery, 59 So. 294, 177 Ala. 212.

86. Cal.—People v. Globe Grain & Milling Co., 294 P. 3, 211 Cal. 121—Bayside Fish Flour Co. v. Zellerbach, 12 P.2d 961, 124 Cal.App. 564.
Vt.—Hazen v. Perkins, 105 A. 249, 92 Vt. 414, 23 A.L.R. 748.

87. U.S.—Liberty Cent. Trust Co. v. Greenbrier College for Women, D.C.W.Va., 50 F.2d 424, affirmed 51 S.Ct. 493, 283 U.S. 800, 75 L.Ed. 1422.
Ariz.—Bone v. Hackett, 185 P. 131, 20 Ariz. 587.
Ill.—People v. Chicago, B. & Q. R. Co., 112 N.E. 278, 273 Ill. 110—O. B. Avery Co., for Use of Allis-Chalmers Mfg. Co., v. Highway Commissioner of Road District No. 8-1, Williamson County, 281 Ill.App. 272, affirmed O. B. Avery Co. v. Highway Commissioner of Road Dist. No. 8-1 in Williamson County, 2 N.E.2d 77, 363 Ill. 279.
La.—Louisiana Highway Commission v. Ferguson, App., 153 So. 342.
N.C.—Town of Newton v. State Highway Commission, 138 S.E. 601, 194 N.C. 159, petition dismissed 139 S.E. 613, 194 N.C. 303—Carlyle v. State Highway Commission, 136 S.E. 612, 193 N.C. 36.
Or.—Fowler v. Gehrke, 111 P.2d 831—Frame v. Arrow Towing Service, 64 P.2d 1312, 155 Or. 522—Rockhill v. Benson, 191 P. 497, 97 Or. 176.
Tex.—Aue v. State, Civ.App., 77 S.W.2d 606.
W.Va.—State Road Commission v. Young, 130 S.E. 478, 100 W.Va. 394.

88. D.C.—Bruckner-Mitchell v. Sun Indemnity Co. of New York, 82 F.2d 434, 65 App.D.C. 178, certiorari denied Sun Indemnity Co. of New York v. Bruckner-Mitchell, Inc., 56 S.Ct. 941, 298 U.S. 677, 80 L.Ed. 1398.
Iowa.—Clausen v. New York Life Ins. Co., 276 N.W. 427, 224 Iowa 803.
Mass.—American Employers' Ins. Co. v. Commissioner of Insurance, 10 N.E.2d 76, 298 Mass. 161—Brest v. Commissioner of Insurance, 169 N.E. 657, 270 Mass. 7.
Pa.—Donaldson v. Fortna, 76 Pa.Super. 403—Commonwealth ex rel. Schnader v. Keystone Indemnity Exchange, 47 Dauph.Co. 7.
Tex.—Lloyds of Texas v. Bobbitt, Civ.App., 40 S.W.2d 897, error dismissed, Com.App., 55 S.W.2d 803—Independent Order of Puritans v. Brown, Civ.App., 229 S.W. 939.
Wash.—Standard F. Ins. Co. v. Fishback, 149 P. 945, 86 Wash. 225.

sioners such as internal revenue,[89] interstate commerce,[90] jury,[91] land,[92] license,[93] motor vehicles,[94] police,[95] prison,[96] public service,[97] radio,[98] railroad,[99] securities,[1] sinking fund,[2] street,[3] street opening,[4] tax,[5] and has been applied to commission-

89. U.S.—R. H. Stearns Co. of Boston, Mass., v. U. S., Ct.Cl., 54 S. Ct. 325, 291 U.S. 54, 78 L.Ed. 647, affirming R. H. Stearns Co. v. U. S., 2 F.Supp. 773, certiorari granted R. H. Stearns Co., Boston, Mass., v. U. S., 54 S.Ct. 56, 290 U. S. 611, 78 L.Ed. 534—Crown Willamette Paper Co. v. McLaughlin, C.C.A.Cal., 81 F.2d 365, certiorari denied 56 S.Ct. 939, 298 U.S. 674, 80 L.Ed. 1396—Page v. Lafayette Worsted Co., C.C.A.R.I., 66 F.2d 339, certiorari denied Lafayette Worsted Co. v. Page, 54 S.Ct. 127, 290 U.S. 692, 78 L.Ed. 596—United Thacker Coal Co. v. Commissioner of Internal Revenue, C.C.A., 46 F. 2d 231—Van Smith Bldg. Material Co. v. Commissioner of Internal Revenue, C.C.A., 44 F.2d 54—Pantages Theater Co. v. Lucas, C.C.A., 42 F.2d 810, certiorari denied Pantages Theater Co. v. Burnet, 51 S. Ct. 102, 282 U.S. 890, 75 L.Ed. 784—Title Insurance & Trust Co. v. Welch, D.C.Cal., 37 F.2d 617—Brooks v. Commissioner of Internal Revenue, C.C.A., 35 F.2d 178—White v. Hood Rubber Co., C.C.A. Mass., 33 F.2d 739, affirming, D.C., Hood Rubber Co. v. White, 28 F.2d 54, and certiorari granted White v. Hood Rubber Co., 50 S.Ct. 67, 280 U.S. 547, 74 L.Ed. 606, reversed on other grounds 50 S.Ct. 215, 280 U.S. 453, 74 L.Ed. 542.

Pa.—Hannum v. New Amsterdam Casualty Co., 5 A.2d 365, 333 Pa. 397.

Signature of the commissioner, although written by another, is presumed to have been personally authorized by the commissioner.—Stern Bros. & Co. v. Burnet, C.C.A., 51 F. 2d 1042—United Thacker Coal Co. v. Commissioner of Internal Revenue, C.C.A., 46 F.2d 231—Trustees for Ohio & Big Sandy Coal Co. v. Commissioner of Internal Revenue, C.C. A., 43 F.2d 782—Pantages Theater Co. v. Lucas, C.C.A., 42 F.2d 810, certiorari denied Pantages Theater Co. v. Burnet, 51 S.Ct. 102, 282 U.S. 890, 75 L.Ed. 784.

90. U.S.—Great Northern Ry. Co. v. Sullivan, C.C.A.Minn., 72 F.2d 587, certiorari granted 55 S.Ct. 216, 293 U.S. 551, 79 L.Ed. 654, reversed on other grounds 55 S.Ct. 472, 294 U.S. 458, 79 L.Ed. 992—Chicago, M., St. P. & P. R. Co. v. Hedges, D.C.Wash., 5 F.Supp. 752.

22 C.J. p 138 note 92.

91. Ky.—Louisville, H. & St. L. R. Co. v. Schwab, 105 S.W. 110, 127 Ky. 82, 31 Ky.L. 1313.

22 C.J. p 138 note 93.

Presumption of regularity of selection and making up of jury list in general see the C.J.S. title Juries § 163, also 35 C.J. p 268 note 1.

92. Ark.—Craft v. Armstrong, 141 S.W.2d 39, 200 Ark. 681.

Iowa.—Fulton v. Sherman, 238 N.W. 88, 212 Iowa 1218.

Miss.—Bousquet v. Brown, 119 So. 166, 152 Miss. 171.

Tex.—Weatherly v. Jackson, 71 S.W. 2d 259, 123 Tex. 213, reversing, Civ.App., 46 S.W.2d 1030—MacRae v. MacRae, Civ.App., 144 S.W.2d 320, error refused—De Grazier v. Panell Oil Corporation, Civ.App., 109 S.W.2d 1109, error dismissed—Humble Oil & Refining Co. v. State, Civ.App., 104 S.W.2d 174, error refused—Lewis v. Heath, Civ. App., 12 S.W.2d 641, error dismissed—Southwestern Settlement & Development Co. v. Village Mills Co., Civ.App., 245 S.W. 975.

Wash.—Paine v. State, 286 P. 89, 156 Wash. 31.

22 C.J. p 138 note 94.

93. N.Y.—Message Photo-Play Co. v. Bell, 166 N.Y.S. 338, 179 App. Div. 13, reversing 167 N.Y.S. 129, 100 Misc. 267—Rudack v. Valentine, 295 N.Y.S. 976, 163 Misc. 326, affirmed 10 N.E.2d 577, 274 N.Y. 615.

94. Conn.—Salt's Textile Mfg. Co. v. Ghent, 139 A. 694, 107 Conn. 211.

95. Cal.—Irwin v. City of Los Angeles, 39 P.2d 851, 3 Cal.App.2d 495.

Mo.—State v. Burney, 191 S.W. 981, 269 Mo. 602.

N.Y.—Rudack v. Valentine, 295 N. Y.S. 976, 163 Misc. 326, affirmed 10 N.E.2d 577, 274 N.Y. 615.

96. Ga.—Johnson v. Walls, 194 S.E. 380, 185 Ga. 177.

97. U.S.—New York Telephone Co. v. Prendergast, D.C.N.Y., 11 F.2d 162.

Ind.—In re Northwestern Indiana Telephone Co., 171 N.E. 65, 201 Ind 667.

Md.—Gregg v. Laird, 87 A. 1111, 121 Md. 1.

Mont.—City of Baker v. Montana Petroleum Co., 44 P.2d 735, 99 Mont. 465.

N.Y.—McGettigan v. New York Cent. R. Co., 196 N.E. 745, 268 N.Y. 66, 99 A.L.R. 283, affirming 275 N.Y.S. 1006, 242 App.Div. 897—Whalen v. New York Central R. Co., 196 N.E. 745, 268 N.Y. 66, 99 A.L.R. 283, affirming 275 N.Y.S. 1007, 242 App. Div. 897—Canfield v. New York Central R. Co., 196 N.E. 745, 268 N.Y. 66, 99 A.L.R. 283, affirming 275 N.Y.S. 1008, 242 App.Div. 897—Earl Carroll Realty Corporation v. New York Edison Co., 252 N.Y. S. 538, 141 Misc. 266—Hudson Valley Ry. Co. v. United Transp. Co., 217 N.Y.S. 614, 127 Misc. 841.

Or.—Anderson v. Thomas, 26 P.2d 60, 144 Or. 572.

98. U.S.—U. S. v. American Bond & Mortgage Co., D.C.Ill., 31 F.2d 448, affirmed, C.C.A., American Bond & Mortgage Co. v. U. S., 52 F.2d 318, certiorari denied 52 S.Ct. 311, 285 U.S. 538, 76 L.Ed. 931.

99. U.S.—Thompson v. Consolidated Gas Utilities Corporation, Tex., 57 S.Ct. 364, 300 U.S. 55, 81 L.Ed. 510, affirming, D.C., Consolidated Gas Utilities Corporation v. Thompson, 14 F.Supp. 318.

Ala.—T. R. Miller Mill Co. v. Louisville & N. R. Co., 92 So. 797, 207 Ala. 253.

Cal.—Western Canal Co. v. Railroad Commission, 15 P.2d 853, 216 Cal. 639, certiorari denied Western Canal Co. v. Railroad Commission of State of California, 53 S.Ct. 688, 289 U.S. 742, 77 L.Ed. 1489—People v. Henry, 21 P.2d 672, 131 Cal.App. 82—Coulter v. Sausalito Bay Water Co., 10 P.2d 780, 122 Cal.App. 480.

Mont.—Doney v. Northern Pac. Ry. Co., 199 P. 432, 60 Mont. 209.

Neb.—State v. Mann, 261 N.W. 173, 129 Neb. 195.

Tex.—Railroad Commission of Texas v. Houston Chamber of Commerce, 78 S.W.2d 591, 124 Tex. 375, affirming Houston Chamber of Commerce v. Railroad Commission of Texas, Civ.App., 19 S.W.2d 583—Culver v. Smith, Civ.App., 74 S.W. 2d 754, error refused—Texas Motor Coaches v. Railroad Commission, Civ.App., 59 S.W.2d 923, affirmed Texas Motor Coaches v. Railroad Commission of Texas, 73 S.W.2d 511, 123 Tex. 517—Texas Motor Coaches v. Railroad Commission, Civ.App., 41 S.W.2d 1074.

22 C.J. p 138 note 98.

1. Mich.—Bowman v. Myers, 217 N. W. 916, 241 Mich. 642.

Pa.—Mazzoleni v. Transamerica Corporation, 169 A. 127, 313 Pa. 317.

2. S.C.—Nicholson v. Villepegue, 74 S.E. 506, 91 S.C. 231.

3. Minn.—Kobs v. Minneapolis, 22 Minn. 159.

4. N.Y.—In re Avenue between Ft. Washington and Haven Aves., 138 N.Y.S. 107, 153 App.Div. 164

5. U.S.—Utah Power & Light Co. v. Pfost, Idaho, 52 S.Ct. 548, 286 U.S. 165, 76 L.Ed. 1038, affirming, D.C., 54 F.2d 803.

Ind.—Baltimore & O. S. W. R. Co. v. Oregon Turnp. Co. of Clark

ers such as water,[6] and zoning[7] commissioners; a commissioner of the general land office,[8] commissioners in partition proceedings,[9] commissioners of public works,[10] and commissioners to take testimony;[11] comptrollers;[12] and constables,[13] except that the presumption does not attach to the acts of a constable in distraint proceedings for rent until after the appraisement is made, since until that time he acts merely as the landlord's agent.[14]

The presumption has also been applied as to the official acts of coroners;[15] a county court;[16] county officers,[17] such as county attorneys,[18] auditors,[19]

County, 84 N.E. 529, 170 Ind 300, affirming, App., 81 N.E. 105.

S.C.—Wingfield v. South Carolina Tax Commission, 144 S.E. 846, 147 S.C. 116.

6. Cal.—Livingstone v. MacGillivray, 36 P.2d 622, 1 Cal.2d 546—Wehrle v. Board of Water and Power Com'rs of Los Angeles, 293 P. 67, 211 Cal. 70.

Colo.—Commonwealth Irr. Co. v. Rio Grande Canal Water Users' Ass'n, 45 P.2d 622, 96 Colo. 478.

N.Y.—Board of Hudson River Regulating Dist. v. Fonda, J. & G. R. Co., 217 N.Y.S. 781, 127 Misc. 866 affirmed 228 N.Y.S. 686, 223 App. Div. 358, modified on other grounds 164 N.E. 541, 249 N.Y. 445, amendment of remittitur granted 166 N.E. 324, 250 N.Y. 559.

7. Cal.—Rehfeld v. City and County of San Francisco, 21 P.2d 419, 218 Cal. 83.

Conn.—Strain v. Mims, 193 A. 754, 123 Conn. 275.

A zoning commission is presumed to act with fair and proper motives, skill and sound judgment.—Strain v. Mims, supra.

8. Tex.—Short v. W. T. Carter & Bro., 126 S.W.2d 953, 133 Tex. 202, reversing Sessums v. W. T. Carter & Bro., Civ.App., 121 S.W.2d 486, appeal dismissed W. T. Carter & Bros. v. Short, 60 S.Ct. 140, 308 U.S. 513, 84 L.Ed. 438—Sawyer v. Robison, 268 S.W. 151, 114 Tex. 437—Clements v. Robinson, 239 S.W.902, 111 Tex. 449—Gulf Production Co. v. State, Civ.App., 231 S.W. 124, error refused—Buchanan v. Barnsley, 112 S.W. 118, 51 Tex. Civ.App. 253.

Presumption of grant

Ruling of commissioner of general land office that land is privately owned raises presumption of a valid grant in view of the presumption that a public official rightly performs his duty.—Anderson v. Polk, 297 S.W. 219, 117 Tex. 73, affirming, Civ.App., 291 S.W. 1112.

9. Ind.—Long v. Schowe, 103 N.E. 785, 181 Ind. 13.

Presumption of regularity of proceedings of partition commissioners in general see the C.J.S. title Partition § 161, also 47 C.J. p 510 notes 42–44.

10. Ill.—Roemheld v. Chicago, 131 Ill.App. 76, affirmed 83 N.E. 391, 231 Ill. 467.

N.Y.—Culp v. New York, 130 N.Y.S. 705, 146 App.Div. 326.

11. Ga.—Scott v. McDaniel, 64 Ga. 780.

22 C.J. p 138 note 7.

12. U.S.—Taylor v. Spurway, C.C.A. Fla., 72 F.2d 97—Amos v. Trust Co. of Florida, C.C.A.Fla., 54 F.2d 286, certiorari denied Illick v. Trust Co. of Florida, 52 S.Ct. 458, 285 U.S. 559, 76 L.Ed. 947.

13. U.S.—Irby v. Corey, C.C.A.Miss., 95 F.2d 963.

R.I.—McDonald v. Brown, 199 A. 750, 61 R.I. 40.

22 C.J. p 138 note 8.

14. Pa.—Murphy v. Chase, 103 Pa. 260—Fahrer v. Blumenthal, 190 A. 206, 125 Pa.Super. 568—American Seating Co. v. Murdock, 169 A. 250, 111 Pa.Super. 242—Pittsburgh Store Fixture & Equipment Co. v. Panelas, 167 A. 430, 110 Pa.Super. 16—Peerless Soda Fountain Service Co. v. Walsh, 160 A. 149, 105 Pa.Super. 71—Sookiasian v. Swift & Co., 100 Pa.Super. 69—Davis v. Commonwealth Trust Co., 45 Dauph.Co. 16.

36 C.J. p 572 note 88.

Constable begins to act as officer of law when appraisement is required and presumption of regularity attaches as to all steps in proceedings from then on including appraisement and sale, although presumption is rebuttable.—Mortgage Building & Loan Ass'n v. J. B. Van Sciver & Co., 155 A. 920, 304 Pa. 408—American Seating Co. v. Murdock, 169 A. 250, 111 Pa.Super. 242—Pittsburgh Store Fixture & Equipment Co. v. Panelas, 167 A. 430, 110 Pa.Super. 16.

Distress by public officer as agent of landlord generally see the C.J.S. title Landlord and Tenant § 689, also 36 C.J. p 572 note 87.

15. Cal.—Huntly v. Zurich General Accident & Liability Ins. Co., 280 P. 163, 100 Cal.App. 201.

22 C.J. p 138 note 9.

16. Ark.—West Twelfth St. Road Imp. Dist. No. 30 v. Kinstley, 63 S.W.2d 980, 188 Ark. 77.

Mo.—Little Prairie Special Road Dist. v. Pemiscot County, 249 S.W. 599, 297 Mo. 568—State ex rel. Kersey v. Sims, App., 286 S.W. 832, transferred, see 274 S.W. 359, 309 Mo. 18.

Or.—Latourette v. County Court of Clackamas County, 281 P. 182, 131 Or. 168.

Presumption as to regularity of judicial proceedings see supra § 145.

17. U.S.—Odland v. Findley, D.C. Ohio, 38 F.Supp. 563.

Cal.—Paton v. Teeter, 99 P.2d 699, 37 Cal.App.2d 477.

Fla.—Volusia County v. State, 125 So. 375, 98 Fla. 1166, rehearing denied 125 So. 813, 98 Fla. 1166.

Ky.—Pike County v. Day and Night Nat. Bank of Pikeville, 32 S.W.2d 969, 236 Ky. 202.

Mont.—Gagnon v. Jones, 62 P.2d 683, 103 Mont. 365.

N.Y.—Town of Irondequoit v. Monroe County, 11 N.Y.S.2d 933, 171 Misc. 125.

S.C.—Bruner v. Smith, 198 S.E. 184, 188 S.C. 75.

Tenn.—Macon County v. Dixon, 100 S.W.2d 5, 20 Tenn.App. 425.

22 C.J. p 138 note 10.

Fiscal officers

Tex.—White v. Calaway, Civ.App., 282 S.W. 642.

18. Ariz.—Pinal County v. Nicholas, 179 P. 650, 20 Ariz. 243.

Ky.—McCracken Fiscal Court v. McFadden, 122 S.W.2d 761, 275 Ky. 819.

Mont.—Hyde v. Mineral County, 236 P. 248, 73 Mont. 363—State Bank of Outlook v. Sheridan County, 230 P. 1097, 72 Mont. 1.

Tex.—Fort Worth & D. C. Ry. Co. v. State, Civ.App., 275 S.W. 111, error dismissed 47 S.Ct. 589, 274 U.S. 718, 71 L.Ed. 1323.

Vt.—Ryan v. Orient Ins. Co., 119 A. 423, 96 Vt. 291.

19. Cal.—Birch v. Monroe, 234 P. 125, 70 Cal.App. 656.

Ind.—Paul v. Walkerton Woodlawn Cemetery Ass'n, 184 N.E. 537, 204 Ind. 693—Van Der Veer v. State, 165 N.E. 265, 97 Ind.App. 1—Board of Com'rs of Boone County v. Adler, 133 N.E. 602, 77 Ind.App. 296.

Ohio.—State v. Zangerle, 134 N.E. 686, 103 Ohio St. 566.

22 C.J. p 138 note 11.

and clerks;[20] a court stenographer or reporter;[21] a department of public works;[22] deputies of clerks of court,[23] or sheriffs,[24] and of a surveyor-general;[25] district attorneys;[26] election officers,[27] such as judges of election;[28] executive heads of departments of the United States,[29] and their assistants;[30] a fiscal court;[31] governors of states;[32] the gov-

20. U.S.—In re Toggery, Inc., D.C. Tex., 60 F.2d 311, affirmed, C.C.A., Kokernot-Nixon Properties v. Wright, 68 F.2d 317.
Cal.—Hind v. Uchida Trading Co., 203 P. 1028, 55 Cal.App. 260.
Ill.—People ex rel. Smith v. Wabash Ry. Co., 35 N.E.2d 325, 377 Ill. 68—Jackson Park Hospital Co. v. Courtney, 4 N.E.2d 864, 364 Ill. 497—People v. Chicago, R. I. & P. Ry. Co., 160 N.E. 841, 329 Ill. 467.
Ind.—Rodman v. Rodman, 54 Ind. 444.
Kan.—Burke v. State Board of Canvassers, 107 P.2d 773, 152 Kan. 826, 132 A.L.R. 356.
Ky.—Walker v. Horton, 118 S.W.2d 781, 274 Ky. 310—Livingston County v. Dunn, 51 S.W.2d 450, 244 Ky 460.
Tex.—Howth v. Taliaferro, Civ.App., 289 S.W. 119—Decatur Land, etc., Co. v. Rutland, Civ.App., 185 S.W. 1064.

21. Iowa.—Wilmot First Nat. Bank v. Eichmeier, 133 N.W. 454, 153 Iowa 154—Manatt v. Scott, 76 N.W. 717, 106 Iowa 203, 68 Am.S.R. 293.
La.—Deblieux v. Travelers' Ins. Co., 164 So. 244, 183 La. 455.
Mo.—Vessels v. Kansas City Light & Power Co., 219 S.W. 80.

22. Mass.—General Outdoor Advertising Co. v. Department of Public Works, 193 N.E. 799, 289 Mass. 149, appeal dismissed General Outdoor Advertising Co. v. Callahan, 56 S.Ct. 495, 297 U.S. 725, 80 L.Ed. 1008, General Outdoor Advertising Co. v. Hoar, 56 S.Ct. 495, 297 U.S. 725, 80 L.Ed. 1008, and Brink v. Callahan, 56 S.Ct. 496, 297 U.S. 725, 80 L.Ed. 1008.
Wash.—Puget Sound Nav. Co. v. Director and Supervisors of Public Works of Washington, 278 P. 189, 152 Wash. 417.

23. Ky.—Slater v. Hatfield, 242 S.W. 618, 195 Ky. 281—Conner v. Parsley, 234 S.W. 972, 192 Ky 827.
N.Y.—Miller v. Lewis, 4 N.Y. 554—Vose v. Conkling, 134 N.Y.S. 718, 75 Misc. 13.

24. Ind.—Hitt v. Carr, 130 N.E. 1, 77 Ind.App. 488.
La.—Gamburg v. Ray, 120 So. 480, 167 La. 865.
Tex.—Graves v. Buzbee, Civ.App., 45 S.W.2d 392.
22 C.J. p 138 note 15.

De facto deputy

The presumption of regularity attaches with reference to a de facto deputy sheriff's acts, without proof of his appointment by official record.—Mosher v. McDonald, 102 N.W. 837, 128 Iowa 68.

25. Or.—Barnhart v. Ehrhart, 54 P. 195, 33 Or. 274.

26. U.S.—McKay v. Rogers, C.C.A. Okl., 82 F.2d 795—Forbes v. U. S., C.C.A.Ala., 268 F. 273, affirming, D.C., U. S. v. Forbes, 259 F. 585.
Ark.—State v. Pollard, 286 S.W. 811, 171 Ark. 607.
Cal.—Shepard v. Mace, 82 P. 1046, 148 Cal. 270—Adamson v. Los Angeles County, 198 P. 52, 52 Cal.App. 125.
Tex.—Adamson v. Connally, Civ.App., 112 S.W.2d 287.

Uprightness and rectitude

As against charges of wrongdoing on the part of a district attorney, there is a presumption of uprightness and rectitude which commonly characterize the conduct of men in public station.—Attorney General v. Tufts, 132 N.E. 322, 239 Mass. 458, 17 A.L.R. 274.

Assistant state's attorney

Conn.—State v. Mills, 121 A. 561, 99 Conn. 217, 36 A.L.R. 500.

27. Ark.—McKenzie v. City of De Witt, 121 S.W.2d 71, 196 Ark. 1115—Cain v. Carl-Lee, 277 S.W. 551, 169 Ark. 887.
Cal.—Mead v. City of Los Angeles, 197 P. 65, 185 Cal. 422.
Colo.—Baldauf v. Gunson, 8 P.2d 265, 90 Colo. 243—Bullington v. Grabow, 298 P. 1059, 88 Colo. 561.
Fla.—Peacock v. Roberts, 195 So. 914, 142 Fla. 701.
Ill.—MacGuidwin v. South Park Com'rs, 164 N.E. 208, 333 Ill. 58.
Ind.—Roberts v. Drake, 185 N.E. 285, 205 Ind. 425.
Ky.—Watts v. Bowen, 63 S.W.2d 917, 250 Ky. 678—Howard v. Unthank, 26 S.W.2d 532, 233 Ky. 579—Lippold v. Hagner, 10 S.W.2d 619, 226 Ky. 103—Bingham v. Johnson, 237 S.W. 1077, 193 Ky. 753.
La.—Le Blanc v. Primeaux, App., 2 So.2d 274.
Mass.—Talbot v. Registrars of Voters of Somerset, 183 N.E. 735, 281 Mass. 284—Independent-Progressive Party v. Secretary of Commonwealth of Massachusetts, 164 N.E. 654, 266 Mass. 18.
Nev.—State v. Daugherty, 231 P. 384, 48 Nev. 299.
N.Y.—Maisel v. Cohen, 22 N.Y.S.2d 490, affirmed 22 N.Y.S.2d 199, 259 App.Div. 1086, reargument denied 22 N.Y.S.2d 464, 259 App.Div. 1117—In re Bewley, 245 N.Y.S. 105, 138 Misc. 108.
N.D.—McDonald v. Koths, 249 N.W. 706, 63 N.D. 716.
Or.—State ex rel. Brown v. Bailey, 51 P.2d 671, 151 Or. 496—In re Riggs, 210 P. 217, 105 Or. 531.
Pa.—In re Election Contest for Office of Burgess of Borough of Ellwood City, 133 A. 379, 286 Pa. 257—In re Brookville's Election, 5 Pa. Dist. & Co. 54, 15 Mun.L.R. 77.
S.C.—Gardner v. Blackwell, 166 S.E. 338, 167 S.C. 313.
Tex.—City of Richmond v. Allred, 71 S.W.2d 233, 123 Tex. 365—Lewis v. Crump, Civ.App., 34 S.W.2d 616.
22 C.J. p 138 note 18—20 C.J. p 238 note 50.
Presumption as to validity of acts of election officers generally see Elections § 274.

28. Ill.—Boland v. City of La Salle, 19 N.E.2d 177, 370 Ill. 387—Rogers v. Meade, 2 N.E.2d 924, 363 Ill. 630—Clarke v. Bettenhausen, 129 N.E. 803, 296 Ill. 373.
N.M.—Zamora v. Archuleta, 10 P.2d 822, 36 N.M. 181.
Tex.—Kartes v. Fritter, Civ.App., 63 S.W.2d 389.
Utah.—Evans v. Reiser, 2 P.2d 615, 78 Utah 253, rehearing denied 3 P.2d 253, 78 Utah 307.

29. U.S.—Sabin v. U. S., Ct.Cl., 44 F.2d 70—Ex parte Kurth, D.C. Cal., 28 F.Supp. 258, appeal dismissed Kurth v. Carr, C.C.A., 106 F.2d 1003.

30. U.S.—Bowling v. U. S., C.C.A. Okl., 299 F. 438.

31. Ky.—Fidelity & Casualty Co. of New York v. Breathitt County, 123 S.W.2d 250, 276 Ky. 173—Durrett Const. Co. v. Caldwell County, 244 S.W. 409, 196 Ky. 158.

Reading of minutes

Where record of meetings of fiscal court, held on different days without sine die adjournment, were legally approved and signed at last meeting, reading and approval of minutes at each separate meeting is conclusively presumed.—Walker v. Fox, 287 S.W. 228, 216 Ky. 33.

32. Ala.—Kelley v. State, App., 200 So. 115—Smith v. State, 129 So. 681, 24 Ala.App. 15.
Ariz.—Ison v. Western Vegetable Distributors, 59 P.2d 649, 48 Ariz. 104.
La.—State ex rel. Covington v. Hughes, 102 So. 824, 157 La. 652.
Mass.—Prescott v. Secretary of Commonwealth, 12 N.E.2d 462, 299 Mass. 191.
Minn.—State v. McMasters, 283 N.W. 767, 204 Minn. 438.
Miss.—Wood v. State, 142 So. 747, 169 Miss. 790—Trotter v. Frank P. Gates & Co., 139 So. 843, 162 Miss. 569.
Ohio.—State ex rel. Davey v. Owen,

ernor-general of the Philippines;[33] guardians;[34] immigration officers;[35] and internal revenue officers.[36]

The presumption of regularity has also been applied to the official acts of judges,[37] quasi-judicial officers,[38] justices of the peace,[39] and other magistrates;[40] a marshal;[41] a master in chancery;[42] the mayor of a city[43] and other municipal officers;[44]

12 N.E.2d 144, 133 Ohio St. 96, 114 A.L.R. 686.
Okl.—Davis v. Childers, 74 P.2d 930, 181 Okl. 468.
R.I.—Carpenter v. Comery, 121 A. 538, 45 R.I. 266.
S.C.—Bruner v. Smith, 198 S.E. 184, 188 S.C. 75.
Tex.—Ex parte Roselle, Civ.App., 222 S.W. 248—Ex parte Pinkus, 25 S.W.2d 334, 114 Tex.Cr. 326—Ex parte Wells, 298 S.W. 904, 108 Tex.Cr. 57.
22 C.J. p 138 note 19.

Making appointments

(1) The court will assume that the governor, making appointments to public office, intended only to do what he was authorized to do by the statutes and constitution.—People v. Scott, 120 P. 126, 52 Colo. 59.

(2) The court should presume that governor would choose honest, intelligent, and competent commissioners to sit on industrial commission, and that he would exercise power of removal of commissioners not possessing such qualification.—Ison v. Western Vegetable Distributors, 59 P.2d 649, 48 Ariz. 104.

Reason for action

When authority is vested in governor to act for certain reason, and he does act, assigning such reason, existence thereof is conclusively presumed, unless statute provides for its judicial determination.—Lee v. Morley, 247 P. 178, 79 Colo. 481.

Veto

Every intendment favors constitutionality of governor's veto.—Texas Co. v. State, 254 P. 1060, 31 Ariz. 485, 53 A.L.R. 258.

33. U.S.—Jover Costas v. Philippine Islands Insular Govt., Philippine Islands, 31 S.Ct. 664, 221 U.S. 623, 55 L.Ed. 884.

34. Kan.—Winfield First Nat. Bank v. Bangs, 136 P. 915, 91 Kan. 54, 140 P. 896, 92 Kan. 270.
La.—Wood v. Frickie, 45 So. 96, 120 La. 180.
Mass.—Cassidy v. Truscott, 192 N.E. 164, 287 Mass. 515.

Guardian ad litem

Presumption exists that guardian ad litem appointed for infant defendant was not guilty of negligence, inattention to duties, or any other improper action.—Spotts v. Spotts, 55 S.W.2d 977, 331 Mo. 917, 87 A.L.R. 660.

35. U.S.—U. S. v. Feldman, N.Y., 247 F. 482, 159 C.C.A. 536.

In case of deportation

U.S.—U. S. ex rel. Hudak v. Uhl, D.C. N.Y., 20 F.Supp. 928, affirmed, C.C.A., 96 F.2d 1023.

36. U.S.—Duffin v. Lucas, C.C.A.Ky., 55 F.2d 786, certiorari denied 53 S.Ct. 14, 287 U.S. 611, 77 L.Ed. 531.
N.Y.—Port Washington Nat. Bank & Trust Co. v. Hartford Fire Ins. Co., 300 N.Y.S. 874, 253 App.Div. 760.

Collector of internal revenue

U.S.—Atlantic Refining Co. v. U. S., Ct.Cl., 44 F.2d 101—Daniel Reeves, Inc., v. Anderson, C.C.A.N.Y., 43 F.2d 679, affirming, D.C., Regla Coal Co. v. Bowers, 37 F.2d 373, and certiorari granted Daniel Reeves, Inc., v. Anderson, 51 S.Ct. 83, 282 U.S. 825, 75 L.Ed. 736, affirmed Graham v. Goodcell, 51 S.Ct. 186, 282 U.S. 409, 75 L.Ed. 415, followed in Jennings v. Anderson, C.C.A.N.Y., 43 F.2d 683, certiorari granted 51 S.Ct. 91, 282 U.S. 833, 75 L.Ed. 741, affirmed Graham v. Goodcell, 51 S.Ct. 186, 282 U.S. 409, 75 L.Ed. 415.

Findings and practice of the administrative officers of the internal revenue department are presumed to be based on fair conclusions as the result of the investigation required of them.—Baltimore Talking Board Co. v. Miles, C.C.A.Md., 280 F. 658, affirming, D.C., 273 F. 531, certiorari denied 42 S.Ct. 590, 259 U.S. 587, 66 L.Ed. 1077.

37. Ariz.—Payne v. Williams, 56 P.2d 186, 47 Ariz. 396.
Ky.—Laswell v. Cooper, 99 S.W.2d 709, 266 Ky. 524—Evans v. Johnson Fiscal Court, 241 S.W. 66, 194 Ky. 849.
Mont.—Burgess v. Lasby, 9 P.2d 164, 91 Mont. 482.
22 C.J. p 138 note 23.
Presumption of regularity with regard to judicial proceedings see supra § 145.

38. U.S.—Paramino Lumber Co. v. Marshall, D.C.Wash., 18 F.Supp. 645, affirmed, C.C.A., 95 F.2d 203, certiorari denied 59 S.Ct. 63, 305 U.S. 603, 83 L.Ed. 382.
Ark.—State ex rel. Attorney General v. Broadaway, 93 S.W.2d 1248, 192 Ark. 634.

Deputy commissioner under Longshoremen's Compensation Act as quasi-judicial officer.—Paramino Lumber Co. v. Marshall, D.C.Wash., 18 F.Supp. 645, affirmed, C.C.A., 95 F.2d 203, certiorari denied 59 S.Ct. 63, 305 U.S. 603, 83 L.Ed. 382.

39. U.S.—Mexican Gulf Oil Co. v. Compania Transcontinental De Petroleo, S. A., D.C.N.Y., 281 F. 148, affirmed, C.C.A., Compania Transcontinental De Petroleo, S. A., v. Mexican Gulf Oil Co., 292 F. 846.
Ga.—Guthrie v. Gaskins, 155 S.E. 185, 171 Ga. 303.
Tex.—Ætna Casualty & Surety Co. v. Love, 121 S.W.2d 986, 132 Tex. 280, affirming Love v. Ætna Casualty & Surety Co., Civ.App., 99 S.W.2d 646.
22 C.J. p 138 note 24.

40. Cal.—Barlow v. Frink, 152 P. 290, 171 Cal. 165.
22 C.J. p 139 note 25.

41. U.S.—Murray v. Hoboken Land, Improvement Co., N.J., 18 How. 272, 15 L.Ed. 372—Cravens v. U. S., C.C.A.Mo., 62 F.2d 261, certiorari denied 53 S.Ct. 594, 289 U.S. 733, 77 L.Ed. 1481—Johnson v. U. S., 247 F. 92, 159 C.C.A. 310.
Ky.—Town of Hodgenville v. Gainesboro Telephone Co., 35 S.W.2d 888, 237 Ky. 419.

Fire marshal is presumed to have acted honestly and fairly in ordering revocation of license to store petroleum products.—Standard Oil Co. of New York v. Commissioner of Public Safety for Commonwealth, 174 N.E. 213, 274 Mass. 155.

42. Ill.—Barnes v. Swedish American Nat. Bank of Rockford, 19 N.E.2d 929, 371 Ill. 20.

Presumption overcome

Presumption of law that master in chancery performed his duty as to giving notice in connection with sale of land in partition cannot prevail over proof furnished by master's affidavit to contrary.—Barnes v. Swedish American Nat. Bank of Rockford, supra.

43. Ala.—Green v. State ex rel. Bradford, 193 So. 312, 238 Ala. 659.
Mass.—Curtis v. City of Boston, 132 N.E. 181, 239 Mass. 401.
Mo.—Aurora Water Co. v. Aurora, 31 S.W. 946, 129 Mo. 540.
S.D.—State v. Eastcott, 220 N.W. 613, 53 S.D. 191.
Tex.—State v. City of McAllen, Civ.App., 56 S.W.2d 297, reversed on other grounds 91 S.W.2d 688, 127 Tex. 63.
22 C.J. p 139 note 27.

Acting mayor

Mo.—Deming v. City of Springfield, App., 224 S.W. 1004.

44. U.S.—Yardley v. Houghton Mifflin Co., C.C.A.N.Y., 108 F.2d 28, affirming, D.C., 25 F.Supp. 361, and certiorari denied 60 S.Ct. 891, 309 U.S. 686, 84 L.Ed. 1029—Federal Reserve Bank v. Panama City, C.C.A.Fla., 87 F.2d 677—City of Sedalia ex rel. and to Use of Ferguson v. Shell Petroleum Corpora-

military officers;[45] milk inspectors;[46] notaries public;[47] officers of the United States government,[48]

tion, C.C.A.Mo., 81 F.2d 193, 106 A.L.R. 1327.
Ala.—Green v. State ex rel. Bradford, 193 So. 312, 238 Ala. 659—Pilcher v. City of Dothan, 93 So. 16, 207 Ala. 421.
Ariz.—Wise v. First Nat. Bank, 65 P.2d 1154, 49 Ariz. 146.
Cal.—Los Angeles Athletic Club v. City of Long Beach, 17 P.2d 1061, 128 Cal.App. 427—Ex parte West, 243 P. 55, 75 Cal.App. 591.
Conn.—Viggiana v. Connecticut Co., 191 A. 95, 122 Conn. 514.
Fla.—State ex rel. Harper v. McDavid, 200 So. 100, 133 A.L.R. 360—Higbee v. Housing Authority of Jacksonville, 197 So. 479, 143 Fla. 560—State ex rel. Harris v. City of Fort Pierce, 149 So. 338, 111 Fla. 174.
Ill.—Stone v. Board of Review of Pike County, 188 N.E. 430, 354 Ill. 286—South East Nat. Bank of Chicago v. Board of Education of City of Chicago, 18 N.E.2d 584, 298 Ill.App. 92—South East Nat. Bank of Chicago v. Board of Education of City of Chicago, 18 N.E.2d 599, 298 Ill.App. 621—South East Nat. Bank of Chicago v. Board of Education of City of Chicago, 18 N.E.2d 601, 298 Ill.App. 621—South East Nat. Bank of Chicago v. Board of Education of City of Chicago, 18 N.E.2d 602, 298 Ill.App. 621—South East Nat. Bank of Chicago v. Board of Education of City of Chicago, 18 N.E.2d 603, 298 Ill.App. 621—People ex rel. Anderson v. Village of Bradley, Kankakee County, 6 N.E.2d 240, 288 Ill.App. 162, reversed on other grounds People ex rel. Anderson v. Village of Bradley, 11 N.E.2d 415, 367 Ill. 301.
Ind.—Board of Trustees of Firemen's Pension Fund v. State ex rel. Stuck, 194 N.E. 623, 208 Ind. 117.
Iowa.—Weiss v. Incorporated Town of Woodbine, 295 N.W. 873.
Ky.—Callis v. Brown, 142 S.W.2d 675, 283 Ky. 759—Moss v. Andrews Asphalt Paving Co., 17 S.W.2d 255, 229 Ky. 419—Stolzy v. City of Henderson, 8 S.W.2d 629, 225 Ky. 358—Wallace v. City of Louisa, 273 S.W. 720, 217 Ky. 419—Johnson County Gas Co. v. Stafford, 248 S.W. 515, 198 Ky. 208.
Mass.—Coleman v. Louison, 5 N.E.2d 46, 296 Mass. 210—Curtis v. City of Boston, 132 N.E. 181, 239 Mass. 401.
Mich.—Michigan Gas & Electric Co. v. City of Dowagiac, 262 N.W. 762, 273 Mich. 153.
Mo.—Wiget v. City of St. Louis, 85 S.W.2d 1038, 337 Mo. 799, 100 A.L.R. 1284—Jacobs v. Waldron, 298 S.W. 773, 317 Mo. 1133—State ex rel. Rawlings v. Kansas City, 250 S.W. 927, 213 Mo.App. 349—Martin v. Kansas City, App., 224 S.W. 141—Roy v. Kansas City, 224 S.W. 132, 204 Mo.App. 332.
Nev.—State v. Board of Com'rs of City of Las Vegas, 1 P.2d 570, 53 Nev. 364.
N.J.—Hamill v. City of Clifton, 160 A. 882, 10 N.J.Misc. 843—Anderson v. Weehawken Tp. in Hudson County, 118 A. 208, 97 N.J.Law 371.
N.M.—Ellis v. New Mexico Const. Co., 201 P. 487, 27 N.M. 312
Ohio.—City of East Cleveland v. Wald, 133 N.E. 798, 103 Ohio St. 373—Boenke v. Cincinnati St. Ry. Co., 10 N.E.2d 232, 56 Ohio App. 227.
Or.—Cole v. City of Portland, 190 P. 720, 96 Or. 645.
Pa.—Miners Sav. Bank of Pittston v. Duryea Borough, 200 A. 846, 331 Pa. 458—Wilson v. City of New Castle, 152 A. 102, 301 Pa. 358—Miller v. Borough of New Oxford, 165 A. 766, 109 Pa.Super. 85.
Tex.—City of Houston v. Chapman, 123 S.W.2d 652, 132 Tex. 443, reversing Chapman v. City of Houston, Civ.App., 101 S.W.2d 348—Shupe v. City of Fort Stockton, Civ.App., 123 S.W.2d 408—Vogel v. Central Texas Securities Corporation, Civ.App., 62 S.W.2d 243, error refused—City of Farmersville v. Texas-Louisiana Power Co., Civ.App., 55 S.W.2d 195, reversed on other grounds Texas-Louisiana Power Co. v. City of Farmersville, Com.App., 67 S.W.2d 235—Ex parte Ernest, 136 S.W.2d 595, 138 Tex.Cr. 441.
Vt.—Neill v. Ward, 153 A. 219, 103 Vt. 117.
Wash.—Chief Petroleum Corporation v. City of Walla Walla, 116 P.2d 560—Langdon v. City of Walla Walla, 193 P. 1, 112 Wash. 446.
22 C.J. p 139 note 28.

Acting borough president
N.Y.—Picone v. City of New York, 29 N.Y.S.2d 539, 176 Misc. 967.

City counselor
Mo.—Norton v. Lynds, App., 24 S.W.2d 183.

City manager
Cal.—Borum v. Graham, 40 P.2d 866, 4 Cal.App.2d 331.

Commoners of town
Mass.—Lamson v. Coulson, 125 N.E. 551, 234 Mass. 288.

Selectmen
Mass.—Town of Saugus v. B. Perini & Sons, 26 N.E.2d 1, 305 Mass. 403—Fleming v. Dane, 22 N.E.2d 609, 304 Mass. 46—Selectmen of Town of Milton v. Judge of Dist. Court of East Norfolk, 189 N.E. 607, 286 Mass. 1.

That a city will do an unconstitutional act will not be presumed in advance.—Jewel Tea Co. v. City of Troy, C.C.A.Ill., 80 F.2d 366.

45. U.S.—Mechanics', etc., Bank v. Union Bank, La., 22 Wall. 276, 22 L.Ed. 871.
22 C.J. p 139 note 29.

Officials in charge of military affairs
It will be presumed that those in charge of military affairs of the nation and state will conduct themselves so as to protect the rights of the people and the administration of their affairs by their public officers.—Carpenter v. Sheppard, 145 S.W.2d 562, 135 Tex. 413, certiorari denied Sheppard v. Carpenter, 61 S.Ct. 734.

46. Cal.—O'Hare v. Peacock Dairies, App., 110 P.2d 90.

47. Ark.—Georgia State Sav. Ass'n v. Marrs, 9 S.W.2d 785, 178 Ark. 18.
Ga.—Southern Grocery Stores v. Kelly, 183 S.E. 924, 52 Ga.App. 551.
Ind.—Voigt v. Mergenthaler Linotype Co., 12 N.E.2d 498, 213 Ind. 325—Kwiatkowski v. Putzhaven, 126 N.E. 3, 189 Ind. 119.
Iowa.—First Trust Joint Stock Land Bank of Chicago, Ill. v. McNeff, 264 N.W. 105, 220 Iowa 1225—Milligan v. Zeller, 196 N.W. 793, 197 Iowa 79.
Ky.—Lee v. Lee, 284 S.W. 1052, 215 Ky. 226.
La.—Bank of White Castle v. Clark, 159 So. 409, 181 La. 303.
Mo.—Church v. Combs, 58 S.W.2d 467, 332 Mo. 334.
N.Y.—In re McCarthy, 196 N.Y.S. 265, 119 Misc. 257, affirmed 196 N.Y.S. 937, 203 App.Div. 833
N.D.—Jolley v. Begeman, 256 N.W. 912, 65 N.D. 205.
S.C.—Arthur v. Hollowell, 98 S.E. 202, 111 S.C. 444.
Tenn.—Lummus Cotton Gin Co. v. Arnold, 269 S.W. 706, 151 Tenn. 540.
Tex.—Bookhout v. McGeorge, Civ.App., 65 S.W.2d 512—National Protective Legion v. Stevens, Civ.App., 258 S.W. 487.
Vt.—Sargent v. Shepard, 111 A. 447, 94 Vt. 351.
Va.—Blair v. Rorer's Adm'r, 116 S.E. 767, 135 Va. 1, motion denied 43 S.Ct. 704, 262 U.S. 234, 67 L.Ed. 1206.
Wis.—State v. Common Council of City of West Allis, 188 N.W. 601, 177 Wis. 537.
22 C.J. p 139 note 30.

Person signing as notary is presumed to be such.—Johnson v. Johnson, 213 N.W. 115, 237 Mich. 563.

48. U.S.—Inland Steel Co. v. National Relations Labor Board, C.C.A., 105 F.2d 246—Brooks v. Commissioner of Internal Revenue, C.C.A., 35 F.2d 178—Pollen v. U.S., 85 Ct.

such as officers of the Federal Home Loan Bank Board,[49] of the National Labor Relations Board,[50] of the national post-office department,[51] of the patent department,[52] and of the treasury department;[53] oil inspectors;[54] overseers of the poor;[55] police officers;[56] and poor officers.[57]

The presumption of regularity also applies to the official acts of the postmaster-general;[58] the president of the United States;[59] public land officers;[60] public safety directors;[61] the Public Works Administrator and his subordinates;[62] receivers;[63] recording officers;[64] referees;[65] a register of deeds;[66] a register of probate;[67] school officers,[68]

Cl. 673—Albina Marine Iron Works v. U. S., 79 Ct.Cl. 714.
Mo.—Skinner v. Davis, 280 S.W. 37, 312 Mo. 581, certiorari granted Mellon v. Skinner, 46 S.Ct. 632, 271 U.S. 656, 70 L.Ed. 1135, certiorari dismissed 47 S.Ct. 333, 273 U.S. 776, 71 L.Ed. 887.

Alien property custodian
U.S.—Kuttroff v. Sutherland, C.C.A. N.Y., 66 F.2d 500.
D.C.—Sigg-Fehr v. White, 285 F. 949, 52 App.D.C. 215.

Commissioner of lighthouses
U.S.—The City of Chattanooga, C.C.A.N.Y., 79 F.2d 23.

49. Officers of Federal Home Loan Bank Board
D.C.—Fletcher v. Jones, 105 F.2d 58, 70 App.D.C. 179, certiorari denied 60 S.Ct. 116, 308 U.S. 555, 84 L.Ed. 467.

50. U.S.—Bradley Lumber Co. of Arkansas v. National Labor Relations Board, C.C.A.La., 84 F.2d 97, certiorari denied 57 S.Ct. 21, 299 U.S. 559, 81 L.Ed. 411.

Trial examiner and attorney for National Labor Relations Board would be presumed to attend to their duties intelligently and reasonably.—Bethlehem Shipbuilding Corporation v. Nylander, D.C.Cal., 14 F.Supp. 201.

51. Cal.—Walker v. Kimball Fruit Co., 289 P. 623, 209 Cal. 629.
Md.—Fidelity & Casualty Co. of New York v. Riley, 178 A. 250, 168 Md. 430.
22 C.J. p 139 note 31.
Presumption as to mailing and delivery of mail matter see supra § 136.

52. U.S.—In re Cady, Cust. & Pat. App., 77 F.2d 106—Detroit Motor Appliance Co. v. Burke, D.C.Minn., 4 F.2d 118—Mackenzie-Kennedy v. U. S., 85 Ct.Cl. 405, certiorari denied 58 S.Ct. 645, 303 U.S. 646, 82 L.Ed. 1108.
22 C.J. p 139 note 33.

53. U.S.—Butler v. Maples, Tenn., 9 Wall. 766, 19 L.Ed. 822—U. S. v. Adams, C.C.Or., 24 F. 348, 11 Sawy. 103.

54. Iowa.—Pfarr v. Standard Oil Co., 146 N.W. 851, 165 Iowa 657, L.R.A.1915C 336.
Neb.—Tegler v. Farmers' Union Gas & Coal Co., 246 N.W. 721, 124 Neb. 336.

55. Me.—Inhabitants of Fort Fairfield v. Inhabitants of Millinocket, 12 A.2d 173, 136 Me. 426.
22 C.J. p 139 note 36.

56. U.S.—Red River Lumber Co. v. Cardenas, C.C.A.Cal., 95 F.2d 157.
Cal.—Maggi v. Pompa, 287 P. 982, 105 Cal.App. 496—Nightingale v. Williams, 233 P. 807, 70 Cal.App. 424.
N.J.—Burkitt v. Beggans, 142 A. 181, 103 N.J.Eq. 7.
N.Y.—Manno v. Metropolitan Life Ins. Co., 249 N.Y.S. 471, 139 Misc. 848.
Ohio.—Lyons v. City of Cincinnati, 9 N.E.2d 988, 55 Ohio App. 458.
Tex.—Citizens Hotel Co. v. Foley, Civ.App., 131 S.W.2d 402, error dismissed, judgment correct.
Va.—Benson v. City of Norfolk, 177 S.E. 222, 163 Va. 1037.
22 C.J. p 139 note 37.

Railroad police officers
U.S.—Erie R. Co. v. Johnson, C.C.A. Ohio, 106 F.2d 550.
Va.—Norfolk & W. Ry. Co. v. Haun, 187 S.E. 481, 167 Va. 157.
W.Va.—Thompson v. Norfolk & W. Ry. Co., 182 S.E. 880, 116 W.Va. 705.

As to arresting for speeding
An officer of the law must arrest a person operating an automobile at a speed greater than the legal limit, and the natural presumption is that an officer making an investigation and causing no arrest was of the opinion that an arrest was not justified and that no violation of law had been committed.—Denny v. Rudy, 121 S.W.2d 951, 275 Ky. 467.

Police officer is conclusively presumed to know his duty, and to refrain from acting outside of such duty.—Grau v. Forge, 209 S.W. 369, 183 Ky. 521, 3 A.L.R. 642.

57. Iowa.—Cherokee County v. Smith, 258 N.W. 182, 219 Iowa 490.
Me.—New Portland v. Kingfield, 55 Me. 172.
N.H.—Thornton v. Campton, 18 N.H. 20.

58. D.C.—Farley v. Heininger, 105 F.2d 79, 70 App.D.C. 200, certiorari denied Heininger v. Farley, 60 S.Ct. 110, 308 U.S. 587, 84 L.Ed. 491.

Assistant postmaster-general
U.S.—Crane v. Nichols, D.C.Tex., 1 F.2d 33.

That post office department will supply adequate mail service on demand, must be assumed, in mandamus to restore trains.—Blease v. Charleston & W. C. Ry. Co., 144 S.E. 233, 146 S.C. 496.

59. U.S.—Lapeyre v. U. S., Ct.Cl., 17 Wall. 191, 21 L.Ed. 606.
Miss.—Harris v. McKissack, 34 Miss. 464.

"Every citizen . . . may be presumed . . . to have been informed of the substance of a declaration made by the president, and . . . to have relied on it as true."—U. S. v. Hicks, D.C.Ky., 256 F. 707, 712.

60. U.S.—Cofield v. McClelland, 16 Wall. 331, 21 L.Ed. 339, affirming 1 Colo. 370.
22 C.J. p 139 note 40.

61. Pa.—Leary v. City of Philadelphia, 172 A. 459, 314 Pa. 458.

62. U.S.—Tennessee Electric Power Co. v. Tennessee Valley Authority, D.C.Tenn., 21 F.Supp. 947, appeal dismissed in part 59 S.Ct. 54, 305 U.S. 663, 83 L.Ed. 430, appeal dismissed 59 S.Ct. 154, 305 U.S. 665, 83 L.Ed. 431, affirmed 59 S.Ct. 366, 306 U.S. 118, 83 L.Ed. 543.

63. Cal.—Baird v. Smith, 46 P.2d 830, 7 Cal.App.2d 597.
22 C.J. p 139 note 41.

64. Ark.—Wasson v. Lillard, 74 S.W.2d 637, 189 Ark. 546.
22 C.J. p 139 note 42.

Registrar of births, marriages, and deaths of a city is a public officer, and in the furtherance of his duty is presumed to have observed all proper formalities.—Gett v. Isaacson, 120 A. 156, 98 Conn. 539.

65. Okl.—Williamson-Halsell-Frazier Co. v. London, 6 P.2d 671, 154 Okl. 24.
22 C.J. p 139 note 43.

Referee in bankruptcy is judicial officer, and his acts are presumed to be legal and within scope of his authority.—Williamson-Halsell-Frazier Co. v. London, 6 P.2d 671, 154 Okl. 24.

66. U.S.—Boydston v. Continental & Commercial Trust & Savings Bank, C.C.A.Okl., 298 F. 31.
Kan.—Jackman v. Lawrence Drilling & Development Co., 187 P. 258, 106 Kan. 59.
S.D.—Fullerton Lumber Co. v. Tinker, 118 N.W. 700, 22 S.D. 427, 18 Ann.Cas. 11.

67. Mich.—Willetts v. Mandlebaum, 28 Mich. 521.

68. Ariz.—Parks v. School Dist. No.

such as clerks[69] and trustees;[70] the national secretary of agriculture,[71] of the interior,[72] of labor,[73] of state,[74] and of the treasury;[75] and the secretary of a state.[76]

The presumption of regularity also has been applied as to the acts and proceedings of sheriffs;[77]

1 of Yavapai County, 193 P. 838, 22 Ariz. 18.
Ind.—Gibson v. Searcy, 137 N.E. 182, 192 Ind. 515—School City of Brazil v. Rupp, 10 N.E.2d 924, 104 Ind. App. 287.
Iowa.—Beck v. Independent Consol. School Dist. of Jefferson Tp., 241 N.W. 427, 213 Iowa 1282—State v. Consolidated Independent School Dist. of Dawson, 187 N.W. 11, 193 Iowa 300—State v. Thompson, 181 N.W. 434, 190 Iowa 1160.
Mich.—School Dist. No. 14, Fractional, Niles Tp. and Buchanan Tp. v. School Dist. No. 1, Buchanan Tp., 254 N.W. 174, 266 Mich. 479.
N.D.—Jones v. Brightwood Independent School Dist. No. 1, 247 N.W. 884, 63 N.D. 275.
Okl.—Board of Education of Oklahoma City v. Cloudman, 92 P.2d 837, 185 Okl. 400.
Pa.—Campbell v. School Dist. of Borough of Bellevue, 195 A. 53, 328 Pa. 197, 113 A.L.R. 841—Day v. School Dist. of Amwell Tp., 128 A. 846, 283 Pa. 248—Hibbs v. Arensberg, 119 A. 727, 276 Pa. 24.
Tex.—Bishop v. Houston Independent School Dist., Com.App., 29 S.W.2d 312, answers conformed to, Civ. App., 35 F.2d 465.
22 C.J. p 139 note 46.

Principal

Pa.—Wertz v. Oliver Tp. School Dist., 43 Pa.Super. 1.

69. Mo.—State ex inf. Mansur ex rel. Fowler v. McKown, 290 S.W. 123, 315 Mo. 1336.
Mont.—O'Brien v. School Dist. No. 1 of Silver Bow County, 219 P. 113, 68 Mont. 432.
Or.—Weinacht v. Bower, 14 P.2d 622, 140 Or. 527.

70. Cal.—Sunset Lumber Co. v. Smith, 272 P. 1068, 95 Cal.App. 307.
Ky.—Pulliam v. Board of Trustees of Bardstown Graded Common School Dist., 287 S.W. 735, 216 Ky. 266—Lamaster v. Wilkerson, 136 S.W. 217, 143 Ky. 226.
Mont.—Buckhouse v. Joint School Dist. No. 28, Lake and Missoula Counties, 277 P. 961, 85 Mont. 141—Peter Mintener Lumber Co. v. School Dist. No. 56 of Carter County, 277 P. 9, 84 Mont. 461—Jersey v. Peacock, 223 P. 903, 70 Mont. 46.
S.C.—Felder v. Johnston, 121 S.E. 54, 127 S.C. 215.
Tex.—Cox v. Moore, Civ.App., 119 S.W.2d 189—Barnhart v. County Board of School Trustees of Young County, Civ.App., 108 S.W.2d 770—Willamar Independent School Dist. v. Lyford Independent School Dist., Civ.App., 8 S.W.2d 239, reversed on other grounds Lyford Independent School Dist. v. Willamar Independent School Dist., Com. App., 34 S.W.2d 854.

School land trustees

Ala.—Barry v. Stephens, 57 So. 467, 176 Ala. 93.

71. U.S.—Oregon-Washington R. & Nav. Co. v. State of Washington, 46 S.Ct. 279, 270 U.S. 87, 70 L.Ed. 482, reversing State v. Oregon-Washington R. & Nav. Co., 223 P. 600, 128 Wash. 365—Wallace v. Hudson-Duncan & Co., C.C.A.Or., 98 F.2d 985, reversing, D.C., Hudson-Duncan & Co. v. Wallace, 21 F.Supp. 295.

72. U.S.—U. S. v. Harris, C.C.A. Wash., 100 F.2d 268, rehearing denied 103 F.2d 1020.
Ariz.—Verde Water & Power Co. v. Salt River Valley Water Users' Ass'n, 197 P. 227, 22 Ariz. 305, certiorari denied 42 S.Ct. 53, 257 U. S. 643, 66 L.Ed. 412
D.C.—Phillips v. Ballinger, 37 App. D.C. 46.
Utah.—Rio Grande Western R. Co. v. Stringham, 110 P. 868, 38 Utah 113.

Leases of Indian's oil lands approved by secretary of the interior are presumed to be regular.—U. S. v. McGugin, D.C.Kan., 28 F.2d 76.

73. U.S.—The Presidente Wilson, C.C.A.N.Y., 56 F.2d 742, reversing, D.C., 50 F.2d 267.

Assistants to secretary of labor

U.S.—Cunard S. S. Co. v. Elting, C.C.A.N.Y., 97 F.2d 373—U. S. ex rel. Petach v. Phelps, C.C.A.Va., 40 F.2d 500—U. S., on Petition of Rocco, ex rel. Constantino, v. Karnuth, D.C.N.Y., 35 F.2d 601, affirmed, C.C.A., 31 F.2d 1022, certiorari denied 50 S.Ct. 28, 280 U.S. 570, 74 L.Ed. 623—MacKusick v. Johnson, C.C.A. Mass., 3 F.2d 398.

On habeas corpus to stay order of deportation, the district court cannot disregard the finding of the secretary of labor who, under seal of the United States, stated that his conclusion in the case resulted from evidence laid before him, on allegation of counsel, on information and belief, that they believed that secretary did not read the record.—Ex parte Kurth, D.C.Cal., 28 F.Supp. 258, appeal dismissed, C.C.A., Kurth v. Carr, 106 F.2d 1003.

74. Vt.—Chase v. Billings, 170 A. 903, 106 Vt. 149.
Secretary of a state see infra text and note 76.

75. Assistant secretary of treasury
U.S.—Ferguson v. Port Huron & Sarnia Ferry Co., D.C.Mich., 13 F.2d 489.

76. Fla.—Johns v. State, 197 So. 791—Peacock v. Roberts, 195 So. 914, 142 Fla. 701.
Kan.—Burke v. State Board of Canvassers, 107 P.2d 773, 152 Kan. 826, 132 A.L.R. 356.
Ky.—Fischer v. Eby, 114 S.W.2d 763, 272 Ky. 545.
Miss.—Wood v. State, 142 So. 747, 169 Miss. 790.
N.Y.—People v. National Security Co., 177 N.Y.S. 838, 189 App.Div. 38.
Tenn.—National Plastic Relief Co. v. Signal Amusement Co., 269 S.W. 40, 151 Tenn. 235.
Tex.—C. R. Miller Mfg. Co. v. Coleman, Com.App., 29 S.W.2d 991, affirming Coleman v. Miller, Civ.App., 19 S.W.2d 829—Robinson v. Bradley, Civ.App., 141 S.W.2d 425—Farm & Home Savings & Loan Ass'n of Missouri v. Muhl, Civ.App., 37 S.W.2d 316, error refused—Jordan v. Grandfield Bridge Co., Civ. App., 290 S.W. 866.
22 C.J. p 140 note 48.

As to notifying foreign corporation of acceptance of service for it

Va.—American Ry. Express Co. v. Fleishman, Morris & Co., 141 S.E. 253, 149 Va. 200, error dismissed American Ry. Express Co. v. Fleischmann, Morris & Co., 49 S.Ct. 94, 278 U.S. 574, 73 L.Ed. 514, and certiorari denied 49 S.Ct. 177, 278 U.S. 652, 73 L.Ed. 562, followed in American Ry. Express Co. v. Newcomb, 141 S.E. 259, 149 Va. 219, error dismissed 49 S.Ct. 94, 278 U.S. 574, 73 L.Ed. 514, and certiorari denied 49 S.Ct. 177, 278 U.S. 652, 73 L.Ed. 562, American Ry. Express Co. v. G. T. Elliott, Inc., 141 S.E. 259, 149 Va. 218, error dismissed 49 S.Ct. 94, 278 U.S. 574, 73 L.Ed. 514, and certiorari denied 49 S.Ct. 177, 278 U.S. 652, 73 L.Ed. 562 and American Ry. Express Co. v. Richmond Hardware Co., 141 S.E. 259, 149 Va. 220, error dismissed 49 S.Ct. 94, 278 U.S. 574, 73 L.Ed. 514, and certiorari denied 49 S.Ct. 177, 278 U.S. 652, 73 L.Ed. 562.

77. Ala.—Ex parte Vaughan, 53 So. 270, 168 Ala. 187.
Del.—State, to Use of Henderson, v. Clark, 13 A.2d 445, 1 Terry 441, reversed on other grounds, Sup., 20 A.2d 127.
Fla.—Quinn R. Barton, Inc. v. Johnson, 196 So. 489, 143 Fla. 245.
Ga.—Benton v. Maddox, App., 16 S.E.2d 141.
Idaho.—McCall v. First Nat. Bank, 277 P. 562, 47 Idaho 519.

a state government or a department thereof;[78] such as a state conservation department;[79] a state governmental body or agency;[80] state legislatures;[81] state officers,[82] such as auditors,[83] and officers of a state banking department;[84] superintendents,[85] such as state superintendent of banks,[86] or of insur-

Ind.—Hitt v. Carr, 130 N.E. 1, 77 Ind.App. 488.
Iowa.—Northwestern Mut. Life Ins. Co. of Milwaukee, Wis. v. Block, 249 N.W. 395, 216 Iowa 401—Heater v. Bagan, 221 N.W. 932, 206 Iowa 1301.
Ky.—Milliken v. Harrod, 122 S.W.2d 148, 275 Ky. 597—Kitchen, Whitt & Co. v. Fannin, 115 S.W.2d 325, 273 Ky. 62.
Mich.—Prudential Ins. Co. of America v. Dworkin, 253 N.W. 233, 266 Mich. 105—Evenson v. State Mut. Rodded Fire Ins. Co. of Michigan, 239 N.W. 285, 256 Mich. 372.
Mo.—Eversmeyer v. Broyles, 216 S. W. 317, 280 Mo 99—Williams v. Luecke, App., 152 S.W.2d 991—Gilpin v. Ætna Life Ins. Co., 132 S.W.2d 686, 234 Mo.App. 566.
Mont.—Stone-Ordean-Wells Co. v. Strong, 20 P.2d 639, 94 Mont. 20—McCarthy v. Anaconda Copper Mining Co., 225 P. 391, 70 Mont. 309.
Ohio.—State ex rel. Hudson v. Kelly, 9 N.E.2d 746, 55 Ohio App. 314.
Okl.—Thrush v. Winslow, 98 P.2d 905, 186 Okl. 499.
Or.—Guthrie v. Haun, 76 P.2d 292, 159 Or. 50—Cobbs-Mitchell Co. v. McMahan, 289 P. 495, 133 Or. 191—Meade v. Churchill, 197 P. 1078, 100 Or. 701.
Pa.—Best v. Blue Ridge Water Supply Co., 7 Pa.Dist. & Co. 549, 20 North.Co. 55.
Tenn.—Siler v. Siler, 277 S.W. 886, 152 Tenn. 379.
Tex.—Richards v. Rule, Com.App., 207 S.W. 912, reversing Rule v. Richards, Civ.App., 159 S.W. 386—Cotton v. Stanford, Civ.App., 147 S.W.2d 930—Brooks v. Frio County, Civ.App., 28 S.W.2d 1107—Lacy v. Sanders, Civ.App., 295 S.W. 288—Spero v. Peters, Civ.App., 219 S.W. 514.
Va.—Harrison's Adm'r v. Garnett, 34 S.E. 612, 97 Va. 697.
Wash.—Atwood v. McGrath, 242 P. 648, 137 Wash. 400—Eberhart v. Murphy, 194 P. 415, 113 Wash. 449, reversing 188 P. 17, 110 Wash. 158.
22 C.J. p 140 note 49.

Successor of sheriff
Miss.—W. T. Rawleigh Co. v. Hester, 200 So. 250.

78. Ill.—Schwing v. Miles, 11 N.E.2d 944, 947, 367 Ill. 436, 113 A.L.R. 1504.
N.M.—State v. Romero, 124 P. 649, 17 N.M. 81, Ann.Cas.1914C 1114.
"The presumption obtains that the state, or a department thereof, will not, and does not, violate the constitution and laws of the state, but that such violation, if it occurs, is by a state officer or the head of a department of the state."—Schwing v. Miles, supra.

Department of insurance
Tex.—Dillehay v. Texas Life Ins. Co., 107 S.W.2d 369, 130 Tex. 197, affirming, Texas Life Ins. Co. v. Dillehay, Civ.App., 79 S.W.2d 342.

79. Ind.—Wallace v. Feehan, 190 N. E. 438, 206 Ind. 422.
N.Y.—People v. Sterling, 13 N.Y.S. 2d 574, 257 App.Div. 560.

80. Mich.—Terre Haute Brewing Co. v. Liquor Control Commission, 288 N.W. 339, 291 Mich. 73.
Ohio.—State ex rel. Rojc v. Industrial Commission of Ohio, 16 N.E.2d 411, 134 Ohio St. 234.

Members of State Liquor Authority
N.Y.—Marks v. Bruckman, 9 N.Y.S. 2d 947, 170 Misc. 709.
Utah.—Utah Liquor Control Commission v. District Court of Seventh Judicial Dist. in and for Carbon County, 111 P.2d 144.

Refusal to comply with city ordinance
A refusal of heads of commonwealth government to comply with provisions of a city ordinance imposing tax on salaries earned by Philadelphia residents and requiring employer to collect tax at source and to furnish commonwealth with list of employees would be presumed to have been in accordance with their conception of their official duty.—Marson v. City of Philadelphia, Pa., 21 A.2d 228.

81. U.S.—Herkness v. Irion, D.C.La., 11 F.2d 386, reversed on other grounds 49 S.Ct. 40, 278 U.S. 92, 73 L.Ed. 198.
Ark.—Ruddell v. Gray, 285 S.W. 2, 171 Ark. 547.
Ind.—State v. Grand Superior Court, 172 N.E. 897, 202 Ind. 197, 71 A. L.R. 1354.
La.—Gulf Refining Co. of Louisiana v. McFarland, 97 So. 433, 154 La. 25, affirmed 44 S.Ct. 402, 264 U.S. 573, 68 L.Ed. 856.
Mont.—State v. Porter, 178 P. 832, 55 Mont. 471.
Okl.—Davis v. Childers, 74 P.2d 930, 181 Okl. 468.
Or.—Pacific Telephone & Telegraph Co. v. Wallace, 75 P.2d 942, 158 Or. 210.
Pa.—Noecker v. Woods, 102 A. 507, 259 Pa. 160.
R.I.—Carpenter v. Comery, 121 A. 538, 45 R.I. 266.
S.C.—Duncan v. Record Pub. Co., 143 S.E. 31, 145 S.C. 196.

Legislators are presumed to be just as loyal to government as are occupants of judicial officers—State ex rel. Davis v. Rose, 122 So. 225, 97 Fla. 710.

82. U.S.—Collins v. Yosemite Park & Curry Co., Cal., 58 S.Ct. 1009, 304 U.S. 518, 82 L.Ed. 1502, reversing, D.C., Yosemite Park & Curry Co. v. Collins, 20 F.Supp. 1009.
Mont.—Barbour v. State Board of Education, 13 P.2d 225, 92 Mont. 321.
Wyo.—Scherck v. Nichols, 95 P.2d 74, 55 Wyo. 4.

Officers and faculty of state college
Colo.—People ex rel. Moore v. Lory, 31 P.2d 1112, 94 Colo. 595.

State budget director in whom legislature placed supervisory and directory powers to carry out and enforce provisions of Budget Act is presumed to act in best interests of taxpayers in exercising his administrative, supervisory, and directory powers.—State v. Manning, 259 N.W. 213, 220 Iowa 525.

83. Minn.—Leach v. Woodhill Realty Co., 194 N.W. 104, 156 Minn. 73.
Mo.—State ex rel. Bradshaw v. Hackmann, 208 S.W. 445, 276 Mo. 600.
Mont.—Judith Basin County v. Livingston, 298 P. 356, 89 Mont 438.
N.Y.—People v. Phœnix Bank, 17 N. Y.Super. 363.
Pa.—Commonwealth v. Strickler, 27 Del.Co. 530.

84. Tex.—Sanders State Bank v. Hawkins, Civ.App., 142 S.W. 84.

85. Cal.—Shaw v. Feehan, 279 P. 658, 207 Cal. 561.
Mo.—In re Moynihan, 62 S.W.2d 410, 332 Mo. 1022, 91 A.L.R. 74.
Mont.—Gagnon v. Jones, 62 P.2d 683, 103 Mont. 365.

86. Ariz.—Fidelity & Deposit Co. of Maryland v. Ware, 53 P.2d 415, 47 Ariz. 12.
Ga.—Davis v. Baldwin, 193 S.E. 892, 185 Ga. 40—Brock v. Gormley, 187 S.E. 211, 53 Ga.App. 789.
Iowa.—Pugh v. Polk County, 263 N. W. 315, 220 Iowa 794—Priest v. Whitney Loan & Trust Co., 261 N. W. 374, 219 Iowa 1281.
N.Y.—Hudson-Harlem Valley Title & Mortgage Co. v. White, 298 N.Y.S. 652, 164 Misc. 47, reversed on other grounds 296 N.Y.S. 424, 251 App.Div. 1, reargument and motion denied 298 N.Y.S. 640, 251 App.Div. 911, appeal dismissed 12 N.E.2d 597, 276 N.Y. 603—Broderick v. Aaron, 264 N.Y.S. 15, 147 Misc. 854, affirmed 266 N.Y.S. 970, 240 App.Div. 823 and 267 N.Y.S. 939, 240 App.Div. 873.

ance;[87] superintendents of schools;[88] supervisors;[89] and surveyors.[90]

The presumption of regularity applies also to acts of tax officers,[91] including assessors[92] and collectors,[93] as well as a state tax board;[94] town auditors;[95] town clerks;[96] a township board,[97] committee,[98] supervisor,[99] or trustee;[1]

87. U.S.—Hentschel v. Fidelity & Deposit Co. of Maryland, C.C.A. Mo., 87 F.2d 833.
Mo.—State ex rel. Missouri State Life Ins. Co. v. Hall, 52 S.W.2d 174, 330 Mo. 1107.

88. Me.—Benson v. Inhabitants of Town of Newfield, 1 A.2d 227, 136 Me. 23.
Or.—McGill v. French, 148 P. 878, 76 Or. 237.
Tex.—Eldorado Independent School Dist. v. Becker, Civ.App., 120 S.W. 2d 476, error dismissed.
Wis.—School Dist. No. 3 of Town of Adams v. Callahan, 297 N.W. 407, 237 Wis. 560.

County superintendent
Ark.—Board of Conference Claimants v. Phillips, 63 S.W.2d 988, 187 Ark. 1113.
Kan.—Emporia Bd. of Education v. Shepherd, 135 P. 605, 90 Kan. 628.
Ky.—Swinford v. Chasteen, 87 S.W.2d 373, 261 Ky. 249—Gadberry v. Board of Education of Russell County, 272 S.W. 393, 209 Ky. 114.
Mo.—State ex rel. and to Use of Parman v. Manring, 58 S.W.2d 269, 332 Mo. 235—State ex rel. School Dist. No. 34, Lincoln County v. Begeman, 2 S.W.2d 110, 221 Mo. App. 257—State ex rel. Hanna v. Ross, 286 S.W. 726, 220 Mo.App. 388.

89. U.S.—Hackler v. Farm & Home Savings & Loan Ass'n, D.C.Mo., 6 F.Supp. 610, appeal dismissed, C.C. A., 73 F.2d 999.
Cal.—Imperial County v. Adams, 3 P. 2d 953, 117 Cal.App. 220—Antelope Valley Union High School Dist. of Los Angeles County v. McClellan, 203 P. 147, 55 Cal.App. 244—Swall v. Los Angeles County, 184 P. 406, 42 Cal.App. 758—Dillwood v. Biecks, 184 P. 35, 42 Cal.App. 602.
Iowa.—Kilpatrick v. Mills County, 288 N.W. 871, 227 Iowa 721—Wheeler v. Riggs, 271 N.W. 509, 222 Iowa 1373—Plymouth County v. Koehler, 267 N.W. 106, 221 Iowa 1022—Kellogg v. Illinois Cent. R. Co., 239 N.W. 557—Maben v. Olson, 175 N.W. 512, 187 Iowa 1060—Heery v. Roberts, 172 N.W. 161, 186 Iowa 61, denying rehearing 170 N.W. 405, 186 Iowa 61.
Miss.—Bishop v. Chickasaw County, 180 So. 395, 182 Miss. 147—Trahan v. State Highway Commission, 151 So. 178, 169 Miss. 732.
N.Y.—In re Board of Sup'rs of Rockland County, 196 N.E. 752, 268 N. Y. 84, reversing In re Suffern-Mt. Ivy County Highway No. 1448, 277 N.Y.S. 345, 243 App.Div. 560.
Pa.—Jefferson County v. Rose Tp., Jefferson County, 129 A. 78, 283 Pa. 126.
Tex.—Garrett v. Anderson, Civ.App., 144 S.W.2d 971, error dismissed, judgment correct.
Utah.—Utah Oil Refining Co. v. Millard County Drainage Dist. No. 4, 50 P.2d 774, 90 Utah 67.
Va.—Hannah v. Board of Sup'rs of Buckingham County, 125 S.E. 679, 140 Va. 698—Ferguson v. Board of Sup'rs of Roanoke County, 113 S. E 860, 133 Va. 561.
Wis.—State v. Outagamie County Board, 185 N.W. 184, 175 Wis. 253.
22 C.J. p 140 note 52.

Legislative act
Act of board of supervisors in establishment of drainage improvement in question was legislative, and the presumption that the board acted rightly can be overcome only by the clearest of proof.—Maben v. Olson, 175 N.W. 512, 187 Iowa 1060.
Township supervisors see infra text and note 99.

90. Cal.—McDonald v. Mason, 76 P. 2d 212, 25 Cal.App.2d 17.
Ky.—Combs v. Adams, 207 S.W. 691, 182 Ky. 762.
Tenn.—Dearing v. Nashville, C. & St. L Ry., 48 S.W.2d 827, 164 Tenn. 359—Dunlap v. Sawvel, 223 S.W. 142, 142 Tenn. 696.
Tex.—State v. Sun Oil Co., Civ.App., 114 S.W.2d 936, error refused.
22 C.J. p 140 note 53.

91. U.S.—In re Cameron County Water Improvement Dist. No. 1, D.C. Tex., 9 F.Supp. 103, reversed on other grounds, C.C.A., Cameron County Water Improvement Dist No. 1 v. Ashton, 81 F.2d 905, certiorari granted Ashton v. Cameron County Water Improvement Dist. No. 1, 56 S.Ct. 683, 298 U.S. 648, 80 L.Ed. 1377, reversed on other grounds 56 S.Ct. 892, 298 U.S. 513, 80 L Ed. 1309, rehearing denied 57 S.Ct. 5, 299 U.S. 619, 81 L.Ed. 457.
Cal.—Esberg v. Badaracco, 259 P. 730, 202 Cal. 110.
Ill.—People ex rel. Gill v. Diversey Hotel Corporation, 4 N.E 2d 365, 364 Ill. 298.
Ky.—McCracken Fiscal Court v. McFadden, 122 S.W.2d 761, 275 Ky. 819.
N.Y.—In re Marsh, 272 N.Y.S. 807, 152 Misc. 454.
Tex.—Mexia Independent School Dist. v. City of Mexia, 133 S.W.2d 118, 134 Tex. 95.
22 C.J. p 140 note 54.

92. U.S.—Wells v. Johnson, D.C.S. D., 205 F. 60.
Ind.—Prott v. City of Gary, 175 N. E. 243, 94 Ind.App. 37.
22 C.J. p 140 note 55.

93. Miss.—Bishop v. Chickasaw County, 180 So. 395, 182 Miss. 147.
Tex.—Underwood v. Pigman, Com. App., 32 S.W.2d 1102, reversing, Civ.App., 21 S.W.2d 703, and modified on other grounds, Com.App., 36 S.W.2d 1114.
22 C.J. p 141 note 56.

94. U.S.—Wells v. Johnson, D.C.S. D., 205 F. 60.

95. Ill.—People v. Chicago, M. & St. P. Ry. Co., 145 N.E. 725, 314 Ill. 378—People v. Chicago & E. I. Ry. Co., 145 N.E. 716, 314 Ill. 352—People v. Cleveland, C. C & St. L. Ry. Co., 138 N.E. 663, 307 Ill. 162.

96. Ind.—Heathco v. State ex rel. Addison, 199 N.E. 260, 209 Ind. 667.
22 C.J. p 141 note 58.

97. Mich.—Big Prairie Tp., Newaygo County, v. Big Prairie Tp. Grange, No. 935, 282 N.W. 143, 286 Mich. 268.

98. N.J.—Campbell v. Teaneck Tp. Committee, Bergen County, 129 A. 757, 101 N.J.Law 461—Reed v. Independence Tp. in Warren County, 107 A. 174, 93 N.J Law 101—Mercer County Traction Co. v. United New Jersey R. & Canal Co., 54 A. 819, 64 N.J.Eq. 588—Bogle v. Woods, 161 A. 357, 10 N.J.Misc. 858—Van Saun v. Township Committee of Pequannock Tp., 150 A. 770, 8 N.J. Misc. 486—Shoemaker v. Township Committee of Centre Tp., 129 A. 432.

99. Pa.—Foresman v. Gregg Tp., 147 A. 64, 297 Pa. 369—Falkinburg v. Venango Tp., 147 A. 62, 297 Pa. 358—Georges Tp. v. Union Trust Co. of Uniontown, 143 A. 10, 293 Pa. 364—Jefferson County v. Rose Tp., Jefferson County, 129 A. 78, 283 Pa. 126—In re Snyder's Case, 13 Pa.Dist. & Co. 143.

1. Ariz.—Johnston v. Smith, 6 P. 2d 891, 39 Ariz. 337.

Successors performing functions of predecessors
Where a statute abolishing former trustees of a town requires them to deliver all records, money, and property to their successors, it must be presumed, on demurrer to a complaint against the town on a lease in name of former trustees, that succeeding officials have since exercised the functions of former trustees.—Sammis v. Town of Huntington, 174 N.Y.S. 610, 186 App.Div. 463.

treasurers,[2] as for instance, of a state,[3] county,[4] municipal corporation,[5] town,[6] or of the federal government;[7] trustees,[8] including trustees in bankruptcy;[9] and acts of the United States senate.[10]

d. Applications of Rule to Particular Acts

The presumption of regularity relates solely to acts done in the routine of official business.

The presumption of regularity relates solely to acts done in the routine of official business,[11] and within the apparent scope of the officer's authority or duty,[12] and not where he has limited authority and can act only within the limits of such authority.[13] As to summary or ex parte[14] and a fortiori

affirming 171 N.Y.S. 965, 104 Misc. 7.

2. Mich.—Chyspewa County v. Bennett, 152 N.W. 229, 153 N.W. 814, 185 Mich. 544.
22 C.J. p 141 note 60.

3. Neb.—Paxton v. State, 81 N.W. 383, 59 Neb. 460, 80 Am.S.R. 689.
Wis.—State v. Krause, 202 N.W. 319, 186 Wis. 59.

4. U.S.—Boydston v. Continental & Commercial Trust & Savings Bank, C.C.A. Okl., 298 F. 31.
Ind.—Finerty v. State ex rel. Greenwald, 19 N.E.2d 846, 215 Ind. 346—Board of Com'rs of Boone County v. Adler, 133 N.E. 602, 77 Ind.App. 296.
Iowa—Board of Sup'rs of Pottawattamie County v. Stone, 237 N.W. 478, 212 Iowa 660.
Mont.—Rosebud County v. Smith, 9 P.2d 1071, 92 Mont. 75.
N.D.—Bowman County v. McIntyre, 202 N.W. 651, 52 N.D. 225.
Ohio.—State ex rel. Hudson v. Kelly, 9 N.E.2d 746, 55 Ohio App. 314.
Okl.—Huddleston v. Vahlberg, 104 P.2d 434, 187 Okl. 541.
S.C.—State v. Maryland Casualty Co., 1 S.E.2d 516, 189 S.C. 405.
Wyo.—Board of Com'rs of Big Horn County v. Byron Drainage Dist., 75 P.2d 759, 764, 52 Wyo. 417, citing Corpus Juris.
22 C.J. p 141 note 62.

Deputy county treasurer
Iowa.—Putnam v. Bussing, 266 N.W. 559, 221 Iowa 871.

5. U.S.—O'Donnell v. Cullen, C.C.A. Wyo., 76 F.2d 955.
Colo.—Manitou v. Colorado Springs First Nat. Bank, 86 P. 75, 37 Colo. 344.
Mo.—Jacobs v. Waldron, 298 S.W. 773, 317 Mo. 1133.

6. Colo.—Town of Morrison v. Burke, 84 P.2d 461, 103 Colo. 167.
Conn.—State v. Atchison, 135 A. 456, 105 Conn. 315.
S.D.—Town of Monroe v. Buss, 261 N.W. 200, 63 S.D. 516.

7. D.C.—Sigg-Fehr v. White, 285 F. 949, 52 App.D.C. 215.

8. U.S.—Dickens v. Howard, C.C.A. Ga., 67 F.2d 263.
Cal.—Stevens v. Plumas Eureka Annex Mining Co., 41 P.2d 927, 2 Cal.2d 493—Nichols v. Nichols, 27 P.2d 414, 135 Cal.App. 488—Mackenzie v. Los Angeles Trust & Savings Bank, 178 P. 557, 39 Cal.App. 247.
Ga.—Tattnall Bank v. Harvey, 198 S.E. 724, 186 Ga. 752.
Ky.—Cooper v. Ensor, 110 S.W.2d 461, 270 Ky. 670—Head v. Oldham Bank & Trust Co., 60 S.W.2d 621, 249 Ky. 292.
Md.—Crise v. Smith, 133 A. 110, 150 Md. 322, 47 A.L.R. 467.
Mich.—Boyer v. Backus, 276 N.W. 564, 282 Mich. 593, motion denied 280 N.W. 756, 282 Mich. 701, certiorari denied 59 S.Ct. 147, 305 U.S. 644, 83 L.Ed. 416, rehearing denied 59 S.Ct. 248, 305 U.S. 674, 83 L.Ed. 437.
N.J.—Trenton Banking Co. v. Howard, Ch., 187 A. 569, affirmed 187 A. 575, 121 N.J.Eq. 85.
N.Y.—In re Forte's Will, 267 N.Y.S. 603, 149 Misc. 327—In re Ebbets' Estate, 267 N.Y.S. 268, 149 Misc. 260.
Or.—Elliott v. Mosgrove, 91 P.2d 852, 162 Or. 507, rehearing denied 93 P.2d 1070, 162 Or. 507.
R.I.—Colt v. Industrial Trust Co., 146 A. 628, 50 R.I. 242.
S.C.—Kirton v. Howard, 134 S.E. 859, 137 S.C. 11.
S.D.—Gordon v. Krovig, 227 N.W. 568, 56 S.D. 134.
Tex.—Griffin v. Hale, 112 S.W.2d 1042, 131 Tex. 152, affirming, Civ. App., 87 S.W.2d 497.
Va.—Triplett v. Trotter, 193 S.E. 514, 169 Va. 440.
22 C.J. p 141 note 64, p 105 note 24.

Trustee under testamentary trust for charity will be presumed to discharge his duties according to testator's expressed intentions.—In re Hunter's Estate, 265 P. 466, 147 Wash. 216.

Trustee bank
U.S.—Anderson v. Pennsylvania Hotel Co., C.C.A.Fla., 56 F.2d 980.
Iowa.—Andrew v. Washington Loan & Trust Co. of Washington, Iowa, 250 N.W. 177, 217 Iowa 464.

Trustees of firemen's relief fund
Conn.—Comley ex rel. Fitzroy v. Board of Trustees of Firemen's Relief Fund of City of Bridgeport, 191 A. 729, 122 Conn. 650.

Trustees of police fund
Ill.—Eddy v. People, 120 Ill.App. 626, affirmed 75 N.E. 1071, 218 Ill. 611.

When trustee converts trust fund, presumption that trustee does its duty no longer obtains.—Andrew v. Washington Loan & Trust Co. of Washington, Iowa, 250 N.W. 177, 217 Iowa 464.

Trustees of school district see supra text and note 70.

9. Or.—Goodnough Mercantile Co. v. Galloway, 84 P. 1049, 48 Or. 239.
22 C.J. p 141 note 65.

Taking possession of property
It will be presumed that a trustee in bankruptcy took possession of the property of the bankrupt immediately on his appointment.—Goodnough Mercantile Co. v. Galloway, supra.

10. U.S.—Barry v. U. S. ex rel. Cunningham, Pa., 49 S.Ct. 452, 279 U.S. 597, 73 L.Ed. 867, reversing, C.C.A., U. S. ex rel. Cunningham v. Barry, 29 F.2d 817, reversing, D.C., 25 F.2d 733, and certiorari granted Barry v. U. S. ex rel. Cunningham, 49 S.Ct. 253, 279 U.S. 827, 73 L.Ed. 979.

Calling witness in investigation
It cannot be assumed that the senate, in calling on a witness in an investigation, will not observe constitutional limitations; but on the contrary it may be assumed that the senate, issuing a warrant for the arrest of such a witness, will discharge the witness on a proper assurance of his appearance when desired.—Barry v. U. S. ex rel. Cunningham, supra.

11. Vt.—Town of Manchester v. Town of Townshend, 2 A.2d 207, 110 Vt. 136.
22 C.J. p 141 note 66.

Taking possession and using property for canal
Pa.—Ligat v. Commonwealth, 19 Pa. 456.

12. U.S.—V. Mueller & Co. v. U. S., Cust. & Pat.App., 115 F.2d 354.
Pa.—Commonwealth ex rel. District Attorney v. Dobrowolski, 5 Pa.Dist. & Co. 16, 23 Luz.Leg.Reg. 31, 72 Pittsb.Leg.J. 234.
Tex.—McLean v. Morrow, Civ.App., 137 S.W.2d 113—Sterling Nat. Bank & Trust Co. of New York v. Ellis, Civ.App., 75 S.W.2d 716, error dismissed.
Vt.—Town of Manchester v. Town of Townshend, 2 A.2d 207, 110 Vt. 136.

13. Tex.—McLean v. Morrow, Civ. App., 137 S.W.2d 113, error dismissed, judgment correct.

14. Ark.—Wildman v. Enfield, 298 S.W. 196, 174 Ark. 1005.
22 C.J. p 141 note 67.

Summary sale for taxes is not presumed regular and proper, but com-

as to extra official[15] proceedings, the party claiming under them must make strict proof of the performance of every prerequisite of the law. Neither does the presumption extend to acts involving the forfeiture of an individual's rights, the depriving him of his property, or the placing of a charge or lien thereon.[16]

Among the acts in respect to which the presumption of regularity has been applied may be mentioned administrative rules and regulations;[17] the administering of an oath or affirmation;[18] the appropriation or expenditure of public funds;[19] the conduct of judicial sales;[20] the designation of official newspapers;[21] the dismissal of a civil service employee;[22] the drawing of grand juries;[23] the

pliance with every substantial requisite of the law must be proved—Ronkendorff v. Taylor, Wash., 4 Pet. 349, 7 L.Ed. 882—22 C.J. p 141 note 67 [a].

15. N.Y.—In re 221st Street in City of New York, 190 N.Y.S. 234, 116 Misc. 506.
Tex.—C. R. Miller Mfg. Co. v. Coleman, Com.App., 29 S.W.2d 991, affirming Coleman v. Miller, Civ.App., 19 S.W.2d 829.
22 C.J. p 141 note 68.

16. U.S.—U. S. v. Seven Oaks Dairy Co., D.C.Mass., 10 F.Supp. 995.
Ark.—Wildman v. Enfield, 298 S.W. 196, 198, 174 Ark. 1005.
D.C.—Barry v. Hall, 98 F.2d 222, 68 App.D.C. 350.
Md.—Applestein v. Osborne, 143 A. 666, 156 Md. 40.
22 C.J. p 141 note 69.
"The presumption that an officer has done his duty is not sufficient to justify depriving one of his property where the proceedings of the officer are ex parte and where the statute expressly requires that certain duties shall be performed which are jurisdictional."—Wildman v. Enfield, supra.

17. N.C.—State v. Hodges, 105 S.E. 417, 180 N.C. 751.
Administrative regulations which seriously cut down rights of individuals to conduct innocent business in manner that involves no consequences injurious to public interests are not presumed to be valid.—U. S. v. Seven Oaks Dairy Co., D.C.Mass., 10 F.Supp. 995.
Rules and regulations of administrative boards or bodies, within the apparent scope of their powers, are presumably reasonable and valid and based on the existence of facts justifying them.
U.S.—Thompson v. Consolidated Gas Utilities Corporation, Tex., 57 S.Ct. 364, 300 U.S. 55, 81 L.Ed. 510, affirming, D.C., Consolidated Gas Utilities Corporation v. Thompson, 14 F.Supp. 318.
Fla.—State ex rel. Hollywood Jockey Club v. Stein, 182 So. 863, 133 Fla. 530—McConville v. Ft. Pierce Bank & Trust Co., 135 So. 392, 101 Fla. 727.
N.J.—Stevens v. Busch Cleaners & Dyers Service, 171 A. 821, 116 N.J. Eq. 331.
Rules and regulations of public service commission are only prima facie reasonable, presumption in favor of rules of an administrative department not being conclusive—Alabama Water Co. v. Wilson, 107 So. 821, 214 Ala. 364.

18. Pa.—In re Wanger, 32 Pa.Dist. & Co. 512.

19. Ariz.—Bank of Lowell v. Cox, 279 P. 257, 35 Ariz. 403.
Fla.—Volusia County v. State, 125 So. 375, 98 Fla. 1166, rehearing denied 125 So. 813, 98 Fla. 1166.
Iowa—Banta v. Clarke County, 260 N.W. 329, 219 Iowa 1195.
La.—City of New Orleans v. Jackson Brewing Co., 110 So. 110, 162 La. 121.
Me.—Inhabitants of Town of Farmington v. Miner, 175 A. 219, 133 Me. 162.
Mass.—Dane v. Treasurer and Receiver General, 128 N.E. 943, 230 Mass. 280—Duffy v. Burrill, 125 N.E. 135, 234 Mass. 42 error dismissed Dane v. Burrill, 41 S.Ct. 447, 255 U.S. 580, 65 L.Ed. 796.
Mich.—Common Council of City of Detroit v. Engel, 173 N.W. 547, 207 Mich. 106.
Minn.—Lindgren v. Town of Algoma, 244 N.W. 70, 187 Minn. 31.
Ohio.—State v. Zangerle, 134 N.E. 686, 103 Ohio St. 566.
S.D.—Jones v. Humphrey, 199 N.W. 772, 47 S.D. 525.
Tenn.—Southern Ry. Co. v. Claiborne County, 291 S.W. 837, 157 Tenn. 71.
Wash.—Tabb v. Funk, 19 P.2d 668, 172 Wash. 189.
Wyo.—Board of Com'rs of Big Horn County v. Byron Drainage Dist., 75 P.2d 759, 52 Wyo. 417.

20. U.S.—National Life Ins. Co. v. U. S., 4 F.Supp. 1000, 78 Ct.Cl. 369, certiorari denied Lucey v. U. S., 54 S.Ct. 560, 291 U.S. 683, 78 L.Ed. 1070.
Fla.—Quinn R. Barton, Inc., v. Johnson, 196 So. 489, 143 Fla. 245.
Iowa.—Korf v. Howerton, 174 N.W. 350, 188 Iowa 120.
Ky.—Mason v. Letcher Coal & Coke Co., 245 S.W. 130, 196 Ky. 629.
La.—Jones v. Alford, App., 172 So. 213.
Me.—Edwards v. Packard, 149 A. 623, 129 Me. 74.
Mich.—Prudential Ins. Co. of America v. Dworkin, 253 N.W. 233, 266 Mich. 105.
N.Y.—Eichhammer v. Parsons, 7 N.E.2d 103, 273 N.Y. 208, 110 A.L.R. 344, modifying 288 N.Y.S. 434, 248 App.Div. 620.
Or.—Guthrie v. Haun, 76 P.2d 292, 159 Or. 50.
Pa.—Mortgage Building & Loan Ass'n v. J. B. Van Sciver & Co., 155 A. 920, 304 Pa. 408.
Tex.—Lacy v. Sanders, Civ.App., 295 S.W. 288.
22 C.J. p 141 note 77.
Advertisement of sale
Ky.—Kitchen, Whitt & Co. v. Fannin, 115 S.W.2d 325, 273 Ky. 62—Cooper v. Ensor, 110 S.W.2d 461, 270 Ky. 670.
La.—Samuels v. Parsons, 83 So. 548, 146 La. 262.
Pa.—American Seating Co. v. Murdock, 169 A. 250, 111 Pa.Super. 242.
Sales under powers granted by deeds of trust are not subject to such presumption.—Smith v. Allbright, Tex.Civ.App., 279 S.W. 852, affirmed Albright v. Smith, Com.App., 288 S.W. 178, reversed on other grounds Allbright v. Smith, 5 S.W.2d 970.
Overcoming presumption
The presumption that the sheriff on selling real estate at a judicial sale has not only issued a certificate of sale to the purchaser, but has filed a duplicate thereof for record in the county recorder's office as required by statute, so as to constitute constructive notice to tenants of the property of the transfer of the title, is disputable, and is overcome by evidence that such tenants were without notice of the sale.—Title Insurance & Trust Co. v. Pfenninghausen, 207 P. 927, 57 Cal.App. 655.

21. N.Y.—People v. Ford, 112 N.Y.S. 130, 127 App.Div. 444.
22 C.J. p 136 note 55 [b].
When designation has been made it is to be presumed that the decision of the official charged with the duty has been arrived at after having due regard to the general requirements of the statute.—People v. Ford, supra.

22. Cal.—Hayman v. City of Los Angeles, 62 P.2d 1047, 17 Cal.App.2d 674.

23. Iowa.—State v. Howard, 10 Iowa 101.
28 C.J. p 775 note 58.

erection and maintenance of traffic signs;[24] the issuance of bonds,[25] licenses,[26] patents,[27] and process;[28] the issuance[29] and levy[30] of executions or attachments;[31] the making of official certificates;[32] the making of returns;[33] the proceedings of con-

24. N.Y.—Armstrong v. Koller, 25 N.Y.S.2d 984, 261 App.Div. 1017.
Va.—Huffman v. Jackson, 9 S.E.2d 295, 175 Va. 564.

25. Ariz.—Parks v. School Dist. No. 1 of Yavapai County, 193 P. 838, 22 Ariz. 18.
Cal.—Crowe v. Boyle, 193 P. 111, 184 Cal. 117—Antelope Valley Union High School Dist. of Los Angeles County v. McClellan, 203 P. 147, 55 Cal.App. 244.
Tenn.—Tennessee Public Service Co. v. City of Knoxville, 91 S.W.2d 566, 170 Tenn. 40.
Wyo.—In re Greybull Valley Irr. Dist., 77 P.2d 617, 52 Wyo. 479, denying rehearing 76 P.2d 339, 52 Wyo. 479, followed in Brewer v. Greybull Valley Irr. Dist., 76 P.2d 351, 52 Wyo. 513.

Place of holding bond election presumed authorized

Miss.—Carter v. Board of Sup'rs of Chickasaw County, 95 So. 306, 131 Miss. 127.

26. U.S.—Franklin Process Co. v. Hoosac Mills Corporation, D.C. Mass., 8 F.Supp. 552, reversed on other grounds, C.C.A., Butler v. U. S., 78 F.2d 1, certiorari granted U. S. v. Butler, 56 S.Ct. 144, 296 U.S. 561, 80 L.Ed. 396, affirmed 56 S.Ct. 312, 297 U.S. 1, 80 L.Ed. 477, 102 A.L.R. 914.
Conn.—Salt's Textile Mfg. Co. v. Ghent, 139 A. 694, 107 Conn. 211.
Mich.—Bowman v. Myers, 217 N.W. 916, 241 Mich. 642.
N.Y.—Marks v. Bruckman, 9 N.Y.S.2d 947, 170 Misc. 709.
Tex.—Wonderful Workers of the World Benev. Ass'n v. Hamilton, Civ.App., 298 S.W. 450.

Refusal of taxicab license

Action of police commissioner and deputy police commissioner in charge of hack bureau of police department in refusing to grant additional licenses for operation of taxicabs within city would be presumed to be reasonable.—Rudack v. Valentine, 295 N.Y.S. 976, 163 Misc. 326, affirmed 10 N.E.2d 577, 274 N.Y. 615.

27. U.S.—Mackenzie-Kennedy v. U. S., 85 Ct.Cl. 405, certiorari denied 58 S.Ct. 645, 303 U.S. 646, 82 L.Ed. 1108.
Presumption of validity of patent in general see the C.J.S. title Patents § 145, also 48 C.J. p 175 note 25—p 177 note 47.

Land patents

U.S.—La Terre Co. v. Billiot's Shell Island, C.C.A.La., 103 F.2d 53, affirming, D.C., 20 F.Supp. 106.
Presumption of validity of land patents in general see the C.J.S. title Public Lands § 194, also 50 C.J. p 1099 note 76—p 1100 note 86.

28. U.S.—Albert Weinbrenner, Inc., v. Finne, C.C.A.Or., 105 F.2d 272.
Ky.—Walker v. Perkins, 76 S.W.2d 251, 256 Ky. 442.
Tex.—Buttrill v. Occidental Life Ins. Co., Civ.App., 31 S.W.2d 833.

29. Ky.—Mann Bros. v. Ball, 18 S.W.2d 946, 230 Ky. 129.
Mo.—Swabey v. Boyers, App., 71 S.W.2d 110.
Tex.—Clements v. Texas Co., Civ.App., 273 S.W. 993.
22 C.J. p 141 note 72.

Overcoming presumption

The presumption that a clerk issuing an execution did so regularly at request of plaintiff, and not defendant's counsel, is not overcome by such clerk's testimony a few years afterward that the best of her recollection was that she issued it at request of defendant's counsel.—Crim v. Thompson, 193 P. 448, 98 Or. 599.

30. Hawaii.—Nichols v. Wah Chong Sun, 28 Hawaii 395.
Iowa.—Northwestern Mut. Life Ins. Co. of Milwaukee, Wis., v. Block, 249 N.W. 395, 216 Iowa 401—Budd v. Durall & Searcy, 36 Iowa 315—Rowan v. Lamb, 4 Greene 468.
Ky.—Mann Bros. v. Ball, 18 S.W.2d 946, 230 Ky. 129—Mason v. Letcher Coal & Coke Co., 245 S.W. 130, 196 Ky. 629.
Mo.—Lackey v. Seibert, 23 Mo. 85.
Mont.—Stone-Ordean-Wells Co. v. Strong, 20 P.2d 639, 94 Mont. 20.
Ohio.—City Loan & Savings Co. v. Kyler, 198 N.E. 503, 50 Ohio App. 390.
Tenn.—Boyd v. Buckingham, 10 Humphr. 434.
Wash.—Atwood v. McGrath, 242 P. 648, 137 Wash. 400—Goshert v. Wirth, 226 P. 124, 130 Wash. 14.
22 C.J. p 141 notes 73, 74.

Levy of distress warrant

Ga.—Speed Oil Co. v. Aldredge, 15 S.E.2d 214.

31. Me.—Devereux Co. v. Silsby, 114 A. 460, 120 Me. 362.
22 C.J. p 141 note 74.

32. U.S.—Pizzano v. Knowles & Co., D.C.Mass., 37 F.Supp. 118—In re Hammett, D.C.Ga., 286 F. 392—Madeira Embroidery Co. v. U. S., 9 Ct. Cust.App. 140.
Ark.—Cain v. Carl-Lee, 281 S.W. 661, 170 Ark. 859.
Cal.—Shaw v. Feehan, 279 P. 658, 207 Cal. 561—Hind v. Uchida Trading Co., 203 P. 1028, 55 Cal.App. 260.
Colo.—People v. Mitchell, 292 P. 228, 88 Colo. 102.
Ill.—People v. Miller, 171 N.E. 672, 339 Ill. 573.
Ind.—Paul v. Walkerton Woodlawn Cemetery Ass'n, 184 N.E. 537, 204 Ind. 693—Kwiatkowski v. Putzhaven, 126 N.E. 3, 189 Ind. 119.
Iowa.—First-Trust Joint Stock Land Bank of Chicago, Ill., v. McNeff, 264 N.W. 105, 220 Iowa 1225—Zellmer v. Smith, 221 N.W. 220, 206 Iowa 725—Clay v. Independent School Dist. of Cedar Falls, 174 N.W. 47, 187 Iowa 89.
Ky.—Walker v. Horton, 118 S.W.2d 781, 274 Ky. 310—Huckabee v. Black Mountain Corporation, 24 S.W.2d 299, 232 Ky. 599—Bingham v. Johnson, 237 S.W. 1077, 193 Ky. 753.
N.M.—Zamora v. Archuleta, 10 P.2d 822, 36 N.M. 181.
N.Y.—Reade v. Halpin, 182 N.Y.S. 45, 111 Misc. 675, reversed on other grounds 184 N.Y.S. 438, 193 App. Div. 566.
Or.—McIntosh Live Stock Co. v. Buffington, 241 P. 393, 116 Or. 399.
Tex.—Texas Building & Mortgage Co. v. Morris, Civ.App., 123 S.W.2d 365, error dismissed—Lewis v. Lindsley, Civ.App., 68 S.W.2d 548, reversed on other grounds Lindsley v. Lewis, 84 S.W.2d 994, 125 Tex. 630—National Protective Legion v. Stevens, Civ.App., 258 S.W. 487—W. T. Wilson Grain Co. v. Louis Tobian & Co., Civ.App., 247 S.W. 906.
Va.—Blair v. Rorer's Adm'r, 116 S.E. 767, 135 Va. 1, motion denied 43 S.Ct. 704, 262 U.S. 234, 67 L.Ed. 1206.
22 C.J. p 141 note 70.

Certified copy of birth record is to be presumed to contain only such particulars as were prescribed by the state board of health at the time.—Gett v. Isaacson, 120 A. 156, 98 Conn. 539.

Certified finding of secretary of state with respect to exemption of corporations from Blue Sky Law is entitled to full faith and credit.—C. R. Miller Mfg. Co. v. Coleman, Tex.Com.App., 29 S.W.2d 991, affirming Coleman v. Miller, Civ.App., 19 S.W.2d 829.

Right to certify legal effect or result of official act or an interpretation thereof cannot be presumed from the fact that the officer has acted lawfully.—C. R. Miller Mfg. Co. v. Coleman, supra.

33. Ga.—Darnell v. Tate, 170 S.E. 63, 177 Ga. 279.
Iowa.—Heater v. Bagan, 221 N.W. 932, 206 Iowa 1301.
Ky.—Walker v. Perkins, 76 S.W.2d 251, 256 Ky. 442.
Mo.—Williams v. Luecke, App., 152 S.W.2d 991.
Tex.—Farmers' Nat. Bank of Ste-

gress;[34] the propriety, regularity, and legality of a meeting of an official body;[35] the questions and answers on an alien's application for a visa;[36] the regularity and verity of records or reports made by public officials;[37] the reinstating of a war risk policy;[38] the sale of Indian lands and disposition of the proceeds;[39] and the service of process.[40]

§ 147. Sanity and Mental Capacity

Persons are presumed to be sane and competent notwithstanding old age, physical disability or infirmity, or the fact of suicide.

It is to be presumed that a person is mentally sound,[41] possesses ordinary or reasonable intelli-

phenville v. Daggett, Com.App., 2 S.W.2d 834, affirming Daggett v. Farmers' Nat. Bank, Civ.App., 259 S.W. 198—Cotten v. Stanford, Civ. App., 147 S.W.2d 930.

W.Va.—Title Ins. Co. of Richmond v. Carver, 166 S.E. 697, 113 W.Va. 58.

22 C.J. p 141 note 75.

Returns of election board are presumed to be regular—In re Election Contest for Office of Burgess of Borough of Ellwood City, 133 A. 379, 286 Pa. 257.

Return of marriage ceremony

Officer or minister is presumed to have made the return of marriage ceremony to the clerk as required by law.—Penn v. Jones, 5 La.App. 371.

34. U.S.—Barry v. U. S. ex rel. Cunningham, Pa., 49 S.Ct. 452, 279 U.S. 597, 73 L.Ed. 867, reversing, C.C.A., U. S. ex rel. Cunningham v. Barry, 29 F.2d 817, reversing, D.C., 25 F.2d 733, and certiorari granted Barry v. U. S. ex rel. Cunningham, 49 S.Ct. 253, 279 U.S. 827, 73 L.Ed. 979.

35. Ariz.—Parks v. School Dist. No. 1 of Yavapai County, 193 P. 838, 22 Ariz. 18.

Ill.—Fiedler v. Eckfeldt, 166 N.E. 504, 335 Ill. 11—People v. Cleveland, C., C. & St. L. Ry. Co., 138 N.E. 663, 307 Ill. 162.

Ind.—State v. Richey, 172 N.E. 119, 202 Ind. 116.

Ky.—Fidelity & Deposit Co. of Maryland v. Commonwealth, for Use of City of Jackson, 67 S.W.2d 719, 252 Ky. 476.

Me.—Milliken v. Gilpatrick, 157 A. 714, 130 Me. 498.

Mass.—Newcomb v. Aldermen of Holyoke, 171 N.E. 826, 271 Mass. 565.

Mich.—White Chapel Memorial Ass'n v. Willson, 244 N.W. 460, 260 Mich. 238.

Minn.—Gates v. First Nat. Bank, 188 N.W. 571, 152 Minn. 283.

N.Y.—Loos v. City of New York, 9 N.Y.S.2d 760, 170 Misc. 14, 104, reversed on other grounds 13 N.Y.S.2d 119, 257 App.Div. 219.

Ohio.—Shalersville Board of Education v. Horner, 9 N.E.2d 918, 55 Ohio App. 356—State v. Higham, 172 N.E. 159, 35 Ohio App. 243.

36. U.S.—Daskaloff v. Zurbrick, C.C.A.Mich., 103 F.2d 579.

37. U.S.—Southwestern Bell Telephone Co. v. City of San Antonio, C.C.A.Tex., 75 F.2d 880, setting aside, D.C., 2 F.Supp. 611, affirmed 4 F.Supp. 570, certiorari denied City of San Antonio v. Southwestern Bell Telephone Co., 55 S.Ct. 835, 295 U.S. 754, 79 L.Ed. 1698—U. S. v. McCullough Seed Co., 13 Ct.Cust.App. 237.

Ala.—Townsend v. Adair, 134 So. 637, 223 Ala. 150—First Nat. Bank of Abbeville v. Terry, Briggs & Co., 83 So. 170, 203 Ala. 401.

Cal.—Wutchumna Water Co. v. Superior Court in and for Tulare County, 12 P.2d 1033, 215 Cal. 734.

Conn.—State v. Atchison, 135 A. 456, 105 Conn. 315—Clark v. Town of Cornwall, 106 A. 347, 93 Conn. 374.

Fla.—Long v. Sphaler, 105 So. 101, 89 Fla. 499.

Ga.—Gordon v. Ransom & Lomax Lumber Co., 106 S.E. 176, 151 Ga. 181—Brinson v. Georgia Railroad Bank & Trust Co., 165 S.E. 321, 45 Ga.App. 459.

Ind.—Van Der Veer v. State, 165 N.E. 265, 97 Ind.App. 1.

Iowa.—State v. Beaton, 180 N.W. 166, 190 Iowa 216, denying rehearing 178 N.W. 1, 190 Iowa 216.

Kan.—Jackman v. Lawrence Drilling & Development Co., 187 P. 258, 106 Kan. 59.

Ky.—Head's Adm'x v. Commonwealth for Use and Benefit of Dawson, 72 S.W.2d 60, 254 Ky. 687—Louisville & N. R. Co. v. Bullitt County, 57 S.W.2d 506, 247 Ky. 489—Huckabee v. Black Mountain Corporation, 24 S.W.2d 299, 232 Ky. 599—Conrad v. Pendleton County, 273 S.W. 57, 209 Ky. 526—Hines v. May, 230 S.W. 924, 191 Ky. 493.

La.—Goldberg v. Banta Bros., 162 So. 786, 183 La. 10—Loughridge v. Parish of Iberia, 158 So. 3, 180 La. 875—Ray v. Parish of Rapides, 125 So. 856, 169 La. 691.

Miss.—Bullock v. Sanford Consol. School Dist., 121 So. 267, 153 Miss. 476—Witherspoon v. State, 103 So. 134, 138 Miss. 310.

R.I.—Gelinas v. Fugere, 180 A. 346, 55 R.I. 225.

Tex.—W. T. Carter & Bro. v. Bendy, Civ.App., 251 S.W. 265.

W.Va.—Forest Glen Land Co. v. George, 122 S.E. 543, 96 W.Va. 209.

Wyo.—McDonald v. Mulkey, 210 P. 940, 29 Wyo. 99.

53 C.J. p 622 note 11.

Rule of procedure printed in authorized city manual is presumed to have been duly adopted.—Thorne v. Squier, 249 N.W. 497, 264 Mich. 98, 89 A.L.R. 126.

Record book copy

As it is proper to copy a deed into a record book, the record book copy is presumed to be correct, being found in a book where it was authorized to be written.—Wilson v. Moseley, 102 S.E. 330, 113 S.C. 278.

38. U.S.—Donsing v. U. S., C.C.A. Wis., 113 F.2d 615.

39. U.S.—Bluejacket v. Ewert, C.C.A.Okl., 265 F. 823, affirmed in part and reversed in part on other grounds Ewert v. Bluejacket, 42 S.Ct. 442, 259 U.S. 129, 66 L.Ed. 858, leave to present petition granted Kendall v. Ewert, 42 S.Ct. 587.

Deposit of proceeds

The presumption is that the purchase money on a sale of the interests of minor heirs of deceased Indian was deposited in banks or with the Indian agent as required by the rules of the secretary of the interior.—Bluejacket v. Ewert, supra.

40. Ga.—Benton v. Maddox, App., 16 S.E.2d 141.

Ind.—Hitt v. Carr, 130 N.E. 1, 77 Ind.App. 488.

Ky.—Fischer v. Eby, 114 S.W.2d 763, 272 Ky. 545—Fleishman v. Goodman, 67 S.W.2d 691, 252 Ky. 535.

La.—Gamburg v. Ray, 120 So. 480, 167 La. 865.

Mich.—Sterling Bank of Sleeper & Chamberlain v. Scott, 204 N.W. 135, 231 Mich. 362.

Mo.—Wells v. Wells, 213 S.W. 830, 279 Mo. 57.

Pa.—Mazzoleni v. Transamerica Corporation, 169 A. 127, 313 Pa. 317.

Tex.—Lanier v. King, Civ.App., 112 S.W.2d 815.

22 C.J. p 141 note 71.

41. U.S.—Beckley Nat. Bank v. Boone, C.C.A.W.Va., 115 F.2d 513, reversing, D.C., Boone v. Equitable Holding Co., 32 F.Supp. 896—Reliance Life Ins. Co. v. Burgess, C.C.A.Mo., 112 F.2d 234, certiorari denied Burgess v. Reliance Life Ins. Co., 61 S.Ct. 137, 311 U.S. 699, 85 L.Ed. 453, rehearing denied 61 S.Ct. 391, 311 U.S. 730, 85 L.Ed. 475—Collins v. Streitz, C.C.A.Ariz., 95 F.2d 430, certiorari denied 59 S.Ct. 67, 305 U.S. 608, 83 L.Ed. 387—Fidelity & Casualty Co. of New York v. Niemann, C.C.A.Mo., 47 F.2d 1056—Hall v. Unger, C.C.Cal., 11 F.Cas.No.5,949, 4 Sawy. 672, affirmed Dexter v. Hall, 15 Wall. 9, 21 L.Ed. 73—Nimick v. Mutual

gence,[42] sensibilities,[43] learning,[44] experience.[45] It | is likewise to be presumed that a person possesses

Ben. Life Ins. Co., C.C.Pa., 18 F. Cas.No.10,266, 3 Brewst. 502—U. S. v. McGlue, C.C Mass., 26 F.Cas. No.15,679, 1 Curt. 1.

Ala.—Equitable Life Assur. Soc. of U. S. v. Welch, 195 So. 554, 239 Ala. 453—Vaughn v. Vaughn, 116 So. 427, 217 Ala. 364—McLeod v. Brown, 98 So. 470, 210 Ala. 491—Vansandt v. Brewer, 95 So. 463, 209 Ala. 131—Harris v. Bowles, 94 So. 757, 208 Ala. 545—Blair v. Jones, 78 So. 69, 201 Ala. 293—Johnson v. Pinckard, 72 So. 127, 196 Ala. 259—Pritchard v. Fowler, 55 So. 147, 171 Ala. 662.

Ariz.—Garner v. Arizona Egyptian Cotton Co., 197 P. 231, 22 Ariz. 318.

Ark.—Dalton v. Polster, 138 S.W.2d 64, 200 Ark. 168.

Cal.—Nourse v. Azvedo, 195 P. 669, 185 Cal. 47—People v. Loper, 112 P. 720, 159 Cal. 6, Ann.Cas.1912B 1193—Olivera v. Grace, App., 116 P.2d 146—California Bank v. Bell, 101 P.2d 724, 38 Cal.App.2d 533—Albertson v. Schmidt, 17 P.2d 158, 128 Cal.App. 344—In re Ivey's Estate, 294 P. 420, 110 Cal.App. 561—Avery v. Avery, 183 P. 453, 42 Cal App. 100.

Colo.—North American Accident Ins. Co. v. Cavaleri, 58 P.2d 756, 98 Colo. 565.

Conn.—Doris v. McFarland, 156 A. 52, 113 Conn. 594.

Fla.—Schaefer v. Voyle, 102 So. 7, 88 Fla. 170—Travis v. Travis, 87 So. 762, 81 Fla. 307.

Ill.—Turley v. Turley, 30 N.E.2d 64, 374 Ill. 571—Quathamer v. Schoon, 19 N.E.2d 750, 370 Ill. 606—Johnson v. Lane, 15 N.E.2d 710, 369 Ill. 135—Langwisch v. Langwisch, 198 N.E. 675, 361 Ill. 632—Morecraft v. Felgenhauer, 178 N.E. 877, 346 Ill. 415—People v. Geary, 131 N.E. 97, 297 Ill. 608—Omer v. Vollbracht, 117 N.E. 1021, 281 Ill 188—Walton v. Malcolm, 106 N.E. 211, 264 Ill. 389, Ann.Cas.1915D 1021—Fidelity & Casualty Co. of New York v. Weise, 55 N.E. 540, 182 Ill. 496, reversing 80 Ill App. 499.

Ind.—Dearmond v. Dearmond, 12 Ind. 455—Graham v. Plotner, 151 N.E. 735, 87 Ind.App. 462.

Iowa.—Ware v. Eckman, 277 N.W. 725, 224 Iowa 783—Davidson v. Piper, 265 N.W. 107, 221 Iowa 171—In re Brockmann's Will, 223 N.W. 473, 207 Iowa 707—Engelbercht v. Davison, 213 N.W. 225, 204 Iowa 1394—Waters v. Waters, 207 N.W. 593, 201 Iowa 586—Speer v. Speer, 123 N.W. 176, 146 Iowa 6, 27 L.R.A.,N.S., 294, 140 Am.S.R. 268.

Ky.—Revlett v. Revlett, 118 S.W.2d 150, 274 Ky. 176—Davenport v. Jenkins' Committee, 283 S.W. 1044, 214 Ky. 716.

Me.—Wallace v. United Order of Golden Cross, 106 A. 713, 118 Me. 184—Thornton v. Appleton, 29 Me. 298.

Md.—Colburn v. Ellers, 153 A. 14, 160 Md. 104—Brown v. Ward, 53 Md. 376, 36 Am.R. 422.

Mich.—In re Ryan, 289 N.W. 291, 291 Mich. 673—Stevens v. Stevens, 254 N.W. 162, 266 Mich. 446—Valisano v. Chicago & N. W. Ry. Co., 225 N.W. 607, 247 Mich. 301.

Miss.—Hamilton Bros. Co. v. Narciese, 158 So. 467, 172 Miss. 24.

Mo.—Fendler v. Roy, 58 S.W.2d 459, 331 Mo. 1083—State ex rel. Bevan v. Williams, 291 S.W. 481, 316 Mo. 665—State v. Rose, 195 S.W. 1013, 271 Mo. 17.

Mont.—Hier v. Farmers Mut. Fire Ins. Co., 67 P.2d 831, 104 Mont 471, 110 A.L.R. 1051—In re Harper's Estate, 40 P.2d 51, 98 Mont. 356—Sommerville v. Greenhood, 210 P. 1048, 65 Mont. 101.

N.H.—Young v. Stevens, 48 N.H. 133, 97 Am.D. 592—Perkins v. Perkins, 39 N.H. 163.

N.J.—Board of Health of Lyndhurst Tp. v. United Cork Cos., 172 A. 347, 116 N.J.Eq. 4, affirmed 176 A. 142, 117 N.J.Eq. 437.

N.Y.—Dodd v. Anderson, 115 N.Y.S. 688, 131 App.Div. 224, reversed on other grounds 90 N.E. 1137, 197 N.Y. 466, 27 L.R.A.,N.S., 336, rehearing denied 92 N.E. 1083, 198 N.Y. 552.

N.C.—Jones v. Winstead, 120 S.E. 89, 186 N.C. 536.

N.D.—Edwardson v. Gerwien, 171 N. W. 101, 41 N.D. 506.

Okl.—In re Nitey's Estate, 53 P.2d 215, 218, 175 Okl. 389, citing **Corpus Juris**—Metropolitan Life Ins. Co. v. Plunkett, 264 P. 827, 129 Okl. 292.

Or.—De La Montanya v. De La Montanya, 281 P. 825, 131 Or. 23—Schindler v. Parzoo, 97 P. 755, 52 Or. 452.

Pa.—Young v. Dollar Savings Bank, 25 Pa.Dist. & Co. 80, 83 Pittsb. Leg.J. 659—Ferrebee's Estate, 18 Pa.Dist. 1015—Craighead v. Smith, 10 Pa.Co. 359—Montgomery Trust Co. v. Griscom, 27 Del.Co. 437.

Philippine.—Standard Oil Co. v. Arenas, 19 Philippine 363.

R.I.—Cole v. Barber, 82 A. 129, 33 R. I. 414.

S.C.—Lee's Heirs v. Lee's Ex'rs, 15 S.C.L. 183, 17 Am.D. 722.

Tex.—Seinsheimer v. Burkhart, 122 S.W.2d 1063, 132 Tex. 336, modifying, Civ.App., 93 S.W.2d 1231—Carter v. State, 12 Tex. 500, 62 Am. D. 539—Redmon v. Leach, Civ. App., 130 S.W.2d 873, error dismissed, judgment correct—Texas Employers' Ins. Ass'n v. Birdwell, Civ.App., 39 S.W.2d 159, error refused—Damron v. Rankin, Civ. App., 34 S.W.2d 360—Langerhans v. Pape, Civ.App., 27 S.W.2d 287—Gerlich v. Myers, Civ.App., 290 S.W. 270—Greenwood v. Furr, Civ. App., 251 S.W. 332.

Va.—Davis v. Alderson, 100 S.E. 541, 125 Va. 681.

W.Va.—Eakin v. Hawkins, 43 S.E. 211, 52 W.Va. 124.

Wis.—In re Farr, 171 N.W. 951, 169 Wis. 451.

22 C.J. p 146 note 46.

Effect of void adjudication of insanity

It will be presumed that an adjudication of insanity was made under the only statute then in effect authorizing it; and, where such statute was determined to be unconstitutional, the presumption of sanity continued to attach.—Torres v. Gersdorff, Tex.Civ.App., 287 S.W. 668, affirmed in part and reversed in part on other grounds Gersdorff v. Torres, Com.App., 293 S.W. 560.

One who has notice of a party's unsoundness of mind cannot rely on the presumption of sanity.—Indianapolis Traction & Terminal Co. v. Henby, 97 N.E. 313, 178 Ind. 239.

Presumption of sanity is one of law, as distinguished from a presumption of fact, and hence will not be considered as evidence.—Laventhal v. New York Life Ins. Co., D. C Mo., 40 F.Supp. 157.

Exercise of prudence

Every adult is presumed to be endowed with sufficient reason to enable him to exercise ordinary prudence.—Artman v. Kansas Cent. R. Co., 22 Kan. 296.

42. Cal.—Murphy v. National Ice Cream Co., 300 P. 91, 114 Cal.App. 482.

Ga.—Ray v. Western & Atlantic R. R., 9 S.E.2d 92, 62 Ga.App. 609.

Iowa.—Gose v. True, 198 N.W. 528, 197 Iowa 1094.

N.C.—Murphy v. Carolina Power & Light Co., 146 S.E. 204, 196 N.C. 484.

S.D.—Cameron v. Miller, 180 N.W. 71, 43 S.D. 429.

Tex.—Redmon v. Leach, Civ.App., 130 S.W.2d 873, error dismissed, judgment correct.

22 C.J. p 146 note 47.

Inability to speak English does not give rise to a presumption of lack of ordinary intelligence.—Fosnes v. Duluth St. R. Co., 122 N.W. 1054, 140 Wis. 455, 30 L.R.A.,N.S., 270.

43. Tex.—City of Tyler v. House, Civ.App., 64 S.W.2d 1007, 1008, citing **Corpus Juris.**

44. N.H.—Cartier v. Cartier, 153 A. 6, 84 N.H. 526.

45. N.H.—Cartier v. Cartier, supra.

S.D.—Cameron v. Miller, 180 N.W. 71, 43 S.D. 429.

ordinary or reasonable judgment,[46] and discretion,[47] and is competent to transact ordinary business.[48] Conversely, there is no presumption of insanity[49] or incompetency,[50] or of lack of ordinary reason and firmness.[51]

Effect of age or physical disability or infirmity. While it has been held that a child under seven years of age is presumed incapable of appreciating and avoiding danger,[52] neither old age[53] nor extreme weakness of body[54] raises a presumption of unsoundness of mind. In the early history of the law a person born deaf and dumb was presumed to be an idiot,[55] although such presumption was rebuttable[56] by proof of understanding.[57] The modern doctrine, however, is that the fact that a person is deaf and dumb does not raise a presumption of idiocy[58] or insanity,[59] although it has also been held that a person who is not only deaf and dumb, but blind, would be considered in law as incapable of any understanding.[60]

Effect of suicide. While the fact of suicide of a person may properly be considered on the question of his sanity, as appears in the C.J.S. title Insane Persons § 5, also 32 C.J. p 759 note 63, the presumption of sanity is not rebutted by such fact,[61] nor does such fact alone raise a presumption of insanity,[62] although the suicide was immediately preceded by irrational acts.[63] A fortiori, an attempt at or threat of suicide will not destroy the presumption of sanity.[64]

§ 148. Sending and Delivery of Telegrams

A telegram is presumed to have been properly delivered by the telegraph company where it was properly addressed and delivered to the company for transmission, and charges were paid.

It is presumed that a telegram reached its destination,[65] and that it was received by the addressee,[66] where, but only where, it is shown that the message was properly addressed,[67] and delivered to a telegraph company for transmission,[68] and that the charges for its transmission were paid.[69] It has also been held that there is no presumption of delivery to the addressee unless there is proof that the message was received by the telegraph office to which it was directed.[70] The presumption of de-

46. Del.—Louft v. C. & J. Pyle Co., 75 A. 619, 24 Del. 192.
Tex.—Redmon v. Leach, Civ.App., 130 S.W.2d 873, error dismissed, judgment correct.

47. S.D.—Cameron v. Miller, 180 N.W. 71, 43 S.D. 429.
Tex.—Redmon v. Leach, Civ.App., 130 S.W.2d 873, error dismissed, judgment correct.
22 C.J. p 146 note 49.

48. Cal.—Shaw v. Feehan, 279 P. 658, 207 Cal. 561.
Ill.—Burke's Estate v. Sullivan, 247 Ill.App. 233.
Tex.—Redmon v. Leach, Civ.App., 130 S.W.2d 873, error dismissed, judgment correct.
22 C.J. p 146 note 50.

49. Ky.—John Hancock Mut. Life Ins. Co. v. Tabb, 117 S.W.2d 587, 273 Ky. 649.
La.—Chandler v. Barrett, 21 La.Ann. 58, 99 Am.D. 701.

50. Ark.—Dalton v. Polster, 138 S.W.2d 64, 200 Ark. 168.
Filing information alleging insanity raises no presumption of incompetency.—State ex rel. Bevan v. Williams, 291 S.W. 481, 316 Mo. 665.

51. S.C.—Brooker v. Silverthorne, 99 S.E. 350, 111 S.C. 553, 5 A.L.R. 1283.

52. Pa.—Sullenberger v. Chester Tract. Co., 33 Pa.Super. 12.

53. Cal.—Johnson v. Studley, 252 P. 638, 80 Cal.App. 538.
N.J.—In re Collins, 18 N.J.Eq. 253.
Pa.—Montgomery Trust Co. v. Griscom, 27 Del.Co. 437.
Utah.—In re Lamont's Estate, 79 P. 2d 649, 95 Utah 219.

54. S.C.—Carmichael v. Carmichael, 96 S.E. 526, 110 S.C. 357.

55. N.Y.—Browner v. Fisher, 4 Johns.Ch. 441.
32 C.J. p 757 note 30.

56. Mass.—Commonwealth v. Hill, 14 Mass. 207.
32 C.J. p 757 note 34.

57. Ga.—Potts v. House, 6 Ga. 324, 50 Am.D. 329.
N.J.—Perrine's Case, 5 A. 579, 41 N.J.Eq. 409.

58. Mo.—State v. Howard, 24 S.W. 41, 118 Mo. 127.
32 C.J. p 757 note 32.

59. La.—Hebert's Succession, 33 La.Ann. 1099.
32 C.J. p 757 note 33.

60. Conn.—Brown v. Brown, 3 Conn. 299, 8 Am.D. 187.
32 C.J. p 757 note 32 [b].

61. Colo.—North American Accident Ins. Co. v. Cavaleri, 58 P.2d 756, 98 Colo. 565.
Me.—Wallace v. United Order of Golden Cross, 106 A. 713, 118 Me. 184.
32 C.J. p 756 note 24.
Presumption against suicide see supra § 135.

62. U.S.—Terry v. Mutual Life Ins. Co., C.C.Kan., 23 F.Cas.No.13,839, 1 Dill. 403, affirmed 15 Wall. 580, 21 L.Ed. 236.
N.Y.—Roche v. Nason, 77 N.E. 1007, 185 N.Y. 128—Coffey v. Home Life Ins. Co., 35 N.Y.Super. 314, 44 How. Pr. 481.
32 C.J. p 756 note 25.

63. Wis.—Karow v. New York Continental Ins. Co., 15 N.W. 27, 57 Wis. 56, 46 Am.R. 17.

64. U.S.—Wolff v. Connecticut Mut. Life Ins. Co., C.C.Mich., 30 F.Cas. No.17,929, 2 Flipp. 355.

65. Ala.—Corry v. Sylvia Y Cia, 68 So. 891, 192 Ala. 550, Ann.Cas. 1917E 1052.
22 C.J. p 102 note 61.

66. D.C.—Campbell v. Willis, 290 F. 271, 53 App.D.C. 296.
22 C.J. p 103 note 62.

67. Cal.—Eppinger v. Scott, 42 P. 301, 112 Cal. 369, 53 Am.S.R. 220.
22 C.J. p 102 note 59.

68. Cal.—Eppinger v. Scott, 42 P. 301, 44 P. 723, 112 Cal. 369, 53 Am. S.R. 220.
22 C.J. p 102 note 60.
Message telephoned to telegraph agent for transmission is presumed to have been heard by the agent as it was spoken.—Western Union Telegraph Co. v. Baltz, 299 S.W. 377, 175 Ark. 167.
Evidence held insufficient to show delivery of message to telegraph company.—Twohig v. Denver & R. G. R. Co., Mo.App., 218 S.W. 897.

69. Ga.—Jackson Co. v. Farmers Peanut Co., 6 S.E.2d 428, 61 Ga. App. 248—Abercrombie v. Georgia Distributing Co., 158 S.E. 530, 43 Ga.App. 258.
Iowa.—City of Ottumwa v. McCarthy Impr. Co., 150 N.W. 586, 175 Iowa 233.

70. Mo.—State v. Gritzner, 36 S.W. 39, 134 Mo. 512.

livery of a telegram is, perhaps, weaker at the outset than the presumption of regular delivery of mail matter,[71] but it becomes strong and convincing where the addressee has an opportunity to deny the receipt of the message, and fails to do so.[72] The presumption of receipt of a telegram is rebuttable,[73] cannot be indulged in an action by a telegraph company to recover its charges,[74] and has been held inapplicable to a cablegram addressed to a place in a foreign country, during the existence of a world war.[75]

§ 149. Virility of Men

Men are presumed capable of sexual intercourse and of procreation regardless of advanced age.

It is presumed in the absence of evidence to the contrary that a male person of mature years is capable of sexual intercourse,[76] and of procreation,[77] even though he has reached a very advanced age.[78]

§ 150. Other Matters

a. Corporate acts and records
b. Health and physical condition
c. Knowledge of facts
d. Making, validity, and genuineness of writings
e. Morality and rightful action; performance of duty
f. Ownership and value
g. Miscellaneous matters

a. Corporate Acts and Records

(1) In general
(2) Acts of directors, officers, and agents

(1) In General

In the absence of a contrary showing, the regularity and validity of corporate acts and proceedings will be presumed.

A corporation is entitled to be treated in a law action precisely as an individual, and only such inferences or presumptions should be indulged against it as would be proper in an action between two individuals.[79]

71. N.Y.—Oregon SS. Co. v. Otis, 3 N.E. 485, 100 N.Y. 446, 43 Am R. 221, appeal dismissed 6 S.Ct. 523, 116 U.S. 548, 29 L.Ed. 719.
Presumption of receipt of mail matter see supra § 136.

72. N.Y.—Oregon SS. Co. v. Otis, supra.

73. Cal.—Eppinger v. Scott, 42 P. 301, 112 Cal. 369, 53 Am.S.R. 220.
Mich.—Long-Bell Lumber Co. v. Nyman, 108 N.W. 1019, 145 Mich. 477, 116 Am.S.R. 310.
Evidence held insufficient to overcome presumption of delivery.—McKeown v. Western Union Telegraph Co., 231 Ill.App. 503.

74. N.Y.—Commercial Cable Co. v. Philipp Bauer Co., 169 N.Y.S. 450, 102 Misc. 699, affirming 165 N.Y.S. 399, 100 Misc. 663.

75. N.Y.—Commercial Cable Co. v. Philipp Bauer Co., 165 N.Y.S. 399, 100 Misc. 663, affirmed 169 N.Y.S. 450, 102 Misc. 699.

76. Ga.—Gardner v. State, 7 S.E. 144, 81 Ga. 144.
22 C.J. p 125 note 57.

77. Ind.—Reasoner v. Herman, 134 N.E. 276, 191 Ind. 642—Darrow v. Geisen, 200 N.E. 711, 102 Ind.App. 14.
N.C.—Smith v. Moore, 100 S.E. 702, 178 N.C. 370.
22 C.J. p 125 note 58.

78. Ark.—Love v. McDonald, 148 S.W.2d 170, 201 Ark. 882—Bowen v. Frank, 18 S.W.2d 1037, 179 Ark. 1004.
Ill.—Carter v. Lewis, 4 N.E.2d 853, 364 Ill. 434, 108 A.L.R. 458.
Ky.—Shepherd v. Moore, 140 S.W.2d 810, 283 Ky. 181—Renaker v. Tanner, 83 S.W.2d 54, 260 Ky. 281—Futrell v. Futrell's Ex'r, 7 S.W.2d 232, 224 Ky. 814—Brown v. Owsley, 248 S.W. 889, 198 Ky. 344—Quigley v. Quigley, 170 S.W. 523, 161 Ky. 85, rehearing denied 172 S.W. 1071, 162 Ky. 754.
Mich.—Rozell v. Rozell, 186 N.W. 489, 217 Mich. 324.
N.J.—Graves v. Graves, 120 A. 420, 94 N.J.Eq. 268.
Tenn.—Jordan v. Jordan, 239 S.W. 423, 145 Tenn. 378.
22 C.J. p 125 note 59.

79. Iowa.—Welton v. Iowa State Highway Commission, 233 N.W. 876, 211 Iowa 625.
Okl.—Morton v. Central Nat. Bank of Okmulgee, 43 P.2d 394, 171 Okl. 494.
Particular presumptions held proper
(1) That five persons, owning all issued capital stock of corporation, constituted board of directors.—Tierney & Lawford v. Wilshire Café Co., 289 P. 621, 209 Cal. 605.

(2) That instrument containing no recital that corporate seal was affixed and no evidence relating thereto was not a sealed obligation.—Drexler-Rochester Properties v. Paris, 259 N.Y.S. 601, 236 App.Div. 409.

(3) That officer's indorsement of note payable to corporation is corporate act.—Commercial State Bank of Omaha, Neb. v. Eilers, 264 P. 452, 124 Or. 379.

(4) That corporation acted through its president in dealing with certain claimants.—Wetchler v. Weal Homes Corporation, 267 N.Y.S. 581, 240 App. Div. 905.

(5) That salaries of corporate officers remaining at same level for many years were reasonable.—Wineburgh v. Seeman Bros., 21 N.Y.S.2d 180.

(6) That acts of a corporation, after it has determined to dissolve, are performed for purpose of settling its affairs.—Grussi v. Eighth Church of Christ, Scientist, of Portland, 241 P. 66, 116 Or. 336.

(7) That the date of a college commencement, as held, was fixed at the meeting of the board of trustees the preceding year, as required by its charter.—Brookfield v. Drury College, 123 S.W. 86, 139 Mo.App. 339.

(8) Where a corporation held and conveyed lands by reference to a recorded map, proof that the map remained on file many years without disclaimer by the corporation, and that it made many deeds by reference thereto, established prima facie that the filing and use of the map as a sales map was authorized by the corporation.—Ridgefield Park v. West Shore R. Co., 89 A. 776, 85 N.J.Law 385—Ridgefield Park v. New York, S. & W. R. Co., 89 A. 773, 85 N.J.Law 278.

(9) Other presumptions.
U.S.—Commissioner of Internal Revenue v. Bonwit, C.C.A., 87 F.2d 764, certiorari denied Bonwit v Helvering, 58 S.Ct. 13, 302 U.S. 694, 82 L.Ed. 536.
Ark.—Protective Life Ins. Co. of Bir-

In the absence of a contrary showing, the presumption is that corporate acts and proceedings are regular and valid.[80] Thus in the absence of contrary evidence, it will be presumed that corporate acts are within the scope of the powers of the corporation[81] and are not ultra vires;[82] that the corporate business is lawfully conducted;[83] and that the corporation has performed and will perform its duty.[84]

In addition, it will be presumed that action taken

mingham, Ala., v. Tibbs, 91 S.W. 2d 593, 192 Ark. 356.
N.Y.—In re Schlossman's Adm'x, 242 N.Y.S. 417, 136 Misc. 893.
Or.—Bartholomae Oil Corporation v Booth, 28 P.2d 1083, 146 Or. 154.

80. U.S.—Central Hanover Bank & Trust Co. v. United Traction Co., C.C.A.N.Y., 95 F.2d 50—Sioux City Stock Yards Co. v. Commissioner of Internal Revenue, C.C.A., 59 F. 2d 944—Majestic Co. v. Orpheum Circuit, C.C.A.Iowa, 21 F.2d 720—Edson Realty Co. v. Commercial Nat. Bank in Shreveport, D.C.La., 29 F.Supp. 22.
Cal.—Childress v. L. Dinkelspiel Co., 263 P. 803, 203 Cal. 263—Michaels v. Pacific Soft Water Laundry, 236 P. 172, 104 Cal.App. 366, rehearing denied 236 P. 1071, 104 Cal.App. 366—Schlitz v. Thomas, 216 P. 51, 61 Cal.App. 635.
Del.—State v. Benson, 128 A. 107, 2 W.W.Harr. 576.
Mo.—White v. Greenlee, 85 S.W.2d 112, 116, 337 Mo. 514, citing **Corpus Juris.**
N.Y.—Almirall & Co. v. McClement, 202 N.Y.S. 139, 207 App.Div. 320, affirmed 147 N.E. 225, 239 N.Y. 630.
Okl.—Morton v. Central Nat. Bank of Okmulgee, 43 P.2d 394, 396, 171 Okl. 494, quoting **Corpus Juris.**
Or.—First Nat. Bank v. Frazier, 22 P.2d 325, 143 Or. 662.
Tex.—Moroney v. Moroney, Com.App., 286 S.W. 167, reforming, Civ.App., 280 S.W. 254—Robinson v. Bradley, Civ.App., 141 S.W.2d 425—Breckenridge Hotel Co. v. J. M. Radford Grocery Co., Civ.App., 33 S.W.2d 1074, rehearing denied 35 S.W.2d 464.
Utah.—Fower v. Provo Bench Canal & Irrigation Co., 101 P.2d 375, certiorari denied 61 S.Ct. 841, 313 U.S. 564, 85 L.Ed. 1523.
Va.—Food Products Co. v. Pierce, 152 S.E. 562, 154 Va. 74.
Wash.—Sommer v. Yakima Motor Coach Co., 26 P.2d 92, 174 Wash. 638.
Wis.—Ruhbush v. Buss, 198 N.W. 608, 184 Wis. 439.
22 C.J. p 107 note 71.

Articles and by-laws are presumptively regular and valid.
U.S.—Rogers v. Hill, N.Y., 53 S.Ct. 731, 289 U.S. 582, 77 L.Ed. 1385, reversing, C.C.A., 62 F.2d 1079, which followed 60 F.2d 109, and certiorari granted 53 S.Ct. 593, 289 U.S. 716, 77 L.Ed. 1469.
Wash.—Fleming v. Reinhardt, 280 P. 9, 153 Wash. 526.

Corporate meetings; notice

(1) The regularity and validity of corporate meetings will be presumed in the absence of contrary evidence.
U.S.—E. E. Gray Corporation v. Meehan, C.C.A.Mass., 54 F.2d 223.
Del.—Duffy v. Loft, Inc., 151 A. 223, 17 Del.Ch. 140, affirmed 152 A. 849, 17 Del.Ch. 376.
Fla.—Gentry-Futch Co. v. Gentry, 106 So. 473, 90 Fla. 595.
Mich.—Voorheis v. Walker, 198 N.W. 994, 227 Mich. 291.
R.I.—Gallogly v. Stender, 154 A. 280, 51 R.I. 303, 76 A.L.R. 435.
Va.—Noremac, Inc., v. Centre Hill Court, 178 S.E. 877, 164 Va. 151.

(2) Unless a showing to the contrary is made, it will be presumed that proper notice of a corporate meeting was given.
Cal.—Whitcomb v. Giannini, 184 P. 887, 43 Cal.App. 229
Va.—Noremac, Inc., v. Centre Hill Court, 178 S.E. 877, 164 Va. 151.

(3) It will be presumed that valid notice of a directors' meeting was given where the corporate minutes recite that the directors were legally notified of the meeting and convened pursuant thereto.—Brooklune Canning & Packing Co. v. Evans, 146 S.W. 828, 163 Mo.App. 564.

Issuance of stock will be presumed regular and in accordance with legal requirements.
La.—Davidson v. American Paper Mfg. Co., 175 So. 753, 188 La. 69, 114 A.L.R. 1044.
N.Y.—Crawford v. Erbsloh, 244 N.Y.S. 502, 137 Misc. 790—Frank Gilbert Paper Co. v. Prankard, 195 N.Y.S. 638.
Wash.—Peck v. Davies, 283 P. 173, 154 Wash. 559.

81. U.S.—Providence Engineering Corporation v. Downey Shipbuilding Corporation, C.C.A.N.Y., 294 F. 641, certiorari denied U. S. Shipping Board Emergency Fleet Corporation v. Chase Nat. Bank of City of New York, 44 S.Ct. 334, 264 U.S. 586, 68 L.Ed. 862.
Mass.—Rosenblum v. Springfield Produce Brokerage Co., 137 N.E. 357, 243 Mass. 111.
Mont.—Conley v. Johnson, 54 P.2d 585, 101 Mont. 376—McMahon v. Cooney, 25 P.2d 131, 95 Mont. 133.
S.D.—McCannon v. Lusk-Mitchell Newspapers, 292 N.W. 82.
Tex.—Humble Oil & Refining Co. v. Strauss, Civ.App., 243 S.W. 528.
Wash.—Yakima Fruit-Growers' Ass'n v. Hall, 40 P.2d 123, 180 Wash. 365.

82. Mont.—Conley v. Johnson, 54 P. 2d 585, 101 Mont. 376—McMahon v. Cooney, 25 P.2d 131, 95 Mont. 133.
N.Y.—In re Heim's Estate, 3 N.Y.S. 2d 134, 166 Misc. 931, affirmed 8 N.Y.S.2d 574, 255 App.Div. 1007.
Tex.—Lewis v. Smith, Civ.App., 289 S.W. 1018.

83. Ga.—Standard Accident Ins. Co. v. Luther Williams Bank & Trust Co., 166 S.E. 260, 45 Ga.App. 831.
Mont.—McMahon v. Cooney, 25 P.2d 131, 95 Mont. 138.
N.Y.—Central Sav. Bank in City of New York v. City of New York, 18 N.E.2d 151, 279 N.Y. 266, reversing 5 N.Y.S.2d 451, 254 App.Div. 502, 121 A.L.R. 607, amended 19 N.E. 2d 659, 280 N.Y. 9, 121 A.L.R. 615, certiorari denied City of New York v. Central Sav. Bank in City of New York, 59 S.Ct. 790, 306 U.S. 661, 83 L.Ed 1058—Municipal Gas Co. of City of Albany v. Public Service Commission, Second Dist., 121 N.E. 772, 225 N.Y. 89, reversing order and answering certified questions 172 N.Y.S. 908, 186 App. Div. 933.
Pa.—Suburban Water Co. v. Borough of Oakmont, 110 A. 778, 268 Pa. 243.
22 C.J. p 107 note 72.

Foreign corporation doing business within the state is presumed to have complied with the laws of such state applicable to foreign corporations doing business therein.—Pekin Cooperage Co. v. State ex rel. Pike County, 122 S.W.2d 468, 197 Ark. 341—Protective Life Ins. Co. of Birmingham, Ala., v. Tibbs, 91 S.W.2d 593, 192 Ark. 356—22 C.J. p 108 note 83.

Compliance with ordinance

There is a presumption that an electric light company which has begun work has obtained permission from the city officials as required by an ordinance.—McWethy v. Aurora Electric Light & Power Co., 67 N.E. 9, 202 Ill. 218, affirming 104 Ill.App. 479.

Assumption by depositors of compliance with law

Depositors may assume that trust companies operating within state will faithfully comply with law.—First State Trust & Savings Bank of Springfield v. Therrell, 138 So. 733, 103 Fla. 1136.

84. N.Y.—Town of Mamaroneck v. New York Interurban Water Co., 190 N.Y.S. 580, 198 App.Div. 396, motion denied Town of Mamaro-

by the governing body of a corporation was in good faith;[85] that a private business corporation has officers and stockholders;[86] that the directors were elected by all of the stockholders, who in so doing acted in their own interest;[87] and that a public sale of corporate property realized its reasonable value.[88] Further, it will be presumed, in the absence of evidence to the contrary, that grants beneficial to the corporation have been accepted;[89] and that a corporate seal attached to an instrument signed by the secretary is the seal of the corporation.[90]

On the other hand, in the absence of contrary evidence, it will not be presumed that a corporation has acted or will act illegally.[91] The courts may not presume that stockholders will exercise their voting right in a manner otherwise than that which they think conducive to the best interests of the corporation.[92]

Dividends. In the absence of contrary evidence, it will be presumed that dividends were declared out of earnings,[93] and that the capital stock was not impaired by the declaration of a dividend.[94]

Carriers. As in the case of other corporations, a carrier is entitled to the presumption that it conducts its business lawfully.[95]

neck v. Village of Mamaroneck, 135 N.E. 933, 233 N.Y. 598, and affirmed Town of Mamaroneck v. Baker, 135 N.E. 962, 233 N.Y. 666—H. R. Moch Co. v. Rensselaer Water Co., 217 N.Y.S. 426, 127 Misc. 545, reversed on other grounds 220 N.Y.S. 557, 219 App.Div. 673, affirmed 159 N.E. 896, 247 N.Y. 160, 62 A.L.R. 1199.

Duty to manage

A corporation which owned all of the stock of another corporation cannot complain of the presumption that it duly performed its duty as to management.—Toledo & C. R. Co. v. Cincinnati, I. & W. R. Co., Ohio, 259 F. 813, 170 C.C.A. 613, certiorari denied Toledo & C. R. Co. v. Equitable Trust Co., 40 S.Ct. 118, 251 U.S. 553, 64 L.Ed. 411.

85. Del.—Hartford Accident & Indemnity Co. v. W. S. Dickey Clay Mfg. Co., Ch., 21 A.2d 178—Cole v. National Cash Credit Ass'n, 156 A. 183, 18 Del.Ch. 47—Davis v. Louisville Gas & Electric Co., 142 A. 654, 16 Del.Ch. 157.

Lease between two corporations with common officers

It will be presumed that a mining lease between two corporations was made in good faith, although the officers of both corporations are the same.—Union Trust Co. v. Philadelphia Branch Mint Operating Co., 134 N.W. 65, 28 S.D. 549.

86. Mo.—Richards v. Northwestern Coal & Mining Co., 119 S.W. 953, 221 Mo. 149.

87. U.S.—Mannington v. Hocking Valley R. Co., C.C.Ohio, 183 F. 133.

88. Or.—Keady v. United R. Co., 100 P. 658, 108 P. 197, 57 Or. 325.

89. Mich.—Detroit Trust Co. v. Allinger, 261 N.W. 90, 271 Mich. 600, appeal dismissed Gause v. Detroit Trust Co. of Detroit, 297 U.S. 695, 56 S.Ct. 572, 80 L.Ed. 986.

Presumption of acceptance of benefits see supra § 120.

Charter

If a charter is granted after having been applied for, acceptance may be presumed.—Foy & Shemwell v. Georgia-Alabama Power Co., D.C.Ga., 298 F. 643.

Release

Corporation is presumed to have accepted release of its debts procured by director giving his personal notes.—Lockwood v. Dickey, 142 A. 689, 83 N.H. 365.

90. Colo.—Bliss v. Harris, 87 P. 1076, 38 Colo. 72.

91. U.S.—American Viscose Corporation v. Rothensies, C.C.A.Pa., 121 F.2d 186, affirming, D.C., 34 F.Supp. 217—Luhrig Collieries Co. v. Interstate Coal & Dock Co., D.C.N.Y., 281 F. 265.

Ind.—Iterman v. Baker, 15 N.E.2d 365, 214 Ind. 308.

Wash.—Chase Nat. Bank of City of New York v. Spokane County, 215 P. 374, 125 Wash. 1.

Wis.—State ex rel. American Legion 1941 Convention Corporation of Milwaukee v. Smith, 293 N.W. 161, 235 Wis. 443.

Loans to stockholders

It will not be assumed payments to sole owners of corporate stock were in violation of charter forbidding loans to stockholders.—Chattanooga Sav. Bank v. Brewer, C.C.A. Tenn., 17 F.2d 79, affirming, D.C., 9 F.2d 982, certiorari denied 47 S.Ct. 764, 274 U.S. 751, 71 L.Ed. 1332.

Use by foreign corporation of name of domestic corporation

Court will not presume that foreign corporation was using name of domestic corporation, which would amount to fraud.—Wilson v. Williams Hardware Co., C.C.A.W.Va., 32 F.2d 103.

92. N.J.—Dvorin v. Greenberg, 151 A. 95, 106 N.J.Eq. 495—Elevator Supplies Co. v. Wylde, 150 A. 347, 106 N.J.Eq. 163.

93. N.J.—Bankers' Trust Co. of New York v. Lobdell, 173 A. 918, 116 N.J.Eq. 363.

Extraordinary dividend declared by corporation is presumed to be based on earnings.—In re Hostetter's Estate, 181 A. 567, 319 Pa. 572.

Dividends as evidence of profits

Declaration and payment of dividends is prima facie evidence corporation has realized profits equal to dividends.—Andrews v. Andrews, 212 N.W. 408, 170 Minn. 175, 51 A.L.R. 542, affirmed 213 N.W. 899, 170 Minn. 175, 51 A.L.R. 542.

94. Iowa.—Redhead v. Iowa Nat. Bank, 103 N.W. 796, 127 Iowa 572.

95. U.S.—Missouri Pac. R. Co. v. Prude, 44 S.Ct. 450, 265 U.S. 99, 68 L.Ed. 919, reversing 247 S.W. 785, 156 Ark. 583—Denver & R. G. R. Co. v. Wagner, Colo., 167 F. 75, 92 C.C.A. 527.

Conn.—New York, N. H. & H. R. Co. v. Salter, 134 A. 220, 104 Conn. 728.

Mo.—State ex rel. and to Use of St. Louis, B. & M. Ry. Co. v. Taylor, 251 S.W. 383, 298 Mo. 474, certiorari granted State of Missouri ex rel. St. Louis, B. & M. Ry. Co. v. Taylor, 44 S.Ct. 132, 263 U.S. 696, 68 L.Ed. 511, affirmed 45 S.Ct. 47, 266 U.S. 200, 69 L.Ed. 247, 42 A.L.R. 1232—Wilcox v. Kansas City Western Ry. Co., 213 S.W. 156, 201 Mo.App. 510.

Or.—Coos Bay Amusement Co. v. American Ry. Express Co., 277 P. 107, 129 Or. 216.

Pa.—Rau v. Wilkes-Barre & E. R. Co., 167 A. 230, 311 Pa. 510.

Tenn.—New River Lumber Co. v. Tennessee Ry. Co., 238 S.W. 867, 145 Tenn. 266.

Tex.—El Paso & S. W. R. Co. v. Keeble, Civ.App., 258 S.W. 859—Fort Worth & R. G. Ry. Co. v. Burns, Civ.App., 242 S.W. 295.

22 C.J. p 107 note 72.

Filing and publishing rates or rules

In the absence of contrary evidence, it will be presumed that a carrier has filed and published its rates or rules as required by law.

Ala.—Robert S. Armstrong & Bros. Co. v. Rowland, 118 So. 502, 22 Ala.App. 613.

Ind.—Davis v. Steele, 146 N.E. 425,

With respect to railroads, it will be presumed that the railroad and its appurtenances are constructed and maintained according to law;[96] that in appropriating land for its right of way the company appropriated the full width authorized by law;[97] that trains running on a railroad track are operated by the owner of the track,[98] unless the name of a different company is marked on the train, in which case the presumption is that it is operated by the company whose name it bears;[99] that trains were operated in compliance with the schedules[1] and arrived at about the usual time;[2] that charges for things essential to the operation of the railroad represent economical expenditures;[3] that tariff schedules posted in the offices of the road are identical with those filed with the interstate commerce commission;[4] and that a report required by statute to be made by railroad companies to the auditor of public accounts for purposes of taxation, and for failure to make which a severe penalty is imposed, was made as required.[5]

With respect to street railroads, it will be presumed that cars running on its tracks are operated by it,[6] and that a company which has mortgaged its franchise obtained the necessary consent of the city which granted the franchise.[7]

Municipal corporation. A municipal corporation is presumed to have been incorporated under the general laws rather than under special legislation.[8] The presumption that a city will do its duty far outweighs the conjecture that it will do otherwise.[9]

Corporate books and records. In the absence of contrary evidence, it is to be implied that a corporation kept records of its doings,[10] and it is presumed that such records are correct and regular.[11]

(2) Acts of Directors, Officers, and Agents

In the absence of a contrary showing, the acts of corporate directors and officers are presumed to be regular and to have been performed in good faith.

In the absence of contrary evidence, the presumption is in favor of the fairness, good faith, and regularity of acts of corporate directors and officers.[12] It will be presumed that the directors have managed

83 Ind.App 300, petition denied 147 N.E. 632, 83 Ind.App. 300.
Kan.—Kennedy v. Atchison, T. & S. F. Ry. Co. 179 P. 314, 104 Kan 129, 368, motion granted 181 P. 117, 104 Kan. 708.
Mo.—Sonken-Galamba Corporation v. Missouri Pac R. Co., 40 S.W.2d 524, 225 Mo.App. 1066.
Tenn.—New River Lumber Co. v. Tennessee Ry. Co., 238 S.W. 867, 145 Tenn. 266.

96. Pa.—Jakway v. Lehigh Valley R. Co., 98 Pa.Super. 300.
Va.—Atlantic Coast Line R Co. v. Tyler, 98 S.E. 641, 124 Va. 484.
22 C.J. p 108 note 85.

97. Pa.—Marshall v. Pennsylvania Co., 44 Pa.Super. 68.
S.C.—Southern R. Co. v. Gossett, 60 S.E. 956, 79 S.C. 372.

98. Mo.—Walsh v. Missouri Pac. R. Co., 14 S.W. 873, 15 S.W. 757, 102 Mo. 582.
22 C.J. p 108 note 87.

99. Ill.—East St. Louis Connecting R. Co. v. Altgen, 112 Ill.App. 471, affirmed 71 N.E. 377, 210 Ill. 213.

1. Tex.—Western Union Tel. Co. v. Harris, Civ.App., 132 S.W. 876.

2. Tex.—Western Union Tel. Co. v. McDavid, 132 S.W. 115, 103 Tex. 601, affirming, Civ.App., 121 S.W. 893.

3. Nev.—State v. Cent. R. Co., 81 P. 99, 28 Nev. 186, 113 Am.S.R. 834.

4. Ala.—Priebe v. Southern R. Co., 66 So. 573, 189 Ala. 437.

5. Ky.—Commonwealth v. Louisville & N. R. Co., 150 S.W. 37, 149 Ky. 829.

6. N.Y.—Jennings v. Brooklyn Heights R Co., 106 N.Y.S. 279, 121 App.Div. 587.

7. Mo.—Kavanaugh v. St. Louis, 119 S.W. 552, 220 Mo. 496.

8. Ind.—Logansport v. Dick, 70 Ind. 65, 36 Am R. 166.
22 C.J. p 108 note 84.

9. U.S.—Puget Sound Power & Light Co. v. City of Seattle, C.C.A. Wash., 29 F.2d 254.

10. N.H.—Haven v. New Hampshire Asylum for Insane, 13 N.H. 532, 38 Am.D. 512.

Resolution authorizing execution of deed or mortgage

If a corporation passes a resolution authorizing its president and secretary to execute a deed or mortgage of its property, the natural and legitimate presumption will be either that a record was made of the same by the secretary in a book containing the proceedings of the corporation, or else that the paper containing such resolution was retained and preserved by the secretary, or both.—Mullanphy Sav. Bank v. Schott, 26 N.E. 640, 135 Ill. 655, 25 Am.S.R. 401.

Presumption arising from absence of record

In suit by school district's grantee, who claimed to be owner of sewer located in city street, to enjoin abutting owner from using sewer, where there was no record that school district which had installed sewer had been granted permit by city, it is presumed that no permit was granted by anyone having authority to grant it.—Cornwall v. Garrison, 81 P.2d 1094, 59 Idaho 287.

11. Cal.—Axis Petroleum Co. v. Taylor, App., 108 P.2d 978.
N.J.—Girard Trust Co. v. Mueller, 7 A.2d 413, 125 N.J.Eq. 597.

Date of entry

In the absence of contrary evidence, it must be presumed that in accordance with statutory directions resolutions of the board of public works ordering improvements were entered on the minute book of the board on the day the improvements were ordered.—Vaughan v. Vaughan, 6 Tenn.App. 354.

Nature of corporate action accepted as true

Nature of corporate action as described in votes of stockholders and directors is commonly accepted as true.—Willson v. Laconia Car Co., 176 N.E. 182, 275 Mass. 435—Dodge v. Commissioner of Corporations and Taxation, 174 N.E. 109, 273 Mass. 187.

Presumption as to incorrectness

There is no presumption that a bookkeeping system commonly used by banks does not show the true state of accounts.—Eltopia Finance Co. v. Colley, 219 P. 24, 126 Wash. 554.

12. U.S.—E. E. Gray Corporation v. Meehan, C.C.A.Mass., 54 F.2d 223—Illinois Bell Telephone Co. v. Moynihan, D.C.Ill., 38 F.2d 77, set aside on other grounds Smith v. Illinois Bell Telephone Co., 51 S.Ct. 65, 282 U.S. 133, 75 L.Ed. 255, conformed to, D.C., Illinois Bell Telephone Co. v. Gilbert, 3 F.Supp. 595, reversed on other grounds and cross appeal dismissed Lindheimer v. Illinois Bell Telephone Co., 54 S.Ct. 658,

the affairs of the corporation;[13] and that the directors, or officers[14] and agents[15] have performed their duties in a regular manner.

There is no presumption ordinarily that corporate directors or officers violated their duty or committed a breach of trust.[16] However, where directors stand presently to benefit by a given result, the presumption that their votes were fairly and honestly cast in good faith for the best interests of the corporation disappears.[17]

b. Health and Physical Condition

The presumption is that persons possess ordinary human faculties and are normal as to health and the natural functions of the body and organs.

In the absence of contrary evidence, it will be presumed that persons possess ordinary human faculties,[18] and are normal as to health[19] and the natural functions of the body and organs.[20] Likewise,

292 U.S. 151, 78 L.Ed. 1182—Noel v. Parrott, C.C.A.Va., 15 F.2d 669, certiorari denied Parrott v. Noel, 47 S.Ct. 457, 273 U.S. 754, 71 L.Ed. 875—Borg v. International Silver Co., D.C.N.Y., 11 F.2d 143, affirmed, C.C.A., 11 F.2d 147—Guaranty Trust Co. of New York v. Grand Rapids, G. H. & M. Ry. Co., D.C.Mich., 7 F.Supp. 511, affirmed, C.C.A., United Light & Power Co. v. Grand Rapids Trust Co., 85 F.2d 331, certiorari denied in part 57 S.Ct. 118, 299 U.S. 591, 81 L.Ed. 436, certiorari granted in part Grand Rapids Trust Co. v. United Light & Power Co., 57 S.Ct. 119, 299 U.S. 534, 81 L.Ed. 393, certiorari dismissed 57 S.Ct. 312, 299 U.S. 618, 81 L.Ed. 456.

Cal.—Fornaseri v. Cosmosart Realty & Building Corporation, 274 P. 597, 96 Cal.App. 549.

Del.—Karasik v. Pacific Eastern Corporation, Ch., 180 A. 604—Hall v. Trans-Lux Daylight Picture Screen Corporation, 171 A. 226, 20 Del.Ch. 78—Cole v. National Cash Credit Ass'n, 156 A. 183, 18 Del.Ch. 47—Bodell v. General Gas & Electric Corporation, 132 A. 442, 15 Del.Ch. 119, affirmed 140 A. 264, 15 Del.Ch. 420—Robinson v. Pittsburgh Oil Refining Corporation, 126 A. 46, 14 Del.Ch. 193.

Mass.—Mairs v. Madden, 30 N.E.2d 242, 307 Mass. 378, 132 A.L.R. 256—Spiegel v. Beacon Participations, 8 N.E.2d 895, 297 Mass. 398—Anderson v. Bean, 172 N.E. 647, 272 Mass. 432, 72 A.L.R. 959—Tapper v. Boston Chamber of Commerce, 126 N.E. 464, 235 Mass. 209.

Mo.—White v. Greenlee, 85 S.W.2d 112, 337 Mo. 514.

Mont.—Ex parte Lockhart, 232 P. 183, 72 Mont. 136.

N.Y.—Blaustein v. Pan American Petroleum & Transport Co., 21 N.Y.S.2d 651, 174 Misc. 601, modified 31 N.Y.S.2d 934, 263 App.Div. 97—Cleary v. Higley, 277 N.Y.S. 63, 154 Misc. 158, affirmed 284 N.Y.S. 989, 246 App.Div. 698—Macy v. Ladd, 219 N.Y.S. 449, 128 Misc. 732—Gallagher v. New York Dock Co., 19 N.Y.S.2d 789.

S.C.—Watson v. Jennings, 144 S.E. 78, 146 S.C. 372.

Utah.—Chapman v. Troy Laundry Co., 47 P.2d 1054, 87 Utah 15.

Presumption of good faith see supra § 126.

Presumption of knowledge of officers and directors see subdivision c of this section.

Stock assessments

It will be presumed that stock assessments were made honestly, in good faith, and for proper purpose.

Cal.—Clark v. Oceano Beach Resort Co., 289 P. 946, 106 Cal.App. 574.

Pa.—Allegheny Valley Camp Meeting Ass'n v. Kountz, 29 Pa.Super. 110.

Statement as to value of stock

It will be presumed that officers made a true statement, as required by statute, of the value of corporation's stock, etc.—Ohlwine v. Pfaffman, 100 N.E. 777, 52 Ind.App. 357.

13. Pa.—First Nat. Bank v. Colonial Hotel Co., 75 A. 412, 226 Pa. 292.

14. U.S.—In re Eldredge Brewing Co., D.C.N.H., 32 F.Supp. 604, affirmed, C.C.A., Eldredge Brewing Co. v. City of Portsmouth, 118 F.2d 410.

Cal.—Childress v. L. Dinkelspiel Co., 263 P. 801, 203 Cal. 262.

Colo.—Robinson v. Booth-Orchard Grove Ditch Co., 31 P.2d 487, 94 Colo. 515.

22 C.J. p 108 note 98.

Bank directors

It will be presumed that bank directors exercised their best judgment in conducting the affairs of the bank.—Devlin v. Moore, 130 P. 35, 64 Or. 433.

15. Ga.—Central of Georgia Ry. Co. v. S. R. Jaques & Tinsley Co., 98 S.E. 357, 23 Ga.App. 396.

16. U.S.—American Viscose Corporation v. Rothensies, C.C.A.Pa., 121 F.2d 186, affirming, D.C., 34 F.Supp. 217—Atwater v. Wheeling & L. E. Ry. Co., C.C.A.Ohio, 56 F.2d 720.

Mass.—Brown v. Little, Brown & Co., 168 N.E. 521, 269 Mass. 102, 66 A.L.R. 1284.

Mont.—Mayger v. St. Louis Min. & Mill. Co. of Montana, 219 P. 1102, 68 Mont. 492.

N.Y.—Frank Gilbert Paper Co. v. Prankard, 198 N.Y.S. 25, 204 App.Div. 83, affirming 195 N.Y.S. 638—Macy v. Ladd, 219 N.Y.S. 449, 128 Misc. 732.

Pa.—Wilson v. Brown, 112 A. 1, 269 Pa. 225.

R.I.—Narragansett Electric Lighting Co. v. Sabre, 146 A. 777, 50 R.I. 288, 66 A.L.R. 1553, reargument denied 147 A. 668, 66 A.L.R. 1553.

22 C.J. p 108 note 97 [a].

Contracts between corporations having common directors or officers as presumptively fraudulent and invalid see Corporations § 789.

17. N.Y.—Blaustein v. Pan American Petroleum & Transport Co., 21 N.Y.S.2d 651, 174 Misc. 601, modified 31 N.Y.S.2d 934, 263 App.Div. 97.

18. Cal.—Kramm v. Stockton Electric R. Co., 101 P. 914, 10 Cal.App. 271.

Ga.—Holcombe v. State, 62 S.E. 647, 5 Ga.App. 47.

Tex.—Texas Employers' Ins. Ass'n v. Birdwell, Civ.App., 39 S.W.2d 159, error refused.

Presumptions as to:

Capacity for childbearing see supra § 121.

Sanity and mental capacity see supra § 147.

Virility of men see supra § 149.

Injured person

It is probably a fair presumption that a person injured was at the time in possession of his usual faculties and able to care for himself.—Brown v. Union Pac. R. Co., 106 P. 1001, 81 Kan. 701, 29 L.R.A.,N.S., 808.

Pedestrian on public highway

The rule applies to a pedestrian using a public highway as well as to persons entering on railway tracks where they have a right to be.—Vansandt v. Brewer, 95 So. 463, 209 Ala. 131.

19. Cal.—Murphy v. National Ice Cream Co., 300 P. 91, 114 Cal.App. 482—Robertson v. Weingart, 267 P. 741, 91 Cal.App. 715—Dallas v. De Yoe, 200 P. 361, 53 Cal.App. 452.

20. N.J.—Board of Health of Lyndhurst Tp. v. United Cork Cos., 172 A. 347, 116 N.J.Eq. 4, affirmed 176 A. 142, 117 N.J.Eq. 437.

Ohio.—Great Atlantic & Pacific Tea Co. v. Hughes, 4 N.E.2d 700, 53 Ohio App. 255, affirmed 3 N.E.2d 415, 131 Ohio St. 501.

Utah.—Harris v. Ogden Steam Laundry Co., 117 P. 700, 39 Utah 436, Ann.Cas.1913E 96.

it will be presumed that all persons will be similarly affected by certain physical conditions.[21]

However, human beings are not sufficiently alike to warrant the presumption that when a drug produces a certain effect on one person, it will, to a certain extent, similarly affect another, taking into account age, strength, and other conditions present.[22]

c. Knowledge of Facts

A party is presumed to know, or is chargeable with knowledge of, matters, such as the contents of an instrument, which he had an opportunity of knowing and should know.

As a general rule, a party is presumed to know, or is chargeable with knowledge of, matters which he had the opportunity of knowing and should know.[23] Thus in the absence of contrary evidence,

Sight

Railroad engineers must be presumed to have eyes at least as good as those of the average person.—Norfolk & W. Ry. Co. v. Henderson, 111 S.E. 277, 132 Va. 297.

Strength

A grown-up man is presumed to be of ordinary strength.—Egge v. Haglund, 179 N.W. 491, 43 S.D. 382.

21. Utah.—Harris v. Ogden Steam Laundry Co., 117 P. 700, 39 Utah 436, Ann.Cas.1913E 96.

22 C.J. p 104 note 87.

22. Ky.—Ohio County Drug Co. v. Howard, 256 S.W. 705, 201 Ky. 346, 31 A.L.R. 1355.

23. U S.—Standard Accident Ins. Co. of Detroit, Mich., v. Federal Nat. Bank of Shawnee, C C.A.Okl., 112 F.2d 692, adhered to 115 F.2d 34—Smith v. Firemen's Ins. Co., C.C.A. Wis., 104 F.2d 546—In re Madison Rys. Co., C.C.A.Wis., 102 F.2d 178—Adams v. Barron G. Collier, Inc., C.C A.Neb., 73 F.2d 975—Simonds v. Norwich Union Indemnity Co., C.C.A Minn., 73 F.2d 412, certiorari denied Norwich Union Indemnity Co. v. Simonds, 55 S.Ct 507, 294 U. S. 711, 79 L.Ed. 1246—Stanolind Oil & Gas Co. v. Kimmel, C.C.A.Okl., 68 F.2d 520—General Tire Co. of Minneapolis v. Standard Accident Ins. Co., C.C.A.Minn, 65 F.2d 237—McKesson & Robbins v. Edwards, C.C.A.N.Y., 57 F.2d 147, reversing, D.C., 38 F.2d 887—The Car Float No. 37, C.C.A.N.Y., 57 F 2d 144, reversing, D.C., The Talisman, 52 F. 2d 691, and certiorari granted New York Cent. R. Co. v. The Talisman, 53 S.Ct. 85, 287 U.S. 587, 77 L.Ed. 513, reversed on other grounds The No. 37, 53 S.Ct. 328, 288 U.S. 239, 77 L Ed. 721—Harjim, Inc., v. Owens, D.C.Fla., 52 F.2d 530, reversed on other grounds, C.C.A., 64 F.2d 306, certiorari denied 54 S Ct. 71, 290 U.S. 655, 78 L.Ed. 568—Lloyd Sabaudo Societa Anonime Per Azioni v. Elting, D.C.N.Y., 46 F.2d 315—Trussell Mfg. Co. v. Irving-Pitt Mfg. Co., D.C.N.Y., 42 F. 2d 750, modified on other grounds, C.C.A., Trussell Mfg. Co. v. Wilson-Jones Co., 50 F.2d 1027—U. S. v. One Chevrolet Four-Door Sedan Automobile, D C.Okl., 41 F.2d 782—W. N. Matthews Corporation v. Alliance Securities Co., C.C.A.Mo., 40 F.2d 879, modified on other grounds 42 F.2d 439—Union Indemnity Co. v. Vetter, C.C A Fla., 40 F.2d 606—Edwards v. Atchison, T. & S. F. R. Co., C.C.A.Cal., 15 F. 2d 37—Globe & Rutgers Fire Ins. Co. v. Winter Garden Co., C.C.A.N. Y., 9 F.2d 227, certiorari denied 46 S.Ct. 352, 270 U.S. 654, 70 L.Ed. 782—Suarez v. Suarez, C.C.A.Puerto Rico, 3 F.2d 362—Liability Assur. Corporation, Limited, of London, England, v. C. E. Carnes & Co., D. C.La., 24 F.Supp. 128, affirmed, C. C.A, C. E. Carnes & Co. v. Employers' Liability Assur. Corporation, Ltd, London, England, 101 F. 2d 739—Anderson v. Atkinson, D. C Ill., 22 F.Supp. 853—Santa Monica Mountain Park Co. v. U. S., D.C. Cal., 20 F.Supp. 209, affirmed, C C. A., 99 F.2d 450, certiorari granted 59 S.Ct. 583, 306 U.S. 624, 83 L.Ed. 1029, certiorari dismissed 59 S.Ct. 647, 306 U S. 666, 83 L Ed. 1062—Melton v. Railroad Commission of Texas, D.C.Tex, 10 F.Supp. 984—In re Bowman Hardware & Electric Co., D.C Ill., 3 F.Supp. 82, reversed on other grounds, C.C.A., 67 F.2d 792.

Ala.—McMullen v. Daniel, 155 So. 687, 229 Ala. 194.

Ariz.—Industrial Commission v. Arizona Power Co., 295 P. 305, 37 Ariz. 425, affirmed 297 P. 452, 38 Ariz. 44—Treat v. Nowell, 294 P. 273, 37 Ariz. 290.

Ark.—Missouri Pac. R. Co. v. Vinson, 118 S.W.2d 672, 196 Ark 500—Northcross v. Miller, 43 S.W 2d 734, 184 Ark. 463—Wilson v. Nugent, 299 S.W. 18, 174 Ark. 1115.

Cal.—Inyo Chemical Co. v. City of Los Angeles, 55 P.2d 850, 5 Cal 2d 525—Los Angeles County Flood Control Dist. v. Abbot, 76 P.2d 188, 24 Cal.App.2d 728—Garfield v. Peoples Finance & Thrift Co. of Riverside, 74 P.2d 1061, 24 Cal.App 2d 144—Western Fruit Growers v. Security Title Insurance & Guarantee Co., 66 P.2d 742, 20 Cal.App 2d 150—Citizens' Nat. Trust & Savings Bank of Los Angeles v. Arrowhead Springs Beverage Co., 14 P.2d 821, 126 Cal.App. 550—In re Kessing's Estate, 10 P.2d 1015, 123 Cal.App. 119—Merrill v. Los Angeles Cotton Mills, 7 P.2d 329, 120 Cal.App. 149—Clark v. Pacific Gas & Electric Co., 5 P.2d 58, 118 Cal. App. 344, rehearing denied 6 P.2d 297, 118 Cal.App. 344—Passow & Sons v. U. S. Fidelity & Guaranty Co., 204 P. 545, 56 Cal.App. 72.

Colo.—Federal Life Ins. Co. v. Wells, 56 P.2d 936, 98 Colo. 455.

Conn.—Bremner v. Marc Eidlitz & Son, 174 A. 172, 118 Conn 666—Holczer v. Independent Brass City Lodge, 133 A. 666, 104 Conn. 539.

D.C.—Farley v. Simmons, 99 F.2d 343, 69 App.D.C. 110, reversing, D. C., Simmons v. Farley, 18 F.Supp. 758, certiorari denied 59 S.Ct 244, 305 U.S. 651, 83 L Ed 422, rehearing denied 59 S.Ct. 356, 305 U.S. 676, 83 L.Ed. 438.

Fla.—Andrews v. First Nat. Bank, 155 So. 143, 115 Fla. 67—Price v. Southern Home Ins. Co. of the Carolinas, 129 So. 748, 100 Fla. 338.

Ga.—Newton v. Gulf Life Ins. Co., 190 S E. 69, 55 Ga.App 330—Land v. Hall, 167 S.E 711, 46 Ga.App. 404—White v. Chambers, 116 S.E. 26, 29 Ga.App. 482.

Idaho.—Federal Land Bank of Spokane v. Bissonnette, 4 P.2d 364, 51 Idaho 219.

Ill.—Wylie v. Fisher, 169 N.E. 237, 337 Ill. 488—Linn v. Clark, 128 N. E. 824, 295 Ill. 22—Stone's Beauty Shops v. Morrison Service Ass'n, 1 N.E.2d 816, 285 Ill.App. 163—Powers v. Walrath, 235 Ill App. 180.

Ind.—Carmen v. Eli Lilly & Co., App., 32 N.E.2d 729.

Iowa.—Wheeler v. Des Moines City Ry. Co., 215 N.W. 950, 205 Iowa 439, 55 A.L.R. 473.

Ky.—Owensboro Undertaking & Livery Ass'n v. Henderson, 115 S.W. 2d 563, 273 Ky. 112—Nussbaum v. General Accident, Fire & Life Assur. Corporation, Limited, of Perth, Scotland, 38 S.W 2d 1, 238 Ky. 348—Louisville Cooperage Co. v. Collins, 14 S.W.2d 1090, 228 Ky. 266—Jackson v. Rose, 3 S.W.2d 641, 223 Ky. 285—Bean v. Brown, 259 S.W. 47, 202 Ky. 215.

La.—Hortman-Salmen Co. v. White, 123 So. 711, 168 La. 1057—Henderson v. Leona Rice Milling Co., 107 So. 459, 160 La. 597—Boyd v. J. C. Penny Co, App., 195 So. 87—Roby Motors Co. v. Price, App., 173 So. 793—Clay v. Liberty Industrial Life Ins. Co., App, 157 So. 838—Irvine v. Noone, 2 La.App. 675.

Md.—Pritchard v. Myers, 197 A. 620, 174 Md. 66, 116 A.L.R. 775.

Mass.—Finlay v. Eastern Racing Ass'n, 30 N.E.2d 859, 308 Mass. 20—Jones v. Swift, 15 N.E.2d 274, 300 Mass. 177—Kelley v. Peters, 12 N.E.2d 184, 299 Mass. 166—West Boylston Mfg. Co. v. Board of Assessors of Easthampton, 178 N.E. 531, 277 Mass. 180—Casey v. Boston Elevated Ry. Co., 150 N.E. 850, 255 Mass. 33—Commissioner of Banks v. Cosmopolitan Trust Co., 148 N.E. 609, 253 Mass. 205, 41 A.L.R. 658.

Mich.—Engel v. State Mut. Rodded Fire Ins. Co., 275 N.W. 231, 281 Mich. 520—Rossbach v. Continental Ins. Co. of City of New York, 267 N.W. 802, 276 Mich. 122—Gibson v. Oswalt, 257 N.W. 825, 269 Mich. 300—Wutzke v. County Fire Ins. Co. of Philadelphia, 254 N.W. 203, 266 Mich. 556—Freeze v. Smith, 236 N.W. 810, 254 Mich. 386—Wolf v. McDonald, 221 N.W. 173, 244 Mich. 59.

Miss.—McCarty v. Love, 110 So. 795, 145 Miss. 330.

Mo.—Johnson v. Chicago & E. I. Ry. Co., 64 S.W.2d 674, 334 Mo. 22—State ex rel. McKinney v. Davidson, 286 S.W. 355—Dolph v. Maryland Casualty Co., 261 S.W. 330, 303 Mo. 534—Maxey v. Railey & Bros. Banking Co., App., 57 S.W.2d 1091—Craven v. Halpin-Boyle Const. Co., App., 15 S.W.2d 853.

Mont.—Willson v. Woodmen of the World, 64 P.2d 1064, 104 Mont. 31—Blackwelder v. Fergus Motor Co., 260 P. 734, 80 Mont. 374.

Nev.—Smith v. Gray, 250 P. 369, 50 Nev. 56.

N.J.—Paruch v. Rasiewicz, 12 A.2d 141, 124 N.J.Law 356—O'Dowd v. U. S. Fidelity & Guaranty Co., 189 A. 97, 117 N.J.Law 444—Federal Reserve Bank of Philadelphia v. Gettleman, 189 A. 86, 117 N.J.Law 416—Trenton Banking Co. v. Howard, 187 A. 569, affirmed 187 A. 575, 121 N.J.Eq. 85.

N.Y.—Kittredge v. Grannis, 155 N.E. 88, 244 N.Y. 168, affirming 214 N.Y.S. 33, 215 App.Div. 486—Mord v. New York Indemnity Co., 214 N.Y.S. 693, 216 App.Div. 252, affirmed 155 N.E. 908, 244 N.Y. 589—Uvalde Asphalt Paving Co. v. City of New York, 188 N.Y.S. 304, 196 App.Div. 740—Fales v. Fales, 290 N.Y.S. 655, 160 Misc. 799, affirmed 295 N.Y.S. 754, 250 App.Div. 751—Gilbert v. Burnstine, 237 N.Y.S. 171, 135 Misc. 305, affirmed 241 N.Y.S. 54, 229 App.Div. 170, reversed on other grounds 174 N.E. 706, 255 N.Y. 348, 73 A.L.R. 1453—Tiggerman v. State, 228 N.Y.S. 576, 132 Misc. 45—Finch v. Goldstein, 214 N.Y.S. 85, 126 Misc. 469, reversed on other grounds 215 N.Y.S. 843, 217 App.Div. 707, affirmed 157 N.E. 146, 245 N.Y. 300—People ex rel. Haecker Sterling Co. v. City of Buffalo, 176 N.Y.S. 642—Silinsky v. Willis, 174 N.Y.S. 190.

N.C.—Corporation Commission v. Stockholders of Bank of Beulaville, 155 S.E. 445, 199 N.C. 586.

Okl.—Gardner Petroleum Co. v. Poe, 26 P.2d 743, 166 Okl. 169—Maryland Casualty Co. v. First State Bank of Dewar, 223 P. 701, 101 Okl. 71.

Pa.—Winslow v. Kaiser, 170 A. 135, 313 Pa. 577—Hertzler v. Nissly, 144 A. 824, 295 Pa. 62—Texter v. Wachs, 73 Pa.Super. 19.

S.D.—Wells v. Booth, 192 N.W. 489, 46 S.D. 280.

Tenn.—General Contract Purchase Corporation v. Conner, 126 S.W.2d 347, 23 Tenn.App. 1—Highsaw v. Creech, 69 S.W.2d 249, 17 Tenn.App. 573.

Tex.—Miller v. Yates, 61 S.W.2d 767, 122 Tex. 435, affirming, Civ.App., 15 S.W.2d 730—Underwood v. Pigman, Com.App., 32 S.W.2d 1102, reversing, Civ.App., 21 S.W.2d 703, and modified on other grounds, Com.App., 36 S.W.2d 1114—Comanche Duke Oil Co. v. Texas Pac. Coal & Oil Co., Com.App., 298 S.W. 554, reversing Texas Pacific Coal & Oil Co. v. Comanche Duke Oil Co., Civ.App., 274 S.W. 193—Guitar Trust Estate v. Boyd, Civ.App., 120 S.W.2d 914—Hacker v. Hacker, Civ.App., 110 S.W.2d 923—Matthews v. Looney, Civ.App., 100 S.W.2d 1061, reversed on other grounds 123 S.W.2d 871, 132 Tex. 313—Magnolia Petroleum Co. v. Railroad Commission of Texas, Civ.App., 90 S.W.2d 659, modified on other grounds 96 S.W.2d 273, 128 Tex. 189—Magnolia Petroleum Co. v. Jackson, Civ.App., 82 S.W.2d 1011, error dismissed—Lindsey v. Dougherty, Civ.App., 60 S.W.2d 300, error refused—Chicago Fire & Marine Ins. Co. v. Foley, Civ.App., 58 S.W.2d 174—Simons v. Galveston, H. & S. A. Ry. Co., Civ.App., 57 S.W.2d 199, error dismissed—Nagle, Witt, Rollins Engineering Co. v. La Salle County Water Improvement Dist. No. 1, Civ.App., 44 S.W.2d 1025, error dismissed—Foster v. Christensen, Civ.App., 42 S.W.2d 460, reversed on other grounds, Com.App., 67 S.W.2d 246—Pfluger v. Hutto Independent School Dist., Civ.App., 34 S.W.2d 632—E. Y. Chambers & Co. v. Little, Civ.App., 21 S.W.2d 17, error refused—Montgomery v. Huff, Civ.App., 11 S.W.2d 237, error refused—Dallas Hotel Co. v. Buffington, Civ.App., 294 S.W. 610—Supreme Lodge, K. P., v. Hooper, Civ.App., 282 S.W. 867—Texas Co. v. Disney, Civ.App., 279 S.W. 280—Arlington Heights Sanitarium v. Deaderick, Civ.App., 272 S.W. 497—Gulf Production Co. v. Palmer, Civ.App., 230 S.W. 1017, error refused—Wagley v. Wagley, Civ.App., 230 S.W. 493—Donoghue v. Lee, Civ.App., 228 S.W. 957—Kansas City, M. & O. Ry. Co. of Texas v. O'Connell, Civ.App., 210 S.W. 757, dismissed for want of jurisdiction—Baker v. Brown, Civ.App., 210 S.W. 312.

Utah.—Industrial Commission of Utah v. Murray City, 188 P. 274, 55 Utah 525.

Vt.—Advance Whip & Novelty Co. v. Benevolent Protective Order of Elks of Montpelier, 170 A. 95, 106 Vt. 72.

Va.—Dunlop v. McGehee's Ex'r, 124 S.E. 199, 139 Va. 643.

Wash.—In re Krueger's Estate, 21 P.2d 1030, 173 Wash. 114—Moise v. Hodges, 287 P. 878, 156 Wash. 591—First Nat. Bank v. Gunning, 220 P. 793, 127 Wash. 307.

W.Va.—Wellman v. Fordson Coal Co., 143 S.E. 160, 105 W.Va. 463—Southern v. Sine, 123 S.E. 436, 95 W.Va. 634.

Wis.—First Nat. Bank & Trust Co. of Racine et al. v. Vegel, 254 N.W. 537, 215 Wis. 359—Wisconsin Hydro-Electric Co. v. Railroad Commission of Wisconsin, 243 N.W. 322, 208 Wis. 348, modifying 236 N.W. 663, 208 Wis. 348—State v. Industrial Commission, 242 N.W. 321, 207 Wis. 652.

Wyo.—Shikany v. Salt Creek Transp. Co., 45 P.2d 645, 48 Wyo. 190.

22 C.J. p 103 note 71.

Creation of suction by moving body

It is presumed that a woman of mature years knows that a physical body of considerable magnitude moving rapidly creates a suction tending to draw other bodies toward it.—Eckart v. Marion, B. & E. Tract. Co., 109 N.E. 224, 59 Ind.App. 217.

Expert knowledge

Where questions involve interpretation and construction of railroad rates and routings, constituting technical subject, interstate commerce commission is presumed to have expert knowledge superior to that possessed by court.—Baltimore & O. R. Co. v. Domestic Hardwoods, 65 F.2d 488, 62 App.D.C. 142, certiorari denied 54 S.Ct. 64, 290 U.S. 647, 78 L.Ed. 561.

Facts of public notoriety

Parties are presumed to know facts of public notoriety.—Laidley v. Rowe, 119 A. 474, 275 Pa. 389.

Knowledge as to proceedings in cause

It is presumed that parties to a creditors' suit and those claiming under them have knowledge as to what proceedings have been had in the cause.—Hogg v. Shield, 76 S.E. 934, 114 Va. 403.

Knowledge of one's own affairs

It is presumed that a man has a reasonable knowledge of his own affairs and knows when his property is greatly inadequate to pay his debts.—Harlan v. Harlan, 1 Ky.Op. 392—Mitchell v. Shrader, 1 Ky.Op. 329.

it is presumed that an owner or vendor of land knows the boundaries thereof;[24] that the members or stockholders of an association or corporation know the provisions of its constitution, charter, or by-laws;[25] that the directors or officers have knowledge of the corporation's financial condition[26] and other matters which it is their duty to know;[27] that an administrator knew that coöwners with decedent of a mining claim were asserting exclusive ownership to the claim because of the forfeiture of decedent's interest by not contributing to the cost of work;[28] that a person is familiar with the law

Modern business practices

Average person is presumed to be familiar with modern business practices.—Allen v. Merchants' Fire Assur. Corporation of New York, 36 P.2d 545, 179 Wash. 189.

Natural consequences of act

A party is presumed to know the natural consequences of his own act.

Cal.—Schwartz v. Brandon, 275 P. 448, 97 Cal.App. 30.

Mo.—Davis v. Buck's Stove & Range Co., 49 S.W.2d 47, 329 Mo. 1177.

N.Y.—Miller v. El Mirasol, Inc., 297 N.Y.S 380, 163 Misc. 346.

Tex.—Norris v. Stoneham, Civ.App., 46 S.W.2d 363.

Wis.—John F. Jelke Co. v. Hill, 242 N.W. 576, 208 Wis. 650.

24. N H—Perley v. Roberts, 18 A. 2d 385.

Tex—McCabe v. Moore, Civ.App., 38 S.W 2d 641, error dismissed—West Lumber Co. v. Chessher, Civ.App., 146 S.W. 976—Gaffney v. Clark, Civ.App., 118 S.W. 606, denying rehearing 115 S.W. 330.

25. Ala.—Americanized Finance Corporation v. Yarbrough, 135 So. 448, 223 Ala. 266—Sovereign Camp, W. O. W., v. Cox, 127 So. 847, 221 Ala. 58.

D.C.—Schickler v. Washington Brewery Co., 33 App.D C. 35.

Fla.—National Council of Knights and Ladies of Security v. Smiley, 100 So. 153, 87 Fla. 139.

Ind.—Asher v. Craig, 190 N.E. 446, 99 Ind.App. 538.

Iowa.—Wry v. Modern Woodmen of America, 271 N.W. 300, 222 Iowa 1179.

Ky.—International Brotherhood of Boilermakers, Iron Shipbuilders, Welders & Helpers of America v. Bogle's Adm'x, 112 S.W.2d 396, 271 Ky. 437.

La.—Continental Bank & Trust Co. v. Sovereign Camp, W. O. W., 126 So. 502, 169 La. 989.

Mass.—Crimmins & Peirce Co. v. Kidder Peabody Acceptance Corporation, 185 N.E. 383, 282 Mass. 367, 88 A.L.R. 1122.

Mo.—Meyer v. St. Louis Southwestern Ry. Co., 2 S.W.2d 185, 221 Mo. App. 265—Beazell v. Farmers' Mut. Ins. Co. of Livingston County, 253 S.W. 125, 214 Mo.App. 430.

N.Y.—O'Connell v. O'Leary, 3 N.Y. S 2d 833, 167 Misc. 324.

Ohio.—Springfield Tp. Mut. Fire Ins. Ass'n v. Foster, 178 N.E. 427, 40 Ohio App. 351.

Or.—Doehler v. Lansdon, 298 P. 200, 135 Or. 687.

Tex.—Bliss v. Brotherhood of Railroad Trainmen, Civ.App., 279 S.W. 883.

Va.—Pulaski & Giles Mut. Ins. Co. v. Downs, 181 S E. 361, 165 Va. 106—International Brotherhood of Boilermakers, Iron Shipbuilders, Welders and Helpers of America v. Wood, 175 S E. 45, 162 Va. 517—Farmers' & Mechanics' Benev. Fire Ins. Ass'n of Roanoke and Botetourt Counties v. Horton, 160 S.E. 315, 157 Va. 114—Kennard v. Travelers' Protective Ass'n of America, 160 S.E. 38, 157 Va. 153.

Wash.—Liptau v. Modern Woodmen of America, 5 P.2d 1043, 165 Wash. 672.

14 C.J. p 845 notes 99, 1.

Knowledge and notice of member of corporation see Corporations, § 487.

Knowledge of corporate by-laws see Corporations § 180.

Stock purchaser is presumed to know provisions of corporate by-laws.—Rogers v. Hill, C.C.A.N.Y., 60 F 2d 109, followed in 62 F 2d 1079, certiorari granted 53 S.Ct. 593, 289 U.S. 716, 77 L.Ed. 1469, reversed on other grounds 53 S.Ct. 731, 289 U.S. 582, 77 L.Ed. 1385, 88 A.L.R. 744.

26. U.S.—Wiggington v. Auburn Wagon Co., C.C.A.W.Va., 33 F 2d 496.

Cal.—Van Denburgh v. Tungsten Reef Mines Co., 67 P.2d 360, 20 Cal.App.2d 463.

Ky.—Hubley's Guardian Ad Litem v. Wolfe, 82 S W.2d 830, 259 Ky. 574, 101 A.L.R. 1359.

Or.—Gantenbein v. Bowles, 203 P. 614, 103 Or. 277—Smith v. Mills, 230 P. 350, 112 Or. 496.

S.D.—Benton School Dist. No. 26 of Spink County v. Woodard, 231 N. W. 288, 57 S.D. 114.

Wash.—Hein v. Gravelle Farmers' Elevator Co., 2 P.2d 741, 164 Wash. 309, 78 A.L.R. 631—Goodin v. Palace Store Co., 4 P.2d 493, 164 Wash. 625.

Wyo.—Wilde v. Zimmerman, 30 P.2d 148, 46 Wyo. 530.

Imputation of knowledge to directors and officers see Corporations § 762.

27. Cal.—First Nat. Finance Corporation v. Five-O Drilling Co., 289 P. 844, 209 Cal. 569.

Colo.—McFerson v. Bristol, 214 P 395, 73 Colo. 214.

D.C.—U. S. v. Burroughs, 65 F.2d 796, 62 App.D C. 163, certiorari granted Burroughs v. U. S., 54 S. Ct. 102, 290 U.S. 618, 78 L Ed. 539, affirmed in part 54 S.Ct. 287, 290 U. S. 534, 78 L.Ed. 484.

Idaho—Jagels v. Cox, 294 P. 515, 50 Idaho 67.

Ill.—Morrison v. Farmers' Elevator Co., 150 N.E. 330, 319 Ill. 372—Roth v. Ahrensfeld, 21 N E.2d 21, 300 Ill.App. 312, affirmed 27 N.E 2d 445, 373 Ill. 550.

Iowa.—Waterloo Canning Co. v. Municipal Court of Waterloo, 243 N. W. 287, 214 Iowa 1169.

Ky—Enterprise Foundry & Machine Works v. Miners' Elkhorn Coal Co., 45 S.W 2d 470, 241 Ky. 779.

Mich.—Carnahan v. M. J. & B. M. Buck Co., 229 N.W. 513, 250 Mich 198.

Minn.—Johnson v. Christlieb, 225 N. W. 927, 178 Minn. 9.

N.J.—Chorpenning v. Yellow Cab Co. of Camden, 167 A. 12, 113 N.J.Eq. 389, affirmed 169 A. 691, 115 N.J. Eq. 170

Tex.—Southwest Gas Co v. Doney, Civ.App, 99 S.W.2d 1107, error dismissed—So Relle v. Mayfield, Civ. App., 69 S.W.2d 167—Merchants' & Manufacturers' Securities Co. v. Wright, Civ.App, 59 S W.2d 1097, error refused—Miles Realty Co. v. Dodson, Civ.App., 8 S.W.2d 516, error dismissed.

Wash.—Bay City Lumber Co. v. Anderson, 111 P.2d 771.

22 C.J. p 108 note 97.

Facts shown by corporate books

A corporation director, actively engaged in conduct of its business, and to whom the books are open for inspection at all times, is chargeable with facts that books disclosed.—McLendon Hardware Co. v. Black, Tex.Civ.App., 264 S.W. 1011.

Knowledge by receiver of pendency of suit

Original receiver of corporation appointed by federal court, who was also ancillary receiver in Louisiana, will be presumed to be aware of suit in state court in Louisiana.—Standard Oil Co. v. Sugar Products Co., 107 So. 566, 160 La. 763.

Presumption in officers' favor

Directors' knowledge of corporation's affairs is not presumed in officers' and directors' favor.—Alward v. Broadway Gold Mining Co., 20 P.2d 647, 94 Mont. 45.

28. Mont.—O'Hanlon v. Ruby Gulch Min. Co., 135 P. 913, 48 Mont. 65.

22 C.J. p 104 note 82.

of gravitation;[29] and, where the circumstances were such as to put a reasonably prudent man on inquiry, that the person under the duty to inquire obtained information which he might have obtained by pursuing an inquiry.[30]

On the other hand, it will not be presumed that a person has knowledge of matters which he had no opportunity of knowing or was under no duty to know.[31] There is no presumption that a person who once had knowledge of a fact retained such knowledge for a considerable length of time,[32] or that a fact once known to a person will be always present in his memory.[33]

Persons dealing with a corporation are not chargeable with knowledge of particular facts;[34] and directors or stockholders, as such, are not presumed to have had actual knowledge of the corporation's business transactions.[35]

Knowledge of contents of instrument. In the absence of evidence to the contrary, it is presumed that a person knows the contents of a written instrument which he signed[36] or the contents of a

29. Ala.—Seaboard Air Line Ry. Co v. Hackney, 115 So. 869, 217 Ala. 382.
Ga.—Burton v. Wadley Southern Ry. Co, 103 S.E. 881, 25 Ga.App. 599.
Iowa.—Sidwell v. Economy Coal Co., 135 N.W. 59, 130 N.W. 729, 154 Iowa 475.

30. Ark.—Northcross v. Miller, 43 S.W.2d 734, 184 Ark. 463—Wilson v. Nugent, 299 S.W. 18, 174 Ark. 1115
Cal.—Miller v. Ash, 105 P. 600, 156 Cal. 544.

31. U.S.—Kramer v. Mills Lumber Co., C.C.A.Mo., 24 F.2d 313, 60 A. L.R. 366.
Iowa.—Booth v. Cady, 257 N.W. 802, 219 Iowa 439.
La.—Boyd v. J. C. Penny Co., App., 195 So. 87.
Mich.—Wutzke v. County Fire Ins. Co. of Philadelphia, 254 N.W. 203, 266 Mich. 556.
Mo.—Voorhees v. Chicago, R. I. & P. Ry. Co., 30 S.W.2d 22, 325 Mo. 835, 70 A.L.R. 1106.
Tenn.—State ex rel. v. Holston Trust Co., 79 S.W.2d 1012, 168 Tenn. 546.
Tex.—Bankers Lloyds v. Montgomery, Com.App., 60 S.W.2d 201, reversing, Civ.App., 42 S.W.2d 285—Bryant v. Lewis, Civ.App., 27 S.W.2d 604, error dismissed.

Candidate's qualifications

Every voter is not presumed to know a candidate's qualifications for office, such as age, residence, want of naturalization, political or religious beliefs.—State, on Inf. of McKittrick, v. Cameron, 117 S.W.2d 1078, 342 Mo. 830.

Chemical characteristics

It will not be presumed that a common laborer knows the chemical characteristics of zinc chloride.—Elliff v. Oregon, R. & Nav. Co., 99 P. 76, 53 Or. 66.

Contents of witnessed instrument

There is no presumption of witness of instrument knowing its contents.—Mangusi v. Vigliotti, 132 A. 464, 104 Conn. 291.

Presumption as to state of title

A person is not conclusively presumed to know the state of his own title to realty.—Seeger v. Odell, Cal., 115 P.2d 977.

Unfamiliarity with language

Where insured was wholly unacquainted with the language in which the answers to his application for insurance were written, he would not be presumed, although he had the policy in his possession for more than a year, to have examined it, and to have familiarized himself with the answers as set forth, and to have repudiated them if false.—New York Life Ins. Co. v. Haru Fukushima, 220 P. 994, 74 Colo. 236.

32. Ala.—Hall & Brown Wood Working Mach. Co. v. Haley Furniture & Mfg. Co., 56 So. 726, 174 Ala. 190, L.R.A.1918B 924.
Conn.—Goodwin v. Dean, 50 Conn. 517.

33. Tex.—Philadelphia Fire Ass'n v. La Grange & Lockhart Compress Co, 109 S.W. 1134, 50 Tex Civ.App. 172.

34. Tex.—Mauritz v. Schwind, Civ. App., 101 S.W.2d 1085, error dismissed.
Persons dealing with corporation as chargeable with notice of by-laws see Corporations § 180.

35. Iowa.—Preston v. Howell, 257 N.W. 415, 219 Iowa 230, 97 A.L.R. 1140—Commercial Sav. Bank of Carroll, Iowa, v. Kietges, 219 N.W. 44, 206 Iowa 90, followed in 219 N.W. 49, 206 Iowa 111.
N.D.—Hughes v. Wachter, 238 N.W. 776, 61 N.D. 513.
Presumptions as to corporate acts and records see supra subdivision a of this section.

Contents of corporate records or books

Stockholders are not presumed to know contents of records of directors' meetings or corporation's account books.—Alward v. Broadway Gold Mining Co., 20 P.2d 647, 94 Mont. 45.

Directors or officers

U.S.—Utley v. Clarke, D.C.N.Y., 16 F.Supp. 435.
Ala.—O'Neal v. Turner, 158 So. 801, 230 Ala. 24—Marx & Co. v. Bankers' Credit Life Ins. Co., 139 So. 421, 224 Ala. 249.
Iowa.—Preston v. Howell, 257 N.W. 415, 219 Iowa 230, 97 A.L.R. 1140—Commercial Savings Bank of Carroll, Iowa v. Kietges, 219 N.W. 44, 206 Iowa 90, followed in 219 N.W. 49, 206 Iowa 111.

36. U.S.—New York Life Ins. Co. v. McCreary, C.C.A.Neb., 60 F.2d 355—Mosbacher v. U. S, Ct.Cl., 30 F. Supp. 703, reversed on other grounds 61 S.Ct. 167, 311 U.S. 619, 85 L.Ed. 393, conformed to, Ct.Cl., 36 F.Supp. 904.
Ark.—Riverside Land Co. v. Big Rock Stone & Material Co., 40 S. W.2d 423, 183 Ark. 1061.
Cal.—Toth v. Metropolitan Life Ins. Co., 11 P.2d 94, 123 Cal.App. 185.
Md.—Vincent v. Palmer, 19 A.2d 183.
Mo.—Ensler v. Missouri Pac. R. Co., 23 S.W.2d 1034, 324 Mo. 530.
N.J.—Paruch v. Rasiewicz, 12 A.2d 141, 124 N.J.Law 356.
N.Y.—Moses v. Carver, 293 N.Y.S. 378, 164 Misc. 204, affirmed 5 N. Y.S.2d 783, 254 App.Div. 402.
Or.—Broad v. Kelly's Olympian Co., 66 P.2d 485, 156 Or. 216.
R.I.—Quaratiello v. Di Biasi, 112 A. 215, 43 R.I. 325.
S.C.—Federal Land Bank of Columbia v. Summer, 167 S.E. 830, 168 S. C. 510.
Tex.—Duncan v. Robertson, 105 S.W. 2d 214, 129 Tex. 637, modifying Robertson v. Duncan, Civ.App., 71 S.W.2d 597, error dismissed 75 S. W.2d 875, 124 Tex. 40—Pioneer Building & Loan Ass'n v. Johnston, Civ.App., 117 S.W.2d 556, error dismissed.
Wis.—Creasy Corporation v. Dunning, 196 N.W. 775, 182 Wis. 388.
22 C.J. p 103 note 72.

Illiterate person

Although a person is illiterate, the presumption exists that he knows contents of written instrument signed by him—Dusbabek v. Bowers, 43 P.2d 97, 173 Okl. 53, rehearing denied 47 P.2d 141, 173 Okl. 53—22 C.J. p 104 note 73.

Party to written contract is presumed to know its contents in the absence of fraud or imposition.
U.S.—In re Eakin Lumber Co., D.C. W.Va., 34 F.Supp. 460.

written instrument which he prepared.[37] Further, it is presumed that a person receiving a written instrument in the transaction of business,[38] as, for example, the purchaser of a bond[39] or the recipient of an insurance policy,[40] is acquainted with its contents.

However, the presumption that a person signing a written instrument has knowledge of its contents does not arise where fraud or imposition is shown,[41] or where, in the case of a written contract, no contractual relations are assumed by reason of the execution of the instrument.[42]

d. Making, Validity, and Genuineness of Writings

The presumption is in favor of the correctness, genuineness, validity, and regularity of writings.

Various presumptions may arise in respect of the making, validity, and genuineness of writings.[43] Generally, the presumption is in favor of the cor-

Cal.—Glickman v. New York Life Ins Co., 107 P.2d 252, 131 A.L.R. 1292.
Ga.—Miller v. Quaker Sav. Ass'n, 186 S E. 885, 53 Ga.App. 703.
Ind.—Welsh v. Kelly-Springfield Tire Co., 12 N.E.2d 254, 213 Ind. 188.
Md.—Owens v. Graetzel, 132 A. 265, 149 Md. 689.
N.J.—Paruch v. Rasiewicz, 12 A.2d 141, 124 N J Law 356—Christie v. Lalor, 181 A. 312, 116 N.J Law 23—Shyowitz v. Union Indemnity Co, 140 A. 448, 104 N.J.Law 339
R I —Morris Plan Co. of Rhode Island v. Di Stefano, 165 A. 365, 53 R.I. 190.
Tenn —McQuiddy Printing Co. v. Hirsig, 134 S.W.2d 197, 23 Tenn. App. 434.
Vt —Johnson v. Hardware Mut. Casualty Co, 187 A. 788, 108 Vt. 269.
Wash.—Singer v. Guy Inv. Co., 111 P. 886, 60 Wash. 674.
Wis.—City Bank of Portage v. Bankers' Limited Mut. Casualty Co., 238 N W. 819, 206 Wis. 1.

Ancillary instrument

One who signs agreement which is material to effect of, and ancillary to, instrument of sale expressly referred to in agreement is presumed to know contents of instrument of sale, although not party thereto.—Federal Intermediate Credit Bank v. Sherrod, 178 S.E. 477, 50 Ga.App. 501.

37. U.S.—Fiorito v. Clyde Equipment Co., C.C.A.Wash., 2 F.2d 807.
N.J.—Perrin v. U. S Express Co, 74 A. 462, 78 N.J.Law 515, 28 L.R. A.,N.S., 645

Books of account

There is a presumption that a person is cognizant of the contents of his own books of account.—Hurley v. Watson, 36 N.W. 726, 68 Mich. 531.

38. N Y.—Belger v. Dinsmore, 51 N. Y. 166, 10 Am.R. 575.

39. Pa.—Rittenhouse v. Lukens Steel Co, 176 A. 543, 116 Pa Super. 303.

40. U.S —Davis v. Fidelity Mut. Life Ins. Co., C.C.A.N.C., 107 F.2d 150—New York Life Ins. Co. v. Stewart, C.C.A La., 69 F.2d 957—Combs v. Equitable Life Ins. Co. of Iowa, D.C.Va., 34 F.Supp. 1002—Employers' Liability Assur. Corporation, Limited, of London, England, v. C. E Carnes & Co, D.C.La., 24 F.Supp. 128, affirmed, C.C.A., C. E Carnes & Co. v. Employers' Liability Assur. Corporation, Ltd., of London, England, 101 F 2d 739—Gill v. Fidelity Phenix Fire Ins. Co., D C.Ky., 5 F Supp. 1.
Ala.—Sovereign Camp, W. O W., v. Lambert, 153 So. 627, 228 Ala. 440.
Ark.—National Reserve Life Ins. Co. v. Cole, 108 S.W.2d 471, 194 Ark. 433.
Fla.—Massachusetts Bonding & Insurance Co. v. Hoxie, 176 So. 480, 129 Fla. 332.
Ind —Metropolitan Life Ins. Co. v. Henry, 24 N.E.2d 918—Lincoln Nat. Life Ins. Co. v. Sobel, App., 35 N. E.2d 121.
Ky —National Life Co. v Wilkerson's Adm'r, 71 S.W 2d 1034, 254 Ky. 459.
La.—Richardson v. American Nat. Ins. Co., 137 So. 370, 18 La App. 468.
Md —North American Accident Ins. Co. v. Plummer, 176 A. 466, 167 Md. 670.
Mich.—Wutzke v. County Fire Ins. Co. of Philadelphia, 254 N.W. 203, 266 Mich. 556.
N.H —Malloy v. Head, 4 A 2d 875, 90 N.H. 58, 123 A.L.R. 941—Sargent v. Canterbury Mut. Fire Ins. Co, 136 A. 124, 82 N.H. 489.
N Y.—Euto v. (American) Lumbermen's Mut. Casualty Co. of Illinois, 288 N.Y S. 232, 247 App.Div. 613—Levic v. Metropolitan Life Ins. Co., 275 N.Y.S 908, 242 App.Div. 595—Sinincrope v. Hartford Fire Ins. Co., 201 N.Y.S. 615, 207 App Div. 114.
Ohio.—Baranowicz v. Metropolitan Life Ins. Co., 34 N.E.2d 987, 66 Ohio App. 444—Springfield Tp Mut. Fire Ins. Ass'n v. Foster, 178 N.E. 427, 40 Ohio App. 351—Safford v. Cleveland Accident Ins. Co., 174 N.E. 157, 37 Ohio App. 84.
Okl.—Massachusetts Protective Ass'n of Worcester, Mass., v. Turner, 41 P.2d 689, 171 Okl. 14.
R.I.—Inventasch v. Superior Fire Ins. Co, 138 A. 39, 48 R I. 321.
S.C.—Horton v. Atlantic Life Ins. Co., 197 S.E. 512, 187 S.C. 155, 116 A.L.R. 788.
Tenn.—Umstattd v. Metropolitan Life Ins. Co., 110 S.W.2d 342, 21 Tenn.App. 312.
Tex.—Merchants' & Manufacturers' Inter-Insurance Alliance v. Hansen, Civ.App., 258 S.W. 257—American Nat. Ins. Co. v. Scott, Civ. App., 257 S.W. 934, affirmed Scott v American Nat. Ins. Co., Com. App, 276 S W. 643.
Wash.—Carstensen v. Standard Accident Ins. Co., 111 P.2d 565—Carew, Shaw & Bernasconi v. General Casualty Co. of America, 65 P.2d 689, 189 Wash. 329—Perry v. Continental Ins Co., 33 P 2d 661, 178 Wash. 24—Hayes v. Automobile Ins. Exch., 218 P. 252, 126 Wash. 487, affirmed 224 P. 594, 129 Wash. 202.
Wis —Eckstein v. Northwestern Mut. Life Ins. Co., 275 N.W. 916, 226 Wis 60.

41. N.Y.—Wiesenthal v. Krane, 234 N.Y.S. 392, 226 App.Div. 82.
Okl.—Dusbabek v. Bowers, 43 P.2d 97, 173 Okl. 53, rehearing denied 47 P.2d 141, 173 Okl 53.

Reliance on agent's representations

Presumption that one accepting policy without dissent is presumed to know contents may be overcome by showing that he relied on agent's representations and insurer's integrity.—Huey v. American Nat. Ins. Co., Tex.Civ.App., 45 S.W.2d 340, reversed on other grounds American Nat. Ins. Co. v. Huey, Com.App., 66 S.W 2d 690.

42. Tex.—Freeman v. B. F. Goodrich Rubber Co., Civ.App., 127 S. W.2d 476, error dismissed.

43. Or.—Ward v. Klamath County, 218 P. 927, 108 Or. 574.

Particular presumptions held proper

(1) That parties intended to make a reasonable and rational contract.—Irwin v. Baggett, 164 So. 745, 231 Ala. 324.

(2) That parties thought that they had fully set forth their agreement.—Kurland v. Massachusetts Amusement Corporation, 29 N.E.2d 749, 307 Mass. 131.

(3) That note payable in dollars represented all of transaction, in so far as the medium of payment was concerned.—C. & J. Camp v. Miller, D.C.Fla., 300 F. 579.

rectness,[44] genuineness,[45] validity,[46] and regularity[47] of writings.

Unless the contrary appears from the evidence or findings,[48] it will be presumed that a written instrument was executed on the day of its date[49] and at the place where it purports to be dated;[50] that a written instrument which is in the possession of the promisee or grantee was duly delivered[51] on the day of its date;[52] and that instruments executed on different dates are separate and distinct, and not parts of the same transaction.[53] It will also be presumed that a person capable of writing will sign his name wherever his signature is required, rather than procure it to be done by others;[54] and that a person who signed his name with

(4) That a set of books showing gross receipts and expenditures was kept—Morrow v. Missouri Pac. R Co., 123 S.W. 1034, 140 Mo.App. 200.

(5) That book entries were properly authorized—Henry v. Travelers' Ins. Co., C.C.Colo, 42 F. 363.

(6) That an affidavit in support of a motion for a continuance was filed by the authority of the person in whose behalf it professes to be made and at whose request the continuance was granted.—Stone v. Missouri Pac. R. Co., 90 P. 251, 75 Kan. 600.

(7) That a copy of an abstract of title, certified in the name of a firm and in the handwriting of one of the members of the firm, was certified during the existence of the partnership.—Teninga v. Glos, 107 N. E. 125, 266 Ill. 94.

(8) That check was tendered in time, there being no evidence to the contrary.—Johnson v. Kaeser, 239 P. 324, 196 Cal. 686.

44. Cal—Williams v. Belling, 245 P. 455, 76 Cal.App. 610
La.—Livingood v. Planters' Oil Mineral Co, 8 La.App. 37.
Miss.—Melchor v. Casey, 161 So. 692, 173 Miss. 67.
Or—Dolph v. Lennon's, Inc., 220 P. 161, 109 Or. 336.
Va—Hitt v. Smallwood, 133 S.E 503, 147 Va. 778.
Wash.—Yakima Shoe Co. v. Summers, 267 P. 47, 147 Wash. 661.

Bills of lading and waybills
Ill.—Paden v. Rockford Palace Furniture Co., 220 Ill.App. 534, certiorari denied in Rockford Palace Furniture Co v. Paden, 42 S.Ct. 54, 257 U.S. 645, 66 L.Ed. 413.

Recital as to payment of consideration
Where bill of sale and lease physically annexed thereto recited payment of two thousand dollars to defendant by plaintiffs' decedent, presumption arises therefrom that such consideration had been received by defendant.—Walsh v. Gray, 212 N.Y. S. 230, 214 App.Div. 296.

Private books of partner
Presumption of correctness, which, as between partners, attaches to entries in partnership books to which all partners have access, does not, however, attach to entries in private books of one of partners, which entries must be established by extrinsic proof.—Riley v. Brown, 237 P 833, 72 Cal.App. 468.

45. U.S—Johnson v. White, C.C.A. Ark, 39 F.2d 793—Malouff v. Pope, C.C.A.Colo., 9 F 2d 254.
Del.—Gow v. Consolidated Coppermines Corporation, 165 A. 136, 19 Del.Ch. 172.
Mont.—Cook v. Hudson, 103 P 2d 137, 110 Mont. 263.

Properly acknowledged instruments are presumed genuine—Metropolitan Lumber Co. v. McColeman, 103 N.W. 809, 140 Mich. 333.

Signatures on initiative petition are presumed to be genuine.—In re Initiative Petition No. 142, State Question No. 205, 82 P.2d 803, 183 Okl 343—In re Referendum Petition No. 71, State Question No. 216, 65 P.2d 985, 179 Okl. 381.

Signature to unaltered document
A signature to a document showing on its face no marks of alteration is prima facie evidence that entire document was act of signer.—Barletta v. New York, N. H & H. R. Co., 8 N E.2d 800, 297 Mass. 275.

46. Md.—Ætna Casualty & Surety Co. v. State, 158 A. 45, 162 Md. 49.
Neb.—Madura v. McKillip, 201 N.W. 633, 112 Neb. 783.
Tenn—Kyle v. Kyle, 74 S.W.2d 1065, 18 Tenn.App. 200.

47. Md.—Owings v. Dayhoff, 151 A. 240, 159 Md. 403.
Mo—In re Greenwood's Estate, 208 S.W. 635, 201 Mo.App 39.
Tenn.—Kyle v. Kyle, 74 S.W.2d 1065, 18 Tenn.App. 200.

Official witness' attestation of signature of party executing written instrument is presumably regular.—Hall v. Simmons, 179 S E. 272, 50 Ga App. 634.

Order of signatures
It will be presumed that signatures to an instrument are in their regular order.—Newell v. White, 73 A. 798, 29 R.I. 343.

48. Mich.—Jackson City Bank & Trust Co. v. Sternburg, 274 N.W. 806, 281 Mich. 313, 112 A.L.R. 1195.
S D.—Wilson v. Hayes-Lucas Lumber Co., 207 N.W. 155, 49 S.D. 341, modified on other grounds 226 N. W. 343, 55 S D. 331.

49. Ark.—State ex rel. Attorney General v. Broadaway, 93 S.W.2d 1248, 192 Ark. 634.
Cal.—Williams v. Belling, 245 P. 455, 457, 76 Cal.App. 610, citing **Corpus Juris.**
Ill.—Holm v. Lynd, 176 N.E. 57, 343 Ill 645—Wilson v. Glos, 107 N.E. 630, 266 Ill. 392, Ann.Cas.1916B 539.
Ind.—Collins v. Siegal, 14 N.E.2d 582, 214 Ind. 206.
Mich—Jackson City Bank & Trust Co. v. Sternburg, 274 N.W. 806, 281 Mich. 313, 112 A.L.R. 1195.
N.Y.—News Syndicate Co. v. Gatti Paper Stock Corporation, 176 N.E. 169, 256 N.Y. 211, reversing 246 N. Y.S. 882, 231 App Div. 812 and 238 N Y.S. 886, 228 App Div. 688, reargument denied 177 N E. 190, 256 N.Y. 678.
22 C.J. p 105 note 28.

50. Ga.—Gress Lumber Co. v. Georgia Pine Shingle Co., 32 S.E. 632, 105 Ga. 847.
22 C.J. p 106 note 29.

County of attesting witness
Written instrument is presumably executed in county of official witness attesting it.—Smith v. Simmons, 133 S.E. 312, 35 Ga.App. 427.

Place of enforcement
Until the contrary appears, a chattel mortgage is presumed to have been executed in the state where it sought to be enforced.—Casner v. Hoskins, 128 P. 841, 130 P. 55, 64 Or. 254.

51. Mich.—Amos-Richia v. Northwestern Mut. L. Ins. Co., 107 N.W. 707, 143 Mich 684.
22 C.J. p 106 notes 33–39.
Presumption of delivery arising from possession of:
Contract see Contracts § 581 g.
Deed see Deeds § 184 b.

Incomplete instrument
Presumption of delivery does not arise where on the face of the instrument some act remains to be done to make it complete.—Amos-Richia v. Northwestern Mut. L. Ins. Co., supra.

52. U S.—Collins v. Streitz, C.C.A. Ariz., 95 F.2d 430, 438, citing **Corpus Juris.**
Cal.—Williams v. Belling, 245 P. 455, 457, 76 Cal.App. 610, citing **Corpus Juris.**
22 C.J. p 106 note 41.

53. N.Y.—Matter of Miller, 78 N.Y. S. 930, 77 App.Div. 473, reversing 75 N.Y.S. 929, 37 Misc. 449.

54. Ill.—Shelby Loan & Trust Co.

a cross mark was illiterate and could not read.[55]

There is no presumption that instruments made on the same date but between different parties were executed simultaneously.[56]

e. Morality and Rightful Action; Performance of Duty

The law presumes morality and rightful action, and that every person performs his duties.

The law presumes morality[57] and rightful action,[58] and it will not be presumed that a person acted immorally[59] or wrongfully.[60]

Performance of duty. In the absence of evidence to the contrary, the presumption is that every person performs his duties.[61]

However, it has been held that there is no presumption of performance of a private duty;[62] and the mere making of an obligation does not create a presumption that the obligation has been performed.[63] The presumption in favor of the performance of a duty on the part of an agent does not obtain where it is shown that the agent acted as an individual and not in his fiduciary capacity.[64]

f. Ownership and Value

Various presumptions may arise in respect of ownership and value, such as presumptions relating to the value of notes, stocks, and bonds.

v. Milligan, 24 N.E.2d 157, 372 Ill. 397.

55. Va.—Interstate Coal & Iron Co. v. Clintwood Coal & Timber Co., 54 S.E. 593, 105 Va. 574.

56. N.Y.—Paul Bernard, Inc. v. Kaufman, 179 N.Y.S. 597.

57. Ark.—Gray v. Gray, 133 S.W.2d 874, 199 Ark. 152.
Mont.—Welch v. All Persons, etc., 254 P. 179, 78 Mont. 370.
N.Y.—In re Gropen's Estate, 294 N.Y.S. 558, 162 Misc. 346—In re Glaser's Estate, 273 N.Y.S. 860, 151 Misc. 778.

58. U.S.—In re Sterling, C.C.A.Cal., 96 F.2d 616, rehearing denied, D.C., 97 F.2d 505, certiorari denied Laugharn v. Bernstein, 59 S.Ct. 93, 305 U.S. 629, 83 L.Ed. 403.
Cal.—Serv-U-Garbage Co. v. Board of Health of City and County of San Francisco, 290 P. 519, 107 Cal.App. 386—Arakelian v. Sears, 200 P. 757, 53 Cal.App. 646.
Md.—Adkins v. Hastings, 114 A. 288, 138 Md. 454.
N.J.—Rothstein v. New York & L. B. R. Co., 3 A.2d 592, 121 N.J.Law 570.
Tex.—Girard Fire & Marine Ins. Co. v. Koenigsberg, Civ.App., 65 S.W.2d 783.
Presumption as to legality and illegality see supra § 134.

Evidence consistent with presence or absence of wrongdoing

Where evidence is capable of interpretation equally consistent with presence or absence of wrongful act, that meaning must be ascribed which accords with its absence.—Lahr v. Tirrill, 8 N.E.2d 298, 274 N.Y. 112, reversing 291 N.Y.S. 269, 249 App.Div. 667, reargument denied 10 N.E.2d 575, 274 N.Y. 611—Digelormo v. Weil, 183 N.E. 360, 260 N.Y. 192, reversing 255 N.Y.S. 1021, 235 App.Div. 780, and reargument denied 185 N.E. 728, 261 N.Y. 536.

Conduct corresponding with truth

As against himself, it is to be presumed that a person's conduct corresponds with the truth.—Wiener v. Crystal Oil Refining Corporation, 165 So. 131, 183 La. 879.

Long silence as indicating fairness

Long silence on the part of the complaining party gives rise to a presumption of fair dealing.—In re Early's Estate, 182 N.Y.S. 537, 12 Misc. 54, affirmed 185 N.Y.S. 926, 195 App.Div. 889.

59. Ala.—Williams v. Wilson, 97 So. 911, 210 Ala. 289.
Cal.—Glos v. McBride, 191 P. 67, 47 Cal.App. 688.

60. U.S.—Flannery v. Flannery Bolt Co., C.C.A.Pa., 108 F.2d 531, affirming, D.C., Flannery Bolt Co. v. Greenslade, 26 F.Supp. 502, certiorari denied Flannery v. Flannery Bolt Co., 60 S.Ct. 615—National Shawmut Bank of Boston v. Topas, C.C.A.Mass., 60 F.2d 467, reversing, D.C., Topas v. National Shawmut Bank, 53 F.2d 1020, and certiorari denied Topas v. National Shawmut Bank of Boston, 53 S.Ct. 292, 287 U.S. 668, 77 L.Ed. 576.
Conn.—City Nat. Bank v. City of Bridgeport, 147 A. 181, 109 Conn. 529.
Miss.—Coca Cola Bottling Works of Greenwood v. Simpson, 130 So. 479, 158 Miss. 390, 72 A.L.R. 143.
Wash.—Hanley v. Most, 115 P.3d 933.

Improper or unlawful motive

Inference of improper or unlawful motive should never be drawn, when legitimate purpose is equally apparent.—In re Hughes' Will, 232 N.Y.S. 84, 225 App.Div. 29, affirmed In re Kelley, 168 N.E. 415, 251 N.Y. 529.

61. U.S.—Powell Bros. Truck Lines v. Platt, C.C.A.Okl., 92 F.2d 879.
Colo.—Board of Com'rs of Adams County v. Heath, 246 P. 794, 79 Colo. 429.
Ga.—Beavers v. Le Sueur, 3 S.E.2d 667, 188 Ga. 393—Georgia Casualty Co. v. McRitchie, 166 S.E. 49, 45 Ga.App. 697—Suddath v. Blanchard & Calhoun, 146 S.E. 798, 39 Ga.App. 262.
Ind.—Hutchinson's Estate v. Arnt, 1 N.E.2d 585, 210 Ind. 509, 108 A.L.R. 530, rehearing denied 4 N.E.2d 202, 210 Ind. 509, 108 A.L.R. 530.
Mo.—Brigham City Fruit Growers' Ass'n v. G. H. Zollmann Produce Co., 220 S.W. 911.
N.Y.—Broderick v. Aaron, 273 N.Y.S. 641, 152 Misc. 791, affirmed 279 N.Y.S. 733, 244 App.Div. 707, affirmed 200 N.E. 46, 269 N.Y. 661, and 1 N.E.2d 334, 270 N.Y. 568, reargument denied 2 N.E.2d 676, 271 N.Y. 524.
Tenn.—Macon County v. Dixon, 100 S.W.2d 5, 20 Tenn.App. 425.

Patriotic society

It will be presumed that a patriotic society will perform its legal duties.—Conley v. Daughters of Republic, 156 S.W. 197, 157 S.W. 937, 106 Tex. 80.

Recording mortgage

Where it is a person's legal duty to record a mortgage, the court will not assume that he will violate that duty.—Aaron v. Bayon, 59 So. 130, 131 La. 228.

62. Conn.—Miles v. Sherman, 166 A. 250, 116 Conn. 678.
Presumption as to performance of official duty see supra § 146.

Publication of order

Where court ordered defendant purchaser of property to publish order of court discharging receivers and fixing limit for making of claims against receivers, it will not be presumed that defendant complied with such order, especially since the knowledge of such fact was peculiarly in defendant's possession, and it did not supply proof thereof at trial.—Carroll v. St. Louis-San Francisco Ry. Co., Mo.App., 274 S.W. 837.

63. S.C.—Sibley v. Sibley, 70 S.E. 615, 88 S.C. 184, Ann.Cas 1912C 1170.
22 C.J. p 107 note 62.

64. Tex.—Reynolds v. Reynolds, Civ.App., 224 S.W. 382.

Various presumptions may arise in connection with ownership and value.[65] Thus, in the absence of contrary evidence, it will be presumed that one named as consignee in a bill of lading is the owner of the consigned goods;[66] that the owner of land is entitled to the crops thereon;[67] that the declared plaintiff in an action is the owner of a judgment obtained therein;[68] that one whose number plates appear on a motor vehicle is its owner;[69] and that the builder of a vessel is the owner.[70]

Unless a contrary showing is made, it will be presumed that the price paid for property at a bona fide sale represents its value.[71] Further, it will be presumed that an obligation,[72] such as a promissory note[73] or bond[74] is worth its par or face value; and while it has been held that no such presumption exists in respect of the value of shares of capital stock,[75] there is some authority apparently to the contrary.[76]

g. Miscellaneous Matters

Presumptions have arisen as to a number of miscel-

65. U.S.—Birge-Forbes Co. v. Heye, Tex., 40 S.Ct. 160, 251 U.S. 317, 64 L.Ed. 286, affirming, D.C., 248 F. 636.
N.Y.—Hussey v. Flanagan, 142 N.E. 594, 237 N.Y. 227, reversing 200 N.Y.S. 549, 206 App.Div. 187.
Wash.—Peters v. Casualty Co. of America, 172 P. 220, 101 Wash. 208.

Manager of business as owner
Where a business was conducted in the name of "Main 203 Tire Service," a presumption that the person managing the business was its owner was not warranted.—Hutchins v. Mendenhall, 253 Ill.App. 248.

Recognition of ownership as showing lawful acquisition
Recognition by cemetery authorities of ownership creates presumption that ownership was acquired in accordance with rules of association, and such presumption continues in absence of evidence to overcome it, or of evidence that ownership which association recognized had terminated.—In re St. Vincent de Paul Benev. Ass'n of New Orleans, La.App., 175 So. 140.

Purchase outside state as evidence of value
The fact that a buyer in Indiana was buying beans in California for shipment to Indiana is presumptive evidence that the value of the beans in Indiana was higher than that in California.—Humphry v. Farmers' Union & Milling Co., 190 P. 489, 47 Cal.App. 211.

Restrictions on use of property as affecting value
There is no presumption that restrictions against using land for slaughter house purposes, etc., made property less valuable.—Noethinger v. Jeffries, 177 N.Y.S. 577, 108 Misc. 372.

66. **Presumption rebuttable**
Vt.—Pacific Lumber Agency v. National Aircraft Materials Corporation, 182 A. 192, 108 Vt. 10.

67. N.D.—Wadsworth v. Owens, 115 N.W. 667, 17 N.D. 173.
22 C.J. p. 104 note 91.

68. Tex.—Heidingsfelder v. Rodgers, Civ.App., 96 S.W.2d 147.

69. Pa.—Baker v. Crystol, 188 A. 174, 324 Pa. 333.
Wash.—Peters v. Casualty Co. of America, 172 P. 220, 101 Wash. 208.

70. N.Y.—Phillips v. Wright, 7 N.Y.Super. 342.

71. Ill.—Cloyes v. Plaatje, 231 Ill.App. 183.
La.—Beneficial Loan Soc. of New Orleans v. Strauss, App., 148 So. 85.

Public sale
(1) In the absence of contrary evidence, the presumption is that the price secured at a public auction sale made on usual terms is the highest and best obtainable and represents the value of the article sold.
Cal.—Boyd v. Benneyan, 266 P. 278, 204 Cal. 23.
N.J.—Wieters v. Hart, 63 A. 241, 67 N.J.Eq. 507, affirmed 64 A. 1135, 68 N.J.Eq. 796.
Pa.—Plummer v. Wilson, 185 A. 311, 322 Pa. 118.

(2) No such presumption may be drawn, however, where the great weight of the evidence shows that the property was worth almost twice as much as it brought at the sale.—Gibson v. People, 122 Ill.App. 217.

Purchase price paid in other property
Where portion of purchase price of personalty is paid in other property at agreed valuation, presumption, at least prima facie, is that such valuation is actual value thereof.—Evankovich v. Howard Pierce, Inc., 8 P.2d 653, 91 Mont. 344.

Price paid for repairs, nothing appearing to cast suspicion on the transaction, is presumptive evidence of the value of the repairs.—Cloyes v. Plaatje, 231 Ill.App. 183.

72. U.S.—Birge-Forbes Co. v. Heye, Tex., 40 S.Ct. 160, 251 U.S. 317, 64 L.Ed. 286, affirming, D.C., 248 F. 636—Chase Nat. Bank of City of New York v. Fidelity & Deposit Co. of Maryland, C.C.A.N.Y., 79 F.2d 84.
N.Y.—Hussey v. Flanagan, 142 N.E. 594, 237 N.Y. 227, reversing 200 N.Y.S. 549, 206 App.Div. 187.

73. U.S.—Bowers v. Max Kaufmann & Co., C.C.A.N.Y., 18 F.2d 69.
Idaho.—Mechanics & Metals Nat. Bank of City of New York v. Pingree, 232 P. 5, 40 Idaho 118.
N.D.—Anderson v. Grand Forks First Nat. Bank, 72 N.W. 916, 6 N.D. 497, affirmed 19 S.Ct. 284, 172 U.S. 573, 43 L.Ed. 558.
Tex.—Buelin v. Smith, Civ.App., 294 S.W. 317, reversed on other grounds Bulin v. Smith, Com.App., 1 S.W.2d 591—Farmers' & Merchants' State Bank of Lelia Lake v. Guffey, Civ.App., 255 S.W. 462.

74. Idaho.—Glenn v. Salih, 256 P. 947, 144 Idaho 370.
Bond secured by mortgage is presumably worth the sum expressed on its face.—Fairchild v. Llewellyn Realty Co., 82 A. 924, 82 N.J.Law 423.
United States government bonds are presumed to be worth par value unless the contrary is shown.
Iowa.—Windahl v. Hasselman, 200 N.W. 583, 198 Iowa 1001.
N.D.—Dakota Nat. Bank v. Brodie, 176 N.W. 738, 46 N.D. 247.

75. Cal.—Castle v. Acme Ice Cream Co., 281 P. 396, 101 Cal.App. 94.
Conn.—Henry v. Kopf, 131 A. 412, 104 Conn. 73.
Idaho.—Hansbrough v. D. W. Standrod & Co., 286 P. 923, 49 Idaho 216.
Ill.—Babcock v. Harrsch, 141 N.E. 701, 310 Ill. 413.
Kan.—Butler County State Bank v. Van Matre, 212 P. 107, 112 Kan. 556.
N.Y.—Hussey v. Flanagan, 142 N.E. 594, 237 N.Y. 227, reversing 200 N.Y.S. 549, 206 App.Div. 187—In re Dupignac's Estate, 204 N.Y.S. 273, 123 Misc. 21, affirmed 207 N.Y.S. 833, 211 App.Div. 862.
Computation of value of stock see Corporations § 415.

76. Mich.—Du Boise v. Flint Commonwealth Corporation, 203 N.W. 71, 230 Mich. 295.
Mo.—State ex rel. and to Use of Missouri Poultry & Game Co. v. Nolte, App., 229 S.W. 273.
Bank stock is ordinarily presumed to be worth par until the contrary appears by competent evidence.—Scandinavian American Bank of Fargo v. Westby, 172 N.W. 665, 41 N.D. 276.

laneous matters, such as presumptions which relate to bonds, checks, deeds, drafts, notes and to the government and law enforcement.

In addition to the presumptions considered supra this section and supra §§ 120–149, infra §§ 151–157, various other presumptions may or may not be proper, depending on the circumstances of the individual case.[77] Thus in the absence of contrary evidence, it will be presumed that a person paid the legal rate of interest[78] or the market price;[79] that money paid by one person to another was due to the latter;[80] that credit was given to a known principal rather than to an agent;[81] that a person lending money on a borrower's promise to repay is not indebted to the borrower;[82] that a fund for the benefit of persons holding debts of unequal amounts was intended to be distributed proportionately;[83] and that a person rendering services in his calling, trade, or profession, did so for a compensation to be paid him.[84]

In addition, it will be presumed that all of the property of a business corporation is useful in its business;[85] that goods were delivered pursuant to an order for delivery thereof found in the possession of the person on whom such order was drawn;[86] that a delivery wagon is operated by the person, firm, or corporation, whose business name appears thereon;[87] and that a probated will and instruments involved in the partition of an estate thereunder are recorded.[88]

Further, there is a presumption that a person

77. Ariz.—Perazzo v. Ortega, 241 P. 518, 29 Ariz. 334.
Ark.—Sovereign Camp, W. O. W, v. Sams, 108 S.W.2d 1089, 194 Ark. 557.
Cal.—Black v. Southern Pac. Co., 12 P.2d 981, 124 Cal.App. 321.
Va.—Camp Mfg. Co. v. Green, 106 S. E. 394, 129 Va. 360.

Particular presumptions held proper

(1) That bondholders consented to transfer of bonds to person taking ing them up.—Anderson v. Pennsylvania Hotel Co., C.C.A.Fla., 56 F.2d 980.

(2) That checks were in payee's possession and control from time she received them until deposited in bank by indorsee.—Ætna Casualty & Surety Co. v. State, 158 A. 45, 162 Md. 49.

(3) That mortgagee was not considered indebted to mortgagor.—Burleson v. Barnes, Iowa, 207 N.W. 359.

(4) That record had a proper certificate of acknowledgment.—Mercantile Trust Co. of San Francisco v. All Persons Claiming, 191 P. 691, 183 Cal. 369.

(5) That plaintiff's delay in instituting action was probably the result of his lack of faith in the merits of his cause.—Clemons v. Dawkins Log & Mill Co., 98 S.W.2d 472, 266 Ky. 157.

(6) That one eating food and suffering therefrom would complain, and that, if no one complained, no one suffered.—Landfield v. Albiani Lunch Co., 168 N.E. 160, 268 Mass. 528.

(7) Other presumptions.
U.S.—Commissioner of Internal Revenue v. Southwest Consol. Corporation, C.C.A.La., 119 F.2d 561—In re Knepper, D.C.N.Y., 12 F.Supp. 989.
Cal.—In re Watts' Estate, 198 P. 1036, 186 Cal. 102.
Del.—New York Trust Co. v. Riley, 16 A.2d 772, certiorari granted Riley v. New York Trust Co., 61 S.Ct. 1105.
Iowa.—Arnd v. Harrington, 287 N.W. 292, 227 Iowa 43.
Md.—Adkins v. Hastings, 114 A. 288, 138 Md. 454.
Tenn.—Vaughan v. Oliver, 3 Tenn. App. 559.
Tex.—Pitts v. Camp County, 39 S.W. 2d 608, 120 Tex. 558, answers to certified questions conformed to, Civ.App., 42 S.W.2d 853
Wash.—Kelly v. Price, 269 P. 842, 148 Wash. 542.

Particular presumptions held improper

(1) That attorney read will before giving his opinion as to its proper construction.—Kunkel v. Kunkel, 110 A. 73, 267 Pa. 163.

(2) That administrator is so neglectful of his own interest as to fail to appeal in proper cases.—Appeal of Hume, 155 A. 730, 130 Me. 338.

(3) That cotenant borrower was not liable to account for rents and profits received and to pay money borrowed.—Drury v State Capital Bank of Eastern Shore Trust Co., 161 A. 176, 163 Md. 84.

(4) That persons will attempt impossible undertaking.—Rabinowitz v. Darnall, Civ.App., 2 S.W.2d 930, reversed on other grounds, Com.App., 13 S.W.2d 73.

(5) That maker of note was physically present in state where note was dated at time of signing.—Wood v. Benjamin, 260 N.Y.S. 535, 146 Misc. 7.

(6) Other presumptions.
La.—Shepard v. Whitney Nat. Bank of New Orleans, App., 177 So. 825.
N.Y.—Eldridge v. Endicott, Johnson & Co., 126 N.E. 254, 228 N.Y. 21, 20 A.L.R. 1, reversing 177 N.Y.S. 863, 189 App.Div. 53.
Pa.—Fitzpatrick v. Thomas, 166 A. 493, 311 Pa. 191—McCarthy v. Yellow Cab Co., 77 Pittsb.Leg.J. 155.
Vt.—University of Vermont and State Agr College v. Ward, 158 A. 773, 104 Vt. 239.

78. Wis.—Zurich General Accident & Liability Ins. Co. v. Industrial Commission of Wisconsin, 216 N. W. 137, 196 Wis. 159, reversed on other grounds 220 N.W. 377, 196 Wis. 159.

79. Tex.—Magnolia Petroleum Co. v. Farmersville Independent Gin Co., Civ.App., 243 S.W. 568.

80. **Rebuttable presumption**
Cal.—McKay v. McKay, 195 P. 385, 184 Cal. 742.

81. N.Y.—Ferris v. Kilmer, 43 N.Y. 300, reversed on other grounds 47 Barb. 411.

82. Mont.—Crawford v. Pierse, 185 P. 315, 56 Mont. 371.

83. U.S.—Eagle Star & British Dominions v. Tadlock, D.C.Cal., 22 F. Supp. 545.
Md.—Weber v. Weber, 181 A. 670, 169 Md. 702.

84. Ill.—Harper v. Owen H. Fay Livery Co., 177 Ill.App. 138, affirmed 106 N.E. 273, 264 Ill. 459.

85. U.S.—Ford Motor Co. v. Clark, C.C.A.Tex., 100 F.2d 515, certiorari granted 59 S.Ct. 775, 306 U.S. 628, 83 L.Ed. 1031, and affirmed Ford Motor Co. v. Beauchamp, 60 S.Ct. 273, 308 U.S. 331, 84 L.Ed. 304. rehearing denied 60 S.Ct. 385, 308 U.S. 640, 84 L.Ed. 531.

86. Tenn.—Kincaid v. Kincaid, 8 Humphr. 17.

87. N.Y.—Diel v. Henry Zeltner Brewing Co., 51 N.Y.S. 930, 30 App. Div. 291.
22 C.J. p 104 note 90.

88. Tex.—Bartlett v. Terrell, Civ. App., 292 S.W. 273.

takes ordinary care of his own concerns;[89] that a person possessing good eyesight must have seen that which was within the range of his vision, if he gave attention and looked,[90] and that he did not look if he failed to see what he should have seen;[91] that a person believes in the fundamental principles of the church to which he belongs;[92] that a drafted soldier was honorably discharged;[93] that a person who was discharged from an insane asylum and thereafter resided at home undisturbed was normally sane at the time of his discharge and continued so;[94] and that decedent had no property subject to administration, where no administration was had in any county of the state.[95]

There is also a presumption that a representation shown to have been made is true;[96] that things shown to have been done were lawfully and duly done;[97] that a letter or statement received by a person was in his possession at the time of trial;[98] that a letter addressed to a party outside the state is in the possession of the person to whom it was addressed;[99] and that a reference to a month means a month of the current year.[1]

On the other hand, it will not be presumed that a bid given to a stranger to the contract was delivered;[2] that an officer is to receive a salary;[3] or that a person would refuse to obey a peremptory writ of mandamus directed to him.[4] No inference of nonpayment or subsisting indebtedness can be drawn from evidence showing that at one time money had been received for the use of another.[5]

Presumptions relating to bonds, checks, drafts, and notes. It will be presumed, in the absence of contrary evidence, that a bond filed in conformity to statutory requirements was approved as required by statute;[6] that a check was given in payment of a debt or for money received at the time;[7] that a draft will be accepted and honored on due presentation;[8] that payment of drafts was made from funds of the drawer in the hands of the drawee;[9] that a promissory note evidences a debt from the maker to the payee,[10] and that the payee was not indebted to the maker;[11] that a note for a certain amount and credit on the maker's books for the same amount represent different items of indebtedness;[12] that an overdue note in possession of the maker is paid;[13] and that a note was paid on the day when the debt evidenced thereby was due.[14]

However, it will not be presumed that an officer of a trust company who aided the holder of an accommodation note in negotiating the same intended to defraud the company;[15] that funds deposited in bank on check account remained any length of time;[16] or that a bank, after disclaiming any interest in, or right to, a judgment on a note which

89. Cal.—Carr v. Anderson, 288 P. 117, 105 Cal.App. 570.

Disbelief of witness as justifying rejection

The presumption that person takes ordinary care of his own concerns cannot be rejected by trial court solely because he does not believe witness who testified that such care was taken.—De Hart v. Allen, Cal. App., 111 P.2d 342.

90. Ark.—Davis v. Draper, 148 S.W. 2d 662.
Mont.—Autio v. Miller, 11 P.2d 1039, 92 Mont. 150.
22 C.J. p 104 note 88.

91. Ark.—Missouri Pac. R. Co. v. Nelson, 115 S.W.2d 872, 195 Ark. 883.
La.—Gibbons v. New Orleans Terminal Co., 1 La.App. 371, affirmed Gibbens v. New Orleans Terminal Co., 105 So. 367, 159 La. 347.

92. Ariz.—Tucker v. Reil, 77 P.2d 203, 51 Ariz. 357.

93. Mass.—Dunn v. Commissioner of Civil Service, 183 N.E. 889, 281 Mass. 376.

94. N.C.—In re Thorp, 64 S.E. 379, 150 N.C. 487.

95. Mo.—Johnson v. Burks, 77 S.W. 133, 103 Mo.App. 221.

96. Md.—Ætna Indemn. Co. v. George A. Fuller Co., 73 A. 738, 74 A. 369, 111 Md. 321.
22 C.J. p 105 note 22.
Presumption as to fraud see supra § 126.

97. Tex.—Huling v. Moore, Civ.App., 194 S.W. 188.
Presumption of legality and illegality see supra § 134.

Erection of building

It will be presumed that legal requirements were complied with in connection with the erection of a building.—Empire Realty Corp. v. Sayre, 95 N.Y.S. 371, 107 App.Div. 415.

98. U.S.—Swinehart Tire & Rubber Co. v. William Whitman Co., C.C.A. Ohio, 266 F. 45.

99. Tex.—Lindsay v. Woods, Civ. App., 27 S.W.2d 263.

1. Ga.—Tipton v. State, 46 S.E. 436, 119 Ga. 304.

2. Tex.—McMahon v. Kirby, Civ. App., 256 S.W. 622.

3. N.M.—State v. Romero, 124 P. 649, 17 N.M. 81, Ann.Cas.1914C 1114.

4. Mo.—Gardner v. Springfield Gas & Electric Co., 135 S.W. 1023, 154 Mo.App. 666.

5. N.J.—Potoker v. Klein, 143 A. 375, 105 N.J.Law 183.

6. Neb.—Seng v. Payne, 128 N.W. 625, 87 Neb. 812.

7. Pa.—City Trust & Savings Bank v. Schwartz, 56 Pa.Super. 645.
22 C.J. p 104 note 3.

8. Iowa.—Gutschenritter v. Whitmore, 139 N.W. 567, 158 Iowa 252.

9. Ill.—Griffin v. Spengler, 176 Ill. App. 429.

10. Presumption rebuttable

Ind.—Hinshaw v. Security Trust Co., 93 N.E. 567, 48 Ind.App. 351.

11. Minn.—Beneke v. Beneke, 138 N. W. 689, 119 Minn. 441, Ann.Cas. 1914B 381.
Mont.—Mundt v. Mallon, 76 P.2d 326, 106 Mont. 242.

12. Vt.—Adams v. Adams, 22 Vt. 50.

13. N.H.—Blodgett v. Webster, 24 N.H. 91, 101.
Tex.—Halfin v. Winkleman, 18 S.W. 433, 83 Tex. 165.

14. Mo.—Lawler v. Vette, 149 S.W. 43, 166 Mo.App. 342.
22 C.J. p 104 note 6.

15. N.Y.—Jacobus v. Jamestown Mantel Co., 134 N.Y.S. 418, 149 App.Div. 356.

16. N.Y.—Lafayette Trust Co. v. Haldane, 131 N.Y.S. 171, 146 App. Div. 553.
22 C.J. p 107 note 57.

had been assigned to it only as collateral for a debt which was later paid, would attempt to assign the judgment.[17]

Presumptions relating to deeds and realty. Unless the contrary is shown by the evidence, it will be presumed that everyone examines the title to real estate before purchasing or receiving a mortgage;[18] that a person to whom a deed conveying land was executed purchased the premises with his own money[19] and voluntarily;[20] that restrictions in a deed are inserted for the benefit of grantor's remaining lands;[21] that lot owners are interested in streets and alleys on a recorded plat;[22] and that sidewalks are normally free from obstructions and pitfalls.[23]

Presumptions relating to government and law enforcement. In a proper case it will be presumed that all laws will be enforced[24] and that legal infractions will be prosecuted;[25] that the government is always ready to pay what it owes;[26] that a sovereign state dealing with a citizen intends to apply the same rules of abstract justice that it applies in actions between citizens;[27] that the supreme court of another state is a court of record and hence has a seal;[28] that the signers of an initiative petition are registered electors;[29] and that a congressional township is a full, rather than a fractional township.[30]

On the other hand, it will not be presumed that one state would attempt to exercise the police power of another state;[31] that a seal used by the secretary of a territory in certifying a public record is the great seal of the territory;[32] or that a contract let by county commissioners without advertising for bids involves the incurring of a liability greater than may be incurred without such advertising.[33]

Presumptions relating to newspapers. In the absence of a contrary showing, it will be presumed that a newspaper was published at or before the time of its date.[34] However, it will not be presumed that the word "Daily" is a part of the name of a newspaper merely because it is published daily.[35]

Presumptions relating to witnesses. In the absence of contrary evidence, it is presumed that witnesses are interviewed before trial[36] and that they speak the truth.[37]

§ 151. Presumptions Arising from Spoliation, Fabrication, or Nonproduction of Evidence

Presumptions arising from spoliation, fabrication or nonproduction of evidence are discussed infra §§ 152–156. Admissions arising from attempts to suppress evidence see § 293 infra.

Examine Pocket Parts for later cases.

§ 152. Spoliation in General

The spoliation of evidence gives rise to inferences or presumptions unfavorable to the spoliator.

The maxim, Omnia præsumuntur contra spoliatorem, "all things are presumed against a wrongdoer," has been frequently applied to unfavorable inferences or presumptions arising from the spoliation of evidence,[38] and, so far as it rests on logic, is

17. Va.—Selden v. Williams, 62 S.E. 380, 108 Va. 542.

18. Ill.—McCoy v. Larson, 3 N.E. 2d 713, 286 Ill.App. 405.

19. Ill.—Stambaugh v. Lung, 83 N.E. 922, 232 Ill. 373.

20. Ind.—Illinois Cent. R. Co. v. Howard, 148 N.E. 413, 196 Ind. 323, denying rehearing 147 N.E 142, 196 Ind. 323.

21. N.Y.—Liberty Bank of Buffalo v. High Park Development Co., 236 N.Y.S. 194, 134 Misc. 733, affirmed 234 N.Y.S. 832, 227 App.Div. 647.

22. Va.—Fugate v. Carter, 144 S.E. 483, 151 Va. 108.

23. N.J.—Hasney v Stacey Amusement Co., 185 A. 666, 14 N.J.Misc. 462.

24. Ga.—Standard Cigar Co. v. Doyal, 166 S.E. 434, 175 Ga. 857.

25. Cal.—Herald v. Glendale Lodge No. 1289, B. P. O. E. of United States, 189 P. 329, 46 Cal.App. 325.

26. U.S.—Bernhardt Furniture Co. v. Robertson, D.C.N.C., 18 F.Supp. 129.

27. Ariz.—State Tax Commission v. United Verde Extension Mining Co., 4 P.2d 395, 39 Ariz. 136, rehearing denied 6 P.2d 889, 39 Ariz. 331.

28. Tex.—Houston Oil Co. v. Kimball, 122 S.W. 533, 124 S.W. 85, 103 Tex. 94, affirming, Civ.App., 114 S.W. 662.
22 C.J. p 107 note 54.

29. Okl.—In re Initiative Petition No. 142, State Question No. 205, 82 P.2d 803, 183 Okl. 343.

Proof insufficient to overcome presumption
Okl.—In re Initiative Petition No. 142, State Question No. 205, supra.

30. Mo.—Doddridge v. Patterson, 121 S.W. 72, 222 Mo. 146.

31. U.S.—E. C. Warner Co. v. W. B. Foshay Co., C.C.A.Minn., 57 F.2d 656, certiorari denied 52 S.Ct. 641, 286 U.S. 558, 76 L.Ed. 1292.

32. Mont.—Milwaukee Gold Extraction Co. v. Gordon, 95 P. 995, 37 Mont. 209.

33. Neb.—State v. Switzer, 112 N.W. 297, 79 Neb. 78.

34. Ind.—Clarke County v. State, 61 Ind. 75.

35. Cal.—Fox v. Wright, 91 P. 1005, 152 Cal. 59.

36. N.H.—La Plante v. Rousseau, 18 A.2d 777.

37. U.S.—U. S. v. Quaker Industrial Alcohol Corporation, D.C.Pa., 2 F.Supp. 863, affirmed, C.C.A., New Amsterdam Casualty Co. v. U. S., 67 F.2d 488, certiorari denied 54 S.Ct. 438, 291 U.S. 662, 78 L.Ed. 1053, rehearing denied 54 S.Ct. 526, 291 U.S. 650, 78 L.Ed. 1053.

Presumption as rebuttable
The presumption that witnesses speak the truth may be overcome by any matters indicating they are not worthy of credit.—U. S. v. One 1939 Cadillac Two-Passenger Coupe, Motor No. 8291842, License No. NJ-MH-27-V, D.C.N.J., 36 F.Supp. 847

38. Ala.—Southern Home Ins. Co. of the Carolinas v. Boatwright, 164 So. 102, 231 Ala. 198.

reinforced by the proposition that men do not as a rule withhold from a tribunal facts beneficial to themselves.[39] In practical administration, however, courts have, under a natural feeling of resentment at double dealing or bad faith, at times imposed penalties which, however justified by this feeling or by considerations of public policy, go beyond the natural and logical effect of the situation.[40]

The presumption contra spoliatorem does not justify the substitution of mere allegation or conjecture for proof,[41] or arbitrarily overthrow a contention clearly established by evidence;[42] but its legitimate effect is confined to rendering evidence admissible which could not be received under ordinary circumstances, or giving to the evidence of the party claiming the benefit of the presumption the strongest construction in his favor that it will reasonably bear.[43] A spoliator of evidence cannot be deprived of his legal rights by the exclusion of other and totally independent evidence offered by him.[44]

§ 153. Destruction of Evidence

The destruction, mutilation, or alteration of evidence without satisfactory explanation gives rise to an inference unfavorable to the spoliator.

The unexplained[45] and deliberate destruction of relevant,[46] documentary,[47] or other[48] evidence, or the mutilation or alteration of such evidence,[49] gives rise to an inference that the matter destroyed or mutilated is unfavorable to the spoliator.

The inference arising from the destruction of evidence ordinarily will not dispense with the necessity for the introduction by the other party of some secondary evidence as to the contents of the document to prove facts which such party claims would have been shown thereby;[50] it merely diminishes the force of the spoliator's evidence[51] and enhances the probative value of that adduced by his opponent.[52] The inference cannot operate when

Ill.—People v. Small, 150 N.E. 435, 319 Ill. 437—Hudson v. Hudson, 122 N.E. 497, 287 Ill. 286—Moore v. David J. Molloy Co., 222 Ill.App. 295.

Tex.—Hutchison v. Massie, Civ.App., 226 S.W. 695, conforming to Massie v. Hutchison, 222 S.W. 962, 110 Tex. 558, dismissed for want of jurisdiction.

22 C.J. p 109 note 12.

39. N.C.—Edwards v. Perry, 185 S.E. 425, 210 N.C. 24—Yarborough v. Hughes, 51 S.E. 904, 139 N.C. 199.

40. Mo.—Shawhan v. Shawhan Distillery Co., 197 S.W. 369, 195 Mo. App. 445.

41. Ark.—Webb v. Bowden, 187 S.W. 461, 124 Ark. 244, Ann.Cas.1918A 60.

22 C.J. p 109 note 14.

42. La.—Rayssiguier v. Fourchy, 22 So. 833, 49 La.Ann. 1627.

22 C.J. p 109 note 15.

43. Cal.—Fox v. Hale & Norcross Silver Min. Co., 41 P. 308, 108 Cal. 369.

22 C.J. p 109 note 16.

44. Mass.—Stone v. Sanborn, 104 Mass. 319, 6 Am.R. 238.

22 C.J. p 109 note 17.

45. Or.—In re Kelly's Estate, 46 P. 2d 84, 150 Or. 598.

46. N.Y.—In re Eno's Will, 187 N.Y.S. 756, 196 App.Div. 131.

47. U.S.—Armstrong v. Belding Bros. & Co., D.C.Conn., 280 F. 895, affirmed, C.C.A., 297 F. 728, certiorari denied Belding Bros. & Co. v. Armstrong, 44 S.Ct. 459, 265 U.S. 585, 68 L.Ed. 1192.

Cal.—Tilton v. Iowa Oil Co., 33 P. 2d 446, 139 Cal.App. 93.

Conn.—Woicicky v. Anderson, 111 A. 896, 95 Conn. 534.

Iowa.—Meyer v. Gotsdiner, 226 N.W. 38, 208 Iowa 677, followed in Meyer v. Steinberg Bros., 226 N.W 40.

Mass.—Wellman v. Carter, 190 N.E 493, 286 Mass. 237.

Mich.—Long v. Earle, 269 N.W. 577, 277 Mich. 505.

Mo.—Gaugh v. Gaugh, 11 S.W.2d 729, 321 Mo. 414, followed in Seehorn v. Gaugh, 11 S.W.2d 750, 321 Mo. 456—Haid v. Prendiville, 238 S.W. 452, 292 Mo. 552—Hunt v. Sanders, 232 S.W. 456, 288 Mo. 337.

Okl.—Harrill v. Penn, 273 P. 235, 134 Okl. 259.

Tex.—Massie v. Hutcheson, Civ.App., 258 S.W. 244, reversed on other grounds, Com.App., 270 S.W. 544.

Wis.—State ex rel. Department of Agriculture v. McCarthy, 299 N.W. 58, 238 Wis. 258.

22 C.J. p 109 note 18.

Particular documents

(1) Books of account.—Runyeon v. Eaches, 79 Pa.Super. 267—22 C.J. p 110 note 19.

(2) Deeds.

Ill.—Hudson v. Hudson, 122 N.E. 497, 287 Ill. 286.

Tex.—Hutchison v. Massie, Civ.App., 226 S.W. 695, conforming to Massie v. Hutchison, 222 S.W. 962, 110 Tex. 558, dismissed for want of jurisdiction.

(3) Letters.—In re Holmes' Estate, 56 P.2d 1333, 98 Colo. 360.

(4) Official papers on file.—Dinniny v. The Sam Sloan, D.C.N.Y., 65 F. 125.

(5) Promissory notes.—Sullivan v. Sullivan, 74 N.E. 608, 188 Mass. 380.

(6) Records.—Murray v. Lepper, 57 N.W. 1097, 99 Mich. 135—22 C.J. p 110 note 21.

(7) Ship's papers.—The Olinde Rodrigues, S.C., 19 S.Ct. 851, 174 U.S. 510, 43 L.Ed 1065—Haigh v. U. S., Pa., 3 Wall. 514, 18 L.Ed. 200.

(8) Time cards.

Ill.—Moore v. David J. Molloy Co., 222 Ill.App. 295.

N.Y.—Farulla v. Ralph A. Freundlich, Inc., 279 N.Y.S. 223, 155 Misc. 262.

48. Ala.—Phœnix Ins. Co. v. Moog, 78 Ala. 284, 56 Am.R. 31.

49. Mich.—Deuches v. Grand Rapids Brass Co., 215 N.W. 392, 240 Mich. 266.

Mo.—Vanausdol v. Bank of Odessa, 5 S.W.2d 109, 222 Mo.App. 91.

Vt.—In re Campbell's Will, 147 A. 687, 102 Vt. 294.

22 C.J. p 110 note 25.

50. Iowa.—Standard Oil Co. v. Stubbs-Auckland Oil Co., 265 N.W. 121, 124, 221 Iowa 489, quoting **Corpus Juris.**

N.Y.—In re Eno's Will, 187 N.Y.S. 756, 196 App.Div. 131.

22 C.J. p 110 note 27.

Inference as substitute for evidence

"The presumption . . . does not take the place of evidence, but is regarded as merely matter of inference in weighing the evidence applicable to the question in dispute."—Ellis J. Gomez & Co. v. Hartwell, 122 A. 461, 464, 97 Vt. 147.

51. Ala.—McCleery v. McCleery, 75 So. 316, 200 Ala. 4.

22 C.J. p 110 note 28.

52. Ala.—McCleery v. McCleery, supra.

22 C.J. p 110 note 29.

there is positive evidence of the contents of the instrument destroyed,[53] and it is, like other inferences, ordinarily rebuttable by satisfactory explanation.[54] However, as appears infra § 293, the spoliation of documentary evidence by a party has been held to be equivalent to an admission of the truth of the other party's allegations, and it has been stated that, where the instrument destroyed was of such nature as to destroy all evidence and the destruction was willful, there follows a conclusive presumption that if produced it would have established the claim of the other party.[55]

An unfavorable inference can arise only against one who actually destroyed or was privy to the destruction of the evidence,[56] and only in cases where the destruction or mutilation was in bad faith for the purpose of suppressing evidence.[57] No unfavorable inference arises where the evidence was lost, destroyed, or mutilated by accident or without the fault of the party in possession of it.[58]

§ 154. Eloignment of Witness or Evidence

Where a party eloigns witnesses or evidence, an inference unfavorable to such party arises.

Where a party eloigns witnesses[59] by removing them beyond the reach of process[60] or dissuading them from attendance,[61] or attempts to do so,[62] or removes or conceals relevant documents[63] or portions thereof,[64] or articles which are material to the controversy,[65] an inference arises that the evidence thus kept out of the case would be highly prejudicial to him.

However, the flight or disappearance of an adverse witness does not raise any inference against a party who is not shown to have procured or connived at the same.[66]

§ 155. Fabrication of Evidence

The fabrication of evidence gives rise to an inference unfavorable to the fabricator.

The fabrication of evidence raises a presumption or, more properly, an inference that the truth, if disclosed, would be detrimental to the interest of the party who has been guilty of such an improper act.[67] Such an inference is created whether the evidence fabricated is documentary[68] or oral,[69] including the exercise of improper influence on witnesses.[70]

Where evidence is vague and uncertain, the presumption will prevail.—Waters v. Lawler, 130 N.E. 335, 297 Ill. 63.

53. Miss.—Bott v. Wood, 56 Miss 136.

54. Cal.—Tilton v. Iowa Oil Co., 33 P.2d 446, 139 Cal.App. 93.
22 C.J. p 110 note 31.

55. Ark.—Middleton v. Middleton, 68 S.W.2d 1003, 188 Ark. 1022.

56. U.S.—McDonald v. United States, C.C.A.Minn., 89 F.2d 128, 137, 138, citing **Corpus Juris.**
22 C.J. p 110 note 32.

Destruction of evidence by partner of party cannot be imputed to the party, for such destruction is wholly outside of the scope of the partnership business.—Ellis J. Gomez & Co. v. Hartwell, 122 A. 461, 97 Vt. 147.

57. U.S.—Berthold-Jennings Lumber Co. v. St. Louis, I. M. & S. Ry. Co., C.C.A.Mo., 80 F.2d 32, 102 A.L.R. 688, certiorari denied 56 S.Ct. 591, 297 U.S. 715, 80 L.Ed. 1001.
Mo.—Owsley v. Owsley, App., 34 S.W.2d 558.
22 C.J. p 110 note 33.

58. Ark.—Gallup v. St. Louis, I. M. & S. R. Co., 215 S.W. 586, 140 Ark. 347.
Mo.—Owsley v. Owsley, App., 34 S.W. 2d 558
22 C.J. p 110 note 34.

59. U.S.—Frank Waterhouse v. Rock Island Alaska Min. Co., Wash., 97 F. 466, 38 C.C.A. 281.
Wash.—Langley v. Devlin, 163 P. 395, 95 Wash. 171.

60. Vt.—Carpenter v. Willey, 26 A. 488, 65 Vt. 168.

61. Idaho.—Houser v. Austin, 10 P. 37, 2 Idaho (Hasb.) 204.
22 C.J. p 110 note 37.

62. N.Y.—Cruikshank v. Gordon, 23 N.E. 457, 118 N.Y. 178.
Vt.—Carpenter v. Willey, 26 A. 488, 65 Vt. 168.

Attempts to bribe witnesses not to testify
Ala.—Southern Home Ins. Co. of the Carolinas v. Boatwright, 164 So. 102, 231 Ala. 198.
Iowa.—Gregory v. Sorenson, 242 N.W. 91, 94, 214 Iowa 1374, citing **Corpus Juris.**
22 C.J. p 110 note 38 [a].

63. U.S.—Baltic Cotton Co. v. U. S., D.C.Ala., 50 F.2d 257, affirmed, C.C.A., 55 F.2d 568.
Cal.—White v. White, 79 P.2d 759, 26 Cal.App.2d 524.
22 C.J. 110 note 39.

64. U.S.—The Sam Sloan, D.C.N.Y., 65 F. 125.

65. Ky.—Federal Lumber Co. v. Reece, 116 S.W. 783.
22 C.J. p 110 note 41.

66. Mo.—State v. Huff, 61 S.W. 900, 1104, 161 Mo. 459.

67. Ill.—Kuhnen v. Kuhnen, 184 N.E. 874, 351 Ill. 591.

Fabricated evidence defined
Fabricated evidence is "evidence manufactured or arranged after the fact, and either wholly false or else warped and discolored by artifice and contrivance with a deceitful intent."—Black L.D.

Fabrication as showing fraud
"The fabrication of testimony is always a badge of weakness in a case, and when clearly established justifies a conclusion of fraud in the entire case."—Gung You v. Nagle, C.C.A.Cal., 34 F.2d 848, 850.

Fabrication as raising presumption
"Such evidence never creates a presumption. It is simply a circumstance to be considered by the jury in determining the weight of the evidence."—Ferrari v. Interurban St. Ry. Co., 103 N.Y.S. 134, 136, 118 App. Div. 155.

68. N.Y.—Christy v. American Temperance L. Ins. Assoc., 123 N.Y.S. 740, 68 Misc. 178.
22 C.J. p 111 note 46.

Evidence held insufficient to show fabrication.—Gung You v. Nagle, C.C.A.Cal., 34 F.2d 848.

69. La.—Miller v. Krouse, App., 177 So. 472.
Mass.—City of Boston v. Santosuosso, 30 N.E.2d 278—D'Arcangelo v. Tartar, 164 N.E. 87, 265 Mass. 350.
22 C.J. p 110 note 44.

70. S.C.—Moore v. Atlantic Coast Line R. Co., 135 S.E. 473, 476, 137 S.C. 319, citing **Corpus Juris.**
22 C.J. p 111 note 45.

Connecting party with attempt to intimidate witness
Evidence of an attempt to intimi-

The probative effect of the inference is in proportion to the effort made and risk incurred in manufacturing the false evidence,[71] and the inference is particularly strong where the fabricator has delayed asserting his claim for a long time and until after the death of the party against whom it is asserted.[72] Nevertheless, the inference cannot prevail where other evidence in the case establishes the allegations of the fabricator.[73]

§ 156. Suppression or Withholding of Evidence

a. In general
b. Nonproduction of documents or other real evidence
c. Failure to call or examine witnesses
d. Failure of party to testify
e. Exclusion of privileged communication

a. In General

The unexplained failure or refusal of a party to produce evidence, or the most satisfactory evidence, in his possession, or to submit to a physical examination, may give rise to an adverse inference.

The unexplained[74] failure or refusal of a party to produce evidence may, under certain circumstances, and sometimes as a result of statute, give rise to an inference unfavorable to such party.[75] In the absence of explanation, the failure or re-

date or influence a witness is not admissible, in the absence of a showing that the opposite party is connected therewith.

Mass.—Minihan v. Boston El. R. Co., 91 N.E. 414, 205 Mass. 402.

Wash.—Meacham v. Gjarde, 78 P.2d 605, 194 Wash. 526.

71. N.Y.—Bass v. Phœnix Ins. Co., 156 N.Y.S. 623, 93 Misc. 8.
22 C.J. p 111 note 48.

72. Tenn.—Daniel v. De Graffenreid, 14 Lea 385.

73. Ill.—Kuhnen v. Kuhnen, 184 N. E. 874, 351 Ill. 591.

74. U.S.—Hann v. Venetian Blind Corporation, C.C.A.Cal., 111 F.2d 455, affirming, D.C., 21 F.Supp. 913—The Algie, D.C.N.Y., 56 F.2d 388, affirmed, C.C.A., U. S. v. The Algie, 67 F.2d 1014.

Ala.—Sewell v. Nolen Bank, 85 So. 375, 204 Ala. 93.

Ark.—Mutual Relief Ass'n v. Weatherly, 291 S.W. 74, 172 Ark. 991.

Conn.—Reetz v. Mansfield, 178 A. 53, 119 Conn. 563.

Ky.—Taylor, for Use and Benefit of Laurel County, v. Jones, 69 S.W.2d 372, 253 Ky. 285.

Minn.—Schultz v. Swift & Co., 299 N. W. 7.

Pa.—Hoffman v. Berwind-White Coal Mining Co., 109 A. 234, 265 Pa. 476.

Tenn.—Baker v. Baker, App., 142 S. W.2d 737.

Nonexistence of evidence

Where evidence is not shown to exist, its nonproduction raises no unfavorable inference.—Letendre v. Union St. Ry., 163 N.E. 755, 265 Mass. 289.

Unexplained failure to produce corroborative evidence tends to impeach the evidence of an uncontradicted witness, where direct contradiction is in the nature of the circumstances impossible.—Chader v. Wilkins, 284 N.W. 183, 226 Iowa 417—Nehring v. Hamilton, 232 N.W. 655, 210 Iowa 1292.

75. U.S.—Rowan County v. Banks-Miller Supply Co., C.C.A.Ky., 95 F. 2d 904—Pairpearl Products v. Joseph H. Meyer Bros., D.C.Me., 58 F.2d 802, modified on other grounds, C.C.A., Joseph H. Meyer Bros. v. Pairpearl Products, 62 F. 2d 668—Henderson v. Richardson Co., C.C.A.W.Va., 25 F.2d 225—Jordan v. United Verde Copper Co., D.C.Ariz., 9 F.2d 144, affirmed, C.C. A., United Verde Copper Co. v. Jordan, 14 F.2d 299, and United Verde Extension Mining Co. v. Jordan, 14 F.2d 304, certiorari denied 47 S.Ct. 243, 273 U.S. 734, 71 L.Ed. 865—Isham v. U. S., 76 Ct.Cl. 1.

Ark.—Brotherhood of Railroad Trainmen v. Long, 53 S.W.2d 433, 186 Ark. 320.

Cal.—Holmes v. Hatch, 80 P.2d 70, 11 Cal.2d 376—Halla v. Bank of America Nat. Trust & Savings Ass'n, 45 P.2d 231, 6 Cal.App.2d 561—James v. Paramount-Famous-Lasky Corporation, 33 P.2d 63, 138 Cal.App. 585.

Conn.—Potter v. Prudential Ins. Co., 142 A. 891, 108 Conn. 271.

Idaho.—Bedke v. Bedke, 53 P.2d 1175, 56 Idaho 235—Vollmer v. Vollmer, 266 P. 677, 46 Idaho 97.

Ill.—Klee v. Chicago Trust Co., 6 N. E.2d 442, 365 Ill. 354, reversing 1 N.E.2d 548, 284 Ill.App. 112—Elam v. Elam, 128 N.E. 324, 294 Ill. 96—First Trust Joint Stock Land Bank of Chicago v. Hickok, 5 N.E.2d 875, 288 Ill.App. 131, reversed on other grounds 10 N.E.2d 646, 367 Ill. 144.

Ind.—Haskell & Barker Car Co. v. Timm, 122 N.E. 788, 73 Ind.App. 612.

La.—Alcock v. Texas & P. Ry. Co., App., 149 So. 132.

Mo.—Derrington v. Southern Ry. Co., 40 S.W.2d 1069, 328 Mo. 283, certiorari denied Southern Ry. Co. v. Derrington, 52 S.Ct. 37, 284 U.S. 662, 76 L.Ed. 561—McCollum v. Watts, 5 S.W.2d 420, 319 Mo. 769—Whitmore v. American Ry. Express Co., 269 S.W. 654, 657, 219 Mo.App. 294, quoting **Corpus Juris.**

N.M.—Douglass v. Mutual Ben. Health & Accident Ass'n, 76 P.2d 453, 459, 42 N.M. 190, citing **Corpus Juris.**

N.Y.—Creditors' Composition Corporation v. American Maracaibo Co., 280 N.Y.S. 306, 244 App.Div. 624, affirmed 199 N.E. 519, 269 N.Y. 527—Potter v. American Union Line, 185 N.Y.S. 842, 114 Misc. 101.

Pa.—Hoffman v. Berwind-White Coal Mining Co., 109 A. 234, 265 Pa. 476—Mahoney v. Francis Mulholland Roofing Co., 5 A.2d 812, 135 Pa. Super. 498—Runyeon v. Eaches, 79 Pa.Super 272.

S.C.—Cato v. Atlanta & C. A. L. Ry. Co., 162 S.E. 239, 164 S.C. 123, certiorari denied Atlanta & C. A. L. Ry. Co. v. Cato, 52 S.Ct. 200, 284 U. S. 684, 76 L.Ed. 577.

Tenn.—City Nat. Bank v. Harle, 7 Tenn.App. 286—Stafford v. Stafford, 1 Tenn.App. 477.

Tex.—Matthews v. Wilson, Civ.App., 141 S.W.2d 747—Dallas Joint Stock Land Bank of Dallas v. Harrison, Civ.App., 135 S.W.2d 573, error granted—Merchant v. Houston Gas & Fuel Co., Civ.App., 78 S.W.2d 656—Moos v. First State Bank of Uvalde, Civ.App., 60 S.W.2d 888, 891, citing **Corpus Juris**—Reilly v. Buster, Civ.App., 52 S.W.2d 521, reversed on other grounds 82 S.W. 2d 931, 125 Tex. 323—Fort Worth & D. C. Ry. Co. v. Greathouse, Civ. App., 41 S.W.2d 418, reversed on other grounds Greathouse v. Fort Worth & Denver City Ry. Co., Com. App., 65 S.W.2d 762—May v. Ocean Accident & Guarantee Corporation, Civ.App., 6 S.W.2d 803, reversed on other grounds Ocean Accident & Guaranty Corporation v. May, Com.App., 15 S.W.2d 594—Meyer v. Viereck, Civ.App., 286 S.W. 894—Lottman v. Cuilla, Civ App., 279 S. W. 519, reversed on other grounds, Com.App., 288 S.W. 123.

Va.—National Surety Co. v. Rountree, 147 S.E. 537, 152 Va. 150.

fusal of a party to produce evidence may create an adverse inference where such evidence is within his knowledge,[76] and within his power to produce,[77] is

Wash.—In re Zimmerli's Estate, 298 P. 326, 162 Wash. 243.
22 C.J. p 111 note 54—45 C.J. p 1147 note 73.
Comments by counsel on nonproduction of evidence or witnesses see the C.J.S. title Trial § 184, also 64 C.J. p 269 note 46—p 273 note 91.
Instructions on effect of suppression or withholding of evidence or failure to appear see the C.J.S. title Trial § 271, also 64 C.J. p 513 note 51—p 515 note 97.

Failure to explain suspicious circumstances

(1) Where suspicious circumstances connected with a transaction are capable of explanation by the parties, their failure to prefer an explanation gives rise to an inference adverse to such parties.
Ark.—Smith v. Wheat, 35 S.W.2d 335, 183 Ark. 169.
Ky.—Cochran's Adm'x v. Cochran, 115 S.W.2d 376, 273 Ky. 1.
22 C.J. p 111 note 54 [d].

(2) Where fraud is charged, as in actions to set aside fraudulent conveyances, the failure of the parties to the transaction to explain suspicious matters relating thereto affords evidence of fraud.
Ark.—Gage v. Chastain, 37 S.W.2d 705, 183 Ark. 641.
N.Y.—Polachek v. New York Life Ins. Co., 263 N.Y.S. 230, 147 Misc. 16, affirmed 268 N.Y.S. 995, 240 App.Div. 1028.
Okl.—Thompson v. Coker, 241 P. 486, 112 Okl. 268—Perry v. Shaver, 225 P. 359, 360, 101 Okl. 248, citing **Corpus Juris.**
27 C.J. p 803 note 86.

Where party has burden of proof or the other party has made a prima facie case, the rule stated in the text is especially applicable.
Cal.—Moore v. Giffen, 294 P. 730, 110 Cal.App. 659.
Ind.—Indianapolis & Cincinnati Tract. Co. v. Monfort, 139 N.E. 677, 80 Ind.App. 639.

Evidence willfully suppressed is presumed to be adverse under a statute so providing.—Williams v. Blue Bird Laundry Co., 259 P. 484, 85 Cal. App. 388—Corison v. Williams, 208 P. 331, 58 Cal.App. 282.

Refusal of witness to answer questions on the ground that the answers might incriminate and degrade him justifies an inference as to the truth of the facts inquired about.—Lynch v. Figge, 192 N.Y.S 873, 200 App. Div. 92.

Evidence held insufficient to show suppression.—Ang Seng Quen v. Te Chico, 7 Philippine 541.

76. U.S.—Equipment Acceptance Corporation v. Arwood Can Mfg. Co., C.C.A.Tenn., 117 F.2d 442—The Algie, D.C.N.Y., 56 F.2d 388, affirmed, C.C.A., U. S. v. The Algie, 67 F.2d 1014—Malouff v. Pope, C.C.A.Colo., 9 F.2d 254—U. S. v. Mammoth Oil Co., D.C.Wyo., 5 F.2d 330, reversed on other grounds, C.C.A., 14 F.2d 705, and affirmed Mammoth Oil Co. v. U. S., 48 S.Ct. 1, 275 U.S. 13, 72 L.Ed. 137.
Ala.—Kirkland v. Kirkland, 181 So. 96, 236 Ala. 120—International Harvester Co. v. Williams, 133 So 270, 222 Ala. 589, followed in 133 So. 275, 222 Ala. 595.
Ariz.—Starkweather v. Conner, 38 P. 2d 311, 44 Ariz. 369.
Del.—Cahall v Lofland, 114 A. 224, 12 Del.Ch. 299.
Ill.—Page v. Keeves, 199 N.E. 131, 362 Ill. 64—Prudential Ins. Co. of America v. Bass, 191 N.E. 284, 357 Ill 72, affirming 274 Ill.App. 76—Lefler v. Board of School Inspectors of City of Peoria, 241 Ill.App. 229, 234, quoting **Corpus Juris.**
Ind.—Jelicic v. Vermillion Coal Co., 144 N.E. 38, 81 Ind App. 675—Indianapolis & Cincinnati Traction Co. v. Montfort, 139 N.E. 677, 80 Ind.App. 639.
La.—J. C. Healy Co. v. Burglass, 1 La.App. 741.
Mich.—Morse v. Port Huron & D. R. Co., 232 N.W. 369, 251 Mich 309.
Mo.—Cuthbert v. Holmes, 14 S.W.2d 444—Huskey v. Metropolitan Life Ins. Co., App., 94 S.W.2d 1075—Cooper v. Metropolitan Life Ins. Co., App., 94 S.W.2d 1070.
N.J.—Turner v. Ridge Heights Land Co., 111 A. 675, 92 N.J.Eq. 64, affirmed 114 A. 418, 92 N.J.Eq. 706.
N.Y.—Coplay Cement Mfg. Co. v. Loeb, 207 N.Y.S. 659, 124 Misc. 640, affirmed 213 N.Y.S. 784, 215 App.Div. 805.
S.C.—Willcox, Ives & Co. v. Jeffcoat, 133 S.E. 463, 135 S.C. 149.
Tenn.—Pickard v. Berryman, App., 142 S.W.2d 764—Stevens v. Moore, App., 139 S.W.2d 710—Greyhound Lines, Inc., v. Patterson, 14 Tenn. App. 652.
Tex.—Norris Bros. v. Mattinson, Civ. App., 145 S.W.2d 204—Traders & General Ins. Co. v. Childers, Civ. App., 95 S.W.2d 461, 463, citing **Corpus Juris**—Jameson v. Farmers' State Bank of Burkburnett, Civ. App., 299 S.W. 458, affirmed Farmers' State Bank of Burkburnett v. Jameson, Com.App., 11 S.W.2d 299, rehearing denied 16 S.W.2d 526—Davis v. Cochran, Civ.App., 275 S. W. 423—Clover v. Clover, Civ.App., 224 S.W. 916.
Vt.—Pacific Lumber Agency v. National Aircraft Materials Corporation, 182 A. 192, 108 Vt. 10.
22 C.J. p 111 note 51.

Duty to disclose evidence

"Peculiar knowledge or possession of evidence carries with it the duty of giving it out if one would avoid the imputation that its concealment naturally reflects."—Southwest Cotton Co. v. Clements, 213 P. 1005, 1008, 25 Ariz. 124, rehearing denied 215 P. 156, 25 Ariz. 169.

Facts within knowledge of adversary

Where act complained of was one defendant would reasonably be expected to account for and plaintiff would not be, there was no room for the assumption that, if evidence for defendant was not true, plaintiff would have denied it.—Shedlock v. Wyoming Valley Autobus Co., 17 A. 2d 384, 340 Pa. 377.

77. U.S.—Equipment Acceptance Corporation v. Arwood Can Mfg. Co., C.C.A.Tenn., 117 F.2d 442—Hann v. Venetian Blind Corporation, C.C.A.Cal., 111 F.2d 455, affirming, D.C., 21 F Supp. 913—The Algie, D.C.N.Y., 56 F.2d 388, affirmed, C.C.A., U. S. v. The Algie, 67 F.2d 1014—Brown v. Maryland Casualty Co. C.C.A.Md., 55 F.2d 159—Malouff v. Pope, C.C.A.Colo., 9 F.2d 254.
Ala.—Kirkland v. Kirkland, 181 So. 96, 236 Ala. 120—Sewell v. Nolen Bank, 85 So. 375, 204 Ala. 93.
Ark.—Mutual Relief Ass'n v. Weatherly, 291 S.W. 74, 172 Ark. 991.
Cal.—Hiner v. Olson, 72 P.2d 890, 23 Cal.App.2d 227, rehearing denied 73 P.2d 945, 23 Cal.App 2d 227—Dahl v. Spotts, 16 P.2d 774, 128 Cal.App. 133—Simpson v. Bergmann, 13 P.2d 531, 125 Cal.App. 1—Tieman v. Red Top Cab Co., 3 P.2d 381, 117 Cal.App. 40—Thomas v. Southern Pac. Co., 2 P.2d 544, 116 Cal.App. 126, certiorari denied Southern Pac. Co. v. Thomas, 52 S.Ct. 265, 284 U.S. 689, 76 L.Ed. 582—Perry v. A. Paladini, Inc., 264 P. 530, 89 Cal App. 275.
Idaho.—Garrett v. Neitzel, 285 P. 472, 48 Idaho 727.
Ill.—Belding v. Belding, 192 N.E. 917, 358 Ill. 216, reversing 272 Ill.App. 196—Prudential Ins. Co. of America v. Bass, 191 N.E. 284, 357 Ill. 72, affirming 274 Ill.App. 76—Pipal v. Grand Trunk Western Ry. Co., 173 N.E. 372, 341 Ill. 320, certiorari denied Grand Trunk Western Ry. Co. v. Pipal, 51 S.Ct. 486, 283 U.S. 838, 75 L.Ed. 1449—Swanson v. S. S. Kresge Co., 24 N.E.2d 62, 302 Ill.App. 455—Princell v. Pickwick Greyhound Lines, 262 Ill.App. 298.
Ky.—Equitable Life Assur. Soc. of U. S. v. Witten, 97 S.W.2d 17, 265 Ky. 448—Huber & Huber Motor Express v. Martin's Adm'r, 96 S.W.2d 595, 265 Ky. 228—Taylor, for Use and Benefit of Laurel County, v. Jones, 69 S.W.2d 372, 253 Ky. 285.

not equally accessible to his opponent,[78] and is such as he would naturally produce if it were favorable to him.[79] A similar effect attends an effort to suppress evidence.[80] It has also been held that, where a party fails to present a fact necessary to his case when it is within his power to do so, it will be presumed that such fact does not exist,[81] and the same is true where evidence as to a certain matter is introduced, and the adverse party, having it within his power to refute such evidence if it is untrue, fails to introduce any refuting evidence.[82]

However, where the party having the burden of

La.—J. P. Hudson & Sons Co. v. Godchaux Co., 118 So. 81, 166 La. 912—Mahaffey v. Mill Creek Lumber Co., App., 147 So. 834—McWilliams v. Mathes, 3 La.App. 282.
Me.—Davis v. Coshnear, 151 A. 725. 129 Me. 334.
Mich.—In re Titsworth's Estate, 286 N.W. 97, 288 Mich. 652—Grigg v. Hanna, 278 N.W. 125, 283 Mich. 443—Laughlin v. Michigan Motor Freight Lines, 268 N.W. 887, 276 Mich. 545—Barber-Greene Co. v. Proksch, 232 N.W. 232, 251 Mich. 329—Brandt v. C. F. Smith & Co., 218 N.W. 803, 242 Mich. 217.
Minn.—Vorlicky v. Metropolitan Life Ins. Co., 287 N.W. 109, 206 Minn. 34.
Mo.—Polk v. Missouri-Kansas-Texas R. Co., 142 S.W.2d 1061, 1063, 346 Mo. 793, citing **Corpus Juris**—Huskey v. Metropolitan Life Ins. Co., App., 94 S.W.2d 1075—Cooper v. Metropolitan Life Ins. Co., App., 94 S.W.2d 1070—Donet v. Prudential Ins. Co. of America, App., 23 S.W.2d 1104.
N.J.—Jacoby v. Jacoby, 140 A. 454, 6 N.J.Misc. 86.
N.Y.—Galbraith v. Busch, 196 N.E. 36, 267 N.Y. 230, reversing 275 N.Y.S. 655, 242 App.Div. 793—Vallee v. Vallee, 277 N.Y.S. 877, 154 Misc. 620, affirmed 288 N.Y.S. 756, 247 App.Div. 874.
N.C.—Smith v. Kappas, 12 S.E.2d 693, 218 N.C. 758, rehearing granted and opinion modified on other grounds 15 S.E.2d 375, 219 N.C. 850—In re Hinton's Will, 104 S.E. 341, 180 N.C. 206.
N.D.—Bentley v. Oldetyme Distillers, 289 N.W. 92, 69 N.D. 587.
Okl.—Loyal Protective Ins. Co. v. Shoemaker, 63 P.2d 960, 178 Okl. 612—Saddler v. Watkins, 36 P.2d 760, 169 Okl. 279—Stricker v. Billingsley, 36 P.2d 474, 169 Okl. 145—Coats v. Riley, 7 P.2d 644, 154 Okl. 291—Harrison v. Reed, 6 P.2d 700, 154 Okl. 39—Critchlow v. Bacon, 285 P. 968, 142 Okl. 168—Johns v. Edwards, 250 P. 1012, 120 Okl. 85—Thompson v. Coker, 241 P. 486, 112 Okl. 268—Fry v. Wolfe, 234 P. 191, 106 Okl. 289.
Pa.—Harkins v. Varone, 159 A. 860, 306 Pa. 376.
S.C.—Willcox, Ives & Co. v. Jeffcoat, 133 S.E. 463, 135 S.C. 149—Smith v. Southern Ry. Co., 113 S.E. 465, 121 S.C. 94.
Tenn.—Pickard v. Berryman, App., 142 S.W.2d 764—Baker v. Baker, App., 142 S.W.2d 737—Stevens v. Moore, App., 139 S.W.2d 710—Taylor v. Goodrich Tire & Rubber Co., 98 S.W.2d 1094, 20 Tenn.App 352.
Tex.—Montgomery Ward & Co. v. Levy, Civ.App., 136 S.W.2d 663, error dismissed, judgment correct—Dallas Joint Stock Land Bank of Dallas v. Harrison, Civ.App., 135 S.W.2d 573, error granted—Cox v. Bankers' Guaranty Life Co., Civ.App., 45 S.W.2d 390—Western Shoe Co. v. Amarillo Nat. Bank, Civ.App., 42 S.W.2d 469—Jameson v. Farmers' State Bank of Burkburnett, Civ.App., 299 S.W. 458, affirmed Farmers' State Bank of Burkburnett v. Jameson, Com.App., 11 S.W.2d 299, rehearing denied 16 S.W.2d 526—International-Great Northern R. Co. v. McGinty, Civ.App., 293 S.W. 302—Chapman v. First Nat. Bank, Civ.App., 275 S.W. 498—Western Union Telegraph Co. v. Honeycutt, Civ.App., 250 S.W. 431—Green v. Scales, Civ.App., 219 S.W. 274—Burnett v. Anderson, Civ.App., 207 S.W. 540.
Utah—Cram v. Reynolds, 186 P. 100, 55 Utah 384.
Va.—American Nat. Ins. Co. v. Branch, 191 S.E. 668, 168 Va. 478—Duke v. Luck, 143 S.E. 692, 150 Va. 406.
22 C.J. p 81 note 39–p 111 note 52.

"Presumption of evasion or concealment"

"In civil cases it may be a duty on the part of either party to the cause where he has evidence in his power and within his reach by which he may repel a claim or charge against him, to produce, or suffer the presumption that the charge or claim is well founded. This rule applies irrespective of the burden of proof. The failure to so produce may give rise to the suggestion or presumption of evasion or concealment."—Shiver & Barnett v. Firemens Ins. Co., 2 S.E.2d 760, 761, 60 Ga.App. 57.

78. La.—Miller v. City of New Orleans, App., 152 So. 141.
Mo.—Huskey v. Metropolitan Life Ins. Co., App., 94 S.W.2d 1075—Cooper v. Metropolitan Life Ins. Co., App., 94 S.W.2d 1070.
Vt.—Pacific Lumber Agency v. National Aircraft Materials Corporation, 182 A. 192, 108 Vt. 10.
22 C.J. p 111 note 52 [d].

79. Mo.—McNicholas v. Continental Baking Co., App., 112 S.W.2d 849—Huskey v. Metropolitan Life Ins. Co., App., 94 S.W.2d 1075—Cooper v. Metropolitan Life Ins. Co., App., 94 S.W.2d 1070—Donet v. Prudential Ins. Co. of America, App., 23 S.W.2d 1104.
Pa.—Hoffman v. Berwind-White Coal Mining Co., 109 A. 234, 265 Pa. 476.
Tex.—Atex Const. Co. v. Farrow, Civ.App., 71 S.W.2d 323, 325, error refused quoting **Corpus Juris.**
Wis.—Booth v. Frankenstein, 245 N.W. 191, 209 Wis. 362.
22 C.J. p 111 note 53.

80. Ala.—Southern Home Ins. Co. of the Carolinas v. Boatwright, 164 So. 102, 231 Ala. 198.
Mass.—Sims v. Rockwell, 31 N.E. 484, 156 Mass. 372.
Nev.—Thomsen v. Keil, 226 P. 309, 48 Nev. 1, reply to petition stricken and rehearing denied 232 P. 1080, 48 Nev. 1.
22 C.J. p 112 note 55.

Statute held inapplicable

Statutes relating to presumptions where evidence is suppressed is inapplicable, where defendant did not produce contract on issue of whether driver injurying plaintiff was defendant's employee.—Preo v. Roed, 278 P. 928, 99 Cal.App. 372.

Evidence held insufficient to show suppression of evidence.—Schreiber Milling & Grain Co. v. Nutrena Mills, 87 P.2d 577, 149 Kan. 276.

81. U.S.—Mammoth Oil Co. v. U. S., Wyo., 48 S.Ct. 1, 275 U.S. 13, 72 L.Ed. 137, affirming, C.C.A., U. S. v. Mammoth Oil Co., 14 F.2d 705, which reversed, D.C., 5 F.2d 330, and certiorari granted Mammoth Oil Co. v. U. S., 47 S.Ct. 332, 273 U.S. 686, 71 L.Ed. 840—Boyne City Lumber Co. v. Doyle, D.C.Mich., 47 F.2d 772—Bonwit Teller & Co. v. U. S., Ct.Cl., 39 F.2d 730, certiorari granted 51 S.Ct. 34, 282 U.S. 823, 75 L.Ed. 734, reversed on other grounds 51 S.Ct. 395, 283 U.S. 258, 75 L.Ed. 1018, conformed to, Ct.Cl., 52 F.2d 904, certiorari denied U. S. v. Bonwit Teller & Co., 52 S.Ct. 311, 285 U.S. 538, 76 L.Ed. 931.
N.C.—Beck v. Wilkins-Ricks Co., 102 S.E. 313, 179 N.C. 231, 9 A.L.R. 554.
Tex.—First Nat. Bank v. Brown, Com.App., 15 S.W.2d 563, reforming, Civ.App., 4 S.W.2d 635.
Va.—American Nat. Bank of Portsmouth v. Ames, 194 S.E. 784, 169 Va. 711, certiorari denied 58 S.Ct. 1046, 304 U.S. 577, 82 L.Ed. 1540.
W.Va.—Despard v. Pearcy, 63 S.E. 871, 65 W.Va. 140.

82. Tex.—Texas Electric Ry. v. Gon-

proof fails to establish a prima facie case, no presumption arises from the failure of the other party to introduce evidence peculiarly within his knowledge.[83] Where defendant introduces no evidence, but submits the case on plaintiff's evidence, no presumption unfavorable to defendant arises from his failure to produce evidence peculiarly within his knowledge and possession.[84]

Failure to produce most satisfactory evidence. Where it is apparent that a party has the power to produce evidence of a more explicit, direct, and satisfactory character than that which he does introduce and relies on, it may be presumed that if the more satisfactory evidence had been given it would have been detrimental to him and would have laid open deficiencies in, and objections to, his case which the more obscure and uncertain evidence did not disclose.[85]

Refusal to submit to physical examination. A party's refusal to submit to a physical examination in an action involving personal injuries to him justifies an inference that such examination would disclose that the injuries are less serious than is claimed.[86]

Force of presumption. The unfavorable presump-

zales, Civ.App., 211 S.W. 347, error refused.
22 C J. p 113 note 62.

83. Conn.—Dunn v. Santamauro, 175 A 913, 119 Conn. 307—Middletown Trust Co. v. Bregman, 174 A. 67, 118 Conn. 651.
La.—State ex rel. City of New Orleans v. Louisiana Highway Commission, 155 So. 250, 179 La. 862.
Mass.—Pabujian v. Pabujian, 165 N. E 421, 266 Mass. 403—Porcino v. DeStefano, 137 N E. 664, 243 Mass. 398.
Mo.—Russell v. St. Louis-San Francisco Ry. Co., 81 S W.2d 621, 336 Mo. 845.
Tenn.—Davis v. Newsum Auto Tire & Vulcanizing Co., 213 S.W. 914, 141 Tenn. 527.
Tex.—Lykes Bros.-Ripley S. S. Co. v. Pluto, Civ.App., 146 S.W.2d 414, error dismissed, judgment correct—Longhorn Drilling Corporation v. Padilla, Civ.App., 138 S.W.2d 164—Texas Unity Oil Co. v. Dolman, Civ.App., 8 S W.2d 815, error dismissed—Galveston, H. & S. A. Ry. Co. v. Landeros, Civ.App., 264 S W. 524.
Va.—Brown v. Parker, 189 S.E. 339, 167 Va. 286.
22 C.J. p 111 note 53 [b]—45 C.J. p 1147 note 78.

Extent of proof required

Where the evidence adduced by the proponent tends to fix liability on his adversary in the sense that under the practice prevailing the case would have to be submitted to a jury if there were one, even though it falls short under the quality and quantum that would entitle him to a decree or judgment as a matter of right, it is sufficient to invoke the rule that if it be within the power of defendant to rebut the unfavorable inference, from the evidence so offered by his opponent, and he fails to do so, it may be inferred from facts shown that the fully developed evidence would tend to establish liability.—Pickard v. Berryman, Tenn.App., 142 S.W.2d 764.

84. U.S.—Owens Bottle-Mach. Co. v. Kanawha Banking & Trust Co., W.Va., 259 F. 838, 170 C.C.A. 638.
Conn.—Middletown Trust Co. v. Bregman, 174 A. 67, 70, 118 Conn. 651, citing **Corpus Juris.**
Md.—J. Cueva Co. v. R. Lancaster Williams & Co., 125 A. 849, 145 Md 526
Mo.—Burnside v. Doolittle, 24 S.W. 2d 1011, 1016, 324 Mo. 722, quoting **Corpus Juris.**
N.Y.—Longo v Booth & Co., 181 N. Y.S 239, 191 App Div. 176.
Vt.—McDuffee v Boston & M. R. R Co, 69 A 124, 81 Vt. 52, 130 Am. S R. 1019.
Wash.—McFarland v. Commercial Boiler Works, Inc., 116 P.2d 288, 293, quoting **Corpus Juris.**

85. U.S.—Interstate Circuit v. U. S., Tex., 59 S Ct. 467, 306 U.S. 208, 83 L Ed 610—Longini Shoe Mfg. Co. v. Ratcliff, Cust. & Pat.App., 108 F.2d 253, 256, quoting **Corpus Juris**—Leonard v. St. Joseph Lead Co., C.C.A.Mo., 75 F.2d 390—Hung You Hong v. U. S., C.C.A.Hawaii, 68 F.2d 67—Armstrong v. Belding Bros. & Co., C C.A.Conn, 297 F 728, affirming, D C., 280 F. 895, and certiorari denied Belding Bros. & Co v. Armstrong, 44 S Ct. 459, 265 U.S. 585, 68 L.Ed. 1192.
Ark.—Mississippi River Fuel Corporation v. Young, 67 S.W.2d 581, 582, 188 Ark 575, quoting **Corpus Juris.**
Cal.—Stedman v. Stedman, 176 P 437, 179 Cal. 288—In re Moore's Estate, 223 P. 73, 65 Cal.App 29.
Fla.—Liddon v. Board of Public Instruction for Jackson County, 175 So. 806, 128 Fla 838.
Miss.—Masonite Corporation v. Hill, 154 So. 295, 298, 170 Miss. 158, 95 A.L R. 157, citing **Corpus Juris.**
Mo.—Burnside v. Doolittle, 24 S.W.2d 1011, 1015, 324 Mo. 722, quoting **Corpus Juris.**
N.M.—Douglass v. Mutual Ben. Health & Accident Ass'n, 76 P.2d 453, 459, 42 N.M. 190, citing **Corpus Juris.**
N.C.—Edwards v. Perry, 185 S.E. 425, 210 N.C. 24.
Okl.—Loyal Protective Ins. Co. v. Shoemaker, 63 P.2d 960, 963, 178 Okl. 612, quoting **Corpus Juris.**
Pa.—Tremaine v. H. K. Mulford Co., 176 A. 212, 216, 317 Pa. 97, quoting **Corpus Juris.**
Tenn.—Stevens v. Moore, App, 139 S.W 2d 710, 717, quoting **Corpus Juris**—Taylor v. Goodrich Tire & Rubber Co., 98 S.W.2d 1094, 1102, 20 Tenn.App. 352, quoting **Corpus Juris.**
Tex.—Bradley v. Howell, Civ App., 126 S.W.2d 547, error dismissed, judgment correct—Richardson v. Baskin, Civ App, 44 S W.2d 1067, 1069, citing **Corpus Juris.**
22 C.J p 115 note 84.

Inability to produce better evidence

Where it does not appear that party held back evidence within his power to produce, nonproduction of more full and definite evidence raises no presumption against him—Bank of Emanuel v. Smith, 124 S.E. 114, 32 Ga.App. 606.

86. La.—Russell v. Celentano, 129 So. 182, 13 La App. 708.
22 C.J. p 123 note 43.
Refusal to submit to examination as affecting damages see Damages § 174 f.

Failure to consult physician

Where no physician is called to treat injured person, although many physicians are available, and extent of injury would depend largely on physician's testimony, inference is warranted that injured person would have called physician had injuries been serious.—Beard v. Williams, 161 So. 750, 172 Miss. 880.

Refusal to permit autopsy

Refusal by wife to permit autopsy on body of deceased husband after it had been buried, based on the ground that after the preparation of the body for the burial it would not determine the cause of death, did not raise a legal presumption as to the cause of death.—Vulcan Detinning Co. v. Industrial Commission, 128 N.E. 917, 295 Ill. 141.

tion or inference arising from the withholding of evidence is not conclusive against the party, but is merely a fact for the consideration of the jury; and such failure cannot be relied on by the other party as affirmative proof of facts as to which the burden of proof is on him.[87] The presumption or inference not only strengthens the probative force of the other party's proof,[88] but is, itself, of certain probative force.[89] It may turn the scale where the evidence is closely balanced.[90]

b. Nonproduction of Documents or Other Real Evidence

An unfavorable inference may result from the unexplained failure of a party to produce documentary or other real evidence, especially after the other party has given notice to produce.

The unexplained failure or refusal of a party to judicial proceedings to produce relevant and competent documentary evidence[91] or an article which

87. N H —Jakel v. Brockelman Bros , 21 A 2d 155
Ohio.—Martin v. Heintz, 184 N.E 852, 126 Ohio St. 227.
Tex —Davis v. Etter & Curtis, Civ. App., 243 S.W. 603.
22 C J. p 112 note 59.

Truth of unproved allegation will not be presumed because defendant did not introduce evidence to rebut the fact alleged —Short v. Philadelphia, B. & W. R. Co., 76 A. 363, 23 Del 108—45 C.J. p 1147 note 79.

88. Tex.—Barrera v. Gannaway, 105 S.W 2d 876, 130 Tex. 142, reversing Gannaway v Barrera, Civ.App., 74 S W.2d 717—Cox v. Bankers' Guaranty Life Co., Civ.App., 45 S.W. 2d 390.

Inference as affording corroboration
"Such inference is one of fact, and not of law; yet it is often weighty, and, if there is any other evidence of such fact at all, such . . . [failure to produce proofs] is strong corroboration."—Henry L. Doherty & Co. v. Youngblut, 204 P. 85, 71 Colo. 30.

89. Tex.—Barrera v. Gannaway, 105 S.W 2d 876, 130 Tex. 142, reversing Gannaway v. Barrera, Civ.App. 74 S W.2d 717—Hilker v. Agricultural Bond & Credit Corporation. Civ App., 96 S.W.2d 544, error dismissed—Western Shoe Co. v. Amarillo Nat. Bank, Civ.App., 42 S.W. 2d 469—Southern Pac. Co. v. Ulmer, Civ App , 282 S.W. 305, affirmed, Com.App., 286 S.W. 193.

90. Conn.—Middletown Trust Co. v. Bregman, 174 A. 67, 70, 118 Conn. 651, citing **Corpus Juris.**
Tex.—Pullman Co v. Cox, 120 S.W. 1058, 56 Tex Civ.App. 327.

91. U S —Ætna Casualty & Surety Co. v. Reliable Auto Tire Co., C. C.A Mo , 58 F 2d 100—Chicago Ry. Equipment Co. v. Commissioner of Internal Revenue, C C.A., 39 F.2d 378, certiorari granted Burnet v. Chicago Ry. Equipment Co., 51 S Ct. 30, 282 U.S. 821, 75 L Ed. 733, reversed on other grounds 51 S. Ct. 137, 282 U.S. 295, 75 L.Ed. 349 —Schock v. Malloy, C.C A.Okl., 26 F.2d 621—Hodgman v. Atlantic Refining Co , D.C.Del., 300 F. 590, reversed on other grounds, C.C.A., Atlantic Refining Co. v. Hodgman, 13 F.2d 781, certiorari denied Hodgman v. Atlantic Refining Co., 47 S. Ct. 240, 273 U.S. 731, 71 L.Ed. 863 —Swinehart Tire & Rubber Co v William Whitman Co., C.C.A.Ohio, 266 F. 45.
Ark.—Sparkman Hardwood Lumber Co. v. Bush, 72 S.W.2d 527, 189 Ark. 391—Mississippi River Fuel Corporation v. Young, 67 S.W.2d 581, 188 Ark. 575.
Cal.—Appling v. Minarets & W. Ry. Co., 280 P. 1029, 100 Cal.App. 621, followed in Appling v. Sugar Pine Lumber Co., 280 P. 1033, 100 Cal. App. 800.
D.C.—Georgia Casualty Co. v. Hoage, 59 F 2d 870, 61 App.D.C. 195.
Ill —People v. Small, 150 N.E. 435, 319 Ill. 437.
Ky.—Black Mountain Corporation v. Thompson, 147 S W.2d 708, 285 Ky. 306.
La —Barnidge v. Cappel Motor Co , 125 So. 778, 12 La.App 216.
Mo —Shidloski v. New York, C. & St. L. R. Co., 64 S.W.2d 259, 263, 333 Mo. 1134, quoting **Corpus Juris.**
N.J.—Norcross v. 1016 Fifth Avenue Co , 196 A. 446, 449, 123 N.J.Eq. 94, citing **Corpus Juris.**
N.Y.—In re Rubin's Will, 292 N.Y. S. 305, 161 Misc. 374—United Traction Co. v. Droogan, 189 N.Y.S. 39, 115 Misc. 672.
Pa.—Tremaine v. H. K. Mulford Co., 176 A. 213, 317 Pa. 97.
Philippine.—Cason v. Rickards, 5 Philippine 611, 4 Off.Gaz. 236—U. S. v. Navarro, 3 Philippine 633, 2 Off.Gaz. 436.
Tex.—Lawson v. Daniel Ripley & Co. Civ.App., 300 S.W. 102—Caddo Gas Co. v. Jeffries, App., 271 S.W. 108.
22 C.J. p 113 note 75.

Particular documents
(1) Bills of lading.—Sumrell v. Atlantic Coast Line R. Co., 67 S.W. 585, 152 N C. 269.
(2) Blue prints.
Ind.—Westervelt v. National Mfg Co , 69 N.E. 169, 33 Ind.App. 18.
Pa.—Hoffman v. Berwind-White Coal Mining Co., 109 A. 234, 265 Pa. 476.
(3) Books of account.
U.S.—Wilson v. Williams Hardware Co., C.C.A.W.Va., 32 F.2d 103—Armstrong v. Belding Bros. & Co., D C.Conn., 280 F. 895, affirmed, C. C.A., 297 F. 728, certiorari denied Belding Bros. & Co. v Armstrong, 44 S Ct. 459, 265 U S. 585, 68 L.Ed. 1192
Ala.—Patterson v. Vest, 113 So. 59, 216 Ala. 312.
La.—Daigle v. Crescent City Garage, App., 180 So. 831
Mich.—Einkorn v. Schemm Brewing Co., 270 N.W. 233, 278 Mich. 105.
S.D.—Holman v. Commercial & Savings Bank, 210 N.W. 730, 50 S.D. 524.
22 C.J. p 113 note 64.
(4) Deeds.
Ark.—Hull v. Hull, 61 S.W 2d 451, 187 Ark. 631—Ramey v. Fletcher, 2 S.W.2d 84, 176 Ark. 196.
Ky.—Cornett v. Maddin, 126 S W.2d 871, 277 Ky. 480.
(5) Insurance policies.
Ohio.—National Ben Life Ins. Co. v. Davis, 176 N.E. 490, 38 Ohio App. 454.
Tex.—Utilities Indemnity Exchange v. Burks, Civ.App., 7 S.W.2d 1112, error dismissed.
Va.—Philadelphia Life Ins Co. v. Erwin, 182 S.E. 209, 165 Va. 469.
(6) Leases.—Wilson v. Griswold, 63 A. 659, 79 Conn. 18.
(7) Letters.
Ark —Burke v. Napoleon Hill Cotton Co., 202 S.W. 827, 133 Ark. 516.
Ky.—McClure v. McClintock, 150 S. W. 332, 150 Ky. 265, 42 L.R A.,N. S., 388, motion overruled 150 S.W. 849, 150 Ky. 773, 42 L.R.A.,N.S., 388.
(8) Maps.—Isabella Gold Min Co. v. Glenn, 86 P. 349, 37 Colo. 165—22 C.J. p 113 note 73.
(9) Memoranda —Mauch Chunk Nat. Bank v. Shrader, 81 S.E. 1121, 74 W.Va. 310.
(10) Notes, checks, and drafts.—Johnson v. Marx Levy, 34 So. 68, 109 La. 1036—Pleasant Hill Motor Co. v. Haire, La.App., 142 So. 613—Galt v. Travelers' Ins. Co., La.App., 141 So. 105.
(11) Notices —Heller v. Beal, 23 Ohio Cir.Ct. 540—22 C.J. p 113 note 72.
(12) Receipts.
Ill.—Kaplan v. Stein, 160 N.E. 552,

would tend to throw light on the issues[92] authorizes, under certain circumstances, an inference or a presumption unfavorable to such party.

Possession or control of such evidence by the party against whom the inference or presumption is sought to be invoked, is necessary;[93] the rule does not apply where the evidence is equally available to both parties.[94] Further, it must appear that there has been an actual suppression or withholding of the evidence;[95] no unfavorable inference arises where the circumstances indicate that the document or article in question has been lost or accidentally destroyed,[96] or where the failure to produce it is otherwise properly accounted for.[97]

Notice to produce. The unfavorable inference resulting from the nonproduction of documents or other real evidence is especially applicable where the party withholding the evidence has had notice or has been ordered to produce it.[98]

According to some cases, unless the party de-

329 Ill. 253, reversing 237 Ill.App. 636.
Nev.—Isola v. Sorani, 222 P. 796, 47 Nev. 365.

(13) Records generally.
Cal.—Chambers v. Hathaway, 200 P. 931, 187 Cal. 104.
Ill.—International Sales Co. v. Industrial Commission, 6 N.E.2d 861, 365 Ill. 436.
Ind.—Schafer Co. v. Hoffman, 155 N. E. 715, 93 Ind.App. 201.
Mo.—Tichenor v. Bowman, 133 S.W. 2d 324—Serat v. Winter, 262 S.W. 66, 218 Mo.App. 60.
N.J.—Parsells Petroleum Products v. White, 156 A. 832, 109 N.J.Eq. 364.
22 C.J. p 113 note 65.

(14) Written agreements.
Cal.—Pryor v. McGuire, 210 P. 532, 59 Cal App. 234.
Or.—Reid v. Wentworth & Irwin, 63 P.2d 210, 155 Or. 265—Donis v. Sawyer Service, 21 P.2d 776, 143 Or. 433.
22 C.J. p 113 note 67.

In actions to set aside fraudulent conveyances, the failure of the parties to the transaction to produce documentary evidence in their possession affords evidence of fraud.
U.S.—National Bank of Republic v. Hobbs, 118 F. 626.
Ky.—Carter v. Richardson, 60 S.W. 397, 22 Ky.L. 1204.

Where facts contained in document are already in evidence, no adverse presumption arises from the fact of its nonproduction.—Strauss v. Insurance Co. of North America, 102 So. 861, 157 La. 661.

Admissibility of evidence

(1) No unfavorable presumption can arise from the withholding of documents which would not be admissible in evidence in favor of the party claiming the advantage of the presumption.
Conn.—Merwin v. Ward, 15 Conn. 377.
Ill.—Law v. Woodruff, 48 Ill. 399.

(2) The rule has been held to be the same even where the documents would not be admissible in his favor without the consent of his adversary.—Merwin v. Ward, supra.

(3) The rule has also been applied where the documents would not have been admissible in favor of the adversary in whose possession they were.—Minneapolis St. Ry. Co. v. Hare, 210 N.W. 161, 168 Minn. 423.

(4) No presumption arises against one who objects to the introduction of, or himself fails to introduce, incompetent documentary evidence.—Rost v. F. H Noble & Co., 147 N E 258, 316 Ill. 357, reversing 232 Ill. App. 430.

Presumption held immaterial
Mo.—Securities Inv. Co. v. St. Louis County Automobile Co., 261 S.W. 87.

92. U.S.—Colvin v. Kokusai Kisen Kabushiki Kaisha, C.C.A Tex., 72 F.2d 44—Patton-Tully Transp. Co. v. Barrett, C.C.A.Ohio, 37 F.2d 516—Osterhoudt v. Federal Sugar Refining Co., D.C N.Y., 14 F.2d 319, modified on other grounds, C.C A., 22 F.2d 475—Puget Sound Tug & Barge Co. v. Olympic Forest Products Co., D.C.Wash., 21 F Supp. 940—The John and Frederick, D. C.N Y, 10 F.Supp. 666.
Ind.—Bence v. Denbo, 183 N.E. 326, 98 Ind.App. 52.
Ky.—Cornett v. Maddin, 126 S.W.2d 871, 277 Ky. 480.
La.—Williams v. Messina, 125 So. 152, 12 La App. 121.
Mo.—Beckman v. Raines, 243 S.W. 192, 210 Mo.App. 253.
Ohio.—Great Atlantic & Pacific Tea Co. v. Hughes, 4 N.E.2d 700, 53 Ohio App. 255, affirmed 3 N.E.2d 415, 131 Ohio St. 501.
Wyo.—Hines v. Sweeney, 201 P. 165, 28 Wyo. 57, rehearing denied 201 P. 1018, 28 Wyo. 57.
22 C.J. p 112 note 56.

93. U.S.—Kyle v. Wadley, D.C.La., 24 F.Supp. 884—Sudduth v. Storm King Coal Co., C.C.A.Ky., 268 F. 433.
Ky.—Petty's Heirs v. Petty, 231 S. W. 52, 191 Ky. 612.
La.—Amite Bank & Trust Co. v. Standard Box & Veneer Co., 149 So. 532, 177 La. 954.
Mo.—Bailey v. Metropolitan Life Ins. Co., App., 115 S.W.2d 151, certiorari quashed State ex rel. Metropolitan Life Ins. Co. v. Shain, 121 S. W.2d 789, 343 Mo. 435—Arnold v. Brotherhood of Locomotive Firemen and Enginemen, 101 S.W.2d 729, 231 Mo.App. 508.
Pa.—Harring v. Glen Alden Coal Co., 198 A. 508, 130 Pa Super. 552, reversed on other grounds 3 A.2d 381, 332 Pa. 410.
Tex.—Georgia Casualty Co. v. Ginn, Civ.App., 272 S.W. 601.
Va.—Liverpool & London & Globe Ins. Co. v. Bolling, 10 S E.2d 518.
22 C.J. p 113 note 63.

94. Mo.—Collins v. People's Bank of Salisbury, App., 33 S.W.2d 139
Tex.—Hines v. Kelley, Com.App., 252 S.W. 1033, reversing, Civ.App., 226 S.W. 493.
Vt.—Pacific Lumber Agency v. National Aircraft Materials Corporation, 182 A. 192, 108 Vt. 10.

95. Mo.—Wade v. Wade, App., 229 S.W. 432.
22 C.J. p 114 note 78.

Where party offered to produce document but offer was not accepted and matter was not thereafter mentioned, no presumption arose from withholding of evidence.—Wade v. Wade, supra.

96. U S.—Allen v. Commissioner of Internal Revenue, C.C A., 117 F. 2d 364.
N.J.—Clark v. Hornbeck, 17 N.J.Eq. 430.
Wash.—Baumeister, Vollmer & Scott Bank v. Talbott, 225 P. 238, 129 Wash. 509.

97. Ala.—Stith Coal Co. v. Crayton, 86 So. 148, 17 Ala.App. 449.
Mo.—Serat v. Winter, 262 S.W. 66, 218 Mo.App. 60.
Pa.—Taylor v. Parmer, 10 A.2d 420, 336 Pa. 585.
Tex.—Rigsby v. Boone County State Bank of Lebanon, Ind., Civ.App., 241 S.W. 207.
22 C.J. p 114 note 80.

98. U.S.—The Domira, D.C.N.Y., 49 F.2d 324, affirmed, C.C.A., 56 F.2d 585—U. S. v. Delaware Bay & River Pilots' Ass'n, C.C.A.Pa., 44 F.2d 1, certiorari denied Delaware Bay & River Pilots' Ass'n v. U. S., 51 S.Ct. 486, 283 U.S. 838, 75 L.Ed. 1449.
Mich.—Einkorn v. Schemm Brewing Co., 270 N.W. 233, 278 Mich. 105.
Mo.—Wall v. Lemons, Inc., 51 S W. 2d 194, 227 Mo.App. 246.
Tex.—Safety Casualty Co. v. Staggs,

siring the production of documentary or other real evidence gives notice to the party in whose possession it is to produce it, no unfavorable presumption or inference can arise from its nonproduction,[99] although it has been held that when writings are proper matters in defense or when the adverse party must have understood that they must necessarily have come into question, notice to produce them may be dispensed with;[1] and some authorities have expressly ruled that no notice to produce is necessary to justify the inference.[2]

Weight of inference. Inferences from the suppression of documents or failure to produce them on notice increase the weight of evidence produced by the other party as to the contents of the documents, or as to the facts to which the documents are relevant, but do not constitute independent evidence of a fact.[3]

c. Failure to Call or Examine Witnesses

The unexplained failure of a party to call or examine an available witness who possesses peculiar knowledge may give rise to an inference that the testimony of such witness would not sustain the contention of the party.

The failure of a party to call a witness may, under some circumstances, and sometimes as a result of express statutory regulation, give rise to an inference that the testimony of such uninterrogated witness would not sustain the contention of the party.[4] In the absence of explanation, the failure

Civ.App., 99 S.W.2d 682, error dismissed—U. S. Fidelity & Guaranty Co. v. Archer, Civ.App., 87 S.W.2d 281, error dismissed—Eddingston v. Acom, Civ.App., 259 S.W. 948.
Va.—Pitt v. Metropolitan Life Ins. Co., 171 S.E. 488, 161 Va. 599.
32 C.J. p 114 note 76.

99. Iowa.—Winnebago County v. Horton, 216 N.W. 769, 771, 204 Iowa 1186, citing **Corpus Juris.**
Pa.—See Edward K. Tryon Co. v. Sugarman, 29 Pa.Dist. & Co. 126, 38 Lack.Jur. 32.
22 C.J. p 114 note 77.

Mere nonproduction of article, such as a weapon used in an assault, does not, in the absence of any demand for its production, raise a presumption that it has been suppressed as evidence.—Stockwell v. Brinton, 142 N.W. 242, 26 N.D. 1.

Demand untimely made
U.S.—The Bouker No. 7, D.C.N.Y., 33 F.Supp. 585.

1. Me.—Kellar v. Savage, 20 Me. 199, 203.

2. Colo.—Henry L. Doherty & Co. v. Youngblut, 204 P. 85, 71 Colo. 30.

3. Cal.—Hampton v. Rose, 56 P.2d 1243, 8 Cal.App.2d 447.
Pa.—Rosenthal v. Ostrow, 134 A. 384, 287 Pa. 87.
Tenn.—Equitable Life Assurance Society of United States v. Cantwell, 4 Tenn.App. 627.
22 C.J. p 114 note 83.

Credibility
The fact that a party could not produce a receipt which she claimed to have received did not affect her legal rights, but only her credibility. —Salvaggio v. Metropolitan Life Ins. Co., 80 Pa.Super. 594.

Inference of hostility
A jury was not entitled to infer, from failure of defendant to produce documents under its control, that, if produced, the documents would be hostile to defendant.—Maurer v. John Hancock Mut. Life Ins. Co., 300 N.Y.S. 646, 164 Misc. 717, reversing 298 N.Y.S. 325, 163 Misc. 723.

Presumption as to specific contents of document
The court will not presume that a document in the possession of, but not produced by, defendant contains certain specific provisions essential to plaintiff's case.—Babicora Development Co. v. Edelman, Tex.Civ.App., 54 S.W.2d 552, error dismissed.

4. U.S.—Bomeisler v. M. Jacobson & Sons Trust, C.C.A.Mass., 118 F.2d 261—Steem-Electric Corporation v. Herzfeld-Phillipson Co., C.C.A.Wis., 118 F.2d 122, affirming, D.C., 29 F.Supp. 1011—The Marsodak, C.C.A.Va., 94 F.2d 339—Sears, Roebuck & Co. v. Peterson, C.C.A.Minn., 76 F.2d 243—Standard Transp. Co. v. Wood Towing Corporation, C.C.A.Va., 64 F.2d 282—Arundel Corporation v. Pennant Line, D.C.N.Y., 42 F.2d 1003—Lincoln Nat. Life Ins. Co. v. Erickson, C.C.A.Minn., 42 F.2d 997—The James McCue, D.C.N.Y., 37 F.2d 934—The Authentic, D.C.N.Y., 37 F.2d 352—The City of Dunkirk, D.C.N.Y., 10 F.2d 609—Walz v. Fidelity-Phœnix Fire Ins. Co. of New York, C.C.A.Mich., 10 F.2d 22, certiorari denied Fidelity-Phœnix Fire Ins. Co. of New York v. Walz, 46 S.Ct. 481, 271 U.S. 665, 70 L.Ed. 1140.
Ala.—Christian Benevolent Burial Ass'n v. Huff, 1 So.2d 390—Goodwin v. Aaron, 85 So. 17, 203 Ala. 677.
Ark.—Mississippi River Fuel Corporation v. Young, 67 S.W.2d 581, 582, 188 Ark. 575, quoting **Corpus Juris.**
Cal.—Logan v. Andrews, 78 P.2d 748, 25 Cal.App.2d 683.
Colo.—Haefeli v. Ahlstrand, 73 P.2d 1378, 101 Colo. 296—Commercial Standard Ins. Co. v. Rinn, 65 P.2d 705, 100 Colo. 76.
Conn.—Baker v. Paradiso, 169 A. 272, 117 Conn. 539—Town of Newtown v. Town of Southbury, 123 A. 278, 100 Conn. 251.
Ga.—Minter v. Kent, 8 S.E.2d 109, 62 Ga.App. 265.
Ind.—Fairway Coffee Co. v. Selch, 183 N.E. 323, 98 Ind.App. 136.
Ky.—Huber & Huber Motor Express v. Martin's Adm'r, 96 S.W.2d 595, 265 Ky. 228—Equitable Life Assur. Soc. of U. S. v. Reynolds, 82 S.W.2d 509, 259 Ky. 504—Grand Lodge, Brotherhood of Railroad Trainmen, v. Bash, 66 S.W.2d 25, 251 Ky. 826.
La.—Succession of Rageur, 98 So. 853, 155 La. 97—Guillory v. Union Sulphur Co., App., 3 So.2d 197—Hornsby v. Rives, App., 2 So.2d 532—Law v. Kansas City Bridge Co., App., 199 So. 155—Hines v. Heinkamp, App., 194 So. 731—Comforto v. Cloverland Dairy Products Co., App., 194 So. 43—Johnson v. Hillyer, Deutsch, Edwards, Inc., App., 185 So. 652, rehearing denied 186 So. 365—Lanes v. Escousse, App., 179 So. 106—Brooks v. First Nat. Life Ins. Co., App., 173 So. 225—Capillon v. Lengsfield, App., 171 So. 194—Hansen v. Ahsen, App., 170 So. 799—McPherson v. Hillyer Deutsch-Edwards, Inc., App., 143 So. 89—Johnson v. Demange-Godman Lumber Co., App., 141 So. 779—Harris v. Louisiana Industrial Life Ins. Co., 141 So. 103, 19 La.App. 589—Franz v. Shushan, 131 So. 591, 14 La.App. 465—Boudreaux v. Myles Salt Co., 123 So. 907, 11 La.App. 480—Perkins v. Long Bell Lumber Co., 8 La.App. 403—Rousseau v. Texas & P. Ry. Co., 4 La.App. 691—Tourmillion v. New Orleans Public Service, Inc., 3 La.App. 297.
Mich.—Patton v. Oakman, 299 N.W. 761, 298 Mich. 672—Fontana v. Ford Motor Co., 270 N.W. 266, 278 Mich. 199.
Mo.—Porter v. Chicago, B. & Q. R. Co., 28 S.W.2d 1035, 325 Mo. 381—Sullivan v. Gideon & N. I. R. Co., 271 S.W. 983, 308 Mo. 48, modifying 247 S.W. 1010, 213 Mo.App. 20—Whitmore v. American Ry. Ex-

to call a witness may create such an inference | against such party where the witness is available[5]

press Co., 269 S.W. 654, 658, 219 Mo App. 294, quoting **Corpus Juris**—Tillman v. City of Carthage, 247 S.W. 992, 297 Mo. 74—Scotten v. Metropolitan Life Ins. Co., App., 68 S.W.2d 60, reversed on other grounds 81 S.W.2d 313, 336 Mo. 724—Guthrie v. Albert Wenzlick Real Estate Co., App., 54 S.W.2d 801—Arnest v. Messerly, App., 17 S.W.2d 670—Gilman v. Fleming, App., 265 S.W. 104—Hardwick v. Wabash R. Co., 168 S.W. 328, 181 Mo.App. 156.

Nev.—Maitia v. Allied Land & Live Stock Co., 248 P. 893, 49 Nev. 451.

N.H.—Stocker v. Boston & M. R. R., 151 A. 457, 84 N.H. 377, 70 A.L.R. 1320.

N.J.—Robinson v. Equitable Life Assur. Soc. of U. S., 8 A.2d 600, 126 N.J.Eq. 242, affirming 198 A. 192, 16 N.J.Misc. 211—Nelson v. Public Service Transp. Co., 135 A. 467, 5 N.J.Misc. 73.

N.M.—Douglass v. Mutual Ben. Health & Accident Ass'n, 76 P.2d 453, 459, 42 N.M. 190, citing **Corpus Juris.**

N.Y.—Standard Fabrics Corporation v. Hob Mfg. Co., 191 N.Y.S. 821, 199 App.Div. 508—Spitzer v. Born, Inc., 185 N.Y.S. 875, 194 App.Div. 739, reversing 182 N.Y.S. 327, 111 Misc. 595—MacDonald v. Kusch, 176 N.Y.S. 823, 188 App.Div. 491.

Or.—Olds v. Von der Hellen, 263 P. 907, 127 Or. 276, modified on other grounds 270 P. 497, 127 Or. 276.

Pa.—Pierpoint v. Pierpoint, 164 A. 808, 108 Pa.Super. 108.

R.I.—Cotugno v. Cranston Loan Co., 165 A. 781—Letts v. Holgate, 165 A. 222, 53 R.I. 198.

Tenn.—Knoxville Cab Co. v. Miller, 138 S.W.2d 428—Cole v. Atlanta Life Ins. Co., 134 S.W.2d 912, 23 Tenn.App. 525—Louisville & N. R. Co. v. Murray, 6 Tenn.App. 374.

Tex.—Marek v. Southern Entreprises, Inc. of Texas, 99 S.W.2d 594, 597, 128 Tex. 377, citing **Corpus Juris**—Craycroft v. Crawford, Com.App., 285 S.W. 275, 282, citing **Corpus Juris,** and reversing, Civ.App., 275 S.W. 124, rehearing denied, Com.App., 287 S.W. 244—Dallas Joint Stock Land Bank of Dallas v. Harrison, Civ.App., 135 S.W.2d 573, 579, citing **Corpus Juris**—Federal Underwriters Exchange v. Stewart, Civ.App., 109 S.W.2d 1031, error dismissed—Jones v. Steinle, Civ.App., 15 S.W.2d 164, error refused—L. E. Whitham & Co. v. Schulz, Civ.App., 14 S.W.2d 881, modified on other grounds Schulz v. L. E. Whitham & Co., 27 S.W.2d 1093, 119 Tex. 211—Caddo Gas Co. v. Jeffries, Civ.App., 271 S.W. 108—Payne v. Castille, Civ.App., 244 S.W. 222, reversed on other grounds Davis v. Castile, Com.App., 257 S.W. 870—Davis v. Etter & Curtis, Civ.App., 243 S.W. 603.

Va.—Metropolitan Life Ins. Co. v. Botto, 143 S.E. 625, 153 Va. 468, reversed on other grounds 154 S.E. 603, 153 Va. 468.

Wash.—Bond v. Werley, 28 P.2d 318, 175 Wash. 659—Bank of Chewelah v. Carter, 5 P.2d 1029, 165 Wash. 663—Lenover v. Beckman, 252 P. 533, 142 Wash. 98.

W.Va.—Mohr v. Mohr, 193 S.E. 121, 119 W.Va. 253—Workman v. Clear Fork Lumber Co., 163 S.E. 14, 111 W.Va. 496—Thompson v. Beasley, 146 S.E. 885, 107 W.Va. 75—Robertson Grocery Co. v. Kinser, 116 S.E. 141, 93 W.Va. 172.

22 C.J. p. 116 note 92.

Comments of counsel on failure to call or examine witness see the C.J.S. title Trial § 184, also 64 C.J. p. 270 note 64 et seq.

Instructions relating to failure to call or examine witness see the C.J.S. title Trial § 271, also 64 C.J. p. 513 note 56 et seq.

Effort to conceal facts

Failure to call witness raises presumption that such witness' testimony would be adverse, where it appears that effort is being made to conceal facts.—Hennessy v. Daigle, 123 So. 900, 11 La.App. 474.

Inference as only inference allowed

Only inference, if any, that could have been drawn from defendant's failure to produce witness was that witness' testimony would have been unfavorable to defendant; defendant's failure to produce witness did not create inference that plaintiffs had not produced all evidence favorable to their claims.—Stocker v. Boston & M. R. R., 151 A. 457, 84 N.H. 377, 70 A.L.R. 1320.

5. U.S.—Zurich General Accident & Liability Ins. Co. v. Brunson, C.C.A.Or., 15 F.2d 906.

Ark.—Rutherford v. Casey, 77 S.W.2d 58, 190 Ark. 79—Mississippi River Fuel Corporation v. Young, 67 S.W.2d 581, 582, 188 Ark. 575, quoting **Corpus Juris.**

Cal.—Calistoga Nat. Bank v. Calistoga Vineyard Co., 79 P.2d 734, 26 Cal.App.2d 519.

Conn.—Baker v. Paradiso, 169 A. 272, 117 Conn. 539—Stuart v. Doyle, 112 A. 653, 95 Conn. 732.

Ga.—Shiver & Barnett v. Firemens Ins. Co., 2 S.E.2d 760, 60 Ga.App. 57.

Kan.—Federal Trust Co. v. Allen, 204 P. 747, 110 Kan. 484.

La.—Centanni v. Centanni, 162 So. 203, 182 La. 632—Toca v. Rojas, 93 So. 108, 152 La. 317—Rubenstein v. Files, 84 So. 33, 146 La. 727—Taylor v. Victoria Nav. Co., App., 176 So. 519—Germalene Chemical Co. v. Virginia Hotel Co., App., 157 So. 762—Blunson v. Knighton, App., 140 So. 302—Paterno v. Kennedy the Cleaner, Inc., 138 So. 531, 18 La.App. 649—Iaccuzzo v. Cole, 135 So. 750, 17 La.App. 353—Weil v. O'Neal, 135 So. 115, 17 La.App. 130—Willis v. Brown, 134 So. 277, 16 La.App. 305—United Motor Car Co. v. Finin, 125 So. 158, 12 La.App. 160—Hawthorn v. Hillyer-Deutsch-Edwards, 119 So. 772, 9 La.App. 660—Reid v. Missouri Pac. R. Co., 3 La.App. 608—Townsend v. Missouri Pac. R. Co., 3 La.App. 598

Mass.—Cutler v. Jordan Marsh Co., 163 N.E. 863, 265 Mass. 245—Attorney General v. Pelletier, 134 N.E. 407, 240 Mass. 264.

Mich.—Douglas v. Insurance Co. of North America, 184 N.W. 539, 215 Mich. 529.

Minn.—M & M Securities Co. v. Dirnberger, 250 N.W. 801, 190 Minn. 57.

Miss.—Robinson v. Haydel, 171 So. 7, 177 Miss. 233.

Mo.—Smith v. Chicago Great Western R. Co., App., 282 S.W. 62—Whitmore v. American Ry. Express Co., 269 S.W. 654, 658, 219 Mo.App. 294, quoting **Corpus Juris**—Burke v. Shaw Transfer Co., 243 S.W. 449, 211 Mo.App. 353, certiorari quashed State ex rel. Shaw Transfer Co. v. Trimble, Sup., 250 S.W. 384.

Mich.—Stephenson v. Golden, 276 N.W. 849, 279 Mich. 710, modifying 272 N.W. 881, 279 Mich. 493.

N.Y.—Group v. Szenher, 20 N.Y.S.2d 803, 260 App.Div. 308, affirmed 31 N.E.2d 508, 284 N.Y. 741—Kings County Lighting Co. v. Lewis, 180 N.Y.S. 570, 110 Misc. 204.

Ohio.—Washington Fidelity Nat. Ins. Co. v. Lacey, 186 N.E. 751, 45 Ohio App. 104.

Pa.—Tremaine v. H. K. Mulford Co., 176 A. 212, 216, 317 Pa. 97, citing **Corpus Juris**—Marshall v. City of Pittsburgh, 180 A. 733, 119 Pa.Super. 189.

S.C.—Ex parte Hernlen, 153 S.E. 133, 156 S.C. 181, 69 A.L.R. 443.

Tenn.—Stevens v. Moore, App., 139 S.W.2d 710, 717, quoting **Corpus Juris.**

Tex.—Moore v. California-Western States Life Ins. Co., Civ.App., 67 S.W.2d 932, error dismissed—Texas & N. O. R. Co. v. Goodwin, Civ.App., 40 S.W.2d 182, error refused.

Va.—Brown v. Parker, 189 S.E. 339, 167 Va. 286—Cole v. Cole, 170 S.E. 621, 161 Va. 116—Royal Indemnity Co. v. Hook, 157 S.E. 414, 155 Va. 956—Altavista Cotton Mills v. Lane, 112 S.E. 637, 133 Va. 1.

W.Va.—Mohr v. Mohr, 193 S.E. 121, 119 W.Va. 253—Miller v. Miller, 161 S.E. 566, 111 W.Va. 338.

22 C.J. p. 115 note 85.

and where the witness or witnesses possesses peculiar or special knowledge[6] concerning facts

Witness present at trial

U.S.—The Eastchester, C.C.A.N.Y., 20 F.2d 357.

Conn.—Smith v. Firestone Tire & Rubber Co., 177 A. 524, 119 Conn. 483

La.—Walter v. Calcasieu Nat. Bank of Lake Charles, 188 So. 43, 192 La. 402—Gunter v. Alexandria Coca Cola Bottling Co., App., 197 So. 159.

Miss.—Southern Bell Telephone & Telegraph Co. v. Quick, 149 So. 107, 167 Miss. 438.

Mo.—National Battery Co. v. Standard Accident Ins. Co., 41 S.W.2d 599, 226 Mo.App. 351—Tabor v. Kansas City Bolt & Nut Co., App., 274 S.W. 911.

Tenn.—Loy v. Loy, App., 151 S.W.2d 178.

Tex.—First Nat. Bank of Schulenburg v. Winkler, Civ.App., 146 S.W.2d 201, error granted.

Appearance of ability to produce witness

(1) Ability to produce the witness must appear in order to warrant an unfavorable inference.

U.S.—Laughlin v. Christensen, C.C.A.Mo., 1 F.2d 215.

Neb.—Large v. Johnson, 248 N.W. 400, 124 Neb. 821.

Tenn.—City of Lawrenceburg v. Maryland Casualty Co., 64 S.W.2d 69, 16 Tenn.App. 238.

Tex.—Davis v. Castile, Com.App., 257 S.W. 870, reversing Payne v. Castille, Civ.App., 244 S.W. 222.

22 C.J. p 115 note 85 [a].

(2) It must appear that witness was under control of litigant failing to produce him.—Llewellyn v. Cincinnati St. Ry. Co., 32 N.E.2d 33, 66 Ohio App. 107.

Meaning of "availability"

As regards inference to be drawn from failure of adverse party to produce witness, "available" does not mean merely available or accessible of subpœna, but "availability" depends either on party's superior means of knowledge of existence and identity of witness or relationship of witness to party, which would reasonably be expected to affect personal interest in outcome of litigation and make it natural that he would be expected to testify in favor of one party and against the other. Witness was peculiarly "available" to one party to action, when such party had so superior an opportunity for knowledge of witness, or there was such community of personal interest between party and witness as in ordinary experience would have made it reasonably probable that witness would have been called to testify for such party except for fact that it was known or feared that his testimony would be damaging rather than favorable.—In re Warden, Mo., 146 S.W.2d 874—Chavaries v. National Life & Accident Insurance Co., Mo.App., 110 S.W.2d 790—Huskey v. Metropolitan Life Ins. Co., Mo.App., 94 S.W.2d 1075.

Procurement by reasonable diligence

In admiralty the absence of an important witness whose testimony could have been procured by reasonable diligence warrants the inference that his testimony would not have been favorable to the party by whom he should have been called.—The Cananova, D.C.Pa., 297 F. 658.

Right to show availability

The opposite party may show that the witness is available to the party who fails to call him.

U.S.—Chicago & N. W. Ry. Co. v. Kelly, C.C.A.Minn., 84 F.2d 569.

Ill.—People v. Drury, 250 Ill.App. 547, affirmed 167 N.E. 823, 335 Ill. 539.

6. U.S.—Interstate Circuit v. U. S., Tex., 59 S.Ct. 467, 306 U.S. 208, 83 L.Ed. 610—W. H. Miner, Inc., v. Peerless Equipment Co., C.C.A.Ill., 115 F.2d 650, certiorari denied Peerless Equipment Co. v. W. H. Miner, Inc., 61 S.Ct. 615—Futrell v. Arkansas-Missouri Power Corporation, C.C.A.Ark., 104 F.2d 752—Ætna Casualty & Surety Co. v. Reliable Auto Tire Co., C.C.A.Mo., 58 F.2d 100—Root v. John T. Robinson Co., D.C.Mass., 55 F.2d 303—Peoria Life Ins. Co. v. Smith, D.C.Mich., 47 F.2d 279—U. S. v. Fifty-Eight Drums of Material Designed for Manufacture of Intoxicating Liquor, D.C.Pa., 38 F.2d 1005—Goodwin-Gallagher Sand & Gravel Corporation v. Washington Bulkley, Inc., D.C.N.Y., 31 F.2d 112, affirmed, C.C.A., F. Jacobus Transp. Co. v. Goodwin-Gallagher Sand & Gravel Corporation, 31 F.2d 115—U. S. v. Otley, D.C.Or., 34 F.Supp. 182—The Montauk, D.C.N.Y., 12 F. Supp. 284, affirmed, C.C.A., Union Ferry Co. of New York & Brooklyn v. U. S., 86 F.2d 1014—The Condor, D.C.N.Y., 8 F.Supp. 929, affirmed, C.C.A., The Nordpol, 84 F.2d 3, certiorari denied Grace S. S. Co. v. Anglo-Chilean Nitrate Sales Corporation, 57 S.Ct. 111 (two cases), 299 U.S. 586, 81 L.Ed. 432—The Richmond, D.C.Va., 275 F. 970, affirmed, C.C.A., The Hawarden, 294 F. 90.

Alaska.—Ex parte Oates, 8 Alaska 319.

Ark.—U. S. Bond & Mortgage Co. v. Reddick, 133 S.W.2d 23, 199 Ark. 82—National Life Co. v. Brennecke, 115 S.W.2d 855, 195 Ark. 1088—Lynch v. Stephens, 14 S.W.2d 257, 179 Ark. 118.

Colo.—Dresser v. W. H. Mullin Lumber Co., 25 P.2d 936, 93 Colo. 271.

Conn.—Dawson v. Davis, 5 A.2d 703, 125 Conn. 330.

D.C.—Evans v. Bell, 263 F. 634, 49 App.D.C. 238.

Iowa.—Henderson v. Ball, 186 N.W. 668, 193 Iowa 812.

Ky.—Rice v. Rice, 50 S.W.2d 26, 243 Ky. 837.

La.—Walter v. Calcasieu Nat. Bank of Lake Charles, 188 So. 43, 192 La. 402—Duhe v. Williams, App., 199 So. 518—Smith v. Metropolitan Life Ins. Co., App., 196 So. 83—Spiro v. Corliss, App., 174 So. 285—Holland v. Continental Casualty Co., App., 155 So. 63—Hopkins v. Dalferes, App., 153 So. 367—Paterno v. Kennedy The Cleaner, Inc., 138 So. 531, 18 La.App. 649—Rossi v. Cust, 136 So. 103, 17 La.App. 349—Weil v. O'Neal, 135 So. 115, 17 La.App. 130—Geddes & Moss Undertaking & Embalming Co. v. Simkins, 4 La.App. 125.

Mich.—Stephenson v. Golden, 276 N.W. 849, 279 Mich. 710, modifying 272 N.W. 881, 279 Mich. 493.

Minn.—M & M Securities Co. v. Dirnberger, 250 N.W. 801, 190 Minn. 57.

Miss.—Southern Bell Telephone & Telegraph Co. v. Quick, 149 So. 107, 167 Miss. 438.

Mo.—Russell v. Franks, 120 S.W.2d 37, 343 Mo. 159—Baker v. Chicago, B. & Q. R. Co., 39 S.W.2d 535, 327 Mo. 986—Alexander v. St. Louis-San Francisco Ry. Co., 38 S.W.2d 1023, 327 Mo. 1012, reversing, App., 4 S.W.2d 888—State ex rel. Wabash Ry. Co. v. Trimble, 260 S.W. 1000, quashing certiorari Koontz v. Wabash Ry. Co., App., 253 S.W. 413—Dunkeson v. Williams, 242 S.W. 653—Brigham City Fruit Growers' Ass'n v. G. H. Zollmann Produce Co., 220 S.W. 911—McCord v. Schaff, 216 S.W. 320, 279 Mo. 558—Earley v. Automobile Ins. Co. of Hartford, Conn., App., 144 S.W.2d 860—Parsons v. Missouri Sav. Bank & Trust Co., App., 114 S.W.2d 203—McNicholas v. Continental Baking Co., App., 112 S.W.2d 849—Streck v. St. Louis County Gas Co., App., 58 S.W.2d 487—Donet v. Prudential Ins. Co. of America, App., 23 S.W.2d 1104—Beck v. Wurst Coal & Hauling Co., App., 293 S.W. 449—Tabor v. Kansas City Bolt & Nut Co., App., 274 S.W. 911.

N.J.—De Pasquale v. Contalvi, 18 A.2d 840, 126 N.J.Law 136—Eichelberger v. Inter-City Transp. Co., 15 A.2d 758, 125 N.J.Law 365, affirming 10 A.2d 267, 123 N.J.Law 595.

N.Y.—Group v. Szenher, 20 N.Y.S.2d 803, 260 App.Div. 308, affirmed 31 N.E.2d 508, 284 N.Y. 741—Kings County Lighting Co. v. Lewis, 180 N.Y.S. 570, 110 Misc. 204.

N.C.—Maxwell v. Proctor & Gamble Distributing Co., 168 S.E. 403, 204 N.C. 309.

essential to a party's case, direct[7] or rebutting,[8] especially if the witness would naturally be favorable to the party's contention,[9] and the party relies instead on the evidence of witnesses less familiar with the matter.[10] Similarly, an adverse inference may arise against a party who fails to examine a witness as to facts covered by his special knowledge.[11]

However, it is not in every case that the failure to call a witness will justify an inference that his testimony would have been unfavorable to the party.[12] No such inference is created where the only

Ohio.—Washington Fidelity Nat. Ins Co. v. Lacey, 186 N.E. 751, 45 Ohio App. 104.
Or.—Larison-Frees Chevrolet Co. v. Payne, 96 P.2d 1067—Rockwood & Co. v. Parrott & Co., 19 P.2d 423, 142 Or. 261.
Pa.—Duchossois v. Duchossois, 10 A. 2d 824, 139 Pa.Super. 1.
Tex.—Fort Worth & D. C. Ry. Co. v. Greathouse, Civ.App., 41 S.W. 2d 418, 423, citing **Corpus Juris**, and reversed on other grounds Greathouse v. Fort Worth & Denver City Ry. Co., Com.App., 65 S. W.2d 762—Williams v. Freeport Sulphur Co., Civ.App., 40 S.W.2d 817—Fort Worth & D. C. Ry. Co. v. Stovall, Civ.App., 272 S.W. 594, certiorari denied 46 S.Ct. 356, 270 U.S. 660, 70 L.Ed. 786
Va.—Chesapeake & O. Ry. Co. v. Colladay, 180 S.E. 400, 164 Va. 292.
Wash.—Gardner v. Herbert, 5 P.2d 782, 165 Wash. 429
W.Va.—Arbogast v. Shields, 14 S.E. 2d 4—Wolfe v. Wolfe, 198 S.E. 209, 120 W.Va. 389—Vaughan v. Memorial Hospital, 130 S.E. 481, 483, 100 W.Va. 290, citing **Corpus Juris.**
Wyo.—Hildebrand v. Chicago, B. & Q. R. R., 17 P.2d 651, 45 Wyo. 175, affirming 13 P.2d 1081, 44 Wyo. 428—Benedict v. Citizens' Nat. Bank of Casper, 13 P.2d 573, 44 Wyo. 466—Jones v. Wettlin, 271 P. 217, 39 Wyo. 331, 69 A.L.R. 840.
22 C.J. p 115 note 86.

Witness without knowledge

Where a witness is not shown to have knowledge of the facts, no unfavorable inference arises from a failure to call him.
U.S.—Laughlin v. Christensen, C.C.A.Mo., 1 F.2d 215—The Toledo, D.C.N.Y., 30 F.Supp. 93.
Cal.—McEwen v. New York Life Ins. Co., 201 P. 577, 187 Cal. 144.
D.C.—Rappaport v. Capital Traction Co., 48 App.D.C. 359.
Md.—Wright v. Rever, 136 A. 61, 151 Md. 558.
Minn.—Drown v. Minneapolis St. Ry. Co., 277 N.W. 423, 202 Minn. 66.
Tenn.—Baker v. Baker, App., 142 S.W.2d 737—Security Finance Co. v. Duncan, 5 Tenn.App. 631.
Tex.—Missouri-Kansas-Texas R. Co. of Texas v. Ashlock, Civ.App., 136 S.W.2d 943, error refused.
Wash.—Washington Fire Relief Ass'n v. Albro, 241 P. 356, 137 Wash. 31.
22 C.J. p 115 note 86 [d], [e].

7. Va.—Royal Indemnity Co. v. Hook, 157 S.E. 414, 155 Va. 956.
22 C.J. p 116 note 87.
8. Tex.—Dallas Joint Stock Land Bank of Dallas v. Harrison, Civ. App., 135 S.W.2d 573, 579, citing **Corpus Juris.**
Va.—Royal Indemnity Co. v. Hook, 157 S.E. 414, 155 Va. 956.
22 C.J. p 116 note 88.
9. Conn.—Cote v. Palmer, 16 A.2d 595, 127 Conn. 321—Dawson v. Davis, 5 A.2d 703, 125 Conn. 330—Ezzo v. Geremiah, 142 A. 461, 107 Conn. 670.
Kan.—Federal Trust Co. v. Allen, 204 P. 747, 110 Kan. 484.
Minn.—Schultz v. Swift & Co., 299 N.W. 7—M & M Securities Co. v. Dirnberger, 250 N.W. 801, 803, 190 Minn. 57, citing **Corpus Juris.**
Mo.—Streck v. St. Louis County Gas Co., App., 58 S.W.2d 487.
Tenn.—Loy v. Loy, App., 151 S.W.2d 178.
Tex.—Taylor & Co. v. Nehi Bottling Co., Civ.App., 30 S.W.2d 494, error dismissed.
Wash.—Rosenstrom v. North Bend Stage Line, 280 P. 932, 154 Wash. 57.
22 C.J. p 116 note 90.

Witness under control of party

(1) Where there is a conflict of testimony, and a party fails to call an available friendly witness over whom he exercises control by employment, relationship, or otherwise, it may be inferred that witness' testimony would not have been favorable.—Marks v. Thompson, 1 N.Y.S. 2d 215.

(2) Where persons in the employ of, and under control of, plaintiff at time of accident were not called as witnesses by plaintiff, and the persons were near place of accident, there was a presumption that such persons' testimony would have been unfavorable to plaintiff, and the presumption was applicable even though plaintiff attempted to establish his case by circumstantial evidence.—Vandergriff v. Willett, Tenn.App., 137 S.W.2d 957.

Failure to call person related

The inference or presumption which operates against a party who fails to call a witness is stronger where the witness is related to such party.—First State Bank of Seminole v. Dillard, Tex.Civ.App., 71 S.W. 2d 407.

10. Ga.—Minter v. Kent, 8 S.E.2d 109, 62 Ga.App. 265.
Va.—Royal Indemnity Co. v. Hook, 157 S.E. 414, 155 Va. 956.
22 C.J. p 116 note 91.
11. U.S.—National Tube Co. v. Kennedy, C.C.A.Pa., 20 F.2d 824—Swinglehurst v. Ballard, D.C., 258 F. 973.
Idaho.—Federal Land Bank of Spokane v. Union Cent. Life Ins. Co., 6 P.2d 486, 51 Idaho 490.
Ky.—Insurance Co. of North America v. Creech Drug Store, 75 S.W. 2d 552, 256 Ky. 56.
N.H.—Mechanics' Savings Bank v. Feeney, 108 A. 295, 79 N.H. 267.
N.Y.—Marks v. Thompson, 1 N.Y.S. 2d 215.
Vt.—Anderson v. Dutton, 139 A. 210, 100 Vt. 464.
22 C.J. p 116 note 89.

12. U.S.—Banque de France v. Chase Nat. Bank of City of New York, C.C.A.N.Y., 60 F.2d 703—Fetan v. Atlantic & Caribbean Steam Nav. Co., D.C.N.Y., 60 F.2d 328—International Harvester Co. v. National Surety Co., C.C.A.Ill., 44 F. 2d 746, reversing, D.C., 29 F.2d 956, certiorari denied National Surety Co. v. International Harvester Co., 51 S.Ct. 179, 282 U.S. 895, 75 L.Ed. 788—Utah Radio Products Co. v. Delco Appliance Corporation, D.C. N.Y., 24 F.Supp. 328—The Ohioan, D.C.N.Y., 9 F.Supp. 361.
Ill.—Painter v. Keeshin Motor Express Co., 18 N.E.2d 65, 297 Ill.App. 557—Budek v. City of Chicago, 279 Ill.App. 410.
La.—Harrington v. Langlinais, App., 158 So. 26.
Mo.—In re Parkinson, 128 S.W.2d 1023, 344 Mo. 715—Chambers v. Chambers, App., 74 S.W.2d 104.
Or.—Bjorkman v. Columbia Wrecking & Fuel Co., 279 P. 633, 130 Or. 189.
Tenn.—Franklin v. Firemen's Ins. Co., 4 Tenn.App. 688.
Tex.—Mills v. Browning, Civ.App., 59 S.W.2d 219—Texas Unity Oil Co. v. Dolman, Civ.App., 8 S.W.2d 815, error dismissed—Clover v. Clover, Civ.App., 224 S.W. 916, error refused.
22 C.J. p 118 note 2 [a].

Willful attempt to suppress testimony

(1) Generally, where party to an action has failed to produce witnesses under his control, who could have testified to material facts favorable to such party, and has failed to explain his failure so to do, inference that testimony of witnesses,

object of calling such witness would be to produce possibly unnecessary evidence;[13] or where an adverse inference would be improper for any other reason,[14] as, for example, where the witness not called is the attorney for the party,[15] or is mentally unsound,[16] or there is some legal prohibition against calling or eliciting the desired evidence from the witness.[17]

Corroborative or cumulative evidence. No inference arises against a party failing to call a witness where the only object of calling such witness would be to produce corroborative[18] or cumulative[19] evidence; although, according to some cases, the failure to call an available witness to corroborate the testimony of a party must be taken strongly against such party,[20] and it has been held that where a witness has been called and examined, an adverse inference may arise from the failure to elicit facts to corroborate the testimony of a party[21] or a mere witness.[22]

Explanation of failure. It is competent for a party to explain his failure to call a witness;[23]

if produced, would have been unfavorable can be drawn only when under all the circumstances failure to produce witnesses, unexplained, creates a suspicion that failure was a willful attempt to withhold competent testimony.—Wright v. Safeway Stores, Wash., 109 P.2d 542.

(2) In a will contest, failure to call as witnesses those named as legatees is not necessarily suppression of evidence.—In re Moore's Estate, 182 P. 285, 180 Cal. 570.

(3) When evidence tends to prove material fact imposing liability on party and he refuses to produce evidence in his power, to produce which would overthrow case made if not founded on fact, presumption arises that such evidence would operate to his prejudice and support adversary's case, but failure to call witness so to testify does not amount to willful suppression of evidence.—Keena v. United Railroads of San Francisco, 239 P. 1061, 197 Cal. 148.

13. U.S.—Cherry-Burrell Co. v. Thatcher, C.C.A.Mont., 107 F.2d 65.
Ill.—Chandler v. Fisher, 125 N.E. 324, 290 Ill. 440.
Iowa.—Brauch v. Freking, 258 N.W. 892, 219 Iowa 556.
22 C.J. p 118 note 95.

Superiority of testimony

Generally, no inference can be drawn from the nonproduction of witnesses, unless their testimony would be superior in respect to the fact to be proved.
Mo.—Roehl v. Ralph, App., 84 S.W. 2d 405—Miller v. Fleming, App., 259 S.W. 139.
Wyo.—Smith v. Beard, 110 P.2d 260—See Ben Realty Co. v. Gothberg, 109 P.2d 455.

Testimony given on former hearing or prosecution

(1) No unfavorable inferences may be drawn from the failure of a party to call a witness where the only evidence that the absent witness might give material to the issues is already before the court in the shape of former evidence given by him in another case.—Lalakea v. Laupahoehoe Sugar Co., 33 Hawaii 745.

(2) Where contestants of will swore beneficiary as witness in probate court, failure of such witness to testify on appeal to circuit court did not raise presumption that his testimony would have been adverse to proponent.—In re Evans' Estate, 277 N.W. 893, 283 Mich. 275.

(3) Automobile accident victim was not precluded from recovering because he failed to call on driver of automobile in which he rode, to testify, it appearing that driver had testified on the prosecution of driver of automobile with which collision occurred.—Cherry-Burrell Co. v. Thatcher, C.C.A.Mont., 107 F.2d 65.

14. Ill.—Cartier v. Troy Lumber Co., 28 N.E. 932, 138 Ill. 533, 14 L.R.A. 470.

Exclusion of testimony of witness

(1) Rule that jury might draw unfavorable inferences from plaintiff's failure to call available witnesses applies only where available witnesses having peculiar or superior knowledge of facts and controversy have not been called, and does not apply where witnesses were actually called but their testimony was excluded because offered at improper time.—Costigan v. Third Ave. R. Co., 207 N.Y.S. 216, 124 Misc. 165.

(2) Failure to produce witness, who heard verbal agreement prior to written contract, cannot prejudice either party, since testimony would be inadmissible to contradict writing.—Federal Sign System v. Amavet, 7 La.App. 680.

15. D.C.—Poffenbarger v. Olson, 38 App.D.C. 522.
N.Y.—Gardner v. Benedict, 27 N.Y.S. 3, 75 Hun 204.
Exclusion of privileged communication see subdivision e of this section.

16. Tex.—Brewster v. State, 88 S.W. 858, 40 Tex.Civ.App. 1.

17. Ind.—Adams v. Main, 29 N.E. 792, 3 Ind.App. 232, 50 Am.S.R. 266.
22 C.J. p 118 note 99.

18. La.—Isaac Bell, Inc., v. Wofford, App., 156 So. 41—Shaw v. Marceaux, 125 So. 460, 12 La.App. 401.
Mo.—Roehl v. Ralph, App., 84 S.W. 2d 405, 413, citing **Corpus Juris.**
22 C.J. p 117 note 93.

19. U.S.—Redwood S. S. Co. v. U. S. Shipping Board Emergency Fleet Corporation, C.C.A.Cal., 18 F.2d 382.
Mo.—Roehl v. Ralph, App., 84 S.W. 2d 405—Miller v. Fleming, App., 259 S.W. 139.
N.Y.—Perlman v. Shanck, 182 N.Y.S. 767, 192 App.Div. 179.
Tenn.—Baker v. Baker, App., 142 S.W.2d 737—Poe v. White Co., 7 Tenn.App. 652.
W.Va.—Montgomery v. Chesapeake & Potomac Telephone Co. of West Virginia, 3 S.E.2d 58—Schiffler v. Kissel, 138 S.E. 107, 103 W.Va. 545.
22 C.J. p 118 note 94.

Calling one of several witnesses

That plaintiff called only one of several witnesses who had equal opportunity to know fact sought to be established, did not authorize inference that other witness would have testified differently.—Bank of Emanuel v. Smith, 124 S.E. 114, 32 Ga.App. 606—22 C.J. p 118 note 94 [b].

Where witness has no other or better knowledge of the facts than that possessed by other witnesses called, the failure of plaintiff to call such witness did not give rise to an inference against him.—Baesens v. New York Cent. R. Co., 193 N.Y.S. 720, 201 App.Div. 191.

20. Del.—Richards v. Jones, 142 A. 832, 16 Del.Ch. 227.
La.—Wicker v. Metropolitan Life Ins. Co. of New York, App., 189 So. 485.
Mass.—Daniels v. Daniels, 134 N.E. 235, 240 Mass. 380.
N.J.—Roach v. Yellow Cab Co., 141 A. 767, 6 N.J.Misc. 386.
22 C.J. p 117 note 93 [b].

21. Vt.—Seward v. Garlin, 33 Vt. 583.

22. Vt.—Button v. Knight, 115 A. 499, 95 Vt. 381.

23. Conn.—Ezzo v. Geremiah, 142 A. 461, 107 Conn. 670.
D.C.—Bernhardt v. City & S. Ry. Co., 263 F. 1009, 49 App.D.C. 265.
Mich.—Green v. Detroit United Ry., 177 N.W. 263, 210 Mich. 119.

and the inference arising from such failure may be rebutted by evidence that the witness is unavailable, or that the party has made every reasonable effort to procure his attendance and testimony.[24] Further, the fact that the witness resides at a great distance from the place of trial and his attendance would involve considerable expense may tend to rebut any unfavorable inference which might otherwise arise from failure to call him.[25]

However, where no efforts have been made to procure the testimony of a witness, by issuing a subpœna or by taking his deposition, and it is not proposed to show that he is dead, or that the party who should have produced him could not reach him with process or take his deposition, the exclusion of a question by such party, where the witness was when last heard from, is proper.[26]

Witness available to both parties. It has been laid down in a large number of cases that where a witness is equally available or accessible to both parties, no presumption or inference against either party can arise by reason of his failure to call such witness.[27]

However, this statement has been characterized

Minn.—M & M Securities Co. v. Dirnberger, 250 N.W. 801, 803, 190 Minn. 57, citing **Corpus Juris.**
Mo.—Looff v. Kansas City Rys. Co., 246 S.W. 578—Brown v. United Rys. Co. of St. Louis, App., 222 S.W. 890.
22 C.J. p 118 note 1.

Propriety of matters in explanation

(1) In action for injuries in a collison, exclusion of written list of witnesses made by defendant's conductor at the time of the accident, with testimony of inability to produce certain of the witnesses, offered to create impression that testimony of such witnesses, if produced, would have been favorable to the defendant, was proper.—Niman v. Detroit United Ry., 183 N.W. 48, 214 Mich. 456.

(2) In an action against a street railway for injuries, the court did not err in refusing to allow witness to testify that he had inquired of every motorman and conductor operating in the vicinity of the accident, and that none of them had any knowledge of the occurrence claimed in order to avoid the inference that witnesses not produced would have given adverse evidence, where there was no question as to the identity of the car on which the accident occurred, and the court's and plaintiff's instructions predicated a recovery on the car shown in the evidence—Miller v. Fleming, Mo.App., 259 S.W. 139.

(3) Injured employee's testimony that other employees refused to appear and testify for fear of discharge was properly excluded.—Knight v. Texas & N. O. R. Co., Tex Civ.App., 26 S.W.2d 672.

(4) Testimony as to whether absent witnesses knew anything about accident is inadmissible.—El Paso Electric Co. v. Whitenack, Tex.Civ. App., 297 S.W. 258, affirmed, Com. App., 1 S.W.2d 594.

24. U.S.—In re Trustees System Co. of Louisville, D.C.Ky., 30 F.Supp. 361.
Ill.—Chicago Title & Trust Co. v. McDonough, 189 N.E. 896, 355 Ill. 648.
Ky.—Tri-State Refining Co. v Skaggs, 4 S.W.2d 739, 223 Ky. 731.
La.—General Finance Co of Louisiana v. Veith, App., 177 So. 71—Bordelon v. T. L. James & Co., App., 148 So. 484
Mass.—Cutler v. Jordan Marsh Co., 163 N.E. 863, 265 Mass. 245—Nager v. Reid, 133 N.E. 98, 240 Mass. 211.
Mo.—Waeckerley v. Colonial Baking Co., 67 S.W.2d 779, 228 Mo.App. 1185.
N.Y.—Maurer v. John Hancock Mut. Life Ins. Co., 300 N.Y.S. 646, 164 Misc. 717, reversing 298 N.Y.S. 325, 163 Misc. 723.
Ohio.—Payne v. Gearhart, 15 Ohio App. 421.
Tenn.—Security Finance Co. v. Duncan, 5 Tenn.App. 631.
Tex.—Coats v. Stewart, Civ.App., 135 S.W.2d 1026, error dismissed, judgment correct—Northern Texas Traction Co. v. Bryan, Civ.App., 299 S.W. 325, conforming to answers 294 S.W. 527, 116 Tex. 479.
Va.—Long v. Harrison, 114 S.E. 656, 134 Va. 424.
22 C.J. p 118 note 2.

Death

(1) Evidence that witness was dead is properly admitted to explain failure to testify—Menard v. Goltra, 40 S.W.2d 1053, 328 Mo. 368.

(2) In an action for damages for fraud in the sale of land, assuming that plaintiff had the right to prove that his wife was dead at the time of the trial, so that the jury might understand why she was not produced as a witness, he had no right to go into the particulars concerning her death and burial, and as a result thereof manifest such grief and distress as was calculated to arouse the sympathy of the jury.—Klein v. Stahl, Tex.Civ.App., 219 S.W. 523.

Illness

U.S.—Boston Ins. Co. v. Mesick & Mesick, D.C.Conn., 286 F. 531.
Cal.—Mattocks v. Class A Motor Co., 267 P. 736, 92 Cal.App. 127.
Wis.—In re Weber's Will, 220 N.W. 380, 196 Wis. 377.

Witness without jurisdiction

The rule that, where a party has control over certain witness, his failure to call witness entitles jury to accept testimony which witness might have controverted and refuse to accept testimony which he might have corroborated, should ordinarily be confined to witnesses within the jurisdiction of the court, whose attendance on the trial might be procured by subpœna.—Perlman v. Shanck, 182 N.Y.S. 767, 192 App.Div. 179.

25. Tex.—Reynolds v. International & G. N. R. Co., 85 S.W. 323, 38 Tex. Civ.App. 273.
22 C.J. p 119 note 3.

26. N.C.—Kornegay v. Atlantic Coast Line R. Co., 70 S.E. 731, 154 N.C. 389.

27. U.S.—Tin Decorating Co. of Baltimore v Metal Package Corporation, C.C.A.N.Y., 37 F.2d 5, affirming, D.C., 29 F.2d 1006, and certiorari denied 50 S.Ct. 410, 281 U.S. 759, 74 L.Ed. 1168—The Elkton, D.C.N.Y., 35 F.2d 49, affirmed, C.C.A., Compania General De Tabacos De Filipinas v. U. S., 49 F.2d 700.
Ala.—Montevallo Mining Co. v. Little, 93 So. 873, 208 Ala. 131.
Ark.—Corning Bank & Trust Co. v. Foster, 74 S.W.2d 797, 189 Ark. 655.
Cal.—Serv-U-Garbage Co. v. Board of Health of City and County of San Francisco, 290 P. 519, 107 Cal. App. 386.
Conn.—Sickmund v. Connecticut Co., 189 A. 876, 122 Conn. 375—Fierberg v. Whitcomb, 177 A. 135, 119 Conn. 390.
Idaho.—Idaho Power Co. v. City of Buhl, 111 P.2d 1088.
La.—Kendricks v. Lewis, App., 175 So. 484—Starnes v. Roumain, App., 157 So. 777—Bordelon v. T. L. James & Co., App., 148 So. 484—Mahaffey v. Mill Creek Lumber Co., App., 147 So. 834—Morgan v. Hillyer, Deutch-Edwards, Inc., App., 142 So. 180—Conners v. Hou-

as inadvertent,[28] and it would seem that it should apply in its full sense only where both parties are equally interested to procure the evidence of such witness, for a witness, while equally accessible to both parties, may be extremely favorable to one, and unfavorable, or even hostile, to the other, and under these circumstances it would seem a fair inference that the party to whom such witness was favorable omitted to call him because his testimony would not support the contentions of such party.[29] It is not difficult to find cases where an unfavorable inference has been indulged against a party who failed to call a witness who naturally would be favorable to him, regardless of the fact that the witness was in court and could have been called and examined by the other party.[30]

Adverse or hostile witness. No unfavorable inference can arise from a party's failure to call or examine a witness who, although possessing peculiar knowledge of the facts, is adverse to him,[31] as for instance, the spouse of the adverse party,[32] or the co-respondent in a divorce suit.[33]

Party calling no witnesses. Where a party calls no witnesses, but submits his case in reliance on the insufficiency of his adversary's evidence, no unfavorable inferences arise from his failure to call witnesses having special knowledge.[34]

Taking over witness. No adverse presumption arises from a party's failure to call a material witness who is present, where on such witness being called by the adverse party, the party who originally failed to call him proceeds to make the witness his own.[35]

Strength of inference. While the inference resulting from the failure to call an available witness

ma Packing Co., 125 So. 294, 13 La.App. 167.
Mo.—In re Thomasson's Estate, 148 S.W.2d 757—Huskey v. Metropolitan Life Ins. Co., App., 94 S.W.2d 1075—Knotts v. Sentinel Life Ins. Co., 67 S.W.2d 798, 228 Mo.App. 353—Waeckerley v. Colonial Baking Co., 67 S.W.2d 779, 228 Mo.App. 1185—Munsill v. Atchison, T. & S. F. Ry. Co., App., 234 S.W. 376.
N.J.—Tanner v. Boynton Lumber Co., 146 A. 332, 104 N.J.Eq. 614.
N.Y.—Longacre v. Yonkers R. Co., 140 N.E. 215, 236 N.Y. 119, 28 A.L.R. 1030, modifying 194 N.Y.S. 952, 202 App.Div. 845—Hayden v. New York Rys. Co., 134 N.E. 826, 233 N.Y. 34, reversing 182 N.Y.S. 928, 192 App.Div. 950—Kezer v. Dwelle-Kaiser Co., 225 N.Y.S. 722, 222 App.Div. 350.
Okl.—Winn v. Willmott, 280 P. 808, 138 Okl. 177.
Pa.—Moseley v. Reading Co., 145 A. 293, 295 Pa. 342.
Tenn.—Stevens v. Moore, App., 139 S.W.2d 710, 718, quoting **Corpus Juris.**
Tex.—Smith v. Triplett, Civ.App., 83 S.W.2d 1104—Atchison, T. & S. F. Ry. Co. v. Saxon, Civ.App., 21 S.W.2d 686, reversed on other grounds Saxon v. Atchison, T. & S. F. Ry. Co., Com.App., 36 S.W.2d 228, rehearing denied 38 S.W.2d 775, certiorari granted Atchison, T. & S. F. Ry. Co. v. Saxon, 52 S.Ct. 30, 284 U.S. 604, 76 L.Ed. 518, reversed on other grounds 52 S.Ct. 229, 284 U.S. 458, 76 L.Ed. 397, conformed to Saxon v. Atchison, T. & S. F. Ry. Co., Com.App., 50 S.W.2d 1095.
Wash.—Rosenstrom v. North Bend Stage Line, 280 P. 932, 154 Wash. 57.
22 C.J. p 119 note 5.

Party's reasons for failure to subpœna particular witness are not a proper subject matter of investigation, where it was no more incumbent on him than on the other party to procure the testimony of such witness.—Ray v. Camp, 36 S.E. 242, 110 Ga. 818.

28. N.Y.—Reehil v. Fraas, 114 N.Y.S. 17, 129 App.Div. 563, 566, reversed on other grounds 90 N.E. 340, 197 N.Y. 64.
22 C.J. p 120 note 6.

29. Ga.—Bank of Emanuel v. Smith, 124 S.E. 114, 32 Ga.App. 606.
22 C.J. p 120 note 7.

30. Mass.—Little v. Massachusetts Northwestern St. R. Co., 118 N.E. 245, 229 Mass. 244.
22 C.J. p 120 note 8.

31. U.S.—Commonwealth Bank v. U. S., C.C.A.Mich., 115 F.2d 327, affirming, D.C., U. S. v. Commonwealth Commercial State Bank, 27 F.Supp. 787—The Eastern Knight, D.C.N.Y., 56 F.2d 428, affirmed, C.C.A., Pan-American Petroleum & Transport Co. v. U. S., 18 F.2d 1020—The Elkton, D.C.N.Y., 35 F.2d 49, affirmed, C.C.A., Compania General De Tabacos De Filipinas v. U. S., 49 F.2d 700.
Ala.—Alabama Power Co. v. Talmadge, 93 So. 548, 207 Ala. 86, error dismissed 42 S.Ct. 463, 259 U.S. 575, 66 L.Ed. 1071.
Ky.—Bankers Bond Co. v. Bergen, 128 S.W.2d 776, 278 Ky. 270.
La.—General Finance Co. of Louisiana v. Veith, App., 177 So. 71.
Mich.—Peck v. Hampel, 291 N.W. 648, 652, 293 Mich. 252, quoting **Corpus Juris.**
Mont.—State v. Kurth, 72 P.2d 687, 691, 105 Mont. 260, citing **Corpus Juris.**
N.Y.—Vollmer v. Automobile Fire Ins. Co. of Hartford, Conn., 202 N.Y.S. 374, 207 App.Div. 67.
Vt.—Button v. Knight, 115 A. 499, 95 Vt. 381.
Va.—Long v. Harrison, 114 S.E. 656, 134 Va. 424.
22 C.J. p 120 note 9.

However, there is authority that where an adverse witness has been called by a party who fails to interrogate him as to a vital issue, there is an inference that the answer of the witness would have been unfavorable to such party.—Marks v. Thompson, 1 N.Y.S.2d 215.

Failure to call witness adverse to both parties

Where witness was hostile or adverse to both plaintiffs and defendants, failure of either plaintiffs or defendants to call witness would not permit drawing of unfavorable inference against them.—Marks v. Thompson, supra.

Pending litigation between party and witness

In will contest, proponent's failure to call as witness neighbor claimed to have exercised undue influence on testator did not create presumption that testimony would have been unfavorable to proponent, where there was then litigation pending between proponent and neighbor.—In re Simpson's Estate, 14 P.2d 1, 169 Wash. 419.

32. N.Y.—Carpenter v. Pennsylvania R. Co., 43 N.Y.S. 203, 13 App.Div. 328.
22 C.J. p 120 note 10.

33. N.Y.—Kenyon v. Kenyon, 34 N.Y.S. 720, 88 Hun 211.

34. Conn.—Baker v. Paradiso, 169 A. 272, 274, 117 Conn. 539, citing **Corpus Juris.**
Wash.—McFarland v. Commercial Boiler Works, 116 P.2d 288, 293, quoting **Corpus Juris.**
22 C.J. p 120 note 12.

35. N.Y.—Fleck v. Cohn, 115 N.Y.S. 652, 131 App.Div. 248.

possessing peculiar knowledge has been denominated a "strong presumption of law,"[36] it has also been stated that such failure raises no presumption at all, but merely authorizes the jury to draw unfavorable inferences.[37] Any inference drawn from such failure is not equivalent to direct evidence;[38] it does not take the place of evidence of material facts,[39] or shift the burden of proof so as to relieve the party on whom rests the necessity of establishing a prima facie case;[40] the inference is not conclusive.[41]

The extent of a party's right to invoke his opponent's failure to call an available witness is merely to impair the value of the opponent's proofs and to give greater credence to the positive evidence of the party on any issue on which it is shown that the witness might have had knowledge.[42] The probative force of the inference varies with the strength of the inducement to call the witness were his evidence favorable,[43] and is intensified where a party declines to avail himself of such evidence to meet a prima facie case of fraud or illegality.[44]

d. Failure of Party to Testify

As a general rule, in the absence of explanation, the nonappearance of a party at the trial or his failure to testify as to material facts within his knowledge creates an inference that he refrained from appearing or testifying because the truth, if made to appear, would not aid his contention.

While there is some authority to the effect that the failure of a party to testify creates no unfavorable inference,[45] as a general rule the nonappearance of a litigant at the trial[46] or his failure or

36. Ill.—Princeville v. Hitchcock, 101 Ill.App. 588.

37. N.J.—Giardelli v. Public Service Ry. Co., 149 A. 39, 8 N.J.Misc. 104.
N.Y.—Group v. Szenher, 20 N.Y.S.2d 803, 260 App.Div. 308, affirmed 31 N.E.2d 508, 284 N.Y. 741—Milio v. Railway Motor Trucking Co., 15 N.Y.S.2d 73, 257 App.Div. 640.
Tex.—Railroad Commission v. Humble Oil & Refining Co., Civ.App., 123 S.W.2d 423, error dismissed.
22 C.J. p 120 note 15.

Speculation by jury

Failure to call a witness within the party's control never authorizes jury to speculate on what the uncalled witness would testify to.—Milio v. Railway Motor Trucking Co., 15 N.Y.S.2d 73, 257 App.Div. 640—Perlman v. Shanck, 182 N.Y.S. 767, 192 App.Div. 179.

38. R.I.—McIver v. Schwartz, 145 A. 101, 50 R.I. 68.
22 C.J. p 120 note 16.

39. Ala.—Elliott v. Northern Alabama Ry. Co., 130 So. 775, 222 Ala. 79.
La.—Di Martino v. Continental Ins. Co. of New York, 175 So. 598, 187 La. 855—Hennessy v. Daigle, 123 So. 900, 11 La.App. 474—Cox v. Magnolia Gas Co., 8 La.App. 103.
Mo.—McClain v. Kansas City Bridge Co., 116 S.W.2d 253, 232 Mo.App. 1189.
N.H.—Stocker v. Boston v. M. R. R., 151 A. 457, 84 N.H. 377, 70 A.L.R. 1320.
Tex.—Davis v. Castile, Com.App., 257 S.W. 870, reversing Payne v. Castille, Civ.App., 244 S.W. 222—Neblett & Norman v. Goukas, Civ.App., 40 S.W.2d 1113.

40. U.S.—Lau Hu Yuen v. U. S., C.C.A.Hawaii, 85 F.2d 327.
Conn.—Middletown Trust Co. v. Bregman, 174 A. 67, 118 Conn. 651.
Ind.—Railway Express Agency v. Bonnell, 33 N.E.2d 980, rehearing denied 34 N.E.2d 927.
Tex.—Wichita Falls, R. & Fort Worth Ry. Co. v. Emberlin, Civ.App., 255 S.W. 796, reversed on other grounds Emberlin v. Wichita Falls, R. & Ft. W. R. Co., Com.App., 267 S.W. 463.
Va.—Hendricks v. Virginia Electric & Power Co., 172 S.E. 160, 161 Va. 793—Hutcheson v. Savings Bank of Richmond, 105 S.E. 677, 129 Va. 281.

Prima facie case as essential

The presumption does not arise until a prima facie case is established by the party on whom the burden of proof rests.
Tex.—Schumacher v. Missouri Pac. Transp. Co., Civ.App., 116 S.W.2d 1136, error dismissed.
Va.—Arnold v. Wood, 3 S.E.2d 374 173 Va. 18.

41. La.—Guaranty Income Life Ins. Co. v. Ball, 141 So. 520, 19 La.App. 759—Franz v. Shushan, 131 So. 591, 14 La.App. 465—Dennis Sheen Transfer Co. v. Mertzweiler, 125 So. 188, 12 La.App. 49.
Mo.—McNicholas v. Continental Baking Co., App., 112 S.W.2d 849—Bowles v. Wabash Ry. Co., App., 271 S.W. 851—Jenkins v. Gordon, App., 256 S.W. 136.
Tex.—Neblett & Norman v. Goukas, Civ.App., 40 S.W.2d 1113.
22 C.J. p 121 note 17.

42. N.H.—Stocker v. Boston & M. R. R., 151 A. 457, 84 N.H. 377, 70 A.L.R. 1320.

43. Wash.—Washington Fire Relief Ass'n v. Albro, 241 P. 356, 137 Wash. 31.
22 C.J. p 121 note 19.

44. W.Va.—Knight v. Capito, 23 W.Va. 639.
22 C.J. p 121 note 20.

45. Ga.—Ward v. Morris, 112 S.E. 719, 153 Ga. 421—Thompson v. Davitte, 59 Ga. 472.

In Illinois

(1) The view has been taken that no unfavorable intendment should be made against a party because he does not testify for himself.—Lowe v. Massey, 62 Ill. 47—Princeville v. Hitchcock, 101 Ill.App. 589.

(2) No presumption of lack of due care arises from plaintiff's failure to testify as to his conduct prior to an accident.—Budek v. City of Chicago, 279 Ill.App. 410.

(3) However, some cases seem to indicate approval of the general rule that, when a party refuses to testify as to relevant matters, the presumption is that the testimony, if given, would be unfavorable to him.—Central Stock & Grain Exchange v. Chicago Bd. of Trade, 63 N.E. 740, 196 Ill. 396—Stamas v. Waskow, 250 Ill.App. 364—Barron v. Levinson, 191 Ill.App. 35.

46. U.S.—Lowenstein v. Reikes, C.C.A.N.Y., 60 F.2d 933, certiorari denied Reikes v. Lowenstein, 53 S.Ct. 315, 287 U.S. 669, 77 L.Ed 577.
La.—J. C. Healy Co. v. Burglass, 1 La.App. 741.
Mo.—Shumate v. Hoefner, 147 S.W.2d 640—Parish v. Casner, 282 S.W. 392—Weil v. Richardson, 24 S.W.2d 175, 224 Mo.App. 990, transferred, see 7 S.W.2d 348, 320 Mo. 310.
N.Y.—Isquith v. Isquith, 242 N.Y.S. 383, 229 App.Div. 555.
22 C.J. p 121 note 22.

Attorney's nonappearance at disciplinary proceeding

Where attorney, accused of soliciting personal injury cases, purposely absented himself at hearing before referee so as to prevent prosecutor of the charges from calling him for cross-examination under the statute, the supreme court would assume that those who secured personal injury cases for him were authorized by him to do what was done to secure them.—In re McDonald, 282 N.W.

refusal to testify[47] as to facts material to his case[48] | and peculiarly within his knowledge[49] creates an in-

677, 204 Minn. 61, rehearing denied 284 N.W. 888, 204 Minn. 61, modified on other grounds 294 N.W. 461.

47. U.S.—Local 167 of International Brotherhood of Teamsters Chauffeurs, Stablemen & Helpers of America v. U. S., N.Y., 54 S.Ct. 396, 291 U.S. 293, 78 L.Ed. 804—U. S. v. Fields, C.C.A.Ark., 102 F.2d 535, 537, quoting **Corpus Juris**—Lowenstein v. Reikes, C.C.A.N.Y., 60 F.2d 993, certiorari denied Reikes v. Lowenstein, 53 S.Ct. 315, 287 U.S. 669, 77 L.Ed. 577—Carter Oil Co. v. McQuigg, D.C.Ill., 27 F. Supp. 182, affirmed, C.C.A., 112 F.2d 275—Kansas City Life Ins. Co. v. Jones, D.C.Cal., 21 F.Supp. 159.

Ala.—Peck v. Henderson, 118 So. 258, 22 Ala.App. 541, certiorari denied 118 So. 262, 218 Ala. 233.

Ark.—Cady v. Guess, 124 S.W.2d 213, 197 Ark. 611.

Colo.—Dresser v. W. H. Mullin Lumber Co., 25 P.2d 936, 93 Colo. 271.

Conn.—Ryan v. Scanlon, 168 A. 17, 117 Conn. 428.

Ind.—Levy v. State, 152 N.E. 873, 86 Ind.App. 666.

Iowa.—Grimes Sav. Bank v. McHarg, 276 N.W. 781, 784, 224 Iowa 644, citing **Corpus Juris.**

Ky.—Baugh v. Williams' Adm'r, 94 S.W.2d 330, 264 Ky. 167—Grand Lodge, Brotherhood of Railroad Trainmen, v. Bash, 66 S.W.2d 25, 251 Ky. 826.

La.—Logan v. Walker, 94 So. 430, 152 La. 880—Zollinger v. Gust, App., 192 So. 132—Crescent Ins. Agency v. Thomas, App., 161 So. 633—Hawkins v. Costley, 123 So. 367, 11 La.App. 602, set aside on other grounds 124 So. 837, 169 La. 229, transferred, see 126 So. 457, 19 La. App. 678—Teissier v. Stewart, 123 So. 174, 11 La.App. 167, denying rehearing 121 So. 777, 11 La.App. 164—A. Stef Lumber Co. v. O'Rourke, 119 So. 572, 9 La.App. 750.

Mass.—Hersey v. Hersey, 171 N.E. 815, 271 Mass. 545, 70 A.L.R. 518.

Mo.—Boillot v. Income Guaranty Co., App., 102 S.W.2d 132, 141, citing **Corpus Juris**—Perles v. Feldman, App., 28 S.W.2d 375—Weil v. Richardson, 24 S.W.2d 175, 224 Mo.App. 990, transferred, see 7 S.W.2d 348, 320 Mo. 310—Henry Evers Mfg. Co. v. Grant, App., 284 S.W. 525—Moore v. Smith, App., 255 S.W. 1071.

Mont.—Hynes v. Silver Prince Mining Co., 281 P. 548, 86 Mont. 10.

N.J.—Lone Star Cement Corporation v. Palmer, 18 A.2d 711, 129 N.J. Eq. 214—Camden Safe Deposit & Trust Co. v. Green, 1 A.2d 308, 124 N.J.Eq. 221—Salzman v. Robinson, 157 A. 547, 10 N.J.Misc. 51.

N.Y.—Polachek v. New York Life Ins. Co., 263 N.Y.S. 230, 147 Misc. 16, affirmed 268 N.Y.S. 995, 240 App.Div. 1028—Hammond v. Hammond, 236 N.Y.S. 100, 134 Misc. 534, affirmed 237 N.Y.S. 557, 227 App.Div. 336.

N.C.—In re Beale's Will, 163 S.E. 684, 202 N.C. 618.

R.I.—Letts v. Holgate, 165 A. 222, 53 R.I. 198.

Tenn.—Hartnett v. Doyle, 64 S.W.2d 227, 16 Tenn.App. 302—Auburn Nashville Company v. Graham, 13 Tenn.App. 444—Columbia Quarry Co. v. Given, Hobbs & Co., 6 Tenn. App. 111.

Tex.—Dallas Joint Stock Land Bank of Dallas v. Harrison, Civ.App., 135 S.W.2d 573, error granted—Fuller v. Texas Park Lot, Civ.App., 133 S.W.2d 605—American General Ins. Co. v. Nance, Civ.App., 60 S.W.2d 280, 284, citing **Corpus Juris,** error refused—Reilly v. Buster, Civ. App., 52 S.W.2d 521, reversed on grounds 82 S.W.2d 931, 125 Tex. 323—McCullough v. McCullough, Civ.App., 20 S.W.2d 224, certified questions answered 36 S.W.2d 459, 120 Tex. 209, and rehearing denied, Civ.App., 39 S.W.2d 105—Vogt v. Guidry, Civ.App., 229 S.W. 656—Donoghue v. Lee, Civ.App., 228 S.W. 957.

Wash.—Yakima First Nat. Bank v. Pettibone, 47 P.2d 997, 182 Wash. 663—Gaskill v. Amadon, 38 P.2d 229, 231, 179 Wash. 375, citing **Corpus Juris**—Glasgow v. Nicholls, 214 P. 165, 169, 124 Wash. 281, 35 A.L.R. 419, citing **Corpus Juris,** affirmed 219 P. 883, 127 Wash. 693, 35 A.L.R. 427, and modified on other grounds 225 P. 1118, 129 Wash. 319.

22 C.J. p 121 note 23, p 122 note 26 [a], [b].

Privilege of refraining from testifying does not protect party from any unfavorable inference which may be drawn from his exercise of such privilege.—Kotler v. Lalley, 151 A. 433, 112 Conn. 86.

Applicability of constitutional prohibitions

"Constitutional protections against the drawing of adverse presumptions from failure to testify . . . [apply] only to criminal cases."—Attorney General v. Pelletier, 134 N.E. 407, 423, 240 Mass. 264.

48. U.S.—Wahlgren v. Bausch & Lomb Optical Co., C.C.A.Ill., 68 F.2d 360, affirming, D.C., Bausch & Lomb Optical Co. v. Wahlgren, 1 F.Supp. 799, and certiorari denied Wahlgren v. Bausch & Lomb Optical Co., 54 S.Ct. 774, 292 U.S. 639, 78 L.Ed. 1491, rehearing denied 54 S.Ct. 862, 292 U.S. 615, 78 L.Ed. 1491.

Kan.—Donley v. Amerada Petroleum Corporation, 106 P.2d 652, 152 Kan. 518.

Mo.—Guthrie v. Gillespie, 6 S.W.2d 886, 319 Mo. 1137.

Tenn.—City Nat. Bank v. Harle, 7 Tenn.App. 286.

Tex.—Liddell v. Gordon, Civ.App., 241 S.W. 750, reversed on other grounds, Com.App., 254 S.W. 1098.

22 C.J. p 121 note 24.

49. U.S.—U. S. v. Fields, C.C.A.Ark., 102 F.2d 535, 537, quoting **Corpus Juris**—U. S. v. Mammoth Oil Co., C.C.A.Wyo., 14 F.2d 705, reversing, D.C., 5 F.2d 330, and certiorari granted Mammoth Oil Co. v. U. S., 47 S.Ct. 332, 273 U.S. 686, 71 L.Ed. 840, affirmed 48 S.Ct. 1, 275 U.S. 13, 72 L.Ed. 137—Hansel v. Purnell, C.C.A.Mich., 1 F.2d 266, certiorari denied Purnell v. Hansell, 45 S.Ct. 98, 266 U.S. 617, 69 L.Ed. 470

Ala.—Newell Contracting Co. v. Berry, 134 So. 870, 223 Ala. 109—Donald v. Swann, 137 So. 178, 181, 24 Ala.App. 463, citing **Corpus Juris,** and certiorari denied 137 So. 181, 223 Ala. 493.

Ariz.—Starkweather v. Conner, 38 P. 2d 311, 44 Ariz. 369.

Idaho.—Coeur D'Alenes Lead Co. v. Kingsbury, 85 P.2d 691, 59 Idaho 627.

Ind.—Great American Tea Co. v. Van Buren, 33 N.E.2d 530.

Iowa.—Henderson v. Ball, 186 N.W. 668, 193 Iowa 812.

Kan.—Donley v. Amerada Petroleum Corporation, 106 P.2d 652, 152 Kan. 518.

Ky.—Guthrie v. Foster, 76 S.W.2d 927, 256 Ky. 753.

La.—Succession of Roque, 146 So. 477, 176 La. 711—J. C. Healy Co. v. Burglass, 1 La.App. 741.

Mich.—Peck v. Hampel, 291 N.W. 648, 652, 293 Mich. 252, quoting **Corpus Juris**—Jaffe v. Ackerman, 272 N.W. 685, 279 Mich. 304.

Mo.—Russell v. Franks, 120 S.W.2d 37, 343 Mo. 159—Baker v. Chicago, B. & Q. R. Co., 39 S.W.2d 535, 327 Mo. 986—Parish v. Casner, 282 S.W. 392—Sanders v. Kaster, 222 S.W. 133—Boillot v. Income Guaranty Co., 102 S.W.2d 132, 140, 231 Mo.App. 531, citing **Corpus Juris**—Jegglin v. Orr, 29 S.W.2d 721, 224 Mo.App. 773.

Neb.—Alexander v. Turner, 297 N.W. 539—Talich v. Marvel, 212 N.W. 540, 115 Neb. 255.

Nev.—Studebaker Bros. Co. of Utah v. Witcher, 199 P. 477, 44 Nev. 468, rehearing denied 201 P. 322, 44 Nev. 468.

N.J.—Wratchford v. Millburn Tp., 146 A. 201, 105 N.J.Law 657, affirming 141 A. 740, 6 N.J.Misc. 483.

N.Y.—Isquith v. Isquith, 242 N.Y.S. 383, 229 App.Div. 555.

N.C.—York v. York, 194 S.E. 486, 212 N.C. 695.

Okl.—Saddler v. Watkins, 36 P.2d 760,

ference that he refrained from appearing or testifying because the truth, if made to appear, would not aid his contention.

However, the general rule is not applicable in all circumstances.[50] It does not apply where the testimony of the party is unnecessary,[51] or where his failure to testify is fully and satisfactorily explained.[52] Further, no unfavorable inference may be drawn where it is shown that the party has no personal knowledge of the facts in issue,[53] or where the facts within his knowledge have been otherwise fully established,[54] as, for example, by deposition,[55] interrogatories,[56] or by testimony at a former proceeding.[57]

No unfavorable inference results from the failure of the party to testify where he is unavoidably absent from the trial,[58] where his mind is impaired,[59] or where he is incompetent as a witness;[60] but a claim that a party was too nervous to attend the trial and testify has been held to be insufficient to prevent unfavorable inferences arising from his failure.[61]

Necessity for prima facie case. Where the party on whom the burden of proof rests has failed to make out a prima facie case, the absence of the adverse party, or his failure to testify, raises no unfavorable inference against him.[62]

Evasive answers given by a party when testifying

169 Okl. 279—Stricker v. Billingsley, 36 P.2d 474, 169 Okl. 145.
Or.—Bays v. Brown, 86 P.2d 951, 160 Or. 594.
Tenn.—Walden v. Walden, 13 Tenn. App. 337—Stumb Motor Co. v. Patterson, 9 Tenn.App. 29—Nobles v. Farmer, 9 Tenn.App. 6—Citizens Bank v. Langford, 6 Tenn.App. 238.
Tex.—Craycroft v. Crawford, Com. App., 285 S.W. 275, reversing, Civ. App., 275 S.W. 124, rehearing denied Com.App., 287 S.W. 244—Mrs. Baird's Bakery v. Davis, Civ App., 54 S.W.2d 1031—Miller v. Head, Civ App. 283 S.W. 886.
Vt.—Barilone Sons Const. Co. v. Reynolds, 199 A. 259, 109 Vt. 436.
Va.—Roanoke Railway & Electric Co. v. Whitner, 3 S.E.2d 169, 173 Va. 253—Eppes v. Eppes, 195 S.E. 694, 169 Va. 778—Sadler v. Marsden, 168 S.E. 357, 160 Va. 392—Puckett v. Draper, 158 S.E. 68, 156 Va. 238.
22 C.J. p 121 note 25—27 C.J. p 803 notes 86, 88.

50. Ohio.—Cincinnati Traction Co. v. Reis, 17 Ohio App. 198.
Va.—Boggs v. Snoddy, 131 S.E. 830, 146 Va. 325.

51. Cal.—Fraters Glass & Paint Co. v. Southwestern Const. Co., 290 P. 45, 107 Cal.App. 1.
Mich.—Farrand v. Aldrich, 48 N.W. 628, 85 Mich. 593.
Mo.—Houghton v. Jacobs, 246 S.W. 285.
Or.—Lehl v. Hull, 54 P.2d 290, 152 Or. 470, denying rehearing 53 P.2d 48, 152 Or. 470.

Questions relating to immaterial matters

Failure to answer two questions on cross-examination did not authorize an inference of withholding facts where questions related to immaterial matters, and witness thought he was being teased and refused to answer.—Baumeister, Vollmer & Scott Bank v. Talbott, 225 P. 238, 129 Wash. 509.

52. Ind.—Empire Health & Accident Ins. Co. v. Purcell, 132 N.E. 664, 76 Ind.App. 551.
Iowa.—Browne v. Johnson, 255 N.W. 862, 218 Iowa 498.
Mo.—Boillot v. Income Guaranty Co., 102 S.W.2d 132, 231 Mo.App. 531.
22 C.J. p 123 notes 37–40.

53. Va.—Murphy's Hotel Co. v. Herndon, 91 S.E 634, 120 Va. 505.
22 C.J. p 123 note 34.

Condition of insured's health

In an action on a life insurance policy where the defense of misrepresentations was interposed, evidence did not show that the condition of insured's health at the time of delivery of policy was peculiarly within the knowledge of plaintiffs, so that their failure to testify precluded recovery.—Burgess v. Pan-American Life Ins. Co., Mo., 230 S.W. 315, reversing, App., 211 S.W. 114.

54. U.S.—Omar Oil & Gas Co. v. Bair Oil Co., D C Wyo., 285 F. 588.

55. Mo.—Metropolitan Life Ins. Co. v. Underwood, 256 S.W. 232, 301 Mo. 87—Clapp v. Kenley, 210 S.W. 10, 277 Mo. 380—Lamport v. General Accident, Fire & Life Assur. Corp., 197 S.W. 95, 272 Mo. 19.

56. Mass.—Bresnick v. Heath, 198 N.E. 175, 177, 292 Mass. 293.

Sufficiency in all cases

"Merely because a party has answered interrogatories may not be enough in all cases to avoid the adverse inference from failure to give testimony on the witness stand."—Bresnick v. Heath, supra.

57. Mo.—Boillot v. Income Guaranty Co., 102 S.W.2d 132, 231 Mo. App. 531.
N.J.—McMaster v. Henkel, 196 A. 439, 123 N.J.Eq. 184.

58. Ala.—Pollak v. Davidson, 6 So. 312, 87 Ala. 551.
22 C.J. p 123 note 38.

Ill health

Ind.—State v. McNelis, 122 N.E. 690, 72 Ind App 231.
22 C.J. p 123 note 38 [a].

Old age

That party, who failed to appear as witness, was seventy-eight years old, was not sufficient to toll rule that where material witness is available, and not produced without reasonable excuse, it will be considered that such witness, if called, would not support party who should have produced witness.—Kansas City Life Ins. Co v. Jones, D.C.Cal., 21 F. Supp. 159.

59. Ind.—Empire Health & Accident Ins. Co. v. Purcell, 132 N.E. 664, 76 Ind.App. 551.
22 C J. p 123 note 39.

60. Iowa.—Browne v. Johnson, 255 N.W. 862, 218 Iowa 498.
Mo.—Allen West Commission Co. v. Richter, 228 S.W. 827—Swearingen v. Moore, 257 S.W. 815, 215 Mo.App. 531.
Ohio.—Leen v. Leen, 6 Ohio App. 254.
22 C.J. p 123 note 40.

61. Mich.—Woodward v. Walker, 158 N.W. 846, 192 Mich. 188.

62. U.S.—U. S. v. Mammoth Oil Co., C.C.A.Wyo., 14 F.2d 705, reversing, D.C., 5 F.2d 330, and certiorari granted Mammoth Oil Co. v. U. S., 47 S.Ct. 332, 273 U.S. 686, 71 L.Ed 840, affirmed 48 S.Ct. 1, 275 U.S. 13, 72 L.Ed. 137.
Mass.—Hinds v. Bowen, 167 N.E. 332, 268 Mass. 55—Bishop v. Pastorelli, 132 N.E. 716, 240 Mass. 104.
Mo.—Russell v. Franks, 120 S.W.2d 37, 343 Mo. 159—Russell v. St. Louis-San Francisco Ry. Co., 81 S.W. 2d 621, 623, 336 Mo. 845, citing **Corpus Juris**—Shidloski v. New York, C. & St. L. R. Co., 64 S.W. 2d 259, 333 Mo. 1134—Frohman v. Lowenstein, 260 S.W. 460, 303 Mo. 339—Allen West Commission v. Richter, 228 S.W. 827—Bahl v. Miles, 6 S.W.2d 661, 664, 222 Mo. App. 984, citing **Corpus Juris.**
Tenn.—Pickard v. Berryman, 142 S.W 2d 764, 769, citing **Corpus Juris**—Auburn Nashville Company v. Graham, 13 Tenn.App. 444.
22 C.J. p 123 note 36.

Duty to speak

Party charged need not speak until

as a witness have practically the same effect as a refusal to testify, and warrant an inference that direct and truthful answers would have been unfavorable to his contentions.[63]

Strength of inference. The inference arising from the failure of a party to testify does not take the place of evidence of material facts,[64] or shift the burden of proof as to relieve the party on whom rests the duty of establishing a prima facie case.[65] Moreover, there is no rule which binds the jury to look to the inference to the exclusion of, or as negativing, positive testimony.[66]

However, the failure of a party to appear or to testify is a circumstance to be considered by the court or jury in the determination of questions of fact on which the testimony of the party would have shed light,[67] and in connection with an unequivocal statement on the other side, which, if untrue, could be disproved by his testimony, often furnishes strong evidence of the fact asserted.[68]

e. Exclusion of Privileged Communication

A party's failure to produce, or his refusal to consent to the admission of, testimony of a witness as to privileged communications generally gives rise to no unfavorable inference.

other party has introduced evidence making case against him.
Mo.—Shidloski v. New York, C. & St. L. R. Co., 64 S.W.2d 259, 333 Mo. 1134—Bahl v. Miles, 6 S.W.2d 661, 222 Mo.App. 984.
R.I.—Misch v. Montgomery, 200 A. 999, 61 R.I. 345, affirmed 3 A.2d 816.

Relying on adversary's evidence
If all doubt as to the truthfulness of one party's contention is removed by positive evidence proceeding from the witnesses introduced against him, no presumption detrimental to him can be indulged from his failure to testify, as without subjecting himself to the imputation of withholding evidence he may properly rely on that which his adversary introduces, where it is uncontradicted.—Citizens' Bank of Union v. Hilkemeyer, 29 S.W.2d 1090, 325 Mo. 849—Missouri Interstate Paper Co v. Gresham, 116 S.W.2d 228, 233 Mo. App. 5—22 C.J. p 123 note 35.

63. Ala.—Kirkland v. Kirkland, 181 So. 96, 236 Ala. 120
Mass.—Cardoza v. Isherwood, 154 N E 859, 258 Mass. 165.
22 C.J. p 122 note 27.

64. Conn.—Doty v. Wheeler, 182 A. 468, 120 Conn. 672—Middletown Trust Co. v. Bregman, 174 A. 67, 71, 118 Conn. 651, citing **Corpus Juris.**
Mass.—Stimpson v. Hunter, 125 N E. 155, 234 Mass. 61, 7 A.L.R. 1067.
Mo.—Guthrie v Gillespie, 6 S.W.2d 886, 890, 319 Mo. 1137, citing **Corpus Juris.**
N.Y.—Polachek v. New York Life Ins. Co., 263 N.Y.S. 230, 147 Misc. 16, affirmed 268 N.Y.S 995, 240 App.Div. 1028—Hammond v. Hammond, 236 N.Y.S 100, 134 Misc. 534, affirmed 237 N.Y.S 557, 227 App.Div. 336—Price v. Price, 178 N.Y.S. 561, affirmed 185 N.Y.S. 570, 194 App.Div. 158.
Ohio.—Cincinnati Traction Co. v. Reis, 17 Ohio App. 198.
22 C.J. p 122 note 29.
Failure of party to testify as constituting admission of truth of adversary's evidence see infra § 293

Failure to testify as barring defense
The fact that a party defendant fails to testify does not, as a matter of law, prevent him from relying on any legal defense to the suit.—Capen v. Capen, 125 N.E. 692, 234 Mass 355.

65. Conn.—Doty v. Wheeler, 182 A. 468, 120 Conn. 672—Middletown Trust Co. v. Bregman, 174 A. 67, 70, 118 Conn. 651, citing **Corpus Juris.**
Ind.—Great American Tea Co. v. Van Buren, 33 N.E 2d 580.
N.Y.—Meyer v. Minsky, 112 N.Y.S. 860, 128 App.Div. 589.
Pa.—Gilmore v. Alexander, 112 A. 9, 268 Pa. 415.
22 C.J. p 122 note 29 [a].

66. N.Y.—Rhinelander v. Rhinelander, 219 N.Y.S 548, 219 App.Div. 189, affirmed 157 N.E. 838, 245 N.Y 510—Polachek v. New York Life Ins. Co, 263 N.Y.S. 230, 147 Misc 16, affirmed 268 N.Y S 995, 240 App Div. 1028.
22 C.J. p 122 note 30.

67. U.S.—One Buick Automobile v. U. S., C.C.A.Okl., 275 F. 809.
Conn.—Wolf v. Sulik, 106 A. 443, 93 Conn. 431, 4 A.L.R. 356.
Ind.—Great American Tea Co. v. Van Buren, 33 N.E.2d 580.
Ky.—Guthrie v. Foster, 76 S.W.2d 927, 256 Ky. 753.
Mass.—Wilson v. Grace, 173 N.E 524, 273 Mass. 146—Attorney General v. Pelletier, 134 N.E. 407, 240 Mass. 264—Capen v. Capen, 125 N E 692, 234 Mass. 355.
Mich.—Detroit Trust Co. v. Hockett, 270 N.W. 243, 278 Mich. 124.
Mo.—Guthrie v. Gillespie, 6 S.W.2d 886, 890, 319 Mo. 1137, citing **Corpus Juris**—Givens v. Spalding Cloak Co., 63 S.W.2d 819, 228 Mo. App. 169.
Neb.—Alexander v. Turner, 297 N. W. 589—Talich v. Marvel, 212 N. W. 540, 115 Neb. 255.
N.H.—Tuttle v. Dodge, 116 A. 627, 80 N.H. 304.
N.M.—Telman v. Galles, 63 P.2d 1049, 41 N.M. 56.
N.Y.—Townley v. Polansky, 173 N. Y.S. 677, 185 App.Div. 685—Meyer v. Minsky, 112 N.Y.S. 860, 128 App. Div. 589.
Tex.—Martin v. Cable, Civ.App., 140 S.W.2d 894—C. V. Hill & Co. v. Fricke, Civ.App., 135 S.W.2d 582, error dismissed, judgment correct—American General Ins. Co. v. Nance, 60 S.W.2d 280, 284, citing **Corpus Juris,** and error refused—Donoghue v. Lee, Civ.App., 228 S. W. 957.
Wash.—Roe v. Duty, 197 P. 47, 115 Wash. 692.
22 C.J. p 122 note 31.
Instructions bearing on party's failure to testify see the C.J.S. title Trial § 271, also 22 C.J. p 122 note 31 [a], 64 C.J. p 515 notes 86–97.

68. Mo.—Givens v. Spalding Cloak Co., 63 S.W.2d 819, 228 Mo.App. 169.
Tenn.—Pickard v. Berryman, App., 142 S.W.2d 764.
Tex.—Miller v. Dyess, 151 S.W.2d 186, reversing, Civ.App., Dyess v. Miller, 126 S.W.2d 538—Central Motor Co. v. Roberson, Civ.App., 139 S.W.2d 287—Dallas Joint Stock Land Bank of Dallas v. Harrison, Civ.App., 135 S.W.2d 573, error granted—Kadane v. Clark, Civ. App., 134 S.W.2d 448, reversed on other grounds 143 S.W.2d 197, 135 Tex. 496—Moos v. First State Bank of Uvalde, Civ.App., 60 S.W.2d 888, error dismissed.
22 C.J. p 122 note 32.

When evidence is closely balanced, the inference arising from a party's failure to testify may turn the scales—Doty v. Wheeler, 182 A. 468, 120 Conn. 672—Middletown Trust Co. v. Bregman, 174 A. 67, 118 Conn. 651.

Allegation of fraud
(1) Where a party is accused of fraud and makes no denial of the accusation there is a particularly strong inference against him.—Mathews v. O'Donnell, 233 S.W. 451, 289 Mo. 235—22 C.J. p 122 note 32 [a].

(2) Such inference may even authorize rendition of a judgment against him.—Van Ingen v. Peterson, 31 Ohio Cir.Ct. 506.

The more generally accepted view is that no unfavorable inference arises from a party's failure to produce, or refusal to consent to the admission of, testimony of a witness as to privileged communications between himself and such party;[69] but there is also authority for the view that under such circumstances an unfavorable inference will arise[70] or may be drawn by the jury.[71]

§ 157. Presumptions Arising from Attempts to Prevent Investigation

An attempt to prevent an investigation of the matter in controversy may raise a presumption adverse to a party.

Where a party attempts to prevent an investigation of the matter in controversy, such attempt may be shown, and will raise a presumption adverse to him.[72]

V. RELEVANCY AND MATERIALITY GENERALLY

A. GENERAL RULES

§ 158. Logical Relevancy

"Logical relevancy" in evidence may be defined as the existence of such a relationship in logic between the fact of which evidence is offered and a fact in issue that the existence of the former renders probable or improbable the existence of the latter.

Logic is the controlling factor in the modern law of evidence. An offer of a party to prove a fact in evidence involves an assertion by him that such a relation exists in reason as a matter of logic between the fact offered and a fact in issue that the existence of the former renders probable or improbable the existence of the latter, and the relation thus asserted is termed "relevancy."[73] It is, therefore, a basic rule of evidence that evidence of whatever facts are logically relevant to the issue is legally admissible[74] except as it may be excluded by

69. N.D.—Meyer v. Russell, 214 N.W. 857, 55 N.D. 546.
22 C.J. p 124 note 46.

Physician and patient

(1) Where communications between a physician and patient are privileged, the failure of the patient to call the physician as a witness does not give rise to an inference that if the physician were called his testimony would be adverse.
U.S.—Halsband v. Columbian Nat. Life Ins. Co., C.C.A.N.Y., 67 F.2d 863, certiorari denied Columbian Nat. Life Ins. Co. v. Halsband, 54 S.Ct. 531, 291 U.S. 681, 78 L.Ed. 1068.
Ind.—Rump v. Woods, 98 N.E. 369, 50 Ind.App. 347.
Miss.—Beard v. Williams, 161 So. 750, 172 Miss. 880—Hobson v. McLeod, 147 So. 778, 165 Miss. 853.
N.D.—Meyer v. Russell, 214 N.W. 857, 55 N.D. 546.

(2) Failure to call as witnesses physicians first attending injured plaintiff does not permit presumption that their testimony would have been unfavorable.—Merrill v. St. Paul City Ry. Co., 212 N.W. 533, 170 Minn. 332.

70. Mo.—Willitts v. Chicago, B. & Q. R. Co., 221 S.W. 65.
22 C.J. p 124 note 47.

Physician and patient

Mo.—McInnis v. St. Louis-Southern, 108 S.W.2d 113, 341 Mo. 677—Willitts v. Chicago, B. & Q. R. Co., 221 S.W. 65—Crapson v. United Chatauqua Co., App., 37 S.W.2d 966—Donet v. Prudential Ins. Co. of America, App., 23 S.W.2d 1104—Bowles v. Wabash Ry. Co., App., 271 S.W. 851—Whitmore v. American Ry. Express Co., 269 S.W. 654, 219 Mo.App. 294.

71. N.Y.—Meditz v. Liggett & Myers Tobacco Co., 3 N.Y.S.2d 357, 167 Misc. 176, affirmed 25 N.Y.S.2d 315.
22 C.J. p 124 note 48.

72. Ky.—Hodges v. Murray, 41 S.W.2d 923, 927, 240 Ky. 127, citing **Corpus Juris.**
Mo.—Polk v. Missouri-Kansas-Texas R. Co., 142 S.W.2d 1061, 1063, citing **Corpus Juris.**
22 C.J. p 124 note 49.

73. Wash.—Johnson v. Ben Olson Co., 278 P. 699, 701, 152 Wash. 646, 66 A.L.R. 77, quoting **Corpus Juris.**
22 C.J. p 158 notes 51, 52.

Relevancy

(1) Relevancy is a logical relationship between evidence and a fact in issue or to be established.
Ga.—Continental Trust Co. v. Bank of Harrison, 136 S.E. 319, 36 Ga.App. 149, conforming to answer to certified questions 134 S.E. 775, 162 Ga. 758, 50 A.L.R. 412—O'Berry v. Davis, 121 S.E. 357, 31 Ga.App. 755.
Mich.—Detroit Iron & Steel Co. v. Detroit Gray Iron Foundry Co., 216 N.W. 391, 240 Mich. 677.
Tex.—Hussmann v. Leavell & Sherman, Civ.App., 20 S.W.2d 829, affirmed Hussman v. Leavell & Sherman, Com.App., 32 S.W.2d 643.
Wash.—Keisel v. Bredick, 74 P.2d 473, 192 Wash. 665.

(2) Relevancy is that quality of evidence which renders it properly applicable in determining the truth or falsity of a matter in issue.
U.S.—Interstate Commerce Commission v. Baird, N.Y., 24 S.Ct. 563, 194 U.S. 25, 48 L.Ed. 860.
S.C.—Dickson's Drug Store v. Davis, 15 S.E.2d 332.

(3) Relevancy of evidence is dependent on probative value—West Chester Sav. Bank of West Chester v. Dayton, 250 N.W. 695, 217 Iowa 64.

(4) Whatever it is necessary for the court to know in order to reach a just conclusion is relevant.—Ismert-Hincke Milling Co. v. Mercurio Bros. Spaghetti Mfg. Co., Mo.App., 243 S.W. 408.

Proof

Generally, any fact or circumstance which leads mind to affirmative or negative of any proposition constitutes "proof."—Levine v. New York Life Ins. Co., 280 N.Y.S. 468, 155 Misc. 806, affirmed 285 N.Y.S. 532, 246 App.Div. 703.

74. U.S.—New England Trust Co. v. Farr, C.C.A.Mass., 57 F.2d 103, certiorari denied 53 S.Ct. 14, 287 U.S. 612, 77 L.Ed. 532.
Ala.—Pitts v. Ross, 134 So. 629, 630, 223 Ala. 35, citing **Corpus Juris.**
Cal.—Byer v. Canadian Bank of Commerce, App., 57 P.2d 985, 988, citing **Corpus Juris,** and affirmed 65 P.2d 67, 8 Cal.2d 297.
Md.—Merryman v. Baltimore City, 138 A. 324, 153 Md. 419.
Mo.—Nall v. Brennan, 23 S.W.2d 1053, 324 Mo. 565, 68 A.L.R. 684—Moore v. Home Ins. Co., App., 73 S.W.2d 297, 299, citing **Corpus Juris.**
N.H.—Bunten v. Davis, 133 A. 16, 82 N.H. 304, 45 A.L.R. 1409.
N.J.—Hampton v. Pennsylvania R. Co., 179 A. 101, 115 N.J.Law 168—Appelbaum v. Prudential Ins. Co.

some specific rule or principle of law,[75] while evidence of facts which are not logically relevant to the issue is not admissible,[76] the onus of showing the relevancy intrinsically or in connection with other facts of a fact offered in evidence being on the party offering the evidence.[77] It follows, there-

of America, 169 A. 677, 12 N.J. Misc. 62.
Pa.—Commercial Credit Co. v. Commercial Banking Corporation, 46 Dauph Co. 323.
Tex.—Lange Cable Tool Drilling Co. v. Barnett Petroleum Corporation, Civ.App., 142 S.W.2d 833—Hussmann v. Leavell & Sherman, Civ. App., 20 S.W.2d 829, affirmed, Com. App., 32 S.W.2d 643.
22 C.J. p 158 note 53.

Conduct of witness, such as a dramatic appearance in the courtroom at an opportune moment has been held not to make his evidence incompetent.—Neal v. Kansas City Rys. Co., Mo., 229 S.W. 215.

Corpus Juris statement cited in support of rule in criminal proceedings.—State v. Berenson, 260 N.W. 256, 260, 65 N.D. 480.

Evidence touching or bearing on issues is relevant.—O'Berry v. Davis, 121 S.E. 857, 31 Ga.App. 755—22 C.J. p 158 note 52 [a].

75. U.S.—Hadley v. Baltimore & O. R. Co., C.C.A.Pa., 120 F.2d 993.
Conn.—Carroll v. Arnold, 141 A. 657, 107 Conn. 535—Alfred Atmore Pope Foundation v. New York, N. H. & H. R. Co., 138 A. 444, 106 Conn. 423.
Fla.—Woodruff v. Lantana Finance Corporation, 136 So. 712, 102 Fla. 950.
N.H.—Gerry v. Neugebauer, 136 A. 751, 83 N.H. 23—Mason v. Dover S. & R. St. Ry., 109 A. 841, 79 N.H. 300.
Pa.—In re Ryman, 11 A.2d 677, 139 Pa.Super. 212.
S.C.—Wimberly v. Sovereign Camp, W. O. W., 2 S.E.2d 532, 190 S.C. 158—Holman v. City of Orangeburg, 110 S.E. 674, 118 S.C. 361.
22 C.J. p 158 note 53 [a]–[c].

76. U.S.—National Labor Relations Board v. Bell Oil & Gas Co., C.C.A., 98 F.2d 406, rehearing denied 98 F.2d 870—Brett v. U. S., C.C.A. Wash., 86 F.2d 305, 308, citing **Corpus Juris**—Oklahoma Gas & Electric Co. v. Bates Expanded Steel Truss Co., D.C.Del., 296 F. 281.
Ala.—Oden-Elliott Lumber Co. v. Butler County Bank, 104 So. 3, 213 Ala. 84—Bradford v. Lawrence, 94 So. 103, 208 Ala. 248—Rattray v. W. P. Brown & Sons Lumber Co., 192 So. 285, 29 Ala.App. 93, certiorari denied 192 So. 288, 238 Ala. 548.
Ark.—Coca-Cola Bottling Co. v. Shipp, 297 S.W. 856, 174 Ark. 130.
Cal.—In re Horton's Estate, 17 P.2d 184, 128 Cal.App. 249.
Fla.—Atlantic Coast Line R. Co. v. Campbell, 139 So. 886, 104 Fla. 274.
Ga.—Wilson v. Willingham-Tift Lumber Co., 5 S.E.2d 611, 60 Ga.App. 901—Stalvey v. Varn Motors & Finance Co., 193 S.E. 627, 56 Ga. App. 696—City of East Point v. Christian, 151 S.E. 42, 40 Ga.App. 633—Ninth Dist. Agricultural and Mechanical School v. Wofford Power Co., 139 S.E. 916, 37 Ga.App. 271—Bush v. Cowart & Dancer, 117 S.E. 104, 30 Ga.App. 138, affirmed 121 S.E. 687, 157 Ga. 746—Jones v. Teasley, 105 S.E. 46, 25 Ga.App. 784—Pope v. Peeples, 101 S.E. 303, 24 Ga.App. 467.
Ill.—Ater v. McClure, 161 N.E. 129, 329 Ill. 519.
Iowa.—Floyd & Newland v. Serenado Mfg. Co., 193 N.W. 581, 196 Iowa 6.
Ky.—Blanton v. Wilson, 28 S.W.2d 970, 234 Ky. 637—Wells v. West, 15 S.W.2d 531, 228 Ky. 737—National Union Fire Ins. Co. v. Forkner, 292 S.W. 765, 219 Ky. 119.
Md.—Parks v. Skipper, 165 A. 319, 164 Md. 388—Frey & Son v. Magness, 157 A. 400, 161 Md. 375—Nelson v. Seiler, 139 A. 564, 154 Md. 63.
Mo.—State v. Day, 47 S.W.2d 147, 149, 226 Mo.App. 884, citing **Corpus Juris.**
N.J.—Kessler v. Sheldon, 131 A. 897, 99 N.J.Eq. 369—Kahala v. Aldrich, 167 A. 772, 11 N.J.Misc. 680, affirmed 169 A. 291, 112 N.J.Law 18—Daniel v. Elmer, 167 A. 751, 11 N.J.Misc. 632, rule discharged 173 A. 911, 113 N.J.Law 227—U. S. Agency v. Metropolitan Lumber Co., 137 A. 432, 5 N.J.Misc. 564—Eannetta v. Delaware, L. & W. R. Co., 129 A. 232, 3 N.J.Misc. 834.
N.Y.—Sandy v. Wicks, 24 N.Y.S.2d 424, 260 App.Div. 1046.
N.C.—Peebles v. Idol, 150 S.E. 665, 198 N.C. 56—Godfrey v. Western Carolina Power Co., 128 S.E. 485, 190 N.C. 24—Dellinger v. Elliot Bldg. Co., 123 S.E. 78, 187 N.C. 845.
Ohio.—Wilson v. Wesler, 160 N.E. 863, 27 Ohio App. 386.
Okl.—Keahey v. Craig, 96 P.2d 521, 186 Okl. 162—Pratt v. Hancock, 246 P. 220, 117 Okl. 300.
Or.—Prouty Lumber & Box Co. v. Cogan, 200 P. 905, 101 Or. 382.
Pa.—Rich Hill Coal Co. v. Bashore, 7 A.2d 302, 334 Pa. 449—Fisher v. Philadelphia Rapid Transit Co., 110 A. 149, 267 Pa. 99—Reifsnyder v. Eberly, 53 York Leg.Rec. 50.
Philippine.—Roxas v. Aguirre, 9 Philippine 475—Evangelista v. Tabayuyong, 7 Philippine 607—Frankel v. Clarke, 5 Philippine 349—Lim-Chingco v. Terariray, 5 Philippine 120—Infante v. Figueras, 4 Philippine 738—Espiritu v. Deseo, 1 Philippine 225.
R.I.—Orleck v. Nemtzow, 195 A. 234, 59 R.I. 284—Correy v. Michaelovitch, 128 A. 673, 46 R.I. 387, 39 A.L.R. 374.
S.C.—Holman v. City of Orangeburg, 110 S.E. 674, 118 S.C. 361.
Tenn.—Pilcher v. Rylee, 2 Tenn.App. 348.
Tex.—Pitts v. Camp County, 39 S.W.2d 608, 120 Tex. 558, answers to certified questions conformed to, Civ.App., 42 S.W.2d 853—Pound v. Popular Dry Goods Co., Civ.App., 139 S.W.2d 341—Sonken-Galamba Corporation v. Hillman, Civ.App., 111 S.W.2d 853, error dismissed—Estes v. Davis, Civ.App., 28 S.W.2d 565, affirmed Davis v. Estes, Com.App., 44 S.W.2d 952—Roberts v. Nowlin, Civ.App., 9 S.W.2d 69—Thos. W. Blake Lumber Co. v. Guaranty State Bank of Woodville, Civ.App., 290 S.W. 187.
Utah.—Building Service Employees Local No. 59 v. Newhouse Realty Co., 95 P.2d 507, 97 Utah 562.
Wash.—Nicktovich v. Olympic Motor Transit Co., 272 P. 736, 150 Wash. 278.
W.Va.—Mercer Funeral Home v. Addison Bros. & Smith, 163 S.E. 439, 111 W.Va. 616—Sycamore Coal Co. v. Adkins, 133 S.E. 330, 101 W.Va. 211.
22 C.J. p 159 note 54—40 C.J. p 462 note 8—53 C.J. p 1029 note 91.
Evidence admissible under pleadings see the C.J.S. title Pleading §§ 524–530, also 49 C.J. p 791 note 15–p 804 note 1.

Collateral facts are, generally speaking, inadmissible.
Md.—Lee v. Tinges, 7 Md. 215.
N.Y.—In re Dale's Will, 288 N.Y.S. 564, 159 Misc. 578.
22 C.J. p 159 note 54 [c], [d].

Exhibit which does not tend either to establish or to disprove any matter in issue is properly rejected.—Adamson v. Mattson, 185 P. 553, 32 Idaho 493.

Superseded or abandoned pleadings

The relevancy of superseded or abandoned pleadings offered in evidence must be determined by the rules governing the admissibility of other evidence.—Hudson v. Slate, 117 S.W. 469, 53 Tex.Civ.App. 453.

77. Tex.—Missouri, K. & T. R. Co. v. Golson, Civ.App., 133 S.W. 456.
22 C.J. p 161 note 55.
Offer of proof see the C.J.S. title Trial § 77, also 64 C.J. p 126 notes 32–35.
Order of proof see the C.J.S. title Trial § 97, also 64 C.J. p 148 note 35–p 150 note 49.

fore, that the rules of evidence are largely those of exclusion.[78]

The rules of evidence are designed to secure an orderly administration of the law[79] and must be given a reasonable and liberal construction to meet and serve the purposes and requirements of changing conditions,[80] avoiding highly refined and metaphysical distinctions;[81] but in a judicial hearing fair rules of evidence are essential.[82] The admissibility of evidence must depend on sound legal principles and not on the discretion of the trial court,[83] although, on the other hand, it cannot depend entirely on fixed and definite rules.[84]

No precise and universal test of relevancy is furnished by the law[85] but the determination of whether particular evidence is relevant rests largely in the discretion of the court,[86] which must be exercised according to the teachings of reason and judicial experience.[87]

Materiality of fact or issue. The admissibility of evidence depends on the question at issue.[88] Relevancy depends not only on logical relationship between the evidence offered and the particular fact but also on such a relationship to a fact which is material,[89] and evidence is not made relevant by being directed to proof of an immaterial issue.[90] No test of relevancy is furnished by a consideration of whether or not an issue raised by the pleadings will be submitted to the jury.[91]

Time of determination. The admissibility of evidence must be determined as of the time at which it is offered.[92]

Civil and criminal proceedings. The rules governing the admissibility of evidence and the tests of its relevancy are in general, as stated in Criminal Law § 600, the same in civil actions and criminal prosecutions.

§ 159. Legal Relevancy or Materiality

Relevant or material evidence is evidence which is not only logically relevant but is of sufficient probative value in the particular case to justify its admission.

Notwithstanding evidence may be logically relevant as the term has been discussed in the preceding section, its admission must be subject to the primary test of its value in the particular case,[93] and in the case of a trial by jury to its fitness to be considered by the jury.[94] The practical conditions under which cases are tried do not always permit the court to hear all the facts which may be in any degree logically relevant to the issue, but require that facts received shall have a somewhat higher degree of probative force, which may be termed "legal relevancy" or "materiality,"[95] and evidence

78. Conn.—Plumb v. Curtis, 33 A. 998, 66 Conn. 154.
22 C.J. p 161 notes 56–60.
"Evidence is admitted, not because it is shown to be competent, but because it is not shown to be incompetent."—Alfred Atmore Pope Foundation v. New York, N. H. & H. R. Co., 138 A. 444, 448, 106 Conn. 423—Johnson v. Shuford, 98 A. 333, 334, 91 Conn. 1—McDonough v. Cohen, 97 A. 861, 862, 90 Conn. 469—Plumb v. Curtis, 33 A. 998, 1000, 66 Conn. 154.

79. Del.—South Atlantic S. S. Co. of Delaware v. Munkacsy, 187 A. 600, 7 W.W.Harr. 580, certiorari denied 57 S.Ct. 233, 299 U.S. 607, 81 L.Ed. 448.

80. Ala.—Woodmen of the World Life Ins. Soc. v. Guyton, 194 So. 655, 239 Ala. 216.

81. Mo.—Lorenzen v. United Rys. Co. of St. Louis, 155 S.W. 30, 249 Mo. 182.

82. U.S.—National Labor Relations Board v. Bell Oil & Gas Co., C.C.A., 98 F.2d 406, rehearing denied 98 F.2d 870.

83. Va.—Crowson v. Swan, 178 S.E. 898, 164 Va. 82.

84. Nonexistence of definite and fixed rules
It has been said, however, that there is no definite and fixed rule governing admissibility of testimony.—Montgomery v. National Convoy & Trucking Co., 195 S.E. 247, 186 S.C. 167.

Statute held inapplicable
Minn.—Crosby v. Moriarity, 181 N.W. 199, 148 Minn. 201.

85. Conn.—Alfred Atmore Pope Foundation v. New York, N. H. & H. R. Co., 138 A. 444, 106 Conn. 423—Plumb v. Curtis, 33 A. 998, 66 Conn. 154.
Tex.—Pound v. Popular Dry Goods Co., Civ.App., 139 S.W.2d 341.

86. Conn.—Portland Water Co. v. Town of Portland, 118 A. 84, 97 Conn. 628.
S.C.—Dubose v. Sullivan, 152 S.E. 699, 155 S.C. 526—Southern Ry. Co. v. Day, 138 S.E. 870, 140 S.C. 388—Atlantic Coast Line R. Co. v. Searson, 135 S.E. 567, 137 S.C. 468—Hydrick v. Milwaukee Mechanics' Fire Ins. Co., 133 S.E. 533, 135 S.C. 62—Southern Coal Co. v. Rice, 115 S.E. 815, 122 S.C. 484—Sloan v. Lee, 114 S.E. 408, 121 S.C. 426—Powers v. Rawles, 112 S.E. 78, 119 S.C. 134—Oliver v. Columbia, N. & L. R. Co., 43 S.E. 307, 65 S.C. 1.

87. Conn.—Alfred Atmore Pope Foundation v. New York, N. H. & H. R. Co., 138 A. 444, 106 Conn. 423—Plumb v. Curtis, 33 A. 998, 66 Conn. 154.

88. U.S.—Newark Bay Cereal Beverage Co. v. Wynne, C.C.A.N.J., 57 F.2d 83.

89. Tenn.—Fry v. Provident Sav. Life Assur. Soc., Ch., 38 S.W. 116.

90. Tex.—Ellerd v. Murray, Civ. App., 247 S.W. 631, 636, citing **Corpus Juris.**

91. Tex.—San Antonio Tract. Co. v. Higdon, 123 S.W. 732, 58 Tex.Civ. App. 83.

92. Pa.—Deegan v. Pennsylvania R. Co., 160 A. 858, 307 Pa. 207.
Argument of counsel to jury after close of evidence has no bearing on admissibility of evidence.—Town of Dickson v. Stephens, 96 S.W.2d 201, 20 Tenn.App. 195.
Subsequent amendment of pleadings
Relevant evidence once admitted remains such as long as it is applicable to any theory presented by the pleadings, notwithstanding the pleadings may have been amended subsequent to admission of the evidence.—Riebenack v. Rubens, 130 A. 542, 102 N.J.Law 186.

93. N.H.—Hebert v. Boston & M. R., 8 A.2d 744, 90 N.H. 324.
Vt.—Dalpe v. Bissette, 130 A. 591, 99 Vt. 179—Smith v. Martin, 106 A. 666, 93 Vt. 111.

94. N.H.—Hebert v. Boston & M. R. R., 8 A.2d 744, 90 N.H. 324.

95. Fla.—Atlantic Coast Line R. Co.

which does not fulfill this requirement may be rejected,[96] as where the court deems that a fact is not of a probative value commensurate with the time required for its use as evidence[97] either because too remote[98] or too uncertain[99] or too conjectural[1] in its nature.

On the other hand, evidence is not inadmissible

v. Campbell, 139 So. 886, 104 Fla 274
Mo.—McDonald v. Kansas City Gas Co., 59 S.W.2d 37, 43, 332 Mo. 356, quoting **Corpus Juris.**
N.H.—Hebert v. Boston & M. R. R., 8 A.2d 744, 90 N.H. 324.
22 C.J. p 162 note 69.

96. U.S.—Brown Fruit Co. v. Gotham Factors Corporation, C.C.A. Neb., 97 F.2d 458.
Ala.—Howton v. E. I. Du Pont De Nemours & Co., 108 So. 344, 214 Ala. 479.
Colo.—Albertson v. Clark, 185 P. 256, 67 Colo. 477.
Conn.—Antel v. Poli, 123 A. 272, 100 Conn. 64—Worden v. Gore-Meehan Co., 78 A. 422, 83 Conn. 642.
Fla.—Atlantic Coast Line R. Co. v. Campbell, 139 So. 886, 104 Fla. 274.
Ga.—Carter v. Marble Products, 154 S.E. 891, 171 Ga. 49—Pope v. Peeples, 101 S.E. 303, 24 Ga.App. 467.
Kan.—Rapier v. Stockgrowers' State Bank of Maple Hill, 185 P. 888, 105 Kan. 606.
Mass.—Massachusetts Northeastern St. Ry. Co. v. Plum Island Beach Co., 151 N.E. 84, 255 Mass. 104.
Minn.—Campbell v. Sargent, 243 N. W. 142, 186 Minn. 293—Muenkel v. Muenkel, 173 N.W. 184, 143 Minn. 29.
N.H.—Buxton v. Langan, 3 A.2d 647, 90 N.H. 13.
N.J.—Hampton v. Pennsylvania R. Co., 179 A. 101, 115 N.J.Law 168—Appelbaum v. Prudential Ins. Co. of America, 169 A. 677, 12 N.J.Misc. 62—Eannetta v. Delaware, L. & W. R. Co., 129 A. 232, 3 N.J.Misc. 834.
N.C.—Dellinger v. Elliot Bldg. Co., 123 S.E. 78, 187 N.C. 845.
Ohio.—Wilson v. Wesler, 160 N.E. 863, 27 Ohio App. 386.
R.I.—Orleck v. Nemtzow, 195 A. 234, 59 R.I. 284.
S.C.—Atlantic Coast Line R. Co. v. Searson, 135 S.E. 567, 137 S.C. 468.
Tenn.—Pilcher v. Rylee, 2 Tenn.App. 348.
Tex.—Estes v. Davis, Civ.App., 28 S.W.2d 565, affirmed Davis v. Estes, Com.App., 44 S.W.2d 952.
Utah.—Farmers' & Merchants' Sav. Bank v. Jensen, 232 P. 1084, 64 Utah 609.
Vt.—Woodhouse v. Woodhouse, 130 A. 758, 99 Vt. 91.
Wash.—Bernstein v. Schwartz, 183 P. 105, 108 Wash. 271.
W.Va.—Mott v. Davis, 111 S.E. 603, 90 W.Va. 613
22 C.J. p 164 note 75—40 C.J. p 462 note 8.

Date of transaction is generally immaterial in determining its legal effect.—Hurd v. Varney, 144 A. 266, 83 N.H. 467.

97. U.S.—Golden Reward Min. Co. v. Buxton Min. Co., C.C.A., 97 F. 413.
Cal.—Sanders v. Austin, 182 P. 449, 180 Cal. 664.
N.C.—Bank of Union v. Stack, 103 S.E. 6, 179 N.C. 514.
22 C.J. p 162 note 70.

98. Ala.—Espalla v. Lyon Co., 146 So. 398, 406, 226 Ala. 235, citing **Corpus Juris**—Sorrell v. Scheuer, 96 So. 216, 209 Ala. 268.
Ark.—Coca-Cola Bottling Co. v. Shipp, 297 S.W. 856, 174 Ark. 130.
Cal.—Irwin v. Brown, App., 115 P.2d 601—Coyne v. Pacific Mut. Life Ins. Co. of California, 47 P.2d 1079, 8 Cal.App.2d 104—East Bay Municipal Utility Dist. v. Kieffer, 278 P. 476, 99 Cal.App. 240, rehearing denied 279 P. 178, 99 Cal.App. 240.
Colo.—Bankers Trust Co. v. International Trust Co., 113 P.2d 656.
Fla.—Atlantic Coast Line R. Co. v. Campbell, 139 So. 886, 104 Fla. 274.
Ga.—Nalley Land & Investment Co. v. Merchants & Planters Bank, 199 S.E. 815, 187 Ga. 142.
Ill.—Miller v. Lake View State Bank, 240 Ill.App. 395.
Kan.—State Bank of Downs v. Abbott, 179 P. 326, 104 Kan. 344.
Md.—S. J. Van Lill Co. v. Frederick City Packing Co., 141 A. 898, 155 Md. 303.
Mass.—Bachinsky v. Rogers, 173 N.E. 549, 273 Mass. 381.
Mich.—Hulett v. Great Atlantic & Pacific Tea Co., 299 N.W. 807, 299 Mich. 59.
N.J.—Millman v. U. S. Mortgage & Title Guaranty Co. of New Jersey, 1 A.2d 265, 121 N.J.Law 28.
N.C.—Godfrey v. Western Carolina Power Co., 128 S.E. 485, 190 N.C. 24—Bank of Union v. Stack, 103 S.E. 6, 179 N.C. 514.
Pa.—Morrow v. Weaver, 16 Pa.Dist. & Co. 94.
S.D.—McMonies v. Geiman, 219 N.W. 262, 52 S.D. 548.
Tex.—Countiss v. Baldwin, Civ.App., 151 S.W.2d 235, error dismissed, judgment correct—James v. Lasco Laundry Supply Co., Civ.App., 84 S.W.2d 901—Knights and Ladies of Security v. Shepherd, Civ.App., 221 S.W. 696.
Utah.—Stoker v. Ogden City, 54 P. 2d 849, 88 Utah 389.
Va.—Chesapeake & O. Ry. Co. v. Golladay, 180 S.E. 400, 164 Va. 292.
Wash.—Davies v. Metropolitan Life Ins. Co., 88 P.2d 829, 198 Wash. 482—McGill v. Baker, 266 P. 138, 147 Wash. 394.
22 C.J. p 162 note 71—53 C.J. p 1029 note 91.

Test of remoteness

(1) Generally, the question of remoteness must depend on all considerations, including time, the character of the evidence, and all the surrounding circumstances which, in the opinion of the court, ought to have a bearing on its worthiness to be brought into the consideration and determination of the matter in contention.—Bishop v. Copp, 114 A. 682, 96 Conn. 571.

(2) Time is only one element to be considered in determining whether evidence offered is too remote to the issue.—Sherburne v. Meade, 21 N.E. 2d 946, 303 Mass. 356.

99. U.S.—National Pressure Cooker Co. v. Stroeter, C.C.A.Wis., 50 F.2d 642, certiorari denied 52 S.Ct. 129, 284 U.S. 674, 76 L.Ed. 570.
La.—Long v. White, App., 146 So. 368, affirmed 149 So. 133.
N.C.—Sprout, Waldron & Co. v. Ward, 107 S.E. 214, 181 N.C. 372.
Or.—Scarpelli v. Portland Electric Power Co., 278 P. 99, 130 Or. 267.
S.C.—Atlantic Coast Line R. Co. v. Searson, 135 S.E. 567, 137 S.C. 468.
Tex.—Chambers v. Winn, Civ.App., 133 S.W.2d 279, reversed on other grounds, Com.App., 154 S.W.2d 454.
22 C.J. p 163 note 72.

1. Ala.—Sorrell v. Scheuer, 96 So. 216, 209 Ala. 268.
Cal.—East Bay Municipal Utility Dist. v. Kieffer, 278 P. 476, 99 Cal. App. 240, rehearing denied 279 P. 178, 99 Cal.App. 240
Md.—Baltimore Quarries Co. v. Gwyer, 112 A. 590, 137 Md. 379.
Mich.—Hulett v. Great Atlantic & Pacific Tea Co., 299 N.W. 807, 299 Mich. 59.
N.C.—Bank of Union v. Stack, 103 S.E. 6, 179 N.C. 514.
Pa.—Moore v. Stauffer Sales Co., 158 A. 191, 104 Pa.Super. 19.
S.D.—McMonies v. Geiman, 219 N.W. 262, 52 S.D. 548.
22 C.J. p 163 note 73.

Matters not within witness' knowledge

Generally speaking a witness may not testify in regard to matters not within his personal knowledge.—Carroll v. Prudential Ins. Co. of America, 15 A.2d 819, 125 N.J.Law 397.

Evidence held not inadmissible as being conjectural or a mere guess.—Traders' & General Ins. Co. v. Hurst, Tex.Civ.App., 55 S.W.2d 1057, error

merely because it is somewhat remote[2] or uncertain[3] or because it is improbable[4] or may conflict with other evidence which the party introduces.[5]

"Materiality," with reference to evidence, means the property of substantial importance[6] and it has been said that evidence is material where it is relevant and goes to the substantial matters in dispute or has a legitimate or effective bearing on the decision of the case.[7] Whether facts are material to any inquiry must be determined by the nature of the right or liability asserted[8] or the issue formed.[9] Proof of any facts essential to plaintiff's recovery is material to the issue.[10]

Discretion. The exclusion of evidence as not material[11] or, more specifically, as not of probative value commensurate with the time which would be required for its use as evidence,[12] either because too remote,[13] too uncertain,[14] or too conjectural,[15] is a matter largely within the discretion of the court. Such discretion must be exercised without prejudice to the litigant[16] and cannot be exercised to reject material evidence.[17]

dismissed.—Green v. Hagens, Tex.Civ. App., 51 S.W.2d 771, error dismissed.

2. Conn.—Reynolds v. Land Mortgage & Title Co., 159 A. 282, 114 Conn. 447.
N.J.—Bradley v. D. E. Cleary Co., 90 A. 1015, 86 N.J.Law 338.
Vt.—Fairbanks v. Frank, 176 A. 294, 107 Vt. 45.
Va.—Chesapeake & O Ry. Co. v. Golladay, 180 S.E. 400, 164 Va. 292.

Evidence of prior or subsequent facts

(1) Evidence of prior or subsequent facts is not inadmissible as being too remote where it has a direct relation to, or raises a fair inference as to the existence of, a fact in issue.
Mass.—Arabia v. John Hancock Mut. Life Ins. Co., 17 N.E.2d 202, 301 Mass 397.
Tex.—Washington Nat. Ins. Co. v. Curry, Civ.App., 97 S.W.2d 525.
22 C.J. p 162 note 71 [a].

(2) Evidence as to continuing facts see infra § 585.

Evidence held not too remote

Cal.—Nelson v. Fernando Nelson & Sons, 55 P.2d 859, 5 Cal.2d 511.
Ga.—Gibson v. Gibson, 178 S.E. 181, 50 Ga.App. 345.
Idaho.—Jakeman v. Oregon Short Line R. Co., 256 P. 88, 43 Idaho 505.
Tex.—Keels v. Metzler, Civ.App., 94 S.W.2d 799, error dismissed.
22 C.J. p 162 note 71 [d].

3. Ala.—Payne v. Roy, 90 So. 605, 206 Ala. 432.
Mo.—Reed v. Steward, 240 S.W. 206—Jones v. St. Louis-San Francisco Ry. Co., 50 S.W.2d 217, 226 Mo.App. 1152.
N.J.—Eberle v. Stegman, 121 A. 618, 98 N.J.Law 37, 879.
Or.—Lott v. De Luxe Cab Co., 299 P. 303, 136 Or. 349.
Vt.—Valenti v. Imperial Assur. Co., 176 A. 413, 107 Vt. 65.

4. Mo.—Neal v. Kansas City Rys. Co., 229 S.W. 215.
22 C.J. p 165 note 87 [a].

5. **Prior testimony of same witness**

Tex.—Pritchard Rice Milling Co. v. Ellis, Civ.App., 266 S.W. 233.

6. U.S.—Willoughby v. Jamison, C.C.A.Mo., 103 F.2d 821, certiorari denied Jamison v. Willoughby, 60 S.Ct. 111, 308 U.S. 588, 84 L.Ed. 492—David Bradley Mfg. Co. v. Eagle Mfg. Co., C.C.Ill., 57 F. 980.

7. Kan.—Lynch v. Rosenberger, 249 P. 682, 683, 121 Kan. 601, quoting **Corpus Juris.**
22 C.J. p 65 note 10.

Whatever is necessary for the court to know in order to reach a proper decision is material.—Ismert-Hincke Milling Co. v. Mercurio Bros. Spaghetti Mfg. Co., Mo.App., 243 S.W. 408.

Superseded or abandoned pleadings

The materiality of superseded or abandoned pleadings offered in evidence must be determined by the rules governing the admissibility of other evidence.—Hudson v. Slate, 117 S.W. 469, 53 Tex.Civ.App. 453—22 C.J. p 164 note 77.

Particular evidence held material

Ohio.—Gschwind v. Viers, 152 N.E. 911, 21 Ohio App. 124.
Tex.—Keels v. Metzler, Civ.App., 94 S.W.2d 799, error dismissed.

8. U.S.—Willoughby v. Jamison, C.C.A.Mo., 103 F.2d 821, certiorari denied Jamison v. Willoughby, 60 S.Ct. 111, 308 U.S. 588, 84 L.Ed. 492.

In trying chain of title, all instruments affecting the record title are material.—Moore v. Hoar, 81 P.2d 226, 27 Cal.App.2d 269.

9. Or.—Prouty Lumber & Box Co. v. Cogan, 200 P. 905, 101 Or. 382.

Evidence to prove immaterial issue is not material.—Willoughby v. Jamison, C.C.A.Mo., 103 F.2d 821, 823, certiorari denied Jamison v. Willoughby, 60 S.Ct. 111, 308 U.S. 588, 84 L.Ed 492.

10. U.S.—Willoughby v. Jamison, supra, citing **Corpus Juris.**
N.J.—American Process Co. v. Pensauken Brick Co., 75 A. 976, 78 N.J.Law 658.

11. Conn.—Bjorkman v. Town of Newington, 154 A. 346, 113 Conn. 181.
Vt.—Aldrich v. Boston & M. R. R., 100 A. 765, 91 Vt. 379.
22 C.J. p 164 note 74.

12. Ill.—Wood v. Prudential Ins. Co. of America, 271 Ill.App. 103, 110, quoting **Corpus Juris.**
Mo.—McDonald v. Kansas City Gas Co., 59 S.W.2d 37, 43, 332 Mo. 356, quoting **Corpus Juris.**
22 C.J. p 164 note 74.

13. U.S.—Metropolitan Life Ins. Co. v. Armstrong, C.C.A.Neb., 85 F.2d 187.
Ala.—Springer v. Sullivan, 119 So. 851, 218 Ala. 645—Sorrell v. Scheuer, 96 So. 216, 209 Ala. 268—Davies v. Barnes, 77 So. 612, 201 Ala. 120.
Cal.—Moiola v. Paggi, 42 P.2d 331, 5 Cal.App.2d 279.
Conn.—Duvall v. Birden, 198 A. 255, 124 Conn. 43—Reynolds v. Land Mortgage & Title Co., 159 A. 282, 114 Conn. 447—Banach v. Bohinski, 139 A. 688, 107 Conn. 156.
Ill.—Wood v. Prudential Ins. Co. of America, 271 Ill.App. 103, 110, quoting **Corpus Juris.**
Mass.—Nelson v. Old Colony St. Ry. Co., 94 N.E. 313, 208 Mass. 159.
Mich.—Whittemore v. Weiss, 33 Mich. 348.
Mo.—McDonald v. Kansas City Gas Co., 59 S.W.2d 37, 43, 332 Mo. 356, quoting **Corpus Juris.**
N.H.—Dowling v. L. H. Shattuck, Inc., 17 A.2d 529.
N.J.—Iverson v. Prudential Ins. Co. of America, 19 A.2d 214, 126 N.J.Law 280—Bradley v. D. E. Cleary Co., 90 A. 1015, 86 N.J.Law 338.
Vt.—Barre Trust Co. v. Ladd, 154 A. 680, 103 Vt. 392—Woodhouse v. Woodhouse, 130 A. 758, 99 Vt. 91.
Wash.—Hutteball v. Montgomery, 60 P.2d 679, 187 Wash. 516.
22 C.J. p 164 note 74.

14. Ill.—Wood v. Prudential Ins. Co. of America, 271 Ill.App. 103, 110, quoting **Corpus Juris.**
Mo.—McDonald v. Kansas City Gas Co., 59 S.W.2d 37, 43, 332 Mo. 356, quoting **Corpus Juris.**
22 C.J. p 164 note 74.

15. Ill.—Wood v. Prudential Ins. Co. of America, 271 Ill.App. 103, 110, quoting **Corpus Juris.**
Mo.—McDonald v. Kansas City Gas Co., 59 S.W.2d 37, 43, 332 Mo. 356, quoting **Corpus Juris.**
22 C.J. p 164 note 74.

16. U.S.—Nussbaum v. Atlas Laundry Co., C.C.A.Ohio, 10 F.2d 353.

17. Minn.—Taylor v. Northern

Confusing, misleading, or prejudicial evidence. Evidence, although logically relevant, may and should be excluded where it will have an undue tendency to confuse or mislead the jury,[18] particularly where the issues are close,[19] as where it would draw into the case issues foreign to the litigation[20] or would serve comparatively little or no purpose except to arouse the passion, prejudice, or sympathy of the jury;[21] but evidence which is properly admissible under the issues presented cannot be excluded merely because of collateral effects detrimental to the party objecting,[22] or because arousing sympathy or prejudice,[23] or because it brings out with it other matters which are not in issue.[24] A distinction is made in some jurisdictions between direct and circumstantial evidence, it being proper to exclude merely circumstantial evidence which would create unfair prejudice[25] but not to exclude direct evidence[26] or evidence of facts directly involved as elements in the case.[27] Whether evidence should be excluded as confusing or misleading[28] or as within the undue prejudice rule[29] is largely in the discretion of the trial court.

§ 160. Intrinsic Sufficiency Not Required

It is not essential that evidence to be admissible be sufficient in itself to establish the whole or any definite portion of a party's contention.

A relevant fact will not be rejected because not sufficient in itself to establish the whole or any definite portion of a party's contention,[30] but all that is required is that the fact must legally tend to prove some matter in issue[31] or to make a prop-

States Power Co., 256 N.W. 674, 192 Minn. 415.
22 C.J. p 164 note 74 [b].

18. Fla.—Atlantic Coast Line R. Co. v. Campbell, 139 So. 886, 104 Fla. 274.
Ill.—Veer v. Hagemann, 165 N.E. 175, 334 Ill. 23.
Mo.—State ex rel. State Highway Commission v. Pope, 74 S.W.2d 265, 228 Mo.App. 888.
N.C.—Dellinger v. Elliot Bldg. Co., 123 S.E. 78, 187 N.C. 845—Bank of Union v. Stack, 103 S.E. 6, 179 N.C. 514.
Pa.—McCaffrey v. Schwartz, 132 A. 810, 285 Pa. 561.
Va.—Good v. Dyer, 119 S.E. 277, 137 Va. 114.

19. N.Y.—Gilmore v. Butts, 189 N.Y.S. 712, 198 App.Div. 108.

20. U.S.—Golden Reward Min. Co. v. Buxton Min. Co., C.C.A.S.D., 97 F. 413.
22 C.J. p 161 note 66.

21. Ala.—Coker v. Coker, 96 So. 201, 209 Ala. 295—Standard Cooperage Co. v. Dearman, 86 So. 537, 204 Ala. 553.
Ariz.—Silver King of Arizona Mining Co. v. Kendall, 201 P. 102, 23 Ariz. 39.
Iowa.—In re Thompson's Estate, 234 N.W. 841, 211 Iowa 935.
Minn.—Mahoney v. Erickson, 202 N.W. 68, 162 Minn. 509
Mo.—Ridenhour v. Oklahoma Contracting Co., App., 45 S.W.2d 108—Edwards v. Smith, App., 286 S.W. 428.
N.H.—Rogers v. Rogers, 114 A. 270, 80 N.H. 96—Pope v. Boston & M. R. R., 104 A. 403, 79 N.H. 52.
N.Y.—Cohn v. Orean Co., 199 N.Y.S. 425, 205 App.Div. 352—Gilmore v. Butts, 189 N.Y.S. 712, 198 App.Div. 108.
N.C.—Dellinger v. Elliot Bldg. Co., 123 S.E. 78, 187 N.C. 845—Bank of Union v. Stack, 103 S.E. 6, 179 N.C. 514.
Tex.—Floyd v. Fidelity Union Casualty Co., Com.App., 39 S.W.2d 1091, denying rehearing 24 S.W.2d 363, reversing, Civ.App., 13 S.W.2d 909—James v. Lasco Laundry Supply Co., Civ.App., 84 S.W.2d 901—Fort Worth & D. C. Ry. Co. v. Westrup, Civ.App., 278 S.W. 490, affirmed, Com.App., 285 S.W. 1053—First Nat. Bank of Amarillo v. Rush, Civ.App., 227 S.W. 378, modified on other grounds, Com.App., 246 S.W. 349, motion granted 249 S.W. 183—Fritter v. Pendleton, Civ.App., 134 S.W. 1186.

22. Cal.—Lampton v. Davis Standard Bread Co., 191 P. 710, 48 Cal.App. 116.
22 C.J. p 161 note 64.
Objecting party's inability to meet evidence offered is not a test of its admissibility.—Behr v. Baker, 238 N.W. 473, 255 Mich. 607.

23. Ala.—Brown v. Leek, 128 So. 608, 221 Ala. 319.
Ariz.—Tom Reed Gold Mines Co. v. Berd, 260 P. 191, 32 Ariz. 479, 57 A.L.R. 55.
Mo.—Plater v. W. C. Mullins Const. Co., 17 S.W.2d 658, 223 Mo.App. 650.
Ohio.—Cushman Motor Delivery Co. v. Smith, 1 N.E.2d 628, 51 Ohio App. 421.
Tex.—Joy v. Peacock, Civ.App., 131 S.W.2d 1012, error granted—Hussmann v. Leavell & Sherman, Civ.App., 20 S.W.2d 829, affirmed Hussman v. Leavell & Sherman, Com.App., 32 S.W.2d 643.
Evidence within rule
N.H.—Rogers v. Rogers, 114 A. 270, 80 N.H. 96.

24. Me.—Plourd v. Jarvis, 58 A. 774, 99 Me. 161.
22 C.J. p 161 note 65.
Evidence within rule
Ga.—Griffin v. Browning, 181 S.E. 801, 51 Ga.App. 743.

25. N.H.—Bunten v. Davis, 133 A. 16, 82 N.H. 304, 45 A.L.R. 1409.

26. N.H.—McCurdy v. Flibotte, 139 A. 367, 83 N.H. 143.

27. N.H.—Bunten v. Davis, 133 A. 16, 82 N.H. 304, 45 A.L.R. 1409.

28. Ill.—Veer v. Hagemann, 165 N.E. 175, 334 Ill. 23.
Mo.—Kelso v. Lincoln Nat. Life Ins. Co., 51 S.W.2d 203, 227 Mo.App. 184.

29. N.H.—Gerry v. Neugebauer, 136 A. 751, 83 N.H. 23—Rogers v. Rogers, 114 A. 270, 80 N.H. 96.

30. U.S.—McCandless v. U. S., Hawaii, 56 S.Ct. 764, 298 U.S. 342, 80 L.Ed. 1205, reversing, C.C.A., 74 F.2d 596, certiorari granted 56 S.Ct. 308, 296 U.S. 570, 80 L.Ed. 403.
Ala.—Ensley Holding Co. v. Kelley, 158 So. 896, 229 Ala. 650—Southern Natural Gas Co. v. Davidson, 142 So. 63, 225 Ala. 171.
Fla.—Ittleson v. Browning, 128 So. 639, 99 Fla. 1195—McMillan v. Reese, 55 So. 388, 61 Fla. 360.
Ga.—Horton v. Johnson, 15 S.E.2d 605.
Md.—Pegg v. Warford, 7 Md. 582.
Mass.—Attorney General v. Pelletier, 134 N.E. 407, 240 Mass. 264.
Mo.—McDonald v. Kansas City Gas Co., 59 S.W.2d 37, 332 Mo. 356.
N.J.—Feldman v. Jacob Branfman & Son, 166 A. 126, 111 N.J.Law 37.
Tex.—West v. First Baptist Church of Taft, 71 S.W.2d 1090, 123 Tex. 388, reversing, Civ.App., 42 S.W.2d 1078—Hussmann v. Leavell & Sherman, Civ.App., 20 S.W.2d 829, affirmed, Hussman v. Leavell & Sherman, Com.App., 32 S.W.2d 643.
22 C.J. p 164 note 78.

31. Ala.—Ensley Holding Co. v. Kelley, 158 So. 896, 229 Ala. 650—Sorrell v. Scheuer, 96 So. 216, 209 Ala. 268.
Ark.—Brooks v. Bale Chevrolet Co., 127 S.W.2d 135, 198 Ark. 17.

osition in issue more or less probable,[32] and bear | directly or indirectly thereon.[33] It is no objection

Ga.—Brown v. Wilson, 189 S.E. 860, 55 Ga.App. 262.
Neb.—Coulthard v. Board of Adjustment of City of Neligh, 265 N.W. 530, 130 Neb. 543.
N.J.—Feldman v. Jacob Branfman & Son, 166 A. 126, 111 N.J.Law 37
Pa.—Hushen v. Home Life Ins. Co. of America, 27 North.Co. 104.
S.C.—Holman v. City of Orangeburg, 110 S.E. 674, 118 S.C 361.
Tex.—Lone Star Gas Co. v. State, 153 S.W.2d 681, modifying State v. Lone Star Gas Co., Civ.App., 129 S.W.2d 1164—West v. First Baptist Church of Taft, 71 S.W.2d 1090, 123 Tex. 388, reversing, Civ.App., 42 S W 2d 1078—Pound v. Popular Dry Goods Co., Civ.App., 139 S.W.2d 341—Sonken-Galamba Corporation v. Hillman, Civ.App., 111 S W 2d 853, error dismissed—Southland Life Ins. Co. v. Norton, Civ.App., 297 S.W. 1083, reversed on other grounds, Com.App., 5 S.W.2d 767, conformed to, Civ.App., 9 S.W.2d 752—Frank v. Feinberg, Civ.App., 256 S.W. 944—Kansas City Life Ins. Co. v. Elmore, Civ.App., 226 S.W. 709.
22 C J. p 164 note 79—40 C J. p 462 notes 6, 7.

Other statements

(1) Evidence which has a reasonable tendency to establish a material fact is admissible.
U.S.—New England Trust Co. v. Farr, C.C.A.Mass., 57 F.2d 103, certiorari denied 53 S.Ct. 14, 287 U.S. 612, 77 L.Ed. 532.
Ala.—George D. Witt Shoe Co. v. Mills, 140 So. 578, 224 Ala. 500—Birmingham Baptist Hospital v. Blackwell, 128 So. 389, 221 Ala. 225.
Ind.—Lake Erie & W. R. Co. v. Howarth, 124 N.E. 687, 73 Ind.App. 454, rehearing denied 127 N.E. 804, 73 Ind.App. 454.
Tex.—Washington Nat. Ins. Co. v. Curry, Civ.App., 97 S.W.2d 525.
Va.—Goodloe v. Smith, 164 S.E. 379, 158 Va. 571.
Wis.—In re Cushman's Estate, 250 N.W. 873, 213 Wis. 74—Graff v. Tinkham, 231 N.W. 593, 202 Wis. 141.
22 C.J. p 164 note 79 [a].

(2) Evidence which has a slight or any tendency to prove a fact is admissible.
Iowa.—Farwell v. Tyler, 5 Iowa 535.
N.H.—Mason v. Dover S. & R. St. Ry., 109 A. 841, 79 N.H. 300—Page v. Hazelton, 66 A. 1049, 74 N.H 252.
S.C.—Entzminger v. Seigler, 195 S. E. 244, 186 S.C. 194.
Tex.—Joy v. Peacock, Civ.App., 131 S.W.2d 1012, error granted.
Va.—Chesapeake & O. Ry. Co. v. Golladay, 180 S.E. 400, 164 Va. 292.
22 C.J. p 164 note 79.

(3) Evidence is relevant and admissible when it touches on the issues so as to assist in getting at the truth of the facts disputed.
Conn.—Carroll v. Arnold, 141 A. 657, 107 Conn. 535—Alfred Atmore Pope Foundation v. New York, N. H. & H. R. Co., 138 A. 444, 106 Conn. 423.
Fla.—Woodruff v. Lantana Finance Corporation, 136 So. 712, 102 Fla. 950—Prior v. Oglesby, 39 So. 593, 50 Fla. 248.
Kan.—Lynch v. Rosenberger, 249 P. 682, 683, 121 Kan. 601, quoting **Corpus Juris.**
Mich.—Ames v. MacPhail, 286 N.W. 206, 289 Mich. 185—Turnbull v. Richardson, 37 N.W. 499, 69 Mich. 400.
S C.—Wimberly v. Sovereign Camp, W. O. W., 2 S.E.2d 532, 190 S.C. 158.
Va.—Chesapeake & O. Ry. Co. v. Golladay, 180 S.E. 400, 164 Va. 292.
22 C.J. p 65 note 9, p 158 note 53 [a], [c].

(4) Facts throwing light on the matter in issue are admissible.
Ala.—George D. Witt Shoe Co. v. Mills, 140 So. 578, 224 Ala. 500—Sorrell v. Scheuer, 96 So. 216, 209 Ala. 268.
Ark.—Coca-Cola Bottling Co. v. Shipp, 297 S.W. 856, 174 Ark. 130.
Mich.—Ames v. MacPhail, 286 N.W. 206, 289 Mich. 185.
Tex.—Lone Star Gas Co. v. State, 153 S.W.2d 681, modifying State v. Lone Star Gas Co., Civ.App., 129 S W.2d 1164—Interstate Forwarding Co. v. McCabe, Civ.App., 285 S.W. 920.
Wash.—Keisel v Bredick, 74 P.2d 473, 192 Wash. 665.

32. Ala.—George D. Witt Shoe Co. v. Mills, 140 So. 578, 224 Ala. 500.
Ark.—Brooks v. Bale Chevrolet Co., 127 S.W.2d 135, 198 Ark. 17.
Colo.—Riss & Co. v. Galloway, 114 P.2d 550.
Ga.—Summit Wagon Co. v. Lowery, 64 S.E. 489, 6 Ga.App. 147.
Ind.—Feichter v. Swift, 132 N.E. 662, 77 Ind.App. 427—Lake Erie & W. R. Co. v. Howarth, 124 N.E. 687, 73 Ind.App. 454, rehearing denied 127 N.E. 804, 73 Ind.App. 454.
Me.—Perlin v. Rosen, 164 A. 625, 131 Me. 481.
Md.—S. J. Van Lill Co. v. Frederick City Packing Co., 141 A. 898, 902, 155 Md. 803, citing **Corpus Juris.**
Or.—Klingback v. Mendiola, 6 P.2d 237, 138 Or. 234.
Tex.—Masterson v. Harris County Houston Ship Channel Nav. Dist., Com.App., 15 S.W.2d 1011, 67 A.L.R. 1324, affirming Unknown Heirs of Thomas v. Harris County Houston Ship Channel Nav. Dist., Civ. App., 6 S.W.2d 396, and rehearing denied Masterson v. Harris County Houston Ship Channel Nav. Dist., Com.App., 18 S.W.2d 588, 67 A.L.R. 1324.
Vt.—Atwood v. Joyce, 192 A. 11, 109 Vt. 30.
Va.—Chesapeake & O. Ry. Co. v. Golladay, 180 S.E. 400, 164 Va. 292.
Wash.—Johnson v. Ben Olson Co., 278 P. 699, 701, 152 Wash. 646, 66 A.L.R. 77, quoting **Corpus Juris.**
22 C.J. p 158 note 52.

Corpus Juris statement cited in support of rule in criminal proceeding—State v. Laris, 2 P.2d 243, 247, 78 Utah 183.

Similar statement

One fact is relevant to another, when, according to the common course of events, the existence of the one, taken alone or in connection with the other facts, renders the existence of the other certain or more probable.

Ala.—George D. Witt Shoe Co. v. Mills, 140 So. 578, 224 Ala. 500.
Conn.—Alfred Atmore Pope Foundation v. New York, N. H. & H. R. Co., 138 A. 444, 106 Conn. 423.
N.J.—Fisher v. Town of Nutley, 199 A. 40, 120 N.J.Law 290.
Tex.—Gulf, C. & S. F. Ry. Co. v. Downs, Civ.App., 70 S.W.2d 318, error refused—Hussmann v. Leavell & Sherman, Civ.App., 20 S.W. 2d 829, 830, affirmed Hussman v. Leavell & Sherman, Com.App., 32 S.W.2d 643.
22 C.J. p 158 note 52.

33. U.S.—Atlantic Greyhound Corporation v. Crenshaw, C.C.A.Ga., 99 F.2d 449.
Ariz.—New York Life Ins. Co. v. McNeely, 79 P.2d 948, 52 Ariz. 181.
Del.—Dougherty v. White, 80 A. 237, 25 Del. 316, Ann.Cas.1914C 876.
Ga.—Talbotton R. Co. v. Gibson, 32 S.E. 151, 106 Ga. 229—Brown v. Wilson, 189 S.E. 860, 55 Ga.App. 262—Continental Trust Co. v. Bank of Harrison, 136 S.E. 319, 36 Ga. App. 149, conforming to answer to certified questions 134 S.E. 775, 162 Ga. 758, 50 A.L.R. 412—O'Berry v. Davis, 121 S.E. 857, 31 Ga. App. 755.
Minn.—In re Weber's Estate, 204 N. W. 52, 163 Minn. 389.
N.C.—Bank of Union v. Stack, 103 S.E. 6, 179 N.C. 514.
Tex.—Hunter, Evans & Co. v. Lanius, 18 S.W. 201, 82 Tex. 677—Lange Cable Tool Drilling Co. v. Barnett Petroleum Corporation, Civ.App., 142 S.W.2d 833—Continental Ins. Co. of New York v. Nabors, Civ. App., 6 S.W.2d 151, error refused.

to the admissibility of a party's testimony that it is competent only on his own theory of the case; he has a right to have the case submitted to the jury on his theory if there is any testimony to support it.[34]

Weight and sufficiency. Evidence is not rendered inadmissible by reason of objections going merely to its weight,[35] unless it lacks sufficient probative force to be legally relevant or material within the rule discussed in the preceding section.

§ 161. Circumstantial Evidence Generally

Circumstantial evidence is evidence which does not directly prove the existence of a fact but merely gives rise to a logical inference that it exists; such evidence is admissible if it affords a basis for a reasonable inference of the existence of the fact.

Circumstantial evidence is evidence which, without going directly to prove the existence of a fact, gives rise to a logical inference that such fact does exist.[36]

In the absence of a statute to the contrary,[37] in civil cases, as well as in criminal proceedings, circumstantial evidence is admissible,[38] at least in the absence of direct evidence.[39]

The trial court usually has considerable discre-

34. Kan.—Lyons v. Berlau, 73 P. 52, 67 Kan. 426.
22 C.J. p 165 note 86.

35. U.S.—New England Trust Co. v. Farr, C.C.A.Mass., 57 F.2d 103, certiorari denied 53 S.Ct. 14, 287 U.S. 612, 77 L.Ed. 532.
Cal.—Bardeen v. Commander Oil Co., 104 P.2d 875, 40 Cal.App.2d 341.
Mo.—McDonald v. Kansas City Gas Co., 59 S.W.2d 37, 332 Mo. 356.
R.I.—Douglas v. Newport County Electric Co., 132 A. 886.
Tex.—Kansas City Life Ins. Co. v. Elmore, Civ.App., 226 S.W. 709.
Va.—Bardach Iron & Steel Co. v. Tenenbaum, 118 S.E. 502, 136 Va. 163.
22 C.J. p 165 note 87.

36. Ky.—Perry's Adm'x v. Inter-Southern Life Ins. Co., 58 S.W.2d 906, 248 Ky. 491.
22 C.J. p 66 note 17.

Other definitions

(1) "Circumstantial evidence" consists in proof of facts and circumstances which are collateral to the fact that is sought to be established and from which the mind concludes that the main or ultimate fact existed.—Duke v. Houston Oil Co. of Texas, Tex.Civ.App., 128 S.W.2d 480, error dismissed, judgment correct.

(2) The evidence of facts and circumstances which, when established, lead the mind to certain conclusions or inferences taken therefrom; the inference of a fact from other facts proved, and the fact thus inferred and assented to by the mind is said to be presumed or taken for granted until the contrary is proved; where, some facts being proved, another fact follows as a natural or very probable conclusion from the facts actually proved, so as readily to gain the assent of the mind from the mere probability of its having occurred.—Texas & N. O. R. Co. v. Warden, Tex.Civ.App., 78 S.W.2d 164, 166, quoting **Corpus Juris**—11 C.J. p 769 notes 42–44.

Experience of mankind as basis

"Circumstantial evidence" is evidence that tends to prove a fact in issue by proving other events or circumstances which, according to the common experience of mankind, are usually or always attended by the fact in issue, and, therefore, affords a basis for reasonable inference by jury or court of occurrence of fact in issue.
Ind.—City of Indianapolis v. Keeley, 79 N.E. 499, 167 Ind. 516—Czuczko v. Golden-Gary Co., 177 N.E. 466, 94 Ind.App. 47, rehearing denied 179 N.E. 19, 94 Ind.App. 47.
Ky.—Wolff v. Employers Fire Ins. Co., 140 S.W.2d 640, 283 Ky. 824, 130 A.L.R. 682.
Or.—Sullivan v. Mountain States Power Co., 9 P.2d 1038, 139 Or. 282.
22 C.J. p 66 note 20 [a].

As direct evidence

While direct and circumstantial evidence have been distinguished, see supra § 2, nevertheless it has been stated that circumstantial evidence is merely direct evidence indirectly employed.—Perry's Adm'x v. Inter-Southern Life Ins. Co., 58 S.W.2d 906, 248 Ky. 491.

Surrounding circumstances distinguished

Reasonable conduct is a conclusion to be drawn by the trier of facts from other facts, and hence all the surrounding circumstances become material facts, as distinguished from circumstantial evidence from which a conclusion as to the existence of such facts is sought to be drawn.—Bunten v. Davis, 133 A. 16, 82 N.H. 304, 45 A.L.R. 1409.

37. N.Y.—Wittemann v. Sands, 144 N.E. 671, 238 N.Y. 434, 37 A.L.R. 1216, reversing 201 N.Y.S. 958, 207 App.Div. 856.

38. Ariz.—New York Life Ins. Co. v. McNeely, 79 P.2d 948, 52 Ariz. 181.
Ark.—Arkansas Power & Light Co. v. Beauchamp, 43 S.W.2d 234, 184 Ark. 698—Farmers' & Merchants' Bank of Bearden v. State, 23 S.W.2d 624, 180 Ark. 994.
Ind.—Indianapolis & Cincinnati Traction Co. v. Montfort, 139 N.E. 677, 80 Ind.App. 639.
Ky.—Harkey v. Haddox, 50 S.W.2d 955, 244 Ky. 380.
Mo.—Luechtefeld v. Marglous, App., 151 S.W.2d 710.
N.Y.—Wittemann v. Sands, 144 N.E. 671, 238 N.Y. 434, 37 A.L.R. 1216 reversing 201 N.Y.S. 958, 207 App. Div. 856.
N.C.—Bank of Beaufort v. Commercial Nat. Bank of Raleigh, 176 S.E. 734, 207 N.C. 216.
Okl.—Marland Refining Co. v. Snider, 251 P. 989, 120 Okl. 116.
Pa.—Mars v. Philadelphia Rapid Transit Co., 154 A. 290, 303 Pa. 80—Hushen v. Home Life Ins. Co. of America, 27 North Co. 104.
Tex.—Duke v. Houston Oil Co. of Texas, Civ.App., 128 S.W.2d 480, error dismissed, judgment correct—Ludtke v. Bankers' Trust Co., Civ.App., 251 S.W. 600.
Vt.—Boguski v. City of Winooski, 187 A. 808, 108 Vt. 380.
Va.—Ryan v. Maryland Casualty Co., 3 S.E.2d 416, 173 Va. 57.
Admissibility of circumstantial evidence in criminal cases see Criminal Law § 604.

Legal evidence

Circumstantial evidence is legal evidence.—De Reeder v. Travelers Ins. Co., 198 A. 45, 329 Pa. 328—Hornick v. Bethlehem Mines Corporation, 161 A. 75, 307 Pa. 264.

Rule forbidding speculation or guesswork on the part of the court or jury does not prohibit the admission of circumstantial evidence.—Perry's Adm'x v. Inter-Southern Life Ins. Co., 58 S.W.2d 906, 248 Ky. 491.

39. Ky.—Perry's Adm'x v. Inter-Southern Life Ins. Co., 58 S.W.2d 906, 248 Ky. 491.
Best evidence rule as confined to documentary evidence see infra § 782.

Where there is no eyewitness, facts may be proved by circumstantial evidence.
Ill.—Ohio Building Safety Vault Co. v. Industrial Board, 115 N.E. 149, 277 Ill. 96.
Ind.—Czuczko v. Golden-Gary Co., 177 N.E. 466, 94 Ind.App. 47, re-

tion as to the latitude of circumstantial evidence,[40] and great latitude generally is allowed in admitting it,[41] especially where direct evidence is lacking.[42]

The facts offered as circumstantial evidence must afford a basis for a reasonable inference of the existence or nonexistence of the fact sought to be proved.[43] Usually such facts are admissible when they throw light on or will assist in a determination of the matter in issue,[44] although in some cases it has been held or stated that the facts introduced as circumstantial evidence must make highly probable,[45] or point strongly in the direction of,[46] the existence or nonexistence of the fact in issue. Where a particular circumstance may control the decision, it has been held that great care should be exercised in admitting it.[47] Facts are admissible as circumstantial evidence, although they may afford an inference other than that for which they are offered,[48] if the inference sought to be drawn is more,[49] or at least not less,[50] probable than any other inference which might be drawn, although it has been held that facts are admissible only where they are consistent with the theory sought to be established and inconsistent with any other.[51] At any rate, a circumstance must be sufficient in connection with other circumstances to give rise to more than a mere suspicion of the existence of the fact sought to be proved,[52] and the facts from which an inference is to be drawn must themselves be proved.[53]

The admissibility of circumstantial evidence is not dependent on its sufficiency, standing alone, to take the case to the jury.[54]

§ 162. Supplementary and Consistent Facts

Evidence of collateral facts may, in the discretion of the court, be admitted where it may aid the trier of fact in determining the truth of the matter in issue.

As a rule, sometimes declared by statute, the admission or exclusion of evidence of collateral facts rests largely in the discretion of the court.[55] Such evidence may be admissible where it may aid the

hearing denied 179 N.E. 19, 94 Ind. App. 47.

40. U.S.—Mutual Life Ins Co. of New York v. Zimmerman, C.C.A. Fla., 75 F.2d 758
Iowa.—Scott v. Sovereign Camp W. O. W., 129 N.W. 302, 149 Iowa 562.
Va.—Goodloe v. Smith, 164 S.E. 379, 158 Va. 571.
Corpus Juris quoted in support of the rule in a criminal proceeding—Terry v. U. S., C.C.A.Va., 51 F.2d 49, 53.

41. U.S.—Mutual Life Ins. Co. of New York v. Zimmerman, C.C.A. Fla., 75 F.2d 758
Fla.—Baugher v. Boley, 58 So. 980, 63 Fla. 75.
Pa.—Stevenson v. Stewart, 11 Pa. 307.
Vt.—Tyrrell v. Prudential Ins. Co. of America, 192 A. 184, 109 Vt. 6, 115 A.L.R. 392—Woodhouse v. Woodhouse, 130 A. 758, 99 Vt. 91.
22 C.J. p 66 note 17 [b].
Contrasted with admission of direct evidence
Greater latitude in presenting evidence must be allowed in cases depending on circumstantial evidence than in those on direct evidence.—Pounds v. Minter, Tex.Com.App., 13 S.W.2d 351, affirming in part and reversing in part Minter v. Pounds, Civ.App., 3 S.W.2d 830.

42. U.S.—Holmes v. Goldsmith, Or., 13 S.Ct. 288, 147 U.S. 150, 37 L.Ed. 118—Northwestern Mut. Life Ins. Co. v. Johnson, C.C.A.Iowa, 275 F. 757.
Mo.—Smith v. St. Louis Public Service Co., App., 84 S.W.2d 161—Mosby v. McKee, Zook & Whiteford Commission Co., 91 Mo.App. 500.

43. Ala.—Southern Ry Co. v. Montgomery, 157 So. 854, 229 Ala. 456—Sorrell v. Scheuer, 96 So. 216, 209 Ala. 268.
Ark.—Coca-Cola Bottling Co. v. Shipp, 297 S.W. 856, 174 Ark. 130.
Conn.—Banach v. Bohinski, 139 A. 688, 107 Conn. 156.
Md.—Lee v. Tinges, 7 Md. 215.
N.Y.—In re Dale's Will, 288 N.Y.S. 564, 159 Misc. 578.
Tex.—Chambers v. Winn, Civ.App., 133 S.W.2d 279, reversed on other grounds, Com.App., 154 S.W.2d 454—Washington Nat. Ins. Co. v. Curry, Civ.App., 97 S.W.2d 525.
Vt.—Gero v. John Hancock Mut. Life Ins. Co., 18 A.2d 154, 111 Vt. 462—Tyrrell v. Prudential Ins. Co. of America, 192 A. 184, 109 Vt. 6, 115 A.L.R. 392.
Wash.—Keisel v. Bredick, 74 P.2d 473, 192 Wash. 665.
22 C.J. p 66 note 17 [a].

44. U.S.—Atlantic Greyhound Corporation v. Crenshaw, C.C.A.Ga., 99 F.2d 449.
Ga.—Talbotton R. Co. v. Gibson, 32 S.E. 151, 106 Ga. 229.
Tex.—Shell Pipe Line Corporation v. Svrcek, Civ.App., 37 S.W.2d 297.
Vt.—Woodhouse v. Woodhouse, 130 A. 758, 99 Vt. 91.
Va.—Goodloe v. Smith, 164 S.E. 379, 158 Va. 571.
22 C.J. p 66 note 17 [b].

45. Miss.—State ex rel. District Attorney v. Ingram, 176 So. 392, 179 Miss. 485.

46. Ky.—Smith v. Ward, 132 S.W.2d 762, 280 Ky. 173.

47. U.S.—Mutual Life Ins. Co. of New York v. Zimmerman, C.C.A. Fla., 75 F.2d 758.

48. Mass.—Bianconi v. Crowley, 152 N.E. 305, 256 Mass. 187.

49. N.Y.—Engel v. United Tract. Co., 96 N.E. 731, 203 N.Y. 321, Ann. Cas.1913A 859.

50. U.S.—Lee v. Malleable Iron Range Co., D.C.Wis., 247 F. 795, modified on other grounds, C.C.A., Malleable Iron Range Co. v. Lee, 263 F. 896, certiorari denied 40 S. Ct. 342, 251 U.S. 562, 64 L.Ed. 415.

51. Miss.—State ex rel. District Attorney v. Ingram, 176 So. 392, 179 Miss. 485.

52. Tex.—Green v. Texas & P. Ry. Co., 81 S.W.2d 669, 125 Tex. 168, reversing, Civ.App., 50 S.W.2d 353.

53. Ark.—Missouri Pac. R. Co. v. Hull, 33 S.W.2d 406, 182 Ark. 873.
Mass.—Commonwealth v. Webster, 5 Cush. 295, 52 Am.D. 711.
22 C.J. p 66 note 20.

54. Mo.—Look v. French, 44 S.W. 2d 128.

55. U.S.—Falstaff Brewing Corporation v. Thompson, C.C.A.Neb., 101 F.2d 301, certiorari denied 59 S. Ct. 834, 307 U.S. 631, 83 L.Ed. 1514—Pacific S. S. Co. v. Holt, C.C.A. Or., 77 F.2d 192—New England Trust Co. v. Farr, C.C.A.Mass., 57 F.2d 103, certiorari denied 53 S. Ct. 14, 287 U.S. 612, 77 L.Ed. 532—Lamborn v. National Bank of Commerce of Norfolk, C.C.A.Va., 15 F. 2d 473, certiorari granted 47 S. Ct. 457, 273 U.S. 688, 71 L.Ed. 841, reversed on other grounds 48 S.Ct. 378, 276 U.S. 469, 72 L.Ed. 657.
Minn.—Luebke v. J. I. Case Threshing Mach. Co., 226 N.W. 415, 178 Minn. 40—Vought v. Porter, 209 N.W. 642, 168 Minn. 43—Chrysler

trier of fact in determining the truth of the matter in issue.[56]

While a fact does not become relevant merely because its existence is consistent with a party's contention,[57] a collateral fact is relevant and admissible when it tends to render probable the contention of the party producing it;[58] and the court may receive aid from evidence which in itself is not relevant to any issue in the case, but which is corroborative of other evidence on a disputed point.[59] Thus evidence may be admitted to show a party's good faith[60] or motive,[61] or to show that an opponent's contention is probably unsound because maintained in bad faith.[62] The court may, especially where the testimony is conflicting, receive evidence of all of the circumstances attending a transaction and the relations of the parties[63] to aid the trier of fact properly to understand their conduct[64] or motives,[65] or to judge as to the reasonableness[66] or unreasonableness[67] of their respective claims. Evidence of facts which happened before or after the transaction in issue, but which relate directly to it, may be admissible,[68] as where they were, or probably may have been, the cause or the effect of a fact in issue.[69]

On the other hand, evidence of collateral facts is to be received with caution,[70] and the court may, in a proper case, reject it,[71] and should reject it when it overshadows the real issues in the case.[72] Evidence of collateral facts is excluded where such facts have no connection with the subject litigated and, therefore, are incapable of shedding light on the inquiry or affording grounds for reasonable presumptions or inferences.[73]

v. Randolph Sand & Gravel Company, 193 N.W. 677, 155 Minn. 297.
Mo.—Lock v. Chicago, B. & Q. R. Co., 219 S.W. 919, 281 Mo. 532.
Or.—Beard v. Beard, 133 P. 795, 66 Or. 526.
22 C.J. p 168 note 17—64 C.J. p 110 note 91.

Corpus Juris quoted and cited in support of the rule in a criminal proceeding.
U.S.—Terry v. U. S., C.C.A.Va., 51 F. 2d 49, 53.
N.M.—State v. Costales, 19 P.2d 189, 191, 37 N.M. 115.

Conclusiveness of inference afforded by a collateral fact is not determinative of the admissibility of the fact.
U.S.—Interstate Commerce Commission v. Baird, N.Y., 24 S.Ct. 563, 194 U.S. 25, 48 L.Ed. 860—Holmes v. Goldsmith, Or., 13 S.Ct. 288, 147 U.S. 150, 37 L.Ed. 118.
Pa.—Stevenson v. Stewart, 11 Pa. 307.
Vt.—Tyrrell v. Prudential Ins. Co. of America, 192 A. 184, 109 Vt. 6, 115 A.L.R. 392.
Va.—Chesapeake & O. Ry. Co. v. Golladay, 180 S.E. 400, 164 Va. 292.
22 C.J. p 164 note 79 [a].

56. Mo.—Lock v. Chicago, B. & Q. R. Co., 219 S.W. 919, 281 Mo. 532.
N.H.—McCrillis v. American Heel Co., 155 A. 410, 85 N.H. 165—Daley v. Metropolitan Life Ins. Co., 128 A. 531, 81 N.H. 502.
22 C.J. p 168 note 14 [a]—64 C.J. p 111 note 94.

Where there is a direct conflict in the evidence of witnesses relating to a material issue, any collateral fact or circumstance tending in any reasonable degree to establish the probability or improbability of the fact in issue is relevant evidence and proper for the consideration of the jury.—Bowers v. Pixley, 197 N.W. 410, 111 Neb. 698—22 C.J. p 167 note 2 [a] (1).

57. Mo.—Chambers v. Hines, 233 S.W. 949, 208 Mo.App. 222.
22 C.J. p 168 note 13.

58. Ala.—George D. Witt Shoe Co. v. Mills, 140 So. 578, 580, 224 Ala. 500, citing **Corpus Juris.**
Mo.—Chambers v. Hines, 233 S.W. 949, 208 Mo.App. 222.
Okl.—Harden v. Kifer, 111 P. 490, 491, 188 Okl. 538, citing **Corpus Juris.**
Vt.—Atwood v. Joyce, 192 A. 11, 109 Vt. 30—Davis v. Randall, 81 A. 250, 85 Vt. 70.
22 C.J. p 167 note 2.

Corpus Juris cited in connection with the rule in criminal proceedings.—Holland v. State, 142 So. 112, 113, 25 Ala.App. 147.

59. Ala.—De Bardeleben v. Sellers, 84 So. 403, 17 Ala.App. 247.
Mo.—Luechtefeld v. Marglous, App., 151 S.W.2d 710—Chambers v. Hines, 233 S.W. 949, 208 Mo.App. 222.
22 C.J. p 168 note 14.
Corroboration of witnesses see the C.J.S. title Witnesses §§ 645–651, also 70 C.J. p 1179 note 49—p 1189 note 62.

60. Va.—Thomas v. Lewis, 15 S.E. 389, 89 Va. 1, 37 Am.S.R. 848, 18 L.R.A. 170.
22 C.J. p 167 note 3.

61. Cal.—Runo v. Williams, 122 P. 1082, 162 Cal. 444.

62. Mich.—Webster v. Sibley, 40 N.W. 772, 72 Mich. 630.
22 C.J. p 167 note 5.

63. U.S.—Copper Process Co. v. Chicago Bonding & Ins. Co., C.C.A.Pa., 262 F. 66, 8 A.L.R. 1477.
S.D.—Sandbo v. Sandbo, 290 N.W. 325.

64. N.C.—Bank of Union v. Stack, 103 S.E. 6, 179 N.C. 514.

65. N.C.—Bank of Union v. Stack, supra.

66. Ill.—Edwin C. Price Co. v. Ruggles & Rademaker Salt Co., 283 Ill. App. 447.
N.C.—Bank of Union v. Stack, 103 S.E. 6, 179 N.C. 514.
22 C.J. p 167 note 11—64 C.J. p 111 note 95.
Credibility and impeachment of witnesses see the C.J.S. title Witnesses §§ 458–651, also 70 C.J. p 759 note 9—p 1189 note 62.

67. Colo.—Dexter v. Collins, 42 P. 664, 21 Colo. 455.
22 C.J. p 167 note 12.

68. Tex.—Horton v. Reynolds, 8 Tex. 284—Western Medical Arts Bldg. Corporation v. Bryan, Civ. App., 5 S.W.2d 862, error dismissed.

69. Ky.—Louisville R. Co. v. Ellerhorst, 110 S.W. 823, 129 Ky. 142, 33 Ky.L. 605.
Mo.—Fryer v. St. Louis-San Francisco Ry. Co., 63 S.W.2d 47, 333 Mo. 740—McDonald v. Kansas City Gas Co., 59 S.W.2d 37, 332 Mo. 356.

70. Minn.—Philips v. Mo, 97 N.W. 969, 91 Minn. 311—Slingerland v. Slingerland, 48 N.W. 605, 46 Minn. 101.

71. Minn.—State Elevator Co. v. Great Northern Ry. Co., 158 N.W. 399, 133 Minn. 295.
64 C.J. p 111 note 96.

72. Minn.—Virtue v. Creamery Package Mfg. Co., 142 N.W. 930, 1136, 123 Minn. 17, L.R.A.1915B 1179, 1195.
22 C.J. p 159 note 54 [a].

73. U.S.—Twachtman v. Connelly, C.C.A.Ohio, 106 F.2d 501.

§ 163. Matters Showing Relevancy of Other Facts or Explanatory of Facts in Evidence or Inferences Therefrom

Facts may be admissible which establish the relevancy of evidence, or explain or render more certain and definite evidence already given, or substantiate inferences therefrom, or which diminish the force of unfavorable facts shown by the opponent.

Facts whose existence is a necessary preliminary to the relevancy of evidence,[74] such as the accuracy of a photograph[75] or a set of books,[76] or the identity of a cause of action,[77] are properly received. In addition, facts which are otherwise irrelevant may be admissible because, by explaining or unfolding a situation, they establish the relevancy of evidence,[78] or because they explain or render more certain and definite evidence which has already been given,[79] or substantiate an inference which might be drawn therefrom.[80]

Explanatory evidence is equally competent to diminish the force of unfavorable facts shown by the opposing party,[81] as by suggesting reasons why witnesses have not been called[82] or books produced.[83]

§ 164. Evidence Irrelevant Unless Preceded or Followed by Other Evidence

Evidence may be admissible where, although it is irrelevant standing alone, it is or may be expected to become relevant in connection with other evidence, or where it forms a link in the chain of evidence necessary to support a party's contention.

Evidence may be admissible where, although it is irrelevant standing alone, it is or may be expected to become relevant in connection with other evidence,[84] or where it forms a link in the chain of evidence necessary to support a party's contention.[85] Conversely, evidence which is not independ-

74. Tex.—Nemir v. Bennett, Civ. App., 238 S.W. 998, 1002, citing **Corpus Juris.**

75. Ind.—Miller v. Louisville, N. A & C. R. Co., 27 N.E. 339, 128 Ind. 97, 25 Am.S.R. 416.

76. Cal.—West Coast Lumber Co. v. Newkirk, 22 P. 231, 22 P. 232, 80 Cal. 275.

77. Mich.—Dupuis v. Interior Constr. & Impr. Co., 50 N.W. 103, 88 Mich. 103.
22 C.J. p 165 note 90.

78. Tex.—Nemir v. Bennett, Civ. App., 238 S.W. 998, 1002, citing **Corpus Juris.**
22 C.J. p 165 note 92.

79. Md.—Miles v. State, for Use of Wistling, 198 A. 724, 174 Md. 292.
Mo.—Chapman v. Metropolitan Life Ins. Co., App., 132 S.W.2d 1096, 1099, citing **Corpus Juris**—Little Bros. Co. v. G. Mathes Iron & Metal Co., App., 223 S.W. 952.
N.Y.—New York Cent. R. Co. v. City of New York, 199 N.Y.S. 780.
Or.—Pacific Trading Co. v. Sun Ins. Office, 25 P.2d 1052, 145 Or. 211—Brosnan v. Boggs, 198 P. 890, 101 Or. 472.
Pa.—Pennsylvania Co. for Insurance on Lives and Granting Annuities v. Philadelphia Electric Co., 200 A. 18, 331 Pa. 125—Ginsburg v. City of Philadelphia, 98 Pa.Super. 131—John Wanamaker, Philadelphia, v. Chase, 81 Pa.Super. 201.
Tex.—McMahon v. Kirby, Civ.App., 256 S.W. 622—Dove v. Coleman, Civ.App., 234 S.W. 917.
Va.—Virginia Talc & Soapstone Co. v. Hurkamp, 98 S.E. 681, 124 Va. 721.
22 C.J. p 166 note 93.
Corpus Juris quoted in support of the rule in a criminal proceeding.—Terry v. U. S., C.C.A.Va., 51 F.2d 49, 53.

Date

A fact otherwise incompetent may be admitted to render the testimony of a witness more definite, as by fixing a date.—Carpenter v. Carpenter, 128 A. 223, 46 R.I. 433—22 C.J. p 165 note 83.

Responsibility of another

One who is charged with but who denies having performed an act of a personal, individual nature may, in the complete establishment of his denial, show by any competent evidence who did the act.—Cook v. Moecker, 217 Ill.App. 479.

80. Pa.—Keath v. Shiffer, 37 Pa. Super. 573.
22 C.J. p 166 note 94.

81. Ala.—Thompson v. Gilliland, 94 So. 53, 208 Ala. 294.
Ariz.—Miller Cattle Co. v. Francis, 298 P. 631, 38 Ariz. 197—Atchison, T. & S. F. Ry. Co. v. Gutierrez, 249 P. 66, 30 Ariz. 491.
Mass.—Foley v. Lord, 122 N.E. 393, 232 Mass. 368.
Mich.—Stehouwer v. Lewis, 227 N. W. 759, 249 Mich. 76, 74 A.L.R. 844.
Miss.—Stamps v. Polk, 108 So. 729, 143 Miss. 551.
Mo.—American Tobacco Co. v. Schulenburg, App., 17 S.W.2d 557.
N.H.—Lafferty v. Houlihan, 121 A. 92, 81 N.H. 67.
N.Y.—Huston v. Chenango County, 1 N.Y.S.2d 252, 253 App.Div. 56, affirmed 16 N.E.2d 301, 278 N.Y. 646
Pa.—Kelly v. Director General of Railroads, 118 A. 436, 274 Pa. 470.
R.I.—Ives v. Lee, 111 A. 765.
Tex.—Home Ben. Ass'n v. Horne, Civ.App., 290 S.W. 226.
Vt.—Tyrrell v. Goslant, 106 A. 585, 93 Vt. 63.
22 C.J. p 166 note 95.
Evidence admissible by reason of admission of similar evidence of adverse party see infra § 190.

82. Cal.—Klamath Lumber Co. v. Co-operative Land & Trust Co., 145 P. 159, 25 Cal.App. 678.
N.J.—Eichelberger v. Inter-City Transp. Co., 15 A.2d 758, 125 N.J. Law 365, affirming 10 A.2d 267, 123 N.J.Law 595.
22 C.J. p 167 note 96.
Presumptions arising from failure to call witnesses or produce documents see supra § 156.

83. Wash.—Finance & Insurance Agency v. Herren, 247 P. 948, 139 Wash. 499.
22 C.J. p 167 note 97.

84. Ala.—Nations v. Harris, 108 So. 29, 214 Ala. 339.
Cal.—Ralph v. Anderson, 200 P. 940, 187 Cal. 45.
Ill.—Wolf v. People's Bank, 255 Ill. App. 127.
Iowa.—Remington v. Machamer, 186 N.W. 32, 192 Iowa 1098.
Ky.—Paducah Grain & Elevator Co. v. Marshall, 246 S.W. 30, 196 Ky. 673.
Vt.—Lowell v. Wheeler's Estate, 112 A. 361, 95 Vt. 113.
Va.—Monroe & Monroe v. Cowne, 112 S.E. 848, 133 Va. 181.
22 C.J. p 165 note 81.
Order of proof see the C.J.S. title Trial § 97, also 64 C.J. p 148 note 35—p 150 note 49.
Corpus Juris statement quoted in support of rule in criminal proceeding.—Glover v. State, 105 S.W.2d 82, 84, 194 Ark. 66.

Compliance with statute

Where a statute provides for the doing of a certain act as evidence of compliance with the statute, evidence of the doing of such act may be admissible as evidence of such compliance, without the aid of other evidence.—Coates v. Marion County, 189 P. 903, 96 Or. 334.

85. U.S.—McCandless v. U. S., Ha-

ently relevant is inadmissible unless its relevancy is made to appear by other evidence,[86] the onus of making such a showing being on the party offering the evidence.[87] Where an apparently irrelevant fact is offered, there must be shown a probability that its relevancy will subsequently appear; the mere possibility that it will do so is not enough.[88]

§ 165. Negative Evidence

Testimony as to the nonexistence of a fact, or as to witness' want of knowledge of its existence, may be admissible where the situation of the witness was such that if the fact had existed he probably would have known it.

Although negative evidence may be so entirely destitute of probative value as to be inadmissible,[89] it is by no means necessary that relevant evidence should always be presented in an affirmative form.[90] Testimony as to the nonexistence of a fact or as to

wall, 56 S.Ct. 764, 298 U.S. 342, 80 L.Ed. 1205, reversing, C.C.A., 74 F.2d 596, certiorari granted 56 S.Ct. 308, 296 U.S. 570, 80 L.Ed. 403.
Ala.—Southern Natural Gas Co. v. Davidson, 142 So. 63, 225 Ala. 171.
Del.—Dougherty v. White, 80 A. 237, 25 Del. 316, Ann.Cas.1914C 876.
Fla.—Ittleson v. Browning, 128 So. 639, 99 Fla. 1195—McMillan v. Reese, 55 So. 388, 61 Fla. 360.
N.J.—Feldman v. Jacob Branfman & Son, 166 A. 126, 111 N.J.Law 37.
S.C.—Entzminger v. Seigler, 195 S.E. 244, 186 S.C. 194.
Tex.—Lange Cable Tool Drilling Co. v. Barnett Petroleum Corporation, Civ.App., 142 S.W.2d 833—Hussmann v. Leavell & Sherman, Civ.App., 20 S.W.2d 829, affirmed Hussman v. Leavell & Sherman, Com.App., 32 S.W.2d 643—Southland Life Ins. Co. v. Norton, Civ.App., 297 S.W. 1083, reversed on other grounds, Com.App., 5 S.W.2d 767, conformed to, Civ.App., 9 S.W.2d 752—Frank v. Feinberg, Civ.App., 256 S.W. 944.
Va.—Goodloe v. Smith, 164 S.E. 379, 158 Va. 571.
Wis.—Gilchrist v. Brande, 15 N.W. 817, 58 Wis. 184.
22 C.J. p 165 note 82.

Corpus Juris statement quoted in support of rule in criminal proceeding.—Glover v. State, 105 S.W.2d 82, 84, 194 Ark. 66.

86. U.S.—Ætna Life Ins. Co. v. McAdoo, C.C.A.Ark., 106 F.2d 618.
Ala.—Crutchfield v. Vogel, 171 So. 889, 233 Ala. 306.
Cal.—Pacific Mfg. Co. v. Perry, 181 P. 820, 40 Cal.App. 708.
Fla.—Ittleson v. Browning, 128 So. 639, 99 Fla. 1195—Malsby v. Gamble, 54 So. 766, 61 Fla. 310.
Iowa.—Jones v. Spencer, 175 N.W. 855, 188 Iowa 94.
Mich.—Grzelka v. Chevrolet Motor Car Co., 281 N.W. 568, 286 Mich. 141.
Miss.—Eminent Household of Columbia Woodmen v. Ramsey, 79 So. 351, 118 Miss. 454.
N.Y.—Halloran v. N. & C. Contracting Co., 164 N.E. 324, 249 N.Y. 381, affirming 226 N.Y.S. 825, 223 App.Div. 721, which reversed 224 N.Y.S. 813, 222 App.Div. 690.
S.D.—First State Bank of Wood v. Anderson, 191 N.W. 339, 46 S.D. 104.
Tex.—Republic Underwriters v. Howard, Civ.App., 69 S.W.2d 584, error dismissed—Hull & Kennedy v. Christian, Civ.App., 283 S.W. 568—Bowman & Blatz v. Raley, Civ.App., 210 S.W. 723—El Paso Electric Ry. Co. v. Terrazas, Civ.App., 208 S.W. 387, error refused.

Particular facts required to show relevancy

(1) Party's knowledge of or connection with transaction of which he seeks to avail himself or by which it is sought to bind him.
Ill.—Morehouse v. Gulf Warehouse & Sales Co., 17 N.E.2d 608, 297 Ill.App. 367.
Ind.—Kline v. Indiana Trust Co., 125 N.E. 434, 74 Ind.App. 351.
Iowa.—Jones v. Spencer, 175 N.W. 855, 188 Iowa 94.
Pa.—Strawn v. Croushore, 3 Fay.L.J. 185.

(2) Authority of person whose act is sought to be shown.
N.C.—Nance v. King, 101 S.E. 212, 178 N.C. 574.
Tex.—Blackman v. Blackman, Civ.App., 128 S.W.2d 433, error dismissed, judgment correct.

87. Wash.—Welch v. Creech, 153 P. 355, 88 Wash. 429, L.R.A.1918A 353.
22 C.J. p 161 note 55.

88. Tex.—Walker v. Kellar, Civ.App., 218 S.W. 792.
22 C.J. p 165 note 85.

89. Ala.—American Trust & Savings Bank v. Montano, 89 So. 899, 18 Ala.App. 136, certiorari denied Montano v. American Trust & Savings Bank, 89 So. 923, 206 Ala. 700.
Ga.—Segars v. City of Cornelia, 4 S.E.2d 60, 60 Ga.App. 457—Atkinson v. Mullis, 110 S.E. 509, 28 Ga.App. 176.
Ky.—Louisville & N. R. Co. v. McCoy, 87 S.W.2d 921, 261 Ky. 435—Louisville Gas & Electric Co. v. Duncan, 31 S.W.2d 915, 235 Ky. 613.
Mass.—Teague v. City of Boston, 179 N.E. 806, 278 Mass. 305.
Mich.—La Due v. Lebanon Tp., 192 N.W. 636, 222 Mich. 301.
Minn.—Brodsky v. Brodsky, 215 N.W. 181, 172 Minn. 250.
N.C.—Lee v. Martin, 132 S.E. 14, 191 N.C. 401.
S.C.—Southern Ry. Co. v. Mayer, 157 S.E. 6, 159 S.C. 332.
S.D.—Karlen v. Trebble, 189 N.W. 519, 45 S.D. 570.
Tex.—Aldana v. Aldana, Civ.App., 42 S.W.2d 661, error dismissed.
22 C.J. p 168 note 20.

Failure to see evident danger

The law will not permit one having an unobstructed view to testify he looked and did not see danger where, if he had properly exercised his sight, he would have seen it.—Dee v. City of Peru, 174 N.E. 901, 343 Ill. 36.

90. U.S.—Norfolk Southern R. Co. v. Stricklin, D.C.N.C., 264 F. 546.
Ala.—Burch v. Ingham Lumber Co., 102 So. 19, 212 Ala. 204.
Cal.—Linforth v. Montgomery, 231 P. 735, 195 Cal. 49—Exposito v. United Railroads of San Francisco, 183 P. 576, 42 Cal.App. 320.
D.C.—Boosalis v. Crawford, 99 F.2d 374, 69 App.D.C. 141.
Ga.—Continental Trust Co. v. Bank of Harrison, 136 S.E. 319, 36 Ga.App. 149, conforming to answer to certified questions 134 S.E. 775, 162 Ga. 758, 50 A.L.R. 412.
Idaho.—Jakeman v. Oregon Short Line R. Co., 256 P. 88, 43 Idaho 505.
Ind.—Western & Southern Life Ins. Co. v. Danciu, 27 N.E.2d 763, denying rehearing 26 N.E.2d 912.
Ky.—Clark County Const. Co. v. Richards' Adm'r, 259 S.W. 331, 202 Ky. 276.
La.—Ogden v. Rosedale Inn, App., 189 So. 162.
Mo.—Furman v. St. Louis Union Trust Co., 92 S.W.2d 726, 338 Mo. 884—Nall v. Brennan, 23 S.W.2d 1053, 324 Mo. 565, 68 A.L.R. 684—Wheeler v. Fidelity & Casualty Co. of New York, 251 S.W. 924, 298 Mo. 619—Loughlin v. Marr-Bridger Grocer Co., App., 10 S.W.2d 75.
Pa.—Commonwealth v. Sweeney, 129 A. 577, 283 Pa. 520.
S.C.—Montgomery v. National Convoy & Trucking Co., 195 S.E. 247, 186 S.C. 167.
Utah.—Fogg v. Oregon Short Line R. Co., 1 P.2d 954, 78 Utah 105.
22 C.J. p 168 note 21.

witness' want of knowledge of its existence is admissible where the situation of the witness was such that if the fact had existed he probably would have known it.[91] Thus, it is well settled that evidence that a witness did not see,[92] hear,[93] or observe[94] is relevant, provided the circumstances are such as properly to lead to the inference that the alleged fact would have been seen, heard, or observed had it actually existed.[95] Absence of knowledge of a particular fact may also be a relevant mental state.[96] The circumstance that there is no

Omission of legal duty constituting actionable negligence is a negative fact.—Carruthers v. Atlantic & Yadkin Ry Co., 9 S E.2d 498, 218 N C. 49, order annulled on other grounds 11 S.E.2d 157, 218 N.C. 377.

Absence of complaint by others

(1) Where the circumstances warrant an inference that persons who have been injured would make complaint, and it is shown that persons other than the person whose injury is in issue were similarly situated and had an opportunity to make complaint, evidence that such persons made no complaint may be admissible.—Landfield v. Albiani Lunch Co., 168 N.E. 160, 268 Mass. 528.

(2) Evidence held properly admitted.

U.S.—Steil v. Holland, C.C.A.Cal., 3 F.2d 776

La.—Ogden v. Rosedale Inn, App., 189 So. 162.

Mass.—Landfield v. Albiani Lunch Co., supra.

(3) Evidence held inadmissible or properly excluded.

Ala.—Winter-Loeb Grocery Co. v. Boykin, 82 So. 437, 203 Ala. 187.

Ark.—Siegel, King & Co. v. Penny & Baldwin, 2 S W.2d 1082, 176 Ark. 336.

Mass.—Rome v. Johnson, 174 N.E. 716, 274 Mass. 444

Mo.—Bloom's Son Co. v. Haas, 108 S. W. 1078, 130 Mo.App. 122.

N.Y.—New York Canners v. Milbourne, 160 N.E. 914, 247 N.Y. 460, reversing 215 N.Y.S. 891, 217 App. Div. 714

S.C.—International Agricultural Corporation v. Hammett, 107 S.E. 917, 116 S.C. 221.

Tex.—E. F. Elmberg Co. v. Dunlap Hardware Co, Com.App., 267 S.W. 258, affirming Dunlap Hardware Co. v. E. F. Elmberg Co., Civ.App., 252 S.W. 1098—Goldsmith v. Ohio Truss Co., Civ.App., 283 S.W. 299—Hill v. Hanan & Son, 131 S.W. 245, 62 Tex.Civ.App. 191—Haynie v. Plano Mfg. Co., 82 S.W. 532, 36 Tex.Civ.App. 567.

91. Ark.—Walloch v. Heiden, 22 S. W.2d 1020, 180 Ark. 844.

Me.—Rogers v. Kendall, 119 A. 616, 122 Me. 248.

N.C.—K. B. Johnson & Sons v. Southern Ry. Co., 199 S.E. 704, 214 N.C. 484.

22 C.J. p 169 note 26.

Residence

(1) One living in a community and well acquainted may testify that he has never heard of a certain named person or that such person does not live there.—Elliott v. Georgia Power Co., 197 S.E. 914, 58 Ga.App. 151—22 C.J. p 169 note 26 [a].

(2) Similarly, the testimony of a postman or letter carrier, who has long been engaged as such, is admissible to prove that a certain person is not a resident of the locality.—In re Hunt, 191 A. 437, 15 N.J.Misc. 331.

92. U.S.—Fels v. East St. Louis & S. Ry. Co., C.C.A.Mo., 275 F. 881.

Ala.—Morgan Hill Paving Co. v. Fonville, 119 So. 610, 218 Ala. 566.

Ind.—Chicago, S. S. & S. B. R. Co. v. Pacheco, 181 N.E. 7, 94 Ind.App 353.

Tex.—Rains County v. Spears, Civ. App., 120 S.W.2d 867.

Wash.—Webber v. Park Auto Transp. Co., 244 P. 718, 138 Wash. 325, 47 A.L.R. 590.

22 C.J. p 168 note 22.

93. Minn.—Polchow v. Chicago, St. P., M. & O. Ry. Co., 270 N.W. 673, 199 Minn. 1.

N.D.—Nichols v. Kluver, 237 N.W. 640, 61 N.D. 42.

Tex.—Payne v. Roberts, Civ.App., 249 S.W. 528.

Wash.—Webber v. Park Auto Transp. Co., 244 P. 718, 138 Wash. 325, 47 A.L.R. 590

22 C.J. p 168 note 23.

94. Colo.—Wold v. City of Boulder, 9 P.2d 931, 91 Colo. 44.

22 C.J. p 168 note 24.

95. Ala.—Planters' Chemical & Oil Co v. Daniel, 96 So 424, 209 Ala. 363—H. & L. M. Warten Cotton Co. v. McGuire, 91 So. 308, 206 Ala. 469.

Ariz.—Davis v. Boggs, 199 P. 116, 22 Ariz. 497.

Cal.—Lahey v. Southern Pac. Co., 61 P.2d 461, 16 Cal.App.2d 652, certiorari denied Southern Pac. Co. v. Lahey, 57 S.Ct. 508, 300 U.S. 665, 81 L.Ed. 873—Thuet v. Southern Pac. Co., 27 P.2d 910, 135 Cal.App. 527.

Fla.—Seaboard Air Line Ry. Co. v. Myrick, 109 So. 193, 91 Fla 918.

Ga.—Mishoe v. Davis, 14 S.E.2d 187, 64 Ga.App. 700—Seaboard Air Line Ry. Co. v. Sarman, 144 S.E. 810, 38 Ga.App. 637.

Idaho.—Kerby v. Oregon Short Line R. Co., 264 P. 377, 45 Idaho 636.

Iowa.—Chilcote v. Chicago & N. W. R. Co., 221 N.W. 771, 206 Iowa 1093—Anderson v. U. S. R. R. Administration, 211 N.W. 872, 203 Iowa 715.

Ky.—Louisville & N. R. Co. v. Ratliff's Adm'r, 85 S.W.2d 1006, 260 Ky. 380.

Md.—Fleischman Transp. Co. v. Egli, 164 A. 228, 163 Md. 663.

Mass.—Byrne v. Dunn, 5 N.E.2d 10, 296 Mass. 184—Hough v. Boston Elevated Ry. Co., 159 N.E 526, 262 Mass. 91—Lenihan v. Boston & M. R. R., 156 N E. 857, 260 Mass. 28.

Mich.—Hudson v. Grand Trunk Western Ry. Co., 198 N.W. 339, 227 Mich. 1.

Mo.—Crossno v. Terminal R. Ass'n of St. Louis, 41 S.W.2d 796, 328 Mo. 826—Dodd v. Terminal R. Ass'n of St. Louis, App., 108 S.W. 2d 982—McMillan v. Isreal, App., 30 S W.2d 626.

Neb.—Hook v. Payne, 190 N.W. 581, 109 Neb. 252.

N.C.—K. B. Johnson & Sons v. Southern Ry. Co., 199 S.E. 704, 214 N.C. 484—Hill v. Norfolk-Southern Ry. Co., 143 S.E. 129, 195 N.C. 605.

Okl.—Hoyt v. St. Louis-San Francisco Ry. Co., 4 P 2d 747, 153 Okl. 7—St. Louis-San Francisco Ry. Co. v. Robinson, 225 P. 986, 99 Okl. 2.

Or.—Lauderback v. Multnomah County, 226 P. 697, 111 Or. 681.

Pa.—Sharpless v. Delaware, L. & W. R. Co., 133 A. 636, 286 Pa. 439—Neuman v. Reading Co., 129 A. 450, 283 Pa. 416.

S.C.—Mishoe v. Atlantic Coast Line R. Co., 197 S.E. 97, 186 S.C. 402.

Tenn.—Tennessee Cent Ry. Co. v. Page, 282 S.W. 376, 153 Tenn. 84—Louisville & N. R. Co. v. Frakes, 11 Tenn.App. 593

Tex.—Latham v. Houston Land & Trust Co., Civ.App., 62 S W.2d 519, error dismissed—Sloan v. Sloan, Civ.App., 32 S.W.2d 513, 518, citing **Corpus Juris**—Louisiana Ry. & Nav. Co. of Texas v. Humphreys, Civ.App., 285 S.W. 869, reversed on other grounds, Com App., Humphries v. Louisiana Ry. & Irr. Co. of Texas, 291 S.W. 1094—Northern Texas Traction Co. v. Smith, Civ. App., 223 S.W. 1013.

Utah.—Clark v. Los Angeles & S. L. R Co., 275 P. 582, 73 Utah 486.

Vt.—Le Febvre's Adm'r v. Central Vermont Ry. Co., 133 A. 359, 99 Vt. 366.

22 C.J. p 169 note 25.

96. Ala.—Alabama Great Southern R. Co. v. Davis, 24 So. 862, 119 Ala. 572.

Mo.—Savage v. Union Electric Light

entry,[97] record,[98] or memorandum[99] of a fact where it would naturally be found if it existed may be relevant. However, such relevancy is, except in cases where the law requires that an instrument to be effective shall be recorded, entirely dependent on the inference arising from regularity and disinterestedness that if the fact existed an entry of it would have been made in that particular place.[1]

§ 166. Unnecessary Evidence

Evidence otherwise admissible may be excluded where the time necessary to hear it would not be judiciously expended because it is merely cumulative, or tends only to prove facts which are admitted, not controverted, sufficiently proved, or otherwise before the jury, or which are obviously true.

The fact that evidence may be relevant and material does not necessarily require its admission, but it may, in the discretion of the court, be excluded if the time necessary to hear it would not be judiciously expended because it is merely cumulative,[2] or tends only to prove facts which are admitted,[3] not controverted,[4] sufficiently proved,[5] or otherwise before the jury,[6] or which are obviously true.[7] Such evidence will be the more readily excluded where if admitted it probably would prejudice and mislead the jury.[8]

B. PARTICULAR MATTERS

§ 167. Ancient Facts

The proof of facts which occurred at a time fairly beyond the ordinary period of personal memory by hearsay evidence is considered infra §§ 195–200, and the admissibility and effect of ancient documents infra §§ 743–752.

Examine Pocket Parts for later cases.

§ 168. Facts of Family History

Where a contention is based on a transaction which, if it occurred, would probably be recorded in family records, existence of the appropriate entry in a proper place is a fact circumstantially relevant.

Where a contention is necessarily based on a transaction which, if it actually occurred, would probably be recorded in family records, existence of the appropriate entry in a proper place is a fact circumstantially relevant.[9]

§ 169. Age

Age may be proved by relevant circumstantial evidence.

Age may be proved by circumstantial evidence[10] which is shown to be relevant.[11]

& Power Co., App., 86 S.W.2d 97—Dixon v. Boeving, App., 208 S.W. 279.

97. Conn.—Peck v. Pierce, 28 A. 524, 63 Conn. 310.
22 C.J. p 169 note 29.
Absence of book entry as proof of negative see infra § 687.
Debtor's schedule of assets
Evidence that a schedule of assets filed by an insolvent debtor did not include certain property is admissible as evidence that the debtor did not then own or pretend to own such property.—Woodward v. Leavitt, 107 Mass. 453, 9 Am.R. 49.

98. U.S.—Norfolk Southern R. Co. v. Stricklin, D.C.N.C., 264 F. 546.
Ala.—Reichert v. Jerome H. Sheip, Inc., 102 So. 440, 212 Ala. 300.
Ill.—In re Panico's Estate, 268 Ill. App 585.
Mont.—Green v. Baker, 214 P. 88, 66 Mont. 568.
22 C.J. p 169 note 30.

99. Ala.—Wisdom v. Reeves, 18 So. 13, 110 Ala. 418.
22 C.J. p 169 note 31.

1. Ga.—American Ry. Express Co. v. Archer, 104 S.E. 92, 25 Ga.App. 647.
22 C.J. p 169 note 32.

2. U.S.—Brown Fruit Co. v. Gotham Factors Corporation, C.C.A.Neb., 97 F.2d 458.
Ga.—Lovelace v. Ivey, 152 S.E. 266, 41 Ga.App. 204.
22 C.J. p 170 note 36.
Contents of writing
A question as to the contents of a writing already in evidence is properly excluded.—Birmingham News Co. v. Moseley, 141 So. 689, 225 Ala. 45.

3. Ga.—Freeman v. Metropolitan Life Ins. Co., 134 S.E. 639, 35 Ga. App. 770.
Ky.—Louisville & N. R. Co. v. Holloway's Adm'r, 173 S.W. 343, 163 Ky. 125.
Tex.—City of Amarillo v. Rust, Civ. App., 64 S.W.2d 821, 827, citing **Corpus Juris.**
22 C.J. p 170 note 37.

4. Mass.—Farrell v. B. F. Sturtevant Co., 80 N.E. 469, 194 Mass. 431.
N.C.—Connor v. Fleming Bros. Lumber & Mfg. Co., 147 S.E. 672, 197 N.C. 66.
22 C.J. p 170 note 38.

5. Tex.—Floyd v. Fidelity Union Casualty Co., Com.App., 39 S.W.2d 1091, 1093, citing **Corpus Juris.**
22 C.J. p 170 note 39.

6. **Pleading**
Evidence as to a pleading in the case which is already before the jury is properly excluded.—Barrera v. Duval County Ranch Co, Tex.Civ. App., 135 S.W.2d 518, error refused.

7. Mo.—Ridenhour v. Oklahoma Contracting Co., App., 45 S.W.2d 108.
Tex.—Kansas City, M. & O. R. Co. v. Hall, Civ.App., 152 S.W. 445.

8. Ky.—Louisville & N. R. Co. v. Holloway's Adm'r, 173 S.W. 343, 163 Ky. 125.
Pa.—Cunningham v. Smith, 70 Pa. 450
Tex.—Floyd v. Fidelity Union Casualty Co., Com.App., 39 S.W.2d 1091, 1093, citing **Corpus Juris**—City of Amarillo v. Rust, Civ.App., 64 S.W.2d 821.

9. N.Y.—Jackson v. King, 5 Cow. 237, 15 Am.D. 468.
Tex.—Howard v. Russell, 12 S.W. 525, 75 Tex. 171.

10. Ga.—Girvin v. Georgia Veneer & Package Co., 85 S.E. 922, 143 Ga. 762.
22 C.J. p 171 note 65.
Age as matter of pedigree see infra § 227.

11. Mo.—Levels v. St. Louis & H. R. Co., 94 S.W. 275, 196 Mo. 606.
N.J.—Supreme Council G. S. F. v. Conklin, 38 A. 659, 60 N.J.Law 565, 41 L.R.A. 449.

§ 170. Birth

Matters relating to the birth of a person may be established by circumstantial evidence.

Matters relating to the fact, date, and place of a person's birth may be established by circumstantial evidence.[12]

Evidence of the presence of a person at a certain place very early in life has been held admissible to prove that such place is his birthplace,[13] although there is authority to the contrary.[14]

§ 171. Name of Person or Place

The fact that a certain name has been used to designate an individual may be established by the evidence of any person who knows it.

The fact that a certain name has been used to designate a particular individual may be established by the evidence of any person who knows it.[15]

§ 172. Relationship

The rules governing the admissibility of hearsay evidence to prove matters of pedigree or relationship are treated infra §§ 226–232.

Examine Pocket Parts for later cases.

§ 173. Identity

Identity may be established by relevant circumstantial evidence, and any evidence which tends to satisfy a person of ordinary judgment is admissible on the issue.

Evidence to prove identity must be relevant.[16] However, in the absence of direct evidence or inspection by the jury, identity may be established by circumstantial evidence.[17]

Any fact, however slight, which tends to satisfy a person of ordinary judgment as to identity is admissible on the issue.[18] The identity of a person may be proved by a description of his physical appearance and characteristics,[19] or by proof of indicative manifestations, such as declarations showing peculiar knowledge,[20] or by proof of conduct, such as residence in a particular locality,[21] or service in the army at a certain time.[22]

§ 174. Mental Condition

Evidence of the mental condition of a person is admissible where such condition is an issue in the case.

Evidence of the mental condition of a person may be introduced where the existence of such a condition is an issue in the case.[23]

For the purpose of proving the mental condition of a person, evidence as to his conduct,[24] or as to other circumstances throwing light on the condition of his mind,[25] may be admitted. Ordinarily, however, a mental condition is not shown by a single manifestation and evidence of a single instance is inadmissible;[26] but the court may, in the proper exercise of its discretion, admit such evidence, or admit evidence of its manifestation in a number of instances, after other evidence of the condition has first been introduced.[27]

§ 175. Mental State and Moral Qualities

Where the mental state of a person is relevant to the issues in the case, it may be proved by evidence of his conduct, or by other circumstantial evidence.

Evidence as to the state of mind of a person is inadmissible where his mental state is not an issue in the case;[28] but such evidence is admissible where relevant to the issues.[29]

12. Md.—Jones v. Jones, 45 Md. 144.
22 C.J. p 172 note 70.
Birth as matter of pedigree see infra § 227.

13. N.J.—Independence Tp. v. Pompton Tp., 9 N.J.Law 209, 212.

14. Conn.—Union v. Plainfield, 39 Conn. 563.

15. Tex.—May v. State, 63 S.W. 132, 43 Tex.Cr. 54.
22 C.J. p 172 note 91.

16. Ga.—Reed v. V. H. Kriegshaber & Son, 160 S.E. 559, 44 Ga.App. 63.

17. Ala.—Blue v. Hooks, 141 So. 627, 224 Ala. 696—Southern Ins. Co. v. Wilson, 108 So. 5, 214 Ala. 373.
Iowa.—Kruidenier's Estate v. Bankers' Trust Co., 209 N.W. 452, 203 Iowa 776.
Vt.—In re Moxley's Will, 152 A. 713, 103 Vt. 100.
22 C.J. p 173 note 19.
Evidence by inspection or real evidence see infra §§ 601–622.
Statement of inference by witness as to identity see infra § 504.

18. Md.—Mitchell v. Stephenson, 152 A. 114, 159 Md. 575.
Vt.—In re Moxley's Will, 152 A. 713, 103 Vt. 100.

19. Vt.—In re Moxley's Will, supra.
Race or nationality
Or.—Tyler v. Moore, 226 P. 443, 111 Or. 499.

20. Ala.—Southern Ins. Co. v. Wilson, 108 So. 5, 6, 214 Ala. 373, citing **Corpus Juris.**
22 C.J. p 173 note 20.

21. Miss.—Wise v. Wynn, 59 Miss. 588, 42 Am.R. 381.
Tex.—Byers v. Wallace, 28 S.W. 1056, 29 S.W. 760, 87 Tex. 503.

22. Tex.—Byers v. Wallace, supra.

23. N.H.—Bruton v. Leavitt Stores Corporation of New Hampshire, 179 A. 185, 87 N.H. 304.

24. Ga.—Hawkins v. Studdard, 63 S.E. 852, 132 Ga. 265, 131 Am.S.R. 190.
22 C.J. p 173 note 31.

25. Del.—State v. Windsor, 5 Del. 512.
Mass.—Wellman v. Carter, 190 N.E. 493, 286 Mass. 237.
22 C.J. p 173 note 32.

26. N.H.—Bruton v. Leavitt Stores Corporation of New Hampshire, 179 A. 185, 87 N.H 304.

27. N.H.—Bruton v. Leavitt Stores Corporation of New Hampshire, supra.

28. Ala.—Cooke v. Embry, 123 So. 27, 219 Ala. 623.
Colo.—Farmers' Bank & Trust Co. v. Miller, 249 P. 644, 80 Colo. 121.
22 C.J. p 173 note 39.

29. Ky.—Cornett v. Lark, 263 S.W. 13, 203 Ky. 767.
N.Y.—O'Marr v. McLean, 238 N.Y.S. 443, 228 App.Div. 19, reversing 235 N.Y.S. 428, 134 Misc. 143.

There is inherent difficulty in establishing the existence of a mental state or in tracing the operations of the human mind;[30] and therefore the mental state of a person who has not testified with respect thereto may be proved by evidence of his conduct[31] or by other circumstantial evidence.[32]

Moral qualities. Proof of moral qualities presents the same practical difficulties as proof of mental state, with which they are much involved and frequently blend.[33]

§ 176. Nature and Condition of Property or Other Subject Matter

The nature and condition of property may be proved by circumstantial evidence.

The existence of a particular trait, characteristic, or condition in inanimate objects or animals may be proved by instances of its manifestation[34] or by other circumstantial evidence.[35]

§ 177. Pecuniary Condition

Evidence tending to prove the pecuniary condition of parties to the action, or of other persons, is admissible when relevant to the issues in the case.

Evidence as to the pecuniary condition of the parties to the action,[36] or of other persons,[37] is inadmissible when irrelevant to the issues in the case; but, where the pecuniary condition of the parties or of other persons is in issue, evidence tending to prove it is admissible.[38]

Evidence of the general reputation of a person for financial responsibility is relevant on the question of his solvency,[39] and an exemplification of the tax digest by the clerk of the court of ordinary of the county in which a person was a resident has been held admissible on the issue of his financial condition.[40] Within reasonable limits, proof of insolvency at a particular time is relevant as circumstantial evidence on the question of insolvency at an earlier date,[41] but evidence that a person was insolvent at a particular time has been held not relevant as circumstantial evidence that he was insolvent six months or more prior thereto, especially where shortly before the earlier date he transferred his property to secure payment of his obligations.[42]

§ 178. Motive, Intent, and Knowledge

Evidence of motive, intent, and knowledge is admissible where such matters are pertinent to the issues in the case.

30. Ala.—Alabama Fertilizer Co. v. Reynolds, 79 Ala 497.
22 C.J. p 173 note 38.

31. Iowa.—Goodale v. Murray, 289 N.W. 450, 227 Iowa 843, 126 A.L.R. 1121.
Mo.—White v. McCoy Land Co, 87 S.W.2d 672, 229 Mo.App. 1019, affirmed White v. Scarritt, Sup., 111 S.W.2d 18
S.D.—Hanson v. Fiesler, 207 N.W. 449, 49 S.D. 442.
22 C.J. p 174 notes 43, 48.
Testimony as to mental state of persons see infra § 510.

Range of evidence
A wide range of evidence is permitted to prove mental state by a general course of conduct.—Peerless Oil & Gas Co. v. Teas, Tex.Civ.App., 138 S.W.2d 637, error granted—Shaw v. Cone, Tex.Civ.App., 56 S.W.2d 667, error dismissed.

32. Okl.—Sovereign Camp W. W. v. Welch, 83 P. 547, 16 Okl. 188.
22 C.J. p 174 note 46.

33. Mass.—Commonwealth v. Abbott, 130 Mass. 472.

34. N.H.—Curtice v. Dixon, 68 A. 587, 74 N.H. 386.
22 C.J. p 175 note 67 [a].
Proof of existence of facts or condition of continuing nature see infra § 585.

35. Tex.—Panhandle Grain & Elevator Co. v. Dowlin, Civ.App., 247 S.W. 873.
22 C.J. p 175 note 68.

36. U.S.—Wheeler & Motter Mercantile Co. v. Lamerton, C.C.A.Okl., 8 F.2d 957, 44 A.L.R 769.
Ga.—Smith v. Satilla Pecan Orchard & Stock Co., 110 S.E. 303, 152 Ga. 538.
Mo.—Sculley v. Rolwing, App., 88 S.W.2d 394.
N.C.—Edwards v Southern States Finance Co., 146 S.E. 89, 196 N.C. 462.
S.D.—Stratton v. Sioux Falls Traction System, 226 N.W. 644, 55 S.D. 464.

37. Ala.—City Nat. Bank v. Nelson, 107 So. 849, 214 Ala. 297.
Ark.—Glens Falls Ins. Co. v. Jenkins, 277 S.W. 541, 169 Ark. 1015.
Ga.—Mobley v. Christian, 145 S.E. 103, 38 Ga.App. 655.
Vt.—Andrews v. Watkins' Estate, 160 A. 176, 104 Vt. 321.

38. Ala.—Coleman v. Adkins, 168 So. 184, 232 Ala. 351.
Ga.—Smith v. Satilla Pecan Orchard & Stock Co., 110 S.E. 303, 152 Ga. 538.
Me.—Fitzmaurice v. McGinn, 162 A. 701, 131 Me. 496.
Mich.—Gietzen v. Campbell, 226 N.W. 338, 247 Mich. 560—Kavanagh v. St. Paul Fire & Marine Ins. Co., 221 N.W. 119, 244 Mich. 391.
S.D.—Stratton v. Sioux Falls Traction System, 226 N.W. 644, 55 S.D. 464.

Evidence held irrelevant to prove pecuniary condition.
Mo.—Jordan v. Daniels, 27 S.W.2d 1052, 224 Mo.App. 749.
Tex.—Ferguson Seed Farms v. McMillan, Civ.App., 296 S.W. 902, reversed on other grounds, Com. App., 18 S.W.2d 595, 63 A.L.R. 1009.

Making of contract
(1) Evidence of person's wealth when alleged improvident contract was made is admissible to show probability that he made it when corroborating circumstances make its admission reasonable.—Andrews v. Watkins' Estate, 160 A. 176, 104 Vt. 321.

(2) However, such evidence should be received with caution.—Andrews v. Watkins' Estate, supra.

39. Wis.—Ellis v. State, 119 N.W. 1110, 138 Wis. 513, 131 Am.S.R. 1022, 20 L.R.A.,N.S., 444.
22 C.J. p 175 note 69 [a].

40. Ga.—Churchill v. Jackson, 64 S.E. 691, 132 Ga. 666, 49 L.R.A.,N.S., 875, Ann.Cas.1913E 1203.

41. Wis.—Ellis v. State, 119 N.W. 1110, 138 Wis. 513, 131 Am.S.R. 1022, 20 L.R.A.,N.S., 444.

Adjudication of insolvency is evidence that may be considered in establishing prior insolvency.—Andrews v. Lytle, D.C.Iowa, 27 F.2d 898, affirmed, C.C.A., Lytle v. Andrews, 34 F.2d 252.

42. Wis.—Ellis v. State, 119 N.W. 1110, 138 Wis. 513, 20 L.R.A.,N.S., 444.

Evidence of the motive, intent, or knowledge with which a person acted, or failed to act, is inadmissible where the legal significance of his conduct is not affected by such matters,[43] but evidence of motive, intent, or knowledge is admissible where such matters are pertinent to the issues in the case.[44] Thus, where it is disputed whether a person has done a certain act, evidence is admissible to show that he intended to do it,[45] or to show the existence of a motive on his part to do it, or to refrain from doing it.[46]

When the motive, intent, or knowledge of a person is pertinent to the issues in the case, the evidence to prove such matters must be relevant.[47] Such matters are seldom capable of direct proof,[48] and they may be proved by evidence as to the character[49] or conduct[50] of the person, or by other circumstantial evidence.[51]

§ 179. Conduct of Parties with Respect to Evidence

Evidence that a party attempted to prevent a fair trial, as by the suppression or fabrication of evidence, is admissible to show that he is conscious of the weakness of his case.

For the purpose of showing that his adversary

43. U.S.—Sartor v. United Gas Public Service Co., C.C.A.La., 84 F.2d 436.
Mo.—Elsas v. Montgomery Elevator Co., 50 S.W.2d 130, 135, 330 Mo. 596, citing **Corpus Juris**—Sexton v. Lockwood, App., 207 S.W. 856.
Tex.—American Ry. Express Co. v. Patterson Produce Co., Com.App., 12 S.W.2d 158, reversing Patterson Produce Co. v. American Ry. Express Co., Civ.App., 1 S.W.2d 456.
Wash.—Tri-State Terminal Co. v. Washington Wheat Growers' Ass'n, 236 P. 75, 134 Wash. 519.
W.Va.—Brightwell v. Simpson, 146 S.E. 383, 385, 106 W.Va. 471, citing **Corpus Juris.**
22 C.J. p 173 note 39 [a], p 175 note 75.

Motive for bringing suit
Evidence of the motive in instituting the action is inadmissible.
U.S.—American & British Mfg. Corporation v. New Idria Quicksilver Mining Co., C.C.A.R.I., 293 F. 509.
Vt.—Bradley v. Kelley, 168 A. 554, 105 Vt. 478.
Motive in bringing action as defense see Actions § 24.

Evidence incidentally proving motive
Evidence having a legitimate tendency to prove or disprove a controverted fact is not inadmissible because motive, which is immaterial, is inferable therefrom.—Miles v. Vermont Fruit Co., 124 A. 559, 98 Vt. 1.

44. U.S.—New York Trust Co. v. Island Oil & Transport Corporation, C.C.A.N.Y., 34 F.2d 655.
Cal.—Irvin v. Petitfils, App., 112 P.2d 688—Melikian v. Independent Paper Stock Co., 47 P.2d 539, 8 Cal.App.2d 166.
Mass.—First Nat. Bank v. Harrison, 171 N.E. 724, 271 Mass. 258.
N.H.—Wright v. Woodward, 111 A. 494, 79 N.H. 474.
N.J.—Aloia v. Plainfield Union Water Co., 168 A. 392, 11 N.J.Misc. 825.
N.Y.—Du Roy & La Maistre v. Gillmore, 284 N.Y.S. 385, 246 App.Div. 37, affirmed 3 N.E.2d 866, 272 N.Y. 454—Application of Gillespie, 17 N.Y.S.2d 15, 172 Misc. 1041.
Or.—Fidelity Security Corporation v. Brugman, 1 P.2d 131, 135, 137 Or. 38, citing **Corpus Juris.**
Tenn.—Power Packing Co. v. Borum, 8 Tenn.App. 162.
Tex.—Lone Star Mut. Life Ass'n v. Klander, Civ.App., 92 S.W.2d 514
Tex.—Patterson Produce Co. v. American Ry. Express Co., Civ.App., 1 S.W.2d 456, reversed on other grounds American Ry. Express Co. v. Patterson Produce Co., Com.App., 12 S.W.2d 158—Federal Reserve Bank of Dallas v. Odle, Civ.App., 288 S.W. 248—Wheatley v. Benson, Civ.App., 279 S.W. 911.
Wash.—Beeson Bros. v. Chambers, 285 P. 433, 437, 155 Wash. 564, quoting **Corpus Juris.**
22 C.J. p 175 note 76.

Motive for flight of person
Evidence of circumstances tending to show that flight of one accused of offense was not because of sense of guilt or fear of arrest or to show motive consistent with innocence, such as advice of friends, is admissible.—Home Ins. Co. of New York v. Trammell, 160 So. 897, 230 Ala. 278

45. Mass.—Conklin v. Consolidated R. Co., 82 N.E. 23, 196 Mass. 302, 13 Ann.Cas. 857.

46. Mass.—Bock v. Wall, 93 N.E. 821, 207 Mass. 506.
N.H.—Buxton v. Langan, 3 A.2d 647, 90 N.H. 13.
W.Va.—Brightwell v. Simpson, 146 S.E. 383, 106 W.Va. 471.

47. U.S.—In re Huntley, D.C.Mass., 14 F.Supp. 784, affirmed C.C.A., Huntley v. Snider, 86 F.2d 539, rehearing denied 88 F.2d 335.

Evidence held admissible
Ala.—Mt. Vernon-Woodberry Mills v. Union Springs Guano Co., 155 So. 710, 26 Ala.App. 136, certiorari denied 155 So. 716, 229 Ala. 91.
Minn.—State Bank of Mora v. Billstrom, 299 N.W. 199.
N.H.—Wright v. Woodward, 111 A. 494, 79 N.H. 474.

Matters occurring subsequently
(1) Matters occurring subsequently are not admissible on the question of motive or intent.—Watson v. Kentucky & Indiana Bridge & R. Co., 126 S.W. 146, 129 S.W. 341, 137 Ky. 619—22 C.J. p 176 note 82.

(2) Evidence as to the probable state of mind of the maker of an instrument after its execution is irrelevant to establish the intention which actuated him at a prior time when the instrument was made and delivered.—Anderson v. Merchants' & Miners' State Bank, 129 S.E. 650, 161 Ga. 12.

48. U.S.—Equitable Life Assur. Soc. of U. S. v. Saftlas, D.C.Pa., 38 F. Supp. 708.
Mo.—Edie v. Coleman, App., 141 S.W.2d 238.

49. Okl.—Sovereign Camp W. W. v. Welch, 83 P. 547, 16 Okl. 188.

50. Iowa.—Goodale v. Murray, 289 N.W. 450, 227 Iowa 843, 126 A.L.R. 1121.
Ky.—Harkey v. Haddox, 50 S.W.2d 955, 244 Ky. 380.
La.—Crichton v. Krouse, App., 142 So. 635.
Mich.—Detroit Iron & Steel Co. v. Detroit Gray Iron Foundry Co., 216 N.W. 391, 240 Mich. 677.

51. U.S.—A. & R. Realty Co. v. Northwestern Mut. Life Ins. Co., C.C.A.Mo., 95 F.2d 703—Equitable Life Assur. Soc. of U. S. v. Saftlas, D.C.Pa., 38 F.Supp. 708.
Mo.—State on Inf. of McKittrick v. Graves, 144 S.W.2d 91—Edie v. Coleman, App., 141 S.W.2d 238.
Wis.—Hudson v. First Trust Co. in Oshkosh, 228 N.W. 121, 200 Wis. 220.

Collateral transactions are sometimes competent for the purpose of showing intent.—Standard Mfg. Co. v. Brons, 118 Ill.App. 632.

Situation at the time
Where a matter turns on a question of intention, it is usually relevant to show the situation at the time to reach the truth as to the intention.—Leggett v. Louisiana Purchase Exposition Co., 137 S.W. 893, 157 Mo.App. 108.

is conscious of the weakness of his case, or is guilty of the act charged or that his claim or defense is false, a party may prove that his adversary attempted to flee after the accident,[52] and, in addition, he may show that his adversary attempted to avoid a complete and fair trial[53] as, for example, by the fabrication[54] or suppression[55] of evidence, or by the intimidation or corruption of witnesses,[56] or by his failure or refusal to call available witnesses,[57] or by other methods.[58]

However, evidence that a third person attempted to prevent a fair trial is inadmissible to prove that a party is conscious of the weakness of his case, in the absence of a showing that the party knew of, or was connected with, the attempt.[59]

§ 180. Customs and Course of Business

The custom of a party or his employees, or the course of conducting his business, may become relevant and material in an action involving some claim or liability arising out of such business.

It frequently happens that the custom of a party or his employees, or the course of conducting his business, may become relevant and material in an action involving some claim or liability arising out of such business;[60] and evidence of a habit of doing a thing in the course of business is, if clearly shown as a definite course of action, admissible as indicating that, on a particular occasion, the thing was done as usual.[61]

However, such evidence is inadmissible when irrelevant to the issues in the case.[62] Evidence which is irrelevant or insufficient to prove a course of business is inadmissible for the purpose.[63] The mere existence of a custom is not necessarily relevant, where no connection thereof with the transaction in question is shown;[64] and, in a given case, the evidence of habit may be so remote, or have

52. Del.—O'Neill v. Cooles, 140 A. 648, 3 W.W Harr. 541.
Attempts to suborn perjury or suppress evidence as admissions against interest see infra § 293.
Presumptions arising from spoliation, fabrication, or nonproduction of evidence see supra §§ 151–156.
Giving wrong name after accident
In automobile accident case, admitting evidence that defendant on taking injured guest to hospital gave name other than his own has been held error.—Redwing v. Moncravie, 21 P.2d 986, 131 Cal.App. 569.

53. W.Va.—Maynard v. Bailey, 102 S.E. 480, 85 W.Va. 679, 9 A.L.R. 981.

54. U.S.—R. E. Hamilton & Sons Co. v. Moss-Jellico Coal Co., C.C.A.Ky., 271 F. 237.

55. N.H.—Hall v. Merrimack Mut. Fire Ins. Co., 13 A.2d 157, 91 N.H. 6.

56. U.S.—New York Life Ins. Co. v. Bacalis, C.C.A.Fla., 94 F.2d 200.
Ala.—Drummond v. Drummond, 102 So. 112, 212 Ala. 242.
Cal.—Longuy v. La Société Française De Bienfaisance Mutuelle, 198 P. 1011, 52 Cal.App. 370
Minn.—Muenkel v. Muenkel, 173 N. W. 184, 143 Minn. 29.
Tex.—Johnson v. Whitehand, Civ. App., 21 S.W.2d 41, 42, citing **Corpus Juris**—American Nat. Ins. Co. v. Nussbaum, Civ.App., 230 S.W. 1102, dismissed for want of jurisdiction
W.Va.—Maynard v. Bailey, 102 S.E. 480, 85 W.Va. 679, 9 A.L.R. 981.
22 C.J. p 176 notes 86–88.

57. N.H.—Lee v. Hustis, 111 A. 627, 79 N.H. 434.
S.C.—Howell v. Southern Ry. Co., 102 S.E. 856, 114 S.C. 21.
Tex.—Texas & P. Ry. Co. v. Hughes, Civ.App., 192 S.W. 1091, error refused

58. N.H.—Graham v. Weber, 109 A. 717, 79 N.H. 393.
Falsehood in preparation of another case
Evidence of plaintiff's alleged falsehood in preparation of case against one defendant has been held relevant in action against other defendant.—Masterson v. Berlin St. Ry., 139 A. 753, 83 N.H. 190.
Similar acts or occurrences see infra §§ 578–593.

59. Ala.—Drummond v. Drummond, 102 So. 112, 212 Ala. 242.
Fraudulent conduct of attorney
Wash.—Meacham v. Gjarde, 78 P.2d 605, 194 Wash. 526.

60. Mass.—City Institution for Savings v. Kelil, 159 N.E. 731, 262 Mass. 302.
22 C.J. p 176 note 91.
Evidence as to customs and usages see Customs and Usages § 33.
Similar acts or occurrences see infra §§ 578–593.

61. Conn.—Boston Lumber Co. v. Pendleton Bros., 129 A. 782, 102 Conn. 626.
Ga.—Jones v. Teasley, 105 S.E. 46, 25 Ga.App. 784.
Md.—Stiegler v. Eureka Life Ins. Co. of Baltimore, 127 A. 397, 146 Md. 629.
Mass.—Santarpio v. New York Life Ins. Co., 16 N.E.2d 668, 301 Mass. 207.
N.H.—Buxton v. Langan, 3 A.2d 647, 90 N.H. 13—Daley v. Metropolitan Life Ins. Co., 128 A. 531, 81 N.H. 502.
Okl.—Board of Com'rs of Garfield County v. Enid Springs Sanitarium & Hospital, 244 P. 426, 116 Okl. 249.
Tex.—Federal Reserve Bank of Dallas v. Odle, Civ.App., 288 S.W. 248.
22 C.J. p 176 note 91.
Mail carriers
It has been held that the general practice of mail carriers in the delivery of letters incorrectly addressed to certain persons may be shown for the purpose of raising an inference that they received certain mail matter which was not correctly addressed.—Troy v. Rudnick, 85 N.E. 177, 198 Mass. 563—22 C.J. p 176 note 92.

62. Ala.—Perry v. Marbury Lumber Co., 103 So. 580, 212 Ala. 542.
Mo.—Hunt v. Sanders, 281 S.W. 422, 313 Mo. 169.
Custom of employer in publicizing garnishments of wages
In an action against a justice of the peace for wrongful issuance of alias attachment against a judgment debtor and his garnisheed employer when the judgment was satisfied, plaintiff judgment debtor's testimony of his employer's custom in giving publicity on pay days to the garnishment of wages has been held inadmissible, in the absence of showing or claim any such thing happened in the particular case; also as evidence directed toward damages not recoverable under the proof.—Samuels v. Davis, 214 S.W. 904, 185 Ky. 177.

63. Ala.—Commercial Credit Co. v. Chevrolet Motor Co., 114 So. 273, 22 Ala.App. 211.
Iowa.—Central Trust Co. v. City of Des Moines, 218 N.W. 580, 205 Iowa 742.

64. S.C.—J. B. Colt Co. v. Robinson, 135 S.E. 312, 137 S.C. 224.
22 C.J. p 176 note 93.

such tendency to produce confusion in its collateral bearing on the issue to which it relates, as to call for its exclusion, in the discretion of the court.[65]

§ 181. Value

Evidence as to the value of property is admissible only where the value of property is in issue. A wide range of investigation is permitted in determining value and the rules as to the admission of evidence are liberally construed.

Evidence as to the value of property is admissible only where the value of property is an issue in the case.[66] Where there is a contract, but a dispute as to the contract price has arisen, evidence of the value of the subject matter is admissible as relevant to the matter in dispute.[67]

Value, whether intrinsic or as regulated by the "market," is a quality so subtle and intangible, is a function of so many variables and these, frequently, of such a trivial nature, where intrinsic, it is so largely a matter of individual estimate or opinion, and when judged by the market its standards so largely consist of the opinion not under oath of a large and usually indefinite number of persons as indicated by trade lists, prices current, and other publications more or less official, that a relaxation of strict rules of evidence is necessary, and use must be made of such probative methods as are available.[68] Value or market price may be shown by either direct or circumstantial evidence.[69]

Generally, the law assumes that the value of a thing is what it will fetch in the open market,[70] the price which the owner, if willing, but not compelled, to sell could obtain from a buyer, willing, but not compelled, to buy.[71]

The admissibility of opinion evidence as to value is discussed infra §§ 501, 545. The admissibility of evidence of similar transactions or acts to prove value is discussed infra § 593.

Market value has been defined as a price established by public sales in the way of ordinary business.[72] Where market value is shown to exist, it may be proved as it existed at any time at which it is relevant.[73] Where a witness has testified as to the market value of an article, further testimony as to whether the value given represents value in trade is properly excluded.[74] Where there is no regular market for a commodity, a wide range of investigation is permitted in determining its market value, and the rules relating to the admission of evidence are liberally construed.[75] Hearsay of a

65. Minn.—Vought v. Porter, 209 N. W. 642, 168 Minn. 43
N.H.—Buxton v. Langan, 3 A.2d 647, 90 N.H. 13.

66. Ariz.—Van Marel v. Watson, 235 P. 144, 28 Ariz. 32.
Cal.—Asnon v. Foley, 288 P. 792, 105 Cal.App. 624.
Mass.—McCarthy v. Simon, 142 N.E. 806, 247 Mass. 514.

67. Kan.—Cole v. Emerson, 1 P.2d 249, 250, 133 Kan. 442, citing **Corpus Juris.**
Vt.—Atwood v. Joyce, 192 A. 11, 109 Vt. 30.
Wash.—Peyser v. Western Dry Goods Co., 102 P. 750, 53 Wash. 633

Cost plus contract

Where plaintiff, who was to charge for lumber for millwork, at cost plus ten per cent, had bought lumber at "log run," and selected therefrom the best for such work, and charged therefor what it was deemed to be worth when graded, evidence of market value of such grade is admissible to test reasonableness of such charge.—Rutland Sash & Door Co. v. Gleason, 126 A. 577, 98 Vt. 215.

68. Ga.—Morrow Transfer Co. v. Robinson, 69 S.E. 317, 8 Ga.App. 409.
22 C.J. p 176 note 96.

Approximation is limit of endeavor in ascertaining property values.—Tierney v. United Pocahontas Coal Co., 109 S.E. 339, 89 W.Va. 402.

69. Ga.—Atlantic Co. v. Farris, 8 S.E.2d 665, 62 Ga.App. 212.
22 C.J. p 177 note 97.

70. U.S.—Chesapeake & Potomac Telephone Co. of Baltimore City v. Whitman, D.C.Md., 3 F.2d 938.

"Market value is standard rule for determining the cash value of property which is freely and currently bought and sold.—Travelers Indemnity Co. v. Plymouth Box & Panel Co., C.C.A.N.C., 99 F.2d 218.

71. U.S.—Chesapeake & Potomac Telephone Co. of Baltimore City v. Whitman, D.C.Md., 3 F.2d 938.

72. N.Y.—Rau v. Seidenberg, 104 N.Y.S. 798, 53 Misc. 386.
Tex.—Ft. Worth & D. C. Ry. Co. v. Hapgood, Civ.App., 210 S.W. 969.
22 C.J. p 186 note 91.

Other definitions

(1) "Market value" is determined by what prudent owner would sell for if he could choose time and terms.—In re Schuyler, Chadwick & Burnham, C.C.A.N.Y., 63 F.2d 241.

(2) "Market value" is price which property will bring when offered for sale by one desiring, but not compelled, to sell, and bought by one desiring, but not compelled, to purchase.—Commonwealth v. Combs, 50 S.W.2d 497, 244 Ky. 204.

(3) As respects liability for negligent loss of an automobile while being repaired, its market value was not such sum as it would bring at a forced sale, but such sum as it would bring when offered to a person who was in the market for a secondhand car, and who was willing to pay its just and full value.—Wagner & Chisholm v. Dunham, Tex.Civ.App., 246 S.W. 1044.

(4) Other statements see 22 C.J. p 186 note 91 [a].

Elements of market value

Supply and demand, the use and benefit, the quantity and quality, what buyers are willing to give and sellers to take, all enter into "market value."—Ft. Worth & D. C. Ry. Co. v. Hapgood, Tex.Civ.App., 210 S.W. 969.

Absence of market place or public exchange does not prevent proof of market price and market value.—Baltimore & O. C. Terminal R. Co. v. Becker Milling Mach. Co., C.C.A.Ill., 272 F. 933—22 C.J. p 186 note 92 [b].

73. Miss.—Parish & Co. v. Yazoo & M. V. R. Co., 60 So. 322, 103 Miss. 288.
22 C.J. p 186 notes 92, 93.

74. Iowa.—Brown v. Dubuque Altar Mfg. Co., 144 N.W. 613, 162 Iowa 343.

75. U.S.—Hard & Rand v. Biston Coffee Co., C.C.A.Mo., 41 F.2d 625.
N.Y.—In re Jennings St. in Borough of Bronx, City of New York, 201 N.Y.S. 799, 207 App.Div. 170.
Tex.—London & Lancashire Ins. Co.

concurrent or composite type is often admitted,[76] but it is otherwise as to the statement of a particular person, not a witness, on the subject of market value.[77]

Explaining market value. It is always open to a party, for the purpose of impairing the weight of evidence introduced by the opposite party, to assign and substantiate reasons why the market price proved by his antagonist is unduly enhanced or unduly depressed.[78]

Exchange. Where the parties to an exchange of property place values on the parcels or items involved solely for the purpose of facilitating the exchange, the value so placed on any particular item or parcel has been held to be,[79] and not to be,[80] admissible as evidence of its value.

Growing crops. Where the value of growing crops is in issue, evidence of the annual rental for the land and the cost of planting and bringing forward the crop to the time in issue is admissible.[81] Testimony as to the probable size and value of the matured crop is admissible.[82] Where the issue is limited to the value of the growing crop on part of the land, evidence of the value of the crop raised on the remainder of the land is admissible.[83]

§ 182. Real Estate

a. In general
b. Sales
c. Offers to buy or sell
d. Appraisals and assessments
e. Rental value and revenue
f. Time to which evidence of value must relate

a. In General

Where the value of realty is in issue, any competent evidence of matters which would be considered by a reasonable vendor or purchaser is admissible; the character, location, and possible uses of the land may be considered in determining its value.

Where the value of real estate is in issue, the evidence should be directed toward establishing the fair cash market value of the property.[84] Any competent evidence of matters, not merely speculative,[85] which would be considered by a prospective vendor or purchaser, or which tend to enhance or depreciate the value of the property, is admissible.[86] The

v. Higgins, Civ.App., 68 S.W.2d 1056, error dismissed
22 C.J. p 187 note 97.

Price lists and market reports
Evidence of market value is not confined to price lists and market reports.—Commander v. Smith, 134 S.E. 412, 192 N.C. 159.

76. Mo.—Graf v. Allen, 74 S.W.2d 61, 230 Mo.App. 721.
22 C.J. p 187 note 98.

77. Okl.—McConnell v Goucher, 108 P.2d 174.
22 C.J. p 187 note 99.

78. U.S.—Twachtman v. Connelly, C.C.A.Ohio, 106 F.2d 501, 507, citing **Corpus Juris.**
22 C.J. p 190 note 48.

79. Cal.—Wood v. Niemeyer, 197 P. 795, 185 Cal. 526.
N.M.—Jones v. Jernigan, 223 P. 100, 29 N.M. 399.

80. Iowa.—Hiller v. Betts, 215 N.W. 233, 204 Iowa 197.

A valuation for purposes of exchange is insufficient to warrant a finding that such was its reasonable value.—Hay v. Boggs, 137 P. 474, 77 Wash. 329.

81. Colo.—Hoover v. Shott, 189 P. 848, 68 Colo. 385.

82. Tex.—Galveston, H. & S. A. R. Co. v. Parr, 28 S.W. 264, 8 Tex.Civ.App. 280.
22 C.J. p 183 note 11 [a], [b].

83. Ark.—Batton v. Jones, 268 S.W. 857, 167 Ark. 478.

84. Ill.—Straus v. Anderson, 9 N.E.2d 205, 366 Ill. 426, modifying 283 Ill.App. 342.
Opinion evidence as to value see infra §§ 501, 545.

85. W.Va.—Tierney v. United Pocahontas Coal Co., 109 S.E. 339, 89 W.Va. 402.
22 C.J. p 177 note 12.

86. Ala.—De Moville v. Merchants & Farmers Bank, 170 So. 756, 761, 233 Ala. 204, citing **Corpus Juris.**
Cal.—City of Beverly Hills v. Anger, 15 P.2d 867, 869, 127 Cal.App. 223, quoting **Corpus Juris.**
Tex.—Foley Bros. Dry Goods Co. v. Settegast, Civ.App., 133 S.W.2d 228, error refused.
W.Va.—Tierney v. United Pocahontas Coal Co., 109 S.E. 339, 89 W.Va. 402.
22 C.J. p 177 note 11.

Flaws in title
Tex.—Robertson v. Warren, 100 S.W. 805, 45 Tex.Civ.App., 584.
22 C.J. p 177 note 14.

Restrictions on use of premises
Mass.—Allen v. Boston, 137 Mass. 319.

In case of oil-bearing land, evidence as to progressive decrease in the productiveness of the oil field in which the land is situated is admissible.—Southern Pac. R. Co. v. San Francisco Sav. Union, 79 P. 961, 146 Cal. 290, 106 Am.S.R. 36, 70 L.R.A. 221, 2 Ann.Cas. 962.

Amount of loan secured by land
Evidence as to the amount of a federal farm loan on land is admissible to prove its value in connection with evidence that the law forbids a loan of more than a certain per cent of the value of the land.—Washington County v. First Nat. Bank, 206 P. 1054, 35 Idaho 438.

Proof of capitalization of codefendant companies to whom C leased or sold the land was held admissible to show value of lands conveyed by plaintiffs to C, where the capital consisted of leases on lands conveyed and by law required to be taken in exchange for stock at their actual value.—Durham v. Scrivener, Civ. App., 259 S.W. 606, affirmed, Com. App., 270 S.W. 161.

In dealing with future of property, consideration should be given all elements which intelligent buyer would consider.—O'Neill v. City of Birmingham, 130 So. 87, 221 Ala. 580.

Effect on market value
Testimony that ditch would improve growth of trees along plaintiff's property and that ditch would not "damage" property was incompetent on issue whether ditch would decrease market value of property.—Christenson v. Nielsen, 54 P.2d 439, 88 Utah 336.

character,[87] location,[88] and physical condition[89] of the real estate, and the use to which it is put,[90] may be placed before the jury, and evidence is admissible to show any probable use to which the land could reasonably be put,[91] such as manufacturing,[92] farming,[93] railroad,[94] or residential[95] purposes, although it is not then being used for such purposes.[96] However, speculative or remote ways in which the land could be used cannot be considered in determining its value.[97]

Special or peculiar value or lack of value which the land has for a witness,[98] or for the owner,[99] or for a prospective purchaser,[1] is irrelevant.

Intrinsic value. It is said that evidence as to the intrinsic value of land is admissible where the land is shown not to have a market value,[2] but not otherwise.[3]

Improvements. The character of the improvements on the land[4] and the extent of improvement going on around it[5] are relevant circumstances on an issue of value. It has been held permissible to show the cost of constructing the improvements;[6]

87. Mich.—Gitson v. Yale Land Co., 180 N.W. 593, 212 Mich. 292.
Tex.—Carver v. Moore, Civ.App., 275 S.W. 90, rehearing denied 275 S.W. 682, reversed on other grounds, Com.App., 288 S.W. 156.

Testimony that land was not of uniform value, unaccompanied by testimony as to value of leasehold interest, was inadmissible in action for trespass by holder of undivided interest in oil lease.—Humble Oil & Refining Co. v. Kishi, Tex.Civ.App., 299 S.W. 687.

88. Tex.—J. P. Watkins Land Mortg. Co. v. Campbell, 84 S.W. 424, 98 Tex. 372, reversing, Civ.App., 81 S.W. 560—Carver v. Moore, Civ.App., 275 S.W. 90, rehearing denied 275 S.W. 682, reversed on other grounds, Com.App., 288 S.W. 156.

Accessibility to market

Proximity of stone and timber claim to market not considered on issue of its value.—U. S. v. Bighorn Sheep Co., D.C.Wyo., 9 F.2d 192.

89. Ga.—Bell v. Tucker, 139 S.W. 573, 37 Ga.App. 254.
Tex.—Foley Bros. Dry Goods Co. v. Settegast, Civ.App., 133 S.W.2d 228, error refused.
22 C.J. p 177 note 1.

90. Ga.—Bell v. Tucker, 139 S.E. 573, 37 Ga.App. 254.
Tex.—Foley Bros. Dry Goods Co. v. Settegast, Civ.App., 133 S.W.2d 228, error refused—Carver v. Moore, Civ.App., 275 S.W. 90, rehearing denied 275 S.W. 682, reversed on other grounds, Com.App., 288 S.W. 156.
22 C.J. p 177 note 2.

Productivity

In an action for damages by reason of the appropriation of land by a municipality, it was proper to permit plaintiff to testify that the land was good meadow land, and how much hay he got from it from year to year.—Creighton v. Board of Water Com'rs of City of Charlotte, 55 S.E. 511, 143 N.C. 171, 10 Ann.Cas. 218.

91. Mo.—Hatton v. Henman, 10 S.W.2d 967, 222 Mo.App. 954.
Tex.—Foley Bros. Dry Goods Co. v. Settegast, Civ.App., 133 S.W.2d 228, error refused.
22 C.J. p 177 note 3.

Intended use

Where complaint in action for damages for the destruction of vegetation growing on plaintiff's land alleges, and the answer denies, that the premises were of great value for pasturage purposes, it is competent to show that plaintiff had previously used, and intended thereafter to use, the land as a pasture.—Joyce Bros. v. Stanfield, 189 P. 1104, 33 Idaho 68.

92. Md.—Clagett v. Easterday, 42 Md. 617.
22 C.J. p 177 note 4.

93. Ala.—Long Distance Tel. & Tel. Co. v. Schmidt, 47 So. 731, 157 Ala. 391.

94. Minn.—Russell v. St. Paul, M. & M. R. Co., 22 N.W. 379, 33 Minn. 210.
Pa.—North Shore R. Co. v. Pennsylvania Co., 96 A. 990, 251 Pa. 445.

95. U.S.—Forsyth v. Doolittle, Ill., 7 S.Ct. 408, 120 U.S. 73, 30 L.Ed. 586.
22 C.J. p 177 note 7.

96. Mont.—Myers v. Bender, 129 P. 330, 46 Mont. 497, Ann.Cas.1916E 245.

97. Cal.—City of Oakland v. Parker, 233 P. 68, 70 Cal.App. 295.
Pa.—Hall v. Delaware, L. & W. R. Co., 105 A. 98, 262 Pa. 292.

98. Tex.—Southwestern Bell Telephone Co. v. Burris, Civ.App., 68 S.W.2d 542.
22 C.J. p 177 note 9.

What witness would pay for land is not relevant.
Ala.—Waller v. Harris, 128 So. 606, 221 Ala. 313.
Ga.—Richardson v. John Hancock Mut. Life Ins. Co., 145 S.E. 448, 167 Ga. 340.

99. Tex.—Texas Power Corporation v. Kuehler, Civ.App., 34 S.W.2d 381, modified on other grounds, Com.App., 52 S.W.2d 76.

1. U.S.—Atwater v. Wheeling & L. E. Ry. Co., C.C.A.Ohio, 56 F.2d 720.

2. Tex.—Norton v. Lea, Civ.App., 283 S.W. 316.
"Our courts have uniformly held that where there is evidence showing or tending to show that a particular piece of property has no market value, or no market value at or near the place in question, or where it is a question for the jury to determine whether the property had in fact a market value, the parties have the right to introduce evidence to prove its actual or intrinsic value."—Foley Bros. Dry Goods Co. v. Settegast, Tex.Civ.App., 133 S.W.2d 228, 232, error refused.

3. Tex.—Cosden Oil Co. v. Sides, Civ.App., 35 S.W.2d 815.

4. Tex.—J. P. Watkins Land Mortg. Co. v. Campbell, 84 S.W. 424, 98 Tex. 392, reversing, Civ.App., 81 S.W. 560.

5. Tex.—J. P. Watkins Land Mortg. Co. v. Campbell, supra.

6. Cal.—Shermaster v. California Home Bldg. Loan Co., 181 P. 409, 40 Cal.App. 661.
Ga.—Kimsey v. Rogers, 142 S.E. 667, 166 Ga. 176.
N.Y.—People ex rel. Gorham Mfg. Co. v. State Tax Commission, 189 N.Y.S. 241, 197 App.Div. 852.
22 C.J. p 178 note 19.

Improvement already included in valuation

Where the evidence fixed the value of real property as enhanced by improvements, the court properly excluded evidence of the cost of such improvements in a contest of a sale of certain heir's interest to others at appraised value.—Ziebarth v. Donaldson, 185 N.W. 377, 150 Minn. 308.

Party wall

Under Code 1897 § 3000, providing that an adjoining owner, desiring to use a party wall, shall pay to the owner thereof "one half of its value, or one half of the part which he wishes to hold in common," in an action to recover one half of the value of a party wall, evidence of what it would have cost to build the wall at the time that defendant's use of it began was properly admitted to show the value of the wall at that time.—

but where the issue was as to the value of a structure, it was held not permissible to show the cost or value of the labor employed in its construction.[7] Evidence that the structure is not the best use of the land and would not be erected anew is admissible.[8]

Encumbrances. A mortgage on land is not evidence of the value of the land since it is usually given as security for a debt and may have no relationship whatever to the value of the property mortgaged.[9] The amount of a mortgage or trust deed on property is not proof of the value of the real estate at the time of its foreclosure.[10] The assumption of a mortgage is not evidence of the value of the land as against any one other than the party assuming the mortgage.[11]

Valuation by owner. The owner of real estate may testify as to the amount he would be willing to accept and would expect to receive on a sale.[12]

Insurance. The amount of insurance placed on a building furnishes no direct evidence of its value,[13] but where it might indicate an estimate of the value of the property by the witness inconsistent with that testified to by him, the amount of insurance may be shown for impeachment purposes.[14]

b. Sales

The price realized on a sale of the land made under ordinary circumstances is evidence of the value of the property at the time of the sale, and of its value at a time reasonably near the sale, provided conditions have remained the same.

A sale of real property made under ordinary circumstances is evidence of its value at the time of the sale,[15] and may be shown to prove value at a different time provided the time interval is short and conditions remain substantially the same;[16]

Hruska v. E. F. Rate Estate, 187 N. W 509, 193 Iowa 588.

Reproduction cost and depreciation may be shown.—In re St. Lawrence Transmission Co., 244 N.Y.S. 508, 137 Misc. 603.

Cost of replacement

Evidence as to probable cost of replacing dwelling house destroyed by fire with same kind of material was proper as circumstance to show value of building.—Gulf, C. & S. F. Ry. Co v. Saunders, Tex.Civ.App., 286 S W. 919.

7. Ga.—Governor v. Talbot County Justices, 20 Ga. 359.
22 C.J. p 178 note 21.

Building not involved in action

In action for conversion of dwelling, cost of constructing garage not involved in the action was not proper element in placing value on building.—Brooks v. McDevitt, 11 P.2d 826, 40 Ariz. 221.

Cost of improvements; value of realty

Proof of the cost of excavating a cellar and constructing buildings is not competent as proof of the market value of real estate of which they form a part.—Ringer v. Wilkin, 183 P. 986, 32 Idaho 330.

8. Mass.—City of Revere v. Revere Const. Co., 189 N.E. 73, 285 Mass. 243.

9. N.J.—Cedar Grove Tp. in Essex County v. New Jersey State Board of Tax Appeals, 171 A. 546, 12 N. J.Misc. 367.

10. Ill.—Straus v. Anderson, 9 N.E. 2d 205, 366 Ill. 426, modifying 283 Ill.App. 342.

Allegation to obtain receiver

That mortgagee obtained appointment of receiver on averment of inadequacy of property did not constitute evidence of value of property.—Pickett v. Comstock, 229 N.W. 249, 209 Iowa 968.

11. N.Y.—Feigenbaum v. Hizsnay, 175 N.Y.S. 223, 187 App.Div. 126, reversing 171 N.Y.S. 1037, 104 Misc. 147.

12. Miss.—City of Clarksdale v Fitzhugh, 185 So. 587, 184 Miss 174.

Admissibility of admissions see infra §§ 270–298.

13. Iowa.—Maxwell v. Iowa State Highway Commission, 271 N.W. 883, 887, 223 Iowa 159, 118 A.L.R 862, citing **Corpus Juris.**

Tenn.—Harriman & Northeastern R. Co. v. McCartt, 15 Tenn.App. 109.
22 C.J. p 182 note 96.

Reason for rule

Evidence of amount of insurance carried on buildings is not substantive evidence of value of buildings, and is not direct evidence thereof, since buildings are often either underinsured or overinsured.—Maxwell v. Iowa State Highway Commission, 271 N.W. 883, 223 Iowa 159, 118 A. L R. 862.

14. Iowa.—Maxwell v. Iowa State Highway Commission, 271 N.W. 883, 887, 223 Iowa 159, 118 A.L R. 862, citing **Corpus Juris**—Holmes v. Rivers, 124 N.W. 801, 145 Iowa 702.

15. Ala.—De Moville v. Merchants & Farmers Bank, 170 So. 756, 761, 233 Ala. 204, citing **Corpus Juris.**

Ill.—Johnson v. Canfield-Swigart Co., 126 N.E. 608, 292 Ill. 101, affirming 211 Ill.App. 423.

Md.—Pumphrey v. Tabler, 2 A.2d 668, 175 Md. 498.

N.J.—Lehigh Valley R. Co. v. Andrus, 117 A. 152.
22 C.J. p 181 note 81.

Sales of personal property as evidence of value see infra § 183 b.

Sales of similar or adjacent lands see infra § 593.

Market cost arrived at by negotiation between able business men familiar with values and not compelled to buy or sell is excellant evidence of value.—Hurley v. U. S., D.C Okl., 10 F.Supp. 365.

As between parties to sale, the price agreed on is evidence of the value of the land.

Iowa.—Hiller v. Betts, 215 N.W. 233, 204 Iowa 197.

Tex.—First Nat. Bank v. Brown, Com.App., 15 S.W.2d 563, reforming, Civ.App., 4 S.W.2d 635.

Sale of portion may be shown as involving the owner's estimate of value.—Houston v. Western Washington R. Co., 54 A. 166, 204 Pa. 321.—East Brandywine & W. R. Co. v. Ranck, 78 Pa. 454.

Few free and open sales

It is common knowledge that there have been few free and open sales of realty in the rural areas in the last few years, and, consequently, there is no sales basis for determining a market value at a given time. —City and County of Denver v. Lyttle, 103 P.2d 1, 106 Colo. 157.

Recital of consideration in deed is not admissible to prove value.—Hibbets v. Threlkeld, 114 N.W. 1045, 137 Iowa 164.

16. Md.—Pumphrey v. Tabler, 2 A. 2d 668, 175 Md. 498.

N.Y.—In re Jennings St. in Borough of Bronx, City of New York, 201 N.Y.S. 799, 207 App.Div. 170.

Tenn.—Union Joint Stock Land Bank of Louisville v. Knox County, 97 S.W.2d 842, 20 Tenn.App. 273.
22 C.J. p 181 note 81.

but where the sale was made at a time remote from the time as of which the property is to be valued or where conditions have materially changed between the time of the sale and the time in issue, evidence of the sale price is not admissible to prove the value of the property at the time in issue.[17]

In determining the probative force of a sale to establish value, all of the circumstances surrounding the sale may be considered.[18]

Forced sales. It is broadly stated that the price realized on a forced sale of realty, such as a tax, foreclosure, or execution sale, is not admissible as evidence of value,[19] and this rule has been applied to sales made pending proceedings to condemn the property for public use;[20] but it has been held that evidence as to the price realized at a forced sale is admissible,[21] at least where the purchaser at the forced sale was a third person who had no part in bringing about the forced sale.[22]

Auction sales. The price obtained at a voluntary auction sale of land,[23] or of an undivided interest therein,[24] is admissible as some evidence of the value of the land, in the absence of proof of imposition or mistake,[25] and is good evidence that the land is worth as much as was paid for it.[26] Such evidence should, however, be accompanied by evidence of the relative condition of the property at the time of sale and at the time in dispute.[27] Where the land is bid in by the owner, the price is not admissible on the issue of value.[28]

Price paid. It has been held that, taken alone, the price paid for land furnishes no evidence of value,[29] even when the bona fides of the transaction is shown.[30] Generally, however, evidence as to the price paid for the land is treated the same as evidence of any sale of the land, and such evidence is admissible if the purchase satisfies the rules as to relevancy generally governing the admissibility of evidence as to sales.[31] Thus, for

Evidence of sale two years before was admissible to show present value, record not showing when property fell into disrepair.—Fidelity Sec. Corporation v. Brugman, 1 P.2d 131, 135, 137 Or. 38, 75 A.L.R. 1333, citing **Corpus Juris.**

17. Iowa.—Beans v. Denny, 117 N.W. 1091, 141 Iowa 52.
Or.—Fidelity Sec. Corporation v. Brugman, 1 P.2d 131, 137 Or. 38, 75 A.L.R. 1333.
Pa.—Procz v. American Steel & Wire Co. of New Jersey, 178 A. 689, 318 Pa. 395.

Evidence of sale six months after foreclosure sale was inadmissible to prove consideration for sale or value at or before foreclosure.—Johnston v. Cassidy, 181 N.E. 748, 279 Mass. 593.

18. Tex.—Broun v. Shannon, Civ. App., 11 S.W.2d 540.

19. Idaho.—State ex rel. McKelvey v. Styner, 72 P.2d 699, 58 Idaho 233.
Mo.—Kansas City & G. Ry. Co. v. Haake, 53 S.W.2d 891, 331 Mo. 429, 84 A.L.R. 1477.
Or.—Richer v. Burke, 34 P.2d 317, 322, 147 Or. 465, citing **Corpus Juris.**
Pa.—Procz v. American Steel & Wire Co. of New Jersey, 178 A. 689, 318 Pa. 395.
22 C.J. p 181 note 85.

"Authorities lay down two rules. . . . The first of these denies the competency of a forced sale as evidence of value. The second of these admits its competency, but denies its exclusiveness and recognizes the admissibility of other evidence as to value."—Maynard v. Bank of Kershaw, 198 S.E. 188, 192, 188 S.C. 160, citing **Corpus Juris.**

Absence of offers

(1) Evidence that sheriff had once offered property in question for sale but received no offer for its purchase is inadmissible.—Elliott v. Wilson, 187 S.E. 825, 181 S.C. 406.

(2) Failure of property subject to special assessment to sell at tax sale is no evidence of property's value relative to assessment.—Morrison v. Culver's Estate, 248 N.W. 237, 216 Iowa 676.

20. Ill.—Pittsburg, C., C. & St. L. R. Co. v. Gage, 121 N.E. 582, 286 Ill. 213.
Mo.—Kansas City & G. Ry. Co. v. Haake, 53 S.W.2d 891, 895, 331 Mo. 429, 84 A.L.R. 1477, citing **Corpus Juris.**
Or.—Coos Bay Logging Co. v. Barclay, 79 P.2d 672, 159 Or. 272.

21. Ga.—May v. Leverette, 139 S.E. 31, 164 Ga. 552.
Minn.—Strimling v. Union Indemnity Co., 222 N.W. 512, 176 Minn. 26.

Foreclosure sale five years after plaintiff took mortgage was held some evidence of its value, in action for fraud in misrepresenting value.—Wolfgram v. Zahn, 214 N.W. 501, 193 Wis. 343.

22. Mo.—Biggers v. Gonter, App., 54 S.W.2d 783.

23. Mass.—Brady v. Finn, 38 N.E. 506, 162 Mass. 260.
22 C.J. p 181 note 89.

24. N.H.—March v. Portsmouth & Concord R. Co., 19 N.H. 372.

25. N.H.—Thornton v. Campton, 18 N.H. 20.
N.Y.—Huntington v. Attrill, 23 N.E. 544, 118 N.Y. 365.

26. N.H.—Thornton v. Campton, 18 N.H. 20.

27. Mass.—Brady v. Finn, 38 N.E. 506, 162 Mass. 260.

28. Ill.—Chicago Sanitary Dist. v. Corneau, 100 N.E. 517, 257 Ill. 93, 22 C.J. p 182 note 94.

29. Idaho.—Ringer v. Wilkin, 183 P. 986, 32 Idaho 330.
Minn.—In re Delinquent Real Estate Taxes in Kanabec County, 204 N.W. 640, 164 Minn. 522.
Tex.—Central State Bank of Coleman v. Henderson, Civ.App., 286 S.W. 518.
Wash.—Jones v. McQuesten, 20 P.2d 838, 840, 172 Wash. 480, citing **Corpus Juris.**
22 C.J. p 180 note 59.

"A single sale of property is not a good criterion of its value."—Harmon v. Stuyvesant Ins. Co., 156 S.W. 87, 89, 170 Mo.App. 309.

Price paid held not criterion of value
Wyo.—Martel v. Hall Oil Co., 255 P. 3, 4, 36 Wyo. 166, 52 A.L.R. 91, citing **Corpus Juris,** and denying rehearing 253 P. 862, 36 Wyo. 166, 52 A.L.R. 91.

Where better evidence is unavailable, purchase price may be shown as evidence of value.—Zimmerman v. Mendelkow, 200 N.W 297, 160 Minn. 330, reversed on other grounds Zimmerman v. Mandelkow, 201 N.W. 289, 160 Minn. 330.

30. N.Y.—People v. Rushford, 80 N.Y.S. 891, 81 App.Div. 298.

31. Ark.—Hayward v. Rowland, 43 S.W.2d 737, 184 Ark. 776.
Cal.—Bonnarjee v. Pike, 185 P. 479, 43 Cal.App. 502.
Ill.—Chicago Title & Trust Co. v. Central Trust Co. of Illinois, 144

evidence of the purchase to be admissible to prove the value of the land, the price must have been paid as part of a voluntary and bona fide transaction,[32] and the purchase must have taken place at a time not too remote from the time as of which the property is to be valued, and conditions in the interim must have remained substantially the same.[33]

Price received. It is generally held that evidence of the price received by the owner at a subsequent sale of the land is admissible to prove the value of the land as of the time in dispute, if the sale satisfies the rules as to probative force generally governing the admissibility in evidence of sales to prove value;[34] but it has also been held that the price received for land is not admissible to prove its value.[35]

Contract. The price fixed in a contract of sale has been held admissible to prove the value of the land.[36]

c. Offers to Buy or Sell

Although there is some authority to the contrary, it is generally held that offers to buy or sell real estate are not admissible to prove the value of the property.

It is said in some cases that bona fide offers to purchase land at a named price, which the owner has declined, are admissible to prove the value of the land;[37] but the weight of authority[38] is that such evidence is not admissible.[39] The analysis

N E 165, 312 Ill. 396, reversing 224 Ill App 474.
Mich —Gitson v Yale Land Co., 180 N W 593, 212 Mich. 292.
Miss.—Robertson v. Planters' Oil Works, 90 So. 325, 127 Miss. 610.
Mo.—City of St. Louis v. Turner, 55 S W 2d 942, 331 Mo. 834.
Vt —Miller v. Belville, 126 A. 590, 98 Vt. 243.
22 C J. p 180 note 61.

Admissible in connection with opinion evidence as to value
Iowa —Millard v Northwestern Mfg. Co , 205 N.W. 979, 200 Iowa 1063.

Corroboration
Evidence as to price paid for property is admissible, where limited to corroboration of testimony as to value of land.—Town of Ayden v. Lancaster, 150 S.E. 40, 197 N.C. 556.

Dependence on circumstances
What the owner paid for property may be some evidence of its present value, or it may not be, depending on the time of, and the circumstances surrounding, its purchase.—Hirsch v. Weiner, 190 N.Y.S. 111, 116 Misc 312.

Where land had no established market value, the cost of such land was some evidence of its value.—Watterson v. Knapp, 95 P.2d 154, 35 Cal.App.2d 283.

Discretion of court
(1) The admission or rejection of such evidence rests in the court's discretion.—Zimmerman v. Mendelkow, 200 N.W. 297, 160 Minn. 330, reversed on other grounds Zimmerman v. Mandelkow, 201 N.W. 289, 160 Minn. 330.

(2) Admitting, as one of the facts to be considered in fixing value, at time of condemnation, of part of a tract, of what a prior owner paid for the whole tract fourteen months before was matter of discretion.—Suburban Land Co. v. Inhabitants of Town of Arlington, 107 N.E. 432, 219 Mass. 539.

Portions of tract
On the question of the value of a large tract of land, evidence of the price paid for portions of the tract, recently purchased is admissible.—Spring Valley Waterworks v. San Francisco, C.C.Cal., 192 F. 137.

32. N.C.—Palmer v. North Carolina State Highway Commission, 141 S.E. 338, 195 N C. 1.
22 C J. p 180 note 62.

33. U.S —Rudin v. Steinbugler, C. C A.N.Y., 103 F.2d 323, affirming, D C., 24 F.Supp. 98.
Ill.—Forest Preserve Dist. of Cook County v. Hahn, 173 N.E. 763, 341 Ill 599.
Mo.—State ex rel. State Highway Commission v. Pope, 74 S W.2d 265, 228 Mo.App. 888.
N.C.—Palmer v. North Carolina State Highway Commission, 141 S.E. 338, 195 N.C. 1.
Vt —Miller v. Belville, 126 A. 590, 98 Vt. 243.
Wash.—Jones v. McQuesten, 20 P. 2d 838, 840, 172 Wash. 480, citing **Corpus Juris.**
22 C J. p 180 note 63.

Matter for trial court
Whether price paid for property was paid at a time too remote to be evidence of present value is usually a question for trial court.—Miller v. Belville, 126 A. 590, 98 Vt. 243.

If appreciable lapse of time exists between dates of assessment and of sale, deed is not admissible, unless the party offering it shows there was no variation in values between such dates, or, if a variation, its nature and extent with reasonable certainty.—Robertson v. Planters' Oil Works, 90 So. 325, 127 Miss. 610.

34. Ky.—Cline v. Cline, 284 S.W. 1110, 215 Ky. 492.
Mich.—Gitson v. Yale Land Co., 180 N.W. 593, 212 Mich. 292—Engel v. Tate, 170 N.W. 105, 203 Mich. 679.
R.I.—Dooley v. Stillson, 128 A. 217, 46 R.I. 332, 52 A.L.R. 1505.

Conditions substantially the same
Price obtained for realty is admissible to establish present value, when conditions affecting value are substantially unchanged.—Fidelity Sec. Corporation v. Brugman, 1 P. 2d 131, 137 Or. 38, 75 A.L.R. 1333.

35. Tex.—Central State Bank of Coleman v. Henderson, Civ.App., 286 S W. 518.

36. N Y.—In re Hamilton Place in City of New York, 122 N Y.S. 660, 67 Misc. 191, dismissed 128 N.Y. S. 283, 143 App.Div. 302, affirmed 96 N.E. 1116, 202 N.Y. 607

37. U.S.—U. S. v. Gideon-Anderson Co., D.C.Mo., 16 F Supp. 627.
Ill.—Kankakee Park Dist. v. Heidenreich, 159 N.E. 289, 328 Ill. 198—City of Chicago v. Lehmann, 104 N. E. 829, 262 Ill 829.
22 C.J. p 179 note 41.
Offers to buy personalty see infra § 183 c.
Offers to buy similar property see infra § 593.

In absence of evidence of actual sales, evidence of bona fide offers to purchase for cash by persons able to buy are some evidence of value of property.—Jefferson Park Dist. v. Sowinski, 168 N.E. 370, 336 Ill. 390—Sanitary Dist. v. Boening, 107 N.E. 810, 267 Ill. 118.

38. Idaho.—Oregon-Washington R. & Nav. Co. v. Campbell, 202 P. 1065, 34 Idaho 601.

39. U.S.—Clarke v. Hot Springs Electric Light & Power Co., C.C. A.Wyo., 55 F.2d 612, certiorari denied 53 S.Ct. 19, 287 U.S. 619, 77 L.Ed. 537.
Ala.—Moore v. Oneonta Motor Co., 137 So. 301, 302, 223 Ala. 510, citing **Corpus Juris**—Dean v. County Board of Education, 97 So. 741, 210 Ala. 256.
Cal.—Fontana Land Co. v. Laughlin, 250 P. 669, 199 Cal. 625, 48 A.L.R. 1308—Hibernia Savings & Loan Soc. v. Ellis Estate Co., 22 P.2d 806, 132 Cal.App. 408—Merchants' Trust Co. v. Hopkins, 284 P. 1072, 103 Cal.App. 473.
Ga.—Groover v. Simmons, 129 S.E. 778, 161 Ga. 93.

made in Corpus Juris that an offer to pay a certain amount for property does not necessarily involve an estimate that such is its full value, and therefore should not be received, as against the owner, for the purpose of establishing that the value is less than he claims,[40] but that such an offer does involve an estimate that the land is worth at least as much as the amount offered, and is therefore relevant to show, on behalf of the owner, that the land is worth not less than such amount,[41] has been followed in a number of decisions. It has been held that the admissibility of evidence of rejected offers to purchase realty rests in the court's discretion.[42]

In any event, an offer to purchase real estate at a certain price is not admissible to prove the value of the property if the offer is not shown to be bona fide,[43] and made by one able to perform.[44] Mere negotiations,[45] or willingness to buy,[46] not ripening into an offer, are not admissible. The testimony of a witness that he would not be willing to buy property in its present condition cannot be received.[47]

Offers to sell. It is generally held that no probative force to establish value can be attached to the mere fact of offers to sell the land in question at a certain price;[48] the amount for which an owner

Kan.—Searcy v. State Highway Commission, 67 P.2d 534, 145 Kan. 709.
Ky.—Warfield Natural Gas Co. v. Wright, 25 S.W.2d 1036, 233 Ky 378—Commonwealth v. Combs, 17 S.W.2d 748, 229 Ky. 627.
Mass.—Dickenson v. Inhabitants of Fitchburg, 79 Mass. 546.
Miss.—State Highway Commission v. Dornbusch, 193 So. 783, 187 Miss. 653—State Highway Commission v. Johnson, 191 So. 820, 186 Miss 889.
Mo.—City of St Louis v. Gerhart Realty Co., 40 S.W.2d 661, 664, 328 Mo. 103, citing **Corpus Juris.**
Mont.—Gallatin Valley Electric Ry. v. Neible, 186 P. 689, 57 Mont. 27
N.C.—Town of Canton v. Harris, 97 S.E. 748, 177 N.C. 10.
S.C.—Baynham v. State Highway Department, 187 S.E. 528, 535, 181 S. C. 435, citing **Corpus Juris.**
22 C.J. p 179 note 42.

Reasons for rule

(1) Evidence of offers to buy is too easily manufactured.
U.S.—Sharp v. United States, N.J., 24 S.Ct. 114, 191 U.S. 341, 48 L.Ed. 211.
Kan.—State v. Nelson, 266 P. 107, 108, 126 Kan. 1, citing **Corpus Juris.**
Mich.—City of Kalamazoo v. Balkema, 233 N.W. 325, 252 Mich. 308.
Okl.—Page v. Oklahoma City, 263 P. 448, 129 Okl. 28.

(2) The difficulty of determining whether or not an unaccepted offer was made in good faith requires the rejection of such evidence.
U.S.—Sharp v. United States, N.J., 24 S.Ct. 114, 191 U.S. 341, 48 L.Ed. 211.
Mich.—City of Kalamazoo v. Balkema, 233 N.W. 325, 252 Mich. 308.
Wash.—Chicago, M. & St. P. R. Co. v. Alexander, 91 P. 626, 47 Wash. 131.

(3) Such testimony simply gives the opinion of the offeror as to the value of the land.
U.S.—Sharp v. United States, N.J., 24 S.Ct. 114, 191 U.S. 341, 48 L.Ed. 211.
Ala.—Dean v. County Board of Education, 97 So. 741, 210 Ala. 256.

(4) The admission of such evidence would raise a collateral issue.—In re Proceedings to Acquire Lands, etc., for Public Park, 150 A. 387, 107 N.J Law 110.

(5) "An unaccepted offer of this kind may be influenced by so many considerations entirely foreign to such an issue, and may put the opposing party at such disadvantage affording him, as it does, no fair opportunity to either anticipate or combat it."—Baynham v. State Highway Department, 187 S.E. 528, 535, 181 S.C. 435.

Impeachment of witness

In action for compensation for land appropriated for street, question asked witness as to offer to buy plaintiff's land is competent, if at all, only to contradict or impeach his estimate of value.—Lloyd v. Town of Venable, 84 S.E. 855, 168 N.C. 531.

Offer by witness not knowing market value was properly excluded on question of value.—Horine v. Cox, 139 S.E. 591, 37 Ga.App. 216.

Taking of option to purchase property at a specified price is not evidence of the real or market value of such property.—Shebley v. Quatman, 134 P. 68, 66 Or. 441.

Offer made during trial

In suit to set aside husband's conveyance of realty to wife, evidence that over a month before the trial plaintiffs offered to pay defendants an amount in cash, give them the year's crop from the premises, cancel all claims against husband, and to assume the encumbrances against the property for a deed thereto, was admissible on the question of value of the property, where the offer was made at the trial.—Safford v. Flynn, 274 N.W. 461, 133 Neb. 213.

In action for damages for preventing sale, bona fide offer of purchase may be shown on issue of extent of damage, but such evidence is inadmissible to prove market value in action where alleged damage is mere depreciation in market value.—Kilbourne v. McAllister, 65 P.2d 516, 179 Okl. 267.

40. N.M.—Tharp v. Massengill, 28 P.2d 502, 504, 38 N.M. 58, citing **Corpus Juris.**
Okl.—Quinn v. State ex rel. King, 49 P.2d 98, 100, 173 Okl. 536, quoting **Corpus Juris.**

41. Ga.—Bell v. Tucker, 139 S.E. 573, 575, 37 Ga.App. 254, citing **Corpus Juris.**
N.M.—Tharp v. Massengill, 28 P.2d 502, 504, 38 N.M. 58, citing **Corpus Juris.**

42. Ill.—Kankakee Park Dist. v. Heidenreich, 159 N.E. 289, 328 Ill. 198.

43. U.S.—Wiget v. Becker, C.C.A. Mo., 84 F.2d 706.
Ill.—Kankakee Park Dist v. Heidenreich, 159 N.E. 289, 328 Ill. 198.
Kan.—Security Ben. Ass'n v. Swartz, 70 P.2d 16, 146 Kan. 267.

44. Ill.—Jefferson Park Dist. v. Sowinski, 168 N.E. 370, 336 Ill. 390.

45. Mo.—City of Cape Girardeau v. Hunze, 284 S.W. 471, 314 Mo. 438, 47 A.L.R. 25.

46. Ga.—May v. Leverette, 139 S.E. 31, 164 Ga. 552.
22 C.J. p 179 note 45.

47. Mo.—McMillen v. Columbia, 97 S.W. 953, 122 Mo.App. 34.
22 C.J. p 177 note 9 [a], p 179 note 46.

48. Cal.—Merchants' Trust Co. v. Hopkins, 284 P. 1072, 103 Cal.App. 473.
Ga.—Wilkes Lumber Co. v. Seaboard Air Line Ry. Co., 121 S.E. 694, 31 Ga.App. 699.
Iowa.—Morrison v. Culver's Estate, 248 N.W. 237, 216 Iowa 676—Pickett v. Comstock, 229 N.W. 249, 209 Iowa 968—Des Moines Joint Stock Land Bank of Des Moines v. Danson, 220 N.W. 102, 103, 206 Iowa 897, quoting **Corpus Juris,** and supplemented on other grounds 221 N.W. 542, 206 Iowa 897.
22 C.J. p 179 note 48.

would have sold his property is influenced by too many fortuitous circumstances to be relevant on an inquiry as to value,[49] but it has also been held that such evidence is admissible.[50] An offer to sell at a certain price may be treated as an admission and, as such, admissible against the owner.[51]

d. Appraisals and Assessments

Although there is some contrary authority, it is generally held that assessments made for purposes of taxation are not admissible to prove the value of land for other purposes.

Although there is some authority to the contrary,[52] the majority of the decisions[53] hold that a valuation of real estate made by public officials for the purpose of taxation is not relevant to aid a jury in determining the value of land[54] or buildings,[55] especially when the assessment is for a time remote from the time in issue.[56] The tax paid is likewise

Offers to sell personalty see infra § 183 c.

Offers to sell similar property see § 593.

49. Iowa.—Des Moines Joint Stock Land Bank of Des Moines v. Danson, supra.
22 C J. p 179 note 50.

50. U.S.—U S. v. Gideion-Anderson Co., D.C Mo., 16 F.Supp. 627.
N.Y.—Sparkill Realty Corporation v. State, 266 N.Y.S. 72, 238 App.Div. 656, reversing 266 N.Y.S. 67, 148 Misc. 626, 630.
Pa.—East Brandywine & W. R Co. v. Ranck, 78 Pa. 454—Orr v. Carnegie Natural Gas Co, 2 Pa.Super. 401, 39 Wkly.N.C. 213.

51. Pa.—Houston v. Western Washington R. Co., 54 A. 166, 204 Pa. 321.
22 C J. p 179 note 51.

52. Mich.—Chamberlin v. Wagar, 262 N.W. 417, 272 Mich. 594.
N.Y.—Mushekian v. Reilly, 208 N.Y. S 314, 124 Misc. 571.
Philippine.—Tenorio v. R. Co., 22 Philippine 411.
22 C J. p 178 note 36.

City's reduction of assessed valuation is some evidence of depreciation—Adler v. Berkowitz, 240 N.Y. S 597, 229 App.Div. 245, modified on other grounds 173 N.E. 574, 254 N.Y. 433.

Deficiency judgment proceeding

On an application for a deficiency judgment under a statute authorizing the court to determine market value by "affidavit or otherwise," an assessment is some evidence of value; it is fixed as the result of the sworn opinion of a deputy commissioner and is probably more accurate than the unsworn appraisals likely to be submitted by interested parties.—President, etc., of Manhattan Co. v. Williams, 274 N.Y.S. 338, 152 Misc. 901.

53. Okl.—Burlison v. Watson, 278 P. 328, 137 Okl. 43.

54. Ala.—Dean v. County Board of Education, 97 So. 741, 745, 210 Ala. 256, citing **Corpus Juris.**
Cal.—Yolo Water & Power Co. v. Edmands, 195 P. 463, 50 Cal.App. 444—McNulty v. Lawley, 184 P. 50, 42 Cal.App. 747.
Colo.—Bankers Trust Co. v. International Trust Co., 113 P.2d 656, 660, citing **Corpus Juris.**
Ill.—People v. Bain, 195 N E. 42, 53, 359 Ill. 455, citing **Corpus Juris**—People v. Stevens, 193 N.E. 154, 160, 358 Ill. 391, citing **Corpus Juris.**
Iowa.—Morrison v. Culver's Estate, 248 N.W. 237, 216 Iowa 676.
Me.—Allard v. La Plain, 130 A. 737, 125 Me. 44.
Mass.—Vineyard Grove Co. v. Town of Oak Bluffs, 163 N.E. 888, 265 Mass. 270—Dorr v. Massachusetts Title Ins. Co., 131 N.E. 191, 238 Mass. 490.
Mo.—Kansas City & G. Ry. Co. v. Haake, 53 S W.2d 891, 892, 331 Mo. 429, quoting **Corpus Juris.**
Pa.—In re Shelmire's Estate, 56 Montg.Co. 260.
Tex.—Jackson v. Goldberg, Civ.App., 283 S.W. 860—Payne v. Beaumont, Civ.App., 245 S.W. 94.
22 C.J. p 178 note 32.
Admissibility of assessments of personal property to prove value see infra § 183 d.

Reason for rule

(1) Testimony showing the assessed valuation cannot be received by the court to show the actual value of property unless supported by other evidence, as it is a matter of common knowledge that property is very often assessed at an amount which is quite different from its actual value.
U.S.—Emerson v. U. S., 76 Ct.Cl. 613.
Colo.—Bankers Trust Co. v. International Trust Co., 113 P.2d 656.

(2) An assessment is merely an ex parte statement made by an officer not subject to cross-examination.
N.C.—Bunn v. Harris, 5 S.E.2d 149, 216 N.C. 366.
Utah.—Littledike v. Wood, 255 P. 172, 69 Utah 323.

Parties other than owner and assessor

(1) The production of assessment rolls, showing the assessed value, is not any evidence of market value, as between parties other than the owner and the assessing municipality.
Del.—Beck v. Kulesza, 156 A. 346, 4 W.W.Harr. 559.
N.H.—Beers v. Davidson, 125 A. 260, 81 N.H. 326.
Wash.—American State Bank v. Butts, 191 P. 754, 111 Wash. 612, 17 A.L.R. 168.

(2) The value placed by the board of supervisors in passing on the assessment roll on land in the vicinity of a particular tract is no evidence of the value of such particular tract on owner's appeal from order fixing the value of such land for taxation.—Caston v. Board of Sup'rs of Covington County, Miss., 93 So. 582.

Testimony that property was assessed at certain per cent of its value was incompetent where witness's knowledge of the value of land was limited to the assessment rolls.—Littledike v. Wood, 255 P. 172, 69 Utah 323.

Statutory provision for admission of assessment on question of value is inapplicable to trials had since effective date of Official Code in which such statute was omitted.—Day v. Adkins, 164 S.E. 238, 112 W. Va. 322.

Different owner

In an action for the destruction by fire of plaintiff's cottage, due to the alleged negligence of the employees of defendant gas company in connecting the gas pipes, it was not error to exclude tax lists as evidence of the value of the property destroyed, where another owned the property when the lists were made up.—Peterson v. Tidewater Power Co., 111 S.E. 8, 183 N C. 243.

Impeachment of witness

Testimony as to tax officer's valuation of property on cross-examination of another witness, testifying as to market value thereof, was not admissible as admission or declaration against interest.—Edmondson v. Carroll, Tex.Civ.App., 65 S.W. 2d 1107, error dismissed.

Evidence held not necessary

In an action wherein overhead expenses are involved and such expenses include taxes paid, although a witness testified as to the tax, records to show the value of land were not necessary.—United Iron Works v. L. J. Smith Const. Co., 227 P. 369, 116 Kan. 482.

55. Ala.—Putman v. White, 88 So. 355, 18 Ala.App. 15.
22 C.J. p 178 note 33.

56. Mo.—Kansas City & G. Ry. Co.

inadmissible to prove the value of the land.[57]

The amount for which the owner has assessed or valued the land for tax purposes has been held inadmissible to prove the value of the land,[58] but other decisions hold that such evidence is admissible against the owner,[59] especially if his statement was made under oath.[60]

Betterment and condemnation assessments. Betterment assessments are not relevant on an issue as to value,[61] and the same is true of assessments made by condemnation commissioners.[62]

Appraisals. An estimate of value made by appraisers cannot affect a party who neither cooperates in nor subsequently ratifies the appointment of the appraisers;[63] but a party may be affected by the report of appraisers appointed by himself.[64]

e. Rental Value and Revenue

The rental value of, and the revenue derived from, land are admissible to prove the value of the land.

The rental value of real estate is admissible as showing the value of the property.[65] Changes in rental value are relevant to prove a change in the value of the land.[66] Accordingly, a general decrease in rental value of premises along the line of an elevated railroad and near the premises in question is competent in determining damage caused by its construction and operation;[67] but a decrease in the rental value of adjacent property is irrelevant when such decrease is not shown to be general in the vicinity.[68] All relevant matters may be considered in determining rental value or the value of a lease.[69] Although there is contrary authori-

v. Haake, 53 S.W.2d 891, 892, 331 Mo. 429, quoting **Corpus Juris.**

22 C.J. p 178 note 31.

57. Iowa.—Morrison v. Culver's Estate, 248 N.W. 237, 216 Iowa 676.
Me.—Allard v. La Plain, 130 A. 737, 125 Me. 44.
Mass.—James Millar Co. v. Commonwealth, 146 N.E 677, 251 Mass. 457.
Tex.—Jackson v. Goldberg, Civ.App., 283 S.W. 860.

58. Tex.—Jackson v. Goldberg, supra.

59. U.S.—U. S. v. First Nat. Bank, D.C.Ala., 250 F. 299.
Ky.—Franklin County v. Bailey, 63 S.W.2d 622, 250 Ky. 528—Leslie County v. Hart, 22 S.W.2d 278, 232 Ky. 24—Commonwealth, by State Highway Commission, v. Combs, 17 S.W.2d 748, 229 Ky. 627.
N.C.—Peterson v. Tidewater Power Co., 111 S.E. 8, 183 N.C. 243.
22 C.J. p 178 note 34.
Admissibility of tax return as an admission see infra § 283

60. Ga.—Tolleson v. Posey, 32 Ga. 372.

61. Minn.—Nelson v. West Duluth, 57 N.W. 149, 55 Minn. 497.

62. Cal.—San Luis Obispo v. Brizzolara, 34 P. 1083, 100 Cal. 434.

63. Ala.—Ex parte Hart, 200 So. 783, 240 Ala. 642.
Wash.—Moorman v. Seattle & M. R. Co., 35 P. 596, 8 Wash. 98.

64. Mich.—Rosenfield v. Case, 49 N. W. 630, 87 Mich. 295.

65. Ala.—Colson v. Harden, 141 So. 639, 224 Ala. 665.
Ark.—Miller v. Miller, 100 S.W.2d 74, 193 Ark. 362.
Ill.—Straus v. Anderson, 9 N.E.2d 205, 366 Ill. 426, modifying 283 Ill. App. 342.
Mo.—Cox v. McKinney, 258 S.W. 445, 212 Mo.App. 522.
N.Y.—People ex rel. Connelly v. Weise. 25 N.Y.S.2d 883, 261 App. Div. 980, reargument denied 27 N.Y.S.2d 475, 261 App.Div. 1094.
Pa.—Gardull v. Royal Ins. Co., 2 A.2d 504, 133 Pa.Super. 257—Steere v. Harford Tp., 83 Pa.Super. 234.
22 C.J. p 181 note 70.

Capitalized value of rent may be considered in ascertaining land values for purpose of taxation.—People ex rel. McDonough v. Goldberg, 188 N.E 428, 354 Ill. 423.

Income from rentals may be shown to establish the value of land.—Spencer v. Miller, 271 N.W. 731, 279 Mich. 194.

Evidence of bona fide rent paid is admissible to prove the value of the land.—Bonnarjee v. Pike, 185 P. 479, 43 Cal.App. 502.

Value of grass

(1) When land trespassed on by defendant's sheep is pasture land, proof of its rental value is admissible to show the value of the grass.—Hanson v. Seawell, 204 P. 660, 35 Idaho 92.

(2) In lessee's action for flooding land, amount of rental is immaterial in determining value of grass or hay.—Brown v. Jones, 278 P. 981, 130 Or. 424.

(3) In an action against a railroad company for damages, the contention that the value of the grass burned should be determined by what rental other persons paid for pasture land is not tenable, since what plaintiff and others paid per acre may or may not have been the value of the land for pasturage or other purposes at the time of making the rental contract, and at the time of the fire the value of the grass might have been more or less than the rental price.—Galveston, H. & S. A. Ry. Co. v. Harris, Tex.Civ.App., 216 S.W. 430.

(4) The rent paid by plaintiff for pasture could not determine the market value of grass destroyed by fire, but, if there was no market value, the rent might be a circumstance to be considered in arriving at the value of the grass for the purpose for which it was intended.—Chicago, R. I. & G. Ry. Co. v. Word, Com.App., 207 S.W. 902, reversing, Civ.App., 158 S.W. 561.

66. N.Y.—Senglaup v. Acker Process Co., 105 N.Y.S. 470, 121 App.Div. 49.
Tex.—Missouri, K. & T. Ry. Co. of Texas v. O'Connor, Civ.App., 51 S.W. 511.
22 C.J. p 181 note 72.

67. N.Y.—Bischoff v. New York El. R. Co., 18 N.Y.S. 865, 61 N.Y.Super. 211, affirmed 33 N.E. 1073, 138 N.Y. 257.
22 C.J. p 181 notes 73–75.

68. Iowa.—Soper v. McClout, 87 N. W. 724.
22 C.J. p 181 note 76.

69. N.Y.—In re Schlossman's Adm'x, 242 N.Y.S. 417, 136 Misc. 893.

Sale of lease

In action for fraud in sale of lease in August, admitting evidence of what particular lease sold for in preceding January was not error.—Reeser v. Hammond, 253 P. 233, 122 Kan. 695.

Whether lease has any value depends on whether the rental value is larger than the rent reserved.—In re Schlossman's Adm'x, 242 N.Y.S. 417, 136 Misc. 893.

Rental value of a prospective lease may be shown by its market value, or by the rent actually obtained by the owner if he exercised reasonable diligence in obtaining all the rent possible.—Branning Mfg. Co. v. Norfolk-Southern R. Co., 121 S.E. 74, 138 Va. 43.

Value of particular crops grown on land is not admissible as showing cash rental value thereof.—Miles v. Johanson, 238 P. 291, 40 Idaho 782.

ty,[70] it is generally held that the rent paid is admissible to prove rental value.[71] Where the rental agreement was made at a time remote from the time in issue, it is not relevant to prove rental value.[72]

Revenue. The net revenue arising from the use of land may be shown on an issue as to the value of the property;[73] but evidence as to the earnings of a business conducted on the land is not admissible to prove the value of the land.[74] However, evidence as to the market value of the crops the land was suited to raise has been held admissible to prove the value of the land.[75]

f. Time to Which Evidence of Value Must Relate

Evidence, to be admissible where the value of realty is in issue, must relate to the time as of which the property is to be valued.

Evidence on an issue as to the value of real estate, in order to be relevant, must relate to the time as of which the value of the property is to be determined,[76] or to a time so near thereto that it may reasonably throw light on the value at such time;[77] and evidence of value at a time considerably before[78] or after[79] the time to which the controversy relates is not admissible, unless it also appears that

Lease on different terms

The value of lease should be proved by competent witnesses familiar with local conditions of the renting values of real estate in that neighborhood, and it was error to admit a lease of the same property on different terms to another.—Richter v. Goldberg, 78 Pa.Super. 309.

Reasonable value of use

That corporation continued in business and needed property sued for in conducting same is pertinent testimony on issue of reasonable value of use.—Baker v. Farmers' Welfare Union, Tex.Civ.App., 3 S.W.2d 155, error dismissed.

Estimated profit from operation of mine under lease based on royalties and limited in time does not constitute a separate and distinct item of value to be added to that of the property, but is only a circumstance tending to prove the value of the lease.—Tierney v. United Pocahontas Coal Co., 109 S.E. 339, 89 W.Va. 402.

70. Pa.—Lever v. Lagomarsino, 127 A. 452, 282 Pa. 110.

71. Cal.—Bonnarjee v. Pike, 185 P. 479, 43 Cal.App. 502.
Ga.—Horine v. Cox, 139 S.E. 591, 37 Ga.App. 216.
Tex.—Foley Bros Dry Goods Co. v. Settegast, Civ.App., 133 S.W.2d 228, error refused.
Wash.—Crosby v. Kitsap County, 281 P. 494, 154 Wash. 212.

In New York

(1) Rent reserved may be some evidence of rental value of premises.—Goelet v. National Surety Co., 164 N.E. 101, 249 N.Y. 287, 62 A.L.R. 425, reversing 228 N.Y.S. 802, 223 App.Div. 836, and 228 N.Y.S. 803, 223 App.Div. 836.

(2) The rent stipulated in a lease by a city of premises for the purpose of a public garage is evidence of the value of the property when so used, when the tenant who remains in possession after a constructive eviction arising from the refusal of the city to permit the erection of such garage seeks to recover his damages arising from such breach as a counterclaim in an action against it for the rent reserved.—City of New York v. Pike Realty Corp., 160 N.E. 359, 247 N.Y. 245, reversing 222 N.Y.S. 785, 220 App.Div. 824, followed in 238 N.Y.S. 808, 227 App.Div. 577.

(3) The rent reserved in a lease is not competent to prove rental value.—People ex rel. Connelly v. Weise, 25 N.Y.S.2d 883, 261 App.Div. 980, reargument denied 27 N.Y.S.2d 475, 261 App.Div. 1094.

Offer to rent property is inadmissible where the conditions at the time of the offer are not shown to have been the same as at the time at which the value is in issue.—St. Louis, I. M. & S. R. Co. v. Brundidge, 171 S.W. 859, 115 Ark 606.

Rentals for part of building

Testimony of specific rental contracts were inadmissible on issue of rental value of building as a whole.—Hewitt v. Buchanan, Tex.Civ.App., 4 S.W.2d 169.

72. Md.—Mayor and Council of City of Baltimore v. Ercolano, 184 A. 164, 170 Md. 341.

73. Ark.—Hayward v. Rowland, 43 S.W.2d 737, 184 Ark. 776.
Ga.—Mitchell County v. Hillard, 126 S.E. 719, 159 Ga. 502.
Ill.—First Nat. Bank v. Gooch, 258 Ill.App. 453.
Tex.—Foley Bros. Dry Goods Co. v. Settegast, Civ.App., 133 S.W.2d 228, error refused.
22 C.J. p 181 note 77.

Sum per month obtainable for pasturing cattle and number which could be pastured is incompetent to establish market value of land.—McCleskey v. McCleskey, Tex.Civ.App., 7 S.W.2d 657.

74. Ind.—Illinois Cent. R. Co. v. Howard, 147 N.E. 142, 196 Ind. 323, rehearing denied 148 N.E. 413, 196 Ind. 323.

75. U.S.—Frankson v. Laures, C.C.A. Iowa, 285 F. 554—St. Louis Smelting & Refining Co. v. Henke, C.C.A. Ill., 277 F. 665.

Connecting proof

In action for damages from false representations on trade of land, it was error to exclude testimony as to the market value of alfalfa in 1918, on the ground that there was no showing that any alfalfa was raised in 1918 or any other year, where a witness had testified directly that alfalfa was raised in 1917 and 1918.—Frankson v. Laures, C.C.A.Iowa, 285 F. 554.

Value of crops before and after injury to land

In a tenant's action to recover damages for drainage of moisture from his land, evidence regarding the value of his crops before and after the drainage is admissible to show the land's usable value, and as to whether plaintiff used proper efforts to reduce the damages.—Baumann v. City of New York, 124 N.E. 141, 227 N.Y. 25, 8 A.L.R. 595, modifying and affirming 167 N.Y.S. 720, 180 App.Div. 498.

76. U.S.—Oakland Water Front Co. v. Le Roy, C.C.A.Cal., 282 F. 385.
N.C.—State Highway & Public Works Commission v. Hartley, 11 S.E.2d 314, 316, 218 N.C. 438, citing **Corpus Juris.**
Wash.—Seguin v. Plano, 295 P. 179, 181, 160 Wash. 421, quoting **Corpus Juris.**
22 C.J. p 182 notes 1–3.

77. U.S.—Oakland Water Front Co. v. Le Roy, C.C.A.Cal., 282 F. 385.
22 C.J. p 182 note 1.

78. U.S.—Beedle v. Campbell, C.C.A. Mo., 100 F.2d 798, certiorari denied Campbell v. Beedle, 59 S.Ct. 835, 307 U.S. 631, 83 L.Ed. 1514.
Mass.—Meisel Press Mfg. Co. v. City of Boston, 172 N.E. 356, 272 Mass. 372—Johnson v. City of Lowell, 134 N.E. 627, 240 Mass. 546.
22 C.J. p 182 note 2.

79. N.Y.—People ex rel. Lehigh Valley Ry. Co. v. Burke, 223 N.Y.S. 168, 221 App.Div. 248, reversed on other grounds 160 N.E. 19, 247 N.Y. 227.
Wash.—Seguin v. Plano, 295 P. 179,

the value has remained the same.[80]

§ 183. Personal Property

a. In general
b. Sales
c. Offers to buy or sell
d. Appraisals and assessments
e. Time and place to which evidence of value must relate
f. Corporate stock
g. Animals

a. In General

Where the value of personal property is in issue, the evidence should be limited to proof of its market value. Where the property involved has no established market value, its value may be proved by evidence as to all matters concerning the property which a reasonable buyer or seller would consider.

As a general rule, where the value of personal property is in issue, the evidence should be directed to its market value rather than to its intrinsic value;[81] it is usually considered that actual or intrinsic value can be shown only where the property has no market value.[82] Where, however, the property in controversy has no established market value, other evidence must necessarily be resorted to to prove its value,[83] and it has been considered that where goods are kept for use and not for sale, their actual value may be shown without first showing that they have no market value.[84] Where the issue is as to the value of personal property which has no readily ascertainable market value, evidence is admissible as to all matters with respect to the property which a reasonable buyer or seller would consider.[85] Ev-

181, 160 Wash. 421, quoting **Corpus Juris.**
22 C.J. p 182 note 3.

80. Wash.—Seguin v. Plano, 295 P. 179, 181, 160 Wash. 421 quoting **Corpus Juris.**
22 C.J. p 182 note 4.

81. N.J.—Sultan v. London Assur. Corporation, 135 A. 58, 4 N.J.Misc. 947.
Tex.—Felker v. Hyman, Civ.App., 135 S.W. 1128.
Opinion evidence as to value see infra §§ 501, 545.

Value of personalty is confined to market value if it has definite market value, otherwise, cost in connection with utility is some evidence of present value.—Bailey v. Ford, 135 A. 835, 151 Md. 664.

Price not greater than that charged by others

Where contractor agreed with subcontractor to furnish material at price not exceeding that charged by others, evidence to show what the highest market prices were was admissible, in suit for contract price, as to credits to be allowed contractor for material furnished.—Van Horn v. Kemena, 127 A. 233, 281 Pa. 579.

82. Kan.—Geselle v. American Home Fire Assur. Co. of New York, 68 P.2d 1097, 1099, 146 Kan. 138, 110 A.L.R. 1370, quoting **Corpus Juris.**
Tex.—Panhandle & S. F. Ry. Co. v. Miller, Civ.App., 64 S.W.2d 1076, error dismissed—Webb-North Motor Co. v. Ross, Civ.App., 42 S.W. 2d 1086, error dismissed—Cudd v. Whippo, Civ.App., 234 S.W. 706.
22 C.J. p 182 note 6.

Existence of market value in issue

If there is a controverted issue as to whether or not the article has a market value then evidence is admissible to show intrinsic or actual value.—Felker v. Hyman, Tex.Civ. App., 135 S.W. 1128.

Evidence as to cost of producing articles having a market value is not admissible.—Brown v. Dubuque Altar Mfg Co., 144 N.W. 613, 163 Iowa 343—22 C.J. p 187 note 1.

83. U.S.—Travelers Indemnity Co. v. Plymouth Box & Panel Co., C.C.A. N.C., 99 F.2d 218.
Ala.—De Moville v. Merchants & Farmers Bank of Greene County, 170 So. 756, 761, 233 Ala. 204, citing **Corpus Juris.**
Mich.—Armstrong v. Rachow, 171 N. W. 389, 205 Mich. 168.
Mo.—Gallup v. Rhodes, 230 S.W. 664, 207 Mo.App. 692.
Tex.—Fort Worth & D. C. Ry. Co. v. Amason, Civ.App., 239 S.W. 359
22 C.J. p 183 note 7.

Place of market value

In an action by an automobile owner against a railroad company for destroying the automobile, where there was no market value for it at or near the place of the accident, the owner had a right to prove its intrinsic value, although there was a market for it in an adjoining county.—San Antonio & A. P. Ry. Co. v. Liggett, Tex.Civ.App., 252 S.W. 191.

Property which cannot be sold

Insurer of property including liquors against theft cannot contend that there was no liability under the policy by reason of theft of intoxicating liquor while war time prohibition was in effect, in that such liquors then had no value, since such liquor did have value, although it could not be sold, and, there being no other evidence thereof, it was permissible for insured to testify as to what he paid for the liquors.—Chicago Bonding & Insurance Co. v. Oliner, 115 A. 592, 139 Md. 408, 18 A.L.R. 1081.

84. Wash.—Kimball v. Betts, 169 P. 849, 99 Wash. 348.
22 C.J. p 182 note 8.

85. U.S.—Sartor v. United Gas Public Service Co., C.C.A.La., 84 F.2d 436.
N.Y.—Sparkill Realty Corporation v. State, 4 N.Y.S.2d 679, 254 App.Div. 78, motion denied 4 N.Y.S.2d 1023, 254 App.Div. 800, affirmed 18 N.E.2d 301, 279 N.Y. 656.
Tex.—London & Lancashire Ins. Co. v. Higgins, Civ.App., 68 S.W.2d 1056, error dismissed.
22 C.J. p 183 note 11.

Second-hand property

(1) The value of second-hand property is established in the same way as that of other property without market value; and accordingly evidence of its cost, its market price when new, and its usefulness and present condition, is admissible.
Mich.—Langland v. Kraemer, 202 N. W. 1007, 230 Mich. 449, quoting **Corpus Juris.**
Mo.—State v. Bresse, 33 S.W.2d 919, 921, 326 Mo. 885, citing **Corpus Juris.**
N.M.—Rutherford v. James, 270 P. 794, 796, 33 N.M. 440, 63 A.L.R. 237, citing **Corpus Juris.**
22 C.J. p 183 notes 20, 21.

(2) Value of used household effects, destroyed by fire, must be determined from owner's sworn estimate of its fair and reasonable value to him in light of original cost, manner of use, etc.—Black v. Nabarrette, Tex.Civ.App., 281 S.W. 1087.

Probable selling price

(1) Where it is impossible to establish a general selling price of goods sold, the actual market value may be shown in buyer's action against seller for nondelivery by proof of facts and circumstances fixing to a reasonable degree of certainty the amount the property would

idence as to the history,[86] character,[87] cost,[88] cost | of replacement,[89] and evidence as to or relating to

bring if offered at ordinary sale.—Seward v. Pennsylvania Salt Mfg Co. 109 A. 617, 266 Pa. 457.

(2) Where carrier loses property which has no recognized market price, the price at which that specific shipment will sell at destination determines its value for purpose of determining damages.—Allen v. Adams Express Co., 77 Pa.Super. 174.

Value in good condition

In determining market value of staple commodity in bad condition, its market value at same time and place in good condition is to be considered.—Collins & G. R. Co. v. Beasley, 136 S.E. 167, 36 Ga.App. 241.

Ship under requisition

The value of a ship which was under requisition by the government during the war at the time she was sunk by a collision must be predicated on that fact, the test not being what would be a fair value between private litigants, if it had not been under requisition.—The Cushing, D.C. N.Y., 285 F. 617, modified on other grounds, C.C.A., 292 F. 560, certiorari granted Standard Oil Co. of New Jersey v. Southern Pac. Co., 44 S.Ct. 133, 263 U.S. 696, 68 L.Ed. 511, order modified on other grounds 44 S.Ct. 135, 263 U.S. 681, 68 L.Ed. 504, and motion granted 44 S.Ct. 458, 265 U.S. 569, 68 L.Ed. 1184, affirmed 45 S.Ct. 465, 268 U.S. 146, 69 L.Ed. 890.

Food regulations

When it does not appear that the value of the article involved was in any way affected by the United States food regulations, they cannot be considered in determining such value.—Glynn Canning Co. v. E. L. Adams Co., 106 S.E. 207, 26 Ga.App. 365.

86. Mo.—Rohwedder-Freymann Jewelry Co. v. Riverside Swine Co., App., 246 S.W. 988.

87. Ill.—Smothers v. Cosgrove-Meehan Coal Co., 264 Ill.App. 488.
R.I.—McDuff v. General Accident, Fire & Life Assur. Corporation, 131 A. 548, 47 R.I. 172.

Absence of complaint as to quality

In action against banks receiving draft for collection, for negligence, enabling drawee to obtain shipment of corn without payment, evidence that plaintiffs bought and resold corn as sound, heavy corn, and thought they would have heard if it had not been that kind of corn, and that there was a custom to claim credit in case of defective quality, was not competent on question of value of corn.—Mercantile Bank & Trust Co. v. Schuhart, Civ.App., 277 S.W. 1087, certified questions answered 277 S.W. 621, 115 Tex. 114.

Storage charge as showing quantity

In action on fire policy for value of tobacco destroyed by fire while stored in warehouse, warehouse owner's testimony as to amount of storage paid was admissible as showing amount of tobacco on storage so as to ascertain value thereof.—Boston Ins. Co. v. Faulkner, 89 S.W.2d 332, 262 Ky. 25.

88. U.S.—Travelers Indemnity Co. v. Plymouth Box & Panel Co., C.C.A. N.C., 99 F.2d 218.
Ark.—J. H. Phipps Lumber Co. v. Phipps, 3 S.W.2d 685, 176 Ark. 642.
Cal.—Fishel v. F. M. Ball & Co., 256 P. 493, 83 Cal.App. 128.
Iowa.—Andrews v. Western Asphalt Paving Corporation, 188 N.W. 900, 193 Iowa 1047.
Ky.—Insurance Co. of North America v. McCraw, 75 S.W.2d 518, 255 Ky. 839.
Mo.—Cothrens v. Kansas City Laundry Service Co., App., 242 S.W. 167—Gallup v. Rhodes, 230 S.W. 664, 207 Mo.App. 692.
Mont.—Durocher v. Myers, 274 P. 1062, 84 Mont. 225.
N.J.—O'Brien v. Broadman, 164 A. 290, 110 N.J.Law 211—Precipio v. Insurance Co. of State of Pennsylvania, 137 A. 549, 103 N.J.Law 589—Lebkeucher v. Pennsylvania R. Co., 116 A. 323, 97 N.J.Law 112, affirmed 118 A. 926, 98 N.J.Law 271.
N.Y.—Dalton v. Hamilton Hotel Operating Co., 206 N.Y.S. 272, 210 App. Div. 407, modified on other grounds 152 N.E. 268, 242 N.Y. 481—Henderson v. Park Central Motors Service, 244 N.Y.S. 409, 138 Misc. 183—Percy v. Bay Ridge Operating Co., 10 N.Y.S.2d 549.
Okl.—McIver v. Katsiolis, 217 P. 422, 93 Okl. 49.
Or.—Barber v. Motor Inv. Co., 298 P. 216, 136 Or. 361.
R.I.—McDuff v. General Accident, Fire & Life Assur. Corporation, 131 A. 548, 47 R.I. 172.
Tex.—Schmoker v. French, Civ.App., 7 S.W.2d 177.
22 C.J. p 183 note 12.

Household goods and wearing apparel

N.M.—Rutherford v. James, 270 P. 794, 33 N.M. 440, 63 A.L.R. 237.

Cost of thing is evidence of its value, especially where it appears that it is comparatively new, and where it has no established market value, as in the case of second-hand goods, lands not on the market, water in the ground, buildings, pipe lines laid in the ground, and the like.—Union Hollywood Water Co. v. City of Los Angeles, 195 P. 55, 184 Cal. 535.

Cost less depreciation, is evidence of value

U.S.—Westchester Fire Ins. Co. v. Bringle, C.C.A.Tenn., 86 F.2d 262.

Original cost is some evidence of replacement cost when determining damages for misrepresentations of quality of materials used in construction of amusement pier.—Crystal Pier Amusement Co. v. Cannan, 25 P.2d 839, 219 Cal. 184, 91 A.L.R. 1357.

Construction cost is admissible to prove value.—Wolfersberger v. Miller, 39 S.W.2d 758, 327 Mo. 1150.

Wholesale value

In action for conversion of property, permitting proof of wholesale value as relating to fair market value was proper.—Northern Rock Island Plow Co. v. Hackett-Gates-Hurty Co., 206 N.W. 446, 165 Minn. 282.

Building as personal property

In action for conversion of dwelling, cost of grading lot was not proper element in considering value of dwelling as personal property.—Brooks v. McDevitt, 11 P.2d 826, 40 Ariz. 221.

Bills paid for materials furnished by third persons were admissible on question of value of additions, although persons were not produced.—Kolmetsky v. Pellicoff, 141 A. 10, 6 N.J.Misc. 315, affirmed 143 A. 336, 105 N.J.Law 240.

Unless absence of market value is shown, testimony respecting reasonable value of bus when new was inadmissible.—Webb-North Motor Co. v. Ross, Tex.Civ.App., 42 S.W.2d 1086, error dismissed.

Where articles have established and regular market price shown by current sales, testimony as to the cost of making them is irrelevant, unless the market price has been inflated by unfair methods.—Wagoner Undertaking Co. v. Jones, 114 S.W. 1049, 134 Mo.App. 101.

Promise to pay reasonable value

In an action on a promise to pay the reasonable value of materials and labor furnished by plaintiff, evidence as to the cost of the same, as to the overhead of plaintiff's factory, and as to the necessary charge for profit is admissible.—Portland Pulley Co. v. Breeze, 199 P. 957, 101 Or. 239.

Proximity in time

In action for damages to personalty, unless too remote, evidence of cost of personalty is admissible.—Newton v. Wilder, 142 So. 831, 225 Ala. 339.

Court's discretion

Refusal to send to jury evidence as to cost price of various items entering into contract of sale of furnaces is within court's discretion.—Tate-Jones & Co. v. Union Electric Steel Co., 126 A. 813, 281 Pa. 448.

89. U.S.—Travelers Indemnity Co. v. Plymouth Box & Panel Co., C.C.A.N.C., 99 F.2d 218.

care,[90] actual[91] and possible[92] use, and condition[93] of the chattel may be considered by the jury in determining its value. The rental value of the chattel,[94] and the income that may be derived from its use,[95] may be shown; but merely sentimental elements of value cannot be considered.[96]

The evidence must be specific; testimony as to value based on averages, will not be received;[97] but where the value of a number of articles is in issue, it is not improper to admit evidence of the value of the property in gross without requiring a valuation of each article separately.[98]

Valuation by owner. The fact that the owner of chattels has placed a certain valuation on them is competent against him as an admission,[99] but cannot be used by him on his own behalf.[1] However, it has been held that the owner of property which has no established market value may testify as to the value of the property to him.[2]

Cost of repairs

(1) In action for injuries to automobile from collision testimony as to actual cost of repairs is admissible, as circumstance to be considered by jury in determining value of repairs.

Ga.—Lamon v. Perry, 125 S.E. 907, 33 Ga.App. 248.

Wash.—Madden v. Nippon Auto Co., 206 P. 569, 119 Wash. 618.

(2) Evidence of amount paid to rebuild wall torn down in making street improvement is inadmissible, where it was not shown price paid was reasonable cost of restoration.—City of Hazard v. Combs, 16 S.W.2d 1022, 229 Ky. 222.

(3) In action by buyer at execution sale for conversion of personalty consisting of miniature golf course equipment, where owner's son, at owner's expense, procured materials and all items necessary to repair golf course, testimony of son as to cost of renovating the course, was admissible, since cost price testified to was cost price to the owner.—Winslow v. Einhorn, R.I., 2 A.2d 390.

Cost of reproduction as of date of valuation constitutes evidence properly to be considered in ascertainment of value.

U.S.—Standard Oil Co. of New Jersey v. Southern Pac. Co., N.Y., 45 S.Ct. 465, 268 U.S. 146, 69 L.Ed. 890, affirming, C.C.A., The Cushing, 292 F. 560, which modified, D. C., 285 F. 617.

Va.—Vaughan v. Mayo Milling Co., 102 S.E. 597, 127 Va. 148.

Depreciation allowance

(1) In determining the fair value of a ship sunk, depreciation should be deducted from the fair cost of reproduction, even though the value of ships was increasing, rather than depreciating, since the increased value was already allowed for in estimating the cost of reproduction.—The Cushing, D.C.N.Y., 285 F. 617, modified on other grounds, C.C.A., 292 F. 560, certiorari granted Standard Oil Co. of New Jersey v. Southern Pac. Co., 44 S.Ct. 123, 263 U.S. 696, 68 L.Ed. 511, order modified on other grounds 44 S.Ct. 135, 263 U.S. 681, 68 L.Ed. 504, and motion granted 44 S. Ct. 458, 265 U.S. 569, 68 L.Ed. 1184, affirmed 45 S.Ct 465, 268 U.S. 146, 69 L.Ed. 890.

(2) In determining the value of a ship, the full depreciation according to tables of ship depreciation need not be deducted from the cost of reproduction, where the vessel had been excellently maintained during the eighteen years of its service.—The Cushing, supra.

Discretion of court

In proceeding to assess damages for taking of coal wharf on harbor by commonwealth, evidence as to cost of reproducing filled land was within court's discretion to admit or exclude.—James Millar Co. v. Commonwealth, 146 N.E. 677, 251 Mass. 457.

Where insurers have right to replace property destroyed by fire by other property of similar kind and quality, replacement value of property is competent in determining the valuation of property.—Gechijian v. Richmond Ins. Co., 25 N.E.2d 191, 305 Mass. 132.

90. Md.—Bailey v. Ford, 135 A. 835, 151 Md. 664.

91. Md.—Bailey v. Ford, supra.

Mo.—Rohwedder-Freymann Jewelry Co. v. Riverside Swine Co., App., 246 S.W. 988.

Mont.—Durocher v. Myers, 274 P. 1062, 84 Mont. 225.

N.Y.—Percy v. Bay Ridge Operating Co., 10 N.Y.S.2d 549.

92. Iowa.—Nosler v. Chicago, B. & Q. R. Co., 34 N.W. 850, 73 Iowa 268.

Value of use of articles which have no market value may be shown.—St. Louis Southwestern R. Co. v. Benjamin, Tex.Civ.App., 161 S.W. 379.

93. Mo.—Cothren v. Kansas City Laundry Service Co., App., 242 S. W. 167.

Mont.—Durocher v. Myers, 274 P. 1062, 84 Mont. 225.

N.Y.—Schwartz v. Fletcher, 265 N.Y. S. 277, 238 App.Div. 554.

22 C.J. p 182 note 9, p 183 note 10.

Evidence that tires were new was admissible on issue of value of automobile.—Motor Sales Corporation v. Wisdom, 96 So. 68, 209 Ala. 242.

Physical condition before and after injuries are admissible on issue of damages.—Schmoker v. French, Tex. Civ.App., 7 S.W.2d 177.

94. Tex.—Stone v. Morrison & Powers, Civ.App., 294 S.W. 641, reversed on other grounds, Com.App., 298 S.W. 538.

95. U.S.—Travelers Indemnity Co. v. Plymouth Box & Panel Co., C. C.A.N.C., 99 F.2d 218.

96. N.Y.—Percy v. Bay Ridge Operating Co., 10 N.Y.S.2d 549.

97. Ill.—W. A. Fraser Co. v. Chicago, B & Q. R. Co., 185 Ill.App. 455.

22 C.J. p 183 note 19.

Stock of merchandise

Testimony disclosing lump sum paid for stock of goods was incompetent on question of market value of merchandise on hand at time of fire, where stock had been depleted and added to.—New York Underwriters' Ins. Co. v. Mullins, 52 S.W.2d 697, 244 Ky. 788.

98. Ill.—Keegan v. Harlan, 134 Ill. App. 363.

99. Kan.—Warner v. Carter, 198 P. 960, 109 Kan. 285.

22 C.J. p 185 note 59.

Admissions generally see infra §§ 270–298.

Explanation, not admission

In pledgee's action on note secured by diamond ring, testimony of pledgee, who, having been asked by pledgor what ring was doing at certain bank, answered that pledgor had said that ring was worth eight hundred dollars, and for pledgor's own benefit pledgee didn't want to carry so valuable a ring, was not any evidence as to value of ring.—Leleux v. Serafino, Tex Civ.App., 88 S.W.2d 1100.

1. Wash.—Motor Mill Co. v. Wilson, 223 P. 1041, 128 Wash. 592.

22 C.J. p 186 note 60.

Evidence as to what owner would take for the property is not admissible.—Motor Mill Co. v. Wilson, 223 P. 1041, 128 Wash. 592—22 C.J. p 187 note 2.

2. Tex.—McCarthy v. Blackwell, Civ.App., 162 S.W. 1163.

22 C.J. p 182 note 7 [b].

Book value

In action for damages to truck

Insurance. While, under particular circumstances, such evidence has been held admissible,[3] ordinarily the amount for which property is insured does not afford an inference as to value of sufficient probative effect to be admissible,[4] except, possibly, in cases where the owner is charged with fraud, misrepresentation, deceit, or bad faith.[5] The amount paid by the insurance company in settlement is generally not admissible to prove value,[6] but such evidence has been admitted.[7]

Bonds. Where bonds have no readily ascertainable market value, evidence as to the value of the property securing the bonds is admissible to prove the value of the bonds.[8] The par value of the bonds may be shown.[9]

b. Sales

Evidence of the price realized on a bona fide sale of personal property is generally admissible to prove the value of the chattel, unless the sale took place at a time remote from the time as of which the property is to be valued.

Evidence of what an article sold for in a bona fide transaction is relevant to prove value,[10] provided the sale took place at a time not too remote from the time as of which the personalty is to be valued.[11] It has been held that compulsory sales are not indicative of value,[12] and are not admissible,[13] particularly where the property was bought by the creditor who forced the sale,[14] although it

tractor which was struck by bus, secretary and general manager of corporate owner of tractor were properly permitted to testify as to owner's valuation thereof immediately before accident, as against contention that valuation given was only book value, where book value was intended to represent real value as nearly as practicable.—Great Eastern Stages v. W. T. Cowan, Inc., 176 A. 613, 167 Md. 690.

Limitations of rule

In tort case, party whose personalty has been negligently destroyed or wrongfully taken from him can testify as to value of property to him only where proof shows that property did not have market or real value and could not be replaced or reproduced.—Pioneer Building & Loan Ass'n v. Compton, Tex.Civ.App., 138 S.W.2d 884.

3. Wash.—Whiting v. Rubinstein, 116 P.2d 305.

4. U.S.—Adelphia Hotel Co. v. Providence Stock Co., C.C.A.Pa., 277 F. 905.
Ky.—New York Underwriters' Ins. Co. v. Mullins, 52 S.W.2d 697, 244 Ky. 788.
Pa.—Pittsburgh Forge & Iron Co. v. Dravo Contracting Co., 116 A. 147, 150, 272 Pa. 118, quoting **Corpus Juris.**
22 C.J. p 186 note 62.
"The amount of the insurance carried on the property might have been equal to, less than, or more than the value of the property."—Daily v. Wilcox, R.I., 106 A. 580, 581.

5. U.S.—Union Pac. R Co. v. Lucas, Kan., 136 F. 374, 69 C.C.A. 218.
22 C.J. p 186 note 63.

Overinsurance

Testimony that the owner had insured the motor vehicle for an amount far in excess of the value indicated by the evidence on his behalf should not be excluded.—Berkley v. Burlington Cadillac Co., Inc., 131 A. 16, 99 Vt. 227.

6. U.S.—Adelphia Hotel Co. v. Providence Stock Co., C.C.A.Pa., 277 F. 905.
Ga.—Powell v. Crowell, 11 S.E.2d 918, 63 Ga.App. 390
Ill.—Burdick v. Valerius, 172 Ill.App. 267.

7. U.S.—Coleman v. Tepel, Pa., 230 F. 63, 144 C.C.A. 361, affirming, D. C., 229 F. 300.

8. N.Y.—Crandall v. A. B. Leach & Co., 223 N.Y.S. 127, 221 App.Div. 263.
Circumstances and course of properties securing bonds for reasonable time before and after purchase must be considered.—Crandall v. A. B. Leach & Co., supra.

9. Cal.—De Haven v. Smith, 256 P. 1099, 201 Cal. 322.

10. U.S.—Heiner v. Crosby, C.C.A. Pa., 24 F.2d 191, affirming, D.C., Crosby v. Heiner, 12 F.2d 604.
Ariz.—Yuma County v. Hanneman, 28 P.2d 622, 624, 42 Ariz. 561, citing **Corpus Juris.**
Ga.—Graham v. John Flannery Co., 124 S.E. 729, 32 Ga.App. 713.
Miss.—Wallace v. Bramlette, 139 So 627, 163 Miss. 44.
Mo.—Rohwedder-Freymann Jewelry Co. v. Riverside Swine Co., App., 246 S.W. 988.
Okl.—Kilbourne v. McAllister, 65 P. 2d 516, 518, 179 Okl. 267, citing **Corpus Juris**—Wichita Mill & Elevator Co. v. National Bank of Commerce of Frederick, 227 P. 92, 94, 102 Okl. 95, citing **Corpus Juris.**
Tenn.—Equitable Life Assur. Soc. of U. S. v. Ellis, 65 S.W.2d 250, 16 Tenn.App. 551.
22 C.J. p 185 note 50.
Sales of realty see supra § 182 b.
Sales of similar property see infra § 593.

Buyer having peculiar interest

Value of collateral when sold in fall of 1927 could not be determined by what it was bartered for in spring of 1928 to one who had peculiar and personal interest in acquiring it.—Williams v. Herman, 249 N.W. 215, 216 Iowa 499.

Private sale

Evidence of price realized on a private sale of goods has no probative force on determining the market value of such goods.—Groves v. Warren, 135 N.E. 230, 233 N.Y. 160, reversing 183 N.Y.S. 949, 193 App. Div. 917—Hoagland Ligety Co. v. Finkelstein, 181 N.Y.S. 353.

"Sales made under peculiar and unusual circumstances, such as sales of small lots, forced sales, and sales in a restricted market, may . . . [not] signify a fair market price or value."—Heiner v. Crosby, C.C.A.Pa., 24 F.2d 191, 193, affirming, D.C., Crosby v. Heiner, 12 F.2d 604.

11. N.Y.—Hotaling v. A. B. Leach & Co., 159 N.E. 870, 247 N.Y. 84, 57 A.L.R. 1136, affirming 222 N.Y.S. 822, 221 App.Div. 756.

Changed conditions

Evidence as to the price paid or offered for market stalls has no bearing on the value of rights in stalls for the remainder of a current year only, with all prospect of continuance beyond that time removed.—Mayor and Council of City of Baltimore v. Ercolano, 184 A. 164, 170 Md. 341.

12. U.S.—C. G. Blake Co. v. U. S., D.C.Ohio, 275 F. 861, affirmed, C. C.A., U. S. v. C. G. Blake Co., 279 F. 71.
"Authorities lay down two rules. . . . The first of these denies the competency of a forced sale as evidence of value. The second of these admits its competency, but denies its exclusiveness and recognizes the admissibility of other evidence as to value."—Maynard v. Bank of Kershaw, 198 S.E. 188, 192, 188 S.C. 160, citing **Corpus Juris.**

13. Me.—Damariscotta - Newcastle Water Co. v. Damariscotta-Newcastle Water Co., 186 A. 799, 134 Me. 349.

14. N.Y.—Hotaling v. A. B. Leach & Co., 159 N.E. 870, 247 N.Y. 84, 57 A.L.R. 1136, affirming 222 N.Y.S. 822, 221 App.Div. 756.

has been held that under such circumstances, the sale is admissible as against the creditor's contention that the property was worth less than the price he paid.[15] On the other hand, evidence of the price realized on a forced sale has been held admissible,[16] at least where the purchaser was a third party who had no part in forcing the sale.[17]

Auction sale. The price realized at an auction sale of personal property is admissible to prove its value, if the sale is fairly conducted with suitable effort to attract bidders,[18] and is made sufficiently near the time involved in the issue.[19] The price realized has been held admissible even though the auction was a forced one, held under judicial authority,[20] but, as to this, there is contrary authority.[21]

Price paid. While, in particular circumstances, the price paid by the owner of the chattel has been held inadmissible to prove the value of the chattel at the time under consideration,[22] it is more commonly held that such evidence is admissible.[23] To be admissible, the purchase must have been at a

15. Mont.—Roy v. Clark, 215 P. 232.

16. U.S.—Nogi v. Greenwood, D.C. Pa., 1 F.Supp. 60.
Conn.—Knox v. Binkoski, 122 A. 400, 99 Conn. 582.
Mass.—Koski v. Haskins, 128 N.E. 427, 236 Mass. 346.
Minn.—Strimling v. Union Indemnity Co., 222 N.W. 512, 172 Minn. 26.
S.C.—Maynard v. Bank of Kershaw, 198 S.E. 188, 188 S.C. 160.

17. Iowa.—Conroy v. Coughlon Auto Co., 171 N.W. 10, 186 Iowa 671.

18. Colo.—First Nat. Bank v. American State Bank of Brighton, 215 P. 473, 476, 73 Colo. 254, citing **Corpus Juris.**
Mich.—Kobic v. Reed, 219 N.W. 678, 242 Mich. 594.
Minn.—Strimling v. Union Indemnity Co., 222 N.W. 512, 176 Minn. 26.
22 C.J. p 185 note 53, p 188 note 15.

Evidence of amount received from auctioneer as distinct from the price for which the property sold is inadmissible.—Perlman v. Levy, 109 N.Y.S. 785.

19. Ala.—Corey v. Penney, 51 So. 624, 165 Ala. 234.
22 C.J. p 185 note 54.

20. Minn.—Strimling v. Union Indemnity Co., 222 N.W. 512, 176 Minn. 26.

21. U.S.—In re McAusland, D.C.N.J., 235 F. 173.
Tex.—Edwards v. Mayes, Civ.App., 136 S.W. 510.

22. Ark.—Addington v. Jones, 234 S.W. 24, 149 Ark. 669.
La.—Baronne Bldg. v. Bullock, 135 So. 59, 16 La.App. 585.
S.D.—Conway v. Belatti, 175 N.W. 703, 42 S.D. 400.
Tex.—Curton v. Craddock, Civ.App., 252 S.W. 1075.
22 C.J. p 184 note 42.

Cost is not criterion of value
Ga.—Lamon v. Perry, 125 S.E. 907, 33 Ga.App. 248.

Cost standing alone is not competent evidence of value.—Haycraft v. Adams, 24 P.2d 1110, 82 Utah 347.

Time and place of sale
Generally, testimony of cost, or price paid by owner for real or personal property, is not admissible on issue as to its market value, especially when remote in point of time or where property was purchased at another place.—San Antonio Public Service Co. v. Murray, Civ.App., 59 S.W.2d 851, error dismissed, 90 S.W.2d 830, 127 Tex. 77.

23. Ala.—People's Auto Co. v. Staples, 143 So. 553, 225 Ala. 372—Southern Ry. Co. v. Bailey, 125 So. 403, 405, 220 Ala. 385, citing **Corpus Juris**—Warrant Warehouse Co. v. Cook, 95 So. 282, 209 Ala. 60.
Ark.—Arts v. Jones, 118 S.W.2d 574, 196 Ark. 1177.
Cal.—Haley v. Traeger, 268 P. 459, 92 Cal.App. 360.
Colo.—Larson v. Long, 219 P. 1066, 1067, 74 Colo. 152, citing **Corpus Juris.**
Conn.—Devinne Hallenbeck Co. v. Autotyre Co., 154 A. 170, 113 Conn. 97.
Fla.—Jacksonville, T. & K. W. Ry. Co. v. Jones, 15 So. 924, 34 Fla. 286.
Ga.—Blaylock v. Walker County Bank, 136 S.E. 924, 36 Ga.App. 377—Olliff v. Howard, 127 S.E. 821, 33 Ga.App. 778—Nashville, C. & St. L. Ry. v. Bass, 123 S.E. 729, 32 Ga.App. 457.
Ill.—Sears, Roebuck & Co. v. Mears-Slayton Lumber Co. 226 Ill.App. 287.
Iowa.—Vincent, Albin & Strahl v. Hines, 200 N.W. 1, 198 Iowa 1224.
Ky.—Insurance Co. of North America v. McCraw, 75 S.W.2d 518, 255 Ky. 839.
Md.—Bailey v. Ford, 135 A. 835, 151 Md. 664.
Mo.—Dingman v. St. Louis Public Service Co., App., 52 S.W.2d 584—Gallup v. Rhodes, 230 S.W. 664, 207 Mo.App. 692.
N.J.—Spatuzzi v. Star Auto Truck Exchange, 196 A. 723, 119 N.J.Law 377—Dantes v. McGann, 118 A. 709, 98 N.J.Law 55—Manna v. Industrial Credit Corporation, 162 A. 559, 10 N.J.Misc. 1098—Smith v. Ryan, 158 A. 822, 10 N.J.Misc. 296.
N.Y.—Schwartz v. Fletcher, 265 N.Y.S. 277, 238 App.Div. 554.
N.C.—Potts v. Carter-Cobb Motor Co., 131 S.E. 739, 191 N.C. 821.
Okl.—McIver v. Katsiolis, 217 P. 422, 93 Okl. 49.
Or.—Portland Pulley Co. v. Breeze, 199 P. 957, 961, 101 Or. 239, citing **Corpus Juris.**
Tex.—Service Mut. Ins. Co. of Texas v. Territo, Civ.App., 147 S.W.2d 846—Wutke v. Yolton, Civ.App., 71 S.W.2d 549, error refused—American Indemnity Co. v. Jamison, Civ.App., 42 S.W.2d 801, 803, citing **Corpus Juris.**
Utah.—Norman v. Utah Hotel Co., 206 P. 556, 60 Utah 52.
Vt.—Houghton v. Grimes, 151 A. 642, 103 Vt. 54—Fenwick v. Sullivan, 145 A. 258, 102 Vt. 28—Donovan v. Towle, 134 A. 588, 99 Vt. 464.
Va.—Norfolk Southern R. Co. v. Fentress, 102 S.E. 588, 127 Va. 87.
22 C.J. p 184 note 43—42 C.J. p 1297 note 8.

Cost of procuring promised chattel
Where vendor failed to furnish certain articles he had agreed to put in house, and purchaser supplied them, in action to recover value thereof, evidence of cost of procuring them was relevant on question of such value.—Yoakam v. Hogan, 243 P. 21, 198 Cal. 16.

Exchange
(1) Cost of auto exchanged for that damaged is admissible to show the value of the damaged car.—Newton v. Wilder, 142 So. 831, 225 Ala. 339.

(2) The value of the property received may be shown as evidence of the value of the property given.—Carr v. Moore, 41 N.H. 131.

(3) In trover for a piano which defendant had taken in a trade for another and more valuable instrument, the amount allowed for the piano in suit is admissible evidence to show its value.—Wulschner-Stewart Music Co. v. Faulkner, 103 N.E. 665, 55 Ind.App. 208.

(4) Where evidence was conflicting as to price buyer was to pay for heifers, evidence of what seller paid for them a short time before was admissible as tending to show their value when he sold them to buyer, and fact that seller paid for them in part with other property did not af-

time not too remote from the time as of which the property is to be valued.[24] The admissibility of evidence as to the price paid is to be determined by considerations involving the exercise of a sound discretion, under all the circumstances,[25] and the evidence is more readily received when other evidence of value is apparently unavailable.[26]

Price received. It is generally held that the price received by the owner at a subsequent sale of the personalty is admissible to prove its value as of the time in dispute,[27] but there is authority apparently

fect admissibility of such evidence.—Atwood v. Joyce, 192 A. 11, 109 Vt. 30.

Fixed prices

(1) When new motor vehicles are universally sold at a fixed price, evidence of what plaintiff paid for his vehicle when new shows its market value at that time.—Texas Power & Light Co. v. Hale, Tex.Civ.App., 276 S.W. 746.

(2) On the other hand, it is held that in an action for breach of warranty by delivering a "light six" automobile instead of a "special six" as ordered, the difference between the list price of such cars at the date of the sale is not proper evidence of the actual difference in value of the two cars at such time.—Harris v. Weber Motor Car Co., 251 S.W. 121, 212 Mo.App. 107.

Purchase from regular dealer in ordinary course of business is evidence of value

Okl.—McIver v. Katsiolis, 217 P. 422, 93 Okl. 49.

Tex.—American Indemnity Co. v. Jamison, Civ.App., 42 S.W.2d 801.

W.Va.—Gorby v. Bridgeman, 99 S.E. 88, 83 W.Va. 727.

In connection with other evidence

Evidence as to what owner paid for an automobile is evidence of its value in connection with his other testimony as to condition of automobile, distance it had been operated, etc.—Tatro v. Baker-Fisk-Hugill Co., 184 N.W. 449, 215 Mich. 623.

Invoice price paid for imported merchandise was some evidence of market value.—U. S. v. Sabin, 12 Ct. Cust.App. 520, rehearing denied 13 Ct.Cust App. 161.

Value as represented

In tort action for fraud in sale of automobile, price paid by buyer for automobile could properly be considered as evidence of value of automobile if it had been as represented by seller.—Currier v. Ames, 4 A.2d 340, 110 Vt. 254.

24. Ala.—Southern Ry. Co. v. Bailey, 125 So. 403, 220 Ala. 385.

Conn.—Devinne Hallenbeck Co. v. Autotyre Co., 154 A. 170, 113 Conn. 97.

Minn.—Hafiz v. Midland Loan Finance Co., 287 N.W. 677, 206 Minn. 76—Whitcomb v. Automobile Ins. Co. of Hartford, 203 N.W. 27, 167 Minn. 362.

N.J.—First Nat. Bank of Toms River v. Levy, 16 A.2d 555, 125 N.J.Law 458.

N.Y.—Schwartz v. Fletcher, 265 N.Y.S. 277, 238 App.Div. 554.

Okl.—McIver v. Katsiolis, 217 P. 422, 93 Okl. 49.

Va.—Norfolk Southern R. Co v. Fentress, 102 S.E. 588, 127 Va. 87.

22 C.J. p 185 note 44—42 C.J. p 1297 note 11.

Recent purchase price is presumptive evidence of its value.—Gilbert v. Lewisburg Ice Cream Co., 184 S.E. 244, 117 W.Va. 107.

Evidence held admissible

Testimony as to price owner paid for automobile three and a half years before collision with street car was not irrelevant.—San Antonio Public Service Co. v. Murray, Civ.App., 59 S.W.2d 851, error dismissed 90 S.W. 2d 830, 127 Tex. 77.

Evidence held inadmissible

Evidence of amount paid for automobile purchased three years before was inadmissible in action for value of car destroyed by fire.—Stevenson v. A. B. C. Fireproof Warehouse Co., Mo.App., 6 S.W.2d 676

Remoteness affects weight, not admissibility, of evidence—Filosi v. Crossman, 149 A. 774, 111 Conn. 178.

25. Conn.—Devinne Hallenbeck Co. v. Autotyre Co., 154 A. 170, 173, 113 Conn. 97, citing **Corpus Juris**—Filosi v. Crossman, 149 A. 744, 111 Conn. 178.

Or.—Mattechek v. Pugh, 55 P.2d 730, 734, 153 Or. 1, citing **Corpus Juris.**

22 C.J. p 185 note 47.

26. Conn.—Devinne Hallenbeck Co. v. Autotyre Co., 154 A. 170, 113 Conn. 97.

22 C.J. p 185 note 48.

27. U.S.—Ed S. Michelson, Inc., v. Nebraska Tire & Rubber Co., C.C.A. Mo., 63 F.2d 597, certiorari denied 54 S.Ct. 52, 290 U.S. 634, 78 L.Ed. 551—Mitchell v. Commissioner of Internal Revenue, C.C.A., 48 F.2d 597, certiorari denied 52 S.Ct. 25, 284 U.S. 646, 76 L.Ed. 549.

Ala.—Vance v. Myers, 106 So. 142, 213 Ala. 660.

Ga.—Central of Georgia Ry. Co. v. George P. Greene & Co., 154 S.E. 809, 41 Ga.App. 794.

Iowa.—Kinsey v. Massey, 216 N.W. 54, 204 Iowa 758—Daugherty v. Advance-Rumely Thresher Co., 180 N.W. 277, 190 Iowa 424.

Mo.—Byrd v. Bankers' & Shippers' Ins. Co., 28 S.W.2d 423, 224 Mo. App. 451.

N.J.—Sultan v. London Assur. Corporation, 135 A. 58, 4 N.J.Misc. 947.

Or.—Hansen-Rynning v. Oregon-Washington R. & Nav. Co., 209 P. 462, 105 Or. 67.

Tex.—Loftus v. Ray, Civ.App., 46 S.W.2d 1034, error dismissed.

Vt.—Slayton v. Drown, 107 A. 307, 93 Vt. 290.

42 C.J. p 1297 notes 9, 11.

Auction sale

That automobile sold for four hundred and seventeen dollars and fifty cents at public auction twenty days after it was wrongfully replevined is some evidence of its market value at time it was replevined, where there was no evidence that sale was not fairly conducted.—Securities Inv. Co. v. White, 91 S.W. 2d 581, 19 Tenn.App. 540.

Evidence as to price realized should be supplemented by proof that the sale was made at the best price obtainable and represents the market value.—Kingston Braid Mills v. Aboff, 179 N.Y.S. 127.

Opinion of value

In action on fire policy, evidence of price for which whole of salved machines and machinery was sold was held admissible on question of value after fire, although such evidence, standing alone, is merely an opinion of value.—Non-Royalty Shoe Co. v. Phœnix Assur. Co., Limited, of London, England, 210 S.W. 37, 277 Mo. 399, modifying, App., 178 S.W. 246.

Place of sale

Where oleo-stearine was sold to be resold and shipped to Portugal, but it did not accord with specifications, and was directed resold with the consent of the shipper, and it appeared that the resale in Portugal was fair, being made by an experienced broker, and the best possible price obtained, evidence as to the price on resale, offered on the question of damages, is admissible, despite objection that the witness knew nothing of market conditions, for the price obtained would establish the market condition.—Smith, De Macedo & Co. v. Swift & Co., 110 A. 141, 267 Pa. 365.

Receiver's report

Court did not err in admitting in evidence the report of a receiver, who under appointment of the court took charge of the subject-matter of the suit, such report showing the amount obtained at the sale of the receiver for said property, where court instructed that the amount of the sale by the receiver could only

to the contrary.[28]

Agreement as to price. In an action between the parties to a sale of or contract to sell personal property, the price fixed in such transaction is admissible to prove the value of the property.[29] It has been held that the contract price is not admissible to prove value as against one not a party to the contract,[30] but, under certain circumstances, such evidence has been held admissible.[31]

c. Offers to Buy or Sell

Although there is some authority to the contrary, offers to buy or sell personal property at a named price are generally not admissible as evidence of the value of the property.

Offers to buy. According to some authorities offers to buy personal property at a price named, made in good faith and rejected by the owner, are admissible as evidence of value.[32] On the other hand, however, there is considerable authority for the view that offers to buy personal property cannot be shown on an issue as to its value.[33] In any event, an offer by one not shown to be ready, willing, and able to make a purchase is not admissible;[34] nor is an offer made at a time remote from

be considered as illustrating the value of the property at the time in question.—Kay v. Benson, 108 S.E. 779, 152 Ga. 185.

Sale after repairs made

(1) In an action by an owner of an automobile for damages in a collision, exclusion of evidence of the cost of repairs and the price brought by the automobile at a sale after being repaired was error, since they were elements tending to show its value after the injury.—Madden v. Nippon Auto Co., 206 P. 569, 119 Wash. 618.

(2) It was not error to admit evidence that defendants after making some repairs on the car sold it to another purchaser at original sale price, as such evidence tended to show its value.—Graves v. Negy, 219 P. 286, 114 Kan. 373.

Sale by converter

(1) In action for conversion of equipment and machinery, rejection of offer of proof as to amount realized on wrongdoer's sale of equipment and machinery was not error.—Weber v. West Seattle Land & Improvement Co., 63 P.2d 418, 188 Wash. 512.

(2) In action for conversion, evidence as to the price received for the goods by defendant, although not conclusive as to the market value, is admissible as some evidence of value.—Flinn v. Springsteel, 182 N.Y.S. 17, 191 App.Div. 769.

Trade in allowance

Where a damaged automobile was traded for a new car, it was held that the amount allowed defendant was properly admitted but that evidence of various other trades thereafter of the damaged car was not admissible to show its value.—Smith v. Fisher, 11 Tenn.App. 273.

28. Tex.—Universal Credit Co. v. Cole, Civ.App., 146 S.W.2d 222.

29. Cal.—Milwaukee Bldg. Co. v. Wetzel, 270 P. 382, 93 Cal.App. 775.
Ill.—Wholesale Grocers Corporation v. Richheimer Brokerage Co., 233 Ill.App. 64.
Tex.—Henderson v. Rowe, Civ.App., 93 S.W.2d 589, error dismissed.

Where time of agreement is not proved, it is not admissible.—Rohlik v. Farmers Ins. Co., 191 N.W. 347, 49 N.D. 235.

30. Ga.—Downs v. Berryman, 100 S.E. 226, 24 Ga.App. 170.

31. **Absence of market**

Where plaintiff, suing for damages to a shipment of seed peas, was a dealer in seed peas, and his method was to contract a year ahead for their sale, and then in turn contract with farmers to raise the peas, and such was the general practice, and although a certain percentage of seed peas had a spot market, there was no general quotation on prices, the price fixed in the contract of sale thereof was some evidence as to their value.—Feelyater v. Chicago, M. & St. P. Ry. Co., 190 N.W. 193, 178 Wis. 362.

Cost of replacement

In an action against a carrier for the loss of high explosive shells manufactured by plaintiff under a contract with one having a contract with the British government, the amount which the government had contracted to pay, although not conclusive, was admissible on the question of actual value, as tending to show the cost of replacement.—Woonsocket Machine & Press Co. v. New York, N. H. & H. R. Co., 131 N.E. 461, 239 Mass. 211.

Later contract for same work can only be taken as evidence of reasonable value of materials, to extent that both contracts substantially correspond.—Milwaukee Bldg. Co. v. Wetzel, 270 P. 382, 93 Cal.App. 775.

32. U.S.—Heiner v. Crosby, C.C.A. Pa., 24 F.2d 191, affirming, D.C., Crosby v. Heiner, 12 F.2d 604.
Ark.—Arts v. Jones, 118 S.W.2d 574, 196 Ark. 1177.
Mass.—Chistopher v. Musolino, 135 N.E. 124, 241 Mass. 202.
22 C.J. p 184 note 32.
Offers to buy:
Real property see supra § 182 c.
Similar property see infra § 593.

Offer by dealer

An offer for an article is ordinarily of doubtful value as evidence of its market value although an offer by a reputable dealer who is endeavoring to purchase for his own account at the lowest possible price with the expectation of being able to resell at a profit in the regular course of business may be competent, although by no means conclusive, evidence.—Youssoupoff v. Widener, 158 N.E. 64, 246 N.Y. 174, affirming 219 N.Y.S. 942, 219 App.Div. 712, which affirms 215 N.Y.S. 24, 126 Misc. 491.

"Posted prices," while not controlling, are admissible on issue of field price of crude oil where coupled with proof of absence of sales.—St. Paul Fire & Marine Ins. Co. v. Pure Oil Co., C.C.A.N.Y., 63 F.2d 771, reversing, D.C., 58 F.2d 393.

Trade-in allowance

Evidence of allowance offered on automobile held admissible to determine value of automobile when stolen.—Cunningham v. Holzmark, 37 S.W.2d 956, 225 Mo.App. 762, motion overruled 47 S.W.2d 1097.

Offer to buy part of property

Where a witness was permitted to state the market value of the lumber, it was not error to exclude evidence as to offers for portions of it, especially where the offers related only to the higher grades of the lumber.—Batte Bros. v. Battle, 213 S.W. 379, 139 Ark. 302.

33. Ala.—Moore v. Oneonta Motor Co., 137 So. 301, 302, 223 Ala. 510, citing **Corpus Juris.**
N.Y.—Wolff v. Cohen, 210 N.Y.S. 472, 125 Misc. 164.
Okl.—Cook v. First Nat. Bank, 236 P. 883, 110 Okl. 111.
Wash.—Hershey v. Hanauer, 185 P. 627, 108 Wash. 498.
22 C.J. p 184 note 34.

"Great weight of authority"

Vt.—Smith v. Reynolds, 108 A. 697, 702, 94 Vt. 28.

34. U.S.—O. B. Crittenden & Co. v. North British & Mercantile Ins. Co. of London, England, C.C.A. Miss., 31 F.2d 700, affirming, D.C., North British & Mercantile Ins. Co. v. Greenville Compress Co., 23 F.2d 526.

the time in issue admissible.[35]

Offers to sell. Offers to sell at a certain price, no sale being actually consummated, are not evidence of value,[36] except possibly against the person making the offer, as an admission.[37]

d. Appraisals and Assessments

Appraisals and assessments of personal property are not admissible to prove the value of the chattels, except possibly as an admission against a party who participated in the appraisal or assessment.

Evidence of estimates in an appraisal of personal property made by one whose action does not legally affect the party against whom the evidence is offered is not admissible to prove the value of the property,[38] even if the appraisal is officially made;[39] but where an appraisal can be deemed the act of a party its results are admissible against him.[40]

Assessments. An assessment for taxation is not competent evidence of the value of personalty,[41] unless it is based on a statement furnished by the owner, in which case it is admissible against him,[42] but not in his favor.[43]

e. Time and Place to Which Evidence of Value Must Relate

Evidence of value, to be admissible, must relate to the time and place as of which the personal property involved is to be valued.

Where the issue of value of personal property is involved in an action, it is usually with respect to the value at some particular time,[44] and hence evidence of value is relevant only when directed to value at the time in question,[45] or at a time so near thereto that it may reasonably be expected to throw some light on the value at such time.[46] It follows

A conditional offer is not admissible.—Swank v. Elwert, 105 P. 901, 55 Or. 487, 500—22 C J. p 184 note 35.

35. Ala.—Tennessee Coal, Iron & R. Co. v. State, 37 So. 433, 141 Ala 103.
22 C.J. p 184 note 36.

36. Cal.—Hibernia Savings & Loan Soc. v. Ellis Estate Co., 22 P.2d 806, 132 Cal.App. 408.
Tex.—Wallace v. First Nat. Bank, Civ.App., 246 S.W. 737.
22 C J. p 184 note 39.
Offers to sell real property see supra § 182 c.

37. Miss.—Gloster Compress & Trading Co. v. Gloster, 76 So. 550, 115 Miss. 578.
Or.—Smith v. Hurley, 143 P. 1123, 73 Or. 268.
As to admissibility of admissions generally see infra §§ 270–298.

38. Wyo.—Quinlan v. Jones, 198 P. 352, 27 Wyo. 410.
22 C.J. p 183 note 23.
Appraisals of realty see supra § 182 d.

Time appraisal made
Exclusion of appraisal offered to prove value of jewelry was proper, where appraisal was made several years after alleged conversion, the appraisal being incompetent to prove value as of time of conversion and not the "best evidence."—First Nat. Bank of Toms River v. Levy, 16 A. 2d 555, 125 N.J.Law 458.

39. Ala.—National, C. & St. L. R. Co. v. Garth, 46 So. 583, 155 Ala. 311.
Mass.—Wright v. Quirk, 105 Mass. 44.

Report of appraisers in bankruptcy
"The Supreme Court of the United States has not yet decided whether the report of the appraisers of a bankrupt's estate is admissible in evidence for the purpose of showing the value of the bankrupt's property prior to the filing of the petition in bankruptcy. . . . We agree . . that such reports should not be admitted in evidence for that purpose. . . . By introducing their report and not the appraisers themselves, the opposing litigant is deprived of the opportunity of cross-examining the appraisers, and ascertaining the method pursued by them in arriving at the value placed by them on the property."—Bank of Forest v. Capital Nat. Bank, 169 So. 193, 198, 176 Miss. 163.

40. D.C.—Ruppert v. McArdle, 42 App.D.C. 392, L.R.A.1915C 846, Ann. Cas.1916B 126.
22 C J. p 183 note 25.
However, in an action by landlord, who had rent lien on tenant's mortgaged chattels, against a chattel mortgagee and mortgagee's sureties for breach of a claim and delivery bond, testimony of one, who had appraised the property in question, although not binding on defendants, was held competent evidence as going to prove the value of the property.—Maynard v. Bank of Kershaw, 198 S.E. 188, 188 S.C. 160.

41. La.—Rapides Grocery Co. v. Grant, 142 So. 696, 174 La. 1083.
22 C.J. p 183 note 27.
Assessments of realty see supra § 182 d.

42. Ind.—Ohlwine v. Pfaffman, 100 N.E 777, 52 Ind.App. 357, followed in Kluge v. Ries, 117 N.E. 262, 66 Ind.App. 610.
Admissibility of assessment as an admission see infra § 283.

43. Ill.—Burdick v. Valerius, 172 Ill.App. 267.

44. U.S.—Nicola Bros. Co. v. Speer Box & Lumber Co., Pa., 133 F. 914, 67 C.C.A. 208.

The value of property taken or destroyed is to be determined as of the time of its taking or destruction.—DeLaney v. Henderson-Gilmer Co., 135 S E. 791, 192 N.C. 647—Newsom v. Cothran, 116 S.E. 415, 185 N.C. 161.

45. Ark.—Arkansas Power & Light Co. v. Decker, 17 S.W 2d 293, 179 Ark. 592.
Del.—Mills Novelty Co. v. Transeau, 8 A.2d 93, 1 Terry 227.
Ohio.—Hedeen v. Bausinger, 162 N.E. 650, 28 Ohio App. 336.
22 C.J. p 190 notes 42, 43.

Decline in value
Where witness testified that he did not remember what the price of maize was on the date defendant refused to accept plaintiff's maize, Jan. 14, 1921, his testimony that between Sept. 13, 1920, and the middle of January, 1921, the market value of maize declined from thirty to fifty cents per hundred held inadmissible, such an estimate being merely a guess.—Farmers' Mill & Elevator Co. v. Hodges, Tex.Com.App., 260 S.W. 166, reversing, Civ.App., 248 S.W. 72.

Shipping season
In action against carrier for delay in shipping material to be used for shipment of citrus fruit, evidence as to date of closing of citrus fruit shipping season is admissible to illustrate value of material at time of arrival at destination.—Atlantic Coast Line R. Co. v. Mach, 109 So. 457, 92 Fla. 442.

46. U.S.—General Commercial Co. v. U. S., 11 Ct.Cust.App. 473.
Ga.—Chalker & Russell v. Savannah Motor Car Co., 140 S.E. 916, 37 Ga. App. 532.
Ind.—Hawkins v. Thompson, 122 N. E. 431, 69 Ind.App. 605.
Ky.—Yorkshire Ins. Co. v. Kirtley, 47 S.W.2d 922, 243 Ky. 162.
Mich.—Langland v. Kraemer, 202 N. W. 1007, 230 Mich. 449.

that evidence of value a considerable time before or after the time in question is not admissible,[47] in the absence of further evidence showing either that the value remained the same,[48] or the comparative values on the two occasions.[49] On the other hand, it has been held that evidence of value at a time several months from the time in controversy is receivable without evidence that the condition of property remained the same during the intervening period, where there is no suggestion by the adverse party of any change.[50] It has been held that the determination of whether or not the evidence is

N.J.—Manna v. Industrial Credit Corporation, 162 A. 559, 10 N.J. Misc. 1098.
N.C.—Newsom v. Cothran, 116 S.E. 415, 185 N.C. 161.
Okl.—Wilson & Co. v. Hickey, 97 P. 2d 564, 186 Okl. 324.
S.D.—Hobbs v. Whitelock, 231 N.W. 904, 908, 57 S.D. 198, citing **Corpus Juris.**
Tex.—Merchants' Cotton Oil Co. v. Acme Gin Co., Civ.App., 284 S.W. 680.
Vt.—Symes v. Fletcher, 115 A. 502, 95 Vt. 431.
22 C.J. p. 190 note 43—42 C.J. p. 1295 note 77.

Variation in value as affecting only weight

In shipper's cross action against carrier to recover value of cedar posts which had been rejected by consignee and sold by carrier, based on alleged negligence of carrier in failing to secure a fair price, where authority to sell was given on April 8, and sale was made on April 21, evidence as to value of posts in March at place posts were rejected, and also at place where sold, was admissible, since variance between values on different dates went only to weight of testimony.—Reed v. Southern Pac. Co., Tex.Civ.App., 99 S.W.2d 1026, error dismissed.

Condition must have remained substantially the same in order to authorize introduction of invoice in evidence to show value.—Moore v. Hutchinson, 148 S.E. 78, 107 W.Va. 275.

To show the value of a patent at a particular time, evidence of its value at other times is admissible.—Hills v. Skagit Steel & Iron Works, 210 P. 17, 122 Wash. 22.

Fluctuating market

Market value of peanuts on one date is some circumstantial evidence of market value on a very near later date in spite of fluctuations of market as it is presumed to remain constant for at least brief periods.—Farm Products Co. v. Eubanks, 116 S.E. 327, 29 Ga.App. 604.

Value of foreign currency

Where an agreement of purchase by plaintiff and sale by defendants of twenty thousand Austrian kronen in the form of currency provided for delivery with accrued interest at three per cent per annum, on plaintiff giving defendants three months' notice, which notice was given April 12, 1917, but defendants did not perform on July 12, 1917, there being then no available market for kronen in this country, it was held that the price of kronen in 1919 was entirely too remote, and that the market price of April, 1917, was admissible as being the nearest available quotation of the fair indication of their market value when defendants broke the contract.—Melzer v. Zimmerman, 194 N.Y.S. 222, 118 Misc. 407.

Eight years

In action against storage company for failure to deliver goods in 1919, evidence of values in 1911, when stored, held relevant where defendant storage company lost goods, so that evidence of values at time of default was unavailable.—Barrett v. Fournal, C.C.A.N.Y., 21 F.2d 298.

47. Cal.—People v. Broome, 7 P.2d 757, 120 Cal.App. 267.
Colo.—Larson v. Long, 219 P. 1066, 74 Colo. 152.
La.—Rapides Grocery Co. v. Grant, 142 So. 696, 174 La. 1083.
Mich.—Kobic v. Reed, 219 N.W. 678, 242 Mich. 594.
Or.—Backus v. West, 205 P. 533, 104 Or. 129.
Tex.—Reed v. Southern Pac. Co., Civ. App., 99 S.W.2d 1026, error dismissed—Automobile Underwriters of America v. Radford, Civ.App., 293 S.W. 869, affirmed Radford v. Automobile Underwriters of America, Com.App., 299 S.W. 852.
Wash.—Peters v. McPhadden, 135 P. 26, 75 Wash. 525, Ann.Cas.1915C 63.
W.Va.—Moore v. Hutchinson, 148 S.E. 78, 107 W.Va. 275.
22 C.J. p. 190 note 44.

Lapse of time affects the weight rather than the admissibility of the evidence.
Conn.—Dwyer v. Redmond, 124 A. 7, 100 Conn. 393.
W.Va.—Foutty v. Chalmax Sales Co., 128 S.E. 389, 99 W.Va. 300.
42 C.J. p. 1296 note 78.

One year

(1) Evidence as to the value of defendant's car almost a year after an accident was properly excluded in action for damages.—Larson v. Long, 219 P. 1066, 74 Colo. 152.

(2) Evidence of value of machinery after it was a year old, was held not to prove what its value was when it was new.—Avery Co. of Texas v. Harrison Co., Tex.Civ.App., 254 S.W. 1015, reversed on other grounds, Com.App., 267 S.W. 254.

Nine months

Testimony as to automobile's value nine months prior to destruction without reference to its condition at time and place of destruction was held inadmissible.—Pate v. Smith, 261 P. 189, 128 Okl. 29.

One month

In an action for damages for breach of a contract to buy cocoanut oil, where the breach occurred April 27, the trial court was not clearly wrong in striking out testimony by a witness as to the price of oil fixed by a contract on April 1 of that year.—E. A. Stevenson & Co. v. Cappelli, R.I., 117 A. 355, reargument denied 117 A. 747.

48. Wash.—Yakima Finance Corporation v. Perkins, 295 P. 189, 190, 160 Wash. 379, quoting **Corpus Juris.**
22 C.J. p. 190 note 45.

Changed condition

(1) In an action for the purchase price of machinery where it had remained in defendant's plant unused and unattended since its installation, testimony as to its present value was properly excluded because, under such conditions, the testimony would not show its value when installed and in working condition.—Howe v. Fulton, 225 Ill.App. 589.

(2) Where parts of automobile delivered for repairs were distributed around shop among other like parts, so that it was impracticable, without putting the parts together again, to give an opinion as to value of the machine, and the owner brought trover, claiming that it was kept for an unreasonable time, and that on demand he offered to pay charges, evidence as to its value when left and a week or a month prior thereto was admissible in determining its highest market value between the conversion and the trial, where defendant neither pleaded nor proved any change in its condition after delivery to him.—Sisson v. Roberts, 104 S.E. 910, 25 Ga.App. 725.

(3) Where evidence showed use and condition of automobile between time witness last saw it and day it burned, his testimony as to its value just before loss was relevant.—Continental Auto Ins. Ass'n v. Traywick, 101 So. 614, 211 Ala. 659.

49. Iowa.—Lundvick v. Westchester F. Ins. Co., 104 N.W. 429, 128 Iowa 376.

50. Del.—Mills Novelty Co. v. Transeau, 8 A.2d 93, 1 Terry 227.

too remote rests in the court's discretion,[51] and should be determined in the light of all of the surrounding circumstances including the nature of the property involved.[52]

Place. Where the value of personal property is in issue, the inquiry is usually as to its value at some particular place, and evidence of value, to be relevant, must be directed to the value of the property at that place.[53] If property has a market value at the place involved in the inquiry, evidence is properly directed to establishing it at that place.[54] Where it appears that no market value for a commodity exists at the place involved in the inquiry, market value at other places may be shown, if these are sufficiently near to show, in connection with cost of transportation, etc., the value at the place in question,[55] and if this market is one legally open to the parties.[56] The question as to what places are sufficiently near is addressed to the sound discretion of the court,[57] the determining consideration being what evidence is practically available to the litigants.[58] The nearest market, if it is fairly illustrative, is usually demanded by the court,[59] and relevancy decreases as distance increases;[60] but nearness is not conclusive where circumstances of variation render the value at the nearer market misleading,[61] and value at a market a great distance away may be shown where it appears that market value is the same in both places, or differs only by the cost of transportation.[62] Value in the controlling market may always be shown, whatever its distance.[63] Where the issue involved relates to the sale and delivery of goods, evidence of value is properly directed to value at the place of delivery,[64] but unless the evidence is clear and explicit as to the value of the article at the place of delivery evidence of value at other places may be received.[65]

f. Corporate Stock

Where corporate stock has no established market value, evidence of the assets, liabilities, and other matters pertinent to the worth of the corporation is admissible to prove the value of the stock.

Evidence of the market value of corporate stock is admissible to prove its value.[66] Evidence as to

Mass.—White Sewing Mach. Co. v. Phenix Nerve Beverage Co., 74 N. E. 600, 188 Mass. 407.

51. U.S.—Barrett v. Fournial, C.C.A. N.Y., 21 F.2d 298
Cal.—Herdan v. Hanson, 189 P. 440, 182 Cal. 538.
Conn.—Knox v. Binkoski, 122 A. 400, 99 Conn. 582.
N.C.—Newsom v. Cothran, 116 S.E. 415, 185 N.C. 161.

52. Tex.—Reed v. Southern Pac. Co., Civ.App., 99 S.W.2d 1026, error dismissed.

53. Ark.—Arkansas Power & Light Co. v. Decker, 17 S.W.2d 293, 179 Ark. 592.
Ohio.—Hedeen v. Bausinger, 162 N. E. 650, 28 Ohio App. 336.

54. Tex.—Sanders v. Blakney, Civ. App., 294 S.W. 238—Merchants' Cotton Oil Co. v. Acme Gin Co., Civ.App., 284 S.W. 680.
22 C.J. p 189 note 26

Taking coal; expense of removal
In trespass for wrongfully entering under plaintiff's property and mining coal, the amount of deduction from the value of the coal at the mouth of the pit, to which defendant was entitled in determining damages for the coal taken, was the cost of loading and hauling to the foot of the shaft, and the hoisting and dumping it into the car at the top.—Smothers v. Cosgrove-Meehan Coal Co., 264 Ill.App. 488.

55. Ark.—Brown v. Kammerman, 270 S.W. 86, 168 Ark. 278—Clear Creek Oil & Gas Co. v. Bushmaer, 264 S.W. 830, 164 Ark. 303—Batte Bros. v. Battle, 213 S.W. 379, 139 Ark. 302.
Or.—Mattechek v. Pugh, 55 P.2d 730, 734, 153 Or. 1, citing **Corpus Juris.**
Tex.—Dale Oil & Refining Co. v. City of Tulia, Civ.App., 25 S.W.2d 671.
Wash.—Nelson v. Eastern Ry. & Lumber Co., 6 P.2d 1111, 166 Wash. 363—Stevens v. Wilson Creek Union Grain & Trading Co., 261 P. 399, 145 Wash. 624.
22 C.J. p 189 notes 29, 30.

Interdependent markets
In action for failure to sell carload of onions consigned to Sacramento at market price there, evidence of the market price at San Francisco was held competent and sufficient to show the market price at Sacramento in view of the interdependence of the two places, and the fact that under the contract, which was for a sale on ten per cent commission, the real destination was San Francisco, Sacramento being the inspection point.—Collins v. United Brokers' Co., 194 P. 458, 99 Or. 556.

56. Md.—Mt. Vernon Brewing Co. v. Teschner, 69 A. 702, 108 Md. 158, 16 L.R.A.,N.S., 758.
N.C.—Moye v. Pope, 64 N.C. 543.

57. Ala.—Comer v. Way, 19 So. 966, 107 Ala. 300, 54 Am.S.R. 93.
Md.—Mt. Vernon Brewing Co. v. Teschner, 69 A. 702, 108 Md. 158, 16 L.R.A.,N.S., 758.
22 C.J. p 189 note 32.

58. Md.—Mt. Vernon Brewing Co. v. Teschner, supra.
22 C.J. p 189 note 33.

59. Wash.—Nelson v. Eastern Ry. & Lumber Co., 6 P.2d 1111, 1113, 166 Wash. 363, citing **Corpus Juris.**
22 C.J. p 189 note 34.

60. Tex.—Dargan v. Robinson, Civ. App., 140 S.W.2d 561, error dismissed.
22 C.J. p 189 note 35.

Several hundred miles
Evidence as to the value of goods at a place several hundred miles distant is immaterial.—Payne v. Cheshire, 107 S.E. 557, 26 Ga.App. 746—Glynn Canning Co. v. E. L. Adams Co., 106 S.E. 207, 26 Ga.App. 365.

61. Ga.—Simpson v. Cincinnati, N. O. & T. P. R. Co., 8 S.E. 524, 81 Ga. 495.
Pa.—Fessler v. Love, 48 Pa. 407.

62. Mo.—Rosenblatt v. Winstanley, App., 186 S.W. 542.

63. U.S.—Weinberg v. Hogan Milling Co., C.C.A.Mo., 299 F. 458.
22 C.J. p 190 note 39.

64. Ala.—Zimmern v. Southern Ry. Co., 92 So. 437, 207 Ala. 169.
22 C.J. p 189 note 27.

65. Ga.—Collins & G. R. Co. v. Beasley, 136 S.E. 167, 36 Ga.App. 241.
22 C.J. p 189 note 28.

Where evidence shows market value at destination, evidence as to market value at other places is not admissible.—Zimmern v. Southern Ry. Co., 92 So. 437, 207 Ala. 169.

Purchase f. o. b. shipping point is some evidence of market value at destination.—Collins & G. R. Co. v. Beasley, 136 S.E. 167, 36 Ga.App. 241.

66. Conn.—Ford v. H. W. Dubiske Co., 136 A. 560, 105 Conn. 572.

the intrinsic value of corporate stock is not admissible to prove its value where a bona fide market value can be established;[67] but where corporate stock has no market value, as where it is not listed or actively traded in on any stock exchange, evidence of the worth of the corporation is admissible to prove the value of the stock.[68] For such purpose, all evidence of matters relevant to the value of the corporation is admissible.[69] Thus evidence as to the net worth[70] or insolvency,[71] the assets and liabilities,[72] the earnings,[73] and the good will[74] of the corporation is admissible to show the value of the stock; or such value may be determined by ascertaining the nature,[75] amount,[76] and perma-

67. U.S.—U. S. v. Reading Co., D.C.Pa., 295 F. 551.
22 C.J. p 182 note 7 [a].

Value of stock as indicative of value of assets of corporation

Market prices of public utility's stocks and bonds are not accurate measure of value of its properties, since such prices are largely dependent on rate state permits corporation to charge.—Chesapeake & Potomac Telephone Co. of Baltimore City v. Whitman, D.C.Md., 3 F.2d 938.

68. U.S.—Oxford Paper Co. v. U. S., Ct.Cl., 52 F.2d 1008, supplemented on other grounds, 56 F.2d 895.
Ariz.—American Surety Co. of New York v. Duvall, 196 P. 457, 22 Ariz. 261.
Iowa.—Humphrey v. Baron, 273 N.W. 856, 223 Iowa 735.
Kan.—Hotchkiss v. Fischer, 31 P.2d 37, 39, 139 Kan. 333, quoting **Corpus Juris.**
22 C.J. p 186 notes 73–85.

If proof by usual methods is impossible, other means may be employed to prove the value of stock.—Ford v. H. W. Dubiske Co., 136 A. 560, 105 Conn. 572.

Market shown to be restricted

U.S.—Heiner v. Crosby, C.C.A.Pa., 24 F.2d 191, affirming, D.C., Crosby v. Heiner, 12 F.2d 604.

Unorganized corporation

Value of stock of corporation never organized may be shown by evidence of net profit or net worth of assets.—McWilliams v. Altemus, 135 A. 856, 288 Pa. 277.

69. Mo.—Moffitt v. Hereford, 34 S. W. 252, 132 Mo. 513.
Nev.—Page v. Walser, 213 P. 107, 46 Nev. 390.
N.Y.—Butler v. Wright, 93 N.Y.S. 113, 103 App.Div. 463, reversed on other grounds 78 N.E. 1002, 186 N. Y. 259.
Pa.—Ferrando v. U. S. Nat. Building & Loan Ass'n, 160 A. 716, 307 Pa. 25.
Wash.—Lewis v. Coleman, 79 P.2d 633, 636, 194 Wash. 674, citing **Corpus Juris.**

Elements of value

(1) Value of stock closely held and not listed should be determined by considering assets, liabilities, profits, good will, etc.—In re Schlossman's Adm'x, 242 N.Y.S. 417, 136 Misc. 893.

(2) The value of corporate common stock having no market value was ascertained by deducting from the net value of corporate assets, tangible and intangible, including value of leaseholds and good will, the value of outstanding preferred stock and dividing the remainder by the number of shares of common stock.—Pett v. Spiegel, 202 N.Y.S. 650.

(3) In action by stockholders of subsidiary corporation, in corporate right, to recover damages from directors of allied corporations who caused subsidiary to issue shares and sell them to allied corporation, which sold the shares to parent corporation, value of shares must be determined from number of shares sold, market conditions, rate of return on shares, history and prospects of subsidiary, its financial condition, and other relevant facts.—Cleary v. Higley, 277 N.Y.S. 63, 154 Misc. 158, affirmed 284 N.Y.S. 989, 246 App.Div. 698.

Book value

(1) Market value increases in corporate stock held by corporation should be deducted from capital and surplus in computing book value—In re Marvin's Estate, 241 N.Y.S. 500, 135 Misc. 899.

(2) To ascertain book value of common stock it was error to use market value of seventy-five dollars per share for preferred stock, instead of par value of one hundred dollars per share.—Newell v. Commissioner of Internal Revenue, C.C.A., 66 F.2d 102.

(3) Book value of stock and financial statements of corporation were not admissible to show value of stock where corporation was a family corporation, since value of stock to anyone outside of family was problematical.—Merriam v. Wimpfheimer, D.C.N.Y., 25 F.Supp. 405.

Liquidating value

In action for value of stock by stockholder dissenting to transfer of assets of building and loan association, court properly refused to take market or liquidating value as basis for valuing plaintiff's stock.—Ferrando v. U. S. Nat. Building & Loan Ass'n, 160 A. 716, 307 Pa. 25.

70. U.S.—U. S. v. Stone Cliff Coal & Coke Co., D.C.W.Va., 6 F.Supp. 1.
Iowa.—Humphrey v. Baron, 273 N. W. 856, 223 Iowa 735.
N.Y.—In re Schlossman's Adm'x, 242 N.Y.S. 417, 136 Misc. 893.

71. Ariz.—Tevis v. Ryan, 108 P. 461, 13 Ariz. 120.

72. Iowa.—Humphrey v. Baron, 273 N.W. 856, 223 Iowa 735.
22 C.J. p 186 notes 73–75.

Contracts held by corporation

(1) In determining market value of stock, commission contracts of corporation were properly omitted, where expiration dates thereof were not shown.—Horn v. J. O. Nessen Lumber Co., 236 Ill.App. 187.

(2) In determining value of stock of lumber company, profits on orders to be filled should be considered.—Horn v. J. O. Nessen Lumber Co., supra.

Intercorporate item

That asset or liability item on corporation's books was due from or to subsidiary was held not to warrant elimination thereof in valuing corporation's stock—In re Auditore's Estate, 240 N.Y.S. 502, 136 Misc. 664, affirmed In re Auditore's Will, 250 N.Y.S. 902, 233 App.Div. 740, appeal dismissed In re Parascandola, 178 N.E. 792, 257 N.Y. 554.

Tax liens on corporation's books, promptly canceled of record, were held not to be considered in valuing corporation's stock in determining liability of deceased stockholder's administrator.—In re Auditore's Estate, supra.

73. U.S.—Newell v. Commissioner of Internal Revenue, C.C.A., 66 F. 2d 102.
N.Y.—In re Schlossman's Adm'x, 242 N.Y.S. 417, 136 Misc. 893.

74. N.Y.—In re Schlossman's Adm'x, 242 N.Y.S. 417, 136 Misc. 893.

To determine value of good will of corporation, take average annual net profits over period of years, deduct interest on average amount of capital invested, and multiply result by suitable number of years' purchase.—In re Schlossman's Adm'x, supra.

75. Mo.—Moffitt v. Hereford, 34 S. W. 252, 132 Mo. 513.
N.Y.—Butler v. Wright, 93 N.Y.S. 113, 103 App.Div. 463, reversed on other grounds 78 N.E. 1002, 186 N. Y. 259.
22 C.J. p 186 note 77.

76. N.Y.—Butler v. Wright, supra.

nency[77] of the business done by the corporation; the dividends paid,[78] the control of the stock,[79] the management,[80] and the market for articles sold, if the business is a commercial one.[81]

The evidence as to value must be directed to the time in issue.[82]

The report of a commercial agency is not competent to prove the value of the stock of a corporation.[83]

Where the value of the property of a corporation at a certain date is in issue, evidence of actual results in the way of profits, ascertained years after such date, is not admissible.[84]

The par value of the stock may be shown[85] by the printed subscription blanks used by the corporation,[86] stock certificates issued by it,[87] or the stock book of the corporation.[88]

Sales. Evidence as to the price at which the stock was purchased or sold is admissible to prove its value,[89] unless the sale was at a time remote from the time in issue.[90] In an action between buyer and seller the price fixed in the contract of sale is evidence of the value of the stock.[91]

g. Animals

In the absence of a readily ascertainable market value for the animal, its value may be proved by evidence of its breed, characteristics, and other qualities.

Where the value of an animal is in issue, evidence as to its intrinsic value is not admissible where the animal has a readily ascertainable market value at the time and place as of which it is to be valued.[92] In the absence of such market value, evidence as to the intrinsic value of the animal is admissible,[93] and it is permissible to show its breed,[94] pedigree,[95] qualities,[96] characteristics,[97]

77. Mo.—Moffitt v. Hereford, 34 S W. 252, 132 Mo. 513.
Wash.—Proctor v. Appleby, 188 P. 481, 110 Wash. 403.

78. Mo—Moffitt v. Hereford, 34 S. W. 252, 132 Mo. 513.
22 C.J. p 186 note 80.

79. Mo.—Moffitt v. Hereford, supra.

80. Mo—Moffitt v. Hereford, supra.

81. Mo—Moffitt v. Hereford, supra.

82. Ga.—Brandt v. Buckley, 109 S. E. 692, 27 Ga.App. 515, transferred, see 107 S.E. 773, 151 Ga. 582.
Kan.—Bushey v. Coffman, 201 P. 1103, 109 Kan. 652.
Ky.—Wright v. Inter-Southern Life Ins. Co., 237 S.W. 401, 193 Ky. 785.

Value two months later
A showing of the capital net worth of corporation on December 31 was not proof of the corporation's net worth on November 6, so as to show book value of stock which was to be purchased as of November 6, the date of holder's death.—Shammah v. Empire Linen Importing Corporation, 20 N.Y.S.2d 797, 260 App.Div. 298.

Evidence of value shortly before sale of stockholder's stock to director was held competent in judge's discretion, in absence of testimony showing change of value—Blabon v. Hay, 169 N.E. 268, 269 Mass. 401.

83. S.C.—Trimble v. Carlisle, 88 S. E. 28, 103 S.C. 411.

84. N.Y.—People v. Barker, 106 N. Y.S. 336, 121 App.Div. 661, affirmed 93 N.E. 378, 200 N.Y. 509

85. Ariz.—American Surety Co. of New York v. Duvall, 196 P. 457, 22 Ariz. 261.

86. Ala.—Lowery v. Mutual Loan Soc., Inc., 79 So. 389, 202 Ala. 51.

87. Ala.—Lowery v. Mutual Loan Soc., Inc., supra.

88. Ala—Lowery v. Mutual Loan Soc., Inc., supra.

89. Iowa.—Farmers' Ins. Co. v. Linn County, 208 N.W. 929, 202 Iowa 444.
Pa.—In re Shelmire's Estate, 56 Montg.Co. 260.

Fair sale of stock is best evidence of its market value.—Helvering v. Security Savings & Commercial Bank, C.C.A., 72 F.2d 874.

Price stock had uniformly brought was some evidence of market value of stock transferred to director by stockholder.—Blabon v. Hay, 169 N. E. 268, 269 Mass. 401.

Property received in exchange
(1) Evidence of fair real value of stock received for other stock was held properly received to determine value for income tax purposes where exchange was made at peak of stock inflation which stock exchange sales registered.—Rogers v. Strong, C.C. A.N.J., 72 F.2d 455, certiorari denied Strong v. Rogers, 55 S.Ct. 217, 293 U.S. 621, 79 L.Ed. 709.

(2) In an action for deceit based on false representations as to value in the sale of certain telephone stock, it was not error to exclude evidence as to how much stock in another corporation plaintiff had received for the property of the corporation purchased by him at a receiver's sale. —Smith v. Reynolds, 108 A. 697, 94 Vt. 28.

90. U.S.—Mandelbaum v. Goodyear Tire & Rubber Co, C.C.A.Iowa, 6 F.2d 818.
N.Y.—Lewis v. A. B. Leach & Co., 199 N.Y.S. 32.

91. N.Y.—Genung v. Turner, 177 N. Y.S 119, 188 App.Div. 390.

92. Tex.—Panhandle & S. F. Ry. Co. v. Snodgrass, Civ.App., 278 S.W. 337.

Cost at point of origin of shipment
In action against railroad for damages to horses and mules, evidence of cost of such animals at point of origin of shipment was held inadmissible, where evidence clearly raised issue that such horses and mules had market value at point of delivery.—Gulf, C. & S. F. Ry. Co. v. Metcalf, Tex.Civ.App., 100 S.W.2d 389.

The market value of an animal is what it will bring in cash on the market.—Kidwell v. Norfolk & W. Ry. Co., 117 S.E. 781, 94 W.Va. 131.

93. Tex.—Panhandle & S. F. Ry. Co. v. Snodgrass, Civ.App., 278 S. W. 337.

94. Ga.—Columbus R. Co. v. Woolfolk, 58 S.E. 152, 128 Ga. 631, 119 Am.S.R. 404, 10 L.R.A.,N.S., 1136.
Iowa.—Rogers v. Wolf, 191 N.W. 801, 195 Iowa 153.

95. Okl.—Indian Territory Illuminating Oil Co. v. Graham, 50 P.2d 720, 174 Okl. 438.
Or.—McCallister v. Sappingfield, 144 P. 432, 72 Or. 422.
Tenn.—Union Traction Co. v. Anderson, 242 S.W. 876, 146 Tenn. 476, 25 A.L.R. 1496.

96. Ga.—Columbus R. Co. v. Woolfolk, 58 S.E. 152, 128 Ga. 631, 119 Am.S.R. 404, 10 L.R.A.,N.S., 1136.
Or.—McCallister v. Sappingfield, 144 P. 432, 72 Or. 422.

97. Iowa.—Rogers v. Wolf, 191 N. W. 801, 195 Iowa 153.
Or.—McCallister v. Sappingfield, 144 P. 432, 72 Or. 422.

Testimony as to weight of mule at time of purchase held admissible in connection with general description of mule.—International-Great Northern R. Co. v. Motley, Tex.Civ.App., 18 S.W.2d 782.

and earning power,[98] and to detail its record as a prize winner at various shows of fine stock.[99]

The price realized on a sale of the animal at or within a reasonable time before or after the time as of which the value of the animal is to be ascertained is admissible as evidence of its value.[1] Evidence as to offers to buy or sell an animal are not admissible to prove its value,[2] except perhaps under special circumstances.[3] The owner may not testify whether he had placed any value on the animal[4] or state at what price he was or is willing to sell it.[5]

§ 184. Services

The value of services may be proved by evidence of the agreed price, the nature of the work, and the result achieved.

In addition to a detailed statement of what was done, the value of personal services may be established circumstantially by proof of relevant facts calculated to show the real value of the services as charged,[6] their beneficial result[7] or lack of it,[8] their dangerous[9] or disgusting[10] character, and the degree of physical strength,[11] acquired skill,[12] or

98. Ky.—Coleman v. Sowders, 268 S. W. 579, 206 Ky. 841.

Comparative earnings

In action for breach of warranty in sale of a jack, proof of his net earnings as he was and what they would have been if he was as warranted was competent to show difference in his market value when not as warranted.—Coleman v. Sowders, supra

99. Mo.—Council v. St. Louis & S. F. R. Co., 100 S.W. 57, 123 Mo.App. 432.

Okl.—Indian Territory Illuminating Oil Co. v. Graham, 50 P.2d 720, 174 Okl. 438.

1. Ky.—Coleman v. Sowders, 268 S. W. 579, 206 Ky. 841.

R.I.—La Fluer v. A. Berman & Sons, 123 A. 445, 45 R.I. 458.

W.Va.—Kidwell v. Norfolk & W. Ry. Co., 117 S.E. 781, 94 W.Va. 131.

Auction sale

In action for damage to carload of horses, evidence of price received at public auction where sale was fair and in good faith, was admissible as tending to prove value.—Vincent, Albin & Strahl v. Hines, 200 N.W. 1, 198 Iowa 1224.

Declining market

(1) Price received on declining market one year later for cattle injured by carrier's negligence could not be taken as basis on which to estimate impaired value.—Jennings v. Missouri Pac. R. Co., 134 So. 694, 172 La. 522.

(2) In action for breach of warranty in sale of a jack, evidence as to decline in price between time of purchase and sale by buyers was admissible on question of value of jack at time of sale.—Coleman v. Sowders, 268 S.W. 579, 206 Ky. 841.

Indirect proof

Where plaintiff sold to defendant a boar and four gilts, receiving a note in part payment, but delivery of one of the gilts had not been made, in a suit on the note, evidence of the value of the boar and of the delivered gilts was inadmissible to show the value of the undelivered gilt for which defendant was entitled to an offset by deducting the value of the animals delivered from the sale price.—Clark v. Gustafson, 192 N.W. 760, 46 S.D. 329.

Mongrel stock; registered stock

(1) In an action for an injury to a fourteen-month-old heifer, evidence as to the price paid for it when it was four months old is admissible; in the case of mongrel stock such evidence would not be relevant, but when the value of the animal is principally in its breeding its sale price will reflect materially on its value at any time.—Budd v. Northern Pac. Ry. Co., 195 P. 1109, 59 Mont. 238.

(2) Even though the sale price of an animal of registered stock is admissible to prove its value a year later, objections were properly sustained to questions involving the expense of keeping the heifer for the period between the time it was bought when four months old and the time it was killed.—Budd v. Northern Pac. Ry. Co., supra.

Place of sale

In a shipper's action for damages to live stock because of delay, evidence as to what plaintiffs paid for the cattle at the point of shipment was inadmissible as having no bearing on the market value at destination.—St. Louis, B. & M. Ry. Co. v. Freasier, Tex.Civ.App., 237 S.W. 344.

2. Tenn.—Union Traction Co. v. Anderson, 242 S.W. 876, 146 Tenn. 476, 25 A.L.R. 1496.

3. N.Y.—Shea v. Chinn, 225 N.Y.S. 756, 131 Misc. 336, reversed on other grounds 229 N.Y.S. 24, 223 App. Div. 476, affirmed 164 N.E. 606, 249 N.Y. 617.

4. N.Y.—Rowan v. Sussdorff, 132 N.Y.S. 550, 147 App.Div. 673.

5. N.Y.—Rowan v. Sussdorff, 132 N.Y.S. 550, 147 App.Div. 673.

6. Conn.—Locke v. Kraut, 83 A. 626, 85 Conn. 486.

22 C.J. p. 190 note 49.

Opinion evidence as to value of services see infra §§ 501, 545.

Value of similar services see infra § 593.

Sale price of finished product

In action for work done and materials furnished in manufacture of vending machines, evidence as to price at which defendant contracted to sell machines was held properly admitted.—Pipe & Tube Bending Corporation of America v. Cornine-Hakanson Die-Casting Co., C.C.A.N.J., 27 F.2d 32.

Cost of building; architects' services

In determining value of services of architects suing prospective builders who abandoned contract, evidence of cost of building ultimately constructed by other builders was inadmissible.—Miller v. San Francisco Church Extension Soc. of M. E. Church, 13 P.2d 824, 125 Cal.App. 85.

Speculative evidence

In suit by partner for his share of profits of venture, purely speculative evidence as to what the work "could have been done for," or what it should have cost if done by another, is inadmissible.—Wilson v. Hunt, Tex.Civ.App., 270 S.W. 263.

Admissions

(1) Statements made by, or attributable to, a party, which amount to admissions as to the value of services, may be shown against such party.

Ala.—Pope v. Randolph, 13 Ala. 214.

Ky.—Holiday v. Watson, 6 Ky.L. 590.

(2) Admissions generally see infra §§ 270–298.

7. Vt.—Plattsburg First Nat. Bank v. Post, 28 A. 989, 66 Vt. 237.

22 C.J. p. 190 note 50.

8. Ill.—Barnes v. Sisson, 44 Ill.App. 327.

22 C.J. p. 190 note 51.

9. Pa.—Thompson v. Stevens, 71 Pa. 161.

10. N.Y.—Reynolds v. Robinson, 64 N.Y. 589.

22 C.J. p. 190 note 53.

11. Ind.—Hall v. Stanley, 86 Ind. 219.

12. N.Y.—Millener v. Driggs, 10 N.Y. St. 237.

Evidence of reputation

(1) Is not admissible to prove

other qualifications required for success.[13] Where the value of professional services is in issue, the professional standing of the person rendering such services is relevant,[14] as is also evidence of the annual income of such person;[15] but evidence as to the reputation for ability of the person rendering the services and his success or failure on other jobs has been held to raise collateral issues and to be inadmissible to prove the value of the services.[16]

The contract price,[17] or the price actually paid,[18] for services is evidence of the value of the services. Evidence as to unaccepted offers to employ deceased are not admissible in a death action to establish the pecuniary worth of deceased.[19]

§ 185. Other Matters

The rule that evidence, to be admissible, must be relevant has been applied to a variety of matters.

The general rule, stated supra §§ 158, 159, that evidence directed toward the proof of any issue, to be admissible, must have a logical relation with the issue to be proved and must be of such probative force to establish the issue as to justify the expenditure by the court of the time required for its reception and consideration, has been applied to a variety of matters and issues.[20]

skill—Cohen v. Stein, 21 N.W. 514, 61 Wis. 508.

(2) Is not admissible to disprove skill.—Jeffries v. Harris, 10 N.C. 105.

13. Ala.—Evans v. Horton, 9 So. 534, 93 Ala. 379.
Mass.—Graves v. Jacobs, 8 Allen 141.
22 C J. p 190 note 56.

A record of previous success is relevant—Low v. Connecticut & P. R R. Co., 45 N.H. 370.

14. Ga.—Marshall v Bahnsen, 57 S. E. 1006, 1 Ga.App. 485.
22 C.J. p 190 note 57.

15. N.Y.—Burke v. Mulgrew 111 N. Y.S. 899, 127 App Div. 733, appeal dismissed 90 N.E. 1156, 197 N.Y. 521.
22 C.J. p 190 note 58.

Earnings in other capacities cannot be considered.—Nelson v. Bruce, 6 P.2d 140, 51 Idaho 378.

16. N.C.—Robbins v. Alexander, 14 S.E.2d 425, 219 N.C. 475.

17. Cal.—Whitty v. Fidelity & Deposit Co. of Maryland, 11 P.2d 84, 123 Cal.App. 334—Milwaukee Bldg. Co. v. Wetzel, 270 P. 382, 93 Cal. App. 775.

Evidence as to the value of the land promised for services is admissible on the question of the value of the services.—Lewis v. Mitchell, 153 S.E. 183, 200 N.C. 652.

Subsequent contract for same work

Later contract can only be taken as evidence of reasonable value of work left undone on breach of earlier contract, to extent that both contracts substantially correspond.—Milwaukee Bldg. Co. v. Wetzel, 270 P. 382, 93 Cal.App. 775.

Charge

In an action against an insurance company by a solicitor and collector for services in investigating claims, plaintiff's evidence that he put a charge of three dollars and fifty cents for each investigation, which "will cover all the travels that I had," did not prove value.—Cheek v. National Life Ins. Co. of United States of America, 207 S.W. 882, 200 Mo.App. 533.

In action on contract which fixed price, evidence as to reasonable value of work was irrelevant.—Asnon v. Foley, 288 P. 792, 105 Cal.App. 624.

18. Cal.—Davis v. Fyfe, 290 P. 468, 107 Cal.App. 281.
Iowa.—Ege v. Born, 236 N.W. 75, 212 Iowa 1138.
Mo.—Wyse v. Miller, 2 S.W.2d 806, 222 Mo.App. 165.

While what was paid was not criterion of value of services, yet it was admissible as circumstance to ascertain that value.—Southeastern Express Co. v. Chambers, 125 S.E. 507, 33 Ga.App. 44.

Bills paid by contractor for work furnished by third persons were held admissible on question of value of additions, although persons were not produced.—Kolmetsky v. Pellicoff, 141 A. 10, 6 N.J.Misc. 315, affirmed 143 A. 336, 105 N.J.Law 240.

19. N.C.—Carpenter v. Asheville Power & Light Co., 131 S.E. 400, 191 N.C. 130.

20. **Matter held relevant and admissible**

(1) In an action on a note given for the purchase price of a motor truck, the defense being misrepresentations inducing the purchase, the fact that repairs to the truck had been made or were necessary within a short time after its purchase was competent and relevant evidence for defendant.—Zimmern v. Standard Motor Car Co., 88 So. 743, 205 Ala. 580.

(2) What the "mill run" of a mill had been while delivering over one million five hundred thousand feet of lumber is some evidence of what it would be while sawing the next one million four hundred thousand feet.—Pye v. Eagle Lake Lumber Co., 227 P. 193, 66 Cal.App. 584.

(3) When question for jury is cost of building, and it is shown that secondhand material entered into its construction, and party furnishing such material failed to make any showing as to its value and cost, he cannot complain because court permitted other party to offer testimony as to its value and allowed jury to consider the evidence in determining cost of building, evidence being under circumstance best evidence of cost.—Nittler-Rhump v. Jones, 199 N.W. 542, 112 Neb. 238.

(4) In an action involving whether a bank had received a draft by mail on or before May 1, letter containing draft being found in bank some time later, no one knowing when letter had arrived, evidence that many persons other than plaintiff had called at bank demanding delivery of checks contained in the same letter was material, the banker undertaking to recite facts to demonstrate that his attention before May 1 was called to the loss or delay of the letter, the fact that many persons were demanding checks tending to make bank employees observe all mail until the envelope was found, and tending to show that the letter must have arrived and been mislaid prior to May 1st.—Texas Co. v. Wimberly, Tex.Civ.App., 213 S.W. 286.

(5) In an action to recover cattle alleged to have been sold by an agent without authority, where agent claimed that he had authority to sell cattle to pay debts contracted for labor, etc., testimony of a witness tending to show that the agent had contracted debts was admissible, although the witness did not know what the contract between the owner and the agent was.—Peterson v. Clay, Tex.Civ.App., 225 S.W. 1112.

(6) Evidence of number of rows in field and number of ears in average row was competent to show weight of corn reported in connection with sale before husking was not correct.—Boss v. Brown, 294 P. 878, 132 Kan. 86.

(7) In action for injuries from falling down marble stairs, expert's testimony that swinging door at head of stairs swung over handrail and top step was admissible as against contention that it was im-

Race and status. On the question whether a person is a member of a particular race, it has been held competent to show general reputation,[21] his association with members of that race,[22] or the fact that he was treated, by a couple belonging to such race, as their child;[23] and, after the death of the person in question, his own statement as to his race has been held admissible.[24] Reputation has also been held admissible to establish whether a given individual is bond or free,[25] although this has been denied,[26] and hearsay from individuals, as distinguished from general reputation, is rejected.[27]

Pedigree of animals. It has been held that the pedigree of an animal may be proved by reputation,[28] but hearsay cannot be admitted for this purpose.[29]

Fairness in business transactions is a question of fact, provable by both direct and circumstantial evidence.[30]

Circumstantial evidence is admissible to prove the exchange of letters by due course of mail,[31] to prove how an injury occurred,[32] and to prove speed.[33]

VI. COMPETENCY GENERALLY

§ 186. In General

Evidence is inadmissible where it is incompetent, although its weakness or tendency to prejudice the adverse party does not render it incompetent. "Bloodhound evidence" has been held to be competent.

Evidence in a civil action or proceeding is inadmissible where it is incompetent or unfit for the purpose for which it is offered.[34] On the other hand, evidence is admissible where it is competent,[35] provided it is also relevant and material under the

material, since plaintiff did not look for handrail.—Goldstein v. United Amusement Corporation, 169 A. 587, 86 N.H. 402.

Matter held irrelevant and inadmissible

(1) In action to recover amount due on contract of sale of growing crop, only issue involved being as to whether defendant had agreed to buy crop, evidence that plaintiff devised a ridiculous instrument, with which he cultivated the crop, was erroneously admitted, there being no question as to the condition of the crops at the time of the alleged sale. —Sexton v. Lockwood, Mo.App., 207 S.W. 856.

(2) On a motion for judgment on a sheriff's bond for failure to make money on an execution, where a traveling salesman testified that he heard the sheriff tell the judgment debtor that he had an execution to levy on certain goods, and that after the sheriff left without making the levy the salesman took some of the goods for a debt due his employers, a question as to whether the witness had handled a collection account for his employers for a resale of the goods back was not relevant to any issue involved.—Planters' Chemical & Oil Co. v. Daniel, 96 So. 424, 209 Ala. 363.

(3) Calculations as to number of bales of hemp that could be stored in compartment of certain dimensions, if competent, was held immaterial in action on policy of fire insurance.—National Union Fire Ins. Co. v. Forkner, 292 S.W. 765, 219 Ky. 119.

(4) Witness' statement of estimate of speed of automobile just before collision at curve was inadmissible as throwing no light on real issue of anticipation of accident.—Mercer Funeral Home v. Addison Bros. & Smith, 163 S.E. 439, 116 W.Va. 616.

21. Okl.—Cole v. McIntosh County School Dist., 123 P. 426, 32 Okl. 692, Ann.Cas.1914A 459.
22 C.J. p 174 note 57.

22. N.C.—Hopkins v. Bowers, 16 S.E. 1, 111 N.C. 175.
Okl.—Cole v. McIntosh County School Dist., 123 P. 426, 32 Okl. 692, Ann.Cas.1914A 459.
22 C.J. p 174 note 58.

23. Ala.—Locklayer v. Locklayer, 35 So. 1008, 139 Ala. 354.

24. Ala.—Locklayer v. Locklayer, supra.

25. Ala.—Tucker v. State, 24 Ala. 77.
Ga.—Bryan v. Walton, 20 Ga. 480, 509.
22 C.J. p 175 note 61.

26. Va.—Charlton v. Unis, 4 Gratt. 58, 45 Va. 58.
22 C.J. p 175 note 62.

27. U.S.—Mima Queen v. Hepburn, D.C., 7 Cranch 290, 3 L.Ed. 348.

28. Miss.—Jones v. Memphis & A. C. Packet Co., 31 So. 201.
22 C.J. p 175 note 65.

29. Ky.—N. N. & M. V. R. Co. v. Simcoe, 14 Ky.L. 526.

30. Cal.—Lowe v. Copeland, 13 P.2d 522, 125 Cal.App. 315.

31. Neb.—Nebraska State Bank of Republican City v. Walker, 196 N.W. 128, 111 Neb. 203.

32. Ohio.—Gschwind v. Viers, 152 N.E. 911, 21 Ohio App. 124.
Utah.—Hammond v. Industrial Commission, 34 P.2d 687, 84 Utah 67.

33. Ga.—Hall v. Slaton, 144 S.E. 827, 38 Ga.App. 619, reversed on other grounds Slaton v. Hall, 148 S.E. 741, 168 Ga. 710, 73 A.L.R. 891, conformed to Hall v. Slaton, 149 S.E. 306, 40 Ga.App. 288.

34. Me.—Gray v. Maine Cent. R. Co., 96 A. 1067, 114 Me. 530.
22 C.J. p 174 note 49.
Competent evidence defined see supra § 2.
General rules as to admissibility of evidence see supra § 158.

35. N.J.—Hampton v. Pennsylvania R. Co., 179 A. 101, 115 N.J.Law 168—Apfelbaum v. Prudential Ins. Co. of America, 169 A. 677, 12 N.J.Misc. 62.

It is axiomatic that one entitled to prove a fact may prove it by any competent means.—Cook v. Moecker, 217 Ill.App. 479—McCracken v. Farmers' Grain Co., 215 Ill.App. 551.

Evidence held competent

(1) Balance obtained by use of an adding machine.—First Nat. Bank v. Rush, Tex.Civ.App., 227 S.W. 378, modified on other grounds, Com.App., 246 S.W. 349.

(2) Testimony of a person's weight shown on card obtained from weighing machine, when witness saw the card.—De Filippo v. Di Pietro, 163 N.E. 742, 265 Mass. 186.

(3) Commission of crime may be proved in civil actions without a trial first had in criminal courts.—Whychulis v. Philadelphia & Reading Coal & Iron Co., 8 Pa.Dist. & Co. 73, 22 Sch.Leg.Rec. 110.

(4) In tracing a chain of title, all instruments affecting the record title are material and competent.—Moore v. Hoar, 81 P.2d 226, 27 Cal.App.2d 269.

Evidence held incompetent

Cal.—Irwin v. Brown, App., 115 P.2d 601.

rules discussed §§ 158–185 supra. Evidence is not incompetent merely because it is weak.[36]

Circumstantial evidence in support of, or against, a proposition is equally competent with direct evidence.[37]

Trailing by bloodhounds. "Bloodhound evidence," that is, evidence of the conduct of a bloodhound, has been held to be competent and admissible in civil actions and proceedings, provided it is not valueless and a proper foundation is laid.[38] The rules governing the establishment of a proper foundation in civil actions are the same as those which control in criminal prosecutions.[39]

Evidence tending to create prejudice. A party cannot be deprived of the benefit of evidence which is relevant and material because it may also have a tendency to prejudice the adverse party in the eyes of the jury.[40]

Witness through whom evidence adduced. An objection to evidence merely because it is offered through the medium of a certain person, who is a competent witness, is not tenable.[41]

§ 187. Evidence Wrongfully Obtained

Evidence obtained fraudulently, wrongfully, or illegally ordinarily is not incompetent, unless it is rendered incompetent as a result of constitutional or statutory regulations.

The courts do not concern themselves with the method by which a party has secured the evidence which he adduces in support of his contentions,[42] and hence in the absence of constitutional or statutory restrictions evidence which is otherwise admissible will not be excluded because it has been obtained fraudulently, wrongfully, or illegally.[43] This

N.J.—Eannetta v. Delaware, L. & W. R. Co., 129 A. 232, 3 N.J.Misc. 834.

36. Ill.—See Johnson & Johnson v. Creamery Package Mfg. Co., 202 Ill.App. 263.
Mich.—Ignaszak v. McCray Refrigerator Co., 190 N.W. 756, 758, 221 Mich 10, citing **Corpus Juris.**
Or.—Rehfield v. Winters, 125 P. 289, 62 Or. 299.
22 C.J. p 192 note 80.

Contrary inferences as test
That contrary inference may be drawn from testimony is not alone a test of its competency.—Ferris v. McArdle, 106 A. 460, 92 N.J.Law 580.

Contradictions and discrepancies as affecting competency
(1) While contradictory statements unexplained may affect the credibility of a witness, they are not for that reason alone incompetent as evidence.—Heard v. Burton-Boyd Mercantile Co., 80 So. 40, 202 Ala. 218.

(2) Discrepancies in party's evidence may affect its weight, but not competency.—Miller Cattle Co. v. Francis, 298 P. 631, 38 Ariz. 197.

37. Mich.—Ricketts v. Froehlich, 188 N.W. 426, 218 Mich. 459.
Circumstantial and direct evidence defined and distinguished see supra § 2.
Circumstantial evidence generally see supra § 161.

Only criterion of competency in case depending on circumstances is whether facts sought to be proved cast any light on issue.—Pounds v. Minter, Tex.Com.App., 13 S.W.2d 351, affirming in part and reversing in part Minter v. Pounds, Civ.App., 3 S.W.2d 830.

38. Minn.—Crosby v. Moriarity, 181 N.W. 199, 148 Minn. 201.

39. Minn.—Crosby v. Moriarity, supra.
Bloodhound evidence in criminal prosecutions see Criminal Law § 646.

40. U.S.—Graham v. U. S., Md., 188 F. 651, 110 C.C.A. 465, affirmed 34 S.Ct. 148, 231 U.S. 474, 58 L.Ed. 319.
Cal.—Martin v. Pacific Gas & Electric Co., 264 P. 246, 203 Cal. 291—Mohn v. Tingley, 217 P. 733, 191 Cal. 470.
Kan.—Harmon v. Electric Theater Co., 206 P. 875, 111 Kan. 252.
Mo.—Ingram v. Prairie Block Coal Co., 5 S.W.2d 413, 319 Mo. 644—Jablonowski v. Modern Cap Mfg. Co., 279 S.W. 89, 312 Mo. 173, affirming, App., 251 S.W. 477—Chapman v. Metropolitan Life Ins. Co., App., 132 S.W.2d 1096, 1099, citing **Corpus Juris**—Paepke v. Stadelman, 300 S.W. 845, 222 Mo.App. 346—Carlson v. Kansas City, Clay County & St. Joseph Auto Transit Co., 282 S.W. 1037, 1042, 221 Mo. App. 537, quoting **Corpus Juris.**
Ohio.—Guth v. Heines, 29 Ohio N.P., N.S., 382.
S.D.—Stratton v. Sioux Falls Traction System, 226 N.W. 644, 55 S.D. 464.
Tex.—Hussmann v. Leavell & Sherman, Civ.App., 20 S.W.2d 829, 832, citing **Corpus Juris,** and affirmed Hussman v. Leavell & Sherman, Com.App., 32 S.W.2d 643.
22 C.J. p 193 note 86.
Admissibility of prejudicial evidence see supra § 159.

Avoidance of inflammatory evidence
Trial court should avoid any matter tending to inflame the jury.—Wildeboer v. Petersen, 175 N.W. 349, 187 Iowa 1169.

41. R.I.—J. W. Bishop Co. v. Curran, 76 A. 275, 30 R.I. 504.

42. U.S.—Olmstead v. U. S., C.C.A. Wash., 19 F.2d 842, 847, quoting **Corpus Juris.**
Cal.—Parker v. Board of Dental Examiners of State of California, 14 P.2d 67, 216 Cal. 285.
Ky.—Streipe v. Hubbuch Bros. & Wellendorf, 25 S.W.2d 358, 359, 233 Ky. 194, citing **Corpus Juris.**
Mo.—Plater v. W. C. Mullins Const. Co., 17 S.W.2d 658, 668, 223 Mo.App. 650, citing **Corpus Juris.**
Tex.—Allison v. American Surety Co. of New York, Civ.App., 248 S.W. 829, 832, citing **Corpus Juris.**
22 C.J. p 192 note 81.

43. U.S.—U. S. v. Lee Hee, C.C.A. N.Y., 60 F.2d 924, affirming, D.C., 53 F.2d 681—Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter, C.C.A.N.Y., 32 F.2d 195, certiorari denied 50 S.Ct. 32, 280 U.S. 579, 74 L.Ed. 629.
Kan.—State v. Robinson, 236 P. 647, 118 Kan. 775.
Ky.—Streipe v. Hubbuch Bros. & Wellendorf, 25 S.W.2d 358, 359, 233 Ky. 194, citing **Corpus Juris.**
Mo.—Plater v. W. C. Mullins Const. Co., 17 S.W.2d 658, 668, 223 Mo. App. 650, citing **Corpus Juris.**
Mont.—Simonsen v. Barth, 208 P. 938, 64 Mont. 95.
N.Y.—Oneida, Limited, v. National Silver Co., 25 N.Y.S.2d 271.
Tex.—McColl v. Hardin ex rel. State, Civ.App., 70 S.W.2d 327—Allison v. American Surety Co. of New York, Civ.App., 248 S.W. 829, 832, citing **Corpus Juris.**
Wis.—State v. Thorson, 231 N.W. 155, 202 Wis. 31.
22 C.J. p 192 note 82.
Competency in criminal prosecutions of evidence wrongfully obtained see Criminal Law § 657.

Act of third person
Where a bank carrying burglary and robbery insurance was robbed and certain funds taken, part of

rule is most frequently applied in the case of documentary evidence, as to which it has been held that papers which are in fact in court may be used in evidence notwithstanding that the party offering them obtained them illegally.[44] Another application is in the case of articles which are in the nature of exhibits.[45]

However, in some jurisdictions where officers of the government violate defendant's constitutional rights by obtaining evidence by means of an illegal search or seizure or by compulsion or duress, the evidence is inadmissible.[46]

§ 188. Telephone Conversations

Evidence of a telephone conversation is competent and admissible, provided the identity of the parties to the conversation is satisfactorily established.

Unless otherwise objectionable,[47] a telephone con-

which were claimed to have been recovered by the sheriff from defendant, who was a friend of the person charged with the actual robbery, in an action by insurer against the robber, defendant, and the sheriff to recover possession of such money, evidence by the officers relative to the search of defendant's room and the recovery of the money found hidden there was admissible, even if it should be conceded that the entry and search of defendant's room was in violation of law, since such wrongful acts could not be charged to plaintiff.—Allison v. American Surety Co. of New York, Tex.Civ.App., 248 S.W. 829.

Election contest

Testimony of voters given in proceeding to inquire into validity of election is admissible in quo warranto trial against alderman, even if illegally procured.—State v. Thorson, 231 N.W. 155, 202 Wis. 31.

Permission of defendant

Where a bank carrying burglary and robbery insurance was robbed and certain funds taken, part of which were claimed to have been recovered by the sheriff from defendant, who was a friend of the person charged with the actual robbery, in an action by insurer against the robber, defendant, and the sheriff to recover possession of such money, evidence by the officers relative to search of defendant's room, and the recovery of the money found hidden there, is admissible, notwithstanding the officers had no search warrant, the room being entered and the search made by defendant's permission.—Allison v. American Surety Co. of New York, Tex.Civ.App., 248 S.W. 829.

Post mortem as unreasonable search and seizure

Post mortem examination is not unreasonable search and seizure, within contemplation of Constitution, as regards admissibility of evidence therefrom.—Streipe v. Hubbuch Bros. & Wellendorf, 25 S.W.2d 358, 233 Ky. 194.

Promise of immunity

Testimony given by witnesses under promise of immunity made in reliance on repealed statute could be considered against dentist seeking to vacate order suspending him from practicing dentistry.—Parker v. Board of Dental Examiners of State of California, 14 P.2d 67, 216 Cal. 285.

Rule at common law

Common law did not exclude evidence because illegally obtained.—Joong Sui Noon v. U. S., C.C.A.Mo., 76 F.2d 249—U. S. v. Lee Hee, C.C.A. N.Y., 60 F.2d 924, affirming, D.C., 53 F.2d 681.

Testimony of hired detectives

That a party's case is predicated on the testimony of hired detectives or investigators does not necessarily render such testimony inadmissible, but this rule does not apply when detectives or investigators are engaged, not for the purpose of obtaining evidence, but to create it by deliberate enticement and inducement to furnish a basis for an application to the court for relief.—Meisner v. Meisner, 29 N.Y.S.2d 342.

Wire tapping

(1) Evidence obtained by the police by tapping a telephone wire should not be excluded on the ground that the police in obtaining the information violated a criminal statute.—People v. McDonald, 165 N.Y.S. 41, 177 App.Div. 806.

(2) A surreptitious wire tapping, not involving a crime or coercion, does not render the evidence thus obtained inadmissible.—Young v. Young, 185 A. 901, 56 R.I. 401.

44. U.S.—American Tobacco Co. v. Werckmeister, N.Y., 28 S.Ct. 72, 207 U.S. 284, 52 L.Ed. 208.
Cal.—Herrscher v. State Bar of California, 49 P.2d 832, 4 Cal.2d 399
N.Y.—Hernandez v. Brookdale Mills, 194 N.Y.S. 283, 201 App.Div. 325.
Philippine.—Barton v. Leyte Asphalt & Mineral Oil Co., Ltd., 46 Philippine 938.
Wash.—Johnson v. Pearson, 186 P. 667, 109 Wash. 147.
22 C.J. p 192 note 84.
Documentary evidence generally see infra §§ 623–775.

Letters

Even though fraudulently, wrongfully, or illegally obtained, letters are not inadmissible on such ground.—Mercer v. Parsons, 112 A. 254, 95 N.J.Law 224—22 C.J. p 192 note 84 [b] (1).

Violation of diplomatic rights

Correspondence is not inadmissible because obtained by order to produce, in violation of rights and privileges of counsel of foreign government.—Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter, C.C.A.N.Y., 32 F.2d 195, certiorari denied 50 S.Ct. 32, 280 U.S. 579, 74 L.Ed. 629.

45. U.S.—The Fidelia, C.C.A.La., 58 F.2d 744.
22 C.J. p 192 note 85.
Exhibits generally see infra §§ 601–610.

Liquor

Liquor is admissible, even though obtained by search and seizure.
U.S.—The Fidelia, C.C.A.La., 58 F.2d 744.
Kan.—State v. Davidson, 15 P.2d 404, 136 Kan. 406.
22 C.J. p 192 note 85 [a] (1).

46. U.S.—Rogers v. U. S., C.C.A.R.I., 97 F.2d 691—Schenck ex rel. Chow Fook Hong v. Ward, D.C.Mass., 24 F.Supp. 776.
Cal.—Parker v. Board of Dental Examiners of State of California, 14 P.2d 67, 216 Cal. 285.
Mo.—Plater v. W. C. Mullins Const. Co., 17 S.W.2d 658, 223 Mo.App. 650.
Wis.—State v. Thorson, 231 N.W. 155, 202 Wis. 31.

Rule held inapplicable

U.S.—Schenck ex rel. Chow Fook Hong v. Ward, D.C.Mass., 24 F.Supp. 776.
Mo.—Plater v. W. C. Mullins Const. Co., 17 S.W.2d 658, 223 Mo.App. 650.
Wis.—State v. Thorson, 231 N.W. 155, 202 Wis. 31.

47. Or.—Johnston v. Fitzhugh, 178 P. 230, 91 Or. 247.

Grounds of inadmissibility

(1) Telephone conversation wherein maker of note was alleged to have told purchaser that maker had not received royalty assignment on oil and mineral lease to be given as consideration, and that unless it was delivered he would not take care of note, was inadmissible on issue of failure of consideration as irrelevant, immaterial, incompetent, and a self-serving declaration.—Thomasson v. Davis, Tex.Civ.App., 74 S.W.2d 557, error dismissed.

versation between a witness and another person is admissible in any case in which a face to face conversation between a witness and another person would be admissible in evidence,[48] provided that the identity of the person with whom the witness was speaking is satisfactorily established,[49] but not otherwise.[50]

Proof of identity is most readily afforded by the

(2) Inaccurate testimony of employee of steamship company as to telephone conversations, four years previously, was purely speculative and without testimonial value—The Frederick v. Luckenbach, D.C.N.Y., 15 F.2d 241.

(3) Admitting testimony of wife of plaintiff in libel action respecting certain communications over telephone constituted error, where she made no claim she informed plaintiff of conversations.—Williams v. Standard-Examiner Pub. Co., 27 P.2d 1, 83 Utah 31.

(4) On the question of a broker's authority, testimony of a witness, who heard the broker tell defendant's president over the telephone that he had made a purchase of German marks, and asked him to confirm it, was not admissible where there was no evidence of what defendant's president said in reply, which reply is determinative of the question of authority, and no other evidence of the conversation of which such testimony could be corroborative.—Gubelman v. Ands Koch, Inc., 138 N.E. 81, 234 N.Y. 425, reversing 192 N.Y.S. 928, 200 App.Div. 894.

(5) Where plaintiff seller relied on a telephone order from defendant buyer's president, and plaintiff's representative, who took the order, stated that she knew defendant's president personally, "having spoken to him on the telephone before," evidently her testimony as to the person from whom she received the order was worthless, in the absence of any other proof that defendant's president authorized the delivery, which was denied by him.—General Cheese Co. v. Moore Bros. Co., 180 N.Y.S. 481.

(6) Other cases see Albany Homeopathic Hospital v. Chalmers, 157 N.Y.S. 1000, 94 Misc. 600, affirmed 170 N.Y.S. 1087, 184 App.Div. 916—22 C.J. p 193 note 88 [a].

48. U.S.—New York Life Ins. Co. v. Silverstein, C.C.A.Mo., 53 F.2d 986—Sawyer v. Eaton, C.C.A.Me., 293 F. 898.
Cal.—Hammond Lumber Co. v. Weeks, 287 P. 573, 105 Cal.App. 315.
Del.—Wyckoff v. Jarrell, 170 A. 802, 5 W.W.Harr. 542.
Ill.—Gates v. Mader, 147 N.E. 241, 316 Ill. 313.
Iowa.—Smith v. Farm Property Mut. Ins. Ass'n of Iowa, 202 N.W. 508, 199 Iowa 693.
Ky.—Pickrell & Craig Co. v. Bollinger-Babbage Co., 264 S.W. 737, 204 Ky. 314.
Mass.—Dorchester Trust Co. v. Casey, 176 N.E. 178, 268 Mass. 494, 71 A.L.R. 1.
Minn.—Wetmore v. Hudson, 183 N.W. 672, 149 Minn. 332.
Mo.—Meyer Milling Co. v. Strohfeld, 20 S.W.2d 963, 224 Mo.App. 508, certiorari quashed State ex rel. Strohfeld v. Cox, 30 S.W.2d 462, 325 Mo. 901—J. E. Hood & Co. v. McCune, App., 235 S.W. 158.
N.J.—Burket v. Ellis, 143 A. 347, 105 N.J.Law 560.
N.C.—A. T. Griffin Mfg. Co. v. Bray, 137 S.E. 151, 193 N.C. 350.
N.D.—Ley v. Home Ins. Co. of New York, 251 N.W. 137, 64 N.D. 200.
Ohio.—Leonard v. Mowbray, 153 N.E. 197, 199, 21 Ohio App. 268, quoting **Corpus Juris.**
Or.—Johnston v. Fitzhugh, 178 P. 230, 91 Or. 247.
Pa.—Scott v. Gill, 89 Pa.Super. 508.
R.I.—Young v. Young, 185 A. 901, 56 R.I. 401—Going v. Vallesi, 158 A. 148, 52 R.I. 113.
Tex.—Western Union Telegraph Co. v. Campbell, Civ.App., 212 S.W. 720, error refused.
Wash.—Beeler v. Pacific Fruit & Produce Co., 233 P. 4, 133 Wash. 116.
Wis.—Borger v. McKeith, 224 N.W. 102, 198 Wis. 315.
22 C.J. p 193 note 89.
Admissions over telephone see infra § 281.

49. U.S.—New York Life Ins. Co. v. Silverstein, C.C.A.Mo., 53 F.2d 986.
Ala.—Western Union Telegraph Co. v. Mathis, 110 So. 399, 215 Ala. 282.
Del.—Wyckoff v. Jarrell, 170 A. 802, 5 W.W.Harr. 542.
Ill.—Chicago Smelting & Refining Corporation v. Sullivan, 246 Ill. App. 538.
Iowa.—Smith v. Farm Property Mut. Ins. Ass'n of Iowa, 202 N.W. 508, 199 Iowa 693.
Mass.—Dorchester Trust Co. v. Casey, 176 N.E. 178, 268 Mass. 494, 71 A.L.R. 1.
Mo.—Meyer Milling Co. v. Strohfeld, 20 S.W.2d 963, 224 Mo.App. 508, certiorari quashed State ex rel. Strohfeld v. Cox, 30 S.W.2d 462, 325 Mo. 901.
N.J.—Burket v. Ellis, 143 A. 347, 105 N.J.Law 560.
N.C.—A. T. Griffin Mfg. Co. v. Bray, 137 S.E. 151, 193 N.C. 350.
N.D.—Ley v. Home Ins. Co. of New York, 251 N.W. 137, 64 N.D. 200.
Ohio.—Leonard v. Mowbray, 153 N.E. 197, 199, 21 Ohio App. 268, quoting Corpus Juris.
22 C.J. p 193 note 90.

50. Ill.—Garden City Foundry Co. v. Industrial Commission, 138 N.E. 122, 307 Ill. 76—Nester Johnson Mfg. Co. v. Goldblatt, 265 Ill. App. 188.
Mass.—Dorchester Trust Co. v. Casey, 176 N.E. 178, 268 Mass. 494, 71 A.L.R. 1—A. T. Stearns Lumber Co. v. Howlett, 157 N.E. 82, 260 Mass. 45, 52 A.L.R. 1125—Morrison v. Tremont Trust Co., 147 N.E. 870, 252 Mass. 383—Larner v. Massachusetts Bonding & Insurance Co., 130 N.E. 92, 238 Mass. 80.
Mo.—Meyer Milling Co. v. Strohfeld, 20 S.W.2d 963, 224 Mo.App. 508, certiorari quashed State ex rel. Strohfeld v. Cox, 30 S.W.2d 462, 325 Mo. 901.
N.J.—Manzueto v. Fackler, 162 A. 583, 109 N.J.Law 374—Citrin v. Tansey, 153 A. 523, 107 N.J.Law 368, affirming 147 A. 384, 7 N.J. Misc. 881—Smarak v. Segusse, 102 A. 254, 91 N.J.Law 57.
N.Y.—In re Hayden's Will, 24 N.Y.S.2d 608, 261 App.Div. 103—Sheedy v. City of New York, 195 N.Y.S. 81, 202 App.Div. 760—Brown v. Raritan Chemical Works, 177 N.Y.S. 309, 188 App.Div. 578—Warren Gordon Lighterage v. Bartley Scow Co., 204 N.Y.S. 205, 123 Misc. 142.
N.C.—A. T. Griffin Mfg. Co. v. Bray, 137 S.E. 151, 193 N.C. 350.
Ohio.—Leonard v. Mowbray, 153 N.E. 197, 199, 21 Ohio App. 268, quoting **Corpus Juris.**
Or.—Johnston v. Fitzhugh, 178 P. 230, 91 Or. 247.
R.I.—Donahue v. Reiner Co., 127 A. 359, 46 R.I. 302.
S.C.—Cohen v. Standard Accident Ins. Co., 9 S.E.2d 222, 194 S.C. 533.
Tex.—Colbert v. Dallas Joint Stock Land Bank, 150 S.W.2d 771, 774, 136 Tex. 268, citing **Corpus Juris,** and reversing Dallas Joint Stock Land Bank v. Colbert, Civ.App., 127 S.W.2d 1004—Spolane v. Coy, Civ.App., 153 S.W.2d 672—Thomasson v. Davis, Civ.App., 74 S.W.2d 857, error dismissed.
22 C.J. p 193 note 91.
Contra Beeler v. Pacific Fruit & Produce Co., 233 P. 4, 133 Wash. 116.

Reason for rule

To hold one responsible for statements and answers made over the telephone by unidentified persons would open the door for fraud and imposition.—Cohen v. Standard Ac-

witness' recognition of the voice of the person with whom he was speaking,[51] and, indeed, a number of cases seem to regard the witness' recognition or identification of the voice of the person with whom he spoke as essential to the admissibility of evidence of a telephone conversation.[52] The generally accepted view, however, is that the identity of the speaker may be established by means other than the recognition of his voice.[53]

The rule requiring the identity of the speaker to be established is subject to a well recognized exception to the effect that, where the witness called the listed telephone number of a party, such as his business office, testimony as to a conversation had with a person answering the telephone and purporting to be the person called is competent, although the witness did not recognize the voice of the person who spoke and is unable to identify the speaker,[54]

cident Ins. Co., 9 S.E.2d 222, 194 S. C. 533.

51. U.S.—New York Life Ins. Co. v. Silverstein, C.C.A.Mo., 53 F.2d 986.
Cal.—Mayr v. Goldschmidt, 218 P. 621, 63 Cal.App. 381.
Del.—Wyckoff v. Jarrell, 170 A. 802, 804, 5 W.W.Harr. 542, citing **Corpus Juris.**
Ga.—Goodson v. Adams Grocery Co., 123 S.E. 748, 32 Ga.App. 419—Easterling v. Bell, 116 S.E. 50, 29 Ga App 465.
Ill.—Bell v. McDonald, 139 N.E. 613, 308 Ill. 329
Iowa.—Smith v. Farm Property Mut. Ins. Ass'n of Iowa, 202 N.W. 508, 199 Iowa 693
Mo.—Meyer Milling Co. v Strohfeld, 20 S.W.2d 963, 224 Mo.App. 508, certiorari quashed State ex rel. Strohfeld v. Cox, 30 S.W.2d 462, 325 Mo. 901—Schwartz v. Mercantile Trust Co., App., 279 S.W. 253.
N.J.—Smarak v. Segusse, 102 A. 254, 91 N.J.Law 57.
N.Y.—Woodruff v Benesch, 182 N.Y. S. 880, 112 Misc. 489—Friedman v. Schlossberg, 186 N.Y.S 78.
Tex.—Colbert v Dallas Joint Stock Land Bank, 150 S.W.2d 771, 774, 136 Tex. 268, citing **Corpus Juris,** and reversing Dallas Joint Stock Land Bank v. Colbert, Civ.App., 127 S.W.2d 1004—Spolane v. Coy, Civ App., 153 S.W.2d 672.
22 C.J. p 193 note 92.

Subsequent recognition

The testimony of a witness as to his conversation over the telephone with a man whose voice he did not then recognize, but did subsequently recognize, as the voice of defendant, is not incompetent, although it may well be thought by the jury to be weak evidence.—People v. Strollo, 83 N.E. 573, 191 N.Y. 42—Woodruff v. Benesch, 182 N.Y.S. 880, 112 Misc. 489.

52. N.Y.—Bonner Mfg. Co. v. Tannenbaum, 169 N.Y.S. 43.
22 C.J. p 193 note 93.

53. U.S.—New York Life Ins. Co. v. Silverstein, C.C.A.Mo., 53 F.2d 986.
Contra Campbell v. U. S. Air Compressor Co., D.C.Ill., 34 F.Supp. 402.
Del.—Wyckoff v. Jarrell, 170 A. 802, 5 W.W.Harr. 542.
Ill.—Wood's Estate v. Tyler, 256 Ill. App. 401.
Iowa.—Hanna v. Central States Electric Co., 232 N.W. 421, 210 Iowa 864—Smith v Farm Property Mut. Ins. Ass'n of Iowa, 202 N.W. 508, 199 Iowa 693.
Mass.—Rich v. Weeks, 181 N.E. 712, 279 Mass. 452.
Mich.—Miller v Kelly, 183 N.W. 717, 215 Mich 254.
Minn.—Merchants' Nat. Bank of St. Paul v. State Bank of Worthington, 214 N.W. 750, 172 Minn. 24.
Mo.—Meyer Milling Co. v. Strohfeld, 20 S.W.2d 963, 224 Mo.App. 508, certiorari quashed State ex rel Strohfeld v. Cox, 30 S.W.2d 462, 325 Mo. 901.
N.J.—Manzueto v. Fackler, 162 A. 583, 109 N.J.Law 374.
N.Y.—Ottida, Inc., v. Harriman Nat. Bank & Trust Co of City of New York, 24 N.Y.S.2d 63, 260 App.Div. 1008—Woodruff v. Benesch, 182 N.Y.S. 880, 112 Misc. 489.
N.C.—A. T. Griffin Mfg. Co. v. Bray, 137 S.E. 151, 193 N.C. 350.
Or.—Johnston v. Fitzhugh, 178 P. 230, 91 Or. 247.
Pa.—Reach v. National Bedding Co., 120 A. 471, 473, 276 Pa. 467, citing **Corpus Juris.**
22 C.J. p 193 note 94.

Evidence held to show identity

(1) In action on indemnity bond for loss of liberty bonds taken surreptitiously by buyer, who left forged check, testimony of plaintiffs' clerk as to telephone conversation with ostensible payee is sufficiently connected by payee's testimony as to questions of age, appearance, and a previous call made to be admissible for purpose of showing that plaintiffs did not rely on the check.—Kahn v. Maryland Casualty Co., 218 P. 452, 63 Cal.App. 180.

(2) Testimony of telephone conversation between witness and plaintiff's bookkeeper was erroneously excluded under evidence identifying person calling witness as plaintiff's bookkeeper.—International Harvester Co. of America v. Caldwell, 153 S.E. 325, 198 N.C. 751.

(3) Other cases.
Ill.—Noyes v. Gold, 34 N.E.2d 1, 310 Ill.App. 1.
Ohio.—Leonard v. Mowbray, 153 N.E. 197, 21 Ohio App. 268.
Tex.—Colbert v. Dallas Joint Stock Land Bank, 150 S.W.2d 771, 136 Tex. 268, reversing Dallas Joint Stock Land Bank v. Colbert, Civ. App., 127 S.W.2d 1004.
22 C.J. p 193 note 94 [a], [b].

Evidence held not to show identity

(1) Witness' statement that person with whom he carried on a telephone conversation stated he was a plaintiff is not sufficient identity to render testimony as to conversation admissible.—Hirsch v. Sherman, 205 N.Y.S. 434, 123 Misc. 419.

(2) Testimony of alleged telephone conversation with buyer was inadmissible for want of identification, where seller had never called buyer before, and buyer's address, telephone number, and business connection were unknown to seller and telephone operator, who was not called.—Wyckoff v. Jarrell, 170 A. 802, 5 W.W.Harr., Del., 542.

(3) In action by purchaser of note against maker, maker's testimony of telephone conversation wherein party calling asked him about signing, and only related that he was buying some stuff with payee, and maker could not recognize voice as that of purchaser, and no other fact was related by which his identity could be established, and there was no evidence that purchaser was then buying any property with payee, is inadmissible to show purchaser's notice of lack of consideration, as not sufficiently identifying person talking as purchaser.—Thomasson v. Davis, Tex.Civ.App., 74 S.W.2d 557, error dismissed.

(4) Other cases see Miller v. Kelly, 183 N.W. 717, 215 Mich. 254.

Subject matter and time of telephone conversation, and parties' conduct, establishing identity of person with whom conversation occurred, may be sufficient to make it admissible.—Merchants' Nat. Bank of St. Paul v. State Bank of Worthington, 214 N.W. 750, 172 Minn. 24.

54. U.S.—John Alt Furniture Co., v. Maryland Casualty Co., C.C.A. Mo., 88 F.2d 36, 41, quoting and citing **Corpus Juris**—New York Life Ins. Co. v. Silverstein, C.C.A. Mo., 53 F.2d 986, 988, quoting **Corpus Juris**—American & British Mfg. Corporation v. New Idria Quicksilver Mining Co., C.C.A.R.I.,

provided the conversation is such as might properly be made to a person answering the call.[55] This exception is recognized for the reason that one who answers a telephone call from the place of business of the person called for, is presumed to be the person called,[56] but such proof of identity is merely prima facie and is subject to rebuttal.[57] Conversely, it has been held that a witness who is called on the telephone may testify as to who the speaker stated he was and what he said, although the speaker was unknown to the witness.[58]

Testimony of bystander. The admissibility of testimony of a bystander as to one side of a telephone conversation is governed by the rule relating to the admissibility of oral conversations,[59] so that one who overheard a telephone conversation should

293 F. 509, 520, citing **Corpus Juris.**

Ala.—Alabama Power Co. v. Jones, 101 So. 898, 212 Ala. 206.

Cal.—Eastman v. Means, 242 P. 1089, 75 Cal.App. 537.

Conn.—Collins v. Lewis, 149 A. 668, 111 Conn. 299.

Ga.—Ayers v. John B. Daniel Co., 133 S.E. 878, 35 Ga.App. 511.

Ind.—Epperson v. Rostatter, 168 N.E. 126, 90 Ind.App. 8.

Md.—Rowan v. State, 3 A.2d 753—Annapolis & Chesapeake Bay Power Co. v. State, 136 A. 615, 152 Md. 241.

Mass.—Lord v. Lowell Institution for Savings, 23 N.E.2d 101, 304 Mass. 212—Irving Tanning Co. v. Shir, 3 N.E.2d 841, 295 Mass. 380—Massachusetts Northeastern St. Ry. Co. v. Plum Island Beach Co., 151 N.E. 84, 255 Mass. 104.

Mich.—Rice v. Fidelity & Casualty Co. of New York, 230 N.W. 181, 250 Mich. 398—Rotter v. Detroit United Ry., 187 N.W. 271, 217 Mich. 686.

Minn.—Merchants' Nat. Bank of St. Paul v. State Bank of Worthington, 214 N.W. 750, 172 Minn. 24—Wetmore v. Hudson, 183 N.W. 672, 149 Minn. 332.

Mo.—Shelton v. Wolf Cheese Co., 93 S.W.2d 947, 338 Mo. 1129—State ex rel. Strohfeld v. Cox, 30 S.W.2d 462, 325 Mo. 901, quashing certiorari Meyer Milling Co. v. Strohfeld, 20 S.W.2d 963, 224 Mo.App. 508—Meeker v. Union Electric Light & Power Co., 216 S.W. 923, 279 Mo. 574—Ozark Fruit Growers' Ass'n v. St. Louis-San Francisco R. Co., 46 S.W.2d 895, 226 Mo.App. 222—Miller v. Phenix Fire Ins. Co. of Paris, France, App., 9 S.W.2d 672.

Neb.—Ware v. Home Mut. Ins. Ass'n of Iowa, 281 N.W. 617, 135 Neb. 329—Connolly v. Davis, 208 N.W. 626, 114 Neb. 556.

N.Y.—Virzi v. Kings County Lighting Co., 8 N.Y.S.2d 239, 255 App. Div. 889.

N.D.—Ley v. Home Ins. Co. of New York, 251 N.W. 137, 64 N.D. 200.

Okl.—City of Pawhuska v. Martin, 1 P.2d 638, 151 Okl. 24—City of Pawhuska v. Crutchfield, 293 P. 1095, 197 Okl. 4.

Or.—Johnston v. Fitzhugh, 178 P. 230, 91 Or. 247.

Pa.—Smithers v. Light, 157 A. 489, 490, 305 Pa. 141, quoting **Corpus Juris**—Wahl v. State Workmen's Ins. Fund, 11 A.2d 496, 139 Pa.Super. 53—Pennsylvania Trust Co. v. Ghriest, 86 Pa.Super. 71.

S.C.—Cohen v. Standard Accident Ins. Co., 9 S.E.2d 222, 194 S.C. 533.

Tenn.—Southeastern Express Co. v. Bowers, Inc., 109 S.W.2d 851, 21 Tenn.App. 295.

Tex.—Colbert v. Dallas Joint Stock Land Bank, 150 S.W.2d 771, 775, 136 Tex. 268, citing **Corpus Juris,** and reversing Dallas Joint Stock Land Bank v. Colbert, Civ.App., 127 S.W.2d 1004—Spolane v. Coy, Civ.App., 153 S.W.2d 672.

Va.—Zurich General Accident & Liability Ins. Co. v. Baum, 165 S.E. 518, 159 Va. 404.

Wash.—Ingraham v. Associated Oil Co., 6 P.2d 645, 648, 166 Wash. 305, quoting **Corpus Juris**—Beeler v. Pacific Fruit & Produce Co., 233 P. 4, 133 Wash. 116.

22 C.J. p 194 note 95.

Leading case is Wolfe v. Missouri, Pac. R. Co., 11 S.W. 49, 97 Mo. 473, 10 Am.S.R. 331, 3 L.R.A. 539.

U.S.—John Alt Furniture Co. v. Maryland Casualty Co., C.C.A.Mo., 88 F.2d 36, 41.

Mo.—Meyer Milling Co. v. Strohfeld, 20 S.W.2d 963, 966, 224 Mo.App. 508, certiorari quashed State ex rel. Strohfeld v. Cox, 30 S.W.2d 462, 325 Mo. 901.

22 C.J. p 194 note 95 [a].

Installation of telephone as invitation

One installing telephone in office impliedly invites communication regarding business matters through that medium.

Mo.—Meeker v. Union Electric Light & Power Co., 216 S.W. 923, 279 Mo. 574—Wolfe v. Missouri Pac. R. Co., 11 S.W. 49, 97 Mo. 473, 10 Am.S.R. 331, 3 L.R.A. 539.

Neb.—Ware v. Home Mut. Ins. Ass'n of Iowa, 281 N.W. 617, 135 Neb. 329.

Okl.—City of Pawhuska v. Martin, 1 P.2d 638, 151 Okl. 24—City of Pawhuska v. Crutchfield, 293 P. 1095, 194 Okl. 4.

Or.—Johnston v. Fitzhugh, 178 P. 230, 91 Or. 247.

When communication is of such nature as to require identification of individual, there must be evidence of such identity, in addition to the mere fact that the witness asked for a connection with his place of business, and that when the connection was made some one who claimed or assumed to be such person responded.

Mass.—Dorchester Trust Co. v. Casey, 176 N.E. 178, 268 Mass. 494, 71 A.L.R. 1.

Mo.—Meyer Milling Co. v. Strohfeld, 20 S.W.2d 963, 224 Mo.App. 508, certiorari quashed State ex rel. Strohfeld v. Cox, 30 S.W.2d 462, 325 Mo. 901.

Tex.—Colbert v. Dallas Joint Stock Land Bank, 150 S.W.2d 771, 136 Tex. 268, reversing Dallas Joint Stock Land Bank v. Colbert, Civ.App., 127 S.W.2d 1004.

22 C.J. p 194 note 95 [c].

Action pursuant to conversation shows identity.—Commercial Casualty Ins. Co. v. Lawhead, C.C.A.W.Va., 62 F.2d 928, certiorari denied 53 S.Ct. 527, 289 U.S. 731, 77 L.Ed. 1480.

55. S.C.—Cohen v. Standard Accident Ins. Co., 9 S.E.2d 222, 194 S.C. 533.

56. Minn.—Merchants' Nat. Bank of St. Paul v. State Bank of Worthington, 214 N.W. 750, 172 Minn. 24—Gardner v. Hermann, 133 N.W. 558, 116 Minn. 161.

Tex.—Spolane v. Coy, Civ.App., 153 S.W.2d 672—Thomasson v. Davis, Civ.App., 74 S.W.2d 857, error dismissed.

57. Mich.—Rice v. Fidelity & Casualty Co. of New York, 230 N.W. 181, 250 Mich. 398.

S.C.—Cohen v. Standard Accident Ins. Co., 9 S.E.2d 222, 194 S.C. 533.

Tex.—Thomasson v. Davis, Civ.App., 74 S.W.2d 857, error dismissed.

58. Mo.—Morriss v. Finkelstein, App., 145 S.W.2d 439—Kansas City Star Pub. Co. v. Standard Warehouse Co., 99 S.W. 765, 123 Mo.App. 13.

Tenn.—General Securities Co. v. Sunday School Pub. Board, 125 S.W.2d 160, 163, 22 Tenn.App. 590, citing **Corpus Juris.**

59. D.C.—Takahashi v. Hecht Co., 64 F.2d 710, 62 App.D.C. 72.

Va.—Atlantic Coast Realty Co. v. Robertson's Ex'r, 116 S.E. 476, 135 Va. 247.

be permitted to testify thereto,[60] particularly when such testimony is corroborative of other testimony,[61] provided, but not unless, he is able to identify positively the speaker whose statements he undertakes to repeat.[62] Such testimony may relate to that portion of the conversation by the party in the bystander's presence or that heard from the party at the other end of the line.[63]

However, this rule is confined to evidence of the portion of conversation overheard, and evidence that the conversation was with a certain third person or that someone brought up a certain topic is inadmissible,[64] although it has been held that even if the person testifying did not hear the conversation, but was told of it by a participant, such testimony is competent.[65]

Testimony of conversations received by other mechanical means. The rules governing the admissibility of testimony of telephone conversations have been extended to include testimony of conversations received by other mechanical means.[66] Thus, testimony of a conversation from another room, received through an electrical apparatus transmitting the voices through ear phones, is competent, provided the identity of the speaker is established.[67]

§ 189. Proof of Act of Municipality

An act of a municipality, not of a legislative character, may be established by any evidence and without showing an ordinance.

Where an act of a municipality is not of a legislative character, it can be proved by any evidence, and it is not necessary to show an ordinance.[68]

60. Colo.—Kent v. Cobb, 133 P. 424, 24 Colo.App. 264.
D.C.—Takahashi v. Hecht Co., 64 F 2d 710, 62 App.D.C. 72.
Ind.—Greenberg v. Greenberg, 133 N.E. 18, 79 Ind.App. 218, rehearing denied 134 N.E. 311, 79 Ind.App 218.
Mass.—Jamaica Pond Garage v. Woodside Motor Livery, 128 N.E. 881, 236 Mass. 541.
N.H.—Hunkins v. Amoskeag Mfg. Co., 169 A. 3, 86 N.H. 356.
N.C.—Sanders v. Griffin, 132 S.E. 157, 191 N.C. 447—Pitt Lumber Co. v. Askew, 116 S.E. 93, 185 N.C. 87.
Ohio.—Fry v. Lebold, App., 31 N.E. 2d 257.
Pa.—Ehrenstrom v. Hess, 105 A. 44, 262 Pa 104.
Tex.—Houston Compress Co. v. Houston Steel & Foundry Co., Civ. App., 22 S.W.2d 737.

61. Iowa.—Kruidenier's Estate v. Bankers' Trust Co., 209 N.W. 452, 203 Iowa 776.
R.I.—Going v. Vallesi, 158 A. 148, 52 R.I. 113.
Tex.—Dallas Gas Co. v. Bankers' & Shippers' Ins. Co., Civ.App., 53 S.W.2d 130, error refused.

62. Mass.—Hughes v. Torregrossa, 180 N.E. 304, 278 Mass. 530.
R.I.—James C. Goff Co. v. Lunn, 143 A. 673, 49 R.I. 455—G. W. McNear, Inc., v. American & British Mfg. Co., 115 A. 709, 44 R.I. 190, certiorari denied American & British Mfg. Co. v. G. W. McNer, Inc., 42 S.Ct. 462, 258 U.S. 629, 66 L.Ed. 800.
Tex.—Cohen v. Compton, Civ.App., 43 S.W.2d 454.
Va.—Atlantic Coast Realty Co. v. Robertson's Ex'r, 116 S.E. 476, 135 Va. 247.
22 C.J. p 194 note 99.
Contra—Hunkins v. Amoskeag Mfg. Co., 169 A. 3, 86 N.H. 356.

Mode of establishing identity

(1) The identity of the other party to a telephone conversation, part of which was overheard by a bystander, may be established by direct or circumstantial evidence.—Atlantic Coast Realty Co. v. Robertson's Ex'r, 116 S.E. 476, 135 Va. 247.

(2) Where a witness heard but one side of a telephone conversation and knew only by inference with whom it was being held, he may testify as to the conversation, where the identity of the other party to the conversation is established by other evidence —Miles v. Andrews, 38 N.E. 644, 153 Ill. 262.

Identification held sufficient

(1) Evidence by witness that she heard plaintiff calling defendant by name over the telephone and listened to part of the conversation between them, and by plaintiff that she called defendant and talked with her and that during the conversation witness listened part of the time, is sufficient identification of the other party to the conversation to render it admissible.—Greenberg v. Greenberg, 133 N.E. 18, 79 Ind.App. 218, rehearing denied 134 N.E. 311, 79 Ind. App. 218.

(2) Testimony that defendant's testator had on two separate evenings called by telephone for plaintiff's agent at a hotel without finding him in, and that on the third evening he put in a call, addressed the agent by name, and stated he had tried to get him previously, with admissions by the agent that he was at the hotel and had a telephone conversation on one occasion and one only with testator, is sufficient to identify the agent as the other party to the telephone conversation, so as to render the conversation admissible, although the agent fixed the date as a different date and gave contrary testimony as to the substance of the conversation.—Atlantic Coast Realty Co. v. Robertson's Ex'r, 116 S.E. 476, 135 Va. 247.

(3) In mortgagor's action for interfering with possession of realty through use of excessive force by officers acting under void writ of assistance and as agents of mortgagee bank, which purchased on foreclosure, and of bank's grantees, witness' testimony that she was familiar with voices of bank president and grantees' attorney, and that she heard attorney ask over telephone if another party was president and receive affirmative answer, was sufficient foundation for admission of testimony that president instructed attorney to eject mortgagor "dead or alive."—Bingham v. National Bank of Montana, 72 P.2d 90, 105 Mont. 159, 113 A.L.R. 315.

63. Ind.—Greenberg v. Greenberg, 133 N.E. 18, 79 Ind.App. 218, rehearing denied 134 N.E. 311, 79 Ind.App. 218.
Ohio.—Megginson v. Bilan, 178 N.E. 281, 40 Ohio App. 210.
Or.—Johnston v. Fitzhugh, 178 P. 230, 91 Or. 247.

64. N.C.—Pitt Lumber Co. v. Askew, 116 S.E. 93, 185 N.C. 87.

65. Kan.—Bailey v. McLeod, 56 P. 2d 460, 143 Kan. 638.

66. Conn.—Kilpatrick v. Kilpatrick, 193 A. 765, 123 Conn. 218.

67. Conn.—Kilpatrick v. Kilpatrick, supra.

68. Mass.—Johnson v. Somerville, 81 N.E. 268, 269, 195 Mass. 370, 372, 10 L.R.A.,N.S., 715.
22 C.J. p 195 note 2.

Motives for discretionary acts cannot be testified to by members of municipal governing body.—Pilcher v. City of Dotham, 93 So. 16, 207 Ala. 421.

§ 190. Evidence Admissible by Reason of Admission of Similar Evidence of Adverse Party

a. In general
b. Nature of evidence

a. In General

Evidence otherwise inadmissible is frequently admitted because of the fact that similar evidence has been introduced by the adverse party, and accordingly the introduction by one party of part of a conversation, writing, or transaction may, within the discretion of the court, entitle the adverse party to introduce the whole thereof.

As stated in Corpus Juris, which statement has been quoted and cited by the courts, it frequently happens that evidence which might be inadmissible under strict rules is nevertheless introduced into the case through inadvertence or otherwise, under which circumstances it is held, sometimes as a result of statutory regulation, that the adverse party is entitled to introduce evidence on the same matters lest he be prejudiced.[69] The party who first intro-

69. U.S.—Twachtman v. Connelly C C.A.Ohio, 106 F.2d 501—Bradley v. Adams, C.C.A.Tenn., 89 F.2d 641 642, quoting **Corpus Juris**—Globe Indemnity Co. v. McAvoy Co., C C A.Ill., 41 F.2d 122, certiorari denied McAvoy Co. v. Globe Indemnity Co., 51 S Ct. 87, 282 U S. 884, 75 L.Ed. 780—In re Weissman, C C.A.Conn., 19 F 2d 769, 53 A.L R 644—American & British Mfg. Corporation v. New Idria Quicksilver Mining Co., C.C.A.R I., 293 F. 509.

Ala.—National Fire Ins Co. of Hartford, Conn., v. Kinney, 141 So. 350, 224 Ala. 586—Marsh v. Cheeseman, 128 So. 796, 221 Ala. 390—Guarenire v. Bessemer Lumber Co, 106 So. 49, 214 Ala. 8—Sheehan v. Wilmot, 105 So. 909, 213 Ala. 687—Lewis v. Martin, 98 So. 635, 210 Ala. 401—Chandler v Chandler, 85 So 558, 204 Ala. 164.

Ark.—Coffee v. Arkansas Power & Light Co, 113 S.W 2d 1100, 195 Ark. 559—Bankers' Fire Ins. Co. v. Williams, 5 S.W.2d 916, 921, 176 Ark. 1188, quoting **Corpus Juris.**

Colo.—Fischer v. Hill, 274 P. 172, 85 Colo. 149—Colorado & S. Ry. Co. v. Western Light & Power Co., 214 P. 30, 37, 73 Colo. 107, citing **Corpus Juris.**

Ga.—Citizens & Southern Bank of Thomaston v. Barron, 181 S.E. 859, 181 Ga. 351—Barrow County Cotton Mills v. Sams, 172 S.E. 820, 48 Ga.App. 357—Real Estate Loan Co. v. Bell, 172 S E. 582, 48 Ga.App. 179.

Idaho.—Idaho Gold Dredging Corporation v. Boise Payette Lumber Co., 115 P.2d 401—King v. Hahn, 234 P. 937, 40 Idaho 555.

Ill.—Wiley v. Department of Public Works and Buildings, 161 N.E. 783, 330 Ill. 312.

Iowa.—Maasdam v. Jefferson County Farmers' Mut. Ins. Ass'n, 268 N. W. 491, 222 Iowa 162—Bremhorst v. Phillips Coal Co., 211 N.W. 898, 202 Iowa 1251—Peterson v. McManus, 172 N.W. 460, 187 Iowa 522.

Ky.—Davis v. Gray, 134 S.W.2d 934, 280 Ky. 819—New York Life Ins. Co. v. Long, 277 S.W. 978, 211 Ky. 656—Clark v. Bourbon County Coop. Live Stock Ass'n, 277 S.W. 493 211 Ky. 402.

La.—Thompson v. Goodman, 126 So 527, 13 La.App. 186.

Mass.—Klefbeck v. Dous, 19 N E.2d 308, 302 Mass. 383—Graustein v. Wyman, 145 N.E. 450, 250 Mass 290.

Mich.—Ames v. MacPhail, 286 N.W. 206, 289 Mich. 185—Lee v. McCormick, 271 N.W. 579, 279 Mich. 120—Bowmaster v. William H De Pree Co., 233 N.W. 395, 252 Mich. 505.

Mo.—Aly v. Terminal R. R. Ass'n of St. Louis, 78 S.W 2d 851, 336 Mo. 340—Ingram v. Prairie Block Coal Co., 5 S.W.2d 413, 319 Mo. 644—Jones v. Werthan Bag Co., 254 S. W. 4, 11, quoting **Corpus Juris**—Bleish v. Rhodes, 242 S.W 971—Berry v. Adams, App., 71 S.W.2d 126—Larabee Flour Mills v. West Plains Commission Co., 262 S.W. 389, 216 Mo.App. 257—Johnson v. Kansas City Electric Light Co, App., 232 S.W. 1094—Rieger v. London Guarantee & Accident Co of London, England, 215 S.W. 920, 202 Mo App 184—Ozias v. Paustian, App., 209 S.W. 587.

Mont.—Northwestern Electric Equipment Co. v. Leighton, 213 P. 1094, 66 Mont. 529.

N.H.—Daniels v. Barker, 200 A. 410, 89 N H. 416.

N.Y.—Irwin v. Foley, 18 N.Y.S.2d 185, 259 App.Div. 156—Hart v Thompson, 41 N.Y.S. 909, 10 App. Div. 183—Carder Realty Corporation v. State, 15 N.Y.S.2d 604, 172 Misc 498, reversed on other grounds 23 N.Y.S.2d 395, 260 App. Div. 459—Lanciano v. Prudential Ins. Co. of America, 251 N.Y.S. 530, 140 Misc. 651—Carpenter v. Sears, 221 N.Y.S. 747, 129 Misc. 574—Carroll v. Harris, 186 N.Y.S. 529, 114 Misc. 392—Fuller v. Jamestown St. R. Co., 26 N.Y.S. 1078, 75 Hun 273, affirmed 42 N.E. 1093, 148 N.Y. 741—Pflum v. Northam Warren Corporation, 185 N.Y.S. 856.

N.C.—Bryant v. Carrier, 198 S.E. 619, 214 N.C. 191—Willis v. City of New Bern, 132 S E. 286, 191 N.C 507.

Okl.—Broswood Oil Co. v. Sand Springs Home, 62 P.2d 1004, 178 Okl. 559—Tyer v. Caldwell, 242 P. 760, 114 Okl 13—Chicago, R. I. & P. Ry. Co. v. Simms, 229 P. 638, 100 Okl. 138—Shawnee Gas & Electric Co. v. Griffith, 222 P 235, 237, 96 Okl. 261, citing **Corpus Juris**—Hines v. Pershin, 215 P. 599, 89 Okl. 297.

Or.—Mattechek v. Pugh, 55 P.2d 730, 153 Or. 1.

Pa.—Shaw v. Rendina 1 Fay.L.J. 201.

S C.—Pinkussohn v. Great Atlantic & Pacific Tea Co., 192 S.E. 283, 184 S.C. 171.

Tex.—Ferguson Seed Farms v. McMillan, Com.App., 18 S.W.2d 595, 63 A.L R. 1009, reversing, Civ.App., 296 S.W. 902—McGlede v Rembert Nat. Bank, Civ.App., 147 S W.2d 580, error dismissed, judgment correct—Krider v Hempftling, Civ. App., 137 S.W.2d 83—National Life & Accident Ins. Co. v Robledo, Civ. App., 93 S.W.2d 1198, error dismissed—Texas Employers Ins. Ass'n v. McNorton, Civ.App., 92 S. W 2d 562, 570, citing **Corpus Juris,** and error dismissed, 122 S.W.2d 1043, 132 Tex. 168—Franklin Fire Ins. Co. v. Coleman, Civ.App., 87 S.W.2d 537, 538, quoting and citing **Corpus Juris**—Dixie Motor Coach Corporation v. Ball, Civ. App., 69 S.W 2d 581, error dismissed—Malchoff v. Austin-Morris Co., Civ.App., 52 S.W.2d 682—Hubbard v. Ehman, Civ.App., 28 S.W. 2d 270—Plaster v. Stutzman, Civ. App., 8 S.W.2d 750—Home Ben. Ass'n v. Horne, Civ.App., 290 S.W. 226—Mathews v. Mathews, Civ. App., 275 S.W. 226—Texas Co. v. Burkett, Civ.App., 255 S.W 763, affirmed 296 S.W. 273, 117 Tex. 16, 54 A.L.R. 1397.

Vt.—Andrews v. Watkins' Estate, 160 A. 176, 104 Vt. 321.

Va.—Culpepper v. Robie, 154 S E. 687, 155 Va. 64.

Wash.—Hinton v. Carmody, 45 P.2d 32, 182 Wash. 123—Luther v. West Side Telephone Co., 235 P. 783, 134 Wash. 410.

22 C.J. p 195 note 3.

Action for death

(1) In a statutory action for death in automobile accident, evidence that defendant was proceeding at exces-

duces improper evidence cannot object to the admission of evidence from the adverse party relating to the same matter.[70]

However, the admission of such evidence is not a matter of absolute right,[71] but rests in the sound discretion of the court,[72] which will not permit a party to introduce evidence, which should not be admitted, merely because the adverse party has brought out some evidence on the same subject, where the circumstances are such that no prejudice can result from a refusal to go into the matter further.[73]

Evidence of whole of conversation, writing, or transaction. Under the rules discussed supra this section, where part of a conversation,[74] declara-

sive rate of speed when he passed witness' car a mile and a half or two miles from place of accident is admissible, where there is other evidence showing that defendant at least maintained as high a rate of speed over intervening distance.—Hinton v. Carmody, 45 P.2d 32, 182 Wash. 123.

(2) In action against township for death of minor occupants resulting from injuries received when truck left brick highway and overturned, indictment charging truck driver with involuntary manslaughter to which driver had pleaded guilty is admissible to contradict driver's testimony for plaintiffs, to effect that he had not pleaded guilty to involuntary manslaughter, even though such testimony concerned immaterial collateral issue.—Helmick v. Township of South Union, 185 A. 609, 323 Pa. 433.

Collateral facts

Evidence of collateral facts may be met by evidence of another such fact, tending to weaken or overcome impression made on jury's mind by former evidence.

Minn.—Empenger v. Empenger, 259 N.W. 795, 194 Minn. 219, rehearing denied 261 N.W. 185, 194 Minn. 219.

Vt.—Andrews v. Watkins' Estate, 160 A. 176, 104 Vt. 321—Lamonda v. Parizo, 98 A. 980, 90 Vt. 381—Fuller v. Valiquette, 41 A. 579, 70 Vt. 502.

Motive

(1) In action on life policy, wherein insurer, which was relying on defense that insured committed suicide, introduced evidence that insured was short in his accounts, so as to establish a motive for suicide, court erred in refusing to permit plaintiff to introduce evidence tending to prove that the claim of shortage was without foundation.—Scott v. Prudential Ins. Co. of America, 282 N.W. 467, 203 Minn. 547.

(2) Likewise, the court should have received plaintiff's offer to show that no claim for any shortage was ever made against insured or against his estate.—Scott v. Prudential Ins. Co. of America, supra.

Remote incidents

Testimony of remote incidents happening years back in a testator's life and bearing on his testamentary capacity were not improperly admitted where proponents themselves had opened the field by the examination of their witnesses.—Catt v. Robins, 137 N.E. 101, 305 Ill. 76.

Value

When insured in action for fire loss was permitted, over insurer's objection, to introduce evidence as to reasonable market value of household goods and personal property destroyed by fire, denying insurer right to introduce evidence as to value of similar property was error.—Maasdam v. Jefferson County Farmers' Mut. Ins. Ass'n, 268 N.W. 491, 222 Iowa 162.

70. U.S.—Bradley v. Adams, C.C.A. Tenn., 89 F.2d 641, 642, quoting **Corpus Juris**—Pennsylvania R. Co. v. Schafer, C.C.A. Ohio, 290 F. 140.
Ala.—Guarenire v. Bessemer Lumber Co., 106 So. 49, 214 Ala. 8—Sheehan v. Wilmot, 105 So. 909, 213 Ala. 687—Sloss-Scheffield Steel & Iron Co. v. Gardner, 85 So. 40, 17 Ala. App. 363.
Ark.—Holloway v. Parker, 127 S.W. 2d 563, 197 Ark. 209, 119 A.L.R. 1359—Bankers' Fire Ins. Co. v. Williams, 5 S.W.2d 916, 921, 176 Ark. 1188, quoting **Corpus Juris.**
Colo.—Fischer v. Hill, 274 P. 172, 85 Colo. 149—Colorado & S. Ry. Co. v. Western Light & Power Co., 214 P. 30, 73 Colo. 107.
Conn.—McCarthy v. Tierney, 165 A. 805, 116 Conn. 593.
Ind.—Glick v. Hunter, 129 N.E. 232, 190 Ind. 51.
Ky.—New York Life Ins. Co. v. Long, 277 S.W. 978, 211 Ky. 656.
Mo.—Jones v. Werthan Bag Co., 254 S.W. 4, 11, quoting **Corpus Juris**—Larabee Flour Mills v. West Plains Commission Co., 262 S.W. 389, 216 Mo.App. 257—Loveland v. Arnold, App., 261 S.W. 741.
Tenn.—Larus v. Bank of Commerce & Trust Co., 257 S.W. 94, 149 Tenn. 126.
Tex.—Franklin Fire Ins. Co. v. Coleman, Civ.App., 87 S.W.2d 537, 538, quoting and citing **Corpus Juris.**
Va.—Schmidt v. Wallinger, 99 S.E. 680, 125 Va. 361.
Wash.—In re Williams' Estate, 258 P. 851, 145 Wash. 19.
22 C.J. p. 196 note 4.

71. Mass.—Goodyear Park Co. v. City of Holyoke, 11 N.E.2d 439, 298 Mass. 510.

72. Iowa.—Nigut v. Hill, 205 N.W. 312, 200 Iowa 748.
Mass.—Goodyear Park Co. v. City of Holyoke, 11 N.E.2d 439, 298 Mass. 510—Graustein v. Wyman, 145 N.E. 450, 250 Mass. 290.
Mo.—Scrivner v. American Car & Foundry Co., 50 S.W.2d 1001, 330 Mo. 408—Jones v. Werthan Bag Co., 254 S.W. 4, 11, quoting **Corpus Juris.**
N.M.—Martin v. New York Life Ins. Co., 234 P. 673, 30 N.M. 400, 40 A.L.R. 406.
Tex.—Franklin Fire Ins. Co. v. Coleman, Civ.App., 87 S.W.2d 537.
Utah.—Knowlton v. Thompson, 218 P. 117, 62 Utah 142.
22 C.J. p. 197 note 18.
Discretion held not abused
Iowa.—Nigut v. Hill, 205 N.W. 312, 200 Iowa 748—Yana way v. Chicago, R. I. & P. Ry. Co., 190 N.W. 21, 195 Iowa 86.

73. U.S.—Ellenbogen v. James Nelson, Limited, C.C.A. N.J., 285 F. 563.
Ala.—Housing Authority of Phenix City v. Stillwell, 3 So.2d 55.
Cal.—San Joaquin & Kings River Canal & Irrigation Co. v. James J. Stevinson, Inc., 220 P. 427, 63 Cal. App. 767.
Colo.—Burke v. South Boulder Canon Ditch Co., 203 P. 1098, 71 Colo. 58.
Conn.—Hall v. Smedley Co., 151 A. 321, 112 Conn. 115.
Ill.—Frochter v. Arenholz, 242 Ill. App. 93, 98, citing **Corpus Juris.**
Iowa.—Peterson v. McManus, 172 N.W. 460, 187 Iowa 522.
Md.—Washington, B. & A. E. R. Co. v. Faulkner, 112 A. 820, 137 Md. 451.
Mo.—Lake Superior Loader Co. v. Huttig Lead & Zinc Co., 264 S.W. 396, 305 Mo. 130—Jones v. Werthan Bag Co., 254 S.W. 4, 11, quoting **Corpus Juris**—Lion Match Co. v. Hess, App., 253 S.W. 108.
N.Y.—Ward v. Richmond, 184 N.Y.S. 508, 193 App.Div. 727.
Or.—Patterson v. Horsefly Irr. Dist., 69 P.2d 282, 157 Or. 1, rehearing denied 70 P.2d 36, 157 Or. 1.
Tex.—Barrow v. Bement, Civ.App., 239 S.W. 273—Burke v. Burke, Civ. App., 233 S.W. 990.
Vt.—Hutchinson v. Knowles, 184 A. 705, 108 Vt. 195, followed in 184 A. 711, 108 Vt. 208—Hayden v. Hoadley, 111 A. 343, 94 Vt. 345.
22 C.J. p. 198 note 19.

74. Ala.—B. F. Kay & Son v. Alabama Cotton & Grain Co., 100 So. 863, 211 Ala. 454—Fulton Bag &

tion[75] or document[76] is shown or introduced in evi- | dence in a particular case by one party, or series of

Cotton Mills v. Leder Oil Co., 92 So. 613, 207 Ala. 350—Industrial Sav. Bank v. Mitchell, 140 So. 449, 25 Ala.App. 13, certiorari denied 140 So. 452, 224 Ala. 335.
Cal.—Raisch v. Monterey County, 35 P.2d 587, 140 Cal.App. 627—Sly v. Abbott, 264 P. 507, 89 Cal.App. 209.
Del.—Canadian Industrial Alcohol Co. v. Nelson, 188 A. 39, 8 W.W. Harr. 26.
Ga.—Usry v. Augusta Southern R. Co., 102 S.E. 184, 24 Ga.App. 722.
Ill.—Taylor v. Filson, 6 N.E.2d 253, 288 Ill.App. 442—Frochter v. Arenholz, 242 Ill.App. 93, 98, citing **Corpus Juris.**
Ind.—Lahr v. Broyles, 155 N.E. 709, 86 Ind.App. 33—American Steel Foundries v. Sech, 122 N.E. 347, 69 Ind.App. 538.
Kan.—Kolterman v. Atkinson, 100 P. 2d 729, 151 Kan. 623.
Ky.—Eskind v. Southern Trust Co., 25 S.W.2d 1018, 233 Ky. 435.
Md.—Stem v. Crawford, 105 A. 780, 133 Md. 579.
Mich.—Bresch v. Wolf, 220 N.W. 737, 243 Mich. 638.
Mo.—Berry v. Adams, App., 71 S.W. 2d 126—Schnurr v. Perlmutter, App., 71 S.W.2d 63—Rodgers v. Schroeder, 287 S.W. 861, 220 Mo. App. 575.
Mont.—Rasmussen v. O. E. Lee & Co., 66 P.2d 119, 104 Mont. 278—McGonigle v. Prudential Ins. Co. of America, 46 P.2d 687, 100 Mont. 203—Varn v. Butte Electric Ry. Co., 249 P. 1070, 77 Mont. 124—Northwestern Electric Equipment Co. v. Leighton, 213 P. 1094, 66 Mont. 529.
Neb.—Culver v. Union Pac. R. Co., 199 N.W. 794, 112 Neb. 441.
N.H.—Charles G. Clapp Co. v. McCleary, 192 A. 572, 89 N.H. 65.
N.Y.—Caccamise v. Metropolitan Casualty Ins. Co. of New York, 300 N.Y.S. 487, 252 App.Div. 521.
N.C.—Winborne v. Lloyd, 183 S.E. 756, 209 N.C. 483.
Or.—Wells v. Morrison, 256 P. 641, 121 Or. 604—Johnston v. Fitzhugh, 178 P. 230, 91 Or. 247—Boyd v. Grove, 173 P. 310, 89 Or. 80—Richey v. Robertson, 169 P. 99, 86 Or. 525.
Pa.—Ransom v. City of Philadelphia, 195 A. 922, 129 Pa.Super. 351—H. W. Roos Co. v. Brady, 157 A. 490, 103 Pa.Super. 579.
S.C.—Norman v. Stevenson Theatres, 156 S.E. 357, 159 S.C. 191.
Tex.—Texas Employers' Ins. Ass'n v. Knouff, 297 S.W. 799, reversed on other ground, Com.App., 7 S.W.2d 68—Denison v. Nunn, Civ.App., 293 S.W. 838—Strickland v. Strickland, Civ.App., 276 S.W. 795—Dunlap Hardware Co. v. E. F. Elmberg Co., Civ.App., 252 S.W. 1098, affirmed E. F. Elmberg Co. v. Dunlap Hardware Co., Com.App., 267 S.W. 258—Booth v. Crosby, Civ. App., 248 S.W. 417.
Utah.—Armstrong v. Larsen, 186 P. 97, 55 Utah 347—Chadwick v. Beneficial Life Ins. Co., 181 P. 448, 54 Utah 443.
Vt.—In re Campbell's Will, 147 A. 687, 102 Vt. 294.
22 C.J. p 196 note 5.

Limitation of rule

In order that the remainder of a conversation, part of which has been given in evidence, may be admissible, it must be competent, relevant, and material.
Ala.—Moore v. Smith, 111 So. 918, 215 Ala. 592.
Ga.—Usry v. Augusta Southern R. Co., 102 S.E. 184, 24 Ga.App. 722.
Mass.—Sullivan v. Morse, 171 N.E. 668, 271 Mass. 501.
Or.—Patterson v. Horsefly Irr. Dist., 69 P.2d 282, 157 Or. 1, rehearing denied 70 P.2d 36, 157 Or. 1—Wells v. Morrison, 256 P. 641, 121 Or. 604—Richey v. Robertson, 169 P. 99, 86 Or. 525—McMahon v. Rankin, 102 P. 608, 103 P. 53, 54 Or. 328.
Vt.—Bianchi v. Millar, 111 A. 524, 94 Vt. 378.

Epithets

In an action on a note, where plaintiff testified on both direct and redirect examination of the bad feeling existing between him and defendant without objection, testimony of the use of vile epithets by plaintiff to defendant was admissible.—Booth v. Crosby, Tex.Civ.App., 248 S.W. 417.

Evidence as foundation for impeachment

The rule that, where a party opens the door by introducing a part of a conversation, the opposing party has a right to all that was said therein, is without application, where the opening party confines his examination to purpose of laying a foundation for impeachment.—Spickelmeir v. Hartman, 123 N.E. 232, 72 Ind. App. 207.

Evidence merely that conversation occurred does not give the party adverse to the one introducing such evidence the right to show what was said in such conversation.—Jones v. Central of Georgia Ry. Co., 85 So. 428, 204 Ala. 148—Provident Life & Accident Ins. Co. v. Black, 73 So. 757, 15 Ala.App. 437.

75. Cal.—Zibbell v. Southern Pac. Co., 116 P. 513, 160 Cal. 237.
Mo.—Crismond v. Kendrick, 29 S.W. 2d 1100, 325 Mo. 613.
Mont.—Northwestern Electric Equipment Co. v. Leighton, 213 P. 1094, 66 Mont. 529.
Or.—Elliff v. Oregon R. & Nav. Co., 99 P. 76, 53 Or. 66.
Vt.—Hutchinson v. Knowles, 184 A. 705, 108 Vt. 195, followed in 184 A. 711, 108 Vt. 208.
Wash.—Baird v. Webb, 294 P. 1000, 160 Wash. 157.

76. Cal.—Miles v. Rosenthal, 266 P. 320, 90 Cal.App. 390.
D.C.—H. Herfurth, Jr., Inc. v. U. S., to Use of Squire, 85 F.2d 719, 66 App.D.C. 220.
Ga.—Usry v. Augusta Southern R. Co., 102 S.E. 184, 24 Ga.App. 722.
Ill.—Pridmore v. Whiting Corporation, 268 Ill.App. 592, 604, quoting **Corpus Juris**—Bryant v. Illinois Cent. R. Co., 252 Ill.App. 428—Cooper v. Illinois Publishing & Printing Co., 218 Ill.App. 95.
Mass.—Sullivan v. Morse, 171 N.E. 668, 271 Mass. 501.
Minn.—Aaberg v. Minnesota Commercial Men's Ass'n, 173 N.W. 708, 143 Minn. 354.
Mont.—McGonigle v. Prudential Ins. Co. of America, 46 P.2d 687, 100 Mont. 203—Varn v. Butte Electric Ry. Co., 249 P. 1070, 77 Mont. 124—Northwestern Electric Equipment Co. v. Leighton, 213 P. 1094, 66 Mont. 529—Pearce v. Metropolitan Life Ins. Co., 186 P. 687, 57 Mont. 79.
N.H.—Charles G. Clapp Co. v. McCleary, 192 A. 572, 89 N.H. 65.
N.Y.—Grattan v. Metropolitan Life Ins. Co., 92 N.Y. 274, 44 Am.R. 372—Warfield v. Wire Wheel Corporation of America, 177 N.Y.S. 733, 107 Misc. 526, affirmed 180 N.Y.S. 957, 191 App.Div. 899.
N.C.—Winborne v. Lloyd, 183 S.E. 756, 209 N.C. 483.
Ohio.—Industrial Commission of Ohio v. Link, 170 N.E. 594, 34 Ohio App. 174, modified on other grounds 171 N.E. 99, 122 Ohio St. 181.
Or.—Sturgis v. Baker, 65 P. 810, 39 Or. 541.
Pa.—Horsfield v. Metropolitan Life Ins. Co., 189 A. 892, 124 Pa.Super. 458.
Tex.—Friesenhahn v. Tips Engine Works, Civ.App., 283 S.W. 341—Booth v. Crosby, Civ.App., 248 S.W. 417—Sovereign Camp, Woodmen of the World, v. Martin, Civ. App., 211 S.W. 270.
Wash.—Crock v. Magnolia Milling Co., 266 P. 727, 147 Wash. 589.
22 C.J. p 196 note 7.

Only material and relevant parts of a document may be admitted.—Robertson v. Russell, 111 S.W. 205, 51 Tex.Civ.App. 257.

Decree

Utah.—Tanner v. Provo Reservoir Co., 98 P.2d 695, rehearing denied 103 P.2d 134.

Pleading

Cal.—Miles v. Rosenthal, 266 P. 320, 90 Cal.App. 390.
Ky.—Baskett v. Jones, 225 S.W. 158, 189 Ky. 391.

documents,[77] book of accounts,[78] letter[79] or correspondence[80] pertaining to the matter, or trans-

N C.—Jones v. Norfolk Southern R Co., 97 S.E. 48, 176 N C. 260.
Tex —National Life & Accident Ins Co v. Robledo, Civ.App., 93 S W 2d 1198, error dismissed.

Constitution and by-laws of mutual benefit association
Ala.—Sovereign Camp, W. O. W, v Adams, 86 So. 737, 204 Ala. 667.
Minn.—Aaberg v. Minnesota Commercial Men's Ass'n, 173 N.W. 708, 143 Minn. 354.
Mo —Boren v. Brotherhood of Railroad Trainmen, 129 S W. 491, 145 Mo.App. 136.

Indorsement, memorandum, or entry
(1) An indorsement, memorandum, or entry on a document or the back thereof may be shown by a party whose adversary has introduced the document, coming from his own possession, in evidence —Stucker v. Shumaker, 139 A. 114, 290 Pa. 348—22 C. J. p 196 note 7 [d].

(2) However, maker's self-serving indorsement on back of agreement, pursuant to which note sued on was alleged to have been made, is not part of agreement so as to compel its reception.—Stucker v. Shumaker, supra

Ordinance
Tex.—Magnolia Petroleum Co. v. Long, 86 S W.2d 450, 126 Tex 195, affirming, Civ.App., 51 S.W.2d 426.

Reception by stipulation
If document not strictly admissible is received by stipulation, general rule that entire document should be admitted is applicable.—Sullivan v. Morse, 171 N.E. 668, 271 Mass. 501.

Record of proceedings
(1) Where defendant, in administratrix's action for death of deceased, pleaded settlement with foreign administratrix, and only introduced record of her appointment, entire record of such proceedings was admissible.—Willgues v. Pennsylvania R. Co., 298 S.W. 817, 318 Mo. 28.

(2) However, a part of record which is not competent evidence to explain the record previously admitted is inadmissible.—Belfore v. Vermont State Highway Department, 187 A 797, 108 Vt. 396

Reference to instrument
(1) The fact that a written instrument, no part of which was included in evidence, was referred to on cross-examination, does not render it admissible when offered in evidence by the opposite party.—San Bois Coal Co. v. Resetz, 143 P. 46, 43 Okl. 384.

(2) Reference in one document to another must be such as to incorporate it for both to be admissible as part of same transaction.—Stucker v. Shumaker, 139 A. 114, 290 Pa. 348.

(3) Where corporate balance sheets have been received in evidence, sheets of comments to which the balance sheets refer are admissible on behalf of the adverse party.—Pridmore v. Whiting Corporation, 268 Ill. App. 592.

Will
Mich.—In re Mann's Estate, 189 N.W. 991, 219 Mich. 695
Mo.—Miller v. Smith, 275 S.W. 769, 306 Mo. 1.

77. D.C.—H. Herfurth, Jr., Inc. v. U. S., to Use of Squire, 85 F 2d 719, 66 App.D.C. 220.
Mont.—Charles Lehman & Co. v. Skadan, 284 P. 769, 86 Mont. 553—Northwestern Electric Equipment Co. v. Leighton, 213 P. 1094, 66 Mont. 529.
S.D.—Pyne v. Risager, 203 N.W. 994, 48 S.D. 265.
22 C.J. p 196 note 8.

Ballots
Ind —Glick v. Hunter, 129 N E. 232, 190 Ind. 51.

78. Ala.—American Trust & Savings Bank v. Montano, 89 So. 899, 18 Ala.App. 136, certiorari denied Montano v. American Trust & Savings Bank, 89 So. 923, 206 Ala. 700.
N.H —Charles G. Clapp Co. v. McCleary, 192 A. 572, 89 N.H. 65.
Pa —Stucker v. Shumaker, 139 A. 114, 290 Pa. 348.
Tex.—Stockwell v. Snyder, Civ.App., 51 S.W 2d 812, reversed on other grounds 84 S.W.2d 705, 126 Tex. 6—Gray v. Stolley, Civ.App., 230 S.W. 866.
22 C J. p 196 note 9.

Proof of correctness
Ill —Wahl v. Schmidt, 237 Ill.App. 372.

79. Ala.—Belt Automobile Indemnity Ass'n v. Ensley Transfer & Supply Co., 99 So. 787, 211 Ala. 84.
N.M.—Martin v. New York Life Ins. Co., 234 P. 673, 30 N.M 400, 40 A.L.R. 406.
N.Y.—Warfield v. Wire Wheel Corporation of America, 177 N Y S. 733, 107 Misc. 526, affirmed 180 N. Y.S. 957, 191 App.Div. 899.
N.C.—Winborne v. Lloyd, 183 S.E. 756, 209 N.C. 483.
Vt.—Hendrickson v. International Harvester Co. of America, 135 A. 702, 100 Vt 161.
22 C.J. p 196 note 10.

80. Cal.—Hinton v. Welch, 177 P. 282, 179 Cal. 463.
Del.—Canadian Industrial Alcohol Co v. Nelson, 188 A. 39, 8 W.W. Harr. 26.
Ill —Stearns v. Stearns, 33 N.E.2d 481, 376 Ill. 283.
Ky.—Richard Ritter, Inc., v. Morris Hess & Co., 277 S.W. 1016, 211 Ky. 730.
Mont.—Northwestern Electric Equipment Co. v. Leighton, 213 P. 1094, 66 Mont. 529.
N.H.—Charles G. Clapp Co. v. McCleary, 192 A 572, 89 N H. 65.
S.C —Nettles v. Nettles, 136 S E. 297, 138 S C. 318.
Tex.—Borschow v. Rosen, Civ.App., 59 S W.2d 1101, error dismissed—Friesenhahn v. Tips Engine Works, Civ App., 283 S W. 341, 343, citing **Corpus Juris**—Shaller v. Allen, Civ.App , 278 S.W. 873, 877, quoting **Corpus Juris.**
W.Va.—Dickinson Fuel Co. v. Glenn Coal Co., 137 S.E. 539, 103 W.Va. 366.
22 C.J. p 196 note 11.

Letter not replied to
(1) A letter which has been replied to is admissible for the purpose of explaining the reply where such reply has been introduced in evidence.
Del.—Canadian Industrial Alcohol Co. v. Nelson, 188 A. 39, 8 W.W. Harr. 26.
Mo.—McCaughan v. John Hill Const. Co., App , 222 S W. 917.
22 C J. p 196 note 11 [c] (1).

(2) However, this does not entitle the same party to introduce in evidence both a letter to him and his reply thereto, where no part of the correspondence has been offered by his adversary.—Houde v. Tolman, 44 N.W. 879, 42 Minn. 522.

Letters subsequent to that admitted
(1) A letter written in answer to another letter which has been introduced in evidence may be admitted
Kan —Dean v Metcalf, 58 P.2d 1073, 144 Kan. 174.
Minn.—Mooney v. Burgess, 172 N.W. 308, 142 Minn. 406.
Neb.—Jensen v. Romigh, 274 N W. 199, 133 Neb 71.
N.H.—Charles G. Clapp Co. v. McCleary, 192 A. 572, 89 N.H. 65.
N.Y.—Jacobson v Silberstein, 182 N Y.S. 150, 192 App Div. 42—Warfield v. Wire Wheel Corporation of America, 177 N.Y.S. 733, 107 Misc 528, affirmed 180 N Y.S. 957, 191 App Div. 899.
S C —Nettles v. Nettles, 136 S.E. 297, 138 S C 318.
22 C.J. p 196 note 11 [d] (2).

(2) In some jurisdictions this is a statutory rule —American Oil Pump & Tank Co. v. Foust, 274 P. 322, 128 Or. 263.

(3) The rule applies even when the reply is to a different letter when it in fact answers the contentions advanced in the letter in evidence.—Warfield v. Wire Wheel Corporation of America, supra.

(4) However, the reply must not be irrelevant or immaterial.—American Oil Pump & Tank Co. v. Foust, supra.

(5) Portions of the reply which are self-serving and merely argumentative should be excluded.—Ja-

action[81] is shown in evidence by one party, the other party, may for purposes of explanation,[82] show the remainder, or so much thereof as is necessary to a complete understanding of the part already shown.[83] As pointed out in Depositions § 91 a, the same principle applies where part of a deposition is introduced in evidence.

Evidence corroborative of first improper evidence. After the improper admission of evidence and the allowance of rebutting evidence, further proof to corroborate the evidence first admitted is not permitted.[84]

b. Nature of Evidence

The improper nature of the evidence does not prevent the application of the rules that where one party has introduced evidence ordinarily inadmissible, or a part thereof, the adverse party is entitled to introduce similar evidence or the whole thereof.

Although there are cases to the contrary,[85] the rules stated in subdivision a of this section apply

cobson v. Silberstein, 182 N.Y.S. 150, 192 App.Div. 42.

(6) Other cases see Edwards v. Erwin, 62 S.E. 545, 148 N.C. 429, 16 Ann.Cas. 393—22 C.J. p 196 note 11 [d].

81. Ala.—Barber v. Martin, 200 So. 787, 240 Ala. 656—Kalevas v. Ferguson, 114 So 292, 294, 216 Ala. 625, citing **Corpus Juris.**
Neb.—Lindley v. Wabash R. Co., 233 N.W. 450, 120 Neb. 195, modifying 231 N.W. 812, 120 Neb. 195, certiorari denied Wabash R. Co. v. Lindley, 51 S.Ct. 655, 283 U.S. 863, 75 L.Ed. 1468.
22 C.J. p 197 note 12.

82. Del.—Canadian Industrial Alcohol Co. v. Nelson, 188 A. 39, 8 W.W.Harr. 26.
Ga.—South Georgia Trust Co. v. Crandall, 170 S.E. 333, 47 Ga.App. 328.
Idaho.—Murphy v. Mutual Life Ins. Co. of New York, 112 P.2d 993—King v. Hahn, 234 P. 937, 40 Idaho 555.
Ill.—Pridmore v. Whiting Corporation, 268 Ill.App. 592, 604, quoting **Corpus Juris**—Cooper v. Illinois Publishing & Printing Co., 218 Ill. App. 95
Mo.—Lake Superior Loader Co. v. Huttig Lead & Zinc Co., 264 S.W. 396, 305 Mo. 130.
Mont.—Varn v. Butte Electric Ry. Co., 249 P. 1070, 77 Mont. 124.
N.Y.—Rauch v. Wander, 203 N.Y.S. 553, 122 Misc. 650.
N.C.—Winborne v. Lloyd, 183 S.E. 756, 209 N.C. 483.
Or.—Green Mountain Log Co. v. Columbia & N. R. R. R., 30 P.2d 1047, 146 Or. 461—Boyd v. Grove, 173 P. 310, 89 Or. 80.
Pa.—Seward v. Pennsylvania Salt Mfg. Co., 80 Pa.Super. 207.
Tenn.—Tennessee Coach Co. v. Young, 80 S.W.2d 107, 18 Tenn. App. 592.
Tex.—Friesenhahn v. Tips Engine Works, Civ.App., 283 S.W. 341—Woodson v. Westbrook, Civ.App., 272 S.W. 821—Burrell Engineering & Construction Co. v. Grisier, Civ. App., 189 S.W. 102, affirmed 240 S.W. 899, 111 Tex. 477.
Vt.—Hendrickson v. International Harvester Co. of America, 135 A. 702, 100 Vt. 161—Hayden v. Hoadley, 111 A. 343, 94 Vt. 345.
Wash.—Crock v. Magnolia Milling Co., 266 P. 727, 147 Wash. 589.
22 C.J. p 197 note 13.

Only so much as is necessary for explanation is admissible.
U.S.—Southern Pac. Co. v. Stephany, Cal., 255 F. 679, 167 C.C.A. 55.
Cal.—Hale v. Milliken, 90 P. 265, 5 Cal.App. 344.
N.Y.—Grattan v. Metropolitan Life Ins. Co., 92 N.Y. 274, 44 Am.R. 372—Warfield v. Wire Wheel Corporation of America, 177 N.Y.S. 733, 107 Misc. 526, affirmed 180 N.Y.S. 957, 191 App.Div. 899.
Tex.—Friesenhahn v. Tips Engine Works, Civ.App., 283 S.W. 341—Burke v. Burke, Civ.App., 233 S.W. 990.
Vt.—Enos v. Owens Slate Co., 160 A. 185, 104 Vt. 329—In re Campbell's Will, 147 A. 687, 102 Vt. 294—Hayden v. Hoadley, 111 A. 343, 94 Vt. 345.
22 C.J. p 197 note 14 [a].

Dismissal of criminal charge
Where plaintiff in assault action introduced evidence of arrest and trial of defendant's employee on criminal charge, admitting evidence of dismissal thereof is not error—Stubbs v. Orpheum Theatre & Realty Co., 300 P. 61, 114 Cal.App. 387.

Evidence not explanatory
(1) Testimony on cross-examination showing part of conversation at time of mutilation of purported will does not warrant testimony showing remainder of conversation since such is not explanatory.—In re Campbell's Will, 147 A. 687, 102 Vt. 294.

(2) Likewise, a report of psychiatrist of his examination of testatrix which was inclosed with letter from attorney who drew allegedly invalid will is not admissible where not explanatory.—Winborne v. Lloyd, 183 S.E. 756, 209 N.C. 483.

(3) Other cases see Lunham v. Lunham, 117 N.Y.S. 396, 133 App. Div. 215—22 C.J. p 197 note 13 [c].

Other explanatory writing
(1) It is immaterial whether the explanations or qualifications are contained in same instrument, or in others, if they are so contemporaneous and connected together as to be parts of one whole.—Warfield v. Wire Wheel Corporation of America, 177 N.Y.S. 733, 107 Misc. 528, affirmed 180 N.Y.S. 957, 191 App.Div. 899.

(2) Other cases see Sturgis v. Baker, 65 P. 810, 39 Or. 541—22 C.J. p 197 note 13 [b].

83. U.S.—Bank of Italy v. F. Romeo & Co., C.C.A.Cal., 287 F. 5
Ala.—Kalevas v. Ferguson, 114 So. 292, 294, 216 Ala. 625, citing **Corpus Juris.**
Cal.—Miles v. Rosenthal, 266 P. 320, 90 Cal.App. 390
Ky.—Eskind v. Southern Trust Co., 25 S.W.2d 1018, 233 Ky. 435
Mont.—Varn v. Butte Electric Ry. Co., 249 P. 1070, 77 Mont. 124.
N.Y.—Caccamise v. Metropolitan Casualty Ins. Co. of New York, 300 N.Y.S. 487, 252 App.Div. 521—Gates v. Gridley, 241 N.Y.S. 710, 229 App.Div. 368—Warfield v. Wire Wheel Corporation of America, 177 N.Y.S. 733, 107 Misc. 528, affirmed 180 N.Y.S. 957, 191 App.Div. 899.
Tex.—Gray v. Stolley, Civ.App., 230 S.W. 866—Bobbitt v. Bobbitt, Civ. App., 223 S.W. 478, dismissed for want of jurisdiction.
W.Va.—Dickinson Fuel Co. v. Glenn Coal Co., 137 S.E. 539, 103 W.Va. 366.
22 C.J. p 197 note 14.

Lack of relation to subject
In action on note payable "as per agreement after date" written agreement found among deceased maker's papers providing for note is inadmissible for want of showing that it and note related to same transaction.—Stucker v. Shumaker, 139 A. 114, 290 Pa. 348.

84. Ala.—Lewis v. Martin, 98 So. 635, 210 Ala. 401.

85. Cal.—Rypka v. Field, App., 115 P.2d 521.
Tex.—Ormes v. Ormes, Civ.App., 300 S.W. 191—Ellerd v. Murray, Civ. App., 247 S.W. 631.
22 C.J. p 198 note 21 [b].

Where objection is made, the admission of illegal evidence on the part of one of the parties will not authorize his adversary to introduce similar illegal evidence in rebuttal.—Smith v. Burroughs, Tex.Civ.App.,

not only to the subject matter of evidence, but also to its nature.[86] It is considered that one party should be allowed to introduce evidence not in its nature such as should be received where similar evidence has been received from the other party without objection, as in the case of secondary evidence,[87] hearsay evidence,[88] declarations of a deceased person,[89] self-serving declarations,[90] declarations against interest,[91] parol evidence affecting writings,[92] opinion evidence,[93] or conclusions of a witness.[94]

Under a statute providing that a notice to produce dispenses with proof as against the party giving the notice, where, in an action against a municipality to restrain the enforcement of an ordinance, the book of ordinances was produced by the municipality under notice, was inspected by plaintiff, and a part of it introduced in evidence, defendant could introduce another ordinance therein without further identification.[95]

§ 191. Evidence Inadmissible by Reason of Exclusion of Similar Evidence of Adverse Party

Where evidence of one party as to a particular matter is excluded, the adverse party may not introduce evidence as to the same matter, but dissimilar evidence is not thereby made inadmissible.

Where evidence of a particular matter offered by one party has been excluded, although perhaps improperly, on the objection of the adverse party, the adverse party is not entitled to introduce evidence with respect to the same matter.[96] An irresponsive answer which was stricken out as such does not en-

34 S.W.2d 364, error dismissed—Massey v. Allen, Tex.Civ.App., 222 S.W. 682.

86. Colo.—Bates v. Hall, 98 P. 3, 44 Colo. 360.
22 C.J. p 198 note 21.

87. Mich.—People's Building & Loan Ass'n Co. v. Rutz, 123 N.W. 6, 158 Mich. 440
N.Y.—McCormack v. Mandelbaum, 92 N.Y.S. 425, 102 App.Div. 302

88. Ariz.—Inspiration Consol. Copper Co. v. Bryan, 252 P. 1012, 31 Ariz. 302.
N.H.—Charles G. Clapp Co. v. McCleary, 192 A. 572, 89 N.H. 65.
Tex.—Friesenhahn v. Tips Engine Works, Civ.App., 283 S.W. 341—Magness v. Great Southern Life Ins. Co., Civ.App., 219 S.W. 280, dismissed for want of jurisdiction.
22 C.J. p 198 note 23.

89. Tex.—Sloan v. Sloan, Civ.App., 32 S.W.2d 513—Hambleton v. Southwest Texas Baptist Hospital, Civ.App., 172 S.W. 574.

90. U.S.—Steil v. Holland, C.C.A. Cal., 3 F.2d 776.
Cal.—Hinton v. Welch, 177 P. 282, 179 Cal. 463—Robinson v. McKnight, 284 P. 1056, 103 Cal.App. 718.
Ill.—Taylor v. Filson, 6 N.E.2d 253, 288 Ill.App. 442.
Ky.—Eskind v. Southern Trust Co., 25 S.W.2d 1018, 233 Ky. 435.
Okl.—Haddock v. Shelton, 286 P. 329, 142 Okl. 202.
Tex.—Friesenhahn v. Tips Engine Works, Civ.App., 283 S.W. 341.
22 C.J. p 197 note 15.

91. N.Y.—Erickson v. Bork, 239 N.Y.S. 13, 135 Misc. 288.

92. Colo.—Eaton v. Commercial Nat. Bank of Coshocton, 182 P. 890, 66 Colo. 450.
D.C.—Pathé Exch. v. Miller, 278 F. 997, 51 App.D.C. 284.
Mich.—Anderson v. Mollitor, 193 N.W. 851, 852, 223 Mich. 159, citing **Corpus Juris.**
Mo.—Meinhardt v. White, 107 S.W.2d 1061, 341 Mo. 446—Hackney v. Hargrove, App., 259 S.W. 495.
N.Y.—Vieser v. Bellows, 205 N.Y.S. 26, 209 App.Div. 540, affirming 199 N.Y.S. 341, appeal dismissed 147 N.E. 221, 239 N.Y. 622.
R.I.—New Bedford Morris Plan Co. v. Hicks, 157 A. 421, 52 R.I. 74
Tex.—Flynt v. Garmon, Civ.App., 275 S.W. 444
Va.—Mann v. W. C. Crenshaw & Co., 163 S.E. 375, 158 Va. 193—Richeson v. Wood, 163 S.E. 339, 344, 158 Va. 269, 82 A.L.R. 1189, citing **Corpus Juris.**
22 C.J. p 198 note 25, p 1295 note 96.

Unambiguous contract

The text rule is inapplicable where the evidence of the opposing party did not tend to vary or contradict the contract—Anderson v. Mollitor, 193 N.W. 851, 223 Mich. 159.

93. Ill.—Crystal Lake Park Dist. v. Consumers' Co., 145 N.E. 215, 313 Ill. 395—Pridmore v. Whiting Corporation, 268 Ill.App. 592—Goddard Tool Co. v. Crown Electrical Mfg. Co., 219 Ill.App. 34.
Minn.—Prevey v. Watzke, 234 N.W. 470, 182 Minn. 332.
Mo.—Vitale v. Biando, App., 52 S.W.2d 24, certiorari quashed State ex rel. Biando v. Haid, Sup., 60 S.W.2d 38.
Okl.—Shawnee Gas & Electric Co. v. Griffith, 222 P. 235, 96 Okl. 261.
Tex.—Petroleum Producers Co. v. Stolley, Civ.App., 137 S.W.2d 207, error dismissed, judgment correct—Rhodes v. Panhandle & S. F. Ry. Co., Civ.App., 243 S.W. 516.
22 C.J. p 198 note 26.

Evidence held inadmissible

(1) In government's condemnation proceeding in which, after landowners failed to introduce lease with their tenants, government offered such lease in evidence, testimony of expert offered by landowners in rebuttal to prove greater rental value than lease reserved was properly rejected—Loughran v. U. S., 64 F.2d 555, 62 App.D.C. 57.

(2) In will contest, testimony of proponent's witness in answer to proper question whether testator was of sound mind did not make contestant's testimony concerning testator's competence to make will admissible.—Camp v. Dobson, 152 So. 38, 228 Ala. 32.

(3) Other cases see Kesner v. Consumers' Co., 239 Ill.App. 92.

94. Ala.—Sloss-Scheffield Steel & Iron Co. v. Gardner, 85 So. 40, 17 Ala.App. 363.
22 C.J. p 198 note 27.

95. Ga.—Stone v. Tallulah Falls, 62 S.E. 592, 131 Ga. 452.

96. Ala.—Tea Java Coffee Co. v. Saxon China Co., 91 So. 885, 207 Ala. 33.
Cal.—Keller v. Cleaver, 67 P.2d 131, 20 Cal.App.2d 364—White v. Cascade Oil Co., 58 P.2d 994, 14 Cal.App.2d 695.
Mass.—Smith v. Burrill, 131 Mass. 92.
Mich.—Rucklich v. American Car & Foundry Co., 188 N.W. 440, 443, 218 Mich. 561, citing **Corpus Juris**—Ward v. Cook, 122 N.W. 785, 158 Mich. 283.
Wis.—Wittenberg v. Lehman, 250 N.W. 756, 213 Wis. 7.
22 C.J. p 198 note 29.

Document admissible only for certain purposes

Where counsel has conceded of record that a document is admissible only for certain purposes, such document, when attempted to be introduced for other purposes, is inadmissible, particularly when its admission would raise an inference unfavorable to the adverse party pred-

title the other party to introduce like evidence.[97]

On the other hand, the fact that a party has succeeded in preventing the admission of certain evidence does not render dissimilar evidence inadmissible.[98] Thus, the exclusion of a question as to what the bargain was in regard to goods sold under written contract does not preclude the admission of testimony as to representations made at and before the signing of the contract.[99]

VII. UNSWORN STATEMENTS

A. HEARSAY

§ 192. Definition

Evidence is hearsay when its probative force depends on the competency and credibility of some person other than the witness.

Evidence is called hearsay when its probative force depends, in whole or in part, on the competency and credibility of some person other than the witness by whom it is sought to produce it.[1]

§ 193. Rule Excluding Hearsay

Subject to certain exceptions, the courts will not receive testimony of a witness as to what some other person told him, as evidence of the existence of the fact asserted.

The courts will not receive the testimony of a witness as to what some other person told him, as evidence of the existence of the fact asserted.[2] The

icated on failure to introduce the document.—Sickmund v. Connecticut Co., 189 A. 876, 122 Conn 375.

97. Mo.—Jones v. Werthan Bag Co., 254 S.W. 4, 11, quoting **Corpus Juris.**
22 C J. p 198 note 20.

98. Idaho.—Schwarz v. Taeger, 258 P. 1082, 44 Idaho 625

99. Wis.—Plano Mfg. Co. v. Bergmann, 78 N.W. 157, 102 Wis. 21.

1. Ark.—Arkansas Power & Light Co. v. Orr, 298 S.W 1029, 1030, 175 Ark. 246, quoting **Corpus Juris.**
N C.—Greene v. Carroll, 171 S.E. 627, 628, 205 N.C. 459—Young v. Stewart, 131 S E. 735, 191 N.C. 297.
N.D.—Northwestern Nat. Bank of Minneapolis, Minn. v. Howlett, 247 N W 57, 58, 63 N D 163.
S.D.—Clendennen v. Bainbridge, 187 N W. 727, 728, 45 S.D. 410.
Tex.—Taylor v. McLennan County, Civ.App., 120 S.W.2d 134, 137, citing **Corpus Juris**—Texas Employers' Ins. Ass'n v. Ritchie, Civ.App., 75 S.W.2d 942, 944, error dismissed, quoting **Corpus Juris.**
Wash.—Moen v. Chestnut, 113 P.2d 1030
22 C.J. p 199 note 35.

Corpus Juris quoted for the definition of hearsay evidence in a case involving a criminal prosecution.—Terry v. U. S., C.C.A.Va., 51 F.2d 49, 52.
Hearsay evidence in criminal prosecutions see Criminal Law §§ 718–729.

Other definitions
(1) "The testimony of a witness relative to the declaration of another for the purpose of proving the facts asserted by the declarant."—Griffith v. Thrall, Ind.App., 29 N.E. 2d 345, 351.

(2) "That kind of statement which does not admit of testing by cross-examination."—Jennings v. U. S., C. C.A.Ga., 73 F.2d 470, 473.

(3) "Statements which are not made in court under sanctity of oath"—Rudisill v. Cordes, 5 A.2d 217, 219, 333 Pa. 544.

(4) Further definitions.—People v. Kraft, 36 N.Y.S. 1034, 1035, 91 Hun 474, 11 N.Y.Cr. 39, 72 N.Y.St. 436, affirmed 43 N.E. 80, 148 N.Y. 631, 12 N.Y.Cr. 69.

2. U.S.—Baltimore American Ins. Co. of New York v. Pecos Mercantile Co., C.C A.N.M., 122 F.2d 143—Krug v. Mutual Ben. Health & Accident Ass'n, C.C.A Mo., 120 F.2d 296—McVeigh v. McGurren, C C.A.Ill., 117 F.2d 672, certiorari denied McGurren v. McVeigh, 61 S.Ct. 960—Roberts v. Metropolitan Life Ins. Co., C.C.A.Ill., 94 F.2d 277, certiorari denied 58 S.Ct. 764, 303 U.S. 660, 82 L Ed. 1119—Smith v. Metropolitan Life Ins. Co., C.C. A Ill., 94 F.2d 277, certiorari denied 58 S.Ct. 1039, 304 U.S. 570, 82 L.Ed. 1535—New York Life Ins Co. v. Bacalis, C.C.A.Fla., 94 F.2d 200—Royal Ins Co. v. Eastham, C. C A Ala., 71 F.2d 385, certiorari denied 55 S Ct. 110, 293 U.S. 557, 79 L Ed. 658—New England Newspaper Pub. Co v. Bonner, C.C.A. Mass., 68 F.2d 880, certiorari denied 54 S.Ct. 630, 292 U.S. 625, 78 L.Ed. 1480, and Bonner v. New England Newspaper Pub. Co., 54 S. Ct. 631, 292 U.S. 625, 78 L.Ed. 1480—In re Glassberg, D.C.N.Y., 59 F. 2d 209—Thomson Mach Co. v. Sternberg, D.C.Ill., 55 F.2d 715—Globe Indemnity Co. v. McAvoy Co., C.C.A.Ill., 41 F.2d 122, certiorari denied McAvoy Co. v. Globe Indemnity Co., 51 S.Ct. 87, 282 U.S. 884, 75 L.Ed. 780—McCandless v. U. S. ex rel. Chila, C.C.A.Pa., 37 F.2d 575—Kling v. McCabe, C.C.A. Iowa, 36 F.2d 337—Cudahy Packing Co. v. City of Omaha, C.C.A. Neb., 24 F.2d 3, certiorari denied 49 S.Ct. 9, 278 U S. 601, 73 L.Ed. 530—U. S. v. Packard Sedan, D.C. Fla., 23 F.2d 865—Great Southern Lumber Co. v. Williams, C C.A La., 17 F.2d 468, reversing, D.C., Williams v. Great Southern Lumber Co., 13 F.2d 246, and certiorari granted 48 S.Ct. 19, 275 U.S. 511, 72 L.Ed. 399, affirmed 48 S.Ct. 417, 277 U.S. 19, 72 L Ed. 761—Wheeler & Motter Mercantile Co. v. Lamerton, C.C A.Okl., 8 F.2d 957, 44 A. L.R. 769—The Hurricane, D.C.Pa., 2 F.2d 70, affirmed, C.C.A., 9 F.2d 396—U. S. v. McCreary, C C.A.Or., 105 F 2d 297, reversing, D.C., McCreary v. U. S., 23 F.Supp. 385—Manley v. Northumberland County, D.C.Pa., 32 F.Supp. 775—J. Lichtman & Sons v. Dollar S. S. Line, D.C.N.Y., 13 F.Supp 717, affirmed, C.C.A., 91 F.2d 1015—In re Scheffler, D.C.N.Y., 2 F.Supp. 221, affirming 1 F.Supp. 582, reversed on other grounds, C.C.A., 68 F.2d 902—H. F. Dangberg Land & Livestock Co v. Day, Cal., 247 F. 477, 159 C.C.A. 531—Pendleton v. U. S. & Venezuela Co., N.Y., 145 F. 508, 76 C.C.A. 186.
Ala.—Southern Home Ins. Co. of the Carolinas v. Boatwright, 176 So. 460, 234 Ala. 668—First Nat. Bank v. Lartigue, 173 So. 21, 233 Ala. 670—National Union Fire Ins. Co. v. Griffith, 127 So. 812, 221 Ala. 112—Morgan Hill Paving Co. v. Pratt City Sav. Bank, 127 So. 500, 220 Ala. 683, followed in 127 So. 502, 220 Ala. 686—Holman v. Latady, Andrews & Co., 124 So. 284, 220 Ala. 112—Barksdale v. Strickland & Hazard, 124 So. 234, 220 Ala. 86—Lynch Jewelry Co. v. Bass, 124 So. 222, 220 Ala. 96—Moore v. Holroyd, 122 So. 349, 219 Ala. 392—Sovereign Camp, W. O. W., v. Colvin, 119 So. 635, 218 Ala.

rule of exclusion is the same whether the evidence | offered consists of a statement purporting to be based

616—Alabama Fuel & Iron Co. v. Adams, Rowe & Norman, 113 So. 265, 216 Ala 403—Veal v. Conn, 109 So. 754, 215 Ala. 90—Brittain v. Vickers, 96 So. 438, 209 Ala. 391—Davis v. Smitherman, 96 So 208, 209 Ala. 244—Bice v. Steverson, 88 So. 753, 205 Ala. 576—Harden v. Bradley, 88 So. 432, 205 Ala. 487—Jackson v. Vaughn, 86 So. 469, 204 Ala. 543—Mixon v. Pennington, 85 So. 562, 204 Ala. 347—Garnett v. Pierce, 85 So. 510, 204 Ala. 186—American Nat. Ins. Co. v. Hammett, 163 So. 461, 26 Ala App 552—Industrial Sav. Bank v. Mitchell, 140 So. 449, 25 Ala.App 13, certiorari denied 140 So. 452, 224 Ala. 335—National Life & Accident Ins. Co. v. Hannon, 118 So. 170, 22 Ala. App. 483, certiorari denied 118 So. 172, 218 Ala. 174.

Alaska.—Alaskan Airways v. Wien, 8 Alaska 179.

Ariz.—Inspiration Consol. Copper Co. v. Bryan, 252 P. 1012, 31 Ariz. 302—Willows Cattle Co. v. Connell, 220 P. 1082, 25 Ariz. 592.

Ark.—Brooks v Bale Chevrolet Co., 127 S.W.2d 135, 193 Ark. 17—General Motors Acceptance Corporation v. Jerry, 27 S.W.2d 997, 181 Ark. 771—Dyer v. Continental Jewelry Co., 10 S.W.2d 1, 178 Ark. 1199—Arkansas Power & Light Co. v. Orr, 298 S.W. 1029, 1031, 175 Ark. 246, quoting **Corpus Juris** Spencer v. Pierce, 287 S.W. 1019, 172 Ark. 108—J. F. Beasley Lumber Co. v. Sparks, 276 S.W. 582, 169 Ark. 640—Mason v. Mason, 267 S.W. 772, 167 Ark. 304—State Nat. Bank of Texarkana v. Birmingham, 266 S.W. 76, 166 Ark. 446—Parker v. Twist, 234 S.W 624, 150 Ark. 448—Forrester v. Locke, 231 S.W. 897, 149 Ark. 225—Tipler-Grossman Lumber Co. v. Forrest City Box Co., 229 S.W. 17, 148 Ark. 132.

Cal.—In re Gaines' Estate, 100 P.2d 1055, 15 Cal.2d 255, superseding 92 P.2d 646—Commercial Union Assur Co. v. Pacific Gas & Electric Co., 31 P.2d 793, 220 Cal. 515—Hermance v. Blackburr, 275 P. 783, 206 Cal. 653—Bridge v Ruggles, 260 P. 553, 202 Cal. 326—San Francisco Bar Ass'n v. Oppenheim, 198 P. 1069, 186 Cal. 75—Bituminized Brick & Tile Co. v. Simons Brick Co., 192 P. 528, 183 Cal. 687—Stevens v. Chisholm, 178 P. 128, 179 Cal 557—Irwin v. Brown, App., 115 P.2d 601—Bartholomai v. Owl Drug Co., App., 108 P.2d 36—Hoffart v. Southern Pac. Co., 92 P.2d 436, 33 Cal.App.2d 591—Barsha v. Metro-Goldwyn-Mayer, 90 P.2d 371, 32 Cal.App.2d 556—Evinger v. MacDougall, 82 P.2d 194, 28 Cal.App. 2d 175—Wills v. Price, 79 P 2d 406, 26 Cal.App.2d 338—Masters v. Board of Dental Examiners of California, 59 P.2d 827, 15 Cal.App.2d 506—Howland v. Doyle, 44 P.2d 453, 6 Cal.App 2d 311—Kimbles v. Kelly, 43 P.2d 871, 6 Cal App.2d 91—Smith v Kiger, 43 P.2d 565, 5 Cal.App.2d 608—McDanels v. General Ins. Co. of America, 36 P. 2d 829, 1 Cal.App.2d 454—In re Horton's Estate, 17 P.2d 184, 128 Cal.App. 249—Nishi v. Inoguchi, 2 P.2d 864, 116 Cal App. 398—Dohrman v J. B. Roof, Inc., 291 P. 879, 108 Cal.App. 456—Ringland v. Hockensmith, 277 P. 902, 99 Cal. App. 66—Bailey v. James, 272 P. 339, 95 Cal.App 12—Leffingwell v. Faubion, 264 P. 306, 89 Cal.App. 157—Miller v. Murphy, 248 P 934, 78 Cal.App. 751—Garrison v. Pearlstein, 229 P. 348, 68 Cal.App 326—In re Holt's Estate, 215 P. 124, 61 Cal App 464—Mohn v. Sumner, 191 P. 991, 48 Cal.App. 314—Watterson v. Owens River Canal Co, 183 P. 816, 42 Cal.App 372.

Colo.—Stone v. Union Fire Ins. Co., 107 P 2d 241, 106 Colo 522—Shockley v. Hill, 15 P.2d 623, 91 Colo. 451.

Conn.—Warner v Warner, 1 A.2d 911, 124 Conn. 625, 118 A.L.R. 1348—Filosi v. Crossman, 149 A. 774, 111 Conn 178—Davis v. Solomon, 126 A. 724, 101 Conn. 465—Driver-Harris Co. v. Charles F. Kenworthy, Inc., 124 A. 808, 100 Conn. 719—Antel v. Poli, 123 A. 272, 100 Conn. 64—Richmond v. City of Norwich, 115 A. 11, 96 Conn. 582—Jacobs v. Jacobs, 110 A. 455, 95 Conn. 57.

Del.—South Atlantic S. S. Co. of Delaware v. Munkacsy, 187 A. 600, 7 W.W.Harr. 580, certiorari denied 57 S.Ct. 233, 299 U.S 607, 81 L.Ed. 448

D.C.—Tri-State Broadcasting Co. v. Federal Communications Commission, 96 F.2d 564, 68 App.D.C. 292—Sundberg v. Schmitt, 29 F.2d 880, 58 App D.C. 292—Murphy v. New York & Cuba Mail S. S. Co., 273 F. 305, 50 App.D.C 341—Holley v. Smalley, 269 F. 694, 50 App.D.C. 178.

Fla.—Florida Power & Light Co. v. Bridgeman, 182 So. 911, 133 Fla. 195.

Ga.—Miller v. Everett, 14 S.E.2d 449—Garner v. Wood, 4 S.E 2d 137, 188 Ga. 463—Higgins v. Trentham 197 S.E. 862, 186 Ga. 264—Peretzman v. Simon, 196 S.E 471, 185 Ga. 681—McWilliam v. Pattillo, 161 S.E. 597, 173 Ga. 771—Mitchell v. Gunter, 152 S.E. 466, 170 Ga. 135—May v. Leverette, 139 S.E. 31, 164 Ga. 552—Wyche v. Bank of Campbell County, 130 S.E. 566, 161 Ga. 329—Chedel v. Mooney, 123 S.E. 300, 158 Ga. 297—First Nat. Bank v. City of Sparta, 114 S.E. 221, 154 Ga. 25—Estill v Citizens' & Southern Bank, 113 S.E. 552, 153 Ga. 618—Mays v. Mays, 113 S.E. 154, 153 Ga. 835—Bibb County v. Williams, 110 S.E. 275, 152 Ga. 489—Wilkes v. Folsom, 106 S.E. 98, 151 Ga. 165—Pitner v. Shugart Bros, 103 S.E. 791, 150 Ga 340, 11 A.L.R. 1399—Alabama Great Southern R. Co. v. McBryar, App., 15 S.E.2d 563—Conoly v. Imperial Tobacco Co., 12 S.E 2d 398, 63 Ga App. 880—Buena Vista Loan & Savings Bank v. Stockdale, 2 S.E 2d 158, 59 Ga.App. 798—Home Ins. Co. of New York v. Montgomery, 200 S.E. 168, 59 Ga.App. 173—Williamson-Inman & Co. v Thompson, 187 S.E. 194, 53 Ga App. 821—Milam v. Lewis, 170 S.E. 404, 47 Ga.App. 376—J. H. Phipps Lumber Co. v. Albany Hardware & Mill Supply Co., 157 S.E 702, 42 Ga App. 820—Campbell v. Dysard Const. Co., 149 S.E. 713, 40 Ga App. 328—Jenkins v. Best Trading Co, 146 S.E. 512, 39 Ga.App. 214—Walton County Bank v Stanton, 144 S.E 815, 38 Ga.App. 591, affirmed Stanton v. Walton County Bank, 149 S.E 573, 169 Ga 40—Bruce v. Brown, 129 S.E. 118, 34 Ga.App. 240—Linenkohl v. Curington, 124 S.E 365, 32 Ga App 616—Taff v Larey, 116 S.E. 866, 29 Ga App. 631—Folds v. New York Life Ins. Co., 108 S.E. 627, 27 Ga.App. 435

Ill.—Eschmann v Cavi, 192 N.E. 226, 357 Ill. 379—Dausch v. Barker, 160 N.E. 765, 329 Ill. 410—Joyce-Watkins Co v. Industrial Commission, 156 N.E. 346, 325 Ill. 378—Cook v. Korshak, 134 N.E 49, 301 Ill. 603, reversing 221 Ill.App. 650—Luthy & Co. v. Paradis, 132 N.E. 556, 299 Ill. 380—Panozzo v. City of Rockford, 28 N.E.2d 748, 306 Ill.App. 443—In re Wright's Estate, 25 N.E. 2d 909, 304 Ill App. 87—Sheets v. Security First Mortg. Co., 12 N.E. 2d 324, 293 Ill.App. 222—Gordon Motor Finance Co. v. Ætna Acceptance Co., 261 Ill.App. 536—Acme Waste Paper Co. v. U. S. Paper Supply Co., 233 Ill.App. 262—Cooper v. Illinois Publishing & Printing Co., 218 Ill.App. 95—Feulner v. Gillam, 211 Ill.App 348.

Ind.—Kelley v Dickerson, 13 N.E.2d 535, 213 Ind. 624—Red Cab v. White, 12 N.E.2d 356, 213 Ind. 269—Kreager v. Kreager, 135 N.E. 660, 192 Ind. 242—C. F Turner Coal Co. v. Collins, 162 N.E. 415, 87 Ind. App. 667—Indiana Bell Telephone Co. v. Haufe, 144 N.E. 844, 845, 81 Ind.App. 660, citing **Corpus Juris**—Snyder v. Snyder, 131 N.E. 248, 76 Ind App. 9—Johnson v. Brady, 126 N.E. 250, 77 Ind.App. 177.

Iowa.—Mitchell v. Montgomery Ward & Co., 285 N.W 187, 226 Iowa 956—Grimes Sav. Bank v. McHarg, 276 N.W. 781, 224 Iowa 644—McGlothlen v. Mills, 265 N.W. 117, 221

Iowa 204—McQueen v. Safeway Stores, 244 N.W. 278, 214 Iowa 1300—Bailey v. Cherokee State Bank of Cherokee, 227 N.W. 129, 208 Iowa 1265—Gruetzmacher v. Quevli, 226 N.W. 5, 208 Iowa 537—Buckley v. Ebendorf, 216 N.W. 20, 204 Iowa 896—Perry v. Perry, 202 N.W. 572, 199 Iowa 685—First Nat. Bank v. Sarvey, 198 N.W. 496, 198 Iowa 1067—Albaugh v. Shrope, 196 N.W. 743, 197 Iowa 844—Miller Grocery Co. v. City of Des Moines, 192 N.W. 306, 195 Iowa 1310, 28 A.L.R 815—Richardson v. Cheshire, 188 N.W. 146, 193 Iowa 930—Polk County v. Owen, 174 N.W. 99, 187 Iowa 220.

Kan.—Jones v. Gill, 66 P.2d 1033, 145 Kan. 482—Schroth v. Bardrick, 186 P. 749, 106 Kan. 154.

Ky.—Moorman Mfg. Co. v. Harris, 134 S.W.2d 936, 280 Ky. 845—Davis v. Bennett's Adm'r, 132 S.W.2d 334, 279 Ky. 799—Stringer v. Stringer, 116 S.W.2d 324, 273 Ky. 251—Commonwealth, for Use and Benefit of Eversole v. West, 27 S.W.2d 385, 261 Ky. 204—Mutual Ben. Health & Accident Ass'n v. Smith, 77 S.W.2d 957, 257 Ky. 288—Harlan Public Service Co. v. Eastern Const. Co., 71 S.W.2d 24, 254 Ky. 135—Poe v. Hankins' Adm'x, 65 S.W.2d 457, 251 Ky. 466—Hunt-Forbes Const. Co. v. Martt, 57 S.W.2d 37, 247 Ky. 376—Wright & Taylor v. Leigh, 16 S.W.2d 493, 229 Ky. 32—Asher v. Asher, 6 S.W.2d 244, 224 Ky. 300—White Const. Co. v. Brooks, 1 S.W.2d 1076, 222 Ky. 621—Brown's Adm'r v. Wilson, 1 S.W.2d 767, 768, 222 Ky. 454, citing **Corpus Juris**—Commonwealth Life Ins. Co. v. Spears, 294 S.W. 138, 219 Ky. 681—Eversole v. Chandler, 289 S.W. 215, 217 Ky. 148—Clolinger v. Callahan, 263 S.W. 700, 204 Ky. 33—Ray v. Ray, 245 S.W. 287, 196 Ky. 279.

La.—Succession of Nelson, 112 So. 298, 163 La. 458—New Orleans Ry. & Light Co. v. United States Fidelity & Guaranty Co., 82 So. 372, 145 La. 364—Dehmer v. Hemler, 131 So. 583, 15 La.App. 201.

Me.—Appeal of Look, 152 A. 84, 129 Me. 359.

Md.—Bloecher & Schaaf v. Pennsylvania R. Co., 160 A. 281, 162 Md. 463—Neavitt v. Lightner, 142 A. 109, 155 Md. 365—Buehner v. Sehlhorst, 132 A. 70, 149 Md. 474—City of Baltimore v. Terlo, 128 A. 353, 147 Md. 330—Washington, B. & A. E. R. Co. v. Faulkner, 112 A. 820, 137 Md. 451—Conservation Co. v. Stimpson, 110 A. 495, 136 Md. 314.

Mass.—City of Boston v. Santosuosso, 30 N.E.2d 278—Lynch v. Lyons, 20 N.E.2d 953, 303 Mass. 116—Hagerty v. Tyler, 4 N.E.2d 463, 295 Mass. 581—Connery v. Cass, 179 N.E. 164, 277 Mass. 545—Hub Const. Co. v. Dudley Wood Works Co., 175 N.E. 48, 274 Mass. 493—Blake v. Great Atlantic & Pacific Tea Co., 164 N.E. 486, 266 Mass. 12—Wendell v. Clark, 134 N.E. 608, 240 Mass. 562—Roberts v. U. S. Trust Co., 125 N.E. 185, 234 Mass. 224.

Mich.—Green v. Sears, Roebuck & Co., 274 N.W. 331, 280 Mich. 568—Baker v. Steketee, 255 N.W. 197, 267 Mich. 304—Van Hartesveldt v. Westrate, 250 N.W. 302, 264 Mich. 538—Domzalski v. Ver Hoven, 235 N.W. 232, 253 Mich. 497—State v. Robinson, 229 N.W. 403, 250 Mich. 99—Jeffries v. Union Trust Co., 227 N.W. 684, 248 Mich. 652—Weisman v. Kuschewski, 219 N.W. 937, 243 Mich. 223—Kiesgen v. Harness, 218 N.W. 667, 242 Mich. 422—New Jersey Title Guarantee & Trust Co. v. McGrath, 214 N.W. 195, 239 Mich. 404—Michigan Grey Iron Castings Co. v. Collson, 203 N.W. 97, 230 Mich. 86—Van Allen v. Sprague, 172 N.W. 532, 206 Mich. 116.

Minn.—Neeson v. Murphy, 277 N.W. 916, 202 Minn. 234—O'Connor v. Chicago, M., St. P. & P. Ry. Co., 251 N.W. 674, 190 Minn. 277, followed in 253 N.W. 670, 190 Minn. 290, certiorari denied Chicago, M., St. P. & P. R. Co. v. O'Connor, 54 S.Ct. 860, 292 P.S. 651, 78 L.Ed. 1500—Kallusch v. Kavli, 240 N.W. 108, 185 Minn. 3—Dell v. Marckel, 238 N.W. 1, 184 Minn. 147—Longman v. Anderson, 199 N.W. 742, 160 Minn. 15.

Miss.—Citizens Bank of Coldwater v. Callicott, 174 So. 78, 178 Miss. 747—Life & Casualty Co. of Tennessee v. Nix, 158 So. 797, 172 Miss. 91—Standard Coffee Co. v. Carr, 157 So. 685, 171 Miss. 714—McRae v. Robinson, 110 So. 504, 145 Miss. 191—Union & Planters' Bank & Trust Co. v. Rylee, 94 So. 796, 130 Miss. 892.

Mo.—State ex rel. Metropolitan Life Ins. Co. v. Shain, 121 S.W.2d 789, 343 Mo. 435, quashing certiorari Bailey v. Metropolitan Life Ins. Co., App., 115 S.W.2d 151—Bello v. Stuever, 44 S.W.2d 619—Leimkuehler v. Wessendorf, 18 S.W.2d 445, 323 Mo. 64—Baker v. Keet-Rountree Dry Goods Co., 2 S.W.2d 733, 318 Mo. 969, rehearing denied 3 S.W.2d 1003, 318 Mo. 969—Exter v. Kramer, 291 S.W. 469, 316 Mo. 762—Denkman v. Prudential Fixture Co., 289 S.W. 591—Enright v. Hale Petroleum Co., 250 S.W. 908—McFarland v. Bishop, 222 S.W. 143, 282 Mo. 524—Fountain v. Starbuck, 209 S.W. 900—State v. School Dist. No. 118, App., 48 S.W.2d 135—Bacon Piano Co. v. Medcalf Jewelry & Music Co., 40 S.W.2d 762, 225 Mo.App. 463—White v. Hasburgh, App., 124 S.W.2d 560—Kansas City Wholesale Grocery Co. v. H. T. Poindexter & Sons Merchandise Co., 107 S.W.2d 841, 232 Mo.App. 378—White v. McCoy Land Co., App., 101 S.W.2d 763, affirmed White v. Scarritt, 111 S.W.2d 18, 341 Mo. 1004—Gore v. Whitmore Hotel Co., 83 S.W.2d 114, 229 Mo.App. 910—Waeckerley v. Colonial Baking Co., 67 S.W.2d 779, 228 Mo.App. 1185—Fesler v. Hunter, App., 35 S.W.2d 641—Bragg v. Specialty Shoe Machinery Co., 34 S.W.2d 184, 225 Mo.App. 902—Lewellen v. Haynie, App., 25 S.W.2d 499—McKelvey v. Marquette Iron & Steel Co., App., 24 S.W.2d 702—Karst v. Chicago Fraternal Life Ass'n, App., 22 S.W.2d 178—Ward v. Western Union Telegraph Co., 22 S.W.2d 81, 224 Mo.App. 16, opinion quashed on other grounds State ex rel. Ward v. Trimble, 39 S.W.2d 372, 327 Mo. 773—Dickey v. Supreme Tribe of Ben Hur, 269 S.W. 633, 218 Mo.App. 281—Gorin Sav. Bank v. Early, App., 260 S.W. 480—Krause v. Spurgeon, App., 256 S.W. 1072—Williams v. Gideon-Anderson Lumber Co., App., 224 S.W. 51—Zaring v. Bauman, App., 223 S.W. 947—Mathewson v. Larson-Myers Co., App., 217 S.W. 609—Sparks v. Harvey, App., 214 S.W. 249—Tate v. St. Louis & S. W. Ry. Co., 209 S.W. 978, 201 Mo.App. 212.

Mont.—Welch v. Thomas, 61 P.2d 404, 102 Mont. 591—Simpson v. Miller, 34 P.2d 528, 97 Mont. 328—Downey v. Northern Pac. Ry. Co., 232 P. 531, 72 Mont. 166—Green v. Baker, 214 P. 88, 66 Mont. 568—Grant v. Nihill, 210 P. 914, 64 Mont. 420—First Nat. Bank v. Middleton, 201 P. 683, 61 Mont. 209.

Neb.—Martin v. Sanford, 261 N.W. 136, 129 Neb. 212, 100 A.L.R. 179—Daly v. Publix Cars, 259 N.W. 163, 128 Neb. 403—Toliver v. Rostin, 232 N.W. 616, 120 Neb. 663—Haecker v. Haecker, 204 N.W. 72, 113 Neb. 587.

N.H.—Daniels v. Barker, 200 A. 410, 89 N.H. 416—Christie v. New England Telephone & Telegraph Co., 177 A. 300, 87 N.H. 236—Caplan v. Caplan, 142 A. 121, 83 N.H. 318—Doe v. Lucy, 139 A. 750, 83 N.H. 160—Adams v. Strain, 113 A. 209, 80 N.H. 90—Boulanger v. McQuestin & Lewis, 106 A. 492, 79 N.H. 175.

N.J.—MacGregor v. Martin, 20 A.2d 427, 126 N.J.Law 492—Pillsbury Flour Mills Co. v. Stone, 140 A. 277, 104 N.J.Law 405—Homan v. Griffin, 110 A. 825, 94 N.J.Law 345—Koch v. Franklin Mortgage & Title Guaranty Co., 176 A. 723, 13 N.J.Misc. 139, affirmed 181 A. 219, 115 N.J.Law 562—Ewart v. Johnson, 166 A. 716, 11 N.J.Misc. 472—Citrin v. Tansey, 147 A. 884, 7 N.J.Misc. 881, affirmed 153 A. 523, 107 N.J.Law 368—Leary v. West Jersey & S. R. Co., 146 A. 359, 1 N.J.Misc. 549—Horton v. Horton, 130 A. 24, 2 N.J.Misc. 683.

N.M.—M. J. O'Fallon Supply Co. v. Tagliaferro, 224 P. 394, 29 N.M.

562—Bezemek v. Balduini, 207 P. 330, 28 N.M. 124.

N.Y.—Mazukiewicz v. Hanover Nat. Bank of City of New York, 148 N. E. 535, 240 N Y. 317, reversing 205 N.Y.S. 278, 209 App.Div. 674, which affirmed 203 N.Y.S. 526, 122 Misc. 290, and reargument denied 150 N. E. 530, 241 N.Y. 504—Moore v. Rosenmond, 144 N.E. 639, 238 N. Y. 356, reversing 201 N Y.S. 926, 207 App.Div. 839—U. S. ex rel. Matthews v. Massachusetts Bonding & Insurance Co., 144 N.E. 631, 238 N.Y. 334, reversing 202 N.Y.S. 867, 207 App.Div. 619, and reargument denied 147 N.E. 172, 239 N.Y. 507—Shuttleworth v. Shuttleworth, 7 N Y.S.2d 828, 255 App.Div. 440—Jean v. Algonquin Hotel Co, 7 N. Y.S.2d 412, 255 App.Div. 279—Kupfer v. Brooklyn Daily Eagle, 293 N Y S. 186, 250 App Div. 19—Kambesel v. Oldman, 276 N.Y.S. 170, 243 App Div. 575—Robinson v. Zappas, 237 N.Y.S. 235, 227 App. Div. 208—Saxton v. Yannuzzi, 224 N.Y.S. 209, 221 App.Div. 817—Weingarten v. Hartford Fire Ins. Co., Hartford, Conn., 220 N.Y.S. 369, 219 App.Div. 560—Blaustein v. Pan American Petroleum & Transport Co., 21 N.Y S.2d 651, 174 Misc. 601—In re Hutchins' Estate, 257 N.Y.S. 94, 143 Misc. 618—Liberty Lace & Netting Works v. Goetz, 184 N.Y.S. 470.

N.C.—Hester v. Horton Motor Lines, 14 S E.2d 794, 219 N.C. 743—Brown v. Montgomery Ward & Co., 8 S. E.2d 199, 217 N.C. 368—Martin v. Cress, 188 S.E. 316, 210 N.C. 776—In re Barker, 188 S E. 205, 210 N. C. 617—Jackson v. Scheiber, 184 S.E. 17, 209 N.C. 441—High Point Savings & Trust Co v. Blackwelder, 183 S.E. 271, 209 N.C. 252—Mason v. Texas Co, 175 S.E. 291, 206 N.C. 805—Moye v. Town of Greenville, 165 S.E. 695, 203 N.C. 259—Young v. Stewart, 131 S.E. 735, 191 N.C. 297—Carpenter v. Asheville Power & Light Co., 131 S.E. 400, 191 N.C. 130—Pangle v. Appalachian Hall, 131 S.E. 42, 190 N.C. 833—Nance v. Norfolk Southern R. Co., 127 S.E. 635, 189 N.C. 638—Brown v. Town of Hillsboro, 117 S.E. 41, 185 N C. 368—State v. Springs, 114 S.E. 851, 184 N.C. 768.

N.D.—Hart v. Rigler, 295 N.W. 308—Hunder v. Rindlaub, 237 N.W. 915, 924, 61 N.D. 389, citing **Corpus Juris**—Kutchera v. Minneapolis, St. P. & S. S. M. Ry. Co., 212 N.W. 51, 54 N.D. 897—Bryngelson v. Farmers' Grain Co., 210 N.W. 19, 54 N. D. 543—Embden State Bank v. Schulze, 201 N.W. 687, 51 N.D. 946.

Ohio.—Lakeside Hospital v. Kovar, 2 N.E.2d 857, 131 Ohio St. 333—Windermere Savings & Loan Co. v. Cleveland Citizens' Pub. Co., 159 N.E. 127, 26 Ohio App. 213—A. F. Waite Taxi & Livery Co. v. McGrew, 16 Ohio App. 219—Farmers' Nat. Bank of Springfield, Ohio, v. Frazier, 13 Ohio App. 245.

Okl.—Sears, Roebuck & Co. v. Robinson, 80 P.2d 938, 183 Okl. 253—Wrightsman Petroleum Co. v. Schwartz, 10 P 2d 695, 157 Okl. 22—Roy v. St. Louis-San Francisco Ry. Co., 4 P.2d 1038, 153 Okl. 270—Howard v. Reeling, 251 P. 495, 122 Okl. 101—Pierce Oil Corporation v. Myers, 245 P. 863, 117 Okl. 161—Incorporated Town of Sallisaw v. Wells, 216 P. 118, 90 Okl. 78.

Or.—Tate v. Emery, 9 P.2d 136, 139 Or. 214—Mumper v. Webster, 3 P. 2d 753, 137 Or. 554, 82 A.L.R. 822—Coles v. Harsch, 276 P. 248, 129 Or. 11—Wallace v. American Life Ins. Co. of Des Moines, Iowa, 225 P. 192, 227 P. 465, 111 Or. 510—Schneider v. Tapfer, 180 P. 107, 92 Or. 520.

Pa.—Orluske v. Nash Pittsburgh Motors Co., 133 A. 148, 286 Pa. 170—Brighenti v. Steiner, 113 A. 690, 270 Pa. 532—Commonwealth v. Smith, 109 A. 786, 266 Pa. 511, 9 A. L.R. 922—Eddyside Co. v. Seibel, 15 A.2d 691, 142 Pa.Super. 174—Maglin v. Peoples City Bank, 14 A.2d 827, 141 Pa.Super. 329—In re Ryman, 11 A.2d 677, 139 Pa Super. 212—Collins v. Home Ins. Co. of New York, 167 A. 621, 110 Pa.Super 72, followed in Collins v. Phoenix Ins. Co. of Hartford, Conn., 167 A. 626, 110 Pa.Super. 83.

Philippine—Cruz v. Joaquin, 2 Philippine 503.

R I.—Cabana v. Olivo, 192 A. 302, 58 R.I. 252—Kavanaugh v Paull, 177 A. 352, 55 R.I. 41—Ash v. Ash, 144 A. 437, 50 R.I. 1.

S C.—Haselden v. Standard Mut. Life Ass'n, 1 S E.2d 924, 190 S C. 1—Leppard v. Southern Ry. Co., 177 S.E. 129, 174 S.C 237—Goethe v. Browning, 143 S.E. 362, 146 S.C 7—Peurifoy v. Little, 143 S.E. 262, 146 S.C. 1—Jones v. Charleston & W. C. Ry. Co., 142 S.E. 516, 517, 144 S C. 212, citing **Corpus Juris**—Jakar v. Jakar, 102 S.E. 337, 113 S.C. 295—State v. Pacific Guano Co, 2 S.E. 265, 26 S.C. 610.

S.D.—Sachs v. Sachs, 283 N.W. 173, 66 S.D. 373—Security Nat. Bank of Sisseton, S. D., v. Crawford, 210 N.W. 982, 50 S.D. 561—Smith v. Olson, 208 N.W. 585, 50 S.D. 81—Spiry v. Spiry, 199 N.W. 778, 47 S.D. 500—Ellwein v. Town of Roscoe, 174 N.W. 748, 42 S.D. 298.

Tenn.—Nelson v. Rural Educational Ass'n, 134 S.W.2d 181, 23 Tenn. App. 409—Mutual Ben. Health & Accident Ass'n v. Houston, 124 S. W.2d 722, 22 Tenn.App. 570—Hoover Lines v. Whitaker, 120 S.W.2d 983, 22 Tenn.App. 223.

Tex.—Stockwell v. Snyder, 84 S.W.2d 705, 126 Tex. 6, reversing, Civ.App., 51 S.W.2d 812—Colbert v. Dallas Joint Stock Land Bank, Com.App., 150 S.W.2d 771, reversing Dallas Joint Stock Land Bank v. Colbert, Civ.App., 127 S.W.2d 1004—Lawrie v. Miller, Com.App., 45 S.W.2d 172, reversing Miller v. Lowrie, Civ. App., 25 S.W.2d 984—Colonial Trust Co. v. Hill County, Com. App., 27 S.W.2d 144, reversing Hill County v. Colonial Trust Co., Civ. App., 18 S.W.2d 787—Houston Oxygen Co. v. Davis, Civ.App., 145 S. W.2d 300, error granted—Landers v. Overaker, Civ.App., 141 S.W.2d 451, error dismissed, judgment correct—Davis v. Roach, Civ.App., 138 S W.2d 268, error dismissed, judgment correct—A. B. C. Storage & Moving Co. v. Herron, Civ.App., 138 S W.2d 211, error dismissed, judgment correct—Fenner & Beane v. Tatum, Civ.App., 129 S.W.2d 490—Clark v. West, Civ.App., 126 S. W.2d 569, reversed on other grounds, Aetna Casualty & Surety Co. v. Clark, Com.App., 150 S.W.2d 78—Taylor v. McLennan County, Civ.App., 120 S W.2d 134, 137, citing **Corpus Juris**—Lewis v. J. P. Word Transfer Co., Civ.App., 119 S.W.2d 106, error refused—Ibanez v. State, Civ.App., 118 S.W.2d 405—Traders & General Ins. Co. v. Burns, Civ.App., 118 S.W.2d 391—Sneed v. Ellison, Civ.App., 116 S. W.2d 864, error dismissed—Commercial Standard Ins. Co. v. Billings, Civ.App., 114 S.W.2d 709, error dismissed—Thames v. Culwell Packing Co., Civ.App., 114 S.W.2d 664—Bristow v. City Inv. Co., Civ. App., 110 S.W.2d 1222, error dismissed—General Exchange Ins. Corporation v. Collins, Civ.App., 110 S.W.2d 127—Frost v. Crockett, Civ App., 109 S.W 2d 529, error dismissed—Williams v. Williams, Civ. App, 108 S.W.2d 297—Richardson v. Watson, Civ.App., 105 S.W.2d 473, error dismissed—Southwest Gas Co. v. Doney, Civ.App., 99 S. W.2d 1107, error dismissed—Patton v. Powell, Civ.App., 93 S.W.2d 800, error dismissed—Lone Star Mut. Life Ass'n v. Klander, Civ. App., 92 S.W.2d 514—Brodt v. Brodt, Civ.App., 91 S.W.2d 837, error dismissed—Fireman's Ins. Co. of Newark, N. J., v. Universal Credit Co., Civ.App., 85 S.W.2d 1061—Texas General Utilities Co. v. Nixon, Civ.App., 81 S.W 2d 250, error refused—Dorsey Life Ass'n v. Sitton, Civ.App., 76 S.W.2d 550—Great Atlantic & Pacific Tea Co. v. Harris, Civ.App., 75 S.W.2d 974, error dismissed—Tinker v. Yellow Cab Co., Civ.App., 74 S.W.2d 521, error dismissed—Reynolds v. Texas Iron Works Sales Corporation, Civ.App., 72 S.W.2d 299, error dismissed—Liberty Mut. Ins. Co. v. Boggs, Civ.App., 66 S.W.2d 787, error dismissed—Sinclair Refining Co. v. Womack, Civ.App., 66 S.W. 2d 402—International Guaranty Thrift Syndicate v. Foley, Civ.App., 66 S.W.2d 346—U. S. Fidelity &

on the declarant's own knowledge but objectionable | as unsworn,[3] or of a sworn statement as to matters

Guaranty Co. v. Inman, Civ.App., 65 S.W.2d 339—Soria v. American Nat. Ins. Co., Civ.App., 57 S.W.2d 321—U. S. Fidelity & Guaranty Co. v. Henderson, Civ.App., 53 S.W.2d 811—Trice v. Bridgewater, Civ. App., 51 S.W.2d 797, modified on other grounds 81 S.W.2d 63, 125 Tex. 75, 100 A.L.R. 1014—First State Bank in Caldwell v. Stubbs, Civ.App., 48 S.W.2d 446—Daggett v. Wolff, Civ.App., 44 S.W.2d 1063—Granata v. Mothner, Civ.App., 44 S.W.2d 817—Reliance Ins. Co. v. Smith, Civ.App., 44 S.W.2d 446, affirmed, Com App., 66 S.W.2d 675—Webb-North Motor Co. v. Ross, Civ.App., 42 S.W.2d 1086, error dismissed—Dial v. Martin, Civ.App., 37 S.W.2d 166, reversed on other grounds Martin v. Dial, Com App., 57 S.W.2d 75, 89 A.L.R. 571—Hooss v. Willingham, Civ.App., 35 S.W. 2d 847, error dismissed—McCombs v. Abrams, Civ.App., 28 S.W.2d 584, affirmed, Com App., 48 S.W.2d 612—Brooks v. Kennedy, Civ App., 28 S.W.2d 214, error dismissed—Miller-Vidor Lumber Co. v. Schreiber, Civ.App., 24 S.W.2d 524, error refused—Hobart Mfg. Co v. Joyce, Civ.App., 22 S.W.2d 955—Gause-Ware Funeral Home v. McGinley, Civ.App., 21 S.W.2d 347—Donnell v. Baker, Civ.App., 15 S.W.2d 120, error dismissed—Ivey v. Neyland, Civ.App., 11 S.W.2d 608, 610, citing **Corpus Juris,** and reversed on other grounds, Com.App., 25 S.W.2d 313—Gulf, C. & S. F. Ry. Co. v. Baldwin, Civ.App., 2 S.W.2d 520—Houston Nat. Bank v. Adams, Civ. App., 295 S.W. 198, affirmed in part and reversed in part on other grounds Adams v. Houston Nat. Bank, Com.App., 1 S.W.2d 878—Butler v. Duffey, Civ.App., 288 S. W. 598—Bain Peanut Co. of Texas v. Pinson & Guyger, Civ.App., 287 S.W. 87, reversed on other grounds Bain Peanut Co. of Texas v. Pinson, Com.App., 292 S.W. 203, set aside on other grounds 294 S.W. 536—Maler v. Hill, Civ.App., 285 S.W. 638—Northern Assur. Co. v. Lawrence, Civ.App., 278 S.W. 476—Light Pub. Co. v. Keeran, 277 S.W. 759, reversed on other grounds, Com.App., 284 S.W. 917—Guaranty State Bank of Graham v. Neill, Civ.App., 275 S.W. 198—Wichita Valley Ry. Co. v. Brown, Civ.App., 274 S.W. 305—Johnson v. Cox, Civ. App, 270 S.W. 892—Chapman v. Jones, Civ.App., 268 S.W. 1119—Chapman v. Denton, Civ.App., 268 S.W. 252—San Marcos Oil Mill v. Soyars, Civ.App., 265 S.W. 173—Burchill v. Hermsmeyer, Civ.App., 262 S.W. 511—Williams v. Tyler, Civ.App., 258 S.W. 886—Moulton v. Deloach, Civ.App., 253 S.W. 303—Baker v. Pierce, Civ.App., 248 S.W. 439, reversed on other grounds, Com App., 259 S.W. 921—Mohon v. Streety, Civ App, 243 S.W. 724—Liddell v. Gordon, Civ.App, 241 S.W. 750, reversed on other grounds, Com App., 254 S W. 1098—Good v. Stansberry, Civ.App., 240 S.W. 958, dismissed for want of jurisdiction—Tippett v. Hickox, Civ.App., 238 S.W. 715, dismissed for want of jurisdiction—W. F. Norman & Sons v. Clark, Civ.App., 221 S.W. 235—Klein v. Brightwell, Civ.App., 219 S.W. 298—Grimes v. Virginia Fire & Marine Ins. Co, Civ.App., 218 S W. 810—Brooks v. Slaughter, Civ.App., 218 S.W. 632—Goree v. Uvalde Nat. Bank, Civ. App., 218 S.W. 620, dismissed for want of jurisdiction—El Paso Grain & Milling Co. v. Lawrence, Civ.App., 214 S W. 512, error refused—Western Union Telegraph Co. v. Fulton, Civ.App., 211 S.W. 285—St. Louis Southwestern Ry. Co of Texas v. Brisco, 100 S.W. 989, 42 Tex.Civ.App. 321.

Utah.—State Bank of Beaver County v. Hollingshead, 25 P.2d 612, 82 Utah 416.

Vt.—Belock v. State Mut. Fire Ins. Co., 185 A. 100, 108 Vt. 252, followed in Belock for Benefit of Cramton v. Union Mut. Fire Ins. Co., 185 A. 106, 108 Vt. 264, and Belock for Benefit of Cramton v. Vermont Mut. Fire Ins. Co, 185 A. 106, 108 Vt. 265—In re Campbell's Will, 147 A. 687, 102 Vt. 294—In re Campbell's Will, 138 A. 725, 100 Vt. 395, 54 A.L.R. 1369—Read v. Webster, 113 A. 814, 95 Vt. 239, 16 A.L.R. 1068—Calliguiri v. Marro, 106 A. 780, 93 Vt. 186.

Va.—Riddick v. King, 128 S.E. 462, 142 Va. 350—Monroe & Monroe v. Cowne, 112 S.E. 848, 133 Va. 181.

Wash.—Williams v. Clayton, 64 P.2d 1017, 189 Wash. 282—Hair v. Old Nat. Ins. Agency, 51 P.2d 398, 184 Wash. 477—Mueller v. Winston Bros. Co., 4 P.2d 854, 165 Wash. 130—Wendell v. Brown, 253 P. 452, 142 Wash. 391—Northwest Hay Ass'n v. Chase, 239 P. 1, 136 Wash. 160.

W.Va.—Wade v. Haught, 164 S.E. 662, 112 W.Va. 469—Charlton v. Pancake, 127 S.E. 70, 98 W.Va. 363—Cook v. Coleman, 111 S.E. 750, 90 W.Va. 748—Woodrum Home Outfitting Co. v. Adams Express Co., 110 S.E. 549, 90 W.Va. 161.

Wis.—Federal Life Ins. Co. v. Thayer, 269 N.W. 547, 222 Wis. 658—Mahoney v. Kennedy, 205 N.W. 407, 188 Wis. 30—Bradley v. Harper, 180 N.W. 130, 173 Wis. 103.

Wyo.—Williams v. Yocum, 263 P. 607, 37 Wyo. 432—McDonald v. Mulkey, 231 P. 662, 32 Wyo. 144.

9 C.J. p 351 note 24, p 357 note 76 [d]—22 C.J. p 199 note 36—42 C.J. p 1219 note 27—48 C.J. p 1145 note 79—53 C.J. p 1029 note 87.

Exclusion as based on competency or relevancy

The principle on which hearsay evidence is excluded by rules of evidence relates to its competency, not to its relevancy.—Maley v. Thomasville Furniture Co., 200 S.E. 438, 214 N.C. 589.

Telephonic communications

(1) Hearsay evidence based on telephonic communications is inadmissible.

U.S.—Campbell v. U. S. Air Compressor Co., D.C.Ill., 34 F.Supp. 402.

N.Y.—Jacobs v. Cohn, 91 N.Y.S. 339, 46 Misc. 115.

N.C.—Powers v. Commercial Service Co, 161 S.E. 689, 202 N.C. 13.

R.I.—James C. Goff Co. v. Lunn, 143 A. 673, 49 R.I. 455.

(2) Where telephone call is from unknown number and called person asks caller's name, reply as to number or caller's name is hearsay.

Mo.—State ex rel. Strohfeld v. Cox, 30 S.W.2d 462, 325 Mo. 901, quashing certiorari Meyer Milling Co. v. Strohfeld, 20 S.W.2d 963, 224 Mo.App. 508.

Tex.—National Aid Life Ass'n v. Murphy, Civ.App., 78 S.W.2d 223, error dismissed—Thomasson v. Davis, Civ.App., 74 S.W.2d 557, error dismissed.

(3) However, where related facts and circumstances tend to reveal identity of party calling, conversation is admissible.—Spolane v. Coy, Tex Civ.App., 153 S.W.2d 672—National Aid Life Ass'n v. Murphy, Tex.Civ.App., 78 S.W.2d 223, error dismissed.

(4) Testimony of witness that he concluded defendant was on telephone wire because telephone girl said so was hearsay.—Goldsmith, Myer & Lobdell v. Gladstone, 148 A. 636, 8 N.J.Misc. 91, affirmed 154 A. 631, 107 N.J.Law 377.

Competency of telephone coversations generally see supra § 188.

Public broadcast

Tex.—Reed v. Magnolia Petroleum Co., Civ.App., 57 S.W.2d 359, error dismissed.

Remarks of attorney

In action for goods sold, remarks of defendants' attorney which he said were only hearsay respecting bankruptcy of defendants or partnership composed by them were held not evidence.—Luse v. Peters, 28 P.2d 357, 219 Cal. 625.

Statements of pauper as to residence

Me.—Belmont v. Vinalhaven, 20 A. 89, 82 Me. 524.

48 C.J. p 491 note 60.

3. Ark.—Arkansas Power & Light

known to the declarant only through hearsay.[4] The rule excluding hearsay is a basic rather than a technical rule.[5] The reason for the rule is that the unsworn statement of a person not called as a witness or subjected to the test of cross-examination is not recognized as having a sufficient probative effect to raise an inference that the fact is as stated;[6] and the rule is particularly applicable when

Co v. Orr, 298 S.W. 1029, 1031, 175 Ark. 246, quoting **Corpus Juris.**
22 C.J. p 199 note 36.

4. U.S.—Baltimore American Ins. Co of New York v. Pecos Mercantile Co., C.C.A.N.M., 122 F.2d 143—Doyle Dry Goods Co. v. Lewis, C C.A.Okl., 5 F.2d 918—Van Kannel Revolving Door Co. v. Uhrich, C.C.A.Kan., 297 F. 363, certiorari denied Uhrich v. Van Kannel Revolving Door Co., 45 S.Ct. 91, 266 U S. 604, 69 L.Ed. 463.
Ala.—Sovereign Camp of Woodmen of the World v. Marshall, 81 So. 246, 17 Ala.App. 32.
Ark.—Roberson v. Roberson, 69 S.W. 2d 275, 188 Ark. 1018—Arkansas Power & Light Co v Orr, 298 S W. 1029, 1031, 175 Ark 246, quoting **Corpus Juris**—Rouw v. Arts, 294 S W. 993, 174 Ark. 79, 52 A.L.R. 1263—Missouri Pac. R. Co. v. North Arkansas Highway Improvement Dist., 269 S.W. 569, 168 Ark. 141—Forrester v. Locke, 231 S.W. 897, 149 Ark. 225—Johnson v. Berg, 227 S.W. 413, 147 Ark. 323.
Cal.—Richmond v Denny, 191 P 554, 47 Cal.App. 745.
Conn.—Vitakunas v. The Mastco, Inc., 137 A. 753, 106 Conn. 286—Henry v. Kopf, 131 A. 412, 104 Conn 73.
Ga.—Hanover Fire Ins. Co. v. Pruitt, 2 S E.2d 123, 59 Ga App. 777—Atkinson v. Mullis, 110 S E. 509, 28 Ga.App. 176.
Ind.—De Lange v. Cones, 19 N.E.2d 850, 215 Ind. 355.
Iowa.—International Harvester Co. of America v Chicago, M. & St. P. Ry. Co., 172 N.W. 471, 186 Iowa 86.
Ky.—Gus Dattilo Fruit Co. v. Louisville & N R. Co., 37 S.W.2d 856, 238 Ky. 322—White v. Nichols, 211 S.W 849, 184 Ky. 335.
Mo.—City Water Co. of Sedalia v. Hunter, 6 S.W.2d 565, 319 Mo. 1240—Mourer v. Wabash Ry. Co., 280 S.W. 1050, 222 Mo.App. 495.
Neb.—Bell Oil & Gas Co. v. A. B. A. Independent Oil & Gasoline Co., 195 N.W. 461, 111 Neb. 18.
N.J.—Weisbond v. Schultz, 126 A. 663, 2 N J.Misc. 1132.
N.Y.—Mengel v. Larkin, 244 N.Y S. 697, 230 App.Div. 783—Saldan Const. Co. v. Kasenetz, 232 N.Y. S. 378, 225 App.Div. 819—Taylor v. Friedman, 212 N.Y.S 26, 214 App.Div. 198—Goodman v. Schached, 260 N.Y.S. 883, 144 Misc. 905—Amsterdam v. Gold, 205 N.Y.S. 231, 123 Misc. 300—Miller v. Insurance Co. of North America, 202 N.Y.S. 295—Economic Developing Corporation v. General Chinaware Corporation, 200 N.Y S. 228—Turkel v. American Ry. Express Co., 188 N.Y.S 207.
R I.—Langley v. F. W. Woolworth Co., 129 A 1, 46 R.I. 394—Gustave Fox Co. v. T. F. Hunt Mfg. Co., 121 A. 382.
Tex.—Commercial Standard Ins. Co. v Billings, Civ App., 114 S W.2d 709, error dismissed—Strack v. Strong, Civ App., 114 S W.2d 313, error dismissed—Logan v. Hunt, Civ.App., 41 S.W.2d 1041—Panhandle & S. F Ry. Co. v. Reynolds, Civ App., 33 S.W.2d 249—Bryson v. Ferrill, Civ App, 25 S.W 2d 1001—Shelton v. Thomas, Civ.App., 11 S W.2d 254—B. F. Goodrich Rubber Co. v. Valley Plumbing & Supply Co., Civ App, 267 S.W. 1036—Chicago, R. I. & G. Ry. Co. v. R. S Le Sage Motor Co, Civ.App, 261 S W. 209—Atchison, T. & S. F. R. Co. v. Francis, Civ.App., 227 S.W. 342, affirmed Francis v. Atchison, T. & S F. Ry. Co., 253 S.W. 819, 113 Tex. 202, 30 A.L.R. 114.
Vt.—Johnson v. Moore, 196 A. 246, 109 Vt. 282.
Wash.—Continental Trading Co. v Seattle Nat. Bank, 199 P. 743, 116 Wash. 479.
22 C.J. p 199 note 36.
Knowledge acquired from statements of others see infra § 200.

Conclusion based on hearsay
Ark.—Fitzhugh v Leonard, 19 S W. 2d 1010, 179 Ark. 816.
Me.—Sprague v. Sampson, 114 A. 305, 120 Me. 353.
Mo.—Kinchlow v. Kansas City, K. V. & W. Ry. Co., 264 S.W. 416.
N J.—Matisovsky v. Fidelity Phenix Fire Ins. Co., 151 A. 877, 107 N.J. Law 69, affirming 147 A. 504, 7 N. J.Misc. 907—Chancellor Union Land Co. v. Jaffe, 140 A. 395, 104 N.J. Law 394.
N.Y.—Bartilucci v. Chayefsky, 201 N. Y.S. 759, 207 App.Div. 254.
Okl.—Metropolitan Life Ins. Co. v. Plunkett, 264 P. 827, 129 Okl. 292.
S.C.—Stack v. Prudential Ins. Co. of America, 174 S.E. 911, 173 S.C. 81—Freeman v. Chavis, 101 S.E. 849, 113 S.C. 326.
Tex.—Magnolia Petroleum Co. v. Railroad Commission of Texas, Civ.App., 90 S.W.2d 659, modified on other grounds 96 S.W.2d 273, 128 Tex. 189.

Testimony as to record
Hearsay rule generally prevents testimony to entry in record, unless witness personally knows matters recorded.—Globe Indemnity Co. of New York v. Reinhart, 137 A. 43, 152 Md. 439.

Testimony based on memoranda made by others
(1) Testimony based on memoranda made by others has been held to be inadmissible.
Cal.—Lusardi v. Prukop, 2 P.2d 870, 116 Cal.App 506.
Miss.—Bourland v. Hatchcock, 188 So. 9, 186 Miss. 223.
Ohio.—New York Cent. R. Co. v. Public Utilities Commission, 179 N E. 739, 124 Ohio St. 549.
S.C.—Beaufort Truck Growers' Ass'n v. Seaboard Air Line Ry. Co., 121 S.E. 554, 128 S.C. 1.
(2) However, calculations based on information received from others have been held not objectionable.
U.S.—Baltimore American Ins. Co. of New York v. Pecos Mercantile Co, C.C.A.N.M., 122 F 2d 143—McCarroll v. Newsham, C.C.A.La., 278 F. 4.
Cal.—Atlas Development Co. v. National Surety Co., 212 P. 196, 190 Cal. 329.
Tex.—Ft. Worth & R. G. Ry. Co. v. Jones, Civ.App., 212 S.W. 552.

Testimony of clerk as to testimony of subscribing witnesses
Parol testimony of clerk regarding what subscribing witnesses testified when will was admitted to probate was held inadmissible because hearsay.—Dickens v. Bonnewell, 168 S.E. 610, 160 Va. 194.

5. Ill.—Novicki v. Department of Finance, 26 N.E.2d 130, 373 Ill. 342.

6. Ark.—Arkansas Power & Light Co. v. Orr, 298 S.W. 1029, 1031, 175 Ark., 246, quoting **Corpus Juris.**
Conn.—Warner v. Warner, 1 A.2d 911, 124 Conn. 625, 118 A.L.R. 1348—Shea v. Hyde, 140 A. 486, 107 Conn. 287.
Ga.—Glisson v. State, 194 S.E. 877, 878, 57 Ga.App. 169, quoting **Corpus Juris.**
Ill.—Novicki v. Department of Finance, 26 N.E.2d 130, 373 Ill. 342.
Iowa.—Mitchell v. Montgomery Ward & Co, 285 N.W. 187, 226 Iowa 956.
Ky.—Davis v. Bennett's Adm'r, 132 S.W.2d 334, 279 Ky. 799—Appalachian Stave Co. v. Pickard, 99 S. W.2d 472, 266 Ky. 565
Minn.—Lepak v. Lepak, 261 N.W. 484, 195 Minn. 24.
Mo.—In re Thomasson's Estate, 148 S.W.2d 757—Sconce v. Jones, 121 S.W.2d 777, 343 Mo. 362—Bank of Dearborn v. Gabbert, 291 S.W. 142, 221 Mo.App. 923.
N.H.—Semprini v. Boston & M. R. R., 179 A. 349, 87 N.H. 279.

such person can be summoned and sworn as a witness.[7]

A hearsay statement will be rejected, although it was embodied in a question to the witness[8] or made part of his answer,[9] although it took the form of an expression of opinion,[10] or although it was made by[11] or to[12] a physician.

The objection that evidence is hearsay is frequently raised under circumstances not calling for an application of the hearsay rule, and the reports are full of cases in which the courts have refused to sustain such an objection.[13] Furthermore, ex-

N.C.—Greene v. Carroll, 171 S.E. 627, 205 N.C. 459.
S.C.—Stack v. Prudential Ins. Co of America, 174 S.E 911, 173 S.C. 81—Jones v Charleston & W. C. Ry. Co, 142 S E. 516, 144 S.C. 212.
Tenn.—Tom Love Grocery Co. v. Maryland Casualty Co., 61 S.W.2d 672, 166 Tenn. 275.
Va.—Stevens v. Mirakian, 12 S.E.2d 780.
Wash.—Steel v. Johnson, 115 P 2d 145—Grant v. Fisher Flouring Mills Co., 68 P.2d 210, 190 Wash. 356
22 C.J. p 205 note 37.

Effect of subsequent availability

As regards admissibility of ex parte statement, right of cross-examination is not saved merely because party making ex parte statement is sworn and subject to cross-examination later—In re Haynsworth, D C. S C., 34 F 2d 334, affirmed in part and reversed in part on other grounds, C.C A., Jones v. Kendall, 34 F.2d 344

7. Ky.—Marshall v. Glover, 226 S. W. 398, 190 Ky. 113
La—Day v. Armour Fertilizer Works, 8 La.App. 720.
Mo—Courter v. George W. Chase & Son Mercantile Co., 299 S.W. 622, 222 Mo App. 43.
N.H.—Williams v. Duston, 111 A. 690, 79 N H. 490.
N.C.—McRae v. Maxton, A. & S. R. Co., 104 S.E 457, 180 N.C. 223.
Wash.—Alverson v. Hooper, 185 P. 808, 108 Wash. 510.
Unavailability of declarant see infra § 206.

8. S.C.—Willis v. Western Union Tel. Co, 53 S E. 639, 73 S.C. 379.
22 C J. p 205 note 38.

9. Tex.—Texas & P. R. Co. v Scott & Co., Civ.App., 86 S.W. 1065.
22 C.J. p 205 note 39.

10. U.S.—Harris v. U. S., C.C.A.Va., 70 F.2d 889—New England Newspaper Pub. Co. v. Bonner, C.C.A. Mass., 68 F.2d 880, certiorari denied 54 S.Ct. 630, 292 U S. 625, 78 L.Ed. 1480, and Bonner v. New England Newspaper Pub. Co., 54 S. Ct. 631, 292 U.S. 625, 78 L.Ed. 1480—U. S. v. McCreary, C.C.A.Or., 105 F.2d 297, reversing, D.C., McCreary v. U. S., 23 F.Supp. 385.
Ala.—C. C. Snyder Cigar & Tobacco Co. v. Stutts, 107 So. 73, 214 Ala. 132.
Cal.—Hanson v. Board of Trustees of Town of Mill Valley, 241 P. 572, 74 Cal.App. 585.
Colo.—Denver Tramway Corporation v. Kuttner, 35 P 2d 852, 95 Colo. 312.
Ga.—Groover v. Simmons, 129 S.E 778, 161 Ga. 93—Jenkins v. Flournoy, 122 S E. 309, 157 Ga. 618.
Ind.—Chicago, I. & L Ry. Co. v. Blankenship, 127 N.E. 209, 77 Ind App. 225.
Ky.—Holden v. Bennett, 49 S.W.2d 568, 243 Ky. 667—Cincinnati, N O. & T. P. R. Co. v. Ross, 294 S W. 460, 219 Ky. 824—Louisville & N. R. Co. v. Roberts, 218 S.W. 713, 187 Ky. 192, 9 A L R. 94.
La—Gill v. Louisiana Highway Commission, App., 153 So. 329.
Mass.—Nicholas v Lewis Furniture Co., 198 N E. 753, 292 Mass 500—Walsh v. Cornwell, 172 N.E. 855 272 Mass. 555.
Mich—Robertson v. Hulbert, 197 N W. 505, 226 Mich 219.
Tex.—Zepeda v. Moore, Civ.App., 153 S.W.2d 212—Oakland Cemetery Lot Owners' Ass'n v. Castleberry, Civ. App., 25 S.W.2d 639—Hubb Diggs Co. v. Bell, Civ.App., 297 S.W. 682, certified questions answered 293 S. W. 808, 116 Tex 427, reversed on other grounds, Com.App., 1 S W.2d 575—Hines v. Collins, Civ.App., 227 S.W. 332.
W.Va—Cook v. Coleman, 111 S.E. 750, 90 W.Va. 748
22 C.J. p 205 note 40.

11. U.S.—U. S. v. McCreary, C.C.A. Or., 105 F.2d 297, reversing, D.C., McCreary v. U. S., 23 F.Supp. 385—U. S v. Buck, C.C.A.Ala., 70 F.2d 1007—Harris v. U. S., C.C.A.Va., 70 F.2d 889—U. S. v. Hill, C.C.A.Or., 61 F.2d 651.
Ala.—Independent Life Ins. Co. v. Vann, 130 So. 520, 24 Ala.App. 93.
Ark.—Debin v. Texas Co., 81 S.W.2d 935, 190 Ark. 849—Pryor v. Pryor, 235 S.W. 419, 151 Ark 150.
Cal—McCully v. McArthur, 201 P. 323, 187 Cal. 194—Lanterman v. Board of Medical Examiners of California, 40 P.2d 913, 4 Cal.App. 2d 319.
Iowa—Wilcox v. Crumpton, 258 N. W. 704, 219 Iowa 389.
Ky.—Cincinnati, N. O. & T. P. R. Co. v. Ross, 294 S.W. 460, 219 Ky. 824—Commonwealth Life Ins. Co. v Spears, 294 S.W. 138, 219 Ky. 681—Louisville & N. R. Co. v. Roberts, 218 S.W. 713, 187 Ky. 192, 9 A.L.R. 94.
Mich.—Bowerman v. Detroit Free Press, 272 N.W. 876, 279 Mich. 480.
Mo.—Poignee v. John Hancock Mut. Life Ins. Co., App., 147 S.W.2d 677.
N.Y.—Dolan v. United Casualty Co., 18 N.Y.S 2d 387, 253 App Div. 784.
Or.—Cobb v. Spokane P. & S. Ry. Co., 44 P.2d 731, 150 Or. 226.
R.I.—Stuckey v Rhode Island Co., 108 A. 581, 42 R I 450
S.C.—Jones v. Charleston & W. C. Ry. Co., 142 S.E. 516, 144 S.C. 212.
Tex.—Dallas Hotel Co v McCue, Civ. App., 25 S.W.2d 902—Gulf, C. & S. F. Ry. Co. v. Baldwin, Civ.App., 2 S.W.2d 520—Haverbekken v. Johnson, Civ.App., 248 S W. 102—Corpus Christi Ry & Light Co. v. Baxter, Civ App., 217 S.W 187.
Utah.—Bucher v. Equitable Life Assur. Soc. of U. S., 63 P.2d 604, 91 Utah 179.
Wash—Atkins v Clein, 100 P.2d 1, 3 Wash.2d 168, opinion adhered to 104 P. 489, 3 Wash 2d 168
W Va—Cook v. Coleman, 111 S.E. 750, 90 W.Va 748.
22 C.J. p 205 note 41.

12. U.S.—Krug v. Mutual Ben. Health & Accident Ass'n, C C.A.Mo., 120 F.2d 296—Altmayer v. Travelers Protective Ass'n of America, C.C.A.Wis., 119 F 2d 1005—Meaney v. U. S., C.C A.N Y., 112 F.2d 538, 130 A L.R. 973—U. S. v. La Favor, C.C.A.Wash., 96 F.2d 425—London Guarantee & Accident Co. v Woelfle, C C.A.Mo., 83 F.2d 325.
Cal.—Turner v. Turner 203 P. 109, 187 Cal. 632.
Mo.—Oesterle v. Kroger Grocery & Baking Co., 141 S.W 2d 780.
Ohio.—Jones v. Goodyear Tire & Rubber Co., 18 N.E.2d 511, 59 Ohio App. 371—Brice v. Samuels, 17 N.E. 2d 280, 59 Ohio App. 9.
22 C.J. p 205 note 42
Independent relevancy of statements as to bodily condition see infra §§ 242–246.

Examination for purposes of litigation

Although for certain purposes an exception to hearsay rule had been recognized in favor of physician's testimony repeating statements made by patient in the course of treatment, concerning the history of his ailment, such testimony is not admissible when patient caused himself to be examined for the purpose of physician's giving evidence in a case about to be tried—Mitchell v. Montgomery Ward & Co., 285 N.W. 187, 226 Iowa 956.

13. U.S.—Woelfle v. Connecticut Mut. Life Ins. Co. of Hartford, Conn., C.C.A.Mo., 103 F.2d 417—

Hindel v. State Farm Mut. Auto Ins. Co. of Bloomington, Ill., C. C.A.Ind., 97 F.2d 777, certiorari denied State Farm Mut. Auto Ins. Co. of Bloomington, Ill., v. Hindel, 59 S.Ct. 153, 305 U.S 647, 83 L.Ed. 418—U. S. v. Sessin, C.C.A.Kan., 84 F.2d 667—Proechel v. U. S., C C.A. Minn., 59 F.2d 648, certiorari denied 53 S.Ct. 122, 287 U.S. 658, 77 L.Ed. 568—Claude Neon Lights v. Rainbow Light, D.C.N.Y., 47 F.2d 345—Eteenpain Co-op. Soc. v. Lillback, C.C.A.Mass., 18 F.2d 912—Daniel v. Pappas, C.C.A.Okl., 16 F.2d 880—Larkin v. Reading Co., D.C.Pa., 28 F.Supp. 292—Brown v. Town of Eustis, Fla., D C.Fla., 293 F. 197—Western Coal & Mining Co. v. Greeson, C.C.A.Ark., 284 F. 510—Payne v. Connor, C.C.A.Me., 274 F. 497.

Ala.—Home Ins. Co. of New York v. Trammell, 160 So. 897, 230 Ala. 278—Lindsey v. Lindsey, 158 So. 522, 229 Ala. 578—Lindsey v. Lindsey, 147 So. 425, 226 Ala. 489—Louisiana State Life Ins. Co. v. Phillips, 135 So. 841, 223 Ala. 5—Tennessee River Nav. Co. v. Walls, 96 So. 266, 209 Ala. 320.

Ariz.—Strahan v. Haynes, 262 P. 995, 33 Ariz. 128.

Ark.—Home Ins. Co. of New York v. Hall, 91 S.W.2d 609, 192 Ark. 283—McGehee v. Yunker & Ronk, 209 S.W. 65, 137 Ark. 397.

Cal.—Shields v. Rancho Buena Ventura, 203 P. 114, 187 Cal. 569—Davis v. Parsons, 130 P. 1055, 165 Cal. 70—Central Heights Imp. Co. v. Memorial Parks, 105 P.2d 596, 40 Cal.App.2d 591—Armstrong v. Ford, 86 P.2d 385, 30 Cal.App.2d 347—Ehlers v. Bihn, 235 P. 673, 71 Cal.App. 479—People v. Arcega, 193 P. 264, 49 Cal.App. 239.

Conn.—Jenkins v. Reichert, 5 A.2d 6, 125 Conn. 258—Erwin M. Jennings Co. v. Di Genova, 141 A. 866, 107 Conn. 491.

D.C.—Janof v. Newsom, 53 F.2d 149, 60 App.D.C. 291.

Ga.—Blackwell v. Houston County, 147 S.E. 574, 168 Ga. 248—McDowell v. Gould, 144 S.E. 206, 166 Ga. 670—Peek v. Irwin, 139 S.E. 27, 164 Ga. 450—Brown v. Kendrick, 135 S.E. 721, 163 Ga. 149—Crider v. Woodward, 135 S.E. 95, 162 Ga. 743—Campbell v. Sims, 131 S.E. 483, 161 Ga. 517—Cooper v. Johnson, 107 S.E. 849, 151 Ga. 608—Alabama Great Southern R. Co. v. McBryar, App., 15 S.E.2d 563—Mishoe v. Davis, 14 S.E.2d 187, 64 Ga.App. 700—J. L. Young Co. v. Minchew, 155 S.E. 356, 42 Ga.App. 228—Davis v. Farmers' & Traders' Bank, 136 S.E. 816, 36 Ga.App. 415—Freeman v. Metropolitan Life Ins. Co., 134 S.E. 639, 35 Ga.App. 770—Commercial Credit Co. v. Fry, 122 S.E. 77, 31 Ga.App. 488—O'Berry v. Davis, 121 S.E. 857, 31 Ga.App. 755—Collier v. Moore, 120 S.E. 441, 31 Ga.App. 227.

Ill.—Mitchell v. Louisville & N. R. Co., 31 N.E.2d 965, 375 Ill. 545, reversing 27 N.E.2d 861, 305 Ill.App. 635, conformed to 35 N.E.2d 81, 310 Ill.App. 563—Rush v. Collins, 8 N.E.2d 659, 366 Ill. 307—Valant v. Metropolitan Life Ins. Co, 23 N. E.2d 922, 302 Ill.App. 196—Ladd v. Cochran & McCluer Co., 274 Ill App. 427—Percival v. Schneider, 255 Ill.App. 428. See Fred Allen Automobile Supply Co. v. H. W. Johns-Manville Co., 211 Ill.App. 217.

Ind.—Lowe v. Swafford, 199 N.E. 709, 209 Ind. 514, 103 A.L.R. 1222—American Surety Co. of New York v. Jay Lodge No. 87, F. & A. M., 196 N.E. 356, 102 Ind App. 82—Hatfield v. Krueger, 187 N.E. 895, 98 Ind.App. 377—Greaf v. Breitenstein, 187 N.E. 347, 97 Ind. App. 525—Pennsylvania R Co. v. Lincoln Trust Co, 167 N.E. 721, 91 Ind.App. 28, rehearing denied Pennsylvania R. Co. of Ft. Wayne v. Lincoln Trust Co, 170 N.E. 92, 91 Ind.App. 28.

Iowa.—Cleophas v. Walker, 233 N.W. 257, 211 Iowa 122—McColl v. Jordan, 205 N.W. 838, 200 Iowa 961.

Kan.—Phipps v. Consolidated Flour Mills Co., 213 P. 637, 113 Kan. 118.

Ky.—Jefferson Standard Life Ins Co. v. Cheek's Adm'r, 80 S.W 2d 518, 258 Ky. 621—King v. Ohio Valley Fire & Marine Ins. Co., 280 S W. 127, 212 Ky. 770.

La.—Lado v. First Nat. Life Ins. Co., App., 158 So 872, affirmed 162 So. 579, 182 La. 726.

Me.—Jones v. Grindal, 117 A. 308, 121 Me. 348.

Md.—Richfield Oil Corporation of New York v. Chesapeake & C. B. R. Co., 20 A.2d 581—Penrose v. Canton Nat. Bank of Canton, 127 A. 852, 147 Md. 200.

Mass.—Shannon v. Ramsey, 193 N.E. 235, 288 Mass. 543—Barbrick v. Huddell, 139 N.E. 629, 245 Mass. 428—Mielke v. Dobrydnio, 138 N. E. 561, 244 Mass. 89.

Mich.—Ames v. MacPhail, 286 N.W. 206, 289 Mich. 185.

Minn.—Arnold v. Northern States Power Co., 297 N.W. 182—Patterson-Stocking, Inc., v. Dunn Bros. Storage Warehouses, 276 N.W. 737, 201 Minn. 308—Lepak v. Lepak, 261 N.W. 484, 195 Minn. 24—Sommerfeld v. Griffith, 216 N.W. 311, 173 Minn. 51—Pleason Realty & Investment Co. v. Kleinman, 206 N.W. 645, 165 Minn. 342.

Mo.—Simpson Advertising Service Co v. Manufacturers' & Merchants' Ass'n of St. Louis, 51 S.W.2d 1019, 330 Mo. 1049—Webb v. Salisbury, 39 S.W.2d 1045, 327 Mo. 1123—Woelfle v. Connecticut Mut. Life Ins. Co. of Hartford, Conn., 112 S.W.2d 865, 234 Mo.App. 135—O'Byrne v. McCormick, 92 S.W.2d 1005, 230 Mo.App. 520—Dunn v. Alton R. Co., App., 88 S.W.2d 224—White v. McCoy Land Co., 87 S. W.2d 672, 229 Mo.App. 1019, affirmed, Sup., White v. Scarritt, 111 S.W.2d 18—Garnett v. S. S. Kresge Co., App., 85 S W.2d 157—Lokey v. Rudy-Patrick Seed Co. of Kansas City, App., 285 S.W. 1028—Amber v. Davis, 282 S W. 459, 221 Mo App. 488—Willis v. Buchanan County Quarries Co., 268 S.W. 102, 218 Mo.App. 698—Elliott v. Fidelity-Phenix Fire Ins. Co. of New York, App., 267 S.W. 441—Cecil v. Wells, 259 S.W. 844, 214 Mo.App. 193—Randazzo Macaroni Mfg. Co. v. Minneapolis & St. L. R. Co, App., 251 S.W. 466—Bloom v. Union Electric Light & Power Co., App., 251 S.W. 411—Berry v. Royster, App., 232 S W. 477—Porterfield v. American Surety Co. of New York, 210 S.W. 119, 201 Mo. App. 8.

Mont.—McGonigle v. Prudential Ins. Co. of America, 46 P.2d 687, 100 Mont. 203.

Nev.—Geyman v. Boulware, 224 P. 409, 47 Nev. 409.

N.H.—Caplan v. Caplan, 142 A. 121, 83 N.H. 318.

N.J.—Carroll v. Prudential Ins. Co. of America, 15 A.2d 810, 125 N.J. Law 397—Dubois v. De Fazio, 4 A.2d 52, 122 N.J.Law 37—Cockrell v. McKenna, 142 A. 20, 104 N.J. Law 592—Rathbun v. Brancatella, 107 A. 279, 93 N.J.Law 222.

N.Y.—Nowak v. Brotherhood of American Yeomen, 162 N.E. 589, 249 N.Y. 78, reversing 224 N.Y.S. 865, 221 App.Div. 832—Gorman v. La Bella, 262 N.Y.S. 345, 146 Misc. 408.

N.C.—Fowler v. Champion Fibre Co., 131 S.E. 380, 191 N.C. 42—Bowman v. Howard, 110 S.E. 98, 182 N C. 662—Board of Com'rs of Stokes County v. George, 109 S.E. 77, 182 N.C. 414.

N D.—Farmers' State Bank of Cathay v. Jeske, 197 N.W. 854, 50 N. D. 813.

Or.—Silver Falls Timber Co. v. Eastern & Western Lumber Co., 40 P. 2d 703, 149 Or. 126—Dockery v. Gardner, 15 P.2d 481, 141 Or. 64.

Pa.—U. S. Savings & Trust Co. of Conemaugh, to Use of Hindes, v. Helsel, 2 A.2d 823, 332 Pa. 433—Orndoff v. Consumers' Fuel Co., 162 A. 431, 308 Pa. 165.

S.C.—Legrande v. Legrande, 182 S. E. 432, 178 S.C. 230, 102 A.L.R. 582—Norman v. Stevenson Theatres, 156 S E. 357, 159 S.C. 191—St. Charles Mercantile Co. v. Armour & Co., 153 S.E. 473, 156 S.C. 397—Beaufort Truck Growers' Ass'n v. Seaboard Air Line Ry. Co., 132 S. E. 819, 134 S.C. 474.

S.D.—Clendennen v. Bainbridge, 187 N.W. 727, 45 S.D. 410.

Tenn.—Caneperi v. State, 89 S.W.2d 164, 169 Tenn. 472—Bank of Com-

ceptions to the hearsay rule have always existed,[14] sometimes as a result of statutory regulations,[15] and the modern tendency is to increase the number.[16] Such exceptions are based on necessity,[17]

merce & Trust Co. v. Pope, 103 S. W.2d 586, 20 Tenn.App. 652.

Tex.—McAfee v. Travis Gas Corporation, 153 S.W.2d 442, reversing, Civ.App., 131 S.W.2d 139—Browning v. Graves, Civ.App., 152 S.W. 2d 515, error refused—Hyman v. Alberry, Civ.App., 130 S.W.2d 891, error dismissed, judgment correct—Ibanez v. State, Civ.App., 118 S. W.2d 405—Howard v. Combs, Civ. App., 113 S.W.2d 221—National Life & Accident Ins. Co. of Nashville, Tenn., v. Jackson, Civ.App., 108 S.W.2d 738, error dismissed—Republic Ins. Co v. Dickson, Civ. App., 87 S.W.2d 899, error dismissed—Flannery v. State, Civ. App., 85 S.W.2d 1052, error refused—Metropolitan Life Ins. Co. v. Delgado, Civ.App., 77 S.W.2d 539—Fort Worth & R. G. Ry. Co. v. Thompson, Civ.App., 77 S.W.2d 289—Texas Employers' Ins Ass'n v. Ritchie, Civ.App., 75 S.W.2d 942, 944, citing **Corpus Juris**—Christie v. Hudspeth County Conservation and Reclamation Dist. No. 1, Civ. App., 64 S.W.2d 978—Martini v. Power Banking Co., Civ.App., 33 S.W 2d 466, error dismissed—Sloan v. Sloan, Civ.App., 32 S W.2d 513—Hart v. Harrell, Civ.App., 17 S.W. 2d 1093—Texas & N. O. R. Co. v. Stevens, Civ.App., 15 S.W.2d 200, affirmed, Com.App., 24 S W.2d 9—Moore v. Follett, Civ.App., 11 S.W. 2d 662, error dismissed—Medford v. Kimmey, Civ.App., 298 S.W. 140—Massie v. Hutcheson, Civ.App., 296 S.W. 939—State Nat. Bank v. Davidson, Civ.App., 295 S.W. 311, error dismissed, Com.App., 2 S.W. 2d 1116—Chicago, R. I. & G. Ry. Co. v. Bernnard, Civ.App., 290 S.W. 292—Harkrider-Keith-Cooke Co. v. Smith, Civ.App., 284 S.W. 612—St. Louis, S. F. & T. Ry. Co. v. Carter, Civ.App., 275 S.W. 224—Brown v. Gray & Wilmerding, Civ. App., 256 S W. 977—Millers' Indemnity Underwriters v. Hughes, Civ.App., 256 S.W. 334—Texas Co. v. Burkett, Civ.App., 255 S.W. 763, affirmed 296 S.W. 273, 117 Tex. 16, 54 A.L.R. 1397—Jackes-Evans Mfg. Co. v. Goss, Civ.App., 254 S.W. 320—Smith v. Woods, Taylor & Co., Civ.App., 235 S.W. 720—Kimball-Mathews Co. v. Nagel, Civ.App., 235 S.W. 318—Dove v. Coleman, Civ.App., 234 S.W. 917—Mayotown Lumber Co. v. Nacogdoches Grocery Co., Civ.App., 221 S.W. 644, affirmed Com.App., 236 S.W. 704—Dalby v. Wall, Civ.App., 218 S.W. 46—Western Union Telegraph Co. v. Dorough, Civ.App., 213 S.W. 282, dismissed for want of jurisdiction—Chicago, R. I. & G. Ry. Co. v. Manby, Civ.App., 207 S.W. 157.

Utah.—Golden v. American Keene Cement & Plaster Co., 95 P.2d 755, 98 Utah 23—Campbell v. Glen Bros.-Roberts Piano Co., 48 P.2d 556, 87 Utah 294.

Vt.—Laferriere v. Gray, 160 A. 270, 104 Vt. 366—Zabarsky v. Employers' Fire Ins Co., 123 A. 520, 97 Vt. 377—Smith v. Martin, 106 A. 666, 93 Vt. 111.

Wash.—Moen v. Chestnut, 113 P.2d 1030—Nelson v. Bjelland, 95 P.2d 784, 1 Wash.2d 268, 125 A.L.R. 641—Inashima v. Wardall, 258 P. 839, 145 Wash. 77—Schmitz v. Matthews, 251 P. 571, 141 Wash. 278—Horowitz v. Kuehl, 200 P. 570, 117 Wash. 16—Cary-Davis Towing Co. v. Spradley, 196 P 655, 115 Wash 93—Naylor v. Lovell, 186 P. 855, 109 Wash. 409.

Wis.—Booth v Frankenstein, 245 N. W. 191, 209 Wis. 362—State v. Thorson, 231 N.W. 155, 202 Wis. 31.

Wyo.—Phelan v. Cheyenne Brick Co., 188 P. 354, 26 Wyo. 493, rehearing denied 189 P. 1103, 26 Wyo 493.

22 C.J. p 205 note 43.

Admissibility of independently relevant statements see infra §§ 239–259.

Conversation through interpreter

(1) An interpreter, who is selected by two persons speaking different languages as a medium of communication with each other, is regarded as a joint agent for that purpose, and the statements of the interpreter as to what they say in the presence of each other are regarded as the statements of the persons themselves, and are admissible as original evidence, and are not hearsay.—Boicelli v. Giannini, 224 P. 777, 65 Cal.App. 601—22 C.J. p 205 note 43 [d].

(2) In a proceeding to disbar counsel for misconduct, testimony by clients as to statements made by the attorney through an interpreter, was admissible.—In re Coburn, 174 N.W. 134, 207 Mich. 350.

(3) However, in death action against railroad, deceased's widow was not competent to testify as to conversation with engineer through an interpreter, where interpreter acted solely for widow.—Gulf, C. & S. F. Ry. Co. v. Giun, 116 S.W.2d 693, 131 Tex. 548, 116 A.L.R. 795, reversing Giun v. Gulf, C. & S. F. R. Co., Civ.App., 89 S.W.2d 465.

Corroborative evidence

In action for unpaid portion of salary, testimony of mutual friend, about conversation with defendant concerning reduction of plaintiff's salary, being corroborative evidence, was held not inadmissible as hearsay.—Lucas v. Morefield, 137 So. 633, 18 La.App. 497.

Oral directions to agent are not hearsay, but substantive evidence to prove agent's authority or lack of authority.—Powerine Co. v. Grimm Stamp & Badge Co., 254 N.W. 722, 127 Neb. 165.

Statement of right of possession

Possessor may state by what right he occupied land claimed by adverse possession without thereby violating hearsay rule—Federal Crude Oil Co. v. Yount-Lee Oil Co., Tex.Civ.App., 73 S.W.2d 969, error dismissed and certiorari denied 55 S Ct. 655, 295 U. S. 741, 79 L.Ed. 1687.

Value of property

Tex.—Eureka Producing Co. v. Hoyt, Civ.App., 266 S.W. 203.

14. U.S.—U. S. v. Aluminum Co. of America, D.C N Y., 35 F Supp. 820—Standard Oil Co. of New York v. Johnson, C.C A.Mass., 299 F. 93.

Neb.—Martin v. Sanford, 261 N.W. 136, 129 Neb. 212, 100 A.L.R. 179.

N.C.—Young v. Stewart, 131 S.E. 735, 191 N.C. 297.

Pa.—In re Ryman, 11 A.2d 677, 139 Pa.Super. 212.

Tex.—Southern Underwriters v. Boswell, Civ.App., 141 S.W.2d 442, error granted.

Relaxation of rule

The hearsay rule, as basis for rejecting extrajudicial testimony or statements, is often relaxed, especially in the case of such statements by a party or his agent where opportunity for confrontation and cross-examination has been afforded and exercised.—Chicago, St P., M. & O. Ry. Co. v. Kulp, C C.A Minn., 102 F.2d 352, certiorari denied 59 S.Ct. 1032, 307 U.S. 636, 83 L.Ed. 1518.

Refusal to make statement

In determining whether money was taken by assignor in bank robbery, jury could consider hearsay testimony that assignor refused to make statement regarding money.—McKinley v. Smith, 17 P.2d 1032, 128 Cal.App. 591.

15. Ga.—Rea v. Pursley, 154 S.E. 325, 170 Ga. 788.

Statutory exceptions as exclusive

Statutory exceptions are not exhaustive of the cases in which hearsay is admissible.—Rea v. Pursley, supra.

16. U.S.—Standard Oil Co. of New York v. Johnson, C.C.A.Mass., 299 F. 93.

Tenn.—Pigg v. Houston & Liggett, 8 Tenn.App. 613.

17. U.S.—U. S. v. Wescoat, C.C.A. W.Va., 49 F.2d 193.

practical common sense,[18] and on the supposition that the circumstances surrounding each situation afford a sufficient probability of the truth of the proposed evidence to enable a jury to weigh it as a circumstance tending to establish the fact sought to be proved.[19]

Applications of hearsay rule. The courts have rejected, as hearsay, statements relating to agency;[20] cause;[21] condition of things;[22] indebtedness and payment;[23] ownership or possession of prop-

Del.—Edsall v. Rockland Paper Co., 194 A. 115, 8 W W Harr. 495
Mo.—Bailey v. Metropolitan Life Ins. Co., App., 115 S.W.2d 151, certiorari quashed State ex rel. Metropolitan Life Ins Co. v. Shain, 121 S.W.2d 789, 343 Mo. 435.
S.C.—Currie v. Davis, 126 S.E 119, petition dismissed Davis v. Currie, 45 S Ct. 88, 266 U.S. 182, 69 L Ed. 234.
Tex.—Southern Underwriters v Boswell, Civ.App., 141 S.W.2d 442, error granted.

18. Tex.—Southern Underwriters v. Boswell, supra.

19. U.S.—U. S v Wescoat, C.C.A. W Va., 49 F.2d 193.
Del.—Edsall v Rockland Paper Co., 194 A. 115, 8 W.W.Harr. 495.
N.H.—Lebrun v. Boston & M. R. R., 142 A. 128, 83 N H. 293.
Or.—Raymond v. Shell Oil Co. of California, 103 P.2d 745.
S.C.—Currie v. Davis, 126 S.E 119, petition dismissed Davis v. Currie, 45 S.Ct 88, 266 U.S 182, 69 L Ed. 234.
Tex.—Southern Underwriters v. Boswell, Civ App., 141 S.W.2d 442, error granted.

Conditions necessary to admission

To be admissible, hearsay evidence must be vouched for by impersonal facts and so related to principal event as to be part thereof.—German Evangelical Bethel Church of Concordia v. Reith, 39 S.W.2d 1057, 327 Mo. 1098, 76 A.L.R. 604.

20. Colo.—Moore v. Switzer, 239 P. 874, 78 Colo 63
Mo.—Austin-Western Road Machinery Co. v. Commercial State Bank, App., 255 S.W. 585—Lyell v. Cox, App., 245 S.W. 343.
N.H.—Login v. Waisman, 136 A. 134, 82 N.H. 500.
N.C.—Arndt v. Jefferson Standard Life Ins. Co., 97 S E. 631, 176 N C. 652.
N.D.—Embden State Bank v. Schulze, 193 N.W. 481, 49 N.D. 777.
Ohio.—Morris Arnoff Realty Co. v. Bryant, 162 N.E. 746, 28 Ohio App. 356.
Tex.—Houston Compress Co. v. Houston Steel & Foundry Co., Civ. App., 22 S.W.2d 737—Raymond v. Merchants' State Bank & Trust Co. of Laredo, Civ.App., 270 S.W. 943—Hamilton v. Hamilton, Civ.App., 225 S.W. 69, dismissed for want of jurisdiction.
Declarations of alleged agent as to agency as hearsay see Agency § 322 c (1).

21. U.S.—Despiau v. U. S. Casualty Co., C.C.A.Puerto Rico. 89 F 2d 43—Calzavaro v Planet S. S Corporation, C C.A.Va., 31 F.2d 885.
Ala.—Townsend v. Adair, 134 So. 637, 223 Ala. 150—C. C. Snyder Cigar & Tobacco Co. v. Stutts, 107 So. 73, 214 Ala. 132—Putman v. White, 88 So. 355, 18 Ala.App. 15.
Ark.—Roark Transp. v. Sneed, 68 S. W.2d 996, 188 Ark. 928—Missouri Pac R. Co. v. Johnson, 268 S.W. 31, 167 Ark. 464.
Cal.—Turner v. Turner, 203 P. 109, 187 Cal. 632.
Ill.—Piersol v. Massachusetts Mut. Life Ins. Co., 260 Ill.App. 578.
Ind.—Sinclair Refining Co. v. McCullom, 24 N.E.2d 784, 107 Ind.App. 356.
Md.—Grzboski v. Bernheimer Leader Stores, 143 A. 706, 156 Md. 146—Pindell v. Rubenstein, 115 A. 859, 139 Md. 567.
Mich.—Grzelka v. Chevrolet Motor Car Co., 281 N.W. 568, 286 Mich. 141—Santure v. Detroit Trust Co., 267 N.W. 583, 275 Mich 661.
Mo.—Murphy v. St. Joseph Ry. Light, Heat & Power Co., 283 S. W 994, 221 Mo.App. 670.
Neb.—Triplett v. Western Public Service Co., 263 N.W. 229, 129 Neb. 799.
N.Y.—Mississippi Shipbuilding Corporation v. Lever Bros. Co., 142 N.E. 332, 237 N.Y. 1, reversing 199 N.Y.S. 777, 205 App.Div. 569, and reargument denied 143 N.E. 744, 237 N.Y. 565.
Okl.—Schaff v. Coyle, 249 P. 947, 121 Okl. 228.
Or.—Raymond v. Shell Oil Co. of California, 103 P.2d 745.
S.C.—Templeton v. Charleston & W. C. Ry. Co., 108 S.E. 363, 117 S C. 44.
Tex.—International Travelers' Ass'n v. Branum, 212 S.W. 630, 109 Tex. 543, reversing, Civ.App., 169 S.W. 389—Connecticut General Life Ins. Co. v. Warner, Civ App., 94 S.W. 2d 514, error refused—Metropolitan Casualty Ins. Co. v. Woody, Civ App., 80 S.W 2d 771, error dismissed—Galveston, H. & S. A. Ry. Co. v. Henry, Civ.App., 252 S.W. 210.

22. U.S.—Interstate Compress Co. v. Agnew, C.C.A.Okl., 276 F. 882.
Ala.—Atlanta & St. A. B. R. Co. v. Spivey, 100 So. 759, 211 Ala. 520—C. M. McMahen & Sons v. Louisville & N. R. Co., 106 So. 56, 21 Ala.App. 66, certiorari denied Ex parte C. M. McMahen & Sons, 106 So. 57, 213 Ala. 642.
Ill.—Labanoski v. Hoyt Metal Co., 126 N.E. 548, 292 Ill. 218—Ava Blue Grass Creamery Co. v. Sussman Bros., 243 Ill App. 483.
Ky.—Coleman v. Sowders, 268 S.W. 579, 206 Ky. 841.
La.—Snowden v. Tremont & G. Ry. Co., App., 140 So. 122.
Miss.—Tuccio v. Smith, 118 So. 195, 151 Miss. 393.
Mo.—Spruce Co. v. Mays, 62 S.W.2d 824, 333 Mo. 582—Hunter v. Waterloo Gasoline Engine Co., 237 S. W. 819, reversed on other grounds 260 S W. 970.
N.D.—Bank of Valley City v. Lee, 175 N.W. 575, 43 N D. 503.
Pa.—Danish Pride Milk Products Co. v. Marcus, 116 A. 303, 272 Pa. 340.
Tenn.—Smith v. Fisher, 11 Tenn.App. 273.
Tex.—Cottle v. Jefferson Securities Co, Civ.App., 272 S.W. 819—Lancaster v. Norris, Civ.App., 271 S. W. 401, reversed on other grounds Norris v. Lancaster, Com.App, 280 S.W. 574—Osceola Oil Co. v. Stewart Drilling Co., Civ.App., 246 S.W. 698, reversed on other grounds, Com.App., 258 S W. 806—Pope v. Clendennen, Civ App., 257 S.W. 335.

23. U.S.—Roberts v. Metropolitan Life Ins. Co., C C A.Ill., 94 F.2d 277, certiorari denied 58 S.Ct. 764, 303 U.S 660, 82 L Ed. 1119—Smith v. Metropolitan Life Ins. Co., 94 F.2d 277, certiorari denied 58 S. Ct. 1039, 304 U.S. 570, 82 L.Ed. 1535—American Ins. Union v. Lowry, C.C.A.Tex., 62 F.2d 209, certiorari denied Lowry v. American Ins. Union, 53 S.Ct. 689, 289 U.S. 745, 77 L.Ed. 1491.
Ala.—Blackwood v. Rutherford, 103 So 689, 212 Ala. 630—Weeks v. Weeks, 99 So. 844, 211 Ala. 117.
Ark.—Myers v. Bushmiaer, 145 S. W.2d 722.
Colo.—Manby v. Sweet Inv. Co., 242 P. 51, 78 Colo. 371.
Conn.—Lentine v. McAvoy, 136 A. 76, 105 Conn. 528.
Ga.—Richie & Co. v. Cohen, App., 14 S.E.2d 603—McDonald v. Redding Lumber Co., 159 S.E. 888, 43 Ga. App. 656.
Kan.—Ramsay v. Root, 263 P. 796, 125 Kan. 178—Stout v. Carter, 251 P. 397, 122 Kan. 94.
La.—Truscon Steel Co. v. B & T. Const. Co., 129 So. 644, 170 La. 1083.
Mo.—Johnson v. Martindale, App., 288 S.W. 970.
N.Y.—Dot Mort Holding Corporation v. Larpeg Realty Corporation, 3 N.Y.S.2d 123, 167 Misc. 242.

erty,[24] or the value thereof;[25] quantity or weight;[27] and want of due care.[28] Insanity cannot be shown by hearsay evidence.[29]

partnership;[26]

Former statement of witness. A witness is not allowed to testify as to an unsworn statement made by himself on a former occasion,[30] and, as stated in

Or.—Rivers Bros. v. C. F. T Co., 264 P. 368, 124 Or. 157
Tex.—Magnolia Petroleum Co. v. Reed, Civ App., 42 S.W.2d 274—Webb v. Smith, Civ.App., 288 S W. 624
Wash.—Lincoln v. Kuskokwim Fishing & Transportation Co., 203 P. 62, 118 Wash. 137.

24. Ala.—First Nat. Bank v. Lartigue, 173 So. 21, 233 Ala. 670—Granade v. U. S. Lumber & Cotton Co., 139 So. 409, 224 Ala. 185—Shelton v. Stapler, 121 So. 34, 219 Ala. 15—Feore v. Trammel, 104 So 808, 213 Ala. 293—Ford v. Hankins, 96 So. 349, 209 Ala. 202.
Ark.—Marks v. Morgan, 263 S W. 970, 165 Ark. 613.
Cal.—Burbank v. McIntyre, 27 P.2d 400, 135 Cal App. 482.
Ga.—Durrence v. Groover, 129 S.E. 29, 160 Ga. 680—Commercial Credit Co. v. Britt, 186 S.E. 449, 53 Ga. App. 430—Evans v. Sears, Roebuck & Co., 176 S.E. 843, 49 Ga. App. 744—Metropolitan Discount Co. v. Wardlaw, 140 S E. 525, 37 Ga.App. 423—Johnson v. People's Bank, 137 S.E. 104, 36 Ga.App. 570.
Iowa.—Roberts v. Morse, 181 N.W. 678, 190 Iowa 1344.
Ky.—Gainesboro Telephone Co. v. Thomas, 28 S.W.2d 34, 234 Ky. 373—Combs v. Combs, 255 S.W. 704, 200 Ky. 771.
La.—Brumfield v. Cryer, App., 154 So. 662.
Mass.—Koski v. Haskins, 128 N.E. 427, 236 Mass. 346.
Mich.—Sexton v. Balinski, 273 N.W. 335, 280 Mich. 28.
Mo.—Cox v. Higdon, App., 67 S.W.2d 547—Bank of Dearborn v. Gabbert, 291 S.W. 142, 221 Mo.App. 923.
N.J.—Moran v. Joyce, 18 A.2d 708, 125 N.J.Law 558.
N.M.—First Sav. Bank & Trust Co., Albuquerque, v. Elgin, 225 P. 582, 29 N.M. 595.
N.C.—Currin v. Currin, 15 S.E.2d 279, 219 N.C. 815—Greene v. Carroll, 171 S.E. 627, 205 N.C. 459.
N.D.—Northwestern Nat. Bank of Minneapolis, Minn., v. Howlett, 247 N.W. 57, 63 N.D. 163.
Tex.—Farmers' Nat. Bank of Stephenville v. Daggett, Com.App., 2 S.W.2d 834, affirming Daggett v. Farmers' Nat. Bank, Civ.App., 259 S.W. 198—James v Davis, Civ. App., 150 S.W.2d 326, error dismissed, judgment correct—Coyle v. Shailer, Civ.App., 91 S.W.2d 920—Wagoner v. Christian, Civ.App., 22 S.W.2d 1085, error dismissed—Massie v. Hutcheson, Civ.App., 258 S.W. 244, reversed on other grounds, Com.App., 270 S.W. 544—Philadelphia Trust Co. v. Johnson, Civ App., 257 S.W. 280—Hulshizer v. First State Bank of Robstown, Civ.App., 207 S.W. 584.
Vt.—Cameron v. Blanchard, 176 A. 290, 107 Vt. 51.

25. U.S.—Norfolk & W. Ry. Co. v. Ft. Dearborn Coal & Export Co., C.C.A W Va., 292 F. 78—Union Pac. R. Co. v. Perrine, C C.A.Neb., 267 F. 657.
D.C.—Baber v. Baessell, 85 F 2d 725, 66 App.D.C. 226.
Fla.—Chesebro Bros. & Robbins v. Merrow, 136 So. 665, 102 Fla. 964.
Ga.—Central of Georgia Ry. Co. v. Miller & Lipshitz, 106 S.E. 15, 26 Ga.App. 210.
Idaho—Intermountain Ass'n of Credit Men v. Milwaukee Mechanics' Ins. Co., 258 P. 362, 44 Idaho 491.
Ky.—Wright v. Inter-Southern Life Ins. Co., 237 S.W. 401, 193 Ky. 785.
Mich—Refrigerating Equipment Co. v. Finch, 242 N.W. 217, 257 Mich. 623.
Miss.—Johnson v. Tootle, 88 So. 406, 126 Miss. 21.
Mo.—McKinney v. Lynch, App., 45 S.W.2d 874.
Mont.—Morgan v. Hines, 211 P. 778 65 Mont. 306.
N.Y.—Edwards v. Maryland Motorcar Ins. Co., 197 N.Y.S. 460, 204 App. Div. 174—Palmer v. Everton, 180 N.Y.S. 730.
N.C.—Bunn v. Harris, 5 S.E.2d 149, 216 N.C. 360—Newby v. Atlantic Coast Realty Co., 103 S.E. 909, 180 N.C. 51.
N.D.—Burdick v. Mann, 236 N.W. 340, 60 N.D. 710, 82 A.L.R. 1443.
Okl.—McConnell v. Goucher, 108 P. 2d 174.
R.I.—National Cash Register Co. v. Underwood, 185 A. 909, 56 R.I. 379.
Tex.—Land Title Bank & Trust Co. v. United Sav. Bank of Detroit, Mich., Civ.App., 117 S.W.2d 847, error dismissed—Edmondson v. Carroll, Civ.App., 65 S.W.2d 1107, error dismissed—Edmondson v. Carroll, Civ.App., 28 S.W.2d 250, affirmed Carroll v. Edmondson, Com. App., 41 S.W.2d 64—Finley v. Beck. Civ.App., 16 S.W.2d 908—Rathbun v. Miller, Civ.App., 266 S.W. 818—Housley v. Strawn Merchandise Co., Com.App., 291 S.W. 864, reversing, Civ.App., 253 S.W. 673—Wichita Falls, R. & F. W. Ry. Co. v. Cooper, Civ.App., 235 S. W. 927.
Utah.—Baglin v. Earl-Eagle Mining Co., 184 P. 190, 54 Utah 572.
Relevancy and materiality of evidence as to value of property see supra §§ 181–183.

Valuation for taxation
U.S.—Dickinson v. Riley, C.C.A.Ark., 86 F.2d 385.
Ala.—Penney v. State, 128 So. 596, 221 Ala. 230.
Ohio.—G A Boeckling Co. v. Schwer, 170 N.E. 648, 122 Ohio St. 40.

26. Ark.—McCurry v Griffin, 279 S. W. 995, 170 Ark. 421.
Cal.—Blinn v. Ritchie, 282 P. 390, 101 Cal.App. 691.
Ky.—General Service Garage v. Lexington Oil Co., 118 S.W.2d 690, 274 Ky. 330.
Tex.—Markowitz v. Davidson, Civ. App., 228 S.W. 968.

27. N.Y.—Hyman v. Cohen, 207 N.Y. S. 190, 124 Misc. 152.
Ohio.—Brady v. Stafford, 152 N.E. 188, 115 Ohio St. 67.
Wash.—International Lumber Export Co. v. M. Furuya Co., 209 P. 858, 121 Wash. 350.
Wyo.—Davis v. Graham, 225 P. 789, 31 Wyo. 239.

28. Cal.—Varner v. Hattenhaber, 42 P.2d 674, 5 Cal.App 2d 199.
Kan.—Wrage v. King, 220 P. 259, 114 Kan. 539.
Mo.—State ex rel. S. S. Kresge Co. v. Shain, 101 S.W.2d 14, 340 Mo. 145—Janis v. Jenkins, 58 S.W.2d 298.
N.Y.—Cook v. Great Atlantic & Pacific Tea Co., 278 N.Y.S. 777, 244 App.Div. 63, affirmed 198 N.E. 423, 268 N.Y. 599.
N.C.—Holeman v. Pensacola Shipbuilding Co., 134 S.E. 647, 192 N.C. 236.
W.Va.—Bean v. Baltimore & O. R. Co., 1 S.E.2d 881.
Wis.—Pawlowski v. Eskofski, 244 N.W. 611, 209 Wis. 189.

29. Ala.—Dickinson v. State, 152 So. 29, 228 Ala. 28, citing **Corpus Juris.**
Idaho.—Herring v. Davis, 273 P. 757, 47 Idaho 211.
22 C.J. p 173 note 33.

30. Ala.—Southern Home Ins. Co. of the Carolinas v. Boatwright, 176 So. 460, 234 Ala. 668—Griswold v. Duke, 140 So. 427, 428, 224 Ala. 402, citing **Corpus Juris**—Konidaris v. Burgess, 137 So. 303, 223 Ala. 512—Watts v. Espy, 101 So. 106, 211 Ala. 502.
Cal.—Leffingwell v. Faubion, 264 P. 306, 89 Cal.App. 157.
Mo.—Woelfle v. Connecticut Mut. Life Ins. Co. of Hartford, Conn., 112 S.W.2d 865, 874, 234 Mo.App. 135, citing **Corpus Juris**—Lynch v. Missouri-Kansas-Texas R. Co., 61 S.W.2d 918, 333 Mo. 89—Commercial Inv. Co. v. Citizens' State Bank of Pratt, Kan., 54 S.W.2d 424, 227 Mo.App. 498.

the C.J.S. title Witnesses § 628, also 70 C.J. p 1153 note 66, declarations of a witness out of court inconsistent with his testimony are not admissible to prove the truth of the facts stated, but only for purposes of impeachment.

Negative hearsay. A negative form of hearsay has been recognized in refusing to admit evidence that a certain person had not mentioned a certain fact to the witness.[31]

Oral admissions. An oral admission of a party can be shown only by the testimony of a person who heard it; a witness who did not hear the admission cannot testify as to what a person who did hear it told him about it.[32]

Acts as hearsay. An act may amount to an expression of feeling so as to come within the rule against hearsay.[33] Further, the courts have excluded, as hearsay, evidence that another's landlord had levied a distress warrant on property allegedly belonging to plaintiff,[34] evidence of the revocation of an automobile driver's license,[35] and evidence of the practice of a contractor's agent with respect to requests for materials.[36]

On the other hand, proof of the conduct of the parties is not objectionable as hearsay,[37] and verbal acts do not fall within the hearsay rule.[38]

Hearsay in connection with other evidence. In connection with other evidence which is competent in itself, evidence which, standing alone, would be objectionable as hearsay, may sometimes be received.[39]

Hearsay before administrative tribunal. Before an administrative tribunal, hearsay has been held to be admissible.[40]

§ 194. Written or Printed Hearsay

Statements otherwise objectionable as hearsay are not rendered admissible because they have been reduced to writing, as where the form is judicial, official, mercantile, or more fugitive, or because they are printed, as where they appear in the form of a book or treatise on a scientific subject.

A statement otherwise objectionable as hearsay does not become competent because it has been reduced to writing.[41] A written statement is equally inadmissible under the rule excluding hearsay evi-

Tex.—Boone v. Moore, Civ.App., 246 S.W. 685.
Wash.—Dunn v. Buschmann, 13 P.2d 69, 169 Wash. 395.
22 C.J. p 206 note 45.

31. Ga.—Sherling v. Continental Trust Co., 165 S.E. 560, 175 Ga. 672.
N.Y.—James K. Thomson Co. v. International Compositions Co., 181 N.Y.S. 637, 191 App.Div. 553.
N.C.—Lake Drain. Comrs. v. Spencer, 93 S.E. 435, 174 N.C 36.

Testimony that no complaints had been received

U.S.—U. S. v. 11¼ Dozen Packages of Article Labeled in Part Mrs. Moffat's Shoo Fly Powders for Drunkenness, D.C.N.Y., 40 F.Supp. 208.
N.Y.—Altkrug v. William Whitman Co., 173 N.Y.S. 669, 185 App.Div. 744.

32. N.J.—Horton v. Horton, 130 A. 24, 2 N.J.Misc. 683.
22 C.J. p 206 note 48.
Who may testify to admissions see infra § 370.

Declaration against interest

Hearsay evidence was not admissible to prove declarations against interest.—Seale v. Schultz, Tex.Civ.App., 3 S.W.2d 563, error dismissed.

33. Mich.—Norris v. Detroit United R. Co., 151 N.W. 747, 185 Mich. 264.
22 C.J. p 206 note 49.
Acts based on hearsay see infra § 201.

34. Ga.—Atlantic Co. v. Farris, 8 S.E.2d 665, 62 Ga.App. 212.

35. N.H.—McCurdy v. Flibotte, 139 A. 367, 83 N.H. 143.

36. N.Y.—Uvalde Asphalt Paving Co. v. City of New York, 183 N.Y.S. 304, 196 App.Div. 740.

37. Iowa.—Goodale v. Murray, 289 N.W. 450, 227 Iowa 843, 126 A.L.R. 1121.

Conduct avoiding alienation of affections

Defendants, in action for alienating husband's affections, may show conduct avoiding alienation, though hearsay.—Caplan v. Caplan, 142 A. 121, 83 N.H. 318.

38. Cal.—Central Heights Imp. Co. v. Memorial Parks, 105 P.2d 596, 40 Cal.App.2d 591.
Kan.—Bourn v. Beck, 226 P. 769, 116 Kan. 231.
La.—Garlick v. Dalbey, 84 So. 441, 147 La. 18.
Minn.—Hanson v. Johnson, 201 N.W. 322, 161 Minn. 229.
Or.—Southeast Portland Lumber Co. v. Heacock, 275 P. 28, 128 Or. 248.

39. U.S.—U. S. v. Mammoth Oil Co., C.C.A.Wyo., 14 F.2d 705, reversing, D.C., 5 F.2d 330, and certiorari granted Mammoth Oil Co. v. U. S., 47 S.Ct. 332, 273 U.S. 686, 71 L.Ed. 840, affirmed 48 S.Ct. 1, 275 U.S. 13, 72 L.Ed. 137.
Ga.—Dickens v. Maxey, 157 S.E. 368, 42 Ga.App. 783—Johnson v. Tifton Buick Co., 149 S.E. 73, 40 Ga.App. 158.
Tex.—Texarkana Motor Co. v. Brashears, Civ.App., 37 S.W.2d 773.
22 C.J. p 206 note 50.

Agency

Where there was evidence tending to establish agency, agent's declarations, that he was authorized to take property from carrier, and his acts in reshipping it in seller's name, and using automobile bearing such name, were not inadmissible as hearsay.—J. B. Colt Co. v. Pickron, 124 S.E. 550, 32 Ga.App. 715.

40. **Civil service commission**

Iowa.—Fronsdahl v. Civil Service Commission of Des Moines, 179 N.W. 874, 189 Iowa 1344.

41. U.S.—Baltimore American Ins. Co. of New York v. Pecos Mercantile Co., C.C.A.N.M., 122 F.2d 143—Morton Butler Timber Co. v. U. S., C.C.A.Tenn., 91 F.2d 884—American Employers' Ins. Co. v. Roundup Coal Mining Co., C.C.A. Neb., 73 F.2d 592—Westco-Chippewa Pump Co. v. Auto-Prime Pump Co., D.C.Ohio, 57 F.2d 556—Grasselli Chemical Co. v. National Aniline & Chemical Co., C.C.A.N.Y., 26 F.2d 305—U. S. v. Packard Sedan, D.C.Fla., 23 F.2d 865—In re Jan W. Paris, Inc., D.C.N.Y., 11 F.Supp. 77, affirmed, C.C.A., 77 F.2d 1003—In re Kamens Quality Markets, D.C.Pa., 10 F.Supp. 263, reversed on other grounds, C.C.A., General Motors Acceptance Corporation v. Horton, 85 F.2d 452—The Condor, D.C.N.Y., 8 F.Supp. 929, affirmed, C.C.A., The Nordpol, 84 F.2d 3, certiorari denied Grace S. S. Co. v. Anglo-Chilean Nitrate Sales Corporation, 57 S.Ct. 111 (two cases), 299 U.S. 586, 81 L. Ed. 432.

dence, where the form is judicial,[42] as in the case of affidavits,[43] answers to interrogatories,[44] depo-

Ala.—Ex parte McLendon, 195 So. 733, 239 Ala. 564.
Ark.—Ozark Mut. Life Ass'n v Dillard, 273 S.W. 378, 169 Ark. 136.
Cal.—Lusardi v. Prukop, 2 P.2d 870, 116 Cal.App. 506—Ryan v. Bank of Italy Nat. Trust & Savings Ass'n, 289 P. 863, 106 Cal.App. 690—City of Stockton v. Vote, 244 P. 609, 76 Cal.App. 369.
Ga.—Love v. Commercial Credit Co., Inc., 12 S.E.2d 99, 103, 64 Ga.App. 18, citing **Corpus Juris**—New York Life Ins. Co. v. Ittner, 200 S.E. 522, 59 Ga.App. 89.
Ill.—Hoef v. Hoef, 153 N.E. 658, 323 Ill. 170.
Ind.—Horner v. Boomershine, 161 N.E. 641, 88 Ind.App. 57.
Ky.—Moorman Mfg. Co v. Harris, 134 S.W.2d 936, 280 Ky. 845—Security Finance Co. v. A. L. Cook & Son, 3 S.W.2d 187, 223 Ky. 124.
Mass.—Shachoy v. Chevrolet Motor Co., 182 N.E. 830, 280 Mass. 442.
Mich.—Daugherty v. Park, 265 N.W. 499, 274 Mich. 673—Truax v. Bliss, 102 N.W. 635, 139 Mich. 153.
Minn.—Clancy v. Daily News Corporation, 277 N.W. 264, 202 Minn. 1
Mo.—In re Warden, 146 S.W.2d 874—Wahl v. Cunningham, 56 S.W.2d 1052, 332 Mo. 21—Littig v. Urbauer-Atwood Heating Co., 237 S.W. 779, 292 Mo. 226—Pantz v. Nelson, 135 S.W.2d 397, 234 Mo.App. 1043—Wilson v. Frankel, App., 61 S.W.2d 363—Weaver Bros. v. Smith, App., 13 S.W.2d 578—Esty v. Walker, 3 S.W.2d 744, 222 Mo. App. 619—Moore v. St. Louis & S. F. Ry. Co., App., 267 S.W. 945.
Mont.—Vukmanovich v. State Assur. Co. of Liverpool, England, 264 P. 933, 82 Mont. 52.
N.J.—Home Owners' Loan Corporation v. Grundy, 4 A.2d 784, 122 N.J.Law 301—Central R. Co. of New Jersey v. State Tax Department, 169 A. 489, 112 N.J.Law 5, affirming Central R. Co. of New Jersey v. State Board of Tax Appeals, 162 A. 889, 109 N.J.Law 395, and certiorari denied Central R. Co. of New Jersey v. State Tax Commission, 55 S.Ct. 79, 293 U.S. 568, 79 L.Ed. 667.
N.Y.—Von Reitzenstein v. Tomlinson, 162 N.E. 584, 249 N.Y. 60, reversing 226 N.Y.S. 919, 222 App. Div. 835—Orthey v. Bowden, 123 N.E. 487, 226 N.Y. 234, reversing Orthey v. Bogan, 163 N.Y. 1125, 177 App.Div. 928—Kass v. Metropolitan Life Ins. Co., 300 N.Y.S. 193, 252 App.Div. 888, affirmed 15 N.E.2d 671, 278 N.Y. 512—Baron v. Baron, 299 N.Y.S. 280, 252 App.Div. 293—Meyer v. Mayo, 187 N.Y.S. 346, 196 App.Div. 78—Blaustein v. Pan American Petroleum & Transport Co., 21 N.Y.S.2d 651, 174 Misc. 601, modified on other grounds 31 N.Y.S.2d 934, 263 App.Div. 97—Polachek v. New York Life Ins. Co., 263 N.Y.S. 230, 147 Misc. 16, affirmed 268 N.Y.S. 995, 240 App Div. 1028—Hutner v. American Surety Co. of New York, 203 N.Y.S. 406, 122 Misc. 677—Astrove v. Eighty-Fourth St. Garage, 179 N.Y.S. 780.
N.C.—Bunn v. Harris, 5 S.E.2d 149, 216 N.C. 366.
Okl.—Metropolitan Life Ins. Co. v. Bradbury, 65 P.2d 433, 179 Okl. 253.
Pa.—Athas v. Fort Pitt Brewing Co., 188 A. 113, 324 Pa. 313—Emery v. Third Nat. Bank, 162 A. 281, 308 Pa. 504—Bossart v. Erie Coal Mining Co., 119 A. 731, 276 Pa. 63—Barna v. Travelers Ins. Co., 89 Pittsb.Leg.J. 176—Gault v. Gault, 86 Pittsb.Leg.J. 87.
S.C.—Haselden v. Standard Mut. Life Ass'n, 1 S.E.2d 924, 190 S.C. 1.
S.D.—Christiansen v. Bankers' & Shippers' Ins. Co., 207 N.W. 108, 49 S.D. 225.
Tex.—Kincheloe v. Kincheloe, Civ. App., 152 S.W.2d 851—Elmore v. Peavy, Civ.App., 143 S.W.2d 983—Taylor v. McLennan County, Civ. App., 120 S.W.2d 134—Southwest Realty Co. v. Barron, Civ.App., 113 S.W.2d 991—Phœnix Refining Co. v. Walker, Civ.App., 108 S.W.2d 323, error dismissed—Duree v. Ætna Ins. Co., Civ.App., 66 S.W. 2d 764—Nueces County v. Nueces County Drainage Dist. No. 2, Civ. App., 5 S.W.2d 620, error refused—Morris v. Davis, Civ.App., 3 S.W.2d 109, affirmed Davis v. Morris, Com.App., 13 S.W.2d 63—Goolsby v. Manning, Civ.App., 270 S.W. 936—Locke v. Wallingford, Civ.App., 265 S.W. 1086—Temple Lumber Co. v. Low, Civ.App., 260 S.W. 637, reversed on other grounds, Com.App., 272 S.W. 769—Gulf, C. & S. F. R. Co. v. Hines, Civ.App., 239 S.W. 244, affirmed, Com.App., 250 S.W. 1013—In re McLaren's Estate, Civ.App., 221 S.W. 1045—Schaff v. Holmes, Civ. App., 215 S.W. 864.
Wash.—Lewis v. Coleman, 79 P.2d 633, 194 Wash. 674—Bennington v. Northern Pac. Ry. Co., 192 P. 1073, 113 Wash. 1.
Wyo.—Brown v. Citizens' Nat. Bank of Cheyenne, 269 P. 40, 38 Wyo. 469.
22 C.J. p 207 note 51—30 C.J. p 1023 note 16 [b].

Automobile driver's report of accident to state department was held inadmissible as report made pursuant to statutory duty.—Ezzo v. Geremiah, 142 A. 461, 107 Conn. 670.

Physician's report
Ill.—Oard v. Dolan, 151 N.E. 244, 320 Ill. 371.
Iowa.—Hamilton v. P. E. Johnson & Sons, 276 N.W. 841, 224 Iowa 1097.
Mo.—Gilday v. Smith Bros., App., 32 S.W.2d 118, record quashed State ex rel. Gilday v. Trimble, 44 S.W. 2d 57, conformed to Gilday v. Smith Bros., 50 S.W.2d 191, 226 Mo.App. 1246.
N.Y.—Lindquist v. Friedelson, 248 N.Y.S. 775, 232 App.Div. 857.
Or.—Bottom v. Portland Electric Power Co., 9 P.2d 129, 139 Or. 209.
22 C.J. p 209 note 68 [b].

Document executed before municipal officers
Philippine.—Order of Dominicans v. Insular Government, 7 Philippine 98—Ismael v. Guanzon, 2 Philippine 347.

42. Finding of appellate court on former appeal
Mo.—Rigley v. Prior, 233 S.W. 828, 290 Mo. 10

Papers signed by judge in former action, not properly part of records and hearsay, were rightfully excluded.—Shapiro v. Park Trust Co., 149 N.E. 313, 253 Mass. 383.

43. U.S.—Syracuse Engineering Co. v. Haight, C.C.A.N.Y., 97 F.2d 573—Seals v. U. S., C.C.A.La., 70 F. 2d 519—Elgin Nat. Watch Co. v. Elgin Clock Co., D.C.Del., 26 F.2d 376.
Ala.—Pan American Petroleum Corporation v. Mullack, 167 So. 728, 232 Ala. 271.
Ark.—Southern Life Ins. Co. v. Floyd, 295 S.W. 715, 174 Ark. 372.
Del.—In re Missouri-Kansas Pipe Line Co., 2 A.2d 273, application for bill of review denied 10 A.2d 500.
Ga.—Ward v. Morris, 126 S.E. 291, 159 Ga. 526.
N.J.—Union County Sav. Bank v. Kolpenitsky, 4 A.2d 413, 125 N.J. Eq. 125.
N.Y.—Poses v. Travelers Ins. Co., Hartford, Conn., 281 N.Y.S. 126, 245 App.Div. 304—Guenther v. Ridgway Co., 176 N.Y.S. 89, 187 App.Div. 593—In re Smith's Estate, 242 N.Y.S. 464, 136 Misc. 863.
N.C.—In re Hargrove's Will, 169 S.E. 812, 205 N.C. 72.
Okl.—Holmes v Nelson, 76 P.2d 1076, 182 Okl. 166.
Or.—In re Braun's Estate, 90 P.2d 484, 161 Or. 503.
S.C.—Holman v. Farrell, 109 S.E. 886, 118 S.C. 12.
Tenn.—Miller v. Gratz, 3 Tenn.App. 498.
Tex.—Owens v. Jackson, Civ.App., 35 S.W.2d 186, error dismissed—Hargis v. Moxon, Civ.App., 34 S.W.2d 353, 354, citing **Corpus Juris.**
22 C.J. p 207 note 52.

44. Miss.—Western Union Telegraph Co. v. Goodman, 146 So. 128, 166 Miss. 782.
22 C.J. p 208 note 53.

sitions,[45] pleadings,[46] whether filed in proceedings at law,[47] or in equity[48] or in special proceedings,[49] or schedules filed by a bankrupt.[50]

In addition, a written statement is inadmissible as hearsay where the form is official, as in the case of records kept by municipal[51] or other public[52] officers, or by private associations,[53] certificates,[54] church[55] or hospital[56] records, or the reports of public boards,[57] or the reports of officers or bod-

45. Ga.—American Nat. Ins. Co. v. Anderson, 157 S.E. 112, 42 Ga.App. 624.
Vt.—Enos v. Owens Slate Co., 160 A. 185, 104 Vt. 329.
22 C.J. p 208 note 54.

46. U.S.—Syracuse Engineering Co. v. Haight, C.C.A.N.Y., 97 F.2d 573—In re Big Pines Lime & Transportation Co., D.C.Cal., 257 F. 141.
Ala.—Indemnity Ins. Co. of North America v. Holiway, 170 So. 329.
Cal.—Miles v. Rosenthal, 266 P. 320, 90 Cal.App. 390.
Ga.—Love v. Commercial Credit Co., 12 S.E.2d 99, 103, 64 Ga.App. 18, citing **Corpus Juris.**
Tenn.—Miller v. Gratz, 3 Tenn.App. 498.
Tex.—Fertitta v. Toler, Civ.App., 43 S.W.2d 467, reversed on other grounds Toler v. Fertitta, Com. App., 67 S.W.2d 229.
22 C.J. p 208 note 55.

Indictment
Cal.—Ryan v. Bank of Italy Nat. Trust & Savings Ass'n, 289 P. 863, 106 Cal.App. 690.

47. S.C.—Morrison v. Union Indemnity Co., 161 S.E. 418, 423, 163 S.C. 137, quoting **Corpus Juris.**
22 C.J. p 208 note 56.

48. Tex.—Granata v. Mothner, Civ. App., 44 S.W.2d 817.
22 C.J. p 208 note 57.

49. S.C.—Morrison v. Union Indemnity Co., 161 S.E. 418, 423, 163 S.C. 137, quoting **Corpus Juris.**
22 C.J. p 208 note 58.

50. N.Y.—Taylor v. Nichols, 119 N.Y.S. 1042, 134 App.Div. 787.

Record of bankruptcy proceedings and testimony and admissions of bankrupt
N.Y.—Rosenbluh v. Kurash, 290 N.Y.S. 576, 248 App.Div. 504.

51. Md.—City of Baltimore v. Terio, 128 A. 353, 147 Md. 330.
22 C.J. p 208 note 60.

52. Ala.—Messer-Johnson Realty Co. v. Security Savings & Loan Co., 94 So. 734, 208 Ala. 541.
Mich.—Sadjak v. Parker-Wolverine Co., 274 N.W. 719, 281 Mich. 84.
22 C.J. p 208 note 61.

War records
Miss.—Quinn v. Louisville & N. R. R. Co., 110 So. 436, 144 Miss. 505.

53. Ark.—United Order of Good Samaritans v. Lomax, 288 S.W. 709, 172 Ark. 330.
Ga.—Metropolitan Life Ins. Co. v. Busby, 157 S.E. 354, 42 Ga.App. 808.
Ill.—National Slovak Soc. of U. S. A., for Use of American Surety Co. of New York v. Matlocha, 29 N.E.2d 946, 307 Ill.App. 41.
Mass.—Klefbeck v. Dous, 19 N.E.2d 308, 302 Mass. 383—Finnegan v. Checker Taxi Co., 14 N.E.2d 127, 300 Mass. 62.
Tenn.—Pigg v. Houston & Liggett, 8 Tenn.App. 613.
22 C.J. p 208 note 62.

54. U.S.—Krug v. Mutual Ben. Health & Accident Ass'n, C.C.A. Mo., 120 F.2d 296.
Ala.—Aiken v. McMillan, 106 So. 150, 213 Ala. 494.
D.C.—Von Zedtwitz v. Sutherland, 26 F.2d 525, 58 App.D.C. 153.
Ill.—Decorators Supply Corporation v. Babka, 8 N.E.2d 559, 290 Ill. App. 298.
Minn.—In re Olson's Estate, 223 N.W. 677, 176 Minn. 360—Miller v. McCarthy, 270 N.W. 559, 198 Minn. 497.
Miss.—Blount v. Houston Coca Cola Bottling Co., 185 So. 241, 184 Miss 69.
N.Y.—Littmann v. Goldstein, 8 N.Y.S.2d 490, 255 App.Div. 540—Hyman Goldman Plumbing & Heating Corporation v. Nesbit, 267 N.Y.S. 889, 149 Misc. 605.
N.C.—Stanley v. Whiteville Lumber Co., 114 S.E. 385, 184 N.C. 302.
Tex.—Norton v. Bridge, Civ.App., 144 S.W.2d 959—American Nat. Ins. Co. v. Fress, Civ.App., 142 S.W.2d 531, error dismissed, judgment correct—Williams v. Mutual Motor Co., Civ.App., 67 S.W.2d 905—Green v. Missouri State Life Ins. Co., Civ. App., 219 S.W. 552.
22 C.J. p 208 note 63.

Death certificate
Ala.—Cotton States Life Ins. Co. v. Crozier, 118 So. 327, 218 Ala. 173.
Md.—Mayor and City Council of Baltimore City v. State, for Use of Blueford, 195 A. 571, 173 Md. 267—Standard Gas Equipment Corporation v. Baldwin, 136 A. 644, 152 Md. 321.
N.Y.—Anderson v. National Accident Soc. of New York, 260 N.Y.S. 862, 145 Misc. 804—Kaufman v. Metropolitan Life Ins. Co., 200 N.Y.S. 559.
Pa.—Hanrahan v. John Hancock Mut. Life Ins. Co., 18 A.2d 512, 143 Pa. Super. 557—Heffron v. Prudential Ins. Co. of America, 8 A.2d 491, 137 Pa.Super. 69.
22 C.J. p 208 note 63 [a].

55. Record of baptism
Tex.—Baldwin v. Salgado, Civ.App., 135 S.W. 608.

56. U.S.—Krug v. Mutual Ben. Health & Accident Ass'n, C.C.A. Mo., 120 F.2d 296.
Ark.—John Hancock Mut. Life Ins. Co. v Ramey, 140 S.W.2d 701, 200 Ark. 635.
Ga.—Bankers Health & Life Ins. Co. v. Kelsey, 5 S.E.2d 600, 60 Ga.App. 899—Mutual Ben. Health & Accident Ass'n of Omaha, Neb., v. Bell, 176 S.E. 124, 49 Ga.App. 640.
Ill.—Wiedow v. Carpenter, 34 N.E.2d 83, 310 Ill.App. 342
La.—Gaines v. Acme Industrial Life Ins. Soc., App., 155 So. 276—Williams v. Locicero, 142 So. 856—Dolan v. Metropolitan Life Ins. Co., 123 So. 379, 11 La.App. 276.
Mass.—Inangelo v. Petterson, 128 N.E. 713, 236 Mass. 439.
Mich.—Sadjak v. Parker-Wolverine Co., 274 N.W. 719, 281 Mich. 84—Job v. Grand Trunk Western Ry. Co., 222 N.W. 723, 245 Mich. 353.
Miss.—Metropolitan Life Ins. Co. v. McSwain, 115 So. 555, 149 Miss. 455.
Ohio.—Reed v. Hensel, 159 N.E. 843, 26 Ohio App. 79.
Pa.—McGine v. State Mut. Ben. Soc., 189 A. 889, 124 Pa.Super. 602—Barna v. Travelers Ins. Co., 89 Pittsb Leg.J. 176.
Tenn.—Hill v. National Life & Accident Ins. Co., Inc., 11 Tenn.App. 33.
Wash.—Dunn v. Buschmann, 13 P.2d 69, 169 Wash. 395—Toole v. Franklin Inv. Co., 291 P. 1101, 158 Wash. 696.
22 C.J. p 209 note 65.

Clinic card
Okl.—Metropolitan Life Ins. Co. v. Bradbury, 65 P.2d 433, 179 Okl. 253.

Hospital card
Ga.—Metropolitan Life Ins. Co. v. Mapp, 142 S.E. 564, 38 Ga.App. 30.

57. Mich.—Daugherty v. Park, 265 N.W. 499, 274 Mich. 673.
N.J.—Central R. Co. of New Jersey v. State Tax Department, 169 A. 489, 112 N.J.Law 5, affirming Central R. Co. of New Jersey v. State Board of Tax Appeals, 162 A. 889, 109 N.J.Law 395, and certiorari denied Central R. Co. of New Jersey v. State Tax Commission, 55 S.Ct. 79, 293 U.S. 568, 79 L.Ed. 667.
Utah.—Continental Nat. Bank of Salt Lake City v. Naylor, 179 P. 67, 54 Utah 49.

Health board
Ga.—Montezuma v. Minor, 73 Ga. 484.

Interstate commerce commission
Ark.—Missouri Pac. R. Co. v. Nelson, 115 S.W.2d 872, 195 Ark. 883.

ies,[58] officials,[59] officers of private corporations,[60] or trustees of an estate.[61]

Further, a written statement is equally inadmissible under the rule excluding hearsay evidence where the form is mercantile, as in the case of accounts of sales[62] or deliveries,[63] or of work done,[64] orders,[65] invoices,[66] inventories,[67] checks,[68] deposit slips,[69] receipts,[70] commercial reports,[71] price sheets,[72] financial statements,[73] or books of ac-

58. Ill.—Coal Creek Drainage & Levee Dist. v. Sanitary Dist. of Chicago, 167 N.E. 807, 336 Ill. 11, reversing 254 Ill.App. 289.
Minn.—Clancy v Daily News Corporation, 277 N.W. 264, 202 Minn. 1.
N.Y.—Klepper v. Seymour House Corporation of Ogdensburg, 209 N.Y.S. 67, 212 App.Div. 277.
Ohio.—Hoare v. City of Cleveland, 186 N.E. 710, 126 Ohio St. 625, affirming Heiser Bros. Co. v. City of Cleveland, 186 N.E. 620, 44 Ohio App. 560.
22 C.J. p 209 note 67.

59. U.S.—Illinois Power & Light Corporation v. Hurley, C.C.A.Mo., 49 F.2d 681, rehearing denied 52 S.Ct. 19, 284 U.S. 637, 76 L.Ed. 541.
Cal.—Ogilvie v. Ætna Life Ins. Co. of Hartford, Conn., 209 P. 26, 189 Cal. 406, 26 A.L.R. 116.
Ill.—Branch v. Woulfe, 21 N.E.2d 148, 300 Ill.App. 472.
Iowa.—Independent School Dist. of Kellogg v. Morris, 226 N.W. 66, 208 Iowa 588.
La.—Daniels v. Union Oil Mill, App., 161 So. 614.
Mich.—Michigan Bankers' Ass'n v. Ocean Accident & Guarantee Corporation, 264 N.W. 868, 274 Mich. 470.
Minn.—Duffey v. Curtis, 258 N.W. 744, 193 Minn. 358.
Mo.—Thrower v. Life & Casualty Ins. Co. of Tennessee, App., 141 S.W.2d 192—White v. Hasburgh, App., 124 S.W.2d 560.
N.J.—Apgar v. Campbell, 151 A. 77, 8 N.J.Misc. 517.
N.Y.—Johnson v. Lutz, 170 N.E. 517, 253 N.Y. 124, affirming 234 N.Y.S. 328, 226 App.Div. 772—Wolf v. Kaufmann, 237 N.Y.S. 550, 227 App.Div. 281, motion granted 173 N.E. 882, 254 N.Y. 598—Needle v. New York Rys. Corporation, 237 N.Y.S. 547, 227 App.Div. 276—Misiazek v. Roberts, 207 N.Y.S. 621, 211 App.Div. 417.
Or.—Christ v. McDonald, 52 P.2d 655, 152 Or. 494.
S.C.—Sandel v. State, 119 S.E. 776, 126 S.C. 1, petition denied 122 S.E. 571, 128 N.C. 178, appeal dismissed 44 S.Ct. 5, 263 U.S. 672, 68 L.Ed. 500, error dismissed 46 S.Ct. 100, 269 U.S. 532, 70 L.Ed. 397—Jowers v. Dysard Const. Co., 100 S.E. 892, 113 S.C. 84.
Tex.—Hobart Mfg. Co. v. Joyce, Civ.App., 22 S.W.2d 955—General Acc. Fire & Life Assur. Corporation v. La Fair, Civ.App., 294 S.W. 247—Gulf, C. & S. F. Ry. Co. v. Hill Civ.App., 284 S.W. 594—Green v Missouri State Life Ins. Co., Civ.App., 219 S.W. 552.
Va.—Southern Ry. Co. v. Leake, 125 S.E. 314, 140 Va. 438.
22 C.J. p 209 note 68.

Court stenographer's transcript

(1) Stenographer's transcript of the proceedings of a trial is not evidence of the purported facts appearing therein.—City of Newark v. Cook, 133 A. 875, 99 N.J.Eq. 527, affirmed 135 A. 915, 100 N.J.Eq. 581 and 135 A. 916 (two cases), 100 N.J.Eq. 582, certiorari denied McEuen v. City of Newark, 47 S.Ct. 768, 274 U.S. 757, 71 L.Ed. 1337.

(2) The stenographer's transcript of witness' testimony at former hearing is mere hearsay, and so testimony by the presiding judge that the transcript was correct is inadmissible, being merely double hearsay.—Woods v. Postal Telegraph Cable Co., 87 So. 681, 205 Ala. 236, 27 A.L.R. 834.

Failure to establish report as exception to hearsay rule

In action for total and permanent disability benefits under war risk policy on ground of alleged mental incapacity, mere fact of presence of report with reference to insured in veterans' administration file did not render report admissible, in absence of establishing report as within class of official records which are excepted from hearsay rule.—U. S. v. Smart, C.C.A.Ala., 87 F.2d 1.

60. Ala.—Mobile & O. R. Co. v. Borden Coal Co., 98 So. 315, 19 Ala.App. 481.
Tex.—Brotherhood of Locomotive Firemen and Enginemen v. Raney, Civ.App., 101 S.W.2d 863, error dismissed.
22 C.J. p 209 note 69.

61. Mo.—Parks v. Marshall, 14 S.W.2d 590, 322 Mo. 218, 62 A.L.R. 835.

62. Ga.—Love v. Commercial Credit Co., 12 S.E.2d 99, 103, 64 Ga.App. 18, citing **Corpus Juris.**
Ky.—Security Finance Co. v. A. L. Cook & Son, 3 S.W.2d 187, 223 Ky. 124.
Me.—Edwards v. Goodall, 137 A. 692, 126 Me. 254.
Mo.—Crowell v. St. Louis-San Francisco Ry. Co., App., 11 S.W.2d 1055.
Ohio.—Ferguson v. Siegel, 163 N.E. 723, 29 Ohio App. 526.
22 C.J. p 209 note 70.

63. Cal.—Holland v. Kelly, 241 P. 579, 74 Cal.App. 576.

64. Cal.—Menefee v. Raisch Improvement Co., 248 P. 1031, 78 Cal.App. 785.
N.J.—Ferraro v. Public Service Ry. Co., 141 A. 590, 6 N.J.Misc. 463.
Ohio.—Ferguson v. Siegel, 163 N.E. 723, 29 Ohio App. 526.
Tex.—Housley v. Strawn Merchandise Co., Com.App., 291 S.W. 864, reversing, Civ.App., 253 S.W. 673.
22 C.J. p 209 note 71.

Professional services

Cal.—Robinson v Western States Gas & Electric Co., 194 P. 39, 184 Cal. 401.
Conn.—Bushnell v. Bushnell, 131 A. 432, 103 Conn. 583, 44 A.L.R. 785.
Ill.—Anglo-California Trust Co. v. Essanay Film Mfg. Co., 155 N.E. 26, 324 Ill. 249.

65. Tex.—U. S. Fidelity & Guaranty Co. v. Roberts Marble Co., Civ.App., 46 S.W.2d 1063

66. Ga.—Georgia Mountain Orchards v. Jones & Stewart, 126 S.E. 865, 33 Ga.App. 513.
Tex.—St. Louis Southwestern R. Co. v. McLeod, Civ.App., 115 S.W. 85.

67. U.S.—Brictson Mfg. Co. v. Close, C.C.A.Neb., 25 F.2d 794, certiorari dismissed 49 S.Ct. 249, 278 U.S. 666, 73 L.Ed. 571
Conn.—Underwood Typewriter Co. v. City of Hartford, 122 A. 91, 99 Conn. 329.
22 C.J. p 209 note 73.

68. Tex.—Browning v. Hinerman, Civ.App., 224 S.W. 236.

69. Tex.—Browning v. Hinerman, supra.

70. Ark.—United Order of Good Samaritans v. Lomax, 288 S.W. 709, 172 Ark. 330.
N.Y.—Friedman-Wallach Co. v. Rosenau Bros., 189 N.Y.S. 102.
Or.—Backus v. West, 205 P. 533, 104 Or. 129.
R.I.—Ott v. Lonergan, 125 A. 273.
22 C.J. p 209 note 74.

71. Ala.—Eggleston v. Wilson, 94 So. 108, 208 Ala. 167.
Fla.—Van Deman v. Demos, 60 So. 342, 64 Fla. 533.
N.Y.—In re Hooper-Holmes Bureau, 19 N.Y.S.2d 456, 173 Misc. 735.

72. Conn.—Burn & Crump v. Metropolitan Lumber Co., 107 A. 609, 94 Conn. 1.

73. U.S.—Oliver v. Brennan, D.C.Cal., 292 F. 197, affirmed In re Wright Motor Co., C.C.A.Cal., 299 F. 106.
Ga.—Owen v. Anderson, 186 S.E. 864, 54 Ga.App. 53.
Ky.—Jones v. Driver, 137 S.W.2d 729, 282 Ky. 82.
S.D.—Hobbs v. Whitelock, 231 N.W. 904, 57 S.D. 198.

count;[74] and where the form is more fugitive, as | in the case of letters,[75] and where the form is more

Wash.—Lewis v. Coleman, 79 P.2d 633, 194 Wash. 674.

74. N.Y.—Botti v. Horton's Estate, 5 N.Y.S.2d 284, 254 App.Div. 889.
Or.—Sather v. Giaconi, 320 P. 740, 110 Or. 433—Radtke v. Taylor, 210 P. 863, 105 Or. 559, 27 A.L.R. 1423.
Tex.—Southwest Gas Co. v. Doney, Civ.App., 99 S.W.2d 1107, error dismissed—Freund v. Hanson's Sons, Civ.App., 215 S.W. 151.
Wis.—In re Porter's Will, 190 N.W. 473, 178 Wis. 556.
22 C.J. p. 209 note 76.

75. U.S.—Valley Shoe Corporation v. Stout, C.C.A.Mo., 98 F.2d 514—Ambler v. Bloedel Donovan Lumber Mills, C.C.A.Wash., 68 F.2d 263, affirming, D.C., 5 F.Supp. 440—Massachusetts Bonding & Insurance Co. v. R. E. Parsons Electric Co., C.C.A.Mo., 61 F.2d 264, 92 A.L.R. 218—New York Life Ins. Co. v. Bullock, D.C.Fla., 59 F.2d 747—Colthurst v. Lake View State Bank of Chicago, Ill., C.C.A.Iowa, 18 F.2d 875—Texas Co. v. Brilliant Mfg. Co., C.C.A.Pa., 2 F.2d 1—Builders & Manufacturers Mut. Casualty Co. v. Paquette, D.C.Me., 21 F.Supp. 858—Ambler v. Bloedel Donovan Lumber Mills, D.C.Wash., 5 F.Supp. 440, affirmed, C.C.A., 68 F.2d 268—Sylvania Industrial Corporation v. U. S., 22 C.C.P.A.(Customs) 230.
Ala.—Southern Life & Health Ins. Co. v. Williams, 163 So. 321, 230 Ala. 681—Connecticut General Life Ins. Co. v. Smith, 145 So. 651, 226 Ala. 142—Woody v. Tucker, Willingham & Co., 110 So. 465, 215 Ala. 278.
Ark.—Chicago, R. I. & P. Ry. Co. v. Greer, 58 S.W.2d 424, 187 Ark. 101—H. G. Pugh & Co. v. Ahrens, 10 S.W.2d 873, 178 Ark. 230—Bevers v. Bradstreet, 280 S.W. 667, 170 Ark. 650—Hatfield Products & Co-operative Ass'n v. Mena Truck & Fruit Growers' Ass'n, 261 S.W. 294, 164 Ark. 182—Martin v. Duke, 245 S.W. 173, 156 Ark. 54—Tipler-Grossman Lumber Co. v. Forrest City Box Co., 229 S.W. 17, 148 Ark. 132—T. J. Ellis & Co. v. Farrell, 225 S.W. 349, 146 Ark. 274.
Cal.—In re Golden's Estate, 48 P.2d 962, 4 Cal.2d 300—Mah See v. North American Acc. Ins. Co. of Chicago, Ill., 213 P. 42, 190 Cal. 421, 26 A.L.R. 123—In re Russell's Estate, 210 P. 249, 189 Cal. 759—Campbell v. Genshlea, 180 P. 336, 180 Cal. 213—Drummond v. Drummond, 103 P.2d 217, 39 Cal.App.2d 418—Hillside Packing Ass'n v. Cowles, 66 P.2d 451, 20 Cal.App.2d 26—City of Los Angeles v. Watterson, 48 P.2d 87, 8 Cal.App.2d 331—First Nat. Bank v. De Moulin, 205 P. 92, 56 Cal.App. 313.
Colo.—Stone v. Union Fire Ins. Co., 107 P.2d 241, 106 Colo. 522—Pierce v. Pierce, 48 P.2d 1024, 97 Colo. 228.
Conn.—Dudley v. Hull, 136 A. 575, 105 Conn. 710—Purcell v. Purcell, 126 A. 353, 101 Conn. 422.
Del.—Canadian Industrial Alcohol Co. v. Nelson, 188 A. 39, 8 W.W. Harr. 26.
Ga.—King v. Board of Education of Richmond County, 156 S.E. 710, 42 Ga.App. 563, affirmed 164 S.E. 52, 174 Ga. 685—Cook v. Clarke Chevrolet Co., 153 S.E. 88, 41 Ga.App. 389—Broadwell v. Maxwell, 134 S.E. 808, 35 Ga.App. 769—Whitestone Marble Co. v. Willingham Stone Co., 126 S.E. 859, 33 Ga.App. 512—Phillips v. Freeman, 118 S.E. 404, 30 Ga.App. 450.
Ind.—Speck v. Kramer, 151 N.E. 37, 84 Ind.App. 646.
Iowa.—Kollmann v. Kollmann, 216 N.W. 77, 204 Iowa 950—Lozier Automobile Exch. v. Interstate Casualty Co., 195 N.W. 885, 197 Iowa 935.
Kan.—Weir v. McVey, 288 P. 766, 130 Kan. 743.
Ky.—Hatton v. Sipple, 108 S.W.2d 730, 269 Ky. 707.
Md.—Frankfort Distilleries v. Burns Bottling Mach. Works, 197 A. 599, 174 Md. 12—Singewald v. Singewald, 166 A. 441, 165 Md. 136—Hendrickson v. Attick, 109 A. 468, 136 Md. 1.
Mass.—Rothwell v. First Nat. Bank, 190 N.E. 812, 286 Mass. 417—Blake v. Great Atlantic & Pacific Tea Co., 164 N.E. 486, 266 Mass. 12.
Mich.—Wilson v. Prudential Ins. Co. of America, 275 N.W. 242, 281 Mich. 541—Garey v. Kelvinator Corporation, 271 N.W. 723, 279 Mich. 174—Kolodig v. Highland Park State Bank, 197 N.W. 520, 226 Mich. 197.
Minn.—Richardson v. North American Life & Casualty Co., 172 N.W. 131, 142 Minn. 295.
Miss.—Whiteside v. Elliott, 107 So. 195, 142 Miss. 43.
Mo.—Wahl v. Cunningham, 56 S.W.2d 1052, 332 Mo. 21—Home Exchange Bank of Jamesport v. Koch, 32 S.W.2d 86, 326 Mo. 369—Carter v. Reynolds County, 288 S.W. 48, 315 Mo. 1233—Hely v. Hinerman, 260 S.W. 471, 303 Mo. 147—State v. Adanks, 256 S.W. 768—United Factories v. Brigham, App., 117 S.W.2d 662, certiorari quashed State ex rel. United Factories v. Hostetter, 126 S.W.2d 1173, 344 Mo. 386—Brown v. Tully, App., 220 S.W. 1012.
Mont.—In re Miller's Estate, 229 P. 851, 71 Mont. 330.
N.J.—Wilkie v. Lash, Inc., 197 A. 39, 119 N.J.Law 355.
N.Y.—Moe v. Bank of U. S., 207 N.Y.S. 347, 211 App.Div. 519—Rusher v. Watt, 186 N.Y.S. 858, 195 App.Div. 490—Fox v. Arctic Placer Min. & Mill. Co., 173 N.Y.S. 708, 185 App.Div. 761, reversed on other grounds 128 N.E. 154, 229 N.Y. 124—Kahle v. Mount Vernon Trust Co., 22 N.Y.S.2d 454.
N.C.—American Nat. Bank v. Brickhouse, 136 S.E. 636, 193 N.C. 231—Bryant v. Bryant, 100 S.E. 178, 178 N.C. 73.
Ohio.—Geller v. Geller, 154 N.E. 727, 115 Ohio St. 468.
Okl.—Horn v. First Mortgage Loan Co., 72 P.2d 777, 181 Okl. 87—New York Life Ins. Co. v. Thompson, 72 P.2d 713, 181 Okl. 108—Ross v. Ross, 54 P.2d 611, 175 Okl. 633—Swift & Co. v. Colvert, 259 P. 844, 127 Okl. 80.
Or.—In re Braun's Estate, 90 P.2d 484, 161 Or. 503—Patterson v. Horsefly Irr. Dist., 69 P.2d 282, 157 Or. 1, rehearing denied 70 P.2d 36, 157 Or. 1—Ebbert v. First Nat. Bank, 279 P. 534, 131 Or. 57.
Pa.—Katz v. Baratz, 9 Pa.Dist. & Co. 411.
R.I.—Vennerbeck & Clase Co. v. Juergens Jewelry Co., 164 A. 509, 53 R.I. 135—Coggeshall v. Davis, 142 A. 536, 49 R.I. 332—Gustave Fox Co. v. T. F. Hunt Mfg. Co., 121 A. 382.
S.C.—Nelson v. Parson, 192 S.E. 358, 184 S.C. 335—Johnson v. Western Union Telegraph Co., 179 S.E. 325, 175 S.C. 344—Morrison v. Union Indemnity Co., 161 S.E. 418, 423, 163 S.C. 137, quoting **Corpus Juris.**
Tenn.—Dushan v. Metropolitan Life Ins. Co., 14 Tenn.App. 422—Parmelee v. T. L. Herbert & Sons, 13 Tenn.App. 101.
Tex.—Verschoyle v. Holifield, 123 S.W.2d 878, 132 Tex. 516, modifying, Civ.App., 90 S.W.2d 907—C. R. Miller Mfg. Co. v. Coleman, Com.App., 29 S.W.2d 991, affirming Coleman v. Miller, Civ.App., 19 S.W.2d 829—Lindquist v. Sanford, Civ.App., 132 S.W.2d 279, error dismissed, judgment correct—Jones v. Selman, Civ.App., 109 S.W.2d 1003, error dismissed—Washington Nat. Ins. Co. v. Curry, Civ.App., 97 S.W.2d 525—Keystone Pipe & Supply Co. v. Osborne, Civ.App., 73 S.W.2d 120—Bankers' Mortg. Co. v. Baxter, Civ.App., 66 S.W.2d 408—Stockwell v. Snyder, Civ.App., 51 S.W.2d 812, reversed on other grounds, Com.App., 84 S.W.2d 705, 126 Tex. 6—U. S. Fidelity & Guaranty Co. v. Roberts Marble Co., Civ.App., 46 S.W.2d 1063—Guaranty State Bank of Hutchins v. Beard, Civ.App., 18 S.W.2d 679—Tarwater v. Donley County State Bank, Civ.App., 277 S.W. 176—Crumley v. Gile, Civ.App., 271 S.W. 641—Western Union Telegraph Co. v. Rauch, Civ.App., 243 S.W.

fugitive, as in the case of postal cards,[76] telegrams,[77] match covers,[78] memoranda,[79] diaries,[80] notices,[81] surveyor's field notes,[82] blueprints,[83] or recitals in a deed,[84] will,[85] power of attorney,[86] or tax return.[87]

However, certain written statements have been admitted as against the objection that they constitute hearsay evidence.[88] It is to be observed that

526—O. C. Robitzsch & Son v. Taliaferro, Civ.App., 237 S.W. 637—Smith v. Dawson, Civ.App., 234 S W. 690—Ten-Pennett Co. v. James, Civ App., 227 S.W. 528—Land v. Dunn, Civ.App., 226 S.W. 801—Baldwin v. Drew, Civ.App., 195 S. W. 636, reversed on other grounds, Com App., 244 S.W. 987.

Utah.—In de Newell's Estate, 5 P.2d 230, 78 Utah 463.

Vt.—Ambrosini v. N. Pelaggie & Co., 108 A. 916, 94 Vt. 119.

Wash.—Patricio v. Scott, 65 P.2d 215, 189 Wash. 302—Bond v. Werley, 28 P.2d 318, 175 Wash. 659—Continental Trading Co. v. Seattle Nat. Bank, 199 P. 743, 116 Wash. 479—Peterson v. Box, 193 P. 215, 113 Wash. 117.

Wis.—Trustees of University Co-op. Co. v. City of Madison, 288 N.W. 742, 233 Wis. 100.

22 C.J. p 209 note 77.

Notes found near body of writer

Ga.—Mishoe v. Davis, 14 S.E.2d 187, 64 Ga.App. 700.

76. Ill.—Capen v. De Steiger Glass Co., 105 Ill. 185.

N.C.—Newton v. Texas Co., 105 S. E. 433, 180 N.C. 561.

77. Cal.—James v. Paramount-Famous-Lasky Corporation, 33 P.2d 63, 138 Cal.App. 585.

Ill.—McKeown v. Western Union Telegraph Co., 231 Ill.App. 503.

Md.—James L. Kernan Co. v. Cook, 159 A. 256, 162 Md. 137.

R.I.—Gustave Fox Co. v. T. F. Hunt Mfg. Co., 121 A. 382.

Tex.—Gulf, C. & S. F. Ry. Co. v. Hill, Civ.App., 284 S.W. 594—Providence-Washington Ins. Co. v. Owens, Civ.App., 207 S.W. 666.

22 C.J. p 210 note 79.

Cablegrams

Wash.—Continental Trading Co. v. Seattle Nat. Bank, 199 P. 743, 116 Wash. 479.

78. Tex.—Texas Liquor Control Board v. Maceo, Civ.App., 147 S. W.2d 954, error dismissed, judgment correct.

79. Ala.—Bell v. Hubert, 95 So. 350, 209 Ala. 23—Deal v. Hubert, 95 So. 349, 209 Ala. 18.

Cal.—City of Stockton v. Vote, 244 P. 609, 76 Cal.App. 369.

Del.—Grossman v. Delaware Electric Power Co., 155 A. 806, 4 W.W.Harr. 521.

Mo.—In re Decker's Estate, 152 S.W. 2d 104—Connell v. A. C. L. Haase & Sons Fish Co., 257 S.W. 760, 302 Mo. 48.

Tex.—J. R. Milam Co. v. First Nat. Bank, Civ.App., 29 S.W.2d 480, error dismissed.

22 C.J. p 210 note 80.

80. Mich.—Stabler v. Clark, 118 N W. 605, 155 Mich. 26.

N.H.—Doe v. Lucy, 139 A. 750, 83 N. H. 160.

81. Colo.—Denver v. Perkins, 114 P. 484, 50 Colo. 159.

22 C.J. p 210 note 82.

82. Tex.—State v. Dayton Lumber Co., Civ.App., 159 S.W. 391.

22 C.J. p 210 note 83.

Hearsay on hearsay

In an action to recover the possession of land under a deed the description of which had to be made certain by parol evidence, notes of a surveyor incorporating matters that the interested owner of the land had told him about the boundaries were held inadmissible as hearsay on hearsay, and without the guaranty of lack of interest in the declarant.—Buckhorne Land & Timber Co. v. Yarbrough, 102 S.E. 630, 179 N.C. 335.

83. Va.—Norfolk, etc., R. Co. v. Bell, 52 S.E. 700, 104 Va. 836.

84. Ga.—Everett v. Korizon-J. Fornara Tile Co., 141 S.E. 646, 165 Ga. 651.

Tex.—Williams v. South Texas Development Co., Civ.App., 138 S.W. 2d 605, error refused—Jones-O'Brien, Inc., v. Loyd, Civ.App., 125 S.W.2d 684, error granted—Vackar v. Gulf Production Co., Civ.App., 113 S W.2d 686—Orr v. Armstrong, Civ.App., 81 S.W.2d 710, error refused—Bowman v. Oakley, Civ. App., 212 S.W. 549, error refused.

22 C.J. p 210 note 85.

85. Mo.—In re Decker's Estate, 152 S.W.2d 104.

R.I.—Industrial Trust Co. v. Colt, 128 A. 200, 46 R.I. 319.

22 C.J. p 210 note 86.

86. Tex.—Stuart v. Harper, Civ. App., 143 S.W. 712.

87. U.S.—Buhl v. Kavanagh, C.C.A. Mich., 118 F.2d 315.

88. **Particular written statements**

(1) Affidavit of banking commissioner of rejection of claim.—Bauer v. Austin, Tex.Civ.App., 4 S.W.2d 201, error dismissed.

(2) Ancient archives.—Magee v. Paul, 221 S.W. 254, 110 Tex. 470, answering certified questions, Civ.App., 159 S.W. 325, and answers conformed to, Civ.App., 224 S.W. 1118.

(3) Ancient deed.—Homewood Realty Corporation v. Safe Deposit & Trust Co. of Baltimore, 154 A. 58, 160 Md. 457, 78 A.L.R. 8.

(4) Bill of lading.—Davis v. Morris, Tex.Com.App., 13 S.W.2d 63, affirming Morris v. Davis, Civ.App., 3 S.W.2d 109.

(5) Bills used as memorandum of account.—Zakutynski v. Livese, 141 A. 667, 6 N.J.Misc. 448, affirmed 144 A. 921, 105 N.J.Law 499.

(6) Copies of judgments, together with executions returned nulla bona.—Oliver v. Lewis, 102 S.E. 146, 149 Ga. 763.

(7) Copy of account sales.—Panhandle & S. F. Ry. Co v. Clarendon Grain Co., Tex.Civ.App., 215 S.W. 866.

(8) Copy of alleged contract.—W. T. Wilson Grain Co. v. Hunt County Oil Co., Tex.Civ.App., 235 S.W. 638.

(9) Evidence as to disciplinary proceedings against attorney disbarred in federal court showing circumstances from which federal proceedings arose.—In re Ulmer, 167 N. E. 749, 268 Mass. 373.

(10) Exemplification of record showing judgment, execution, and sale of land.—Massell Realty Co. v. Hanbury, 141 S.E. 653, 165 Ga. 534.

(11) Exhibits made by complainant from books of public service corporation.—Muskogee Gas & Electric Co. v. State, 186 P. 730, 81 Okl. 176.

(12) Findings of board of local inspectors which investigated collision.—The Abangarez, D.C.La., 60 F. 2d 543.

(13) Itemized account attached to, and made part of, answer.—Succession of Bell, 193 So. 645, 194 La. 274.

(14) Memorandum drawn from tax books of county by chairman of board of equalizers, showing tax returns of several persons.—Roberts v. Allen, 122 S.E. 86, 31 Ga.App. 660.

(15) Official list of orders of survey made by a commissioner of the Republic of Texas.—Southwestern Settlement & Development Co. v. Village Mills Co., Tex.Civ.App., 245 S. W. 975.

(16) Paper obtained from record in court of appeals of former trial of case.—Equitable Life Assur. Soc. of U. S. v. Witten, 97 S.W.2d 17, 265 Ky. 443.

(17) Petition and judgment in former suit.

Cal.—Hudson v. Ukiah Water & Improvement Co., 204 P. 862, 55 Cal. App. 709.

Tex.—Sanders v. Kansas City Life Ins. Co., Civ.App., 152 S.W.2d 506, error refused.

written statements made on the personal knowledge of the writer are admitted in cases forming exceptions to the hearsay rule, see infra §§ 217–237, or, as is shown infra §§ 623–775, under rules relating to documentary evidence. It has also been held that a document which would have served as original evidence of what a petition was, if the petition had been lost, cannot be classed as hearsay evidence.[89]

Printed hearsay. A hearsay statement does not become competent by reason of the fact that it is

(18) Proofs of loss of postal matter.—Boerner v. U. S., C.C.A.N.Y., 117 F.2d 387, affirming D.C., 30 F.Supp. 635, and certiorari denied 61 S.Ct. 1120.

(19) Record kept by the freight agent at the point of delivery, showing that shipments had lain in railroad office for considerable periods, and that defendant in several cases paid demurrage.—J. L. Mott Iron Works v. Kaiser Co., 103 S.E. 783, 131 S.C. 392, certiorari granted First Nat. Bank of Aiken v. J. L. Mott Iron Works, 41 S.Ct. 64, 254 U.S. 627, 65 L.Ed. 445, and affirmed 42 S.Ct. 286, 258 U.S. 240, 66 L.Ed. 593.

(20) Report by probation officer appointed by juvenile court, made in discharge of duty.—Akins v. Craig, 158 S.E. 632, 43 Ga.App. 363.

(21) Report of casualty insurer's attorney, written immediately after conversation with attorney for plaintiff in automobile collision case.—Gibbons v. Perkins, 230 N.Y.S. 273, 132 Misc. 583.

(22) Report of examination of injured employee by employer's surgeon, since deceased.—Lebrun v. Boston & M. R. R., 142 A. 128, 83 N.H. 293.

(23) Report of insurer's medical examiner to insurer's disability claim division regarding plaintiff's claim.—Anderson v. Metropolitan Life Ins. Co., Mo.App., 96 S.W.2d 631.

(24) Reports of railroad employees, on date of alleged injury, which tended to disprove plaintiff's testimony that a named person was conductor on car.—Wilkinson v. Phœnix Ry. Co. of Arizona, 236 P. 704, 28 Ariz. 216.

(25) Sketch of map of land described in the deed and testimony based thereon.—Wigham v. Wilson, Tex.Civ.App., 211 S.W. 469.

(26) Statement of assets of corporation.—Bituminized Brick & Tile Co. v. Simons Brick Co., 192 P. 528, 183 Cal. 687.

(27) Tags showing weight of meat ordered.—Jan Wai v. Smith-Riddell Co., 202 P. 952, 55 Cal.App. 59.

(28) Train sheets and testimony of official train dispatcher.—Currie v. Davis, S.C., 126 S.E. 119, petition dismissed Davis v. Currie, 45 S.Ct. 88, 266 U.S. 182, 69 L.Ed. 234.

(29) Other written statements.—Flanagan v. Madison Square State Bank, 11 N.E.2d 969, 292 Ill.App. 448

Diagram of scene of accident

Cal.—Augenthaler v. Pinkert, 32 P. 2d 686, 138 Cal.App. 455.

Or.—Mansfield v. Southern Oregon Stages, 1 P.2d 591, 136 Or. 669, followed in Longden v. Southern Oregon Stages, 1 P.2d 596, 136 Or. 684.

Hospital records

Del.—Grossman v. Delaware Electric Power Co., 155 A. 806, 4 W.W.Harr. 521.

La.—Lado v. First Nat. Life Ins. Co., 162 So. 579, 182 La. 726, affirming, App., 158 So. 872.

Md.—Globe Indemnity Co. of New York v. Reinhart, 137 A. 43, 152 Md. 439.

Mass.—Claffey v. Fenelon, 161 N.E. 616, 263 Mass. 427.

Minn.—Schmidt v. Riemenschneider, 265 N.W. 816, 196 Minn. 612.

Tenn.—Hill v. National Life & Accident Ins. Co., Inc., 11 Tenn.App. 33.

Wash.—Murgatroyd v. Dudley, 50 P. 2d 1025, 184 Wash. 222.

Ledger

Tenn.—Pigg v. Houston & Liggett, 8 Tenn.App. 613.

Receipt

Tex.—Carter v. Daniel, Civ.App., 273 S.W. 688.

Records kept by government officials in regular course of duty

U.S.—U. S. v. Wescoat, C.C.A.W.Va., 49 F.2d 193.

D.C.—Demeter v. U. S., 66 F.2d 188, 62 App.D.C. 208.

Ga.—Rhodes v. Mutual Benefit Health & Accident Ass'n, 8 S.E.2d 685, 62 Ga.App. 208.

Report of mercantile agency

Minn.—Trainor v. Buchanan Coal Co., 191 N.W. 431, 154 Minn. 204.

Tex.—Thomas v. Fitts-Smith Dry Goods Co., Civ.App., 151 S.W.2d 243.

Report of physical examination of veteran at veteran's bureau

U.S.—U. S. v. Ware, C.C.A.La., 110 F.2d 739—U. S. v. Hartley, C.C.A. Mont., 99 F.2d 923—U. S. v. Timmons, C.C.A.Fla., 68 F.2d 654—Long v. U. S., C.C.A.S.C., 59 F.2d 602—Third Nat. Bank & Trust Co. v. U. S., C.C.A.Ohio, 53 F.2d 599—U. S. v. Cole, C.C.A.Ohio, 45 F.2d 339.

Sales record

Ga.—Southern Ry. Co. v. Black, 196 S.E. 291, 57 Ga.App. 592.

Letters

(1) Letters evidencing verbal acts are admissible.

La.—Garlick v. Dalbey, 84 So. 441, 147 La. 18.

N.M.—Murray v. Murray, 240 P. 303, 30 N.M. 557.

(2) Letters which were not offered as proof of the truth of their contents, but were offered as proof of a course of conduct by the sender, were not inadmissible.—Golden v. American Keene Cement & Plaster Co., 95 P.2d 755, 98 Utah 23.

(3) In wife's action for alienating her husband's affections, husband's letter to plaintiff explaining why he left her was held not inadmissible.—Williamson v. Williamson, 48 P.2d 588, 183 Wash. 71, adhered to 54 P.2d 1215, 185 Wash. 707.

(4) Letter by bankrupt purporting to show financial condition, written to obtain further merchandise, was admissible in suit by bankrupt's trustee to recover assets.—Hardin v. Rubin, 151 S.E. 31, 169 Ga. 608.

(5) Unsigned carbon copy of letter written by insurance agency to motorist's insurer to effect that motorist felt terrible about accident and felt that he was to blame because of inviting guest and also for accident was held not inadmissible as hearsay, where carbon copy was given to guest by motorist, and delivery of letter to guest without repudiation of its contents was at least admission which amounted to adoption of such statements.—Monsos v. Euler, 256 N. W. 630, 216 Wis. 133.

(6) In action against state highway commission for breach of provision in bridge construction contract requiring that list of qualified workers in the county be furnished contractor by employment agency, where action was tried to the court, letter by chief engineer of commission to its chief counsel, of which a copy was sent to contractor reciting that county employment agency had not coöperated with contractor, was properly admitted.—Hancock v. State Highway Commission, Mo., 149 S.W. 2d 823.

(7) In suit to recover total and permanent disability benefits under group health insurance policy taken out by employer for benefit of employees, letters written by employer's office manager to insured's mother regarding insurance were admissible against insurer.—Porter v. Equitable Life Assur. Soc. of U. S., Mo.App., 71 S.W.2d 766.

89. Tex.—Blair v. Boyd, 129 S.W. 870, 61 Tex.Civ.App. 435.

printed,[90] although it appears in the responsible form of a book,[91] and although such book is a treatise by an author of standard authority on a scientific subject,[92] such as a medical treatise.[93]

However, certain printed statements have been admitted as against the objection that they constitute hearsay evidence.[94] A statement in a standard treatise is competent where the relevant fact is the existence of the statement itself,[95] and it has been held that a statement by the compiler in the preface to a dictionary published in 1850 that he had adopted Webster's Dictionary as the basis for his own is admissible.[96]

§ 195. Composite Hearsay

Matters constituting composite hearsay are discussed infra §§ 196–199.

Examine Pocket Parts for later cases.

§ 196. Reputation as to Matters of General Interest

Evidence of reputation as to matters of general interest is admissible.

Although it has been suggested that reputation is not a form of hearsay but a fact in itself circumstantially relevant,[97] nevertheless it consists of the general statements of members of the community with relation to a particular fact, and hence may be regarded as a species of composite hearsay.[98]

Reputation has a higher probative value than the mere unsworn statements of a single person or of a few persons, and indeed statements on a matter of general interest, which have been so uniform, reiterated, and dominant as to create a general reputation throughout the community,[99] at a time when it was fairly distinterested,[1] may well give rise to an inference that the fact is as asserted,[2] and such reputation is accordingly received in evidence when original and primary evidence to the same effect is not obtainable,[3] or even in corroboration of a witness who states the fact positively.[4] The reputation which is admissible, however, must refer to

90. Ga.—Hardin v. Reynolds, 6 S.E.2d 328, 189 Ga. 534.
Okl.—Ferriman v. Turner, 227 P. 443, 99 Okl. 277.
22 C.J. p 210 note 91.

Newspapers or newspaper articles
Del.—Nye Odorless Incinerator Corporation v. Felton, 162 A. 504, 5 W.W.Harr. 236.
Ga.—Georgia State Sav. Ass'n v. Wilson, 5 S.E.2d 14, 189 Ga. 21.
Ky.—Haralambo's Ex'r v. Christopher, 21 S.W.2d 983, 231 Ky. 550.
Mo.—Shields v. Kansas City Rys. Co., 264 S.W. 890—State v. Adanks, 256 S.W. 768—State ex rel. State Highway Commission v. Hoffmann, App., 132 S.W.2d 27.
Tex.—Hearn v. Covington, Civ.App., 22 S.W.2d 1073.
22 C.J. p 210 note 91 [a] (1), p 929 notes 73, 74.

91. Ill.—Ogren v. Rockford Star Printing Co., 123 N.E. 587, 288 Ill. 405.
22 C.J. p 211 note 92.

City directory
Tex.—Defferari v. Terry, Civ.App., 68 S.W.2d 253, reversed on other grounds 99 S.W.2d 290, 128 Tex. 521—Venting v. Carrigan, Civ.App., 26 S.W.2d 711, error dismissed—Creosoted Wood Block Paving Co. v. McKay, Civ.App., 211 S.W. 822.

Telephone directory
U.S.—Campbell v. U. S. Air Compressor Co., D.C.Ill., 34 F.Supp. 402.

92. Tex.—General Life Ins. Co. v. Potter, Civ.App., 124 S.W.2d 409.
22 C.J. p 211 note 93.

93. S.C.—Baker v. Southern Cotton Oil Co., 159 S.E. 822, 824, 161 S.C. 479, quoting **Corpus Juris**—Edwards v. Union Buffalo Mills Co., 159 S.E. 818, 820, 162 S.C. 17, quoting **Corpus Juris.**
Tex.—Hicks v. Brown, Civ.App., 128 S.W.2d 884, modified on other grounds, Com.App., 151 S.W.2d 790—General Life Ins. Co. v. Potter, Civ.App., 124 S.W.2d 409.
22 C.J. p 211 note 94.

94. **Particular printed statements**
(1) Copy of laws which fugitive was charged with violating.—Ex parte Cupp, 84 S.W.2d 731, 129 Tex. Cr. 25.

(2) Newspaper article delivered to plaintiff by defendant.—Pilkington v. Pilkington, 93 S.W.2d 1068, 230 Mo. App. 569.

(3) Printed provision of standard fire policy.—Hanover Fire Ins. Co. v. Slaughter, Tex.Civ.App., 111 S.W.2d 362.

(4) Quotation from standard and authoritative work respecting voltage necessary to produce fatal shock.—Blakeney v. Alabama Power Co., 133 So. 16, 222 Ala. 394.

95. U.S.—Brown v. Piper, Mass., 91 U.S. 37, 23 L.Ed. 200.
22 C.J. p 211 note 95.
Independent relevancy generally see infra §§ 239–264.

96. U.S.—G. & C. Merriam Co. v. Syndicate Pub. Co., N.Y., 207 F. 515, 125 C.C.A. 177, appeal dismissed 35 S.Ct. 708, 237 U.S. 618, 59 L.Ed. 1148.
22 C.J. p 211 note 96.

97. Md.—Boone v. Purnell, 28 Md. 607, 92 Am.D. 713.

98. N.C.—In re Nelson's Will, 186 S.E. 480, 210 N.C. 398, 105 A.L.R. 1441.
Okl.—In re Miller's Estate, 78 P.2d 819, 825, 182 Okl. 534, citing **Corpus Juris.**

"Hearsay" and "reputation" distinguished
(1) "There is a distinction . . . between ordinary hearsay and evidence of repute, although reputation is necessarily established by the general opinion and expression of the community."—Commonwealth v. Murr, 7 Pa.Super. 391, 393, 42 Wkly. N.C. 263, 15 Lanc.L.Rev. 241.

(2) "A sort of distinction is allowed between hearsay and reputation. Yet reputation is nothing more than hearsay derived from those who had the means of knowing the fact, and may exist when those best acquainted with the fact are dead."—Scott v. Blood, 16 Me. 192, 196.

99. N.C.—Medlin v. Wake County Bd. of Education, 83 S.E. 483, 167 N.C. 239, Ann.Cas.1916E 300.
22 C.J. p 211 note 99.

1. N.J.—Reid v. Reid, 17 N.J.Eq. 101.

2. Cal.—Simons v. Inyo Cerro Gordo Mining & Power Co., 192 P. 144, 48 Cal.App. 524.
22 C.J. p 211 notes 98 [a], 2.
Reputation as evidence of marriage see the C.J.S. title Marriage § 44, also 38 C.J. p 1337 note 58.

3. Cal.—Stevens v. San Francisco & N. P. R. Co., 35 P. 165, 100 Cal. 554.
22 C.J. p 170 note 43, p 211 note 3.

4. Kan.—Rizer v. James, 26 Kan. 221.

a public or general right and not to a particular exercise of it.[5]

Particular subject matter. Among subjects in which the community is interested, and concerning which reputation has been held admissible, are its general rights or liabilities as a whole with respect to beaches,[6] bridges, ferries, highways, profits a prendre, and free warrens;[7] the existence of general customs[8] or rights of common;[9] the fact of municipal incorporation;[10] and, as shown in Boundaries § 106, the location of public and private boundaries.

Evidence as to common reputation of ownership is admissible where claims to public lands and to water on such lands are involved,[11] but the reputation must be that of a past generation.[12] As the performance of certain public or quasi public services is a matter of importance to the community, the fact that a designated person discharges the duties of an office or occupation of general concern,[13] or of popular interest,[14] may be shown by reputation.

Facts of genealogy stand in a peculiar position as a matter of quasi public concern, and, where the race to which a person belongs is in issue, proof of general reputation is competent.[15] Parentage may be proved by general reputation.[16]

§ 197. Reputation as to Matters of Special or Limited Interest

Evidence of reputation cannot ordinarily be received where the fact involved is of only special or limited interest.

Where the fact involved is of only special or limited interest, evidence of reputation cannot be received.[17] Among the facts which are within this rule are the habits or idiosyncrasies of individual members of the community in business or social life;[18] their position in the community;[19] and their financial,[20] mental,[21] or physical[22] condition. Oth-

Existence of partnership
Kan.—Rizer v. James, supra.

5. Mass.—Enfield v. Woods, 99 N.E. 331, 212 Mass. 547.

6. Conn.—Borden v. Town of Westport, 151 A. 512, 112 Conn. 152.

7. Cal.—Simons v. Inyo Cerro Gordo Mining & Power Co., 192 P. 144, 48 Cal.App. 524.
22 C.J. p 211 note 7, p 212 note 9.

8. Me.—Scott v. Blood, 16 Me. 192.
22 C.J. p 212 note 11.

Meaning of word "block"
Evidence of common reputation existing in community regarding meaning of word "block," as used in map and conveyances, is admissible.—Ferris v. Emmons, 6 P.2d 950, 214 Cal. 501.

9. Me.—Scott v. Blood, 16 Me. 192.
22 C.J. p 212 note 12.

10. N.H.—Bow v. Allenstown, 34 N. H. 351, 69 Am.D. 489.
22 C.J. p 212 note 14.

11. Cal.—Simons v. Inyo Cerro Gordo Mining & Power Co., 192 P. 144, 48 Cal.App. 524.

12. **Highway**
General reputation is inadmissible to prove whether land is portion of a highway, the only reputation admissible to establish such fact being that of a past generation.—Kempf v. Wooster, 121 A. 881, 99 Conn. 418—22 C.J. p 254 note 19 [a].

Water rights
Where evidence as to ancient common reputation as to the ownership of water rights was admissible, the most that could be shown by a witness was that there was an ancient common reputation in the community relative to the diversion and use of water for some beneficial purpose, stating what that reputation was, and to ask the witness to state who was reputed to be the owner of "springs" could only mislead, since there can only be ownership of a right to take and use water, and not of the corpus of the water.—Simons v. Inyo Cerro Gordo Mining & Power Co., 192 P. 144, 48 Cal.App. 524.

13. Pa.—Smay v. Smith, 1 Penr. & W. 1.
22 C.J. p 212 note 17.

14. Tex.—Allen v. Halsted, 87 S.W. 754, 39 Tex.Civ.App. 324.
22 C.J. p 212 note 18.

15. N.C.—Gilliland v. Buncombe County Bd. of Education, 54 S.E. 413, 141 N.C. 482.
Tex.—Stewart v. Profit, Civ.App., 146 S.W. 563.
Declarations as to pedigree see infra §§ 226–232.

16. Tenn.—Ford v. Ford, 7 Humphr. 92.
Relevancy and materiality of facts of family history see supra §§ 168–172.

Where question of crime involved
Proof of paternity cannot be made by evidence of its notoriety or general acceptance as a fact, where the establishment of such relationship will convict the parents of criminal conduct.—Stephens v. Richardson, 66 So. 497, 189 Ala. 360.

17. U.S.—Davila v. U. S., C.C.A.Puerto Rico, 54 F.2d 356.
N.C.—In re Nelson's Will, 186 S.E. 480, 210 N.C. 398, 105 A.L.R. 1441.
S.C.—Coleman v. Stevens, 117 S.E. 305, 124 S.C. 8.
Tex.—Baugh v. Baugh, Civ.App., 224 S.W. 796.
22 C.J. p 212 note 22.

18. Ga.—Booth v. Floyd, 108 S.E. 113, 151 Ga. 732.
22 C.J. p 212 note 23.

19. N.Y.—Eastman v. Caswell, 8 How.Pr. 75.
22 C.J. p 212 note 24 [a].

20. Pa.—Watterson v. Fuellhart, 32 A. 597, 169 Pa. 612.
22 C.J. p 212 note 25.
However, it has been held that, in an action on a demand note against indorser, general reputation is admissible in a proper case on the question of solvency or insolvency of the maker corporation and other indorsers.—Lucas v. Swan, C.C.A.W. Va., 67 F.2d 106.

21. N.C.—In re Nelson's Will, 186 S.E. 480, 210 N.C. 398, 105 A.L.R. 1441.
22 C.J. p 213 note 26.

Insanity
(1) Insanity cannot be shown by reputation in the general community.
Ala.—Dickinson v. State, 152 So. 29, 30, 228 Ala. 28, citing **Corpus Juris.**
Md.—Mitchell v. Slye, 111 A. 814, 137 Md. 89.
S.C.—Fielder & Brown v. Jennings, 126 S.E. 448, 131 S.C. 26.
22 C.J. p 173 note 34, p 213 note 26 [a].

(2) Insanity may not be established by reputation in the family.—Walker v. State, 1 N.E. 856, 102 Ind. 502—22 C.J. p 173 note 35.

Whether insane person is dangerous, and has homicidal tendencies, cannot be proved by reputation.—Whitesides v. Wheeler, 164 S.W. 335, 158 Ky. 121, 50 L.R.A.,N.S., 1104, Ann.Cas.1915D 223.

22. Tex.—Home Circle Soc. No. 1 v. Shelton, Civ.App., 81 S.W. 84.
22 C.J. p 213 note 27.

er facts included within the rule are facts of personal history,[23] even where, as in case of the ownership[24] or possession[25] of property, real[26] or personal,[27] or a modus concerning it,[28] the matter is one in which the community has a degree of interest; or the relation, as of agency[29] or partnership,[30] in which members of the community stand to each other; and residence in a particular place or community.[31]

In addition, general reputation cannot establish the existence of moral qualities,[32] such as chastity[33] or loyalty,[34] except where proof of character is permitted in case of a party, see infra §§ 423–436, or a witness see the C.J.S. title Witnesses §§ 491–536, also 70 C.J. p 820 note 22–p 934 note 77.

However, it has been held that evidence of reputation is admissible to prove that a certain name has been used to designate a particular individual,[35] or to prove the designation of a house[36] or other place.[37] Further, evidence of reputation of ownership of property has been admitted as a circumstance showing an assertion of ownership under a deed,[38] to show the character of an asserted claim,[39] to show notice or notoriety of claim of title,[40] to show presumption of deed and acquiescence of the apparent owner;[41] and such evidence is properly admitted under a statute providing that ownership may be presumed from common reputation.[42] Likewise, general reputation as to the character of the possession of land is admissible if confined to the period before the existence of any dispute.[43]

§ 198. Rumors

Rumor is not evidence to prove a particular fact, although the existence of a rumor may be independently relevant.

Rumor is as much inferior in probative quality to hearsay as reputation is above it; consequently, as a rule rumor is not relevant evidence to prove a particular fact.[44]

However, the existence of a rumor may be independently relevant.[45]

§ 199. Tradition

Tradition is not deemed sufficiently probative to warrant an inference of the truth of the fact asserted except where it relates to matters of public or general interest.

Although tradition has a probative value superior to rumor, it is not deemed sufficiently probative to warrant an inference of the truth of the fact asserted,[46] except where it relates to matters of pub-

23. Ala.—Landers v. Hayes, 72 So. 106, 196 Ala. 533.
22 C.J. p 213 note 28.

24. Ala.—Morris v. Card, 135 So. 340, 223 Ala. 254.
Cal.—Simons v. Inyo Cerro Gordo Mining & Power Co., 192 P. 144, 48 Cal.App 524.
Ga.—Smith v. Smith, 145 S.E. 661, 167 Ga. 368—McWilliams v. McWilliams, 144 S.E. 286, 166 Ga. 792.
Mo.—Diehl v. A. P. Green Fire Brick Co., 253 S.W. 984, 299 Mo. 641.
22 C.J. p 213 note 29.

25. Cal.—Simons v. Inyo Cerro Gordo Mining & Power Co., 192 P. 144, 48 Cal.App. 524.
22 C J. p 213 note 30.

26. Ala.—Morris v. Card, 135 So. 340, 223 Ala. 254.
Cal.—Simons v. Inyo Cerro Gordo Mining & Power Co., 192 P. 144, 48 Cal.App. 524.
Ga.—Smith v. Smith, 145 S.E. 661, 167 Ga. 368—McWilliams v. McWilliams, 144 S.E. 286, 166 Ga. 792.
22 C.J. p 213 note 31.

Predicate for proof by reputation
So-called constructive possession of land by Confederate soldier until his death, and fact that land lay idle for more than fifty years thereafter, were not sufficient predicate for proof by neighborhood reputation that the land belonged to soldier.—Price v. Humble Oil & Refining Co., Tex.Civ. App., 152 S.W.2d 804.

27. S.D.—Stevens v. Deering, 60 N. W. 739, 6 S D. 200.
22 C.J. p 213 note 32.

Putting property in wife's name
In replevin suit, evidence that it was the understanding with the people that plaintiff's husband had put his property in his wife's name was incompetent.—Phipps v. Markin, 208 S.W. 106, 203 Mo.App. 187.

28. N.M.—Perkins v. Roswell, 113 P. 609, 16 N.M. 185.

29. W.Va.—Thompson v. Laboringman's Mercantile & Mfg. Co., 53 S. E. 908, 60 W.Va. 42, 6 L.R.A.,N.S., 311.
22 C.J. p 213 note 34.

30. Ala.—Central R. & Banking Co. v. Smith, 76 Ala. 572, 52 Am.R. 353.
22 C.J. p 213 note 35.

31. N C.—Ferguson v. Wright, 18 S. E. 691, 113 N.C. 537.
22 C.J. p 213 note 36.

32. Me.—Boies v. McAllister, 12 Me. 308.
22 C.J. p 174 note 54.

33. Me.—Boies v. McAllister, supra.

34. Tenn.—Hart v. Reynolds, 1 Heisk. 208.

35. U.S.—U. S. v. Dodge, D.C.Or., 25 F.Cas.No.14,974, Deady 186.

36. U.S.—U. S. v. Dodge, supra.

37. U.S.—U. S. v. Dodge, supra.
22 C.J. p 172 note 94.

38. Tex.—Chapman v. Kellogg, Com. App., 252 S.W. 151, reversing, Civ. App., Kellogg v. Chapman, 201 S. W. 1096.

39. Tex.—Jackson v. Piper, Civ.App., 28 S.W.2d 240.

40. Kan.—Eresch v. Guipre, 51 P.2d 1016, 142 Kan. 747.
Mont.—Brennan v. Mayo, 72 P.2d 463, 105 Mont. 276.

41. Tex.—Price v. Humble Oil & Refining Co., Civ.App., 152 S.W.2d 804.

42. N.D.—Heuer v. Heuer, 253 N.W. 856, 64 N.D. 497.

43. Md.—Hines v. Symington, 112 A. 814, 137 Md. 441.

Extent of possession
Md.—Hines v. Symington, 112 A. 814, 137 Md. 441.

44. Ky.—Whittaker v. Prater, 39 S. W.2d 248, 239 Ky. 173.
Tex.—Tarwater v. Donley County State Bank, Civ.App., 277 S.W. 176—Dalton v. Dalton, Civ.App., 233 S.W. 546—Vacicek v. Trojack, Civ. App., 226 S.W. 505.
22 C.J. p 213 note 37.

45. Conn.—Cooke v. Weed, 97 A. 765, 90 Conn. 544.
22 C.J. p 214 note 38.
Independently relevant statements see infra §§ 239–264.

46. Ga.—Luttrell v. Whitehead, 49 S.E. 691, 121 Ga. 699.
22 C.J. p 214 note 39.

lic or general interest.[47] The admission of evidence of tradition regarding matters of public or general interest constitutes an exception to the hearsay rule,[48] but in order that such evidence be admissible the declarant must be dead, or supposed to be dead.[49]

§ 200. Knowledge Acquired from Statements of Others

A witness cannot testify to facts as to which his knowledge is derived from unsworn statements of others; but knowledge acquired in the line of official duty or employment is not objectionable as based on hearsay.

From the rule stated supra § 193 that a witness cannot testify as to what he heard other persons say, it follows naturally that he will not be permitted to testify to facts where his knowledge thereof is derived from the unsworn statements of others,[50] or even where his knowledge is partly based on such statements,[51] and the rule in this respect is the same, although the foundation of the witness' knowledge is hearsay in the composite form of reputation in the community,[52] or in the form of a written or even an official statement.[53] The rule applies to proof of the contents of a lost docu-

Tradition as:
Proof of pedigree see infra § 232.
To boundaries see Boundaries § 106.

Family tradition as to residence
D.C.—Von Zedtwitz v. Sutherland, 26 F.2d 525, 58 App.D.C. 153.

47. Me.—Piper v. Voorhees, 155 A. 556, 130 Me. 305.
22 C.J. p 214 note 40.

48. Me.—Piper v. Voorhees, supra.

49. Me.—Piper v. Voorhees, supra.

50. U.S.—Hall v. Ætna Life Ins. Co., C.C.A.Ark., 85 F.2d 447—Upton v. Harrison, C.C.A.N.C., 68 F.2d 232, certiorari denied 54 S.Ct. 718, 292 U.S. 633, 78 L.Ed. 1486—Lucas v. Swan, C.C.A.W.Va., 67 F.2d 106—Armborst v. Cincinnati Traction Co., C.C.A.Ohio, 25 F.2d 240—Producers' & Refiners' Corporation v. Lehmann, C.C.A.Wyo., 18 F.2d 492—Aluminum Co. of America v. Thompson Products, D.C.Ohio, 25 F.Supp. 175, modified on other grounds, C.C.A., 122 F.2d 796—U. S. v. Vandegrift & Co., 9 Ct.Cust. App. 25.
Ala.—New Morgan County Building & Loan Ass'n v. Plemmons, 97 So. 46, 210 Ala. 16—Ford v. Hankins, 96 So. 349, 209 Ala. 202.
Cal.—Anderson v. Hagen, 66 P.2d 168, 19 Cal.App.2d 714—Balcom v. F. A. Shipley Co., 204 P. 39, 55 Cal. App. 474.
Conn.—Vitakunas v. The Mastco, Inc., 137 A. 753, 106 Conn. 286.
Ga.—Rocker v. De Loach, 173 S.E. 709, 178 Ga. 480—Rice & Hutchins Atlanta Co. v. Griffin, 104 S.E. 634, 150 Ga. 607—Bazemore v. Powell, 188 S.E. 282, 54 Ga.App. 444—Strachan Shipping Co. v. Hazlip-Hood Cotton Co., 132 S.E. 454, 35 Ga.App. 94, conforming to answer to certified questions 131 S.E. 283, 161 Ga. 480—Dyer v. Cannon, 100 S.E. 723, 24 Ga.App. 304.
Ind.—Lake Erie & W. R. Co. v. Howarth, 124 N.E. 687, 73 Ind.App. 454, rehearing denied 127 N.E. 804, 73 Ind.App. 454.
Ky.—Appalachian Stave Co. v. Pickard, 99 S.W.2d 472, 266 Ky. 565—Gainesboro Telephone Co. v. Thomas, 28 S.W.2d 34, 234 Ky. 373—Eastham v. Stumbo, 279 S.W. 1109, 212 Ky. 685—Davis v. Butler, 250 S.W. 126, 198 Ky. 795.
Mass.—Shachoy v. Chevrolet Motor Co., 182 N.E. 830, 280 Mass. 442—Eastern Advertising Co. v. Standard Nut Co., 162 N.E. 339, 264 Mass. 238.
Mich.—In re Jodys' Estate, 275 N.W. 762, 282 Mich. 48.
Mo.—St. Louis Union Trust Co. v. Little, 10 S.W.2d 47, 320 Mo. 1058—In re Sizer, 267 S.W. 922, 306 Mo. 356—Biggs v. Modern Woodmen of America, App., 71 S.W.2d 783, reversed on other grounds 82 S.W.2d 898, 336 Mo. 879—Kinsella v. Kinsella, App., 60 S.W.2d 747—Gash v. Mansfield, App., 28 S.W. 2d 127—Rudy v. Cleveland, C., C. & St. L. R. Co., App., 278 S.W. 814—O'Neil Implement Mfg. Co. v. Gordon, App., 269 S.W. 636—American Trust Co. v. Moore, App., 248 S.W. 983.
Mont.—Alley v. Butte & Western Mining Co., 251 P. 517, 77 Mont. 477.
N.H.—Sullivan v. Sullivan, 18 A.2d 828.
N.J.—Auchter v. Elliott Bus Corporation, 198 A. 376, 120 N.J.Law 105—Sothern v. Vandyke, 174 A. 877, 114 N.J.Law 1—Prudential Ins. Co. of America v. Mantz, 17 A.2d 279, 128 N.J.Eq. 480—Gerlach v. Ball, 140 A. 235, 102 N.J.Eq. 85.
N.Y.—Uvalde Asphalt Paving Co. v. City of New York, 188 N.Y.S. 304, 196 App.Div. 740—Porter v. Orensein, 180 N.Y.S. 418—Silverman v. Permanent Bldg. Co., 174 N.Y.S. 711—Knickerbocker Metallic Bed Co. v. Newman, 174 N.Y.S. 651.
N.D.—Farmers' State Bank of Cathay v. Jeske, 197 N.W. 854, 856, 50 N.D. 813, citing **Corpus Juris**—Asch v. Washburn Lignite Coal Co., 186 N.W. 757, 48 N.D. 734.
Pa.—Laidley v. Rowe, 119 A. 474, 275 Pa. 389.
S.C.—Sample v. Gulf Refining Co., 191 S.E. 209, 183 S.C. 399—Meehan v. Commercial Casualty Ins. Co., 165 S.E. 194, 166 S.C. 496.
Tex.—Stafford v. Powell, Civ.App., 148 S.W.2d 965—Taylor v. McLennan County, Civ.App., 120 S.W.2d 134, 137, citing **Corpus Juris**—Finley v. Pafford, Civ.App., 104 S.W. 2d 163, error dismissed—Traders & General Ins. Co. v. Rhodabarger, Civ.App., 93 S.W.2d 1180, 1184, citing **Corpus Juris**—McClory v. Schneider, Civ.App., 51 S.W.2d 738, error dismissed—Williams v. Penick-Hughes Co., Civ.App., 36 S.W. 2d 1060—Fowler v. Hardee, Civ. App., 16 S.W.2d 154—Shelton v. Thomas, Civ.App., 11 S.W.2d 254—Bankers' & Shippers' Ins. Co. of New York v. Sharber Grocery Co., Civ.App., 297 S.W. 474—Schaff v. Bourland, Civ.App., 266 S.W. 843—Gulf, C. & S. F. Ry. Co. v. Dean, Civ.App., 261 S.W. 520—Jackes-Evans Mfg. Co. v. Goss, Civ.App., 254 S.W. 320, 322, citing **Corpus Juris.**
Vt.—Gero v. John Hancock Mut. Life Ins. Co., 18 A.2d 154, 111 Vt. 462—Johnson v. Moore, 196 A. 246, 109 Vt. 282—Enos v. Owens Slate Co., 160 A. 185, 104 Vt. 329—Land Finance Corporation v. St. Johnsbury Wiring Co., 147 A. 285, 102 Vt. 256.
Va.—Meadows v. McClaugherty, 187 S.E. 475, 167 Va. 41.
Wis.—Trustees of University Co-op. Co. v. City of Madison, 288 N.W. 742, 233 Wis. 100—First Nat. Bank v. Naylor, 247 N.W. 855, 211 Wis. 225—Lehan v. Chicago & N. W. Ry. Co., 172 N.W. 787, 169 Wis. 327.
Wyo.—Jordan v. Natrona Lumber Co., 75 P.2d 378, 52 Wyo. 393.
22 C.J. p 214 note 42.

51. Mich.—Patrick v. Howard, 10 N. W. 71, 47 Mich. 40.
22 C.J. p 215 note 43.

52. Ala.—Ramsey v. Smith, 35 So. 325, 138 Ala. 333.
22 C.J. p 215 note 44.

53. U.S.—Crowell Bros. v. Panhandle Grain & Elevator Co., C.C.A. Okl., 271 F. 129, certiorari denied Panhandle Grain & Elevator Co. v. Cromwell Bros., 42 S.Ct. 48, 257 U. S. 635, 66 L.Ed. 408.
Cal.—Miles v. A. Arena & Co., 73 P. 2d 1260, 23 Cal.App.2d 680.
Ga.—Riggs v. Scarboro, 195 S.E. 918, 57 Ga.App. 457.

ment,[54] and has been applied to evidence of the value of property.[55]

However, it is considered that knowledge acquired in the line of official duty or employment is not objectionable as based on hearsay.[56]

§ 201. Acts Based on Hearsay

Evidence of every material act of a witness having its sole origin in hearsay statements made to him should be rejected.

Where conversations are properly excluded because they are hearsay, evidence of every material act done by the witness which had its sole origin in the hearsay statements made to him, should also be rejected.[57]

§ 202. Proof as to Character of Evidence

Generally the testimony of a witness is received where he may have personal knowledge and it does not affirmatively appear that he speaks from hearsay, subject to be stricken if it subsequently appears to be hearsay.

While it has been asserted that the testimony of a witness should not be received unless it first appears that he is prepared to testify from his own knowledge,[58] the more generally accepted view is that, where the matter in controversy is such that the witness may have personal knowledge and it does not affirmatively appear that he speaks from hearsay, his testimony should be received,[59] subject to be stricken if it subsequently appears to be objectionable under the hearsay rule.[60]

The hearsay quality of the witness' knowledge may sufficiently appear from his own statement,[61] as where it is sought to prove the contents of a lost instrument by a witness who cannot read or write,[62] or where a witness attempts to state what he "found out,"[63] or "understood,"[64] or "heard."[65] Where a witness testified as to certain facts and then added that he was too young to remember that now, his explanation rendered his testimony hearsay.[66]

§ 203. Hearsay Additional to Personal Knowledge

Testimony as to a fact which the witness knows personally is not inadmissible because he also knows it from hearsay.

Testimony as to a fact of which the witness swears he has personal knowledge is not rendered inadmissible by a further showing that he also knows it from hearsay.[67]

N.Y.—McHenry v. Heiderich, 236 N.Y.S. 1, 134 Misc. 546.
22 C.J. p 215 note 45.

54. N.C.—Propst v. Mathis, 20 S.E. 710, 115 N.C. 526.
22 C.J. p 215 note 46.

55. N.J.—Reynolds v. Zisette Co., 155 A. 132, 9 N.J.Misc. 624.
Tex.—Texas & N. O. R. Co. v. Mandell, Civ.App., 117 S.W.2d 1116.
Utah.—Baglin v. Earl Eagle Mining Co., 184 P. 190, 54 Utah 572.
22 C.J. p 215 note 47.

56. U.S.—Transcontinental Petroleum Co. v. Interocean Oil Co., C.C.A.S.D., 262 F. 278.
Ky.—Joseph Denunzio Fruit Co. v. Louisville & N. R. Co., 123 S.W.2d 813, 276 Ky. 168.
Mo.—Metz v. Kansas City, 81 S.W.2d 462, 229 Mo.App. 402—Dick v. Puritan Pharmaceutical Co., App., 46 S.W.2d 941.
22 C.J. p 215 note 48.

57. Ky.—Louisville & N. R. Co. v. Murphy, 150 S.W. 79, 150 Ky. 176.
22 C.J. p 215 note 49.
Acts as hearsay see supra § 193.

58. Iowa.—Peck v. Parchen, 2 N.W. 597, 52 Iowa 46, 54.
22 C.J. p 215 note 50.
Showing of opportunity to know
In guest's action against host for injuries received when automobile upset after running into loose dirt near a bridge, at night, denying cross-examination, whether witness knew if any steps were taken immediately after accident to put flares near bridge was proper where there was no showing that witness had an opportunity to know about placing of flares.—Ellison v. Colby, 8 A.2d 637, 100 Vt. 431.

59. U.S.—William S. Merrell Co. v. Anacin Co., Cust. & Pat.App., 109 F.2d 339, 344, quoting **Corpus Juris.**
Ga.—Carter v. Marble Products, 175 S.E. 480, 179 Ga. 122—McCrea v. Georgia Power Co., 1 S.E.2d 664, 187 Ga. 708—Jarriel v. Savannah Guano Co., 128 S.E. 237, 34 Ga.App. 72—Flint River & N. E. R. Co. v. Maples, 73 S.E. 957, 10 Ga.App. 573.
Ky.—Culton v. Simpson, 96 S.W.2d 856, 265 Ky. 343—Sympson Bros. Coal Co. v. Coomes, 58 S.W.2d 594, 248 Ky. 324.
Mo.—Weniger v. Weniger, App., 32 S.W.2d 775.
Tex.—New Amsterdam Casualty Co. v. Reeves, Civ.App., 300 S.W. 206.
22 C.J. p 215 note 51.
Testimony of medical witness as to what statistics showed concerning result of injuries similar to those received by plaintiff was held not objectionable as hearsay, since his answer would be assumed to have been a conclusion reached after a judicious comparison of all that he had read or learned on subject.—Forrest v. Fink, 234 P. 860, 71 Cal.App. 34.

60. Ky.—Sympson Bros. Coal Co. v. Coomes, 58 S.W.2d 504, 248 Ky. 324.
22 C.J. p 215 note 52.

61. D.C.—Arnold v. Thompson & Spear Co., 279 F. 307, 51 App.D.C. 325.
Ga.—Horine v. Cox, 139 S.E. 591, 37 Ga.App. 216.
22 C.J. p 215 note 53.

62. Cal.—Russell v. Brosseau, 4 P. 643, 65 Cal. 605.

63. Tex.—Rosenthal v. Middlebrook, 63 Tex. 333—Strack v. Strong, Civ.App., 114 S.W.2d 313, error dismissed.

64. Ky.—Combs v. Combs, 114 S.W. 334, 130 Ky. 827.
22 C.J. p 215 note 56.
Where facts are otherwise positively stated, evidence of witness of his "understanding" as to certain facts cannot be rejected as hearsay.—J. J. Bull & Son v. Carpenter, 124 S.E. 381, 32 Ga.App. 637.

65. Mo.—Biggs v. Modern Woodmen of America, App., 71 S.W.2d 783, reversed on other grounds 82 S.W.2d 898, 336 Mo. 879.

66. Ala.—Hardy v. Randall, 55 So. 997, 173 Ala. 516.
Occupancy in ejectment
Ala.—Hardy v. Randall, supra.

67. U.S.—Baltimore American Ins. Co. of New York v. Pecos Mercantile Co., C.C.A.N.M., 122 F.2d 143.

§ 204. Impossibility of Obtaining Other Evidence

Hearsay evidence is sometimes admitted where more satisfactory evidence of the facts asserted by declarant is not available and the facts cannot be proved in any other way than by his declaration.

While it has been said generally that the rule excluding hearsay applies with full force, although no better evidence is to be found,[68] there is a considerable tendency to apply, under such circumstances, an analogy to the rule, stated infra §§ 822–834, which admits secondary evidence when the best or primary evidence is lost, destroyed, or inaccessible, and to receive hearsay evidence where it is made apparent that more satisfactory evidence of the facts asserted by the declarant is not available.[69] Such a situation arises where the declarant is dead,[70] out of the jurisdiction,[71] or physically unable to testify in court or by deposition,[72] or when, for any reason satisfactory to the court, he cannot be found or cannot be produced in court,[73] and the situation presents the further element of impossibility of proving the fact in any other way than by his declaration.[74]

Facts in pais, which occurred at a time fairly beyond the ordinary period of personal memory,[75] and of which no written evidence can be presumed to exist, may be established by direct hearsay evidence.[76]

§ 205. Death of Declarant

Unless otherwise provided by statute, declarations objectionable as hearsay are not rendered competent by reason of the death of declarant.

The rule, in the absence of statute providing otherwise, is that declarations which are objectionable as hearsay are not rendered competent by the fact that the declarant has died since such declarations were made.[77] It has been recognized, however, that

Fla.—Fred Howland, Inc., v. Morris, 196 So. 472, 143 Fla. 189, 128 A.L.R. 1013.
Minn.—Pankonin v. Federal Life Ins. Co., 246 N.W. 14, 187 Minn 479.
N.J.—Orcutt v. Orcutt, 119 A. 377, 94 N.J.Eq. 303.
Tex.—Norris v. Lancaster, Com.App., 280 S.W. 574, reversing Lancaster v. Norris, Civ.App., 271 S.W. 401—Fort Worth & R. G. Ry. Co. v. Thompson, Civ.App., 77 S.W.2d 289.
22 C.J. p 216 note 58.

68. Tex.—Reeves v. State, 7 Tex. App. 276.

69. U.S.—U. S. v. Aluminum Co. of America, D.C.N.Y., 35 F.Supp. 820—The Spica, C.C.A.N.Y., 289 F. 436.
22 C.J. p 216 note 61.

"Necessity"

"Necessity," one of the bases underlying all exceptions to the hearsay rule, is not necessarily predicated on the fact that there is no other evidence available from any source to prove the point in question, but rather that a "necessity" exists because the particular information is not obtainable in a more authentic form from the same source.—In re Roeder's Estate, 103 P.2d 631, 44 N.M. 429.

Information obtained through broker

Testimony of witness as to samples of goods not being approved was held not objectionable because he stated he knew it only through his broker, it being impracticable to get the information in any other way, and witness having previously testified that the goods were sold subject to approval, and that the samples were to be sent to a broker.—Lockerman v. Eastern Shore Trust Co., 126 A. 140, 146 Md. 330.

70. Ark.—Crawford v. Center, 100 S.W.2d 83, 193 Ark. 287.
N.Y.—In re Shlevin's Estate, 283 N.Y.S. 377, 157 Misc. 40.
Tex.—Lancaster v. Magrill, Civ.App., 244 S.W. 1078.
22 C.J. p 216 note 62.

Necessity for admission of record entry is established by proof of entrant's death.—Lebrun v. Boston & M. R. R., 142 A. 128, 83 N.H. 293.

71. Eng.—Udall's Case, 1 How.St.Tr. 1271.

72. Tex.—Griffith v. Sauls, 14 S.W. 230, 77 Tex. 630.

73. U.S.—The Spica, C.C.A.N.Y., 289 F. 436.

74. Mass.—Crouch v. Eveleth, 15 Mass. 305.
22 C.J. p 216 note 65.

In the absence of this element, death, unavailability, or incompetency of the declarant does not render hearsay admissible see infra §§ 205, 206.

75. Mass.—North Brookfield v. Warren, 16 Gray 171.
22 C.J. p 170 note 41.

76. U.S.—Virginia & West Virginia Coal Co. v. Charles, D.C.Va., 251 F. 83.
22 C.J. p 170 note 42.

77. U.S.—Krug v. Mutual Ben. Health & Accident Ass'n, C.C.A.Mo., 120 F.2d 296—Reliance Life Ins. Co. v. Burgess, C.C.A.Mo., 112 F.2d 234, certiorari denied Burgess v. Reliance Life Ins. Co., 61 S.Ct. 137, 311 U.S. 730, 85 L.Ed. 475, rehearing denied 61 S.Ct. 391, 311 U.S. 730, 85 L.Ed. 475—Yarbrough v. Prudential Ins. Co. of America, C.C.A.Ga., 100 F.2d 547, denying rehearing 99 F.2d 874—Bonner v. Texas Co., C.C.A.Tex., 89 F.2d 291—Wirthlin v. Mutual Life Ins. Co., C.C.A.Utah, 56 F.2d 137, 86 A.L.R. 138—Bellamy v. Eagle Picher Lead Co., C.C.A.Mo., 31 F.2d 662—Sylvania Industrial Corporation v. U. S., 22 C.C.P.A.(Customs) 230, 235, quoting **Corpus Juris.**

Ala.—Little v. Montgomery, 180 So. 269, 235 Ala. 615—Birmingham & A. Ry. Co. v. Campbell, 82 So. 546, 203 Ala. 296.
Ark.—Eureka Oil Co. v. Mooney, 292 S.W. 681, 173 Ark. 335—Griffin v. Union Trust Co., 266 S.W. 289, 166 Ark. 347—Arkmo Lumber Co. v. Cantrell, 252 S.W. 901, 159 Ark. 445.
Cal.—Ensign v. Southern Pac. Co., 223 P. 953, 193 Cal. 311—In re Russell's Estate, 210 P. 249, 189 Cal. 759—In re Akers' Guardianship, 194 P. 706, 184 Cal. 514—Lake v. Churchill, 67 P.2d 107, 20 Cal.App. 2d 411—Rochex & Rochex v. Southern Pac. R. Co., 17 P.2d 794, 128 Cal.App. 474—Lample v. McDougall, 285 P. 328, 103 Cal.App. 779—Roth v. Thomson, 180 P. 656, 40 Cal.App. 208.
Colo.—Stone v. Union Fire Ins. Co., 107 P.2d 241, 244, 106 Colo. 522, citing **Corpus Juris**—Manby v. Sweet Inv. Co., 242 P. 51, 52, 78 Colo. 371, citing **Corpus Juris.**
Conn.—Furcolo v. Auto Rental Co., 148 A. 377, 110 Conn. 540.
Del.—Cooper v. Baker, 139 A. 254, 3 W.W.Harr. 489.
Ga.—Hobbs v. Houston, 9 S.E.2d 749, 190 Ga. 505—Heaton v. Hayes, 4 S.E.2d 570, 188 Ga. 632—State Banking Co. v. Miller, 196 S.E. 47, 185 Ga. 653—Jenkins v. Philips, 185 S.E. 812, 182 Ga. 477—Higgins v. Trentham, 197 S.E. 862, 186 Ga. 264—Phillips v. Phillips, 137 S.E. 561, 163 Ga. 899—Faucett v. Rogers, 108 S.E. 798, 152 Ga. 168—Gullatt

an exception to the hearsay rule under such circumstances would be desirable.[78]

Statutory regulations. In some jurisdictions, as a result of statutory regulations, declarations of a person since deceased are, under certain conditions, admissible.[79]

Under some statutes declarations of a person since deceased are admissible where they were made in good faith, before the commencement of the action and on the declarant's personal knowledge.[80]

v. Thompson, 196 S.E. 107, 57 Ga. App. 669—Hodge v. American Mut. Liability Ins. Co., 195 S.E. 765, 57 Ga.App. 403—Standard Brick & Tile Co. v. Posey, 193 S.E. 613, 56 Ga. App. 686—Metropolitan Life Ins. Co. v. Polk, 192 S.E. 472, 56 Ga.App. 310—N. C. Foster Lumber Co. v. Sykes, 166 S.E. 61, 45 Ga.App. 826.

Idaho.—Jensen v. Wheeler & England, 1 P.2d 624, 51 Idaho 91—Blaine County Inv. Co. v. Mays, 291 P. 1055, 49 Idaho 766.

Ill.—Teter v. Spooner, 137 N.E. 120, 305 Ill. 198—Scott v. Cornell, 129 N.E. 94, 295 Ill. 508—De Costa v. Bischer, 122 N.E. 819, 287 Ill. 598—In re Carlson's Estate, 2 N.E.2d 963, 286 Ill.App. 81—Delee v. Leahy, 278 Ill.App. 178.

Ind.—Emry v. Beaver, 137 N.E. 55, 192 Ind. 471.

Iowa.—Reed v. Reed, 281 N.W. 444, 225 Iowa 773—Pride v. Interstate Business Men's Acc. Ass'n of Des Moines, 216 N.W. 62, 207 Iowa 167, 62 A.L.R. 31.

Ky.—Barnett v. Barnett, 142 S.W.2d 975, 283 Ky. 710—Nelson's Adm'x v. Kitchen Lumber Co., 122 S.W. 2d 1037, 276 Ky. 3—Nolen v. Wilson's Adm'r, 277 S.W. 315, 211 Ky. 156—Meyers' Adm'x v. Chesapeake & O. Ry. Co., 259 S.W. 1027, 202 Ky. 443—Tinsley v. Tinsley, 225 S.W. 720, 193 Ky. 324.

La.—Succession of Ipser, 157 So. 380, 180 La. 656—Winter v. Gani, App., 199 So. 600.

Md.—Loving v. Mutual Life Ins. Co. of New York, 117 A. 323, 140 Md. 173—Benzinger v. Hemler, 107 A. 355, 134 Md. 581.

Minn.—In re Olson's Estate, 180 N. W. 1009, 148 Minn. 122, rehearing denied Olson's Estate v. Johnson, 181 N.W. 569, 148 Minn. 122.

Mo.—State ex rel. Gneckow v. Hostetter, 105 S.W.2d 928, 340 Mo. 1177, quashing Gnekow v. Metropolitan Life Ins. Co., 99 S.W.2d 126, reversed 108 S.W.2d 621—Bennett v. Myres, App., 21 S.W.2d 943—Whitmore v. American Ry. Express Co., 269 S.W. 654, 219 Mo.App. 294—McCune v. Daniels, App., 251 S.W. 458—Gieske v. Redemeyer, App., 224 S.W. 92.

Mont.—Wilson v. Davis, 103 P.2d 149, 110 Mont. 356.

Neb.—Dvorak v. Kucera, 264 N.W. 737, 130 Neb. 341.

N.H.—Berry v. Merrill, 161 A. 34, 85 N.H. 525.

N.J.—Borough of Haworth v. State Board of Tax Appeals, 21 A.2d 309, 127 N.J.Law 67—Prudential Ins. Co. of America v. Mantz, 17 A.2d 279, 128 N.J.Eq. 480—In re Haness' Estate, 130 A. 655, 98 N.J.Eq. 645.

N.Y.—Marrow v. Moskowitz, 174 N.E. 460, 255 N.Y. 219, affirming 242 N.Y.S. 523, 230 App.Div. 1—In re Ivory, 21 N.Y.S.2d 6, 259 App.Div. 1046—Rawlings v. Prudential Ins. Co. of America, 9 N.Y.S.2d 979, 256 App.Div. 284—Handel v. New York Rapid Transit Corporation, 297 N. Y.S. 216, 252 App.Div. 142, affirmed 13 N.E.2d 468, 277 N.Y. 548—In re Berardini's Will, 264 N.Y.S. 479, 238 App.Div. 433, affirmed In re Berardini, 189 N.E. 730, 263 N.Y. 627—Uvalde Asphalt Paving Co. v. City of New York, 188 N.Y.S. 304, 196 App.Div. 740—In re Dryer's Estate, 257 N.Y.S. 257, 143 Misc. 310.

N.C.—High Point Savings & Trust Co., v. Blackwelder, 183 S.E. 271, 209 N.C. 252—Hager v. Whitener, 169 S.E. 645, 204 N.C. 747—Chandler & Ragland v. Marshall, 126 S.E. 742, 189 N.C. 301—Matthis v. Johnson, 104 S.E. 366, 180 N.C. 130.

Pa.—Harry E. Jackson Co. v. Pennsylvania R. Co., 172 A. 20, 112 Pa. Super. 535—Yost v. Susquehanna Pipe Line Co., 32 Luz.Leg.Reg. 324.

R.I.—Industrial Trust Co. v. Colt, 128 A. 280, 46 R.I. 319.

S.C.—Correll v. City of Spartanburg, 169 S.E. 84, 169 S.C. 403.

S.D.—Tabor State Bank of Tabor v. Rollins, 223 N.W. 726, 54 S.D. 521.

Tenn.—Campbell v. Henley, 110 S.W. 2d 329, 172 Tenn. 135.

Tex.—Niemann v. Garcia, Civ.App., 144 S.W.2d 621, error dismissed, judgment correct—Averitt v. Warren, Civ.App., 125 S.W.2d 691—Finley v. Pafford, Civ.App., 104 S.W. 2d 163, error dismissed—Plunkett v. Simmons, Civ.App., 63 S.W.2d 313, error dismissed—Dansby v. Stroud, Civ.App., 48 S.W.2d 1018, 1021, error refused, citing **Corpus Juris**—Aldana v. Aldana, Civ.App., 42 S.W.2d 661, error dismissed—Brigman v. Holt & Bowers, Civ. App., 32 S.W.2d 220, error refused—Ruiz v. Vela, Civ.App., 26 S.W. 2d 286, error dismissed—Ormes v. Ormes, Civ.App., 300 S.W. 191—Warren v. Humphreys, Civ.App., 274 S.W. 250—Willis v. Pierce, Civ. App., 260 S.W. 1087—Sparks v. Johnson, Civ.App., 255 S.W. 975.

Vt.—Bancroft v. Vail, 115 A. 224, 95 Vt. 304.

Va.—Boggs v. Snoddy, 131 S.E. 830, 146 Va. 325.

Wis.—In re Suckow's Estate, 212 N. W. 280, 192 Wis. 124—Maine v. Maryland Casualty Co., 178 N.W. 749, 172 Wis. 350, 15 A.L.R. 1536.

22 C.J. p 216 note 66.

Effect of impossibility of obtaining other evidence see supra § 204.

Corpus Juris cited in a case holding that the error, if any, in admitting testimony of the declaration of a deceased was, under the circumstances, trivial and not reversible.—Dwinelle v. Union Pac. R. Co., 92 P. 2d 741, 744, 104 Colo. 545.

Test for admitting deceased's declaration is whether declaration was made under circumstances showing no probable motive to falsify facts declared.—Aldana v. Aldana, Tex.Civ. App., 42 S.W.2d 661, error dismissed.

78. U.S.—Krug v. Mutual Ben. Health & Accident Ass'n, C.C.A.Mo., 120 F.2d 296.

22 C.J. p 216 note 67.

Resolution by American Bar Association has advocated admission of such declarations made before controversy had arisen.—Stone v. Union Fire Ins. Co., 107 P.2d 241, 106 Colo. 522.

79. Mass.—Holyoke Nat. Bank v. Proulx, 167 N.E. 521, 267 Mass. 296.

R.I.—Segee v. Cowan, 20 A.2d 270.

22 C.J. p 217 notes 69, 76.

80. U.S.—American Ry. Express Co. v. Rowe, C.C.A.Mass., 14 F.2d 269, 272, citing **Corpus Juris**, and certiorari denied 47 S.Ct. 336, 273 U.S. 743, 71 L.Ed. 869.

Mass.—O'Brien v. Bernoi, 8 N.E.2d 780, 297 Mass. 271—Holyoke Nat. Bank v. Proulx, 167 N.E. 521, 267 Mass. 296—Greene v. Boston Safe Deposit & Trust Co., 152 N.E. 107, 255 Mass. 519.

R.I.—Segee v. Cowan, 20 A.2d 270—Rhode Island Hospital Trust Co. v. Sherman, 185 A. 601, 56 R.I. 355—Kopinos v. Sommer's Transfer Co., 170 A. 490, 54 R.I. 132—Bradley v. Quinn, 166 A. 814, 53 R.I. 349, denying reargument 164 A. 330, 53 R. I. 108—Caswell v. Bathrick, 164 A. 505, 53 R.I. 114.

22 C.J. p 217 notes 69–72.

Want of good faith

The declarations are not admissible where they were not made in good faith.—Bodfish v. Cross, 126 N. E. 655, 235 Mass. 428.

Lack of personal knowledge

The declarations are inadmissible where they were not made on the personal knowledge of declarant.—Maloof v. Post Pub. Co., 28 N.E.2d 458, 306 Mass. 279—Dorchester Trust

Statutes of this character are to be liberally construed[81] to extend rather than to restrict the intended relief and to effectuate their corrective purpose.[82] They apply to written as well as to oral declarations,[83] and render evidence of such declarations competent, whenever the testimony of the decedent to the same effect would have been admissible.[84] However, such statutes do not apply to proceedings involving the proof of a will.[85] They have no application to any rule of exclusion except that of hearsay, and if on any other ground the evidence offered is objectionable such statutes do not render it admissible.[86] Whether a particular statement is admissible under such statutes is a preliminary question for the court to decide.[87] The fact that deceased's deposition might have been, but was not, taken does not affect the admissibility of statements of decedent.[88]

In some jurisdictions the statute authorizes the admission of evidence of declarations of a decedent relative to the matters in issue in actions by, or against, the personal representative of the deceased declarant.[89] Such a statute applies to written declarations[90] and permits in evidence declarations made by the decedent after the bringing of an action against him, the action being continued against his personal representative.[91] If the jury believes evidence of what decedent said, the situation is the same as though he had so testified in court.[92]

§ 206. Unavailability or Incompetency of Declarant

That declarant is unavailable or incompetent as a witness does not justify the admission of hearsay evidence.

Hearsay evidence does not become admissible by reason of the fact that the declarant is unavailable as a witness,[93] as where he has left the state[94] or

Co. v. Casey, 176 N.E. 178, 268 Mass. 494, 71 A.L.R. 1—Hicks v. H. B. Church Truck Service Co., 156 N.E. 254, 259 Mass 272—Dow v. Dow, 137 N.E. 746, 243 Mass. 587—Crowley v. O'Donnell, 131 N.E. 70, 238 Mass. 475.

What constitutes personal knowledge

Personal knowledge of declarant, to entitle declarations of deceased to admission in evidence, must be derived from exercise of declarant's own senses.—Tenney v. Foss, 167 N. E. 280, 268 Mass. 69.

Opinion

(1) If statement was merely assertion of opinion, as distinguished from one of fact, it was not admissible.—Eldredge v. Barton, 122 N.E. 272, 232 Mass. 183—22 C.J. p 217 note 72 [a] (1), (2).

(2) However, where statement sought to be introduced as declaration of decedent involves more or less opinion, if it is, in substance, an inference of fact from a set of facts observed by him, which could not be described in detail, statement is admissible.—Eldredge v. Barton, 122 N. E. 272, 232 Mass. 183.

81. Mass.—Tenney v. Foss, 167 N.E. 280, 268 Mass. 69—Barney v. Magenis, 135 N.E. 142, 241 Mass. 268.

82. Mass.—In re Keenan, 192 N.E. 65, 287 Mass. 577, 96 A.L.R. 679.

83. Mass.—Carr v. Dighton, 118 N. E. 525, 229 Mass. 304—White v. Boston El. R. Co., 94 N.E. 278, 208 Mass. 193.

Statement reduced to writing

Fact that a statement was made by a party plaintiff and reduced to writing and signed by decedent ten or twelve years before the trial did not render it incompetent.—Quimby v. Boston Elevated Ry. Co., 142 N.E. 925, 248 Mass. 364.

84. Mass.—Sylvester v. New York, N. H. & H. R. Co., 104 N.E. 437, 217 Mass. 148.

85. Mass.—Brady v. Doherty, 149 N.E. 198, 253 Mass. 518.

86. Mass.—Pappathanos v. Coakley, 161 N.E. 804, 263 Mass. 401.

87. Mass.—O'Brien v. Bernoi, 8 N.E. 2d 780, 297 Mass. 271—Rothwell v. First Nat. Bank, 190 N.E. 812, 286 Mass. 417—Bodfish v. Cross, 126 N.E. 655, 235 Mass. 428.
22 C.J. p 217 note 75.

Burden of satisfying conditions for the admission of such evidence rested on party offering it.—Cummings v. Moore, 25 N.E.2d 221, 305 Mass. 105—Kelley v. Jordan Marsh Co., 179 N.E. 299, 278 Mass. 101—McCabe v. City of Chelsea, 163 N.E. 255, 265 Mass. 494.

Finding inferred from admission

Finding of deceased declarant's good faith, making declaration admissible, will be inferred from admission, where exceptions failed to state inquiry was not made.—Tenney v. Foss, 167 N.E. 280, 268 Mass. 69—Horan v. Boston Elevated Ry. Co., 129 N.E. 355, 237 Mass. 245—22 C.J. p 217 note 75 [c].

Admission of hospital record of deceased on issue whether facts authorizing admission of deceased's declarations existed did not require giving probative force to hospital record upon issue of liability.—Kelley v. Jordan Marsh Co., 179 N.E. 299, 278 Mass. 101.

Discretion of court

The trial court should have considerable discretion in applying the statute.—Walsh v. Morgan, 198 A. 555, 60 R.I. 349.

Finding held authorized

U.S.—Podolsky v. La Forge, C.C.A. Mass., 92 F.2d 954—Kelley v. Jordan Marsh Co., 179 N.E. 299, 278 Mass. 101—Holyoke Nat. Bank v. Proulx, 167 N.E. 521, 267 Mass. 296—New York Cent. R. Co. v. Central Vermont Ry. Co., 136 N.E. 825, 243 Mass. 56.

R.I.—Walsh v. Morgan, 198 A. 555, 60 R.I. 349.

88. U.S.—American Ry. Express Co. v. Rowe, C.C.A.Mass., 14 F.2d 269, certiorari denied 47 S.Ct. 336, 273 U.S. 743, 71 L.Ed. 869.

89. Conn.—Furcolo v. Auto Rental Co., 148 A. 377, 110 Conn. 540.
22 C.J. p 217 note 76.

Evidence held inadmissible

Testimony by plaintiff claiming under an administrator's deed that a deceased grantor told him that he did not sign the deed through which defendant claimed is not within statute.—Bowne v. Ide, 147 A. 4, 109 Conn. 307.

90. Conn.—Walter v. Sperry, 85 A. 739, 86 Conn. 474, 44 L.R.A.,N.S., 28.

91. Conn.—Walter v. Sperry, supra.

92. Conn.—Furcolo v. Auto Rental Co., 148 A. 377, 110 Conn. 540.
22 C.J. p 217 note 76.

93. N.C.—Nowell v. Basnight, 116 S.E. 87, 185 N.C. 142.
Death of declarant see supra § 205.
Effect of impossibility of obtaining other evidence see supra § 204.

94. Ala.—Johnson v. State, 59 Ala. 37.
N.C.—Nowell v. Basnight, 116 S.E. 87, 185 N.C. 142.

country,[95] or is sick,[96] or cannot be examined[97] or compelled to testify.[98]

The incompetency of declarant as a witness does not permit the introduction of hearsay evidence.[99]

§ 207. Verification of Statements

Testimony by a witness that he has truly stated to a third person, from his own knowledge, a fact which he has since forgotten renders competent testimony of such third person as to what the statement was; and a like rule applies to evidence translated by an interpreter.

Where a witness testifies that he has truly stated to a third person, from his own knowledge, a fact which he has since forgotten, he thereby renders competent the testimony of that person as to what the forgotten statement actually was.[1]

The course is the same in other cases where the testimony of two witnesses is necessary to a complete statement; thus, where an interpreter swears that he truly translated certain evidence to a court stenographer, the stenographer may then swear that he has truly reproduced the statements made to him by the interpreter, and such minutes may be read to refresh the stenographer's recollection.[2]

§ 208. Statement of Results

Notwithstanding the hearsay rule, a witness may state what certain unsworn statements show and, assuming them to be correct, what they prove.

The hearsay rule does not necessarily preclude a witness from stating what certain unsworn statements show and, assuming them to be correct, what they prove;[3] nor is such rule violated by allowing a witness to state the results of voluminous facts, or of an inspection of books and papers which cannot conveniently take place in court.[4]

§ 209. Remote or Collateral Facts

Remote or collateral facts may be proved by hearsay.

Hearsay is sometimes received as proof of remote or collateral facts.[5]

§ 210. Matters to Be Decided by Judge

The hearsay rule is considerably relaxed where the evidence is addressed solely to the judge.

A strong reason for the exclusion of hearsay is found in the distrust of the ability of a jury to give the proper weight to an unsworn statement, as only a well trained mind can give such a statement any weight without grave danger of giving it undue weight.[6] This reason is not present where the evidence is addressed solely to the judge, to enable him to decide matters of fact, or to determine as to the exercise of discretion, and consequently the rule is considerably relaxed under such circumstances.[7]

B. DECLARATIONS

§ 211. In General

A declaration is an unsworn statement or narration of facts made by a party to the transaction or by one who has an interest in the existence of the facts recounted.

A declaration is a species of hearsay, which has

95. Tex.—Bradshaw v. State, 155 S.W. 218, 68 Tex.Cr. 622.
22 C.J. p 217 note 80.

96. Md.—Gaither v. Martin, 3 Md. 146.
22 C.J. p 217 note 81.

97. Vt.—Churchill v. Smith, 16 Vt. 560.
22 C.J. p 217 note 82.

98. Conn.—State v. Yanz, 50 A. 37, 74 Conn. 177, 92 Am.S.R. 205, 54 L.R.A. 780.

99. Mass.—Le Baron v. Crombie, 14 Mass. 234.
S.C.—Fonville v. Atlanta & C. Air Line Ry. Co., 75 S.E. 172, 93 S.C. 287, petition dismissed Fonville v. Atlantic & C. Air Line R. Co., 76 S.E. 615.
22 C.J. p 217 note 84.

1. N.J.—Rathbun v. Brancatella, 107 A. 279, 93 N.J.Law 222—Chalmers v. Anthony, 151 A. 549, 8 N.J.Misc. 775.
22 C.J. p 218 note 85.

2. Mass.—Commonwealth v. Storti, 58 N.E. 1021, 177 Mass. 339.
22 C.J. p 218 note 86.

3. Mo.—Twedell v. Treasure, App., 44 S.W.2d 216.
Or.—Cranston v. Stanfield, 261 P. 52, 123 Or. 314.
22 C.J. p 218 note 87.

4. Mo.—Masonic Mut. Ben. Soc. v. Lackland, 10 S.W. 895, 97 Mo. 137, 10 Am.S.R. 298.
Opinion evidence as to result of complex or collective facts see infra § 461.

5. Ark.—Hinkle v. Lassiter, 218 S.W. 825, 142 Ark. 223.
Ill.—Rush v. Collins, 8 N.E.2d 659, 366 Ill. 307.
Mo.—Looff v. Kansas City Rys. Co., 246 S.W. 578.
Mont.—Hester v. Western Life & Accident Co. of Denver, Colo. 215 P. 508, 67 Mont. 286.
S.C.—Cross v. Southern Coal & Coke Co., 149 S.E. 14, 151 S.C. 309.
Tenn.—Cannon v. Chadwell, App., 150 S.W.2d 710.
Tex.—Douglass v. Wallace, Civ.App., 211 S.W. 530.
22 C.J. p 218 note 89.
Introductory testimony
Admission of hearsay testimony, preliminary in character, and having no direct bearing on main issue, is not error.
Kan.—Bailey v. McLeod, 56 P.2d 460, 143 Kan. 638.
Mich.—Gietzen v. Campbell, 226 N.W. 338, 247 Mich. 560.
Vt.—Bradley v. Blandin, 110 A. 309, 94 Vt. 243.

6. U.S.—Mima Queen v. Hepburn, D. C., 7 Cranch 290, 3 L.Ed. 348.
22 C.J. p 218 note 91.
Admissibility of hearsay evidence before administrative tribunal see supra § 193.

7. Ind.—Carman v. State, 196 N.E. 78, 84, 208 Ind. 297, citing **Corpus Juris.**
22 C.J. p 218 notes 93, 94.

been defined as an unsworn statement or narration of facts made by a party to the transaction, or by one who has an interest in the existence of the facts recounted.[8] The rules pertaining to the admissibility of declarations relate to unsworn statements or declarations extrajudicial in nature, and not to statements made in court.[9]

Frequently declarations, while objectionable as hearsay, in a broad sense, are subject to another objection, of itself sufficient for their rejection, lying in the fact that they are irrelevant, see infra § 212, or, as is shown infra §§ 213–216, they lack probative value because of the untrustworthiness of the declarant.

§ 212. Irrelevant Declarations

A declaration is rejected as irrelevant where it has no bearing on the existence of any disputed fact, or where it is not sufficiently connected with the party so as to affect him.

A declaration is rejected as irrelevant where it appears that it can have no bearing on the existence of any disputed fact,[10] at least in the absence of additional facts which are not furnished.[11] Likewise a statement or declaration is inadmissible where it is not sufficiently connected with the party so as to affect him and thereby become relevant,[12] as where a statement is not shown to have been made in his presence,[13] or to have been heard by

8. Black L.D.

9. Conn.—Dawson v. Davis, 5 A.2d 703, 704, 125 Conn. 330, citing Corpus Juris.
Miss.—Brister v. Dunaway, 115 So. 36, 149 Miss. 5.

10. U.S.—Grand Trunk Western R. Co. v. H. W. Nelson Co., C.C.A. Mich., 116 F.2d 823, rehearing denied 118 F.2d 252.
Ala.—Morgan Hill Paving Co. v. Pratt City Sav. Bank, 127 So. 500, 220 Ala. 683, followed in 127 So. 502, 220 Ala. 686—Davis v. Erwin, 107 So. 903, 214 Ala. 341.
Cal.—Richmond v. Denny, 191 P. 554, 47 Cal.App. 745—Yoshizumi v. Platt Produce Co., 185 P. 689, 43 Cal.App. 673.
Ga.—First Nat. Bank of Blakely v. Wade, 102 S.E. 836, 25 Ga.App. 132.
Ind.—Ross v. Felter, 123 N.E. 20, 71 Ind.App. 58.
Mo.—State ex rel. State Highway Commission v. Hoffmann, App., 132 S.W.2d 27—Gosnell v. Camden Fire Ins. Ass'n, of Camden, N. J., App., 109 S.W.2d 59.
N.Y.—Senner & Kaplan Co. v. Gera Mills, 173 N.Y.S. 265, 185 App.Div. 562.
Okl.—Potts v. Hale-Halsell Co., 1 P.2d 650, 150 Okl. 248—Wheeler v. Sexton, 216 P. 915, 91 Okl. 225.
Or.—Babcock v. Gray, 107 P.2d 846.
Pa.—Ries v. Ries' Estate, 185 A. 288, 322 Pa. 211.
S.C.—Matheson v. American Telephone & Telegraph Co., 135 S.E. 306, 137 S.C. 227.
Wash.—Yakima County v. Olson, 162 P. 987, 94 Wash. 579.
22 C.J. p 218 note 99—45 C.J. p 1259 note 77.

11. U.S.—Oliver v. Bell, C.C.A.Pa., 103 F.2d 760, affirming, D.C., 23 F. Supp. 30.
Ala.—Edmondson v. Anniston City Land Co., 29 So. 596, 128 Ala. 589.
Cal.—Irwin v. Brown, App., 115 P.2d 601—Miles v. A. Arena & Co., 73 P.2d 1260, 23 Cal.App.2d 680—Central Sav. Bank of Oakland v. Lake, 217 P. 563, 62 Cal.App. 588.
Ga.—McCrea v. Georgia Power Co., 174 S.E. 798, 179 Ga. 1
Ill.—Independent Oil Men's Ass'n v. Fort Dearborn Nat. Bank, 142 N.E. 458, 311 Ill. 278, affirming 226 Ill.App. 570.
Md.—Bracey v. McGary, 106 A. 622, 134 Md. 267
Mass.—Cummings v. Moore, 25 N.E.2d 221, 305 Mass. 105—Kelley v. Jordan Marsh Co., 179 N.E. 299, 278 Mass. 101—McCabe v. City of Chelsea, 163 N.E. 255, 265 Mass. 494—Wright v. Fisher, 125 N.E. 172, 234 Mass. 70.
Mont.—Greening v. Gazette Printing Co., 88 P.2d 862, 108 Mont. 158
N.Y.—Kittredge v. Grannis, 140 N.E. 730, 236 N.Y. 375, reversing Kittredge v. Lawrence, 197 N.Y.S. 923, 204 App.Div. 870, 205 App.Div. 838, and reargument denied 142 N.E. 315, 236 N.Y. 637.
Vt.—Calliguiri v. Marro, 106 A. 780, 93 Vt. 186.
22 C.J. p 219 note 1.

12. U.S.—Mason v. Royal Indemnity Co., D.C.Ga., 35 F.Supp. 477—U.S. v. Case & Co., 13 Ct.Cust.App. 122.
Ala.—Southern Ins. Co. v. Wilson, 108 So. 5, 214 Ala. 373—Barfield v. South Highlands Infirmary, 68 So. 30, 191 Ala. 553, Ann.Cas.1916C 1097.
Cal.—Clapp v. Churchill, 130 P. 1061, 164 Cal. 741—Chapman v. Associated Transit Terminal Corporation, 10 P.2d 1023, 123 Cal.App. 157.
Colo.—Smith v. McFerson, 234 P. 1074, 77 Colo. 168.
Ga.—Shankle v. Crowder, 163 S.E. 180, 174 Ga. 399.
Iowa.—Pride v. Interstate Business Men's Acc. Ass'n of Des Moines, 216 N.W. 62, 207 Iowa 167, 62 A.L.R. 31.
Kan.—Walker v. O'Connell, 52 P. 894, 59 Kan. 306.
Ky.—White v. Williams, 49 S.W. 808, 105 Ky. 802, 20 Ky.L. 1600.
Me.—Frye v. E. I. Du Pont De Nemours & Co., 151 A. 537, 129 Me. 289.
Mass.—Commissioner of Banks of Commonwealth v. Weisberg, 143 N.E. 910, 249 Mass. 357.
Mich.—Wabash Ry. Co. v. Bloomgarden, 180 N.W. 443, 212 Mich. 410.
Mo.—Orr v. St. Louis Union Trust Co., 236 S.W. 642, 291 Mo. 383.
N.Y.—Klein v. Katz, 193 N.Y.S. 98, 200 App.Div. 473.
S.C.—Stone v. School Dist. No. 17 of Greenville County, 159 S.E. 536, 161 S.C. 249.
Tex.—Lone Star Shipbuilding Co. v. Daniels, Civ.App., 217 S.W. 225.
Wash.—Mitchell v. Berg, 210 P. 194, 122 Wash. 127.
Wis.—Agenstein v. Westphal, 192 N.W. 391, 180 Wis. 40.
5 C.J. p 669 notes 84, 86, 87, 92–94—22 C.J. p 219 notes 3–7—48 C.J. p 719 note 14.

Statement held sufficiently connected
Or.—Keller v. Johnson, 194 P. 185, 99 Or. 113.
Tex.—People's Sav. Bank v. Marrs, Civ.App., 206 S.W. 847.

13. U.S.—Chapman v. Alton R. Co., C.C.A.Ill., 117 F.2d 669.
Ala.—Cargall v. Riley, 95 So. 821, 209 Ala. 183—Finney v. Newson, 82 So. 441, 203 Ala. 191.
Cal.—Silva v. MacAuley, 26 P.2d 887, 135 Cal.App. 249, rehearing denied 27 P.2d 791, 135 Cal.App. 249.
Fla.—Pendarvis v. Pfeifer, 182 So. 307, 132 Fla. 724.
Ga.—Braswell v. W. H. Braswell & Son, 122 S.E. 78, 31 Ga.App. 706.
Idaho.—Reilly v. Lucraft, 198 P. 674, 34 Idaho 41.
Ill.—Rockwood Sprinkler Co. v. Phillips Co., 265 Ill.App. 267.
Ind.—Masters v. Stewart, 198 N.E. 800, 101 Ind.App. 243.
Iowa.—Lawson v. Boo, 287 N.W. 282, 227 Iowa 100—Nortman v. Lally, 215 N.W. 713, 204 Iowa 638.
Ky.—Strong v. Abner, 105 S.W.2d 599, 268 Ky. 502.
Mich.—Baker v. Steketee, 255 N.W. 197, 267 Mich. 304.
N.J.—Mesgleski v. Public Service Coordinated Transport, 160 A. 321, 10 N.J.Misc. 766.

him or brought to his notice.[14]

Agency not apparent. An unsworn statement may be irrelevant because made by a third person whose agency for the party,[15] as by reason of the relationship of father,[16] mother,[17] husband,[18] wife,[19] son,[20] daughter,[21] or grandchild,[22] or because the declarant is acting as an employee[23] has not been satisfactorily established. The same is true where it is not satisfactorily established that the declarant occupied the relation of agent as interpreter.[24]

Privity not apparent. The statements of one not satisfactorily shown to have been in privity with a party are irrelevant when offered against him as declarations of a privy.[25]

§ 213. Untrustworthiness of Declarant

Untrustworthiness of the declarant may result from a lack of knowledge of the facts, see infra § 214, or from a motive to misrepresent, see infra §§ 215, 216.

Examine Pocket Parts for later cases.

§ 214. Lack of Knowledge

A statement which possesses no probative quality because of the lack of knowledge of the declarant should be rejected.

If a statement, when offered in evidence, is found to possess no probative quality, because the declarant was unable to state the truth of the matter from lack of knowledge or sufficient opportunities for acquiring knowledge, it should be rejected.[26]

N.Y.—Lally v. Cronen, 159 N.E. 723, 247 N.Y. 58, reversing 221 N.Y.S. 279, 220 App.Div. 253, affirmed 222 N.Y.S. 578, 221 App.Div. 751, and reargument denied 161 N.E. 188, 247 N.Y. 575.
Okl.—Potts v. Hale-Halsell Co., 1 P.2d 650, 150 Okl. 248.
Pa.—Waugaman v. Henry, 75 Pa.Super. 94.
S.C.—Swift & Co. v. Callaham, 131 S.E. 146, 133 S.C. 353.
Tex.—Soria v. American Nat. Ins. Co., Civ.App., 57 S.W.2d 321—Booth v. Crosby, Civ.App., 248 S.W. 417.
22 C.J. p 219 note 9.

Repetition of statement to party
Third person's statement in defendant's absence does not become admissible against defendant merely because thereafter repeated to defendant by witness who heard conversation.—Hunder v. Rindlaub, 237 N.W. 915, 61 N.D. 389.

Declarations to insurance agent
Where the agent procuring the insurance is regarded as the agent of the applicant, declarations made to him by the applicant are not admissible on behalf of plaintiff.—O'Rourke v. John Hancock Mut. L. Ins. Co., 50 A. 834, 23 R.I. 457, 91 Am.S.R. 643, 57 L.R.A. 496.

Representations made by bailor
Public representations made by the bailor before the bailment as to the good condition of the property are not admissible in the absence of evidence that they were communicated to the bailee.—Moneyweight Scale Co. v. Woodward, 29 Pa.Super. 142.

Application of rule to original testimony
The rule excluding statements made out of the presence of the adverse party does not apply to original testimony.—Swesnik Loan Co. v. Courtney, 10 N.E.2d 512, 291 Ill.App. 549.

In stock purchaser's action for fraudulent representations as to financial condition of corporation, claimed to have been made to plaintiff and third person, who furnished plaintiff with funds wherewith to buy stocks, defendant was entitled to testify as to his statements to third person, made when plaintiff was not present, notwithstanding deposition of third person, who had died prior to trial, as to such conversation was not offered in evidence by plaintiff.—Taylor v. Manning, 179 N.Y.S. 827, 190 App.Div. 559.

Substitution of administrator of party
In an action on a bond for additional cost of changing an open ditch to a tile drain, where defendant died before trial and his administrator was substituted, evidence of the drainage engineer as to the origin of the proposed change and how it was effected was not objectionable as showing conversations with a party other than defendant, and not in defendant's presence, where the conversation was with the original defendant.—Wilson-Subdrainage Dist. of Harrison-Pottawattamie Drainage Dist. No. 1 v. Richardson, 190 N.W. 384, 195 Iowa 345.

14. Ga.—Buice v. McCarty Johnstone Co., 110 S.E. 503, 28 Ga.App. 192.
Ind.—Hitt v. Carr, 162 N.E. 409, 201 Ind. 17.
22 C.J. p 219 note 8.

Delivery of letter shown
Idaho.—McMickle v. McMickle, 88 P.2d 530, 60 Idaho 1.

15. Ind.—Wilson v. Reynolds, 13 N.E.2d 218, 213 Ind. 436.
N.J.—Mausert v. Mutual Distributing Co., 109 A. 503, 94 N.J.Law 222.
S.C.—Kirven v. Kirven, 160 S.E. 432, 162 S.C. 162.
22 C.J. p 219 note 10.

Exact authority need not be shown
In an action for commission earned by procuring munitions contract for defendant with the British government, it was not essential as a prerequisite to the admission in evidence of correspondence and conference with British officials to show their exact authority as representatives of Great Britain.—Noble v. Mead-Morrison Mfg. Co., 129 N.E. 669, 237 Mass. 5.

16. Wis.—Grotjan v. Rice, 102 N.W. 551, 124 Wis. 253.
22 C.J. p 219 note 11.

17. Me.—Lawrence v. Cooke, 56 Me. 187, 96 Am.D. 443.
Va.—French v. Chapman, 13 S.E. 479, 88 Va. 317.

18. Mich.—Coldwater Nat. Bank v. Buggie, 75 N.W. 1057, 117 Mich. 416.
22 C.J. p 220 note 13.

19. N.Y.—McKay v. Lasher, 24 N.E. 711, 121 N.Y. 477.
22 C.J. p 220 note 14.

20. Okl.—Rauh v. Morris, 137 P. 1174, 40 Okl. 288.
22 C.J. p 220 note 15.

21. Ill.—Treat v. Merchants' Life Assoc., 64 N.E. 992, 198 Ill. 431.
S.C.—Dobson v. Cothran, 13 S.E. 679, 34 S.C. 518.

22. Mass.—O'Kelly v. O'Kelly, 8 Metc. 436.

23. N.J.—King v. Atlantic City Gas & Water Co., 58 A. 345, 70 N.J.Law 679.
22 C.J. p 220 note 18.

24. Mont.—Territory v. Big Knot on Head, 11 P. 670, 6 Mont. 242.
22 C.J. p 220 note 19 [a].

25. Tex.—Gillingham v. Timmins, Civ.App., 104 S.W.2d 115, error dismissed.
22 C.J. p 220 note 20.

26. Tex.—Price v. Humble Oil & Refining Co., Civ.App., 152 S.W.2d 804.
22 C.J. p 220 note 21.

§ 215. Motive to Misrepresent in General

An unsworn statement should be rejected where the declarant had a motive to misrepresent.

An unsworn statement should be rejected where the declarant had a motive to misrepresent.[27] Thus an unsworn statement should be excluded where the declarant spoke under the influence of bias,[28] or self interest, see infra § 216, or, post litem motam, under the influence of a controversial spirit.[29]

§ 216. Self-Serving Declarations

a. In general

b. Extent and limitation of rule generally

c. Statements by agent or other persons

a. In General

As a general rule, a self-serving declaration or act of a party is inadmissible in evidence in his favor; and the death of the declarant does not render his self-serving declarations admissible unless they are admissible by reason of statute.

Generally a party cannot make evidence for himself by his own declarations,[30] and it is a well established general rule that a statement of a party, whether oral or written,[31] which is of a self-serv-

27. Conn.—Mentz v. Town of Greenwich, 171 A. 10, 118 Conn. 137.
22 C.J. p 220 note 22.

28. Ala.—Lavender v. Hall, 60 Ala. 214.
Conn.—Goodno v Hotchkiss, 92 A. 419, 88 Conn. 655.

29. Wyo.—Civic Ass'n of Wyoming v. Railway Motor Fuels, 116 P.2d 236, 245, citing **Corpus Juris.**
22 C.J. p 220 note 25.

Declarations after garnishment

Declarations by attachment defendant after garnishee has been served are not admissible against attachment plaintiff in favor of garnishee. —Schooley v. Efnor, 209 N.W. 408, 202 Iowa 141.

30. Ill.—National Importing & Trading Co. v. E. A. Bear & Co., 155 N. E. 343, 324 Ill. 346, reversing 236 Ill.App. 426.
Iowa.—Mutual Ben. Life Ins. Co. v. Steckel, 280 N.W. 523.
Kan.—Platts v. Thompson, 268 P. 833, 126 Kan. 544.
Okl.—Whitsett v. Parnell, 289 P. 696, 144 Okl. 186.

31. U.S.—American Employers' Ins. Co. v. Roundup Coal Mining Co., C.C.A.Neb., 73 F.2d 592.
Ala.—Hall v. Hall, 121 So. 718, 219 Ala. 199.
Cal.—Bacon v. Bacon, 69 P.2d 884, 21 Cal.App.2d 540—Weiner v. Luscombe, 66 P.2d 151, 19 Cal.App.2d 668—Patrick v. Superior Court in and for City and County of San Francisco, 33 P.2d 466, 139 Cal.App. 1.
D.C.—Demeter v. U. S., 66 F.2d 188, 62 App.D.C. 208.
Ga.—Blakeney v. Bank of Hahira, 167 S.E. 114, 176 Ga. 190—Sovereign Camp W. O. W. v. Bell, 156 S. E. 235, 42 Ga.App. 323.
Ill.—Rockwood Sprinkler Co. v. Phillips Co., 265 Ill.App. 267—In re Chapman's Estate, 248 Ill.App. 12.
Ind.—Kaczmarczyk v. Dolato, 133 N. E. 829, 191 Ind. 540—Ross v. Fear-Campbell Co., 147 N.E. 720, 88 Ind. App. 527.
Iowa.—In re Manning's Estate, 244 N.W. 860, 215 Iowa 746—Rice v. Armour & Co., 187 N.W. 588, 194 Iowa 144.
Kan.—Benton Grain Co. v. Reger, 293 P. 955, 131 Kan. 735.
Mich.—Reichert v. Negaunee State Bank, 254 N.W. 149, 266 Mich. 413.
Mo.—Wahl v. Cunningham, 56 S.W. 2d 1052, 332 Mo. 21—Littig v. Urbauer-Atwood Heating Co., 237 S. W. 779, 292 Mo 226—Pantz v. Nelson, 135 S.W.2d 397, 234 Mo.App. 1043—Shapiro v. John Hancock Mut. Life Ins. Co., 107 S W.2d 829, 232 Mo.App. 396—Alter v. John McMenamy Investment & Real Estate Co., App., 50 S.W.2d 691—Schwartz v. Mercantile Trust Co., App., 279 S.W. 253.
N.Y.—In re Burrows' Estate, 250 N. Y.S. 257, 139 Misc. 802, modified 256 N.Y.S. 974, 235 App.Div. 764, reversed 182 N.E. 79, 259 N.Y. 449.
N.C.—Starr v. O'Quinn, 104 S.E. 66, 180 N C. 92.
Ohio.—Coutellier v. Industrial Commission of Ohio, 186 N.E. 400, 126 Ohio St. 546, followed in Industrial Commission of Ohio v. Johnson, 190 N.E. 456, 127 Ohio St. 589—Sprow v. Laronge, 164 N.E. 534, 30 Ohio App. 135.
Pa.—Dempsey v. Dobson, 34 A. 459, 174 Pa. 122, 52 Am.S.R. 816, 32 L. R.A. 761—Bee, Inc., v. Pizor, 178 A. 525, 117 Pa.Super. 598—In re O'Brien's Estate, 158 A. 319, 103 Pa.Super. 160—Hazleton Casket Co. v. Turnbach, 33 Luz.L.Reg. 465.
R.I.—La Brosse Realty Corporation v. Sabre, 148 A. 314, 50 R.I. 400.
Tex.—Wheeler v. Lee, Civ.App., 53 S.W.2d 648, set aside on other grounds Lee v. Wheeler, 84 S.W.2d 695, 126 Tex. 15—Belt v. McGehee, Civ.App., 9 S.W.2d 407.
Wash.—Dunn v. Buschmann, 13 P.2d 69, 169 Wash. 395—Bemis v. Meyer, 206 P. 566, 119 Wash. 599.
22 C.J. p 220 note 26.

Bolstering testimony by exhibit

In an action for seller's failure to deliver cloth, a written statement showing range of market prices, as stated by a favorable witness, in columns parallel to the contract prices, which was in fact a statement of buyers' case as they contended it had been proved, was held improperly submitted to the jury.—Becker v. Arnstaedt & Co., 202 N.Y.S. 627, 207 App.Div. 633.

Affidavits

D.C.—Demeter v. U. S., 66 F.2d 188, 62 App.D.C. 208.
Me.—Guild v. Eastern Trust & Banking Co., 133 A. 164, 125 Me. 292—Guild v. Eastern Trust & Banking Co., 126 A. 872, 124 Me. 208.
N.Y.—Wagner v. City of New York, 294 N.Y.S. 456, 250 App.Div. 381.
Tex.—Johnson v. Whitehand, Civ. App., 52 S.W.2d 919—Miller v. Broadway, Civ.App., 261 S.W. 223.
Wash.—Samuel & Jessie Kenney Presbyterian Home v. Kenney, 88 P. 108, 45 Wash. 106.
Wis.—Markgraf v. Columbia Bank of Lodi, 233 N.W. 782, 203 Wis. 429.

Applications for insurance

Wis.—McKnelly v. Brotherhood of American Yeoman, 152 N.W. 169, 160 Wis. 514.

Bills or written statements of account

Ga.—Young v. Landers, 119 S.E. 464, 31 Ga.App. 59.
N.J.—Ferraro v. Public Service Ry. Co., 141 A. 590, 6 N.J.Misc. 463.

Book entries

U.S.—Nettles v. Tillson, C.C.A.Fla., 87 F.2d 770—Sawhill v. Lawrence, C.C.A Pa., 69 F.2d 194—Johnson v. Matson, C.C.A.Cal., 45 F.2d 550.
Ill.—Kaplan v. Stein, 160 N.E. 552, 329 Ill. 253, reversing 237 Ill.App. 636—Baxter v. Metropolitan Life Ins. Co., 149 N.E. 243, 318 Ill. 369 —Davis v. Lichigan Cent. R. Co., 128 N.E. 539, 294 Ill. 355, affirming 213 Ill.App. 259.
Iowa.—Winnebago County v. Horton, 216 N.W. 769, 204 Iowa 1186.
Mich.—Reichert v. Negaunee State Bank, 254 N.W. 149, 266 Mich. 413—Hobart v. Vanden Bosch, 240 N.W. 1, 256 Mich. 686—Maynard Coal Co. v. Wolverine Portland Cement Co., 192 N.W. 631, 222 Mich. 334.
Mo.—In re Greenwood's Estate, 208 S.W. 635, 201 Mo.App. 39.

N.Y.—Bogatin v. Brader, 278 N.Y.S. 780, 243 App.Div. 856—Purick v. Port Jefferson Electric Light Co., 174 N.Y.S. 285, 186 App.Div. 214.
Tex.—Fite v. First Nat. Bank, Civ. App., 279 S.W. 581.
Wash.—Seal v. Long, 192 P. 896, 112 Wash. 370.
22 C.J. p 226 note 33.

Check book stubs
N.J.—Skinner v. Reinhardt, 153 A. 632, 108 N.J.Eq. 24.
N.Y.—Mills v. McMullen, 38 N.Y.S. 705, 4 App.Div. 27.

Checks and drafts payable to drawer
In action for money paid, checks and drafts drawn by plaintiff in defendant's absence, some of which were payable to himself, and not on their face showing that defendant was connected therewith, were inadmissible as in the nature of self serving declarations.—Donaghey v. Williams, 185 S.W. 778, 123 Ark. 411.

Diary
Wash.—Dennis v. Trick, 5 P.2d 493, 165 Wash. 403.

Financial statements and inventories
Cal.—Carter v. Carr, 33 P.2d 852, 139 Cal.App. 15.
Conn.—Hall v. Smedley Co., 151 A. 321, 112 Conn. 115.
Ind.—Graham v. Plotner, 151 N.E. 735, 87 Ind.App. 462.
Ky.—Veach's Adm'r v. Louisville & I. Ry. Co., 228 S.W. 35, 190 Ky. 678.
Md.—Farmer v. Associated Professors of Loyola College in City of Baltimore, 171 A. 361, 166 Md. 455.
N.Y.—Columbus Trust Co. v. Upper Hudson Electric & R. Co., 206 N.Y.S. 368, 123 Misc. 771.
S.D.—Hobbs v. Whitelock, 231 N.W. 904, 57 S.D. 198.
Wash.—First State Bank of Kellogg v. Merritt, 1 P.2d 902, 163 Wash. 467.

Interoffice communications
Idaho.—Murphy v. Mutual Life Ins. Co. of New York, 112 P.2d 993.
Md.—Frankfort Distilleries v. Burns Bottling Mach. Works, 197 A. 599, 174 Md. 12.
Mo.—McCormick v. Travelers' Ins. Co., 264 S.W. 916, 215 Mo.App. 258.
N.Y.—Moscow Fire Ins. Co of Moscow, Russia, v. Bank of New York & Trust Co., 294 N.Y.S. 648, 161 Misc. 903, affirmed 1 N.Y.S.2d 640, 253 App.Div. 710, and 1 N.Y.S.2d 641, 253 App.Div. 710, appeal dismissed Moscow Fire Ins. Co. v. Bank of New York & Trust Co., 16 N.E.2d 854, 278 N.Y. 709, affirmed Moscow Fire Ins. Co. of Moscow, Russia v. Bank of New York & Trust Co., 3 N.Y.S.2d 653, 253 App. Div. 644, affirmed Moscow Fire Ins. Co. v. Bank of New York & Trust Co., 20 N.E.2d 758, 280 N.Y. 286, reargument denied 21 N.E.2d 890, 280 N.Y. 848, certiorari granted U. S. v. Moscow Fire Ins. Co., 60 S.Ct. 129, 308 U.S. 542, 84 L.Ed. 456, rehearing denied 60 S.Ct. 706, 309 U. S. 697, 84 L.Ed. 1036, motion denied Moscow Fire Ins. Co. v. Bank of New York & Trust Co., 24 N.E. 2d 487, 281 N.Y. 818, affirmed U. S. v. Moscow Fire Ins. Co., 60 S.Ct. 725, 309 U.S. 624, 84 L.Ed. 986.

Letters
U.S.—A. B. Leach & Co. v. Peirson, Pa., 48 S.Ct. 57, 275 U.S. 120, 72 L.Ed. 194, 55 A.L.R. 457, reversing, C.C.A., 16 F.2d 86, certiorari granted 47 S.Ct. 95, 273 U.S. 676, 71 L.Ed. 835—Ætna Life Ins Co. v. Kepler, C.C.A.Neb., 116 F.2d 1—Jones v. Foster, C.C.A.Va., 70 F.2d 200, certiorari denied 55 S.Ct. 70, 293 U.S. 558, 79 L.Ed. 659—Methudy v. Roy, Cust. & Pat.App., 65 F.2d 171—Halsey, Stuart & Co. v. Farmers' Bank of McSherrystown, C.C.A.Pa., 37 F.2d 476—Trotter v. Union Indemnity Co., C.C.A.Wash., 35 F.2d 104, affirming, D.C., 33 F.2d 363—Lord & Spencer v. M. N. Stout Co., C.C.A.Mass., 33 F.2d 60—City of Excelsior Springs ex rel. and to Use of Fitze v. National Surety Corporation, D.C.Mo., 30 F.Supp. 633—Esteve Bros. & Co. v. Harrell, C.C.A.La., 272 F. 382.
Ala.—Sovereign Camp, W. O. W., v. Harris, 153 So. 870, 228 Ala. 417—Denson v. Kirkpatrick Drilling Co., 144 So. 86, 225 Ala. 473—Commonwealth Life Ins. Co. v. Barr, 119 So. 11, 218 Ala. 505—Belt Automobile Indemnity Ass'n v. Ensley Transfer & Supply Co., 99 So. 787, 211 Ala. 84.
Ark.—Leiper v. Harper, 283 S.W. 356, 171 Ark. 1188—Black v. Hogsett, 224 S.W. 439, 145 Ark. 178.
Cal.—In re Golden's Estate, 48 P.2d 962, 4 Cal.2d 300—Tucker v. Beneke, 182 P. 299, 180 Cal. 588—Citizens' Nat. Trust & Savings Bank of Los Angeles v. Arrowhead Springs Beverage Co., 14 P.2d 821, 126 Cal.App. 550—Feder v. Bryson, 295 P. 546, 111 Cal.App. 448—Bloom v. Pacific Mut. Life Ins. Co. of California, 259 P. 496, 85 Cal.App. 419.
Colo.—Eltzroth v. Murphy, 223 P. 760, 75 Colo. 5.
Conn.—Britton v. Hartshorn, 156 A. 48, 113 Conn. 484—Roberti v. Barbieri, 136 A. 85, 105 Conn. 539.
D.C.—Lucas v. Hamilton Realty Corporation, 105 F.2d 800, 70 App.D.C. 277.
Ga.—Electric Paint & Varnish Co. v. Lunsford, 176 S.E. 816, 49 Ga.App. 840.
Idaho.—Hoffer v. City of Lewiston, 85 P.2d 238, 59 Idaho 538.
Ill.—George J. Cooke Co. v. Fred Miller Brewing Co., 146 N.E. 459, 316 Ill. 46—Home Life Ins. Co. v. Franklin, 24 N.E.2d 874, 303 Ill.App. 146—Lippman v. Graber, 255 Ill.App. 345—Lindsey v. Rosen, 255 Ill.App. 21, conforming to directions 167 N.E. 89, 335 Ill. 402—Koban v. Gordon Supply Co., 253 Ill.App. 569—Thompson v. Western Casket Co., 219 Ill.App. 184.
Iowa.—Mutual Ben. Life Ins. Co. v. Steckel, 280 N.W. 523—Alquist v. Thompson, 251 N.W. 509—Abell v. Partello, 211 N.W. 868, 202 Iowa 1236—In re Coffin's Estate, 179 N.W. 123, 189 Iowa 862.
Kan.—Mid Continent Tire Mfg Co. v. Motor Equipment Co., 208 P. 659, 111 Kan. 719.
Ky.—Suter v. Suter, 128 S.W.2d 704, 278 Ky. 403—Vogt v. H. H. Newmark Co., 50 S.W.2d 54, 244 Ky. 91—Richard Ritter, Inc., v. Morris Hess & Co., 277 S.W. 1016, 211 Ky. 730.
Mass.—Reardon v. Murdock, 198 N.E. 268, 292 Mass. 362—Gibson v. McGuiness, 192 N.E. 494, 288 Mass. 153—Kana v. Fishman, 176 N.E. 922, 276 Mass. 206—Morrison v. Tremont Trust Co., 147 N.E. 870, 252 Mass. 383—Curtis v. Boston Ice Co., 129 N.E. 444, 237 Mass. 343—Wagman v. Ziskind, 125 N.E. 633, 234 Mass. 509—Sargent v. Lord, 122 N.E. 761, 232 Mass. 585.
Mich.—Wilson v. Prudential Ins. Co. of America, 275 N.W. 242, 281 Mich. 541.
Minn.—Marino v. Northern Pac. Ry. Co., 272 N.W. 267, 199 Minn. 369—Pettersen v. Fosseen, 260 N.W. 225, 194 Minn. 265—Webster Lumber Co. v. Roedter, 217 N.W. 933, 173 Minn. 529.
Mo.—Wahl v. Cunningham, 56 S.W.2d 1052, 332 Mo. 21—Commerce Trust Co. v. Langley, 9 S.W.2d 923, 321 Mo. 124—Smith v. Ohio Millers' Mut. Fire Ins. Co., 6 S.W.2d 920, 320 Mo. 146—Champion Coated Paper Co. v. Shilkee, 237 S.W. 109—Ely v. Kobermann, App., 35 S.W.2d 953—Hannan, Hickey Bros. Const. Co. v. Chicago, B. & Q. R. Co., App., 247 S.W. 436, transferred, see, Sup., 226 S.W. 881—Dietz v. Nix, 216 S.W. 791, 202 Mo.App. 639.
Neb.—Waits v. Columbia Fire Underwriters Agency of National Fire Ins. Co. of Hartford, Conn., 261 N.W. 170, 129 Neb. 207.
N.J.—Robinson v. Borough of Edgewater, 119 A. 7, 98 N.J.Law 205.
N.M.—Martin v. New York Life Ins. Co., 234 P. 673, 30 N.M. 400, 40 A.L.R. 406.
N.Y.—Henry Glass & Co. v. Misroch, 147 N.E. 71, 239 N.Y. 475, modifying 206 N.Y.S. 373, 210 App. Div. 783—McNally v. 301 Madison Ave. Corporation, 211 N.Y.S. 25, 213 App.Div. 616—Steber v. Palm Knitting Co., 201 N.Y.S. 478, 206 App.Div. 439—In re Potter's Estate, 7 N.Y.S.2d 603—Israel v. Savoy Watch Co., 192 N.Y.S. 333—Louis v. Bleecker Export & Trading Co., 189 N.Y.S. 199—Weiner v. H. Jaeckel & Sons, 179 N.Y.S. 629—Block v. Brinn, 176 N.Y.S. 763—White v. Burke, 174 N.Y.S. 716.
N.C.—Shaw Cotton Mills v. Acme

ing nature is not admissible in evidence in his fa- | vor.[32]

Hosiery Mills, 106 S.E. 24, 181 N. C. 33.
Ohio—Tolerton v. Robinson, 33 Ohio Cir.Ct. 179, 13 Ohio Cir.Ct.,N.S., 171.
Okl.—New York Life Ins Co. v. Thompson, 72 P.2d 713, 181 Okl. 108.
Or.—Dose v. Chas. H. Lilly Co., 286 P. 560, 132 Or. 533.
Pa.—Emmons v. McCreery, 160 A. 722, 307 Pa. 62—Hershey v. Love, 122 A. 225, 278 Pa. 161—Wahl v. State Workmen's Ins. Fund, 11 A. 2d 496, 139 Pa.Super 53—Huron v. Schomaker, 1 A.2d 537, 132 Pa. Super. 462—Sanner v. U. S. Transfer Co., 193 A. 830, 127 Pa.Super. 191—Bednorzenski v. Schrager, 189 A. 690, 124 Pa.Super. 486—Marino v. Vecchio, 83 Pa.Super. 377.
R.I.—Sheltra v. O'Rourke, 155 A. 401, 51 R.I. 392—Lewis Mears Co. v. Norfolk County Creamery, 137 A. 149, 48 R.I. 221.
S.C.—Funderburk v. Sovereign Camp, W. O. W., 183 S.E. 462, 179 S.C. 80.
S.D.—McMacken v. Lennan, 193 N.W. 668, 46 S.D. 448.
Tex.—Lindquist v. Sanford, Civ.App., 132 S.W.2d 279, error dismissed, judgment correct—Gibraltar Colorado Life Co. v. Taylor, Civ.App., 99 S.W.2d 1084, reversed on other grounds 123 S.W.2d 318, 132 Tex. 328—Keystone Pipe & Supply Co. v. Osborne, Civ.App., 73 S.W.2d 120—Bankers' Mortg. Co. v. Baxter, Civ.App., 66 S.W.2d 408—Shambaugh v. Willard, Civ.App., 45 S.W. 2d 1105—Stevens v. Hunt, Civ.App., 39 S.W.2d 124—Walker v. Rogers, Civ.App., 10 S.W.2d 763—Detroit Belt Lacer Co. v. Fowler Co., Civ. App., 4 S.W.2d 651—New Amsterdam Casualty Co. v. Parham, Civ. App., 2 S.W.2d 866, error dismissed—Dickey v. Jackson, Civ.App., 293 S.W. 584, reversed on other grounds, Com.App., 1 S.W.2d 577—Continental Casualty Co. v. Easley, Civ.App., 290 S.W. 251, reversed on other grounds Easley v. Continental Casualty Co., Com.App., 296 S.W. 487—Owens v. Navarro County Levee Improvement Dist. No. 8, Civ.App., 281 S.W. 577, certified questions answered, Com. App., 280 S.W. 532—Tarwater v. Donley County State Bank, Civ. App., 277 S.W. 176—Crumley v. Gile, Civ.App., 271 S.W. 641—Forrest v. Hull, Civ.App., 267 S.W. 308—Frazier v. Crews, Civ.App., 255 S.W. 673—O. C. Robitzsch & Son v. Taliaferro, Civ.App., 237 S. W. 637—Hartford Life Ins. Co. v. Patterson, Civ.App., 231 S.W. 814, error refused—McDonald v. Whaley, Civ.App., 228 S.W. 313, modified on other grounds, Com.App., 244 S.W. 596—First Nat. Bank v. Rush, Civ.App., 227 S.W. 378, modified on other grounds, Com.App., 246 S.W. 349—Peterson v. Clay, Civ App., 225 S.W. 1112—Negociacion Agricola y Ganadera de San Enrique, S. A., v. Love, Civ.App., 220 S.W. 224—Klein v. Stahl, Civ. App., 219 S.W. 523—McMahon v. Gunter, Civ.App., 219 S W. 284.
Utah.—Clayton v. Ogden State Bank, 26 P.2d 545, 82 Utah 564.
Wash.—W. W. Conner Co. v. McCollister & Campbell, 115 P.2d 370—Fleishbein v. Thorne, 74 P.2d 880, 193 Wash. 65—Bond v. Werley, 28 P.2d 318, 175 Wash. 659—Ziebarth v. Manion, 295 P. 561, 161 Wash. 201—Levy v. Simon, 205 P. 426, 119 Wash. 179.
W.Va.—Reiser v. Lawrence, 123 S. E. 451, 96 W.Va. 82.
22 C.J. p 220 note 26 [a], p 229 notes 50–53.

Memoranda

Ariz.—Saylor v. Hawes, 245 P. 354, 30 Ariz. 197.
Cal.—Bohn v. Gruver, 295 P. 891, 111 Cal.App. 386.
Mich.—Truesdell v. Michigan R. Co., 196 N.W. 334, 225 Mich. 374—Boyle v. Waters, 173 N.W. 519, 206 Mich. 515.
Mo.—Eastin v. Bank of Harrisonville, 246 S.W. 991, 213 Mo.App. 130.
N.Y.—Hutson v. Title Guarantee & Trust Co., 195 N.Y.S. 316, 118 Misc. 795.
Tex.—J. R. Milan Co. v. First Nat. Bank, Civ.App., 29 S.W.2d 480, error dismissed—Locke v. Wallingford, Civ.App., 265 S.W. 1086.
22 C.J. p 220 note 26 [c].

Minutes of meetings

Kan.—Royce v. Farmers' Life Ins. Co., 191 P. 581, 107 Kan. 245.
S.C.—Intendant and Wardens of Town of Port Royal v. Charleston & W. C. Ry. Co., 134 S.E. 497, 136 S.C. 525.
Wash.—Cannon v. Seattle Title Trust Co., 252 P. 699, 142 Wash. 213.

Newspaper article

Mich.—Van Lonkhuyzen v. Daily News Co., 170 N.W. 93, 203 Mich. 570.

Pleadings

Cal.—In re McCarthy's Estate, 15 P. 2d 223, 127 Cal.App. 80—Miles v. Rosenthal, 266 P. 320, 90 Cal.App. 390—Campbell v. Rice, 136 P. 512, 22 Cal.App. 734.
D.C.—Myers v. Tschiffely, 73 F.2d 657, 64 App.D.C. 17.
Iowa.—Welpton v. Marshall, 186 N. W. 854.
Ky.—Rakestraw v. Sebree Deposit Bank, 225 S.W. 506, 189 Ky. 668.
Md.—Farmer v. Associated Professors of Loyola College in City of Baltimore, 171 A. 361, 166 Md. 455.
Mich.—In re Corby's Estate, 203 N. W. 877, 231 Mich. 235.
Mo.—Wilson v. Frankel, App., 61 S. W.2d 363.
N.J.—Freeman v. Ackerson, 110 A. 701, 94 N.J.Law 308.
N.Y.—Wagner v. City of New York, 294 N.Y.S. 456, 250 App.Div. 381.
N.C.—Lupton v. Day, 190 S.E. 722, 211 N.C. 443.
Tex.—Hughes v. Dopson, Civ.App., 135 S.W.2d 148—Johnson v. Whitehand, Civ App., 52 S.W.2d 919—Fertitta v. Toler, Civ.App., 43 S. W.2d 467, reversed on other grounds Toler v. Fertitta, Com. App., 67 S W.2d 229—Reo Motor Car Co. of Texas v. Barnes, Civ. App., 9 S.W.2d 374.
Va.—Palmetto Fire Ins. Co. v. Fansler, 129 S.E. 727, 143 Va. 884.
22 C.J. p 220 note 26 [i].

Recitals in wills, deeds, or mortgages

Cal.—Sethmann v. Bulkley, 61 P.2d 765, modified on other grounds 68 P.2d 961, 9 Cal.2d 21—Potter v. Smith, 191 P. 1023, 48 Cal.App. 162.
Ill.—Feulner v. Gillam, 216 Ill.App. 85.
N.Y.—Sumner v. Sumner, 219 N.Y.S. 31, 128 Misc. 404, affirmed 222 N. Y.S. 908, 221 App.Div. 760.
Tex.—Texas Co. v. Lee, Civ.App., 135 S.W.2d 180, error granted—Wilder v. American Produce Co., Civ.App., 106 S.W.2d 1073—Orr v. Armstrong, Civ.App., 81 S.W.2d 710, error refused—Sabinal Nat. Bank v. Cunningham, Civ.App., 256 S.W. 317—Clark v. Scott, Civ.App., 212 S.W. 728.
Wash.—Castleman v. Schiffner, 294 P. 983, 160 Wash. 313.
22 C.J. p 220 note 26 [d], [e].

Statements in written reports

Ala.—Birmingham News Co. v. Moseley, 141 So. 689, 225 Ala. 45.
Ill.—Osborn v. Albers, 7 N.E.2d 447, 365 Ill. 631, reversing, App., 4 N. E.2d 396.
N.Y.—Trampusch v. Kastner, 274 N. Y.S 771, 242 App.Div. 803.
W.Va.—Scott v. Norfolk & W. Ry. Co., 140 S.E. 329, 104 W.Va. 461.

Telegrams

Ark.—Mutual Ben. Health & Accident Ass'n v. Neale, 33 P.2d 604, 43 Ariz. 532.
22 C J. p 220 note 26 [b].

Ticker tape records

Ticker tape records, although adopted as office records by makers, are not binding on third person.—Benton Grain Co. v. Reger, 293 P. 955, 131 Kan. 735.

32. U.S.—U. S. v. Hayman, C.C.A. Wis., 115 F.2d 599—Anglo California Nat. Bank of San Francisco v. Lazard, C C.A.Cal., 106 F.2d 693, certiorari denied 60 S.Ct. 379, 308 U.S. 624, 84 L.Ed. 521—Erie Iron & Steel Co. v. Cambridge Steel Prod-

Such declarations are not rendered admissible by | the mere fact that they were made in the presence

ucts Co., C.C.A.Pa., 52 F.2d 145—Kling v. McCabe, C.C.A.Mo., 36 F.2d 337—Perkins v. Haskell, C.C.A.N.J., 31 F.2d 53, dismissing appeal, D C, Haskell v. Perkins, 28 F.2d 222, and certiorari denied 49 S.Ct. 513, 279 U.S. 872, 73 L Ed. 1007—Conn v. Roos, C C.A.Tex., 14 F.2d 64

Ala.—W. F. Covington Planter Co. v. Roberson, 194 So. 171, 239 Ala. 70—Waters v. Blackmon, 153 So. 739, 228 Ala. 462—Teague v. Tennessee Valley Bank, 104 So. 228, 213 Ala. 21.

Ariz.—Pawley v. First Nat. Bank, 256 P. 507, 32 Ariz. 135—Arizona Eastern R. Co. v. Cox, 233 P. 1102, 27 Ariz 467.

Ark.—Davis v. Falls, 288 S.W. 723, 172 Ark. 314.

Cal.—Barcroft v. Livacich, 96 P.2d 951, 35 Cal.App 2d 710—Betty v. Knapp, 43 P.2d 325, 5 Cal App.2d 512—Security Trust & Savings Bank v. McAdoo, 293 P. 149, 109 Cal.App. 505.

Colo.—Stone v. Union Fire Ins Co, 107 P.2d 241, 106 Colo. 522

Ga.—Groover v. Wilkes, 98 S.E. 503, 148 Ga. 794—Gullatt v. Thompson, 6 S.E 2d 447, 61 Ga.App. 253—Jackson Co. v. Farmers Peanut Co., 6 S.E.2d 428, 61 Ga.App. 248—Gay v. Osteen, 192 S.E. 539, 56 Ga.App. 224.

Ill.—National Importing & Trading Co. v. E. A. Bear & Co, 155 N.E. 343, 324 Ill. 346, reversing 236 Ill. App. 426—George J. Cooke Co. v. Fred Miller Brewing Co., 146 N.E. 459, 316 Ill. 46—Illinois Tuberculosis Ass'n v. Springfield Marine Bank, 282 Ill.App. 14—Foley & Co. v. Excelsior Stove & Mfg. Co., 265 Ill.App. 78—Harty v. Smith, 74 Ill.App. 194.

Ind.—Keener School Tp. v. Eudaly, 175 N.E. 363, 93 Ind.App. 627—Golibart v. Sullivan, 66 N.E. 188, 30 Ind.App. 428.

Iowa.—Ankeney v. Brenton, 238 N.W. 71, 214 Iowa 357.

Ky.—Equitable Life Assur. Soc. of U. S. v. Green, 83 S W.2d 478, 259 Ky. 773—Hacker v. Deaton, 254 S. W. 1055, 200 Ky. 383—Doom v. Vinson, 244 S.W. 894, 196 Ky. 449

La.—Winter v. Gani, App., 199 So. 600.

Me.—Norton v. Smith, 150 A. 494, 129 Me. 127.

Md.—Takoma Park Bank v. Abbott, 19 A.2d 169—Frankfort Distilleries v. Burns Bottling Mach. Works, 197 A. 599, 174 Md. 12.

Mass.—Jacobs v. Jacobs, 183 N.E. 147, 281 Mass. 198—Bilodeau v. Fitchburg, & L. St. Ry. Co., 128 N.E. 872, 236 Mass. 526—Hazelton v. Allen, 3 Allen 114.

Minn.—Kolars v. Delnik, 266 N.W. 705, 197 Minn. 183—Fischer v. Chicago & N. W. Ry. Co., 258 N.W. 4, 193 Minn. 73.

Miss.—Bullard v. Citizens Nat. Bank of Meridian, 171 So. 540, 541, 177 Miss 735, citing **Corpus Juris.**

Mo.—Fishback v. Prock, 279 S.W. 38, 311 Mo. 494—Weller v. Weaver, 100 S W.2d 594, 598, 231 Mo.App. 400, citing **Corpus Juris**—Munton v. A. Driemeier Storage & Moving Co, 22 S.W.2d 61, 223 Mo App. 1124—Woods v. Woods, App, 13 S.W. 2d 569—Grant v. Kansas City Southern Ry. Co., 157 S.W. 1016, 172 Mo App. 334.

Mont.—Gilcrest v. Bowen, 24 P.2d 141, 95 Mont. 44.

Neb.—In re Parvin's Estate, 270 N. W. 470, 131 Neb. 853.

N.J.—Carey v. Deems, 129 A. 191, 101 N J.Law 419—Helminsky v. Ford Motor Co, 162 A. 189, 10 N J.Misc. 1042, affirmed 168 A. 420, 111 N. J.Law 369.

N.Y.—Scott v. Palmer, 283 N.Y.S. 114, 157 Misc. 133, affirmed 286 N.Y.S. 453. 246 App.Div. 379, affirmed 6 N.E 2d 409, 273 N.Y. 471.

N.C.—In re Yelverton's Will, 153 S. E. 319, 198 N.C. 746—Nissen v. Baker, 152 S.E. 34, 198 N.C. 433—Shaw Cotton Mills v. Acme Hosiery Mills, 106 S.E. 24, 181 N.C. 33.

Okl.—Campbell v. Vance, 248 P. 634, 118 Okl. 283—Zarrow v. Whisler, 225 P. 917, 99 Okl. 111.

Or.—Maeder Steel Products Co. v. Zanello, 220 P. 155, 109 Or. 562—Stanfield v. Arnwine, 202 P. 559, 102 Or. 289.

Pa.—Ries v. Ries' Estate, 185 A. 288, 322 Pa. 211—Sears v. Birbeck, 184 A. 6, 321 Pa. 375—Emmons v. McCreery, 160 A. 722, 307 Pa. 62—Heyman v. Hanauer, 152 A. 910, 302 Pa. 56—Bednorzenski v. Schrager, 189 A. 690, 124 Pa.Super. 486—In re Schultz's Estate, 24 Pa.Dist. & Co. 546—Gelbarth v. Moore, 29 Del.Co. 68.

Philippine.—Lim-Chingco v. Terarray, 5 Philippine 120, 3 Off.Gaz. 687—Richmond v. Anchuelo, 4 Philippine 596, 3 Off.Gaz. 605.

S C.—Dantzler v. Southern Ry. Co., 149 S.E. 750, 152 S.C. 287—Merchants' & Planters' Nat. Bank of Union v. Hunter, 102 S.E. 720, 113 S.C. 394.

Tenn.—Robbins v. New York Life Ins. Co., 72 S.W.2d 788, 18 Tenn. App. 70—Adcock v. Simon, 2 Tenn. App. 617.

Tex.—Andress v. Crump, Com.App., 29 S.W.2d 1038, reversing, Civ. App., 12 S.W.2d 1077—Niemann v. Garcia, Civ.App., 144 S.W.2d 621, error dismissed, judgment correct—Averitt v. Warren, Civ.App., 125 S.W.2d 691—Thomasson v. Davis, Civ.App., 74 S.W.2d 557, error dismissed—Hood v. Robertson, Civ. App., 33 S.W.2d 882—Worth Mills v. Copeland, Civ.App., 33 S.W.2d 580, error refused—Dallas Hotel Co. v. McCue, Civ.App., 25 S.W.2d 902—Moore v. Follett, Civ.App., 11 S.W.2d 662, error dismissed—B. F. Goodrich Rubber Co. v. Valley Plumbing & Supply Co., Civ.App., 267 S.W. 1036—Lipsitz v. Prideaux, Civ.App., 266 S.W. 199—Olschewske v. Priester, Civ.App., 264 S.W. 517, reversed on other grounds, Com.App., 276 S.W. 647—Hargrove v. Fort Worth Elevators Co., Civ. App., 262 S W. 868, reversed on other grounds, Com.App., 276 S.W. 426—McDonald v. Whaley, Civ. App., 207 S.W. 609—De Shazo v. Eubank, Civ.App., 191 S W. 369, reversed on other grounds, Com. App., 222 S.W. 976.

Vt.—Farmer v. Williams, 102 A. 932, 92 Vt. 132.

Va.—Gallion & Gregory v. Winfree, 105 S.E. 539, 129 Va. 122.

Wash.—McFarland v. Department of Labor and Industries, 62 P.2d 714, 188 Wash. 357—Stusser v. Gottstein, 35 P 2d 5, 178 Wash. 360—David P. Eastman, Inc., v. Northwestern Mut. Life Ins. Co., 13 P. 2d 488, 169 Wash. 125

W.Va.—Scott v. Norfolk & W. Ry. Co, 140 S.E. 329, 104 W.Va. 461—Dickinson Fuel Co. v. Glenn Coal Co, 137 S.E. 539, 103 W.Va. 366.

Wis.—Markgraf v. Columbia Bank of Lodi, 233 N.W. 782, 203 Wis. 429.

Wyo.—Civic Ass'n of Wyoming v. Railway Motor Fuels, 116 P.2d 236.

9 C.J. p 651 notes 21, 22—22 C.J. p 221 note 27.

Time of interest see infra subdivision b of this section.

Contracts made with third persons after the event are self-serving declarations and are not available as proof.—Nowalk v. Hileman, 180 A. 93, 118 Pa.Super. 322.

Declarations of donee

(1) The declaration of a donee in possession to the effect that he claims the property by gift is inadmissible as substantive evidence of the gift.—Couch v. Couch, 37 So. 405, 141 Ala. 361—28 C.J. p 676 note 22.

(2) Gifts causa mortis cannot be proved by mere hearsay declarations of the alleged donee.

N.J.—Buecker v. Carr, 47 A. 34, 60 N.J.Eq. 300.

Va.—Thomas v. Lewis, 15 S.E. 389, 89 Va. 1, 37 Am.S R. 848, 18 L.R. A. 170.

Particular declarations held inadmissible

(1) The declarations of insured as to his age, corroborating his statements in the application.—Tuite v. Supreme Forest W. C., 187 S.W. 137, 193 Mo.App. 619.

(2) Self-serving statements as to the terms or meaning of a contract.

of, or in a conversation or correspondence with, the opposing party or his agent,[33] in the absence of assent to their truth by the opposing party, see subdivision b of this section; by having been brought to the attention of the other party or his agent and commented on by him;[34] by having been part of a conversation or correspondence with the declarant's witness;[35] or by being brought out on cross-examination.[36] Such declarations are equally inadmissible when offered by the declarant's representatives, devisees, or heirs,[37] since, as is noted infra this subdivision, the death of a declarant does not render his statements admissible. The rule of exclusion also applies when such declarations are offered in evidence by third persons on their own behalf.[38]

The rule excluding self-serving declarations is a part of the hearsay rule,[39] and its purpose is to prevent the manufacturing of evidence.[40] A self-serving declaration within the rule is one made by a party in his own interest at some place and time out of court and it does not include testimony which he gives as a witness at the trial.[41]

U.S.—Thomson Mach. Co. v. Sternberg, D.C.Ill., 55 F.2d 715.
Iowa.—Albia Light & Ry. Co. v. Gold Goose Coal & Mining Co., 176 N.W. 722, affirmed 185 N.W. 571, 192 Iowa 869.
La.—Palmer v. Smith Co., 116 So. 186, 165 La. 788.
Mo.—McFarland v. Bishop, 222 S.W. 143, 282 Mo. 534.
Pa.—Newalk v. Hileman, 180 A. 93, 118 Pa.Super. 322
Tex.—First Nat. Bank v. Hoover, Civ.App., 269 S.W. 262.

(3) Declarations in support of the declarant's own interest in real property.
Ala.—Miles v. Rhodes, 131 So. 633, 222 Ala. 208.
Cal.—Chamberland v. Whitney, 66 P.2d 220, 19 Cal.App.2d 660.
Conn.—Borden v. Town of Westport, 151 A. 512, 112 Conn. 152—Borden v. Town of Westport, 134 A. 803, 105 Conn. 139.
N.C.—Roe v. Journigan, 106 S.E. 680, 181 N.C. 180.
Pa.—Honan v. Donaldson, 200 A. 30, 331 Pa. 388—King v. King, 127 A. 142, 281 Pa. 511—In re Kaufmann's Estate, 127 A. 133, 281 Pa. 519.
Tex.—Ibanez v. State, Civ.App., 118 S.W.2d 405—First State Bank in Caldwell v. Stubbs, Civ.App., 48 S.W.2d 446—Warren v. Humphreys, Civ.App., 274 S.W. 250—Massie v. Hutcheson, Civ.App., 258 S.W. 244, reversed on other grounds, Com.App., 270 S.W. 544—Ellis v. Haynes, Civ.App., 216 S.W. 249.
Va.—Foster v. Helms, 194 S.E. 799, 169 Va. 634—Sawyer v. Matthews, 184 S.E. 238, 166 Va. 177.

(4) Self-serving statements of a grantor as to the interest transferred, conditions of the sale, etc.
Ark.—Smith v. School Dist. No. 14, 94 S.W.2d 706, 192 Ark. 792.
Ky.—Kentland Coal & Coke Co. v. Levine, 5 S.W.2d 280, 224 Ky. 75.
Utah.—Ruthrauff v. Silver King Western Min. & Mill. Co., 80 P.2d 338, 95 Utah 279.

(5) Self-serving declarations as to title or possession of personal property.
Cal.—Hotaling v. Hotaling, 203 P. 745, 187 Cal. 695.
Ind.—Wilson v. Reynolds, 13 N.E.2d 218, 213 Ind. 436.
Iowa.—Malcor v. Johnson, 273 N.W. 145, 223 Iowa 644.
N.Y.—Herrick v. Hamilton, 290 N.Y.S. 65, 160 Misc. 440.
Or.—Fredenburg v Horn, 218 P. 939, 108 Or. 672, 30 A.L.R. 1153.

(6) Self-serving declarations as to payment by either a debtor or a creditor.
U.S.—In re Smolka, D.C.Mich., 58 F.2d 403.
Mo.—Weller v. Weaver, 100 S.W.2d 594, 231 Mo.App. 400.
48 C.J. p 719 notes 11–13.

(7) Self-serving declarations as to mental state, intention, understanding, or motive.
U.S.—Halsey, Stuart & Co. v. Farmers' Bank of McSherrystown, C.C.A.Pa., 37 F.2d 476.
Ala.—Montgomery v. McNutt, 108 So. 752, 214 Ala. 692.
Ark.—Heard v. Farmers' Bank of Hardy, 295 S.W. 38, 174 Ark. 194.
Cal.—Kershaw v. Madsen, 216 P. 55, 62 Cal.App. 11.
Ga.—Kline Car Corporation v. Watkins Motor Co., 106 S.E. 211, 26 Ga.App. 338.
Iowa.—Streblow v. Sylvester, 191 N.W. 788, 195 Iowa 168—Hughes v. Greider, 190 N.W. 420, 194 Iowa 726—Shuck v. Vanderventer, 4 Greene 264.
Ky.—Castle v. Allen, 120 S.W.2d 219, 274 Ky. 658—Conley's Adm'r v. Hall, 86 S.W.2d 1015, 261 Ky. 1.
Mich.—Standard Oil Co. v. Murray, 183 N.W. 55, 214 Mich. 299.
Mo.—Weller v. Weaver, 100 S.W.2d 594, 231 Mo.App. 400.
N.Y.—In re Porianda's Estate, 176 N.E. 826, 256 N.Y. 423, reversing 244 N.Y.S. 915, 230 App.Div. 788, which affirmed 237 N.Y.S. 715, 135 Misc. 389—Dworkowitz v. Cascio, 193 N.Y.S. 326.
Va.—Flannagan v. Northwestern Mut. Life Ins. Co., 146 S.E. 353, 152 Va. 38.
W.Va.—Carter v. Walker, 1 S.E.2d 483.

(8) Other declarations see Stockley v. Cissna, Tenn., 119 F. 812, 56 C.C.A. 324—22 C.J. p 226 note 38 [a].

33. Mo.—McCarty v. Bishop, 102 S.W.2d 126, 231 Mo.App. 604.
N.D.—Wilkins v. National Union Fire Ins. Co. of Pittsburgh, Pa., 189 N.W. 317, 48 N.D. 1295.
Wash.—Proctor v. Appleby, 188 P. 481, 110 Wash. 403.
22 C.J. p 226 notes 30, 31.

34. N.H.—Braley v. Braley, 16 N.H. 426.
N.J.—Duysters v. Crawford, 55 A. 823, 69 N.J.Law 614.

35. U.S.—Thomson Mach. Co. v. Sternberg, D.C.Ill., 55 F.2d 715.
Ky.—Asher v. Asher, 6 S.W.2d 244, 224 Ky. 300.
Mo.—Stinson v. Lemar, App., 289 S.W. 970.
22 C.J. p 225 note 29.

36. Ill.—Mathes v. Chicago City R. Co., 178 Ill.App. 34.
La.—Dickson v. Grissom, 4 La.Ann. 538.

37. D.C.—Bailey v. Smith, 23 F.2d 977, 57 App.D.C. 369.
Ga.—Kelly v. Sinclair, 168 S.E. 78, 46 Ga.App. 499.
Kan.—Rayl v. Brown, 195 P. 611, 108 Kan. 385.
Ky.—Horn's Adm'r v. Prudential Ins. Co. of America, 65 S.W.2d 1017, 252 Ky. 137—Lawson's Adm'r v. Brandenburg, 41 S.W.2d 201, 240 Ky. 68—Sutton v. Russell's Ex'r, 33 S.W.2d 629, 236 Ky. 535—Veach's Adm'r v. Louisville & L. Ry. Co., 228 S.W. 35, 190 Ky. 678.
Md.—Lynch v. Rogers, 10 A.2d 619, 177 Md. 478.
Mich.—In re Heiler's Estate, 284 N.W. 641, 288 Mich. 49.
Ohio.—Keck v. Bahlke, 6 Ohio App. 246.
22 C.J. p 226 note 35.

38. Ark.—Watson v. Davidson, 217 S.W. 777, 141 Ark. 591.
Mo.—Marshall v. Kansas City, 249 S.W. 82, 297 Mo. 304.
22 C.J. p 226 note 36.

39. N.H.—Caplan v. Caplan, 142 A. 121, 83 N.H. 318.

40. R.I.—Rich v. Tanenbaum, 198 A. 240, 60 R.I. 254.

41. Conn.—Dawson v. Davis, 5 A.2d 703, 125 Conn. 330.

Effect of direct testimony as to same matters. Where there is direct evidence as to the same matters as to which a party's declaration has been admitted in evidence against the objection that it was self-serving, the admission of the declaration, even if technically improper, cannot be regarded as prejudicial error.[42]

Effect of failure to object. Where self-serving declarations are admitted without objection, the evidence cannot afterward be objected to as incompetent.[43]

Self-serving acts. Self-serving acts are but a form of declaration and are within the rule excluding self-serving declarations.[44]

Effect of death of declarant. The death of the declarant does not render his self-serving declarations admissible,[45] except in jurisdictions where the rule has been changed by statute.[46]

Mont.—Welch v. Thomas, 61 P.2d 404, 102 Mont. 591.
Neb.—Powerine Co. v. Grimm Stamp & Badge Co., 254 N.W. 722, 127 Neb. 165.
Or.—Brosnan v. Boggs, 198 P. 890, 101 Or. 472.

42. Okl.—McCurtain Cotton Oil Co. v Guthrie, 294 P. 133, 135, 146 Okl. 144, quoting **Corpus Juris.**
Tex.—Johnson v. Tunstall, Com.App., 25 S.W.2d 828, reversing Tunstall v. Johnson, Civ.App., 13 S.W.2d 240.
22 C.J. p 230 note 67.

Corpus Juris quoted in a case involving a criminal prosecution.—State v. Floyd, 177 S.E. 375, 390, 174 S.C. 288.

43. N.Y.—Thyll v. New York & L. B. R. Co., 87 N.Y.S. 345, 92 App. Div. 513, modifying 84 N.Y.S. 175.

44. Mich.—Wilkie v. Weller, 193 N. W. 235, 222 Mich. 664.
N.Y.—Dworkowitz v. Cascio, 193 N. Y.S. 326.
Tex.—Maxwell v. Campbell, Civ.App., 102 S.W.2d 471—Miller-Vidor Lumber Co. v. Schreiber, Civ.App., 298 S.W. 154.
22 C.J. p 230 note 63.

Indorsement of checks after trial
Checks indorsed by defendants after trial in a lower court, offered to show customary place of indorsement, were properly excluded as self-serving acts.—Benuliewicz v. Berger, 139 N.E. 784, 245 Mass. 137.

45. U.S.—Wirthlin v. Mutual Life Ins. Co., C.C.A.Utah, 56 F.2d 137, 86 A.L.R. 138.
Ala.—Republic Iron & Steel Co. v. Reed, 137 So. 673, 223 Ala. 617—Eidson v. McDaniel, 114 So. 204, 216 Ala. 610.
Ark.—Gray v. Gray, 133 S.W.2d 874, 199 Ark. 152—Dunaway v. Ragsdale, 9 S.W.2d 6, 177 Ark. 718—Beichslich v. Beichslich, 5 S.W.2d 739, 177 Ark. 47—Arkmo Lumber Co. v. Cantrell, 252 S.W. 901, 159 Ark. 445—Brotherhood of Railroad Trainmen v. Fountaine, 245 S.W. 17, 155 Ark. 578.
Cal.—Barcroft v. Livacich, 96 P.2d 951, 35 Cal.App.2d 710—Roth v. Thomson, 180 P. 656, 40 Cal.App. 208.
Del.—Palmer v. Lodge, 109 A. 125, 7 Boyce 537.
Ga.—Miller v. Everett, 14 S.E.2d 449—Jenkins v. Philips, 185 S.E. 812, 182 Ga. 477—Hodge v. American Mut. Liability Ins. Co., 195 S.E. 765, 57 Ga.App. 403—Kelly v. Sinclair, 168 S.E. 78, 46 Ga.App. 499.
Ill.—Pluard v. The Maccabees, 136 N. E. 767, 304 Ill. 552, reversing 221 Ill.App. 647—Republic Iron & Steel Co. v. Industrial Commission, 134 N.E. 754, 302 Ill. 401.
Ind.—Richard v. Marshall County Trust & Savings Co., 143 N.E. 152, 195 Ind. 540—Kindel v. French, 131 N.E. 227, 190 Ind. 595—Miller v. Kifer, 130 N.E. 278, 75 Ind.App. 198.
Iowa.—Nortman v. Lally, 215 N.W. 713, 201 Iowa 638.
Ky.—Suter v. Suter, 128 S.W.2d 704, 278 Ky. 403—Nelson's Adm'x v. Kitchen Lumber Co., 122 S.W.2d 1037, 276 Ky. 3—Prudential Ins. Co. of America v. Pierce's Adm'x, 109 S.W.2d 616, 270 Ky. 216—Cumberland Gasoline Corporation v. Fields' Adm'r, 80 S.W.2d 28, 258 Ky. 417—Mayfield v. Cupp, 64 S.W. 2d 884, 251 Ky. 328—North American Acc. Ins. Co. v. Caskey's Adm'r, 4 S.W.2d 383, 223 Ky. 600—Petty v. Petty, 295 S.W. 863, 220 Ky. 569—Bean's Adm'r v. Bean, 287 S.W. 239, 216 Ky. 95—Crouch v. Mason, 251 S.W. 182, 199 Ky. 371—Robinson v. Eastern Gulf Oil Co., 244 S.W. 914, 196 Ky. 385.
La.—Hicks v. Meridian Lumber Co., 94 So. 903, 152 La. 975—Winter v. Gani, App., 199 So. 600—Youngblood v. Colfax Motor Co., 125 So. 883, 12 La.App. 415—Commercial Trust & Savings Bank v. Thorengren, App., 122 So. 92.
Md.—Loving v. Mutual Life Ins. Co. of New York, 117 A. 323, 140 Md. 173.
Miss.—First Nat. Bank v. Owen, 171 So. 4, 177 Misc. 339.
Mo.—Bernblum v. Travelers Ins. Co. of Hartford, Conn., 105 S.W.2d 941, 340 Mo. 1217—Bland v. Buoy, 74 S.W.2d 612, 335 Mo. 967—Ragsdale v. Achuff, 27 S.W.2d 6, 324 Mo. 1159—Pursifull v. Pursifull, 257 S.W. 117—Weller v. Weaver, 100 S. W.2d 594, 231 Mo.App. 400—Schwartz v. Mercantile Trust Co., App., 279 S.W. 253.
Neb.—Kiser v. Sullivan, 184 N.W. 93, 106 Neb. 454.
N.J.—Gilbert v. Gilbert Mach. Works, 6 A.2d 213, 122 N.J Law 533.
N.Y.—Rawlings v. Prudential Ins. Co. of America, 9 N.Y.S.2d 979, 256 App.Div. 284—Meehan v. Keenan, 234 N.Y.S. 365, 226 App.Div. 812—In re Levinsky's Estate, 260 N.Y. S. 151, 145 Misc. 318.
Ohio.—Bry v. Miller, 179 N.E. 194, 40 Ohio App. 582.
Okl.—National Aid Life Ass'n v. Wiles, 41 P.2d 655, 171 Okl. 57.
Pa.—Yentis v. Mills, 148 A. 909, 299 Pa. 25—King v. King, 127 A. 142, 281 Pa. 511—Gelbarth v. Moore, 29 Del.Co. 68.
S.C.—Dantzler v. Southern Ry. Co., 149 S.E. 750, 152 S.C. 287.
Tex.—International Travelers' Ass'n v. Branum, 212 S.W. 630, 109 Tex. 543, reversing, Civ.App., 169 S.W. 389—Lawrie v. Miller, Com.App., 45 S.W.2d 172, reversing Miller v. Lowrie, Civ.App., 25 S.W.2d 984—Niemann v. Garcia, Civ.App., 144 S. W.2d 621, error dismissed, judgment correct—Averitt v. Warren, Civ.App., 125 S.W.2d 691—Green v. Hagens, Civ.App., 51 S.W.2d 771, error dismissed—Watson v. Watson, Civ.App., 28 S.W.2d 1100—Vaughn v. Vaughn, Civ.App., 287 S. W. 687—Dancy v. Peyton, Civ.App., 282 S.W. 819, error dismissed—Warren v. Humphreys, Civ.App., 274 S.W. 250.
Va.—Boggs v. Snoddy, 131 S.E. 830, 146 Va. 325.
Wash.—David P. Eastman, Inc., v. Northwestern Mut. Life Ins. Co., 13 P.2d 488, 491, 169 Wash. 125, citing **Corpus Juris**—Mott v. McDonald, 265 P. 153, 147 Wash. 106—Levy v. Simon, 205 P. 426, 119 Wash. 179.
22 C.J. p 230 note 74.

46. Conn.—Sterling Materials Co. v. Brooks Bank & Trust Co., 177 A. 718, 119 Conn. 549—Norbutas v. Bendler, 166 A. 388, 116 Conn. 728—Woodward v. City of Waterbury, 155 A. 825, 113 Conn. 457.
Mass.—Filosa's Case, 4 N.E.2d 439, 295 Mass. 592—Crowe v. Bixby, 129 N.E. 433, 237 Mass. 249.
22 C.J. p 231 note 75.

Construction of statute
In general, the statute in Massachusetts making admissible the declarations of deceased persons does

b. Extent and Limitation of Rule Generally

Under various circumstances self-serving declarations may nevertheless be admitted, as where they are a part of the res gestæ, or better proof is unavailing, or a declaration against interest has been admitted.

The application of the rule excluding self-serving declarations is governed largely by the same tests which control in the application of the hearsay rule.[47]

The self-serving character of a declaration will not alone warrant its rejection if cogent grounds exist for its admission,[48] and a declaration which, although self-serving on one issue, has independent relevance on another not involving the truth of the statement may be admissible on the latter issue.[49] Likewise oral or written statements, assented to or recognized as true by the adverse party or his representative, are not inadmissible as self-serving declarations.[50] Whether declarations or communications are self-serving is to be determined as of the time they are made,[51] and a statement made by a party or his agent at a time when no motive to misrepresent can exist has been held not to be inadmissible as a self-serving declaration,[52] although

not remove any ground of objection except the rule against hearsay, but the statute is construed liberally and makes admissible every declaration within its terms made on personal knowledge, although it does not make admissible mere opinion based upon facts not known to the declarant through his own senses.—Kulchinsky v. Segal, 30 N.E.2d 830, 307 Mass. 571.

47. Okl.—Cowen v. T. J. Stewart Lumber Co., 58 P.2d 573, 177 Okl. 266.

48. N.H.—Charles G. Clapp Co. v. McCleary, 192 A. 572, 89 N.H. 65—Smith v. Boston & M. R. R., 177 A. 729, 87 N.H. 246—Caplan v. Caplan, 142 A. 121, 83 N.H. 318.

Competent letter containing self-serving statements

Competent letter will not be rejected because containing statements of self-serving character.—National Importing & Trading Co. v. E. A. Bear & Co., 155 N.E. 343, 324 Ill. 346, reversing 236 Ill.App. 426.

Conduct avoiding alienation of affections

Defendants, in action for alienating husband's affections, may show conduct avoiding alienation, although self-serving.—Caplan v. Caplan, 142 A. 121, 83 N.H. 318.

49. Ariz.—Pawley v. First Nat. Bank, 256 P. 507, 32 Ariz. 135.
Cal.—Shreve & Co. v. McGinnis, 45 P.2d 364, 7 Cal.App.2d 243.
Conn.—Papas v. Ætna Ins. Co., 150 A. 310, 111 Conn. 415.
Ind.—Seymour Improvement Co. v. Viking Sprinkler Co., 161 N.E. 389, 87 Ind.App. 179.
Kan.—Bourn v. Beck, 226 P. 769, 116 Kan. 231.
Ohio.—Jones v. Goodyear Tire & Rubber Co., 18 N.E.2d 511, 59 Ohio App. 371.
Okl.—Cowen v. T. J. Stewart Lumber Co., 58 P.2d 573, 177 Okl. 266.
Pa.—Ries v. Ries' Estate, 185 A. 288, 322 Pa. 211.
Wis.—Wisconsin Orange Crush Bottling Co. v. Meicher, 224 N.W. 702, 198 Wis. 461, modified on other grounds 225 N.W. 737, 198 Wis. 461.
22 C.J. p 230 note 64.

Showing of previous claim

Declarations made by a party in his own interest may be admitted where a failure to assert a claim or right may be construed against the party as an implied negation, or where the assertion of such claim at a later date is attributed to conditions and exigencies which have arisen since the transaction in question, which motive would be disproved by showing earlier declarations to the same effect.—Hotaling v. Hotaling, 203 P. 745, 187 Cal. 695.

Admissible to show intention

Conn.—McDermott v. McDermott, 115 A. 638, 97 Conn. 31.
Mo.—Coles v. Belford, 232 S.W. 728, 289 Mo. 97.
N.J.—Minton v. Sutton, 135 A. 693, 100 N.J.Eq. 403, affirmed 139 A. 600, 102 N.J.Eq. 61.
Tex.—Delta Land & Timber Co. v. Spiller, Civ.App., 216 S.W. 414, error refused.
Utah.—Mower v. Mower, 228 P. 911, 64 Utah 260.

Admissible to show agent's authority

Ind.—Lowenstine v. Citro, 129 N.E. 280, 74 Ind.App. 516.

50. U.S.—Crown Central Petroleum Corporation v. Bates, C.C.A.Tex., 37 F.2d 508, certiorari denied 50 S.Ct. 348, 281 U.S. 743, 74 L.Ed 1156.
Cal.—Wilson v. Southern Pac. Land Co., 215 P. 396, 61 Cal.App. 545.
Mass.—Barry v. MacNeill, 143 N.E. 901, 249 Mass. 279.
Mo.—Peterman v. Crowley, 226 S.W. 944—Bredel v. Parker-Russell Min. & Mfg. Co., App., 21 S.W.2d 932.
N.J.—Zakutynski v. Livese, 141 A. 667, 6 N.J.Misc. 448, affirmed 144 A. 921, 105 N.J.Law 499.
Or.—Wieder v. Lorenz, 99 P.2d 38—Stubblefield v. Montgomery Ward & Co., 96 P.2d 774, 163 Or. 432, 125 A.L.R. 1228, rehearing denied 98 P.2d 14, 163 Or. 432, 125 A.L.R. 1228.
Tex.—Sealy Cotton Co. v. Gustafson & Spencer, Civ.App., 258 S.W. 911—Peacock v. Aug. A. Busch & Co., Civ.App., 231 S.W. 447.
Wyo.—First Nat. Bank v. Ford, 216 P. 691, 30 Wyo. 110, 31 A.L.R. 1441.

Effect of admissions by silence or acquiescence with respect to written statements generally see infra § 297.

Book entries made in the regular course of business and subject to inspection by the adverse party are not inadmissible as self-serving.
Cal.—Davis v. Fanny Briggs Carr, Inc., 288 P. 710, 105 Cal.App. 777.
Ill.—Bank of Sandoval v. First Nat. Bank of Sandoval, 216 Ill.App. 571.
Neb.—Waltham Piano Co. v. Pierson, 176 N.W. 364, 104 Neb. 199.
Wash.—McDonald v. McDonald, 206 P. 23, 119 Wash. 396.

Letter not within rule

The letter of an architect, suing for services, stating alleged facts of his employment, and demanding payment, being inadmissible as a self-serving declaration, was not competent to explain, qualify, or aid in the construction of defendant's answering letter, which did not admit the truth of the architect's letter.—Sargent v. Lord, 122 N.E. 761, 232 Mass. 585.

51. Okl.—Cowen v. T. J. Stewart Lumber Co., 58 P.2d 573, 177 Okl. 266.

52. N.H.—Lebrun v. Boston & M. R. R., 142 A. 128, 83 N.H. 293.
N.Y.—In re Kempf's Estate, 248 N.Y.S. 247, 138 Misc. 704—Gibbons v. Perkins, 230 N.Y.S. 273, 132 Misc. 583—In re Fricke's Will, 202 N.Y.S. 906, 122 Misc. 427.
Tex.—De Beque v. Ligon, Civ.App., 286 S.W. 749, reversed on other grounds, Com.App., 292 S.W. 157.
Wash.—Green v. Fuller, 294 P. 1037, 159 Wash. 691.

Acts showing physical disability at a time when there would be no excuse for pretension or feigning are not inadmissible as self-serving.—Employers' Liability Assur. Corporation v. Young, Tex.Civ.App., 34 S.W.2d 622, error dismissed.

Routine reports by employees where no motive to misrepresent is present are not inadmissible as self-serving.—Wilkinson v. Phœnix Ry. Co. of Arizona, 236 P. 704, 28 Ariz. 216.

it has been held to the contrary that one cannot manufacture evidence for himself although he may not be interested at the time.[53]

Letters which are a part of a general or mutual correspondence and which are relevant to the issue are admissible although some of them may contain self-serving declarations.[54] Likewise a letter, although of a self-serving character, may be admissible where it throws light on the terms of a contract or shows the interpretation of a contract by the parties,[55] or where it shows that a notice or demand of a particular nature was given[56] and the time when it was given.[57]

That a declaration is self-serving is frequently made the basis of an objection which by no means falls within the scope of the rule, and hence in numerous instances the court has held that under the particular circumstances the declarations, oral or written, sought to be excluded are not inadmissible as self-serving.[58]

Declaration by grantor after conveyance

In an ejectment action, involving the construction of an excepting clause in a deed, grantor's letter, stating what the boundaries were, was not to be excluded as a self-serving declaration, where written after he ceased to have any interest in the property excepted by the deed. Rider v. Ferguson, 187 N.Y.S. 727, 196 App.Div. 570.

53. N.C.—White v. Green, 50 N.C. 47.

54. U.S.—Steil v. Holland, C.C.A.Cal., 3 F.2d 776.
Ala.—Seaboard Air Line Ry. Co. v. Goss, 106 So. 607, 214 Ala. 102.
Idaho.—McMickle v. McMickle, 88 P. 2d 530, 60 Idaho 1.
Ill.—Kesner v. Faroll, 268 Ill.App. 531.
La.—Hussmann v. Westfeldt Bros., 120 So. 623, 167 La. 995.
Mass.—Horowitz v. S. Slater & Sons, 164 N.E. 72, 265 Mass. 143, followed in Connelly v. S. Slater & Sons, 164 N.E. 77, 265 Mass. 155.
Miss.—McCormick Motor Car Co. v. U. S. Rubber Co., 141 So. 595, 163 Miss. 293.
Mo.—Wollums v. Mutual Ben. Health & Accident Ass'n, 46 S.W.2d 259, 226 Mo.App. 647.
Or.—Johnson v. Meyers, 177 P. 631, 91 Or. 179.
Pa.—Faulkner v. Wynnewood Park Corporation, 57 Montg.Co. 124.

55. Cal.—Dolman Co. v. Rubber Corporation of America, 293 P. 129, 109 Cal.App. 353.
Colo.—William E. Russell Coal Co. v. Vesta Mines, 1 P.2d 104, 89 Colo. 219.
N.Y.—Gould v. Murray, 3 N.Y.S.2d 660, 253 App.Div. 646.
Va.—Goldstein v. Old Dominion Peanut Corporation, 15 S.E.2d 103.

Offer

Where the issue is whether or not an offer was made, a letter showing the offer to have been made is not inadmissible as self-serving.—Gifford v. Gifford, 138 N.E. 550, 244 Mass. 302.

56. Colo.—Head Camp, Pacific Jurisdiction, W. O. W., v. Clapp, 211 P. 384, 72 Colo. 369.
Iowa.—Mutual Ben. Life Ins. Co. v. Steckel, 280 N.W. 523.
Pa.—Shively v. McDonnell, 162 A. 287, 308 Pa. 298—Minster v. Pennsylvania Co. for Insurances on Lives and Granting Annuities, 159 A. 465, 104 Pa.Super. 301.
R.I.—Rich v. Tanenbaum, 198 A. 240, 60 R.I. 254.
Vt.—Merchants' Nat Bank v. Carpenter, 165 A. 909, 105 Vt. 339—Shortsleeves v. Troville, 117 A. 819, 95 Vt. 468.

Nonconsent to termination of lease

A letter, although objected to as self-serving, may be admitted to show nonconsent to the termination of a lease where the issue is whether or not consent was given.—Richfield Oil Co. v. Estes, 98 P.2d 851, 55 Ariz. 81.

57. Cal.—Hinton v. Welch, 177 P. 282, 179 Cal. 463.
R.I.—Kirk v. Ball, 120 A. 165, 45 R. I. 93.

58. U.S.—Parfumerie Roger & Gallet v. M. C. M. Co., C.C.A.N.Y., 24 F.2d 698—Western Coal & Mining Co. v. Greeson, C.C.A.Ark., 284 F. 510.
Ala.—Bank of Kennedy v. Dorroh, 96 So. 611, 209 Ala. 511—Lackland v. Turner, 91 So. 877, 207 Ala. 73—American Cast-Iron Pipe Co. v. Birmingham Tailoring Co., 91 So. 484, 206 Ala. 609.
Ark.—Dyke Bros. v. Stokes, 272 S.W. 663, 168 Ark. 943.
Cal.—In re Clover's Estate, 176 P. 452, 179 Cal. 313—Central Heights Imp. Co. v. Memorial Parks, 105 P.2d 596, 40 Cal.App.2d 591.
Colo.—Thomas v. Seloom, 250 P. 381, 80 Colo. 189.
Ga.—Bennett v. Cox, 146 S.E. 835, 167 Ga. 843—Odum v. McArthur, 139 S.E. 870, 165 Ga. 103—Phillips v. Phillips, 137 S.E. 561, 163 Ga. 899—Brown v. Kendrick, 135 S.E. 721, 163 Ga. 149—Alabama Great Southern R. Co. v. McBryar, App., 15 S.E.2d 563—Farrow v. Whitaker, 198 S.E. 821, 58 Ga.App. 454—Electric Paint & Varnish Co. v. Lunsford, 198 S.E. 277, 58 Ga.App. 270—National-Ben Franklin Fire Ins. Co. v. Darby, 172 S.E. 74, 48 Ga. App. 394.
Idaho.—Garrett v. Neitzel, 285 P. 472, 48 Idaho 727.
Ill.—Kempinski v. Tuthill Building Material Co., 255 Ill.App 375—Lamar v. Collins, 252 Ill.App. 238.
Ind.—Ætna Life Ins. Co. of Hartford, Conn., v. Weatherhogg, 4 N.E.2d 679, 103 Ind.App. 506—Seymour Improvement Co. v. Viking Sprinkler Co., 161 N.E. 389, 87 Ind.App. 179.
Iowa.—Kauffman v. Logan, 174 N.W. 366, 187 Iowa 670.
Ky.—Equitable Life Assur. Soc. of U. S v. McDonald, 87 S.W.2d 123, 261 Ky. 148.
Mass.—Thompson v. Sylvester, 174 N. E. 502, 274 Mass. 364—Burke v. Kellough, 126 N.E. 787, 235 Mass. 405.
Minn.—Pleason Realty & Investment Co. v. Kleinman, 206 N.W. 645, 165 Minn. 342.
Mo.—State ex rel. Richards v. Fidelity & Casualty Co. of New York, App., 82 S.W.2d 123—Foley v. Union House Furnishing Co., 60 S.W. 2d 725, 228 Mo.App 1063—Vanausdol v. Bank of Odessa, 5 S.W.2d 109, 222 Mo.App. 91—Fewel v. St. Louis & S. F. Ry. Co., App., 267 S.W. 960—McCormick v. Travelers' Ins. Co., 264 S.W. 916, 215 Mo.App. 258—Stoddart v. National Liberty Ins. Co. of America, App., 251 S.W. 398—Marshall v. Motten, App., 224 S.W. 8.
N.M.—Citizens' Bank of Clovis v. Brown, 32 P.2d 755, 38 N.M. 310.
N.Y.—Tunick v. Federal Food Stores, 191 N.Y.S. 174, 117 Misc. 329—Reichbach v. Schleider, 199 N.Y.S. 539.
N.D.—Dawson Farmers' Elevator Co. v. Opp, 223 N.W. 350, 57 N.D. 598.
Pa.—Donaldson, to Use of Bielski v. Bielski, 17 A.2d 616, 340 Pa. 528, certiorari denied Bielski v. Samuels, 61 S.Ct. 1112—Schwab v. Continental-Equitable Title & Trust Co., 199 A. 150, 330 Pa. 540—Reach v. National Bedding Co., 120 A. 471, 276 Pa. 467.
S.C.—Green v. McDaniel, 168 S.E. 197, 168 S.C. 533—Cross v. Southern Coal & Coke Co., 149 S.E. 14, 151 S.C. 309.
S.D.—Arlt v. Langley, 227 N.W. 469, 56 S.D. 79—Conway v. Belatti, 175 N.W. 703, 42 S.D. 400.

Declarations part of the res gestæ. Statements constituting part of the res gestæ are not rendered inadmissible by the fact that they are also self-serving,[59] but a party himself cannot bolster his case by testifying to his own self-serving declarations although they are part of the res gestæ.[60]

Unavailability of better proof. It has been considered in some cases that self-serving declarations may be admitted on the ground of necessity if no better proof is available,[61] such as self-serving declarations in ancient documents or ancient archives.[62]

Statements as to injury or pain. Statements as to the extent of injuries made by the injured person to a physician for the purpose of treatment are not inadmissible as self-serving declarations,[63] but statements made to one other than a physician,[64] or made to a physician for a purpose other than treatment,[65] are inadmissible. Statements by an injured person as to the cause of, or the manner of receiving, the injury, when not a part of the res gestæ, are inadmissible as self-serving,[66] although they are made to a physician,[67] but the physician may testify concerning the statements to show the basis for his diagnosis and treatment.[68]

Tex.—Spolane v. Coy, Civ.App., 153 S.W.2d 672—Kirklin v. Standard Coffee Co., Civ.App., 114 S.W.2d 263—Gulf, C. & S. F. Ry. Co. v. Metcalf, Civ.App., 100 S.W.2d 389—Texas Employers' Ins. Ass'n v. Ritchie, Civ.App., 75 S.W.2d 942, error dismissed—Davenport v. Texas & N. O. R. Co., Civ.App., 72 S.W.2d 933—First Nat. Bank v. Willis, Civ.App., 58 S.W.2d 1065—Capital Hotel Co. v. Rittenberry, Civ.App., 41 S.W.2d 697, error dismissed—American Exchange Nat. Bank of Dallas v. Keeley, Civ.App., 39 S.W.2d 929, error dismissed—Houston Compress Co. v. Houston Steel & Foundry Co., Civ.App., 22 S.W.2d 737—Texas Employers' Ins. Ass'n v. Knouff, Civ.App., 297 S.W. 799, reversed on other grounds, Com.App., 7 S.W.2d 68—Carter v. Daniel, Civ.App., 273 S.W. 688—Texas Co. v. Burkett, Civ.App., 255 S.W. 763, affirmed 296 S.W. 273, 117 Tex. 16, 54 A.L.R. 1397—Kimball-Mathews Co. v. Nagel, Civ.App., 235 S.W. 318—Carleton-Ferguson Dry Goods Co. v. McFarland, Civ.App., 230 S.W. 208, dismissed for want of jurisdiction—Vaello v. Rodriguez, Civ.App., 218 S.W. 1082, dismissed for want of jurisdiction—Delta Land & Timber Co. v. Spiller, Civ.App., 216 S.W. 414, error refused—Schaff v. Hollin, Civ.App., 213 S.W. 279, error refused—Parker v. Harrell, Civ.App., 212 S.W. 542—Wilson v. J. W. Crowdus Drug Co., Civ.App., 190 S.W. 194, affirmed, Com.App., 222 S.W. 223.

Vt.—Laferriere v. Gray, 160 A. 270, 104 Vt. 366.

Va.—Guntner v. Hughes, 129 S.E. 239, 143 Va. 36—Keister's Ex'rs v. Philips' Ex'x, 98 S.E. 674, 124 Va. 585—Douglas Land Co. v. T. W. Thayer Co., 58 S.E. 1101, 107 Va. 292.

22 C.J. p 227 notes 39, 41.

A copy of a contract is not inadmissible as self-serving.—Krell v. Tucker, 204 N.Y.S. 307.

Acts in performance of a contract with the adverse party are not objectionable as self-serving.

Cal.—Central Heights Imp. Co. v. Memorial Parks, 105 P.2d 596, 40 Cal.App.2d 591.

Mo.—Weinshenk v. Sullivan, App., 100 S.W.2d 66.

S.D.—Arlt v. Langley, 227 N.W. 469, 56 S.D. 79.

Even a self-serving balance of account may be admissible where another witness with the account books before him verifies the items thereof.—Cassells v. Reid, 9 Philippine 580, 6 Off.Gaz. 219.

59. Cal.—Barcroft v. Livacich, 96 P.2d 951, 35 Cal.App.2d 710.

Mo.—Edwards v. Ethyl Gasoline Corporation, 112 S.W.2d 555, 560, 342 Mo. 98, quoting **Corpus Juris.**

Tex.—Texas Employers' Ins. Ass'n v. Harbuck, Civ.App., 73 S.W.2d 113, error dismissed.

22 C.J. p 230 note 65.

Limitation of rule

While the exception from the rule against self-serving declarations of declarations accompanying an act proper to be given in evidence, and in some way qualifying or giving character to the same, is well recognized, it should not be extended beyond its established limitations.—Miller v. Kifer, 130 N.E. 278, 75 Ind.App. 198.

Letter part of res gestæ

Although a letter is self-serving, it may be admissible where it is of the res gestæ of the transaction.

Ala.—Denson v. Kirkpatrick Drilling Co., 144 So. 86, 225 Ala. 473.

Tex.—Conley v. Texas Co., Civ.App., 289 S.W. 169.

60. Minn.—Fischer v. Chicago & N. W. Ry. Co., 258 N.W. 4, 193 Minn. 73—Perkins v. Great Northern Ry. Co., 188 N.W. 564, 152 Minn. 226.

61. Ill.—O'Connell v. Yellow Cab Co., 222 Ill.App. 118.

Tex.—Boulware v. Kempner, Civ.App., 36 S.W.2d 527.

22 C.J. p 231 note 77.

62. Tex.—Magee v. Paul, 221 S.W. 254, 110 Tex. 470, answering certified questions, Civ.App., 159 S.W. 325, and answers conformed to 224 S.W. 1118—Boulware v. Kempner, Civ.App., 36 S.W.2d 527.

63. U.S.—Hartford Accident & Indemnity Co. v. Baugh, C.C.A.Tex., 87 F.2d 240, certiorari denied 57 S.Ct. 670, 300 U.S. 679, 81 L.Ed. 883.

64. Ky.—Cincinnati, N. O. & T. P. R. Co. v. Ross, 294 S.W. 460, 219 Ky. 824.

Mich.—Layton v. Cregan & Mallory Co., 257 N.W. 888, 269 Mich. 574.

65. U.S.—Gilmore v. U. S., C.C.A. Miss., 93 F.2d 774, certiorari denied 58 S.Ct. 1039, 304 U.S. 569, 82 L.Ed. 1534—Third Nat. Bank & Trust Co. v. U. S., C.C.A.Ohio, 53 F.2d 599—U. S. v. Wilson, C.C.A.S.C., 50 F.2d 1063.

D.C.—U. S. v. Balance, 59 F.2d 1040, 61 App.D.C. 226.

Ohio.—Toledo Rys. & Light Co. v. Prus, 7 Ohio App. 412.

Tex.—Gaines v. Stewart, Civ.App., 57 S.W.2d 207.

66. Ga.—Gay v. Osteen, 192 S.E. 539, 56 Ga.App. 224.

Ill.—Recklein v. Industrial Commission, 168 N.E. 665, 337 Ill. 37—Frederick v. Industrial Commission, 160 N.E. 845, 329 Ill. 490—Selz-Schwab & Co. v. Industrial Commission, 156 N.E. 763, 326 Ill. 120—Scharfenstein v. Forest City Knitting Co., 253 Ill.App. 190.

Ky.—Everman's Adm'r v. Louisville & N. R. Co., 293 S.W. 977, 219 Ky. 478—Bass v. Louisville & N. R. Co., 288 S.W. 738, 216 Ky. 796.

N.J.—Helminsky v. Ford Motor Co., 168 A. 420, 111 N.J.Law 369, affirming 162 A. 189, 10 N.J.Misc. 1042.

Ohio.—Coutellier v. Industrial Commission of Ohio, 186 N.E. 400, 126 Ohio St. 546, followed in Industrial Commission of Ohio v. Johnson, 190 N.E. 456, 127 Ohio St. 589.

45 C.J. p 1259 note 67.

67. N.J.—Helminsky v. Ford Motor Co., 162 A. 189, 10 N.J.Misc. 1042, affirmed 168 A. 420, 111 N.J.Law 369.

Ohio.—Dickson v. Gastl, 28 N.E.2d 688, 64 Ohio App. 346.

68. Ky.—Prudential Ins. Co. of

Statements as to present pain and suffering have been held not inadmissible as self-serving declarations.[69]

Effect of admission of declarations against interest. The admission of declarations against interest does not, according to some authorities, render conflicting and self-serving declarations admissible,[70] but there are cases in which a contrary view has been asserted;[71] and provision is sometimes made by statute for the admission of declarations of a decedent in his own favor after his declarations against interest on the same subject have been introduced in evidence by a party adverse to his personal representatives.[72]

c. Statements by Agents or Other Persons

A party may not introduce the unsworn statements of persons acting in his behalf, such as his agent, employee, attorney, etc., and he may not introduce in his favor the self-serving statements of his predecessor in title. A corporation may not introduce the unsworn statements of one of its officers.

The unsworn declarations of an agent or employee are not admissible on behalf of the principal or employer,[73] and this applies whether the statements were oral or in writing.[74] Likewise, oral or written declarations of an attorney on behalf of his client,[75] of a guardian for his ward,[76] of a principal for his surety,[77] of one defendant on behalf of his codefendant,[78] of one partner on behalf of his copartner,[79] or of a husband or wife for his or her

America v. Downs, 64 S.W.2d 902, 251 Ky. 208.

69. Mo.—Smith v. Wilson, App., 296 S.W. 1036.
Tex.—Metropolitan Life Ins. Co. v. Delgado, Civ.App., 77 S.W.2d 539
Mental pain
Complaints of mental pain at the time are not subject to the rule excluding self-serving declarations.—Caplan v. Caplan, 142 A. 121, 83 N.H. 318.

70. N.C.—Ratliff v. Ratliff, 42 S.E. 887, 131 N.C. 425, 63 L.R.A. 963.
22 C.J. p 230 note 69.

71. Kan.—Trustees of Baker University v. Farrar, 8 P.2d 343, 134 Kan. 722.
La.—Succession of Abascal, 105 So. 31, 158 La. 969.
N.Y.—Martorella v. Prudential Ins. Co. of America, 264 N.Y.S. 751, 238 App.Div. 532.
22 C.J. p 230 note 70.

72. Or.—In re Fisher's Estate, 274 P. 1098, 128 Or. 415—Mace v. Timberman, 251 P. 763, 120 Or. 144—Fredenburg v. Horn, 218 P. 939, 108 Or. 672, 30 A.L.R. 1153—Goff v. Kelsey, 153 P. 103, 78 Or. 337.
Applicability to deceased agent of decedent
A statute providing that when a party to a proceeding by or against an executor appears as a witness in his own behalf, or offers evidence of statements made by deceased against the interest of the deceased, statements of deceased concerning the same subject matter in his own favor may also be proved, does not include declarations of a deceased agent of deceased.—Sargent v. Foland, 207 P. 349, 104 Or. 296.

73. U.S.—Bracken v. Cato, C.C.A. Tex., 54 F.2d 457.
Ala.—Sovereign Camp, W. O. W., v. Waller, 167 So. 563, 232 Ala. 170.
Conn.—McClure v. Middletown Trust Co., 110 A. 838, 95 Conn. 148.
Iowa.—Rice v. Armour & Co., 187 N. W. 588, 194 Iowa 144.
Mich.—Harley v. Hartford Fruit Growers' & Farmers' Exch., 184 N. W. 507, 216 Mich. 146.
Mo.—Breid v. Mintrup, 219 S.W. 703, 203 Mo.App. 567.
S.C.—Simon v. Ætna Casualty & Surety Co., 148 S.E. 648, 151 S.C. 44.
Tex.—Morgan v. Gordon, Civ.App., 13 S.W.2d 905, error dismissed.
22 C.J. p 228 note 42, p 229 note 54.
Agent since deceased
The rule applies although the agent has died since the making of the declaration.—Stone v. Union Fire Ins. Co., 107 P.2d 241, 106 Colo. 522—22 C.J. p 228 note 43.
Statement or report as to accident
Ala.—Alaga Coach Line v. Foy, 150 So. 493, 227 Ala. 506.
Mo.—Tyson v. Bernhard, 17 S.W.2d 270, 322 Mo. 633.
N.J.—Del Rosso v. U. S. Trucking Corporation, 147 A. 641, 7 N.J.Misc. 967.
Wash.—Williams v. Clayton, 64 P.2d 1017, 189 Wash. 282.
22 C.J. p 229 note 55 [a].

74. Ga.—Atlanta Life Ins. Co. v. Thompson, 158 S.E. 775, 43 Ga. App. 331.
Ohio.—Rickabaugh v. Youngstown Municipal Ry. Co., 9 N.E.2d 900, 55 Ohio App. 431.
Tex.—National Life & Accident Ins. Co. v. Baughman, Civ.App., 54 S. W.2d 537—Providence-Washington Ins. Co. v. Owens, Civ.App., 207 S.W. 666.
22 C.J. p 229 notes 49, 51–53, 55.
Audit of books
In employee's action for agreed salary and percentage of profits, private audit of books made for defendants was held inadmissible as self-serving.—Stockwell v. Snyder, 84 S.W.2d 705, 126 Tex. 6, reversing Civ.App., 51 S.W.2d 812.
Report of insurer's physician
In action on fraternal disability certificate, report of medical examination of insured by insurer's physician, which report allegedly showed that insured was not disabled under certificate and was made by physician with a view to testifying against insured, was inadmissible.—Roberson v. Brotherhood of Locomotive Firemen and Enginemen, 114 S. W.2d 136, 233 Mo.App. 159, certiorari quashed State ex rel. Brotherhood of Locomotive Firemen and Enginemen v. Shain, 123 S.W.2d 1, 343 Mo. 666.
Letters
Tex.—New Amsterdam Casualty Co. v. Parham Civ.App., 2 S.W.2d 866, error dismissed
22 C.J. p 229 note 55 [b].

75. Me.—Laforge v. LeBlanc, 18 A. 2d 138.
Okl.—Whitsett v. Parnell, 289 P. 696, 144 Okl. 186.
Or.—Maasdam v. Blokland, 261 P. 66, 123 Or. 128.
Pa.—Knoell v. Carey, 140 A. 522, 291 Pa. 531.
Tex.—Morriss v. Knepper, Civ.App., 10 S.W.2d 1012.
22 C.J. p 229 notes 50, 52, 53.

76. Tenn.—Keele v. Cunningham, 2 Heisk. 288.

77. Ind.—Williams v. State, 89 Ind. 570—Ricketts v. Harvey, 78 Ind. 152.

78. Cal.—Ohlson v. Frazier, 39 P.2d 429, 2 Cal.App.2d 708.
Mo.—Electric Products Co. v. St. Louis Theater Supply Co., App., 273 S.W. 135.
22 C.J. p 228 note 44.

79. Mass.—Gold v. Marshall, 157 N. E. 699, 260 Mass. 492.
Mo.—McCue v. Schweer, 295 S.W. 816, 221 Mo.App. 1029.
22 C.J. p 228 note 45.
A partnership ledger is not necessarily admissible to disprove a third person's claim against a member of the partnership.—Waltham Piano Co. v. Pierson, 176 N.W. 364, 104 Neb. 199.

spouse[80] are rejected. Where the interests of defendants are opposed, a self-serving statement of one defendant is not admissible to the prejudice of his codefendant.[81]

Officer of corporation. A corporation cannot introduce in evidence an oral or written unsworn declaration in its favor made by one of its officers,[82] although it is in the form of a resolution of the board of directors.[83]

Public officer. The rule excluding self-serving declarations applies to an oral or written declaration of a public officer which cannot be introduced in evidence in an action by or against the public corporation under which the declarant holds or held his official position.[84]

Declarations of privy. One claiming ownership of property cannot use as evidence in his favor the self-serving declarations of his predecessors in title,[85] although such declarations have been brought to the attention of the opposite party.[86]

§ 217. Declarations against Interest

a. In general
b. Distinctions

a. In General

As an exception to the hearsay rule, declarations against interest are admissible under certain conditions, and may be admissible as proof both of facts directly asserted and of facts incidental thereto and within the scope of the declaration.

Where a person makes a statement which is opposed to his own interest, an inference arises that such statement would not have been made unless it had been true, and, as an exception to the hearsay rule,[87] evidence of such statement may sometimes,

80. Cal.—Thomas v. Hoffman, 9 P.2d 538, 122 Cal.App. 213.
Iowa.—Nortman v. Lally, 215 N.W. 713, 204 Iowa 638.
Tex.—Boone v. Moore, Civ.App., 246 S.W. 685.
22 C.J. p 229 note 48.

81. Mich.—Sexton v. Balinski, 273 N.W. 335, 280 Mich. 28.
Mo.—King v. Rieth, 108 S.W.2d 1, 341 Mo. 467.
N.Y.—Clark v. Thompson, 15 N.Y.S. 2d 291, 258 App.Div. 748.
Tex.—Jackson v. Poteet, Civ.App., 89 S.W. 980.

82. U.S.—Globe Indemnity Co. v. McAvoy Co., C.C.A.Ill., 41 F.2d 122, certiorari denied McAvoy Co. v. Globe Indemnity Co., 51 S.Ct. 87, 282 U.S 884, 75 L.Ed. 780.
Ill.—Wanless v. Peabody Coal Co., 13 N.E.2d 996, 294 Ill.App. 401.
Kan.—Royce v. Farmers' Life Ins. Co., 191 P. 581, 107 Kan. 245.
Md.—Frankfort Distilleries v. Burns Bottling Mach. Works, 197 A. 599, 174 Md. 12.
Miss.—Bullard v. Citizens Nat. Bank of Meridian, 171 So. 540, 541, 177 Miss. 735, citing **Corpus Juris.**
Mo.—Kregain v. Blake, 239 S.W. 495, 292 Mo. 498—Commercial Inv. Co. v. Citizens' State Bank of Pratt, Kan., 54 S.W.2d 424, 426, 227 Mo. App., 498, quoting **Corpus Juris.**
Wash.—David P. Eastman, Inc., v. Northwestern Mut. Life Ins. Co., 13 P.2d 488, 491, 169 Wash. 125, citing **Corpus Juris.**
22 C.J. p 229 notes 56, 57.

83. Cal.—Breslauer v. McCormick-Saeltzer Co., 160 P. 251, 31 Cal. App. 284.
N.D.—Finseth v. Bismarck Motor Co., 189 N.W. 106, 48 N.D. 1176.

84. Conn.—Dawson v. Orange, 61 A. 101, 78 Conn. 96.
22 C.J. p 229 note 59.
Resolution of county board
County board's resolution reducing teachers' salaries "in order that each year operate within budget," was held a self-serving declaration.—Morton v. Hancock County, 30 S.W. 2d 250, 161 Tenn. 324.

85. Ala.—Reeves v. Reeves, 92 So. 551, 207 Ala. 362.
Ark.—Beichslich v. Beichslich, 5 S.W.2d 739, 177 Ark. 47—Denton v. Atkinson, 241 S.W. 364, 158 Ark. 641.
Cal.—Durrell v. Bacon, 5 P.2d 961, 119 Cal.App. 31—Trample v. McDougall, 285 P. 328, 103 Cal.App. 779—Johnson v. Davidson, 202 P. 159, 54 Cal.App. 251.
Ill.—Chicago Ry. Equipment Co. v. Wilson, 250 Ill.App. 231.
Iowa.—Buckley v. Ebendorf, 216 N.W. 20, 204 Iowa 896.
Ky.—Jones v. Driver, 137 S.W.2d 729, 282 Ky. 82—Elkhorn Land & Improvement Co. v. Wallace, 24 S.W.2d 560, 232 Ky. 741—Robinson v. Eastern Gulf Oil Co., 244 S.W. 914, 196 Ky. 385.
Md.—Tillinghast v. Tramp, 176 A. 629, 168 Md. 34.
Mich.—Sallan Jewelry Co. v. Bird, 215 N.W. 349, 240 Mich. 346.
Mo.—Lanphere v. Affeld, 99 S.W.2d 36—Roberts v. Roberts, 291 S.W. 485.
N.Y.—Gorton v. Lane, 204 N.Y.S. 31, 208 App.Div. 833—In re Levinsky's Estate, 260 N.Y.S. 151, 145 Misc. 318—In re McArdle's Estate, 250 N.Y.S. 276, 140 Misc. 257—In re Wendell's Estate, 201 N.Y.S. 845, 121 Misc. 569.
N.C.—Best v. Utley, 127 S.E. 337, 189 N.C. 356—Reese v. Woods, 109 S.E 846, 182 N.C. 703.
N.D.—Perry v. Erdelt, 231 N.W. 888, 59 N.D. 741.
S.C.—Atlantic Coast Line R. Co. v. Searson, 135 S.E. 567, 137 S.C. 468.
Tex.—Niemann v. Garcia, Civ.App., 144 S.W.2d 621, error dismissed, judgment correct—Brightwell v. Scott, Civ.App., 111 S.W.2d 739, error dismissed—Minter v. Pounds, Civ.App., 3 S.W.2d 830, affirmed in part and reversed in part on other grounds Pounds v. Minter, Com. App., 13 S.W.2d 351—Vaughn v. Vaughn, Civ.App., 287 S.W. 687—Sparks v. Johnson, Civ.App., 235 S.W. 975.
W.Va.—Farrar v. Goodwin, 126 S.E. 922, 98 W.Va. 215—De Pue v. Steber, 108 S.E. 590, 89 W.Va. 78.
Wis.—Wilcox v. Powell's Estate, 240 N.W. 122, 206 Wis. 513.
22 C.J. p 229 note 61.

86. Conn.—Manwaring v. Griffing, 5 Day 561.

87. U.S.—Wirthlin v. Mutual Life Ins. Co., C.C.A.Utah, 56 F.2d 137, 140, citing **Corpus Juris.**
Ala.—Employers Ins. Co. of Alabama v. Diggs, 175 So. 344, 234 Ala. 425.
Cal.—Mayfield v. Fidelity & Casualty Co. of New York, 61 P.2d 83, 16 Cal.App.2d 611.
Ga.—Murdock v. Adamson, 77 S.E. 181, 12 Ga.App. 275.
Ill.—Republic Iron & Steel Co. v. Industrial Commission, 134 N.E. 754, 302 Ill. 401.
La.—Demasi v. Whitney Trust & Savings Bank, App., 176 So. 703.
Mo.—Brown v. Holman, 238 S.W. 1065, 1069, 292 Mo. 641, citing **Corpus Juris.**
N.H.—Tuftonboro v. Willard, 197 A. 404, 89 N.H. 253.
N.Y.—Kittredge v. Grannis, 155 N.E. 88, 244 N.Y. 168, affirming 214 N.Y.S. 33, 215 App.Div. 486.
N.C.—Best v. Utley, 127 S.E. 337, 189 N.C. 356.
Okl.—Ætna Life Ins. Co. v. Strauch, 67 P.2d 452, 179 Okl. 617.
Wash.—Fleishbein v. Thorne, 74 P. 2d 880, 193 Wash. 65.

as a result of express statutory permission, be received,[88] provided it does not offend against the general rules governing admissibility of evidence.[89] The reception of such evidence is not dependent on the existence of privity between declarant and one of the parties to the suit.[90]

While it has been stated that this class of evidence is not favorably regarded,[91] the objection thereto concerns its weight rather than its competency.[92]

Incidental facts. Declarations against interest are not only received as evidence of the fact directly asserted, but of incidental facts fairly embraced within the scope of the declaration.[93]

Requirements for admission of declaration. By way of summary it has been stated that to render a statement admissible as a declaration against interest the following four requirements must be met: (1) Declarant must be unavailable as a witness. (2) The declaration must have related a fact against the apparent pecuniary or proprietary interest of declarant when his statement was made. (3) The declaration must have concerned a fact personally cognizable by declarant. (4) The circumstances must render it improbable that a motive to falsify existed.[94] These various requirements are discussed in the following sections.

b. Distinctions

Declarations against interest are to be distinguished from admissions and res gestae statements.

Declarations against interest are to be distinguished from other matters.[95]

Admissions. Declarations against interest are entirely distinct from admissions.[96] Admissions amount to a waiver of proof whereas declarations constitute evidence of the fact declared.[97]

Wis.—Truelsch v. Northwestern Mut. Life Ins. Co., 202 N.W. 352, 186 Wis. 239, 38 A.L.R. 914.

88. U.S.—Wirthlin v. Mutual Life Ins. Co., C.C.A.Utah, 56 F.2d 137, 140, citing **Corpus Juris.**
Ala.—Benefit Ass'n of Ry. Employees v. Armbruster, 129 So. 78, 221 Ala. 399—McCord v. State, 126 So. 873, 220 Ala. 466—Montgomery v. McNutt, 108 So. 752, 214 Ala. 692.
Ark.—Barton v. Barton, 71 S.W.2d 464, 189 Ark. 303.
Cal.—Warder v. Hutchison, 231 P. 563, 69 Cal.App. 291.
Ill.—Republic Iron & Steel Co. v. Industrial Commission, 134 N.E. 754, 302 Ill. 401.
Ky.—Louisville & N. R. Co. v. Rowland's Adm'r, 286 S.W. 929, 215 Ky. 663.
La.—Winter v. Gani, App., 199 So. 600—Demasi v. Whitney Trust & Savings Bank, App., 176 So. 703.
Md.—Stiegler v. Eureka Life Ins. Co. of Baltimore, 127 A. 397, 146 Md. 629.
Mo.—Graham v. Stroh, 117 S.W.2d 258, 262, 342 Mo. 686, quoting **Corpus Juris**—Brown v. Holman, 238 S.W. 1065, 1069, 292 Mo. 641, citing **Corpus Juris**—Weller v. Weaver, 100 S.W.2d 594, 231 Mo.App. 400—Twedell v. Treasure, App., 44 S.W.2d 216, 228, citing **Corpus Juris.**
N.H.—Tuftonboro v. Willard, 197 A. 404, 99 N.H. 253.
N.J.—Ehling v. Diebert, 15 A.2d 655, 128 N.J.Eq. 115, affirmed 17 A.2d 777, 129 N.J.Eq. 11.
N.Y.—Gottwald v. Medinger, 12 N.Y.S.2d 241, 257 App.Div. 107.
N.C.—Dill-Cramer-Truitt Corporation v. Downs, 160 S.E. 492, 201 N.C. 478—Best v. Utley, 127 S.E. 337, 189 N.C. 356.
Ohio.—Lacey v. Heisey, 5 N.E.2d 699, 53 Ohio App. 451—Second Nat. Bank of Bucyrus v. First Nat. Bank of Columbus, 7 Ohio App. 68.
Okl.—Ætna Life Ins. Co. v. Strauch, 67 P.2d 452, 179 Okl. 617.
Or.—Mace v. Timberman, 251 P. 763, 120 Or. 144.
Pa.—Rudisill v. Cordes, 5 A.2d 217, 333 Pa. 544—Zumbro v. Zumbro, 69 Pa.Super. 600—Ford v. A. E. Dick Co., 8 Pa.Dist. & Co. 430, 22 Sch. Leg.Rec. 177, reversed on other grounds 135 A. 903, 288 Pa. 140.
Philippine.—Taguinot v. Tanay, 9 Philippine 396—Leonardo v. Santiago, 7 Philippine 401—Oas v. Roa, 7 Philippine 20.
S.C.—Dantzler v. Southern Ry. Co., 149 S.E. 750, 152 S.C. 287.
Tenn.—Tom Love Grocery Co. v. Maryland Casualty Co., 61 S.W.2d 672, 166 Tenn. 275.
Tex.—Jewell v. El Paso Electric Co., Civ.App., 47 S.W.2d 328, error dismissed.
Vt.—Page v. Cave, 111 A. 398, 94 Vt. 306.
Va.—Bear's Adm'x v. Bear, 109 S.E. 313, 131 Va. 447.
Wash.—Fleishbein v. Thorne, 74 P. 2d 880, 193 Wash. 65.
W.Va.—Carter v. Walker, 1 S.E.2d 483, 121 W.Va. 81—Nixon v. Shaver, 176 S.E. 849, 115 W.Va. 469.
Wis.—Truelsch v. Northwestern Mut. Life Ins. Co., 202 N.W. 352, 186 Wis. 239, 38 A.L.R. 914.
19 C.J. p 1162 note 90, p 1163 notes 5, 6—22 C.J. p 231 note 79—42 C.J. p 1218 note 22.

89. Pa.—Baumberger v. Supreme Hive Ladies of the Maccabees, 5 Pa.Dist. & Co. 25, 4 Wash.Co. 84.
Tex.—Tinker v. Yellow Cab Co., Civ. App., 74 S.W.2d 521.

Shedding light on issue
Although a declaration is against interest, it should be rejected where it sheds no light on the real issue involved.—Benefit Ass'n of Ry. Employees v. Armbruster, 129 So. 78, 221 Ala. 399.

90. N.Y.—Elsworth v. Muldoon, 15 Abb.Pr.,N.S., 440, 46 How Pr. 246.
N.C.—Smith v. Moore, 55 S.E. 275, 142 N.C. 277, 7 L.R.A.,N.S., 684.

91. R.I.—Tillinghast v. Harrop, 9 A. 2d 28.
Tex.—Phillips Petroleum Co. v. First Nat. Bank of Pampa, Civ.App., 64 S.W.2d 1057, 1060, citing **Corpus Juris.**
22 C.J. p 232 note 81.

92. La.—Hood v. Glass, App., 198 So. 543.

Caution in use
While oral declarations against interest are admissible, such testimony is not of a very satisfactory character and it should be received and weighed with caution.
Mont.—Gray v. Grant, 206 P. 410, 62 Mont. 452.
Or.—Goodin v. Cornelius, 200 P. 915, 101 Or. 422.

93. Mont.—Wilson v. Davis, 103 P. 2d 149, 159, 110 Mont. 456, citing **Corpus Juris.**
22 C.J. p 237 note 68.

94. N.C.—Hager v. Whitener, 169 S. E. 645, 204 N.C. 747.
Okl.—Ætna Life Ins. Co. v. Strauch, 67 P.2d 452, 179 Okl. 617.

95. N.C.—Royal Ins. Co. v. Atlantic Coast Line R. Co., 143 S.E. 516, 195 N.C. 693.

96. N.C.—Royal Ins. Co. v. Atlantic Coast Line R. Co., supra—Jelser v. White, 110 S.E. 849, 183 N. C. 126.
Admissions see infra §§ 270–383.

97. N.C.—Jelser v. White, 110 S.E. 849, 183 N.C. 126.

As is shown infra § 270 et seq, the admission is primary evidence and is receivable, although declarant is available as a witness; it is competent only when declarant, or someone identified in legal interest with him, is a party to the action; and need not have been considered by declarant as opposed to his interest at the time when it was made. On the other hand, the declaration against interest is in the nature of secondary evidence, receivable only when declarant is unavailable as a witness;[98] it is competent in any action to which it is relevant, although declarant is not a party to, or in privity with, any party to the action;[99] and it must have been, when made, to the knowledge of declarant, against his obvious and real interest.[1]

Res gestæ. A declaration against interest is distinguishable from a res gestæ statement by the fact that it need not accompany or explain a relevant act, although its probative weight is greater where it does accompany or explain such an act.[2]

§ 218. Unavailability of Declarant as Witness

a. In general
b. Declarations of person since deceased

a. In General

Declarations against interest are admissible only where the declarant is unavailable as a witness, and, according to some authorities, unavailability must result from the death of declarant.

Evidence of a declaration against interest must be not only relevant but necessary,[3] as where there is a necessity for resorting to this class of evidence because declarant has died or because some other acceptable reason precludes his appearance as a witness.[4] Being an inferior grade of evidence, it can be received only where there is affirmative proof that it is the best attainable;[5] in other words, that the testimony of the original declarant cannot be procured because he is absent from the jurisdiction of the court,[6] cannot be compelled to testify,[7] or is incapacitated, physically or mentally, from attendance.[8] Some of the cases adopt a very strict view holding that it is only when declarant is dead that his declarations can be received.[9]

The fact that a declarant is unavailable as a witness because of his infamy does not, it has been held, authorize the receipt of his declarations against interest.[10]

b. Declarations of Person Since Deceased

In a proper case, declarations against interest of a person since deceased may be admitted, as in an action for wrongful death, whether or not such declarations are a part of the res gestae and whether or not privity exists between the declarant and a party to the suit.

Where a declarant is unavailable as a witness because of his death, it is well settled that evidence may, in a proper case, be received of his declarations against his interest,[11] whether or not such

98. Or.—Mace v. Timberman, 251 P. 763, 768, 120 Or 144, quoting **Corpus Juris.**
Unavailability of declarant as witness see infra § 218.

99. Mont.—Wilson v. Davis, 103 P. 2d 149, 159, 110 Mont. 456, quoting **Corpus Juris.**
N.H.—Rand v. Dodge, 17 N.H. 343.
Or.—Carpenter v. Carpenter, 56 P.2d 305, 311, 153 Or. 584, 105 A.L.R 386, citing **Corpus Juris,** and modified on other grounds and rehearing denied 57 P.2d 1098, 153 Or. 584, 105 A.L.R. 386, rehearing denied and decree supplemented 58 P.2d 507, 153 Or. 584, 105 A.L.R. 386—Mace v. Timberman, 251 P. 763, 768, 120 Or. 144, quoting **Corpus Juris.**

1. Or.—Mace v. Timberman, supra, quoting **Corpus Juris.**
Adverse character of declaration see infra §§ 222, 223.

2. Kan.—Mentzer v. Burlingame, 118 P. 698, 85 Kan. 641.
22 C.J. p 232 note 86.

3. Ky.—Jones v. Tennis Coal Co., 94 S.W. 6, 29 Ky.L. 623.
22 C.J. p 232 note 88.

4. U.S.—Syracuse Engineering Co v. Haight, C.C.A.N.Y., 97 F.2d 573.
La.—Demasi v. Whitney Trust & Savings Bank, App., 176 So. 703.

5. Conn.—Fitch v. Chapman, 10 Conn. 8.
22 C.J. p 232 note 89.

6. Ark.—Walnut Ridge Mercantile Co. v. Cohn, 96 S.W. 413, 79 Ark. 338.
Pa.—Alter v. Berghaus, 8 Watts. 77.
Absence from jurisdiction not sufficient
Iowa.—Mahaska County v. Ingalls, 16 Iowa 81.

7. Va.—Harriman v. Brown, 8 Leigh 697, 35 Va. 697.

8. Mass.—Union Bank v. Knapp, 3 Pick. 96, 15 Am.D. 181.
Declarant of unsound mind at time of trial
Tex.—New Amsterdam Casualty Co. v. First Nat. Bank, Civ.App., 134 S.W.2d 470, error dismissed, judgment correct.

9. Tenn.—Tom Love Grocery Co. v. Maryland Casualty Co., 61 S.W.2d 672, 166 Tenn. 275.
22 C.J. p 233 note 94.
Declarations of decedent against interest see subdivision b of this section.

10. Tenn.—Tom Love Grocery Co. v. Maryland Casualty Co., supra.
Burglar
Unsworn statements of burglar who was not party to nor representative of parties to burglary policy sued on is not admissible as declaration against interest, notwithstanding his conviction for burglary subsequent to statements disqualified him as witness.—Tom Love Grocery Co. v. Maryland Casualty Co., supra.

11. U.S.—Halleck v. Hartford Accident & Indemnity Co., C.C.A.Tex., 75 F.2d 800—Citizens' Nat. Bank of Los Angeles v. Santa Rita Hotel Co., C.C.A.Ariz., 22 F.2d 524.
Ala.—McCord v. State, 126 So. 373, 220 Ala. 466.
Ark.—Barton v. Barton, 71 S.W.2d 464, 189 Ark. 303.
Cal.—Mayfield v. Fidelity & Casualty Co. of New York, 61 P.2d 83, 16 Cal.App.2d 611.
Ill.—Keshner v. Keshner, 33 N.E.2d 877, 376 Ill. 354, reversing In re Keshner's Estate, 26 N.E.2d 529, 304 Ill.App. 640—Republic Iron &

declarations are part of the res gestæ.[12] The absence of privity between declarant and the parties to the suit does not preclude the admission of his declarations, provided they were adverse to his interests.[13]

On the other hand, the declarations of a person since deceased which are not against his interest are inadmissible;[14] and, where the death of declarant is in issue, it has been held that evidence of his declarations against interest is inadmissible.[15]

Statutory regulations. In some jurisdictions declarations against interest of a person since deceased are admissible under statutory regulations,[16] as, for example, under statutes providing for the

Steel Co. v. Industrial Commission, 134 N.E. 754, 302 Ill. 401.

Iowa.—Kisor v. Litzenberg, 212 N.W. 343, 203 Iowa 1183—Snyder v. Guthrie, 187 N.W. 953, 193 Iowa 624, 24 A.L.R. 950.

Kan.—Lee v. Downing, 214 P. 786, 113 Kan. 329.

Ky.—Cumberland Gasoline Corporation v. Fields' Adm'r, 80 S.W.2d 28, 258 Ky. 417—Louisville & N. R. Co. v. Rowland's Adm'r, 286 S.W. 929, 215 Ky. 663—Robinson v. Eastern Gulf Oil Co., 244 S.W. 914, 196 Ky. 385.

La.—Winter v. Gani, App., 199 So. 600—Hood v. Glass, App., 198 So. 543.

Mo.—Pursifull v. Pursifull, 257 S.W. 117—Brown v. Holman, 238 S.W. 1065, 292 Mo. 641—Cape County Sav. Bank v. Wilson, 34 S.W.2d 981, 225 Mo.App. 14.

N.H.—Patten v. Patten, 115 A. 558, 80 N.H. 590.

N.J.—Ehling v. Diebert, 15 A.2d 655, 128 N.J.Eq. 115, affirmed, 17 A.2d 777, 129 N.J.Eq. 11.

N.Y.—Martorella v. Prudential Ins. Co. of America, 264 N.Y.S. 751, 238 App.Div. 532—Moore v. Fingar, 115 N.Y.S. 1035, 131 App.Div. 399—In re Kempf's Estate, 248 N.Y.S. 247, 138 Misc. 704.

N.C.—Best v. Utley, 127 S.E. 337, 189 N.C. 356.

Ohio.—Latham v. Clark, 166 N.E. 685, 120 Ohio St. 559—Second Nat. Bank of Bucyrus v. New First Nat. Bank of Columbus, 7 Ohio App. 68.

Okl.—Ætna Life Ins. Co. v. Strauch, 67 P.2d 452, 179 Okl. 617.

Or.—Mace v. Timberman, 251 P. 763, 120 Or. 144.

Pa.—Rudisill v. Cordes, 5 A.2d 217, 333 Pa. 544—Yentis v. Mills, 148 A. 909, 299 Pa. 25—King v. King, 127 A. 142, 281 Pa. 511—In re Phillips' Estate, 10 Pa.Dist. & Co. 475—Petition of Eppley, 37 Pa.Dist. & Co. 151, 53 York Leg.Rec. 153.

Tenn.—Tom Love Grocery Co. v. Maryland Casualty Co., 61 S.W.2d 672, 166 Tenn. 275—Johnson v. Graves, 15 Tenn.App. 466.

Tex.—Hearon v. Jackson, Civ.App., 109 S.W.2d 230, error dismissed—Jewell v. El Paso Electric Co., Civ.App., 47 S.W.2d 328, error dismissed—Kelly v. Kelly, Civ.App., 291 S.W. 631, reversed on other grounds, Com.App., 294 S.W. 518—Warren v. Humphreys, Civ.App., 274 S.W. 250—Humphreys v. Green, Civ.App., 271 S.W. 116.

Vt.—Lowell v. Wheeler's Estate, 112 A. 361, 95 Vt. 113—Page v. Cave, 111 A. 398, 94 Vt. 306.

Va.—Bear's Adm'x v. Bear, 109 S.E. 313, 131 Va. 447.

Wash.—Fleishbein v. Thorne, 74 P.2d 880, 193 Wash. 65—In re Krause's Estate, 21 P.2d 268, 173 Wash. 1—Levy v. Simon, 205 P. 426, 119 Wash. 179.

W.Va.—Nixon v. Shaver, 176 S.E. 849, 115 W.Va. 469.

Wis.—Wilcox v. Powell's Estate, 240 N.W. 122, 206 Wis. 513—Truelsch v. Northwestern Mut. Life Ins. Co., 202 N.W. 352, 186 Wis. 239, 38 A.L.R. 914.

22 C.J. p 232 note 93

Declarations of decedent generally see supra § 205.

Corroborative evidence of contract to make will

Declarations of promisor subsequent to his contract to make a will, being against interest, are admissible, not as sufficient in themselves to prove the fact, but as corroborative of evidence of witnesses to contract.—Jefferson v. Simpson, 98 S.E. 212, 83 W.Va. 274.

Partnerships

(1) In suit for accounting, declarations of deceased partner as to amount of interest in partnership undertaking, being statements of evidential facts against interest, are admissible.—Rosenstock v. Rosenstock, 134 A. 143, 151 Md. 253.

(2) Other cases see Heidenheimer v. Johnson, 13 S.W. 46, 76 Tex. 200—22 C.J. p 232 note 93 [a].

Summary of factors governing admissibility

Declarations made by a deceased person as to facts presumably within his knowledge, if relevant to the matter of inquiry, are admissible in testimony as between third parties, first, when it appears that declarant is dead; second, that the declaration was against his pecuniary interest; third, that it was a fact in relation to a matter of which he was personally cognizant; fourth, that declarant had no possible motive to falsify the fact declared.—Jackson v. Johnson, 88 So. 410, 126 Miss. 26.

12. Ky.—Commonwealth Life Ins. Co. v. Clarke, 123 S.W.2d 811, 276 Ky. 151.
Or.—Carpenter v. Carpenter, 56 P.2d 305, 153 Or. 584, 105 A.L.R. 386, modified on other grounds and rehearing denied 57 P.2d 1098, 153 Or. 584, 105 A.L.R. 386, rehearing denied and decree supplemented 58 P.2d 507, 153 Or. 584, 105 A.L.R. 386.

13. Ohio.—Helmig v. Kramer, 192 N.E. 388, 48 Ohio App. 71.
Or.—Carpenter v. Carpenter, 56 P.2d 305, 153 Or. 584, 105 A.L.R. 386, modified on other grounds and rehearing denied 57 P.2d 1098, 153 Or. 584, 105 A.L.R. 386, rehearing denied and decree supplemented 58 P.2d 507, 153 Or. 584, 105 A.L.R. 386.

Peculiar means of knowledge

Statement by person, since deceased, concerning matter which he had peculiar means of knowing and no interest to misrepresent and opposed to his pecuniary interest, is admissible in evidence, in absence of privity between him and parties to suit.—Helmig v. Kramer, 192 N.E. 388, 48 Ohio App. 71.

Knowledge of declarant see infra § 220

Book entries of third person

Declarations and authorized book entries of third person since deceased, against interest, are admissible.—Kittredge v. Grannis, 155 N.E. 88, 244 N.Y. 168, affirming 214 N.Y.S. 33, 215 App.Div. 486.

14. U.S.—Bonner v. Texas Co., C.C.A.Tex., 89 F.2d 291—Halleck v. Hartford Accident & Indemnity Co., C.C.A.Tex., 75 F.2d 800.
Dying declarations see infra § 238.
Nature of interest of declarant see infra § 219.

15. Tex.—Tarwater v. Donley County State Bank, Civ.App., 277 S.W. 176.

16. Cal.—Roberts v. Mills, 205 P. 872, 56 Cal.App. 556.
Or.—Goodin v. Cornelius, 200 P. 915, 101 Or. 422.
Philippine.—Taguinot v. Tanay, 9 Philippine 396.
R.I.—Tillinghast v. Harrop, 9 A.2d 28.
Va.—Lackey v. Price, 128 S.E. 268, 142 Va. 789.

Consistency of statutes

Statute admitting declarations of deceased against interest in realty is consistent with act admitting declarations of person under whom title is claimed, made while holding title.—

admission of declarations against interest made by persons since deceased where the declarations were not made with a view to pending litigation.[17]

However, the declarations of a deceased are inadmissible where the circumstances are not such as to bring them within the terms of the particular statute.[18] Under a statute providing for the admission of declarations against interest of a decedent in respect of real property, declarations which concern personal property are not admissible,[19] and under such a statute declarations made by a person after he has conveyed his real property are inadmissible for the reason that the declarations are not against his interest or in respect of his real property.[20]

Death actions. The rule that declarations of a decedent against his interest are admissible has been applied where it is sought to introduce such declarations in a suit for damages for the death of declarant.[21] Declarations of deceased against interest, made after the injury, have been admitted on behalf of defendant to show that the injury was not the cause of death,[22] or that the injury was caused by contributory negligence on the part of deceased.[23] Declarations of deceased against interest made before the injury may be admitted for the purpose of showing the conditions or circumstances existing at the time of the injury.[24] In an action for wrongful death which can be maintained only where decedent could have maintained an action for injuries, it has been held that there is such privity between decedent and those suing for damages for his death as to make his declarations against his interest admissible.[25]

On the other hand, under a statute allowing in evidence declarations against pecuniary interest, it has been held that the declarations of a deceased militating against recovery for his wrongful death are inadmissible for the reason that declarant had no interest in the cause of action for wrongful death and that consequently the declaration could not be against his interest.[26]

§ 219. Nature of Interest of Declarant

a. In general
b. Pecuniary interest
c. Proprietary interest
d. Declarations of assured

a. In General

To be admissible as a declaration against interest, the declaration must have been against an obvious and existing pecuniary or proprietary interest of declarant.

To be admissible as a declaration against interest, the declarant must have had an interest in the subject matter of his declaration.[27]

A declaration is not admissible in evidence unless the interest against which it militated was of either a pecuniary or proprietary nature.[28] Accordingly an unsworn statement of a third person is not

Kurth v. Le Jeune, 269 P. 408, 83 Mont. 100.

Declarations made over two years before death

That decedent's declarations, relating to oral agreement to give plaintiffs his property in exchange for services, made during agreement, were made more than two years prior to his death, did not affect their admissibility, in action against his estate for value of services as declarations against interest, under Code Civ.Proc. § 1853, if they had a logical tendency to show decedent's understanding as to terms under which plaintiffs were performing alleged services.—Warder v. Hutchison, 231 P. 563, 69 Cal.App. 291.

17. Ga.—Henderson v. Jefferson Standard Life Ins. Co., 147 S.E. 901, 39 Ga.App. 609.

Mailing of notice as "beginning of litigation"

Mailing of notice of assessment to stockholder of insolvent bank is not "beginning of litigation" within statute admitting declarations of deceased not made with view to pending litigation.—Bennett v. Cox, 146 S.E. 835, 167 Ga. 843.

18. Ga.—State Banking Co. v. Miller, 196 S.E. 47, 185 Ga. 653.

19. Mont.—Wilson v. Davis, 103 P. 2d 149, 110 Mont. 356.

20. Mont.—Wilson v. Davis, supra.

21. Ky.—Reed v. Philpot's Adm'r, 31 S.W.2d 709, 235 Ky. 429.
Pa.—Rudisill v. Cordes, 5 A.2d 217, 333 Pa. 544.
Tex.—Hovey v. See, Civ.App., 191 S.W. 606.

Denial of injury

In compensation proceedings for death of employee, statement of employee to physician denying claimed injury was admissible, since statements made against interest by one not party to a contract may be shown even when party is dead.—Wills v. Berberich's Delivery Co., 98 S.W.2d 569, 339 Mo. 856.

Existing heart condition

Railroad should be allowed, in death action, to show, as statement against interest, that deceased who fell on station platform recognized weakness of his heart, where death certificate showed that heart disease caused death.—Louisville & N. R. Co. v. Rowland's Adm'r, 286 S.W. 929, 215 Ky. 663.

22. Ohio.—Bond Hill v. Atkinson, 16 Ohio Cir.Ct. 470, 9 Ohio Cir.Dec. 185.
Tex.—Hardin v. St. Louis Southwestern R. Co., Civ.App., 88 S.W. 440.

23. Ga.—Georgia R. & Banking Co. v. Fitzgerald, 34 S.E. 316, 108 Ga. 507, 49 L.R.A. 175.
17 C.J. p 1307 note 12.

24. Ky.—Hollingsworth v. Warnock, 65 S.W. 163, 112 Ky. 96, 23 Ky. L. 1395.
17 C.J. p 1308 note 15.

25. Tex.—Hovey v. See, Civ.App., 191 S.W. 606.

26. Cal.—Marks v. Reissinger, 169 P. 243, 35 Cal.App. 44.

27. Tex.—Justiss v. Naquin, Civ. App., 137 S.W.2d 72, error dismissed, judgment correct.

28. Va.—State Life Ins. Co. v. Hairston, 62 S.E. 1057, 108 Va. 832, 128 Am.S.R. 989.

"Most of the authorities hold strictly to the rule that the statement must have been adverse to a pecuniary or proprietary interest."—Helmig v. Kramer, 192 N.E. 388, 391, 48 Ohio App. 71.

admissible merely because it appears to have been against the interest of the declarant by subjecting him to a civil action[29] or to a criminal prosecution.[30] However, the declaration may be admissible where it is against the pecuniary or the proprietary interest of the declarant.[31]

Existing interest. The declarant must have possessed an actual interest, real or apparent, at the time when his declaration was made.[32] This rule excludes declarations of a former owner of the property,[33] or of a prospective heir thereto.[34]

Obvious interest. The interest of the declarant must have been so obvious and direct as presumably to have been present in his mind at the time of the declaration,[35] and accordingly a declaration which would be against interest only in certain remote or improbable contingencies is not competent.[36]

b. Pecuniary Interest

Declarations are admissible where they are against the pecuniary interest of the declarant, as in the case of an acknowledgment of indebtedness or of payment.

Where the declarant had adequate knowledge of the facts stated, and primary evidence cannot be procured, the declaration is admissible if made against his pecuniary interest.[37] Thus the declaration is admissible where it amounts to an acknowledgment of declarant's indebtedness to others,[38] or that nothing is due him on a particular account,[39] or to a concession of the receipt[40] or misappropriation[41] of money, or that he is liable for an increased share of a common obligation,[42] or is individually liable for the whole claim.[43]

However, to render declarations admissible as against pecuniary interest it is necessary that they be, in fact, against such interest,[44] and that the declarant's pecuniary interest relate to the subject matter of his declaration.[45]

c. Proprietary Interest

In a proper case, declarations are admissible where they are against the proprietary interest of the declarant, as in the case of declarations in disparagement of title to real or personal property or in respect of boundaries.

An unsworn statement otherwise relevant is com-

29. N.Y.—Ayer v. Colgrove, 30 N.Y.S. 788, 81 Hun 322.
22 C.J. p 235 note 28.

30. Iowa.—Mahaska County v. Ingalls, 16 Iowa 81.
22 C.J. p 235 note 29.
Admissibility of confessions of guilt as declarations against interest in criminal prosecutions see Criminal Law § 749.

Arson

Where insurer claimed that property was burned as result of conspiracy between insured and one who fired the property, latter's confession is not admissible against insured, in an action on the policy, on the theory it was a declaration against interest, the rule applying only to declarations against pecuniary interest.—Royal Ins. Co. v. Taylor, W.Va., 254 F. 805, 166 C.C.A. 251.

"Penal interest" in addition to pecuniary or proprietary interest

The statement of a decedent that he had fired first in a shooting affray was admissible as against his pecuniary and proprietary interest. The court stated that such declaration was also against the "penal interest" of decedent, intimating that this was an additional ground for holding that the declaration was competent evidence.—Reed v. Philpot's Adm'r, 31 S.W.2d 709, 235 Ky. 429.

31. N.C.—Smith v. Moore, 55 S.E. 275, 142 N.C. 277, 7 L.R.A.N.S., 684.
W.Va.—Nixon v. Shaver, 176 S.E. 849, 115 W.Va. 469.
Declarations against pecuniary or proprietary interest see subdivisions b and c of this section.

32. N.J.—Turner v. Cole, 173 A. 613, 620, 116 N.J.Eq. 368, quoting **Corpus Juris,** and affirmed 179 A. 113, 118 N.J.Eq. 497.
Tex.—Reynolds v. Porter, Civ.App., 54 S.W.2d 1086, 1088, citing **Corpus Juris.**
22 C.J. p 234 note 22.

33. Mont.—Wilson v. Davis, 103 P. 2d 149, 110 Mont 356.
22 C.J. p 234 note 23.
Declarations of grantor before and after conveyance see infra § 222.

34. Mo.—Morton v. Massie, 3 Mo. 482.
N.C.—In re Murray, 54 S.E. 435, 141 N.C. 588.

35. Utah.—Smith v. Hanson, 96 P. 1087, 34 Utah 171, 18 L.R.A.,N.S., 520.
22 C.J. p 234 note 25.

36. Cal.—In re Baird's Estate, 223 P. 974, 193 Cal. 225.
22 C.J. p 235 note 26.

Possibility of receiving legacy under will is not "pecuniary or proprietary interest" rendering beneficiary's statements concerning testatrix' mental incapacity admissible as against such interest in will contest after beneficiary's death.—Helmig v. Kramer, 192 N.E. 388, 48 Ohio App. 71.

37. Ala.—McCord v. State, 126 So. 873, 220 Ala. 466.
Ark.—People's Savings Bank v. McInturff, 227 S.W. 400, 147 Ark. 296.
22 C.J. p 233 note 95.

38. Cal.—Mayfield v. Fidelity & Casualty Co. of New York, 61 P.2d 83, 16 Cal.App.2d 611.
Kan.—Lee v. Downing, 214 P. 786, 113 Kan. 329.
Ky.—Petty v. Petty, 295 S.W. 863, 220 Ky. 569.
N.Y.—Gottwald v. Medinger, 12 N.Y.S.2d 241, 242, 257 App.Div. 107, citing **Corpus Juris.**
22 C.J. p 233 note 96.

39. N.Y.—Sparling v. Wells, 49 N.Y.S. 321, 24 App.Div. 584.
22 C.J. p 233 note 97.

40. Ind.—Keesling v. Powell, 49 N.E. 265, 149 Ind. 372.
22 C.J. p 233 note 98.

41. Iowa.—Scott County v. Fluke, 34 Iowa 317—Mahaska County v. Ingalls, 16 Iowa 81.

Spurious character of certificates on which money was borrowed

Decedent's declarations that stock certificates on which he borrowed money were spurious are admissible as admissions against pecuniary interest.—Citizens' Nat. Bank of Los Angeles v. Santa Rita Hotel Co., C.C.A.Ariz., 22 F.2d 524.

42. N.Y.—Card v. Moore, 74 N.Y.S. 18, 68 App.Div. 327, affirmed 66 N.E. 1105, 173 N.Y. 598.
22 C.J. p 233 note 1.

43. Ala.—Humes v. O'Bryan, 74 Ala. 64—Raines v. Raines, 30 Ala. 425.

44. Mont.—Wilson v. Davis, 103 P. 2d 149, 110 Mont. 356.

45. Ohio.—Helmig v. Kramer, 192 N.E. 388, 48 Ohio App. 71.

petent, the primary evidence being unattainable, if it was against the proprietary interest of the declarant.[46] Thus a declaration is admissible where it is in disparagement of declarant's title,[47] as where one in possession of a chattel or chose in action declares that he is not its absolute owner,[48] or that he has made a gift[49] or other transfer[50] of it, or holds it in trust;[51] or where an heir at law states the existence of a will of his ancestor.[52] A declaration by an owner of land to the effect that his use of a way over adjacent land was permissive in its origin and not adverse is admissible in a suit for obstruction of the way.[53]

Declarations by person in possession of land. In a proper case, declarations of persons in possession of land against their proprietary interest therein may be received in evidence.[54] Thus a declaration may be admitted where a person in actual possession of realty under an apparent claim of ownership concedes that he holds in trust,[55] or as tenant rather than owner,[56] as a tenant for life,[57] or under another person,[58] or holds or owns less than the entire interest,[59] or states that he does not claim to own the land,[60] that he has never received a deed conveying it to him,[61] that he has conveyed it by deed to another[62] or has dedicated it to public use,[63] that a deed by which he conveyed it was a deed of gift,[64] that a document conferring on him an additional interest in the land has been canceled,[65] or that someone other than himself owns the property.[66]

Boundaries. In a proper case, statements concerning boundaries may be admissible as declarations against interest.[67] Declarations of landowners made during the time of their ownership and adverse to their interests may be admissible in evidence as tending to show the location of boundaries designated by grants, deeds, or wills.[68]

However, the exception to the hearsay rule which admits declarations as to boundaries stands on a

46. Ga.—See Jolley v. City of Macon, 143 S.E. 894, 166 Ga. 506.
Me.—Peacock v. Ambrose, 116 A. 832, 121 Me. 297.
Miss.—Kyle v. Peoples Bank & Trust Co., 187 So. 534, 186 Miss. 287.
Mo.—Bunker v. Fidelity Nat Bank & Trust Co., 73 S.W.2d 242, 335 Mo. 305.
N.Y.—Moore v. Fingar, 115 N.Y.S. 1035, 131 App.Div. 399—In re McCafferty's Will, 264 N.Y.S. 38, 147 Misc. 179.
S.C.—Carson v. McCaskill, 99 S.E. 108, 111 S.C. 516.
22 C.J. p 233 note 3.

47. Ala.—Reedy v. Kelley, 94 So. 86, 208 Ala. 305—McKleroy v. Musgrove, 84 So. 280, 203 Ala. 603.
N.Y.—Hutson v. Title Guarantee & Trust Co., 195 N.Y.S. 316, 118 Misc. 795.
Va.—Chiles v. Bowyer, 103 S.E. 619, 127 Va. 249.

Sale by record owner
Statement by deceased owner of record to person seeking to purchase land in controversy that he had sold the land to his son is admissible in action to try title as a declaration against interest and as a circumstance to support contention that father had conveyed the land to son.—Humphreys v. Green, Tex.Civ.App., 271 S.W. 116.

48. Mont.—Delmoe v. Long, 88 P. 778, 35 Mont. 139.
22 C.J. p 234 note 4.

49. Mich.—Keller v. McConville, 141 N.W. 652, 175 Mich. 479.
22 C.J. p 234 note 5.

50. Colo.—Allen v. Shires, 107 P. 1070, 47 Colo. 433.
22 C.J. p 234 note 6.

51. Pa.—Laughlin v. Laughlin, 69 A. 288, 218 Pa. 629.
22 C.J. p 234 note 7.

52. N.Y.—Fetherly v. Waggoner, 11 Wend. 599.

53. Mass.—Daw v. Lally, 100 N.E. 1024, 213 Mass. 578.

54. U.S.—Richmond Cedar Works v. Foreman Blades Lumber Co., C.C.A.N.C., 267 F. 363.
Conn.—Borden v. Town of Westport, 151 A. 512, 112 Conn. 152.
Ga.—Crider v. Woodward, 135 S.E. 95, 162 Ga. 743.
Mo.—Coshow v. Otey, 222 S.W. 804.

55. Cal.—Tech v. McMeekan, 118 P. 476, 17 Cal.App. 14.
22 C.J. p 234 notes 9, 10.

56. Cal.—Mercantile Trust Co. of San Francisco v. All Persons Claiming, 191 P. 691, 183 Cal. 369.

Invalidity of lease
In an action to quiet title, an acknowledgment by defendant that he held the property, not as owner or adverse claimant, but as tenant, made in his lease, is not affected as evidence of a declaration against interest by the fact that the lease may not have been validly executed on the part of lessor by his attorney in fact, the power of attorney not being shown.—Mercantile Trust Co. of San Francisco v. All Persons Claiming, supra.

57. Ga.—Lamar v. Pearre, 17 S.E. 92, 90 Ga. 377.

58. Tex.—Ft. Wayne First Nat. Bank v. Howard, Civ.App., 174 S.W. 719.
22 C.J. p 234 note 12.

59. Ga.—McLeod v. Swain, 13 S.E. 315, 87 Ga. 156, 27 Am.S.R. 229.
22 C.J. p 234 note 13.

60. Ill.—Kirby v. Kirby, 86 N.E. 259, 236 Ill. 255.
Tex.—Alexander v. Conley, Civ.App., 187 S.W. 254.

61. N.C.—Smith v. Moore, 55 S.E. 275, 142 N.C. 277, 7 L.R.A.,N.S., 684.
22 C.J. p 234 note 15.

62. Colo.—Allen v. Shires, 107 P. 1070, 47 Colo. 433.
22 C.J. p 234 note 16.

63. Ark.—Davies v. Epstein, 92 S.W. 19, 77 Ark. 221.

64. Ga.—Shackelford v. Orris, 68 S.E. 838, 135 Ga. 29.

65. Minn.—Hosford v. Rowe, 42 N.W. 1018, 41 Minn. 245.

Antenuptial contract
Minn.—Hosford v. Rowe, supra.

66. Mich.—Loranger v. Carpenter, 112 N.W. 125, 148 Mich. 549.
22 C.J. p 234 note 20.

67. N.C.—Carr v. Bizzell, 134 S.E. 462, 192 N.C. 212.
Tex.—Barlow v. Greer, Civ.App., 222 S.W. 301.

Hearsay statement of former owner, since deceased, against interest relative to boundaries of property may be admitted in action to quiet title to which he is not a party, but where at the time the declarant spoke he had parted with title, and had done so under a warranty and where his statement would, if true, have reduced the acreage he warranted, his statement is not against interest but is self-serving and properly excluded.—Borden v. Town of Westport, 134 A. 803, 105 Conn. 139.

68. Va.—Bradshaw v. Booth, 105 S.E. 555, 129 Va. 19.

footing different from that governing the admissibility of declarations against interest,[69] and while statements concerning boundaries may be against interest and offered in evidence as declarations against interest, in which case their admissibility will be controlled by the general rules governing this class of evidence, they may also be offered merely as declarations concerning boundaries, whether or not adverse to the interest of the speaker, and in the latter case their admissibility will be controlled by the rules considered infra §§ 234, 249.

d. Declarations of Assured

Declarations of an assured, since deceased, made at a time when he had a vested interest in a life insurance policy and showing facts precluding recovery on the policy may be admissible as declarations against interest.

Declarations of an assured, since deceased, tending to show facts which would preclude recovery on a policy of life insurance may be admissible as declarations against his pecuniary or proprietary interest where the policy is payable to the assured or his estate, or where it is payable to another with a reserved right to change the beneficiary.[70]

On the other hand, if the assured at the time of his declarations is without authority to change the beneficiary, the beneficiary rather than the assured has the vested right in the policy and therefore declarations of the assured cannot be against his own interest and may not be admitted as declarations against interest.[71]

§ 220. Knowledge of Declarant

It is requisite to the admissibility of a declaration against interest that the declarant have knowledge of the subject of his declaration.

It is essential to relevancy in the declaration that the declarant should have adequate knowledge with respect to the subject covered by his statement.[72]

§ 221. Absence of Motive to Misrepresent

To render a declaration against interest admissible, there should be a guarantee of the trustworthiness of the declaration.

To be admissible as a declaration against interest, there should be a circumstantial guarantee of the trustworthiness of the declaration.[73] While it has been stated that the declarant should have been

69. N.H.—Tuftonboro v. Willard, 197 A. 404, 89 N.H. 253.

70. Cal.—McEwen v. New York Life Ins. Co., 183 P. 373, 42 Cal.App. 133.
Ky.—Commonwealth Life Ins. Co. v. Clarke, 123 S.W.2d 811, 276 Ky. 151.
Md.—Stiegler v. Eureka Life Ins. Co. of Baltimore, 127 A. 397, 146 Md. 629.
N.Y.—Martorella v. Prudential Ins. Co. of America, 264 N.Y.S. 751, 238 App.Div. 532.
Okl.—Ætna Life Ins Co. v. Strauch, 67 P.2d 452, 179 Okl. 617.
37 C.J. p 626 note 11.
Admissions of assured see infra § 368.

Declaration of suicidal intent
(1) Declarations made by insured after taking poison that she did not care to live were admissible in beneficiary's action on life policy where insured had retained right to change beneficiary so that statement indicating suicidal intent was against his own pecuniary interest.—Martorella v. Prudential Ins. Co. of America, 264 N.Y.S. 751, 238 App.Div. 532.

(2) Declarations of suicidal intent have been held admissible to preclude recovery of double indemnity for accidental death under life policy.—Wirthlin v. Mutual Life Ins. Co., C.C.A.Utah, 56 F.2d 137, 86 A.L.R. 138.

Showing falsity of insurance application
Statements of insured to physician that he had had severe cough and syphilis were competent to show falsity of statements, in application for life policy.—Grand Lodge, Brotherhood of Railroad Trainmen v. Johnson, 15 S.W.2d 499, 228 Ky. 669.

Interest as vested in assured and not in beneficiary
Where life policy provided that beneficiary was subject to change at any time by act of insured and that policy was void if insured should die by his own hand within one year from the date thereof, the beneficiary had no vested interest until the death of the insured without change of beneficiary, and therefore declarations of insured that he intentionally shot himself are admissible as against his interest.—Commonwealth Life Ins. Co. v. Clarke, 123 S.W.2d 811, 276 Ky. 151.

71. Cal.—McEwen v. New York Life Ins. Co., 183 P. 373, 42 Cal.App. 133.
37 C.J. p 626 note 13.

Giving policy to named beneficiary
Where a policy reserving the right to change the beneficiary is given by assured to the beneficiary, such gift destroys the right to change the beneficiary and deprives assured of his vested right in the policy, so that his declarations subsequent to that time are not against his interest and are inadmissible.—McEwen v. New York Life Ins. Co., supra.

72. Ala.—Benefit Ass'n of Ry. Employees v. Armbruster, 129 So. 78, 221 Ala. 399.
Mo.—King v. Rieth, 108 S.W.2d 1, 7, 341 Mo. 467, citing **Corpus Juris.**
N.C.—Royal Ins. Co. v. Atlantic Coast Line R. Co., 143 S.E. 516, 195 N.C. 693.
Okl.—Ætna Life Ins. Co. v. Strauch, 67 P.2d 452, 179 Okl. 617.
R.I.—Tillinghast v. Harrop, 9 A.2d 28.
Tex.—Price v. Humble Oil & Refining Co., Civ.App., 152 S.W.2d 804.
22 C.J. p 235 note 30.

73. La.—Demasi v. Whitney Trust & Savings Bank, App., 176 So. 703.

Circumstances at time of declaration as decisive
In determining whether affidavit of depositor that all withdrawals from account were made by her or with her consent, contradicting depositor's testimony in husband's suit for deposit as funds belonging to community of acquêts and gains was admissible on retrial after depositor's death, affidavit should be examined in light of circumstances existing at time it was made in order to resolve whether it carried requisite guaranty of truthfulness in order to be admitted as a statement against interest.—Demasi v. Whitney Trust & Savings Bank, supra.

free from any motive to misrepresent,[74] such statement means merely that where there exists both a self-serving and a self-disserving interest, the latter must preponderate over the self-serving interest.[75] If the portion of a declaration ostensibly against interest can be separated from a self-serving portion, the self-serving portion is rejected, while if it cannot be so separated the entire declaration may be rejected;[76] and it has been considered that, if the statements in favor of the declarant equal or preponderate over those against his interest, the declaration cannot be received.[77] When the receipt of interest is indorsed on an instrument with the apparent effect of removing the bar of limitations, evidence of such a statement will not be received without affirmative and satisfactory proof that the indorsement was made at a time when it was against the real interest of declarant.[78]

In the absence of a coexisting self-serving interest, the mere fact that the statement is against the declarant's interest furnishes very satisfactory assurance that it was not made under the influence of a motive to misrepresent,[79] and indeed constitutes a strong guaranty of truth.[80] The character of the declaration also dispenses with any necessity that it should have been made ante litem motam.[81]

§ 222. Adverse Character of Declaration Generally

To be admissible as a declaration against interest, the statement must have been actually against the interest of declarant at the time it was made.

In order for a declaration to be admissible as a declaration against interest, it must clearly appear that the statement of the declarant was actually against his interest[82] at the time when it was made;[83] otherwise the statement will not be admitted.[84]

Declarations of grantor before and after conveyance. It has been held that a grantor's declarations made both before and after the execution of his deed may be admissible as declarations against interest.[85] However, according to other authorities, declarations of a grantor are inadmissible if made before acquiring title[86] or after parting with title.[87]

74. Minn.—Halvorsen v. Moon & Kerr Lumber Co., 91 N.W. 28, 87 Minn. 18, 94 Am.S.R. 669.
22 C.J. p 235 note 31.

Voluntary character of statement

Where testimony of deponent, since deceased, was procured over deponent's express objections and under compulsion of purported authority of law, deposition which was inadmissible as such because of lack of substantial compliance with statutes authorizing depositions, was not admissible as a "declaration against interest."—McLean v. Hargrove, Tex.Civ.App., 144 S.W.2d 1021, error granted.

75. La.—Demasi v. Whitney Trust & Savings Bank, App., 176 So. 703.

Predominance of self-serving interest

Affidavit of depositor that all of withdrawals from account were made by her or with her consent, contradicting depositor's testimony in husband's suit for deposit as funds belonging to community of acquêts and gains was not admissible on retrial of husband's suit after depositor's death as a statement against interest, where affidavit was made after an adverse judgment was rendered against husband in first trial with the object of securing funds remaining in account, since self-serving interest predominated over disserving interest in probable influence.—Demasi v. Whitney Trust & Savings Bank, supra.

76. Ill.—Chamberlain v. Chamberlain, 6 N.E. 444, 116 Ill. 480.
22 C.J. p 236 note 44.

77. Ga.—Massee-Felton Lumber Co. v. Sirmans, 50 S.E. 92, 122 Ga. 297, 299.
22 C.J. p 236 note 45

78. N.C.—Gupton v. Hawkins, 35 S.E. 229, 126 N.C. 81.
22 C.J. p 236 note 42 [a].

79. Kan.—Mentzer v. Burlingame, 118 P. 698, 85 Kan. 641.
22 C.J. p 235 note 32.

80. Ala.—Humes v. O'Bryan, 74 Ala. 64.
22 C.J. p 235 note 33.

81. La.—Demasi v. Whitney Trust & Savings Bank, App., 176 So. 703.
Minn.—Halvorsen v. Moon & Kerr Lumber Co., 91 N.W. 28, 87 Minn. 18, 94 Am.S.R. 669.

Corpus Juris cited in a case in which the court found it to be unnecessary to decide whether the character of an affidavit as a declaration against interest dispensed with the necessity of showing that it was made ante litem motam because, as such declaration, it was inadmissible on another ground, namely, that it was not spontaneous nor made prior to the time when its use as evidence could have been contemplated.—Jelser v. White, 110 S.E. 849, 850, 183 N.C. 126.

82. Cal.—Barr v. Branstetter, 184 P. 409, 42 Cal.App. 725.
Mo.—Pantz v. Nelson, 135 S.W.2d 397, 402, 234 Mo.App. 1043, citing **Corpus Juris**—Bedwell v. Capitol Mut Ass'n, App., 66 S.W.2d 155.
N.J.—Turner v. Cole, 173 A. 613, 620, 116 N.J.Eq. 368, quoting **Corpus Juris**, and affirmed 179 A. 113, 118 N.J.Eq. 497.
N.C.—Nobles v. Davenport, 111 S.E. 180, 183 N.C. 207, 26 A.L.R. 1086—Roe v. Journegan, 102 S.E. 498, 179 N.C. 686.
Utah.—Ruthrauff v. Silver King Western Min. & Mill. Co., 80 P.2d 338, 343, 95 Utah 279, citing **Corpus Juris.**
22 C.J. p 235 note 35.

Sufficiency of showing as to adverse character

In an action for the value of services to a decedent by his deceased wife's niece, testimony as to his statements as to plaintiff's having done work for him, and the time he spent in her home is admissible as declarations against interest, in view of further testimony as to his statements that he expected to pay her and the presumption that such was their understanding.—Shern v. Sims, Mo.App., 258 S.W. 1029.

83. N.J.—Turner v. Cole, 173 A. 613, 620, 116 N.J.Eq. 368, quoting **Corpus Juris**, and affirmed 179 A. 113, 118 N.J.Eq. 497.
22 C.J. p 235 note 36.

84. N.J.—Turner v. Cole, supra, quoting **Corpus Juris.**
22 C.J. p 235 note 37.

85. Tenn.—Couch v. Hoover, 79 S.W.2d 807, 18 Tenn.App. 523.

86. N.J.—Turner v. Cole, 173 A. 613, 116 N.J.Eq. 368, affirmed 179 A. 113, 118 N.J.Eq. 497.

87. Ala.—Laird v. Columbia Loan & Investment Co., 114 So. 208, 216 Ala. 619

§ 223. Declarations of Former Holder of Negotiable Paper

Declarations against interest of a former holder of negotiable paper may be admissible where the declarant is deceased or otherwise unavailable as a witness, provided his possession of the paper has first been proved by competent evidence.

The declarations against interest of a former holder of negotiable paper may be admissible where the declarant is deceased or otherwise unavailable as a witness.[88] In such a case the fact of possession of the paper must be independently proved before the declaration becomes admissible; the declaration is not competent to prove the fact of possession.[89]

§ 224. Form of Declaration

The form of a declaration against interest is ordinarily immaterial; it may be admitted whether it is oral, written, or printed.

A declaration against interest may be oral[90] or in writing,[91] there being no general distinction between the two forms of statement with regard to admissibility;[92] and such declarations may even be in printed form.[93]

Declarations against interest have been admitted when they appeared in accounts,[94] deeds,[95] entries,[96] evidence given on a former occasion,[97] indorsements,[98] inventories,[99] letters,[1] purported testamentary instruments,[2] receipts,[3] tax returns,[4] and in the enrollment of a vessel.[5] Admissions by contract have been treated as within the rule where the declarant has died.[6]

§ 225. Declarations in Course of Business or Performance of Duty

The authorities differ as to the admissibility of declarations made in the course of business or in the performance of a duty, or of conduct equivalent to such declarations; ordinarily written entries are, and oral declarations are not, admitted.

It has been laid down that entries made by a person in the ordinary course of his business, of acts which his duty in such business requires him to do, are, in case of his death,[7] or where he is otherwise

N.J.—Turner v. Cole, 173 A. 613, 116 N.J.Eq. 368, affirmed 179 A. 113, 118 N.J.Eq. 497.

Admissions made before or after parting with title see infra § 316.

Declarations of former or prospective owner generally see supra § 219.

Declaration made after parting with interest

Evidence of declarations of deceased wife that deed to husband was absolute, was erroneously admitted on question whether there was agreement by husband to convey to another where such declarations were made after she had conveyed the property and thus parted with her interest therein.—Taylor v. Bunnell, 247 P. 240, 77 Cal.App. 525.

Interest of a grantor conveying property by warranty deed is not sufficient for the admission of his declarations against interest made after conveyance.—Kurth v. Le Jeune, 269 P. 408, 83 Mont. 100.

88. N.C.—Currin v. Currin, 15 S.E. 2d 279, 219 N.C. 815.

Admissions of former holder of negotiable paper see infra § 333.

89. N.C.—Currin v. Currin, supra.

Holding note after maturity

In action on note by an alleged holder in due course, testimony concerning conversation had by maker and original payee tending to show that the original payee held the note after its maturity was held inadmissible under circumstances.—Currin v. Currin, supra.

90. Mont.—Kester v. Nelson, 10 P.2d 379, 92 Mont. 69—Gray v. Grant, 206 P. 410, 61 Mont. 452.

Or.—Goodin v. Cornelius, 200 P. 915, 101 Or. 422.

22 C.J. p 236 note 51.

91. Ohio.—Latham v. Clark, 166 N. E. 685, 686, 120 Ohio St. 559, citing **Corpus Juris.**

22 C.J. p 236 note 52.

92. Ohio.—Latham v. Clark, supra, citing **Corpus Juris.**

22 C.J. p 237 note 53.

93. Tex.—Southern Pac. Co. v. Allen, 106 S.W. 441, 48 Tex.Civ.App. 66.

Railroad folder

Tex.—Southern Pac. Co. v. Allen, supra.

94. Ala.—Hart v. Kendall, 3 So. 41, 82 Ala. 144.

22 C.J. p 237 note 55.

95. Tex.—Ryle v. Davidson, 115 S. W. 28, 102 Tex. 227.

96. S.C.—Wimberly v. Sovereign Camp, W. O. W., 2 S.E.2d 532, 190 S.C. 158.

22 C.J. p 237 note 58.

97. S.C.—Wilson v. Gordon, 53 S.E. 79, 73 S.C. 155.

98. Ky.—Fitzpatrick v. Dundon, 201 S.W. 339, 179 Ky. 784.

99. Cal.—In re Hill, 138 P. 690, 167 Cal. 59.

1. Tex.—Brewer v. Cochran, 99 S.W. 1033, 45 Tex.Civ.App. 179.

Wis.—Truelsch v. Northwestern Mut. Life Ins. Co., 202 N.W. 352, 186 Wis. 239, 38 A.L.R. 914.

Carbon copy

Where unsigned carbon copy of a signed letter, sought to be admitted, had been shown to witness and constituted a declaration of a decedent against interest, it was admissible, although not shown to have been mailed.—Gerkey v. Hampe, Mo.App., 274 S.W. 510.

2. N.Y.—Robinson v. Munn, 201 N. Y.S. 655, 206 App.Div. 576, reversed on other grounds 143 N.E. 784, 238 N.Y. 40.

Tex.—Tinker v. Yellow Cab Co., Civ. App., 74 S.W.2d 521, error dismissed.

Remission of debts

An instrument relating to deceased's property, not in proper form to be subject to probate, is inadmissible as a will, and hence insufficient to remit debts, but admissible to corroborate other evidence that a note and mortgage payable to decedent had been settled, since it was a declaration against interest, although not made to the debtor.—People's Sav. Bank v. McInturff, 227 S.W. 400, 147 Ark. 296.

3. N.H.—Rand v. Dodge, 17 N.H. 343.

22 C.J. p 237 note 64.

4. N.Y.—In re Brown's Estate, 190 N.Y.S. 184, 116 Misc. 483.

Income tax deduction

Item in decedent's income tax return, as part of salary deduction from gross business income, of an amount paid an employee, is evidence against his estate on the question of agreed compensation of employee.—In re Brown's Estate, supra.

5. Pa.—Hall v. The Ins. Co., 3 Phila. 331.

6. N.H.—Rand v. Dodge, 17 N.H. 343.

7. Colo.—Royal Indemnity Co. v. Industrial Commission, 293 P. 342, 88 Colo. 113.

unavailable as a witness,[8] admissible evidence of the act so done, although the entries are not against the interest of the person making them; but there are cases in which written declarations in the course of business have been rejected.[9]

Oral declarations. In the United States oral declarations made while the declarant was acting in the course of duty are generally excluded under the hearsay rule,[10] although there are cases in which such declarations have been admitted[11] where necessary to prevent a failure of justice.[12] In any event, irrelevant declarations are inadmissible.[13]

Conduct. It has been considered that the conduct of a person in the course of his official duties or business may be shown, although its only probative force consists in the fact that it implies a declaration to a particular effect;[14] but there is also authority for the contrary view.[15]

§ 226. Declarations as to Pedigree

a. In general
b. Proof of declarations

In General

As an exception to the rule excluding hearsay evidence, under proper conditions an unsworn statement is admissible on an issue of pedigree.

Subject to the limitations and restrictions considered infra §§ *227–232*, an unsworn statement of a competent declarant concerning matters of genealogy is, sometimes as a result of express statutory regulation, admissible,[16] unless it is irrele-

Pa.—Hazleton Casket Co. v. Turnbach, 33 Luz.Leg.Reg. 465.
22 C.J. p 237 note 72.
Admissibility as documentary evidence see infra §§ 683–691.

Exception to general principle

Rule that bills of lading, issued by master of vessel who has died, are admissible against buyer on issue of when goods were shipped, is exception to general principle that bill of lading is mere declaration of person who signs it, incompetent as proof of shipment against any one else.—London Produce Co. v. Poels & Brewster, 209 N.Y.S. 516, 124 Misc. 869, reversed on other grounds 215 N.Y.S. 485, 216 App Div. 424.

Writings as presumptive evidence under statute

In action on note executed by deceased, refusal to admit assessment rolls signed by deceased and containing no reference to note was not error under statute making deceased person's writings presumptive evidence only when made in performance of duty enjoined by law, since statute relating to assessments did not require listing of liabilities.—In re Cheney's Estate, 274 N.W. 5, 223 Iowa 1076.

8. Ark.—Bush v. Taylor, 207 S.W. 226, 136 Ark. 554.
Mo.—Toon v. David G. Evans Coffee Co., App., 103 S.W.2d 533.

9. Wis.—Manning v. Ft. Atkinson School Dist. No. 6, 102 N.W. 356, 124 Wis. 84.
22 C.J. p 237 note 73.

10. Colo.—Royal Indemnity Co. v. Industrial Commission, 293 P. 342, 344, 88 Colo. 113, quoting **Corpus Juris.**
22 C.J. p 237 note 77.
Hearsay rule see supra § 193.

Admission as proof of vital issue

In an action for damages for breach of defendant's contract to sell plaintiff a dental business, testimony of plaintiff buyer's former employer that at the time plaintiff claimed the contract with defendant was made he notified such employer that he was going to leave, and stated that he had made some arrangement with defendant, was erroneously admitted since plaintiff's declaration out of court was received as proof of the vital issue in the case that the contract had been made between him and defendant, and not as proof that the contract was being made.—Brown v. Salzberg, 188 N.Y.S. 813, 197 App.Div. 235.

11. Mich.—Wilcox v. Jenison, 164 N. W. 484, 198 Mich. 182.
22 C.J. p 238 note 78.

12. Ark.—Bush v. Taylor, 207 S.W. 226, 136 Ark. 554.

13. Colo.—Thomas v. Seloom, 250 P. 381, 80 Colo. 189.

14. Vt.—Meserve v. Folsom, 20 A. 926, 62 Vt. 504.
22 C.J. p 238 note 80.

15. Tex.—Stallings v. State, Cr., 63 S.W. 127.
22 C.J. p 238 note 81.

16. U.S.—Miami County Nat. Bank of Paola, Kan., v. Bancroft, C.C.A. Kan., 121 F.2d 921—Brewster v. Villa, C.C.A.Tex., 90 F.2d 853—U. S. v. Eng Suak Lun, C.C.A.Kan., 67 F.2d 307—U. S. v. Mid-Continent Petroleum Corporation, C.C.A.Okl., 67 F.2d 37, certiorari denied Hosey v. Mid-Continent Petroleum Corporation, 54 S.Ct. 346, 290 U.S. 702, 78 L.Ed. 603—U. S. v. Wallis, C.C.A.N.Y., 279 F. 401.
Ala.—Sheffield Iron Corporation v. Dennis, 86 So. 467, 204 Ala. 530.
Cal.—In re McNamara's Estate, 183 P. 552, 181 Cal. 82, 7 A.L.R. 313—In re Braig's Estate, App., 110 P. 2d 1066—In re Purcell's Estate, 53 P.2d 784, 11 Cal.App.2d 237—Rose v. San Diego Electric Ry. Co., 24 P.2d 838, 133 Cal.App. 646—In re Woolsey's Estate, 17 P.2d 767, 128 Cal.App. 391—In re Horgan's Estate, 268 P. 1090, 93 Cal.App. 36.
Conn.—Shea v. Hyde, 140 A. 486, 107 Conn. 287.
Del.—Pote v. Farren, 129 A. 238, 3 W.W.Harr. 1.
Ga.—Massell Realty Co. v. Hanbury, 141 S.E. 653, 165 Ga. 534—Estill v. Estill, 100 S.E. 365, 149 Ga. 384.
Hawaii.—Helekahi v. Laa, 32 Hawaii 1—Drummond v. Makaena, 30 Hawaii 116.
Ill.—Welch v. Worsley, 161 N.E. 493, 330 Ill. 172—Sugrue v. Crilley, 160 N.E. 847, 329 Ill. 458, certiorari denied 49 S.Ct. 20, 278 U.S. 616, 73 L.Ed. 539.
Ind.—Horner v. Boomershine, 161 N. E. 641, 88 Ind.App. 57—Castor v. McDole, 148 N.E. 643, 80 Ind.App. 556.
Kan.—Allen v. Protected Home Circle, 212 P. 95, 112 Kan. 576.
Ky.—New York Life Ins. Co. v. McQuie, 126 S.W.2d 458, 277 Ky. 268—Prudential Ins. Co. of America v. Pierce's Adm'x, 109 S.W.2d 616, 270 Ky. 216—Benham v. Kentucky Central Life & Accident Ins. Co., 38 S.W.2d 954, 240 Ky. 169.
La.—Succession of Marcour, 156 So. 198, 180 La. 129—Succession of Anderson, 145 So. 270, 176 La. 66.
Mich.—In re Wright's Estate, 211 N. W. 746, 237 Mich. 375—Livernash v. De Lorme, 175 N.W. 177, 208 Mich. 295—Kotzke v. Kotzke's Estate, 171 N.W. 442, 205 Mich. 184.
Minn.—Geisler v. Geisler, 200 N.W. 742, 160 Minn. 463.
Mo.—Osmak v. American Car & Foundry Co., 40 S.W.2d 714, 328 Mo. 159, 77 A.L.R. 722—Rauch v. Metz, 212 S.W. 357.
Mont.—In re Wray's Estate, 19 P.2d 1051, 93 Mont. 525.
N.J.—Barsotti v. Bertolino, 189 A. 659, 121 N.J.Eq. 346.
N.Y.—Morecroft v. Taylor, 234 N.Y. S. 2, 225 App.Div. 562—In re Hayden's Estate, 29 N.Y.S.2d 852, 176

vant.[17] This rule constitutes a well established exception to the hearsay rule.[18]

Such a declaration furnishes a probative inference of the truth of the facts directly asserted,[19] and is admissible as a matter of necessity because of the difficulty or inability of obtaining other evidence.[20] Such declarations have been regarded as primary evidence of the fact asserted.[21]

b. Proof of Declarations

Ordinarily declarations as to pedigree may not be proved by hearsay evidence or by affidavit; but, except for evidence of reputation which usually is limited to members of the family, any competent witness, including the person to whom the declaration relates, may testify thereto.

A declaration as to pedigree may not be proved by hearsay evidence.[22] Further, an affidavit containing evidence of the declaration is not admissible,[23] unless its reception is authorized by statute.[24]

Competency of witness. Any person who is a competent witness may testify on a matter of pedigree as to a declaration which was heard by him.[25]

Misc. 1078—In re Wood's Estate, 299 N.Y.S. 195, 164 Misc. 425—In re Glaser's Estate, 273 N.Y.S. 860, 151 Misc. 778—In re Whalen's Estate, 261 N.Y.S. 761, 146 Misc. 176—In re Mosley's Will, 247 N.Y.S. 520, 138 Misc. 847.
N.C.—Bowman v. Howard, 110 S.E. 98, 182 N.C. 662.
Okl.—In re Hamm's Estate, 99 P.2d 895, 186 Okl. 610—Cotcha v. Ferguson, 25 P.2d 789, 165 Okl. 152—In re McDade's Estate, 218 P. 532, 95 Okl. 120—O'Neill v. Lauderdale, 195 P. 121, 80 Okl. 170—Lauderdale v. O'Neill, 177 P. 113, 74 Okl. 119.
Or.—In re Wakefield's Estate, 87 P.2d 794, 161 Or. 330, rehearing denied 89 P.2d 592, 161 Or. 330—Garvin v. Western Cooperage Co., 184 P. 555, 94 Or. 487.
Pa.—In re McLaughlin's Estate, 29 Del Co. 478.
R.I.—Budlong v. Budlong, 136 A. 308, 48 R.I. 144.
Tex.—Smith v. Lynn, Civ.App., 152 S.W.2d 838—Skinner v. Vaughan, Civ.App., 103 S.W.2d 454—Hurley v. Hirsch, Civ.App., 66 S.W.2d 337, error dismissed—Gardenhire v. Gardenhire, Civ.App., 258 S.W. 1077—Smith v. McDowell, Civ.App., 240 S.W. 563.
Va.—Rawles v. Bazel, 126 S.E. 690, 141 Va. 734.
W.Va.—Prickett v. Frum, 132 S.E. 501, 101 W.Va. 217.
22 C.J. p 238 note 86, p 239 note 90.
Admissibility in criminal cases see Criminal Law § 722 b.

Corpus Juris cited for rules as to pedigree declarations.—Garner v. Wood, 4 S.E.2d 137, 140, 188 Ga. 463.

Strict legal proof not required

(1) Necessary limitation on number of witnesses who could have personal knowledge as to facts at once so precise and so personal as those of family history has required that these facts shall be provable under relaxed conditions.
Mo.—Shaw v. Tracy, 8 S.W. 434, 95 Mo. 531.
N.D.—In re Peterson, 134 N.W. 751, 22 N.D. 480.

(2) This is especially so when remote in point of time.—Howard v. Russell, 12 S.W. 525, 75 Tex. 171.

(3) "Kinship is proved in various ways, and the strict legal proof required for other issues is not demanded."—Morecroft v. Taylor, 234 N.Y.S. 2, 6, 225 App.Div. 562.

17. D.C.—Welch v. Lynch, 30 App. D.C. 122.
Ky.—New York Life Ins. Co. v. McQuie, 126 S.W.2d 458, 277 Ky. 268.

18. U.S.—U. S. v. Eng Suak Lun, C.C.A.Kan., 67 F.2d 307—U. S. v. Wallis, C.C.A.N.Y., 279 F. 401.
Del.—Pote v. Farren, Del.Super. 129 A. 238, 3 W.W.Harr. 1.
Hawaii.—Drummond v. Makaena, 30 Hawaii 116.
Ind.—Castor v. McDole, 148 N.E. 643, 80 Ind.App. 556.
Kan.—Allen v. Protected Home Circle, 212 P. 95, 112 Kan. 576.
Ky.—New York Life Ins. Co. v. McQuie, 126 S.W.2d 458, 277 Ky. 268—Benham v. Kentucky Central Life & Accident Ins. Co., 38 S.W.2d 954, 240 Ky. 169.
Mo.—Osmak v. American Car & Foundry Co., 40 S.W.2d 714, 328 Mo. 159, 77 A.L.R. 722.
N.J.—Barsotti v. Bertolino, 189 A. 659, 121 N.J.Eq. 346.
N.Y.—In re Hayden's Estate, 29 N.Y.S.2d 852, 176 Misc. 1078—In re Wood's Estate, 299 N.Y.S. 195, 164 Misc. 425—In re Mosley's Will, 247 N.Y.S. 520, 138 Misc. 847.
N.C.—Bowman v. Howard, 110 S.E. 98, 182 N.C. 662.
Okl.—In re Hamm's Estate, 99 P.2d 895, 186 Okl. 610.
R.I.—Budlong v. Budlong, 136 A. 308, 48 R.I. 144.
Tex.—Smith v. Lynn, Civ.App., 152 S.W.2d 838.
Va.—Rawles v. Bazel, 126 S.E. 690, 141 Va. 734.

Never included in hearsay rule

"It is commonly said that such evidence is an exception to the hearsay rule. It did not become an exception by a process of exclusion. It was never within the rule. The development of the hearsay rule did not proceed so far as to include it among the classes of testimony excluded."—Geisler v. Geisler, 200 N.W. 742, 743, 160 Minn. 463.

19. Cal.—In re Horgan's Estate, 268 P. 1090, 93 Cal.App. 36.
Kan.—Allen v. Protected Home Circle. 212 P. 95, 112 Kan. 576.
22 C.J. p 239 note 87.
Facts incidentally or inferentially stated see infra § 231.

20. U.S.—Brewster v. Villa, C.C.A. Tex., 90 F.2d 853.
Cal.—In re Braig's Estate, App., 110 P.2d 1066.
Hawaii.—Drummond v. Makaena, 30 Hawaii 116.
Mich.—Livernash v. De Lorme, 175 N.W. 177, 208 Mich. 295.
22 C.J. p 239 note 92.

21. Ill.—Jachrow v. Grosse, 100 N.E. 290, 257 Ill. 36, 42, Ann.Cas.1914 A. 820.
22 C.J. p 239 note 91.

22. N.Y.—People v. Miller, 63 N.Y.S. 949, 30 Misc. 355.

23. Tex.—Inland Waterways Pipe Line Co. v. Lipstate, Civ.App., 78 S.W.2d 240, error dismissed.

Reason for rule

Declaration must be offered by witness on witness stand or by deposition, so that he may be cross-examined regarding his means of knowledge and other matters of pertinent inquiry.—Inland Waterways Pipe Line Co. v. Lipstate, supra.

Affidavit on information and belief

Affidavit of stranger based only on information and belief is inadmissible.—Bernards Tp. v. Bedminster Tp., 64 A. 960, 74 N.J.Law 92.

24. **Affidavit on file for specified period**

Under a statute providing that affidavits concerning matters of family history which have been on file for a specified period shall be received as prima facie evidence of the facts therein stated, an affidavit not on file for the requisite period is not admissible.—Inland Waterways Pipe Line Co. v. Lipstate, Tex. Civ.App., 78 S.W.2d 240, error dismissed.

25. Cal.—In re Purcell's Estate, 53 P.2d 784, 11 Cal.App.2d 237.
N.Y.—In re Guilford's Will, 185 N.Y.S. 248.
22 C.J. p 253 note 8.

With regard to reputation in the family, however, although there is some authority to the contrary,[26] it is usually held that the reporting witness must be a member of the family by birth or marriage,[27] and that such reputation cannot be proved by neighbors[28] or other members of the community;[29] but a witness whose knowledge of family matters was derived from intimate acquaintance with the family may testify as to facts of family history, such evidence being personal knowledge rather than mere hearsay.[30]

Testimony concerning one's self. It has been held proper, where the evidence is otherwise competent, for one to testify to facts of family history which relate to him,[31] such as the identity of his parents,[32] or other relations,[33] or the place of his birth,[34] or, as appears in infra § 227 b, his age.

Conclusion of witness. Where it is desired to show a declaration as to pedigree, the statement itself must be given in evidence and it is not permissible for a witness to state his deduction therefrom,[35] except where claimant seeks to reach the estate of the declarant himself and not to establish a right through him to the property of others.[36]

§ 227. Subject Matter of Declaration

a. In general
b. Age
c. Death

a. In General

Declarations of pedigree may include, and are frequently admissible as evidence of, any notable facts in the family history, such as matters relating to birth, descent, heirship, etc.

The facts regarded as those of genealogy or pedigree, take a wide range, and embrace any notable fact in the life of a member of the family or in the family history.[37] Thus declarations may include and, except where it is required that there be a distinct issue of pedigree, see § 231 infra, are admissible as evidence of, matters relating to birth,[38] descent,[39] and such as evidence of matters relat-

Interested party
Under statute, an interested party cannot testify on behalf of estate as to deceased's statements.—Webber v. Stewart, 273 S.W. 438, 209 Ky. 598.

26. S.C.—McLain v. Woodside, 79 S.E. 1, 95 S.C. 152.
22 C.J. p 254 note 10 [a].

27. Vt.—In re Hurlburt, 35 A. 77, 68 Vt. 366, 35 L.R.A. 794.
22 C.J. p 254 note 10.
Relationship to family and proof thereof see infra § 229.
Family tradition is not within this restriction.—Carter v. Montgomery, 2 Tenn.Ch. 216.
Proof of relationship
Witness' relationship to family may be established by his own testimony.—Smith v. Henney, Tex.Civ.App., 54 S.W. 801.

28. Ala.—Elder v. State, 26 So. 213, 123 Ala. 35.
Miss.—Henderson v. Cargill, 31 Miss. 367.

29. Ala.—Elder v. State, 26 So. 213, 123 Ala. 35.
Ga.—Lamar v. Allen, 33 S.E. 958, 108 Ga. 158.

30. U.S.—U. S. v. Mid-Continent Petroleum Corporation, C.C.A.Okl., 67 F.2d 37, certiorari denied Hosey v. Mid-Continent Petroleum Corporation, 54 S.Ct. 346, 290 U.S. 702, 78 L.Ed. 603.
Minn.—Hoyt v. Lightbody, 108 N.W. 843, 98 Minn. 189, 116 Am.S.R. 358, 8 Ann.Cas. 984.
Okl.—In re Hamam's Estate, 99 P.2d 895, 186 Okl. 610—Frank v. Harjo, 286 P. 14, 142 Okl. 157—Neustadt v. Colline Oil Co., 284 P. 52, 141 Okl. 113, certiorari denied 51 S.Ct. 38, 282 U.S. 799, 75 L.Ed. 719.

31. Hawaii.—Helekahi v. Laa, 32 Hawaii 1.

32. Cal.—In re Ganes' Estate, 299 P. 550, 114 Cal.App. 17.
N.Y.—In re Findlay, 170 N.E. 471, 253 N.Y. 1, reversing In re Findlay's Adm'rs, 236 N.Y.S. 489, 226 App.Div. 638.

33. Hawaii.—Helekahi v. Laa, 32 Hawaii 1.
Mont.—State v. Bowser, 53 P. 179, 21 Mont. 133.
Neb.—Comstock v. State, 15 N.W. 355, 14 Neb. 205.

34. U.S.—Lee Hin v. U. S., C.C.A. Hawaii, 74 F.2d 172—U. S. v. Tod, C.C.A.N.Y., 296 F. 345.

35. Ga.—Mobley v. G. S. Baxter & Co., 85 S.E. 859, 143 Ga. 565.
22 C.J. p 254 note 14.

36. Okl.—Isaac v. Phillips, 232 P. 41, 105 Okl. 82.

37. Mo.—Rauch v. Metz, 212 S.W. 357.
Declarations as evidence of legitimacy or illegitimacy see Bastards § 5 c-e.
Corpus Juris cited for the statement as to what constitutes pedigree.—Plunket v. Simmons, Tex.Civ.App., 63 S.W.2d 313, 315, error dismissed.
Absence of limitation as to kind of fact
"There is in truth no definite or formal limitation as to the kind of fact that may be the subject of the statement. The general inquiry should be: Were the circumstances named in the statement such a marked item in the ordinary family history and so interesting to the family in common that statements about them in the family would be likely to be based on fairly accurate knowledge and to be sincerely uttered?"—Rauch v. Metz, Mo., 212 S.W. 357, 362.

38. U.S.—Brewster v. Villa, C.C.A. Tex., 90 F.2d 853.
Ala.—Sheffield Iron Corporation v. Dennis, 86 So. 467, 204 Ala. 530.
Ga.—Massell Realty Co. v. Hanbury, 141 S.E. 653, 165 Ga. 534.
Ky.—Prudential Ins. Co. of America v. Pierce's Adm'x, 109 S.W.2d 616, 270 Ky. 216—Benham v. Kentucky Central Life & Accident Ins. Co., 38 S.W.2d 954, 240 Ky. 169.
La.—Succession of Marcour, 156 So. 198, 180 La. 129.
Okl.—Cotcha v. Ferguson, 25 P.2d 789, 165 Okl. 152—In re McDade's Estate, 218 P. 532, 95 Okl. 120.
Pa.—Simon v. New York Life Ins. Co., 70 Pa.Super. 408.
Tex.—Gardenhire v. Gardenhire, Civ.App., 258 S.W. 1077.
22 C.J. p 240 note 95.
Place of birth
U.S.—Lee Hin v. U. S., C.C.A.Hawaii, 74 F.2d 172—U. S. v. Tod, C.C.A. N.Y., 296 F. 345—U. S. v. Wallis, C.C.A.N.Y., 279 F. 401.

39. U.S.—U. S. v. Mid-Continent Petroleum Corporation, C.C.A.Okl., 67 F.2d 37, certiorari denied Hosey v. Mid-Continent Petroleum Corporation, 54 S.Ct. 346, 290 U.S. 702, 78 L.Ed. 603.
Ala.—Sheffield Iron Corporation v. Dennis, 86 So. 467, 204 Ala. 530.
Ga.—Massell Realty Co. v. Hanbury, 141 S.E. 653, 165 Ga. 534.

ing to heirship,[40] failure of heirs,[41] issue or want of issue,[42] marriage[43] or celibacy,[44] name,[45] and parentage[46] or other relationship,[47] as well as the degree thereof.[48] However, it has been held not to include a description of the physical characteristics of a relative,[49] or a statement as to the residence of a former owner of certain premises.[50]

Particular relationships. Among the relationships stated by the declarant may be that of father,[51] mother,[52] father-in-law,[53] mother-in-law,[54] grandfather,[55] and brother or sister.[56] Likewise, among

Ky.—Benham v. Kentucky Central Life & Accident Ins. Co., 38 S.W. 2d 954, 240 Ky. 169.
La.—Succession of Marcour, 156 So. 198, 180 La. 129.
Pa.—Simon v. New York Life Ins. Co., 70 Pa.Super. 408.
22 C.J. p 240 note 97.

40. U.S.—Miami County Nat. Bank of Paola, Kan., v. Bancroft, C.C.A. Kan., 121 F.2d 921—U. S. v. Mid-Continent Petroleum Corporation, C.C.A.Okl., 67 F.2d 37, certiorari denied Hosey v. Mid-Continent Petroleum Corporation, 54 S.Ct. 346, 290 U.S. 702, 78 L.Ed. 603.
Cal.—In re Barton's Estate, 60 P.2d 471, 16 Cal.App.2d 246, motion denied 67 P.2d 695, 20 Cal.App.2d 648—Rose v. San Diego Electric Ry. Co., 24 P.2d 838, 133 Cal.App. 646.
Md.—Hendrickson v. Attick, 109 A. 468, 136 Md. 1.
Mont.—Welch v. All Persons, etc., 254 P. 179, 78 Mont. 370.
Tex.—Skinner v. Vaughan, Civ.App., 103 S.W.2d 454.
Wyo.—In re Black's Estate, 216 P. 1059, 1067, 30 Wyo. 55, citing **Corpus Juris.**
18 C.J. p 873 note 55—22 C.J. p 240 note 98.

Testimony of heirs named by witnesses as to who else were heirs and next of kin of testatrix was held not inadmissible as hearsay, since hearsay is sometimes the only available method of proving kinship.—Hathaway v. North, 1 So.2d 490, 190 Miss. 697.

41. Cal.—In re Morgan's Estate, 265 P. 241, 203 Cal. 569.
22 C.J. p 240 note 99.

42. U.S.—U. S. v. Mid-Continent Petroleum Corporation, C.C.A.Okl., 67 F.2d 37, certiorari denied Hosey v. Mid-Continent Petroleum Corporation, 54 S.Ct. 346, 290 U.S. 702, 78 L.Ed. 603.
22 C.J. p 240 note 1.

43. U.S.—Brewster v. Villa, C.C.A. Tex., 90 F.2d 853—U. S. v. Mid-Continent Petroleum Corporation, C.C.A.Okl., 67 F.2d 37, certiorari denied Hosey v. Mid-Continent Petroleum Corporation, 54 S.Ct. 346, 290 U.S. 702, 78 L.Ed. 603.
Ala.—Sheffield Iron Corporation v. Dennis, 86 So. 467, 204 Ala. 530.
Ga.—Massell Realty Co. v. Hanbury, 141 S.E. 653, 165 Ga. 534.
Ky.—Benham v. Kentucky Central Life & Accident Ins. Co., 38 S.W.2d 954, 240 Ky. 169.
La.—Succession of Marcour, 156 So. 198, 180 La. 129.
Mo.—Osmak v. American Car & Foundry Co., 40 S.W.2d 714, 328 Mo. 159, 77 A.L.R. 722.
Okl.—Cotcha v. Ferguson, 25 P.2d 789, 165 Okl. 152—In re McDade's Estate, 218 P. 532, 95 Okl. 120.
Pa.—Simon v. New York Life Ins. Co., 70 Pa.Super. 408.
22 C.J. p 241 note 4.
Evidence of marriage generally see the C.J.S. title Marriage § 44, also 38 C.J. p 1330 note 94—p 1345 note 97.

44. N.Y.—Jacobs v. Fowler, 119 N.Y.S. 647, 135 App.Div. 713.
Tex.—Hintze v. Krabbenschmidt, Civ. App., 44 S.W. 38.

45. U.S.—U. S. v. Mid-Continent Petroleum Corporation, C.C.A.Okl., 67 F.2d 37, certiorari denied Hosey v. Mid-Continent Petroleum Corporation, 54 S.Ct. 346, 290 U.S. 702, 78 L.Ed. 603.
W.Va.—Prickett v. Frum, 132 S.E. 501, 101 W.Va. 217.
22 C.J. p 241 note 6.

46. U.S.—U. S. v. Mid-Continent Petroleum Corporation, C.C.A.Okl., 67 F.2d 37, certiorari denied Hosey v. Mid-Continent Petroleum Corporation, 54 S.Ct. 346, 290 U.S. 702, 78 L.Ed. 603.
Cal.—In re Purcell's Estate, 53 P.2d 784, 11 Cal.App.2d 237—In re Ganes' Estate, 299 P. 550, 114 Cal. App. 17.
Ga.—Estill v. Estill, 100 S.E. 365, 149 Ga. 384.
Ill.—Welch v. Worsley, 161 N.E. 493, 330 Ill. 172—In re Healea's Estate, 254 Ill.App. 334.
Ind.—Horner v. Boomershine, 161 N.E. 641, 88 Ind.App. 57—Castor v. McDole, 148 N.E. 643, 80 Ind.App. 556.
Iowa.—Pike v. Standage, 175 N.W. 12, 187 Iowa 1152.
Mich.—In re Wright's Estate, 211 N.W. 746, 237 Mich. 375.
N.J.—Barsotti v. Bertolino, 189 A. 659, 121 N.J.Eq. 346
N.Y.—In re Findlay, 170 N.E. 471, 253 N.Y. 1, reversing In re Findlay's Adm'rs, 236 N.Y.S. 489, 226 App.Div. 638.
Pa.—Simon v. New York Life Ins. Co., 70 Pa.Super. 408.
Tex.—Davis v. Williams, Civ.App., 144 S.W.2d 445, error dismissed, Sup., 146 S.W.2d 982—Skinner v. Vaughan, Civ.App., 103 S.W.2d 454—Smith v. McDowell, Civ.App., 240 S.W. 563.
22 C.J. p 241 note 7.

47. U.S.—Miami County Nat. Bank of Paola, Kan., v. Bancroft, C.C.A. Kan., 121 F.2d 921—U. S. v. Mid-Continent Petroleum Corporation, C.C.A.Okl., 67 F.2d 37, certiorari denied Hosey v. Mid-Continent Petroleum Corporation, 54 S.Ct. 346, 290 U.S. 702, 78 L.Ed. 603.
Ala.—Sheffield Iron Corporation v. Dennis, 86 So. 467, 204 Ala. 530.
Cal.—In re Horgan's Estate, 268 P. 1090, 93 Cal.App. 36.
Ga.—Massell Realty Co. v. Hanbury, 141 S.E. 653, 165 Ga. 534.
Hawaii.—Helekahi v. Laa, 32 Hawaii 1.
Ind.—Scott v. State, 34 N.E. 219, 77 Ind.App. 606.
Iowa.—In re Frey's Estate, 224 N.W. 597, 207 Iowa 1229.
Ky.—Benham v. Kentucky Central Life & Accident Ins. Co., 38 S.W. 2d 954, 240 Ky. 169.
La.—Succession of Marcour, 156 So. 198, 180 La. 129.
Md.—Walkup v. Pratt, 5 Harr. & J. 51.
Mo.—Rauch v. Metz, 212 S.W. 357.
N.Y.—In re Glaser's Estate, 273 N.Y.S. 860, 151 Misc. 778.
Pa.—Simon v. New York Life Ins. Co., 70 Pa.Super. 408.
22 C.J. p 241 note 8.

48. U.S.—U. S. v. Mid-Continent Petroleum Corporation, C.C.A.Okl., 67 F.2d 37, certiorari denied Hosey v. Mid-Continent Petroleum Corporation, 54 S.Ct. 346, 290 U.S. 702, 78 L.Ed. 603.
22 C.J. p 241 note 9.

49. Tex.—Plunkett v. Simmons, Civ. App., 63 S.W.2d 313, error dismissed.

50. N.Y.—Tevlin v. Kessman, 213 N.Y.S. 921, 215 App.Div. 844.

51. Iowa.—Hays v. Claypool, 145 N.W. 874, 164 Iowa 297.
22 C.J. p 241 note 10.

52. Tex.—Wren v. Howland, 75 S.W. 894, 33 Tex.Civ.App. 87.
22 C.J. p 242 note 13.

53. U.S.—Jewell v. Jewell, S.C., 1 How. 219, 11 L.Ed. 108.

54. U.S.—Jewell v. Jewell, supra.

55. N.H.—South Hampton v. Fowler, 54 N.H. 197.
Tex.—Brown v. Lazarus, 25 S.W. 71, 5 Tex.Civ.App. 81.

56. Cal.—In re Hartman, 107 P. 105, 157 Cal. 206, 36 L.R.A.,N.S., 530, 21 Ann.Cas. 1302.
22 C.J. p 242 note 15.

the relationships stated may be that of husband,[57] wife,[58] child,[59] grandchild,[60] uncle,[61] nephew,[62] and niece.[63] The declarant may state his own relationship to the family.[64]

The pedigree of an animal may, it has been held, be established by hearsay evidence or general reputation.[65]

b. Age

Declarations which meet the requirements of the pedigree rule may include, and frequently are admissible as evidence of, the age of a person. A witness may testify to his own age.

Hearsay evidence is not admissible to prove the age of another.[66]

However, under the pedigree rule, age is regarded as a genealogical fact, and declarations which meet the requirements of that rule, see §§ 228–232 infra, may include, and ordinarily are admissible as evidence of, the age of a person,[67] although in some jurisdictions the admissibility of such declarations to prove age depends on the existence of a distinct issue of pedigree.[68] Reputation in the family[69] and family tradition[70] are admissible to prove age; and it has been held that members of the family of the person in question,[71] or others having an intimate

57. D.C.—Green v. Norment, 16 D. C. 80.
22 C.J. p 242 note 16.

58. U.S.—Blackburn v. Crawford, Md., 3 Wall. 175, 18 L.Ed. 186.
22 C.J. p 242 note 17.

59. Ark.—Brooks v. Turner, 201 S. W. 809, 133 Ark. 72.
22 C.J. p 242 note 18.

60. U.S.—Vezina v. U. S., Minn., 245 F. 411, 157 C.C.A. 573.
22 C.J. p 242 note 19.

61. Mich.—Fraser v. Jennison, 3 N. W. 882, 42 Mich. 206.

62. Cal.—Taylor v. McCowen, 99 P. 351, 154 Cal. 798.
22 C.J. p 242 note 21.

63. Ga.—Malone v. Adams, 39 S.E. 507, 113 Ga. 791, 84 Am.S.R. 259.
N.C.—Moffit v. Witherspoon, 32 N.C. 185.

64. Pa.—Simon v. New York Life Ins. Co., 70 Pa.Super. 408.
22 C.J. p 242 note 23.

65. Tenn.—Citizens' Rapid Transit Co. v. Dew, 45 S.W. 790, 100 Tenn. 317, 66 Am.S.R. 754, 40 L.R.A. 518.
22 C.J. p 242 note 30.

Corpus Juris cited in a case holding that a certificate of registration of cattle is inadmissible in the absence of evidence of genuineness.—Texas Pipe Line Co. v Sheffield, Tex. Civ.App., 99 S.W.2d 684.

66. Ga.—Garner v. Wood, 4 S.E.2d 137, 188 Ga. 463.
N.J.—Kiely v. MacMurray, 139 A. 343, 5 N.J.Misc. 1091.

67. U.S.—U. S. v. Mid-Continent Petroleum Corporation, C.C.A.Okl., 67 F.2d 37, certiorari denied Hosey v. Mid-Continent Petroleum Corporation, 54 S.Ct. 346, 290 U.S. 702, 78 L.Ed. 603.
Ark.—United Order of Good Samaritans v. Lomax, 288 S.W. 709, 172 Ark. 330.
N.C.—Keller v. Caldwell Furniture Co., 154 S.E. 674, 199 N.C. 413.
Pa.—Hardy v. State Mut. Ben. Soc., 170 A. 704, 111 Pa.Super. 336—Simon v. New York Life Ins. Co., 70 Pa.Super. 408.
22 C.J. p 239 note 94.

Proof of age in criminal cases see Criminal Law § 722 a.

Making and marking of birthday cake
Vt.—Parkhurst v. Krellinger, 38 A. 67, 69 Vt. 375.
22 C.J. p 250 note 58 [a].

Corroborative evidence
Without reference to the restrictions of the pedigree rule, an undertaker's record and a newspaper article have been held admissible to corroborate other evidence as to age.—Succession of Marcour, 156 So. 198, 180 La. 129.

Pedigree in issue
No question of pedigree need be involved.—State v. Bowman, 213 S.W. 64, 278 Mo. 492.

Requirements not met
Mo.—State v. Bowman, 213 S.W. 64, 278 Mo. 492.
Tex.—Jung v. Harris, Civ.App., 231 S.W. 335.
22 C.J. p 171 notes 61–63.

Age of declarant
(1) Evidence of statement of deceased as to his age is admissible to prove his age.—National Aid Life Ass'n v. Morgan, 32 P.2d 288, 168 Okl. 226—Oklahoma Union Ins. Co. v. Morgan, 32 P.2d 285, 168 Okl. 228—Bell v. Bearman, 133 P. 188, 37 Okl. 645.

(2) Definite statements or declarations of person whose age is in question, made by him during his lifetime on solemn occasions when it was his bounden duty to speak the truth, and when there was no motive on his part to speak other than the truth, are admissible.—Messina v. New York Life Ins. Co., 161 So. 462, 173 Miss. 378.

(3) In an action on a life insurance policy, declarations of insured as to his age are admissible.
Ky.—New York Life Ins. Co. v. McQuie, 126 S.W.2d 458, 277 Ky. 268.
Miss.—Life & Casualty Ins. Co. v. Parker, 161 So. 465, 173 Miss. 180, citing **Corpus Juris.**
N.Y.—Kass v. Metropolitan Life Ins. Co., 300 N.Y.S. 193, 252 App.Div. 888, affirmed 15 N.E.2d 671, 278 N. Y. 512.
22 C.J. p 239 note 94 [a] (1)—37 C.J. p 627 notes 19–21.

68. Mo.—Tuite v. Supreme Forest W. C., 187 S.W. 137, 193 Mo.App. 619.
N.Y.—Kass v. Metropolitan Life Ins. Co., 300 N.Y.S. 193, 252 App.Div. 888, affirmed 15 N.E.2d 671, 278 N. Y. 512.
Ohio.—Pickering v. Peskind, 183 N.E. 301, 43 Ohio App. 401.
Okl.—National Aid Life Ass'n v. Wiles, 41 P.2d 655, 171 Okl. 57.
22 C.J. p 171 notes 61–63.
Necessity that pedigree be in issue and proof of pedigree as incidentally proving age see infra § 231.

69. Ga.—Metropolitan Life Ins. Co. v. Saul, 5 S.E.2d 214, 189 Ga. 1.
22 C.J. p 248 note 22.
Composite statements as to pedigree see infra § 232 b.

70. Ky.—Benham v. Kentucky Central Life & Accident Ins. Co., 38 S.W.2d 954, 240 Ky. 169.
Minn.—Rosenthal v. Supreme Ruling F. M. C., 152 N.W. 404, 129 Minn. 214.
Tex.—National Life & Accident Ins. Co. v. Harris, Civ.App., 118 S.W.2d 838—Jaffe v. Deckard, Civ.App., 261 S.W. 390.

71. Ark.—Foreman v. Dickinson, 6 S. W.2d 829, 177 Ark. 121—Ault v. McGaughey, 292 S.W. 359, 173 Ark. 322.
Ill.—Chicago & A. R. Co. v. Lewondowski, 60 N.E. 497, 190 Ill. 301.
Md.—City of Baltimore v. State, 126 A. 130, 146 Md. 440.

Brother
Mich.—Fontana v. Ford Motor Co., 270 N.W. 266, 278 Mich. 199.

Wife
Neb.—Grand Lodge A. O. U. W. v. Bartes, 98 N.W. 715, 69 Neb. 631, 111 Am.S.R. 577, vacating 96 N.W. 186, 69 Neb. 631, 111 Am.S.R. 577.

Mother or sister
Neb.—George v. State, 85 N.W. 840, 61 Neb. 669.

acquaintance with the family,[72] may testify as to age, although their testimony is based on family tradition or reputation.[73]

Testimony as to own age. Although his testimony be confessedly based on hearsay,[74] direct or composite,[75] a witness may testify to his own age,[76] as this is a fact of which he may be said to have knowledge based on family tradition.[77]

Such testimony has been regarded as original, direct, and primary evidence.[78] It is admissible without regard to other or better evidence which has been introduced or which is available,[79] and it is immaterial that the witness' parents are alive and available, or that they actually testify.[80]

c. Death

Authorities differ as to whether death may be proved by hearsay evidence apart from the pedigree rule, although declarations which meet the requirements of the pedigree rule may include, and ordinarily are admissible as evidence of, the death of a person.

While in some cases it has been broadly held, without reference to the pedigree rule, that death may be proved by hearsay evidence,[81] according to other cases hearsay evidence is inadmissible to prove death,[82] at least where the fact is susceptible of definite proof and is of recent occurrence.[83] However, under the pedigree rule death is regarded as a genealogical fact, and declarations which meet the requirements of that rule, see §§ 228–232 infra,

72. Ill.—Chicago & A. R. Co. v. Lewondowski, 60 N.E. 497, 190 Ill. 301
22 C.J. p 172 note 68.
Opinion evidence of age see infra § 493.

73. Ark.—Ault v. McGaughey, 292 S.W. 359, 173 Ark. 322.
Neb.—Grand Lodge A. O. U. W. v. Bartes, 98 N.W. 715, 69 Neb. 631, 111 Am.S.R. 577, vacating 96 N.W. 186, 69 Neb. 631, 111 Am.S.R. 577.
22 C.J. p 172 note 68, p 248 note 22.

74. Ark.—Terry Dairy Co. v. Nalley, 225 S.W. 887, 146 Ark. 448, 12 A.L.R. 1208
Okl.—Mandler v. Harvey, 249 P. 391, 119 Okl. 185
Pa.—Commonwealth ex rel. Park v. Joyce, 175 A. 422, 316 Pa. 434.
22 C.J. p 171 note 56.

Partially based on hearsay
Tex.—Johnson v. State, 59 S.W. 898, 42 Tex.Cr. 298.
22 C.J. p 171 note 55.

75. Mont.—State v. Bowser, 53 P. 179, 21 Mont. 133.
22 C.J. p 171 note 57.

76. U.S.—U. S. v. Tod, C.C.A.N.Y., 296 F. 345.
Ariz.—Dutzler v. State, 19 P.2d 326, 327, 41 Ariz. 436, quoting **Corpus Juris.**
Ark.—Foreman v. Dickinson, 6 S.W. 2d 829, 177 Ark 121—Terry Dairy Co. v. Nalley, 225 S.W. 887, 146 Ark. 448, 12 A.L.R. 1208.
Conn.—Creer v. Active Automobile Exch., 121 A. 888, 99 Conn. 266.
Md.—City of Baltimore v. State, 126 A. 130, 146 Md. 440.
Mich.—Fontana v. Ford Motor Co., 270 N.W. 266, 278 Mich. 199.
N.J.—Hancock v. Supreme Council Catholic Benev. Legion, 55 A. 246, 69 N.J.Law 308.
N.Y.—Ginsburgh v. Solomon, 123 N.Y.S. 246.
Okl.—Mandler v. Harvey, 249 P. 391, 119 Okl. 185.
Pa.—Commonwealth ex rel. Park v. Joyce, 175 A. 422, 423, 316 Pa. 434, citing **Corpus Juris**—Simon v. New York Life Ins. Co., 70 Pa.Super. 408.
R.I.—Correy v. Michaelovitch, 128 A. 673, 46 R.I. 387, 39 A.L.R. 374, citing **Corpus Juris.**
Tex.—Coleman v. Buttram, Civ.App., 40 S.W.2d 977—Lewis v. State, Cr., 64 S.W. 240.
22 C.J. p 171 note 58.
Competency of witnesses as to pedigree see supra § 226 b.

77. Mo.—State v. Marshall, 36 S.W. 619, 39 S.W. 63, 137 Mo. 463.

78. Pa.—Commonwealth ex rel. Park v. Joyce, 175 A. 422, 316 Pa. 434.

Best evidence
Such evidence is the best evidence, and is not secondary evidence.—Fontana v. Ford Motor Co., 270 N.W. 266, 278 Mich. 199—Morrison v. Emsley, 19 N.W. 187, 53 Mich. 564.

79. Pa.—Commonwealth ex rel. Park v. Joyce, 175 A. 422, 316 Pa. 434.

80. Okl.—Mandler v. Harvey, 249 P. 391, 119 Okl. 185
Pa.—Commonwealth ex rel. Park v. Joyce, 175 A. 422, 316 Pa. 434.
22 C.J. p 171 note 58 [d].

81. N.Y.—Jackson ex dem. Miner v. Boneham, 15 Johns. 226.
17 C.J. p 1176 note 34.

Letters relating disappearance as admissible
Letters written by members and acquaintances of the family concerning their knowledge of the disappearance and absence of one of the members of the family are admissible in evidence.
Kan.—Allen v. Protected Home Circle, 212 P. 95, 112 Kan. 576.
Mass.—Hanzes v. Flavio, 135 N.E. 612, 234 Mass. 320.

Information gained from one not member of family
Evidence of a witness that he was told that a certain person was dead is not sufficient to prove such death, where the person who told him so was not a member of the family of the person supposed to be dead, and it is not shown what means he had of knowing the fact.—Dudley v. Grayson, 6 T.B.Mon., Ky., 259—17 C.J. p 1177 note 36.

82. Mo.—Bailey v. Metropolitan Life Ins. Co., App., 115 S.W.2d 151, certiorari quashed State ex rel. Metropolitan Life Ins. Co. v. Shain, 121 S.W.2d 789, 343 Mo. 435.

In Texas
(1) Evidence as to result of inquiries made by witness in counties where certain person once lived and was last heard of is inadmissible as hearsay on issue of his death.—Soria v. American Nat. Ins. Co., Tex.Civ.App., 57 S.W.2d 321.

(2) However, it has been held that death may be proved by hearsay.—Western Union Telegraph Co. v. Alred, Tex.Civ.App., 4 S.W.2d 666, error refused, followed in Western Union Telegraph Co. v. Hill, Tex.Civ.App., 4 S.W.2d 668, error refused—York v. Hilger, Civ.App., 84 S.W. 1117.

(3) Evidence that witness was informed by a person, since dead, of the death of another person is admissible.—Turner v. Sealock, 54 S.W. 358, 21 Tex.Civ.App. 594.

83. N.Y.—Fosgate v. Herkimer Mfg. & Hydraulic Co., 12 Barb. 352, affirmed 12 N.Y. 580.

Where there is positive evidence of individual's death, hearsay evidence may be excluded.—Williams v. Alabama Fuel & Iron Co., 102 So. 136, 212 Ala. 159.

After lapse of time
Hearsay evidence as proof of death is admissible only after a considerable lapse of time.—Stouvenel v. Stephens, 26 How.Pr.N.Y., 244—17 C.J. p 1177 note 39.

Declaration by administrator out of court as to date of death has no probative force as evidence of death or time of death.—Harris v. State Bank, 97 N.Y.S. 1044, 49 Misc. 458.

Finding and burial of body
Hearsay evidence of finding and burial of body of person is inadmissible.—Jackson v. Etz, 5 Cow.,N.Y., 314.

may include, and ordinarily are admissible as evidence of, the death of a person,[84] although in some jurisdictions the admissibility of such declarations to prove death depends on the existence of a distinct issue of pedigree.[85]

A newspaper announcement of the death of an individual is not admissible to prove the fact of such person's death.[86]

Composite statements. While a mere rumor or belief that a person died at a certain time is no evidence of his being dead,[87] at least where the source of the rumor is not stated,[88] yet evidence of reputation in the family[89] or in the community,[90] or family tradition,[91] has been held admissible to establish the fact of death, provided there has been a considerable lapse of time.[92]

Cause or manner of death. Hearsay evidence is inadmissible to prove the manner or cause of death, as, for example, to prove suicide.[93]

§ 228. Competency of Declarant in General

To render declarations as to pedigree admissible, it must appear that declarant would have been qualified as a witness, that he had mental capacity, had knowledge of the facts stated, and was free of any motive to misrepresent the facts.

In order to render declarations as to pedigree admissible, it must appear that the declarant would

84. U.S.—Brewster v. Villa, C.C.A. Tex., 90 F.2d 853—U. S. v. Mid-Continent Petroleum Corporation, C.C.A.Okl., 67 F.2d 37, certiorari denied Hosey v. Mid-Continent Petroleum Corporation, 54 S.Ct. 346, 290 U.S. 702, 78 L.Ed. 603—U. S. v. Wallis, C.C.A.N.Y., 279 F. 401.
Ala.—Sheffield Iron Corporation v. Dennis, 86 So. 467, 204 Ala. 530.
Cal.—In re Paulsen's Estate, 178 P. 143, 179 Cal. 528—In re Newman's Estate, 94 P.2d 356, 34 Cal.App.2d 706.
Ga.—Massell Realty Co. v. Hanbury, 141 S.E. 653, 165 Ga. 534—Piedmont Hotel Co. v. Henderson, 72 S.E. 51, 9 Ga.App. 672.
Ill.—Spencer v. Means, 231 Ill.App. 351.
Kan.—Allen v. Protected Home Circle, 212 P. 95, 112 Kan. 576.
Ky.—Benham v. Kentucky Central Life & Accident Ins. Co., 38 S.W.2d 954, 240 Ky. 169.
La.—Succession of Marcour, 156 So. 198, 180 La. 129.
Minn.—In re Gravunder's Estate, 263 N.W. 458, 195 Minn. 487.
N.Y.—Fosgate v. Herkimer Mfg. & Hydraulic Co., 12 Barb. 352, affirmed 12 N.Y. 580—People v. Miller, 63 N.Y.S. 949, 30 Misc. 355, 14 N.Y.Cr. 407.
Okl.—Cotcha v. Ferguson, 25 P.2d 789, 165 Okl. 152—In re McDade's Estate, 218 P. 532, 95 Okl. 120.
Pa.—Simon v. New York Life Ins. Co., 70 Pa.Super. 408.
22 C.J. p 240 note 96.

Pedigree in issue
No question of pedigree need be involved.
Ark.—Wilson v. Brownless, 24 Ark. 586, 91 Am.D. 523.
Ind.—Metropolitan Life Ins. Co. v. Lyons, 98 N.E. 824, 50 Ind.App. 534.
Tex.—Primm v. Stewart, 7 Tex. 178.

Requirements not met
Ga.—Cone v. Lythgoe, 150 S.E. 465, 40 Ga.App. 491.
Iowa.—Carns v. Crandall, 10 Iowa 377.
Tex.—Carter v. Barnes, Com.App., 25 S.W.2d 606, reversing, Civ.App., 16 S.W.2d 136.

Entries in family Bible
Testimony as to entries in a family Bible have been held admissible to prove the death of members of family.—Secrist v. Green, Ill., 3 Wall., U.S., 744, 18 L.Ed. 153.

Recital in deed
A recital in a deed that the record owner of the fee is dead and that one of the subscribing grantors is her daughter and heir at law is admissible to prove the death of such person, the deed being signed not only by the daughter but by the brothers and sisters of the person alleged to be dead, since the oral declarations of the persons so related would be competent proof of the death—Postlewaite v. Wise, 17 W.Va. 1.

85. Mo.—Bailey v. Metropolitan Life Ins. Co., App., 115 S.W.2d 151, certiorari quashed State ex rel. Metropolitan Life Ins. Co. v. Shain, 121 S.W.2d 789, 343 Mo. 435.
Necessity that pedigree be in issue and proof of pedigree as incidentally proving facts relating to death see infra § 231.

86. N.J.—James Mitchell, Inc., v. Kreuger's Unknown Executors, 163 A. 10, 12, 10 N.J.Misc. 1176, citing **Corpus Juris.**
N.Y.—Fosgate v. Herkimer Mfg. & Hydraulic Co., 9 Barb. 287.

87. Ill.—Gayton v. Equitable Life Assur. Soc. of U. S., 245 Ill.App. 432.
N.Y.—Vought v. Williams, 46 Hun 638, affirmed 24 N.E. 195, 120 N.Y. 253, 8 L.R.A. 591, 17 Am.S.R. 634.
Tex.—Tarwater v. Donley County State Bank, Civ.App., 277 S.W. 176.
17 C.J. p 1177 note 41.
Composite statements as to pedigree see infra § 232 b.

Rumor that person is alive as proof
Where an individual is presumed dead, a mere rumor that he is not dead, but has absconded for the purpose of defrauding the insurance company, will not justify a refusal to pay the loss.—Travelers' Ins. Co. v. Sheppard, 12 S.E. 18, 85 Ga. 751.

88. Ill.—Lichtenhan v. Prudential Ins. Co. of America, 191 Ill.App. 412.

89. Ill.—Spencer v. Means, 231 Ill. App. 351.
Ind.—Metropolitan Life Ins. Co. v. Lyons, 98 N.E. 824, 50 Ind.App. 534.
Tex.—Tarwater v. Donley County State Bank, Civ.App., 277 S.W. 176.
22 C.J. p 249 note 24.

90. Ky.—Ewing's Heirs v. Savary, 3 Bibb 235.
Tex.—Primm v. Stewart, 7 Tex. 178—Houston City St. R. Co. v. Richart, Civ.App., 27 S.W. 920.
17 C.J. p 1177 note 43.

Mere repute has been held inadmissible to prove death.—Prout v. McNab, 6 Dem.Surr., N.Y., 152.

Competency of witness
Evidence of reputation of death of person given by one who did not even live in same state was not admissible to establish death.—Denbo v. Boyd, 185 S.W. 236, 194 Mo.App. 121.

91. Ala.—Cavin v. Cavin, 185 So. 741, 237 Ala. 185.
22 C.J. p 250 note 51.

92. Or.—Lipp v. Mutual Life Ins. Co. of New York, 267 P. 519, 125 Or. 522.
17 C.J. p 1177 note 45.

93. Ala.—Sovereign Camp, W. O. W., v. Adams, 86 So. 737, 204 Ala. 667.
Mich.—Shiovitz v. New York Life Ins. Co., 275 N.W. 181, 281 Mich. 382.
Minn.—Laury v. Northwestern Mut. Life Ins. Co., 230 N.W. 648, 180 Minn. 803, affirmed 231 N.W. 824, 180 Minn. 205.
Pa.—Heffron v. Prudential Ins. Co. of America, 8 A.2d 491, 137 Pa.Super. 69.
Tex.—Texas State Life Ins. Co. v. Fress, Civ.App., 138 S.W.2d 198.

have been qualified to testify as a witness.[94] Declarant must be possessed of sufficient intelligence to know his relatives, and if he has that capacity his declarations are admissible on an issue of pedigree, although he is incompetent to manage his property.[95] In addition, it must be affirmatively shown[96] that the declarant had actual knowledge as to the facts stated by him[97] or such opportunity for acquiring knowledge as leads to a reasonable inference that he possessed such knowledge.[98]

Absence of motive to misrepresent. In order for a declaration as to pedigree to be admissible, it is necessary that the declarant should have been disinterested[99] to the extent of having no motive which can fairly be assumed to be such as would induce him to state the fact otherwise than as he understood it.[1] The statement must therefore be shown to have been made ante litem motam;[2] and a fortiori it must have been made before commencement of a suit involving the issue to which the declaration relates.[3]

However, it is not material that the parties had had a mere difference;[4] that there had been an unrelated controversy;[5] that a controversy had arisen regarding a cognate matter,[6] unless it clearly foreshadowed one on the precise subject matter of the declaration;[7] that a controversy, since entirely abated, once existed;[8] or that a state of affairs was known to exist out of which a controversy might at any time arise.[9] On the other hand, the declara-

94. Conn.—Shea v. Hyde, 140 A. 486, 107 Conn. 287.

95. Ill.—Champion v. McCarthy, 81 N.E. 808, 228 Ill. 87, 11 L.R.A.,N.S., 1052, 10 Ann.Cas. 517.

96. N.C.—Kaywood v. Barnett, 20 N. C. 91.

97. Tex.—Smith v. Lynn, Civ.App., 152 S.W.2d 838.
22 C.J. p 246 note 89.

98. Iowa—In re Frey's Estate, 224 N.W. 597, 599, 207 Iowa 1229, citing **Corpus Juris.**
N.C.—Ashe v. Pettiford, 98 S.E. 304, 177 N.C. 132.
Okl.—Cotcha v. Ferguson, 25 P.2d 789, 165 Okl. 152—O'Neill v. Lauderdale, 195 P. 121, 80 Okl. 170.
22 C.J. p 246 note 90.

Declaration held admissible where predicate had been laid that declarants were in position to know the facts.—Hurley v. Hirsch, Tex.Civ. App., 66 S.W.2d 387, error dismissed.

99. U.S.—Lee Choy v. U. S., C.C.A. Hawaii, 49 F.2d 24.
N.C.—In re Hargrove's Will, 169 S. E. 812, 205 N.C. 72—Jelser v. White, 110 S.E. 849, 183 N.C. 126.
22 C.J. p 246 note 92.

1. Conn.—Shea v. Hyde, 140 A. 486, 107 Conn. 287.
Iowa—In re Frey's Estate, 224 N.W. 597, 599, 207 Iowa 1229, quoting **Corpus Juris.**
La.—Succession of Anderson, 145 So. 270, 275, 176 La. 66, citing **Corpus Juris.**
Mich.—Kotzke v. Kotzke's Estate, 171 N.W. 442, 205 Mich. 184.
Miss.—Messina v. New York Life Ins. Co., 161 So. 462, 173 Miss. 378.
Mont.—Welch v. All Persons, etc., 278 P. 110, 85 Mont. 114.
N.Y.—In re Hayden's Estate, 29 N.Y. S.2d 852, 176 Misc. 1078—In re Strong's Estate, 6 N.Y.S.2d 300, 168 Misc. 716, affirmed In re Strong's Will, 11 N.Y.S.2d 225, 256 App.Div. 971.
Tex.—Tarwater v. Donley County State Bank, Civ.App., 277 S.W. 176.
22 C.J. p 246 note 93.

Mere possibility of bias
Statement of insured in application for insurance was admissible as exception to hearsay rule without violating rule requiring that statement must have been made ante litem motam, notwithstanding alleged interest of insured to misrepresent, since mere possibility of bias or desire to misrepresent was insufficient to warrant exclusion.—New York Life Ins. Co. v. McQuie, 126 S.W.2d 458, 277 Ky. 268.

Self-serving declarations
Rule as to pedigree evidence does not go so far as to apply to self-serving declarations.—Ghelin v. Johnson, 243 N.W. 443, 186 Minn. 405.
Self serving declarations see supra § 216.

2. Cal.—In re Barton's Estate, 60 P. 2d 471, 16 Cal.App.2d 246, motion denied 67 P.2d 695, 30 Cal.App.2d 648—In re Horgan's Estate, 268 P. 1090, 93 Cal.App. 36.
Conn.—Shea v. Hyde, 140 A. 486, 107 Conn. 287.
Del.—Pote v. Farren, 129 A. 238, 3 W. W.Harr. 1.
Hawaii.—Helekahi v. Laa, 32 Hawaii 1.
Ill.—Sugrue v. Crilley, 160 N.E. 847, 329 Ill. 458, certiorari denied 49 S.Ct. 20, 278 U.S. 616, 73 L.Ed. 539—Foulkes v. Chicago Title & Trust Co., 283 Ill.App. 142.
Iowa.—In re Frey's Estate, 224 N.W. 597, 599, 207 Iowa 1229, quoting **Corpus Juris.**
Ky.—New York Life Ins. Co. v. McQuie, 126 S.W.2d 458, 277 Ky. 268.
Mo.—Osmak v. American Car & Foundry Co., 40 S.W.2d 714, 328 Mo. 159, 77 A.L.R. 722.
N.Y.—In re Hayden's Estate, 29 N.Y. S.2d 852, 176 Misc. 1078—In re Strong's Estate, 6 N.Y.S.2d 300, 168 Misc. 716, affirmed In re Strong's Will, 11 N.Y.S.2d 225, 256 App.Div. 971—In re Wood's Estate, 299 N.Y.S. 195, 164 Misc. 425—In re Whalen's Estate, 261 N.Y.S. 761, 146 Misc. 176—In re Mosley's Will, 247 N.Y.S. 520, 138 Misc. 847.
N.C.—In re Hargrove's Will, 169 S.E. 812, 205 N.C. 72—Keller v. Caldwell Furniture Co., 154 S.E. 674, 199 N.C. 413.
Okl.—Cotcha v. Ferguson, 25 P.2d 789, 165 Okl. 152—In re McDade's Estate, 218 P. 532, 95 Okl. 120.
Or.—In re Braun's Estate, 90 P.2d 484, 161 Or. 503—Garvin v. Western Cooperage Co., 184 P. 555, 94 Or. 487.
Pa.—In re McLaughlin's Estate, 29 Del.Co. 478.
22 C.J. p 246 note 94.

Ante litem motam as beginning of controversy
This expression is not limited to the time of bringing suit, but refers to the beginning of the controversy. —Jelser v. White, 110 S.E. 849, 183 N.C. 126—Rollins v. Wicker, 70 S.E. 934, 154 N.C. 559.

Statements made at birth regarding pedigree of child are admissible in proceeding to establish identity of missing legatee.—In re Emery's Estate, 156 A. 130, 108 N.J.Eq. 601.

3. N.Y.—In re Findlay's Adm'rs, 236 N.Y.S. 489, 226 App.Div. 638, reversed on other grounds In re Findlay, 170 N.E. 471, 253 N.Y. 1.
22 C.J. p 247 note 95.

4. Ill.—In re Healea's Estate, 254 Ill.App. 334.

5. Ill.—In re Healea's Estate, supra.

6. Mo.—Vantine v. Butler, 144 S.W. 807, 240 Mo. 521, 39 L.R.A.,N.S., 1177.
22 C.J. p 247 note 96.

7. Mo.—Vantine v. Butler, supra.
22 C.J. p 247 note 98.

8. Mo.—Vantine v. Butler, supra.
Va.—Gregory v. Baugh, 2 Leigh 665, 29 Va. 665.

9. Mo.—Vantine v. Butler, 144 S.W.

tion is inadmissible if a controversy in fact existed, although the declarant was ignorant of it,[10] or it had not reached the stage of litigation.[11]

A declaration made expressly with a view to a probable future contest is admissible for what it is worth,[12] and the same is true of a declaration made with the express purpose of preventing disputes;[13] but declarations made in the process of collecting evidence to substantiate the claim involved in a subsequent action are incompetent.[14]

Declarations made ante litem motam may be received although they are in support of the declarant's interest,[15] and although the declarant was in the same situation touching the subject matter of the controversy as the party relying on the declarations.[16]

§ 229. Relationship to Family and Proof Thereof

a. In general
b. Proof of relationship

a. In General

A declaration of pedigree generally must be made by someone related by birth or affinity to the family concerned.

While there appears to be some authority to the contrary,[17] as a general rule, for a declaration of pedigree to be admissible, it must have been made by someone related to the family concerned.[18] Consequently, under the general rule the courts will not receive declarations as to pedigree made by intimate friends[19] or neighbors,[20] or even by persons

807, 810, 240 Mo. 521, 39 L.R.A.,N.S., 1177.
22 C.J. p 247 note 1.

10. Mo.—Vantine v. Butler, supra.
22 C.J. p 247 note 2.

11. Mo.—Vantine v. Butler, supra.
22 C.J. p 247 note 3.

12. Mo.—Vantine v. Butler, supra.

13. U.S.—Elliott v. Peirsol, Ky., 1 Pet. 328, 7 L.Ed. 164.
D.C.—Green v. Norment, 16 D.C. 80.

14. Mo.—Vantine v. Butler, 144 S.W. 807, 240 Mo. 521, 39 L.R.A.,N.S., 1177.
22 C.J. p 247 note 6.

15. Tex.—Fowler v. Simpson, 15 S.W. 682, 79 Tex. 611, 23 Am.S.R. 370.
22 C.J. p 247 note 7.

16. Ill.—Champion v. McCarthy, 81 N.E. 808, 228 Ill. 87, 11 L.R.A.,N.S., 1052, 10 Ann.Cas. 517.
22 C.J. p 247 note 8.

17. **Member of family circle**
Whether hearsay pedigree statement is admissible depends on whether declarant was member of family circle having personal knowledge of family tradition; accordingly, declaration of deceased stepmother that child she reared was not sister of other children in family was admissible in proceedings to determine child's right to inherit.—Budlong v. Budlong, 136 A. 308, 48 R.I. 144.

18. U.S.—Miami County Nat. Bank of Paola, Kan., v. Bancroft, C.C.A.Kan., 121 F.2d 921—Brewster v. Villa, C.C.A.Tex., 90 F.2d 853—Ho Gou Chong v. U. S., C.C.A.Hawaii, 77 F.2d 497—U. S. v. Eng Suak Lun, C.C.A.Kan., 67 F.2d 307—U. S. v. Mid-Continent Petroleum Corporation, C.C.A.Okl., 67 F.2d 37, certiorari denied Hosey v. Mid-Continent Petroleum Corporation, 54 S.Ct. 346, 290 U.S. 702, 78 L.Ed. 603.
Ala.—Sheffield Iron Corporation v. Dennis, 86 So. 467, 204 Ala. 530.
Cal.—In re Barton's Estate, 60 P.2d 471, 16 Cal.App.2d 246, motion denied 67 P.2d 695, 20 Cal.App.2d 648.
Conn.—Shea v. Hyde, 140 A. 486, 107 Conn. 287.
Del.—Pote v. Farren, 129 A. 238, 3 W.W.Harr. 1.
Ga.—Massell Realty Co. v. Hanbury, 141 S.E. 653, 165 Ga. 534.
Hawaii.—Helekahi v. Laa, 32 Hawaii 1—Drummond v. Makaena, 30 Hawaii 116.
Ill.—Welch v. Worsley, 161 N.E. 493, 330 Ill. 172—Sugrue v. Crilly, 160 N.E. 847, 329 Ill. 458, certiorari denied 49 S.Ct. 20, 278 U.S. 616, 73 L.Ed. 539—Foulkes v. Chicago Title & Trust Co., 283 Ill.App. 142.
Ind.—Castor v. McDole, 148 N.E. 643, 80 Ind.App. 556.
Iowa.—In re Frey's Estate, 224 N.W. 597, 599, 207 Iowa 1229, citing **Corpus Juris.**
Md.—Hendrickson v. Attick, 109 A. 468, 136 Md. 1.
N.J.—Barsotti v. Bertolino, 189 A. 659, 121 N.J.Eq. 346—Saracino v. Kosower Const. Co., 140 A. 458, 459, 102 N.J.Eq. 230, 57 A.L.R. 1241, citing **Corpus Juris.**
N.Y.—In re Hayden's Estate, 29 N.Y.S.2d 852, 176 Misc. 1078—In re Whitcomb's Will, 10 N.Y.S.2d 824, 170 Misc. 579—In re Strong's Estate, 6 N.Y.S.2d 300, 168 Misc. 716, affirmed In re Strong's Will, 11 N.Y.S.2d 225, 256 App.Div. 971—In re Wood's Estate, 299 N.Y.S. 195, 164 Misc. 425—In re Wendel's Estate, 262 N.Y.S. 41, 146 Misc. 260—In re Whalen's Estate, 261 N.Y.S. 761, 146 Misc. 176—In re Mosley's Will, 247 N.Y.S. 520, 138 Misc. 847—In re Guilford's Will, 185 N.Y.S. 248.
Okl.—Cotcha v. Ferguson, 25 P.2d 789, 165 Okl. 152—In re McDade's Estate, 218 P. 532, 95 Okl. 120—O'Neill v. Lauderdale, 195 P. 121, 80 Okl. 170.
Pa.—Torrence's Estate, 47 Pa.Super. 509.
Tex.—Conyer v. Burckhalter, Civ.App., 275 S.W. 606, error dismissed Burckhalter v. Conyer, Com.App., 7 S.W.2d 73, set aside and reversed on other grounds 9 S.W.2d 1029.
Va.—Rawles v. Bazel, 126 S.E. 690, 141 Va. 734.
22 C.J. p 243 notes 48, 50.

Early tendency to the contrary
(1) It was the early tendency to regard intimate acquaintance with the family as a sufficient basis for knowledge as to facts of pedigree, and thus declarations of intimate friends were received.
Minn.—Backdahl v. Grand Lodge A.O.U.W., 48 N.W. 454, 46 Minn. 61.
N.J.—Westfield v. Warren, 8 N.J.Law 249.

(2) In addition, declarations of persons living with the family were accepted.
Conn.—Chapman v. Chapman, 2 Conn. 347, 7 Am.D. 277.
N.Y.—Jackson v. Cooley, 8 Johns. 128.

(3) Further, declarations of other persons having adequate knowledge of facts of family genealogy or opportunities for acquiring it, were accepted.
D.C.—Scott v. Herrell, 27 App.D.C. 395.
Ill.—Greenwood v. Spiller, 3 Ill. 502.
22 C.J. p 243 notes 43, 46.

19. Mo.—Vantine v. Butler, 144 S.W. 807, 810, 240 Mo. 521, 39 L.R.A.,N.S., 1177.
Tex.—Gibson v. Dickson, Civ.App., 178 S.W. 44.

20. Ala.—Landers v. Hayes, 72 So. 106, 196 Ala. 533.
22 C.J. p 244 note 52.

living in the family[21] or by servants,[22] however trustworthy[23] or however long employed in the family.[24]

However, it is not essential that declarant belong to the same branch of the family as the person to whom the declaration relates;[25] nor is it necessary that the degree of relationship existing between declarant and the person in question should be made out, if some relationship is shown.[26]

Where the issue is as to the relationship between two persons, a showing that a declarant was related to one of them is sufficient to render his declarations admissible, and it is not necessary that declarant be shown to have been related to both persons.[27]

Consanguinity or affinity. The relationship of declarant to the family may be by birth,[28] or, according to numerous authorities, by affinity.[29] Accordingly, the declarations of the husband of a person connected with the family by birth,[30] or of the wife of such person,[31] are admissible.

However, the declarations of the father[32] or sister[33] of a wife with respect to matters of pedigree of the husband's family have been held to be incompetent.

Legitimacy. While it is usually considered that in order to render a declaration as to pedigree admissible it is necessary that the relationship of declarant to the family should be of a legitimate character,[34] and, therefore, a bastard's declarations as to the pedigree of his putative family, or conversely, the declarations of a member of the family as to a bastard, are not admissible,[35] there are cases in which the courts have shown a tendency to relax the rule.[36]

21. Okl.—O'Neill v. Lauderdale, 195 P. 121, 80 Okl. 170.
22 C.J. p 244 note 53.
Foster parent
N.Y.—In re Wendel's Estate, 262 N.Y.S. 41, 146 Misc. 260.

22. N.Y.—In re Wendel's Estate, supra.
22 C.J. p 244 note 54.

23. Mo.—Vantine v. Butler, 144 S.W. 807, 240 Mo. 521, 39 L.R.A.,N.S., 1177.
22 C.J. p 244 note 55.

24. Mo.—Vantine v. Butler, supra.
22 C.J. p 244 note 56.

25. Conn.—Shea v. Hyde, 140 A. 486, 107 Conn. 287.
Hawaii.—Helekahi v. Laa, 32 Hawaii 1.

26. Iowa.—Alston v. Alston, 86 N.W. 55, 114 Iowa 29.
First cousin
Conn.—Shea v. Hyde, 140 A. 486, 107 Conn. 287.

27. Conn.—Shea v. Hyde, supra.
Okl.—Neustadt v. Coline Oil Co., 284 P. 52, 141 Okl. 113, certiorari denied 51 S.Ct. 38, 282 U.S. 799, 75 L.Ed. 719.
22 C.J. p 244 note 58.

28. U.S.—U. S. v. Eng Suak Lun, C.C.A.Kan., 67 F.2d 307—U. S. v. Mid-Continent Petroleum Corporation, C.C.A.Okl., 67 F.2d 37, certiorari denied Hosey v. Mid-Continent Petroleum Corporation, 54 S.Ct. 346, 290 U.S. 702, 78 L.Ed. 603.
Ga.—Massell Realty Co. v. Hanbury, 141 S.E. 653, 165 Ga. 534.
Hawaii.—Helekahi v. Laa, 32 Hawaii 1—Drummond v. Makaena, 30 Hawaii 116.
Ill.—Welch v. Worsley, 161 N.E. 493, 330 Ill. 172—Sugrue v. Crilly, 160 N.E. 847, 329 Ill. 458, certiorari denied 49 S.Ct. 20, 278 U.S. 616, 73 L.Ed. 539—Foulkes v Chicago Title & Trust Co., 283 Ill.App. 142.
Ind.—Castor v. McDole, 148 N.E. 643, 80 Ind.App. 556.
Iowa.—In re Frey's Estate, 224 N.W. 597, 207 Iowa 1229.
N.J.—Barsotti v. Bertolino, 189 A. 659, 121 N.J Eq. 346.
N.Y.—In re Hayden's Estate, 29 N.Y.S.2d 852, 176 Misc. 1078—In re Whitcomb's Will, 10 N.Y.S.2d 824, 170 Misc. 579—In re Strong's Estate, 6 N.Y.S.2d 300, 168 Misc. 716, affirmed In re Strong's Will, 11 N.Y.S.2d 225, 256 App.Div. 971—In re Wood's Estate, 299 N.Y.S. 195, 164 Misc. 425—In re Wendel's Estate, 262 N.Y.S. 41, 146 Misc. 260—In re Whalen's Estate, 261 N.Y.S. 761, 146 Misc. 176—In re Mosley's Will, 247 N.Y.S. 520, 138 Misc. 847.
Okl.—Cotcha v. Ferguson, 25 P.2d 789, 165 Okl. 152—In re McDade's Estate, 218 P. 532, 95 Okl. 120—O'Neill v. Lauderdale, 195 P. 121, 80 Okl. 170.
22 C.J. p 244 note 59.

29. U.S.—U. S. v. Eng Suak Lun, C.C.A.Kan., 67 F.2d 307—U. S. v. Mid-Continent Petroleum Corporation, C.C.A.Okl., 67 F.2d 37, certiorari denied Hosey v. Mid-Continent Petroleum Corporation, 54 S.Ct. 346, 290 U.S. 702, 78 L.Ed. 603.
Ga.—Massell Realty Co. v. Hanbury, 141 S.E. 653, 165 Ga. 534.
Hawaii.—Helekahi v. Laa, 32 Hawaii 1—Drummond v. Makaena, 30 Hawaii 116.
Ill.—Welch v. Worsley, 161 N.E. 493, 330 Ill. 172—Sugrue v. Crilly, 160 N.E. 847, 329 Ill. 458, certiorari denied 49 S.Ct. 20, 278 U.S. 616, 73 L.Ed. 539—Foulkes v. Chicago Title & Trust Co., 283 Ill.App. 142
Ind.—Castor v. McDole, 148 N.E. 643 80 Ind.App. 556.
Iowa.—In re Frey's Estate, 224 N.W. 597, 207 Iowa 1229.
N.J.—Barsotti v. Bertolino, 189 A. 659, 121 N.J Eq. 346.
N.Y.—In re Hayden's Estate, 29 N.Y.S.2d 852, 176 Misc 1078—In re Whitcomb's Will, 10 N.Y.S 2d 824, 170 Misc. 579—In re Strong's Estate, 6 N.Y.S.2d 300, 168 Misc. 716, affirmed In re Strong's Will, 11 N.Y.S.2d 225, 256 App.Div. 971—In re Wood's Estate, 299 N.Y.S. 195, 164 Misc 425—In re Wendel's Estate, 262 N.Y.S. 41, 146 Misc. 260—In re Whalen's Estate, 261 N.Y.S. 761, 146 Misc. 176—In re Mosley's Will, 247 N.Y.S. 520, 138 Misc. 847.
Okl.—Cotcha v. Ferguson, 25 P.2d 789, 165 Okl. 152—In re McDade's Estate, 218 P. 532, 95 Okl. 120—O'Neill v. Lauderdale, 195 P. 121, 80 Okl. 170.
22 C.J. p 244 note 60.

30. U.S.—Jewell v. Jewell, S.C., 1 How. 219, 11 L.Ed. 108.
22 C.J. p 244 note 61.

31. Iowa.—In re Carroll, 128 N.W. 929, 149 Iowa 617.
22 C.J. p 244 note 62.

32. Tex.—Sargent v. Lawrence, 40 S.W. 1075, 16 Tex.Civ.App. 540.

33. U.S.—Blackburn v. Crawford, Md., 3 Wall. 175, 18 L.Ed. 186.

34. U.S.—Fulkerson v. Holmes, Va., 6 S.Ct. 780, 117 U.S. 389, 29 L.Ed. 915.
22 C.J. p 244 note 65.

35. Neb.—Stoppert v. Nierle, 63 N.W. 382, 45 Neb. 105.
22 C.J. p 245 note 66.

36. Ill.—Champion v. McCarthy, 81 N.E. 808, 228 Ill. 87, 11 L.R.A.,N.S., 1052, 10 Ann.Cas. 517.
Or.—State v. McDonald, 103 P. 512, 104 P. 967, 106 P. 444, 55 Or. 419.

b. Proof of Relationship

The relationship of the declarant to the family concerned must be proved by evidence, direct or circumstantial, other than the statements of the declarant, although only slight proof is rquired.

In order to render a declaration as to pedigree admissible, the relationship of declarant to the family concerned must, except where it is admitted,[37] be established by evidence[38] other than the statements of declarant himself.[39]

The evidence to prove relationship may be either direct[40] or circumstantial, such as declarant's bearing the family name[41] or a name identical with that of the subject of the declaration,[42] recognition of declarant by the family,[43] or mention of him in family conveyances[44] and other dispositions of property.[45] However, it has also been held that mere identity of names, religion, and nativity are insufficient to show relationship.[46]

Declaration concerning declarant himself. Independent evidence of relationship is not required where the declaration concerns declarant himself,[47] as where claimant seeks to reach the estate of declarant, and not to establish a right through him to the property of others.[48]

Sufficiency of evidence. The evidence must be sufficient to establish relationship prima facie, to the satisfaction of the court;[49] but a prima facie showing is sufficient,[50] and it has been stated that only slight proof of the relationship will be required.[51]

Effect of statutes

Under statutes placing bastards in exactly the same position as legitimate children with respect to their mother, it would seem that declarations should be admitted where relationship is that of mother and bastard child.—Northrop v. Hale, 76 Me. 306, 49 Am.R. 615—22 C.J. p 245 note 69.

Inheritance by bastard from or through mother see Bastards § 25.

37. N.Y.—In re Findlay, 170 N.E. 471, 253 N.Y. 1, reversing In re Findlay's Adm'rs, 236 N.Y.S. 489, 226 App Div. 638.
Tex.—Wren v. Howland, 75 S.W. 894, 33 Tex.Civ.App. 87.

38. Cal.—In re Purcell's Estate, 53 P.2d 784, 11 Cal.App.2d 237.
22 C.J. p 245 note 71.

39. U.S.—Miami County Nat. Bank of Paola, Kan., v. Bancroft, C.C.A.Kan., 121 F.2d 921—U. S. v. Eng Suak Lun, C.C.A.Kan., 67 F.2d 307.
Conn.—Shea v. Hyde, 140 A. 486, 107 Conn. 287.
Del.—Pote v. Farren, 129 A. 238, 3 W.W.Harr. 1.
Hawaii.—Helekahi v. Laa, 32 Hawaii 1—Drummond v. Makaena, 30 Hawaii 116.
Ill.—Foulkes v. Chicago Title & Trust Co., 283 Ill.App. 142.
N.Y.—In re Findlay, 170 N.E. 471, 253 N.Y. 1, reversing In re Findlay's Adm'rs, 236 N.Y.S. 489, 226 App.Div. 638—In re Hayden's Estate, 29 N.Y.S.2d 852, 176 Misc. 1078—In re Wood's Estate, 11 N.Y.S.2d 168, 170 Misc. 877—In re Whitcomb's Will, 10 N.Y.S.2d 824, 170 Misc. 579—In re Wood's Estate, 299 N.Y.S. 195, 164 Misc. 425—In re Whalen's Estate, 261 N.Y.S. 761, 146 Misc. 176—In re Mosley's Will, 247 N.Y.S. 526, 138 Misc 847.
Okl.—Isaac v. Phillips, 232 P. 41, 105 Okl. 82, citing **Corpus Juris.**
Or.—Garvin v. Western Cooperage Co., 184 P. 555, 94 Or. 487
Pa.—Commonwealth v. Sweeney, 129 A. 577, 283 Pa. 520—In re McLaughlin's Estate, 29 Del.Co. 478.
22 C.J. p 245 note 72.

Legitimacy of relationship

Since legitimacy of relationship may be assumed if not disputed, preliminary proof of legitimate connection with family is not essential to receiving declarations of members of family as to legitimacy of one of its members.—Flora v. Anderson, C.C.Ohio, 75 F. 217—22 C.J. p 245 notes 81, 82.

Relationship to person offering testimony

It has been held that before declarations of deceased person as to his relationship to intestate are admissible on behalf of one claiming to share in intestate's estate, relationship of the claimant to declarant must be shown.—In re Clark, 110 P. 828, 13 Cal.App. 786.

40. N.Y.—In re Hayden's Estate, 29 N.Y.S.2d 852, 176 Misc. 1078.
22 C.J. p 245 note 73.

41. Me.—Northrop v. Hale, 76 Me. 306, 49 Am.R. 615.
Tex.—Brown v. Lazarus, 25 S.W. 71, 5 Tex.Civ.App. 81.

42. Cal.—In re Williams, 61 P. 670, 128 Cal. 552, 79 Am.S.R. 67.

43. D.C.—Green v. Norment, 16 D.C. 80.

44. Tex.—DeLeon v. McMurray, 23 S.W. 1038, 5 Tex.Civ.App. 280.

45. Cal.—In re Williams, 61 P. 670, 128 Cal. 552, 79 Am.S.R. 67.

46. N.Y.—In re Whalen's Estate, 261 N.Y.S. 761, 146 Misc. 176.

47. Del.—Pote v. Farren, 129 A. 238, 3 W.W.Harr. 1.

No other family concerned

Declarations of decedent's mother as to her two marriages and issue from both, which declarations were transmitted from her to second generation, declared anew by second generation and acted on by third generation until time came to share estate, were competent, where decedent was the common ancestor and was not seeking to establish a relationship with any other family such as would require proof of her marriage to the father of decedent's half-brother in addition to her declarations.—In re Glaser's Estate, 273 N.Y.S. 860, 151 Misc. 778.

48. Ill.—Nolan v. Barnes, 128 N.E. 293, 294 Ill. 25.
Okl.—Isaac v. Phillips, 232 P. 41, 42, 105 Okl. 82, citing **Corpus Juris.**
22 C.J. p 246 note 84.

49. Tex.—Brown v. Lazarus, 25 S.W. 71, 5 Tex.Civ.App. 81.
22 C.J. p 246 note 85.

Evidence held sufficient

N.Y.—In re Hayden's Estate, 29 N.Y.S. 2d 852, 176 Misc. 1078.

50. N.Y.—Layton v. Kraft, 98 N.Y.S. 72, 111 App.Div. 842, 18 N.Y.Ann. Cas. 228.
22 C.J. p 246 note 86.

51. U.S.—U. S. v. Mid-Continent Petroleum Corporation, C.C.A.Okl., 67 F.2d 37, certiorari denied Hosey v. Mid-Continent Petroleum Corporation, 54 S.Ct. 346, 290 U.S. 702, 78 L.Ed. 603.
Hawaii.—Helekahi v. Laa, 32 Hawaii 1—Drummond v. Makaena, 30 Hawaii 116.
N.Y.—In re Wood's Estate, 11 N.Y.S. 2d 168, 170 Misc. 877—In re Whalen's Estate, 261 N.Y.S. 761, 146 Misc. 176.
22 C.J. p 246 note 87.

Reason for rule

"The relationship of the declarant with the family might be as difficult to prove as the fact in controversy."—Fulkerson v. Holmes, Va., 6 S.Ct. 780, 784, 117 U.S. 389, 29 L.Ed. 915—Miami County Nat. Bank of Paola, Kan. v. Bancroft, C.C.A. Kan., 121 F.2d 921, 924.

§ 230. Unavailability of Direct Evidence

Declarations of pedigree generally will not be received when better evidence is available; such declarations are not admissible unless declarant is dead, or is otherwise unavailable.

It is a guiding principle, applicable in pedigree as in other cases, that declarations will not be received when better evidence is available.[52] As a general rule, declarations as to pedigree are not admissible unless declarant is dead,[53] although the rule is sometimes relaxed to the extent of receiving such declarations where declarant is otherwise unavailable,[54] as where he is beyond the jurisdiction of the court,[55] or is incapable of testifying.[56]

In accordance with the principle that declarations will not be received when better evidence is available, it has been held that a declaration otherwise admissible is rendered inadmissible where living members of the same family can be examined as witnesses on the same point;[57] but there is also authority for the contrary view.[58]

§ 231. Necessity That Pedigree Be in Issue

Authorities differ as to whether the rule admitting declarations as to pedigree is limited to cases where pedigree itself is directly in issue. An admissible declaration is evidence of facts incidentally or inferentially stated.

It has been laid down that declarations as to pedigree can be received only where pedigree itself is directly in issue.[59] However, the rule adopted in many cases is that the fact that pedigree is relevant to the issue is sufficient to admit the evidence,[60] and that declarations as to matters of genealogy or facts incidentally connected therewith are admissible as proof of the fact or facts contained therein in any case in which such facts are relevant, regardless of whether pedigree is separately in issue;[61]

52. Pa.—Keller v. Nutz, 5 Serg. & R. 246.
Va.—Rawles v. Bazel, 126 S.E. 690, 141 Va. 734.
W.Va.—Peterson v. Ankrom, 25 W. Va. 56.
22 C.J. p 248 note 14.

53. U.S.—Miami County Nat. Bank of Paola, Kan., v. Bancroft, C.C.A. Kan., 121 F.2d 921.
Ala.—Sheffield Iron Corporation v. Dennis, 86 So. 467, 204 Ala. 530.
Cal.—In re Barton's Estate, 60 P.2d 471, 16 Cal.App.2d 246, motion denied 67 P.2d 695, 20 Cal.App.2d 648—In re Horgan's Estate, 268 P. 1090, 93 Cal.App. 36.
Conn.—Shea v. Hyde, 140 A. 486, 107 Conn. 287.
Del.—Pote v. Farren, 129 A. 238, 3 W.W.Harr. 1.
Ga.—Massell Realty Co. v. Hanbury, 141 S.E. 653, 165 Ga. 534.
Hawaii.—Helekahi v. Laa, 32 Hawaii 1—Drummond v. Makaena, 30 Hawaii 116.
Ill.—Welch v. Worsley, 161 N.E. 493, 330 Ill. 172—Sugrue v. Crilley, 160 N.E. 847, 329 Ill. 458, certiorari denied 49 S.Ct. 20, 278 U.S. 616, 73 L.Ed. 539—Foulkes v. Chicago Title & Trust Co., 283 Ill.App. 142.
Ind.—Castor v. McDole, 148 N.E. 643, 80 Ind.App. 556.
La.—Sunseri v. Cassagne, 185 So. 1, 191 La. 209.
Md.—Hendrickson v. Attick, 109 A. 468, 136 Md. 1.
Mo.—Osmak v. American Car & Foundry Co., 40 S.W.2d 714, 328 Mo. 159, 77 A.L.R. 722.
N.Y.—Kass v. Metropolitan Life Ins. Co., 300 N.Y.S. 193, 252 App.Div. 888, affirmed 15 N.E.2d 671, 278 N.Y. 512—In re Findlay's Adm'rs, 236 N.Y.S. 489, 226 App.Div. 638, reversed on other grounds In re Findlay, 170 N.E. 471, 253 N.Y. 1—In re Hayden's Estate, 29 N.Y.S.2d 852, 176 Misc. 1078—In re Wood's Estate, 299 N.Y.S. 195, 164 Misc. 425—In re Whalen's Estate, 261 N.Y.S. 761, 146 Misc. 176—In re Mosley's Will, 247 N.Y.S. 520, 138 Misc. 847—People v. Miller, 63 N.Y.S. 949, 30 Misc. 355, 14 N.Y.Cr. 407.
Okl.—Cotcha v. Ferguson, 25 P.2d 789, 165 Okl. 152—In re McDade's Estate, 218 P. 532, 95 Okl. 120—O'Neill v. Lauderdale, 195 P. 121, 80 Okl. 170.
Pa.—In re McLaughlin's Estate, 29 Del.Co. 478.
Tex.—Jung v. Harris, Civ.App., 281 S.W. 335—Conyer v. Burckhalter, Civ.App., 275 S.W. 606, error dismissed Burckhalter v. Conyer, Com.App., 7 S.W.2d 73, set aside and reversed on other grounds 9 S.W.2d 1029—Gardenhire v. Gardenhire, Civ.App., 258 S.W. 1077.
22 C.J. p 247 note 9.

However, a declaration of a living declarant has been allowed, although text rule was recognized, where declarant was out of the jurisdiction and the party offering the declaration in evidence was regarded by the court as an innocent victim of circumstances; but the court held that subsequent declarations, contradicting earlier ones, were also admissible.—In re Strong's Estate, 6 N.Y.S.2d 300, 168 Misc. 716, affirmed In re Strong's Will, 11 N.Y.S.2d 225, 256 App.Div. 971.

Proof of death of declarant

(1) Hearsay proof of death of declarant has been held insufficient.—Lee Choy v. U.S., C.C.A. Hawaii, 49 F.2d 24.

(2) Admissibility of hearsay to prove death see supra § 227 c.

(3) Death presumed from absence.—Keller v. Caldwell Furniture Co., 154 S.E. 674, 199 N.C. 413.
22 C.J. p 247 note 9 [b].

54. U.S.—Brewster v. Villa, C.C.A. Tex., 90 F.2d 853.
Tex.—Smith v. Lynn, Civ.App., 152 S.W.2d 838.

55. Or.—Garvin v. Western Cooperage Co., 184 P. 555, 94 Or. 487.
Va.—Rawles v. Bazel, 126 S.E. 690, 141 Va. 734.
22 C.J. p 248 note 10.

56. Ala.—Perolio v. Doe, 73 So. 197, 197 Ala. 560.

57. Tex.—Wolf v. Wilhelm, Civ.App., 146 S.W. 216.

Declaration held admissible where predicate had been laid that facts could not be shown by living witnesses.—Hurley v. Hirsch, Tex.Civ.App., 66 S.W.2d 387, error dismissed.

58. Ill.—Jarchow v. Grosse, 100 N.E. 290, 257 Ill. 36, Ann.Cas 1914A 820.

59. N.Y.—Kass v. Metropolitan Life Ins. Co., 300 N.Y.S. 193, 252 App.Div. 888, affirmed 15 N.E.2d 671, 278 N.Y. 512.
Ohio.—Pickering v. Peskind, 183 N.E. 301, 43 Ohio App. 401.
Okl.—National Aid Life Ass'n v. Wiles, 41 P.2d 655, 171 Okl. 57.
22 C.J. p 170 notes 50–53, p 172 note 71, p 248 note 15.

60. Vt.—In re Hurlburt, 35 A. 77, 68 Vt. 366, 35 L.R.A. 794.
22 C.J. p 248 note 16.

61. Cal.—In re Paulsen's Estate, 178 P. 143, 179 Cal. 528.
22 C.J. p 171 note 54.

In Missouri

(1) It has been held that there is no sufficient reason for restricting the admissibility of such evidence to cases involving pedigree.—State

and further support for this rule may be found supra § 227, in cases in effect applying it without expressly recognizing it.

Particular matters, which pedigree declarations have been held not admissible to prove, include army service,[62] pauper settlement,[63] freedom,[64] the color of a child's father,[65] nonaccess of a husband,[66] or the source of money.[67]

Incidental or inferential facts. On an inquiry as to pedigree, an admissible unsworn statement is evidence not only of facts directly asserted by it, see § 226 a supra, but also of such relevant facts as may be incidentally[68] or inferentially[69] stated, such as the dates at which[70] or, according to some authorities, the localities in which[71] events of genealogical importance, such as births, deaths, and marriages, took place, names,[72] number,[73] residence of a branch of the family,[74] or their ownership of property.[75]

§ 232. Form of Declaration

a. In general
b. Composite statements

a. In General

A pedigree declaration which is authentic may be in any form, oral or written, and it may be implied from conduct. A written statement must have been written by, or under the direction of, a competent declarant.

A declaration relating to pedigree may be in any form capable of conveying thought,[76] provided the authenticity of the vehicle conveying the statement is established to the satisfaction of the court by evidence dehors itself,[77] as by recognition in the family[78] or production from proper custody.[79] However, the declaration must be a statement of fact, and not merely the opinion of the members of the family.[80]

The declaration may be oral[81] or in writing;[82] the oral statement is as competent as written evidence on the same point.[83]

Conduct of members of family; acquiescence. Facts of family history may be circumstantially established by the conduct of members of the family,[84] which evinces a belief or opinion on the sub-

v. Bowman, 213 S.W. 64, 278 Mo. 492.

(2) Further, it has been stated that "the character of the litigation in which the evidence is offered is immaterial. It is the nature of the statement which determines its admissibility, and not the character of the litigation in which it is offered" —Rauch v. Metz, 212 S.W. 357, 362.

(3) However, it has also been held that hearsay evidence is not admissible under the pedigree rule where pedigree is not at issue.—Bailey v. Metropolitan Life Ins. Co., App., 115 S.W.2d 151, certiorari quashed State ex rel. Metropolitan Life Ins. Co. v. Shain, 121 S.W.2d 789, 343 Mo. 435—Tuite v. Supreme Forest W. C., 187 S.W. 137, 193 Mo.App. 619.

62. Tex.—Sargent v. Lawrence, 40 S. W. 1075, 16 Tex.Civ.App. 540.

63. Conn.—Union v. Plainfield, 39 Conn. 563.
22 C.J. p 172 notes 1–11—48 C.J. p 490 note 44, p 492 notes 67, 68.
However, family record of births and marriages has been held competent evidence of date of marriage of pauper's father.—North Brookfield v. Warren, 16 Gray, Mass., 171.

64. U.S.—Davis v. Wood, 1 Wheat. 6, 4 L.Ed. 22.
22 C.J. p 242 note 26.

65. N.C.—State v. Watters, 25 N.C. 455.
22 C.J. p 242 note 27.

66. Wis.—Watts v. Owens, 22 N.W. 720, 62 Wis. 512.
22 C.J. p 242 note 28.

67. Ark.—Bispham v. Turner, 103 S.W. 1135, 83 Ark. 331.
22 C.J p 242 note 29.

68. Kan.—Allen v. Protected Home Circle, 212 P. 95, 96, 112 Kan. 576, citing **Corpus Juris.**
22 C J. p 242 note 32.

69. Kan.—Allen v. Protected Home Circle, supra, citing **Corpus Juris.**
22 C.J. p 242 note 33.

70. Kan.—Allen v. Protected Home Circle, supra, citing **Corpus Juris.**
22 C.J. p 242 note 34.

71. S.C.—Hazelwood v. Mayes, 96 S.E. 672, 111 S.C. 23.
22 C.J. p 243 note 35.

72. U.S.—McClaskey v. Barr, C.C. Ohio, 47 F. 154, reversed on other grounds 70 F. 529, 17 C.C.A. 251.

73. S.C.—Hazelwood v. Mayes, 96 S. E. 672, 111 S.C. 23.
Tex.—DeLeon v. McMurray, 23 S.W. 1038, 5 Tex.Civ.App. 280.

74. Mich.—Fraser v. Jennison, 3 N. W. 882, 42 Mich. 206.
22 C.J. p 243 note 40.

75. Md.—Maslin v. Thomas, 8 Gill 18—Pancoast v. Addison, 1 Harr. & J. 350, 2 Am D. 520.

76. N.Y.—In re Whalen's Estate, 261 N.Y.S. 761, 146 Misc. 176.
22 C.J. p 248 note 17.

77. U.S.—McClaskey v. Barr, C.C. Ohio, 54 F. 781.

78. Ky.—Prudential Ins. Co. of America v. Pierce's Adm'x, 109 S. W.2d 616, 270 Ky. 216.
22 C.J. p 248 note 19.

79. Va.—Union Cent. L. Ins. Co. v. Pollard, 26 S.E. 421, 94 Va. 146, 64 Am.S.R. 715, 36 L.R.A. 271.
22 C.J. p 248 note 20.

80. N.Y.—Vought v. Williams, 46 Hun 638, affirmed 24 N.E. 195, 120 N.Y. 253, 17 Am.S.R. 634, 8 L.R.A. 591.
Tex.—Keith v. Keith, 87 S.W. 384, 9 Tex.Civ.App. 363.

81. Ala.—Sheffield Iron Corporation v. Dennis, 86 So. 467, 204 Ala. 530.
Iowa.—In re Frey's Estate, 224 N.W. 597, 207 Iowa 1229.
N.Y.—In re Whalen's Estate, 261 N. Y.S. 761, 776, 146 Misc. 176, quoting **Corpus Juris.**
22 C.J. p 251 note 69.

82. Ala.—Sheffield Iron Corporation v. Dennis, 86 So. 467, 204 Ala. 530.
Iowa.—In re Frey's Estate, 224 N.W. 597, 207 Iowa 1229.
22 C.J. p 251 note 72.

83. N.Y.—In re Whalen's Estate, 261 N.Y.S. 761, 776, 146 Misc. 176, quoting **Corpus Juris.**
22 C.J. p 251 note 70.

84. Okl.—Frank v. Harjo, 286 P. 14, 16, 142 Okl. 157, citing **Corpus Juris.**
22 C.J. p 250 note 58.

Direct evidence

In an action by a nonresident alien for the death of her son, testimony of a relative and frequent visitor of the family that plaintiff treated decedent as her son and called him her son, and decedent treated plaintiff as his mother and had spoken of her as his mother, was competent to establish the relationship, being di-

ject.[85] It has been asserted that the statements of a deceased relative are not to be regarded as separate and distinct conversations, but are to be taken as indivisible, indicating the treatment of the person whose pedigree is in dispute.[86]

For reasons analogous to those on which "admissions by acquiescence" by a party are based, see §§ *294–297* infra, statements made by any person,[87] in any form,[88] are admissible as evidence of any facts of family history asserted, provided it affirmatively appears by direct or circumstantial evidence[89] the statement was brought to the attention of a member of the family who would be interested in correcting a mistake,[90] and his conduct, in connection with such assertion, indicated acquiescence in, or assent to, the statement.[91] It must also affirmatively appear that the declaration concerns the subject of the inquiry.[92]

Monuments and portraits. Monumental inscriptions[93] and family portraits[94] are regarded as admissible if sufficiently authenticated as genuine, as by having been received as such by the family.

Requirements as to written instruments. Written statements as to pedigree are equally admissible whether they were made by a person whose oral declarations to the same effect would be competent,[95] or by some other person under his direction.[96] It must appear, however, that the writing was made by, or under the direction of, a competent declarant or that it was acknowledged by a competent declarant as a correct family memorial,[97] except where it is in the form of an entry in a family Bible or testament which is produced from the proper custody, in which event the assent of the family is presumed.[98] The admissibility of the writing is not affected by the fact that the instrument is not valid and effectual for its original purpose.[99]

The statement may be contained in an affidavit;[1] an application for an allotment of land,[2] or for a bank account,[3] or for insurance;[4] articles of separation between husband and wife;[5] a deed;[6] a deposition;[7] a family Bible,[8] genealogical table,[9] or

rect evidence thereof.—Garvin v. Western Cooperage Co., 184 P. 555, 94 Or. 487.

85. N.Y.—McCarty v. Hodges, 2 Edm.Sel.Cas. 433.

86. Ind.—Castor v. McDole, 148 N.E. 643, 80 Ind.App. 556.

Reason for admission of declarations

It has been stated that declarations concerning pedigree are admitted on the theory that they tend to show that the person to whom they refer was recognized and treated as one of the family.—Castor v. McDole, supra.

87. Md.—Jones v. Jones, 45 Md. 144.
22 C.J. p 251 note 63.

88. Cal.—People v. Ratz, 46 P. 915, 115 Cal. 132.
22 C.J. p 251 note 64.

89. Cal.—People v. Ratz, supra.
22 C.J. p 251 note 65.

90. N.H.—Eastman v. Martin, 19 N.H. 152.
22 C.J. p 251 note 66

91. N.J.—Supreme Council G. S. F. v. Conklin, 38 A. 659, 60 N.J.Law 565, 41 L.R.A. 449.
22 C.J. p 251 note 67.

92. Pa.—Gehr v. Fisher, 22 A. 859, 143 Pa. 311.
22 C.J. p 251 note 68.

93. U.S.—McClaskey v. Barr, C.C. Ohio, 54 F. 781.
22 C.J. p 253 note 96.

Secondary evidence

Examined copies of inscriptions are admissible for the sake of convenience; and where monuments are decayed by the processes of time, or have been destroyed or removed, evidence of the recollection of witnesses respecting them and the inscriptions they bore has been admitted.—Eastman v. Martin, 19 N.H. 152.

94. Tex.—Kirby v. Boaz, Civ.App., 121 S.W. 223.

95. N.H.—Eastman v. Martin, 19 N.H. 152.
N.Y.—In re Deutscher's Estate, 229 N.Y.S. 814, 817, 132 Misc. 205, citing **Corpus Juris.**

Any entry as declaration

As respects admissibility in evidence to prove pedigree, any entry made by a deceased parent or other relative is regarded as the declaration of such parent or relative.—Prudential Ins. Co. of America v. Pierce's Adm'x, 109 S.W.2d 616, 270 Ky. 216.

96. N.Y.—In re Deutscher's Estate, 229 N.Y.S. 814, 817, 132 Misc. 205, citing **Corpus Juris.**
22 C.J. p 253 note 93.

97. Pa.—Carskadden v. Poorman, 10 Watts 82, 36 Am.D. 145.
22 C.J. p 253 note 94.

Proof of genuineness of signature

Tex.—Conyer v. Burckhalter, Civ.App., 275 S.W. 606, error dismissed Burckhalter v. Conyer, Com.App., 7 S.W.2d 73.

98. Ky.—Prudential Ins. Co. of America v. Pierce's Adm'x, 109 S.W.2d 616, 270 Ky. 216.
22 C.J. p 253 note 95.

99. D.C.—Jennings v. Webb, 8 App. D.C. 43.
22 C.J. p 253 notes 90, 91.

1. Ga.—Massell Realty Co. v. Hanbury, 141 S.E. 653, 165 Ga. 534.
22 C.J. p 251 note 74.

Proof of execution is essential.—Locklayer v. Locklayer, 35 So. 1008, 139 Ala. 354.

2. Okl.—Kanimaya v. Choctaw Lumber Co., 294 P. 822, two cases, 147 Okl. 94—Kanimaya v. Choctaw Lumber Co., 294 P. 817, 147 Okl. 90.

3. N.Y.—In re Deutscher's Estate, 229 N.Y.S. 814, 132 Misc. 205.

4. N.Y.—Kass v. Metropolitan Life Ins. Co., 300 N.Y.S. 193, 252 App. Div. 888, affirmed 15 N.E.2d 671, 278 N.Y. 512.

5. Mich.—Bechtel v. Barton, 110 N.W. 935, 147 Mich. 318.

6. N.J.—Rollins v. Atlantic City R. Co., 62 A. 929, 73 N.J.Law 64.
22 C.J. p 251 note 76.

Proof of heirship of grantor

An allegation in a deed by the grantee cannot prove heirship of the grantor.—Watkins v. Smith, 45 S.W. 560, 91 Tex. 589.

7. U.S.—Davis v. Forrest, C.C.D.C., 7 F.Cas.No.3,634, 2 Cranch C.C. 23.

8. Fla.—Tampa Shipbuilding & Engineering v. Adams, 181 So. 403, 132 Fla. 419, rehearing denied Tampa Shipbuilding & Engineering Co. v. Adams, 181 So. 893, 132 Fla. 419.
Ky.—Prudential Ins. Co. of America v. Pierce's Adm'x, 109 S.W.2d 616, 270 Ky. 216.
22 C.J. p 252 note 78.

After destruction of original

That entries in Bible concerning conjugal relations and birth of children were made after destruction of Bible containing original entries was held to affect merely weight of such entries, not their competency.—Rankin v. Dunn, 49 S.W.2d 1018, 243 Ky. 784.

9. N.Y.—Commonwealth Water Co.

other family record;[10] a lease;[11] a letter;[12] a memorandum;[13] a mortgage;[14] a pleading;[15] the record of a proceeding;[16] a school census;[17] a town clerk's record;[18] or a will.[19]

b. Composite Statements

Evidence of reputation or tradition in the family is admissible under the pedigree rule.

Reputation in the family gives rise to an inference of the existence of facts of family genealogy.[20] Thus reputation in the family gives rise to the existence of such facts as birth,[21] descent,[22] failure of issue,[23] heirship,[24] identity,[25] marriage,[26] celibacy,[27] parentage,[28] or relationship;[29] or facts incidentally connected with genealogy, such as residence[30] or the dates of events of family history;[31] and evidence of such reputation will be received on an issue of pedigree[32] concerning any member of any branch of the family.[33] While it has been laid down in a number of cases that general reputation in a neighborhood or vicinity is competent,[34] much that has been stated in many of these cases has been described as dictum,[35] and the accepted rule appears to be that the only reputation which may be shown is reputation among those who would be competent declarants, so that reputation outside of the family is inadmissible,[36] except under unusual circumstances.[37]

v. Brunner, 161 N.Y.S. 794, 175 App. Div. 153.
22 C.J. p 252 note 79.

Competency of compiler

Admissibility of genealogical table depends on whether compiler meets all requirements as declarant, that is, death and membership in family.—Miami County Nat. Bank of Paola, Kan., v. Bancroft, C.C.A.Kan., 121 F.2d 921.

10. W.Va.—Prickett v. Frum, 132 S.E. 501, 101 W.Va. 217.
22 C.J. p 252 note 80.

11. Minn.—In re Pederson, 106 N.W. 958, 97 Minn. 491.

12. Cal.—In re Paulsen's Estate, 178 P. 143, 179 Cal. 528.
22 C.J. p 252 note 82.

13. Md.—Barnum v. Barnum, 42 Md. 251.
Mich.—Hunt v. Supreme Council O. of C. F., 31 N.W. 576, 64 Mich. 671, 8 Am.S.R. 855.

14. Okl.—Bell v. Bearman, 133 P. 188, 37 Okl. 645.
22 C.J. p 252 note 85.

15. N.Y.—In re Schiff's Estate, 238 N.Y.S. 778, 136 Misc. 129.
22 C.J. p 252 note 86.

Petition as proof

Allegation in petition in suit between other parties has been held not admissible to prove heirship.—Watkins v. Smith, 45 S.W. 560, 91 Tex. 589.

16. Pa.—Simon v. New York Life Ins. Co., 70 Pa.Super. 408.

Matters in issue in proceeding

It has been held that, in suit to annul marriage on ground that wife had negro blood, testimony of wife's distant relative in another case concerning the color of wife's great-greatgrandmother could not be considered in absence of showing that the color of the parties was an issue in the other case.—Sunseri v. Cassagne, 185 So. 1, 191 La. 209.

Copy of testimony before commission

Okl.—In re McDade's Estate, 218 P. 532, 95 Okl. 120.

17. Ky.—Bertram v. Witherspoon, 127 S.W. 533, 138 Ky. 116, 119, Ann. Cas.1912A 1217.
22 C.J. p 252 note 87.

18. Vt.—Derby v. Salem, 30 Vt. 722.

19. N.Y.—In re Schiff's Estate, 238 N.Y.S. 778, 136 Misc. 129.
22 C.J. p 252 note 89.

20. U.S.—U. S. v. Mid-Continent Petroleum Corporation, C.C.A.Okl., 67 F.2d 37, certiorari denied Hosey v. Mid-Continent Petroleum Corporation 54 S.Ct. 346, 290 U.S. 702, 78 L.Ed. 603.
22 C.J. p 248 note 21.

21. N.Y.—Morecroft v. Taylor, 234 N.Y.S. 2, 225 App.Div. 562.
22 C.J. p 248 note 23.

22. N.H.—Eastman v. Martin, 19 N.H. 152.

23. Tenn.—Miller v. Gratz, 3 Tenn. App. 498.
22 C.J. p 249 note 26.

24. Wis.—In re Dexheimer's Estate, 221 N.W. 737, 197 Wis. 145.

Heirship by adoption, like that by blood, becomes matter of common knowledge in vicinity of son and parents.—Carter v. Capshaw, 60 S.W.2d 959, 249 Ky. 483.

25. Tex.—Wallace v. Byers, 38 S.W. 228, 14 Tex.Civ.App. 574.

26. Pa.—In re Pickens, 29 A. 875, 163 Pa. 14, 25 L.R.A. 477.
22 C.J. p 249 note 28.

27. N.Y.—Jacobs v. Fowler, 119 N.Y.S. 647, 135 App.Div. 713.

28. Ky.—Thomas v. McBeth's Adm'r, 82 S.W.2d 790, 259 Ky. 484.

29. Iowa.—In re Frey's Estate, 224 N.W. 597, 207 Iowa 1229.
22 C.J. p 249 note 30.

30. Mich.—Frazer v. Jennison, 3 N.W. 882, 42 Mich. 206.

31. Pa.—American L. Ins., etc., Co. v. Rosenagle, 77 Pa. 507.
22 C.J. p 249 note 33.

32. Ala.—Reichert v. Jerome H. Sheip, Inc., 102 So. 440, 212 Ala. 300.
Cal.—In re Braig's Estate, App., 110 P.2d 1066.
Minn.—Geisler v. Geisler, 200 N.W. 742, 160 Minn. 463.
Or.—Lipp v. Mutual Life Ins. Co. of New York, 267 P. 519, 125 Or. 522.
Tex.—Smith v. Lynn, Civ.App., 152 S.W.2d 838.
Wis.—In re Dexheimer's Estate, 221 N.W. 737, 197 Wis. 145.
22 C.J. p 249 note 34.

Admissibility to prove age or death see supra § 227 b, c.

33. Mass.—Butrick v. Tilton, 29 N.E. 1088, 155 Mass 461.
Vt.—Webb v. Richardson, 42 Vt. 465.

34. Iowa.—Hays v. Claypool, 145 N.W. 874, 164 Iowa 297.
22 C.J. p 249 note 36.

In Alabama

(1) It has been held that general reputation and common report in immediate neighborhood as well as in families of parties are admissible to show affiliation.—Cavin v. Cavin, 185 So. 741, 237 Ala. 185—McCrary v. Matthews, 179 So. 367, 235 Ala. 409—Martin v. Martin, 171 So. 734, 233 Ala. 310—Lay v. Fuller, 59 So. 609, 178 Ala. 375.

(2) However, it has also been held that only reputation in family is admissible to prove pedigree.—Elder v. State, 26 So. 213, 123 Ala. 35—22 C.J. p 249 note 39 [a] (2).

35. Cal.—In re Heaton, 67 P. 321, 135 Cal. 385.
22 C.J. p 249 note 37.

36. U.S.—U. S. v. Mid-Continent Petroleum Corporation, C.C.A.Okl., 67 F.2d 37, certiorari denied Hosey v. Mid-Continent Petroleum Corporation, 54 S.Ct. 346, 290 U.S. 702, 78 L.Ed. 603.
N.C.—Burgin v. Dougherty, 150 S.E. 672, 198 N.C. 813.
Okl.—Frank v. Harjo, 286 P. 14, 16, 142 Okl. 157, quoting **Corpus Juris.**
22 C.J. p 249 note 39.

37. Tex.—Wiess v. Hall, Civ.App., 135 S.W. 384.
22 C.J. p 250 note 40.

The rule applicable to direct statements that the declarant must be dead, see § 230 supra, has been held not to apply where the evidence is of family reputation;[38] but there is also authority for the view that the only reputation which may be shown is reputation among deceased members of the family.[39] It is also necessary that the reputation should have existed among distinterested persons, and consequently reputation is competent only as it existed ante litem motam.[40]

The admissibility of composite hearsay, such as evidence of reputation, tradition, or rumor, is considered generally in §§ 195–199 supra.

Tradition. Tradition in the family, being a form of family history[41] or reputation,[42] is admissible to prove facts of genealogy.[43] Thus tradition is admissible to prove such facts as birth,[44] descent,[45] marriage,[46] parentage,[47] or relationship[48] on any inquiry as to pedigree.

It has been held that evidence of tradition in the family is inadmissible unless the members of the family among whom it arose are dead.[49]

§ 233. Declarations as to Matters of Public and General Interest

Under certain conditions, an unsworn statement is admissible to prove matters of public or general interest.

Subject to the limitations and restrictions considered in §§ 234–237 infra, it is the rule that in proving relevant matters of public or general interest[50] an unsworn statement affords an inference of the truth of the facts asserted,[51] and is therefore admissible as evidence of such facts.[52]

Facts incidentally asserted. As to facts which are merely incidentally and not directly asserted, the declaration is not admissible.[53] It has been held, however, that a declaration is admissible where it undertakes to locate a matter of public interest by reference to the location of something else, such as a house.[54]

§ 234. Subject of Declaration

a. In general
b. Private boundaries

a. In General

Various subjects have been regarded as of sufficient public interest to warrant the admission of declarations; declarations as to matters of private interest are ordinarily inadmissible.

Among subjects of sufficient public interest to admit evidence of declarations concerning them are: The boundaries of public corporations;[55] the in-

Reputation in tribe
U.S.—U. S. v. Mid-Continent Petroleum Corporation, C.C.A.Okl., 67 F.2d 37, certiorari denied Hosey v. Mid-Continent Petroleum Corporation, 54 S.Ct. 346, 290 U.S. 702, 78 L.Ed. 603.

38. Tex.—Smith v. Kenney, Civ.App., 54 S.W. 801.
Wis.—DuPont v. Davis, 30 Wis. 170.

39. Vt.—In re Hurlburt, 35 A. 77, 68 Vt. 366, 35 L.R.A. 794.
22 C.J. p 250 note 44.

40. Vt.—In re Hurlburt, supra.
22 C.J. p 250 note 41.

41. Wis.—Eaton v. Tallmadge, 24 Wis. 217.
22 C.J. p 250 note 46.

42. Vt.—In re Hurlburt, 35 A. 77, 68 Vt. 366, 35 L.R.A. 794.
22 C.J. p 250 note 47.

Nature of family tradition discussed
Vt.—In re Hurlburt, supra.
22 C.J. p 250 note 45.

43. U.S.—U. S. v. Mid-Continent Petroleum Corporation, C.C.A.Okl., 67 F.2d 37, certiorari denied Hosey v. Mid-Continent Petroleum Corporation, 54 S.Ct. 346, 290 U.S. 702, 78 L.Ed. 603.
Ala.—Cavin v. Cavin, 185 So. 741, 237 Ala. 185.
Hawaii.—Helekahi v. Laa, 32 Hawaii 1.
Ky.—New York Life Ins. Co. v. McQuie, 126 S.W.2d 458, 277 Ky. 268.
Minn.—Geisler v. Geisler, 200 N.W. 742, 160 Minn. 463.
Tex.—Smith v. Lynn, Civ.App., 152 S.W.2d 838.
22 C.J. p 250 note 48.
Admissibility to prove age or death see supra § 227 b, c.

Rebuttal of proof of tradition
Where proofs of pedigree and filiation in support of pedigree all rest on family tradition, facts tending to disprove truth or accuracy of such tradition are admissible, subject to same rules as in other cases.—Reichert v. Jerome H. Sheip, Inc., 102 So. 440, 212 Ala. 300.

44. Ala.—Cavin v. Cavin, 185 So. 741, 237 Ala. 185.
Minn.—Houlton v. Manteuffel, 53 N. W. 541, 51 Minn. 185.
Tex.—Jaffe v. Deckard, Civ.App., 261 S.W. 390.

45. Ala.—Cavin v. Cavin, 185 So. 741, 237 Ala. 185.

46. Ala.—Cavin v. Cavin, supra—Mostilla v. Ash, 176 So. 356, 234 Ala. 626.
22 C.J. p 250 note 52.

47. Ala.—Cavin v. Cavin, 185 So. 741, 237 Ala. 185.

48. Ala.—Cavin v. Cavin, supra.
22 C.J. p 250 note 53.

49. N.Y.—Fosgate v. Herkimer Mfg. & Hydraulic Co., 12 Barb. 352, affirmed 12 N.Y. 580.

50. N.Y.—Swinnerton v. Columbian Ins. Co., 22 N.Y.Super. 361, affirmed 37 N.Y. 174, 4 Transcr.A. 159, 93 Am.D. 560.
22 C.J. p 254 note 17.

51. Conn.—Boston Southwest School Dist. v. Williams, 48 Conn. 504.
22 C.J. p 254 note 18.

52. N.H.—Lawrence v. Tennant, 15 A. 543, 64 N.H. 532.
22 C.J. p 254 notes 19, 20.
Application of rule to proof of private boundaries see infra § 234.

Reasons for rule
(1) The continued influence of a difficulty in procuring other evidence.—Scoggins v. Dalrymple, 52 N.C. 46—22 C.J. p 254 note 15.
(2) The feeling that general discussion as to matters of this kind is a guaranty that the statement ultimately prevailing will be accurate.—Bolton Southwest School Dist. v. Williams, 48 Conn. 504—22 C.J. p 254 note 16.

53. Conn.—Bolton Southwest Dist. v. Williams, supra.
22 C.J. p 256 note 53.

54. Mass.—Abington v. North Bridgewater, 23 Pick. 170.

55. Mass.—Drury v. Midland R. Co., 127 Mass. 571.
22 C.J. p 255 note 26.

corporation of municipalities;[56] the location of highways,[57] or streets,[58] or of large navigable watercourses;[59] and the public ownership of lands.[60]

Matters of private interest. Except in the case of private boundaries, see subdivision b of this section, the rule under discussion does not apply to matters other than those of public or general interest.[61]

b. Private Boundaries

Under certain conditions, unsworn statements are ordinarily admissible to prove the location of private boundaries, or their landmarks, or related facts.

Subject to the limitations or restrictions considered in §§ 235–238 infra, unsworn statements may be received as evidence of private boundaries, where such boundaries are ancient[62] or coincide with public boundaries.[63]

Moreover, in other boundary cases, while there exists some authority to the contrary,[64] it is generally the rule, resulting from necessity,[65] that such declarations, if otherwise competent,[66] may be admitted as to the location of the boundary,[67] its landmarks,[68] and other facts relating thereto.[69] Further declarations made at the same time as to matters other than those of boundary are not admissible.[70]

The admissibility of a declaration as to private boundaries as an independently relevant statement is considered in § 249 infra.

§ 235. Competency of Declarant and Proof Thereof

In order that a declaration as to matters of public or general interest be admissible, it must appear that the declarant would have been qualified as a witness, that he had adequate knowledge of the facts, that he was disinterested, and that the declaration was made ante litem motam.

In order that a declaration as to matters of public or general interest be admissible, it must appear that the declarant would have been qualified as a witness at the time the declaration is offered in evidence;[71] and, if so, a declaration in relation to boundaries is not rendered inadmissible by the fact

56. N.H.—Bow v. Allenstown, 34 N. H. 351, 69 Am.D. 489.

57. Conn.—Wooster v. Butler, 13 Conn. 309.
22 C.J. p 255 note 29.

58. Pa.—Birmingham v. Anderson, 40 Pa. 506.

59. Mass.—Drury v. Midland R. Co., 127 Mass. 571.
N.J.—Curtis v. Aaronson, 7 A. 886, 49 N.J.Law 68, 60 Am.R. 584.

60. Mass.—Enfield v. Woods, 99 N. E. 331, 212 Mass. 547.
22 C.J. p 255 note 32.

61. Cal.—Andrews v. Russell, 259 P. 113, 85 Cal.App. 149.
22 C.J. p 255 notes 37, 38.

62. Ark.—De Loney v. State, 115 S.W. 138, 88 Ark. 311.
Conn.—Mentz v. Town of Greenwich, 171 A. 10, 118 Conn. 137.
22 C.J. p 255 note 43.
Evidence held inadmissible under rule as to ancient boundaries.—Kurth v. Le Jeune, 269 P. 408, 83 Mont. 100.

63. N.J.—Curtis v. Aaronson, 7 A. 886, 49 N.J.Law 68, 60 Am.R. 584.
22 C.J. p 256 note 44.

64. Ala.—Southern Iron Wks. v. Georgia Cent. R. Co., 31 So. 723, 131 Ala. 649.
22 C.J. p 256 notes 45–47.

65. Idaho.—Case v. Ericson, 258 P. 536, 44 Idaho 686.
Va.—Woody v. Abrams, 169 S.E. 915, 160 Va. 683.
Necessity arising from unavailability of declarant, etc.
"The necessity for receiving such statements arises from the unavailability of the declarant coupled with the fact that landmarks are perishable and records are oftentimes incomplete or inaccurate."—Tuftonboro v. Willard, 197 A. 404, 407, 89 N.H. 253.

66. Conn.—Dawson v. Town of Orange, 61 A. 101, 78 Conn. 96.

67. Conn.—Borden v. Town of Westport, 134 A. 803, 105 Conn. 139.
Ga.—Moore v. McAfee, 106 S.E. 274, 151 Ga. 270.
Idaho—Case v. Ericson, 258 P. 536, 44 Idaho 686.
Md.—Wissler v. Elkins, 131 A. 444, 149 Md. 318.
N.C.—Peltz v. Burgess, 145 S.E. 781, 196 N.C. 395—Brown v. Buchanan, 140 S.E. 749, 194 N.C. 675—Pace v. McAden, 131 S.E. 629, 191 N.C. 137—Tripp v. Little, 119 S.E. 225, 186 N.C. 215—Buckhorne Land & Timber Co. v. Yarbrough, 102 S.E. 630, 179 N.C. 335.
Tenn.—Boyd v. Ducktown Chemical & Iron Co., 89 S.W.2d 360, 19 Tenn. App. 392.
22 C.J. p 256 note 48.
Guarantee of trustworthiness
"The requirement that before a declaration of boundary is admissible it must appear that the declarant had knowledge of the bound of which he spoke, and the further requirement that there must appear no interest or motive on his part to misrepresent, provide the circumstantial guarantee of truth upon which this exception rests."—Tuftonboro v. Willard, 197 A. 404, 407, 89 N.H. 253.
Hearsay and reputation distinguished
There is a distinction between "hearsay" and "evidence by reputation," the latter being competent as to ancient boundaries, and the former, as in case of declarations of deceased persons, as to boundaries of more recent origin.—Corbett v. Hawes, 122 S.E. 478, 187 N.C. 653.
Hearsay, other than declarations of deceased persons, to prove boundaries see Boundaries § 105.
Evidence of reputation or tradition as to boundaries see Boundaries § 106.

68. Neb.—Hickman v. Jones, 230 N. W. 95, 119 Neb. 485.
N.C.—Randolph v. Roberts, 120 S.E. 193, 186 N.C. 621.
Tenn.—Boyd v. Ducktown Chemical & Iron Co., 89 S.W.2d 360, 19 Tenn. App. 392.
Va.—Woody v. Abrams, 169 S.E. 915, 160 Va. 683.
22 C.J. p 256 note 49.
However, declarations of plaintiff's remote grantor to moving government monument, were held not competent to disprove plaintiff's testimony that remote grantor pointed out monument.—Kurth v. Le Jeune, 269 P. 408, 83 Mont. 100.

69. Conn.—Patzloff v. Kasperovitch, 165 A. 349, 116 Conn. 440.
Width of avenue, where boundary depends thereon, may be proved by declaration under this rule.—Patzloff v. Kasperovitch, supra.

70. Mass.—Van Deusen v. Turner, 12 Pick. 532.

71. Conn.—Mentz v. Town of Greenwich, 171 A. 10, 118 Conn. 137—

that the declarant was incompetent to testify at the time when the declaration was made.[72]

Knowledge of facts. In order that a declaration as to matters of public and general interest be admissible, it must be shown that the declarant had actual knowledge of the facts.[73] Similarly, as to matters of quasi public interest, such as the location of private boundaries,[74] their landmarks,[75] or particular facts connected therewith,[76] it is well established that it must be shown that the declarant had adequate[77] knowledge; but the existence of such knowledge may be proved circumstantially.[78]

Knowledge of boundaries of land, sufficient to qualify persons as declarants, may be attributed to surveyors of the land,[79] chain carriers[80] having sufficient technical training to recognize the professional significance of what they observe,[81] or others intelligently coöperating in the survey;[82] but the declarations of the surveyor or those who assisted him are not, without more, admissible to fix the locality of the survey.[83] Sufficient knowledge may also be attributed to owners of the property while in possession,[84] and to owners of premises adjoining those as to the boundaries of which the declarations are offered in evidence;[85] but the declarations of an owner as to the boundary between two adjoining tracts are inadmissible unless the source of his information is shown.[86]

However, while such facts may have evidentiary value as to declarant's knowledge,[87] it need not be shown that the declarant was, at the time of the declaration as to the boundary, the owner or occupant of the land or that he had been such owner or occupant,[88] or that the declaration was made while the declarant was on the land or engaged in pointing out the bounds of his estate,[89] although it has been held in some states that a surveyor's declarations are competent only when made on the premises.[90]

Absence of motive to misrepresent. The declarant must have been disinterested,[91] that is, he must have been without such interest to misrepresent the

Borden v. Town of Westport, 134 A. 803, 105 Conn. 139.
22 C.J. p 258 note 75.

72. N.C.—Whitehurst v. Pettipher, 87 N.C. 179, 180, 42 Am.R. 520.
22 C.J. p 258 note 75.

73. Mo.—Brewster v. Bulow, 296 S. W. 372.
22 C.J. p 257 note 56.

74. Ark.—De Loney v. State, 115 S. W. 138, 88 Ark. 311.
Conn.—Mentz v. Town of Greenwich, 171 A. 10, 118 Conn. 137—Borden v. Town of Westport, 134 A. 803, 105 Conn. 139.
Idaho.—Case v. Ericson, 258 P. 536, 44 Idaho 686.
N.H.—Perley v. Roberts, 18 A.2d 385—Tuftonboro v. Willard, 197 A. 404, 89 N.H. 253.
Wash.—Alverson v. Hooper, 185 P. 808, 108 Wash. 510.
22 C.J. p 257 note 57.

Evidence held admissible
Statement of deceased declarant who had lived entire life near land in dispute was admissible to show boundary location.—Borden v. Town of Westport, 151 A. 512, 112 Conn. 152.

Evidence held inadmissible
Surveyor's testimony as to others' statements concerning boundaries, without showing basis for informants' opinion, was inadmissible.—Marvil Package Co. v. Ginther, 140 A. 95, 154 Md. 213.

75. Wash.—Alverson v. Hooper, 185 P. 808, 108 Wash. 510.
22 C.J. p 257 note 58.

76. Mo.—Lemmon v. Hartsook, 80 Mo. 13.

77. Vt.—Turner Falls Lumber Co. v. Burns, 45 A. 896, 71 Vt. 354.
22 C.J. p 257 note 60.

78. Vt.—Turner Falls Lumber Co. v. Burns, supra.
22 C.J. p 257 note 61.

79. Tex.—City of Dallas v. McMurray, Civ.App., 282 S.W. 296.
9 C.J. p 274 note 58—22 C.J. p 257 note 62.

Declarations when making a different survey from the one in controversy, which was not originally made by him, and of which he had no previous knowledge, are not admissible to identify the corners and lines of the survey in controversy.—Thacker v. Wilson, Tex.Civ.App., 122 S.W. 938—Cable v. Jackson, 42 S.W. 136, 16 Tex.Civ.App. 579.

80. S.C.—Southern Realty & Inv. Co. v. Keenan, 83 S.E. 39, 99 S.C. 195.
22 C.J. p 257 note 63.

81. Va.—Fry v. Stowers, 22 S.E. 500, 92 Va. 13.
22 C.J. p 257 note 64.

82. S.C.—Southern Realty & Inv. Co. v. Keenan, 83 S.E. 39, 99 S.C. 195.
9 C.J. p 274 note 58—22 C.J. p 257 note 65.

83. Mo.—Evans v. Greene, 21 Mo. 170.
9 C.J. p 274 note 58.

84. Ala.—Murray v. Fowler, 88 So. 849, 205 Ala. 597.
Conn.—Connecticut Light & Power Co. v. Fleetwood, 200 A. 334, 124 Conn. 386—Patzloff v. Kasperovich, 165 A. 349, 116 Conn. 440.
Tex.—Simpson v. De Ramirez, 110 S. W. 149, 50 Tex.Civ.App. 25.
Va.—Woody v. Abrams, 169 S.E. 915, 160 Va. 683.
22 C.J. p 257 note 66.

Knowledge based on misunderstanding
That opinion of landowner may have been based on a common misunderstanding in the neighborhood went to the weight rather than to the admissibility of the evidence.—Salisbury Beach Associates v. Littlefield, 200 A. 777, 89 N.H. 447.

85. N.C.—Lewis v. John L. Roper Lumber Co., 18 S.E. 52, 113 N.C. 55.
22 C.J. p 257 note 67.

86. Md.—Marvil Package Co. v. Ginther, 140 A. 95, 154 Md. 213.
22 C.J. p 257 note 67 [a].

87. N.H.—Tuftonboro v. Willard, 197 A. 404, 89 N.H. 253.

88. N.H.—Tuftonboro v. Willard, supra.
22 C.J. p 257 note 60 [a].

89. N.H.—Tuftonboro v. Willard, supra.
22 C.J. p 256 note 50.

90. Tex.—Cockrell v. Work, Civ. App., 94 S.W.2d 784, error dismissed.
9 C.J. p 274 note 58 [a]—22 C.J. p 256 note 51.

91. Mo.—Brewster v. Bulow, 296 S. W. 372.
N.H.—Tuftonboro v. Willard, 197 A. 404, 89 N.H. 253.
N.C.—Peltz v. Burgess, 145 S.E. 781, 196 N.C. 395—Brown v. Buchanan, 140 S.E. 749, 194 N.C. 675—Pace v. McAden, 131 S.E. 629, 191 N.C. 137—Corbett v. Hawes, 122 S.E. 478, 187 N.C. 653—Tripp v. Little,

facts as would render his declaration untrustworthy,[92] and must not have been exposed to bias[93] or the warmth generated by controversy.[94] The declaration must, therefore, have been made ante litem motam.[95]

It is not conclusive against the reception of a declaration that it is self-serving,[96] although the probative effect of the declaration is increased where it is against the interest of the declarant.[97]

§ 236. Unavailability of Direct Evidence

Declarations as to matters of public interest or as to private boundaries are admissible when declarant is dead, or according to some authorities, is otherwise unavailable as a witness.

Unsworn statements as to matters of public interest generally,[98] as well as declarations regarding the location or marks of private boundaries,[99] are admissible when the declarant is dead, or, it has been held, is otherwise unavailable as a witness,[1] although in some jurisdictions absence from the jurisdiction is regarded as insufficient to admit the evidence.[2]

It has been held that, if the declarant is dead, his declaration may be shown notwithstanding there is a living witness who could testify to the same matter.[3]

§ 237. Form of Declaration

Declarations as to matters of public interest or private boundaries may be made in various forms, including conduct tantamount to a declaration.

Declarations as to matters of public and general interest,[4] or as to private boundaries,[5] may be made

119 S.E. 225, 186 N.C. 215—Hoge v. Lee, 113 S.E. 776, 184 N.C. 44—Buckhorne Land & Timber Co. v. Yarbrough, 102 S.E. 630, 179 N.C. 335.
22 C.J. p 257 note 68.

Adjoining owner

(1) It has been held that an adjoining owner is not necessarily interested so as to make him incompetent as a declarant in respect of boundaries.—Bethea v. Byrd, 95 N.C. 309, 59 Am.R. 240—22 C.J. p 257 note 68 [a].

(2) However, it has also been held that a declaration by an adjoining owner is inadmissible because not made by one who had no interest to misrepresent the truth.—Mentz v. Town of Greenwich, 171 A. 10, 118 Conn. 137.

92. Conn.—Mentz v. Town of Greenwich, 171 A. 10, 118 Conn. 137—Borden v. Town of Westport, 134 A. 803, 105 Conn. 139.
N.H.—Salisbury Beach Associates v. Littlefield, 200 A. 777, 89 N.H. 447.
22 C.J. p 258 note 71.

Fraudulent scheme

Report of deputy county surveyor of survey made while engaged in fraudulent scheme to acquire land from state was held not admissible.—Blaffer v. State, Tex.Civ.App., 31 S.W.2d 172, error refused.

93. Va.—Harriman v. Brown, 8 Leigh 697, 35 Va. 697.
22 C.J. p 258 note 69.

94. N.C.—Dancy v. Sugg, 19 N.C. 515.

95. Ark.—De Loney v. State, 115 S.W. 138, 88 Ark. 311.
Conn.—Mentz v. Town of Greenwich, 171 A. 10, 118 Conn. 137—Borden v. Town of Westport, 134 A. 803, 105 Conn. 139.
Idaho.—Case v. Ericson, 258 P. 536, 44 Idaho 686.
N.C.—Peltz v. Burgess, 145 S.E. 781, 196 N.C. 395—Brown v. Buchanan, 140 S.E. 749, 194 N.C. 675—Corbett v. Hawes, 122 S.E. 478, 187 N.C. 653—Hoge v. Lee, 113 S.E. 776, 184 N.C. 44—Buckhorne Land & Timber Co. v. Yarbrough, 102 S.E. 630, 179 N.C. 335.
Wash.—Alverson v. Hooper, 185 P. 808, 108 Wash. 510.
22 C.J. p 258 note 72.

Declaration held inadmissible

N.C.—Pace v. McAden, 131 S.E. 629, 191 N.C. 137—Tripp v. Little, 119 S.E. 225, 186 N.C. 215.

Unrelated controversy will not render declaration inadmissible.—Randolph v. Roberts, 120 S.E. 193, 186 N.C. 621—22 C.J. p 258 note 72 [b].

96. U.S.—Tracy v. Eggleston, Tex., 108 F. 324, 47 C.C.A. 357, certiorari denied 22 S.Ct. 935, 183 U.S. 699, 46 L.Ed. 396.
Vt.—Child v. Kingsbury, 46 Vt. 47.

97. Vt.—Powers v. Silsby, 41 Vt. 288.

98. Mo.—Brewster v. Bulow, 296 S.W. 372.
22 C.J. p 258 note 76.

99. Conn.—Mentz v. Town of Greenwich, 171 A. 10, 118 Conn. 137—Borden v. Town of Westport, 151 A. 512, 112 Conn. 152—Borden v. Town of Westport, 134 A. 803, 105 Conn. 139
Idaho.—Case v. Ericson, 258 P. 536, 44 Idaho 686.
Neb.—Hickman v. Jones, 230 N.W. 95, 119 Neb. 485.
N.H.—Tuftonboro v. Willard, 197 A. 404, 89 N.H. 253.
N.C.—Peltz v. Burgess, 145 S.E. 781, 196 N.C. 395—Brown v. Buchanan, 140 S.E. 749, 194 N.C. 675—Pace v. McAden, 131 S.E. 629, 191 N.C. 137—Corbett v. Hawes, 122 S.E. 478, 187 N.C. 653—Randolph v. Roberts, 120 S.E. 193, 186 N.C. 621—Tripp v. Little, 119 S.E. 225, 186 N.C. 215—Hoge v. Lee, 113 S.E. 776, 184 N.C. 44—Buckhorne Land & Timber Co. v. Yarbrough, 102 S.E. 630, 179 N.C. 335.
Tenn.—Boyd v. Ducktown Chemical & Iron Co., 89 S.W.2d 360, 19 Tenn. App. 392.
Tex.—Beal v. Asberry, 20 S.W. 115—Tucker v. Smith, 3 S.W. 671, 68 Tex. 473—Evans v. Hurt, 34 Tex. 111.
9 C.J. p 274 note 58—22 C.J. p 258 note 77.

1. Tex.—Cockrell v. Work, Civ.App., 94 S.W.2d 784, error dismissed.

Declarant living and within reach of process

Declaration was inadmissible where declarant was living at time of trial and was within reach of the process of the court.—Alverson v. Hooper, 185 P. 808, 108 Wash. 510.

2. N.C.—Coldwell Land, etc., Co. v. Triplett, 66 S.E. 343, 151 N.C. 409.
22 C.J. p 258 note 78.

3. U.S.—Beard v. Talbot, C.C., 2 F. Cas.No.1,182, Brunn.Coll.Cas. 201, Cooke (Tenn.) 142.

4. N.H.—Bow v. Allenstown, 34 N.H. 351, 69 Am.D. 489.
22 C.J. p 258 note 81.
Composite hearsay as to matters of public and general interest see supra §§ 195–199.

5. N.H.—Tuftonboro v. Willard, 197 A. 404, 89 N.H. 253.
Tex.—Daniels v. Fitzhugh, 35 S.W. 38, 13 Tex.Civ.App. 300.
Composite hearsay as to private boundaries see Boundaries § 106.

Sworn statement

Competency of a declaration made by decedent as to location of a corner of land is not affected because sworn to, since not in the form of a deposition and not receivable in any other suit.—Randolph v. Roberts, 120 S.E. 193, 186 N.C. 621.

in various forms, and may even be made by conduct tantamount to a declaration.[6]

Written declarations have been held to be proper which were made in the form of deeds,[7] depositions,[8] field notes,[9] plans,[10] and surveys.[11]

§ 238. Dying Declarations

Dying declarations generally are not admissible in civil cases, although in some jurisdictions such declarations are received under certain conditions.

It has been generally held that dying declarations are not admissible in civil cases.[12] However, in certain jurisdictions dying declarations are, under certain conditions, admissible in civil cases,[13] and in some of the jurisdictions such declarations are permitted in evidence as a result of statutory regulation.[14] Where such declarations are admitted, they are received generally on the theory that the conscious danger of impending death is equivalent to the sanction of an oath.[15]

In any event, a dying declaration is not competent evidence when, tested by the standards of legal evidence, its substance is found to be incompetent.[16]

Conditions of admission. In those jurisdictions in which dying declarations are admissible, there are certain conditions on which such admissibility depends.[17] Thus it is essential that death be imminent,[18] and that declarant be conscious of that fact;[19] that, where there is a statute, the preliminary facts which bring the declaration within its scope be made to appear;[20] that the declaration relate to the facts or circumstances pertaining to the

6. N.H.—Tuftonboro v. Willard, 197 A. 404, 89 N.H. 253.

Nodding assent

Testimony that surveyor who laid out stone wall on adjoining land nodded in assent when asked in witness' presence if wall was being built on the westerly line of highway was admissible.—Tuftonboro v. Willard, supra.

That surveyor "put down" corner constitutes declaration—Bowman v. Howard, 110 S.E. 98, 182 N.C. 662.

7. N.H.—New Boston v. Dunbarton, 15 N.H. 201.

8. Cal.—Morton v. Folger, 15 Cal. 275.
Ky.—McNeil v. Dixon, 1 A.K.Marsh. 365, 10 Am.D. 740.
9 C.J. p 274 note 58 [d].

9. Ohio—Detwiler v. Toledo, 13 Ohio Cir.Ct. 572, 6 Ohio Cir.Dec. 297.

Field notes of a junior survey

Tex.—Keystone Mill Co. v. Peach River Lumber Co., Civ.App., 96 S.W. 64.

10. Mass.—Weld v. Brooks, 25 N.E. 719, 152 Mass. 297.
Pa.—Birmingham v. Anderson, 40 Pa. 506.

11. Tex.—Cottingham v. Seward, Civ.App., 25 S.W. 797.

12. Ala.—O'Bar v. Southern Life & Health Ins. Co., 168 So. 580, 232 Ala. 459.
Cal.—Thrasher v. Board of Medical Examiners of State of California, 185 P. 1006, 44 Cal.App. 26.
Ga.—Mishoe v. Davis, 14 S.E.2d 187, 64 Ga.App. 700.
Idaho.—McCarthy v. Harrop, 3 P.2d 458, 51 Idaho 107.
Ky.—Prudential Ins. Co. of America v. Keeling's Adm'x, 112 S.W.2d 994, 271 Ky. 558—Hansel v. Commonwealth, 84 S.W.2d 68, 69, 260 Ky. 148, citing **Corpus Juris.**
La.—Day v. Armour Fertilizer Works, 8 La.App. 720.
N.J.—Post v. Anderson, 163 A. 666, 11 N.J.Misc. 1, citing **Corpus Juris,** and appeal dismissed 168 A. 622, 111 N.J.Law 303.
Ohio.—Mitchell v. New York Life Ins. Co., 22 N.E.2d 998, 62 Ohio App. 54, reversed on other grounds 27 N.E.2d 243, 136 Ohio St. 551.
Okl.—Blair v. Rogers, 89 P.2d 928, 185 Okl. 63, citing **Corpus Juris.**
Wis.—Schabo v. Wolf-Pepper Transportation & Storage Co., 229 N.W. 549, 201 Wis. 190.
22 C.J. p 258 note 91.
Admissibility of dying declarations in:
Criminal cases generally see Criminal Law § 741.
Prosecutions for:
Abortion see Abortion § 25.
Homicide see the C.J.S. title Homicide §§ 286–306, also 30 C.J. p 250 note 85–p 282 note 81.

In proceedings under workmen's compensation act for death of employee, dying declarations of the employee as to the cause of the fire which caused his death were held not admissible, dying declarations not being admissible in a civil action.—Milne v. Sanders, 228 S.W. 702, 143 Tenn. 602.

In Nebraska

(1) The rule stated in the text has been held to prevail in a case in which the declarations would have been inadmissible even as dying declarations, since death was not imminent and the declarations were not made in expectation of impending death.—Tongue v. Perrigo, 265 N.W. 737, 130 Neb. 564.

(2) However, the principle restricting competency of dying declarations to homicide cases had previously been modified so as to make dying declarations admissible in a statutory proceeding to secure revocation of the license of a physician for participation in a criminal abortion.—State ex rel. Sorensen v. Lake, 236 N.W. 762, 121 Neb. 331.

(3) Further, it had been intimated, in a case in which the declaration was admitted as part of the res gestæ, that the modification might well be extended to proceedings under workmen's compensation act.—Ridenour v. Lewis, 238 N.W. 745, 121 Neb. 823.

13. Ark.—Missouri Pac. R. Co. v. Hampton, 112 S.W.2d 428, 195 Ark. 335.
Kan.—Ritchie v. Metropolitan Life Ins. Co., 66 P.2d 622, 145 Kan. 525.
Pa.—Rudisill v. Cordes, 5 A.2d 217, 333 Pa. 544.
22 C.J. p 258 note 91 [b].

14. U.S.—Henry H. Cross Co. v. Simmons, C.C.A.Ark., 96 F.2d 482.
Ark.—Albritton v. C. M. Ferguson & Son, 122 S.W.2d 620, 197 Ark. 436.
N.C.—Holmes v. Wharton, 140 S.E. 93, 194 N.C. 470.

15. Kan.—Ritchie v. Metropolitan Life Ins. Co., 66 P.2d 622, 145 Kan. 525.
Pa.—Rudisill v. Cordes, 5 A.2d 217, 333 Pa. 544.
22 C.J. p 258 note 91 [b].

16. Ala.—O'Bar v. Southern Life & Health Ins. Co., 168 So. 580, 232 Ala. 459.
Mo.—Meffert v. Lawson, 233 S.W. 31, 289 Mo. 337.
Pa.—Rich Hill Coal Co. v. Bashore, 7 A.2d 302, 334 Pa. 449.

17. N.C.—Holmes v. Wharton, 140 S.E. 93, 194 N.C. 470.

18. Kan.—Ritchie v. Metropolitan Life Ins. Co., 66 P.2d 622, 145 Kan. 525.

19. Kan.—Ritchie v. Metropolitan Life Ins. Co., supra.

20. N.C.—Holmes v. Wharton, 140 S.E. 93, 194 N.C. 470.

fatal injury or death;[21] that the subject matter be such as declarant, if he had survived, would have been competent to testify to,[22] and that, therefore, the declaration must relate to facts only, and not to the declarant's opinion or conclusion;[23] and that declarant had knowledge, or the opportunity for knowledge, as to the facts declared.[24]

C. INDEPENDENTLY RELEVANT STATEMENTS

1. In General

§ 239. In General

Where the fact that a particular statement was made is of itself a relevant fact, regardless of the truth or falsity of such statement, the statement is admissible in evidence as an independently relevant fact.

Where, regardless of the truth or the falsity of a statement, the fact that it has been made is relevant, the hearsay rule does not apply, but the statement may be shown.[25] Evidence as to the making of such statement is not secondary but primary,[26] for the statement itself may constitute a fact in issue, or be circumstantially relevant as to the existence of such a fact.[27] Such statements are not regarded as evidence of the facts asserted by declarant,[28] although in many instances, as for example in direct statements as to the existence of a bodily condition,[29] or mental state,[30] it is doubtful if this rule is strictly followed. Unless so affected by suspicion as to be irrelevant,[31] statements are competent in favor of declarant.[32] The statement need not be contemporaneous with the fact in issue, but unless the court deems it too remote to be

21. U.S.—Henry H. Cross Co. v. Simmons, C.C.A.Ark., 96 F.2d 482.

22. U.S.—Henry H. Cross Co. v. Simmons, supra.

23. U.S.—Henry H. Cross Co. v. Simmons, supra.

24. U.S.—Henry H. Cross Co. v. Simmons, supra.

25. Kan.—Malone v. New York Life Ins. Co., 83 P.2d 639, 148 Kan. 555.
Mo.—In re Thomasson's Estate, 148 S.W.2d 757.
Tenn.—Cannon v. Chadwell, App., 150 S.W.2d 710, 712, quoting **Corpus Juris.**
Tex.—Huff v. Huff, Civ.App., 72 S.W.2d 675, error dismissed—Jaffe v. Deckard, Civ.App., 261 S.W. 390
Utah.—Parry v. Harris, 72 P.2d 1044, 93 Utah 317.
22 C.J. p 259 note 96.

Accounting for fact or act
When a relevant fact or act is to be accounted for, a conversation had by one of the litigating parties with a third person, in the absence of the other, may account for it, or serve as a link in the chain of explanation; and, if so, it is admissible.—Brown v. Matthews, 4 S.E. 13, 79 Ga. 1.

Irrelevant declarations are inadmissible.—Brown's Adm'r v. Wilson, 1 S.W.2d 767, 222 Ky. 454.

Particular evidence held admissible
(1) In attorney's action against property owner for services rendered in procuring increase of condemnation award against city, mayor's testimony as to conversations with attorney, to establish that attorney performed services.—Graeser v. Jones, 251 N.W. 162, 217 Iowa 499.

(2) In trespass to try title, depending on whether a deed was forged, where it appeared that the deed was destroyed, and the parties, witnesses, and notary had died, declaration by a witness that an attesting witness said he had seen the grantor sign the deed, in corroboration of other testimony—Rodgers v. Bell, Tex.Civ.App., 207 S.W. 630.

(3) On issue of proper search for a lost instrument, testimony as to information received from the heirs of the original grantee of the instrument concerning the search by them and inability to find it.—Humphreys v. Green, Tex.Civ.App., 234 S.W. 562.

(4) Other evidence.
U.S.—Elmer Co. v. Kemp, C.C.A.Cal., 67 F.2d 948, modifying, D.C., Kemp v. Elmer Co., 56 F.2d 657—Cleaves v. Kenney, C.C.A.Mass., 63 F.2d 682.
Ala.—Ziliak & Schafer Milling Co. v. Moore, 131 So. 798, 222 Ala. 254.
Conn.—Mower v. State Department of Health, 142 A. 473, 108 Conn. 74, appeal dismissed Mower v. State Department of Health for State of Connecticut, 49 S.Ct. 82, 278 U.S. 570, 73 L.Ed. 511.
Ill.—Santa Rosa-Vallejo Tanning Co. v. Charles Kronauer & Co., 228 Ill.App. 236.
Okl.—Central Nat. Bank of Alva v. Baker, 50 P.2d 1128, 174 Okl. 375
Pa.—Levison v. Davis, 61 A. 819, 212 Pa. 148—Modern Transfer Co. v. Pennsylvania Public Utility Commission, 12 A.2d 458, 139 Pa.Super. 197.

Under some statutes the act, declaration, or omission of a party is competent evidence against him.—Griswold v. Frame, 191 P. 962, 48 Cal.App. 178.

26. Mo.—Haile v. Metropolitan Life Ins. Co., App., 96 S.W.2d 628.
Tenn.—Cannon v. Chadwell, App., 150 S.W.2d 710, 712, quoting **Corpus Juris.**
22 C.J. p 260 note 97.

27. Tenn.—Cannon v. Chadwell, supra.
22 C.J. p 260 note 99.
Statements constituent of legal results see infra §§ 260–264.
No predicate is necessary for the admission of such evidence.—Conecuh Naval Stores Co. v. Castillow, 96 So. 142, 209 Ala. 271.

28. Cal.—In re Carson's Estate, 194 P. 5, 184 Cal. 437, 17 A.L.R. 239.
Conn.—Kennel v. Kennel, 21 A.2d 400.
Iowa.—State v. Brown, 253 N.W. 836, 218 Iowa 166—Graeser v. Jones, 251 N.W. 162, 217 Iowa 499.
Tenn.—Cannon v. Chadwell, 150 S.W. 2d 710, 712, quoting **Corpus Juris.**
Tex.—Bishop Mfg. Co. v. Sealy Oil Mill & Mfg. Co., Civ.App., 220 S.W. 203, reversed on other grounds, Com.App., 235 S.W. 850.
22 C.J. p 260 note 1.

29. Tex.—Texas Cent. R. Co. v. Powell, 86 S.W. 21, 38 Tex.Civ.App. 157.
Statements as to bodily condition generally see infra §§ 242–246.

30. Cal.—Kyle v. Craig, 57 P. 791, 125 Cal. 107.
22 C.J. p 260 note 3.

31. Ala.—Powell v. Henry, 11 So. 311, 96 Ala. 412.
22 C.J. p 260 note 4.

32. Minn.—Hanson v. Johnson, 201 N.W. 322, 161 Minn. 229.
22 C.J. p 260 note 5.

relevant, it may either precede[33] or follow[34] the time at which the existence of the fact sought to be proved is material. It is wholly immaterial whether such declarations were made in the presence of an adverse party to the litigation or not,[35] or what the character of the litigation is.[36] Narrative statements are, however, excluded under the rule which prevents a party from using declarations independently relevant as evidence of the facts alleged in them.[37]

Death of declarant. The fact that declarant is dead at the time of the trial does not render an otherwise relevant declaration inadmissible,[38] and his executors may be entitled to the benefit of it, even though the declaration was in his favor.[39]

Hearsay evidence of the making of a statement which is independently relevant cannot be received.[40]

§ 240. Form of Statement

An independently relevant declaration may be either oral or written.

An unsworn statement independently relevant may be oral,[41] or may appear in various written forms,[42] such as book entries,[43] letters,[44] telegrams,[45] memoranda,[46] newspaper[47] and other[48] notices, pleadings,[49] promissory notes,[50] mortgages,[51] receipts,[52] bills of lading,[53] and records.[54]

2. Circumstantial Evidence

§ 241. Basis of Opinion Generally

Statements to a witness which form the basis of an opinion, testified to by him, are admissible.

Where opinion evidence is received, statements made to the witness, and on which his opinion is based, in whole or in part, may be shown.[55] Accordingly, a physician may testify as to statements made to him by the person whose bodily condition is relevant, made for the purpose of securing diagnosis and treatment, not to establish the truth of the facts stated, but to show the basis of his opinion as to the nature and extent of the disease or injury.[56] It has also been held that a physician who examined plaintiff for the purpose of qualify-

33. Minn.—Kessler v. Von Rank, 174 N.W. 839, 144 Minn. 220.
22 C.J. p 260 note 8.

34. Cal.—De Cou v. Howell, 214 P. 444, 190 Cal. 741.
Kan.—Burdg v. Scott, 208 P. 668, 111 Kan. 610.
22 C.J. p 260 note 9.

35. Cal.—In re Carson's Estate, 194 P. 5, 184 Cal. 437, 17 A.L.R. 239—Adkins v. Brett, 193 P. 251, 184 Cal. 252.
Iowa.—Shippley v. Gremmels, 185 N.W. 922, 192 Iowa 801.
Tex.—Southland Life Ins. Co. v. Greenwade, Civ.App., 143 S.W.2d 648, error granted.

36. Cal.—In re Carson's Estate, 194 P. 5, 184 Cal. 437, 17 A.L.R. 239.

37. Cal.—In re Carson's Estate, supra.
22 C.J. p 260 note 10.

38. Ky.—Baskett v. Rudy, 217 S.W. 112, 186 Ky. 208.

39. N.J.—Kelly v. Pitney, 121 A. 593, 98 N.J.Law 773.

40. Tex.—Chism v. C. W. Hall Motor Co., Civ.App., 278 S.W. 350.
22 C.J. p 261 note 11.

41. D.C.—Lee v. Mitcham, 98 F.2d 298, 69 App.D.C. 17, 117 A.L.R. 1427.
Iowa.—Nodle v. Hawthorn, 77 N.W. 1062, 107 Iowa 380.
R.I.—Rhode Island Hospital Trust Co. v. Sherman, 185 A. 601, 56 R.I. 355.
22 C.J. p 276 note 80.

42. Cal.—In re Painter, 89 P. 98, 150 Cal. 498, 11 Ann.Cas. 760.
D.C.—Lee v. Mitcham, 98 F.2d 298, 69 App.D.C. 17, 117 A.L.R. 1427.
22 C.J. p 261 note 13.
Diaries
Conn.—Duvall v. Birden, 198 A. 255, 124 Conn. 43—Barber's App., 27 A. 973, 63 Conn. 393, 22 L.R.A. 90.
Irregularities in taking deposition
Alleged irregularities in taking deposition, which was never completed and admitted only as statement, were immaterial.—Curtin v. Salomon, 251 P. 237, 80 Cal.App. 470.

43. Ga.—Cody v. Gainsville First Nat. Bank, 30 S.E. 281, 103 Ga. 789.
22 C.J. p 261 note 14.

44. Ala.—Miller v. McGuire, 80 So. 433, 202 Ala. 351—Bulger v. Ross, 12 So. 803, 98 Ala. 267.
Conn.—Socony-Vacuum Oil Co. v. Elton, 11 A.2d 5, 126 Conn. 310.
D.C.—Chichester Chemical Co. v. U. S., 49 F.2d 516, 60 App.D.C. 134.
22 C.J. p 261 note 15.

45. Ark.—Chrisman v. Carney, 33 Ark. 316.
Pa.—Commonwealth v. Gentry, 5 Pa. Dist. 703.

46. Cal.—Pasadena Trust & Savings Bank v. Bryson, 189 P. 816, 46 Cal. App. 730.
22 C.J. p 261 note 17.

47. U.S.—Jewell v. Jewell, S.C., 1 How. 219, 11 L.Ed. 108.
N.J.—Horton v. Horton, 130 A. 24, 2 N.J.Misc. 683.

48. Pa.—Fox v. Foster, 4 Pa. 119.

49. Mo.—In re Thomasson's Estate, 148 S.W.2d 757.

50. Md.—McCann v. Preston, 28 A. 1102, 79 Md. 223.

51. Mich.—Daniels v. Dayton, 13 N.W. 392, 49 Mich. 137.
S.C.—Battle v. De Vane, 138 S.E. 821, 140 S.C. 305.

52. N.Y.—Sturm v. Atlantic Mut. Ins. Co., 38 N.Y.Super. 281, affirmed 63 N.Y. 77—Singer Mfg. Co. v. Coon, 30 N.Y.S. 232, 9 Misc. 465.

53. Pa.—Jordan v. Wilson, 25 Pa. 390.

54. Wash.—Dormitzer v. German Sav., etc., Soc., 62 P. 862, 23 Wash. 132.

55. W.Va.—Curfman v. Monongahela West Penn Public Service Co., 166 S.E. 848, 113 W.Va. 85.
22 C.J. p 261 note 26.

56. U.S.—U. S. v. Roberts, C.C.A. Colo., 62 F.2d 594.
Ala.—Lowery v. Jones, 121 So. 704, 219 Ala. 201, 64 A.L.R. 553.
Cal.—Tierney v. Charles Nelson Co., 64 P.2d 1150, 19 Cal.App.2d 34—Davis v. Renton, 298 P. 834, 113 Cal.App. 561.
Ga.—Mutual Life Ins. Co. of New York v. Davis, 173 S.E. 471, 48 Ga. App. 742.
Iowa.—Schuler v. Cudahy Packing Co., 275 N.W. 39, 223 Iowa 1323.
Okl.—Orth Kleifeker & Wallace v. Scott, 49 P.2d 112, 173 Okl. 448—Eagle-Picher Lead Co. v. Black, 22 P.2d 907, 164 Okl. 67.

ing himself as a witness may testify to statements made by plaintiff during the examination as to subjective symptoms,[57] or even as to his previous condition and past suffering, when declared by the expert to be necessary to enable him to form an opinion as to the nature and extent of the disease or injury,[58] to show on what information he based his opinion.

§ 242. Bodily Condition

Statements of a person which are fairly indicative of the existence of a relevant bodily condition of the declarant at the time are admissible.

As a general rule, statements which are fairly indicative of the existence of a relevant bodily condition of declarant at the time of the declaration[59] will be received as circumstantial evidence of the existence of that condition,[60] even though made a considerable time after the injury from which the condition is claimed to have resulted was received.[61] The length of the interval will, however, affect the weight of the evidence,[62] because statements made immediately or soon after the injury was received are less subject to a suspicion of fabrication than statements made a considerable time thereafter.[63] Such statements gain in probative force in proportion as they are involuntary[64] and ante litem motam,[65] and exclude the suspicion of being in whole or in part feigned.[66] Indeed, it is generally held,

Pa.—John v. Reick-McJunkin Dairy Co., 127 A. 143, 281 Pa. 543

Necessity of stating facts on which medical expert's opinion is based see infra § 536.

In response to defendant's examination

In personal injury action, where defendant on direct examination of a physician who was not plaintiff's regular physician had included history of plaintiff's injuries as given by plaintiff as part of premise for hypothetical question on which physician gave his opinion, plaintiff's counsel was properly permitted to elicit what her complaints were on which he based his opinion.—City of Maryville v. McConkey, 90 S.W.2d 951, 19 Tenn.App. 520.

57. Neb.—Turpin v. State, 281 N.W. 800, 135 Neb. 389.

Or.—Reid v. Yellow Cab Co., 279 P. 635, 131 Or. 27, 67 A.L.R. 1, per Rossman, J.

Wash.—Kraettli v. North Coast Transp. Co., 6 P.2d 609, 166 Wash. 186, 80 A.L.R. 1520—Estes v. Babcock, 205 P. 12, 119 Wash. 270.

W.Va.—Curfman v. Monongahela West Penn Public Service Co., 166 S.E. 848, 113 W.Va. 85.

Admissibility of such statements as independently relevant facts see infra § 246.

In mental case, expert witness may testify to irrational statements made to him by subject or to other statements which tend to support expert's opinion.—U. S. v. Roberts, C. C.A.Colo., 62 F.2d 594.

Not evidence of condition

Such statements are not evidence of declarant's condition, but are admitted to show the basis for the expert's opinion.—Poropat v. Olympic Peninsula Motor Coach Co., 299 P. 979, 163 Wash. 78.

58. Cal.—Groat v. Walkup Drayage & Warehouse Co., 58 P.2d 200, 14 Cal.App.2d 350—Willoughby v. Zylstra, 42 P.2d 685, 5 Cal.App.2d 297—Sherwood v. Thomas, 12 P.2d 676, 124 Cal.App. 450.

59. Mo.—Haile v. Metropolitan Life Ins. Co., App., 96 S.W.2d 628.

22 C.J. p 262 note 32.

Statements years before

Statements which constituted circumstantial evidence of bodily conditions which induced, led up to, and finally culminated in the very disability for which plaintiff seeks to be benefited, are competent, notwithstanding they had been made and uttered a matter of years before.—Haile v. Metropolitan Life Ins. Co., supra.

60. U.S.—Wilks v. U. S., C.C.A.N.Y., 65 F.2d 775.

Cal.—Hatzakorzian v. Rucker-Fuller Desk Co., 239 P. 709, 197 Cal. 82, 41 A.L.R. 1027—Bloomberg v. Laventhal, 178 P. 496, 179 Cal. 616—Willoughby v. Zylstra, 42 P.2d 685, 5 Cal.App.2d 297—Muzzy v. Supreme Lodge of Fraternal Brotherhood, 18 P.2d 107, 129 Cal.App. 1.

Idaho.—Roy v. Oregon Short Line R. Co., 42 P.2d 476, 55 Idaho 404, certiorari denied Oregon Short Line R. Co. v. Roy, 56 S.Ct. 89, 296 U.S. 579, 80 L.Ed. 409.

Ill.—Brant v. Chicago & A. R. Co., 214 Ill.App. 126, affirmed 128 N.E. 732, 294 Ill. 606.

Ky.—Steele Coal Co. v. Vanover, 272 S.W. 418, 209 Ky. 148.

Me.—Ross' Case, 126 A. 484, 124 Me. 107.

Mich.—Stinson v. Payne, 203 N.W. 831, 231 Mich. 158.

Miss.—Metropolitan Life Ins. Co. v. Moss., 102 So. 343, citing **Corpus Juris.**

Mo.—Toon v. David G. Evans Coffee Co., App., 103 S.W.2d 533—Haile v. Metropolitan Life Ins. Co., App., 96 S.W.2d 628.

Neb.—Turpin v. State, 281 N.W. 800, 135 Neb. 389.

N.C.—Munden v. Metropolitan Life Ins. Co., 196 S.E. 872, 213 N.C. 504.

N.D.—Jacobson v. Mutual Ben. Health & Accident Ass'n, 296 N. W. 545.

Or.—Stuart v. Occidental Life Ins. Co., 68 P.2d 1037, 156 Or. 522.

Tex.—Metropolitan Life Ins. Co. v. Delgado, Civ.App., 77 S.W.2d 539.

Utah.—Boyd v. Industrial Commission of Utah, 48 P.2d 498, 88 Utah 173, rehearing denied 53 P.2d 80, 88 Utah 184—Hammond v. Industrial Commission, 34 P.2d 687, 84 Utah 67.

22 C.J. p 262 note 33—1 C.J. p 501 note 92—5 C.J. p 669 note 90—17 C.J. p 1307 note 9.

Consciousness

Evidence of deceased's declarations after being struck by truck were admissible, as showing consciousness and suffering after injury.—Hicks v. H. B. Church Truck Service Co., 156 N.E. 254, 259 Mass. 272.

61. Tex.—Texas Electric Ry. v. Shelton, Civ.App., 286 S.W. 526.

Utah.—Tedesco v. Industrial Commission of Utah, 46 P.2d 670, 86 Utah 501—Hammond v. Industrial Commission, 34 P.2d 687, 84 Utah 67.

22 C.J. p 263 note 34.

Not limited to time

Such exclamations of pain are not limited to the time of the accident, nor to any limited time thereafter. —Lowery v. Jones, 121 So. 704, 219 Ala. 201, 64 A.L.R. 553.

62. Ind.—Southern Indiana R. Co. v. Davis, 69 N.E. 550, 32 Ind.App. 569.

22 C.J. p 263 note 35.

63. N.Y.—Werely v. Persons, 28 N. Y. 344, 84 Am.D. 346.

22 C.J. p 263 note 36.

64. Ky.—Louisville, etc., R. Co. v. Smith, 84 S.W. 755, 27 Ky.L. 257.

65. Ind.—Alexandria v. Young, 51 N. E. 109, 20 Ind.App. 672.

Mich.—Strudgeon v. Sand Beach, 65 N.W. 616, 107 Mich. 496.

Tex.—International, & G. N. R. Co. v. Kuehn, 21 S.W. 58, 2 Tex.Civ.App. 210.

66. U.S.—Delaware, L. & W. R. Co.

except perhaps in case of statements made to physicians, see infra § 246, that the statements, to be admissible, must be made under circumstances warranting the inference that they were made spontaneously, and not with a view to their effect on the controversy.[67] It is not, however, necessary that the statement should be a part of the res gestæ of the happening of the injury.[68] In the absence of a suspicion of fabrication, it is not essential that the statements should have been made ante litem motam;[69] but they have been received, although made post litem motam,[70] or even after suit has been brought,[71] or during the trial.[72]

Intoxication. The statements of a person alleged to have been intoxicated at the time are admissible to show the fact of intoxication.[73]

Insanity of the sufferer at the time of making declarations as to then existing pain does not render evidence of such declarations inadmissible.[74]

Statements of third persons. An unsworn statement of a third person cannot be direct evidence of the existence of a particular bodily condition in men[75] or in animals,[76] although declarant was intimately acquainted with the facts.[77] The fact that the declaration was made in the presence of the person to whose bodily condition it related does not render it admissible,[78] unless in the latter case his acquiescence was in the nature of an admission, in which event the statement may be used against him.[79]

§ 243. Form of Declaration in General

A declaration indicating bodily condition is generally held to be admissible whether articulate or inarticulate, although in some jurisdictions statements other than inarticulate expressions of pain are inadmissible unless made to a physician for purposes of treatment.

v. Ashley, N.J., 67 F. 209, 14 C.C.A. 368.
Mich.—Butts v. Eaton Rapids, 74 N.W. 872, 116 Mich. 539.
22 C.J. p 263 note 39.

67. Kan.—St. Louis, etc., R. Co v. Chaney, 94 P. 126, 77 Kan. 276.
Mich.—Rogers v. City of Detroit Department of Street Railways, 286 N.W. 167, 289 Mich. 86—Layton v. Cregan & Mallory Co., 257 N.W. 888, 269 Mich. 574—Layton v. Cregan & Mallory Co., 252 N.W. 337, 265 Mich. 574.
Mo.—Haile v. Metropolitan Life Ins. Co., App., 96 S.W.2d 628.
Neb.—Hewitt v. Eisenhart, 55 N.W. 252, 36 Neb. 794.
22 C.J. p 263 notes 40, 41.

Spontaneous expressions

(1) Natural and spontaneous expressions indicating present bodily pain are admissible as original evidence.—Roy v. Oregon Short Line R. Co., 42 P.2d 476, 55 Idaho 404, certiorari denied Oregon Short Line R. Co. v. Roy, 56 S.Ct. 89, 296 U.S. 579, 80 L.Ed. 409.

(2) Such statements are in the nature of res gestae.—Republic Underwriters v. Howard, Tex.Civ.App., 69 S.W.2d 584, error dismissed.

68. Or.—Stuart v. Occidental Life Ins. Co., 68 P.2d 1037, 156 Or. 522.
Tex.—Associated Indemnity Corporation v. Baker, Civ.App., 76 S.W.2d 153, error dismissed—U. S. Fidelity & Guaranty Co. v. Nettles, Civ.App., 21 S.W.2d 31, reversed on other grounds, Com.App., 35 S.W.2d 1045—Security Union Casualty Co. v. Frederick, Civ.App., 295 S.W. 301—Lumbermen's Reciprocal Ass'n v. Adcock, Civ.App., 244 S.W. 645—Trinity, etc., R. Co. v. Carpenter, Civ.App., 132 S.W. 837.

69. Mich.—Strudgeon v. Sand Beach, 65 N.W. 616, 107 Mich. 496.
Vt.—Bagley v. Mason, 37 A. 287, 69 Vt. 175.

70. Mich.—Strudgeon v. Sand Beach, 65 N.W. 616, 107 Mich. 496.
22 C.J. p 263 note 44.

71. Ind.—Indianapolis Southern R. Co. v. Tucker, 98 N.E. 431, 51 Ind. App. 480.
22 C.J. p 263 note 45.

72. Mass.—Fleming v. Springfield, 28 N.E 910, 154 Mass. 520, 26 Am. S R. 268.

73. Ark.—Albritton v. C. M. Ferguson & Son, 122 S.W.2d 620, 197 Ark. 436.

74. Tex.—Knox v. Robbins, Civ.App., 151 S.W. 1134.

75. U.S.—U. S. v. Johnson, C.C.A. Ark., 94 F.2d 539—Raymond & Whitcomb Co. v. Ebsary, C.C.A N. Y., 9 F.2d 889, reversing, D.C., Ebsary v. Raymond & Whitcomb Co., 4 F.2d 285.
Ark.—Sloan v. Newman, 266 S.W. 257, 166 Ark. 259.
Idaho.—Pierstorff v. Gray's Auto Shop, 74 P 2d 171, 58 Idaho 438.
Ky.—Friedman Co. v. Friedman, 113 S.W.2d 1172, 272 Ky. 205.
Mo.—Bailey v. Metropolitan Life Ins. Co., App., 115 S.W.2d 151, certiorari quashed State ex rel. Metropolitan Life Ins. Co. v. Shain, 121 S.W.2d 789, 343 Mo. 435.
Tex.—Knights and Ladies of Security v. Shepherd, Civ.App., 221 S.W. 696.
22 C.J. p 261 note 27.

Statements received by physician from third persons concerning the bodily condition of another are inadmissible as hearsay.
Minn.—Bullock v. New York Life Ins. Co., 233 N.W. 858, 182 Minn. 192—Laury v. Northwestern Mut. Life Ins. Co., 231 N.W. 824, 180 Minn. 205, affirming 230 N.W. 648, 180 Minn. 205.
Ohio.—Salko v. Metropolitan Life Ins. Co., 3 N.E.2d 664, 52 Ohio App. 367.

76. Iowa.—Welch v. Norton, 36 N. W. 758, 73 Iowa 721.

77. Mich.—Brown v. Metropolitan L. Ins. Co., 32 N.W. 610, 65 Mich. 306, 8 Am.S.R. 894.
22 C J. p 261 note 29.

Statements of physicians

(1) What a physician said about the condition of another is generally held to be inadmissible.
U.S.—U. S. v. Johnson, C.C.A.Ark., 94 F.2d 539—Luke v. U. S., C.C.A. Ga., 84 F.2d 823.
Ark.—Progressive Life Ins. Co. v. Hulbert, 118 S.W.2d 268, 196 Ark. 352.
Cal.—In re Russell's Estate, 210 P. 249, 189 Cal. 759—In re Hess' Estate, 192 P. 35, 183 Cal. 589—Duffy v. Duffy, 235 P. 62, 71 Cal.App. 251.
Md.—Zipus v. United Rys. & Electric Co. of Baltimore City, 108 A. 884, 135 Md. 297.
N.Y.—Albers v. Wilson, 195 N.Y.S. 145, 201 App.Div. 775.
Ohio.—Cincinnati Traction Co. v. McKim, 13 Ohio App. 108.
Tenn.—Tevis v. Proctor & Gamble Distributing Co., 113 S.W.2d 64, 21 Tenn.App. 494.

(2) It has been held, however, that a witness might be permitted to testify that a doctor told her she had a misplaced kidney.—Texas Employers' Ins. Ass'n v. Knouff, Tex.Civ. App., 297 S.W. 799, reversed on other grounds, Com.App., 7 S.W.2d 68.

78. Pa.—Wilt v. Vickers, 8 Watts 227.
Tex.—Missouri, etc., R. Co. v. Dawson, 29 S.W. 1106, 10 Tex.Civ.App. 19.

79. Ill.—Kozlowski v. Chicago, 113 Ill.App. 513.
22 C.J. p 261 note 31.

The representation may take any form, inarticulate, as in groanings,[80] moanings,[81] or physical manifestations,[82] or articulate, as in exclamations, see infra § 244, or more detailed statements summarized as complaints,[83] or declarations of pain and suffering.[84] In some jurisdictions, however, declarations as to bodily condition,[85] except for involuntary audible exhibitions of pain, such as sighs, screams, groans, and such,[86] are inadmissible unless made to a physician, or unless, in a personal injury case, they

80. Tex.—U. S. Fidelity & Guaranty Co. v. Nettles, Civ.App., 21 S.W.2d 31, reversed on other grounds, Com App., 35 S.W 2d 1045—Texas Electric Ry. v. Shelton, Civ.App., 286 S.W. 526.
22 C.J. p 263 note 48.

81. Ill.—McCambridge v. Chicago, 178 Ill App. 513.
Mont.—Burles v. Oregon Short Line R. Co., 140 P. 513, 49 Mont. 129, Ann.Cas.1916A 873.

82. **Particular manifestations admissible**
(1) Facial expression—McCambridge v. Chicago, 178 Ill.App. 513.
(2) Holding hand on stomach.—Chicago & Alton R. Co. v. Industrial Commission, 142 N.E. 182, 310 Ill. 502.

83. U.S.—Travelers' Ins. Co. v. Locke, D C.N.Y., 56 F.2d 443.
Ala.—Birmingham Electric Co. v. Guess, 131 So 883, 222 Ala. 280.
Cal.—Muzzy v. Supreme Lodge of Fraternal Brotherhood, 18 P.2d 107, 129 Cal.App. 1—Williams v. A. R. G. Bus Co., 190 P. 1036, 47 Cal. App. 568.
Md.—Pennsylvania R. Co. v. Simmons, 150 A. 263, 159 Md. 114.
Mich.—Stinson v. Payne, 203 N.W. 831, 231 Mich. 158.
Mo.—Rainier v. Quincy, O. & K. C. R. Co., 271 S.W. 500—Young v. Metropolitan Life Ins. Co., 84 S.W.2d 1065, 229 Mo.App. 823, certiorari quashed State ex rel. Metropolitan Life Ins. Co. v. Allen, 100 S.W.2d 487, 339 Mo. 1156—Weiler v. Peerless White Lime Co., App., 64 S.W. 2d 125—Benson v. Smith, App., 38 S.W.2d 749—Hill v. Edward F. Guth Co., App., 35 S.W.2d 924—Martin v. Travelers' Ins. Co., App., 247 S.W. 1024, certified 276 S.W. 380, 310 Mo. 411, 41 A.L.R. 1372—Fletcher v. Kansas City Rys. Co., App., 221 S.W. 1070.
N.C.—Martin v. P. H. Hanes Knitting Co., 127 S.E. 688, 189 N.C. 644.
Okl.—Dewitt v. Johnson, 41 P.2d 476, 170 Okl. 625.
Or.—Derrick v. Portland Eye, Ear, Nose & Throat Hospital, 209 P. 344, 105 Or. 90.
Tex.—Dulaney Inv. Co. v. Wood, Civ. App., 142 S.W.2d 379, error dismissed, judgment correct—Metropolitan Life Ins. Co. v. Delgado, Civ.App., 77 S.W.2d 539—American Employers' Ins. Co. v. Singleton, Civ.App., 14 S.W.2d 939, reversed on other grounds, Com.App., 24 S. W.2d 26—Great West Mill & Elevator Co. v. Hess, Civ.App., 281 S. W. 234—Lumbermen's Reciprocal Ass'n v. Adcock, Civ.App., 244 S. W. 645—San Antonio Public Service Co. v. Mitchell, Civ.App., 238 S. W. 265, error granted—Parker v. Harrell, Civ.App., 212 S.W. 542.
Utah.—Boyd v. Industrial Commission of Utah, 48 P.2d 498, 88 Utah 173, rehearing denied 53 P.2d 80, 88 Utah 184—Hammond v. Industrial Commission, 34 P.2d 687, 84 Utah 67.
Wash.—Buell v. Park Auto Transp. Co., 231 P. 161, 132 Wash. 92.
22 C J. p 263 note 52.

Exact language
Where witnesses were permitted to testify as to plaintiff's expressions and complaints of pain and suffering, there was no error in declining to permit plaintiff to show the exact language used.—Elder v. Ralls Sanitarium, 122 So. 41, 219 Ala. 298.

General complaints are admissible, but complaints as to specific pains are inadmissible.—Alabama Great Southern R. Co. v. McBryar, Ga.App., 15 S.E.2d 563.

In rebuttal
Where defendant endeavored to show that the injured person made no complaint, evidence of complaints by him is admissible in rebuttal.—Associated Indemnity Corporation v. Baker, Tex Civ.App., 76 S W.2d 153, error dismissed—Hines v. Blackman, Tex.Civ.App., 226 S W. 142, affirmed, Com.App., 239 S.W. 908.

Statement to employer
Where it is the practice of the industrial commission to require a claimant for workmen's compensation to obtain the certificate of his employer to an application for compensation, the statement of an injured workman made to his employer, or his superior, at the first opportunity after the injury, should be regarded as competent.—Industrial Commission of Ohio v. Mounjoy, 173 N.E. 263, 36 Ohio App. 476.

84. N.D.—Halverson v. Zimmerman, 232 N.W. 754, 60 N.D. 113.
Tex.—Hess v. Rouse, Civ.App., 22 S. W.2d 1077.

85. Ga.—Broyles v. Prisock, 25 S. E. 389, 97 Ga. 643.
Ill.—West Chicago St. R. Co. v. Kennelly, 48 N.E. 996, 170 Ill. 508.
Mich.—Matthews v. Lamberton, 151 N.W. 563, 184 Mich. 493.
Minn.—Williams v. Great Northern Ry. Co., 70 N.W. 860, 68 Minn. 55.
22 C.J. p 264 note 53.
"The plaintiff's wife was permitted to testify to his complaints made in her hearing. She said he complained of his side a great deal, and, being told to state all of his complaints, she said his head hurt him, and his side and leg; he suffered a great deal. Such evidence as this, by a witness other than the wife of a party, was competent and admissible, so long as the law excluded parties from being witnesses in their own behalf; but now that they are, by statute, competent to testify, and where, as in this case, the testimony is heard from the plaintiff himself, who knew the facts of pain and suffering, his wife, whose knowledge of them was derived from hearsay, was not competent to prove complaints which were no part of the res gestae of the injury. The ground on which such evidence was formerly deemed competent was the ground of necessity. That necessity no longer exists. The higher and better evidence is that of the person who has actual knowledge of the truth of the pains and other feelings to which the complaints relate."—Atlanta St. R. Co. v. Walker, 21 S. E. 48, 49, 93 Ga. 462.

86. Del.—Wilkins v. Mayor, Etc., of City of Wilmington, 42 A. 418, 16 Del. 132.
Ill.—West Chicago St. Ry. Co. v. Carr, 48 N E. 992, 170 Ill. 478.
N.Y.—Smith v. Dittman, 11 N.Y.S. 769, 16 Daly 427.
22 C.J. p 264 note 53.

Natural and instinctive expressions
(1) Unless complaints are made to a physician with the view to medical treatment, the proof should be limited to such complaints as are the natural and instinctive expressions of present sufferings. Evidence is not admissible of complaints which consist simply of answers to questions, or are merely descriptive statements or assertions of the existence of present suffering.—Martin v. Sherwood, 51 A. 526, 74 Conn. 475.

(2) Evidence held admissible as natural and instinctive expressions of present suffering.
Ala.—Alabama Power Co. v. Edwards, 121 So. 543, 219 Ala. 162.
Conn.—Woodward v. City of Waterbury, 155 A. 825, 113 Conn. 457.
However, it has been held that a witness should not be permitted to testify that "she screamed with the ankle awfully."—West Chicago St. Ry. Co. v. Kennelly, 48 N.E. 996, 170 Ill. 508.

form part of the res gestæ of the accident.[87]

Statements of conclusions by the injured person are not admissible as independently relevant statements.[88]

§ 244. Exclamations of Pain

Where relevant, exclamations of present pain are admissible.

Where the bodily condition of a person is a relevant fact, exclamations of present pain[89] or distress[90] which are shown to be the natural and spontaneous expression of present feeling and not the result of a deliberate purpose[91] are competent circumstantial evidence of the existence of the particular bodily condition, especially where there are other indications of the condition.[92] It is not necessary that the exclamations should have been contemporaneous with the injury causing the condition,[93] but such exclamations have been held admissible, even though they occurred a considerable time after the injury,[94] or after declarant had decided to bring suit therefor.[95] It is not necessary that the exact words used by the sufferer should be shown.[96]

§ 245. Narrative Statements

As a general rule mere narrative statements as to bodily condition, or the causes or effect of sickness or injury, are inadmissible.

Statements of a narrative nature as to the causes,[97] attendant circumstances,[98] or effect[99] of the sickness or injuries, or the manner in which, or the time at which, an injury was inflicted,[1] or the nature of former symptoms,[2] or past sufferings of the persons,[3] or in general, as to bodily condition at

87. Ill.—Springfield Cons. R. Co v. Hoeffner, 51 N.E 884, 175 Ill. 634.
Tex.—St. Louis Southwestern R. Co. v. Brown, 69 S.W. 1010, 30 Tex. Civ.App. 57.
Wis.—Hall v. American Masonic Acc. Assoc., 57 N.W. 366, 86 Wis. 518.

88. Mo.—Martin v. Travelers' Ins. Co., App., 247 S W. 1024, certified 276 S.W. 380, 310 Mo. 411, 41 A.L.R. 1372.

89. Ala.—Harris v. Brown, 134 So. 34, 24 Ala.App. 264.
Ga.—Lathem v. Hartford Accident & Indemnity Co., 3 S.E.2d 916, 60 Ga. App. 523.
Ill.—Brant v. Chicago & A. R. Co., 214 Ill.App. 126, affirmed 128 N.E. 732, 294 Ill. 606.
Mich.—Rogers v. City of Detroit, Department of Street Railways, 286 N.W. 167, 289 Mich. 86—Simmons v. Petersen, 174 N.W. 536, 207 Mich. 508.
Mo.—Haile v. Metropolitan Life Ins. Co., App., 96 S.W.2d 628.
N.J.—De Palma v. Economy Auto Supply Co, 130 A. 206, 3 N.J.Misc. 827, affirmed 133 A. 919, 102 N.J. Law 714.
N D.—Jacobson v. Mutual Ben. Health & Accident Ass'n, 296 N. W. 545.
Ohio.—Cincinnati Traction Co. v. McKim, 13 Ohio App. 108.
Or.—Stuart v. Occidental Life Ins. Co., 68 P.2d 1037, 156 Or. 522.
22 C.J. p 264 note 56, p 265 note 60.

Not exclamations of pain

Deceased's statement, "I don't see how he came to hit me," was not admissible as an exclamation of pain.—Hicks v. H. B. Church Truck Service Co., 156 N.E. 254, 259 Mass. 272.

Particular exclamations admitted

(1) "My God! it hurts!"—Duran v. Yellow Aster Min. & Mill. Co., 181 P. 395, 40 Cal.App. 633.

(2) "Oh, mama! oh mama!" made by a child after being struck by a train.—Hines v. Johnson, 224 S.W. 989, 145 Ark. 592.

Only spontaneous exclamations accompanying the injury or injuries are admissible.—Layton v. Cregan & Mallory Co., 257 N.W. 888, 269 Mich. 574.

90. Ark.—Hines v. Johnson, 224 S. W. 989, 145 Ark. 592.
22 C.J. p 265 note 57.

91. Kan.—St. Louis & S. F. R. Co. v. Chaney, 94 P. 126, 77 Kan. 276.
22 C.J. p 265 note 58.

92. N.Y.—Hagenlocher v. Coney Island & B. R. Co., 1 N.E. 536, 99 N.Y. 136.

93. Ga.—Lathem v. Hartford Accident & Indemnity Co., 3 S.E.2d 916, 60 Ga App. 523.
Mo.—Haile v. Metropolitan Life Ins. Co., App., 96 S.W.2d 628.
Utah.—Tedesco v. Industrial Commission of Utah, 46 P.2d 670, 86 Utah 501—Hammond v. Industrial Commission, 34 P.2d 687, 84 Utah 67.
22 C.J. p 266 note 62.

94. Ark.—Prescott & N. W. R. Co. v. Thomas, 167 S.W. 486, 114 Ark. 56.
Mich.—McCormick v. Detroit, G. H. & M. R. Co., 104 N.W. 390, 141 Mich. 17.

95. Mich.—McCormick v. Detroit, G. H. & M. R. Co., supra.

96. Ind.—Indianapolis Southern R. Co. v. Tucker, 98 N.E. 431, 51 Ind. App. 480.

97. Ala.—Lowery v. Jones, 121 So. 704, 219 Ala. 201, 64 A.L.R. 553.
Idaho.—Erickson v. Edward Rutledge Timber Co., 191 P. 212, 33 Idaho 179.
Ill.—Teter v. Spooner, 116 N.E. 673, 279 Ill. 39—Collins v. Waters, 54 Ill. 485.
Ind.—Abendroth v. Fidelity & Deposit Co. of Maryland, 124 N.E. 714, 73 Ind.App. 50.
Ky.—Steele Coal Co. v. Vanover, 272 S W. 418, 209 Ky. 148.
La.—Hicks v. Meridian Lumber Co., 94 So 903, 152 La. 975.
Mich.—Sanborn v. Income Guaranty Co., 221 N.W. 162, 244 Mich. 99.
Minn.—Perkins v. Great Northern Ry. Co., 188 N.W. 564, 152 Minn. 226.
Mo.—Toon v. David G. Evans Coffee Co., App., 103 S.W.2d 533.
Pa.—McMahon v. Edward G. Budd Mfg Co., 164 A. 850, 108 Pa.Super. 235.
22 C J. p 266 note 66.
Narrative statements to physicians see infra § 246.

By whom made

Recitals as to cause of injury or how received are not admissible, when sought to be shown by person other than injured party.—Texas Employers' Ins. Ass'n v. Davidson, Tex.Civ.App., 288 S.W. 471, rehearing denied 290 S.W. 871.

98. Md.—Hazlitt v. Dewlow, 189 A. 213, 171 Md. 398.
22 C.J. p 266 note 67.

99. Okl.—Smith v. Chicago, R. I. & P. R. Co., 142 P. 398, 42 Okl. 577.
22 C.J. p 266 note 68.

1. Okl.—Smith v. Chicago, R. I. & P. R. Co., supra.
22 C.J. p 266 notes 69, 70.

2. Minn.—Williams v. Great Northern R. Co., 70 N.W. 860, 68 Minn. 55, 37 L.R.A. 199.
22 C.J. p 266 note 71.

3. U.S.—Raymond & Whitcomb Co. v. Ebsary, C.C.A. N.Y., 9 F.2d 889, reversing, D.C., Ebsary v. Raymond & Whitcomb Co., 4 F.2d 285.
Ala.—Lowery v. Jones, 121 So. 704, 219 Ala. 201, 64 A.L.R. 553.
Cal.—Bloomberg v. Laventhal, 178 P. 496, 179 Cal. 616.

another time,[4] are incompetent; especially, in case of injury, where at the time of the statement the patient has been removed from the scene of the accident.[5]

§ 246. To Whom Made

Any competent witness may testify to a relevant declaration indicating bodily condition. Statements to a physician as to bodily condition, particularly when made for the purpose of diagnosis and treatment, are admissible.

Relevant statements as to bodily condition are competent when made in the hearing of any person, and may be proved by any competent witness.[6] Accordingly it is permissible to show statements made in the hearing of a nurse[7] or other attendant,[8] the wife,[9] husband,[10] mother[11] or father[12] of the sufferer, or even an ordinary bystander.[13]

Statements to a physician as to pain or suffering or the location and nature of symptoms, made for the purpose of diagnosis and treatment, are received as circumstantial evidence of the existence of the bodily condition stated,[14] and are entitled to more

Idaho.—Roy v. Oregon Short Line R. Co., 42 P.2d 476, 55 Idaho 404, certiorari denied Oregon Short Line R. Co. v. Roy, 56 S.Ct. 89, 296 U.S. 579, 80 L.Ed. 409.
Mich.—Layton v. Cregan & Mallory Co., 257 N.W. 888, 269 Mich. 574—Layton v. Cregan & Mallory Co., 252 N.W. 337, 265 Mich. 574—Sanborn v. Income Guaranty Co., 221 N.W. 162, 244 Mich. 99.
N.C.—Martin v. P. H. Hanes Knitting Co., 127 S.E. 688, 189 N.C. 644.
Tex.—Texas Employers' Ins. Ass'n v. Davidson, Civ.App., 288 S.W. 471, rehearing denied 290 S.W. 871—Gulf, C. & S. F. Ry. Co. v. Young, Civ.App., 284 S.W. 664.
22 C.J. p 266 note 72.

Emotional demonstrations

Permitting witness to describe plaintiff's emotional demonstrations exhibited before jury as characteristic of his condition is not proper.—Gleason v. Lowe, 205 N.W. 199, 232 Mich. 300.

4. Pa.—Woroniak v. Federal Life Ins. Co., 17 Lehigh Co.L.J. 358.
Tex.—Dallas Hotel Co. v. McCue, Civ. App., 25 S.W.2d 902.
22 C.J. p 267 note 73.

5. Mich.—Merkle v. Bennington Tp., 24 N.W. 776, 58 Mich. 156, 55 Am. R. 666.

6. Ala.—Alabama Power Co. v. Edwards, 121 So. 543, 219 Ala. 162.
Ky.—Meador v. Arnold, 94 S.W.2d 626, 264 Ky. 378
Mo.—Haile v. Metropolitan Life Ins. Co., App., 96 S.W.2d 628—Benson v. Smith, App., 38 S.W.2d 749.
Ohio.—Cincinnati Traction Co. v. McKim, 13 Ohio App. 108.
Okl.—Dewitt v. Johnson, 41 P.2d 476, 478, 170 Okl. 625, citing **Corpus Juris.**
Tex.—Republic Underwriters v. Howard, Civ.App., 69 S.W.2d 584, error dismissed—Texas Electric Ry. v. Shelton, Civ.App., 286 S.W. 526.
Utah.—Hammond v. Industrial Commission, 34 P.2d 687, 84 Utah 67.
Wash.—Buell v. Park Auto Transp. Co., 231 P. 161, 132 Wash. 92.
22 C.J. p 267 notes 76, 77.

Limitation as to form of declaration when not made to physician see supra § 243.

7. Cal.—Green v. Pacific Lumber Co., 62 P. 747, 130 Cal. 435.
Ill.—Horney v. St. Louis & N. E. R. Co., 165 Ill.App. 547.
Vt.—Brown v. Mt. Holly, 38 A. 69, 69 Vt. 364.

8. Vt.—Bagley v. Mason, 37 A. 287, 69 Vt. 175—Drew v. Sutton, 55 Vt. 586, 45 Am.R. 644

9. Utah.—Hammond v. Industrial Commisson, 34 P.2d 687, 84 Utah 67.
22 C.J. p 267 note 80.

10. Mo.—Benson v. Smith, App., 38 S.W.2d 749.

11. Or.—Derrick v. Portland Eye, Ear, Nose & Throat Hospital, 209 P. 344, 105 Or. 90

12. Ala.—Western Steel Car & Foundry Co. v. Bean, 50 So. 1012, 163 Ala. 255.

13. Mo.—Haile v. Metropolitan Life Ins. Co., App., 96 S.W.2d 628.
22 C.J. p 267 note 82.

14. U.S.—Ætna Life Ins. Co. v. Quinley, C.C.A.Neb., 87 F.2d 732—London Guarantee & Accident Co. v. Woelfle, C.C.A.Mo., 83 F.2d 325.
Ala.—Lowery v. Jones, 121 So. 704, 219 Ala. 201, 64 A.L.R. 553.
Cal.—Willoughby v. Zylstra, 42 P.2d 685, 5 Cal.App.2d 297.
Ill.—Cuneo Press Co. v. Industrial Commission, 173 N.E. 470, 341 Ill. 569—Told v. Madison Bldg. Co., 216 Ill.App. 29.
Ind.—Murray v. Cottrell, 141 N.E. 524, 80 Ind.App. 521.
Ky.—Equitable Life Assur. Soc. of U. S. v. Fannin, 53 S.W.2d 703, 245 Ky. 474.
Mass.—Arabia v. John Hancock Mut. Life Ins. Co., 17 N.E.2d 202, 301 Mass. 397.
Mo.—Evans v. Missouri Pac. R. Co., 116 S.W.2d 8, 342 Mo. 420—Corbett v. Terminal R. Ass'n of St. Louis, 82 S.W.2d 97, 336 Mo. 972—Schulz v. St. Louis-San Francisco Ry. Co., 4 S.W.2d 762, 319 Mo. 8—McNicholas v. Continental Baking Co., App., 112 S.W.2d 849—Chavaries v. National Life & Accident Ins. Co. of Tennessee, App., 110 S.W.2d 790—Curry v. Federal Life Ins. Co., 287 S.W. 1053, 221 Mo.App. 626—Murphy v. St. Joseph Ry. Light, Heat & Power Co., 283 S.W. 994, 221 Mo.App. 670—Adolf v. Brown, 255 S.W. 947, 213 Mo.App. 406—Sparks v. Harvey, App., 214 S.W. 249.
N.J.—Wilhelmi v. American Ry. Express Co., 142 A. 555, 6 N.J.Misc. 674, affirmed 146 A. 198, 106 N.J. Law 610.
N.C.—Moore v. Summers Drug Co., 175 S.E. 96, 206 N.C. 711—Bryant v. Burns-Hammond Const. Co., 150 S.E. 122, 197 N.C. 639.
Or.—Wise v. State Industrial Accident Commission, 35 P.2d 242, 148 Or. 461—Reid v. Yellow Cab Co., 279 P. 635, 131 Or. 27, 67 A.L.R. 1, per Rossman, J.—Yarbrough v. Carlson, 202 P. 739, 102 Or. 422—Patterson v. Howe, 202 P. 225, 102 Or. 275.
Pa.—Freedman v. Mutual Life Ins. Co. of New York, 21 A.2d 81—McMinis v. Philadelphia Rapid Transit Co., 135 A. 722, 288 Pa. 377—Boyle v. Philadelphia Rapid Transit Co., 134 A. 446, 286 Pa. 536—Lichtenwallner v. Laubach, 105 Pa. 366—Mirabella v. Metropolitan Life Ins. Co., 18 A.2d 474, 143 Pa. Super. 500—Naparava v. Glen Alden Coal Co., 32 Luz Leg.Reg. 437—Slater v. Tri-City Freight Line, 28 Del.Co. 84—Jones v. McGinty, 27 Del.Co. 452.
Tenn.—City of Maryville v. McConkey, 90 S.W.2d 951, 19 Tenn.App. 520—Bell v. Travelers' Ins. Co., 79 S.W.2d 824, 18 Tenn.App. 552
Tex.—Texas Employers Ins. Ass'n v. Ebers, Civ.App., 134 S.W.2d 797, error dismissed, judgment correct—Texas & N. O. R. Co. v. Churchill, Civ.App., 74 S.W.2d 1030, error dismissed—San Antonio Public Service Co. v. Mitchell, Civ.App., 238 S.W. 265, error granted.
Utah.—Hammond v. Industrial Commission, 34 P.2d 687, 84 Utah 67.
Wash.—Kraettli v. North Coast Transp. Co., 6 P.2d 609, 166 Wash. 186, 80 A.L.R. 1520.
22 C.J. p 267 notes 83–85.

Complaints

Attending physician may testify

weight than similar statements made to another person.[15] Only such statements, however, as are made for the purpose of securing,[16] and which are necessary to secure,[17] proper diagnosis and treatment are admissible. Narrative statements to a physician are to be rejected where they relate to facts not connected with diagnosis and treatment,[18] such as the cause of an illness or injury,[19] the circumstanc-

as to complaints of patient.—Raymond & Whitcomb Co. v. Ebsary, C.C.A.N.Y., 9 F.2d 889, reversing, D. C., Ebsary v Raymond & Whitcomb Co, 4 F.2d 285.

Present symptoms

(1) Declarations of present symptoms told by a patient to a physician for the purpose of diagnosis and treatment are admissible.

U.S.—Meaney v. U. S., C.C.A.N.Y., 112 F.2d 538, 130 A.L.R. 973.

N.J.—Koske v. Delaware, L. & W. R. Co., 142 A. 43, 104 N.J.Law 627, certiorari granted Delaware, L. & W. R. Co. v. Koske, 49 S.Ct. 13, 278 U.S. 586, 73 L.Ed. 521, affirmed 49 S.Ct. 202, 279 U.S. 7, 73 L.Ed. 578.

(2) A statement by a patient that his sputum was stained with blood was a declaration of a present symptom.—Hartford Accident & Indemnity Co. v Baugh, C.C.A.Tex., 87 F.2d 240, certiorari denied 57 S.Ct. 670, 300 U.S. 679, 81 L.Ed. 883.

Spontaneous utterances of a patient in the course of his examination by a physician are admissible.

U.S.—Meaney v. U. S., C.C.A.N.Y., 112 F.2d 538, 130 A.L.R. 973.

Tex.—Galveston, H. & S. A. Ry. Co. v. Easton, 257 S.W. 924.

Testimony by plaintiff

In an action by servant against master to recover damages by reason of unskillfulness of physician employed by master, testimony of plaintiff as to what he told the physician as to the condition of his arm, when the latter examined it and changed splints put there by another physician, was admissible.—McMahan v. Carolina Spruce Co., 105 S.E. 439, 180 N.C. 636.

15. Utah.—Hammond v. Industrial Commission, 34 P.2d 687, 84 Utah 67.

22 C.J. p 268 note 86.

16. Ky.—Great Atlantic & Pacific Tea Co. v. Eiseman, 81 S.W.2d 900, 259 Ky. 103.

17. Ky.—Chesapeake & O. R. Co v. Hay, 58 S.W.2d 228, 248 Ky. 69.

18. U.S.—Hartford Accident & Indemnity Co. v. Carter, C.C.A.Tex., 110 F.2d 355—Ætna Life Ins. Co. v. Quinley, C.C.A.Neb., 87 F.2d 732.

Ky.—Louisville & N. R. Co. v. Rowland's Adm'r, 286 S.W. 929, 215 Ky. 663.

Mo.—Schulz v. St. Louis-San Francisco Ry. Co., 4 S.W.2d 762, 319 Mo. 8—Freese v. St. Louis Public Service Co., App., 58 S.W.2d 758—De Moss v. Evens & Howard Fire Brick Co., App., 57 S.W.2d 720—Hutchinson v. Missouri Pac. Ry. Co., App., 288 S.W. 91—Curry v. Federal Life Ins. Co., 287 S.W. 1053, 221 Mo.App. 626—Murphy v. St. Joseph Ry. Light, Heat & Power Co., 283 S.W. 994, 221 Mo.App. 670—Adolf v. Brown, 255 S.W. 947, 213 Mo.App. 406

Ohio.—Brice v. Samuels, 17 N.E.2d 280, 59 Ohio App. 9.

Or.—Reid v. Yellow Cab Co., 279 P. 635, 636, 131 Or. 27, 67 A.L.R. 1, quoting **Corpus Juris**, and declaring it to be better rule, per Coshow, C. J., and McBride and Rand, JJ.

Pa.—Kirby v. Carnegie-Illinois Steel Corporation, Super., 21 A.2d 123.

Tex.—Texas Indemnity Ins. Co. v. Gannon, Civ.App., 38 S.W.2d 181, error dismissed.

Utah.—Boyd v. Industrial Commission of Utah, 48 P.2d 498, 88 Utah 173, rehearing denied 53 P.2d 80, 88 Utah 184.

22 C.J. p 269 note 88.

Descriptive statements

Mere descriptive statements of a sick or injured person as to the symptoms and effects of his malady are only admissible under the following circumstances: First, they must have been made to a medical attendant for the purpose of medical treatment; second, they must relate to existing pain or other symptoms from which the patient is suffering at the time; third, such statements are only admissible when the medical attendant is called on to give an expert opinion based in part on them.

Minn.—Strommen v. Prudential Ins. Co., 245 N.W. 632, 187 Minn. 381—Sund v. Chicago, R. I. & P. Ry. Co., 204 N.W. 628, 164 Minn. 24.

Tex.—Gulf, C. & S. F. Ry. Co. v. Young, Civ.App., 284 S.W. 664.

Youth of declarant

Although statements made by a patient to his physician may be competent, on other grounds, the extreme youth of the patient does not of itself make such statements competent evidence.—Gulf Refining Co. v. Frazier, 15 Tenn.App. 662.

In mental cases

It is not competent for a medical expert on the question of insanity, in giving the reasons on which his opinion is founded, to repeat the narrations of monomaniacs as to the development of their malady, or of unprofessional nurses as to the conduct of insane persons in their care.—Wood v. Sawyer, 61 N.C. 251.

19. U.S.—Ætna Life Ins. Co. v. Quinley, C.C.A.Neb., 87 F.2d 732.

Ark.—Mutual Ben. Health & Accident Ass'n v. Basham, 87 S.W.2d 583, 191 Ark. 679.

Cal.—Losleben v. California State Life Ins. Co., 6 P.2d 1012, 1013, 119 Cal.App. 556, quoting **Corpus Juris**.

Ga.—Lathem v. Hartford Accident & Indemnity Co., 3 S.E.2d 916, 60 Ga.App. 523.

Ill.—Spiegel's House Furnishing Co. v. Industrial Commission, 123 N.E. 606, 288 Ill. 422, 6 A.L.R. 540.

Me.—Ross' Case, 126 A. 484, 124 Me. 107.

Mich.—Ginsberg v. Burroughs Adding Mach. Co., 170 N.W. 15, 204 Mich. 130.

Minn.—Bliss v. Swift & Co., 248 N.W. 754, 189 Minn. 210—Strommen v. Prudential Ins. Co., 245 N.W. 632, 187 Minn. 381.

Mo.—Evans v. Missouri Pac R. Co., 116 S.W.2d 8, 342 Mo. 420.

N.J.—Le Grand v. Hubbard & Lange, 150 A. 575, 8 N.J.Misc. 470.

Ohio.—Dugan v. Industrial Commission of Ohio, 22 N.E.2d 132, 135 Ohio St. 652—Kunzie v. Leeds, Inc., 34 N.E.2d 448, 66 Ohio App. 469—Mitchell v. New York Life Ins. Co., 22 N.E.2d 998, 62 Ohio App. 54, reversed on other grounds 27 N.E.2d 243, 136 Ohio St. 551—Industrial Commission of Ohio v. Strassel, 11 Ohio App. 234.

Or.—Watrous v. Salem Brewery Ass'n, 49 P.2d 375, 151 Or. 294—Wise v. State Industrial Accident Commission, 35 P.2d 242, 148 Or. 461.

Pa.—Jones v. McGinty, 27 Del.Co. 452.

Tenn.—Bell v. Travelers' Ins. Co., 79 S.W.2d 824, 18 Tenn.App. 552.

22 C.J. p 269 note 89.

Must be res gestæ

The statements of a person to his attending physician as to the causes of his injury and the circumstances under which it occurred are not admissible, even though made for the purpose of diagnosis and treatment, unless they were made so soon after the accident and under such circumstances as to constitute part of the res gestæ.

U.S.—London Guarantee & Accident Co. v. Woelfle, C.C.A.Mo., 83 F.2d 325.

Pa.—Riley v. Carnegie Steel Co., 119 A. 832, 276 Pa. 82.

Responsibility

Statements of patient testified to by physician must not go into question of responsibility.—Lowery v. Jones, 121 So. 704, 219 Ala. 201, 64 A.L.R. 553.

Workmen's compensation cases

Under some statutes it is permis-

es under which an injury was received,[20] or the instrument with which it was inflicted,[21] or past sufferings of the patient.[22] Indeed, it has been indicated that statements by a patient to a physician to be admissible must relate to the present, not to the past, and that anything in the nature of a narration of past events must be excluded.[23] Where, however, a statement to a physician, although narrative in character, relates to a matter which it is necessary or proper for him to know in order that he may accurately diagnose and properly treat the case, it may be shown.[24] The basis for admission

sible for the industrial commission in workmen's compensation cases to receive testimony of a physician as to what a patient told him about the cause of his injury.—Baker v. Industrial Commission of Ohio, 186 N.E. 10, 44 Ohio App. 539.

20. U.S.—Ætna Life Ins. Co. v. Quinley, C.C.A.Neb., 87 F.2d 732.
Md.—Hazlitt v. Dewlow, 189 A. 213, 171 Md. 398.
Mo.—Evans v. Missouri Pac. R. Co., 116 S.W.2d 8, 342 Mo. 420.
Or.—Reid v. Yellow Cab Co., 279 P. 635, 131 Or. 27, 67 A.L.R. 1, per Coshow, C. J., and McBride, J.
22 C.J. p 269 note 90.

21. Ill.—Collins v. Waters, 54 Ill. 485.

22. Mo.—Evans v. Missouri Pac. R. Co., 116 S.W.2d 8, 342 Mo. 420—Corbett v. Terminal R. Ass'n of St. Louis, 82 S.W.2d 97, 336 Mo. 972—Schulz v. St. Louis-San Francisco Ry. Co., 4 S.W.2d 762, 319 Mo. 8—Magill v. Boatmen's Bank, 232 S.W. 448, 288 Mo. 489.
22 C.J. p 269 note 92.

23. U.S.—Hartford Accident & Indemnity Co. v. Baugh, C.C.A.Tex., 87 F.2d 240, certiorari denied 57 S. Ct. 670, 300 U.S. 679, 81 L.Ed. 883.

Under care of doctor

Evidence that the patient had told him that he had been under the care of a doctor off and on since the time of the injury was inadmissible, as it was not a recital of a present existing condition.—Freese v. St. Louis Public Service Co., Mo.App., 58 S.W.2d 758.

24. U.S.—U. S. v. Calvey, C.C.A.Pa., 110 F.2d 327—U. S. v. Tyrakowski, C.C.A.Ill., 50 F.2d 766.
Cal.—Willoughby v. Zylstra, 42 P.2d 685, 5 Cal.App.2d 297.
Ga.—Lathem v. Hartford Accident & Indemnity Co., 3 S.E.2d 916, 60 Ga.App. 523.
Ky.—Equitable Life Assur. Soc. of U. S. v. Spencer, 90 S.W.2d 704, 262 Ky. 478—Valentine v. Weaver, 228 S.W. 1036, 191 Ky. 37.
Md.—Spence v. Bethlehem Steel Co., 197 A. 302, 306, 173 Md. 539, quoting **Corpus Juris.**
Mo.—Coghill v. Quincy, O. & K. C. Ry. Co., App., 206 S.W. 912.
Neb.—Willis v. Order of Railroad Telegraphers, 296 N.W. 443.
Ohio.—Kellogg v. Industrial Commission of Ohio, 19 N.E.2d 511, 60 Ohio App. 22—Jones v. Goodyear Tire & Rubber Co., 18 N.E.2d 511, 59 Ohio App. 371—Baker v. Industrial Commission of Ohio, 186 N.E. 10, 44 Ohio App. 539.
Okl.—Orth Kleifeker & Wallace v. Scott, 49 P.2d 112, 173 Okl. 448.
Pa.—Roberts v. Pitt Pub. Co., 198 A. 668, 330 Pa. 44.
Tenn.—Gulf Refining Co. v. Frazier, 15 Tenn.App. 662.
Tex.—Associated Indemnity Corporation v. Baker, Civ.App., 76 S.W.2d 153, error dismissed—Texas & N. O. R. Co. v. Churchill, Civ.App., 74 S.W.2d 1030, error dismissed—Texas Employers' Ins. Ass'n v. Marsden, Civ.App., 57 S.W.2d 900, reversed on other grounds 92 S.W.2d 237, 127 Tex. 84—Texas Employers' Ins. Ass'n v. Knouff, Civ.App., 297 S.W. 799, reversed on other grounds, Com.App., 7 S.W.2d 68.
Utah.—Boyd v. Industrial Commission of Utah, 48 P.2d 498, 88 Utah 173, rehearing denied 53 P.2d 80, 88 Utah 184—Hammond v. Industrial Commission, 34 P.2d 687, 84 Utah 67—Peterson v. Industrial Commission of Utah, 27 P.2d 31, 83 Utah 94.
Wis.—Kraut v. State, 280 N.W. 327, 333, 228 Wis. 386, quoting **Corpus Juris.**
Wyo.—Acme Cement Plaster Co. v. Westman, 122 P. 89, 20 Wyo. 143.
22 C.J. p 269 note 93.

Cause of illness or injury

Ala.—Alabama Power Co. v. Edwards, 121 So. 543, 219 Ala. 162.
La.—Youngblood v. Colfax Motor Co., 125 So. 883, 12 La.App. 415.
Ohio.—Kellogg v. Industrial Commission of Ohio, 19 N.E.2d 511, 60 Ohio App. 22.
22 C.J. p 269 note 93 [a].

Fact of injury

(1) It has been held that the fact of injury may be shown by the patient's statements to his physician.
Idaho.—Hillman v. Utah Power & Light Co., 51 P.2d 703, 56 Idaho 67.
Ohio.—Knuzie v. Leeds, Inc., 34 N.E.2d 448, 66 Ohio App. 469.

(2) Such statements, however, have also been held not to be necessary for treatment and, consequently, inadmissible.—Thirkill v. Kansas City Life Ins. Co., 270 N.W. 797, 278 Mich. 588.

History of case

(1) Statements made by a patient to his physician, in describing the history of his case, have been held to be admissible where made for the purpose of, and where necessary to secure proper, diagnosis and treatment.
U.S.—Meaney v. U. S., C.C.A.N.Y., 112 F.2d 538, 130 A.L.R. 973.
Ky.—Horn's Adm'r v. Prudential Ins. Co. of America, 65 S.W.2d 1017, 252 Ky. 137.
Mont.—Bingham v. National Bank of Montana, 72 P.2d 90, 105 Mont. 159, 113 A.L.R. 315.
Pa.—Boyle v. Philadelphia Rapid Transit Co., 134 A. 446, 286 Pa. 536.
Tex.—Walker v. Great Atlantic & Pacific Tea Co., 112 S.W.2d 170, 131 Tex. 57, reversing Great Atlantic & Pacific Tea Co. v. Walker, Civ.App., 104 S.W.2d 627.

(2) The trial judge may prevent an abuse of the right to offer such evidence where it is possible that patient did not really consult physician for treatment.—Meaney v. U. S., C.C.A.N.Y., 112 F.2d 538, 130 A.L.R. 973.

(3) It has also been held, however, that a physician should not be allowed to repeat the history of the case given by the patient during the examination.
Mo.—Poumeroule v. Postal Tel. Cable Co., 152 S.W. 114, 167 Mo.App. 533—Chavaries v. National Life & Accident Ins. Co. of Tennessee, App., 110 S.W.2d 790—Sparks v. Harvey, App., 214 S.W. 249.
N.J.—Brownsey v. General Printing Ink Corporation, 193 A. 824, 118 N.J.Law 505.
Wis.—Ogodziski v. Gara, 181 N.W. 227, 173 Wis. 371.

Time and circumstances of injury

The testimony of physicians as to such statements is competent to show the "how" and "when" of the injury, but not the "where," as the latter is not necessary to a proper diagnosis.
Idaho.—Hillman v. Utah Power & Light Co., 51 P.2d 703, 56 Idaho 67.
Ky.—Valentine v. Weaver, 228 S.W. 1036, 191 Ky. 37—Hill's Adm'x v. North America Acc. Ins. Co., 215 S.W. 428, 185 Ky. 520, 186 Ky. 273.
Utah.—Boyd v. Industrial Commission of Utah, 48 P.2d 498, 88 Utah 173, rehearing denied 53 P.2d 80, 88 Utah 184—Hammond v. Industrial Commission, 34 P.2d 687, 84 Utah 67.

However, it has been held that evidence of declarations to a physician should be confined to involuntary expressions of present pain.—Texas

of such evidence is that it is unreasonable to suppose that the patient under such circumstances would give false information.[25] A large discretion is vested in the trial court in determining the admissibility of such evidence.[26]

Expectation that physician will testify. Where statements to a physician are made, not for the purpose of diagnosis and treatment, but in order to enable him to testify as a witness, declarant's statements are usually rejected as hearsay.[27] There is, however, authority to the effect that these considerations, while going to the weight of the evidence, do not suffice to exclude statements indicative of present suffering,[28] or as to its locality,[29] especially where the declarations are of a spontaneous and involuntary character, such as exclamations, shrinking, wincing, etc.[30] It has also been held that a physician may testify to a statement or narration given by a patient in relation to his condition, symptoms, sensations, and feelings, both past and present, when such statements are necessary to enable him to give his opinion as an expert.[31] Where a physician is called in for the purpose of treating or advising as to the treatment of a sick or injured person, it is not a sufficient reason for rejecting the statements of such person to the physician that it is also anticipated that the physician may be a witness.[32]

§ 247. Claim by One in Possession

Declarations by one in possession of property characterizing his possession are admissible.

The claim under which property is being held by a declarant,[33] or the character of his posses-

State Fair v. Marti, 69 S.W. 432, 30 Tex.Civ.App. 132.

25. Ky.—Valentine v. Weaver, 228 S.W. 1036, 191 Ky. 37.
Mo.—Coghill v. Quincy, O. & K. C. Ry Co., App., 206 S.W. 912.
Admission of such evidence is justified on the ground that the motive prompting a patient to speak the truth under such circumstances is at least equal to that when he is narrating present symptoms, and what he has felt in the past is as apt to be important in his treatment as what he feels at the moment.—Meaney v. U. S., C.C.A.N.Y., 112 F.2d 538, 130 A.L.R. 973.

26. Or.—Reid v. Yellow Cab Co., 279 P. 635, 131 Or. 27, 67 A.L.R. 1, per Coshow, C. J., and McBride, J.

27. U.S.—U. S. v. Roberts, C.C.A. Colo., 62 F.2d 594—Third Nat. Bank & Trust Co. v. U. S., C.C.A.Ohio, 53 F.2d 599.
Ill.—Told v. Madison Bldg. Co., 216 Ill.App. 29—Stadler v. Chicago City R. Co, 159 Ill.App. 617.
Ky.—Equitable Life Assur. Soc. of U S. v. Spencer, 90 S.W.2d 704, 262 Ky. 478.
Minn.—Sund v. Chicago, R. I. & P. Ry. Co., 204 N.W. 628, 164 Minn. 24.
N.J.—Koske v. Delaware, L. & W. R. Co., 142 A. 43, 104 N.J.Law 267, certiorari granted Delaware, L. & W. R. Co. v. Koske, 49 S.Ct. 13, 278 U.S. 586, 73 L.Ed 521, affirmed 49 S.Ct. 202, 279 U.S. 7, 73 L.Ed. 578—Rubin v. L. H. Trowbridge Sign Co., 122 A. 763, 99 N.J.Law 216—Hutchinson v. Jersey Cent. Traction R. Co., 126 A. 482, 1 N.J. Misc. 278.
N.Y.—Slacke v. Yellow Taxi Corporation, 24 N.Y.S.2d 490, 260 App.Div. 1046, reargument denied 25 N.Y.S. 2d 1001, 261 App.Div. 838.
Ohio.—Jones v. Goodyear Tire & Rubber Co., 18 N.E.2d 511, 59 Ohio App. 371—Baker v. Industrial Commission of Ohio, 186 N.E. 10, 44 Ohio App. 539.
Or.—Reid v. Yellow Cab Co., 279 P. 635, 131 Or. 27, 67 A.L.R. 1, per Coshow, C. J., and McBride, J.
Tex.—United Employers Casualty Co. v. Marr, Civ.App., 144 S.W.2d 973, error dismissed, judgment correct—Federal Underwriters Exchange v. Arnold, Civ.App., 127 S.W.2d 972, error dismissed, judgment correct.—Brotherhood of Locomotive Firemen and Enginemen v. Raney, Civ. App., 101 S.W.2d 863, error dismissed—Traders & General Ins. Co. v. Wright, Civ.App., 95 S.W.2d 753, affirmed Wright v. Traders & General Ins. Co., 123 S.W.2d 314, 132 Tex. 172—Gaines v. Stewart, Civ. App., 57 S.W.2d 207.
Wyo.—Northwest States Utilities Co. v. Brouilette, 65 P.2d 223, 233, 51 Wyo. 132, quoting **Corpus Juris** as stating the "better and safer rule" and disapproving dictum to contrary appearing in Acme Cement Plaster Co. v. Westman, 122 P 89, 20 Wyo. 143.
22 C.J. p 269 note 94.
Exclamations of pain while being examined by doctor in preparing for trial are inadmissible.—Steele v. Stahelin, 207 N.W. 822, 234 Mich. 307.

28. Ind.—Murray v. Cotterell, 141 N. E. 524, 80 Ind.App. 521.
Tex.—Missouri Pac. Ry. Co. v. Baldwin, Com.App., 273 S.W. 834, affirming, Civ.App., 261 S.W. 418, and certiorari denied 46 S.Ct. 336, 270 U.S. 645, 70 L.Ed. 777.
22 C.J. p 270 note 95.
Headaches
Statements to a physician that an injury to a patient's head was tender at all times and that his headaches were constant were statements as to present suffering within text rule.—Schulz v. St. Louis-San Francisco Ry. Co., 4 S.W.2d 762, 319 Mo. 8.

29. Vt.—Kent v. Lincoln, 32 Vt. 591.

30. Mo.—Missouri, K. & T. R. Co. v. Johnson, 67 S.W. 768, 95 Tex. 409.
22 C.J. p 270 note 97.

31. Ind.—Cleveland, C., C. & I. R. Co. v. Newell, 3 N.E. 836, 104 Ind. 264, 54 Am.R. 312—Ehrman v. Miller, 191 N.E. 184, 100 Ind.App. 123.

32. Mich.—Judd v. Caledonia Tp., 114 N.W. 346, 150 Mich. 480.
Tex.—El Paso & S. W. R. Co. v. Polk, 108 S.W. 761, 49 Tex.Civ.App. 269.

33. Ala.—Watt v. Lee, 191 So. 628, 238 Ala. 451—First Nat. Bank v. Lartigue, 173 So. 21, 233 Ala. 670.
Ark.—Lynn v. Martin, 265 S.W. 948, 166 Ark. 296.
Cal.—Olson v. Cornwell, 25 P.2d 879, 134 Cal.App. 419.
Ga.—Sharp v. Autry, 194 S.E 194, 185 Ga. 160—Stanford v. Calhoun, 127 S.E. 138, 159 Ga. 867.
Ill.—Keshner v. Keshner, 33 N.E.2d 877, 376 Ill. 354, reversing In re Keshner's Estate, 26 N.E.2d 529, 304 Ill.App. 640.
Mo.—Roberts v. Roberts, 291 S.W. 485.
Neb.—Yardum v. Evans, 235 N.W. 85, 120 Neb. 699.
N.C.—Wilmington Furniture Co. v. Cole, 178 S.E. 579, 207 N.C. 840, 847.
Pa.—In re Kaufmann's Estate, 127 A. 133, 281 Pa. 519.
S.C.—Battle v. DeVane, 138 S.E. 821, 140 S.C. 305.
Tex.—Purdy v. Pruitt, Civ.App., 112 S.W.2d 808, error dismissed—Byrd v. Taylor, Civ.App., 40 S.W.2d 942, error dismissed—Sloan v. Sloan, Civ.App., 32 S.W.2d 513, 519, citing **Corpus Juris.**
Va.—Eppes v. Eppes, 195 S.E. 694, 169 Va. 778.
Wash.—Daniel v. Daniel, 181 P. 215, 106 Wash. 659.
Wis.—Kidder v. Kidder, 268 N.W. 221, 222 Wis. 183.
22 C.J. p 270 note 99.

sion,[34] may be shown by declarations indicative of a relevant animus,[35] whether favorable[36] or unfavorable[37] to the declarant.

The declarations of one in possession are not competent as direct evidence of the facts asserted,[38] for the reason that as to the facts themselves the

Donee

(1) Declarations of donee in possession to the effect that he claims the property as a gift are admissible as tending to show claim of ownership.—Stevens v. People's Sav. Bank, 171 N.W. 130, 185 Iowa 619—28 C.J. p 676 note 23.

(2) Such declarations are also admissible to rebut any inference of an admission against his ownership arising from his production of the property on the request of another.

Mich.—Harris v. Cable, 71 N.W. 531, 113 Mich. 192.

Tenn.—Gibson v. Buis, 218 S.W. 220, 142 Tenn. 133.

(3) Where an attempt has been made to show that the donee never claimed the property until after the death of the donor his declarations may be admitted in rebuttal.—Thomas v. Lewis, 15 S.E. 389, 89 Va. 1, 37 Am.S.R. 848, 18 L.R.A. 170.

Execution of mortgage

Exclusion of proof that plaintiff in possession had mortgaged property was held error, since every act amounting to exercise of ownership is relevant and evidence thereof is admissible.—Ravine House Co. v. Bradstreet, 148 A. 481, 102 Vt. 370.

34. U.S.—The John E. Berwind, C.C.A.N.Y., 56 F.2d 13—Richmond Cedar Works v. Foreman Blades Lumber Co., C.C.A.N.C., 267 F. 363.

Ala.—Watt v. Lee, 191 So. 628, 238 Ala. 451—Stewart v. Carnell, 180 So. 397, 235 Ala. 636—First Nat. Bank v. Lartigue, 173 So. 21, 233 Ala. 670—Taylor v. Ladd, 158 So. 761, 229 Ala. 562—Marsh v. Gragg, 153 So. 219, 228 Ala. 269—Shelton v. Stapler, 121 So. 34, 219 Ala. 15—Eidson v. McDaniel, 114 So. 204, 216 Ala. 610—Bradford v. Buttram, 88 So. 829, 205 Ala. 599—Daniel v. Wade, 83 So. 99, 203 Ala. 355—U. S. Lumber & Cotton Co. v. Cole, 81 So. 664, 202 Ala. 688—Mt. Vernon-Woodberry Mills v. Union Springs Guano Co., 155 So. 710, 26 Ala.App. 136, certiorari denied 155 So. 716, 229 Ala. 91.

Ark.—Reynolds v. Balding, 36 S.W. 2d 402, 183 Ark. 397.

Del.—Delaware Land & Development Co. v. First and Central Presbyterian Church of Wilmington, Del., 147 A. 165, 16 Del.Ch. 410.

Fla.—Harrison v. Speer, 114 So. 515, 94 Fla. 937.

Ga.—Merchants' & Citizens' Bank v. Clark, 179 S.E. 103, 180 Ga. 490—McWilliam v. Mitchell, 177 S.E. 579, 179 Ga. 726—Boyd v. Boyd, 159 S.E. 674, 173 Ga. 139—Smith v. Smith, 145 S.E. 661, 167 Ga. 368—Wallace v. Mize, 112 S.E. 724, 153 Ga. 374—Arnold v. Johnson, 104 S.E. 499, 150 Ga. 604—Jarriel v. Savannah Guano Co., 138 S.E. 237, 34 Ga.App. 72—McCool v. Wilcher, 107 S.E. 365, 27 Ga.App. 96.

Hawaii.—Kainea v. Kreuger, 31 Hawaii 108.

Ill.—Tillotson v. Foster, 141 N.E. 412, 310 Ill. 52—Rush v. Rush, 136 N.E. 808, 304 Ill. 558—Jones v. Taylor, 261 Ill.App. 403, 415, citing **Corpus Juris**—Andrews v. Votaw, 240 Ill. App. 311, 319, citing **Corpus Juris.**

Kan.—St. John Nat. Bank v. Leslie, 199 P. 468, 109 Kan. 461.

Ky.—Nelson v. Johnson, 226 S.W. 94, 189 Ky. 815.

Me.—Nevells v. Carter, 119 A. 62, 122 Me. 81.

Minn.—Pennig v. Schmitz, 249 N.W. 39, 189 Minn. 262.

Mo.—Stephens v. Fowlkes, 92 S.W.2d 617, 338 Mo. 527—Roberts v. Roberts, 291 S.W. 485—Willis v. Robinson, 237 S.W. 1030, 291 Mo. 650—Johnson v. Jameson, 209 S.W. 919—McAdams v. Austin, App., 72 S.W.2d 513.

N.H.—Hoban v. Bucklin, 184 A. 362, 88 N.H. 73, modified on other grounds 186 A. 8, 88 N.H. 73.

N.Y.—City of Oneida v. Drake, 232 N.Y.S. 248, 133 Misc. 382.

N.C.—Blades v. Wilmington Trust Co., 178 S.E. 565, 207 N.C. 771.

N.D.—Derrick v. Klein, 253 N.W. 70, 64 N.D. 438.

Pa.—Gates v. Keichline, 128 A. 490, 282 Pa. 584—Mickey v. Hardin, 79 Pa.Super. 592—Gelbarth v. Moore, 29 Del.Co. 68.

R.I.—Saunders v. Kenyon, 159 A. 824, 52 R.I. 221.

S.D.—Ansted v. Grieve, 231 N.W. 912, 57 S.D. 215, affirmed 235 N.W. 648, 58 S.D. 245.

Tenn.—Wilson v. Wilson, 130 S.W. 2d 140, 23 Tenn.App. 244.

Tex.—Smith v. Robertson, Com.App., 235 S.W. 847, reversing Robertson v. Smith, Civ.App., 220 S.W. 620—Highway Motor Freight Lines v. Slaughter, Civ.App., 84 S.W.2d 533—Newton v. McCarrick, Civ.App., 75 S.W.2d 472, 475, citing **Corpus Juris,** error dismissed—Byrd v. Taylor, Civ.App., 40 S.W.2d 942, error dismissed—Smith v. Burroughs, Civ.App., 34 S.W.2d 364, error dismissed—Sloan v. Sloan, Civ.App., 32 S.W.2d 513, 519, citing **Corpus Juris**—Jackson v. Piper, Civ.App., 28 S.W.2d 240—Humphreys v. Green, Civ.App., 271 S.W. 116—Sabinal Nat. Bank v. Cunningham, Civ.App., 256 S.W. 317—Carleton-Ferguson Dry Goods Co. v. McFarland, Civ.App., 230 S.W. 208, dismissed for want of jurisdiction—Bishop v. Paul, Civ.App., 217 S.W. 435, dismissed for want of jurisdiction.

Vt.—Pope v. Hogan, 102 A. 937, 92 Vt. 250

Va.—Honaker Lumber Co. v. Kiser, 113 S.E. 718, 134 Va. 50—Schaubuch v. Dullemuth, 60 S.E. 745, 108 Va. 86, 15 Ann.Cas. 825.

22 C.J. p 271 notes 1, 2.

Declarant need not be party to case

Ga.—Turner v. Duncan, 108 S.E. 532, 152 Ga. 54.

Defendant's answer in former suit showing that he then claimed an interest in the same land, adverse to plaintiff, is admissible on the question whether he claimed such adverse interest at the commencement of the present action.—Miles v. Strong, 36 A. 55, 68 Conn. 273.

35. Where such evidence is irrelevant it will be excluded.—Caraker v. Brown, 111 S.E. 51, 152 Ga. 677.

36. Del.—Delaware Land & Development Co. v. First and Central Presbyterian Church of Wilmington, Del., 147 A. 165, 16 Del.Ch. 410.

Fla.—Harrison v. Speer, 114 So. 515, 94 Fla. 937.

Ga.—Boyd v. Boyd, 159 S.E. 674, 173 Ga. 139—Hightower v. Keaton, 144 S.E. 759, 167 Ga. 94—Smith v. Lemon, 142 S.E. 554, 166 Ga. 93.

Ill.—Rush v. Rush, 136 N.E. 808, 304 Ill. 558.

Minn.—Hanson v. Johnson, 201 N.W. 322, 161 Minn. 229.

Tex.—Purdy v. Pruitt, Civ.App., 112 S.W.2d 808, error dismissed.

22 C.J. p 271 note 3.

Ancient declarations as to ownership are admissible.—De Ramirez v. De Ramirez, Tex.Civ.App., 29 S.W. 2d 872, error refused—22 C.J. p 271 note 3 [c].

37. Del.—Delaware Land & Development Co. v. First and Central Presbyterian Church of Wilmington, Del., 147 A. 165, 16 Del.Ch. 410.

Ill.—Jones v. Scott, 145 N.E. 378, 314 Ill. 118.

Mo.—Wrather v. Lawson, App., 247 S.W. 473.

Ohio.—Goz v. Tenney, 136 N.E. 215, 104 Ohio St. 500.

Pa.—R. Munroe & Sons v. Mason, 83 Pa.Super. 411.

Tex.—Liddell v. Gordon, Com.App., 254 S.W. 1098, reversing, Civ.App., 241 S.W. 750.

22 C.J. p 271 note 4, p 364 notes 73, 74.

38. Cal.—Bank of America Nat. Trust & Savings Ass'n v. Bank of Amador County, 28 P.2d 86, 135 Cal.App. 714.

Del.—Delaware Land & Development

declarations are hearsay,[39] whether they relate to the general history of the declarant's possession[40] or title,[41] whether they are in favor of the declarant,[42] his privies,[43] or his representatives,[44] and even though they were made when the declarant was in articulo mortis,[45] or are offered in evidence after his death.[46]

Declarations accompanying possession, and serving to explain or give character to the same, are frequently held to be admissible as part of the res gestæ of possession,[47] and it has been said to be under the same rule that narrative declarations as to the existence of past events,[48] or statements of intention as to the future[49] are excluded.

Declaration of stranger. A declaration by a person who does not stand in any relation of privity to either party to the action is irrelevant and cannot be received.[50]

Necessity for possession. In order for a declaration to be competent it must have been made while the declarant was in possession,[51] but constructive possession is sufficient.[52] The declaration need not have accompanied or been contemporaneous with any distinct or particular act of possession,[53] nor is it necessary, in case of land, that the declarant should have been on the land when the statement was made.[54]

Co. v. First and Central Presbyterian Church of Wilmington, Del., 147 A. 165, 16 Del Ch 410.
Ga.—Sharp v. Autry, 194 S.E. 194, 185 Ga. 160.
Ky.—Davis v. Bennett's Adm'r, 132 S.W.2d 334, 279 Ky. 799.
N.Y.—City of Oneida v. Drake, 232 N.Y.S. 248, 133 Misc. 382.
Del.—Gates v. Keichline, 128 A. 490, 282 Pa. 584—In re Kaufmann's Estate, 127 A. 133, 281 Pa. 519—Gelbarth v. Moore, 29 Del.Co. 68.
Va.—Pocahontas Fuel Co. v. Dillion, 170 S.E. 616, 161 Va. 301.
22 C.J. p 272 note 5.

39. Cal.—Bank of America Nat. Trust & Savings Ass'n v. Bank of Amador County, 28 P.2d 86, 135 Cal.App. 714.
22 C.J. p 272 note 6.

Estoppel
Where reliance is placed on an estoppel, claims made by one in possession to plaintiff are inadmissible when made in defendant's absence.—Shannon v. Nicoma Park Development Co., 54 P.2d 143, 176 Okl. 53—Yonkman v. Harvey, 271 P. 839, 133 Okl. 252.

40. Pa.—Collins v. Lynch, 31 A. 921, 167 Pa. 635.
22 C.J. p 272 note 7.

41. Ala.—First Nat. Bank v. Lartigue, 173 So. 21, 233 Ala. 670.
Mo.—Pantz v. Nelson, 135 S.W.2d 397, 402, 234 Mo.App. 1043, citing **Corpus Juris**—McAdams v. Austin, App., 72 S.W.2d 513.
Okl.—Shannon v. Nicoma Park Development Co., 54 P.2d 143, 176 Okl. 53.
22 C.J. p 272 note 8.

42. Ga.—Sharp v. Autry, 194 S.E. 194, 185 Ga. 160.
22 C.J. p 272 note 9.

43. N.J.—Kaufhold v. Roth, 64 A. 1057, 74 N.J.Law 61.
23 C.J. p 272 note 10.

44. Me.—Holmes v. Sawtelle, 53 Me. 179.
22 C.J. p 272 note 11.

45. N.Y.—Jackson v. Vredenbergh, 1 Johns. 159.

46. Ark.—Waldroop v. Ruddell, 131 S.W. 670, 96 Ark 171.
22 C.J. p 272 note 13.

47. U.S.—The John E. Berwind, C.C.A.N.Y., 56 F.2d 13—Richmond Cedar Works v. Foreman Blades Lumber Co., C.C.A.N.C., 267 F. 363
Ala.—First Nat. Bank v. Lartigue, 173 So. 21, 233 Ala. 670—Taylor v. Ladd, 158 So. 761, 229 Ala. 562—Shelton v. Stapler, 121 So. 34, 219 Ala. 15—Eidson v. McDaniel, 114 So. 204, 216 Ala. 610—Daniel v. Wade, 83 So. 99, 203 Ala. 355.
Del.—Delaware Land & Development Co. v. First and Central Presbyterian Church of Wilmington, Del., 147 A. 165, 16 Del.Ch. 410.
Ga.—Lanier v. Bryant, 179 S.E. 346, 180 Ga. 409—McWilliam v. Mitchell, 177 S.E. 579, 179 Ga. 726.
Minn.—Pennig v. Schmitz, 249 N.W. 39, 189 Minn. 262.
Mo.—Johnson v. Jameson, 209 S.W. 919—Wrather v. Lawson, App., 247 S.W. 473.
Or.—Tracy v. Juanto, 205 P. 822, 103 Or. 416.
Pa.—Mickey v. Hardin, 79 Pa.Super. 592.
Tex.—Highway Motor Freight Lines v. Slaughter, Civ.App., 84 S.W.2d 533—Smith v. Burroughs, Civ.App., 34 S.W.2d 364, error dismissed—Sloan v. Sloan, Civ.App., 32 S.W.2d 513.
Va.—Honaker Lumber Co. v. Kiser, 113 S.E. 718, 134 Va. 50—Russell's Ex'rs v. Passmore, 103 S.E. 652, 127 Va. 475—Keister's Ex'rs v. Philips' Ex'x, 98 S.E. 674, 124 Va. 585.
22 C.J. p 273 note 19, p 364 note 71 [a].

In nature of res gestæ
Iowa.—Stevens v. People's Sav. Bank, 171 N.W. 130, 185 Iowa 619.

48. Hawaii.—Kainea v. Kreuger, 31 Hawaii 108.
22 C.J. p 273 note 20.

49. Conn.—Comins v. Comins, 21 Conn. 413.
Fla.—Herrin v. Abbe, 46 So. 183, 55 Fla. 769, 18 L.R.A.,N.S., 907.

50. Iowa—Oberholtzer v. Hazen, 70 N.W. 207, 101 Iowa 340.
Tex.—Gardenhire v. Gardenhire, Civ. App., 258 S.W. 1077.

51. U.S.—Dolbear v. Gulf Production Co., C.C.A.Tex., 268 F. 737, certiorari denied Shannon v. Gulf Production Co., 41 S.Ct. 375, 255 U.S. 569, 65 L.Ed. 790.
Ala.—Hamilton v. Pruitt, 89 So. 79, 206 Ala. 58.
Conn.—Byard v. Hoelscher, 151 A. 351, 112 Conn. 5.
Ga.—Sharp v. Autry, 194 S.E. 194, 185 Ga. 160—Bacon v. Hinesville Bank, 144 S.E. 125, 38 Ga.App. 422—McSwain v. S. & W. Estroff, 129 S.E. 16, 34 Ga.App. 183.
Mo.—Esty v. Walker, 3 S.W.2d 744, 222 Mo.App. 619.
Pa.—Owens v. Peters, 191 A. 399, 126 Pa.Super. 501.
Tex.—James v. Davis, Civ.App., 150 S.W.2d 326, error dismissed, judgment correct—Humphreys v. Green, Civ.App., 271 S.W. 116.
Va.—Pocahontas Fuel Co. v. Dillion, 170 S.E. 616, 161 Va. 301.
22 C.J. p 273 note 15.

Record title holder
Declarations of one having title of record, but not in possession, showing that she claimed a lot were not admissible.—Davis v. Davis, 277 S.W. 1025, 211 Ky. 711.

52. Ala.—Williams v. Dent, 170 So. 202, 205, citing **Corpus Juris.**
22 C.J. p 273 note 16.

53. Ill.—Knight v. Knight, 53 N.E. 306, 178 Ill. 553.

54. Ala.—Owen v. Moxon, 52 So. 527, 167 Ala. 615.
22 C.J. p 273 note 18.

The fact of possession must be shown by evidence apart from the declarations themselves.[55]

Character of statement. In order for a declaration by one in possession to be admissible, it must be such as to characterize his possession[56] and must be made when it is pertinent[57] and important on the question of actual ownership[58] of the property in question.[59] It must be more than a casual and conversational remark, and must be made when the person was called upon to make it, and when the truth was required to be spoken.[60] The rule admitting declarations of persons in possession of property cannot be extended to declarations touching past conversations or transactions between the parties.[61] Where it is sought to show such a declaration in order to aid the presumption of ownership from possession, the declaration must be something more than hearsay, and must give definite significance to equivocal conduct by adding a missing link.[62] Where the declaration is not limited to the claim under which or the intention with which possession is held, but involves other facts as to which it is merely hearsay, it may, in the discretion of the court, be rejected.[63]

Possession subordinate to title of another. Where the declarant in possession is a lessee,[64] or a tenant by the curtesy[65] or in dower,[66] or a cotenant,[67] or a mortgagee,[68] or one holding an option to purchase,[69] his possession may well be under his actual rights and does not in itself put the owner upon an inquiry as to the animus with which it is being held, and hence his declaration of adverse claim is not relevant, unless shown to have been brought to the attention of the owner;[70] but the statements of one in possession to the effect that he is a tenant of real[71] or personal[72] property, and as to who is the particular person under whom he claims to hold such real estate[73] or personalty,[74] and even as to what lands are embraced in the holding,[75] are competent circumstantial evidence, in favor of the person named as owner, of the existence of a relevant fact.

§ 248. Real Property in General

The rule that declarations by one in possession of property characterizing such possession are admissible has been applied in a number of situations relating to real property.

In the case of real estate, declarations by one in possession of land are competent to show that his user or possession was adverse to the title of another, see Adverse Possession § 221 b 5 (b) aa, and that the person affected by the user or possession knew of its nature;[76] to determine the territorial extent of his possession;[77] to show the intent with

55. Minn.—Whitney v. Wagener, 87 N.W. 602, 84 Minn. 211, 87 Am.S.R. 351.
22 C.J. p 273 note 22.

56. Va.—Pocahontas Fuel Co. v Dillion, 170 S.E. 616, 161 Va. 301.
22 C.J. p 273 note 23.

Will
Deceased father's will disposing of property was admissible in son's suit for specific performance of deceased's contract to convey, as showing that father then regarded property as his own.—Flannery v. Woolverton, 160 N.E. 762, 329 Ill. 424

57. N.Y.—Hamlin v. Hamlin, 84 N. E. 805, 192 N.Y. 164, reversing 102 N.Y.S. 571, 117 App.Div. 493, affirming 100 N.Y.S. 701, 51 Misc. 111.
Utah.—Surbaugh v. Butterfield, 140 P. 757, 44 Utah 446.

58. N.Y.—Hamlin v. Hamlin, 84 N. E. 805, 192 N.Y. 164, reversing 102 N.Y.S. 571, 117 App.Div. 493, affirming 100 N.Y.S. 701, 51 Misc 111.

59. Conn.—Dawson v. Orange, 61 A. 101, 78 Conn. 96.

60. N.Y.—Hamlin v. Hamlin, 84 N. E. 805, 192 N.Y. 164, 171, reversing 102 N.Y.S. 571,. 117 App.Div. 493, affirming 100 N.Y.S. 701, 51 Misc. 111.
22 C.J. p 273 note 30.

Map
In an action for royalty under a coal lease, a map of the area mined or excavated, prepared by the lessee pursuant to statute, should be treated as in the nature of a declaration by the lessee.—Campbell v. Centerville Block Coal Co., 179 N.W. 957, 190 Iowa 18.

61. Ala.—Shelton v. Stapler, 121 So. 34, 219 Ala. 15—Eidson v. McDaniel, 114 So. 204, 216 Ala. 610.

62. Vt.—Hopkins v. Heywood, 86 A. 305, 86 Vt. 486, 49 L.R.A.,N.S., 710.

63. Ark.—Sharp v. Johnson, 22 Ark. 79.
Ky.—Wickliffe v. Ensor, 9 B.Mon 253.

64. Ala.—Jones v. Pelham, 4 So. 22, 84 Ala. 208.
22 C.J. p 274 note 34.

65. Mass.—Morgan v. Larned, 10 Metc. 50.

66. Mo.—Salmons v. Davis, 29 Mo. 176.

67. Ga.—Harral v. Wright, 57 Ga. 484.
Me.—Sewall v. Sewall, 8 Me. 194.

68. Tex.—Hays v. Hays, 1 S.W. 895, 66 Tex. 606.

69. Cal.—American Fruit Growers of California v. Jackson, 265 P. 926, 203 Cal. 748.

70. Ala.—Butler v. Butler, 32 So. 579, 133 Ala. 377.
22 C.J. p 274 note 39.

71. N.Y.—Mautner v. Brody, 120 N. Y.S. 734.

Slave
Testimony as to acts and declarations by slaves are competent to show assertion of possession for the master.—Richmond Cedar Works v. Foreman Blades Lumber Co., C.C.A. N.C., 267 F. 363.

72. Minn.—King v. Frost, 10 N.W. 423, 28 Minn. 417.

73. Ark.—Dial v. Armstrong, 113 S. W.2d 503, 195 Ark. 621.
22 C.J. p 274 note 42.

74. Minn.—Rosenberg v. Burnstein, 61 N.W. 684, 60 Minn. 18.
22 C.J. p 274 note 43.

75. Pa.—Sheaffer v. Eakman, 56 Pa. 144.
W.Va.—State v. King, 63 S.E. 468, 64 W.Va. 546, appeal dismissed 30 S. Ct. 225, 216 U.S. 92, 54 L.Ed. 396.

76. Vt.—Dodge v. Stacy, 39 Vt. 558.

77. Mo.—Willis v. Robinson, 237 S. W. 1030, 291 Mo. 650.
Vt.—Smith v. Vermont Marble Co., 133 A. 355, 99 Vt. 384.
Va.—Honaker Lumber Co. v. Kiser, 113 S.E. 718, 721, 134 Va. 50, citing **Corpus Juris.**
22 C.J. p 274 note 48.

which the declarant made an entry on the land;[78] or to negative an intent on his part to abandon the ownership.[79] It is not ground for rejecting the declarations that they are self-serving,[80] if they are made in apparent good faith; and the benefit of them in such case inures not only to the declarant, but to those in privity with him,[81] including his representatives[82] and creditors.[83] Statements by one in possession of real property are admissible to indicate the source of the title relied on,[84] so far as that fact may have legitimate incidental bearing on the good faith and nature of the claim or its extent;[85] but generally declarations made by a person in possession of real property as to the history and source of title are inadmissible under this exception to the hearsay rule.[86] Likewise such declarations are not competent to sustain or destroy record title.[87]

Form of declaration. The declaration may be oral or in writing,[88] or even in the form of general reputation.[89]

§ 249. Declarations as to Private Boundaries

Declarations by one in possession of realty as to the boundaries of such property are admissible to show the extent of his claim; and in some jurisdictions, where the declarant has since died, his declarations while owner and in possession, made while pointing out his boundaries, are admissible as evidence of the facts as stated.

While the declaration of one in possession of premises as to the line of his boundary is not evidence that such is in fact the true line,[90] it is primary evidence of the extent of his claim in that particular,[91] provided at the time of the statement he was the owner of the land,[92] and was in actual possession thereof,[93] and, according to some authori-

Division

In suit to reform deed for mistake in description of premises conveyed plaintiff, declarations of plaintiff's grantor and another as to division between them of tract claimed by plaintiff were competent as proving that a division of such tract had been made and what that division was.—Meekins v. Meekins, 271 S.W. 18, 168 Ark. 654.

78. Mo.—Stephens v. Fowlkes, 92 S. W.2d 617, 338 Mo. 527.
Va.—Honaker Lumber Co. v. Kiser, 113 S.E. 718, 721, 134 Va. 50, citing **Corpus Juris.**
22 C.J. p 274 note 52.

79. N.C.—Holliday v. McMillan, 83 N.C. 270.

80. Ga.—Boyd v. Boyd, 159 S.E. 674, 173 Ga. 139—Smith v. Smith, 145 S.E. 661, 167 Ga. 368—Hightower v. Keaton, 144 S.E. 759, 167 Ga. 94—Smith v. Lemon, 142 S.E. 554, 166 Ga. 93.
Ill.—Rush v. Rush, 136 N.E. 808, 304 Ill. 558.
Okl.—Harmon v. Kerns, 36 P.2d 898, 169 Okl. 290.
Va.—Honaker Lumber Co. v. Kiser, 113 S.E. 718, 721, 134 Va. 50, citing **Corpus Juris.**
22 C.J. p 274 note 54.

Res gestæ of possession

"Such declarations are part of the res gestæ of possession, and are not objectionable as being self-serving declarations."—Harrison v. Speer, 114 So. 515, 517, 94 Fla. 937.

81. Ala.—Gunn v. Parsons, 104 So. 390, 213 Ala. 217—Ray v. Farrow, 100 So. 868, 211 Ala. 445.
Ga.—Sharp v. Autry, 194 S.E. 194, 185 Ga. 160—Wallace v. Mize, 112 S.E. 724, 153 Ga. 374.
Ill.—Rush v. Rush, 136 N.E. 808, 304 Ill. 558.
Ind.—Moore v. Stewart, 152 N.E. 285, 86 Ind.App. 1.
R.I.—Saunders v. Kenyon, 159 A. 824, 52 R.I. 221.
Tex.—Smith v. Burroughs, Civ.App., 34 S.W.2d 364, error dismissed—Humphreys v. Green, Civ.App., 271 S.W. 116—Houston Oil Co of Texas v. Ainsworth, Civ.App., 245 S.W. 760.
22 C.J. p 274 note 55, p 364 notes 67, 69–71.

In Montana, by virtue of statute, where one derives title to real property from another, declarations of the latter, while holding title, with relation to the property are evidence against the former.—U. S. v. Eldredge, D.C.Mont., 33 F.Supp. 337.

82. Ark.—Seawell v. Young, 91 S.W. 544, 77 Ark. 309.
22 C.J. p 275 note 56.

83. N.H.—Merrill v. Gould, 16 N.H. 347.

84. Va.—Honaker Lumber Co. v. Kiser, 113 S.E. 718, 721, 134 Va. 50, citing **Corpus Juris.**
22 C.J. p 274 note 49.

85. Va.—Honaker Lumber Co. v. Kiser, supra, citing **Corpus Juris.**
22 C.J. p 274 notes 50, 51.

86. Ala.—Shelton v. Stapler, 121 So. 34, 219 Ala. 15—Bradford v. Buttram, 88 So. 829, 205 Ala. 599.
Ga.—Bibb County v. Jones, 106 S.E. 727, 151 Ga. 302.
Va.—Pocahontas Fuel Co. v. Dillion, 170 S.E. 616, 161 Va. 301.

Trust

Under a statute providing that no trust concerning lands, except such as may arise by implication or operation of law, shall be created or declared unless by writing, verbal declarations by a grantee that he held the property in trust are not admissible to establish an express trust.—Hornbeck v. Crawford, 279 P. 870, 130 Or. 230.

Parol trusts and effect of statute of frauds in trusts in or affecting land see the C.J.S. title Trusts § 32, 33, also 65 C.J. p 245 note 95—p 251 note 33.

87. N.Y.—City of Oneida v. Drake, 232 N.Y.S. 248, 133 Misc. 382.
S.D.—Ansted v. Grieve, 231 N.W. 912, 57 S.D. 215, affirmed 235 N.W. 648, 58 S.D. 245.

88. Nodle v. Hawthorn, 77 N.W. 1062, 107 Iowa 380.
22 C.J. p 276 notes 80, 81.

89. Mich.—Sanscrainte v. Toronto, 49 N.W. 497, 87 Mich. 69.
22 C.J. p 276 note 82.

90. Ill.—Rehfuss v. Hill, 90 N.E. 187, 243 Ill. 140.
22 C.J. p 275 note 59.

91. Ind.—Robinson v. Rice, 154 N.E. 391, 85 Ind.App. 483.
Mich.—Doctor v. Turner, 231 N.W. 115, 251 Mich. 175.
Mo.—Willis v. Robinson, 237 S.W. 1030, 291 Mo. 650.
N.C.—Thompson v. Buchanan, 151 S.E. 861, 198 N.C. 278—Bowman v. Howard, 110 S.E. 98, 182 N.C. 662.
R.I.—Saunders v. Kenyon, 159 A. 824, 52 R.I. 221.
Tex.—Bond v. Kirby Lumber Co., Civ.App., 2 S.W.2d 936, error refused.
Va.—Honaker Lumber Co. v. Kiser, 113 S.E. 718, 721, 134 Va. 50, citing **Corpus Juris.**
22 C.J. p 275 note 60.

92. Ky.—Parsons v. Commonwealth, 148 S.W.2d 298, 301, citing **Corpus Juris**—Varney v. Orinoco Mining Co., 257 S.W. 1016, 201 Ky. 571.
N.Y.—McMahon v. Morse, 237 N.Y.S. 361, 135 Misc. 233.
22 C.J. p 275 note 61.

93. Ala.—Aiken v. McMillan, 106 So. 150, 213 Ala. 494.
Ky.—Parsons v. Commonwealth, 148

ties, provided also the declaration was made while declarant was in the act of establishing or pointing out the boundaries[94] and while he was on the land itself.[95] Such evidence is competent in behalf of those in privity with declarant.[96]

A declaration by a tenant or equitable owner as to the location of a corner or line is admissible if paper title in the landlord or trustee is shown.[97] The declarations of an agent in possession of his principal's realty, made within the scope of his agency, and while performing duties assigned him and in relation thereto, with respect to the boundaries of the premises, are admissible.[98]

Death of declarant. An anomalous rule as to declarations concerning private boundaries, presenting certain features of both the rule under consideration and that regulating the admissibility of declarations of deceased persons generally as to matters of private boundaries, see supra §§ 234–237, is followed in some jurisdictions, to the effect that declarations of a deceased owner or tenant, in possession of lands and on the premises, made while in the act of pointing out his own boundaries, and their marks, are competent evidence,[99] not only of declarant's claim as to the extent of his possession, but of the fact that the boundaries and landmarks are as stated, provided there is no interest to misrepresent,[1] and provided further declarant had adequate means of knowledge.[2] If declarant never occupied the land to which his declaration relates, as owner[3] or otherwise,[4] or had ceased to do so at the time of the declaration,[5] or if the declaration was made in any other connection than that of pointing out boundaries,[6] or if declarant is not shown to be dead,[7] the declaration is inadmissible.

§ 250. Personal Property

The declarations of one in possession of personal property which characterize his possession are admissible.

The existence and extent of a claim of one in possession of personal property as to the ownership thereof or rights therein may be shown by his relevant declarations,[8] although they operate in declar-

S.W.2d 298, 301, citing **Corpus Juris.**
22 C.J. p 275 note 62.

94. Conn.—Noyes v. Ward, 19 Conn. 250.

95. U.S.—Hunnicutt v Peyton, Tex., 102 U S. 333, 26 L.Ed. 113.
22 C.J. p 275 note 64.

96. Ind.—Robinson v. Rice, 154 N. E. 391, 85 Ind.App. 483.
Mich.—Doctor v. Turner, 231 N.W. 115, 251 Mich. 175.
N.C.—Thompson v. Buchanan, 151 S. E. 861, 198 N.C. 278.
R.I.—Saunders v. Kenyon, 159 A. 824, 52 R.I. 221.
22 C.J. p 275 note 65.

97. W Va.—State v. King, 63 S.E. 468, 64 W.Va. 546, appeal dismissed 30 S.Ct. 225, 216 U.S. 92, 54 L.Ed. 396.

98. S.C.—Marion County Lumber Co. v. Tilghman Lumber Co., 60 S.E. 33, 79 S.C. 54.

99. Ky.—Williams v. Waddle, 148 S. W.2d 298, 301, 285 Ky. 416, citing **Corpus Juris.**
Me.—Borneman v. Milliken, 124 A. 200, 123 Me. 488.
22 C.J. p 275 notes 69–71.

1. Me.—Royal v. Chandler, 21 A. 842, 83 Me. 150.
22 C.J. p 275 note 72, p 276 note 73.

2. N.H.—Lawrence v. Tennant, 15 A. 543, 64 N.H. 532.
22 C.J. p 276 note 74.

3. N.C.—Perkins v. Brinkley, 45 S. E. 652, 133 N.C. 348.
22 C.J. p 276 note 75.

4. Mass.—Bartlett v. Emerson, 7 Gray 174.

5. Ky.—Williams v. Waddle, 148 S. W.2d 298, 301, 285 Ky. 416, citing **Corpus Juris.**
N.Y.—Beattie v. Garrison, 198 N.Y. S. 71, 204 App.Div. 335, affirmed 142 N.E 289, 236 N.Y. 574.
22 C.J. p 276 note 77.

6. Mass.—Peck v. Clark, 8 N.E. 335, 142 Mass. 436.
22 C.J. p 276 note 78.

7. Me.—Williamson v. Gooch, 69 A. 691, 103 Me. 402.
22 C.J. p 276 note 79.

8. Ala.—Dutton v. Gibson, 148 So. 397, 226 Ala. 657—Martin v. Davis, 141 So. 667, 224 Ala. 648—Hayes v. Gilmore, 90 So. 320, 206 Ala. 436.
Conn.—Carrano v. Hutt, 105 A. 323, 93 Conn. 106.
Ga.—Bacon v. Hinesville Bank, 144 S.E. 125, 38 Ga.App. 422—Nelson v. J. L. Brannon & Co., 123 S.E. 735, 32 Ga.App. 455.
Ill.—Jones v. Taylor, 261 Ill.App. 403, 415, citing **Corpus Juris**—Andrews v. Votaw, 240 Ill.App. 311, 319, citing **Corpus Juris.**
Ind.—Lynch v. Martin, 151 N.E. 620, 84 Ind.App. 478.
Iowa.—Malcor v. Johnson, 273 N.W. 145, 223 Iowa 644.
Kan.—Hampson v. Stanfield, 103 P.2d 910, 152 Kan. 333.
Ky.—Moore v. Wilson, 18 S.W.2d 873, 230 Ky. 49—Robinson v. Eastern Gulf Oil Co., 244 S.W. 914, 196 Ky 385.
Minn.—Hanson v. Johnson, 201 N.W. 322, 161 Minn. 229—Hansen v Shepherd, 191 N.W. 599, 154 Minn 277.
Mo.—Wrather v. Lawson, App., 247 S.W. 473.
Mont.—Brennan v. Mayo, 72 P.2d 463, 105 Mont. 276—Williams v. Gray, 203 P. 524, 62 Mont. 1.
Neb.—Yardum v. Evans, 235 N.W. 85, 120 Neb. 699.
N J.—Pascall v. Fidelity Union Trust Co. of Newark, 185 A. 478, 120 N.J. Eq. 462.
Ohio.—Goz v. Tenney, 136 N.E. 215, 104 Ohio St. 500.
Or.—Tracy v. Juanto, 205 P. 822, 103 Or. 416—Keller v. Johnson, 194 P. 185, 99 Or. 113—Bosma v. Harder, 185 P. 741, 94 Or. 219.
Pa.—Scheid v. Storch, 115 A. 841, 842, 271 Pa. 496, citing **Corpus Juris.**
See Meeder v. Masajada, 86 Pa. L.J. 413.
Tex.—Sloan v. Sloan, Civ.App., 32 S. W.2d 513—Husbands v. Fore, Civ. App., 27 S.W.2d 610.
Wash.—Rogers v. Joughin, 277 P. 988, 152 Wash. 448—Christianson v. Shepherd, 255 P. 942, 143 Wash. 537.
W.Va.—De Pue v. Steber, 108 S.E. 590, 89 W.Va. 78.
22 C.J. p 276 note 83, p 364 notes 68–71.

Offer to sell

In replevin for cattle seized under an execution against plaintiff's husband, testimony that the husband had offered to sell witness some of the cattle was not incompetent when taken in connection with other evidence tending to show that plaintiff permitted her husband to use the property as his own.—Mitchell v. Smith, 111 S.W. 806, 86 Ark. 486.

ant's own favor.[9] Such declarations, to be admissible, must accompany the possession and must be made where the nature of the possession is the subject of inquiry, and must concern the title or explain the character of the possession. They must not go beyond this.[10] Such statements are not evidence of the truth of the facts stated or the validity of the claim asserted.[11] Declarant must have been in possession at the time of making the declaration,[12] and declarations made during the pendency of the litigation have been rejected.[13]

Explanation of possession. The declarations of persons in possession of personal property, explanatory of the character of their possession are competent.[14]

§ 251. Effect of Observation

Declarations which are fairly indicative of the effect on the declarant of observed appearances, conduct, or sensations are admissible.

Exclamations and other relevant unsworn statements are competent circumstantial evidence where they fairly indicate the effect on declarant of observed appearances,[15] conduct,[16] or sensations.[17] Declarations of opinion based on observation are not within the rule.[18]

§ 252. Fraud and Good Faith

Where relevant, declarations tending to show fraud or good faith may be admissible.

An unsworn statement may furnish circumstantial evidence of fraud[19] or good faith.[20] The only limit which can be fixed to the range of such statements is that of relevancy;[21] but it is of course necessary that the fact sought to be proved should itself be relevant.[22]

§ 253. Identification

Independently relevant statements are admissible to prove identity.

An unsworn statement may be admitted for the purpose of identifying a date,[23] a payment,[24] a person[25] or a place,[26] and, likewise, may be admit-

9. Ga.—Mixon v. Lacey, 107 S.E. 259, 26 Ga.App. 542.
Iowa.—Stevens v. People's Sav Bank, 171 N.W. 130, 185 Iowa 619.
22 C.J. p 277 note 84.

10. "If they show the source or manner of acquiring the title or the details of the agreement under which the possession is held, or are a mere narrative of a past event, they are incompetent and inadmissible."—Tracy v. Juanto, 205 P. 822, 824, 103 Or. 416.

Evidence held inadmissible, where it was an agent's recital of a past transaction, and where declarant did not assert personal ownership directly, but told how, and for what price, he obtained it.—Androvitch v. Fowler, 182 P. 222, 54 Utah 506.

11. Ill.—Tollifsen v. Middle States Inv. Co., 253 Ill.App. 320.
Iowa.—Stevens v. People's Sav. Bank, 171 N.W. 130, 185 Iowa 619.
Neb.—Yardum v. Evans, 235 N.W. 85, 120 Neb. 699.
N.J.—Pascall v. Fidelity Union Trust Co. of Newark, 185 A. 478, 120 N.J.Eq. 462.
22 C.J. p 277 note 85.

12. Ga.—Nelson v. J. L. Brannon & Co., 123 S.E. 735, 32 Ga.App. 455.
22 C.J. p 277 note 86.

13. Ga.—Smith v. Johnson, 80 S.E. 1051, 13 Ga.App. 837.
22 C.J. p 277 note 87.

14. Conn.—Carrano v. Hutt, 105 A. 323, 93 Conn. 106.
22 C.J. p 277 note 88.

15. Ga.—Atlanta Consol. St. R. Co. v. Bagwell, 33 S.E. 191, 107 Ga. 157.
22 C.J. p 277 note 90.

16. Neb.—Omaha, etc, R. Co. v. Chollette, 59 N.W. 921, 41 Neb. 578.
22 C.J. p 277 note 91.

17. Conn.—Kearney v. Farrell, 28 Conn. 317, 73 Am.D. 677.
22 C.J. p 277 note 92.

18. Ky.—Hughes v. Louisville, etc., R. Co., 48 S.W. 671, 104 Ky. 774, 20 Ky.L. 1029.
22 C.J. p 277 note 93.

19. U.S.—Hyland v. Millers Nat. Ins. Co., D.C.Cal., 58 F.2d 1003, affirmed, C.C.A., 91 F.2d 735, rehearing denied 92 F.2d 462, and certiorari denied 58 S.Ct. 644, 303 U.S. 645, 82 L.Ed. 1107.
Ala.—Williams v. Bedenbaugh, 110 So. 286, 215 Ala. 200.
Md.—Rent-a-Car Co. v. Globe & Rutgers Fire Ins. Co., 156 A. 847, 161 Md. 249.
Mass.—Fisher v. Leland, 4 Cush. 456, 458, 50 Am.D. 805.
Ohio.—U. S. Fidelity & Guaranty Co. v. Kinneman, 153 N.E. 261, 22 Ohio App. 369.
Tex.—Colvard v. Goodwin, Civ.App., 24 S.W.2d 786, error dismissed.
22 C.J. p 277 note 94.

20. Cal.—Central Heights Imp. Co. v. Memorial Parks, 105 P.2d 596, 40 Cal.App.2d 591—Alpine Petroleum Co. v. Lewis, 241 P. 910, 75 Cal. App. 157.
Iowa.—Shippley v. Gremmels, 185 N.W. 922, 192 Iowa 801.
Wash.—Askey v. New York L. Ins. Co., 172 P. 887, 102 Wash. 27, L.R.A.1918F 267.
22 C.J. p 277 note 95.

Absence of misrepresentation
Evidence of statements made by insured to the society's medical examiner as to his previous affliction with muscular rheumatism is admissible to show that he did not make any misrepresentation when he denied ever having acute or inflammatory rheumatism.—National Council K. & L. S. v. Sealey, Tex.Civ.App., 162 S.W. 455.

21. N.H.—Banfield v. Parker, 36 N.H. 353.
Va.—Smith v. Betty, 11 Gratt. 752, 52 Va. 752.

22. S.C.—Gruber v. Boyles, 3 S.C.L. 266, 2 Am.D. 665.
22 C.J. p 278 note 97.

23. Mich.—Cook v. Knowles, 38 Mich. 316.
R.I.—Carpenter v. Carpenter, 128 A. 223, 46 R.I. 433.
22 C.J. p 278 note 98.

24. Md.—Mitchell v. Dall, 2 Harr. & G. 159.

25. Conn.—Toletti v. Bidizcki, 173 A. 223, 118 Conn. 531.
N.C.—Smith v. Kappas, 12 S.E.2d 693, 218 N.C. 758, rehearing granted and opinion modified on other grounds 15 S.E.2d 375, 219 N.C. 850.
Tenn.—Armstrong v. Bowman, 115 S.W.2d 229, 21 Tenn.App. 673.
Tex.—Plunkett v. Simmons, Civ.App., 63 S.W.2d 313, error dismissed.
22 C.J. p 278 note 1.

Knowledge of acts
Statements made ante litem motam by a person whose identity is in question, which show a recollection or knowledge of the acts, affairs, or experiences of the person whom he is supposed to be are relevant and admissible on the issue of his identity.—In re Moxley's Will, 152 A. 713, 103 Vt. 100.

26. Mont.—In re Colbert, 153 P. 1022, 51 Mont. 455.

ted to identify property, real[27] or personal,[28] or a transaction,[29] provided the fact of identity is shown to be in issue or relevant to the issue,[30] and no better or more conclusive evidence on the subject can be produced.[31] On the other hand, statements as to identity of persons[32] or things,[33] which are not of such a character as to come within the exception to the hearsay rule as independently relevant statements, see supra § 239, are inadmissible.

§ 254. Mental Condition

Where relevant, declarations of a person are admissible to show his mental condition.

Statements by a person which indicate a certain mental condition of declarant may be received as circumstantial evidence that such condition existed,[34] although they are not competent as direct evidence of the facts asserted.[35] Such declarations are competent, not only when made at the time at which the mental condition of declarant is relevant,[36] but also when they were made before[37] or after[38] such time, provided the statement is not too remote.[39]

Mental condition of another. A statement by a person not called as a witness, as to the mental condition of another person, is hearsay and inadmissible,[40] even though declarant occupied a close family[41] or professional[42] relationship to the person spoken of.

Capacity for resistance to suggestions. The mental strength of a person may be a fact of great importance in estimating the effect of pressure on him in the form of fraud[43] or undue influence;[44] in which cases much assistance is gained by consid-

N.H.—Blodgett v. Park, 84 A. 42, 76 N.H. 435, Ann Cas.1913B 853—Fairfield v. Amherst, 57 N.H. 479.

27. Mont.—Collins v. McKay, 92 P. 295, 36 Mont. 123, 122 Am.S.R. 334.
22 C.J. p 278 note 3.

28. Ark.—Knight v. Wilson, 54 S.W. 2d 991, 186 Ark. 662.
22 C.J. p 278 note 4.

29. Mass.—Earle v. Earle, 11 Allen 1.
Vt.—State v. Ward, 17 A. 483, 61 Vt. 153—Hill v. North, 34 Vt. 604.

30. Vt.—Perry v. Smith, 22 Vt. 301.

31. Ga.—Martin v. Atkinson, 7 Ga. 228, 50 Am.D. 403.
Tex.—Nebring v. McMurrain, Civ. App., 46 S.W. 369.
22 C.J. p 278 note 7.

32. Cal.—Scott v. Los Angeles Mountain Park Co., 267 P. 914, 92 Cal.App. 258.
Tex.—American Mortg. Corporation v. Dunnam, Civ.App., 59 S.W.2d 1095, error dismissed.

Identity of companies
Tex.—Guarantee Bond & Mortgage Co. v. Bain, Civ.App., 16 S.W.2d 554.

Person injured
In an action for damages for injury at a railroad crossing, where plaintiff's witness saw the collision, but did not know that plaintiff was the person injured, refusing to permit defendant on cross-examination to ask him if the doctor told him next morning that plaintiff got hurt was not error, it being hearsay and the parties not being present.—Davis v. Smitherman, 96 So. 208, 209 Ala. 244.

33. Mass.—Nesci v. Angelo, 144 N.E. 287, 249 Mass. 508.

34. U.S.—U.S. v. Roberts, C.C.A. Colo., 62 F.2d 594.
Ala.—Stewart v. Carnell, 180 So. 307, 235 Ala. 636.
Ill.—Teter v. Spooner, 137 N.E. 129, 305 Ill. 198.
Iowa.—Reed v. Reed, 281 N.W. 444, 225 Iowa 773.
Md.—Tillinghast v. Lamp, 176 A. 629, 632, 168 Md. 34, citing **Corpus Juris.**
R.I.—Rhode Island Hospital Trust Co. v. Sherman, 185 A. 601, 56 R.I. 355.
Tex.—Stewart v. Miller, Civ.App., 271 S.W. 311.
W.Va.—De Pue v. Steber, 108 S.E. 590, 89 W.Va. 78.
22 C.J. p 278 notes 8, 9, p 364 note 76 [d].

Plans and designs
Statements by insured shortly before his death, where the defense of suicide is set up, appearing to have been made in a natural manner and not under circumstances of suspicion, concerning his plans and designs, are admissible to show his condition of mind.—Scott v. Prudential Ins. Co. of America, 282 N.W. 467, 203 Minn. 547.

35. Md.—Tillinghast v. Lamp, 176 A. 629, 632, 168 Md. 34, citing **Corpus Juris.**
22 C.J. p 278 note 10.

Statements held inadmissible for any purpose except to show the mental condition of declarant.—Dowlin v. Boyd, Tex.Civ.App., 284 S.W. 636, affirmed in part and reversed in part on other grounds, Com.App., 291 S.W. 1095.

36. Mass.—Pickens v. Davis, 134 Mass. 252, 45 Am.R. 322.

37. Mich.—Mettetal v. Hall, 284 N.W. 698, 288 Mich. 200.
Minn.—Scott v. Prudential Ins. Co. of America, 282 N.W. 467, 203 Minn. 547.
22 C.J. p 278 note 12.

38. Mich.—Mettetal v. Hall, 284 N.W. 698, 288 Mich. 200.
R.I.—Rhode Island Hospital Trust Co. v. Sherman, 185 A. 601, 56 R.I. 355.
Tex.—Stewart v. Miller, Civ.App., 271 S.W. 311.
W.Va.—De Pue v. Steber, 108 S.E. 590, 89 W.Va. 78.
22 C.J. p 278 note 13.

39. Pa.—Harden v. Hays, 14 Pa. 91.
Tex.—Rankin v. Rankin, 151 S.W. 527, 105 Tex. 451, reversing, Civ.App., 134 S.W. 392.
22 C.J. p 279 note 14.

40. Ill.—Dausch v. Barker, 160 N.E. 765, 329 Ill. 410.
22 C.J. p 279 note 15.

41. Tex.—Stewart v. Miller, Civ App., 271 S.W. 311.
Va.—Hentz v. Wallace's Adm'r, 150 S.E. 389, 153 Va. 437.
22 C.J. p 279 note 16.

42. Mass.—Clifford v. Taylor, 90 N.E. 862, 204 Mass. 358.
Mich.—Renaud v. Pageot, 61 N.W. 3, 102 Mich. 568.
22 C.J. p 279 note 17.

43. Mich.—Mettetal v. Hall, 284 N.W. 698, 288 Mich. 200.
22 C.J. p 279 note 18.

44. Ga.—Lemon v. Jenkins, 48 Ga. 313.
Mich.—Wagner v. Zang, 294 N.W. 402, 295 Mich. 254—Mettetal v. Hall, 284 N.W. 698, 288 Mich. 200.
Or.—In re Wayne's Estate, 294 P. 590, 134 Or. 464, denying rehearing 291 P. 356, 134 Or. 464.
R.I.—Rhode Island Hospital Trust Co. v. Sherman, 185 A. 601, 56 R.I. 355.
Tex.—Stewart v. Miller, Civ.App., 271 S.W. 311.
22 C.J. p 279 note 19.

Vague statements which do not show the exercise of any undue influence on declarant should be ex-

ering the declarations of the person in question,[45] whether they be oral[46] or written, as in the case of letters[47] or diaries.[48]

Mental weakness and insanity. Declarations of a person are admissible as evidence of weakness of his mental faculties,[49] or of his insanity,[50] provided of course they are of such character as to indicate the existence of such conditions.[51]

Power of memory. Declarations involving the use of memory are admissible as evidence of declarant's ability to recollect,[52] or to show failure or impairment of his memory.[53]

§ 255. Mental State

Statements tending to show a person's state of mind, if relevant to the issues, are admissible.

Where the existence of a particular mental state in a particular individual is a relevant fact,[54] his declarations which indicate the existence or nonexistence of such state are admitted as circumstantial evidence,[55] even though the declarant himself may be available as a witness.[56] Although in some instances the res gestæ doctrine and this exception to the hearsay rule coincide and serve equally to admit the statement in question,[57] the two rules are nevertheless wholly distinct in their nature and in

cluded.—Moore v. Thornton, 179 S.E. 720, 180 Ga. 533.

45. Ga.—Howell v. Howell, 47 Ga. 492.
22 C.J. p 279 note 20.

46. R.I.—Rhode Island Hospital Trust Co. v. Sherman, 185 A. 601, 56 R.I. 355.
22 C.J. p 279 note 21.

47. Ala.—Bulger v. Ross, 12 So. 803, 98 Ala. 267.
22 C.J. p 279 note 23.

48. Conn.—Barber's Appeal, 27 A. 973, 63 Conn. 393, 22 L.R.A. 90.

49. N.C.—State v. Cooper, 87 S.E. 50, 170 N.C. 719, 721.
Pa.—Wilkinson v. Pearson, 23 Pa. 117.

50. Wash.—McFarland v. Department of Labor and Industries, 62 P.2d 714, 188 Wash. 357.
22 C.J. p 279 note 26.

51. Md.—Stewart v. Redditt, 3 Md. 67, 78.
22 C.J. p 279 note 27.

52. N.J.—Donnelly v. State, 26 N.J.Law 463, 495, affirmed 26 N.J.Law 601.

53. N.C.—McRae v. Malloy, 93 N.C. 154.
Pa.—Rouch v. Zehring, 59 Pa. 74—Chess v. Chess, 1 Penr. & W. 32, 21 Am.D. 350.

54. Mass.—Neafsey v. Stone, 174 N.E. 278, 274 Mass. 235.
Wash.—Gregory v. Peabody, 244 P. 998, 138 Wash. 591.
22 C.J. p 279 note 30.

Alienation of affections

(1) In a suit for alienation of affections, where the state of a spouse's feelings toward the other is material, his or her declarations indicative of his or her then mental state are admissible.
Cal.—Adkins v. Brett, 193 P. 251, 184 Cal. 252.
N.H.—Daniels v. Barker, 200 A. 410, 89 N.H. 416.

(2) Before an overt act showing defendant's influence over the alienated spouse has taken place, declarations showing the alienated spouse's state of mind are admissible; but after such an overt act has taken place, such declarations are inadmissible as hearsay.—Johnson v. Richards, 294 P. 507, 50 Idaho 150.

(3) Where defendant's intent is relevant in such a suit, his statements and declarations disclosing such intent are admissible.—Dunn v. Dunn, 241 Ill.App. 11.

55. U.S.—S. C. Johnson & Son v. Johnson, D.C.N.Y., 28 F.Supp. 744, modified on other grounds C.C.A., 116 F.2d 427.
Cal.—Hatzakorzian v. Rucker-Fuller Desk Co., 239 P. 709, 197 Cal. 82, 41 A.L.R. 1027—Adkins v. Brett, 193 P. 251, 184 Cal. 252—Stromerson v. Averill, 102 P.2d 571, 39 Cal.App.2d 118.
Ind.—Koenig v. Bryce, 180 N.E. 682, 94 Ind.App. 689.
Iowa.—Goodale v. Murray, 289 N.W. 450, 227 Iowa 843, 126 A.L.R. 1121.
Kan.—Fauser v. Jordan, 103 P.2d 862, 152 Kan. 407—Malone v. New York Life Ins. Co., 83 P.2d 639, 148 Kan. 555.
Ky.—Commonwealth v. Clark County Nat. Bank, 219 S.W. 175, 187 Ky. 151, error dismissed Clark County Nat. Bank v. Commonwealth of Kentucky, 41 S.Ct. 147, 254 U.S. 664, 65 L.Ed. 464.
Me.—Plummer v. Metropolitan Life Ins. Co., 169 A. 302, 132 Me. 220.
Mass.—Hicks v. H. B. Church Truck Service Co., 156 N.E. 254, 259 Mass. 272.
Mo.—Platt v. Huegel, 32 S.W.2d 605, 326 Mo. 776—Browning v. Browning, 41 S.W.2d 860, 226 Mo.App. 322—Elliott v. Fidelity-Phenix Fire Ins. Co. of New York, App., 267 S.W. 441.
Mont.—Brown v. Homestake Exploration Corporation, 39 P.2d 168, 98 Mont. 305.
N.H.—American Employers Ins. Co. v. Wentworth, 5 A.2d 265, 90 N.H. 112—Blake v. Lord, 4 A.2d 360, 90 N.H. 42—Mitchell v. Smith's Estate, 4 A.2d 355, 90 N.H. 36.
N.Y.—Quinn v. Pietro, 56 N.Y.S. 419, 38 App.Div. 484.
Pa.—Disbrow v. Ulster Tp., 8 A. 913, 6 Pa.Cas. 33.
Tenn.—Long v. Tomlin, 125 S.W.2d 171, 22 Tenn.App. 607.
Wyo.—Worth v. Worth, 49 P.2d 649, 48 Wyo. 441, 103 A.L.R. 107.
22 C.J. p 279 note 31, p 364 note 76.

"The rule is without exception so far as occurs to us at the moment, that whenever the intention, feeling, belief, or other mental state of a person at a particular time, including his bodily feeling, is material to an issue under trial, evidence of such person's declarations at the time, indicative of his then mental state, are admissible in evidence. It is wholly immaterial whether such declarations were made in the presence of an adverse party to the litigation or not, or what the character of the litigation is. The sole tests are, Is the intention, belief, or other mental state of the declarant at the time material to the issues under trial, and does the declaration indicate what the declarant's intention, belief, or other mental state at the time was?"—In re Carson's Estate, 194 P. 5, 9, 184 Cal. 437, 17 A.L.R. 239.

Complaints of mental pain, when in issue, stand on the same ground as complaints of physical pain, and are admissible.—Smith v. Boston & M. R. R., 177 A. 729, 87 N.H. 246—Caplan v. Caplan, 142 A. 121, 83 N.H. 318.

Satisfaction

Ala.—Newell Contracting Co. v. Lacy, 155 So. 379, 380, 229 Ala. 208, citing **Corpus Juris.**

Evidence held inadmissible as not being within text rule.—Stone v. Union Fire Ins. Co., 107 P.2d 241, 106 Colo. 522.

56. Mich.—Perry v. Lovejoy, 14 N.W. 485, 49 Mich. 529, explaining White v. Ross, 10 N.W. 188, 47 Mich. 172.

57. N.H.—American Employers Ins. Co. v. Wentworth, 5 A.2d 265, 90 N.H. 112.
Admissibility of res gestæ statements to show relevant mental state see infra § 403.

their right to exist.[58]

The effect of a certain influence on the mind of the declarant may be shown by his statements.[59]

The rule as to declarations disclosing the mental state of the declarant applies to declarations made at the time at which such mental state is relevant,[60] and is also extended to declarations made prior[61] and subsequent[62] to such time, provided, of course, such declarations are not too remote. Such declarations may be admissible even though they were made after the suit was instituted, if the mental state of declarant at that time is relevant.[63]

Of course, declarations tending to show the state of mind of another are hearsay and are inadmissible.[64]

Narrative statement. A narrative statement of the existence of a past state of feeling on the part of the declarant is not admissible,[65] especially where it is self-serving[66] and made post litem motam.[67] Where, however, the statement, although narrative, amounts to an admission, it is competent against the declarant.[68]

Particular states of mind. The fact that a person's mental state at a given time was one of assent may be shown by proving his statement indicative of such a feeling;[69] and, conversely, a person's dissent may be shown by his relevant declarations.[70]

The belief of a person, when it is a relevant fact, may be proved circumstantially by his declarations;[71] and statements brought to his attention may be independently relevant as showing the grounds of belief.[72]

Whether a person is acting under constraint may be shown by his relevant declarations.[73]

A person's mental state of fear is provable by his declarations unless they are too remote.[74]

Declarations of a person are competent to show the friendly nature of his feelings toward another,[75] provided the state of the declarant's mind is relevant to the inquiry.[76] Of course, such declarations are not competent to establish the truth of facts directly asserted therein.[77] On the other hand, where declarant's ill will toward a person relates directly to the issues of a case, his declarations showing the existence of such ill will are admissible.[78]

Declarations in pais may be admissible as tending to show that the mental state of the declarant is one of indifference.[79]

58. N.H.—American Employers Ins. Co. v. Wentworth, supra.
22 C.J. p 280 note 34.

59. Tex.—Jackson v. Jackson, Civ. App., 35 S.W.2d 830, 836, quoting **Corpus Juris.**
22 C.J. p 280 note 35.

60. Cal.—Adkins v. Brett, 193 P. 251, 184 Cal. 252.
N.H.—American Employers Ins. Co. v. Wentworth, 5 A.2d 265, 90 N.H. 112.
22 C.J. p 280 note 37.

61. Cal.—Hatzakorzian v. Rucker-Fuller Desk Co., 239 P. 709, 197 Cal. 82, 41 A.L.R. 1027.
N.H.—American Employers Ins. Co. v. Wentworth, 5 A.2d 265, 90 N.H. 112.
22 C.J. p 280 note 38.

62. Kan.—Fruser v. Jordan, 103 P. 2d 862, 152 Kan. 407.
22 C.J. p 280 note 39.

63. N.H.—Caplan v. Caplan, 142 A. 121, 83 N.H. 318.

64. Pa.—Miller v. Hottenstein, 1 Woodw. 236.
Vt.—Prazak v. Burzelko, 160 A. 189, 104 Vt. 457.

65. Colo.—Stone v. Union Fire Ins. Co., 107 P.2d 241, 106 Colo. 522.
Iowa.—McGlothlen v. Mills, 265 N.W. 117, 118, 221 Iowa 204, citing **Corpus Juris.**
N.H.—American Employers Ins. Co. v. Wentworth, 5 A.2d 265, 90 N.H. 112.
22 C.J. p 280 note 41.

66. Ga.—Colquitt v. Thomas, 8 Ga. 258.
22 C.J. p 281 note 42.

67. Mich.—Eldredge v. Sherman, 44 N.W. 948, 79 Mich. 484—Lewis v. Rice, 27 N.W. 867, 61 Mich. 97.
Mo.—Tucker v. Tucker, 32 Mo. 464.

68. Md.—Kershner v. Kershner, 36 Md. 309.
Pa.—Proprietary v. Ralston, 1 Dall. 18, 1 L.Ed. 18.
22 C.J. p 281 note 44.

69. N.H.—American Employers Ins. Co. v. Wentworth, 5 A.2d 265, 90 N.H. 112.
22 C.J. p 281 note 45, p 364 note 76 [b].

70. N.H.—Wood v. Fiske, 62 N.H. 173.
Tex.—Brown v. State, Cr., 28 S.W. 536.
Vt.—Evarts v. Young, 52 Vt. 329.

71. Cal.—In re Russell's Estate, 210 P. 249, 189 Cal. 759.
Colo.—In re Holmes' Estate, 56 P.2d 1333, 98 Colo. 360.
Minn.—Farrar v. Locomotive Engineers' Mut. Life & Accident Ins. Ass'n, 173 N.W. 705, 143 Minn. 468.
22 C.J. p 281 note 47.

72. Kan.—Matthews v. McNeill, 157 P. 387, 98 Kan. 5.
22 C.J. p 281 note 48.

73. N.Y.—Bennett v. Smith, 21 Barb. 439.

74. Cal.—Hatzakorzian v. Rucker-Fuller Desk Co., 239 P. 709, 716, 197 Cal. 82, 41 A.L.R. 1027, quoting **Corpus Juris.**
22 C.J. p 281 notes 50, 51.

Explanation of cause of fear

In will contest, testimony of witness as to statements made by him in conversation with testatrix, necessary to explain her statement with reference to cause of fear of being poisoned by caveator, was not irrelevant.—Ezell v. Mobley, 129 S.E. 532, 160 Ga. 872.

75. Iowa.—Howe v. Richards, 83 N.W. 909, 112 Iowa 220.
22 C.J. p 281 note 52.

76. Mo.—State v. Punshon, 27 S.W. 1111, 124 Mo. 448.
Tex.—Fuller v. State, 17 S.W. 1108, 30 Tex.App. 559.

77. Conn.—State v. Swift, 18 A. 664, 57 Conn. 496.
Ohio.—Preston v. Bowers, 13 Ohio St. 1, 82 Am.D. 430.

78. N.H.—Caplan v. Caplan, 142 A. 121, 83 N.H. 318.
Tex.—Adams v. Adams, Civ.App., 253 S.W. 605, error dismissed 278 S.W. 1114, 114 Tex. 582.

79. Ga.—Perry v. State, 36 S.E. 781, 110 Ga. 234.
N.Y.—Quinn v. Pietro, 56 N.Y.S. 419, 38 App.Div. 484.

Readiness may be shown by declarations reasonably probative of its existence;[80] and a person's declarations may also be admissible to show his willingness[81] or unwillingness.[82]

§ 256. Intent and Intention

Where declarant's intent or intention is relevant, his declarations disclosing such intent or intention are admissible.

Declarations may be relevant evidence as to the existence of a particular intent[83] or intention[84] in the mind of the declarant. Such declarations are admissible if, and not unless, the existence of the particular mental state at the time to which the declarations relate is a relevant fact;[85] and are to

80. N.C.—Cronly v. Murphy, 64 N.C. 489.
22 C.J. p 287 note 28.

81. Ky.—Howard v. Whittaker, 64 S.W.2d 173, 250 Ky. 836.
22 C.J. p 287 note 29

82. Ga.—Girvin v. Georgia Veneer & Package Co., 85 S.E. 922, 143 Ga. 762.
Pa.—Loudon v. Blythe, 27 Pa. 22, 67 Am.D. 442.

83. Cal.—Pasadena Trust & Savings Bank v. Bryson, 189 P. 816, 46 Cal. App. 730.
Conn.—Socony-Vacuum Oil Co. v. Elion, 11 A.2d 5, 126 Conn. 310
Ky.—Howard v. Whittaker, 64 S.W. 2d 173, 250 Ky. 836.
Md.—Rent-a-Car Co. v. Globe & Rutgers Fire Ins. Co., 156 A. 847, 161 Md. 249.
Mo.—Edie v. Coleman, App., 141 S.W. 2d 238.
Utah.—Mower v. Mower, 228 P. 911, 914, 64 Utah 260, quoting **Corpus Juris.**
W.Va.—De Pue v. Steber, 108 S.E. 590, 89 W.Va. 78.
Wyo.—Worth v. Worth, 49 P.2d 649, 48 Wyo. 441, 103 A.L.R. 107.
22 C.J. p 281 note 57, p 364 note 76 [a].

84. U.S.—U. S. v. O'Brien, C.C.A. Va., 51 F.2d 37, 41, citing **Corpus Juris.**
Ala.—McCord v. State, 126 So. 873, 220 Ala. 466—Montgomery v. McNutt, 108 So. 752, 214 Ala. 692—Feore v. Trammel, 104 So. 808, 213 Ala. 293—Stoudemire v. Davis, 94 So. 498, 208 Ala. 495—Miller v. McGuire, 80 So. 433, 202 Ala. 351.
Cal.—Stromerson v. Averill, 102 P. 2d 571, 39 Cal.App.2d 118—O'Dea v. Hibernia Savings & Loan Soc., 7 P.2d 318, 119 Cal.App. 622—Pasadena Trust & Savings Bank v. Bryson, 189 P. 816, 46 Cal.App. 730.
Conn.—Kloek v. Pierson, 196 A. 147, 123 Conn. 465—Smith v. Firestone Tire & Rubber Co., 177 A. 524, 119 Conn. 483—Van Guilder v. Van Guilder, 123 A. 19, 100 Conn. 142.
D.C.—Lee v. Mitcham, 98 F.2d 298, 69 App.D.C. 17, 117 A.L.R. 1427—Chichester Chemical Co. v. U. S., 49 F.2d 516, 60 App.D.C. 134.
Ga.—Brewer v. Mackey, 171 S.E. 273, 177 Ga. 813.
Idaho.—In re Coleman, 23 P.2d 1115, 1117, 53 Idaho 339, quoting **Corpus Juris.**
Ill.—Totten v. Totten, 128 N.E. 295, 294 Ill. 70.
Ind.—Koenig v. Bryce, 180 N.E. 682, 94 Ind.App. 689.
Iowa.—Goodale v. Murray, 289 N.W. 450, 227 Iowa 843, 126 A.L.R. 1121.
Kan.—Malone v. New York Life Ins. Co., 83 P.2d 639, 148 Kan. 555—Conry v. McLean, 232 P. 1030, 117 Kan. 595.
Ky.—Peck v. Peck, 75 S.W.2d 522, 255 Ky. 835—Bosse v. Bosse, 57 S.W.2d 995, 248 Ky. 11.
Mo.—Schnur v. Dunker, App., 38 S.W.2d 282—West v. Duncan, App., 249 S.W. 127.
Mont.—Ross v. Industrial Accident Board, 80 P.2d 362, 106 Mont. 486.
N.Y.—Cohoes Bronze Co. v. Georgia Home Ins. Co., 276 N.Y.S. 619, 243 App.Div. 224—In re Blodgett's Estate, 7 N.Y.S.2d 364, 168 Misc. 898.
N.D.—Grotberg v. First Nat. Bank, 210 N.W. 21, 54 N.D. 548.
Ohio.—Chenoweth v. Cary, App., 31 N.E.2d 716, appeal dismissed 23 N.E.2d 949, 136 Ohio St. 123.
Pa.—Moyer v. Frankford Crate Co., 2 A.2d 587, 588, 133 Pa.Super. 323, quoting **Corpus Juris.**
Tex.—Southland Life Ins. Co. v. Greenwade, Civ.App., 143 S.W.2d 648, error granted—Moore v. McLennan County, Civ.App., 278 S.W. 341—O'Fiel v. Janes, Civ.App., 269 S.W. 1074, affirmed Janes v. O'Fiel, Com.App., 280 S.W. 163, motion dismissed 299 S.W. 640.
Utah.—Golden v. American Keene Cement & Plaster Co., 95 P.2d 755, 98 Utah 23—Mower v. Mower, 228 P. 911, 914, 64 Utah 260, quoting **Corpus Juris.**
Va.—Lackey v. Price, 128 S.E. 268, 142 Va. 789.
22 C.J. p 282 note 58.
"The primary and natural proofs of intention are the statements in regard thereto made by the person, the purpose of whose acts is sought to be discovered."—Blackstone Canal Nat. Bank v. Oast, 121 A. 223, 225, 45 R.I. 218.

Domicile
A man's declarations as to his place of residence are competent evidence after his death on the question of his domicile.—Wilson v. Terry, 9 Allen, Mass., 214.

Grantors
While evidence of the declarations of a grantor made after he has parted with title and in disparagement of it are inadmissible, see infra § 325, subsequent acts and declarations of the grantor may be proven for the purpose of showing the original intent of the grantor.
U.S.—Shell Oil Co. v. Manley Oil Corporation, D.C.Ill., 37 F.Supp. 289, reversed on other grounds, C.C.A., 124 F.2d 714.
Cal.—Northern California Conference Ass'n of Seventh Day Adventists v. Smith, 285 P. 314, 209 Cal. 26.
Ill.—Waters v. Lawler, 130 N.E. 335, 297 Ill. 63
Iowa.—McKemey v. Ketchum, 175 N.W. 325, 188 Iowa 1081.
Mass.—Bond v. Orr, 165 N.E. 426, 266 Mass. 475.
N.J.—Salmon v. Pittenger, 193 A. 843, 122 N.J.Eq. 165—First Nat. Bank v. Rutherford Trust Co., 157 A. 142, 109 N.J.Eq. 265.
Tex.—Hall v. Barrett, Civ.App., 126 S.W.2d 1045—Newton v. McCarrick, Civ.App., 75 S.W.2d 472, error dismissed.
Utah.—Stanley v. Stanley, 94 P.2d 465, 97 Utah 520.
Wyo.—McFadden v. French, 213 P. 760, 29 Wyo. 401.
Statements to show fraud as to creditors see infra §§ 338–341.
Loose declarations as to intention are inadmissible.—Gelbarth v. Moore, 29 Del.Co., Pa., 68.

Suicide
As issue whether insured committed suicide involved inquiry into his state of mind at time thereof, his statement three days before death that he intended to kill himself was not hearsay.—Freeman v. Metropolitan Life Ins. Co., 134 S.E. 639, 35 Ga.App. 770.

85. U.S.—Williams v. Great Southern Lumber Co., La., 48 S.Ct. 417, 277 U.S. 19, 72 L.Ed. 761, affirming, C.C.A., Great Southern Lumber Co. v. Williams, 17 F.2d 468, which reversed, D.C., Williams v. Great Southern Lumber Co., 13 F.2d 246, and certiorari granted 48 S.Ct. 19, 275 U.S. 511, 72 L.Ed. 399—Stark v. U. S., D.C.Ohio, 14 F.2d 616.
Cal.—Shaver v. Canfield, 70 P.2d 507, 21 Cal.App.2d 734.
Conn.—Dunham v. Cox, 70 A. 1033, 81 Conn. 268.
Ga.—Kelly v. Sinclair, 168 S.E. 78, 46 Ga.App. 499—Brooks v. Pitts, 100 S.E. 776, 24 Ga.App. 386.
Idaho.—In re Coleman, 23 P.2d 1115,

be excluded where the intent does not affect the legal result of the transaction.[86] The declarations are not direct evidence of the facts asserted, but merely circumstantial evidence as to the existence of some relevant and material fact.[87] Such evidence is admissible, not as a part of the res gestæ, but as a fact relevant to a fact in issue,[88] although, as hereinafter pointed out in § 403, a statement forming a part of the res gestæ may also be admissible to disclose intent or intention.

The declaration showing intention may be either oral or written.[89]

Declarations evincing a particular intent or intention are relevant in very many connections when the legal effect of an act or the animus with which it is done is to be determined;[90] for example, to establish the intention with which goods,[91] money,[92] or negotiable instruments[93] were received, or with which goods,[94] written instruments,[95] or money[96] were delivered to another; to show on whose account money was delivered[97] or received;[98] to show purpose in taking possession of either real or personal property, or otherwise to qualify the act;[99] to show intention as bearing on the abandonment of the ownership of property,[1] the making of a gift, see infra § 260, or advancement,[2]

1117, 53 Idaho 339, quoting **Corpus Juris.**
Md.—Washington, B. & A. E. Ry. Co. v. State, 113 A. 338, 137 Md. 538.
Mo.—Clay v. Walker, App., 6 S.W.2d 961—McCune v. Daniels, App., 225 S.W. 1020—Lorton v. Trail, App., 216 S.W. 54.
Pa.—Cockcroft v. Metropolitan Life Ins. Co., 3 A.2d 184, 133 Pa.Super. 598—Moyer v. Frankford Crate Co., 2 A.2d 587, 588, 133 Pa.Super. 323, quoting **Corpus Juris.**
S.C.—Meehan v. Commercial Casualty Ins. Co., 165 S.E. 194, 166 S.C. 496—Wateree Power Co. v. Rion, 102 S.E. 331, 113 S.C. 303.
Tex.—Norton v. Lea, Civ.App., 283 S.W. 316.
Va.—Flannagan v. Northwestern Mut. Life Ins. Co., 146 S.E. 353, 152 Va. 38.
22 C.J. p 282 notes 59, 60.

86. Ill.—Dodge v. Thomas, 107 N.E. 261, 266 Ill. 76, Ann.Cas.1915C 1097.
22 C.J. p 282 note 61.

87. Idaho.—In re Coleman, 23 P.2d 1115, 1117, 53 Idaho 339, quoting **Corpus Juris.**
Utah.—Mower v. Mower, 228 P. 911, 914, 64 Utah 260, quoting **Corpus Juris.**
W.Va.—De Pue v. Steber, 108 S.E. 590, 89 W.Va. 78.
22 C.J. p 282 notes 62, 63.

88. Conn.—Smith v. Firestone Tire & Rubber Co., 177 A. 524, 119 Conn. 483.
22 C.J. p 282 note 65.

89. D.C.—Lee v. Mitcham, 98 F.2d 298, 69 App.D.C. 17, 117 A.L.R. 1427.

Letters

Intention may be shown by contemporaneous declarations in letters written under circumstances excluding suspicion.
Ala.—Miller v. McGuire, 80 So. 433, 202 Ala. 351.
D.C.—Chichester Chemical Co. v. U. S., 49 F.2d 516, 60 App.D.C. 134.
22 C.J. p 282 note 58 [b].

Written declaration on envelope containing securities are admissible to show intention.—Pasadena Trust & Savings Bank v. Bryson, 189 P. 816, 46 Cal.App. 730.

90. D.C.—Lee v. Mitcham, 98 F.2d 298, 69 App.D.C. 17, 117 A.L.R. 1427.
Tex.—O'Fiel v. Janes, Civ.App., 269 S.W. 1074, affirmed Janes v. O'Fiel, Com.App., 280 S.W. 163, motion dismissed 299 S.W. 640.
22 C.J. p 283 note 66.

"It is well settled that where intention is the subject of inquiry, and acts are admitted in evidence, declarations accompanying such acts and explanatory of them are always admissible."—O'Fiel v. Janes, Tex.Civ.App., 269 S.W. 1074, 1084, affirmed Janes v. O'Fiel, Com.App., 280 S.W. 163.

Lascivious disposition

In an action for assault on female plaintiff, evidence of conversations between the parties, both of whom were married to others, and of defendant's statements to another tending to show his lascivious disposition toward plaintiff, was admissible.—McKenney v. Davis, 178 N.W. 330, 189 Iowa 358.

91. Me.—Whittemore v. Wentworth, 76 Me. 20.

92. Ala.—Dillard v. Scruggs, 36 Ala. 670.
Ill.—Medley v. People, 49 Ill.App. 218.

93. Mo.—State v. Blackburn, 201 S.W. 96, 273 Mo. 469.
N.Y.—Higby v. New York, etc., R. Co., 16 N.Y.Super. 497, 7 Abb.Pr. 259.

Firm note

Declarations of partner to the effect that the debtor was a member of the firm are admissible to show that the creditor took a firm note under misapprehension without intending to release the debtor.—Tozier v. Crafts, 123 Mass. 480.

To make intelligible, give point and certainty to, and clearly indicate consequences of, ambiguous or meaningless act of delivery or receipt of negotiable or written instruments, extrajudicial statement of intent with which act is done is admissible.—In re Kaufmann's Estate, 127 A. 133, 281 Pa. 519.

94. Ala.—Jones v. Chenault, 27 So. 515, 124 Ala. 610, 82 Am.S.R. 211.
Cal.—Clark v. Rush, 19 Cal. 393.
22 C.J. p 283 note 70.

95. Mass.—Hagar v. Norton, 73 N.E. 1073, 188 Mass. 47.
22 C.J. p 283 note 71.

96. R.I.—Blackstone Canal Nat. Bank v. Oast, 121 A. 223, 45 R.I. 218.
22 C.J. p 283 note 72.

To pay plaintiff

Evidence that defendant in taking certain money from a safe declared that he was about to take such money to pay plaintiff may be admissible as relevant to the issue of payment.—Dunham v. Cox, 70 A. 1033, 81 Conn. 268.

Preliminary evidence

Mere evidence that a certain conversation related to defendant's business is not admissible without a claim that it is preliminary to the admission of evidence of defendant's declaration of an intention to pay plaintiff with money he then took from a safe.—Dunham v. Cox, 70 A. 1033, 81 Conn. 268.

97. N.H.—Carter v. Beals, 44 N.H. 408.
N.Y.—Lee v. Kennedy, 54 N.Y.S. 155, 25 Misc. 140.

98. N.H.—Hall v. Young, 37 N.H. 134.

99. Tex.—Addison v. Ball, Civ.App., 262 S.W. 877.
22 C.J. p 283 note 75.

1. N.D.—Grotberg v. First Nat. Bank, 210 N.W. 21, 54 N.D. 548.

2. Ga.—Bland v. Beasley, 76 S.E. 50, 138 Ga. 712.
Ill.—Dodge v. Thomas, 107 N.E. 261, 266 Ill. 76, Ann.Cas.1915C 1097.

In presence of beneficiary

Declarations of parent, making advancements to child which are contemporaneous with gifts, or subsequent verbal declarations by him to

or the delivery of a deed;[3] or to show intention of a husband to desert his wife and family.[4] A declaration indicating a present intention to do a particular act in the immediate future, made in apparent good faith and not for self-serving purposes, is admissible to prove that the act was in fact performed.[5] Evidence of declarations by an insured when he left home, of the purpose of his trip, and when he would return, is admissible as bearing on the presumption of death arising from absence;[6] but it has also been held that a letter deliberately prepared by an insured was not admissible under such circumstances as showing his mental condition at the time and his feeling and mental attitude toward his family.[7]

Time of declaration. A declaration of intent or intention is not necessarily admissible because made contemporaneously with relevant acts; existence of the particular mental state at that time must itself be a relevant fact.[8] On the other hand, no requirement exists that the making of a declaration indicating intent or intention should be contemporaneous with the time when its existence is relevant, but the test is logic rather than time, and, within limits prescribed by the rules as to remoteness,[9] prior[10] or subsequent,[11] as well as accompanying,[12] statements are competent.

Death of declarant. An otherwise relevant declaration is not rendered incompetent by reason of the fact that the declarant is dead.[13] It has also been declared that such a declaration, to be admissible, must appear to have been made in a natural manner, and not under circumstances of suspicion.[14]

Declarations favorable to declarant. If a declaration of intent or intention is relevant, the declarant is entitled to the benefit of it, even though it be in his favor.[15]

§ 257. Knowledge

The existence or absence of knowledge, where relevant, may be shown by a person's declarations and statements to a person whose knowledge is relevant are admissible. General knowledge may also be shown as bearing on a person's knowledge.

The existence[16] of knowledge may be shown, or

child and not controverted by latter, are admissible in subsequent suit for partition among devisees, but mere declarations of father made in son's absence are not provable.—Alward v. Woodard, 146 N.E. 154, 315 Ill. 150.

Declaration of widow was inadmissible as against son in determining whether property deeded son by father was advancement.—Pilkington v. Wheat, 51 S.W.2d 42, 330 Mo. 767, transferred, see App., 35 S.W.2d 666.

3. Ala.—Napier v. Elliott, 40 So. 752, 146 Ala. 213, 119 Am.S.R. 17.
Cal.—Belser v. American Trust Co., 13 P.2d 951, 125 Cal.App. 344.
Utah.—Stanley v. Stanley, 94 P.2d 465, 97 Utah 520.
Vt.—Rich v. Wry, 6 A.2d 7, 110 Vt. 307.
Admissibility of evidence to prove delivery of deeds generally see Deeds § 196.

4. N.Y.—Moore v. Fingar, 122 N.Y.S. 851, 138 App.Div. 929.

5. Conn.—Smith v. Firestone Tire & Rubber Co., 177 A. 524, 119 Conn. 483.

6. Mo.—Bradley v. Modern Woodmen of America, 124 S.W. 69, 146 Mo.App. 428.

7. Mo.—Bergman v. Supreme Tent, Knights of Maccabees of the World, 220 S.W. 1029, 203 Mo.App. 685.

8. Ala.—Brand v. Abbott, 42 Ala. 499.
Mich.—Hialey v. Hialey, 121 N.W. 465, 157 Mich. 45.

9. Ala.—Moore v. Welden, 143 So. 831, 225 Ala. 458.
22 C.J. p 284 note 85.
Remoteness in time as bearing on legal relevancy or materiality see supra § 159.

10. Ala.—Feore v. Trammel, 104 So. 808, 213 Ala. 293—Miller v. McGuire, 80 So. 433, 202 Ala. 351.
Kan.—Malone v. New York Life Ins. Co., 83 P.2d 639, 148 Kan. 555.
Ky.—Howard v. Whittaker, 64 S.W.2d 173, 250 Ky. 836.
Mo.—Koonse v. Missouri Pac. R. Co., 18 S.W.2d 467, 472, 322 Mo. 813, citing **Corpus Juris**, and certiorari denied Missouri Pac. R. Co. v. Koonse, 50 S.Ct. 34, 280 U.S. 582, 74 L.Ed. 632.
22 C.J. p 284 note 86.
To characterize act
Declarations of intentions to do some act in the future are often admissible to characterize the act when done, and the extent to which such evidence is admissible is largely within the discretion of the trial court.—Kessler v. Von Bank, 174 N.W. 839, 144 Minn. 220.

11. Ala.—Montgomery v. McNutt, 108 So. 752, 214 Ala. 692.
Cal.—De Cou v. Howell, 214 P. 444, 190 Cal. 741.
Kan.—Burdg v. Scott, 208 P. 668, 111 Kan. 610
22 C.J. p 284 note 87.

12. Tex.—Koller v. State, 38 S.W. 44, 36 Tex.Cr. 496.

13. Cal.—Pasadena Trust & Savings Bank v. Bryson, 189 P. 816, 46 Cal. App. 730.
Idaho.—In re Coleman, 23 P.2d 1115, 1117, 53 Idaho 339, quoting **Corpus Juris.**
Ky.—Bosse v. Bosse, 57 S.W.2d 995, 248 Ky. 11
Me.—Peacock v. Ambrose, 116 A. 832, 121 Me. 297.
N.Y.—Union Trust Co. of Rochester v. Boardman, 213 N.Y.S. 277, 215 App.Div. 73, affirmed 159 N.E. 678, 246 N.Y. 627.
22 C.J. p 284 note 90.
To change domicile
Declarations of decedent as to intent to change domicile are admissible on question of jurisdiction to grant letters of administration.—Holmes v. Holmes, 103 So. 884, 212 Ala. 597.

14. Pa.—Cockcroft v. Metropolitan Life Ins. Co., 3 A.2d 184, 133 Pa. Super. 598.

15. Mo.—Koonse v. Missouri Pac. R. Co., 18 S.W.2d 467, 472, 322 Mo. 813, citing **Corpus Juris**, and certiorari denied Missouri Pac. R. Co. v. Koonse, 50 S.Ct. 34, 280 U.S. 582, 74 L.Ed. 632.
22 C.J. p 284 note 89.

16. Ala.—H. & L. M. Warten Cotton Co. v. Southern Ry. Co., 94 So. 726, 208 Ala. 417.
Mo.—O'Leary v. Scullin Steel Co., 260 S.W. 55, 303 Mo. 363—Henry v. First Nat. Bank of Kansas City, App., 115 S.W.2d 121, 133, quoting **Corpus Juris**—Garnett v. S. S. Kresge Co., App., 85 S.W.2d 157, 159, quoting **Corpus Juris**, quashed on the ground that only part of the statements were admissible to prove knowledge, the balance being

the absence[17] of knowledge may be shown by declarations of the person whose knowledge is of importance, even though such declarations were made a considerable time before or after the time involved in the inquiry, provided there is not such an element of remoteness as destroys materiality.[18]

Where a person's knowledge of a particular fact is relevant, it may be shown that an unsworn statement of another person as to its existence was brought to his attention in the same way that any other relevant statement may be shown to have been made to him.[19] It is accordingly permissible to show direct and specific statements, such as advice,[20] information,[21] instructions,[22] notices,[23] representations,[24] or threats.[25] The evidence offered must in all cases have a logical tendency to establish the fact of knowledge,[26] but, provided the time is not too remote, statements made to a person whose knowledge is relevant may be shown, although made a considerable time before the time when such knowledge is relevant.[27]

General knowledge. As bearing on whether a particular person had knowledge of a certain fact it is competent to show general notoriety,[28] general knowledge,[29] or reputation[30] in the community of which such person is a member, provided such notoriety or reputation is established to such an extent as to raise a reasonable inference that the fact was known to the person in question.[31] It has also been held that newspaper[32] or other[33] publication of a fact raises an inference that a person likely to have learned of the statement[34] did so learn.

regarded as evidence of negligence, not knowledge, in State v. Shain, Sup., 101 S.W.2d 14—Wainwright v. Westborough Country Club, App., 45 S.W.2d 86, 91, quoting **Corpus Juris.**

Mont.—Brown v. Homestake Exploration Corporation, 39 P.2d 168, 98 Mont. 305

N.M.—Crespin v. Albuquerque Gas & Electric Co., Co., 50 P.2d 259, 262, 39 N.M. 473, citing **Corpus Juris.**

Tex.—U. S. Fidelity & Guaranty Co. v. Henderson, Civ.App., 53 S.W.2d 811.

Wash.—Norton v. Payne, 281 P. 991, 154 Wash. 241.

22 C.J. p 284 note 92, p 364 note 76 [c].

17. N.Y.—Taylor v. Crowninshield, 5 N.Y.Leg.Obs. 209.

18. Mo.—Garnett v. S. S. Kresge Co., App., 85 S.W.2d 157, 159, quoting **Corpus Juris,** and quashed on other grounds in State v. Shain, Sup., 101 S.W.2d 14—Wainwright v. Westborough Country Club, App., 45 S.W.2d 86, 91, quoting **Corpus Juris.**

22 C.J. p 284 notes 94, 95.

Legal materiality generally see supra § 159.

19. Cal.—People v. Megladdery, 105 P.2d 385, 389, 40 Cal.App.2d 643, citing **Corpus Juris**—Dunn v. Shamoon, 99 P.2d 1113, 37 Cal. App.2d 486.

Ga.—Atlantic Coast Line R. Co. v. Stovall-Pace Co., 118 S.E. 62, 65, 30 Ga.App. 326, quoting **Corpus Juris.**

N.M.—Crespin v. Albuquerque Gas & Electric Co., 50 P.2d 259, 262, 39 N.M. 473, citing **Corpus Juris.**

Tex.—Texas Employers Ins. Ass'n v. Little, Civ.App., 96 S.W.2d 677, error dismissed—Cocke v. Humphreys & Day, Civ.App., 293 S.W. 892.

Wash.—Nelson v. Bjelland, 95 P.2d 784, 1 Wash.2d 268, 125 A.L.R. 641.

22 C.J. p 284 notes 97–99.

Husband of party

Where a suit by a wife was one which she might bring as a single woman, and her husband is a witness, statements and transactions, which if made in the presence of the wife would have been admissible, which were made in the presence af the husband, were not admissible.—Bannon v. Louisville Trust Co., 150 S.W. 510, 150 Ky. 401.

20. Cal.—Blackwell v. American Film Co., 209 P. 999, 189 Cal. 689.

Conn.—Harbison v. Barwinsky, 124 A. 223, 100 Conn. 602.

22 C.J. p 285 note 1.

21. Colo.—Commercial Bank & Trust Co. v. Beach, 180 P. 982, 66 Colo. 226.

Tex.—Texas Employers Ins. Ass'n v. Little, Civ.App., 96 S.W.2d 677, error dismissed.

22 C.J. p 285 note 2.

22. Mich.—Bellows v. Crane Lumber Co., 89 N.W. 367, 129 Mich. 560.

22 C.J. p 285 note 3.

23. Ariz.—Carrillo v. Murray & Layne Co., 216 P. 689, 25 Ariz. 303.

Tex.—Burrell Engineering & Construction Co. v. Griesier, 240 S.W. 899, 111 Tex. 477.

22 C.J. p 285 note 4.

Statements constituent of legal results see infra §§ 260–264.

24. Iowa.—Hannawalt v. U. S. Equitable L. Assur. Soc., 72 N.W. 284, 102 Iowa 667.

22 C.J. p 285 note 5.

25. Tex.—Levy v. State, 12 S.W. 596, 28 Tex.App. 203, 19 Am.S.R. 826.

22 C.J. p 285 note 6.

26. N.J.—Bowne v. Mt. Holly Nat. Bank, 45 N.J.Law 360.

22 C.J. p 285 note 7.

27. Ill.—Davids v. People, 61 N.E. 537, 192 Ill. 176—Schwartz v. Berkshire L. Ins. Co., 91 Ill.App. 494.

28. Mo.—State, on Inf. of McKittrick v. Williams, 144 S.W.2d 98—State on Inf. of McKittrick v. Graves, 144 S.W.2d 91—State, on inf McKittrick, v. Wymore, 132 S.W.2d 979, 984, 345 Mo. 169, citing **Corpus Juris.**

22 C.J. p 285 note 9.

29. Ala.—Ingram v. Watson, 100 So. 557, 211 Ala. 410.

22 C.J. p 285 note 10, p 286 note 12 [a].

Evidence of general knowledge held insufficient to bring case within rule.—Chandler v. Russel, 180 S.E. 313, 316, 164 Va. 318, wherein the **Corpus Juris** rule as quoted by counsel is set forth.

30. Minn.—Hahn v. Penney, 63 N.W. 843, 62 Minn. 116.

22 C.J. p 285 note 11.

31. Cal.—Sowden v. Idaho Quartz Min. Co., 55 Cal. 443.

22 C.J. p 286 note 13.

Disorderly character

Evidence of statements and conversation testified to by investigators, police officers, and the inmates of the premises allegedly used for lewdness and prostitution is admissible as tending to show defendant's knowledge of the disorderly character of the place maintained by her.—People ex rel. Crowe v. Ludwig, 258 Ill.App. 268.

32. Mass.—Roberts v. Spencer, 123 Mass. 397—Commonwealth v. Robinson, 1 Gray 555.

33. Mass.—Putnam v. Gunning, 39 N.E. 347, 162 Mass. 552.

34. N.H.—Clark v. Ricker, 14 N.H. 44.

N.Y.—Milbank v. Dennistoun, 23 N.Y.Super. 382, reversed on other grounds 21 N.Y. 386.

Pa.—Gaskell v. Morris, 7 Watts & S. 32.

§ 258. Malice, Motive, and Purpose

Where such mental state is relevant, declarations are admissible to show the malice, motive, or purpose of declarant.

Declarations may be admissible as evidence of malice on the part of the declarant;[35] and it has also been held that they may be received to show his lack of malice,[36] although this has been denied.[37]

Declarations are admissible to prove the influence of a particular motive upon the mind of the declarant,[38] provided the fact of such influence is relevant,[39] or to prove his purpose.[40] The evidence thus introduced goes only to the question whether such a statement was made, and cannot be considered as evidence of the truth of the statement itself.[41] Mere narrative statements as to the declarant's object in doing a past act are inadmissible.[42] The fact that the statement was made subsequent to the time when the animus or motive of declarant is in question goes to the relevancy of the declaration, and the admission of such evidence is largely discretionary with the trial court.[43] At least where a party has testified as to his motive or purpose, mere hearsay statements of third persons cannot be introduced to explain his motive or purpose.[44]

Of departure or absence. When it is material to show the purpose or reason for the departure of a person, his declarations of his purpose made at or about the time of his departure are admissible.[45] Such statements are admissible as independently relevant statements,[46] although, as hereinafter discussed in § 403, where such statements are made under such circumstances as to constitute a part of the res gestæ they are admissible as such. It is not indispensable that such a declaration be so closely connected with the act of taking the journey as to form a part thereof. It is sufficient if the declaration appears to have been made in a natural manner without circumstances of suspicion and purports to evidence the declarant's state of mind with reference to the purpose of the proposed journey and there be such proximity between the time of the making of the declaration and the incident involved in the suit as, under the circumstances, will furnish reasonable assurance that there has

35. Mont.—Edquest v. Tripp & Dragstedt Co., 19 P.2d 637, 93 Mont. 446.
S.C.—Lazar v. Great Atlantic & Pacific Tea Co., 14 S.E.2d 560—Terry v. Richardson, 116 S.E. 273, 123 S.C. 319.
Va.—Bourne v. Richardson, 113 S.E. 893, 133 Va. 441.
Wyo.—Worth v. Worth, 49 P.2d 649, 48 Wyo. 441, 103 A.L.R. 107.
22 C.J. p 286 note 17.

Declarations of plaintiff in attachment may be admissible as tending to show malice on his part in suing out the writ.—Dothard v. Sheid, 69 Ala. 135—6 C.J. p 526 note 5.

Subsequent declarations are admissible to show malice.—Polk v. Missouri-Kansas-Texas R. Co., Mo., 142 S.W.2d 1061.

36. Ga.—Conoly v. Imperial Tobacco Co., 12 S.E.2d 398, 63 Ga.App. 880.
Mass.—Leach v. Wilbur, 9 Allen 212.

37. Mo.—Moore v. Sauborin, 42 Mo. 490.
22 C.J. p 286 note 19.

38. Ala.—McCord v. State, 126 So. 873, 220 Ala. 466.
Iowa.—State v. Brown, 253 N.W. 836, 218 Iowa 166.
Kan.—Malone v. New York Life Ins. Co., 83 P.2d 639, 148 Kan. 555.
Ky.—Howard v. Whittaker, 64 S.W. 2d 173, 250 Ky. 836.
N.Y.—Nowak v. Brotherhood of American Yeomen, 162 N.E. 589, 249 N.Y. 78, reversing 224 N.Y.S. 865, 221 App.Div. 832.
S.C.—Lazar v. Great Atlantic & Pacific Tea Co., 14 S.E.2d 560—Terry v. Richardson, 116 S.E. 273, 123 S.C. 319.
Wyo.—Worth v. Worth, 49 P.2d 649, 48 Wyo. 441, 103 A.L.R. 107.
22 C.J. p 286 note 20.

39. Ill.—Williams v. Fletcher, 30 Ill.App. 219, affirmed 21 N.E. 783, 129 Ill. 356.
Mass.—Neafsey v. Stone, 174 N.E. 278, 274 Mass. 235.
S.C.—Meehan v. Commercial Casualty Ins. Co., 165 S.E. 194, 166 S.C. 496.

40. Ala.—McCord v. State, 126 So. 873, 220 Ala. 466.
Mich.—Morse v. Port Huron & D. R. Co., 232 N.W. 369, 251 Mich. 309—Power v. Palmer, 183 N.W. 199, 214 Mich. 551—Livingston v. Burroughs, 33 Mich. 511.
N.Y.—Nowak v. Brotherhood of American Yeomen, 162 N.E. 589, 249 N.Y. 78, reversing 224 N.Y.S. 865, 221 App.Div. 832.
N.C.—Hunt v. Richardson, 192 S.E. 843, 212 N.C. 28—Wilmington Furniture Co. v. Cole, 178 S.E. 579, 207 N.C. 840, 847.
Tex.—Southland Life Ins. Co. v. Greenwade, Civ.App., 143 S.W.2d 648, error granted.
22 C.J. p 286 note 22.

41. Iowa.—State v. Brown, 253 N.W. 836, 218 Iowa 166.

42. Ark.—Welch v. Welch, 200 S.W. 139, 132 Ark. 227.
22 C.J. p 286 note 23.

43. S.C.—Terry v. Richardson, 116 S.E. 273, 123 S.C. 319.

44. Tex.—Ater v. Ellis, Civ.App., 227 S.W. 222, dismissed for want of jurisdiction.

45. Cal.—In re McNamara's Estate, 183 P. 552, 181 Cal. 82, 7 A.L.R. 313.
Idaho.—In re Coleman, 23 P.2d 1115, 1117, 53 Idaho 339, quoting **Corpus Juris.**
Ind.—Koenig v. Bryce, 180 N.E. 682, 94 Ind.App. 689.
Mo.—Edwards v. Ethyl Gasoline Corporation, 112 S.W.2d 555, 342 Mo. 98.
N.Y.—Brown v. Nassau Electric R. Co., 209 N.Y.S. 205, 213 App.Div. 834.
N.D.—Grotberg v. First Nat. Bank, 210 N.W. 21, 54 N.D. 548.
Tex.—Prater v. Traders & General Ins. Co., Civ.App., 83 S.W.2d 1038, 1039, citing **Corpus Juris**—Compton v. Republic Building & Loan Ass'n, Civ.App., 67 S.W.2d 1095, 1097, quoting **Corpus Juris**—Maryland Casualty Co. v. Kent, Civ. App., 271 S.W. 929, affirmed, Com. App., 3 S.W.2d 414.
22 C.J. p 286 note 24.

Suicide notes

A note written by deceased just before his disappearance stating that he intended to commit suicide has been held admissible as an independently relevant fact.—U. S. v. O'Brien, C.C.A.Va., 51 F.2d 37.

46. Tex.—Prater v. Traders & General Ins. Co., Civ.App., 83 S.W.2d 1038.
22 C.J. p 287 note 27.

been no change of purpose or design in the meantime.[47]

§ 259. Other Declarations Admissible as Circumstantial Evidence

Various independently relevant declarations other than those before specifically considered have been held to be admissible.

Explanation of conduct. Under some statutes, when information, conversations, letters and replies, and similar evidence are facts to explain motives or conduct, they are admissible as original evidence.[48]

Fact of injury. Where the issue is whether there was an accidental injury to a deceased, the fact that he did mention the injury, or did not mention it, to the one under whom he was working or to his attending physician is competent and material evidence.[49]

Provocation. An unsworn declaration may be admissible as proving or constituting provocation.[50]

Reasons assigned. When the reasons for conduct are relevant, statements indicating the existence of such reasons may be competent.[51] It has been considered that the declarations must accompany the act for which they assign the reason,[52] and that they are evidence of the truth of the reason given,[53] but it has also been held that such a declaration is not evidence of the truth of the facts stated.[54] Complaints not distinctly assigning reasons for conduct are not within the rule.[55]

Recognition. Declarations may be received as circumstantial evidence that the declarant recognized another person.[56]

Fortifying or refreshing memory. An unsworn statement which was calculated to fix the attention[57] or refresh the memory[58] of a person may be admissible for that reason.

3. Statements Constituent of Legal Results

§ 260. In General

An unsworn statement which may, in and of itself, bring about a legal result may be admissible.

An unsworn statement may, in and of itself, bring about, or assist in bringing about, a legal result, in which case proof of the statement is necessarily relevant, because the fact of making the statement is an issue in the case.[59] The statements may be

47. Tex.—Prater v. Traders & General Ins. Co., supra.

48. Ga.—Williams v. Fouche, 129 S.E. 49, 160 Ga. 801—Moss v. Moss, 93 S.E. 875, 147 Ga. 311.

Letter

Ga.—Hall v. Simmons, 179 S.E. 272, 50 Ga.App. 634.

Response to questions

Under such a statute, where a driver of an automobile, before going on a railroad track at a crossing, asked the occupants of the automobile if the way was clear, the responses by the occupants that they could see nothing were, in an action by the driver against the railroad for running into him at the crossing, admissible in evidence as showing the circumstances under which he acted.—Central of Georgia Ry. Co. v. Dumas, 160 S.E. 814, 44 Ga.App. 152.

49. Kan.—Werth v. Minnesota Mut. Life Ins. Co., 47 P.2d 76, 142 Kan. 255.

50. Mich.—Hendrickson v. Harry, 164 N.W. 393, 166 N.W. 1023, 200 Mich. 41.
22 C.J. p 287 note 31.

51. Ga.—Southern Ry. Co. v. Tudor, 168 S.E. 98, 46 Ga.App. 563—Seaboard Air Line Ry. Co. v. Benton, 159 S.E. 717, 43 Ga.App. 495, reversed on other grounds 165 S.E. 593, 175 Ga. 491, conformed to 166 S.E. 219, 45 Ga.App. 832.
Ill.—Carpenters' Union v. Citizens' Committee to Enforce Landis Award, 164 N.E. 393, 333 Ill. 225, 63 A.L.R. 157, reversing 244 Ill. App. 540.
Ind.—George F. Hinrichs, Inc., v. U. S. Bank & Trust Co. of Rochester, 163 N.E. 842, 88 Ind.App. 327.
Ky.—Poe v. Hankins' Adm'x, 65 S.W.2d 457, 251 Ky. 466.
Mass.—Brannen v. Bouley, 172 N.E. 104, 272 Mass. 67—Stodder v. Rosen Talking Mach. Co., 135 N.E. 251, 241 Mass. 245, 22 A.L.R. 1197—Hubbard v. Allyn, 86 N.E. 356, 200 Mass. 166.
Mo.—Dick v. Puritan Pharmaceutical Co., App., 46 S.W.2d 941.
W.Va.—Swartz v. Kay, 109 S.E. 822, 89 W.Va. 641.
22 C.J. p 287 notes 32, 33.

52. Mass.—Brannen v. Bouley, 172 N.E. 104, 272 Mass. 67.
Or.—Raymond v. Shell Oil Co. of California, 103 P.2d 745.
22 C.J. p 287 note 34.

53. U.S.—Anderson v. New York & T. SS. Co., C.C.N.Y., 47 F. 38, affirmed 50 F. 462, 1 C.C.A. 529.
Colo.—Williams v. Williams, 37 P. 614, 20 Colo. 51.

54. U.S.—Buckeye Powder Co. v. E. I. Dupont De Nemours Powder Co., N.J., 39 S.Ct. 38, 248 U.S. 55, 63 L.Ed. 123, affirming 223 F. 881, 139 C.C.A. 319.
Mo.—Dick v. Puritan Pharmaceutical Co., App., 46 S.W.2d 941.

55. Hawaii.—Torson v. Beckley, 20 Hawaii 406.
N.Y.—Saxton v. New York El. R. Co., 18 N.Y.S. 188, 60 N.Y.Super. 421.

56. Iowa.—State v. Schmidt, 35 N.W. 590, 73 Iowa 469.
22 C.J. p 287 note 39.

57. Wash.—State v. Nordstrom, 35 P. 382, 7 Wash. 506.
22 C.J. p 287 note 40.

58. Pa.—Howser v. Commonwealth, 51 Pa. 332.
Refreshing memory of witnesses see the C.J.S. title Witnesses §§ 357–363, also 70 C.J. p 577 note 43–p 600 note 62.

59. Cal.—Liberty Bank v. Ernst, 269 P. 959, 960, 93 Cal.App. 560, citing **Corpus Juris.**
N.C.—Branch v. Ayscue, 119 S.E. 201, 186 N.C. 219.
Pa.—Eaton v. New York Life Ins. Co. of New York, 172 A. 121, 315 Pa. 68, 95 A.L.R. 462.
Tex.—Jaffe v. Deckard, Civ.App., 261 S.W. 390.
22 C.J. p 287 note 45.

Advancement or trust

Declarations of brother purchasing in name of sister, either before or at time of purchase, are admissible to show whether advancement or

those of one acting in a representative capacity as an agent[60] or as a public official.[61]

Gifts. The declarations of a donor, either before or after the alleged gift, unless equally consistent with an intent not to give,[62] are admissible, as bearing on his intention, for the purpose of establishing the gift[63] or as corroborative of other testimony.[64] Declarations of the donor are also competent on the question of delivery.[65] The whole of what was said at the time of the transaction must be taken together to ascertain the donor's intention.[66] The length of time between the declaration and the gift affects the weight, but not the competency, of the evidence,[67] unless it is so great as to render the declaration incapable of shedding any light on the question in issue.[68] Prior or contemporaneous declarations of the alleged donor are also admissible to show that a certain transaction was not intended as a gift;[69] but when the gift is once established his subsequent declarations are inadmissible to invalidate it,[70] and such declarations are not rendered admissible by the fact that declarations admitting the gift are in evidence for the donee.[71]

§ 261. Contracts, Agency, Bailment, Sale

Unsworn statements constituting contracts, such as of agency, bailment, and sale, if not falling within statutory prohibitions, are admissible.

Unless the contract is such as to fall within enumerated statutory restrictions, unsworn statements showing a contract[72] or unsworn statements

trust was intended, but declarations after purchase are incompetent to control the effect of the prior transaction —Montgomery v. McNutt, 108 So. 752, 214 Ala. 692.

Creation of trust

Declarations as to how property is taken are admissible to show whether such property is taken as a trust.—Forsland v. Gorman, 145 N.E 187, 313 Ill. 252.

Nature of indorsement

Under a statute providing that blank indorsements of negotiable paper may always be explained between the parties themselves, conversation between accommodation indorser and principal was not hearsay, and was pertinent on question whether she was surety for all the apparent principals or cosurety with some of them for the real principal. —Taff v. Larey, 116 S.E 866, 29 Ga. App. 631.

60. Ill.—Hoffman v. Chicago Title & Trust Co., 64 N.E. 1027, 198 Ill. 452.
22 C.J. p 288 note 47.

61. Ala.—Martin v. State, 8 So. 23, 89 Ala. 115, 18 Am.S.R. 91.

62. U.S.—Wright v. Bragg, Wis., 106 F. 25, 45 C.C.A. 204.

63. Ala.—Feore v. Trammel, 104 So. 808, 213 Ala. 293.
Cal.—Hutchinson v. California Trust Co., App., 111 P.2d 401—O'Dea v. Hibernia Savings & Loan Soc., 7 P.2d 318, 119 Cal.App. 622—Hynes v. White, 190 P. 836, 47 Cal.App. 549.
Fla.—Purvis v. Malloy, for Use and Benefit of Tiller. 176 So. 71, 129 Fla. 191.
Ga.—Neal v. Neal, 111 S.E. 387, 153 Ga. 44.
Ill.—Sando v. Smith, 237 Ill.App. 570.
Ky.—Hale v. Hale, 224 S.W. 1078, 189 Ky. 171.
Me.—Peacock v. Ambrose, 116 A. 832, 121 Me. 297.
Miss.—McClellan v. McCauley, 130 So. 145, 149, 158 Miss. 456, quoting **Corpus Juris.**
Mo.—McCune v. Daniels, App., 225 S.W. 1020.
N.Y.—In re Brown's Ex'r, 226 N.Y. S. 1, 130 Misc. 865, modified on other grounds In re Brown's Estate, 232 N.Y.S. 371, 225 App.Div. 759, modified on other grounds. In re Brown's Will, 169 N.E. 612, 252 N.Y. 366.
Ohio.—Bolles v. Toledo Trust Co., 4 N.E.2d 917, 132 Ohio St. 21.
Pa.—In re Kaufmann's Estate, 127 A. 133, 281 Pa. 519.
Vt.—Trask v. Walker's Estate, 134 A. 853, 100 Vt. 51.
28 C.J. p 675 note 14, p 704 notes 8, 11.

A writing signed by the donor, declaring or showing an intention to make a gift of the property in dispute, is admissible.—Pasadena Trust & Savings Bank v. Bryson, 189 P. 816, 46 Cal.App. 730—28 C.J. p 704 note 9.

64. Miss.—McClellan v. McCauley, 130 So. 145, 149, 158 Miss. 456, quoting **Corpus Juris.**
28 C.J. p 675 note 15.

65. Ill.—In re Mancini's Estate, 245 Ill.App. 547.
Neb.—In re Dayton's Estate, 237 N.W. 303, 121 Neb. 402.
28 C.J. p 704 note 13.

66. N.J.—Wright v. Sanger, 137 A. 657, 658, 101 N.J.Eq. 203, citing **Corpus Juris.**
28 C.J. p 675 note 16.

67. Miss.—McClellan v. McCauley, 130 So. 145, 149, 158 Miss. 456, quoting **Corpus Juris.**
28 C.J. p 675 note 17.

68. Miss.—McClellan v. McCauley, supra, quoting **Corpus Juris.**
28 C.J. p 675 note 18.

69. Miss.—McClellan v. McCauley, supra, quoting **Corpus Juris.**
28 C.J. p 675 note 19.

Inconsistent intent

Prior statements of an alleged donor showing a state of mind and purpose inconsistent with an alleged gift are admissible to show that no gift was made.
Mass.—Whitney v. Wheeler, 116 Mass. 490.
N.J.—First Nat. Bank v. Rutherford Trust Co., 157 A. 142, 109 N.J.Eq. 265.
W.Va.—De Pue v. Steber, 108 S.E. 590, 89 W.Va. 78.
28 C.J. p 704 note 10.

70. Ga.—Howell v. Howell, 59 Ga. 145.
Miss.—McClellan v. McCauley, 130 So. 145, 149, 158 Miss. 456, quoting **Corpus Juris.**
N.C.—Bynum v. Fidelity Bank of Durham, 12 S.E.2d 898, 901, 219 N. C. 109, quoting **Corpus Juris.**
S.C.—Copeland v. Craig, 8 S.E.2d 858, 193 S.C. 484.
28 C.J. p 675 note 20, p 704 note 12.

71. Ga.—Ogden v. Dodge County, 25 S.E. 321, 97 Ga. 461.

72. Ala.—Waller v. Simpson, 94 So. 343, 208 Ala. 333.
Ill.—Edwin C. Price Co. v. Ruggles & Rademaker Salt Co., 283 Ill.App. 447.
La.—Central Hardware Co. v. Elliott, 3 La.App. 572.
Mich.—Koopmans v. I. K. Parsons & Son, 231 N.W. 87, 250 Mich. 464.
Minn.—Claggett v. Chicago, M. & St. P. Ry. Co., 193 N.W. 957, 156 Minn. 37—Matteson v. Blaisdell, 182 N.W. 442, 148 Minn. 352.
N.Y.—Melkon v. H. B. Kirk & Co., 249 N.Y.S. 229, 232 App.Div. 134 —Briggs v. Devoe, 84 N.Y.S. 1063, 89 App.Div 115.
N.C.—Ollis v. Board of Education of Avery County, 187 S.E. 772, 210 N.C. 489.
Okl.—Kansas City Southern Ry. Co. v. Keffer, 220 P. 361, 96 Okl. 63
S.D.—Warren v. Lincoln, 235 N.W. 597, 58 S.D. 196.

showing its rescission,[73] are admissible. Such statements may be also admissible because they create the relation of agency,[74] or fix the authority of an agent;[75] because they constitute the incidents of a bailment;[76] or because they assist to constitute a sale of real[77] or personal[78] property, or affect the legal result of a sale.[79] So, also, an offer,[80] and its acceptance[81] or refusal,[82] may be so established by statements of the parties, or their representatives, made while something still remains to be done for the achievement of the legal result in question, and before the parties have separated.[83] It follows that, where the making of a contract extends over several interviews, a relevant statement on any such occasion is competent.[84]

§ 262. Notice, Demand, or Refusal

Notice, demand, or refusal may be shown by evidence of unsworn statements.

Unsworn statements may be admissible as constituting notice,[85] a demand,[86] or a refusal.[87]

§ 263. Denial or Disclaimer

Evidence of unsworn statements, where relevant, may be admissible to show a denial or disclaimer.

A denial may consist of unsworn statements, which are admissible because the fact of denial is in issue,[88] and a disclaimer of ownership, total or partial, may be a relevant fact, properly proved by evidence of the statements of persons not witnesses.[89]

§ 264. Conspiracy, Libel, or Slander

Declarations constituting a criminal agreement or conspiracy, where relevant, are admissible.

Declarations may be admissible because they constitute a criminal agreement or conspiracy.[90] Admissibility of admissions by conspirators and persons acting together see infra § 362.

Tex.—Chiles v. Good, Civ.App., 41 S.W.2d 738, reversed on other grounds, Good v. Chiles, Com.App., 57 S.W.2d 1100—House v. Rogers, Civ.App., 23 S.W.2d 414, affirmed Rogers v. House, Com.App., 39 S.W.2d 1111—Rupert v. Swindle, Civ.App., 212 S.W. 671—Lilly v. Yeary, Civ.App., 152 S.W. 823.
22 C.J. p 288 note 49.

Contract with another

In action to recover from general contractor and bondsman for material allegedly furnished to subcontractor, evidence relative to contract between subcontractor and company from which subcontractor purchased material, consisting of communications between them and canceled checks, was competent to show that plaintiff did not furnish material and that material had been furnished by and payment made in full to another.—Republic Creosoting Co. v. Foulkes Contracting Co., 8 N.E.2d 416, 103 Ind.App. 457.

73. Ala.—Babcock v. Huntington, 9 Ala. 869.
Ind.—Leas v. Grubbs, Wils. 301.

74. Ill.—Stevick v. Vennum, 227 Ill. App. 86.
22 C.J. p 288 note 52.

Statements of alleged agent that he was an agent were admissible to show that plaintiff understood that he was dealing with an agent.—Carter v. Carr, 33 P.2d 852, 139 Cal. App. 15.

75. Pa.—Jackson v. Emmens, 13 A. 210, 119 Pa. 356.
22 C.J. p 288 note 53.

76. N.C.—Hunt v. Richardson, 192 S.E. 843, 212 N.C. 28.
22 C.J. p 288 note 54.

77. Okl.—Kansas City Southern Ry. Co. v. Keffer, 220 P. 361, 96 Okl. 63.
22 C.J. p 288 note 55.

78. Ga.—Cook v. Pinkerton, 7 S.E. 171, 81 Ga. 89, 12 Am.S.R. 297.
22 C.J. p 288 note 56.

79. Ill.—Lambe v. Manning, 49 N.E. 509, 171 Ill. 612.
Tex.—Smith v. T. M. Richardson Lumber Co., 49 S.W. 574, 92 Tex. 448.
22 C.J. p 288 note 57.

80. Ala.—Sayre v. Durwood, 35 Ala. 247.

81. Minn.—Peet v. Sherwood, 50 N.W. 241, 929, 47 Minn. 347.
22 C.J. p 288 note 59.

Conditional acceptance

Insurance agents' declarations when they manually delivered life policy to insured, and insured's declarations when she took policy, were admissible to show whether delivery and acceptance were conditional.—Eaton v. New York Life Ins. Co. of New York, 172 A. 121, 315 Pa. 68, 95 A.L.R. 462.

82. Cal.—Bee v. San Francisco & Humboldt Bay R. Co., 46 Cal. 248.
Tex.—Largent v. Beard, Civ.App., 53 S.W. 90.
22 C.J. p 288 note 60.

83. Tex.—Hartford, Conn., Ætna Ins. Co. v. Brannon, Civ.App., 91 S.W. 614.
Vt.—Fifield v. Richardson, 34 Vt. 410.
22 C.J. p 288 note 61.

84. Mo.—Porter v. Hannibal & St. Joseph R. Co., 60 Mo. 160.
N.Y.—Ahern v. Goodspeed, 72 N.Y. 108.

85. Ala.—Langham v. Jackson, 100 So. 757, 211 Ala. 416.
Ariz.—Carrillo v. Murray & Lavne Co., 216 P. 689, 25 Ariz. 303.
Ga.—Paul v. Thompson, 45 S.E. 387, 118 Ga. 358.
Tex.—Burrell Engineering & Construction Co. v. Griesler, 240 S.W. 899, 111 Tex. 477.
Wash.—State v. Northwestern Inv. Co., 126 P. 895, 70 Wash. 381.
Independently relevant statements showing knowledge see supra § 257.

86. Ark.—Wallace v. Bernheim, 37 S.W. 712, 63 Ark. 108—Gracie v. Robinson, 14 Ark. 438.
N.Y.—Elsterman v. Kahlen, 63 N.Y.S. 234, 30 Misc. 795.

87. Ill.—Pickel v. Leutgert, 59 Ill. App. 378.
Mich.—Merrill v. Cahill, 8 Mich. 55.

88. Tex.—Jaffe v. Deckard, Civ.App., 261 S.W. 390.
22 C.J. p 289 note 66.

89. Ala.—Beasley v. Howell, 22 So. 989, 117 Ala. 499.
22 C.J. p 289 note 67.

90. Md.—Rent-a-Car Co. v. Globe & Rutgers Fire Ins. Co., 156 A. 847, 161 Md. 249.
W.Va.—Swartz v. Kay, 109 S.E. 822, 89 W.Va. 641.
22 C.J. p 289 note 68.

D. WEIGHT OF TESTIMONY AS TO UNSWORN STATEMENTS

§ 265. In General

Unsworn statements are generally considered as weak evidence, but they are entitled to such weight as they deserve.

It may be stated, as a general rule, that evidence of unsworn statements admitted under the various exceptions to the hearsay rule, see supra §§ 192–264, is regarded as weak evidence, which should be received with caution.[91] Such evidence, when admitted, should be considered and weighed precisely as other evidence,[92] the ultimate determination of

91. Ark.—Plunkett-Jarrell Grocer Co. v. Freeman, 92 S.W.2d 849, 853, 192 Ark. 380, quoting **Corpus Juris.**
La.—Hood v. Glass, App., 198 So. 543—Elston, Prince & McDade, Inc., v. Economy Cash Store, 1 La. App. 36.
Mont.—Roy v. King's Estate, 179 P. 821, 55 Mont. 567.
Or.—Goodin v. Cornelius, 200 P. 915, 101 Or. 422.
Tex.—Logan v. Logan, Civ.App., 112 S.W.2d 515, 524, quoting **Corpus Juris,** error dismissed.
22 C.J. p 290 note 77.

Declarations against interest are the weakest and least satisfactory evidence, and should be received and weighed with caution.—Langston v. Currie, 26 P.2d 160, 95 Mont. 57—Gilcrest v. Bowen, 24 P.2d 141, 95 Mont. 44—Gray v. Grant, 206 P. 410, 62 Mont. 452.

Fabrication

Evidence of oral statements of a person not called as a witness, is open to the objection that it is easily fabricated.—Gray v. Grant, supra—22 C.J. p 290 note 75.

Imperfect comprehension

The statement may have been imperfectly comprehended, wrongly interpreted, or misunderstood by an honest reporting witness and should be received with caution.—Bohen v. North American Life Ins. Co. of Chicago, 177 N.W. 706, 188 Iowa 1349—22 C.J. p 290 note 76.

Imperfect remembrance

(1) It is a common experience of those dealing with human testimony that conversations are very imperfectly remembered.
Iowa.—In re Rich's Estate, 200 N. W. 713, 199 Iowa 902—Bohen v. North American Life Ins. Co. of Chicago, 177 N.W. 706, 188 Iowa 1349.
Kan.—Terbovich v. Kolinda, 58 P.2d 70, 73, 144 Kan. 19, quoting **Corpus Juris.**
22 C.J. p 289 note 69.

(2) This is particularly true where the exact language used is sought to be recalled after a considerable lapse of time.
Ill.—Crawford v. Hurst, 138 N.E. 620, 307 Ill. 243.
Iowa.—In re Rich's Estate, supra.
Ky.—Lewis v. Shell, 266 S.W. 254, 205 Ky. 624.
Minn.—Matteson v. Blaisdell, 182 N. W. 442, 148 Minn. 352.
22 C.J. p 289 note 70, p 295 note 45.

(3) Likewise, matters are imperfectly remembered where the words spoken were of indifferent interest to the hearer, so that he would have no occasion to treasure them up in his memory.—Crawford v. Hurst, supra—22 C.J. p 290 note 72, p 294 note 16.

(4) Also, where the statement was made in loose, casual, or random conversation, remembrance thereof is often imperfect.
Ill.—Crawford v. Hurst, supra.
Pa.—Kirk v. Ford, 200 A. 26, 330 Pa. 579—In re King's Estate, 27 North. Co. 255.
22 C.J. p 290 note 73.

Reputation

Evidence of a common reputation as to the ownership of a right to take water from a spring on public land can have little, if any, probative force, since the nature and extent of a right to divert water depends on a nice application of facts to legal principles with which the average layman has no acquaintance.—Simons v. Inyo Cerro Gordo Mining & Power Co., 192 P. 144, 48 Cal. App. 524.

Statutes

The distrust of this character of evidence has even found expression in statutes providing that testimony as to oral admission should be "scanned with care," or requiring the court to instruct the jury that such testimony should be regarded "with caution."
Cal.—People v. Sternberg, 43 P. 201, 111 Cal. 11.
Ga.—Stewart v. De Loach, 12 S.E. 1067, 86 Ga. 729.
22 C.J. p 291 notes 78, 79.

92. U.S.—McClaskey v. Barr, C.C. Ohio, 54 F. 781, affirming 47 F. 154.
Ala.—Hill Grocery Co. v. Carroll, 136 So. 789, 223 Ala. 376.
Cal.—Hamilton v. Ferguson, 79 P. 2d 427, 26 Cal.App.2d 390.
La.—Boone v. Mrs. Maurer's Bakery, App., 170 So. 246.
Miss.—Kyle v. Peoples Bank & Trust Co., 187 So. 534, 186 Miss. 287.
N.H.—In re Opinion of the Justices, 190 A. 425, 88 N.H. 484.
N.Y.—Wheeler v. Lewis, 196 N.Y.S. 817, 203 App.Div. 222.
N.D.—Dearborn Truck Co. v. Nedreloe, 193 N.W. 311, 49 N.D. 793.
Pa.—Mickey v. Hardin, 79 Pa.Super. 592.
Tex.—Elliott v. Elliott, Civ.App., 120 S.W.2d 631, error dismissed—West Lumber Co. v. Henderson, Civ.App., 238 S.W. 710, modified on other grounds, Com.App., 252 S.W. 1044.

Conclusion as to what declarant said, without stating what declarant actually said, is not entitled to weight.—Sproat v. Travelers' Ins. Co., 137 A. 621, 289 Pa. 351.

Ambiguous and equivocal statements are without value as testimony.—Keystone Mill Co. v. Peach River Lumber Co., Tex.Civ.App., 96 S.W. 64.

Hearsay evidence, admitted without objection, is held of little weight.—In re Guilford's Will, 185 N.Y.S. 248.

Pedigree

(1) Declarations relative to pedigree are not entitled to the same weight that is to be given to direct and positive evidence.—Lauderdale v. O'Neill, 177 P. 113, 74 Okl. 119.

(2) The circumstances and conditions surrounding entry in family Bible as hearsay declaration of pedigree are of paramount importance in determining weight thereof.—Prudential Ins. Co. of America v. Pierce's Adm'x, 109 S.W.2d 616, 270 Ky. 216.

(3) The reliance to be placed on a declaration as to pedigree depends on the circumstances attending the declaration, as well as the knowledge which declarant is supposed to have possessed as to the matters of which he spoke.—Denoyer v. Ryan, C.C. Minn., 24 F. 77.

(4) Evidence of pedigree must be considered in weighing evidence.—In re Noel's Heirship, 10 P.2d 259, 156 Okl. 177.

(5) Pedigree evidence may constitute substantial evidence which will support a verdict.—In re Braig's Estate, Cal.App., 110 P.2d 1066.

(6) Particular pedigree testimony held prima facie trustworthy.—Prickett v. Frum, 132 S.E. 501, 101 W.Va. 217.

(7) Particular pedigree testimony held insufficient to establish issue.—Smith v. Lynn, Tex.Civ.App., 152 S.W.2d 338.

the weight to be given them resting in the province of the trier of the facts.[93] Under some circumstances, such statements may be sufficient to prove the issue in question[94] and to support a decision,[95] particularly where supported by other evidence.[96] Where the issue is one of intention,[97] or the character of declarant's possession of property,[98] his declarations at or about the time are of much probative force, and under some circumstances, a declaration, honestly made, is entitled to great weight.[99] Such unsworn statements are not, as a rule, conclusive,[1] and they are not control-

Public reputation and declarations of early settlers may be insufficient to establish that a monument marking a section corner is the southeast corner, rather than the southwest corner, of a particular section—Hickman v. Jones, 230 N.W. 95, 119 Neb. 485.

Self-serving declarations

(1) Held of little weight.

U.S.—Mason v. U. S., C.C.A.Vt., 63 F.2d 791.

Mo.—Essey v. Bushakra, 252 S.W. 459, 299 Mo. 147

(2) Held insufficient to prove issue.

U.S.—Collins v. Olsen, Cust. & Pat. App., 102 F.2d 828—Clark v. Gibbs, C.C.A.Fla., 69 F.2d 364.

Ark.—Mushrush v. Downing, 24 S.W. 2d 972, 181 Ark. 85.

Idaho.—Smith v. Binford, 256 P. 366, 44 Idaho 244.

Ill.—Western & Southern Indemnity Co. v. Industrial Commission, 8 N.E.2d 644, 366 Ill. 240.

Mass.—Perangelo's Case, 177 N.E. 892, 277 Mass. 59.

Mo.—Munton v. A. Driemeier Storage & Moving Co., 22 S.W.2d 61, 223 Mo.App. 1124.

N.Y.—Knorr v. General Baking Co., 278 N.Y.S. 3, 243 App.Div. 828—In re Glaser's Estate, 273 N.Y.S. 860, 151 Misc. 778—In re Mason's Will, 236 N.Y.S. 720, 134 Misc. 902.

Tenn.—Morton v. Hancock County, 30 S.W.2d 250, 161 Tenn. 324.

Tex.—Boulware v. Kempner, Civ. App., 36 S.W.2d 527.

(3) Held of no weight.

N.Y.—In re Gardner's Will, 17 N.Y.S.2d 572, 173 Misc. 202, affirmed 23 N.Y.S.2d 848, 260 App.Div. 886, reargument denied 24 N.Y.S.2d 1012, 260 App.Div. 1028.

Utah.—Ruthrauff v. Silver King Western Min. & Mill. Co., 80 P.2d 338, 95 Utah 279.

Wash.—W. W. Conner Co. v. McCollister & Campbell, Inc., 115 P.2d 370.

(4) Held insufficient as independent proof of facts stated.—Clark v. Gibbs, C.C.A.Fla., 69 F.2d 364.

93. Ala.—Stoudemire v. Davis, 94 So. 498, 208 Ala. 495.

Ark.—Plunkett-Jarrell Grocer Co. v. Freeman, 92 S.W.2d 849, 853, 192 Ark. 380, quoting **Corpus Juris** at length.

Ga.—Estill v. Estill, 100 S.E. 365, 149 Ga. 384.

Mo.—Wahl v. Cunningham, 56 S.W. 2d 1052, 1057, 332 Mo. 21, quoting **Corpus Juris.**

N.C.—McKay v. Bullard, 14 S.E.2d 657, 219 N.C. 589—Latham v. Andrews Mfg Co., 105 S.E. 423, 180 N.C. 627.

Tenn.—West v. Southern Ry. Co., 100 S.W.2d 1004, 20 Tenn.App. 491.

Tex.—Meyers v. Baylor University in Waco, Civ.App., 6 S.W.2d 393, error refused.

Vt.—In re Moxley's Will, 152 A. 713, 103 Vt. 100.

22 C.J. p 291 note 80.

Argument

In suit for injunction restraining enforcement of Virginia statutes regulating writing of insurance on ground that statutes were unconstitutional, resolution of Virginia Association of Insurance Agents construing statutes and interpretation of statute by chief examiner of Virginia insurance bureau which were promulgated after institution of suit were not entitled to weight in determining controversy except in so far as they constituted arguments on part of defendants as to interpretation of statute and its probable effect.—Osborne v. Ozlin, D.C.Va., 29 F.Supp. 71, affirmed Osborn v. Ozlin, 60 S.Ct. 758, 310 U.S. 53, 84 L.Ed. 1074.

94. Cal.—Tobin v. National Casualty Co., 219 P. 482, 63 Cal.App. 578.

Ill.—Nolan v. Barnes, 128 N.E. 293, 294 Ill. 25—Beckers v. City of Kankakee, 213 Ill.App. 538.

Iowa.—Kuebker v. Success Heater & Mfg. Co., 192 N.W. 435.

Pa.—In re King's Estate, 27 North. Co. 255.

Prima facie proof

Mich.—Alison v. Whitcomb, 286 N.W. 165, 289 Mich. 80.

N.Y.—Piwowarski v. Cornwell, 7 N.E.2d 111, 273 N.Y. 226, reversing 288 N.Y.S. 887, 247 App.Div. 925.

95. Mo.—Wahl v. Cunningham, 56 S.W.2d 1052, 1057, 332 Mo. 21, quoting **Corpus Juris.**

Pa.—Leitch v. Pittsburgh Diamond Nat. Bank, 83 A. 416, 234 Pa. 557.

96. Mont.—Roy v. King's Estate, 179 P. 821, 55 Mont. 567.

97. Hawaii.—Hurley v. Knudsen, 30 Hawaii 887, rehearing denied 30 Hawaii 911.

Conclusive

"What may be the state of mind of a capable person at a given time is a matter of fact of which that person alone has knowledge. No other person is in a position to know absolutely or accurately to declare the truth. His act may belie his declaration, or antecedent declaration may tender refutation of latest expression, and, thus, issue of fact may be made against him. But wherever he presently makes declaration of what his intent was at a given time and that declaration is against his present claim of interest he ought to be concluded thereby—barring, of course, reason to doubt his competency or presence of other excusing conditions."—Stephenson v. Barrow, Tex.Com App., 15 S.W.2d 575, 576, reversing Stevenson v. Barrow, Civ. App., 5 S.W.2d 200.

Remote declarations of intention to do some act in the future are of little weight.—Kessler v. Von Bank, 174 N.W. 839, 144 Minn. 220.

Self-serving declarations are insufficient to establish intention.—Commonwealth v. Clark County Nat. Bank, 219 S.W. 175, 187 Ky. 151, error dismissed Clark County Nat. Bank v. Commonwealth of Kentucky, 41 S.Ct. 147.

Subsequent statements

Expressed intention at time of execution and delivery of deed could not be controlled by subsequent statements regarding intention of grantor.—Gallagher v. Gallagher, 276 P. 634, 98 Cal.App. 180.

98. Ill.—McIntyre v. McIntyre, 122 N.E. 824, 287 Ill. 544.

99. N.Y.—In re Schiff's Estate, 238 N.Y.S. 778, 136 Misc. 129.

Pa.—Modern Transfer Co. v. Pennsylvania Public Utility Commission, 12 A.2d 458, 139 Pa.Super. 197—Tursi v. Parry, 5 A.2d 399, 135 Pa.Super. 285.

Nature of dividend

Declaration by officers of corporation made honestly is entitled to great weight in determining whether dividend belongs to income or capital of trust.—Coolidge v. Grant, 146 N.E. 719, 251 Mass. 352.

Parties to contract

Acts or declarations of parties to a contract, especially when they are contrary to interest or repugnant to interest, done with a full and contemporaneous appreciation of the circumstances, are of peculiar force.—Eppes v. Eppes, 195 S.E. 694, 169 Va. 778.

1. D.C.—Takahashi v. Hecht Co., 64 F.2d 710, 62 App.D.C. 72—Takahashi v. Hecht Co., 50 F.2d 326, 60 App.D.C. 176.

ling if the actual facts and circumstances justify a contrary conclusion.[2] A court or jury are not bound to give equal credit to all parts of a statement; they may believe a part and disregard the rest.[3] Statements made ante litem motam are entitled to greater weight than statements made after the controversy has arisen.[4]

A person's memory of his own utterances is regarded as more authentic than that of a listener.[5]

Construction. All statements should be construed with reference to the subject matter of the conversation.[6] Of course, a declaration should not be construed so as to have a meaning different from that obviously intended.[7]

Gifts. Mere declarations of intent to give, or that a gift has been made, are generally held to be insufficient to establish a gift,[8] especially where the donor's acts are inconsistent with his having parted with possession and control of the property;[9] nor are they sufficient to disprove a gift otherwise shown to have been made.[10] Of course, declarations of the donor as to the making of a gift are to be weighed by the jury, or by the court in trials without a jury, and when considered together with other corroborative evidence may be sufficient to establish a gift.[11] Mere declarations of a donor that he has made a gift are not sufficient evidence of a delivery,[12] and until a declaration may be seen to include a statement of delivery as a matter of fact, or facts from which a delivery may reasonably be inferred, it is not evidence of a delivery.[13] It is generally held, however, where it does not appear that the declarations were made in jest,[14] that delivery may be proved by the declarations of the donor.[15] A declaration by an alleged donor of an intention to give and the subsequent possession of the property by the donee may be sufficient to establish a gift.[16] Even where the gift remained in the hands of the donor until his death, it may be proved by acknowledgments of the donor if the jury are satisfied that it was attended with all the necessary formalities.[17] Where the proof of an alleged gift rests on the declarations of the donor, those declarations must be unequivocal,[18] especial-

Iowa.—Faber v. New York Life Ins. Co., 265 N.W. 305, 221 Iowa 740.
N.C.—McKay v. Bullard, 14 S.E.2d 657, 219 N.C. 589—Morgan v. Royal Ben. Society, 83 S.E. 479, 167 N.C. 262.
Or.—Doolittle v. Robinson, 206 P. 229, 105 Or. 163.
Tenn.—West v. Southern Ry. Co., 100 S.W.2d 1004, 20 Tenn.App. 491.
Tex.—Purdy v. Pruitt, Civ.App., 112 S.W.2d 808, error dismissed.

Declarations against interest

(1) Declarations against interest are generally held not to be conclusive against the person making them, but they may be explained.
Ark.—Phipps v. Martin, 33 Ark. 207.
Mo.—Linderman v. Carmin, 127 S.W. 124, 142 Mo.App. 519.

(2) Such declarations, however, have been held to be conclusive against the party making them, and not to be annulled or explained away by counter declarations.—Davis v. Murphy, 182 N.W. 365, 105 Neb. 839—Evans v. Kelly, 178 N.W. 630, 104 Neb. 712.

2. Tex.—Stratton v. Hall, Civ.App., 90 S.W.2d 865, error dismissed.
Wash.—Duvall v. Pioneer Sand & Gravel Co., 71 P.2d 567, 191 Wash. 417.

3. Tenn.—West v. Southern Ry. Co., 100 S.W.2d 1004, 20 Tenn.App. 491.

4. U.S.—Hovey v. Stevens, C.C. Mass., 12 F.Cas.No.6,745, 1 Woodb. & M. 290.
Miss.—Baker v. Kelly, 41 Miss. 696, 93 Am.D. 274.

5. U.S.—Jordan v. Eaton, D.C.Me., 13 F.Cas.No.7,520, 2 Hask. 236.
22 C.J. p 291 note 82.

6. Ga.—Graham v. John Flannery Co., 124 S.E. 729, 32 Ga.App. 713.

7. Ill.—Stevens v. Gallagher, 224 Ill. App. 195

8. Ky.—Hale v. Hale, 224 S.W. 1078, 189 Ky. 171.
N.H.—Reynolds v. Kenney, 179 A. 16, 87 N.H. 313, 98 A.L.R. 751.
N.Y.—In re Brady's Estate, 234 N.Y.S. 366, 133 Misc. 795, reversed on other grounds 239 N.Y.S. 5, 228 App.Div. 56, affirmed 173 N.E. 879, 254 N.Y. 590—In re Brown's Ex'r, 226 N.Y.S. 1, 130 Misc. 865, modified on other grounds In re Brown's Estate, 232 N.Y.S. 371, 225 App.Div. 759, modified on other grounds In re Brown's Will, 169 N.E. 612, 252 N.Y. 366.
Okl.—Devin v. Mitchell, 286 P. 335, 142 Okl. 233, 69 A.L.R. 681.
Pa.—In re Kaufmann's Estate, 127 A. 133, 281 Pa. 519.
Tenn.—Atchley v. Rimmer, 255 S.W. 366, 148 Tenn. 303, 30 A.L.R. 1481.
28 C.J. p 681 note 1, p 705 note 36.

Writing by donor on envelope containing securities that they were the sole property of the donee is insufficient to show a complete gift by delivery.—Pasadena Trust & Savings Bank v. Bryson, 189 P. 816, 46 Cal. App. 730.

9. W.Va.—White v. White, 60 S.E. 885, 64 W.Va. 30.
28 C.J. p 682 note 2.

Little weight

Declarations of the donor should have but little weight attached to them as against any act of the donor inconsistent therewith.
Fla.—Purvis v. Malloy, for Use and Benefit of Tiller, 176 So. 71, 129 Fla. 191.
Pa.—Erie & W. Val. R. Co. v. Knowles, 11 A. 250, 117 Pa. 77.

10. Ga.—Culpepper v. Culpepper, 89 S.E. 161, 18 Ga.App. 182.
28 C.J. p 682 note 3.

11. Ga.—Whatley v. Mitchell, 100 S.E. 229, 24 Ga.App. 174.
Mass.—Mangan v. Howard, 130 N.E. 76, 238 Mass. 1.
28 C.J. p 682 note 5.

12. N.H.—Reynolds v. Kenney, 179 A. 16, 87 N.H. 313, 98 A.L.R. 751.
28 C.J. p 682 note 6.

13. N.H.—Reynolds v. Kenney, supra.
Ohio.—Bolles v. Toledo Trust Co., 4 N.E.2d 917, 132 Ohio St. 21.
Tenn.—Atchley v. Rimmer, 255 S.W. 366, 148 Tenn. 303, 30 A.L.R. 1481.

14. S.C.—Blake v. Jones, 8 S.C. 141, 21 Am.D. 530.

15. Iowa.—Darland v. Taylor, 3 N.W. 510, 52 Iowa 503, 35 Am.R. 285.
N.Y.—In re Mackintosh's Estate, 249 N.Y.S. 534, 140 Misc. 12.
N.C.—Zollicoffer v. Zollicoffer, 84 S.E. 349, 168 N.C. 326.
28 C.J. p 682 notes 7, 8.

16. Md.—Loney v. Loney, 38 A. 1071, 86 Md. 652.
28 C.J. p 682 note 10.

17. S.C.—Caldwell v. Wilson, 29 S.C. L. 75.

18. Pa.—Dunning v. Reese, 7 Kulp. 201
28 C.J. p 682 note 12.

ly where the surroundings favor the wrongful acquisition of the property.[19]

A donee's declarations and acts are not in themselves sufficient to show a gift.[20]

§ 266. Statements of Decedents

Testimony as to the oral statements of deceased persons is the weakest kind of evidence.

Exposed to all the infirmities mentioned in the preceding section and to the further objection that it is impossible, in most cases, to convict the witness of perjury if his testimony is willfully false, testimony as to the oral statements of deceased persons is therefore regarded as the weakest kind of evidence and subjected to the closest scrutiny.[21] Testimony coming from one's own written declarations is entitled to more serious consideration than is evidence of a secondary or hearsay character as to what a person, since deceased, said in life.[22] Where one party has introduced an alleged statement by deceased, made after the injury causing death, it is competent for the other party to show that deceased never recovered consciousness after the injury.[23]

§ 267. Positive and Negative Testimony

Positive evidence as to the making of unsworn statements usually outweighs mere negative testimony.

Positive testimony of a witness that he heard a statement made usually outweighs the testimony of other persons who were present and who testify merely to a want of recollection,[24] or that they did not hear it,[25] especially if the circumstances of the particular case indicate that they were inattentive.[26] Such positive testimony may outweigh the alleged declarant's testimony that he has no recollection of making the statement attributed to him,[27] or even his express denial, where he concedes that he cannot definitely recollect what he said,[28] or where such denial, under the circumstances of the case, is in effect merely an assertion of absence of recollection.[29] Positive testimony has no clear advantage over a flat denial by the alleged declar-

19. Pa.—McCarthy's Estate, 4 Pa. Dist. 453, 16 Pa.Co. 513.

20. Ark.—Smith v. Jones, 8 Ark. 109.
Cal.—In re Rathgeb, 57 P. 1010, 125 Cal. 302.

21. Cal.—Herbert v. Lankershim, 71 P.2d 220, 9 Cal.2d 409—Corison v Williams, 208 P. 331, 58 Cal.App 282.
Colo.—Fagan v. Fisher, 222 P. 647, 74 Colo. 473.
Ill.—Keshner v. Keshner, 33 N.E.2d 877, 376 Ill. 354, reversing In re Keshner's Estate, 26 N.E.2d 529, 304 Ill.App. 640—Thomas v. National Paper Napkin Mfg. Co., 8 N.E.2d 520, 522, 290 Ill.App. 291, quoting **Corpus Juris**—In re Carlson's Estate, 2 N.E.2d 963, 965, 286 Ill.App. 81, quoting **Corpus Juris.**
Iowa.—Williams v. Harrison, 293 N.W. 41—Bohen v. North American Life Ins. Co., of Chicago, 177 N.W. 706, 188 Iowa 1349.
Ky.—McMillan v. Massie's Ex'r, 27 S.W.2d 416, 233 Ky. 808.
La.—Foscue v. Mitchell, 182 So. 740, 751, 190 La. 758, citing **Corpus Juris**—Franchebois v. New York Life Ins. Co., 131 So. 46, 171 La. 358—Gaddis v. Brown, App., 1 So.2d 845—Winter v. Gani, App., 199 So. 600—Duhe v. Williams, App., 199 So. 518—Dunn v. Bayonne, App., 197 So. 284.
Mich.—Bell v. Cramer's Estate, 295 N.W. 553, 296 Mich. 44.
Mont.—Welch v. All Persons, etc., 254 P. 179, 78 Mont. 370—Gray v. Grant, 206 P. 410, 62 Mont. 452.
Neb.—Goodwin v. Freadrich, 280 N.W. 917, 921, 135 Neb. 203, quoting **Corpus Juris.**
N.J.—Pluchino v. Piccolo, 175 A. 812, 813, 114 N.J.Law 82, citing **Corpus Juris.**
N.Y.—In re Buckler, 237 N.Y.S. 242, 227 App.Div. 146
Pa.—Eaton v. New York Life Ins Co. of New York, 172 A. 121, 315 Pa. 68, 95 A.L.R. 462—In re King's Estate, 27 North.Co. 255.
Tex.—Logan v. Logan, Civ.App., 112 S.W.2d 515, 524, error dismissed, quoting **Corpus Juris.**
Wash.—Wayman v. Miller, 81 P.2d 501, 195 Wash. 457.
22 C.J. p 291 note 85.

High character of particular witness cannot be permitted to form an exception to the rule.—Foscue v. Mitchell, 182 So. 740, 190 La. 758—Brivgier v. Gordon, 14 La.Ann. 274.

Little probative value
Evidence of conversations with a deceased person, standing alone, are of comparatively little probative value.
Iowa.—Makinson v. Shumick, 193 N.W. 407, 196 Iowa 980.
Wash.—Wayman v. Miller, 81 P.2d 501, 195 Wash. 457.

Loose declarations by deceased parties will be accorded little weight in adjudicating a matter of such paramount importance as the title to land.—Kirk v. Ford, 200 A. 26, 330 Pa. 579.

Record title
Statements by deceased wife that she had given a quitclaim deed to property to her husband are insufficient to prevail over record title.—Allen v. Allen, 127 N.E. 85, 292 Ill. 453, 27 A.L.R. 1.

22. Cal.—Herbert v. Lankershim, 71 P.2d 220, 9 Cal.2d 409.

23. Ala.—Memphis & C. R. Co v. Martin, 23 So. 231, 117 Ala. 367.

24. Mont.—Lindblom v. Employers' Liability Assur. Corporation, 295 P. 1007, 88 Mont. 488.
22 C.J. p 292 note 87.
Weight of positive and negative evidence generally see infra § 1037.

Notice
Positive statement of lessor's witness that he had given lessee notice required by lease was entitled to greater weight than negative testimony of nonrecollection given by lessee's witnesses.—Wiener v. Crystal Oil Refining Corporation, 165 So. 131, 183 La. 879.

25. La.—Bache v. Stoltz, 134 So. 112, 16 La.App. 524.
N.Y.—Devonshire v. Stubbs, 238 N.Y.S. 707, 135 Misc. 886.
22 C.J. p 292 note 88.

26. Conn.—Johnson v. Scribner, 6 Conn. 185.

27. La.—E. W. Ullrich Glass Co. v. Interstate Electric Co., 132 So. 363, 171 La. 336.
Mont.—Blaser v. Clinton Irr. Dist., 53 P.2d 1141, 100 Mont. 459.
22 C.J. p 292 note 90.

28. U.S.—Stevenson v. Marble, C.C. Cal., 84 F. 23, appeal dismissed Marble v. Stevenson, 90 F. 830, 32 C.C.A. 609.

29. Wis.—Ralph v. Chicago & Northwestern R. Co., 32 Wis. 177, 14 Am. R. 725.
22 C.J. p 292 note 92.

ant[30] who gives his version of what he said,[31] or over a positive denial by other witnesses who had equal means of knowledge and were paying attention.[32] Indeed the circumstances may be such that the alleged declarant's statement of want of recollection will outweigh the positive testimony of the reporting witness.[33] Negative testimony of persons in daily contact with deceased that they never heard him make any such statement as claimed is, of course, entitled to weight;[34] but affirmative evidence of a conversation with deceased person is, as a rule, entitled to more weight than mere negative testimony of others, not present at that time, that they never heard deceased say anything like that.[35]

§ 268. Circumstances Tending to Disparage Testimony

Various circumstances may disparage testimony of unsworn statements.

The following circumstances have been noticed as tending to impair the credibility of testimony to oral declarations: That the testimony is improbable;[36] that the alleged statement is inconsistent with proved facts in the case,[37] absurd,[38] or demonstrably false;[39] that the statement is not in harmony with the conduct of the witness or of declarant,[40] or that it conflicts with declarant's statements to other persons at other times;[41] that the witness was not on such terms of intimacy with declarant that the latter would have been likely to make the witness a confidant;[42] that the witness is not corroborated by any independent circumstances in the case;[43] that the alleged declarant testifies in direct contradiction of the witness,[44] especially where the former is disinterested and the latter biased;[45] that the testimony of the witness is contradicted by other persons present at the time,[46] or that the latter did not hear the alleged statement;[47] that witnesses testifying to the statement do not agree in their memory of the essential part thereof;[48] that a witness testifying to a statement made in conversation cannot give the entire conversation,[49] or was not present so as to hear all of it;[50] that the alleged statement was made in a hurried conversation,[51] or in the heat of discussion;[52] that the witness was deaf[53] or very young[54] when the alleged statement was made, or is grossly ignorant,[55] or has slight appreciation of the force of words and little skill in expressing in his own language what others have said;[56] that better evi-

30. Me.—Downing v. Freeman, 13 Me. 90.
N.Y.—Cridler v. Colegrove, 5 N.Y.St. 232.
N.C.—Reeves v. Poindexter, 53 N.C. 308.

31. Me.—Downing v. Freeman, 13 Me. 90.
N.Y.—Cridler v. Colegrove, 5 N.Y.St. 232.

32. N.J.—Hildreth v. Marshall, 27 A. 465, 51 N.J.Eq. 241.
22 C.J. p 292 note 95.

33. Iowa.—Dalby v. Cronkhite, 22 Iowa 222.
Ky.—Logan v. McChord, 2 A.K.Marsh. 224.
22 C.J. p 292 note 96.

34. Wash.—Wayman v. Miller, 81 P. 2d 501, 195 Wash. 457.

35. Wash.—Wayman v. Miller, supra.

36. Va.—Norfolk & W. R. Co. v. Strickler, 86 S.E. 824, 118 Va. 153.
22 C.J. p 293 note 97.

37. Mass.—O'Halleron v. Miller, 175 N.E. 94, 274 Mass. 508.
R.I.—Tillinghast v. Harrop, 9 A.2d 28.
22 C.J. p 293 note 98.

Donor's declaration of intent to give property to son, made after transfer of such property to a corporation, is held valueless.—In re Brown's Ex'r, 226 N.Y.S. 1, 130 Misc. 865, modified on other grounds In re Brown's Estate, 232 N.Y.S. 371, 225 App.Div. 759, modified on other grounds In re Brown's Will, 169 N.E. 612, 252 N.Y. 366.

38. U.S.—U. S. v. Bernal, D.C.Cal., 24 F.Cas.No.14,581.
Iowa.—Cooper v. Skeel, 14 Iowa 578.

39. D.C.—Emerson v. Riley, 41 App. D.C. 480
Mo.—Grantham v. Gossett, 81 S.W. 895, 182 Mo. 651.
N.Y.—Davidson v. Rightmyer, 77 N. Y.S. 977, 38 Misc. 493.

40. Md.—Whalen v. Milholland, 43 A. 45, 89 Md. 199, 44 L.R.A. 208.
22 C.J. p 293 note 2.

41. N.J.—Wolfinger v. McFarland, 54 A. 862, 63 A. 1119, 67 N.J.Eq. 687.
22 C.J. p 293 note 3.

Statements held not conflicting
N.Y.—In re Glaser's Estate, 273 N. Y.S. 860, 151 Misc. 778.

42. Ala.—Bryan v. Cowart, 21 Ala. 92.
22 C.J. p 293 note 4.

43. Mo.—Collins v. Harrell, 118 S.W. 432, 219 Mo. 279.
22 C.J. p 293 note 5.

44. Iowa.—Oberholtzer v. Hazen, 70 N.W. 207, 101 Iowa 340.
22 C.J. p 293 note 7.

45. Pa.—Snodgrass v. Carnegie Steel Co., 33 A. 1104, 173 Pa. 228.
22 C.J. p 293 note 8.

46. Ga.—Mathis v. State, 18 Ga. 343.
N.J.—Stiefel v. Stiefel, Ch., 35 A. 287.

47. Miss.—Hall v. Thompson, 9 Miss. 443.

48. Mo.—Grantham v. Gossett, 81 S. W. 895, 182 Mo. 651.
22 C.J. p 293 note 11.

Pedigree declaration
It is not necessary that the family should all concur as to the correctness of a pedigree declaration, but this, and every other relevant circumstance, may be considered by the tribunal in determining the weight to be given to the evidence. —Southern L. Ins. Co. v. Wilkinson, 53 Ga. 535.

49. Ind.—Chandler v. Schoonover, 14 Ind. 324.
22 C.J. p 293 note 12.

50. Pa.—Cover v. Manaway, 8 A. 393, 115 Pa. 338, 2 Am.S.R. 552.
22 C.J. p 294 note 13.

51. U.S.—Ward v. The Fashion, D. C.Mich., 29 F.Cas.No.17,154, 6 McLean 152, Newb.Adm. 8.

52. Pa.—Cover v. Manaway, 8 A. 393, 115 Pa. 338, 2 Am.S.R. 552.

53. N.J.—Fee v. Sharkey, 44 A. 673, 59 N.J.Eq. 284, affirmed 45 A. 1091, 60 N.J.Eq. 446.
22 C.J. p 294 note 17.

54. N.J.—Dean v. Anderson, 34 N.J. Eq. 496, 506.
22 C.J. p 294 note 18.

55. N.Y.—Henry v. Henry, 8 Barb. 588.

56. N.J.—Midmer v. Midmer, 26 N. J.Eq. 299, affirmed 27 N.J.Eq. 548.

dence to prove the fact admitted in the alleged statement is available but is not produced;[57] that other persons present when the alleged statement was made are not produced or their absence is not accounted for;[58] that the alleged statement was obtained for the purpose of being used against declarant in the suit;[59] that witnesses testifying to the statement are parties interested or otherwise biased;[60] that the alleged statement was made in the presence of the witness alone;[61] that the alleged statement was made by a foreigner speaking English imperfectly,[62] or was made partly in a foreign language not well understood by the witness and partly in English, which declarant imperfectly understood;[63] that there was a different subject matter to which the alleged statement might well refer;[64] that the witness testifies to several different conversations which together supply all that is necessary for the case in hand;[65] that the witness is not positive in his testimony,[66] at one time distrusted the accuracy of his memory of the statement to which he testifies,[67] or fails to remember his own previous sworn statements of the language used;[68] that the memory of the witness is in a confused condition;[69] that the witness makes the alleged declarant contradict himself in the same conversation;[70] that discrepancies in the examination of the witness in chief and his cross-examination, although immaterial, betray inaccuracy or confusion of memory;[71] that the witness' testimony is loose, uncertain, and contradictory;[72] that the witness cannot state who, if anybody, was present, or is unable to locate definitely the time of the conversation, although it must have been recent if it occurred at all;[73] that the manner of the witness does not inspire confidence;[74] that the witness does not recollect how the conversation arose, who introduced the particular topic, how he happened to come in contact with declarant on the occasion, or to whom he first repeated what was said;[75] that the witness has made mistakes in other parts of his testimony;[76] that the credibility of the witness is seriously impaired by other parts of his testimony,[77] or that he is seriously discredited as to part of his testimony by the opposing testimony of several witnesses;[78] that the witness prevaricates and contradicts himself,[79] or gives materially different versions of the language used;[80] that the witness has made contradictory statements as to the import of the declaration;[81] that the witness has evidently been "instructed" by the party in whose interest he testifies;[82] that there is a remarkably minute concurrence in the testimony of the several witnesses creating suspicion that they are testifying in concert;[83] that the witness is of bad or doubtful character;[84] and that the reputation of the witness for truth and veracity has been seriously shaken[85] and appears to be inferior to that of declarant who directly contradicts him.[86] Inability of the witness to repeat the conversation or state-

57. Mont.—Escallier v. Great Northern R. Co., 127 P. 458, 46 Mont. 238, 249, Ann.Cas.1914B 468.
22 C.J. p 294 note 21.

58. Md.—Lowe v. Protestant Episcopal Church, 35 A. 87, 83 Md. 409.
22 C.J. p 294 note 22.
Presumption arising from failure to call witnesses see supra § 156.

59. Va.—Donaghe v. Tams, 81 Va. 132.
22 C.J. p 294 note 23.

60. Mont.—Reid v. Hennessy Mercantile Co., 123 P. 397, 45 Mont. 383.
22 C.J. p 294 note 24.

61. Mo.—Grantham v. Gossett, 81 S. W. 895, 182 Mo. 651.
22 C.J. p 294 note 25.

62. U.S.—Camden & A. R. Transp. Co. v. The Lotty, D.C.N.Y., 4 F. Cas.No.2,337a.

63. Ill.—Schwachtgen v. Schwachtgen, 65 Ill.App. 127.

64. Iowa.—Cooper v. Skeel, 14 Iowa 578.

65. N.J.—Cooper v. Carlisle, 17 N.J. Eq. 525.

66. Mass.—Harding v. Brooks, 5 Pick. 244.
22 C.J. p 294 note 31.

67. Va.—Horner v. Speed, 2 Patt. & H. 616.

68. Ky.—Vaughn v. Hann, 6 B.Mon. 338.

69. Mo.—Grantham v. Gossett, 81 S. W. 895, 182 Mo. 651.
22 C.J. p 294 note 34.

70. U.S.—Garey v. Union Bank, C.C. D.C., 10 F.Cas.No.5,241a, 3 Cranch C.C. 233, affirmed Union Bank v. Geary, 5 Pet. 99, 8 L.Ed. 60.

71. Va.—Horner v. Speed, 2 Patt. & H. 616.

72. Mont.—Escallier v. Great Northern R. Co., 127 P. 458, 46 Mont. 238, Ann.Cas.1914B 468.
22 C.J. p 294 note 38.

73. U.S.—U. S. v. McKee, C.C.Mo., 26 F.Cas.No.15,683.

74. N.J.—White v. Williams, 3 N.J. Eq. 376.
Ohio.—Williams v. Robson, 6 Ohio St. 510.

75. Mont.—Escallier v. Great Northern R. Co., 127 P. 458, 46 Mont. 238, 249, Ann.Cas.1914B 468.
N.J.—Hodge v. Amerman, 2 A. 257, 40 N.J.Eq. 99.

76. Ala.—Alexander v. Hooks, 4 So. 417, 84 Ala. 605.
22 C.J. p 295 note 43.

77. U.S.—U. S. v. Bernal, D.C.Cal., 24 F.Cas.No.14,581.

78. U.S.—Hostetter Co. v. Sommers, C.C.N.Y., 84 F. 333.
Mont.—Escallier v. Great Northern R. Co., 127 P. 458, 46 Mont. 238, 249, Ann.Cas.1914B 468.

79. Ky.—Powell v. Swan, 5 Dana 1.
Mont.—Reid v. Hennessy Mercantile Co., 123 P. 397, 45 Mont. 386.

80. U.S.—In re Goold, D.C.Me., 10 F. Cas.No.5,604, 2 Hask. 34.

81. N.Y.—Sidway v. Sidway, 7 N.Y. S. 421, 4 Silv.Sup 124.
Ont.—McManus v. McManus, 24 Grant Ch., U.C., 118.

82. Iowa.—Epps v. Dickerson, 35 Iowa 301.
Ky.—Vaughn v. Hann, 6 B.Mon. 338.
22 C.J. p 295 note 51.

83. Mo.—Fanning v. Doan, 41 S.W. 742, 139 Mo. 392.
22 C.J. p 295 note 52.

84. Ky.—Vaughn v. Hann, 6 B.Mon. 338.
22 C.J. p 295 note 53.

85. N.Y.—Marre v. Ginochio, 2 Bradf.Surr. 165.

86. U.S.—U. S. v. McKee, C.C.Mo., 26 F.Cas.No.15,683.

ment verbatim may[87] or may not[88] decrease the weight of his testimony according to the probability, in view of the circumstances of the statement and the time which has elapsed since it was made, that the witness would have been impressed by the statement and would still retain in his memory the exact language used. Indeed the circumstances may be such that the mere profession of the witness that he can give a verbatim report will, of itself, cast suspicion on his testimony.[89] Where a witness cannot recollect what was said, but declares that he can recollect what was not said, the latter statement is of questionable credibility.[90] Declarations against interest have been said to have but slight weight as against documentary evidence.[91]

§ 269. Circumstances Favorable to Testimony

Various circumstances have been noticed as tending to accredit testimony as to unsworn statements.

The following facts have been noticed as tending to accredit testimony to oral statements: That the testimony of the witness is reasonable and probable in view of the established facts,[92] or is corroborated by the other evidence in the case;[93] that the subject matter of the statement was likely to be discussed between the witness and declarant, who were intimate acquaintances;[94] that several witnesses concur in their testimony as to the statement,[95] while declarant himself, highly interested, alone denies it;[96] that the temptation to falsify was great, and the witness could have sworn to more specific and numerous declarations without fear of contradiction;[97] that several witnesses testify as to the same statement having been made to them at different times;[98] that the conduct of the witness subsequent to the alleged statement seems to have been influenced by it;[99] that the subsequent conduct of the alleged declarant tends to confirm the testimony;[1] that the witness, with no possible motive to prevaricate, related the same story soon after the alleged statement was made;[2] that the several witnesses who testify to the alleged statement had met declarant for the express purpose of discussing the subject matter of the statement;[3] that the attention of the witness was specially directed to the statement;[4] that the circumstances were such that the persons testifying must have given close attention to the statements when made, and to the exact meaning of the person who made them;[5] that the memory of the witness is refreshed by a memorandum made at the time;[6] that the witness is a person of unimpeachable character;[7] that the witnesses are disinterested and unbiased,[8] and are not impeached in any manner;[9] that the witness testifies very circumstantially and positively;[10] that no attempt is made to contradict the witness where it might have been done with effect had his testimony been untrue;[11] that the alleged declarant, a party to the suit, although present at the trial, is not called as a witness,[12] or, testifying in the case, does not contradict the witness or offer any explanations.[13] Where the alleged declarant denies

87. Mo.—Grantham v. Gossett, 81 S.W. 895, 182 Mo. 651.
22 C.J. p 295 note 56.

88. N.J.—Williams v. Carle, 10 N.J. Eq. 543.
22 C.J. p 295 note 57.

89. U.S.—Ruch v. Rock Island, Ill., 97 U.S. 693, 24 L.Ed. 1101—In re Goold, D.C.Me., 10 F.Cas.No 5,604, 2 Hask. 34.
Ohio.—Wagers v. Dickey, 17 Ohio 439, 49 Am.D. 467.
22 C.J. p 295 note 58.

90. N.Y.—Orser v. Orser, 24 N.Y. 51.

91. Ky.—McMillan v. Massie's Ex'r, 27 S.W.2d 416, 418, 233 Ky. 808, citing **Corpus Juris.**
La.—Pargoud v. Amberson, 10 La. 352.

92. Neb.—Cobb v. Macfarland, 127 N.W. 377, 87 Neb. 408.
22 C.J. p 295 note 60.

93. Mont.—Roy v. King's Estate, 179 P 821, 55 Mont. 567.
22 C.J. p 295 note 61.

94. N.J.—Varick v. Hitt, Ch., 55 A. 139.
22 C.J. p 295 note 62.

95. Iowa.—Francis v. Francis, 162 N.W. 839, 180 Iowa 1191.
22 C.J. p 295 note 63.

96. Pa.—In re Krug, 46 A. 484, 196 Pa. 484.
22 C.J. p 295 note 65.

97. N.J.—Young v. Young, 27 A. 627, 51 N.J.Eq. 491.

98. Ga.—Burk v. Hill, 45 S.E. 732, 119 Ga. 38.
22 C.J. p 295 note 67.

99. N.J.—Hatch v. Van Dervoort, 34 A. 938, 54 N.J.Eq. 511.

1. U.S.—Cornell Steamboat Co. v The Tillie A., D.C.N.Y., 84 F. 684.
N.J.—Shipman v. Cook, 16 N.J.Eq. 251.
Wis.—Blanchard v. McDougal, 6 Wis. 167, 70 Am.D. 458.

2. Me.—Grant v. Bradstreet, 33 A. 165, 87 Me. 583.

3. Ill.—Doerr v. Brune, 56 Ill.App. 657.

4. N.J.—Gifford v. Thorn, 9 N.J.Eq. 702.
Pa.—Eichelberger's Estate, 32 A. 605, 170 Pa. 242.
22 C.J. p 296 note 72.

5. Neb.—Cobb v. Macfarland, 127 N.W. 377, 87 Neb. 408.

6. N.J.—Gifford v. Thorn, 9 N.J.Eq. 702, 712.

7. N.J.—Gifford v. Thorn, supra.
22 C.J. p 296 note 75.

8. N.Y.—Gillespie v. Moon, 2 Johns. Ch. 585, 7 Am.D. 559.
22 C.J. p 296 note 76.

9. N.Y.—Gillespie v. Moon, 2 Johns. Ch. 585, 7 Am.D. 559.
Pa.—Ferguson v. Rafferty, 18 A. 484, 128 Pa. 337, 6 L.R.A. 33.
22 C.J. p 296 note 77.

10. Pa.—Ferguson v. Rafferty, supra.
22 C.J. p 296 note 79.

11. La.—Fox's Succ., 2 Rob. 299.
N.J.—Gibbons v. Potter, 30 N.J.Eq. 204, affirmed 31 N.J.Eq. 374.
22 C.J. p 296 note 80.

12. Iowa—Keller v. Jackson, 12 N.W. 618, 58 Iowa 629.
22 C.J. p 296 note 81.

13. U.S.—McCall v. McDowell, C.C. Cal., 15 F.Cas.No.8,673, 1 Abb. 212, Deady 233.
22 C.J. p 296 note 82.

the statement, circumstances favorable to the testimony of the reporting witness may be found in such circumstances as that the denial is not delivered in a satisfactory manner,[14] or is not so clear and positive as the opposing testimony;[15] that the alleged declarant has evidently testified falsely in other particulars; or that he gives an unsatisfactory explanation of his language and attributes to it a sense improbable in itself and contrary to that in which it was understood by the witness.[16]

VIII. ADMISSIONS

A. IN GENERAL

§ 270. Definitions and Distinctions

"Admissions" in the law of evidence are concessions or voluntary acknowledgments made by a party of the existence of certain facts. They may be classified as being either judicial or extrajudicial; but some authorities have divided admissions into quasi admissions on the one hand, and true or judicial admissions on the other.

"Admissions," in the law of evidence, have been defined as being concessions or voluntary acknowledgments made by a party of the existence of certain facts.[17] They have also been defined as statements by a party or someone identified with him in legal interest of the existence of a fact which is relevant to the cause of his adversary.[18] The term embraces any statement of fact made by a party which is against his interest[19] or unfavorable to the conclusion for which he contends[20] or inconsistent with the facts alleged by him.[21] Admissions may be either direct or express,[22] or implied or indirect.[23]

Extrajudicial and judicial admissions; quasi admissions. For the purposes of their treatment in this title, admissions are divided into two main categories: (1) Judicial admissions, which are admissions appearing of record in the proceedings of a court,[24] and which are considered infra §§ 299–313. (2) Admissions not so appearing, which are designated extrajudicial admissions and are considered infra §§ 272–298. It should be noted, however, that some authorities, having in view the effect of admissions rather than the circumstances under which they are made, have divided admissions into "quasi admissions" on the one hand, and admissions proper or "true" or "judicial" admissions on the other. Under this classification quasi admissions are acts or utterances, usually extrajudicial, which create an inconsistency with, and discredit to a greater or lesser degree, the present claim or other evidence of the person creating the inconsistency[25] and constitute but items in the mass of evidence,[26] while admissions proper[27] or true admissions[28] or judicial

14. N.J.—Russell v. Russell, 47 A. 37, 60 N.J.Eq. 282, affirmed 49 A. 1081, 63 N.J.Eq. 282, 49 L.R.A. 722.
22 C.J. p 296 note 83.

15. U.S.—Mutual Reserve Fund Life Assoc. v. Cleveland Woolen Mills, Tenn., 82 F. 508, 27 C.C.A. 212.
22 C.J. p 296 note 84.

16. U.S.—Johnson v. The Industry, D.C.Cal., 13 F.Cas.No.7,391, Hoffm. Op. 488.

17. Tex.—National Union Fire Ins. Co. of Pittsburgh, Pa. v. Richards, Civ.App., 290 S.W. 912, 915, citing **Corpus Juris.**
1 C.J. p 1363 notes 4, 5.

18. Ga.—Brooks v. Sessoms, 171 S.E. 222, 223, 47 Ga.App. 554, citing **Corpus Juris.**

19. U.S.—Hack v. American Surety Co. of New York, C.C.A.Ind., 96 F.2d 939, certiorari denied, 59 S.Ct. 95, 305 U.S. 631, 83 L.Ed. 405, rehearing denied 59 S.Ct. 145, 305 U.S. 671, 83 L.Ed. 435, certiorari denied American Surety Co. of New York v. Hack, 59 S.Ct. 95, 305 U.S. 631, 83 L.Ed. 405, rehearing denied 59 S.Ct. 144, 305 U.S. 671, 83 L.Ed. 435.
Md.—Wolfe v. State, 194 A. 832, 836, 173 Md. 103, citing **Corpus Juris.**
Neb.—Gorman v. Bratka, 298 N.W. 691, modified on other grounds 300 N.W. 807.
1 C.J. p 1363 note 6.

20. Neb.—Falkinburg v. Interstate Business Men's Accident Co. of Des Moines, Iowa, 272 N.W. 924, 132 Neb. 670.
"A statement, oral or written, suggesting any inference as to any fact in issue, or relevant fact unfavorable to the conclusion contended for by the person by whom or on whose behalf the statement is made"—Ogden v. Sovereign Camp W. W., 113 N.W. 524, 78 Neb. 806, 809.

21. Neb.—McDaniel v. Farlow, 271 N.W. 905, 132 Neb. 273.

22. Ill.—Bell v. McDonald, 139 N.E. 613, 308 Ill. 329.
Ky.—Coleman v. McIntosh, 211 S.W. 872, 184 Ky. 370.
N.Y.—Alper v. Bookstaver, 190 N.Y.S. 515.

23. Ill.—Bell v. McDonald, 139 N.E. 613, 308 Ill. 329.
Ky.—Coleman v. McIntosh, 211 S.W. 872, 184 Ky. 370.
N.Y.—Alper v. Bookstaver, 190 N.Y.S. 515.
Admissions by:
Conduct see infra §§ 291–293.
Silence or acquiescence see infra §§ 294–297.

24. Colo.—Marron v. Helmecke, 67 P.2d 1034, 1036, 100 Colo. 364, citing **Corpus Juris.**

25. Ky.—Sutherland v. Davis, 151 S.W.2d 1021, 286 Ky. 743.
Mo.—Maltz v. Jackoway-Katz Cap Co., 82 S.W.2d 909, 336 Mo. 1000.

26. Mo.—Maltz v. Jackoway-Katz Cap Co., supra.
La.—Coleman v. Jones, 60 So. 243, 131 La. 803.
Conclusiveness of admissions see infra §§ 379–381.

27. N.C.—Jelser v. White, 110 S.E. 849, 183 N.C. 126.
"It is of the nature of an admission that it be by intention an act of waiver, relating to the opponent's proof of the fact, and not merely a statement or assertion or concession, made for some independent purpose."
D.C.—Alamo v. Del Rosario, 98 F.2d 328, 330, 69 App.D.C. 47.
La.—Coleman v. Jones, 60 So. 243, 245, 131 La. 803.

28. Mo.—Maltz v. Jackoway-Katz

admissions[29] are formal acts done in the course of judicial proceedings which waive or dispense with the production of evidence, by conceding for the purposes of litigation that the proposition of fact involved is true.

"Admissions" are distinguished from "confessions" in that the latter term is used only in criminal cases and properly applies only to acknowledgments of guilt.[30]

The distinctions between declarations against interest and admissions are discussed supra § 217 b.

§ 271. To Whom Made

Although there is some authority to the contrary, it is generally held that it is immaterial to whom an admission is made. It need not be communicated to the opposite party.

A statement need not be communicated to the opposite party in order to be competent as an admission.[31] It is admissible if made to the agent[32] or attorney[33] of the party offering it, or to declarant's employee,[34] or to anyone sufficiently connected with the transaction.[35] Indeed it has been stated and held that as respects its admissibility it is immaterial to whom an admission was made, so long as all the other requisites are present.[36] This is borne out by the fact that in the great number of cases referred to elsewhere in this discussion, where admissions made to persons bearing varied or no relationship to the declarant have been held admissible, the question of such relationship or absence thereof has not been raised. However, it has been held that an admission to a stranger to the transaction, who did not appear to represent the adverse party, is not admissible.[37]

B. EXTRAJUDICIAL ADMISSIONS

§ 272. Admissibility in General

a. In general
b. Requirement that statement be one of fact

a. In General

Any statement made by or attributable to a party to an action which constitutes an admission against his interest and tends to establish or disprove any material fact in the case is competent evidence against him.

Any statement, whether oral or written,[38] made by or attributable to a party to an action, which constitutes an admission against his interest, as defined supra § 270, and tends to establish or disprove any material fact in the case, is competent evidence against him in such action.[39] Evidence of an ad-

Cap Co., 82 S.W.2d 909, 336 Mo. 1000

29. D.C.—Alamo v. Del Rosario, 98 F.2d 328, 69 App.D.C. 47.
Ky.—Sutherland v. Davis, 151 S.W. 2d 1021, 286 Ky. 743.

30. Cal.—People v. Velarde, 59 Cal. 457.
1 C.J. p 1363 note 8 [a] (1)—22 C. J. p 297 note 97.

31. Ga.—Austin v. Long, 57 S.E. 964, 1 Ga.App. 258.

32. U.S.—Morse Dry Dock & Repair Co. v. Munson S. S. Line, D.C.N. Y., 155 F. 150, affirmed 158 F. 1021, 85 C.C.A. 666.
Ark.—Life & Casualty Ins. Co. v. Dunham, 52 S.W.2d 620, 186 Ark. 121.
22 C.J. p 410 note 92 [a] (2).

33. Mich.—Priebisch v. Ottenwess, 142 N.W. 597, 176 Mich. 476.
Tex.—Graves v. Smith, Civ.App., 140 S.W. 489.

34. U.S.—Parker v. Cushman, Mo., 195 F. 715, 117 C.C.A. 71.

35. Tex.—Galveston, H. & S. A. Ry. Co. v. Booth, Civ.App., 209 S.W. 198.

Consignee

In action by shipper against carrier for loss of cattle, letter written by defendant's claim agent, admitting that cattle died while in defendant's possession, was admissible in evidence, where the letter appeared to have been written to the consignee, thus disclosing a sufficient connection with the shipment.—Galveston, H. & S. A. Ry. Co. v. Booth, supra.

36. Cal.—Altube v. Aguirre, 212 P. 217, 59 Cal.App. 762.
Ill.—Adamsen v. Magnelia, 280 Ill. App. 418.
Ky.—Sutton v. Russell's Ex'r., 33 S. W.2d 629, 630, 236 Ky. 535, quoting **Corpus Juris.**
Ohio.—Goz v. Tenney, 136 N.E. 215, 104 Ohio St. 500.
22 C.J. p 410 note 92.
Particular writings and documents see infra § 283.

37. Pa.—Wally v. Jones, 119 A. 75, 275 Pa. 250.

Admission of account stated

An admission of indebtedness made to a stranger is not evidence of an account stated, although it would be evidence thereof if it were made to the creditor or his representative.—Bee v. Tierney, 58 Ill.App. 552.

38. N.C.—McCoy v. Justice, 155 S.E. 452, 199 N.C. 602.
Pa.—Kneirim v. Pfeil, 6 Sch.Reg. 329.
Tex.—Wise v. Haynes, Civ.App., 103 S.W.2d 477.
Oral admissions see infra §§ 279–281.
Written admissions see infra §§ 282–284.

39. U.S.—Buhl v. Kavanaugh, C.C. A.Mich., 118 F.2d 315—Joong Sui Noon v. U. S., C.C.A.Mo., 76 F.2d 249.
Ala.—Waller v. Simpson, 94 So. 343, 208 Ala. 333—Clifton v. Gay, 109 So. 168, 21 Ala.App. 412, certiorari denied 109 So. 170, 215 Ala. 22.
Ark.—Pacific Mut. Life Ins. Co. of California v. Butler, 93 S.W.2d 329, 192 Ark. 614.
Fla.—Robinson v. Pepper, 116 So. 4. 94 Fla. 1184.
Ill.—Schaffner v. Equitable Life Assur. Soc. of U. S., 8 N.E.2d 212, 290 Ill.App. 174.
Mo.—Langston v. Howell County, 79 S.W.2d 99, 336 Mo. 444—Graves v. Beard, 1 Mo. 747—McCaughan v. John Hill Const. Co., App., 222 S. W. 917.
Neb.—Falkinburg v. Inter-State Business Men's Accident Co. of Des Moines, Iowa, 272 N.W. 924, 132 Neb. 670—McDaniel v. Farlow, 271 N.W. 905, 132 Neb. 273.
N.H.—Caplan v. Caplan, 142 A. 121, 83 N.H. 318.
N.C.—McCoy v. Justice, 155 S.E. 452, 199 N.C. 602.
Pa.—Logue v. Gallagher, 3 A.2d 191, 133 Pa.Super. 570—Liebster v. Lucas, 82 Pa.Super. 184—Stackwell

mission is not objectionable as hearsay; indeed the rule under which such evidence is admitted is a well recognized exception to the hearsay rule,[40] and proof of an admission by hearsay evidence does not depend for its admissibility on its conforming to any other exception to the hearsay rule, such as res gestæ.[41] The admissibility of extrajudicial admissions rests on the fact of inconsistency with the present position of the party who made them.[42] Where a statement is admissible as tending to prove a particular fact, the fact that it also tends to prove other facts does not preclude its admission.[43]

Purpose and intent of statement. Although, as appears infra § 298, the time, place, and circumstances of the making of an extrajudicial admission do not as a rule affect its admissibility, nevertheless the purpose and intent with which a statement is made are sometimes considered in determining whether or not it is an admission so as to be receivable in evidence as such.[44] Thus it will be seen in § 285 infra that a statement made for the purpose of effecting a compromise is generally regarded as not being an admission and is inadmissible. So too statements made in tax returns and assessment lists are by some authorities held not admissible as admissions, see infra § 283. Circumstances as affecting the voluntary character of an admission are considered infra § 278.

Admission based on hearsay. Although it has been held that statements made as mere matters of hearsay are not receivable in evidence as admissions,[45] there is also authority for the view that,

v. McDowell, 12 Pa.Dist. & Co. 515, 77 Pittsb.Leg.J. 203—Knierim v. Pfeil, 6 Sch.Reg. 329.

Tex.—Outlaw v. Gulf Oil Corporation, Civ.App., 137 S.W.2d 787, reversed on other grounds, Gulf Oil Corporation v. Outlaw, Com.App., 150 S.W.2d 777—Sportatorium v. State, Civ.App., 104 S.W.2d 912, error dismissed—Wise v. Haynes, Civ.App., 103 S.W.2d 477, 482, quoting **Corpus Juris**—American Nat. Ins. Co. v. Villegas, Civ.App., 32 S.W.2d 1109—National Union Fire Ins. Co. of Pittsburgh, Pa., v. Richards, Civ.App., 290 S.W. 912, 915, citing **Corpus Juris**—Wiggins v. Tiller, Civ.App., 230 S.W. 253.

Wash.—Simonson v. Huff, 215 P. 49, 124 Wash. 549.

22 C.J. p 297 note 5—5 C.J. p 668 note 82.

Competency of admissions as dependent on maker see infra §§ 314–368.

"Any statement made by a party to an action, which is against his own interest and which, in its nature, tends to establish or disprove any material fact, or alleged material fact in the case, is competent to be put in evidence against him in the trial of that action."—Gorman v. Braika, Neb., 298 N.W. 691, 693, modified on other grounds 300 N.W. 807.

Statements held admissible

(1) In an action for damages for wrongful killing, evidence of a declaration by defendant, susceptible of the inference, when considered with other evidence, that he was the perpetrator of the homicide, was competent.—Kuykendall v. Edmondson, 94 So. 546, 208 Ala. 553.

(2) In an action for injuries to a minor struck by an automobile, evidence that defendant had stated he "had sent a man out there and he had run over a little boy" was held admissible to show that the driver was in defendant's service at the time of the injury.—Bains Motor Co. v. Lecroy, 96 So 483, 209 Ala. 345.

(3) In an action for injuries to a boy where plaintiff's evidence showed that he was under fourteen, it was error to exclude defendant's offered testimony that, when he applied for employment, the boy stated he was over sixteen, as evidence of his age.—Terry Dairy Co. v. Nalley, 225 S.W. 887, 146 Ark. 448, 12 A.L.R. 1208.

(4) In suit against physician for burn from electro-therapeutic machine, defendant's statement to plaintiff's mother, in response to her statement that plate was loose and burn due to carelessness, "I know it and I can't tell you how bad I feel about it," was admissible as admission against interest.—Adamsen v. Magnelia, 280 Ill.App. 418.

(5) Other illustrations see Nanney v. I. H. Shell & Son, Mo App., 138 S.W.2d 717—22 C.J. p 298 note 5 [a].

40. Cal.—Herbert v. Lankershim, 71 P.2d 220, 9 Cal.2d 409.

Ill.—Van Meter v. Gurney, 240 Ill. App. 165.

Neb.—McDaniel v. Farlow, 271 N.W. 905, 132 Neb. 273.

N.J.—U. S. Fidelity & Guaranty Co. v. Coatsworth, 112 A. 313, 95 N.J.Law 108.

N.Y.—Anthus v. Rail Joint Co., 185 N.Y.S. 314, 193 App.Div. 571, affirmed 132 N.E. 887, 231 N.Y. 557.

Tex.—Wise v. Haynes, Civ.App., 103 S.W.2d 477, 482, quoting **Corpus Juris.**

22 C.J. p 298 note 7.

The effect of the doctrine of admissions is to dispense with the requirement of cross-examination.—General Finance v. Stratford, 109 F.2d 843, 71 App.D.C. 343.

Necessity of oath

It is not a prerequisite to the receipt of an admission made by a party against his interest that such admission be under oath.—Jackson v. Dickman, 9 N.Y.S.2d 688, 256 App. Div. 925, reargument denied 11 N.Y.S.2d 557, 256 App.Div. 1003.

41. Neb.—McDaniel v. Farlow, 271 N.W. 905, 132 Neb. 273.

N.H.—Semprini v. Boston & M. R. R., 179 A. 349, 87 N.H. 279.

42. U.S.—Buhl v. Kavanaugh, C.C.A. Mich., 118 F.2d 315—Sollows v. McCann Erickson, Inc., D.C.N.Y., 27 F.Supp. 491.

Tex.—Negociacion Agricola y Ganadera de San Enrique, S. A., v. Love, Civ.App., 220 S.W. 224.

43. Ind.—Gifford v. Gifford, 107 N.E. 308, 58 Ind.App. 665.

Or.—Stocklen v. Barrett, 114 P. 108, 58 Or. 281.

22 C.J. p 298 note 10.

44. **Statement prepared for party offering it**

In an action for negligence in adjustment of claim against an insurance company, a memorandum prepared by an accountant in connection with preparation of proof of loss, manifestly prepared either by or with coöperation of defendant in plaintiffs' interest as plaintiffs' agent, as one of the steps in defendant's work in securing adjustment, was not admissible in evidence as an admission by defendant, direct or implied, of its correctness, and, not being supported by any proof of either its authenticity or correctness on the part of plaintiffs, was not competent from that point of view.—Alper v. Bookstaver, 190 N.Y.S. 515.

Statements in an obituary notice concerning the mental faculties of the deceased are not admissible against the persons who had the notice published, since "such a notice does not purport to be, and is not understood as, a statement of facts from which any one is justified in drawing legal conclusions."—In re Hull, 89 N.W. 979, 983, 117 Iowa 738.

45. Pa.—Stackwell v. McDowell, 12

even though the statement was not based on the personal knowledge of the one by whom it was made, it may nevertheless constitute an admission and be admitted as such, if the circumstances indicate an adoption of the hearsay matter by the declarant.[46]

Withdrawal of admission. While an extrajudicial admission may be withdrawn before it is acted on, it is still evidence of the fact admitted, and its withdrawal goes only to its weight.[47]

b. Requirement That Statement Be One of Fact

To be competent as an admission a statement must be one of fact, and a statement which is a mere opinion or conclusion or a conclusion of law is as a rule inadmissible. An admission by a party of his fault or of his adversary's freedom from fault is generally held admissible.

To be competent as an admission a statement must be one of fact.[48]

Opinions and conclusions. Although there is authority to the contrary,[49] a statement of declarant's opinion[50] or conclusion[51] respecting a matter

Pa.Dist. & Co. 515, 77 Pittsb.Leg. J. 203.
Tex.—Tinker v. Yellow Cab Co., Civ. App., 74 S.W.2d 521, error dismissed—Reynolds v. Texas Iron Works Sales Corporation, Civ.App., 72 S.W.2d 299, error dismissed—Webb-North Motor Co. v. Ross, Civ App., 42 S.W.2d 1086—Williams v. Fuerstenberg, Civ.App., 12 S.W.2d 812, 815, citing **Corpus Juris**, and reversed on other grounds Com.App., 23 S.W.2d 305.
22 C.J. p 299 note 19.

"A statement describing another's declaration is normally not regarded as an admission of the fact asserted by the other. One does not admit everything he recounts or describes merely by reason of the relating of them."—In re Gaines' Estate, 100 P.2d 1055, 1058, 15 Cal.2d 255, superseding, App., 92 P.2d 646.

Understanding

A statement of what the declarant "understood" particular facts to be is inadmissible.
Mo.—Baker v. Keet-Rountree Dry Goods Co., 2 S.W.2d 733, 318 Mo. 969, rehearing denied 3 S.W.2d 1003, 318 Mo. 969.
N.Y.—Mittnacht v. Bache, 45 N.Y.S. 81, 16 App.Div. 426.

46. U.S.—Reidy v Myntti, C.C.A. Alaska, 116 F.2d 725.
Ga.—Brooks v. Sessoms, 171 S.E. 222, 47 Ga.App. 554—Chero Cola Bottling Co. v. Southern Express Co., 116 S.E. 325, 29 Ga.App. 656
Ind.—Hege & Co. v. Tompkins, 121 N.E. 677, 69 Ind.App. 273.
Iowa.—Helberg v. Zuck, 208 N.W. 209, 201 Iowa 860.
Mo.—Wright v. Quattrochi, 49 S.W.2d 3, 330 Mo. 173—Mayhew v Travelers' Protective Ass'n of America, App., 52 S.W.2d 29.
N.Y.—Davison v. Long Island Home, 278 N.Y.S. 167, 243 App.Div. 791—Anthus v. Rail Joint Co., 185 N.Y.S. 314, 193 App.Div. 571, affirmed 132 N.E. 887, 231 N.Y. 557.
Tex.—Wise v. Haynes, Civ.App., 103 S.W.2d 477.
Wis.—Hilton v. Hayes, 141 N.W. 1015, 154 Wis. 27.
22 C.J. p 298 note 8.

Reason for rule

"The admissibility of this class of evidence does not depend upon the personal knowledge of a defendant, but is predicated upon the assumption that he will not make statements of fact contrary to his interest unless he is satisfied that such statements are true."—Janus v. Akstin, N.H., 20 A.2d 552, 553, citing **Corpus Juris.**

47. Me.—Liberty v. Haines, 64 A. 665, 101 Me. 402.

48. U.S.—Grand Trunk Western R. Co. v. H. W. Nelson Co., C.C.A. Mich., 116 F.2d 823, rehearing denied 118 F.2d 252—Coca-Cola Bottling Co. of Henderson v. Munn, C.C.A.N.C., 99 F.2d 190—Martin v. Burgess, C.C.A.Ala., 82 F.2d 321.
Mo.—Wright v. Quattrochi, 49 S.W.2d 3, 330 Mo. 173.
N.C.—Royal Ins. Co. v. Atlantic Coast Line R. Co., 143 S.E. 516, 195 N.C. 693.
Tex.—National Union Fire Ins. Co. of Pittsburgh, Pa. v. Richards, Civ. App., 290 S.W. 912—Negociacion Agricola y Ganadera de San Enrique, S. A. v. Love, Civ.App., 220 S.W. 224.
Utah.—S. W. Bridges & Co. v. Candland, 54 P.2d 842, 88 Utah 373.
22 C.J. p 297 note 4.

49. Mo.—Mayhew v. Travelers' Protective Ass'n of America, App., 52 S.W.2d 29.

50. U.S.—Coca-Cola Bottling Co. of Henderson v. Munn, C.C.A.N.C., 99 F.2d 190—Martin v. Burgess, C.C.A.Ala., 82 F.2d 321.
Ky.—Miller v. Weck, 217 S.W. 904, 186 Ky. 552.
Mo.—Baker v. Keet-Rountree Dry Goods Co., 2 S.W.2d 733, 740, 318 Mo. 969, citing **Corpus Juris,** and rehearing denied 3 S.W.2d 1003, 318 Mo. 969—Tappe v. Pohlman, App., 79 S.W.2d 485, 488, citing **Corpus Juris.**
N.H.—Caswell v. Maplewood Garage, 149 A. 746, 84 N.H. 241, 73 A.L.R. 433.
N.C.—Royal Ins. Co. v. Atlantic Coast Line R. Co., 143 S.E. 516, 195 N.C. 693.
Tex.—San Antonio Public Service Co. v. Jackson, Civ.App., 103 S.W.2d 251, 252, quoting **Corpus Juris**—Tinker v. Yellow Cab Co., Civ. App., 74 S.W.2d 521, error dismissed—Williams v. Fuerstenberg, Civ.App., 12 S.W.2d 812, 815, citing **Corpus Juris,** and reversed on other grounds, Com.App., 23 S.W.2d 305.
22 C.J. p 299 note 17.

A prediction is inadmissible as an admission of the truth of the thing predicted.—Atlanta & Lowry Nat. Bank v. Maughon, 131 S.E. 916, 35 Ga.App. 25.

Based on hearsay

In will contest wherein testator's son testified that after he told his wife, who was proponent of will, of suffering which mother and children had endured at hands of testator, wife's reply was, "He must be crazy; I wouldn't live with a man like that," exclusion of question to son as to how many times his wife had said that in her opinion testator must be crazy was held not error, since wife's statement that testator must be crazy was mere opinion based on alleged facts outside of wife's own knowledge.—Rynn v. Rynn, 181 A. 289, 55 R.I. 310.

Honesty of an individual

Defendant's letter stating his opinion that plaintiff was a person completely honorable and able to perform any contract he might make, etc., not being an admission of a matter of fact, was held inadmissible.—Negociacion Agricola y Ganadera de San Enrique, S. A., v. Love, Tex.Civ.App., 220 S.W. 224.

51. Cal.—Shaver v. Canfield, 70 P.2d 507, 21 Cal.App.2d 734.
N.H.—Caswell v. Maplewood Garage, 149 A. 746, 84 N.H. 241, 73 A.L.R. 433.
Tex.—Tinker v. Yellow Cab Co., Civ. App., 74 S.W.2d 521, error dismissed.
W.Va.—Keyser Canning Co. v. Klots Throwing Co., 128 S.E. 280, 98 W.Va. 487.

in issue is generally held inadmissible as an admission of the fact, although it may be admissible where the fact that a party had a certain opinion at a particular time is of itself relevant.[52]

Legal conclusions. As a general rule, statements or admissions relating to a question of law[53] or constituting conclusions of law[54] or opinions as to what the law is,[55] are not admissible in evidence, for the reason that a party should not be affected by statements which may be attributed to a misapprehension of his legal right.[56] This rule has been held to apply where the matter admitted involves both a question of law and a question of fact,[57] but there is also authority for the view that an admission in which law and fact are inextricably mingled may be shown.[58] Where the admission is actually one of fact it should not be excluded because made in the form of a conclusion of law.[59] The general rule governing the admissibility of statements involving opinions or conclusions of law has been said to be that they are no more admissible than they would be if offered by a witness on the stand,[60] but it has also been held that an admission involving an opinion or conclusion of law or of mixed law and fact need not, in order to be admissible, conform to that standard.[61]

Admission of fault or freedom from fault. A number of cases have held that a statement made by a party to an action involving negligence that he or someone other than his adversary was at fault or that his adversary was free from fault comes within the general rule excluding opinions or conclusions and is inadmissible,[62] at least where the statement was based on facts not within the personal knowledge of declarant.[63] However, such statements are generally held admissible[64] as against the contention that they should be excluded as opinions

52. Okl.—National Aid Life Ass'n v. Wiles, 41 P.2d 655, 657, 171 Okl. 57, citing **Corpus Juris.**
22 C.J. p. 299 note 18.

53. U.S.—Grand Trunk Western R. Co. v. H. W. Nelson Co., C.C.A. Mich., 116 F.2d 823, rehearing denied 118 F.2d 252.
Ga.—Atlanta & Lowry Nat. Bank v. Maughon, 131 S.E. 916, 918, 35 Ga. App. 25, citing **Corpus Juris.**
Mo.—L. E. Lines Music Co. v. Holt, 61 S.W.2d 326, 327, 332 Mo. 1098, citing **Corpus Juris**—Wright v. Quattrochi, 49 S.W.2d 3, 330 Mo. 173.
Tex.—Texas Employers' Ins. Ass'n v. Sewell, Civ.App., 32 S.W.2d 262, error refused—National Union Fire Ins. Co. of Pittsburgh, Pa., v. Richards, Civ.App., 290 S.W. 912, 915, citing **Corpus Juris.**
22 C.J. p. 298 note 12.

54. N.H.—Caswell v. Maplewood Garage, 149 A. 746, 84 N.H. 241, 73 A.L.R. 433.

55. Ga.—Atlanta & Lowry Nat. Bank v. Maughon, 131 S.E. 916, 35 Ga.App. 25.

Forfeiture of deposit

A statement that the speaker had forfeited a deposit he had made to be delivered as a first payment on the purchase price of land, may be regarded as his opinion of the law, rather than a statement of fact.—Monger v. Effland, 125 P. 46, 87 Kan. 710.

56. Ga.—Solomon v. Solomon, 2 Ga. 18.
22 C.J. p. 298 note 13.

57. Mo.—Crockett v. Morrison, 11 Mo. 3.

58. Ala.—Strickland v. Davis, 128 So. 233, 221 Ala. 247—Lewis v. Harris, 31 Ala. 689.
N.H.—Caswell v. Maplewood Garage, 149 A. 746, 84 N.H. 241, 73 A.L.R. 433.

59. Ind.—Hege & Co. v. Tompkins, 121 N.E. 677, 680, 69 Ind.App. 273. "We know of no rule that requires an admission to be disregarded because made in the form of a conclusion of law rather than a statement of fact."—Hege & Co. v. Tompkins, supra.

60. U.S.—Martin v. Burgess, C.C.A. Ala., 82 F.2d 321.
N.H.—Caswell v. Maplewood Garage, 149 A. 746, 84 N.H. 241, 73 A.L.R. 433.
Tex.—National Union Fire Ins. Co. of Pittsburgh, Pa., v. Richards, Civ.App., 290 S.W. 912.

61. Ala.—Strickland v. Davis, 128 So. 233, 221 Ala. 247.

62. Ky.—Miller v. Weck, 217 S.W. 904, 186 Ky. 552.

63. Mo.—Wright v. Quattrochi, 49 S.W.2d 3, 330 Mo. 173.
N.C.—Royal Ins. Co. v. Atlantic Coast Line R. Co., 143 S.E. 516, 195 N.C. 693.
Wis.—Hilton v. Hayes, 141 N.W. 1015, 154 Wis. 27.

64. Cal.—Gulzoni v. Tyler, 30 P. 981, 64 Cal. 334—Frank v. Myers, 60 P. 2d 144, 16 Cal.App.2d 16.
Colo.—Ryan Gulch Reservoir Co. v. Swartz, 234 P. 1059, 77 Colo. 60—Holman v. Boston Land & Security Co., 36 P. 797, 20 Colo. 7.
Ind.—Acton v. Lowery, App., 34 N.E.2d 972—Warner Gear Co. v. De Peugh, 123 N.E. 363, 70 Ind.App. 264.
Ky.—Dix v. Gross, 111 S.W.2d 673, 271 Ky. 231—Stegall v. Patton, 21 S.W.2d 488, 231 Ky. 365.
Mass.—Mielke v. Dobrydnio, 138 N.E. 561, 244 Mass. 89—Eldredge v. Barton, 122 N.E. 272, 232 Mass. 183—Ellis v. Pierce, 51 N.E. 974, 172 Mass. 220.
Mich.—Williams v. Wood, 244 N.W. 490, 260 Mich. 322—Lund v. Lough, 153 N.W. 12, 186 Mich. 640.
Mo.—Friedman v. United Rys. Co. of St. Louis, 238 S.W. 1074, 293 Mo. 235.
N.H.—L'Esperance v. Sherburne, 155 A. 203, 85 N.H. 103.
Nev.—Peterson v. Pittsburg Silver Peak Gold Mining Co., 140 P. 519, 37 Nev. 117.
N.Y.—Jackson v. Dickman, 9 N.Y.S. 2d 688, 256 App.Div. 925, reargument denied 11 N.Y.S.2d 557, 256 App.Div. 1003.
Wash.—Barnett v. Bull, 250 P. 955, 141 Wash. 139—Simonson v. Huff, 215 P. 49, 124 Wash. 549.
45 C.J. p. 1259 note 71.

Opinion accompanied by fact on which based

(1) Defendant's statement that he was driving while under the influence of liquor, and it was his fault that the accident had occurred, was admissible.—Liebster v. Lucas, 82 Pa. Super. 184.

(2) In guest's action against host for injuries sustained in automobile accident, exclusion of evidence of statements made by host immediately and for several days after accident to effect that accident was all her fault because she was driving too fast held reversible error.—McDaniel v. Farlow, 271 N.W. 905, 132 Neb. 273.

Malpractice

A statement by the patient that defendant saved his foot, and that if it had not been for him his leg would have been ruined, was admissible as an admission against interest.—Knowles v. Blue, 95 So. 481, 209 Ala. 27.

or conclusions,[65] and regardless of the fact that the statements were not based on the personal knowledge of the declarants.[66]

Valuation of property. As a general rule, the valuation placed on property by a party may be shown against him as an admission.[67]

§ 273. Purpose for Which Admitted

Admissions are ordinarily admissible as original or substantive evidence of the truth of the statements made or of the existence of facts which they tend to establish; while they may be used to impeach or contradict the testimony of the party who made them, their admissibility does not depend on, nor should their effect be confined to, their tendency to do so.

Admissions are ordinarily admissible as original or substantive evidence of the truth of the statements made or of the existence of any facts which they have a tendency to establish,[68] and their admissibility is not dependent on any tendency to discredit the person by whom they were made.[69] Of course, where the party who has made the ad-

65. Ala.—Pittman v. Calhoun, 172 So. 263, 233 Ala. 450.
Cal.—Rudd v. Byrnes, 105 P. 957, 156 Cal. 636, 26 L.R.A.,N.S., 134, 20 Ann.Cas. 124.
Ga.—Central of Georgia R. Co. v. Mosely, 38 S.E. 350, 112 Ga. 914.
Mo.—Grodsky v. Consolidated Bag Co., 26 S.W.2d 618, 324 Mo. 1067—Runyan v. Marceline Coal & Mining Co., 172 S.W. 1165, 186 Mo.App. 707.
Or.—Swain v. Oregon Motor Stages, 82 P.2d 1084, 160 Or. 1, 118 A.L.R. 1225.
Tex.—Farrand v. Houston & T. C. R. Co., Civ.App., 205 S.W. 845—Hovey v. See, Civ.App., 191 S.W. 607.
"A declaration of a party, touching a transaction known to him, that he was at fault, whether intended as an expression that he was legally at fault, or of conscious wrongdoing as between man and man, is admissible."—Strickland v. Davis, 128 So. 233, 237, 221 Ala. 247.
Erroneous view of the law
The fact that declarant's view of the law is erroneous does not render the admission of liability inadmissible, where, if the accident occurred in the manner testified to by him, there was little occasion for his saying that he was to blame.—Robbins v. Weed, 169 N.W. 773, 187 Iowa 64.

66. Ind.—Hege & Co. v. Tompkins, 121 N.E. 677, 69 Ind.App. 273.
Iowa.—Read v. Reppert, 190 N.W. 32, 194 Iowa 620.

67. Cal.—Nelson v. Fernando Nelson & Sons, 55 P.2d 859, 5 Cal.2d 511.
Minn.—Kessler v. Kruidenier, 219 N.W. 552, 554, 174 Minn. 434, citing **Corpus Juris.**
Mo.—State ex rel. State Highway Commission v. Lindley, App., 96 S.W.2d 1065, record quashed on other ground and cause remanded State ex rel. State Highway Commission of Missouri v. Shain, 102 S.W.2d 666, 340 Mo. 802, mandate conformed to State ex rel. State Highway Commission v. Lindley, 113 S.W.2d 132, 232 Mo.App. 831.
N.Y.—People ex rel. Lehigh Valley Ry. Co. v. Burke, 223 N.Y.S. 168, 221 App.Div. 248, reversed on other grounds 160 N.E. 19, 247 N.Y. 227.
22 C.J. p 180 note 54.
In tax returns or assessment lists see infra § 283.
An admission by a bailee in possession as to the value of the property is admissible against him—Clark v. Shrimski, 77 Mo.App. 166.
Sale price
Landowner's letters, naming price of timber on lands and insisting that such price was not above the market value, are more than mere offers to sell, and are admissible as declarations against interest in tax assessment proceeding.—Penney v. State, 128 So. 596, 221 Ala. 230.

68. Ill.—Bradenkamp v. Rouge, 143 Ill.App. 492.
Ky.—Dix v. Gross, 111 S.W.2d 673, 271 Ky. 231—Sympson Bros. Coal Co. v. Coomes, 58 S.W.2d 594, 248 Ky. 324—Pollard v. Vandivir, 26 S.W.2d 495, 233 Ky. 563—Stegall v. Patton, 21 S.W.2d 488, 231 Ky. 365.
Miss.—Weyen v. Weyen, 139 So. 608, 165 Miss. 257, modified on other grounds and suggestion of error overruled 139 So. 856, 165 Miss. 257.
Mo.—Tappe v. Pohlman, App., 79 S.W.2d 485.
Neb.—Falkinburg v. Interstate Business Men's Accident Co. of Des Moines, Iowa, 272 Neb. 924, 132 Neb. 670—McDaniel v. Farlow, 271 N.W. 905, 132 Neb. 273—Luikart v. Korbmaker, 258 N.W. 263, 264, 128 Neb. 199, citing **Corpus Juris.**
R.I.—Rynn v. Rynn, 181 A. 289, 55 R.I. 310.
Tex.—Outlaw v. Gulf Oil Corporation, Civ.App., 137 S.W.2d 787, reversed on other grounds, Gulf Oil Corporation v. Outlaw, Com.App., 150 S.W.2d 777—Wise v. Haynes, Civ.App., 103 S.W.2d 477, 482, quoting **Corpus Juris.**
Utah.—Malia v. Seeley, 57 P.2d 357, 89 Utah 262.
Vt.—In re Wells' Will, 113 A. 822, 95 Vt. 16.
22 C.J. p 298 note 6, p 299 note 20
"The rule is well settled that admissions of a party to a suit are always competent and admissible as substantive evidence when offered by the opposite party."—Van Meter v. Gurney, 240 Ill.App. 165, 188.
Basis of rule
"What a party, as to a matter of fact, has voluntarily admitted to be true, may reasonably be taken as true, especially as to a matter adverse to him, for presumptively a party ordinarily does not admit as true that which is against him unless it is true."—Peterson v. Richards, 272 P. 229, 235, 73 Utah 59.
Admissions are competent to prove
(1) Payment of a debt.
U.S.—Xenia First Nat. Bank v. Stewart, Ohio, 5 S.Ct. 845, 114 U.S. 224, 29 L.Ed. 101.
Ill.—Ballance v. Frisby, 3 Ill. 63.
Ind.—Applegate v. Baxley, 93 Ind. 147.
48 C.J. p 719 note 8.
(2) Nonpayment of debts.—Steiner v. Jeffries, 24 So. 37, 118 Ala. 573—48 C.J. p 719 note 9.
(3) A contract.—Waller v. Simpson, 94 So. 343, 208 Ala. 333.
(4) Declarant's negligence.—Atchison, T. & S. F. R. Co. v. Potter, 58 P. 471, 60 Kan. 808, 72 Am.S.R. 385—45 C.J. p 1259 note 71.
(5) Adversary's freedom from negligence.
Or.—Haltom v. Fellows, 73 P.2d 680, 157 Or. 514.
Vt.—McKenzie v. Boutwell, 65 A. 99, 79 Vt. 383.
(6) The responsibility of a master or principal for the negligent acts of his servant or agent.
Md.—Hynes v. Wilson, 128 A. 70, 147 Md. 360.
Mass.—Dennison v. Swerdlove, 146 N.E. 27, 250 Mass. 507.
Ohio.—Goz v. Tenney, 136 N.E. 215, 104 Ohio St. 500.
45 C.J. p 1259 note 75.
(7) That declarant was the one who committed a trespass.
Kan.—Mecartney v. Smith, 62 P. 540, 10 Kan.App. 580.
Pa.—McGill v. Ash, 7 Pa. 397.
Declarations in disparagement of a person's title to property are receivable in evidence against him.—Knorr v. Raymond, 73 Ga. 749—22 C.J. p 298 note 6 [a].

69. Ark.—Public Utilities Corpora-

missions testifies, and the admissions are contradictory to or inconsistent with his testimony, the admissions are competent for the purpose of discrediting and impeaching him,[70] although they should not be limited to the purpose of discrediting.[71]

§ 274. Actions or Proceedings in Which Admitted

Admissions are equally competent whether offered in real or personal actions or in probate proceedings.

The nature of the action or proceeding does not affect the admissibility of admissions. Thus they are equally competent whether offered in real[72] or personal[73] actions or in probate proceedings,[74] or, as appears in Divorce § 125, in divorce proceedings.

§ 275. By Which Party Provable

An admission may be proved only at the instance of a party whose interests are adverse to those of the declarant.

An admission may be proved only at the instance of a party whose interests are adverse to those of the declarant; it cannot be proved by the declarant himself or by one in privity with him.[75] The fact that the declaration of the party offering it was communicated to the adverse party does not make it admissible as an admission by the adverse party,[76] although, as appears infra §§ 294–297, it may be admitted in connection with evidence showing an admission by silence or acquiescence on the part of the party to whom such declaration was communicated.

§ 276. Relevancy and Materiality

To be admissible, an admission must, at the time it is offered, be relevant to, and have a material bearing on, the issues in the case.

In order that a statement offered as an admission may be received it must, at the time when it is offered,[77] be relevant to,[78] and have a material bearing on,[79] the issues in the case; but if the state-

tion of Arkansas v. Carden, 32 S.W.2d 1058, 182 Ark. 858.
Conn.—Tappan v. Knox, 162 A. 7, 115 Conn 508.
Iowa.—O'Neil v. Redfield, 139 N.W. 555, 158 Iowa 246.
Utah.—Malia v. Seeley, 57 P.2d 357, 360, 89 Utah 262, citing **Corpus Juris**—Peterson v. Richards, 272 P. 229, 73 Utah 59.

70. Ark.—Pacific Mut. Life Ins. Co. of California v Butler, 93 S.W.2d 329, 192 Ark. 614.
Cal.—Herbert v. Lankershim, 71 P.2d 220, 9 Cal.2d 409—McCullough v. Langer, 73 P.2d 649, 23 Cal.App. 2d 510—Donaghue v. Hayden, 208 P. 1007, 58 Cal.App. 457.
Ky.—Pollard v. Vandivir, 26 S.W.2d 495, 233 Ky. 563.
Mo.—Nanney v. I. H. Shell & Son, App., 138 S.W.2d 717—State ex rel. State Highway Commission v. Lindley, App., 96 S.W.2d 1065, record quashed on other ground and cause remanded State ex rel State Highway Commission of Missouri v. Shain, 102 S.W.2d 666, 340 Mo. 802, mandate conformed to State ex rel. State Highway Commission v. Lindley, 113 S.W.2d 132, 232 Mo. App. 831.
Pa.—Heyman v. Hanauer, 152 A. 910, 302 Pa. 56.
Tenn.—Croson v. Marsh, 12 Tenn. App. 33.
Tex.—Pyron v. Brownfield, Civ.App., 238 S.W. 725.
Utah.—Malia v. Seeley, 57 P.2d 357, 360, 89 Utah 262, citing **Corpus Juris.**
Vt.—In re Wells' Will, 113 A. 822, 95 Vt. 16.
22 C.J. p 299 note 22.
Impeaching party through inconsistent or contradictory statements generally see the C.J.S. title Witnesses § 575, also 70 C.J. p 1019 note 78.

71. Ky.—Dix v. Gross, 111 S.W.2d 673, 271 Ky. 231—Stegall v. Patton, 21 S.W.2d 488, 231 Ky 365.
Miss.—Weyen v. Weyen, 139 So. 608, 165 Miss. 257, modified on other grounds and suggestion of error overruled 139 So. 856, 165 Miss. 257.
N.Y.—Retter v. Olean St. R. Co., 125 N.Y.S. 674, 140 App.Div. 667.

72. Mass.—Barnard v. Pope, 14 Mass. 434, 7 Am.D. 225.
22 C.J. p 299 note 24.
Ejectment
N.J.—Rowan v. Yarnall, 90 A. 730, 83 N.J.Eq. 210.
N.C.—McCollum v. Chisholm, 59 S.E. 160, 146 N.C. 18.

73. D.C.—Dobbins v. Thomas, 30 App.D.C. 511.
22 C.J. p 299 note 25.
By bailor against bailee.—Robinson v Haas, 40 Cal. 474—6 C.J. p 1162 note 16.

74. Pa.—In re Bramberry, 27 A. 405, 156 Pa. 628, 36 Am.S.R. 64, 22 L.R.A. 594.

75. Cal.—Shivley v. Eureka Tellurium Gold-Min. Co., 61 P. 939, 129 Cal. 293.
22 C.J. p 299 note 28.

76. Ala.—St. John v. O'Connel, 7 Port. 466.
Iowa.—Clement v. Drybread, 78 N.W. 235, 108 Iowa 701.

77. Ind.—Keesling v. Doyle, 35 N.E. 126, 8 Ind.App. 43.
Md.—Willard v. Horsey, 22 Md. 89.

78. Ill.—Gentry v. Chicago & A. R. Co., 126 N.E. 193, 291 Ill. 431.
Mass.—Waltham Watch & Clock Co. v. City of Waltham, 172 N.E. 579, 272 Mass. 396, 71 A.L.R. 960.
Tex.—Tinker v. Yellow Cab Co., Civ. App., 74 S.W.2d 521, error dismissed.
22 C.J. p 299 note 32.
Statements held relevant
(1) In seller's suit for buyer's conversion of refrigerator accepted by seller as cash payment on purchase price, but left in buyer's possession, agreed valuation of refrigerator was relevant as admission by buyer as to value of refrigerator when agreement was made.—Pritchard v. Ballard, 173 S.E. 174, 48 Ga.App. 532.
(2) Other statements.—Clifton v. Gay, 109 So. 168, 21 Ala.App. 412, certiorari denied 109 So. 170, 215 Ala. 22—22 C.J. p 299 note 32 [b].
Statements held irrelevant
(1) In a prosecution for false imprisonment growing out of arrest of plaintiff as a deserter, evidence as to statements by plaintiff showing his intention to enter into the military service is inadmissible, the question being whether plaintiff had actually become a soldier when defendants assumed to exercise military authority over him.—Tyler v. Pomeroy, 8 Allen, Mass., 480.
(2) Correspondence between plaintiff and defendant in which plaintiff refused to allow defendant's physicians to make a physical examination should have been excluded, where the uncontroverted evidence showed that later he agreed to an examination and that one was made.—Galveston, H. & S. A. R. Co. v. Hughes, Tex.Civ. App., 91 S.W. 643.

79. U.S.—Domareck v. Bates Motor

ment itself possesses these characteristics it is not necessary that the transaction in connection with which it was made should be relevant and material.[80]

An admission indicating bad faith in connection with prosecution or defense of an action should be received.[81]

§ 277. Certainty

An admission should possess the same degree of certainty as would be required in the evidence which it represents. The statement need not be a direct, but may be an indirect, admission.

An admission should possess the same degree of certainty as would be required in the evidence which it represents,[82] and hence mere conjectures[83] or suggestions as to what might have happened if certain circumstances had not occurred[84] are not competent; neither should an alleged admission be considered where the subject matter to which it refers is left uncertain.[85] It is not necessary that the statement should be a direct admission; it may be an indirect admission, as where it bears on the issue incidentally or circumstantially.[86] A statement is not competent as an admission where it does not, under a reasonable construction, appear to admit or acknowledge the fact which is sought to be proved by it.[87]

Transport Lines, C.C.A.Ill., 93 F.2d 522.
Miss.—Lanham v. Wright, 142 So. 5, 164 Miss. 1.
Neb.—McDaniel v. Farlow, 271 N.W. 905, 132 Neb. 273.
Tex.—Tinker v. Yellow Cab Co., Civ. App., 74 S.W.2d 521, error dismissed.
22 C.J. p 300 note 33.

Remoteness in point of time may afford sufficient reason for rejecting an admission.
Kan.—Central Branch Union Pac. R. Co. v. Andrews, 14 P. 509, 37 Kan 162.
Tex.—Kuehn v. Kuehn, Civ.App., 259 S.W. 290.
22 C.J. p 180 note 55, p 300 note 33 [a].

Changed conditions
In proceedings to condemn land for a river improvement project, admissions as to benefits from improvement made by riparian owners, when the project was first considered, and when it was materially different from the project finally executed, could be excluded by the trial court without abusing the discretion vested in it.—U. S. v. River Rouge Improvement Co., C.C.A.Mich., 285 F. 111, reversed on other grounds 46 S.Ct. 144, 269 U.S. 411, 70 L.Ed. 339.

Admissions held material
Md.—Hynes v. Wilson, 128 A. 70, 147 Md. 360.
Neb.—Falkinburg v. Interstate Business Men's Accident Co. of Des Moines, Iowa, 272 N.W. 924, 132 Neb. 924.
22 C.J. p 300 note 33 [b].

Admissions held immaterial
(1) The evidence of a witness as to an admission of notice of a fact which if received prior to the purchase of land would prevent a party from rescinding the transaction on the ground of fraudulent representations, and which if received after the purchase and payment of purchase price would not affect his right, was properly disregarded as immaterial, where witness failed to show that notice was received prior to purchase.—Bell v. Kyle, 192 P. 512, 27 N.M. 9.

(2) In action for personal injuries and damage to plaintiff's automobile, when run into by truck forced that way by defendant's car, defendant's evidence that owners of truck had offered to settle with plaintiff's counsel for one thousand dollars was properly excluded as immaterial.—Foley v. Lord, 122 N.E. 393, 232 Mass. 368.

80. Utah.—Meyers v. San Pedro, L. A. & S. L. R. Co., 104 P. 736, 36 Utah 307, 21 Ann.Cas. 1229.

81. R.I.—Eastman v. Dunn, 83 A. 1057, 34 R.I. 416.

On ground of public policy
Evidence that a defendant said, during a conversation with plaintiff, when the possibility of a settlement was being discussed, that if plaintiff brought him into court there would not be a chance in the world for plaintiff, as defendant and his codefendants had "rehearsed their story over and over," and defendant "would swear the court house out, if necessary," was admissible as a matter of public policy, if for no other reason.—Eastman v. Dunn, supra.

82. U.S.—St. Louis Car Co. v. Glover Equipment Co., C.C.A.Mo., 298 F. 404.
Miss.—Lanham v. Wright, 142 So. 5, 164 Miss. 1.
22 C.J. p 300 note 36.
"An admission must be certain, consistent, and definite. It must be couched in language reasonably capable, without forced or strained construction, to bear the interpretation sought to be placed on it."—Pulver v. Union Inv. Co., C.C.A.Minn., 279 F. 699, 705.

83. U.S.—Pulver v. Union Inv. Co., supra.
Miss.—Lanham v. Wright, 142 So. 5, 164 Miss. 1.
Mo.—Inzerillo v. Chicago, B. & Q. R. Co., 35 S.W.2d 44, 225 Mo.App. 1213.
22 C.J. p 300 note 37.

84. Miss.—Lanham v. Wright, 142 So. 5, 164 Miss. 1.
22 C.J. p 300 note 38.
"**Suppositious statements** are excluded."—Pulver v. Union Inv. Co., C.C.A.Minn., 279 F. 699, 705.

85. U.S.—Lubriko Co. v. Wyman, C.C.A.Pa., 290 F. 12.
Wyo.—Smith v. Beard, 110 P.2d 260, 274, citing **Corpus Juris.**
22 C.J. p 300 note 39.

Subject matter indicated by other evidence
Evidence as to statements made to a witness by a party about a hog was properly admitted over objection that the witness did not know what hog the party was referring to, where there was other evidence from which the jury could infer that he was referring to the hog involved in the action.
Ala.—Hesk v. Ellis, 75 So. 329, 200 Ala. 17.
Mass.—Nichols v. Allen, 112 Mass. 23.

86. Ky.—Coleman v. McIntosh, 211 S.W. 872, 184 Ky. 370.
22 C.J. p 300 note 41.

87. U.S.—Pulver v. Union Inv. Co., C.C.A.Minn., 279 F. 699.
Cal.—Cabrera v. Thannhauser & Co., 192 P. 45, 183 Cal. 604—Barr v. Branstetter, 184 P. 409, 42 Cal. App. 725.
Mo.—Grovier Produce Co. v. T. C. Bottom Produce Co., App., 209 S.W. 619.
N.H.—Derosier v. New England Telephone & Telegraph Co., 130 A. 145, 81 N.H. 451.
Wash.—Proctor v. Appleby, 188 P. 481, 110 Wash. 403.
Construction of statements see infra § 377.

Statements held not admissions
(1) Insurance carrier's check to hospital, with notation thereon that it was for X-ray examination of one injured at insured's plant, was not admissible as admission by insured that employee suffered injury as alleged.—McMahon v. Edward G. Budd

§ 278. Voluntary Character

An admission is not competent unless it was made voluntarily.

An admission is not of sufficient probative weight to be competent unless it is voluntary;[88] and hence a statement obtained or made under duress,[89] particularly when coupled with fraud,[90] is not competent as an admission; but an admission does not lose its voluntary character because it was made before an arbitrator,[91] a magistrate taking a deposition,[92] or an immigration officer,[93] and an admission, otherwise voluntary, is not incompetent because made in the grand jury room, in the presence of the jurors, where declarant was not sent for as a witness, and the jury were not in session.[94] It has also been held that an admission does not lose its voluntary character because made while the declarant was in the custody of an officer of the law.[95] The fact that an admission is made in response to a false suggestion of fact does not render it inadmissible.[96]

Mistake, ignorance of language, etc. A statement made by reason of a mistake is admissible,[97] as is a statement made by one hysterical but not unconscious.[98] It has been held that a statement is admissible despite the claim of the party who signed it that he was unable to read or understand it,[99] but it has also been held that a statement in a paper signed by mark by one who could neither read nor write could not constitute an admission.[1]

Mfg. Co., 164 A. 850, 108 Pa.Super. 235.

(2) A letter written by an insurance company after a fire, giving notice of the cancellation of the policy, with the statement "The above notice will not affect liability, if any, for loss and damage alleged to have occurred on" the date of the fire, was not an admission of the liability.—Leland v. Fireman's Ins. Co., 20 Erie Co. 65, 52 York Leg.Rec. 9, reversed on other grounds 193 A. 475, 127 Pa. Super. 533.

(3) In action for refusal to convey realty, defendant's listed price was inadmissible as admission of fair market price.—Baker v. Ellis, 244 Ill. App. 330.

(4) An expression of willingness to give something to another as a favor is not an admission of an obligation.—Razer v. Brown, 101 So. 398, 156 La. 1008—Junk v. Golden Ranch Sugar & Cattle Co., 48 So. 267, 122 La. 794.

(5) A statement that one will not appeal is not an admission of liability.—Lee v. Moore, 161 Ill.App. 643.

(6) A subsequent deed, executed by the successor of a grantor of a vein of coal in the land described, from which was excepted the coal claimed by the grantee's successor, was not an admission of adverse ownership.—Laidley v. Rowe, 119 A. 474, 275 Pa. 389.

(7) In a dentist's action against a father for services to his minor son, the father's answer to a bill made out against the son, but sent to him, the father, that it would not be paid "for quite some time yet," was neither an admission of liability on his part nor evidence of ratification of the son's act in contracting for the services.—Stimpson v. Hunter, 125 N. E. 155, 234 Mass. 61, 7 A.L.R. 1067.

(8) A statement that one will not claim damages is not an admission that he has suffered none.—Driscoll v. Taunton, 36 N.E. 495, 160 Mass. 486.

(9) An unreceipted bill has no probative effect as an admission.—Pleasanton v. Simmons, 47 A. 697, 18 Del. 477.

(10) Other statements.

U.S.—Baxter v. Continental Casualty Co., C.C.A.Mo., 48 F.2d 467, appeal dismissed 52 S.Ct. 2, 284 U.S. 578, 76 L.Ed. 502.

Ark.—Creasey Grocery Corporation v. Southern Mercantile Co., 277 S.W. 513, 169 Ark. 1046.

Md.—Severin v. Robert S. Green, Inc., 170 A. 731, 166 Md. 305.

Mass.—Saad v. Steuer, 134 N.E. 370, 241 Mass. 31.

Mo.—Studt v. Leiweke, App., 100 S. W.2d 30—Inzerillo v. Chicago, B. & Q. R. Co., 35 S.W.2d 44, 225 Mo. App. 1213.

88. Pa.—Logue v. Gallagher, 3 A.2d 191, 133 Pa.Super. 570—Knierim v. Pfeil, 6 Sch.Reg. 329.

Tex.—National Union Fire Ins. Co. of Pittsburgh, Pa., v. Richards, Civ.App., 290 S.W. 912.

22 C.J. p 301 note 43.

"The sole test [of admissibility of an admission] is the voluntary character of the statement."—Joong Sui Noon v. U. S., C.C.A.Mo., 76 F.2d 249, 251.

89. U.S.—Gulotta v. United States, C.C.A.Mo., 113 F.2d 683, 686, citing **Corpus Juris.**

N.Y.—Adams v. F. W. Woolworth Co., 257 N.Y.S. 776, 144 Misc. 27.

22 C.J. p 301 note 44.

90. N.Y.—Adams v. F. W. Woolworth Co., 257 N.Y.S. 776, 144 Misc. 27.

91. Md.—Calvert v. Friebus, 48 Md. 44.

92. S.C.—McGahan v. Crawford, 25 S.E. 123, 47 S.C. 566.

93. U.S.—U. S. v. Chan Nom Gee, D. C.Wash., 47 F.2d 758, affirmed, C. C.A., Chan Nom Gee v. U. S., 57 F. 2d 646.

Hawaii.—Matter of Umeno, 3 Hawaii Fed. 481.

94. Ky.—Collins v. Wilson, 39 S.W. 33, 18 Ky.L. 1049.

22 C.J. p 301 note 49.

95. Ill.—Reed v. Kabureck, 229 Ill. App. 36.

N.Y.—Notara v. De Kamalaris, 49 N.Y.S. 216, 22 Misc. 337.

Applicability of "Sweating Act"

Since the "Sweating Act" renders inadmissible only such statements as are obtained from a person in custody charged with a crime and questioned in an attempt to obtain information concerning his connection with or knowledge thereof, statements made to officers were not inadmissible where the parties had not been arrested and were not in custody charged with a crime, and the officers had merely been sent to notify them that the county attorney wanted to see them.—Marsee v. Hunt's Adm'x, 55 S.W.2d 376, 246 Ky. 503.

96. Mo.—Higgins v. Dellinger, 22 Mo. 397.

97. Pa.—Purcell v. Metropolitan Life Ins. Co., 3 A.2d 340, 332 Pa. 535.

Tex.—Cooper Grocery Co. v. Neblett, Civ.App., 203 S.W. 365, reversed on other grounds, Com.App., 221 S. W. 963.

98. Mo.—Friedman v. United Rys. Co. of St. Louis, 238 S.W. 1074, 293 Mo. 235.

99. Mass.—Hovanesian v. Boyajian, 4 N.E.2d 1006, 296 Mass. 165.

R.I.—Parenteau v. Parenteau, 153 A. 872, 51 R.I. 263.

1. U.S.—Mitchell v. Toole, C.C.A. Miss., 287 F. 25.

Admission of signature but denial of statement see infra § 282.

§ 279. Oral Admissions

Oral admissions are competent evidence as to such facts as are provable by parol evidence; and this is true even where there is an admission in writing to the same effect.

Apart from the many cases involving oral admissions which have been referred to in other connections in this discussion of extrajudicial admissions, it has been frequently held that oral admissions of a party are competent evidence against him,[2] as to such facts,[3] and such facts only,[4] as are provable by parol evidence. This is true even though there is an admission in writing to the same effect,[5] such as a promissory note;[6] and it is likewise true although a writing might be required to achieve the same result in the absence of such an admission.[7] So, also, the existence of any facts which are legally competent at law or in equity to affect the operation of a written instrument may be established by oral admissions.[8]

§ 280. Through Interpreter

If the parties have voluntarily agreed to such method of conversation, an admission made through an interpreter is admissible; and it is generally held that such an admission may be proved by evidence other than that of the interpreter.

A competent oral admission may be made through an interpreter,[9] where such method of conversation is, in some manner, voluntarily adopted by the parties.[10] It is generally held that such admissions may be proved otherwise than by the evidence of an interpreter;[11] but there is some authority to the contrary,[12] and it has also been held that an admission made through an interpreter is not admissible unless the interpreter is produced as a witness to testify that he translated truly.[13]

§ 281. Over Telephone

If the speaker is sufficiently identified, an admission made over the telephone is competent evidence.

An admission made in a telephone conversation may be proved,[14] where the witness identified the speaker[15] by his voice[16] or otherwise,[17] and there is no doubt as to the identity of the person who made the admission.[18] Where a person's telephone number is called and there is a response and reply from one who assumes to be or to represent the person called, admissions made by the person answering are received without proof of the identity of the speaker.[19] On the other hand, it has been held that the

2. Ala.—Smith v. Sharp, 98 So. 566, 210 Ala. 587—Bains Motor Co. v. Lecroy, 96 So. 483, 209 Ala. 345.
Cal.—Herbert v. Lankershim, 71 P.2d 220, 9 Cal.2d 409.
Del.—Conner v. Brown, 3 A.2d 64, 9 W.W.Harr. 529.
Ill.—Schaffner v. Equitable Life Assur. Soc. of U. S., 8 N.E.2d 212, 290 Ill.App. 174—Reed v. Kaburek, 229 Ill.App. 36.
Neb.—McDaniel v. Farlow, 271 N.W. 905, 132 Neb. 273.
N.H.—Caplan v. Caplan, 142 A. 121, 83 N.H. 318.
22 C.J. p 301 note 53.

3. Tex.—Addison v. Ball, Civ.App., 262 S.W. 877, 883, citing **Corpus Juris**—Pyron v. Brownfield, Civ.App., 238 S.W. 725.
22 C.J. p 301 note 54.

4. U.S.—Murphy v. Craig, C.C.A. Ariz., 28 F.2d 963.
22 C.J. p 301 note 54.

5. Me.—Blackington v. Rockland, 66 Me. 332.
N.Y.—Bayliss v. Cockcroft, 81 N.Y. 363.
Best evidence rule as affecting competency of admissions as to matters evidenced by writings or records see infra § 788.
Admission of contents of writings
When a party voluntarily reads a letter to another, such statement assumes the form of an admission by the party reading the letter as to its contents, and testimony of such admission becomes primary evidence.—Purinton v. Purinton, 63 A. 925, 101 Me. 250, 115 Am.S.R. 309, 8 Ann.Cas. 205.

6. Ala.—Chapman v. Peebles, 4 So. 273, 84 Ala. 283.
N.Y.—Dimon v. Keery, 66 N.Y.S. 817, 54 App.Div. 318.

7. N.Y.—Utica First Nat. Bank v. Ballou, 49 N.Y. 155.

8. Del.—Harris v. Harris, 2 Del. 354.
22 C.J. p 301 note 61.
Parol evidence affecting writings generally see infra §§ 851–864.
Character of agreement
Where written instrument was consistent with theory of both parties, admissions made by one of the parties after the execution of the contract were admissible as to the character of the agreement.—Pyron v. Brownfield, Tex.Civ.App., 238 S.W. 725.

9. Mass.—O'Brien v. Bernoi, 8 N.E.2d 780, 297 Mass. 271.
22 C.J. p 301 note 62.

10. Mo.—Dickey v. Supreme Tribe of Ben Hur, 269 S.W. 633, 218 Mo.App. 281.

11. Mass.—O'Brien v. Bernoi, 8 N.E.2d 780, 297 Mass. 271.
Mo.—Dickey v. Supreme Tribe of Ben Hur, 269 S.W. 633, 634, 218 Mo.App. 281, citing **Corpus Juris.**
22 C.J. p 301 note 63.
Mode of proof of admissions generally see infra § 372.

12. Ill.—Szczech v. Chicago City Ry. Co., 157 Ill.App. 150.

13. Mont.—Vukmanovich v. State Assur. Co. of Liverpool, England, 264 P. 933, 82 Mont. 52.

14. U.S.—Harold Lloyd Corporation v. Witwer, C.C.A.Cal., 65 F.2d 1, reversing, D.C., Witwer v. Harold Lloyd Corporation, 46 F.2d 792, certiorari dismissed 54 S.Ct. 94, 78 L.Ed. 1507—Sollows v. McCann Erickson, Inc., D.C.N.Y., 27 F.Supp. 491.
22 C.J. p 301 note 65.
Evidence of telephone conversations generally see supra § 188.

15. Conn.—General Hospital Soc. v. New Haven Rendering Co., 65 A. 1065, 79 Conn. 581, 118 Am.S.R. 173, 9 Ann.Cas. 168.
22 C.J. p 302 note 66.
Connecting admissions generally see supra § 371.

16. Iowa.—Conkling v. Standard Oil Co., 116 N.W. 822, 138 Iowa 596.
22 C.J. p 302 note 67.

17. Ky.—Holzhauer v. Sheeny, 104 S.W. 1034, 127 Ky. 28, 31 Ky.L. 1238.
22 C.J. p 302 note 68.

18. Mich.—Harrison Granite Co. v. Pennsylvania R. Co., 108 N.W. 1081, 145 Mich. 712.

19. Cal.—Smith v. Hollander, App., 257 P. 577, 580, citing **Corpus Juris.**
22 C.J. p 302 note 70.

mere statement of the person responding to a telephone call that he is the manager of the corporation called is insufficient proof of such fact so as to render his admissions over the telephone admissible against the corporation.[20]

Use of intermediary. A telephone conversation is competent notwithstanding the fact that it was necessary to use the services of an intermediary,[21] and such intermediary has forgotten what was said.[22]

§ 282. Written Admissions

An admission may be contained in a writing made by a party or his authorized agent, or adopted by him by some unequivocal act.

An admission may be contained in a writing,[23] including writings of the character which are customarily employed in mercantile affairs,[24] made by a party, or by his authorized agent, or adopted by him[25] by some unequivocal act, such as revising them,[26] or admitting their correctness when they are shown or read over to him.[27]

Admission of signature but denial of statement. In an action for personal injuries a written statement signed by plaintiff and claimed to have been made by him prior to the action, giving the circumstances of his injury, is admissible although plaintiff, while admitting his signature, denies having said the things contained therein.[28]

---

20. Mo.—Shelton v. Wolf Cheese Co., 93 S.W.2d 947, 338 Mo. 1129.
Proof of agency of declarant generally see infra § 344.

21. Ky.—Sullivan v. Kuykendall, 82 Ky. 483, 56 Am.R. 901.
Neb.—Oskamp v. Gadsden, 52 N.W. 718, 35 Neb. 7, 37 Am.S.R. 428, 17 L.R.A. 440.

22. Ky.—Sullivan v. Kuykendall, 82 Ky. 483, 56 Am.R. 901.

23. Ill.—Reed v. Kabureck, 229 Ill. App. 36.
N.J.—U. S. Fidelity & Guaranty Co. v. Coatsworth, 112 A. 313, 95 N.J. Law 108.
Pa.—Heyman v. Hanauer, 152 A. 910, 302 Pa. 56.
22 C.J. p 302 note 74.
Book entries as admissions see infra § 694.

Verification not necessary
Where a writing is signed by the party against whom it is sought to be introduced as an admission, it is not necessary that it should have been sworn to by him.—Leonard v. King, Tex.Civ.App., 135 S.W. 742.

Signature by mark
Written statement of plaintiff, signed, with assistance, by his mark, while confined to bed a few days after injury, was proper as admission.—Grossnickle v. Avery, 152 N.E. 288, 96 Ind.App. 479, rehearing denied 154 N.E. 395.

Writings held admissions
(1) In building contractor's action for work and material, owner's written agreement to execute mortgage in payment was admissible as admission respecting amount due contractor.—Baumgartner v. Hearn Const. Co., 143 So. 789, 106 Fla. 867.

(2) Statement of father in records that infants had been stillborn was admission against interest.—Wehrman v. Farmers' & Merchants' Sav. Bank of Durant, 259 N.W. 564, 221 Iowa 249, rehearing overruled 266 N.W. 290, 221 Iowa 249.

(3) Card signed by defendant, acknowledging purchase at auction, was admissible for purpose of showing she purchased property for twelve thousand three hundred dollars, with certain costs.—Spellman v. Bradley, 115 So. 403, 165 La. 106.

(4) Amount of deposits shown by books of bank was held to constitute admission regarding amount of deposits during period under consideration.—Peart v. Schwenker, 227 N.W. 945, 200 Wis. 200.

(5) Other writings.
U.S.—Fidelity & Casualty Co. of New York v. Martin, C.C.A.Mont., 66 F.2d 438.
Ariz.—Rodgers v. Berger, 103 P.2d 266, 55 Ariz. 433.

24. Tex.—Olschewske v. Priester, Civ.App., 264 S.W. 517, reversed on other grounds, Com.App., 276 S.W. 647.
22 C.J. p 303 note 75.

Declaration of trust and assignment setting out list of creditors and amount due constituted admission of indebtedness.—Kendall v. San Pedro Lumber Co., 276 P. 1042, 98 Cal. App. 242.

25. U.S.—Roche v. Commissioner of Internal Revenue, C.C.A.Ala., 63 F.2d 623.
N.Y.—Prout v. Chisolm, 47 N.Y.S. 376, 21 App.Div. 54.
Tex.—Wise v. Haynes, Civ.App., 103 S.W.2d 477.
Vt.—Smith v. Martin, 106 A. 666, 93 Vt. 111.
22 C.J. p 303 note 76.
"The use by a party of a document made by another sometimes amounts to an approval of its statements as correct, in which case the document may be received against him as an admission."—Smith v. Reynolds, 108 A. 697, 700, 94 Vt. 28.

Writings held adopted
(1) By introduction into evidence.—Oliver v. Brennan, D.C.Cal., 292 F. 197, affirmed, C.C.A., In re Wright Motor Co., 299 F. 106.

(2) By incorporation in proof of loss.—St. Louis & Tennessee River Packet Co. v. Nowland, 215 S.W. 11, 279 Mo. 500.

(3) By reference.—Klein v. Prudential Ins. Co. of America, 117 N.E. 942, 221 N.Y. 449, affirming 150 N.Y.S. 1092, 165 App.Div. 986.

Writings held not adopted
(1) A report by a real estate dealer appraising certain properties which was submitted with other data to the consideration of the interstate commerce commission for tentative valuation purposes was not adopted by the submitting railroad so as to constitute it evidence of an admission against interest in a subsequent tax proceeding.—People ex rel. Lehigh Valley Ry. Co. v. Burke, 160 N.E. 19, 247 N.Y. 227, reversing 223 N.Y.S. 168, 221 App.Div. 248.

(2) Other cases see State v. King, 63 S.E. 468, 64 W.Va. 546—22 C.J. p 303 note 76 [b].

26. Ill.—Henkle v. Smith, 21 Ill. 238.

27. Ala.—Huggins v. Southern R. Co., 41 So. 856, 148 Ala. 153.
Or.—Pacific Export Lumber Co. v. North Pac. Lumber Co., 80 P. 105, 46 Or. 194.
22 C.J. p 303 note 78.

28. Ark.—St. Louis, I. M. & S. R. Co. v. Dallas, 124 S.W. 247, 93 Ark. 209.
Ky.—Davis v. Antol, 262 S.W. 278, 203 Ky. 273.

No estoppel
Where a statement admittedly signed by plaintiff, is competent and relevant, the doctrine of estoppel cannot be invoked to prevent its introduction, even though there is evidence to the effect that plaintiff did not state some of the things contained therein.—Watkins v. Metropolitan Life Ins. Co., 250 S.W. 350, 158 Ark. 386.

§ 283. Particular Documents or Writings

Competent admissions may be made in sealed instruments, promissory notes, letters, telegrams, memoranda, and an almost endless variety of miscellaneous writings. The authorities are not in harmony on the question of the competency of tax returns and assessments as evidence of admissions.

A competent admission may be made in a sealed instrument, such as a bond,[29] a deed,[30] a mortgage,[31] a lease,[32] a release,[33] or an assignment of a judgment.[34]

Promissory notes. A promissory note or an indorsement thereon may embody an admission[35] of the amount lent[36] or paid[37] thereon.

Memoranda. Provided they are sufficiently definite, memoranda may constitute admissions and be received as prima facie evidence,[38] and this is true even though they be of an informal character,[39] and are not signed.[40] Memoranda are competent as admissions regardless of whom they are given to,[41] and, indeed, even though they are intended only for private inspection.[42] Of course, a memorandum which does not have the probative force to show an admission, is inadmissible as such.[43]

Letters. Letters written by a party or by his authorized agent may constitute written admissions,[44]

29. N.M.—Southern Car Mfg. & Supply Co. v. Wagner, 89 P. 259, 14 N. M. 195.
22 C.J. p 303 note 80.

30. Pa.—Tursi v. Parry, 5 A.2d 399, 135 Pa.Super. 285.
Philippine.—Naval v. Enriguez, 3 Philippine 669.
Tex.—Johnson v. Conger, Civ.App., 166 S.W. 405.
22 C.J. p 303 note 81.

Correction deed
In action involving title to land, a correction deed, even though not passing legal title to heirs or grantee of deceased grantee, was admissible as an admission on grantor's part as to a mistake of description in the original deed, even though executed after the institution of the suit.—Lott v. Dashiell, Tex.Civ.App., 233 S.W. 1103, modified on other grounds Dashiel v. Lott, Com.App., 243 S.W. 1072.

31. Me.—Bradstreet v. Winter, 109 A. 482, 119 Me. 30.
22 C.J. p 303 note 82.

Deed of trust
Tex.—Yates v. Home Building & Loan Co., Civ.App., 103 S.W.2d 1081.

Chattel mortgage
Tex.—Martin v. Auto Finance Co., Civ.App., 25 S.W.2d 919.

32. Miss.—Pope v. Ivy, 78 So. 367, 117 Miss. 501.

33. Ky.—Bement v. Ohio Valley Banking & Trust Co., 35 S.W. 139, 99 Ky. 109, 18 Ky.L. 37, 59 Am.S.R. 445.
22 C.J. p 303 note 84.

34. Pa.—Hennessy's Estate, 4 L.T. N.S. 9.

35. Ala.—Turrentine v. Grigsby, 23 So. 666, 118 Ala. 380.
22 C.J. p 303 note 86.

Consideration immaterial
Note admitting legality of city's assessment could be pleaded as admission against interest, whether there was consideration or not.—City of McComb v. Flowers, 125 So. 565, 156 Miss. 87.

Unsigned note drawn by defendant, but which he refused to execute, is admissible to show the amount of his indebtedness.—Turrentine v. Grigsby, 23 So. 666, 118 Ala. 380.

36. N.Y.—Scudder v. Kelly, 140 N. Y.S. 611, 156 App.Div. 877.

Amount for which discounted
Ala.—Colgin v. State Bank, 11 Ala. 222.

37. Md.—Murdock v. Schindel, 98 A. 149, 128 Md. 633.
22 C.J. p 303 note 88.

38. Ala.—Gulf Red Cedar Co. v. Crenshaw, 65 So. 1010, 188 Ala. 606.
Ga.—Walker v. Rome, 64 S.E. 310, 6 Ga.App. 59.
Certainty of admission see supra § 277.

39. Md.—Corbin v. Staton, 115 A. 23, 139 Md. 150.
22 C.J. p 305 note 10.

Memorandum of purchases
In action for conversion of wheat on which plaintiff had chattel mortgage, contents of memorandum of wheat purchased by defendant from chattel mortgagor were admissible as admission against interest as against contention that such testimony was hearsay.—Hilker v. Agricultural Bond & Credit Corporation, Tex.Civ.App., 96 S.W.2d 544, error dismissed.

40. Ga.—Gaines v. Gaines, 39 Ga. 68.
22 C.J. p 305 note 12.

Buyer's notebook
In action for price of barrels, notebook kept by buyer containing admissions against interest as to number of barrels received and confirming testimony of seller's employee as to entries made by seller in calendar sheet, which had been lost at time of trial, was properly admitted.—Corbin v. Staton, 115 A. 23, 139 Md. 150.

41. Cal.—Altube v. Aguirre, 212 P. 217, 59 Cal.App. 762.
To whom made generally see supra § 271.

42. Cal.—Altube v. Aguirre, supra.
Vt.—Stannard v. Smith, 40 Vt. 513.

43. N.Y.—Rosenberger v. Simons, 185 N.Y.S. 317.

44. U.S.—New York Alaska Gold Dredging Co. v. Walbridge, C.C.A. Alaska, 76 F.2d 655—Helvering v. Miller, C.C.A.N.Y., 75 F.2d 474—A. C. Lawrence Leather Co. v. Compagnie Générale Transatlantique, C.C.A.N.Y., 18 F.2d 930, affirming, D.C., 12 F.2d 83, and certiorari denied Compagnie Generale Transatlantique v. A. C. Lawrence Leather Co., 47 S.Ct. 770, 274 U.S. 761, 71 L.Ed. 1338.
Ala.—Pilot Life Ins. Co. of Greensboro, N. C., v. Hawkins, 131 So. 889, 222 Ala. 218—Tennessee Valley Bank v. Valley View Farm, 97 So. 62, 210 Ala. 123.
Ark.—Head v. Winship, 297 S.W. 841, 174 Ark. 1179—Davis v. Falls, 288 S.W. 723, 172 Ark. 314.
Cal.—Bank of Italy Nat. Trust & Savings Ass'n v. Johnson, 46 P.2d 244, 7 Cal.App.2d 463.
Ga.—Terrell v. Harris, 157 S.E. 387, 42 Ga.App. 760—Bell v. Tucker, 139 S.E. 573, 37 Ga.App. 254.
Idaho.—Furst & Thomas v. Elliott, 56 P.2d 1064, 1071, 56 Idaho 491, citing **Corpus Juris**—Rowland v. Demming Exploration Co. Trustees, 260 P. 1032, 45 Idaho 99.
Mich.—Majewski v. Martin Bros. Barrel & Box Co., 203 N.W. 102, 230 Mich. 548.
Minn.—Brodsky v. Brodsky, 222 N.W. 931, 176 Minn. 198.
Mo.—Huttig v. Brennen, 41 S.W.2d 1054, 328 Mo. 471—Globe American Corporation v. Miller, 131 S.W.2d 340, 234 Mo.App. 253—Porter v. Equitable Life Assur. Soc. of U. S., App., 71 S.W.2d 766—Mayhew v. Travelers' Protective Ass'n of America, App., 52 S.W.2d 29—Vail v. Beavers, App., 34 S.W.2d 546—Smith v. North British & Mercantile Ins. Co., 263 S.W. 1031, 214 Mo. App. 539.
Mont.—Northwestern Electric Equipment Co. v. Leighton, 213 P. 1094, 66 Mont. 529.
N.Y.—Seneca Wire & Mfg. Co. v. A. B. Leach & Co., 159 N.E. 700, 247

and to render them admissible in evidence it is not necessary that they shall have been sent to the party offering them,[45] or that the letters to which they are replies shall be produced or accounted for.[46]

In accordance with the general rules governing admissions considered supra §§ 272–278, letters are not admissible as admissions where they are irrelevant[47] or have no probative force as respects the fact in issue,[48] or where the alleged admissions contained therein are not sufficiently definite or certain,[49] or where the letters do not themselves show an admission of some fact.[50]

Telegrams. A telegram may be given in evidence as an admission provided it is shown that it actually emanated from the party against whom it is sought to be used,[51] or that the statements therein are fairly attributable to him.[52] The fact that the telegram was sent to one other than the party offering it does not render it inadmissible.[53]

Tax returns and assessments. Except where they are clothed with a statutory privilege against disclosure,[54] returns for taxation, being statements of the party to be affected under circumstances in which it is incumbent on him to disclose the truth, are regarded by the great weight of authority as admissions which may be received in evidence,[55]

N.Y. 1, reversing 219 N.Y.S. 478, 219 App.Div. 702—Balcourt v. Metropolitan Life Ins. Co., 18 N.Y.S.2d 30, 173 Misc. 422.
Ohio.—Harrison Bldg. Co. v. Beckerman, 156 N.E. 919, 24 Ohio App. 202.
Or.—Hayes v. Cummings, 236 P. 756, 115 Or. 13.
Pa.—Purcell v. Metropolitan Life Ins. Co., 3 A.2d 340, 332 Pa. 535—Doylestown Aluminum Ware Co. v. Stern, 90 Pa.Super. 332.
S.C.—Appleby v. Reserve Loan Life Ins. Co., 172 S.E. 776, 172 S.C. 42—Southern Coal Co. v. Rice, 115 S.E. 815, 122 S.C. 484.
Tenn.—Home Indemnity Co. of New York v. Bogue, 79 S.W.2d 580, 168 Tenn. 493—Horn v. Goodman, 1 Tenn.App. 90.
Tex.—Joy v. Peacock, Civ.App., 131 S.W.2d 1012, error granted.
22 C.J. p 303 note 89, p 905 note 49.

Correspondence between parties showing admissions against interest is admissible.
U.S.—Curtis v. Harris, Davis & Co., C.C.A.Ala., 272 F. 265.
Va.—Bardach Iron & Steel Co. v. Tenenbaum, 118 S.E. 502, 136 Va. 163.

Part of letter gone
A letter, whose contents could be interpreted as admission of indebtedness admitted to have been written by defendant, was admissible against him although part thereof was gone.—Decatur Fertilizer Co. v. Walls, 102 So. 32, 212 Ala. 226.

Death of writer
The fact that the writer of a letter is dead and that the party receiving the letter, being an interested person, cannot testify against his estate does not render the letter itself inadmissible.—Harriman v. Jones, 58 N.H. 328.

45. U.S.—Texas Co. v. Brilliant Mfg. Co., C.C.A.Pa., 2 F.2d 1.
Ala.—Penney v. State, 128 So. 596, 221 Ala. 230—Grand Lodge, K. P., v. Yancy, 156 So. 575, 26 Ala.App. 152, certiorari denied 156 So. 579, 229 Ala. 239.
Cal.—Powers v. Board of Public Works, 15 P.2d 156, 216 Cal. 546—McCullough v. Langer, 73 P.2d 649, 23 Cal.App.2d 510.
Ky.—Coleman v. McIntosh, 211 S.W. 872, 184 Ky. 370.
N.Y.—Hallenbeck v. S. Wander & Sons Chemical Co., 189 N.Y.S. 334, 197 App.Div. 855.
Vt.—In re Wells' Will, 113 A. 822, 95 Vt. 16.
22 C.J. p 304 note 90, p 905 note 90.
To whom admissions generally must be made see supra § 271.

To state insurance fund
Where issue was whether newspaper carrier, whose motorcycle struck plaintiff, was company's servant or independent contractor, company's letter to state insurance fund which indicated that, after the accident and a prior decision, a contract was made with carriers as independent contractors, and which stated that theretofore carriers had been classified as "employees" under "chauffeurs," was admissible.—Joslin v. Idaho Times Pub. Co., 91 P.2d 386, 60 Idaho 235.

46. Mass.—Wiggin v. Boston & A. R. Co., 120 Mass. 201.
47. S.C.—Clark v. Columbia Ry., Gas & Electric Co., 108 S.E. 178, 117 S.C. 11.
48. U.S.—Domarek v. Bates Motor Transport Lines, C.C.A.Ill., 93 F.2d 522.
Miss.—Tanham v. Wright, 142 So. 5, 165 Miss. 1.

Threatening letter by defendant to plaintiff is admissible in automobile collision case to show falsity of defense.—Chatfield v. Morgan, 131 A. 845, 99 Vt. 337.

49. Miss.—Tanham v. Wright, 142 So. 5, 164 Miss. 1.

Uncertainty of subject matter
Letter written by plaintiff, expressing alarm, because addressee had revealed conversation, but not showing to what the writer referred, could not be admitted as an admission, and the jury allowed to conjecture that defendant referred to the same matter about which the addressee testified.—Lubriko Co. v. Wyman, C.C.A.Pa., 290 F. 12.

50. U.S.—Lubriko Co. v. Wyman, supra.
51. Ky.—Hazelwood v. Woodward, 126 S.W.2d 857, 277 Ky. 447.
22 C.J. p 305 note 8, p 905 note 49.
52. Ark.—Head v. Winship, 297 S.W. 841, 174 Ark. 1179.

Approval
A telegram sent by a third person, but approved by defendant, and the answer thereto, are admissible against defendant.—Farnsworth v. Nevada Co., Utah, 102 F. 578, 42 C.C.A. 509.

53. Cal.—Rosenberg v. Geo. A. Moore & Co., 263 P. 806, 203 Cal. 211—San Francisco Iron & Metal Co. v. American Milling & Industrial Co., 1 P.2d 1008, 115 Cal.App. 238.
22 C.J. p 905 note 50.
Mo.—Brigham City Fruit Growers' Ass'n v. G. H. Zollmann Produce Co., 220 S.W. 911.

54. Mass.—Leave v. Boston Elevated Ry. Co., 28 N.E.2d 483, 306 Mass. 391—James Millar Co. v. Commonwealth, 146 N.E. 677, 251 Mass. 457—Brackett v. Commonwealth, 111 N.E. 1036, 223 Mass. 119, Ann.Cas.1918B 863.
N.Y.—People v. Isaac G. Johnson & Co., 210 N.Y.S. 92, 213 App.Div. 402.

55. U.S.—Roche v. Commissioner of Internal Revenue, C.C.A.Ala., 63 F.2d 623—U. S. v. Farrell, D.C.Conn., 35 F.2d 38.
Colo.—Bankers Trust Co. v. International Trust Co., 113 P.2d 656, 660, citing **Corpus Juris.**
Mo.—Seibel-Suessdorf & I. Mfg. Co. v. Manufacturers' Ry. Co., 130 S.W. 288, 230 Mo. 59—Banking House of Wilcoxin & Co. v. Darr, 41 S.W. 227, 139 Mo. 660.
22 C.J. p 305 note 15, p. 306 notes 18, 19.

Income tax
In action against corporation to recover balance due to plaintiff's intestate for services rendered by in-

even on the question of value.[56] However, some authorities hold that, since it is a known and common practice for property owners to minimize the value of the property listed by them in such returns, such returns are not to be considered or admitted as admissions against interest on the question of value,[57] although they may be admissible otherwise than as admissions.[58] On the other hand, tax lists or assessments which are not prepared by the person to be affected, and do not even represent, in all cases, the judgment of the person by whom they are prepared, as to the full value of property listed, are generally held not competent as admissions on a question as to value,[59] although some cases have held such assessments admissible where they were apparently based on the owner's valuation.[60]

The rule that in order to be received into evidence an admission must have been made by the party against whom it is offered, or by some one for whose admissions he is responsible, has been applied to tax returns or assessments.[61] Thus an assessment list or schedule not signed by the party against whom it is offered or by his agent,[62] nor, indeed, sworn to by any person,[63] is inadmissible. So, too, it has been held that tax returns of a corporation are not ordinarily competent as evidence of admissions by individual stockholders.[64] Tax assessments made by a state agency and not by a city are not competent as admissions by the city as to the character of property.[65]

Miscellaneous. The principle that written ad-

testate to corporation, copies of corporation's income tax statements were admissible as admissions of facts therein stated.—Wentz v. Guaranteed Sand & Gravel Co., 287 N.W. 113, 205 Minn. 611.

Omissions from returns

Tax returns purporting to list all of the taxpayer's property of a particular class which do not include the property in question are admissible as admissions against interest.

Ill.—Green v. Smith, 180 Ill.App. 572.

Kan.—Pfeifer v. Basgall, 211 P. 134, 112 Kan. 269.

56. U.S.—Rogers v. Helvering, C.C.A., 107 F.2d 394—McCandless v. U. S., C.C.A.Hawaii, 74 F.2d 596, 603, citing **Corpus Juris,** and certiorari granted 56 S.Ct. 308, 296 U.S. 570, 80 L.Ed. 403, reversed on other grounds 56 S.Ct. 764, 298 U.S. 342, 80 L.Ed. 1205—Great Falls Gas Co. v. Public Service Commission of Montana, D.C.Mont., 34 F.2d 297—Chicago & N. W. Ry. Co. v. Eveland, D.C.S.D., 285 F. 425, vacated on other grounds, C.C.A., 289 F. 783—Forbes v. U. S., C.C.A.Ala., 268 F. 273.

Colo.—Stone v. Union Fire Ins. Co., 107 P.2d 241, 106 Colo. 522.

Ga.—Southern R. Co. v. Tharp, 30 S.E. 795, 104 Ga. 560.

Iowa.—Haggard v. Independent School Dist., 85 N.W. 777, 113 Iowa 486.

Mo.—St. Louis, O. H. & C. Ry. Co. v. Fowler, 44 S.W. 771, 142 Mo. 670.

Tex.—City of Corpus Christi v. McLaughlin, Civ.App., 147 S.W.2d 576, error dismissed—Clark v. City of Eastland, Civ.App., 134 S.W.2d 509—Dickens County v. Dobbins, Civ.App., 95 S.W.2d 153—State v. Doom, Civ.App., 278 S.W. 255—Trinity & B. V. Ry. Co. v. Orenbaum, Civ.App., 173 S.W. 531—Missouri, K. & T. Ry. Co. of Texas v. Mitchell, Civ.App., 166 S.W. 126—Crystal City & U. R. Co. v. Isbell, Civ.App., 126 S.W. 47.

Wis.—Worthington Pump & Machinery Corporation v. City of Cudahy, 237 N.W. 140, 205 Wis. 227.

22 C.J. p 306 note 16.

Better authorities are said so to hold.—Rosenberger v. H. E. Wilcox Motor Co., 177 N.W. 625, 145 Minn. 408.

Personal property

(1) In an action for injuries to plaintiff's car, caused by defendant, a voluntary return by plaintiff to the county assessor, showing his automobile to be worth fifty dollars, was admissible as an admission against interest.—Donaghue v. Hayden, 208 P. 1007, 58 Cal.App. 457.

(2) In a case of trespass and negligence for damages to a stock of oil paintings, etc., which plaintiff testified were worth over twenty thousand dollars, the court erred in excluding affidavits of plaintiff made for his tax returns in which he swore that the gross amount of goods owned by him was four thousand dollars.—McCaughan v. John Hill Const. Co., Mo.App., 222 S.W. 917.

In condemnation proceeding, landowner's return of value to assessor is admissible as proof of admission.

Iowa.—Welton v. Iowa State Highway Commission, 233 N.W. 876, 882, 211 Iowa 625, citing **Corpus Juris.**

Minn.—Minneapolis-St. Paul Sanitary Dist. v. Fitzpatrick, 277 N.W. 394, 402, 201 Minn. 442, quoting **Corpus Juris.**

Tex.—Aue v. State, Civ.App., 77 S.W. 2d 606—Fort Worth & D. S. P. Ry. Co. v. Gilmore, Civ.App., 13 S.W. 2d 416.

57. Okl.—Phillips Petroleum Co. v. Malone, 66 P.2d 5, 179 Okl. 449—Winemiller v. Lorton, 249 P. 406, 121 Okl. 99.

In Kentucky

(1) The text rule has been followed.—Franklin County v. Bailey, 63 S.W.2d 662, 250 Ky. 528.

(2) There is also apparently contra authority.—Davisworth v. S. T. & J. M. Wright, 17 S.W.2d 756, 757, 229 Ky. 572, citing **Corpus Juris.**

Reasons for rule

"The valuation . . . was for a wholly different purpose from the present one. This court knows judicially and as a part of the financial history of the state that land is never assessed for purposes of taxation at its real cash market value, though that may be the law, but only in comparison with other lands around it, and, if petitioner valued it, we would presume she placed such comparative value, instead of the real market value, upon it."—Wray v. Knoxville, L. F. & J. Ry. Co., 82 S.W. 471, 475, 113 Tenn. 544—22 C.J. p 306 note 17 [a].

58. Ky.—Franklin County v. Bailey, 63 S.W.2d 662, 250 Ky. 528.

59. Colo.—Bankers Trust Co. v. International Trust Co., 113 P.2d 656, 660, citing **Corpus Juris**—Stone v. Union Fire Ins. Co., 107 P.2d 241, 106 Colo. 522.

Iowa.—Haggard v. Independent School Dist., 85 N.W. 777, 113 Iowa 486.

Okl.—Champlin Refining Co. v. Donnell, 49 P.2d 208, 173 Okl. 527, 103 A.L.R. 157.

22 C.J. p 306 note 17.

60. N.C.—Daniels v. Fowler, 31 S.E. 598, 123 N.C. 35.

61. Ind.—Bartlett v. Burden, 39 N. E. 175, 11 Ind.App. 419.

62. Colo.—Bankers Trust Co. v. International Trust Co., 113 P.2d 656.

63. Ind.—Meridian Mut. Fire Ins. Co. v. Sapkaris, 145 N.E. 784, 82 Ind.App. 272.

64. U.S.—Wiget v. Becker, C.C.A.Mo., 84 F.2d 706.

65. Pa.—City of Philadelphia v.

missions are competent has been applied to an almost endless variety of writings and documents,[66] among which may be mentioned receipts;[67] reports of agents or servants;[68] statements of the circumstances of an accident;[69] a report of an accident to a casualty company,[70] or an employers' liability insurance company;[71] mercantile agency reports;[72] contracts;[73] wills;[74] claims;[75] bills of lading;[76] waybills;[77] applications;[78] statements of account;[79] and reports required by rules or statutes.[80] Other

Brady, 157 A. 694, 104 Pa.Super. 79, affirmed 162 A. 173, 308 Pa. 135.

66. U.S.—Graff Furnace Co. v. Machler, C.C.A.Pa., 19 F.2d 989, certiorari denied 48 S.Ct. 38, 275 U.S. 543, 72 L.Ed. 416.
Mich.—Munroe, Boyce & Co. v. Ward, 174 N.W. 285, 207 Mich. 369.
Mo.—State ex rel. State Highway Commission v. Hoffmann, App., 132 S.W.2d 27.
N.Y.—In re Andrade's Estate, 299 N.Y.S. 329, 164 Misc. 714, affirmed 12 N.Y.S.2d 784, 257 App.Div. 813, motion denied 14 N.Y.S.2d 279, 257 App.Div. 958, reargument denied 14 N.Y.S.2d 279, 257 App.Div. 958—Morgan v. Hartog, 175 N.Y.S. 521.
Okl.—National Aid Life Ass'n v. Wiles, 41 P.2d 655, 657, 171 Okl. 57, quoting **Corpus Juris.**
Tex.—Metropolitan Life Ins. Co. v. Moss, Civ.App., 109 S.W.2d 1035, 1037, quoting **Corpus Juris.**
Utah.—Bracken v. Dahle, 251 P. 16, 68 Utah 486.
22 C.J. p 306 note 20.

67. Md.—Hazelwood v. Bittinger, 150 A. 713, 159 Md. 262.
Utah.—Browning v. Equitable Life Assur. Soc. of U. S., 72 P.2d 1060, 94 Utah 532, rehearing denied 80 P.2d 348, 94 Utah 570.
22 C.J. p 306 note 21.

Nature of articles received

A record describing articles of freight received at a local station and delivered to the consignee, with his signature acknowledging receipt thereof, is an admission as to the nature of the articles receipted for.—State v. Dahlquist, 115 N.W. 81, 17 N.D. 40.

68. Cal.—Roche v. Llewellyn Iron Works Co., 74 P. 147, 140 Cal. 563.
22 C.J. p 306 note 22.

69. Ark.—Public Utilities Corporation of Arkansas v. Carden, 32 S.W.2d 1058, 182 Ark. 858.
Cal.—Lampton v. Davis Standard Bread Co., 191 P. 710, 48 Cal.App. 116.
Ky.—Davis v. Antol, 262 S.W. 278, 203 Ky. 273.
La.—Shepard v. Whitney Nat. Bank of New Orleans, App., 177 So. 825.
Minn.—Sohns v. M. B. Hubbard Grocery Co., 203 N.W. 782, 163 Minn. 187.
Mo.—St. Louis & Tennessee River Packet Co. v. Nowland, 215 S.W. 11, 279 Mo. 500.
Or.—Swain v. Oregon Motor Stages, 82 P.2d 1084, 160 Or. 1, 118 A.L.R. 1225.
R.I.—Parenteau v. Parenteau, 153 A. 872, 51 R.I. 263.

Boat reports, made by company hiring chartered scow, with assistance of latter's captain, who signed them, were admissible as admissions against interest in owner's action against charterer for damages to scow.—The Cleary Bros. No. 61, C.C.A.N.J., 61 F.2d 393.

70. U.S.—State Farm Mut. Automobile Ins. Co. v. Bonacci, C.C.A.Neb., 111 F.2d 412.
Ohio.—Goz v. Tenney, 136 N.E. 215, 104 Ohio St. 500.
22 C.J. p 306 note 23.

71. Cal.—Roche v. Llewellyn Iron Works Co., 74 P. 147, 140 Cal. 563.

72. Wis.—Merrill Nat. Bank v. Illinois & Wisconsin Lumber Co., 77 N.W. 185, 101 Wis. 247.

73. Ga.—Bainbridge Power Co. v. Ivey, 144 S.E. 825, 38 Ga.App. 586.

Contracts held to constitute admissions

(1) Contract between plaintiff and defendant.—Wilson-Otwell & Cone v. Ritch, 112 So. 547, 93 Fla. 698.

(2) Contract between defendant and a third person.
U.S.—Union Trust Co. of Cleveland, Ohio, v. Woodrow Mfg. Co., C.C.A. Iowa, 48 F.2d 194.
Ala.—Lewis v. Robertson, 14 So. 166, 100 Ala. 246.

(3) Contract fixing alimony.—Hughes v. Hughes, 228 P. 675, 68 Cal. App. 195.

(4) Shipping contracts.—Coad v. Pennsylvania Ry. Co., 175 N.W. 344, 187 Iowa 1025.

(5) Contract of carriage.—McElvain v. St. Louis & S. F. R. Co., 131 S.W. 736, 151 Mo.App. 126.

(6) Option contract.—Springer v. Chicago, 37 Ill.App. 206, affirmed 26 N.E. 514, 135 Ill. 552, 12 L.R.A. 609.

74. Tex.—White v. Holman, 60 S.W. 437, 25 Tex.Civ.App. 152.
22 C.J. p 307 note 57.

75. Tenn.—Kenner v. City Nat. Bank, 47 S.W.2d 756, 164 Tenn. 288, granting rehearing in part 46 S.W.2d 46, 164 Tenn. 119.

Claims held to constitute admissions

(1) In an action against a widow for services, a claim filed against her husband's estate and subsequently withdrawn.—Templer v. Lee, 103 N.E. 1090, 55 Ind.App. 433.

(2) A shipper's claim for damages for the negligent carriage of live stock.—Heitman v. Chicago, M. & St. P. R. Co., 123 P. 401, 45 Mont. 406.

(3) A claim for compensation for injuries.—Webster Mfg. Co. v. Schmidt, 77 Ill.App. 49.

76. Iowa.—Coad v. Pennsylvania Ry. Co., 175 N.W. 344, 187 Iowa 1025.
N.Y.—London Produce Co. v. Poels & Brewster, 209 N.Y.S. 516, 124 Misc. 869, reversed on other grounds 215 N.Y.S. 485, 216 App.Div. 424.
22 C.J. p 307 note 47.

77. Iowa.—Coad v. Pennsylvania Ry. Co., 175 N.W. 344, 187 Iowa 1025.

78. U.S.—British Acoustic Films, Limited, v. Electrical Research Products, C.C.A.Del., 113 F.2d 263, affirming, D.C., 29 F.Supp. 531.

Applications held to constitute admissions

(1) An application for an employee's bond, although no bond was issued, the issue being the amount of the salary agreed to be paid.—Ackerman v. Berriman, 113 N.Y.S. 1015.

(2) An application for life insurance, the issue being applicant's date of birth.—Taylor v. State Grand Lodge A. O. U. W., 111 N.W. 919, 101 Minn. 72, 118 Am.S.R. 606, 11 L.R.A.,N.S., 92, 11 Ann.Cas. 260.

(3) An application for membership in a beneficial order.
Pa.—Cupryk v. Ruthenian Nat. Union, 66 Pa.Super. 595.
Tex.—Robertson v. Ephraim, 18 Tex. 118.

79. Ala.—Minchener v. Robinson, 53 So. 749, 169 Ala. 472.
22 C.J. p 307 note 32.

80. U.S.—U. S. v. American Surety Co. of New York, C.C.A.N.Y., 56 F.2d 734.
Mass.—Boston & N. St. Ry. Co. v. Goodell, 124 N.E. 260, 233 Mass. 428.

Illustrations

(1) Certificate or statement filed under Interstate Commerce Commission Rules, rule 5.—South Carolina Asparagus Growers' Ass'n v. Southern Ry. Co., C.C.A.S.C., 64 F.2d 419, certiorari denied 54 S.Ct. 65, 290 U.S. 647, 78 L.Ed. 561—Mellon v. World Pub. Co., C.C.A.Okl., 20 F.2d 613, affirming, D.C., World Pub. Co. v. Davis, 16 F.2d 130, and certiorari denied Mellon v. World Pub. Co., 48 S.Ct. 119, 275 U.S. 561, 72 L.Ed. 426.

(2) Reports and records of an accident made pursuant to statutory requirements.—Ætitis v. Spring Valley Coal Co., 150 Ill.App. 497.

(3) A registration of names and addresses of owners of tenement houses made as required by law.—Tenement House Dept. v. Weil, 134

writings which have been held to constitute admissions include a railroad company's bulletin or rules as to the proper manner of performing operations;[81] a statement of the affairs of a corporation;[82] a financial statement to a rating agency;[83] a newspaper article;[84] a prospectus;[85] advertisements;[86] an audit of books;[87] an entry in a ship's log;[88] office records of a railroad station agent;[89] a report of an indemnity insurance company to the insured employer that the employer complied with the law and had no dangerous machinery, etc.;[90] a bill of sale;[91] a bill and voucher for services;[92] a credit memorandum;[93] a proof of loss in a suit between insured and third party;[94] "prices current" sent by a factor to his customer, the issue being the market price;[95] an inventory made by the attorney of a party sued for taking possession of a stock of goods under a void writ, as an admission of value;[96] an agreement between riparian owners admitting the construction of a dam;[97] exemption papers;[98] a verified claim of exemptions;[99] checks endorsed by the party charged with the admission;[1] statements as to the amount of coal mined;[2] maps or plats;[3] a bank deposit slip, to prove the account;[4] and an abstract of title.[5]

§ 284. Ineffective or Undelivered Documents

As a general rule, a written statement is none the less competent as an admission because it is contained in a document ineffective for the purpose for which it was made.

A written statement is none the less competent as an admission because it is contained in a document which is not itself effective for the purpose for which it was made,[6] either by reason of illegality,[7] or the incompetency of a party thereto,[8] or by rea-

N.Y.S. 1062, 76 Misc. 273—22 C.J. p 307 note 63.

(4) Premium statements submitted to State Insurance Fund, notwithstanding statute prohibiting disclosure of information acquired from employers pursuant to Workmen's Compensation Act without authority of department or pursuant to its rules, "or as otherwise required by law."—Joslin v. Idaho Times Pub. Co., 91 P.2d 386, 60 Idaho 235.

81. N.H.—Smith v. Boston & M. R. R., 177 A. 729, 87 N.H. 246.
Wash.—Gillum v. Pacific Coast R. Co., 279 P. 114, 152 Wash. 657.

82. Me.—Trask v. Chase, 77 A. 698, 107 Me. 137.
22 C.J. p 307 note 34.

Certificate of corporate condition
Mass.—Waltham Watch & Clock Co. v. City of Waltham, 172 N.E. 579, 272 Mass. 396, 71 A.L.R. 960.

83. Tex.—Oppenheim v. Swinehart Tire & Rubber Co. of Tennessee, Civ.App., 22 S.W.2d 991, error dismissed.

84. N.Y.—Edwards v. Watertown, 13 N.Y.S. 309.

85. Wis.—State v. Windus, 243 N.W. 216, 208 Wis. 583.

86. Idaho.—Groefsema v. Mountain Home Co-op. Irr. Co., 190 P. 356, 33 Idaho 86.
Tex.—Sportatorium v. State, Civ. App., 104 S.W.2d 912, error dismissed.
22 C.J. p 307 note 40.

Folders issued by railroads.—Pecos & N. T. R. Co. v. Cox, Tex.Civ. App., 150 S.W. 265—Southern Pac. Co. v. Allen, 106 S.W. 441, 48 Tex. Civ.App. 66, followed in Southern Pac. Co. v. Godfrey, 107 S.W. 1135, 48 Tex.Civ.App. 616.

87. Vt.—Smith v. Reynolds, 108 A. 697, 94 Vt. 28.

88. U.S.—The Newfoundland, D.C. S.C., 89 F. 510, reversed on other grounds 20 S.Ct. 274, 176 U.S. 97, 44 L.Ed. 386.

89. U.S.—Louisville & N. R. Co. v. U. S., Tenn., 186 F. 280, 108 C.C.A. 326.

90. Mich.—Great Lakes Laundry Co. v. Ætna L. Ins. Co., 151 N.W. 744, 184 Mich. 294.

91. Ala.—Myrick v. Wallace, 59 So. 704, 5 Ala.App. 398.
22 C.J. p 307 note 36.

92. Iowa.—Kelley v. Royal Neighbors of America, 139 N.W. 481, 158 Iowa 547.
22 C.J. p 307 note 37.

93. Minn.—General Electric Co. v. Jordan, 162 N.W. 1061, 137 Minn. 107.

94. U.S.—Nelson Bros. Coal Co. v. Perryman-Burns Coal Co., D.C.N. Y., 43 F.2d 564, reversed on other grounds, C.C.A., 48 F.2d 99.

95. N.Y.—Weidner v. Olivit, 96 N.Y. S. 37, 108 App.Div. 122, affirmed 81 N.E. 1178, 188 N.Y. 611.

96. Ill.—Chicago Title & Trust Co. v. Core, 79 N.E. 108, 223 Ill. 58, affirming 126 Ill.App. 272.

97. Pa.—Lynch v. Troxell, 56 A. 413, 207 Pa. 162.

98. Ga.—Huntington v. Chisholm, 61 Ga. 270.

99. Ala.—Jackson v. Grisham, 55 So. 165, 171 Ala. 553.

1. U.S.—Carpenter v. Baltimore & O. R. Co., C.C.A.Ohio, 109 F.2d 375.

2. Kan.—Home-Riverside Coal Min. Co. v. Fores, 67 P. 445, 64 Kan. 39.

3. Tex.—Outlaw v. Gulf Oil Corporation, Civ.App., 137 S.W.2d 787, reversed on other grounds, Gulf Oil Corporation v. Outlaw, Com.App., 150 S.W.2d 777.

Official city map, although not showing street boundaries legally established, was evidence so far as it contained admissions against interest of city.—Klepper v. Seymour House Corporation of Ogdensburg, 218 N.Y.S. 476, 218 App.Div. 686, reversed on other grounds 158 N.E. 29, 246 N.Y. 85, 62 A.L.R. 955.

4. Mass.—L'Herbette v. Pittsfield Nat. Bank, 38 N.E. 368, 162 Mass. 137, 44 Am.S.R. 354.

5. Pa.—Ege v. Medlar, 82 Pa. 86.

6. Or.—Fidelity Reserve & Loan Co. v. Lincoln County Logging Co., 23 P.2d 905, 144 Or. 45.
22 C.J. p 308 note 66.

Release lacking consideration
An instrument purporting to be a release, which declared that defendant was not liable and which was signed by plaintiff, but for which there was no consideration, was held incompetent as evidence of an admission by plaintiff.—Shilliam v. Newman, 162 P. 977, 94 Wash. 637.

7. Ark.—Iron Mountain, etc., R. Co. v. Stansell, 43 Ark. 275.
Pa.—Bear v. Trexler, 3 Wkly.N.C. 214.

8. Ind.—Indianapolis Chair Mfg. Co. v. Wilcox, 59 Ind. 429.

son of being not signed,[9] executed,[10] or delivered.[11] Accordingly, contracts have been held competent evidence of admissions, although they were unenforceable,[12] as by reason of the operation of the statute of frauds,[13] or because one of the parties was a foreign corporation not qualified to do business within the state.[14] However, it has been held that, where a contract signed by plaintiff has been excluded because of plaintiff's inability to prove its execution by defendant, defendant is not entitled to introduce the contract as a statement of plaintiff without consenting to be bound thereby.[15]

§ 285. Offers of Compromise

a. In general
b. What constitutes offer or part of negotiations

a. In General

Proof of an offer by either party to compromise the controversy involved in a litigation between them, or of any statements or admissions made as part of compromise negotiations, is generally inadmissible.

It is a well established principle that proof of an offer to compromise the controversy involved in a litigation, or of the fact that an offer to compromise was made, is inadmissible,[16] apart, at least,

9. Ala.—Turrentine v. Grigsby, 23 So. 666, 118 Ala. 380.

By second witness to will

Paper signed only by one witness, and so defective as will, was held competent as admission by decedent of recognized contract obligation.—Thomas v. Hens, 220 N.Y.S. 785, 219 App.Div. 627.

10. Iowa.—Snyder v. Reno, 38 Iowa 329.
22 C.J. p 308 note 70.

An unexecuted deed in the handwriting of the grantor is competent as an admission by him.—Warren v. Wilson, 71 S.E. 818, 992, 89 S.C. 420.

11. Neb.—Blue Valley State Bank v. Milburn, 216 N.W. 299, 116 Neb. 131.
N.Y.—Narganes v. Madan, 146 N.Y.S. 922, 161 App.Div. 563.

12. Ky.—Luster v. Whitlock, 262 S.W. 572, 203 Ky. 405.
Mich.—Bishop v. Fletcher, 12 N.W. 849, 48 Mich. 555.

13. Ala.—Ex parte Farrow, 92 So. 426, 207 Ala. 197, denying certiorari Farrow v. Burns, 92 So. 236, 18 Ala.App. 350.
Wash.—Platt v. Bradner Co., 230 P. 633, 131 Wash. 573.

14. Ala.—Pocahontas Graphite Co. v. Minerals Separation North American Corporation, 109 So. 873, 215 Ala. 225.

15. N.J.—Mach. Mfg. Co. v. Donovan, 91 A. 310, 86 N.J.Law 327.
22 C.J. p 307 note 65.

16. U.S.—Lowenstein v. Federal Rubber Co., C.C.A.Mo., 85 F.2d 129—Arnold v. Owens, C.C.A.N.C., 78 F.2d 495—Outlook Hotel Co. v. St. John, C.C.A.N.J., 287 F. 115.
Ala.—Chandler v. Owens, 179 So. 256, 259, 235 Ala. 356, citing **Corpus Juris**—Indemnity Co. of America v. Pugh, 132 So. 165, 222 Ala. 251—Globe & Rutgers Fire Ins. Co. v. Pappas, 122 So. 346, 219 Ala. 332—Yates v. Barnett, 112 So. 122, 215 Ala. 554—B. F. Kay & Son v. Alabama Cotton & Grain Co., 100 So. 863, 211 Ala. 454—Burleson v. Gillan, 89 So. 36, 205 Ala. 673.
Ark.—Wilkerson v. Gerard, 138 S.W.2d 76, 200 Ark. 125—Lake v. Wright, 53 S.W.2d 233, 186 Ark. 227—Bristow v. Bristow, 52 S.W.2d 44, 186 Ark. 38—Rye v. Norsworthy, 7 S.W.2d 782, 177 Ark. 1195.
Cal.—Harris v. Miller, 235 P. 981, 196 Cal. 8—Boyes v. Evans, 58 P.2d 922, 926, 14 Cal.App.2d 472, citing **Corpus Juris**—H. D. Taylor Co. v. J. H. Jonas & Sons, 4 P.2d 797, 118 Cal.App. 208—Anderson v. Rindge Co., 270 P. 262, 93 Cal.App. 725.
Colo.—In re Ainsworth's Estate, 79 P.2d 1045, 102 Colo. 392.
Conn.—Riccio v. Montano, 105 A. 625, 93 Conn. 289.
Fla.—Mutual Ben. Health & Accident Ass'n v. Bunting, 183 So. 321, 133 Fla. 646.
Ill.—Hill v. Hiles, 32 N.E.2d 933, 309 Ill.App. 321—Shellabarger v. Nattier, 7 N.E.2d 365, 289 Ill.App. 473—Guardian Life Ins. Co. of America v. Swanson, 3 N.E.2d 324, 286 Ill.App. 278—Smothers v. Cosgrove-Meehan Coal Co., 264 Ill. App. 488—Edward Edinger Co. v. Willis, 260 Ill.App. 106.
Ind.—Maglaris v. Claude Neon Federal Co., Ind.App., 198 N.E. 462, 465, 101 Ind.App. 156, citing **Corpus Juris.**
Iowa.—Hoover v. First American Fire Ins. Co. of New York, 255 N.W. 705, 218 Iowa 559—Hansell v. Farmers' Mut. Hail Ins. Ass'n of Iowa, 228 N.W. 88, 209 Iowa 378—Lynch v. Egypt Coal Co., 181 N.W. 385, 190 Iowa 1272.
Kan.—Laidler v. Peterson, 92 P.2d 18, 23, 150 Kan. 306, citing **Corpus Juris**—T. M. Deal Lumber Co. v. Jones, 21 P.2d 933, 936, 137 Kan. 480, quoting **Corpus Juris**—McComas v. Clements, 21 P.2d 895, 137 Kan. 681—Moore v. Connelly, 237 P. 900, 901, 119 Kan. 35, citing **Corpus Juris**—Kaull v. Blacker, 193 P. 182, 107 Kan. 578.
Ky.—Whitney v. Penick, 136 S.W.2d 570, 281 Ky. 474.
La.—Washington-Youree Hotel Co. v. Union Indemnity Co., App., 146 So. 342.
Mass.—Ross v. Fishtine, 177 N.E. 811, 277 Mass. 87—Snell v. Rousseau, 154 N.E. 70, 257 Mass. 559.
Miss.—Atlantic Life Ins. Co. v. Serio, 157 So. 474, 171 Miss. 726—Federal Land Bank of New Orleans v. Robinson, 134 So. 180, 160 Miss. 546.
Mo.—Schneider v. Dubinsky Realty Co., 127 S.W.2d 691, 344 Mo. 654—Starnes v. St. Joseph Ry., Light, Heat & Power Co., 52 S.W.2d 852, 331 Mo. 44, affirming, App., 22 S.W.2d 73—Huttig v. Brennan, 41 S.W.2d 1054, 328 Mo. 471—Scholz v. Mackay, App., 75 S.W.2d 604—O'Sullivan v. Wells, App., 10 S.W.2d 313—Bassett v. Moberly Paving Brick Co., 268 S.W. 645, 648, 219 Mo.App. 81, quoting **Corpus Juris**—Landsbaum v. Janet Realty Co., App., 226 S.W. 604.
Mont.—Continental Oil Co. v. Bell, 21 P.2d 65, 94 Mont. 123.
Neb.—Myers v. McMaken, 276 N.W. 167, 133 Neb. 524.
N.Y.—Mihalcho v. Massachusetts Fire & Marine Ins. Co., 242 N.Y.S. 640, 229 App.Div. 813—Wemyss Furniture Co v. Strober, 191 N.Y.S. 783, 199 App.Div. 449—Van Schaick v. Carr, 289 N.Y.S. 495, 503, 159 Misc. 873, citing **Corpus Juris**—Lee v. Rudd, 198 N.Y.S. 628, 120 Misc. 407—Gordon v. Hall, 203 N.Y.S. 107—Weiner v. H. Jaeckel & Sons, 179 N.Y.S. 629—Ginsberg v. Green, 173 N.Y.S. 410.
N.C.—Stein v. Levins, 171 S.E. 96, 205 N.C. 302.
Ohio.—Weyant v. McCurdy, 12 Ohio App. 491.
Okl.—Kunkel v. Rattray, 231 P. 541, 110 Okl. 289—Vogel Bros. & Co. v. Bastin, 203 P. 219, 84 Okl. 273—Thorp Oil & Specialty Co. v. Home Oil Refining Co., 192 P. 573, 79 Okl. 225.
Or.—Blue v. City of Union, 75 P.2d 977, 159 Or. 5—Dalk v. Lachmund, 70 P.2d 558, 157 Or. 152.
Pa.—Duff v. Vogt, 89 Pa.Super. 412.
R.I.—Roger Laudati, Inc., v. Liberatore, 154 A. 120, 121, 51 R.I. 282, citing **Corpus Juris**—Carpenter v. Carpenter, 135 A. 325, 48 R.I. 56—Messler v. Williamsburg City Fire Ins. Co., 108 A. 832, 42 R.I. 460.

from its possible admissibility as independently relevant evidence, see infra § 286. The rule extends beyond proof of the bare fact of the offer and the terms thereof, and excludes as well proof of anything that occurred during the negotiations and constituted an inseparable part of the effort to compromise, including statements and admissions made for that purpose and with that end in view.[17]

S.D.—Erickson v. Webber, 237 N.W. 558, 58 S.D. 446, 80 A.L.R. 914.
Tex.—Mosley v. Harkins, Civ.App., 147 S.W.2d 309—Hyde v. Marks, Civ.App., 138 S.W.2d 619, error dismissed, judgment correct—Lloyds America v. Poe, Civ.App., 69 S.W.2d 160, error dismissed—Gulf, C. & S. F. Ry. Co. v. Hitt, Civ.App., 60 S.W.2d 864—Mathis v. Wherry, Civ.App., 45 S.W.2d 700, 701, citing **Corpus Juris**—Crawford v. Ramey, Civ.App., 13 S.W.2d 747, 749, error dismissed, citing **Corpus Juris**—Merchants' Cotton Oil Co. v. Acme Gin Co., Civ.App., 284 S.W. 680—Miller v. Lewis, Civ.App., 277 S.W. 796—Woodson v. Westbrook, Civ.App., 272 S.W. 821—Gulf, C. & S. F. Ry. Co. v. Pryor, Civ.App., 238 S.W. 1040—Northern Texas Traction Co. v. Smith, Civ.App., 223 S.W. 1013—McDonald v. Whaley, Civ.App., 207 S.W. 609.
Vt.—Town of Milton v. Bruso, 10 A.2d 203, 204, 111 Vt. 82, citing **Corpus Juris.**
Va.—Brickell v. Shawn, 9 S.E.2d 330, 175 Va. 373—Hendrickson v. Meredith, 170 S.E. 602, 161 Va. 193—Duncan v. State Highway Commission, 128 S.E. 546, 142 Va. 135.
Wash.—Svea Fire & Life Ins. Co. v. Spokane P. & S. Ry. Co., 28 P.2d 266, 268, 175 Wash. 622, citing **Corpus Juris.**
W.Va.—Keatley v. Hanna Chevrolet Co., 6 S.E.2d 1—Averill v. Hart & O'Farrell, 132 S.E. 870, 101 W.Va. 411.
Wis.—Papke v. Haerle, 207 N.W. 261, 189 Wis. 156.
22 C.J. p 308 note 76.

"An offer, concession, or admission, made in the course of an ineffectual treaty of compromise, and constituting in itself the point yielded for the sake of peace, and not because it was just or true, is not competent evidence against the party making it."—National Life & Accident Ins. Co. v. Williams, 138 N.E. 826, 828, 84 Ind.App. 343.

Under statute

Cal.—Scott v. Sciaroni, 226 P. 827, 66 Cal.App. 577.
Ga.—Smith v. Smith, 145 S.E. 63, 167 Ga. 98—Slade v. Raines, 139 S.E. 805, 165 Ga. 89—English v. Moore, 110 S.E. 737, 28 Ga.App. 265.
Or.—Blue v. City of Union, 75 P.2d 977, 159 Or. 5—Dalk v. Lachmund, 70 P.2d 558, 157 Or. 152—Marshall v. Olson, 202 P. 736, 102 Or. 502.

Documentary evidence generally

Letters, bills, memoranda, or other writings, or the contents of any of them, which constitute offers of compromise or parts of the negotiations looking toward compromise are inadmissible.
Ky.—Thornton's Adm'r v. Minton's Ex'r, 64 S.W.2d 158, 250 Ky. 805.
Mass.—Ashton Valve Co. v. Jean, 173 N.E. 689, 273 Mass. 360.
Mich.—Olshove v. Pere Marquette R. Co., 248 N.W. 906, 263 Mich. 579.
N.J.—Teitelbaum v. Massachusetts Accident Co., 181 A. 395, 13 N.J. Misc. 811, affirmed 184 A. 808, 116 N.J.Law 417.
N.M.—Springer Ditch Co. v. Wright, 247 P. 270, 31 N.M. 457.
N.Y.—Gutkind v. George Lueders & Co., 196 N.E. 201, 267 N.Y. 320, reversing 275 N.Y.S. 338, 242 App.Div. 764, and reargument denied 198 N.E. 429, 268 N.Y. 610—Williams v. John Hancock Mut. Life Ins. Co., 285 N.Y.S. 840, 246 App.Div. 891, denying reargument 283 N.Y.S. 87, 245 App.Div. 585, reversing 277 N.Y.S. 429, 154 Misc. 504.
Ohio.—Harrison Bldg. Co. v. Beckerman, 156 N.E. 919, 24 Ohio App. 202.
Okl.—Cowen v. T. J. Stewart Lumber Co., 58 P.2d 573, 177 Okl. 266.
Pa.—Hindman v. Pittsburgh Trust Co., 109 A. 876, 266 Pa. 204.
S.C.—Atlantic Coast Line R. Co. v. Searson, 135 S.E. 567, 137 S.C. 468.
Tenn.—Tennessee Cent. Ry. Co. v. Scarbrough, 9 Tenn.App. 295.
Wash.—Cannon v. Seattle Title Trust Co., 252 P. 699, 142 Wash. 213.

An offer to confess judgment, there being no admission of liability, is generally held inadmissible.—Geyer v. Western Union Telegraph Co., 93 S.W.2d 660, 192 Ark. 578—22 C.J. p 308 note 76 [c].

Elicited by cross-examination

Evidence of compromise, adduced directly by plaintiff, was held incompetent, although brought out by proper questions on cross-examination.—Yoakam v. Hogan, 243 P. 21, 198 Cal. 16.

Unexecuted release having no consideration

That defendant voluntarily repaired plaintiff's automobile after a collision so that the release of liability tendered by defendant, if signed by plaintiff, would have been ineffective for want of consideration, does not make the release, which was a mere offer to buy peace, admissible on plaintiff's behalf as an admission by defendant.—Moore v. Stetson Mach. Works, 188 P. 769, 110 Wash. 649.

Apparently contrary is the holding that in an action for services performed for defendant company it was error to admit a proposition to plaintiff to pay him therefor in stock where it did not appear on its face to be a proposition of settlement.—Alabama Securities Co. v. Dewy, 47 So. 55, 156 Ala. 530.

17. Cal.—Boyes v. Evans, 58 P.2d 922, 926, 14 Cal.App.2d 472, citing **Corpus Juris.**
Ill.—Hill v. Hiles, 32 N.E.2d 933, 309 Ill.App. 321—Shellabarger v. Nattier, 7 N.E.2d 365, 289 Ill.App. 473.
Ind.—National Life & Accident Ins. Co. v. Williams, 138 N.E. 826, 84 Ind.App. 343.
Iowa.—Swan v. Philleo, 190 N.W. 406, 194 Iowa 790.
Ky.—Harlan Fuel Co. v. Wiggington, 262 S.W. 957, 203 Ky. 546.
Md.—Union Trust Co. of Maryland v. Resisto Mfg. Co., 181 A. 726, 169 Md. 381—Brown v. Hebb, 175 A. 602, 167 Md. 535, 97 A.L.R. 366.
Mass.—Chase v. Chase, 171 N.E. 651, 271 Mass. 485.
Minn.—Schmitt v. Eagle Roller Mill Co., 272 N.W. 277, 199 Minn. 382.
Miss.—Aaronson v. McGowan, 180 So. 738, 740, 181 Miss. 642, citing **Corpus Juris.**
Mo.—Jacobs v. Danciger, 130 S.W.2d 588, 344 Mo. 1042, certiorari denied Danciger v. Jacobs, 60 S.Ct. 144, 308 U.S. 607, 84 L.Ed. 507—Jacks v. Link, 236 S.W. 10, 291 Mo. 282—Sculley v. Rolwing, App., 88 S.W.2d 394—Bassett v. Moberly Paving Brick Co., 268 S.W. 645, 648, 219 Mo.App. 81, quoting **Corpus Juris**—Landsbaum v. Janet Realty Co., App., 226 S.W. 604.
N.J.—Harr v. Du Bois, 19 A.2d 655, 126 N.J.Law 343.
N.M.—Balduini v. Ulibarri, 228 P. 607, 608, 30 N.M. 127, citing **Corpus Juris.**
N.Y.—White v. Old Dominion SS. Co., 6 N.E. 289, 102 N.Y. 660—Joseph Wander, Inc. v. Becker Bldg., 10 N.Y.S.2d 701, 256 App.Div. 1029—Weiner v. H. Jaeckel & Sons, 179 N.Y.S. 629.
Ohio.—Harrison Bldg. Co. v. Beckerman, 156 N.E. 919, 24 Ohio App. 202.
Okl.—Phillips Petroleum Co. v. Malone, 66 P.2d 5, 179 Okl. 449—Gibson v. Chickasha Cotton Oil Co., 15 P.2d 41, 159 Okl. 291—Lynn v. Midland Valley R. Co., 249 P. 270, 121 Okl. 172.
Or.—Wallace v. American Life Ins. Co. of Des Moines, Iowa, 225 P. 192, 202, 227 P. 465, 111 Or. 510, quoting **Corpus Juris.**

The fact that a party admits that he made an offer of compromise does not render such offer admissible in evidence,[18] but it has been held that, where a party has admitted to a third person that he offered his adversary a certain amount as damages for the injuries suffered by the latter, this may be shown on the question of damages.[19] Mere willingness to consider an offer of compromise is, of course, inadmissible,[20] and it has also been held proper to exclude evidence that an agent was authorized to offer a compromise.[21]

Reasons for rule. One of the reasons often assigned for the rule is that, since the law favors the settlement of controversies out of court,[22] a person is entitled to endeavor to "buy his peace" without danger of being prejudiced in case his effort should fail;[23] hence any communications made toward that end will be regarded as privileged.[24] Another reason advanced is that a true offer of compromise

R.I.—Andrews v. Tallman, 131 A. 50, 47 R.I. 111.
Tex.—Bush v. Gaffney, Civ.App., 84 S.W.2d 759—Security Banking & Investment Co. v. Flanagan, Civ. App., 241 S.W. 702, modified on other grounds, Com.App., 254 S.W. 761, corrected, 262 S.W. 741—Lomax v. Trull, Civ.App., 232 S.W. 861, dismissed for want of jurisdiction.
Wash.—Ingraham v. Associated Oil Co., 6 P.2d 645, 166 Wash. 305.
W.Va.—Keately v. Hanna Chevrolet Co., 6 S.E.2d 1.
22 C.J. p 310 note 77.

Under statute

Cal.—Truman v. Sutter-Butte Canal Co., 244 P. 923, 76 Cal.App. 293.
Ga.—Georgia Chemical Works v. Malcom, 197 S.E. 763, 186 Ga. 763—Blakely Hardwood Lumber Co v. Reynolds Bros. Lumber Co., 160 S.E. 775, 173 Ga. 602—Duncan v. Bailey, 134 S.E. 87, 162 Ga. 457—Ocean Accident & Guarantee Corporation v. Jones, 194 S.E. 75, 56 Ga.App. 820—Broyles v. Haas, 172 S.E. 742, 48 Ga.App. 321—Hill Bros. v. Render, 125 S.E. 79, 33 Ga.App. 13—English v. Moore, 110 S.E. 737, 28 Ga.App. 265.

Pleadings

Original and amended complaints, prepared and filed pursuant to effort of parties to settle controversy without ligitation, were properly excluded from evidence.—Hyden v. Anderson, 127 N.E. 808, 73 Ind.App. 529.

Silence or acquiescence

The silence of the party to whom an offer is made, as well as the statements contained in the offer, are inadmissible.—Garber v. Levine, 146 N.E. 21, 250 Mass. 485—22 C.J. p 310 note 77 [d].

18. N.C.—Stein v. Levins, 171 S.E. 96, 205 N.C. 302.
22 C.J. p 311 note 87.

19. Cal.—Story v. Nidiffer, 80 P. 692, 146 Cal. 549.

20. Ky.—North River Ins. Co. v. Walker, 170 S.W. 983, 161 Ky. 368.
22 C.J. p 311 note 90.
"A mere suggestion for the discussion of a compromise is inadmissible."—Wood v. Morrissey, D.C.La., 31 F.Supp. 449.

21. Md.—Pentz v. Pennsylvania F. Ins. Co., 48 A. 139, 92 Md. 444.
22 C.J. p 311 note 91.

22. Ala.—Indemnity Co. of America v. Pugh, 132 So. 165, 222 Ala. 251—Yates v. Barnett, 112 So. 122, 215 Ala. 554
D.C.—McMahon v. Matthews, 48 App. D.C 303.
Ill.—Hill v. Hiles, 32 N.E.2d 933, 309 Ill.App. 321.
Ky.—Whitney v. Penick, 136 S.W.2d 570, 281 Ky. 474.
Minn.—Schmitt v. Eagle Roller Mill Co., 272 N.W. 277, 199 Minn. 382—Bartels v. Schwake, 190 N.W. 178, 153 Minn. 251.
Mo.—Jacobs v. Danciger, 130 S.W. 2d 588, 344 Mo. 1042, certiorari denied Danciger v. Jacobs, 60 S.Ct. 144, 308 U.S. 607, 84 L.Ed. 507—Sculley v. Rolwing, App., 88 S.W. 2d 394—Scholz v. Mackay, App., 75 S.W 2d 604—Inzerillo v. Chicago, B. & Q. R. Co., 35 S.W.2d 44, 225 Mo. App. 1213—Starnes v. St. Joseph Ry., Light, Heat & Power Co., App., 22 S.W.2d 73, affirmed 52 S.W.2d 852, 331 Mo. 44—Landsbaum v. Janet Realty Co., App., 226 S.W. 604.
Neb.—Myers v. McMaken, 276 N.W. 167, 133 Neb. 167.
N.M.—Balduini v. Ulibarri, 228 P. 607, 30 N.M. 127.
Ohio.—Weyant v. McCurdy, 12 Ohio App. 491.
Or.—Blue v. City of Union, 75 P.2d 977, 159 Or. 5.
S.D.—Erickson v. Webber, 237 N.W. 558, 58 S.D. 446, 80 A.L.R. 914.
Tenn.—Sullins v. Farragut Tire & Battery Co., 234 S.W. 330, 144 Tenn. 491.
Tex.—St. Louis Southwestern Ry. Co. of Texas v. Adcock, Civ.App., 269 S.W. 144—Lomax v. Trull, Civ. App., 232 S.W. 861, dismissed for want of jurisdiction.
22 C.J. p 308 note 73.
"The origin of the rule is probably based on human experience, as well as precepts from the Scriptures, and is crystallized into a maxim. It is a maxim of the law that it is for the best interest of the community to have law suits ended, or, as expressed in the Latin, 'Interest reipublicæ ut sit finis litium.' "—Gibson v. Chickasha Cotton Oil Co., 15 P.2d 41, 43, 159 Okl. 291.

23. U.S.—Moffitt-West Drug Co. v. Byrd, Ind.T., 92 F. 290, 34 C.C.A. 355.
Kan.—T. M. Deal Lumber Co. v. Jones, 21 P.2d 933, 935, 137 Kan. 480, quoting **Corpus Juris.**
Mo.—Bassett v. Moberly Paving Brick Co., 268 S.W. 645, 648, 219 Mo.App. 81, quoting **Corpus Juris**—Landsbaum v. Janet Realty Co., App., 226 S.W. 604.
N.H.—Gagne v. New Haven Road Const. Co., 175 A. 818, 87 N.H. 163.
N.M.—Balduini v. Ulibarri, 228 P. 607, 608, 30 N.M. 127, citing **Corpus Juris.**
N.Y.—Merkling v. Ford Motor Co., 296 N.Y.S. 393, 251 App.Div. 89—Lee v. Rudd, 198 N.Y.S. 628, 120 Misc. 407.
Ohio.—Weyant v. McCurdy, 12 Ohio App. 491.
Okl.—Phillips Petroleum Co. v. Malone, 66 P.2d 5, 179 Okl. 449.
Or.—Wallace v. American Life Ins. Co. of Des Moines, Iowa, 225 P. 192, 202, 227 P. 465, 111 Or. 510, quoting **Corpus Juris.**
S.C.—Floyd v. Montgomery Lumber Co., 98 S.E. 139, 111 S.C. 382.
Tex.—Bush v. Gaffney, Civ.App., 84 S.W.2d 759—Crawford v. Ramsey, Civ.App., 13 S.W.2d 747, 749, error dismissed, citing **Corpus Juris.**
Wash.—Buob v. Feenaughty Machinery Co., 103 P.2d 325, 4 Wash.2d 276—Svea Fire & Life Ins. Co. v. Spokane, P. & S. Ry. Co., 28 P.2d 266, 175 Wash. 622—Eckhardt v. Harder, 294 P. 981, 983, 160 Wash. 207, citing **Corpus Juris.**
22 C.J. p 308 note 75.

24. Ala.—Indemnity Co. of America v. Pugh, 132 So. 165, 222 Ala. 251—Ford v. Bradford, 103 So. 549, 212 Ala. 515.
Mo.—Starnes v. St. Joseph Ry., Light, Heat & Power Co., App., 22 S.W.2d 73, affirmed 52 S.W.2d 852, 331 Mo. 44.
Or.—Blue v. City of Union, 75 P.2d 977, 159 Or. 5—Dalk v. Lachmund, 70 P.2d 558, 157 Or. 152.
R.I.—Carpenter v. Carpenter, 135 A. 325, 48 R.I. 56.
Utah.—Avgikos v. Lowry, 179 P. 988, 54 Utah 217.
"Such offers are regarded in nature as confidential overtures of pacification. The policy of the law favors amicable adjusting of litiga-

does not, in legal contemplation, involve an admission on the part of a defendant that he is legally liable, or on the part of a plaintiff that his claim is groundless or even doubtful, since it is made with a view to avoiding controversy and saving the expense of litigation,[25] and since, as appears infra § 285 b, it is the very distinguishing mark of an offer of compromise that it is made tentatively, hypothetically, and in contemplation of mutual concessions;[26] and, if the evidence should be received, it would have a tendency to mislead the jury, who might well take the offer to indicate what in law it does not indicate.[27]

By and to whom made and purposes for which inadmissible. Although, as appears infra § 286, some authorities hold such evidence admissible where the fact of the offer is independently relevant, a number of authorities have stated in broad terms that evidence coming within the rule is inadmissible as an admission against the interest of the person who made the offer or statement.[28] The rule excluding such evidence is applied with equal force whether the offer was made by the party against whom a claim is asserted or by the party who asserts a claim;[29] thus the offer cannot be shown as an admission of liability,[30] nor the amount

tion."—Yates v. Barnett, 112 So. 122, 123, 215 Ala. 554.

25. Neb.—Myers v. McMaken, 276 N. W. 167, 133 Neb. 524.
N.H.—Gagne v. New Haven Road Const. Co, 175 A. 818, 87 N.H. 163.
22 C.J. p 311 note 82.

26. Cal.—Scott v. Sciaroni, 226 P. 827, 66 Cal.App. 577.
La.—Washington-Youree Hotel Co. v. Union Indemnity Co., App., 146 So. 342
Miss.—Shell Petroleum Corporation v. Eagle Lumber & Supply Co., 158 So. 331, 171 Miss. 539.
Mont.—Continental Oil Co. v. Bell, 21 P.2d 64, 94 Mont. 123.
N.H.—Caplan v. Caplan, 142 A. 121, 83 N.H. 318.
Or.—Blue v. City of Union, 75 P.2d 977, 159 Or. 5—Dalk v. Lachmund, 70 P.2d 558, 157 Or. 152.
Tenn.—Sullins v. Farragut Tire & Battery Co., 234 S.W. 330, 144 Tenn. 491.
Wis.—Papke v. Haerle, 207 N.W. 261, 189 Wis. 156
22 C.J. p 311 notes 81, 83.

The rule excluding an offer of compromise is based on the proposition that such an offer does not ordinarily proceed from and imply a belief that the adversary's claim is well founded, but rather that the further prosecution of the claim, whether well-founded or not, will cause such annoyance as is preferably avoided by the payment of the sum offered and the offer therefore does not signify the admission at all.
Fla.—Mutual Ben. Health & Accident Ass'n v. Bunting, 183 So. 321, 327, 133 Fla. 646.
N.M.—Jones v. Jernigan, 223 P. 100, 29 N.M. 399.

27. Ill.—Edwin S. Hartwell Lumber Co. v. Bork, 138 Ill.App. 500.
Okl.—Kunkel v. Rattray, 231 P. 541, 110 Okl. 289.
Tex.—St. Louis Southwestern Ry. Co. of Texas v. Adcock, Civ.App., 269 S.W. 144.
22 C.J. p 311 note 84.

28. U.S.—Outlook Hotel Co. v. St. John, C.C.A.N.J., 287 F. 115.
Ala.—B. F. Kay & Son v. Alabama Cotton & Grain Co., 100 So. 863, 211 Ala. 454—Burleson v. Gillan, 89 So. 36, 205 Ala. 673.
Ark.—Wilkerson v. Gerard, 138 S.W.2d 76, 200 Ark. 125.
Cal.—Anderson v. Rindge Co., 270 P. 262, 93 Cal.App. 725.
S.D.—Erickson v. Webber, 237 N.W. 558, 58 S.D. 446, 80 A.L.R. 914.
Va.—Brickell v. Shawn, 9 S.E.2d 330, 175 Va. 373—Hendrickson v. Meredith, 170 S.E. 602, 161 Va. 193—Duncan v. State Highway Commission, 128 S.E. 546, 142 Va. 135.
Wash.—Svea Fire & Life Ins. Co. v. Spokane, P. & S. Ry. Co., 28 P.2d 266, 268, 175 Wash. 622, citing **Corpus Juris.**
Independent relevancy of offer see infra § 286.

"It is difficult to see how an offer of compromise is incompetent to show liability and yet admissible to show one of the essential facts to make out a case of liability."—Sullins v. Farragut Tire & Battery Co., 234 S.W. 330, 331, 144 Tenn. 491.

To show knowledge

Evidence relating to negotiations for compromise is no more competent to show defendant's knowledge of plaintiff's injury than to show general admission of liability.—Kenney v. Wong Len, 128 A. 343, 81 N.H. 427.

Evidence excluded as self-serving

In a suit to recover the purchase price paid for land on vendor's default in sinking a well before a given date, a letter from vendors proposing to execute a deed to be deposited subject to a new contract was held properly excluded as being self-serving and offer to compromise.—McDonald v. Whaley, Tex.Civ. App., 228 S.W. 313, modified on other grounds, Com.App., 244 S.W. 596.

29. Mo.—Bassett v. Moberly Paving Brick Co., 268 S.W. 645, 648, 219 Mo.App. 81, quoting **Corpus Juris.**
22 C.J. p 310 note 78.

30. U.S.—Meek v. Miller, D.C.Pa., 1 F.R.D. 162.
Iowa.—Golden v. Bilbo, 184 N.W. 643, 192 Iowa 319.
Md.—Union Trust Co. of Maryland v. Resisto Mfg. Co., 181 A. 726, 169 Md. 381—Brown v. Hebb, 175 A. 602, 608, 167 Md. 535, 97 A.L.R. 366, citing **Corpus Juris.**
Mass.—Anonik v. Ominsky, 158 N.E. 267, 261 Mass. 65.
Mich.—Olshove v. Pere Marquette R. Co., 248 N.W. 906, 263 Mich. 579—Marsh v. Rogers, 197 N.W. 540, 226 Mich. 290.
Minn.—Bartels v. Schwake, 190 N. W. 178, 153 Minn. 251.
N.H.—Gagne v. New Haven Road Const. Co., 175 A. 818, 87 N.H. 163—Young v. Osgood, 163 A. 398, 86 N.H. 102—Caplan v. Caplan, 142 A. 121, 83 N.H. 318—Kenney v. Wong Len, 128 A. 343, 81 N.H. 427.
N.Y.—Williams v. John Hancock Mut. Life Ins. Co., 285 N.Y.S. 840, 246 App.Div. 891, denying reargument 283 N.Y.S. 87, 245 App.Div. 585, reversing 277 N.Y.S. 429, 154 Misc. 504—Emery v. Litchard, 245 N.Y.S. 209, 137 Misc. 885.
Okl.—Vogel Bros. & Co. v. Bastin, 203 P. 219, 84 Okl. 273.
Pa.—Mannella v. City of Pittsburgh, 6 A.2d 70, 334 Pa. 396.
Tenn.—Sullins v. Farragut Tire & Battery Co., 234 S.W. 330, 144 Tenn. 491.
Tex.—Provident Life & Accident Ins. Co. of Chattanooga v. Flowers, Civ. App., 91 S.W.2d 847, error dismissed—St. Louis Southwestern Ry. Co. of Texas v. Adcock, Civ. App., 269 S.W. 144—Staskey v. Smith, Civ.App., 240 S.W. 1032—Quanah, A. & P. Ry. Co. v. Lancaster, Civ.App., 207 S.W. 606.
Utah.—Avgikos v. Lowry, 179 P. 988, 54 Utah 217.

Admission of existence of cause of action cannot be shown by offer of compromise.

Ark.—Geyer v. Western Union Telegraph Co., 93 S.W.2d 660, 192 Ark. 578.
Mass.—Calvin Hosmer, Stolte Co. v. Paramount Cone Co., 189 N.E. 192, 285 Mass. 278.

offered as an admission of the amount of liability[31] or of any liability whatever[32] by the party against whom the claim is made, nor, on the other hand, can the offer be shown as an admission by the party making the claim that he is not entitled to more than he has offered to accept.[33]

Although there is authority to the contrary,[34] it has been held that the rule of exclusion applies only between the parties.[35] So a statement to a third person cannot be excluded as being related to a compromise where there were no communications whatever between the parties to that end.[36]

b. What Constitutes Offer or Part of Negotiations

Whether or not a statement constitutes an offer of compromise, or is sufficiently connected with compromise negotiations, must be determined in each case from the apparent intention of the parties.

It is often difficult to determine in a particular case what amounts to an ordinary admission and what constitutes an offer of compromise within the meaning of the general rule above stated; and the intention of the parties must be the guide in each case.[37] If the proposal is tentative, and any statements made in connection with it hypothetical, if the offer was made to "buy peace" and in contemplation of mutual concessions, it is as to such point a mere offer of compromise.[38] On the other hand,

31. U.S.—Dawes v. Continental Ins. Co. of City of New York, D.C.La., 1 F.Supp. 603.
Ark.—Geyer v. Western Union Telegraph Co., 93 S.W.2d 660, 192 Ark. 578.
Ky.—National Fire Ins. Co. of Hartford, Conn., v. Cannon & Byers Millinery Co., 255 S.W. 154, 200 Ky. 655.
Mich.—Marsh v. Rogers, 197 N.W. 540, 226 Mich. 290.
N.H.—Gagne v. New Haven Road Const. Co., 175 A. 818, 87 N.H. 163.
N.M.—Springer Ditch Co. v. Wright, 247 P. 270, 31 N.M. 457.
Or.—Wallace v. American Life Ins. Co. of Des Moines, Iowa, 225 P. 192, 227 P. 465, 111 Or. 510.
Pa.—Mannella v. City of Pittsburgh, 6 A.2d 70, 334 Pa. 396.
Tex.—Hawkins v. Black, Civ.App., 23 S.W.2d 755.
Wis.—Tigerton Lumber Co. v. Holt Hardwood Co., 192 N.W. 73, 180 Wis. 197.
22 C.J. p 311 note 85.

Condemnation proceedings
In action to condemn land, condemnor's offer of compromise was not admissible in evidence on the issue of the value of the land.
U.S.—Barnes v. South Carolina Public Service Authority, C.C.A.S.C., 120 F.2d 439, affirming In re South Carolina Public Service Authority, D.C., 37 F.Supp. 28.
Va.—Duncan v. State Highway Commission, 128 S.E. 546, 142 Va. 135.

32. Kan.—T. M. Deal Lumber Co. v. Jones, 21 P.2d 933, 935, 137 Kan. 480.
"An offer of an amount to buy peace may be made when nothing is in fact owed."—T. M. Deal Lumber Co. v. Jones, 21 P.2d 933, 935, 137 Kan. 480.

33. Ga.—Malsby & Co. v. Widincamp, 102 S.E. 178, 24 Ga.App. 737.
Mont.—Continental Oil Co. v. Bell, 21 P.2d 65, 94 Mont. 123.
Or.—Blue v. City of Union, 75 P.2d 977, 159 Or. 5.
Tex.—Sullivan v. Missouri, K. & T. R. Co. of Texas, 220 S.W. 769, 110 Tex. 360, reversing Missouri, K. & T. Ry. Co. of Texas v. Sullivan, Civ.App., 157 S.W. 193.

Offer in statement of loss
In an action on a fire policy, where plaintiffs introduced in evidence the proofs of loss, the court properly refused to permit defendant's counsel to call jury's attention to the fact that it contained an offer to settle for a certain amount, such evidence being inadmissible to show the value of the stock or the extent of damage and loss caused by the fire.—National Fire Ins. Co. of Hartford, Conn., v. Cannon & Byers Millinery Co., 255 S.W. 154, 200 Ky. 655.

Offer to settle disability claim
Insured's offer to settle or compromise claim for one additional weekly disability payment had no effect, except to indicate disability period, where not acted on by insurer.—Johnson v. Universal Life Ins. Co., La.App., 150 So. 438.

34. Neb.—Myers v. McMaken, 276 N.W. 167, 133 Neb. 524.

35. U.S.—Huntley v. Snider, C.C.A. Mass., 86 F.2d 539, affirming, D.C., In re Huntley, 14 F.Supp. 784, rehearing denied, C.C.A., Huntley v. Snider, 88 F.2d 335.

36. Cal.—San Francisco Iron & Metal Co. v. American Milling & Industrial Co., 1 P.2d 1008, 115 Cal. App. 238.

37. Cal.—Truman v. Sutter-Butte Canal Co., 244 P. 923, 76 Cal.App. 293.
Mo.—Jacobs v. Danciger, 130 S.W.2d 588, 344 Mo. 1042, certiorari denied Danciger v. Jacobs, 60 S.Ct. 144, 308 U.S. 607, 84 L.Ed. 507.
Or.—Blue v. City of Union, 75 P.2d 977, 159 Or. 5—Wallace v. American Life Ins. Co. of Des Moines, Iowa, 225 P. 192, 227 P. 465, 111 Or. 510.
"Whether an offer to compromise a claim, or to settle it by a partial or complete payment, amounts to an admission of the truth of the facts on which the claim is based, and is therefore receivable in evidence, is a question which has given rise to prolonged discussion and to varied, but often unsatisfactory, attempts at explanation."—Moore v. Stetson Mach. Works, 188 P. 769, 770, 110 Wash. 649.

38. Ark.—Seeman v. Hilderbrand, 113 S.W.2d 724, 195 Ark. 677—Hinton v. Brown, 298 S.W. 198, 174 Ark. 1025.
Cal.—Irer v. Gawn, 277 P. 1053, 99 Cal.App. 17.
Iowa.—Whisler v. Home Ins. Co. of New York, 276 N.W. 606, 224 Iowa 201.
Mass.—Wagman v. Ziskind, 125 N.E. 633, 234 Mass. 509.
Minn.—Schmitt v. Eagle Roller Mill Co., 272 N.W. 277, 199 Minn. 382.
Mo.—Jacobs v. Danciger, 130 S.W. 2d 588, 344 Mo. 1042, certiorari denied Danciger v. Jacobs, 60 S.Ct. 144, 308 U.S. 607, 84 L.Ed. 507—Landsbaum v. Janet Realty Co., App., 226 S.W. 604.
Okl.—Freeman v. Vandruff, 259 P. 257, 126 Okl. 238—Vogel Bros. & Co. v. Bastin, 203 P. 219, 84 Okl. 273.
Pa.—Fenner v. Murray, 92 Pa.Super. 567.
Tex.—Sullivan v. Missouri, K. & T. R. Co. of Texas, 220 S.W. 769, 110 Tex. 360, reversing Missouri, K. & T. Ry. Co. of Texas v. Sullivan, Civ.App., 157 S.W. 193—Provident Life & Accident Ins. Co. of Chattanooga v. Flowers, Civ.App., 91 S.W.2d 847, error dismissed.
W.Va.—Keatley v. Hanna Chevrolet Co., 6 S.E.2d 1.
"As is seen from the definitions of the word 'compromise' one of its elements is a concession. The concession is prompted by a desire for peace and an avoidance of litigation. Influenced by such prompting, the

if the intention is apparent to admit liability and to seek to buy or secure relief against a liability recognized as such,[39] or if the party making the proposal apparently intended to make no concession but to exact all that he deemed himself entitled to,[40] the proposal is an ordinary admission

party may forego rights which he could readily establish in litigation, but he surrenders them for the sake of peace"—Dalk v. Lachmund, 70 P. 2d 558, 560, 157 Or. 152.

An offer to give or take less than is claimed due indicates an offer to compromise.

Ga.—Smith v. Marbut-Williams Lumber Co., 139 S.E. 590, 37 Ga.App. 239.

La.—Washington-Youree Hotel Co. v. Union Indemnity Co., App., 146 So. 342.

Or.—Blue v. City of Union, 75 P.2d 977, 159 Or. 5.

Offer accompanied by denial of liability indicates an offer of compromise.

D.C.—McMahon v. Matthews, 48 App D C. 303.

Mo.—Columbia Planing Mill Co. v. American F. Ins. Co., 59 Mo.App. 204.

R.I.—Roger Laudati, Inc., v. Liberatore, 154 A. 120, 51 R.I. 282.

Motor vehicle accidents

(1) An offer to compromise or a statement indicating a willingness to do so which, by its language and under the circumstances under which made, cannot be taken as an admission of liability for injuries occasioned by a motor vehicle accident is inadmissible.

U.S.—Outlook Hotel Co. v. St. John, C.C.A.N.J., 287 F. 115.

Neb.—Myers v. McMaken, 276 N.W. 167, 133 Neb. 524.

N.H.—Young v. Osgood, 163 A. 398, 86 N.H. 102.

N.Y.—Merkling v. Ford Motor Co., 296 N.Y.S. 393, 251 App.Div. 89.

Va.—Brickell v. Shawn, 9 S.E.2d 330, 175 Va. 373.

(2) A request by defendant that plaintiff sign a release after defendant voluntarily repaired plaintiff's automobile is in the nature of an offer of compromise rather than an admission of liability.—Moore v. Stetson Mach. Works, 188 P. 769, 110 Wash. 649.

Communications held offers of compromise

(1) That surgeon asked patient what it would take to satisfy him.—Hester v. Ford, 130 So. 203, 221 Ala. 592.

(2) That insurer offered to pay insured full amount of policy if insured would take one thousand dollars less on her husband's policy.—Mutual Ben. Health & Accident Ass'n v. Bunting, 183 So. 321, 133 Fla. 646.

(3) That plaintiff made an offer to defendant to credit against purchase money the amount which defendant might have paid on judgments obtained by lienors, on condition that defendant would pay the balance then due with interest.—Malsby & Co. v. Widincamp, 102 S.E. 178, 24 Ga.App. 737.

(4) That mule dealer sued for death of prospective buyer who was injured while examining mules, directed buyer's son to tell buyer that dealer carried insurance and that dealer would see what could be done.—Jones v. Hall, 195 S.E. 879, 57 Ga.App. 477.

(5) That owners of defendant company said, "Well, J., if you sign a paper that you won't prosecute the company, I will let the men go around the mine and gather a subscription for you, and I will head the list for $10, and Mr. D. will perhaps do that or better, and you will get a good subscription."—Lynch v. Egypt Coal Co., 181 N.W. 385, 190 Iowa 1272.

(6) That defendant's adjuster stated that the other insurers were paying ninety and ninety-three per cent for losses, and that, if plaintiff would settle on ninety-three per cent, the papers would be filled out.—Fidelity Union Fire Ins. Co. v. Hicks, Tex Civ.App., 250 S.W. 1084.

(7) Other cases.

Iowa.—Golden v. Bilbo, 184 N.W. 643, 192 Iowa 319.

Minn.—Bartels v. Schwake, 190 N.W. 178, 153 Minn. 251.

Mont.—Continental Oil Co. v. Bell, 21 P.2d 65, 94 Mont. 123.

Wash.—Eckhardt v. Harder, 294 P. 981, 160 Wash. 207.

39. Ala.—Louisville & N. R. Co. v. John W. O'Neill Co., 85 So. 482, 204 Ala. 154.

Iowa.—Suntken v. Suntken, 272 N.W. 132, 223 Iowa 347—Wise v. Adair, 50 Iowa 104.

Mo.—Jacobs v. Danciger, 130 S.W.2d 588, 344 Mo. 1042, certiorari denied Danciger v. Jacobs, 60 S.Ct. 144, 308 U.S. 607, 84 L.Ed. 507.

N.C.—Connor v. Fleming Bros. Lumber & Mfg. Co., 147 S.E. 672, 197 N.C. 66.

Or.—Dalk v. Lachmund, 70 P.2d 558, 157 Or. 152—McCallister v. Farra, 243 P. 785, 117 Or. 278.

R.I.—Wartell v. Novograd, 141 A. 461, 49 R.I. 191.

Tex.—Kollaer v. Puckett, Civ.App., 232 S.W. 914, dismissed for want of jurisdiction.

Wash.—Svea Fire & Life Ins. Co. v. Spokane, P. & S. Ry. Co., 28 P.2d 266, 175 Wash. 622.

W.Va.—Ingles v. Stealey, 101 S.E. 167, 85 W.Va. 155.

"There is a distinction between an offer or proposition to compromise a doubtful or disputed claim and an offer to settle upon certain terms a claim that is unquestioned."—Broyles v. Haas, 172 S.E. 742, 745, 48 Ga.App. 321.

An offer to pay all damages is a circumstance sufficient to warrant the inference of an admission of liability.—Gagne v. New Haven Road Const. Co., 175 A. 818, 87 N.H. 163—Altman v. Boston & N. St. R. Co., 78 A. 616, 75 N.H. 573—Gray v. Rollinsford, 58 N.H. 253.

Motor vehicle accidents

Where, after a motor vehicle accident, defendant voluntarily promises or offers that he will pay plaintiff's repair bill or otherwise compensate him for his damages, and by his language or conduct indicates his admission of liability, his statements are admissible as such, and are not excluded as offers of compromise.

U.S.—Arnold v. Owens, C.C.A.N.C., 78 F.2d 495.

Ala.—Landham v. Lloyd, 136 So. 815, 223 Ala. 487.

Kan.—McComas v. Clements, 21 P.2d 895, 137 Kan. 681.

La.—Hebert v. Collom, 136 So. 663, 17 La.App. 582.

Mass.—Dennison v. Swerdlove, 146 N. E. 27, 250 Mass. 507—Mielke v. Dobrydnio, 138 N.E. 561, 244 Mass. 89.

Pa.—Liebster v. Lucas, 82 Pa.Super. 184.

Vt.—Turgeon v. Baker, 163 A. 588, 105 Vt. 61—Thayer v. Glynn, 106 A. 834, 93 Vt. 257.

42 C.J. p 1230 note 88.

Communications held not offers of compromise

(1) Carrier's offer to pay for a lost article on proof of its value.—Lewis v. Joyner, 113 S.E. 829, 29 Ga.App. 92.

(2) Letter of insurer reciting limit of its liability and letter of insured refusing to accept settlement.—Provident Life & Accident Ins. Co. v. Nicholson, 160 S.E. 5, 157 Va. 345.

40. Ark.—Ehlers v. Rose, 30 S.W.2d 849, 182 Ark. 131.

Tenn.—Shelby County v. Adams, 15 Tenn.App. 66.

Value of land to be condemned

Evidence that owner of tract sought to be condemned offered to take one thousand dollars for it the day before was admissible as an admission against interest.—Williamson County v. Brock, 10 N.E.2d 654, 367 Ill. 159.

Fair estimate of value

Where the amount named in an offer to accept a certain sum in settlement appears to have been arrived at

against interest and not an attempt to compromise. Accordingly negotiations alleged to constitute all or part of an unsuccessful compromise treaty may be admitted as admissions of liability where it appears that they proceeded on the tacit assumption that the entire amount claimed was actually due,[41] or where there was no denial, express or implied, of liability and the only questions discussed were the amount to be paid,[42] the terms,[43] time,[44] or method[45] of payment, or whether the declarant shall be given some incidental advantage in consideration of payment.[46] So too, where there is no denial of liability, it may be competent to show that a party promised to do the fair thing,[47] or the right thing,[48] or to settle,[49] or adjust,[50] or make good,[51] failure to deny liability being the significant circumstance.[52] Likewise a suggestion of submitting the matter to arbitration has been held admissible;[53] but where an offer to arbitrate relates to the question of liability itself it is not competent as an admission,[54] and consent to the appointment of a referee or auditor involves no such admission of liability as to have evidentiary value.[55]

Pendency of action or controversy. The rule excluding offers of compromise or the negotiations comprising them applies as well where the offer was made before as after the commencement of the action.[56] However, there must be a contro-

as a fair estimate of value, it is relevant.
Mo.—Springfield v. Schmook, 68 Mo. 394.
R.I.—Daniels v. Woonsocket, 11 R.I. 4.

A claim of damage for the purpose of obtaining payment thereof is not an offer of compromise and is competent against the party making the same for the purpose of showing that subsequent claims by him are fictitious or exaggerated.—Kugel v. Sterling, 164 Ill.App. 371.

Offer to accept any amount offered
Where the claimant in a workman's compensation proceeding offered to accept whatever amount the employer's insurer was willing to pay in settlement, the offer was a circumstance to be considered on the preliminary question of whether claimant had admitted that his claim was groundless but it did not preclude consideration of other circumstances.—Gagne v. New Haven Road Const. Co., 175 A. 818, 87 N.H. 163.

41. Nev.—Orr Ditch & Water Co. v. Silver State Lodge, 78 P.2d 95, 100, 58 Nev. 292, citing **Corpus Juris.**
22 C.J. p 313 note 10.

42. Cal.—Truman v. Sutter-Butte Canal Co., 244 P. 923, 76 Cal.App. 293.
Ill.—Smith v. Gray, 147 N.E. 459, 316 Ill. 488, reversing 232 Ill.App. 624—Smothers v. Cosgrove-Meehan Coal Co., 264 Ill.App. 488, 492, citing **Corpus Juris.**
Mass.—Tosti v. Rossetti, 179 N.E. 212, 277 Mass. 553.
Nev.—Orr Ditch & Water Co. v. Silver State Lodge, 78 P.2d 95, 100, 58 Nev. 292, citing **Corpus Juris.**
N.H.—Davidson v. American Cent. Ins. Co., 119 A. 707, 80 N.H. 552.
Wash.—Poole's Seed & Implement Co. v. Rudene, 200 P. 1104, 117 Wash. 150.
22 C.J. p 313 note 11.

Recognition of value of services
In a real estate broker's action for seven hundred fifty dollars compensation earned on the exchange of land, evidence that after the deal was consummated defendant agreed to pay plaintiff the amount sued for, but later declined to do so, and of admissions by defendant that he offered plaintiff three hundred dollars, and later three hundred seventy-five dollars, was admissible, in so far as it tended to show that defendant recognized the importance and value of plaintiff's services.—Barnes v. Beakley, Tex.Civ.App., 224 S.W. 531.

43. Ga.—Teasley v. Bradley, 47 S.E. 925, 120 Ga. 373.
22 C.J. p 313 note 12.

Offer to give new note
In suit against maker and guarantor of notes, evidence that maker offered after suit was filed to give a new note if payee would release guarantor was admissible to show admission of liability, as against contention that it was proof of offer of compromise.—Brewer v. Foshee, App., 178 So. 778, modified on other grounds 179 So. 87, 189 La. 220.

44. Ala.—Walker v. American Agricultural Chemical Co., 80 So. 36, 202 Ala. 214.
Tex.—Ayres v. MacDonald, Civ.App., 233 S.W. 597, reversed on other grounds McDonald v. Ayres, Com.App., 242 S.W. 192.

45. Ind.—Hood v. Tyner, 28 N.E. 1033, 3 Ind.App. 51.
Wyo.—Kahn v. Traders' Ins. Co., 34 P. 1059, 4 Wyo. 419, 62 Am.S.R. 47.

46. Pa.—Wallace v. Hussey, 63 Pa. 24.

47. Ala.—Alexander v. Smith, 61 So. 68, 180 Ala. 541.
22 C.J. p 313 note 15.

48. Or.—McCallister v. Farra, 243 P. 785, 117 Or. 278.

49. Iowa.—Langdon v. Ahrends, 147 N.W. 940, 166 Iowa 636.

50. Mass.—Dennison v. Swerdlove, 146 N.E. 27, 250 Mass. 507.

51. Mass.—Wiseman v. Rome, 146 N.E. 28, 250 Mass. 505.

52. Nev.—Orr Ditch & Water Co. v. Silver State Lodge, 78 P.2d 95, 100, 58 Nev. 292, citing **Corpus Juris.**
22 C.J. p 313 note 18.

53. Ga.—Adair v. Carmichael 191 S.E. 177, 55 Ga.App. 696—Barrow County Cotton Mills v. Sams, 172 S.E. 820, 48 Ga.App. 357.
22 C.J. p 313 note 17.

An agreement to arbitrate as to the extent of damage and the amount to be paid, and containing no express or implied denied of liability, was held admissible.—Orr Ditch & Water Co. v. Silver State Lodge, 78 P.2d 95, 100, 58 Nev. 292, citing **Corpus Juris.**

54. Iowa.—Mundhenk v. Central Iowa R. Co., 11 N.W. 656, 57 Iowa 718.

55. Tex.—Hughes v. Christy, 26 Tex. 230.

56. Ill.—Cook v. Korshak, 134 N.E. 49, 301 Ill. 603, reversing 221 Ill. App. 650.
Mo.—Jacobs v. Danciger, 130 S.W. 2d 588, 344 Mo. 1042, certiorari denied Danciger v. Jacobs, 60 S.Ct. 144, 308 U.S. 607, 84 L.Ed. 507.
22 C.J. p 310 note 79.

Condemnation proceedings
(1) Where the law contemplates negotiations between the condemning party and the owner of property before condemnation proceedings are instituted, an unaccepted offer of compromise made pending such negotiations cannot be proved on the issue of value.—City of Greensboro v. Garrison, 130 S.E. 203, 190 N.C. 577—22 C.J. p 312 note 2 [a] (2).

(2) However, it has been held that an offer to sell land to a railroad before it is located should be regarded as an offer made before the controversy arose, and is properly admitted in a subsequent condemnation proceeding.—Kaufman v. Pittsburg, C. & W. R. Co., 60 A. 2, 210 Pa. 440—22 C.J. p 312 note 2 [a] (1).

versy between the parties at the time of the alleged offer. for if there is no controversy there is nothing to compromise.[57] Some authorities have even held, or at least intimated, that there must have been a disputed claim prior to the alleged offer;[58] but others have held that an offer made in recognition of an existing claim or controversy is within the rule even though such claim has not as yet been expressed.[59]

Connection of statement with compromise negotiations. Not every statement or admission made in connection with compromise negotiations is excluded, for, as appears infra in § 287, statements of independent facts so made are admissible, and certainly no statement or admission will be excluded because of compromise connections unless it appears to have been made as part of, and under the motivating influence of, compromise negotiations pending or contemplated at the time.[60] It is not, however, necessary that it should be expressly stated that what is said or written is on the faith of the compromise negotiations;[61] it is sufficient if this fact can be satisfactorily inferred from the circumstances under which the statement was made.[62] Thus, for example, the actual pendency of negotiations for a settlement[63] or the pendency of litigation[64] at the time the statement or admission is made is a circumstance warranting such an inference. Conversely, where no compromise negotiations appear to have been pending or contemplated, or where the circumstances actually negative their existence, or where the statements are not connected with or referable to any such negotiations, so that the statements appear to have been made by reason of their supposed truth, they are competent, and are not to be excluded merely because the party subsequently asserts that he intended to effect a compromise.[65] So a statement has been held ad-

57. Mo.—Bush v. Stumpe, 222 S.W. 1006—Starnes v. St. Joseph Ry., Light, Heat & Power Co. App. 22 S.W.2d 73, affirmed 52 S.W.2d 852, 331 Mo 44—Landsbaum v. Janet Realty Co., App., 226 S.W. 604.
R.I.—Wartell v. Novograd, 141 A. 461, 49 R.I. 191.
S.C.—Floyd v. Montgomery Lumber Co., 98 S.E. 139. 111 S.C. 382.
Tex.—West v. Cashin, Civ.App., 83 S.W.2d 1001, 1008, error dismissed, citing **Corpus Juris**—Lloyds America v. Poe, Civ.App., 69 S.W.2d 160, 162, error dismissed, citing **Corpus Juris.**
22 C.J. p 312 note 2.

58. Tex.—West v. Cashin, Civ.App., 83 S.W.2d 1001, error dismissed—Lloyds America v. Poe, Civ.App., 69 S.W.2d 160—Merchants' Cotton Oil Co. v. Acme Gin Co., Civ.App., 284 S.W. 680—Texas & P. R. Co. v. Spann, Civ.App., 173 S.W. 600.

59. D.C.—McMahon v. Matthews, 48 App.D.C. 303.
Mo.—Starnes v. St. Joseph Ry., Light, Heat & Power Co., App., 22 S.W. 2d 73, 79, affirmed 52 S.W.2d 852, 331 Mo. 44—Swearingen v. Moore, 257 S.W. 815, 215 Mo.App. 531.
Contra Brown v. Republic Casualty & Surety Co., Mo.App., 31 S.W.2d 111—Farber v. Boston Ins. Co., 256 S.W. 1079, 215 Mo.App. 564—Paris v. Waddell, 123 S.W. 79, 139 Mo. App. 288.
22 C.J. p 312 note 2 [b].
"A controversy exists within the meaning of the rule whenever anything has transpired within the knowledge of the parties which has made the interests of the parties hostile. Even though no one has ever intimated that he claims a cause of action against the other, yet, if anything has happened which is calculated to produce litigation, the fact that one person offered to pay for a release of that possible cause of action and that the other refused to grant the release on such terms characterizes the transaction as an offer of compromise of an existing controversy, without proof of any previous claims or negotiations."—Starnes v. St. Joseph Ry., Light, Heat & Power Co., supra.

60. Ga.—Bussey v. Holtsizer, 152 S. E. 293, 41 Ga.App. 178
Okl.—Cherry Bros. Trading Co. v. Rock Island Implement Co., 214 P. 559, 89 Okl. 201.
22 C.J. p 311 note 92.

61. Mich.—Manistee Nat. Bank v. Seymour, 31 N.W. 59, 64 Mich. 59.
22 C.J. p 311 note 93.

62. Colo.—Chicago, B. & Q. R. Co. v. Roberts, 57 P. 1076, 26 Colo. 329.

63. Mich.—Corlett-Stone Lumber Co. v. Parker, 203 N.W. 122, 230 Mich. 537.
N.M.—Springer Ditch Co. v. Wright, 247 P. 270, 31 N.M. 457.
22 C.J. p 312 note 95.

64. Md.—Reynolds v. Manning, 15 Md. 510.

65. Cal.—Bank of Italy Nat. Trust & Savings Ass'n v. Johnson, 46 P. 2d 244, 7 Cal.App.2d 463.
Ga.—Kaiser v. Simmons, 183 S.E. 343, 52 Ga.App. 355.
Ind.—Krauss v. Weaver, 130 N.E. 800, 191 Ind. 133.
Kan.—Moore v. Connelly, 237 P. 900, 119 Kan. 35.
La.—Usher v. Rieth, 6 La.App. 861.
Mich.—Marsh v. Rogers, 197 N.W. 540, 226 Mich. 290.
Mo.—Huttig v. Brennan, 41 S.W.2d 1054, 1063, 328 Mo. 471, citing **Corpus Juris**—Madison v. Taxi Owners Ass'n, App., 148 S.W.2d 106.
Ohio.—Springfield Gas Co. v. Herman, 188 N.E. 733, 46 Ohio App. 309.
Okl.—Phillips Petroleum Co v. Malone, 66 P.2d 5, 179 Okl. 449—Freeman v. Vandruff, 259 P. 257, 126 Okl. 238—Cherry Bros. Trading Co. v. Rock Island Implement Co, 214 P. 559, 561, 89 Okl. 201, quoting **Corpus Juris.**
Tex.—Bush v. Gaffney, Civ.App., 84 S.W.2d 759—Shaw v. Brennan, Civ. App., 22 S.W.2d 1092, error dismissed—Pandem Oil Corporation v. McKinney, Civ.App., 3 S.W.2d 466, error dismissed—Ayres v. MacDonald, Civ.App., 233 S.W. 597, reversed on other grounds McDonald v. Ayres, Com.App., 242 S.W. 192.
Vt.—Turgeon v. Baker, 163 A. 588, 105 Vt. 61—Thayer v. Glynn, 106 A. 834, 93 Vt. 257.
W.Va.—Averill v. Hart & O'Farrell, 132 S.E. 870, 101 W.Va. 411.
22 C.J. p 312 notes 99, 1.

Subsequent offer
"Where a party makes admissions without regard to a compromise, and when it does not appear that any compromise or proposition to compromise is in view, the fact that she may afterwards propose that the parties compromise will not have a retroactive effect so as to prevent her independent admissions from being proved against her."—McBride v. Georgia R. & Electric Co., 54 S.E. 674, 125 Ga. 515.

Connection revealed by proffert of other evidence
Where evidence of offer of compromise had been excluded, plaintiffs' oral evidence on subject was properly rejected, since plaintiffs could not have their separate questions divorced from showing of whole transaction previously made.—Olshove v. Pere Marquette R. Co., 248 N.W. 906, 263 Mich. 579.

missible where it was made merely as an inducement to consent to open negotiations for compromise,[66] or before any compromise was discussed,[67] or after an attempt to effect a compromise had been abandoned;[68] when made by a person not seeking a compromise[69] of the matter before the court in the action,[70] or by a party who had consistently refused to compromise,[71] or by a person who could not settle the dispute;[72] when made while the declarant was discussing the liability of another;[73] or when the statement was made in connection with an attempt to compromise another claim not included in the action in which such statement is offered.[74] Although it has been held that a statement of fact or an admission cannot be excluded as having been part of compromise negotiations where no such negotiations were pending at the time it was made,[75] there is also authority for the view that, where a controversy actually exists, the fact that there have been no prior negotiations will not exclude a statement which itself constitutes the initial offer of compromise or overture of pacification.[76]

§ 286. Independent Relevancy of Offer

According to some authorities, an offer of compromise, although inadmissible to show an admission of liability, may be admissible as relevant circumstantial evidence to prove other facts; but other authorities hold that it is inadmissible to prove any fact entering the question of liability, or, indeed, for any purpose whatsoever.

According to some authorities, an offer of compromise, although inadmissible as an admission of liability, may be admissible as relevant circumstantial evidence to prove a fact other than that of liability,[77] such as due diligence,[78] waiver,[79] good

Conversation dealing with performance

Permitting seller's attorney to testify to conversation with defendant's agent as to seller's refusal to ship more seed until seed shipped was paid for was not error, it not referring to a settlement but to performance.—Lokey v. Rudy-Patrick Seed Co. of Kansas City, Mo.App., 285 S.W. 1028.

Denial of liability

In action for balance due on soda fountain, letter from defendant's agent denying liability was admissible as plaintiff's exhibit, against contention that letter was offer of compromise.—Krummenacher Drug Co. v. Chouteau, Mo.App., 296 S.W. 255.

Admission of liability

An admission of liability contained in an offer to settle in response to a demand for a settlement is not inadmissible as made with a view to a compromise when there is nothing to indicate that there has been any effort to compromise, and such effort cannot be inferred from the circumstances under which the offer was made.—Hening & Hagedorn v. Glanton, 108 S.E. 256, 27 Ga.App. 339.

In "hope" of compromise

That plaintiff submitted to physical examination in hope of effecting compromise is no objection to physicians' testimony as to result of examination.—Plater v. W. C. Mullins Const. Co., 17 S.W.2d 658, 223 Mo. App. 650.

66. Iowa.—Ewing v. Hatcher, 154 N.W. 869, 175 Iowa 443.
22 C.J. p 313 note 3.

67. La.—Ellis v. New Orleans Great Northern R. Co., 126 So. 64, 169 La. 797.

68. Conn.—Broschart v. Tuttle, 21 A. 925, 59 Conn. 1, 11 L.R.A. 33.

69. Cal.—Smith v. Whittier, 30 P. 529, 95 Cal. 279.
22 C.J. p 313 note 5.

Discussion of disputed account

Evidence of statements made during mere discussion of disputed account is admissible, discussion not necessarily being attempt at compromise.—Fink & Schindler Co. v. Gavros, 257 P. 156, 83 Cal.App. 582.

70. Ind.—McCrum v. McCrum, 76 N.E. 415, 36 Ind.App. 636.

71. W.Va.—Levine Bros. v. Mantell, 111 S.E. 501, 90 W.Va. 166.

72. Mo.—Moore v. H. Gaus & Sons Mfg. Co., 20 S.W. 975, 113 Mo. 98.
22 C.J. p 313 note 7.

Infant's suit

In a minor's action for personal injury, evidence tending to establish that his next friend had made an offer of compromise and settlement of the injury was held properly excluded on the ground that a next friend has no authority to settle or compromise an infant's suit without leave of court.—Rubin v. L. H. Trowbridge Sign Co., 122 A. 763, 99 N.J. Law 216.

Advice to compromise

Permitting evidence that deceased railroad employee's friend and coworker, who had no authority to act for the railroad in this matter, advised widow to compromise was held not error.—Norfolk & W. Ry. Co. v. Lumpkins, 144 S.E. 485, 151 Va. 173.

73. Ga.—Freeman v. Bigham, 65 Ga. 580.

74. Mo.—Huttig v. Brennan, 41 S.W.2d 1054, 1063, 328 Mo. 471, citing **Corpus Juris.**
Tex.—Mosley v. Harkins, Civ.App., 147 S.W.2d 309.
22 C.J. p 313 note 9.

75. Vt.—Thayer v. Glynn, 106 A. 834, 93 Vt. 257.

76. Mo.—Starnes v. St. Joseph Ry. Light, Heat & Power Co., Mo.App., 22 S.W.2d 73, affirmed 52 S.W.2d 852, 331 Mo. 44.
Apparently contra Brown v. Republic Casualty & Surety Co., Mo.App., 31 S.W.2d 111—Paris v. Waddell, 123 S.W. 79, 139 Mo.App. 288.

77. Ga.—John Deere Plow Co. v. Anderson, 116 S.E. 38, 29 Ga.App. 497.
Iowa.—Suntken v. Suntken, 272 N.W. 132, 138, 223 Iowa 347, quoting **Corpus Juris.**
22 C.J. p 314 note 23.

Concealment of cause of action

In suit to require accounting of earnings of partnership, testimony concerning proposed compromise agreement between plaintiff and defendant was properly admitted as circumstance relating to question of concealment of cause of action, where defense was that action was barred by limitations.—Lake v. Wright, 53 S.W.2d 233, 186 Ark. 227.

Agency

Testimony regarding offer of compromise by insurer's attorney was held admissible to establish attorney was insurer's agent.—Meehan v. Commercial Casualty Ins. Co., 165 S.E. 194, 166 S.C. 496.

78. R.I.—Messler v. Williamsburg City Fire Ins. Co., 108 A. 832, 42 R.I. 460.

Reason for delay

Evidence of promise to settle is admissible as explaining the delay in bringing suit.—Dierks Lumber & Coal Co. v. Tollett, 10 S.W.2d 5, 178 Ark. 199.

79. Ill.—Hasterlik v. New Jersey Fidelity & Plate Glass Ins. Co., 229 Ill.App. 604.
22 C.J. p 314 note 25.

Time limit for bringing suit

Evidence that negotiations were conducted for a considerable time is

faith in asserting a claim[80] or in the performance of a contract,[81] reliance on an alleged promise,[82] or interest in the event of the suit.[83] However, it has been held that evidence of an offer of compromise is not only inadmissible as an admission of liability, but is equally inadmissible to prove any material fact entering the question of liability,[84] or to discredit a party as a witness,[85] or to contradict his testimony;[86] and it has even been said that such evidence is incompetent for all purposes.[87]

§ 287. Statement of Independent Facts

A statement or admission made apparently independently of the concessions involved in the proposed compromise, and purporting to be true rather than hypothetical, is admissible, provided it is separable from the offer.

Although, as appears supra § 285, when a statement or apparent admission is made only tentatively and hypothetically, in manifest contemplation of a compromise, and with a view to mutual concessions, it is inadmissible, where the statement or admission is made apparently independently of the concessions involved in the proposed compromise, and purports to be true rather than hypothetical, it is admissible,[88] provided it is not so integrated with an offer of compromise as to be inseparable from it.[89] The precise manner in which the statement or admission is related to the proposed compromise is immaterial; the rule applies equally where the statement directly relates or refers to a compromise offer,[90] or is made in connection therewith,[91] or accompanies it,[92] or was made pending

admissible to show waiver of the time limit for bringing suit.—Messler v. Williamsburg City Fire Ins. Co., 108 A. 832, 42 R.I. 460.

80. W.Va.—Parkersburg & Marietta Sand Co. v. Smith, 85 S.E. 516, 76 W.Va. 246, Ann.Cas.1918E 449.
22 C.J. p 314 note 26.

81. Tex.—Southern Home Bldg. Co. v. Wimbish, Civ.App., 112 S.W.2d 211.

82. Colo.—Cross v. Kistler, 23 P. 903, 14 Colo. 571.

83. Ala.—Watson v. Reed, 29 So. 837, 129 Ala. 388.
22 C.J. p 314 note 28.

84. Tenn.—Sullins v. Farragut Tire & Battery Co., 234 S.W. 330, 144 Tenn. 491.

As proof of agency

In an action resulting from the negligence of an alleged agent, driver of defendant, evidence of an offer of a compromise settlement with plaintiff was inadmissible, even though offered to show that the driver was an agent as a circumstance of relationship and not for the purpose of fixing liability.—Sullins v. Farragut Tire & Battery Co., 234 S.W. 330, 144 Tenn. 491, overruling Lynde v. Browning, 2 Tenn.Civ.App. 262.

Where fact of offer is in issue

Evidence that an offer of compromise was made would be admissible where the question at issue is whether such an offer was made.—Sullins v. Farragut Tire & Battery Co., 234 S.W. 330, 144 Tenn. 491.

85. Vt.—Neal v. Thornton, 31 A. 296, 67 Vt. 221.
22 C.J. p 311 note 89.

86. Ill.—Alward v. Woodard, 146 N.E. 154, 315 Ill. 150.

87. Mo.—Engel v. Powell, 134 S.W. 74, 154 Mo.App. 233, 238.
"Declarations made at the time of the offer [by plaintiff], that it was not made to show an offer of compromise, but for the purpose of showing that defendant was not acting in good faith, did not make it competent evidence. The purpose for which it was offered, did not render that competent, which from its nature was forbidden by the law. Offers to compromise are universally held to be incompetent for all purposes."—Engel v. Powell, supra.

88. U.S.—Phœnix Assur. Co., Limited, of London, England v. Davis, Tex., 67 F.2d 824.
Ala.—Louisville & N. R. Co. v. John W. O'Neill Co., 85 So. 482, 204 Ala. 154.
Cal.—Scott v. Sciaroni, 226 P. 827, 66 Cal.App. 577.
Fla.—Mutual Ben. Health & Accident Ass'n v. Bunting, 183 So. 321, 133 Fla. 646.
Ga.—Blakely Hardwood Lumber Co. v. Reynolds Bros. Lumber Co., 160 S.E. 775, 173 Ga. 602.
Ill.—Edward Edinger Co. v. Willis, 260 Ill.App. 106.
Ind.—National Life & Accident Ins. Co. v. Williams, 138 N.E. 826, 84 Ind.App. 343.
Iowa.—Suntken v. Suntken, 272 N.W. 132, 223 Iowa 347.
Kan.—Stanley v. Beaty, 83 P.2d 637, 148 Kan. 492—T. M. Deal Lumber Co. v. Jones, 21 P.2d 933, 137 Kan. 480—McComas v. Clements, 21 P.2d 895, 137 Kan. 681—Kaull v. Blacker, 193 P. 182, 107 Kan. 578.
La.—Kohlman v. Witherell & Dobbins Co., 98 So. 756, 759, 155 La. 57, citing **Corpus Juris.**
Mass.—Calvin Hosmer, Stolte Co. v. Paramount Cone Co., 189 N.E. 192, 285 Mass. 278.
N.M.—Balduini v. Ulibarri, 228 P. 607, 608, 30 N.M. 127, citing **Corpus Juris.**
N.Y.—Emery v. Litchard, 245 N.Y.S. 209, 137 Misc. 885.
N.C.—Lewis v. Lewis, 134 S.E. 486, 192 N.C. 267.
N.D.—Gunther v. Baker, 188 N.W. 575, 48 N.D. 1071.
Ohio.—Hughes v. Hanselman, 185 N.E. 852, 44 Ohio App. 516—Weyant v. McCurdy, 12 Ohio App. 491.
Tex.—Farmers' State Bank & Trust Co. v. Gorman Home Refinery, Com.App., 3 S.W.2d 65, 67, citing **Corpus Juris,** and affirming, Civ.App., 273 S.W. 694—United Employers Casualty Co. v. Smith, Civ.App., 145 S.W.2d 249, 250, citing **Corpus Juris.**
Wash.—L. Romano Engineering Corporation v. State, 113 P.2d 549.
W.Va.—Keatley v. Hanna Chevrolet Co., 6 S.E.2d 1, 121 W.Va. 669.
22 C.J. p 314 note 29, p 315 notes 30, 35.
"Plaintiff was not, in an effort to buy peace, admitting something then in issue. The admission he made was not induced by the effort to compromise, since it was wholly unnecessary to any settlement of the litigation then pending. It was stated as a fact, and not merely hypothetically."—Lovett v. West Virginia Cent. Gas Co., 79 S.E. 1007, 73 W.Va. 40, 45.

To facilitate settlement

The fact that the statement would probably not have been made at all except on the assumption that it would facilitate a settlement does not render it inadmissible.—Rose v. Rose, 44 P. 658, 112 Cal. 341.

89. Md.—Union Trust Co. of Maryland v. Resisto Mfg. Co., 181 A. 726, 729, 169 Md. 381, citing **Corpus Juris**—Brown v. Hebb, 175 A. 602, 608, 167 Md. 535, 97 A.L.R. 366, citing **Corpus Juris.**

90. Iowa.—Suntken v. Suntken, 272 N.W. 132, 138, 223 Iowa 347, quoting **Corpus Juris.**
22 C.J. p 315 note 31.

91. Pa.—Heyman v. Hanauer, 152 A. 910, 302 Pa. 56—Mrkich v. Pennsylvania R. Co., 23 Westmoreland Co.L.J. 182.

92. Kan.—Kaull v. Blacker, 193 P. 182, 107 Kan. 578.

compromise negotiations.[93] To be independent within the rule the statement or admission must not involve the disputed facts forming the subject matter of the proposed compromise;[94] but it need not, of course, be independent of the subject matter of the controversy between the parties.[95]

The rule is frequently applied so as to admit admissions of liability;[96] and under it admissions of a variety of other facts have been admitted, such as, for example, admissions of possession of land in controversy,[97] an advance in the price of goods after the placing of an order,[98] the quantity of coal taken by a trespasser where the compromise involved only the amount to be paid,[99] and facts tending to show contributory negligence.[1] The rule has also been applied to permit the introduction of such matters as threats to give false testimony,[2] or suggestions of suppressing incriminating evidence,[3] of compounding a crime,[4] of marrying complainant in bastardy proceedings,[5] or of the party's ability to use indirect influences to divide the jury.[6]

In written communications. At least so much of a written communication as constitutes a statement of an independent fact may be admitted, although the communication also contains an offer of compromise,[7] unless the offer cannot be separated from the

Md.—Union Trust Co. of Maryland v. Resisto Mfg. Co., 181 A. 726, 169 Md. 381.
Mass.—Calvin Hosmer, Stolte Co. v. Paramount Cone Co., 189 N.E. 192, 285 Mass. 278.
N.M.—Jones v. Jernigan, 223 P. 100, 29 N.M. 399.
N.D.—Gunther v. Baker, 188 N.W. 575, 48 N.D. 1071.
Pa.—Mannella v. City of Pittsburgh, 6 A.2d 70, 334 Pa. 396.

Admission in preamble

An admission against interest made in the preamble of a proposed contract of compromise was admissible, where the admission did not disclose the purpose of compromise.—Keatley v. Hanna Chevrolet Co., 6 S.E.2d 1, 121 W.Va. 669.

Recognition of contract

Where the execution of the contract sued on is denied by defendant, a letter offering to compromise the claim and making an express recognition of the contract is admissible in evidence as an admission of the execution of the contract.—Scofield v. Parlin & Orendorff Co., Ill., 61 F. 804, 10 C.C.A. 83.

93. Cal.—Scott v. Sciaroni, 226 P. 827, 66 Cal.App. 577.
Ga.—Blakely Hardwood Lumber Co. v. Reynolds Bros. Lumber Co., 160 S.E. 775, 173 Ga. 602.
Ill.—Smothers v. Cosgrove-Meehan Coal Co., 264 Ill.App. 488—Hyde Park Inv. Co. v. Hyde Park State Bank, 257 Ill.App. 539.
Iowa.—Suntken v. Suntken, 272 N.W. 132, 138, 223 Iowa 347, quoting **Corpus Juris**—Hoover v. First American Fire Ins. Co. of New York, 255 N.W. 705, 218 Iowa 559.
La.—Kohlman v. Witherell & Dobbins Co., 98 So. 756, 155 La. 57.
Mich.—Sanderson v. Barkman, 261 N.W. 291, 272 Mich. 179.
N.H.—Gagne v New Haven Road Const. Co., 175 A. 818, 87 N.H. 163—Caplan v. Caplan, 142 A. 121, 83 N.H. 318.
N.M.—Balduini v. Ulibarri, 228 P. 607, 30 N.M. 127.
N.C.—Montgomery v. Lewis, 122 S.E. 374, 187 N.C. 577.
Ohio.—Harrison Bldg. Co. v. Beckerman, 156 N.E. 919, 24 Ohio App. 202—Weyant v. McCurdy, 12 Ohio App. 491.
Or.—Blue v. City of Union, 75 P.2d 977, 159 Or. 5—Dalk v. Lachmund, 70 P.2d 558, 157 Or. 152.
Pa.—Mannella v. City of Pittsburgh, 6 A.2d 70, 334 Pa. 396.
S.D.—Erickson v. Webber, 237 N.W. 558, 58 S.D. 446, 80 A.L.R. 914.
Va.—Brickell v. Shawn, 9 S.E.2d 330, 175 Va. 373—Hendrickson v. Meredith, 170 S.E. 602, 606, 161 Va. 193, citing **Corpus Juris.**
Wash.—Ingraham v. Associated Oil Co., 6 P.2d 645, 166 Wash. 305.
Wis.—Papke v. Haerle, 207 N.W. 261, 189 Wis. 156.
22 C.J. p 315 note 32.

"The distinction between a statement of an independent fact during negotiations for settlement and the offer of compromise itself as an admission of liability is generally recognized."—Olshove v. Pere Marquette R. Co., 248 N.W. 906, 907, 263 Mich. 579.

During meeting for purpose of compromising

Such a statement or admission is admissible although made at a meeting arranged for the purpose of effecting a compromise.
Ill.—Edward Edinger Co. v. Willis, 260 Ill.App. 106.
Md.—Union Trust Co. of Maryland v. Resisto Mfg. Co., 181 A. 726, 169 Md. 381.
Mass.—Akers v. Demond, 103 Mass. 318.

94. Md.—Brown v. Hebb, 175 A. 602, 167 Md. 535, 97 A.L.R. 366.
Okl.—Kunkel v. Rattray, 231 P. 541, 110 Okl. 289.

Facts admitted as basis of discussion

Letters written for the purpose of settling a controversy respecting liability for agreed rent, after the abandonment of operation on a certain line under a trackage arrangement, were competent to establish the abandonment.—New York Cent. R. Co. v. Central New England Ry. Co., 162 N.E. 324, 264 Mass. 128, certiorari granted Central New England Ry. Co. v. Boston & A. R. Co., 49 S.Ct. 176, 278 U.S. 596, 73 L.Ed. 526, affirmed 49 S.Ct. 358, 279 U.S. 415, 73 L.Ed. 770.

95. Iowa.—Suntken v. Suntken, 272 N.W. 132, 137, 223 Iowa 347, quoting **Corpus Juris.**
Md.—Brown v. Hebb, 175 A. 602, 608, 167 Md. 535, 97 A.L.R. 366, citing **Corpus Juris.**
Va.—Brickell v. Shawn, 9 S.E.2d 330, 175 Va. 373.
W.Va.—Keatley v. Hanna Chevrolet Co., 6 S.E.2d 1, 121 W.Va. 669.
22 C.J. p 315 note 35.

96. Cal.—Scott v. Sciaroni, 226 P. 827, 66 Cal.App. 577.
Kan.—Stanley v. Beaty, 83 P.2d 637, 148 Kan. 492.
S.D.—Erickson v. Webber, 237 N.W. 558, 58 S.D. 446, 80 A.L.R. 914.
Tex.—Merchants' Cotton Oil Co. v. Acme Gin Co., Civ.App., 284 S.W. 680.
Wash.—Ingraham v. Associated Oil Co., 6 P.2d 645, 166 Wash. 305.
22 C.J. p 315 note 36.

97. N.C.—Lewis v. Lewis, 134 S.E. 486, 192 N.C. 267.

98. La.—Kohlman v. Witherell & Dobbins Co., 98 So. 756, 155 La. 57.

99. Ill.—Smothers v. Cosgrove-Meehan Coal Co., 264 Ill.App. 488.

1. Mich.—Sanderson v. Barkman, 261 N.W. 291, 272 Mich. 179.

2. Pa.—Caffery v. Philadelphia & R. Ry. Co., 104 A. 569, 261 Pa. 251.

3. Neb.—Robb v. Hewitt, 58 N.W. 88, 39 Neb. 217.
22 C.J. p 316 note 38.

4. La.—State v. Wright, 21 So. 160, 48 La.Ann. 1525.
N.C.—State v. Jefferson, 28 N.C. 305.

5. Ala.—Laney v. State, 19 So. 531, 109 Ala. 34.

6. Conn.—Broschart v. Tuttle, 21 A. 925, 59 Conn. 1, 11 L.R.A. 33.

7. Kan.—Stanley v. Beaty, 83 P.2d 637, 148 Kan. 492.
Md.—Brown v. Hebb, 175 A. 602, 167 Md. 535, 97 A.L.R. 366.

statements of fact,[8] but the irrelevant portion should be pointed out to the jury with instructions to disregard it.[9] It has been held, however, that where the communication is offered as a whole it may be excluded on objection, even though the statements of fact are separable from the offer of compromise.[10]

§ 288. Offer "Without Prejudice"

A party's admission made in the course of compromise negotiations, even though otherwise admissible, is not competent evidence against him where it is stated to be made without prejudice in those or equivalent words.

A party's admission of liability or of other facts in the course of negotiations for a compromise, even though otherwise admissible, as, for example, where it is a statement of an independent fact,[11] is not competent evidence against him, where the admission is expressly stated to be made without prejudice. The words "without prejudice" are not indispensable, an equivalent expression being equally efficacious,[12] and, indeed, an agreement not to make prejudicial use of an admission may be inferred from circumstances.[13] Of course, evidence of an offer of compromise which is plainly such is inadmissible even if it is not stated that it is made without prejudice,[14] for such offers are presumed to have been so made.[15]

§ 289. Functions of Court and Jury

Whether an offer or statement constitutes an offer of compromise or an inseparable part of one, or an independent admission, presents a preliminary question, which is ordinarily one for the court in the first instance, but if there is sufficient doubt the question may be submitted to the jury under proper instructions.

Before the competency of an offer or statement is passed on, the preliminary question of whether it is an offer of compromise or an inseparable part of one, or an independent admission, must be decided.[16] Ordinarily this question is, in the first instance, one for the court;[17] and where there is no doubt that the proffered statement was an offer of compromise, it is error to submit the question to the jury.[18] However, where the circumstances create a doubt as to the nature of the statement, the preliminary question is one of fact,[19] and if the case is being tried before a jury, the statement may,[20]

Mass.—Wagman v. Ziskind, 125 N.E. 633, 234 Mass. 509.
N.C.—Lewis v. Lewis, 134 S.E. 486, 192 N.C. 267.
22 C.J. p 316 note 42.

8. Md.—Brown v. Hebb, 175 A. 602, 167 Md. 535, 97 A.L.R. 366.
22 C.J. p 316 note 43.
"This rule [that independent admissions are admissible] cannot be applied where the admission is so coupled with the offer that they cannot be separated so as to show distinctly what was in the writer's mind."—Merchants' Cotton Oil Co. v. Acme Gin Co., Tex.Civ.App., 284 S.W. 680, 682.

9. Me.—Beaudette v. Gagne, 33 A. 23, 87 Me. 534.
22 C.J. p 316 note 44.

10. Conn.—Knowles v. Crampton, 11 A. 593, 55 Conn. 336.
Uncertainty as to matter offered
Refusing defendant's offer of portion of letter written by plaintiff to defendant after suit was brought, part of which letter contained offer of compromise, was not error where offer did not clearly show which part of letter was meant.—Cowen v. T. J. Stewart Lumber Co., 58 P.2d 573, 177 Okl. 266.

11. Ga.—Leidy v. Gould, 140 S.E. 400, 37 Ga.App. 410.
Md.—Union Trust Co. of Maryland v. Resisto Mfg. Co., 181 A. 726, 169 Md. 381—Brown v. Hebb, 175 A. 602, 167 Md. 535, 97 A.L.R. 366.
22 C.J. p 316 note 46.

12. Ga.—Walton County Bank v. Stanton, 144 S.E. 815, 38 Ga.App. 591, affirmed Stanton v. Walton County Bank, 149 S.E. 573, 169 Ga. 40.
22 C.J. p 316 note 50.

13. Tex.—Merchants' Cotton Oil Co. v. Acme Gin Co., Civ.App., 284 S.W. 680.
22 C.J. p 316 note 51.

14. U.S.—Outlook Hotel Co. v. St. John, C.C.A.N.J., 287 F. 115.
Wash.—Moore v. Stetson Mach. Works, 188 P. 769, 110 Wash. 649.
In New Jersey
(1) The rule has been enunciated that an offer of compromise is admissible unless it is stated to be made without prejudice.—Richardson v. International Pottery Co., 43 A. 692, 63 N.J.Law 248.
(2) However, as appears supra § 285, later cases have held offers inadmissible without reference to any such accompanying condition.

15. U.S.—West v. Smith, Conn., 101 U.S. 263, 273, 25 L.Ed. 809—Home Insurance Co. v. Baltimore Warehouse Co., Md., 93 U.S. 527, 23 L.Ed. 868—Outlook Hotel Co. v. St. John, C.C.A.N.J., 287 F. 115.
Tex.—Quannah, A. & P. Ry. Co. v. Lancaster, Civ.App., 207 S.W. 606.

16. N.H.—Gagne v. New Haven Road Const. Co., 175 A. 818, 87 N.H. 163.

17. Or.—Blue v. City of Union, 75 P.2d 977, 159 Or. 5.
22 C.J. p 316 note 60.
Discretion
The admission or nonadmission of such evidence is in the sound discretion of the court.
Mich.—Wood v. Henley, 296 N.W. 657, 296 Mich. 491.
Ohio.—Hughes v. Hanselman, 185 N.E. 852, 44 Ohio App. 516.

18. D.C.—McMahon v. Matthews, 48 App.D.C. 303, 309.
Reason for rule
"To let the testimony go to the jury would be to commit the wrong which the rule rendering such testimony incompetent was intended to prevent."—McMahon v. Matthews, supra.

19. Vt.—Turgeon v. Baker, 163 A. 588, 105 Vt. 61.
Where court is trier of facts
Where in a workman's compensation proceeding in which the court was the trier of facts, evidence was offered that claimant had offered to accept whatever the employer's insurer would pay in settlement, it was error to exclude such evidence as a matter of law; the court should have decided as a question of fact whether such offer amounted to an admission that claimant's case was groundless, and if he so found, should have made a ruling to such effect to protect the rights of the parties.—Gagne v. New Haven Road Const. Co., 175 A. 818, 87 N.H. 163.

20. U.S.—Phoenix Assur. Co., Limited, of London, England, v. Davis, C.C.A.Tex., 67 F.2d 824, 826, citing **Corpus Juris**—Merchants' Cotton

and, it has been held, should,[21] be received in evidence under instructions to the jury not to consider it if found to be a mere offer of compromise.

§ 290. Agreements for Compromise

It is usually considered that the rule excluding evidence of offers of compromise does not apply to a completed agreement for a compromise, and that such an agreement, unless for some reason void, is ordinarily admissible.

While it has been broadly stated that compromises, like offers of compromise, are not admissible in evidence,[22] as admissions of liability,[23] it is usually considered that the rule excluding evidence of offers of compromise does not apply to a completed agreement for a compromise, but such agreement may be shown,[24] where it is afterward repudiated by one of the parties,[25] unless it is for some reason void;[26] but an unsigned compromise agreement prepared by the party against whom it is sought to be introduced in evidence is not admissible.[27] The fact that a plaintiff has accepted a settlement of an action cannot be regarded as an admission that such action was without justification.[28] According to some authorities, proof of payment pursuant to a compromise agreement is inadmissible as an admission of liability for the claim compromised,[29] but there is authority to the contrary.[30] Of course, statements of independent facts contained in an agreement of compromise are admissible as admissions by the parties signing the agreement, in an action by or against a third person.[31]

§ 291. Admissions by Conduct

Evidence of prior conduct inconsistent with a contention advanced in litigation is admissible as being in the nature of an admission.

Where a party on the trial of an action advances contentions which are inconsistent with his prior conduct with relation to the matter in controversy, such prior conduct may be shown as being in the nature of an admission.[32]

Oil Co. v. Acme Gin Co., Civ.App., 284 S.W. 680.
22 C.J. p 317 note 61.

21. N.H.—Gagne v. New Haven Road Const. Co., 175 A. 818, 87 N.H. 163.

22. Tex.—Hyde v. Marks, Civ.App., 138 S.W.2d 619, error dismissed, judgment correct.

23. Okl.—Gibson v. Chickasha Cotton Oil Co., 15 P.2d 41, 159 Okl. 291.

24. U.S.—Huntley v. Snider, C.C.A. Mass., 86 F.2d 539, affirming, D.C., In re Huntley, 14 F.Supp. 784, rehearing denied, C.C.A., Huntley v. Snider, 88 F.2d 335.
Cal.—Harris v. Miller, 235 P. 981, 196 Cal. 8.
Wash.—Smith v. Telford, 203 P. 938, 118 Wash. 502.
Wyo.—Carpenter & Carpenter v. Kingham, 109 P.2d 463, 472, citing **Corpus Juris,** and modified on other ground and rehearing denied 110 P.2d 824.
22 C.J. p 317 note 62.
Note, however, a case holding that an alleged agreement between the parties for payment of the full amount due was not inadmissible as a compromise, since it was not a compromise.—Erwin M. Jennings Co. v. Di Genova, 141 A. 866, 107 Conn. 491.
Arbitration agreement was held not inadmissible as compromise offer in action on hail policy.—Hansell v. Farmers' Mut. Hail Ins. Ass'n of Iowa, 228 N.W. 88, 209 Iowa 378.

25. Iowa.—Dugger v. Kelly, 150 N.W. 27, 168 Iowa 129.
Md.—Union Trust Co. of Maryland v. Resisto Mfg. Co., 181 A. 726, 729, 169 Md. 381, quoting **Corpus Juris.**
Okl.—Lane v. F. S. Miller Lumber Co., 222 P. 968, 101 Okl. 14.
Abandonment under right reserved
Under agreement whereby principal and surety recognized liability in suit on bond for which principal gave his notes, and stipulating that obligee could sue on notes or return them and prosecute its suit as though notes had never been given, obligee could not take advantage of such recognition of liability by surety in suit on bond.—Continental Ins. Co. v. Prevost, La.App., 154 So. 671.

26. Tex.—Houston v. Stewart, 90 S.W. 49, 40 Tex.Civ.App. 499.
Infant's action
Where an agreement of compromise of an infant's suit for personal injuries was reduced to judgment which was subsequently vacated at the instance of the judgment creditor, the compromise agreement was inadmissible on the issue of liability.—Denison v. Crowley, Milner & Co., 271 N.W. 735, 279 Mich. 211.

27. Pa.—Burns v. Pennsylvania R. Co., 79 A. 125, 229 Pa. 648.

28. Mo.—Searcy v. Searcy, 193 S.W. 871, 196 Mo.App. 311.

29. Ala.—Hughes v. Daniel, 65 So. 518, 187 Ala. 41.
Mass.—Ross v. Fishtine, 177 N.E. 811, 277 Mass. 87.
Okl.—Gibson v. Chickasha Cotton Oil Co., 15 P.2d 41, 159 Okl. 291.
Advance payments
Checks given as advance compensation payments, at specified rate per week, pursuant to a compromise settlement which failed of consummation, were not admissible in evidence in compensation suit as an admission by employer that deceased employee's average weekly wage was the specified amount.—Bedner v. Federal Underwriters Exchange, Tex.Civ.App., 133 S.W.2d 214, error dismissed, judgment correct.
Evidence of doubt as to law
Although compromise of litigation involving taxes by city and taxpayer was not evidence as an admission on issue of rights and liabilities of taxpayer, it was evidence of some doubt of the law applicable in making the assessment.—Trustees of Phillips Exeter Academy v. Exeter, 11 A.2d 569, 90 N.H. 472.
Compromise of part of claim
In action by insurer on claim assigned to it by insured for damage to insured's crop caused by fire allegedly started by railroad, evidence of railroad's compromise with insured and his lessor as to part of the loss, containing no admission of responsibility, was inadmissible as admission against interest.—Svea Fire & Life Ins. Co. v. Spokane, P. & S. Ry. Co., 28 P.2d 266, 175 Wash. 622.

30. Ala.—Crawford v. McLeod, 64 Ala. 240.
N.Y.—Emery v. Litchard, 245 N.Y.S. 209, 137 Misc. 885.
22 C.J. p 317 note 62 [a].

31. Conn.—Hall v. Sera, 152 A. 148, 112 Conn. 291.
Tex.—Forreston Gin Co. v. Waxahachie Nat. Bank, Civ.App., 31 S.W.2d 355, reversed on other grounds Waxahachie Nat. Bank v. Forreston Gin Co., Com.App., 46 S.W.2d 666.

32. U.S.—U. S. ex rel. Vajtauer v. Commissioner of Immigration at Port of New York, N.Y., 47 S.Ct.

Evidence of this character takes a wide range and may be received, for example, where the matter in controversy is the ownership,[33] value,[34] or control[35] of property; the existence of a relevant mental state,[36] such as assent[37] or lack thereof,[38] intent,[39] motive,[40] knowledge,[41] or recklessness;[42] or the existence of such matters as claim,[43] disclaimer,[44] fraud,[45] probable cause,[46] and ratification.[47]

However, the fact that goods have been sold under a distress warrant constitutes no admission of their ownership by any particular person.[48] Further a mere offer to return to dissatisfied customers the consideration received does not constitute an admission that the transaction was fraudulent.[49]

Failure to advance claim. In case of a plaintiff or other claimant it may be shown that he has failed under suitable circumstances to advance the demand on which he relies.[50]

302, 273 U.S. 103, 71 L.Ed. 560, affirming, D.C., U. S. ex rel. Vajtauer v. Curran, 15 F.2d 127—U. S. ex rel. Bilokumsky v. Tod, N.Y., 44 S. Ct. 54, 263 U.S. 149, 68 L.Ed. 221—Carpenter v. Baltimore & O. R. Co., C.C.A.Ohio, 109 F.2d 375.

Ark.—Field v. Koonce, 12 S.W.2d 772, 178 Ark. 862, 68 A.L.R. 1303—Watkins v. Reliance Life Ins. Co., 238 S.W. 10, 12, 152 Ark. 12, citing **Corpus Juris.**

Ill.—Bell v. McDonald, 139 N.E. 613, 308 Ill. 329.

Mass.—Hall v. Shain, 197 N.E. 437, 291 Mass. 506.

Mo.—Reiling v. Russell, 134 S.W.2d 33, 345 Mo. 517—Rice v. Jefferson City Bridge & Transit Co., 216 S. W. 746.

N.H.—Caplan v. Caplan, 142 A. 121, 83 N.H. 318.

N.C.—Hoge v. Lee, 113 S.E. 776, 184 N.C. 44.

Tex.—Farmers' State Bank & Trust Co. v. Gorman Home Refinery, Com.App., 3 S.W.2d 65, 67, citing **Corpus Juris,** and affirming, Civ. App., 273 S.W. 694—Campbell v. McLaughlin, Com.App., 280 S.W. 189, 191, quoting **Corpus Juris**—Wise v. Haynes, Civ.App., 103 S. W.2d 477—Hussmann v. Leavell & Sherman, Civ.App., 20 S.W.2d 829, 831, citing **Corpus Juris,** and affirmed Hussman v. Leavell & Sherman, Com App., 32 S.W.2d 643.

Vt.—Chatfield v. Morgan, 131 A. 845, 99 Vt. 337.

Wash.—Proctor v. Appleby, 188 P. 481, 110 Wash. 403.

W.Va.—Elkins v. Tompkins, 117 S.E. 914, 94 W.Va. 136.

22 C.J. p 317 note 67.

Conduct in former litigation

Where, in a prior suit involving similar issues, one of the parties, who is also a party to the subsequent litigation, has been guilty of fraudulent conduct from which can be logically inferred his belief in the existence or nonexistence of some fact in issue in the subsequent suit, evidence of such fraudulent conduct in the course of the former litigation may be admitted as evidence against him.—Reiling v. Russell, 134 S.W.2d 33, 345 Mo. 517.

33. U.S.—Peoples Trust & Savings Bank v. Hubbell, C.C.A.Kan., 102 F.2d 754.

Mich.—Power v. Palmer, 183 N.W. 199, 214 Mich. 551.

22 C.J. p 318 note 68.

Application for entry as admission of title in United States

An application for entry of lands as a homestead is an admission that the title thereto was in the United States, and is inconsistent with a claim thereafter made that the applicant had already acquired the title by adverse possession.—Hanks v. Lee, 195 P. 302, 57 Utah 537.

Failure to make return for taxation is an admission of lack of ownership.—Carter v. Marble Products, 175 S.E. 480, 179 Ga. 122.

34. Or.—Fischer v. Bayer, 210 P. 452, 108 Or. 311.

Offer to exchange property

Evidence that, previous to defendants' trespass, for which action is brought, they made an offer of exchange, for plaintiffs' land, of other such land of equal area in the vicinity, is competent by way of admission as to the then considered value of plaintiffs' land, although thereafter conditions may have changed, as the court would presumably give weight to any evidence of change before the trespass—Oakland Water Front Co. v. Le Roy, C.C.A.Cal., 282 F. 385.

Offer to sell

An offer to sell property at a certain price is admissible as an admission of the value of the property.—Phelps v. Root, 63 A. 941, 78 Vt. 493—22 C.J. p 319 note 88 [c].

Value of improvements

Evidence that the owner of a building filed proof of loss, specifying the value of improvements, and collected the amount claimed, is admissible as an admission contrary to his contention that the improvements were valueless.—Conlin v. Osborn, 120 P. 755, 161 Cal. 659.

35. Conn.—Reetz v. Mansfield, 178 A. 53, 119 Conn. 563.

Insurance policy obtained by property owner is admissible as an admission of the owner's control of the property.—Benussi v. Hannah, 199 P. 1063, 53 Cal.App. 243.

Repairs subsequent to an accident may be shown as an admission that the person causing the repairs to be made was in control of the premises.—Benussi v. Hannah, supra.

38. Mass.—Walsh v. Feinstein, 146 N.E. 355, 251 Mass. 109.

37. Ga.—Churchman v. Robinson, 20 S.E. 215, 93 Ga. 731.

22 C.J. p 318 note 70.

38. N.Y.—Donahue v. Case, 61 N.Y. 631.

39. Tex.—Keesey v. Old, 17 S.W. 928, 82 Tex. 22.

22 C.J. p 318 note 72.

40. Pa.—Fulmer v. Williams, 15 A. 726, 122 Pa. 191, 9 Am.S.R. 88, 1 L.R.A. 603.

22 C.J. p 318 note 73.

41. Mich.—Totten v. Totten, 138 N. W. 257, 172 Mich. 565.

22 C.J. p 318 note 74.

42. Conn.—Linsley v. Bushnell, 15 Conn. 225, 38 Am.D. 79.

43. Cal.—Davey v. Grigsby, 196 P. 296, 51 Cal.App. 220.

22 C.J. p 319 note 76.

However, where a buyer, as instructed by the sellers, made claim against the carrier for goods purchased arriving in decayed condition, the buyer did not, by filing the claim with the carrier, admit he had no claim against the sellers.—Austin, Nicholls & Co. v. Barberio, Tex.Civ. App., 246 S.W. 703.

44. Ohio.—Eisenzimmer v. Connecticut Fire Ins. Co., 161 N.E. 553, 27 Ohio App. 366.

22 C.J. p 319 note 77.

45. Pa.—Horn v. Brooks, 61 Pa. 407.

22 C.J. p 319 note 78.

46. Mass.—Hackett v. King, 8 Allen 144, 85 Am.D. 695.

47. N.Y.—Bronson v. Wiman, 8 N. Y. 182.

22 C.J. p 319 note 81.

48. Pa.—Sork v. Label, 2 A.2d 521, 133 Pa. Super. 169.

Reason for rule is that, as discussed in the C.J.S. title Landlord & Tenant § 681, also 36 C.J. p 549 note 31—p 553 note 3, a landlord is entitled to distrain for unpaid rent on any goods found on the premises, regardless of the ownership.—Sork v. Label, supra.

49. Ind.—Edwards v. Hudson, 14 N. E.2d 705, 214 Ind. 120.

50. Ark.—Field v. Koonce, 12 S.W. 2d 772, 178 Ark. 862, 68 A.L.R. 1303.

22 C.J. p 319 note 88.

However, the mere failure to claim under insurance policies is not, as against the person inflicting the injuries, an admission that no injuries were suffered,[51] and an employee's failure to file a compensation claim is not, as against persons causing the injury, an admission of the termination of disability, particularly when the remedy against the persons causing the injury has been vigorously pursued.[52]

Flight. Defendant's flight from the scene of an accident is tantamount to an admission of responsibility.[53]

Hospital or medical care. The offer of a master to provide his injured servant with a nurse[54] or to pay the doctor's bills and wages of the servant during his incapacity[55] or to take care of him, coupled with advice not to have a member amputated,[56] does not tend to prove liability of the master for the injury; nor, in view of a statute prohibiting such effect, does payment of medical expenses of the employee constitute an admission of liability,[57] although if there is, or probably will be, evidence showing that the payment of medical expenses by the employer was made as an acknowledgment of liability evidence of the payment is admissible.[58] Hospitalization and nursing of an injured employee as emergency treatment cannot be treated as an admission that the injury occurred in the course of the employment within the meaning of workmen's compensation acts, either on the part of the employer or the insurer,[59] nor can payments by such insurer for emergency treatments constitute an admission of liability under the policy;[60] but the act of the employer in reimbursing the employee for medical expenditures is an admission of liability under such statutes.[61]

Where a person has been injured, the fact that another person took the injured person to a hospital and provided medical care,[62] or paid[63] or promised to pay[64] for such care, or otherwise enabled the injured person to obtain medical treatment,[65] does not constitute an implied admission of liability, unless the surrounding circumstances indicate an admission of liability rather than an act of benevolence.[66]

Payment. In an action by a wife for the death of her husband, evidence concerning the payment of compensation by defendant to the wife has been held to be admissible.[67]

While it has been held that payments to an employee constitute admissions that the employee is entitled to compensation,[68] unless such effect is prohibited by statute,[69] where the employer alleges that the employee was not injured while in the course of his employment, the fact of payment does not amount to an admission of injury in the course of the employment.[70]

Payment by an insured of premiums during a period of alleged total disability does not constitute

51. U.S.—Cherry-Burrell Co. v. Thatcher, C.C.A.Mont., 107 F.2d 65.

52. Mo.—Reiling v. Russell, 134 S.W.2d 33, 345 Mo. 517.

53. Ala.—Greenwood v. Bailey, 184 So. 285, 28 Ala.App. 362.
Conn.—Kotler v. Lalley, 151 A. 433, 112 Conn. 86.
La.—Langenstein v. Reynaud, 127 So. 764, 13 La.App. 272—Vuillemot v. August J. Claverie & Co., 125 So. 168, 12 La.App. 236.

54. Vt.—Sias v. Consolidated Lighting Co., 50 A. 554, 556, 73 Vt. 35.
Discussion of rule
"It must be the impulse of every humane employer to provide this assistance for a disabled workman without means, and the rule of evidence ought to be such as to permit his doing it without danger to himself. Such an act should be treated as a humane recognition of an existing necessity, and not as an admission of the justice of a claim not then asserted."—Sias v. Consolidated Lighting Co., supra.

55. N.Y.—Grogan v. Dooley, 105 N.E. 135, 211 N.Y. 30.

56. Mass.—Wilson v. Daniels, 145 N.E. 469, 250 Mass. 359.

57. La.—Fowler v. Louisiana Highway Commission, App., 160 So. 813

58. N.H.—Clairmont v. Cilley, 153 A. 465, 85 N.H. 1.

59. U.S.—Winningham v. Travelers Ins. Co., C.C.A.Tex., 93 F.2d 520.

60. Mo.—Ocean Accident & Guarantee Corporation v. Missouri Engineering & Contracting Co., App., 63 S.W.2d 196.

61. Mo.—Morrow v. Orscheln Bros. Truck Lines, App., 151 S.W.2d 138.

62. N.C.—Patrick v. Bryan, 162 S.E. 207, 202 N.C. 62—Barber v. Southern Ry. Co., 138 S.E. 17, 193 N.C. 691.

63. La.—Portier v. Picou, 3 So.2d 295—Floyes, for Use and Benefit of Floyes, v. City of Monroe, App., 194 So. 102.
N.C.—Brown v. Wood, 160 S.E. 281, 201 N.C. 309—Norman v. Porter, 148 S.E. 41, 197 N.C. 222.
Contra Sullivan v. Heyer, 21 N.E.2d 776, 300 Ill.App. 599.

64. U.S.—Arnold v. Owens, C.C.A. N.C., 78 F.2d 495.
Mass.—Kindell v. Ayles, 160 N.E. 813, 263 Mass. 244.
Ohio.—Quiel v. Wilson, App., 34 N.E.2d 590.
42 C.J. p 1230 note 89.

65. Mo.—Waters v. Hays, 118 S.W.2d 39, conforming to State ex rel. Steinbruegge v. Hostetter, 115 S.W.2d 802, 342 Mo. 341, quashing judgment Waters v. Hays, App., 103 S.W.2d 498, record quashed State ex rel. Waters v. Hostetter, 126 S.W.2d 1164, 344 Mo. 443, mandate conformed to Waters v. Hays, App., 130 S.W.2d 220.

66. U.S.—Arnold v. Owens, C.C.A.N.C., 78 F.2d 495.

67. Cal.—Dawson v. San Diego Electric Ry. Co., 255 P. 215, 82 Cal.App. 141.
Payment of claims of third persons see infra § 292.

68. La.—Johnson v. Vernon Parish Lumber Co., 92 So. 219, 151 La. 664.

69. La.—Fowler v. Louisiana Highway Commission, App., 160 So. 813—Doby v. Canulette Shipbuilding Co., App., 156 So. 51—Foret v. Paul Zibilich Co., 137 So. 366, 18 La.App. 363.

70. La.—Moore v. Louisiana Oil Refining Corporation, 4 La.App. 540.

an admission that the disability was merely temporary.[71] There is authority that whether a payment for injuries and an acceptance of a release actually was made is a question of fact for the trial court sitting as a jury.[72]

Evidence of part payment by a defendant insurer under a policy is admissible as an admission[73] of the existence of the policy,[74] its effectiveness at the time of the loss or injury,[75] the nature of the disability,[76] and of the amount of the employee's salary as a basis for the amount of compensation.[77] However, part payment of an employee's demand for compensation is not an admission of the employer's liability therefor when there is no obligation, express or implied, to make compensation.[78]

Payment of interest on commercial paper does not constitute an admission of liability for the principal where such payment is merely pursuant to an obligation plainly expressed in a written agreement.[79]

A tender of payment is an admission of liability.[80] Likewise, tender of a part of the amount claimed to be due as delinquent taxes constitutes an admission of a proper assessment, except as to equalization.[81]

Acceptance by an employee of a lesser wage than that claimed is an admission against interest.[82] Further, the receipt of sick benefits from other insurers constitutes an admission that the beneficiary was sick at the time of receiving the benefits.[83] However, the fact that a client has accepted the fruits of a judgment does not, as against the attorney's claim for compensation, amount to an admission that the damages were correctly assessed.[84]

Precautions taken to avoid loss by threatened litigation, as by obtaining a bond of indemnity,[85] efforts to buy off a conflicting claim,[86] offers to purchase perishable property before it spoils,[87] insuring one's self against liability for accidents,[88] transferring registration of an automobile to an unlicensed person,[89] or paying a mechanic in order to avoid the enforcement of a lien[90] are inadmissible for the reason that they imply no concession of liability.

Recognition of claim. In the case of a defendant it may be shown that his conduct has been such as to involve a recognition of the validity of the claim which he resists,[91] as by seeking a release from liability,[92] withdrawal from contesting,[93] or refusing to give his name without sufficient reason.[94] In addition, it may be shown that defendant's conduct involves a recognition of the validity of the claim by his doing something which indicates fear

71. U.S.—Lando v. Equitable Life Assur. Soc. of U. S., D C.Cal., 11 F. Supp. 729, affirmed, C.C.A., 84 F.2d 640.

72. N.J.—Dobbin v. Ratiner, 140 A. 32, 6 N.J.Misc. 117.

73. U.S.—Travelers Ins. Co. v. Drake, C.C A.Cal., 89 F.2d 47.

74. Tex.—Bankers' Lloyds v. Seymour, Civ.App., 49 S.W.2d 508—Zurich General Accident & Liability Ins. Co. v. Thompson, Civ.App., 47 S.W.2d 663—Texas Employers' Ins. Ass'n v. Varner, Civ.App., 20 S.W.2d 334.

75. Tex.—Bankers' Lloyds v. Seymour, Civ.App., 49 S.W.2d 508—Texas Employers' Ins. Ass'n v. Varner, Civ.App., 20 S W.2d 334.

76. Cal.—Bagnall v. Travelers' Ins. Co. of Hartford, Conn., 296 P. 106, 111 Cal.App. 714.
Ga.—New York Life Ins. Co. v. Thompson, 165 S.E. 847, 45 Ga.App. 638, affirmed 172 S.E. 3, 177 Ga. 898.

Disability at time of suit
Part payment does not constitute an admission that the disability continued up to the time of the suit.—New York Life Ins. Co. v. Thompson, supra.

77. Tex.—Fidelity & Casualty Co. of New York v. Branton, Civ.App., 70 S.W.2d 780, error dismissed.

78. U.S.—Camp v U. S., Ct.Cl., 5 S.Ct. 687, 113 U.S. 648, 28 L.Ed. 1081.

79. Wis.—Goodwin v. Bode, 189 N. W. 130, 177 Wis. 275.

80. Ill.—La Salle County v. Hatheway, 78 Ill.App. 95—Illinois Ins. Co. v. Manchester F. Assur. Co., 77 Ill.App. 673.

81. Tex.—Zachry v. City of Uvalde, Civ App., 24 S.W.2d 517, affirmed, Zachary v. City of Uvalde, Com.App., 42 S.W.2d 417.

82. N.Y.—Horn v. City of Jamestown, 7 N.Y.S.2d 62, 255 App.Div. 824.

83. N.Y.—Seidenspinner v. Metropolitan L. Ins. Co., 67 N.E. 123, 175 N.Y. 95, reversing 74 N.Y.S. 1108, 70 App Div. 476.

84. Ala.—Steiner, Crum & Weil v. Smith Sons Lumber Co., 93 So. 399, 207 Ala. 442.

85. N.C.—Lucas v. Nichols, 52 N.C. 32.
Ohio.—See City of Cleveland v. Connelly, 14 Ohio Cir.Ct.,N.S., 433.

86. Mich.—Wallen v. Rossman, 7 N. W. 901, 45 Mich. 333—Chapin v. Hunt, 40 Mich. 595.

87. Ga.—Armour v. Ross, 35 S.E. 787, 110 Ga. 403.

88. Me.—Sawyer v. J. M. Arnold Shoe Co., 38 A. 333, 90 Me. 369.
Mass.—Anderson v. Duckworth, 38 N.E. 510, 162 Mass. 251.

89. Mass.—Wilson v. Grace, 173 N. E. 524, 273 Mass. 146.

90. Wis.—Kelley v. Schupp, 18 N.W. 725, 60 Wis. 76.

91. Ark.—Field v. Koonce, 12 S.W.2d 772, 178 Ark. 862, 68 A.L.R. 1303.
Ind.—Epperson v. Rostatter, 168 N. E. 126, 90 Ind.App. 8.
N.Y.—McDonogh v. Paine, 209 N.Y.S. 440, 212 App Div. 572.
Tex.—Hussmann v. Leavell & Sherman, Civ.App., 20 S.W.2d 829, 832, citing **Corpus Juris** and affirmed Hussman v. Leavell & Sherman, Com.App., 32 S.W.2d 643—San Angelo Water, Light & Power Co. v. Baugh, Civ.App., 270 S.W. 1101.
22 C.J. p 319 note 89.

92. Tex.—Hussmann v. Leavell & Sherman, Civ.App., 20 S.W.2d 829, 832, citing **Corpus Juris,** and affirmed Hussman v. Leavell & Sherman, Com.App., 32 S.W.2d 643.
22 C.J. p 319 note 90.

93. Mo.—F. O. Sawyer Paper Co. v. Mangan, 68 Mo.App. 1.
Tex.—Hussmann v. Leavell & Sherman, Civ.App., 20 S.W.2d 829, 832, citing **Corpus Juris,** and affirmed Hussman v. Leavell & Sherman, Com.App., 32 S.W.2d 643.

94. Mass.—Jones v. Shattuck, 56 N. E. 736, 175 Mass. 415.

of an unsuccessful issue of litigation,[95] such as alienating property prior to a claim or suit but after the occurrence out of which the claim or action arose,[96] unless the transfer is for a valuable consideration,[97] or unless there is no relationship between the expected liability and the alienation.[98]

Further, where a defendant denies liability, it may be shown that he rested his defense on some other ground[99] or endeavored to gain time by promises of settlement.[1]

Repairs subsequent to accident. The making of repairs or similar conduct subsequent to an accident may not be shown as tending to prove a consciousness of negligence.[2] Evidence of repairs gratuitously made by a landlord is not admissible as an admission of a duty to make repairs,[3] although, where the evidence is conflicting as to whether the duty to keep premises in repair is imposed on the landlord or tenant by the terms of the lease, evidence of subsequent repairs by the landlord is admissible as in the nature of an admission of his duty to repair.[4]

Title to office or position. Where title to an office or position is in question, it may be shown, as against the incumbent, that he has discharged its duties;[5] and, conversely, where the question is whether a person is entitled to hold an office or position, the fact that a party has recognized such a right is as to him a competent fact.[6]

However, the fact that a person entitled to a position has taken examinations without obtaining a passing mark does not amount to an admission by him that such an examination is necessary to qualify for the position.[7]

Miscellaneous. Various other instances of conduct have been held to constitute[8] or not to consti-

95. Mass.—Lizotte v. Warren, 19 N.E.2d 60, 302 Mass. 317—Labrie v. Midwood, 174 N.E. 214, 273 Mass. 578.
R.I.—Chaufty v. De Vries, 102 A. 612, 41 R.I. 1.
Tex.—Hussmann v. Leavell & Sherman, Tex.Civ.App., 20 S.W.2d 829, 832, citing **Corpus Juris**, and affirmed Hussman v. Leavell & Sherman, Com.App., 32 S.W.2d 643.

96. Ill.—Goelitz v. Lathrop, 3 N.E.2d 305, 286 Ill.App. 248.
Iowa.—West Chester Bank of West Chester v. Dayton, 250 N.W. 695, 697, 217 Iowa 64, citing **Corpus Juris**.
Mass.—Credit Service Corporation v. Barker, 33 N.E.2d 293, 308 Mass. 476—Portland Gaslight Co. v. Ruud, 136 N.E. 75, 242 Mass. 272.
Minn.—Klein v. Pasch, 190 N.W. 338, 153 Minn. 291.
N.D.—Harmon v. Haas, 241 N.W. 70, 61 N.D. 772, 80 A.L.R. 1131.
Or.—Umphlette v. City of Silverton, 59 P.2d 244, 154 Or. 156—Mattechek v. Pugh, 55 P.2d 730, 153 Or. 1.
R.I.—Carlin v. Toste, 149 A. 584—Stanford v. Panniello, 133 A. 441.
5 C.J. p 669 note 83—22 C.J. p 319 note 93.

97. Mo.—Amsinger v. Najim, 73 S.W.2d 214, 335 Mo. 528.

98. Iowa.—West Chester Sav. Bank of West Chester v. Dayton, 250 N.W. 695, 217 Iowa 64.

99. Or.—Nichols v. Southern Pac. R. Co., 31 P. 296, 23 Or. 123, 37 Am.S.R. 664, 18 L.R.A. 55.
22 C.J. p 319 note 96.

1. Ala.—Wharton v. Thomason, 78 Ala. 45.
N.Y.—Peck v. Richmond, 2 E.D. Smith 380.

2. La.—Floyes, for Use and Benefit of Floyes v. City of Monroe, App., 194 So. 102.

3. Mass.—McKeon v. Cutter, 31 N.E. 389, 156 Mass. 296.
Tex.—F. H. Vahlsing, Inc., v. Hartford Fire Ins. Co., Civ.App., 108 S.W.2d 947, 952, quoting **Corpus Juris**, error dismissed.

4. Mass.—Readman v. Conway, 126 Mass. 374.

5. N.Y.—Trowbridge v. Baker, 1 Cow. 251.
22 C.J. p 319 note 84.

6. Pa.—Cummin v. Smith, 2 Serg. & R. 440.
22 C.J. p 319 note 85.

7. Iowa.—Brown v. Sturgeon, 287 N.W. 834, 227 Iowa 136.

8. U.S.—Barrett Co. v. Panther Rubber Mfg. Co., C.C.A.Mass., 24 F.2d 329.
Cal.—Ehlers v. Bihn, 235 P. 673, 71 Cal.App. 479.
22 C.J. p 317 note 67 [a].

Absence of complaint as affecting existence of injury

Evidence that no complaint was made by one who claimed to have received an injury is admissible on the question whether any such injury was suffered.—Fuller v. Jamestown St. R. Co., 26 N.Y.S. 1078, 75 Hun 273, affirmed 42 N.E. 1093, 148 N.Y. 741.

Erection of signboard as admission of public crossing

Erection of signboard after collision was admissible as admission that crossing was public.—Louisville & N. R. Co. v. Foster, 18 S.W.2d 983, 230 Ky. 157.

Failure to file tax return as showing profits made

Omission of a business man to file an income tax return may be an admission that no profit was made.—Kregel v. Cirkler, 198 N.W. 664, 158 Minn. 175.

Failure to give statement as showing no consideration

Failure of a creditor to give a statement of account due when requested is admissible as tending to prove a want of consideration for the obligation.—Hale v. Herring, Tex.Civ.App., 102 S.W.2d 468.

Insulation of electric wire as establishing proper construction

Where an electric company insulated a high-tension wire line when it was installed, the fact of insulation may be considered as an admission that insulation was indicated as proper construction under the circumstances and may be considered on the question of its negligence to the public and persons rightly on street in failing to keep the insulation in good order.—Hickman v. Union Electric Light & Power Co., Mo., 226 S.W. 570.

New safeguards as admission of ineffectiveness of old

Change in the kind of safeguard used may involve an admission that the kind superseded is insufficient, which may be shown in an action for an accident subsequently happening at a place where the safeguard is of the kind superseded in similar places.—Stephenville, etc., R. Co. v. Schrank, Tex.Civ.App., 175 S.W. 471.

Recognition of relation

On an issue as to the existence of a definite relation it may be shown that a party has recognized its existence.—Harding v. St. Louis Nat. Stock Yards, 90 N.E. 205, 242 Ill. 444—22 C.J. p 319 note 83.

Reinstatement of policy as showing premiums paid

Insurer's reinstatement of life policy constituted admission of insurer

tute[9] an admission.

Other acts and conduct as constituting or not constituting an admission are discussed elsewhere in this work, as, for example, retention of an account for an unreasonable time without objection see Account Stated § 37, and acceptance or procurement of a release see the C.J.S. title Release § 43, also 53 C.J. p 1245 notes 41–43.

§ 292. Settlements or Compromises with Third Persons

Evidence of payment of claims of third persons in the same position as a claimant is admissible as tending to show an admission, although evidence of settlements by a party of claims of other persons arising out of the same transaction, such persons being in the same position as the adverse party, is not admissible, except in unusual cases.

While the payment of the claims of other persons who are in the same position as claimant is not, of itself, an admission of liability,[10] nevertheless evidence of such payment is admissible as tending to show an implied admission of liability;[11] but, where the situation of the parties is different, evidence of payment is not admissible as an admission.[12]

A settlement between a party and a third person cannot be shown, even though it relates to the matters involved in the action and the person with whom the compromise was made was in the same position as the party seeking to show such settlement.[13] The rule above stated may be subject

that all premiums then due on policy were paid—National Fidelity Life Ins. Co. v. Henry, 48 P.2d 829, 173 Okl. 305.

9. N.H.—Olena v. Standard Oil Co., 135 A. 27, 82 N.H. 408.

Care at crossing as showing nonreliance on flagman

That driver and occupant of automobile looked for train at crossing was not an admission of nonreliance on flagman.—Ellington v. Chicago, R. I. & P. Ry. Co., Mo.App., 45 S.W.2d 105.

Domestication of foreign corporation as doing business in state

Domestication of a foreign corporation in order to be enabled to sue does not amount to an admission that the corporation was doing business in the state of the forum.—Creamery Package Mfg. Co. v. Cheyenne Ice Cream Co., 100 P.2d 116, 55 Wyo. 277.

Execution of deed as establishing liability on note

Act of wife in joining husband in executing deed to payee of note is not a recognition of her liability thereon, where at the time she did not know her name was on note.—West Chester Sav. Bank of West Chester v. Dayton, 250 N.W. 695, 217 Iowa 64.

Failure to give notice

Where railroad has no knowledge of whom to notify of accident, evidence of failure to give notification is inadmissible.—Clark v. Columbia Ry., Gas & Electric Co., 108 S.E. 178, 117 S.C. 11.

Revocation of suspension as denoting suspension unjustified

Revocation of a suspension of a government employee is not admissible as an admission that the suspension was unjustified.—Goodwin v. City of Nashua, N.H., 18 A.2d 825.

Setting aside money as admission of liability

Setting aside money to meet possible charge under trustee writ is not necessarily admission of liability to alleged debtor in writ.—White v. Beacon Trust Co., 177 N.E. 853, 277 Mass. 75.

10. U.S.—Chicago & N. W. Ry. Co. v. Kendall, C.C.A.Minn., 186 F. 139.
Ill.—Hill v. Hiles, 32 N.E.2d 933, 309 Ill.App. 321.
Ind.—Louisville, N. A. & C. R. Co. v. Roberts, 42 N.E. 247, 13 Ind.App. 692.
N.Y.—Woodland v. Cote, 299 N.Y.S. 742, 252 App.Div. 254.
Tex.—Thweatt v. Ocean Accident & Guarantee Corporation, Civ.App., 62 S.W.2d 250, error refused—Morton Salt Co. v. Keele, Civ.App., 293 S.W. 224, error dismissed 294 S.W. 1107, 116 Tex. 508—Galveston, H. & S. A. Ry. Co. v. Hertzig, 22 S.W. 1013, 3 Tex.Civ.App. 296.
22 C.J. p 320 note 14 [c].

11. U.S.—Krebs Pigment & Chemical Co. v. Sheridan, D.C.Pa., 12 F. Supp. 254, affirmed, C.C.A., 79 F. 2d 479.
N.H.—Goddard v. Berlin Mills Co., 131 A. 601, 82 N.H. 225.
N.C.—Rand v. Home Life Ins. Co., 174 S.E. 749, 206 N.C. 760.
Tenn.—Tennessee Coach Co. v. Young, 80 S.W.2d 107, 111, 18 Tenn. App. 592, quoting **Corpus Juris.**
Tex.—Magnolia Petroleum Co. v. Owen, Civ.App., 101 S.W.2d 354, error dismissed—Thweatt v. Ocean Accident & Guarantee Corporation, Civ.App., 62 S.W.2d 250, error refused—Magnolia Petroleum Co. v. Reed, Civ.App., 42 S.W.2d 274—Morton Salt Co. v. Keele, Civ.App., 293 S.W. 244, error dismissed 294 S.W. 1107, 116 Tex. 508—Galveston, H. & S. A. Ry. Co. v. Hertzig, 22 S.W. 1013, 3 Tex.Civ.App. 296.
22 C.J. p 320 note 14.

Flowage

Payments to other landowners along a stream for flowage caused by defendant's dam may be shown, particularly when made to owners of land further up the stream than plaintiff's land.—Goddard v. Berlin Mills Co., 131 A. 601, 82 N.H. 225.

Injuries to animals

In action for value of calf drowned in pit on land leased by defendant, plaintiff could prove that defendant paid claims for cow drowned in same pit.—Magnolia Petroleum Co. v. Reed, Tex.Civ.App., 42 S.W.2d 274.

Question for court

Whether the facts necessary to render the evidence admissible are shown is question for trial court.—Goddard v. Berlin Mills Co., 131 A. 601, 82 N.H. 225.

12. U.S.—Union Assur. Soc. v. Oregon-Washington R. & Nav. Co., C.C.A.Or., 299 F. 263.
S.C.—Thompson v. Richmond & D. R. Co., 24 S.C. 366.
Tex.—Kirklin v. Standard Coffee Co., Civ.App., 114 S.W.2d 263.

Payment under contract liability as admission of tort

Payment of claim under contract liability is not admissible in evidence as an admission that the damages were caused by its negligence in an action in tort by another to recover for such alleged negligence.—Union Assur. Soc. v. Oregon-Washington R. & Nav. Co., C.C.A. Or., 299 F. 263.

13. Ariz.—Schneider v. McAleer, 4 P.2d 903, 39 Ariz. 190.
Conn.—Ezzo v. Geremiah, 142 A. 461, 107 Conn. 670.
Iowa.—Jones v. Krambeck, 290 N.W. 56.
Md.—Nelson v. Seiler, 139 A. 564, 154 Md. 63.
Mass.—Carpenter v. Boston & Maine R. R., 3 N.E.2d 184, 295 Mass. 103.
Mo.—Tappe v. Polhmann, App., 79 S.W.2d 485, 489, citing **Corpus Ju-**

to exceptions under unusual circumstances.[14] A settlement by an injured person with an insurance company in which he carried a policy is not admissible in an action by him against the person whose alleged negligence caused the injury.[15]

§ 293. Attempts to Suborn Perjury or Suppress Evidence

Evidence of attempts to suborn perjury, suppress or destroy documentary evidence, or give false evidence is admissible as an admission, although the failure to produce evidence which the party cannot produce cannot be deemed an admission, and a failure to testify is not an admission where no duty to testify exists.

Evidence of a party's falsehood and all similar conduct is receivable against him as an indication of his consciousness that his case is weak or unfounded.[16]

An attempt to suborn perjury is evidence that the cause of the party by whom such attempt was made, or to whom it is attributable, is unjust,[17] or at least weak;[18] and the same is true of an attempt to persuade witnesses not to attend a trial or not to testify.[19] In addition, spoliation of documentary evidence constitutes an admission of the truth of the allegation of the opposite party.[20] Fur-

ris—Akin v. Hull, App., 30 S.W.2d 1101.
Wyo.—Carpenter & Carpenter v. Kingham, 109 P.2d 463, 472, citing **Corpus Juris,** and modified on other grounds and rehearing denied 110 P.2d 824.
22 C.J. p 320 note 15.

Injuries in common accident

(1) Where several persons are injured in the same accident a compromise with one cannot be shown in an action by the other.
U.S.—Domarek v. Bates Motor Transport Lines, C.C.A.Ill., 93 F.2d 522—Hawthorne v. Eckerson Co., C.C.A.Vt., 77 F.2d 844—Paster v. Pennsylvania R. R., C.C.A.N.Y., 43 F.2d 908.
Cal.—Curtis v. McAuliffe, 288 P. 675, 106 Cal.App. 1.
Ill.—Hill v. Hiles, 32 N.E.2d 933, 309 Ill.App. 321—Chicago City Ry. Co. v. Cooney, 95 Ill.App. 471, affirmed 63 N.E. 1029, 196 Ill. 466.
Ky.—Powers' Adm'r v. Wiley, 44 S.W.2d 591, 592, 241 Ky. 645, citing **Corpus Juris.**
Mo.—Pfiffner v. Kroger Grocer & Baking Co., App., 140 S.W.2d 79.
Mont.—Ashley v. Safeway Stores, 47 P.2d 53, 100 Mont. 312.
N.H.—Masterson v. Berlin St. Ry., 139 A. 753, 83 N.H. 190.
Tex.—Missouri, K. & T. R. Co. v. Smith, Civ.App., 101 S.W. 453.
22 C.J. p 320 note 15 [b]—42 C.J. p 1230 note 90.

(2) The reason for the rule is that the law favors the settlement of controversies out of court, and, if a man could not settle one claim out of court without fear that this would be used in another suit as an admission against him, many settlements would not be made.
U.S.—Hawthorne v. Eckerson Co., C.C.A.Vt., 77 F.2d 844.
Ill.—Hill v. Hiles, 32 N.E.2d 933, 309 Ill.App. 321.
Ky.—Powers' Adm'r v. Wiley, 44 S.W.2d 591, 241 Ky. 645.
Mo.—Pfiffner v. Kroger Grocer & Baking Co., App., 140 S.W.2d 79.

(3) A conversation by a passenger in a car in connection with a negotiation for a settlement of his claim is inadmissible in an action between other parties.—Chandler v. Owens, 179 So. 256, 259, 235 Ala. 356, citing **Corpus Juris.**

14. Wyo.—Carpenter & Carpenter v. Kingham, Wyo., 109 P.2d 463, 472, citing **Corpus Juris,** and modified on other grounds and rehearing denied 110 P.2d 824.
22 C.J. p 320 note 16.

Evidence of dishonest settlement by a party of the claim of another injured at the same time is competent.—Paster v. Pennsylvania R. R., C.C.A.N.Y., 43 F.2d 908.

15. U.S.—Puget Sound Electric R. Co. v. Van Pelt, Wash., 168 F. 206, 93 C.C.A. 492.
Tex.—San Antonio & A. P. R. Co. v. Tucker, Civ.App., 157 S.W. 175.

16. Mass.—D'Arcangelo v. Tartar, 164 N.E. 87, 265 Mass. 350.
Utah.—Nelson v. Lott, 17 P.2d 272, 81 Utah 265.

17. Ala.—Chestang v. Kirk, 118 So. 330, 332, 218 Ala. 176, citing **Corpus Juris.**
Ky.—Dix v. Gross, 128 S.W.2d 753, 278 Ky. 343.
Miss.—Interstate Co. v. Garnett, 122 So. 373, 381, 154 Miss. 325, quoting **Corpus Juris,** and suggestion of error overruled 122 So. 756, 154 Miss. 325, 63 A.L.R. 1402.
Mo.—Pennington v. Kansas City Rys. Co., 213 S.W. 137, 201 Mo.App. 483.
Ohio.—De Groodt v. Skrbina, 144 N.E. 601, 111 Ohio St. 108, 38 A.L.R. 591.
Pa.—McHugh v. McHugh, 40 A. 410, 186 Pa. 197, 65 Am.S.R. 849, 41 L.R.A. 805.
W.Va.—Maynard v. Bailey, 102 S.E. 480, 85 W.Va. 679, 9 A.L.R. 981.
22 C.J. p 321 note 19.
Relevancy of evidence as to subornation of perjury or suppression of evidence see supra § 179.

18. Mo.—Scrivner v. American Car & Foundry Co., 50 S.W.2d 1001, 330 Mo. 408.
N.Y.—Nowack v. Metropolitan St. R. Co., 60 N.E. 32, 166 N.Y. 433, 82 Am.S.R. 691, 54 L.R.A. 592, reversing 66 N.Y.S. 533, 54 App.Div. 302.
Pa.—Heslop v. Heslop, 82 Pa. 537.

19. Iowa.—Gregory v. Sorenson, 242 N.W. 91, 214 Iowa 374.
N.H.—Login v. Waisman, 136 A. 134, 82 N.H. 500.
Tex.—Johnson v. Whitehand, Civ. App., 21 S.W.2d 41, error dismissed.
22 C.J. p 321 note 21.

Advice of counsel

Where defendant's counsel informed an employee that it was the custom of employees as witnesses to claim a constitutional right against self-incrimination, but not as to the nature of the right of privilege, such advice is admissible as an admission that defendant's case is wrong or unjust.—Freeman v. Kansas City Public Service Co., Mo.App., 30 S.W.2d 176.

Testimony as unfavorable

An attempt to persuade witnesses not to attend a trial or to refrain from testifying may be construed as an admission that the testimony of the witness would be unfavorable.
Iowa.—Gregory v. Sorenson, 242 N.W. 91, 214 Iowa 1374.
N.H.—Login v. Waisman, 136 A. 134, 82 N.H. 500.

20. Mo.—Gaugh v. Gaugh, 11 S.W.2d 729, 321 Mo. 414, followed in Seehorn v. Gaugh, 11 S.W.2d 750, 321 Mo. 456—Haid v. Prendiville, 238 S.W. 452, 292 Mo. 552—Pomeroy v. Benton, 77 Mo. 64.
Presumptions arising from spoliation, fabrication, or nonproduction of evidence see supra §§ 151–156.

Reason for rule

The law, in consequence of the fraud practiced by the spoliation, will presume that the evidence destroyed will establish the other party's demand to be just.—Gaugh v. Gaugh, 11 S.W.2d 729, 321 Mo. 414, followed in Seehorn v. Gaugh, 11 S.W.2d 750, 321 Mo. 356—Haid v. Prendiville, 238 S.W. 452, 292 Mo. 552—Pomeroy v. Benton, 77 Mo. 64.

Rule held inapplicable

Mo.—Owsley v. Owsley, App., 34 S.W.2d 558.

ther, the suppression[21] or destruction[22] of documents is in the nature of an admission that they are unfavorable to the party having control of them, and a similar result may attach to an attempt to prevent investigation.[23] Accordingly such matters may be shown as being in the nature of admissions.[24]

On the other hand, evidence of a failure to produce evidence not reasonably within the power of the party to produce is inadmissible as an admission.[25]

The failure of a party to testify does not amount to a positive admission of the truth of the evidence of the other party,[26] unless a duty to testify exists.[27] Likewise the failure to call a witness does not amount to a positive admission of the truth of the evidence which he might have been called to contradict.[28] A refusal to permit an autopsy after the body has been prepared by an undertaker for burial cannot be deemed an admission as to the cause of death.[29]

§ 294. Admissions by Silence or Acquiescence

Evidence of silence is admissible as evidence of an admission where the silence is improper or unnatural; and a definite statement of fact in connection with a total or partial failure to reply or in connection with acquiescence is, under certain conditions, allowed in evidence as an admission of the truth of the statement.

Evidence of silence may be, but is not necessarily, admissible as showing an admission.[30] If a person remains silent when silence is not proper or natural, evidence of such silence is admissible as evidencing an admission;[31] but evidence of silence when silence is natural and proper is not admissible as evidence of an admission.[32]

An unanswered statement which, although made in the presence of a party, is not connected with his conduct at the time when it was made, is mere hearsay and is not evidence against him of any

21. U.S.—U. S. Fidelity & Guaranty Co. v. Leong Dung Dye, C.C.A.Hawaii, 52 F.2d 567, certiorari denied 52 S.Ct. 311, 285 U.S. 537, 76 L. Ed. 930.
Cal.—Ross v. San Francisco-Oakland Terminal Rys. Co., 191 P. 703, 47 Cal.App. 753.
22 C.J. p 321 note 22.

Failure to introduce document in evidence

In statutory proceeding for unlawful detainer by transferee of the grantee of landlord against tenant, tenant's failure to introduce lease in evidence, which was presumably identified by him when on the stand, was itself in the nature of an "admission" that its introduction would not have been of any value to him. —Gray v. Callahan, 197 So. 396, 143 Fla. 673.

22. Ala.—Powell v. Smith, 96 So. 135, 209 Ala. 254.
N.D.—Ward County v. Warren, 155 N.W. 658, 32 N.D. 79.

23. Cal.—Clark v. Tulare Lake Dredging Co., 112 P. 564, 14 Cal. App. 414.
22 C.J. p 321 note 24.

24. Ala.—Chestang v. Kirk, 118 So. 330, 332, 218 Ala. 176, citing **Corpus Juris**—Powell v. Smith, 96 So. 135, 209 Ala. 254.
Ky.—Dix v. Gross, 128 S.W.2d 753, 278 Ky. 348.
Miss.—Interstate Co. v. Garnett, 122 So. 373, 381, 154 Miss. 325, quoting **Corpus Juris,** and suggestion of error overruled 122 So. 756, 154 Miss. 325, 63 A.L.R. 1402.
Mo.—Scrivner v. American Car & Foundry Co., 50 S.W.2d 1001, 330 Mo. 408.
Ohio.—De Groodt v. Skrbina, 144 N. E. 601, 111 Ohio St. 108, 38 A.L.R. 591.
Pa.—McHugh v. McHugh, 40 A. 410, 186 Pa. 197, 65 Am.S.R. 849, 41 L.R.A. 805.
Tex.—Johnson v. Whitehand, Civ. App., 21 S.W.2d 41, error dismissed
22 C.J. p 321 notes 19–24—45 C.J. p 1232 note 34.

25. Ga.—Bentley v. Southern Ry. Co., 182 S.E. 815, 52 Ga.App. 188.

Failure to check cars for missing bolts

In action against railroad for injuries sustained by automobile passenger when bolt allegedly fell from train while automobile was passing under bridge over which train was running, failure of railroad to check every car that might have passed over bridge at the time for missing bolts and to produce evidence of result of investigation was not a nonproduction of evidence so as to constitute an admission that bolt fell from train.—Bentley v. Southern Ry. Co., 182 S.E. 815, 52 Ga.App. 188.

26. Mass.—Wilson v. Grace, 173 N. E. 524, 273 Mass. 146.
N.Y.—Meyer v. Minsky, 112 N.Y.S. 860, 128 App.Div. 589—Polachek v. New York Life Ins. Co., 263 N.Y.S. 230, 147 Misc. 16, affirmed 268 N.Y. S. 995, 240 App.Div. 1028.
Or.—Lehl v. Hull, 54 P.2d 290, 152 Or. 470, denying rehearing 53 P. 2d 48, 152 Or. 470.

27. N.Y.—Townley v. Polansky, 173 N.Y.S. 677, 185 App.Div. 685.
Okl.—Thompson v. Coker, 241 P. 486, 112 Okl. 268—Caldwell v. Stevens, 167 P. 610, 64 Okl. 290, L.R.A.1918B 421.

28. La.—Reid v. Missouri Pac. R. Co., 3 La.App. 608—Townsend v. Missouri Pac. R. Co., 3 La.App. 598.
N.Y.—Meyer v. Minsky, 112 N.Y.S. 860, 128 App.Div. 589.

29. Ill.—Vulcan Detinning Co. v. Industrial Commission, 128 N.E. 917, 295 Ill. 141.

30. Conn.—Watson v. Bigelow Co., 58 A. 741, 77 Conn. 124.
Vt.—McCann v. Hallock, 30 Vt. 233.

31. Ala.—Bevill v. Wilkins, 113 So. 28, 216 Ala. 299.
Cal.—Jayne, Occidental Indemnity Co., Intervener, v. Morck, App., 111 P.2d 696.
Ohio.—Baltimore & O. R. Co. v. Shober, 176 N.E. 88, 38 Ohio App. 216.
Tex.—Koons v. Rook, Com.App., 295 S.W. 592, affirming Rook v. Koons, Civ.App., 289 S.W. 1077.

32. Ky.—Park v. Schell, 295 S.W. 161, 220 Ky. 317.
Mich.—Millar v. Macey Co., 257 N. W. 821, 269 Mich. 265
Tex.—Koons v. Rook, Com.App., 295 S.W. 592, affirming Rook v. Koons, Civ.App., 289 S.W. 1077.

Absence of warning to employee

Failure of manufacturer of office furniture to warn its sales representative that he would not receive commission on sale of noncatalogued furniture is not an implied admission that he was entitled thereto, the employer having no duty to give such warning.—Millar v. Macey Co., 257 N.W. 821, 269 Mich. 265.

Silence under arrest

Evidence that a person under arrest did not state certain facts is not admissible as an admission, there being no duty to make the statements. —Koons v. Rook, Tex.Com.App., 295 S.W. 592, affirming Rook v. Koons, Civ.App., 289 S.W. 1077.

fact narrated therein.[33] On the other hand, provided the requirements discussed in § 295 infra are present, where a definite[34] statement of a matter of fact,[35] affecting a party or his rights,[36] is made, the statement, although inadmissible as evidence of the facts stated, is, in connection with a total or partial failure to reply,[37] admissible as tending to show a concession of the truth of the facts stated,[38] according to the decisions on the question

33. Minn.—Weber v. Weber, 134 N. W 124, 116 Minn. 494.
22 C.J. p 321 note 27.

Party's presence or absence does not affect the competency of declarations or statements by a person other than the party.—Adkins v. Brett, 193 P. 251, 184 Cal. 252.

34. Md.—Wolfe v. State, for Use of Brown, 194 A. 832, 836, 173 Md. 103, citing **Corpus Juris.**
Mass.—Warner v. Fuller, 139 N.E. 811, 245 Mass. 520
Wash.—Beck v. Dye, 92 P.2d 1113, 1118, 200 Wash. 1, 127 A.L.R. 1022, citing **Corpus Juris.**

35. Iowa.—Doherty v. Edwards, 290 N.W. 672.
Kan.—Baird v. Bureman, 26 P.2d 272, 273, 138 Kan. 381, citing **Corpus Juris.**
Md.—Wolfe v. State, for Use of Brown, 194 A. 832, 836, 173 Md. 103, citing **Corpus Juris.**
Mass.—Warner v. Fuller, 139 N.E. 811, 245 Mass. 520
Tex.—Miller v. Dyess, 151 S.W.2d 186, 191, quoting **Corpus Juris,** and reversing Dyess v. Miller, Civ.App., 126 S.W.2d 538.
Vt.—Jasmin v. Parker, 148 A. 874, 102 Vt. 405.
Wash.—Beck v. Dye, 92 P.2d 1113, 1118, 200 Wash. 1, 127 A.L.R. 1022, citing **Corpus Juris.**
22 C.J. p 321 note 29.

Conclusion of law
That defendant had not denied he was bound by lease when statement was made to him was inadmissible, since admission, if any, was of a conclusion of law.—Potts v. Park Inv. Co., 161 N.E. 40, 27 Ohio App. 235.

Expression of opinion
(1) Failure to reply to an expression of an opinion may not be shown as an admission.
Hawaii.—Wall v. Focke, 22 Hawaii 221.
Vt.—Jasmin v. Parker, 148 A. 874, 102 Vt. 405.

(2) The rule that the failure to deny a statement amounts to an admission should not be extended to include mere opinion of third person as to weight and significance of facts previously admitted by declarant.—Wolfe v. State, for Use of Brown, 194 A. 832, 173 Md. 103.

Statement held not factual
Kan.—Baird v. Bureman, 26 P.2d 272, 138 Kan. 381.

36. Iowa.—Doherty v. Edwards, 290 N.W. 672.
Kan.—Baird v. Bureman, 26 P.2d 272, 273, 138 Kan 381, citing **Corpus Juris.**
Mass.—Warner v. Fuller, 139 N E 811, 245 Mass 520.
Mich.—Donker v. Powers, 202 N.W 989, 230 Mich. 237.
N.Y.—Devonshire v. Stubbs, 238 N. Y S 707, 135 Misc. 886.
S.C.—Keen v. Army Cycle Mfg. Co., 117 S.E. 531, 124 S C. 342.
Tex.—Miller v. Dyess, 151 S W.2d 186, 191, quoting **Corpus Juris,** and reversing Dyess v. Miller, Civ. App., 126 S W.2d 538.
Wash.—Beck v Dye, 92 P.2d 1113, 1118, 200 Wash. 1, 127 A.L.R. 1022, citing **Corpus Juris.**
22 C.J. p 321 note 30

Statement held not affecting rights
Kan.—Baird v. Bureman, 26 P.2d 272, 138 Kan. 381.

37. U S.—U. S. ex rel. Vajtauer v. Commissioner of Immigration at Port of New York, N. Y., 47 S Ct 302, 273 U.S. 103, 71 L Ed. 560, affirming, D.C., U. S. ex rel. Vajtauer v. Curran, 15 F.2d 127—U. S. ex rel Bilokumsky v. Tod, N. Y., 44 S.Ct. 54, 263 U.S. 149, 68 L. Ed. 221.
Ala.—Wheat v. Croom, 7 Ala. 349—Watson v. Byers, 6 Ala 393—Greenwood v. Bailey, 184 So 285, 28 Ala.App. 362.
Cal.—In re Gaines' Estate, 100 P.2d 1055, 15 Cal.2d 255, superseding, App, 92 P.2d 646—Adkins v. Brett, 193 P. 251, 184 Cal. 252.
Conn.—Huber v. H. R. Douglas, Inc., 108 A. 727, 94 Conn. 167.
Iowa.—Doherty v. Edwards, 290 N. W. 672.
Kan.—Baird v. Bureman, 26 P.2d 272, 273, 138 Kan. 381, citing **Corpus Juris.**
Ky.—Ray v. Ray, 245 S.W. 287, 290, 196 Ky. 579, quoting **Corpus Juris.**
Md.—Wolfe v. State, for Use of Brown, 194 A. 832, 836, 173 Md. 103, citing **Corpus Juris.**
Mass.—Popkin v. Goldman, 165 N. E. 655, 266 Mass. 531—Warner v. Fuller, 139 N E. 811, 245 Mass. 520—Boston & W. R. Corp. v. Dana, 1 Gray 83.
Mich.—Donker v. Powers, 202 N.W. 989, 230 Mich. 237.
Miss.—Ford v. Byrd, 184 So. 443, 183 Miss. 846.
Mo.—State v. Ellison, 182 S.W. 996, 266 Mo. 604, Ann.Cas.1918C 1—McCarty v. Bishop, 102 S.W.2d 126, 129, 231 Mo.App. 604, citing **Corpus Juris.**
N.J.—Ollert v. Ziebell, 114 A. 356, 96 N J.Law 210—Janner v. Janner, 166 A. 95, 113 N J.Eq. 110.
N.Y.—People v. Pollock, 235 N.Y.S. 553, 226 App Div. 406—Devonshire v Stubbs, 238 N.Y.S. 707, 135 Misc. 886.
Or.—Willhite v. Freed, 299 P. 691, 137 Or. 1.
S.C.—Keen v. Army Cycle Mfg Co., 117 S.E 531, 124 S C. 342.
Tex.—Miller v. Dyess, 151 S.W.2d 186, 191, quoting **Corpus Juris,** and reversing Dyess v. Miller, Civ.App., 126 S.W.2d 538—Martin v. City of Corsicana, Civ App., 130 S.W.2d 405, error dismissed, judgment correct—Traders & General Ins Co. v. Russell, Civ App., 99 S W.2d 1079, 1082, citing **Corpus Juris,** error dismissed—In re McLaren's Estate, Civ.App., 221 S.W. 1045.
Wash.—Beck v. Dye, 92 P.2d 1113, 1118, 200 Wash. 1, 127 A.L.R. 1022, citing **Corpus Juris.**
22 C J. p 321 note 34.

Statement alone as hearsay
The statement itself, without additional proof of silence, is inadmissible as hearsay.—Ray v. Ray, 245 S.W. 287, 196 Ky. 579.

38. U S.—U. S. ex rel. Vajtauer v. Commissioner of Immigration at Port of New York, N Y., 47 S.Ct. 302, 273 U.S. 103, 71 L.Ed. 560, affirming, D.C, U. S. ex rel. Vajtauer v. Curran, 15 F 2d 127—U. S. ex rel. Bilokumsky v. Tod, N. Y., 44 S Ct. 54, 263 U.S. 149, 68 L.Ed. 221.
Ala.—Wheat v. Croom, 7 Ala. 349—Watson v. Byers, 6 Ala. 393—Greenwood v. Bailey, 184 So. 285, 28 Ala App 362.
Ark.—Ellisville Lumber Co. v. First Nat. Bank, 284 S.W. 724, 171 Ark. 469.
Cal.—In re Gaines' Estate, 100 P 2d 1055, 15 Cal.2d 255, superseding, App., 92 P.2d 646—Adkins v. Brett. 193 P. 251, 184 Cal. 252—Pleasants v. Hanson, 192 P. 183, 48 Cal.App. 626.
Conn.—Huber v. H. R Douglas, Inc., 108 A. 727, 94 Conn. 167.
Idaho.—Quillin v. Colquhoun, 247 P. 740, 42 Idaho 522.
Ill.—Bell v. McDonald, 139 N.E. 613, 308 Ill. 329.
Iowa.—Doherty v. Edwards, 290 N. W. 672—Haldeman v. Martin, 217 N.W. 851, 205 Iowa 302.
Kan.—Baird v. Bureman, 26 P.2d 272, 273, 138 Kan. 381, citing **Corpus Juris.**
Ky.—Ray v. Ray, 245 S W. 287, 290, 196 Ky 579, quoting **Corpus Juris.**
Md.—Wolfe v. State, for Use of

to the same extent as an express admission.[39] In some jurisdictions evidence of a declaration or act of another in the presence and within the observation of a party, together with evidence of the party's conduct with relation thereto, is expressly made admissible by statutes.[40] Where a number of statements are made under conditions that silence will be deemed an admission, the failure to answer a part of such statements constitutes an admission of their truth.[41] The rule as to admission by silence is inapplicable when a reply is made.[42]

Evasive answer. Evidence that a party was asked a question pertinent to the matter in controversy, and made an evasive answer is admissible as showing an admission.[43]

Acquiescence. Where a statement of a third person is adopted by another as his own, either expressly or by conduct, the truth of the statement will be deemed admitted.[44] Evidence that a statement was made to a party and that he acquiesced in it is admissible as an admission of the truth of the facts stated.[45]

Requisites of statements made. The fact of nondenial or other conduct being the essential element, it is comparatively immaterial by whom the statement itself is made.[46] Thus, where a statement of a deceased joint tenant is repeated by a surviving joint tenant without denial, such statement and lack of denial constitutes an admission against the surviving tenant.[47] Evidence of silence of a principal as to adverse statements made by his agent is admissible as an admission by the principal.[48] Likewise, where one spouse makes a statement, the silence or acquiescence of the other spouse is admissible as an admission against the latter, provided the requisite conditions are present,[49]

Brown, 194 A. 832, 836, 173 Md. 103, citing **Corpus Juris.**

Mass.—Popkin v. Goldman, 165 N.E. 655, 266 Mass. 531—Warner v. Fuller, 139 N.E. 811, 245 Mass. 520—Mallen v. Boynton, 132 Mass. 443.

Mich.—Donker v. Powers, 202 N.W. 989, 230 Mich. 237.

Miss.—Ford v. Byrd, 184 So. 443, 183 Miss. 846.

Mo.—State v. Ellison, 162 S.W. 996, 266 Mo. 604, Ann.Cas 1918C 1—McCarty v. Bishop, 102 S.W. 126, 129, 231 Mo.App. 604, citing **Corpus Juris.**

N.J.—Ollert v. Ziebell, 114 A. 356, 96 N.J.Law 210—Janner v. Janner, 166 A. 95, 113 N.J.Eq. 110.

N.Y.—Corenbleth v. Gulden, 15 N.Y.S.2d 101, 257 App.Div. 629—People v. Pollock, 235 N.Y.S. 553, 226 App.Div. 406.

Or.—Willhite v. Freed, 299 P. 691, 137 Or. 1.

Pa.—Bednorzenski v. Schrager, 189 A. 690, 124 Pa.Super. 486.

S.C.—Keen v. Army Cycle Mfg. Co., 117 S.E. 531, 124 S.C. 342.

Tex.—Miller v. Dyess, 151 S.W.2d 186, 191, quoting **Corpus Juris,** and reversing Dyess v. Miller, Civ.App., 126 S.W.2d 538—Martin v. City of Corsicana, Civ.App., 130 S.W.2d 405, error dismissed, judgment correct—Traders & General Ins. Co. v. Russell, Civ.App., 99 S.W.2d 1079, 1082, citing **Corpus Juris,** and error dismissed—In re McLaren's Estate, Civ.App., 221 S.W. 1045.

Vt.—Jasmin v. Parker, 148 A. 874, 102 Vt. 405—Hersey v. Barton, 23 Vt. 686.

Wash.—Beck v. Dye, 92 P.2d 1113, 1118, 200 Wash. 1, 127 A.L.R. 1022, citing **Corpus Juris.**

Wis.—Alex G. Goethel Sheet Metal Works Co. v. American Lace Paper Co., 251 N.W. 474, 213 Wis. 248, 5 C.J. p 668 note 82—22 C.J. p 321 note 35.

Reason for rule

The rule is based on the maxim, Qui tacet consentire videtur.—Bednorzenski v. Schrager, 189 A. 690, 124 Pa.Super. 486—Moore v. Smith, 14 Serg. & R., Pa., 388, 393.

39. Wis.—Alex G. Goethel Sheet Metal Works Co. v. American Lace Paper Co., 251 N.W. 474, 213 Wis. 248.

40. Cal.—Kohlhauer v. Bronstein, 67 P.2d 1078, 21 Cal.App.2d 4—Griswold v. Frame, 191 P. 962, 48 Cal.App. 178—Baldarachi v. Leach, 186 P. 1060, 44 Cal.App. 603.

Or.—Swain v. Oregon Motor Stages, 82 P.2d 1084, 160 Or. 1, 118 A.L.R. 1225—Harris v. Hindman, 278 P. 954, 130 Or. 15—Johnson v. Underwood, 203 P. 879, 102 Or. 680—Patty v. Salem Flouring Mills Co., 96 P. 1106, 53 Or. 350.

Basis of statutory provision is the well-established rule of evidence that silence or omission to act constitutes an admission.—Johnson v. Underwood, 203 P. 879, 102 Or. 680—Patty v. Salem Flouring Mills Co., 96 P. 1106, 53 Or. 350.

41. Cal.—Adkins v. Brett, 193 P. 251, 184 Cal. 252.
22 C.J. p 322 note 39.

42. Iowa.—Muirhead v. Challis, 240 N.W. 912, 213 Iowa 1108.

43. Mich.—Rowe v. Bregenzer, 126 N.W. 706, 161 Mich. 684.

Failure to mention matters

Assistant cashier's statement in reply to query that described checks had been presented without mentioning others amounted to admission by bank that no other checks were presented.—Few v. First Nat. Bank, 151 S.E. 546, 40 Ga.App. 791.

44. Cal.—In re Gaines' Estate, 100 P.2d 1055, 15 Cal.2d 255, superseding, App., 92 P.2d 646.

45. Conn.—Kelly v. City of Waterbury, 114 A. 530, 96 Conn. 494.

Mass.—Boston & W. R. Corp. v. Dana, 1 Gray 83.

Mo.—Roelofson v. Whitten, App., 249 S.W. 688.

N.J.—Brouzell v. Reeves, 152 A. 387, 8 N.J.Misc. 856.

22 C.J. p 322 note 36.

Evidence held inadmissible

Where in an action against sergeant and superintendent of police for death of plaintiff's decedent caused by negligence of alleged incompetent driver of patrol automobile, sister of decedent testified that she told the superintendent what she had heard patrolmen under him say, and that he replied that he knew that the driver was not just what he should be, but he had done the best he could, an offer to prove what she had heard as to the incompetency was properly rejected as the reply was not sufficient admission of incompetency to admit the hearsay statements.—Kelly v. City of Waterbury, 114 A. 530, 96 Conn. 494.

46. Ky.—Ray v. Ray, 245 S.W. 287, 290, 196 Ky. 579, quoting **Corpus Juris.**
22 C.J. p 322 note 40.

47. Cal.—In re Gaines' Estate, 100 P.2d 1055, 15 Cal.2d 255, superseding, App., 92 P.2d 646.

48. N.J.—Mulligan v. Clappis, 1 A.2d 414, 121 N.J.Law 119.

49. Colo.—McIntire v. Schiffer, 72 P. 1056, 31 Colo. 246.

Ind.—Vanover v. Roach, 195 N.E. 579, 101 Ind.App. 138.

although if a spouse is incompetent to testify for or against the other spouse, see the C.J.S. title Witnesses §§ 75–99, also 70 C.J. p 118 note 68–p 162 note 40, the contrary is true.[50]

Evidence of silence or acquiescence is not, it has been held, rendered inadmissible by the fact that the statement acquiesced in, standing alone, would be inadmissible.[51]

§ 295. Significance of Failure to Reply

a. In general
b. Statements in hearing or presence
c. Understanding of statement
d. Right of speaker to information

a. In General

In order that evidence of a failure to reply to a statement of fact may be admissible as an admission, a reply must be natural and proper and the party must have had knowledge and an opportunity sufficient to enable him to reply.

The failure of a party to reply to a statement made in his presence or hearing is significant only where the nature of the statement, and the circumstances under which it was made, are such as to render a reply natural and proper.[52] Where de-

Ky.—Landy v. Moritz, 109 S.W. 897, 33 Ky.L. 223.
Or.—Swain v. Oregon Motor Stages, 82 P.2d 1084, 160 Or. 1, 118 A.L.R. 1225.
Tex.—Ibanez v. State, Civ.App., 118 S.W.2d 405.
22 C.J. p 322 note 44—p 400 note 84.

50. Mo.—Hoffmann v. Hoffmann, 29 S.W. 603, 126 Mo. 486—St. Louis Fourth Nat. Bank v. Nicholas, 43 Mo.App. 385.

51. Iowa.—Dean v. Carpenter, 111 N.W. 815, 134 Iowa 275.

Self-serving declaration

(1) That statement is self-serving does not render inapplicable the rules of admission by silence or acquiescence—Ollert v. Ziebell, 114 A. 356, 96 N.J.Law 210—22 C.J. p 322 note 41.

(2) However, the contrary has also been held.—Wilson v. Davison, 136 N.E. 354, 242 Mass. 237.

Self-serving declarations generally see supra § 216.

52. U.S.—Sanders v. Schenley Products Co., C.C.A.N.Y., 108 F.2d 23—Mickewicz v. U. S., C.C.A.N.J., 4 F.2d 48—McKay Co. v. Shott Mfg. Co., D.C.Ohio, 25 F.Supp. 716—Pulver v. Union Inv. Co., C.C.A.Minn., 279 F. 699.
Ala.—Lindsey v. Lindsey, 158 So. 522, 524, 229 Ala. 578, citing **Corpus Juris**—Wheat v. Croom, 7 Ala. 349—Watson v. Byers, 6 Ala. 393.
Ark.—Hines v. Patterson, 225 S.W. 642, 146 Ark. 367.
Cal.—Ogilvie v. Ætna Life Ins. Co. of Hartford, Conn., 209 P. 26, 189 Cal. 406, 26 A.L.R. 116—Baldarachi v. Leach, 186 P. 1060, 44 Cal.App. 603.
Conn.—Weller v. Fish Transport Co., 192 A. 317, 123 Conn. 49—Rockwell v. New Departure Mfg. Co., 128 A. 302, 102 Conn. 255—Kelly v. City of Waterbury, 114 A. 530, 96 Conn. 494.
Ill.—Bell v. McDonald, 139 N.E. 613, 308 Ill. 329.
Ind.—Howard v. Howard, 69 Ind. 592.
Iowa.—Doherty v. Edwards, 290 N.W. 672—Albia Light & Ry. Co. v. Gold Goose Coal & Mining Co., 176 N.W. 722, affirmed 185 N.W. 571.
Kan.—Baird v. Bureman, 26 P.2d 272, 138 Kan. 381—Platts v. Thompson, 268 P. 833, 126 Kan. 544.
Ky.—Ray v. Ray, 245 S.W. 287, 196 Ky. 579.
Me.—Gerulis v. Viens, 156 A. 378, 130 Me. 378, 76 A.L.R. 1387.
Mass.—Warner v. Fuller, 139 N.E. 811, 245 Mass. 520—Attorney General v. Pelletier, 134 N.E. 407, 240 Mass. 264.
Mich.—Donker v. Powers, 202 N.W. 989, 230 Mich. 237.
Mo.—Keim v. Blackburn, 280 S.W. 1046.
N.J.—Ollert v. Ziebell, 114 A. 356, 96 N.J.Law 210.
N.Y.—O. G. Orr & Co. v. Fireman's Fund Ins. Co., 256 N.Y.S. 79, 235 App.Div. 1, reversing 253 N.Y.S. 2, 141 Misc. 330—People v. Pollock, 235 N.Y.S. 553, 226 App.Div. 406—Devonshire v. Stubbs, 238 N.Y.S. 707, 135 Misc. 886.
N.C.—Goodrich v. Matthews, 98 S.E. 529, 177 N.C. 198.
Or.—Swain v. Oregon Motor Stages, 82 P.2d 1084, 160 Or. 1, 118 A.L.R. 1225—Harris v. Hindman, 278 P. 954, 130 Or. 15.
Pa.—Bednorzenski v. Schrager, 189 A. 690, 124 Pa.Super. 486—Moore v. Smith, 14 Serg. & R. 388.
Tenn.—W. W. Dillon & Co. v. Sharber, 90 S.W.2d 533, 19 Tenn.App. 488.
Tex.—Miller v. Dyess, 151 S.W.2d 186, reversing Dyess v. Miller, Civ.App., 126 S.W.2d 538—Traders & General Ins. Co. v. Russell, Civ.App., 99 S.W.2d 1079, error dismissed—In re McLaren's Estate, Civ.App., 221 S.W. 1045.
Vt.—Jasmin v. Parker, 148 A. 874, 102 Vt. 405—McCann v. Hallock, 30 Vt. 233.
Wash.—Beck v. Dye, 92 P.2d 1113, 200 Wash. 1, 127 A.L.R. 1022—Proctor v. Appleby, 188 P. 481, 110 Wash. 403.
Wis.—Alex G. Goethel Sheet Metal Works Co. v. American Lace Paper Co., 251 N.W. 474, 213 Wis. 248.
Wyo.—Smith v. Beard, 110 P.2d 260.
22 C.J. p 322 note 46.

Other explanation consistent with silence

"Inference of assent [from silence following a communication] may safely be made only when no other explanation is equally consistent with silence; and there is always another such explanation,—namely ignorance, or dissent—unless the circumstances are such that a dissent would in ordinary experience have been expressed, if the communication had not been correct."—Bednorzenski v. Schrager, 189 A. 690, 693, 124 Pa.Super. 486, quoting 2 Wigmore Evid. 2d ed.

Reason for rule

The rule rests on that universal principle of human conduct which leads us to repel an unfounded imputation or claim.
Ala.—Wheat v. Croom, 7 Ala. 349.
Cal.—Baldarachi v. Leach, 186 P. 1060, 44 Cal.App. 603.
Mich.—Donker v. Powers, 202 N.W. 989, 230 Mich. 237.

Effect of statute

Statutes providing that acquiescence or silence, when the circumstances require an answer or denial or other conduct, may amount to an admission have been construed to mean that acquiescence or silence will not amount to an admission unless the circumstances require an answer or denial.—English v. Moore, 110 S.E. 737, 28 Ga.App. 265.

Evidence of demand for the money sued for, to which no reply is made, is admissible when the demand was made under such circumstances that a reply would ordinarily be made.—Sonnesyn v. Hawbaker, 148 N.W. 476, 127 Minn. 15.

Circumstances not calling for reply

(1) Advice to plaintiff to kick defendant.—Baird v. Bureman, 26 P.2d 272, 138 Kan. 381.

(2) Accusations by an injured child that defendant caused the injuries, made while being taken to a hospital in a car in which defendant was riding, while his parents were with

fendant denies liability, it may be shown that he made no denial on a particular occasion when a denial would have been natural.[53] Silence or acquiescence of a party may be shown where the facts stated tend to expose him to the consequences of a criminal act,[54] or would inflict a civil injury,[55] or injuriously affect his title to real[56] or personal[57] property, or limit his right to recover damages for a serious injury,[58] as under such circumstances it would be reasonable to expect a denial of the statement if it was not true. Further, if a party testifying or being able to testify has an adequate opportunity to controvert testimony previously heard by him, the fact of nondenial is admissible.[59]

On the other hand, no admission can be implied from silence where the failure to answer was caused by constraint,[60] or the party was not aware at the time that he had an interest,[61] or believed that he had no interest,[62] or was only indirectly affected,[63] or where, as the matter was presented, he had no interest to object,[64] for example, where the statement was not addressed to the party[65] or was in his favor.[66] It has also been held that no probative weight can be attached to the failure of a husband to deny statements of his wife where his conduct may fairly be attributed to considerations of domestic harmony.[67]

Knowledge of party. In order that any significance may attach to the failure of a party to reply to a statement he must have been possessed of knowledge concerning the subject matter of the statement sufficient to enable him to reply if he was inclined to do so.[68]

Opportunity for reply. Where no opportunity is available to reply to a statement, silence is not evidence of an admission of the truth of the statement.[69]

him, and while obviously suffering great pain.—Donker v. Powers, 202 N.W. 989, 230 Mich. 237.

(3) Statement by bystander that plaintiff fainted, the remark not impugning her motives or character.—Hines v. Patterson, 225 S.W. 642, 146 Ark. 367.

(4) Creditor's failure to reply to debtor's statement at a chance meeting on a street that he would protect creditor to certain amount did not justify inference that sum named was all due.—Platts v. Thompson, 268 P. 833, 126 Kan. 544.

(5) Where plaintiff, who claimed that defendant had breached its agreement to extend credit to a corporation in which both were interested, stated, in reply to defendant's inquiry as to why a receiver had been appointed, that it was because defendant did not live up to his contract.—Pulver v. Union Inv. Co., C.C.A.Minn., 279 F. 699.

(6) A motorist who struck pedestrian at an intersection was under legal and moral duty to render assistance to injured pedestrian and was not required to enter into verbal combat with bystanders as to who was to blame for accident, at risk of having his silence construed as an admission of fault.—Beck v. Dye, 92 P.2d 1113, 200 Wash. 1, 127 A.L.R. 1022.

(7) Other cases see Pond v. Pond, 65 A. 97, 79 Vt. 352, 8 L.R.A.,N.S., 212—22 C.J. p 322 note 46 [a].

Statements calling for reply

Ill.—Bell v. McDonald, 139 N.E. 613, 308 Ill. 329.
Or.—Harris v. Hindman, 278 P. 954, 130 Or. 15.
Tex.—Peveto v. Smith, 133 S.W.2d 572, 134 Tex. 308, modifying 113 S.W.2d 216, 134 Tex. 308—Traders & General Ins. Co. v. Russell, Civ. App., 99 S.W.2d 1079, error dismissed.
Wis.—Alex G. Goethel Sheet Metal Works Co. v. American Lace Paper Co., 251 N.W. 474, 213 Wis. 248.

53. Or.—Pacific Mill Co. v. Inman, 80 P. 424, 46 Or. 352.
22 C.J. p 319 note 95.

54. Ala.—Hicks v. Lawson, 39 Ala. 90.

55. Wis.—Kimball v. Post, 44 Wis. 471.
22 C.J. p 323 note 48.

56. Tex.—Johnson v. Lagow, Civ. App., 6 S.W.2d 383, affirmed, Com. App., 14 S.W.2d 818.
22 C.J. p 323 note 49.

57. Mich.—Matthews v. Forslund, 70 N.W. 1105, 112 Mich. 591.
22 C.J. p 323 note 50.

58. Tex.—Soloranzo v. Texas Employers' Ins. Ass'n, Civ.App., 264 S.W. 121.
22 C.J. p 323 note 51.

59. Ill.—Bell v. McDonald, 139 N.E. 613, 308 Ill. 329.
22 C.J. p 323 note 52.

60. Ga.—Sindall v. Jones, 57 Ga. 85.

61. Me.—Ware v. Ware, 8 Me. 42.

62. Ala.—Collier v. Dick, 18 So. 522, 111 Ala. 263.
N.Y.—Gerding v. Funk, 64 N.Y.S. 423, 48 App.Div. 603, affirmed 61 N.E. 1129, 169 N.Y. 572.

63. Pa.—In re Huston, 31 A. 553, 167 Pa. 217.
Vt.—Brainard v. Buck, 25 Vt. 573, 60 Am.D. 291.

64. Cal.—Henshall v. Coburn, 169 P. 1014, 177 Cal. 50.
Iowa.—Ludwig v. Blackshere, 71 N.W. 356, 102 Iowa 366.

65. Ark.—Hines v. Patterson, 225 S.W. 642, 146 Ark. 367.
Me.—Geralis v. Viens, 156 A. 378, 130 Me. 378, 76 A.L.R. 1387.
22 C.J. p 323 note 59.

66. N.C.—Hill v. Ætna L. Ins. Co., 63 S.E. 124, 150 N.C. 1.

67. Miss.—Riley v State, 65 So. 882, 107 Miss. 600, L.R.A.1915A 1041.
22 C.J. p 324 note 72 [a].

68. Mass.—Warner v. Fuller, 139 N.E. 811, 245 Mass. 520.
Mich.—Donker v. Powers, 202 N.W. 989, 230 Mich. 237.
N.J.—Ollert v. Ziebell, 114 A. 356, 96 N.J.Law 210.
Wash.—Beck v. Dye, 92 P.2d 1113, 200 Wash. 1, 127 A.L.R. 1022.
22 C.J. p 325 note 91.

69. Ark.—Hines v. Patterson, 225 S.W. 642, 146 Ark. 367.
Conn.—Weller v. Fish Transport Co., 192 A. 317, 123 Conn. 49.
Ga.—Washington Loan & Banking Co. v. Stanton, 124 S.E. 557, 32 Ga. App. 712.
Mich.—Donker v. Powers, 202 N.W. 989, 230 Mich. 237.
N.J.—Ollert v. Ziebell, 114 A. 356, 96 N.J.Law 210.
N.Y.—People v. Pollock, 235 N.Y.S. 553, 226 App.Div. 406.
Or.—Swain v. Oregon Motor Stages, 82 P.2d 1084, 160 Or. 1, 118 A.L.R. 1225.
Tex.—Traders & General Ins. Co. v. Russell, Civ.App., 99 S.W.2d 1079, error dismissed—In re McLaren's Estate, Civ.App., 221 S.W 1045.
Wash.—Beck v. Dye, 92 P 2d 1113, 200 Wash. 1, 127 A.L.R. 1022.

Suffering preventing reply

(1) Even though statements naturally requiring a reply are made in

Interruption of orderly proceeding. The doctrine of silence or acquiescence as constituting an admission does not apply in case of statements made in judicial proceedings where an answer would be an unseemly interruption of the proceedings in progress,[70] as in case of testimony in open court,[71] or the discharge by a judge,[72] counsel,[73] or other person,[74] of his proper functions in court proceedings.[75]

Similarly, the doctrine of silence or acquiescence does not apply to statements made in the course of sermons.[76]

b. Statements in Hearing or Presence

Evidence of a failure of a party to reply to a statement of fact cannot be deemed an admission unless the statement was made in his hearing or presence.

In order that evidence of silence may be admissible as an admission it is essential that the statement of fact be made in the hearing of the party.[77] Further, in order that any significance may attach to a party's failure to reply to a statement, generally it must be made to appear that he actually heard it;[78] a statement is not admissible where the party sought to be affected thereby was unable to hear it, as where he was deaf[79] or unconscious.[80] The mere fact that the party was within hearing distance of the speaker is not sufficient,[81] unless the situation was such that he must necessarily have heard.[82]

On the question of probability that a party heard a statement it is proper to consider such matters as the loudness of tone in which the statement was made,[83] intervention of partitions between the speaker and the party,[84] and whether the party was listening[85] or was employed about other matters.[86]

Presence. It has been broadly stated that, where other conditions are present, the failure of a party to deny a statement made in his presence may be deemed an admission.[87] On the other hand, silence

the presence of a party, when the party is suffering great pain or shock and does not reply, evidence of the silence is not admissible as an admission.

Ark.—Hines v. Patterson, 225 S.W. 642, 146 Ark. 367.

Ill.—Wheeler v. City of Le Roy, 130 N.E. 330, 296 Ill. 579.

Me.—Geralis v. Viens, 156 A. 378, 130 Me. 378, 76 A.L.R. 1387.
22 C.J. p 324 note 77.

(2) However, in action against driver of automobile to recover for death of occupant, it has been held that the admission of statements made by deceased in presence of driver, shortly after accident, that driver was driving very fast and that deceased requested him to slow down, was not error where driver was not injured in accident, and driver's solicitude for deceased did not furnish sufficient excuse to render evidence inadmissible.—Doherty v. Edwards, Iowa, 290 N.W. 672.

70. Ind.—Buchanan v. Morris, 151 N.E. 385, 198 Ind. 79.
N.Y.—Leggett v. Schwab, 97 N.Y.S. 805, 111 App.Div. 341.

Status of tribunal, whether high or low, does not affect the rule.—Leggett v. Schwab, supra.

71. Ga.—Washington Loan & Banking Co. v. Stanton, 124 S.E. 557, 32 Ga.App. 712.

Ind.—Buchanan v. Morris, 151 N.E. 385, 198 Ind. 79—Johnson v. Holliday, 79 Ind. 151—Howard v. Howard, 69 Ind. 592.

Tex.—In re McLaren's Estate, Civ. App., 221 S.W. 1045.
22 C.J. p 323 note 63.

72. Me.—Norton v. State Univ., 76 A. 912, 106 Me. 436.
22 C.J. p 324 note 64.

73. Mo.—Simpson v. Burnett, 252 S.W. 949, 299 Mo. 232.
22 C.J. p 324 note 66.

Unchallenged argument of counsel
Although counsel's statements in argument are not evidence, yet, when unchallenged, they may be accepted by jury as facts.—John P. Mills Organization v. Bell, 37 S.W.2d 680, 225 Mo.App. 685.

74. Ala.—Abercrombie v. Allen, 29 Ala. 281.
22 C.J. p 324 note 67.

75. Ala.—Collier v. Dick, 18 So. 522, 111 Ala. 263.
22 C.J. p 324 note 68.

76. Mass.—Johnson v. Trinity Church Soc., 11 Allen 123.

77. Ala.—Wheat v. Croom, 7 Ala. 349—Watson v. Byers, 6 Ala. 393.
Cal.—Siskin v. Dembroff, 9 P.2d 908, 121 Cal.App. 730.
Iowa.—Doherty v. Edwards, 290 N.W. 672.
Kan.—Baird v. Bureman, 26 P.2d 272, 138 Kan. 381.
Mass.—Warner v. Fuller, 139 N.E. 811, 245 Mass. 520—Mallen v. Boynton, 132 Mass. 443.
Mich.—Donker v. Powers, 202 N.W. 989, 230 Mich. 237.
N.J.—Ollert v. Ziebell, 114 A. 356, 96 N.J.Law 210.
S.C.—Keen v. Army Cycle Mfg. Co., 117 S.E. 531, 124 S.C. 342.
Tex.—Miller v. Dyess, 151 S.W.2d 186, reversing Dyess v. Miller, Civ. App., 126 S.W.2d 538.
Vt.—Jasmin v. Parker, 148 A. 874, 102 Vt. 405.
Wash.—Beck v. Dye, 92 P.2d 1113, 200 Wash. 1, 127 A.L.R. 1022.

78. Idaho.—Quillin v. Colquhoun, 247 P. 740, 42 Idaho 522.
Ky.—Broadway Coal-Mining Co. v. Ortkies, 254 S.W. 434, 200 Ky. 8.
Me.—Geralis v. Viens, 156 A. 378, 130 Me. 378, 76 A.L.R. 1387.
Mich.—Donker v. Powers, 202 N.W. 989, 230 Mich. 237.
N.J.—Ollert v. Ziebell, 114 A. 356, 96 N.J.Law 210.
N.Y.—People v. Pollock, 235 N.Y.S. 553, 226 App.Div. 406—Devonshire v. Stubbs, 238 N.Y.S. 707, 135 Misc. 886.
Pa.—Dr. Sweet Root Beer, Inc., v. Kittanning Brewing Co., 83 Pa. Super. 349.
Tex.—Landers v. Overaker, Civ.App., 141 S.W.2d 451, error dismissed, judgment correct.
22 C.J. p 324 note 73.

79. Mass.—Tufts v. Charlestown, 4 Gray 537.

80. Ky.—Morris v. City Transfer & Yellow Taxi Co., 294 S.W. 1030, 220 Ky. 219.
22 C.J. p 324 note 76.

81. N.Y.—Jackson v. Builders' Wood Working Co., 36 N.Y.S. 227, 91 Hun 435.

82. Or.—Josephi v. Furnish, 41 P. 424, 27 Or. 260.
22 C.J. p 324 note 80.

83. Pa.—Vincent v. Huff, 8 Serg. & R. 381.

84. N.Y.—Yale v. Dart, 17 N.Y.S. 179, reversed on other grounds 19 N.Y.S. 389.

85. N.H.—Steer v. Little, 44 N.H. 613.

86. Mass.—Drury v. Hervey, 126 Mass. 519.
Pa.—Moore v. Smith, 14 Serg. & R. 388.

87. Cal.—In re Gaines' Estate, 100

as to a statement made out of the party's presence, even when heard by the party, has been held not to amount to an admission.[88]

Evidence that conversations between third parties, not in the party's presence, were reported to the party who failed to reply thereto has been held to be admissible as an admission,[89] although there is contrary authority.[90]

c. Understanding of Statement

Evidence of the failure of a party to reply to a statement of fact is inadmissible as an admission unless the party understood the statement.

In order that a party's conduct with reference to a statement may be relevant as an admission, it is necessary that he should have understood the statement.[91] Therefore, a statement which was made in a language of which the party was ignorant or with which he was not familiar is not competent.[92]

d. Right of Speaker to Information

Evidence of a failure of a party to reply to a statement of fact is inadmissible as an admission where the statement is made by a person who is not entitled to the information sought.

It has been held that evidence of silence of a person in whose hearing a statement of fact is made is inadmissible as an admission where the speaker has no right to information on the subject,[93] as in cases where the failure to reply might fairly be attributed to a mere disinclination to discuss personal affairs with strangers.[94]

On the other hand, an obligation to reply exists where it appears that the party addressed must have known that the speaker would alter his position in the event of nondenial,[95] or where the party addressed is under obligation to afford to the speaker correct information regarding the subject matter of the declaration.[96]

§ 296. Determination as to Admissibility

Preliminary questions relating to admissions by silence or acquiescence are for the court, such as the question whether a reply to a statement was required; it is for the jury to decide whether the party heard or understood the statement.

Whether the situation was one from which the jury may reasonably find a party's conduct relevant to a fact in issue is a preliminary question for the court,[97] to be determined in view of the evidence in the case, direct or circumstantial;[98] for a person is not at liberty to make evidence for himself by the simple expedient of saying something to his opponent and then supporting the truth of his statement by proof that it was not denied.[99] Silence or

P.2d 1055, 15 Cal.2d 255, superseding, Civ.App., 92 P.2d 646.
Iowa.—Doherty v. Edwards, 290 N.W. 672.
Md.—Wolfe v. State, for Use of Brown, 194 A. 832, 836, 173 Md. 103, citing **Corpus Juris.**
N.Y.—Corenbleth v. Gulden, 15 N.Y.S.2d 101, 257 App.Div. 629.
Tex.—Martin v. City of Corsicana, Civ.App., 130 S.W.2d 405, error dismissed, judgment correct.

88. Ind.—Burwell v. First Nat. Bank, 159 N.E. 15, 86 Ind.App. 581.
Mo.—State v. Ellison, 182 S.W. 996, 266 Mo. 604, Ann.Cas.1918C 1.
Tex.—Landers v. Overaker, Civ.App., 141 S.W.2d 451, error dismissed, judgment correct.

89. Tex.—Central Texas Ice Co. v. Thomas, Civ.App., 29 S.W.2d 434, affirmed, Com.App., 45 S.W.2d 181.
Explanatory of report of conversation
Testimony as to a conversation between other parties not in the party's presence has been held admissible as explanatory of a report of such conversation later made to him and of his reply.—Ponting v. More, 165 Ill.App. 536.

90. N.Y.—Schoenherr v. Hartfield, 158 N.Y.S. 388, 172 App.Div. 294.

91. Conn.—Weller v. Fish Transport Co., 192 A. 317, 123 Conn. 49.
Kan.—Baird v. Bureman, 26 P.2d 272, 138 Kan. 381.
Ky.—Broadway Coal-Mining Co. v Ortkies, 254 S.W. 434, 200 Ky. 8.
Me.—Conquest v. Goldman, 117 A. 236, 121 Me. 335.
Md.—Wolfe v. State, for Use of Brown, 194 A. 832, 836, 173 Md. 103, citing **Corpus Juris.**
Mich.—Donker v. Powers, 202 N.W. 989, 230 Mich. 237.
N.J.—Ollert v. Ziebell, 114 A. 356, 96 N.J.Law 210.
N.Y.—People v. Pollock, 235 N.Y.S. 553, 226 App.Div. 406—Surace v. Ide, 225 N.Y.S. 744, 131 Misc. 69.
Tex.—Miller v. Dyess, 151 S.W.2d 186, reversing Dyess v. Miller, Civ. App., 126 S.W.2d 538—Landers v. Overaker, Civ.App., 141 S.W.2d 451, error dismissed, judgment correct.
Wash.—Beck v. Dye, 92 P.2d 1113, 200 Wash. 1, 127 A.L.R. 1022.
22 C.J. p 325 note 87.

92. U.S.—Parulo v. Philadelphia & R. R. Co., C.C.N.Y., 145 F. 664.
22 C.J. p 325 note 88.

93. Ala.—Thornton v. Savage, 25 So. 27, 120 Ala. 449.
22 C.J. p 325 note 92.

94. Ala.—Thornton v. Savage, supra —Perry v. Johnston, 59 Ala. 648.
Impertinent statements by stranger may be treated with silence without incurring the penalty of having the silence deemed an admission.—Keim v. Blackburn, Mo., 280 S.W. 1046—State v. Ellison, 182 S.W. 996, 266 Mo. 604, Ann Cas.1918C 1—22 C.J. p 325 note 92 [a].

95. S C.—Hendrickson v. Miller, 8 S. C.Law 296.

96. N.C.—Reid v. Barnhart, 54 N.C. 142—Andres v. Lee, 21 N.C. 318.

97. Mo.—McCarty v. Bishop, 102 S. W.2d 126, 129, 231 Mo.App. 604, citing **Corpus Juris.**
Or.—Johnson v. Underwood, 203 P. 879, 885, 102 Or. 680, quoting **Corpus Juris.**
22 C.J. p 325 note 98.

98. Ind.—Conway v. State, 21 N.E. 285, 118 Ind. 482.
Mo.—McCarty v. Bishop, 102 S.W.2d 126, 129, 231 Mo.App. 604, citing **Corpus Juris.**
Offer of evidence, or question itself must show silence, and speculation or previous evidence cannot be considered.—McCarty v. Bishop, 102 S.W.2d 126, 231 Mo.App. 604.
Evidence held sufficient
Iowa.—Wildeboer v. Peterson, 203 N.W. 284, 201 Iowa 1202.

99. Mont.—Stagg v. Stagg, 32 P.2d 856, 862, 96 Mont. 573, quoting **Corpus Juris.**
22 C.J. p 325 note 1.

acquiescence is a species of evidence to be received with caution;[1] and it is essential that the fact of silence or acquiescence be established prior to the admission of the statement.[2] It is for the court to determine as a preliminary question whether the circumstances were such as reasonably to require a party to reply to a statement addressed to him.[3]

On the other hand, it is for the jury to decide whether the party actually heard[4] and could understand[5] the statement.

§ 297. In Respect to Written Statements

a. In general
b. Letters and telegrams

a. In General

The doctrine of admission by silence or acquiescence applies to written statements.

Where it is affirmatively shown, by either direct or circumstantial evidence, that a writing or document has been brought to the attention of a party,[6] and the circumstances are such that, if the party dissented from the statements contained therein, his dissent would naturally have been manifested by some objection,[7] his failure to deny the accuracy thereof may be relevant as an admission, and hence the writing and the failure to object thereto may be shown in evidence.[8] Evidence of the failure to deny the truth of written statements is especially admissible where other statements in the same document are disputed.[9]

However, in order that failure to correct a written statement should be a relevant fact, it must appear that some duty exists to make corrections and some power to do so; mere access to the books is not sufficient,[10] and simply disregarding a claim leaves the positions of the parties entirely unaffected.[11] Where all liability is denied, no inference of acquiescence in the correctness of amounts charged can be drawn from failure to object to them specifically.[12]

Particular writings. Under the rule stated supra this section that the failure to deny the accuracy of a written statement may be relevant as an admission, it may be competent to show the contents of, or statements contained in, accounts or reports of sales,[13] particularly where the parties meet to scrutinize and adjust them;[14] affidavits;[15] bills of

1. Iowa.—Doherty v. Edwards, 290 N.W. 672.
22 C.J. p 325 note 2.

2. Ind.—City of Indianapolis v. Barthel, 141 N.E. 339, 194 Ind. 273, rehearing overruled 142 N.E. 409, 194 Ind. 273.
Mo.—McCarty v. Bishop, 102 S.W.2d 126, 231 Mo.App. 604.
22 C.J. p 326 note 3.

Corroborative evidence

(1) When evidence is merely corroborative of direct statements by the party, defendant's evidence that defendant in plaintiff's presence made certain statements as to circumstances of accident is properly excluded in absence of preliminary showing that plaintiff in some way assented to such statements, since offer of such evidence was not broad enough to show its competency.—McCarty v. Bishop, 102 S.W.2d 126, 231 Mo.App. 604.

(2) Question asking plaintiff if she had not heard defendant make a statement to a third party concerning the circumstances of the collision is properly excluded, where plaintiff was not asked whether she had denied such statement, since preliminary showing of plaintiff's assent to such statement was requisite, especially where conflicting evidence as to similar statement made by plaintiff had already been admitted.—McCarty v. Bishop, supra.

3. U.S.—Pulver v. Union Inv. Co., C.C.A.Minn., 279 F. 699.
22 C.J. p 322 note 46 [b].

4. Iowa.—State v. Dexter, 87 N.W. 417, 115 Iowa 678.

5. N.Y.—Surace v. Ide, 225 N.Y.S. 744, 131 Misc. 69.
N.C.—State v. Perkins, 10 N.C. 377.

6. Ala.—Blackwood v. Rutherford, 103 So. 689, 212 Ala. 630.
Mass.—Stimpson v. Hunter, 125 N.E. 155, 234 Mass. 61, 7 A.L.R. 1067.
Mo.—In re Greenwood's Estate, 208 S.W. 635, 201 Mo.App. 39.
Okl.—Great American Life Ins. Co. v. Stephenson, 55 P.2d 56, 59, 176 Okl. 295, quoting **Corpus Juris.**
Tex.—Cauble v. Cauble, Civ.App., 2 S.W.2d 967, 969, quoting **Corpus Juris.**
22 C.J. p 328 note 27.

7. N.Y.—Grego v. Demario, 234 N.Y.S. 805, 226 App.Div. 833, reversing 231 N.Y.S. 130, 133 Misc. 53.
Tex.—Cauble v. Cauble, Civ.App., 2 S.W.2d 967, 969, quoting **Corpus Juris.**

8. Okl.—Great American Life Ins. Co. v. Stephenson, 55 P.2d 56, 59, 176 Okl. 295, quoting **Corpus Juris.**
Tex.—Cauble v. Cauble, Civ.App., 2 S.W.2d 967, 969, quoting **Corpus Juris.**
22 C.J. p 328 note 29.

9. U.S.—Wiggins v. Burkham, Ind., 10 Wall. 129, 19 L.Ed. 884.
22 C.J. p 329 note 46.

10. Ala.—Orr v. Stewart, 69 So. 649, 13 Ala.App. 542.
Mass.—Cheney v Cheney, 39 N.E. 187, 162 Mass. 591.

Absence of duty

The exclusion of a notice of a mortgage sale of logs, reciting that they were marked "J," and testimony of an officer serving same, offered to establish such marking on the theory that failure to protest constituted an admission of the truth of its recitals, was not error, there being no call for any protest to the officer serving same.—Reichel v. Schneider & Brown Lumber Co., 196 N.W. 614, 226 Mich. 24.

11. Ala.—Sullivan v. Louisville & N. R Co., 30 So. 528, 128 Ala. 77.
Mass.—Robinson v. Fitchburg & Worcester R. Co., 7 Gray 92.

12. Wis.—Hinton v. Coleman, 45 Wis. 165.

13. Ga.—Tribble v. Tribble, 144 S.E. 665, 166 Ga. 850.
R.I.—James C. Goff Co. v. Lunn, 137 A. 879, 48 R.I. 416.
22 C.J. p 328 note 30.

14. Pa.—Darlington v. Taylor, 3 Grant 195.

15. N.Y.—Schrowang v. Sahler, 2 N.Y.S. 140.
Tex.—Wise v. Haynes, Civ.App., 103 S.W.2d 477.

sale;[16] book entries;[17] invoices;[18] lists of rents;[19] notices to quit;[20] promissory notes;[21] receipts;[22] recitals in a resolution of the board of directors of a corporation;[23] reports of agents[24] or lessees;[25] and signs.[26]

However, evidence of a failure to object to an itemized statement of damages, coupled with a reference to the person's attorneys, is not admissible as an admission of the correctness of the statement.[27]

Newspaper statement. Failure to deny a newspaper statement is not ordinarily regarded as an admission of its truth,[28] although it has been held that, where a newspaper item is shown to the party with respect to whom it makes certain statements, and, on reading it, he makes no reply, this circumstance may be received in evidence.[29]

Acquiescence. Where there is an express acquiescence in a written statement, evidence of such statement and acquiescence is admissible as an admission.[30] Likewise, book entries have been held admissible as admissions where the party has adopted the entries as correct by the receipt of benefits based thereon.[31]

However, no admission by acquiescence results where the parties do not intend that their conduct should have such effect.[32]

b. Letters and Telegrams

As a general rule the doctrine of admission by silence is inapplicable where the statement of fact is contained in a letter or telegram, but where a reply would be natural and proper the doctrine of admission by silence may apply and a statement contained in a letter or telegram may be independently relevant for other reasons.

Under ordinary circumstances, the mere fact that one received a letter containing false statements of fact does not impose on him any obligation to reply thereto, and hence as a general rule an omission to answer a written communication has no probative value as tending to show an admission of the truth of the matters stated therein,[33] especially where the party failing to reply has taken a final position in the matter in dispute, or for some other reason the correspondence has ended because no advantage could be deemed likely to accrue from further correspondence.[34]

There are circumstances, however, under which unanswered letters are competent evidence of ad-

16. N.Y.—Fisk Pavement, etc., Co. v. Evans, 37 N.Y.Super. 482, affirmed 60 N.Y. 640.

17. Iowa.—Crist v. Tallman, 179 N.W. 522, 190 Iowa 1248.
22 C.J. p 328 note 33.

18. Ind.—Davis Const. Co. v. Granite Sand & Gravel Co., 163 N.E. 240, 90 Ind.App. 379.
22 C.J. p 328 note 34.

19. N.Y.—Del Piano v. Caponigri, 46 N.Y.S. 452, 20 Misc. 541.

20. Ill.—St. Louis Cons. Coal Co. v. Schaefer, 31 Ill.App. 364, affirmed 25 N.E. 788, 135 Ill. 210.

21. Mass.—Traders' Nat. Bank v. Rogers, 45 N.E. 923, 167 Mass. 315, 57 Am.S.R. 458, 36 L.R.A. 539.
N.H.—Corser v. Paul, 41 N.H. 24, 77 Am.D. 753.
Failure to deny genuineness of the signature to a note may be shown.
La.—White System of Shreveport v. Theus, App., 182 So. 394.
Mass.—Traders' Nat. Bank v. Rogers, 45 N.E. 923, 167 Mass. 315, 57 Am.S.R. 458, 36 L.R.A. 539.

22. Okl.—Great American Life Ins. Co. v. Stephenson, 55 P.2d 56, 176 Okl. 295.

23. Tex.—Hoskins v. Velasco Nat. Bank, 107 S.W. 598, 48 Tex.Civ.App. 246.
22 C.J. p 329 note 38.

24. Ala.—Life & Casualty Ins. Co. v. Cain, 116 So. 154, 217 Ala. 301.
22 C.J. p 329 note 40.

25. Ky.—Givens v. Providence Coal Co., 60 S.W. 304, 22 Ky.L. 1217.

26. Mass.—Welch v. McNeil, 101 N.E. 985, 214 Mass. 402.
22 C.J. p 329 note 43.

27. Ill.—Anderson v. Mitchell, 253 Ill.App. 509.

28. U.S.—Spencer v. Read, Iowa, 217 F. 508, 133 C.C.A. 360
Mo.—Louisiana Purchase Exposition Co. v. Emerson, 129 S.W. 753, 149 Mo.App. 594.

29. Del.—Grier v. Deputy, 40 A. 716, 1 Marv. 19.

30. Ky.—Martin v. Taylor's Ex'x, 147 S.W.2d 70, 285 Ky. 128.
Pa.—W. L. Irish & Co. v. Asdell, 159 A. 46, 103 Pa.Super. 605.

31. N.Y.—Coplay Cement Mfg. Co. v. Loeb, 207 N.Y.S. 659, 124 Misc. 640, affirmed 213 N.Y.S. 784, 215 App.Div. 805.

32. Mo.—Freyer v. Bank of Laddonia, 296 S.W. 452, 220 Mo.App. 924.

33. U.S.—A. B. Leach & Co. v. Peirson, Pa., 48 S.Ct. 57, 275 U.S. 120, 72 L.Ed. 194, 55 A.L.R. 457, reversing, C.C.A., 16 F.2d 86, certiorari granted 47 S.Ct. 95, 273 U.S. 676, 71 L.Ed. 835.
Cal.—Simpson v. Bergmann, 13 P.2d 531, 125 Cal.App. 1.
Ill.—Hoef v. Hoef, 153 N.E. 658, 323 Ill. 170.
Md.—Bregel v. Cooper, 157 A. 719, 161 Md. 416.
Minn.—Wells-Dickey Trust Co. v. Lien, 204 N.W. 950, 164 Minn. 307.
Mont.—Whorley v. Patton-Kjose Co., 5 P.2d 210, 217, 90 Mont. 461, citing **Corpus Juris.**
N.J.—Cartan v. Cartan, 115 A. 353, 93 N.J.Eq. 175.
N.Y.—C. Alexopoulos Frères, Inc., v. Nemours Trading Corporation, 199 N.Y.S. 74, 205 App.Div. 39.
Ohio.—Aftel v. Cound, 167 N.E. 402, 32 Ohio App. 270.
Or.—Wakefield, Fries & Co. v. Sherman, Clay & Co., 17 P.2d 319, 141 Or. 270—Dose v. Chas. H. Lilly Co., 286 P. 560, 562, 132 Or. 533, citing **Corpus Juris.**
Puerto Rico.—Freiria & Co. v. Cortes Bros. & Co., 32 Puerto Rico 117.
Wis.—Mahoney v. Kennedy, 205 N.W. 407, 188 Wis. 30.
22 C.J. p 326 note 4.
Unanswered letters, not part of res gestæ or parties' mutual correspondence, are inadmissible as implied admissions by addressee.—Wakefield, Fries & Co. v. Sherman, Clay & Co., 17 P.2d 319, 141 Or. 270.

34. Mont.—Whorley v. Patton-Kjose Co., 5 P.2d 210, 217, 90 Mont. 461, citing **Corpus Juris.**
N.Y.—Merchants' Nat. Bank of Plattsburgh v. R. Prescott & Son, 249 N.Y.S. 6, 139 Misc. 603, affirmed 257 N.Y.S. 900, 235 App.Div. 878, reargument denied 258 N.Y.S. 1016, 236 App.Div. 764.
22 C.J. p 326 note 5.

mission by silence as to the statements therein contained.[35]

The test of admissibility of letters as admissions is found in whether the circumstances are such that in the ordinary practice of mankind the party receiving the letter would have answered it if he did not acquiesce in the statements contained therein.[36] A failure to reply may be a relevant fact where the party receiving a letter has in any way invited it,[37] or where there is any ground to infer that he has acted on it[38] by partly answering[39] or otherwise recognizing it,[40] or where, with such letter, goods or other articles are forwarded with bills, and these are received without return or protest,[41] or where money is sent on terms and conditions stated in the letter and is not returned and there is no objection to, or denial of, the statements contained in the inclosing writing.[42] Further, a dunning letter written to a debtor and incidentally stating the terms of the contract under which the money is alleged to be due has been held admissible in connection with a failure to reply;[43] and where a letter from one party to a contract to the other shows that the writer places a different construction on the contract than does the other party, the latter's silence has been held to constitute an acquiescence in such construction.[44] In order that letters may be admissible in connection with the absence of a denial it is essential that the evidence be properly offered.[45]

Letters addressed to a party are not of themselves competent evidence against him,[46] unless they are shown to have been received by him,[47] and then only in connection with his reply[48] or his other conduct with respect to the letter.[49]

Telegrams are subject to the same rules in this respect as letters.[50] A telegram may be admissible under the same circumstances as would warrant the admission of a letter containing the same statements.[51]

Incompetency of written statement. Where a letter received is itself incompetent as evidence, the failure of a party to reply thereto does not render the writing admissible as an admission in connection with the absence of a reply,[52] and the same is true in the case of a letter incompetent in evidence which is followed by a letter acknowledging its re-

35. Cal.—Simpson v. Bergmann, 13 P.2d 531, 125 Cal.App. 1.
Or.—Wieder v. Lorenz, 99 P.2d 38—De Vol v. Citizens' Bank, 179 P. 282, 92 Or. 696, rehearing denied 181 P. 985, 92 Or. 606.
Wis.—Mahoney v. Kennedy, 205 N. W. 407, 188 Wis. 30—Mahoney v. Kennedy, 179 N.W. 754, 172 Wis. 568.
Wyo.—First Nat. Bank v. Ford, 216 P. 691, 699, 30 Wyo. 110, citing **Corpus Juris.**
22 C.J. p 326 note 8.
Existence of contract
Failure of corporation, which was furnishing lumber for dwelling, to reply to letter wherein owner asserted that company was contractor's surety, was held admissible on question of existence of suretyship contract.—Simpson v. Bergmann, 13 P.2d 531, 125 Cal.App. 1.
Running correspondence
Letters which are a part of a running correspondence and which have been unanswered are, in connection with the failure to reply, admissible as admissions.—Wieder v. Lorenz, Or., 99 P.2d 38—22 C.J. p 326 note 8 [b].

36. Cal.—Simpson v. Bergmann, 13 P.2d 531, 534, 125 Cal.App. 1, citing **Corpus Juris.**
Mich.—Union Trust Co. v. Tighe, 241 N.W. 878, 880, 258 Mich. 201, quoting **Corpus Juris.**
Mo.—Simpson v. Burnett, 252 S.W. 949, 953, 299 Mo. 232, citing **Corpus Juris.**
Or.—Wieder v. Lorenz, 99 P.2d 38.
Pa.—Bednorzenski v Schrager, 189 A. 690, 124 Pa.Super. 486.
Wis.—Gillette v. Manitowoc Church Furniture Co., 235 N.W. 438, 204 Wis. 145—Mahoney v. Kennedy, 205 N.W. 407, 188 Wis. 30.
22 C.J. p 327 note 9.

37. Iowa.—Iowa-Minnesota Land Co. v. Conner, 112 N.W. 820, 136 Iowa 674.
22 C.J. p 327 note 10.

38. Mass.—Commonwealth v. Eastman, 1 Cush. 189, 48 Am.D. 596.

39. N.M.—Eagle Min. & Impr. Co. v. Hamilton, 91 P. 718, 14 N.M. 271.
22 C.J. p 327 note 12.

40. Ky.—Murray v. East End Impr. Co., 60 S.W. 648, 22 Ky.L. 1477.
22 C.J. p 327 note 13.

41. Ind.—St. Joseph Hydraulic Co. v. Globe Tissue Paper Co., 59 N.E. 995, 156 Ind. 665.
Mass.—Sturtevant v. Wallack, 4 N.E. 615, 141 Mass. 119.

42. Ind.—St. Joseph Hydraulic Co. v. Globe Tissue Paper Co., 59 N. E. 995, 156 Ind. 665.

43. Wis.—Murphey v. Gates, 51 N. W. 573, 81 Wis. 370.
22 C.J. p 327 note 16.

44. Ga.—Peninsular Naval Stores Co. v. Parrish, 80 S.E. 28, 13 Ga. App. 779.

45. Wash.—Irwin v. Buffalo Pitts Co., 81 P. 849, 39 Wash. 346.
22 C.J. p 327 note 20.

46. Mass.—Leavitt v. Maynes, 117 N.E. 343, 228 Mass. 350.
22 C.J. p 305 note 1.

47. Cal.—Barlow v. Barnes, 155 P. 457, 172 Cal. 98.
22 C.J. p 305 note 2.

48. Ill.—Henning v. Quindel, 195 Ill.App. 393.
22 C.J. p 305 note 3.

49. Mo.—Alexander v. Llewellyn, App., 70 S.W.2d 115.
22 C.J. p 305 note 6.

50. N.Y.—Lynch v. McCabe, 111 N. Y.S. 291, 126 App.Div. 744.

51. Me.—Dennis v. Waterford Packing Co., 93 A. 58, 113 Me. 159, Ann. Cas.1917D 788.
22 C.J. p 327 note 18.

52. Mass.—Sargent v. Lord, 122 N. E. 761, 232 Mass. 585.
N.Y.—Travers v. Lawlor, 280 N.Y.S. 575, 245 App.Div. 32—C. Alexopoulos Freres, Inc. v. Nemours Trading Corporation, 199 N.Y.S. 74, 205 App Div. 39.
Or.—Dose v. Chas. H. Lilly Co., 286 P. 560, 132 Or. 533.
Wyo.—First Nat. Bank v. Ford, 216 P. 691, 30 Wyo. 110.
Self-serving letter
Mass.—Sargent v. Lord, 122 N.E. 761, 232 Mass. 585.
N.Y.—C. Alexopoulos Freres, Inc. v. Nemours Trading Corporation, 199 N.Y.S. 74, 205 App.Div. 39.
Or.—Dose v. Chas. H. Lilly Co., 286 P. 560, 132 Or. 533.
Wyo.—First Nat. Bank v. Ford, 216 P. 691, 30 Wyo. 110.

ceipt and containing references to it.[53]

However, a letter incompetent as evidence may be rendered admissible as an admission when coupled with acquiescence by the recipient as to the truth of the statements contained therein.[54]

Independent relevancy. A letter, the statements of which are not competent in connection with nondenial or other conduct of the party, may still be relevant for other reasons,[55] as, for example, to prove demand[56] or notice.[57]

§ 298. Time, Place, and Surrounding Circumstances

The time and place of the making of an extrajudicial admission ordinarily do not affect the question of admissibility.

The time and place of the making of an extrajudicial admission and the circumstances surrounding the admission bear only on its weight and not on its competency as evidence,[58] except where it is sought to use the admissions of one person against another, in which case the time of the admission becomes material as bearing on whether the declarant, at the time of making the statement, could, by his statements, affect the party against whom the evidence is offered.[59]

C. JUDICIAL ADMISSIONS

§ 299. In General

A judicial admission may be made in any judicial proceeding, and is competent as evidence in the same case or in another action. Unless it is withdrawn it is binding on the parties, counsel, and court. The matter of its withdrawal or modification is largely within the control of the court.

A judicial admission, as defined supra § 270, may be made in any judicial proceeding, including proceedings in probate courts[60] and in bankruptcy.[61] So far as its competency in evidence is concerned, the admission may be made either in the case in which it is sought to be used,[62] such as on a former trial of the case,[63] or it may be made in some other action or judicial proceeding,[64] the record of

53. Mass.—Sargent v. Lord, 122 N.E. 761, 232 Mass. 585.

54. Mass.—Sargent v. Lord, supra.
Or.—Wieder v. Lorenz, 99 P.2d 38.
Self-serving letter
Mass.—Sargent v. Lord, 122 N.E. 761, 232 Mass. 585.
Or.—Wieder v. Lorenz, 99 P.2d 38.
Acquiescence held not present
Mass.—Sargent v. Lord, 122 N.E. 761, 232 Mass. 585.
Assent as rendering self-serving letters admissible see supra § 216.

55. Mass.—Dutton v. Woodman, 9 Cush. 255, 57 Am.D 46.
Minn.—Hulett v. Carey, 69 N.W. 31, 66 Minn. 327, 61 Am.S.R. 419, 34 L.R.A. 384.
Wash.—Irwin v. Buffalo Pitts Co., 81 P. 849, 852, 39 Wash. 346.

56. N.J.—Hand v. Howell, 38 A. 748, 61 N.J.Law 142, affirmed 43 A. 1098, 61 N.J.Law 694.
Vt.—Hill v. Pratt, 29 Vt. 119.

57. N.J.—Hand v. Howell, 38 A. 748, 61 N.J.Law 142, affirmed 43 A. 1098, 61 N.J.Law 694.
22 C.J. p 327 note 24.

58. Mo.—McCaughan v. John Hill Const. Co., App., 222 S.W. 917.
22 C.J. p 329 note 50.
Statute as to statements by person injured
In action against motorist for death of guest, testimony by uninterested witness, that approximately an hour and a half after accident, guest told witness that accident was caused by an approaching automobile which crowded motorist's automobile off highway, was not barred by statute respecting admissibility in evidence in actions for personal injury of statements made by injured person within seventy-two hours of time when injury happened, especially where witness testified that guest's mind was normal when statements were made.—Hoffman v. Labutzke, 298 N.W. 583, 238 Wis. 164.

59. Ind.—Piggly-Wiggly Stores v. Lowenstein, 147 N.E. 771, 197 Ind. 62.
22 C.J. p 329 note 51.

60. U.S.—Thrush v. Fullhart, W.Va., 210 F. 1, 126 C.C.A. 581.
N.Y.—Potter v. Ogden, 33 N.E. 228, 136 N.Y. 384.
22 C.J. p 329 note 53.

61. Mass.—Hughes v. Northampton St. R. Co., 96 N.E. 77, 210 Mass. 206.
22 C.J. p 329 note 54.

62. Ga.—McDay v. Long, 11 S.E.2d 395, 63 Ga.App. 421.
22 C.J. p 329 note 55.

63. U.S.—Silverman v. Bermuda & West Indies S. S. Co., D.C.N.Y., 12 F.Supp. 164.
Ga.—Wager v. Carrolton Bank, 133 S.E. 622, 162 Ga. 508.
Kan.—Morrison v. Montgomery, 184 P. 985, 105 Kan. 430.
"General admission admitted on the first trial is not limited to that trial, but remains binding upon the parties throughout the litigation."—Silverman v. Bermuda & West Indies S. S. Co., D.C.N.Y., 12 F.Supp. 164, 168.

64. U.S.—Sinclair Refining Co. v. Jenkins Petroleum Process Co., C.C.A.Me., 99 F.2d 9, certiorari denied Jenkins Petroleum Process Co. v. Sinclair Refining Co., 59 S.Ct. 362, 305 U.S. 659, 83 L.Ed. 427, rehearing denied 59 S.Ct. 484, 305 U.S. 667, 83 L.Ed. 1062, rehearing denied 59 S.Ct. 1035, 307 U.S. 651, 83 L.Ed. 1530—U. S. v. Chan Nom Gee, D.C.Wash., 47 F.2d 758, affirmed, C.C.A., Chan Nom Gee v. U. S., 57 F.2d 646.
Idaho.—Idaho Falls Nat. Bank v. Bennett, 247 P. 794, 42 Idaho 705.
Ill.—Sugrue v. Crilley, 160 N.E. 847, 329 Ill. 458, certiorari denied 49 S.Ct. 20, 278 U.S. 616, 73 L.Ed. 539.
Ky.—Hazelwood v. Woodward, 126 S.W.2d 857, 277 Ky. 447.
Md.—Holler v. Miller, 9 A.2d 250, 177 Md. 204.
Mo.—Baur v. Dirhold, App., 82 S.W.2d 133—Szuch v. Bohn, App., 57 S.W.2d 695.
N.C.—Cox v. Wright, 11 S.E.2d 158, 218 N.C. 342.
Wyo.—Hatten Realty Co. v. Baylies, 290 P. 561, 42 Wyo. 69, 72 A.L.R. 587.
22 C.J. p 329 note 55.
Admissions in criminal case as competent in civil action see infra § 300.
Where position of parties changed
Admitting documents in another case in which present defendant was codefendant with plaintiff, as admis-

the former action being admissible for the purpose of establishing the admission;[65] and this rule applies regardless of whether the other action was at law or in equity,[66] and although the party seeking to use the admission was not served with process in the former action.[67] However, with respect to conclusiveness, as explained infra § 381, an admission made in another case does not have the same force as a judicial admission in the same case, but is regarded as being in the nature of an extrajudicial admission.[68] A judicial admission does not apply as to facts which, at the time thereof, have become nonexistent.[69]

Unless withdrawn, a judicial admission is binding on the parties,[70] and counsel,[71] and even on the court itself,[72] except as to matters of law.[73]

Discretion of court as to receipt or withdrawal. Judicial admissions relate to procedure,[74] and accordingly it is largely within the administrative control and discretion of the court to determine all matters relating to their receipt,[75] withdrawal, explanation, or modification,[76] and enforcement.[77] The court may, in its discretion, permit a judicial admission to be withdrawn as having been made by mistake or improvidently,[78] but, as has been said, such discretion should be exercised cautiously, as a withdrawal is not favored.[79]

A party is not required to accept a judicial admission of his adversary, but may insist on proving the fact.[80]

Availability of other evidence of the fact does not affect the admissibility of a judicial admission, but it may be received, although declarant is an available witness or even present in court.[81]

§ 300. Form of Admission in General

a. In general
b. Admissions in criminal cases

sion against interest of present defendant, was proper.—Martin v. Dixon, 241 P. 213, 49 Nev. 161.

65. Tenn.—Fidelity Trust Co. v. Norton, 10 Tenn.App. 132.
22 C.J. p 330 note 61 [b].

Court records are admissible as judicial admissions.—Lee v. Virginia & Maryland Bridge Co., 18 W.Va. 299.

66. Mo.—Baur v. Dirhold, App., 82 S.W.2d 133.
22 C.J. p 329 note 56.

67. Mo.—Baur v. Dirhold, supra.

68. S.D.—Renville State Bank v. Kinsberg, 166 N.W. 643, 40 S.D. 141.
22 C.J. p 330 note 59.

69. La.—Richards v. Roudilion, 140 So. 274, 19 La.App. 535.

Voluntary nonsuit as not admission of order which had previously expired.—Richards v. Roudilion, supra.

70. U.S.—The Doyle, C.C.A.Pa., 105 F.2d 113, 117, citing **Corpus Juris**—Silverman v. Bermuda & West Indies S. S. Co., D.C.N.Y., 12 F. Supp. 164.
Conn.—Kanopka v. Kanopka, 154 A. 144, 113 Conn. 30, 80 A.L.R. 619.
Or.—Columbia Digger Sand & Gravel Co. v. Ross Island Sand & Gravel Co., 25 P.2d 911, 917, 145 Or. 96, citing **Corpus Juris.**
22 C.J. p 330 note 61.

Party whose suit is dismissed, whether as in case of nonsuit or otherwise, is bound by his judicial admissions as to the title of the property claimed.—Gulf Refining Co. v. Hart, 57 So. 581, 130 La. 51.

In Louisiana, Rev.Civ.Code § 2291, providing that a judicial confession amounts to full proof against him who made it, has reference only to judicial confessions made in the instant suit itself.—Sanderson v. Frost, 3 So.2d 626, 198 La. 295.
Conclusiveness of judicial admissions see infra § 381.

71. U.S.—Waldron v. Waldron, Ill., 15 S.Ct. 383, 156 U.S. 361, 39 L.Ed. 453.

72. Or.—Columbia Digger Sand & Gravel Co. v. Ross Island Sand & Gravel Co., 25 P.2d 911, 917, 145 Or. 96, citing **Corpus Juris.**

73. Ala.—Wise v. Schneider, 88 So. 662, 205 Ala. 537.
Mich.—Bradway v. Miller, 167 N.W. 15, 200 Mich. 648.
Admission of conclusion of law as not binding on the court see infra § 381.

74. N.D.—McCarty v. Kepreta, 139 N.W. 992, 24 N.D. 395, 48 L.R.A., N.S., 65, followed in McCarty v. Talley, 139 N.W. 1012, 24 N.D. 395.

"Judicial admission, strictly speaking, is a matter determining procedure, regardless of proof in the case or probative force of the admission."—McCarty v. Kepreta, 139 N.W. 992, 1005, 24 N.D. 395, 48 L.R.A., N.S., 65.

75. Mass.—Commonwealth v. Miller, 3 Cush. 243.

76. Ala.—Prestwood v. Watson, 20 So. 600, 111 Ala. 604.
Conn.—Kanopka v. Kanopka, 154 A. 144, 113 Conn. 30, 80 A.L.R. 619.
Explanation or limitation of admissions generally see infra §§ 374, 375.

If admission is conditional and the condition is not complied with a party may withdraw it.—Irwin v. McKnight, 76 Ga. 669.

77. Me.—Holley v. Young, 68 Me. 215, 28 Am.R. 40.

78. Conn.—Kanopka v. Kanopka, 154 A. 144, 113 Conn. 30, 80 A.L.R. 619.
N.Y.—Owen v. Cawley, 36 N.Y. 600, 3 Transcr.App. 270, affirming 42 Barb. 105.
W.Va.—Keller v. Norfolk & W. Ry. Co., 167 S.E. 448, 451, 113 W.Va. 286, citing **Corpus Juris.**
22 C.J. p 330 note 60.

Leave to withdraw judicial admission may be granted by the court, on timely notice and a proper showing of mistake, imposition, or surprise.—Keller v. Norfolk & W. Ry. Co., 167 S.E. 448, 113 W.Va. 286—22 C.J. p 340 note 12 [a].

79. Ala.—Prestwood v. Watson, 20 So. 600, 111 Ala. 604, 608.
22 C.J. p 330 note 60 [a].

When there was other proof establishing the fact admitted at a former trial, the admission cannot be withdrawn.—Connor v. Lake Shore & M. S. R. Co., 133 N.W. 1003, 168 Mich. 29.

Judicial confession under the Louisiana code is the declaration which the party, or his special attorney in fact, makes in a judicial proceeding, and it cannot be revoked unless made through error of fact.—Coleman v. Jones, 60 So. 243, 131 La. 803.

80. Mo.—State v. Boyer, 112 S.W.2d 575, 580, 342 Mo. 64, quoting **Corpus Juris**—Ruppel v. Clayes, 72 S.W.2d 833, 835, 230 Mo.App. 699, quoting **Corpus Juris.**
22 C.J. p 330 note 69.

81. Pa.—Stevenson v. Ebervale Coal Co., 50 A. 818, 201 Pa. 112, 88 Am.S.R. 805.
22 C.J. p 330 note 70.

a. In General

A judicial admission may be made orally or in writing, or it may be implied from the conduct of the party.

The precise form which the admission may assume is immaterial, as any act or statement which may fairly be interpreted as an admission against interest on a material matter of court inquiry may be shown in evidence.[82] A judicial admission may be oral, as a verbal waiver of proof made in open court,[83] a withdrawal of a contention,[84] or a disclosure made before the court;[85] or it may be in writing, as in pleadings, as explained infra §§ 301–306, depositions, infra § 308, stipulations, infra § 307, instructions,[86] the endorsement of a summons,[87] a report[88] or inventory[89] submitted by an executor or administrator, the appraisal of an estate,[90] statements submitted by a guardian,[91] an inventory[92] or schedule[93] filed in bankruptcy proceedings, or bankruptcy records;[94] or it may be implied from the conduct of the party.[95] A letter, written to an auditor to whom a case has been referred, and containing an admission of fact, may properly be used

82. La.—Walker v. Bremmer, 4 La. App. 200.
Tex.—Campbell v. McLaughlin, Com. App., 280 S.W. 189, reversing, Civ. App., 270 S.W. 257.

Admission of title
(1) Claim of title under grant from commonwealth was admission of title in commonwealth at time of grant.—James River & Kanawha Power Co. v. Old Dominion Iron & Steel Corporation, 122 S.E. 344, 138 Va. 461.

(2) Claimant's claim of title by voluntary deed from defendant in execution, executed prior to loan deed foreclosed by plaintiff, constituted admission of title in defendant.—Moore v. Prudential Ins. Co. of America, 168 S.E. 48, 176 Ga. 489.

Application by guardian for permission to invest ward's funds is admission, in suit by children against administratrix of their father, who had been their guardian, to establish their claim to land on ground that guardian had used their funds to pay for or to improve it.—Hardy v. Hardy, 100 S.E. 101, 149 Ga. 371.

Acts or statements held not admissible as admissions
(1) Failure to argue issue of fault on plaintiff's theory as not admission of liability, if facts were as plaintiff claims.—Olena v. Standard Oil Co., 135 A. 27, 82 N.H. 408.

(2) Failure to have temporary injunction vacated, as not admission that allegations of bill were true.—Mickewicz v. U. S., C.C.A.N.J., 4 F. 2d 48.

(3) Listing of account in bankruptcy court.—Johnson v. First Nat. Bank, 88 So. 449, 205 Ala. 420.

(4) Statement made in hospital to claim agent.—Gallaher v. U. S. Fidelity & Guaranty Co., Tex.Civ. App., 77 S.W.2d 312, error dismissed.

83. Del.—Godwin v. State, 74 A. 1101, 24 Del. 173, Ann.Cas.1913E 940.
22 C.J. p 330 note 71.

84. Vt.—Coolidge v. Taylor, 80 A. 1038, 85 Vt. 39.

85. Me.—Dunbar v. Dunbar, 13 A. 578, 80 Me. 152, 6 Am.S.R. 166.

Attempt to show that debt has been paid is admissible as an admission of the debt—Goodrich v. Union Oil Co. of California, 274 P. 935, 85 Colo. 218.

86. Mo—National Warehouse & Storage Co. v. Toomey, 163 S.W 558, 181 Mo.App. 64.

Instructions held not admissions
(1) An instruction for defendant, on a prior trial, that plaintiff was entitled to recover nominal damages only, is not admissible as an admission that plaintiff is entitled to recover.—National Warehouse & Storage Co. v. Toomey, supra.

(2) An offered instruction by defendant as to the determination of the value of goods destroyed is not an admission that if plaintiff, as seller, had not arbitrarily fixed the price on such goods, the value might be established by plaintiff's selling price.—International Harvester Co. of America v. Chicago, M. & St. P. Ry. Co., 172 N.W. 471, 186 Iowa 86.

87. N.C.—Cox v. Wright, 11 S.E.2d 158, 218 N.C. 342.

88. Ind.—Beal v. State, 77 Ind. 231.

89. Mich.—Snider v. Schaffer, 267 N. W. 791, 276 Mich. 92.
Pa.—Tilghman v. Fisher, 9 Watts 441.
22 C.J. p 331 note 78.

90. U.S.—Thrush v. Fullhart, W.Va., 210 F. 1, 126 C.C.A. 581.
Wash.—Kennedy v. Burr, 171 P. 1022, 101 Wash. 61.

91. Mo.—State v. Richardson, 29 Mo. App. 595.

92. Ky.—Dupuy v. Harris, 6 B.Mon. 534.

93. Mass.—Hughes v. Northampton St. R. Co., 96 N.E. 77, 210 Mass. 206.
22 C.J. p 331 note 82.

94. Pa.—Lyon v. Phillips, 106 Pa. 57.

95. Miss.—Huff v. Murray, 158 So. 475, 171 Miss. 656.
Tex.—Campbell v. McLaughlin, Com. App., 280 S.W. 189, reversing, Civ. App., 270 S.W. 257.

Appearance and participation in trial Appearance of defendants and their participation in trial of action of unlawful entry and detainer is an admission in absence of evidence to contrary, that they were withholding land from plaintiff—Huff v. Murray, 158 So. 475, 171 Miss. 656.

Delay in pleading contract
That agreement under which defendant claimed property was not pleaded until during trial, was not suspicious circumstance sufficient to impeach verity of instrument pleaded.—Bibler v. Bibler, 216 N.W. 99, 205 Iowa 639.

Failure to allege damages
In death action, failure of one defendant, injured in accident involved, to allege damages, was not admission of his negligence, as such allegation would have been simply averment of legal conclusion.—Jayne, Occidental Indemnity Co., Intervener, v. Morck, Cal.App., 111 P.2d 696.

Failure to contradict affidavit
Where shortly after action was commenced by employee for wrongful discharge, employee moved for summary judgment and in opposition employer presented its officer's affidavit wherein officer swore that he and employee had made oral agreement canceling employment contract, and employee in replying affidavit stated that if officer's version were true alleged agreement of cancellation was legally invalid, exclusion of the two affidavits offered by employer at trial on theory that employee's failure squarely to contradict the officer was a virtual admission of making of rescission agreement was not error, since, on motion for summary judgment, employee had no reason to contradict the officer.—Sanders v. Schenley Products Co., C.C.A.N.Y., 108 F.2d 23.

Refusal to produce document as not admission
City's refusal in response to notice, to produce documents of title on ground that they were not relevant nor material on hearing for temporary injunction to prevent encroachment on street, did not amount to admission that city did not have title, nor relieve plaintiff of burden of showing such fact.—Dure v. City of Macon, 127 S.E. 142, 159 Ga. 875.

by the auditor in making his decision,[96] but a letter from one party to another does not rise to the dignity of a judicial admission.[97] Where the only ground of an objection to the introduction of an assignment is that it is inadmissible because made after the action was instituted, the objection is, in effect, a concession of the assignment.[98] However, a failure to disprove an allegation of the opposing party is not an admission thereof,[99] and a statement in open court that certain allegations of a complaint are admitted by not answering does not amount to an admission of statements which amount to conclusions of the pleader.[1] So, also, a statement by defendant's attorney, in an action involving a disputed boundary, that no evidence would be introduced to dispute the location of certain stones, was not an admission that the stones were correctly located.[2] A motion on behalf of plaintiff for the filing of the contract "whereon his cause of action is based," which is not submitted during, or for the purposes of, the trial, but merely to secure possession and inspection of the contract in preparation for the trial, is not a judicial admission that the cause of action is based solely on an express contract.[3] The action of defendant in filing his answer, and offering it as a standard for comparison of handwriting, cannot be considered as an admission by plaintiff of the genuineness of the signature or as an estoppel which will prevent him from denying it.[4]

Notices. A notice served pursuant to statutory requirements may be competent as an admission.[5]

Forthcoming or release bond. A competent admission may be contained in a forthcoming[6] or release[7] bond given in attachment proceedings; or it may be contained in a replevin bond.[8]

b. Admissions in Criminal Cases

Admissions by defendant in a criminal case, as where he enters a plea of guilty, are competent as evidence in a civil action by him involving the same subject matter.

Admissions by defendant in a criminal case may be competent as judicial admissions, against him, in a civil action involving the same subject matter.[9] Where defendant has pleaded guilty to a criminal charge, such as for assault or battery, evidence of the fact of such plea,[10] although the plea was sub-

96. N.H.—Holderness v. Baker, 44 N.H. 414.

97. Mo.—St. Louis Gunning Adv. Co. v. Baptiste, 116 S.W. 438, 135 Mo.App. 503.

98. Mo.—Gillespie v. St. Paul F. & M. Ins. Co., 153 S.W. 1079, 168 Mo. App. 320.

99. Ill.—Carroll v. Chicago City R. Co., 180 Ill.App. 309.

1. N.Y.—Cohen v. Thomas, 103 N.E. 708, 209 N.Y. 407, affirming 127 N.Y.S. 1116, 142 App.Div. 937.
22 C.J. p 331 note 88.

2. Ind.—North v. Jones, 100 N.E. 84, 53 Ind.App. 203.

3. Vt.—Boville v. Dalton Paper Mills, 85 A. 623, 86 Vt. 305.

4. Ind.—Ashwell v. Miller, 103 N.E. 37, 54 Ind.App. 381.

5. Wis.—Berger v. Abel & Bach Co., 124 N.W. 410, 141 Wis. 321.

6. Ala.—McDonald v. Stephens, 85 So. 746, 204 Ala. 359.
Ky.—Tingle v. Kelly, 92 S.W. 303, 29 Ky. L. 24.

7. N.M.—Southern Car Mfg. & Supply Co. v. Wagner, 89 P. 259, 14 N.M. 195.

8. N.J.—Knight v. Huber Inv. Co., 132 A. 656, 102 N.J.Law 359.

As evidence of notice

Giving of a replevin bond is a judicial admission of notice, equivalent in effect to acknowledgment or waiver of personal service.—Blakely Milling & Trading Co. v. Thompson, 128 S.E. 688, 34 Ga.App. 129—Cincinnati Ry. Co. v. Pless, 60 S.E. 8, 3 Ga.App. 403.

9. N.Y.—Notara v. De Kamalaris, 49 N.Y.S. 216, 22 Misc. 337.
22 C.J. p 329 note 57.
Admission in civil case as evidence in criminal case see Criminal Law § 733.

10. Cal.—Langensand v. Obert, 18 P. 2d 725, 129 Cal.App. 214.
Ill.—Hermanson v. Shaffer, 184 Ill. App. 273.
Iowa.—Boyle v. Bornholtz, 275 N.W. 479, 224 Iowa 90—Hauser v. Griffith, 71 N.W. 223, 102 Iowa 215.
Kan.—Musick v. Enos, 148 P. 624, 95 Kan. 397.
Mass.—Morrissey v. Powell, 23 N.E. 2d 411, 304 Mass. 268, 124 A.L.R. 1522.
Mich.—Nielson v. Eiler, 227 N.W. 688, 248 Mich. 545.
Minn.—Klein v. Pasch, 190 N.W. 338, 153 Minn. 291.
N.H.—Weiss v. Wasserman, 15 A.2d 861.
Or.—Spain v. Oregon-Washington R. & Nav. Co., 153 P. 470, 78 Or. 355, Ann.Cas.1917E 1104.
Pa.—Smith v. Kurtz, 34 Pa.Dist. & Co. 439.
Tex.—Balaguer v. Macey, Civ.App., 238 S.W. 322, dismissed for want of jurisdiction.
Wash.—Konshuk v. Hayes, 273 P. 957, 150 Wash. 565.
W.Va.—Gillespie v. Modern Woodmen of America, 133 S.E. 333, 101 W.Va. 602.
22 C.J. p 330 note 74.
"A plea of guilty to a charge of crime is in the nature of an admission. It is an admission of wrong on the part of a defendant so pleading. The jury are therefore entitled to consider it as it considers any other admission; they must view it in connection with the surrounding circumstances, and give it such weight as in their judgment the circumstances warrant."—Konshuk v. Hayes, 273 P. 957, 958, 150 Wash. 565.

There must be an unequivocal statement that an act indicating an unwillingness to contend is consistent with a belief that there is no liability and cannot be used as an admission.—Harrison v. Baker, 5 Litt., Ky., 250.

In accident case

(1) In a motor vehicle accident case, defendant's plea of guilty to a criminal charge for negligent or reckless driving, is admissible as an admission against interest.
Cal.—Olson v. Meacham, 19 P.2d 527, 129 Cal.App. 670.
Mass.—Morrissey v. Powell, 23 N.E. 2d 411, 304 Mass. 268, 124 A.L.R. 1522.
N.H.—Weiss v. Wasserman, 15 A.2d 861.
Ohio.—Freas v. Sullivan, 200 N.E. 639, 130 Ohio St. 486.
Wis.—Olk v. Marquardt, 234 N.W. 723, 203 Wis. 479.

(2) Defendant's plea of guilty of violating a criminal statute is admissible on issue of culpability, but not as admission of negligence.—

sequently withdrawn,[11] or the record of his conviction on the plea of guilty,[12] may be introduced, in a civil action, as an admission on his part against interest, and is also admissible in rebuttal to contradict defendant.[13] This rule, admitting such an admission, does not apply where defendant, when making the plea, was not sufficiently apprised of the charge against him.[14] A plea of guilty, in a federal court, is competent as an admission in a civil action in a state court, although the matter charged is not an offense against a federal law.[15] Defendant's dismissal of an appeal from a conviction on a plea of not guilty, does not constitute a plea of guilty, so as to make the transcript competent, as an admission, in a civil case involving the same facts.[16]

A plea of "nolo contendere" is an admission of guilt only for the purposes of the case and cannot be used as an admission in a civil case for the same act, as stated in Criminal Law § 425.

§ 301. Pleadings

A constructive admission, as by a failure to deny a traversable allegation, has slight probative value; but a distinct statement of facts in a pleading is admissible, unless, in some states, the pleading is unverified.

A constructive admission,[17] as by failure to deny a traversable allegation,[18] has slight, if any, probative value, although, so far as necessary to effectuate its purpose, it is, even if not offered in evidence,[19] conclusive on the specific issue to which it applies,[20] unless or until changed by amendment or otherwise.[21] However, a distinct statement of

Dzura v. Phillips, 175 N.E. 629, 275 Mass. 283.

Exclusion of evidence of plea

It has been held that, where no offense was shown to have been committed which justified an arrest, the exclusion of evidence, in an action for false imprisonment, that plaintiff had pleaded guilty before a magistrate is not reversible error.—Larson v. Feeney, 162 N.W. 275, 196 Mich. 1, L.R.A.1917D 694.

11. Mass.—Morrissey v. Powell, 23 N.E.2d 411, 304 Mass. 268, 124 A.L.R. 1522.

Act of trial judge in permitting withdrawal of plea of guilty cannot change the fact that defendant pleaded guilty and should not be construed as amounting to a complete destruction of the force and effect, as a matter of evidence in civil action to which defendant is party, of the plea of guilty.—Morrissey v. Powell, supra.

12. Ala.—Fidelity-Phenix Fire Ins. Co. of New York v. Murphy, 146 So. 387, 226 Ala. 226.
Iowa.—In re Johnston's Estate, 261 N.W. 908, 220 Iowa 328, supplemented 262 N.W. 488, 220 Iowa 328.
Miss.—Albrecht v. State, 62 Miss. 516.
N.D.—Engstrom v. Nelson, 171 N.W. 90, 91, 41 N.D. 530, citing **Corpus Juris.**
Or.—Spain v. Oregon-Washington R. & Nav. Co., 153 P. 470, 78 Or. 355, Ann.Cas.1917E 1104.
S.C.—Globe & Rutgers Fire Ins. Co. v. Foil, 200 S.E. 97, 189 S.C. 91.
5 C.J. p 686 note 92.

"An exception to the rule that a judgment in a criminal prosecution cannot be received in a civil action to establish the truth of the facts in which it was rendered has been held to arise where the defendant in the criminal case pleaded guilty, and the record showing such plea is offered in a civil action against him growing out of the same offense, such a record being admitted not as a judgment establishing the fact, but as the deliberate declaration or admission against interest that the fact is so; in other words a solemn confession of the very matter charged in the civil action."—Langensand v. Obert, 18 P.2d 725, 727, 129 Cal.App. 214.

Judgment in criminal prosecution as evidence in civil action generally see the C.J.S. title Judgments § 754, also 34 C.J. p 970 note 3—p 972 note 23.

13. Wash.—Schmitz v. Kirchan, 73 P. 678, 32 Wash. 546.
5 C.J. p 686 note 93.

Cross-examination confined to same offense

It is improper to ask defendant on cross-examination whether he put in any plea of guilty when he was arrested on a charge growing out of this assault, for the question is not confined to an inquiry of the same offense involved in the civil proceeding.—Ritter v. Griswold, 56 So. 860, 2 Ala.App. 618.

14. Conn.—Zenuk v. Johnson, 158 A. 910, 114 Conn. 383—Grasso v. Frattolillo, 149 A. 838, 111 Conn. 209.

Mere defect in complaint does not destroy the value of evidence of the plea of guilty as an admission, if defendant understood the charge against him.—Weiss v. Wasserman, N.H., 15 A.2d 861.

Reckless driving

In action based on a statute making operator of automobile liable to guest where accident was result of operator's reckless disregard of rights of others, exemplified copy of court record allegedly showing that operator had been arrested and charged with reckless driving after accident and had pleaded guilty is inadmissible as admission to establish liability under statute, where the statutes make a distinction between recklessness endangering and that not endangering life and limb and indefiniteness of record as to which offense operator had pleaded guilty.—Sothern v. Vandyke, 174 A. 877, 114 N.J.Law 1.

15. Ind.—Rosencranz v. Tidrington, 141 N.E. 58, 193 Ind. 472, 28 A.L.R. 1136.

Where applicant for admission to bar violated laws of state and pleaded guilty to an indictment in a federal court, the competency of such admission as evidence was not changed because a federal court in another case adjudged that such violation was not an offense against federal law.—Rosencranz v. Tidrington, supra.

16. Mo.—Sklebar v. Downey, 285 S.W. 148, 220 Mo.App. 5.

17. N.Y.—Doughty v. Pallissard, 3 N.Y.S.2d 452, 454, 167 Misc. 55, quoting **Corpus Juris.**
22 C.J. p 331 note 92.

18. Nev.—Richards v. Steele, 86 P.2d 30, 31, 59 Nev. 121, citing **Corpus Juris,** and rehearing denied 87 P.2d 805, 59 Nev. 121.
N.Y.—Doughty v. Pallissard, 3 N.Y.S.2d 452, 454, 167 Misc. 55.
22 C.J. p 331 note 93.

19. Cal.—In re McCarthy's Estate, 15 P.2d 223, 226, 127 Cal.App. 80, citing **Corpus Juris.**
N.Y.—Doughty v. Pallissard, 3 N.Y.S.2d 452, 454, 167 Misc. 55.
22 C.J. p 331 note 94.

20. Colo.—Bowes v. Cannon, 116 P. 336, 50 Colo. 262.
N.Y.—Doughty v. Pallissard, 3 N.Y.S.2d 452, 454, 167 Misc. 55—Metropolis Bank v. Faber, 56 N.Y.S. 542, 38 App.Div. 159.
Weight of admissions generally see infra § 382.

21. N.Y.—Doughty v. Pallissard, 3

facts which is material and competent,[22] and which is contained in a pleading, and apparently relied on because actually existing, is admissible, as a judicial admission,[23] although the statement is voluntary and unnecessary[24] or does not bear on the plea on which the issue is tried,[25] and although the pleading was filed by a party without the knowledge of his attorney.[26] It is essential that the statement be against the interest of the pleader,[27] and that it be not merely a statement of a legal conclusion.[28]

Such a statement in a verified pleading may, of course, be introduced as an admission;[29] but some authorities hold that such a statement is admissible regardless of whether or not the pleading is signed or verified,[30] although the effect of the pleading as evidence must be determined from the circumstances under which it was made,[31] and verification adds to the probative force of the admission.[32] Other authorities, however, regard unsigned or unverified pleadings as merely statements of the party's counsel, and for that reason consider them inadmissible.[33] Another statement of the rule is that the pleading is competent against the party if he signed it or otherwise acquiesced in the statements contained therein.[34]

One who desires to avail himself of admissions in a pleading must accept them as an entirety; he cannot select such portion as may suit him and reject

N.Y.S.2d 452, 454, 167 Misc. 55, quoting **Corpus Juris.**
22 C.J. p 331 note 96.

Where contention is abandoned and disclaimed at the trial, an allegation made in advancing such contention "cannot be viewed as an admission of the fact contended for."—Johnston v. Los Angeles, 159 P. 873, 31 Cal.App. 41, 44.

22. Ill.—Frank v. Central Mut. Ins. Co., 273 Ill.App. 445.
Iowa.—Second Nat. Bank of New Hampton v. Hults, 182 N.W. 175, 191 Iowa 353.
N.D.—Union Nat. Bank of Minot v. Western Bldg. Co., 175 N.W. 628, 44 N.D. 336.
Ohio.—Scovanner v. Toelke, 163 N.E. 493, 119 Ohio St. 256.
Tex.—Bernstein v. Hilton, Civ.App., 45 S.W.2d 643.

Allegation by way of evidence as to facts in another case to which pleader was not a party is not an admission.—Harris v. Chipman, Utah, 156 F. 929, 84 C.C.A. 429—22 C.J. p 332 note 11 [c].

Statement held not admission
Where plaintiff, in assumpsit on fidelity bond, alleged filing of proof of loss in accordance with policy, defendant's allegation denying averment and in support of assertion attaching proof of loss as exhibit was not admission of facts stated in proof of loss, only question raised being whether proof complied with policy requirements.—Niessen Co. v. U. S. Fidelity & Guaranty Co., 175 A. 738, 115 Pa.Super. 445.

23. N.J.—Freeman v. Ackerson, 110 A. 701, 94 N.J.Law 308.
N.D.—Union Nat. Bank of Minot v. Western Bldg. Co., 175 N.W. 628, 44 N.D. 336.
Okl.—Tway v. Hartman, 75 P.2d 893, 181 Okl. 608.
22 C.J. p 331 note 97.

"It is the general rule that the pleadings in a particular case, for the purpose of use as such in that case, are to be regarded as judicial admissions, rather than just ordinary admissions."—Kirk v. Head, Tex., 152 S.W.2d 726, 728, affirming, Civ.App., 132 S.W.2d 125.

Classes of admissions
"There are admissions in pleadings which are conclusively binding upon the party making them. There are other such admissions of milder character which are not conclusive but which are proper evidence as constituting statements against interest. The latter class of admissions in pleadings occupies the same place in a trial as other admissions against interest no matter how made."—Stolte v. Larkin, C.C.A. Minn., 110 F.2d 226, 233.

Common-law pleadings are admissible in evidence.—People ex rel. Nelson v. Central Mfg. Dist. Bank, 28 N.E.2d 154, 306 Ill.App. 15.

Affirmative answers claimed to contain admissions against interest should be admitted with the right to argue the meaning of the language used.—National Ass'n of Creditors v. Grassley, 292 P. 416, 159 Wash. 185.

Statements in a counterclaim
N.J.—Freeman v. Ackerson, 110 A. 701, 94 N.J.Law 308.
Admissions by answer in equity see Equity § 347.

24. Wis.—Sims v. La Prairie Mut. Fire Ins. Co., 77 N.W. 908, 101 Wis. 586.
Unnecessary pleadings see infra § 305.

25. Ga.—Howard v. Glenn, 11 S.E. 610, 85 Ga. 238, 21 Am.S.R. 156.

26. Idaho.—Pence v. Sweeney, 28 P. 413, 3 Idaho 914.

27. Tex.—Reynolds v. Porter, Civ.App., 54 S.W.2d 1086.

28. Kan.—Olmstead v. Koester, 14 Kan. 463.
Tex.—Reynolds v. Porter, Civ.App., 54 S.W.2d 1086.

29. Ill.—People ex rel. Nelson v. Central Mfg. Dist. Bank, 28 N.E.2d 154, 306 Ill.App. 15.
N.Y.—Standard Oil Co. of New York v. Boyle, 246 N.Y.S. 142, 231 App.Div. 101.

30. Ark.—Greer v. Davis, 5 S.W.2d 742, 177 Ark. 55.
Ill.—Linn v. Clark, 128 N.E. 824, 295 Ill. 22—In re Clark's Estate, 264 Ill.App. 544.
22 C.J. p 332 note 2.

"Parties to causes are presumed to know the contents of pleadings filed by them."—Linn v. Clark, 128 N.E. 824, 827, 295 Ill. 22.

Carbon copy of proposed plea, prepared by defendant's attorney, but not signed or filed by defendant, or exhibited to him, is not admissible in evidence at the instance of the other party, although defendant's counsel had stated to opposing counsel that such a plea would be filed.—Brown v. Wilcox, 102 S.E. 818, 150 Ga. 88.

31. Ill.—Linn v. Clark, 128 N.E. 824, 295 Ill. 22.

32. U.S.—Pope v. Allis, Wis., 68 S.Ct. 69, 115 U.S. 363, 29 L.Ed. 393.
22 C.J. p 332 note 3.

33. U.S.—Fidelity & Deposit Co. of Maryland v. Redfield, C.C.A.Idaho, 7 F.2d 800.
Ala.—Ex parte E. C. Payne Lumber Co., 85 So. 9, 203 Ala. 668.
Iowa.—Welpton v. Marshall, 186 N.W. 854.
Miss.—Pigott v. Pigott, 73 So. 800, 112 Miss. 873.
22 C.J. p 332 note 5.

Complaint is not admissible where the proof shows that the allegations therein were made by counsel under a mistake of fact, that plaintiff did not so state the matter, and that he did not sign the complaint and had never seen it until it was offered in evidence.—Griffin Grocery Co. v. Thaxton, 11 S.W.2d 473, 178 Ark. 736.
Judicial admissions by attorney see infra § 361.

34. N.D.—Union Nat. Bank of Minot v. Western Bldg. Co., 175 N.W. 628, 44 N.D. 336.

the remainder,[35] where it qualifies and explains the admission offered;[36] but a portion of a pleading which contains an admission of a distinct and separate fact may be admitted without the introduction of explanatory matter which does not modify or alter the admission.[37] A party cannot insist on the receipt of declarations in his own favor because contained in a pleading.[38]

A statement in a bill of particulars may be competent as an admission,[39] although there is authority to the contrary.[40]

Solemn admissions. Admissions in a pleading are sometimes termed solemn admissions.[41]

§ 302. In Same Case

Statements in a pleading are generally admissible against the party making them or his successor in the litigation, on any subsequent trial of the case.

As stated in Corpus Juris, which has been cited and quoted with approval, statements in a pleading which are satisfactorily shown to be those of the party[42] or to have been approved by him[43] are admissible against the party making them or his successor in the litigation,[44] as proof of the facts admitted therein, on any trial of the case subsequent to the making of such statements,[45] including a trial in an appellate court.[46] Such statements are equally competent whether the pleader is plaintiff,[47] or

35. Mo.—Hildreth v. Hudloe, App., 282 S.W. 747.
N.Y.—Schlesinger v. McDonald, 94 N.Y.S. 721, 106 App.Div. 570—Goodyear v. De la Vergne, 10 Hun 537.
Or.—Beck v. General Ins. Co. of America, 18 P.2d 579, 582, 141 Or. 446, quoting **Corpus Juris.**
22 C.J. p 332 note 6.

36. Cal.—Granite Gold Min. Co. v. Maginness, 50 P. 269, 118 Cal. 131.
22 C.J. p 332 note 7.

If admission is coupled with affirmative allegation, the adverse party cannot rely on the admission unless he accepts it as modified by the accompanying allegation.—Vanderbilt v. Schreyer, 21 Hun 537, reversed on other grounds 91 N.Y. 392.

37. N.C.—White v. Hines, 109 S.E. 31, 182 N.C. 275—Wade v. McLean Contracting Co., 62 S.E. 919, 149 N.C. 177—Sawyer v. Roanoke R. & Lumber Co., 58 S.E. 598, 145 N.C. 24, 22 L.R.A.,N.S., 200.
N.D.—Union Nat. Bank of Minot v. Western Bldg. Co., 175 N.W. 628, 44 N.D. 336.
Tex.—Wauhop v. Sauvage, Civ.App., 159 S.W. 185.

38. Iowa.—Welpton v. Marshall, 186 N.W. 854.
N.J.—Freeman v. Ackerson, 110 A. 701, 94 N.J.Law 308.
22 C.J. p 332 note 8.
Self-serving declarations generally see supra § 216.

39. Ill.—Black Diamond Fuel Co. v. Illinois Fuel & Phosphate Co., 219 Ill.App. 150.
Okl.—Chicago, R. I. & P. R. Co. v. Mashmore, 96 P. 630, 21 Okl. 275, 17 Ann.Cas. 277.
Wash.—American Copper, Brass & Iron Works v. Galland-Burke Brewing & Malting Co., 70 P. 236, 30 Wash. 178.

Written statement in nature of bill of particulars, purporting to be signed by a party's attorney, and which the opposing party claims was delivered to his counsel as a bill of particulars, has been held admissible.—American Copper, Brass & Iron Works v. Galland-Burke Brewing & Malting Co., supra.

40. N.Y.—Brittingham v. Stevens, 1 N.Y.Super. 421.

41. Idaho—Knowles v. New Sweden Irr. Dist., 101 P. 81, 16 Idaho 217.

42. Ariz.—Buehman v. Smelker, 68 P.2d 946, 950, 50 Ariz. 18, quoting **Corpus Juris.**
22 C.J. p 332 note 9.

43. Ariz.—Buehman v. Smelker, 68 P.2d 946, 50 Ariz. 18.
Minn.—Warder, Bushnell & Glessner Co. v. Willyard, 49 N.W. 300, 46 Minn. 531, 24 Am.S.R. 250.
N.D.—Union Nat. Bank of Minot v. Western Bldg. Co., 175 N.W. 628, 44 N.D. 336.

44. U.S.—Stolte v. Larkin, C.C.A. Minn., 110 F.2d 226—Darling Shops of Tennessee v. Brack, C.C.A.Ark., 95 F.2d 135—Pullman Co. v. Bullard, C.C.A.Ga., 44 F.2d 347.
Ala.—Alabama Water Co. v. City of Anniston, 135 So. 585, 590, 223 Ala. 355, citing **Corpus Juris.**
Ariz.—Buehman v. Smelker, 68 P.2d 946, 50 Ariz. 18.
Kan.—Toelle v. Sells-Floto Shows Co., 207 P. 849, 111 Kan. 562.
Ky.—Baskett v. Jones, 225 S.W. 158, 189 Ky. 391.
Mo.—Johnston v. City of St. Louis, App., 138 S.W.2d 666.
N.J.—Freeman v. Ackerson, 110 A. 701, 94 N.J.Law 308—Loudon v. Loudon, 168 A. 840, 114 N.J.Eq. 242, 89 A.L.R. 904, modifying 169 A. 335, 114 N.J.Eq. 212.
Tex.—Harris v. Allison, Civ.App., 11 S.W.2d 821, error dismissed—Hart-Parr Co. v. Krizan & Maler, Civ. App., 212 S.W. 835.
Wash.—Smith v. Saulsberry, 288 P. 927, 157 Wash. 270.
22 C.J. p 332 note 11.

45. Ariz.—Buehman v. Smelker, 68 P.2d 946, 50 Ariz. 18.
Cal.—Tieman v. Red Top Cab Co., 3 P.2d 381, 117 Cal.App. 40.
N.C.—Dillingham v. Gardner, 13 S.E.2d 478, 219 N.C. 227.
22 C.J. p 333 note 12.

Patentee's preliminary statement, replying to interference declaration, is pleading, but is admissible in evidence to show admissions as to time of invention, in suit to require assignment of patent to his former employer—New Jersey Zinc Co. v. Singmaster, D.C.N.Y., 4 F.Supp. 967, modified on other grounds, C.C.A., 71 F.2d 277, certiorari denied Singmaster v. New Jersey Zinc Co., 55 S.Ct. 106, 293 U.S. 591, 79 L.Ed. 685.

On counterclaim subsequently filed
Where in reply to a codefendant's counterclaim, plaintiff adopts the original complaint and avers that each allegation thereof is true, a paragraph of the original complaint is admissible in evidence by the codefendant although he was not a party to the suit when the original complaint was filed.—Dillingham v. Gardner, 13 S.E.2d 478, 219 N.C. 227.

46. Iowa.—Tipton v. Tipton, 151 N.W. 90, 169 Iowa 182, Ann.Cas.1916 C 360.
Minn.—Warder, Bushnell & Glessner Co. v. Willyard, 49 N.W. 300, 46 Minn. 531, 24 Am.S.R. 250.

47. La.—Friedman v. New Orleans Ry. & Light Co., 96 So. 821, 153 La. 951—Williams v. Brocato, App., 194 So. 67.
Pa.—Dr. Sweet Root Beer, Inc., v. Kittanning Brewing Co., 83 Pa. Super. 349.
Wis.—Knerzer v. Worthing, 197 N.W. 199, 183 Wis. 39.
22 C.J. p 333 note 14.

Allegations held insufficient to show admission of contributory negligence, in action by occupant of automobile against driver thereof for injuries.—French v. Tebben, 27 P.2d 474, 53 Idaho 701.

Petition showing agreed statement of facts
Tex.—Reed v. Southern Pac. Co., Civ.App., 123 S.W.2d 392, error refused.

whether he is defendant,[48] as in case of admissions in an affidavit of defense, as a pleading,[49] or in a counterclaim or cross bill.[50]

Statements in an answer, however, cannot be used as admissions in support of plaintiff's case, where the answer interposes a general denial,[51] and this rule applies in case of a general denial of a cross action.[52] A statement in an answer also cannot be used as an admission in the original proceedings, where it controverts a new issue raised by a supplemental and amended petition;[53] and an admission or statement under one allegation is not admissible where inconsistent defenses are pleaded.[54] Where the substance of two petitions is the same, so that both petitions can be considered as one, an answer to the first petition is an answer to both, and the averments of the second petition are inadmissible.[55] The pleadings of both parties may be admitted where the introduction of one pleading is necessary to make clear the admissions in the other.[56] Under some statutes, pleadings are not evidence on the trial and hence statements therein cannot be shown as admissions.[57]

Failure to deny an allegation may be used in some instances as a so-called "admission by conduct."[58] Under the express provisions of some statutes, an allegation of fact in plaintiff's statement of claim, which is not denied in the affidavit of defense, shall be taken to be admitted.[59]

Distinct counts and pleas. Where there are two

Theory of cause
In suit on life policy, wherein defense was that insured's death was not accidental but was result of suicide, plaintiff did not admit that death was not accidental by seeking recovery only for face value of policy, as he had a right to do, instead of for double indemnity as provided in case of accidental death.—Shiovitz v. New York Life Ins. Co., 275 N.W. 181, 281 Mich. 382.

48. U.S.—Howard v. Halsted, D.C.N.Y., 296 F. 782, affirmed, C.C.A., Howard v. Halstead, 298 F. 1020.
Ark.—Greer v. Davis, 5 S.W.2d 742, 177 Ark. 55.
Cal.—Brooke v. Glide, 179 P. 546, 39 Cal.App. 534.
Iowa.—Second Nat. Bank of New Hampton v. Hults, 182 N.W. 175, 191 Iowa 353.
Kan.—Adams v. Morgan, 52 P.2d 643, 142 Kan. 865—Toelle v. Sells-Floto Shows Co., 207 P. 849, 111 Kan. 562.
Ky.—Baskett v. Jones, 225 S.W. 158, 189 Ky. 391.
N.Y.—Standard Oil Co. of New York v. Boyle, 246 N.Y.S. 142, 231 App. Div. 101.
N.C.—Lupton v. Day, 190 S.E. 722, 211 N.C. 443—West v. Collins Baking Co., 181 S.E. 551, 208 N.C. 526—West Const. Co. v. Atlantic Coast Line Ry. Co., 116 S.E. 3, 185 N.C. 43—White v. Hines, 109 S.E. 31, 182 N.C. 275.
Pa.—Dr. Sweet Root Beer, Inc. v. Kittanning Brewing Co., 83 Pa. Super. 349.
Tex.—Bernstein v. Hilton, Civ.App., 45 S.W.2d 643—Kretzschmar v. Christensen, Civ.App., 37 S.W.2d 844, error dismissed.
Wash.—Smith v. Saulsberry, 288 P. 927, 157 Wash. 270.
W.Va.—First Nat. Bank v. McGraw, 101 S.E. 474, 85 W.Va. 298.
22 C.J. p 333 note 15.

Original answer is admissible as an admission of facts alleged therein.—Howard v. Halsted, D.C.N.Y., 296 F. 782, affirmed, C.C.A., Howard v. Halstead, 298 F. 1020.

Motion to reopen case
La.—Baton Rouge Investment & Realty Co. v. Bailey, 103 So. 184, 157 La. 838.

Petition for writ of mandate filed between trials.—Tieman v. Red Top Cab Co., 3 P.2d 381, 117 Cal.App. 40.

Plea in abatement
Pa.—Witmer v. Schatter, 2 Rawle 359.

"Brief statement" of defense, filed under a statute abolishing special pleading and containing admissions, is not evidence to plaintiff.—Piper v. Boston & M. R. Co., 75 A. 1041, 75 N.H. 435.

49. Pa.—Shobert v. Brookville Bank & Trust Co., 200 A. 942, 132 Pa. Super 365—Carr & McIlvain v. Jakoby, 89 Pa.Super. 299.
22 C.J. p 333 note 15 [c].

In Massachusetts, an affidavit of defense constitutes no part of the pleadings, and defendant's affidavit of defense, counter to plaintiff's affidavit of no defense, cannot be read to jury, except at plaintiff's option in case it contradicts defendant's testimony, or contains probative admission on his part.—Indiana Flooring Co. v. Rudnick, 127 N.E. 428, 236 Mass. 90.

50. N.J.—Freeman v. Ackerson, 110 A. 701, 94 N.J.Law 308.
Tex.—Thomas v. Basden & Carrell, Civ.App., 4 S.W.2d 336.
22 C.J. p 333 note 15 [b].

Admissions in wife's bill of particulars, in husband's divorce action, contrary to her interest and contention in counterclaim, are admissible in evidence, where wife testifies in support of counterclaim.—Loudon v. Loudon, 168 A. 840, 114 N.J.Eq. 242, 89 A.L.R. 904, modifying 169 A. 335, 114 N.J.Eq. 212.

Vendor's failure to reconvene for balance of purchase price, in suit to annul contract for purchase of land, was not admission that contract had been abrogated.—Whitaker v. Pailet, 132 So. 352, 171 La. 805.

51. Tex.—Hynes v. Packard, 45 S.W. 562, 92 Tex. 44—Liquid Carbonic Co. of Texas v. Southwestern Drug Corporation, Civ.App., 73 S.W.2d 152, error dismissed—Hines v. Warden, Civ.App., 229 S.W. 957.

Allegations in cross action are not subject to rule that allegations in answer following general denial are inadmissible to prove facts averred.—Ed S. Hughes Co. v. Clark Bros. Co., Tex.Civ.App., 63 S.W.2d 230.

52. Tex.—Gordon v. Ratliff, Civ. App., 169 S.W. 372.

General denial and special answer
Where plaintiff generally denied defendant's cross petition which, although alleging that defendant deposited materials on plaintiff's premises, did not charge a conversion, the filing of a special plea, alleging that plaintiff purchased the material, is not an admission against interest authorizing recovery by defendant for the conversion.—Gordon v. Ratliff, supra.

53. La.—Viguerrie v. Mrs. E. D. Burguiers Planting Co., 46 So. 114, 121 La. 97.

54. Tex.—Hart-Parr Co. v. Krizan & Maler, Civ.App., 212 S.W. 835.

55. Pa.—O'Boyle v. Harry Seitz & Sons, 160 A. 145, 105 Pa.Super. 135.

56. N.C.—Gallimore v. Grubb, 72 S.E. 628, 156 N.C. 575.
22 C.J. p 332 note 11 [b].

57. Mass.—Woodworth v. Fuller, 126 N.E. 781, 235 Mass. 443.
22 C.J. p 333 note 21.

58. Cal.—White v. Hendley, 169 P. 710, 35 Cal.App. 267.
N.Y.—Roscoe Lumber Co. v. Standard Silica Co., 70 N.Y.S. 1130, 62 App.Div. 421.
Admissions by conduct generally see supra § 291–293.

59. Pa.—Lang v. Casey, 191 A. 586,

or more distinct counts or pleas, and the issue on each is separately tried, an allegation in one cannot be taken as an admission of a fact distinct from the proof of the issue on that one.[60]

An inconsistency in the statement of the facts, in different counts of a declaration, is not evidence of an admission of plaintiff that the facts are not as stated by him in his testimony on the trial of the cause.[61] A prior inconsistent pleading, however, setting out a different state of facts may be used to discredit the present claim of a party.[62]

§ 303. In Other Cases

a. In general
b. Responsibility for statement
c. Independent relevancy

a. In General

An admission in a pleading in one action may be received in evidence against the pleader or his successor in interest on the trial of another action to which he is a party, in favor of a party to the latter action, provided the admission is relevant and material to the issues involved in such action.

It is well established that an admission contained in a pleading in one action may be received in evidence against the pleader on the trial of another action,[63] the rule in this respect being the same whether the actions are both at law, both in eq-

326 Pa. 193—Ketchum v. Conneaut Lake Co., 163 A. 534, 309 Pa. 224—Buehler v. U. S. Fashion Plate Co., 112 A. 632, 269 Pa. 428—Massiah v. Hood, 10 A.2d 79, 138 Pa. Super. 90—Almar Tea Co. v. Pennsylvania Railroad Co., 82 Pa.Super. 464.

60. Miss.—Morris v. Henderson, 37 Miss. 492.

61. N.H.—Larry v. Herrick, 58 N. H. 40.

62. Va.—Burch v. Grace Street Bldg. Corporation, 191 S.E. 672, 168 Va. 329.

63. U.S.—Williams v. Williams, C.C. A.Ill., 61 F.2d 257, certiorari denied 53 S.Ct. 404, 288 U.S. 612, 77 L.Ed. 986—Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter, C.C. A.N.Y., 32 F.2d 195, certiorari denied 50 S.Ct. 32, 280 U.S. 579, 74 L.Ed. 629—Manley v. Northumberland County, D.C.Pa., 32 F.Supp. 775—Lehigh Valley R. Co. v. Allied Machinery Co. of America, C. C.A.N.Y., 271 F. 900, certiorari denied 41 S.Ct. 625, 256 U.S. 704, 65 L.Ed. 1180, and error dismissed 42 S.Ct. 93, 257 U.S. 614, 66 L.Ed. 398.
Ala.—Lipscomb v. Moore, 150 So. 907, 227 Ala. 547—City of Jasper v. Sanders, 145 So. 827, 226 Ala. 84—Cooke v. Wilbanks, 135 So. 435, 223 Ala. 312, 83 A.L.R. 1441—Elder v. Ralls Sanitarium, 122 So. 41, 219 Ala. 298.
Ark.—De Camp v. Graupner, 249 S. W. 6, 157 Ark. 578.
Cal.—Eaton v. Thieme, 59 P.2d 638, 15 Cal.App.2d 458—Mellor v. Rideout, 257 P. 173, 83 Cal.App. 621.
Colo.—Irvin v. Blair, 68 P.2d 28, 100 Colo. 349.
Conn.—Bartolotta v. Calvo, 152 A. 306, 112 Conn. 385.
Del.—Rudnick v. Schoenberg, 122 A. 902, 2 W.W.Harr. 339.
D.C.—U. S. v. Securities Corporation General, 4 F.2d 619, 55 App.D.C. 256, affirmed White v. Mechanics' Securities Corporation, 46 S.Ct. 116, 269 U.S. 283, 70 L.Ed. 275.
Fla.—In re Price's Estate, 176 So. 492, 129 Fla. 467.
Ga.—Central of Georgia Ry. Co. v. Goens, 119 S.E. 669, 30 Ga.App. 770—Florence, Phillips & Co. v. Newsome, 106 S.E. 619, 26 Ga.App. 501—Swift & Co. v. Dawson Paper Shell Pecan Co., 101 S.E. 754, 24 Ga.App. 625.
Ill.—Osborne v. Osborne, 156 N.E. 306, 325 Ill. 229—Kubin v. Chicago Title & Trust Co., 29 N.E.2d 859, 307 Ill.App. 12—People ex rel. Nelson v. Central Mfg. Dist. Bank, 28 N.E.2d 154, 306 Ill.App. 15.
Iowa.—Mitchell v. Automobile Underwriters of Des Moines, 281 N. W. 832, 225 Iowa 906
Kan.—Betts v. Gilbert, 87 P.2d 637, 149 Kan. 431.
Mass.—Lewis v. Kanters, 159 N.E. 617, 262 Mass. 275.
Mich.—Bullen v. Chicago & N. W. Ry. Co., 209 N.W. 124, 235 Mich. 240.
Mo.—Simmons v. Kansas City Jockey Club, 66 S.W.2d 119, 334 Mo. 99—Prentiss v. Illinois Life Ins. Co., 225 S.W. 695—Reid v. Brotherhood of Railroad Trainmen, App., 232 S. W. 185, 188, citing **Corpus Juris**—Watkins v. Kansas City & W. B. Ry. Co., App., 209 S.W. 950.
Neb.—Paxton v. State, 81 N.W. 383, 59 Neb. 460, 80 Am.S.R. 689.
N.J.—Lincks v. Erie R. Co., 116 A. 493, 97 N.J.Law 343.
N.Y.—Armstrong v. Duffy, 25 N.Y. S.2d 162, 261 App.Div. 41, reargument denied 27 N.Y.S.2d 457, 261 App.Div. 1035—Wilkie v. Gordon, 240 N.Y.S. 170, 228 App.Div. 450—In re Ries, 175 N.Y.S. 58, 187 App. Div. 82.
N.C.—McCoy v. Justice, 155 S.E. 452, 199 N.C. 602—Middleton v. Hunter, 142 S.E. 325, 195 N.C. 418—Ledford v. Tallassee Power Co., 138 S.E. 424, 426, 194 N.C. 98, citing **Corpus Juris.**
N.D.—Pipan v. Ætna Ins. Co., 235 N. W. 719, 60 N.D. 657—Power v. Williams, 205 N.W. 9, 53 N.D. 54.
Okl.—Reeves v. Langford, 72 P.2d 782, 181 Okl. 192—Forry v. Mickle, 69 P.2d 39, 180 Okl. 113—Knupp v. Hubbard, 265 P. 133, 130 Okl. 111.
Or.—Cornely v. Campbell, 186 P. 563, 94 Or. 345, rehearing denied 187 P. 1103, 95 Or. 345.
Pa.—Seligman & Co. v. Kearns, 81 Pa.Super. 413.
S.D.—Frazier v. Travelers Ins. Co. of Hartford, Conn., 287 N.W. 589, 66 S.D. 638.
Tex.—Wise v. Haynes, Civ.App., 103 S.W.2d 477—Woods v. Bost, Civ. App., 26 S.W.2d 299, error dismissed—Cerf v. McElroy, Civ.App., 25 S.W.2d 950, error refused—Sabanovich v. People's Finance Co., Civ.App., 16 S.W.2d 897, reversed on other grounds People's Finance Co. of Dallas v. Sabanovich, Com. App., 26 S.W.2d 187—National Cattle Loan Co. v. Armstrong, Civ. App., 8 S.W.2d 767, 769, quoting **Corpus Juris**—Western Oil Fields Corporation v. Nowlin, Civ.App., 288 S.W. 554.
Wash.—Crary v. Coffin, 268 P. 881, 148 Wash. 287.
22 C.J. p 333 note 22.

Admission in bill of particulars

Okl.—Chicago, R. I. & P. R. Co. v. Mashore, 96 P. 630, 21 Okl. 275, 17 Ann.Cas. 277.

Wife's divorce bill filed several years after her husband's disappearance may be deemed an admission that she then believed him to be alive, and is admissible as such an admission in an action by her for insurance for his death.—Ledger v. Northwestern Mut. Life Ins. Co., 241 N.W. 803, 258 Mich. 26.

Motion for security for costs as not admission

Where a sheriff joins in a motion for security for costs in an action of replevin, after accepting a delivery bond, moving "the court to rule the plaintiff to give security for the costs already accrued and thereafter to accrue in the above entitled cause, for the reason that plaintiff has not sufficient property subject to execution out of which the officers of the court could levy their costs," it is

uity, or one in equity and the other at law.[64] It is not essential that both actions should be in the same court,[65] but admissions made in the pleadings filed in a federal court are competent in a state court, and vice versa;[66] nor is a pleading filed in another action rendered inadmissible by the fact that such action was brought in a state other than that in which it is sought to use the pleading as evidence.[67] Indeed it is not even necessary that the court in which the pleading was filed should have had jurisdiction of the action in which it was filed.[68]

It is, however, essential that the statements in the pleading should be relevant and material to the issues involved in the action in which it is sought to be used,[69] although it is not necessary that the offer should be limited to the parts of the pleading containing the admissions, where the remainder is not prejudicial.[70]

A statutory provision that the pleadings shall not be evidence on the trial applies only to the trial of the case in which the pleadings are filed, and does not prevent an admission in a pleading being introduced in the trial of another case.[71]

Nature of statement. The statement must be precise and definite.[72] A failure to answer the allegations of a petition may constitute an admission of their truth available in another action,[73] unless the petition was dismissed before the time for answering had expired.[74] Where a judgment has been entered by default, the essential allegations of the claim on which the judgment was entered are admissible in another proceeding as evidence of an admission by silence.[75] An answer which denies each and every allegation of the complaint, but consents to a settlement without trial, is not admissible as an admission against interest.[76]

not admissible in an action on the bond, as an admission by the sheriff that the delivery bond was insufficient.—McAleenan v. Dickmann, 107 S.W. 444, 128 Mo.App. 703.

64. U.S.—Manley v. Northumberland County, D.C.Pa., 32 F.Supp. 775.
Mo.—State ex rel. and to Use of Standard Regulator Co. v. Fidelity & Deposit Co. of Maryland, App., 228 S.W. 865.
Pa.—Morrett v. Fire Ass'n of Philadelphia, 108 A. 171, 265 Pa. 9.
22 C.J. p 334 note 23.

Bill to enjoin prosecution of an action at law may be read in evidence against complainant on the trial of such action as an acknowledgment of the facts therein.—Kankakee & S. R. Co. v. Horan, 23 N.E. 621, 131 Ill. 288—22 C.J. p 334 note 23 [a].

Disclaimer, as a part of the procedure in ejectment, is competent as an admission in a subsequent action of assumpsit.—Morrett v. Fire Ass'n of Philadelphia, 108 A. 171, 265 Pa. 9.

In assumpsit, pleadings in a prior equity suit between the same parties are admissible as admissions to contradict their testimony in the later case.—Lindsay v. Dutton, 75 A. 1096, 227 Pa. 208.

65. U.S.—Fidelity & Casualty Co. of New York v. Brightman, C.C.A.Mo., 53 F.2d 161.
Ill.—Acme Waste Paper Co. v. U. S. Paper Supply Co., 233 Ill.App. 262.
Tex.—Wise v. Haynes, Civ.App., 103 S.W.2d 477.
22 C.J. p 335 note 24.

66. Ill.—Kankakee & S. R. Co. v. Horan, 23 N.E. 621, 131 Ill. 288.
Mo.—Meissner v. Standard R. Equipment Co., 109 S.W. 730, 211 Mo. 112.
Tex.—Commercial Nat. Bank of Hutchinson, Kan., v. Heid Bros. Civ. App., 257 S.W. 913, certiorari denied 44 S.Ct. 638, 265 U.S. 595, 68 L.Ed. 1198—Lancaster v. Faskin, Civ.App., 248 S.W. 754.

67. Mo.—Kirkpatrick v. Metropolitan St. R. Co., 109 S.W. 682, 211 Mo. 68, 81, reversing 107 S.W. 1025, 129 Mo.App. 524.
Tex.—National Cattle Loan Co. v. Armstrong, Civ.App., 8 S.W.2d 767.

68. S.D.—Redwater Land & Canal Co. v. Reed, 128 N.W. 702, 26 S.D. 466.

69. Ala.—Birmingham Electric Co. v. Wood, 130 So. 786, 222 Ala. 103—Graves v. Cruse-Crawford Mfg. Co., 82 So. 452, 203 Ala. 202.
Cal.—Cowell v. Armstrong, 290 P. 1036, 210 Cal. 218—Frazee v. Fox Film Corporation, 188 P. 286, 45 Cal.App. 661.
Ga.—Bryan v. Haney, 168 S.E. 116, 46 Ga.App. 524—Central of Georgia Ry. Co. v. Goens, 119 S.E. 669, 30 Ga.App. 770.
Iowa.—Dow v. Stockport Sav. Bank, 210 N.W. 815, 202 Iowa 594.
Kan.—Sawtelle v. Cosden Oil & Gas Co., 277 P. 45, 128 Kan. 220.
Mass.—Clarke v. Taylor, 168 N.E. 806, 269 Mass. 335.
Mo.—Simmons v. Kansas City Jockey Club, 66 S.W.2d 119, 334 Mo. 99—Horigan Realty Co. v. First Nat. Bank, 289 S.W. 352, 221 Mo.App. 960.
Ohio.—National Fire Ins. Co. v. Sayers, 16 Ohio App. 398.
Okl.—Knupp v. Hubbard, 265 P. 133, 130 Okl. 111.
Tex.—Wise v. Haynes, Civ.App., 103 S.W.2d 477—American Indemnity Co. v. Martin, Civ.App., 54 S.W.2d 542, reversed in part on other grounds 84 S.W.2d 697, 126 Tex. 73—Woods v. Bost, Civ.App., 26 S.W.2d 299, error dismissed—National Cattle Loan Co. v. Armstrong, Civ.App., 8 S.W.2d 767, error refused.
22 C.J. p 335 note 28.

Verified amendment in a prior action by plaintiff against one of defendants on an additional claim to notes secured by collateral in present case is properly excluded, where materiality of allegation of such amendment is not shown.—McLaughlin-Gormley-King Co. v. Hauser, 202 N.W. 574, 200 Iowa 210.

70. Tex.—Seligmann v. Greif, Civ. App., 109 S.W. 214.

71. Mass.—Clarke v. Taylor, 168 N.E. 806, 269 Mass. 335—Johnson v. Russell, 11 N.E. 670, 144 Mass. 409.

72. S.C.—Martin v. Campbell, 32 S.C.Eq. 205.

73. Iowa.—Sawyer v. Kelly, 127 N.W. 977, 148 Iowa 644.
Mo.—Miller v. Journal Co., 152 S.W. 40, 246 Mo. 722, Ann.Cas.1914B 679.

General denial cannot be received in another action as evidence of an admission of the allegations of the complaint, although under statute the failure specifically to deny a particular allegation may have had the effect of an admission in that particular action.—Slayden v. Palmo, 117 S.W. 1054, 53 Tex.Civ.App. 227.

74. Iowa.—Sawyer v. Kelly, 127 N.W. 977, 148 Iowa 644.

75. Cal.—In re McCarthy's Estate, 15 P.2d 223, 127 Cal.App. 80.

Deceased husband's original complaint in divorce action, in which wife defaulted, alleging that there was no community property, is admissible against widow in subsequent proceedings for partial distribution of estate.—In re McCarthy's Estate, supra.

76. Ariz.—Schneider v. McAleer, 4 P.2d 903, 39 Ariz. 190.

A statement on information and belief has been held not competent as an admission,[77] but there is high authority for the contrary view.[78]

In whose favor admissible. The rule that pleadings in another action may be shown as admissions is, of course, applicable where the parties to the action in which it is sought to use such pleadings as evidence are the same as in the former action.[79] However, such identity of parties is not essential; the former pleading is admissible even though the party who introduces it in evidence was a stranger to the action in which it was filed.[80]

Against whom admissible. The allegations in the pleadings in the prior action are competent as admissions, not only against the pleader, as stated supra, but also against his privies or successors in interest in the present action.[81] As a general rule, however, allegations in a pleading in another action are not admissible in evidence against a person who was not a party to the other action;[82] and they are not admissible in a proceeding between parties, none of whom claim under the pleader, and to which proceeding the pleader is not a party.[83] Statements in the pleadings of one defendant are not admissible against his codefendant.[84] A petition, in another action against defendant by a third person, who is not a party to the present proceeding, is not admissible as an admission against plaintiff.[85]

b. Responsibility for Statement

A pleading in another action, generally, is admissible against the pleader where it is authenticated by his signature or verified by his oath, or where the statements therein are such that information in respect thereto must have come to the attorney from his client.

A pleading in another action is admissible against the party in whose behalf it was filed, where it is authenticated by his signature,[86] or that of his authorized agent or attorney;[87] or where it is verified by the party's oath,[88] although he testifies that

77. N.Y.—New York v. Fay, 6 N.Y.S. 400, 53 Hun 553, 554.
22 C.J. p 335 note 33.

78. U.S.—Pope v. Allis, Wis., 6 S.Ct. 69, 115 U.S. 363, 29 L.Ed. 393.
Vt.—Houghton v. Grimes, 151 A. 642, 103 Vt. 54.
22 C.J. p 335 note 34.
Affects weight only
The fact that a statement is made on information and belief goes only to its weight and not to its admissibility.—Hereford First Nat. Bank v. Hogan, Tex.Civ.App., 185 S.W. 880.

79. Ark.—Valley Planting Co. v. Wise, 123 S.W. 768, 93 Ark. 1, 26 L.R.A.,N.S., 403.
Kan.—Every v. Rains, 115 P. 114, 84 Kan. 560.
N.D.—Power v. Williams, 205 N.W. 9, 53 N.D. 54.
Tex.—De George v. Rodgers-De Long Hotel Co., Civ.App., 126 S.W.2d 79, error dismissed.
22 C.J. p 336 note 42.

80. Ala.—City of Jasper v. Sanders, 145 So. 827, 226 Ala. 84.
Ark.—Kirkpatrick v. American Ry. Express Co., 6 S.W.2d 524, 177 Ark. 334.
Cal.—Tieman v. Red Top Cab Co., 3 P.2d 381, 383, 117 Cal.App. 40, citing **Corpus Juris.**
Mass.—Lewis v. Kanters, 159 N.E. 617, 262 Mass. 275.
Minn.—Carpenter v. Tri-State Telephone & Telegraph Co., 211 N.W. 463, 169 Minn. 287.
N.C.—Burlington Hotel Corporation v. Dixon, 145 S.E. 244, 196 N.C. 265.
N.D.—Union Nat. Bank of Minot v. Western Bldg. Co., 175 N.W. 628, 44 N.D. 336.
Pa.—Morrett v. Fire Ass'n of Philadelphia, 108 A. 171, 265 Pa. 9.
Tex.—Chanowsky v. Friedman, Civ.App., 108 S.W.2d 752, error dismissed—Wise v. Haynes, Civ.App., 103 S.W.2d 477.
22 C.J. p 336 note 43.
Wife's allegations in divorce suit as to husband's intoxication is admissible against her in action on husband's life policy.—Krajewski v. Western & Southern Life Ins. Co., 217 N.W. 62, 241 Mich. 396.

81. U.S.—Williams v. Williams, C.C.A.Ill., 61 F.2d 257, certiorari denied 53 S.Ct. 404, 288 U.S. 612, 77 L.Ed. 986.
N.Y.—Wilkie v. Gordon, 240 N.Y.S. 170, 228 App.Div. 450.
Admission of ancestor
Where one sues to recover land which he claims as the heir of another, admissions of the ancestor in pleadings in an action to which he was a party are admissible against the heir.—Warner v. Sapp, Tex.Civ.App., 97 S.W. 125.
Admissions of deceased owners of real estate generally see infra § 327.
In proceedings by warrant to eject intruder, admission of a person under whom defendant claimed possession, contained in her petition filed in another court, were admissible in evidence, although the petition was not verified.—Tison v. South Georgia R. Co., 68 S.E. 651, 8 Ga.App. 91.

82. Ind.—Star Pub. Co. v. Ball, 134 N.E. 285, 192 Ind. 158.
La.—Young Bros. v. Succession of Von Schoeler, 91 So. 551, 151 La. 73.
Mo.—Accomac Realty Co. v. City of St. Louis, 152 S.W.2d 100, 103, citing **Corpus Juris.**
Tex.—Moseley v. Fikes, Civ.App., 126 S.W.2d 589, error granted—Bolt v. State Sav. Bank, Civ.App., 145 S.W. 707.

83. Mo.—Grafeman Dairy Co. v. Mercantile Club, 241 S.W. 923.

84. Cal.—McDermott v. Mitchell, 47 Cal. 249.
22 C.J. p 336 note 46.
Admissions of coparties as against each other generally see infra § 318.

85. Ga.—Butler v. Ginsburg, 117 S.E. 262, 30 Ga.App. 238.

86. U.S.—Williams v. Williams, C.C.A.Ill., 61 F.2d 257, certiorari denied 53 S.Ct. 404, 288 U.S. 612, 77 L.Ed. 986—Fidelity & Deposit Co. of Maryland v. Redfield, C.C.A.Idaho, 7 F.2d 800.
Fla.—Smith v. Dowling, 89 So. 315, 81 Fla. 867.
Wash.—Dingfelder v. White Bluffs Warehouse Co., 229 P. 17, 131 Wash. 129.
22 C.J. p 335 note 35.

87. Iowa.—Mitchell v. Automobile Underwriters of Des Moines, 281 N.W. 832, 225 Iowa 906.
Tex.—National Cattle Loan Co. v. Armstrong, Civ.App., 8 S.W.2d 767, error refused.
Verified complaint sworn to by corporation's president must be given weight as admission by corporation.—Nelson Bros. Coal Co. v. Perryman-Burns Coal Co., D.C.N.Y., 43 F.2d 564, reversed on other grounds, C.C.A., 48 F.2d 99.
Admissions by agents and other representatives generally see infra §§ 342–368.

88. U.S.—Fidelity & Deposit Co. of Maryland v. Redfield, C.C.A.Idaho, 7 F.2d 800—Kentucky Rock As-

he signed and swore to the pleading without reading it;[89] or where the statements contained therein are of such a nature that information with respect to the facts set forth could have come to the attorney only from his client,[90] or the record shows that the pleader's agent, when drafting the pleading, had access to the original sources of information.[91]

It has been held that a party is bound by admission contained in a pleading prepared by his attorney, although he did not swear to or know of the statements therein,[92] and even though he had no actual knowledge of the existence of the pleading.[93] However, the generally accepted view recognizes a distinction between statements contained in a pleading in another case which can fairly be regarded as statements by the party, and those which are inadmissible as being merely emanations of counsel,[94] as where the party has not signed or verified the pleading,[95] or is not shown to have knowledge thereof.[96] Under this view, it is required as a condition of admissibility, that the statement be affirmatively connected with the party as one which he has made because it was true,[97] such as that the pleading be drawn by his direction and the statement therein be made with his assent or under his direction.[98]

phalt Co. v. Helburn, D.C.Ky., 20 F.Supp. 364, affirmed, C.C.A., 108 F.2d 779.
Ala.—Birmingham Electric Co. v. Wood, 130 So. 786, 222 Ala. 103.
D.C.—U. S. v. Securities Corporation General, 4 F.2d 619, 55 App.D.C. 256, affirmed White v. Mechanics' Securities Corporation, 46 S.Ct. 116, 269 U.S. 283, 70 L.Ed. 275.
Fla.—Smith v. Dowling, 89 So. 315, 81 Fla. 867.
Ill.—Kubin v. Chicago Title & Trust Co., 29 N.E.2d 859, 307 Ill.App. 12—People ex rel. Nelson v. Central Mfg. Dist. Bank, 28 N.E.2d 154, 306 Ill. App. 15.
Miss.—Simon v. Desporte, 116 So. 534, 535, 150 Miss. 673, citing **Corpus Juris.**
N.Y.—Reichbart v. Smith-Eisemann Corporation of America, 210 N.Y. S. 414, 213 App.Div. 178.
S.D.—Frazier v. Travelers Ins. Co. of Hartford, Conn., 287 N.W. 589, 66 S.D. 638.
Wash.—Dingfelder v. White Bluffs Warehouse Co., 229 P. 17, 131 Wash. 129.
22 C.J. p 335 note 36.

Verification with permission to counsel to revise

Answers made in writing under oath, but with the understanding that they may be revised by counsel before being signed, are clearly admissible in evidence against the party answering, although neither signed nor revised.—Lynde v. McGregor, 13 Allen, Mass., 182, 90 Am. D. 188.

89. Miss.—Simon v. Desporte, 116 So. 534, 150 Miss. 673.

90. U.S.—Fidelity & Deposit Co. of Maryland v. Redfield, C.C.A.Idaho, 7 F.2d 800, 803, quoting **Corpus Juris.**
Wyo.—Quealy Land & Live Stock Co. v. George, 18 P.2d 253, 45 Wyo. 254, citing **Corpus Juris.**
22 C.J. p 335 note 37.

91. Wash.—Schotis v. North Coast Stevedoring Co., 1 P.2d 221, 163 Wash. 305, 78 A.L.R. 1427.

92. Ill.—Allen v. U. S. Fidelity & Guaranty Co., 109 N.E 1035, 269 Ill. 234—In re Clark's Estate, 264 Ill.App. 544.
Minn.—Carpenter v. Tri-State Telephone & Telegraph Co., 211 N.W. 463, 169 Minn. 287.
22 C.J. p 335 note 38.

Showing lack of authority

Testimony of the attorney whose name is signed to the pleading, that defendant did not employ him in the cause, is sufficient to overthrow the presumption arising from his name being signed as defendant's attorney, and to exclude the pleading as evidence.—Anderson v. McPike, 86 Mo. 293.
Admissions by attorney generally see infra § 361.

93. Mo.—Dowzelot v. Rawlings, 58 Mo. 75.

94. Ala.—Ex parte E. C. Payne Lumber Co., 85 So. 9, 203 Ala. 668, reversing Simpson v. E. C. Payne Lumber Co., 82 So. 649, 17 Ala.App. 159—State v. Atlantic Coast Line R. Co., 81 So. 60, 202 Ala. 558, certiorari denied Atlantic Coast Line R. Co. v. State of Alabama, 40 S.Ct. 485, 253 U.S. 489, 64 L.Ed. 1027.

Disclaimer signed by an attorney and filed in an action is not competent as an admission against the client in another action, since the presumption of the attorney's authority does not exist when pleadings are sought to be used by other persons in other actions.—Webber v. Austin, 121 A. 673, 123 Me. 95.

95. U.S.—Fidelity & Casualty Co. of New York v. Brightman, C.C.A.Mo., 53 F.2d 161.
Ala.—Reichert v. Jerome H. Sheip, Inc., 91 So. 618, 206 Ala. 648.
Tex.—Massachusetts Bonding & Insurance Co. v. Le May, Civ.App., 28 S.W.2d 259, error dismissed.
22 C.J. p 335 note 40 [a].

Unsigned and unverified answer in a former action should not be received.—Creal v. Gallup, Tex., 231 F. 96, 145 C.C.A. 284.

96. U.S.—Fidelity & Casualty Co. of New York v. Brightman, C.C.A.Mo., 53 F.2d 161.
Ala.—Graves v. Cruse-Crawford Mfg. Co., 82 So. 452, 203 Ala. 202.

97. U.S.—Fidelity & Deposit Co. of Maryland v. Redfield, C.C.A.Idaho, 7 F.2d 800.
N.D.—Pipan v. Ætna Ins Co., 235 N. W. 719, 721, 60 N.D. 657, citing **Corpus Juris.**
Wash.—Dingfelder v. White Bluffs Warehouse Co., 229 P. 17, 19, 131 Wash. 129, quoting **Corpus Juris.**
22 C.J. p 335 note 41.

Pleading by company as not admissible against directors

In an action against corporate directors for fraud inducing a subscription to stock, the complaint in an action of the company against its president and others was improperly received in evidence against the directors, it not appearing that any of them had ever seen it or knew what it contained, and it not being competent as the admission of an agent—Reno v. Bull, 124 N.E. 144, 226 N.Y. 546, reversing 165 N.Y.S. 1109, 179 App.Div. 891, and reargument denied 125 N.E. 924, 227 N. Y. 591.

98. Ala.—Birmingham Electric Co. v. Wood, 130 So. 786, 222 Ala. 103—Graves v. Cruse-Crawford Mfg. Co., 82 So. 452, 203 Ala. 202—State v. Atlantic Coast Line R. Co., 81 So. 60, 202 Ala. 558, certiorari denied Atlantic Coast Line R. Co. v State of Alabama, 40 S.Ct. 485, 253 U.S. 489, 64 L Ed. 1027.
Mass.—Clarke v. Taylor, 168 N.E. 806, 269 Mass. 335.
N.D.—Power v. Williams, 205 N.W. 9, 53 N.D. 54.
Tex.—Cauble v. Cauble, Civ.App., 2 S.W.2d 967, error dismissed.
Wash.—Dingfelder v. White Bluffs Warehouse Co., 229 P. 17, 131 Wash. 129.

In statements setting out specific cause of action or defense, the attorney presumably is acting under special authorization of his client.—

A pleading in another action, alleging facts inconsistent with the pleader's present contention, is admissible although it is not verified by the witness testifying.[99]

c. Independent Relevancy

Statements made in a former pleading may be competent as evidence apart from their character as admissions.

Statements made in a former pleading may be competent evidence apart from their character as admissions,[1] for example, they may be competent to show that an action was brought[2] and its general nature,[3] or that the issues in two actions are the same,[4] provided the record affirmatively shows relevancy in the statements offered.[5] In like manner these statements are admissible to show that a former position was inconsistent with the one taken later;[6] that the amount claimed in two actions is different;[7] that a party has failed to advance a present claim under suitable circumstances;[8] that a defense, entirely obvious if true, was not suggested at an earlier stage;[9] or that a party has suffered a default, when if certain facts were true he probably would not have done so.[10]

§ 304. Abandoned or Superseded Pleadings

Statements in a pleading which has been abandoned, or superseded by amendment, may be competent as admissions against the pleader, where they are material and relevant to the issues in connection with which they are sought to be introduced; and they may also be independently relevant to prove some fact connected with the case.

Although a pleading which has been withdrawn or stricken out or superseded by amendment is out of the case in its capacity as a pleading, so that the pleader is no longer concluded by it, and statements therein cease to be judicial admissions,[11] they still remain as statements seriously made and are admissible in evidence, on behalf of the opposite party, as admissions by the pleader,[12] where he is a party

Clarke v. Taylor, 168 N.E. 806, 269 Mass. 335.

99. N.Y.—Eastern Rolling Mills Co. v. Hercules Steel Corporation, 197 N.Y.S. 628.

1. Ala.—Ponder v. Cheeves, 16 So. 145, 104 Ala. 307.
Wyo.—Quealy Land & Live Stock Co. v. George, 18 P.2d 253, 256, 45 Wyo. 254, citing **Corpus Juris.**

Nonresidence
On hearing of defendants' motion for nonsuit for failure of nonresident plaintiff to furnish an indorser for costs, pleadings in another case were admissible in evidence on behalf of defendants to show plaintiff is not an inhabitant of the commonwealth.—Keown v. Hughes, 123 N.E. 98, 233 Mass. 1.

To show knowledge of facts
Ark.—New Coronado Coal Co. v. Jasper, 222 S.W. 22, 144 Ark. 58.

2. Ala.—Birmingham Electric Co. v. Wood, 130 So. 786, 222 Ala. 103—Ricketts v. Garrett, 11 Ala. 806.
Ill.—Byrne v. Byrne, 47 Ill. 507.
Mo.—King v. Mittalberger, 50 Mo. 182.

3. Cal.—Thompson v. Municipal Bond Co., 73 P.2d 274, 23 Cal.App. 2d 402.
22 C.J. p 336 note 50.

4. Mass.—Radclyffe v. Barton, 37 N.E. 373, 161 Mass. 327.

Pleadings in action on judgment are admissible, in a subsequent action of audita querela to recover the amount paid on the judgment, in order to show that the issues in both cases are the same.—Radclyffe v. Barton, supra.

5. Ill.—Gardner v. Meeker, 48 N.E. 307, 169 Ill. 40.
22 C.J. p 336 note 52.

6. Ark.—Kirkpatrick v. American Ry. Express Co., 6 S.W.2d 524, 177 Ark. 334.
Conn.—Bartolotta v. Calvo, 152 A. 306, 112 Conn. 385—Miles v. Strong, 36 A. 55, 68 Conn. 273.
Ill.—Review Printing & Stationery Co. v. McCoy, 10 N.E.2d 506, 291 Ill.App. 524—Acme Waste Paper Co. v. U. S. Paper Supply Co., 233 Ill.App. 262.
Mo.—Lintz v. Atlanta Life Ins. Co., 49 S.W.2d 675, 226 Mo.App. 1087.
N.Y.—Eastern Rolling Mills Co. v. Hercules Steel Corporation, 197 N.Y.S. 628.
Pa.—Seligman & Co. v. Kearns, 81 Pa.Super. 413.
Wash.—Schotis v. North Coast Stevedoring Co., 1 P.2d 221, 163 Wash. 305, 78 A.L.R. 1427.
Wyo.—Quealy Land & Live Stock Co. v. George, 18 P.2d 253, 45 Wyo. 254.
22 C.J. p 336 note 53.

7. Md.—Calvert v. Friebus, 48 Md. 44.
22 C.J. p 336 note 54.

8. Ind.—Springer v. Drosch, 32 Ind. 486, 2 Am.R. 356.

9. Md.—Garey v. Sangston, 20 A. 1034, 64 Md. 31.

10. Me.—Cragin v. Carleton, 21 Me. 492.
Mo.—Miller v. Journal Co., 152 S.W. 40, 246 Mo. 722, Ann.Cas.1914B 679.
N.Y.—Millard v. Adams, 21 N.Y.S. 424, 1 Misc. 431.

11. U.S.—Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter, C.C.A.N.Y., 32 F.2d 195, certiorari denied 50 S.Ct. 32, 280 U.S. 579, 74 L.Ed. 629.
Ga.—Mims v. Jones, 69 S.E. 824, 135 Ga. 541—Bray v. C. I. T. Corporation, 179 S.E. 925, 51 Ga.App. 196.
Idaho.—Anderson v. Hoops, 19 P.2d 908, 52 Idaho 757—Shurtliff v. Extension Ditch Co., 94 P. 574, 14 Idaho 416.
Or.—Mount v. Welsh, 247 P. 815, 118 Or. 568.
Tex.—Kirk v. Head, 152 S.W.2d 726, affirming, Civ.App., 132 S.W.2d 125.

12. U.S.—Pullman Co. v. Bullard, C.C.A.Ga., 44 F.2d 347—Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter, C.C.A.N.Y., 32 F.2d 195, certiorari denied 50 S.Ct. 32, 280 U.S. 579, 74 L.Ed. 629.
Ark.—Taylor v. Evans, 145 S.W. 564, 102 Ark. 640.
Cal.—Lowmiller v. Monroe, Lyon & Miller, 282 P. 537, 101 Cal.App. 147, denying rehearing 281 P. 433, 101 Cal.App. 147, followed in Colclough v. Monroe, Lyon & Miller, 281 P. 434, 101 Cal.App. 791.
Ga.—Statham v. Council, 9 S.E.2d 768, 190 Ga. 517—Williams v. Fouche, 138 S.E. 580, 164 Ga. 311—McElmurray v. Blodgett, 47 S.E. 531, 120 Ga. 9—Fleischer Knitting Mills v. Union Dry Goods Store, 199 S.E. 646, 58 Ga.App. 659—La Hatte v. Walton, 184 S.E. 742, 53 Ga.App. 6—Hawthorne v. Pope, 180 S.E. 920, 51 Ga.App. 498—Bray v. C. I. T. Corporation, 179 S.E. 925, 51 Ga.App. 196—City of Thomson v. McCorkle, 171 S.E. 186, 47 Ga.App. 529—Clift & Goodrich v. Mincey Mfg. Co., 152 S.E. 136, 41 Ga.App. 38—Payne v. Rivers, 110 S.E. 45, 28 Ga.App. 28—Central of Georgia Ry. Co. v. S. R. Jaques & Tins-

to the subsequent litigation,[13] where the statements are material and relevant to the issues in connection with which they are sought to be introduced,[14] and where, in case of a pleading withdrawn by leave of court, no order is made relieving the pleader from the admissions made;[15] and the probative force of such statements has even been given a prima facie value.[16] The fact that the subsequent amendment or withdrawal is made in another case does not affect the admissibility of the original pleading as an admission, particularly where the amendment or withdrawal is not brought to the

ley Co., 98 S.E. 357, 23 Ga.App. 396—White Sewing Machine Co. v. Horkan, 66 S.E. 811, 7 Ga.App. 283.

Idaho.—Anderson v. Hoops, 19 P.2d 908, 910, 52 Idaho 757, citing **Corpus Juris**—Shurtliff v. Extension Ditch Co., 94 P. 574, 578, 14 Idaho 416.

Ill.—Bennett v. Auditorium Bldg. Corporation, 19 N.E.2d 626, 299 Ill. App. 139—Niederle v. Chicago Rapid Transit Co., 264 Ill.App. 347.

Ind.—Pittsburg, C., C. & St. L. R. Co. v. Hoffman, 155 N.E. 622, 87 Ind.App. 619, petition to transfer denied and error denied Pittsburgh, C., C. & St. L. R. Co. v. Hoffman, 162 N.E. 403, 200 Ind. 178.

Iowa.—Beery v. Glynn, 243 N.W. 365, 214 Iowa 635—Larson v. Stanton State Bank, 208 N.W. 726, 202 Iowa 333—Sievertsen v. Paxton-Eckman Chemical Co., 133 N.W. 744, 160 Iowa 662, affirmed 142 N. W. 424, 160 Iowa 662.

Kan.—Tarkowski v. Banks, 101 P.2d 893, 151 Kan. 898.

Ky.—Streipe v. Liberty Mut. Ins. Co., 47 S.W.2d 1004, 243 Ky. 15.

Mich.—Ward v. Alpine, 171 N.W. 446, 204 Mich. 619

Mo.—Wahl v. Cunningham, 56 S.W. 2d 1052, 332 Mo. 21—City of St. Louis v. Sheahan, 36 S.W.2d 951, 327 Mo. 305—Rockenstein v. Rogers, 31 S.W.2d 792, 326 Mo. 468—Andrus v. Business Men's Acc. Ass'n of America, 223 S.W. 70, 283 Mo. 442, 13 A.L.R. 779—Burton v. Phillips, App., 7 S.W.2d 712—Miller v. Griswold, App., 241 S.W. 986—Wrightsman v. Herrick, 109 S.W. 104, 130 Mo.App. 266.

Mont.—Safransky v. City of Helena, 39 P.2d 644, 651, 98 Mont. 456, citing **Corpus Juris**—Gardiner v. Eclipse Grocery Co., 234 P. 490, 72 Mont. 540.

N.Y.—Polakoff v. Hill, 27 N.Y.S.2d 142, 261 App.Div. 777—McNulty v. Zaganos, 7 N.Y.S.2d 446, 255 App. Div. 274—Vermeule v. City of Corning, 174 N.Y.S. 220, 186 App. Div. 206, reversing 166 N.Y.S. 546—Maylender v. Fulton County Gas & Electric Co., 227 N.Y.S. 209, 131 Misc. 514.

Ohio.—Hawke v. Noyes, 23 N.E.2d 508, 62 Ohio App. 186—Ford v. Commercial Motor Freight, 14 N.E. 2d 354, 57 Ohio App. 384.

Okl.—Tway v. Hartman, 75 P.2d 893, 181 Okl. 608—Republic Nat. Bank of St. Louis, Mo. v. First State Bank of Oilton, 237 P. 578, 110 Okl. 299—Lane v. Choctaw, O. & G. R. Co., 91 P. 883, 19 Okl. 324.

Or.—Beck v. General Ins. Co. of America, 18 P.2d 579, 141 Or. 446—Thompson v. Union Fishermen's Co-op. Packing Co., 273 P. 953, 128 Or. 172—Mount v. Welsh, 247 P. 815, 118 Or. 568.

Pa.—Easton School Dist. v. Continental Casualty Co., 155 A. 93, 94, 304 Pa. 67, quoting **Corpus Juris.**

Tex.—Kirk v. Head, 152 S.W.2d 726, affirming, Civ.App., 132 S.W.2d 125—Corn v. Crosby County Cattle Co., Com.App., 25 S.W.2d 290, affirming Crosby County Cattle Co. v. Corn, Civ.App., 25 S.W.2d 283, and rehearing denied Corn v. Crosby County Cattle Co., Com.App., 29 S.W.2d 999—Campbell v. McLaughlin, Com.App., 280 S.W. 189, reversing, Civ.App., 270 S.W. 257—Mitchell Oil & Gas Co. v. Green, Civ. App., 115 S.W.2d 729—Wise v. Haynes, Civ.App., 103 S.W.2d 477—Abel v. Maxwell Hardware Co., Civ.App., 28 S.W.2d 312—Henry v. Publix Theatres Corporation, Civ. App., 25 S.W.2d 695, error refused—More v. More, Civ.App., 7 S.W.2d 1096, error refused—Louisiana Ry. & Nav. Co. of Texas v. Cotton, Civ. App., 1 S.W.2d 393—Sorenson v. City Nat. Bank, Civ.App., 293 S.W. 638—Western Oil Fields Corporation v. Nowlin, Civ.App., 288 S.W. 554—Bain Peanut Co. of Texas v. Pinson & Guyer, Civ.App., 273 S. W. 655—Hall v. Williams & Ellis, Civ.App., 267 S.W. 520—O'Loughlin v. Moran, Civ.App., 250 S.W. 774—Hart-Parr Co. v. Krizan & Maler, Civ.App., 212 S.W. 835.

Wis.—Williams v. Jensen, 231 N.W. 276, 202 Wis. 19.

Wyo.—Willis v. Willis, 49 P.2d 670, 681, 48 Wyo. 403, citing **Corpus Juris,** and rehearing denied 54 P.2d 814, 49 Wyo. 296.

22 C.J. p 337 note 59.

Abandoned paragraph of answer is admissible in evidence, to show admission of pleader made therein.—Smith v. Smith, 71 S.E. 158, 136 Ga. 197.

Allegations stricken out on appeal

Allegations in defense and counterclaim stricken out on former appeal constitute sworn admissions available to plaintiff on motion for judgment on pleadings.—Rifkin v. Ed Zit Holding Corporation, 237 N.Y.S. 161, 227 App.Div. 795, modified on other grounds 173 N.E. 219, 254 N.Y. 352, remittitur amended 175 N.E. 315, 255 N.Y. 565.

Superseded answer, not having a general denial, is admissible in proof of the facts therein admitted against interest.—Payne v. Malone, Tex.Civ. App., 239 S.W. 998—Lantry-Sharpe Contracting Co. v. McCracken, Tex. Civ.App., 134 S.W. 363.

Repudiation before referee

Allegations of answer, subsequently repudiated on hearing before referee, could be considered as admission.—Weil v. Weil, 237 N.Y.S. 668, 227 App.Div. 378.

Amended, withdrawn, or abandoned pleadings as not conclusive on pleader see the C.J.S. title Pleading § 60, also 49 C.J. p 126 note 99—p 127 note 6.

Amendment proposed but disallowed see infra § 306.

Conclusiveness of withdrawn, abandoned, or suspended pleading as evidence see infra § 381.

13. Mo.—Fink v. Kansas City Southern R. Co., 154 S.W. 1134, 169 Mo. App. 691.

Pa.—Easton School Dist. v. Continental Casualty Co., 155 A. 93, 304 Pa. 67.

Pleading of one not a party to subsequent action is not competent as admission.—Wrightsman v. Herrick, 109 S.W. 104, 130 Mo.App. 266.

14. Ariz.—Buehman v. Smelker, 68 P.2d 946, 50 Ariz 18.

Mo.—Meriwether v. Publishers: Geo. Knapp & Co., 123 S.W. 1100, 224 Mo. 617.

Ohio.—National Fire Ins. Co. v. Sayers, 16 Ohio App. 398.

Okl.—Knupp v. Hubbard, 265 P. 133, 130 Okl. 111.

Pa.—Easton School Dist., to Use of Miller v. Continental Casualty Co., 155 A. 93, 94, 304 Pa. 67, quoting **Corpus Juris.**

Tex.—Corn v. Crosby County Cattle Co., Com.App., 25 S.W.2d 290, affirming Crosby County Cattle Co. v. Corn, Civ.App., 25 S.W.2d 283, and rehearing denied Corn v. Crosby County Cattle Co., Com.App., 29 S.W.2d 999—Mitchell Oil & Gas Co. v. Green, Civ.App., 115 S.W.2d 729—Wise v. Haynes, Civ.App., 103 S.W.2d 477—Martin v. Texas Co., Civ.App., 89 S.W.2d 260, error granted—Louisiana Ry. & Nav. Co. of Texas v. Cotton, Civ.App., 1 S. W.2d 393.

22 C.J. p 338 note 60.

15. Ill.—Blakeslee v. Blakeslee, 106 N.E. 470, 265 Ill. 48.

16. S.C.—Willis v. Tozer, 21 S.E. 617, 44 S.C. 1.

trial court's attention.[17]

To be so used as evidence by the adverse party, the statement or admission must be contrary to a contention made by the pleader in the case on trial,[18] and the superseded pleading must be introduced in evidence,[19] except where the pleading is superseded or amended after the evidence is closed.[20]

The pleading must be shown originally to have been made as a statement of fact, and connected directly with the party himself, as having been made or authorized and inspired by him.[21] It is not sufficient that the attorney signed and filed the original pleadings,[22] for in many instances the necessity for amendment arises because counsel has failed to apprehend the facts correctly.[23] Such considerations have sometimes led to an assertion of the view that a pleading is not admissible as evidence, even in the same action, where it has been superseded by an amended pleading[24] or has been withdrawn[25] or abandoned,[26] unless the connection of the party therewith is emphasized by some special circumstances,[27] such as the payment of money into court[28] or verification under oath.[29]

As a general rule, however, the courts, while conceding the truth of the considerations on which the foregoing rulings are based, regard them as affecting the weight, rather than the competency, of the statements, and hold that after making all due allowances there may remain a residuum of probative force in statements in abandoned or superseded pleadings, to the benefit of which the opposite party is entitled,[30] in the absence of evidence that the pleading was unauthorized,[31] or an affirmative showing that the party was without knowledge of the real facts when such pleading was prepared.[32] The statement will therefore be received,

17. Mont.—Safransky v. City of Helena, 39 P.2d 644, 98 Mont. 456.

18. Tex.—Abel v. Maxwell Hardware Co., Civ.App., 28 S.W.2d 312—Hart-Parr Co. v. Krizan & Maler, Civ. App., 212 S.W. 835.

Mere failure to allege particular fact in abandoned pleading is not evidence of existence or nonexistence thereof.—Hall v. Williams & Ellis, Tex Civ.App, 267 S.W. 520.

19. Ga.—Continental Trust Co. v. Bank of Harrison, 136 S.E. 319, 36 Ga App. 149, conforming to answer to certified questions 134 S.E. 775, 162 Ga. 758, 50 A.L.R. 412.
Mo.—Briscoe v. Metropolitan St. Ry. Co., 120 S.W. 1162, 222 Mo. 104—Hildreth v. Hudloe, App., 282 S.W. 747.
Okl.—Byers v. Sharp, 153 P. 127, 49 Okl. 456.
Tex.—Daniels v. Stewart, 132 S.W. 967, 63 Tex.Civ.App. 447.
22 C.J. p 338 note 62.

20. Ga.—Continental Trust Co. v. Bank of Harrison, 136 S.E. 319, 36 Ga.App. 149, conforming to answer to certified questions 134 S.E. 775, 162 Ga. 758, 50 A.L.R. 412.

Amendment after admission

Amendment of an answer after its admission in evidence does not destroy the original answer as evidence.—Herzfeld v. Reinach, 60 N.Y.S. 658, 44 App.Div. 326, 6 N.Y.Ann.Cas. 244.

21. N.Y.—McKane v. Dady, 112 N.Y.S. 650, 128 App.Div. 190, affirmed 95 N.E. 1133, 201 N.Y. 574.
S.D.—Corbett v. Clough, 65 N.W. 1074, 8 S.D. 176.
Tex.—Abel v. Maxwell Hardware Co., Civ.App., 28 S.W.2d 312.
22 C.J. p 338 note 63.

Attorney's legal conclusion, as set forth in a petition without authority from plaintiff, is not admissible as an admission by plaintiff.—Jordan v. Cooley, 202 N.W. 560, 199 Iowa 777.

22. S.D.—Corbett v. Clough, 65 N.W. 1074, 8 S.D. 176.
22 C.J. p 338 note 64.

23. Mass.—Taft v. Fiske, 5 N.E 621, 140 Mass. 250, 54 Am.R. 459.
N.Y.—McGrath v. Nassau Electric R. Co., 112 N.Y.S. 471, 128 App.Div. 63.

24. Ariz.—Buehman v. Smelker, 68 P.2d 946, 50 Ariz. 18.
22 C.J. p 338 note 66.

25. Ark.—Tri-State Transit Co. of Louisiana v. Miller, 65 S.W.2d 9, 188 Ark. 149, 90 A.L.R. 1389.
Mass.—Baldwin v. Gregg, 13 Metc. 253.
22 C.J. p 338 note 67.

Withdrawal before appearance of party

Statements made in a complaint filed by a corporation and verified by its attorney, which was withdrawn before appearance by defendant and a new complaint filed, are not admissible as admissions by the corporation against its interest.—Kirven v. Virginia-Carolina Chemical Co., S.C., 145 F. 288, 76 C.C.A. 172, 7 Ann. Cas. 219.

26. Ariz.—Buehman v. Smelker, 68 P.2d 946, 50 Ariz. 18.
W.Va.—Bartley v. Western Maryland R. Co., 95 S.E. 443, 81 W.Va. 795.

27. S.D.—Corbett v. Clough, 65 N.W. 1074, 8 S.D. 176.

Party as source of statements

Where it appears that statements in the pleading could have come from no one but party, the pleading is competent evidence and is admissible without further showing.—Buehman v. Smelker, 68 P.2d 946, 50 Ariz. 18.

28. Cal.—Pfister v. Wade, 10 P. 369, 69 Cal. 133.

29. Ariz.—Buehman v. Smelker, 68 P.2d 946, 50 Ariz. 18.
Ark.—Tri-State Transit Co. of Louisiana, Inc. v. Miller, 65 S.W.2d 9, 188 Ark. 149.
Tex.—Barrett v. Featherstone, 35 S.W. 11, 36 S.W. 245, 89 Tex. 567.

30. Ill.—People ex rel. Nelson v. Central Mfg Dist. Bank, 28 N.E. 2d 154, 306 Ill.App. 15.
Iowa.—Beery v. Glynn, 243 N.W. 365, 214 Iowa 635.
S.C.—Hall v. Woodward, 9 S.E. 684, 30 S.C. 564.
22 C.J. p 338 note 72.

Intervener's petition

Where intervener permits plaintiff without objection to introduce in evidence intervener's original petition containing an admission as to a certain issue as to which the petition is amended, the petition is proper for consideration by the jury, whether or not the admission in the petition subsequently amended was the mistake of the pleader.—Gates Co. v. Behrends, 197 N.W. 640, 197 Iowa 499.

Plea of tender

Although in assumpsit a plea of tender or an offer to tender is withdrawn, plaintiff has a right to prove the same as an admission of indebtedness by defendant.—O'Connell v. King, 59 A. 926, 26 R.I. 544.

31. Mo.—Anderson v. McPike, 86 Mo. 293.
22 C.J. p 339 note 73.

32. Mo.—Koons v. St. Louis Car Co., 101 S.W. 49, 203 Mo. 227.

Misapprehension or mistake not shown

It is duty of the court in deciding the case to consider any admissions made in the original verified petition, where order granting leave to file amended petition did not show that it was based on an affidavit that ad-

even though the suit has been discontinued,[33] or dismissed,[34] or the judgment therein annulled for want of jurisdiction;[35] but in order to introduce the allegations of a petition, dismissed on the motion of plaintiff, as admissions on the part of defendant, it must be shown that defendant's answer either admitted or failed to deny the averments of the petition.[36]

It is not material that the case is being heard on appeal from a lower court,[37] or whether the superseded pleading was[38] or was not[39] verified, or even that the pleading has been withdrawn absolutely from the files,[40] or has not been filed at all.[41] If, however, it affirmatively appears that the former pleading was filed without authority, it is not admissible.[42]

Where a pleading is not abandoned voluntarily, it has been held that the statements contained therein cannot be used against the pleader as admissions,[43] as in case of a pleading which has been stricken out by the court.[44]

A successful demurrer to a pleading does not preclude the reception in evidence of an admission of fact therein.[45]

Abandonment as to party. An admission against interest by plaintiff in his pleading against two defendants is admissible against him, although the action is abandoned as to one defendant, if it fits into the other defendant's theory of the case.[46]

Entire statement to be considered. Where one party has read in evidence a part of an abandoned pleading of the other party which would be misleading if unexplained, it is proper to permit the latter party to introduce the whole of the pleading in evidence.[47]

Independent relevancy. Abandoned or superseded pleadings may be independently relevant, if they are inconsistent with the subsequent pleadings,[48] and where they possess the characteristic of independent relevancy they may be received to prove some independent fact connected with the case,[49] to show that the pleader made a different claim or defense at another time,[50] to raise unfavorable inferences as to good faith in a belated claim or defense,[51] to show a waiver of defense,[52] or to im-

missions therein were made under a misapprehension or by a mistake.—People ex rel. Nelson v. Central Mfg. Dist. Bank, 28 N.E.2d 154, 306 Ill. App. 15.

33. La.—Byrne v. Hibernia Nat. Bank, 31 La.Ann. 81.
22 C.J. p 339 note 75.

34. Ill.—Mey v. Guilliman, 105 Ill. 272.
Iowa.—Tipton v. Tipton, 151 N.W. 90, 169 Iowa 182, Ann.Cas 1916C 360.
Okl.—Knupp v. Hubbard, 265 P. 133, 130 Okl. 111.
Tex.—Thomas v. Pugh, Civ.App., 6 S.W.2d 202.

Bill of interpleader dismissed
Where defendant sought by a sworn bill of interpleader to have action dismissed, and bill of interpleader was dismissed on some technical ground on motion by plaintiff, material allegations of such bill were admissible in evidence in first action against defendant.—Ward v. Alpine Tp., 171 N.W. 446, 204 Mich. 619.

35. La.—Starns v. Hadnot, 12 So. 561, 45 La.Ann. 318.

36. Ga.—Gray v. Hines, 104 S.E. 925, 25 Ga.App. 794

This rule is not altered by the fact that the former petition was prepared and signed by an attorney employed for plaintiff by defendant in a supposedly friendly suit to settle the case.—Gray v. Hines, supra.

37. Mo.—Mahan v. Brinnell, 67 S. W. 930, 94 Mo.App. 165.

38. Colo.—Barton v. Laws, 35 P. 284, 4 Colo.App. 212.
Ill.—Robinson v. Marr, 206 Ill.App. 12.

39. Wis.—Lindner v St Paul F. & M. Ins Co, 67 N.W. 1125, 93 Wis. 526, 531.
22 C J. p 339 note 80.

40. Ill.—Daub v. Englebach, 109 Ill. 267.

41. Mich.—Matson v. Melchor, 4 N. W. 200, 42 Mich. 477.

42. Mo.—Anderson v. McPike, 86 Mo. 293.

43. Ky.—Lane v. Bryant, 37 S.W. 584, 100 Ky. 138, 18 Ky.L. 857, 36 L.R.A. 709.
Tex.—Dunson v. Nacogdoches County, 37 S.W. 978, 15 Tex.Civ.App. 9.
22 C J. p 339 note 84.

Election between inconsistent defenses required
Ky.—Lane v. Bryant, 37 S.W. 584, 100 Ky. 138, 18 Ky.L. 857, 36 L.R.A. 709.

44. Tex.—Watters v. Parker, 19 S. W. 1022—Dunson v. Nacogdoches County, 37 S.W. 978, 19 Tex.Civ. App., 9.

45. U.S.—Washington & C. Ry. Co. v. Mobile & O. R. Co., Ala., 255 F. 12, 166 C.C.A. 340, reversing, D.C., Mobile & O. R. Co. v Washington & C. Ry. Co., 242 F. 531.
Ill.—Fischer v. Jackson, 239 Ill.App. 322.
Ind.—Portland Body Works v. McCullough Supply Co., 119 N.E. 180, 72 Ind.App. 216.

46. U.S.—Stolte v. Larkin, C.C.A. Minn., 110 F.2d 226.

47. Ill.—Niederle v. Chicago Rapid Transit Co, 264 Ill.App. 347.
Tex.—Galveston, H & S. A. R. Co. v Fitzpatrick, Civ.App., 91 S.W. 355.

48. N.H.—Masterson v. Berlin St. Ry, 139 A. 753, 83 N.H. 190.

49. Cal.—Pfister v. Wade, 10 P. 369, 69 Cal. 133.
Iowa.—Sheldon v. Crane, 125 N.W. 238, 146 Iowa 461.
Or.—Laam v. Green, 211 P. 791, 106 Or. 311.

Amount of damages
Although a plaintiff may amend his declaration to increase the amount of damages prayed, the amount prayed in the original declaration may be considered as bearing on fair amount of damages.—Hesse v. Diehl, 271 N.W. 721, 279 Mich. 168.

50. Ala.—Alabama Water Co. v. City of Anniston, 135 So. 585, 223 Ala. 355.
Ark.—Taylor v. Evans, 145 S.W. 564, 102 Ark. 640.
Mo.—Lebrecht v. New State Bank of Woodward, Okl., App., 229 S.W. 285.
Tex.—First State Bank of Santa Anna v. Lawther Grain Co., Civ. App., 262 S.W. 166—Ryan v. Dutton, Civ.App., 38 S.W. 546.
Vt.—Berkley v. Burlington Cadillac Co., 131 A. 16, 99 Vt. 227.

51. Mo.—Walser v. Wear, 42 S.W. 928, 141 Mo. 443.
22 C.J. p 339 note 90.

52. Mo.—Dye v. New York Life Ins. Co., 227 S.W. 1062, 207 Mo.App. 540.

peach the pleader as a witness,[53] or they may be admissible on the pleader's behalf to rebut discrediting testimony.[54] Under some statutes, abandoned or superseded pleadings cannot be used as evidence in the case in which they are filed.[55]

§ 305. Unnecessary Pleadings

Allegations in unnecessary pleadings cannot be regarded as judicial admissions by the pleader.

Allegations in unnecessary pleadings cannot be regarded as judicial admissions by which the pleader is concluded.[56]

§ 306. Amendments Proposed but Disallowed

Admissions in disallowed proposed amendments have been held admissible.

It has been held that admissions, beneficial to plaintiff, and material to his case, contained in a proffered amendment to defendant's answer, were admissible as evidence in behalf of plaintiff, although the proffered amendment was disallowed and the petition waived discovery.[57]

§ 307. Stipulations and Agreements as to Facts

A stipulation or agreed statement of facts is admissible against the party as a judicial admission, if it is relevant to the issue on which it is offered. If it is not limited to the pending trial it is admissible on a subsequent trial of the cause, and may be admitted in another action.

An agreed statement of facts[58] or other stipulations by counsel,[59] as to matters of fact within the scope of their professional functions,[60] binds the party as a judicial admission,[61] although it was made before issue joined;[62] and such an admission is competent evidence against the party,[63] provided, of course, it is relevant to the issue on which it is offered.[64]

Where these agreements are made to avoid continuances[65] to expedite the trial of a cause,[66] or for some other specific purpose, and are by their terms limited to a particular occasion or temporary object,[67] they possess no force beyond the occasion

53. Cal.—Schuh v. Oil Well Supply Co., 195 P. 703, 50 Cal.App. 588
22 C.J. p 339 note 91.

Verified answer containing admissions of allegations of fact in the complaint, although superseded by an amended answer denying such allegations, is admissible as evidence of such admissions, where defendant is a witness and is given an opportunity to explain the inconsistencies.—Evans v. Daniel, C.C.A.Nev., 289 F. 335.

54. Tex.—Corn v. Crosby County Cattle Co., Com.App., 25 S.W.2d 290, affirming Crosby County Cattle Co. v. Corn, Civ.App., 25 S.W.2d 283, and rehearing denied Corn v. Crosby County Cattle Co., Com.App., 29 S.W.2d 999.

55. Mass.—Taft v. Fiske, 5 N.E. 621, 140 Mass. 250, 54 Am.R. 459—Phillips v. Smith, 110 Mass. 61.

Statement of facts contained in pleading before amendment which are inconsistent with allegation in amended pleading cannot, under such a statute, be introduced as admission that latter is untrue.—Fellows, Gamage Co. v. Jackman, 6 N.E.2d 826, 296 Mass. 570.

Statutory rule is not applicable to questions as to parties, and not pleading.—Fellows, Gamage Co. v. Jackman, supra.

56. Vt.—Oakes v. Buckman, 88 A. 736, 87 Vt. 187, 190.
22 C.J. p 339 note 93.

57. Ga.—Norris v. Rawlings, 76 S.E. 60, 138 Ga. 711.

58. Ga.—Luther v. Clay, 28 S.E. 46, 100 Ga. 236, 39 L.R.A. 95.
Mo.—Foster Lumber Co. v. Atchison, T. & S. F. R. Co., 194 S.W. 281, 270 Mo. 629, L.R.A.1918A 768.
Tex.—Dobbs v. Order of United Commercial Travelers of America, Civ.App., 241 S.W. 191.

59. Colo.—Melnick v. Bowman, 79 P.2d 368, 370, 102 Colo. 384, citing **Corpus Juris.**
Ill.—Allen v. U. S. Fidelity & Guaranty Co., 109 N.E. 1035, 269 Ill. 234, affirming 193 Ill.App. 193.
Okl.—Loman v. Paullin, 152 P. 73, 51 Okl. 294.

Stipulation, not unqualifiedly assented to by both parties, is ineffective as admission of facts.—Lehigh Valley R. Co. v. Maas & Waldstein Co., 131 A. 884, 102 N.J.Law 332.
Admissions by attorneys generally see infra § 361.

60. Ala.—Prestwood v. Watson, 20 So. 600, 111 Ala. 604.
22 C.J. p 339 note 98.

61. Me.—Currie v. Cleveland, 79 A. 19, 108 Me. 103, 105.
Tex.—Dobbs v. Order of United Commercial Travelers of America, Civ.App., 241 S.W. 191.
22 C.J. p 339 note 99.

Stipulation withdrawing answer as admission against interest.—Pullman Holding Co. v. Restaurant Crillon, 211 N.Y.S. 301, 125 Misc. 748.

Party not joining in stipulation as not bound thereby.—Yule v. Webster, 41 N.W. 391, 25 Neb. 560, followed in Yule v. Black, 41 N.W. 394, 25 Neb. 572—22 C.J. p 339 note 99 [a].
Operation and effect of stipulation generally see the C.J.S. title Stipulations § 12, also 60 C.J. p 65 note 99—p 66 note 8.

62. Iowa.—Jones v. Clark, 37 Iowa 586.
Okl.—Loman v. Paullin, 152 P. 73, 51 Okl. 294.

63. Colo.—Melnick v. Bowman, 79 P.2d 368, 102 Colo. 384.
Ga.—King v. Shepard, 30 S.E. 634, 105 Ga. 473.
22 C.J. p 340 note 2.

64. U.S.—Maine Northwestern Dev. Co. v. Northwestern Commercial Co., Wash., 240 F. 583, 153 C.C.A. 387.
Ala.—Ross v. Roy, 39 So. 583.
Colo.—Melnick v. Bowman, 79 P.2d 368, 370, 102 Colo. 384, citing **Corpus Juris.**

Stipulation as to interstate commerce
In an action under the Federal Employers' Liability Act, 45 U.S.C.A. §§ 51–59, to recover damages for personal injuries received while working on an engine, a stipulation by defendant's counsel that defendant was engaged in interstate commerce is not an admission that the engine was being used in interstate commerce at the time of the injury.—Day v. Chicago & N. W. Ry. Co., 269 Ill.App. 435, affirmed 188 N.E. 540, 354 Ill. 469.

65. Ala.—Sibley v. Smith, 52 So. 27, 167 Ala. 158.
Kan.—Central Branch Union Pac. R. Co. v. Shoup, 28 Kan. 394, 42 Am.R. 163.

66. Mich.—Detroit v. C. H. Little Co., 109 N.W. 671, 146 Mich. 373.

67. Cal.—Cloverdale Union High

or after the purpose has been accomplished.[68] If, however, the admissions are on their face unqualified, no limitation to the pending trial is implied, but if by their terms they are not limited, and are unqualified admissions of facts, the limitation is not implied,[69] and they are receivable as judicial admissions, in any subsequent trial of the cause between the parties,[70] in the absence of fraud or mistake in making the agreement.[71]

An unqualified statement or stipulation connected with the party as having been made or authorized by him is admissible against him in another action,[72] even though the admission may have been withdrawn.[73] Abandoning the stipulation by consent connotes a mutual waiver of any probative effect.[74] So also, where the agreed facts are as to present status and the conditions are subject to change, the stipulation is not admissible after a change has actually occurred.[75] An agreed statement of facts made for the purposes of one action cannot be received in another action between different parties merely because the latter action relates to the same subject matter;[76] and a stipulation between plaintiff and one of several defendants is not binding on defendant who did not sign it, and who makes timely objection to its introduction in evidence.[77]

§ 308. Affidavits and Depositions

a. Affidavits
b. Depositions

a. Affidavits

A judicial admission in an affidavit used in the case is admissible against the party making or adopting the affidavit, and it may also be admitted in another action to which he is a party.

A judicial admission contained in an affidavit used in the case is, when relevant, competent evidence,[78] even though it was not made, but merely adopted, by the party against whom it is used,[79] and it may be competent evidence for the adverse party

School Dist. of Sonoma County v. Peters, 264 P. 273, 88 Cal.App. 731.
Ga.—King v. Shepard, 30 S.E. 634, 105 Ga. 473.
Me.—Currie v. Cleveland, 79 A. 19, 108 Me. 103.
Utah.—Holt v. Bayles, 39 P.2d 715, 85 Utah 364.

68. Ala.—Prestwood v. Watson, 20 So. 600, 111 Ala. 604.
Utah.—Holt v. Bayles, 39 P.2d 715, 85 Utah 364.
22 C.J. p 340 note 7.

Stipulation regarding amendments to pleadings subsequently superseded by other and further amendments is not evidence against a party respecting any material fact.—Maine Northwestern Dev. Co. v. Northwestern Commercial Co., Wash., 240 F. 583, 153 C.C.A. 387.

69. Ala.—Prestwood v. Watson, 20 So. 600, 111 Ala. 604.
Tex.—Maryland Casualty Co. v. Frizzell, Civ.App., 58 S.W.2d 135.
22 C.J. p 340 note 8.

70. Ala.—Chapman v. York, 103 So. 567, 212 Ala. 540.
Ill.—Deffler v. Loudenback, 233 Ill. App. 240.
N.H.—Page v. Brewsters, 54 N.H. 184.
Tex.—City of Beaumont v. Stephenson, Civ.App., 107 S.W.2d 915—Maryland Casualty Co. v. Frizzell, Civ.App., 58 S.W.2d 135.
22 C.J. p 340 note 9.

71. Tex.—City of Beaumont v. Stephenson, Civ.App., 107 S.W.2d 915, error dismissed.

Where, on first appeal, parties agree to statement of facts, such statement is admissible on a second trial if there is no showing of fraud or mistake in making the agreement.—City of Beaumont v. Stephenson, Tex.Civ.App., 107 S.W.2d 915.

72. Iowa.—Wallace v. Farmers' Exch. Co., 197 N.W. 654, 197 Iowa 568.
Mo.—Shaughnessy v. Davis Sewing Mach. Co., App., 254 S.W. 713.
N.Y.—Pullman Holding Co. v. Restaurant Crillon, 211 N.Y.S. 301, 125 Misc. 748—Bennis v. Conley, 231 N.Y.S. 635.
N.C.—Burlington Hotel Corporation v. Dixon, 145 S.E. 244, 196 N.C. 265.
Tex.—National Life & Accident Ins. Co. v. Casas, Civ.App., 36 S.W.2d 323—Dobbs v. Order of United Commercial Travelers of America, Civ.App., 241 S.W. 191.
22 C.J. p 340 notes 10, 11.

Rule admitting pleadings in subsequent action on behalf of stranger applies to admission in record signed by counsel, such as agreed statement of facts signed by counsel for both parties.—Burlington Hotel Corporation v. Dixon, 145 S.E. 244, 196 N.C. 265.

73. Ga.—King v. Shepard, 30 S.E. 634, 105 Ga. 473.
22 C.J. p 340 note 12.

74. Pa.—McLughan v. Bovard, 4 Watts 308.

75. Okl.—Capital Townsite Co. v. Brown, 126 P. 722, 34 Okl. 568.
22 C.J. p 340 note 17.

76. Ark.—Beene v. Hutto, 105 S.W. 2d 530, 531, 194 Ark. 107, quoting **Corpus Juris.**
N.Y.—Elting v. Scott, 2 Johns. 157.

77. Minn.—Burnetti v. Duluth & I. R. Ry. Co., 209 N.W. 879, 168 Minn. 136.

78. Ala.—McDonald v. Stephens, 85 So. 746, 204 Ala. 359.
Cal.—Frazee v. Fox Film Corporation, 188 P. 286, 45 Cal.App. 661.
Iowa.—Erwin v. Fillenwarth, 137 N.W. 502, 160 Iowa 210.
Me.—Guild v. Eastern Trust & Banking Co., 133 A. 164, 125 Me. 292.
Miss.—Columbian Mut. Life Assur. Soc. v. Harrington, 104 So. 297, 139 Miss. 826.
Tex.—Louisiana Ry. & Nav. Co. of Texas v. Cotton, Civ.App., 1 S.W.2d 393.
22 C.J. p 341 note 19.

An affidavit by plaintiff in replevin, to enable him to obtain possession of the property, and which contains a statement of its value, constitutes an admission thereof, and is admissible against him.
Ill.—Moore v. Paul F. Beech Co., 221 Ill.App. 609.
Kan.—Warner v. Carter, 198 P. 960, 109 Kan. 285.
Okl.—Stiller v. Atchison, 124 P. 595, 34 Okl. 45.

Although the party taking the affidavit may wish to suppress it because it operates against him it may be read in evidence.—McMahon v. Spangler, 4 Rand. 51, 25 Va. 51.

79. U.S.—Tennessee Coal, Iron & R. Co. v. Brewer, C.C.A.Ala., 92 F. 2d 804.
22 C.J. p 341 note 20.

Affidavits of other persons, which adverse claimants of land presented to show adverse possession entitling claimants to patents from state under statute, are admissible against claimants and their privies as constituting by adoption claimants' own statements of nature and course of

on the trial of another issue from that on which it was offered.[80] A judicial admission by affidavit is admissible although the affiant has testified to the same effect,[81] although the affiant is dead,[82] although the affidavit was irregularly taken,[83] although the authority of the officer before whom the affidavit was sworn to is not proved,[84] or although it was sworn to on information and belief.[85] An affidavit made in a state court may be used as an admission in the cause after its removal to a federal court;[86] and, while an affidavit made in one case cannot have a conclusive effect in another case, it is nevertheless admissible,[87] even on behalf of a party who was not a party to the action in which it was made or originally used.[88] The affidavit must of course be formally offered in evidence in order to render it available.[89]

An ex parte affidavit is not admissible as an admission against interest of a third person who derives his rights through affiant;[90] and such an affidavit of one defendant is not admissible against his codefendant where the latter has had no opportunity to file cross interrogatories.[91] An affidavit by a third person on an application for a new trial for newly discovered evidence cannot be held a judicial admission of absence of merit in an appeal from the judgment rendered on the first trial.[92] So also a failure to make a motion to vacate an order of arrest issued on ex parte affidavits cannot be regarded as an admission of the truth of the averments of the affidavits.[93]

b. Depositions

Statements made in a deposition, relevant to the issues, may be admitted against the deponent as admissions against interest in the same or another action to which he is a party, even though he is present in court and able to testify, or has testified.

Statements made by a party in his deposition in the cause containing relevant judicial admissions are competent against him,[94] even though they are not based on his personal knowledge.[95] A deposition taken in one action may also be received as an admission against interest in another action,[96] in

their title.—Tennessee Coal, Iron & R. Co. v. Brewer, C.C.A.Ala., 92 F.2d 804.

Ex parte affidavits of a stranger to the action and in no way binding a party thereto, are not admissible. —Turner v. Gonzales, 64 S.W. 565, 3 Ind.Terr. 649.

Reading as part of record

Reading the affidavit of a third person as part of a record does not make the statements contained in such record available as admissions. Ill.—Love v. People, 94 Ill.App. 237. Ky.—Hargis v. Price, 4 Dana 79.

80. U.S.—Chicago & N. W. R. Co. v. Ohle, Iowa, 6 S.Ct. 632, 117 U.S. 123, 29 L.Ed. 837.

81. Ala.—Orr v. Travelers' Ins. Co., 24 So. 997, 120 Ala. 647.

82. Ga.—Phillips v. Collinsville Granite Co., 51 S.E. 666, 123 Ga. 830.
22 C.J. p 341 note 22.

83. Iowa.—Davenport v. Cummins, 15 Iowa 219.

84. N.Y.—Morrell v. Cawley, 17 Abb. Pr. 76.

85. U.S.—Chicago & N. W. R. Co. v. Ohle, Iowa, 6 S.Ct. 632, 117 U. S. 123, 29 L.Ed. 837.

86. U.S.—National SS. Co. v. Tugman, N.Y., 12 S.Ct. 361, 143 U.S. 28, 27 L.Ed. 87.

87. Mass.—Knight v. Rothschild, 52 N.E. 1062, 172 Mass. 546.
Or.—Tippin v. Ward, 5 Or. 450.
22 C.J. p 341 note 26.

An affidavit in a criminal case may be used in a subsequent civil proceeding.—Garman v. U. S., 34 Ct.Cl. 237.

Conclusiveness of admission by affidavit made in another case see infra § 381.

88. Ga.—Phillips v. Collinsville Granite Co., 51 S.E. 666, 123 Ga. 830

89. Ill.—Foster v. Liverpool & London Globe Ins. Co., Limited, 222 Ill. App. 37.
Iowa.—Marshall Field Co. v. Oren Ruffcorn Co., 90 N.W. 618, 117 Iowa 157.

90. U.S.—Columbia Casualty Co. v. Thomas, C.C.A.Fla., 101 F.2d 151.

In an automobile liability insurer's action against an insured driver and also against injured persons to establish the insurer's nonliability under the policy, an affidavit of the driver indicating that his vehicle was not being used within the policy coverage at the time of the accident is not admissible as an admission against the driver's interest so as to bind the injured persons on the ground that they derived their rights against the insurer under the policy through the driver.—Columbia Casualty Co. v. Thomas, supra.

91. Tex.—Veck v. Culbertson, Civ. App., 57 S.W. 1114.

92. N.D.—McCarty v. Talley, 139 N. W. 1012, 24 N.D. 395—McCarty v. Kepreta, 139 N.W. 992, 24 N.D. 395, 48 L.R.A.,N.S., 65.

93. N.Y.—Talcott v. Harris, 93 N.Y. 567.

94. U.S.—Johnston v. Hawkinson, C. C.A.Mo., 119 F.2d 110—Sampsell v. Anches, C.C.A.Wash., 108 F.2d 945.
Cal.—Automobile, Truck, Tractor & Implement Co. v. Salladay, 203 P. 163, 55 Cal.App. 219.
Mo.—Dawes v. Williams, 40 S.W.2d 644, 328 Mo. 680—Hanser v. Lerner, App., 153 S.W.2d 806—Kneezle v. Scott County Milling Co., App., 113 S.W.2d 817—Heyde v. Patten, App., 39 S.W.2d 813—McMillan v. Isreal, App., 30 S.W.2d 626—Donet v. Prudential Ins. Co. of America, App., 23 S.W.2d 1104—Cox v. Reynolds, App., 18 S.W.2d 575—McCaslin v. Mullins, App., 17 S.W.2d 684—Mahon v. Fletcher's Estate, App., 245 S.W. 372.
N.H.—Cote v. Sears, Roebuck & Co., 166 A. 279, 86 N.H. 238.
22 C.J. p 341 note 31.

Necessity for signature

Until the deposition is signed by deponent it is not his deposition, and contains no admissions on his part.—Davis v. Otto, Mo.App., 206 S. W. 409.

Deposition of a witness used by a party to the suit on a former trial thereof.—Louisiana Ry. & Nav. Co. of Texas v. Cotton, Tex.Civ.App., 1 S.W.2d 393.

95. U.S.—Cambioso v. Maffet, Pa., 4 F.Cas.No. 2,330, 2 Wash.C.C. 98.

96. Cal.—Insured Life Fund Co. v. Ward, 77 P.2d 890, 25 Cal.App.2d 476—Newby v. Gibson, 44 P.2d 468, 6 Cal.App.2d 359.
Mo.—Pulitzer v. Chapman, 85 S.W.2d 400, 337 Mo. 298—Mertens v. McMahon, App., 28 S.W.2d 456, transferred, see 66 S.W.2d 127, 334 Mo. 175, 93 A.L.R. 1285—Vest v. S. S. Kresge Co., App., 213 S.W. 165.
Neb.—Falkinburg v. Inter-State Business Men's Accident Co. of Des Moines, Iowa, 272 N.W. 924, 132 Neb. 670.
Tex.—National Cattle Loan Co. v.

which the deponent is properly joined as a party,[97] even though he was not a party to the action in which the deposition was taken,[98] regardless of whether or not it was used in the action in which it was taken,[99] and whether it was made by the party himself or by an authorized agent.[1]

A deposition is competent although it was made in a personal capacity and is offered against the party in a representative capacity;[2] although it was taken in perpetuam[3] or de bene esse;[4] although it was taken on insufficient notice,[5] or without the statutory formalities;[6] although it was not filed as required by statute;[7] although the cause for taking it no longer exists;[8] although the deponent is dead;[9] or even though the deposition itself has been suppressed.[10] A statute making a deposition generally inadmissible unless the witness is dead, absent, or incapacitated does not affect the admissibility of the deposition of a party as an admission against interest.[11]

The fact that deponent is present and able to testify, or has testified does not preclude the introduction of his deposition as an admission.[12]

A deposition of one of several defendants is admissible, as part of plaintiff's case in chief, as an admission against such defendant[13] over the objection of his codefendant.[14]

§ 309. Interrogatories and Answers Thereto

Interrogatories and answers thereto may be competent as judicial admissions either in the same or another action.

Where interrogatories are filed for the purpose of obtaining discovery, the party's answers have the force of judicial admissions in the suit in which they are made,[15] although the answers were not made with the formality required by statute.[16] Such statements may also be received as admissions in

Armstrong, Civ.App., 8 S.W.2d 767, error refused.
22 C.J. p 341 note 33.

97. Mo.—Case Plow Works v. Ross, 74 Mo.App. 437.
22 C.J. p 342 note 34.

98. Mo.—Black v. Epstein, 120 S.W. 754, 221 Mo. 286.
22 C.J. p 342 note 35.

99. Mo.—Padley v. Catterlin, 64 Mo. App. 629.
22 C.J. p 342 note 36.

1. Mo.—Henry v. First Nat. Bank, 115 S.W.2d 121, 232 Mo.App. 1071.
Deposition of person in membership department of incorporated collecting agency is inadmissible as admission against interest of the agency where it is not shown to be an admission of its agency.—Samuel Haas Trimmed Hat Co. v. Service Ass'n, 297 S.W. 129, 222 Mo.App. 307.

2. Mo.—Kritzer v. Smith, 21 Mo. 296.

3. Mass.—Faunce v. Gray, 21 Pick. 243.
Tex.—Chaddick v. Haley, 17 S.W. 233, 81 Tex. 617.
In Maine a contrary rule has been established by statute.—Dwinel v. Godfrey, 44 Me. 65.

4. N.Y.—Meyer v. Campbell, 20 N.Y.S. 705, 1 Misc. 283.
S.C.—McGahan v. Crawford, 25 S.E. 123, 47 S.C. 566.

5. N.H.—Carr v. Griffin, 44 N.H. 510.

6. N.H.—Carr v. Griffin, supra.
22 C.J. p 342 note 42.
In Texas
(1) The rule is stated that if a deposition of a party is not taken in substantial compliance with the statutory requirements it is not admissible as an admission against interest of the deponent unless it was voluntarily made by him.—Reilly v. Buster, 82 S.W.2d 931, 125 Tex. 323, reversing Civ.App., 52 S.W.2d 521—Pettit v. Campbell, Tex.Civ.App., 149 S.W.2d 633—McLean v. Hargrove, Tex.Civ.App., 144 S.W.2d 1021, error granted.
(2) Under earlier decisions, the deposition, although improperly taken, would have been admissible as an admission.—Bilger v. Buchanan, Tex., 6 S.W. 408—Edwards v. Norton, 55 Tex. 405.

7. N.H.—Profile, etc., Hotels Co. v. Bickford, 54 A. 699, 72 N.H. 73.

8. Me.—Hatch v. Brown, 63 Me. 410.
22 C.J. p 342 note 44.

9. U.S.—Stephens v. Howells Sales Co., D.C.N.Y., 16 F.2d 805.

10. Tex.—Parker v. Chancellor, 15 S.W. 157, 78 Tex. 524.
22 C.J. p 342 note 45.
Proof required
Statements in a deposition which has been suppressed because not taken before a proper officer cannot be received unless there is proof that the statements were correctly written down as made by the declarant and that he signed the writing.—German F. Ins. Co. v. Gibbs, 92 S.W. 1068, 96 S.W. 760, 42 Tex.Civ.App. 407.

11. Mo.—Pulitzer v. Chapman, 85 S.W.2d 400, 337 Mo. 298—Kneezle v. Scott County Milling Co., App., 113 S.W.2d 817.

12. U.S.—Sampsell v. Anches, C.C.A. Wash., 108 F.2d 945, 955, citing **Corpus Juris.**
Cal.—Newby v. Gibson, 44 P.2d 468, 6 Cal.App.2d 359.
Kan.—Moore v. Brown, 23 Kan 269.
Mo.—Pulitzer v. Chapman, 85 S.W.2d 400, 337 Mo. 298—Dawes v. Williams, 40 S.W.2d 644, 328 Mo. 680—Henry v. First Nat. Bank, 115 S.W.2d 121, 232 Mo.App. 1071—Kneezle v. Scott County Milling Co., App., 113 S.W.2d 817—Heyde v. Patten, App., 39 S.W.2d 813—Rosenstein v. Lewis Automobile Co., App., 34 S.W.2d 1023—Donet v. Prudential Ins. Co. of America, App., 23 S.W.2d 1104—Cox v. Reynolds, App., 18 S.W.2d 575—McCaslin v. Mullins, App., 17 S.W.2d 684—Mahon v. Fletcher's Estate, App., 245 S.W. 372—Hutchinson v. Sunshine Oil Co., App., 218 S.W. 951—Vest v. S. S. Kresge Co., App., 213 S.W. 165.
22 C.J. p 342 note 46—18 C.J. p 739 note 83.

13. Mo.—Hutchinson v. Sunshine Oil Co., App., 218 S.W. 951.

14. Mo.—Conway v. Silver King Oil & Gas Co., App., 94 S.W.2d 942.

15. Ga.—Sizer v. Melton, 58 S.E. 1055, 129 Ga. 143.
Iowa.—Beem v. Farrell, 113 N.W. 509, 135 Iowa 670—Van Horn v. Smith, 12 N.W. 789, 59 Iowa 142.
Wis.—Lange v. Heckel, 175 N.W. 788, 171 Wis. 59.
22 C.J. p 342 note 49.
Answers in deposition
Where the declarations made by a deponent, who is a party to the suit and is examined by the opposite party, are proved by the testimony of the stenographer who took the deposition, which is not introduced in evidence, the statements of deponent have the effect merely of declarations against interest.—In re Arnold, 82 P. 252, 147 Cal. 583.

16. Me.—Jewett v. Rines, 39 Me. 9.

an action other than that in which they were made,[17] although the issues in the two cases are different.[18]

Interrogatories prepared but abandoned are not admissible as admissions of the attorney who prepared them or as depositions taken by consent,[19] and unanswered interrogatories are not admissible, as being confessed, where it is shown that there was no refusal to answer them.[20]

§ 310. Claim Statements

Competent admissions may be contained in statements of claims.

Competent admissions may be contained in a statement of claim against a decedent's estate[21] or a mechanic's lien claim.[22]

§ 311. Testimony

The testimony given by or for a party at the trial of a case may be used against him as an admission in the same, or on a subsequent, trial, or even in another action, provided such testimony is material and relevant.

The testimony of a party at the trial of a case may amount to a judicial admission, and may be admitted and used against him as such at the same trial,[23] or as primary evidence on a subsequent trial.[24] So also, except where there are statutory provisions to the contrary with respect to evidence

Mass.—Lynde v. McGregor, 13 Allen 182, 90 Am D. 188.
Tex.—Edwards v. Norton, 55 Tex. 405.

17. Ala.—Cooke v. Wilbanks, 135 So. 435, 223 Ala. 312, 83 A.L.R. 1441—Williams v. Bedenbaugh, 110 So. 286, 215 Ala. 200.
Ga.—Sizer v. Melton, 58 S.E. 1055, 129 Ga. 143.
La.—Givens v. Washington Nat. Ins. Co., App., 170 So. 810.
Mo.—Mertens v. McMahon, App., 28 S.W.2d 456, transferred, see 66 S.W.2d 127, 334 Mo. 175, 93 A.L.R. 1285.
22 C.J. p 343 note 52.

Interrogatories and answers of an officer of a corporation in one case are not admissible in another case as admissions of the corporation, unless the officer had authority to make admissions for the corporation, or unless the corporation dealt with them as admissions.—Sizer v. Melton, 58 S.E. 1055, 129 Ga. 143.

In federal court

Defendant's answers to interrogatories in previous action, as required by state law, may properly be admitted in a subsequent action in federal court.—Federal Surety Co. v. City of Staunton, Ill., for Use of McWane Cast Iron Pipe Co., C.C.A.Ala., 29 F.2d 9, certiorari denied 49 S.Ct. 253, 279 U.S. 840, 73 L.Ed. 986.

Inadmissibility

In action for injuries sustained in automobile accident, exclusion of interrogatory as to whether defendant had been convicted for drunken driving on night of accident and defendant's affirmative answer, unaccompanied by any evidence of sentence, was not error, since the fact elicited did not constitute an admission or confession of defendant that defendant was drunk at the time of the accident.—Blackman v. Coffin, 15 N.E.2d 469, 300 Mass. 432.

18. La.—Hood v. Chambliss, 7 La. Ann. 106.
Mass.—Williams v. Cheney, 3 Gray 215.

19. Ark.—Murphy v. St. Louis, etc., R. Co., 122 S.W. 636, 92 Ark. 159

20. Tex.—Cloudt v. Dismukes, Civ. App., 68 S.W.2d 526.

21. Cal.—Pollitz v. Wickersham, 88 P. 911, 150 Cal. 238
Me.—Guild v. Eastern Trust & Banking Co., 126 A. 872, 124 Me. 208.

Filing claim in bankruptcy against estate as not admission of liability for debts.—Bushong v. R. R. Thompson Estate Co., C.C.A.Or., 262 F. 297.

22. Iowa.—W. T. Joyce Co. v. Carroll Light, etc., Co., 133 N.W. 785, 153 Iowa 372.

23. Iowa.—Helberg v. Zuck, 208 N.W. 209, 201 Iowa 860.
Mo.—Madden v. Red Line Service, App., 76 S.W.2d 435—De Lorme v. St. Louis Public Service Co., App., 61 S.W.2d 247.
Pa.—Little v. Straw, 192 A. 894, 326 Pa. 577.
Va.—Watson v. Coles, 195 S.E. 506, 170 Va. 141.

Contradicting pleading

Plaintiff's statements as a witness in his own behalf, which directly contradict material allegations of his complaint, constitute informal judicial admissions.—Van Meter v. Zumwalt, 206 P. 507, 35 Idaho 235.

24. Ala.—Waller v. Simpson, 94 So. 343, 208 Ala. 333.
Conn.—Kanopka v. Kanopka, 154 A. 144, 113 Conn. 30, 80 A.L.R. 619.
Fla.—Hall v. State, 187 So. 392, 407, 136 Fla. 644, citing **Corpus Juris.**
Iowa.—First Sav. Bank of Crawfordsville v. Edgar, 199 N.W. 1011, 199 Iowa 1136.
Mich.—Loveland v. Nelson, 209 N.W. 835, 235 Mich. 623.
Mo.—Hudlow v. Langerhans, 91 S.W. 2d 629, 230 Mo.App. 1160.
Neb.—Lukart v. Korbmaker, 258 N.W. 263, 128 Neb. 199.
N.J.—First Nat. Bank v. Stoneley, 168 A. 602, 111 N.J.Law 519.
S.C.—Dyson v. Commonwealth Life Ins. Co. of Louisville, Ky., 180 S.E. 475, 479, 176 S.C. 411, quoting **Corpus Juris.**
Tex.—Park v. Sullivan, Civ.App., 12 S.W.2d 265.
Wash.—Riverside Finance Co. v. Griffith, 248 P. 786, 140 Wash. 322
W.Va.—Morrison v. Judy, 13 S.E.2d 751.
22 C.J. p 343 note 60.

Admissible as primary evidence

The testimony of a party to an action or suit, given on a former trial thereof, and tending to show an admission by the party against interest, is admissible as "primary evidence," when offered by the party seeking the benefit of such supposed admission.—Morrison v. Judy, W.Va., 13 S.E.2d 751.

A properly authenticated transcript of the evidence of a former trial of the same case between the same parties is admissible in evidence on another trial, to prove admissions made by a party who is a witness.—Empire Cotton Oil Co. v. Penny, 102 S.E. 556, 25 Ga.App. 104.

Coroner's inquest

(1) Admissions in defendant's testimony at a coroner's inquest, as to his actions at the time of the accident, are admissible in a subsequent trial of an action for injuries or death, caused by the accident.
Conn.—Walsh v. Studwell, 135 A. 554, 105 Conn. 453.
Mo.—Hudlow v. Langerhans, 91 S.W. 2d 629, 230 Mo.App. 1160.

(2) However, in an action on a fraternal benefit certificate void if death should occur as a consequence of a violation of law by the member, a transcript of evidence at the inquest showing that deceased was accidentally shot while engaged in making an unlawful assault is inadmissible as an admission, notwithstanding the proofs of death prescribed by the by-laws required a duly authenticated transcript of the proceedings at the inquest, since the furnishing of such transcript was essentially involuntary.—Allen v. Knights and Ladies of Security, 195 P. 616, 108 Kan. 419.

Evidence taken before a special master and filed before the party

in certain specified proceedings,[25] testimony given by a party on a trial of one case is competent against him as an admission on the subsequent trial of another action,[26] whether he was a party to such former action[27] or merely a witness therein,[28] and even though the testimony was given under compulsory process,[29] or in another state.[30] The former statement must, of course, be relevant in the action in which it is offered.[31] A party is entitled to show that his opponent is concealing a fact to which he has previously testified,[32] or has given testimony on another occasion inconsistent with his present evidence,[33] or the statement may be admissible because it shows knowledge.[34]

It is not necessary that the answers should have been responsive to the questions;[35] that the testimony claimed to be an admission should have been all of the party's testimony on that particular matter;[36] that a similar admission should have been contained in the party's pleading;[37] that the attention of the witness should be first called to his former statement;[38] that the former statement should

became such may be competent as a judicial admission against his interest.—Shannon v. Lunsford, 111 So. 22, 215 Ala. 465.

Trial on appeal

Ill.—Chase v. Debolt, 7 Ill. 371.

Former evidence generally see infra §§ 384–402.

25. N.Y.—Lapham v. Marshall, 3 N. Y.S. 601, 51 Hun 36—Dusenbury v. Dusenbury, 48 N.Y.Super. 205, 63 How.Pr. 349.

Pa.—Uhler v. Maulfair, 23 Pa. 481.

26. U.S.—In re Taylor, D.C.N.Y., 7 F.Supp. 592.

Cal.—Murphy v. Davids, 186 P. 143, 181 Cal. 706—Drummey v. State Board of Funeral Directors and Embalmers, Cal.App., 77 P.2d 912, affirmed, Cal., 87 P.2d 848.

Iowa.—Stark v. White, 245 N.W. 337, 215 Iowa 899—Duncan v. Rhomberg, 236 N.W. 638, 212 Iowa 389—Old Line Life Ins. Co. of America v. Jones, 221 N.W. 210, 206 Iowa 664—Schaffer v. Campbell, 199 N. W. 334, 198 Iowa 43—Sapiro v. Rutledge, 181 N.W. 257, 190 Iowa 1032—Barish v. Barish, 180 N.W. 724, 190 Iowa 493.

Mass.—W. A. & H. A. Root v. MacDonald, 157 N.E. 684, 260 Mass. 344, 54 A.L.R. 1422.

Mich.—Bullen v. Chicago & N. W. Ry. Co., 209 N.W. 124, 235 Mich. 240.

Okl.—Harry v. Hertzler, 90 P.2d 656, 185 Okl. 151.

Vt.—Steele v. Lackey, 177 A. 309, 107 Vt. 192.

Wis.—State v. Thorson, 231 N.W. 155, 202 Wis. 31.

22 C.J. p 343 note 61.

Admissions by insured

In action by insurer to avoid liability under automobile liability policy because of insured's failure actively to cooperate in defense of damage action against insured, admissions against interest made by insured in damage action and in written statement and proof of loss furnished to insurer are admissible against him.—State Farm Mut. Automobile Ins. Co. v. Bonacci, C.C.A. Neb., 111 F.2d 412.

Testimony given before a senate investigating committee is admissible against defendant, in an action to cancel contracts and leases of naval oil reserves.—Pan-American Petroleum & Transport Co. v. U. S., Cal., 47 S.Ct. 416, 273 U.S. 456, 71 L.Ed. 734, affirming, C.C.A., Pan-American Petroleum Co. v. U. S., 9 F.2d 761, modifying, D.C., U. S. v. Pan-American Petroleum & Transport Co., 6 F.2d 43 and certiorari granted Pan-American Petroleum & Transport Co. v. U. S., 46 S.Ct. 356, 270 U. S. 640, 70 L.Ed. 775.

Testimony of bankrupt

(1) Testimony by a bankrupt before a referee in bankruptcy is admissible against him as an admission in a subsequent suit or proceedings against him involving relevant matters.

U.S.—Wilkinson v. Livingston, C.C.A. Mo., 45 F.2d 465.

Conn.—Todd v. Bradley, 122 A. 68, 99 Conn. 307.

La.—Louisiana Mortg. Corporation v. Pickens, App., 182 So. 385.

Neb.—Gentry v. Burge, 261 N.W. 854, 129 Neb. 493.

(2) In action to set aside bankrupt's transfers of property as fraudulent, the bankrupt's admissions made before referee are admissible as against transferees, where there is joint interest and privity of design in disposition and acquisition of property to place it beyond reach of creditors.—Gentry v. Burge, supra.

(3) In suit by trustee in bankruptcy to set aside voluntary conveyance of bankrupt to wife, examination on oath of bankrupt in bankruptcy proceedings is admissible as sworn admission touching consideration for conveyance.—Thomas v. Mickle, 154 So. 95, 228 Ala. 458.

(4) Testimony of a bankrupt given in other proceedings may be received as an admission against him, on a hearing for his discharge, when the proper foundation for its reception in evidence is laid.—In re Taylor, D.C.N.Y., 7 F.Supp. 592.

27. Cal.—Stanton v. Freeman, 126 P. 377, 19 Cal.App. 464.

Ind.—Jones v. Dipert, 23 N.E. 944, 123 Ind. 594.

Ky.—Mercer v. King, 13 Ky.L. 429.

S.C.—Dyson v. Commonwealth Life Ins. Co. of Louisville Ky., 180 S.E. 475, 176 S.C. 411.

28. Okl.—Harry v. Hertzler, 90 P. 2d 656, 185 Okl. 151.

S.C.—Dyson v. Commonwealth Life Ins. Co. of Louisville, Ky., 180 S. E. 475, 176 S.C. 411.

22 C.J. p 343 note 63.

Attorney's testimony as a witness in another action or proceeding with regard to certain misconduct on his part is admissible as a judicial admission in a proceeding to disbar him for such misconduct.

Ill.—In re Huff, 20 N.E.2d 101, 371 Ill. 98—In re Tuttle, 20 N.E.2d 98, 371 Ill. 153—In re Ellis, 20 N. E.2d 96, 371 Ill. 113.

Mo.—In re Pate, 119 S.W.2d 11, 232 Mo.App. 478.

29. N.Y.—Notara v. De Kamalaris, 49 N.Y.S. 216, 22 Misc. 337.

22 C.J. p 343 note 64.

30. Ala.—Loeb v. Peters, 63 Ala. 243, 35 Am.R. 17.

31. U.S.—Docherty v. Robins Dry Dock & Repair Co., C.C.A.N.Y., 32 F.2d 545.

S.C.—Dyson v. Commonwealth Life Ins. Co. of Louisville, Ky., 180 S.E. 475, 479, 176 S.C. 411, quoting **Corpus Juris.**

22 C.J. p 344 note 66.

Evidence of admissions held not too remote

Tex.—Vick v. Schaff, Civ.App., 260 S.W. 916.

32. Neb.—Lowe v. Vaughan, 67 N. W. 464, 48 Neb. 651.

33. Tex.—Munk v. Stanfield, Civ. App., 100 S.W. 213.

22 C.J. p 344 note 68.

34. Ala.—Loeb v. Peters, 63 Ala. 243, 35 Am.R. 17.

N.C.—Allen v. Allen, 195 S.E. 801, 213 N.C. 264.

35. Md.—Kirk v. Garrett, 35 A. 1089, 84 Md. 383.

36. Iowa.—Frick v. Kabaker, 90 N. W. 498, 116 Iowa 494.

37. Iowa.—Judge v. Jordan, 46 N.W. 1077, 81 Iowa 519.

38. Mich.—Merrill v. Leisenring, 131 N.W. 538, 166 Mich. 219.

22 C.J. p 344 note 73.

be contradictory of any statement made by the party at the trial in which it is offered;[39] or even that the former testimony should have been given in court.[40] It has been held not sufficient to exclude the statement that the testimony was illegally taken,[41] although this has been denied.[42] The former testimony is not inadmissible because it was merely an expression of opinion without a statement of the facts on which such opinion was based.[43]

As the admission is primary evidence, it is immaterial that the party who made it is present in court and can be called as a witness;[44] but this rule has been held not to apply to the prior admissions of a witness, not a party, where the witness himself may be produced and examined.[45]

Testimony of third persons as witnesses in another case are admissible against a party if the latter is bound thereby because of agency,[46] joint or common interest,[47] or his having vouched for their credibility and impliedly asserted the fact by calling them as witnesses;[48] but not otherwise.[49] It has been held that where a party sues in a representative capacity an admission by him while testifying in an individual capacity in a former trial is inadmissible.[50]

§ 312. Judgments

A judgment rendered on a prior trial, or in a prior action, may be admissible as an admission against interest.

The judgment rendered on a former trial, or in a prior action may be admissible as an admission against interest, as shown by the recitals therein,[51] although the judgment was subsequently reversed,[52] provided the admission is material and relevant to

39. Iowa.—Lush v. Parkersburg, 104 N.W. 336, 127 Iowa 701.
22 C.J. p 344 note 74.

40. Ala.—Waller v. Simpson, 94 So. 343, 208 Ala. 333.

41. Mich.—Lilley v. Mutual Ben. L. Ins. Co., 52 N.W. 631, 92 Mich. 153.

42. N.J.—Wilson v. Hill, 13 N.J.Eq. 143.

43. Ky.—Stafford v. Tarter, 96 S.W. 1127, 29 Ky.L. 1184.

44. Neb.—Lukart v. Korbmaker, 258 N.W. 263, 264, 128 Neb. 199, citing **Corpus Juris.**
Pa.—Stevenson v. Ebervale Coal Co., 50 A. 818, 201 Pa. 112, 88 Am.S.R. 805.
W.Va.—Morrison v. Judy, 13 S.E.2d 751.

Although a party does not testify on a second trial, his testimony at the first trial may be used against him.—Grand Lodge A. O. U. W. v. Taylor, 131 P. 783, 24 Colo.App. 106.

45. Mich.—In re Bagley Ave. in City of Detroit, 226 N.W. 688, 248 Mich. 1.

46. U.S.—Guardian Trust Co. v. Meyer, C.C.A.Neb., 19 F.2d 186.
Ill.—Dowie v. Driscoll, 68 N.E. 56, 203 Ill. 480.
Ind.—Buchanan v. Morris, 151 N.E. 385, 198 Ind. 79.
Mo.—Lee v. Allen, App., 120 S.W.2d 172.
S.C.—Dyson v. Commonwealth Life Ins. Co. of Louisville, Ky., 180 S.E. 475, 176 S.C. 411.
Tex.—Dickens County v. Dobbins, Civ.App., 95 S.W.2d 153.

Where same issues involved
In action for alleged fraudulent breach of life policy, testimony of defendant's agent who testified on former trial is admissible on subsequent trial where same issue was involved as against contention that at time of trial of first suit he was no longer in employ of defendant, since under such circumstances alleged agent would constitute a "third person," whose testimony would be admissible on subsequent trial.—Dyson v. Commonwealth Life Ins. Co. of Louisville, Ky., 180 S.E. 475, 176 S.C. 411.

Testimony of officer or employee held not admissible as admission.
Ind.—Buchanan v. Morris, 151 N.E. 385, 198 Ind. 79.
Mass.—Topjian v. Boston Casing Co., 192 N.E. 507, 288 Mass. 167.
Mo.—Badger Lumber Co. v. St. Louis-San Francisco Ry. Co., 89 S.W.2d 954, 338 Mo. 349.

47. Ill.—Dowie v. Driscoll, 68 N.E. 56, 203 Ill. 480.
Tex.—Knights of Modern Maccabees v. Gillis, 125 S.W. 338, 59 Tex.Civ. App. 109.
22 C.J. p 344 note 89.

In action on husband's note to wife defended on ground that note was barred by limitations, where plaintiffs claimed that payment during coverture interrupted running of statute, husband's testimony, taken in contest of wife's will as to payments made upon note during coverture, was admissible.—Enwright v. Griffith, 172 N.W. 156, 169 Wis. 284.

48. Iowa.—Knapp v. Brotherhood of American Yeomen, 126 N.W. 336, 149 Iowa 137.
W.Va.—Keyser Canning Co. v. Klots Throwing Co., 128 S.E. 280, 98 W.Va. 487.

A party who takes his adversary's deposition does not constitute the deponent his witness, so as to be bound by his statements as admissions.—Bush v. Block, 187 S.W. 153, 193 Mo.App. 704.

49. Ill.—Dowie v. Driscoll, 68 N.E. 56, 203 Ill. 480.
Mo.—Wallingford v. Terminal R. R. Ass'n of St. Louis, 88 S.W.2d 361, 337 Mo. 1147—Akin v. Hull, App., 30 S.W.2d 1101.

Testimony of father not admission by son
In proceeding by minor son for compensation for death of mother, testimony of claimant's father could not be so attributed to claimant as to be considered a judicial admission by son, preventing later contradiction.—Wyatt v. Kansas City Art Institute, 88 S.W.2d 210, 229 Mo.App. 1166.

50. Va.—Director General of Railroads v. Gordon, 114 S.E. 668, 134 Va. 381.

51. Cal.—Delger v. Jacobs, 125 P. 258, 19 Cal.App. 197.
Tex.—C. I. T. Corporation v. Waltrip, Civ.App., 70 S.W.2d 206, error dismissed—Cauble v. Cauble, Civ.App., 2 S.W.2d 967, error dismissed—Wootton v. Jones, Civ.App., 286 S. W. 680.
22 C.J. p 345 note 98.

Special findings in former suit, resulting in judgment in favor of defendants, are admissible as admissions against interest.—Campbell v. McLaughlin, Tex.Com.App., 280 S.W. 189, reversing, Civ.App., 270 S.W. 257.

Enforcement of judgment as not admission
La.—Homer Electric Shop v. J. D. Waldrip & Son, 139 So. 539, 19 La. App. 117.
Conviction in criminal case as admission see supra § 300 b.
Judgment as admission in behalf of stranger see the C.J.S. title Judgments § 821, also 34 C.J. p 1055 notes 56–63.

52. Tex.—Wootton v. Jones, Civ. App., 286 S.W. 680.

the issue involved.[53] This rule is especially applicable where the judgment was rendered by default[54] or taken by confession.[55] A judgment in a prior action, however, which is not conclusive because of lack of identity of parties, although rendered with the consent of the party against whom it is offered in a subsequent suit, is not admissible as an admission by such party of the verity of the facts therein recited.[56] A judgment entered on a motion, allowing certain items, is not an admission of the justice of any item allowed by the court on a different theory.[57] Under the express provisions of some statutes, an offer before trial to confess judgment for a part of the cause of action or amount claimed, is not admissible as an admission of the cause of action or of the amount to which plaintiff is entitled.[58] The taking of a judgment by a creditor against a partnership in which one member is bankrupt is not an admission of anything affecting the constituent members of the partnership.[59]

The entry of a compulsory nonsuit, on which a motion for its removal is withdrawn by leave of court, is not admissible as an admission.[60]

§ 313. Applications for Continuances

An application for a continuance, containing admissions, is competent evidence.

An application for a continuance may be shown in evidence where it contains admissions.[61]

D. BY WHOM MADE

1. In General

§ 314. General Statement

An admission may be made either by a party himself or by a person for whose statements he is legally responsible.

An admission may be made either by a party himself or by a person for whose statements he is legally responsible.[62]

Condition of declarant. An admission made by one who was at the time suffering great pain as a result of a fatal injury, and who was also in a stupified or only partially conscious condition, has been rejected.[63]

§ 315. Persons Not Sui Juris

Admissions of infants and other declarants who are not sui juris may be shown for what they are worth.

In order that admissions may be received in evidence, it is not necessary that declarant should be sui juris.[64] Admissions of infants,[65] insane persons,[66] married women,[67] or spendthrifts under

53. Tex.—Crow v. Burmeister, Civ. App., 26 S.W.2d 447.
Court's findings and conclusions held inadmissible as being immaterial.—Crow v. Burmeister, supra.

54. Tex.—Cauble v. Cauble, Civ.App., 2 S.W.2d 967, error dismissed—Miller v. Laughlin, Civ.App., 147 S.W. 711.
Default judgment as admission generally see the C.J.S. title Judgments § 201, also 34 C.J. p 173 note 49–p 177 note 4.

55. Pa.—Barclay v. Barclay, 79 A. 667, 230 Pa. 467—Earnest v. Hoskins, 100 Pa. 551.

56. Iowa.—Geo. Birrell, Inc., v. Fidelity & Casualty Co. of New York, 188 N.W. 26, 193 Iowa 860.

57. Tex.—Otis Elevator Co. v. Cook, Civ.App., 219 S.W. 546, dismissed for want of jurisdiction.

58. Iowa.—Bohen v. North American Life Ins. Co. of Chicago, 177 N.W. 706, 188 Iowa 1349.
Ky.—Brummett v. Bacot, 90 S.W.2d 69, 262 Ky. 316.
Okl.—Tulsa Cab Co. v. Warfield, 112 P.2d 366—Johnson v. Gaines, 96 P. 2d 68, 186 Okl. 91.

59. Tex.—Paggi v. Rose Mfg. Co., Civ.App., 285 S.W. 852.

60. Pa.—Altsman v. Kelly, 9 A.2d 423, 427, 336 Pa. 481.
Reason for rule
"A discontinuance does not constitute either an adjudication by an appropriate tribunal, of a party's right of action or an acknowledgment that the claim is not good in law."—Altsman v. Kelly, supra.

61. Tex.—Scott v. Woodard, 88 S.W. 406, 39 Tex.Civ.App. 498.
Admissions to prevent continuance see Continuances §§ 107–109.

62. U.S.—Buhl v. Kavanagh, C.C.A. Mich., 118 F.2d 315.
Pa.—Heyman v. Hanauer, 152 A. 910, 302 Pa. 56.
Vt.—Smith v. Reynolds, 108 A. 697, 94 Vt. 28.
Wash.—Proctor v. Appleby, 188 P. 481, 110 Wash. 403.
22 C.J. p 345 note 2.
"Admissions" by court
Statements of the court are not "admissions."—Hack v. American Surety Co. of New York, C.C.A.Ind., 96 F.2d 939, certiorari denied 59 S. Ct. 95, 305 U.S. 631, 83 L.Ed. 405, rehearing denied 59 S.Ct. 145, 305 U.S. 671, 83 L.Ed. 435, certiorari denied American Surety Co. of New York v. Hack, 59 S.Ct. 95, 305 U.S. 631, 83 L.Ed. 405, rehearing denied 59 S.Ct. 144, 305 U.S. 671, 83 L.Ed. 435.

63. Tenn.—Middle Tennessee R. Co. v. McMillan, 184 S.W. 20, 134 Tenn. 490.

64. Fla.—Hodges v. Atlantic Nat. Bank of Jacksonville, 184 So. 875, 876, quoting **Corpus Juris.**

65. Fla.—Hodges v. Atlantic Nat. Bank of Jacksonville, supra, quoting **Corpus Juris.**
Ill.—Reed v. Kabureck, 229 Ill.App. 36, 40, citing **Corpus Juris.**
Mo.—Gebhardt v. United Rys. Co. of St. Louis, 220 S.W. 677, 9 A. L.R. 1076.
N.J.—Bankers' Trust Co. v. Bank of Rockville Center Trust Co., 168 A. 733, 114 N.J.Eq. 391, 89 A.L.R. 697, reversing 159 A. 505, 110 N.J.Eq. 203.
N.Y.—Ackerman v. Runyon, 1 Hilt. 169, 3 Abb.Pr. 111.
22 C.J. p 345 note 5.

66. Fla.—Hodges v. Atlantic Nat. Bank of Jacksonville, 184 So. 875, 876, quoting **Corpus Juris.**
22 C.J. p 345 note 6.

67. Fla.—Hodges v. Atlantic Nat. Bank of Jacksonville, supra, quoting **Corpus Juris.**
22 C.J. p 345 note 7.

guardianship,[68] may be shown for what they are worth, although they are not binding on declarant.[69]

Admissions of one who has been declared an habitual drunkard have been held not to be competent against his committee.[70]

§ 316. Interest at Time of Statement

It is essential to the reception of admissions in evidence that declarant shall have had some interest in the matter at the time of making the statement.

It is a requisite of admissibility of admissions that declarant should have had, at the time of making the statement, some interest in the matter.[71] Accordingly, a statement in disparagement of title is admissible if made while declarant was seized of the particular interest to which the statement relates,[72] but not if made before he was possessed of,[73] or after he had parted with,[74] such interest.

It is not essential, however, that an admission by a party, as distinguished from a statement against interest made by a person who is not a party, be contrary to the interest of the party at the time it is made; it is enough if it be inconsistent with the position which the party takes either in pleadings or at the trial.[75]

§ 317. Parties to the Record

An admission of a party to the record against his interest of a material fact relevant to an issue in the case is competent against him as substantive evidence of the fact admitted.

An admission of a party to the record is competent against him,[76] although he is prosecuting or de-

68. U.S.—Hodges v. Atlantic Nat. Bank of Jacksonville, supra, quoting **Corpus Juris.**
22 C.J. p 345 note 8.

69. Fla.—Hodges v. Atlantic Nat. Bank of Jacksonville, supra, quoting **Corpus Juris.**
22 C.J. p 345 note 9.

70. Pa.—Ruffner v. Luther, 19 Pa. Co. 349.

71. N.Y.—Kwiatkowski v. John Lowry, Inc., 290 N.Y.S. 627, 248 App.Div. 459.
22 C.J. p 345 note 11.

72. N.J.—Turner v. Cole, 173 A. 613, 620, 116 N.J.Eq. 368, quoting **Corpus Juris,** and affirmed 179 A. 113, 118 N.J.Eq. 497.
22 C.J. p 345 note 12.

73. N.J.—Turner v. Cole, supra, quoting **Corpus Juris.**
Tex.—Gay v. Jackman, Com.App., 252 S.W. 1042, reversing Jackman v. Gay, Civ.App., 237 S.W. 315, and rehearing overruled, Com.App., 254 S.W. 927.
22 C.J. p 345 note 13.

74. N.J.—Turner v. Cole, 173 A. 613, 620, 116 N.J.Eq. 368, quoting **Corpus Juris,** and affirmed 179 A. 113, 118 N.J.Eq. 497.
22 C.J. p 345 note 14.

75. N.H.—Harvey v. Provandie, 141 A. 136, 83 N.H. 236.

76. U.S.—Erceg v. Fairbanks Exploration Co., C.C.A.Alaska, 95 F. 2d 850, certiorari denied 59 S.Ct. 74, 305 U.S. 615, 83 L.Ed. 392—Carter Coal Co. v. Nelson, C.C.A. Va., 91 F.2d 651—Quebedeaux v. Hammons, C.C.A.Ariz., 22 F.2d 530—Unkle v. Wills, C.C.A.Okl., 281 F. 29.
Ala.—Pittman v. Calhoun, 172 So. 263, 233 Ala. 450—Williams v. Dent, 170 So. 202, 233 Ala. 109—Bell, Rogers & Zemurray Bros. v. Jenkins, 130 So. 396, 221 Ala. 652—Copeland v. Dabbs, 129 So. 88, 221 Ala. 489—Strickland v. Davis, 128 So. 233, 221 Ala. 247—Whiddon v. Malone, 124 So. 516, 220 Ala. 220—Roll v. Dockery, 122 So. 630, 219 Ala. 374, 65 A.L.R. 1473—Harvey v. Bodman, 103 So. 569, 212 Ala. 503—Ford v. Bradford, 103 So. 549, 212 Ala. 515—Earnest v. Fite, 100 So. 637, 211 Ala. 363—Knowles v. Blue, 95 So. 481, 209 Ala. 27—Roberts v. E. L. Thompson & Son, 122 So. 614, 23 Ala. App. 164, certiorari denied 122 So. 615, 219 Ala. 402—Drummonds v. Donahoo, 114 So. 277, 22 Ala.App. 215.
Ark.—Covington v. Little Fay Oil Co., 13 S.W.2d 306, 178 Ark. 1046—McCormack-Reedy Lumber Co. v. Savage, 273 S.W. 1028, 169 Ark. 192.
Cal.—Adkins v. Brett, 193 P. 251, 184 Cal. 252—In re Allan's Estate, 82 P.2d 190, 28 Cal.App.2d 181—Frank v. Myers, 60 P.2d 144, 16 Cal.App. 2d 16—People v. One Ford Coupé, Engine No. 18-98810, 51 P.2d 382, 10 Cal.App.2d 321—Bourne v. Root, 13 P.2d 1066, 125 Cal.App. 461—Shaver v. United Parcel Service, 266 P. 606, 90 Cal.App. 764—Wurdeman v. Waller, 263 P. 558, 88 Cal.App. 393—Latky v. Wolfe, 259 P. 470, 85 Cal.App. 332.
Colo.—Ryan Gulch Reservoir Co. v. Swartz, 234 P. 1059, 77 Colo. 60.
Conn.—Williams v. Smith, 181 A. 622, 120 Conn. 521—Davis v. Greenstein, 153 A. 161, 112 Conn. 530.
Fla.—Purvis v. Malloy, for Use and Benefit of Tiller, 176 So. 71, 129 Fla. 191.
Ga.—Southern Cotton Oil Co. v. Raines, 155 S.E. 484, 171 Ga. 154—Duke v. Ayers, 136 S.E. 410, 163 Ga. 444—Leverett v. Nunn, 115 S.E. 906, 154 Ga. 877—Buckeye Cotton Oil Co. v. T. W. Murphy & Sons, 129 S.E. 553, 34 Ga.App. 363—Kline Car Corporation v. Watkins Motor Co., 106 S.E. 211, 26 Ga.App. 338.
Hawaii.—Alexander v. Cressaty, 32 Hawaii 281.
Idaho.—Judd v. Oregon Short Line R. Co., 44 P.2d 291, 55 Idaho 461—New England Nat. Bank of Kansas City v. Hubbell, 238 P. 308, 41 Idaho 129.
Ill.—River Park Dist. v. Brand, 158 N.E. 687, 327 Ill. 294—Hassey v. A. C. Allyn & Co., 28 N.E.2d 164, 306 Ill.App. 37—Probasco v. Crane Co., 238 Ill.App. 287.
Ind.—Acton v. Lowery, App., 34 N. E.2d 972—Warner Gear Co. v. De Peugh, 123 N.E. 363, 70 Ind.App. 264.
Iowa.—Noble v. United Ben. Life Ins. Co., 297 N.W. 881—Duncan v. Rhomberg, 236 N.W. 638, 212 Iowa 389—Cooley v. Killingsworth, 228 N.W. 880, 209 Iowa 646—Wilkinson v. Queal Lumber Co., 226 N.W. 43, 208 Iowa 933—First Nat. Bank of Hawkeye v. Patterson, 177 N.W. 545, 188 Iowa 1237.
Kan.—Dent v. Jefferson County Com'rs, 235 P. 873, 118 Kan. 519.
Ky.—Martin v. Taylor's Ex'x, 147 S. W.2d 70, 285 Ky. 128—Garthee v. Belford, 139 S.W.2d 740, 282 Ky. 652—Honaker v. Crutchfield, 57 S. W.2d 502, 247 Ky. 495—Bennett v. Bennett's Ex'r, 51 S.W.2d 241, 244 Ky. 394—Gess v. Wilder, 36 S.W. 2d 617, 237 Ky. 830—Sutton v. Russell's Ex'r, 33 S.W.2d 629, 630, 236 Ky. 535, quoting **Corpus Juris**—Cincinnati, N. O. & T. P. R. Co v. Gilreath's Adm'r, 15 S.W.2d 267, 228 Ky. 385—North American Acc. Ins. Co. v. Caskey's Adm'r, 4 S.W. 2d 383, 223 Ky. 600—Sumrall's Ex'rs v. James, 299 S.W. 207, 221 Ky. 498—Sprague v. Bertke, 283 S.W. 401, 214 Ky. 441.
Md.—Wolfe v. State, for Use of Brown, 194 A. 832, 173 Md. 103—Kasten v. Kasten, 157 A. 533, 161 Md. 409.
Mass.—Di Rienzo v. Goldfarb, 153 N. E. 784, 257 Mass. 272.

fending the action in a representative capacity.[77] The rule applies whether the admissions relate to the fact in issue or to a fact relevant to the issue.[78] It is not material whether the issue is at law or in equity,[79] or whether it was made by the

Mich.—Murner v. Thorpe, 279 N.W. 849, 284 Mich. 331—Williams v. Wood, 244 N.W. 490, 260 Mich. 322—Hamilton v. Clippert, 214 N.W. 419, 239 Mich. 440—Fuller v. Magatti, 203 N.W. 868, 231 Mich. 213.

Minn.—Papke v. Pearson, 280 N.W. 183, 203 Minn. 130—Dell v. Marckel, 238 N.W. 1, 184 Minn. 147—Jeffries v. Stromme, 204 N.W. 541, 164 Minn. 45—Collins v. Joyce, 178 N.W. 503, 146 Minn. 233—Thorkeldson v. Nicholson, 175 N.W. 1008, 145 Minn. 491.

Miss.—Lanham v. Wright, 142 So. 5, 164 Miss. 1—McCoy v. Key, 123 So. 873, 155 Miss. 64—Neal v. Hooper, 122 So. 103, 153 Miss. 884—Singletary v. Ginn, 121 So. 820, 153 Miss. 700.

Mo.—Grodsky v. Consolidated Bag Co., 26 S.W.2d 618, 324 Mo. 1067—Span v. Jackson, Walker Coal & Mining Co., 16 S.W.2d 190, 322 Mo. 158—Friedman v. United Rys. Co. of St. Louis, 238 S.W. 1074, 293 Mo. 235—Grafeman Dairy Co. v. Northwestern Bank, 235 S.W. 435, 290 Mo. 311—Adair v. Kansas City Terminal R. Co., 220 S.W. 920, 282 Mo. 133—Hawken v. Schwartz, App., 72 S.W.2d 877—Concrete Steel Co. v. Reinforced Concrete Co., App., 72 S.W.2d 118—Joyce v. Biring, 43 S.W.2d 845, 226 Mo.App. 162—Lutzenberger v. Dent, App., 31 S.W.2d 394—Lanham v. Vesper-Buick Automobile Co., App., 21 S.W.2d 890—Hinson v. Morris, App., 298 S.W. 254—Kilcoyne v. Metz, App., 258 S.W. 4—Hague v. Threadgill, App., 236 S.W. 895—Mitchell v. Violette, App., 221 S.W. 777.

Mont.—Tanner v. Smith, 33 P.2d 547, 97 Mont. 229—Edquest v. Tripp & Dragstedt Co., 19 P.2d 637, 93 Mont. 446.

Neb.—Havlik v. Anderson, 264 N.W. 146, 130 Neb. 94—Gentry v. Burge, 261 N.W. 854, 129 Neb. 493.

N.J.—Fielder v. Friedman, 12 A.2d 897, 124 N.J.Law 514—Sandford v. Chanaz Co., 189 A. 670, 117 N.J. Law 485—West Heights Realty Corporation v. Adelman, 152 A. 196, 107 N.J.Eq. 351—Wright v. Beith, 157 A. 840, 9 N.J.Misc. 1183—Gibbs v. Barton, 130 A. 439, 3 N.J.Misc. 1025.

N.Y.—Anarney v. Newark Fire Ins. Co., 159 N.E. 902, 247 N.Y. 176, 56 A.L.R. 1149, reversing 224 N.Y.S. 844, 221 App.Div. 818—Fried v. Rabiner, 16 N.Y.S.2d 796, 258 App. Div. 921—Gottwald v. Medinger, 12 N.Y.S.2d 241, 257 App.Div. 107—Jackson v. Dickman, 9 N.Y.S.2d 688, 256 App.Div. 925, reargument denied 11 N.Y.S.2d 557, 256 App. Div. 1003—Allaire v. Silberberg, 205 N.Y.S. 634, 210 App.Div. 109—Van Bergen v. Tishman, 205 N.Y.S. 48, 123 Misc. 169—Deutsch v. New York, N. H. & H. R. Co., 194 N.Y.S. 99—Amateau v. B. Brown, Inc., 187 N.Y.S. 189.

N.C.—Daniel v. East Tennessee Packing Co., 3 S.E.2d 282, 215 N.C. 762—M. P. Hubbard Co. v. Brown, 118 S.E. 896, 186 N.C. 96.

N.D.—Kraft v. Martell, 225 N.W. 79, 58 N.D. 58—Whipple v. First Nat. Bank, 224 N.W. 297, 57 N.D. 844.

Ohio.—Freas v. Sullivan, 200 N.E. 639, 130 Ohio St. 486—Conrad v. Kerby, 31 N.E.2d 168, 66 Ohio App. 359—In re Heile, 29 N.E.2d 175, 65 Ohio App. 45—Smith v. Cleveland Ry. Co., 164 N.E. 59, 30 Ohio App. 21—Wicker v. Kenney, 19 Ohio App. 346.

Or.—Swain v. Oregon Motor Stages, 82 P.2d 1084, 160 Or. 1, 118 A.L.R. 1225—Fletcher v. Yates, 211 P. 179, 105 Or. 680—Caldwell v. Hoskins, 186 P. 50, 94 Or. 567—Franklin v. Webber, 182 P. 819, 93 Or. 151.

Pa.—Moffitt v. Moffitt, 16 A.2d 418, 340 Pa. 107—Hildebrand v. Burger, 156 A. 593, 102 Pa.Super. 163—Trebucza v. Nelson, 22 Erie Co. 4—Burger v. Paul, 6 Sch.Reg. 298.

Philippine.—Luchsinger v. Melliza, 9 Philippine 376—Oas v. Roa, 7 Philippine 20.

S.D.—Sachs v. Sachs, 283 N.W. 173, 66 S.D. 373.

Tex.—Thompson v. Moor, Com.App., 14 S.W.2d 803, reversing, Civ.App., 4 S.W.2d 117—Hinrichs v. Texas & N. O. R. Co., Civ.App., 153 S.W. 2d 859—Magee v. Barnes, Civ.App., 135 S.W.2d 1038—Barrera v. Duval County Ranch Co., Civ.App., 135 S.W.2d 518, error refused—Holton v. Hutchinson, Civ.App., 90 S.W.2d 1103—Wells v. Henderson, Civ.App., 78 S.W.2d 683, error refused—Watson v. Watson, Civ.App., 28 S.W.2d 1100—Guaranty Bond State Bank of San Angelo v. Duncan, Civ.App., 19 S.W.2d 400, error dismissed—Westbrook v. Adams, Civ.App., 17 S.W.2d 116, affirmed Adams v. Bankers Life Co., Com.App., 36 S.W.2d 182—Evans v. Ball, Civ.App., 6 S.W.2d 180, error dismissed—Connor v. Crain, Civ.App., 289 S.W. 712—Lawless v. Ellis, Civ.App., 281 S.W. 1090—Nogals Oil & Gas Co. v. Merchants' & Planters' Bank, Civ.App., 264 S.W. 341.

Utah.—Chadwick v. Beneficial Life Ins. Co., 181 P. 448, 54 Utah 443.

Vt.—Smith v. Reynolds, 108 A. 697, 94 Vt. 28.

Wash.—Collyer v. Egbert, 93 P.2d 399, 200 Wash. 342—In re Water Rights in McFarlane Creek in Okanogan County, 218 P. 248, 126 Wash. 364.

19 C.J. p 1163 notes 5, 6—22 C.J. p 345 note 15—25 C.J. p 543 notes 56, 57, 60—37 C.J. p 627 note 24—42 C.J. p 1219 note 37, p 1222 note 5—45 C.J. p 324 note 21.

Admissions by donee inconsistent with claim of gift

Ill.—Mohr v. Smith, 176 Ill.App. 64.

N.J.—Wright v. Sanger, 137 A. 657, 658, 101 N.J.Eq. 203, citing **Corpus Juris.**

Admissions of sole legatee or beneficiary under will or codicil

Ill.—Pollock v. Pollock, 159 N.E. 305, 328 Ill. 179.

Mass.—McMann v. Murphy, 156 N.E. 680, 259 Mass. 397.

Tenn.—Hager v. Hager, 66 S.W.2d 250, 17 Tenn.App. 143.

Admission of party as hearsay, etc.

(1) Testimony to prove admissions made against interest by a party to the suit is not incompetent or objectionable as hearsay.

Idaho.—Curtis v. Curtis, 70 P.2d 369, 58 Idaho 76.

Tex.—Holton v. Hutchinson, Civ.App., 90 S.W.2d 1103—Margules v. Terry, Civ.App., 273 S.W. 690.

(2) Admission of party is admissible against him without regard to whether made on personal knowledge or hearsay, or was a conclusion—Mayhew v. Travelers' Protective Ass'n of America, Mo.App., 52 S.W. 2d 29.

(3) A conversation had by the father of the plaintiff, who was injured in an automobile accident, wherein defendant stated that he "realized that the boy (his servant) was probably driving in a reckless manner," is admissible as an admission against interest, although defendant did not see the accident.—Read v. Reppert, 190 N.W. 32, 194 Iowa 620.

77. Ky.—Sutton v. Russell's Ex'r, 33 S.W.2d 629, 630, 236 Ky. 535, quoting **Corpus Juris.**

Mass.—Phillips v. Middlesex County, 127 Mass. 262.

Administrator, suing on life policy, is bound by proofs of death filed by him before his appointment as administrator.—Vecchio v. Metropolitan Life Ins. Co., 230 N.Y.S. 131, 224 App.Div. 301—Cirrincioni v. Metropolitan Life Ins. Co., 228 N.Y.S. 354, 223 App.Div. 461.

78. N.Y.—Mindlin v. Dorfman, 189 N.Y.S. 265, 197 App.Div. 770.

22 C.J. p 347 note 17.

79. U.S.—Smith v. Burnham, C.C. Mass., 22 F.Cas.No.13,018, 2 Sumn 612.

pleadings or was specially framed.[80]

Requisites of admissibility of party's admission. An admission of a party to the record is competent against him regardless of whether the admission was made in or out of court[81] or was made under oath,[82] orally, or in writing;[83] and the admission is competent regardless of where,[84] to whom,[85] or when[86] it was made, unless the time of the statement of itself renders it irrelevant to the issue on which it is offered,[87] or the time when it was made brings the statement within a statute prohibiting its use as evidence.[88] Admissibility is not conditioned

Ala.—Brandon v. Cabiness, 10 Ala. 155.

80. N.C.—McRainy v. Clark, 4 N.C. 698.

81. Ark.—Greer v. Davis, 5 S.W.2d 742, 177 Ark. 55.
Conn.—Tappan v. Knox, 162 A. 7, 115 Conn. 508.
Tex.—Hart-Parr Co. v. Krizan & Maler, Civ.App., 212 S.W. 835.

Extrajudicial admission
U.S.—In re Weissman, C.C.A.Conn., 19 F.2d 769, 53 A.L.R. 644.
Cal.—Farmers' & Merchants' Nat. Bank of Los Angeles v. Stowell, 44 P.2d 392, 6 Cal.App. 373.
Ga.—Fletcher v. Gordon, 136 S.E. 108, 36 Ga.App. 228.
Mo.—Reiling v. Russell, 134 S.W.2d 33, 345 Mo. 517.
N.Y.—Gangi v. Fradus, 125 N.E. 677, 227 N.Y. 452, reversing 174 N.Y.S. 903, 187 App.Div. 934, and 174 N.Y.S. 904, 187 App.Div. 934.

Judicial admission
Conn.—Kanopka v. Kanopka, 154 A. 144, 113 Conn. 30, 80 A.L.R. 619.

Admission made in deposition in another case
Mo.—Vest v. S. S. Kresge Co., App., 213 S.W. 165.

Declarations of defendant while under arrest
Tex.—Koons v. Rook, Com.App., 295 S.W. 592, affirming, Civ.App., Rook v. Koons, 289 S.W. 1077.

82. Mo.—Hudlow v. Langerhans, 91 S.W.2d 629, 230 Mo.App. 1160.

83. Ark.—Greer v. Davis, 5 S.W.2d 742, 177 Ark. 55.
Mo.—Hudlow v. Langerhans, 91 S.W.2d 629, 230 Mo.App. 1160.
Competency of oral and written admissions see supra §§ 279–284, 300.

No matter how made, the admission of a party to a fact may be given in evidence against him.—People ex rel. Nelson v. Central Mfg. Dist. Bank, 28 N.E.2d 154, 306 Ill. App. 15.

Oral admission
Mont.—Linn v. French, 33 P.2d 1002, 97 Mont. 292.

Written admission
Mo.—No Dust O Co. v. Home Trust Co., App., 46 S.W.2d 203.

Admission of party in particular writing

(1) Adopted resolution.—Albert Hanson Lumber Co. v. U. S., La., 43 S.Ct. 442, 261 U.S. 581, 67 L.Ed. 809, affirming, C.C.A., 277 F. 894.

(2) Assignment of royalty interest.—Hardie v. Peterson, 282 P. 494, 86 Mont. 150.

(3) Hospital records.—Schaefer v. Lowell-Krekeler Grocery Co., Mo. App., 49 S.W.2d 209.

(4) Letter.
Ala.—McClure v. Atlantic Life Ins. Co., 164 So. 58, 231 Ala. 252.
La.—Graves v. Nelm, App., 1 So.2d 810.
Tenn.—Fulmer v. Jennings, App., 148 S.W.2d 39.

(5) Proof of death.
U.S.—Gordon v. Mutual Life Ins. Co. of New York, D.C.La., 37 F.Supp. 873.
Cal.—Tobin v. National Casualty Co., 219 P. 482, 63 Cal.App. 578.
Ga.—Hamrick v. Progressive Life Ins. Co., 1 S.E.2d 596, 59 Ga.App. 553.
Ky.—Inter-Southern Life Ins. Co. v. Hinkle's Adm'x, 11 S.W.2d 913, 226 Ky. 724.
La.—Jackon-Robertson v. Louisiana Industrial Life Ins. Co., App., 186 So. 121.
Pa.—Drogalis v. Metropolitan Life Ins. Co., 8 Sch.Reg. 120.

(6) Report of injury to liability insurance company.—Hill v. Jackson, Mo.App., 272 S.W. 105.

(7) Signed memorandum.—York v. Long, 99 P.2d 1041, 186 Okl. 643.

(8) Signed narrative.—Flint v. Loew's St. Louis Realty & Amusement Corporation, 126 S.W.2d 193, 344 Mo. 310.

(9) Trust deed.—Griffay v. Robbins, Tex.Civ.App., 91 S.W.2d 1160, error dismissed.

(10) Written statement.
Ky.—Deupree v. Walker, 72 S.W.2d 732, 255 Ky. 30.
Mass.—Blackman v. Coffin, 15 N.E.2d 469, 300 Mass. 432.
Mo.—Swift v. St. Louis-San Francisco Ry. Co., App., 15 S.W.2d 964.

84. Mo.—Vest v. S. S. Kresge Co., App., 213 S.W. 165.
Wash.—Daniel v. Daniel, 181 P. 215, 106 Wash. 659.
Materiality of place of making extrajudicial admissions see supra § 298.

85. N.Y.—Galbraith v. Galbraith, 290 N.Y.S. 739, 248 App.Div. 914.
Wash.—Daniel v. Daniel, 181 P. 215, 106 Wash. 659.
To whom admissions must be made see supra § 271.

Admission to stranger or third person
Cal.—Farmers' & Merchants' Nat. Bank of Los Angeles v. Stowell, 44 P.2d 392, 6 Cal.App.2d 373.
Minn.—Le Mieux v. Cosgrove, 193 N.W. 586, 155 Minn. 353
Wash.—Flint v. Owl Land & Investment Co., 210 P. 811, 122 Wash. 401.
Wis.—Markgraf v. Columbia Bank of Lodi, 233 N.W. 782, 203 Wis. 429.

86. Iowa.—Shippley v. Gremmels, 185 N.W. 922, 192 Iowa 801.
Pa.—Preston v. Schroeder, 27 Del. Co. 350.
Wash.—Daniel v. Daniel, 181 P. 215, 106 Wash. 659.
W.Va.—Roberts v. Lykins, 145 S.E. 440, 106 W.Va. 280.
22 C.J. p 347 note 18.

87. **Declarations of legatee prior to making of will**
Ga.—Brown v. Kendrick, 135 S.E. 721, 163 Ga. 149.
Iowa.—Casad v. Ripley, 124 N.W. 196, 145 Iowa 544.
Tex.—Huff v. Huff, Civ.App., 52 S.W. 2d 1092—Adams v. Adams, Civ. App., 253 S.W. 605, error dismissed 278 S.W. 1114, 114 Tex. 582.

88. Ga.—Alford v. Sharber, 154 S.E. 463, 41 Ga.App. 707—Jenkins v. Best Trading Co., 146 S.E. 512, 39 Ga.App. 214.

Construction and application of statutes

(1) A statute providing that a statement secured from an injured person within a specified number of days after injuries is presumably fraudulent for use in action for damages for the injuries merely creates an initial presumption of fraud and does not render the statement inadmissible as evidence.—Lestico v. Kuehner, 283 N.W. 122, 204 Minn. 125.

(2) A statute providing that no statement made by injured person within a certain number of hours after injury happened shall be received in evidence in action for resulting damages, unless admissible as part of res gestæ, is inapplicable to statements voluntarily and intelligently made by an injured person to a person who is entirely disinterested and is not engaged in procuring statements from injured persons for the purpose of their being used as evidence against the persons making them.—Kirsch v. Pomisal, 294 N.W. 865, 236 Wis. 264.

on a prior showing by the opposite party of the time and place when it was made,[89] or conditioned on his ability to fix such time and place;[90] and it is not necessary to the competency of the admission of a party that it shall have been made as a part of the res gestæ,[91] although in a particular case the declaration of a party against interest may have been made at such time and under such circumstances as to be part of the res gestæ and therefore admissible both as a res gestæ statement and as an admission or declaration against interest.[92]

Further, admissibility of a party's admission is not conditioned on showing that the conduct of the party offering the statement was affected by it.[93] The admission of a party is competent against him regardless of whether he is[94] or is not[95] present at the trial.

To be receivable as an admission against interest, a statement of a party to a suit must be against his interest,[96] and must concern a material fact.[97] On the other hand, the admissions of a party against his interest are admissible against him where they are admissions of material matters[98] and bear on, or are pertinent or relevant to, an issue in the case.[99]

Where admissions are offered as those of a party, declarant must be a party to the record at the time of the offer[1] and the declaration must be traced to the party in question by some evidence of the identity of declarant with such party.[2]

Nature and use of admission of party. An admission of a party to the record is original, primary, independent, and substantive evidence[3] of the fact or facts covered thereby[4] and it may be used to make

(3) A statute requiring a motorist involved in an accident to give his name, address, and other information and to render assistance and providing that the rendering of assistance or other compliance with the statute shall not be evidence of liability merely provides, in effect, that the performance of the required acts shall not be considered an admission of liability and does not preclude the giving of evidence of acts or statements from which liability on the part of the motorist may logically be inferred.—Rieger v. Kirkland, Wash., 111 P.2d 241.

89. Ill.—Balswic v. Balswic, 179 Ill. App. 118.

90. Colo.—Teller v. Ferguson, 51 P. 429, 24 Colo. 432.

91. Iowa.—Ege v. Born, 236 N.W. 75, 212 Iowa 1138.

92. Pa.—Curry v. Riggles, 153 A. 325, 302 Pa. 156.

93. Mass.—Mason v. Lothrop, 7 Gray 354.

94. Mo.—Vest v. S. S. Kresge Co., App., 213 S.W. 165.

95. Wis.—State v. Thorson, 231 N. W. 155, 202 Wis. 31.

96. Mo.—Kaley v. Huntley, App., 88 S.W.2d 200.
Neb.—Dvorak v. Kucera, 264 N.W. 737, 130 Neb. 341.

97. Mo.—Kaley v. Huntley, App., 88 S.W.2d 200.

98. Ark.—Covington v. Little Fay Oil Co., 13 S.W.2d 306, 178 Ark. 1046.
Conn.—Tappan v. Knox, 162 A. 7, 115 Conn. 508.
Neb.—Havlik v. Anderson, 264 N.W. 146, 130 Neb. 94.
N.H.—Piatel. v. Swindell, 151 A. 262, 84 N.H. 462—Caswell v. Maplewood Garage, 149 A. 746, 84 N.H. 241, 73 A.L.R. 433.
N.Y.—Galbraith v. Galbraith, 290 N. Y.S. 739, 248 App.Div. 914—Scheiner v. Metropolitan Life Ins. Co., 257 N.Y.S. 783, 236 App.Div. 24.
Okl.—Harry v. Hertzler, 90 P.2d 656, 185 Okl. 151.
Tex.—West Lumber Co. v. Morris & Barnes, Civ App., 257 S.W. 592.
Wash.—Daniel v. Daniel, 181 P. 215, 106 Wash. 659.

99. U.S.—Albert Hanson Lumber Co. v. U. S., La., 43 S.Ct. 442, 261 U.S. 581, 67 L.Ed. 809, affirming, C.C.A., 277 F. 894—Transmarine Corporation v. Charles H. Levitt & Co., C. C A.N.Y., 25 F.2d 275—Tudor v. Leslie, D.C.Mass., 1 F.R.D. 448.
Ark.—Watkins v. Metropolitan Life Ins. Co., 250 S.W. 350, 158 Ark. 386.
Iowa.—Glass v. Hutchinson Ice Cream Co., 243 N.W. 352, 214 Iowa 825.
Miss.—Arky v. Coker, 137 So. 790, 161 Miss. 694.
Mo.—Tappe v. Pohlmann, App., 79 S. W.2d 485—Anderson v. Merchants' & Mechanics' Mut. Aid Soc., App., 46 S.W.2d 938—Hill v. Jackson, App., 272 S.W. 105.
Neb.—Weisel v. Hobbs, 294 N.W. 448.
Ohio.—Smith v. Rogers, 16 Ohio App. 110.

1. Mo.—Neff v. Cameron, 111 S.W. 1139, 213 Mo. 350, 127 Am.S.R. 606, 18 L.R.A.,N.S., 320.
22 C.J. p 348 note 27.

Party in proceeding for forfeiture of property

In proceeding for forfeiture of an automobile, a person who has a property interest in the car is, in law, a party to the libel, even though he does not actually appear and make himself a party; and the car is affected by his admissions.—U. S. v. One Buick Automobile, D.C.Vt., 21 F. 2d 789.

2. N.Y.—Muessling v. Leisner, 224 N.Y.S. 689, 221 App.Div. 524.
22 C.J. p 348 note 22.

3. U.S.—Order of United Commercial Travelers of America v. Greer, C.C.A.Okl., 43 F.2d 499.
Ark.—Covington v. Little Fay Oil Co., 13 S.W.2d 306, 178 Ark. 1046.
Ill.—Van Meter v. Gurney, 240 Ill. App. 165.
Iowa.—Glass v. Hutchinson Ice Cream Co., 243 N.W. 352, 214 Iowa 825.
Ky.—Dix v. Gross, 111 S.W.2d 673, 271 Ky. 231—Stegall v. Patton, 21 S.W.2d 488, 231 Ky. 365.
Mich.—Scheloski v. Schricker, 222 N.W. 710, 245 Mich. 391.
Neb.—McDaniel v. Farlow, 271 N.W. 905, 132 Neb. 273—Havlik v. Anderson, 264 N.W. 146, 130 Neb. 94.
N.J.—Ambrose v. Indemnity Ins. Co. of North America, 12 A.2d 693, 124 N.J.Law 438.
N.Y.—Mindlin v. Dorfman, 189 N.Y.S. 265, 197 App.Div. 770.
Tenn.—Tubb v. Boyd, 13 Tenn.App. 432.
Wyo.—Sneider v. Big Horn Milling Co., 200 P. 1011, 28 Wyo. 40.
Laying foundation for proof of admission see infra § 369.

4. Ala.—Ewart v. Cunningham, 122 So. 359, 219 Ala. 399.
Cal.—Kyne v. Kyne, 100 P.2d 806, 38 Cal.App.2d 122.
Mo.—Tappe v. Pohlmann, App., 79 S. W.2d 485.
N.H.—Caswell v. Maplewood Garage, 149 A. 746, 84 N.H. 241, 73 A.L.R. 433.
N.Y.—Gangi v. Fradus, 125 N.E. 677, 227 N.Y. 452, reversing 174 N.Y.S. 903, 187 App.Div. 934, and 174 N. Y.S. 904, 187 App.Div. 934.
Utah.—Malia for Use and Benefit of Creditors of North Sanpete Bank v. Seeley, 57 P.2d 357, 89 Utah 262.
Vt.—Hall v. Royce, 192 A. 193, 109

out the opponent's case[5] by proving or disproving a fact in issue;[6] it is admitted not merely for the purpose of impeachment,[7] although it may be used for this purpose, as well as for the purpose of furnishing substantive evidence, where the party who made it takes the witness stand and gives testimony contrary to, or inconsistent with, his prior extrajudicial statement.[8]

While an admission of one party may be used to confirm or corroborate other evidence introduced by the adverse party,[9] it is not necessary that the admission should be entirely consistent with the other evidence introduced by the adverse party,[10] it being permissible for one party to take advantage of the admissions of the other party as long as no repudiation of the former's pleading and general trial theory results.[11]

Statements constituting admission of party. If a statement offered as an admission of a party against interest is deemed not to be such, or not to be within the rule making it admissible, it should not be received in evidence or, if received, considered and given weight, as an admission.[12]

According to some authorities a statement of defendant that good care will be given plaintiff in a personal injury case or that his hospital expenses will be paid is not an admission of negligence or liability.[13] Other authorities have reached the opposite conclusion as to such statements and other general statements, such as that the matter will be fixed up or made right,[14] notwithstanding the statement

Vt. 99—Robinson v. Leonard, 134 A. 706, 100 Vt. 1.

5. N.H.—Caswell v. Maplewood Garage, 149 A. 746, 84 N.H. 241, 73 A.L.R. 433.

Use by plaintiff of defendant's admissions

Defendant's admissions may be utilized by plaintiff in proving plaintiff's cause of action or in supporting his case.

Mich.—Van Buren v. Armstrong-Jewell Const. Co., 226 N.W. 213, 247 Mich. 522.

Mo.—Concrete Steel Co. v. Reinforced Concrete Co., App., 72 S.W. 2d 118—Kilcoyne v. Metz, App., 258 S.W. 4—Latham v. Hosch, 233 S. W. 84, 207 Mo.App. 381—Pinteardd v. Hosch, App., 233 S.W. 81.

6. Ky.—Stegall v. Patton, 21 S.W.2d 488, 231 Ky. 365.

Oral contract

In seeking to enforce an oral contract made by defendants for his benefit, and which is not within the statute of frauds, plaintiff is entitled to prove the alleged oral contract by defendants' admissions.—People's State Sav. Bank of Baxter v. Cross, 198 N.W. 70, 197 Iowa 750.

7. Ala.—Ewart v. Cunningham, 122 So. 359, 219 Ala. 399.

Ky.—Dix v. Gross, 111 S.W.2d 673, 271 Ky. 231—Stegall v. Patton, 21 S.W.2d 488, 231 Ky. 365.

Lack of dependence

(1) The admissibility of admissions of a party is not dependent on any tendency to discredit party's testimony.—Malia for Use and Benefit of Creditors of North Sanpete Bank v. Seeley, 57 P.2d 357, 89 Utah 262.

(2) A statement of defendant may be competent as admission against interest, although inadmissible for impeachment purposes.—Zylstra v. Graham, 221 N.W. 318, 244 Mich. 319, affirmed 224 N.W. 343, 246 Mich. 91.

Rules governing prior statements of witnesses offered to be shown for the purpose of impeachment may be inapplicable to an admission against interest made by a party to the suit.—Anderson v. Merchants' & Mechanics' Mut. Aid Soc., Mo.App., 46 S.W. 2d 938.

8. Cal.—Kyne v. Kyne, 100 P.2d 806, 38 Cal.App.2d 122—Gates v. Pendleton, 236 P. 365, 71 Cal.App. 752.

Ga.—Cuzzourt v. Popham, 199 S.E. 848, 58 Ga.App. 758.

Iowa.—Starry v. Starry & Lynch, 225 N.W. 268, 208 Iowa 228.

Mass.—Langan v. Pianowski, 29 N.E. 2d 700, 307 Mass. 149.

Pa.—La Furia v. New Jersey Ins. Co. of Newark, 200 A. 167, 131 Pa. Super. 413.

Utah.—Malia for Use and Benefit of Creditors of North Sanpete Bank v. Seeley, 57 P.2d 357, 89 Utah 262.

9. Ky.—Dix v. Gross, 111 S.W.2d 673, 271 Ky. 231.

Mo.—Gann v. Chicago, R. I. & P. Ry. Co., 6 S.W.2d 39, 319 Mo. 214.

Pa.—Moffitt v. Moffitt, 16 A.2d 418, 340 Pa. 107.

10. N.Y.—Williams v. Sargeant, 46 N.Y. 481.

11. Mo.—Spoeneman v. Uhri, 60 S. W.2d 9, 332 Mo. 821.

12. U.S.—U. S. v. Hayman, C.C.A. Wis., 115 F.2d 599.

Ala.—Alabama Power Co. v. Smith, 155 So. 601, 229 Ala. 105.

Ark.—Merchants' Bank of Kansas City v. Searcy Wholesale Grocer Co., 265 S.W. 961, 166 Ark. 153.

Cal.—Phillips v. Powell, 290 P. 441, 210 Cal. 39—Donahoo v. Lovas, 288 P. 698, 105 Cal.App. 705.

D.C.—Maddox v. Jinkens, 88 F.2d 744, 66 App.D.C. 362, certiorari denied 57 S.Ct. 929, 301 U.S. 699, 81 L.Ed. 1354.

Ky.—Herald-Post v. Spinner, 38 S. W.2d 245, 238 Ky. 436—Miller v. Weck, 217 S.W. 904, 186 Ky. 552.

La.—Lowery v. Zorn, App., 157 So. 826.

N.C.—McLeod v. Hicks, 164 S.E. 617, 203 N.C. 130—Hall v. Hall, 103 S. E. 136, 179 N.C. 571.

Pa.—Szwed v. Bruno, 56 Montg.Co. 21.

Tex.—Republic Underwriters v. Greenhaw, Civ.App., 114 S.W.2d 362—Leleux v. Serafino, Civ.App., 88 S.W.2d 1100—Reynolds v. Porter, Civ.App., 54 S.W.2d 1086—Roseborough v. Loftus, Civ.App., 13 S.W.2d 950, error dismissed.

Vt.—Hutchinson v. Knowles, 184 A. 705, 108 Vt. 195, followed in 184 A. 711, 108 Vt. 208.

Va.—Brickell v. Shawn, 9 S.E.2d 330, 175 Va. 373.

Wis.—Pawlowski v. Eskofski, 244 N.W. 611, 209 Wis. 189.

Ejectment cases

(1) It has been held that the admission of plaintiff that he did not claim by adverse possession is inadmissible in ejectment based on adverse possession.—Porter v. Gaines, 52 S.W. 376, 151 Mo. 560.

(2) Statements made by plaintiff as to his interest in the property are not admissible in favor of defendant to establish a resulting trust in favor of persons of whom defendant was not a creditor.—Pfeffer v. Kling, 68 N.Y.S. 641, 58 App.Div. 179, affirmed 64 N.E. 1125, 171 N.Y. 668.

13. Fla.—Babcock v. Flowers, 198 So. 326.

Wash.—Libbee v. Handy, 1 P.2d 312, 163 Wash. 410.

14. Ga.—Rentz v. Collins, 181 S.E. 678, 51 Ga.App. 782.

Ill.—Johnson v. Marshall, 241 Ill. App. 80.

Mass.—Bernasconi v. Bassi, 158 N.E. 341, 261 Mass. 26.

N.C.—Brown v. Wood, 160 S.E. 281, 201 N.C. 309.

In action by hospital, statements of defendant to injured person, for whom hospital services were ren-

also discloses that defendant has insurance,[15] although, standing alone, defendant's statement that he has insurance is not an admission of liability[16] and a mere statement that an insurance company will repair a truck damaged in a collision with a passenger automobile is not an admission of ownership of the car.[17]

§ 318. Coparties

a. In general
b. Admissibility against coparty

a. In General

Admissions of one of two or more coparties are competent against the declarant, except where they relate to a fact on which the interests of all of the coparties depend and where, consequently, they cannot be received in evidence against the declarant without affecting the other coparties injuriously.

As a general rule admissions of one of two or more coparties are competent against declarant,[18] although he may have been defaulted;[19] and they are not to be excluded merely because in terms they also affect a coparty,[20] or because they may have an ulterior or collateral effect detrimental to a coparty.[21]

Where, however, the interests of coparties are all dependent on the existence of a particular fact, the admission of one of them regarding such fact cannot be received,[22] because it could have no effect as to himself without affecting the others.[23] Thus in proceedings to contest a will where there are several legatees, devisees, or beneficiaries having similar, but separate and distinct, interests and the issue involves the validity of the whole will, rather than the validity of any particular devise or bequest, in the absence of proof of conspiracy, the admissions of a devisee, legatee, or beneficiary as to the mental capacity of the testator or as to undue influence are inadmissible.[24] However, an insistence that the admission of a legatee against his interest is not admissible because it might be injuri-

dered at defendant's request, that he would pay hospital bill, are competent as admissions.—Valentine v. Morgan, 222 N.W. 412, 207 Iowa 232.

15. Cal.—McPhee v. Lavin, 191 P. 23, 183 Cal. 264—Fleming v. Flick, 35 P.2d 210, 140 Cal.App. 14—King v. Wilson, 2 P.2d 833, 116 Cal.App. 191—Maberto v. Wolfe, 289 P. 218, 106 Cal.App. 202—Symons v. Woodden, 274 P. 987, 97 Cal App 39.
Mo.—Steinman v. Brownfield, App., 18 S.W.2d 528—Wulze v. Aquardo, App., 6 S W.2d 1017.
Employer's statements that compensation would take care of claimant and that employee was hurt in course of work were admissions.—O'Boyle v. Harry Seitz & Sons, 160 A. 145, 105 Pa Super. 135.

16. Ill.—Hall v. Scott, 231 Ill.App. 494.
Iowa.—Kuhn v. Kjose, 248 N.W. 230, 216 Iowa 36.
Mo.—Schroeder v. Rawlings, 127 S.W. 2d 678, 344 Mo. 630—Whitman v. Carver, 88 S.W.2d 885, 337 Mo. 1247.

17. Miss.—Atwood v. Garcia, 147 So. 813, 167 Miss. 144.

18. U.S.—Tudor v. Leslie, D.C.Mass., 1 F.R.D. 448.
Ala.—Powell v. Pate, App., 1 So.2d 36.
Cal.—Griffin v. Jacobsen, 61 P 2d 350, 17 Cal.App.2d 68—Gorzeman v. Artz, 57 P.2d 550, 13 Cal.App.2d 660—Tieman v. Red Top Cab Co., 3 P.2d 381, 117 Cal App. 40—Olsen v. J. J. Jacobs Motor Co., 278 P. 1051, 99 Cal.App. 423.
Colo.—General Foods Sales Co. v. Smith, 97 P.2d 429.
Ill.—Panozzo v. City of Rockford, 28 N E.2d 748, 306 Ill.App. 443—Holcomb v. Magee, 217 Ill.App. 272.
Iowa.—White v. Center, 254 N.W. 90, 218 Iowa 1027—Ege v. Born, 236 N.W. 75, 212 Iowa 1138—McDonald v. Robinson, 224 N.W. 820, 207 Iowa 1293, 62 A.L.R 1419, followed in McDonald v. Padzensky, 224 N. W. 824.
Ky.—Wimsatt's Adm'x v. Louisville & N. R. Co., 31 S.W.2d 729, 235 Ky. 405.
Mich.—Gibbard v. Cursan, 196 N.W. 398, 225 Mich. 311.
Minn.—Sohns v. M. B. Hubbard Grocery Co., 203 N.W. 782, 163 Minn. 187.
Mo.—State ex rel. S. S. Kresge Co. v. Shain, 101 S.W.2d 14, 340 Mo. 145—Chawkley v. Wabash Ry. Co., 297 S.W. 20, 317 Mo. 782—Saunders v. Prue, App., 151 S.W.2d 478—Garnett v. S. S. Kresge Co., App., 85 S.W.2d 157—Proffitt v. Farmers' Produce Exchange Co-op. Ass'n, No. 277, App., 64 S.W.2d 746.
Neb.—Berggren v. Hannan, Odell & Van Brunt, 215 N.W. 556, 116 Neb. 18.
Tenn.—Nichols v. Smith, 111 S.W.2d 911, 21 Tenn.App. 478.
Tex.—Armour & Co. v. Tomlin, Civ. App., 42 S.W.2d 634, affirmed Com. App., 60 S.W.2d 204—Stoppelberg v. Stoppelberg, Civ.App., 222 S.W. 587—Dendinger v. Martin, Civ.App., 221 S W. 1095, dismissed for want of jurisdiction.
Utah.—Reid v. Owens, 93 P.2d 680, 98 Utah 50, 126 A.L.R. 55.
22 C.J. p 348 note 28—42 C.J. p 1219 note 38.

19. N.H.—Lakeport Nat. Bank v. McDonald, 116 A. 638, 80 N.H. 337.
22 C.J. p 348 note 29.

20. Mass.—Broderick v. Higginson, 48 N.E. 269, 169 Mass. 482, 61 Am. S.R. 296.
22 C.J. p 348 note 30.

21. Cal.—Lampton v. Davis Standard Bread Co., 191 P. 710, 48 Cal. App. 116.

22. S.C.—Leppard v. Southern R. Co., 177 S.E. 129, 131, 174 S.C. 237, quoting **Corpus Juris.**
22 C.J. p 348 note 31.

23. Pa.—McShain v. Indemnity Ins. Co. of North America, 12 A.2d 59, 338 Pa. 113.
S.C.—Leppard v. Southern Ry. Co., 177 S.E. 129, 131, 174 S.C. 237, quoting **Corpus Juris**—Windham v. Howell, 59 S.E. 852, 78 S.C. 187.

24. Cal.—In re Lavinburg's Estate, 119 P. 915, 161 Cal. 536.
Ill.—Ginsberg v. Ginsberg, 198 N.E. 432, 361 Ill. 499—Powell v. Bechtel, 172 N.E. 765, 340 Ill. 330—Pollock v. Pollock, 159 N.E. 305, 328 Ill. 179—Joyal v. Pilotte, 127 N.E. 741, 293 Ill. 377—McCune v. Reynolds, 123 N.E. 317, 288 Ill. 188.
Ind.—Kennedy v. Kennedy, 136 N.E. 557, 192 Ind. 353.
Iowa.—In re Green's Estate, 288 N. W. 881, 227 Iowa 702—Wackman v. Wiegold, 212 N.W. 122, 202 Iowa 1391.
Mass.—Neill v. Brackett, 135 N.E. 690, 241 Mass 534—Old Colony Trust Co. v. Di Cola, 123 N.E. 454, 233 Mass. 119.
Mich.—In re Teller's Estate, 284 N. W. 696, 288 Mich. 193—In re Spinner's Estate, 226 N.W. 862, 248 Mich. 263—In re Luders' Estate, 212 N.W. 965, 238 Mich. 87.
Minn.—In re Knutson's Estate, 174 N.W. 617, 144 Minn. 111.
Miss.—Nebhan v. Mansour, 139 So. 166, 162 Miss. 418, suggestion of

ous to the interests of the other contestees has been held to be without merit.[25]

Entry of discontinuance. The entry of a discontinuance as to a particular party renders his admissions incompetent.[26]

Admissibility in favor of coparty. The admission of a defendant against his own interest and in favor of a codefendant is competent for the codefendant.[27] However, a defendant who is shown by plaintiff's evidence to have employed plaintiff cannot escape liability on the theory that another defendant has admitted that he also employed plaintiff;[28] and where separate actions, based on independent grounds, are brought by the same plaintiff against different defendants, the admissions of defendant in one case are not a defense to defendant in another case.[29]

b. Admissibility against Coparty

An admission of one party may not be received in evidence against a coparty, unless it is chargeable to, and binding on, the coparty because of authorization, adoption, acquiescence, privity, joint interest or liability, or other good reason.

An admission of one party is not binding on, or evidence against, a coparty[30] where it was not made in the presence of the coparty,[31] or with his knowledge,[32] consent,[33] or authority,[34] where the coparty has not adopted the statement as his own,[35] where the interest or liability of the coparties is several,[36] and there is no agency,[37] partnership,[38] conspiracy,[39] or privity[40] between the parties, or joint purpose on their part.[41] The rule in this respect is the

error overruled and amended 139 So. 878, 162 Miss. 418.
Mo.—Schoenhoff v. Haering, 38 S.W. 2d 1011, 327 Mo. 837.
22 C.J. p 348 note 31 [a] (1).

25. Tex.—Moos v First State Bank of Uvalde, Civ.App., 60 S.W.2d 888, error dismissed.

Necessity of substantial interest
Substance, rather than form, should be considered in applying the rule of the text; and, where the legatees other than declarant are given only nominal bequests by the will and would receive larger sums in the event of intestacy, the rule will not be applied.—Look v. French, Mo., 144 S.W.2d 128—22 C.J. p 348 note 31 [a] (2).

26. Ill.—Bensley v. Brockway, 27 Ill. App. 410.

27. Ga.—Cade v. Hatcher, 72 Ga. 359.
22 C.J. p 352 note 60.

28. Mo.—Whittington v. Westport Hotel Operating Co., 33 S.W.2d 963, 326 Mo. 1117.

29. Mass.—Nugent v. Boston Consol. Gas Co., 130 N.E. 488, 238 Mass. 221.

30. U.S.—American Casualty Co. of Reading, Pa., v. Windham, C.C.A. Ga., 107 F.2d 88, affirming, D.C., 26 F.Supp. 261, certiorari denied 60 S.Ct. 714, 309 U.S. 674, 84 L.Ed. 1019—Western Pac. R. Corporation v. Baldwin, C.C.A.Mo., 89 F.2d 269—Trinity Universal Ins. Co. v. Cunningham, D.C.Mo., 25 F.Supp. 801, affirmed, C.C.A., 107 F.2d 857, certiorari dismissed 60 S.Ct. 1074, 310 U.S. 654, 84 L.Ed. 1419.
Cal.—Nishi v. Inoguchi, 2 P.2d 864, 116 Cal.App. 398—Progressive Finance Corporation v. Vining, 1 P.2d 1004, 115 Cal.App. 423, setting aside 300 P. 979.
Ga.—Moody v. Board of Com'rs of Roads and Revenues of Appling County, 113 S.E. 103, 29 Ga.App. 21.
Ill.—Hill v. Hiles, 32 N.E.2d 933, 309 Ill.App. 321—Panozzo v. City of Rockford, 28 N.E.2d 748, 306 Ill. App. 443.
Ind.—Buchanan v. Morris, 151 N.E. 385, 198 Ind. 79.
Iowa.—White v. Center, 254 N.W. 90, 218 Iowa 1027.
Kan.—Smith v. Republic Underwriters, Waco, Tex., 103 P.2d 858, 152 Kan. 305.
La.—Schwartz Supply Co. v. Breen, App., 184 So. 228—Parks v. Hall, App. 179 So. 868, followed in 179 So. 877, Hall v. Hall, 179 So. 877 and Carbons Consolidated v. Hall, 179 So. 878, annulled on other grounds Parks v. Hall, 181 So. 191, 189 La. 849, mandate conformed to 182 So. 347.
N.H.—Masterson v. Berlin St. Ry., 139 A. 753, 83 N.H. 190.
N.Y.—Aarons v. Standard Varnish Works, 296 N.Y.S. 312, 163 Misc. 84, affirmed 3 N.Y.S.2d 910, 254 App.Div. 560—Goschar v. Bauer, 13 N.Y.S.2d 328.
Ohio.—In re Heile, 29 N.E.2d 175, 65 Ohio App. 45.
Va.—Chandler v. Satchell, 168 S.E. 744, 160 Va. 160.
W.Va.—First Nat. Bank v. McGraw, 101 S.E. 474, 85 W.Va. 298.
5 C.J. p 669 note 84.

Declarations of a defaulted defendant are generally inadmissible against his codefendant.—Steckel v. Swift & Co., Mo.App., 56 S.W.2d 806—Shannon v. Del-Home Light Co., Mo.App., 43 S.W.2d 872—22 C.J. p 349 note 34 [b].

Party incompetent to testify against codefendant
Ill.—Worthy v. Birk, 224 Ill.App. 574.

31. Ala.—Wilder v. Reed, 112 So. 312, 216 Ala. 29.
Ga.—Farrow v. Whitaker, 198 S.E. 821, 58 Ga.App. 454.
Ky.—Eversole v. Chandler, 289 S.W. 215, 217 Ky. 148—Baskett v. Coombs' Adm'r, 247 S.W. 1118, 198 Ky. 17.
N.C.—Morrison v. Southern States Finance Co., 148 S.E. 458, 197 N.C. 322.
42 C.J. p 1219 note 39.

Absence forestalling inference of acquiescence or approval
N.Y.—In re Esterheld's Will, 19 N.Y.S.2d 572, 173 Misc. 1056.

32. U.S.—Dauber v. Boyajian, C.C.A.N.Y., 62 F.2d 1002.

33. Iowa.—Graham v. Williams, 293 N.W. 562.

34. Ill.—Worthy v. Birk, 224 Ill.App. 574.

35. Iowa.—Graham v. Williams, 293 N.W. 562.

36. Ariz.—Bristol v. Moser, 99 P.2d 706, 709, 55 Ariz. 185, citing **Corpus Juris.**
Mo.—Fawkes v. National Refining Co., 108 S.W.2d 7, 10, 341 Mo. 630, citing **Corpus Juris.**
22 C.J. p 349 note 34.

Absence of joint ownership or interest
Neb.—Gentry v. Burge, 261 N.W. 854, 129 Neb. 493.
Vt.—Cameron v. Blanchard, 176 A. 290, 107 Vt. 51.

37. Ariz.—Bristol v. Moser, 99 P.2d 706, 55 Ariz. 185.
N.J.—Campanella v. Bono, 200 A. 544, 120 N.J.Law 435.

38. N.J.—Campanella v. Bono, supra.

39. Ill.—Worthy v. Birk, 224 Ill. App. 574.
Mo.—Zorn v. Zorn, 64 S.W.2d 626.

40. Iowa.—Graham v. Williams, 293 N.W. 562.
Mass.—Becker v. Becker, 130 N.E. 843, 238 Mass. 362.
Neb.—Gentry v. Burge, 261 N.W. 854, 129 Neb. 493.

41. Vt.—Cameron v. Blanchard, 176 A. 290, 107 Vt. 51.

same in equity and at law;[42] it applies to judicial,[43] as well as to extrajudicial, admissions; and it is particularly applicable where the intent of the party making the admission is merely nominal[44] or there is no evidence that he has any interest in the subject matter of the admission.[45]

On the other hand, the admission of one party may be competent against a coparty in some situations,[46] as where, on grounds of privity or agency, the admission would be competent against the coparty although declarant had not been made a party,[47] or where the admission is fairly chargeable to the coparty of declarant by reason of acquiescence,[48] or where, in situations discussed infra this subdivision, the admission is rendered competent by the joint ownership or interest, or joint liability of the parties.

Community of interest. A mere community of interest between coparties will not make the admissions of one competent against the others,[49] even where, as in an action for a joint tort,[50] or for divorce on the ground of adultery,[51] the act charged, if committed at all, must have been committed by both parties, or where a common interest exists in a given property[52] or claim[53] under a legal or equitable[54] title. The same is true as to admissions of one of several persons claiming as devisees or legatees under a will,[55] or as heirs or distributees under the statute of descent.[56]

Further, there is no such joint interest as will make the admissions of one competent against the others between tenants in common,[57] tenants by the entirety,[58] a tenant for life and the remainderman,[59] executors and administrators,[60] trustees,[61] or stockholders in a corporation.[62]

Joint ownership or interest. Where several coparties to the record are the joint owners of real or personal property,[63] or are jointly interested in

42. W.Va.—Hudkins v. Crim, 61 S.E. 166, 64 W.Va. 225.
22 C.J. p 349 note 35.

43. Ark.—Bryant v. Lewis, 144 S.W. 2d 37.
22 C.J. p 350 note 36.

Admissions
(1) In answer.
Ark.—Bryant v. Lewis, supra.
Iowa.—Eclipse Lumber Co. v. Murphy Co., 221 N.W. 930, 206 Iowa 1280.
Tex.—Justin McCarty, Inc., v. Ash, Civ.App., 18 S.W.2d 765.
W.Va.—Hudkins v. Crim, 61 S.E. 166, 64 W.Va. 225.

(2) In answers to interrogatories.—McNiff v. Boston Elevated Ry. Co., 125 N.E. 391, 234 Mass. 252.

(3) In deposition.
Mo.—Saunders v. Prue, App., 151 S.W.2d 478—Vest v. S. S. Kresge Co., App., 213 S.W. 165.
N.Y.—Nixon v. Beacon Transp. Corporation, 264 N.Y.S. 114, 239 App. Div. 830.

(4) In ex parte statement under oath.—Theuber v. Marek, Tex.Civ. App., 222 S.W. 293.

(5) In statement made when witness at coroner's inquest.—Kellner v. Witte, 23 P.2d 1045, 133 Cal.App. 231.

44. Iowa.—Graham v. Williams, 293 N.W. 562.
La.—Mire v. Haas, App., 174 So. 374.
Admissions of nominal party see infra § 319.

45. Va.—Buchanan v. Wilson, 165 S.E. 422, 159 Va. 49.

46. Kan.—Hewey v. Miller, 295 P. 723, 132 Kan. 289.
Miss.—Bell v. Morrison, 27 Miss. 68.
Mo.—Telaneus v. Simpson, 12 S.W. 2d 920, 321 Mo. 724—Beitling v. S. S. Kresge Co., 116 S.W.2d 522, 232 Mo.App. 1195.

47. Iowa.—Ft. Dodge Culvert & Steel Co. v. Miller, 206 N.W. 141, 200 Iowa 1169.
S.C.—W. T. Rawleigh Co. v. Thompson, 114 S.E. 702, 122 S.C. 43.

Authorization or adoption
U.S.—Murray v. Third Nat. Bank of St. Louis, Ohio, 234 F. 481, 148 C.C.A. 247.
Vt.—Bradley v. Briggs, 22 Vt. 95.

Authorization and other considerations
Whether statements of defendant would be admissible against codefendant depended on whether circumstances showed that statements were made with codefendant's authority and other considerations.—Tudor v. Leslie, D.C.Mass., 1 F.R.D. 448.

48. S.C.—Charleston Live Stock Co. v. Collins, 60 S.E. 944, 79 S.C. 383.
22 C.J. p 350 note 37.

49. N.Y.—In re Esterheld's Will, 19 N.Y.S.2d 572, 173 Misc. 1056.
22 C.J. p 350 note 40.

50. Ind.—Roberts v. Kendall, 29 N.E. 487, 3 Ind.App. 339.
22 C.J. p 350 note 41.

51. N.J.—Howard v. Howard, 78 A. 195, 77 N.J.Eq. 186.
22 C.J. p 350 note 42.

52. S.C.—Windham v. Howell, 59 S.E. 852, 78 S.C. 187.
22 C.J. p 350 note 43.

53. La.—Jackson v. Illinois Cent. R. Co., 14 So. 514, 46 La.Ann. 226.

54. Mass.—Pope v. Devereux, 5 Gray 409.

55. Mo.—Zorn v. Zorn, 64 S.W.2d 626—Gott v. Dennis, 246 S.W. 218, 296 Mo. 66.
N.H.—Harvey v. Provandie, 141 A. 136, 83 N.H. 236.
N.Y.—In re Kupfer's Estate, 247 N.Y.S. 381, 138 Misc. 821.
22 C.J. p 350 note 46.

56. U.S.—Koen v. Beardsley, C.C.A. Colo., 63 F.2d 595.
Iowa.—In re Green's Estate, 288 N.W. 881, 227 Iowa 702.
22 C.J. p 351 note 47.

57. Ala.—Higdon v. Leggett, 94 So. 359, 208 Ala. 352.
Tex.—Williams v. Fuerstenberg, Civ. App., 12 S.W.2d 812, reversed on other grounds Com.App., 23 S.W.2d 305.
Vt.—Davis v. Union Meeting House Soc., 108 A. 704, 93 Vt. 520.
22 C.J. p 351 note 48.

58. Vt.—Pope v. Hogan, 102 A. 937, 92 Vt. 250.
30 C.J. p 1024 note 25.

59. Mass.—McGregor v. Wait, 10 Gray 72, 69 Am.D. 305.
22 C.J. p 351 note 49.

60. N.Y.—In re Jacobs' Estate, 9 N.Y.S.2d 278, 169 Misc. 904.
22 C.J. p 351 note 50.

Where statement is irrelevant, it may be held inadmissible without considering when, and under what circumstances, statements or declarations made by one executor or administrator without the presence of his coexecutor or coadministrator may be received.—Heywood v. Ogden Motor Car Co., 6 P.2d 171, 78 Utah 564.

61. N.C.—Belding v. Archer, 42 S.E. 800, 131 N.C. 287.
22 C.J. p 351 note 51.

62. Cal.—Dean v. Ross, 38 P. 912, 105 Cal. 227.
22 C.J. p 351 note 52.

63. Pa.—Bank of Pittsburgh v. Purcell, 133 A. 31, 286 Pa. 114—La

the subject matter of the controversy,[64] the admissions of one are competent against all, where no fraud or collusion appears,[65] except for the purpose of proving the joint interest.[66]

Joint liability. Where two or more codefendants, if liable at all, are liable jointly, an admission of one is competent against the other,[67] provided it was made within the scope of the common purpose and relates to the joint interest in the matter out of which the liability is claimed to arise.[68]

Joint pleading. Where all the coparties unite in a pleading, admissions contained therein are competent against all and not merely against the one by whom the pleading was verified.[69]

Common purpose. Where a number of persons, owning lands of like quality in severalty, unite as plaintiffs for a purpose common to all the properties, the admissions against interest of some of the parties as to their tracts may be applied to all.[70]

Coparty in former suit. Where the answer of the husband in a former suit against husband and wife is receivable as an admission against interest in a subsequent suit against him alone, there is no error in admitting the answer of the wife which is practically identical with that of the husband.[71]

§ 319. Nominal Parties

Admissions of a nominal party are not competent to affect the real party in interest.

Where an action is prosecuted or defended in the name of a person other than the real party in interest, admissions of the nominal party are not competent to affect the real party,[72] unless the admission was made while the nominal party possessed a beneficial interest in the subject matter.[73] Nevertheless admissions of a sole plaintiff on the record that he has no interest are provable to defeat the action, where there is no proof that any one else has an interest.[74]

Guardian ad litem or next friend. Admissions of a guardian ad litem or next friend are not competent to affect the interest of the person whom declarant represents in the action.[75]

§ 320. Real Parties in Interest

Admissions or declarations against interest made by a person who is not a party to the record, but who is a real party in interest, are competent against a nominal party representing declarant's interest in the action.

Declarations of a person beneficially interested in the result of litigation are admissible against the nominal party representing his interest,[76] unless it

Furia v. New Jersey Ins. Co. of Newark, 200 A. 167, 169, 131 Pa. Super. 413, quoting **Corpus Juris.**
22 C.J. p 351 note 53.

64. Colo.—Enyart v. Orr, 238 P. 29, 78 Colo. 6.
Ill.—Lowe v. Huckins, 190 N.E. 683, 356 Ill. 360.
Or.—Weider v. Lorenz, 99 P.2d 38, 45, citing **Corpus Juris.**
Pa.—La Furia v. New Jersey Ins. Co. of Newark, 200 A. 167, 169, 131 Pa. Super. 413, quoting **Corpus Juris.**
22 C.J. p 351 note 54.

Legatees or devisees having joint interests
Ill.—Ginsberg v. Ginsberg, 198 N.E. 432, 361 Ill. 499—Pollock v. Pollock, 159 N.E. 305, 328 Ill. 179—McCune v. Reynolds, 123 N.E. 317, 288 Ill. 188.

65. Pa.—La Furia v. New Jersey Ins. Co. of Newark, 200 A. 167, 169, 131 Pa.Super. 413, quoting **Corpus Juris.**
22 C.J. p 352 note 56.

66. Ill.—Lowe v. Huckins, 190 N.E. 683, 356 Ill. 360.
Pa.—La Furia v. New Jersey Ins. Co. of Newark, 200 A. 167, 169, 131 Pa. Super. 413, quoting **Corpus Juris.**
22 C.J. p 352 note 57.

67. Miss.—Interstate Co. v. Garnett, 122 So. 373, 381, 154 Miss. 325, quoting **Corpus Juris,** and suggestion of error overruled 122 So. 756, 154 Miss. 325, 63 A.L.R. 1402.
Mo.—Fawkes v. National Refining Co., 108 S.W.2d 7, 10, 341 Mo. 630, citing **Corpus Juris**—City of St. Louis ex rel. and to Use of Sears v. Clark, App., 35 S.W.2d 986, 992, citing **Corpus Juris.**
N.M.—Lopez v. Townsend, 82 P.2d 921, 925, 42 N.M. 601, citing **Corpus Juris.**
22 C.J. p 352 note 58.

Joint makers of promissory note
The admissions of one or two more joint makers of a promissory note are competent evidence against all. —Lowe v. Huckins, 190 N.E. 683, 684, 356 Ill. 360, citing **Corpus Juris**—22 C.J. p 352 note 58 [a].

Family expenses
In an action against husband and wife to recover for coal as family expenses, evidence of an admission of the husband that the account is due should have been admitted, as it would have tended to fix the liability of the husband, and the nature of the merchandise sold, if for family use, would have made a statute apply so as to charge a like liability against the wife.—Richardson v. W. L. Robinson Coal Co., 95 Ill.App. 283.

68. Miss.—Interstate Co. v. Garnett, 122 So. 373, 381, 154 Miss. 325, quoting **Corpus Juris,** and suggestion of error overruled 122 So. 756, 154 Miss. 525, 63 A.L.R. 1402.
22 C.J. p 352 note 59

69. N.Y.—Talbot v. Laubheim, 81 N.E. 163, 188 N.Y. 421.
22 C.J. p 350 note 39.

70. W.Va.—Liberty Coal Co. v. Bassett, 150 S.E. 745, 108 W.Va. 293.

71. Tex.—Chanowsky v. Friedman, Civ.App., 108 S.W.2d 752, error dismissed.

72. Va.—Virginia Electric & Power Co. v. Mitchell, 164 S.E. 800, 159 Va. 855, supplemented 167 S.E. 424, 159 Va. 855.
22 C.J. p 352 note 61.

73. Ala.—Sally v. Gooden, 5 Ala. 78.
22 C.J. p 353 note 62.

74. Mich.—Hogan v. Sherman, 5 Mich. 60.

75. Cal.—Gackstetter v. Market St. Ry. Co., 20 P.2d 93, 96, 130 Cal. App. 316, citing **Corpus Juris.**
Ky.—Clark v. Wells-Elkhorn Coal Co., 284 S.W. 91, 215 Ky. 128.
Md.—Pindell v. Rubenstein, 115 A. 859, 862, 139 Md. 567, citing **Corpus Juris.**
Mo.—Mackey v. Shreckengaust, App., 27 S.W.2d 752.
N.C.—Cook v. Edwards, 153 S.E. 323, 324, 198 N.C. 738, quoting **Corpus Juris.**
Tex.—Gersdorff v. Torres, Com.App., 293 S.W. 560, affirming in part and reversing in part Torres v. Gersdorff, Civ.App., 287 S.W. 668.
22 C.J. p 353 note 64.

76. U.S.—Krebs Pigment & Chem-

is impossible to admit them without prejudicing the interests of nondeclarants.[77] Where a trustee has a purely nominal position in relation to the action,[78] and where an executor or administrator is a formal party,[79] statements of the person beneficially interested are admissible; but where an executor or administrator is actually representing the interests of the estate, declarations of an heir at law, next of kin, legatee, or devisee are inadmissible,[80] and under similar circumstances the admission of a cestui que trust may be incompetent.[81]

Nature of interest. In order to render a person's admissions competent his interest must be real and financial;[82] it is not sufficient that he has a sentimental interest due to relationship,[83] is under a moral obligation to indemnify a party,[84] or has an interest similar to the one involved in the action.[85] A person who will be called on to pay the judgment in case of an adverse result,[86] or who will receive the whole or a portion of the proceeds in the case of a successful one,[87] is a real party in interest within the rule stated.

Showing interest. The fact of interest in a third person should be established prima facie by evidence exclusive of his own declarations.[88]

§ 321. Strangers

A party to an action is not bound by an admission, to which he has not assented, of a person who does not occupy toward him any relation of privity, agency, or joint interest.

Unless he assents thereto,[89] a party to an action cannot be affected by the admission of a person who does not occupy toward him any relation of privity, agency, or joint interest.[90]

ical Co. v. Sheridan, C.C.A.Pa., 79 F.2d 479, affirming, D.C., 12 F.Supp. 254.
Ala.—Hampton v. Roberson, 163 So. 644, 231 Ala. 55—Farmers' Union Warehouse Co. v. Barnett Bros., 137 So. 176, 223 Ala. 435.
22 C.J. p 353 note 65.

In action against escrow holder, admissions of the other contracting party are admissible to show his inability to comply with the terms of his agreement.—Guaranty State Bank v. Higbee, Tex.Civ.App., 254 S.W. 225.

77. Ga.—Morris v. Stokes, 21 Ga. 552.
Tenn.—Brown v. Moore, 6 Yerg. 278.

Corpus Juris cited in connection with a statement that it may be questionable whether an exception to the general rule would exclude the declarations where the interest of others is necessarily involved; but the court notes that the point was not raised by objection.—Hampton v. Roberson, 163 So. 644, 646, 231 Ala. 55.

78. Ala.—McLemore v. Nuckolls, 37 Ala. 662.

79. Ill.—Isley v. McClandish, 20 N.E.2d 890, 299 Ill.App. 564.
22 C.J. p 353 note 68.

80. U.S.—Merchants' Life Assoc. v. Yoakum, C.C.A.Tex., 98 F. 251, 39 C.C.A. 56.
22 C.J. p 353 note 69.

Where heir is not the real party in interest, his admissions are not evidence against the administrator.—E. A. Strout Farm Agency v. Hosford, 128 A. 685, 81 N.H. 507.

81. Colo.—Barker v. Hamilton, 3 Colo. 291.
22 C.J. p 353 note 70.

82. Ga.—Bridges v. State, 34 S.E. 1037, 110 Ga. 246.
22 C.J. p 353 note 71.

83. N.H.—Taylor v. Grand Trunk R. Co., 48 N.H. 304, 2 Am.R. 229.

84. Conn.—Stratford v. Sanford, 9 Conn. 275.

85. Conn.—Hamlin v. Fitch, Kirby 174.

86. Mass.—Bayley v. Bryant, 24 Pick. 198.
N.C.—Kerchner v. Reilly, 72 N.C. 171.

87. N.H.—Hamblett v. Hamblett, 6 N.H. 333.

Recovery as community property

In motorist's action for injuries sustained in grade crossing collision, evidence of statements made by motorist's wife to claim agent concerning the collision was admissible where it tended to contradict wife's testimony, notwithstanding wife was not named a party plaintiff, since recovery would have been community property, and wife had as much interest in the outcome as did husband, and her interest would not have been increased by including her name as party plaintiff.—Hinrichs v. Texas & N. O. R. Co., Tex.Civ.App., 153 S.W. 2d 859.

88. Ala.—Bowen v. Snell, 11 Ala. 379.
22 C.J. p 354 note 77.

89. Ill.—Mueller v. Mueller, 222 Ill. App. 435.

90. U.S.—Buhl v. Kavanagh, C.C.A. Mich., 118 F.2d 315.
Ala.—Roberts v. E. L. Thompson & Son, 122 So. 614, 23 Ala.App. 164, certiorari denied 122 So. 615, 219 Ala. 402.
Cal.—In re Relph's Estate, 221 P. 361, 192 Cal. 451—McDanels v. General Ins. Co. of America, 36 P. 2d 829, 1 Cal.App.2d 454.
Colo.—Holt v. Mundell, 112 P.2d 1039, 107 Colo. 373.
Ga.—Hollis v. Virginia-Carolina Chemical Co., 107 S.E. 554, 27 Ga. App. 103.
Ill.—Tope v. Tope, 18 N.E.2d 229, 370 Ill. 187—Mundell v. Cravens, 267 Ill.App. 447—Mueller v. Mueller, 222 Ill.App. 435
Ind.—Lincoln Nat. Bank & Trust Co. of Fort Wayne v. Parker, App., 34 N.E.2d 190.
Ky.—Bowling v. Bourne, 127 S.W.2d 148, 277 Ky. 758.
La.—Baldwin v. Arkansas-Louisiana Pipe Line Co., 171 So. 442, 185 La. 1051—Walter A. Meller Co. v. Rodessa Gasoline Co., App., 178 So. 687.
Mass.—City of Boston v. Santosuosso, 30 N.E.2d 278—Shea v. Sullivan, 158 N.E. 771, 261 Mass. 255—Rockport Granite Co. v. Plum Island Beach Co., 142 N.E. 834, 248 Mass. 290—Rowley v. Cole, 138 N.E. 568, 244 Mass. 375.
Mo.—Gillioz v. State Highway Commission, 153 S.W.2d 18—Gott v. Dennis, 246 S.W. 218, 296 Mo. 66—Gibbany v. Walker, 121 S.W.2d 317, 233 Mo.App. 489, transferred, see 113 S.W.2d 792, 342 Mo. 156—Bank of Dearborn v. Gabbert, 291 S.W. 142, 221 Mo.App. 923.
N.H.—Morin v. Travelers' Ins. Co., 160 A. 482, 85 N.H. 471—E. A. Strout Farm Agency v. Hosford, 128 A. 685, 81 N.H. 507.
N.J.—Center Garage Co. v. Columbia Ins. Co., 115 A. 401, 96 N.J.Law 456.
Ohio.—Ettinger v. Goodyear, 165 N.E. 862, 30 Ohio App. 572.
Or.—Wise v. State Industrial Accident Commission, 35 P.2d 242, 148 Or. 461.
Tex.—Reliance Ins. Co. v. Smith, Com.App., 66 S.W.2d 675, affirming, Civ.App., 44 S.W.2d 446—Scott & Carmody v. Canon, Com.App., 240 S.W. 304, reversing Canon v. Scott, Civ.App., 230 S.W. 1042—More v. More, Civ.App., 7 S.W.2d 1096, er-

2. PRIVIES AND FORMER OWNERS GENERALLY

§ 322. In General

As against a party to the record an admission of a privy, such as a former owner of property under or through whom he claims, is competent.

Privity between declarant and a party to the record may render an admission competent,[91] and hence where an owner of property makes admissions in disparagement of his title these may be shown against persons claiming under or through him.[92] Such an admission, being primary evidence, is competent, although, it has been held, declarant is available as a witness;[93] but it is necessary, as a preliminary to the admission of the statement, that the existence of privity should be shown;[94] and to be admissible against successors in title and interest, it is necessary that the statement in question be against the interest of declarant.[95]

The statements of a person as to his precise intention in putting a chattel in its place on realty, made after the controversy had arisen, are not to be accepted except as against himself.[96]

Person having paramount title. As against one having a paramount or superior title, the admissions of one in possession have been held not to be competent.[97]

Adverse claimant. As against one claiming adversely to declarant, an admission cannot be shown, there being no privity.[98]

§ 323. Necessity for Title in Declarant

To be competent against a successor in title, an admission of a former owner of property must have been made when title was in declarant.

In order to render an admission of a former owner of property competent against his successor in title, it must have been made at a time when the title was in declarant.[99] An admission of a former owner may not be received against his successor in

ror refused—Times Pub. Co. v. Ray, Civ.App., 1 S.W.2d 471, affirmed Ray v. Times Pub. Co., Com. App., 12 S.W.2d 165—Butler v. Duffey, Civ.App., 288 S.W. 598—Burleson & Baker v. Sugarland Industries, Civ.App., 240 S.W. 669, affirmed, Com.App., 255 S.W. 165—Chapman v. Dickerson, Civ.App., 223 S.W. 318.

Va.—Life Ins. Co. of Virginia v. Brockman, 3 S.E.2d 480, 173 Va. 86.

Wis.—Hudson v. Gleason, 177 N.W. 14, 171 Wis. 238.

22 C.J. p 408 note 90.

Judicial admissions cannot be received in an action to which declarant is not a party.

Kan.—Morrison v. Montgomery, 184 P. 985, 105 Kan. 430.

Mo.—Collins v. Leahy, 125 S.W.2d 874, 344 Mo. 250.

N.Y.—In re Roche's Beach, City of New York, 294 N.Y.S. 22, 250 App. Div. 239.

Utah.—Garner v. Anderson, 248 P. 496, 67 Utah 553.

22 C.J. p 408 note 90 [e].

Statements by detectives to a police judge that they made an arrest on orders of defendant's general manager are incompetent in an action for false imprisonment.—Vest v. S. S. Kresge Co., Mo.App., 213 S.W. 165.

An inventory is competent evidence against the party making it but not against any other person.—Mundell v. Cravens, 267 Ill.App. 447.

91. U.S.—Grant v. Fletcher, D.C. Mich., 283 F. 243.

Cal.—Davey v. Grigsby, 196 P. 296, 51 Cal.App. 220.

Del.—Eastern Shore Public Service Co. v. Town of Seaford, 2 A.2d 265, sustaining Town of Seaford v. Eastern Shore Public Service Co., 2 A.2d 258, appeal dismissed Eastern Shore Public Service Co. v. Town of Seaford, 59 S.Ct. 483, 306 U.S. 616, 83 L.Ed. 1024, rehearing denied 59 S.Ct. 589, 306 U.S. 668, 83 L.Ed. 1063.

Ga.—Brookman v. Rennolds, 98 S.E. 543, 148 Ga. 721.

Iowa.—Lake v. Moots, 244 N.W. 693, 215 Iowa 126.

N.H.—Tuftonboro v. Willard, 197 A. 404, 89 N.H. 253.

N.Y.—Kwiatkowski v. John Lowry, Inc., 11 N.E.2d 563, 276 N.Y. 126, 114 A.L.R. 916, reversing 298 N.Y.S. 485, 251 App.Div. 850.

Or.—Farmers' & Fruit-Growers' Bank v. Davis, 184 P. 275, 93 Or. 655.

Tex.—Belote v. Enochs, Civ.App., 131 S.W.2d 691, error granted—Tinker v. Yellow Cab Co., Civ.App., 74 S.W.2d 521, error dismissed—Gardenhire v. Gardenhire, Civ.App., 258 S.W. 1077.

Wis.—Gloede v. Socha, 226 N.W. 950, 199 Wis. 503.

22 C.J. p 354 note 78.

92. Ark.—Stacy v. Stacy, 300 S.W. 437, 175 Ark. 763.

La.—Larose v. Naquin, 90 So. 676, 150 La. 353.

Mich.—Reichel v. Schneider & Brown Lumber Co., 196 N.W. 614, 226 Mich. 24.

Pa.—Dawson v. Coulter, 106 A. 187, 262 Pa. 566.

22 C.J. p 354 note 79.

93. Tex.—Texas & N. O. R. Co. v. Broom, 114 S.W. 655, 53 Tex.Civ. App. 78.

22 C.J. p 355 note 80.

94. N.H.—Barker v. Publishers' Paper Co., 97 A. 749, 78 N.H. 160.

22 C.J. p 355 note 81.

95. Tex.—Bristow v. City Inv. Co., Civ.App., 110 S.W.2d 1222, error dismissed.

96. Del.—Martindale v. Bowers Beach Corporation, 118 A. 299, 13 Del.Ch. 288.

97. Ga.—Sweeney v. Sweeney, 46 S.E. 76, 119 Ga. 76, 100 Am.S.R. 159.

22 C.J. p 355 note 82.

Admissions of life tenant

(1) Admissions of a life tenant are not competent against the remainderman.—Gibson v. Gaines, 73 So. 929, 198 Ala. 583—22 C.J. p 355 note 81 [a].

(2) However, it has been held that where remaindermen claimed prescriptive title to lands based partly on life tenant's possession, evidence showing that life tenant admitted that fence and buildings encroached on defendant's right of way and that life tenant's use thereof was only permissive was competent as tending to show character of possession.—Atlantic Coast Line R. Co. v. Gunn, 194 S.E. 365, 185 Ga. 108.

98. Mass.—Duff v. Leary, 16 N.E. 417, 146 Mass. 533.

Miss.—Geoghegan v. Marshall, 4 So. 63.

99. Ark.—Wootton v. Keaton, 272 S.W. 869, 168 Ark. 981.

N.J.—Turner v. Cole, 173 A. 613, 620, 116 N.J.Eq. 368, quoting **Corpus Juris**, and affirmed 179 A. 113, 118 N.J.Eq. 497.

Tex.—Price v. Humble Oil & Refining Co., Civ.App., 152 S.W.2d 804.

22 C.J. p 356 note 84.

title if it was made either before declarant acquired title[1] or after it had passed from him,[2] unless the successor has concurred or acquiesced therein.[3]

§ 324. Real Estate

An admission against interest made by a former owner of real property while he was owner is competent against one claiming under him an interest acquired after the making of the declaration, unless the successor in interest is protected against the subject matter of the admission by reason of being a purchaser for value without notice.

A statement, declaration, or admission against interest, made by a former owner of real estate on his own knowledge,[4] and during his ownership[5] or possession,[6] or while in both ownership and possession,[7] is competent against one who claims under him an interest acquired since the declaration was made,[8] unless the successor in interest is so situated that the fact stated, if true, cannot affect him, as in the case of a purchaser for value without notice.[9] The rule is the same whether the admission is judicial[10] or extrajudicial;[11] and a competent admission may be by silence or acquiescence,[12] or in a written instrument which is not effective for the purpose for which it is designed.[13]

There are situations in which the rule is not applicable and the declaration or admission of a former owner of real estate should be rejected,[14] as where the admission or declaration is immaterial,[15] it was not against the interest of declarant at the time it was made,[16] declarant never, at any time, had title to the real property in question,[17] or, at the time of the making of the declaration, he had parted with title[18] or was not in possession.[19] An admission by a person under whom only one of several parties claim affects such party only.[20] There is some authority that the declaration of a former owner of real estate is admissible only with reference to his possession, and, as against his successor, is inadmissible to deny, attack, or destroy a record

Title or possession

Ga.—McCrea v. Georgia Power Co., 1 S.E.2d 664, 187 Ga. 708—McCrea v. Georgia Power Co., 174 S.E. 798, 179 Ga. 1.

1. Mont.—Kurth v. Le Jeune, 269 P. 408, 83 Mont. 100.
N.J.—Turner v. Cole, 173 A. 613, 620, 116 N.J.Eq. 368, quoting **Corpus Juris**, and affirmed 179 A. 113, 118 N.J.Eq. 497.
22 C.J. p 356 note 85.

2. Ark.—Wootton v. Keaton, 272 S. W. 869, 168 Ark. 981.
Minn.—Peterson v. Johnson Nut Co., 297 N.W. 178—Sons v. Sons, 177 N. W. 498, 145 Minn. 367.
N.J.—Turner v. Cole, 173 A. 613, 620, 116 N.J.Eq. 368, quoting **Corpus Juris**, and affirmed 179 A. 113, 118 N.J.Eq. 497.
Tex.—Hooks v. Neill, Civ.App., 21 S. W.2d 532, error refused.

3. N.J.—Turner v. Cole, 173 A. 613, 620, 116 N.J.Eq. 368, quoting **Corpus Juris**, and affirmed 179 A. 113, 118 N.J.Eq. 497.
22 C.J. p 356 note 87.

4. Ala.—Beasley v. Clarke, 14 So. 744, 102 Ala. 254.

5. Cal.—Keese v. Beardsley, 213 P. 500, 190 Cal. 465, 26 A.L.R. 1538.
N.J.—National Silk Dyeing Co. v. Grobart, 175 A. 91, 117 N.J.Eq. 156.
Pa.—Greiner v. Commonwealth, 6 A. 2d 67, 334 Pa. 299.
S.C.—Wilson v. Southern Ry., Carolina Division, 115 S.E. 764, 123 S. C. 399.

During continuance of interest

All acts and declarations of owner of land made during continuance of his interest tending to show character or extent of his possession or interest, or the location of boundaries, are competent evidence, not only against himself but also against those who claim through or under him.—Dawson v. Coulter, 106 A. 187, 262 Pa. 566.

6. Tex.—Townsend v. Chailiett, Civ. App., 45 S.W.2d 354.
19 C.J. p 1162 note 92.

7. Del.—Delaware Land & Development Co. v. First and Central Presbyterian Church of Wilmington, Del., 147 A. 165, 16 Del.Ch. 410.
N.C.—Blades v. Wilmington Trust Co., 178 S.E. 565, 207 N.C. 771.

8. Ga.—Anderson v. Black, 13 S.E. 2d 650, 191 Ga. 627.
Ky.—Lovill v. Hatfield, 268 S.W. 807, 207 Ky. 142.
Mont.—Gilcrest v. Bowen, 24 P.2d 141, 95 Mont. 44.
Philippine.—Lerma v. De la Cruz, 7 Philippine 581.
Tex.—Smith v. Lynn, Civ.App., 152 S.W.2d 838—Valdez v. Yoe, Civ. App., 39 S.W.2d 122.
Vt.—Weinberg v. Roberts, 131 A. 14, 99 Vt. 249.
22 C.J. p 356 note 90.

Declarations as to relevant facts concerning real property made by the owner are available as admissions against successors in title as an exception to the hearsay rule.—Reichel v. Schneider & Brown Lumber Co., 196 N.W. 614, 226 Mich. 24.

9. Tex.—James v. Davis, Civ.App., 150 S.W.2d 326, error dismissed, judgment correct—Hardin v. Hardin, Civ.App., 66 S.W.2d 362.
22 C.J. p 357 note 91.

10. N.Y.—Ford v. Belmont, 30 N. Y.Super. 97, affirmed 30 N.Y.Super. 508.
22 C.J. p 357 note 94.

11. Ind.T.—Noble v. Worthy, 45 S. W. 137, 1 Ind.T. 458.

Particular matters received in evidence

Maps, recitals in deeds, monuments, and boundaries, of which the owner was author, have been received in evidence.—Dunn v. Eaton, 23 S.W. 163, 92 Tenn. 743.

12. La.—Lejeune v. Barrow, 11 La. Ann. 501.

13. Ala.—Steed v. Knowles, 12 So. 75, 97 Ala. 573, 580.

14. Mont.—Wilson v. Davis, 103 P. 2d 149, 110 Mont. 356.
Tex.—Southwestern Lumber Co. of New Jersey v. Evans, Civ.App., 275 S.W. 1078.
19 C.J. p 1162 note 93.

Statements of grantee do not bind grantor

Iowa.—Swanson Automobile Co. v. Stone, 174 N.W. 247, 187 Iowa 309.

15. Vt.—Utley v. Town School Dist of Woodbury, 9 A.2d 117, 110 Vt. 522.

16. Mont.—Osnes Livestock Co. v. Warren, 62 P.2d 206, 103 Mont. 284.

17. Mo.—Clark v. Clark, 4 S.W.2d 807, 319 Mo. 591.
N.H.—Perley v. Roberts, 18 A.2d 385.
Tex.—Stewart v. Miller, Civ.App., 271 S.W. 311.

18. Mont.—Wilson v. Davis, 103 P. 2d 149, 110 Mont. 356.

19. Ga.—George v. Williams, 170 S. E. 790, 177 Ga. 630—Blackwell v. Houston County, 147 S.E. 574, 168 Ga. 248.
N.C.—Kirkman v. Holland, 51 S.E. 846, 139 N.C. 185.
19 C.J. p 1162 note 93 [a].

20. Pa.—Grant v. Levan, 4 Pa. 393.

title which appears to be sufficient in all respects.[21]

§ 325. Grantors

Admissions of a grantor against his interest, made while he held title, are competent against persons claiming under him; but admissions made by the grantor after he has parted with title are not admissible against his grantee or other persons claiming under his grant.

Admissions, declarations, or statements of a grantor in derogation of his title and against his interest, made while he held title or was in possession, are admissible against his successors in interest and all persons claiming under him.[22] On the other hand, it has been asserted generally that declarations of a grantor, not made in the presence of the grantee and not sanctioned, or acquiesced in, by the grantee with full knowledge thereof, are not admissible to defeat the deed or impeach the title of the grantee,[23] regardless of whether they were made before or after the execution of the deed.[24]

Statements after alienation. Declarations of a grantor, made after he has parted with his title, are not admissible against his grantee or other persons claiming under his grant,[25] especially where they were made in the absence of the grantee.[26] The rule applies although the grantor has reserved an equitable interest in the land conveyed.[27] Abandonment[28] or dedication[29] is regarded as equivalent to a conveyance for the purpose of making the rule applicable; and the rule is the same where the prop-

21. Me.—Shaw v. McKenzie, 160 A. 911, 131 Me. 248.
Declaration of deceased former owner see infra § 327.

22. Ark.—Bolden v. Grayson, 266 S W. 975, 167 Ark. 180—Jefferson v. Souter, 233 S.W. 804, 150 Ark. 55
Cal.—James v. James, 251 P. 666, 80 Cal.App. 185.
N.C.—Gray v. Davis, 113 S.E. 597, 184 N.C. 95.
Vt.—Smith v. Vermont Marble Co., 133 A. 355, 99 Vt. 384.
22 C.J. p 356 note 90—30 C.J. p 1023 note 24.

Admissions or declarations relative to easements

Mass.—Bond v. Orr, 165 N.E. 426, 266 Mass. 475.
Mo.—Auxier v. Horn, 213 S.W. 100.
22 C.J. p 357 notes 92, 93.

23. Ark.—Reynolds v. Balding, 36 S.W.2d 402, 173 Ark. 397.
Ill.—Gregory v. Gregory, 175 N.E. 804, 343 Ill. 630—Waters v. Lawler, 130 N.E. 335, 297 Ill. 63—Delfosse v. Delfosse, 122 N.E. 484, 287 Ill. 251.
Iowa.—Jones v. Betz, 210 N.W. 609, 203 Iowa 767, amended 213 N.W. 282, 203 Iowa 767.
Md.—Moran v. O'Brien, 144 A. 257, 156 Md. 221.
Minn.—Reek v. Reek, 239 N.W. 599, 184 Minn. 532.

24. Ill.—Delfosse v. Delfosse, 122 N. E. 484, 287 Ill. 251.

Statement to scrivener

Ill.—Gaines v. Kracke, 170 N.E. 430, 338 Ill. 172.

Declarations during preparation and at time of signing, but before delivery, of deed

Cal.—Shaver v. Canfield, 70 P.2d 507, 21 Cal.App.2d 734.

25. U.S.—McMan Oil & Gas Co. v. Hurley, C.C.A.Tex., 24 F.2d 776, certiorari denied Satterthwait v. McMan Oil & Gas Co., 49 S.Ct. 34, 278 U.S. 640, 73 L.Ed. 555—Dingess v. Huntington Development & Gas Co., C.C.A.W.Va., 271 F. 864—American Steel Foundries v. Sibley Soap Co., C.C.A.Pa., 270 F. 70.
Ala.—Roberts v. E. L. Thompson & Son, 122 So. 614, 23 Ala.App. 164, certiorari denied 122 So. 615, 219 Ala. 402.
Cal.—City of Manhattan Beach v. Cortelyou, 76 P.2d 483, 10 Cal.2d 653—Rocha v. Rocha, 240 P. 1010, 197 Cal. 396—Shaver v. Canfield, 70 P.2d 507, 21 Cal.App.2d 734—Overton v. Harband, 44 P.2d 484, 6 Cal. App.2d 455—Woodson v. Torgerson, 291 P. 663, 108 Cal.App. 386—People v. Southern Pac. R. Co., 228 P. 726, 68 Cal.App. 153.
Ill.—Shlensky v. Shlensky, 15 N.E. 2d 694, 369 Ill. 179—Kronan Building & Loan Ass'n v. Medeck, 13 N.E.2d 66, 368 Ill. 118—Herrin v. McCarthy, 171 N.E. 621, 339 Ill. 530—Dausch v. Barker, 160 N.E. 765, 329 Ill. 410.
Iowa.—Huxley v. Liess, 285 N.W. 216, 226 Iowa 819—Mathers v. Sewell, 186 N.W. 636, 193 Iowa 35.
Ky.—Williams v. Waddle, 148 S.W.2d 298, 285 Ky. 416—Preston v. Vanhoose, 116 S.W. 279.
Md.—Quillen v. Bell, 149 A. 462, 158 Md. 677.
Mass.—Reidy v. Kennedy, 124 N.E. 289, 233 Mass. 514.
Mich.—Bartkowiak v. Bartkowiak, 283 N.W. 49, 286 Mich. 623.
Minn.—Russell v. Roach, 217 N.W. 115, 173 Minn. 314—Crispo v. Conboy, 190 N.W. 541, 153 Minn. 343.
N.H.—Smart v. Huckins, 134 A. 520, 82 N.H. 342.
N.Y.—Purdy v. Towse, 291 N.Y.S. 237, 249 App.Div. 688.
Pa.—Jarvis v. Bell, 146 A. 153, 296 Pa. 568—In re Kaufmann's Estate, 127 A. 133, 281 Pa. 519.
Philippine.—City of Manila v. Del Rosario, 5 Philippine 227.
Tex.—Simonds v. Stanolind Oil & Gas Co., 114 S.W.2d 226, 134 Tex. 332, reversing 103 S.W.2d 784, and rehearing denied 136 S.W.2d 207, 134 Tex. 332—Kincheloe v. Kincheloe, Civ.App., 152 S.W.2d 851—Wise v. Haynes, Civ.App., 103 S.W.2d 477—Coleman v. Klein, Civ.App., 97 S.W. 2d 265, error dismissed—Phillips v. Anderson, Civ.App., 93 S.W.2d 171—Hardin v. Hardin, Civ.App., 66 S. W.2d 362—Hooks v. Neill, Civ.App., 21 S.W.2d 532, error refused—Stewart v. Miller, Civ.App., 271 S.W. 311.
Wash.—Julien v. Herren, 271 P. 891, 149 Wash. 573.
W.Va.—Reed v. Gunter, 133 S.E. 123, 101 W.Va. 514.
Wis.—Falk v. Devendorf, 177 N.W. 894, 172 Wis. 10.
22 C.J. p 357 note 98—51 C.J. p 251 note 43.

Declarations after transfer of equitable title

Declarations by the owner of the fee as to debts secured by mortgage thereon do not bind, and are not evidence against, purchasers claiming under an agreement which had theretofore vested the equitable title in them.—Keese v. Beardsley, 213 P. 500, 190 Cal. 465, 26 A.L.R. 1538.

26. Cal.—City of Manhattan Beach v. Cortelyou, 76 P.2d 483, 10 Cal. 2d 653—Rocha v. Rocha, 240 P. 1010, 197 Cal. 396—Belser v. American Trust Co., 13 P.2d 951, 125 Cal.App. 344.
Iowa.—Pickworth v. Whitford, 293 N.W. 47—Huxley v. Liess, 285 N. W. 216, 226 Iowa 819—Shepherd v. Delaney, 181 N.W. 753, 191 Iowa 138.
Mich.—Kovich v. Church & Church, 255 N.W. 421, 267 Mich. 640.
Or.—Lytle v. Hulen, 275 P. 45, 128 Or. 483, 114 A.L.R. 587.
Tex.—Johnson v. Lagow, Civ.App., 6 S.W.2d 383, affirmed, Com.App., 14 S.W.2d 818.

27. Mass.—Warren v. Carey, 12 N.E. 999, 145 Mass. 78.

28. Ky.—May v. Jones, 4 Litt. 21.

29. Mass.—Hayden v. Stone, 121 Mass. 413.

erty has been removed from the possession of declarant by operation of law.[30]

In some situations, however, the rule is considered inapplicable and subsequent declarations of a grantor are held admissible,[31] as where the declarations do not affect[32] or impeach[33] the title or interest of the grantee, but, instead, tend to sustain the deed,[34] or where the declarations were made in the presence of the grantee and were acquiesced in or adopted by him.[35]

Persons claiming under deeds of common grantor. Where persons claim under successive deeds of a common grantor, his relevant declarations affect grantees taking under conveyances subsequent thereto, but are inadmissible against those who acquired interests prior to that time.[36]

§ 326. Mortgagors, Donors, and the Like

The admissions of a mortgagor, donor, or lienholder of real property, made while declarant held title to, or an interest in, the property, are admissible against their privies; and while the admissions of a landlord may be competent against the tenant, the tenant's admissions are inadmissible as against the landlord.

Declarations of a mortgagor of real property are competent as against the mortgagee, so far as they affect the estate conveyed,[37] unless they were made after the execution of the mortgage.[38] The same principle applies in the case of other liens on real property.[39]

Donors. Admissions of a donor of real property are competent to affect the title or interest of the donee,[40] unless they were made subsequent to the consummation of the gift.[41]

Lienholders. Admissions made by one holding a lien on real property are competent against others whose title is derived through such lien,[42] unless made after declarant's interest in the property had terminated.[43]

Landlord and tenant. Declarations of a landlord in relation to the estate leased are usually competent against his tenant,[44] but declarations of a tenant cannot be received as admissions as against the landlord.[45]

§ 327. Deceased Owners

Under some circumstances the admissions of a deceased owner of real property are admissible against his successors in interest or persons claiming under him or relying on his title.

30. Mo.—Benshaw v. The Pawnee, 19 Mo. 532.

31. **Summary of situations**
Declarations admissible as part of the res gestæ as exceptions to the general rule that declarations by grantor subsequent to conveyance disparaging grantee's title are inadmissible are: First, where evidence first establishes a continuing conspiracy to defraud between grantor and grantee; second, where the declarations are made in grantee's presence and are not dissented from by him; and, third, where grantor remains in possession after the transfer.—Ollason v. Glasscock, 224 P. 284, 26 Ariz. 193.

Transfer of title in issue
When a grantor has parted with title to property, his acts and declarations in disparagement thereof, made in the absence of the grantee, are inadmissible, but whenever in a particular action the issue itself is whether grantor has parted with title, his subsequent acts and declarations are admissible as bearing on the question of delivery.—Barcroft v. Livacich, 96 P.2d 951, 35 Cal.App.2d 710.

32. Kan.—Martin v. Shumway, 132 P. 993, 89 Kan. 892.

33. Tex.—Hall v. Nunn Electric Co., Civ.App., 214 S.W. 452.

34. Cal.—Cohn v. Cohn, 20 P.2d 61, 130 Cal.App. 349.

35. Ariz.—Ollason v. Glasscock, 224 P. 284, 26 Ariz. 193.
Tex.—Wise v. Haynes, Civ.App., 103 S.W.2d 477.

36. Conn.—Lockwood v. Lockwood, 14 A. 293, 56 Conn. 106.
22 C.J. p 358 note 4.

37. Mass.—Flagg v. Mason, 6 N.E. 702, 141 Mass. 64.
22 C.J. p 358 note 5.

38. Cal.—Overton v. Harband, 44 P. 2d 484, 6 Cal.App.2d 455.
Tex.—Hardin v. Hardin, Civ.App., 66 S.W.2d 362.
22 C.J. p 358 note 6.

Admissibility for other purpose
Admission is not binding on mortgagee, but nevertheless, may be admissible in evidence to prove a certain fact in issue.—Susquehanna Trust & Safe Deposit Co. v. United Telephone & Telegraph Co., C.C.A.Pa., 6 F.2d 179.

Declarations not admissible against assignee of mortgagee
Pa.—Brighenti v. Steiner, 113 A. 690, 270 Pa. 532.

39. Iowa.—Severson v. Gramm, 100 N.W. 862, 124 Iowa 729.
Tex.—Howardy v. McKenzie, 54 Tex. 171.

Vendor's lien
An admission against interest made by the holder of the equity of redemption subject to a vendor's lien is not binding on the assignee of vendor's lien notes whose rights are already fixed.—Duke v. Walker, Tex. Civ.App., 17 S.W.2d 93.

40. Minn.—Hayes v. Hayes, 148 N. W. 125, 126 Minn. 389.
22 C.J. p 358 note 12.

41. Ark.—Wootton v. Keaton, 272 S. W. 869, 168 Ark. 981.
Ill.—Whipple v. Carrico, 137 N.E. 84, 305 Ill. 164.
22 C.J. p 358 note 13.

42. Minn.—Anderson v. Lee, 76 N. W. 24, 73 Minn. 397.
22 C.J. p 358 note 8.

43. S.C.—Gowdy v. Gowdy, 65 S.E. 385, 83 S.C. 349.

44. Tex.—Alma Oil Co. v. Shepperd, Civ.App., 116 S.W.2d 495, error dismissed.
22 C.J. p 358 note 10.

Admissions of part of owners
In an action for possession of land, which was leased to plaintiffs after defendants' failure to drill certain oil wells as prescribed in the lease to them, admissions made by some of the owners were inadmissible, where the suit was brought to recover the entire tract, the defense was predicated on the right to retain the entire tract, and the case was tried on the theory of entire claims to all interests in the lands.—Wally v. Jones, 119 A. 75, 275 Pa. 250.

45. Tex.—Carter v. Townsend, Civ. App., 139 S.W.2d 641, error dismissed, judgment correct.
22 C.J. p 358 note 11.

Relevant[46] admissions as to matters of fact,[47] in disparagement of his title or against his interest,[48] made by a deceased owner of real estate while he was actually in possession and claiming ownership,[49] or after the execution of a deed, but in the presence of the grantee,[50] are competent against his successors in interest and all persons claiming under him or relying on his title,[51] such as his grantees,[52] devisees,[53] heirs at law,[54] or his executors or administrators in any proceedings in which they rely on his title.[55] Declarations of a deceased grantor made after the execution of the deed are admissible on the question of delivery, where delivery is a controverted matter and the other evidence bearing thereon is inconclusive or gives rise to conflicting inferences.[56]

Sometimes, however, the declarations of a deceased owner or alleged owner of real property are held inadmissible,[57] as where they are not of such nature as to constitute admissions against interest,[58] or are too general and indefinite,[59] or where they were made after a conveyance of the land in question by decedent[60] and not in the presence of the grantee,[61] or when declarant did not have either possession or legal title.[62] According to some authorities, the declarations of a deceased former owner, while admissible to show the character of his possession,[63] are not competent on the question of title.[64]

§ 328. Husband and Wife; Dower Interest

The declarations of a deceased husband ordinarily are not competent against a tenant in dower.

It has been considered by several courts that a tenant in dower does not claim under her husband

46. N.Y.—Russell v. Amlot, 116 N.Y.S 1080, 132 App.Div. 584.
22 C.J. p 359 note 14.

47. Ark.—Norden v. Martin, 149 S.W 2d 550.
22 C.J. p 359 note 15.

48. Ark.—Norden v. Martin, supra.
Ga.—Miller v. Everett, 14 S.E.2d 449.
La.—Commercial Trust & Savings Bank v. Thorengren, App., 122 So. 92.
Mo.—Stoff v. Schuetze, 240 S.W. 139, 293 Mo. 635.
Mont.—Laundreville v. Mero, 281 P. 749, 86 Mont. 43, 69 A.L.R. 416.
Or.—Schramm v. Burkhart, 2 P.2d 14, 137 Or. 208—Holman v. Lutz, 282 P. 241, 132 Or. 185, mandate denied 284 P. 825, 132 Or. 185.
Utah.—Chamberlain v. Larsen, 29 P. 2d 355, 83 Utah 420.
Wash.—In re Hart's Estate, 271 P. 886, 149 Wash. 600.

49. Ark.—Norden v. Martin, 149 S.W.2d 550.
Colo.—Wilson v. Birt, 235 P. 563, 77 Colo. 206.
N.Y.—Staley v. Nellis, 177 N.Y.S. 112, 188 App Div. 325.

50. Cal.—Rodriguez v. Rodriguez, 231 P. 375, 69 Cal.App. 399.
Mo.—Hughes v. Renshaw, 282 S.W. 1014, 314 Mo. 95.

51. Ark.—Norden v. Martin, 149 S.W.2d 550.
Cal.—Bardeen v. Commander Oil Co., 104 P.2d 875, 40 Cal.App.2d 341.
Ky.—Haralambo's Ex'r v. Christopher, 21 S.W.2d 983, 231 Ky. 550.
Mo.—Stoff v. Schuetze, 240 S.W. 139, 293 Mo. 635.
Mont.—Gilcrest v. Bowen, 24 P.2d 141, 95 Mont. 44.
N.Y.—Staley v. Nellis, 177 N.Y.S. 112, 188 App.Div. 325.
Tex.—Peterson v. Martin, Civ.App., 69 S.W.2d 484, error dismissed—Dancy v. Peyton, Civ.App., 282 S.W. 819, error dismissed.
Vt.—Capital Garage Co. v. Powell, 118 A. 524, 96 Vt. 145.
Va.—Camp Mfg. Co. v. Green, 106 S.E. 394, 129 Va. 360.
Declarations of deceased husband see infra § 328.

52. Cal.—Rodriguez v. Rodriguez, 231 P. 375, 69 Cal.App. 399.
Colo.—Wilson v. Birt, 235 P. 563, 77 Colo. 206.

53. Tex.—Brito v. Slack, Civ.App., 25 S.W.2d 881.
22 C.J. p 359 note 17.

54. Iowa.—Shepherd v Delaney, 181 N.W. 753, 191 Iowa 138.
Ky.—Robinson v. Eastern Gulf Oil Co., 244 S.W. 914, 196 Ky. 385.
Mass.—Boston & N. St. Ry. Co. v. Goodell, 124 N.E. 260, 233 Mass. 428.
Or.—Moore v. Moore, 188 P. 696, 96 Or. 134.
Tex.—Edwards v. Edwards, Civ.App., 52 S.W.2d 657, error refused—Brito v. Slack, Civ.App., 25 S.W.2d 881.
Vt.—In re Campbell's Will, 147 A. 687, 102 Vt. 294.
22 C.J. p 359 note 16.

Forced heirs

Husband's admission that property purchased in name of wife was her paraphernal property is not binding on his forced heirs.—Commercial Trust & Savings Bank v. Thorengren, La.App., 122 So. 92.

55. Pa.—In re Cridge's Estate, 137 A. 455, 289 Pa. 331.
22 C.J. p 359 note 18.

56. Cal.—Shaver v. Canfield, 70 P.2d 507, 21 Cal.App.2d 734.
Kan.—Stanley v. Martin, 22 P.2d 951, 137 Kan. 894.
N.M.—Schultz v. Young, 24 P.2d 276, 37 N.M. 427.

57. Conn.—Bowne v. Ide, 147 A. 4, 109 Conn. 307, 66 A.L.R. 1036.
Ga.—Daniels v. Avery, 145 S.E. 45. 167 Ga. 54.
Ill.—Chicago Title & Trust Co. v. Friedland, 136 N.E. 720, 304 Ill. 248.
Kan.—Robertson v. Wangler, 190 P. 788, 107 Kan. 45.
Minn.—Merchants' & Farmers' State Bank of Grove City v. Olson, 250 N.W. 366, 189 Minn. 528, 89 A.L.R. 1289—Reek v. Reek, 239 N.W. 599, 184 Minn. 532.
Mont.—Wilson v. Davis, 103 P.2d 149, 110 Mont. 356.
Tex.—Hughes v. Freiley, Civ.App., 1 S.W.2d 459—Forrest v. Coppard, Civ.App., 300 S.W. 959.

58. Tex.—Hays v. Dumraese, Civ. App., 153 S.W.2d 225.

59. Ark.—Knight v. Rogers, 151 S.W.2d 669.

60. Ind.—Kemp v. Kemp, 154 N.E. 505, 92 Ind.App. 268.
Iowa.—Shepherd v. Delaney, 181 N.W. 753, 191 Iowa 138.
Mont.—Wilson v. Davis, 103 P.2d 149, 110 Mont. 356.

Requirements of admissibility

Declarations of intestate donor subsequent to transfer are inadmissible, unless part of res gestæ or against interest of donor, as affecting advancements.—Edwards v. Livesay, 261 S.W. 839, 203 Ky. 53.

61. Cal.—Taylor v. Bunnell, 247 P. 240, 77 Cal.App. 525.
Ill.—Gregory v. Gregory, 175 N.E. 804, 343 Ill. 630.

62. Mo.—Gaugh v. Gaugh, 11 S.W. 2d 729, 321 Mo. 414, followed in Seehorn v. Gaugh, 11 S.W.2d 750, 321 Mo. 456.

63. Me.—Shaw v. McKenzie, 160 A. 911, 131 Me. 248.
19 C.J. p 1163 note 3.

64. Me.—Shaw v. McKenzie, supra.
19 C.J. p 1163 note 4.

in such a sense that his declarations are competent against her by reason of privity,[65] although the contrary view has also been asserted.[66]

§ 329. Personal Property

Statements of a former owner of personal property relative to his title have been held admissible against persons claiming under him, unless they were made after he had parted with title.

It is generally held that a relevant[67] statement by the owner of chattels, regarding or affecting his title, is admissible against parties claiming under him,[68] although there is authority for the contrary view.[69] Such declarations cannot affect one who claims under a title adverse or paramount to that of declarant.[70]

Statements after transfer. Statements of a former owner of personal property, made after he has parted with his title, are not admissible in evidence either against the immediate transferee of declarant[71] or against a subsequent owner,[72] unless the person against whom the statement is sought to be used has acquiesced therein.[73]

§ 330. Sellers

The admissions of a seller of personal property are admissible against the buyer where they were made before the sale, but ordinarily are not admissible where they were made after the sale.

The admissions of a seller of personal property in derogation of his title are admissible against the buyer where they were made before the sale;[74] but where they were made after the sale, they are not available against successors in title or to defeat the title of the buyer,[75] unless the buyer acquiesced therein,[76] or unless, as is considered infra § 341, there is an issue as to the fraudulent character of the sale in respect of creditors and the circumstances are such as to bring the case within an exception to the general rule.

§ 331. Mortgagors and Pledgors

Declarations of a mortgagor of chattels, made before the execution of the mortgage, may be admissible against the mortgagee or a purchaser at a foreclosure sale, but declarations of a mortgagor or pledgor made after the execution of the mortgage or pledge are not admissible against the mortgagee or pledgee.

Declarations of a mortgagor of chattels against his title, made before execution of the mortgage, are usually held admissible against the mortgagee,[77] or one who purchased at a foreclosure sale under the mortgage,[78] although the contrary view has some support.[79]

On the other hand, it is generally held that declarations of a mortgagor of personalty made after the execution of the mortgage cannot affect the mortgagee,[80] or one who claims through the mortgage under foreclosure;[81] but it has been held that declarations made by the mortgagor after the execution of the mortgage and while he was in possession of the property are admissible against a commission agent who, although not a purchaser and, strictly speaking, not a privy, bases his right to dispose of the property on the title of the mortgagor and who bears a relation to the mortgagor as close as that of a successor in title.[82]

Pledgor. Declarations of a pledgor made subse-

65. S.C.—Dowling v. De Witt, 81 S. E. 173, 96 S.C. 435.
22 C.J. p 359 note 19.

66. N.Y.—Van Duyne v. Thayre, 14 Wend. 233.

67. Tex.—O'Brien v. Hilburn, 22 Tex. 616.
W.Va.—Wustland v. Potterfield, 9 W.Va. 438.

68. U.S.—British Acoustic Films, Limited v. Electrical Research Products, C.C.A.Del., 113 F.2d 263, affirming, D.C., 29 F.Supp. 531.
22 C.J. p 359 note 23.
Declaration against interest by person in possession
Cal.—Standard Dredging Co. v. Title Insurance & Trust Co., 273 P. 871, 96 Cal.App. 93.
Mo.—First Nat. Bank of Silverton, Tex., v. National Live Stock Commission Co., App., 227 S.W. 640.

69. U.S.—Dodge v. Freedman's Savings & Trust Co., D.C., 93 U.S. 379, 23 L.Ed. 920.
22 C.J. p 360 note 24.

70. Ga.—Oliver v. Persons, 30 Ga. 391, 76 Am.D. 657.
22 C.J. p 360 note 25.

71. U.S.—Andrew Jergens Co. v. Woodbury, Inc., D.C.Del., 273 F. 952, affirmed, C.C.A., 279 F. 1016, certiorari denied 43 S.Ct. 92, 260 U.S. 728, 67 L.Ed. 484.
Cal.—Schooler v. Williamson, 221 P. 195, 192 Cal. 472.
22 C.J. p 360 note 26.
Admissions of sellers of personalty see infra § 330.

72. Mo.—Western Auction & Storage Co. v. Shore, App., 179 S.W. 769.
N.Y.—Woodhouse v. Jones, 5 N.Y. Leg.Obs. 20.

73. Iowa.—Neeb v. McMillan, 60 N. W. 612, 92 Iowa 200.
22 C.J. p 360 note 28.

74. Tex.—Texas Pipe Line Co. v. Cozart, Civ.App., 38 S.W.2d 903, error dismissed.

75. Ill.—Cook v. Korshak, 134 N.E. 49, 301 Ill. 603, reversing 221 Ill. App. 650.
Mich.—Reichel v. Schneider & Brown Lumber Co., 196 N.W. 614, 226 Mich. 24.
Statements by former owner after transfer see supra § 329.

76. Wash.—Harris v. Northwest Motor Co., 199 P. 992, 116 Wash. 412.

77. Vt.—Johnson v. Tuttle, 187 A. 515, 108 Vt. 291, 106 A.L.R. 1291.
22 C.J. p 360 note 29.

78. Ala.—Shaw v. Cleveland, 59 So. 534, 5 Ala.App. 333.

79. N.Y.—Dwelly v. Van Houghton, 4 N.Y.Leg.Obs. 101.

80. Tex.—Howard v. Franklin Ins. Co., Civ.App., 226 S.W. 447.
Vt.—Johnson v. Tuttle, 187 A. 515, 108 Vt. 291, 106 A.L.R. 1291.
22 C.J. p 360 note 32.

81. Okl.—Enid First Nat. Bank v. Yoeman, 90 P. 412, 17 Okl. 613.

82. Mo.—First Nat. Bank of Silverton, Tex., v. National Live Stock Commission Co., App., 227 S. W. 640.

quently to the execution of the pledge are not admissible against the pledgee.[83]

§ 332. Mortgagees

The declarations of a mortgagee of personalty have been considered to be competent against persons subsequently claiming under him.

Declarations of a mortgagee of personalty, made while holding his securities have been considered to be competent against those subsequently claiming under him,[84] although the contrary view has been asserted.[85]

§ 333. Assignors

a. In general
b. Assignors of negotiable instruments

a. In General

While there is some contrary authority, generally admissions of an assignor, including an assignor for the benefit of creditors, are competent against the assignee and persons claiming under him where they were made before, but not where they were made after, the assignment.

While there is authority for rejecting such statements although they were made before declarant parted with his title,[86] the generally accepted view is that declarations of the assignor of a chose in action, which amount to admissions so far as he is concerned, are competent against the assignee and persons claiming under him.[87] This is true regardless of the nature of the claim or instrument assigned,[88] unless, as shown in subdivision b of this section, it is a negotiable instrument transferred before maturity, for value, to a person without notice of the subject matter of the admission. However, to be admissible against the assignee, such admissions or declarations must have been made at a time when declarant had or owned an interest in the claim or property,[89] and this ordinarily means that they must have been made before the assignment.[90]

Declarations after transfer. Declarations of an assignor made after the assignment and notice thereof to the debtor are not admissible against the assignee or those claiming under him,[91] provided the assignment was made in good faith.[92] The application of the rule is not affected by the fact that the action is brought by the assignee in the name of the assignor.[93]

Insolvency or bankruptcy. Although a contrary view has been asserted,[94] admissions of an assignor for the benefit of creditors or of one who takes advantage of a state or national law for the relief of insolvent debtors are, when made before, or in, the assignment, usually held competent evidence against the assignee or trustee.[95] The rule does not apply to statements of a bankrupt which are self-serving and not admissions against interest.[96]

Declarations made subsequent to the assignment are usually held not competent to affect the rights

83. Ky.—Fuqua v. Bogard, 62 S.W. 480, 22 Ky.L. 1910.

84. Neb.—Farmers' L. & T. Co. v. Montgomery, 46 N.W. 214, 30 Neb. 33.
22 C.J. p 360 note 35.

85. N.Y.—Merkle v. Beidleman, 58 N.E. 757, 165 N.Y. 21.

86. N.Y.—Clark v. Rowell, 298 N.Y.S. 232, 163 Misc. 777.
22 C.J. p 361 note 38.

87. Cal.—Riedy v. Bidwell, 269 P. 682, 93 Cal.App. 202.
Iowa.—Lake v. Moots, 244 N.W. 693, 695, 215 Iowa 126, quoting Corpus Juris.
N.C.—Royal Ins. Co. v. Atlantic Coast Line R. Co., 143 S.E. 516, 195 N.C. 693.
Okl.—Hemisphere Oil & Gas Co. v. Oil Well Supply Co., 230 P. 245, 104 Okl. 83.
Vt.—Johnson v. Tuttle, 187 A. 515, 108 Vt. 291, 106 A.L.R. 1291.
Wis.—Gloede v. Socha, 226 N.W. 950, 199 Wis. 503.
22 C.J. p 361 note 37.

88. Iowa.—Lake v. Moots, 244 N.W. 693, 215 Iowa 126.

89. Iowa.—Lake v. Moots, supra.

90. Iowa.—Lake v. Moots, supra.

Burden of showing time of declaration

A party who offers the declaration of an assignor as against an assignee or subsequent holder has the burden of showing affirmatively that the statement was made before the assignment.
Ill.—Oliver v. McDowell, 100 Ill.App. 45.
Va.—Wilcox v. Pearman, 9 Leigh 144, 36 Va. 144.

91. Cal.—Chard v. O'Connell, 62 P. 2d 369, 7 Cal.2d 663.
Ill.—Illman v. Kruse, 134 N.E. 107, 301 Ill. 408—Merchants' State Bank of Centralia v. Chicago, B. & Q. R. Co., 245 Ill.App. 211.
Minn.—True v. Citizens' Fund Mut. Fire Ins. Co., 246 N.W. 474, 187 Minn. 636.
Or.—Security Savings & Trust Co. v. Portland Flour Mills Co., 261 P. 432, 124 Or. 276.
Pa.—Rines v. Witman, 145 A. 808, 296 Pa. 181.
S.C.—Davis v. W. H. Crozier & Co., 113 S.E. 377, 121 S.C. 99.
22 C.J. p 361 notes 39, 40.

92. Cal.—Banning v. Marleau, 65 P. 964, 133 Cal. 485.
22 C.J. p 361 note 41.

93. U.S.—Palmer v. Cassin, D.C., 18 F.Cas.No.10,687, 2 Cranch C C. 66.
22 C.J. p 361 note 43.

94. N.Y.—Truax v. Slater, 86 N.Y. 630.
22 C.J. p 361 note 45.

95. Cal.—Kendall v. San Pedro Lumber Co., 276 P. 1042, 98 Cal. App. 242.
Ill.—Sturdyvin v. Ward, 168 N.E. 666, 336 Ill. 594.
22 C.J. p 361 note 44.

Admissions in schedules

(1) It has been held that bankrupt's admissions in schedules may be used against trustee, to prove falsity of statement made before bankruptcy, on faith of which goods were sold bankrupt.—In re Weissman, C.C.A.Conn., 19 F.2d 769, 53 A. L.R. 644.

(2) However, it has also been held that ex parte statement in schedules, without right of cross-examination, that bankrupts assumed note, is not binding on trustee or other creditors. —In re Haynsworth, D.C.S.C, 34 F. 2d 334, affirmed in part and reversed in part on other grounds, C.C.A., Jones v. Kendall, 34 F.2d 344.

96. U.S.—In re Smolka, D.C.Mich., 58 F.2d 403.

of those claiming under it,[97] although exceptions to this rule have been recognized where the declarations deal with fraud[98] or ownership;[99] and the rule has been held inapplicable to subsequent testimony of the bankrupt or assignor regarding a set-off.[1]

b. Assignors of Negotiable Instruments

The competency of admissions against interest made by a former owner of negotiable paper varies according to the time of the admission, the time of the transfer, and other factors; and there is some conflict in the decisions relating to the competency of such admissions.

Admissions against interest made by the owner of a promissory note before he parted with its title or possession, and when he alone was interested, may be admissible in evidence against a subsequent holder,[2] or at least they may be admissible in certain situations, as explained subsequently in this section; but there is some authority for the view that the owner of negotiable paper cannot be affected by declarations of a former owner, although made before declarant had parted with his title.[3]

Admissions of a holder of a negotiable instrument, tending to show the existence of equitable defenses thereto, cannot be received as against a subsequent holder in due course.[4] However, admissions relating to matters which would be available as defenses in an action by a holder in due course have been held competent as against a transferee of the declarant,[5] although there is also authority for the contrary view.[6] Admissions of a prior owner are competent against a holder without consideration,[7] or one who acquired notice of the fact to which the admission relates.[8]

It is usually held that admissions made by the holder of a negotiable instrument before transfer thereof are competent evidence against one to whom it is transferred after maturity,[9] although there is authority for the view that such admissions are not competent.[10] Acts of the assignor after maturity, indicating ownership of the notes, or his statements with relation thereto, considered as acts, are admissible on an issue as to whether the notes were transferred before maturity.[11]

Admissions after transfer. Admissions or declarations made by a former holder of a negotiable instrument after it has been transferred by him are incompetent as against a subsequent holder,[12] except as they may be admissible on the issue as to whether one who claims to be the owner of the instrument is a bona fide holder.[13] It is incumbent on the person seeking to use an admission of a former holder to show that it was made before a transfer;[14] but it is not necessary that this should be shown by direct evidence.[15]

§ 334. Deceased Owners

A statement of a decedent in respect of personal property, whether a chattel or a chose in action, which was an admission against his interest may be admissible against his executor or administrator or other person claiming under him.

A statement of a decedent, which was a declaration or admission against his interest and which would have been admissible if offered against him, is admissible against his executor or administrator or other person claiming under him.[16] Admissions of a deceased owner of personal property in dis-

97. N.Y.—Burke v. National Liberty Ins. Co. of America, 209 N.Y.S. 608, 212 App.Div. 738.
22 C.J. p 362 note 46.

98. Mich.—Koch v. Lyon, 46 N.W. 779, 82 Mich. 513.
22 C.J. p 362 note 47 [b].

99. U.S.—In re Thompson, D.C.N.J., 197 F. 681.
22 C.J. p 362 note 47 [a].

1. Kan.—Home Hardware & Implement Co. v. Denniston, 18 P.2d 135, 136 Kan. 838.

2. Ill.—Hanchett v. Kimbark, 7 N.E. 491, 118 Ill. 121.
22 C.J. p 236 note 46.

Statements showing fraud in inception of note
Where a note was given in part payment of a garage business, in transferee's action thereon evidence of statements of the payee at the time of the garage sale in reference to indebtedness against his business is admissible to show fraud in the note's inception.—Smith v. Word, Tex.Civ.App., 248 S.W. 734.

3. U.S.—Dodge v. Freedman's Savings & Trust Co., D.C., 93 U.S. 379, 23 L.Ed. 920.
22 C.J. p 236 note 48.

4. Neb.—Piper v. Neylon, 116 N.W. 159, 81 Neb. 481.
22 C.J. p 362 note 48.

5. Ill.—Williams v. Judy, 8 Ill. 282, 44 Am.D. 699.
22 C.J. p 362 note 49.

6. U.S.—Dodge v. Freedman's Savings & Trust Co., D.C., 93 U.S. 379, 23 L.Ed. 920.
22 C.J. p 362 note 50.

7. Mo.—Dolan v. Kehr, 9 Mo.App. 351.

8. Neb.—Benton v. Sikyta, 122 N.W. 61, 84 Neb. 808, 24 L.R.A.,N.S., 1057.
22 C.J. p 362 note 52.

9. Mass.—Sears v. Moore, 50 N.E. 1027, 171 Mass. 514.
22 C.J. p 236 note 47, p 362 note 53.

10. U.S.—Dodge v. Freedman's Savings & Trust Co., D.C., 93 U.S. 379, 23 L.Ed. 920.
22 C.J. p 362 note 54.

11. U.S.—Bondholders Securities Corporation v. Ayling, D.C.Conn., 22 F.Supp. 847.
S.D.—Rumely Co. v. Anderson, 150 N.W. 939, 35 S.D. 114.

12. N.Y.—Merchants' Nat. Bank of Plattsburgh v. R. Prescott & Son, 249 N.Y.S. 6, 139 Misc. 603, affirmed 257 N.Y.S. 900, 235 App.Div. 878, reargument denied 258 N.Y.S. 1016, 236 App.Div. 764.
22 C.J. p 236 note 49, p 362 note 56.

13. Tex.—Morris v. Brown, 85 S.W. 1015, 38 Tex.Civ.App. 266.

14. N.C.—Wooten v. Outlaw, 18 S.E. 252, 113 N.C. 281.
22 C.J. p 363 note 57.

15. Ala.—Sally v. Gooden, 5 Ala. 78.

16. Conn.—Carroll v. Arnold, 141 A. 657, 107 Conn. 535.
Ill.—Patten v. Knowe, 188 N.E. 173,

paragement of his title, to whomsoever made,[17] are competent against his personal representatives and next of kin or legatees.[18] Admissions of a decedent may also be received against his personal representatives to show the contractual or other surviving liabilities of decedent to others,[19] or to affect his representatives in suits on claims due to the estate,[20] unless such admissions are too remote to possess any probative value.[21]

A statement of decedent is inadmissible as an admission where such statement does not constitute an admission[22] or is irrelevant.[23] A statement of decedent in respect of the title to property in which he has no interest and as to which he is a stranger cannot affect the title of another person and is inadmissible against such other person.[24]

In an action or proceeding brought or continued after the death of an injured person to recover damages or compensation for his injuries or death, a statement of decedent, which would have been admissible against him as an admission against interest in an action or proceeding by him to recover damages or compensation for personal injuries, has been held admissible in many,[25] although not in all,[26] jurisdictions.

Deceased donor. Statements of a decedent who was a donor or alleged donor are inadmissible against the alleged donee or to invalidate his title where they were made after the delivery or trans-

354 Ill. 156—Republic Iron & Steel Co. v. Industrial Commission, 134 N.E. 754, 302 Ill. 401.
Mo.—Robertson Bros. v. Garrison's Estate, App., 21 S.W.2d 202.
N.H.—Hurd v. Varney, 144 A. 266, 83 N.H. 467.

17. Kan.—Miller v. McDowell, 77 P. 101, 69 Kan. 453.
22 C.J. p 363 note 59.

18. Cal.—In re Smead's Estate, 28 P.2d 348, 219 Cal. 572.
Ga.—Ferrell v. Wight, 200 S.E. 271, 187 Ga. 360.
Mich.—Reese v. Collins, 242 N.W. 834, 259 Mich. 48.
Mo.—Graham v. Stroh, 117 S.W.2d 258, 342 Mo. 686.
N.H.—Knox v. Perkins, 163 A. 497, 86 N.H. 66.
N.C.—Jones v. Waldroup, 7 S.E.2d 366, 217 N.C. 178.
Or.—Schramm v. Burkhart, 2 P.2d 14, 137 Or. 208—Holman v. Lutz, 282 P. 241, 132 Or. 185, mandate denied 284 P. 825, 132 Or. 185.
Va.—Slater v. Slater, 98 S.E. 7, 124 Va. 370.
22 C.J. p 363 note 60.

19. Ga.—Hartley v. Hartley, 179 S.E. 245, 50 Ga.App. 848.
Ill.—Antrim v. Pfender, 13 N.E.2d 827, 294 Ill.App. 617—In re Mancini's Estate, 245 Ill.App. 547.
La.—Succession of Crawford, 134 So. 269, 16 La.App. 326.
Mass.—Worthen v. Burgess, 173 N.E. 530, 273 Mass. 437.
Mo.—Robertson Bros. v. Garrison's Estate, App., 21 S.W.2d 202—Guthrie v. Fields, App., 299 S.W. 141.
Neb.—In re Griffin's Estate, 190 N.W. 268, 109 Neb. 116.
N.H.—Hurd v. Varney, 144 A. 266, 83 N.H. 467.
Ohio.—Bry v. Miller, 179 N.E. 194, 40 Ohio App. 582.
Tex.—Roberson v. Hughes, Com.App., 231 S.W. 734, reversing Hughes v. Robinson, Civ.App., 214 S.W. 946—Averitt v. Warren, Civ.App., 125 S.W.2d 691.
Wash.—Loundry v. Lillie, 270 P. 1029, 149 Wash. 316.
Wis.—In re Linkman's Estate, 210 N.W. 705, 191 Wis. 353.
22 C.J. p 363 note 61.

Purpose of admission

Statements made by deceased father, not in son's presence, tending to show contract under which son was to receive farm for services rendered, are not admissible as part of oral contract, but merely to show one was made.—In re Engel's Estate, 200 N.W. 138, 228 Mich. 385.

20. Wash.—Mott v. McDonald, 265 P. 153, 147 Wash. 106.
Wis.—Breuer v. Arenz, 233 N.W. 76, 78, 202 Wis. 453, citing **Corpus Juris.**
22 C.J. p 363 note 62.

21. Mo.—Steltemeier v. Barrett, 91 S.W. 56, 115 Mo.App. 323.

22. Ga.—Gullatt v. Thompson, 196 S.E. 107, 57 Ga.App. 669.

23. Ga.—Shadburn Banking Co. v. Streetman, 179 S.E. 377, 180 Ga. 500, 99 A.L.R. 854.

24. Vt.—Ravine House Co. v. Bradstreet, 148 A. 481, 102 Vt. 370.

25. Ala.—Clark v. Farmer, 159 So. 47, 229 Ala. 596.
Ill.—Cuneo Press Co. v. Industrial Commission, 173 N.E. 470, 341 Ill. 569—Republic Iron & Steel Co. v. Industrial Commission, 134 N.E. 754, 302 Ill. 401.
Ky.—Reed v. Philpot's Adm'r, 31 S.W.2d 709, 235 Ky. 429.
N.J.—Brice v. Atlantic Coast Electric Ry. Co., 132 A. 253, 102 N.J. Law 288.
N.Y.—Kwiatkowski v. John Lowry, Inc., 11 N.E.2d 563, 276 N.Y. 126, 114 A.L.R. 916, reversing 298 N.Y.S. 485, 251 App.Div. 850.
Contra Kwiatkowski v. John Lowry, Inc., 290 N.Y.S. 627, 248 App.Div. 459.
Pa.—Hughes v. Delaware & Hudson Canal Co., 35 A. 190, 176 Pa. 254.
Va.—Virginia Electric & Power Co. v. Decatur, 3 S.E.2d 172, 4 S.E.2d 294, 173 Va. 153.
Wis.—Hoffman v. Labutzke, 298 N.W. 583, 238 Wis. 164.

In Massachusetts

(1) In action, begun by decedent and prosecuted by her administrator, against street railroad for injuries to deceased passenger on boarding street car, street car inspector, who testified to a talk with passenger at station after she had been assisted from the car, was properly allowed to testify that passenger did not in any form of words speak of a sudden or jerky start of the car.—Carson v. Boston El. Ry., 33 N.E.2d 701, 309 Mass. 32.

(2) In an action by an administrator on two causes of action, one for conscious suffering of deceased and one for death, an admission against interest of decedent is admissible on the counts for conscious suffering and, while it is not binding on the administrator or the next of kin on the counts for death, the next of kin not being in privity with, or claiming under, intestate, it may, under statute, be admissible on both claims as declarations of a deceased person, if the preliminary requirements of the statute have been satisfied.—Eldredge v. Barton, 122 N.E. 272, 232 Mass. 183.

26. N.C.—Holmes v. Wharton, 140 S.E. 93, 194 N.C. 470—Dowell v. City of Raleigh, 91 S.E. 849, 173 N.C. 197.

Admission as to lack of support

Where there is no privity between deceased and those for whose benefit an action is brought as to their substantive right to recover, admissions made by deceased prior to the accident which caused his death that he was not contributing to the support of anybody is inadmissible.—Murphy v. St. Louis, I. M. & S. R. Co., 122 S.W. 636, 92 Ark. 159.

fer[27] and in the absence of the alleged donee;[28] but statements of decedent that certain personal property belongs to a third person are admissible against a person claiming them by gift from the decedent where the statements were made before the consummation of any gift;[29] and statements of a decedent that he has made a gift of certain property are admissions tending to diminish his property and are admissible in behalf of the donee and persons claiming under him against persons, such as distributees or the administrator, claiming the property as part of the estate of decedent.[30]

§ 335. Donors

Statements made by a donor of personalty after the consummation of the gift are not admissible to disprove or invalidate the gift.

The declarations or admissions of a donor of personal property, made after the completion of the gift, are not admissible to disprove or invalidate the gift.[31] The admissions of a deceased donor of personal property are considered above in § 334.

§ 336. Declarations of Debtor as Affecting Creditor

Statements of a debtor in disparagement of his title to property, made while he is in possession, may be admissible against an attaching or execution creditor, but declarations of the debtor are inadmissible against a creditor who seeks to set aside a conveyance as fraudulent.

Statements of a debtor while he is in possession of real or personal property and in disparagement of his title thereto are competent against an attaching or execution creditor,[32] provided the statements were made prior to the time at which the specific rights of the creditor as against such property accrued.[33] However, when such a creditor seeks to set aside an alleged fraudulent conveyance, declarations of the debtor are not admissible against the creditors on behalf of the alleged fraudulent transferee.[34]

§ 337. Independent Relevancy

The admissibility of independently relevant statements, whether made by privies or other persons, is considered in §§ 239–264 supra.

3. Transferor, on Issue of Fraud as to Creditors

§ 338. As Affecting Declarant

When not too remote, statements of a transferor indicating an intent to defraud creditors are admissible against him on an issue of fraud as to creditors.

On an issue as to the fraudulent character of a sale or conveyance with respect to creditors, statements indicating the existence of a fraudulent intent are competent against declarant, whether made before[35] or after[36] the transfer, unless the court

27. N.J.—Dill v. Dill, 179 A. 370, 118 N.J.Eq. 374, affirmed 183 A. 172, 119 N.J.Eq. 467.
N.Y.—In re Landau's Estate, 298 N.Y.S. 150, 163 Misc. 894.
Declarations made after change of beneficiary of insurance policy
N.Y.—Virano v. Rodtz, 285 N.Y.S. 847, 247 App.Div. 766, affirmed 3 N.E.2d 882, 272 N.Y. 489.

28. Md.—Walkling v. Walkling, 159 A. 264, 162 Md. 188.

29. Vt.—Ravine House Co. v. Bradstreet, 148 A. 481, 102 Vt. 370.

30. Ark.—Aycock v. Bottoms, 144 S.W.2d 43.
Ill.—Chicago Title & Trust Co. v. Kirchner, 213 Ill.App. 289.
Iowa.—Flint v. Varney, 264 N.W. 277, 220 Iowa 1241.
N.Y.—In re Wiemann, 221 N.Y.S. 409, 220 App.Div. 276—In re Brown's Ex'r, 226 N.Y.S. 1, 130 Misc. 865, modified on other grounds In re Brown's Estate, 232 N.Y.S. 371, 225 App.Div. 759, modified on other grounds In re Brown's Will, 169 N.E. 612, 252 N.Y. 366.
N.D.—Perry v. Erdelt, 231 N.W. 888, 59 N.D. 741.
N.C.—Bynum v. Fidelity Bank of Durham, 12 S.E.2d 898, 901, 219 N.C. 109, quoting **Corpus Juris.**
Or.—Carpenter v. Carpenter, 56 P.2d 305, 153 Or. 584, 105 A.L.R. 386, modified on other grounds and rehearing denied 57 P.2d 1098, 153 Or. 584, 105 A.L.R. 386, rehearing denied and decree supplemented 58 P.2d 507, 153 Or. 584, 105 A.L.R. 386.
Pa.—In re Leadenham's Estate, 137 A. 247, 289 Pa. 216.
28 C.J. p 675 note 14, p 704 notes 11, 13.
In corroboration of other testimony
Mich.—Lerche v. Kishpaugh, 147 N.W. 499, 180 Mich. 617—Campbell v. Sech, 119 N.W. 922, 155 Mich. 634.

31. Ark.—Wootton v. Keaton, 272 S.W. 869, 168 Ark. 981.
Miss.—McClellan v. McCauley, 130 So. 145, 149, 158 Miss. 456, quoting **Corpus Juris.**
Mont.—Fender v. Foust, 265 P. 15, 82 Mont. 73.
22 C.J. p 363 note 65—28 C.J. p 675 note 20.

32. N.H.—Putnam v. Osgood, 52 N.H. 148.
22 C.J. p 367 note 96.

33. Ga.—James v. Taylor, 20 S.E. 309, 93 Ga. 275.
22 C.J. p 367 note 97.
Before creation of debt
A rule more stringent than that stated in the text is that, for admissions of a debtor to be admissible against his creditor, they must have been made before the debt of the creditor arose; after it arose, although the creditor may not have acquired a lien or other specific tangible right in the property, his relation as creditor protects him against the impairment of his remedy to collect his debt by admissions or declarations thereafter made.—First Nat. Bank v. Lartigue, 173 So. 21, 233 Ala. 670.

34. Ala.—Hooper v. Edwards, 18 Ala. 280.
Wash.—Sayward v. Numan, 32 P. 1022, 6 Wash. 87.

35. Ariz.—Ollason v. Glasscock, 224 P. 284, 26 Ariz. 193.
Ga.—Cutts v. Geiger, 169 S.E. 127, 176 Ga. 864.
N.Y.—Meyer v. Mayo, 187 N.Y.S. 346, 196 App.Div. 78.
Va.—Irby v. Gardner, 160 S.E. 81, 157 Va. 132.
22 C.J. p 364 note 80.

36. Cal.—Zeller v. Knapp, 26 P.2d 704, 135 Cal.App. 122.

deems them too remote to be relevant.[37]

§ 339. As Affecting Transferee

On an issue of fraud as to creditors, statements of the transferor are admissible against the transferee in some, but not in other, situations.

On an issue of fraud as to creditors, statements of the transferor may[38] or may not[39] be admissible against the transferee, depending primarily, see infra §§ 340, 341, on whether the statements were made before or after the transfer.

§ 340. Statements before Transfer

Declarations by the transferor in possession and before alienation are competent against the transferee to show fraud on the part of the declarant, but they may be rejected where there is no further evidence to show fraudulent intent on the part of the transferee.

Declarations of an owner of property in possession and before alienation are competent against his vendee to show fraud on the part of declarant.[40] However, such declarations alone are not sufficient to establish fraudulent intent on the part of the transferee,[41] and the court may properly reject them altogether, if no further evidence is forthcoming to show that fact.[42]

§ 341. Statements after Transfer

Subject to certain exceptions, as a general rule declarations of the transferor, made subsequent to the transfer, are inadmissible against the transferee on an issue of fraud on creditors.

As a general rule, declarations made by the transferor subsequent to the transfer of title and possession, and out of the presence and without the knowledge, of the transferee, are not admissible, on an issue as to fraud on creditors, to impeach the transfer or affect the title of the transferee.[43] However, it has been considered that where declarations of a transferor subsequent to the transfer are so intimately connected with other declarations made prior to the transfer as not to be readily separable therefrom, they may be admitted against the transferee.[44] Further, where a transferee ratifies or acquiesces in statements of his transferor, tending to indicate that the transfer was fraudulent as against creditors of the transferor, such statements are competent as against the transferee.[45]

Collusion independently shown. Where there is a design common to both transferor and transferee to defraud the creditors of the transferor, a species of agency is implied, and the declarations of either during the pendency of the common design and within its scope, whether made before or after the transfer and in or outside of judicial proceedings, are competent against the other.[46] The most usual application of this rule is to admit the declarations of the grantor or transferor, made subsequent to the transfer, against the grantee or transferee, where there is independent evidence of the collusion, conspiracy, common purpose or design, or participation by the grantee in the fraud.[47]

Conn.—Robinson v. Dobbins, 142 A. 572, 108 Conn. 58.
Ga.—Cutis v. Geiger, 169 S.E. 127, 176 Ga. 864.
Or.—Sitton v. Peyree, 241 P. 62, 117 Or. 107, rehearing denied 242 P. 1112, 117 Or. 107.
22 C.J. p 364 note 81.

37. Idaho.—Kelly v. Perrault, 48 P. 45, 5 Idaho 221.
Me.—Littlefield v. Getchell, 32 Me. 390.

38. La.—Bank of Baldwin v. Broussard, 120 So. 637, 10 La.App. 801, denying rehearing 119 So. 567, 10 La.App. 404.

39. Ky.—Gilbert v. Watts, Ritter & Co., 60 S.W.2d 142, 249 Ky. 27.
N.J.—Cartan v. Phelps, 105 A. 240, 89 N.J.Eq. 599, affirming, Ch., 108 A. 114.
Va.—Neff v. Edwards, 139 S.E. 291, 148 Va. 616.

40. N.Y.—Meyer v. Mayo, 187 N.Y.S. 346, 196 App.Div. 78.
22 C.J. p 365 note 83.

41. Or.—Beers v. Aylsworth, 69 P. 1025, 41 Or. 251.
22 C.J. p 365 note 84.
Conclusiveness and weight of admissions see infra §§ 379–382.

42. Colo.—Jefferson County Bank v. Hammel, 53 P. 286, 11 Colo.App. 337.
22 C.J. p 365 note 85.

43. Ga.—Cutis v. Geiger, 169 S.E. 127, 176 Ga. 864—Hollis v. Virginia-Carolina Chemical Co., 107 S.E. 554, 27 Ga.App. 103.
Idaho.—Buhl State Bank v. Glander, 56 P.2d 757, 56 Idaho 543.
Ill.—Third Nat. Bank v. Norris, 162 N.E. 829, 331 Ill. 230.
Mass.—Flannagan v. Keefe, 145 N.E. 42, 250 Mass. 118.
Okl.—General Explosives Co. v. Wilcox, 268 P. 266, 131 Okl. 190.
Or.—Sitton v. Peyree, 241 P. 62, 117 Or. 107, rehearing denied 242 P. 1112, 117 Or. 107.
Pa.—Jarvis v. Bell, 146 A. 153, 296 Pa. 568.
Tex.—Evans v. First Nat. Bank, Civ. App., 65 S.W.2d 366, error dismissed.
22 C.J. p 365 note 86.
Contra Zeller v. Knapp, 26 P.2d 704, 135 Cal.App. 122.

Admissibility against mortgagee

Testimony as to conversation with mortgagor in mortgagee's absence is inadmissible against mortgagee to show knowledge or notice on his part of fraud in conveyance to mortgagor. —Seybold v. Johnson, Tex.Civ.App., 11 S.W.2d 399, error dismissed.

44. Ky.—Smith v. Leforce, 14 Ky. L. 399.
Mass.—Holbrook v. Holbrook, 113 Mass. 74.

45. Ky.—Cogar v. Lancaster Nat. Bank, 152 S.W. 278, 151 Ky. 470.
Neb.—Bender v. Kingman, 87 N.W. 142, 62 Neb. 469.

46. Ala.—Cooke v. Wilbanks, 135 So. 435, 436, 223 Ala. 312, 83 A.L.R. 1441, citing **Corpus Juris.**
Conn.—Robinson v. Dobbins, 142 A. 572, 108 Conn. 58.
22 C.J. p 366 note 89.

47. Cal.—McGee v. Allen, 60 P.2d 1026, 7 Cal.2d 468.
Conn.—Robinson v. Dobbins, 142 A. 572, 108 Conn. 58.
Idaho.—Buhl State Bank v. Glander, 56 P.2d 757, 56 Idaho 543.
Me.—Consolidated Rendering Co. v. Martin, 145 A. 896, 899, 128 Me. 96, 64 A.L.R. 790, citing **Corpus Juris.**
Pa.—Singer v. Bugis, 87 Pa.Super. 426.
Tenn.—First Nat. Bank of Centreville v. Wilkins, 11 Tenn.App. 9.
Tex.—Johnson v. Lagow, Com.App.,

As a preliminary to the admission of such statements, the existence of a conspiracy or common design, or the transferee's knowledge of, or participation in, the fraud, must be independently and satisfactorily shown,[48] or there must be at least some slight preliminary proof of a conspiracy;[49] but a retention of possession by the transferor, beyond the time reasonably necessary to perfect a change of possession, sufficiently indicates the existence of a common design to defraud creditors to let in declarations of the transferor made subsequent to the transfer and while he remained in possession.[50] This inference is particularly strong in cases involving the transfer of personal property.[51] Where the fact of possession by the transferor at the time of the declaration is not affirmatively shown,[52] or where the circumstances of the case are such that this fact fails to give rise to the usual inference of conspiracy to defraud creditors,[53] the admissions of the transferor after the transfer cannot be received.

4. Agents and Other Representatives

§ 342. Authority to Represent Party in General

A party will be affected by the admission of another only where the declarant is expressly or impliedly authorized to represent and bind him.

A party will be affected by the admission of another where the person making the statement is expressly or impliedly authorized to represent and bind him as in the case of a relationship of agency or partnership.[54] On the other hand, in the absence of the existence of a relationship from which authority to act for another may be derived, the admission of one person is not binding on another.[55] Accordingly a party cannot put the declarations of his own agent in evidence since such declarations do not bind the other party in the absence of their knowledge and consent.[56]

14 S.W.2d 818, affirming, Civ.App., 6 S.W.2d 383.
22 C.J. p 366 note 90.

Prima facie case of conspiracy
Ark.—McKee v. Hendricks, 264 S.W. 825, 952, 165 Ark. 369.

Circumstantial evidence of grantee's passive assent to fraud
Kan.—Stanley v. Martin, 22 P.2d 951, 137 Kan. 894.

Assumption of fraud
The subsequent declarations of the grantor are admissible against the grantee where the transfer is presumptively fraudulent against creditors by reason of the consideration therefor being only nominal.—Hart, Schaffner & Marx v. Koch, 164 A. 369, 107 Pa.Super. 528.

48. Mont.—Dick v. King, 257 P. 1022, 80 Mont. 40.
Tenn.—First Nat. Bank of Centreville v. Wilkins, 11 Tenn.App. 9.
22 C.J. p 366 note 91.

49. Pa.—Jarvis v. Bell, 146 A. 153, 296 Pa. 568.

50. Tex.—Evans v. First Nat. Bank, Civ.App., 65 S.W.2d 366, error dismissed.
22 C.J. p 367 note 92.

51. Okl.—Evans v. Cooper, 54 P.2d 368, 176 Okl. 41—King Auto Service v. Hodges, 288 P. 483, 143 Okl. 260.
22 C.J. p 367 note 93.

52. Ind.—Kaczmarczyk v. Dolato, 133 N.E. 829, 191 Ind. 540.
22 C.J. p 367 note 94.

53. Mo.—Gordon v. Ritenour, 87 Mo. 54.
22 C.J. p 367 note 95.

54. Cal.—In re Gaines' Estate, 100 P. 2d 1055, 15 Cal.2d 255, superseding, App., 92 P.2d 646.
N.Y.—Remington Arms Co. v. Cotton, 180 N.Y.S. 486, 190 App.Div. 600.
22 C.J. p 320 note 14 [d]—51 C.J. p 251 note 42 [b].
"It is one of the cardinal principles of an admission that the party speaking must be in a position of authority to speak."—City of Stockton v. Vote, 244 P. 609, 620, 76 Cal.App. 369.

Representative relation held shown
(1) Adjuster of insurer, who appeared before compensation commissioner as the representative of defendants, employer and insurer, to obtain official sanction to a voluntary agreement of the parties in interest.—Riccio v. Montano, 105 A. 625, 93 Conn. 289.

(2) Audit and financial statement of insolvent corporation made by public accountant under direction of corporation's officers was admissible.—Brown v. Ball, 12 P.2d 28, 123 Cal.App. 758.

55. Conn.—Haugh v. Kirsch, 135 A. 568, 105 Conn. 429.
Ind.—Wilson v. Reynolds, 13 N.E.2d 218, 213 Ind. 436.
Iowa—Frame v. Olmsted, 187 N.W. 18, 193 Iowa 412.
Mass.—Waltham Watch & Clock Co. v. City of Waltham, 172 N.E. 579, 272 Mass. 396, 71 A.L.R. 960—Alden Bros. Co. v. Dunn, 162 N.E. 773, 264 Mass. 355—Lajoie v. Milliken, 136 N.E. 419, 242 Mass. 508.
Mo.—Reiling v. Russell, 134 S.W.2d 33, 345 Mo. 517—Kuehn v. Ritter, 233 S.W. 5.
N.J.—Dziadosc v. American Casualty Co., 176 A. 150, 114 N.J.Law 137, reversing 171 A. 137, 12 N.J.Misc. 205.
N.Y.—Muessling v. Leisner, 224 N.Y.S. 689, 221 App.Div. 524.
Or.—Johnson v. Underwood, 203 P. 879, 102 Or. 680.
Pa.—McKeage Machinery Co. v. Osborne & Sexton Machinery Co., 188 A. 543, 124 Pa.Super. 387.
R.I.—Princess Ring Co. v. Read, 192 A. 173, 58 R.I. 178.
Tex.—Connellee v. Oil Belt Pub. Co., Civ.App., 263 S.W. 633.
25 C.J. p 544 note 75.
Admissions by stranger generally see supra § 321.

Authority held not shown
(1) Declarations by drawee of draft as to reasons for nonpayment do not bind drawer since drawee is not drawer's agent.—Kardynal v. Grezezinski, 238 N.W. 213, 255 Mich. 421.

(2) Employer's declarations, after insured's death, that employment terminated before death was not binding on claimant under group policy.—Joiner v. Metropolitan Life Ins. Co., 151 S.E. 540, 40 Ga.App. 740.

(3) Automobile guest is not bound by host's admissions in action against third persons to recover for collision.
Cal.—Ohlson v. Frazier, 39 P.2d 429, 2 Cal.App.2d 708.
N.H.—Morris v. Boston & M. R. R., 160 A. 52, 85 N.H. 265—Fraser v. Berlin St. Ry., 146 A. 714, 84 N.H. 107.

56. Tex.—Townsend, Townsend & Co. v. South Plains Monument Co., Civ.App., 257 S.W. 648.

§ 343. Agents and Employees in General

The relevant admissions of an agent to another as to matters of fact may be admissible against the principal as primary evidence provided that they were made within the scope and in the course of his agency, pending the transaction to which they relate.

As it has been said to have been well stated in Corpus Juris, an admission of an agent or employee may be received in evidence against his principal,[57] if relevant to the issues involved,[58] where the agent, in making the admission, was acting within the scope of his authority,[59] and the transaction or ne-

To which party admission available see infra § 383.

57. U.S.—Paramount Productions v. Smith, C.C.A.Cal., 91 F.2d 863, certiorari denied 58 S.Ct. 266, 302 U.S. 749, 82 L.Ed. 579.
Ala.—Hamilton v. O'Rear, 141 So. 565, 224 Ala. 625—Estes Lumber Co. v. Investors' Syndicate, 137 So. 31, 223 Ala. 408—Montevallo Mining Co. v. Little, 93 So. 873, 208 Ala. 131—Mobile Pure Milk Co. v. Coleman, 161 So. 826, 26 Ala.App. 402, certiorari denied 161 So. 829, 230 Ala. 432.
Cal.—Continental Ins. Co. of New York v. Pacific Greyhound Lines, Super., 111 P.2d 37—Shields v. Oxnard Harbor Dist., App., 116 P.2d 121—Pacific States Savings & Loan Co. v. Stowell, 46 P.2d 780, 7 Cal.App.2d 280—Grissim v. Blumenthal & Co., 245 P. 768, 76 Cal.App. 712—Arthur v. Graham, 222 P. 371, 64 Cal.App. 608.
Conn.—Friedman v. Vogel, 116 A. 330, 97 Conn. 293.
Del.—Cerchio v. Mullins, 138 A. 277, 3 W.W.Harr. 245.
Ga.—Glover v. Summerour, 141 S.E. 211, 165 Ga. 513—Speir v. Westmoreland, 149 S.E. 422, 40 Ga.App. 302—National Union Fire Ins. Co. v. Macon Hardwood Lumber Co., 102 S.E. 180, 24 Ga.App. 726.
Idaho—Hemminger v. Tri-State Lumber Co., 68 P.2d 54, 57 Idaho 697—Aker v. Aker, 20 P.2d 796, 52 Idaho 713, appeal dismissed and certiorari denied 54 S.Ct. 80, 290 U.S. 587, 78 L.Ed. 518.
Ill.—Germann v. Huston, 23 N.E.2d 371, 302 Ill.App. 38—Muenter v. Moline Plow Co., 193 Ill.App. 261.
Ky.—Thomas' Adm'x v. Ashland Fire Brick Co., 4 S.W.2d 757, 223 Ky. 821—Paducah Hosiery Mills v. Proctor & Schwartz, 276 S.W. 803, 210 Ky. 806.
Mass.—Bennett v. Fitzgerald, 188 N.E. 247, 284 Mass. 535.
Mo.—State ex rel. S. S. Kresge Co. v. Shain, 101 S.W.2d 14, 17, 340 Mo. 145, quoting **Corpus Juris**—Smith v. Ohio Millers' Mut. Fire Ins. Co., 6 S.W.2d 920, 928, 320 Mo. 146, citing **Corpus Juris.**
Neb.—Wert v. Equitable Life Assur. Soc. of U. S., 283 N.W. 506, 511, 135 Neb. 654, quoting **Corpus Juris.**
N.J.—Wagenaar v. Finkelman, 156 A. 153, 9 N.J.Misc. 961, affirmed 162 A. 579, 109 N.J.Law 422.
N.Y.—Davidson v. Madison Corporation, 247 N.Y.S. 789, 231 App.Div. 421, affirmed 177 N.E. 393, 257 N.Y. 120, 76 A.L.R. 1103—Fowler v. Trull, 1 Hun 409, 3 Thomps. & C. 522—In re Brown's Estate, 190 N.Y.S. 184, 116 Misc. 483.
N.C.—National Exchange Bank of Chester, S. C., v. Sklut, 152 S.E. 697, 198 N.C. 589—Fidelity Bank v. Wysong & Miles Co., 98 S.E. 769, 177 N.C. 284.
Okl.—National Benev. Soc. v. Russell, 48 P.2d 1047, 173 Okl. 331—Coon v. Boston Ins. Co., 192 P. 1092, 79 Okl. 296.
R.I.—Seltzer v. Pugh, 136 A. 765.
S.C.—Cook v. C. I. T. Corporation, 4 S.E.2d 801, 191 S.C. 440, 125 A.L.R. 306—St. Charles Mercantile Co. v. Armour & Co., 153 S.E. 473, 156 S.C. 397.
Tex.—Thornell v. Missouri State Life Ins. Co., Com.App., 249 S.W. 203, affirming, Civ.App., 229 S.W. 653—Fenner & Beane v. Tatum, Civ.App., 129 S.W.2d 490—Home Ins. Co., New York, v. Privitt, Civ.App., 120 S.W.2d 294, error dismissed—McMillian v. Sims, Civ.App., 112 S.W.2d 793, error granted—Brown v. Stoker, Civ.App., 102 S.W.2d 248, 251, citing **Corpus Juris,** error dismissed—Kuehn v. Kuehn, Civ.App., 259 S.W. 290—Graham-Brown Shoe Co. v. Snodgrass, Civ.App., 257 S.W. 632—Parmele v. Abdo, Civ.App., 215 S.W. 369.
Utah—Golden v. American Keene Cement & Plaster Co., 95 P.2d 755, 98 Utah 23—Western Securities Co. v. Spiro, 221 P. 856, 62 Utah 623.
Va.—Eppes v. Eppes, 195 S.E. 694, 169 Va. 778.
Wash.—Avgerinion v. First Guaranty Bank, 252 P. 535, 142 Wash. 73—F. W. Woolworth Co. v. City of Seattle, 177 P. 664, 104 Wash. 629.
Wis.—Gloede v. Socha, 226 N.W. 950, 199 Wis. 503.
22 C.J. p 367 note 99—25 C.J. p 544 note 72.
"Declarations and doings of a third person, acting in the capacity of an agent, are excepted from the general rule respecting hearsay testimony. They are admitted in evidence against the principal, as the representations or acts of the principal himself, whom the agent represents, while engaged in the particular transaction to which the declaration or acts refer. They must constitute a part of the res gestæ in the course of his employment about the matter in question; they must accompany the doing of the business or making the contract, and must be within the scope of the delegated authority."—Lovell v. Underwriting Management Corporation, 153 A. 478, 107 N.J.Law 357.
Letters signed by the agent as such are admissible in evidence against his principal.—Chero Cola Bottling Co. v. Southern Express Co., 116 S.E. 325, 29 Ga.App. 656—22 C.J. p 367 note 99 [b].
Statements held admissible
(1) In suit to cancel oil and gas lease, declarations by lessee's employees, in complete charge of drilling operations, that drilling of eighteen-foot hole was all they intended to do.—Street v. Masterson, Tex.Civ.App., 277 S.W. 407.
(2) In action against physicians for malpractice, statement of physician employee of defendants characterizing operation of diathermy machine.—Wemmett v. Mount, 292 P. 93, 134 Or. 305.
(3) Statements by lumber company's agent to owner of house under construction that company was backing contractor.—Clem v. Forbess, Tex.Civ.App., 10 S.W.2d 223, error dismissed.
(4) Evidence disclosing negotiations and resulting contract was admissible as against party not present but represented by agent.—Henderson v. Dwyer, 13 P.2d 408, 36 N.M. 222.
(5) Where seller of goods which did not conform to the contract employed manufacturer to replace parts to the buyer, it thereby made the manufacturer its agent, and correspondence between it and the buyer is admissible in evidence in an action by the buyer for breach of contract.—Southern Border Motor Co. v. Fasken, C.C.A.Tex., 285 F. 24.
(6) Where scope of agency and authority is sufficiently broad, a general manager or superintendent may make an admission of liability which is admissible against the principal.—Davison v. Long Island Home, 278 N.Y.S. 167, 243 App.Div. 791.

58. U.S.—Economy Baler Co. v. Cohen, C.C.A.N.Y., 296 F. 904.
Iowa.—Glass v. Hutchinson Ice Cream Co., 243 N.W. 352, 214 Iowa 825.
S.C.—J. A. Fay & Egan Co. v. Mims, 149 S.E. 246, 151 S.C. 484—McCall Co. v. Surasky, 128 S.E. 849, 132 S.C. 59.

59. Ala.—National Life & Accident Ins. Co. v. McGhee, 191 So. 884, 891, 238 Ala. 471, quoting **Corpus**

gotiation to which the admission relates was pending at the time when it was made.[60]

Conversely, a declaration of an agent, not within the scope of his authority nor in the course of the negotiation to which it refers, is not admissible against the principal,[61] unless it was made under

Juris—Woodlawn Infirmary v. Byers, 112 So. 831, 216 Ala. 210—U. S. Cast Iron Pipe & Foundry Co. v. Caldwell, 94 So. 540, 208 Ala. 260—Simpson v. E. C. Payne Lumber Co., 82 So. 649, 17 Ala.App. 159, reversed on other grounds Ex parte E. C. Payne Lumber Co., 85 So. 9, 203 Ala. 668.

Ariz.—Central Copper Co. v. Klefisch, 270 P. 629, 633, 34 Ariz. 230, citing **Corpus Juris.**

Cal.—Chase v. Van Camp Sea Food Co., 292 P. 179, 109 Cal.App. 38.

Colo.—General Foods Sales Co. v. Smith, 97 P.2d 429—Thomas v. Seloom, 250 P. 381, 80 Colo. 189.

D.C.—Gordon v. Thomas, 70 F.2d 752, 63 App.D.C. 148.

Ga.—Ross v. Durrence, 181 S.E. 581, 181 Ga. 52—Waddington v. Stores Mut. Protective Ass'n, 183 S.E. 143, 52 Ga.App. 331—J. B. Colt Co. v. Wheeler, 120 S.E. 792, 31 Ga.App. 427—Chero Cola Bottling Co. v. Southern Express Co., 116 S.E. 325, 29 Ga.App. 656.

Idaho.—Aker v. Aker, 20 P.2d 796, 800, 52 Idaho 713, citing **Corpus Juris,** and appeal dismissed and certiorari denied 54 S.Ct. 80, 290 U.S. 587, 78 L.Ed. 518—Taylor v. Fluharty, 239 P. 1049, 41 Idaho 511.

Ill.—Lake Shore Country Club v. Brand, 171 N.E. 494, 339 Ill. 504.

Iowa.—Vincent, Albin & Strahl v. Hines, 200 N.W. 1, 198 Iowa 1224—Louisa County Nat. Bank v. Burr, 199 N.W. 359, 198 Iowa 4.

Kan.—Interstate Nat. Bank of Kansas City, Mo. v. Koster, 292 P. 805, 131 Kan. 461.

Ky.—Blue Diamond Coal Co. v. Sizemore, 71 S.W.2d 11, 254 Ky. 102—Vincennes Bridge Co. v. Poulos, 27 S.W.2d 952, 234 Ky. 243.

Mass.—Cleary v. First National Stores, 196 N.E. 868, 291 Mass. 172—De Blois v. Boylston & Tremont Corporation, 183 N.E. 823, 281 Mass. 498.

Minn.—Smith v. Emporium Mercantile Co., 251 N.W. 265, 266, 190 Minn. 294, citing **Corpus Juris.**

Miss.—Capital Loan & Investment Co. v. Benson, 111 So. 575, 146 Miss. 607—Union & Planters' Bank & Trust Co. v. Rylee, 94 So. 796, 130 Miss. 892.

Mo.—State ex rel. Kresge Co. v. Shain, 101 S.W.2d 14, 17, 340 Mo. 145, quoting **Corpus Juris**—In re Lacy, 112 S.W.2d 594, 234 Mo.App. 71—Sullenger v. Towle, App., 91 S.W.2d 188.

Mont.—Exchange State Bank of Glendive v. Occident Elevator Co., 24 P.2d 126, 95 Mont. 78, 90 A.L.R. 740.

Neb.—Wert v. Equitable Life Assur. Soc. of U. S., 283 N.W. 506, 511, 135 Neb. 654, quoting **Corpus Juris**—Roh v. Opocensky, 253 N.W. 680, 126 Neb. 518.

N.H.—Ernshaw v. Roberge, 170 A. 7, 86 N.H. 451.

N.J.—Van Allen v. Lobel, 8 A.2d 608, 123 N.J.Law 273—Albrecht v. Thieme, 116 A. 276, 97 N.J.Law 103, affirmed 118 A. 926, 98 N.J. Law 249—F. A. North Co. v. Maniera, 127 A. 172, 3 N.J.Misc. 97.

N.D.—Rigler v. North Dakota Const. Co., 220 N.W. 441, 57 N.D. 37—Clark v. Payne, 187 N.W. 817, 48 N.D. 911.

Okl.—Continental Casualty Co. v. Derrick, 86 P.2d 798, 184 Okl. 267—Pierce Oil Corporation v. Myers, 245 P. 863, 117 Okl. 161.

Or.—Craswell v. Biggs, 86 P.2d 71, 160 Or. 547—Hansen v. Oregon-Washington R. & Nav. Co., 188 P. 963, 97 Or. 190, rehearing denied 191 P. 655, 97 Or. 190.

Pa.—McGrath v. Pennsylvania Sugar Co., 127 A. 780, 282 Pa. 265—Campbell v. G. C. Murphy Co., 186 A. 269, 122 Pa.Super. 342.

S.C.—J. A. Fay & Egan Co. v. Mims, 149 S.E. 246, 151 S.C. 484.

Tenn.—Kenner v. City Nat. Bank, 46 S.W.2d 46, 164 Tenn. 119, rehearing granted in part 47 S.W.2d 756, 164 Tenn. 288.

Tex.—Edwards v. West Texas Hospital, Civ.App., 89 S.W.2d 801. Error dismissed—Missouri-Kansas-Texas R. Co. of Texas v. Salsman, Civ.App., 58 S.W.2d 1026, error dismissed—Dixie Motor Coach Corporation v. Meredith, Civ.App., 45 S.W.2d 364, error dismissed—State Amusement Co. v. Turrentine & Thompson, Civ.App., 21 S.W.2d 344—McBurnett v. Smith & McCallin, Civ.App., 286 S.W. 599—Baleja v. Henderson, Civ.App., 241 S.W. 1080.

Vt.—Cameron v. Blanchard, 176 A. 290, 107 Vt. 51.

Wash.—State ex rel. Hamilton v. Standard Oil Co. of California, 68 P.2d 1031, 190 Wash. 496.

22 C.J. p 369 note 1.

Agency law applicable

Admissibility of statements of one speaking for another depends on law of agency, not of evidence.—Caswell v. Maplewood Garage, 149 A. 746, 84 N.H. 241, 73 A.L.R. 433.

Consciousness of liability

Opinion of agent involving consciousness of liability or fault is admissible against principal as admission only where made within scope of agent's authority.—S. W. Bridges & Co. v. Candland, 54 P.2d 842, 88 Utah 373.

60. Ala.—National Life & Accident Ins. Co. v. McGhee, 191 So. 884, 891, 238 Ala. 471, citing **Corpus Juris.**

Idaho.—Taylor v. Fluharty, 239 P. 1049, 41 Idaho 511.

Md.—Loving v. Mutual Life Ins. Co. of New York, 117 A. 323, 140 Md. 173.

Mich.—Hughitt v. Sayen, 188 N.W. 430, 218 Mich. 451.

Mo.—State ex rel. Kresge Co. v. Shain, 101 S.W.2d 14, 17, 340 Mo. 145, quoting **Corpus Juris**—Murray v. De Luxe Motor Stages of Illinois, App., 133 S.W.2d 1074—Henry v. First Nat. Bank, 115 S.W.2d 121, 232 Mo.App. 1071—Garnett v. S. S. Kresge Co., App., 85 S.W.2d 157—Gaines v. Berkshire Life Ins. Co., 68 S.W.2d 905, 908, 228 Mo.App. 319, quoting **Corpus Juris.**

Neb.—Wert v. Equitable Life Assur. Soc. of U. S., 283 N.W. 506, 511, 135 Neb. 654, quoting **Corpus Juris**—Waits v. Columbia Fire Underwriters Agency of National Fire Ins. Co. of Hartford, Conn., 261 N. W. 170, 171, 129 Neb. 207, quoting **Corpus Juris.**

N.J.—Lovell v. Underwriting Management Corporation, 153 A. 478, 107 N.J.Law 357.

N.Y.—Ellis v. Allen, 211 N.Y.S. 488, 125 Misc. 841.

N.D.—Kopald Electric Co. v. Ocean Accident & Guarantee Corporation, 251 N.W. 852, 64 N.D. 213.

S.C.—Snipes v. Augusta-Aiken Ry. & Electric Corporation, 149 S.E. 111, 151 S.C. 391—Williams v. Western Union Telegraph Co., 136 S.E. 218, 138 S.C. 281.

Tex.—General American Life Ins. Co. v. Gant, Civ.App., 119 S.W.2d 693, error dismissed—San Antonio Public Service Co. v. Jackson, Civ.App., 103 S.W.2d 251, error dismissed.

22 C.J. p 370 note 2.

61. U.S.—Standard Oil Co. of New Jersey v. Neville, C.C.A.W.Va., 48 F.2d 580—Andrew Jergens Co. v. Bonded Products Corporation, D. C.N.Y., 13 F.2d 417, modified on other grounds, C.C.A., 21 F.2d 419, certiorari denied Bonded Products Corp. v. Andrew Jergens Co., 48 S. Ct. 204, 275 U.S. 572, 72 L.Ed. 432—Holt v. Metropolitan Refining Co., D.C.N.Y., 9 F.Supp. 662—Bennett v. Hoffman, C.C.A.N.Y., 289 F. 797.

Ala.—Wade v. Brisker, 173 So. 64, 233 Ala. 585—Hackney v. Dudley, 113 So. 401, 216 Ala. 400.

Ark.—Farmers' Club Co. v. Emmerson Mercantile Co., 241 S.W. 372, 153 Ark. 614.

Cal.—Ogilvie v. Ætna Life Ins. Co. of Hartford, Conn., 209 P. 26, 189 Cal. 406, 26 A.L.R. 116—Grissim v.

such circumstances that the silence or acquiescence of the principal makes the admission his own, see supra § 294, or was ratified by the principal.[62] Competency of the agent to make admissions on the subject is not alone sufficient; the admission which it is sought to use must have been made in connection with the discharge of the agent's duty,[63] and must be a statement of fact, rather than an expression of opinion.[64] Ordinarily the statements must have also been based on the agent's own knowl-

Blumenthal & Co., 245 P. 768, 76 Cal.App. 712.
Ga.—De Loach v. Miles, 145 S.E. 888, 38 Ga.App. 790—Willingham v. Benton, 103 S.E. 497, 25 Ga.App. 412.
Ill.—Clark v. Hoering-Buchholz Co., 254 Ill.App. 60.
Ky.—Consolidated Grocery Co.'s Trustee in Bankruptcy v. Hadad, 53 S.W.2d 951, 245 Ky. 549.
Md.—Grzboski v. Bernheimer Leader Stores, 143 A. 706, 156 Md. 146—Culver v. Nichols, 117 A. 873, 140 Md. 448.
Mass.—Cleary v. First National Stores, 196 N.E. 868, 291 Mass. 172—Cook v. Farnum, 154 N.E. 577, 258 Mass. 145—Rankin v. Brockton Public Market, 153 N.E. 97, 257 Mass. 6—Nager v. Reid, 133 N.E. 98, 240 Mass. 211.
Minn.—Smith v. Emporium Mercantile Co., 251 N.W. 265, 266, 190 Minn. 294, citing **Corpus Juris.**
Miss.—Capital Loan & Investment Co. v. Benson, 111 So. 575, 146 Miss. 607.
Mo.—State ex rel. Kresge Co. v. Shain, 101 S.W.2d 14, 17, 340 Mo. 145, quoting **Corpus Juris**—Stipel v. Piggott, 269 S.W. 942, 945, 219 Mo.App. 222, quoting **Corpus Juris.**
Neb.—Wert v. Equitable Life Assur. Soc. of U. S., 283 N.W. 506, 511, 135 Neb. 654, quoting **Corpus Juris**—Waits v. Columbia Fire Underwriters Agency of National Fire Ins. Co. of Hartford, Conn., 261 N.W. 170, 171, 129 Neb. 207, quoting **Corpus Juris.**
N.H.—Semprini v. Boston & M. R. R., 179 A. 349, 87 N.H. 279—Hunkins v. Amoskeag Mfg. Co., 169 A. 3, 86 N.H. 356—McCleary v. Lourie, 117 A. 730, 80 N.H. 389.
N.J.—Waggener v. Fidelity Union Trust Co., 21 A.2d 668, 127 N.J.Law 146—Van Allen v. Lobel, 8 A.2d 608, 123 N.J.Law 273—Christine v. Mutual Grocery Co., 194 A. 625, 119 N.J.Law 149—Thompson v. Giant Tiger Corporation of Camden, 189 A. 649, 118 N.J.Law 10.
N.Y.—Eastern Dist. Piece Dye Works v. Travelers' Ins. Co., 138 N.E. 401, 234 N.Y. 441, 26 A.L.R. 1505, affirming 190 N.Y.S. 822, 198 App. Div. 610.
Ohio.—King v. Carnahan, 22 N.E.2d 436, 61 Ohio App. 84.
Pa.—Jones v. Silverman, 95 Pa.Super. 336.
R.I.—Brewer v. F. David & Co., 123 A. 89, 45 R.I. 418.
S.C.—Murray Co. v. Ouzts, 109 S.E. 122, 117 S.C. 388
Tenn.—Life & Casualty Ins. Co. v. Robertson, 6 Tenn.App. 43.
Tex.—Roadway Express v. Gaston, Civ.App., 91 S.W.2d 883, error dismissed—Burroughs v. Smith, Civ App., 8 S.W.2d 301, error dismissed—Southern Surety Co. v. Nalle & Co., Civ.App., 231 S.W. 402, reversed on other grounds, Com. App., 242 S.W. 197—Lone Star Gas Co. v. McCullough, Civ.App., 220 S.W. 1114.
Utah.—S. W. Bridges & Co. v. Candland, 54 P.2d 842, 88 Utah 373—Fish Lake Resort Co. v. Industrial Commission of Utah, 275 P. 580, 73 Utah 479.
Va.—Monroe & Monroe v. Cowne, 112 S.E. 848, 133 Va. 181.
Wash.—Space v. Tacoma Durant Co., 296 P. 822, 161 Wash. 232—Proctor v. Appleby, 188 P. 481, 110 Wash. 403.
W.Va.—Reynolds v. W. T. Grant Co., 186 S.E. 603, 117 W.Va. 615.
Wyo.—Cromberg Bros. v. Johnson, 208 P. 446, 29 Wyo. 11.
7 C.J. p 1131 note 18—22 C.J. p 372 note 3—25 C.J. p 543 note 68.

Mere employment insufficient

Employer is not chargeable with employees' statements about him or his affairs merely because of their employment to work for him.—Gordon v. Thomas, 70 F.2d 752, 63 App. D.C. 148.

Statements held not admissible

(1) Admissions made in "employer's first report" of injury by unauthorized person will be disregarded.—Andrews v. Emporium Forestry Co., 230 N.Y.S. 707, 224 App.Div. 327, reversed on other grounds 166 N.E. 336, 250 N.Y. 592.

(2) Admissions of agent authorized to lease lands are not admissible to defeat limitation title already perfected in principal, nor to show principal's possession was not adverse.—Burroughs v. Smith, Tex.Civ.App., 8 S.W.2d 301, error dismissed.

(3) Answers given by defendant's agent to interrogatories propounded by plaintiff in course of preparation for trial could not be used to enlarge the authority conferred by defendant on agent with respect to agent's prior statements concerning circumstances surrounding accident.—Van Allen v. Lobel, 8 A.2d 608, 123 N.J.Law 273.

(4) Declaration of workman sent to remove piano as to its condition and fitness for use as musical instrument.—F. A. North Co. v. Maniera, 127 A. 172, 3 N.J.Misc. 97.

62. Neb.—Wert v. Equitable Life Assur. Soc. of U. S., 283 N.W. 506, 511, 135 Neb. 654, quoting **Corpus Juris.**
22 C.J. p 375 note 5.

63. Ala.—National Life & Accident Ins. Co. v. McGhee, 191 So. 884, 891, 238 Ala. 471, quoting **Corpus Juris**—Hackney v. Dudley, 113 So. 401, 216 Ala. 400.
Ill.—City of Chicago v. Jewish Consumptives' Relief Soc. of Chicago, 154 N.E. 117, 323 Ill. 389.
Iowa.—Louisa County Nat. Bank v. Burr, 199 N.W. 359, 198 Iowa 4.
Md.—Loving v. Mutual Life Ins. Co. of New York, 117 A. 323, 140 Md. 173.
Minn.—Smith v. Emporium Mercantile Co., 251 N.W. 265, 266, 190 Minn. 294, citing **Corpus Juris.**
Mo.—State ex rel. Kresge Co. v. Shain, 101 S.W.2d 14, 340 Mo. 145.
Neb.—Wert v. Equitable Life Assur. Soc. of U. S., 283 N.W. 506, 511, 135 Neb. 654, quoting **Corpus Juris**—Waits v. Columbia Fire Underwriters Agency of National Fire Ins. Co. of Hartford, Conn., 261 N.W. 170, 171, 129 Neb. 207, quoting **Corpus Juris.**
N.J.—Waggener v. Fidelity Union Trust Co., 21 A.2d 668, 127 N.J.Law 146—Van Allen v. Lobel, 8 A.2d 608, 123 N.J.Law 273—Lovell v. Underwriting Management Corporation, 153 A. 478, 107 N.J.Law 357.
Okl.—Independent Torpedo Co. v. Carder, 25 P.2d 62, 165 Okl. 87.
Tex.—San Antonio Public Service Co. v. Jackson, Civ.App., 103 S.W.2d 251, error dismissed—Sinclair Refining Co. v. Womack, Civ.App., 66 S.W.2d 402.
Utah.—S. W. Bridges & Co. v. Candland, 54 P.2d 842, 88 Utah 373.
Vt.—Jones v. Gay's Express, 9 A.2d 121, 110 Vt. 531.
W.Va.—Reynolds v. W. T. Grant Co., 186 S.E. 603, 117 W.Va. 615.
22 C.J. p 375 note 6.

The agent's authority continues until the work intrusted to him is fully completed.—Williams v. Western Union Telegraph Co., 136 S.E. 218, 138 S.C. 281—22 C.J. p 375 note 6.

64. Ala.—National Life & Accident Ins. Co. v. McGhee, 191 So. 884, 891, 238 Ala. 471, citing **Corpus Juris.**
Minn.—Smith v. Emporium Mercantile Co., 251 N.W. 265, 266, 190 Minn. 294, citing **Corpus Juris.**
Neb.—Wert v. Equitable Life Assur. Soc. of U. S., 283 N.W. 506, 511, 135 Neb. 654, quoting **Corpus Juris.**

edge,[65] but an authorized statement based on the report of others may be admissible.[66]

An agent's declarations, if relevant, are primary evidence,[67] and have been held competent notwithstanding the availability of declarant as a witness,[68] although this has been denied.[69] The death of the principal[70] or of the agent[71] does not render the agent's admission incompetent.

The principal is not affected by facts stated by his agent to him,[72] and not communicated to the other party,[73] or by declarations of the agent in his own favor.[74]

Reception against declarant. Admissions are competent against the declarant, although they were made by him as the agent of another person.[75]

§ 344. Proof of Agency

To render admissible the acts and statements of an alleged agent, it must be sufficiently proved, directly or inferentially, by evidence other than the statements of the declarant, that he was the agent of the party to be charged with the admission and that he was acting within the scope of his authority; but the court in its discretion may permit the admission to be introduced before proof of the agency.

Unless the agency is already apparent[76] or is expressly or impliedly admitted,[77] or unless the statement has been ratified,[78] the party seeking to introduce the admission must establish the relation of agency between the declarant and the person against whom it is sought to use his admission,[79] and the

N.Y.—Edwards v. Maryland Motorcar Ins. Co., 197 N.Y.S. 460, 204 App.Div. 174.
Tex.—Zepeda v. Moore, Civ.App., 153 S.W.2d 212—San Antonio Public Service Co. v. Jackson, Civ.App., 103 S.W.2d 251, error dismissed—Roadway Express v. Gaston, Civ. App., 91 S.W.2d 883, error dismissed—Red Arrow Freight Lines v. Gravis, Civ.App., 84 S.W.2d 540.
Utah.—S. W. Bridges & Co. v. Candland, 54 P.2d 841, 88 Utah 373.
22 C.J. p 375 note 8.

Value of property

Statement by agent as to value of property is inadmissible as original evidence of such value.—Murray Co v. Gilbert, Tex.Civ.App., 80 S.W.2d 805.

65. Ala.—National Life & Accident Ins. Co. v. McGhee, 191 So. 884, 891, 238 Ala. 471, citing **Corpus Juris.**
Ky.—McCormick Harvesting Mach. Co. v. Ripley, 6 Ky.L. 658.
Minn.—Smith v. Emporium Mercantile Co., 251 N.W. 265, 266, 190 Minn. 294, citing **Corpus Juris.**
Neb.—Wert v. Equitable Life Assur. Soc. of U. S., 283 N.W. 506, 511, 135 Neb. 654, quoting **Corpus Juris.**
N.C.—Royal Ins. Co. v. Atlantic Coast Line R. Co., 143 S.E. 516, 195 N.C. 693.

66. Va.—Washington-Virginia Ry. Co. v. Deahl, 100 S.E. 840, 841, 126 Va. 144.
"If, however, the statement related to a matter within the sphere of his authority, and was made in the course of an investigation or negotiation concerning that matter, then regardless of how he derived his knowledge, he spoke as and for his principal, and his statement was admissible."—Washington-Virginia Ry. Co. v. Deahl, supra.

Report required by statute, made by agent acting within scope of authority, may be admissible as an admission by principal notwithstanding the agent did not have personal knowledge of the facts reported.
Ill.—Susemiehl v. Red River Lumber Co., 28 N.E.2d 743, 306 Ill.App. 430.
N.C.—Carlton v. Bernhardt-Seagle Co., 188 S.E. 77, 210 N.C. 655.

67. Idaho.—Hemminger v. Tri-State Lumber Co, 68 P.2d 54, 57 Idaho 697.
Wis.—Smith v. Wallace, 25 Wis. 55.

68. Mo.—Henry v. First Nat. Bank, 115 S.W.2d 121, 232 Mo.App. 1071.
22 C.J. p 375 note 10.

69. Ala.—Betts v. Planter's & Merchant's Bank of Huntsville, 3 Stew. 18.
Tex.—Weir v. McGee, 25 Tex.Suppl. 21.

70. Ga.—Hines v. Poole, 56 Ga. 638.

71. S.C.—Wimberly v. Sovereign Camp, W. O. W., 2 S.E.2d 532, 190 S.C. 158.
22 C.J. p 375 note 13.

72. Ala.—Beitman v. Birmingham Paint & Glass Co., 64 So. 600, 185 Ala. 313.

73. Cal.—Puritas Coffee & Tea Co. v. De Martini, 206 P. 96, 56 Cal. App. 628.

74. Ill.—Hutchison Grocery Co. v. Louisville & N. R. Co., 230 Ill.App. 291.
22 C.J. p 375 note 15.

75. Cal.—Kellner v. Witte, 23 P.2d 1045, 133 Cal.App. 231.
Colo.—General Foods Sales Co. v. Smith, 97 P.2d 429.
Iowa.—Leyner v. Leyner, 98 N.W. 628, 123 Iowa 185.

76. Ind.—Slusser v. Romine, 200 N. E. 731, 102 Ind.App. 25.
Md.—Great Eastern Casualty Co. v. Schwartz, 122 A. 647, 143 Md. 452.
22 C.J. p 376 note 18.

Statute establishing agency dispenses with necessity of its proof.—Universal Ins. Co. v. Arrigo, 44 P. 2d 1020, 96 Colo. 531.

Cashier of bank

Conversations with one in bank, designated cashier and acting as such, may be shown, without proofs of his appointment and actual authority.—Larson v. Citizens' State Bank of Westbrook, 172 N.W. 125, 142 Minn. 334.

77. Ala.—Bibby v. Thomas, 31 So. 432, 131 Ala. 350.
Colo.—Universal Ins. Co. v. Arrigo, 44 P.2d 1020, 96 Colo. 531.
Ill.—Mitchell v. Sherman E. McEwen Associates, 196 N.E. 186, 360 Ill. 278.

78. Iowa.—Higbee v. Trumbauer, 83 N.W. 812, 112 Iowa 74.
22 C.J. p 376 note 20.

79. U.S.—Perkins v. Haskell, C.C.A. N.J., 31 F.2d 53, dismissing appeal, D.C., Haskell v. Perkins, 28 F.2d 222, and certiorari denied 49 S.Ct. 513, 279 U.S. 872, 73 L.Ed. 1007—Firestone Tire & Rubber Co. v. McCutcheon, C.C.A.Colo., 284 F. 220.
Ala.—London & Scottish Assur. Corporation of London, England, v. Smith, 158 So. 892, 229 Ala. 556—Perry v. Marbury Lumber Co., 103 So. 580, 212 Ala. 542—Commercial Credit Co. v. Chevrolet Motor Co., 114 So. 273, 22 Ala.App. 211.
Cal.—Harris v. Miller, 235 P. 981, 196 Cal. 8—Groeneveld v. Delozier, 261 P. 493, 86 Cal.App. 640.
Colo.—Crawford v. Melvin, 246 P. 283, 79 Colo. 414—Order of Railway Conductors v. Jones, 239 P. 882, 78 Colo. 80.
Conn.—Bailey v. Bobecki, 166 A. 677, 117 Conn. 653—Whiteman v. Al's Tire & Service Garage, 161 A. 519, 115 Conn. 379.
Ga.—Indemnity Ins. Co. of North America v. Lamb, 193 S.E. 76, 56 Ga.App. 492—Grimes v. City of Macon, 161 S.E. 633, 44 Ga.App. 374—Ninth Dist. Agricultural and Mechanical School v. Wofford Power Co., 139 S.E. 916, 37 Ga.App. 271—Allen v. Southern Ry. Co., 126

fact that the admission was made while declarant was acting within the scope of his authority.[80] As a general rule such agency and authority must be shown by affirmative evidence other than the declarations or statements of the alleged agent,[81] but, where the fact and scope of the agency have been shown by other evidence, declarant's statements with respect thereto may be admitted in corroboration of such other evidence.[82] Evidence of the agency may be either direct or inferential,[83]

S.E. 722, 33 Ga.App. 209—Southern Nursery Co. v. Montfort, 115 S.E. 150, 29 Ga.App. 328—Willingham v. Benton, 103 S.E. 497, 25 Ga.App. 412.

Idaho.—Hample v. McKinney, 258 P. 179, 44 Idaho 435.

Ill.—Bowers v. Heflebower, 243 Ill. App. 129—Launtz v. Kinloch Telephone Co., 239 Ill.App. 204—King v. Chicago, B. & Q. R. Co., 235 Ill. App. 401.

Ind.—Miller v. Schaffner, 176 N.E. 860, 93 Ind.App. 156.

Iowa.—Walters v. Iowa Electric Co., 212 N.W. 886, 203 Iowa 467—Turkington v. Chicago, R. I. & P. Ry. Co., 194 N.W. 75, 196 Iowa 304.

Ky.—McFarland's Adm'r v. McFarland, 30 S.W.2d 958, 235 Ky. 283.

Md.—Whistler v. Hanna, 137 A. 276, 152 Md. 597.

Minn.—First Nat. Bank v. Schroder, 221 N.W. 62, 175 Minn. 341—Hanson v. Johnson, 201 N.W. 322, 161 Minn. 229.

Miss.—Saenger Amusement Co. v. Murray, 91 So. 459, 128 Miss. 782

Mo.—Hunter v. Waterloo Gasoline Engine Co., 260 S.W. 970, reversing, App., 237 S.W. 819—Goldsberry v. Farmers Mut. Fire & Lightning Ins. Co. of Polk County, App., 86 S.W.2d 578—Fowler v. Missouri, K. & T. R. Co., 84 S.W. 2d 194, 229 Mo.App. 561—Elmer v. Flett, App., 297 S.W. 985.

N.J.—Venditto v. Spratt's Patent (America), 174 A. 697, 113 N.J. Law 357—Erie Land & Improvement Co. v. Symitakos, 170 A. 51, 112 N.J.Law 320—Kessler v. Sheldon, 131 A. 897, 99 N.J.Eq. 369—Sylvester v. Koehler, 170 A. 811, 12 N.J.Misc. 184.

N.Y.—Reno v. Bull, 124 N.E. 144, 226 N.Y. 546, reversing 165 N.Y.S. 1109, 179 App.Div. 891, reargument denied 125 N.E. 924, 227 N.Y. 591—Webber v. American Union Bank, 222 N.Y.S. 359, 221 App.Div. 94, reversing 217 N.Y.S. 833, 128 Misc. 123—States Import & Export Corporation v. Hartford Fire Ins. Co., 206 N.Y.S. 323, 210 App.Div. 374—Samuel Eiseman & Co. v. Kugelman, 177 N.Y.S. 495, 188 App.Div. 718.

Ohio.—Wakem v. Leroy, 169 N.E. 308, 33 Ohio App. 265.

Okl.—Pierce Oil Corporation v. Myers, 245 P. 863, 117 Okl. 161.

R.I.—Standish v. Heaton, 123 A. 691, 45 R.I. 421.

S.C.—Matheson v. American Telephone & Telegraph Co., 135 S.E. 306, 137 S.C. 227.

Tex.—State Amusement Co. v. Turrentine & Thompson, Civ.App., 21 S.W.2d 344—Denby Motor Truck Co. v. Mears, Civ.App., 229 S.W. 994, dismissed for want of jurisdiction—Clark v. Merriam & Millard Co., Civ.App., 223 S.W. 869.

Vt.—Ellis J. Gomez & Co. v. Hartwell, 122 A. 461, 97 Vt. 147—Chadwick v. Wiggin, 116 A. 74, 95 Vt. 515.

Wis.—Zurich Accident & Liability Ins. Co. v. Industrial Commission of Wisconsin, 213 N.W. 630, 193 Wis. 32—Smith v. Yellow Cab Co., 180 N.W. 125, 173 Wis. 33.

22 C.J. p 376 note 21.

Connecting admission with party against whom it is to be used see infra § 371.

Agency for corporation

(1) Where agency to act for corporation in particular matter is established, it is not necessary to show that person making admission was officer of corporation.—Clark-Rice Corporation v. Waltham Bleachery & Dye Works, 166 N.E. 867, 267 Mass. 402.

(2) Physician's admission does not bind corporation unless it is shown that he was acting for corporation.—Giraney v. Oregon Short Line R. Co., 33 P.2d 359, 54 Idaho 535.

It is a question for the court whether agency is sufficiently established to render admission of alleged agent admissible against the principal.

Mass.—Lajoie v. Milliken, 136 N.E. 419, 242 Mass. 508.

Vt.—Hendrickson v. International Harvester Co. of America, 135 A. 702, 100 Vt. 161.

80. Ga.—J. T. Richardson & Son v. Studebaker Corporation of America, 114 S.E. 648, 29 Ga.App. 249.

Ill.—Worthy v. Birk, 224 Ill.App. 574.

Kan.—Hezlep v. A-1 Oil & Gas Co., 212 P. 881, 112 Kan. 661.

Ky.—U. S. Fidelity & Guaranty Co. v. Antle, 42 S.W.2d 1, 240 Ky. 243.

Mich.—Berlin State Bank v. Nelson, 204 N.W. 92, 231 Mich. 463—Allen v. Robert Gage Coal Co., 188 N.W. 388, 218 Mich. 347.

N.Y.—Levy v. Wallach, 178 N.Y.S. 216—Lyon v. Starr Piano Co., 174 N.Y.S. 640

Or.—Utah-Idaho Sugar Co. v. Lewis, 187 P. 590, 95 Or. 224.

Tex.—Osceola Oil Co. v. Stewart Drilling Co., Civ.App., 246 S.W. 698, reversed on other grounds, Com.App., 258 S.W. 806—Rhodes v. Smith, Civ.App., 230 S.W. 227—Wall & Stabe Co. v. Berger, Civ. App., 212 S.W. 975.

Express delegation of authority need not be shown

Vt.—Ellis J. Gomez & Co. v. Hartwell, 122 A. 461, 97 Vt. 147.

81. Ala.—American Nat. Ins. Co. v. Brooks, 97 So. 790, 210 Ala. 317.

Ark.—Nowlin-Carr Co. v. Cook, 283 S.W. 7, 171 Ark. 51.

Ga.—Waddington v. Stores Mut. Protective Ass'n, 183 S.E. 143, 52 Ga. App. 331—J. B. Colt Co. v. Wheeler, 120 S.E. 792, 31 Ga.App. 427.

Iowa.—Vincent, Albin & Strahl v. Hines, 200 N.W. 1, 198 Iowa 1224.

Md.—Kurdle v. Brookmeyer, 191 A. 416, 172 Md. 246—Wells v. Hecht Bros. & Co., 142 A. 258, 155 Md. 618.

Mo.—Shelton v. Wolf Cheese Co., 93 S.W.2d 947, 953, 338 Mo. 1129, citing **Corpus Juris**—Austin-Western Road Machinery Co. v. Commercial State Bank, App., 255 S.W. 585.

Mont.—Ashley v. Safeway Stores, 47 P.2d 53, 100 Mont. 312.

N.H.—Alexander v. Todd, 199 A. 83, 89 N.H. 365.

N.D.—Clark v. Payne, 187 N.W. 817, 48 N.D. 911.

Okl.—Pierce Oil Corporation v. Myers, 245 P. 863, 117 Okl. 161.

Tex.—Webb-North Motor Co. v. Ross, Civ.App., 42 S.W.2d 1086, error dismissed—State Amusement Co. v. Turrentine & Thompson, Civ. App., 21 S.W.2d 344.

Vt.—Residents of Royalton v. Central Vermont Ry. Co., 138 A. 782, 100 Vt. 443.

22 C.J. p 377 note 22—25 C.J. p 543 note 70.

No admission of agency

Testimony of defendant's driver, although authorizing inference that he was acting within scope of employment, was held not admission of such fact by defendant.—C. J. Kamper Grocery Co. v. Sauls, 144 S.E. 403, 38 Ga.App. 487.

82. Mo.—Adams v. Carlo, App., 84 S.W.2d 682.

Va.—Buchanan v. Wilson, 165 S.E. 422, 159 Va. 49.

83. Ala.—Alabama Power Co. v. Shaw, 111 So. 17, 215 Ala. 436.

Ill.—Mitchell v. Sherman E. McEwen Associates, 196 N.E. 186, 360 Ill. 278.

N.C.—Berry v. Richmond Cedar Works, 113 S.E. 772, 184 N.C. 187.

22 C.J. p 377 note 23.

Statements of the person charged may be shown to prove the existence and nature of the relation, if any,

but the agency of a declarant cannot be shown by the statement of another person, claiming to be an agent of the party sought to be charged, but whose authority is not shown to extend to binding his principal by such a statement.[84]

Order of proof. While proof of the agency should ordinarily precede the reception of an admission of the alleged agent, this is a matter resting in the discretion of the court, which may receive the statement subject to its being connected by a subsequent showing of agency.[85]

Sufficiency of evidence. The evidence on the question of agency need not be conclusive, but it is sufficient if it is such as would justify a finding that the relation existed.[86]

§ 345. Res Gestæ Statements

Generally, declarations not part of the res gestae, or made after the fact to which they relate and unconnected with any act of agency are inadmissible; but admissions made under authority and in the course of its exercise may be admissible although relating to a past event or although made before the transaction in question.

It is frequently said that the declarations of an agent affect the principal only when they are "part of the res gestæ;"[87] and that consequently his state-

between himself and the other party. —Doryk v. Perth Amboy Bottling Co., 139 A. 419, 104 N.J.Law 87— 45 C.J. p 1259 note 76.

Answering telephone

(1) While a person answering a telephone at the office of a party is presumed to be his agent, where the party sought to be charged was a corporation, independent proof of the authority has been required.—Shelton v. Wolf Cheese Co., 93 S.W.2d 947, 953, 338 Mo. 1129, citing **Corpus Juris**—22 C.J. p 377 note 23 [a].

(2) Admissions over telephone generally see supra § 281.

(3) Presumption of agency in such circumstances generally see Agency p 253 note 84.

84. Mont.—Exchange State Bank of Glendive v. Occident Elevator Co., 24 P.2d 126, 130, 95 Mont. 78, 90 A.L.R. 740, citing **Corpus Juris.** 22 C.J. p 377 note 24.

Corpus Juris rule held inapplicable to testimony of agent in trial of cause as to authority of another alleged agent.—Exchange State Bank of Glendive, v. Occident Elevator Co., supra, citing **Corpus Juris.**

85. Ala.—Alabama Power Co. v. Shaw, 111 So. 17, 215 Ala. 436.
Cal.—Brea v. McGlashan, 39 P.2d 877, 3 Cal.App.2d 454.
Mo.—Eisenbarger v. Wilhite, App., 238 S.W. 159.
Tex.—Dee v. Taylor-Hanna-James Co., Civ.App., 227 S.W. 361.
22 C.J. p 377 note 26.

86. Cal.—Brea v. McGlashan, 39 P. 2d 877, 3 Cal.App.2d 454.
22 C.J. p 377 note 27.

Evidence sufficient to establish agency

Ariz.—United Bank & Trust Co. v. Jones, 249 P. 747, 30 Ariz. 557.
Cal.—Gist v. Security Trust & Savings Bank, 24 P.2d 153, 218 Cal. 581—Dickey v. Dunn, 252 P. 770, 80 Cal.App. 724—Hathaway v. McGillycuddy, 206 P. 108, 56 Cal.App. 689.
Colo.—Valley Lands & Investment Co. v. Killean, 230 P. 393, 76 Colo. 91.
Ga.—Atlantic Coast Line R. Co. v. Stovall-Pace Co, 118 S.E. 62, 30 Ga.App. 326.
Ind.—Chicago, I. & L. Ry. Co. v. Downey, 5 N.E.2d 656, 103 Ind. App. 672.
Iowa.—Basta v. Farm Property Mut. Ins. Ass'n of Iowa, 252 N.W. 125, 217 Iowa 240.
Mo.—Simpson Advertising Service Co. v. Manufacturers' & Merchants' Ass'n of St. Louis, 51 S.W.2d 1019, 330 Mo. 1049—Brown v. Republic Casualty & Surety Co., App., 31 S.W.2d 111—Krummenacher Drug Co. v. Chouteau, App., 296 S.W. 255.
N.J.—International Dye & Print Works v. Fashion Screen Printing Co., 186 A. 467, 116 N.J.Law 610, affirmed 189 A. 138, 117 N.J.Law 424.
Or.—La Follet v. Jones, 193 P. 446, 98 Or. 136.
S.C.—Moore v. Atlantic Coast Line R. Co., 135 S.E. 473, 137 S.C. 319.
Tex.—Federal Underwriters Exchange v. Cost, Civ.App., 115 S.W. 2d 706, affirmed 123 S.W.2d 332, 132 Tex. 299—Texas Employers' Ins. Ass'n v. Knouff, Civ.App., 297 S.W. 799, reversed on other grounds, Com.App., 7 S.W.2d 68.
Vt.—Chadwick v. Wiggin, 116 A. 74, 95 Vt. 515.
22 C.J. p 376 note 21 [a].

Evidence not sufficient to establish agency

Conn.—Alfred Fox Piano Co. v. Bennett, 114 A. 529, 96 Conn. 448.
Ga.—Waddington v. Stores Mut. Protective Ass'n, 183 S.E. 143, 52 Ga. App. 331—J. B. Colt Co. v. Wheeler, 120 S.E. 792, 31 Ga.App. 427.
Iowa.—Vincent, Albin & Strahl v. Hines, 200 N.W. 1, 198 Iowa 1224.
La.—Lepine v. First Nat. Life Ins. Co., App., 184 So. 376.
Tex.—Texas & N. O. R. Co. v. Harrison, Civ.App., 260 S.W. 907—Texas & N. O. R. Co. v. Peterson, Civ. App., 260 S.W. 906.
Vt.—Read & Davis v. Reynolds, 112 A. 359, 95 Vt. 45.
22 C.J. p 376 note 21 [b].

87. U.S.—Overland Const. Co. v. Sydnor, C.C.A.Ohio, 70 F.2d 338—Gratz v. McKee, C.C.A.Mo., 9 F.2d 593, certiorari denied 46 S.Ct. 472, 270 U.S. 664, 70 L.Ed. 788—The Condor, D.C.N.Y., 8 F.Supp. 929, affirmed, C.C.A., The Nordpol, 84 F. 2d 3, certiorari denied Grace S. S. Co. v. Anglo-Chilean Nitrate Sales Corporation, 57 S.Ct. 111, two cases, 299 U.S. 586, 81 L.Ed. 432.
Ala.—Atlanta Life Ins. Co. v. Bolden, 194 So. 653, 239 Ala. 231—Birmingham News Co. v. Browne, 153 So. 889, 228 Ala. 414—Arlington Realty Co. v. Lawson, 153 So. 425, 228 Ala. 214—Ellis Motor Co. v. Hibbler, 121 So. 47, 219 Ala. 53—Hackney v. Dudley, 113 So. 401, 216 Ala. 400—U. S. Cast Iron Pipe & Foundry Co. v. Caldwell, 94 So. 540, 208 Ala. 260.
Ark.—Indemnity Ins. Co. of North America v. Krone, 9 S.W.2d 33, 177 Ark. 953, 60 A.L.R. 1493.
Cal.—Hollander v. Wilson Estate Co., 7 P.2d 177, 214 Cal. 582—Kellner v. Witte, 23 P.2d 1045, 133 Cal. App. 231—Bodholdt v. Garrett, 10 P.2d 533, 122 Cal.App. 566—Shaver v. United Parcel Service, 266 P. 606, 90 Cal.App. 764—Brush v. Southern Pac. Co., 190 P. 216, 47 Cal.App. 54.
Ga.—Baker v. H. E. Lowe Electric Co., 170 S.E. 337, 47 Ga.App. 259—Usry v. Augusta Southern R. Co., 102 S.E. 184, 24 Ga.App. 722.
Kan.—Lindsay v. Halstead Milling & Elevator Co., 179 P. 360, 104 Kan. 410.
Ky.—Consolidated Coach Corporation v. Earls' Adm'r, 94 S.W.2d 6, 263 Ky. 814—Cincinnati, N. O. & T. P. Ry. Co. v. Gilreath's Adm'r, 15 S.W.2d 267, 228 Ky. 385—Powers v. Gatliff Coal Co., 14 S.W.2d 216, 228 Ky. 5—Bell v. Louisville & N. R. Co., 287 S.W. 219, 216 Ky. 42.
Md.—Loving v. Mutual Life Ins. Co. of New York, 117 A. 323, 140 Md. 173.
Mass.—Nager v. Reid, 133 N.E. 98, 240 Mass. 211.
Mich.—Garey v. Kelvinator Corporation, 271 N.W. 723, 279 Mich. 174.

ments made in casual conversation not involving any business of the agency,[88] or after the fact to which they relate and unconnected with any act of agency,[89] are inadmissible against the principal.

Mo.—Brandtjen & Kluge v. Hunter, App., 145 S.W.2d 1009—Murray v. De Luxe Motor Stages of Illinois, App., 133 S.W.2d 1074—Gaines v. Berkshire Life Ins. Co., 68 S.W.2d 905, 908, 228 Mo.App. 319, quoting **Corpus Juris**—Varas v. James Stewart & Co., 17 S.W.2d 651, 223 Mo.App. 385.

N.J.—Lovell v. Underwriting Management Corporation, 153 A. 478, 107 N.J.Law 357.

N.Y.—Kraus v. Fifth Ave. Coach Co., 253 N.Y.S. 230, 233 App.Div. 357—Tartakoff v. Holstein, 234 N.Y.S. 398, 134 Misc. 39.

N.C.—Smith v. Kappas, 12 S.E.2d 693, 218 N.C. 758—Hildebrand v. McDowell Furniture Co., 193 S.E. 294, 212 N.C. 100—Hunsucker v. Corbitt, 122 S.E. 378, 187 N.C. 496—Berry v. Richmond Cedar Works, 113 S.E. 772, 184 N.C. 187.

N.Y.—Page v. Hirsch, 202 N.Y.S. 787, 207 App.Div. 733.

N.D.—Kopald Electric Co. v. Ocean Accident & Guarantee Corporation, 251 N.W. 852, 64 N.D. 213.

Or.—Pacific States Fire Ins. Co. v. C. Rowan Motor Co., 260 P. 441, 122 Or. 665.

Pa.—Burns v. Joseph Flaherty Co., 123 A. 496, 278 Pa. 579.

S.C.—Housand v. Armour & Co., 175 S.E. 516, 173 S.C. 268.

Tex.—Missouri-Kansas-Texas R. Co. of Texas v. Salsman, Civ.App., 58 S.W.2d 1026, error dismissed—Lang Floral & Nursery Co. v. Sheridan, Civ.App., 245 S.W. 467.

Utah.—Fish Lake Resort Co. v. Industrial Commission of Utah, 275 P. 580, 73 Utah 479.

22 C.J. p 377 note 29.

Doctrine of res gestæ distinguished

(1) While statements by an agent bind the principal as an admission against interest only where the agent made such statements as part of an act or transaction in which he was then engaged as part of his duty, or as phrased in the text rule, as "part of the res gestæ," such admissions constitute an exception to the hearsay rule distinct from that of spontaneous unsworn declarations admissible as "res gestæ" regardless of the agency of declarant.

Vt.—Jones v. Gay's Express, 9 A.2d 121, 110 Vt. 531.

W.Va.—Reynolds v. W. T. Grant Co., 186 S.E. 603, 117 W.Va. 615.

(2) "Statements which form a part of the res gestæ, if made by an agent for either party, are admitted, not because of the agency, but regardless of it. The statements of a bystander, if otherwise admissible, are fully as competent as are those of an agent. . . . On the other hand, an admission may only be received in evidence if made by a party or by his agent authorized to speak for him in that regard. Whether or not an admission conforms to the requirements of the res gestæ rule is wholly immaterial. The two exceptions are quite distinct."—Semprini v. Boston & M. R. R., 179 A. 349, 350, 87 N.H. 279.

(3) Admissibility of spontaneous declarations of agent under res gestæ exception to hearsay rule see infra § 410.

In North Carolina

(1) It has been held that the statements of a driver immediately after accident as to whether he was acting within the scope of his employment are admissible in suit against principal.—Smith v. Miller, 183 S.E. 370, 209 N.C. 170.

(2) It was subsequently held that statements of such a nature are inadmissible since not a part of the res gestæ, and that Smith v. Miller, supra, was out of line with other decisions and distinguishable on its facts.—Pinnix v. Griffin, 12 S.E.2d 667, 219 N.C. 35.

Statements held to be part of res gestæ

Mo.—Porter v. Withers Estate Co., 210 S.W. 109, 201 Mo.App. 27.

22 C.J. p 377 note 29 [a].

88. Kan.—Interstate Nat. Bank of Kansas City, Mo. v. Koster, 292 P. 805, 131 Kan. 461.

Minn.—Longman v. Anderson, 199 N.W. 742, 160 Minn. 15.

Mo.—Gaines v. Berkshire Life Ins. Co., 68 S.W.2d 905, 908, 228 Mo.App. 319, quoting **Corpus Juris**—Stipel v. Piggott, 269 S.W. 942, 945, 219 Mo.App. 222, quoting **Corpus Juris.**

Tex.—Fenner v. American Surety Co. of New York, Civ.App., 97 S.W.2d 741, affirmed American Surety Co. of New York v. Fenner, 125 S.W.2d 258, 133 Tex. 37.

22 C.J. p 378 note 30.

89. U.S.—F. W. Martin & Co. v. Cobb, C.C.A.Ark., 110 F.2d 159—Gratz v. McKee, C.C.A.Mo., 9 F.2d 593, certiorari denied 46 S.Ct. 472, 270 U.S. 664, 70 L.Ed. 788.

Ala.—C. C. Snyder Cigar & Tobacco Co. v. Stutts, 107 So. 73, 214 Ala. 132—Corsbie v. Poore, 198 So. 268, 29 Ala.App. 487, certiorari denied 198 So. 272, 240 Ala. 207.

Ark.—Frolich v. Hicks, 222 S.W. 373, 143 Ark. 565.

Ga.—Smith v. Vaughn, 140 S.E. 892, 37 Ga.App. 558.

Iowa.—State Bank of Prairie City v. Cooper, 205 N.W. 333, 201 Iowa 225.

Ky.—U. S. Fidelity & Guaranty Co. v. Antle, 42 S.W.2d 1, 240 Ky. 243—White Const. Co. v. Brooks, 1 S.W.2d 1076, 222 Ky. 621—Black Mountain Corporation v. Thomas, 291 S.W. 737, 218 Ky. 497—Saunders Drive-It-Yourself Co. v. Walker, 284 S.W. 1088, 215 Ky. 267—Louisville Auto Supply Co. v. Irvine, 278 S.W. 149, 212 Ky. 60—E. P. Barnes & Bro. v. Eastin, 227 S.W. 578, 190 Ky. 392.

Md.—Grzboski v. Bernheimer Leader Stores, 143 A. 706, 156 Md. 146.

Mass.—Topping v. Eastern Massachusetts St. Ry. Co., 147 N.E. 882, 252 Mass. 270.

Mich.—Garey v. Kelvinator Corporation, 271 N.W. 723, 279 Mich. 174—Hughitt v. Sayen, 188 N.W. 430, 218 Mich. 451.

Minn.—Crosby v. Paine, 211 N.W. 947, 170 Minn. 43—Longman v. Anderson, 199 N.W. 742, 160 Minn. 15—Spencer v. Duluth Auto Supply Co., 191 N.W. 39, 154 Minn. 15.

Miss.—Deposit Guaranty Bank & Trust Co. v. Silver Saver Stores, 148 So. 367, 166 Miss. 882.

Mo.—Shelton v. Wolf Cheese Co., 93 S.W.2d 947, 338 Mo. 1129—State ex rel. Vesper-Buick Automobile Co. v. Daues, 19 S.W.2d 700, 323 Mo. 388, 67 A.L.R. 157, quashing part of opinion Lanham v. Vesper-Buick Automobile Co., App., 6 S.W.2d 995—Chawkley v. Wabash Ry. Co., 297 S.W. 20, 317 Mo. 782—Gaines v. Berkshire Life Ins. Co., 68 S.W.2d 905, 908, 228 Mo.App. 319, quoting **Corpus Juris**—Rhoades v. Robinson's Estate, 6 S.W. 1007, 222 Mo. App. 912—Stipel v. Piggott, 269 S.W. 942, 945, 219 Mo.App. 222, quoting **Corpus Juris**—Hunter v. Waterloo Gasoline Engine Co., App., 237 S.W. 819, reversed on other grounds 260 S.W. 970.

Neb.—Waits v. Columbia Fire Underwriters Agency of National Fire Ins. Co. of Hartford, Conn., 261 N.W. 170, 129 Neb. 207.

N.Y.—Kraus v. Fifth Ave. Coach Co., 253 N.Y.S. 230, 233 App.Div. 357—Wolfe v. Madison Ave. Coach Co., 13 N.Y.S.2d 741, 171 Misc. 707—Ellis v. Allen, 211 N.Y.S. 488, 125 Misc. 841—Oneida, Limited, v. National Silver Co., 25 N.Y.S.2d 271.

N.C.—Pangle v. Appalachian Hall, 131 S.E. 42, 190 N.C. 833.

N.D.—Kopald Electric Co. v. Ocean Accident & Guarantee Corporation, 251 N.W. 852, 64 N.D. 213.

Tenn.—Gulf Refining Co. v. Frazier, 15 Tenn.App. 662.

Tex.—Empire Gas & Fuel Co. v. Muegge, 143 S.W.2d 763, 135 Tex. 520, reversing, Civ.App., 116 S.W.2d 758—San Antonio Public Service Co. v. Jackson, Civ.App., 103 S.W.2d 251, error dismissed—Carter v. Guaranty State Bank of Woodville, Civ.App., 262 S.W. 108—Mulhall

However, as long as anything remains to be done in the transaction, statements of the agent made within the scope of his agency are competent as part of the res gestæ, although relating to a past event;[90] and like other res gestæ statements, considered infra § 413, his statements are received where, although made after the occurrence, they were made at a time when the immediate effect of the occurrence may be supposed to have exerted a controlling influence on the mind of declarant.[91] Also, where an agent is specially authorized by his principal to make admissions as to past transactions, such admissions are admissible against the principal if they were made in the course of the agent's employment.[92]

Statements made before the transaction in question, but relevant thereto, are admissible if authorized.[93]

§ 346. Narrative Statements

Generally admissions made by an agent in a narrative statement of a past transaction are inadmissible against his principal.

The rule which has been said to have been "succinctly and comprehensively" stated in Corpus Juris is that admissions made by an agent in a narrative statement of a past transaction cannot be received in evidence against his principal.[94] The

v. Express Pub. Co., Civ.App., 225 S.W. 545.
Vt.—Jones v. Gay's Express, 9 A.2d 121, 110 Vt. 531.
W.Va.—Reynolds v. W. T. Grant Co., 186 S.E. 603, 117 W.Va. 615.
Wis.—In re Leedom's Estate, 261 N. W. 683, 218 Wis. 534.
22 C.J. p 378 note 31, p 372 note 3 [d]—25 C.J. p 543 note 69.
Inadmissibility of narrative statements see infra § 346.

Basis of cause of action

Rule that agent's statements regarding past transaction are incompetent against principal applies when statements relate to past occurrence which itself gives rise to cause of action and cannot be regarded as part of res gestæ.—Baker v. Glens Falls Ins. Co., 93 S.W.2d 851, 264 Ky. 1.

Negligence or cause of injury

(1) Statements by agent as to negligence or cause of injury to person or property are generally inadmissible if made after transaction in question and not part of res gestæ.
Ala.—Arlington Realty Co. v. Lawson, 153 So. 425, 228 Ala. 214.
Ariz.—Brooks v. Neer, 47 P.2d 452, 46 Ariz. 144.
Cal.—Shaver v. United Parcel Service, 266 P. 606, 90 Cal.App. 764.
Iowa.—Wieneke v. Steinke, 233 N.W. 535, 211 Iowa 477—Looney v. Parker, 230 N.W. 570, 210 Iowa 85—Cooley v. Killingsworth, 228 N.W. 880, 209 Iowa 646—Wilkinson v. Queal Lumber Co., 226 N.W. 43, 208 Iowa 533—Droullard v. Rudolph, 223 N.W. 100, 207 Iowa 367.
Ky.—Paducah Coca-Cola Bottling Co. v. Reeves, 88 S.W.2d 39, 261 Ky. 539—Gess v. Wilder, 36 S.W.2d 617, 237 Ky. 830—Cincinnati, N. O. & T. P. Ry. Co. v. McWhorter, 262 S.W. 253, 203 Ky. 252.
Mass.—Cleary v. First National Stores, 196 N.E. 868, 291 Mass. 172.
Miss.—Gulf, M. & N. R. Co. v. Hudson, 107 So. 369, 142 Miss. 542.
Mo.—McLain v. Atlas Assur. Co., Limited, of London, England, App., 67 S.W.2d 849.
N.J.—Thompson v. Giant Tiger Corporation of Camden, 189 A. 649, 118 N.J.Law 10.
N.Y.—Moore v. Rosenmond, 144 N.E. 639, 238 N.Y. 356, reversing 201 N.Y.S. 926, 207 App.Div. 839—Galbraith v. Galbraith, 290 N.Y.S. 739, 248 App.Div. 914—Archibald v. Hill Sanatorium, 201 N.Y.S. 86, 121 Misc. 193.
Ohio.—Liberty Highway Co. v. Callahan, 157 N.E. 708, 24 Ohio App. 374.
Pa.—Campbell v. G. C Murphy Co., 186 A. 269, 122 Pa.Super. 342.
S.C.—Sandel v. State, 119 S.E. 776, 126 S.C. 1, petition denied 122 S.E. 571, 128 N.C. 178, appeal dismissed 44 S.Ct. 5, 263 U.S. 672, 68 L.Ed. 500, error dismissed 46 S.Ct. 100, 269 U.S. 532, 70 L.Ed. 397.

(2) Accordingly, a driver's admission after collision, that he was at fault, was not admissible against his employer, since he had no authority to confess liability.—Red Arrow Freight Lines v. Gravis, Tex.Civ.App., 84 S.W.2d 540.

(3) However, it has been held that an official report of accident by driver to commissioner of motor vehicles may be introduced in evidence in action for injuries sustained in accident for purpose of proving an admission of driver.—Weissman v. Hokamp, 188 A. 923, 171 Md. 197, dissenting opinion 189 A. 813, 171 Md. 197.

90. S.C.—Williams v. Western Union Telegraph Co., 136 S.E. 218, 138 S.C. 281.

Within agent's jurisdiction

The fact that the statement refers to a past act does not preclude its admissibility if the matter in question is still pending within the jurisdiction of the agent.—Snipes v. Augusta-Aiken Ry. & Electric Corporation, 149 S.E. 111, 151 S.C. 391.

91. Ky.—Saunders Drive-It-Yourself Co. v. Walker, 284 S.W. 1088, 215 Ky. 267.
Wash.—Samuels v. Hiawatha Holstein Dairy Co., 197 P. 24, 115 Wash. 343.
22 C.J. p 379 note 33.

92. Cal.—Guberman v. Weiner, 51 P. 2d 1141, 10 Cal.App.2d 401.
Ga.—Baker v. H. E. Lowe Electric Co., 170 S.E. 337, 47 Ga.App. 259.
Va.—Duke v. Luck, 143 S.E. 692, 150 Va. 406.
22 C.J. p 369 note 1 [b].

Statutory report of accident by authorized agent binds employer as respects admission therein.—Craciola v. Lewis, 253 N.Y.S. 752, 233 App.Div. 437—Anthus v. Rail Joint Co., 185 N.Y.S. 314, 193 App.Div. 571, affirmed 132 N.E. 887, 231 N.Y. 557.

93. Ala.—Alabama Power Co. v. Shaw, 111 So. 17, 215 Ala. 436.
Mass.—Van Steenbergen v. Barrett, 190 N.E. 597, 286 Mass. 400.
Pa.—Derrick v. Harwood Electric Co., 111 A. 48, 268 Pa. 136.

94. Ala.—Greenwald v. Russell, 172 So. 895, 233 Ala. 502—General Refrigeration Sales Co. v. Taylor, 158 So. 314, 229 Ala. 479—Atlas Portland Cement Co. v. Sharpe, 96 So. 632, 209 Ala. 464—Corsbie v. Poore, 198 So. 268, 29 Ala.App. 487, certiorari denied 198 So. 272, 240 Ala. 207.
Cal.—Barton v. McDermott, 291 P. 591, 108 Cal.App. 372.
Ky.—Powers v. Gatliff Coal Co., 14 S.W.2d 216, 228 Ky. 5.
Md.—Grzboski v. Bernheimer Leader Stores, 143 A. 706, 156 Md. 146.
Mo.—State ex rel. S. S. Kresge Co. v. Shain, 101 S.W.2d 14, 340 Mo. 145—Shelton v. Wolf Cheese Co., 93 S.W.2d 947, 338 Mo. 1129—Murray v. De Luxe Motor Stages of Illinois, App., 133 S.W.2d 1074—Youel v. Bank of Atchison County, 117 S.W.2d 376, 378, 233 Mo.App. 1, citing **Corpus Juris**—Stipel v. Piggott, 269 S.W. 942, 945, 219 Mo. App. 222, quoting **Corpus Juris**—Martin v. Woodlea Inv. Co., 226 S. W. 650, 206 Mo.App. 33.
Mont.—Rossberg v. Montgomery Ward & Co., 99 P.2d 979, 982, 110 Mont. 154, quoting **Corpus Juris**—Newman v. Bitter Root Irr. Dist., 28 P.2d 195, 196, 95 Mont. 521, citing **Corpus Juris.**

reason for such exclusion is sometimes stated to be that statements of this character are not part of the res gestæ,[95] but a ground of exclusion quite as potent may be found in a consideration of the fact that it is ordinarily no part of an agent's duty to prejudice his principal by narrative statements construing[96] or otherwise affecting[97] his principal's rights or liabilities, or to discuss the propriety of his conduct even in relation to the subject matter of the agency.[98] However, as appears supra § 345, an agent may have such authority as to enable him to bind his principal by a statement as to a past transaction where such statement is made while he is acting in the course of his employment.

§ 347. Relation Must Exist When Statement Made

The relation of agency must exist at the time the statement is made in order to permit its introduction as an admission of the principal.

The relation of principal and agent must exist at the time the statement is made in order to permit its introduction into evidence as an admission.[99]

An admission made before declarant was employed as the agent of the party against whom it is sought to be used[1] or after such employment had terminated[2] cannot be received.

§ 348. Independent Relevancy

Statements of an agent, when made within the scope of his authority, may be competent because they are relevant facts which constitute the transaction itself, or because they tend to establish circumstantially the existence of material facts or of a relevant mental state.

Statements of an agent may be competent because they are relevant facts which either alone or with other facts constitute the transaction itself,[3]

N.Y.—Muessling v. Leisner, 224 N.Y.S. 689, 221 App.Div. 524.
N.C.—Hester v. Horton Motor Lines, 14 S.E.2d 794, 219 N.C. 743—Pinnix v. Griffin, 12 S.E.2d 667, 219 N.C. 35—Staley v. Royal Pines Park, 162 S.E. 202, 202 N.C. 155—Norfolk Southern Ry. Co. v. Smitherman, 101 S.E. 208, 178 N.C. 595.
Okl.—Palacine Oil Co. v. Philpot, 289 P. 281, 289, 144 Okl. 123, citing **Corpus Juris.**
Or.—Hansen v. Oregon-Washington R. & Nav. Co., 188 P. 963, 97 Or. 190, rehearing denied 191 P. 655, 97 Or. 190.
Pa.—Bitonti v. National Liberty Ins. Co. of America, 96 Pa.Super. 521.
S.C.—Hall v. Benefit Ass'n of Ry. Employees, 161 S.E. 867, 868, 164 S.C. 80, quoting **Corpus Juris**—Williams v. Western Union Telegraph Co., 136 S.E. 218, 138 S.C. 281.
Tex.—Red Arrow Freight Lines v. Gravis, Civ.App., 84 S.W.2d 540—Sinclair Refining Co. v. Womack, Civ.App., 66 S.W.2d 402, 404, citing **Corpus Juris**—Trice v. Bridgewater, Civ.App., 51 S.W.2d 797, modified on other grounds 81 S.W.2d 63, 125 Tex. 75, 100 A.L.R. 1014.
Wash.—Space v. Tacoma Durant Co., 296 P. 822, 824, 161 Wash. 232, quoting **Corpus Juris.**
Wis.—Hamilton v. Reinemann, 290 N.W. 194, 233 Wis. 572.
22 C.J. p 379 note 34.

95. Tex.—Red Arrow Freight Lines v. Gravis, Civ.App., 84 S.W.2d 540.
22 C.J. p 380 note 35.

96. Mont.—Rossberg v. Montgomery Ward & Co., 99 P.2d 979, 982, 110 Mont. 154, quoting **Corpus Juris.**
S.C.—Hall v. Benefit Ass'n of Ry. Employees, 161 S.E. 867, 868, 164 S.C. 80, quoting **Corpus Juris.**
22 C.J. p 380 note 36.

Responsibility for injury
"The rule is settled that the declarations of an employee as to who was responsible for an injury, made after its occurrence, is incompetent as against his employer, for the reason that his employment does not carry with it authority to make declarations or admissions at a subsequent time as to the manner in which he had performed his duties."—Casteel v. Yantis Harper Tire Co., 39 S.W.2d 306, 308, 183 Ark. 912.

97. Iowa.—Wilkinson v. Queal Lumber Co., 226 N.W. 43, 208 Iowa 933.
S.C.—Hall v. Benefit Ass'n of Ry. Employees, 161 S.E. 867, 868, 164 S.C. 80, quoting **Corpus Juris.**
Tex.—Burroughs v. Smith, Civ.App., 8 S.W.2d 301, error dismissed.
22 C.J. p 380 note 37.

98. Mont.—Rossberg v. Montgomery Ward & Co., 99 P.2d 979, 982, 110 Mont. 154, quoting **Corpus Juris.**
S.C.—Hall v. Benefit Ass'n of Ry. Employees, 161 S.E. 867, 868, 164 S.C. 80, quoting **Corpus Juris.**
Tex.—Red Arrow Freight Lines v. Gravis, Civ.App., 84 S.W.2d 540.
22 C.J. p 380 note 38.

99. Mass.—Morrison v. Tremont Trust Co., 147 N.E. 870, 252 Mass. 383.
Mo.—Henry v. First Nat. Bank, 115 S.W.2d 121, 232 Mo.App. 1071.
N.D.—Kopald Electric Co. v. Ocean Accident & Guarantee Corporation, 251 N.W. 852, 64 N.D. 213.

1. Mich.—Garey v. Kelvinator Corporation, 271 N.W. 723, 730, 279 Mich. 174, citing **Corpus Juris**—Hughitt v. Sayen, 188 N.W. 430, 432, 218 Mich. 451, citing **Corpus Juris.**
Va.—Deitz v. Whyte, 109 S.E. 212, 131 Va. 19.
22 C.J. p 381 note 39.

2. U.S.—Lyons Milling Co. v. Goffe & Carkener, C.C.A.Kan., 46 F.2d 241, 248, 83 A.L.R. 501, citing **Corpus Juris,** and affirming, D.C., Goffe & Clarkener v. Lyons Milling Co., 26 F.2d 801.
Ala.—Corley v. Vizard, 84 So. 299, 203 Ala. 564.
Ark.—Arkansas Anthracite Coal & Land Co. v. Dunlap, 218 S.W. 839, 142 Ark. 358.
Cal.—Taylor v. Bernheim, 209 P. 55, 58 Cal.App. 404.
Colo.—Crawford v. Melvin, 246 P. 283, 79 Colo. 414.
Ga.—Jackson Co. v. Farmers Peanut Co., 6 S.E.2d 428, 61 Ga.App. 248—Willingham v. Benton, 103 S.E. 497, 25 Ga.App. 412.
Mich.—Garey v. Kelvinator Corporation, 271 N.W. 723, 730, 279 Mich. 174, citing **Corpus Juris**—Hughitt v. Sayen, 188 N.W. 430, 432, 218 Mich. 451, citing **Corpus Juris.**
Minn.—Spencer v. Duluth Auto Supply Co., 191 N.W. 39, 154 Minn. 15.
N.Y.—McCabe v. Interstate Iron & Steel Co., 27 N.Y.S.2d 862, 262 App.Div. 777.
N.D.—Wilkins v. National Union Fire Ins. Co. of Pittsburgh, Pa., 189 N.W. 317, 48 N.D. 1295.
Okl.—Lilly v. Hanson, 43 P.2d 405, 171 Okl. 604.
Va.—Deitz v. Whyte, 109 S.E. 212, 131 Va. 19.
22 C.J. p 381 note 40.

Corpus Juris rule held inapplicable where party adopted declarant's statement as his own.—Paterson v. Jordan, 181 So. 242, 243, 236 Ala. 54.

3. Ala.—Southern Wood Preserving Co. v. McCamey, 118 So. 393, 218 Ala. 201.
Ky.—Baker v. Glens Falls Ins. Co., 93 S.W.2d 851, 264 Ky. 1.
22 C.J. p 381 note 42.

provided they were made within the scope of the agency,[4] or were ratified by the principal.[5] Thus where an agent makes representations,[6] accepts,[7] claims,[8] disclaims,[9] ratifies,[10] or waives[11] something for his principal, or acts as interpreter,[12] or makes a contract,[13] offer of settlement,[14] or ouster[15] for him, the agent's statements may be the facts which constitute the legal result.

A statement of an agent may also tend to establish circumstantially the existence of material facts[16] or of a relevant mental state,[17] although it was not made in the course of transacting business for the principal,[18] and amounted to merely a narrative of past events.[19]

§ 349. Character of Agency

An agent's admission may bind his principal regardless of whether his authority is express or implied or is secretly limited by the principal unknown to the person with whom the agent deals, but generally the admission must be within the precise scope of the purpose of the delegated authority.

The character of the agency between declarant and the party against whom the statement is offered may be such as to confer express authority on the agent to make admissions, and in such case the admissibility of the statement offered is clear.[20] So the statement of an agent acting for both parties, as to a matter entrusted to him for decision, is admissible.[21] Further, even though the making of

Independently relevant statements generally see supra §§ 239–264.

4. Cal.—Bellone v. Kleinau, 201 P. 977, 54 Cal.App. 428.
22 C.J. p 381 note 43.

5. Mass.—Lajoie v. Milliken, 136 N.E. 419, 242 Mass. 508.
22 C.J. p 381 note 44.

6. Cal.—Bellone v. Kleinau, 201 P. 977, 54 Cal.App. 428.
Iowa.—Roenfeld v. Poston, 171 N.W. 597, 186 Iowa 769.

7. Mass.—Lajoie v. Milliken, 136 N.E. 419, 242 Mass. 508.
22 C.J. p 381 note 45.

8. Mass.—Barker v. Mackay, 56 N.E. 614, 175 Mass. 485.
22 C.J. p 381 note 46.

9. Ala.—Pearson v. Adams, 29 So. 977, 129 Ala. 157.
Pa.—Richards v. Murphy, 1 Whart. 185.

10. U.S.—Rogers v. The Marshal, Wis., 1 Wall. 644, 17 L.Ed. 714.
Del.—State v. Stidham, 110 A. 680, 1 W.W.Harr. 8.

11. Wis.—Zielke v. London Assur. Corp., 25 N.W. 436, 64 Wis. 442.

12. Minn.—Miller v. Lathrop, 52 N.W. 274, 50 Minn. 91.
Ohio.—Schutter v. Williams, 1 Ohio Dec. (Reprint) 47, 1 West.L.J. 319.
Wis.—Nadau v. White River Lumber Co., 43 N.W. 1135, 76 Wis. 120, 20 Am.S.R. 29.

13. Tex.—McDonald v. McDonald, Civ.App., 143 S.W.2d 142, error dismissed, judgment correct.
22 C.J. p 382 note 51.

14. N.H.—Gray v. Rollinsford, 58 N.H. 253.

15. N.Y.—Morgan v. Short, 34 N.Y.S. 10, 13 Misc. 279.

16. Ky.—Baker v. Glens Falls Ins. Co., 93 S.W.2d 851, 264 Ky. 1—Saunders Drive-It-Yourself Co. v. Walker, 284 S.W. 1088, 215 Ky. 267.
Mont.—Rossberg v. Montgomery Ward & Co., 99 P.2d 979, 986, 110 Mont. 154, quoting **Corpus Juris.**
Wis.—Gloede v. Socha, 226 N.W. 950, 199 Wis. 503.
22 C.J. p 382 note 54.

Notice
Ala.—Somerall v. Citizens' Bank, 101 So. 429, 211 Ala. 630.
Ky.—Baker v. Glens Falls Ins. Co., 93 S.W.2d 851, 264 Ky. 1.
Miss.—Yazoo City v. Loggins, 110 So. 833, 145 Miss. 793.
Mo.—Henry v. First Nat. Bank, 115 S.W.2d 121, 232 Mo.App. 1071—Garnett v. S. S. Kresge Co., App., 85 S.W.2d 157—Pulsifer v. City of Albany, 47 S.W.2d 233, 226 Mo.App. 529—Citizens' Bank of Edina v. Kriegshauser, 244 S.W. 107, 211 Mo.App. 33.
Ohio.—F. W. Woolworth Co. v. Saxton, 177 N.E. 219, 39 Ohio App. 118.
22 C.J. p 382 note 54 [f].

Limited competency
Such declarations are not necessarily competent to show the truth of the facts asserted.—Henry v. First Nat. Bank, 115 S.W.2d 121, 232 Mo. App. 1071—22 C.J. p 382 note 54 [g].

Identity of driver
Testimony of employee, automobile driver, after accident was competent to identify him as driver of car causing injury.—Casteel v. Yantis-Harper Tire Co., 39 S.W.2d 306, 183 Ark. 912.

17. Ark.—Loose-Wiles Biscuit Co. v. Jolly, 238 S.W. 613, 152 Ark. 442.
Iowa.—Evans v. Boyle, 64 N.W. 619, 94 Iowa 753.

Intent
Ala.—Corley v. Vizard, 84 So. 299, 203 Ala. 564.
22 C.J. p 382 note 55 [c].

Knowledge
U.S.—Barrett Co. v. Panther Rubber Mfg. Co., C.C.A.Mass., 24 F.2d 329.
Ill.—Myers Const. Co. v. Wood River Drainage & Levee Dist. of Madison County, Ill., 221 Ill.App. 473.
Kan.—Tannahill v. Depositors' Oil & Gas Co., 203 P. 909, 110 Kan. 254.
Ky.—Baker v. Glens Falls Ins. Co., 93 S.W.2d 851, 264 Ky. 1.
Mo.—State ex rel. S. S. Kresge Co. v. Shain, 101 S.W.2d 14, 340 Mo. 145—Wainwright v. Westborough Country Club, App., 45 S.W.2d 86—Yarbrough v. Wisconsin Lumber Co., App., 211 S.W. 713.
Mont.—Rossberg v. Montgomery Ward & Co., 99 P.2d 979, 986, 110 Mont. 154, citing **Corpus Juris.**
N.C.—Jones v. Raney Chevrolet Co., 9 S.E.2d 395, 217 N.C. 693—Markham v. Duke Land & Improvement Co., 158 S.E. 852, 201 N.C. 117.
Okl.—Palacine Oil Co. v. Philpot, 289 P. 281, 144 Okl. 123.
Tex.—Fenner v. American Surety Co. of New York, Civ.App., 97 S.W.2d 741, affirmed American Surety Co. of New York v. Fenner, 125 S.W.2d 258, 133 Tex. 37.
22 C.J. p 382 note 55 [e].

Malice
S.C.—Lazar v. Great Atlantic & Pacific Tea Co., 14 S.E.2d 560.
Tex.—International & G. N. R. Co. v. Telephone Tel. Co., 5 S.W. 517, 69 Tex. 277, 5 Am.S.R. 45.

18. Mont.—Rossberg v. Montgomery Ward & Co., 99 P.2d 979, 986, 110 Mont. 154, quoting **Corpus Juris.**
Tex.—Fenner v. American Surety Co. of New York, Civ.App., 97 S.W.2d 741, affirmed American Surety Co. of New York v. Fenner, 125 S.W.2d 258, 133 Tex. 37.
22 C.J. p 382 note 56.

19. Mo.—Henry v. First Nat. Bank, 115 S.W.2d 121, 232 Mo.App. 1071.
Mont.—Rossberg v. Montgomery Ward & Co., 99 P.2d 979, 986, 110 Mont. 154, quoting **Corpus Juris.**
22 C.J. p 382 note 57.

20. Ill.—Smothers v. Cosgrove-Meehan Coal Co., 264 Ill.App. 488.
N.Y.—Hershkowitz v. Director General of Railroads, 181 N.Y.S. 196.
Tenn.—Nelson v. Rural Educational Ass'n, 134 S.W.2d 181, 23 Tenn. App. 409.
22 C.J. p 369 note 1 [b].

21. U.S.—David Stott Flour Mills v. Richardson, D.C.Pa., 6 F.2d 332.
S.C.—Harper v. American Ry. Express Co., 138 S.E. 354, 139 S.C. 545.

declarations may not have been expressly authorized by the principal, yet if they were ordinary incidents of the position which the agent occupies, authorization will be implied.[22] So a party who seeks to benefit from a transaction engaged in by another is bound to treat such other as his agent and is affected by the latter's admissions in the course of the transaction.[23]

A general agent's power to affect the principal by his statements is not impaired by undisclosed instructions or other limitations unknown to the person with whom the agent is dealing,[24] or by the fact that the principal is ignorant of the agent's acts.[25] The scope of such an agency is extended where the principal is at a distance or out of the country.[26] Where, however, the agent's authority has been delegated for a particular purpose, the statements of the agent must be within the precise scope of such purpose.[27]

§ 350. Subagents

Admissions of a subagent within the reasonable scope of his agency may bind the principal.

While, as a general rule, a delegated authority cannot without the assent of the principal be itself delegated, see Agency § 136, it has been considered that admissions of relevant facts by a subagent employed by the agent, within the reasonable scope of his agency may bind the principal.[28]

§ 351. Particular Occupations or Employments

a. Insurance
b. Maritime affairs
c. Mechanical occupations
d. Other occupations or employments

a. Insurance

An admission of fact made by an agent of an insurer binds the principal provided it was made in the course of the declarant's employment as to a matter within the scope of his authority; but ordinarily, an insurer may not bind the insured, nor the insured bind the insurer, by admissions not made by virtue of any special agency.

An admission made by the agent of insurer is competent against the principal,[29] provided, but not unless, it appears to have been made within the scope of the agent's authority[30] at the time when

22. U.S.—Johnson v. J. H. Yost Lumber Co., C.C.A.Neb., 117 F.2d 53

23. Utah.—Golden v. American Keene Cement & Plaster Co., 95 P.2d 755, 98 Utah 23.

24. Neb.—Sindelar v. T. B. Hord Grain Co., 219 N.W. 145, 116 Neb. 776.

22 C.J. p 382 note 59.

Particular forms of agency see infra §§ 360–368.

25. Conn.—Carney v. Hennessey, 49 A. 910, 74 Conn. 107, 92 Am.S.R. 199, 53 L.R.A. 699.

26. N.Y.—Rothschild v. Schuberth, 21 N.Y.Super. 289.

27. Tenn.—Nelson v. Rural Educational Ass'n, 134 S.W.2d 181, 23 Tenn.App. 409.

Tex.—Southern Surety Co. v. Nalle & Co., Com.App., 242 S.W. 197, 200, citing **Corpus Juris**, and reversing Civ.App., 231 S.W. 402—Texas Nursery Co. v. Knight, Civ.App., 292 S.W. 588.

22 C.J. p 382 note 62.

28. Mich.—Turner v. Phœnix Ins. Co., 21 N.W. 326, 55 Mich. 236.

22 C.J. p 383 note 64.

29. Ga.—Globe & Rutgers Fire Ins. Co. v. Jewell-Loudermilk Co., 137 S.E. 286, 36 Ga.App. 538.

Ky.—Baker v. Glens Falls Ins. Co., 93 S.W.2d 851, 852, 264 Ky. 1, citing **Corpus Juris.**

Md.—Great Eastern Casualty Co. v. Schwartz, 122 A. 647, 143 Md. 452.

Mo.—Smith v. Ohio Millers' Mut. Fire Ins. Co., 6 S.W.2d 920, 320 Mo. 146—Shapiro v. John Hancock Mut. Life Ins. Co., 107 S.W.2d 829, 232 Mo.App. 396—Porter v. Equitable Life Assur. Soc. of U. S., App., 71 S.W.2d 766—Godwin v. Iowa State Ins. Co. of Keokuk, Iowa, App., 27 S.W.2d 464, certiorari denied Iowa State Ins. Co. of Keokuk, Iowa v. Godwin, 51 S.Ct. 83, 282 U.S. 880, 75 L.Ed. 777.

N.C.—Profitt v. State Mutual Fire Ins. Co., 97 S.E. 635, 176 N.C. 680.

Okl.—National Aid Life Ass'n v. Wiles, 41 P.2d 655, 171 Okl. 57.

S.C.—Appleby v. Reserve Loan Life Ins. Co., 172 S.E. 776, 172 S.C. 42—Simon v. Ætna Casualty & Surety Co., 148 S.E. 648, 151 S.C. 44.

Tex.—Reliance Ins. Co. v. Smith, Civ.App., 44 S.W.2d 446, affirmed, Com.App., 66 S.W.2d 675—National Union Fire Ins. Co. of Pittsburgh, Pa., v. Richards, Civ.App., 290 S.W. 912—Connecticut Fire Ins. Co. v. Fields, Civ.App., 236 S.W. 790.

22 C.J. p 383 note 78.

Agency of insured for beneficiary see infra § 368.

Payment of premium by insured may be shown by admissions of an agent of insurer.

Neb.—Union L. Ins. Co. v. Haman, 74 N.W. 1090, 54 Neb. 599.

Tex.—General American Life Ins. Co. v. Gant, Civ.App., 119 S.W.2d 693, error dismissed.

Medical agents are within rule.

Ind.—Western & Southern Life Ins. Co. v. Danciu, 26 N.E.2d 912, rehearing denied 27 N.E.2d 763.

Tex.—Metropolitan Life Ins. Co. v. Moss, Civ.App., 109 S.W.2d 1035, error dismissed.

22 C.J. p 383 note 78 [c].

Soliciting agent is within the rule.—Basta v. Farm Property Mut. Ins. Ass'n of Iowa, 252 N.W. 125, 217 Iowa 240—22 C.J. p 383 note 78 [d].

30. Ala.—National Life & Accident Ins. Co. v. McGhee, 191 So. 884, 238 Ala. 471.

Ga.—Folds v. New York Life Ins. Co., 108 S.E. 627, 27 Ga.App. 435.

Ind.—Ætna Ins. Co. of Hartford, Conn., v. Robinson, App., 6 N.E.2d 746.

Kan.—Debus v. Missouri State Life Ins. Co., 225 P. 91, 115 Kan. 773.

Mo.—Green v. American Life & Accident Ins. Co., App., 93 S.W.2d 1119—Brown v. Republic Casualty & Surety Co., App., 31 S.W.2d 111.

Neb.—Wert v. Equitable Life Assur. Soc. of U. S., 283 N.W. 506, 511, 135 Neb. 654, quoting **Corpus Juris.**

N.Y.—Turner v. Northwestern Mut. Life Ins. Co., 133 N.E. 435, 232 N.Y. 171, reversing 179 N.Y.S. 955, 190 App.Div. 913.

N.D.—Wilkins v. National Union Fire Ins. Co. of Pittsburgh, Pa., 189 N.W. 317, 48 N.D. 1295.

Okl.—Continental Casualty Co. v. Derrick, 86 P.2d 798, 184 Okl. 267.

Or.—Schluter v. Niagara Fire Ins. Co., 264 P. 859, 124 Or. 560.

S.C.—Wimberly v. Sovereign Camp, W. O. W., 2 S.E.2d 532, 190 S.C.

it was made,[31] and while he was engaged in the business of the principal,[32] and that it amounts to a statement of fact rather than an expression of opinion.[33]

Narrative statements of the agent of insurer are usually excluded,[34] although it has been held that statements relating to a past transaction, made by general agents possessing the requisite authority, may be competent.[35] A statement concerning insured's standing when he died, made in the discharge of official duties, is admissible on behalf of the beneficiary.[36]

A holder of accident liability insurance cannot bind insurer by his admissions.[37] Insurer cannot bind insured by its action where its agency to act for him is not established.[38]

b. Maritime Affairs

Generally, the owner of a vessel may be bound by admissions of the captain if made in the course of his employment, but not by admissions of a pilot, crew member, workman, or clerk having limited authority.

In maritime affairs the captain of a vessel is general agent for her owners, and his declarations are competent against them if made in the course of his employment,[39] although it is otherwise as to statements made after the transaction to which they relate,[40] or as to statements not connected with the transaction of the captain's business.[41] The owner cannot be affected by statements of a pilot,[42]

158—Sanders v. Commonwealth Life Ins. Co. of Kentucky, 132 S.E. 828, 134 S.C. 435.
Tex.—Taylor v. U. S. Fidelity & Guaranty Co., Com.App., 283 S.W. 161, modifying U. S. Fidelity & Guaranty Co. v. Taylor, Civ. App., 273 S.W. 320—Metropolitan Life Ins. Co. v. Moss, Civ.App., 109 S.W.2d 1035, error dismissed—Texas Hardware Mut. Fire Ins. Co. v. Flewellen, Civ.App., 68 S.W.2d 521, error dismissed—Texas Employers' Ins. Ass'n v. Drummond, Civ.App., 267 S.W. 335, affirmed, Com.App., 279 S.W. 1116—Northern Assur. Co. v. Lawrence, Civ.App., 209 S.W. 430.
22 C.J. p 383 note 79.

Statement of soliciting agent, outside his authority, is inadmissible.—McNamee v. Zimmett, 189 N.Y.S. 638, 197 App.Div. 738—22 C.J. p 383 note 79 [a].

31. N.Y.—Brown v. Dutchess County Mut. Ins. Co., 71 N.Y.S. 670, 64 App.Div. 9.
S.C.—Cohen v. Standard Accident Ins. Co., 9 S.E.2d 222, 194 S.C. 533.

32. Ala.—Atlanta Life Ins. Co. v. Bolden, 194 So. 653, 239 Ala. 231—U. S. Fidelity & Guaranty Co. v. Millonas, 89 So. 732, 206 Ala. 147, 29 A.L.R. 520.
Ga.—Folds v. New York Life Ins. Co., 108 S.E. 627, 27 Ga.App. 435.
Neb.—Wert v. Equitable Life Assur. Soc. of U. S., 283 N.W. 506, 512, 135 Neb. 654, quoting **Corpus Juris.**
N.Y.—Turner v. Northwestern Mut. Life Ins. Co., 133 N.E. 435, 232 N. Y. 171, reversing 179 N.Y.S. 955, 190 App.Div. 913.
Tex.—General American Life Ins. Co. v. Gant, Civ.App., 119 S.W.2d 693, error dismissed.
22 C.J. p 383 note 81.

33. Neb.—Wert v. Equitable Life Assur. Soc. of U. S., 283 N.W. 506, 511, 135 Neb. 654, quoting **Corpus Juris.**
22 C.J. p 383 note 82.

Value and adaptability for reconstruction of remnants of building after fire were matters of fact, about which insurer's adjuster might make admissions; but statement that building was total loss within policy was conclusion of law, inadmissible against insurer.—National Union Fire Ins. Co. of Pittsburgh, Pa., v. Richards, Tex.Civ.App., 290 S.W. 912.

Statement as to cause of death, made in report by agents not shown to have any direct actual knowledge of the facts set forth is inadmissible.—Jennings v. Sovereign Camp, W. O. W., Tex.Civ.App., 296 S.W. 961.

34. U.S.—American Ins Union v. Lowry, C.C.A.Tex., 62 F.2d 209, certiorari denied Lowry v. American Ins. Union, 53 S.Ct. 689, 289 U.S. 745, 77 L.Ed. 1491.
Cal.—Crawford v. Trans-Atlantic Fire Ins. Co., 57 P. 177, 125 Cal. 609.
Colo.—Colorado Life Co. v. Winegarner, 35 P.2d 860, 95 Colo. 261.
Neb.—Waits v. Columbia Fire Underwriters Agency of National Fire Ins. Co. of Hartford, Conn., 261 N. W. 170, 129 Neb. 207.
N.C.—Pinnix v. Griffin, 12 S.E.2d 667, 219 N.C. 35.
N.D.—Kopald Electric Co. v. Ocean Accident & Guarantee Corporation, 251 N.W. 852, 64 N.D. 213.
Or.—Pacific States Fire Ins. Co. v. C. Rowan Motor Co., 260 P. 441, 122 Or. 665.
Tex.—Southern Surety Co. v. Nalle & Co., Com.App., 242 S.W. 197, reversing, Civ.App., 231 S.W. 402.
22 C.J. p 383 note 83.

35. Ark.—Home Ins Co. of New York v. Hall, 91 S.W.2d 609, 192 Ark. 283.
22 C.J. p 384 note 84.

Transfer of insurance
In action on fire policy covering goods subsequently moved to different locality, evidence that after fire insurer's agent admitted that he had received request by insured's agent to transfer insurance, but had neglected to do so, was admissible.—Baker v. Glens Falls Ins. Co., 93 S. W.2d 851, 264 Ky. 1.

36. Ala.—Sovereign Camp of Woodmen of the World v. Marshall, 81 So. 246, 17 Ala.App. 32.
Tex.—Supreme Lodge K. H. v. Rampy, Civ.App., 45 S.W. 422.

37. U.S.—Indemnity Ins. Co. of North America v. Forrest, C.C.A. Cal., 44 F.2d 465.
N.H.—Ætna Life Ins. Co. v. Chandler, 193 A. 233, 89 N.H. 95—Morin v. Travelers' Ins. Co., 160 A. 482, 85 N.H. 471.

38. Ill.—Last v. Brams, 238 Ill.App. 82.

39. U.S.—The Joseph J. Hock, C.C. A.N.Y., 70 F.2d 259, reversing, D. C., 4 F.Supp. 628—The Abangarez, D.C.La., 60 F.2d 543—The Rosalie M., C.C.A.Tex., 12 F.2d 970, affirming, D.C., 4 F.2d 815.
22 C.J. p 384 note 87.

Statements held admissible
(1) Statement as to speed of ship at time of collision.—The Kaga Maru, D.C.Wash., 18 F.2d 295.

(2) Statement as to failure to warn employee as to manner of construction and operation of steam tug boat.—Wilson v. St. Joe Boom Co., 200 P. 884, 34 Idaho 253.

40. U.S.—The Catalina, C.C.A.Cal., 95 F.2d 283, affirming, D.C., 18 F. Supp. 461.

41. U.S.—Northwestern Union Packet Co. v. Clough, Wis., 20 Wall. 528, 22 L.Ed. 406.
Pa.—Chambers v. Davis, 3 Whart. 40.

Reason for engine failure
Captain's statement as to engineer's statement of reason for engine room failing to respond to signal was inadmissible against owner.—Calzavaro v. Planet S. S. Corporation, C.C.A. Va., 31 F.2d 885.

42. U.S.—The Kaga Maru, D.C. Wash., 18 F.2d 295.

members of the crew,[43] workmen employed for a specific purpose,[44] or employees who have only specific clerical duties to perform.[45]

c. Mechanical Occupations

Agents employed in mechanical occupations are within the rule that an agent's declaration will bind his principal when, and only when, they are within the scope of his authority and in the course of his employment.

The general rule admitting the declarations of agents when, and only when, they are within the scope of the agent's authority and in the course of his employment applies to mechanical occupations,[46] such as that of a superintendent,[47] foreman,[48] or chief engineer.[49]

The principal may be affected by the statements of an agent intrusted with the general oversight of manufacturing establishments, who has been commissioned to discharge the duty of the principal to provide safe and convenient tools and appliances for carrying on the work,[50] but mere superintendency of a number of men does not establish the relation of general agency to make admissions.[51] A workman cannot affect his employer by statements as to matters with which his employment gives him no concern,[52] such as the merits of the article[53] or the condition of the property[54] with which he is dealing. Neither are statements of employees in manufacturing or other mechanical operations as to the condition of the works, ways, or machinery of the establishment admissible against the employer.[55]

d. Other Occupations or Employments

Various occupations and employments other than those hereinbefore specifically considered have been held to render admissible or not to render admissible statements in connection therewith.

Bailment. While mere possession of property does not constitute a relation of agency so as to bind the owner by the holder's admissions,[56] an owner will be assumed to have conferred on his bailee all usual and customary powers necessary for the safety of the property,[57] and its proper and profitable use,[58] so as to render admissible his statements in connection therewith. So the declaration of one in possession of property as to the nature and character of such possession is ordinarily competent.[59]

Building. An architect is such an agent of the owner that his declarations, within the scope of his employment,[60] may affect the owner;[61] but a

Mo.—Ready v. The Highland Mary, 20 Mo. 264.

43. U.S.—Maltby v. The R. R. Kirkland, D.C.Va., 48 F. 760.

Engineer

U.S.—Calzavaro v. Planet S. S. Corporation, C.C.A.Va., 31 F.2d 885.

Watch officer

U.S.—The Condor, D.C.N.Y., 8 F. Supp. 929, affirmed The Nordpol, C.C.A., 84 F.2d 3, certiorari denied Grace S. S. Co. v. Anglo-Chilean Nitrate Sales Corporation, 57 S. Ct. 111, two cases, 299 U.S. 586, 81 L.Ed. 432.

44. N.Y.—Mallory v. Perkins, 22 N Y.Super. 572.

45. Mich.—Ward's Central & Pacific Lake Co. v. Elkins, 34 Mich. 439, 22 Am.R. 544.

46. Mass.—Wood v. Canadian Imperial Dry, 5 N.E.2d 8, 296 Mass. 80.

Tex.—Long v. Metcalf, Civ.App., 134 S.W.2d 485, error dismissed, judgment correct—Stark v. R. B. George Machinery Co., Civ.App., 41 S.W.2d 1023, affirmed R. B. George Machinery Co. v. Stark, 73 S.W.2d 519, 123 Tex. 529.

22 C.J. p 384 note 93.

Bus or truck driver

Tex.—Dixie Motor Coach Corporation v. Meredith, Civ.App., 45 S.W.2d 364, error dismissed.

Wis.—Hamilton v. Reinemann, 290 N.W. 194, 233 Wis. 572.

47. Kan.—Hilton v. Sheridan Coal Co., 297 P. 413, 132 Kan. 525.

S.C.—Price v. American Agr. Chemical Co., 176 S.E. 352, 173 S.C. 518.

22 C.J. p 384 note 94.

48. Ky.—Vincennes Bridge Co. v. Poulos, 27 S.W.2d 952, 234 Ky. 243.

Wis.—Zurich Accident & Liability Ins. Co. v. Industrial Commission of Wisconsin, 213 N.W. 630, 193 Wis. 32.

22 C.J. p 384 note 95.

49. U.S.—New Jersey Shipbuilding & Dredging Co. v. Long Beach on the Ocean, D.C.N.Y., 12 F.2d 111.

Ala.—Alabama Power Co. v. Smith, 155 So. 601, 229 Ala. 105.

Wis.—Hupfer v. National Distilling Co., 96 N.W. 809, 119 Wis. 417.

50. Iowa.—Black v. Des Moines Mfg. & Supply Co., 77 N.W. 504.

Mich.—Van Dusen v. Letellier, 44 N. W. 572, 78 Mich. 492.

51. Mich.—Layzell v. J. H. Somers Coal Co., 117 N.W. 179, 120 N.W. 268, 156 Mich. 268.

22 C.J. p 384 note 98.

52. Ind.—Smith v. Barber, 63 N.E. 1014, 153 Ind. 322.

53. Ind.—Smith v. Barber, supra.

54. U.S.—Bedell v. The Steamship Potomac, N.Y., 8 Wall. 590, 19 L. Ed. 511—Maury v. Talmadge, C.C. Ohio, 16 F.Cas.No.9,315, 2 McLean 157.

55. Mo.—Courter v. George W. Chase & Son Mercantile Co., 299 S.W. 622, 222 Mo.App. 43.

22 C.J. p 384 note 3.

56. Mich.—Brooks v. Taylor, 31 N. W. 837, 65 Mich. 208.

22 C.J. p 383 note 70.

57. N.Y.—Morrison v. New York & N. H. R. Co., 32 Barb. 568.

58. Cal.—Corson v. Berson, 25 P. 7, 86 Cal. 433.

22 C.J. p 383 note 72.

59. Ala.—Herzfeld Lumber Co v. Langley, 93 So. 378, 18 Ala.App. 485.

Admissions by tenant as to the character and extent of his holding are substantive evidence against his landlord claiming by adverse possession.

Ky.—Kentucky Coal Lands Co. v. J. D. Hughes Lumber Co., 255 S.W. 689, 200 Ky. 798.

Tex.—Cass v. Green, Civ.App., 227 S.W. 238, supplementing opinion 224 S.W. 938.

Ownership of sheep

The rule against establishing agency by declarations of the agent does not make inadmissible declarations of a sheep herder in possession of sheep as to the ownership of the sheep.—Tracy v. Juanto, 205 P. 822, 103 Or. 416.

60. Mo.—Ahern v. Boyce, 26 Mo.App. 558.

61. S.C.—J. L. Mott Iron Works v. Kaiser Co., 103 S.E. 783, 131 S.C.

building contractor is not an agent of the owner,[62] although his admissions may be competent where they are independently relevant as to show the receipt of material, the rendition of services, etc.[63] The statements of a superintendent or foreman in charge of construction may be admissible as against his principal if in connection with a matter over which he has actual or apparent authority;[64] but he cannot bind his principal by an admission as to the general conduct of the work.[65]

Dealings in property. The admissions of an agent for the buying, selling, or leasing of property, when done within the scope of the agency and while engaged in discharging his duties, are competent against the principal,[66] but such an agent is not concerned with his employer's title to the goods which he is employed to sell.[67] The admissions of a vendor's agent are not binding on the vendee where it is not shown that the agent represented the latter.[68] However, where one is the common agent of buyer and seller, his admissions are competent in favor of either principal against the other.[69]

Interpreters. Persons who conduct a conversation through an interpreter constitute him their agent so that the statements of the interpreter, while acting as such, as to what each party said are competent against such party.[70]

Mercantile affairs. General managers may affect their principals by statements as to the ordering of goods,[71] the condition of goods sold,[72] the employment of men,[73] or the care and management of property under their control;[74] but their declarations as to their principal's title to his stock in trade are not competent,[75] and in no event are their declarations competent when made apart from the transaction of business for the principal.[76] A subordinate employee's statements as to matters with which he has no connection or authority is also inadmissible.[77]

Bookkeepers are presumably entitled to give receipts stating on what account property was received,[78] or to state whether the principal's books were correctly kept;[79] but statements as to the acceptance or rejection of merchandise,[80] or as to his satisfaction with the place where goods were stored[81] or as to other matters not within his authority,[82] are ordinarily not competent against his employer.

Collectors. Receiving a claim for collection implies, as a rule, authority to make declarations concerning its payment,[83] but mere authority to receive money confers no right to make statements about it.[84]

Sheriffs and constables. Sheriffs employed for the service of civil, as distinguished from criminal, process may affect the person employing them within the scope of the employment by statements made in a reasonable discharge of the duties of the agency;[85] but it is not within the agency of a sheriff to

392, certiorari granted First Nat. Bank of Aiken v. J. L. Mott Iron Works, 41 S.Ct. 64, 254 U.S. 627, 65 L.Ed. 445, and affirmed 42 S.Ct. 286, 258 U.S 240, 66 L.Ed. 593.
22 C.J. p 383 note 66.

62. N.Y.—Happy v. Mosher, 48 N.Y. 313.

63. Md.—Treusch v. Shryock, 51 Md. 162.
22 C.J. p 383 note 68.

64. Ark.—Stewart-McGehee Const. Co. v. Brewster, 3 S.W.2d 42, 176 Ark. 430.

65. Mass.—Chelsea Cong. Ohab Shalom v. Hathaway, 104 N.E. 379, 216 Mass. 539.

66. Ill.—Smith v. Smith, 172 N.E. 736, 340 Ill. 373.
Mo.—Wisconsin & Arkansas Lumber Co. v. Buschow Lumber Co., App., 236 S.W. 410.
22 C.J. p 383 note 73.

Admissions held inadmissible as outside scope of authority
Mass.—Waltham Watch & Clock Co. v. City of Waltham, 172 N.E. 579, 272 Mass. 396, 71 A.L.R. 960.

67. Neb.—Bowman v. Griffith, 53 N.W. 140, 35 Neb. 361.
N.Y.—Sharp v. Lamy, 55 N.Y.S. 784, 37 App.Div. 136.
Pa.—Pier v. Duff, 63 Pa. 59.

68. Wash.—Munson v. McGregor, 94 P. 1085, 49 Wash. 276.

69. Mass.—Copeland v. Boston Dairy Co., 68 N.E. 218, 184 Mass. 207.
Va.—Hawse v. Bryan, 138 S.E. 721, 148 Va. 194.

70. Okl.—Terrapin v. Barker, 109 P. 931, 26 Okl. 93.
22 C.J. p 384 note 86.

71. Mo.—Henderson Woolen Mills v. Edwards, 84 Mo.App. 448.

72. Tex.—Standefer v. Aultman & Taylor Mach. Co., 78 S.W. 552, 34 Tex.Civ.App. 160.

73. Tex.—Western Union Beef Co. v. Kirchevalle, Civ.App., 26 S.W. 147.

74. Ill.—St. Louis Nat. Stock Yards v. Tiblier, 39 Ill.App. 422.

75. U.S.—Winchester & Partridge Mfg. Co. v. Creary, Tex., 6 S.Ct. 369, 116 U.S. 161, 29 L.Ed. 591.

76. Ga.—People's Nat. Bank v. Harper, 40 S.E. 717, 114 Ga. 603.
N.Y.—Warner v. Warren, 46 N.Y. 228.

77. Cal.—Wills v. Price, 79 P.2d 406, 26 Cal.App.2d 238.

78. Pa.—Myers v. Brice, 2 Pennyp. 382.

79. Tex.—Ellis v. Garvey, 13 S.W. 320, 76 Tex. 371.

80. Ga.—Smith v. Vaughn, 140 S.E. 892, 37 Ga.App. 558.

81. Mass.—Phenix Nerve Beverage Co. v. Dennis & Lovejoy Wharf & Warehouse Co., 75 N.E. 258, 189 Mass. 82.

82. La.—Carter v. Lofton, 135 So. 119, 17 La.App. 223, rehearing denied 136 So. 107, 17 La.App. 223.
Mo.—Caruthersville Lumber Co. v. Taylor, App., 281 S.W. 97.

83. Ill.—Cheney v. Beaty, 56 Ill.App. 90.
Okl.—Bank of McAlester v. Middlebrooks, 241 P. 765, 767, 115 Okl. 92, quoting **Corpus Juris.**

84. N.Y.—Hyland v. Sherman, 2 E.D.Smith. 234.
Okl.—Bank of McAlester v. Middlebrooks, 241 P. 765, 767, 115 Okl. 92, quoting **Corpus Juris.**

85. U.S.—Leavenworth v. Bank of Gillett, C.C.A.Ark., 276 F. 24.

characterize the bona fides of a sale conducted by him.[86]

Declarations of a deputy or undersheriff affect the sheriff,[87] if made within the scope of declarant's official duty and while engaged in discharging it,[88] and when the process is in force,[89] and in the officer's hands, although service has already been made.[90] A sheriff who intrusts a constable with the service of a writ is affected by the latter's declarations while serving it;[91] but a constable is not, simply by having process committed to him for service, authorized by his principal to tamper with witnesses.[92]

§ 352. Reference to Another for Information

Admissions by a third person acting in accordance with his authority are admissible against one who has expressly referred another to such third person for information in regard to an uncertain or disputed fact.

A declaration competent as an admission may be made by one to whom the party to be affected by it has sent another for information on a given point,[93] where the person to be affected has indicated that declarant is authorized to speak for him,[94] as under such circumstances a relation of agency within the scope of the reference is established.[95] It is, of course, necessary that declarant should state facts rather than his opinion,[96] or what he has derived from hearsay,[97] and that the declarations should be made subsequent to the reference,[98] and should relate to the matters concerning which reference was made to declarant.[99] Such declarations are primary evidence,[1] receivable although declarant is available as a witness,[2] or after his death.[3]

§ 353. Form of Statement

The admission of an agent may be made orally, in writing, or by silence or acquiescence.

The admission of an agent may be oral[4] or written,[5] or may even be made by silence or acquiescence.[6] Such admission or admissions by an agent

Okl.—Elk City State Bank of Elk City v. Davis, 248 P. 639, 118 Okl. 294.
22 C.J. p 385 note 15.

86. Mo.—Kean v. Newell, 2 Mo. 9.

87. Vt.—Lyman v. Lull, 20 Vt. 349.
22 C.J. p 385 note 17.

88. Ill.—Grimshaw v. Paul, 76 Ill. 164.
N.Y.—Barker v. Binninger, 14 N.Y 270.

89. N.Y.—Mott v. Kip, 10 Johns. 478.

90. Pa.—Wheeler v. Hambright, 9 Serg. & R. 390.

91. Tenn.—Walker v. Howell, 1 Coldw. 238.

92. Vt.—Green v. Woodbury, 48 Vt. 5.

93. D.C.—General Finance v. Stratford, 109 F.2d 843, 71 App.D.C. 343.
Mich.—Heuser v. Schemm Brewing Co., 281 N.W. 339, 340, 285 Mich. 600, citing **Corpus Juris.**
N.Y.—Cacicedo v. McAteer, 221 N.Y. S. 60, 220 App.Div. 186.
Tex.—West Texas Produce Co. v. Wilson, 34 S.W.2d 827, 120 Tex. 35.
22 C.J. p 385 note 24.

94. D.C.—General Finance v. Stratford, 109 F.2d 843, 71 App.D.C. 343.
Mich.—Heuser v. Schemm Brewing Co., 281 N.W. 339, 340, 285 Mich. 600, citing **Corpus Juris.**
N.Y.—Montgomery v. John Hancock Mut. Life Ins. Co., 250 N.Y.S. 403, 140 Misc. 233.
Tex.—Osceola Oil Co. v. Stewart Drilling Co., Com.App., 258 S.W. 806, reversing, Civ.App., 246 S.W. 698—Oliver v. Huckins, Civ.App., 244 S.W. 625.
22 C.J. p 385 note 25.

Authority held not shown
Ill.—Charles D. Stone & Co. v. New York Cent. R. Co., 214 Ill.App. 483.

95. Ill.—Charles D. Stone & Co. v. New York Cent. R. Co., supra.
Mich.—Heuser v. Schemm Brewing Co., 281 N.W. 339, 340, 285 Mich. 600, citing **Corpus Juris.**
22 C.J. p 385 note 26.

96. Mo.—Levi v. Missouri, K. & T. R. Co., 138 S.W. 699, 157 Mo.App. 536.
N.Y.—Lambert v. People, 76 N.Y. 220, 6 Abb.N.Cas. 181, 32 Am.R. 293.

97. N.Y.—Meyer v. Metropolitan Life Ins. Co., 271 N.Y.S. 261, 151 Misc. 274, affirmed 276 N.Y.S. 796, 243 App.Div. 514.

98. Md.—Chilton v. Jones, 4 Harr. & J. 62.
N.Y.—Cohn v. Goldman, 76 N.Y. 284.
22 C.J. p 385 note 29.

99. U.S.—Allen v. Killinger, Ill., 8 Wall. 480, 19 L.Ed. 470.
22 C.J. p 385 note 30.

1. Pa.—Craig v. Craig, 3 Rawle 472, 24 Am.D. 390.

2. Pa.—Craig v. Craig, supra.

3. N.Y.—McElwee Mfg. Co. v. Trowbridge, 22 N.Y.S. 674, 68 Hun 28, affirmed 37 N.E. 825, 142 N.Y. 679.

4. Ala.—Montevallo Mining Co. v. Little, 93 So. 873, 208 Ala. 131.
S.C.—St. Charles Mercantile Co. v. Armour & Co., 153 S.E. 473, 156 S.C. 397.
Tex.—Brown v. Stoker, Civ.App., 102 S.W.2d 248, error dismissed.
22 C.J. p 385 note 34.

5. Ga.—Atlantic Coast Line R. Co. v. Stovall-Pace Co., 118 S.E. 62, 30 Ga.App. 326.
Mo.—Henry v. First Nat. Bank, 115 S.W.2d 121, 232 Mo.App. 1071.
N.M.—Henderson v. Dwyer, 13 P.2d 408, 36 N.M. 222.
Or.—Pelton v. General Motors Acceptance Corporation, 7 P.2d 263, 139 Or. 198, rehearing denied 9 P.2d 128, 139 Or. 198.
Pa.—Margulies v. Gottlieb, 73 Pa.Super. 184.
22 C.J. p 385 note 35.

Statements in application for policy of insurance
Ala.—Mobile Pure Milk Co. v. Coleman, 161 So. 826, 26 Ala.App. 402, certiorari denied 161 So. 829, 230 Ala. 432.

6. Cal.—In re Gaines' Estate, 100 P.2d 1055, 15 Cal.2d 255, superseding, App., 92 P.2d 646.
La.—Dumesnil v. Steinberg, 130 So. 135, 14 La.App. 545, denying rehearing 129 So. 243, 14 La.App. 545.
S.C.—Keen v. Army Cycle Mfg. Co., 117 S.E. 531, 124 S.C. 342.
Tex.—Travelers Ins. Co. v. Gibson, Civ.App., 110 S.W.2d 241, modified on other grounds 130 S.W.2d 1026, 133 Tex. 534.
22 C.J. p 386 note 36.
Admissions by silence or acquiescence generally see supra § 294.

Admissions held shown
(1) Executor's silence when testatrix was told card to be signed creating joint tenancy would only enable executor to withdraw money from bank account was admissible as admission.—In re Fritz' Estate, 20 P.2d 361, 130 Cal.App. 725.

(2) Testimony of conversations constituting oral conditional sale agreement between manufacturer and dealer was held admissible against buyers represented at con-

may be made in a pleading[7] or as a witness on a former trial;[8] but an admission otherwise incompetent is not rendered competent because it is made by a witness.[9]

§ 354. Agents of Private Corporations

A relevant admission of fact by an agent is competent against a private corporation provided that the making of the admission is within the scope of the agent's authority, in connection with the performance of his duties, and with reference to some pending act or transaction; but where requisite authority exists, an admission may be made as to a past transaction.

Admissions of an agent of a private corporation, when relevant to the issues,[10] are competent against the corporation,[11] provided, but not unless, they are within the scope of the powers of declarant,[12] were

versations.—Siskin v. Dembroff, 9 P. 2d 908, 121 Cal.App. 730.

Admission held not shown

(1) Failure of company's officers to deny statement of bookkeeper involved in automobile collision that he was on company's business was not necessarily implied admission of truth.—Dudley v. Preston Motor Co., C.C.A.Tenn., 51 F.2d 8.

(2) Testimony as to satisfaction evidenced by railroad claim agent after obtaining settlement for death of plaintiff's husband was inadmissible.—Hixon v. Georgia Southern & F. Ry. Co, 137 S.E. 260, 163 Ga. 734.

(3) Other circumstances.

Cal.—Ewing v. Hayward, 195 P. 970, 50 Cal.App. 708.

N.Y.—Hoppenstedt v. Amy, 174 N.Y. S. 742.

22 C.J. p 386 note 36 [a].

7. Ark.—Whiting v. Beebe, 12 Ark. 421.

Ga.—Massachusetts Bonding & Insurance Co. v. U. S. Conservation Co., 122 S.E. 728, 31 Ga.App. 716.

8. Iowa.—Peden v. Chicago, R. I. & P. R. Co., 42 N.W. 625, 78 Iowa 131, 4 L.R.A. 401.

Mo.—Kansas City v. Mastin Realty & Mining Co., 161 S.W. 1150, 253 Mo. 619.

9. Ga.—Savannah F. & W. R. Co. v. Flannagan, 9 S.E. 471, 82 Ga. 579, 14 Am.S.R. 183.

Colo.—Denver & R. G. R. Co. v. Watson, 40 P. 778, 6 Colo.App. 429.

10. D.C.—Takahashi v. Hecht Co., 50 F.2d 326, 60 App.D.C. 176.

Ky.—U. S. Fidelity & Guaranty Co. v. Antle, 42 S.W.2d 1, 240 Ky. 243—White Const. Co. v. Brooks, 1 S.W.2d 1076, 222 Ky. 621.

Mo.—Baker v. Keet-Rountree Dry Goods Co., 2 S.W.2d 733, 318 Mo. 969, rehearing denied 3 S.W.2d 1003, 318 Mo. 969.

Mont.—Rossberg v. Montgomery Ward & Co., 99 P.2d 979, 982, 110 Mont. 154, quoting **Corpus Juris.**

22 C.J. p 386 note 40.

11. Ariz.—Fortuna Consol. Mining Co. v. Miller, 239 P. 789, 29 Ariz. 104.

Ark.—Mullins v. Ritchie Grocer Co., 35 S.W.2d 1010, 183 Ark. 218.

Cal.—Fabry v. San Joaquin Light & Power Corporation, 204 P. 558, 55 Cal.App. 752.

Ky.—Baker v. Glens Falls Ins. Co., 93 S.W.2d 851, 264 Ky. 1—Steinke v. North Vernon Lumber Co., 227 S.W. 274, 190 Ky. 231.

Mich.—Swaney v. John Schlaff Creamery Co., 180 N.W. 599, 212 Mich. 567.

Minn.—Peterson v. Schober, 256 N. W. 308, 192 Minn. 315—Northern Timber Products Co. v. Stone-Ordean-Wells Co., 180 N.W. 920, 148 Minn. 69.

Mo.—Philibert v. Benjamin Ansehl Co., 119 S.W.2d 797, 342 Mo. 1239—Simpson Advertising Service Co. v. Manufacturers' & Merchants' Ass'n of St. Louis, 51 S.W.2d 1019, 330 Mo. 1049—Horn v. Shell Pipe Line Corporation, App., 52 S.W.2d 16—People's Bank of Ava v. Rankin, App., 30 S.W.2d 638.

Mont.—Rossberg v. Montgomery Ward & Co., 99 P.2d 979, 982, 110 Mont. 154, quoting **Corpus Juris.**

N.Y.—Gaillard Realty Co. v. Manhattan Brass Co., 263 N.Y.S. 397, 238 App.Div. 84—Wallace v. Taylor, 198 N.Y.S. 60, 204 App.Div. 341.

Okl.—Stapleton Motor Sales Co v. Oates, 235 P. 513, 109 Okl. 173.

Or.—Pelton v. General Motors Acceptance Corporation, 7 P.2d 263, 139 Or. 198, rehearing denied 9 P. 2d 128, 139 Or. 198.

Tex.—Metropolitan Life Ins. Co. v. Moss, Civ.App., 109 S.W.2d 1035, error dismissed—Mosher Steel & Machinery Co. v. Nash, Civ.App., 6 S.W.2d 158, error dismissed.

Va.—Du Pont Engineering Co. v. Blair, 106 S.E. 328, 129 Va. 423.

22 C.J. p 386 note 41.

Admissions made by alter ego of company within line of duty were binding on principal.—Bryson v. Phelps, 125 So. 795, 23 Ala.App. 346, certiorari denied 125 So. 798, 220 Ala. 389.

12. U.S.—Dudley v. Preston Motor Co., C.C.A.Tenn., 51 F.2d 8—McLeod Lumber Co. v. Western Redwood Co., C.C.A.Cal., 8 F.2d 930.

Ala.—Atlanta Life Ins. Co. v. Bolden, 194 So. 653, 239 Ala. 231—U. S. Cast Iron Pipe & Foundry Co. v. Caldwell, 94 So. 540, 208 Ala. 260—Alabama Power Co. v. Talmadge, 93 So. 548, 207 Ala. 86, error dismissed 42 S.Ct. 463, 259 U.S. 575, 66 L.Ed. 1071.

Ark.—Pine Bluff Co. v. Bobbitt, 273 S.W. 1, 168 Ark. 1019.

Cal.—California Pear Growers' Ass'n v. Herspring, 213 P. 518, 60 Cal. App. 503.

D.C.—Takahashi v. Hecht Co., 50 F. 2d 326, 60 App.D.C. 176.

Ga.—Ninth Dist. Agricultural and Mechanical School v. Wofford Power Co., 139 S.E. 916, 37 Ga.App. 271—Massachusetts Bonding & Insurance Co. v. U. S. Conservation Co., 122 S.E. 728, 31 Ga.App. 716.

Ind.—Little Wonder Light Co. v. Van Slyke, 153 N.E. 477, 198 Ind. 269.

Iowa.—Cox v. Des Moines Electric Light Co., 229 N.W. 244, 209 Iowa 931.

Kan.—Corbett v. Kansas Gas & Electric Co., 27 P.2d 234, 138 Kan. 691.

Ky.—International Shoe Co. v. Johnson, 67 S.W.2d 505, 252 Ky. 440—Kentucky River Coal Corporation v. Williams, 10 S.W.2d 617, 226 Ky. 93—Caddy Oil Co. v. Sommer, 218 S.W. 288, 186 Ky. 843.

Mass.—Morton v. Dobson, 30 N.E.2d 231, 307 Mass. 394—Conti v. Brockton Ice & Coal Co., 2 N.E.2d 1015, 295 Mass. 15—Correira v. Boston Motor Tours, 169 N.E. 775, 270 Mass. 88—H. D. Watts Co. v. American Bond and Mortgage Co., 157 N.E. 634, 260 Mass. 599—Hargreaves v. Keogh Storage Co., 145 N.E. 456, 250 Mass. 339—Douglas v. Holyoke Mach. Co., 124 N.E. 478, 233 Mass. 573.

Mich.—Union Trust Co. v. Parker, 232 N.W. 360, 251 Mich. 630.

Minn.—Peterson v. Johnson Nut Co., 297 N.W. 178—Smith v. Emporium Mercantile Co., 251 N.W. 265, 190 Minn. 294.

Mo.—McMonigal v. North Kansas City Development Co., 129 S.W.2d 75, 233 Mo.App. 1040.

Mont.—Rossberg v. Montgomery Ward & Co., 99 P.2d 979, 982, 110 Mont. 154, quoting **Corpus Juris.**

Neb.—Sindelar v. T. B. Hord Grain Co., 219 N.W. 145, 116 Neb. 776.

N.Y.—Hanrahan v. New York Edison Co., 144 N.E. 499, 238 N.Y. 194, reversing 201 N.Y.S. 908, 207 App. Div. 852—Isaacson v. J. L. Blum Co., 178 N.Y.S. 333.

N.C.—First & Citizens Nat. Bank v. Toxey, 187 S.E. 553, 210 N.C. 470—Harvell v. Haynes Auto Co., 98 S.E. 377, 177 N.C. 29.

Okl.—Sears, Roebuck & Co. v. Robinson, 80 P.2d 938, 183 Okl. 253.

Or.—Wilson v. Steel Tank & Pipe Co. of Oregon, 52 P.2d 1120, 1124, 152 Or. 386, citing **Corpus Juris.**

made in connection with the performance of his duties,[13] and are statements of fact rather than mere expressions of opinion[14] or personal attitude.[15] Such acts and declarations of authorized agents are admissible against the company even though the adverse party is another corporation of which they are also agents.[16] The rule, however, does not extend so far as to permit third persons to show statements made in confidential communications by the receiver of a corporation.[17]

As a general rule, the agent's declaration, to bind the corporation, must be made contemporaneous with or in the course of the business or transaction then pending.[18]

Narrative statements as to a past transaction are ordinarily not admissible against the principal.[19]

Pa.—Milwaukee Locomotive Mfg. Co. v. Point Marion Coal Co., 144 A. 100, 294 Pa. 238.
S.C.—Housand v. Armour & Co., 175 S.E. 516, 173 S.C. 268.
Tenn.—Boyd v. Ducktown Chemical & Iron Co., 89 S.W.2d 360, 19 Tenn.App 392.
Tex.—Southern Surety Co. v. Nalle & Co., Com.App., 242 S.W. 197, 200, citing **Corpus Juris**, and reversing, Civ.App., 231 S.W. 402—American Nat. Ins. Co. v. Ingle, Civ.App., 129 S.W.2d 426, error granted—Woodward-Wanger Co. v. Nelson, Civ.App., 11 S.W.2d 371—Western Union Telegraph Co. v. Satterwhite, Civ.App., 300 S.W. 218—National Surety Co. v. Rogers, Civ.App., 257 S.W. 651—Negociacion Agricola y Ganadera de San Enrique, S. A., v. Love, Civ.App., 220 S.W. 224.
Utah.—Fish Lake Resort Co. v. Industrial Commission of Utah, 275 P. 580, 73 Utah 479—Sweatman v. Linton, 241 P. 309, 66 Utah 208.
Wis.—Zurich Accident & Liability Ins. Co. v. Industrial Commission of Wisconsin, 213 N.W. 630, 193 Wis. 2.
22 C.J. p 386 note 42.

13. U.S.—Riverside Fibre & Paper Co. v. O. C. Keckley Co., C.C.A.Ill., 32 F.2d 23.
Ala.—Atlanta Life Ins. Co. v. Bolden, 194 So. 653, 239 Ala. 231.
Kan.—Stecher v. Southwestern Bell Telephone Co., 295 P. 709, 132 Kan. 362.
Ky.—Harlan Public Service Co. v. Eastern Const. Co., 71 S.W.2d 24, 254 Ky. 135—U. S. Fidelity & Guaranty Co. v. Antle, 42 S.W.2d 1, 240 Ky. 243—Ehremann v. Old F. G. Walker Distillery Co., 246 S.W. 789, 197 Ky. 244—Caddy Oil Co. v. Sommer, 218 S.W. 288, 186 Ky. 843—Craig's Adm'x v. Kentucky Utilities Co., 209 S.W. 33, 183 Ky. 274.
Mass.—Atlantic Nat. Bank of Boston v. Hupp Motor Car Corporation, 10 N.E.2d 131, 298 Mass. 200.
Mich.—Union Trust Co. v. Parker, 232 N.W. 360, 251 Mich. 630.
Mo.—Shelton v. Wolf Cheese Co., 93 S.W.2d 947, 338 Mo. 1129.
Mont.—Rossberg v. Montgomery Ward & Co., 99 P.2d 979, 982, 110 Mont. 154, quoting **Corpus Juris.**
N.J.—Safner v. Gollin, 115 A. 348, 96 N.J.Law 431, affirmed 117 A. 927, 97 N.J.Law 576.
N.Y.—Young v. Grant Lunch Corporation, 4 N.Y.S.2d 366, 254 App. Div. 174—Hanrahan v. New York Edison Co., 144 N.E. 499, 238 N.Y. 194, reversing 201 N.Y.S. 908, 207 App.Div. 852.
Or.—Derrick v. Portland Eye, Ear, Nose & Throat Hospital, 209 P. 344, 349, 105 Or. 90, citing **Corpus Juris.**
Tex.—Osceola Oil Co. v. Stewart Drilling Co., Com.App., 258 S.W. 806, reversing, Civ.App., 246 S.W. 693—Southern Surety Co. v. Nalle & Co., Com.App., 242 S.W. 197, 200, citing **Corpus Juris**, and reversing, Civ.App., 231 S.W. 402—Webb-North Motor Co. v. Ross, Civ.App., 42 S.W.2d 1086, error dismissed.
Utah.—Fish Lake Resort Co. v. Industrial Commission of Utah, 275 P. 580, 582, 73 Utah 479, quoting **Corpus Juris.**
Va.—Griffith v. Electrolux Corporation, 11 S.E.2d 644, 176 Va. 378.
22 C.J. p 387 note 43.

Admissions made after termination of agency do not bind the corporation.
Cal.—City of Manhattan Beach v. Cortelyou, 76 P.2d 483, 10 Cal.2d 653.
Minn.—Eberlein v. Stockyards Mortgage & Trust Co., 204 N.W. 961, 164 Minn. 323.
N.Y.—Fox v. Arctic Placer Min. & Mill. Co., 173 N.Y.S. 708, 185 App. Div. 761, reversed on other grounds 128 N.E. 154, 229 N.Y. 124.
Tex.—Carter v. Guaranty State Bank of Woodville, Civ.App., 262 S.W. 108.
Wash.—Hurley-Mason Co. v. Pacific Commissary Co., 191 P. 624, 111 Wash. 439.

14. U.S.—New York Life Ins. Co. v. Rankin, Mo., 162 F. 103, 89 C.C.A. 103.
Minn.—Rosenberger v. H. E. Wilcox Motor Co., 177 N.W. 625, 145 Minn. 408.
Neb.—Wert v. Equitable Life Assur. Soc. of U. S., 283 N.W. 506, 512, 135 Neb. 654, quoting **Corpus Juris.**

Statement held mere conclusion of law
Tenn.—D. S. Etheridge Co. v. Peterson, 90 S.W.2d 957, 19 Tenn.App 530.

15. Mass.—Conti v. Brockton Ice & Coal Co., 2 N.E.2d 1015, 295 Mass. 15.
Tex.—Liner v. U. S. Torpedo Co., Com.App., 12 S.W.2d 552, reversing U. S. Torpedo Co. v. Liner, Civ. App., 300 S.W. 641, and set aside on other grounds Liner v. U. S. Torpedo Co., Com.App., 16 S.W.2d 519.

16. Cal.—Pauly v. Pauly, 40 P. 29, 107 Cal. 8, 48 Am.S.R. 98.

17. Mass.—Ft. Payne Coal & Iron Co. v. Webster, 39 N.E. 786, 163 Mass. 134.

18. Ky.—White Const. Co. v. Brooks, 1 S.W.2d 1076, 222 Ky. 621.
Minn.—Longman v. Anderson, 199 N.W. 742, 160 Minn 15.
Mo.—Shelton v. Wolf Cheese Co., 93 S.W.2d 947, 338 Mo. 1129—Williams v. Gideon-Anderson Lumber Co., App., 224 S.W. 51.
Tex.—Southern Surety Co. v Nalle & Co., Com.App., 242 S.W. 197, reversing, Civ.App., 231 S.W. 402—Webb-North Motor Co. v Ross, Civ. App., 42 S.W.2d 1086, error dismissed.
Wash.—Crock v. Magnolia Milling Co., 266 P. 727, 147 Wash. 589.

19. U.S.—McMan Oil & Gas Co. v. Hurley, C.C.A.Tex., 24 F.2d 776, certiorari denied Satterthwait v. McMan Oil & Gas Co., 49 S.Ct. 34, 278 U.S. 640, 73 L.Ed. 555.
Ala.—Alabama Power Co. v. Smith, 155 So. 601, 229 Ala. 105.
Cal.—Burgesser v. Bullock's, 214 P. 649, 190 Cal. 673—Lampton v. Davis Standard Bread Co., 191 P. 710, 48 Cal.App. 116.
Ky.—Sparks v. Maeschal, 289 S.W. 308, 217 Ky. 235—Prestonsburg Superior Oil Gas Co. v. Vance, 284 S.W. 405, 215 Ky. 77, 47 A.L.R. 483.
Miss.—Deposit Guaranty Bank & Trust Co. v. Silver Saver Stores, 148 So. 367, 166 Miss. 882.
Mo.—Shelton v. Wolf Cheese Co., 93 S.W.2d 947, 338 Mo. 1129—Murray v. De Luxe Motor Stages of Illinois, App., 133 S.W.2d 1074—Youel v. Bank of Atchison County, 117 S.W.2d 376, 378, 233 Mo.App. 1, citing **Corpus Juris**—Yarbrough v. Wisconsin Lumber Co., App., 211 S.W. 713.
Mont.—Rossberg v. Montgomery Ward & Co., 99 P.2d 979, 110 Mont. 154.
N.C.—Staley v. Royal Pines Park, 162 S.E. 202, 202 N.C. 155.

However, as a corporation, like an individual, may make admissions after the event, and as a corporation can act only by its agents, officers or agents possessing the requisite authority may affect the corporation by statements subsequent to the event.[20]

A corporation acting through its agents may not make an admission binding on officers or employees for whom it has no authority to speak.[21]

§ 355. Officers and Employees

The rule that the admissions of its agents bind a corporation provided the agents acted within the scope of their authority and in connection with their official duties applies to the admissions of officers and employees of either general or limited authority.

A private corporation will be affected by the relevant declarations of its proper officers[22] of general or limited authority, if made in the line of declarant's official duty,[23] but not by admissions made when declarant was not engaged in the discharge of his duties,[24] or which are beyond the scope of his authority,[25] or which are made after the termination of declarations of other agents, although the scope of authority of such officers is necessarily much broader than that of other agents.—Southern Surety Co. v. Nalle & Co., Tex.Com.App., 242 S.W. 197, reversing, Civ.App., 231 S.W. 402.

Ohio.—Kroger Grocery & Baking Co. v. McCune, 188 N.E. 568, 46 Ohio App. 291.
Or.—Hansen v. Oregon-Washington R. & Nav. Co., 188 P. 963, 97 Or. 190, rehearing denied 191 P. 655, 97 Or. 190.
S.C.—Howle v. Mountain Ice Co., 165 S.E. 724, 167 S.C. 41.
Tex.—West Texas Produce Co. v. Wilson, 34 S.W.2d 827, 120 Tex. 35—Liner v. U. S. Torpedo Co., Com.App., 16 S.W.2d 519, setting aside 12 S.W.2d 552, affirming U. S. Torpedo Co. v. Liner, Civ.App., 300 S.W. 641—Southern Surety Co. v. Nalle & Co., Com.App., 242 S.W. 197, reversing, Civ.App., 231 S.W. 402.
Vt.—Jones v. Gay's Express, 9 A.2d 121, 110 Vt. 531.
22 C.J. p 387 note 47.
Narrative statements of agents generally see supra § 346.

20. U.S.—Chicago, St. P., M. & O. Ry. Co. v. Kulp, C.C.A.Minn., 102 F.2d 352, certiorari denied 59 S.Ct. 1032, 307 U.S. 636, 83 L.Ed. 1518—Pan-American Petroleum Co. v. U. S., C.C.A.Cal., 9 F.2d 761, modifying, D.C., U. S. v Pan-American Petroleum Co., 6 F.2d 43, and certiorari granted Pan-American Petroleum & Transport Co. v. U. S., 46 S.Ct. 356, 270 U.S. 640, 70 L.Ed. 775, affirmed 47 S.Ct. 416, 273 U.S. 456, 71 L.Ed. 734.
Ariz.—Central Copper Co. v. Klefisch, 270 P. 629, 34 Ariz. 230.
Ga.—Baker v. H. E. Lowe Electric Co., 170 S.E. 337, 47 Ga.App. 259.
Ill.—Susemiehl v. Red River Lumber Co., 28 N.E.2d 743, 306 Ill.App. 430.
Ky.—Blue Diamond Coal Co. v. Sizemore, 71 S.W.2d 11, 254 Ky. 102.
Mo.—Madison v. Taxi Owners Ass'n, App., 148 S.W.2d 106.
S.C.—Price v. American Agr. Chemical Co., 176 S.E. 352, 173 S.C. 518.
Tex.—Southern Surety Co. v. Nalle & Co., Com.App., 242 S.W. 197, reversing, Civ.App., 231 S.W. 402—Universal Transp. Co. v. Ramos, Civ.App., 37 S.W.2d 238, error dismissed—Mosher Steel & Machinery Co. v. Nash, Civ.App., 6 S.W.2d 158, error dismissed.
Wash.—Sporsem v. First Nat. Bank, 233 P. 641, 133 Wash. 199, 40 A.L.R. 854.
22 C.J. p 387 note 48.

21. Mo.—Brown & Bigelow v. J. F. Laughead & Co., 118 S.W.2d 74, 134 Mo.App. 620.

22. Ala.—First Nat. Bank v. Culverhouse, 164 So. 124, 26 Ala.App. 560.
Idaho.—Rowland v. Demming Exploration Co., Trustees, 260 P. 1032, 45 Idaho 99—Clarke v. Blackfoot Waterworks, 228 P. 326, 39 Idaho 304.
Mass.—Kramer v. Massachusetts Gas & Electric Light Supply Co., 11 N.E.2d 497, 298 Mass. 457.
Mont.—Northwestern Electric Equipment Co. v. Leighton, 213 P. 1094, 66 Mont. 529.
Va.—Sydnor & Hundley v. Bonifant, 164 S.E. 403, 158 Va. 703.
22 C.J. p 387 note 49.

23. Ala.—Alabama Power Co. v. Talmadge, 93 So. 548, 207 Ala. 86, error dismissed 42 S.Ct. 463, 259 U.S. 575, 66 L.Ed. 1071.
Ark.—Heard v. Farmers' Bank of Hardy, 295 S.W. 38, 174 Ark. 194.
Del.—Eastern Shore Public Service Co. v. Town of Seaford, 2 A.2d 265, sustaining Town of Seaford v. Eastern Shore Public Service Co., 2 A.2d 258, and appeal dismissed Eastern Shore Public Service Co. v. Town of Seaford, 59 S.Ct. 483, 306 U.S. 616, 83 L.Ed. 1024, rehearing denied 59 S.Ct. 589, 306 U.S. 668, 83 L.Ed. 1063.
Kan.—Royce v. Farmers' Life Ins. Co., 191 P. 581, 107 Kan. 245.
Ky.—Caddy Oil Co. v. Sommer, 218 S.W. 288, 186 Ky. 843.
Mass.—Boston Food Products Co. v. Wilson & Co., 139 N.E. 637, 245 Mass. 550.
Minn.—Longman v. Anderson, 199 N.W. 742, 160 Minn. 15.
Mo.—Borth v. Proctor, 219 S.W. 72.
Mont.—Raish v. Orchard Canal Co., 218 P. 655, 656, 67 Mont. 140, citing **Corpus Juris.**
Wash.—Platt v. Bradner, 230 P. 633, 131 Wash. 573.
22 C.J. p 387 note 50.

Executive officers

The competency of statements of executive officers is subject to the same rules as govern the competency of declarations of other agents, although the scope of authority of such officers is necessarily much broader than that of other agents.—Southern Surety Co. v. Nalle & Co., Tex.Com.App., 242 S.W. 197, reversing, Civ.App., 231 S.W. 402.

24. Ill.—Hoke v. Harrisburg Hospital, 281 Ill.App. 247.
Mo.—Meyer v. Dubinsky Realty Co., App., 133 S.W.2d 1106.
N.J.—Raffetto v. Warner Bros. Theatres, 2 A.2d 595, 596, 121 N.J.L. 333, citing **Corpus Juris.**
N.C.—Bank of Spruce Pine v. Boone Fork Mfg. Co., 120 S.E. 330, 186 N.C. 744.
Tex.—Standard v. Texas Pacific Coal & Oil Co., Civ.App., 47 S.W.2d 443, error dismissed.
22 C.J. p 388 note 51.

Benefit to corporation

Declarations of an officer are not rendered admissible against corporation, because it might in some way be benefited thereby; such benefit being insufficient to constitute him an agent or to show that he acted in his official capacity.—Louisa County Nat. Bank v. Burr, 199 N.W. 359, 198 Iowa 4.

25. Ariz.—Central Copper Co. v. Klefisch, 270 P. 629, 34 Ariz. 230.
Ky.—Caddy Oil Co. v. Sommer, 218 S.W. 288, 186 Ky. 843.
Mass.—Parsons v. Dwight State Co., 17 N.E.2d 197, 301 Mass. 324, 118 A.L.R. 1099.
Mich.—Garey v. Kelvinator Corporation, 271 N.W. 723, 279 Mich. 174.
Mont.—Rossberg v. Montgomery Ward & Co., 99 P.2d 979, 110 Mont. 154.
N.Y.—Golden v. Horn & Hardart Co., 278 N.Y.S. 385, 244 App.Div. 92, affirmed 200 N.E. 309, 270 N.Y. 544.
Tenn.—Boyd v. Ducktown Chemical & Iron Co., 89 S.W.2d 360, 19 Tenn. App. 392.
Tex.—Colbert v. Dallas Joint Stock Land Bank, Com.App., 150 S.W.2d 771, reversing Dallas Joint Stock Land Bank v. Colbert, 127 S.W.2d 1004.
22 C.J. p 388 note 52.

Declarations of director of a corporation are not binding on the corporation, unless they are within the

tion of his employment.[26]

Particular officers and employees. The statements of the president in connection with his duties as such are competent against the corporation,[27] and the same is true of admissions of the vice president,[28] the secretary[29] or the treasurer.[30] Corporate directors act as a body, and while their acts or admissions as a body are binding on the corporation, it is otherwise as to the acts or admissions of individual directors.[31] Trustees having charge of the assets of a corporation are general officers within the rule that the admissions of such officers bind the corporation.[32]

Admissions of the cashier are competent against the corporation,[33] if made while he was acting within the scope of his authority[34] and transacting the

scope of his ordinary powers, or some special agency relative to the subject matter is shown.
Mich.—Garey v. Kelvinator Corporation, 271 N.W. 723, 279 Mich. 174.
Tex.—Daughtry v. Blanket State Bank, Civ.App., 60 S.W.2d 272.
22 C.J. p 388 note 52 [a].

26. N.Y.—McCabe v. Interstate Iron & Steel Co., 27 N.Y.S.2d 862, 262 App.Div. 777.

27. Ariz.—Fortuna Consol. Mining Co. v. Miller, 239 P. 789, 29 Ariz. 104.
Ark.—Heard v. Farmers' Bank of Hardy, 295 S.W. 38, 174 Ark. 194.
Cal.—California Stearns Co. v. Treadwell, 256 P. 242, 82 Cal.App. 553.
Ga.—Baker v. H. E. Lowe Electric Co., 170 S.E. 337, 47 Ga.App. 259.
Ill.—Hoke v. Harrisburg Hospital, 281 Ill.App. 247.
Ky.—Shields Const. Co. v. Cowan, 109 S.W.2d 585, 270 Ky. 173—Happy Coal Co. v. Brashear, 92 S.W. 2d 23, 263 Ky. 257.
La.—Webb v. Shreveport Packing Co., App., 180 So. 843.
Mass.—James Millar Co. v. Commonwealth, 146 N.E. 677, 251 Mass. 457.
Minn.—Mortgage Land Inv. Co. v. McMains, 215 N.W. 192, 172 Minn. 110—Rosenberger v. H. E. Wilcox Motor Co., 177 N.W. 625, 145 Minn. 408.
Mo.—Brown & Bigelow v. J. F. Laughead & Co., App., 118 S.W.2d 74—Klaber v. Fidelity Bldg. Co., App., 19 S.W.2d 758—Kaufman v. Baden Ice Cream Mfrs., App., 7 S.W.2d 298.
Nev.—Hough v. Reserve Gold Mining Co., 35 P.2d 742, 55 Nev. 375.
N.C.—Fidelity Bank v. Wysong & Miles Co., 98 S.E. 769, 177 N.C. 284.
Va.—Blacksburg Mining & Mfg. Co. v. Bell, 100 S.E. 806, 125 Va. 565.
22 C.J. p 388 note 53.

Statements outside of scope of the president's powers and duties are not admissible.
U.S.—Kentucky Rock Asphalt Co. v. Helburn, D.C.Ky., 20 F.Supp. 364, affirmed, C.C.A., 108 F.2d 779.
Ga.—Tennille Banking Co. v. Ward, 116 S.E. 347, 29 Ga.App. 660.
Iowa.—Louisa County Nat. Bank v. Burr, 199 N.W. 359, 198 Iowa 4.
Pa.—Burns v. Joseph Flaherty Co., 123 A. 496, 278 Pa. 579.
22 C.J. p 388 note 53 [d].

Location of boundary
In absence of proof to the contrary, president is not presumed to have authority to bind corporation by declarations as to claims of the corporation with respect to location of disputed boundary.—Blacksburg Mining & Mfg. Co. v. Bell, 100 S.E. 806, 125 Va. 565.

Past transaction
(1) Narrative statements of the president after the transaction to which such statements relate are not admissible.
U.S.—First Nat. Bank of Sweetwater, Tex., v. Rust, Tex., 257 F. 29, 168 C.C.A. 241, certiorari denied Rust v. First Nat. Bank of Sweetwater, 40 S.Ct. 13, 250 U.S. 667, 63 L.Ed. 1197.
N.C.—Bank of Spruce Pine v. Boone Fork Mfg. Co., 120 S.E. 330, 186 N. C. 744.
22 C.J. p 388 note 53 [f].

(2) However, where president is alter ego of corporation, his statements in the due performance of his official duties, as to a past transaction are admissible.—Baker v. H. E. Lowe Electric Co., 170 S.E. 337, 47 Ga.App. 259.

(3) President's statement as to past event is nevertheless admissible where it related directly to transaction under consideration as to which he had authority, and did not involve a completed transaction.—Simpson Advertising Service Co. v. Manufacturers' & Merchants' Ass'n of St. Louis, 51 S.W.2d 1019, 330 Mo. 1049.

28. U.S.—U. S. v. Charleston, S. C., Min. & Mfg. Co., D.C.Fla., 298 F. 127, affirmed, C.C.A., Charleston, S. C., Min. & Mfg. Co. v. U. S., 3 F.2d 1019, certiorari denied 45 S.Ct. 513, 268 U.S. 695, 69 L.Ed. 1162, affirmed 47 S.Ct. 348, 273 U.S. 220, 71 L.Ed. 618.

Admission held unauthorized
N.C.—Miles F. Bixler Co. v. Britton, 134 S.E. 488, 192 N.C. 199.

No presumption of authority
It has been held that there is no presumption of law that a vice president is authorized to bind the corporation by his admissions.
N.H.—Westminster Nat. Bank v. New England Electrical Works, 62 A. 971, 73 N.H. 465, 111 Am.S.R. 637, 3 L.R.A.,N.S., 551.
N.C.—Underwood v. Germania Life Ins. Co., 67 S.E. 587, 152 N.C. 274.
Or.—Parker v. C. A. Smith Lumber & Mfg. Co., 138 P. 1061, 70 Or. 41.

29. Ark.—Arkansas Burial Soc. v. Hough, 104 S.W.2d 809, 193 Ark. 1105.
Iowa.—Kuebker v. Success Heater & Mfg. Co., 192 N.W. 435.
Mo.—Weber v. Joslyn, App., 102 S.W. 2d 693.
N.J.—Lovell v. Underwriting Management Corporation, 153 A. 478, 107 N.J.Law 357.
22 C.J. p 388 note 54.

30. Minn.—Rosenberger v. H. E. Wilcox Motor Co., 177 N.W. 625, 145 Minn. 408—Mealey v. Bemidji Lumber Co., 136 N.W. 1090, 118 Minn. 427.

31. Mich.—Garey v. Kelvinator Corporation, 271 N.W. 723, 279 Mich. 174.
Mont.—Raish v. Orchard Canal Co., 218 P. 655, 657, 67 Mont. 140, citing **Corpus Juris.**
Neb.—Smith v. Bankers Nat. Life Ins. Co., 265 N.W. 546, 130 Neb. 552.
22 C.J. p 389 note 57.

32. Idaho.—Rowland v. Demming Exploration Co., Trustees, 260 P. 1032, 45 Idaho 99.
Wash.—Olympia Box & Package Co. v. Pacific Veneer Co., 213 P. 24, 123 Wash. 533.
22 C.J. p 389 note 58.

33. Ala.—First Nat. Bank v. Culverhouse, 164 So. 124, 26 Ala.App. 560.
Ind.—Dunbar v. Demaree, 2 N.E.2d 1003, 102 Ind.App. 585.
Minn.—Larson v. Citizens' State Bank of Westbrook, 172 N.W. 125, 142 Minn. 334.
Miss.—Pennington v. People's Bank of Sumner, 95 So. 694, 132 Miss. 23.
S.D.—Kraft v. Security State Bank of Winner, 199 N.W. 774, 47 S.D. 546.
Tex.—San Angelo Water, Light & Power Co. v. Baugh, Civ.App., 270 S.W. 1101.
22 C.J. p 389 note 59.

34. Ga.—Nalley Land & Investment Co. v. Merchants & Planters Bank, 199 S.E. 815, 187 Ga. 142.
N.Y.—Commercial Motors Mortg.

business of the corporation.[35]

The rule admitting statements of agents of a corporation within the scope of their authority applies to general managers,[36] financial managers,[37] and other general agents,[38] such as superintendents.[39] The rule has also been applied to a foreman,[40] a sales manager,[41] an accountant,[42] a clerk,[43] a telegraph messenger boy,[44] the local manager of a telephone company,[45] a telephone switchboard operator,[46] a timekeeper,[47] a claim adjuster,[48] and a sleeping car porter.[49]

§ 356. Stockholders

The admissions of a stockholder, as such, do not ordinarily affect the corporation.

A stockholder, merely as such, is not an agent of the corporation, and hence his statements do not affect the corporation,[50] especially where such statements were made after he had parted with his stock.[51]

§ 357. Agents for Railroad Corporations

A railroad corporation may be affected by the admissions of its officer or agent provided that the agent was acting within the scope of his authority and in the reasonable discharge of his duties in the matter as to which the statement was made.

A railroad corporation may be affected by the relevant admissions of its agent,[52] provided the agent was authorized to act in the matter concerning which the statement was made,[53] and made the

Corporation v. Mack International Motor Truck Corporation, 209 N.Y.S. 661, 213 App.Div. 25.
Tenn.—Kenner v. City Nat. Bank, 46 S.W.2d 46, 164 Tenn. 119, rehearing granted in part 47 S.W.2d 756, 164 Tenn. 288.
22 C.J. p 389 note 60.

Assistant cashier
Ala.—Farish v. Hawk, 2 So.2d 407.
Ark.—Pierce v. Sicard, 3 S.W.2d 337, 176 Ark. 511.

35. Mo.—Youel v. Bank of Atchison County, 117 S.W.2d 376, 233 Mo. App. 1—Citizens' Bank of Edina v. Kriegshauser, App., 273 S.W. 764.
22 C.J. p 389 note 61.

36. U.S.—Johnson v. J. H. Yost Lumber Co., C.C.A.Neb., 117 F.2d 53.
Ala.—Farmers' Union Warehouse Co. v. Barnett Bros., 137 So. 176, 223 Ala. 435—Gadsden General Hospital v. Hamilton, 103 So. 553, 212 Ala. 531, 40 A.L.R. 294.
Ark.—Des Arc Oil Mill v. McLeod, 206 S.W. 655, 137 Ark. 615.
Cal.—Massetti v. Madera Canal & Irrigation Co., 68 P.2d 260, 20 Cal.App.2d 708.
Conn.—Voegeli v. Waterbury Yellow Cab Co., 150 A. 303, 111 Conn. 407, 69 A.L.R. 902.
Mass.—Wood v. Canadian Imperial Dry, 5 N.E.2d 8, 296 Mass. 80.
Mo.—Madison v. Taxi Owners Ass'n, App., 148 S.W.2d 106—Fuqua v. Lumbermen's Supply Co., 76 S.W.2d 715, 229 Mo.App. 210—Porterfield v. American Surety Co. of New York, 210 S.W. 119, 201 Mo.App. 8.
Wash.—Weller v. Snoqualmie Falls Lumber Co., 285 P. 446, 155 Wash. 526—Royal Dairy Products Co. v. Spokane Dairy Products Co., 225 P. 412, 129 Wash. 424.
22 C.J. p 389 note 62.

37. Neb.—Finegold v. Union Outfitting Co., 193 N.W. 331, 110 Neb. 202.
22 C.J. p 389 note 63.

38. U.S.—Johnson v. J. H. Yost Lumber Co., C.C.A.Neb., 117 F.2d 53.
Ga.—American Fidelity & Casualty Co. v. McWilliams, 191 S.E. 191, 55 Ga.App. 658.
Kan.—Debus v. Missouri State Life Ins. Co., 225 P. 91, 115 Kan. 773.
N.D.—Bentley v. Oldetyme Distillers, 298 N.W. 417.
Ohio.—F. W. Woolworth Co. v. Saxton, 177 N.E. 219, 39 Ohio App. 118.
22 C.J. p 389 note 64.

39. U.S.—Henry H. Cross Co. v. Simmons, C.C.A.Ark., 96 F.2d 482.
Kan.—Hilton v. Sheridan Coal Co., 297 P. 413, 132 Kan. 525.
Mo.—Whittington v. Westport Hotel Operating Co., 33 S.W.2d 963, 326 Mo. 1117.
22 C.J. p 389 note 65.

40. Ky.—Vincennes Bridge Co. v. Poulos, 27 S.W.2d 952, 234 Ky. 243—Steinke v. North Vernon Lumber Co., 227 S.W. 274, 190 Ky. 231.
N.J.—Farrell v. Ferry Hat Co., 159 A. 153, 10 N.J.Misc. 319.
Or.—Hansen v. Oregon-Washington R. & Nav. Co., 188 P. 963, 97 Or. 190, rehearing denied 191 P. 655, 97 Or. 190.
Tex.—West Texas Produce Co. v. Wilson, 34 S.W.2d 827, 120 Tex. 35.
22 C.J. p 389 note 66.

Admission held unauthorized
Tenn.—Boyd v. Ducktown Chemical & Iron Co., 89 S.W.2d 360, 19 Tenn. App. 392.

41. Mass.—Atlantic Nat. Bank of Boston v. Hupp Motor Car Corporation, 10 N.E.2d 131, 298 Mass. 200.
22 C.J. p 389 note 67.

42. Neb.—Heller v. Speier, 230 N.W. 335, 119 Neb. 787—Rewick v. Dierks Lumber & Coal Co., 190 N.W. 875, 109 Neb. 300.

43. S.C.—Brooks v. Central Baptist Church, 193 S.E. 326, 185 S.C. 200.
Receiving clerk in main office of a telegraph company is within rule.—Western Union Tel. Co. v. Wells, 39 So. 838, 50 Fla. 474, 111 Am.S.R. 129, 2 L.R.A.,N.S., 1072, 7 Ann.Cas. 531.

44. Miss.—Western Union Tel. Co. v. Walters, 63 So. 194, 106 Miss. 59.

45. Tex.—Texas & Pacific Tel. Co. v. Prince, 82 S.W. 327, 36 Tex.Civ. App. 462.

46. Tex.—Southern Tel. & Tel. Co. v. Evans, 116 S.W. 418, 54 Tex. Civ. App. 63.

47. Ariz.—Arizona Power Co. v. Kellam, 114 P. 561, 13 Ariz. 291.

48. Tex.—Universal Transp. Co. v. Ramos, Civ.App., 37 S.W.2d 238, error dismissed.
22 C.J. p 389 note 73.

49. U.S.—Hill v. Pullman Co., C.C. Pa., 188 F. 497.
Mo.—Fisher v. Pullman Co., 254 S.W. 114, 212 Mo.App. 280.

50. Conn.—Beardsley v. Smith, 16 Conn. 368, 41 Am.D. 148.
22 C.J. p 389 note 75.

51. Ohio.—Hogg v. Zanesville Canal & Mfg. Co., 5 Ohio 410.

52. Ala.—St. Louis-San Francisco Ry. Co. v. Curtis, 113 So. 54, 216 Ala. 296.
Iowa.—Coad v. Pennsylvania Ry. Co., 175 N.W. 344, 187 Iowa 1025.
Minn.—Johnson v. Chicago & N. W. Ry. Co., 220 N.W. 602, 175 Minn. 197.
Mo.—Fewel v. St. Louis & S. F. Ry. Co., App., 267 S.W. 960.
22 C.J. p 390 note 77.

Agent's attempt to establish perjured testimony may be used as an admission of railroad's weak defense.—Schaff v. Coyle, 249 P. 947, 121 Okl. 228.

Irrelevant statement is inadmissible
Vt.—Yardley v. Rutland R. Co., 153 A. 195, 103 Vt. 182.

53. Iowa.—Turkington v. Chicago, R. I. & P. Ry. Co., 194 N.W. 75, 196 Iowa 304.
Minn.—Johnson v. Chicago & N. W. Ry. Co., 220 N.W. 602, 175 Minn. 197.

statement while he was acting in regard to that particular matter[54] and in the reasonable discharge of his duties.[55]

Particular officers or employees. Subject to the usual limitations with respect to the scope of the agency of declarant and the connection of the declaration with the duties of his position, a railroad company may be affected by the admissions of its president,[56] secretary,[57] general solicitor,[58] or a specially authorized director,[59] and also by the admissions of a general manager,[60] traffic manager,[61] general freight or passenger agent,[62] or claim agent.[63] Even statements of agents or employees of more limited authority, made while they were acting within the limits of their authorities and in connection with the performance of their duties, are admissible against the company,[64] although, of course, the company cannot be affected by admissions which go beyond the scope of declarant's authority or concern matters with which he was not engaged at the time of making the statement.[65]

N.H.—Wright v. Boston & M. R. R., 127 A. 435, 81 N.H. 361.
22 C.J. p 390 note 78.

Reports

(1) A report made by an agent to the corporation, although made for the information of the corporation alone, has been held admissible if made in the discharge of his duty.
U.S.—Chicago, St. P., M. & O. Ry. Co. v. Kulp, C.C.A.Minn., 102 F.2d 352, certiorari denied 59 S.Ct. 1032, 307 U.S. 636, 83 L.Ed. 1518.
Ala.—St. Louis-San Francisco Ry. Co. v. Curtis, 113 So. 54, 216 Ala. 296.
22 C.J. p 386 note 41 [d] (1).

(2) But it has also been held that such a report being in the nature of a narrative statement is not admissible in the absence of proof that the corporation has adopted his statements as its own.
Kan.—Flanigan v. Hines, 193 P. 1077, 108 Kan. 133.
Me.—Warner v. Maine Cent. R. Co., 88 A. 403, 111 Me. 149, 47 L.R.A., N.S., 830.
Wis.—Lehan v. Chicago & N. W. Ry. Co., 172 N.W. 787, 169 Wis. 327.

54. Ariz.—Atchison, T. & S. F. R. Co. v. Carrow, 156 P. 965, 18 Ariz. 92.

55. Minn.—Johnson v. Chicago & N. W. Ry. Co., 220 N.W. 602, 175 Minn. 197.
Wis.—Vogel v. Delaware, L. & W. R. Co., 171 N.W. 198, 168 Wis. 567.
22 C.J. p 390 note 80.

56. Ill.—Lake Shore & M. S. R. Co. v. Baltimore, & O. & C. R. Co., 37 N.E. 91, 149 Ill. 272.
22 C.J. p 390 note 81.

57. Ind.—Indianapolis & C. R. Co. v. Jewett, 16 Ind. 273.

58. Ind.—Ohio & M. R. Co. v. Levy, 32 N.E. 815, 34 N.E. 20, 134 Ind. 343.

59. Conn.—Norwich & W. R. Co. v. Cahill, 18 Conn. 484.

60. Md.—Pennsylvania R. Co. v. Orem Fruit & Produce Co., 73 A. 571, 111 Md. 356.
22 C.J. p 390 note 85.

61. S.C.—People's Oil & Fertilizer Co. v. Charleston & W. C. R. Co., 65 S.E. 733, 83 S.C. 530.
22 C.J. p 390 note 86.

62. Ga.—Atlantic Coast Line R. Co. v. Stovall-Pace Co., 118 S.E. 62, 30 Ga.App. 326.
22 C.J. p 390 note 87.

63. Ga.—Atlantic Coast Line R. Co. v. Stovall-Pace Co., 118 S.E. 62, 30 Ga.App. 326.
Tex.—Galveston, H. & S. A. Ry. Co. v. Booth, Civ.App., 209 S.W. 198.
W.Va.—William F. Mosser Co. v. Payne, 114 S.E. 365, 92 W.Va. 41.
22 C.J. p 385 note 23, p 390 note 88.

Admission held unauthorized

U.S.—Fort Worth & D. C. Ry. Co. v. Jones, C.C.A.Tex., 294 F. 858.

64. U.S.—Chicago, St. P., M. & O. Ry. Co. v. Kulp, C.C.A.Minn., 102 F.2d 352, certiorari denied 59 S.Ct. 1032, 307 U.S. 636, 83 L.Ed. 1518.
Ind.—Pittsburgh, C., C. & St. L. R. Co. v. Mexico Elevator & Live Stock Co., 149 N.E. 573, 85 Ind.App. 42.
Tex.—Missouri-Kansas-Texas R. Co. of Texas v. Salsman, Civ.App., 58 S.W.2d 1026, error dismissed.
22 C.J. p 390 note 89.

Conductor

U.S.—Reading Co. v. Larkin, C.C.A. Pa., 114 F.2d 416, affirming, D.C., Larkin v. Reading Co., 28 F.Supp. 292, and certiorari denied Reading Co. v. Larkin, 61 S.Ct. 175, 311 U.S. 707, 85 L.Ed. 459—Chicago, St. P., M. & O. Ry. Co. v. Kulp, C.C.A. Minn., 102 F.2d 352, certiorari denied 59 S.Ct. 1032, 307 U.S. 636, 83 L.Ed. 1518.
22 C.J. p 390 note 89 [d].

Division superintendent

Ind.—Pittsburgh, C., C. & St. L. R. Co. v. Mexico Elevator & Live Stock Co., 149 N.E. 573, 85 Ind.App. 42.
Mo.—Downing v. St. Louis-San Francisco Ry. Co., 285 S.W. 791, 220 Mo.App. 260.
22 C.J. p 390 note 89 [f].

Station agent

Ark.—Louisiana & N. W. R. Co. v. J. P. Machen & Co., 294 S.W. 714, 174 Ark. 122.
22 C.J. p 390 note 89 [k].

65. Cal.—Dryden v. Western Pac. R. Co., 36 P.2d 394, 1 Cal.App.2d 40.
Ky.—Wimsatt's Adm'x v. Louisville & N. R. Co., 31 S.W.2d 729, 235 Ky. 405.
Minn.—Millen v. Great Northern Ry. Co., 188 N.W. 257, 152 Minn. 547.
Mo.—Brown v. Wabash Ry. Co., 281 S.W. 64, 223 Mo.App. 518, transferred, see 274 S.W. 388, 309 Mo. 217.
N.H.—Semprini v. Boston & M. R. R., 179 A. 349, 87 N.H. 279.
N.J.—Drotar v. Pennsylvania R. Co., 199 A. 75, 120 N.J.Law 199, affirmed 8 A.2d 299, 123 N.J.Law 201.
Tenn.—Ward v. Gulf, M. & N. R. Co., 134 S.W.2d 917, 23 Tenn.App. 533.
Tex.—Missouri-Kansas-Texas R. Co. of Texas v. Salsman, Civ.App., 58 S.W.2d 1026, error dismissed—Houston E. & W. T. Ry. Co. v. Lord, Civ.App., 290 S.W. 816—Hines v. Collins, Civ.App., 227 S.W. 332—St. Louis Southwestern Ry. Co. v. Cox, Civ.App., 221 S.W. 1043.
Wis.—Lehan v. Chicago & N. W. Ry. Co., 172 N.W. 787, 169 Wis. 327.
22 C.J. p 391 note 90.

Brakeman

Ark.—Webb v. Kansas City Southern R. Co., 208 S.W. 301, 137 Ark. 107.
Iowa.—Hartford Fire Ins. Co. v. Mellon, 220 N.W. 331, 206 Iowa 182.
Mo.—Stroud v. Missouri Pac. R. Co., 236 S.W. 891, 210 Mo.App. 311.
22 C.J. p 391 note 90 [b].

Car inspector

Kan.—Flanigan v. Hines, 193 P. 1077, 108 Kan. 133—Atchison, T. & S. F. R. Co. v. Burks, 96 P. 950, 78 Kan. 515, 18 L.R.A.,N.S., 231.

Conductor

Md.—Baltimore & O. R. Co. v. State, for Use of Carbone, 181 A. 830, 169 Md. 345.
Mo.—Stroud v. Missouri Pac. R. Co., 236 S.W. 891, 210 Mo.App. 311.
Wash.—Spokane County v. Great Northern Ry. Co., 35 P.2d 1, 178 Wash. 389.
22 C.J. p 391 note 90 [e].

Division superintendent

Cal.—Hackley v. Southern Pac. Co., 45 P.2d 447, 6 Cal.App.2d 611, cer-

§ 358. Agents for Street Railway Corporations

The statements or conduct of agents of a street railway corporation are admissible against it when made within the scope of their authority and in connection with the performance of their duties.

The statements of the general officers of a street railway corporation are admissible against it when made within the scope of their authority and in connection with the performance of their duties,[66] but not otherwise;[67] and the same rule applies to employees and other agents whose authority is more limited.[68] An agent's attempt to bribe witnesses may be admissible against the corporation.[69]

§ 359. Public Officers or Agents

Governmental bodies are not bound by the admissions of their officers or agents unless made within the scope of their authority and in the reasonable discharge of their duties; nor do the statements of public officers bind private persons for whom they are not acting as agents.

Statements of a public officer in the absence of express authority are not competent against the national[70] or a state[71] government; and even where the necessary authority is conferred the statement is admissible only if it was made within the scope of such authority.[72]

Public corporations, such as counties, cities, or towns, may be affected by declarations of public officers within the scope of their authority.[73] On the other hand, statements will not be admitted if not made within the scope of declarant's official duties and authority and in the reasonable discharge thereof,[74] and a somewhat stricter proof of authority of declarant is required than in the case of pri-

tiorari denied Southern Pac. Co. v. Hackley, 56 S.Ct. 153, 296 U.S. 630, 80 L.Ed. 447.

Engineer

Ark.—St. Louis-San Francisco Ry. Co. v. Vernon, 258 S.W. 126, 162 Ark. 226.

Ky.—Cincinnati, N. O. & T. P. R. Co. v. Gilreath's Adm'r, 15 S.W.2d 267, 228 Ky. 385.

22 C.J. p 391 note 90 [f].

Fireman

Mo.—Chawkley v. Wabash Ry. Co., 297 S.W. 20, 317 Mo. 782.

N.H.—Semprini v. Boston & M. R. R., 179 A. 349, 87 N.H. 279.

22 C.J. p 391 note 90 [g].

Freight agent

N.C.—Norfolk Southern Ry. Co. v. Smitherman, 101 S.E. 208, 178 N. C. 595.

Tex.—Panhandle & S. F. Ry. Co. v. Miller, Civ.App., 64 S.W.2d 1076, error dismissed.

Vt.—Booth v. New York Cent. R. Co., 112 A. 894, 95 Vt. 9.

22 C.J. p 391 note 90 [h].

Porter

N.Y.—Simon v. Pullman Co., 215 N. Y.S. 798, 127 Misc. 272.

Postmaster

Wash.—Harry v. Northern Pac. Ry. Co., 178 P. 465, 105 Wash. 469.

22 C.J. p 391 note 90 [j].

Section foreman or boss

Ky.—Chesapeake & O. Ry. Co. v. Saulsberry, 88 S.W.2d 949, 262 Ky. 31.

Mo.—Fowler v. Missouri, K. & T. R. Co., 84 S.W.2d 194, 229 Mo.App. 561.

S.C.—Atlantic Coast Line R. Co. v. Searson, 135 S.E. 567, 137 S.C. 468.

Tex.—Texas & N. O. R. Co. v. Jones, Civ.App., 242 S.W. 269.

22 C.J. p 391 note 90 [k].

Station agent

Mo.—Sinclair v. Missouri, K. & T. Ry. Co., App., 253 S.W. 380.

N.D.—Kutchera v. Minneapolis, St. P. & S. S M. Ry. Co., 212 N.W. 51, 54 N.D. 897—Clark v. Payne, 187 N. W. 817, 48 N.D. 911.

Tex.—Texas & P. Ry. Co. v. Boaz, Civ.App., 22 S.W.2d 492.

22 C.J. p 391 note 90 [l].

66. Tex.—Austin Electric R. Co. v. Faust, Civ.App., 133 S.W. 449.

67. Ala.—Ricketts v. Birmingham St. R. Co., 5 So. 353, 85 Ala. 600.

22 C.J. p 392 note 92.

68. Ind.—Terre Haute, I. & E. Traction Co. v. Holland, 131 N.E. 534, 76 Ind.App. 99.

R.I.—Rivera v. United Electric Rys. Co., 151 A. 130.

22 C.J. p 392 note 93.

Claim agent

(1) Statements rejected.—San Antonio Public Service Co. v. Jackson, Tex.Civ.App., 103 S.W.2d 251, error dismissed—22 C.J. p 392 note 93 [b].

(2) Statements admitted.—Washington-Virginia Ry. Co. v. Deahl, 100 S.E. 840, 126 Va. 141.

Conductor

Statements rejected.

Ala.—Bradley v. Lewis, 100 So. 324, 211 Ala 264

Wis.—Bell v. Milwaukee Electric Ry. & Light Co., 172 N.W. 791, 169 Wis. 408.

22 C.J. p 392 note 93 [c].

Driver or motorman

Statements rejected.

Mass.—Topping v. Eastern Massachusetts St. Ry Co., 147 N.E. 882, 252 Mass 270.

N.Y.—Vadney v. United Traction Co., 177 N.Y.S. 114, 188 App.Div. 365.

22 C.J. p 392 note 92 [d].

69. N.Y.—Nowack v. Metropolitan St. R Co., 60 N.E. 32, 166 N.Y. 433, 82 Am.S.R. 691, 54 L.R.A. 592.

70. U.S.—Hinkley v. U. S., 49 Ct. Cl. 148—Water v. U. S., 4 Ct.Cl. 389.

Report by revenue agent of alleged facts submitted by one as basis for claim is not binding as an admission since such report is evidence only of its contents and not of the facts stated therein.—Suisman & Blumenthal v. Eaton, D.C. Conn., 8 F.Supp. 217.

71. Minn.—State v. Olson, 56 N.W. 585, 55 Minn. 118.

N.Y.—State Treasurer v. Ulysses Apartments, 250 N.Y.S. 190, 232 App.Div. 393.

72. Ga.—Bennett v. Barr, 176 S.E. 681, 49 Ga.App. 831.

N.J.—Central R. Co. of New Jersey v. State Tax Department, 169 A. 489, 112 N.J.Law 5, affirming Central R. Co. of New Jersey v. State Board of Tax Appeals, 162 A. 889, 109 N.J.Law 395, and certiorari denied Central R. Co. of New Jersey v. State Tax Commission, 55 S. Ct. 79, 293 U.S. 568, 79 L.Ed. 667.

22 C.J. p 392 note 97.

73. U.S.—Manley v. Northumberland County, D.C.Pa., 32 F.Supp. 775.

Kan.—Stone v. City of Pleasanton, 223 P. 312, 314, 115 Kan. 378, quoting **Corpus Juris.**

N.Y.—Beechwood Gun Club v City of Beacon, 275 N.Y.S. 249, 153 Misc. 358, affirmed 275 N.Y.S. 219, 242 App.Div. 761.

22 C.J p 392 note 98.

Rule applied to city employee

Tex.—City of Brownsville v. Crixell, Civ.App., 275 S W. 430.

Admission as to irrelevant matter is inadmissible.—Algonquin Golf Club v. City of Glendale, 81 S.W.2d 354, 230 Mo.App. 951.

74. U.S.—Rockingham County v. Luten Bridge Co., C.C.A.N.C., 35 F.2d 301, 66 A.L.R. 735.

Cal.—San Bernardino County v. Industrial Accident Commission, 37 P.2d 122, 1 Cal.App.2d 598—City of Stockton v. Vote, 244 P. 609, 76

vate corporations, by reason of the fact that the officers of public corporations are regarded as public officials rather than mere agents.[75] An inhabitant of a town is not in any sense its agent so as to make his admissions competent against it.[76]

A statement by a public officer not acting as agent of a private person does not bind such person, at least where he has not assented to such statement.[77] So admissions made by one public officer do not bind another officer sued in a personal action.[78]

§ 360. Particular Forms of Agency

The admissibility of admissions made in particular forms of agency is treated infra §§ 361–368. Admissions by agents in particular occupations or employments is considered supra § 351.

Examine Pocket Parts for later cases.

§ 361. Attorneys

a. In general
b. Judicial admissions

a. In General

An attorney may make admissions of fact which will affect his client provided that the statement is made during the performance of duties of his employment within the actual or ostensible scope of the authority delegated and during the continuance of his agency; his statements may also be admissible as independently relevant evidence.

The rule in Corpus Juris, characterized as "supported by practically universal authority," is that an attorney may make admissions of fact which will affect his client,[79] provided his authority is made

Cal.App. 369—Hanson v. Board of Trustees of Town of Mill Valley, 241 P. 572, 74 Cal.App. 585
Ill.—Myers Const. Co. v. Wood River Drainage & Levee Dist. of Madison County, Ill., 221 Ill.App. 473
Md.—Reinhardt Const. Co. v. City of Baltimore, 146 A. 577, 157 Md. 420.
Mass.—Goodyear Park Co. v. City of Holyoke, 11 N.E.2d 439, 298 Mass. 510.
N.J.—Nash v. City of Perth Amboy, 138 A. 893, 104 N.J.Law 60.
N.Y.—Miller v. State, 1 N.Y.S.2d 623, 253 App.Div. 182, reversed on other grounds 17 N.E.2d 773, 279 N.Y. 74—In re New York Title & Mortgage Co. (Series B-K), 21 N.Y.S.2d 575.
N.C.—Town of Dillsboro v. Dills, 138 S.E. 540, 194 N.C. 185.
Pa.—Borough of Wilson v. Eichlin, 98 Pa.Super. 188.
Tex.—Swink v. City of Dallas, Com.App., 36 S.W.2d 222, reversing, Civ.App., 19 S.W.2d 601.
22 C.J. p 392 note 99.

City employee cannot bind city by narrative statement as to past transaction.—Bodholdt v. Garrett, 10 P.2d 533, 122 Cal.App. 566.

Admissions by overseers of poor held unauthorized
Mass.—Lanesborough v. Ludlow, 145 N.E. 57, 250 Mass. 99.
22 C.J. p 392 note 99 [b].

75. Kan.—Stone v. City of Pleasanton, 223 P. 312, 314, 115 Kan. 378, quoting **Corpus Juris.**
22 C.J. p 392 note 99.

76. U.S.—Hunter v. Marlboro, C.C.Mass., 12 F.Cas.No.6,908, 2 Woodb. & M. 168.
N.H.—In re Landaff, 34 N.H. 163.

77. U.S.—Illinois Power & Light Corporation v. Hurley, C.C.A.Mo., 49 F.2d 681, certiorari denied 52 S.Ct. 19, 284 U.S. 637, 76 L.Ed. 541—Williams v. Edward Gillen Dock, Dredge & Construction Co., Ohio, 258 F. 591, 169 C.C.A. 531.

78. U.S.—Suisman & Blumenthal v. Eaton, D.C.Conn., 8 F.Supp. 217.

79. Ala.—First Nat. Bank v. Culverhouse, 164 So. 124, 26 Ala.App. 560.
Cal.—Scholes v. Silvius, 207 P. 291, 57 Cal.App. 395.
Fla.—U. S. Fidelity & Guaranty Co. v. Snite, 143 So. 615, 106 Fla. 702.
Ga.—Hardeman v. Hardeman, 175 S.E. 9, 179 Ga. 34—Glover v. Summerour, 141 S.E. 211, 165 Ga. 513—Commercial Credit Co. v. Fry, 122 S.E. 77, 31 Ga.App. 488.
Iowa—Suntken v. Suntken, 272 N.W. 132, 137, 223 Iowa 347, quoting **Corpus Juris.**
Ky.—Greenway v. Watson, 105 S.W.2d 848, 268 Ky. 745.
Mass.—Graustein v. H. P. Hood & Sons, 200 N.E. 14, 293 Mass. 207—Morrison v. Segal, 169 N.E. 789, 270 Mass. 292—Washington & Devonshire Realty Co. v. Lewis Diamond Co., 161 N.E. 883, 263 Mass. 554—Simon v. Lettiere, 154 N.E. 84, 257 Mass. 563.
Miss.—Planters' Mfg. Co. v. Greenwood Agency Co., 152 So. 476, 168 Miss. 892.
Mo.—In re Noell, 96 S.W.2d 213, 234 Mo.App. 1162.
N.H.—Barry v. Bartis, 155 A. 703, 85 N.H. 202.
N.Y.—Seneca Wire & Mfg. Co. v. A. B. Leach & Co., 159 N.E. 700, 247 N.Y. 1, reversing 219 N.Y.S. 478, 219 App.Div. 702.
N.C.—Winborne v. McMahan, 173 S.E. 278, 206 N.C. 30—Richardson v. Satterwhite, 164 S.E. 825, 203 N.C. 113.
Tenn.—Home Indemnity Co. of New York v. Bogue, 79 S.W.2d 580, 168 Tenn. 493.
Tex.—Lancaster v. Faskin, Civ.App., 248 S.W. 754.
1 C.J. p 702 note 50 [a]—22 C.J. p 393 note 2—25 C.J. p 543 notes 65–67.

"The trend of the modern decisions seems to be that an attorney employed prior to the institution of litigation is but an agent, and that his authority to make admissions for his principal is not affected by the fact that he is an attorney-at-law, and that if the admission is within the scope of his employment, he has the same authority to bind his client as any other agent."—Gibson v. Metropolitan Life Ins. Co., Mo.App., 147 S.W.2d 193, 196.

Written or oral admissions
(1) Attorney's relevant and material admissions within the scope of his employment are admissible in evidence against his client, whether written or oral.—Suntken v. Suntken, 272 N.W. 132, 223 Iowa 347.

(2) So a letter written by an attorney within the scope of his authority is admissible.
Ill.—Parker v. Louisville & N. R. Co., 230 Ill.App. 259.
Md.—Mercantile Trust & Deposit Co. v. Rode, 112 A. 574, 137 Md. 362.
N.Y.—In re Dickerson's Estate, 300 N.Y.S. 748, 165 Misc. 230.
22 C.J. p 393 note 2 [a].

Attorney's clerk having the management of a cause may by his statement affect the client to the same extent as the attorney himself might have done.
Iowa.—Lord v. Wood, 94 N.W. 842, 120 Iowa 303.
N.Y.—Power v. Kent, 1 Cow. 211.

Irrelevant or immaterial statement is inadmissible
Idaho.—Sorensen v. Larue, 252 P. 494, 43 Idaho 292.
Kan.—Lawitzka v. Board of Com'rs of Allen County, 76 P.2d 880, 147 Kan. 405.
Mo.—Samuel Haas Trimmed Hat Co. v. Service Ass'n, 297 S.W. 129, 222 Mo.App. 307.

affirmatively to appear[80] by evidence other than the declaration of the attorney,[81] and provided the statement is shown to have been made within the actual or ostensible scope of the authority delegated,[82] during the continuance of his agency,[83] and while engaged in a bona fide[84] attempt to discharge the duties of his employment;[85] but it is no part of an attorney's duty to discuss his client's affairs with third persons,[86] and his admissions in common conversation cannot be received in evidence against his client.[87] Likewise, a litigant is not bound by statements made to him by his attorney in expressing his opinion as to the matters involved.[88]

Independent relevancy. An attorney's statement may be independently relevant and admissible because it constitutes the operative facts of the transaction.[89] Accordingly, even though an attorney's admission is not made under circumstances making it evidence against his client, it is admissible to show that the attorney knew the fact admitted.[90]

b. Judicial Admissions

A distinct and formal admission made by an attorney acting in his professional capacity on a trial binds his client as a judicial admission, unless withdrawn for proper cause; but such an admission is ordinarily incompetent in another action unless made

Intent a question for jury
The question of the intent with which an admission was made by an attorney may be left to the jury.—Central Branch Union Pac. R. Co. v. Shoup, 28 Kan. 394, 42 Am.R. 163.

Statement held not an admission
N.Y.—Eldridge v. Endicott, Johnson & Co., 126 N.E. 254, 228 N.Y. 21, 20 A.L.R. 1, reversing 177 N.Y.S. 863, 189 App.Div. 53.
Or.—Laubhein v. Holsman, 225 P. 190, 111 Or. 78.

80. U.S.—Parker State Bank v. Pennington, C.C.A.Colo., 9 F.2d 966—Hays v. Stine, C.C.A.W.Va., 289 F. 224.
Cal.—Whitaker v. Title Ins. & Trust Co., 199 P. 528, 186 Cal. 432.
Ga.—Glover v. Summerour, 141 S.E. 211, 165 Ga. 513.
Iowa.—Suntken v. Suntken, 272 N.W. 132, 137, 223 Iowa 347, quoting **Corpus Juris.**
Ky.—McFarland's Adm'r v. McFarland, 30 S.W.2d 958, 235 Ky. 283.
Mass.—Kana v. Fishman, 176 N.E. 922, 276 Mass. 206—Dorchester Trust Co. v. Casey, 176 N.E. 178, 268 Mass. 494, 71 A.L.R. 1.
Mo.—Gibson v. Metropolitan Life Ins. Co., App., 147 S.W.2d 193.
N.C.—Tallant v. B. & H. Coach Co., 148 S.E. 927, 197 N.C. 783.
Pa.—Malone v. Marano, 192 A. 254, 326 Pa. 316.
R.I.—Monroe v. Lavimodiere, 167 A. 534, 53 R.I. 500.
22 C.J. p 393 note 3.

Where letter was written before suit by one who subsequently appeared as defendant's attorney in the suit, it was held not to be admissible without proof that the letter was authorized.—Hall v. Benefit Ass'n of Ry. Employees, 161 S.E. 867, 868, 164 S.C. 80, quoting **Corpus Juris.**

Authority held shown
Cal.—Scholes v. Silvius, 207 P. 291, 57 Cal.App. 395.
Ill.—Hoover v. Hoover, 30 N.E.2d 940, 307 Ill.App. 590.
Iowa.—Suntken v. Suntken, 272 N.W. 132, 223 Iowa 347.

Authority held not shown
(1) Generally—McFarland's Adm'r v. McFarland, 30 S.W.2d 958, 235 Ky. 283.
(2) Declaration in attorneys' letter that it was written at party's request was alone insufficient to establish attorneys' agency so as to make letter competent evidence against supposed principal.—Whitsett v. Parnell, 289 P. 696, 144 Okl. 186.

81. Ga.—Glover v. Summerour, 141 S.E. 211, 165 Ga. 513.
Iowa.—Suntken v. Suntken, 272 N.W. 132, 137, 223 Iowa 347, quoting **Corpus Juris.**
22 C.J. p 393 note 4.

82. U.S.—Mount Hope Finishing Co. v. Seneca Textile Corporation, D.C.N.Y., 39 F.Supp. 994—In re Lincoln Trust Co., D.C.Neb., 9 F.Supp. 643, modified on other grounds, C.C.A., First Trust Co. of Lincoln, Neb., v. Ricketts, 75 F.2d 309.
Ariz.—Buehman v. Smelker, 68 P.2d 946, 50 Ariz. 18.
Iowa.—Suntken v. Suntken, 272 N.W. 132, 137, 223 Iowa 347, quoting **Corpus Juris.**
Ky.—McFarland's Adm'r v. McFarland, 30 S.W.2d 958, 235 Ky. 283.
Mo.—Gibson v. Metropolitan Life Ins. Co., App., 147 S.W.2d 193.
Or.—Rivers Bros. v. C. F. T. Co., 264 P. 368, 124 Or. 157.
Pa.—Malone v. Marano, 192 A. 254, 326 Pa. 316—Mahler v. Singer, 132 A. 718, 720, 285 Pa. 540, citing **Corpus Juris.**
S.C.—Hall v. Benefit Ass'n of Ry. Employees, 161 S.E. 867, 164 S.C. 80.
Wyo.—Ellis v. Federal Land Bank of Omaha, 113 P.2d 954.
22 C.J. p 393 note 5.

Unauthorized letter by an attorney to a person against whom the client intends to bring suit is not binding on the client.
Ga.—Georgia Chemical Works v. Malcolm, 197 S.E. 763, 186 Ga. 275.
S.C.—Hall v. Benefit Ass'n of Ry. Employees, 161 S.E. 867, 868, 164 S.C. 80, quoting **Corpus Juris.**
22 C.J. p 393 note 5 [b].

Statement after attachment
It is not permissible to introduce unauthorized statements of attachment plaintiff's attorney as to his reasons for suing out the writ.—Empire Mill Co. v. Lovell, 41 N.W. 583, 77 Iowa 100, 14 Am.S.R. 272—6 C.J. p 527 note 8.

Infant's attorney cannot make admissions against infant's interests, or otherwise waive his rights, as by admissions at trial.—Mackey v. Shreckengaust, Mo.App., 27 S.W.2d 752.

83. D.C.—Phillips & Sager v. Kern, 271 F. 547, 50 App.D.C. 317.
Iowa.—Suntken v. Suntken, 272 N.W. 132, 137, 223 Iowa 347, quoting **Corpus Juris.**
Ky.—McFarland's Adm'r v. McFarland, 30 S.W.2d 958, 235 Ky. 283.
22 C.J. p 394 note 6.

84. Iowa.—Suntken v. Suntken, 272 N.W. 132, 137, 223 Iowa 347, quoting **Corpus Juris.**
22 C.J. p 394 note 7.

85. Iowa.—Suntken v. Suntken, supra, quoting **Corpus Juris.**
Ky.—McFarland's Adm'r v. McFarland, 30 S.W.2d 958, 235 Ky. 283.
22 C.J. p 394 note 8.

86. N.Y.—Fay v. Hebbard, 42 Hun 490.
Vt.—Underwood v. Hart, 23 Vt. 120.

87. Ill.—Baldassare v. Federal Union Life Ins. Co. of Cincinnati, 268 Ill.App. 243—Whitney v. George E. Corbett Boiler & Tank Co., 246 Ill. App. 569.
Or.—Rivers Bros. v. C. F. T. Co., 264 P. 368, 124 Or. 157.
Pa.—Mahler v. Singer, 132 A. 718, 285 Pa. 540.
22 C.J. p 394 note 10.

88. Iowa.—In re Dodge's Estate, 223 N.W. 106, 207 Iowa 374.

89. Tex.—McDonald v. McDonald, Civ.App., 143 S.W.2d 142, error dismissed, judgment correct.
Independent relevancy generally see supra § 348.

90. N.Y.—Beinert v. Tivoli, 116 N.Y.S. 4, 62 Misc. 616.

without limitation to the purposes of the particular action in which it was made.

Judicial admissions are frequently those of counsel or of the attorney of record,[91] who is, for the purposes of the trial, the agent of his client.[92] When such admissions are made in the counsel's professional capacity,[93] for the purpose of dispensing with proof of some fact,[94] or modifying the severity of some rule of practice,[95] and to that end are distinct and formal,[96] they bind the client,[97] whether made during,[98] or even after,[99] the trial.

Admissions by an attorney may be received, even though they were made in the exercise of a wide discretion with which the client has as a rule so little personal connection as to establish in many cases no real relation of agency.[1] Thus, it is within the appropriate function of counsel to make admissions dispensing with strict rules of law or practice as to matters incidental to the issue, such as the formal proof of a corporation record,[2] or other document;[3] or as to facts about which the client cannot exercise a trained judgment, for example, what an absent[4] or deceased[5] witness would testify if present; or, in general, as to technical matters relating to the machinery of a trial.[6]

Admissibility in subsequent cases. The anomalous relations of agency existing between counsel and client impose an important limitation on the use of ju-

91. Ill.—Hughes v. Eldorado Coal & Mining Co., 197 Ill.App. 259.
Mass.—Graustein v. H. P Hood & Sons, 200 N.E. 14, 293 Mass. 207.
Mo.—In re Noell, 96 S.W.2d 213, 234 Mo.App. 162—Sonken-Galamba Corporation v. Missouri Pac. R. Co., 40 S.W.2d 524, 225 Mo.App. 1066.
Vt.—Hall v. Fletcher, 136 A. 388, 100 Vt. 210.
22 C J. p 394 note 15.
Judicial admissions generally see supra §§ 299–313.

Argument or trial

A court may accept and act on admissions of counsel made in argument or on trial of a cause.—New York Evening Post Co. v. Chaloner, C.C.A.N.Y., 265 F. 204, certiorari dismissed 40 S.Ct. 396, 252 U.S. 591, 64 L.Ed. 731.

92. Mo.—In re Noell, 96 S.W.2d 213, 234 Mo.App. 1162.
Or.—Hansen v. Oregon-Washington R. & Nav. Co., 188 P. 963, 97 Or. 190, rehearing denied 191 P. 655, 97 Or. 190.
22 C.J. p 394 note 16.

93. Vt.—Hall v. Fletcher, 136 A. 388, 100 Vt. 210.
22 C.J. p 394 note 18.

Stranger to litigation

An allegation in a brief could bind only the parties to the litigation, and not another party for whom one of the attorneys who prepared the brief was counsel.—Welch v. Johnson, 184 P. 280, 93 Or. 591, denying rehearing 183 P. 776, 93 Or. 591.

94. Kan.—Morrison v. Montgomery, 184 P. 985, 105 Kan. 430.
Ky.—National Life & Accident Ins. Co. v. Braswell, 272 S.W. 413, 209 Ky. 165.
Mich.—Weber v. Enoch C. Roberts Iron Ore Co., 258 N.W. 408, 270 Mich. 38.
Vt.—Hall v. Fletcher, 136 A. 388, 100 Vt. 210.
22 C.J. p 394 note 19.

95. U.S.—Illinois Cent. R. Co. v. Norris, Ill., 245 F. 926, 158 C.C.A. 214.
N.H.—Hanson v. Hoitt, 14 N.H. 56—Pike v. Emerson, 5 N.H 393, 22 Am.D. 468.

96. Kan.—Morrison v. Montgomery, 184 P. 985, 105 Kan. 430.
22 C.J. p 394 note 21.

Incidental or casual remarks of counsel cannot be considered as admissions.—Coats v. General Motors Corporation, 39 P.2d 838, 3 Cal.App. 2d 340—22 C.J. p 394 note 21 [a]

Expression of individual opinion by counsel during trial does not bind party.
U.S.—Habirshaw Electric Cable Co. v. Habirshaw Electric Cable Co., C.C.A.N.Y., 296 F. 875, 43 A.L.R. 1035, certiorari denied Whitman v. Bondholders Committee of Dec. 1, 1921, 44 S.Ct. 633, 265 U.S. 587, 68 L.Ed. 1193.
Mo.—In re Condemnation of Property for Park in City of St. Joseph, 263 S.W. 97, error dismissed Corby's Estate v. City of St. Joseph, 45 S.Ct. 351, 267 U.S. 578, 69 L.Ed. 797.

97. Ariz.—Moore v. Blackstone, 180 P. 526, 20 Ariz. 328.
Kan.—In re Hoover's Estate, 180 P. 275, 104 Kan. 635.
Mass.—Brocklesby v. City of Newton, 200 N.E 351, 294 Mass. 41—Graustein v. H. P. Hood & Sons, 200 N.E. 14, 293 Mass. 207.
Mo.—Cantrell v. Knight, App., 72 S.W.2d 196.
Ohio.—Muskingum Watershed Conservancy Dist. v. Funk, 16 N.E.2d 454, 134 Ohio St. 302—Nassar v. Interstate Motor Freight System, 16 N.E.2d 832, 58 Ohio App. 443.
Okl.—Wester v. Lucas, 57 P.2d 1179, 177 Okl. 147—Ætna Building & Loan Ass'n v. McCarty, 189 P. 357, 78 Okl. 187.
Or.—Montesano Lumber & Mfg. Co. v. Portland Iron Works, 186 P. 428, 94 Or. 677.
Tenn.—Tippett v. Shaw, 4 Tenn.App. 132.
Tex.—Petroleum Casualty Co. v. Bristow, Civ.App., 35 S.W.2d 246, error dismissed.
Vt.—Raptis v. Alexander, 158 A. 73, 104 Vt 203—Hall v. Fletcher, 136 A. 388, 100 Vt. 210.
22 C.J. p 395 note 22.

Statement held not admission as to matters to which it does not expressly or impliedly extend.
Cal.—Frankish v. Frankish Co., 283 P. 970, 103 Cal.App. 93.
Mo.—Carlson v. Wells, 276 S.W. 26, 42 A.L.R. 1319.
Utah.—Huntsville Irr. Ass'n v. Rollo, 191 P. 423, 56 Utah 442.

98. Kan.—In re Hoover's Estate, 180 P. 275, 104 Kan. 635.
Mass.—Clifford Shoe Co. v. United Shoe Machinery Corporation, 8 N.E.2d 161, 297 Mass. 94—Graustein v. H. P Hood & Sons, 200 N.E. 14, 293 Mass. 207.
Vt.—Hall v. Fletcher, 136 A. 388, 100 Vt. 210.
22 C.J. p 395 note 24.

Opening case

Admissions are binding even when made in opening case.—Kolas v. Larochelle, 169 N.E. 662, 270 Mass. 49—22 C.J. p 395 note 24 [a].

99. U.S.—The Harry, D.C.N.Y., 11 F. Cas.No 6,147, 9 Ben. 524.
Ala.—Carmichael v. U. S Fidelity & Guaranty Co., 50 So. 1003, 163 Ala. 320.
22 C.J. p 395 note 25.

1. N.Y.—Anderson v. McAleenan, 8 N.Y.S. 483, 15 Daly 444.

2. Conn.—Perry v. Simpson Waterproof Mfg. Co., 40 Conn. 313.

3. N.Y.—Voisin v. Commercial Mut. Ins. Co, 22 N.Y.S. 348, 67 Hun 365.
S.C.—Cooke v. Pennington, 7 S.C. 385.

4. Ala.—Ryan v. Beard, 74 Ala. 306.

5. Ala.—Ryan v. Beard, supra.
N.C.—Virginia-Carolina Chemical Co. v. Kirven, 41 S.E. 1, 130 N.C. 161.

6. Ill.—Chicago City R. Co. v. McMeen, 70 Ill.App. 220.
La.—Lacoste v. Robert, 11 La.Ann. 33.

dicial admissions made by counsel when these are offered in subsequent cases. The original admission may have been made only with respect to the pending case to save time[7] or avoid a continuance,[8] or only provisionally to raise an issue of law, as on an agreed statement of facts,[9] a bill of exceptions,[10] a demurrer,[11] or a special verdict,[12] or in order to formulate a request for a charge to the jury.[13] A judicial admission by an attorney is therefore not so necessarily connected with the party as to be deemed competent in another action,[14] especially where the issues are different[15] and the parties not the same,[16] unless it was made without limitation to the purposes of any particular action,[17] or was ratified by the client.[18]

Withdrawal. A judicial admission made by counsel may be withdrawn[19] where cause for withdrawal is shown;[20] but the withdrawal relates only to the judicial character of the admission, leaving it such force as it may have as an extrajudicial admission.[21]

§ 362. Conspirators and Persons Acting Together

a. In general
b. Nature and object of statement

a. In General

The admissions of one party engaged in a common design or conspiracy may be admissible as against his co-conspirators provided the existence of the conspiracy or common design between the parties affected by the admission, at the time the admissions were made, is sufficiently proved by evidence other than the statements of the declarant, but the order of proof rests in the discretion of the court.

A community of interest and object between several persons acting together establishes a relation of agency[22] which may render the admission of one of them competent against the others,[23] although it

7. Kan.—In re Hoover's Estate, 180 P. 275, 104 Kan 635.
22 C.J. p 395 note 34.

8. Ala.—Ryan v. Beard, 74 Ala. 306.
N.C.—Cutler v. Cutler, 40 S.E. 689, 130 N.C. 1, 89 Am.S.R. 854, 57 L.R.A. 209.

9. Or.—Garvin v. Western Cooperage Co., 184 P. 555, 94 Or. 487.
22 C.J. p 395 note 36.

10. Ky.—Beeler v. Young, 3 Bibb. 520.

11. U.S.—Auld v. Hepburn, C.C.D.C., 2 F.Cas.No 650, 1 Cranch C.C. 122.
Ill.—Kankakee & S. R. Co v. Horan, 23 N.E. 621, 131 Ill. 288.
Mich.—Belden v. Blackman, 83 N.W. 616, 124 Mich. 667.

12. Md.—Dorsey v. Gassaway, 2 Harr. & J. 402, 3 Am.D. 557.

13. La.—Keane v. Fisher, 7 La.Ann. 334.

14. Kan.—Morrison v. Montgomery, 184 P. 985, 105 Kan. 430.
Or.—Garvin v. Western Cooperage Co., 184 P. 555, 94 Or. 487.
6 C.J. p 859 note 62—22 C.J. p 395 note 41.

Isolated statement
Whether isolated statement in prior action constitutes an admission depends on the whole record of the former trial and the circumstances under which the statement was made.—Silverman v. Bermuda & West Indies S. S. Co., D.C.N.Y., 12 F.Supp. 164.

Argumentative statement in brief to appellate court does not bind client in subsequent trial.—Marx v. Ettlinger, Cal.App., 116 P.2d 482—Sichterman v. R. M. Hollingshead Co., 4 P.2d 181, 117 Cal.App. 504.

15. U.S.—Atchison, T. & S. F. R. Co. v. Sullivan, Colo., 173 F. 456, 97 C.C.A. 1.

16. Mass.—Porter v. Rust, 131 N.E. 173, 238 Mass. 526
Or.—Garvin v. Western Cooperage Co., 184 P. 555, 94 Or. 487—Welch v. Johnson, 184 P. 280, 93 Or. 591, denying rehearing 183 P. 776, 93 Or. 591.
22 C.J. p 395 note 43.

17. Ill.—Deffler v. Loudenback, 241 Ill.App. 314.
Kan.—Hodgson v. Mutual Ben. Health & Accident Ass'n, 112 P.2d 121, 153 Kan. 511—In re Hoover's Estate, 180 P. 275, 104 Kan. 635.
Mo.—In re Noell, 96 S.W.2d 213, 234 Mo.App. 1162—Dempsey v. McGinnis, App., 249 S.W. 662.
Utah.—Gee v. Baum, 199 P. 680, 58 Utah 445.
Vt.—Hall v. Fletcher, 136 A. 388, 100 Vt. 210.
6 C.J. p 650 note 3—22 C.J. p 395 note 44.

Distinct and formal admission of a fact in the course of a trial may be given in evidence on a subsequent trial.—Morrison v. Montgomery, 184 P. 985, 105 Kan. 430.

18. Mo.—Nichols, Shepard & Co. v. Jones, 32 Mo.App. 657.

19. Conn.—Perry v. Simpson Waterproof Mfg. Co., 40 Conn. 313.
Ind.—Hays v. Hynds, 28 Ind. 531.
N.C.—Cutler v. Cutler, 40 S.E. 689, 130 N.C. 1, 89 Am.S.R. 854, 57 L.R.A. 209.

20. N.Y.—Goodman v. Mercantile Credit Guarantee Co., 45 N.Y.S. 508, 17 App.Div. 474.

21. Conn.—Perry v. Simpson Waterproof Mfg. Co., 40 Conn. 313.

22. Iowa.—Gregory v. Sorenson, 242 N.W. 91, 214 Iowa 374.
22 C.J. p 396 note 50.

Implied authorization
Such declarations are admitted because they are a part of the execution of the plan of the conspiracy and have been impliedly authorized by the other conspirators.—U. S. v. Aluminum Co. of America, D.C.N.Y., 1 F.R.D. 1.

23. U.S.—National Ben Franklin Fire Ins. Co. v. Stuckey, C.C.A.Ga., 79 F.2d 631—International Indemnity Co. v. Lehman, C.C.A.Wis., 28 F.2d 1, certiorari denied 49 S.Ct. 83, 278 U.S. 648, 73 L.Ed 561—U. S. v. Aluminum Co. of America, D.C.N.Y., 1 F.R.D. 1.
Ark.—Sanders v. Berry, 214 S.W. 58, 139 Ark. 447.
Conn.—Robinson v. Dobbins, 142 A. 572, 108 Conn. 58.
Ga.—Deckner-Willingham Lumber Co. v. Turner, 155 S.E. 1, 171 Ga. 240.
Ill.—Buttitta v. Lawrence, 178 N.E. 390, 346 Ill. 164, reversing 260 Ill. App. 94—Tribune Co. v. Thompson, 174 N.E. 561, 342 Ill. 503—People v. Small, 150 N.E. 435, 319 Ill. 437—Cox v. Ætna Casualty & Surety Co. of Hartford, Conn., 248 Ill.App. 209.
Iowa.—Independent Order of Foresters v. Scott, 272 N.W. 68, 223 Iowa 105—Gregory v. Sorenson, 242 N.W. 91, 214 Iowa 374—Mowry v. Reinking, 213 N.W. 274, 203 Iowa 628.
Kan.—Hutson v. Imperial Royalties Co., 13 P.2d 298, 135 Kan. 718, affirming 5 P.2d 825, 134 Kan. 378, 85 A.L.R. 789, modified on other grounds and rehearing denied 14 P.2d 658, 136 Kan. 176—Minch v. Winters, 253 P. 578, 582, 122 Kan 533, citing **Corpus Juris**—Burkhart v. Garden City Sugar & Land Co., 237 P. 1024, 119 Kan. 54.

was not made in the presence of the party against whom it is sought to be used.[24] Accordingly, on the question of lawfulness of a combination, declarations of one of the parties in furtherance of its object are admissible against the others.[25]

Common purpose. A mere allegation of the existence of a conspiracy and common design is not sufficient to render an admission competent against parties other than declarant:[26] it must appear that at the time when the statement was made[27] there existed between the parties affected by the declaration some common undertaking or agreement, express or implied, to carry out the common purpose in a definite way by united efforts.[28] This may be

Mass.—Brannen v. Bouley, 172 N.E. 104, 272 Mass. 67—Whitcomb v. Reed-Prentice Co., 159 N.E. 922, 262 Mass. 348—Feinberg v. Poorvu, 143 N.E. 824, 249 Mass. 88—Attorney General v. Pelletier, 134 N.E. 407, 240 Mass. 264.

Mich.—Martinoff v. Jackson News Pub. Co., 197 N.W. 576, 226 Mich. 233—Kefuss v. Whitley, 189 N.W. 76, 220 Mich. 67.

Minn.—Matesic v. Maras, 225 N.W. 84, 177 Minn. 240.

Mo.—Reese v. Fife, 279 S.W. 415, 424, citing **Corpus Juris**—Gebhardt v. United Rys. Co. of St. Louis, 220 S.W. 677, 9 A.L.R. 1076—McCutchan v. Kansas City Life Ins. Co. of Kansas City, App., 122 S.W.2d 59—Browning v. Browning, 41 S.W.2d 860, 226 Mo.App. 322—Rice v. Gray, 34 S.W.2d 567, 225 Mo.App. 890—In re Kelley's Estate, 255 S.W. 1064, 213 Mo.App. 492—Locke v. Woodman, App., 225 S.W. 352.

N.Y.—Hornstein v. Podwitz, 234 N.Y.S. 429, 226 App.Div. 53, appeal dismissed 173 N.E. 674, 254 N.Y. 443, 84 A.L.R. 1, affirming 229 N.Y.S. 159, 224 App.Div. 11, and 241 N.Y.S. 123, 229 App.Div. 167—Blaustein v. Pan American Petroleum & Transport Co., 21 N.Y.S.2d 651, 174 Misc. 601, modified on other grounds 31 N.Y.S.2d 934, 263 App.Div. 97.

N.C.—Hamilton v. Southern Ry. Co., 158 S.E. 75, 200 N.C. 543, certiorari denied Southern Ry. Co. v. Hamilton, 52 S.Ct. 19, 284 U.S. 636, 76 L.Ed. 541.

Okl.—Hall v. Smith, 259 P. 537, 126 Okl. 206.

S.C.—Page v. Pilot Life Ins. Co., 5 S.E.2d 454, 192 S.C. 59, 125 A.L.R. 872.

Tex.—Johnson v. Lagow, Com.App., 14 S.W.2d 818, affirming, Civ.App., 6 S.W.2d 383—Vittitoe v. Junkin, Civ.App., 54 S.W.2d 166, error dismissed—Davis v. Morrison, Civ.App., 14 S.W.2d 296—Rowley v. Braly, Civ.App., 286 S.W. 241—Reisenberg v. Hankins, Civ.App., 258 S.W. 904.

W.Va.—Swartz v. Kay, 109 S.E. 822, 89 W.Va. 641.

Wis.—Boyce v. Independent Cleaners, 240 N.W. 132, 206 Wis. 521.

22 C.J. p 396 note 51.

Rule in criminal cases applicable

Rules governing admission and consideration of acts and declarations of co-conspirators in criminal cases apply also in civil actions.

Ga.—Farmers' & Traders' Bank v. Davis, 146 S.E. 793, 39 Ga.App. 74.

Ky.—Yorkshire Ins. Co., Limited of York, England, v. Bryan, 60 S.W.2d 120, 248 Ky. 847.

Application in particular cases

(1) Conversion

Neb.—Fullerton v. Fullerton, 136 N.W. 847, 91 Neb. 649

Tex.—Prairie Lea Production Co. v. Tiller, Civ.App., 286 S.W. 638.

(2) Official misconduct.

Mass.—Attorney General v. Pelletier, 134 N.E. 407, 240 Mass. 264.

Tex.—Perry v. State, 98 S.W. 411, 44 Tex.Civ.App. 55.

(3) In action for divorce on ground of adultery, testimony as to wife's admissions, corroborated by other evidence was held admissible against corespondent.—Marshall v. Marshall, 3 F.2d 344, 55 App.D.C. 173, 40 A.L.R. 624.

(4) It has been held, however, that admissions of the corespondent in such divorce suit are inadmissible against the party with whom the adultery was allegedly committed.

D.C.—O'Neil v. O'Neil, 299 F. 914, 55 App.D.C. 40.

N.J.—Horton v. Horton, 130 A. 24, 2 N.J.Misc. 683.

(5) In will contest, admissions of one of several legatees are not admissible to show undue influence, notwithstanding some of legatees engaged in conspiracy to dominate will.—In re Lake's Estate, 260 N.W. 779, 271 Mich. 675.

Statements too remote to bear on issue of express malice of defendants are inadmissible with respect to such issue.—Kile v. Anderson, 196 N.W. 762, 182 Wis. 467.

24. U.S.—Barry v. Legler, C.C.A.Mo., 39 F.2d 297.
Ala.—Hancock v. Hullett, 82 So. 522, 203 Ala. 272.
Ga.—Simmons Hardware Co. v. Timmons, 179 S.E. 726, 180 Ga. 531.
N.C.—McCoy v. Justice, 155 S.E. 452, 199 N.C. 602.
Tex.—Williams v. Williams, Civ.App., 108 S.W.2d 297—Wells v. Scales, Civ.App., 232 S.W. 303.
22 C.J. p 397 note 52.

25. U.S.—Hitchman Coal & Coke Co. v. Mitchell, W.Va., 38 S.Ct. 65, 245 U.S. 229, 62 L.Ed. 260, reversing 214 F. 685, 131 C.C.A. 425, affirming and modifying, D.C., 202 F. 512, and mandate stayed 38 S.Ct. 190.

26. Ga.—Foster v. Thrasher, 45 Ga. 517.
22 C.J. p 397 note 54.

27. U.S.—Royal Ins. Co. v. Eastham, C.C.A.Ala., 71 F.2d 385, certiorari denied 55 S.Ct. 110, 293 U.S. 557, 79 L.Ed. 658.
N.Y.—Blaustein v. Pan American Petroleum & Transport Co., 2 N.Y.S.2d 651, 174 Misc. 601.
22 C.J. p 397 note 55

Before agreement

(1) Declarations before the agreement was entered into are not admissible against persons other than declarant.

Iowa.—Mowry v. Reinking, 213 N.W. 274, 203 Iowa 628.

Tex.—Hoad v. Aritex Oil Co., Civ.App., 243 S.W. 490.

22 C.J. p 397 note 55 [b].

(2) However, when prima facie case of unlawful conspiracy was made, evidence of co-conspirators' acts in furtherance of conspiracy, although done before defendant became connected with conspiracy, was held admissible.—Rowland v. State, Tex.Civ.App., 55 S.W.2d 133, error dismissed.

Partial completion of the projected enterprise does not exclude an otherwise relevant statement.

U.S.—International Indemnity Co. v. Lehman, C.C.A.Wis., 28 F.2d 1, certiorari denied 49 S.Ct. 83, 278 U.S. 648, 73 L.Ed. 561—Calcutt v. Gerig, C.C.A.Tenn., 271 F. 220.

Tex.—Johnson v. Lagow, Com.App., 14 S.W.2d 818, affirming, Civ.App., 6 S.W.2d 383.

22 C.J. p 397 note 55 [c].

So long as the common purpose remains a competent declaration may be made at any time.

U.S.—National Ben Franklin Fire Ins. Co. v. Stuckey, C.C.A.Ga., 79 F.2d 631.

N.Y.—Fogerty v. Jordan, 25 N.Y. Super. 319.

Holding property under deed

Where fraudulent combination to alter deed is established, declaration of either conspirator is admissible against the other, so long as a conspirator holds property under altered deed, although relationship has ceased.—Williams v. Williams, Tex.Civ.App., 108 S.W.2d 297.

28. Ark.—Watson v. Davidson, 217 S.W. 777, 141 Ark. 591.

proved by either direct or circumstantial evidence.[29] Declarations of one of the persons alleged to be engaged in the common design are not admissible to prove its existence,[30] but may be received in corroboration if sufficient evidence is produced aliunde.[31] Prima facie proof of the common design is sufficient and necessary to admit the statement; but the evidence need not be conclusive.[32]

The order of proof rests in the discretion of the court, which may receive the statement subject to its being connected later in the trial by a showing as to the existence of the common design.[33] Whether sufficient prima facie evidence of the existence of a conspiracy has been produced is ordinarily a preliminary question for determination by the court,[34] but the fact of conspiracy is ultimately a question

Cal.—Taylor v. Bernheim, 209 P. 55, 58 Cal.App. 404.
Fla.—Kight v. American Eagle Fire Ins. Co. of New York, 170 So. 664, 125 Fla. 608.
Ga.—National Ben Franklin Fire Ins. Co. v. Purvis, 7 S.E.2d 296, 61 Ga.App. 674.
Idaho—In re Felton, 94 P.2d 166, 60 Idaho 540.
Ill.—Tribune Co. v. Thompson, 174 N.E 561, 342 Ill. 503—Worthy v. Birk, 224 Ill.App. 574—Marcus v. Ratsky, 198 Ill.App. 496.
Ind.—Kreager v. Kreager, 135 N.E. 660, 192 Ind. 242.
Minn.—Seitz v. Frey, 188 N.W. 266, 152 Minn. 170.
Mo.—McCutchan v. Kansas City Life Ins. Co. of Kansas City, App., 122 S.W.2d 59—Lewellen v. Haynie, App., 25 S.W.2d 499—Kansas City Breweries Co. v. Markowitz, 221 S.W. 398, 203 Mo.App. 390, transferred, see, Sup., 212 S.W. 849.
Pa.—Jarvis v. Bell, 146 A. 153, 296 Pa. 568—Gaunce v. Backhouse, 37 Pa. 350.
S.C.—Page v. Pilot Life Ins. Co., 5 S.E.2d 454, 192 S.C. 59, 125 A.L.R. 872—Howle v. Mountain Ice Co., 165 S.E. 724, 167 S.C. 41.
Tenn.—Allen v. Melton, 99 S.W.2d 219, 20 Tenn.App. 387.
Tex.—Reliance Ins. Co. v. Smith, Com.App., 66 S.W.2d 675, affirming, Civ.App., 44 S.W.2d 446—Williams v. Williams, Civ.App., 108 S.W.2d 297—North River Ins. Co. of New York v. Daniel, Civ.App., 101 S.W.2d 401—Davis v. Morrison, Civ.App., 14 S.W.2d 296—Johnson v. Lagow, Civ.App., 6 S.W.2d 383, affirmed, Com.App., 14 S.W.2d 818—Guaranty State Bank of Goose Creek v. Brill, Civ.App., 268 S.W. 260, reversed on other grounds Brill v. Guaranty State Bank of Goose Creek, Com.App., 280 S.W. 537—Daggett v. Farmers' Nat. Bank, Civ.App., 259 S.W. 198, affirmed Farmers' Nat. Bank of Stephenville v. Daggett, Com.App., 2 S.W.2d 834—Wells v. Scales, Civ.App., 222 S.W. 303.
Vt.—In re Waterman's Will, 150 A. 65, 102 Vt. 443.
22 C.J. p 397 note 56.

Evidence as to what one, not named as a conspirator, said and did is immaterial unless it was a part of, and said and done in furtherance of, the alleged conspiracy.—Mowry v. Reinking, 213 N.W. 274, 203 Iowa 628.

29. U.S.—National Ben Franklin Fire Ins. Co. v. Stuckey, C.C.A.Ga., 79 F.2d 631.
Iowa.—Mowry v. Reinking, 213 N.W. 274, 203 Iowa 628.
Mo.—McCutchan v. Kansas City Life Ins. Co. of Kansas City, App., 122 S.W.2d 59.
22 C.J. p 398 note 57.

30. Cal.—Taylor v. Bernheim, 209 P. 55, 58 Cal.App. 404.
Fla.—Kight v. American Eagle Fire Ins. Co. of New York, 170 So. 664, 125 Fla. 608.
Idaho.—In re Felton, 94 P.2d 166, 60 Idaho 540.
Kan.—Hutson v. Imperial Royalties Co., 13 P.2d 298, 135 Kan. 718, affirming 5 P.2d 825, 134 Kan. 378, 85 A.L.R. 789, modified on other grounds and rehearing denied 14 P.2d 658, 136 Kan. 176.
N.D.—Crites v. St. Paul Fire & Marine Ins. Co., 200 N.W. 1016, 51 N.D. 788.
Tenn.—Allen v. Melton, 99 S.W.2d 219, 20 Tenn.App. 387.
Tex.—Garcia v. Volpe, Civ.App., 17 S.W.2d 1087.
22 C.J. p 398 note 58.

Connection of third person

Declarations of one conspirator to another are incompetent to establish connection of third person with conspiracy.—Hutson v. Imperial Royalties Co., 13 P.2d 298, 135 Kan. 718, affirming 5 P.2d 825, 134 Kan. 378, 85 A.L.R. 789, modified on other grounds and rehearing denied 14 P.2d 658, 136 Kan. 176.

31. Conn.—Macchio v. Breunig, 3 A.2d 670, 125 Conn. 113.
Ill.—Buttitta v. Lawrence, 178 N.E. 390, 346 Ill. 164, reversing 260 Ill. App. 94.
22 C.J. p 398 note 59.

32. Fla.—Kight v. American Eagle Fire Ins. Co. of New York, 170 So. 664, 125 Fla. 608.
Mass.—Attorney General v. Pelletier, 134 N.E. 407, 240 Mass. 264.
Mo.—McCutchan v. Kansas City Life Ins. Co. of Kansas City, App., 122 S.W.2d 59.
Mont.—Loncar v. National Union Fire Ins. Co. of Pittsburgh, Pa., 274 P. 844, 84 Mont. 141.
Tex.—Williams v. Williams, Civ. App., 108 S.W.2d 297—Rowley v. Braly, Civ.App., 286 S.W. 241.
Wash.—State ex rel. Hamilton v. Standard Oil Co. of California, 68 P.2d 1031, 190 Wash. 496.
22 C.J. p 398 note 60.

Conspiracy sufficiently established

U.S.—National Ben Franklin Fire Ins. Co. v. Stuckey, C.C.A.Ga., 79 F.2d 631.
Ark.—McKee v. Hendricks, 264 S.W. 825, 952, 165 Ark. 369.
Cal.—Budd v. Morgan, 203 P. 754, 187 Cal. 741.
Ill.—Buttitta v. Lawrence, 178 N.E. 390, 346 Ill. 164, reversing 260 Ill. App. 94.
Mo.—Reese v. Fife, 279 S.W. 415—Day v. Lusk, 219 S.W. 597.
Tex.—Johnson v. Lagow, Civ.App., 6 S.W.2d 383, affirmed, Com.App., 14 S.W.2d 818—Rowley v. Braly, Civ. App., 286 S.W. 241.
22 C.J. p 398 note 60 [a].

Evidence insufficient to establish conspiracy

Tex.—North River Ins. Co. of New York v. Daniel, Civ.App., 101 S.W.2d 401—Daggett v. Farmers' Nat. Bank, Civ.App., 259 S.W. 198, affirmed Farmers' Nat. Bank of Stephenville v. Daggett, Com.App., 2 S.W.2d 834.
Vt.—Goss v. Burt, 78 A. 120, 84 Vt. 52.

33. Fla.—Kight v. American Eagle Fire Ins. Co. of New York, 170 So. 664, 125 Fla. 608.
Ill.—Buttitta v. Lawrence, 178 N.E. 390, 346 Ill. 164, reversing 260 Ill. App. 94.
Kan.—Webb v. Boulanger, 229 P. 754, 116 Kan. 711.
Minn.—Matesic v. Maras, 225 N.W. 84, 85, 177 Minn. 240, citing **Corpus Juris.**
Mo.—McCutchan v. Kansas City Life Ins. Co. of Kansas City, App., 122 S.W.2d 59.
22 C.J. p 398 note 61.

Only with caution should declarations depending on finding of conspiracy be received preliminarily or retained in case.—Walz v. Fidelity-Phoenix Fire Ins. Co. of New York, C.C.A.Mich., 10 F.2d 22, certiorari denied Fidelity-Phoenix Fire Ins. Co. of New York v. Walz, 46 S.Ct. 481, 271 U.S. 665, 70 L.Ed. 1140.

34. Conn.—Antonio Pepe Co. v. Apuzzo, 120 A. 681, 98 Conn. 807.
Mo.—McCutchan v. Kansas City Life

for the jury,[35] who are also to decide whether the declarations were made in furtherance of the common design.[36]

b. Nature and Object of Statement

The admission of one party to a conspiracy, to be admissible against the others, should relate to the common object and be made while the declarant is engaged in carrying it out. A statement may be relevant in and of itself as where it tends circumstantially to establish the existence of a relevant mental state.

In order that a declaration of one party to a conspiracy or common enterprise may be received against another, it is necessary that such declaration should relate to the common object and be made while declarant is engaged in carrying it out.[37] Statements concerning past transactions are not within the usual scope of the agency conferred by unity of purpose,[38] and hence a declaration by a conspirator, made after the common purpose has been accomplished or the common enterprise abandoned, is incompetent against his associates,[39] and this is true even though it was made by him as a witness in court.[40] It has been held, however, that any admission of a co-conspirator, even though subsequently made, may be admissible to characterize the actions of the parties.[41]

Independent relevancy. The statement of a fellow conspirator may be relevant in and of itself,[42] as where it tends circumstantially to establish the existence of a relevant mental state, such as intent,[43] motive,[44] purpose,[45] or adulterous disposition,[46] and may thus affect not only declarant, but so far as connected with the statement[47] all his associates in the common enterprise, although it was made prior to the conspiracy.[48]

§ 363. Domestic Relations

a. Husband and wife
b. Other relationships

a. Husband and Wife

Ordinarily the admissions of a husband or wife are not admissible against his or her spouse, but where actual agency is sufficiently proved the statements of one

Ins. Co. of Kansas City, App., 122 S.W.2d 59.
22 C.J. p 398 note 62.

35. U.S.—U. S. v. Aluminum Co. of America, D.C.N.Y., 1 F.R.D. 1.
Mo.—McCutchan v. Kansas City Life Ins. Co. of Kansas City, App., 122 S.W.2d 59.
Tex.—Davis v. Morrison, Civ.App., 14 S.W.2d 296.
22 C.J. p 398 note 63.

36. Wash.—State v. Dilley, 87 P. 133, 44 Wash. 207.

37. U.S.—National Ben Franklin Fire Ins. Co. v. Stuckey, C.C.A.Ga., 79 F.2d 631—Royal Ins. Co. v. Taylor, W.Va., 254 F. 805, 166 C.C.A. 251.
Ark.—Glens Falls Ins. Co. v. Jenkins, 277 S.W. 541, 169 Ark. 1015.
Cal.—Smeland v. Renwick, 196 P. 283, 50 Cal.App. 565.
Ill.—People v. Bither, 165 N.E. 798, 334 Ill. 264.
Iowa.—Mowry v. Reinking, 213 N.W. 274, 203 Iowa 628.
Neb.—Nebraska State Bank of Valparaiso v. Citizens' State Bank of Thedford, 240 N.W. 575, 122 Neb. 522.
N.D.—Grabow v. Bergeth, 229 N.W. 282, 59 N.D. 214.
R.I.—G. W. McNear, Inc., v. American & British Mfg. Co., 115 A. 709, 44 R.I. 190, certiorari denied American & British Mfg. Co. v. G. W. McNer, Inc., 42 S.Ct. 462, 258 U. S. 629, 66 L.Ed. 800—G. W. McNear, Inc., v. American & British Mfg. Co., 107 A. 242, 42 R.I. 302.
22 C.J. p 398 note 65.

Act or declaration

(1) "An admission of one conspirator, if made during the life of the conspiracy, is admissible against a joint conspirator, when it relevantly relates to and is 'in furtherance of the conspiracy.' Construing the expression 'in furtherance of the conspiracy' reference is not to the admission as such, but rather to the act concerning which the admission is made; that is to say, if the act or declaration, concerning which the admission or declaration is made, be in furtherance of the conspiracy, then it may be said that the admission is in furtherance of the conspiracy."—International Indemnity Co. v. Lehman, C.C.A.Wis., 28 F.2d 1, 4, certiorari denied 49 S.Ct. 83, 278 U.S. 648, 73 L.Ed. 561.

(2) It has been held, however, that the fact that one conspirator tells another something relevant to conspiracy does not alone make declaration competent, but declaration must itself be in furtherance of common object.—U. S. v. Aluminum Co. of America, D.C.N.Y., 1 F.R.D. 1.

Irrelevant admission is inadmissible

U.S.—Wheeler & Motter Mercantile Co. v. Jamerton, C.C.A.Okl., 8 F.2d 957, 44 A.L.R. 769.

38. Conn.—Smith v. Brockett, 38 A. 57, 69 Conn. 492.
22 C.J. p 399 note 74.

39. U.S.—Royal Ins. Co. v. Eastham, C.C.A.Ala., 71 F.2d 385, certiorari denied 55 S.Ct. 110, 293 U.S. 557, 79 L.Ed. 658.
Ala.—Fidelity-Phenix Fire Ins. Co. of New York v. Murphy, 166 So. 604, 231 Ala. 680, certiorari denied 57 S.Ct. 19, 299 U.S. 557, 81 L.Ed. 410.
Ky.—Grote v. Blakely, 264 S.W. 1055, 204 Ky. 410.
La.—Craddock v. Jones, App., 143 So. 529.
Mo.—Holt v. Williams, 240 S.W. 864, 210 Mo.App. 470.
Neb.—Nebraska State Bank of Valparaiso v. Citizens' State Bank of Thedford, 240 N.W. 575, 122 Neb. 522.
Tenn.—Allen v. Melton, 99 S.W.2d 219, 20 Tenn.App. 387.
Tex.—Hoad v. Aritex Oil Co., Civ. App., 243 S.W. 490.
22 C.J. p 399 note 75.

40. Conn.—Smith v. Brockett, 38 A. 57, 69 Conn. 492.

41. Mo.—Kirby v. Davis, App., 91 S.W.2d 215.

42. Miss.—Stovall v. Farmers & Merchants Bank of Memphis, 16 Miss. 305, 47 Am.D. 85.
N.J.—Patton v. Freeman, 1 N.J.Law 113.
Independently relevant statements generally see supra §§ 239–264.

43. N.J.—Stewart v. Johnson, 18 N.J.Law 87.
22 C.J. p 399 note 68.

44. Ark.—Gray v. Nations, 1 Ark. 557.

45. Pa.—McCaskey v. Graff, 23 Pa. 321, 62 Am.D. 336.

46. N.J.—Rice v. Rice, Ch., 23 A. 946.

47. Mass.—Pond v. Pond, 132 Mass. 219.
22 C.J. p 399 note 72.

48. Ark.—Wallace v. Bernheim, 37 S.W. 712, 63 Ark. 108.
N.J.—Stewart v. Johnson, 18 N.J. Law 87.

spouse may bind the other, provided they were made within the scope of the agency and in performance of the duties thereof and are not narrative of past transactions.

The general rule is that declarations or admissions of a husband are not admissible in evidence against his wife[49] in an action concerning, or which may affect, her separate estate,[50] unless she has assented thereto so as to bind herself under the rules stated supra § 294. Conversely, statements of a wife are not competent against her husband[51] even where he sues in her right,[52] or is sued for her acts or debts,[53] nor are the admissions of the wife competent against the estate of the husband after his death.[54]

However, the declarations of a wife, made before her marriage, respecting her right to property have been admitted in evidence against her husband,[55] and it has been held that declarations of a wife against her interest, in the absence of her husband, are admissible against the husband, who claims as tenant by the curtesy of his deceased wife,[56] and that in an action brought by the husband for the wrongful death of the wife, her admissions as to matters relevant to the issue may be shown.[57]

Actual agency of one spouse for the other, like any other agency, renders the declarations of the agent admissible against the principal,[58] provided they were made within the scope of the agency,[59]

49. U.S.—Hedrick v. Hockfield, D.C.N.C., 283 F. 574.
Ala.—Lowery v. Jones, 121 So. 704, 219 Ala. 201, 64 A.L.R. 553—Powell v. Smith, 96 So. 135, 209 Ala. 254.
Cal.—Lorenz v. Hunt, 264 P. 336, 89 Cal.App. 6.
Conn.—Haugh v. Kirsch, 135 A. 568, 105 Conn. 429.
Ga.—Dawson Nat. Bank v. Shields, 163 S.E. 197, 174 Ga. 388.
Idaho.—Hill v. Porter, 223 P. 538, 38 Idaho 574.
Ill.—Keller v. Joseph, 160 N.E. 117, 329 Ill. 148—Frewin v. Stark, 149 N.E. 588, 319 Ill. 35—Post v. Weaver, 134 N.E. 26, 302 Ill. 169—Luthy & Co. v. Paradis, 132 N.E. 556, 299 Ill. 380.
Ind.—Owen County State Bank v. Guard, 26 N.E.2d 395.
Iowa.—Price v. Scharpff, 261 N.W. 511, 220 Iowa 125—Farmers' Sav. Bank v. Ringgenberg, 253 N.W. 826, 218 Iowa 86.
Ky.—Bowling v. Webster, 273 S.W. 501, 209 Ky. 661—Leahman v. Broughton, 244 S.W. 403, 196 Ky. 146—Landy v. Moritz, 109 S.W. 897, 33 Ky.L. 223.
Mass.—Hannon v. Schwartz, 23 N.E.2d 1022, 304 Mass. 468.
Mo.—Phipps v. Markin, 208 S.W. 106, 203 Mo.App. 187.
Neb.—Dvorak v. Kucera, 264 N.W. 737, 130 Neb. 341.
N.Y.—Weingarten v. Hartford Fire Ins. Co., Hartford, Conn., 220 N.Y.S. 369, 219 App.Div 560.
Ohio.—Hiller v. Shaw, 187 N.E. 130, 45 Ohio App. 303—Cope-Shanks Motor Co. v. Herzig, 169 N.E. 581, 33 Ohio App. 345.
Tex.—Ibanez v. State, Civ.App., 118 S.W.2d 405.
22 C.J. p 400 note 82—30 C.J. p 1023 note 21.

Spouses jointly sued

(1) In suit by husband's judgment creditor to set aside alleged fraudulent conveyance of realty to wife wherein husband was merely a party pro forma, admission by husband that he owned realty, was inadmissible, in absence of evidence that, when husband made such statement, husband and wife had conspired to defeat creditor's claim.—Ibanez v. State, supra.

(2) Principle of convenience and expediency which justified joint trial of actions against husband and against wife did not permit use against wife of evidence against husband of his admissions of negligence.—Ernshaw v. Roberge, 170 A. 7, 86 N.H. 451.

(3) Instrument signed by husband alone, acknowledging tenancy with respect to community property claimed to have been held adversely, is admissible to go before jury in trespass to try title against husband and wife for what it is worth on issue of limitations—Davis v. Cisneros, Tex.Civ.App., 220 S.W. 298, dismissed for want of jurisdiction.

50. N.H.—Ernshaw v. Roberge, 170 A. 7, 86 N.H. 451.
Tex.—Berryman v. Norfleet, Civ. App., 41 S.W.2d 722, error dismissed.
Vt.—Cameron v. Blanchard, 176 A. 290, 107 Vt. 51.
22 C.J. p 400 note 83.

51. Ariz.—Bristol v. Moser, 99 P.2d 706, 55 Ariz. 185.
Ill.—John v. John, 153 N.E. 363, 322 Ill. 236.
Minn.—Zimmerman v. Mendelkow, 200 N.W. 297, 160 Minn. 330, reversed on other grounds Zimmerman v. Mandelkow, 201 N.W. 289, 160 Minn. 330.
N.J.—Ockford v. Steinmeyer, 127 A. 576, 3 N.J.Misc. 166.
22 C.J. p 400 note 85.

Community property

Under statute, wife may not authorize vesting of title of community property in third person by concessions or admissions unauthorized by husband, although judicially made as witness in suit to set aside for undue influence conveyance to them.—Allen v. Esgate, 230 P. 818, 131 Wash. 618.

52. Ala.—Jordan v. Hubbard, 26 Ala. 433.
22 C.J. p 401 note 86.

53. Tex.—Neblett & Norman v. Goukas, Civ.App., 40 S.W.2d 1113.
22 C.J. p 401 note 87.

54. Cal.—Hoyt v. Zumwalt, 86 P. 600, 149 Cal. 381.
Ill.—Downing v. Mayes, 38 N.E. 620, 153 Ill. 330, 46 Am.S.R. 896.
Puerto Rico.—Will v. Tornabelle, 3 Puerto Rico Fed. 125.

55. Ill.—Brush v. Blanchard, 19 Ill. 31.
Iowa.—Claussen v. La Franz, 1 Iowa 226.
S.C.—Willis v. Snelling, 40 S.C.L. 280.

56. Pa.—Frazier v. Foreman, 111 A. 923, 269 Pa. 13—Munson v. Crookston, 68 A. 962, 219 Pa. 419.

57. Tex.—Hardin v. St. Louis Southwestern R. Co., Civ.App., 88 S.W. 440.

58. Ariz.—Bristol v. Moser, 99 P.2d 706, 55 Ariz. 185.
Neb.—Roh v. Opocensky, 253 N.W. 680, 126 Neb. 518.
Tex.—Lassiter v. Bouche, Civ.App., 41 S.W.2d 88, error refused—Dendinger v. Martin, Civ.App., 221 S.W. 1095, dismissed for want of jurisdiction.
22 C.J. p 401 note 93.

Joint bank account

The interest of a husband and wife in a bank account in their joint names is joint, and not that of mere tenants in common, so that letters written by the wife were competent as admissions, both against her and against her husband.—Hayes v. Claessens, 137 N.E. 313, 234 N.Y. 230, modifying 196 N.Y.S. 312, 202 App.Div. 762.

59. Ark.—Franks v. Rogers, 245 S.W. 311, 156 Ark. 120.
Conn.—Lipkowitz v. Freedman, 113 A. 152, 96 Conn 84.
Iowa.—Nortman v. Lally, 215 N.W. 713, 204 Iowa 638—Way v. S. L. Collins Oil Co., 173 N.W. 20, 187 Iowa 1375.

and while declarant was discharging the duties[60] thereof. The agency must be proved[61] by evidence other than the declarations of the alleged agent;[62] but this proof may be either direct or circumstantial.[63] A showing of a joint interest in land is not, however, sufficient.[64]

Narrative statements[65] and statements made after the agency has ceased,[66] are excluded; and the same is usually true of statements as to transactions occurring before coverture, whenever made,[67] although it is held that where the husband claims property which came to him from his wife through the marriage her declarations as to her rights, made before coverture, may be received.[68]

The disqualification of husband and wife as witnesses against each other, where it exists, may operate to exclude admissions of one spouse against the other.[69]

As against the declarant, the admissibility of statements is not affected by the fact that they were made as agent for his or her spouse.[70]

b. Other Relationships

The mere relationship of parent and child does not render the admissions of one competent against the other unless actual agency is shown; and the same rule applies to the relationship of brother and sister.

Parent and child. The mere relationship of parent and child does not render admissions of the child competent against the parent[71] or admissions of the parent or grandparent competent against the child,[72] although there may, of course, be such an agency as will make the statement of one competent against the other.[73]

Brothers and sisters. In the absence of special authority duly established by preliminary proof a person is not affected by declarations of his or her brother or sister.[74]

§ 364. Master and Servant

A servant's declarations are incompetent against the master, except in so far as an agency as to the subject of the declaration is shown.

A servant's declarations regarding the rights[75] or liabilities[76] of his master are incompetent against

Okl.—Bank of McAlester v. Middlebrooks, 241 P. 765, 115 Okl. 92.
22 C.J. p 401 note 94.

Statements held not within scope of agency

Vt.—Cameron v. Blanchard, 176 A. 290, 107 Vt. 51.

60. Colo.—Zarlengo v. Zarlengo, 197 P. 1019, 70 Colo. 189.
Iowa.—Nortman v. Lally, 215 N.W. 713, 204 Iowa 638.
22 C.J. p 401 note 95.

61. Ariz.—Bristol v. Moser, 99 P.2d 706, 55 Ariz. 185.
22 C.J. p 401 note 96.

62. Ariz.—Bristol v. Moser, supra.
22 C.J. p 401 note 97.

63. Ala.—Rochelle v Harrison, 8 Port. 351.
Pa.—Hackman v. Flory, 16 Pa. 196.

64. Mich.—Johnson v. Douglas, 274 N.W. 780, 281 Mich. 247.
22 C.J. p 401 note 99.

Tenants by entirety

Spouse's admissions may not be used to bind other spouse's interest in property owned by them as tenants by entirety.—Johnson v Douglas, 274 N.W. 780, 281 Mich. 247—30 C.J. p 1024 note 25.

Interest in community property, against which judgment in action may be levied on account of acts of husband, does not make wife his agent so as to render her admissions admissible.—Bristol v. Moser, 99 P. 2d 706, 55 Ariz. 185.

65. N.Y.—Hall v. First Nat. Bank of Kenmore, 234 N.Y.S. 432, 226 App.Div. 190, affirmed 171 N.E. 779, 253 N.Y. 554.
Tex.—Earhart v. Agnew, Com.App., 222 S.W. 188, reversing, Civ.App., 190 S.W. 1140—O'Fiel v. Janes, Civ. App., 220 S.W. 371, error refused.
22 C.J. p 402 note 1.

66. Kan.—Taylor v. Deverell, 23 P. 628, 43 Kan. 469.
22 C.J. p 402 note 2.

67. Ind.—Brown v. Lasselle, 6 Blackf. 147, 38 Am.D. 135.

68. Ill.—Brush v. Blanchard, 19 Ill. 31.
Iowa.—Claussen v. La Franz, 1 Iowa 226.
S.C.—Willis v. Snelling, 40 S.C.L. 280.

69. U.S.—Duncan v. Landis, Pa., 106 F. 839, 45 C.C.A. 666.
22 C.J. p 402 note 6.

70. Iowa.—Leyner v. Leyner, 98 N. W. 628, 123 Iowa 185.

71. U.S.—Helvering v. Miller, C.C.A., 75 F.2d 474.
Conn.—Haugh v. Kirsch, 135 A. 568, 105 Conn. 429.
La.—Rush v. Town of Farmerville, 101 So. 243, 156 La. 857—Toca v. Rojas, 93 So. 108, 152 La. 317.
Mo.—Goldsberry v. Farmers Mut. Fire & Lightning Ins. Co. of Polk County, App., 86 S.W.2d 578.
N.Y.—Kuchlik v. Feuer, 267 N.Y.S. 256, 239 App.Div. 338, affirmed 191 N.E. 555, 264 N.Y. 542.
22 C.J. p 399 note 78—17 C.J. p 1308 note 16.

72. Cal.—Holden v. Patten-Blinn Lumber Co., 45 P.2d 1037, 7 Cal. App.2d 220.
Md.—Pindell v. Rubenstein, 115 A. 859, 139 Md. 567.
S.D.—Karlen v. Trebble, 189 N.W. 519, 45 S.D 570.
Tex.—Long v. Galveston Electric Co., Civ.App., 59 S.W.2d 228, error dismissed.
22 C.J. p 399 note 79.

73. Conn.—Ezzo v. Geremiah, 142 A. 461, 107 Conn. 670.
Idaho.—Aker v. Aker, 20 P.2d 796, 52 Idaho 713, appeal dismissed and certiorari denied 54 S.Ct. 80, 290 U.S. 587, 78 L.Ed. 518.
22 C.J. p 400 note 80.

Operation of car

Declarations of minor son to be admissible against father must be made within scope of son's authority in operation of family car, and contemporaneous with some action in connection therewith.—Trice v. Bridgewater, Civ.App., 51 S.W.2d 797, modified on other grounds 81 S.W.2d 63, 125 Tex. 75, 100 A.L.R. 1014.

74. Ga.—Faucett v. Rogers, 108 S.E. 798, 152 Ga. 168.
Mo.—Schutz v. Great American Ins. Co., 103 S.W.2d 904, 231 Mo.App. 640.
22 C.J. p 402 note 8.

75. U.S.—Pittston First Nat. Bank v. Hoggson, Pa., 242 F. 261, 155 C.C.A. 101.
N.H.—Guerin v. New England Tel., etc., Co., 46 A. 185, 70 N.H. 133.

76. N.Y.—Ochs v. Kroehle, 173 N.Y. S. 184, 185 App.Div. 374.
Va.—Mankin v. Aldridge, 105 S.E. 459, 127 Va. 761.
22 C.J. p 402 note 10—3 C.J. p 162 notes 5, 6—39 C.J. p 1357 note 99 [b].

the master, except in so far as an agency as to the subject of the declaration is shown.

§ 365. Partners

a. In general
b. Scope of declarations
c. Statements after dissolution of partnership

a. In General

If the existence of the partnership is sufficiently proved by evidence other than the statements of the declarant himself, the admissions of one partner or joint contractor are ordinarily competent against all the other partners or joint contractors.

As a result of the agency arising out of the relation of partnership,[77] the admissions of one partner or joint contractor as to matters of fact[78] are ordinarily competent against all the other partners or joint contractors,[79] provided they are made within the scope of the partnership business, as appears infra subdivision b of this section. The admissibility of statements otherwise competent is not affected by the fact that declarant has since died[80] or ceased to be a member of the firm,[81] or that the person to whom the declaration was made was not a member of the firm;[82] but statements made before declarant became a partner are not admissible.[83]

Proof of partnership. An admission is not competent against persons alleged to be partners of declarant until there has been affirmative evidence of the existence of the partnership[84] sufficient to satisfy the court that the jury would reasonably be justified in finding that the partnership relation actually existed.[85] It is, however, within the discretion of the court to receive a declaration as against declarant, subject to the condition that it may become competent as against his alleged partners if the partnership relation is established later in the trial.[86]

The statements of declarant himself are not proper evidence as to the existence of the partnership,[87] except as against himself,[88] and other partners present,[89] although it has been held that the partnership may be proved by the successive declarations of each of the several partners,[90] and the

77. Partnership law applicable
Admissibility of partner's statements as evidence against copartner or firm depends on law of partnership, not of evidence.—Caswell v. Maplewood Garage, 149 A. 746, 84 N. H. 241, 73 A.L.R. 433.

78. S.C.—King v. Wesner, 16 S.E.2d 289, 293, quoting **Corpus Juris.**
22 C.J. p 402 note 13.

79. Ala.—Hartline v. Allen, 92 So. 648, 207 Ala. 407.
Cal.—In re Gaines' Estate, 100 P.2d 1055, 15 Cal.2d 255, superseding 92 P.2d 646—Bank of Italy Nat. Trust & Savings Ass'n v. Johnson, 46 P. 2d 244, 7 Cal.App.2d 463—Schnier v. Percival, 256 P. 1109, 83 Cal. App. 470.
Conn.—Macchio v. Breunig, 3 A.2d 670, 125 Conn. 113.
Idaho.—Boise Payette Lumber Co. v. Sarret, 221 P. 130, 38 Idaho 278.
Ill.—Oneida State Bank v. Peterson, 226 Ill.App. 381—Reynolds v. Radke, 112 Ill.App. 575.
Iowa.—Seekell v. Fletcher, 5 N.W. 200, 53 Iowa 330.
Ky.—Jett v. South, 9 Ky.Op. 812—Bowling v. Martin, 6 Ky.Op. 67.
Mass.—Brannon v. Hursell, 112 Mass. 63.
Minn.—Robyn v. White, 189 N.W. 577, 153 Minn. 76.
Mo.—King v. Rieth, 108 S.W.2d 1, 4, citing **Corpus Juris**—Adair v. Kansas City Terminal R. Co., 220 S.W. 920, 282 Mo. 133.
N.J.—Martin v. De Young, 122 A. 813, 99 N.J.Law 284—Osbun v. De Young, 122 A. 809, 99 N.J.Law 204.
Or.—Wieder v. Lorenz, 99 P.2d 38—First Nat. Bank v. Labbe, 30 P.2d 355, 146 Or. 415.
Pa.—Little v. Fairchild, 10 Pa.Super. 211, aff. 46 A. 133, 195 Pa. 614—Little v. Clarke, 36 Pa. 114, 8 Pittsb. Leg.J. 97, 1 Luz.Leg.Obs. 1.
S.C.—King v. Wesner, 16 S.E.2d 289, 293, quoting **Corpus Juris.**
Tex.—Dee v. Taylor-Hanna-James Co., Civ.App., 227 S.W. 361, 362, citing **Corpus Juris**—Blum v. Bratton, 21 S.W. 65, 2 Tex.Civ.App. 226.
Utah.—Looney v. Bingham Dairy, 282 P. 1030, 1033, 75 Utah 53, 73 A.L.R. 427, citing **Corpus Juris.**
Wyo.—Ideal Bakery v. Schryver, 299 P. 284, 43 Wyo. 108.
22 C.J. p 402 note 14.

Joint adventurers
U.S.—Mann v. Commonwealth Bond Corporation, D.C.N.Y., 27 F.Supp. 315.

80. Ala.—Smitha v. Cureton, 31 Ala. 652.
22 C.J. p 403 note 15.

81. Conn.—Munson v. Wickwire, 21 Conn. 513.

82. Tex.—Willis Point Bank v. Bates, 10 S.W. 348, 72 Tex. 137.

83. Mass.—Nickerson v. Russell, 53 N.E. 141, 172 Mass. 584.

84. Or.—Wieder v. Lorenz, 99 P.2d 38.
Tenn.—Badger v. Boyd, 65 S.W.2d 601, 16 Tenn.App. 629.
Tex.—Cox v. Bond, Civ.App., 91 S.W. 2d 479, error dismissed.
Va.—Chapman v. Wilson, 40 Va. 284.
22 C.J. p 403 note 18.

85. Mass.—Glassman v. Barron, 178 N.E. 628, 277 Mass. 376.
Or.—Wieder v. Lorenz, 99 P.2d 38.
22 C.J. p 403 note 19.

Prima facie showing is necessary.—Swanson v. Siem, 12 P.2d 1053, 124 Cal.App. 519.

86. Cal.—Swanson v. Siem, supra.
Tex.—Dee v. Taylor-Hanna-James Co., Civ.App., 227 S.W. 361, 362, citing **Corpus Juris.**
22 C.J. p 403 note 20.

87. Ill.—Consumers' Petroleum Co. v. Sugar, 250 Ill.App. 377.
Miss.—Thompson v. A. J. Lyon & Co., 119 So. 912, 152 Miss. 318—Lea v. Guice, 21 Miss. 656.
N.Y.—Nixon v. Jenkins, 1 Hilt. 318.
Tenn.—Badger v. Boyd, 65 S.W.2d 601, 16 Tenn.App. 629.
Tex.—Cox v. Bond, Civ.App., 91 S.W. 2d 479, error refused.
22 C.J. p 403 note 21.

To establish membership
(1) As to who constitute the partnership, the declarations of a conceded partner are inadmissible.—Rector v. Robins, 86 S.W. 667, 74 Ark. 437.

(2) Conduct of conceded partners was held not an admission that another was a partner notwithstanding his denial of such relation.—Rowland v. Canuso, Pa., 196 A. 823.

88. Mo.—King v. Rieth, 108 S.W. 2d 1, 341 Mo. 467.
Tex.—Cox v. Bond, Civ.App., 91 S. W.2d 479, error refused.
22 C.J. p 403 note 22.

89. Mo.—King v. Rieth, 108 S.W. 2d 1, 341 Mo. 467.

90. N.H.—Caswell v. Maplewood

statement of an alleged partner may be used to corroborate other independent proof of the partnership relation.[91]

b. Scope of Declarations

To be admissible against the partnership, the statement must be within the scope of the partnership business, and in the absence of apparent authority a partner's statement cannot be used to show that an act or transaction is a firm matter if it is not one; nor are narrative statements as to past transactions admissible.

In order to be admissible against partners of declarant, the statement must be within the scope of the partnership business.[92] A partner's statements are ordinarily not admissible for the purpose of showing that a certain act or transaction was one within the scope of the partnership,[93] so that, when the form of the transaction is such as clearly to indicate that it is not a firm matter, the partner cannot make it such by his declarations to that effect;[94] but a partner's statement that he was acting on firm business may be admissible if made under apparent authority,[95] and in any case his statements are admissible to establish his own liability.[96] A partner is bound by statements in accounts and other communications sent out by a copartner, so far as the matters are within the scope of the partner's business,[97] but not by declarations in declarant's own favor[98] or as to his individual business.[99]

Narrative statements as to past transactions are not usually regarded as competent against partners of declarant,[1] although an admission as to the way in which an accident was caused has been received.[2]

c. Statements after Dissolution of Partnership

Although there is some contrary authority, it is generally held that admissions made by a partner after dissolution of the partnership are not competent against the other partners in the absence of prior authority or subsequent ratification.

It has been held in a number of cases that statements of a partner made after dissolution of the firm in regard to business previously transacted are admissible against all the partners,[3] although incompetent to create a new or additional liability,[4] or, alone, to prove indebtedness of the firm.[5] It is more widely held, however, that admissions made by a partner after the dissolution of the partnership are not competent against the other partners for any purpose,[6] in the absence of prior authority or subsequent ratification,[7] even though such admissions

Garage, 149 A. 746, 84 N.H. 241, 73 A.L.R. 433.
22 C.J. p 403 note 23.

91. Ark.—Berry v. Lathrop, 24 Ark. 12.
Conn.—Macchio v. Breunig, 3 A.2d 670, 125 Conn. 113.

92. Mass.—M. E. Hall Co. v. Gale, 142 N.E. 813, 248 Mass. 299.
Miss.—Thompson v. A. J. Lyon & Co., 119 So. 912, 152 Miss. 318.
Mo.—Mansfield v. Howell, 279 S.W. 1058, 218 Mo.App. 557.
N.H.—Caswell v. Maplewood Garage, 149 A. 746, 84 N.H. 241, 73 A.L.R. 433.
N.Y.—Union Nat. Bank v. Underhill, 7 N.E. 293, 102 N.Y. 336, 2 N.Y. St. 48, affirming 19 N.Y.Wkly.Dig. 404, 33 Hun 660.
Pa.—Treon v. Shipman, 119 A. 74, 275 Pa. 246, citing **Corpus Juris.**
Utah.—Looney v. Bingham Dairy, 282 P. 1030, 1033, 75 Utah 53, 73 A.L.R. 427, citing **Corpus Juris.**
22 C.J. p 403 note 25.

To prove knowledge
Declaration not within scope of partnership business cannot be admitted in action against partnership even to show knowledge of declarant as to certain matters.—Looney v. Bingham Dairy, supra.

93. Ala.—Wise v. Schneider, 88 So. 662, 205 Ala. 537.
Mass.—Taft v. Church, 39 N.E. 283, 162 Mass. 527.
Mich.—Heffron v. Hanford, 40 Mich. 305.
Mo.—Mansfield v. Howell, 279 S.W. 1058, 218 Mo.App. 557.
Neb.—Columbia Nat. Bank v. Rice, 67 N.W. 165, 48 Neb. 428.
N.H.—Caswell v. Maplewood Garage, 149 A. 746, 84 N.H. 241, 73 A.L.R. 433.
N.Y.—Kittel v. Callahan, 19 N.Y.S. 397, 46 N.Y.St. 404.
42 C.J. p 1222 notes 15, 16.

94. N.Y.—Union Nat. Bank v. Underhill, 7 N.E. 293, 102 N.Y. 336, 2 N.Y.St. 48, affirming 19 N.Y. Wkly.Dig. 404, 33 Hun 660.
Pa.—Treon v. Shipman, 119 A. 74, 275 Pa. 246, citing **Corpus Juris.**
22 C.J. p 403 note 26.

95. Pa.—Treon v. Shipman, 119 A. 74, 275 Pa. 246.

96. Ark.—Herman Kahn & Co. v. A. T. Bowden & Co., 96 S.W. 126, 80 Ark. 23, 10 Ann.Cas. 132.
Utah.—Looney v. Bingham Dairy, 260 P. 855, 70 Utah 398.

97. Iowa.—S. Schulein Co. v. Meyer Lipschutz & Sons & Mushkin, 227 N.W. 141, 208 Iowa 1315.
22 C.J. p 403 note 27.

98. Ind.—Bond v. Nave, 62 Ind. 505.
22 C.J. p 404 note 28.

99. Mich.—Welch v. Palmer, 48 N.W. 552, 85 Mich. 310.
22 C.J. p 404 note 29.

1. Mo.—King v. Rieth, 108 S.W.2d 1, 341 Mo. 467.
22 C.J. p 404 note 30.

2. Wis.—Muench v. Heinemann, 96 N.W. 800, 119 Wis. 441.

3. Mich.—Bell v. Porter, 246 N.W. 93, 261 Mich. 97.
S.C.—Fripp v. Williams, Birnie & Co., 14 S.C. 502.
22 C.J. p 404 notes 32, 33.
However, a statement relating to an undertaking wholly outside the business of the firm is not admissible against a former partner.—M. E. Hall Co. v. Gale, 142 N.E. 813, 248 Mass. 299.
Operation of statute of limitations when it has not as yet barred a partnership debt may be arrested by declarations of a partner after dissolution.—Shelton v. Cocke, Crawford & Co., Va., 3 Munf. 191—22 C.J. p 404 note 33 [a].

4. S.C.—Fripp v. Williams, 14 S.C. 502.
Va.—Davis v. Poland, 23 S.E. 292, 92 Va. 225.

5. S.C.—Meggett v. Finney & Jones, 35 S.C.L. 220.
Va.—Davis v. Poland, 23 S.E. 292, 92 Va. 225—Shelton v. Cocke, Crawford & Co., 3 Munf. 191.

6. U.S.—In re Malschick, D.C.Pa., 217 F. 492.
Cal.—Garbutt v. Chappe, 21 P.2d 594, 131 Cal.App. 284.
N.Y.—Griggs v. Smith, 13 N.Y.S. 273, 35 N.Y.St. 577.
Tex.—Hutson v. Clark, Civ.App., 3 S.W.2d 484—Cohen v. Adams, 35 S.W. 303, 13 Tex.Civ.App. 118.
22 C.J. p 404 note 36.

7. Minn.—Shakopee First Nat. Bank

relate to matters pending at the time of dissolution.[8]

Winding up business. Where one partner acts as the agent of the others in winding up the business after the dissolution of the partnership, his admissions, within the scope of such agency, are competent against the other partners, his principals;[9] but declarations not connected with the winding up of the business are not competent against former partners of declarant.[10]

§ 366. Principal and Surety or Guarantor

An admission by a principal, whether made orally, in writing, or by acquiescence, is binding on his surety if made within the period of the suretyship contract, in connection with the obligation or duties to which it relates, and during the pendency of such obligation or duties, and similarly the surety's admissions may bind the principal; but generally admissions by the principal debtor after a guaranty are not competent against the guarantor.

In cases of suretyship, an admission of the principal, when made in good faith,[11] in connection with the obligation or duties to which the suretyship relates,[12] and during the pendency thereof,[13] is competent against the surety,[14] although not to the ex-

v. Strait, 67 N.W. 987, 65 Minn. 162.

Admission of liability

Partners' dissolution agreement made after execution of partnership contract sued on, reciting contracts made by specified partner would be carried out by other partner, was admissible as such other partner's admission of liability on contract, regardless of whether he knew of existence of contract.—Maynard v. Rawlins, 163 S.E. 269, 45 Ga.App. 91.

8. La.—White v. Kearney, 9 Rob. 495.

9. Ky.—Stockton v. Johnson, 6 B Mon. 408.
22 C.J. p 404 note 39.

10. Md.—Owings v. Low, 5 Gill & J. 134.
22 C.J. p 405 note 40.

11. Wash.—Armstrong v. Goldberg, 67 P.2d 328, 329, 190 Wash. 210, citing **Corpus Juris.**
22 C.J. p 405 note 41.

12. U.S.—U. S. v. American Surety Co. of New York, C.C.A.N.Y., 56 F.2d 734.
Ala.—Indemnity Ins. Co. of North America v. Holiway, 170 So. 329.
Ark.—Indemnity Ins. Co. of North America v. Krone, 9 S.W.2d 33, 177 Ark. 953, 60 A.L.R. 1493.
Wash.—Armstrong v. Goldberg, 67 P.2d 328, 329, 190 Wash. 210, citing **Corpus Juris.**
22 C.J. p 405 note 42.

Statements as to other obligations are inadmissible.—Pendleton v. U. S., C.C.Va., 19 Fed.Cas.No.10,924, 2 Brock. 75.

Separate capacity

The returns made by a person as administrator are not admissible against the sureties of that person as guardian of the same estate.—Johnson v. McCullough, 59 Ga. 212.

13. Ala.—U. S. Fidelity & Guaranty Co. v. Benson Hardware Co., 132 So. 622, 628, 222 Ala. 429.

Past liability

"If the principal is at the time performing the functions for which the surety is bound, an admission relating to the status of such business extending to the amount of liability then outstanding comes within the rule of admissibility. But, after the termination of the business for which the surety was bound, and no duty existed which the contractor is required to perform in connection with which the admission is made, it is not admissible against the surety."—U. S. Fidelity & Guaranty Co. v. Benson Hardware Co., supra.

Admissions in suit

(1) Declarations and acts of principal in action against himself on the principal obligation after termination of the transactions in question have been held incompetent against the surety.
N.Y.—Rae v. Beach, 76 N.Y. 164, 19 Alb.L.J. 178—Aeschlimann v. Presbyterian Hospital, 53 N.Y.S. 998, 29 App.Div. 630, affirmed 59 N.E. 148, 165 N.Y. 296, 80 Am.S.R. 723, 725.
Pa.—Thommen v. Wolfe, 13 Pa.Dist. & Co. 491.

(2) So in an action against the sureties of a public officer, for breach of duty, judgments obtained against the latter are not evidence against the former.—McDowell v. Burwell's Adm'rs, Va., 4 Rand. 317.

14. U.S.—Fidelity & Deposit Co. of Maryland v. People's Bank of Sanford, C.C.A.N.C., 72 F.2d 932, affirming, D.C., People's Bank of Sanford, N. C., v. Fidelity & Deposit Co. of Maryland, 4 F.Supp. 379, and certiorari denied 55 S.Ct. 348, 293 U.S. 627, 79 L.Ed. 714—U. S. v. American Surety Co. of New York, C.C.A.N.Y., 56 F.2d 734—Fidelity & Deposit Co. of Maryland v. U. S., C.C.A.Md., 55 F.2d 100—U. S. Fidelity & Guaranty Co. v. Bank of Thorsby, C.C.A. Ala., 46 F.2d 950, 952, citing **Corpus Juris.**
Ala.—Indemnity Ins. Co. of North America v. Holiway, 170 So. 329—U. S. Fidelity & Guaranty Co. v. Benson Hardware Co., 132 So. 622, 629, 222 Ala. 429, citing **Corpus Juris.**
Ark.—Indemnity Ins. Co. of North America v. Krone, 9 S.W.2d 33, 177 Ark. 953, 60 A.L.R. 1493—Fidelity & Deposit Co. of Maryland v. Cunningham, 7 S.W.2d 332, 177 Ark. 638.
Cal.—Piggly Wiggly Yuma Co. v. New York Indemnity Co., 3 P.2d 15, 116 Cal.App. 541.
Conn.—Davis v. Kingsley, 13 Conn. 285.
Ill.—W. T. Rawleigh Co. v. Ulm, 268 Ill.App. 248.
Kan.—Ft. Scott Building & Loan Ass'n v. McAfee, 10 P.2d 651, 135 Kan. 355, quoting **Corpus Juris.**
Mich.—Kent County v. Krakowski, 175 N.W. 427, 207 Mich. 631.
Minn.—Stein v. Kelly, 216 N.W. 792, 173 Minn. 613—Ceylon Farmers' Elevator Co. v. Fidelity & Deposit Co. of Maryland, 203 N.W. 985, 163 Minn. 280—Farmers' Co-op. Exch. Co. v. U. S. Fidelity & Guaranty Co., 184 N.W. 792, 150 Minn. 126.
Miss.—McCoy v. Key, 123 So. 873, 155 Miss. 64.
Mo.—City of St. Louis ex rel. Sears v. Southern Surety Co., 62 S.W.2d 432, 333 Mo. 180—Union Trust Co. v. Wyatt, 58 S.W.2d 708—Bank of Oak Ridge v. Duncan, 40 S.W.2d 656, 32 Mo. 182.
Ohio.—Sturgell v. Grand Union Tea Co., 32 Ohio Cir.Ct.,N.S., 188.
Tex.—Clark v. West, Civ.App., 126 S.W.2d 569, reversed on other grounds Aetna Casualty & Surety Co. v. Clark, Com.App., 150 S.W. 2d 78—American Surety Co. of New York v. West State Bank, Civ.App., 4 S.W.2d 312, error refused—Lasater v. Purcell Mill & Elevator Co., 54 S.W. 425, 22 Tex. Civ.App. 33.
Wash.—Armstrong v. Goldberg, 67 P.2d 328, 329, 190 Wash. 210, citing **Corpus Juris.**
22 C.J. p 405 note 43—9 C.J. p 123 note 82.

Statements held admissible

(1) School treasurer's admissions of depositary bank's unsafe condition, known to him at time of mak-

tent of varying his liability[15] or of determining the rights of several sureties as between themselves.[16] It has been held, however, that the principal's admission of his indebtedness under a contract is ordinarily not binding on the surety thereon unless the latter agreed to be bound thereby.[17] It has also been held that unless the principal's admission is part of the res gestæ, it will not be admitted against the sureties being sued alone, although it will be admitted when the suit is against the principal and sureties on a joint obligation.[18]

Where the obligation of the surety is for the proper performance by the principal of the duties of an office or position, the declaration is competent only if made while the principal occupied such office or position;[19] but it is immaterial that he had been relieved, because of misconduct, from the performance of duties other than that to which the declarations relate.[20] Admissions made prior to the execution of the obligation,[21] or narrative statements made after breach of the obligation,[22] or after expiration of the time for which the surety is held,[23] cannot be received against the surety. The liability of the surety cannot be established by the principal's statement of what the surety has said.[24]

Representative of principal. Admissions of the personal representative of the principal or his recognition of the obligation are not competent evidence against the surety.[25]

An admission by a surety, when made in good faith and in connection with the obligation as to which he is surety, is competent not only against declarant but also against the principal.[26]

Form of statement. Competent admissions may be made by word of mouth,[27] contained in books or other writings,[28] or evidenced by silence or acquiescence.[29]

Principal and guarantor. The general rule is that admissions made by the principal debtor after a guaranty are not competent against the guarantor,[30] but a contrary view has been indicated where

ing deposits.—Lane Independent Consol. School Dist. No. 1 of Jerauld County v. Endahl, 224 N.W. 951, 55 S.D. 73.

(2) Statement of treasurer to president of association as to what he had done with moneys given him for purchase of securities and with securities purchased.—Ft. Scott Building & Loan Ass'n v. McAfee, 10 P.2d 851, 135 Kan 355.

(3) In suit on bond of testamentary trustee who was also executor, report made by principal of his trusteeship showing that he had received no property as trustee was competent as showing in what capacity he was handling fund received by him.—State ex rel. Richards v. Fidelity & Casualty Co. of New York, Mo.App., 82 S.W.2d 123.

Administrator

It was apparently held, however, that statements made by an administrator out of the presence of the surety on his bond were inadmissible as against the surety.—Sharp v. State, 109 A. 454, 135 Md. 551.

15. Wash.—Armstrong v. Goldberg, 67 P.2d 328, 329, 190 Wash. 210, citing **Corpus Juris.**
22 C.J. p 405 note 44.

16. U.S.—Very v. Watkins, Ark., 23 How. 469, 16 L.Ed. 522.
Wash.—Armstrong v. Goldberg, 67 P.2d 328, 329, 190 Wash. 210, citing **Corpus Juris.**

17. Wash.—W. T. Rawleigh Co. v. Graham, 103 P.2d 1076, 4 Wash.2d 407, 129 A.L.R. 596.

18. Tex.—Brite v. Atascosa County, Civ.App., 247 S.W. 878.

19. Ala.—Graves v. Ætna Ins. Co. of Hartford, Conn., 110 So. 390, 215 Ala. 250.
Ark.—Indemnity Ins. Co. of North America v. Krone, 9 S.W.2d 33, 177 Ark. 953, 60 A.L.R. 1493.
Ga.—Atlanta Journal Co. v. Knowles, 102 S.E. 191, 24 Ga.App. 745.
22 C.J. p 405 note 49.

20. Mo.—Father Matthew Young Men's Total Abstinence & Ben. Soc. v. Fitzwilliam, 12 Mo.App. 445, affirmed 84 Mo. 406.

21. Ga.—Johnson v. McCullough, 59 Ga. 212.
22 C.J. p 406 note 51.

22. Ala.—U. S. Fidelity & Guaranty Co. v. Benson Hardware Co., 132 So. 622, 629, 222 Ala. 429, citing **Corpus Juris**—Graves v. Ætna Ins. Co. of Hartford, Conn., 110 So. 390, 215 Ala. 250—W. T. Rawleigh Co. v. Jordan, 116 So. 302, 22 Ala.App. 395.
Tex.—American Surety Co. of New York v. State, Civ.App., 277 S.W. 790.
22 C.J. p 406 note 52—46 C.J. p 1083 note 15.

23. Ark.—Indemnity Ins. Co. of North America v. Krone, 9 S.W.2d 33, 177 Ark. 953, 60 A.L.R. 1493.
22 C.J. p 406 note 53.

24. Iowa.—Root Music Co. v. Caldwell, 6 N.W. 695, 54 Iowa 432.

25. Ala.—Harrison v. Heflin, 54 Ala. 552.

26. Ind.—Chapel v. Washburn, 11 Ind. 393.

27. Ark.—Fidelity & Deposit Co. of Maryland v. Cunningham, 7 S.W. 2d 332, 177 Ark. 638.
Mich.—Kent County v. Krakowski, 175 N.W. 427, 207 Mich. 631.
22 C.J. p 405 note 46.

28. U.S.—Supreme Council C. K. A. v. Fidelity & Casualty Co. of New York, Tenn., 63 F. 48, 11 C.C.A. 96—Simonton v. Boucher, Pa., 22 F. Cas.No.12,877, 2 Wash.C.C. 473.
N.Y.—Metropolitan L. Ins. Co. v. Callen, 4 N.Y.S. 833, 23 N.Y.St. 629.
Ohio.—Sturgell v. Grand Union Tea Co., 13 Ohio App. 240.
S.C.—Treasurers of State v. Bates, 2 Bailey 362.
W.Va.—Star Grocery Co. v. Bradford, 74 S.E. 509, 70 W.Va. 496, 39 L.R.A.,N.S., 184.
22 C.J. p 405 note 47.

Statements in account books kept by or under the direction of the principal are admissible against a surety.—American Surety Co. of New York v. West State Bank, Tex. Civ.App., 4 S.W.2d 312, error refused—22 C.J. p 405 note 47 [a].

Accounts filed by the principal in court are competent against the surety.—In re Sacks' Estate, 274 N.Y.S. 707, 153 Misc. 262—22 C.J. p 405 note 47 [b].

Official reports of the principal as a public officer are competent against the surety.—U. S. v. Boyd, Miss., 5 How. 29, 12 L.Ed. 36—Rodes v. Commonwealth, 45 Ky. 359, 6 B.Mon. 359—22 C.J. p 405 note 47 [c].

29. Iowa.—Bartlett v. Illinois Surety Co., 119 N.W. 720, 142 Iowa 538.

30. Pa.—Citizens' Nat. Bank of Lehighton v. Kupres, 161 A. 466, 106 Pa.Super. 164.
22 C.J. p 406 note 57.

the agreement was to guarantee performance of a contract to be made by the principal in the future, which contract was made by parol.[31]

§ 367. Fiduciaries

a. In general
b. Executors, administrators, and guardians

a. In General

While evidence as to admissions of a trustee have been broadly held admissible or inadmissible as against the cestui que trust, the test appears to be the scope of the powers conferred by the nature of the trust or the instrument establishing it; admissions by the settlor of the trust may bind the estate as against the beneficiaries.

A cestui que trust cannot be affected by the admissions of one who, although assuming to be trustee, was not appointed to the trust,[32] or has not fully qualified for the discharge of its duties.[33] It has been frequently held that even a trustee who has been duly appointed and qualified cannot affect the cestui que trust by his admissions,[34] unless they were made by the authority of the cestui que trust;[35] but there is also authority for the view that admissions of a trustee may affect a cestui que trust.[36] The true distinction is suggested by cases holding that the competency of any particular statement is determined by the powers conferred by the nature of the trust or the instrument under which the trustee is acting,[37] and by a consideration of the nature of the statement, see infra subdivision b of this section. Narrative statements,[38] and statements not made in the discharge of the duties of the trust[39] are in any case rejected.

Admissions by the settlor of a trust may constitute evidence of liability of the estate to beneficiaries of the trust;[40] but where the trust is irrevocable and has passed beyond the control of the settlor, his acts and declarations in derogation of the title of the cestui que trust are inadmissible.[41]

b. Executors, Administrators, and Guardians

While it has been held that an executor or administrator cannot bind the estate or its beneficiaries by his admissions, at least as to matters of which he has no first-hand knowledge, other decisions hold that his admissions are competent if relating to matters within his authority concerning the estate. Generally a guardian cannot bind his ward by his admissions.

Although it has been generally held that an executor or administrator cannot by his admissions injuriously affect the estate intrusted to his care or the persons who are beneficially interested therein,[42] it has also been asserted in a number of cases that admissions by such a person are competent against the estate if pertinent to performance of acts relating to the estate.[43] The distinction has been suggested that the agency of an executor or

31. Pa.—Meade v. McDowell, 5 Binn. 195.
Tex.—Opet v. Denzer, Civ.App., 93 S.W. 527, 528.
22 C.J. p 406 note 58.

32. N.H.—Moore v. Butler, 48 N. H. 161.
Tex.—Phillips v. Herndon, 14 S.W. 857, 78 Tex. 378, 22 Am.S.R. 59.

33. N.Y.—Le Long v. Siebrecht, 187 N.Y.S. 150, 196 App.Div. 74.
N.C.—Cook v. Edwards, 153 S.E. 323, 198 N.C. 738.
22 C.J. p 406 note 60.

34. Ill.—Darlington v. Perry, 187 N.E. 796, 354 Ill. 22.
Tex.—Williams v. Fuerstenberg, Civ. App., 12 S.W.2d 812, reversed on other grounds, Com.App., 23 S.W. 2d 305.
22 C.J. p 406 note 61.

35. Vt.—Sargeant v. Sargeant, 18 Vt. 371.
22 C.J. p 407 note 62.

36. Mass.—Washington & Devonshire Realty Co. v. Lewis Diamond Co., 161 N.E. 883, 263 Mass. 554.
22 C.J. p 407 note 63.

Admissions held competent

(1) Admissions by trustee under a trust deed with respect to a sale conducted thereunder are admissible against the mortgagee whom he represents.—Borth v. Proctor, Mo., 219 S.W. 72.

(2) Oral declarations of alleged trustee may be relied on to prove payment of purchase price of land by or on account of cestui que trust.—Gates v. Keichline, 128 A. 490, 282 Pa. 584.

37. U.S.—St. Louis Fourth Nat. Bank v. Albaugh, Kan., 107 F. 819, 46 C.C.A. 655, affirmed 23 S.Ct. 450, 188 U.S. 734, 47 L.Ed. 673.
Neb.—Reed v. Beardsley, 6 Neb. 493.
N.Y.—Church v. Howard, 79 N.Y. 415.
Ohio.—Hueston v. Hueston, 2 Ohio St. 488.

38. N.C.—Calvert v. Alvey, 68 S.E. 153, 152 N.C. 610, 136 Am.S.R. 847.

39. Ky.—Clark v. Wells-Elkhorn Coal Co., 284 S.W. 91, 215 Ky. 128.
22 C.J. p 407 note 67.

40. N.Y.—In re Anyon's Estate, 244 N.Y.S. 244, 137 Misc. 582.

41. U.S.—Bingen v. First Trust Co. of St. Paul, D.C.Minn., 23 F.Supp. 958, reversed on other grounds, C. C.A., 103 F.2d 260.

42. Pa.—Bilaitis v. Nevereski, 42 Lack.Jur. 133.
S.D.—In re Barnes' Estate, 220 N. W. 527, 53 S.D. 200.
Tenn.—Life & Casualty Ins. Co. v. Robertson, 6 Tenn.App. 43.
Tex.—Williams v. Fuerstenberg, Civ. App., 12 S.W.2d 812, reversed on other grounds, Com.App., 23 S.W. 2d 305.
22 C.J. p 407 note 68.

Testamentary capacity

Statement of executor concerning testamentary capacity of testatrix is inadmissible as against those claiming under will.—In re McKay's Will, 111 S.E. 5, 183 N.C. 226.

43. Mich.—Henderson v. Connolly's Estate, 292 N.W. 543, 294 Mich. 1.
N.Y.—Strang v. Prudential Ins. Co. of America, 188 N.E. 161, 263 N. Y. 71, reversing 263 N.Y.S. 972, 239 App.Div. 798, and followed in Kane v. Metropolitan Life Ins. Co., 267 N.Y.S. 1008, 240 App.Div. 910, which affirmed 292 N.Y.S. 395, 161 Misc. 303, reversing 256 N.Y.S. 917, 143 Misc. 631—In re Brady's Estate, 239 N.Y.S. 5, 228 App.Div. 56, reversing 234 N.Y.S. 366, 133 Misc. 795, and affirmed 173 N.E. 879, 254 N.Y. 590.
S.C.—Gibert v. Glenn, 156 S.E. 325, 159 S.C. 135.
22 C.J. p 407 note 69.

Sole person interested

Where executor or administrator was only person materially inter-

administrator, merely as such, does not extend to the making of admissions with respect to matters of which he has no first hand knowledge, as for instance the existence of an indebtedness by the decedent in his lifetime;[44] but where an action involves a transaction in which the representative, as such, and within the line of his duties, took part, his admissions in connection with such transaction are competent, as for instance where such a representative is sued on a debt lawfully contracted by him in his representative capacity.[45]

Declarations or admissions made before declarant had qualified as executor or administrator,[46] which are outside of the scope of his agency[47] or of his duty in discharging it,[48] or which were not made in connection with the discharge of his duty[49] are rejected.

Admissions of one of several coexecutors or coadministrators have been held competent against the estate,[50] although there is also authority for the view that such admissions are not competent,[51] either against the coexecutors or against the beneficiaries of the estate.[52] An administrator cannot, without his own consent, be affected by statements of a predecessor in the trust,[53] nor can the title of an owner of property be affected by an admission of the administrator of his predecessor in title.[54] An administrator may be bound by admissions of decedent with respect to a liability which is the basis of a suit.[55]

Guardians. Although it has been held that admissions of a guardian within the scope of his agency may affect the ward,[56] the more generally accepted view is that the interest of a ward cannot be adversely affected by the statements of his guardian.[57] Admissions made by one acting in his individual capacity before he became the guardian of minor children cannot be held binding on his wards.[58]

§ 368. Insured and Beneficiary

a. In general

b. Mutual benefit insurance

ested in the estate, his admissions against interest were held admissible.
Mass.—Becker v. Becker, 130 N.E. 843, 238 Mass. 362.
Or.—In re Kukes' Estate, 252 P. 947, 120 Or. 542.
That executor denied having made admissions after testatrix' death did not render them inadmissible.—In re Fritz' Estate, 20 P.2d 361, 130 Cal. App. 725.

44. Pa.—Compton v. Heilman, 1 A. 2d 682, 331 Pa. 545—Rowland v. Clark, 95 A. 451, 250 Pa. 192.
S.D.—In re Barnes' Estate, 220 N. W. 527, 528, 53 S.D. 200, quoting **Corpus Juris.**

45. S.C.—Slead v. Brannon, 24 S.C. L. 298.

46. Ind.—City of Indianapolis v. Barthel, 141 N.E. 339, 194 Ind. 273, rehearing overruled 142 N.E. 409, 194 Ind. 273.
N.Y.—Le Long v. Siebrecht, 187 N. Y.S. 150, 196 App.Div. 74—Kane v. Metropolitan Life Ins. Co., 256 N.Y.S. 917, 143 Misc. 631, reversed on other grounds 292 N.Y.S. 395, 161 Misc. 303, affirmed 267 N.Y.S. 1008, 240 App.Div. 910, following Strang v. Prudential Ins. Co. of America, 188 N.E. 161, 263 N.Y. 71, which reversed 263 N.Y.S. 972, 239 App.Div. 798.
Ohio.—Sullivan v. Sullivan, 31 N.E. 2d 165, 66 Ohio App. 315.
Or.—Johnson v. Underwood, 203 P. 879, 102 Or. 680.
22 C.J. p 407 note 71.

47. Conn.—Donnelly v. Garvan, 151 A. 168, 111 Conn. 626.
N.Y.—In re Engel's Estate, 250 N. Y.S. 648, 140 Misc. 276.
Pa.—Allegheny Trust Co. v. State Life Ins. Co. of Indianapolis, Ind., 167 A. 251, 110 Pa.Super. 37.
22 C.J. p 407 note 72.
As against legatees
Executor's statement, if it were an admission that decedent was capable when transferring property to defendant, could not be received against executor, as representative of legatees.—Harvey v. Provandie, 141 A. 136, 83 N.H. 236.

48. N.Y.—Simon v. Etgen, 107 N.E. 1066, 213 N.Y. 589.

49. N.Y.—Scully v. McGrath, 94 N. E. 195, 201 N.Y. 61, reversing 120 N.Y.S. 1145, 136 App.Div. 905.
22 C.J. p 407 note 74.

50. S.C.—Gibert v. Glenn, 156 S.E. 325, 159 S.C. 135.
22 C.J. p 407 note 75.

51. Conn.—Kane v. Kane, 142 A. 466, 107 Conn. 716.
22 C.J. p 407 note 76.

52. N.Y.—In re Jacobs' Estate, 9 N. Y.S.2d 278, 169 Misc. 904.

53. Ala.—Rogers v. Grannis, 20 Ala. 247—McLaughlin v. Nelms, 9 Ala. 925.
Conn.—Pease v. Phelps, 10 Conn. 62.
However, testimony that executrix made no demand for sum for which administrator succeeding her brought suit because decedent had paid money as defendant's guarantor was held admissible to discredit administrator's case, without respect to whether it bound administrator as an admission.—Doe v. Lucy, 139 A. 750, 83 N.H. 160.

54. Mass.—Lawrence v. Wilson, 35 N.E. 858, 160 Mass. 304.

55. Fla.—Fisher v. Guidy, 142 So. 818, 106 Fla. 94.
N.J.—Melosh v. Melosh, 6 A.2d 472, 125 N.J.Eq. 486.

56. Ind.—Hart v. Miller, 64 N.E. 239, 29 Ind.App. 222.
N.H.—Tenney v. Evans, 14 N.H. 343, 40 Am.D. 194.
Or.—Westenfelder v. Green, 34 P. 23, 24 Or. 448.

57. Ark.—Parks v. Thomas, 210 S. W. 141, 138 Ark. 70.
Mich.—Power v. Harlow, 23 N.W. 606, 57 Mich. 107.
Mo.—Nichols v. Supreme Tribe of Ben Hur, App., 274 S.W. 868.
Ohio.—Sullivan v. Sullivan, 31 N.E. 2d 165, 66 Ohio App. 315.
Okl.—Holmes v. Nelson, 76 P.2d 1076, 1077, 182 Okl. 166, citing **Corpus Juris.**
Tex.—Williams v. Fuerstenberg, Civ. App., 12 S.W.2d 812, reversed on other grounds, Com.App., 23 S.W. 2d 305.
22 C.J. p 408 note 80.
After incompetent's death
A guardian could not bind the incompetent's estate by admission against interest after incompetent's death, notwithstanding her subsequent appointment as administratrix of the incompetent's estate.—Sullivan v. Sullivan, 31 N.E.2d 165, 66 Ohio App. 315.

58. Ga.—Johnston v. Coney, 48 S. E. 373, 120 Ga. 767.
N.C.—Cook v. Edwards, 153 S.E. 323, 198 N.C. 738.

a. In General

While admissions of the insured are generally incompetent against the beneficiary, they are in some instances admissible, as where insured has reserved a jus disponendi as to the beneficial interest in the policy. Admissions of the beneficiary are admissible against him to show the falsity of statements by insured in the application for insurance.

It has been said that there is some confusion in the decisions on the question whether the admissions and declarations of insured may be received in evidence against the holder of the policy,[59] and that fine distinctions have been made in the admission or rejection of such evidence, each case often being governed by its particular facts.[60] As a general rule, admissions of the person insured are regarded as incompetent against the beneficiary to whom a loss is payable,[61] especially if made before the inception of the insurance contract.[62] However, the distinction is often recognized that where the assured reserves a jus disponendi as to the beneficial interest in the policy, his declaration may affect the beneficiary,[63] so that if the policy is payable to insured, or although payable to another, insured reserves the right to change the beneficiary, his admissions as to his health, which tend to show the falsity of material statements in his application, are admissible against his representative or beneficiary.[64]

59. Vt.—Fitzgerald v. Metropolitan L. Ins. Co., 98 A. 498, 90 Vt. 291. 37 C.J. p 626 note 8.
Admissions in insurance transactions generally see supra § 351.

60. Wash.—Askey v. New York L. Ins. Co., 172 P. 887, 102 Wash. 27, L.R.A.1918F 267.

61. U.S.—New York Life Ins. Co. v. Hatcher, C.C.A.Ga., 115 F.2d 52.
Ala.—Atlanta Mut. Ins. Co. v. Price, 97 So. 826, 210 Ala. 334—Frank v. Frank, 96 So. 859, 209 Ala. 630, 32 A.L.R. 1478.
Ark.—Missouri State Life Ins. Co. v. Witt, 256 S.W. 46, 161 Ark. 148—Brotherhood of Railroad Trainmen v. Merideth, 225 S.W. 337, 146 Ark. 140.
Cal.—Paez v. Mutual Indemnity, Accident, Health & Life Ins. Co. of California, 3 P.2d 69, 116 Cal.App. 654.
Ill.—Mueller v. Mueller, 222 Ill.App. 435.
N.J.—Geir v. John Hancock Mut. Life Ins. Co., 147 A. 651, 7 N.J. Misc. 991.
N.Y.—Eastern Dist. Piece Dye Works v. Travelers' Ins. Co., 138 N.E. 401, 234 N.Y. 441, 26 A.L.R. 1505, affirming 190 N.Y.S. 822, 198 App. Div. 610.
N.C.—Evans v. Junior Order United American Mechanics, 111 S.E. 526, 183 N.C. 358.
Pa.—Purcell v. Metropolitan Life Ins. Co., 10 A.2d 442, 336 Pa. 588—Kuhns v. New York Life Ins. Co., 147 A. 76, 297 Pa. 418.
Va.—Metropolitan Life Ins. Co. v. Johnson, 2 S.E.2d 288, 172 Va. 506.
22 C.J. p 408 note 82—37 C.J. p 626 note 13.

Reason for rule

"The insured in such a case is not a party to the record, has no interest in the policy, and, if he is to be considered as the agent of the beneficiary in procuring it, his agency ceases with its issuance, so that there is no legal ground upon which his statements can be received."—Grangers' L. Ins. Co. v. Brown, 57 Miss. 308, 315, 34 Am.R. 446.

In proceeding under compensation act for employee's death, admitting in evidence employee's statement that he was improperly at place of accident was held improper as against beneficiaries.—Kennedy v. Columbian Casualty Co., 43 S.W.2d 201, 163 Tenn. 312.

Statements made by representative of insured, after the death of the latter, are not binding on the beneficiaries entitled to the insurance.—Gilmore v. Continental Casualty Co., 108 P. 447, 58 Wash. 203.

62. Ind.—Penn Mut. L. Ins. Co. v. Wiler, 100 Ind. 92, 50 Am.R. 769.
22 C.J. p 408 note 83.

63. U.S.—Wirthlin v Mutual Life Ins. Co., Utah, 56 F.2d 137, 86 A.L.R. 138.
Ala.—Atlanta Mut. Ins. Co. v. Price, 97 So. 826, 210 Ala. 334.
Ga.—Volunteer State Life Ins. Co. v. McGinnis, 103 S.E. 168, 150 Ga. 162, answers to certified questions conformed to 103 S.E. 824, 25 Ga. App. 508.
Ill.—Schaffner v. Equitable Life Assur. Soc. of U. S., 8 N.E.2d 212, 290 Ill.App. 174.
Ind.—Equitable Life Assur. Soc. of U. S. v. Campbell, 151 N.E. 682, 85 Ind.App. 450, denying rehearing 150 N.E. 31, 85 Ind.App. 450.
Vt.—Cummings v. Connecticut General Life Ins. Co., 142 A. 82, 101 Vt. 73.
22 C.J. p 408 note 86.

"The rule that subsequent statements of the insured cannot be received to adversely affect the interests of beneficiaries does not apply where the insured reserves the right to change the beneficiaries, and thereby remains the master of the policy so far as concerns beneficiaries."—Messina v. New York Life Ins. Co., 161 So. 462, 464, 173 Miss. 378.

Where policy was payable to insured's estate, insured's declaration regarding change of beneficiary was admissible when estate sought to establish its rights to money.—Northern Life Ins. Co. v. Burkholder, 293 P. 919, 134 Or. 401, denying rehearing 283 P. 739, 131 Or. 537.

Statements held admissible

(1) Statements by insured relative to premium payments to keep policy alive or to reinstatement.—Equitable Life Assur. Soc. of the U. S. v. Campbell, 150 N.E. 31, 85 Ind. App. 450, rehearing denied 151 N.E. 682, 85 Ind.App. 450.

(2) Statements by insured in registration books and naturalization papers to show insured's age where it was claimed that he had misstated his age.—Messina v. New York Life Ins. Co., 161 So. 462, 173 Miss. 378.

(3) In action on accident policy, insured's declaration that he was not injured.—Benefit Ass'n of Ry. Employees v. Armbruster, 129 So. 78, 221 Ala. 399.

Where insured was equitable owner of cause of action on fire policies, his statements bind party suing on policies who is not a bona fide assignee for value.—Walz v. Fidelity-Phœnix Fire Ins. Co. of New York, C.C.A.Mich., 10 F.2d 22, certiorari denied Fidelity-Phœnix Fire Ins. Co. of New York v. Walz, 46 S.Ct. 471, 271 U.S. 665, 70 L.Ed. 1140.

64. U.S.—Prudential Ins. Co. of America v. Loewenstein, C.C.A.W.Va., 76 F.2d 479—Self v. New York Life Ins. Co., C.C.A.Ark., 56 F.2d 364, certiorari denied 53 S.Ct. 11, 287 U.S. 607, 77 L.Ed. 527.
Mo.—Chavaries v. National Life & Accident Ins. Co. of Tennessee, App., 110 S.W.2d 790, 793, citing **Corpus Juris.**
22 C.J. p 408 note 85—37 C.J. p 626 note 11.

Irrelevant matter

Statement with respect to a condition of health which did not cause or contribute to cause insured's death is, however, inadmissible since irrelevant to the issues.—Chavaries v. National Life & Accident Ins. Co. of Tennessee, Mo.App., 110 S.W.2d 790, 793, citing **Corpus Juris.**

It has also been held, without express reference to the foregoing distinctions, that it is competent to prove declarations intimately connected with the existence of the contract, as that it has lapsed,[65] or declarations tending to show that statements made in the application on which the policy issued were untrue,[66] at least where the beneficiary waived the right to object to the introduction of such statements.[67] According to some decisions, insured's admissions cannot be used against the beneficiary to show the falsity of statements in the application, although where other evidence shows such falsity, his admissions may be introduced to show knowledge of the misrepresentation.[68] An application signed by insured has been admitted into evidence to show the true character of the contract between the parties.[69]

The admissions of an employer having group insurance on the lives of his employees do not necessarily bind the employee's beneficiary.[70]

Admissions of beneficiary. Admissions of the beneficiary, such as with respect to the condition of insured's health are admissible against such beneficiary for the purpose of showing falsity of statements made by insured in his application for insurance.[71] Accordingly, proofs of loss voluntarily submitted to the insurer by the beneficiary are admissible against him as evidence of false representations made by insured in the application,[72] except where the statements contained in the claim were not authorized by the beneficiary.[73]

b. Mutual Benefit Insurance

In mutual benefit insurance, admissions of the member are generally admissible against the beneficiary if made as part of the res gestæ and not too remote from the time of the application if inconsistent therewith; but such admissions are not competent where insured reserves no right to change the beneficiary.

In actions on certificates issued by mutual benefit or fraternal societies, it is the general rule, notwithstanding some contrary authority,[74] that the declarations and admissions of the member are admissible against the beneficiary,[75] and accordingly such admissions may be introduced to show the falsity of statements made in the application whether made before[76] or after[77] the application. Under this rule a prior application for life insurance in anoth-

65. Ind.—Equitable Life Assur. Soc. of U. S. v. Campbell, 151 N.E. 682, 85 Ind.App. 450, denying rehearing 150 N.E. 31, 85 Ind.App. 450.
Mass.—Baraca v. Metropolitan Life Ins. Co., 154 N.E. 90, 257 Mass. 538.
22 C.J. p 408 note 84.

66. Iowa.—Welch v. Union Cent. L. Ins. Co., 78 N.W. 853, 108 Iowa 224, 50 L.R.A. 774.
37 C.J. p 627 note 17.
Previous insurance
In action on automobile liability policy by parties injured by insured, statement of insured that another insurer had canceled previous insurance, offered to show falsity of warranty that no insurer had previously canceled automobile insurance was admissible.—Emery v. Pacific Employers Ins. Co., 67 P.2d 1046, 8 Cal.2d 663.

67. Neb.—Willis v. Order of Railroad Telegraphers, 296 N.W. 443.

68. Kan.—National Reserve Life Ins. Co. v. Jeffries, 75 P.2d 302, 147 Kan. 16.
Va.—Metropolitan L. Ins. Co. v. O'Grady, 80 S.E. 743, 115 Va. 830.
37 C.J. p 627 note 15.

69. Tex.—Universal Life & Accident Ins. Co. v. Reed, Civ.App., 115 S.W.2d 728.

70. Mo.—Douglas v. Metropolitan Life Ins. Co., App., 297 S.W. 87.

71. Mo.—Burgess v. Pan-American Life Ins. Co., 230 S.W. 315, reversing, App., 211 S.W. 114.
37 C.J. p 627 note 24.
Admission as to immaterial matter is, however, inadmissible.—Sovereign Camp, W. O. W., v. Colvin, 119 So. 635, 218 Ala. 616.

72. Mo.—Burgess v. Pan-American Life Ins. Co., 230 S.W. 315, reversing, App., 211 S.W. 114.
45 C.J. p 324 note 22.
Irregularity of coroner's certificate of cause of death does not affect its admissibility as an admission of the beneficiary submitting such certificate as part of the proof of loss.—Thornell v. Missouri State Life Ins. Co., Tex.Civ.App., 229 S.W. 653, affirmed, Com.App., 249 S.W. 203.

73. Ala.—Sovereign Camp, W. O. W., v. Reed, 94 So. 910, 208 Ala. 457.
Statement of physician
Beneficiary repudiating insurer's claim that insured had tuberculosis when policy was issued was held not bound by statement of attending physician filed with claim.—Turner v. National Life & Accident Ins. Co., 17 S.W.2d 13, 159 Tenn. 130.

74. Ark.—Brotherhood of Railroad Trainmen v. Merideth, 225 S.W. 337, 146 Ark. 140.
N.Y.—Grossman v. Supreme Lodge K. & L. H., 6 N.Y.S. 821, 3 Silv. Sup. 111.
N.C.—Evans v. Junior Order United American Mechanics, 111 S.E. 526, 183 N.C. 358.

75. Ill.—Gill v. Modern Woodmen of America, 221 Ill.App. 388.
Neb.—Whitehorn v. Royal Arcanum, 269 N.W. 821, 131 Neb. 713.
22 C.J. p 408 notes 88, 89—45 C.J. p 323 note 4.
Statements held admissible
(1) That insured engaged in illegal sale of liquors in violation of terms of membership.—Dix v. Modern Woodmen of America, 280 N.W. 663, 68 N.D. 385.

(2) That member procured the insurance with intent to defraud by committing suicide.—Smith v. National Ben. Soc., 25 N.E. 197, 123 N.Y. 85, 9 L.R.A. 616.

(3) Statement tending to show member's understanding that he was not in good standing in association.—Whitehorn v. Royal Arcanum, 269 N.W. 821, 131 Neb. 713—Ogden v. Sovereign Camp, W. W., 111 N.W. 797, 113 N.W. 524, 78 Neb. 804, 806.

(4) Where a physician has testified that he had attended insured in a certain town prior to the time of the application, and that the latter was then suffering from a particular disease, a statement by insured a short time before his death to a fellow lodge member that he had formerly resided at the place mentioned by the physician was competent, the possibility that such evidence might prove to be a link in a chain of evidence whereby the untruthfulness of insured's statement in the application might be shown being too remote to justify its exclusion.—Head Camp Pacific Jurisdiction W. O. W. v. Loeher, 68 P. 136, 17 Colo.App. 247.

76. Ala.—Sovereign Camp, W. O. W. v. Padgett, 130 So. 797, 222 Ala. 93.
45 C.J. p 323 note 5.

77. Ky.—Knights of Maccabees of World v. Shields, 160 S.W. 1043, 156 Ky. 270, 49 L.R.A.,N.S., 853,

er company is admissible to contradict insured's statement as to age, made in the application for insurance in defendant society,[78] although there is authority to the contrary.[79] So it has been held that, where there is independent proof tending to show the falsity of statements in the application, evidence of prior declarations of insured are admissible to show his knowledge of such falsity.[80]

Since the admissibility of insured's admissions under the rule stated above rests on the theory that during his lifetime he retains full dominion over the certificate and the beneficiary has only an expectant interest,[81] it follows that where the certificate is made payable in the first instance to the beneficiary, and insured reserves no right to change the beneficiary, his declarations relating to past events, and made after the issuance of the certificate, are not competent against the beneficiary.[82]

In order to render declarations of insured admissible to prove the falsity of his statements in the application, it is generally held that they must have been made at a time not remote from the time of the application;[83] and declarations not a part of the res gestæ of an act as to which evidence is admissible are not competent.[84]

E. PROOF AND EFFECT

§ 369. Laying Foundation

Apart from connecting or authenticating evidence, no foundation is necessary to render admissions against interest admissible as original evidence.

Apart from authenticating and connecting proof discussed infra § 371, it is generally held that no predicate or foundation need be laid for proof of an admission against interest as direct or original evidence.[85] Thus it is not necessary for proof of an admission to ask declarant whether he made the

rehearing denied 162 S.W. 778, 157 Ky. 35, 49 L.R.A.,N.S., 860.
45 C.J. p 323 note 6.

78. Ill.—Libre v. Brotherhood of American Yeomen, 168 Ill.App. 328.
Minn.—Taylor v. Grand Lodge A. O. U. W., 111 N.W. 919, 101 Minn. 72, 118 Am.S.R. 606, 11 L.R.A.,N.S., 92, 11 Ann.Cas. 260.

79. Colo.—Supreme Lodge K. H. v. Wollschlager, 44 P. 598, 22 Colo. 213.
45 C.J. p 323 note 9.

80. Wis.—Johnson v. Fraternal Reserve Assoc., 117 N.W. 1019, 136 Wis. 528—McGowan v. Supreme Court, I. O. F., 80 N.W. 603, 104 Wis. 173.

81. Wash.—Armstrong v. Modern Woodmen of America, 160 P. 946, 93 Wash. 352, Ann.Cas.1918E 263.
45 C.J. p 323 note 11.

82. Mich.—Tessmann v. Supreme Commandery U. F., 61 N.W. 261, 103 Mich. 185.
Ohio.—Fraternal Mutual L. Ins. Co. v. Applegate, 7 Ohio St. 292.

83. Wis.—Johnson v. Fraternal Reserve Assoc., 117 N.W. 1019, 136 Wis. 528.

84. Wis.—McGinty v. Brotherhood of R. Trainmen, 164 N.W. 249, 166 Wis. 83.
45 C.J. p 324 note 14.

85. U.S.—New York Alaska Gold Dredging Co. v. Walbridge, C.C.A. Alaska, 76 F.2d 655.
Ala.—Dickson v. Dinsmore, 122 So. 437, 219 Ala. 353.
Cal.—Pece v. Tama Trading Co., 70 P.2d 652, 22 Cal.App.2d 219.
Iowa.—Noble v. United Ben. Life Ins. Co., 297 N.W. 881.
Miss.—White v. Weitz, 152 So. 484, 169 Miss. 102.
Mont.—Howe v. Messimer, 275 P. 281, 84 Mont. 304.
Neb.—Falkinburg v. Inter-State Business Men's Acc. Co. of Des Moines, Iowa, 272 N.W. 924, 132 Neb. 670—McDaniel v. Farlow, 271 N.W. 905, 132 Neb. 273.
Ohio.—Conrad v. Kerby, 31 N.E.2d 168, 66 Ohio App. 359—Association of Army & Navy Stores v. Schaengold, 184 N.E. 17, 44 Ohio App. 40.
Tex.—Marine Production Co. v. Richey, Civ.App., 89 S.W.2d 1078, error dismissed—Nance v. McClellan, Civ. App., 54 S.W.2d 1109, affirmed 89 S.W.2d 774, 126 Tex. 580, 106 A.L.R. 117.
Vt.—Robinson v. Leonard, 134 A. 706, 100 Vt. 1.
Wis.—Klein v. Beeten, 172 N.W. 736, 169 Wis. 385, 5 A.L.R. 1237.
However, it was held error to permit defendant to be asked on cross-examination whether he had not attempted to have plaintiff arrested because he sent him a dunning letter regarding the commission sued for, where defendant was not given an opportunity to admit his bias and prejudice against plaintiff.—Paulson v. Reeds, 156 N.W. 1031, 33 N.D. 141.

Distinguished from impeachment evidence

(1) Generally.
Ala.—Dickson v. Dinsmore, 122 So. 437, 219 Ala. 353.
Mo.—Mertens v. McMahon, 66 S.W.2d 127, 334 Mo. 175, 93 A.L.R. 1285, transferred, see, App., 28 S.W.2d 456.
Mont.—Howe v. Messimer, 275 P. 281, 84 Mont. 304.
Vt.—Robinson v. Leonard, 134 A. 706, 100 Vt. 1.
Wis.—Klein v. Beeten, 172 N.W. 736, 169 Wis. 385, 5 A.L.R. 1237.

(2) The testimony given by a party to a suit in a previous suit or in another judicial proceeding in which he was a party is admissible in the second suit without the necessity of laying foundation to impeach the party as a witness.—Louisiana Mortg. Corporation v. Pickens, La.App., 182 So. 385.

(3) In husband's suit to rescind contract and cancel deed on the ground that he was owner of the land, legal title to which was held by the wife who traded land to the grantee, testimony of both husband and wife, in prior action by wife for the same relief to the effect, that wife was owner of the land and that husband acted as her agent in making the trade with the grantee, was not inadmissible on the ground that the evidence could be used only for contradiction purposes, and that such ground failed because the husband and wife had not testified in the husband's suit.—Hill v. Hopkins, 133 S.W.2d 634, 198 Ark. 1049.

Circumstances need not be proved

(1) A declaration of a party against his interest concerning subject of controversy is admissible against him without first stating circumstances of time, place, and parties present.
Cal.—Pece v. Tama Trading Co., 70 P.2d 652, 22 Cal.App.2d 219—Swartz

statement which it is intended to prove.[86] If, however, proof of the admission is sought for impeachment purposes only, a proper foundation must be laid for the impeaching questions.[87]

Necessity of foundation for impeachment of witnesses generally is considered in the C.J.S. title Witnesses § 480, also 70 C.J. p 799 note 19. Necessity of foundation for proof of inconsistent statements is considered in the C.J.S. title Witnesses §§ 598–602, also 70 C.J. p 1083 note 6–p 1090 note 71.

§ 370. Who May Testify

Oral admissions may be proved by any competent witness who heard them, or by declarant himself.

Generally a party's statements against interest may be proved by other witnesses.[88] An oral admission may be proved by questioning the party making it with respect thereto,[89] or by any competent witness who heard it,[90] even though the statement was confidential as to him,[91] unless, of course, it was legally privileged under the rules discussed in the C.J.S. title Witnesses §§ 252–314, also 70 C.J. p 376 note 39–p 472 note 8.

The fact that a witness did not hear[92] or does not remember[93] the entire conversation in which an admission was made has been held not to pre-

v. Feddershon, 268 P. 430, 92 Cal. App. 285.
Mont.—Howe v. Messimer, 275 P. 281, 84 Mont. 304.

(2) Persons to whom plaintiff's statements were made need not first be proved.—Cadle v. McHargue, 60 S.W.2d 973, 249 Ky 385.

Judicial admissions
Ala.—Shannon v. Lunsford, 111 So. 22, 215 Ala. 465.
La.—Louisiana Mortg. Corporation v. Pickens, App., 182 So. 385.
Preliminary consideration of offer of compromise as admission see supra §§ 285–289.

86. Ala.—Kimmey v. Calloway, 52 Ala. 222.
Ky.—Cadle v. McHargue, 60 S.W.2d 973, 249 Ky. 385.
Mo.—Mertens v. McMahon, 66 S.W. 2d 127, 334 Mo. 175, 93 A.L.R. 1285, transferred, see, App., 28 S.W.2d 456.
Mont.—Howe v. Messimer, 275 P. 281, 84 Mont. 304.
N.Y.—Boyd v. Boyd, 29 N.Y.S. 7, 9 Misc. 161, 59 N.Y.St. 727, reversed on other grounds 32 N.Y.S. 295, 11 Misc. 357, 24 N.Y.Civ.Proc. 230, 65 N.Y.St. 502—Fisher v. Monroe, 21 N.Y.S. 995, 2 Misc. 326, 51 N.Y.St. 585, reargument denied 22 N.Y.S. 1129, 3 Misc. 633.
Ohio.—Conrad v. Kerby, 31 N.E.2d 168, 66 Ohio App. 359.
Vt.—Robinson v. Leonard, 134 A. 706, 100 Vt. 1.
22 C.J. p 410 note 94.

Reason for rule
The rule that a witness must have been asked when on the stand whether he made a statement about to be offered as a self-contradiction does not apply to proof of the admission of a party against interest, as the reason for the rule is to provide a fair opportunity for explanation before the departure of the witness, while a party is in theory present throughout the trial, and has ample opportunity to take the stand and make any explanation necessary.—Mindlin v. Dorfman, 189 N.Y.S. 265, 197 App.Div. 770.

Denial by party unnecessary
Declarations of a party as to the subject matter of the controversy, which are contradictory of statements made as a witness, are admissible without a denial thereof by him as a witness.—State v. Pulley, 82 A. 857, 82 N.J.Law 579.

Distinguished from declarations of witnesses not parties
Ky.—Cadle v. McHargue, 60 S.W.2d 973, 249 Ky. 385.

Patent infringement cases
In a number of patent infringement cases, however, it was held that admissions against interest are not admissible unless the party is interrogated with respect thereto when on the stand as a witness.—Esnault-Pelterie v. Chance Vought Corporation, D.C.N.Y., 56 F.2d 393, affirmed, C.C.A., 66 F.2d 474—General Electric Co. v. P. R. Mallory & Co., C.C.A.N.Y., 298 F. 579, certiorari denied 45 S.Ct. 94, 266 U.S. 609, 69 L.Ed. 466.
Assent or failure to deny as element of admissibility of admission by silence see supra § 296.

87. Miss.—White v. Weitz, 152 So. 484, 169 Miss. 102.
Or.—Kitchel v. Gallagher, 270 P. 488, 126 Or. 373.

88. Or.—Kitchel v. Gallagher, 270 P. 488, 126 Or. 373.

Examination before trial
Plaintiff is not obliged to call adverse party present in court as his witness, but he may read any admission in his favor made by adverse party in examination before trial.—Van Bergen v. Tishman, 205 N.Y.S. 48, 123 Misc. 169.
Proof of admission through interpreter see supra § 280.

89. Ark.—Watkins v. Metropolitan Life Ins. Co., 250 S.W. 350, 158 Ark. 386.
Wyo.—Sneider v. Big Horn Milling Co., 200 P. 1011, 28 Wyo. 40.

90. U.S.—Johnson v. Umsted, C.C.A. Ark., 64 F.2d 316.
Or.—Mace v. Timberman, 251 P. 763, 120 Or. 144.
Tenn.—McDonald v. Baldwin, App., 148 S.W.2d 385—Carnahan v. Wood, 2 Swan 500.
Tex.—Keels v. Metzler, Civ.App., 94 S.W.2d 799, error dismissed.
Wyo.—Sneider v. Big Horn Milling Co., 200 P. 1011, 1013, 28 Wyo. 40, citing **Corpus Juris.**
22 C.J. p 344 notes 82–85, p 410 note 95.

Attorney
Admissions of a party can be proved by an attorney for the opposite side.—Nye Odorless Incinerator Corporation v. Felton, 162 A. 504, 5 W.W.Harr., Del., 236—Jolls v. Keegan, 55 A. 340, 4 Pennew., Del., 21.

Admission at prior trial may be proved
(1) By judge.—Wilson v. Lewis, 65 So. 919, 11 Ala.App. 261.

(2) By official court reporter or stenographer.
U.S.—Johnson v. Umsted, C.C.A.Ark., 64 F.2d 316.
Ind.—Fuller v. Fuller, 100 N.E. 869, 52 Ind.App. 488.
Minn.—Amor v. Stoeckele, 78 N.W. 1046, 76 Minn. 180.

(3) By adverse party in former action.—Williams v. Smith, 72 A. 1093, 29 R.I. 562.

Reference to bill of exceptions by other witnesses
It is proper for witnesses, testifying as to admissions made by a party, to refresh their memories by referring to a certified copy of a bill of exceptions taken at a previous trial, and, having sworn that the substance of their recollection is fairly set out in such copy, to incorporate it in their depositions.—Iglehart v. Jernegan, 16 Ill. 513.

91. Ala.—Pope v. State, 57 So. 245, 174 Ala. 63.
Ill.—Crain v. Jacksonville First Nat. Bank, 2 N.E. 486, 114 Ill. 516.

92. La.—State v. Freddy, 41 So. 436, 117 La. 121, 116 Am.S.R. 195.
22 C.J. p 410 note 98.

93. Ill.—Voorheis v. Bovell, 20 Ill. App. 538.

clude him from testifying as to the admission, although there is authority for the contrary view.[94]

It is not necessary that the witness should be able to fix accurately the date of the conversation in which the admission was made.[95]

Where an alleged admission was contained in a letter which has been lost, any one who read the letter may testify as to its contents.[96]

§ 371. Connecting Admission

To render statements admissible as admissions against interest they must be properly connected with the party against whom offered.

In order that a statement may be used against a party as an admission, there must be at least prima facie proof that it was made by him or by some person whose statements may legally affect him.[97] Where the admission is a written one, there must be some proof of the authenticity or identity of the writing,[98] the burden being on the party offering

94. N.Y.—Scott v. Young, 4 Paige 542.
22 C.J. p 410 note 91.

95. Pa.—Norris v. Clark, 29 Pa.Super. 562.

96. Mont.—In re Colbert, 153 P. 1022, 51 Mont. 455.

97. U.S.—Andrew Jergens Co. v. Bonded Products Corporation, D.C. N.Y., 13 F.2d 417, modified on other grounds, C.C.A., 21 F.2d 419, certiorari denied Bonded Products Corp. v. Andrew Jergens Co., 48 S.Ct. 204, 275 U.S. 572, 72 L.Ed. 432.
Ala.—Powell v. Smith, 96 So. 135, 209 Ala. 254.
Ark.—Watkins v. Metropolitan Life Ins. Co., 250 S.W. 350, 158 Ark. 386.
Cal.—Lewis v. Western Truck Line, 112 P.2d 747, 753, citing **Corpus Juris**—Siskin v. Dembroff, 9 P.2d 908, 121 Cal.App. 730.
Ga.—Hale v. Hale, 129 S.E. 445, 34 Ga.App. 314.
Ill.—See Potter v. Cleveland, C., C. & St. L. Ry. Co., 211 Ill.App. 605.
Miss.—Rea v. Underwood, 152 So. 272, 168 Miss. 799
N.H.—Caswell v. Maplewood Garage, 149 A. 746, 84 N.H. 241, 73 A.L.R. 433.
Tex.—Castelo v. Castelo, Civ.App., 89 S.W.2d 1033, error dismissed—Standard Acc. Ins. Co. v. Williams, Civ.App., 4 S.W.2d 1023, affirmed, Com.App., 14 S.W.2d 1015.
22 C.J. p 344 note 86, p 411 note 4.

Extrajudicial admissions require proof.—Reid v. Owens, 69 P.2d 265, 92 Utah 432.

Establishing identity

Identity of person making extrajudicial statement may be established by circumstantial evidence or testimony of witnesses other than those proving statement.—Lundy v. Tucker, 130 S.E. 924, 34 Ga.App. 721.

Proof by declarant

(1) Making of statement, oral or written, may be proved by party's own admission when on stand.—Watkins v. Metropolitan Life Ins. Co., 250 S.W. 350, 158 Ark. 386.

(2) In action for unlawful death caused by abortion, admissions by defendant that he told truth in criminal prosecution against codefendant physician justified admitting defendant's testimony given therein as against defendant.—Pleak v. Cottingham, 178 N.E. 309, 94 Ind.App. 365.

Admission by adoption

(1) Insurer, seeking to introduce doctor's affidavit as to cause of insured's death, must lay proper foundation by making at least a prima facie showing that the beneficiary furnished the affidavit.—Dickey v. Supreme Tribe of Ben Hur, 269 S.W. 633, 218 Mo.App. 281.

(2) In action on life policy, evidence was held insufficient to establish that physician's certificate obtained by defendant was adopted by beneficiary as proof of death.—Tennenbaum v. Metropolitan Life Ins. Co., 252 N.Y.S. 599, 141 Misc. 394.

Corporate director

Admitting conversation of director, without pointing out particular director, was held not error.—Lahman v. Burnes Nat. Bank of St. Joseph, Mo., C.C.A.Neb., 20 F.2d 897.

Predecessor in interest

(1) To render declarations of predecessor in interest admissible, proper foundation must be laid by showing that declaration was made while declarant was holding title to property in controversy, that declarant was in fact the grantor of party against whom declaration is offered, and that declaration was against interest.—Osnes Livestock Co. v. Warren, 62 P.2d 206, 103 Mont. 284.

(2) In suit to enjoin cutting of timber and for trespass, certificate issued by defendant's predecessor, signed by him as "County Surveyor," showing correctness of map of plaintiff's lands, relied on as part of deed under which she was attempting to prescribe, amounting to a declaration admissible against defendants, privies in estate of the surveyor, where defendant showed that surveyor was in actual possession at date of certificate, which plaintiff disputed, was admissible over objection that it did not appear that it was made while surveyor was in possession.—Brookman v. Rennolds, 98 S.E. 543, 148 Ga. 721.

(3) In suit by heirs to recover land and to cancel deeds executed on administrator's sale by which title passed to defendant in possession, the admission of the purchaser that he was not a bona fide purchaser, but bid for administrator, would be competent only if there was evidence showing notice to last purchaser of invalidity of sale, if limited in effect to party making admission and not considered on question of notice to defendant.—Warner v. Hill, 100 S.E. 393, 149 Ga. 464.

Identification or connection sufficient
Mo.—Wells v. Wells, App., 48 S.W.2d 109.

Identification insufficient
N.Y.—Muessling v. Leisner, 224 N.Y.S. 689, 221 App.Div. 524.
Determining admissibility of admission by silence see supra § 296.
Identification of person speaking over telephone see supra § 281.
Proof of:
Agency generally see supra § 344.
Agency of husband for wife and vice versa see supra § 363.
Common purpose see supra § 362.
Existence of partnership see supra § 365.

98. U.S.—In re Lincoln Trust Co., D.C.Neb., 9 F.Supp. 643, modified on other grounds, C.C.A., First Trust Co. of Lincoln, Neb. v. Ricketts, 75 F.2d 309.
Cal.—Lewis v. Western Truck Line, App., 112 P.2d 747, 753, citing **Corpus Juris.**
Idaho.—Curtis v. Ficken, 16 P.2d 977, 52 Idaho 426.
Ind.—Craig v. Citizens Trust Co., 26 N.E.2d 1006.
Md.—J. Norman Geipe, Inc., v. Collett, 190 A. 836, 172 Md. 165, 109 A.L.R. 887.
N.Y.—Rathfelder v. Flag, 12 N.Y.S.2d 136, 257 App.Div. 71, affirmed 24 N.E.2d 984, 282 N.Y. 563.
N.D.—McCurdy v. Hughes, 248 N.W. 512, 63 N.D. 435.
22 C.J. p 411 note 5.

Extent of proof

Person can be bound by written admission only on proof that he wrote it or that it was written by some one authorized by him to do so.—Castelo v. Castelo, Tex.Civ.App., 89 S.W.2d 1033, error dismissed.

Unsigned statements

Statements written by defendant's

the writing to make such proof.[99] Letters offered as admissions must be affirmatively shown, otherwise than by regularity of business dealings,[1] to have been written by the party against whom they are offered, or by someone for whose act he is proved to be responsible,[2] either originally or by ratification.[3]

The trier of the facts determines whether an admission in evidence has been made.[4]

Use of interpreter to render oral admission admissible is considered in § 281 supra.

§ 372. Mode of Proof

Statements introduced for impeachment purposes need not be reintroduced to be available as admissions. The authorities seem not to be in accord on whether or not the pleadings in a case must be introduced in evidence for admissions therein to be available.

Ordinarily general and applicable rules must be observed in proving admissions against interest.[5] Where a statement of a party has been proved for the purpose of impeachment, it is not necessary to reprove it to allow it to be considered as an admission.[6]

While it is desirable that the witness should re-

claim adjuster, allegedly containing plaintiff's statements to claim adjuster concerning accident, were held properly excluded, where not signed by plaintiff.
Ga.—Southern R. Co. v. Cowan, 183 S.E. 331, 52 Ga.App 360.
N.J.—Caniano v. Dependable Amusement Co., 8 A.2d 830, 123 N.J.Law 419.

Hospital record
Hospital record containing statement against injured party's interest has no probative value as an admission where source of information stated in record is not shown.—Franklin v. Nowak, 4 N.E.2d 232, 53 Ohio App. 44.

Pleadings
(1) Allegation of pleading signed and verified by party's attorney to be admissible as admission requires proof that party read pleading or knew its contents.—Usletten v. City of Brookings, 235 N.W. 705, 58 S.D. 303, affirmed 240 N.W. 851, 59 S.D. 477.

(2) Preliminary proof of authenticity of party's alleged answers to questions in writing is dispensable predicate to introduction of writing in evidence as statement against his interest.—Lewis v. Western Truck Line, Cal.App., 112 P.2d 747.

Pleadings in former suit
(1) Party offering abandoned pleading must lay proper predicate therefor by first showing pleading was filed by opposite party.—Abel v. Maxwell Hardware Co., Tex.Civ.App., 28 S.W.2d 312.

(2) Declarations, stating that accident was caused solely by defendant truck driver's negligence, in actions for personal injuries and damage to automobile colliding with truck, were held inadmissible as evidence in plaintiffs' subsequent actions against driver of another automobile also involved in accident, in absence of showing that plaintiffs personally made, authorized, or adopted such statements, which are assumed to have originated with counsel drawing declarations.—Jennings v Bragdon, 194 N.E. 697, 289 Mass. 595.

Deposition at former trial
Mo.—Mertens v. McMahon, 66 S.W. 2d 127, 334 Mo. 175, 93 A.L.R. 1285, transferred, see, App., 28 S.W.2d 456.

Inadequate authentication
Mo.—Blair v. Acacia Mut. Life Ins. Co., App., 121 S.W.2d 193.
Pa.—Seckinger v. Economy Laundry, 3 A.2d 46, 133 Pa.Super. 414.

Sufficient authentication
Ga.—Rhodes v. Mutual Benefit Health & Accident Ass'n, 8 S.E.2d 685, 62 Ga.App. 208.

Sufficient identification
Del.—Laurel Produce Growers' Ass'n v. Gordy, 124 A. 806, 2 W.W.Harr. 405.

Authorship impossible
A telegram offered in evidence as an admission against interest was properly excluded, where it would have been impossible for the purported sender to have caused or directed the telegram to be sent.—Ikenberry v. New York L. Ins. Co., 149 N.W. 292, 127 Minn. 215.

99. Ariz.—Buehman v. Smelker, 68 P.2d 946, 50 Ariz. 18.

Abandoned pleadings
Party offering abandoned or superseded pleadings signed by attorney only as evidence has burden to show satisfactorily that pleadings offered are those of party or that party approved them.—Buehman v. Smelker, 68 P.2d 946, 50 Ariz. 18.

1. Tex.—Stevens v. Equitable Mfg. Co., 67 S.W. 1041, 29 Tex.Civ.App. 168.
22 C.J. p 304 note 92.

2. U.S.—Helvering v. Miller, C.C.A. N.Y., 75 F.2d 474—Holt v. Metropolitan Refining Co., D.C.N.Y., 9 F.Supp. 662.
Ala.—American Standard Life Ins. Co. v. Tolliver, 146 So. 625, 627, 25 Ala.App. 363, citing Corpus Juris.
N.D.—McCurdy v. Hughes, 248 N.W. 512, 63 N.D. 435.
Tex.—Gardner v. Wesner, Civ.App., 55 S.W.2d 1104, error refused.
22 C.J. p 304 note 94, p 411 note 5 [a].

Unsigned letter
The fact that a letter is unsigned does not render it inadmissible if there is other evidence sufficient to present a jury question as to its authorship.
Ala.—Decatur Fertilizer Co. v. Walls, 102 So. 32, 212 Ala. 226.
Ky.—Coleman v. McIntosh, 211 S.W. 872, 184 Ky. 370.
22 C.J. p 304 note 93 [a].

Evidence held insufficient
Tex.—Castelo v. Castelo, Civ.App., 89 S.W.2d 1033, error dismissed.
Admissibility of letters against recipient see supra § 297.

3. Cal.—Neely v. Naglee, 23 Cal. 152.
22 C.J. p 305 note 95.

4. Iowa.—Cerny v. Secor, 234 N.W. 193, 211 Iowa 1232.
Mass.—Leary v. Kieth, 152 N.E. 245, 256 Mass. 157.
N.Y.—Gangi v. Fradus, 125 N.E. 677, 227 N.Y. 452, reversing 174 N.Y.S. 903, 904, 187 App.Div. 934.
Pa.—Logue v. Gallagher, 3 A.2d 191, 133 Pa.Super. 570.
S.D.—Frazier v. Travelers Ins. Co. of Hartford, Conn., 287 N.W. 589, 66 S.D. 638.
Utah.—Reid v. Owens, 69 P.2d 265, 92 Utah 432.

5. **Request for continuance** by attorney for a party made by mail and telephone may be shown by testimony as to what referee said with respect to such request, even though the party and his attorney were not in court at the time the referee made the statement.—Stevick v. Vennum, 227 Ill.App. 86.
Mode of connecting telephone conversation with declarant is considered supra § 281.
Mode of proof as affected by best evidence rule see infra § 788.
Use of interpreter to render admission admissible see supra § 280.

6. Ind.—Clark v. Rhoads, 79 Ind. 342.

peat the exact words used by declarant, it is not necessary that he should do so, but he may state the substance of the conversation or admission,[7] although he cannot state his understanding of the admission,[8] or his conclusion as to what it would prove.[9] Where the party seeking to use an admission has shown that the statement was made under oath in a judicial proceeding in which it was relevant, he should not be allowed to go any further into the circumstances under which it was made.[10] However, it has been held that before an admission by a party or his attorney made in a former trial may be shown as an admission in a second trial of the same case, it must first be shown why the admission was made, the circumstances thereof, and its purpose.[11]

Where a person claims a beneficial interest under a written instrument to which he is not a party, not having signed it, his admission as to the purpose for which it was executed may be used against him without first proving the execution of the instrument by those who signed it.[12]

An admission of having collected money on executions is competent without production of the executions or copies thereof.[13]

A witness who testifies to an oral admission need not produce a memorandum thereof made by him at the time, unless this is required of him on cross-examination.[14]

Pleadings. Ordinarily, admissions in pleadings cannot be regarded as evidence unless the pleadings are introduced on the trial at the proper time and in the proper way.[15] In some jurisdictions, however, the pleadings in the action being tried are considered as before the court without being offered in evidence,[16] except as to superseded pleadings, which generally must be introduced in evidence to be read as an admission.[17]

Testimony at former trial. Admissions in a prior trial may not be proved by an unauthenticated record of the entire trial,[18] the proper method being proof by the stenographer who took the testimony or any competent person who heard the admissions.[19] A transcript of testimony taken by a private stenographer in a proceeding in which there are no official stenographers is admissible to prove an admission if the stenographer testifies that he correctly reported the testimony and transcribed it, but cannot remember the testimony without the aid of the transcript.[20] The mode of proof of former evidence generally is considered infra §§ 399–401.

7. Pa.—Nissley v. Brubaker, 43 A. 967, 192 Pa. 388.
22 C.J. p 411 note 6.

8. Ala.—Dennis v. Chapman, 19 Ala. 29, 54 Am.D. 186.

9. Ill.—Marshall v. Adams, 11 Ill. 37.
N.C.—Southern L. & T. Co. v. Benbow, 47 S.E. 435, 135 N.C. 303.

10. Mass.—Farnum v. Whitman, 73 N.E. 473, 187 Mass. 381.

11. Ark.—Mammoth Spring School Dist. No. 2 v. Fairview School Dist. No. 7, 80 S.W.2d 615, 190 Ark. 769.

12. Fla.—Williams v. Keyser, 11 Fla. 234, 89 Am.D. 243.

13. Md.—Mantz v. Collins, 4 Harr. & M. 65.

14. N.Y.—Parsons v. Disbrow, 1 E. D. Smith 547.

15. U.S.—Pullman Co. v. Bullard, C.C.A.Ga., 44 F.2d 347—U. S. v. Fifty-Eight Drums of Material Designed for Manufacture of Intoxicating Liquor, D.C.Pa., 38 F. 2d 1005.
Conn.—Theron Ford Co. v. Dudley, 133 A. 746, 104 Conn. 519.
Pa.—Buehler v. U. S. Fashion Plate Co., 112 A. 632, 269 Pa. 428.
22 C.J. p 411 note 14.

Rule relaxed

"The admissions in the affidavit [of defense] were evidence for the plaintiff, and, while it does not appear that the affidavit was formally offered, these admissions were twice made the basis of objections to offers by the defendant, which had the effect of bringing them upon the record, as did the affirmance by the court of the plaintiff's point that under the pleadings and evidence the verdict must be in favor of the plaintiff. It is not the same as if the affidavit was a mere admission, which, with her attention called to it, the defendant might possibly explain away. By rule of court where the case was tried the affidavit was a pleading, of which the court took notice, and by which the defendant is concluded while it stands."—Hilliard v. Lyons, Pa., 180 F. 685, 686, 103 C.C.A. 651.

Oral testimony as to contents improper.—Pacific Const. Co. v. Cochran, 243 P. 405, 29 Ariz. 554.

Plea of guilty in criminal case

Witness may be asked, as admission of fact charged, whether he has pleaded guilty in criminal matter, and question and answers are admissible, if admission is competent evidence.—Dzura v. Phillips, 175 N.E. 629, 275 Mass. 283.

Particular methods

A fact averred in the statement of claim and not specifically denied in the affidavit of defense is an admitted fact, but does not become such for purposes of trial unless put before the jury in one of three ways: First, by the presiding judge stating to the official stenographer in the presence of counsel that certain facts which he details and directs to be placed on the notes of trial are averred in the statement and not denied in the affidavit, and hence must be treated as admitted; second, by counsel directing to be placed on such notes certain detailed facts which they admit; or third, by offering in evidence specific parts of the statement of claim with what counsel conceive to be the replies thereto contained in the affidavit of defense, and having the facts thus sought to be established placed on the notes of trial as admitted, because averred in the statement, and not denied in the affidavit of defense.—Buehler v. U. S. Fashion Plate Co., 112 A. 632, 269 Pa. 428.

Lost pleading

Parol evidence of the contents of a lost pleading filed in a former suit is admissible.—Schwartz v. Osthimer, 4 Ind. 109.

16. Mo.—Hildreth v. Hudloe, App., 282 S.W. 747.

17. Mo.—Wahl v. Cunningham, 56 S.W.2d 1052, 332 Mo. 21.
22 C.J. p 338 note 62.

18. U.S.—Johnson v. Umsted, C.C.A.Ark., 64 F.2d 316.

19. U.S.—Johnson v. Umsted, supra.

20. Mo.—Woerheide v. Kelley, 243 S. W. 158.

§ 373. Duty to Show Entire Statement

Only such part of a statement containing an admission as is necessary to render it intelligible and give its true meaning need be offered, it being proper to leave to the party affected by the admission to show other portions which may weaken the force of the alleged admission.

A party who seeks to show an admission must give in evidence so much of the statement as will show the real meaning of the alleged admission,[21] and will not be allowed to show a part of a statement disconnected from other parts which qualify the language which it is sought to show,[22] even though a portion thereof serves the party who made the admission,[23] especially where the qualification is such as to deprive the language used of any real force as an admission.[24] Subject to this limitation, however, it does not seem to be incumbent on the party seeking to show an admission to introduce evidence of all that was said on the occasion in question,[25] or introduce in evidence the entire writing in which the alleged admission is contained,[26]

Use of memoranda to prove former testimony generally is considered infra § 399.

21. Mo.—Friedman v. United Rys. Co. of St. Louis, 238 S.W. 1074, 1076, 293 Mo. 235, citing **Corpus Juris.**
22 C.J. p 411 note 18.

Pleading

(1) Generally the whole of a pleading should be offered in evidence rather than a part thereof.
Mo.—Hildreth v. Hudloe, App., 282 S.W. 747.
Or.—Beck v. General Ins. Co. of America, 18 P.2d 579, 582, 141 Or. 446, quoting **Corpus Juris.**

(2) Plaintiffs may not accept as admissions parts of answer favorable to contention and refuse to be bound by unfavorable parts.—Green v. Messing, 258 N.Y.S. 82, 236 App. Div. 107.

(3) If an answer or part thereof is offered in evidence as an admission, the complaint or that portion thereof necessary to make the answer intelligible may and should also be offered.
Fla.—Randall v. Parramore, 1 Fla. 409.
N.C.—Lupton v. Day, 190 S.E. 722, 211 N.C. 443.

(4) Defendants were not required to offer the complaint to which the answer referred, which could not have affected the answer in so far as it related to the issue in question.—Redwater Land & Canal Co. v. Reed, 128 N.W. 702, 26 S.D. 466.

(5) In a suit by an oil and gas lessor to quiet title, where defendant lessee disclaimed as to all of the premises save ten acres, the lessor could not use the disclaimer to establish his title to all of the premises save the ten acres reserved in a release executed by the lessee, and at the same time attack the sufficiency of the reservation, the pleadings of the lessee setting up the disclaimer and reservation.—Osburn v. Finkelstein, 126 N.E. 11, 189 Ind. 90.

Entire conversation

In action for injuries to wife sustained when automobile driven by husband was struck by defendant's street car, defendant, in introducing testimony as to wife's statement to husband immediately after accident in which she admitted being at fault, should show the whole conversation, including the statements of the husband.—Friedman v. United Rys. Co. of St. Louis, 238 S.W. 1074, 293 Mo. 235.

22. Pa.—Heyman v. Hanauer, 152 A. 910, 302 Pa. 56—Swieczkowski v. Sypniewski, 144 A. 141, 294 Pa. 323—Buehler v. U. S. Fashion Plate Co., 112 A. 632, 269 Pa. 428.
22 C.J. p 344 note 81, p 412 note 19.

Duty of declarant

Under Pennsylvania practice, if an affidavit of defense only qualifiedly concedes a particular fact, should plaintiff offer it in evidence as if the fact were unqualifiedly admitted, it is the duty of defendant at that time to call attention to the qualification, by a proper objection, and, when this course is pursued, the court will not admit the evidence without the qualification; if it does, an exception may be entered in support of a future assignment of error.—Buehler v. U. S. Fashion Plate Co., supra.

23. Pa.—Heyman v. Hanauer, 152 A. 910, 302 Pa. 56.
"Where a party undertakes to prove an admission of another party, he must give the whole admission, and if a portion serves the party who made the admission, he must not leave it out."—Weaver v. Welsh, 191 A. 3, 6, 325 Pa. 571.

24. Mo.—Milliken v. Thyson Commn. Co., 100 S.W. 604, 202 Mo. 637.
Neb.—Sibert v. Hostick, 135 N.W. 1054, 91 Neb. 255.

25. Iowa.—Jones v. Mutual Acc. Ass'n, 61 N.W. 485, 92 Iowa 652.
N.Y.—Nixon v. Beacon Transp. Corporation, 264 N.Y.S. 114, 239 App. Div. 830.
22 C.J. p 412 note 21.

Pointing out other part

Admission of part of statement is not error as against contention that all of statement was not given where objector did not point out other parts he wished given, and in fact other parts were given.—Holler v. Miller, 9 A.2d 250, 177 Md. 204.

Where an answer admits due proof of death, but denies that death was caused by accident, plaintiff may read the admissions to the jury, without reading the denial.—Jones v. U. S. Mutual Acc. Ass'n, 61 N.W. 485, 92 Iowa 652.

26. N.C.—Wheless v. Edwards, 125 S.E. 4, 188 N.C. 457.
Pa.—City of Pittsburgh v. Pittsburgh Rys. Co., 83 A. 273, 234 Pa. 223—Real Estate-Land Title & Trust Co. v. Homer Building & Loan Ass'n, 10 A.2d 786, 138 Pa. Super. 563.
Tex.—Zachry v. City of Uvalde, Civ. App., 24 S.W.2d 517, affirmed Zachary v. City of Uvalde, Com.App., 42 S.W.2d 417—Burke v. Burke, Civ.App., 233 S.W. 990.
22 C.J. p 305 note 96, p 412 note 22.

Pleading

(1) A party may offer in evidence a portion of his adversary's pleading containing an admission of a distinct and separate fact, relevant to the inquiry, without being required to introduce accompanying, qualifying, or explanatory matter, the latter being open for the opposing party to introduce.
N.C.—Lupton v. Day, 190 S.E. 722, 211 N.C. 443—Sears, Roebuck & Co. v. Rouse Banking Co., 132 S.E. 468, 191 N.C. 500—Weston v. Royal Typewriter Co., 110 S.E. 581, 183 N.C. 1—Jones v. Norfolk Southern R. Co., 97 S.E. 48, 176 N.C. 260.
Pa.—Fichtner v. Fichtner, 99 Pa. Super. 584.

(2) In such case plaintiff offering part of answer is not bound by any part not specifically offered.—Crew Levick Co. v. Philadelphia Inv. Building & Loan Ass'n, 177 A. 498, 117 Pa.Super. 397.

(3) It has been held that the explanatory matter need not be offered at the same time if not modifying or altering the part containing the admission.—Wade v. McClean Contracting Co., 62 S.E. 919, 149 N.C. 177—Sawyer v. Roanoke R. & Lumber Co., 58 S.E. 598, 145 N.C. 24, 22 L. R.A.,N.S., 200—Lewis v. Norfolk & W. Ry. Co., 43 S.E. 919, 132 N.C. 382.

it being proper for him to introduce in evidence so much as he deems favorable to himself, leaving it to his adversary to show other portions of the statement or writing which may weaken the force of, or are contradictory to, the alleged admission.[27] A fortiori he is not required to show statements contradictory to the admission made at other times.[28]

A party who introduces a letter written by his adversary as an admission is not bound to read into the evidence the whole correspondence in the course of which such letter was written,[29] and where a defendant has put in two answers, plaintiff may avail himself of the first as an admission without introducing the second in evidence.[30]

Depositions. One party may be permitted to read a portion of a former deposition to prove admissions by the adverse party whose deposition he has taken[31] or which has been taken ex parte[32] in the cause pending, leaving it to the other party to read the remainder of the deposition.[33] However, while a party's deposition, taken in a suit between different parties, may be read in evidence against him as an admission, the rule is that the whole deposition must be read.[34]

Contradiction of part of writing. The party offering a written admission is not bound by all the statements in the writing, but may take advantage of such as are in his favor and contradict the rest.[35]

§ 374. Explanation or Limitation

A party making an admission at the trial may explain to the jury the extent of the facts he intended to admit in the absence of prejudice. Proponent of an alleged admission may argue to the jury his theory of the meaning of language in an answer which he has offered in evidence as an admission.

When a party to an action makes an admission at the trial, he should be permitted to explain to the jury the extent of the facts he intended to admit where the adversary was not misled or put to any disadvantage in reliance on the admission.[36] A party offering affirmative answers of his adversary in evidence as containing admissions may argue to the jury his theory of what the language used means.[37]

The right of declarant to explain, rebut, or contradict admissions against interest is considered infra §§ 379 and 380.

(4) Where the statute requires each paragraph of an answer to be sufficient in itself, it is not error to admit in evidence against the pleader, as an admission, a single paragraph of an answer filed in a former action between the same parties.—Kentucky & Indiana Cement Co. v. Cleveland, 30 N.E. 802, 4 Ind. App. 171.

27. Mo.—Rettlia v. Salomon, 274 S.W. 366, 368, 308 Mo. 673, citing **Corpus Juris.**
N.Y.—Nixon v. Beacon Transp. Corporation, 264 N.Y.S. 114, 239 App. Div. 830.
N.C.—Wheles v. Edwards, 125 S.E. 4, 188 N.C. 457.
Tex.—Zachry v. City of Uvalde, Civ. App., 24 S.W.2d 517, affirmed Zachary v. City of Uvalde, Com.App., 42 S.W.2d 417.
22 C.J. p 412 note 23.

A direct examination complete in itself is competent evidence of the party's testimony, he being present in court and able to state what he said upon cross-examination.—Johnson v. Powers, 40 Vt. 611.
Right of declarant to show entire statement see infra § 375.

28. S.C.—Edwards v. Ford, 18 S.C. L. 461.
22 C.J. p 412 note 24.

29. N.Y.—Lewis Pub. Co. v. Lenz, 83 N.Y.S. 841, 86 App.Div. 451.
22 C.J. p 412 note 25.

30. N.C.—Avery v. Stewart, 48 S.E. 775, 136 N.C. 426, 68 L.R.A. 776.

31. N.Y.—Nixon v. Beacon Transp. Corporation, 264 N.Y.S. 114, 239 App.Div. 830.
18 C.J. p 736 note 47.

Reason for rule
"The rules relative to reading parts of the deposition I think proceed on the old ground that a party may always use the admissions of the other side, or their answers to interrogatories, without putting in the whole admission or answer, leaving it to the trial judge, or to the other side, to require the whole answer, if explanatory, to be read."—Matter of Van Ness, 139 N.Y.S. 485, 78 Misc. 592, 614.

Changed deposition
Defendant may read original testimony contained in plaintiff's deposition and elicit from plaintiff causes for changes made as admission against interest.—Wilson v. Marland Refining Co., Mo.App., 7 S.W.2d 442.

Different proceeding
Admissions in depositions may be used in a different proceeding against the deponent without reading all of the depositions.—Hope v. Walsenburg First Nat. Bank, 82 S.E. 929, 142 Ga. 310.

32. Tex.—Watson v. Winston, Civ. App., 43 S.W. 852.

33. N.Y.—Nixon v. Beacon Transp. Corporation, 264 N.Y.S. 114, 239 App.Div. 830.
18 C.J. p 736 note 49.

Absence of objection
Part of defendant's deposition, offered by plaintiff as an admission by defendant, was admissible, where plaintiff suggested that he had no objection to defendant reading the remainder.—Rettlia v. Salomon, 274 S.W. 366, 308 Mo. 673.

34. Mo.—Kritzer v. Smith, 21 Mo. 296.
18 C.J. p 736 note 50.

35. Pa.—McAvoy v. Commonwealth Title, Ins. & Trust Co., 27 Pa.Super. 271.
22 C.J. p 413 note 28.

Self-serving declarations in writing containing admissions.—Heyman v. Hanauer, 152 A. 910, 302 Pa. 56.

Pleading
No estoppel results from the use of an adversary's pleading as an admission, but the party may use so much of the pleading as operates as an admission in his favor and disprove other allegations of the pleading.—Mott v. Consumers' Ice Co., 73 N.Y. 543—Algase v. Horse Owners' Mut. Indemn. Ass'n, 29 N.Y.S. 101, 77 Hun 472.
Admissions in pleadings in former proceedings as estoppel see Estoppel § 121.

36. Ga.—Hutchinson v. Woodward, 89 S.E. 208, 145 Ga. 325.

37. Wash.—National Ass'n of Creditors v. Grassley, 292 P. 416, 159 Wash. 185.

§ 375. Right to Show Entire Statement

a. Party offering admission
b. Party against whom admission introduced

a. Party Offering Admission

The party offering an admission may show other parts of the conversation to enhance its effect and support the probability that it was made.

The party by whom an admission is offered may show other portions of the conversation in which it occurred, which tend to explain the admission and support the probability that it was actually made,[38] or to accentuate the admission.[39]

b. Party against Whom Admission Introduced

When part of a statement is in evidence as an admission, judicial or extrajudicial, the party affected thereby may offer the whole thereof in so far as it is relevant to rebut, explain, qualify, or contradict the alleged admission.

Where one party brings out part of a transaction, conversation, statement, writing, or course of conduct as an admission against interest, the other party may thereafter bring out the whole of it to offer his own explanation thereof and rebut its discrediting and damaging effect, even though proof otherwise incompetent is used.[40] Accordingly, where an oral admission of a party has been shown, he is entitled to show the entire statement which was made at the same time,[41] either by cross-examination of the witness who testified to the admission,[42] or by means of other witnesses.[43] If made in the course of a conversation the whole of the conversation bearing thereon may be admitted,[44] including what was said by both parties thereto,[45] if the statement claimed to be an admission cannot be properly understood except in connection with what was said by the other party.[46] However, only such parts of the conversation as are relevant to the admission may be shown,[47] and portions which are of no value in explaining or qualifying it and are otherwise incompetent as irrelevant or prejudicial should be excluded.[48]

Remarks and statements of witness. Where part of a conversation is introduced as an admission of the party, and in that conversation reference was had to expressions used by him on former occasions, he may bring these forward so far as they are required to render complete and intelligible the conversation first shown in evidence.[49]

In the case of written admissions, the entire writing, so far as it relates to the subject matter of the admission may and should be received in evidence,[50]

38. Mo.—Lanham v. Vesper-Buick Automobile Co., App., 21 S.W.2d 890, 894, quoting **Corpus Juris.**
22 C.J. p 413 note 29.

39. Mo.—Lanham v. Vesper-Buick Automobile Co., supra, quoting **Corpus Juris.**
S.C.—Devlin v. Kilcrease, 27 S.C. L. 425.

40. Iowa.—Reeves v. Lyon, 277 N. W. 749, 224 Iowa 659.
Mo.—Dunn v. Alton R. Co., App., 88 S.W.2d 224.
N.H.—Charles G. Clapp Co. v. McCleary, 192 A. 572, 89 N.H. 65.
17 C.J. p 1307 note 8.

41. Ala.—First Nat. Bank v. Lartigue, 173 So. 21, 24, 233 Ala. 670, citing **Corpus Juris.**
Cal.—Handley v. Lombardi, 9 P.2d 867, 122 Cal.App. 22.
Md.—State for Use of Balderston v. Hopkins, 196 A. 91, 92, 173 Md. 321, citing **Corpus Juris.**
Mo.—O'Sullivan v. Wells, App., 10 S.W.2d 313.
22 C.J. p 413 note 32.

As to payment
Where a creditor admitted the receipt of money from his debtor, but stated it to be a loan, the admission taken together does not amount to proof of payment.—Oldham v. Henderson, 4 Mo. 295.

42. Iowa.—Geddes v. McElroy, 154 N.W. 320, 171 Iowa 633.
22 C.J. p 413 note 33.

43. Ala.—First Nat. Bank v. Lartigue, 173 So. 21, 233 Ala. 670.
22 C.J. p 413 note 34.

44. Iowa.—Reeves v. Lyon, 277 N. W. 749, 224 Iowa 659.
22 C.J. p 413 note 32 [a].

Hearsay
The rule that all of the conversation is admissible when it explains a part thereof already put in evidence cannot be used to secure the admission of hearsay evidence as to what another told the witness.—Jaquith v. Worden, 123 P. 33, 73 Wash. 349, 48 L.R.A.,N.S., 827.

45. Mo.—O'Sullivan v. Wells, App., 10 S.W.2d 313.
22 C.J. p 414 note 35.

46. Mo.—O'Sullivan v. Wells, supra.
22 C.J. p 414 note 36.

47. Iowa.—Kuhn v. Kjose, 248 N. W. 230, 216 Iowa 36.

48. Ill.—Young v. Bennett, 5 Ill. 43.
Iowa.—Kuhn v. Kjose, 248 N.W. 230, 260 Iowa 36.
N.H.—McCurdy v. Flibotte, 139 A. 367, 83 N.H. 143.

Fact of insurance in accident case
(1) Reference to insurance as part of a statement by defendant admitting fault in accident should be excluded if it can be done without substantially impairing or affecting the natural force of the admission.—McCurdy v. Flibotte, supra.

(2) Testimony in personal injury suit as to defendant's statement that he had insurance covering damage was not admissible to explain testimony as to his statement in same conversation of how accident happened.—Kuhn v. Kjose, 248 N.W. 230, 216 Iowa 36—McDermott v. Johnson, 186 N.W. 630, 193 Iowa 19.

(3) However, it has been stated that the fact that, in a conversation wherein defendant admitted ownership of the horse causing the injuries, he said that the horse was insured does not deprive plaintiff of the right to show entire conversation.—Flieg v. Levy, 133 N.Y.S. 249, 148 App.Div. 781.

49. Iowa.—Hutton v. Doxsee, 89 N. W. 79, 116 Iowa 13.
N.H.—Barker v. Barker, 16 N.H. 333.

50. U.S.—Cox v. U. S., C.C.A.Ill., 103 F.2d 133.
N.Y.—American Can Co. v. Schlechter, 213 N.Y.S. 195, 126 Misc. 178.
Pa.—Weaver v. Welsh, 191 A. 3, 325 Pa. 571.
22 C.J. p 414 note 39.

Reason for rule
"It is to the sum total that the speaker has committed himself."—

even though self-serving,[51] and where two writings are clearly connected, the admission of one renders the other competent.[52] It has even been held that a contemporaneous oral explanation of a written admission may be shown.[53]

Judicial admissions in the same[54] or another[55] action are subject to the same rule. Thus, when one party introduces evidence given at a former trial,[56] or shows statements contained in a deposition,[57] or in the pleadings in the same[58] or another[59] action, the entire statement with relation to the subject matter of the admission should be received. Hence, such parts of the testimony given at a former proceeding as are not on the same subject as that in evidence as an admission and which are not necessary to make understood or to explain that in evidence are properly excluded.[60]

Self-serving statements. The right to introduce the entire statement is limited to matters which tend to qualify or explain the admission, and does not extend to unconnected self-serving statements.[61] A fortiori, the party whose admission has been shown

Holler v. Miller, 9 A.2d 250, 252, 177 Md. 204.

Qualifying elements

A part of a written statement offered against a party must be accompanied by all other relevant parts, and all parts possibly tending to qualify the admissions or to present the whole effect of what was said or written on the point involved must be given to the jury.—Holler v. Miller, supra.

Exclusion of part

Excluding evidence of isolated statement in income tax return was not error, where effect of whole return which is in evidence was at variance with it.—In re Williams' Estate, 258 P. 851, 145 Wash. 19.

51. N.Y.—Hirsch v. Lichtenstein, 139 N.Y.S. 4, 79 Misc. 31.
22 C.J. p 305 note 97.

52. N.H.—Charles G. Clapp Co. v. McCleary, 192 A. 572, 89 N.H. 65.
22 C.J. p 414 note 40.

Letters

(1) The rule of the text has been applied to letters.

N.Y.—Lewis Pub. Co. v. Lenz, 83 N.Y.S. 841, 86 App Div. 451—Lexow v. Belding, 76 N.Y.S. 602, 72 App. Div. 446.

Pa.—Glatfelter v. Mendels, 46 Pa. Super. 562.

(2) A letter accompanying a statement of account is within the rule.—Morris v. Jamieson, 68 N.E. 742, 205 Ill. 87, affirming 99 Ill.App. 32.

(3) Where letter is read as party's admission, his answer may be admissible in reply.—Charles G. Clapp Co. v. McCleary, 192 A. 572, 89 N.H. 65.

53. Okl.—Kirschner v. Kirschner, 36 P.2d 297, 300, 169 Okl. 129, citing **Corpus Juris.**
22 C.J. p 414 note 41.

Conflicting statement

Where, in personal injury action, defendant introduced plaintiff's application for life insurance containing statement that plaintiff's recovery from injuries was good, evidence of plaintiff's oral declarations, made at time of execution of application and in direct conflict with written statement, was admissible in rebuttal as part of transaction.—Kirschner v. Kirschner, 36 P.2d 297, 169 Okl. 129.

54. Mich.—Merrill v. Leisenring, 131 N.W. 538, 166 Mich. 219.
N.Y.—American Can Co. v. Schlechter, 213 N.Y.S. 195, 126 Misc. 178.
Pa.—Weaver v. Welsh, 191 A. 3, 325 Pa. 571.

55. W.Va.—Waldron v. W. M. Ritter Lumber Co., 94 S.E. 393, 80 W.Va. 792.
22 C.J. p 414 note 43.

56. Iowa.—Reeves v. Lyon, 277 N.W. 749, 224 Iowa 659.
Tenn.—West v. Southern Ry. Co., 100 S.W.2d 1004, 20 Tenn.App. 491.
22 C.J. p 414 note 44.

Unrecorded explanation

Party is entitled to prove that he made explanations at the time which were not taken down.—Boardman v. Wood, 3 Vt. 570.

Where relevant cannot be readily separated from the irrelevant in a party's testimony, the whole may be read.—Eaton v. New England Tel. Co., 68 Me. 63.

57. Mo.—Rettlia v. Salomon, 274 S.W. 366, 308 Mo. 673—Southern Bank v. Nichols, 100 S.W. 613, 202 Mo. 309—Meyer v. Dubinsky Realty Co., App., 133 S.W.2d 1106.
N.H.—Robinson v. New England Cable Co., 111 A. 269, 79 N.H. 398.
N.Y.—National Fire Ins. Co. of Hartford, Conn., v. Shearman, 227 N.Y.S. 522, 223 App.Div. 127.
22 C.J. p 414 note 45.

Irrelevant parts

Plaintiff can at the trial read from a deposition taken on behalf of defendant, which was incompetent, admissions made by defendant's counsel in open court without permitting the other parts of the deposition to be read in evidence.—Lanter v. Southern States Life Ins. of Alabama, 104 S.E. 193, 114 S.C. 536.

As against codefendant

Where deposition of one defendant taken in another case was offered as an admission against interest as to such defendant alone, this did not justify introduction of many parts of the deposition which bore not on such defendant's liability, but related wholly to the liability of his codefendant, such parts being easily separable.—Vest v. S. S. Kresge Co., Mo.App., 213 S.W. 165.

58. La.—Fontenot v. Ludeau, 186 So. 21, 191 La. 540, followed in Deshotels v. Ludeau, 186 So. 26, 191 La. 554, Fontenot v. Ludeau, 186 So. 26, 191 La. 555, McDaniel v. Ludeau, 186 So. 26, 191 La. 556, Fontenot v. Ludeau, 186 So. 27, 191 La. 557 and Tate v. Ludeau, 186 So. 27, 191 La. 558.
N.C.—Malcolm v. Mooresville Cotton Mills, 133 S.E. 7, 191 N.C. 727.
Pa.—Weaver v. Welsh, 191 A. 3, 325 Pa. 571.
S.C.—Murph v. Lincoln Reserve Life Ins. Co., 105 S.E. 698, 115 S.C. 318.
22 C.J. p 414 note 46.

Superseded pleading

The admission in evidence of certain sections of plaintiff's superseded original petition was not error where those sections were relative to further portions of that petition, a preceding paragraph of which had already been admitted at instance of defendant and were but explanatory thereof.—Joy v. Peacock, Tex.Civ.App., 131 S.W.2d 1012, error granted.

Inadmissible pleading

Such parts of a party's pleadings as do not explain or qualify other parts thereof in evidence as admissions are not admissible.—Bridgers v. Farmers' Banking & Trust Co., 152 S.E. 393, 198 N.C. 494—Weston v. Royal Typewriter Co., 110 S.E. 581, 183 N.C. 1.

59. Ala.—Callan v. McDaniel, 72 Ala. 96.
22 C.J. p 414 note 47.

60. Iowa.—Jones v. Krambeck, 290 N.W. 56.

61. Iowa.—Jones v. Krambeck, supra.
N.Y.—American Can Co. v. Schlechter, 213 N.Y.S. 195, 126 Misc. 178.
22 C.J. p 414 note 48.

Pleading

(1) Where only a part of a pleading is put in evidence as an admission, the pleader may not use other parts of the pleading to relieve himself from supporting its averments by proof.—City of Pittsburgh v. Pittsburgh Rys. Co., 83 A. 273, 234

cannot introduce his self-serving statements made on another and separate occasion.[62]

§ 376. Entire Statement to Be Considered

The favorable and unfavorable parts of a statement in evidence as an admission must be considered and weighed together, although it is for the triers of the facts to determine what weight to give to either.

When an entire statement is admitted in evidence, the favorable or self-serving part of it must be duly considered and weighed together with the unfavorable part.[63] However, all parts of the statement are not necessarily to be regarded as worthy of equal credit.[64] The triers of fact may reject such portions, if any, as appear to be inconsistent, improbable, or rebutted by other circumstances in evidence;[65] but they are not at liberty to ignore or disbelieve the favorable or self-serving part capriciously and without any reasonable grounds.[66] It has been said that they cannot believe part and disbelieve another part unless such parts are distinct and relate to different matters or facts.[67]

The assertion of a legal right to do an act, coupled with an admission that the party did the act, does not neutralize the admission.[68]

§ 377. Construction of Statements

The language of an admission should be construed in light of the purpose for which it was used and in connection with the circumstances, and it should be construed to include only such admissions of facts as are reasonably inferable therefrom.

Ordinarily the whole of an admission is to be taken and construed together.[69]

The language of a party should be construed in view of the purpose for which it is used,[70] and in connection with the surrounding circumstances and

Pa. 223—Crew Levick Co. v. Philadelphia Inv. Building & Loan Ass'n, 177 A. 498, 117 Pa.Super. 397.

(2) Part of pleading against interest of pleader is evidence of what is stated, but what appears in favor of pleader is not evidence of what is stated, although whole pleading is in evidence.—Hildreth v. Hudloe, Mo. App., 282 S.W. 747.

(3) Other illustrations see 22 C.J. p 414 note 48 [a] (3), (5).

62. Ohio.—Bry v. Miller, 179 N.E. 194, 40 Ohio App. 582.
22 C.J. p 415 note 49.

63. Md.—Holler v. Miller, 9 A.2d 250, 177 Md. 204—Askin v. Moulton, 131 A. 82, 85, 149 Md. 140, quoting **Corpus Juris.**
Mo.—Concrete Steel Co. v. Reinforced Concrete Co., App., 72 S.W.2d 118, 121, citing **Corpus Juris.**
Neb.—Warnick v. Warnick, 187 N.W. 51, 107 Neb. 747.
Okl.—Johnson v. Bement, 235 P. 535, 109 Okl. 260.
Pa.—Weaver v. Welsh, 191 A. 3, 325 Pa. 571.
Tenn.—Nelson v. Rural Educational Ass'n, 134 S.W.2d 181, 190, 23 Tenn. App. 409—Nichols v. Smith, 111 S.W.2d 911, 917, 21 Tenn.App. 478—West v. Southern Ry. Co., 100 S.W.2d 1004, 20 Tenn.App. 491.
Utah.—State v. Dunkley, 39 P.2d 1097, 1109, 85 Utah 546, quoting **Corpus Juris.**
22 C.J. p 415 note 50.
" 'Every admission upon which a party relies is to be taken as an entirety of the fact which makes for his side, with the qualifications which limit, modify, or destroy its effect on the other side.' "—Nelson v. Rural Educational Ass'n, supra—Nichols v. Smith, supra.

Judicial admissions

(1) Under some statutes a judicial admission must not be divided against the litigant who makes it but must be taken for all that is said in the admission.—Daspit v. Sinclair Refining Co., 3 So.2d 259, 198 La. 9.

(2) Admission in an adversary's pleadings, to be available, must be taken with qualifications and limitations, and, where facts alleged in connection therewith nullify it, its effect as an admission is destroyed.—Johnson v. Bement, 235 P. 535, 109 Okl. 260—Oklahoma Moline Plow Co. v. Smith, 139 P. 285, 41 Okl. 498.

(3) Court must give due credit to all allegations of affidavit of defense offered in evidence by plaintiff.—E. J. Keller Co. v. Reading Co., C.C.A.Pa., 49 F.2d 33.

(4) In depositor's action on bank's implied obligation to pay deposit where depositor rested on admissions in pleadings, affidavit of defense pleading express agreement that money was not to be repaid would be considered, notwithstanding substantive defense based on new matter could not be considered, since scope of defendant's admissions are defined by denials and by affirmative allegations.—Dektor v. Overbrook Nat. Bank of Philadelphia, D.C.Pa., 10 F. Supp. 894, affirmed, C.C.A., 77 F.2d 491, certiorari denied 55 S.Ct. 917, 295 U.S. 755, 79 L.Ed. 1698, rehearing denied 56 S.Ct. 82, 296 U.S. 661, 80 L.Ed. 471.

(5) Defendant's admission, in action on life policy that policy was still in force, did not entitle plaintiff to recover thereon, where defense of misrepresentations was asserted elsewhere in affidavit of defense.—Boyle v. Eureka-Maryland Assur. Corporation, 176 A. 33, 116 Pa.Super. 61.

64. Md.—Askin v. Moulton, 131 A. 82, 85, 149 Md. 140, quoting **Corpus Juris**—Reynolds v. Manning, 15 Md. 510.
Mo.—Concrete Steel Co. v. Reinforced Concrete Co., App., 72 S.W.2d 118, 121, citing **Corpus Juris.**
Tenn.—Nelson v. Rural Educational Ass'n, 134 S.W.2d 181, 23 Tenn. App. 409.
22 C.J. p 415 note 51.

65. Md.—Askin v. Moulton, 131 A. 82, 85, 149 Md. 140, quoting **Corpus Juris**—Reynolds v. Manning, 15 Md. 10.
Tenn.—Nelson v. Rural Educational Ass'n, 134 S.W.2d 181, 23 Tenn.App. 409—West v. Southern Ry. Co., 100 S.W.2d 1004, 20 Tenn.App. 491.
22 C.J. p 415 note 52.

66. Md.—Askin v. Moulton, 131 A. 82, 149 Md. 140.
Mo.—Concrete Steel Co. v. Reinforced Concrete Co., App., 72 S.W. 2d 118.
Tenn.—Nelson v. Rural Educational Ass'n, 134 S.W.2d 181, 23 Tenn.App. 409.
22 C.J. p 415 note 53.

67. N.J.—Fox v. Tambson, 8 N.J. Law 275.

68. N.H.—Moore v. Ross, 11 N.H. 547.

69. N.H.—McCurdy v. Flibotte, 139 A. 367, 83 N.H. 143.

70. Mo.—Concrete Steel Co. v. Reinforced Concrete Co., App., 72 S.W. 2d 118, 121, citing **Corpus Juris.**
N.Y.—In re Berardini's Will, 264 N.Y.S. 479, 238 App.Div. 433, affirmed In re Berardini, 189 N.E. 730, 263 N.Y. 627.
22 C.J. p 416 note 56.

statements.[71] The statement will not be subjected to a strained construction in order to deduce therefrom an admission,[72] nor will it be so construed as to include admissions of fact not reasonably inferable therefrom,[73] it being available against declarant only where it is reasonably susceptible of a con-

71. Iowa.—Degner v. Anderson, 239 N.W. 790, 213 Iowa 588.
N.C.—Wm. Whitman, Inc., v. York, 133 S.E. 427, 192 N.C. 87.
Pa.—Pfeiffer v. Dyer, 145 A. 284, 295 Pa. 306.

72. Ga.—Selman v. Wallace, 165 S.E. 851, 45 Ga.App. 688.
Mass.—Bodell v. Sawyer, 3 N.E.2d 279, 294 Mass. 534.
Mo.—Williams v Maxwell, 82 S.W.2d 270—Williams v American Life & Accident Ins. Co., App., 112 S.W.2d 909—Concrete Steel Co. v. Reinforced Concrete Co., App., 72 S.W. 2d 118, 121, citing **Corpus Juris.**
Neb.—Evans v. Kelly, 178 N.W. 630, 104 Neb 712.
Or.—McCarty v. Sirianni, 285 P. 825, 132 Or. 290
Vt.—Holbrook Grocery Co. v. Armstrong, 122 A 458, 97 Vt. 197.
22 C.J. p 416 note 57.

Statements not admissions
Ky.—Childers v. Johnson's Ex'rs, 100 S.W.2d 834, 267 Ky. 657—Wilson v. Smith, 20 S.W.2d 472, 230 Ky. 648.

73. Ark.—Tri-State Packet Co. v. G. R. Brickey Mercantile Co., 235 S.W. 40, 150 Ark. 657.
Cal.—McGillivray v. Hampton, 179 P. 733, 38 Cal.App. 726.
Ill.—Stateman v. Travelers Casualty Ins. Co., 15 N.E.2d 607, 296 Ill. App. 5.
Ky.—Joyeux v. Anderson-Dulin-Varnell Co., 281 S.W. 796, 213 Ky. 658.
La.—Daspit v. Sinclair Refining Co., 3 So 2d 259, 198 La. 9.
Mo.—Dimond v. Terminal R. Ass'n of St. Louis, 141 S.W.2d 789—State ex rel. Rawlings v. Kansas City, 250 S.W. 927, 213 Mo.App. 349.
N.H.—Lavigne v. Nelson, 18 A.2d 832.
Or.—In re Stafford's Estate, 28 P.2d 840, 145 Or. 510.
Pa.—Rowland v. Canuso, 196 A. 823.
Wis.—Brochu v. Taylor, 269 N.W. 711, 223 Wis. 90.

Conclusion of law
Employer's statement that injury to automobile salesman was received in course of salesman's employment did not constitute "admission" that salesman was engaged, at time of accident in which salesman's guest was fatally injured, in trying to sell the guest an automobile, which was only way in which salesman could have been so engaged as to impose liability on employer and its insurer for guest's death, such statement being a conclusion of law.—Hanson v. Engebretson, 294 N.W. 817, 237 Wis. 126.

Admission as to what witness would say is not admission of truth of testimony which would be thus given.—Lummi Bay Packing Co. v. Kryder, Mo.App., 263 S.W. 543.

Admission of contract implies merely its execution and not its contents.—Erdman v. Upham, 75 N.Y.S. 241, 70 App.Div. 315.

Admissions by counsel
Admission of counsel that there was no evidence that damage from flowage was because of logs, was not an admission that their presence in stream was proper.—Goddard v. Berlin Mills Co., 131 A. 601, 82 N.H. 225.

Agreed statement of fact
(1) Agreed statement of facts does not admit conclusions of law or of fact drawn therefrom.—Winn v. Herring-Hall-Marvin Safe Co., 126 S.E. 879, 33 Ga.App. 419.

(2) Admission therein that retention of title contract which was basis of suit was recorded did not admit that it was legally entitled to record, or that record constituted constructive notice.—Winn v. Herring-Hall-Marvin Safe Co., supra.

(3) Nor was admission that one party to case was chargeable with constructive notice as law might imply from record of instrument admission that constructive notice existed in fact.—Winn v. Herring-Hall-Marvin Safe Co., supra.

Agency or employment not admitted
Iowa.—Burns v. Eno, 240 N.W. 209, 213 Iowa 881.
N.Y.—Craciola v. Lewis, 253 N.Y.S. 752, 233 App.Div. 437.
Ohio—Lombardi v. Silver, App., 32 N.E 2d 558.
Pa.—Zimmer, to Use of Hammer, v. Zsigmond, 167 A. 405, 109 Pa.Super. 322.

Contract not proved
In action on alleged oral contract to pay for advertising concept, alleged statement of defendant's vice president in telephonic conversation that plaintiff's idea had landed advertising contract was at most an admission and was not proof of the fact of the contract.—Sollows v. McCann Erickson, Inc., D.C.N.Y., 27 F. Supp. 491.

Fault or liability not admitted
U.S.—Zurich General Accident & Liability Ins. Co. v. Mid-Continent Petroleum Corporation, C.C.A.Okl., 43 F.2d 355.
Ill.—McKeown v. Western Union Telegraph Co., 231 Ill.App. 503.
La.—Proctor v. Opelousas Ins. Agency, 158 So. 627, 181 La. 79—Riggs v. New Orleans, T. & M. Ry. Co., 87 So. 723, 148 La. 717.
Mass.—Casey v. Boston & M. R. R., 121 N.E. 403, 231 Mass. 529.
Mo.—Olian v. Olian, 59 S.W.2d 673, 332 Mo. 689—O'Neal v. Grand Lodge of Brotherhood of Railroad Trainmen, 261 S.W. 128, 216 Mo. App. 212.
Mont.—Loudon v. Scott, 194 P. 488, 58 Mont. 645, 12 A.L.R. 1487.
N.H.—Alexander v. Todd, 199 A. 82, 89 N.H. 365—Rouleau v. Blotner, 152 A. 916, 84 N.H. 539.
Or.—Casto v. Hansen, 261 P. 428, 123 Or. 20.
Tenn.—Nichols v. Smith, 111 S.W.2d 911, 21 Tenn.App. 478.
22 C.J. p 416 note 57 [c].

Inferences from conduct
(1) Employer's secretary's statement, that he would stop its contractor's trespassing, was not acknowledgment that contractor was servant.—Massee & Felton Lumber Co. v. Macon Cooperage Co., 162 S.E. 396, 44 Ga.App. 590.

(2) Where president of corporation placed checking account in his name as trustee for himself and one nephew, the balance to be paid to the survivor, action of nephew, after death of president, in placing account in his name and that of his brother as joint tenants, could not be construed as admission that corporation, in which nephew and his brother owned majority stock after death of president and of which they were executives, had interest in account.—Dougherty v. Dougherty, 2 A.2d 433, 175 Md. 441.

(3) Defendant's failure to respond to notice that note and guaranty sued on would be introduced in evidence merely admitted genuineness of signatures, but not that guaranty was guaranty of obligation evidenced by note.—North American Bond & Mortgage Co. v. Twohy, 293 P. 717, 159 Wash. 442.

Innuendo
Admission by defendant that facts alleged in telegram charging him by innuendo with crime of wrongfully disposing of mortgaged property were true, without admission that he committed crime as charged, was not admission of truth of charge.—Williams v. Equitable Credit Co., 126 S.E. 855, 33 Ga.App. 441.

Patent infringement
Although defendant admitted that a prior device infringed complainant's patent, complainant cannot in a subsequent suit recover on the theory that defendant's last device was a mechanical equivalent of the first, for such use of the admission is im-

struction involving an admission as to the matter in question.[74] The statement is, however, competent evidence of all that can justly be inferred from it.[75]

In aid of the construction of an admission the subsequent course of both parties on the trial may be considered.[76]

The meaning or construction of a statement offered as an admission is ordinarily for the trier of the facts.[77] It has been held, however, that the construction of a concession as to a fact made at the

proper, as it would allow the measuring of complainant's rights by the admission, instead of by the patent. —Universal Form Clamp Co. v. Taxis, C.C.A.Ill., 267 F. 578, certiorari denied Taxis v. Universal Form Clamp Co., 41 S.Ct. 14, 254 U.S. 642, 65 L.Ed. 453.

Admissions held not inferable

Cal.—Canal Oil Co. v. National Oil Co., 66 P.2d 197, 19 Cal.App.2d 524 —Linde v. Emmick, 61 P.2d 338, 16 Cal.App.2d 676.

Ga.—Selman v. Wallace, 165 S.E. 851, 45 Ga.App. 688—Pelotte v. Simmons, 152 S.E. 310, 41 Ga.App. 198.

Mo.—Moldovan v. John Hancock Mut. Life Ins. Co., App., 124 S.W.2d 541 —Varner v. Kroger Grocery & Baking Co., App., 75 S.W.2d 585.

N.H.—Byron v. Boston & M. R. R., 136 A. 250, 82 N.H. 434.

N.M.—State v. New Mexican Printing Co., 177 P. 751, 25 N.M. 102.

Or.—Topolos v. Skotheim, 270 P. 753, 126 Or. 683.

Pa.—Vasey v. McLean, 165 A. 241, 310 Pa. 282.

Tex.—Mason v. Peterson, Com.App., 250 S.W. 142, reversing, Civ.App., 232 S.W. 567—Davis v. Cox, Civ. App., 229 S.W. 987, reversed on other grounds, Com.App., 239 S.W. 917.

74. N.Y.—Hayes v. Claessens, 179 N.Y.S. 153, 189 App.Div. 449.
22 C.J. p 416 note 58.

Refusal to deny

Statement by owner sought to be enjoined from violating zoning ordinance that she would not contradict that there were three families in house was sufficient to show three-family occupancy.—Buckley v. Baldwin, 244 N.Y.S. 295, 230 App.Div. 245.

Statement of lack of memory as to a fact does not constitute an admission.—Mertens v. McMahon, Mo. App., 28 S.W.2d 456, transferred, see 66 S.W.2d 127, 334 Mo. 175, 93 A.L.R. 1285.

Admission of criminal conviction

An admission that motorist has been found guilty of violating statute prohibiting operation of automobile, so as to endanger the lives and safety of the public, is not an admission of the fact of violation and has no probative force to show negligence of motorist sued by guest for injuries sustained in collision.—Blackman v. Coffin, 15 N.E.2d 469, 300 Mass. 432.

75. Ga.—Johnson v. People's Bank, 137 S.E. 104, 36 Ga.App. 570.
22 C.J. p 417 note 59.

Admission of fault or liability

Mass.—Rosen v. Burnham, 172 N.E. 894, 272 Mass. 583—Bernasconi v. Bassi, 158 N.E. 341, 261 Mass 26 —Wiseman v. Rome, 146 N.E. 28, 250 Mass 505—Dennison v Swerdlove, 146 N.E. 27, 250 Mass. 507.

N.H.—L'Esperance v. Sherburne, 155 A. 203, 85 N.H. 103.

Scope of employment

Mo.—Tutie v. Kennedy, App., 272 S.W. 117.

Statement not opinion

Landlord's admission in month of September that cropper will have approximately a certain amount of cotton and corn as his share of crop cannot, in garnishment by cropper's creditor, be adjudged a mere speculative opinion or prophecy, but may be construed as stating that the crop had reached the point of development where its yield was capable of definite ascertainment.—Woods v. Lewis, 116 S.E. 542, 30 Ga.App. 76.

Validity of preliminary steps or proceedings

(1) Admission that valid patent had been issued carried with it admission that there had been a compliance with all requirements preliminary to issue of patent.—La Terre Co. v. Billiot's Shell Island, D.C.La., 20 F.Supp. 106, affirmed, C.C.A., 103 F.2d 53.

(2) Admission of validity of original assessment for water and sewer system was admission that necessary steps preliminary thereto were had.—Washington Suburban Sanitary Commission v. Scrivener, 137 A. 492, 153 Md. 68.

Admission of judgment implies validity of the judgment.—McCurdy v. Ryan, 76 N.W. 1079, 56 Neb. 511.

Permission includes control

Landlord's assertion that permission was accorded tenant to use roof for limited purposes, constitutes admission that control of roof was in landlord.—Reiman v. Moore, Cal. App., 108 P.2d 452.

Pleading

Iowa.—Hamilton v. Sprague, 209 N.W. 446, 202 Iowa 47.

Admissions held inferable

Cal.—Logan v. Andrews, 78 P.2d 748, 25 Cal.App.2d 683.

Conn.—Town of Newton v. Town of Southbury, 123 A. 278, 100 Conn. 251.

Me.—Roux v. Morey, 148 A. 406, 128 Me. 428.

N.Y.—Craciola v. Lewis, 253 N.Y.S. 752, 233 App.Div. 437.

Tex.—Stephenson v. Barrow, Com. App., 15 S.W.2d 575, reversing Stevenson v. Barrow, Civ.App., 5 S.W.2d 200.

76. Ala.—Missouri State Life Ins. Co. v. Finn, 145 So. 141, 143, 225 Ala. 672, citing **Corpus Juris.**

N.Y.—Akers v. Overbeck, 41 N.Y.S. 382, 18 Misc. 198.

77. Cal.—Kohlhauer v. Broustein, 67 P.2d 1078, 21 Cal.App.2d 4.

Conn.—Lesser v. Smith, 160 A. 302, 115 Conn. 86.

Iowa.—Cerny v. Secor, 234 N.W. 193, 211 Iowa 1232.

Me.—Roux v. Morey, 148 A. 406, 128 Me. 428.

N.H.—U. S. Fidelity & Guaranty Co. v. Dunn, 7 A.2d 246, 90 N.H. 236 —Byron v. Boston & M. R. R., 136 A. 250, 82 N.H. 434.
22 C.J. p 417 note 61.

In light of other evidence, court was not bound to draw inference which might have been claimed to arise from alleged judicial admission.—Lesser v. Smith, 160 A. 302, 115 Conn. 86.

Inferences to be drawn are for jury.

Mass.—Kenyon v. Vogel, 145 N.E. 462, 250 Mass. 341.

N.J.—Ollert v. Ziebell, 114 A. 356, 96 N.J.Law 210.

Facts admitted in pleadings

(1) The scope and extent of admissions contained in a pleading offered in evidence are for the triers of the facts.—Dektor v. Overbrook Nat. Bank of Philadelphia, D.C.Pa., 10 F.Supp. 894, affirmed, C.C.A., 77 F.2d 491, certiorari denied 55 S.Ct. 917, 295 U.S. 755, 79 L.Ed. 1698, rehearing denied 56 S.Ct. 82, 296 U.S. 661, 80 L.Ed. 471.

(2) Where plaintiff rests case on admissions in pleadings, in case of dispute, what the facts sought to be established as admitted are must be determined by court, and, as so determined, they, and not pleadings, become evidence for purposes of trial.—Dektor v. Overbrook Nat. Bank of Philadelphia, supra.

(3) If fact is asserted in paragraph of statement of claim, corresponding paragraph of affidavit of defense is to be considered only for purpose of seeing how far it limits or how much it subtracts from asserted fact, and remainder, after court has made subtraction, is the

trial is for the judge and not the jury.[78]

§ 378. Denial of Statements

A categorical denial of the making of an admission is proper, such a denial raising a question of fact for the triers of the facts.

A party against whom an admission is introduced in evidence may categorically deny that he made such admission,[79] or may give his own version of the alleged conversation or statement.[80] Such a denial does not destroy the probative effect or value of the alleged admission;[81] it merely raises a question of credibility as between the party declarant and witnesses testifying to the admission for the triers of the facts to determine.[82]

§ 379. Conclusiveness of Admissions

Admissions against interest are sometimes divided into "true" admissions, which are conclusive, and "quasi" admissions, which constitute a mere item of evidence in the case.

Some cases distinguish between what they term "true admissions" and "quasi admissions," defined in § 270 supra, the former being considered conclusive and made to dispense with proof of the fact admitted, while the latter are considered as mere items of evidence in no sense final or conclusive.[83] It has been said that except when formally made at the trial, an admission is at most only evidentiary matter which may be rendered nugatory by other evidence in the case.[84]

§ 380. Extrajudicial Admissions

Except where estoppel elements are present, extrajudicial admissions are not conclusive on the party against whom offered. They may be explained, rebutted, or contradicted by proper evidence.

Except where the elements of estoppel exist,[85] an extrajudicial admission is not conclusive on the party making it or to whom it is attributable,[86] where testimony to the contrary or in explanation

evidence.—Dektor v. Overbrook Nat. Bank of Philadelphia, supra.

Inferences from conduct

Jury could infer that defendant's payment for medical attention to plaintiff, injured in automobile collision, was due to representation by defendant's employee that he was at fault.—Watt v. Associated Oil Co., 260 P. 1012, 123 Or. 50.

Statement introduced by declarant

In action to determine insurer's liability under omnibus clause in automobile liability policy, insured's written statement, which was introduced through insured who admitted its truth, could be treated as affirmative evidence and master was not obliged to accept interpretation which insured placed on the statement in answer to leading questions by insurer's counsel.—U. S. Fidelity & Guaranty Co. v. Dunn, 7 A.2d 246, 90 N.H. 236.

78. N.Y.—Scarpolla v. Oliver Typewriter Co., 165 N.Y.S. 885.

79. Ga.—Haas & Howell v. Godby, 125 S.E. 897, 33 Ga.App. 218.
Mo.—Scrivner v. American Car & Foundry Co., 50 S.W.2d 1001, 330 Mo. 408.
N.Y.—Robinson v. Equitable Life Assur. Soc. of U. S., 276 N.Y.S. 541, 154 Misc. 77.
Okl.—Potts v. Hale-Halsell Co., 1 P. 2d 650, 150 Okl. 248.
Tex.—Armstrong v. Marshall, Civ. App., 146 S.W.2d 250, error dismissed, judgment correct—More v. More, Civ.App., 7 S.W.2d 1096, error refused.
22 C.J. p 417 note 62.

80. N.Y.—Thon v. Rochester R. Co., 30 N.Y.S. 620, 83 Hun 443, affirmed 29 N.Y.S. 675.
22 C.J. p 417 note 63.

81. Pa.—Logue v. Gallagher, 3 A. 2d 191, 133 Pa.Super. 570.
However, it has been held that the probative force of admissions made out of court is destroyed by declarant's subsequent testimony that he did not make the declarations or that they were misunderstood.—Brosius v. Sunflower Lead, etc., Co., 130 S.W. 134, 149 Mo.App. 181.

Undenied explanatory evidence not conclusive

Where making of admissions was denied but there was no evidence that if made their author misapprehended facts, effect of admissions was not avoided as matter of law merely by testimony pointing to different conclusion, even though it was not directly contradicted.—Haas & Howell v. Godby, 125 S.E. 897, 33 Ga.App. 218.

82. Ga.—Haas & Howell v. Godby, supra.
Pa.—Logue v. Gallagher, 3 A.2d 191, 133 Pa.Super. 570.

83. Mo.—Maltz v. Jackoway-Katz Cap Co., 82 S.W.2d 909, 336 Mo. 1000.

84. U.S.—Ira S. Bushey & Sons v. W. E. Hedger & Co., C.C.A.N.Y., 40 F.2d 417—The Lillian, D.C.N.Y., 8 F.Supp. 625, affirmed, C.C.A., De Mars v. Seaboard Sand & Gravel Corporation, 75 F.2d 1011.

85. Ga.—Buckeye Cotton Oil Co. v. Malone, 126 S.E. 913, 33 Ga.App. 519.
Me.—Central Maine Power Co. v. Rollins, 138 A. 170, 174, 126 Me. 299, citing **Corpus Juris.**
Miss.—Atlantic Life Ins. Co. v. Serio, 157 So. 474, 475, 171 Miss. 726, quoting **Corpus Juris.**
N.H.—Giroux v. New York Life Ins. Co., 159 A. 142, 85 N.H. 355.
Tex.—Heckert v. American Casualty Co., Civ.App., 129 S.W.2d 424.
Wash.—Wallin v. Massachusetts Bonding & Insurance Co., 277 P. 999, 152 Wash. 272.
22 C.J. p 417 note 64.

Simple admissions not estoppels

U.S.—Martin v. Burgess, C.C.A.Ala., 82 F.2d 321.

Admissions acted on

(1) Generally admissions which have been acted on by others are conclusive against party making them as between him and party whose conduct has been influenced.—Long v. Robinson, 281 S.W. 78, 222 Mo.App. 503—22 C.J. p 417 note 64 [a].

(2) Rule that burden on plaintiff in attachment suit, to prove truth of facts in affidavit, is sustained by defendant's declarations justifying attachment, is inapplicable, where attachment creditor ignored affidavit of claimants and proceeded to sell attached property.—Long v. Robinson, supra.

Admission of principal as to surety

Admission of principal acted on is conclusive on surety in absence of fraud or mistake.—Lewison v. Hoffman, 29 N.Y.S. 1119, 8 Misc. 583, 60 N.Y.St. 582.

86. U.S.—Strouse v. Union Indemnity Co., C.C.A.N.Y., 67 F.2d 528—Wertheimer v. Travelers' Protective Ass'n of America, C.C.A.Utah, 64 F.2d 435—Nelson Bros. Coal Co. v. Perryman-Burns Coal Co., C.C.A.N.Y., 48 F.2d 99, reversing, D.C., 43 F.2d 564—Joslyn v. Cadillac

Auto Co, Mich., 177 F. 863, 101 C.C.A. 77.
Ala.—Robinson v. Solomon Bros. Co, 155 So. 553, 229 Ala. 137—New York Life Ins. Co. v. Turner, 104 So. 634, 213 Ala. 286.
Ark.—McClintock v. Lankford, 234 S. W. 633, 149 Ark. 670.
Cal.—MacGregor v. Knowlden, 282 P. 438, 102 Cal.App. 42—Bennett v. Northwestern Nat. Ins. Co., 257 P. 586, 84 Cal.App. 130.
Ga.—Schneider v. Metropolitan Life Ins. Co., 7 S.E.2d 772, 62 Ga.App. 148.
Ill.—Patten v. Knowe, 188 N.E. 173, 354 Ill. 156.
Ind.—McDowell v. Duer, 133 N.E. 839, 78 Ind.App. 440.
Iowa.—Wright v. Mahaffa, 270 N. W. 402, 405, 222 Iowa 872, citing **Corpus Juris**—Wehrman v. Farmers' & Merchants' Sav. Bank of Durant, 259 N.W. 564, 221 Iowa 249, rehearing overruled 266 N.W. 290, 221 Iowa 249.
Ky.—Inter-Southern Life Ins. Co. v. Hinkle's Adm'x, 11 S.W.2d 913, 226 Ky. 724—Kushner v. Knopf, 288 S. W. 1027, 217 Ky. 35—Duncan's Ex'rs v. Porch, 248 S.W. 526, 198 Ky. 177.
La.—Chappuis & Chappuis v. Kaplan, 129 So. 156, 170 La. 763.
Mass.—Arabia v. John Hancock Mut. Life Ins. Co., 17 N.E.2d 202, 301 Mass. 397—Burke v. John Hancock Mut. Life Ins. Co., 195 N.E. 507, 290 Mass. 299—North Shore Blue Book v. Burlen, 152 N.E. 710, 256 Mass. 431.
Mich.—Snider v. Schaffer, 267 N.W. 791, 276 Mich. 92—Hallock v. Income Guaranty Co., 259 N.W. 133, 270 Mich. 448.
Minn.—Brodsky v. Brodsky, 222 N. W. 931, 176 Minn. 198—Keil v. Fuller, 193 N.W. 37, 155 Minn. 159.
Miss.—Atlantic Life Ins. Co. v. Serio, 157 So. 474, 476, 171 Miss. 726, quoting **Corpus Juris.**
Mo.—Ruckert v. Moore, 295 S.W. 794, 317 Mo. 228—Æolian Co. of Missouri v. Boyd, App., 138 S.W.2d 692—Tevlin v. Federal Life Ins. Co. of Chicago, App., 127 S.W.2d 743—Boehm v. Acacia Mut. Life Ins. Co., App., 119 S.W.2d 976—Dieterle v. Standard Life Ins. Co., App., 119 S.W.2d 440—Basham v. Prudential Ins. Co. of America, 113 S.W.2d 126, 232 Mo.App. 782—Vernon v. Farm & Home Ass'n, App., 72 S.W.2d 827—Rush v. Metropolitan Life Ins. Co., App., 63 S. W.2d 453—Cook v. Missouri Pac. R. Co., App., 51 S.W.2d 171—Hannah v. Butts, 14 S.W.2d 31, 222 Mo.App. 1098—Graber v. Wells, App., 7 S.W.2d 719—Nichols v. Supreme Tribe of Ben Hur, App., 274 S.W. 868—Musser v. Great Northern Life Ins. Co., 266 S.W. 325, 218 Mo.App. 640—Shanebarg v. National Acc. Soc., App., 263 S.W. 512—Collins v. Phoenix Assur. Co., Limited of London, 258 S.W. 732, 215 Mo.App. 683—Wasson v. City of Sedalia, App., 236 S.W. 399—Schreiber v. Andrews, App., 234 S. W. 862—Hanheide v. Supreme Tribe of Ben Hur, App., 223 S.W. 684.
N.H.—Cote v. Sears, Roebuck & Co., 166 A. 279, 86 N.H. 238—Giroux v. New York Life Ins. Co., 159 A. 142, 85 N.H. 355.
N.Y.—Wachtel v. Equitable Life Assur. Soc. of U. S., 194 N.E. 850, 266 N.Y. 345, reversing 271 N.Y. S. 650, 241 App.Div. 172, reargument denied 196 N.E. 60, 267 N.Y. 289—Rudolph v. John Hancock Mut. Life Ins. Co., 167 N.E. 223, 251 N.Y. 208, reversing 231 N.Y.S. 874, 224 App.Div. 857—Robinson v. Equitable Life Assur. Soc. of U. S., 276 N.Y.S. 541, 154 Misc. 77—Ampere Barge Co. v. New York Cent. R. Co., 216 N.Y.S. 287, 127 Misc. 444.
Or.—Fagerlie v. New York Life Ins. Co., 278 P. 104, 129 Or. 485.
Pa.—Hanrahan v. John Hancock Mut. Life Ins. Co., 18 A.2d 512, 143 Pa.Super. 557—Jones v. Industrial Health, Accident & Life Ins. Co., 189 A. 734, 125 Pa.Super. 143—Cockroft v. Metropolitan Life Ins. Co., 189 A. 687, 125 Pa.Super. 293—American Surety Co. of New York v. Meadville Lodge, No 219, B.P.O.E., 174 A. 591, 114 Pa.Super. 451—Wilmer v. Industrial Health, Accident & Life Ins. Co., 101 Pa. Super. 366—Drogalis v. Metropolitan Life Ins. Co., 8 Sch.Reg. 120.
Tenn.—Home Indemnity Co. of New York v. Bogue, 79 S.W.2d 580, 168 Tenn. 493—Hill v. National Life & Accident Ins. Co., Inc., 11 Tenn. App. 33.
Tex.—Thornell v. Missouri State Life Ins. Co., Com.App., 249 S. W. 203, affirming, Civ.App., 229 S. W. 653—Blue Bonnet Life Ins. Co. v. Reynolds, Civ.App., 150 S.W.2d 372—Taylor v. Atlanta Life Ins. Co., Civ.App., 130 S.W.2d 889, error dismissed—Supreme Forest Woodmen Circle v. Garcia, Civ. App., 124 S.W.2d 951—Metropolitan Life Ins. Co. v. Moss, Civ.App., 109 S.W.2d 1035, error dismissed—Mahoney v. Mahoney, Civ.App., 103 S.W.2d 459, 462, quoting **Corpus Juris**—Sovereign Camp, W. O. W. v. Derrick, Civ.App., 64 S. W.2d 982, error refused.
Va.—Worrell v. Worrell, 4 S.E.2d 343, 174 Va. 11.
Wash.—Collyer v. Egbert, 93 P.2d 399, 200 Wash. 342.
22 C.J. p 417 note 65—42 C.J. p 786 note 91—45 C.J. p 1261 notes 2, 3.

Amount of indebtedness

In mortgagors' suit against mortgagee for injunction against foreclosure sale and for accounting, mortgagee's admissions concerning amount of indebtedness due should have no more binding force than mortgagors admissions.—Federal Land Bank of New Orleans v. Brumfield, 187 So. 522, 185 Miss. 487.

Bailment

A statement made by the bailor during the negotiations for the bailment to the effect that the place in which the property was to be kept was suitable does not estop him to show the unfitness of the place.—Wolscheid v. Thome, 43 N.W. 12, 76 Mich. 265 (sheep sheds).

Liability

(1) In employee's action for injuries, payment of money in settlement and taking of receipt therefor was held not as matter of law conclusive admission of employer's liability.—Chicago, R. I. & P. Ry. Co. v. Cline, 14 P.2d 495, 91 Colo. 255.

(2) In action by widow against chauffeur for death of husband in automobile collision, statement by husband that he placed no blame on chauffeur could be considered by jury as an admission against interest, but could not be held conclusive on question of chauffeur's civil liability.—Clark v. Farmer, 159 So. 47, 229 Ala. 596.

Value of property

(1) While a prior agreement between the parties as to the value of the property in condemnation proceeding has evidentiary value as an admission, it is not conclusive in determining the fair value to be fixed.—Albert Hanson Lumber Co. v. U. S., La., 43 S.Ct. 442, 261 U.S. 581, 67 L.Ed. 809, affirming, C.C.A., 277 F. 894—U. S. v. Gideon-Anderson Co., D.C.Mo., 16 F.Supp. 627.

(2) Report as to value of railroad property prepared by real estate dealer and submitted by railroad to interstate commerce commission is not controlling under the circumstances on question of value for tax purposes.—People ex rel. Lehigh Valley Ry. Co. v. Burke, 160 N.E. 19, 247 N.Y. 227.

(3) Value stated in bill of sale securing preëxisting promissory note did not conclusively establish value of property at conversion or between conversion and trial.—Odum v. Cotton States Fertilizer Co., 142 S.E. 470, 38 Ga.App. 46.

(4) In seller's suit for buyer's conversion of refrigerator accepted by seller as cash payment on purchase price, but left in buyer's possession, agreed valuation of refrigerator was relevant as admission by buyer as to value of refrigerator when agreement was made, but not conclusive of its value at time of conversion eighteen months later.—Pritchard v. Ballard, 173 S.E. 174, 48 Ga.App. 532.

(5) Price agreed on by parties to oral sale of property is not conclu-

appears,[87] although it does have evidential value[88] and presents a question of fact.[89] The rule in this respect is the same regardless of whether the admission was oral[90] or written,[91] or is implied from the conduct of the party, as in case of silence or acquiescence.[92]

The party against whom an alleged admission is shown may introduce evidence to explain or rebut the statement[93] and thus diminish its weight as an

sive of value.—Singletary v. Ginn, 121 So. 820, 153 Miss. 700.

(6) In an action for injuries to plaintiff's car, caused by defendant, a voluntary return by plaintiff to the county assessor, showing his automobile to be worth fifty dollars, admissible as an admission against interest, was not conclusive.—Donaghue v. Hayden, 208 P. 1007, 58 Cal. App. 457.

Receipt

A receipt given for an amount paid under an accident policy in payment of all claims under the policy as detailed in a statement of account delivered therewith, the correctness of which was acknowledged by the receipt, is evidence so far as it involves an admission on insured's part that he was only partially disabled during a certain period, but amounts to no more than an admission.—Browning v. Equitable Life Assur. Soc of U. S., 72 P.2d 1060, 94 Utah 532, rehearing denied 80 P. 2d 348, 94 Utah 570.

Tax returns

(1) In actions involving damage to realty the values in the assessment list for taxation made by the owner were not conclusive but had evidential value in determining amount of damage.—Bringardner Lumber Co. v. Knuckles, 108 S W.2d 511, 269 Ky. 567—Davidson v. Commonwealth ex rel. State Highway Commission, 61 S.W.2d 34, 249 Ky. 568.

(2) Appraised reproduction value of corporation's property in profits tax return signed by defendant was not binding on him, in action to set aside settlement.—De Roode v. Sheppey, C.C.A Ohio, 32 F.2d 634.

Suborning perjury or suppressing evidence

(1) Admissions implied from attempts to suppress evidence or suborn perjury are not conclusive. —Nowack v. Metropolitan St. R. Co., 60 N E. 32, 166 N.Y. 433, 82 Am.S. R. 691, 54 L.R.A. 592, reversing 66 N.Y.S. 533, 54 App.Div. 302.

87. Ky.—Duncan's Ex'rs v. Porch, 248 S.W. 526, 198 Ky. 177.
Mass.—Leary v. Keith, 152 N.E. 245, 256 Mass. 157.
Mo.—Æolian Co. of Missouri v. Boyd, App., 138 S.W.2d 692.

Opinion of deceased

That deceased employee did not believe injury received in employment caused illness did not preclude recovery for his death, since he might have been mistaken.—Gulf, M. & N. R. Co. v. Graham, 117 So. 881, 153 Miss. 72.

88. Ark.—McClintock v. Lankford, 234 S W. 633, 149 Ark. 670.
Ga.—Buckeye Cotton Oil Co. v. Malone, 126 S.E. 913, 33 Ga.App. 519.
Ky.—Bringardner Lumber Co. v. Knuckles, 108 S.W.2d 511, 269 Ky. 567.
Minn.—Brodsky v. Brodsky, 222 N. W. 931, 176 Minn. 198.

89. Cal.—MacGregor v. Knowlden, 282 P. 438, 102 Cal.App. 42.

90. Ga.—Southern Cotton Oil Co. v. Raines, 155 S.E. 484, 171 Ga. 154.
Mo.—O'Sullivan v. Wells, App., 10 S.W.2d 313.
22 C.J. p 418 note 66.

91. Ark.—Watkins v. Metropolitan Life Ins. Co., 250 S.W. 350, 158 Ark. 386.
Cal.—Ashley v. Rivera, 29 P.2d 199, 220 Cal. 75.
Ga.—Schneider v. Metropolitan Life Ins. Co., 7 S.E.2d 772, 62 Ga.App. 148.
Iowa.—Dykes v. Washington Nat. Ins. Co. of Chicago, Ill., 285 N.W. 201, 226 Iowa 771.
Mich.—Snider v. Schaffer, 267 N.W. 791, 276 Mich. 92.
Mo.—O'Sullivan v. Wells, App., 10 S W.2d 313.
N.Y.—In re Sacks' Estate, 274 N.Y. S. 707, 153 Misc. 262.
Pa.—Hanrahan v. John Hancock Mut. Life Ins. Co., 18 A.2d 512, 143 Pa.Super 557.
Tenn.—Kenner v. City Nat. Bank, 47 S.W.2d 756, 164 Tenn. 288, granting rehearing in part 46 S.W.2d 46, 164 Tenn. 119.
Tex.—Supreme Forest Woodmen Circle v. Garcia, Civ.App., 124 S.W. 2d 951.
Va.—Worrell v. Worrell, 4 S.E.2d 343, 174 Va. 11.
22 C.J. p 418 note 67.

92. U.S.—Bondholders Securities Corporaton v. Ayling, D.C.Conn., 22 F.Supp. 847.
Mo.—Ruckert v. Moore, 295 S.W. 794, 317 Mo. 228.
N.Y.—Horn v. City of Jamestown, 7 N Y.S.2d 62, 255 App.Div. 824.
Or.—Wieder v. Lorenz, 99 P.2d 38.
22 C.J. p 419 note 68.

93. U.S.—Cox v. U. S, C C.A.Ill., 103 F.2d 133—Bondholders Securities Corporation v. Ayling, D.C. Conn., 22 F.Supp. 847.
Ark.—Watkins v. Metropolitan Life Ins. Co., 250 S.W. 350, 158 Ark. 386.
Cal.—Ashley v. Rivera, 29 P.2d 199, 220 Cal. 75—Bass v. Farmers Mut. Protective Fire Ins. Co. of San Joaquin County, 68 P.2d 302, 21 Cal.App.2d 21.
Ga.—Carter v. Marble Products, 175 S.E. 480, 179 Ga. 122—Southern Cotton Oil Co. v. Raines, 155 S. E. 484, 171 Ga. 154—Schneider v. Metropolitan Life Ins. Co., 7 S.E. 2d 772, 62 Ga.App. 148—Pacific Mut. Life Ins. Co. v. Barfield, 194 S.E. 258, 261, 57 Ga.App. 43, quoting **Corpus Juris**—Haas & Howell v. Godby, 125 S.E. 897, 33 Ga. App. 218.
Iowa.—Dykes v. Washington Nat. Ins. Co. of Chicago, Ill., 285 N.W. 201, 226 Iowa 771.
Ky.—Sutherland v. Davis, 151 S W. 2d 1021, 286 Ky. 743—Commonwealth Life Ins. Co. v. Pendleton, 21 S.W 2d 985, 231 Ky. 591, 66 A. L.R. 1526—Kushner v Knopf, 288 S.W. 1027, 217 Ky. 35—Duncan's Ex'rs v. Porch, 248 S.W. 526, 198 Ky. 177.
Me.—Central Maine Power Co. v. Rollins, 138 A. 170, 174, 126 Me. 299, citing **Corpus Juris.**
Mich.—Snider v. Schaffer, 267 N.W. 791, 276 Mich. 92.
Mo.—Schriedel v. John Hancock Life Ins. Co., App., 133 S.W.2d 1103—Prince v. Metropolitan Life Ins. Co., App., 129 S W.2d 5—Basham v. Prudential Ins. Co. of America, 113 S.W.2d 126, 232 Mo.App. 782—Parks v Maryland Casualty Co., App., 91 S.W.2d 1186, 1192, citing **Corpus Juris**—Otto v. Metropolitan Life Ins. Co., 72 S.W.2d 811, 228 Mo.App 742—Schreiber v. Andrews, App., 234 S.W. 862.
Neb.—Hinnenkamp v. Metropolitan Life Ins. Co., 279 N.W. 784, 134 Neb. 846.
N.H.—Canney v. Massachusetts Bonding & Insurance Co., 189 A. 168, 88 N H. 325.
N.Y.—Wachtel v. Equitable Life Assur. Soc. of U. S., 194 N.E. 850, 266 N.Y. 345, reversing 271 N Y S. 650, 241 App.Div. 172, reargument denied 196 N.E. 60, 267 N.Y. 289—Rudolph v. John Hancock Mut. Life Ins. Co., 167 N.E 223, 251 N. Y. 208, reversing 231 N.Y.S. 874, 224 App.Div. 857—Rubin v. Siegel, 177 N.Y.S. 342, 188 App.Div. 636—Ziegler v. City of New York, 281 N.Y.S. 462, 156 Misc. 624, affirmed 291 N.Y.S. 401, 248 App.Div. 873 and 300 N.Y.S. 1152, 253 App.Div. 764—Robinson v. Equitable Life Assur. Soc. of U. S., 276 N.Y.S. 541, 154 Misc. 77—In re Sacks' Estate, 274 N.Y.S. 707, 153 Misc. 262—No. 615 Flatbush Ave. Cor-

admission,[94] or even contradict or prove the falsity | thereof, whether written or oral.[95] He may show

poration v. Hatoff, 214 N.Y.S. 138, 126 Misc. 573.
N.C.—Collins v. Seaboard Air Line Ry. Co., 120 S.E. 824, 187 N.C. 141.
Or.—Fagerlie v. New York Life Ins. Co., 278 P. 104, 129 Or. 485.
Pa.—Evans v. Penn Mutual Life Ins. Co. of Philadelphia, 186 A. 133, 322 Pa. 547—Moquin v. Mervine, 146 A. 443, 297 Pa. 79—Maculuso v. Humboldt Fire Ins. Co. of Pittsburgh, 115 A. 828, 271 Pa. 489—Hanrahan v. John Hancock Mut. Life Ins. Co., 18 A.2d 512, 143 Pa. Super. 557—Oliver v. Industrial Health, Accident & Life Ins. Co., 189 A. 736, 125 Pa.Super. 149—Jones v. Industrial Health, Accident & Life Ins. Co., 189 A. 734, 125 Pa.Super. 143—American Surety Co. of New York v. Meadville Lodge, No. 219, B.P.O.E., 174 A. 591, 114 Pa.Super. 451.
Tenn.—Home Indemnity Co. of New York v. Bogue, 79 S.W.2d 580, 168 Tenn. 493—Kenner v. City Nat. Bank, 47 S.W.2d 756, 164 Tenn 288, granting rehearing in part 46 S.W.2d 46, 164 Tenn. 119—Hill v. National Life & Accident Ins. Co., Inc., 11 Tenn.App. 33.
Tex.—Thornell v. Missouri Life Ins. Co., Com.App., 249 S.W. 203, affirming, Civ.App., 229 S.W. 653—Armstrong v. Marshall, Civ.App., 146 S.W.2d 250, error dismissed, judgment correct—Heckert v. American Casualty Co., Civ.App., 129 S.W.2d 424—Grigsby v. First Nat. Bank, Civ.App., 125 S.W.2d 368, reversed on other grounds, Com.App., 144 S.W.2d 244, rehearing denied and opinion corrected on other grounds 146 S.W.2d 174—Southland Life Ins. Co. v. Brown, Civ.App., 121 S.W.2d 653, error dismissed.
Va.—Worrell v. Worrell, 4 S.E.2d 343, 174 Va. 11.
Wash.—Collyer v. Egbert, 93 P.2d 399, 200 Wash. 342.
Wis.—De Groot v. Mutual Life Ins. Co. of New York, 190 N.W. 443, 179 Wis. 202.
22 C.J. p 419 note 69—17 C.J. p 1307 note 7.

Condition of admission

A water company could not be bound by any admission as to the extent of water power rights beyond the conditions for which the admission was expressly made.—Kavanaugh v. Cohoes Power & Light Corporation, 187 N.Y.S. 216, 114 Misc. 590.

Erroneous statement may be explained.—Dykes v. Washington Nat. Ins. Co. of Chicago, Ill., 285 N.W. 201, 226 Iowa 771.

Meaning of words used

(1) Where the language used permits, a party may show what he meant by the words used in the statement.
Ga.—Schneider v. Metropolitan Life Ins. Co., 7 S.E.2d 772, 62 Ga.App. 148.
Mo.—Parks v. Maryland Casualty Co., App., 91 S.W.2d 1186.

(2) However, it is error to permit parol evidence to vary the clear and unambiguous meaning of words embodying the admission.—Chero Cola Bottling Co. v. Southern Express Co., 116 S.E. 325, 29 Ga.App. 656.

Explaining inconsistent statements

In an action on health insurance policy, making statements of fact in proof submitted conclusive on claimant, evidence may be admitted to explain two contradictory proofs by claimant to secure payment of agreed indemnity.—Eberle v. Loyal Protective Ins. Co., of Boston, Mass., 239 P. 972, 119 Kan 399.

Admission by conduct or silence

(1) Conduct relied on as an admission may be explained.
Colo.—Chicago, R. I. & P. Ry. Co. v. Cline, 14 P.2d 495, 91 Colo. 255.
Ky.—Louisville & N. R. Co. v. Foster, 18 S.W.2d 983, 230 Ky. 157.
Mo.—Scrivner v. American Car & Foundry Co., 50 S.W.2d 1001, 330 Mo. 408—Conley v. Lafayette Motor Car Co., 221 S.W. 165, 204 Mo. App. 37.
N.H.—Moore v. Dunn, 42 N.H. 471.
22 C.J. p 419 note 69 [a], [c].

(2) In personal injury action, evidence that plaintiff had wife and three children, which ordinarily would be inadmissible, could be admitted to show his necessity for ready money in order to rebut contention that small settlement with insurance companies was due to fact that he was not severely hurt.—Bowles v. Wabash Ry. Co., Mo.App., 271 S.W. 851.

(3) In action on notes wherein maker asserted defense that plaintiff was not holder in due course and offered in evidence letters written by payee after maturity demanding payment, plaintiff was entitled to prove authority of payee to write letters for holder and pledgee in explanation of how letters came to be written and to neutralize inference that neither pledgee nor holder were in possession at that time.—Bondholders Securities Corporation v. Ayling, D.C.Conn., 22 F.Supp. 847.

Credibility of explanation is for jury

N.Y.—Robinson v. Equitable Life Assur. Soc. of U. S., 276 N.Y.S. 541, 154 Misc. 77.

Admission as to collateral matter

Where so-called admission against interest of deceased person is not in respect to specific issue litigated, but rather indirectly or on collateral matter, evidence going to explain same is admissible.—Empenger v. Empenger, 261 N.W. 185, 194 Minn. 219, denying rehearing 259 N.W. 795, 194 Minn. 219.

Parole evidence rule not affected

In partners' action against single defendant for services rendered, admitting partner's testimony that letter addressed to defendant and three others, tending to establish admission that contract was made with all four persons was so addressed at defendant's request, was not error as permitting terms of written instrument to be varied by parol, where letter was written after services were performed and did not purport to be any part of employment contract.—Christensen v. Johnson, 61 P.2d 597, 90 Utah 273.

94. Ga.—Carter v. Marble Products, 175 S.E. 480, 179 Ga. 122.
22 C.J. p 419 note 70.

Facts on which admission is based may be shown.—In re Findlay's Adm'rs, 236 N.Y.S. 489, 226 App.Div. 638, reversed on other grounds Findlay, In re, 170 N.E. 471, 253 N.Y. 1.

95. U.S.—Strouse v. Union Indemnity Co., C.C.A.N.Y., 67 F.2d 528—U. S. v. American Surety Co of New York, C.C.A.N.Y., 56 F.2d 734.
Ga.—Carter v. Marble Products, 175 S.E. 480, 179 Ga. 122.
Iowa.—Dykes v. Washington Nat. Ins. Co. of Chicago, Ill., 285 N.W. 201, 226 Iowa 771.
Ky.—Sutherland v. Davis, 151 S.W. 2d 1021, 286 Ky. 743—Kushner v. Knopf, 288 S.W. 1027, 217 Ky. 35.
Mich.—Shiovitz v. New York Life Ins. Co., 275 N.W. 181, 281 Mich. 382—Snider v. Schaffer, 267 N.W. 791, 276 Mich. 92.
Minn.—Empenger v. Empenger, 261 N.W. 185, 194 Minn. 219, denying rehearing 259 N.W. 795, 194 Minn. 219—Cooper v. Progressive Assur. Co., 234 N.W. 645, 182 Minn. 434.
Miss.—Atlantic Life Ins. Co. v. Serio, 157 So. 474, 171 Miss. 726.
Mo.—Scrivner v. American Car & Foundry Co., 50 S.W.2d 1001, 330 Mo. 408—Basham v. Prudential Ins. Co. of America, 113 S.W.2d 126, 232 Mo.App. 782—Otto v. Metropolitan Life Ins. Co., 72 S.W. 2d 811, 228 Mo.App. 742.
N.Y.—Wachtel v. Equitable Life Assur. Soc. of U. S., 194 N.E. 850, 266 N.Y. 345, reversing 271 N.Y.S. 650, 241 App.Div. 172, and reargument denied 196 N.E. 60, 267 N.Y. 289.
Pa.—Evans v. Penn Mutual Life Ins. Co. of Philadelphia, 186 A. 133, 322 Pa. 547—Hanrahan v. John Hancock Mut. Life Ins. Co., 18 A. 2d 512, 143 Pa.Super. 557—Oliver

the circumstances under which the statement was made,[96] or the writing containing the same signed,[97] and he may prove his reasons for making the statement,[98] or the purpose for which it was made.[99]

It may also be shown that the statement was made under a mistake of fact,[1] or in ignorance of the facts,[2] or that declarant was ignorant of the meaning of the language used.[3] It has even been held that declarant may show that his statement was made under a mistake of law,[4] but this has been denied.[5]

Where the alleged admission was made by an agent, a lack of authority may be shown.[6]

The extent to which a party may go to explain or contradict an admission is largely for the sound discretion of the court.[7] However, evidence which goes beyond the bounds of explanation or denial is not admissible for such purpose,[8] and evidence

v. Industrial Health, Accident & Life Ins. Co., 189 A. 736, 125 Pa. Super. 149—Jones v. Industrial Health, Accident & Life Ins. Co., 189 A. 734, 125 Pa.Super. 143—American Surety Co. of New York v. Meadvill Lodge, No 219, B.P. O.E., 174 A. 591, 114 Pa.Super. 451—Wilmer v. Industrial Health, Acc., & Life Ins. Co., 101 Pa.Super. 366.

Tenn.—Home Indemnity Co. of New York v. Bogue, 79 S.W.2d 580, 168 Tenn. 493.

Tex.—Grigsby v. First Nat. Bank, Civ.App., 125 S.W.2d 368, reversed on other grounds, Com.App., 144 S.W.2d 244, rehearing denied and opinion corrected on other grounds 146 S.W.2d 174—Supreme Forest Woodmen Circle v. Garcia, Civ. App., 124 S.W.2d 951—Supreme Forest Woodmen Circle v. Garcia, Civ.App., 103 S.W.2d 1108, error refused—Mahoney v. Mahoney, Civ.App., 103 S.W.2d 459, 462, quoting **Corpus Juris.**

Va.—Worrell v. Worrell, 4 S.E.2d 343, 174 Va. 11.

Wash.—Wallin v. Massachusetts Bonding & Insurance Co., 277 P. 999, 152 Wash. 272.

W.Va.—Bulick v. Milkint, 111 S.E. 310, 90 W.Va. 509.

Wyo.—Creamery Package Mfg. Co. v. Cheyenne Ice Cream Co., 100 P. 2d 116, 55 Wyo. 277.

22 C.J. p 420 notes 81–83.

Corporate existence in state

Assertions by corporation in deeds executed by it, that it is a corporation duly organized under the laws of certain states in which it is operating, do not conclude it, in an action by one of the states against it as a domestic corporation for a franchise tax, from denying that it was duly organized in that state.—State v. Atlantic Coast Line R. Co., 81 So 60, 202 Ala. 558, certiorari denied Atlantic Coast Line R. Co. v. State of Alabama, 40 S.Ct. 485, 253 U.S. 489, 64 L.Ed. 1027.

Writing of fixed meaning

Oral evidence by declarant, in explanation of a letter in conflict with the fixed and definite wording thereof, is properly excluded.—Barr v. MacGlothlin, 11 S.E.2d 617, 176 Va. 474.

96. U.S.—Albert Hanson Lumber Co. v. U. S., La., 43 S.Ct. 442, 261 U. S. 581, 67 L.Ed. 809, affirming, C. C.A., 277 F. 894.

Ga.—Carter v. Marble Products, 175 S.E. 480, 179 Ga. 122.

La.—Chappuis & Chappuis v. Kaplan, 129 So. 156, 170 La. 763.

Mass.—First Nat. Bank v. Swift, 155 N.E. 606, 258 Mass. 573.

Mo.—O'Sullivan v. Wells, App., 10 S.W.2d 313—Dickey v. Supreme Tribe of Ben Hur, App., 253 S. W. 417.

N.H.—Giroux v. New York Life Ins. Co., 159 A. 142, 85 N.H. 355.

N.Y.—Ziegler v. City of New York, 281 N.Y.S. 462, 156 Misc. 624, affirmed 291 N.Y.S. 401, 248 App. Div. 873, and 300 N.Y.S. 1152, 253 App.Div. 764.

Wash.—Lung v. Washington Water Power Co., 258 P. 832, 144 Wash. 676.

22 C.J. p 419 note 71.

Mode of proof

Attending circumstances may be proved by any person acquainted therewith.—Carter v. Marble Products 175 S.E. 480, 179 Ga. 122.

97. Ark.—Watkins v. Metropolitan Life Ins. Co., 250 S.W. 350, 158 Ark. 386.

Mo.—O'Sullivan v. Wells, App., 10 S. W.2d 313—Schreiber v. Andrews, App., 234 S.W. 862.

22 C.J. p 419 note 72.

Conditional admission

Where buyer of trucks signed purchase-money chattel mortgages and notes in blank with instruction to seller to fill in the amounts of the notes and descriptions of trucks when delivery was made, the rule that mortgagor was bound by admissions made in the mortgages was inapplicable where blanks thereof were filled in without delivery of the trucks.—Securities Inv. Co. v. St. Louis County Automobile Co., Mo., 261 S.W. 87.

98. Ky.—Duncan's Ex'rs v. Porch, 248 S.W. 526, 198 Ky. 177.

22 C.J. p 419 note 73.

Inducing representations

Testimony by injured person of representations by railroad's claim agent to induce signing of paper stating cause of injury, was properly admitted after railroad company introduced paper in cross-examining injured person.—O'Sullivan v. Wells, Mo.App., 10 S.W.2d 313.

99. U.S.—Morgan v. U. S., Colo., 169 F. 242, 94 C.C.A. 518.

Iowa.—Castner v. Chicago, etc., R. Co., 102 N.W. 499, 126 Iowa 581.

1. La.—Sawyer v. Liberty Industrial Life Ins. Co., App., 172 So. 24, refusing rehearing 171 So. 415.

Mo.—Hamra v. Orten, 233 S.W. 495, 208 Mo.App. 36.

Tenn.—Hill v. National Life & Accident Ins. Co., Inc., 11 Tenn.App. 33.

22 C.J. p 420 note 75.

Written admissions

Tenn.—Hill v. National Life & Accident Ins. Co., Inc., 11 Tenn.App. 33.

22 C.J. p 420 note 75 [c].

Misinformation

That statement made was based on misinformation may be shown to jury as affecting weight of admission.

Cal.—Gulart v. Azevedo, 216 P. 405, 62 Cal.App. 108.

Ga.—Chero Cola Bottling Co. v. Southern Express Co., 116 S.E. 325, 29 Ga.App. 656.

Payment of compensation

Employer's payment of compensation to injured employee before investigating accident was made through error of fact, from which it is relievable.—Johnson v. Provencal Turpentine Co., 125 So. 321, 12 La. App. 78.

2. Mo.—Schreiber v. Andrews, App., 234 S.W. 862.

22 C.J. p 420 note 76.

3. Cal.—Bush v. Barnett, 31 P. 2, 96 Cal. 202.

4. Neb.—State v. Paxton, 90 N.W. 983, 65 Neb. 110, 134.

22 C.J. p 420 note 78.

5. Ill.—Harvey v. Chicago & A. R. Co., 77 N.E. 569, 221 Ill. 242, affirming 116 Ill.App. 507.

Tex.—Nations v. Thomas, 25 Tex. Suppl. 221.

6. Tex.—Wilkins v. Clawson, 110 S. W. 103, 50 Tex.Civ.App. 82.

7. Mo.—Scrivner v. American Car & Foundry Co., 50 S.W.2d 1001, 330 Mo. 408.

8. Mo.—Scrivner v. American Car & Foundry Co., supra.

Relevancy must be shown

Where plaintiff introduced evidence that defendant's agent had attempted

which does not in any way impugn or qualify the fact admitted is irrelevant.[9]

As discussed in § 382 infra, full and unquestionable evidence is necessary to overcome a clear admission, and it, until disputed, contradicted, or explained is, or may be, binding and conclusive on the party by whom made or to whom attributable.[10] If the evidence explaining an admission is sufficient to overcome or destroy the effect thereof, it can no longer serve as affirmative proof of the adversary or nullify other affirmative proof of declarant.[11]

Admissions of coparty or privy. Statements received in evidence because they are admissions by a coparty or by one in privity with a party, see supra §§ 314–368, are not conclusive on the party against whom they are introduced,[12] but may be explained, qualified, or contradicted,[13] to the same extent as admissions of the party himself. Where, however, the admissions of a party to the record are properly admitted against a coparty, the fact that declarant has no interest in the suit at the time when his admission is shown is irrelevant and inadmissible.[14]

Admissibility of counter declarations. It is generally held that a party against whom an admission is introduced is not entitled to show in rebuttal that at other times statements inconsistent with, or contradictory to, the alleged admission were made by him,[15] or by the person whose admission is attribu-

to establish perjured testimony, evidence to statements of witness in harmony therewith to show good faith of agent would not be admissible, unless it was first established that agent knew that such statements had been made and had reasonable grounds to believe them true, and that relying thereon he did acts complained of.—Schaff v. Coyle, 249 P. 947, 121 Okl. 228.

9. Ala.—Pearson v. Adams, 29 So. 977, 129 Ala. 157.

10. U.S.—Gordon v. Mutual Life Ins. Co. of New York, D.C.La., 37 F.Supp 873—Sprout, Waldron & Co. v. Bauer Bros. Co., D.C.Ohio, 26 F.Supp. 162.
Ala.—Grabove v. Mutual Ben. Health & Accident Ass'n, 1 So.2d 297.
Kan.—National Reserve Life Ins. Co. v. Jeffries, 75 P.2d 302, 147 Kan. 16.
Miss.—Pannell v. Glidewell, 107 So. 273, 142 Miss. 77.
Mo.—Schriedel v. John Hancock Life Ins. Co., App., 133 S.W.2d 1103—Walker v. National Life & Accident Ins. Co., App., 130 S.W.2d 668—Prince v. Metropolitan Life Ins. Co., App., 129 S.W.2d 5—Boehm v. Acacia Mut. Life Ins. Co., App., 119 S.W.2d 976—Powell v. Brosnahan, 115 S.W.2d 140, 232 Mo.App. 1161, opinion quashed on other grounds State ex rel. Brosnahan v. Shain, 126 S.W.2d 1193, 344 Mo. 404—McNairy v. Standard Life Ins. Co., App., 114 S.W.2d 156—Bailey v. American Life & Accident Ins. Co., App., 96 S.W.2d 903—Farage v. John Hancock Mut. Life Ins Co., 81 S.W.2d 344, 229 Mo.App. 698—Thomas v. Modern Woodmen of America, 260 S.W. 552, 218 Mo. App. 10.
Neb.—Hinnenkamp v. Metropolitan Life Ins. Co., 279 N.W. 784, 134 Neb. 846.
N.Y.—Wachtel v. Equitable Life Assur. Soc. of U. S., 194 N.E. 850, 266 N.Y. 345, reversing 271 N.Y.S. 650, 241 App.Div. 172, and reargument denied 196 N.E. 60, 267 N.Y. 289—Rudolph v. John Hancock Mut. Life Ins. Co., 167 N.E. 223, 251 N.Y 208, reversing 231 N.Y.S. 874, 224 App.Div. 857—Cirrincioni v. Metropolitan Life Ins. Co., 228 N.Y.S. 354, 223 App Div. 461—Mindlin v. Dorfman, 189 N.Y.S. 265, 197 App.Div. 770—De Marco v. John Hancock Mut. Life Ins. Co., 261 N.Y S. 742, 146 Misc. 117.
Tex.—Commonwealth Casualty & Ins. Co. v. Stephens, Civ.App., 150 S.W. 2d 424.
22 C.J. p 420 note 86.
"Undisputed and unexplained admissions may be conclusive on party making them and his privies."—Smith v. Vermont Marble Co., 133 A. 355, 357, 99 Vt. 384.
Approval of account
That defendant approved account of plaintiff, in the absence of explanation as to what was intended by such approval, shows that correctness of account was admitted.—Finley v. Pew, 205 P. 310, 28 Wyo. 342, rehearing denied 206 P. 148, 28 Wyo. 342.
Confessions
A voluntary confession of embezzlement by an employee is conclusive on him in an action on an indemnity bond.—Indemnity Ins. Co. of North America v. Krone, 9 S.W.2d 33, 177 Ark. 953, 60 A.L.R. 1493.
Burden of proof on declarant to explain or contradict admission.
Ala.—Smith v. Gaines, 97 So. 739, 210 Ala. 245—Sovereign Camp, W. O. W., v. Craft, 94 So. 831, 208 Ala. 467.
Tenn.—Home Indemnity Co. of New York v. Bogue, 79 S.W.2d 580, 168 Tenn. 493.
Amount of indebtedness
In action by finance company as assignee of conditional sales contract for amount due on sale price of automobile truck which buyer sold to oil company, wherein creditor to whom buyer assigned amount due from oil company as security intervened, claiming entire amount due, letter which was introduced in evidence by creditor which had been written from finance company to buyer stating that finance company acknowledged creditor's claim as prior claim in amount of three hundred dollars and that remittance should be sent to finance company for balance was held to preclude either finance company or creditor from recovering more than amount provided therein.—Universal Credit Co. v. Standard Oil Co., 7 N.E.2d 498, 289 Ill.App 613.
Written admission of fraud
Where the evidence of fraud is in writing, signed by the party to be charged, such writing, like any other testimonial document, may, in effect, be conclusive on the party.—Grigg v. Hanna, 278 N.W. 125, 283 Mich. 443.

11. N.Y.—Wachtel v. Equitable Life Assur. Soc of U. S., 194 N.E. 850, 266 N.Y. 345, reversing 271 N.Y.S. 650, 241 App.Div. 172, and reargument denied 196 N.E. 60, 267 N.Y. 289.

12. Ill.—Patten v. Knowe, 188 N.E. 173, 354 Ill. 156.
22 C J. p 420 note 89.

13. Ill.—Patten v. Knowe, supra.
Wash.—Hurley-Mason Co. v. Pacific Commissary Co., 191 P. 624, 111 Wash. 439.
22 C.J. p 420 note 90.
Predecessor in title
Me.—Central Maine Power Co. v. Rollins, 138 A. 170, 174, 126 Me. 299, citing **Corpus Juris.**
22 C.J. p 420 note 90 [a] (1).

14. Conn.—Bulkley v. Landon, 3 Conn. 76.

15. Ala.—First Nat. Bank v. Lartigue, 173 So. 21, 22, 233 Ala. 670, citing **Corpus Juris.**
Ohio.—Bry v. Miller, 179 N.E. 194, 40 Ohio App. 582.

table to him.[16] This does not prevent the showing of a counter declaration made immediately after the original statement which constitutes a part or continuation thereof,[17] under the rule discussed in § 375 b permitting the entire statement to be introduced.

Admissions by conduct or acquiescence cannot be rebutted by subsequent contradictory declarations,[18] but it is of course permissible to show that at the time of the statement claimed to have been acquiesced in, the party challenged its correctness.[19]

It has been held that written admissions may be rebutted by proof of other written declarations contrary thereto.[20]

Effect on proponent of admission. Except to the extent that the admission constitutes the only evidence on the point in issue,[21] the party who introduces in evidence an admission made by or attributable to his adversary is not bound by such admission,[22] certainly not by parts thereof favorable to declarant in evidence as part of the entire statement.[23]

Conclusiveness of evidence on the introducing party is considered generally infra § 1040.

§ 381. Judicial Admissions

a. In general
b. Concessions and stipulations
c. Pleadings
d. Testimony
e. Admissions by counsel
f. In other proceedings

a. In General

Unequivocal judicial admissions are generally conclusive on the party, but not, it is sometimes held, on the court. Some cases distinguish formal judicial admissions intended to limit the issues and those which serve as ordinary evidence in the case, the former being held conclusive, but not the latter.

The cases abound with statements and holdings that a judicial admission is generally conclusive on the party by whom it was made or to whom it is attributable,[24] if made in the case on trial,[25] and if unequivocal,[26] and unexplained or uncontradicted,[27] unless declarant is relieved from the effect of such an admission by reason of its having been made by inadvertence or under a mistake of fact.[28] Such an admission made in the case on trial constitutes a waiver of proof generally dispensing with the production of evidence by the opposing party as

Tex.—Hearon v. Jackson, Civ.App., 109 S.W.2d 230, error dismissed.
22 C.J. p 421 note 93.

Ownership of property

In proceeding in estate on petition of wife claiming that realty acquired by decedent after marriage was community property, refusal to permit decedent's wife to show conversations which she had with tax expert prior to time when she as administratrix filed income and estate tax return describing realty in controversy as separate property of decedent estate was not error, although wife's acts and declarations in connection with return were competent evidence.—In re Allan's Estate, 82 P.2d 190, 28 Cal.App.2d 181.

16. Me.—Royal v. Chandler, 9 A. 615, 79 Me. 265, 1 Am.S.R. 305.
22 C.J. p 421 note 94.

However, it has been said that declaration of one, since deceased, that certain property was his, is admissible and competent to rebut evidence of his declarations to contrary.—Succession of Abascal, 105 So. 31, 158 La. 969.

17. Ala.—First Nat. Bank v. Lartigue, 173 So. 21, 233 Ala. 670.

18. Ala.—Roberts v. Trawick, 22 Ala. 490.
Mass.—Boston & W. R. Corp. v. Dana, 1 Gray 83.

19. Ga.—Mitchem v. Allen, 57 S.E. 721, 128 Ga. 407.

20. U.S.—Riggs v. Lindsay, D.C., 7 Cranch 500, 3 L.Ed. 419.

21. Mo.—Williams v. Excavating & Foundation Co., 93 S.W.2d 123, 230 Mo.App. 973.

Unfavorable aspect is not to be disregarded in such case.—Williams v. Excavating & Foundation Co., 93 S.W.2d 123, 230 Mo.App. 973.

22. Colo.—Nitro Powder Co. v. Kearns, 114 P. 396, 50 Colo. 1.
22 C.J. p 420 note 87.

23. Tenn.—Nelson v. Rural Educational Ass'n, 134 S.W.2d 181, 23 Tenn.App. 409—West v. Southern Ry. Co., 100 S.W.2d 1004, 20 Tenn. App 491.

Matters considered

One offering admissions is not bound by statements which are favorable to declarant, but may rebut such statements or show them to be erroneous, and it is for the court or jury to reject such portions, if any, as appear to be inconsistent, improbable, or rebutted by other circumstances in evidence.—Nelson v. Rural Educational Ass'n, 134 S.W.2d 181, 23 Tenn.App. 409.

24. U.S.—Wiget v. Becker, C.C.A. Mo., 84 F.2d 706.
Conn.—King v. Spencer, 161 A. 103, 105, 115 Conn. 201, citing **Corpus Juris**—Lesser v. Smith, 160 A. 302, 115 Conn. 86.
La.—In re Immanuel Presbyterian Church, 37 So. 873, 113 La. 911—Thompson v. Haubtman, App., 137 So. 362.
Neb.—Cooper v. State, 243 N.W. 837, 839, 123 Neb. 605, quoting **Corpus Juris.**
Ohio.—State v. Board of Education of Richland Tp., 6 Ohio Supp. 59, 63, quoting **Corpus Juris.**
Or.—Columbia Digger Sand & Gravel Co. v. Ross Island Sand & Gravel Co., 25 P.2d 911, 145 Or. 96.
22 C.J. p 421 note 98.

Adverse party

Judicial admission is binding on person making it, but is not necessarily binding on adverse party.—Shea v. Hern, 171 A. 248, 132 Me. 361—Kimball v. Thompson, 122 A. 46, 123 Me. 116.

Court where made

(1) An admission of record is binding on the party, although made in another division of the court and for purposes of former trial.—Pennington v. Kansas City Rys. Co., 223 S.W. 428, 284 Mo. 1.

(2) An admission on the trial of a cause cannot be withdrawn in an appellate court—Montgomery v. Givhan, 24 Ala. 568.

25. Del.—Rudnick v. Schoenberg, 122 A. 902, 2 W.W.Harr. 339.

26. U.S.—The Doyle, C.C.A.Pa., 105 F.2d 113.

27. Mo.—Hanser v. Lerner, App., 153 S.W.2d 806—De Lorme v. St. Louis Public Service Co., App., 61 S.W.2d 247—Thompson v. Business Men's Acc. Ass'n of America, App., 231 S.W. 1049.

28. La.—Succession of Fontano, 200

to the fact admitted.[29] However, it is held that such an admission is not conclusive on the court,[30] and it has been said that judicial admissions may be disregarded in the interests of justice.[31]

Some cases distinguish between formal judicial admissions intended to limit the issues or dispense with proof and informal admissions which constitute evidence in the case like any other evidence.[32] The latter is given prima facie force, but is not conclusive so as to prevent disputation by other evidence.[33] The former, however, is conclusive, removing the matter involved from the field of disputed issues and barring declarant from disputing it.[34]

An admission in a deposition taken before trial has been held not to conclude deponent on the trial.[35] If unexplained, however, such an admission has been said to be prima facie binding.[36]

An admission of a conclusion of law made during the trial is not binding on the court, trial or appellate,[37] or on the party by whom it was made.[38]

b. Concessions and Stipulations

Concessions or stipulations as to a fact for purpose of trial and intended as an act of waiver relating to proof are conclusive on the party making such concessions or stipulations, subject to his right to qualify their effect or probative force.

A concession or stipulation as to a fact made for the purpose of trial has the force and effect of an established fact binding on the party making the same,[39] as well as on the court,[40] unless the court in its reasonable discretion allows the concession to be later withdrawn, explained, or modified if it appears to have been made by improvidence or mistake.[41] It has been said that to have such effect the concession must be intended as an act of waiver relating to the opponent's proof of the fact and

So. 142, 196 La. 775—Thompson v. Haubtman, App., 137 So 362.
Ohio.—State v. Board of Education of Richland Tp., 6 Ohio Supp. 59.
22 C.J. p 422 note 99.

Right of withdrawal

An admission made at the trial may be withdrawn for inadvertence or mistake in the absence of elements of an estoppel.—Hutchinson v. Woodward, 89 S E. 208, 145 Ga. 325.

29. Conn.—Bochicchio v. Petrocelli, 11 A.2d 356, 126 Conn. 336, 127 A.L. R. 457—King v. Spencer, 161 A. 103, 115 Conn. 201.
Del.—Rudnick v. Schoenberg, 122 A. 902, 2 W.W.Harr. 339.
Pa.—Nusbaum v. Warwick Hotel Co., 170 A. 388, 112 Pa.Super. 277.

30. U S.—L. P. Larson, Jr., Co. v. Wm Wrigley, Jr., Co, Ill., 253 F. 914, 166 C C.A. 14, certiorari denied William Wrigley, Jr., Co. v. L. P. Larson, Jr., Co., 39 S.Ct. 22, 248 U.S. 580, 63 L.Ed. 430.
Ohio.—State v. Board of Education of Richland Tp., 6 Ohio Supp. 59, 63, quoting **Corpus Juris.**
Vt.—Scoville v. Brock, 70 A. 1014, 81 Vt 405.

Judicial notice as factor

(1) Court is not bound by admissions of parties as to a fact which is contrary to matters of which it takes judicial notice.—Hobart-Lee Tie Co. v. Grabner, 219 S.W. 975, 206 Mo.App. 96.

(2) Under stipulation authorizing judgment on fact allegations admitted to be true, court could consider facts of which it had judicial knowledge.—Thompson v. Scott, 19 S.W.2d 1063, 323 Mo. 790.

Opinion as to construction of contract

Wis.—Milwaukee Corrugating Co. v. Flagge, 198 N.W. 394, 184 Wis. 139.

31. U.S.—The Doyle, C C.A.Pa., 105 F.2d 113.

32. Ky.—Sutherland v. Davis, 151 S. W.2d 1021, 286 Ky 743.
N.Y.—Manhattan Roofing Co. v. Hagedorn, 180 N.Y.S. 816, 110 Misc. 657.

33. N.Y.—Manhattan Roofing Co. v. Hagedorn, supra.

34. Ky.—Sutherland v. Davis, 151 S.W.2d 1021, 286 Ky. 743.

35. Iowa.—Wright v. Mahaffa, 270 N.W. 402, 406, 222 Iowa 872, quoting **Corpus Juris.**
Mo.—Cable v Metropolitan Life Ins. Co., 128 S.W.2d 1123, 233 Mo.App. 1093—Ditsch v. Kansas City Power & Light Co, 128 S W.2d 1055, 233 Mo.App. 1163—Jenkins v Kansas City, 91 S.W.2d 98, 230 Mo. App. 337—Hodges v. American Nat. Ins. Co., App., 6 S W.2d 72—McCombs v. Foster, 62 Mo.App. 303.

Conflicting testimony at trial

(1) Where plaintiff made conflicting statements in deposition and testimony at trial, jury could believe that plaintiff told truth at the trial, even in the absence of explanation of lack of harmony between the statements.—Cable v. Metropolitan Life Ins. Co., 128 S.W.2d 1123, 233 Mo.App. 1093—Ditsch v. Kansas City Power & Light Co., 128 S.W.2d 1055, 233 Mo.App. 1163.

(2) Statements of party in deposition taken prior to trial, that at time renewal note which was subject of action was executed original note was unpaid, did not bar defense that note was paid, where from entire evidence it could be inferred that witness was undertaking to say that he had made numerous payments to payee of note for which no credit had been given, and that note in question was a valid obligation against which maker was entitled to have credited moneys paid to payee.—Short v. White, 133 S.W.2d 1039, 234 Mo.App. 499.

36. Mo.—Hanser v. Lerner, App., 153 S.W.2d 806—De Lorme v. St. Louis Public Service Co., App., 61 S.W.2d 247.

37. U.S.—Pitcairn v. American Refrigerator Transit Co., C C.A.Mo., 101 F.2d 929, certiorari denied 60 S.Ct. 78, 308 U.S. 566, 84 L.Ed. 475.
22 C.J. p 423 note 17.

38. U.S.—Pitcairn v. American Refrigerator Transit Co., supra.
22 C J. p 423 note 18.

39. Conn.—Kanopka v. Kanopka, 154 A. 144, 113 Conn. 30, 80 A.L R. 619.
Mo.—Polk v. Missouri-Kansas-Texas R. Co., 111 S.W.2d 138, 341 Mo. 1213, 114 A.L R. 873.

Agreed statement of facts

An agreed statement of facts constitutes an admission of facts estopping a party from denying facts so admitted in subsequent action involving the same cause of action constituting a memorial of fact against such party.—Dobbs v. Order of United Commercial Travelers of America, Tex.Civ.App., 241 S.W. 191.

Binding waiver of issue

Vt.—Raptis v. Alexander, 158 A. 73, 104 Vt. 203.

Concession as confessory pleading

D.C.—Alamo v. Del Rosario, 98 F.2d 328, 69 App.D.C. 47.

40. Ga.—McDay v. Long, 11 S.E 2d 395, 63 Ga.App. 421.
N.Y.—Wignall v. Wignall, 298 N.Y.S. 251, 163 Misc. 910.

41. Conn.—Kanopka v. Kanopka, 154 A. 144, 113 Conn. 30, 80 A.L.R. 619.

not merely as a statement made for some independent purpose.[42] A party is, however, entitled to explain or qualify the effect of an admission made in this way,[43] or he may deny the authority of his counsel to bind him beyond the particular case,[44] and the statement may be deprived of probative force by the consideration that it was not made as a fact but as a concession to obtain the opinion of the court.[45]

c. Pleadings

As a general rule, an admission in a pleading on which a party goes to trial is conclusive against him. This is not so as to admissions in pleadings which have been withdrawn, superseded, or abandoned.

Generally stated, an admission in a pleading on which a party goes to trial is conclusive against him,[46] unless altered by amendment,[47] or unless revoked for error of fact,[48] and this is true even though it results merely from a failure to deny an allegation to which a response is required.[49]

Some cases, however, have held that whether admissions in a pleading conclusively bind the pleader depends on the circumstances of each case,[50] and that under certain circumstances admissions in pleadings may have merely the force and effect of admissions generally,[51] and as such may be explained by the pleader,[52] but that, on the other hand, if public policy requires, the pleader will be concluded from denying the force and effect of admissions in his pleadings, regardless of the truth or falsity of the allegations constituting the admissions.[53]

Admission not relied on. It has been held that where plaintiff does not rely on an admission in the answer of an allegation in the complaint, but introduces evidence which has the effect of disapproving his own allegation, defendant is not bound by his admission.[54]

Withdrawn or superceded pleadings. Admissions in withdrawn, abandoned, superseded, or suspended pleadings are not conclusive on the pleader, but may be explained or contradicted;[55] such an ad-

42. D.C.—Alamo v. Del Rosario, 98 F.2d 328, 69 App.D.C. 47.
Concession for purpose of giving testimony is not judicial admission in sense that it is conclusive.—Alamo v. Del Rosario, supra.

43. Ga.—King v. Shepard, 30 S.E. 634, 105 Ga. 473—Luther v. Clay, 28 S.E. 46, 100 Ga. 236, 39 L.R.A. 95.

44. Mich.—Isabelle v. Iron Cliffs Co., 23 N.W. 613, 57 Mich. 120.
22 C.J. p 340 note 14.

45. Pa.—Hart's Appeal, 8 Pa. 32—Gibson v. Rowland, 35 Pa.Super. 158.

46. U.S.—Stolte v. Larkin, C.C.A. Minn., 110 F.2d 226—Pullman Co. v. Bullard, C.C.A.Ga., 44 F.2d 347.
Conn.—Le Witt v. Park Ecclesiastical Society, 130 A. 387, 103 Conn. 285.
Ga.—Field v. Manly, 195 S.E. 406, 185 Ga. 464.
Mo.—Strong v. Turner, App., 122 S.W. 2d 71.
Mont.—Anderson v. Mace, 45 P.2d 771, 99 Mont. 421.
Or.—Wieder v. Lorenz, 99 P.2d 38.
Pa.—Real Estate-Land Title & Trust Co. v. Homer Building & Loan Ass'n, 10 A.2d 786, 138 Pa.Super. 563—Petition of O'Malley, 48 Dauph.Co. 428.
Tex.—Smith v. Frost, Com.App., 254 S.W. 926, reversing Frost v. Smith, Civ.App., 207 S.W. 392—Heid Bros. v. Riesto, Civ.App., 281 S.W. 638, 639, citing **Corpus Juris.**
22 C.J. p 422 note 3.
Pleading controls over testimony.
Cal.—In re Cover's Estate, 204 P. 583, 188 Cal. 133.
Tex.—Tate v. Tate, Civ.App., 15 S.W.2d 159, reversed on other grounds, Com.App., 27 S.W.2d 137.
Lines of controversy defined
Pleading is, for purpose of cause, a defining of lines of controversy and waiver of proof on all matters outside lines of dispute.—Nusbaum v. Warwick Hotel Co., 170 A. 388, 112 Pa.Super. 277.
Contradiction prohibited
Cal.—Chase v. Van Camp Sea Food Co., 292 P. 179, 109 Cal.App. 38.
Question not for jury
Or.—Southern Oregon Co. v. Kight, 228 P. 132, 112 Or. 66.
Conclusiveness of allegations in pleadings generally, see the C.J.S. title Pleading §§ 59–62, also 49 C.J. p 122 note 54–p 128 note 28.
Effect of admissions in plea or answer see the C.J.S. title Pleading § 160, also 49 C.J. p 287–p 289 note 27.

47. Ga.—Field v. Manly, 195 S.E. 406, 185 Ga. 464.

48. La.—Succession of Fontano, 200 So. 142, 196 La. 775.

49. U.S.—Deputron v. Young, Neb., 10 S.Ct. 539, 134 U.S. 241, 33 L.Ed. 923.
22 C.J. p 422 note 4.

50. Md.—Kramer v. Globe Brewing Co., 2 A.2d 634, 175 Md. 461.

51. U.S.—Stolte v. Larkin, C.C.A. Minn., 110 F.2d 226.
22 C.J. p 422 note 3 [b], [c].
Casual admission
Vt.—Scoville v. Brock, 70 A. 1014, 81 Vt. 405.
Improper pleading
Where intervening petition could be treated only as admission in writing by party, since unnecessary and without effect as a pleading, such party could deny truth of statements therein.—Collinsworth v. City of Catlettsburg, 32 S.W.2d 982, 236 Ky. 194.
Inconsistent pleas
Where defendant, in addition to pleading that note sued on was forgery, alleged that he had been discharged of all liability with respect to land contract, it being claimed the note was given in connection therewith, such plea of release of liability and want of consideration, while material on the question of ratification of the alleged forged signature, was not conclusive.—Second Nat. Bank of New Hampton v. Hults, 182 N.W. 175, 191 Iowa 353.

52. Md.—Kramer v. Globe Brewing Co., 2 A.2d 634, 175 Md. 461.
22 C.J. p 422 note 3 [d].

53. Md.—Kramer v. Globe Brewing Co., supra.

54. N.Y.—Dressner v. Manhattan Delivery Co., 92 N.Y.S. 800.
Ohio.—State v. Board of Education of Richland Tp., 6 Ohio Supp. 59.
Failure to accept admission
Where defendant in the affidavit to his plea admits a certain amount to be due, but plaintiff fails to take a judgment for the amount so admitted and the action proceeds, defendant is not bound by his admission.—Laubheimer v. Naill, 40 A. 888, 88 Md. 174, followed in Sisters of Notre Dame v. Kusnitt, 93 A. 928, 125 Md. 323.

55. U.S.—Pullman Co. v. Bullard, C.C.A.Ga., 44 F.2d 347—Howard v. Halsted, D.C.N.Y., 296 F. 782, af-

mission must be weighed like any other admission.[56]

Effect on adverse party. The party adverse to the pleader is not bound by an admission in a pleading but may use it so far as it is in his favor and disprove the remainder.[57] However, a party failing to offer proof disproving such remainder is bound thereby.[58]

An admission in the pleading of negligence does not preclude a finding of willful misconduct.[59]

Effect as to coparties. Although a coparty of the pleader may be bound by an admission in the pleading,[60] where each of the coparties presents different contentions, the admissions contained in the pleading of one of such parties does not preclude the other from proving the contrary.[61]

An answer to an interrogatory relieves the adversary of the need of proving the fact admitted, but it is not conclusive and will not prevail over other evidence offered at the trial.[62]

d. Testimony

Admissions made in the testimony of a party while a witness in the case are binding and conclusive if deliberate and unequivocal and unexplained or uncontradicted.

There has been said to be a conflict of authority with regard to the effect of admissions made by a party in his testimony while a witness in the case[63] and it has been stated generally that such admissions should be viewed in the light of all of the circumstances and conditions proved.[64] However,

firmed, C.C.A., Howard v. Halstead, 298 F. 1020.

Ala.—Missouri State Life Ins. Co. v. Finn, 145 So. 141, 225 Ala. 672.

Cal.—Mallett v. Doherty, 231 P. 1005, 69 Cal.App. 653.

Ga.—Field v. Manly, 195 S.E. 406, 185 Ga. 464—Fleischer Knitting Mills v. Union Dry Goods Store, 199 S.E. 646, 58 Ga.App. 659—Griffin v. Browning, 181 S.E. 801, 51 Ga.App. 743—Bray v. C. I. T. Corporation, 179 S.E. 925, 51 Ga.App. 196—Watkins v. Price Mercantile Co., 164 S.E. 231, 45 Ga.App. 272—Payne v. Rivers, 110 S.E. 45, 28 Ga.App. 28.

Iowa.—Larson v. Stanton State Bank, 208 N.W. 726, 202 Iowa 333.

Kan.—Tarkowski v. Banks, 101 P.2d 893, 151 Kan. 898.

Minn.—Neilsen v. Union State Bank of Minneapolis, 205 N.W. 453, 165 Minn. 25.

Mo.—Conduitt v. Trenton Gas & Electric Co., 31 S.W.2d 21, 326 Mo. 133—Andrus v. Business Men's Acc. Ass'n of America, 223 S.W. 70, 283 Mo. 442, 13 A.L.R. 779—Cantrell v. Knight, App., 72 S.W.2d 196—Negbaur v. Fogel Const. Co., App., 58 S.W.2d 346—Moore v. Leach, App., 14 S.W.2d 21.

Mont.—Gardiner v. Eclipse Grocery Co., 234 P. 490, 72 Mont. 540—Hester v. Western Life & Accident Co. of Denver, Colo., 215 P. 508, 67 Mont. 286.

N.H.—George W. Blanchard & Son Co. v. American Realty Co., 108 A. 291, 79 N.H. 295.

Okl.—Republic Nat. Bank of St. Louis, Mo., v. First State Bank of Oilton, 237 P. 578, 110 Okl. 299.

Tex.—Kirk v. Head, 152 S.W.2d 726, affirming, Civ.App., 132 S.W.2d 125—Hirsch v. Dearing, Civ.App., 151 S.W.2d 949—Panhandle Steel Products Co. v. Fidelity Union Casualty Co., Civ.App., 23 S.W.2d 799—Hall v. Williams & Ellis, Civ. App., 267 S.W. 520—Hubb-Diggs Co. v. Mitchell, Civ.App., 256 S.W. 702—O'Loughlin v. Moran, Civ.App., 250 S.W. 774.

Vt.—Barclay v. Wetmore & Morse Granite Co., 110 A. 1, 94 Vt. 227.

Wyo.—Willis v. Willis, 49 P.2d 670, 48 Wyo. 403, rehearing denied 54 P.2d 814, 49 Wyo. 296.

22 C.J. p. 422 note 6.

Reason for rule

Such a pleading ceases to be a "judicial admission."—Kirk v. Head, Tex., 152 S.W.2d 726, affirming, Civ. App., 132 S.W.2d 125.

Mistake may be shown

Mass.—American Mut. Liability Ins. Co. v. Condon, 183 N.E. 106, 280 Mass. 517.

Or.—Beck v. General Ins. Co. of America, 18 P.2d 579, 141 Or. 446.

Absence of knowledge or consent

Mo.—Miller v. Griswold, App., 241 S.W. 986.

Or.—Beck v. General Ins. Co. of America, 18 P.2d 579, 141 Or. 446.

Tex.—More v. More, Civ.App., 7 S.W.2d 1096, error refused.

On question of sufficiency of amended pleading

Where a party makes in his pleading solemn admissions against interest, in the absence of mistake, a court, in passing on the sufficiency of a subsequently amended pleading filed by him, should consider such admissions and treat them as admitted facts.—Page v. Geiser Mfg. Co., 87 P. 851, 17 Okl. 110.

56. Ga.—Payne v. Rivers, 110 S.E. 45, 28 Ga.App. 28.

Mo.—Andrus v. Business Men's Acc. Ass'n of America, 223 S.W. 70, 283 Mo. 442, 13 A.L.R. 779—Cantrell v. Knight, App., 72 S.W.2d 196—Negbaur v. Fogel Const. Co., App., 58 S.W.2d 346.

57. Pa.—Abrams v. Uenking, 81 Pa. Super. 422.

22 C.J. p. 422 note 7.

Introduction in evidence not admission

Mo.—U. S. Feed Mills Co. v. Missouri Pac. R. Co., 36 S.W.2d 136, 224 Mo.App. 1134.

Pa.—Long for Use of Gordon v. Daylor, 46 Dauph.Co. 162.

58. Or.—Beck v. General Ins. Co. of America, 18 P.2d 579, 141 Or. 446.

Pa.—Abrams v. Uenking, 81 Pa.Super. 422.

Offer of proof without limitation

Where a party introduces an adversary's pleadings without any reservation or limitation, all the statements in such documents, like other admissions, whether favorable to or against the pleader, will stand as admissions, unless rebutted or controverted by other evidence.—Warnick v. Warnick, 187 N.W. 51, 107 Neb. 747.

59. Cal.—Frank v. Myers, 60 P.2d 144, 16 Cal.App.2d 16.

60. Tenn.—New River Lumber Co. v. Tennessee R. Co., 191 S.W. 334, 136 Tenn. 661.

61. Minn.—State ex rel. Town of Stuntz v. City of Chisholm, 273 N.W. 235, 199 Minn. 403.

62. Conn.—Bochicchio v. Petrocelli, 11 A.2d 356, 126 Conn. 336, 127 A.L.R. 457.

63. Ky.—Sutherland v. Davis, 151 S.W.2d 1021, 286 Ky. 743.

64. Ky.—Sutherland v. Davis, supra.

Minn.—Vondrashek v. Dignan, 274 N.W. 609, 200 Minn. 530.

N.H.—Harlow v. Laclair, 136 A. 128, 82 N.H. 506, 50 A.L.R. 973.

Circumstances considered

"'Among the circumstances which should be considered in such a case are the following: (1) Was the party at the time when the occurrence about which he testified took place, and when he testified, in full pos-

the admissions of a party in his testimony are as a general rule binding on him[65] and preclude him from avoiding the consequences of his testimony by the introduction of, or reliance on, other evidence in the case[66] unless the circumstances and conditions give rise to the probability of error in the party's own testimony[67] or unless the effect thereof is avoided by some explanation.[68] To bring admissions of the party within this rule it would seem that they must have been deliberate and unequivocal,[69] that they relate to matters of fact and are positive and definite in their character,[70] and

session of his mental faculties? (2) Was his intelligence and command of English such that he fully understood the purport of the questions and his answers thereto? (3) What was the nature of the facts to which he testified? Was he simply giving his impressions of an event as a participant or an observer, or was he testifying to facts peculiarly within his own knowledge? (4) Is his testimony contradicted by that of other witnesses? (5) Is the effect of his testimony clear and unequivocal, or are his statements inconsistent and conflicting?' It would seem reasonable that all of the circumstances related above should be taken into consideration in determining the conclusiveness of the testimony of the party to an action and perhaps such other circumstances as may manifest themselves in a different state of case."

Ky.—Sutherland v. Davis, 151 S.W. 2d 1021, 1024, 286 Ky. 743.

N.H.—Harlow v. Laclair, 136 A. 128, 131, 82 N.H. 506, 50 A.L.R. 973.

Declarant not real party in interest

In guest's action against intoxicated host for injuries arising out of automobile collision, host's denial in his testimony of intoxication did not deprive host of defense alleged in his answer that guest was contributorily negligent in riding with host who was intoxicated, where host's answer also alleged insurer had assumed financial responsibility for accident.—Richard v. Canning, La.App., 158 So. 598.

65. Ala.—Gray v. Pankey, 100 So. 880, 211 Ala. 539.

Fla.—Kight v. American Eagle Fire Ins. Co. of New York, 170 So. 664, 125 Fla. 608.

Mo.—Turner v. Ragan, 229 S.W. 809—Scott v. Kansas City Public Service Co., App., 115 S.W.2d 518—McNairy v. Standard Life Ins. Co., App., 114 S.W.2d 156—McCoy v. Home Oil & Gas Co., App., 60 S.W.2d 715—Beecham v. Greenlease (Cadillac) Motor Co., 38 S.W.2d 535, 225 Mo.App. 619—Haddow v. St. Louis Public Service Co., App., 38 S.W.2d 284, 286, citing **Corpus Juris.**

N.H.—White v. Brown Co., 159 A. 124, 85 N.H. 389.

Tex.—Kimmell v. Tipton, Civ.App., 142 S.W.2d 421—Wristen v. Wristen, Civ.App., 119 S.W.2d 1104, error dismissed—Southern Surety Co. v. Inabnit, Civ.App., 1 S.W.2d 412.

Va.—Yellow Cab Co of Virginia v. Gulley, 194 S.E. 683, 169 Va. 611. 22 C.J. p 422 note 8.

Issue eliminated

Admission by defendant of execution of notes disposes of plea of non est factum adversely to defendant.—Stevens v. Green, 156 S.E. 626, 42 Ga.App. 512

Falsity of testimony given by party on stand while in full possession of his faculties may not be urged by such party as a basis for going to the jury.—Harlow v Laclair, 136 A. 128, 82 N.H. 506, 50 A.L.R. 973.

Recovery barred

Mo.—Madden v. Red Line Service, App., 76 S.W.2d 435—De Lorme v. St. Louis Public Service Co., App., 61 S.W.2d 247.

Under statute

La.—Thompson v. Haubtman, App., 137 So. 362.

66. Ky.—Sutherland v. Davis, 151 S.W.2d 1021, 286 Ky. 743.

N.H.—Harlow v. Laclair, 136 A. 128, 82 N.H. 506, 50 A.L.R. 973.

Authorities reviewed

N.H.—Harlow v. Laclair, supra.

Conclusive admissions

(1) Under circumstances, testimony of automobile guest suing host for injuries, that host was intoxicated at time of accident was a "judicial admission", which barred guest from disputing it either by host's testimony or by argument of guest's counsel, and required trial judge to direct jury to accept it as conclusive of disputed issue.—Sutherland v. Davis, 151 S.W.2d 1021, 286 Ky. 743.

(2) In automobile guest's action for injuries received when motorist drove automobile against center pier of viaduct on city street, wherein only defense was that guest was contributorily negligent in remaining in automobile with knowledge that motorist was intoxicated and motorist testified that he was not under influence of liquor, exclusion of defendant's offer of testimony of other witnesses to prove that he was intoxicated at time shortly after accident was not error, since motorist's testimony was given understandingly of facts peculiarly within his own knowledge and apparently honestly and in good faith.—Vondrashek v. Dignan, 274 N.W. 609, 200 Minn. 530.

(3) Act of lessor in removing a defect in a stairway in a two-apartment building after lessee of entire building fell and was injured could not serve lessee as an admission by lessor that the latter had reserved the possession and control of the stairway in the face of lessee's own testimony that she rented the entire building, such testimony being in the nature of a judicial admission.—Turner v. Ragan, Mo., 229 S.W. 809.

Admissions defeating recovery

One who admits positive and definite facts which defeat his right to recover is concluded by such admission and cannot complain of a direction of a verdict against him, if the admission is not subsequently modified or explained to show he was mistaken in good faith.—Stanolind Oil & Gas Co. v. State, Tex., 145 S.W.2d 569, modifying 133 S.W.2d 767, reversing, Civ.App., 114 S.W.2d 699.

67. Ky.—Sutherland v. Davis, 151 S.W.2d 1021, 286 Ky. 743.

Modification for mistake

La.—Thompson v. Haubtman, App., 137 So. 362.

Tex.—Stanolind Oil & Gas Co. v. State, 145 S.W.2d 569, modifying 133 S.W.2d 767, reversing, Civ. App., 114 S.W.2d 699.

68. Mo.—Evans v. Massman Const. Co., 115 S.W.2d 163, 232 Mo.App. 1105, reversed on other grounds 122 S.W.2d 924, 343 Mo. 632—De Lorme v. St Louis Public Service Co., App., 61 S.W.2d 247—McCoy v. Home Oil & Gas Co., App., 60 S.W.2d 715—Weddle v. St. Joseph Ry., Light, Heat & Power Co., App., 47 S.W.2d 1098, opinion quashed on other grounds State ex rel. Weddle v. Trimble, 52 S.W.2d 864, 331 Mo. 1.

General statements as to ownership

General testimony that property "belonged" to another does not estop declarant from asserting the true situation which shows certain rights in such property to be in declarant.—Bishop v. Lynch, Wash., 111 P.2d 996.

69. Conn.—King v. Spencer, 161 A. 103, 115 Conn. 201—Kanopka v. Kanopka, 154 A. 144, 113 Conn. 30, 80 A.L.R. 619.

Okl.—Sturm v. American Bank & Trust Co. of Ardmore, 44 P.2d 974, 172 Okl. 294.

70. N.H.—Harlow v. Laclair, 136 A. 128, 82 N.H. 506, 50 A.L.R. 973.

Tex.—Stanolind Oil & Gas Co. v. State, 145 S.W.2d 569, modifying 133 S.W.2d 767, reversing, Civ. App., 114 S.W.2d 699.

that they are made by a person of mature years and unimpaired mentality.[71] If it is doubtful that a party to the action comprehends his own testimony, or if it is so confused as not to constitute an unequivocal admission, it is not conclusive on such party and the court is not precluded from considering all the evidence.[72]

An admission in testimony dispenses with the necessity of proving the fact admitted.[73]

Some authorities hold that admissions in testimony are not to be taken as conclusively true, but only presumptively so,[74] to be taken as absolutely true and conclusive if unexplained and uncontradicted.[75]

A statement in the testimony of a party consisting of a mere informal admission not made to limit the issues or do away with proof is considered in some cases as having prima facie force but as not being conclusive so as to prevent disputation by declarant.[76] So a party is not concluded by a statement in the nature of an admission made on cross-examination which is inconsistent with the direct testimony, or with the other facts and circumstances in evidence.[77]

Where the admission is in the nature of an estimate or guess, it may be overcome by evidence of the facts and circumstances which form the basis of the admission.[78]

e. Admissions by Counsel

Distinct and unequivocal admissions made by counsel may be conclusive on the party unless withdrawn by order of court for good cause shown.

Admissions by counsel made in the trial of a cause

Statements not conclusive

The admission by a party on the stand that he signed a statement is not such an admission that the facts in the statement are true so as to preclude proof to the contrary.—Wright v. Mahaffa, 270 N.W. 402, 222 Iowa 872.

71. Ky.—Sutherland v. Davis, 151 S.W.2d 1021, 286 Ky. 743.
N.H.—Harlow v. Laclair, 136 A. 128, 82 N.H. 506, 50 A.L.R. 973.

72. Conn.—King v. Spencer, 161 A. 103, 115 Conn. 201.

73. Ala.—Gray v. Pankey, 100 So. 880, 211 Ala. 539.
Conn.—King v. Spencer, 161 A. 103, 115 Conn. 201.
22 C.J. p 422 note 9.

74. Ga.—Hansberger Motor Transp. Co. v. Pate, 181 S.E. 796, 798, 51 Ga.App. 877, citing **Corpus Juris.**
Iowa.—Wright v. Mahaffa, 270 N.W. 402, 406, 222 Iowa 872, quoting **Corpus Juris.**
Mo.—Haddow v. St. Louis Public Service Co., App., 38 S.W.2d 284.
22 C.J. p 423 note 10.

Reason for rule

"An honest party to a cause may make statements as a witness against his interest which he believes to be true and yet the entire balance of the testimony in the case show that he was mistaken."—Ephland v. Missouri Pac. R. Co., 57 Mo. App. 147, 162.

As prima facie binding

(1) Admission in party's testimony, unless avoided by explanation, is prima facie binding.—Madden v. Red Line Service, Mo.App., 76 S.W.2d 435.

(2) Plaintiff's statements as a witness in his own behalf, which directly contradict material allegations of his complaint, constitute informal judicial admissions, which are accorded the quality of prima facie proof, and for the purposes of the action must be taken as true.—Van Meter v. Zumwalt, 206 P. 507, 35 Idaho 235.

Explanation of testimony proper

In action against joint tort-feasor, where plaintiff unwittingly testified he "settled" with other joint tort-feasor, admitting copy of covenant not to sue as explanation of testimony held proper, such document being in explanation and not contradictory of testimony given.—Finlay v. Plante, 160 A. 865, 52 R.I. 325.

75. Tex.—Sovereign Camp, W. O. W., v. Rodriguez, Civ.App., 125 S.W.2d 1069, reversed on other grounds Rodriguez v. W. O. W. Life Ins. Co., 145 S.W.2d 1077, 136 Tex. 43.

Inconsistency must be explained

or admission against interest in testimony is conclusive.—Scott v. Kansas City Public Service Co., Mo.App., 115 S.W.2d 518.

76. N.Y.—Manhattan Roofing Co. v. Hagedorn, 180 N.Y.S. 816, 110 Misc. 657.

Damages sought

A statement by plaintiff, while testifying in an action for injuries to his land, that he claimed no damages prior to a designated date, does not prevent an inquiry as to all damages not barred by limitations, for it does not amount to a retraxit, and does not show a contract for want of mutuality and consideration, but is a mere statement which ought to have weight with the jury in determining the damages.—Arthur v. Henry, 73 S.E. 206, 157 N.C. 393.

77. U.S.—Mathis v. Tutweiler, C.C.A.Tenn., 295 F. 661.
Or.—Cox v. Jones, 5 P.2d 102, 138 Or. 327.

Distinguished from formal admission

Or.—Cox v. Jones, 5 P.2d 102, 138 Or. 327.

78. Conn.—King v. Spencer, 161 A. 103, 105, 115 Conn. 201, citing **Corpus Juris.**
Ga.—Hansberger Motor Transp. Co. v. Pate, 181 S.E. 796, 798, 51 Ga.App. 877, citing **Corpus Juris.**
Iowa.—Wright v. Mahaffa, 270 N.W. 402, 406, 222 Iowa 872, quoting **Corpus Juris.**
Mo.—Cluck v. Abe, 40 S.W.2d 558, 328 Mo. 81—Scott v. Kansas City Public Service Co., App., 115 S.W.2d 518—Haddow v. St. Louis Public Service Co., App., 38 S.W.2d 284, 286, citing **Corpus Juris.**
N.Y.—Manhattan Roofing Co. v. Hagedorn, 180 N.Y.S. 816, 110 Misc. 657.
Wash.—Harry v. Northern Pac. Ry. Co., 178 P. 465, 105 Wash. 469.
22 C.J. p 423 note 11.

Opponent's admission

Defendant's admission on cross-examination consisting of estimates as to speed of automobile is available to plaintiff where plaintiff also gave vague approximations as to speed of the car in his own testimony.—Little v. Straw, 192 A. 894, 326 Pa. 577.

Admission as to balance due

In the buyer's action against the installment seller for trespass in repossessing furniture, the testimony of the buyer who said, "I reckon I owed him a balance on that furniture," was not conclusive against her, in the absence of evidence that she ever added up the receipts for payments, and it was for the jury to say whether anything was still owed.—Anderson v. Tadlock, 175 So. 412, 27 Ala.App. 513.

may be conclusive on the party[79] unless withdrawn or set aside by order of the court for good cause shown, such as inadvertence or mistake,[80] or lack of authority.[81] It has been held that to fall in such category the admission must be made for the purpose of substituting it for regular legal evidence at the trial,[82] it must be distinct and unequivocal,[83] and if made for such purpose it cannot ordinarily be withdrawn.[84]

f. In Other Proceedings

Ordinarily, and except for an estoppel, an admission made in the course of another proceeding or trial is not conclusive but may be explained or contradicted.

Unless elements of an estoppel be present,[85] a party to an action is ordinarily not concluded by an admission made by him or by one whose admission affects him, in the course of another action, but such admission may be explained or contradicted.[86]

79. La.—Perkins v. Douglass, 11 La.Ann. 471.
Mo.—Sonken-Galamba Corporation v. Missouri Pac. R. Co., 40 S.W.2d 524, 225 Mo.App. 1066—Probst v. St. Louis Basket & Box Co., 207 S.W. 891, 200 Mo.App. 568, affirmed State ex rel. St. Louis Basket & Box Co. v. Reynolds, 224 S.W. 401, 284 Mo. 372.
N.C.—Turner v. Southeastern Grain & Live Stock Co., 102 S.E. 849, 179 N.C. 457—Brooks v. Brooks, 90 N.C. 142.
Or.—Arstill v. Fletcher, 187 P. 854, 95 Or. 308.

Admission by both sides
N.C.—Brooks v. Brooks, 90 N.C. 142.
Conclusiveness on subsequent trial see infra subdivision f of this section.

80. La.—Perkins v. Douglass, 11 La. Ann. 471.
Mo.—State ex rel. St. Louis Basket & Box Co. v. Reynolds, 224 S.W. 401, 284 Mo. 372, affirming Probst v. St. Louis Basket & Box Co., 207 S.W. 891, 200 Mo.App. 568.
N.C.—Turner v. Southeastern Grain & Live Stock Co., 102 S.E. 849, 179 N.C. 457.

Effect cannot be lessened by counsel's own testimony showing that admission was not authorized by client, and that it was made from statements of a witness whom he believed, and by whose affidavit, produced, it appeared that the witness did not state quite so much as was covered by the admission.—Perkins v. Douglass, 11 La.Ann. 471.

Opening statement
An oral admission of a material fact made by an attorney in his opening statement to the jury, if distinct and formal and made for the purpose of dispensing with the formal proof of some fact at the trial, is a solemn admission and conclusive upon the party making it.—Grimmett v. Grimmett, 195 P. 133, 80 Okl. 176—Patterson v. Morgan, 155 P. 694, 53 Okl. 95.
Effect of opening statement of counsel generally see the C.J.S. title Trial § 161, also 64 C.J. p 237 note 81—p 242 note 21.

Right of withdrawal
(1) An admission of fact by counsel in the trial of a cause may be withdrawn with the consent of the court.—In re Gunderman's Estate, 168 N.W. 359, 102 Neb. 590.

(2) Admission of counsel by improvidence or mistake may be withdrawn.—Mid-Co Gasoline Co. v. Back, 217 P. 1041, 95 Okl. 29.

(3) Withdrawal should be permitted if the admission is made for a limited purpose only and the court holds it acceptable only unrestricted.—Siedlek v. Bradley, 137 A. 667, 289 Pa. 516.

81. Tex.—Houston, E. & W. T. R. Co. v. De Walt, 70 S.W. 531, 96 Tex. 121, 97 Am.S.R. 877.
22 C.J. p 339 note 73 [a].

82. Mo.—Beattie Mfg. Co. v. Gerardi, 214 S.W. 189.

Statements not binding if made casually or in heat of argument, not as substitute for legal evidence.—Beattie Mfg. Co. v. Gerardi, supra.

83. Okl.—Grimmett v. Grimmett, 195 P. 133, 80 Okl. 176.

84. Mo.—Probst v. St. Louis Basket & Box Co., 207 S.W. 891, 200 Mo. App. 568, affirmed State ex rel. St. Louis Basket & Box Co. v. Reynolds, 224 S.W. 401, 284 Mo. 372.

85. Ariz.—City of Phœnix v. Johnson, 75 P.2d 30, 51 Ariz. 115.
Md.—Stinchcomb v. Realty Mortg. Co., 188 A. 790, 171 Md. 317.
Va.—Burch v. Grace Street Bldg. Corporation, 191 S.E. 672, 168 Va. 329.
W.Va.—Keller v. Norfolk & W. Ry. Co., 167 S.E. 448, 113 W.Va. 286.

86. U.S.—Blanks v. Klein, Miss., 53 F. 436, 3 C.C.A. 585.
Ariz.—Alabam Freight Lines v. Chateau, 114 P.2d 233—City of Phœnix v. Johnson, 75 P.2d 30, 38, 51 Ariz. 115, citing **Corpus Juris.**
Del.—Rudnick v. Schoenberg, 122 A. 902, 2 W.W.Harr. 339.
Kan.—Morrison v. Montgomery, 184 P. 985, 105 Kan. 430.
La.—Crichton v. Krouse, App., 142 So. 635.
Mass.—Morrissey v. Powell, 23 N.E. 2d 411, 304 Mass. 268, 124 A.L.R. 1522—Bean's Case, 176 N.E. 528, 275 Mass. 543.
Mich.—Krajewski v. Western & Southern Life Ins. Co., 217 N.W. 62, 241 Mich. 396.
Minn.—Henslin v. Wingen, 280 N.W. 281, 203 Minn. 166—Gussman v. Rodgers, 251 N.W. 18, 190 Minn. 153.
Mo.—McNatt v. Wabash Ry. Co., 108 S.W.2d 33.
N.Y.—In re Sack's Estate, 274 N.Y.S. 707, 153 Misc. 262—Lodewick v. Cutting, 201 N.Y.S. 276, 121 Misc. 348.
N.C.—Burlington Hotel Corporation v. Dixon, 145 S.E. 244, 196 N.C. 265.
Okl.—Avis v. Hopping, 88 P.2d 622, 625, 184 Okl. 527, quoting **Corpus Juris**—Forry v. Mickle, 69 P.2d 39, 180 Okl. 113.
Pa.—Morrett v. Fire Ass'n of Philadelphia, 108 A. 171, 265 Pa. 9.
Tex.—Mahoney v. Mahoney, Civ.App., 103 S.W.2d 459, 462, quoting **Corpus Juris.**
W.Va.—Gillespie v. Modern Woodmen of America, 133 S.E. 333, 336, 101 W.Va. 602, quoting **Corpus Juris.**
22 C.J. p 421 note 98 [c], p 423 note 19—5 C.J. p 686 note 94.
"While it is competent to introduce pleadings or solemn admissions as defined by law as evidence, nevertheless the admissions so admitted are not conclusive. The party making such admissions has the legal right to show, if he can, that they were made under misapprehension or by inadvertence or mistake, or for the purpose of dispensing with formal proof, or that they were made for the purpose of presenting a particular point in the particular case under consideration."—Burlington Hotel Corporation v. Dixon, 145 S.E. 244, 245, 196 N.C. 265.

Apparently contrary cases reviewed
Del.—Rudnick v. Schoenberg, 122 A. 902, 2 W.W.Harr. 339.

Admission through interpreter
Plaintiff may explain admissions against interest, but cannot blame interpreter of her choosing through whom admissions were made.—Krajewski v. Western & Southern Life Ins. Co., 217 N.W. 62, 241 Mich. 396.

Affidavit
Conn.—Bernhardt v. Cappelletti, 133 A. 576, 104 Conn. 501.
Mich.—Wood v. Vroman, 184 N.W. 520, 215 Mich. 449.
22 C.J. p 423 note 19 [b] (1).

Agreed statement of facts
In mandamus suit to compel city and its officers to deliver draft, where parties agreed to statement of facts, resolution of city commission modi-

fying provisions of ordinance approving settlement between plaintiff and city which was incorporated in agreed statement, was inadmissible where no predicate was laid to attack agreed statement of facts.—City of Beaumont v. Stephenson, Tex. Civ.App., 107 S.W.2d 915, error dismissed.

Answer to interrogatories in previous actions.—Federal Surety Co. v. City of Staunton, Ill., for Use of McWane Cast Iron Pipe Co., C.C.A. Ala., 29 F.2d 9, 14, citing **Corpus Juris**, and certiorari denied 49 S.Ct. 253, 279 U.S. 840, 73 L.Ed. 986—22 C.J. p 343 note 55.

Bankruptcy schedules
Minn.—Henslin v. Wingen, 280 N.W. 281, 203 Minn. 166.

Bill of exceptions in a cause is not necessarily conclusive on a retrial in respect of its statements as to concessions made on the first trial. —Mullin v. Vermont Mut. F. Ins. Co., 56 Vt. 39.

Conclusion of law
A conclusion of law contained in the pleading of a prior proceeding is not binding on the pleader in a subsequent action.—State ex rel. McCormack v. American Building & Loan Ass'n, Tenn., 150 S.W.2d 1048.

Pleadings generally
(1) An admission is not conclusive, and may be explained or contradicted.
U.S.—Nelson Bros. Coal Co. v. Perryman-Burns Coal Co., C.C.A.N.Y., 48 F.2d 99, reversing, D.C., 43 F.2d 564.
Cal.—De Bock v. De Bock, 184 P. 890, 43 Cal.App. 283.
Del.—Rudnick v. Schoenberg, 122 A. 902, 2 W.W.Harr. 339.
Fla.—In re Price's Estate, 176 So. 492, 129 Fla. 467.
Ga.—Dixon v. Cassels Co., 130 S.E. 75, 34 Ga.App. 478.
Ill.—People, for Use of Hammond, v. Graydon, 28 N.E.2d 318, 306 Ill.App. 163—Dwyer v. Dwyer, 265 Ill.App. 155.
Md.—Stinchcomb v. Realty Mortg. Co., 188 A. 790, 171 Md. 317.
Mich.—Guarantee Bond & Mortgage Co. v. Hilding, 224 N.W. 643, 246 Mich. 334.
Mo.—Creighton v. Missouri Pac. R. Co., 66 S.W.2d 980, 229 Mo.App. 325, certiorari denied Missouri Pac. R. Co. v. Creighton, 55 S.Ct. 70, 293 U.S. 558, 79 L.Ed. 659.
N.D.—Power v. Williams, 205 N.W. 9, 53 N.D. 54—Union Nat. Bank of Minot v. Western Bldg. Co., 175 N. W. 628, 44 N.D. 336.
Okl.—Reeves v. Langford, 72 P.2d 782, 181 Okl. 192.
S.D.—Frazier v. Travelers Ins. Co. of Hartford, Conn., 287 N.W. 589, 66 S.D. 638.
Vt.—Houghton v. Grimes, 151 A. 642, 103 Vt. 54.
22 C.J. p 423 note 19 [b] (3).

(2) An admission is but a quasi admission.—Nusbaum v. Warwick Hotel Co., 170 A. 388, 112 Pa.Super. 277.

(3) Weight thereof is for trier of facts to determine in view of all evidence in case.—Kubin v. Chicago Title & Trust Co., 29 N.E.2d 859, 307 Ill.App. 12.

(4) If pleader can amend and thereby destroy admission in pleading of prior action it is not ordinarily entitled to overwhelming weight.—Mellor v. Rideout, 257 P. 173, 83 Cal. App. 621.

(5) Lack of knowledge may be shown, the whole question being for the jury.—Frazier v. Travelers Ins. Co. of Hartford, Conn., 287 N.W. 589, 66 S.D. 638.

(6) Lack of authority in attorney drawing pleading may be shown — Dwyer v. Dwyer, 265 Ill.App. 155.

(7) Under the Louisiana statute, an allegation in a pleading not necessary thereto does not have the effect of an estoppel in another suit involving the pleader.—Little v. Barbe, 198 So. 368, 195 La. 1071.

(8) Reasons for withdrawal of pleading in former case may be shown if pleading was admitted on question of good faith in making claim.—Bartolotta v. Calvo, 152 A. 306, 112 Conn. 385.

Plea of guilty or conviction thereon
(1) A plea of guilty or a conviction thereon is not conclusive on the pleader but may be explained or rebutted in a subsequent civil case in which the plea or conviction is in evidence as an admission.
U.S.—Podolsky v. La Forge, C.C.A. Mass., 92 F.2d 954.
Cal.—Fawkes v. Reynolds, 211 P. 449, 190 Cal. 204.
Iowa.—Boyle v. Bornholtz, 275 N.W. 479, 224 Iowa 90—Swan v. Philleo, 190 N.W. 406, 194 Iowa 790.
Mass.—Morrissey v. Powell, 23 N.E. 2d 411, 304 Mass. 268, 124 A.L.R. 1522—Minasian v. Ætna Life Ins. Co., 3 N.E.2d 17, 295 Mass. 1.
S.C.—Globe & Rutgers Fire Ins. Co. v. Foil, 200 S.E. 97, 189 S.C. 91.
W.Va.—Gillespie v. Modern Woodmen of America, 133 S.E. 333, 101 W.Va. 602.
22 C.J. p 423 note 19 b (7)—5 C.J. p 686 note 94.

(2) This is certainly so as to a plea of guilty which has been withdrawn.—Morrissey v. Powell, supra.

(3) Reasons for plea may be given.
Mass.—Morrissey v. Powell, supra.
Mich.—Finner v. Porath, 190 N.W. 648, 221 Mich. 28.
S.C.—Globe & Rutgers Fire Ins. Co. v. Foil, 200 S.E. 97, 189 S.C. 91.
Vt.—Prazak v. Burzeiko, 160 A. 189, 104 Vt. 457.
22 C.J. p 419 note 73.

(4) In Iowa it has been held that the circumstances under which a plea is made may not be shown.—Hauser v. Griffith, 71 N.W. 223, 102 Iowa 215, following Root v. Sturdivant, 29 N. W. 802, 70 Iowa 55.

(5) This has been held so notwithstanding a statute providing that, when part of a declaration is given in evidence by one party, the other is entitled to show the whole will not entitle defendant to show explanatory remarks made by him at the time of pleading guilty.—Root v. Sturdivant, supra.

Plea of nolo contendere
A plea of nolo contendere to an indictment with a protestation of defendant's innocence does not conclude him in a civil action from disputing the facts charged in the indictment. —Commonwealth v. Horton, 9 Pick., Mass., 206.

Position is prior dismissed action
U.S.—Sinclair Refining Co. v. Jenkins Petroleum Process Co., C.C.A.Me., 99 F.2d 9, certiorari denied Jenkins Petroleum Process Co. v. Sinclair Refining Co., 59 S.Ct. 362, 305 U.S. 659, 83 L.Ed. 427, rehearing denied 59 S.Ct. 484, 306 U.S. 667, 83 L.Ed. 1062, rehearing denied 59 S.Ct. 1035, 307 U.S. 651, 83 L.Ed. 1530.

Stipulation or admission of counsel in former trial is not conclusive on client in subsequent trial of same case —Lenow v. Bank of Commerce & Trust Co., 4 Tenn.App., 218.

Testimony in prior proceedings
(1) Testimony in former trial is not conclusive.
Ga.—Scott v. Powell Paving Co. of North Carolina, 159 S.E. 895, 43 Ga.App. 705.
Kan.—Morton v. Brinks, 197 P. 210, 108 Kan. 743.
Mo.—Gibbons v. Wells, App., 293 S. W. 89—Lambert v. Wells, App., 264 S.W. 37.
Okl.—Avis v. Hopping, 88 P.2d 622, 184 Okl. 527.
22 C.J. p 423 note 19 [b] (4).

(2) Contradictory testimony at current trial may not be precluded. —Short v. White, 133 S.W.2d 1039, 234 Mo.App. 499—Lambert v. Wells, Mo.App., 264 S.W. 37.

Value of property in replevin
(1) The value of the property stated in the affidavit or replevin bond by plaintiff in a replevin action is not such an admission as to conclude him from proving the true value when sued on the replevin bond.
Conn.—Bernhardt v. Cappelletti, 133 A. 576, 104 Conn. 501.
N.J.—Knight v. Huber Inv. Co., 132 A. 656, 102 N.J.Law 359.
Contra Moore v. Paul F. Beech Co., 221 Ill.App. 609, and Stiller v. Atchison, T. & S. F. R. Co., 124 P. 595, 34 Okl. 45.

(2) The stated value, however, is prima facie correct as against declar-

However, in the absence of explanatory evidence such an admission may be binding.[87]

The adversary is not bound by such an admission.[88]

An admission by counsel is usually binding on a subsequent trial of the same case,[89] unless the party is relieved therefrom on application to the court;[90] it is otherwise when it is reasonably apparent that the admission was made only for the purposes of the pending trial.[91] Such an admission is held not to be evidence against the client in another case,[92] nor to be conclusive on an appeal and trial de novo.[93]

§ 382. Weight of Admissions

a. In general
b. Sufficiency
c. Tacit admissions

a. In General

Although to be viewed with caution, particularly if oral, admissions should be considered and weighed like other evidence, in the light of all the evidence in the case, and if voluntarily made and clearly proved may dispense with the necessity of further proof of the fact admitted.

Although as has been considered in §§ 370–381 supra particular admissions may under some circumstances be conclusive on the party making them and preclude him from adducing evidence in contradiction thereof, where oral admissions are not of a character or made under such circumstances that they may be regarded as conclusive, they, as in the case of other unsworn statements which are discussed in § 265 supra, are as a rule regarded as evidence of the weakest and least satisfactory character[94] and hence to be received and viewed with caution and subject to the closest scrutiny, statutes sometimes so providing.[95] This is particularly true

ant.—Kimball v. Thompson, 122 A. 46, 123 Me. 116.

(3) Conclusiveness of recitals as to value generally see the C.J.S. title Replevin § 339, also 54 C.J. p 673 notes 83–93.

87. Tex.—Miller v. Dyess, 151 S.W. 2d 186, reversing Dyess v. Miller, Civ.App., 126 S.W.2d 538.

Testimony in prior suit

Plaintiff, who on a second trial makes no correction in his previous testimony aside from merely stating a state of facts diametrically contradictory of what he had testified on the first trial, without any claim of mistake or oversight or misunderstanding or explanation, is concluded by his former testimony without right to have jury pass on his credibility.—Dempsey v. City Light & Traction Co., Mo.App., 256 S.W. 155.

88. Me.—Kimball v. Thompson, 122 A. 466, 123 Me. 116.

89. Mo.—Pennington v. Kansas City Rys. Co, 223 S.W. 428, 284 Mo. 1.
22 C.J. p 423 note 13.
Admissions of counsel in same trial see supra subdivision e of this section.

90. N.Y.—Elias v. Coleman, 152 N.Y. S. 451, 88 Misc. 714.
22 C.J. p 423 note 14.

Mistake

An admission of counsel in motion for new trial that agreed statement of facts used on trial included statement absent therefrom was not binding.—Teague v. Wylie, Tex.Civ.App., 110 S.W.2d 941.

91. Me.—Currie v. Cleveland, 79 A. 19, 108 Me. 103, 106.
22 C.J. p 423 note 15.

92. Philippine.—De la Rama v. Benedicto, 5 Philippine 512, 4 Off.Gaz. 142.

93. Mich.—Morrison v. Riker, 26 Mich. 385.

94. La.—Gibson v. Fitts, 180 So. 509, 189 La. 753—Davidson v. American Paper Mfg. Co, 175 So. 753, 188 La. 69, 114 A.L.R. 1044.
Mich.—In re Van Dyk's Estate, 284 N.W. 665, 288 Mich. 115—Tincknell v. Ward, 280 N.W. 104, 285 Mich. 47.
N.Y.—In re O'Donnell's Estate, 197 N.Y.S. 826, 119 Misc. 580.
Wis.—Kruse v. Weigand, 235 N.W. 426, 204 Wis. 195, followed in 235 N.W. 431, 204 Wis. 206, Smith v. Weigand, 235 N.W 431, 204 Wis. 207, Smith v. Weigand, 235 N.W. 431, 204 Wis 208, two cases, and Woodard v. Weigand, 235 N.W. 432, 204 Wis. 209.

Dangerous and unreliable

N.Y.—Wheeler v. Lewis, 196 N.Y.S. 817, 203 App.Div. 222.

Admission to party or other interested person

Ky.—Bradley v. Clarke, 293 S.W. 1082, 219 Ky. 438—Scheible v. Kalkoff, 276 S.W. 846, 210 Ky. 789.
Utah.—Jensen v. Howell, 282 P. 1034, 75 Utah 64.

95. Ala.—Heflin v. Heflin, 113 So. 535, 216 Ala. 519—Wilder v. Reed, 112 So. 312, 216 Ala. 29.
Cal.—Tieman v. Red Top Cab Co., 3 P.2d 381, 117 Cal.App. 40—Barton v. McDermott, 291 P. 591, 108 Cal.App. 372—Brandt v. Brandt, 260 P. 342, 85 Cal.App. 720.
Del.—Conner v. Brown, 3 A.2d 64, 9 W.W.Harr. 529—Eastern Shore Public Service Co. v. Town of Seaford, 2 A.2d 265, sustaining Town of Seaford v. Eastern Shore Public Service Co., 2 A.2d 258, appeal dismissed Eastern Shore Public Service Co. v. Town of Seaford, 59 S. Ct. 483, 306 U.S. 616, 83 L.Ed. 1024, rehearing denied 59 S.Ct. 589, 306 U.S. 668, 83 L.Ed. 1063
Idaho.—In re MacKenzie, 33 P.2d 113, 54 Idaho 481.
Iowa.—Kuhn v. Kjose, 248 N.W. 230, 216 Iowa 36—In re Rich's Estate, 200 N.W. 713, 199 Iowa 902—Frederick v. Frederick, 182 N.W. 195, 191 Iowa 202.
Mich.—In re Van Dyk's Estate, 284 N.W. 665, 288 Mich. 115—McInerney v. Detroit Trust Co, 271 N.W. 545, 279 Mich. 42—Wild v. Wild, 254 N.W. 208, 266 Mich. 570.
Mont.—Sylvain v. Page, 276 P. 16, 84 Mont. 424, 63 A.L.R 528—Humble v. St. John, 234 P. 475, 72 Mont. 519.
N.Y.—In re Toukatley's Estate, 203 N.Y.S. 175, 122 Misc. 120—In re O'Donnell's Estate, 197 N.Y.S. 826—In re Wetterau, 182 N.Y.S. 521.
Or.—Hanks v. Norby, 54 P.2d 836, 152 Or. 610—Demas v. First Nat. Bank, 247 P. 151, 120 Or. 470, affirmed 251 P. 62, 120 Or. 470—Jones v. Bramwell, 226 P. 694, 111 Or. 316.
R.I.—Rossi v. Ronci, 7 A.2d 773.
22 C.J. p 290 note 75–p 291 note 79.

Reasons for rule

(1) "Verbal admissions should be received with caution and subjected to careful scrutiny, as no class of evidence is more subject to error or abuse. Witnesses having the best motives are generally unable to state the exact language of an admission, and are liable, by omission or change of words, to convey a false impression of the language used. Furthermore, no other class of testimony affords such temptations or opportunities for unscrupulous witnesses to distort the facts, or to commit open perjury, as it is often impossible to contradict their testimony at all, or at least by any other witness than

of admissions made by persons since deceased.[96]

Some authorities distinguish admissions reduced to writing, considering the latter to be entitled to great weight,[97] while in some jurisdictions statutes provide that all admissions be scanned with care.[98]

It is held in some jurisdictions that verbal admissions without corroborating facts or circumstances are alone insufficient to sustain a verdict or finding on a vital issue.[99]

The rule recognizing the unsatisfactory nature of admissions as evidence does not mean that such an admission may not constitute substantial evidence.[1] It may not be entirely rejected[2] without fair consideration,[3] and, if undenied when full opportunity for denial is afforded, such an admission constitutes substantial evidence of the facts admitted.[4] Furthermore, if deliberately made in view of all the facts to which it relates and clearly proved,[5] and if sufficiently clear and definite,[6] an admission is not necessarily weak evidence requiring corroboration,[7] but rather, whether oral[8] or

the party himself. These and similar considerations have repeatedly led the courts to declare in substance that admissions are evidence of low grade—the weakest and most unsatisfactory form of evidence.' "—Sylvain v. Page, 276 P. 16, 20, 84 Mont. 427, 63 A.L.R. 528.

(2) "The rule is based largely upon the frailty of human memory, the danger of mistake, or imperfection in repetition of the statements, or, as otherwise stated, such verbal statements are 'easy to be misunderstood and difficult to be accurately reproduced.' "—Heflin v. Heflin, 113 So. 535, 537, 216 Ala. 519.

(3) "Aside from the danger of fabrication, verbal admissions are regarded as unreliable evidence, because experience shows that they are frequently misunderstood, imperfectly remembered, and inadvertently made"—Tousey v Hastings, 86 N.E. 831, 832, 194 N.Y. 79.

Both parties affected by rule
Iowa.—Halstead v. Rohret, 235 N.W. 293, 212 Iowa 837.

Careful scrutiny of circumstances under which made.—In re Fein's Will, 230 N.Y.S. 308, 132 Misc. 613—In re Meyers' Estate, 223 N.Y.S. 701, 129 Misc. 760.

Admissions in casual conversations
Mich.—Bartkowiak v. Bartkowiak, 283 N.W. 49, 286 Mich. 623—Johnson v. Douglas, 274 N.W. 780, 281 Mich. 247.

Admission by infant
N.J.—Bankers' Trust Co. v. Bank of Rockville Center Trust Co., 168 A. 733, 114 N.J.Eq. 391, 89 A.L.R. 697, reversing 159 A. 505, 110 N.J. Eq. 203.

Scrutinized in light of circumstances
Ill.—Megginson v. Megginson, 10 N.E.2d 815, 367 Ill. 168—Fierke v. Elgin City Banking Co., 7 N.E.2d 875, 366 Ill. 66—In re Hanson's Estate, 26 N.E.2d 175, 304 Ill.App. 157.

Admission to party or other interested person
N.Y.—Gnichtel v. Stone, 135 N.E. 852, 233 N.Y. 465.

96. Colo.—Parker v. Hilliard, 102 P.2d 734, 106 Colo. 187—Schwartz' Estate v. Silvey, 73 P.2d 994, 101 Colo. 336.
Del.—New York Trust Co. v. Riley, 16 A.2d 772, certiorari granted Riley v. New York Trust Co., 61 S.Ct. 1105.
Ill.—Megginson v. Megginson, 10 N.E.2d 815, 367 Ill. 168—Fierke v. Elgin City Banking Co., 7 N.E.2d 875, 366 Ill. 66—In re Hanson's Estate, 26 N.E.2d 175, 304 Ill.App. 157—In re Carlson's Estate, 2 N.E.2d 963, 286 Ill.App. 81—Chicago Title & Trust Co. v. Merchants' Loan & Trust Co., 244 Ill.App. 302.
Iowa.—Williams v. Harrison, 293 N.W. 41.
La.—Gibson v. Fitts, 180 So. 509, 189 La. 753—Davidson v. American Paper Mfg. Co., 175 So. 753, 188 La. 69, 114 A.L.R. 1044—Beard v. Morris & Co., 101 So. 147, 156 La. 798—Commercial Trust & Savings Bank v. Thorengren, App., 122 So. 92.
Mich.—Bartkowiak v. Bartkowiak, 283 N.W. 49, 286 Mich. 623—Johnson v. Douglas, 274 N.W. 780, 281 Mich. 247—McInerney v. Detroit Trust Co., 271 N.W. 545, 279 Mich. 42—Hope v. Detroit Trust Co., 266 N.W. 326, 275 Mich. 213—Wild v. Wild, 254 N.W. 208, 266 Mich. 570.
Mont.—Humble v. St. John, 234 P. 475, 72 Mont. 519.
N.Y.—In re Buckler, 237 N.Y.S. 242, 227 App.Div. 146—McCallum v. Pickens, 213 N.Y.S. 119, 126 Misc. 436, affirmed 215 N.Y.S. 882, 217 App.Div. 714.
Wash.—Loundry v. Lillie, 270 P. 1029, 149 Wash. 316.
22 C.J. p 291 note 85—17 C.J. p 1308 note 13.

Reason for rule
Admissions of decedent cannot ordinarily be specifically contradicted.—Moreen v. Carlson's Estate, 6 N.E.2d 871, 365 Ill. 482, reversing In re Carlson's Estate, 2 N.E.2d 963, 286 Ill.App. 81.

Clear and convincing evidence is required when extrajudicial admissions are relied on to establish indebtedness against decedent.—Nelson v. Bruce, 6 P.2d 140, 51 Idaho 378.

97. Or.—Demas v. First Nat. Bank, 247 P. 151, 120 Or. 470, affirmed 251 P. 62, 120 Or. 470.

98. Ga.—Griffin v. Browning, 181 S.E. 801, 51 Ga.App. 743—Payne v Rivers, 110 S.E. 45, 28 Ga.App. 28.

99. Wash.—Kennett v. Federici, 93 P.2d 333, 200 Wash. 156—Commercial Importing Co. v. Wear, 41 P.2d 777, 180 Wash. 669.

Admission by decedent
La.—Beard v. Morris & Co., 101 So. 147, 156 La. 798.

Vital issue not for jury
Wash.—Low v. Colby, 243 P. 18, 137 Wash. 476, affirmed 247 P. 475, 137 Wash. 476.

1. Cal.—Barton v. McDermott, 291 P. 591, 108 Cal.App. 372.
Utah.—Mehr v. Child, 61 P.2d 624, 90 Utah 348.

2. Del.—Eastern Shore Public Service Co. v. Town of Seaford, 2 A.2d 265, sustaining Town of Seaford v. Eastern Shore Public Service Co., 2 A.2d 258, appeal dismissed Eastern Shore Public Service Co. v. Town of Seaford, 59 S.Ct. 483, 306 U.S. 616, 83 L.Ed. 1024, rehearing denied 59 S.Ct. 589, 306 U.S. 668, 83 L.Ed. 1063.
R.I.—Rossi v. Ronci, 7 A.2d 773.

Weight deserved should be given to such evidence.—Wheeler v. Lewis, 196 N.Y.S. 817, 203 App.Div. 222.

3. R.I.—Rossi v. Ronci, 7 A.2d 773.

4. Iowa.—Frederick v. Frederick, 182 N.W. 195, 191 Iowa 202.
Wash.—Kennett v. Federici, 93 P.2d 333, 200 Wash. 156.

5. Cal.—Harp v. Harp, 69 P. 28, 136 Cal. 421.
Iowa.—In re Rich's Estate, 200 N.W. 713, 199 Iowa 902.
Utah.—Reid v. Owens, 69 P.2d 265, 92 Utah 432—Mehr v. Child, 61 P.2d 624, 90 Utah 348.

6. Cal.—Harp v. Harp, 69 P. 28, 136 Cal. 421.

7. Mont.—Carey v. Guest, 258 P. 236, 78 Mont. 415.
Utah.—Reid v. Owens, 69 P.2d 265, 92 Utah 432—Mehr v. Child, 61 P.2d 624, 90 Utah 348.

8. Mo.—Wells v. Wells, App., 48

in writing,[9] is evidence of a highly satisfactory character.[10]

If voluntarily made,[11] and distinct and unequivocal,[12] admissions against interest are taken or presumed to be true,[13] and dispense with the necessity of any other proof of the fact admitted,[14] although it does not render other proof of the fact incompetent.[15]

Considered like other evidence. An admission is to be considered and weighed like other evidence,[16]

S.W.2d 109, 111, quoting **Corpus Juris.**
22 C.J. p 424 note 20.

If actually made and correctly understood, oral admissions are of great weight.—In re Fein's Will, 230 N.Y.S. 308, 132 Misc. 613.

9. Mo.—Wells v. Wells, App., 48 S.W.2d 109, 111, quoting **Corpus Juris.**
22 C.J. p 424 note 21.

10. U.S.—Joong Sui Noon v. U. S., C.C.A.Mo., 76 F.2d 249.
Mo.—Wells v. Wells, App., 48 S.W.2d 109, 111, quoting **Corpus Juris.**
22 C.J. p 424 note 22.

Convincing proof
Mich.—Power v. Palmer, 183 N.W. 199, 214 Mich. 551.

Evidence as circumstantial, not direct
Conn.—Perrelli v. Savas, 160 A. 311, 115 Conn. 42.

Great inherent force
Utah.—Reid v. Owens, 69 P.2d 265, 92 Utah 432—Mehr v. Child, 61 P.2d 624, 90 Utah 348.

Judicial admissions generally
(1) Judicial admissions are strongest and highest evidence against party making them.—Leitz Eagan Funeral Home v. Ridgley, La.App., 189 So. 647—Santos v. Duvic, 133 So. 399, 16 La.App. 105.

(2) This is so if the admission is not improvidently or mistakenly made.—Bailey v. Firemen's Ins. Co., 150 S.E. 365, 108 W.Va. 75.

(3) An admission in an interference proceeding that the adversary's exhibit illustrated the subject matter of the issue, made by a former attorney, if not conclusively binding upon the client, is very persuasive in determining whether the commissioner's decision that the adversary had disclosed the invention in issue should be affirmed.—Ball v. Barnhurst, 270 F. 693, 50 App.D.C. 257.

(4) Admission in testimony of party is entitled to great weight.—Manhattan Roofing Co. v. Hagedorn, 180 N.Y.S. 816, 110 Misc. 657.

Plea of guilty in criminal case
W.Va.—Gillespie v. Modern Woodmen of America, 133 S.E. 333, 101 W.Va. 602.

11. Ga.—Scott v. Kelly-Springfield Tire Co., 125 S.E. 773, 33 Ga.App. 297.
Utah.—Peterson v. Richards, 272 P. 229, 73 Utah 59.

12. Okl.—Grimmett v. Grimmett, 195 P. 133, 80 Okl. 176—Patterson v. Morgan, 155 P. 694, 53 Okl. 95.

13. Fla.—Robinson v. Pepper, 116 So. 4, 94 Fla. 1184.
Miss.—Pannell v. Glidewell, 107 So. 273, 142 Miss. 77.
Mo.—McNairy v. Standard Life Ins. Co., App., 114 S.W.2d 156—McCoy v. Home Oil & Gas Co., App., 60 S.W.2d 715—Scott v. McLennan, App., 242 S.W. 140.
Okl.—In re Assessment of Alleged Omitted Property, 58 P.2d 134, 138, 177 Okl. 74, citing **Corpus Juris.**
Tex.—Southland Life Ins. Co. v. Brown, Civ.App., 121 S.W.2d 653, error dismissed.
Utah.—Peterson v. Richards, 272 P. 229, 73 Utah 59.
22 C.J. p 425 note 23.

Prima facie evidence of facts recited
U.S.—Federal Surety Co. v. Staunton, Ill., for Use of McWane Cast Iron Pipe Co., C.C.A.Ala., 29 F.2d 9, citing **Corpus Juris,** and certiorari denied 49 S.Ct. 253, 279 U.S. 840, 73 L.Ed. 986.
Ala.—Sovereign Camp, W. O. W., v. Craft, 94 So. 831, 208 Ala. 467—Sovereign Camp of Woodmen of the World v. Marshall, 81 So. 246, 17 Ala.App. 32.
Ga.—Scott v. Kelly-Springfield Tire Co., 125 S.E. 773, 33 Ga.App. 297.
Tex.—New Amsterdam Casualty Co. v. First Nat. Bank, Civ.App., 134 S.W.2d 470, error dismissed, judgment correct.
Utah.—Reid v. Owens, 69 P.2d 265, 92 Utah 432—Mehr v. Child, 61 P.2d 624, 90 Utah 348.
Wash.—Hurley-Mason Co. v. Pacific Commissary Co., 191 P. 624, 111 Wash. 439.
22 C.J. p 343 note 54.

Admission by attorney
Mo.—Wild v. Pitcairn, 149 S.W.2d 800—Ace Min. & Mill. Co. v. R. U. Mining Co., 247 S.W. 172.

Admission in testimony
Idaho.—Van Meter v. Zumwalt, 206 P. 507, 35 Idaho 235.

Decedent's admission
Ill.—Patten v. Knowe, 188 N.E. 173, 354 Ill. 156.

14. Colo.—Snowden v. Taggart, 17 P.2d 305, 91 Colo. 525.
Okl.—In re Assessment of Alleged Omitted Property, 58 P.2d 134, 138, 177 Okl. 74, citing **Corpus Juris.**
Utah.—Reid v. Owens, 69 P.2d 265, 92 Utah 432—Mehr v. Child, 61 P.2d 624, 90 Utah 348—Peterson v. Richards, 272 P. 229, 73 Utah 59.
22 C.J. p 425 note 24.

Burden of proof discharged
In suit on open account, in which defendant pleaded general issue, if during giving of his testimony defendant should admit that he owes a portion of asserted indebtedness, such admission would be of importance only to extent of aiding plaintiff in discharging the burden of proving its case.—J. D. Adams Co. v. Dauterive, La.App., 193 So. 506.

Judicial admissions generally
La.—Santos v. Duvic, 133 So. 399, 16 La.App. 105.

Admission by attorney
Mo.—Wild v. Pitcairn, 149 S.W.2d 800.
Okl.—Grimmett v. Grimmett, 195 P. 133, 80 Okl. 176—Patterson v. Morgan, 155 P. 694, 53 Okl. 95.

Opening statement of counsel
An equivocal statement of doubtful meaning in counsel's opening statement cannot supply proof of a material fact.—Grimmett v. Grimmett, 195 P. 133, 80 Okl. 176—Patterson v. Morgan, 155 P. 694, 53 Okl. 95.
Effect of opening statement of counsel see the C.J.S. title Trial § 161, also 64 C.J. p 237 note 81—p 242 note 21.

Pleading
Facts alleged in complaint relieve defendant of necessity of introducing evidence to prove facts alleged.—Houghton v. Grimes, 151 A. 642, 103 Vt. 54.

Substitute for connecting proof
Where evidence is admitted on condition that it be connected by proof of some fact, an admission of such fact by the adversary renders unnecessary further proof thereof.—Fong Lin v. Probert, 195 P. 437, 50 Cal.App. 339.

15. La.—Schutt v. Shreveport Belt R. Co., 33 So. 577, 109 La. 500.
22 C.J. p 425 note 25.

16. U.S.—Pardee Co. v. Austin, C.C.A.La., 58 F.2d 967.
Ala.—Robinson v. Solomon Bros. Co., 155 So. 553, 229 Ala. 137.
Ariz.—Rodgers v. Berger, 103 P.2d 266, 55 Ariz. 433.
Fla.—Robinson v. Pepper, 116 So. 4, 94 Fla. 1184.
Ga.—Griffin v. Browning, 181 S.E. 801, 51 Ga.App. 743.
Ill.—Dwyer v. Dwyer, 265 Ill.App. 155.
Ind.—McDowell v. Duer, 133 N.E. 839, 78 Ind.App. 440—Warner Gear Co. v. De Peugh, 123 N.E. 363, 70 Ind.App. 264.

to be considered in the light of the other evidence in the case,[17] the ultimate determination as to value, effect, or weight thereof being for triers of the facts.[18] All circumstances in connection with the

La.—Chappuis & Chappuis v. Kaplan, 129 So. 156, 170 La. 763.
Mass.—Leary v. Keith, 152 N.E. 245, 256 Mass. 157.
Mich.—Henderson v. Connolly's Estate, 292 N.W. 543, 294 Mich. 1—Hallock v. Income Guaranty Co., 259 N.W. 133, 270 Mich. 448.
Mo.—Cook v. Missouri Pac. R. Co., App., 51 S.W.2d 171—Tutie v. Kennedy, App., 272 S.W. 117.
Mont.—Carey v. Guest, 258 P. 236, 78 Mont. 415.
N.Y.—Gangi v. Fradus, 125 N.E. 677, 227 N.Y. 452, reversing 174 N.Y.S. 903, 904, 187 App.Div. 934—Schneider v. Swartele, 267 N.Y.S. 714, 239 App.Div. 329, affirmed 8 N.E.2d 336, 273 N.Y. 662.
Tenn.—Fidelity Mut. Life Ins. Co. v. Guess, 101 S.W.2d 694, 171 Tenn. 205.
Tex.—Aycock v. Green, Civ.App., 94 S.W.2d 894, error dismissed.
22 C.J. p 426 note 28.

"Admissions are not proof, but are only a means of proof having evidentiary value to be considered by the jury."—Buckeye Cotton Oil Co. v. Malone, 126 S.E. 913, 914, 33 Ga.App. 519.

Full consideration given as to truth of statement.—Bower v. Nelson, Tex.Civ.App., 138 S.W.2d 601, error refused.

Abandoned or superseded pleading
Mo.—Conduitt v. Trenton Gas & Electric Co., 31 S.W.2d 21, 326 Mo. 133—Negbaur v. Fogel Const. Co., App., 58 S.W.2d 346.
Tex.—Kirk v. Head, 152 S.W.2d 726, affirming, Civ.App., 132 S.W.2d 125.

Prior judicial proceeding
La.—Little v. Barbe, 198 So. 368, 195 La. 1071.

Tax returns
Tax return is unsatisfactory evidence of value of property listed, such evidence having little, if any, probative force.
U.S.—Savannah Sugar Refining Corporation v. Atlantic Towing Co., C.C.A.Ga., 15 F.2d 648, affirming, D.C., The Silverway, 14 F.2d 154.
Tex.—Fort Worth & D. S. P. Ry. Co. v. Gilmore, Civ.App., 13 S.W.2d 416.

17. U.S.—In re Weissman, D.C.Conn., 37 F.2d 585, affirmed, C.C.A., 37 F.2d 587.
Ariz.—Rodgers v. Berger, 103 P.2d 266, 55 Ariz. 433.
Cal.—Fawkes v. Reynolds, 211 P. 449, 190 Cal. 204.
Ga.—Griffin v. Browning, 181 S.E. 801, 51 Ga.App. 743.
Ill.—Megginson v. Megginson, 10 N.E.2d 815, 367 Ill. 168—Fierke v. Elgin City Banking Co., 7 N.E.2d 875, 366 Ill. 66—In re Hanson's Estate, 26 N.E.2d 175, 304 Ill.App. 157—Dwyer v. Dwyer, 265 Ill.App. 155.
Ky.—Duncan's Ex'rs v. Porch, 248 S.W. 526, 198 Ky. 177.
La.—Crichton v. Krouse, App., 142 So. 635—Sears v. Interurban Transp. Co., 125 So. 748, 14 La.App. 343.
Mich.—Henderson v. Connolly's Estate, 292 N.W. 543, 294 Mich. 1—Hallock v. Income Guaranty Co., 259 N.W. 133, 270 Mich. 448.
Mo.—Ruckert v. Moore, 295 S.W. 794, 317 Mo. 228—Aeolian Co. of Missouri v. Boyd, App., 138 S.W.2d 692.
N.D.—Dexter v. Lichtenwalter, 186 N.W. 279, 48 N.D. 633.
Wyo.—Willis v. Willis, 49 P.2d 670, 48 Wyo. 403, rehearing denied 54 P.2d 814, 49 Wyo. 296.
45 C.J. p 1261 notes 2–3.

Admissions based on misinformation furnished by adversary introducing admissions in evidence are of no weight.—Gulart v. Azevedo, 216 P. 405, 62 Cal.App. 108.

Absence of authority in attorney
Ill.—Dwyer v. Dwyer, 265 Ill.App. 155.

Inferences drawn
Where by admission at trial defendant concedes ownership of an automobile in which he was riding at time of accident, an inference is justified that the driver was acting as his agent at the time.—Haigh v. Hill, 224 P. 474, 65 Cal.App. 517.

Undelivered instrument is of little value as an admission.—Robinson v. Cushman, 2 Denio, N.Y., 149.

Admission on cross-examination
Or.—Cox v. Jones, 5 P.2d 102, 138 Or. 327.

Testimony in prior trial
Mo.—Gibbons v. Wells, App., 293 S.W. 89.

Declarations of decedent
N.Y.—Schneider v. Swartele, 267 N.Y.S. 714, 239 App.Div. 329, affirmed 8 N.E.2d 336, 273 N.Y. 662.

As affecting title
Although title to real estate may not be lost by admissions, such admissions may explain partnership settlement paper and conveyance of coal mining rights as negativing the contention that only merchantable coal was sold, and to prevent one member getting an accounting twenty-eight years after dissolution.—Stevens v. Delaware, L. & W. R. Co., 122 A. 504, 278 Pa. 284.

Effect on testimony of declarant
Ex parte written statements of plaintiff only affected the weight and value of her testimony so far as they were contradictory.—Worrell v. Worrell, 4 S.E.2d 343, 174 Va. 11.

Time of admission
In action against buyers for failure to accept and pay for goods, defended on the ground that the evidence was insufficient to show which of two orders had been accepted as the real contract between the parties, an admission by plaintiff in his correspondence with defendants, indicating his inability to determine which contract was the one upon which he actually relied, lost none of its force as such an admission from the fact that it "was written after defendants' cancellation."—Baxter v. Iglesias, 183 N.Y.S. 35.

18. U.S.—Strouse v. Union Indemnity Co., C.C.A.N.Y., 67 F.2d 528.
Ala.—Smith v. Gaines, 97 So. 739, 210 Ala. 245.
Ark.—Watkins v. Metropolitan Life Ins. Co., 250 S.W. 350, 158 Ark. 386.
Cal.—Kohlhauer v. Bronstein, 67 P.2d 1078, 21 Cal.App.2d 4—Tieman v. Red Top Cab Co., 3 P.2d 381, 117 Cal.App. 40.
Colo.—Schwartz' Estate v. Silvey, 73 P.2d 994, 101 Colo. 336.
Conn.—Russo v. Metropolitan Life Ins. Co., 3 A.2d 844, 125 Conn. 132.
D.C.—General Finance, Inc. v. Stratford, 109 F.2d 843, 71 App.D.C. 343.
Ga.—Pacific Mut. Life Ins. Co. v. Barfield, 194 S.E. 258, 261, 57 Ga. App. 43, quoting **Corpus Juris**—Griffin v. Browning, 181 S.E. 801, 51 Ga.App. 743—Scott v. Powell Paving Co. of North Carolina, 159 S.E. 895, 43 Ga.App. 705—Buckeye Cotton Oil Co. v. Malone, 126 S.E. 913, 33 Ga.App. 519.
Ill.—Kubin v. Chicago Title & Trust Co., 29 N.E.2d 859, 307 Ill.App. 12.
Iowa.—Wright v. Mahaffa, 270 N.W. 402, 406, 222 Iowa 872, quoting **Corpus Juris**—Hamilton v. Sprague, 209 N.W. 446, 202 Iowa 47—Taylor v. State Ins. Co., 77 N.W. 1032, 107 Iowa 275.
Mass.—Wilson v. Grace, 173 N.E. 524, 273 Mass. 146.
Miss.—Randall v. Skinner, 192 So. 341, 187 Miss. 602—Gulf, M. & N. R. Co. v. Graham, 117 So. 881, 153 Miss. 72.
Mo.—Maltz v. Jackoway-Katz Cap Co., 82 S.W.2d 909, 336 Mo. 1000—Ruckert v. Moore, 295 S.W. 774, 317 Mo. 228—Williams v. American Life & Accident Ins. Co., App., 112 S.W.2d 909—Concrete Steel Co. v. Reinforced Concrete Co., App., 72 S.W.2d 118—Van Orman v. J. C. Penney Co., App., 60 S.W.2d 409—Cook v. Missouri Pac. R. Co., App., 51 S.W.2d 171—Waite v. Boutross, 39 S.W.2d 454, 225 Mo. App. 724—Graber v. Wells, App., 7 S.W.2d 719—Tutie v. Kennedy,

admission should be considered,[19] such as the nature of the statement[20] and the circumstances under which it was made,[21] the weight and effect of an admission depending largely on such factors.[22]

App., 272 S.W. 117—Scott v. McLennan, App., 242 S.W. 140—Miller v. Griswold, App., 241 S.W. 986—Schreiber v. Andrews, App., 234 S.W. 862—Hanheide v. Supreme Tribe of Ben Hur, App., 223 S.W. 684.

Mont.—Carey v. Guest, 258 P. 236, 78 Mont. 415—Mullery v. Great Northern Ry. Co., 148 P. 323, 50 Mont. 408.

N.Y.—Gangi v. Fradus, 125 N.E. 677, 227 N.Y. 452, reversing 174 N.Y.S. 903, 187 App.Div. 934, and 174 N.Y.S. 904, 187 App.Div. 934—In re Meyers' Estate, 223 N.Y.S. 701, 129 Misc. 760.

Ohio.—Kraemer v. Bates Motor Transport Lines, 11 N.E.2d 105, 56 Ohio App. 427.

Okl.—Knupp v. Hubbard, 265 P. 133, 130 Okl. 111.

Or.—Southern Oregon Co. v. Kight, 228 P. 132, 112 Or. 66.

Pa.—Heyman v. Hanauer, 152 A. 910, 302 Pa. 56—Logue v. Gallagher, 3 A.2d 191, 133 Pa.Super. 570.

S.C.—Keen v. Army Cycle Mfg. Co., 117 S.E. 531, 124 S.C. 342.

S.D.—Frazier v. Travelers Ins. Co. of Hartford, Conn., 287 N.W. 589, 66 S.D. 638.

Tex.—Blue Bonnet Life Ins. Co. v. Reynolds, Civ.App., 150 S.W.2d 372, error refused—Roberson v. Home Owners' Loan Corporation, Civ. App., 147 S.W.2d 949, error dismissed, judgment correct—Southland Life Ins. Co. v. Brown, Civ. App., 121 S.W.2d 653, error dismissed—Jackman v. Gay, Civ.App., 237 S.W. 315, reversed on other grounds Gay v. Jackman, Com. App., 252 S.W. 1042.

Vt.—Smith v. Vermont Marble Co., 133 A. 355, 99 Vt. 384.

Va.—Worrell v. Worrell, 4 S.E.2d 343, 174 Va. 11.

W.Va.—Gillespie v. Modern Woodmen of America, 133 S.E. 333, 101 W. Va. 602.

Wis.—Hafeman v. Seymer, 219 N.W. 375, 195 Wis. 625.

22 C.J. p 426 note 33.

"They have two phases for the jury's consideration: The one, were they made; the other, their effect. In neither phase have they any characteristic or quality peculiar to themselves, or distinguishing them from the other facts in evidence. It is with them, as with the other facts in evidence, the jury may find they were not made or do not exist." —Gangi v. Fradus, 125 N.E. 677, 679, 227 N.Y. 452, reversing 174 N.Y.S. 903, 904, 187 App.Div. 934.

Conflict in evidence

Mo.—Carter v. Farmers Bank of Chariton County, 108 S.W.2d 152, 232 Mo.App. 705.

Okl.—Republic Nat. Bank of St. Louis, Mo., v. First State Bank of Oilton, 237 P. 578, 110 Okl. 299.

Quasi admission

Admission made at beginning of hearing of compensation case before referee of compensation commission that liability of employers was covered by insurers was merely a quasi admission, weight of which was for triers of fact, where substantial evidence in denial of insurance was subsequently introduced.—Maltz v. Jackoway-Katz Cap Co., 82 S.W.2d 909, 336 Mo. 1000.

Superseded pleading

Ga.—Payne v. Rivers, 110 S.E. 45, 28 Ga.App. 28.

Iowa.—Larson v. Stanton State Bank, 208 N.W. 726, 202 Iowa 333.

Mo.—Conduitt v. Trenton Gas & Electric Co., 31 S.W.2d 21, 326 Mo. 133—Andrus v. Business Men's Acc Ass'n of America, 223 S.W. 70, 283 Mo. 442, 13 A.L.R. 779—Cantrell v. Knight, App., 72 S.W.2d 196.

Pleadings in other proceedings

N.C.—Middleton v. Hunter, 142 S.E. 325, 195 N.C. 418.

Estimates as to value

Evidentiary value of estimates placed on its property by utility for tax purposes is for determination of public service commission in fixing rates.—Great Falls Gas Co. v. Public Service Commission of Montana, D.C. Mont., 34 F.2d 297.

Admission by decedent

Wash.—Loundry v. Lillie, 270 P. 1029, 149 Wash. 316.

Summary judgment improper under circumstances.—Olympia Shipping Corporation v. U. S., C.C.A.N.Y., 11 F.2d 600.

19. Mich.—Fitzgerald v. Lozier Motor Co., 154 N.W. 67, 187 Mich. 660.

Mo.—Van Orman v. J. C. Penney Co., App., 60 S.W.2d 409.

20. Iowa.—Wright v. Mahaffa, 270 N.W. 402, 406, 222 Iowa 872, quoting **Corpus Juris.**

Mo.—Williams v. American Life & Accident Ins. Co., App., 112 S.W.2d 909.

22 C.J. p 426 note 34.

21. Colo.—Schwartz' Estate v. Silvey, 73 P.2d 994, 101 Colo. 336.

Ind.—Warner Gear Co. v. De Peugh, 123 N.E. 363, 70 Ind.App. 264.

Iowa.—Wright v. Mahaffa, 270 N.W. 402, 406, 222 Iowa 872, quoting **Corpus Juris.**

Miss.—Randall v. Skinner, 192 So. 341, 187 Miss. 602.

Mo.—Conduitt v. Trenton Gas & Electric Co., 31 S.W.2d 21, 326 Mo. 133—Cantrell v. Knight, App., 72 S.W.2d 196—Graber v. Wells, App., 7 S.W.2d 719—Dickey v. Supreme Tribe of Ben Hur, 269 S.W. 633, 218 Mo.App. 281—Dickey v. Supreme Tribe of Ben Hur, App., 253 S.W. 417.

N.H.—Giroux v. New York Life Ins. Co., 159 A. 142, 85 N.H. 355.

Okl.—Sturm v. American Bank & Trust Co. of Ardmore, 44 P.2d 974, 172 Okl. 294.

22 C.J. p 426 note 35.

22. Okl.—Higby v. Martin, 28 P.2d 1097, 167 Okl. 10.

Utah.—Christensen v. Johnson, 61 P. 2d 597, 90 Utah 273.

Wis.—Papke v. Haerle, 207 N.W. 261, 189 Wis. 156.

"The effect they have, in reason and sound judgment, upon the mind of the jury, in view of their language, character, the time when and person to whom they were made, the circumstances and conditions attending their making, and the other facts in evidence, is the effect they should have upon the claim of the party. In case they were made in ignorance of the facts or in an abnormal state of mind, or were based in part upon mere opinion, or were made casually or thoughtlessly or insincerely, or under like or analogous conditions or circumstances, they may, in reason deserve slight consideration or value or none at all. In case they were made understandingly and deliberately, are of pure fact within the knowledge of the declarant, and were made under conditions and circumstances conducive to veracity, and are not overborne by the other facts in evidence. they may, in reason and sound judgment, establish a cause of action or a defense."—Gangi v. Fradus, 125 N.E. 677, 679, 227 N.Y. 452, reversing 174 N.Y.S. 903, 904, 187 App.Div. 934.

Persuasive evidence

In action for loss of eye, claimed to have resulted from negligence of defendant physician in wiping pus from ulcer in eyelid across open sore in eyeball from which piece of steel had been extracted, and affidavit made by the patient in claiming compensation from the employer was held persuasive evidence as an admission on his part as to the cause of the injury, although not conclusive.—Wood v. Vroman, 184 N.W. 520, 215 Mich. 449.

Admissions of enhanced or great weight

(1) Written statements of party made at or shortly after time of transaction will outweigh his later parol testimony given after controversy has arisen and when he is interested in different result.

Okl.—McGann v. McGann, 37 P.2d 939, 169 Okl. 515.

Tex.—Shaw v. Korth, Civ.App., 26 S.W.2d 351.

Proof of an admission cannot overcome clear proof that the fact is otherwise than as admitted,[23] although its evidentiary force is not annulled by the declarant's subsequent assertion that the state-

(2) Letter voluntarily written at unsuspicious time is entitled to great weight.—Evans v. Independent Nat. Life Ins. Co., La.App., 148 So. 264.

(3) Deed by executor of one adjoining owner, conveying to himself as an individual and another land and recognizing existence of easement in other adjoining owner, was entitled to great weight in determining whether easement had been extinguished by virtue of prior deed—Tursi v. Parry, 5 A.2d 399, 135 Pa. Super. 285.

(4) Deceased's declarations are of great probative force where numerous witnesses testify thereto.—Loundry v. Lillie, 270 P. 1029, 149 Wash. 316.

(5) Other instances see 22 C.J. p 426 note 35 [c].

Admissions of little weight

(1) Vague and equivocal statements.—Baudenbach v. Schwerdtfeger, 230 N.Y.S. 640, 224 App.Div. 314, error dismissed Baudenbach v. Schlesinger, 166 N.E. 322, 250 N.Y. 555.

(2) Where title to realty is involved, oral admissions are received with caution and are entitled to little weight.—Roche v. Roche, 121 N.E. 621, 286 Ill. 336—Wells v. Messenger, 94 N.E. 87, 249 Ill. 72—Corder v. Corder, 16 N.E. 107, 124 Ill. 229.

(3) Statement of father that infants had been stillborn, without real knowledge of the facts, has little weight on the question of technical existence of infants.—Wehrman v. Farmers' & Merchants' Sav. Bank of Durant, 259 N.W. 564, 221 Iowa 249, rehearing overruled 266 N.W. 290, 221 Iowa 249.

(4) In determining whether holder had been guilty of willful concealment in procuring naturalization certificate, little weight could be attached to admission contained in statement secured by government agents where person who interpreted questions and answers upon which statement was based had very poor understanding of holder's Italian dialect.—U. S. v. Petrucci, D.C.Pa., 23 F.Supp. 687.

(5) Other instances.

Ill.—Sugrue v. Crilley, 160 N.E. 847, 329 Ill. 458, certiorari denied 49 S. Ct. 20, 278 U.S. 616, 73 L.Ed. 539—Chicago Title & Trust Co. v. Merchants' Loan & Trust Co., 244 Ill.App. 302.

N.Y.—In re New York Title & Mortgage Co. (Series B-K), 21 N.Y.S.2d 575.

22 C.J. p 426 note 34 [a].

Circumstances detracting from weight

(1) Fact that plaintiff was hysterical when making admissions affects weight and credibility thereof.—Friedman v. United Rys. Co. of St. Louis, 238 S.W. 1074, 293 Mo. 235.

(2) In an action on a benefit certificate, a statement in the proofs of death furnished by plaintiff that deceased committed suicide is deprived of its binding force by plaintiff's testimony that, in making the statement in the proofs, she relied upon statements of physicians who attended deceased, and not on her own personal knowledge of the facts.—Dickey v. Supreme Tribe of Ben Hur, 269 S.W. 633, 218 Mo.App. 281—Dickey v. Supreme Tribe of Ben Hur, Mo.App., 253 S.W. 417.

(3) Employee's statement to doctor that employee had had an attack of "flu," without medical or scientific proof, would not constitute an "admission" of any probative value in determining whether bronchiectasis arose out of and in course of employment or resulted from flu.—Hirst v. Chevrolet Muncie Division of General Motors Corporation, Ind.App., 33 N.E.2d 773.

(4) Statements consisting of casual remarks made approximately thirty years before trial are of slight probative value.—Tichenor v. Bowman, Mo., 133 S.W.2d 324.

(5) Statement of driver, allegedly made shortly after crash, that he must have been asleep when his automobile collided with car at railroad crossing, was of no evidentiary value, where driver was practically unconscious until he arrived at hospital and driver testified positively that he was not asleep.—Los Angeles & S. L. R. Co. v. Lytle, 52 P.2d 464, 56 Nev. 192, denying rehearing 47 P.2d 934, 56 Nev. 192.

(6) Verbal admissions testified to after a length of time should be received cautiously and scrutinized carefully.—Conner v. Brown, 3 A.2d 64, 9 W.W.Harr., Del., 529.

(7) Other instances.—Mathes v. Schwing, 125 So. 121, 169 La. 272, setting aside 119 So. 577, 19 La.App. 680, affirmed 123 So. 156, 11 La.App. 5, 19 La.App. 680—22 C.J. p 293 note 97—p 295 note 59, p 426 note 35 [b].

23. U.S.—Howard v. Halsted, D.C. N.Y., 296 F. 782, affirmed, C.C.A., Howard v. Halstead, 298 F. 1020.

Ga.—Buckeye Cotton Oil Co. v. Malone, 126 S.E. 913, 33 Ga.App. 519.

La.—Hobgood v. Louisiana & A. Ry. Co., App., 156 So. 657—Hall v. Excelsior Steam Laundry Co., 5 La.App. 6.

Mass.—Pastrick v. S. S. Kresge Co., 192 N.E. 485, 288 Mass. 194—Hirrell v. Lacey, 174 N.E. 679, 274 Mass. 431—Leary v. Keith, 152 N.E. 245, 256 Mass. 157.

Mich.—Henderson v. Connolly's Estate, 292 N.W. 543, 294 Mich. 1.

N.J.—Onufer v. Strout, 183 A. 215, 116 N.J.Law 274.

N.Y.—Merchants' Nat. Bank of Plattsburgh v. R. Prescott & Son, 249 N.Y.S. 6, 139 Misc. 603, affirmed 257 N.Y.S. 900, 235 App.Div. 878, reargument denied 258 N.Y.S. 1016, 236 App.Div. 764.

Tex.—Hinnant v. Rodriguez, Civ.App., 255 S.W. 1000, affirmed, Com.App., 267 S.W. 471.

Wis.—Gould v. Pennsylvania Fire Ins. Co., 183 N.W. 245, 174 Wis. 422.

22 C.J. p 426 note 29.

Admission to party

Ky.—Bradley v. Clarke, 293 S.W. 1082, 219 Ky. 438—Scheible v. Kalkoff, 276 S.W. 846, 210 Ky. 789.

Effect of contrary evidence not destroyed—Swift v. St. Louis-San Francisco Ry. Co., Mo.App., 15 S.W.2d 964.

Weight accorded admission

(1) Declarations of deceased in a death action are not given much weight where the evidence clearly shows that defendant was guilty of gross negligence.—Galveston, H. & S. A. R. Co. v. Pingenot, Tex.Civ.App., 142 S.W. 93.

(2) Admissions of grantor, to prove parol gift or sale of land between parent and child, should have little weight attached to them as against any act of grantor inconsistent therewith—Purvis v. Malloy, for Use and Benefit of Tiller, 176 So. 71, 129 Fla. 191.

(3) Statements, in nature of conclusions and of intentions, not disclosed by adequate language, have little weight when opposed to definite statements and specific conversations in favor of adverse parties.—Pannell v. Glidewell, 107 So. 273, 142 Miss. 77.

(4) Notes executed by plaintiff in behalf of another, expressly given in payment for conveyance, were persuasive evidence against plaintiff's claim in property conveyed.—Lee v. Lee, 11 S.W.2d 956, 226 Ky. 776.

Ownership

Statements of insured to employee of fire marshal as to ownership of insured property made subsequent to fire in which property was destroyed could not affect insured's ownership, as respects right to recover on fire policy, where her ownership was absolute and unconditional.—France v. Firemen's Ins. Co. of Newark, La.App., 170 So. 424.

ment relied on as an admission was not true.[24] The effect of an admission is not impaired by the existence of a written agreement with respect to the matter involved therein which is in the possession of declarant,[25] or by a statement, in connection therewith, in the nature of a protest against the admitted fact.[26]

With relation to self-serving declaration. Where self-serving declarations are in evidence because part of the writing containing admissions, the latter is entitled to more weight than the former.[27]

b. Sufficiency

Evidence of an admission in light of the circumstances or other evidence in the case may be sufficient to establish the fact admitted or the cause of action or defense depending on such fact.

In the absence of opposing evidence or in the light of the surrounding circumstances or other evidence in the case, an admission against interest may be sufficient to establish the fact admitted,[28]

24. Ga.—Wootten v. Braswell, 172 S.E. 679, 48 Ga.App. 312.
"It is for the trier of the fact to say whether it was true or false when made."
Ga.—Wootten v. Braswell, 172 S.E. 679, 48 Ga.App. 312.
Mo.—Pinteardd v. Hosch, App., 233 S.W. 81, 83—Kirkwood Gynasium & Armory Hall Assoc. v. Van Ness, 61 Mo.App 361, 364.
"Admissions, made before a controversy arose are entitled to more weight than denials at the trial."—Brea v. McGlashan, 39 P.2d 877, 882, 3 Cal.App.2d 454.
Admission may be taken at full value although denied by party.—Kenney v. Eblen, 75 P.2d 177, 181 Okl. 514.

25. Ga.—Burch v. Harrell, 20 S.E. 212, 93 Ga. 719.

26. Iowa.—Gay v. Lloyd, 1 Greene 78, 46 Am.D. 499.

27. Pa.—Heyman v. Hanauer, 152 A. 910, 302 Pa. 56.

28. U.S.—J. E. Riley Inv. Co. v. Sakow, C.C.A.Alaska, 98 F.2d 8—South Carolina Asparagus Growers' Ass'n v. Southern Ry. Co., C.C.A. S.C., 64 F.2d 419, certiorari denied 54 S.Ct. 65, 290 U.S. 647, 78 L.Ed. 561—Steinfur Patents Corporation v. J. Meyerson, Inc., D.C.N.Y., 56 F.2d 372, modified on other grounds, C.C.A., Steinfur Patents Corporation v. William Beyer, Inc., 62 F.2d 238—Citizens' Nat. Bank of Los Angeles v. Santa Rita Hotel Co., C.C.A.Ariz., 22 F.2d 524—Mellon v. World Pub. Co., C.C.A.Okl., 20 F.2d 613, affirming, D.C., World Pub. Co. v. Davis, 16 F.2d 130, certiorari denied Mellon v. World Pub. Co., 48 S.Ct. 119, 275 U.S. 561, 72 L.Ed. 426—Gordon v. Mutual Life Ins. Co. of New York, D.C.La., 37 F.Supp. 873—Sprout, Waldron & Co. v. Bauer Bros. Co., D.C.Ohio, 26 F.Supp. 162.
Ala.—Grabove v. Mutual Ben. Health & Accident Ass'n, 1 So.2d 297—American Cast-Iron Pipe Co. v. Birmingham Tailoring Co., 91 So. 484, 206 Ala. 609.
Ariz.—Rodgers v. Berger, 103 P.2d 266, 55 Ariz. 433.
Ark.—Oyler v. Semple, 260 S.W. 744, 163 Ark. 620.
Cal.—Jacobus v. Brero, 212 P. 617, 190 Cal. 374—Long Beach Brick Co. v. De Dodson, 285 P. 382, 104 Cal.App. 99.
Colo.—Blaine v. Morgan, 220 P. 497, 74 Colo. 221.
Conn.—Albright v. MacDonald, 183 A. 389, 121 Conn. 88—Perrelli v. Savas, 160 A. 311, 115 Conn. 42.
Fla.—Robinson v. Pepper, 116 So. 4, 94 Fla. 1184.
Ga.—Griffin v. Browning, 181 S.E. 801, 51 Ga.App. 743—Hawthorne v. Pope, 180 S.E. 920, 51 Ga.App. 498—Scott v. Kelly-Springfield Tire Co., 125 S.E. 773, 33 Ga.App. 297—Woods v. Lewis, 116 S.E. 542, 30 Ga.App. 76.
Ill.—Reed v. Kabureck, 229 Ill.App. 36.
Ky.—Martin v. Taylor's Ex'x, 147 S.W.2d 70, 285 Ky. 128.
La.—Henderson v. C. M. Thibodeaux Co., App., 177 So. 414—Woods v. National Life & Accident Ins. Co., App., 166 So. 501—Albert v. New Capital Industrial Life Ins. Co., App., 154 So. 755.
Mass.—Hall v. Shain, 197 N.E. 437, 291 Mass. 506—Leary v. Keith, 152 N.E. 245, 256 Mass. 157.
Mich.—Hamilton v. Clippert, 214 N.W. 419, 239 Mich. 440.
Miss.—Arky v. Coker, 137 So. 790, 161 Miss. 694—Singletary v. Ginn, 121 So. 820, 153 Miss. 700—Pannell v. Glidewell, 107 So. 273, 142 Miss. 77.
Mo.—Langan v. U. S. Life Ins. Co., 130 S.W.2d 479, 344 Mo. 989, 123 A.L.R. 1409, transferred, see, App., 121 S.W.2d 268, transferred, see, Sup., 114 S.W.2d 984—Hanser v. Lerner, App., 153 S.W.2d 806—Walker v. National Life & Accident Ins. Co., App., 130 S.W.2d 668—De Lorme v. St. Louis Public Service Co., App., 61 S.W.2d 247—Wells v. Wells, App., 48 S.W.2d 109, 111, quoting **Corpus Juris**—Waite v. Boutross, 39 S.W.2d 454, 225 Mo.App. 724—Scott v. McLennan, App., 242 S.W. 140.
N.J.—Reporting Corporation v. Deshere, Sup., 131 A. 635.
N.M.—Ward v. Ares, 223 P. 766, 29 N.M. 418.
N.Y.—Hildebrand v. Hempstead Mach. Works, 283 N.Y.S. 941, 246 App.Div. 756—Low v. Dyer, 187 N.Y.S. 463, 196 App.Div. 346.
Pa.—Evans v. Penn Mut. Life Ins. Co. of Philadelphia, 186 A. 133, 322 Pa. 547—Drogalis v. Metropolitan Life Ins. Co., 8 Sch.Reg. 120.
Tenn.—Home Beneficial Ass'n v. McClain, 95 S.W.2d 53, 20 Tenn.App. 24.
Tex.—Blue Bonnet Life Ins. Co. v. Reynolds, Civ.App., 150 S.W.2d 372, error refused—First State Bank in Caldwell v. Stubbs, Civ.App., 48 S.W.2d 446—Texas Pacific Coal & Oil Co. v. Ames, Civ.App., 284 S.W. 315, reversed on other grounds, Com.App., 292 S.W. 191
Utah.—Peterson v. Richards, 272 P. 229, 73 Utah 59.
Vt.—Houghton v. Grimes, 151 A. 642, 103 Vt. 54.
Va.—Saunders v. Pruntey, 26 S.E. 584, 2 Va.Dec. 469.
Wis.—Hafemann v Seymer, 219 N.W. 375, 195 Wis. 625—Zurich Accident & Liability Ins. Co. v. Industrial Commission of Wisconsin, 213 N.W. 630, 193 Wis 32.
Wyo.—Ideal Bakery v. Schryver, 299 P. 284, 43 Wyo. 108.
22 C.J. p 425 note 26—48 C.J. p 727 notes 57, 58.

Concession as to facts
Cal.—Wilson v. Mattei, 258 P. 453, 84 Cal.App. 567.
N.Y.—Wignall v. Wignall, 298 N.Y.S. 251, 163 Misc. 910.

Pleadings
U.S.—White v. Mechanics' Securities Corporation, 46 S.Ct. 116, 269 U.S. 283, 70 L.Ed. 275, affirming U. S. v. Securities Corporation General, 4 F.2d 619, 55 App.D.C. 256, and White v. Mechanics' Securities Corporation, 4 F.2d 624, 55 App.D.C. 261.
Ga.—Field v. McElroy, 180 S.E. 756, 51 Ga.App. 407.
Iowa.—Hamilton v. Sprague, 209 N.W. 446, 202 Iowa 47.
Pa.—Wolverine Glass Co. v. Miller, 123 A. 672, 279 Pa. 138.
Tex.—Kirk v. Head, 152 S.W.2d 726, affirming, Civ.App., 132 S.W.2d 125.

Abandoned or superseded pleading
Tex.—Chisos Mining Co. v. Tijanez, Civ.App., 298 S.W. 642.

Testimony at trial
Ark.—Priestly v. Furst, 91 S.W.2d 599, 192 Ark. 374.

or the cause of action or liability or defense resting on proof of such fact,[29] and it has been considered that cogent or full and unquestioned proof is required to overcome the effect of a deliberate admission.[30] Conversely, the circumstances or other evidence in the case may render the admission in-

Testimony in prior proceeding
La.—Bienvenue v. Bienvenue, 188 So. 41, 192 La. 395.

Prima facie case
U.S.—Weaver v. Commissioner of Internal Revenue, C.C.A., 58 F.2d 755, followed in Mysell v. Commissioner of Internal Revenue, 58 F.2d 1083.
D.C.—U. S. v. Securities Corporation General, 4 F.2d 619, 55 App.D.C. 256, affirmed White v. Mechanics' Securities Corporation, 46 S.Ct. 116, 269 U S. 283, 70 L Ed. 275.
N.J.—Lincks v. Erie R. Co., 116 A. 493, 97 N.J.Law 343.
N.Y.—Seneca Wire & Mfg. Co v. A. B. Leach & Co., 159 N.E. 700, 247 N.Y. 1, reversing 219 N.Y.S. 478, 219 App.Div. 702.
N.C.—Davis v. Crump, 14 S.E.2d 666, 219 N.C. 625.
Tex.—Aycock v. Green, Civ.App., 94 S W.2d 894, error dismissed—Holton v. Hutchinson, Civ.App., 90 S.W.2d 1103.
Utah.—Reid v. Owens, 69 P.2d 265, 92 Utah 432.
Wis.—De Groot v. Mutual Life Ins. Co. of New York, 190 N.W. 443, 179 Wis. 202.
Wyo.—Ver Straten v. Board of Com'rs of Goshen County, 246 P. 916, 35 Wyo. 67.

Sufficient to go to jury
S.C.—Keen v. Army Cycle Mfg. Co., 117 S E. 531, 124 S.C. 342.

Issue eliminated
Extrajudicial admission eliminates issue of fact covered, if declarant offers no evidence that admission is untrue.—Faulkner v. Western Union Telegraph Co., 13 S.W 2d 1088, 223 Mo.App. 228.

Undenied admission
(1) Positive admission undenied has probative effect in any case.—McDowell v. Droz, 64 P.2d 1210, 179 Okl. 1119.

(2) Facts of admission are considered established where undenied by party having opportunity so to do.
Tex.—McDonald v. Ayres, Com.App., 242 S.W. 192, reversing Ayres v. MacDonald, Civ.App., 233 S.W. 597.
Wash.—Wiard v. Market Operating Corporation, 34 P.2d 875, 178 Wash. 265.

Doctor's report to insurer
In action by insurer to cancel life policy on ground that deceased insured suffered from tuberculosis when policy was delivered, report of insurer's examining physician, that insured was in good health at the time of the examination, was competent evidence on the condition of insured's health at that time, and, if accepted as true by the jury, was sufficient to support verdict for defendants.—Western & Southern Life Ins. Co. v. Danciu, Ind., 26 N.E 2d 912, rehearing denied 27 N.E 2d 763.

Execution of note may be established by proof of maker's admission.—In re Donohoe's Estate, 115 A. 878, 271 Pa. 554, 20 A.L R. 392.

Notice of claim
Admission of employer that employee showed him his injured hand, and informed him injury was received in employer's employ, was sufficient for purpose of claiming compensation.—Sinitiere v. Morris, 132 So. 144, 16 La.App. 202.

Principal's confession against surety
Employee's voluntary confession of embezzlement was at least prima facie evidence against surety on his indemnity bond.—Indemnity Ins. Co. of North America v. Krone, 9 S.W. 2d 33, 177 Ark. 953, 60 A.L.R. 1493.

29. Cal.—Gorzeman v. Artz, 57 P 2d 550, 13 Cal.App.2d 660—Troy v. Troy, 16 P.2d 290, 127 Cal.App. 489
D C.—General Finance v. Stratford, 109 F.2d 843, 71 App.D.C. 343.
Ind.—Horner v. Daily, 133 N.E. 585, 77 Ind.App. 378.
La.—Royal Indemnity Co. v. Shreveport Macaroni Mfg. Co., 137 So. 753, 18 La.App. 275.
Mich.—Snider v. Schaffer, 267 N.W. 791, 276 Mich. 92.
Mo.—Langan v. U. S. Life Ins. Co., 130 S.W.2d 479, 344 Mo. 989, 123 A.L.R. 1409, transferred, see, App., 121 S.W.2d 268, transferred, see, Sup., 114 S.W.2d 984—Concrete Steel Co. v. Reinforced Concrete Co., App., 72 S.W.2d 118.
N.J.—Ruh v. Hyle, 138 A. 104, 5 N. J.Misc. 680.
N.Y.—Schneider v. Swartele, 267 N Y. S. 714, 239 App.Div. 329, affirmed 8 N.E.2d 336, 273 N.Y. 662—Morgan v. Hartog, 175 N.Y.S. 521.
Ohio.—Buescher v. Ellenberger, App., 34 N.E.2d 1013.
Or.—Bowerman v. Columbia Gorge Motor Coach System, 284 P. 579, 132 Or. 106.
Pa.—O'Boyle v. Harry Seitz & Sons, 160 A. 145, 105 Pa.Super. 135—Knierim v. Pfeil, 6 Sch.Reg. 329.
Tex.—Counts v. Dobbs, Civ.App., 235 S.W. 716.

Prima facie proof
Cal.—Kendall v. San Pedro Lumber Co., 276 P. 1042, 98 Cal.App. 242.
Mass.—Ferreira v. Franco, 173 N.E. 529, 273 Mass. 272—Wilson v. Grace, 173 N.E. 524, 273 Mass. 146.
Mich.—Battle Creek Food Co. v. Kirkland, 299 N.W. 167, 298 Mich. 515.
Neb.—Orchard & Wilhelm Co. v. Petersen, 256 N.W. 37, 127 Neb. 476
Utah—Reid v. Owens, 93 P.2d 680, 98 Utah 50, 126 A.L.R 55—Peterson v. Richards, 272 P. 229, 73 Utah 59.

Admission limited to facts
Defendant's admission that he was driving automobile at thirty-five miles an hour on country road held not prima facie evidence of negligence, where driving at thirty-five miles per hour is not necessarily negligence—Siler v. Renfro Supply Co., 26 S W.2d 12, 233 Ky. 487.

Payment
La.—George T. Bishop, Inc., v. Jones, 136 So. 101, 17 La.App. 410.

Trust may be established by admissions of party to be charged.—State, for Use of Burrow, v. Cothron, 113 S.W.2d 81, 21 App.Div. 519.

Judicial admissions
(1) Sufficient to sustain verdict.—Farmers' Peanut Co. v. Lucas, 175 S. E. 176, 206 N.C. 922.

(2) Under Louisiana statute judicial confession is full proof against him who made it.—Beard v. Vincent, 141 So. 862, 174 La. 869.

(3) In action for unlawful death caused by abortion, admissions by defendant that he told truth in criminal prosecution against codefendant physician warranted recovery as to defendant.—Pleak v. Cottingham, 178 N.E. 309, 94 Ind.App. 365.

(4) Rule that burden on plaintiff in attachment, to prove truth of facts stated in affidavit, is sustained by defendant's declarations justifying attachment, applies only where plaintiff bases his affidavit on defendant's statement denying ownership on which plaintiff has relied.—Long v. Robinson, 281 S.W. 78, 222 Mo.App. 503.

30. Mo.—Wells v. Wells, App., 48 S. W.2d 109, 111, quoting **Corpus Juris.**
Tenn.—Rice v. Southwestern R. Bank, 7 Humphr. 39.
22 C.J. p 425 note 27.

Evidence insufficient
Ark.—Hill v. Hopkins, 133 S.W.2d 634, 198 Ark. 1049.
Iowa.—Campbell v. Humphreys, 210 N.W. 558, 202 Iowa 472.
Mo.—No Dust O Co. v. Home Trust Co., App., 46 S.W.2d 203.
Or.—Selman v. Shirley, 91 P.2d 312, 161 Or. 582, 124 A.L.R. 16, adhering to former opinion 85 P.2d 384, 161 Or. 582, 124 A.L.R. 1.

Self-serving declaration insufficient
A written statement by stockholders to their client that his stock had been sold for a particular price was

sufficient to establish that for which it was offered in evidence.[31]

Admission of fault or liability. Where admissible, see supra § 272, an admission of fault or liability has probative force.[32] However, a mere acknowledgment of fault or liability is insufficient to establish the same if there is no liability or actionable fault present as a matter of law,[33] as where such admission is made in ignorance of declarant's rights and responsibilities.[34] Similarly plaintiff's statement at the time of the incident, that defendant was not at fault, is not conclusive so as to preclude recovery, such statement being as to a question of law.[35] Nevertheless such an admission of fault coupled with facts which may constitute liability in law may be sufficient to support a finding of liability.[36]

Admissions as proof of gift. Admissions of an alleged donor with respect to a gift are not in themselves sufficient evidence to establish the gift,[37] especially where his acts are inconsistent with his having parted with possession and control of the property;[38] nor are they sufficient to disprove a gift otherwise shown to have been made.[39] However, they are to be weighed by the trier of the facts and, when considered together with other corroborative evidence showing a delivery of possession, and an absolute parting of all dominion or interest in the subject of the gift, may be sufficient to establish the gift.[40]

Where the donor repeatedly declared his intention to make a certain gift, subsequent admissions that he had made the gift are sufficient evidence of an actual delivery to complete the title of the donee.[41]

A donee's admissions may be sufficient to negative a gift.[42]

Conspirator's confession. The confession of one of the conspirators without corroboration is insufficient to establish a cause of action or defense arising out of a conspiracy involving another of the alleged conspirators.[43]

c. Tacit Admissions

Tacit admissions may be just as effective as oral or written admissions to establish the fact admitted, but their weight depends on the circumstances.

While an admission by conduct, silence, or acquiescence may be as effective as an oral or written admission would be,[44] its weight depends very largely on the surrounding circumstances, and, in the case of silence, on the probability of a denial if the statements were untrue.[45] Under some circum-

an admission conclusive as direct evidence against the brokers and was not overcome by a subsequent letter written by the stockholders stating that the sale had not been made, since the letter was self-serving evidence.—Vollmer v. Newburger, 121 A. 56, 277 Pa. 282.

31. Cal.—Barton v. McDermott, 291 P. 591, 108 Cal.App. 372.
D.C.—Skene v. Marinello Co., 270 F. 701, 50 App.D.C. 265.
La.—Farque v. Gulf States Utilities Co., App., 140 So. 90.
Mich.—Ayling v. City of Detroit, 266 N.W. 372, 275 Mich. 338.
Miss.—Smith v. Dauber, 125 So. 102, 155 Miss. 694.
N.H.—Login v. Waisman, 136 A. 134, 82 N.H. 500.
N.Y.—Phillipson v. Moore, 198 N.Y.S. 290, 204 App.Div. 140—Stollman v. Olmsted, 196 N.Y.S. 689, 203 App.Div. 476.
Pa.—Taylor v. Parmer, 10 A.2d 420, 336 Pa. 585.
Tex.—Aycock v. Green, Civ.App., 94 S.W.2d 894, error dismissed—Payne v. Malone, Civ.App., 239 S.W. 998.

32. Mass.—Zandan v. Radner, 136 N.E. 387, 242 Mass. 503.

33. Ala.—McClusky v. Duncan, 113 So. 250, 216 Ala. 388.
Fla.—Robb v. Pike, 161 So. 732, 119 Fla. 833.
Ga.—Cook v. Brown, 98 S.E. 92, 23 Ga.App. 284.
La.—Parker v. Employers' Casualty Co., App., 152 So. 373.
N.Y.—In re Toukatley's Estate, 203 N.Y.S. 175, 122 Misc. 120.
Conclusion erroneous
Ala.—McClusky v. Duncan, 113 So. 250, 216 Ala. 388.
La.—Mathes v. Schwing, 125 So. 121, 169 La. 272, setting aside 119 So. 577, 19 La.App. 680, affirmed 123 So. 156, 11 La.App. 5, 19 La.App. 680.

34. N.Y.—In re Toukatley's Estate, 203 N.Y.S. 175, 122 Misc. 120.

35. Md.—Gordon v. Opalecky, 137 A. 299, 152 Md. 536.
Mo.—Graber v. Wells, App., 7 S.W.2d 719—Runyan v. Marceline Coal & Mining Co., 172 S.W. 1165, 196 Mo.App. 707.

36. La.—Parker v. Employers' Casualty Co., App., 152 So. 373.
Mont.—Carey v. Guest, 258 P. 236, 78 Mont. 415.

37. Pa.—In re Kaufmann's Estate, 127 A. 133, 281 Pa. 519.
28 C.J. p 681 note 1.

38. Mo.—Roethemeier v. Veith, 69 S.W.2d 930, 934, 334 Mo. 1030, citing **Corpus Juris.**
28 C.J. p 682 note 3.

39. Ga.—Culpepper v. Culpepper, 89 S.E. 161, 18 Ga.App. 182.
28 C.J. p 682 note 3.

40. Cal.—Skellenger v. England, 253 P. 191, 81 Cal.App. 176.
Miss.—Pannell v. Glidewell, 107 So. 273, 142 Miss. 77.
Mo.—Roethemeier v. Veith, 69 S.W. 2d 930, 334 Mo. 1030.
28 C.J. p 682 note 5.
Admission in other proceeding
Plaintiff, having convinced court in former action that statements as to gift were true, cannot complain of finding in instant case that they were true.—Skellenger v. England, 253 P. 191, 81 Cal.App. 176.

41. Mass.—Alger v. North End Sav. Bank, 15 N.E. 916, 146 Mass. 418, 4 Am.S.R. 331.
28 C.J. p 682 note 8.

42. N.Y.—Hayes v. Claessens, 179 N.Y.S. 953, 189 App.Div. 449.

43. Ky.—Yorkshire Ins. Co., Limited, of York, England, v. Bryan, 60 S.W.2d 120, 248 Ky. 847.

44. Ga.—Scott v. Kelly-Springfield Tire Co., 125 S.E. 773, 33 Ga.App. 297.
N.Y.—In re Lasher's Estate, 2 N.Y.S. 2d 204, 165 Misc. 592.
Tex.—Security Motor Co. v. Chestnut, Civ.App., 244 S.W. 385.
22 C.J. p 426 note 36.

45. Mass.—Credit Service Corpora-

stances a party's silence may militate against him,[46] but an adverse inference from conduct or silence is to be drawn with extreme caution,[47] especially where the statement was made by a stranger to the controversy.[48] It is for the jury to determine the weight to be accorded to such an admission.[49]

The admission implicit in an attempt to bribe a witness constitutes corroborative evidence as distinguished from substantive evidence.[50]

The same probative effect is not necessarily given to a failure to reply to a written communication as is given to a failure to reply to oral statements made in the presence of the party.[51] Failure to deny a statement in a written communication is merely a circumstance to be weighed in connection with other evidence bearing on the correctness of the statement,[52] usually having less probative force than would attach to a failure to reply to an oral statement made directly to the party.[53]

§ 383. To Which Party Available

An admission in evidence may be used by either side in support of its views.

Where an admission has been introduced into evidence and thus brought into the case, it may be used by either side in support of its views.[54]

IX. FORMER EVIDENCE

§ 384. In General

Under certain conditions, evidence taken at a former trial may be introduced at a subsequent trial, irrespective of the outcome of the former trial.

The mere fact that testimony has been given in the course of a former proceeding between the parties to a case on trial is no ground for admitting it in evidence.[55] Such former evidence is second-

tion v. Barker, 33 N.E.2d 293, 308 Mass. 476.

N.Y.—Sahoff Corporation v. William B. May Co. Real Estate, 15 N.Y.S 2d 795, 258 App.Div. 157, reargument denied 16 N.Y.S.2d 1016, 258 App.Div. 877.

Pa.—Bednoraenski v. Schrager, 189 A. 690, 124 Pa.Super. 486.

Wis.—Mahoney v. Kennedy, 205 N. W. 407, 188 Wis. 30.

22 C.J. p 426 note 37.

46. U.S.—Mammoth Oil Co. v. U. S., Wyo., 48 S.Ct. 1, 275 U.S. 13, 72 L. Ed. 137—U. S. v. Todd, N.Y., 44 S. Ct. 54, 263 U.S. 149, 68 L.Ed. 221.

Ga.—Hathcock v. Hathcock, 184 S.E. 785, 52 Ga.App. 805.

Mass.—Attorney General v. Pelletier, 134 N.E. 407, 240 Mass. 264.

22 C.J. p 426 note 38.

Facts within party's knowledge

(1) Silence of party on subject material to her case, and peculiarly within her knowledge, furnishes strong and often conclusive evidence that she does not speak lest truth hurt her cause.—Kolensky v. De Francesco, 129 A. 777, 102 Conn. 660.

(2) Where the facts are peculiarly within his knowledge, silence of bankrupt on petition by trustee in bankruptcy for turnover order is most persuasive evidence, and must be taken strongly against him.—In re Glassberg, D.C.N.Y., 59 F.2d 209.

Failure to assert claim at a time when its assertion might reasonably have been expected is a matter proper for consideration on an issue as to the existence or validity of such claim.—Chidester v. Harlan, 159 N. W. 659, 180 Iowa 171.

47. Ala.—Stephens v. Barnwell, 45 So. 233, 154 Ala. 124.

22 C.J. p 426 note 39.

Probative force

(1) Such evidence is weak in probative force.—Keim v. Blackburn, Mo., 280 S.W. 1046—McCarty v. Bishop, 102 S.W.2d 126, 231 Mo.App. 604.

(2) Showing that necessary witness has been kept away is persuasive, not probative, evidence.—Login v. Waisman, 136 A. 134, 82 N.H. 500.

Implied admissions standing alone cannot sustain an entire case, although in case of conflicting evidence it may turn the scale.—Credit Service Corporation v. Barker, 33 N. E.2d 293, 308 Mass. 476.

48. Mass.—Whitney v. Houghton, 127 Mass. 527—Larry v. Sherburne, 2 Allen 34.

49. Cal.—Coats v. General Motors Corporation, 39 P.2d 838, 844, 3 Cal.App.2d 340, citing **Corpus Juris**—Baldarachi v. Leach, 186 P. 1060, 44 Cal.App. 603.

Mich.—Donker v. Powers, 202 N.W. 989, 230 Mich. 237.

N.J.—Ollert v. Ziebell, 114 A. 356, 96 N.J.Law 210.

22 C J. p 426 note 41.

50. Iowa.—Gregory v. Sorenson, 242 N.W. 91, 214 Iowa 374.

51. Pa.—Bednorzenski v. Schrager, 189 A. 690, 124 Pa.Super. 486.

Wis.—Mahoney v. Kennedy, 205 N.W. 407, 188 Wis. 30.

22 C.J. p 327 note 25, 26.

52. Pa.—Bednorzenski v. Schrager, 189 A. 690, 124 Pa.Super. 486.

22 C.J. p 327 note 25.

53. Pa.—Bednorzenski v. Schrager, supra.

Wis.—Mahoney v. Kennedy, 205 N.W. 407, 188 Wis. 30.

22 C.J. p 327 note 26.

54. U.S.—Brown v. Brown, C.C.R.I., 4 F.Cas No.1,994, 1 Woodb. & M. 325.

Affidavit

Where an affidavit is used in evidence by a party, he cannot object to the attorney of the opposite party reading it and commenting on it.—Asbach v. Chicago, B. & Q. R. Co., 53 N.W. 90, 86 Iowa 101.

55. Ga.—Estill v. Citizens' & Southern Bank, 113 S.E. 552, 153 Ga. 618.

Tex.—Carter v. Irvine, Civ.App., 77 S.W.2d 247.

Admissibility of former evidence for purpose of contradiction of witness see the C.J.S. title Witnesses § 639, also 70 C.J. p 1175 notes 61–69.

Former evidence in criminal proceedings see Criminal Law §§ 892–899.

Necessity of independent recollection of facts as prerequisite to admissibility where witness refreshes his memory by use of former evidence see the C.J.S. title Witnesses § 360, also 70 C.J. p 595 note 1–p 597 note 21.

Refreshing memory of witness by use of former evidence see the C.J.S. title Witnesses § 358, also 70 C.J. p 589 note 11–p 590 note 26.

Cross-examination as to testimony on former trial

Questions to defendant's witness on cross-examination as to what another witness for defendant, who did not testify in the present trial, testified to in the former trial of the case, were improper and prejudicial. —Walter v. Joline, 120 N.Y.S. 1025, 136 App.Div. 426.

ary evidence,[56] and has been characterized as hearsay evidence.[57]

When, however, as frequently happens, it is impossible to produce on a trial evidence which was introduced at a previous trial, the former evidence is, as a matter of necessity,[58] received,[59] sometimes by express statutory permission,[60] if it is relevant and material on the later trial,[61] and provided further certain conditions discussed hereafter in §§ 385–396 are found to exist.

It is immaterial to the admission of former evidence what was the outcome of the former trial or suit in which the witness was examined,[62] but the evidence may be received whether the former action was abandoned,[63] dismissed,[64] terminated by a nonsuit,[65] or for other reason failed to result in a decision.[66] The evidence is not to be rejected

56. Wyo.—See Ben Realty Co. v. Gothberg, 109 P.2d 455, 56 Wyo. 294.
Best and secondary evidence see infra §§ 776–850.

57. Ark.—George v. Davie, 145 S.W. 2d 729.
Ga.—Walker v. Walker, 14 Ga. 242.
Tex.—Lone Star Gas Co. v. State, 153 S.W.2d 681, modifying State v. Lone Star Gas Co., Civ.App., 129 S.W.2d 1164.

Criticism of characterization

"The admission of the testimony of a witness on a former trial is frequently inaccurately spoken of as an exception to the rule against the admission of hearsay evidence. The analogy is not at all perfect. Objections to hearsay evidence consist of the want of the sanction of an oath and of an opportunity to cross-examine the witness. These two objections do not apply where former testimony is sought to be introduced in evidence. In the latter case the testimony is taken down word for word at a former trial and preserved. The testimony is taken in open court in the presence of the parties and witnesses under the supervision of the trial judge under oath of the witness where there is full opportunity to examine and cross-examine the witness, to search his motives, appeal to his conscience, and test his recollection and the accuracy of his statements. So taken it must be as high an order of testimony as a deposition taken upon interrogatories in the private office of a notary public or some like officer."—Habig v. Bastian, 158 So. 508, 510, 117 Fla. 864.

Testimony excluded as hearsay

Testimony of a witness that she heard witness testify on a former trial that he had written certain letters and the letters themselves are properly excluded as hearsay.—Estill v. Citizens' & Southern Bank, 113 S.E. 552, 153 Ga. 618.

58. U.S.—U. S. v. Bosca, Reed, MacKinnon Co., 24 Cust. & Pat.App. (Customs) 364, 370, citing **Corpus Juris.**
Ariz.—Tom Reed Gold Mines Co. v. Moore, 11 P.2d 347, 40 Ariz. 174.
Ga.—Walker v. Walker, 14 Ga. 242—Herndon v. Chamberlain, 146 S.E. 503, 39 Ga.App. 207.
Mass.—Ibanez v. Winston, 109 N.E. 814, 222 Mass. 129.
N.Y.—Crary v. Sprague, 12 Wend. 41, 27 Am.D. 110.
Wyo.—See Ben Realty Co. v. Gothberg, 109 P.2d 455, 462, 56 Wyo. 294, citing **Corpus Juris.**
22 C.J. p 427 note 44.

59. Ala.—Hines v. Miniard, 94 So. 302, 208 Ala. 176.
Hawaii.—Correa v. Waiakea Mill Co., 32 Hawaii 310.
La.—Young v. Reed, App., 192 So. 780.
Mich.—Dunbar v. McGill, 37 N.W. 285, 69 Mich. 297.
Mo.—Welp v. Bogy, 277 S.W. 600, 218 Mo.App. 414.
N.Y.—Lieberman v. Warman, 20 A. 2d 604, 19 N.J.Misc. 417.
N.D.—Leach v. Nelson, 196 N.W. 755, 50 N.D. 538.
Or.—Obermeier v. Mortgage Co. Holland-America, 224 P. 1089, 111 Or. 14.
Pa.—In re Nixon's Estate, 159 A. 172, 104 Pa.Super. 506.
R.I.—Rhode Island Hospital Trust Co. v. Sherman, 135 A. 601, 56 R.I. 355.
Tex.—Lone Star Gas Co. v. State, 153 S.W 2d 681, modifying State v. Lone Star Gas Co., Civ.App., 129 S.W.2d 1164—Texas Employers' Ins. Ass'n v. Burnett, Civ.App., 77 S.W.2d 742, reversed on other grounds, Com.App., 105 S.W.2d 200—Carter v. Irvine, Civ.App., 77 S.W.2d 247.
22 C.J. p 427 note 43.

60. Ariz.—Tom Reed Gold Mines Co. v. Moore, 11 P.2d 347, 40 Ariz. 174.
Nev.—Martin v. Duncan Automobile Co., 296 P. 24, 53 Nev. 212.
Ohio.—New York Cent. R. Co. v. Stevens, 185 N.E. 542, 126 Ohio St. 395, 87 A.L.R. 884.
Okl.—King Auto Service v. Hodges, 288 P. 483, 143 Okl. 260.
Or.—In re Water Rights in Silvies River, 237 P. 322, 115 Or. 27—Hansen-Rynning v. Oregon-Washington R. & Nav. Co., 209 P. 462, 105 Or. 67.
Pa.—Almar Building & Loan Ass'n v. Broad St. Trust Co., 176 A. 767, 116 Pa.Super. 465.
Tex.—In re Brackenridge's Estate, Civ.App., 245 S.W. 786, reversed on other grounds Brackenridge v. Roberts, 267 S.W. 244, 114 Tex. 418, rehearing denied 270 S.W. 1001, 114 Tex. 418.

Statute authorizing use of depositions

The statute authorizing use of depositions taken in conformity to provisions relating to depositions to perpetuate testimony related solely to testimony so obtained, and did not authorize introduction of testimony which had been given at former trial of cause and had been preserved in bill of exceptions therein.—Collins v. Leahy, 125 S.W.2d 874, 344 Mo. 250.

61. Del.—Industrial Trust Co. v. Flaherty, 180 A. 583, 7 W.W.Harr. 94.
Mass.—Chase v. Chase, 171 N.E. 651, 271 Mass. 485.
22 C.J. p 427 note 45.

Separation of immaterial matter

To put trial court in error in rejecting transcript of former testimony, immaterial matter should have been separated when transcript was offered.—St. Louis-San Francisco Ry. Co. v. Swaney, 113 So. 410, 216 Ala. 454.

Evidence held inadmissible

Where only question was whether contract to devise property was made, evidence at former trial concerning disposition of property in will was properly excluded.—McDermott v. Lankenau, 154 S.E. 149, 170 Ga. 585.

62. Ala.—Hill v. McWhorter, 187 So. 494, 237 Ala. 419.

63. Ala.—Hill v. McWhorter, 187 So. 494, 495, 237 Ala. 419, citing **Corpus Juris.**
Ark.—McTighe v. Herman, 42 Ark. 285.

64. Ala.—Hill v. McWhorter, 187 So. 494, 495, 237 Ala. 419, citing **Corpus Juris.**
Iowa.—E. H. Emery & Co. v. American Refrigerator Transit Co., 184 N.W. 750, 193 Iowa 93, 20 A.L.R. 86.
22 C.J. p 427 note 48.

65. Ala.—Hill v. McWhorter, 187 So. 494, 495, 237 Ala. 419, citing **Corpus Juris.**
22 C.J. p 427 note 49.

66. Ala.—Hill v. McWhorter, 187 So. 494, 495, 237 Ala. 419, citing **Corpus Juris.**
22 C.J. p 427 note 50.

because there is other evidence to the same effect,[67] or because it was not offered at a former retrial at which it would have been available.[68] It is not a valid objection that the testimony was in the witness' favor.[69]

The former evidence must have been taken under the sanctity of an oath.[70] It has been held that, where on the former trial the court had jurisdiction of the parties and power to administer oaths, the evidence may be received, although the court before which it was taken had no jurisdiction of the subject matter;[71] but this has been denied.[72]

A stipulation as to what a witness would testify at one trial has been held admissible on another trial after his death,[73] but there is also authority for the rejection of such evidence,[74] where the agreement was made merely to prevent a continuance.[75] The rule admitting former evidence does not permit the admission of a mere offer of a witness to testify to certain facts,[76] or a deposition, which was stricken out and did not become a part of the evidence on the former trial.[77]

The party against whom the evidence was introduced at the first trial may use it at the later trial,[78] unless the witness would have been disqualified from testifying in his favor at the first trial.[79]

It has been held that a transcript of the examination of defendant, taken at a former trial, is admissible to show that no reference or testimony was read from a card index introduced in the case.[80]

Objections to former evidence. The former evidence is, sometimes by reason of statute, open to any objections[81] going to the substance of the testimony, or the competency of the witness,[82] which would exclude the testimony of the witness to the same matters, save that objections which were available, but not urged, at the first trial cannot be urged at the subsequent trial,[83] especially where the witness is deceased.[84] In some jurisdictions the rule as to objections to the evidence relates only to its relevancy and materiality and not to its competency,[85] at least not to the competency of the witness at the time the testimony is offered at the second trial, see infra § 394.

Failure to testify. In an action for damages for injuries suffered because of an act for which de-

67. Tex.—Thurmond v. Trammell, 28 Tex. 371, 91 Am D. 321.

68. Tex.—Thurmond v. Trammell, supra.

69. N.C.—Mechanics Bank & Trust Co. v. Whilden, 94 S.E. 723, 175 N. C. 52.
Vt.—Earl v. Tupper, 45 Vt. 275.

70. U.S.—Smythe v. Inhabitants of New Providence Tp., Union County, C.C.A.N J., 263 F. 481, reversing, D.C., Smythe v. Inhabitants of New Providence Tp., 253 F. 824.
Fla.—Habig v. Bastian, 158 So. 508, 117 Fla. 864.

Necessity of showing

Testimony of deceased witness on former examining trial should not be introduced without showing that deceased was sworn.—Monahan v. Clemons, 279 S.W. 974, 212 Ky. 504.

71. Colo.—Jerome v. Bohm, 40 P. 570, 21 Colo. 322.

72. Mont.—In re Colbert's Estate, 153 P. 1022, 51 Mont. 455.
22 C.J. p 427 note 57.

73. N.Y.—Fortunato v. New York, 77 N.Y.S. 575, 74 App.Div. 441, modified on other grounds 66 N.E. 1109, 173 N.Y. 608.

74. Mont.—Kelly v. Kipp, 250 P. 819, 77 Mont. 110.

75. Ala.—Ryan v. Beard's Heirs, 74 Ala. 306.
22 C.J. p 427 note 61.

76. Tex.—Lane v. De Bode, 69 S.W. 437, 29 Tex.Civ.App. 602.

77. N.Y.—Young v. Valentine, 69 N. E. 643, 177 N.Y. 347, affirming 79 N.Y.S. 536, 78 App.Div. 633.

78. Ala.—Louisville & N. R. Co. v. Scott, 167 So. 572, 576, 232 Ala. 284, citing **Corpus Juris.**
22 C.J. p 427 note 58.

79. Ala.—House v. Camp, 32 Ala. 541.
22 C.J. p 427 note 59.

80. Mich.—Ballance v. Dunnington, 224 N.W. 434, 246 Mich. 36.

81. Ala.—Louisville & N. R. Co. v. Scott, 167 So. 572, 576, 232 Ala. 284, citing **Corpus Juris**—House v. Camp, 32 Ala. 541.
Mont.—Arnold v. Genzberger, 31 P. 2d 296, 96 Mont. 358.
Ohio.—Smith v. Cincinnati Traction Co., 24 Ohio N.P., N.S., 565.
22 C.J. p 427 note 64.

Evidence impeaching witness

Evidence elicited on cross-examination of deceased witness by plaintiff at former trial of same suit tending to impeach her as witness for defendant is inadmissible where plaintiff sought to introduce such evidence given at former trial in its entirety, since by so doing she became plaintiff's witness.—Louisville & N. R. Co. v. Scott, 167 So. 572, 232 Ala. 284.

82. Ala.—Ætna Ins. Co. v. Koonce, 171 So. 269, 233 Ala. 265.

Objections available under statutes

Statute providing that all testimony so offered shall be open to all objections which might be taken, if the witness was personally present, refers to objections for irrelevancy or immateriality of evidence, incompetency of a witness to testify, or incompetency to testify on a given subject.—Smith v. Cincinnati Traction Co., 24 Ohio N.P., N.S., 565.

83. N.D.—Leach v. Nelson, 196 N.W. 755, 50 N.D. 538.
Tex.—Sherman Gas & Electric Co. v. Belden, 123 S.W. 119, 103 Tex. 59, 27 L.R.A.,N.S., 237.
Objection to evidence given at former trial without objection when reintroduced at subsequent trial see the C.J.S. title Trial § 115, also 64 C.J. p 172 notes 38, 39.

Leading questions

That the testimony offered was in response to leading questions does not render it objectionable.—Smith v. Cincinnati Traction Co., 24 Ohio N.P., N.S., 565.

Responsiveness of answers

Where the testimony of a witness was admitted without objection on the first trial, the court, on admitting the report of the testimony on the second trial, could not exclude answers because not responsive.
Ohio.—Smith v. Cincinnati Traction Co., 24 Ohio N.P., N.S., 565.
Tex.—Sherman Gas & Electric Co. v. Belden, 123 S.W. 119, 103 Tex. 59, 27 L.R.A.,N.S., 237, reversing, Civ. App., 115 S.W. 897.

84. Ohio.—Smith v. Cincinnati Traction Co., 24 Ohio N.P., N.S., 565.
22 C.J. p 427 note 66.

85. Fla.—Habig v. Bastian, 158 So. 508, 117 Fla. 864.

fendant was prosecuted in a criminal proceeding it is improper to refer to defendant's failure to testify in the criminal case.[86]

Reciprocal right. In order that former testimony may be admissible when offered by one party, there must exist a reciprocal right in the other party to introduce it.[87]

§ 385. Nature of Former Trial

In order that former evidence may be admissible, it is not necessary that the evidence has been given on the trial of a cause in the exact technical shape of the second action; it may have been given at a previous regular trial of the same action, or at a former trial where the parties and issues were substantially the same, or at a preliminary hearing; but it may not have been given on an examination not directed to a defined issue, or at a coroner's inquest, or, in some jurisdictions, in a criminal proceeding.

Rather a broad meaning is given to the word "trial" as applied to the proceeding at which the evidence was originally adduced.[88] In general, it is sufficient if the point was investigated in a judicial proceeding of any kind, wherein the party to be affected by such testimony had the right of cross-examination.[89] It is not necessary that the former testimony should have been given on the trial of a cause in the exact technical shape of the second action.[90] The evidence received includes that given at a previous regular trial of the same action or suit[91] or proceeding;[92] and includes that given on a former trial where the parties and issues were substantially the same.[93] It also includes evidence

86. Ky.—Monahan v. Clemons, 279 S.W. 974, 212 Ky. 504.

87. U.S.—U. S. v. Aluminum Co. of America, D.C.N.Y., 1 F.R.D. 48.

88. Colo.—Gibson v. Gagnon, 257 P. 348, 350, 82 Colo. 108, citing **Corpus Juris.**
22 C.J. p 428 note 67.

89. N.H.—Orr v. Hadley, 36 N.H. 575.
Opportunity for cross-examination see infra § 390.

Testimony taken on examination before trial
(1) In action for injuries, refusal of court to permit defendant to read in evidence its own testimony taken by plaintiff on examination before trial was not error, since such testimony did not prejudice defendant or affect any of its substantial rights, especially in view of fact that court offered to allow defendant opportunity to produce witness on trial.—Kaufman v. John Abramson & Co., 288 N.Y.S. 305, 248 App.Div. 628.

(2) In insurer's action for premiums on liability policies, evidence given by defendant on examination before trial was admissible in so far as defendant was concerned, but was incompetent in so far as the evidence applied to an impleaded defendant which should have an opportunity to cross-examine the original defendant.—Van Schaick v. Sullivan, 271 N.Y.S. 537, 241 App.Div. 268, affirmed 195 N.E. 214, 266 N.Y. 591.

90. N.H.—Orr v. Hadley, 36 N.H. 575.

91. Ala.—Hines v. Miniard, 94 So. 302, 208 Ala. 176.
Ariz.—Tom Reed Gold Mines Co. v. Moore, 11 P.2d 347, 40 Ariz. 174.
Ark.—Conine v. Mize, 70 S.W.2d 845, 189 Ark. 92—Pine Bluff Co. v. Bobbitt, 294 S.W. 1002, 174 Ark. 41.
Ill.—McInturff v. Insurance Co. of North America, 93 N.E. 369, 248 Ill. 92, 140 Am.S.R. 153, 21 Ann. Cas. 176.
Me.—Edgerley v. Appleyard, 86 A. 244, 110 Me. 337, Ann.Cas 1914D 474—Watson v. Proprietors of Lisbon Bridge, 14 Me. 201, 31 Am.D. 49.
Mo.—Vessels v. Kansas City Light & Power Co., 219 S.W 80.
Or.—Obermeier v. Mortgage Co. Holland-America, 224 P. 1089, 111 Or. 14.
Tex.—Lone Star Gas Co. v. State, 153 S.W.2d 681, modifying State v. Lone Star Gas Co., Civ.App., 129 S.W.2d 1164.
22 C.J. p 428 note 68.

Equity suit
Testimony admitted on former trial of case in equity may be admitted on subsequent trial after the case has been transferred to the law side.—Brauer v. Laughlin, 211 Ill.App. 534.

92. Or.—Obermeier v. Mortgage Co. Holland-America, 224 P. 1089, 111 Or. 14.

"Proceeding" construed
Word "proceeding" following "trial" in statute relating to reading of reported testimony of absent witness, was intended to include practically every inquiry which might invoke attention of court.—Martin v. Duncan Automobile Co., 296 P. 24, 53 Nev. 212.

Escheat proceeding
The testimony of a witness, since deceased, before orphans' court in escheat proceedings, which was a public one after due notice, was properly admitted on trial of claim of one alleging to be a relative of decedent, notwithstanding claimant was not present, and had no opportunity to cross-examine such witness, as such testimony was not testimony in another suit, but was testimony given in the escheat proceeding to which claimant became a party by traversing the finding of the orphans' court.—Commonwealth v. Sweeney, 129 A. 577, 283 Pa. 520.

93. Ala.—Hines v. Miniard, 94 So. 302, 208 Ala. 176.
Colo.—Gibson v. Gagnon, 257 P. 348, 82 Colo. 108.
Ill.—McInturff v. Insurance Co. of North America, 93 N.E. 369, 248 Ill. 92, 140 Am.S.R. 153, 21 Ann. Cas. 176.
Mass.—Yale v. Comstock, 112 Mass 267.
N.H.—Orr v. Hadley, 36 N.H. 575.
Identity of issues see infra § 389.
Identity of parties see infra § 387.

Evidence held admissible
Testimony taken in county court in support of claim against estate for board of deceased was admissible in subsequent action by claimant against widow, individually and as administratrix, to set aside alleged fraudulent conveyance by decedent, where witness had died since proceedings in county court.—Zimdars v. Zimdars, 295 N.W. 675, 236 Wis. 484.

(2) In husband's claim under intestate law against wife's will excluding him for his alleged desertion, deceased wife's evidence taken in her incompleted divorce action for desertion was admissible on issue of whether he had willfully, maliciously, and without proper cause deserted her, and whether she had consented to the desertion.—In re Nixon's Estate, 159 A. 172, 104 Pa.Super. 506.

(3) In proceeding to recover amount of note from deceased maker's estate, probate court properly admitted maker's testimony on issue whether note was his obligation at hearing before federal conciliation commissioner in bankruptcy proceeding wherein payee intervened.—George v. Davie, Ark., 145 S.W.2d 729.

Foreign suit
Testimony of defendant in foreign suit to establish prior lien on trust fund was admissible in local action to enforce claim against fund.—

brought out at a preliminary hearing,[94] or at a hearing to dissolve a temporary restraining order which was entered to preserve the res pending the disposition of the cause.[95] It has also been held that the testimony of voters in a John Doe proceeding to inquire into the validity of an election is admissible in a subsequent quo warranto proceeding to oust the official elected from office.[96]

On the other hand, the testimony of a witness on a general examination which is not directed to a defined issue, as an examination before a referee as to the acts, conduct, or property of a bankrupt, is not admissible in a subsequent proceeding involving relevant matters.[97] Evidence given at a coroner's inquest is inadmissible[98] except that such evidence has been held competent in some proceedings of a special nature, such as hearings before an industrial accident commission.[99] An examination of plaintiff, since deceased, before a commissioner, touching the truth of the matters set forth by him in an affidavit under which a capias ad respondendum had issued in the cause, is not admissible on the subsequent trial of the cause.[1]

Under statutes in some jurisdictions, in order that former evidence may be admissible it must be offered at a new trial of the same or identical action;[2] it is not enough that the litigation in the two actions or proceedings concern the same subject

Westchester Mortg. Co. v. Newport Trust Co., 146 A. 774, 50 R.I. 263.

94. Colo.—Gibson v. Gagnon, 257 P. 348, 82 Colo. 108.
22 C.J. p 428 note 69.

Disbarment proceeding

In proceeding to disbar attorney a transcript of the testimony of a deceased witness taken at the preliminary investigation of the case by the state bar committee is admissible.—In re Pate, 119 S.W.2d 11, 232 Mo.App. 478.

95. Fla.—Alexander v. Bess, 167 So. 533, 123 Fla. 713.

96. Wis.—State v. Thorson, 231 N. W. 155, 202 Wis. 31.

Public policy

Receipt of such evidence is not against public policy, for such proceeding is at most no more under ban of secrecy than proceeding before grand jury.—State v. Thorson, supra.

Privilege of secrecy of testimony

Defendant in quo warranto proceeding cannot object to introduction of testimony of voters given in proceeding to inquire into validity of election, even if such proceeding is on parity with grand jury proceeding, since the privilege of secrecy of the testimony is that of the witness and not that of defendant.—State v. Thorson, supra.

97. U.S.—In re National Boat & Engine Co., D.C Me., 216 F. 208.
Conn.—Todd v. Bradley, 122 A. 68, 74, 99 Conn. 307.

Reason for rule

"The most serious and sufficient objection to the admissibility of such evidence is not the lack of opportunity for cross-examination, but that examinations of this kind are not confined to well-defined issues, properly made known to the persons concerned, with opportunity given to present evidence and be heard on questions of fact or law which will be raised or involved in the investigation. In such conditions the rules of evidence cannot be carefully applied, and the proceedings lack in these particulars the elements of the due process of law by which only may a person be deprived of his property."—Todd v. Bradley, supra.

98. Colo.—Germania Life Ins. Co. v. Ross-Lewin, 51 P. 488, 24 Colo. 43, 65 Am.S.R. 215—Jackson v. Crilly, 26 P. 331, 16 Colo. 103.
D.C.—Capital Tract. Co. v. King, 44 App.D.C. 315.
Ill.—Pittsburg, C. & St. L. Ry. Co. v. McGrath, 3 N.E. 439, 115 Ill. 172—Carroll v. Krause, 280 Ill.App. 52.
Ky.—Chesapeake & O. Ry. Co. v. McDonald, 39 S.W.2d 253, 239 Ky. 258.
Me.—Edgerley v. Appleyard, 86 A. 244, 110 Me. 337, Ann.Cas.1914D 474.
Mo.—Wallingford v. Terminal R. R. Ass'n of St. Louis, 88 S.W.2d 361, 337 Mo. 1147.
N.Y.—Cook v. New York Central R. R. Co., 5 Lans. 401.
Pa.—Schrieber v. Erie Lighting Co., 19 Erie Co. 490.
S.C.—Brogdon v. Northwestern R. Co. of South Carolina, 139 S.E. 459, 141 S.C. 238—Petrie v. Columbia & G. R. Co., 7 S.E. 515, 29 S.C. 303.

Impeachment purposes only use

Ill.—Carroll v. Krause, 280 Ill.App. 52.

99. Cal.—Los Angeles County v. Industrial Accident Commission of California, 11 P.2d 434, 123 Cal. App. 12.

1. N.J.—Sokobin v. Ornstein, 158 A. 468, 108 N.J.Law 304.

2. Ariz.—Tom Reed Gold Mines Co. v. Moore, 11 P.2d 347, 40 Ariz. 174.
Iowa.—Spiers v. Hendershott, 120 N. W. 1058, 142 Iowa 446.
N.J.—First Nat. Bank of Toms River v. Levy, 16 A.2d 555, 125 N.J. Law 458.

"Further trial of case"

(1) Deceased witness' testimony in wife's personal injury action was inadmissible in husband's subsequent action for loss of consortium, husband's action not being "further trial of case" within statute.—Lord v. Boschert, 189 N.E. 863, 47 Ohio App. 54.

(2) Action by state under Compensation Act against employer who failed to comply with act brought after commission had made award is a "further trial," within statute, so as to permit introduction of testimony of witnesses before industrial commission.—Schomer v. State ex rel Bettman, 190 N.E. 638, 47 Ohio App. 84.

Retrial of "case"

(1) Under statute providing for use of former evidence on retrial of the case or proceeding, the word "case" is not used in a narrow, strictly legal, or technical sense.—E. H. Emery & Co. v. American Refrigerator Transit Co., 184 N.W. 750, 193 Iowa 93, 20 A.L.R. 86.

(2) The testimony of witnesses at a former trial, of a cause dismissed as to one of defendants, and dismissed without prejudice as to defendant in the trial of the present action, is admissible, the issues being the same and practically a retrial of the former "case."—E. H. Emery & Co. v. American Refrigerator Transit Co., supra.

(3) Transcript of testimony on hearing in habeas corpus to obtain custody of a child is not receivable, on application to modify divorce decree as to custody of child, to show what witnesses other than one of the parties testified to, since it is not a retrial of the habeas corpus action.—Barish v. Barish, 180 N.W. 724, 190 Iowa 493.

(4) Transcript of evidence of bankrupt taken before commissioner of bankruptcy is not admissible in action to recover shoes purchased by bankrupt, since evidence was not given at prior trial of same cause.—Endicott Johnson Corporation v. Shapiro, 205 N.W. 511, 200 Iowa 843.

matter,[3] and evidence of a statement made by a witness in an entirely different kind of litigation will be rejected.[4]

Creditors' meeting. In a suit to avoid as preferences payments made by a bankrupt, testimony by the bankrupt, given without objection, that the report of his testimony given at a meeting of the creditors was correct and that he confirmed it, constituted an adoption of such testimony as would permit the admission of the report in evidence.[5] In a suit by a trustee in bankruptcy to cancel a deed of the bankrupt's alleged to have been made to defraud creditors, the bankrupt's testimony when examined at a creditors' meeting before the referee in bankruptcy has been allowed in evidence against his grantee.[6]

Criminal proceeding. There is some authority which holds that testimony in a criminal case is admissible against the party thereto in a subsequent civil case,[7] at least where in the criminal case the prosecuting witness had charge and control of the case with power to examine the witnesses and the subsequent civil action involved the same act for which the criminal prosecution was instituted and was between the party instituting the criminal proceeding and defendant therein.[8] However, it has been held in other cases that testimony of a witness in a criminal proceeding is not admissible in a subsequent civil suit,[9] even though the civil suit is between the party instituting the criminal proceeding and defendant therein.[10] At any rate, where the party in the subsequent civil case against whom the testimony in the former criminal case is offered, had no control over such criminal case and had no opportunity therein to cross-examine the witness or to introduce evidence to rebut that offered, the testimony in such criminal case is not admissible in the subsequent civil case.[11]

§ 386. Tribunal before Which Evidence Given

The character of the tribunal before which former testimony was taken, whether it was an inferior court, or even a referee or arbitrator, usually is not a valid objection to the admissibility of the evidence on the subsequent trial.

The fact that the evidence was originally given before a subordinate court is not usually regarded as an objection to its reception.[12] Testimony given before referees,[13] quasi judicial tribunals,[14] and magistrates as arbitrators[15] has been received.

3. Ariz.—Tom Reed Gold Mines Co. v. Moore, 11 P.2d 347, 40 Ariz. 174.

Difference in actions

Transcribed testimony of injured person and others in action for injuries was inadmissible in subsequent action by deceased injured person's administratrix, actions being different.—Tom Reed Gold Mines Co. v. Moore, 11 P.2d 347, 40 Ariz. 174.

4. N.J.—First Nat. Bank of Toms River v. Levy, 16 A.2d 555, 125 N. J.Law 458.

5. U.S.—J. M. Radford Grocery Co. v. Haynie, C.C.A.Tex., 261 F. 349.

6. Ga.—Myers v. Wright, 123 S.E. 740, 158 Ga. 418.

7. Mich.—School Dist. of City of Pontiac v. Sachse, 264 N.W. 396, 274 Mich. 345.

Or.—In re Water Rights in Silvies River, 237 P. 322, 336, 115 Or. 27, citing **Corpus Juris.**

22 C.J. p 431 note 1.

Disbarment proceeding

Testimony of a witness in a prosecution against an attorney for corrupting and attempting to corrupt a juror is admissible in a disbarment proceeding against the attorney, where the same matter is being inquired into and the witness is not available.—In re Lacy, 112 S.W.2d 594, 234 Mo.App. 71.

8. Iowa.—Krueger v. Sylvester, 69 N.W. 1059, 100 Iowa 647.

Wis.—Charlesworth v. Tinker, 18 Wis. 633.

9. Pa.—Marcinkiewicz v. Kutawich, 87 Pa.Super. 260—Schrieber v. Erie Lighting Co., 19 Erie Co. 490.

Action on fire policy

In action to recover on fire policy, testimony of witness who has since died, given in prosecution of insured for burning the property covered by insurance, is properly excluded.

Ill.—McInturff v. Insurance Co. of North America, 93 N.E. 369, 248 Ill. 92, 140 Am.S.R. 153, 21 Ann.Cas. 176.

Okl.—Concordia Fire Ins. Co. v. Wise, 246 P. 595, 114 Okl. 254.

Workmen's compensation proceeding

Testimony of a witness in a criminal action is not admissible in a subsequent workmen's compensation proceeding.—Citizens Bank & Trust Co. v. Reid Motor Co., 5 S.E.2d 318, 216 N.C. 432.

10. Okl.—Concordia Fire Ins. Co. v. Wise, 246 P. 595, 114 Okl. 254.

Pa.—Harger v. Thomas, 44 Pa. 128, 84 Am.D. 422—Marcinkiewicz v. Kutawich, 87 Pa.Super. 260—Kwiecinski v. Melovitz, 34 Luz.Leg.Reg. 368.

11. Tenn.—Milne v. Sanders, 228 S W. 702, 143 Tenn. 602.

12. Tex.—Clement v. Rainey, Civ. App., 50 S.W.2d 359, error refused.

22 C.J. p 428 note 71.

District and county court

In will case, permitting proponent to use as evidence at trial in district court testimony heard and reduced to writing at trial in county court was not error.—Clement v. Rainey, Tex. Civ.App., 50 S.W.2d 359, error refused.

Justice's court

Testimony of witness on trial of action in justice's court is admissible on trial of case on appeal to circuit or district court, provided the necessary prerequisite conditions exist.

Mich.—Lewis v. Ruolo, 53 N.W. 622, 93 Mich. 475.

Neb.—Young v. Sage, 60 N.W. 313, 42 Neb. 37.

13. N.C.—Nutt v. Thompson, 69 N C. 548.

22 C.J. p 428 note 73.

Workmen's compensation proceeding

Transcript of testimony of deceased witness, who testified at initial hearing before referee appointed by industrial commission was admissible at rehearing before referee and at subsequent trial in court of common pleas.—Industrial Commission of Ohio v. Glick, 197 N.E. 372, 49 Ohio App. 415.

14. Md.—Howell v. Tilden, 1 Harr. & M. 84.

22 C.J. p 428 note 74.

15. N.H.—Bailey v. Woods, 17 N.H. 365.

22 C.J. p 428 note 75.

On the other hand, testimony at a consent arbitration, the arbitrators having no power to administer oaths, has been rejected;[16] and testimony given before a committee of the United States senate which was considering the confirmation of an appointment to office has been excluded in quo warranto proceedings challenging the appointee's residential qualifications.[17]

§ 387. Identity of Parties

To warrant the reception of evidence given at a former trial, the parties at the later trial must be substantially the same, although complete mutuality of parties is not required.

In order to warrant the reception of evidence given at a formal trial, it must appear that the parties to the later trial are, either actually or constructively, the same,[18] even though the subject matter of the actions is the same,[19] as otherwise the party against whom the evidence is offered could not have had the opportunity of cross-examining the witness, which, as appears infra § 390, is essential.

16. N.J.—Jessup v. Cook, 6 N.J.Law 434.

17. D.C.—Newman v. U. S., 43 App. D.C. 53.

18. U.S.—O'Donnell v. U. S., C.C.A. Cal., 91 F.2d 14, certiorari granted U. S. v. O'Donnell, 58 S.Ct. 146, 302 U.S. 677, 82 L.Ed. 523, reversed on other grounds 58 S.Ct. 708, 303 U.S. 501, 82 L.Ed. 980—Smythe v. Inhabitants of New Providence Tp., Union County, C.C.A.N.J., 263 F. 481, reversing, D.C., Smythe v. Inhabitants of New Providence Tp., 253 F. 824—Metropolitan St. Ry. Co. v. Gumby, N.Y., 99 F. 192, 39 C.C.A. 455—U. S. v. Aluminum Co. of America, D.C.N.Y., 1 F.R.D. 48.

Ala.—Hill v. McWhorter, 187 So. 494, 237 Ala. 419—Louisville & N. R. Co. v. Scott, 167 So. 572, 232 Ala. 284—Hines v. Miniard, 94 So. 302, 208 Ala. 176.

Ariz.—Tom Reed Gold Mines Co. v. Moore, 11 P.2d 347, 348, 40 Ariz. 174, citing **Corpus Juris.**

Ark.—Conine v. Mize, 70 S.W.2d 845, 189 Ark. 92—Pine Bluff Co. v. Bobbitt, 294 S.W. 1002, 174 Ark. 41.

Cal.—Redwine v. Moncravie, 32 P.2d 408, 138 Cal.App. 432—Kuck v. Raftery, 4 P.2d 552, 117 Cal.App. 755.

Hawaii.—Metzger v. Lalakea, 32 Hawaii 706.

Ill.—Chicago Ry. Equipment Co. v. Wilson, 250 Ill.App. 231.

Iowa.—Hawkins v. Vermeulen, 231 N.W. 361, 211 Iowa 1279—Iowa Nat. Bank v. Davis, 174 N.W. 692, 188 Iowa 346.

La.—Young v. Reed, App., 192 So. 780—Mathes v. Gaines, 127 So. 408, 409, 19 La.App. 692, citing **Corpus Juris,** and recalled 129 So. 200, 19 La.App. 692, and annulled on other grounds 130 So. 570, 14 La.App. 549, 19 La.App. 692.

Me.—Inhabitants of Ellsworth v. Inhabitants of Waltham, 132 A. 423, 125 Me. 214.

Md.—Annarina v. Boland, 111 A. 84, 136 Md. 365.

N.J.—Lupino v. Sestanovich, 178 A. 769, 115 N.J.Law 217—Lieberman v. Warman, 20 A.2d 604, 19 N.J. Misc. 417.

N.D.—Leach v. Nelson, 196 N.W. 755, 50 N.D. 538.

Or.—Obermeier v. Mortgage Co. Holland-America, 224 P. 1089, 111 Or. 14.

Pa.—American Trust Co. v. Kaufman, 135 A. 210, 287 Pa. 461—Marcinkiewicz v. Kutawich, 87 Pa.Super. 260—Schrieber v. Erie Lighting Co., 19 Erie Co. 490.

S.C.—Nock v. Fidelity & Deposit Co., 178 S.E. 839, 175 S.C. 188, 98 A.L.R. 757—Cross v. Southern Coal & Coke Co., 149 S.E. 14, 151 S.C. 309—Atlantic Coast Line R. Co. v. Baker, 141 S.E. 688, 143 S.C. 445.

Tenn.—Security Finance Co. v. Duncan, 5 Tenn.App. 631, 638, citing **Corpus Juris.**

Tex.—Security Realty & Development Co. v. Bunch, Civ.App., 143 S.W.2d 687, error dismissed, judgment correct—Campbell v. Hicks, Civ.App., 83 S.W.2d 1013, error dismissed.

Vt.—Houghton v. Grimes, 151 A. 642, 103 Vt. 54.

Wis.—Maxcy v. Peavey, 190 N.W. 84, 178 Wis. 401.

Wyo.—Stockgrowers' State Bank v. Shultz, 276 P. 532, 534, 40 Wyo. 274, citing **Corpus Juris.**

22 C.J. p 428 note 79.

Privity between parties as satisfying requirement of identity see infra § 388.

Substantial identity

There should be a substantial identity of parties.

Cal.—McAlister v. Dungan, 291 P. 419, 108 Cal.App. 185.

Ill.—McInturff v. Insurance Co. of America, 93 N.E. 369, 248 Ill. 92, 97, 140 Am.S.R. 153, 21 Ann.Cas. 176, affirming 155 Ill.App. 225.

Minn.—Cox v. Selover, 213 N.W. 902, 171 Minn. 216.

Identity of parties held insufficient

(1) In action against railroad for overcharges, testimony before public service commission at previous hearing of company's application for increase in rates, at which plaintiff made no appearance, is inadmissible.—Green Mountain Log Co. v. Columbia & N. R. R. R., 16 P.2d 1106, 141 Or. 188.

(2) On petition to be adjudged competent, after a guardian for his person and estate had been appointed, testimony given by plaintiff in an assault case against petitioner was properly excluded.—In re Hallenberg's Guardianship, 174 N.W. 443, 144 Minn. 39.

Party in different capacities

(1) Testimony in former action is admissible where party, although acting in different capacities, that is, as administrator of testatrix and as administrator of testatrix's husband, represented in both cases the same ultimate beneficiaries.—Rhode Island Hospital Trust Co. v. Sherman, 185 A. 601, 56 R.I. 355.

(2) Other cases see Smith v. Keyser, 22 So. 149, 115 Ala. 455—22 C.J. p 428 note 79 [d].

Requirement as incident of identity of issues

It has been stated that the requirement of identity of parties is only an incident or corollary of the requirement as to identity of issue.—George v. Davie, Ark., 145 S.W.2d 729.

Identity of issues see infra § 389.

Testimony in suit to which persons not parties

Defendants were not bound by testimony of witnesses in prior proceedings to which they were not parties.—Jos. Riedel Glass Works v. Indemnity Ins. Co. of North America, 25 N.Y.S.2d 46, 261 App.Div. 886, motions denied 27 N.Y.S.2d 189, two cases, 261 App.Div. 956, appeal denied 27 N.Y.S.2d 1013, 261 App.Div. 956.

19. N.J.—Lupino v. Sestanovich, 178 A. 769, 115 N.J.Law 217.

Same accident

(1) Testimony in former action having origin in same accident in which plaintiffs were not parties was properly rejected.—Lupino v. Sestanovich, supra.

(2) In action for death of husband, testimony of deceased witness at former trial of same suit relating to witness' testimony in another suit for death of wife sustained in same accident was inadmissible, since parties to actions were not same.—Louisville & N. R. Co. v. Scott, 167 So. 572, 232 Ala. 284.

This rule does not, however, require complete mutuality or identity of all parties;[20] it is sufficient that the parties to the action in which the evidence is offered were also parties opposed to each other in the former action.[21] A mere nominal change of parties is of no consequence provided the parties in the second action are so privy in interest with those on the former trial that the same motive and need for cross examination existed.[22] A change of parties by which a party is omitted will not prevent the admission of the evidence;[23] but the addition of new parties not privies, in the subsequent action will render the former evidence inadmissible,[24] at least on objection by such new party.[25]

§ 388. Privity

The requirement of identity of parties as a condition to the admission of former evidence is satisfied by the existence of a relation of privity between parties to the successive trials.

The requirement of identity of parties as a condition to the admission of former evidence see supra § 387, is satisfied by the existence of a relation of privity between parties to the successive trials.[26]

Privity in this respect means a person claiming under one of the former parties,[27] and comprehends,[28] and is limited to,[29] privies in blood, in law or in estate. Accordingly, the former evidence may be used by the executor or administrator of the party by whom it was originally introduced,[30] by the widow and minor children of an injured employee who sue for his death which arose out of the same accident for which in the former proceeding he sought compensation,[31] by the parents of a deceased child in an action for damages for his death where, by order of court, they were substituted as plaintiffs instead of the administrator of deceased who was plaintiff in the former trial;[32] or the former evidence may be used against the ex-

20. La.—Young v. Reed, App., 192 So. 780.
Minn.—Cox v. Selover, 213 N.W. 902, 171 Minn. 216.
Mont.—Arnold v. Genzberger, 31 P.2d 296, 96 Mont. 358.
22 C.J. p 428 note 79 [e].

21. Cal.—Gates v. Pendleton, 236 P. 365, 71 Cal.App. 752.
22 C.J. p 428 note 79 [e].

22. Ala.—Hill v McWhorter, 187 So. 494, 237 Ala. 419.
Ill.—McInturff v. Insurance Co. of North America, 93 N.E. 369, 248 Ill. 92, 140 Am.S.R. 153, 21 Ann.Cas. 176.

23. Cal.—Gates v. Pendleton, 236 P. 365, 71 Cal.App. 752.
Iowa.—Freeby v. Incorporated Town of Sibley, 186 N.W. 685, 195 Iowa 200, modified on other grounds 191 N.W. 867, 195 Iowa 1032.

24. U.S.—Irving Air Chute Co. v. Russell Parachute Co., D.C.Del., 41 F.2d 387, reversed on other grounds, C.C.A., 47 F.2d 130.

25. U.S.—Irving Air Chute Co. v. Russell Parachute Co., supra.

26. U.S.—Metropolitan St. R. Co. v. Gumby, N.Y., 99 F. 192, 39 C.C.A. 455.
Ala.—Julian v. Woolbert, 81 So. 32, 202 Ala. 530.
Ariz.—Tom Reed Gold Mines Co. v. Moore, 11 P.2d 347, 348, 40 Ariz. 174, citing Corpus Juris.
Colo.—Gibson v. Gagnon, 257 P. 348, 82 Colo. 108.
Me.—Inhabitants of Ellsworth v. Inhabitants of Waltham, 132 A. 423, 125 Me. 214.
Mont.—Arnold v. Genzberger, 31 P. 2d 296, 96 Mont. 358.
22 C.J. p 429 note 81.

Identity of parties held sufficient

A wife, joining her husband in suit for partition of land claimed as her separate property, bore such relation to prior suit, wherein defendants' predecessor in title recovered land from husband, as to make testimony of witnesses in such suit on issues of adverse possession and nondelivery of deed to one through whom wife claimed title admissible against her on trial of partition suit. —Security Realty & Development Co v. Bunch, Tex.Civ.App., 143 S.W.2d 687, error dismissed, judgment correct.

27. Cal.—McAlister v. Dungan, 291 P. 419, 108 Cal.App. 185.
Me.—Inhabitants of Ellsworth v. Inhabitants of Waltham, 132 A. 423, 125 Me. 214.

Requirement as to dominant party

(1) In order that a party in the second case may be bound by the testimony in the former case, the party sought to be bound in the second case must have proceeded in the second case under or through the corresponding party to the relationship in the first case or on a right derived from such corresponding party. It is the dominant party which must be a party to the first case to lead to admissibility in the second case in favor of or against the subordinate party in the second case.—U. S. v. Aluminum Co. of America, D.C.N.Y., 1 F.R.D. 48.

(2) In determining whether there is privity in law between Federal Trade Commission and United States so as to make testimony of deceased witness in federal trade commission proceeding admissible in proceeding instituted by United States, the question is whether United States is in privity with federal trade commission, and not whether federal trade commission is in privity with United States.—U. S. v. Aluminum Co. of America, supra.

(3) The United States is not in privity with the federal trade commission.—U. S. v. Aluminum Co. of America, supra.

Remainderman

A remainderman is a privy of the life tenant in this respect.—Shook v. Fox, 110 N.Y.S. 951, 126 App.Div. 565—Jackson ex dem. Bates v. Lawson, 15 Johns., N.Y., 539.

28. U.S.—Metropolitan St. R. Co. v. Gumby, N.Y., 99 F. 192, 39 C.C.A. 455.
Ala.—Julian v. Woolbert, 81 So. 32, 202 Ala. 530.
Ariz.—Tom Reed Gold Mines Co. v. Moore, 11 P.2d 347, 40 Ariz. 174.
Cal.—McAlister v. Dungan, 291 P. 419, 108 Cal.App. 185.
Mont.—Arnold v. Genzberger, 31 P.2d 296, 96 Mont. 358.
N.Y.—Jackson v. Crissey, 3 Wend. 251.

29. U.S.—U. S. v. Aluminum Co. of America, D.C.N.Y., 1 F.R.D. 48.

30. Ky.—Kentucky Traction & Terminal Co. v. Downing's Adm'r, 167 S.W. 683, 159 Ky. 502.
22 C.J. p 429 note 82.

31. Tex.—Texas Employers' Ins. Ass'n v. Burnett, Civ.App., 77 S.W. 2d 742, reversed on other grounds 105 S.W.2d 200, 129 Tex. 407.

32. Ark.—Inspiration Consol. Copper Co. v. Bryan, 252 P. 1012, 31 Ariz. 302.

ecutor or administrator,[33] agent,[34] assignee,[35] purchaser,[36] or grantee[37] of the party against whom it was used on the former trial.

On the other hand the necessary privity does not arise from mere community of interest,[38] or merely from the relationship of husband and wife;[39] nor does it exist between devisee and executor[40] or next of kin and administrator.[41] Privity does not exist between an injured party who brought an action for his injuries and his personal representatives who sue for his death resulting from the injuries for which deceased formerly brought suit, where such cause of action for death is not a mere continuation of the right of action which deceased had in his lifetime, but is a new right of action created by statute.[42] There is no privity between an infant claiming damages for injuries to himself and a parent claiming damages for the loss of his services and medical expenses,[43] although the contrary has been asserted.[44] The parties are not the same where the first action is brought by a minor for his own personal injuries arising out of an accident and the other action is brought by several persons, one of whom is the plaintiff in the first action, suing on the statutory right granted them as heirs for the death of their ancestor, whose death was caused from injuries received in the same accident.[45]

In an action against officers of a corporation as individuals for commissions it has been held that plaintiff is entitled to introduce testimony of such officers in the trial of another action by plaintiff against the corporation wherein they testified that they, as individuals, had employed plaintiff.[46]

Party paying costs or employing counsel. The fact that one has contributed to the cost of defending an action, but without the right to intermeddle in any way with the conduct of the defense, does not render him privy to the action, so as to authorize the use against him of evidence taken therein,[47] but it has been held otherwise as to one who, although not a party to an action, employed a lawyer to defend it so that he was in fact represented therein by counsel.[48]

§ 389. Identity of Issues

The party seeking to introduce evidence given at a former trial must show that the issues on the two trials are substantially the same.

It is incumbent on the party seeking to introduce evidence given at a former trial to show[49] to the

33. Ala.—Julian v. Woolbert, 81 So. 32, 202 Ala. 530.
22 C.J. p 429 note 83.

34. Ill.—Goodrich v. Hanson, 33 Ill. 498.

35. S.C.—Martin v. Ragsdale, 50 S. E. 671, 71 S.C. 67.
22 C.J. p 429 note 85.

36. Tex.—Moreland v. Wise, Civ. App., 82 S.W.2d 169.

On issue of bona fides of sale

Defendant's testimony, on trial of action resulting in judgment against him, that he owned personal property on which constable attempted to levy execution, was admissible in his son's suit for injunction against levy as bearing on bona fides of transaction disclosed by father's so-called bill of sale to son and issue as to which of them owned property.—Moreland v. Wise, supra.

37. Ill.—Stephens v. Hoffman, 104 N. E. 1090, 263 Ill. 197.
Mass.—Yale v. Comstock, 112 Mass. 267.

38. N.Y.—Jackson v. Crissey, 3 Wend. 251.
22 C.J. p 430 note 87.

Interest in proving same facts as sufficient

The fact that two parties litigant in two different suits happen to be interested in proving or disproving the same facts creates no privity between them.—Duffy v. Blake, 157 P. 480, 91 Wash. 140.

39. Ohio.—Lord v. Boschert, 189 N. E. 863, 47 Ohio App. 54.
Pa.—American Trust Co. v. Kaufman, 135 A. 210, 287 Pa. 461.

40. N.Y.—Burnham v. Burnham, 62 N.Y.S. 120, 46 App.Div. 513, affirmed 59 N.E. 1119, 165 N.Y. 659.

41. Md.—Jacob Tome Inst. v. Davis, 41 A. 166, 87 Md. 591.

42. N.Y.—Murphy v. The New York Cent. & H. R. R. Co., 31 Hun 358.
Wash.—Arsnow v. Red Top Cab Co., 292 P. 436, 159 Wash. 137.

43. U.S.—Metropolitan St. R. Co. v. Gumby, N.Y., 99 F. 192, 39 C.C.A. 455.
N.C.—McLean v. Scheiber, 193 S.E. 708, 212 N.C. 544.

Reason for rule

"Manifestly no such mutual or successive relationship exists between the infant claiming damages for his pain and suffering, and his mother claiming damages for the loss of his services; the causes of action are distinct, and neither claimant could, under any circumstances, succeed to the other's cause of action."—Metropolitan St. Ry. Co. v. Gumby, N.Y., 99 F. 192, 198, 39 C.C.A. 455.

44. Ind.—Indianapolis & St. L. R. Co. v. Stout, 53 Ind. 143.

Criticism of rule

The case of Indianapolis & St. L. R. Co. v. Stout, supra, has been criticized as "not well reasoned and seems to be unsupported by authority."—Metropolitan St. Ry. Co. v. Gumby, N.Y., 99 F. 192, 198, 39 C.C.A. 455.

45. Cal.—Smith v. Schwartz, 96 P. 2d 816, 35 Cal.App.2d 659.

46. N.Y.—Horn v. Bennett, 293 N.Y. S. 455, 250 App.Div. 732.

47. U.S.—Rumford Chemical Works v. New Jersey Hygienic Chemical Co., N.J. & N.Y., 30 S.Ct. 45, 215 U. S. 156, 54 L.Ed. 137, reversing 159 F. 436, 86 C.C.A. 416, and affirming 154 F. 65, 83 C.C.A. 177.

48. Ky.—Brownlee v. Bunnell, 103 S.W. 284, 31 Ky.L. 669.

49. Iowa.—Kostlan v. Mowery, 226 N.W. 32, 208 Iowa 623.
Mo.—Oxford v. St. Louis-San Francisco Ry. Co., 52 S.W.2d 983, 331 Mo. 53.
22 C.J. p 430 note 93.

Methods of showing identity

(1) Only competent evidence of matter involved in former action, witness' testimony in trial of which is offered at trial of subsequent action because of his absence from state, is record of former action.—Redwing v. Moncravie, 32 P.2d 408, 138 Cal.App. 432.

(2) Other cases see Lett v. State, 27 So. 256, 124 Ala. 64—22 C.J. p 430 note 93 [a].

satisfaction of the court[50] that the issue at the former trial was the same, or substantially the same, as the issue at the later trial.[51] The reason of this requirement is that, in the absence of such identity of issue, the opportunity for cross-examination at the former trial, see infra § 390, would have been of little or no value, and the test of identity is said to be found in the opportunity, at the former trial, to cross-examine the witness fully as to the matter in issue at the second trial.[52]

The requirement of identity is satisfied where the issue on which the former evidence is offered is common to both cases.[53] It is immaterial that there were other issues in either case,[54] except that the issues in the first case must have been the same as to each and every issue in the second case to which the testimony might properly have related if the witness had been present to testify in the second case.[55] It is immaterial that the form of action was changed;[56] that there is a nominal change of counts in the complaint;[57] that the complaint was amended, where it did not change the issues;[58] that on the second trial a party has a different theory of law;[59] or that the subject matter of the two actions is different,[60] although in some jurisdictions it has been stated that the subject matter of the two actions must be the same.[61] The rule does not re-

50. Me.—Edgeley v. Appleyard, 86 A. 244, 110 Me. 337, Ann.Cas.1914D 474.
22 C.J. p 430 note 94.

51. U.S.—Smythe v. Inhabitants of New Providence Tp., Union County, C.C.A.N.J., 263 F. 481, reversing, D.C., Smythe v. Inhabitants of New Providence Tp., 253 F. 824.
Ala.—Hill v. McWhorter, 187 So. 494, 495, 237 Ala. 419, citing **Corpus Juris**—Hines v. Miniard, 94 So. 302, 208 Ala. 176.
Ariz.—Tom Reed Gold Mines Co. v. Moore, 11 P.2d 347, 40 Ariz. 174.
Colo.—Gibson v. Gagnon, 257 P. 348, 82 Colo. 108—Plains Iron Works Co. v. Haggott, 210 P. 696, 697, 72 Colo. 228, citing **Corpus Juris.**
Ill.—Chicago Ry. Equipment Co. v. Wilson, 250 Ill.App. 231.
Iowa.—Kostlan v. Mowery, 226 N.W. 32, 33, 208 Iowa 623, citing **Corpus Juris**—E. H. Emery & Co. v. American Refrigerator Transit Co., 184 N.W. 750, 193 Iowa 93, 20 A.L.R. 86.
La.—Young v. Reed, App., 192 So. 780.
Me.—Inhabitants of Ellsworth v. Inhabitants of Waltham, 132 A. 423, 125 Me. 214.
Md.—Kremis v. Kremis, 161 A. 255, 163 Md. 223—Annarina v. Boland, 111 A. 84, 136 Md. 365.
Mo.—Evans v. Sears, Roebuck & Co., App., 129 S.W.2d 53—In re Lacy, 112 S.W.2d 594, 603, 234 Mo.App. 71, citing **Corpus Juris.**
Mont.—Nelson v. Gough, 202 P. 196, 61 Mont. 301.
N.C.—Citizens Bank & Trust Co. v. Reid Motor Co., 5 S.E.2d 318, 216 N.C. 432—McLean v. Scheiber, 193 S.E. 708, 212 N.C. 544.
N.D.—Leach v. Nelson, 196 N.W. 755, 50 N.D. 538.
Or.—In re Water Rights in Silvies River, 237 P. 322, 115 Or. 27.
S.D.—Lampert Lumber Co. v. Pexa, 201 N.W. 702, 48 S.D. 39.
Tenn.—Security Finance Co. v. Duncan, 5 Tenn.App. 631, 638, citing **Corpus Juris.**
Tex.—Lone Star Gas Co. v. State, 153 S.W. 681, modifying State v. Lone Star Gas Co., Civ.App., 129 S.W.2d 1164—Security Realty & Development Co. v. Bunch, Civ.App., 143 S.W.2d 687, error dismissed, judgment correct—Campbell v. Hicks, Civ.App., 83 S.W.2d 1013, error dismissed.
Vt.—Houghton v. Grimes, 151 A. 642, 103 Vt. 54.
Wash.—Arsnow v. Red Top Cab Co., 292 P. 436, 159 Wash. 137.
Wis.—Maxcy v. Peavey, 190 N.W. 84, 178 Wis. 401.
Wyo.—Stockgrowers' State Bank v. Shultz, 276 P. 532, 534, 40 Wyo. 274, citing **Corpus Juris.**
22 C.J. p 430 note 95.

Relation to same matter
Under some statutes the testimony in the former action must relate to the same matter—Kuck v. Raftery, 4 P.2d 552, 117 Cal.App. 755.

Disability and death claims from same injury
(1) Where employer in a proceeding by employee for a disability award under the Workmen's Compensation Law exercised the right of cross-examination, the testimony was admissible in a proceeding for benefits for death resulting from the same injury.—Hill v. Ancram Paper Mills, 195 N.Y.S. 522, 202 App.Div. 36.

(2) There is a sufficient identity of issues between a compensation proceeding brought by an injured employee for total and permanent incapacity and a subsequent action for his death, which arose out of the same accident, brought by his widow and minor children against the same insurance carrier.—Texas Employers' Ins. Ass'n v. Burnett, Civ.App., 77 S.W.2d 742, reversed on other grounds 105 S.W.2d 200, 129 Tex. 407.

52. Mo.—Evans v. Sears, Roebuck & Co., App., 129 S.W.2d 53, 57, citing **Corpus Juris.**
Mont.—Nelson v. Gough, 202 P. 196, 61 Mont. 301.
22 C.J. p 430 note 97.

53. Colo.—Gibson v. Gagnon, 257 P. 348, 82 Colo. 108.
Or.—In re Water Rights in Silvies River, 237 P. 322, 336, 115 Or. 27, citing **Corpus Juris.**
22 C.J. p 431 note 98.

54. Or.—In re Water Rights in Silvies River, supra, citing **Corpus Juris.**
22 C.J. p 431 note 98.

55. Mo.—Evans v. Sears, Roebuck & Co., App., 129 S.W.2d 53.

56. Pa.—Evans v. Reed, 78 Pa. 415.
Requirement that former testimony be offered at new trial of same action see supra § 385.

57. Ala.—Hill v. McWhorter, 187 So. 494, 237 Ala. 419.

Withdrawal of count
In action based on cutting and removing timber from land, testimony given at former trial was admissible although statutory penalty was also sought in former trial.—Hill v. McWhorter, supra.

58. Mont.—Nelson v. Gough, 202 P. 196, 61 Mont. 301.

59. N.D.—Leach v. Nelson, 196 N.W. 755, 50 N.D. 538.
22 C.J. p 430 note 95 [d].

60. Colo.—Gibson v. Gagnon, 257 P. 348, 82 Colo. 108.
Or.—In re Water Rights in Silvies River, 237 P. 322, 336, 115 Or. 27, citing **Corpus Juris.**
22 C.J. p 431 note 99.

61. N.J.—Lieberman v. Warman, 20 A.2d 604, 19 N.J.Misc. 417.
Pa.—Marcinkiewicz v. Kutawich, 87 Pa.Super. 260—Schrieber v. Erie Lighting Co., 19 Erie Co. 490.
Tex.—Security Realty & Development Co. v. Bunch, Civ.App., 143 S.W.2d 687, error dismissed, judgment correct.

Substantially the same
Testimony taken at former trial is admissible where the second suit involves substantially the same subject matter.—School Dist. of City of Pontiac v. Sachse, 264 N.W. 396, 274 Mich. 345.

quire that the causes of action be identical.[62] Conversely, the evidence is rejected where the issue is not common to both actions, although they concern the same subject matter,[63] and the fact to which the evidence relates is material in both actions.[64]

The fact that the testimony was given on the hearing of a motion for a new trial in the former action instead of on the former trial of the case does not make it inadmissible in the subsequent case on the ground that there is not the required identity of issue.[65]

§ 390. Opportunity for Cross-Examination

In order that testimony given at a former trial may be admissible, the party against whom it is offered, or his representative, must have had an opportunity to cross-examine the witness.

In order that testimony given at a former trial may be admissible, it is necessary that the party against whom the evidence is offered, or some one identified with him in legal interest, should have had, at the time when the testimony was given, an opportunity to cross-examine the witness,[66] with respect to each and every issue in the second case to which the testimony of the witness might have properly related if he had been present to testify as a witness in the case.[67]

Where, however, such an opportunity has been actually afforded, the evidence is not to be rejected because the right to cross-examine was not exercised.[68] It is not essential to the admissibility of such former evidence that the party against whom it is offered was personally present at the former trial, if he was represented by counsel,[69] or if he had actual or constructive notice of the examination.[70] If the party against whom the evidence is offered, examined the witness on the former trial, it is immaterial whether the examination was direct or cross-examination.[71]

§ 391. Excuses for Nonproduction of Witness

In order that the testimony of a witness on a former trial may be admissible, it is essential, and the party offering the testimony must satisfactorily show, that

Subject matter to which evidence relates

It is not necessary that causes of action should be identical in order that evidence used on a former trial may be used on a subsequent one, but only that the subject-matter to which the evidence relates shall be the same.—Hassett v. Rathbone, 198 N.Y.S. 381, 204 App.Div. 229.

62. Ariz.—Tom Reed Gold Mines Co. v. Moore, 11 P.2d 347, 40 Ariz. 174.
N.Y.—Hassett v. Rathbone, 198 N.Y.S. 381, 204 App.Div. 229.

63. Ill.—Beamer v. Morrison, 71 N.E. 402, 210 Ill. 443.
22 C.J. p 431 note 2.

64. Cal.—Marshall v. Hancock, 22 P. 61, 80 Cal. 82.
22 C.J. p 430 note 95.

65. Mich.—Jonescu v. Orlich, 189 N.W. 919, 220 Mich. 89.

66. U.S.—Smythe v. Inhabitants of New Providence Tp., Union County, C.C.A.N.J., 263 F. 481, reversing, D.C., Smythe v. Inhabitants of New Providence Tp., 253 F. 824.
Ala.—Hill v. McWhorter, 187 So. 494, 237 Ala. 419—Hines v. Miniard, 94 So. 302, 208 Ala. 176.
Ariz.—Tom Reed Gold Mines Co. v. Moore, 11 P.2d 347, 348, 40 Ariz. 174, citing **Corpus Juris.**
Ark.—Conine v. Mize, 70 S.W.2d 845, 189 Ark. 92—Pine Bluff Co. v. Bobbitt, 294 S.W. 1002, 174 Ark. 41.
Fla.—Habig v. Bastian, 158 So. 508, 117 Fla. 864.
Hawaii.—Metzger v. Lalakea, 32 Hawaii 706—Drummond v. Makaena, 30 Hawaii 116.
Iowa.—Kostlan v. Mowery, 226 N.W. 32, 208 Iowa 623.
La.—Young v. Reed, App., 192 So. 780
Mich.—School Dist. of City of Pontiac v. Sachse, 264 N.W. 396, 274 Mich. 345.
Mo.—Evans v. Sears, Roebuck & Co., App., 129 S.W.2d 53, 57, citing **Corpus Juris**—In re Pate, 119 S.W.2d 11, 232 Mo.App. 478.
N.J.—Lieberman v. Warman, 20 A.2d 604, 19 N.J.Misc. 417.
N.Y.—Hill v. Ancram Paper Mills, 195 N.Y.S. 522, 202 App.Div. 36.
N.C.—Citizens Bank & Trust Co. v. Reid Motor Co., 5 S.E.2d 318, 216 N.C. 432—McLean v. Scheiber, 193 S.E. 708, 212 N.C. 544.
Pa.—Marcinkiewicz v. Kutawich, 87 Pa.Super. 260—Schrieber v. Erie Lighting Co., 19 Erie Co. 490.
Tex.—Lone Star Gas Co. v. State, 153 S.W. 681, modifying State v. Lone Star Gas Co., Civ.App., 129 S.W.2d 1164—Security Realty & Development Co. v. Bunch, Civ.App., 143 S.W.2d 687, error dismissed, judgment correct—Campbell v. Hicks, Civ.App., 83 S.W.2d 1013, error dismissed.
22 C.J. p 431 note 4.

Ex parte affidavit

(1) An ex parte affidavit made by witness since deceased, for use on hearing of application for interlocutory relief in same case is not admissible on final trial of case.—Byrd v. Prudential Ins. Co. of America, 196 S.E. 72, 185 Ga. 625.

(2) On setting aside of default judgments in actions for rent, permitting plaintiff to use on second trial ex parte affidavit and lease used in first trial to make out a prima facie case instead of compelling plaintiff to establish its case by testimony subject to cross-examination was error.—McArdle Real Estate Co. v. McGowan, 172 A. 786, 12 N.J.Misc. 500.

(3) Other cases see Fender v. Ramsey, 62 S.E. 527, 131 Ga. 440—22 C.J. p 431 note 4 [d].

Impleaded defendant

Evidence given on examination before trial was incompetent in so far as evidence applied to impleaded defendant which should have opportunity to cross-examine witness.—Van Schaick v. Sullivan, 271 N.Y.S. 537, 241 App.Div. 268, affirmed 195 N.E. 214, 266 N.Y. 591.

67. Mo.—Evans v. Sears, Roebuck & Co., App., 129 S.W.2d 53.
Wash.—Arsnow v. Red Top Cab Co., 292 P. 436, 159 Wash. 137.

68. Pa.—Arnold v. Carroll, 83 Pa.Super. 308.
22 C.J. p 431 note 5.

69. Ala.—Hill v. McWhorter, 187 So. 494, 237 Ala. 419.

70. Pa.—Commonwealth v. Sweeney, 129 A. 577, 283 Pa. 520—Arnold v. Carroll, 83 Pa.Super. 308.

Sufficiency of notice

Whatever puts a party on inquiry amounts to notice, provided inquiry becomes a duty and would lead to knowledge of facts by exercise of ordinary intelligence and understanding. Placing the case on the trial list was sufficient notice.—Arnold v. Carroll, supra.

71. Ala.—Louisville & N. R. Co. v. Scott, 167 So. 572, 232 Ala. 84.

the witness is inaccessible or otherwise unable to testify, and, in some jurisdictions, that the witness' deposition could not have been obtained.

Where not otherwise objectionable, see supra §§ 385–390, the testimony of a witness on a former trial of the case may be introduced on a subsequent trial thereof where the witness is inaccessible[72] or otherwise unable to testify,[73] but if the witness is available his former testimony is not admissible.[74] Where the statutes expressly enumerate the cases in which the testimony given by a witness on a former trial may be admitted on a subsequent trial, the former testimony may be admitted only in those cases enumerated.[75]

A party seeking to introduce the testimony of a witness given on a former trial must first introduce preliminary evidence of the existence of the reasons for its introduction.[76] He must show that the witness or witnesses whose testimony is offered are not available for examination at the time of the trial,[77] and that it is impossible for him to procure their attendance and testimony.[78] According to

72. Ga.—Galloway v. Hogg, 146 S.E. 156, 167 Ga. 502—Estill v. Citizens' & Southern Bank, 113 S.E. 552, 153 Ga. 618—Allen v. Davis, 128 S.E. 74, 34 Ga.App. 5.
Hawaii.—Correa v. Waiakea Mill Co., 32 Hawaii 310.
La.—Young v. Reed, App., 192 So. 780.
Mich.—School Dist. of City of Pontiac v. Sachse, 264 N.W. 396, 274 Mich. 345.

73. Cal.—Kuck v. Raftery, 4 P.2d 552, 117 Cal.App. 755.
Hawaii.—Correa v. Waiakea Mill Co., 32 Hawaii 310.
Mo.—Welp v. Bogy, 277 S.W. 600, 218 Mo.App. 414.
Or.—Obermeier v. Mortgage Co. Holland-America, 224 P. 1089, 111 Or. 14.

74. U.S.—Sinclair Refining Co. v. Jenkins Petroleum Process Co., C.C.A.Me., 99 F.2d 9, certiorari denied Jenkins Petroleum Process Co. v. Sinclair Refining Co., 59 S.Ct. 362, 305 U.S. 659, 83 L.Ed. 427, rehearing denied 59 S.Ct. 484, 306 U.S. 667, 83 L.Ed. 1062, rehearing denied 59 S.Ct. 1035, 307 U.S. 651, 83 L.Ed. 1530.
Ala.—Adams v. Thornton, 3 So. 20, 82 Ala. 260.
Cal.—Kuehn v. Carlos, 89 P.2d 672, 32 Cal.App.2d 295.
D.C.—Karrick v. Cantrill, 290 F. 321, 53 App.D.C. 346.
Md.—Annarina v. Boland, 111 A. 84, 136 Md. 365.
N.H.—Clark v. Boston & Maine R. R., 182 A. 175, 87 N.H. 434.
Okl.—First Nat. Bank v. Gum, 293 P. 188, 146 Okl. 53.

Exclusion of oral testimony to admit former testimony

Trial judge cannot exclude oral testimony of witnesses present in court, and admit instead thereof their printed testimony on another occasion.—Williamson v. Casa-Eguia, 170 N.E. 486, 253 N.Y. 41, reversing 234 N.Y.S. 449, 226 App.Div. 195.

Propriety of consideration of former testimony

Where witness could not remember testimony he had given on former trial of same cause, action of trial court in taking into consideration his notes, or recollection of his notes, or of testimony at former trial, was reversible error.—Friedman v. Steinhauser, N.J., 180 A. 378.

75. Cal.—Van Orden v. Golden West Credit & Adjustment Co., 9 P.2d 572, 122 Cal.App. 132—Kuck v. Raftery, 4 P.2d 552, 117 Cal.App. 755.
Mo.—Collins v. Leahy, 125 S.W.2d 874, 344 Mo. 250.
Or.—Hansen-Rynning v. Oregon-Washington R. & Nav. Co., 209 P. 462, 105 Or. 67.

76. Fla.—Habig v. Bastian, 158 So. 508, 117 Fla. 864.

Mode of proof

The showing necessary to justify admission of evidence preserved in bill of exceptions in a cause may be made by testimony of witness contained in transcript or deposition itself, or by testimony of other witnesses.—Collins v. Leahy, 125 S.W.2d 874, 344 Mo. 250.

Showing held sufficient

Mo.—Collins v. Leahy, 146 S.W.2d 609.

77. Ala.—Burns v. Leath, 184 So. 176, 236 Ala. 615—Hines v. Miniard, 94 So. 302, 208 Ala. 176—E. E. Yarbrough Turpentine Co. v. Taylor, 78 So. 812, 201 Ala. 434.
Colo.—Boyd v. Brown, 267 P. 200, 83 Colo. 547.
Hawaii.—Drummond v. Makaena, 30 Hawaii 116.
La.—Mathes v. Gaines, 127 So. 408, 19 La.App. 692, recalled 129 So. 200, 19 La.App. 692, and annulled on other grounds 130 So. 570, 14 La.App. 549, 19 La.App. 692.
Md.—Kremis v. Kremis, 161 A. 255, 163 Md. 223.
Mass.—A. T. Stearns Lumber Co. v. Howlett, 131 N.E. 217, 239 Mass. 59.
Or.—In re Water Rights in Silvies River, 237 P. 322, 115 Or. 27.
R.I.—Monroe v. Lavimodiere, 167 A. 534, 53 R.I. 500.
Wis.—Maxcy v. Peavey, 190 N.W. 84, 178 Wis. 401.

Questions based on former testimony

On retrial, allowing questions based on testimony given at former trial by witnesses not shown to be unavailable, was reversible error.—O'Connor v. Bonney, 231 N.W. 521, 57 S.D. 134.

78. Ala.—Evans Furniture Co. v. Meyers, 81 So. 843, 17 Ala.App. 65.
Cal.—Kuehn v. Carlos, 89 P.2d 672, 32 Cal.App.2d 295.
Ga.—Estill v. Citizens' & Southern Bank, 113 S.E. 552, 153 Ga. 618.
Ill.—Kaufman v. Helmick, 212 Ill. App. 10.
Ind.—United Telephone Co. v. Barva, 147 N.E. 716, 83 Ind.App. 61.
Ky.—Nowak v. Joseph, 142 S.W.2d 970, 283 Ky. 735.
La.—Citizens Bank & Trust Co. v. Jones, App., 167 So. 510, 513, quoting **Corpus Juris.**
Mich.—Andrews v. Murphy, 209 N.W. 63, 235 Mich. 236, quoting **Corpus Juris.**
Miss.—Williams Yellow Pine Co. v. Williams, 193 So. 1, 187 Miss. 425.
N.Y.—Rychlovsky v. Rychlovsky, 300 N.Y.S. 80, 252 App.Div. 893.
Ohio.—New York Cent. R. Co. v. Stevens, 185 N.E. 542, 126 Ohio St. 395, 87 A.L.R. 884
S.D.—O'Connor v. Bonney, 231 N.W. 521, 523, 57 S.D. 134, quoting **Corpus Juris.**
Tex.—Acker v. Thompson, Civ.App., 128 S.W.2d 852, reversed and cause remanded—Carter v. Irvine, Civ. App., 77 S.W.2d 247, 249, citing **Corpus Juris**—Kurz v. Soliz, Civ. App., 231 S.W. 424.
22 C.J. p 431 note 6.

Prima facie showing

A prima facie showing is sufficient.—Estill v. Citizens' & Southern Bank, 113 S.E. 552, 153 Ga. 618.

Affidavits

(1) The filing of affidavit by party or his attorney is indispensable prerequisite to introduction of testimony of witness on former trial in absence of something in record showing unavailability of witnesses.—Home Laundry Co. v. Cook, 125 S.W.2d 763, 277 Ky. 8—Wallace v. Lackey, 250 S.W. 843, 199 Ky. 190.

(2) Affidavit should be filed before the trial is entered on.—Southern Ry. in Kentucky v. Owen, 176 S.W. 25, 164 Ky. 571.

(3) Affidavit should state facts rather than conclusions.—Devine v.

some authorities it is necessary to show that it has been impossible to secure the deposition of the witness for use on the trial,[79] but this preliminary proof is not required by other authorities.[80]

The preliminary proof should be full and convincing,[81] and the inability of the witness to appear must be established by a ruling of the court or by agreement of counsel.[82] The sufficiency of such proof is primarily a question for the trial court[83] and is largely within its discretion,[84] which will not be interfered with unless an abuse of discretion is shown.[85] The court should find the facts with regard to the reason alleged for inability to produce the witness or take his deposition,[86] and, if it is decided that the proper conditions for admitting former evidence exist, a party may insist on its admission as a matter of right.[87]

A female whose testimony, under the statute, can be taken by interrogatories, and who cannot be compelled to attend court in person under subpœna, is not such an inaccessible witness as permits her testimony on a former trial to be used.[88]

§ 392. Death

Testimony given at a former trial or hearing by a witness since deceased is admissible.

Where it is affirmatively shown that a witness is dead,[89] and other prerequisites exist, the testimony given by him at a former trial or hearing should be received.[90]

Chicago City R. Co., 182 Ill.App. 366.

79. Ark.—Pine Bluff Co. v. Bobbitt, 294 S.W. 1002, 174 Ark. 41.
Ga.—Herndon v. Chamberlain, 146 S. E. 503, 39 Ga.App. 207.
Ill.—Brownlie v. Brownlie, 183 N.E. 613, 351 Ill. 72.
Ky.—Wallace v. Lackey, 250 S.W. 843, 199 Ky. 190—Southern Ry. in Kentucky v. Owen, 176 S.W. 25, 164 Ky. 571.
Tex.—Carter v. Irvine, Civ.App., 77 S.W.2d 247.
22 C.J. p 432 note 7.
Requirement of deposition of absent witness see infra § 393.

80. Colo.—Plains Iron Works Co. v. Haggott, 210 P. 696, 72 Colo. 228.
Del.—Gibson v. Gillespie, 152 A. 589, 4 W.W Harr. 331.

81. Mich.—Andrews v. Murphy, 209 N.W. 63, 235 Mich. 236, quoting **Corpus Juris.**
22 C.J. p 432 note 8.
Telegram from witness
Telegram from revenue agent who had testified at previous trial involving income tax matters stating that he had not been summoned, that his testimony in view of restrictions would be valueless, and that due to his official position he could not be required to testify, did not constitute predicate for introduction of testimony given by him at former trial.—Carter v. Irvine, Tex.Civ.App., 77 S. W.2d 247.

82. R.I.—Monroe v. Lavimodiere, 167 A. 534, 53 R.I. 500.

83. Colo.—Schwalbe v. Postle, 249 P. 495, 80 Colo. 1.
Ga.—Estill v. Citizens' & Southern Bank, 113 S.E. 552, 153 Ga. 618—Herndon v. Chamberlain, 146 S.E. 503, 39 Ga.App. 207—Allen v. Davis, 128 S.E. 74, 34 Ga.App. 5.
Md.—Bielski v. Rising, 163 A. 207, 163 Md. 492.

84. Ark.—Pine Bluff Co. v. Bobbitt, 294 S.W. 1002, 174 Ark. 41.
Fla.—Alexander v. Bess, 167 So. 533, 123 Fla. 713.
Ga.—Estill v. Citizens' & Southern Bank, 113 S.E. 552, 153 Ga. 618—Herndon v. Chamberlain, 146 S.E. 503, 39 Ga.App. 207—Allen v. Davis, 128 S.E. 74, 34 Ga.App. 5.
Md.—Bielski v. Rising, 163 A. 207, 163 Md. 492.
Mich.—Andrews v. Murphy, 209 N.W. 63, 235 Mich. 236, quoting **Corpus Juris.**
Mo.—Welp v. Bogy, 277 S.W. 600, 218 Mo.App. 414.
Tex.—Culver v. State, Civ.App., 85 S.W.2d 997, error refused—Bowles v. Bryan, Civ.App., 277 S.W. 760, 766, citing **Corpus Juris.**
Wyo.—See Ben Realty Co. v. Gothberg, 109 P.2d 455, 462, citing **Corpus Juris.**
22 C.J. p 432 note 9.

85. Colo.—Schwalbe v. Postle, 249 P. 495, 80 Colo. 1.
Fla.—Alexander v. Bess, 167 So. 533, 123 Fla. 713.
Ga.—Allen v. Davis, 128 S.E. 74, 34 Ga.App. 5.
Md.—Bielski v. Rising, 163 A. 207, 163 Md. 492.
Mich.—Andrews v. Murphy, 209 N.W. 63, 235 Mich. 236, quoting **Corpus Juris.**
Okl.—King Auto Service v. Hodges, 288 P. 483, 143 Okl. 260.
Tex.—Culver v. State, Civ.App., 85 S.W.2d 997, error refused—Bowles v. Bryan, Civ.App., 277 S.W. 760, 766, citing **Corpus Juris.**
22 C.J. p 433 note 10.

86. Mich.—Andrews v. Murphy, 209 N.W. 63, 235 Mich. 236, quoting **Corpus Juris.**
22 C.J. p 433 note 11.

87. Mich.—Andrews v. Murphy, supra, quoting **Corpus Juris.**
22 C.J. p 433 note 12.

88. Ga.—Estill v. Citizens' & Southern Bank, 113 S.E. 552, 153 Ga. 618.

89. Ala.—Hines v. Miniard, 94 So. 302, 208 Ala. 176.
Iowa.—Grimes Sav. Bank v. McHarg, 236 N.W. 418, 213 Iowa 969, certiorari denied McHarg v. Grimes Sav. Bank, 53 S.Ct. 5, 287 U.S. 599, 77 L.Ed. 522.
22 C.J. p 433 note 14.
Sufficiency of showing
Suggestion of death of witness in former trial and appointment of special administrator established prima facie witness' death and was sufficient to lay foundation for introduction of his testimony at former trial. —Bass v. Minich, 109 S.W.2d 139, 194 Ark. 589.

90. U.S.—Smythe v. Inhabitants of New Providence Tp., Union County, N. J., C.C.A.N.J., 263 F. 481, reversing, D.C., Smythe v. Inhabitants of New Providence Tp., 253 F. 824.
Ala.—Hill v. McWhorter, 187 So. 494, 237 Ala. 419—Hines v. Miniard, 94 So. 302, 208 Ala. 176.
Ark.—George v. Davie, 145 S.W.2d 729—Bass v. Minich, 109 S.W.2d 139, 194 Ark. 589—Conine v. Mize, 70 S.W.2d 845, 189 Ark. 92—Ft. Smith, S. & R. I. R. Co. v. Moore, 289 S.W. 6, 172 Ark. 353, certiorari granted 47 S.Ct. 575, 274 U.S. 728, 71 L.Ed. 1315, reversed on other grounds 48 S.Ct. 300, 276 U.S. 593, 72 L.Ed. 722.
Cal.—Kuck v. Raftery, 4 P.2d 552, 117 Cal.App. 755.
Colo.—Gibson v. Gagnon, 257 P. 348, 82 Colo. 108.
Ill.—Chicago Ry. Equipment Co. v. Wilson, 250 Ill.App. 231.
Iowa.—Grimes Sav. Bank v. McHarg, 236 N.W. 418, 213 Iowa 969, certiorari denied McHarg v. Grimes Sav. Bank, 53 S.Ct. 5, 287 U.S. 599, 77 L.Ed. 522.
La.—Young v. Reed, App., 192 So. 780.
Mich.—School Dist. of City of Pontiac v. Sachse, 264 N.W. 396, 274 Mich. 345—Klein v. Kirschbaum, 215 N.W. 289, 240 Mich. 368.
Mo.—Vessels v. Kansas City Light & Power Co., 219 S.W. 80—Welp v.

§ 393. Absence

Former testimony of a witness may be received where the witness is absent, although in various jurisdictions other circumstances in addition to the absence of the witness must exist.

Former testimony may be received, usually as a result of statutory regulation, where the witness is absent[91] beyond the jurisdiction of the court,[92] provided, in some jurisdictions, if he is a resident of

Bogy, 277 S.W. 600, 218 Mo.App. 414.
Mont.—Arnold v. Genzberger, 31 P.2d 296, 96 Mont. 358.
Nev.—Martin v. Duncan Automobile Co., 296 P. 24, 53 Nev. 212.
N.J.—Lieberman v. Warman, 20 A.2d 604, 19 N.J Misc. 417.
N.Y.—Longacre v. Yonkers R. Co., 182 N.Y.S 373, 191 App.Div. 770.
Ohio.—Industrial Commission of Ohio v. Glick, 197 N.E. 372, 49 Ohio App 415—Smith v. Cincinnati Traction Co., 24 Ohio N.P.,N.S , 565.
Or.—Obermeier v. Mortgage Co. Holland-America, 224 P. 1089, 111 Or. 14.
Pa.—Evans v. Reed, 78 Pa. 415.
R.I.—Westchester Mortg. Co. v. Newport Trust Co., 146 A. 774, 50 R.I. 263.
Tex.—Lone Star Gas Co. v. State, 153 S.W.2d 681, modifying State v. Lone Star Gas Co., Civ.App., 129 S. W.2d 1164—Security Realty & Development Co. v. Bunch, Civ.App., 143 S.W.2d 687, error dismissed, judgment correct—Campbell v. Hicks, Civ.App., 83 S.W.2d 1013, error dismissed—Carter v. Irvine, Civ.App., 77 S.W 2d 247, 249, citing **Corpus Juris**—Kurz v. Soliz, Civ. App., 231 S.W. 424.
W.Va.—Patterson v. New River & Pocahontas Consol. Coal Co., 104 S E. 491, 87 W.Va. 177.
Wis.—Zimdars v. Zimdars, 295 N.W. 675, 236 Wis. 484—Nelson v. Ziegler, 220 N.W. 194, 196 Wis. 426.
22 C.J. p 433 note 15.

Admission of deceased

In action of detinue in which plaintiff claimed title under mortgage, sworn admission of execution of mortgage by deceased mortgagor at another trial was admissible.—Roberts v. Davis, 160 So. 718, 230 Ala. 272.

Trustee in trust proceeding

Testimony given pursuant to court's order, by trustee representing all interests in trust, to report and explain facts relating to origin, assets, and investment of estate, was admissible on petition by successor trustee and another for final distribution of estate, not being in opposition to rule limiting use of testimony of deceased witness.—Farmer v. Quinn's Trust Estate, 105 A. 763, 133 Md. 558.

Testimony introduced pursuant to stipulation

In action for fraudulent misrepresentations inducing exchange of realty for worthless note, transcript of his testimony in another fraud action introduced in evidence pursuant to stipulation was competent to prove decedent's fraud.—Evans v. Gibson, 31 P.2d 389, 220 Cal. 476.

91. Iowa.—Grimes Sav. Bank v. McHarg, 236 N.W. 418, 213 Iowa 969, certiorari denied McHarg v. Grimes Sav. Bank, 53 S.Ct. 5, 287 U.S. 599, 77 L.Ed. 522.
Ky.—Louisville & N. R. Co. v. Galloway, 294 S.W. 135, 219 Ky. 595.
La.—Young v. Reed, App, 192 So. 780.

Matters not embraced by deposition

Where defendant, prior to second trial, took deposition of witness for plaintiff who testified at first trial, and plaintiff on second trial adopted the deposition, transcript of witness' testimony on first trial was admissible on matters not covered by the deposition.—Turner v. Missouri-Kansas-Texas R. Co., Mo., 142 S.W.2d 455, 129 A.L.R. 829.

92. Ala.—Aetna Ins. Co. v. Koonce, 171 So. 269, 233 Ala. 265—Hines v. Miniard, 94 So. 302, 208 Ala. 176.
Ark.—Conine v. Mize, 70 S.W.2d 845, 189 Ark. 92—Northwestern Rug Mfg. Co. v. Leftwich Hardware & Furniture Co., 2 S.W 2d 1109, 176 Ark. 212—Pine Bluff Co. v. Bobbitt, 294 S.W. 1002, 174 Ark. 41.
Cal.—Kuck v. Raftery, 4 P.2d 552, 117 Cal.App. 755.
Colo.—Schwalbe v. Postle, 249 P. 495, 80 Colo. 1.
Del.—Gibson v. Gillespie, 152 A. 589, 4 W.W.Harr. 331.
Ga.—Estill v. Citizens' & Southern Bank, 113 S.E. 552, 153 Ga. 618—Carswell, Moxley & Son v. Harrison, 126 S.E. 293, 33 Ga.App. 140.
Mich.—Gloeser v. Moore, 278 N.W. 781, 284 Mich. 106.
Minn.—Cox v. Selover, 213 N.W. 902, 171 Minn. 216—Farrar v. Locomotive Engineers' Mut. Life & Accident Ins. Ass'n, 173 N.W. 705, 143 Minn. 468.
Mo.—Fowler v. Cavitt, App., 294 S.W. 731—Scott v. American Ins. Co., App., 222 S.W. 1047.
Neb.—Wolski v. National Life & Accident Ins. Co., 283 N.W. 381, 135 Neb. 643.
N.D.—Reid v. Ehr, 174 N.W. 71, 43 N.D. 109, 6 A.L.R. 586.
Ohio.—Schomer v. State ex rel. Bettman, 190 N.E. 638, 47 Ohio App. 84.
Or.—Obermeier v. Mortgage Co. Holland-America, 224 P. 1089, 111 Or. 14.
Tex.—Lone Star Gas Co. v. State, 153 S.W.2d 681, modifying State v. Lone Star Gas Co., Civ.App., 129 S. W.2d 1164—Kurz v. Soliz, Civ. App., 231 S.W. 424.
W.Va.—Browning v. Hoffman, 111 S. E. 492, 90 W.Va. 568.
22 C.J. p 434 note 16.

At common law

To authorize the introduction of former testimony it was necessary to show that the witness was dead; absence from the state was not enough, because he might be found and examined on commission.—Longacre v. Yonkers R. Co., 182 N.Y.S. 373, 191 App.Div. 770.

Discretion of court

Whether or not a witness beyond the jurisdiction of the state is "inaccessible" in the sense in which that word is used in the Code is, in each particular case, a question for determination by the trial judge, in the exercise of a sound discretion.—Atlanta & C. Air-Line Ry. Co. v. Gravitt, 20 S.E. 550, 93 Ga. 369, 44 Am.S.R. 145.

Notice of intention to use former testimony

The testimony of witnesses on former trial, who were residents of a county other than one wherein trial was had, could be used and read in evidence on subsequent trial without a previous notice being given of an intention so to do.—Gaty v. United Rys. Co., Mo., 251 S.W. 61—Scully v. Rolwing, Mo.App., 115 S. W.2d 96.

Beyond reach of process

The words "beyond the jurisdiction of the court" in statute authorizing introduction of former testimony are to be construed as meaning beyond the reach of the process of the court.—New York Cent. R. Co. v. Stevens, 185 N.E. 542, 126 Ohio St. 395, 87 A.L.R. 884.

Within United States

The fact that the witness is within the United States, although out of the jurisdiction of the court, does not render his evidence given at a former trial of the same case inadmissible.—Welp v. Bogy, 277 S.W. 600, 218 Mo.App. 414.

Within reach of process

Statute providing that evidence given in a former trial may be proved in a subsequent trial, where the witness is deceased, or out of the state, or unable to testify, does not apply where a witness, although absent from the place of trial, is within the state and can be subpœnaed, as the words "unable to testify" refer only to the mental or physical inability of the witness.—Hansen-Rynning v. Oregon-Washington R. & Nav. Co., 209 P. 462, 105 Or. 67.

the state, his absence is by reason of military or naval service.[93] In some jurisdictions former testimony may be received where the party offering the evidence has made diligent but fruitless efforts to locate the witness.[94] While the requirement does not exist in some jurisdictions,[95] in other jurisdictions the absence of a witness will not authorize the admission of his former testimony unless it has been impossible to secure his deposition for use on the trial,[96] or to induce him to come to the place of trial and testify.[97]

It is incumbent on the party seeking to introduce the former evidence to show the existence of foregoing circumstances, failing in which the evidence cannot be received.[98] The former testimony of a

Willingness to appear

Former testimony of witness who is outside jurisdiction of court is admissible even though such witness would be willing to appear and testify or his deposition could be taken.—Almar Building & Loan Ass'n v. Broad St. Trust Co., 176 A. 767, 116 Pa.Super. 465.

Presence at trial on prior day

Transcript of testimony given by witness at former trial is admissible where witness although subpœnaed and present on first day of trial, was not present when transcript of his testimony was offered.—Sculley v. Rolwing, Mo.App., 88 S.W.2d 394.

Outside of county

(1) In some jurisdictions, permitting introduction of testimony of a witness, given at a former hearing, who, at the time of the trial, resided outside of the county in which the trial was held, is proper.

Kan.—Watson v. Wheat Growers' Ass'n, 243 P. 1051, 120 Kan. 444.

Mo.—Gaty v. United Rys. Co., 251 S.W 61—Scully v. Rolwing, App., 115 S.W.2d 96—Sculley v. Rolwing, App., 88 S.W.2d 394.

Okl.—King Auto Service v. Hodges, 288 P. 483, 143 Okl. 260—Caldwell v. Kuykendall, 221 P. 84, 94 Okl. 84.

(2) In other jurisdictions a witness is not out of jurisdiction of court within rule permitting admission of former testimony of absent witness merely because he does not reside in or may not be found in county in which trial is had.—Carter v. Irvine, Tex.Civ.App., 77 S.W.2d 247.

(3) Residence in another county of the state does not render the witness inaccessible, so as to admit his former testimony.—Brinson R. Co. v. Beard, 76 S.E. 76, 11 Ga.App. 737.

(4) Reading testimony given at former trial is error, where witnesses live in adjoining county.—New York Cent. R. Co. v. Stevens, 185 N.E. 542, 126 Ohio St. 395, 87 A.L.R. 884.

Showing of absence

A showing that witness for defendant at former trial no longer resided at apartment where he had resided four and one-half years before was an insufficient showing of his absence from place of trial to justify admission of his testimony at former trial.—Collins v. Leahy, 125 S.W.2d 874, 344 Mo. 250.

In Nevada

(1) By express statutory enactment former testimony is allowed in evidence where the witness is beyond the jurisdiction of the court.—Martin v. Duncan Automobile Co., 296 P. 24, 53 Nev. 212.

(2) Formerly it was held that the rule applicable to the testimony of a dead witness did not apply to the testimony of one who was beyond the jurisdiction of the court, so that where the residence of a witness outside the jurisdiction was known, or could have been discovered by the exercise of due diligence, and his testimony could have been taken by commission, his testimony taken on a former trial was excluded.—Gerhauser v. North British and Mercantile Insurance Company, 7 Nev. 174.

93. N.Y.—Fink v. 37 West 36th St. Co., 280 N.Y.S. 269, 244 App.Div. 622.

94. Ark.—Pine Bluff Co. v. Bobbitt, 294 S.W. 1002, 174 Ark. 41.
Ga.—Estill v. Citizens' & Southern Bank, 113 S.E. 552, 153 Ga. 618.
Hawaii.—Tsuruda v. Farm, 18 Hawaii 434.
La.—Young v. Reed, App., 192 So. 780.
Mo.—Drake v. Kansas City Public Service Co., 63 S.W.2d 75, 333 Mo. 520.
Tex.—Lone Star Gas Co. v. State, 153 S.W.2d 681, modifying State v. Lone Star Gas Co., Civ.App., 129 S.W.2d 1164—Carter v. Irvine, Civ. App., 77 S.W.2d 247.
22 C.J. p 435 note 17.

Liberal application of rule in civil cases

The rule is more liberally applied to civil than to criminal cases.—Rotter v. Detroit United Ry., 187 N.W. 271, 217 Mich. 686.

Requirement of due diligence

(1) Due diligence must be exercised to find a witness before transcript of his testimony at former trial can be admitted.—Welp v. Bogy, 277 S.W. 600, 218 Mo.App. 414.

(2) No definite rule can be laid down as to what would constitute a showing of due diligence in all cases. Generally, the question of the sufficiency of the proof as to the showing of due diligence is confided to the discretion of the trial judge.—Welp v Bogy, supra—22 C.J. p 435 note 17 [a].

(3) The issuance of subpœnas, the delivery of the same to the sheriff or to any person authorized by law to serve the same, search for the witness, and return of the subpœnas "not found" will generally satisfy the requirements of due diligence.—Welp v. Bogy, 277 S.W. 600, 218 Mo.App. 414—Bender v. Bender, Mo.App., 193 S.W. 294.

95. Del.—Gibson v. Gillespie, 152 A. 589, 4 W.W.Harr. 331.
Okl.—King Auto Service v. Hodges, 288 P. 483, 143 Okl. 260.
Pa.—Almar Building & Loan Ass'n v. Broad St. Trust Co., 176 A. 767, 116 Pa.Super. 465.

96. Ark.—Conine v. Mize, 70 S.W.2d 845, 189 Ark. 92—Pine Bluff Co. v. Bobbitt, 294 S.W. 1002, 174 Ark. 41.
Ky.—Taylor v. Slider, 215 S.W. 827, 185 Ky. 756.
Mass.—A. T. Stearns Lumber Co. v. Howlett, 131 N.E. 217, 239 Mass. 59—Ibanez v. Winston, 109 N.E. 814, 222 Mass. 129.
Tex.—Carter v. Irvine, Civ.App., 77 S.W.2d 247—Morris v. Davis, Civ. App., 292 S.W. 574.
Va.—Director General of Railroads v. Gordon, 114 S.E. 668, 134 Va. 381.
Wyo.—See Ben Realty Co. v. Gothberg, 109 P.2d 455.
22 C.J. p 435 note 18.

Party as witness

Plaintiff who is outside the jurisdiction and is financially unable to attend the trial is not entitled to introduce in evidence testimony given by him on a former trial, for if living, he should be present or have his deposition taken.—Hubbard v. Schofield, 125 S.E. 221, 97 W.Va. 453.

97. Mass.—A. T. Stearns Lumber Co. v. Howlett, 131 N.E. 217, 239 Mass. 59—Ibanez v. Winston, 109 N.E. 814, 222 Mass. 129.
Wis.—Schofield v. Rideout, 290 N. W. 155, 233 Wis. 550.
Wyo.—See Ben Realty Co. v. Gothberg, 109 P.2d 455.

98. Ala.—Hines v. Miniard, 94 So. 302, 208 Ala. 176—Evans Furniture Co. v. Meyers, 81 So. 843, 17 Ala. App. 65.
Cal.—Kuck v. Raftery, 4 P.2d 552, 117 Cal.App. 755.
Ga.—Estill v. Citizens' & Southern Bank, 113 S.E. 552, 153 Ga. 618.

witness is not admissible where he is within the jurisdiction of the court and could have been reached by subpoena, and is not otherwise disqualified.[99]

Permanency of absence. Some authorities consider that the absence of the witness must have a character of permanency, and a mere transient absence will not suffice,[1] but generally it is sufficient to show that the witness is actually absent at the time of the trial,[2] although merely for a temporary purpose.[3]

Absence from court room. Absence from the court room is sometimes, under statute, regarded as sufficient to warrant introducing the absent witness' former testimony.[4]

Procurement or connivance of party. In some jurisdictions the absence of the witness must have occurred without the procurement or connivance of the party seeking to introduce the former testimony.[5] Where it appears that the party against whom the testimony of the witness would probably militate has been instrumental in preventing the attendance of the witness, the former evidence is admitted almost as a matter of course.[6]

§ 394. Disqualification

The testimony of a witness on a former trial is admissible where he has since become incompetent to testify by reason of the death of the adverse party, his own physical disability or, in some jurisdictions, by the acquisition of an interest in the controversy. Civil death of the witness by reason of a felony will not render his former testimony admissible.

Where a party or an interested witness has become incompetent by reason of the death of the

Ky.—Taylor v. Slider, 215 S.W. 827, 185 Ky. 756.
La.—Citizens Bank & Trust Co. v. Jones, App., 167 So. 510, 513, quoting **Corpus Juris.**
Tex.—Kurz v. Soliz, Civ.App., 231 S.W. 424.
Va.—Director General of Railroads v. Gordon, 114 S.E. 668, 134 Va. 381.
22 C.J. p 435 note 19.

Right to prove absence of witness
Party offering former testimony must be permitted to make proof of absence of witness.—Caldwell v. Kuykendall, 221 P. 84, 94 Okl. 84.

Sufficiency of showing
(1) Evidence held sufficient.
Del.—Gibson v. Gillespie, 152 A. 589, 4 W.W.Harr. 331.
Mo.—Fowler v. Cavitt, App., 294 S.W. 731.

(2) A party moving that absent witnesses' testimony on previous trial of same case be read as their evidence on retrial must make substantially same disclosures and representations as are required to obtain continuance of trial because of witnesses' absence.—Nowak v. Joseph, 142 S.W.2d 970, 283 Ky. 735.

(3) Testimony of officer that subpœna for the witness had been placed in his hands and he returned it to the clerk of the court indorsed "Not found in the county." was a sufficient foundation for the admission of the evidence, for the presumption of law is that the officer has performed the duties of his office and such return was equivalent to a statement that he had made the proper search for the witness and was unable to find him in the county.—Caldwell v. Kuykendall, 221 P. 84, 94 Okl. 84.

(4) Evidence that witness who had given testimony no longer resided at apartment where he had resided four and one-half years before was insufficient to show that his testimony could not be obtained.—Collins v. Leahy, 125 S.W.2d 874, 344 Mo. 250.

(5) An affidavit, reciting that two witnesses were absent from state and that affiant was informed that one of them was in certain state and the other in third state, but did not know either's address, was insufficient.—Nowak v. Joseph, 142 S.W.2d 970, 283 Ky. 735.

(6) Proof that witness had come down from another state for former trial about a month previously, had been given money to return, and had been seen at a railway station waiting for a train, was insufficient showing of her absence from the state on present trial to justify reading in evidence her former testimony.—Longacre v. Yonkers R. Co., 182 N.Y.S. 373, 191 App.Div. 770.

(7) Where only evidence as to whereabouts of one whose testimony on former trial was sought to be introduced was that he had been in California for about two years, but it was not shown that he was a nonresident, or that his whereabouts was unknown, or that his deposition could not have been taken, such testimony was properly excluded.—United Telephone Co. v. Barva, 147 N.E. 716, 83 Ind.App. 61.

99. D.C.—Karrick v. Cantrill, 290 F. 321, 53 App.D.C. 346.

1. Ala.—Hines v. Miniard, 94 So. 302, 208 Ala. 176.
22 C.J. p 435 note 20.

Sufficiency of showing of permanency of absence
(1) Evidence that witness had moved with his family to another state, where he resided and was employed, warranted finding that witness was beyond reach of court's process, and would remain so permanently or for such indefinite period that plaintiff could not procure his personal attendance.—Ætna Ins. Co. v. Koonce, 171 So. 269, 233 Ala. 265.

(2) Where plaintiff stated that witness at a former trial was in Indiana, and had been living there more than a year, this did not show that witness was permanently and indefinitely absent from the jurisdiction, so as to justify admission of his testimony.—Hines v. Miniard, 94 So. 302, 208 Ala. 176.

2. Ariz.—Inspiration Consol. Copper Co. v. Bryan, 252 P. 1012, 31 Ariz. 303.
Nev.—Martin v. Duncan Automobile Co., 296 P. 24, 53 Nev. 212.
22 C.J. p 435 note 21.

3. Ariz.—Inspiration Consol. Copper Co. v. Bryan, 252 P. 1012, 31 Ariz. 302.
Cal.—Willard v. Valley Gas & Fuel Co., 182 P. 32, 180 Cal. 561.
Nev.—Martin v. Duncan Automobile Co., 296 P. 24, 53 Nev. 212.
22 C.J. p 436 note 22.

4. Iowa.—Lucia v. Utterback, 198 N.W. 626, 197 Iowa 1181.
22 C.J. p 436 note 23.

Presence in county
The former testimony is admissible although the witness resides in the county in which the case is tried.—J. L. Owens Co. v. Leland Farmers' Elevator Co., 198 N.W. 19, 198 Iowa 271.

5. Ark.—Conine v. Mize, 70 S.W.2d 845, 189 Ark. 92—Pine Bluff Co. v. Bobbitt, 294 S.W. 1002, 174 Ark. 41.
Mo.—Gaty v. United Rys. Co., 251 S.W. 61.

6. Mo.—Welp v. Bogy, 277 S.W. 600, 218 Mo.App. 414.
Tex.—Lone Star Gas Co. v. State, 153 S.W.2d 681, modifying, State v. Lone Star Gas Co., Civ.App., 129 S.W.2d 1164—Carter v. Irvine, Civ. App., 77 S.W.2d 247.
22 C.J. p 436 notes 24 [a], 25.

adverse party, see the C.J.S. title Witnesses § 132, also 70 C.J. p 206 note 26–p 211 note 85, his testimony at a former trial, when the adverse party was living, generally may be received.[7] The testimony of a witness on a former trial of the case on a question of the genuineness of a signature is admissible where he is disqualified from testifying on the subsequent trial by reason of blindness.[8]

Where the disqualification results from the acquisition of an interest in the controversy since the witness testified, it has been held in some jurisdictions that the former testimony should be received[9] while in other jurisdictions the testimony has been rejected,[10] but as is shown in the C.J.S. title Witnesses § 131, also 70 C.J. p 202 note 87–p 206 note 25, under the modern statutory rule a witness is not disqualified by reason of interest.

Former evidence is not made competent because the witness has become civilly dead by reason of felony.[11]

§ 395. Mental Incapacity

Former testimony may be received where the witness has become insane or mentally incapacitated, but mere failure of the witness' memory ordinarily does not justify the admission of former testimony.

Where a witness has become insane or mentally incapacitated, his former evidence is received[12] where it appears that he is likely to remain in that condition,[13] although it is otherwise in cases of mere failure of memory, not amounting to imbecility.[14] However, it has been stated that, considering that testimony given by a witness on confirmation of a default could be admissible in an action to annul the judgment rendered therein, by reason of the fact that the matter was remote and the witness unable to recall the facts testified to, or that he had testified at all, such evidence would not be admissible unless it was first ascertained that the witness could not recall the facts testified to after being shown the evidence.[15]

§ 396. Inability to Attend

Physical inability of a witness to testify, resulting from illness, old age, or other infirmity, and inability to attend because of official or professional duties, may constitute sufficient reasons for receiving his former testimony.

In a number of jurisdictions physical inability of the witness to testify has been held a sufficient reason for receiving his former testimony.[16] Although

7. Fla.—Habig v. Bastian, 158 So. 508, 117 Fla. 864.
Ga.—Georgia Chemical Works v. Malcolm, 197 S.E. 763, 186 Ga. 275.
N.Y.—Hassett v. Rathbone, 198 N.Y. S. 381, 204 App.Div. 229.
22 C.J. p 436 note 28.
In Michigan
(1) By force of express statutory provision former testimony of a party is not rendered incompetent by subsequent death of adverse party.—Klein v. Kirschbaum, 215 N.W. 289, 240 Mich. 368.
(2) Formerly such testimony was rendered incompetent by reason of the death of the adverse party.—Barker v. Hebbard, 45 N.W. 964, 81 Mich. 267—22 C.J. p 436 note 29.

8. Tex.—Houston v. Blythe, 60 Tex. 506.

9. Ky.—Smithpeters v. Griffin, 10 B. Mon. 259.
La.—Wafer v. Hemken, 9 Rob. 203.

10. Pa.—Chess v. Chess, 17 Serg. & R. 409.
22 C.J. p 436 note 31.

11. Kan.—State v. Conway, 44 P. 627, 56 Kan. 682.
Mass.—Le Baron v. Crombie, 14 Mass. 234.

12. Ala.—Hines v. Minyard, 94 So. 302, 208 Ala. 176.
Ga.—Estill v. Citizens' & Southern Bank, 113 S.E. 552, 153 Ga. 618.
Mo.—Welp v. Bogy, 277 S.W. 600, 218 Mo.App. 414.
Tex.—Lone Star Gas Co. v. State, 153 S.W.2d 681, modifying State v. Lone Star Gas Co., Civ.App., 129 S.W.2d 1164—Security Realty & Development Co. v. Bunch, Civ. App., 143 S.W.2d 687, error dismissed, judgment correct—Carter v. Irvine, Civ.App., 77 S.W.2d 247—Smith v. Smith, Civ.App., 234 S. W. 419, 421, quoting **Corpus Juris** and dismissed for want of jurisdiction.
22 C.J. p 436 note 34.
Evidence held insufficient to establish alleged insanity or mental deficiency of witness.
Md.—Bielski v. Rising, 163 A. 207, 163 Md. 492.
Mo.—Oxford v. St. Louis-San Francisco Ry. Co., 52 S.W.2d 983, 331 Mo. 53.

13. Ga.—Estill v. Citizens' & Southern Bank, 113 S.E. 552, 153 Ga. 618.
Wis.—Markowitz v. Milwaukee Electric Railway & Light Co., 284 N.W. 31, 230 Wis. 312.

14. Mass.—A. T. Stearns Lumber Co. v. Howlett, 131 N.E. 217, 239 Mass. 59.
Mo.—Turner v. Missouri-Kansas-Texas R. Co., 142 S.W.2d 455, 463, 129 A.L.R. 829, citing **Corpus Juris.**
Nev.—Gerhauser v. North British and Mercantile Insurance Company, 7 Nev. 174.
Tex.—Smith v. Smith, Civ.App., 234 S.W. 419, 421, quoting **Corpus Juris** and dismissed for want of jurisdiction.
22 C.J. p 436 note 35.
However, it has been held that the reading of a police officer's testimony given in former trial was not error, where officer could not remember all his former testimony, and it was agreed specified questions were asked in former trial and answered by officer.—Monaghan v. Keith Oil Corporation, 183 N.E. 252, 281 Mass. 129.
Admission of part of former testimony to fill gaps
Where, prior to a second trial, a deposition was obtained from a witness who testified in first trial, in which deposition witness stated his inability to remember details of the accident but that his testimony given on the point at first trial would be correct, parts of the transcript of the testimony given by such witness on first trial were not admissible in second trial to fill in gaps in the deposition due to witness' faulty memory.—Turner v. Missouri-Kansas-Texas R. Co., Mo., 142 S.W.2d 455, 129 A. L.R. 829.

15. La.—Polk v. Saunders, 5 La.App. 450.

16. Fla.—Alexander v. Bess, 167 So. 533, 123 Fla. 713.
Tex.—Lone Star Gas Co. v. State, 153 S.W.2d 681, modifying State v. Lone Star Gas Co., Civ.App., 129 S.W.2d 1164—Security Realty & Development Co. v. Bunch, Civ.

there is some contrary authority,[17] illness of a witness, preventing his attendance, has been held a sufficient reason for receiving his former testimony,[18] provided, in some jurisdictions, it is not temporary but of such a character that in all reasonable probability the witness will never be able to attend the trial.[19] Extreme age[20] and great bodily infirmity[21] of the witness have been held sufficient reasons for receiving his former evidence.

Inability of a witness to attend, by reason of being engaged in an official duty, has been held to render his former testimony admissible,[22] and a similar rule has been established by statute with respect to a witness who is engaged in professional duties.[23]

§ 397. Scope of Proof Required

a. In general

b. Accuracy as to language of witness on former trial

a. In General

All of the testimony of the witness on the former trial is admissible, but the authorities do not agree as to whether the entire testimony must be introduced.

In general, all of the former testimony of the witness is admissible.[24] If the evidence of a witness on a former trial is established by the testimony of a person who heard it, see infra § 401, the reporting witness must be able to recollect all of the testimony given by the witness,[25] at least as far as it relates to matters relevant to the action in which it is sought to be used.[26] This requires that the reporting witness shall be able to state what the witness on the former trial said both on direct examination and on cross-examination,[27] where it appears that there was a cross-examination,[28] the result of which was to modify the testimony given on direct examination.[29]

It has been laid down that the entire testimony of the witness on the former trial should be put in evidence;[30] but according to other authorities as long as the former testimony is available[31] the party need put in evidence only so much thereof as he desires,[32] and it is then the right of the adverse party, at his option, to supplement the evidence, as

App., 143 S.W.2d 687, error dismissed, judgment correct.

17. Ky.—Southern Ry. in Kentucky, v. Owen, 176 S.W. 25, 164 Ky. 571.
22 C.J. p 437 note 37.

Inability as excuse for lack of diligence

That an absent witness was physically unable to attend trial or have her deposition taken did not excuse the party desiring her evidence for not using due diligence in securing or attempting to secure her testimony, or, if she could not attend, being prepared to make a proper showing for a continuance, or for the introduction of her testimony on a former trial.—Estill v. Citizens' & Southern Bank, 113 S.E. 552, 153 Ga. 618.

18. Hawaii.—Correa v. Waiakea Mill Co., 32 Hawaii 310—Tsuruda v. Farm, 18 Hawaii 434.
Mo.—Welp v. Bogy, 277 S.W. 600, 218 Mo.App. 414.
Tex.—Federal Underwriters Exchange v. Rigsby, Civ.App., 130 S.W.2d 1105, error dismissed, judgment correct—Carter v. Irvine, Civ. App., 77 S.W.2d 247—Bowles v. Bryan, Civ.App., 277 S.W. 760.
22 C.J. p 437 note 36.

Physician's certificate

The rule is applicable even though a physician's certificate is not produced.—Team v. Green, 211 P. 791, 106 Or. 311.

Waiver of objection

Testimony of witness in former case who was unable to testify in instant case on account of illness, was admissible where objection that failure to testify was due to illness instead of death was waived.—Rhode Island Hospital Trust Co. v. Sherman, 185 A. 601, 56 R.I. 355.

19. Mich.—Siefert v. Siefert, 82 N.W. 511, 123 Mich. 664.
Wis.—Markowitz v. Milwaukee Electric Railway & Light Co., 284 N.W. 31, 230 Wis. 312.

20. Ga.—Estill v. Citizens' & Southern Bank, 113 S.E. 552, 153 Ga. 618.
22 C.J. p 437 note 38.

21. Ga.—Estill v. Citizens' & Southern Bank, supra.
22 C.J. p 437 note 39.

22. La.—Noble v. Martin, 7 Mart.N.S. 282.

23. Mo.—Doyle v. St. Louis Transit Co., 101 S.W. 598, 124 Mo.App. 504.

24. Cal.—Willard v. Valley Gas & Fuel Co., 182 P. 32, 180 Cal. 561.

Direct and cross examination

Admitting transcript of entire direct and cross examination of deceased witness, who testified on former trial, has been held proper.
Ark.—Ft. Smith, S. & R. I. R. Co. v. Moore, 289 S.W. 6, 172 Ark. 353, certiorari granted 47 S.Ct. 575, 274 U.S. 728, 71 L.Ed. 1315, reversed on other grounds 48 S.Ct. 300, 276 U.S. 593, 72 L.Ed. 722.
Iowa.—Grimes Sav. Bank v. McHarg, 236 N.W. 418, 213 Iowa 969, certiorari denied McHarg v. Grimes Sav. Bank, 53 S.Ct. 5, 287 U.S. 599, 77 L.Ed. 522.

Memorandum used in testifying

Where a memorandum made by plaintiff, and used by her when giving testimony on the first trial of case, was incorporated in the record of her testimony on first trial, not as an independent document, but as part of her testimony, it was properly introduced on second trial, despite the objection that plaintiffs were permitted to use secondary documentary evidence without showing loss or destruction of the original.—Willard v Valley Gas & Fuel Co., 182 P. 32, 180 Cal. 561.

25. Ky.—Monahan v. Clemons, 279 S.W. 974, 212 Ky. 504.
Md.—Black v. Woodrow, 39 Md. 194.
22 C.J. p 438 note 50.

26. Ind.—Horne v. Williams, 23 Ind. 37.
22 C.J. p 438 note 51.

27. Md.—Black v. Woodrow, 39 Md. 194.
22 C.J. p 439 note 52.

28. Pa.—Philadelphia & R. R. Co. v. Spearen, 47 Pa. 300, 86 Am.D. 544—Chess v. Chess, 17 Serg. & R. 409.

29. Pa.—Chess v. Chess, supra.
22 C.J. p 439 note 54.

30. U.S.—Rumford Chemical Works v. Hygienic Chemical Co., C.C.N.J., 148 F. 862, affirmed 154 F. 65, 83 C.C.A. 177, certiorari denied 28 S.Ct. 257, 207 U.S. 592, 52 L.Ed. 355, and affirmed 30 S.Ct. 45, 215 U.S. 156, 54 L.Ed. 137.

31. Colo.—City of Boulder v. Stewardson, 189 P. 1, 67 Colo. 582.

32. Colo.—City of Boulder v. Stewardson, supra.
Mass.—Randall v. Peerless Motor

given by introducing other portions of such testimony.[33] The party may offer only the direct examination or such portions thereof as he deems material, and need not introduce the cross-examination,[34] and the adverse party may introduce the cross-examination and portions of the direct examination not introduced,[35] and it will be considered not as his own evidence, but as evidence of the party who first introduced the former testimony.[36] A transcript containing only a portion of the evidence may be introduced where the remainder of the evidence is testified to by witnesses.[37]

Where the former testimony is read to the jury, only the questions which the witness answered may be read, and not those which he was not permitted to answer, especially where the questions to which objections were sustained were of such a form and nature that the mere asking would prejudice a jury.[38]

b. Accuracy as to Language of Witness on Former Trial

Originally it was required that the reporting witness should be able to state in identical words the language of the witness on the former trial, but under the modern rule the reporting witness need give only the substance of the former testimony.

Originally it was required that the reporting witness should be able to state in identical words the language of the witness on the former trial.[39] However, it came to be recognized that the strictness of this requirement practically nullified the rule admitting former evidence,[40] and at an early day the rigor of the requirement was relaxed.[41] The result has been the establishment of the modern rule that it is sufficient that the substance of the former testimony be given by the reporting witness.[42]

The practical application of the modern rule is by no means uniform; some courts require very strict accuracy in reporting the language of the witness on the former trial,[43] while others are satisfied with a less strict adherence to what was actually said by the witness, provided it appears that a substantially correct report of his testimony is presented.[44] It must appear to the satisfaction of the court that the reporting witness can comply with whatever degree of strictness is required by the law of the jurisdiction in which the former testimony is to be used.[45]

§ 398. Media of Proof

The testimony given on a former trial may be proved by any competent evidence.

The testimony given on a former trial may be proved by any competent evidence.[46] The various means of proving evidence given on a former trial are discussed infra §§ 399–401.

§ 399. Notes or Memoranda

a. In general
b. Of attorney
c. Of judge
d. Of stenographer

a. In General

Former testimony may be proved by a writing thereof taken under the sanction of the court, or by notes thereof taken by any person who will swear to their accuracy; a person who took notes of the former testimony may use them to refresh his recollection.

Where the original testimony was reduced to writing under the sanction of the court, the writing is competent and the best evidence.[47] Although there is authority to the contrary,[48] generally, a witness who has no present recollection of the former testimony can make his notes of such testimony evidence by testifying to a recollection that they

Car Co., 99 N.E 221, 212 Mass. 352.

33. Colo.—City of Boulder v. Stewardson, 189 P. 1, 67 Colo. 582.
Mo—Moffett v. Butler Mfg. Co., 46 S.W.2d 869.
22 C.J. p 197 note 17, p 439 note 57.

34. Colo.—City of Boulder v. Stewardson, 189 P. 1, 67 Colo. 582.

35. Colo.—City of Boulder v. Stewardson, supra.
Ill.—Brownlie v. Brownlie, 191 N.E. 268, 357 Ill. 117, 93 A.L.R. 1041.

36. Colo.—City of Boulder v. Stewardson, 189 P. 1, 67 Colo. 582.

37. Ind.—Keener School Tp. v. Eudaly, 175 N.E. 363, 93 Ind.App. 627.

38. Ariz.—Illinois Bankers Life Ass'n v. Theodore, 55 P.2d 806, 47 Ariz. 314.

39. Ohio.—Smith v. Smith, Wright p 643.
22 C.J. p 437 note 42.

40. Neb.—Omaha St. Ry. Co. v. Elkins, 58 N.W. 164, 39 Neb. 480.
22 C.J. p 437 note 44.

41. Neb.—Vandewege v. Peter, 119 N.W. 226, 83 Neb. 140.
22 C.J. p 437 note 43.

42. Ark.—Northwestern Rug Mfg. Co. v. Leftwich Hardware & Furniture Co., 2 S.W.2d 1109, 176 Ark. 212.
22 C.J. p 437 notes 45, 46.

43. Mass.—Jaquith v. Morrill, 90 N.E. 556, 204 Mass. 181.
22 C.J. p 438 note 47.

44. Pa.—Hepler v. Mount Carmel Savings Bank, 97 Pa. 420, 39 Am. R. 813.
22 C.J. p 438 note 48.

45. Neb.—Vandewege v. Peter, 119 N.W. 226, 83 Neb. 140.
22 C.J. p 438 note 49.

46. Conn.—Seymour Trust Co. v. Hershowitz, 131 A. 399, 103 Conn. 532.

47. Ga.—Walker v. Walker, 14 Ga. 242.
22 C.J. p 439 note 58.

Minutes of previous trial
It has been held improper to admit in evidence the minutes of the previous trial.—Berkowitz v. Equitable Life Assur. Soc. of U. S., 6 N.Y.S.2d 120, 168 Misc. 357.

48. U.S.—U. S. v. Wood, C.C.Pa., 28 F.Cas.No.16,756, 3 Wash.C.C. 440.
S.C.—Yancey v. Stone, 27 S.C.Eq. 429.

were accurate when made;[49] and, a fortiori, it is no objection that a reporting witness cannot state the former testimony from his recollection alone without reference to his minutes or memoranda.[50] Where it is shown that the original notes have been lost, a copy may be used.[51]

To refresh his recollection, a witness may use contemporaneous notes which he took of former testimony,[52] or he may use other memoranda.[53]

b. Of Attorney

Notes taken by counsel in the former trial are competent memoranda for proof of the testimony therein, but they are not evidence per se.

Notes taken by counsel for the purpose of the trial are competent memoranda for proof of former evidence,[54] and they may be used to refresh his recollection.[55] However, they are not evidence per se.[56]

c. Of Judge

Where properly authenticated, the minutes of the judge before whom the former trial was held are competent evidence of the testimony given thereat, but they are of no higher grade than other competent evidence of the former testimony.

The minutes of the judge before whom the former trial or hearing was held are competent evidence of the testimony given thereat,[57] provided, but not unless, they are properly authenticated[58] by the oath of the judge,[59] and reinforced by some personal recollection on his part.[60]

Such minutes, not being an official record, are no higher grade of evidence than any other competent evidence of the former testimony,[61] and in modern times their importance and use has been lessened by the use of stenography in court.[62]

d. Of Stenographer

The former testimony of a witness may be proved by the authenticated notes of a stenographer, particularly those of the official court stenographer, but such notes do not constitute evidence per se, unless such effect has been given to them by statute.

The purpose of having testimony taken down in shorthand is to preserve it for future reference,[63] and there is a very general tendency to recognize the accuracy and disinterestedness of the work of an official stenographer.[64] The former testimony of a witness may be proven by the official stenographer.[65] The testimony may be read by the stenographer who took it.[66]

Transcript of notes. A transcript of the stenographer's notes may be used to prove the testimony given by a witness at a former trial,[67] although the

49. Mo.—Woerheide v. Kelley, 243 S.W. 158, 161, quoting **Corpus Juris**—Hudlow v. Langerhans, App., 91 S.W.2d 629, 633, quoting **Corpus Juris**—Welp v. Bogy, 277 S.W. 600, 218 Mo.App. 414—Miller v. Geeser, 180 S.W. 3, 193 Mo.App. 1.
22 C.J. p 439 note 61.

50. Mo.—Woerheide v. Kelley, 243 S.W. 158, 161, quoting **Corpus Juris**—Hudlow v. Langerhans, App., 91 S.W.2d 629, 633, quoting **Corpus Juris.**
22 C.J. p 439 note 62.

51. Mo.—Woerheide v. Kelley, 243 S.W. 158, 161, quoting **Corpus Juris**—Hudlow v. Langerhans, App., 91 S.W.2d 629, 633, quoting **Corpus Juris.**
22 C.J. p 439 note 63.

52. Mo.—Woerheide v. Kelley, 243 S.W. 158, 161, quoting **Corpus Juris**—Hudlow v. Langerhans, App., 91 S.W.2d 629, 633, quoting **Corpus Juris.**
22 C.J. p 439 note 59.

53. Ala.—Riley v. Fletcher, 64 So. 85, 185 Ala. 570.
Bill of exceptions see infra § 400.

54. N.C.—Ashe v. DeRossett, 50 N.C. 299, 72 Am.D. 552.
22 C.J. p 439 note 64.

55. N.C.—Carpenter v. Tucker, 3 S.E. 831, 98 N.C. 316.

56. Md.—Waters v. Waters, 35 Md. 531.
22 C.J. p 440 note 66.

57. Mo.—Welp v. Body, 277 S.W. 600, 218 Mo.App. 414.
22 C.J. p 440 note 67.

58. N.J.—Ross v. Nevin Bus Lines, 154 A. 198, 9 N.J.Misc. 412.
N.Y.—McRavy v. Barto, 99 N.Y.S. 712, 114 App.Div. 262.

59. Vt.—Whitcher v. Morey, 39 Vt. 459.
22 C.J. p 440 note 69.

60. N.Y.—Huff v. Bennett, 6 N.Y. 337, affirming 4 N.Y.Super. 120.
22 C.J. p 440 note 70.

61. Vt.—Earl v. Tupper, 45 Vt. 275.
22 C.J. p 440 note 71.

62. Wis.—Jackson v. State, 51 N.W. 89, 81 Wis. 127.

63. Mo.—Padgitt v. Moll, 60 S.W. 121, 159 Mo. 143, 81 Am.S.R. 347, 52 L.R.A. 854.

64. Kan.—Wright v. Wright, 50 P. 444, 58 Kan. 525.
22 C.J. p 440 note 74.
Court stenographers see the C.J.S. title Stenographers §§ 1–12, also 60 C.J. p 21 note 4 et seq.

65. Ky.—Wallace v. Lackey, 250 S.W. 843, 199 Ky. 190.
Mich.—Gloeser v. Moore, 278 N.W. 781, 284 Mich. 106—Merrill v. Leisenring, 131 N.W. 538, 166 Mich. 219.

66. Ky.—Wallace v. Lackey, 250 S.W. 843, 199 Ky. 190.
Mich.—Gloeser v. Moore, 278 N.W. 781, 284 Mich. 106.
Okl.—King Auto Service v. Hodges, 288 P. 483, 143 Okl. 260.
R.I.—Edwards v. Miller, 131 A. 554.
22 C.J. p 442 note 98 [1] (2).

From original notes
Where original stenographic notes were part of record of former trial, there was no error in permitting stenographer as witness to read from his original notes.—Jones v. Douglass, 103 So. 441, 158 La. 57.

67. Conn.—Seymour Trust Co. v. Hershowitz, 131 A. 399, 103 Conn. 532.
Iowa.—Lucia v. Utterback, 198 N.W. 626, 197 Iowa 1181.
Ky.—Armstrong v. Board of Civil Service Com'rs of City of Newport, 48 S.W.2d 1055, 243 Ky. 415.
Mo.—Welp v. Body, 277 S.W. 600, 218 Mo.App. 414.
Okl.—Brittain v. Puckett, 48 P.2d 1058, 173 Okl. 422—King Auto Service v. Hodges, 288 P. 483, 143 Okl. 260—Caldwell v. Kuykendall, 221 P. 84, 94 Okl. 84.
22 C.J. p 440 note 75.

Certified copy
Method of reproducing testimony of deceased witness, if relevant, by certified copy of transcript is author-

testimony is not embodied in a bill of exceptions.[68] The transcript must be authenticated in some way,[69] as by the oath[70] or testimony[71] of the stenographer as to its accuracy; but testimony of the presiding judge that the transcript is correct is inadmissible.[72]

The transcript is not evidence per se,[73] except where it has been given this effect by statute;[74] and in some jurisdictions it has no greater efficacy than notes taken by the judge or any other person.[75] However, it has been stated that a transcript of the notes of the official court stenographer constitutes the best evidence of the former testimony of a witness,[76] and it has even been accorded a prima facie effect;[77] but it is not conclusive even though it is admissible by reason of statute,[78] and it is not the best evidence in the sense that all other evidence is secondary and inadmissible.[79]

Parol explanation of notes. Parol explanation has been held competent to make the stenographer's notes clear.[80]

§ 400. Record

Testimony given in the former trial may be proved from official records thereof, although the authorities do not agree as to whether such testimony may be proved by a bill of exceptions containing the testimony.

Where the former testimony is contained in a public record it may be proved by the admission in evidence of the original record itself.[81] It has been held that the former evidence of a witness may be proved by a certificate of evidence in a chancery case, signed by the judge and constituting part of the record,[82] by an agreed brief of evidence, considered and approved by the court,[83] by the agreed statement of case on appeal,[84] by a "case" settled and certified by the judge, pursuant to statute and containing all the evidence,[85] by an original bill of testimony approved by the judge, certified to by the clerk, and filed in the court of appeals,[86] by a transcript of the evidence incorporat-

ized.—Houghton v. Grimes, 151 A. 642, 103 Vt. 54.

Question and answer method

Permitting court's stenographer to read in evidence question and answer testimony given on former trial is not error.—Gulf, C. & S. F. Ry Co. v. Coffman, Tex.Civ.App., 11 S.W.2d 631, affirmed Coffman v. Gulf, C. & S. F. Ry. Co., Com.App., 23 S.W.2d 304.

68. Mo.—Miller v. Geeser, 180 S.W. 3, 193 Mo.App. 1.

69. U.S.—In re Taylor, D.C.N.Y., 7 F.Supp. 592.
Cal.—Kuehn v. Carlos, 89 P.2d 672, 32 Cal.App.2d 295.
Mich.—Job v. Grand Trunk Western Ry. Co, 222 N.W. 723, 245 Mich. 353—Garazewski v. Wurm, 169 N. W. 871, 204 Mich. 227.
N.J.—Keller v. Linsenmeyer, 139 A. 33, 36, 101 N.J.Eq. 664, citing **Corpus Juris.**
22 C.J. p 441 note 79.

Showing required

Absent witness' testimony at former trial was properly excluded, in absence of showing that transcript of evidence taken thereat was made by official reporter, duly appointed and sworn, or that testimony was transcribed or certified as correct.—Redwing v. Moncravie, 32 P.2d 408, 138 Cal.App. 432.

Certificate of appellate court clerk

Former testimony of absent witness is properly authenticated by certificate of the clerk of the supreme court of the state in whose office the testimony was filed on appeal of the former case.—Caldwell v. Kuykendall, 221 P. 84, 94 Okl. 84.

Unofficial stenographer

Where stenographer was not the official court reporter, and proper foundation was not laid for use of notes to refresh memory, transcript of testimony should not have been admitted.—Nalley v. First Nat. Bank, 293 P. 721, 135 Or. 409, 76 A.L.R. 625, rehearing denied 296 P. 61, 135 Or. 409, 76 A.L.R. 625.

70. Ky.—Wallace v. Lackey, 250 S. W. 843, 199 Ky. 190.
Mich.—Garazewski v. Wurm, 169 N. W. 871, 204 Mich. 227.
N.J.—Keller v. Linsenmeyer, 139 A. 33, 36, 101 N.J.Eq. 664, citing **Corpus Juris.**
Okl.—Brittain v. Puckett, 48 P.2d 1058, 173 Okl. 422—King Auto Service v. Hodges, 288 P. 483, 143 Okl. 260.
22 C.J p 441 note 78.

Necessity for filing

Competent evidence of witnesses adduced at former trial, transcribed and certified by court reporter, and incorporated in case-made, which is signed and settled by trial judge and filed with clerk of district court, is admissible as deposition of such witnesses, though reporter's notes were not filed in district court, as required by statute.—City Nat. Bank of McAlester v. Edwards, 229 P. 487, 100 Okl. 202.

71. Conn.—Seymour Trust Co. v. Hershowitz, 131 A. 399, 103 Conn. 532.
S.C.—Awtrey v. Wood, 101 S.E. 920, 113 S.C. 309.

72. Ala.—Woods v. Postal Telegraph Cable Co., 87 So. 681, 205 Ala. 236, 27 A.L.R. 834.

73. Ariz.—Tom Reed Gold Mines Co. v. Moore, 11 P.2d 347, 40 Ariz. 174, citing **Corpus Juris.**
Conn.—Seymour Trust Co. v. Hershowitz, 131 A. 399, 103 Conn. 532.
Neb.—Lipscomb v. Lyon, 27 N.W. 731, 19 Neb. 511.
22 C.J. p 441 note 76.

74. Iowa.—In re Wiltsey's Will, 109 N.W. 776, 135 Iowa 430.
22 C.J. p 441 note 77.

75. Mich.—Garazewski v. Wurm, 169 N.W. 871, 204 Mich. 227.

76. Mo.—Showen v. Metropolitan St. Ry. Co., 148 S.W. 135, 164 Mo.App. 41.
22 C.J. p 441 note 80.

77. Kan.—Atchison, T. & S. F. R. Co. v. Osborn, 67 P. 547, 64 Kan. 187.
22 C.J. p 441 note 81.

78. Ala.—Alabama Western R. Co. v. Downey, 58 So. 918, 177 Ala. 612.

79. N.Y.—Harmon v. Matthews, 27 N.Y.S.2d 656.

80. W.Va.—Carrico v. West Virginia Cent. & P. R. Co., 19 S.E. 571, 39 W.Va. 86, 24 L.R.A. 50.

81. N.C.—Blalock v. Whisnant, 5 S. E.2d 130, 216 N.C. 417.

Necessity for certification

A statute requiring a copy of a public record to be certified as a prerequisite to its admission in evidence does not apply to the original record.—Blalock v. Whisnant, supra.

82. Ill.—O'Connor v. Mahoney, 42 N. E. 378, 159 Ill. 69.
22 C.J. p 442 note 90.

83. Ga.—West End Park Co. v. Mitchell, 165 S.E. 628, 175 Ga. 613.
22 C.J. p 442 notes 91, 94.

84. N.C.—Blalock v. Whisnant, 5 S. E.2d 130, 216 N.C. 417.

85. Minn.—Finnes v. Selover, 131 N. W. 371, 114 Minn. 339.
22 C.J. p 442 note 92.

86. Ky.—Harbison & Walker Co. v. White, 114 S.W. 250.

ed in the case made,[87] or by a certified copy of the record of testimony.[88]

On the other hand, a record of a county clerk's office cannot be used to show evidence although it contains a transcript of the testimony,[89] and former testimony may not be proved by a certified copy of the statement of facts on a former appeal, not shown to have been made up from stenographer's notes, and of the verity of which there is no other proof.[90] A fortiori, a statement of facts prepared in contemplation of an appeal and not containing the detailed testimony of the witness is not competent.[91]

Docket entries are admissible in a subsequent action to show the allowance of a substitute declaration after trial before an auditor.[92]

Bill of exceptions. In some jurisdictions a bill of exceptions containing the testimony is not alone sufficient to prove the testimony of a witness on a former trial,[93] and is not admissible in evidence in proof thereof, unless called for by the opposite party.[94] In other jurisdictions such a bill is sufficient for the purpose;[95] but it is not the sole method of proving former testimony and its availability does not preclude the use of other methods.[96] In such case, inasmuch as the transcript of the evidence, when properly filed and incorporated in the bill of exceptions, becomes an official record, either the original transcript contained in the bill, or the official carbon copy thereof filed with the papers, must be introduced, or a copy thereof duly certified by the clerk of the appellate court or by the clerk of the court having the legal custody of the original papers;[97] an unofficial copy thereof is not admissible on proof by an attorney in the case that, in his judgment, it was a correct copy of the original transcript.[98]

A bill of exceptions is admissible in aid of the memory of a witness who testifies to the former evidence,[99] and it is sometimes permitted by statute that a bill of exceptions may be read on a subsequent trial as a deposition.[1]

§ 401. Witnesses

The former evidence of a witness may be established by the testimony of any person who can swear to it from memory, even though, according to some authorities, the testimony was taken down in shorthand and transcribed.

The former evidence of a witness may be established by the testimony of any person who can swear to it from memory.[2] It has been held that the reception of such testimony is not precluded by the fact that the former evidence was taken down in shorthand and transcribed,[3] nor by statutory provi-

87. Okl.—Kansas City, M. & O. Ry. Co. v. Roe, 180 P. 371, 72 Okl. 238.

Failure to file reporter's notes

Testimony of witnesses at a former trial, between the same parties involving the same subject matter, transcribed by the court reporter from his stenographic report, certified and incorporated in the case made, signed and settled by the trial judge, and filed with the district court clerk, is admissible in evidence as depositions, although the reporter's notes were not filed as required by statute.—Kansas City, M. & O. Ry. Co. v. Roe, supra.

88. Tex.—In re Brackenridge's Estate, Civ.App., 245 S.W. 786, reversed on other grounds Brackenridge v. Roberts, 267 S.W. 244, 114 Tex. 418, rehearing denied 270 S.W. 1001, 114 Tex. 418.

89. N.Y.—Hilliker v. Rueger, 114 N.E. 391, 219 N.Y. 334.

90. Tex.—Texas & N. O. R. Co. v. Williams, Civ.App., 178 S.W. 701.

91. Tex.—Houston & T. C. R. Co. v. Smith, Civ.App., 51 S.W. 506.

92. Mass.—Savage v. Walshe, 140 N.E. 787, 246 Mass. 170.

93. Ala.—Riley v. Fletcher, 64 So. 85, 185 Ala. 570.
22 C.J. p 442 note 86.

Bill of exceptions prepared on former appeal

Ill.—Boss v. Illinois Cent. R. Co., 221 Ill.App. 504.

94. Ala.—Riley v. Fletcher, 64 So. 85, 185 Ala. 570, explaining Torrey v. Burney, 21 So. 348, 113 Ala. 496.

95. Ky.—Wallace v. Lackey, 250 S.W. 843, 199 Ky. 190.
22 C.J. p 441 note 85.

In Missouri

(1) The rule of the text has been recognized.—Gaty v. United Rys. Co., 251 S.W. 61—Scully v. Rolwing, App., 115 S.W.2d 96—Welp v. Bogy, 277 S.W. 600, 218 Mo.App. 414.

(2) However, it has been held in a number of cases that it must be shown by other evidence that the testimony contained in the bill of exceptions is substantially the same as that delivered by the witness or it is not admissible.—Scoville v. Hannibal & St. J. R. Co., 6 S.W. 654, 94 Mo. 84—Jaccard v. Anderson, 37 Mo. 91.

96. Mo.—Welp v. Bogy, 277 S.W. 600, 218 Mo.App. 414.

97. Ky.—Wallace v. Lackey, 250 S.W. 843, 199 Ky. 190.

98. Ky.—Wallace v. Lackey, supra.

99. Ala.—Riley v. Fletcher, 64 So. 85, 185 Ala. 570.
22 C.J. p 442 note 88.

1. Mo.—Turner v. Missouri-Kansas-Texas R. Co., 142 S.W.2d 455, 129 A.L.R. 829.
22 C.J. p 442 note 89.

2. Ala.—Woods v. Postal Telegraph Cable Co., 87 So. 681, 205 Ala. 236, 27 A.L.R. 834.

Ark.—Northwestern Rug Mfg. Co. v. Leftwich Hardware & Furniture Co., 2 S.W.2d 1109, 176 Ark. 212.

Ky.—Wallace v. Lackey, 250 S.W. 843, 199 Ky. 190.

Mich.—Gloeser v. Moore, 278 N.W. 781, 787, 284 Mich. 106, citing **Corpus Juris.**

Mo.—Welp v. Bogy, 277 S.W. 600, 218 Mo.App. 414.

N.Y.—Harmon v. Matthews, 27 N.Y.S.2d 656.

Ohio.—Schomer v. State ex rel. Bettman, 190 N.E. 638, 47 Ohio App. 84.

Pa.—Wolfe v. Scott, 119 A. 468, 275 Pa. 343.
22 C.J. p 442 note 98.

At common law

Under the common law, the method of proving the former evidence of a witness, since deceased or unavailable, was by a person who heard him testify.—Tom Reed Gold Mines Co. v. Moore, 11 P.2d 347, 40 Ariz. 174.

3. Ga.—Galloway v. Hogg, 146 S.E. 156, 167 Ga. 502.

sions making the stenographic notes evidence per se of the testimony of a witness at a former trial.[4] However, there is also authority for the view that where there is a transcript of the former evidence it cannot be proved by the testimony of witnesses;[5] and if the testimony of an inaccessible witness, given in a former trial, has been reduced to writing, and agreed on as correct between the parties, and filed under the sanction and approval of the court, it must be adduced.[6]

The witness cannot use memoranda, of the accuracy of which he has no knowledge and the source of which is not known.[7] It is not proper to examine the witness by reading to him, from an alleged transcript, what purport to be extracts from the former testimony and asking him whether such testimony was given.[8]

§ 402. Effect and Impeachment

a. Effect
b. Impeachment

a. Effect

Former testimony, when introduced, is original evidence, equivalent, under certain conditions, to a deposition; a party is not conclusively bound by the testimony of himself or of his witness on a former trial.

Testimony given at a former trial, when introduced in evidence, is original evidence,[9] and should be considered by the jury and given the same effect as though the witnesses at the former trial had repeated their testimony in open court.[10] However, prior contradictory statements of the witness, made in a prior proceeding, do not constitute affirmative evidence or evidence in chief of the facts stated.[11]

When former testimony is preserved in the shorthand notes of an official court reporter it is in weight the equivalent of a deposition,[12] and, it has been stated, is likely to be more satisfactory.[13]

Testimony by a party on a former trial of the case,[14] or of another case,[15] will not estop him from giving testimony contradictory thereto, if he can show that his former testimony was given inconsiderately, by mistake, or without full knowledge of the facts.[16] His former testimony is not conclusive

N.Y.—Harmon v. Matthews, 27 N.Y.S.2d 656.
22 C.J. p 443 note 99.

4. Ky.—Austin v. Commonwealth, 98 S.W. 295, 124 Ky. 55, 30 Ky.L. 295.
Okl.—Oklahoma R. Co. v. Boles, 120 P. 1104, 30 Okl. 764.

5. Mo.—Estes v. Missouri Pac. R. Co., 85 S.W. 909, 111 Mo.App. 1.

6. Ga.—Galloway v. Hogg, 146 S.E. 156, 167 Ga. 502—Walker v. Walker, 14 Ga. 242.

7. Md.—Packham v. Glendmeyer, 63 A. 1048, 103 Md. 416.

8. Md.—Packham v. Glendmeyer, supra.

9. Fla.—Habig v. Bastian, 158 So. 508, 117 Fla. 864.
Ga.—Maynard v. Rawlins, 163 S.E. 269, 45 Ga.App. 91.
Hawaii.—Lalakea v. Laupahoehoe Sugar Co., 33 Hawaii 745.

Testimony of party

Testimony of a party on a former trial, contradicted by him on the subsequent trial, should, when introduced in evidence in the later trial, be considered as substantive evidence and it is error to restrict its purposes to corroboration and impeachment.—Miller v. Melton-Rhodes Co., 102 S.E. 782, 179 N.C. 467.

Exclusion of other evidence to prove same facts

Where the original defendant had died since the first trial of the cause, and his widow and sole devisee was substituted as defendant, and she introduced the evidence of her deceased husband given at the former trial, her evidence should be confined to what took place after his death, and she should not have been permitted to testify to any facts occurring in his lifetime.—Wallace v. Lackey, 250 S.W. 843, 199 Ky. 190.

10. Ala.—Central of Georgia Ry. Co. v. Holmes, 134 So. 875, 876, 223 Ala. 188, citing Corpus Juris.
Ga.—Maynard v. Rawlins, 163 S.E. 269, 45 Ga.App. 91.
22 C.J. p 443 note 5.

Competency of testimony for other purposes

In proceedings against policeman charged with perjury, transcript of testimony in police court in another case is competent only to show policeman's testimony.—Armstrong v. Board of Civil Service Com'rs of City of Newport, 48 S.W.2d 1055, 243 Ky. 415.

Effect of contradictory statements

Where the evidence of a witness who testified in another case is admitted in evidence in the present case and the witness also testifies in the present case the effect of the evidence given on the trial of the other case will not be destroyed by any contradictions by the witness in the present case, such contradictions merely raising an issue of fact.—Lalakea v. Laupahoehoe Sugar Co., 33 Hawaii 745.

11. N.Y.—Roge v. Valentine, 20 N.E.2d 751, 280 N.Y. 268, reversing 7 N.Y.S.2d 958, 255 App.Div. 475, reargument denied 9 N.Y.S.2d 900, 256 App.Div. 817, reargument denied 21 N.E.2d 695, 280 N.Y. 809.
Previous inconsistent statements as substantive evidence see the C.J.S. title Witnesses § 628, also 70 C.J. p 1153 note 64—p 1155 note 69.

12. Fla.—Habig v. Bastian, 158 So. 508, 117 Fla. 864.
Kan.—Atchison, T. & S. F. R. Co. v. Osborn, 67 P. 547, 64 Kan. 187.
Okl.—Brittain v. Puckett, 48 P.2d 1058, 173 Okl. 422.

Equal dignity

Former testimony is equal, if not superior, to testimony taken by deposition.—King Auto Service v. Hodges, 288 P. 483, 143 Okl. 260.

13. Fla.—Habig v. Bastian, 158 So. 508, 117 Fla. 864.

14. Ga.—Scott v. Powell Paving Co. of North Carolina, 159 S.E. 895, 43 Ga.App. 705.

15. Iowa.—Citizens' State Bank of Earlham v. Martens, 215 N.W. 754, 204 Iowa 1378.

16. Tenn.—Tate v. Tate, 148 S.W. 1042, 126 Tenn. 169—Aiken v. Galyon-Crumley Lumber Co., 1 Tenn. App. 702.
Conclusiveness of admissions see supra §§ 379–381.
Testimony in former case as admission against party on subsequent trial see supra § 311.

against him,[17] even though it is unexplained.[18]

Any discrepancy in the testimony of a witness testifying on different trials of a cause should be resolved in favor of the earlier testimony, the transaction then being fresher in his mind.[19] A party is not bound by the testimony of his witnesses at a former trial where the testimony of other witnesses at a subsequent trial is inconsistent therewith,[20] and he need not explain the testimony of his witnesses at the former trial.[21]

b. Impeachment

Former evidence may be impeached by showing the reputation of the absent witness, but such evidence may not be impeached by showing contradictory statements by such witness.

Former evidence may be impeached by showing that the reputation of the absent witness was bad when the evidence was given,[22] but it is usually held that it cannot be impeached by showing contradictory statements by the former witness.[23]

17. Minn.—Pogue v. Great Northern R. Co., 148 N.W. 889, 127 Minn. 79.
Mo.—Schroeder v. Wells, 298 S.W. 806—Steele v. Kansas City Southern Ry. Co., 257 S.W. 756, 302 Mo. 207—Davidson v. St. Louis-San Francisco Ry. Co., 256 S.W. 169, 301 Mo. 79—Smith v. Producers Cold Storage Co., App., 128 S.W.2d 299—Katz v. North Kansas City Development Co., 14 S.W.2d 701, 223 Mo.App. 606—Guilvezan v. Union of Roumanian Beneficial & Cultural Societies of America, App., 287 S.W. 787—Lambert v. Wells, App., 264 S.W. 37.

18. Mo.—Smith v. Producers Cold Storage Co., App., 128 S.W.2d 299.

19. Colo.—Adams Express Co. v. Ten Winkel, 96 P. 818, 44 Colo. 59.
Mo.—Pulitzer v. Chapman, 85 S.W. 2d 400, 411, 337 Mo. 298, quoting **Corpus Juris.**

20. Mo.—Katz v. North Kansas City Development Co., 14 S.W.2d 701, 223 Mo.App. 606.

21. Mo.—Katz v. North Kansas City Development Co., supra.

22. N.Y.—Losee v. Losee, 2 Hill 609.
Ohio.—Runyan v. Price, 15 Ohio St. 1, 86 Am.D. 459.

23. Ky.—Gatliff Coal Co. v. Hill's Adm'r, 92 S.W.2d 56, 62, 263 Ky. 309, citing **Corpus Juris.**
22 C.J. p 443 note 9.

WORDS AND PHRASES
AND
MAXIMS
IN THIS VOLUME

	Page
Æsthetic education	182
Estate	1
Estatuto	181
Est autem vis legem simulans	181
Est boni judicis ampliare jurisdictionem	181
Est boni judicis ampliare justiciam, non jurisdictionem	181
Estelionato	181
Estendard	181
Estendart	181
Est enim aliquid quod non oporteat, etiam si licet. Quidquid vero non licet, certe non oportet	181
Est enim juris civilis species consuetudo; enimvero, diuturna consuetudo pro jure et lege, in his, quæ non ex scripto descendunt observari, solet. Maxime autem probatur consuetudo ex rebus judicatis	181
Est enim jus quod lex constituit	181
Est enim obligatio quasi contraligatio	181
Ester	182
Esterilidad	182
Ester in judgment	182
Estero	182
Est etiam, ubi profecto damnum præstet facere, quam lucrum	182
Esthetic	182
Estilicidio	182
Estilo	182
Estimación	182
Estimate	182
Estimated	184
Estimation	185
Estipendario	185
Est ipsorum legislatorum tanquam viva vox; rebus et non verbis legem imponimus	185
Estipulación	185
Estirpe	185
Est jus publicum quod ad statum reipublicæ pertinet	185
Est nihil aliud præsumptio quam opinio ex probabili ratiocinatione concepta	185
Estop	185
Estoque	466
Estoveria sunt ardendi, arandi, construendi, et claudendi	466
Estoveriis habendis	466
Estovers	466
Est pœna pecuniaria, sicut corporalis, et quælibet pœna corporalis, quamvis minima, major est qualibet pœna pecuniaria	466
Est quiddam perfectius in rebus licitis	466
Estrays	466
Estreat	466
Estreciatus	467
Estrepe	467
Estrepement	467
Estricto	467
Estuary	467
Est un maxime en nostre ley "parols pout ple"	467
Estupro	467
Et	467
Etablissement	469
Et cætera	467
Et cetera	467
Etching	469
Et cum duo jura in una persona concurrunt, æquam est ac si essent in diversis	469

	Page
Et est pactio duorum plerumque in idem placitum consensus	469
Ethical preparation	469
Ethics	469
Ethiopian	469
Ethylene glycol	469
Et impotentia excusat legem	469
Et in jure, non remota sed proxima causa spectatur	469
Et in majore summa, continetur minor	470
Etiquette of the profession	470
Et lex plus laudatur, quando ratione probatur	470
Et sicut ad quæstionem juris non respondent juratores, sed judices; sic ad quæstionem facti non respondent judices, sed juratores	470
Et ubi eadem est ratio, idem est jus	470
Eu	470
Eucaine	470
Euchre	470
Eum, qui nocentem infamavit, non esse bonum æquum, ob eam rem condemnari; peccata enim nocentium nota esse, et oportere et expedire	470
Eundo et redeundo	470
Eundo, morando, et redeundo	470
Eunomy	470
Eunuch	470
Euphemism	470
Euquinine	470
Europe	470
European plan	470
Evade	470
Evangelical	470
Evangelist	470
Evaporation	471
Evasio	471
Evasion	471
Evasive	471
Evasive answer	471
Eve	471
Even	471
Evening	472
Evenly balanced	472
Event	472
Eventual	474
Eventually	474
Eventus est qui ex causa sequitur; et dicitur eventus quia ex causis evenit	474
Eventus varios res nova semper habet	474
Ever	474
Evergreen	474
Every	474
Every man must be taken to contemplate the probable consequences of the act he does	475
Everyone	475
Everything	475
Everywhere	475
Eviccion	475
Evict	476
Evicted	476
Eviction	476
Evidence	476
Fortuitous event	473
Standard	181

INDEX TO
ESTATES

Abandonment, life estates, extinguishment by, § 65, p. 78
Abolition, estates tail, statutory provisions, § 29
Acceleration,
  Executory interests, § 122, p. 140
  Remainders, § 82
    Personal property, § 139
Acceptance, life estates, offer to convey, § 32
Accounting,
  Executory interests in personal property, relief by way of, § 144, p. 177
  Life estates, requirement of, § 62
  Remaindermen, § 85
  Remainders,
    Burden of proof in action of, § 102
    Limitations applicable in action for, § 99, p. 121
Accretions, life estates, rights as to, § 41
Accumulation of income, life estates in personal property, rights as to, § 136, p. 161
Acquiescence, life estates, sale or conveyance of, § 51
Act of God,
  Conditions impossible because of, performance excused, § 20, p. 34
  Destruction of building on life estate resulting from, liability as to, § 43, p. 55
  Life estate terminated by, crops planted prior to termination of estate, § 40
Actions,
  Executory interests, personal property, post
  Life tenants,
    Actions by or against, § 67, pp. 85–88
    Personal property, § 133
  Limitation of actions, post personal property, post
  Remaindermen, actions by or against, §§ 97–104, pp. 114–125
  Reversioners, §§ 111–118
    Pleadings, § 115
Administration of estates, life tenant as liable for expense of, § 49
Administrators. Executors and Administrators, post
Adopted children, vested remainders to members of class, opening to let in, § 73
Adverse possession,
  Estates tail, barring entail by, § 27
  Life estates, § 66, pp. 82–85
    Personal property, § 134, p. 154
  Remainders,
    Limitations applicable, § 99, p. 120
    Parties to suit by remaindermen to recover against adverse claimants, § 100
  Reversions, § 109
Adversity, estate as signifying, § 1, p. 8
Agreements,
  Life estates,
    Power to make agreements with respect to, § 56
    Present value fixed by, § 36
Agreements—Continued.
  Life estates—Continued,
    Termination by, § 65, p. 78
Alienation,
  Conditional fee, effect of, § 11
  Contingent remainders, § 88, p. 101
  Element of, § 2
  Estates tail, power of, § 26
  Executory interests, § 122, p. 140
  Expectancy, estates in, § 15
  Fee simple estate, § 8, p. 18
    Element of, § 8, p. 20
  Life estates, § 33
    Personal property, § 137
    Right of life tenant, § 51
  Reversions, § 108
  Vested remainders, § 88, p. 100
Alternates, contingent remainders, § 75
Alternative limitations, executory interests, § 121, p. 135
Annuity, term as including, § 2
Appointment, contingent remainder as remainder subject to power of, § 72
Assessments, life estates, liability for, § 47, pp. 59–63
Assignment,
  Contingent remainders, personal property, § 142
  Determinable fee as subject to, § 10, p. 24
  Executory interests, right to assign, § 122, p. 140
  Life estates, § 50
    Personal property, § 137
Attachment,
  Interest in property as comprehending, § 1, p. 11
  Remainders, levy on under, § 86
Attorney's fees, life estates, allowance in proceedings for sale or conveyance of, § 53
Bar, estates tail, § 27
Bargain and sale,
  Contingent remainders, conveyance by operating as destruction of, § 92
  Estates tail, barring entail by, § 27
  Executory interest created by deed of, § 121, p. 136
Base fee,
  Classified, § 10, pp. 22–25
  Fee simple applied to, § 8, p. 18
  Incidents of, § 10, p. 23
  Qualification annexed to, § 10, p. 23
  Statute quia emptoris as not doing away with, § 10, p. 25
Beneficial property right, interest as denoting, § 1, p. 10
Bill quia timet, vested remainders, resort to equity by bill, § 144, p. 177
Bills of sale, quasi remainder in personal property, creation by, § 139
Birth of issue,
  Conditional fee,
    Alienation before, § 11

Birth of issue—Continued,
Conditional fee Continued,
Effect of, § 11
Executory interests, limitation over on failure of issue, § 121, p. 134
Botes, life estates, rights as to, § 39
Breach of conditions, reverter of title as result of breach of condition subsequent, § 20, p. 33
Buildings, life estates, removal or destruction of as waste, § 43, p. 54
Burden of proof,
Executory interests in personal property, evidence relating to, § 144, p. 180
Remaindermen, actions by or against, § 102
Reversions, actions relating to, § 116
Business, term as including, § 1, p. 10
Case, action of, injury to interest in reversion, § 113
Certainty,
Executory interests, § 122, p. 136
Vested remainders as implying, § 69
Change in grade, life estates, damages as recoverable for by life tenant, § 67, p. 86
Character, estate as including, § 1, p. 8
Charges,
Life estates,
Burden of proof as to, § 102
Liability for, § 48
Charitable uses, statute of, barring estates tail, § 27
Charles, life estates, receivers in case of failure to pay, § 64
Children,
Estates tail, heirs of body as meaning children, § 21
Meaning of within rule in Shelley's Case, § 4
Remainders, limiting to class consisting of, § 73
Choses in action, term as including, § 2
Classes, remainders, limitation to, § 73
Classification, §§ 5–20, pp. 13–35
Base fee, § 10, pp. 22–25
Condition, estates on, § 20, pp. 30–35
Conditional fee, §§ 9, 11
Connection of tenants, regard to, § 16
Contingent estate, § 5, p. 14
Contingent remainders, § 71
Copyhold estate, § 12
Determinable fee, § 10, pp. 22–25
Enjoyment, regard to time of, §§ 13–15
Equitable estate or interest, § 5, p. 16
Estates tail, § 23
Executory limitations, § 121, pp. 133–136
Expectancy, estates in, § 15
Fee simple, § 8, pp. 18–22
Freehold,
Estate of, § 7
Estates less than, § 12
Future estates, § 121, p. 136
Gage, estates in, § 20, p. 31
Implied condition, estates on, § 20, p. 30
Inheritance, estate of, § 7
Legal estate or interest, § 5, p. 16
Life estates, § 31
Limited fee, § 9
Number of tenants, regard to, §§ 16–18
Pledge, estates in, § 20, p. 31
Plurality, estates in, § 18
Classification—Continued,
Qualifications of interest, regard to, §§ 19, 20, pp. 30–35
Qualified fee, § 10, pp. 22–25
Quantity of interest, regard to, §§ 6–12, pp. 16–27
Severalty, estates in, § 17
Time of enjoyment, regard to, §§ 13–15
Vadio, estates in, § 20, p. 31
Vested estate, § 5, p. 14
Coal lands, wrongful mining and removal of coal, damages recoverable by reversioner, § 118
Collateral limitation, defined, § 120
Common law,
Abrogation of, statutory provisions, § 3
Conditional limitations as having no existence at, § 119
Conditional limitations as not recognized by, § 20, p. 35
Contingent remainders, release to reversioner or tenant in possession, § 88, p. 103
Executory interests, personal property, recognition of, § 138
Executory interests as having no existence at, § 119
Fee simple at, § 8, p. 19
Forfeiture of estate at, § 65, p. 80
Freehold estate at, § 7
Future interests, recognition of, § 133
Interest in property, § 1, p. 10, n. 49
Life estates,
Apportionment of rent on death of life tenant during period of lease, § 41
Personal property, § 133
Personal property, life estate in, § 133
Possibility of reverter at, § 105
Remainders,
Nature of, § 68
Principles as governing, § 84
Waste, life tenant's liability for, § 43, p. 52
Widowhood, estate for, § 20, p. 32, n. 52.
Common recovery,
Contingent remainders, conveyance at common law by, § 88, p. 104
Estates tail, bar by fictitious proceeding called, § 27
Comparison, conditions precedent and subsequent, § 20, p. 32
Condition in life, estate as signifying, § 1, p. 8
Conditional fee,
Alienation, effect of, § 11
Classification, § 11
Classified, § 9
Debts, liability for, § 11
Defined, § 11
Fee simple applied to, § 8, p. 18
Forfeiture, treason, § 11
Liability for debts, § 11
Remainders, limitation on, § 78
Conditional limitations,
Defined, § 120
Estate resulting, § 20, p. 35
Executory interest created by deed as, § 120
Conditions,
Estates on, classification, § 20, pp. 30–35
Fee simple, estate of inheritance without conditions, § 8, p. 18

Conditions—Continued,
Limitations distinguished, § 20, p. 34
Merger of estate, § 125
Requisites of conditions annexed to estate, § 20, p. 34
Vested remainders, § 69
Conditions precedent, estates on, classification, § 20, p. 30
Conditions subsequent,
Breach of condition, limitations over on as conditional limitation, § 120
Contingent remainders, § 71
Estates on, classification, § 20, p. 30
Fee simple estate as not subject to, § 8, p. 20
Vested remainders, § 69
Connection of tenants, classification with regard to, §§ 16–18
Consideration, freehold to begin in futuro, estate created as dependent on, § 121, p. 136
Construction,
Remainders, § 83
Statute of uses, § 119
Constructive possession, remainders, rights of remaindermen as to, § 85
Consumable goods, life estate in, security as necessary on taking possession, § 134, p. 156
Contingency,
Estates tail, defeating by happening of, § 21
Life estate made to depend on, § 30
Life estates, termination by happening of, § 65, p. 79
Contingent disseizin of tenant of particular estate as destruction of, § 92
Contingent estate,
Classification as, § 5, p. 14
Future estates, § 15
Contingent interest,
Legislative power to direct creation or divestiture, § 3
Term interest as applied to property as including, § 5, p. 15
Contingent remainderman, injunction at instance of § 61
Contingent remainders, §§ 70–75, pp. 90–93
Acceleration, doctrine as inapplicable to, § 82
Actions by or against remaindermen,
Parties to, § 100
Right of action, § 98, p. 114
Alienation of, § 87; § 88, p. 101
Alternates, creation as to, § 75
Appointment, remainder subject to power of, § 72
Assignment, personal property, § 142
Attachment, liability to, § 86
Bargain and sale, conveyance by as destruction of, § 92
Characteristics, § 72
Class, limiting to, § 73
Classification, § 71
Common recovery, conveyance at common law by, § 88, p. 104
Construction of, § 83
Conveyance of, § 88, p. 102
Destruction by, § 92
Cross-remainders, § 74
Damages, right of remaindermen to sue for, § 98, p. 114
Contingent remainders—Continued,
Defined, § 71
Destruction of, § 91
Equitable relief, § 92
Exercise of power conferred by will, § 92
Merger, § 93
Nature of contingency, § 94
Statutory provisions preventing, § 95
Determination of preceding particular estate, destruction by, § 91
Devise of, § 88, p. 103
Distinguished from vested remainders, § 69
Double contingency, § 75
Double possibility, contingency involving as invalidating, § 94
Equitable relief, destruction of, § 92
Equity, relief in, § 98, p. 116
Executory limitations distinguished, § 122, p. 136
Executory remainders, status as, § 70
Feoffment with livery of seizin, destruction by, § 92
Fine, conveyance at common law by, § 88, p. 104
Foreclosure of mortgage on, § 90
Illegal contingency, validity in case of, § 94
Interest in land, § 72
Judicial sale of, § 89, p. 104
Limitations, § 71
Merger, destruction by, § 93
Mortgage of, § 90
Personal property,
Determination of, § 139
Transfer of, § 142
Possibility of defeasance as transforming vested remainder into, § 139
Possibility on possibility, contingency involving as invalidating, § 94
Preservation of, § 96
Protection of, § 96
Quality of interest, alteration in as not defeating, § 81
Quantity of interest, alteration in as defeating, § 81
Quieting title, maintenance of suit against remaindermen, § 98, p. 117
Remoteness, validity in case of, § 94
Repugnancy to law, validity in case of, § 94
Revival after destruction of, § 91
Statutory provisions,
Conveyance of, § 88, p. 103
Destruction of, § 95
Limiting to class, § 73
Raising to dignity of estate, § 72
Substitute, creation as to, § 75
Successive contingent remainders, validity of, § 94
Tortious alienation, destruction by, § 92
Trust estates, preservation by, § 96
Waste, right to recover for, § 98, p. 115
Contingent use, defined, § 120
Contract,
Establishment of estate by, § 3
Life estates, power to contract with respect to, § 56
Contribution,
Life estates,
Life tenant paying off principal of encumbrance, § 48, p. 64

Estates tail—Continued,
Personal chattels, entailing of, § 25
Possibility of issue extinct, § 28
Provisions in instrument creating entail, barring entail under, § 27
Redemption, sale of equity of as barring entail, § 27
Remainders, limitation after, § 78
Reversionary interest, § 21
Status, § 22
Statutory abolition or modification, § 29
Treason, forfeiture for, § 26
Estoppel,
Life estates,
Lease of, § 54
Sale or conveyance of, § 51
Remaindermen, repudiation of sale by life tenant, § 99, p. 121
Estovers, life estates, right to, §§ 33, 39
Evidence.
Burden of proof, ante
Executory interest in personal property, actions relating to, § 144, p. 180
Life estates,
Actions by or against life tenant, § 67, p. 87
Proceedings for sale of, § 52
Remainders, actions by or against remaindermen, § 102
Reversions, actions relating to, § 116
Executed remainders, vested remainder as, § 69
Execution, estates tail, sale under, § 26
Executors and administrators,
Life estates, management and control of property placed in executor by will, § 38
Life estates in personal property, authority to require security before giving possession, § 134, p. 158
Executory interests, §§ 119–122, pp. 131–141
Abridgment of preceding estate, § 122, p. 137
Absolute fee simple, limitations over after, § 121, p. 134
Acceleration, § 122, p. 140
Accounting, personal property, § 144, p. 177
Adverse possession, absolute title as taken by to defeat limitation over, § 122, p. 139
Alienation, § 122, p. 140
Alternative limitations, § 121, p. 135
Effect of failure of, § 122, p. 140
Assignment, § 122, p. 140
Bargain and sale deed creating, § 121, p. 136
Certainty, § 122, p. 136
Characteristics, § 122, pp. 136–141
Classes of, § 121, pp. 133–136
Collateral limitations, § 120
Conditional limitations, creation by deed, § 120
Contingent remainder distinguished, § 122, p. 136
Contingent use, § 120
Covenant to stand seized, § 121, p. 136
Death of first taker, effect of, § 122, p. 139
Defeasible fee, alienation of fee subject to limitations, § 122, p. 141
Defeasible fee simple, limitations after, § 121, p. 134
Definite failure of issue, limitation over after as valid, § 121, p. 134
Definitions, § 120
Executory interests—Continued,
Depreciation, personal property, § 141, p. 173
Derogation of life estate, gift to take effect in, § 121, p. 135
Derogation of prior fee, fee limited in, § 119
Destructibility, § 122, pp. 136, 138
Devise of, § 122, p. 140
Executory devise as interest created by will, § 120
Devolution, § 122, p. 140
Estates in futuro, § 121, p. 135
Estates tail, limitation over on failure of issue creating, § 121, p. 135
Exemption from power of first taker, § 122, p. 138
Expenses, personal property, § 141, p. 173
Extinguishment, merger as, § 122, p. 139
Failure of issue, limitation over on, § 121, p. 134
Failure of prior gift on gift over, effect of, § 122, p. 139
Failure of gift over on prior gift, effect of, § 122, p. 140
Fee limited after or in derogation of prior fee, § 119
Fee simple, limitation after, § 121, p. 134
Fiduciary relationship, personal property, § 141, p. 170
Freehold to commence in futuro, § 121, p. 135
Future estates, classification, § 121, p. 136
General classification of, § 121, p. 133
Gifts with absolute power of disposal, validity of limitation after, § 122, p. 137
History of, § 119
Impairment of corpus, personal property, § 141, p. 170
Incidents of, § 122, pp. 136–141
Income tax, liability as to, § 141, p. 174
Inheritability, § 122, p. 141
Judicial sale, liability to, § 122, p. 140
Liabilities of owner, personal property, § 141, pp. 169–174
Losses, personal property, § 141, p. 173
Merger,
Extinguishment of, § 122, p. 139
Personal property, § 143
Money, creation of, § 139
Mortgage of, § 122, p. 140
Origin of, § 119
Partial derogation of fee, § 121, p. 134
Perpetuities, rule against as applying, § 122, p. 138
Personal property, §§ 138–144, pp. 165–181
Accounting, § 144, p. 177
Actions relating to, § 144, pp. 176–181
Burden of proof, § 144, p. 180
Evidence, § 144, p. 180
Form of remedy, § 144, p. 176
Limitations, § 144, p. 178
Parties, § 144, p. 179
Pleading, § 144, p. 180
Relief, § 144, p. 181
Right to relief, § 144, p. 176
Time to sue, § 144, p. 178
Trial or hearing, § 144, p. 181
Analogy to remainders of executory devises, § 139
Arrest under writ of ne exeat on removal of property, § 144, p. 178

Executory interests—Continued,
Personal property—Continued,
Burden of proof in actions relating to, § 144, p. 180
Conversion of, § 141, p. 171
Death of life tenant, § 141, p. 172
Depreciation, § 141, p. 173
Equity, right to relief in form of remedy in equity, § 144, p. 176
Evidence in actions relating to, § 144, p. 180
Expenses, § 141, p. 173
Fiduciary relationship, § 141, p. 170
Impairment of corpus, § 141, p 170
Injunction, relief by way of, § 144, p. 177
Investment in real estate, § 141, p. 171
Laches of life tenant barring claim against remainderman, § 141, p. 171
Law actions, right to relief in form of remedy at law, § 144, p. 176
Liabilities of owner, § 141, pp. 169–174
Life tenant as debtor, § 141, p. 171
Losses. § 141, p. 173
Merger, § 143
Ne exeat, § 144, p. 178
Parties to actions relating to, § 144, p. 179
Pleading in actions relating to, § 144, p. 180
Possession of, § 141, p. 171
Principles applicable to, § 139
Receivers, § 144, p. 178
Recognition of, § 138
Reversionary interests, § 140
Rights of owner, § 141, pp. 169–174
Sale of property and investment of proceeds, § 141, p. 170
Sequestration, § 144, p. 178
Specific performance, § 144, p. 177
Termination of preceding estate, effect of, § 141, p. 171
Transfer of interest, § 142
Trial of actions relating to, § 144, p. 181
Trustee relationship, § 141, p. 169
Waste, § 141, p. 170
Persons not in esse, limitations to, § 121, p. 136
Possession, personal property, § 141, p. 171
Possibility coupled with interest, § 122, p. 136
Power of disposal, limitation after gift with, § 122, p. 137
Prior estates, effect of failure of, § 122, p. 139
Prior executory interests, taking effect of, § 122, p. 140
Protection against waste, § 122, p. 136
Real property, classification of, § 121, p. 134
Receivers, personal property, § 144, p. 178
Remainders, creation of interests operating in analogy to, § 139
Remoteness, gift over void for, § 122, p. 140
Repugnant contingency, limitation on, § 122, p. 137
Restraint on alienation, contingency involving, § 122, p. 137
Reversions, personal property, § 140
Rights of owner, personal property, § 141, pp. 169–174
Rule against perpetuities, application of, § 122, p. 138
Shifting use, § 120
Springing use, § 120
Executory interests—Continued,
Statute of uses, § 119
Term interest including as applied to property, § 5, p. 15
Termination of preceding estate, personal property, § 141, p. 171
Transfer of, personal property, § 142
Trustee relationship, personal property, § 141, p. 169
Validity of limitations, § 122, p. 136
Waste,
Personal property, § 141, p. 170
Protection against, § 122, p. 136
Wills, creation by, § 120
Executory limitations,
Expectancy, estate in, § 15
Fee simple estate, § 8, p. 20
Executory remainders, contingent remainders as, § 70
Expectancy,
Alienation of estates in, § 15
Classification of estates in, § 15
Contingent remainder as, § 139
Descent of estates in, § 15
Term as applied to rights in, § 1, p. 9
Vested interest as not one creating mere expectancy, § 5, p. 16, n. 34
Expectation, freehold estate, § 7
Expenses,
Executory interests, personal property, § 141, p. 173
Life estates, liability in respect of, § 49
Express condition, estates on, classification, § 20, p. 31
Extent of interest,
Estate in land as, § 1, p. 8
Fee simple estate, § 8, p. 19
Extinguishment, reversion, §§ 109, 110
Fee,
Conditions annexed to, § 20, p. 30
Interest in property as comprehending estate in, § 1, p. 11
Power of disposition distinguished, § 8, p. 19
Term as applied to land as not necessarily importing, § 1, p. 9
Fee in abeyance, freehold estate, § 7
Fee simple,
Alienation, right of as essential element, § 8, p. 20
Alienation of estate, element of, § 8, p. 18
Application of term, § 8, p. 18
Base fee, term applied to, § 8, p. 18
Classification as, § 8, pp. 18–22
Common law, § 8, p. 19
Condition subsequent to,
Defeat of estate by nonperformance, § 20, p. 32
Estate as subject to, § 8, p. 20
Conditional fee, application of term to, § 8, p. 18
Control of other persons, restraint as to, § 8, p. 21
Convertible term, § 8, p. 18
Debts of owner, liability for, § 8, p. 20
Defined, § 8, p. 18
Descent of estate in, § 8, p. 20
Determinable fee, term applied to, § 8, p. 18
Determinable fee converted into, impossible contingency, § 10, p. 23
Equitable estate, § 8, p. 19

Fee simple—Continued,
Executory limitations, estate as not subject to, § 8, p. 20
Executory limitations after, § 121, p. 134
Incidents of, § 8, p. 19
Indefeasible title or estate, § 8, p. 20
Legal estate, § 8, p. 19
Limitations, estate as not subject to, § 8, p. 20
Limited restraint on alienation, validity of, § 8, p. 21
Nature of estate, § 8, p. 19
Partial restraint on alienation, validity of, § 8, p. 21
Particular persons, restraint on alienation to as valid, § 8, p. 21
Partition, prohibition against as restraint on alienation, § 8, p. 22
Perpetuity, absolute estate in, § 8, p. 20
Reasonable restraints on alienation, § 8, p. 21
Remainders,
Joint conveyance by remaindermen and life tenants, § 88, p. 100
Limitation on, § 78
Repurchase, restraint as to as valid, § 8, p. 22.
Restraints on alienation, validity of, § 8, p. 21
Rule in Shelley's Case, § 4
Synonymous terms, § 8, p. 18
Tenant in tail, conveyance of, § 26
Title, § 8, p. 20
Fee simple absolute, estate to which applied, § 8, p. 19
Fee simple defeasible, executory limitation after gift of, validity, § 122, p. 137
Fee tail,
Estates tail, ante
Rule in Shelley's Case, § 4
Felony, estates tail as liable to forfeiture for, § 26
Fences, life estates, right to take wood from off land for, § 39
Feudal system,
Fee held by ordinary feudal tenure, ecclesiastical tenure of frankalmoign, § 8, p. 19
Tenant paravail under, § 1, p. 11
Feudal tenure, merger, doctrine as originating from principles of, § 123
Financial status, term as used to denote, § 2
Fine,
Contingent remainders, conveyance at common law by, § 88, p. 104
Estates tail, bar by, § 27
Firewood, life estates, right of life tenant to cut timber for, § 43, p. 53
Flocks, life estate in, right to increase, § 135
Forfeiture,
Conditional fee, treason, § 11
Life estates, § 65, p. 80
Formedon in remainder, remaindermen, recovery of property by, § 98, p. 116
Frankalmoign, ecclesiastical tenure of, fee held by ordinary feudal tenure distinguished, § 8, p. 19
Fraud,
Remainders,
Burden of proof where remainderman alleges, § 102
Sale or conveyance of, § 88, p. 101
Freehold,
Classification of estate of, § 7
Estates less than, classification, § 12
Life estates, § 30
Term as applied to land as not necessarily importing, § 1, p. 9
Fuel, life estates, right of life tenant to take wood from off land for, § 39
Funeral expenses, life estates, liability for, § 33
Future enjoyment, vested estates as having present fixed right of, § 5, p. 14
Future estates,
Classification of, § 121, p. 126
Limitations, § 15
Term as applying to, § 1, p. 9
Future interests, personal property, §§ 138–144, pp. 165–181
Gage, estates in, classification, § 20, p 31
Gas wells, life tenant's right to work, § 42
General grant, life estates, creation by, § 32
General tenancy, defined, § 1, p. 11
Gifts, life estates, personal property, § 137
Guardian and ward, life estates, allowance to guardian for services in connection with sale or conveyance of, § 53
Heirs,
Distinguished, § 1, p. 9
Rule in Shelley's Case limiting estate as to, § 4
Heirs of body,
Conditional fee, restraining fee as to, § 11
Estates tail as going to, § 21
Rule in Shelley's Case limiting estate to, § 4
Herds, life estate in, right to increase, § 135
History, executory interests, § 119
Husband and wife,
Life estates,
Crops planted by husband of life tenant prior to death of wife, § 40
Disability attaching to life tenant to assert title against remainderman as attaching to wife, § 35
Surrender by abandonment of husband by wife or remarriage, § 65, p. 80
Illegitimate children, vested remainders to members of class, opening to let in, § 73
Implication, life estates, creation by, § 32
Implied condition, estates on, classification, § 20, p. 30
Impossible contingency, determinable fee converted into fee simple in case of, § 10, p. 23
Improvements,
Life estates,
Recovery for, § 45, pp. 56–59
Right to take wood from off land for, § 39
Incidents, § 2
Base fee, § 10, p. 23
Condition subsequent, estates on, § 20, p. 33
Determinable fee, § 10, p. 23
Estates tail, § 26
Executory interests, § 122, pp. 136–141
Fee simple estate, § 8, p. 19
Alienation, § 8, p. 20
Life estates, § 33
Qualified fee, § 10, p. 23
Remainders, § 68

Income,
Estate as including, § 1, p. 8
Life estates,
Personal property, rights as to, § 136, p. 161
Rights as to, § 41
Income tax, executory interests, liability for, § 141, p. 174
Incorporeal hereditaments, estates less than freehold as interest in, § 12
Increase, reproductive property, life estate in, § 135
Indefeasible title, fee simple estate, § 8, p. 20
Indeterminate duration, freehold estate as estate of, § 7
Infants, remainders, judicial sales, § 89, p. 105
Ingress and egress, life estates, right of emblements as carrying right of, § 40
Inheritance,
Damages recoverable by reversioner for injuries to, § 118
Estate by, life estates as result of freehold not of inheritance, § 7
Estate of,
Base fee, § 10, p. 24
Classification, § 7
Curtesy, fee conditional as subject to, § 11
Determinable fee, § 10, p. 24
Dower, fee conditional as subject to, § 11
Estates tail as, § 21
Life estate as, § 30
Pur autre vie, § 31
Qualified fee, § 10, p. 24
Injury to, evidence in action by reversioner, § 116
Injunction,
Executory interests in personal property, relief by way of, § 144, p. 177
Life estates, prevention of threatened injury to remainder, § 61
Remainders, relief by way of, § 98, p. 116
Instructions, remaindermen, actions by and against, § 104
Insurance,
Life estates,
Liability as to, § 46
Termination by failure to maintain, § 65, p. 79
Intention,
Life estates in personal property, security on taking possession as dependent on, § 134, p. 156
Meaning of term as dependent on, § 1, p. 8
Merger,
Application of doctrine in accordance with, § 124, p. 144
Legal and equitable estate, § 128
Possession, life estates, personal property, § 134, p. 152
Interest, meaning as applied to property, § 1, p. 10
Interest in land, contingent remainder as, § 72
Interest in property,
Classification with regard to qualifications of, §§ 19, 20, pp. 30–35
Equitable estate as, § 5, p. 16
Term as referring to, § 2
Inventory,
Life estates,
Personal property, § 134, p. 154
Right of remainderman to require, § 58
Investment, life estates, personal property, § 135
Issue,
Conditional fee, estate as fee simple on condition of having issue, § 11
Estates tail, heirs of body as meaning lawful issue, § 21
Executory interests, limitation over on failure of issue, § 121, p. 134
Possibility of extinct, estates tail after, § 28
Joint tenancy,
Cross-remainders, rule as not operating in case of, § 74
Estates in, § 18
Judgment,
Remaindermen, actions by and against, § 104
Reversions, actions relating to, general rules applicable, § 117
Judicial construction, life estates created by, § 32
Judicial sales,
Executory interests, § 122, p. 141
Life estates,
Purchaser of life estate at as required to give bond for delivery of property, § 59
Termination by, § 65, p. 78
Remainders, § 89, pp. 104–107
Personal property, § 142
Jury questions, actions by or against life tenant, § 67, p. 87
Laches,
Remaindermen, action by or against, § 99, p. 121; § 144, p. 179
Reversions, actions relating to, § 112
Land tenant, defined, § 1, p. 11
Landed estate, defined, § 1, p. 9
Law actions, executory interests, personal property, right to relief in form of remedy at law, § 144, p. 176
Law questions, actions by or against life tenant, § 67, p. 87
Lay fee, defined, § 8, p. 19
Lease,
Estates tail, bar by, § 27
Life estates, § 54
Creation by, § 32
Rents as belonging to life tenant, § 41
Legal and equitable estates, merger, § 128
Legal estate,
Fee simple, § 8, p. 19
Life estates, creation by operation of law, § 31
Legal interest, vested estate, § 5, p. 16
Legal rights, interest in property as including, § 1, p. 10
Legal title, life tenant as possessing, § 30
Liens,
Distinguished, § 1, p. 9
Life estates,
Payment of encumbrance by life tenant, § 48, p. 64
Remainderman paying taxes as having, § 47, p. 61
Life estates, §§ 30–67, pp. 39–88
Abandonment, extinguishment by, § 65, p. 78
Acceptance of offer to convey, § 32
Accounting, requirements as to, § 62
Accretions, rights as to, § 41
Accumulation of income, personal property, § 136, p. 161

Life estates—Continued,
Acquisition of outstanding title or claim, § 35
Actions by or against life tenant, § 67, pp. 85–88
Administration expenses, liability for, § 49
Adoption of lease of by remainderman, continued occupation by lessee as not amounting to, § 54
Adverse possession, § 66, pp. 82–85
Personal property, § 134, p. 154
Agreement,
Power to make agreements with respect to, § 56
Present value, fixing by, § 36
Termination by, § 65, p. 78
Agricultural erections, right to take wood from off land for, § 39
Alienability, § 33
Alienation,
Breach of covenant against as terminating, § 65, p. 79
Personal property, § 137
Alienation of interest, rights of life tenant, § 51
Apportionment of expense of improvements, § 45, p. 58
Apportionment of rent on death of life tenant during rent period, § 41
Appreciation in principal, remainderman as entitled to, § 41
Assertion of title against remainderman, disability attaching to, § 35
Assessments, liability for, § 47, pp. 59–63
Assignment of, § 50
Base or determinable fee distinguished, § 10, p. 25
Botes, rights as to, § 39
Breach of covenant, termination by, § 65, p. 79
Buildings, removal or destruction of as waste, § 43, p. 54
Capital of, rights as to, § 41
Change in grade, life tenant as authorized to recover damages for, § 67, p. 86
Charges,
Burden of proof as to, § 102
Liability for, § 48
Receiver in case of failure to pay, § 64
Classification, § 31
Consumable goods, security as necessary on taking possession, § 134, p. 156
Contingency, dependency on, § 30
Contingency on happening of, § 65, p. 79
Contracts, power to contract with respect to, § 56
Contribution,
Life tenant paying principal of encumbrance, § 48, p. 64.
Recourse of life tenant paying assessment for public improvement, § 47, p. 63
Conventional estate, § 31
Corporate stock, increase of, § 136, p. 163
Creation, § 32
Crops, rights as to, § 40
Cultivation, right to remove timber to reduce land to, § 43, p. 54
Damages, recovery of by life tenant, § 67, p. 88
Danger of loss or injury, personal property, security in case of, § 134, p. 156

Life estates—Continued,
Death of life tenant,
Lease as affected by, § 54
Termination by, § 65, p. 78
Death of life tenant during lease of premises, rights as to rents, § 41
Debts, liability for, § 48
Debts of life tenant, liability for, § 33
Deed, creation by, § 32
Definition, § 30
Deterioration, liability for, § 49
Disclaimer, forfeiture for, § 65, p. 81
Disposition, power of life tenant, § 34
Distinctions, base or determinable fee, § 10, p. 25
Dower right as merging in widow in possession as life tenant, § 130
Duration, § 30
Present value calculated according to, § 36
Easements, right of action for interference with, § 67, p. 86
Ejectment, recovery by life tenant in action of, § 67, p. 86
Emblements, rights as to, § 40
Encumbrances,
Liability for, § 48
Life tenant as purchaser at sale to satisfy, § 35
Right to encumber, § 55
Enjoyment,
Life tenant's right of action for injury occasioned to, § 67, p. 86
Right of, § 38
Equity,
Jurisdiction to order mortgage of, § 55
Protection of rights of remaindermen, § 60
Estoppel, lease by way of, § 54
Estovers, § 39
Right to, § 33
Evidence, actions by or against life tenant, § 67, p. 87
Executors and administrators, management and control of property placed in by will, § 38
Expenses, liability in respect of, § 49
Express words, creation by, § 32
Fact questions, actions by or against life tenants, § 67, p. 87
Fences, right to take wood from off land for, § 39
Firewood, right of life tenant to cut timber for, § 43, p. 53
Foreclosure sale, termination by, § 65, p. 78
Forfeiture, § 65, p. 80
Freeholds not of inheritance, § 7
Fuel, right to take wood from land for, § 39
Funeral expenses, liability for, § 33
Gas wells, life tenant's right to work, § 42
General grant, creation by, § 32
Herds, right to increase, § 135
Holding over of by lessee on death of life tenant, § 54
Husband and wife, surrender by abandonment of husband by wife or remarriage, § 65, p. 80
Impairment of estate in remainder, § 34
Impeachment for waste, § 43, p. 51
Implication, creation by, § 32
Improvements,
Recovery for, § 45, pp. 56–59
Right to take wood from off land for, § 39

Life estates—Continued,
Incidents, § 33
Income,
Life tenant as entitled to, § 41
Personal property, rights as to, § 136, p. 161
Ingress and egress, right to emblements as carrying right of, § 40
Inheritance, status as estate of, § 30
Injunction, protection of interest of remainderman by, § 61
Insurance,
Liability as to, § 46
Termination by failure to maintain, § 65, p. 79
Interest, money, § 136, p. 163
Inventory, right of remainderman to require, § 58
Inventory as essential, personal property, § 134, p. 154
Judicial construction, creation by, § 32
Judicial sales,
Purchaser of life estate at as required to give bond for delivery of property, § 59
Termination by, § 65, p. 78
Jury questions, actions by or against life tenant, § 67, p. 87
Law questions, actions by or against life tenant, § 67, p. 87
Lease, § 54
Creation by, § 32
Lease of property, rights as to rents, § 41
Legal estates, creation by operation of law, § 31
Legal title, life tenant possessing, § 30
Liabilities of life tenant, §§ 37–53, pp. 46–72
Liens,
Payment of encumbrance by life tenant, § 48, p. 64
Remainderman paying taxes, § 47, p. 61
Live stock, increase of, § 136, p. 163
Losses, liability for, § 49
Merger, § 126
Dower right of widow in possession, § 130
Termination by, § 65, p. 79
Mines,
Right of life tenant to work, § 42
Timber for working of, § 39
Money,
Creation in, § 133
Interest on, § 136, p. 163
Possession, § 134, p. 153
Security as necessary on taking possession, § 134, p. 157
Mortgages,
Liability as to, § 48
Right to mortgage, § 55
Nature of, § 30
Notice,
Proceedings for authority to mortgage, § 55
Termination of, § 65, p. 78
Oil or gas wells, life tenant's right to work, § 42
Ordinary expenses, liability for, § 49
Outbuildings, right of life tenant to remove, § 43, p. 54
Outstanding title or claim, acquisition of, § 35
Parties to proceedings by or against life tenant, § 67, p. 86
Partition, recovery by life tenant in suit for, § 67, p. 86
Life estates Continued,
Perishable property,
Possession of, § 134, p. 154.
Security as necessary on taking possession, § 134, p. 156
Permanent improvements, liability to make, § 45, p. 56
Personal property, post
Personal representative, rents due life tenant at death as collectible by, § 41
Pleading, actions by or against life tenant, § 67, p. 87
Possession,
Life tenant's right to sue for injury occasioned to, § 67, p. 86
Personal property, § 134, pp. 152–159
Termination of estate, § 65, p. 81
Possession of estate, rights as to, § 38
Power of disposal, limitations after as valid, § 122, p. 138
Present value of, § 36
Preservation of property, § 34
Liability for repairs necessary for, § 44
Presumptions, possession as not adverse, § 66, p. 83
Privity of contract between life tenant and remainderman, § 34
Profits, rights as to, § 41
Property in which created, § 32
Protection of remainder, remedies for, §§ 57–64
Public improvements, liability for assessment for, § 47, p. 62
Quasi trustee, relation of life tenant to remainderman or reversioner as that of, § 34
Ratification, lease of, § 54
Receivers,
Appointment to collect rents and pay taxes, § 47, p. 61
Appointment with custody of property to protect future estate, § 64
Regulation, § 30
Reimbursement, sale of entire interest for purpose of, § 52
Relation of life tenant to remainderman or reversioner, § 34
Remainderman, relation of life tenant to, § 34
Remainders, limitation on, § 78
Remedies, protection of remainder or reversion, §§ 57–64
Rent free, life tenant as holding estate, § 34
Rents and profits,
Accounting to life tenant for by remainderman obtaining possession before determination of life estate, § 38
Life tenant as entitled to, § 41
Personal property, § 136, p. 161
Renunciation, adverse possession requiring, § 66, p. 83
Repairs,
Liability as to, § 44
Receiver in case of failure to make, § 64
Termination because of failure to make. § 65, § 79
Reproductive property, right to increase, § 135
Residuary fund, interest on, § 136, p. 163
Reversioner, relation of life tenant to, § 34
Rights of life tenant, §§ 37–53, pp. 46–72

Life estates Continued,
Rule in Shelley's Case, § 4
Sale or conveyance, §§ 50–53, pp. 66–72
Acquiescence of remainderman, § 51
Allowances in connection with, § 53
Appearance in proceedings for, § 52
Apportionment of proceeds, § 53
Assignment as transfer of whole interest, § 50
Attorney's fees as recoverable, § 53
Broker's commissions as allowable, § 53
Decree, § 52
Division and disposition of proceeds, § 53
Estoppel as to, § 51
Evidence in proceedings for, § 52
Guardian's fees as recoverable, § 53
Investment of proceeds, § 53
Irregularities in proceedings for, § 52
Life tenant, § 51
Notice of proceedings, § 52
Order of court, § 52
Parties to proceedings, § 52
Payment of debt into court, § 53
Personal property, § 137
Pleading in proceedings for, § 52
Proceeding for, § 52
Public sale as essential, § 62
Ratification of, § 51
Security as required, § 59
Security, necessity of to protect remaindermen, § 59
Security as essential, personal property, § 134, p. 155
Separate actions by life tenant and remaindermen for damages to estate, § 67, p. 86
Slaves, children of, § 136, p. 163
Statutory provisions,
Forfeiture for waste, § 65, p. 81
Lease of, § 54
Sale of interest, § 52
Termination of, § 65, p. 78
Strangers, adverse possession by or against, § 66, p. 84
Subrogation, life tenant paying assessment for public improvement, § 47, p. 63
Surrender, termination by, § 65, p. 79
Taxes,
Acquisition of title adverse to remainderman by life tenant allowing property to be sold for taxes, § 35
Forfeiture for nonpayment of, § 65, p. 81
Liability for, § 47, pp. 59–63
Receiver in case of failure to pay, § 64
Termination by failure to pay, § 65, p. 79
Tenancy in common between life tenant and remainderman, § 34
Tenure between life tenant and remainderman, § 34
Termination, § 65, pp. 78–82
Adverse possession after, § 66, p. 85
Third persons, adverse possession by or against, § 66, p. 84
Timber,
Forfeiture for waste in cutting of, § 65, p. 81
Liability for cutting and removal of, § 43, p. 53
Right to cut for necessary repairs on premises, § 39
Life estates—Continued,
Trespass quare clausum fregit, maintenance of action of by life tenant, § 67, p. 86
Trover, maintenance of action on by life tenant, § 67, p. 86
Trustee, relation of life tenant to remainderman or reversioner as that of, § 34
Unproductive realty, taxes as chargeable to life tenant, § 47, p. 62
Use of property, § 34
Personal property, § 135
Usufruct, termination of, § 65, p. 79
Verbal agreement, creation by, § 32
Waste,
Accounting in case of, § 62
Failure to make necessary repairs as, § 44
Forfeiture for, § 65, p. 80
Injunction to prevent, § 61
Liability for, § 43, pp. 51–55
Neglect to pay taxes as, § 47, p. 62
Parties to suit by remaindermen to forfeit for, § 100
Wills, creation by, § 32
Wood for fuel, tenant for life as entitled to, § 39
Working mines, quarries, etc., § 42
Written surrender, necessity of writing, § 65, p. 80
Life expectancy, present value of life estate, consideration in determining, § 36
Limitation of actions,
Executory interests in personal property, actions relating to, § 144, p. 178
Remainders, actions by or against remaindermen, § 99, p. 118
Reversions,
Actions relating to, § 112
Running of limitations against right, § 109
Limitations,
Conditions distinguished, § 20, p. 34
Contingent remainders, § 71
Fee simple estate as not subject to, § 8, p. 20
Rule in Shelley's Case, § 4
Limited fee, classified, § 9
Lineal heirs, estates tail, requirements as to, § 23
Live stock, life estate in, increase, § 136, p. 163
Losses,
Executory interests, personal property, § 141, p. 173
Life estates, liability for, § 49
Merger, §§ 123–131, pp. 141–150
Abolishment of doctrine, § 124, p. 143
Actualities, doctrine as resting on, § 125
Annihilation of lesser estate under doctrine of, § 123
Application of doctrine, § 123
Conditions essential to, § 125
Curtesy, right of as merging in fee, § 129
Declaration of owners of estates as governing, § 124, p. 146
Derivation of doctrine, § 123
Distinct estates as essential to, § 125
Dower, right of, § 130
Enlargement by accession of preceding estate, § 123
Equitable estates, § 128
Equity, application of rule in, § 124, p. 144
Estates tail, § 131

Merger—Continued,
Executory interests,
Extinguishment by, § 122, p. 139
Personal property, § 143
Extinguishment of lesser estate, § 123
Favoring of doctrine, § 124, p. 143
Feudal tenures, doctrine as originating from principles of, § 123
Foundation for doctrine, § 123
Greater estate as not mergeable into smaller, § 123
Inchoate right of dower, § 130
Intention, application of doctrine in accordance with, § 124, p. 144
Law, doctrine as inflexible at, § 124, p. 143
Legal and equitable estate, § 128
Life estates, § 126
Termination by, § 65, p. 79
Origin of doctrine, § 123
Ownership of estate as affected, § 124, p. 145
Personal property, doctrine as applicable to, § 143
Portion of particular estate, § 123
Possibilities, doctrine as not resting on, § 125
Possibility of reverter as subject to, § 105
Quantity as affected by, § 123
Remainders,
Destruction by, § 93
Estates for years, § 127
Reversions, § 126
Estates for years, § 127
Extinguishment by, § 110
Statement of doctrine, § 123
Validity of greater estate as essential to, § 125
Vested remainders as essential in case of life estates, § 126
Years, estates for, § 127
Mines, life tenant's right to work, § 42
Mining and removing coal from land, damages recoverable by reversioner, § 118
Mixed estate, conditional limitations resulting in, § 20, p. 35
Modification,
Estates tail, statutory provisions, § 29
Leases, life estates, § 54
Money,
Executory interests, creation of, § 139
Life estate in,
Creation of, § 133
Interest on, § 136, p. 163
Possession, § 134, p. 153
Security as necessary on taking possession, § 134, p. 157
Remainders as to, interest as recoverable, § 141, p. 173
Mortgages,
Contingent remainders, § 90
Estates tail, tenant in tail as empowered to execute, § 27
Interest in property comprehending, § 1, p. 11
Life estates,
Liability in respect of, § 48
Right to mortgage, § 55
Remainders, § 90
Redemption from, § 85
Reversions, redemption from, § 107
Vested remainders, § 90
Nature, § 2
Conditions repugnant to, performance of excused, § 20, p. 34
Estates tail, § 21
Fee simple estate, § 8, p. 19
Life estates, § 30
Ne exeat, executory interests in personal property, arrest under writ of, § 144, p. 178
Nonuser, remainders, forfeiture by, § 91
Notice,
Life estates,
Proceedings for authority to mortgage, § 55
Proceedings for sale of, § 52
Termination of, § 65, p. 78
Number of tenants, classification with regard to, §§ 16–18
Occupancy, life estates, tenant pur autre vie, § 31
Occupation, terre-tenant as person in occupation, § 1, p. 11
Office, estate as including, § 1, p. 8
Oil or gas wells, life tenant's right to work, § 42
Ordinary expenses, life estates, liability in respect of, § 49
Origin,
Estates tail, § 22
Executory interests, § 119
Merger, doctrine of, § 123
Outbuildings, life estates, right of life tenant to remove, § 43, p. 54
Outstanding title or claim, life estates, acquisition of, § 35
Ownership,
Interest used to denote, § 1, p. 10
Merger of estates as affecting, § 124, p. 145
Term as signifying condition or circumstance in which owner stands with relation to, § 1, p. 8
Partial restraint on alienation, fee simple estate, § 8, p. 21
Parties,
Executory interests in personal property, actions relating to, § 144, p. 179
Life estates,
Actions by or against life tenant, § 67, p. 86
Proceedings for sale of, § 52
Remaindermen, actions by or against, § 100
Remainders, judicial sales, proceedings for, § 89, p. 106
Reversions, actions relating to, § 114
Partition,
Fee simple estate, prohibition against as restraint on alienation, § 8, p. 22
Life estates, recovery by life tenant in suit for, § 67, p. 86
Vested remaindermen, maintenance of action for, § 98, p. 114
Performance of conditions,
Estates tail, continuance as dependent on, § 21
Fee conditional as becoming absolute by, § 11
Nonperformance of condition precedent, effect of, § 20, p. 31
Perishable property,
Life estate in,
Possession, § 134, p. 154
Security as necessary on taking possession, § 134, p. 156

Perpetuities,
Executory interests, rule against perpetuities as applying, § 122, p. 138
Fee simple as absolute estate in, § 8, p. 20
Personal property,
Contingent remainders, determination of, § 139
Estates in, §§ 132–144, pp. 151–181
Creation of, § 132
Principles governing, § 132
Estates tail, § 25
Executory interest, ante
Future interest in, §§ 138–144, pp. 165–181
Life estate in, § 133–137, pp. 151–165
Accumulation of income, § 136, p. 161
Action by life tenant, § 133
Adverse possession, § 134, p. 154
Alienability, § 137
Alternative appointment of trustees, § 134, p. 158
Assignability, § 137
Bond of life tenant, § 134, p. 155, n. 7
Commutation of interest, § 134, p. 152
Consent of remaindermen to possession without giving of security, § 134, p. 158
Consumption of corpus, § 135
Conversion of property, § 135
Corpus, encroachment on, § 135
Creation of, § 133
Custody of property, § 134, p. 152
Danger of loss or injury, security in case of, § 134, p. 156
Discretion of court, security, § 134, p. 155
Encroachment on corpus, § 135
Encroachment on principal, § 134, p. 154
Enhanced value, rights in respect of, § 136, p. 162
Exchange of, § 137
Executor as authorized to require security before giving possession, § 134, p. 158
Gift of, § 137
Good faith purchasers, § 137
Income, § 136, p. 161
Increase from reproductive property, § 135
Intervention of trustee as unnecessary, § 133
Inventory as essential, § 134, p. 154
Investment, § 135
Land and personal property, § 135
Nature of estate, § 135
Possession, security as essential, § 134, p. 155
Possession of property, § 134, pp. 152–159
Principles governing, § 133
Profits, § 136, p. 161
Purchaser as required to give security, § 134, p. 157
Reinvestment, § 135
Residuary bequest, § 134, p. 153
Right to consume property, § 135
Right to create, § 133
Sale of interest, § 134, p. 152
Sale or conveyance, § 137
Security as essential, § 134, p. 155
Third person purchasing as required to give security, § 134, p. 157
Trustee, alternative appointment of, § 134, p. 158
Use of property, § 135
Personal property—Continued,
Life estate in—Continued,
Waiver of security before taking possession, § 134, p. 158
Quasi remainders in,
Creation of, § 139
Method of creating, § 139
Remainders in, acceleration, § 139
Term as including, § 1, p. 8; § 2
Trust in, creation by parol, § 139
Vested remainder, determination of, § 139
Vesting of estates in, law as favoring, § 138
Personal representatives, life estates, rents due life tenant at time of death as collectible by, § 41
Persons not in esse, executory interests limited to, § 121, p. 136
Pleading,
Executory interests in personal property, actions relating to, § 144, p. 180
Life estates,
Actions by or against life tenant, § 67, p. 87
Proceedings for sale of, § 52
Remaindermen, actions by or against, § 101
Reversions, actions relating to, § 115
Pledge, estates in, classification, § 20, p. 31
Plurality, estates in, classification, § 18
Possession,
Base fee, absolute right to, § 10, p. 24
Determinable fee, absolute right to, § 10, p. 24
Executory interests, personal property, § 141, p. 171
Life estates,
Life tenant's right of action for injury occasioned to, § 67, p. 86
Personal property, § 134, pp. 152–159
Security as essential, § 134, p. 155
Rights as to, § 38
Termination of estate, § 65, p. 81
Remainders, rights of remaindermen as to, § 85
Reversion, right of, § 107
Term as signifying condition in which owner stands with relation to, § 1, p. 8
Terre-tenant as person in actual possession, § 1, p. 11
Vested estates, § 5, p. 14
Vested remainders, § 69
Possessory actions, remaindermen, right to maintain, § 98, p. 115
Possibility of reverter,
Alienation of, § 15
Conditional fee, § 11
Reversion distinguished, § 105
Posthumous child, remainders, defeat of because not in esse at time of determination of particular estate, § 81
Power, life estate coupled with, mortgage of entire estate by life tenant, § 55
Power of disposition,
Executory limitations after gift with, validity, § 122, p. 137
Fee distinguished, § 8, p. 19
Life estates, § 34
Limitation after as valid, § 122, p. 38
Preferences, vested estate, § 5, p. 14
Present value, life estate, § 36
Presumptions, life estates, possession as not adverse, § 66, p. 83

Privity of contract, life tenant and remainderman, § 34
Procedure, life estates, sale or conveyance of, § 52
Property,
Estate as including, § 1, p. 8
Estates tail, right to bar as property, § 27
Interest as synonymous with, § 1, p. 10
Prosperity, estate as signifying condition of, § 1, p. 8
Public improvements, life estates, liability for assessment for, § 47, p. 62
Public policy, conditions contrary to, performance excused in case of, § 20, p. 34
Pur autre vie,
Estate for life of some person other than tenant, § 31
Termination of estate, § 65, p. 79
Purchase,
Estate by,
Defined, § 1, p. 9
Rule in Shelley's Case, § 4
Qualifications of interest, classification with regard to, §§ 19, 20, pp. 30–35
Qualified fee,
Classified, § 10, pp. 22–25
Incidents of, § 10, p. 23
Remainders, limitation on, § 78
Statute quia emptoris as not doing away with, § 10, p. 25
Quantity, classification with regard to, §§ 6–12, pp. 16–27
Quantity of interest,
Contingent remainders, alteration in as defeating, § 81
Estate in land as, § 1, p. 8
Remainders, preceding particular estate, § 78
Vested remainder as implying certainty as to, § 69
Quarries, life tenant's right to work, § 42
Quasi fee, defined, § 8, p. 19
Quasi remainders,
Legal remedies, right of remaindermen to, § 144, p. 176
Personal property,
Creation of, § 139
Method of creating, § 139
Quasi trustee, life estates, relation of life tenant to remainderman or reversioner as that of, § 34
Quieting title, contingent remaindermen, maintenance of suit against for purpose of, § 98, p. 117
Rank, estate as including, § 1, p. 8
Ratification, life estates, sale or conveyance of, § 51
Real property,
Rule in Shelley's Case applying only to, § 4
Term as including, § 1, p. 8
Receivers,
Executory interests, personal property, § 144, p. 178
Life estates,
Appointment to collect rents and pay taxes, § 47, p. 61
Appointment to protect future estate, § 64
Remainders, appointment to collect rents and profits, § 98, p. 117
Redemption,
Estates tail, sale of equity of as barring entail, § 27
Remaindermen, right of, § 85
Redemption—Continued,
Reversioners, right to redeem from mortgage, § 107
Re-entry,
Condition subsequent, re-entry for breach of, § 20, p. 33.
Reversion, right of re-entry for nonperformance of condition as, § 105, n. 39
Reformation of instruments, remaindermen, relief by way of, § 98, p. 117
Regulation, life estates, § 30
Reimbursement, life estates, sale of entire interest for purpose of, § 52.
Reinvestment,
Life estates, personal property, § 135
Remainders, parties to proceedings to sell land for, § 100
Relatives, remainders, limiting to class consisting of, § 73
Remainders, §§ 68–104, pp. 88–125
Acceleration of, § 82
Personal property, § 139
Accounting,
Burden of proof in action for, § 102
Limitations applicable in action for, § 99, p. 121
Accounting between remaindermen, § 85
Actions by or against remaindermen, §§ 97–104, pp. 114–125
Admissibility of evidence, § 102
Burden of proof, § 102
Costs, § 104
Damages, § 103
Decree, § 104
Evidence, § 102
Instructions, § 104
Judgment, § 104
Laches, § 99, p. 121; § 144, p. 179
Limitations, § 99, p. 118; § 144, p. 178
Parties, § 100
Pleading, § 101
Possessory actions, § 98, p. 115
Prematurity, § 144, p. 179
Relief, § 104
Right of action, § 98, pp. 114–118
Sufficiency of evidence, § 102
Torts, § 98, p. 114
Trial, § 104
Adverse possession,
Limitations applicable, § 99, p. 120
Parties to action by remaindermen to recover against adverse claimants, § 100
Attachment, levy on under, § 86
Burden of proof, actions by or against remaindermen, § 102
Children, limiting to class consisting of, § 73
Class, limitation to, § 73
Common law, principles of as governing, § 84
Conditional fee, limitation on, § 78
Construction, § 83
Constructive possession, rights of remaindermen as to, § 85
Contingent remainders, ante
Contribution between remaindermen, § 85
Corporate stock, delivery as unnecessary in case of transfer from remaindermen to life tenant, § 142

Remainders—Continued,
Costs, actions by and against remaindermen, § 104
Creditors of remaindermen, liability to claims of, § 86
Damages, actions by and against life tenant, § 103
Defined, § 68
Delegation of particular estate, limitations as to take effect in, § 80
Destruction, §§ 91–95, pp. 109–113
Act of tenant of particular estate, § 92
Contingent remainders, § 91
Merger resulting in, § 93
Nature of contingency, § 94
Right of action for, § 98, p. 114
Statutory provisions, § 95
Tenant of particular estate, act of, § 92
Determinable fee, limitation on, § 78
Determination of preceding estate, §§ 80–82
Ejectment,
Burden of proof in action of, § 102
Damages in action of by remaindermen, § 103
Limitations applicable, § 99, p. 120
Recovery by remaindermen in action of, § 98, p. 116
Equity, relief in, § 98, p. 116
Estates tail, limitations after, § 78
Estoppel, repudiation of sale by life tenant, § 99 p. 121
Evidence, actions by or against remaindermen, § 102
Executory interests, creation of interest operating in analogy to, § 139
Expectancy, estates in, § 18
Fee simple, limitation on, § 78
Forfeiture, nonuser, § 91
Formedon in remainder, recovery of property by, § 98, p. 116
Fraud,
Burden of proof where remainderman alleges, § 102
Sale or conveyance of, § 88, p. 101
Impairment of estate in remainder, § 34
Incidents of, § 68
Infants, judicial sales of, § 89, p. 105
Injunction, relief by way of, § 98, p. 116
Instructions, actions by and against remaindermen, § 104
Judgment, actions by and against remaindermen, § 104
Judicial sales, personal property, § 142
Liability of remaindermen, § 86
Life estates, limitation on, § 78
Limitations, actions by or against remaindermen, § 99, p. 118
Merger, § 126
Destruction by, § 93
Estates for years merging in, § 127
Misnomer of estate as reversion, effect of in action by remaindermen for injury to estate, § 101
Money, interest on amount as recoverable by remainderman, § 141, p. 173
Mortgage, § 90
Redemption from, § 85
Nature, § 68
Remainders—Continued,
Nonuser, forfeiture by, § 91
Parties,
Actions by or against remaindermen, § 100
Judicial sales, § 89, p. 106
Permanent injuries to land, parties to suit by contingent remaindermen to recover for, § 100
Personal property. Executory interests, ante
Pleadings, actions by or against remaindermen, § 101
Possession, rights of remaindermen as to, § 85
Possessory actions, maintenance of, § 98, p. 115
Posthumous child, defeat of because not in esse at determination of particular estate, § 81
Precedent particular estate, purchaser of remainder as taking subject to rights of owner of, § 88, p. 101
Preceding particular estate, §§ 76–82, pp. 93–96
Determination of, §§ 80–82
Necessity of, § 77
Quantity of, § 78
Simultaneous creation, § 79
Protection of, § 96
Qualified fee, limitation on, § 78
Quantity of interests, preceding particular estate, § 78
Quieting title, maintenance of suit for purpose of against contingent remaindermen, § 98, p. 117
Receivers, appointment to collect rents and profits, § 98, p. 117
Redemption from mortgage, § 85
Reformation of instruments, relief by way of, § 98, p. 117
Reinvestment,
Parties to proceedings to sell land for, § 100
Sale for purpose of, § 89, p. 104
Relatives, limiting to class consisting of, § 73
Remedies, protection of, §§ 57–64
Rents and profits, right of action for on termination of preceding estate, § 98, p. 115
Reversion as not including, § 105
Rights of remaindermen, § 85
Sale or conveyance, §§ 87–89, pp. 100–107
Avoidance of, § 88, p. 101
Contingent remainders, § 88, p. 101
Disposition of proceeds, § 89, p. 106
Fraud in respect of, § 88, p. 101
Joint conveyance, § 88, p. 100
Judicial sale, § 89, pp. 104–107
Limitations applicable, § 99, p. 120
Personal property, § 142
Remaindermen, § 88, pp. 100–104
Rules governing, § 87
Vested remainders, § 88, p. 100
Simultaneous creation of particular preceding estate, § 79
Statutory provisions,
Actions by or against remaindermen, § 98, p. 117
Destruction of, § 95
Limitation of actions by or against remaindermen, § 99, p. 119
Preceding particular estate, § 77
Regulation of, § 84

Remainders—Continued,
Tax title, remaindermen as authorized to purchase, § 85
Taxes, liability of remaindermen for, § 86
Time of vesting, § 81
Torts, right of action for, § 98, p. 114
Trial, actions by and against remaindermen, § 104
Trover and conversion, maintenance of action for, § 98, p. 114
Vested remainders, post
Waste,
Injunction to prevent, § 98, p. 117
Right of action for, § 98, p. 114
Written assignments, personal property, § 142
Years, estate for, limitation after, § 78
Remedies,
Executory interests, personal property, § 144, p. 176
Life estate, protection of remainder or reversion, §§ 57–64
Reversions, form of remedy for injury to, § 113
Remembrance, freehold estate in, § 7
Remoteness,
Contingent remainders, validity as affected, § 94
Executory interests, gift over void for, § 122, p. 140
Rent charge, term as including, § 2
Rents and profits,
Life estates,
Accounting for by remainderman obtaining possession before determination of life estate, § 38
Life tenant as entitled to, § 41
Personal property, § 136, p. 161
Remaindermen, right of action for on termination of preceding estate, § 98, p. 115
Reversions, rents as separable incident, § 107
Repairs,
Life estates,
Liability as to, § 44
Receiver in case of failure to make, § 64
Reproductive property, life estate in, right to increase, § 135
Repugnant contingency, executory interest, limitation on, § 122, p. 137
Repurchase, fee simple estate, restraint as to, § 8, p. 22
Residuary fund, life estate in, interest on, § 136, p. 163
Restraint on alienation,
Executory limitation involving, § 122, p. 137
Fee simple estate, § 8, p. 20
Retrospective effect, abrogation of rule in Shelley's Case, statutory provisions, § 4
Reversions, §§ 105–118, pp. 125–131
Abeyance, doctrine of nonabeyance as not applicable to, § 106
Actions relating to, §§ 111–118
Damages recoverable, § 118
Evidence and burden of proof, § 116
Form of remedy, § 113
Laches, § 112
Limitations, § 112
Parties, § 114
Pleading, § 115
Right of action, § 111
Reversions—Continued,
Actions relating to—Continued,
Trial and judgment, § 117
Adverse possession, § 109
Alienation of, § 108
Case, action of as proper form of procedure for injury to interest, § 113
Characteristics, § 106
Conditional fee, donor as having possibility of reverter, § 11
Conveyance of, rights granted, § 108
Damages recoverable in actions relating to, § 118
Definitions, § 105
Determinable fee, § 10, p. 24
Devise of, § 108
Distinctions, § 105
Equity, maintenance of suit in to prevent threatened injury, § 111
Estates tail, § 21
Evidence, actions relating to, § 116
Executory interests, personal property, § 140
Expectancy, estates in, § 15
Extinguishment, §§ 109, 110
Grant of, rights passing by, § 108
Injuries to inheritance, right of action for, § 111
Laches, actions relating to, § 112
Liabilities of reversioner, § 107
Limitation of actions, running of limitations against, § 109
Limitation of actions relating to, § 112
Merger, § 126
Estates for years, § 127
Extinguishment by, § 110
Mortgages, redemption from, § 107
Parties, actions relating to, § 114
Pleadings, actions relating to, § 115
Possession, right of, § 107
Possibility of reverter distinguished, § 105
Preceding estates, § 106
Redemption from mortgage, right to redeem, § 107
Remainder as not included, § 105
Remedies, form of remedy for injury to, § 113
Remedies for protection of, §§ 57–64
Rents as separable incident of, § 107
Rights of reversioner, § 107
Seizin of, § 106
Timber, cutting of, § 107
Transfer of, § 108
Trespass, liability for, § 107
Trial and judgment, actions relating to, § 117
Vested rights, § 106
Revival, contingent remainders, § 91
Rule in Shelley's Case, § 4
Abolishment of Rule, statutory provisions, § 29
Sale,
Life estates, ante
Remainders, ante
Security, life estates, necessity of to protect remaindermen, § 59
Seizin, reversions, § 106
Sequestration, executory interests in personal property, relief by way of, § 144, p. 178
Settled estate, defined, § 1, p. 9
Severalty, estates in, classification, § 17

Shelley's Case,
Abolishment of rule in, statutory provisions, § 29
Rule in, § 4
Shifting use,
Defined, § 120
Derogation of life estate, gift to take effect in, § 121, p. 135
Simple ownership, limitation of estate in lands to, § 3
Slaves, life estate in, children of, § 136, p. 163
Social position, estate as including, § 1, p. 8
Specific performance, executory interest in personal property, relief by way of, § 144, p. 177
Springing use, defined, § 120
Statute of uses,
Construction and effect of, § 119
Freehold to commence in futuro, executory devise by, § 121, p. 135
Statute quia emptores, base or qualified fee as not abrogated by, § 10, p. 25
Statutory provisions,
Contingent remainders,
Conveyance of, § 88, p. 103
Destruction of, § 95
Limiting to class, § 73
Raising to dignity of estate, § 72
Control of matters relating to, § 3
Estates tail,
Abolition or modification, § 29
Bar of, § 27
Liability for debts of tenant, § 26
Life estates,
Forfeiture for waste, § 65, p. 81
Lease of, § 54
Sale of interest, § 52
Termination of, § 65, p. 78
Meaning of term as used in, § 1, p. 8
Regulation of matters relating to, § 3
Remainders,
Actions by or against remaindermen, § 98, p. 117
Destruction of, § 95
Limitation of actions by or against remaindermen, § 99, p. 119
Preceding particular estate, § 77
Regulation of, § 84
Stock and stockholders, life estate in corporate stock, increase in value of, § 136, p. 163
Strangers, life estates, adverse possession by or against, § 66, p. 84
Subrogation, life estates, life tenant paying assessment for public improvement, § 47, p. 63
Substitutes, contingent remainders, § 75
Succession, use of term as having same meaning, § 1, p. 10
Successive contingent remainders, validity of, § 94
Successive remainders, double contingencies distinguished, § 75
Sufferance,
Estates by, less than freehold, § 12
Tenancy by, lessee of life tenant holding over after death of life tenant, § 54
Surrender, life estates, termination by, § 65, p. 79
Synonymous terms, § 1, p. 8
Fee simple and fee, § 8, p. 18
Tail. Estates tail, ante
Tax title, remainders, remaindermen as authorized to purchase, § 85
Taxes,
Life estates,
Acquisition of adverse title by life tenant permitting property to be sold for, § 35
Forfeiture for nonpayment of, § 65, p. 81
Liability for, § 47, pp. 59–63
Receiver in case of failure to pay, § 64
Termination by failure to pay, § 65, p. 79
Remainders, liability of remaindermen for, § 86
Tenancy, defined, § 1, p. 11
Tenancy in common,
Estates in, § 18
Life tenant and remainderman, § 34
Tenant, defined, § 1, p. 11
Tenant paravail, defined, § 1, p. 11
Termination,
Life estates, § 65, pp. 78–82
Adverse possession after, § 66, p. 85
Terre-tenant,
Defined, § 1, p. 11
Land tenant as, § 1, p. 11
Third persons, life estates, adverse possession by or against, § 66, p. 84
Timber,
Life estates,
Forfeiture for waste in cutting of, § 65, p. 81
Right of life tenant to cut and remove, § 43, p. 53
Right to cut for necessary repairs on premises, § 39
Reversions, cutting of, § 107
Time,
Enjoyment, classification with regard to, §§ 13–15
Remainders, vesting of, § 81
Title,
Distinguished, § 1, p. 9
Interest as synonymous with, § 1, p. 10
Torts, remainders, right of action for, § 98, p. 114
Trade, term as including, § 1, p. 10
Treason,
Conditional fee, forfeiture for, § 11
Estates tail as liable to forfeiture for, § 26
Trespass,
Reversions, liability for, § 107
Vested remainders, maintenance of action for, § 98, p. 114
Trespass quare clausum fregit, life tenant, maintenance of action of, § 67, p. 86
Trial,
Executory interests in personal property, actions relating to, § 144, p. 181
Remaindermen, actions by and against, § 104
Reversions, actions relating to, general rules applicable, § 117
Trover and conversion,
Life estates, maintenance of action by life tenant, § 67, p. 86
Vested remaindermen, maintenance of action of, § 98, p. 114
Trust estates, contingent remainders, preservation of, § 96
Trustee, life estates, relation of life tenant to remainderman or reversioner as that of, § 34

Unproductive realty, life estate in, taxes as chargeable to life tenant, § 47, p. 62
Use and occupation,
Lessee of life estate holding over on death of life tenant as liable for value of, § 54
Life estates, personal property, § 135
Vested remaindermen, § 80
Use of property, life tenant, § 34
Usufruct, life estates, termination of, § 65, p. 79
Vadio, estates in, classification, § 20, p. 31
Value of interest, vested remainder as implying certainty as to, § 69
Validity, fee simple estate, restraints on alienation, § 8, p. 21
Verbal agreement, life estates, creation by, § 32
Vested estate,
Classification as, § 5, p. 14
Determinable fee, § 10, p. 25
Future estates, § 15
Life estates as, § 32, n. 96
Vested interest,
Legislative power to create or divest, § 3
Reversions, § 106
Vested remainders, § 69
Acceleration of, § 82
Actions by or against remaindermen, right to maintain action, § 98, pp. 114–118
Alienation of, § 88, p. 100
Attachment, levy on under, § 86
Class, limiting to members of, § 73
Construction of, § 83
Conveyance of, § 88, p. 100
Enjoyment of, § 80
Equity,
Relief in, § 98, p. 116
Resort to by bill quia timet, § 144, p. 177
Mortgage of interest, § 90
Nonuser, forfeiture by, § 91
Partition, maintenance of action for, § 98, p. 114
Personal property,
Determination of, § 139
Disposition of, § 142
Premature determination of preceding estate, effect of, § 82
Time of vesting, § 81
Trespass, maintenance of action for, § 98, p. 114
Use and possession of property, § 80
Vesting of estates, personalty, law as favoring, § 138
Vesting of title, estates tail, delay in, § 22
Waiver, life estates in personal property, possession without giving of security, § 134, p. 158
Waste,
Contingent remainders, right of recovery for, § 98, p. 115
Determinable fee, liability for, § 10, p. 24
Waste—Continued,
Estates tail, holder of estate after possibility of extinct as punishable for waste, § 28
Executory interest,
Personal property, § 141, p. 170
Protection against, § 122, p. 136
Life estates,
Accounting in case of, § 62
Failure to make necessary repairs as, § 44
Forfeiture for, § 65, p. 80
Injunction to prevent, § 61
Liability for, § 43, pp. 51–55
Neglect to pay taxes as, § 47, p. 62
Parties to suit by remaindermen to forfeit for, § 100
Remainders,
Injunction to prevent, § 98, p. 117
Right of action for, § 98, p. 114
Widowhood,
Estate during, defeat of, § 30
Estate for,
Nature of, § 20, p. 32, n. 52
Termination by subsequent marriage, § 65, p. 79
Wills,
Establishment of estate by, § 3
Estate at, less than freehold, § 12
Executory interests created by, § 120
Fee simple estate, restraint on alienation by as invalid, § 8, p. 21
Life estate in personal property created by, possession or custody of, § 134, p. 152
Life estate under, bond of life tenant, § 134, p. 155, n. 7
Life estates, creation by, § 32
Quasi remainder in personal property, creation by, § 139
Tenancy by, lessee of life estate holding over on death of life tenant, § 54
Words and phrases. Definitions, ante
Writ of entry, remaindermen, burden of proof on, § 102
Writing, reversion as not requiring, § 106
Years,
Estate for,
Determinable fee distinguished from, § 10, p. 25
Lease of life estate for term of years, § 54
Less than freehold, § 12
Merger, § 127
Remainder limited after, § 78
Reversion preceded by, § 106
Lease for, life estate created in premises occupied by tenant under, liability for repairs, § 44

INDEX TO

ESTOPPEL

Abandonment,
Claim under title by virtue of which possession was taken, effect of, § 15
Estoppel in pais distinguished, § 59, p. 241
Municipal corporations, estoppel by, § 138, p. 408
Abrogation, contract, estoppel by in case of, § 57
Abutting owners, encroachments on street by, estoppel against municipality in respect of, § 146
Acceptance,
Benefits. Acceptance of benefits, post
Contract, estoppel as to, § 58
Deed, grantee as estopped to deny title by, § 15
Deed poll, estoppel arising from, § 18
Estoppel by deed as requiring, § 42
Mortgage, estoppel to deny title of mortgagor, § 16
Quasi estoppel, basis of as acceptance of benefits, § 107
Quitclaim deed, estoppel as arising on, § 18
Acceptance of benefits, §§ 109–112, pp. 347–362
Adopted child, objections to status of, § 110, p. 358
Appeal bond, § 110, p. 353
Bills or notes, § 110, p. 358
Bonds, § 110, p. 353
Bulk sales, participation in, § 110, p. 356, n. 86
Checks, § 110, p. 358
Condemnation proceeding, § 110, p. 357
Contracts, § 110, p. 350
Corporate charter, § 110, p. 358
Deeds, § 110, p. 352
Direct nature of benefits involved, § 109, p. 349
Divisions of property, § 110, p. 358
Elements of estoppel by, § 109, p. 349
Emoluments of office, estoppel to deny legality of creation, § 112
Executors and administrators, sales by, § 110, p. 356
Extent of estoppel by, § 109, p. 349
False representations inducing, § 109, p. 349
Fraud, waiver of right to sue for deceit inducing contract, § 110, p. 352
Governmental agency, § 143
Ignorance of rights, contracts, § 110, p. 351
Implied conditions, § 109, p. 348
Inconsistent positions precluded, § 109, p. 347
Judgment or decree, § 110, p. 357
Judicial order, § 110, p. 357
Judicial sales, § 110, p. 356
Knowledge, estoppel as dependent on, § 109, p. 349
Land survey, § 110, p. 358
Lease, § 110, p. 358
Mortgages, § 110, p. 352
Municipal corporations, § 111, pp. 358–361
Parties dealing with, § 112
Partition sale, § 110, p. 356
Payment, § 110, p. 358
Acceptance of benefits—Continued,
Public as estopped by, § 142, p. 422
Public policy, contracts against, § 110, p. 352
Public use, taking property for, § 110, p. 357
Quasi-municipal corporations, § 111, pp. 358–361
Reasonable interpretation of rule relating to estoppel by, § 109, p. 350
Receipt of money, § 110, p. 358
Receivers, sales by, § 110, p. 356
Repudiation of obligations after, § 109, p. 348
Rescission of contract, effect of, § 110, p. 351, n. 27
Sales, § 110, p. 355
State, estoppel by, § 138, p. 410
Supersedeas bond, § 110, p. 353
United States, estoppel by, § 138, p. 410
Wills, § 110, p. 353
Accord and satisfaction, equitable estoppel, defense as available under plea of, § 153, p. 443
Accounts, acquiescence, estoppel by, § 114, p. 367
Acknowledgment,
Estoppel by deed as requiring, § 41
Owner of land attesting conveyance or mortgage thereof as estopped to assert title, § 93
Acquiescence,
Improvements, municipal corporations, § 146
Public officers or agents, estoppel by, § 138, p. 408
Silence or acquiescence, post
Actions, inconsistency in positions before and after commencement of litigation, § 116
Actions involving, §§ 153–165, pp. 440–466
Actual knowledge, equitable estoppel, necessity of, § 70, p. 266
Administrators. Executors or administrators, post
Admissibility of evidence, § 161
Admissions,
Certainty, § 84, p. 297
Equitable estoppel by, § 84, pp. 295–298
Estoppel as, § 59, p. 238, n. 76
Recitals in instrument, § 36
Estoppel by, § 7
Estoppel in pais requiring, § 67, p. 256
Ignorance, effect of, § 84, p. 297
Inconsistency, § 84, p. 297
Oath, effect of, § 84, p. 297
Plea of estoppel, § 158
Pleadings, § 118
Former proceedings, § 121, pp. 386–391
Ignorance or mistake as affecting, § 121, p. 389
Successful denial as essential, § 121, p. 389
Reliance on as essential to create estoppel, § 84, p. 296
Adopted child, acceptance of benefits precluding objections as to status of, § 110, p. 358

Adoption, equitable estoppel distinguished, § 60
Adverse claim, purchase of as not operating to preclude denial of validity, § 15
Adverse possession,
After-acquired title, estoppel to assert, § 34
Offer to buy from adverse claimants, estoppel of true owner by, § 125
Silence or failure to assert title to property adversely claimed, § 88
Verbal recognition of title of prior owner, § 125
Advice, estoppel resulting from advice to act or refrain from acting in particular manner, § 108. p. 343
Affidavits, disclaimer by, § 86
Affirmance, quasi estoppel, basis of, § 107
Affirmative relief, equitable estoppel, assertion as ground for, § 148
After-acquired title,
Estoppel in pais as affecting, § 150
Estoppel to assert, §§ 21–35, pp. 203–212
Adverse title, § 34
Application of doctrine, § 30
Champertous conveyances, § 21
Circuity of action avoided, § 21
Consideration, § 21
Conveyances operating as, § 22
Covenants,
Inoperative covenants, § 28
Nature of, § 27
Necessity for, § 26
Deeds, § 22
Easements as within rule, § 30
Encumbrances, covenant against as basis, § 27
Enlarging estate granted, § 21
Equitable title, § 30
Estate or right affected, §§ 30–34
Execution sale as basis, § 25
Fraud, § 21
Further assurance, covenant for as basis, § 27
Grantees, privy of, § 54
Husband and wife, § 30
Inoperative covenants as basis, § 28
Instruments founding estoppel, §§ 25–29
Judgment lien as affected, § 35
Judicial sales, § 34
Knowledge of grantee as affecting, § 21
Leases, § 21
Legal title, § 30
Mechanics' liens, § 21
Mistake, § 21
Momentary seizin, instrument giving, § 29
Mortgages, § 23
Nature of covenants, § 27
Necessity for covenants, § 26
Non-claim, covenant of as basis, § 27
Operation of law in vesting title in grantee, § 35
Partition deed, § 21, n. 24
Patent from sovereignty, § 31
Personal property, § 24
Possession, covenant for as basis, § 27
Possibility of reverter, § 30
Present estate only conveyed, § 22
Quiet enjoyment, covenant for as basis, § 27
After-acquired title—Continued,
Estoppel to assert—Continued,
Quitclaim deed, § 22
Real estate, §§ 21–23, pp. 203–206
Seizin, covenant of as basis, § 27
Special covenant as basis, § 27
Subsequent grantee as affected, § 35
Tax sales, § 34
Tax title, § 30
Third persons, §§ 32, 33
Vendor's lien as basis, § 34
Vesting title in grantee by operation of law, § 35
Agents, public agents, estoppel by acts of, § 142, pp. 417–427
Alimony, stipulations in decree respecting amount of, § 120
Alteration of instruments, representations as estoppel to assert, § 81
Ancestors, forced heirs as estopped by acts or conduct of, § 132
Antagonistic claim, purchase of by grantee, effect of, § 15
Antenuptial agreements, estoppel by deed resulting, § 20
Apparent scope of authority, state as estopped by acts of officers within, § 142, p. 422
Apparent title or authority, clothing another with, negligence, §§ 104–106, pp. 331–341
Appeal and error,
Bond,
Acceptance of benefits under, § 110, p. 353
Recitals in operating as estoppel, § 40
Appropriation of water rights, acquiescence, estoppel by, § 114, p. 367
Arbitrariness, equitable estoppel, § 63, p. 250
Assent,
Acquiescence as founded on, § 114, p. 363
Waiver as involving idea of, § 67, p. 258
Assertion of title, failure to assert as estoppel, § 88
Assessments, municipal corporations, estoppel in respect of, § 147, pp. 433–436
Assignments,
Equitable estoppel, availability against assignees, § 133
Invention, estoppel by deed, § 20
Mortgage, estoppel resulting, § 16
Attachment, bond for release of, recitals in operating as estoppel, § 40
Attestation, owner attesting conveyance or mortgage of land as estopped to assert title, § 93
Attorneys, equitable estoppel, availability against, § 134
Authority,
Apparent title or authority, clothing another with, negligence, §§ 104–106, pp. 331–341
Prior recognition or assertion of, § 123
Automobiles, apparent title of authority over, clothing another with as creating estoppel, § 106, p. 338
Bail bond,
Acceptance of benefits, estoppel resulting, § 110, p. 353
Forfeiture, estoppel to deny validity by sheriff undertaking forfeiture, § 124

Bankruptcy, equitable estoppel, availability against assignee in, § 134
Banks and banking, representations as to check being good as estoppel, § 81
Bar,
Estoppel by deed, § 10
Operation as, § 1
Benefits,
Acceptance of benefits, ante
Equitable estoppel, requirement as to, § 73
Inconsistent positions, estoppel as dependent on benefit resulting, § 108, p. 346
Bills and notes,
Acceptance of benefits, § 110, p. 358
Acquiescence, estoppel by, § 114, p. 367
Apparent title or authority over, clothing another with, § 106, p. 335
Representations as to validity of, § 81
Bills of lading, apparent title or authority, clothing another with, § 106, p. 335
Blank checks, negligence in intrusting to agent, § 103, p. 328, n. 88
Bonds,
Acceptance of benefits, § 110, p. 353
Acquiescence, estoppel by in controversies arising out of, § 114, p. 367
Apparent title or authority over, clothing another with, § 106, p. 335
Recitals in, estoppel to deny, § 40
Representations as to validity of, § 81
Budget laws, municipality as not estopped by acts or contracts in violation of, § 143
Bulk sales, acceptance of benefits, participation in, § 110, p. 356, n. 86
Burden of proof, § 160
Capacity, prior recognition or assertion of, § 123
Carelessness, estoppel by negligence as precluded by, § 102
Casual declarations or admissions, equitable estoppel, sufficiency of, § 69, p. 261
Cause of action, equitable estoppel as, § 63, p. 251
Certainty,
Admissions, § 84, p. 297
Deed, estoppel by, § 44
Equitable estoppel, element of, § 77
Recitals, estoppel to deny as dependent on, § 37
Representations, necessity of, § 78
Waiver, element of, § 77
Certificates of deposit, apparent title or authority over, clothing another with, § 106, p. 335
Cestui que trust, equitable estoppel, availability against, § 135
Champerty and maintenance, after-acquired title, estoppel to assert in respect of champertous conveyances, § 21
Change of position,
Acquiescence, inducing another to believe of acquiescing in transaction resulting in, § 114, p. 362
Conduct inducing, equitable estoppel as result, § 59, p. 240
Equitable estoppel, § 59, p. 236
Estoppel by deed as requiring, § 10
Inconsistent position induced by, estoppel resulting, § 108, p. 346
Instructions as to, § 164
Change of position—Continued,
Matters of law, estoppel as resulting, § 117, p. 373
Person claiming estoppel, elements of, § 72, p. 275
Pleading of, § 156, p. 451
Reliance on representations, element of, § 78, p. 287, n. 76
Change of venue, inconsistent position with regard to, § 118
Character, prior recognition or assertion of, § 123
Chattel mortgages,
Assignment of personal property subject to, estoppel to deny title, § 127
Deed in form of as estoppel, § 19
Motor vehicle left with dealer for purpose of sale, apparent title or authority as creating estoppel in respect to mortgage, § 106, p. 340
Ownership, estoppel to deny, § 14
Permitting another to mortgage personal property without objection as estoppel, § 91
Title, estoppel to deny, § 14
Checks,
Acceptance of benefits, § 110, p. 358
Apparent title or authority over, clothing another with, § 106, p. 335
Representations, bank representing check as good as estopped in respect of, § 81
Choses in action,
Clothing another with apparent title or authority over, negligence in respect of, § 106, p. 335
Deed, estoppel by, § 13
Circuity of action,
After-acquired title, estoppel to assert as based on, § 21
Estoppel by deed, avoidance of, § 10
Circumstantial evidence, waiver shown by, § 162, p. 460
Cities. Municipal corporations, post
Claim of title, possession or acts of ownership under, § 126
Classification, § 2
Clean hands maxim, element of, § 75
Clothing another with apparent title or authority. Negligence, post
Collateral proceedings, recitals, estoppel to deny, § 37
Commencement of litigation, inconsistency in positions before and after, § 116
Common grantee, equitable estoppel, availability against, § 133
Common grantor, paramount title, connection with on assertion by one of two grantees, § 15
Common law,
Plea at, § 155
Pleadings, estoppel in pais, § 153, p. 440
Common mistake, acquiescence due to, estoppel as arising, § 114, p. 365
Common source of title, agreements respecting operating as estoppel, § 120
Community property, deed, estoppel by, § 47, n. 90
Comparison of terms and principles, § 59, p. 240
Competency, deed, estoppel by as requiring competent parties, § 43
Compromise and settlement,
Acquiescence, estoppel by, § 114, p. 367
Offer or attempt at as basis of estoppel, § 84, p. 297

Compromise and settlement—Continued,
Participation in compromise settlement or acquiescence in, § 115, n. 7
Stipulation for, inconsistency, § 120
Concealment,
Conduct, estoppel by requiring, § 67, p. 255, n. 48
Equitable estoppel, element of, § 67, p. 254
Inducing another to act by, § 100
Inference of from circumstances, § 69, p. 262
Pleading, allegations necessary, § 156, p. 451
Silence or inaction amounting to, § 87, p. 305
Conclusions of law, pleadings, statements in pleadings in former suit, § 121, p. 389
Condemnation proceedings, acceptance of benefits in, § 110, p. 357
Conditional sales,
Apparent title or authority permitted to remain in dealer, assignee of mortgage or contract as protected, § 106, p. 339
Estoppel by deed, § 20
Conduct,
Equitable estoppel by, § 59, p. 239
Misrepresentation of facts or concealment as essential, § 67, p. 255, n. 48
Reliance on representation as essential, § 71, p. 268
Representation relied on, § 130
Waiver involving, § 61, p. 245
Waiver shown by, § 162, p. 460
Confession and avoidance, plea of estoppel as, § 155
Confidential relationship,
Reliance on representations, effect of, § 78, p. 288
Representations, repudiation rendered inequitable because of, § 79
Conflict of laws, pleading estoppel, § 153, p. 443
Conjecture, estoppel not based on, § 162, p. 458
Consent, waiver as matter of, § 67, p. 258
Consideration,
After-acquired title, estoppel to assert, § 21
Contracts,
Acceptance of benefits operating as estoppel in respect of, § 110, p. 351
Acknowledgment of operating as estoppel, § 58
Equitable estoppel, necessity of, § 67, p. 259
Illegality of, representations as to as estoppel, § 81
Mortgages. recitals as to operating as estoppel, § 39
Necessity of, § 61, p. 248
Recitals as to, estoppel to deny, § 37; § 38, p. 217
Recitals without, estoppel as not resulting, § 40
Representations as to, estoppel as resulting, § 81
Waiver, necessity of, § 67, p. 260
Waiver as not requiring, § 61, p. 248
Want or failure of, representations as to, § 81
Consistent remedies, estoppel arising as between, § 61, p. 247
Construction,
Contracts, determination of effect of recitals therein, § 58
Instruments creating estoppel by deed, § 44
Constructive fraud, negligence amounting to, § 69, p. 262
Constructive knowledge,
Acquiescence by person with, § 114, p. 362
Constructive knowledge—Continued,
Admissions made with, § 84, p. 295
Apparent title or authority in another, estoppel as not resulting, § 106, p. 340
Equitable estoppel, concealment of material facts with, § 67, p. 254
Misrepresentations, estoppel by, § 78, p. 285
Constructive notice, mortgage or sale of property by one with constructive notice of title, § 90
Consummation of agreement, estoppel from asserting claim inconsistent therewith, § 108, p. 343
Continuances, stipulations for, § 120
Contractors, bond, recitals in operating as estoppel, § 40
Contracts,
Acceptance of benefits, estoppel resulting, § 110, p. 350
Acquiescence, estoppel by as applying to controversies arising out of, § 114, p. 366
Equitable estoppel as applicable to rights and liabilities under, § 151
Estoppel by, §§ 55–58, pp. 231–236
Abrogated contract as basis, § 57
Acceptance and acting on in good faith, § 58
Acknowledgment of consideration, § 58
Agreed facts, § 55, p. 231
Agreement resulting from recitals essential, § 58
Consideration acknowledged therein, § 58
Denial of facts settled by, § 55, p. 232
Estoppel by misrepresentation distinguished, § 62
Ignorance of facts, § 55, p. 232
Kinds of, § 55, pp. 231–234
Marshaling assets, § 55, p. 233, n. 47
Mistake, § 55, p. 232
Mutuality, § 57, n. 54
Office of, § 55, p. 232
Parties to whom applicable, § 55, p. 233
Performance of contract, § 55, p. 231
Possession of another's property in recognition of title, § 55, p. 231
Power of attorney, § 55, p. 233, n. 47
Privies, § 55, p. 233
Recitals in, § 58
Representations inducing, § 58
Seal as essential, § 56
Settled facts, § 55, p. 232
Valid contract as essential, § 57
Waiver, § 67, p. 260
Warranty inducing contract, § 58
Municipal corporations, acceptance of benefits as estoppel to deny want of power to make, § 111, p. 358
Contributory negligence, estoppel by negligence as precluded by, § 102
Convertible terms, waiver and estoppel, § 61, p. 245
Conveyances,
Acknowledgment of by owner, estoppel as resulting, § 93
Election to ratify or disaffirm, adoption of one course precluding other, § 110, p. 352
Corporate acts, acquiescence, estoppel by in respect to officers, stockholders and creditors, § 114, p. 368

Corporate charter, acceptance of benefits under, § 110, p. 358
Corporations,
Affidavit filed by secretary reciting abandonment of charter, estoppel as result of, § 121, p. 387, n. 39
Equitable estoppel, availability as against officers acting in official capacity, § 134
Counter estoppel, equitable, § 65
Counties, equitable estoppel, doctrine as applicable to, § 141, p. 414
Course of dealing,
Prior recognition or assertion of authority, etc., § 123
Recognition of title involved, § 125
Covenants,
Acceptance of deed with covenants of seizin, estoppel in respect of, § 15
After-acquired title,
Estoppel to assert,
Inoperative covenants, § 28
Nature of, § 27
Necessity for, § 26
After-acquired title in respect of conveyance with covenants of warranty, estoppel resulting, § 21
Deeds, estoppel by, § 10
Instrument as basis for estoppel by deed as requiring no technical covenants, § 17
Invalid deed, estoppel by, § 43
Creditors,
Deed, estoppel by, § 52
Equitable estoppel, availability against, § 137
Participating in proceeds of sale of debtor's assets, estoppel resulting, § 110, p. 355
Criminal act,
Appearance of ownership accomplished through instrumentality of, estoppel not based on, § 105
Negligence, wrong accomplished through instrumentality of criminal act, § 103, p. 330
Criminal prosecutions, doctrine as applicable against people in, § 140
Culpable negligence, equitable estoppel, equivalent of knowledge, § 70, p. 266
Cumulative bonds, recitals in, estoppel in respect of, § 40
Date, recitals as to, estoppel to deny, § 38, p. 215
Deceit. Fraud, post
Declarations, waiver shown by, § 162, p. 460
Decrees. Judgments or decrees, ante
Dedication, acquiescence, estoppel by, § 114, p. 367
Deed,
Acceptance of benefits, estoppel resulting, § 110, p. 352
Delivery, mere possession of undelivered deed as not creating apparent authority to transfer title, § 105
Estoppel by, §§ 10–54, pp. 195–231
Acceptance, § 42
Acknowledgment as essential, § 41
After-acquired title, ante
Agent, § 48, n. 93
Antenuptial agreements, § 20
Assignment of invention, § 20
Certainty of instrument, § 44
Change of position as necessary, § 10
Deed—Continued,
Estoppel by—Continued,
Chattel mortgage, deed in form of, § 19
Circuity of action, avoidance of, § 10
Community property, § 47, n. 90
Competent parties required for, § 43
Conditional sales, § 20
Construction of instrument to determine effect as, §§ 44
Covenants as essential, § 10
Covenants in invalid deed, § 43
Creditors levying on lands, § 52
Deed itself as sufficient, § 18
Definition, § 10
Privity, § 51
Delivery, § 42
Determination of other instrument to create, § 44
Devisees, § 53
Essentials, § 10
Estoppel against estoppel, § 12
Estoppel by misrepresentation distinguished, § 62
Estoppel in pais distinguished, § 10
Execution of instruments as affecting, § 41
Executors or administrators, § 48
Extent of, § 45
Foundation, §§ 17–20
Fraud, § 43
Grantee as estopped, § 15
Grantor, § 13
Heirs, § 53
Incompetency of parties, § 43
Instruments founding, §§ 17–20
Invalid instrument as basis, § 17
Legislative grant of land as, § 20
Lessor, § 13
Mechanic's lien, § 20
Mistake, § 43
Mortgagee, § 16
Mortgages, derogation of, assertion of anything in, § 14
Municipalities, § 49
Mutuality, § 11
Nature of, § 10
Nuisance, assertion of, § 45, n. 82
Opportunity to plead, § 153, p. 445
Particular instruments and parties thereto, §§ 13–20, pp. 196–203
Personal property, § 13
Persons for and against whom arising, §§ 46–54, pp. 226–231
Capacity in which acting, § 48
Claim through grantee, § 54
Devisees, § 53
Different rights or capacities, parties acting in, § 48
Donee of grantor, § 46
Executors or administrators, § 48
Grantor's donee, § 46
Heirs, § 53
Municipalities, § 49
Parties to instrument, §§ 47–49
Privies, §§ 50–54, pp. 228–231
Public officers, § 48
Representative parties, § 48
State, § 49

Deed—Continued,
Estoppel by—Continued,
Persons for and against whom arising—Continued,
Strangers to deed, § 46
Pleading, § 153, p. 443
Privies, §§ 50–54, pp. 228–231
Public officers executing conveyances in capacity as such, § 48
Public policy, conveyance contrary to as not rendered effective by, § 45
Quitclaim deed, § 18
Ratification of acceptance, § 42
Recordation as essential, § 41
Representations as essential, § 10
Representative parties, § 48
Seal as essential, § 41
Self-contradictory description, § 44, n. 74
State, § 49
Strangers as not within rule, § 46
Subsequent acquisition of title in different right, § 48
Technical covenants for title as not essential, § 17
Third persons conveying property, § 13
Truth apparent on face of instrument, § 44
Truth of recitals in instrument, §§ 36–40, pp. 213–222
Valid instrument as essential, § 43
Void instrument as not operating as, § 43
Voluntary execution of instruments as essential, § 41
Inconsistent position, persons claiming under, § 110, p. 352
Quitclaim deeds, post
Deed of trust, misrepresentations on sale of land under, equitable estoppel, § 82
Deed poll, estoppel arising from, § 18
De facto officers, municipal corporations, estoppel by acts of, § 142, p. 418
Defenses,
Demurrer raising defense, § 154
Equitable estoppel as matter of defense, § 148
Estoppel as result of failure to make defense in proceeding which is not available, § 115
Inconsistency with previous position,
Former proceedings, § 119, p. 382
Same proceeding, § 118
Deficiency judgment representations respecting, equitable estoppel arising, § 82
Definitions, § 1
Deed, estoppel by, § 10
Equitable estoppel, § 59, pp. 236–242
Estoppel by laches, § 1
In pais, estoppel by matters, § 59, p. 236
Misrepresentation, estoppel by, § 59, p. 236
Privity, § 51
Quasi estoppel, § 107
Record, estoppel by, § 4
Technical estoppel, § 1
Title by estoppel, § 1
Waiver, § 61, p. 242
Warranty, estoppel by, § 10
Delay,
Acquiescence, estoppel by in case of, § 114, p. 365
Asserting estoppel, § 66
Delivery,
Contracts, acceptance of benefits as estoppel to avoid obligation for nondelivery, § 110, p. 351
Deed, mere possession of undelivered deed as not creating apparent authority to transfer title, § 105
Estoppel by deed requiring, § 42
Demurrer,
Defense raised by, § 154
Estoppel as available on, § 153, p. 446
Setting up estoppel, § 157
Depositions,
Contradiction of, estoppel as to, § 122
Disclaimer by, § 86
Derogation of deed, estoppel to assert anything in, § 13
Description,
Recitals as to,
Estoppel to deny, § 38, p. 217
Mortgages, § 39
Descriptive matters, recitals, estoppel to deny, § 37
Devisees,
Deed, estoppel by, § 53
Equitable estoppel, availability against, § 132
Diligence, reliance on representations, necessity of, § 78
Direction of verdict, actions involving, § 163, p. 463
Disadvantage, conduct resulting in, equitable estoppel resulting, § 59, p. 240
Disavowal, § 86
Disclaimer, § 86
Former proceedings, § 119, p. 382, n. 88
Dismissal or nonsuit, admissions in proceedings resulting in dismissal as estoppel, § 7
Dispensation with right or advantage, waiver as implying, § 72, p. 273
Distinctions, § 1
Adoption and equitable estoppel, § 60
Equitable estoppel, §§ 60–62, pp. 242–248
Legal and equitable estoppel, § 62
Quasi estoppel, § 107
Ratification and equitable estoppel, § 60
District of Columbia, equitable estoppel, doctrine as applicable to, § 141, p. 415
Divestiture of title, application of doctrine for purpose of, § 150
Division of property, acceptance of benefits, § 110, p. 358
Divorce, stipulations in decree respecting amount of alimony, § 120
Drainage districts, equitable estoppel, doctrine as applicable to, § 141, p. 415
Duebills, apparent title or authority over, clothing another with, § 106, p. 335
Easements,
After-acquired title, estoppel to assert, § 30
Municipal land encumbered by, estoppel to build on, § 145
Ejectment,
Equitable estoppel as available as defense, § 64
Pleading in actions of, exceptions, § 153, p. 445
Railroads, forfeiture of right to maintain against on permitting construction across land without objection, § 95
Election, quasi estoppel, basis in, § 107
Elements,
Acceptance of benefits, estoppel by, § 109, p. 349

Elements—Continued,
Acquiescence, § 114, p. 363
Equitable estoppel, §§ 67–77, pp. 254–283
Inconsistency in judicial proceedings, estoppel by, § 117, p. 374
Inconsistent position, estoppel by, § 108, p. 344
Waiver, § 67, p. 257
Eminent domain,
Acceptance of benefits in condemnation proceeding, § 110, p. 357
Municipal corporations, agreement in restraint of right to condemn, § 146
Encroachment on land, knowledge and apparent acquiescence in as quasi estoppel, § 114, p. 366, n. 89
Encroachments, city streets, estoppel as to right to abate, § 145
Encumbrances, covenant against, after-acquired title operating as estoppel based on, § 27
Equitable estoppel, §§ 59–152, pp. 236–440
Acceptance of benefits, ante
Acquiescence,
Municipal improvements, § 146
Silence or acquiescence, post
Acts done or omitted, element of, § 72, p. 274
Actual knowledge, necessity of, § 70, p. 266
Admission, element of, § 67, p. 256
Admissions creating, § 84, pp. 295–298
Adoption, distinguished, § 60
Adverse effect on person claiming estoppel, § 74, p. 279
Affirmative relief, assertion as ground for, § 148
Against whom available, §§ 131–137, pp. 397–403
Agents, estoppel by acts of public agents, § 142, pp. 417–427
Application of doctrine, § 59, p. 239; § 63, p. 250; § 148
Assessments, collection of, § 147, pp. 433–436
Assignees, availability against, § 133
Attorneys availability against, § 134
Availability, §§ 130–137, pp. 397–403
Availability at law, § 64
Bankruptcy, availability against assignee in, § 134
Benefits to person against whom asserted, element of, § 73
Certainty, element of, § 77
Cestui que trust, availability against, § 135
Change of position, § 59, p. 236
Person claiming, § 72, p. 275
Circumstances determining application of doctrine, § 59, p. 239
Claim to property, § 150
Clean hands maxim as applicable, § 75
Common grantee, availability against, § 133
Concealment of material facts, necessity of, § 67, p. 254
Conduct, § 59, p. 239
Element of, § 72, p. 274
Consideration, necessity of, § 67, p. 259
Consistency of conduct, § 108, p. 342
Contract,
Necessity of, § 67, p. 259
Rights and liabilities under, § 151
Counter estoppel, § 65
Counties, liability to, § 141, p. 414
Creditors, availability against, § 137
Equitable estoppel—Continued,
Criminal laws, enforcement of, § 140
Crimes, application to defend, § 148
Culpable negligence as equivalent of knowledge, § 70, p. 266
Default of person setting up estoppel, § 75
Defense, matter of, § 148
Defined, § 59, pp. 236–242
Delay in asserting, § 66
Devisees, availability against, § 132
Disavowal, § 86
Disclaimer, § 86
Distinctions, §§ 60–62, pp. 242–248
Legal estoppel, § 62
Waiver, § 61, pp. 242–248
District of Columbia, liability to, § 141, p. 415
Drainage districts, doctrine as applicable to, § 141, p. 415
Duty to inform party against whom estoppel arises, § 71, p. 272
Effect of, § 148
Ejectment, availability as defense, § 64
Elements of, § 59, pp. 236–242; §§ 67–77, pp. 254–283
Benefits to person against whom asserted, § 73
Certainty, § 77
Default of person setting up, § 75
Intent, § 69, pp. 260–263
Knowledge of facts, § 70, p. 264
Mutuality, § 76
Reliance on representations, § 71, pp. 267–273
Equality of knowledge or notice, effect of, § 71, p. 272
Estoppel against estoppel, § 65
Evidence, use as, § 153, p. 441
Existence of legal right as essential, § 67, p. 258
Extent of, § 148
Failure to assert claim, § 98
Failure to assert title or right, § 88
False representations,
Materiality, § 68
Necessity of, § 67, p. 254
Federal government, liability to, § 140
Forbearance, conduct inducing, § 59, p. 240
Fraud,
Application to defend, § 148
Intent to deceive as essential, § 69, p. 262
Participation in by person claiming estoppel, § 75
General denial, defense as available under, § 153, p. 442
Good faith, § 75
Government, liability to, §§ 138–147, pp. 403–436
Grantees, availability against, § 133
Grants to use streets, § 145
Grounds, §§ 78–106, pp. 283–338
Harsh nature of doctrine, § 63, p. 249
Heirs, availability against, § 132
Ignorance of facts, effect of, § 70, p. 265
Improvements, acquiescence in municipal improvements, § 146
Imputed knowledge as basis of, § 70, p. 266
Inconsistent positions, post
Inducements, § 59, p. 237
Element of, § 71, p. 269

Equitable estoppel—Continued,
Influence of representation, element of, § 71, p. 267
Injury to party, element of, § 73
Intent, element of, § 69, pp. 260–263
Irregular exercise of power by municipality, § 144
Irrigation districts, doctrine as applicable to, § 141, p. 415
Laches, assertion of, § 66
Land titles, application to, § 59, p. 239
Legal estoppel distinguished, § 62
Licenses to use streets, § 145
Liens, failure to assert, § 99
Materiality of representations, § 68
Matters precluded, §§ 148–152, pp. 436–440
Misrepresentations, post
Mistake, effect of acting under, § 70, p. 265
Mortgagees, availability against, § 133
Municipal corporations,
Acquiescence in improvements, § 146
Liability to, § 138, p. 404; § 141, pp. 413–417
Mutuality, § 76
Negligence, post
Next of kin, availability against, § 132
Object of doctrine, § 63, pp. 248–252
Omission to act, element of, § 72, p. 274
Operation and effect of, §§ 130–147, pp. 397–436
Origin, § 59, p. 240
Parishes, liability to, § 141, p. 415
Parties, availability against, § 131
Penal nature, § 63, p. 250
Personal representatives, availability against, § 132
Personal status or right, § 149
Persons affected, §§ 130–147, pp. 397–436
Pleading, § 153, pp. 440–448
Police juries, doctrine as applicable to, § 141, p. 415
Prejudice,
Element of, § 74, pp. 276–281
Necessity of, § 59, p. 237
Presumption of ouster distinguished, § 59, p. 241
Privies,
Availability against, § 131
Availability in favor of, § 130
Promissory estoppel distinguished, § 59, p. 241
Protection of right, § 148
Protective nature, § 63, p. 251
Public officers,
Estoppel by acts of, § 142, pp. 417–427
Liability to, §§ 138–147, pp. 403–436
Purpose of, § 63, pp. 248–252
Quasi municipal corporations, liability to, § 141, pp. 413–417
Ratification, distinguished, § 60
Real property, doctrine as extending to, § 63, p. 250
Receipts, § 85
Receivers, availability against, § 134
Reciprocal nature, § 76
Reliance on representations, element of, § 71, pp. 267–273
Remedies, application to, § 152
Renunciation, § 86
Representations, post
Equitable estoppel—Continued,
Representative capacity, availability against persons acting in, §§ 134–137
School districts, doctrine as applicable to, § 141, p. 415
Silence or acquiescence, post
Special pleading, § 153, pp. 440–448
State governments, liability to, § 140
Strangers,
Availability against, § 136
Availability to, § 130
Streets, grants or licenses to use, § 145
Subsequent representations or conduct, reliance on, § 71, p. 270
Taxation, exercise of power of, § 147, pp. 433–436
Title, § 150
Failure to assert, § 88
Townships, doctrine as applicable to, § 141, p. 415
Ultra vires acts, § 143
Undue advantage, prevention of, § 63, p. 252
United States, invoking against, § 138, p. 401
Villages, § 141, p. 415
Volunteers, availability to, § 130
Waiver distinguished, § 61, pp. 242–248
Willfulness, element of, § 69, p. 261
Wrongful act of person setting up, § 75
Equitable title, after-acquired title, estoppel to assert, § 30
Equity,
Doctrine as resting on, § 108, p. 346
Doctrine of estoppel in pais as limited to, § 64
Foundation on principles of, § 3
Escrows,
Acquiescence, estoppel by in respect to delivery of instrument held in, § 114, p. 367
Clothing of purchaser with apparent authority to mortgage property by placing deed in, § 105, n. 15
Estates of decedents,
Acquiescence, estoppel by in respect of management and distribution, § 114, p. 367
Claims against, estoppel to assert invalidity of obligations, § 132
Estoppel against estoppel, § 12
Equitable estoppel, § 65
Evidence,
Admissibility, § 161
Branch of law of, § 63, p. 249
Burden of proof, § 160
Contradiction of, prior action or proceeding, § 122
Distinguished, § 1
Equitable estoppel, use as evidence, § 153, p. 441
Inconsistency, former proceedings, § 122
Inconsistent positions in respect of, judicial proceedings, § 118
Pleading as not essential where estoppel shown in, § 153, p. 446
Presumptions, post
Principle as rule of, § 1
Prior actions or proceedings, estoppel to contradict, § 122
Weight and sufficiency, § 162, pp. 457–461
Exceptions, estoppel to deny, § 38, p. 218
Execution, after-acquired title, sale on execution as basis for estoppel to assert, § 25

Execution of instruments, estoppel by deed as affected by, § 41
Executors and administrators,
Acceptance of benefits of sales by, § 110, p. 356
Deed, estoppel by, § 48
Recitals in bond of, estoppel as to, § 40
Expenditures,
Permitting without objection, §§ 94–97, pp. 314–320
Railroads, permitting construction across land with apparent acquiescence, § 95
Silence or acquiescence, purchaser permitted to make without objection, § 96
Expression of opinion, estoppel by misrepresentation as not created by, § 79
Extent, § 148
Acceptance of benefits, estoppel by, § 109, p. 349
Inconsistent positions, estoppel by, § 108, p. 344
Judicial proceedings, prior claim or position in, § 117, p. 373
Fact matters,
Admissions relating to as essential to constitute estoppel, § 84, p. 298
Representations as to only as creating, § 79
Fact questions, actions involving, § 163, pp. 461–464
Failure to plead, effect of, § 153, p. 448
Fair dealing, promotion and enforcement of, § 63, p. 251
False representations, equitable estoppel, necessity of, § 67, p. 254
Farm Credit Administration, doctrine as applicable to, § 140, n. 65
Fault, equitable estoppel as based on, § 67, p. 257
Federal government,
Equitable estoppel, liability to, § 140
Unauthorized acts or statements of officers as estoppel, § 142, p. 419
Findings, actions involving, § 165
Fire regulations, acts of officers or agents in violation of as not creating estoppel, § 142, p. 421
Forbearance,
Conduct inducing, equitable estoppel resulting, § 59, p. 240
Waiver resulting, § 61, p. 244
Forced heirs, estoppel by acts or conduct of ancestor, § 132
Foreclosure,
Filing of bill for, estoppel resulting, § 16
Silence or acquiescence, permitting sale on without objection, § 92
Forfeitures, waiver of, sufficiency of proof, § 162, p. 460
Forged instruments, representations as to operating as estoppel, § 81, n. 34
Forgery,
Acquiescence, estoppel by in respect to forged signatures, § 114, p. 368
Negligence, forged instrument as basis of estoppel by, § 102, n. 84
Form, pleas, actions involving, § 155
Former proceedings,
Pleadings, allegations or admissions in, § 121, pp. 386–391
Testimony in, § 122
Forum, law of as governing, § 63, p. 249
Franchises, municipal corporations, estoppel in respect of, § 146
Fraud,
Acceptance of benefits, waiver of right to sue for deceit, § 110, p. 352
Advantage of own fraud or wrong, estoppel in respect of, § 108, p. 343
After-acquired title, estoppel to assert, § 21
Deed, estoppel by, § 43
Doctrine as inapplicable when operating as, § 63, p. 251
Equitable estoppel, application of doctrine to uphold, § 148
Estoppel in pais distinguished, § 59, p. 241
Express intention to deceive as not essential, § 69, p. 262
Future events, representations as to helping perpetrate a fraud, § 80, p. 290
Participation in by person setting up estoppel, § 75
Purpose of as to prevent, § 1
Recitals, estoppel in respect of as affected, § 40
Reliance on own fraud or wrong, § 75
Frauds, statute of,
Acceptance of benefits under contract void as in violation of, § 110, p. 351
Availability as defense, § 150
Further assurance, covenant for, after-acquired title operating as estoppel based on, § 27
Future events, representations as to, § 80, pp. 289–292
Garnishment,
Bond, recitals in operating as estoppel, § 40
Bond given to procure release of, acceptance of benefits operating as estoppel, § 110, p. 353
General denial, equitable estoppel, defense as available under, § 153, p. 442
Good faith,
Apparent ownership, persons dealing with apparent owner, § 106, p. 338
Element of, § 75
Reliance on representations, § 78, p. 287
Governing law, pleading estoppel, § 153, p. 443
Government, equitable estoppel against, §§ 138–147, pp. 403–436
Governmental functions, municipal corporations, estoppel in respect of exercise of, § 141, p. 415
Grantee,
Acceptance of deed operating as estoppel, § 15
After-acquired title inuring to, § 21
Capacity of, estoppel of grantor to question, § 13
Equitable estoppel, availability against, § 143
Estoppel by deed,
Persons claiming through, § 54
Privies, § 50
Operation of principle in favor of, § 13
Persons claiming through, estoppel by deed, § 54
Recitals in deed as binding on, § 37
Title, estoppel to deny, § 15
Grantor,
Estoppel against, § 13
Recitals in deed as binding on, § 37
Guardian and ward,
Bond of guardian, recitals operating as estoppel, § 40
Prior recognition or assertion of authority, capacity, etc., of guardian, § 123
Harshness, equitable estoppel, § 63, p. 249
Heirs,
Deed, estoppel by, § 53

Heirs—Continued,
Equitable estoppel, availability against, § 132
Highways, dedication of, estoppel by acquiescence, § 114, p. 367
Husband and wife,
After-acquired title, estoppel to assert, § 30
Apparent title to or authority over real property belonging to wife permitted to be in husband, estoppel resulting, § 105
Contracts, acceptance of benefits precluding objection of absence of wife's statutory assent, § 110, p. 351
Personal property, estoppel resulting as to wife knowingly permitting husband to deal with her personal property as his own, § 106, p 336
Identity, recitals as to, estoppel to deny, § 38, p. 215
Ignorance,
Acceptance of benefits, contracts, § 110, p 351
Admissions due to, § 84, p. 297
Admissions in pleading in former proceeding, estoppel as dependent on, § 121, p. 388
Apparent title or authority, clothing another with, § 105
Contract, estoppel by, § 55, p. 232
Equitable estoppel, effect of, § 70, p. 265
Judicial proceedings, prior claim or position in, § 117, p. 372
Pleadings, admissions in, former proceedings, § 121, p. 389
Reliance on representations, § 78, p. 287
Silence or acquiescence, estoppel by as dependent on ignorance of adverse party, § 87, p. 303
Implied misrepresentations, §§ 87–101, pp. 301–323
Implied ratification, acquiescence as, § 113
Implied waiver,
Creation of, § 72, p. 274
Estoppel giving rise to, § 61, p. 246
Improvements,
Municipal corporations, acquiescence in, § 146
Permitting without objection, §§ 94–97, pp. 314–320
Silence or acquiescence,
Nearby property, § 97
Purchaser of land making without objection, § 96
Imputed knowledge,
Conduct based on, last clear chance doctrine as in nature of, § 71, p. 273
Equitable estoppel based on, § 70, p. 266
In pais, estoppel by matters,
See, also, Equitable Estoppel, ante
Abandonment distinguished, § 59, p. 241
Admission as essential, § 67, p. 256
Availability at law, § 64
Classification, § 2
Definition of, § 59, p. 236
Elements of, §§ 67–77, pp. 254–283
Estoppel by deed distinguished, § 10
Form of, § 59, p. 240
Fraud distinguished, § 59, p. 241
Mutuality, § 76
Negligence, post
Object of doctrine, § 63, pp. 248–262
Pleading, § 153, p. 440
Prejudice, § 74, p. 276
Inaction. Silence or acquiescence, post
Inconsistency,
Admitted facts, § 84, p. 297
Purpose of as to prevent, § 1
Inconsistent position,
Acceptance of benefits precluding, § 109, p. 347
Changes of venue, estoppel resulting, § 118
Commencement of litigation, inconsistency before and after, § 116
Contract asserted in prior action, § 119, p. 383
Contracts, acceptance of benefits in part only, § 110, p. 351
Deed, persons claiming under, § 110, p. 352
Doctrine of equitable estoppel precluding, § 108, pp. 341–347
Element of estoppel by, § 108, p. 344
Estoppel by contract, § 55, p. 232
Evidence,
Former proceedings, § 122
Judicial proceedings, § 118
Extent of estoppel by, § 108, p. 346
Government assuming, § 138, p. 405
Inducement or advice in respect of, § 108, p. 343
Instructions, judicial proceedings, § 118
Intervention, § 119, p. 384, n. 3
Judicial proceedings,
Former proceedings, § 119, pp. 381–384
Prior claim or position in, §§ 117–120, pp. 372–386
Same proceeding, § 118
Stipulations and consents, § 120
Jurisdiction, § 119, p. 384
Knowledge of facts, effect of, § 108, p. 342
Minimizing injury, attempt as not resulting in, § 108, p. 347
Misleading effect as essential, § 108, p. 345
Mortgages, persons claiming under, § 110, p. 352
Official capacity, parties acting in, § 124
Pleadings, § 118
Former proceedings, § 121, p. 387
Prior claim or position in judicial proceeding, §§ 117–120, pp. 372–386
Procedure, § 118
Former proceedings, § 119, p. 383
Process, judicial proceedings, § 118
Reliance on conduct or representations, § 108, p. 342
Representative capacity, suits brought or defended in, § 119, p. 384
Requests, § 129
Stipulations, judicial proceedings, § 120
Successive judicial proceedings, § 119, p. 381
Title asserted in prior action, § 119, p. 383
Written instruments, claim under, § 128
Indemnity bonds, recitals in, estoppel to deny, § 40
Independent causes of action, defeat on one as estopping prosecution of others, § 116
Inducements,
Conduct, equitable estoppel, § 59, p. 240
Equitable estoppel, element of, § 71, p. 269
Equitable estoppel resulting, § 59, p. 237
Estoppel as result of inducing another to act or refrain from acting, § 108, p. 343
Infants,
Acquiescence, estoppel by in respect to employment of, § 114, p. 368

Infants—Continued,
Contracts, acceptance of benefits precluding objection because of minority of one of parties, § 110, p. 351
Inference, estoppel by, § 125
Influence, estoppel as result of influencing another to act or refrain from acting, § 108, p. 343
Injury, element of, § 73
Inoperative covenants, after-acquired title operating as estoppel based on, § 28
Instructions,
Actions involving, § 164
Inconsistent positions in, § 118
Insurance policies, apparent title or authority over, clothing another with, § 106, p. 335
Intention,
Admissions, equitable estoppel as dependent on, § 84, p. 295
Apparent title or authority, clothing another with, § 104
Equitable estoppel, element of, § 69, pp. 260–263
Fact question as to, § 163, p. 464
Inference as to, § 162, p 458
Inference in respect of, § 162, p. 461
Misrepresentations, estoppel by, § 78, p. 285
Negligence supplying, § 69, p. 261
Negligence supplying place of, § 102
Pleading intent, § 156, p. 451
Relinquishment of right, waiver as requiring, § 67, p. 257
Representations, element of, § 78, p. 283
Silence or acquiescence, intent to deceive as essential to estoppel by, § 87, p. 304, n. 91
Sufficiency of evidence as to, § 162, p. 461
Waiver, element of, § 69, p. 263
Intervention, inconsistent positions in, § 119, p. 384, n. 3
Irrigation districts, equitable estoppel, doctrine as applicable to, § 141, p. 415
Issues, actions involving, § 159
Judgment,
Actions involving, § 165
Silence or acquiescence, failure of judgment debtor to assert invalidity of judgment, § 87, p. 306
Judgment creditor,
After-acquired title operating as estoppel as affecting rights of, § 35
Apparent owner, estoppel as not available to judgment creditors of person clothed with apparent ownership, § 106, p. 338
Judgment or decree,
Acceptance of benefits of, § 110, p. 357
Agreements respecting date of rendition, estoppel as to, § 120
Estoppel by, § 6
Misrepresentations, equitable estoppel arising with respect to, § 82
Judicial admissions, estoppel by, § 7
Judicial estoppel,
Evidence, former proceedings, § 122
Inconsistent positions in judicial proceedings, estoppel by distinguished, § 117, p. 378
Pleadings, former proceedings, § 121, p. 390
Judicial order, acceptance of benefits of, § 110, p. 357
Judicial proceedings,
Participation in without objection, § 115
Judicial proceedings—Continued,
Prior claim or position in, §§ 117–120, pp. 372–386
Acquiescence as assumption of position, § 117, p. 372, n. 32
Admissions or allegations in pleading, § 118
Advantage or disadvantage resulting as essential to estoppel, § 117, p. 374
Changes of venue, § 118
Consents, § 120
Contract asserted in prior action, § 119, p. 383
Defeat on original position, § 117, p. 378
Defense inconsistent with previous position, § 118, p. 379
Former proceedings, § 119, p. 382
Deliberate assumption of particular position, § 117, p. 372
Determination of merits of initial position as essential, § 117, p. 377
Distinctions, § 117, p. 378
Equitable element generally, § 117, p. 374
Evidence, § 118
Extent of estoppel, § 117, p. 373
Favorable decree or judgment in respect of first position as essential, § 117, p. 376
Ignorance, § 117, p. 372
Injurious effect as essential to estoppel by, § 117, p. 374
Instructions, § 118
Judicial determination of merits of initial position as essential, § 117, p. 377
Jurisdiction, § 119
Knowledge, § 117, p. 375
Misleading effect as essential, § 117, p. 374
Mistake, § 117, p. 372
Objections inconsistent with previous position, § 118
Former proceedings, § 119, p. 382
Pleading, § 118
Procedure, § 118
Former proceeding, § 119, p. 383
Process, § 118
Reliance on, § 117, p. 374
Same proceeding, § 118
Stipulations, § 120
Successful maintenance of first position operating as estoppel, § 117, p. 375
Time of trial, § 118
Title asserted in prior action, § 119, p. 383
Judicial records, estoppel by, § 5
Judicial sales,
Acceptance of benefits under, § 110, p. 356
After-acquired title by, estoppel to assert, § 34
Laches in instituting suit to avoid, § 115, n. 7
Silence or acquiescence,
Improvements by purchasers at judicial sales, § 96
Permitting without objection, § 92
Jurisdiction,
Appeal and error, acceptance of benefits under appeal bond precluding objection to, § 110, p. 354
Inconsistent positions with respect of, § 119, p. 384
Jury questions, actions involving, § 163, pp. 461–464
Justice, foundation on principles of, § 3

Knowledge.
See, also, Notice, post
Acceptance of benefits, estoppel as dependent on, § 109, p. 349
Acquiescence as founded on, § 114, p. 363
Admissions made with, § 84, p. 295
After-acquired title, estoppel to assert, § 21
Clothing another with apparent title or authority, estoppel as dependent on, § 105
Disavowal, estoppel by as dependent on, § 86
Disclaimer, estoppel by as dependent on, § 86
Equality of as respects equitable estoppel, § 71, p. 272
Equitable estoppel,
Concealment of material facts with knowledge, § 67, p. 254
Elements of, § 70, p. 264
Expenditures, permitting without protest, § 94, p. 315
Foreclosure sales, estoppel by silence or acquiescence as requiring knowledge, § 92
Improvements, permitting without protest, § 94, p. 315
Inconsistent positions, estoppel resulting as affected, § 108, p. 342
Instructions relating to, § 164
Judicial proceedings,
Inconsistency in, § 117, p. 375
Participation in without objection, § 115
Judicial sales, permitting without objection, § 92
Liens, estoppel as result of failure to assert as requiring, § 99
Misrepresentations, estoppel by, § 78, p. 285
Mortgage or sale of property with knowledge of claim of another, standing by without objection as estoppel, § 90
Occupancy of land, knowledge implied from, § 71, p. 272
Proof of, § 162, p. 461
Reliance on representation, element of, § 71, p. 270
Renunciation, estoppel by as dependent on, § 86
Silence or acquiescence,
Estoppel by as requiring, § 87, p. 302
Failure to assert claim, § 98
Waiver, elements of, § 70, p. 266
Laches,
Acquiescence as akin to, § 113
Assertion of, § 66
Definition of estoppel by, § 1
Distinguished, § 59, p. 241
Judicial sales, institution of suit to avoid, § 115, n. 7
Public officers or agents, estoppel by, § 138, p. 408
Land survey, acceptance of benefits, § 110, p. 358
Land titles, equitable estoppel as to, § 59, p. 239
Last clear chance doctrine, imputed knowledge, conduct based on, § 71, p. 273
Law, equitable estoppel as available at, § 64
Law questions, actions involving, § 163, pp. 461–464
Lease,
Acceptance of benefits, § 110, p. 358
Acquiescence, estoppel by, § 114, p. 367
After-acquired title, estoppel to assert in respect of, § 21
Legal estoppel, equitable estoppel distinguished, § 62
Legal title, after-acquired title, estoppel to assert, § 30
Legislative grant, estoppel by deed as resulting, § 20
Lessor, estoppel to deny title, § 13
Licenses,
Beneficiary acquiescing therein as estopped to deny validity, § 112
Streets, municipalities estopped in respect of, § 145
Liens, failure to assert as creating estoppel, § 99
Limitation of actions, representations operating as estoppel to assert limitations, § 81
Maps, references in, estoppel to deny, § 38, p. 218
Marshaling assets and securities, estoppel by contract, § 55, p. 233, n. 47
Materiality,
Admissions, § 84, p. 296
Equitable estoppel, false representations, § 68
Recitals, estoppel to deny as dependent on, § 37
Representations, necessity of, § 79
Matters precluded, §§ 148–152, pp. 436–440
Mechanics' liens,
After-acquired title, estoppel to assert in respect of, § 21
Estoppel by deed, § 20
Meeting of minds, waiver, sufficiency of proof as to, § 162, p. 461
Merger, mortgages, estoppel to claim, § 14, n. 75
Minimizing injury, inconsistent position as respects estoppel as not resulting from attempt, § 108, p. 347
Misrepresentations, estoppel by, §§ 59–106, pp. 236–338
See, also, Representations, post
Active misrepresentation of facts, § 71, p. 272
Constructive knowledge of falsity of representations, § 78, p. 285
Defined, § 59, p. 236
Distinctions, § 62
False representations as ground, § 78, pp. 283–288
Government, estoppel against as dependent on, § 138, p. 407
Implied misrepresentations, §§ 87–101, pp. 301–323
Intent, § 78, p. 285
Judgment, § 82
Knowledge of falsity, § 78, p. 285
Mortgages, § 82
Mutuality, § 76
Negligence, § 66
Pleading, § 156, p. 451
Reliance on representations, post
Silence or acquiescence, post
Mistake,
Acquiescence, estoppel as arising in case of, § 114, p. 365
After-acquired title, estoppel to assert, § 21
Contract, estoppel by, § 55, p. 232
Deed, estoppel by, § 43
Equitable estoppel, effect of acting under, § 70, p. 265
Judicial proceedings, prior claim or position in, § 117, p. 372
Pleading, admissions in, former proceedings, § 121, p. 389
Recitals, estoppel respecting as affected § 40

Momentary seizin, after-acquired title operating as estoppel based on instruments giving, § 29
Morality, foundation on principles of, § 3
Mortgages,
Acceptance of benefits, estoppel resulting, § 110, p. 352
Acceptance of operating as estoppel to deny title of mortgagor, § 16
After-acquired title, estoppel to assert, § 23
Apparent title or authority over, clothing another with, § 106, p 335
Assignment of, estoppel resulting from, § 16
Chattel mortgages, ante
Defective description, estoppel to take advantage of, § 14, n. 75
Description of premises, recitals as to operating as estoppel, § 39
Equitable estoppel, availability against mortgagee, § 133
Execution of instrument, estoppel to deny, § 14
False representations as to, equitable estoppel, § 82
Inconsistent position, persons claiming under, § 110, p. 352
Merger, estoppel to claim, § 14, n. 75
Misrepresentations as to, equitable estoppel arising, § 82
Permitting mortgage of property without objection, §§ 89–93, pp. 308–314
Pre-existing debt, estoppel in respect of, § 14
Prior encumbrances, recitals as to operating as estoppel, § 39
Recitals in, estoppel to deny, § 39
Third persons, estoppel to assert title in, § 14
Motor vehicles, apparent title or authority over, clothing another with as creating estoppel, § 106, p. 338
Municipal corporations,
Abandonment, estoppel by, § 138, p. 408
Acceptance of benefits, § 111, pp. 358–361
Parties dealing with, § 112
Acquiescence, improvements, § 146
Acts of officers or agents, estoppel by, § 142, p. 417
Assessments, estoppel in respect to collection of, § 147, pp. 433–436
Collection of taxes and assessments, estoppel in respect of, § 147, pp. 433–436
Condemnation, agreement in restraint of right, § 146
Conduct of officers or agents, estoppel by, § 142, p. 417
Contracts,
Acceptance of benefits, parties dealing with as estopped to deny power to make, § 112
Acceptance of benefits as estoppel to deny want of power to make, § 111, p. 358
Deeds, estoppel by, § 49
De facto officers or agents, estoppel by acts of, § 142, p. 418
Encroachments on streets, estoppel in respect to right to abate, § 145
Equitable estoppel, liability to, § 138, p. 404; § 141, pp. 413–417
Franchises, estoppel in respect of, § 146
Grant, estoppel to deny validity of, § 112
Illegal acts, estoppel in respect of, § 143
Municipal corporations—Continued,
Improvements, acquiescence in, § 146
Irregular exercise of power,
Acceptance of benefits as estoppel to deny contract invalid because of, § 111, p. 360
Estoppel in respect of, § 144
Licenses, beneficiary of acquiescing therein as estopped to deny validity, § 112
Licenses to use streets, estoppel in respect of, § 145
Neglect of officers or agents, estoppel by, § 142, p. 420
Officers or agents, estoppel by acts of, § 142, p. 417
Omissions of officers or agents, estoppel by, § 142, p. 420
Ordinances, estoppel to deny validity, § 138, p. 411
Perpetual franchise, estoppel to terminate, § 146
Proprietory functions, acceptance of benefits operating as estoppel to deny validity of contract irregularly made, § 111, p. 361
Seal, presence of seal on contract as estoppel to inquire into power to make contract, § 142, p. 423
Streets, estoppel relating to, § 145
Taxes, estoppel in respect to collection of, § 147, pp. 433–436
Trivial improvements, basis of estoppel, § 146
Ultra vires acts, estoppel in respect of, § 143
Unauthorized acts or statements of officers, § 142, p. 419
Unauthorized method of exercising power, § 144
Void contracts, estoppel to deny liability under, § 143
Municipalities, grant to use streets, estoppel as to, § 145
Mutuality,
Contracts,
Acceptance of benefits precluding objection for want of, § 110, p. 351
Estoppel by, § 57, n. 54
Deed, estoppel by, § 11
Equitable estoppel, element of, § 76
Misrepresentation, estoppel by, § 76
Record, estoppel by, § 8
Nature, estoppel by deed, § 10
Negligence, §§ 102–106, pp. 324–338
Acts causing injury to one of two innocent persons, § 103, pp. 325–331
Blank checks, entrusting to agent, § 103, p. 328, n. 88
Blank stock certificates, negligent signing of by bank, § 103, p. 328, n. 88
Burden of proof as to estoppel by, § 160, n. 5
Carelessness of another as affecting estoppel by, § 102
Clothing another with apparent title or authority, §§ 104–106, pp. 331–341
Fraudulent or deceptive purpose as essential to create estoppel, § 106, p. 337
Good faith on part of person dealing with apparent owner, § 106, p. 338
Husband and wife, § 105
Ignorance of party claiming estoppel, § 105
Innocent third persons dealing with apparent owner, § 104

Negligence—Continued,
Clothing another with apparent title or authority—Continued,
Intention as affecting, § 104
Judgment creditors of apparent owner as not authorized to claim estoppel, § 106, p 338
Knowledge as essential to estoppel, § 105
Mere possession on part of apparent owner of personal property as insufficient to create estoppel, § 106, p. 336
Motor vehicles, § 106, p. 338
Omissions or acts constituting, § 106, p. 337
Personal property, § 106, pp. 334–341
Protection of innocent persons dealing with apparent owner, § 104
Real property, § 105
Regular course of business, § 106, p. 339, n. 55
Reliance on apparent ownership, § 104
Contributory negligence of one claiming estoppel, effect of, § 102
Criminal act, wrong accomplished through instrumentality of, § 103, p. 330
Duty owing to party claiming estoppel as essential, § 102
Equitable estoppel arising through, § 59, p. 237
Forged instrument as basis of estoppel by, § 102, n. 84
Innocent parties, acts causing injury to one of two, § 103, pp. 325–331
Intent, supplying place of, § 102
Intent supplied by, § 69, p. 261
Misrepresentation, estoppel by, § 66
One of two innocent persons required to suffer by acts of third, § 103, pp. 325–331
Personal property, clothing another with apparent title or authority over, § 106, pp. 334–341
Proximate cause, necessity of, § 102
Real property, clothing another with apparent title or authority over, § 105
Stolen property, bona fide purchaser of property obtained by transferor in trade for, § 103, p. 328, n. 88
Timekeeper having checks issued to fictitious name and cashing on own indorsement, employer as estopped to claim reimbursement, § 103, p. 328, n. 88
Warehouse receipts, indorsement in blank to bookkeeper, § 103, p. 328, n. 88
Next of kin, equitable estoppel, availability against, § 132
Nonaction, public officers or agents, estoppel by, § 138, p. 408
Nonclaim, covenant of, after-acquired title operating as estoppel based on, § 27
Notice,
See, also, Knowledge, ante
Equality of as respects equitable estoppel, § 71, p. 272
Improvements, owner permitting making of without giving notice of title as estopped, § 94, p. 316
Nuisance, estoppel by deed in respect of, § 45, n. 82
Oath,
Admissions made under, § 84, p. 297
Pleading in former proceeding, § 121, p. 387
Objections,
Inconsistency with previous position, § 118
Former proceedings, § 119, p. 382
Odiousness of, § 3
Official certificates and acts, estoppel arising out of, § 124
Official functions, public officer as estopped in private capacity as to, § 142, p. 426
Omission to act, equitable estoppel, element of, § 72, p. 274
Operation and effect, equitable estoppel, §§ 130–147, pp. 397–436
Opinion,
Mere expression of as creating estoppel by misrepresentation, § 79
Pleadings, former suit, § 121, p. 389
Opportunity to plead, waiver of estoppel requiring, § 153, p. 445
Oral waiver, creation of, § 72, p. 274
Ordinances,
City council as estopped to deny validity, § 142, p. 423
Estoppel to deny validity, public service corporations acceptance ordinance imposing limitations of rates, § 112
Municipal authorities as estopped to deny validity, § 138, p. 411
Origin, equitable estoppel, § 59, p. 240
Ostensible ownership or authority, estoppel of party conferring, good faith, § 103, p. 338
Ouster, presumption of, equitable estoppel distinguished, § 59, p. 241
Outstanding title, estoppel to deny validity as result of purchase, § 15
Ownership,
Acts of under claim of title, § 126
Chattel mortgagee, estoppel to deny, § 14
Parishes, equitable estoppel, doctrine as applicable to, § 141, p. 415
Parks, acquiescence, estoppel by in respect to use and dedication, § 114, p. 367
Parol declarations, disclaimer or disavowal, estoppel arising from, § 86
Participation in judicial proceedings, acquiescence operating as estoppel, § 115
Particularity, pleading, § 156, p. 450
Parties, waiver, requirements as to, § 67, p. 258
Partition,
Acceptance of benefits of sales and proceedings for, § 110, p. 356
Acquiescence, estoppel by, § 114, p. 367
Acquiescence in proceedings as resulting in estoppel, § 115
After-acquired title, estoppel to assert in respect of partition deed with warranty, § 21, n. 24
Partnership, prior recognition or assertion of authority, etc., § 123
Passivity, estoppel by acquiescence as created by, § 114, p. 365
Past events, representations, doctrine as applicable only to, § 80, p. 289
Past transactions, recitals as to, estoppel in respect of, § 40
Patents,
Public lands,
After-acquired title operating as estoppel as applying to, § 31

Patents—Continued,
Public lands—Continued,
Misrepresentation in securing, § 12
Payment,
Acceptance of benefits, § 110, p. 358
Equitable estoppel, defense as available under plea of, § 153, p. 443
Penal nature, equitable estoppel, § 63, p. 250
Performance of contract, estoppel by, § 55, p. 231
Perpetual franchise, estoppel to terminate, § 146
Personal property,
After-acquired title, estoppel to assert, § 24
Application of doctrine to title or right in, § 150
Clothing another with apparent title or authority over, negligence in respect of, § 104, pp. 334–341
Deed, estoppel by as applying to, § 13
Doctrine extending to, § 63, p. 250
Mortgage of, permitting without objection, § 91
Negligence, clothing another with apparent title or authority over, § 106, pp. 334–341
Sale of, permitting without objection, § 91
Personal representatives,
Equitable estoppel, availability against, § 132
Prior recognition or assertion of authority, etc., § 123
Personal status, equitable estoppel, § 149
Pleadings,
Admissions in, §§ 118, 158
Estoppel by, § 7
Former proceeding, § 121, pp. 386–391
Ignorance or mistake in respect of, § 121, p. 389
Successful denial by opposite party as essential, § 121, p. 389
Conclusions of law, statements amounting to in former suit as not operating as estoppel, § 121, p. 389
Confession and avoidance, plea of, § 155
Demurrer, § 154
Setting up estoppel, § 157
Disclaimer by, § 86
Effect of pleading unsuccessfully, § 158
Estoppel by, § 7
Former proceedings, allegations or admissions in, § 121, pp. 386–391
Inconsistent positions in respect of, § 118
Issues, proof and variance, § 159
Judicial estoppel in respect of, former proceedings, § 121, p. 390
Necessity for, § 153, pp. 440–448
Opinions, statements amounting to in pleadings in former suit as not operating as estoppel, § 121, p. 389
Particularity, § 156, p. 450
Reply to, § 157
Requisites and sufficiency of allegations, § 156, pp. 449–452
Unsuccessful pleading, effect of, § 158
Waiver, allegations required, § 156, p. 452
Pleas, nature and form of, § 155
Pledges,
Automobiles left with dealer for purpose of sale, apparent authority to sell as estoppel in so far as relating to pledge, § 106, p. 340
Permitting pledge of property without objection as estoppel, § 91
Police juries, equitable estoppel, doctrine as applicable to, § 141, p. 415
Police power, doctrine as not applicable to deprive government of exercise of, § 140
Possession,
Claim of title, § 126
Covenant for, after-acquired title operating as estoppel based on, § 27
Recognition of title of another after taking of, estoppel as not arising, § 55, p. 231
Subordination to another title, persons taking possession of property in, § 127
Surrender of as sufficient to create estoppel, § 101
Possibility of reverter, after-acquired title, estoppel to assert, § 30
Protestative conditions, contracts, acceptance of benefits precluding objection because of, § 110, p. 351
Power of attorney, contract, estoppel by, § 55, p. 233, n. 47
Powers, recitals as to, estoppel to deny, § 38, p. 217
Pre-existing debt, mortgage to secure, estoppel to deny validity, § 14
Prejudice,
Acquiescence, estoppel by as requiring, § 114, p. 364
Contract, estoppel by, § 55, p. 232
Equitable estoppel, necessity of, § 59, p. 237
Inconsistent position, § 108, pp. 342, 346
Judicial proceedings,
Inconsistency in, § 117, p. 374
Participation in without objection, § 115
Person setting up estoppel, element of, § 74, pp. 276–281
Reliance on representations, elements of, § 78, p. 286
Stipulations in judicial proceedings, estoppel as dependent on, § 120
Waiver, element of, § 74, p. 280
Waiver as not necessarily requiring, § 61, p. 247
Preponderance of evidence, proof of estoppel by, § 162, p. 457
Present events, representations, doctrine as applicable to, § 80, p. 289
Presumption of ouster, equitable estoppel distinguished, § 59, p. 241
Presumptions, § 160
Waiver, conduct prejudicially misleading, § 69, p. 264
Principal and agent, estoppel by deed, agent as estopped, § 48, n. 93
Principal and surety, recitals in bond, estoppel to deny, § 40
Prior acts or conduct, inconsistency, estoppel by reason of, § 108, pp. 341–347
Prior claim or position. Judicial proceedings, ante
Privies, deed, estoppel by, §§ 50–54, pp. 228–231
Privity,
Contract, estoppel by, § 55, p. 233
Equitable estoppel, availability in favor of privy, § 130
Grantee in deed, estoppel as against those in privity, § 13
Procedure,
Actions involving, §§ 153–159, pp. 440–454
Inconsistent positions in respect of, judicial proceedings, § 118

Process, inconsistent positions in respect of, judicial proceedings, § 118
Promissory estoppel,
Equitable estoppel distinguished, § 59, p. 241
Representations as to future events, § 80, p. 290
Proof, actions involving, § 159
Proprietary capacity, federal or state government as liable to estoppel when acting in, § 140
Proprietary functions,
Municipal corporations, acceptance of benefits as estoppel to deny validity of contract irregularly made in proprietary capacity, § 111, p. 361
Municipal corporations estopped in respect of, § 141, p. 416
Protective nature, equitable estoppel, § 63, p. 251
Proximate cause, negligence, necessity of, § 102
Proximate result, representations, element of, § 71, p. 269
Public funds, illegal disbursements, knowledge of officer as raising estoppel in case of, § 142, p. 420
Public officers,
Bond, recitals in operating as estoppel, § 40
Deed, estoppel by in respect to execution of conveyances by, § 48
Equitable estoppel, liability to, §§ 138–147, pp. 403–436
Estoppel by acts of, § 142, pp. 417–427
Public policy,
Contracts against, acceptance of benefits as precluding objection, § 110, p. 352
Conveyance contrary to, estoppel by deed as not rendering effective, § 45
Equitable estoppel as inapplicable to transactions contrary to, § 63, p. 251, n. 17
Public revenues, doctrine as not applicable to affect, § 140
Public service commissions, fixing of rates in accordance with requests, estoppel to subsequently enjoin order, § 129
Public service corporations, acceptance of ordinance imposing limitations of rates, estoppel to deny validity of ordinance, § 112
Public showroom, goods left with dealer and placed with similar goods in, apparent title as respects estoppel, § 106, p. 335
Public use, taking property for, acceptance of benefits operating as estoppel, § 110, p. 357
Purchasers,
Improvements and expenditures by without objection, estoppel to contest title of, § 96
Retention of possession of property, estoppel as respects damages for fraudulent representation, § 110, p. 356
Purpose of, § 1
Contract, estoppel by, § 55, p. 232
Equitable estoppel, § 63, pp. 248–252
Quasi estoppel,
Basis of, § 107
Encroachment on land, apparent acquiescence as, § 114, p. 366, n. 89
Legal bars constituting, § 2
Quasi municipal corporations,
Acceptance of benefits, § 111, pp. 358–361
Acts or conduct of officers or agents, estoppel by, § 142, p. 417
Equitable estoppel, liability to, § 141, pp. 413–417
Quasi municipal corporations—Continued,
Officers or agents, estoppel by acts of, § 142, p. 417
Ultra vires acts, estoppel in respect of, § 143
Quiet enjoyment, covenant for, after-acquired title, estoppel based on, § 27
Quieting title, pleading estoppel in actions for purpose of, exceptions, § 153, p. 445
Quitclaim deeds,
After-acquired title, estoppel to assert, § 22
Making or acceptance of as estoppel, § 18
Railroads, permitting construction across land without objections, § 95
Ratification,
Acceptance of benefits, § 109, p. 347
Acceptance of instrument, estoppel by deed resulting, § 42
Acquiescence, defense resting on principle of, § 113
Equitable estoppel distinguished, § 60
Quasi estoppel, basis in, § 107
Real property,
After-acquired title, estoppel to assert, §§ 21–23, pp. 203–206
Apparent title or authority over, clothing another with, § 105
Application of doctrine to title or right in, § 150
Clothing another with apparent title or authority over, negligence in respect of, § 105
Conveyance without authority, mere silence of owner at time of as estoppel to assert title, § 90
Doctrine extending to, § 63, p. 250
Mortgage of, permitting without objection, § 90
Negligence, clothing another with apparent title or authority, § 105
Permitting sale or mortgage of without objection, § 90
Sale of, permitting without objection, § 90
Silence or acquiescence, permitting sale or mortgage of without objection, § 90
Reasonable knowledge, waiver based on, § 70, p. 267
Receipts, equitable estoppel created by, § 85
Receivers,
Acceptance of benefits, sales by, § 110, p. 356
Equitable estoppel, availability against, § 134
Prior recognition or assertion of authority, etc., § 123
Recitals,
Estoppel to deny, §§ 36–40, pp. 213–222
Admission of facts, § 36
Bond, § 40
Certainty, § 37
Collateral action, § 37
Consideration, § 37; § 38, p. 217
Consideration as essential, § 40
Contract, § 58
Contradictory matters, § 40
Cumulative bond, § 40
Date of instrument, § 38, p. 215
Death of obligee as affecting, § 40
Deeds, §§ 37, 38, pp. 213–219
Description, § 38, p. 217
Descriptive matter, § 37
Exceptions, § 38, p. 218
Extent of, § 37
Fraud as affecting, § 40

Recitals—Continued,
Estoppel to deny—Continued,
General recitals, § 37
Identity of grantee, § 38, p. 215
Indemnity bonds, § 40
Instruments in general, § 36
Intent of parties, § 37
Judicial compulsion of execution of instrument, § 41
Limitation in operation of recitals, § 37
Maps, § 38, p. 218
Materiality, § 37
Matters of fact in deed, § 37, p. 213
Mistake as affecting, § 40
Mortgages, § 39
Outstanding interest, making deed subject to, § 38, p. 216
Particular recitals, § 37
Past transactions, § 40
Power to convey, § 38, p. 217
Principal and surety, § 40
Prior agreements, § 38, p. 215
Quantity of estate conveyed, § 38, p. 215
References to prior instruments, § 38, p. 216
Reservations, § 38, p. 218
Sealed instruments, § 41
Surety bonds, § 40
Title, § 38, p. 216
Judicial proceedings, compromise, § 7
Record,
Estoppel by, §§ 4–9
Classification, § 2
Defined, § 4
Immaterial allegations, § 7
Judgment, § 6
Judicial admissions, § 7
Judicial record, § 5
Matters precluded, § 9
Mutuality, § 8
Opportunity to plead, § 153, p. 445
Persons estopped, § 8
Pleading, § 7; § 153, p. 443
Relitigation as precluded between same parties, § 9
United States, § 8
Recordation, estoppel by deed as requiring, § 41
Reliance on representations,
Acquiescence, estoppel by as requiring, § 114, p. 364
Admissions, § 84, p. 296
Change of position, element of, § 78, p. 287, n. 76
Character of representations as respects right to rely on, § 78, p. 287
Confidential relationship, effect of, § 78
Diligence in respect of, § 78, p. 288
Disclaimer, § 86
Element of, § 71, pp. 267–273
Estoppel resulting, § 59, p. 238
Good faith, § 78, p. 287
Ignorance, element of, § 78, p. 287
Inconsistent positions, § 108, p. 342
Inference as to, § 162, p. 458
Instructions as to, § 164
Intention, element of, § 78, p. 285
Judicial estoppel, § 117, p. 378
Judicial proceedings, prior claim or position in, § 117, p. 374
Reliance on representations—Continued,
Knowledge, necessity of, § 71, p. 270
Pleading of, § 156, p. 451
Prejudice, element of, § 78, p. 286
Proof of, § 162, p. 458
Silence or acquiescence, standing by on sale or mortgage of property, § 90
Suspicious circumstances effect of, § 71, p. 271
Relinquishment of position, waiver involving, § 61, p. 245
Relinquishment of right, waiver, conduct warranting inference of, § 67, p. 257
Remedies, equitable estoppel, application to, § 152
Renunciation, § 86
Replevin, pleading estoppel in actions of, exceptions, § 153, p. 445
Replication, setting up matter in avoidance of estoppel, § 157
Reply, setting up estoppel, § 157
Representations,
See, also, Misrepresentations, ante
Acceptance of benefits induced by, § 109, p. 349
Acting on, estoppel resulting, § 59, p. 238
Alteration of instruments, assertion of, § 81
Bills and notes, validity of, § 81
Bonds, validity of, § 81
Certainty, element of, § 78
Claim of estoppel based on representations induced by own conduct, § 75
Conduct amounting to, § 59, p. 240
Confidential relationship, repudiation rendered inequitable because of, § 79
Consideration, want or failure of, § 81
Contract induced by, § 58
Deed, estoppel by requiring, § 10
Equitable estoppel,
Estoppel by conduct, § 130
Limiting to import of, § 148
Equitable estoppel arising from, § 59, p. 237
Expression of opinion, mere fact of as creating estoppel, § 79
Fact matters, estoppel only as to, § 79
Forged instruments, § 81, n. 34
Future events, doctrine as applicable to, § 80, pp. 289–292
Government, estoppel against as dependent on, § 138, p. 407
Inference of from circumstances, § 69, p. 262.
Intention, element of, § 78, p. 283.
Judgments, equitable estoppel arising with respect to, § 82
Limitation of actions, assertion of, § 81
Materiality of, §§ 68, 79
Mortgage, equitable estoppel arising with respect to, § 82
Opinion, expression of as not creating, § 79
Past events, doctrine as applicable only to, § 80, p. 289
Pleading, § 156, p. 451
Present events, doctrine as applicable only to, § 80, p. 289
Proximate result, element of, § 71, p. 269
Reliance on representations, ante
Signature, estoppel as to, § 81
Stock, validity of, § 81
Subsequent acts, bearing on question of estoppel, § 71, p. 270

Representations—Continued,
Uncertain representations as basis for, § 78, p. 288
Vague representation as basis, § 78, p. 288
Validity, bills, notes, etc., § 81
Willfulness, element of, § 78, p. 283
Representative capacity,
Equitable estoppel, availability against persons acting in, §§ 134–137
Estoppel by deed, parties acting in, § 48
Inconsistent positions, suits brought or defended in, § 119, p. 384
Repudiation, acceptance of benefits, § 109, p. 348
Requests, inconsistent position with, § 129
Rescission of contracts, acceptance of benefits from, effect of, § 110, p. 351, n. 27
Reservations, deeds, estoppel to deny, § 38, p. 218
Retraction of disclaimer, effect of, § 86
Reversions, improvements by life tenant, owner of reversion permitting making of as estopped to assert title, § 94, p. 316
Rights, prior assertion or recognition of, § 125
Rights in general, failure to assert, § 88
Rule of evidence, principle as, § 1
Sale of property, permitting without objection, §§ 89–93, pp. 308–314.
Sales,
Acceptance of benefits, estoppel resulting, § 110, p. 355
Acquiescence, estoppel by in controversies arising out of, § 114, p. 367
Salesroom, automobile permitted to remain in after purchase, apparent ownership of as respects estoppel, § 106, p. 339
School districts,
Bond issues, acceptance of proceeds as estoppel to assert defect in proceeding, § 111, p. 361
Equitable estoppel, doctrine as applicable to, § 141, p. 415
Schools and school districts, trustees, prior recognition or assertion of authority, etc., § 123
Seal,
Contract, estoppel by as requiring, § 56
Estoppel by deed requiring, § 41
Municipal corporations, estoppel as result of, § 142, p. 423
Sealed instruments, recitals in, estoppel to deny, § 41
Secret understanding, waiver, sufficiency as basis of, § 69, p. 264
Seizin, covenant of, after-acquired title operating as estoppel based on, § 27
Service of process, stipulations, waiver of, § 120
Sex, operation without regard to, § 63, p. 250, n. 1
Signature,
Contracts, acceptance of benefits under contract objected to for lack of signature, § 110, p. 351
Negligence in signing paper without reading, § 102
Representations as to operating as estoppel, § 81
Silence or acquiescence, §§ 87–101, pp. 301–323
Accounts, estoppel by acquiescence as to, § 114, p. 367
Acknowledgment, witnessing or taking, § 93
Acquiescence in general, §§ 113–115, pp. 362–370
Acts of others, acquiescence in, § 114, pp. 362–368
Adverse claim to property, § 88
Silence or acquiescence—Continued.
Appropriation of water rights, estoppel by acquiescence, § 114, p. 367
Assent, acquiescence as founded on, § 114, p. 363
Assertion of title or right, failure as to, § 88
Attestation of conveyance or mortgage by owner, § 93
Bills and notes, estoppel by acquiescence in controversies arising out of, § 114, p. 367
Bonds, estoppel by acquiescence in cases arising out of, § 114, p. 367
Change of position, acquiescence inducing, § 114, p. 362
Chattel mortgages, permitting without objection, § 91.
Circumstances rendering it duty to speak as essential, § 87, p. 301
Claim, failure to assert, § 98
Common mistake, acquiescence due to, § 114, p. 365
Compromise or settlement, participation in compromise suit, § 115, n. 7
Concealment of facts, § 100
Concealment resulting from, § 87, p. 305
Conduct viewed in light of understanding of rights, § 87, p. 306
Constructive knowledge, acquiescence by person with, § 114, p. 362
Contracts, abrogation of rule in controversies arising out of, § 114, p. 366
Corporate acts, estoppel by acquiescence in respect of officers, stockholders and creditors, § 114, p. 368
Dedication, estoppel by acquiescence in respect of, § 114, p. 367
Defense of acquiescence, dual nature of, § 113
Delay in taking action as not acquiescence, § 114, p. 365
Distinctions, equitable estoppel, § 59, p. 241
Dual nature of acquiescence as defense, § 113
Duty to speak as essential, § 87, p. 301
Elements of estoppel by, acquiescence, § 114, p. 363
Encroachment on land, apparent acquiescence as quasi estoppel, § 114, p. 366, n. 89
Equal means of knowledge, estoppel by silence as affected, § 87, p. 303, n. 91
Equitable estoppel, element of, § 72, p. 274
Equitable estoppel arising, § 59, p. 237
Escrow, estoppel by acquiescence in respect of delivery of instrument held in, § 114, p. 367
Estates of decedents, estoppel by acquiescence in respect of management and distribution of, § 114, p. 367
Estoppel by in respect to use and dedication, § 114, p. 367
Expenditures,
Permitting without objection, §§ 94–97, pp. 314–320
Purchaser of land making without objection, § 96
Extent of rule, acquiescence, § 114, p. 363
Failure to assert claim, § 98
Failure to assert title or right, § 88
Foreclosure sales, permitting without objection, § 92

Silence or acquiescence—Continued,
Forged signatures, estoppel by acquiescence in respect of, § 114, p. 368
Highways, estoppel by acquiescence in respect to use and dedication, § 114, p. 367
Ignorance of adverse party as essential to estoppel by, § 87, p. 303
Implied ratification, acquiescence as, § 113
Improvements,
Nearby property, § 97
Permitting without objection, §§ 94–97, pp. 314–320
Purchaser of land making without objection, § 96
Infants, estoppel by acquiescence in respect to employment of, § 114, p. 368
Intent to deceive as essential, § 87, p. 304, n. 91
Judgment, failure of judgment debtor to assert invalidity of, § 87, p. 306
Judicial proceedings, participation in without objection, § 115
Judicial sales,
Improvements made by purchaser at, § 96
Permitting without objection, § 92
Knowledge,
Acquiescence as importing and being founded on, § 114, p. 363
Improvements or expenditures made without objection, § 94, p. 315
Knowledge of facts, § 87, p. 302
Laches, acquiescence as akin to, § 113
Land titles, equitable estoppel arising as to, § 59, p. 239
Leases, estoppel by acquiescence in cases arising out of, § 114, p. 367
Licenses, beneficiary of estopped to deny validity, § 112
Liens, failure to assert, § 99
Mere silence of itself as not raising estoppel, § 87, p. 301.
Misrepresentations as result of, § 87, p. 305
Mistake, acquiescence due to, § 114, p. 365
Mortgage of property, permitting, §§ 89–93, pp. 308–314
Nearby property, failure to object to improvements made on, § 97
Nonaction as creating estoppel, § 114, p. 365
Opportunity for investigation, estoppel by acquiescence as requiring, § 114, p. 364
Opportunity to speak, necessity of, § 87, p. 302
Parks, estoppel by acquiescence in respect to use and dedication, § 114, p. 367
Particular applications of rule, § 114, p. 366
Partition, estoppel by acquiescence in respect of, § 114, p. 367
Partition proceedings, participation and acquiescence in, § 115
Passivity as creating estoppel, § 114, p. 365
Permitting sale or mortgage of property, § 89
Personal property, sale or mortgage of without objection, § 91
Pledges, permitting without objection, § 91
Prejudice, estoppel by acquiescence requiring, § 114, p. 364
Public sale, permitting without objection, § 92
Silence or acquiescence—Continued,
Purchasers, improvements and expenditures by without objection, § 96
Quasi estoppel, basis of, § 107
Railroads, permitting construction of over land without protest, § 95
Ratification, defense of acquiescence resting on principle of, § 113
Real property,
Improvements or expenditures on, permitting without objection, §§ 94–97, pp. 314–320
Permitting sale or mortgage of without objection, § 90
Reliance on, essential element of estoppel, § 71, p. 268
Reliance on representation, estoppel by ratification requiring, § 114, p. 364
Sale of property, permitting, §§ 89–93, pp. 308–314
Sales, estoppel by acquiescence in controversies arising out of, § 114, p. 367
Settlements, estoppel by acquiescence in respect of, § 114, p. 367
Standing by on sale or mortgage of property, § 90
Streets, estoppel by acquiescence in respect to use and dedication of, § 114, p. 367
Surrender of possession of property, § 101
Title, failure to assert, § 88
Trust funds, estoppel by acquiescence in respect of, § 114, p. 367
Waiver, acquiescence as species of, § 113
Water rights, estoppel by acquiescence in respect to use and appropriation of, § 114, p. 367
Willfulness, element of, § 69, p. 261
Witnessing or taking acknowledgment of conveyance or mortgage, § 93
Simple contracts. Contracts, ante
Sovereign, deed, estoppel by, § 49
Sovereign capacity, federal or state government as liable to estoppel when acting in, § 140
Special benefits, requirement as element of equitable estoppel, § 73
Special covenants, after acquired title operating as estoppel based on, § 27
Special pleading, necessity for, § 153, pp. 440–448
Specific performance, equitable estoppel as not available when specific performance cannot be decreed, § 63, p. 251
States,
Deeds, estoppel by, § 49
Equitable estoppel, government as liable to, § 140
Laches, estoppel by, § 138, p. 409
Proprietary capacity, doctrine of estoppel as applicable when acting in, § 140
Taxation, estoppel in respect to exercise of power, § 147, p. 433
Unauthorized acts or statements of officers, estoppel, by, § 142, p. 419
Status, prior recognition or assertion of, § 123
Statutory provisions,
Acceptance of benefits under, § 109, p. 348, n. 10
Equitable estoppel, reliance on representations § 59, p. 239
Pleading, exceptions to rule, § 153, p. 445
Public estopped by, § 138, p. 410

Statutory provisions—Continued,
Sales not made in compliance with, title by estoppel in case of, § 106, p. 341
Stipulations, inconsistent positions, judicial proceedings, § 120
Stock and stockholders,
Railroads, mutual estoppel by agreement between selves in reliance on which large expenditures have been made, § 95
Representations as to validity of, § 81
Stolen property, bona fide purchaser of property obtained by transferor in trade for, estoppel by negligence, § 103, p. 328, n. 88
Strangers,
Deed, estoppel by as applying to, § 46
Equitable estoppel,
Availability against, § 136
Availability to, § 130
Streets,
License to use, acquiescence in improvement as estopping city, § 111, p. 361
Municipality estopped in respect of, § 145
Subordination to another title, possession in, § 127
Successive proceedings, inconsistent positions in, estoppel as resulting, § 119, p. 381
Superlaw, equitable estoppel as, § 63, p. 250
Supersedeas,
Bond,
Acceptance of benefits under, § 110, p. 353
Recitals in operating as estoppel, § 40
Surrender of possession, mere fact of as creating estoppel, § 101
Sworn pleadings, prior actions, doctrine of estoppel as to matters contained in, § 121, p. 388
Tax sales, after-acquired title based on, estoppel to assert, § 34
Tax title, after-acquired title, estoppel to assert, § 30
Taxation, estoppel in respect to exercise of power of, § 147, pp. 433–436
Technical estoppel,
Deed, conclusiveness, § 10
Defined, § 1
Law as not favoring, § 3, n. 14
Terminology, § 1
Third persons,
Admissions made to, § 84, p. 296
After-acquired title in name of, estoppel to assert, §§ 32, 33
Apparent title or authority, protection of innocent third persons dealing with apparent owner, § 104
Conveyance by as estoppel against owner, § 13
Mortgaging property under claim of right, owner standing by without objecting as estopped, § 90
Outstanding title in, estoppel of mortgagor to assert, § 14
Record, estoppel by as operating against, § 8
Sale of property under claim of title, owner standing by without objecting as estopped, § 90
Statements of as basis of estoppel, § 69, p. 261
Title, setting up contrary to recital in deed, § 38, p. 216
Timekeeper, cashing of checks on own indorsement after issuing to fictitious names, employer as estopped to claim reimbursement from bank, § 103, p. 328, n. 88
Title,
Acceptance of mortgage as estoppel to deny, § 16
Chattel mortgagee, estoppel to deny, § 14.
Clothing another with apparent title, negligence in respect of, § 105
Disclaimer of, § 86
Equitable estoppel as to, § 150
Estoppel to deny, grantee in deed, § 15
Failure to assert, § 88
Mortgagor, estoppel to deny, § 14
Personal property, clothing another with apparent title to, § 106, p. 334
Possession in subordination to, § 127
Possession of another's property in recognition of, estoppel as not arising, § 55, p. 231
Possession or acts of ownership under claim of, § 126
Prior assertion or recognition of, § 125
Recitals as to, estoppel to deny, § 38, p. 216
Record of notice of, estoppel by silence in case of, § 71, p. 272
Title by estoppel, defined, § 1
Towns. Municipal corporations, ante
Townships, equitable estoppel, doctrine as applicable to, § 141, p. 415
Treaties, public estopped by, § 138, p. 411
Trespass, railroads, forfeiture of right to maintain against on permitting construction across land, § 95
Trespass to try title, pleading estoppel in actions of, exceptions, § 153, p. 445
Trial, actions involving, §§ 163–165, pp. 461–466
Trust funds, acquiescence, estoppel by, § 114, p. 367
Truth,
Bar precluding denial of, § 1
Recitals in instruments, estoppel to deny, §§ 36–40, pp. 213–222
Representations acted on, estoppel as consisting in holding for truth, § 59, p. 238
Ultra vires,
Application of doctrine of, § 143
Doctrine as not prevailing when defeating ends of justice or working legal wrong, § 111, p. 359
Unconscionable position, quasi estoppel as applicable to preclude maintenance of, § 107
Undue advantage,
Party gaining as estopped, § 73
Prevention of, § 63, p. 252
United States,
Acceptance of benefits, estoppel by, § 138, p. 410
Equitable estoppel, invoking against, § 138, p. 404
Proprietary capacity, doctrine as applicable when acting in, § 140
Record, estoppel by, § 8
Taxation, estoppel in respect to exercise of power, § 147, p. 433
Unknown conditions, waiver of, § 70, p. 267, n. 54
Use actions, equitable estoppel, availability against parties to action for, § 134
Used car dealers, clothing with apparent title or authority, leaving car with for purpose of finding purchaser, § 106, p. 339, n. 55

Vague representations, basis of estoppel, § 78, p. 288
Validity,
Contract, estoppel by, § 57
Deed, estoppel by requiring valid instrument, § 43
Representations as to validity of bills, notes, etc., § 81
Variance, actions involving, § 159
Vendor's lien, after-acquired title based on, estoppel to assert, § 34
Verdict, actions involving, § 165
Villages,
Equitable estoppel, doctrine as applicable to, § 141, p. 415
Municipal corporations, ante
Void contracts, municipal corporations, estoppel to deny liability on, § 143
Void instruments, estoppel by deed as not resulting in case of, § 43
Volunteers, equitable estoppel, availability to, § 130
Waiver,
Acquiescence as species of, § 113
Acts or omissions, creation by, § 72, p. 274
Basis of, § 61, p. 246
Burden of proof as to, § 160
Certainty, element of, § 77
Consent, § 67, p. 258
Consideration, necessity of, § 67, p. 260
Consideration as not necessary, § 61, p. 248
Contract, necessity of, § 67, p. 260
Direction of verdict on ground of, § 163, p. 464
Dispensation with some right or advantage, implication of, § 72, p. 273
Distinctions, § 61, pp. 242–248
Distinguished, § 61, p. 242
Election to forego, implication of, § 72, p. 273
Elements, § 67, p. 257
Certainty, § 77
Intent, § 69, p. 263
Knowledge of facts, § 70, p. 266
Prejudice or injury, § 74, p. 280
Elements necessary, proof of, § 162, p. 460
Estoppel by, § 108, p. 343
Existence of legal right, necessity, § 67, p. 258
Existing right or benefit as essential, § 67, p. 257
Express waiver, § 72, p. 274
Fact question as to, § 163, p. 463
Implication of, § 162, p. 460
Implied waiver, § 72, p. 274
Inducement to act on reasonable belief that certain rights will be waived, § 108, p. 343
Intent, element of, § 69, p. 263
Jury question as to, § 163, p. 463
Knowledge, elements of, § 70, p. 266
Law question as to, § 163, p. 463
Legal right, § 67, p. 258
Objection that estoppel was not specially pleaded, § 153, p. 446
Waiver—Continued,
Parties, requirements as to, § 67, p. 258
Pleading, § 153, p. 443
Allegations required, § 156, p. 452
Prejudice, element of, § 74, p. 280
Presumptions, § 69, p. 264; § 160
Proof of, § 159
Reasonable knowledge as essential to, § 70, p. 267
Relinquishment of known right, necessity of, § 61, p. 247
Relinquishment of right, conduct indicating as essential, § 67, p. 257
Secret understanding as basis, § 69, p. 264
Sovereign right, § 140, n. 65
Special pleading, necessity of, § 153, p. 443
Statutory declarations respecting, dependency upon, § 72, p. 274
Sufficiency of evidence as to, § 162, p. 460
Unknown conditions, § 70, p. 267, n. 54
Voluntary nature of act, § 72, p. 273
Warehousemen, blank warehouse receipts, negligence in intrusting to bookkeeper after indorsement, § 103, p. 328, n. 88
Warrants, apparent title or authority over, clothing another with, § 106, p. 335
Warranty,
Contract induced by, estoppel in respect of, § 58
Estoppel by,
After-acquired title in respect of conveyance with covenants of warranty, § 21
Defined, § 10
Grantor, § 13
Partition deed, after-acquired title, § 21, n. 24
Water rights, acquiescence, estoppel by in respect to use and appropriation of, § 114, p. 367
Willfulness,
Equitable estoppel, element of, § 69, p. 261
Representations, element of, § 78, p. 283
Wills,
Acceptance of benefits, estoppel resulting, § 110, p. 353
References to in deed, estoppel to deny, § 38, p. 216
Writing,
Contracts, acceptance of benefits precluding objection of not reducing to writing, § 110, p. 351
Copy annexed to pleading where estoppel by writing invoked, § 156, p. 452
Disclaimer in, § 86
Estoppel by matters in, classification, § 2
Waiver, requirements as to, § 74, p. 274
Written instruments, inconsistent positions, claim under, § 128
Zoning ordinances, acts of officers or agents in violation of as not creating estoppel, § 142, p. 421

INDEX TO
EVIDENCE

Complete Index for Title Evidence
SEE VOLUME 32

END OF VOLUME.